SUPREME COURT
STATE OF NEW MEXICO
COMMEMORATIVE
APPELLATE OPINIONS

VOLUME 2

JUSTICE RICHARD E. RANSOM

1987–1997

FOREWORD

Justice Richard C. Bosson (retired)
Supreme Court (2002–2015)
Court of Appeals (1994–2002)

How fortunate for me that I followed so closely Justice Ransom's years on the Court, 1987–1997. His opinions, and there are literally hundreds of them on a wide variety of topics, were often the most recent precedent, the starting place for my analysis. "See what Ransom has to say on the subject" was the daily command to my law clerks, "and I mean everything!" Over time, we studied almost every one of the opinions included in this volume; they never disappointed.

Ransom was extraordinarily prolific. A Justice for a mere 10 years, his published opinions exceed 300 in number, coupled with another 100 or so unpublished. His goal was to write one opinion a week, an unimaginable target today. Yet, if you do the math, he came pretty close over a 10-year span. I doubt anyone has ever done more, or will even approach it given the present certiorari system.

Beyond numbers, it is the quality of those opinions that truly sets Ransom apart. At least two things stand out. First, his opinions display real scholarship, a prodigious work ethic, and deep reflection followed by a fair, principled result. Ransom was a teacher, dressed in black robes, armed with an uncanny ability to analyze and persuade. One could, of course, disagree with an ultimate conclusion. But, even if unpersuaded, unsuccessful advocates had to concede that they were heard.

To that point, I have always sensed a certain humility in Ransom's writings. Never pedantic, avoiding a top-down, "because-I-said-so" kind of style, Ransom wrote his opinions more like a discussion, as if he were engaged in a dialogue with the reader. It was a dialogue in which both author and audience labored together to reach the fairest, most principled conclusion. In that same spirit, Ransom appropriately observed that the policy-making role of the judiciary, in all but constitutional issues, was a limited one, always subject to legislative intervention if that body chose to act.

Ransom's opinions also show courage. At times, he was a trailblazer leading the Court in new directions, sometimes overturning contrary precedent for principled reasons. At other times, existing precedent could be internally inconsistent, even conflicted, and confusion reigned. Ransom rose to the challenge of creating order out of chaos.

To that point, opinions that come to mind from this volume include: *Swafford v. State*, 1991-NMSC-043 (clarifying the law of multiple punishment double jeopardy); *Castillo v. County of Santa Fe*, 1988-NMSC-037 and *California First Bank v. State*, 1990-NMSC-106 (introducing new analysis for waiver of immunity under the Tort Claims Act); and *Saiz v Belen Sch. Dist*., 1992-NMSC-018 (new analysis of strict liability for inherently dangerous activities and nondelegable duty). The list is far from complete. In *Campos v State*, 1994-NMSC-012 and *State v. Gutierrez*, 1993-NMSC-062, Ransom created a new analytical structure for when New Mexico courts should interpret the New Mexico constitution independently of similar language in the United States constitution. It is no exaggeration to acknowledge that Ransom is the father of modern state constitutional jurisprudence.

Of course, Ransom was not always successful, at least not in his own time. In a recent insightful article, UNM law professors Browde and Occhialino, compare the evolving views of Justices Ransom and Montgomery, colleagues on the Court for a brief five years, that continue today to inform our law on tortious negligence and the intertwining concepts of foreseeability, duty, and public policy. *See* Michael B. Browde and Mario E. Occhialino, *A Model of Collegial Judicial Decision-Making: The Ransom-Montgomery years on the New Mexico Supreme Court*, 52 n.m. l. rev. 427 (2022). Reviewing several of the opinions included in this volume, as well as special concurrences and dissents worthy of

review, the authors conclude that Ransom's views, though prescient, took another generation to capture a consensus of the full Court. *See Rodriguez v. Del Sol Shopping Ctr. Ass'n L.P.*, 2014-NMSC-014.

Finally, as an historical fact largely lost to history, Ransom was the architect of our present certiorari court. Whereas previously, the Supreme Court exercised original appellate jurisdiction sitting in three-judge panels over large swaths of legal appeals, Ransom and his colleagues grew frustrated at the lack of time and opportunity to study the state's thorniest legal issues and write comprehensively about them. We can thank Justice Ransom for the present certiorari system that affords the Court control over its docket, and thus greater opportunity to pause and reflect. Whether we have taken full advantage of Ransom's gift, only time will tell.

BIOGRAPHY

Justice Richard E. Ransom was born in Hampton, Iowa in 1932 and moved to New Mexico with his family in 1937, graduating from Albuquerque High School in 1950. A Navy ROTC Marine Corps candidate, Justice Ransom majored in political science at the University of New Mexico and graduated with University Honors in 1954. Following graduation, Justice Ransom served in the United States Marine Corps as a rifle platoon leader and company commander. After serving in the military from 1954 to 1956, he attended law school at Georgetown University School of Law, serving as Staff Editor of the Georgetown Law Journal in 1958. Justice Ransom graduated with his law degree in 1959.

Upon receiving his law degree and returning to New Mexico, Justice Ransom first gained employment with the personal injury firm of Smith and Kiker. In 1970 he formed his own professional corporation, focusing on products liability and consumer protection cases. In 1972, he was inducted as a Fellow of the International Academy of Trial Lawyers. From 1979 to 1985, Justice Ransom also served on the board of directors of the latter organization. He served as Editor of the New Mexico Trial Lawyers Association Journal from 1967 to 1982. From 1982 to 1987, Justice Ransom served as Chair of the New Mexico Supreme Court Committee on Uniform Civil Jury Instructions. Further honors and service to the profession included serving as State Chairman for the American College of Trial Lawyers from 1984 to 1986.

Elected to the New Mexico Supreme Court in 1986, Justice Ransom served from January 1987 until retiring in February 1997 and was retained by the voters in a 1994 election. From 1991 to 1994, Justice Ransom served as Chief Justice on the Court, during which his administrative focuses included implementing computer technology in New Mexico courthouses, determining appropriate responsibilities for the Court of Appeals and Supreme Court, and changing the Supreme Court primarily into a discretionary court. During his decade of service, he authored approximately three hundred published opinions and around one hundred unpublished opinions. In 1997, he won the State Bar of New Mexico's Seth D. Montgomery Distinguished Judicial Service Award. After retiring from the New Mexico Supreme Court, Justice Ransom served as an adjunct professor at the University of New Mexico School of Law. Even after his official retirement from the New Mexico Supreme Court, Justice Ransom sat pro tempore on cases as recently as 2010, continuing a legacy of serving the people of New Mexico when called upon.

NEW MEXICO SUPREME COURT OFFICIAL CITATIONS

JUSTICE RICHARD E. RANSOM

NEW MEXICO SUPREME COURT CASES REPORTED

JUSTICE RICHARD E. RANSOM

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CASE NAME **Page No.**

Justice Richard E. Ransom

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-052

Filing Date: June 22, 1987

Docket No. 16,725

WESTERN BANK, a New Mexico Banking Corporation,

Plaintiff-Appellant,

vs.

GENE MATHERLY and MELBA MATHERLY, his wife, RICHARD H. MACALLISTER and VIVIAN I. MACALLISTER, his wife,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY ROBERT H. DOUGHTY, II, District Judge

Motion for Rehearing Denied July 13, 1987

Burroughs & Rhodes,
Jefferson R. Rhodes,
Alamogordo,

for Appellant.

S. Thomas Overstreet,
Alamogordo,

for Appellees.

OPINION

RANSOM, Justice.

{1} This is an action for declaratory judgment filed in the district court of Otero County to determine the conflicting security interests of Western Bank and Gene and Melba Matherly (Matherly) as those interests may have been affected by the law of contracts and the secured transactions sections of the Uniform Commercial Code (UCC), NMSA 1978, Sections 55-9-101 to 55-9-507 (Orig. Pamp. and Cum. Supp. 1986). Plaintiff Western Bank, asserting it had become the lienholder first in priority, unsuccessfully sought a determination that it would be entitled to proceeds from the sale of certain equipment after repossession by defendant Matherly. Western Bank appeals from the district court's judgment that Matherly is entitled to the proceeds free from any claim of Western Bank. We affirm.

{2} Matherly originally sold real property and equipment to Merkling and Bell, doing business as Tire Tech, Inc. (Merkling-Bell) for $350,000, of which $52,000 was secured by the equipment. An agreement provided for placing in escrow a bill of sale and special bill of sale to the equipment, and provided that such bill of sale would not be delivered until the full amount of the purchase price was paid. Deeds to the real property were likewise placed in escrow. In addition to the remedies set forth in the escrow agreement, Matherly obtained on the equipment two security agreements which were perfected and properly filed of record on January 18 and March 22, 1983.

{3} The escrow agreement provided that, upon default of Merkling-Bell, Matherly could declare the unpaid balance due and payable, foreclose the security interest and make demand on the personal guarantors; or, Matherly could cancel the agreement, considering all payments as liquidated damages and rent, and take delivery of all instruments and funds in the possession of the escrow agent.

{4} The agreement between Matherly and Merkling-Bell also recognized that Merkling-Bell would borrow $50,000 from the First National Bank of Alamogordo, a debt to be secured by subordination of the Matherly security interest

in the equipment. Subsequent to that borrowing, Merkling-Bell unsuccessfully approached the First National Bank for more operating capital, and then successfully approached Western Bank about refinancing the original $50,000 and borrowing an additional $20,000. Accordingly, the debt to the First National Bank was paid in full, and the First National Bank released of record the security agreement it had obtained. The First National Bank did not assign or transfer to Western Bank the security agreement or its interest in the equipment. There was no agreement between Matherly and Western Bank to subordinate in favor of Western Bank the Matherly interest in the equipment. Instead, Western Bank simply obtained from Merkling-Bell a security agreement which was properly filed of record on May 4, 1983.

{5} When Merkling-Bell defaulted, Matherly declared a forfeiture under the contract of sale, and obtained from escrow the special warranty deed to the real property and the special bill of sale to the equipment. These documents were recorded. Matherly then sold both the real property and the equipment to MacAllister who owes Matherly at least $48,000 for the purchase of the equipment. Western Bank is owed in excess of $48,000 by Merkling-Bell, for which indebtedness Western Bank claims a security interest in the equipment and a right to proceeds from the resale of the equipment by Matherly to MacAllister.

{6} This appeal arises out of Western Bank's challenge of the trial court's findings that (1) the interest of Merkling-Bell, and persons claiming through them to the collateral, e.g., Western Bank, was terminated under the forfeiture provision of the contract of sale upon which Merkling-Bell defaulted; and that (2) Matherly did not agree to subordinate to Western Bank the Matherly interest in the personal property.

{7} The essence of the legal argument presented by Western Bank is that a security interest in personal property governed by the controlling secured transactions sections of the UCC may not be conjunctively forfeited with an interest in real property under a real estate contract in New Mexico.

{8} Western Bank would have this Court hold that Matherly was satisfied by the cancellation of the contract and that the security interest of Western Bank survived and became paramount to all other parties.[1] Western Bank argues that in *Davies v. Boyd*, 73 N.M. 85, 385 P.2d 950 (1963), this Court held that once the seller disaffirms the contract and retains as liquidated damages the payments made up to that time, seller has no further right to enforce other provisions of the contract. Western Bank supports its position further by relying on the case of *Kimura v. Wauford*, 104 N.M. 3, 715 P.2d 451 (1986), which emphasized the importance of the *Davies* holding regarding the election of rights under the same contract.[2]

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[1] Western Bank further contends that Matherly had no competing security interest in the equipment because of noncompliance with the UCC in repossession and disposition of the collateral. However unnecessary to its decision, the trial court found that Matherly properly took possession of the personal property pursuant to the security agreement. There is substantial evidence that Matherly's possession of the equipment was proper under Section 55-9-503, which allows the secured party the right to possession of the collateral upon default. The trial court further found that Matherly sold the collateral and the real property to MacAllister in a commercially reasonable manner. Section 55-9-504(3) permitted the sale of the collateral in the private sale which was accomplished by agreement between Matherly and MacAllister. Pursuant to Section 55-9-504(4), such sale "discharges the security interest under which it is made and any security interest or lien subordinate thereto." The Western Bank security interest was subordinate to the Matherly security interest.

[2] Western Bank's analysis fails to recognize the fact that Matherly had two separate agreements in effect with Merkling-Bell, i.e., an escrow agreement *and* a security agreement that created an additional interest in the equipment. In fact, the escrow agreement provided that the "security agreement shall be *in addition to* the security provided by this agreement. . . ." (Emphasis added.) It does not appear as though the parties intended that foreclosure of the security interest and cancellation of the agreement would be mutually exclusive remedies. "A secured creditor is not required to elect a remedy. He can take any permitted action or combination of actions." *Citicorp Homeowners, Inc. v. Western Surety Co.*, 131 Ariz. 334, 336, 641 P.2d 248, 250 (Ariz. App.1981); *accord Ruidoso State Bank v. Garcia*, 92 N.M. 288, 587 P.2d 435 (1978) (the purpose of Section 55-9-501 is to abolish the doctrine of election of remedies).

{9} However, the instant case is controlled not by Matherly's security interest, but by the fact that, upon default and forfeiture by Merkling-Bell, Western Bank lost any security interest it had by and through Merkling-Bell. The trial court's finding in this regard was correct. In *Campos v. Warner*, 90 N.M. 63, 559 P.2d 1190 (1977), this Court considered whether a conditional vendee could create in his lessee any greater interest in the property leased than was possessed by the vendee. We held that, when the interest in property of a conditional vendee is forfeited upon default, the forfeiture is enforceable against all claiming through the vendee. Persons claiming through the vendee take their interest in property subject to all claims of title enforceable against the vendee.

> [T]his court has adopted a principle in cases dealing with the rights of judgment creditors of vendees under real estate contracts that is persuasive with reference to the issue at hand. In *Warren v. Rodgers*, 82 N.M. 78, 475 P.2d 775 (1970), this court considered whether a *{*34}* vendee under a real estate contract has an interest in real estate to which a judgment lien can attach. In that case the purchaser of the real estate defaulted on his contract and the seller declared a forfeiture and regained possession. This court stated (82 N.M. at 79, 80, 475 P.2d at 776, 777):
>
> > The contract of sale never having been completed by the debtor-vendee, he had no vested legal interest in the real estate on which the lien could attach * * *
> >
> > A judgment creditor can claim no greater rights than a vendee might have asserted in offering to cure a default. The vendor had no contractual obligation with the judgment creditor and, therefore, was not bound to accept him in lieu of the vendee.
>
> In accord is *Petrakis v. Krasnow*, 54 N.M. 39, 56, 213 P.2d 220, 230 (1949). Also see *Mutual Building & Loan Ass'n of Las Cruces v. Collins*, 85 N.M. 706, 516 P.2d 677 (1973) which overruled a portion of *Warren v. Rodgers, supra*, on a point that is not relevant to this case.

Id. at 64, 559 P.2d at 1191. This principle is modified in the *Collins* case only to the extent that the equitable interest of a conditional vendee in possession is subject to the attachment of a judgment lien and foreclosure in the same manner as ordinary suits for the foreclosure of mortgages.

{10} We hold that, where there are no intervening equities whereby the vendor may be estopped to enforce a forfeiture against one claiming through a conditional vendee of personal property, a vendee can create no greater interest in personal property than is possessed by the vendee, and one claiming a UCC security interest through the vendee takes his interest in the property subject to all claims of title enforceable against the vendee, including forfeiture upon default.

{11} Finally, with respect to its challenge of the court's finding that Matherly would not have agreed to subordinate to Western Bank his interest in the personal property, Western Bank relies upon *Grise v. White*, 355 Mass. 698, 247 N.E.2d 385 (1969). In *Grise* it is stated that bankruptcy courts uniformly construe subordination agreements to afford to the security interest thereby given priority the practical benefits of asserting the subordinator's claim. Here, however, contrary to the facts in *Grise*, Matherly did not agree to subordinate his security interest to Western Bank. Our Court has firmly established that "'[i]t is not within the province of the courts to write a new contract for the parties * * * [The court's] duty is confined to interpreting the contract which [the parties] made for themselves.'" *Lazo v. Board of County Comm'rs*, 102 N.M. 35, 38, 690 P.2d 1029, 1032 (1984) (quoting *Thompson v. Occidental Life Ins. Co.*, 90 N.M. 620, 621, 567 P.2d 62, 63 (Ct. App.), *cert. denied*, 91 N.M. 4, 569 P.2d 414 (1977)) The court cannot do for the party that which they failed to do for themselves. *Kimberly, Inc. v. Hays*, 88 N.M. 140, 537

P.2d 1402 (1975). A subordination agreement by implication is not recognized; it must be expressed. 69 Am. Jur.2d *Secured Transactions* § 478 (1973); *see also* NMSA 1978, 55-9-316 official comment (the rights of a person entitled to priority cannot be adversely affected by an agreement to which he is not a party).

{12} For the above stated reasons, the judgment of the district court is affirmed.

{13} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

TONY SCARBOROUGH,
Chief Justice

HARRY E. STOWERS, JR.,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-086

Filing Date: September 10, 1987

Docket No. 16,495

TONY G. LOVATO,

Petitioner-Appellee,

vs.

CITY OF ALBUQUERQUE, et al.,

Respondents-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
PHILIP R. ASHBY, District Judge

Manny Aragon, Chief Trial Attorney,
Eddie Gallegos, Assistant City Attorney,
Paula Forney-Thompson, Assistant City Attorney,
Albuquerque,

for Appellants.

Jeff Romero,
Albuquerque,

for Appellee.

OPINION

RANSOM, Justice.

{1} The City of Albuquerque and named city officials (City) challenge the permanent writ of mandamus by which the district court ordered the City to conduct a personnel board hearing requested by petitioner Lovato. We affirm.

{2} Lovato has been a classified city employee, in various capacities, for twenty-seven years. A classified employee is one who is permanently employed by the City and entitled to all rights and benefits guaranteed by the merit system, one of which is recourse to the grievance procedure. Since 1973 Lovato has been on assignment status, a position that applies only to classified employees who are placed in supervisory positions by an administrative head of a department, agency or special program. *See* Albuquerque, N.M., Merit System Ordinance § 2-9-7, Revised Ordinances 1974 (1980 ed.), and Personnel Rules and Regulations §§ 451-52 (the merit system and personnel rules, respectively).

{3} The assignment resulted in a five percent salary increase for Lovato. On March 3, 1986, Lovato was removed from assignment status with a corresponding five percent reduction in pay. He filed his grievance with the City's personnel board, complaining of the transfer and resulting pay reduction. By letter, the chief administrative officer for the City denied that there was a grievable issue. Lovato timely filed a request for a personnel board hearing which was also denied. The basis for each denial was Section 452 of the personnel rules which states in pertinent part that removal from assignment status and consequent reassignment are specifically exempt from the grievance provisions.

{4} On April 22, Lovato filed his petition for mandamus in which he requested that the City be ordered to comply with its duty to grant a personnel board hearing on the merits of his transfer and pay reduction. On April 24, the alternative writ was issued and a hearing was set for May 2, at which the City was to show cause why it should not grant a personnel board hearing on the merits of Lovato's grievance. On April 28, however, the chief administrative officer granted Lovato a May 22 hearing, but only on the limited issue of grievability. In its opinion letter of May 5, the court made permanent the writ and concluded that the City's denial of a full

hearing on Lovato's claims resulted in a denial of his right to due process of law.

{5} On appeal, the city questions whether the district court could grant mandamus in light of the failure of Lovato to appear at the May 22 hearing, and his failure to exhaust the administrative remedy available to him under the merit system and personnel rules. Although the City characterizes this as a lack of subject matter jurisdiction, the City is actually arguing the absence of a prerequisite to the court's exercise of its jurisdiction to grant mandamus. In addition, the City challenges a finding of fact and conclusions of law concerning (1) whether Lovato had a property interest in continued employment in his assignment position, and (2) whether due process was afforded Lovato before the personnel board.

{6} The City's point that the district court was without mandamus jurisdiction is without merit. At the request of a person beneficially interested, mandamus lies to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law. NMSA 1978, §§ 44-2-4, -5. The act to be compelled must be ministerial, that is, an act or thing which the public official is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. *El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs*, 89 N.M. 313, 316-17, 551 P.2d 1360, 1363-64 (1976). Mandamus is the proper remedy where the public official refuses or delays to act, and it will compel action if the law requires the official to act one way or another. *Id.* at 317, 551 P.2d at 1364.

{7} Under the circumstances of this case, the district court properly found that Lovato was beneficially interested in the issues of this case and was being denied his remedy in the ordinary course of law, that being the grievance procedure under the merit system. Mandamus is provided by statute when, as here, City officials fail in their duty to provide the required remedy. By comparison, a suit in contract would not have been plain, speedy or adequate, nor an appropriate action to compel the City to hold a full hearing. Mandamus will lie where ordinary proceedings would be inadequate. *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 282, 573 P.2d 213, 216 (1977); *see Light v. Bd. of Educ.*, 170 Conn. 35, 41, 364 A.2d 229, 231 (1975). The district court properly concluded that it had mandamus jurisdiction.

{8} The City denies that it failed to provide the plain, speedy and adequate remedy of hearing and contends that the administrative procedure made available to Lovato on May 22 was adequate. Seeking support in *Jette v. Bergland*, 579 F.2d 59 (10th Cir.1978), the City believes it should have the opportunity to address the issue of how its personnel rules are interpreted before the matter is decided by the court. The City maintains further that had the issue of grievability been decided against Lovato, he would have the right to petition for judicial review at that time. *See* SCRA 1986, 12-601. The City's grant of a hearing in May was solely to determine the issue of grievability. The district court concluded as a matter of law that, because Lovato had a property right in continued employment in his assignment position, the transfer was grievable. We agree.

{9} The Supreme Court has held that "property" under the fourteenth amendment includes government benefits such as public employment. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 344, 96 S. Ct. 2074, 2077, 48 L. Ed. 2d 684 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 576-78, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). In *Perkins v. Bd. of Directors*, 686 F.2d 49 (1st. Cir. 1982), the court stated that "[a] public employee has a constitutional protected interest in continued employment where he has a reasonable expectation . . . that he will continue to be employed." Lovato's employment status was a protected property interest only if he had an express or implied right to continue employment. *See generally Bishop*, 426 U.S. at 343, 96 S. Ct. at 2077.

{10} Property interests are not created by the Constitution; they are protected by the Constitution. "[T]hey are created and their dimensions are defined by existing rules or understandings that stem from an independent source * * *." *Roth*, 408 U.S. at 577, 92 S. Ct. 2709. The sufficiency of any claim of entitlement must be decided by reference to the independent source of rules or understandings that secure the benefit. 426 U.S. at 344, 96 S. Ct. at 2077. *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 536, 105 S. Ct. 1487, 1490, 84 L. Ed. 2d 494 (1985); *Paul v. Davis*, 424 U.S. 693, 709, 96 S. Ct. 1155, 1164, 47 L. Ed. 2d 405 (1976). For example in *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), the court found that the independent source of rules and understandings consisted of certain administrative actions and the common law of tenure. There, the college teacher had a lack of express rights under his contract, but the college officials had previously indicated that he had a claim to re-employment under a "de facto" tenure program. The court held that this gave him sufficient claim of entitlement to require a hearing prior to the final decision not to renew his contract. *Id.* at 603, 92 S. Ct. at 2700.

{11} It also has been recognized that under New Mexico law a constitutionally protected property interest can arise despite the absence of a statute or formal contract. *Casias v. City of Raton*, 738 F.2d 392, 394 (10th Cir. 1984). In the case at bar, the independent source of rules and understandings consists of (1) the City's action in retaining Lovato in the assignment position for thirteen years, and (2) the merit system and personnel rules which pertain to permanent positions. Although Section 2-9-7 of the merit system and Sections 451 and 452 of the personnel rules provide that assignment positions are "not permanent advancements in the classification plan," that classified "employees assigned to these positions may be reassigned at any time at the discretion of their respective administrative head," and that "reassignment is not the subject of a grievance," the district court correctly found that, after a thirteen year employment in his assignment position, Lovato's employment at the position, grade, and pay rate prior to transfer could not be considered a temporary, discretionary advancement within the meaning of the merit system and personnel rules. *See Black's Law Dictionary* 1312 (5th ed. 1979) ("temporary" means that which is to last for a limited time only, as distinguished from that which is perpetual or indefinite).

{12} Lovato's interest in continued employment in the same position clearly rose to the level of a constitutionally protected property interest. The requirements of due process apply to deprivation of interests encompassed within the fourteenth amendment's protection of property. *Perry v. Sindermann*. We affirm the district court's holding that the denial of a full hearing on Lovato's claims resulted in a deprivation of his right to due process of law. Accordingly, the entry of the permanent writ of mandamus against the City is affirmed.

{13} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-101

Filing Date: October 8, 1987

Docket No. 17,063

DANIEL BAKER and DOROTHY BAKER,

Plaintiffs,

vs.

A. J. ARMSTRONG,

Defendant-Third Party Plaintiff-Appellant,

v.

GENERAL ACCIDENT INSURANCE COMPANY,

Third-Party Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
W. J. Schnedar, District Judge

As Amended on Denial of Rehearing, October 28, 1987

Shamas & Perrin,
K. Douglas Perrin,
Paul Snead,
Roswell,

for Appellant.

Dines & McCary,
Jim Dines,
Melissa Fassett,
Albuquerque,

for Appellee GAIC.

Charles C. Currier,
Roswell,

for Plaintiffs.

Civerolo, Hansen & Wolf,
Cynthia A. Fry,
Albuquerque,

for amicus curiae NM Defense Lawyers Association.

William H. Carpenter,
Albuquerque,

amicus curiae NM Trial Lawyers Association.

OPINION

RANSOM, Justice.

{1} A. J. Armstrong, who had been sued by the Bakers for damages arising from an automobile accident, brought a third-party action against his insurer seeking a declaratory judgment that the Bakers' punitive damages claim was covered by his insurance policy. Armstrong appeals the summary judgment granted in favor of his insurer, General Accident Insurance Company.

{2} At issue is whether General Accident contracted to pay punitive damages and, if it did, whether such a provision would be unenforceable as against public policy. Contracts in violation of public policy of the state cannot be enforced. *DiGesu v. Weingardt*, 91 N.M. 441, 575 P.2d 950 (1978).

{3} The automobile insurance policy in question provided that the insurer pay "damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident." In applying this clear and unambiguous language, we need not resort to rules of interpretation or construction. *See McKinney v. Davis,* 84 N.M. 352, 503 P.2d 332 (1972). The

policy has no provision that excluded damages awarded to punish for driving in a grossly negligent, reckless, wanton or willful manner. Therefore, if Armstrong has become legally responsible to pay punitive damages for bodily injury, the contract language applies to that responsibility.

{4} General Accident argues that punitive damages are for punishment and not for actual bodily injury or property damage. However, actual bodily injury or property damage is a prerequisite to punitive damages, and the punishment must be reasonably related to the injury or damage. SCRA 1986, 13-1827. Clearly, the punitive damages in question were to punish for bodily injury caused by driving in a grossly negligent, reckless, wanton or willful manner. Without bodily injury or property damage, there would be no cause of action for the conduct charged. *See Stewart v. State Farm Mut. Auto Ins. Co.*, 104 N.M. 744, 726 P.2d 1374 (1986).

{5} While General Accident could have contracted to exclude punitive damages, it did not do so by the language it chose to use. It argues that the "uniform net loss" provision used in almost all liability insurance contracts typically states that the insurance company will pay "all sums" which the insured shall become legally obligated to pay arising from bodily injury or property damage, and that, therefore, General Accident excluded punitive damages by not agreeing to pay "all sums." As the phrase was so artfully turned in oral argument, we agree that, "rich and resourceful as is the English language," General Accident could have excluded punitive damages by means other than forgoing use of the words "all sums."

{6} Our application of the clear language of the policy promotes the reasonable expectations of the average insured who contemplates protection against claims of any character for which he becomes liable in the operation of an automobile. A court should not construe an exclusion of liability for punitive damages where there is nothing in the insuring clause to forewarn an insured that such was to be the intent of the parties. *See Price v. Hartford Accident and Indem. Co.*, 108 Ariz. 485, 487-88, 502 P.2d 522, 524-25 (1972) (*quoting* 7 Appelman's Insurance Law & Practice, § 4312 at 132-36 and Cum. Supp. at 86). *See also Lopez v. Foundation Reserve Inc. Co.*, 98 N.M. 166, 646 P.2d 1230 (1982) (the reasonable expectations of the insured are to be fulfilled).

{7} This state has never announced a public policy which would render unenforceable contracts insuring against liability for punitive damages. To the contrary, in defining vehicle insurance, the New Mexico insurance code allows for insurance against any loss, liability or expense resulting from the use of a vehicle. NMSA 1978, § 59(A)-7-7 (Orig. Pamp. 1984). In *Greenwood Cemetery, Inc. v. Travelers Indemn. Co.*, 238 Ga. 313, 232 S.E.2d 910 (1977), the court reasoned that, because the insurance code allowed for insurance against all legal liabilities, insurance was allowed against the legal award of punitive damages.

{8} Furthermore, under the tort claims act, a governmental entity is required to pay any punitive damages awarded against a public employee acting within the scope of his duty and not acting fraudulently or with actual intentional malice. NMSA 1978, § 41-4-4 (Repl. Pamp. 1986). The medical malpractice act allows for punitive damages to be paid from the proceeds of the health care provider's insurance contract if the contract expressly provides coverage. NMSA 1978, § 41-5-7(H) (Repl. Pamp. 1986). Clearly, insurance contracts covering punitive damages do not contravene positive law of this state nor any rule of public morals.

{9} Prior to *Stewart*, this Court, in *Wolff v. General Cas. Co. of Am.*, 68 N.M. 292, 361 P.2d 330 (1961), held that, under the terms of the insurance policy involved, "there is no public policy in New Mexico which requires denial of coverage [for willful acts]." 68 N.M. at 298, 361 P.2d at 335. There, the Court was reviewing a blanket liability policy which did not have language excluding coverage for the intentional act of assault and battery for which Wolff was seeking indemnification from compensatory and punitive damages. The grant of the insurer's motion for summary judgment absolved the insurer from liability for any of

Wolff's damages. On appeal, in holding that coverage should not be denied, this Court, in essence, refused to extend the public policy prohibiting insurance coverage for intentionally produced injuries to unintended consequences of intentional acts. The Court, however, never reached the separate issue of the insurability of punitive damages. *See* Hall, *The Validity of Insurance Coverage for Punitive Damages - An Unresolved Question?*, 4 N.M. L. Rev. 65 (1973).

{10} Nor does *Stewart* answer whether New Mexico's public policy permits insuring against liability for punitive damages. In *Stewart*, this Court limited its discussion to whether an insurer was liable under an uninsured motorist provision to pay the punitive damages awarded to its insured after arbitration. Although the insurer was held liable, the decision does not conclusively establish a public policy allowing the insurability of punitive damages. The Court made clear that it was not subverting or undercutting the purpose of punitive damages. 104 N.M. at 747, 726 P.2d at 1377. The insurer, after paying its insured, could seek recovery from the uninsured tortfeasor. Because the tortfeasor would experience the intended punishment by having to pay the punitive damage award, the policy underlying punitive damages would not be undermined.

{11} The seminal case outlining the public policy reasons which have been expressed against allowing liability coverage for punitive damages is *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962). The public policy against coverage is to make effective the discouragement of wrongdoing by the imposition of punishment. Damages for punishment and deterrence must ultimately rest on the party actually responsible for the wrongdoing. "If the person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff. . . . And there is no point in punishing the insurance company; it has done no wrong." *Id.* at 440.

{12} More persuasive to us, however, is that the purchase of insurance cannot be presumed by this Court to encourage the conduct sought to be deterred by exemplary or punitive damages. Further, it is common knowledge that the prospect of cancelled coverage or rated premiums is a strong deterrent to bad driving in today's society. What is true for coverage against liability for compensatory damages seems true for those who seek to maintain coverage against the eventuality of a punitive damage award - it being well to remember that the most careful driver may wish to insure against the adverse finding of those charged with weighing the evidence to determine (by a preponderance) whether an act or omission constituted ordinary or gross negligence. Compared to any dilution of the punishment effect of a decision publicly awarding punitive damages, the right of a person and his or her insurer to freely contract for insurance against an adjudication of liability for such conduct is the more weighty policy consideration. *See General Elec. Credit Corp. v. Tidenberg*, 78 N.M. 59, 62, 428 P.2d 33, 36 (1967) ("[P]ublic policy encourages freedom between competent parties of the right to contract, and requires the enforcement of contracts, unless they clearly contravene some positive law or rule of public morals.").

{13} Aside from the dilution effect of deterrence and punishment, it is argued that the allowance of insurance against punitive damages gives rise to conflict of interest between the insurer and the insured in settlement negotiations and in trial tactics, and gives rise to conflict between the rule allowing jury consideration of the defendant's financial standing and the rule against referring to the defendant's insurance in the presence of the jury. *See McNulty*, 307 F.2d at 441.

{14} We perceive that a conflict of interest between the insurer and the insured regarding settlement or trial tactics is more likely where the insurer does not assume liability for punitive damages, and not vice versa. In *McNulty*, the court pointed to three instances of conflict: first, when the insurer refused an offer of settlement; second, when the insurer did not apprise the insured about punitive damages before trial; and finally, when the insurer conceded liability for compensatory damages. *Id.* However, we

see these conflicts as having arisen because the insurer was assuming no liability for punitive damages, not because the punitive damages were covered by insurance. *See id.* at 433.

{15} There remains an evidence question to be resolved regarding the admissibility of insurance coverage. On the one hand, evidence of liability insurance is inadmissible to show negligence or wrongful action. SCRA 1986, 11-411. On the other hand, evidence of a defendant's finances is admissible in assessing punitive damages. *Aragon v. General Elec. Credit Corp.*, 89 N.M. 723, 557 P.2d 572 (Ct. App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976). We hold that punitive damages liability coverage is not an asset which can be used to measure true punishment and that, therefore, it should not be considered by the jury in assessing a defendant's financial standing. *See Michael v. Cole*, 122 Ariz. 450, 452, 595 P.2d 995, 997 (1979). Such evidence could only have the tendency to encourage the jury to discount the limits before assessing damages in accordance with the defendant's financial standing.

{16} Therefore, this Court joins the majority of jurisdictions which allow insurance contracts to cover liability for punitive damages.[1] Citizens and their insurers should have the right to contract for insurance against the possibility of a judicial decision finding that a person's conduct rises above ordinary negligence and justifies punitive damages. If insurance companies market policies which consumers reasonably expect cover all damages, then the insurer should honor that contract. Contracts should be held invalid against public policy only if there is an evil tendency connected with the contract itself, and insurance coverage of punitive damages has not been related in any substantial way to the commission of wrongful acts. *See Harrell v. Travelers Indem. Co.*, 279 Or. 199, 567 P.2d 1013 (1977); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964).

{17} We reverse the summary judgment entered in favor of General Accident, and remand for further action on the third party complaint in accordance with this opinion.

{18} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

DAN SOSA,
JR., Senior Justice, concurs

TONY SCARBOROUGH,
Chief Justice (concurring in result only)

[1] *Employers Ins. Co. of Alabama v. Brock*, 233 Ala. 551, 172 So. 671 (1937); *Price v. Hartford Accident and Indem. Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); *Southern Farm Bureau Casualty Co. v. Daniel*, 246 Ark. 849, 440 S.W.2d 582 (1969); *Greenwood Cemetery, Inc. v. Travelers Indem. Co.*, 238 Ga. 313, 232 S.E.2d 910 (1977); *Abbie Uriguen Oldsmobile Buick, Inc v. United States Fire Ins. Co.*, 95 Idaho 501, 511 P.2d 783 (1973); *City of Cedar Rapids v. Northwestern Nat'l Ins. Co. of Milwaukee*, 304 N.W.2d 228 (Iowa 1981); *Continental Ins. Co. v. Hancock*, 507 S.W.2d 146 (Ky.1974); *Fagot v. Ciravola*, 445 F. Supp. 342 (E.D. La.1978); *First Nat. Bank of St. Mary's v. Fidelity and Deposit Co.*, 283 Md. 228, 389 A.2d 359 (1978); *Anthony v. Frith*, 394 So.2d 867 (Miss.1981); *First Bank (N.A.)-Billings v. Transamerica Ins. Co.*, 679 P.2d 1217 (Mont.1984); *Hartford Accident & Indemn. Co. v. Wolbarst*, 95 N.H. 40, 57 A.2d 151 (1948); *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 319 S.E.2d 217 (1984); *Harrell v. Travelers Indem. Co.*, 279 Or. 199, 567 P.2d 1013 (1977); *Morrell v. Lalonde*, 45 R.I. 112, 120 A. 435 (1923); *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964); *Dairyland County Mut. Ins. Co. v. Wallgren*, 477 S.W.2d 341 (Tex. Civ. App.1972); *State v. Glen Falls Ins. Co.*, 137 Vt. 313, 404 A.2d 101 (1979); *Hensley v. Erie Ins. Co.*, 168 W.Va. 172, 283 S.E.2d 227 (1981); *Brown v. Maxey*, 124 Wis.2d 426, 369 N.W.2d 677 (1985); *Sinclair Oil Corp. v. Columbia Casualty Co.*, 682 P.2d 975 (Wyo.1984); *contra Ford Motor Co. v. Home Ins. Co.*, 116 Cal. App.3d 374, 172 Cal. Rptr. 59 (1981); *Universal Indem. Ins. Co. v. Tenery*, 96 Colo. 10, 39 P.2d 776 (1934); *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir.1962); *Guardianship of Estate of Smith v. Merchants Mut. Bonding Co.*, 211 Kan. 397, 507 P.2d 189 (1973); *Braley v. Berkshire Mut. Ins. Co.*, 440 A.2d 359 (Me.1983); *Wojciak v. Northern Package Corp.,* 310 N.W.2d 675 (Minn.1981); *Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co.*, 172 N.J. Super. 10, 410 A.2d 696 (1980); *Hartford Accident and Indem. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 422 N.Y.S.2d 47, 397 N.E.2d 737 (1979); *Esmond v. Liscio*, 209 Pa. Super. 200, 224 A.2d 793 (1966).

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-102

Filing Date: October 14, 1987

Docket No. 16,496

ROBERT H. LEVENSON,

Plaintiff-Appellee,

vs.

**JOHNNY F. MOBLEY,
JAMES M. TYLER, JR., LINDA P. TYLER,
WILLIAM J. WHITESELL and
FRANCES R. WHITESELL,**

Defendants-Appellants.

**APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY
Burt Cosgrove, District Judge**

Dubois, Caffrey, Cooksey & Bishcoff,
Lydia A. Mangold, George A. Dubois,
Albuquerque,

for Appellants.

Arthur A. Greenfield,
Albuquerque,

for Appellee.

OPINION

RANSOM, Justice.

{1} Levenson brought a breach of contract suit against five business associates (defendants). A bench trial was held in which judgment was rendered against defendants in the amount of $50,119 plus costs and prejudgment interest. On appeal, defendants challenge the judgment and the trial court's denial of a motion for new trial. We affirm.

{2} Levenson and defendants were shareholders in approximately twenty-six entities, one of which was North American Land Developments, Inc., (NALD), a subchapter S corporation. The effect of its tax status meant that undistributed profits and losses were attributed directly to the shareholders in proportion to their holdings. In 1973, Levenson sought to sever all business relationships with defendants. This case concerns the buyout arrangement with regard only to NALD.

{3} Several written agreements were made between Levenson and defendants to accomplish the buyout of Levenson's NALD shares. The agreement which is the basis of this action, dated June 13, 1973, reads in its entirety as follows:

> The undersigned hereby promise that if Robert H. Levenson or his wife are required to include in their income for federal income tax reporting purposes any taxable income of North American Land Developments, Inc., for its fiscal year ending April 30, 1973 for which Robert H. Levenson and his wife have tax liability, the undersigned will cause to be paid to Robert H. Levenson and his wife upon demand in cash an amount equal to the amount of taxable income of North American Land Developments, Inc., required to be included in the income of Robert H. Levenson and his wife.

{4} After the agreement was signed, NALD filed its federal income tax return for the fiscal year ending April 30, 1973, on which it reported a loss. Thereafter, Levenson filed his 1973 individual income tax return which included his proportionate share of the loss. In 1976, however, as part of an audit of Levenson's federal income tax return for 1973 and other years, the IRS disallowed the NALD loss and instead required Levenson to include his share of NALD's income. (NALD was involved in a separate IRS

audit in which the loss originally reported was determined to be profit.) Levenson commenced a tax court action appealing the IRS determination, but later entered into a compromise regarding his distributive share of the income. This compromise was approved and made a judgment of the U.S. Tax Court on July 19, 1982, and Levenson included in his 1973 income an amount of $50,119 as his share of NALD's income for the year ending April 30, 1973. Of significance is the fact that Levenson was able to avoid payment of any tax on this amount due to a 1976 tax loss carry-back which was unrelated to NALD.

{5} The dispositive issue on appeal involves whether the trial court erred in finding that the agreement was clear and unambiguous. Is the contract directly expressed by its terms, or is it reasonably susceptible to two or more constructions? Defendants submit that the trial court mischaracterized the agreement as an "income reporting" agreement. Further, they challenged two findings of fact and four conclusions of law which relate directly to the language of the agreement. Additional issues on appeal involve the admission of parol and hearsay evidence, a substantial evidence question, and the admission of the U.S. Tax Court decision with attachments.

{6} Relying on *Tsakres v. Owens*, 561 P.2d 1218 (Alaska 1977), defendants contend that an ambiguity exists in the language of the agreement, claiming it is subject to more than one reasonable interpretation. First, defendants challenge the use of the word "require" in one finding of fact and two conclusions of law which state in pertinent part that Levenson was "required" to report the $50,119 as income from NALD's operations. Instead, defendants contend that a "required reporting" of income was a condition precedent which was never satisfied by Levenson. Defendants reason that Levenson "voluntarily agreed" to include the disputed amount in his 1973 income tax return during settlement negotiations with the IRS, thus he was not "required" to include it. Further, defendants allege that a second condition precedent exists by virtue of the language "income * * * for which * * * Levenson * * * [has] tax liability." The challenged conclusions of law state that Levenson has a "tax liability" for the NALD income reported. Defendants submit that, due to the unrelated 1976 carryback, Levenson did not pay any tax on the $50,119, thus he incurred no tax liability, and defendants' liability under the contract never arose. In support of this claim, defendants rely on *Smith v. Tinley*, 100 N.M. 663, 674 P.2d 1123 (1984), for the proposition that "any interpretation by the trial court which renders a contract such that reasonable men would not enter into it is disfavored." We do not agree with defendants' appraisal of the case.

{7} Whether an ambiguity exists is a question of law to be decided by the court. *Young v. Thomas*, 93 N.M. 677, 604 P.2d 370 (1979). This Court has held that a contract is deemed ambiguous only if it is reasonably and fairly susceptible of different constructions. *Vickers v. North Am. Land Devs., Inc.*, 94 N.M. 65, 68, 607 P.2d 603, 606 (1980). The mere fact that the parties are in disagreement on construction to be given to the contract does not necessarily establish an ambiguity. *Id.* In making its determination, the court must consider the agreement as a whole. *Shaeffer v. Kelton*, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980). Moreover, where the terms of an agreement are plainly stated, the intention of the parties must be ascertained from the language used. *Hoge v. Farmers Market & Supply Co.*, 61 N.M. 138, 140, 296 P.2d 476, 477-78 (1956). Absent a finding of ambiguity, provisions of a contract need only be applied, rather than construed or interpreted. *McKinney v. Davis*, 84 N.M. 352, 353, 503 P.2d 332, 333 (1972). Defendants' reliance on *Smith* is misplaced in that the district court properly found that the agreement between Levenson and defendants was clear and unambiguous, thus any interpretation beyond application of plain language was unnecessary.

{8} The analysis must focus upon the meaning of the words "required" and "tax liability" as used in the agreement. As a general rule, the words employed will be assigned their ordinary meaning unless it is shown that the parties used them in a different sense. "[A]bsent express language to the contrary, a court should apply the everyday meaning in interpreting the terms of a contract."

Crownover v. National Farmers Union Property & Casualty Co., 100 N.M. 568, 572, 673 P.2d 1301, 1305 (1983) (citing *Clear v. Patterson*, 80 N.M. 654, 459 P.2d 358 (Ct. App.1969)). The ordinary meaning of the word "require" is "to ask, request, or desire (a person) to do something; to ask for authoritatively or imperatively." *Webster's Third New Int'l Dictionary* 1929 (1981). This meaning must prevail over defendants' contention that Levenson's settlement with the IRS was necessarily voluntary and not within the ordinary meaning of "require." An acceptance of defendants' reasoning would be inconsistent with the rule of law in *Crownover*. Without a determination of ambiguity, the court need not reach the question of intent of the parties regarding an extraordinary use of the word "required." The intent of the parties deduced from the language employed by them is conclusive. *Davies v. Boyd*, 73 N.M. 85, 385 P.2d 950 (1963).

{9} The pivotal determination, then, is whether the report of NALD income was "required." It is questioned whether Levenson could have settled with the IRS for any amount because of the alleged agreed-upon reimbursement by defendants. However, the determination of the $50,119 amount was an IRS decision, not one of the tax court or Levenson. At oral argument, appellants' counsel was asked if a tax settlement was ever voluntary. The response was that Levenson should not have settled while the NALD audit was unresolved, and, in this sense, the settlement was voluntary. In *Thermopolis Northwest Electric Co. v. Ireland*, 119 F.2d 409 (10th Cir.1941), the court was asked whether "the sum paid in compromise and settlement of [a] * * * suit was voluntarily paid." The court held that "[a] sum paid in a prudent settlement of a suit made in good faith is paid under compulsion." *Id.* at 412. We agree. Therefore, based upon the supported findings of fact that (1) there was no evidence that the compromise entered into by Levenson was influenced in any manner by the income reporting agreement, and (2) that, after the tax court appeal, Levenson entered into a compromise with the IRS which was approved and made a judgment of the U.S. Tax Court, the trial court could properly conclude that "Levenson was required to report as taxable income from NALD * * * the sum of $50,119."

{10} Defendants' second argument regarding the phrase "tax liability" is also inconsistent with applicable law. The plain meaning rule is subject to several exceptions, one of which applies to defendants' interpretation of the phrase "tax liability." Technical words ordinarily will be taken in a technical sense unless context or local usage shows intention to the contrary. *See United States v. Continental Oil Co.*, 237 F. Supp. 294, 298 (D.C.W.D.Ok. 1964), *aff'd*, 364 F.2d 516 (10th Cir.1966); *Josefowicz v. Porter*, 32 N.J. Super. 585, 590, 108 A.2d 865, 868 (1954); *see Crown Northwest Equip., Inc. v. Donald M. Drake Co.*, 49 Or. App. 679, 620 P.2d 946 (1980), *cert. denied*, 290 Or. 727, 631 P.2d 340 (1981); 4 S. Williston, *A Treatise on the Law of Contracts* § 618 at 707 (3d ed.1961). In the case at bar, the term "tax liability" must be accorded the technical meaning as used in the Internal Revenue Code. Title 26 of the Code defines "tax liability" as "the tax imposed by this chapter for the taxable year" and enumerates several exceptions, none of which apply to the facts of this case. I.R.C. § 26 (1986).

{11} A "carry-back" is a provision in tax law which permits a taxpayer to apply to prior years a net operating loss from a subsequent year, necessitating a recomputation of tax in the preceding years. *Black's Law Dictionary* 194 (5th ed. 1979); I.R.C. § 172(b) (1986). It is only after taxable income is determined, and an amount of tax is calculated and charged to a taxpayer, that a taxpayer may employ a devise such as a "carry-back" to reduce the amount of tax imposed.

{12} Defendants would have this Court hold that "tax liability" has a technical meaning of "actual payment of taxes." This reasoning conflicts with the applicable law and is not persuasive to this Court. It is inconsistent with the agreement to pay the taxable income of NALD which was required to be reported. There was no agreement to reimburse taxes actually paid. Moreover, the language in the agreement should not become inoperative simply because of the fact that Levenson was able to meet his tax

liability through the application of a carry-back. The district court correctly concluded that Levenson had tax liability for the NALD income which he was required to report, "whether or not he was able to avoid payment of taxes on such income by offsetting deductions not related to NALD," and that it was "irrelevant that Levenson did not pay taxes on the * * * $50,119."

{13} When an issue to be determined rests upon interpretation of documentary evidence, this Court is in as good a position as the trial court to determine the facts and draw its own conclusions. *City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 103, 678 P.2d 1170, 1178 (1984). We note that words and expressions in lawyer-prepared instruments are to be given their legal connotations. *Miller v. Weller*, 288 F.2d 438, 440 (3d Cir.1961). The trial court found that both the buyout and income reporting agreements were drafted and reviewed by attorneys for the parties. Generally, when terms having a definite legal meaning are knowingly used in a written instrument, the parties will be presumed to have intended such terms to have their proper legal meaning and significance, at least in the absence of any contrary intention appearing in the instrument. *Malbone Garage, Inc. v. Minkin*, 272 App. Div. 109, 72 N.Y.S.2d 327 (1947). We agree with the trial court that this agreement was directly expressed by its terms.

{14} Next, we address defendants' claim that a violation of the parol evidence rule occurred when the trial court allowed Levenson's testimony about discussions with defendants' attorney prior to the execution of the agreement. The contention that this testimony was prejudicial and went to the meaning of the agreement is without merit. Evidence extrinsic to a written contract is properly admitted to determine the circumstances under which the parties contracted and the purpose of the contract. *In re Estate of Russell v. Quinn*, 69 Cal.2d 200, 70 Cal. Rptr. 561, 444 P.2d 353 (1968); *Rush v. Rush*, 85 Nev. 623, 626-27, 460 P.2d 844, 846 (1969); *see also Brock v. Adams*, 79 N.M. 17, 19, 439 P.2d 234, 236 (1968) (evidence concerning written contract was properly received, not for purpose of modifying contract but to explain surrounding circumstances).

> In order to determine initially whether the terms of *any written instrument* are clear, definite and free from ambiguity the court must examine the instrument in the light of the circumstances surrounding its execution so as to ascertain what the parties meant by the words used. Only then can it be determined whether the seemingly clear language of the instrument is in fact ambiguous.

In re Estate of Russell, 69 Cal.2d at 208, 70 Cal. Rptr. at 566, 444 P.2d at 359 (emphasis in original). The challenged testimony of Levenson clearly revolves around his personal knowledge surrounding the circumstances under which the agreement was executed and was properly received by the trial court.

{15} On the other hand, we agree with defendants that the hearsay rule was violated with the admission of Levenson's testimony which referred to statements of NALD's attorney, a non-party. However, error in the admission of evidence by the trial court, sitting without a jury, does not require that judgment be reversed unless appellants satisfy their burden to show the error was prejudicial. *Keil v. Wilson*, 47 N.M. 43, 44-45, 133 P.2d 705, 706 (1942). Defendants made no showing of prejudice. This testimony regarding the circumstances under which the parties contracted did not affect the plain language of the agreement upon which the decision is based.

{16} Further, defendants challenge the court's finding that defendants did not request to be consulted about Levenson's tax court proceedings. A review of the record, including the correspondence between counsel, indicates that substantial evidence supports the finding. An appellate court will not disturb trial court findings which are supported by substantial evidence. *Cave v. Cave*, 81 N.M. 797, 474 P.2d 480 (1970).

{17} Defendants' final challenge concerns the admission of the U.S. Tax Court decision, stipulation,

audit statements and worksheets. Issues of authentication and hearsay were raised. Defendants, however, failed to show that any error was prejudicial or that it substantially influenced the judgment of the court. The decision and stipulation were otherwise admitted. The audit statements and worksheets only corroborated the $50,119 settlement figure which was not in dispute.

{18} Based upon the foregoing discussion, the judgment of the trial court is affirmed in its entirety.

{19} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA,
JR., Senior Justice

HARRY E. STOWERS,
JR., Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-107

Filing Date: November 3, 1987

Docket No. 16,798

MANUEL F. SILVA, et al.,

Petitioners,

vs.

STATE OF NEW MEXICO, et al.,

Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Mayo T. Boucher, District Judge

Ray M. Vargas,
Albuquerque,

for Petitioners.

Keleher & McLeod,
Judith L. Durzo,
Rebecca A. Houston,
Albuquerque,

for Respondents.

William H. Carpenter,
Albuquerque,

for Amicus Curiae NM Trial Lawyers Association.

Douglas A. Baker,
Charles E. Stuckey,
Albuquerque,

for Amicus Curiae NM Defense Lawyers Association.

OPINION

RANSOM, Justice.

{1} This case is before the Court on a writ of certiorari to the court of appeals to review an opinion on interlocutory appeal which affirmed the ruling of the court below that plaintiffs were not entitled to partial summary judgment of liability. Plaintiffs had sought partial summary judgment on the grounds of claim or issue preclusion arising out of prior action taken by the United States District Court for the District of New Mexico. Also on review is the affirmance of the trial court's dismissal of a direct action under the Tort Claims Act against the state, the Corrections and Criminal Rehabilitation Department of the State of New Mexico (Corrections Department), and the Secretary of Corrections. This question, as it relates to the applicability of *respondeat superior*, has been briefed for us by the New Mexico Trial Lawyers Association and the New Mexico Defense Lawyers Association. These excellent briefs by friends of this Court have been of significant aid.

{2} This action was brought seeking damages for the wrongful death of Manuel Silva (Silva) who committed suicide by hanging while incarcerated at a facility of the Corrections Department. Because of psychiatric problems, Silva was held at a facility where he could receive medication; and it was known that special care was required to prevent his suicide. Negligent failure to provide that care was the alleged cause of Silva's suicide.

{3} The defendants included the state, the Corrections Department, and the Secretary of Corrections (Francke), and other law enforcement officers and health care providers. Moving the court for partial summary judgment on the issue of defendants' liability, plaintiffs relied upon the doctrines of *res judicata* (claim preclusion) or, alternatively, upon collateral estoppel (issue preclusion). The motion was based on an order entered

by the federal court in Duran v. Anaya, No. 7-721-JB, on unchallenged findings of a special master who conducted an evidentiary hearing into the events and circumstances surrounding Silva's death. Duran is a class action in which partial consent decrees and an agreement were approved and adopted on July 14, 1980, requiring the State of New Mexico, its Corrections Department and its Secretary of Corrections to operate by certain standards, procedures and policies for the benefit of a class of inmates to which Silva belonged.

{4} The federal court found that Francke and others connected with the Corrections Department failed to operate by standards and procedures required by the consent decree. These included staffing, training and provision for facilities which would have provided Silva a course of treatment and acute mental health care to address the mental disorder undergirding his basic prison classification and to address his immediate symptoms of depression and suicidal ideation. Also, adherence to required standards and procedures would have caused Silva to be placed on a suicide watch and would have otherwise protected him from a suicide attempt or aided in his resuscitation.

{5} Application of the doctrine of *res judicata*, or "claim preclusion," depends upon identity of prior and subsequent actions in four respects: (1) parties or privies, (2) capacity or character of persons for or against whom the claim is made, (3) cause of action, and (4) subject matter. *Three Rivers Land Co. v. Maddoux*, 98 N.M. 690, 652 P.2d 240 (1982); *Adams v. United Steelworkers of Am., AFL-CIO*, 97 N.M. 369, 640 P.2d 475 (1982). When the duty sued upon stems from different roots in the prior and subsequent actions, even if both actions involve essentially the same course of wrongful conduct, it is indicated that the suits arise from different causes of action. *Adams***,** 97 N.M. at 373, 640 P.2d at 479. Here, suffice to say, the hearing ordered by the federal court to inquire into whether the defendants in *Duran* were in compliance with the "consent decree" with respect to the events and circumstances surrounding Silva's death was not the same cause of action as the personal representatives' action for wrongful death. Where the ultimate facts necessary for the resolution of two suits are different, and the issues necessarily dispositive in the prior cause are different from those in the subsequent cause, the doctrine of *res judicata* is inapplicable. *Torres v. Village of Capitan*, 92 N.M. 64, 68, 582 P.2d 1277, 1281 (1978).

> [W]here the causes of action in the cases are identical in all respects, the first judgment is a conclusive bar upon the parties and their privies as to every issue which either was or properly could have been litigated in the previous case. But absent the identity of causes of action, the parties are precluded from relitigating only those ultimate issues and facts shown to have been actually and necessarily determined in the previous litigation.

City of Santa Fe v. Velarde, 90 N.M. 444, 446, 564 P.2d 1326, 1328 (1977).

{6} Collateral estoppel bars relitigation of ultimate facts or issues actually and necessarily decided in a prior suit. Under collateral estoppel, or "issue preclusion," the cause of action in the second suit need not be identical with the first suit. *Adams v. United Steelworkers of Am., AFL-CIO; see Torres v. Village of Capitan; City of Santa Fe v. Velarde*; and *Edwards v. First Fed. Sav. & Loan Ass'n of Clovis*, 102 N.M. 396, 400, 696 P.2d 484, 488 (Ct. App.1985) (with analysis of "issues actually and necessarily decided").

{7} It is clear from the cited New Mexico authorities that, in deciding whether to apply the doctrine of collateral estoppel, the trial judge may determine that its application would be fundamentally unfair and would not further the aim of the doctrine, which is to prevent endless relitigation of issues. Fundamental fairness requires that the party against whom estoppel is asserted had a full and fair opportunity to litigate. To give rise to estoppel, the finding of ultimate facts in the prior action must have been final. *See C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 160-61, 597 P.2d 1190, 1200-01 (Ct. App.1979). Also, for application of collateral estoppel, New Mexico has adhered to the

rule that the parties in the second suit must be the same or in privity with the parties in the first suit. A growing number of jurisdictions hold that, absent fundamental unfairness in a given case, the doctrine of collateral estoppel may be applied against parties or their privies to both suits regardless of whether the party asserting the doctrine was privy to the first suit.

> The reason given for the "same parties" requirement is the doctrine of mutuality. The mutuality requirement prevents a litigant from invoking the conclusive effect of a judgment unless that litigant would have been bound if the judgment had gone the other way. Dissatisfaction with the mutuality requirement resulted in a "modern" view of mutuality, which dispenses with the "same parties" requirement. *Atencio v. Vigil*, 86 N.M. 181, 521 P.2d 646 (1974). The modern view has two aspects—defensive collateral estoppel, *see Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971), and offensive collateral estoppel, *see Parklane Hosiery Co. v. Shore* [439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)].

Edwards, 102 N.M. at 401, 696 P.2d at 489. In *Edwards*, defensive collateral estoppel was allowed despite defendant's not having been a party to a prior federal court action brought by Edwards against the United States claiming that a tax was wrongfully levied on First Federal Savings & Loan Association of Clovis.

{8} The *Edwards* court held that the federal law of collateral estoppel governs the preclusion effect of the federal judgment in a case which decided a federal question, and that the application of collateral estoppel in federal courts is not grounded upon the "mechanical requirement of mutuality," but is tested by whether a litigant has had a "full and fair opportunity for a judicial resolution" of the issue. In the subsequent suit for damages against First Federal, Edwards claimed First Federal's response to the levied tax was to unlawfully use trust funds rather than the personal funds to the taxpayer. To the contrary, in his memorandum opinion, the federal judge had stated that, "[b]ecause the Trust is a nullity and sham for tax purposes, property held in the name of the Trust is not shielded from levy by the government." The showing by First Federal in support of summary judgment based upon the use of collateral estoppel as a complete defense to Edward's claim consisted of the memorandum and decision in the federal suit. This satisfied movant's burden of showing a prima facie case for summary judgment. The federal judgment, deciding a federal question, precluded in subsequent state proceedings any issue which was actually and necessarily decided in the federal suit. It was then respondent's burden to show there was a factual issue as to a full and fair opportunity to litigate. Respondent did not do so. To the extent the court of appeals affirmed the summary judgment on the basis of defensive collateral estoppel, we specifically approve Judge Wood's excellent opinion in *Edwards*.

{9} Plaintiffs in the present case, however, assert the offensive use of collateral estoppel as adopted in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979), a stockholder's action against a corporation, its officers, directors and others who were claimed to have issued false and misleading proxy statements. Before the action came to trial, the Securities and Exchange Commission sued the same defendants and obtained a declaratory judgment based upon findings that the proxy statement was false and misleading in essentially the same respects claimed by Shore in his suit. As did the plaintiffs in the present case, Shore moved for partial summary judgment asserting that Parklane, its officers, directors and other defendants were collaterally estopped from relitigating the issues that had been resolved against them in the action brought by the SEC.

{10} In *Parklane Hosiery Co.*, the Supreme Court adopted a general rule that a trial judge may allow the use of offensive collateral estoppel except in cases where a plaintiff could easily have joined in the earlier action or where the application of offensive estoppel would be unfair to a defendant. Unfairness was discussed as arising where a defendant had little incentive to defend

vigorously in the first suit, where the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant, or where the second action affords the defendant procedural opportunities unavailable in the first action that could have easily caused a different result. *Id*. at 330-31, 99 S. Ct. at 651-52. It was also noted that the presence or absence of a jury as fact finder is basically neutral, quite unlike, for example, the necessity of defending the first lawsuit in an inconvenient forum. *Id.* at 352 n. 19 99 S. Ct. at 662. As to constitutional rights to a jury trial, the court held that, regardless of whether the party against whom estoppel is asserted has previously lost because of adverse factual findings in law or in equity, by jury verdict or court decision, there is no further fact-finding function for a jury to perform in the subsequent action, since the common factual issues have been resolved in the previous action. *Id*. at 335-36, 99 S. Ct. at 653-654; *cf. Ex parte Peterson*, 253 U.S. 300, 310, 40 S. Ct. 543, 546, 64 L. Ed. 19 (1920) ("No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined.").

{11} In accordance with the principles discussed herein, we hold that the doctrine of defensive collateral estoppel may be applied when a defendant seeks to preclude a plaintiff from relitigating an issue the plaintiff has previously litigated and lost regardless of whether defendant was privy to the prior suit; and that the doctrine of offensive collateral estoppel may be applied when a plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully regardless of whether plaintiff was privy to the prior action.

{12} The trial court is in the best position to decide whether a party against whom estoppel is asserted has had a full and fair opportunity to litigate. Neither the offensive or defensive use of collateral estoppel is to be applied where the record is insufficient to determine what issues were actually and necessarily determined by prior litigation, *Howell v. Anaya*, 102 N.M. 583, 698 P.2d 453 (Ct. App.), *cert. denied*, 102 N.M. 613, 698 P.2d 886 (1985), and it is the burden of the movant invoking the doctrine of collateral estoppel to introduce sufficient evidence for the court to rule whether the doctrine is applicable. *International Paper Co. v. Farrar*, 102 N.M. 739, 700 P.2d 642 (1985). When the movant has made a prima facie showing, the trial court must consider the countervailing equities including, but not limited to, prior incentive for vigorous defense, inconsistencies, procedural opportunities, and inconvenience of forum as discussed in *Parklane Hosiery Co.* Although the Supreme Court also noted that the presence or absence of a jury is basically neutral, we do not believe such a fact to be altogether immaterial. To be similarly considered is the use of a special master or other alternative or administrative dispute resolution techniques in the prior litigation.

{13} In the present case, we do not know whether, in denying the plaintiffs' motion for partial summary judgment on defendants' liability, the trial court determined either finality of issues actually and necessarily decided, or issues of fairness. The court found only that questions of material fact exist. This could be interpreted as meaning that, because the doctrine of offensive collateral estoppel had not been adopted in New Mexico, no fact issues had been precluded. In deciding whether to apply the doctrine of collateral estoppel, the threshold issues of fact are for the court to resolve. It does not appear that the court exercised discretion in deciding finality or fairness because it determined that the decision involved a controlling question of law as to which there is substantial ground for difference of opinion. In due course, leave to file this interlocutory appeal was granted.

{14} We could remand for the trial court to reconsider the motion for partial summary judgment in accordance with the law articulated in this opinion. However, it is the opinion of this Court that, as a matter of law, the federal court did not actually and necessarily make a final determination that any failure of defendants to exercise ordinary care was a proximate cause of Silva's death. These are the ultimate fact issues in question. Failure to operate by standards and procedures required by the consent decree is not a matter which subjects defendants to offensive use of collateral estoppel. Under the consent decree,

the agreement specifically purports not to establish standards of culpability for civil liability.

{15} As to whether a direct action lies against the state and its entities under the Tort Claims Act, NMSA 1978, Sections 41-4-1 through 41-4-29 (Repl. Pamp. 1986 & Cum. Supp. 1987), we believe that the court of appeals was correct in *Abalos v. Bernalillo County Dist. Attorney's Office*, 105 N.M. 554, 734 P.2d 794 (Ct. App.), *cert. quashed*, 106 N.M. 35, 738 P.2d 907 (1987), specifically modifying *Silva v. State*, the case presently before us. A governmental entity is most immune from liability for any tort of its employee acting within the scope of duties for which immunity is waived. NMSA 1978, § 41-4-4(A). When the act of the employee is the act of the public entity, let the master answer. To the extent that prior cases have rejected the applicability of the tort doctrine of *respondeat superior* under the Tort Claims Act, e.g., *Wittkowski v. State*, 103 N.M. 526, 710 P.2d 93 (Ct. App.), *cert. quashed*, 103 N.M. 446, 708 P.2d 1047 (1985), those cases are hereby overruled. As stated in *Abalos*:

> To name a particular entity in an action under the Tort Claims Act requires two things: (1) a negligent public employee who meets one of the waiver exceptions under Sections 41-4-5 to -12; and (2) an entity that has immediate supervisory responsibilities over the employee. If a public employee meets an exception to immunity, then the particular entity that supervises the employee can be named as a defendant in an action under the Tort Claims Act. If the city or state directly supervises the employee, then the city or state can be named.

105 N.M. at 559, 734 P.2d at 799. It is only when a public employee is acting within the scope of his employment and in furtherance of the business of a public entity that immunity and the Tort Claims Act have any relevance. *See Garcia v. Albuquerque Pub. Schools Bd. of Educ.*, 95 N.M. 391, 622 P.2d 699 (Ct. App.1980) (Sutin, J., specially concurring), *cert. quashed*, 95 N.M. 426, 622 P.2d 1046 (1981); **cf.** *Candelaria v. Robinson*, 93 N.M. 786, 606 P.2d 196 (Ct. App.1980). Therefore, it is only when the public entity is itself acting through its employee with the right to control the manner in which the details of work are to be done, SCRA 1986, 13-403, that the Tort Claims Act comes into play. The public entity can act only through its employees, and the act of the offending employee is the act of the public entity under traditional tort concepts. *Cf.* SCRA 1986, 13-409.

{16} While the *Abalos* court has held that, "[i]f the city or state directly supervises the employee, then the city or state can be named," we believe that traditional tort law requires that statement to be interpreted to include the right of control regardless of whether exercised. Public policy recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity. NMSA 1978, § 41-4-2(A). While the court may apply the doctrine of remoteness in striking the state or city as a named defendant, the court must be constrained in each instance to avoid inherently unfair and inequitable results. Adherence to a principle of "direct supervision" should never be used to defeat totally a claim which otherwise has been brought under traditional concepts of *respondeat superior*. In the present case, we do not know whether the trial court exercised its discretion in granting defendants' motion for dismissal of the state. The dismissal of the state and the Corrections Department is reversed and, on remand, the trial court may reconsider the motion for dismissal of the state in terms of the doctrine of remoteness.

{17} The trial court erred in concluding that certain statutory waivers of immunity were inapplicable as a matter of law to the acts or admissions of Francke while acting within the scope of his duties as Secretary of Corrections. No public employee is immune from tort liability while acting within the scope of duty where immunity has been waived by one or more of the eight sections of specified exceptions. NMSA 1978, § 41-4-4. Of the eight sections, four are arguably applicable here. These include duties in the operation or maintenance of any building, machinery, equipment, or furnishings (41-4-6), duties in the operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home or like

facilities (41-4-9), duties of providing health care services (41-4-10), or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties (41-4-12). This Court has held that the Secretary of Corrections is not a law enforcement officer within the meaning of Section 41-4-12 as defined in Section 41-4-3(D). *Anchondo v. Corrections Dep't*, 100 N.M. 108, 666 P.2d 1255 (1983). Therefore, Francke cannot be held liable under the waiver of immunity in that section. However, as pointed out in *Anchondo*, the duties of the Secretary of Corrections require that he manage all operations of the department, exercise general supervisory authority over all department employees, organize the department into the most efficient organizational units, and issue and enforce orders and instructions. It will be for the finder of fact to determine whether Francke failed to exercise ordinary care in the discharge of these duties as they may be found to include the operation or maintenance of the corrections and medical care facilities and health care services proximately related to the death of Silva.

{18} While Francke may be liable for negligent performance of a duty, he is not subject to liability because of the negligent act or omission of some other employee, merely because of his executive position. *See Clark v. Ruidoso-Hondo Valley Hosp.*, 72 N.M. 9, 380 P.2d 168 (1963). We hold only that Francke's management and enforcement duties may be found to have included staffing, training and provision for facilities which would have provided Silva a course of treatment, health care and protection to address the mental disorder undergirding his basic prison classification.

{19} Failure of an employee to operate in compliance with practices adopted by a governmental entity for the welfare of persons similarly situated to the plaintiff constitutes evidence of negligence in a tort action. *Petznick v. United States*, 575 F. Supp. 698 (D. Neb. 1983); *Dillenbeck v. City of Los Angeles*, 69 Cal.2d 472, 446 P.2d 129 (1968). Under the terms of the consent decree, as we have previously noted, the agreement must not be construed to establish or change the standard of culpability for civil liability. That standard is established by the traditional tort concept of duty to exercise ordinary care. Evidence of the breach of that standard may include the failure to operate by practices separately adopted by the Corrections Department unless the court finds, as a threshold issue, that the practice would not have been adopted but for the agreement. Regardless of the adoption of practices, the jury may consider acts and omissions relevant to treatment, health care and protection measured against the standard of ordinary care or the testimony of experts relevant to that standard. Pursuant to the federal order adopting the consent decree, we hold only that no evidence may be adduced through the agreement itself.

{20} We affirm the court of appeals in part, on its affirmance of the ruling of the court below that plaintiffs were not entitled to partial summary judgment of liability. We reverse the court of appeals in part, on its affirmance of the trial court's dismissal of a direct action under the Tort Claims Act against the state, the Corrections Department, and the Secretary of Corrections, and we remand this case to the district court for further proceedings consistent with this opinion.

{21} IT IS SO ORDERED.

RICHARD E. RAMSON,
Justice

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

TONY SCARBOROUGH,
Chief Justice and

HARRY E. STOWERS,
JR., Justice, dissent.

SCARBOROUGH,
Chief Justice, dissenting.

{22} I dissent.

{23} The trial court properly refused to enter partial summary judgment in favor of plaintiffs because the issue of fact resolved in the prior action is not the same issue of fact that is involved in this case, because no final judgment was entered in the prior action, and because the Duran Decree and actions thereunder cannot establish the standard of culpability for civil liability. Furthermore, the trial court properly dismissed plaintiffs' Tort Claims Act claims against the State of New Mexico (State), the Corrections and Criminal Rehabilitation Department (CCRD) and Secretary of Corrections Michael Francke (Francke) because sovereign immunity precludes plaintiffs' claims against these defendants. I would therefore affirm the trial court and the Court of Appeals.

{24} The doctrine of collateral estoppel can only be invoked where an identical issue of fact is involved in prior and subsequent actions. *International Paper Co. v. Farrar*, 102 N.M. 739, 741, 700 P.2d 642, 644 (1985); *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L. Ed. 2d 552 (1979) (one purpose of collateral estoppel is to protect litigants from burden of relitigating identical issues). In this case, the federal action only decided that the terms of the Duran Decree were violated, it did not decide that defendants were liable for Silva's alleged wrongful death. The federal action therefore cannot preclude defendants from litigating, for the first time, their alleged liability for Silva's death.

{25} Moreover, the doctrine of collateral estoppel can only be invoked where a final judgment has been entered. *C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 597 P.2d 1190 (Ct. App.1979). No final judgment has been entered in the federal action. The federal court merely found that the terms of the Duran Decree had been violated and ordered Francke to identify the persons who violated the decree and show cause why they should not be held in contempt.

{26} In any event, the order which adopted the Duran Decree, dated July 14, 1980, specifically states that "[t]he agreement and the policies attached thereto and the partial consent decrees on file herein are not to be construed to establish or change the standard of culpability for civil or criminal liability * * * *" One unambiguous thrust of the July 14, 1980 order is to preclude the specific abuse of *Duran* sanctioned today by the majority.

{27} The State is not a proper party defendant under the Tort Claims Act. *Wittkowski v. State*, 103 N.M. 526, 710 P.2d 93 (Ct. App.), *cert. quashed***,** 103 N.M. 446, 708 P.2d 1047 (1985). The trial court therefore did not err in dismissing plaintiffs' Tort Claims Act claim against the State. I note that there is no legislative, Court of Appeals or Supreme Court authority to support the position taken by the majority concerning the circumstances under which the State may be sued under the Tort Claims Act.

{28} NMSA 1978, Section 41-4-4(A) (Repl. Pamp.1986) provides: "A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978." Sections 41-4-5 through 41-4-12 only waive liability for the torts of public employees and law enforcement officers. Since the CCRD is neither a public employee nor a law enforcement officer, the trial court properly dismissed plaintiffs' Tort Claims Act claim against the CCRD.

{29} NMSA 1978, Section 41-4-2(B) (Repl. Pamp.1986) provides that "[l]iability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty * * * *" As Judge Minzner pointed out in the Court of Appeals' opinion in this case, respondeat superior is not a traditional tort concept of duty; it is a tort concept of vicarious liability. The majority therefore errs in employing the doctrine of respondeat superior in a Tort Claims Act context.

{30} Finally, the statutory waivers of immunity contained in Sections 41-4-6 (relating to public employee negligence in the operation or maintenance of any building, public park, machinery, equipment or furnishings), 41-4-9 (relating to public employee negligence in the operation of any hospital, infirmary, mental institution, clinic, dispensary, medical care home or like facilities),

and 41-4-10 (relating to public employee negligence in the provision of health care services) cannot be reasonably interpreted to encompass the actions of Francke acting within the scope of his duties as Secretary of Corrections. The trial court therefore properly dismissed plaintiffs' Tort Claims Act claim against Francke.

{31} In sum, the majority opinion, insofar as it concerns the doctrine of collateral estoppel, is entirely superfluous; and insofar as it relates to the concept of sovereign immunity under the Tort Claims Act, it completely ignores the clear intent of the legislature. I therefore dissent.

STOWERS,
Justice, dissenting

{32} I dissent.

{33} The majority has misconstrued both the application of the Duran Consent Decree and the application of the Tort Claims Act.

{34} It is important to lay to rest once and for all that the Duran Consent Decree by its terms can have no application to any cause external to the Duran case.

{35} It is equally clear that the issues involving the Tort Claims Act were properly construed and applied by the court of appeals in its opinion which I adopt, and I direct that said opinion of the court of appeals be printed in its entirety as part of my dissent.

No. 9267
Court of Appeals of New Mexico
Dec. 4, 1986.

OPINION

MINZNER, Judge.

{36} In response to separate motions by the parties, the memorandum opinion issued on October 9, 1986 is withdrawn, and the following formal opinion is substituted. *See* NMSA 1978,S. Ct.Misc.R.7 (Repl.1984).

{37} Plaintiffs appeal the dismissal of all claims filed by them as administrators of the estate of Manuel Silva against the State of New Mexico (State) and the Corrections and Criminal Rehabilitation Department of the State of New Mexico (CCRD), as well as claims filed by them against Secretary of Corrections Michael Francke (Francke) under the New Mexico Tort Claims Act, NMSA 1978, Sections 41-4-1 through -29 (Repl.1986) (Act). All claims arose out of the death of Manuel Silva, who committed suicide by hanging while incarcerated at the Central Correctional Facility in Los Lunas. Plaintiffs also appeal the denial of their motion for partial summary judgment against these defendants and others. Although both parties requested oral argument, in the judgment of the panel, argument was not necessary. The motion is denied. We affirm.

BACKGROUND.

{38} Plaintiffs' appellate claims arise out of a suit filed against the state, CCRD, Francke, the Reception and Diagnostic Center Classification Committee, and several individuals employed by the Department of Corrections (defendants.) The complaint included three counts under the Act and one count under 42 U.S.C. Section 1983 (Supp. III 1979).

{39} Plaintiffs moved for partial summary judgment as to liability, contending as a result of *Duran v. Anaya*, U.S. District Court Case No. CIV-77-721-JB (*Duran*), that defendants were precluded from disputing the issue of liability. The trial court denied the motion and granted defendants' motion to strike all exhibits relating to *Duran* that had been attached to plaintiffs' motion. Subsequently, Francke, CCRD, and State moved to dismiss all claims under the Act. The trial court granted this motion and entered final judgment as to Francke under NMSA 1978, Civ.P. Rule 54(b)(1) (Repl.1980) and as to CCRD and State under Civ.P. Rule 54(b)(2).

{40} This court granted plaintiffs' application for interlocutory appeal and, on plaintiffs' motion, consolidated the interlocutory appeal with the appeal from the final judgments that had been

entered. We address first plaintiffs' appeal from the final judgments.

THE APPEAL OF RIGHT: WHETHER THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS UNDER THE TORT CLAIMS ACT.

{41} After the supreme court abolished common law sovereign immunity, the legislature provided a statutory version in the Act. *See Begay v. State*, 104 N.M. 483, 723 P.2d 252 (Ct. App.1985), *rev'd on other grounds, Smialek v. Begay,* 104 N.M. 375, 721 P.2d 1306 (1986). Consequently, a cause of action against a governmental entity or public employee must lie within one of the express exceptions to the statutory form of immunity contained in the Act. *Id.* We discuss separately plaintiffs' claims against the State, CCRD, and Francke.

A. Claims Against the State.

{42} Under the Act, the particular agency that caused the alleged harm is the party that may be held liable and against whom a judgment may be entered. *See Begay; Wittkowski v. State*, 103 N.M. 526, 710 P.2d 93 (Ct. App.1985). In this case, plaintiffs allege negligence as to CCRD. The district court properly dismissed the claims against the State. *Id.*

{43} A prior opinion of the court of appeals, authored by Judge Wood, sets out in greater detail our rationale. That decision was overruled on other grounds. *See generally Clothier v. Lopez*, 103 N.M. 593, 711 P.2d 870 (1985) (overruling *Lopez v. State*, 24 SBB 193 (Ct. App.1985) as to the proper venue for claims under the Act). We take this opportunity to paraphrase a portion of Judge Wood's reasoning in *Lopez v. State* as our rationale for this issue. That reasoning is as follows:

Section 41-4-17, concerning the Act as an exclusive remedy, is written in terms of the governmental entity "whose act or omission gave rise to the suit or claim." Section 41-4-19 refers in Paragraph A to an action against a governmental entity and in Paragraph B to a judgment against a governmental entity. Section 41-4-23, concerning the public liability fund, refers in Paragraph B to liability insurance for state agencies, the defense of "any" state agency, and the payment of judgments against governmental entities.

{44} The statutory provisions cited in the preceding paragraph indicate that the negligent agency is the entity that may be held liable. *New Mexico State Highway Commission v. Ferguson*, 98 N.M. 680, 652 P.2d 230 (1982), reached a similar result in considering a notice question. *Ferguson* held: "the statute means the particular agency that caused the alleged harm must have actual notice before written notice is not required." 98 N.M. at 681, 652 P.2d 230. We hold that the Act means that the particular agency that caused the alleged harm is the party that may be held liable and against whom a judgment may be entered.

B. Claims Against CCRD.

{45} Plaintiffs make two contentions as to CCRD. The first relies on Section 41-4-2(B), which states that "[l]iability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty." Plaintiffs contend that the principle of respondeat superior is a traditional tort concept of duty.

{46} The phrase "traditional tort concepts of duty and the reasonably prudent person's standard of care," however, refers to theories of negligence. Respondeat superior is a doctrine that imposes vicarious liability. Under the doctrine, one is held liable for the negligence of another, because of a special relationship. It applies when there has been an act or omission, by the other person, that breaches a tort concept of duty. Plaintiffs may not, by relying on the doctrine, avoid the need to identify a right to sue the entity against whom liability is asserted.

{47} Under the Act, plaintiffs must identify an act or omission that is negligent and one that is expressly stripped of immunity. Plaintiffs' second argument acknowledges this obligation.

{48} Plaintiffs contend that CCRD is liable under Section 41-4-6, -9, and -10. Each of these sections waives immunity for negligence of "public employees." A "public employee" is defined as an officer, employee, or servant of a governmental entity. § 41-4-3(E). The corrections department is a governmental entity under the Tort Claims Act, not an employee of a governmental entity. *See Wittkowski*. Therefore, CCRD does not fall within any of these sections, and the trial court properly dismissed the claims against CCRD.

C. Claims Against Francke.

{49} Section 41-4-6 waives immunity for 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." Section 41-4-9 waives immunity for negligence of public employees "in the operation of any hospital, infirmary * * * *" Under Section 41-4-10 immunity is waived for "public employees licensed by the state or permitted by law to provide health care services."

{50} Francke is clearly a "public employee," but that is not sufficient to establish on the part of plaintiff of a right to sue. The language on which plaintiffs rely must cover his acts or omissions.

{51} Plaintiffs argue Francke falls within Section 41-4-6 as an employee negligent in the operation or maintenance of a building or machinery. Plaintiffs contend that decedent's clothing was "machinery" within the terms of the Act because he hanged himself with his shirt; in not removing the clothing from decedent's possession, correctional facility employees failed to properly maintain machinery. Plaintiffs suggest as well that the design of the building enabled decedent to hang himself, and such a defect in design is encompassed by the relevant phrase.

{52} Plaintiffs also claim in effect that there was not an adequate health-care system in place. Consequently, they ask us to hold that Francke is liable under Section 41-4-9, for operation of a facility comparable to a hospital, and under Section 41-4-10, as one of the "public employees licensed by the state or permitted by law to provide health care services."

{53} Statutory words are to be used in their ordinary and usual sense unless the contrary is apparent, *see Methola v. County of Eddy*, 95 N.M. 329, 622 P.2d 234 (1980), and, as a statute in derogation of the common law, the Act is to be strictly construed. *See State ex rel. Miera v. Chavez*, 70 N.M. 289, 373 P.2d 533 (1962). We hold that plaintiffs' claims under Section 41-4-6, -9, and -10 do not lie within the plain meaning of those exceptions. *See generally Anchondo v. Corrections Dept.*, 100 N.M. 108, 666 P.2d 1255 (1983) (duties of secretary of corrections are primarily administrative). *See also Begay; Wittkowski*.

{54} Finally, plaintiffs argue that Francke acted unconstitutionally and therefore outside the scope of his duties, and that having done so, he subjected himself to personal liability and may be sued under the Act. This contention must be rejected. A cause of action under the Act must fit into one of the exceptions listed in the Act; all the exceptions are for employees acting within the scope of their duties. It follows that any claim against an individual not acting within the scope of his duties is not a claim under the Act.

{55} Plaintiffs contend generally that Francke might be liable for negligent supervision or other negligence in failing to ensure compliance with the 1980 *Duran* consent decree. For the reasons stated above, we are not persuaded that any of the statutory provisions on which plaintiffs rely support the claim. Thus, the trial court did not err in dismissing plaintiffs' claims against Francke under the Act. *See C & H Construction & Paving, Inc. v. Foundation Reserve Insurance Co.*, 85 N.M. 374, 512 P.2d 947 (1973).

THE INTERLOCUTORY APPEAL.

{56} As to claims under the Act against the individual employees and the claim under 42 U.S.C. Section 1983 against those employees

and Francke, all of which are still pending in the district court, plaintiffs argue that they should have been granted partial summary judgment on liability as a result of the special master's findings and Judge Burciaga's order in *Duran,* we are not able to agree.

{57} Plaintiffs' argument on appeal relies on events subsequent to the order approving a partial consent decree. They are as follows: in May 1984, Judge Juan Burciaga ordered a hearing by a special master to inquire into Silva's death in order to enable the court to determine whether noncompliance with the consent decree had contributed to the circumstances resulting in the death. After an evidentiary hearing the special master filed a report which was confirmed by order of the court on August 15, 1984. In confirming the report, Judge Burciaga found that provisions of the consent decree had been violated, and ordered Francke to identify the persons who violated the decree and show cause why they should not be held in contempt. Subsequently plaintiffs moved to intervene; their motion was denied.

{58} The rules of res judicata are applicable when a final judgment has been entered. *See Berlint v. Bonn*, 102 N.M. 394, 696 P.2d 482 (Ct. App.1985); *C & H Construction & Paving Co. v. Citizens Bank*, 93 N.M. 150, 597 P.2d 1190 (Ct. App.1979). in addition, the second suit must be identical with the prior suit, in several respects, particularly, there must be identity of subject matter, cause of action, and parties. Torres v. Village of Capitan, 92 N.M. 64, 582 P.2d 1277 (1978). A judgment or order is not final unless all issues of law and fact necessary to be determined have been determined, and the case has been completely disposed of to the extent the court has power to dispose of it. *Clancy v. Gooding*, 98 N.M. 252, 647 P.2d 885 (Ct. App.1982). Where no further judicial action on the part of the court is essential, then the decree entered by the court is a final one. *In re Estate of Foster*, 102 N.M. 707, 699 P.2d 638 (Ct. App.1985).

{59} Collateral estoppel also applies only where there has been a final judgment. *C & H Construction & Paving Co. v. Citizens Bank*. It involves issue preclusion, rather than a bar to the second proceeding, *see Torres;* the issue precluded from relitigation must have been actually litigated and necessarily determined in the prior case between parties or their privies. *International Paper Co. v. Farrar*, 102 N.M. 739, 700 P.2d 642 (1985). An issue is actually litigated when it is properly raised, by the proceedings or otherwise, and is submitted for determination and is determined. *Paulos v. Janetakos*, 46 N.M. 390, 129 P.2d 636 (1942).

{60} The special master was instructed "to enable the Court to consider" whether violations of the consent decree "contributed in a material way to the circumstances resulting in" Silva's death. The order entered by Judge Burciaga directed Francke to make further fact finding and gave him an opportunity to argue that contempt had not occurred.

{61} We conclude that the order was not final for purposes of either res judicata or collateral estoppel. We also conclude that plaintiffs have not shown that the subject matter of the contempt hearing was the same as that of the present lawsuit or identified issues in the present suit that were actually litigated and determined in the prior one. There was no finding on proximate cause, and the employees who violated the standards were not identified. Thus, we do not reach the more difficult issues briefed by the parties.

{62} We hold that plaintiffs did not make the requisite prima facie showing. *See International Paper Co. v. Farrar; Edwards v. First Federal Savings & Loan Assoc. of Clovis*, 102 N.M. 396, 696 P.2d 484 (Ct. App.1985). The trial court acted properly in denying plaintiffs' motion for partial summary judgment.

{63} In support of their motion for partial summary judgment, plaintiffs submitted portions of the transcript of the hearing before the special master, as well as various records. The trial court granted defendants' motion to strike. In view of our disposition as to the motion for summary judgment, any issue as to the motion to strike is moot. On remand, plaintiffs should not be precluded from offering at trial any relevant exhibits

and testimony otherwise admissible to support their theory of liability.

{64} Plaintiffs had the burden, in moving for summary judgment, to show the finality of the order upon which they relied. *See Ballard v. Markey*, 66 N.M. 265, 346 P.2d 1045 (1959). Until a prima facie showing was made, appellees had no obligation to dispute finality. *See Security Bank & Trust v. Parmer*, 97 N.M. 108, 637 P.2d 539 (1981). Because finality was part of plaintiffs' burden in moving for summary judgment, and because we conclude that burden was not sustained, the trial court's decision to deny partial summary judgment should be affirmed.

CONCLUSION.

{65} We conclude that the district court was correct in denying the motion for partial summary judgment, as well as in granting the motion to dismiss. The trial court is affirmed, and the cause remanded for trial on the merits.

{66} IT IS SO ORDERED.

WILLIAM R. HENDLEY,
Chief Judge

THOMAS A. DONNELLY,
Judge, Concur

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-119

Filing Date: December 15, 1987

Docket No. 17,075

MANUEL P. TRUJILLO,

Plaintiff-Appellant,

vs.

TELESFOR GONZALES, Taos County Commissioner, District No. 1, JOHN GAILLOUR, JR., Taos County Commissioner, District No. 2, and SAMUEL MONTOYA, Chief Executive Officer, Taos County Commission,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
Art Encinias, District Judge

Crollett & Sanchez,
Robert Crollett,
Sam B. Sanchez,
Taos,

for Appellant.

White, Koch, Kelley & McCarthy,
Kevin Reilly,
Santa Fe,

for Appellees.

OPINION

RANSOM, Justice.

{1} Manuel P. Trujillo brought a breach of contract suit against Taos County Commissioners Gonzales and Gaillour and the Board of Commissioner's chief executive officer, Samuel Montoya. Trujillo moved for summary judgment, and defendants moved for dismissal. The court entered an order of dismissal. On appeal, alleging existence of a valid written two-year employment contract, Trujillo claims he was entitled to judgment as a matter of law and that the court erred in dismissing his complaint with prejudice. We affirm the court's decision.

{2} In December 1984, while employed by the state, Trujillo was offered the job of Taos County Road Superintendent by Commissioner Cisneros. (Cisneros resigned in June 1985 and was replaced by defendant Gaillour.) Trujillo conditioned his acceptance of employment upon receiving a two-year guarantee since he was within two years of retirement with the state. In January 1985, Commissioners Cisneros and Romero orally promised Trujillio employment for a two-year period beginning January 1. Trujillo accepted and voluntarily terminated his employment with the state. The minutes of the meeting of the Board of County Commissioners for January 7, 1985, at which Trujillo's employment was ratified, indicate that he was appointed as an exempt employee (one whose employment is at will). The minutes do not acknowledge the oral promise of a two-year tenure made by Cisneros and Romero. In September 1986, Gonzales and Gaillour informed Trujillo that his employment was being terminated effective September 16.

{3} Trujillo filed his initial complaint against the individual commissioners and Montoya, not against the Board. The original complaint had three counts, including intentional interference with contractual rights and intentional infliction of emotional distress; however, only the breach of contract claim is in issue on appeal. Defendants denied the existence of a written two-year employment contract and moved for dismissal on the grounds that the complaint failed to state a claim upon which relief could be granted. The May 1987 order which granted defendants' motion to dismiss also denied Trujillo's motions to amend the complaint to name the Board as the

proper party defendant and for summary judgment. As stated in that order, the court "determined that the Complaint as originally filed fails to state a claim on which relief can be granted because it is barred by governmental immunity, is foreclosed by the statutory requirement of a valid written contract found in § 37-1-23, N.M.S.A. 1978, fails to name the proper parties, and is based on illegal and unauthorized actions. The Court also has determined that the Amended Complaint attached to Plaintiff's Motion to Amend the Complaint* * * also fails to state a claim on which relief can be granted for the same reasons, except that it does name the proper parties."

{4} The dispositive issue is whether the court erred by granting defendants' motion to dismiss based upon its determination that Trujillo failed to allege a valid written employment contract with the county in order to be excepted from the provisions of NMSA 1978, Section 37-1-23 which states that "[g]overnmental entities are granted immunity from actions based on contract, except actions based on a valid written contract."

{5} Trujillo maintains that the written minutes of the January 7 board meeting constituted a valid employment contract barring a claim of immunity from suit. Under the heading of "RATIFICATION OF EXEMPT EMPLOYEES," the minutes states that "Mr. Samuel O. Montoya read the list of employees to serve in the administrative capacity." Trujillo's name appeared for the position of road superintendent. Following the list, the minutes contained the statement that "* * * Gonzales made motion to ratify all new exempt employees* * * * Romero seconded the motion. Motion carried unanimously." Cisneros was also present at the meeting, along with several other non-voting persons.

{6} Trujillo submits that because the written ratification of his employment as an exempt employee is ambiguous and uncertain as a matter of law, the court should have allowed extrinsic evidence of the oral promise in order to determine the nature of his term of employment. We disagree.

{7} The minutes are not ambiguous. Rather, the terms of the employment as stated in the minutes and as orally promised are inconsistent. While parties may leave portions of written contracts to oral expression, under such circumstances oral expressions are legally significant *only if they are not contradictory* and have some effect upon interpretation, application and legal operation of the written portion. *Baum v. Great Western Cities, Inc. of New Mexico*, 703 F.2d 1197, 1206 (10th Cir. 1983).

{8} Finally, the reaction of the two commissioners extending an offer of a two-year employment to Trujillo was without statutory authority and, thus, not a valid act capable of binding the county. NMSA 1978, Section 10-15-3 provides that no action of any commission or other policy-making body shall be valid unless it is taken or made at a meeting held in accordance with the Open Meetings Act. *See* NMSA 1978, §§ 10-15-1 to 10-15-4 (Repl. Pamp.1983). Although Section 10-15-1(E)(2) does provide for privately-held *discussions* concerning personnel matters. In this case, the ratification of Trujillo's employment as an exempt employee was the final action. In addition, NMSA 1978, Section 4-38-1 (Repl. Pamp.1984), states that "[t]he powers of a county as a body politic and corporate shall be exercised by a board of county commissioners."

> A municipal or county counsel or legislative body can act only as a body and when in legal session as such. And the powers of a municipal council or body must be exercised at a meeting which is legally called. Action of all the members of the council separately is not the action of the council, and an agreement entered into separately by the members of the council outside a regular meeting is not binding.

56 Am. Jur.2d *Municipal Corporations, Counties, and Other Political Subdivisions* § 155 (1971). Moreover, a contract unlawfully entered into, though in good faith, creates no liability on

the part of the body politic to pay for it, even in quantum meruit for goods furnished or labor performed. *See Hagerman v. Town of Hagerman*, 19 N.M. 118, 128-29, 141 P. 613, 617 (1914); *accord Fancher v. Board of Comm'rs of Grant County*, 28 N.M. 179, 204-05, 210 P. 237, 247 (1922). Thus, as a matter of law, the oral promise made by two commissioners, not at a duly constituted meeting of the Board, does not bind the county.

{9} Alternatively, Trujillo argues that defendants are estopped from denying the existence of a valid two-year employment agreement and asserting the provisions of Section 37-1-23 to deny contractual liability. This argument is based upon Trujillo's reliance on *State Highway Dep't v. Yurcic*, 85 N.M. 220, 223, 511 P.2d 546, 549 (1973) (estoppel not applied against State except in exceptional situations where there is shocking degree of aggravated and over-reaching conduct). We find no merit in Trujillo's equitable argument because the language of the applicable statute is clear. Trujillo's had no right to rely on the oral representations made to him here. *See Raton Waterworks Co. v. Town of Raton*, 9 N.M. 70, 90-91, 49, P. 898, 905 (1987) (persons dealing with public officials are chargeable with notice of limitations on their powers).

{10} Accordingly, based upon the foregoing, the order of dismissal of the district court is affirmed.

{11} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

TONY SCARBOROUGH,
Chief Justice

HARRY E. STOWERS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-120

Filing Date: December 18, 1987

Docket No. 16,547

EMORY ASHBAUGH,

Petitioner,

vs.

NANCY M. ENGLEMAN WILLIAMS (Formerly Nancy Engleman White), as Personal Representative of the Estate of Marsha Maria Engleman, Deceased, and DONOVAN RAKESTRAW, as Personal Representative of the Estate of Constance Louise Rakestraw, Deceased,

Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Frederick M. Mowrer, District Judge

Motion for Rehearing Denied, January 7, 1988

Martin E. Threet,
Robert T. Reeback,
Threet and King,
Albuquerque,

for Petitioner.

William H. Carpenter,
Daymon B. Ely,
Carpenter Law Office, Ltd.,
Albuquerque,

for Respondents.

OPINION

ON MOTION FOR REHEARING

{1} Petitioner's motion for rehearing is granted. The Opinion filed December 18, 1986 is *withdrawn* and the following Opinion is substituted in its place:

RANSOM, Justice.

{2} This case is before the Court on writ of certiorari to the court of appeals to review the correctness of that court's imposition of vicarious tort liability upon an absent owner-lessor of a liquor license. Liability arose out of lessee's service of alcohol to an intoxicated patron who injured third parties. Lessor Ashbaugh was granted an interlocutory appeal when, based on the Liquor Control Act, NMSA 1978, Sections 60-3 A-1 to 3A-5, 60-7 A-1 to 7A-25 (Repl. Pamp.1981), the trial court denied his motion for summary judgment. The facts and proceedings are more specifically set forth in the opinion of the court of appeals and will not be repeated here.

{3} Under Section 60-3A-2(B) of the Liquor Control Act, enacted in 1981, the licensee is fully liable and accountable for the use of the license. This accountability includes but is not limited to violations of the Act. Under Section 60-7A-16, it is a violation for a person to knowingly sell or serve alcoholic beverages to an intoxicated person. On September 13, 1982, prior to the December 1982 occurrence resulting in the injuries here, this Court held that, prospectively, liability may arise to a third party whose injuries are proximately caused by such sale or service. *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982).

{4} New Mexico has recognized no innkeeper accountability apart from violations of the Act. Further, in 1983 the legislature provided specifically that:

> No civil liability shall be predicated upon the breach of Section 60-7A-16 NMSA 1978 by a licensee, except in the case of the licensee who:

(1) sold or served alcohol to a person who was intoxicated; and

(2) it was reasonably apparent to the licensee that the person buying or apparently receiving service of alcoholic beverages was intoxicated; and

(3) the licensee knew from the circumstances that the person buying or receiving service of alcoholic beverages is [was] intoxicated.

NMSA 1978, § 41-11-1(C) (Supp.1983). "Licensee" is defined as the person licensed and the agents or servants of the licensee. § 41-11-1(C) (Supp.1983).

{5} Liability of the person licensed must now be predicated upon the knowing acts of the licensee, or upon vicarious liability for the knowing acts of agents or servants whose work the licensee has the right to control. *See* SCRA 1986, 13-403 and 406. The absent owner-lessor of the license would not be liable for the acts of a lessee not in the employ of the licensee. *See id*.

{6} Plaintiffs do not assert liability of the licensee based upon any use of the license except as related to a breach of Section 60-7 A-16. If Section 41-11-1(A) were applicable, then defendant would be neither directly nor vicariously liable under Section 60-7 A-16. However, Section 41-11-1(A), enacted in 1983, cannot be applicable because at the time of the injury in 1982 the cause of action created by Section 60-3 A-2(B) and recognized by *Lopez v. Maes* inured to the plaintiffs as a vested right. *See Torres v. Sierra*, 89 N.M. 441, 445, 553 P.2d 721, 725 (Ct. App.), *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976).

{7} We cannot now apply Section 41-11-1(A) retroactively against the plaintiff and divest him of that right. This Court in *Rubalcava v. Garst*, 53 N.M. 295, 298, 206 P.2d 1154, 1156 (1949), quoting with approval from *Baker v. Tulsa Bldg. & Loan Ass'n,* 179 Okl, 432, 435, 66 P.2d 45, 49 (1936), declared:

> [A] 'vested right' is the power to do certain actions or possess certain things lawfully, and is substantially a property right, and may be created either by common law, by statute, or by contract. And when it has been once created, and has become absolute, it is protected from the invasion of the Legislature by those provisions in the Constitution which apply to such rights. *And a failure to exercise a vested right before the passage of a subsequent statute, which seeks to divest it, in no way affects or lessens that right.* (Emphasis added.)

{8} There is a rational basis for full liability of a licensee who might otherwise insulate himself or herself from accountability through a lease that passes profits to the lessor/licensee from an irresponsible lessee. It is contemplated that the person who seeks and is awarded the license be responsible and accountable for use of the license. While the legislature may not be said to have specifically foreseen in its 1981 legislation that a licensee would be liable for third-party injuries proximately caused by a lessee's violation of the Liquor Control Act, the legislature was not required to consider all prospects for liability when it provided that the licensee be fully liable and accountable for the use of the license. The legislation was clearly intended to be all inclusive, not selective.

> Legislation is often written in terms which are broad enough to cover many situations which could not be anticipated at the time of enactment. So a statute, expressed in general terms and written in the present or future tense, will be applied, not only to existing but also prospectively to future things and conditions.

2A N. Singer, Sutherland Statutory Construction § 49.02, at 348 (Sands 4th Ed.1984). *See also Anderson v. Black & Decker (U.S.), Inc.*, 597 F. Supp. 1298, 1302 (D.E.Ky.1984) ("Under the plain meaning rule statutes ordinarily apply to unforeseen developments unless such application would lead to an absurd result.").

{9} We agree with the court of appeals that Section 60-3A-2(B) is clear on its face and needs no interpretation. The licensee is fully liable and accountable for the use of the license, and this accountability includes violation of the Act. The exception for an absent owner-lessor of a license was not adopted until after liability attached in this case. We accept the reasoning of the court of appeals and affirm its opinion.

{10} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

TONY SCARBOROUGH,
Chief Justice (not participating)

HARRY E. STOWERS, JR., Justice
(dissenting).

STOWERS, Justice, dissenting.

{11} I respectfully dissent.

{12} This case was correctly decided in the opinion filed on December 18, 1986. A further review, after rehearing, does not change my conclusion. I incorporate herein the reasoning of the original opinion.

{13} The sole issue before us is whether, under the facts in this case, dramshop liability can be imputed to the absent, nonoperating, nonparticipating owner-lessor for the actions of his lessee. The incident at issue occurred on December 10, 1982.

{14} There was no dramshop liability in New Mexico when the Legislature enacted the Liquor Control Act in 1981, *see Marchiondo v. Roper*, 90 N.M. 367, 563 P.2d 1160 (1977); therefore, no such liability was contemplated when Section 60-3A-2(B) was enacted.

{15} In *Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982), we permitted a cause of action against a *tavernkeeper-operator* where an injury to a third person had resulted from the *tavernkeeper's sale of intoxicating liquor* to an obviously intoxicated person. *Lopez* provided a cause of action against tavern operators and was not intended to apply, nor does it apply, to an absent, nonoperating, nonparticipating owner-lessor.

{16} Petitioner was not present, did not operate the tavern or authorize anyone on his behalf to sell liquor to Nuanes. It is unreasonable to hold a person civilly liable for that over which he has no control and which he therefore has no opportunity to prevent.

{17} As further evidence of the fact that the Legislature never intended to impute liability to an absentee-owner for the actions of his lessee without knowledge or reason to know of those actions, we have only to look at the subsequent legislation. Section 41-11-1 enacted in 1983 states:

> A. No civil liability shall be predicated upon the breach of Section 60-7A-16 NMSA 1978 by a licensee, except in the case of the licensee who:
>
> (1) sold or served alcohol to a person who was intoxicated;
>
> (2) it was reasonably apparent to the licensee that the person buying or apparently receiving service of alcoholic beverages was intoxicated; and
>
> (3) the licensee knew from the circumstances that the person buying or receiving service of alcoholic beverages was intoxicated.

NMSA 1978, § 41-11-1(A) (Cum. Supp.1983).

{18} Accordingly, the judgment of the district court should be reversed and the case remanded for entry of an order granting summary judgment in favor of petitioner.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-034

Filing Date: May 9, 1988

Docket No. 16,835

FRANK PADILLA,

Plaintiff-Appellant,

vs.

PUEBLO OF ACOMA, D/B/A SKY CITY CONTRACTORS,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Frederick M. Mowrer, District Judge

Motion for Rehearing Denied June 3, 1988

Grisham, Lawless & Earl,
Richard V. Earl,
Albuquerque, New Mexico

or Appellant.

Ortega & Snead, P.A.,
Michael D. Bustamante,
Albuquerque, New Mexico

for Appellee.

OPINION

RANSOM, Justice.

{1} Frank Padilla, a roofing consultant, sued the Pueblo of Acoma d/b/a Sky City Contractors for breach of contracts under which Padilla supervised Sky City's installation of roofs on two building projects located off the Acoma reservation. The Pueblo moved to dismiss the suit for lack of subject matter jurisdiction on the grounds of sovereign immunity. Following a hearing, the district court granted the Pueblo's motion and dismissed the complaint. Padilla appeals. We reverse.

{2} We initially address whether the Pueblo adequately raised lack of subject matter jurisdiction in its motion to dismiss under SCRA 1986, 1-012(B)(1). Padilla submits that, under *Aetna Casualty & Surety Co. v. Bendix Control Division*, 101 N.M. 235, 680 P.2d 616 (Ct. App.1984), a proper challenge of jurisdiction must contain something more than the bare allegations within the motion. *Id.* at 240, 680 P.2d at 621. Padilla argues that the Pueblo's failure either to verify or to accompany its motion with an affidavit or other sworn testimony requires this Court to accept as true Padilla's allegation that Sky City is an unincorporated association registered and authorized to do business in New Mexico and, by implication, not protected under the Pueblo's tribal immunity.

{3} The focus in *Aetna* was limited, however, to factual allegations that would satisfy the "minimum contacts" due process requirements for personal jurisdiction over a nonresident defendant. There, the complaint alleged sufficient facts concerning the commission of a tortious act within the state. The allegations in the complaint had to be taken as true in the absence of affidavits or other testimony under oath supporting a motion asserting lack of personal jurisdiction. In this case, the jurisdictional attack is on the power and authority of the court to act when an Indian tribe asserts its sovereign immunity. The plaintiff's naming of the Pueblo of Acoma as the defendant, together with the long recognized policy of judicial notice of Pueblo Indian tribes, *United States v. Lucero*, 1 N.M. 422 (1869), established the factual basis for the Pueblo's motion to dismiss on the grounds of sovereign immunity. No sworn testimony was necessary to establish that the defendant was indeed a Pueblo Indian tribe. We accept as true, and discuss later in this opinion, the allegation that the defendant Pueblo was doing business as an unincorporated association

registered and authorized to do business in the state.

{4} The issue before us is whether the state courts have the power and authority to exercise jurisdiction over an Indian tribe that has not waived sovereign immunity for liability claimed to arise out of the tribe's off-reservation conduct. *See State v. Patten*, 41 N.M. 395, 69 P.2d 931 (1937) (three jurisdictional essentials are jurisdiction over parties, jurisdiction of subject matter, and power or authority to decide particular matters presented).[1]

{5} The laws of the United States are the supreme law of the land, and judges in every state are bound thereby. U.S. Const. art. VI. We feel constrained, therefore, to answer the jurisdictional question in terms of whether the supreme law of the land has divested the courts of the State of New Mexico of the power and authority over an Indian tribe that has not waived sovereign immunity for off-reservation business conduct. Or, to put it in other words, has the supreme law of the land divested state courts of subject matter jurisdiction over a private claim against an Indian tribe that asserts sovereign immunity for its off-reservation business conduct?

{6} Where a tribe's sovereign immunity obtains, it is well settled and binding upon this Court that only under congressional consent or an effective waive may a state court exercise jurisdiction over a recognized Indian tribe. *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977). Furthermore, any waiver of tribal immunity from suit "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 953-54, 47 L. Ed. 2d 114 (1976)). Tribal sovereignty is subject to plenary federal control and definition. Absent federal authorization, tribal immunity is privileged from diminution by the states. *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 106 S. Ct. 2305, 2313, 90 L. Ed. 2d 881 (1986).

{7} Crucial to the concluding decisional portion of this opinion is the absence of any controlling case law specifically divesting state courts of jurisdiction over Indian tribes doing business outside of reservation boundaries as an unincorporated association registered and authorized to do business in the state. Before reaching the determinative issue in this case, however, we will consider other significant points raised and argued by the parties.

{8} Padilla points to no federal legislation which would constitute congressional consent to sue the Pueblo of Acoma d/b/a Sky City Contractors for breach of contract. He does claim that NMSA 1978, Section 53-9-1 (Repl. Pamp.1983), establishes that the Pueblo Indians may be sued as a corporation and be required to defend such suit in any court of law or equity. Padilla relies on the following statutory language:

> The inhabitants within the state of New Mexico, known by the name of the Pueblo Indians, and living in towns or villages built on lands granted to such Indians by the laws of Spain and Mexico * * * shall be known in the law by the name of the Pueblo de * * *, (naming it), and by that name they and their successors shall have perpetual succession, sue and be sued, plead and be impleaded, bring and defend in any court of law or equity, all such actions, pleas and matters whatsoever, proper to recover, protect, reclaim, demand or assert the right of such inhabitants, or any individual thereof, to any lands, tenements or hereditaments, possessed, occupied or claimed contrary to law, by any person whatsoever, and to bring and defend all such actions, and to resist any encroachment, claim or trespass

[1] Padilla contends as well that by doing business in the state Pueblo of Acoma d/b/a Sky City is susceptible to state court jurisdiction under the New Mexico "long arm" statute, NMSA 1978, Section 38-1-16 (Repl. Pamp.1987). Reliance on this statute to confer jurisdiction is misplaced. Section 38-1-16 allows the courts of this state to assert in personam jurisdiction over nonresident defendants. *Moore v. Graves*, 99 N.M. 129, 654 P.2d 582 (Ct. App.1982).

made upon such lands, tenements or hereditaments, belonging to said inhabitants, or to any individual.

{9} The clause "sue and be sued" must be evaluated within the context of the statute and its history. The original enactment of Section 53-9-1 predates the 1848 treaty of Guadalupe Hidalgo which similarly protected title to Pueblo Indian lands. *See Treaty of Peace Between the United States and Mexico*, NMSA 1978 (Vol.1 Pamp.3); *United States v. Joseph*, 94 U.S. (4 Otto) 614, 24 L. Ed. 295 (1876), *aff'g* 1 N.M. 593 (1874). The territorial statute was passed to define the status of Pueblo Indian tribes under United States jurisdiction and to establish their right to protect their lands from encroachment. *See Garcia v. United States*, 43 F.2d 873 (10th Cir.1930). Further, in *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950, *cert. denied*, 368 U.S. 915, 82 S. Ct. 194, 7 L. Ed. 2d 131 (1961), this Court, in examining whether a political subdivision of the state could extend its corporate limits to include lands of an Indian tribe, found that the terms upon which New Mexico was admitted to the United States left no room for a claim by the state to governmental power over the Indian tribes and Indian lands, unless Congress specifically granted jurisdiction or unless the decisions of the United States Supreme Court sanctioned the exercise of jurisdiction. *Id.* at 330, 361 P.2d at 952. The territorial statute, which clearly was enacted to protect the right of Indians to aboriginal lands, cannot be extended to constitute a federal grant of general jurisdiction over Indian tribes to the State.

{10} Tribal immunity cases generally center upon the Indian Reorganization Act of 1934, codified at 25 U.S.C. Sections 461-479 (1976). *See Felix v. Cohen's Handbook of Federal Indian Law* Ch. 6 § A4c (R. Strickland ed. 1982). Under Section 16 of the Act, Indian tribes have been found to have waived immunity by virtue of legislative ordinances enacted under a tribal constitution. *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir.1980), *aff'd*, 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982). Further, federal courts generally have held that the "sue and be sued" proviso of a tribal corporate charter under Section 17 of the Act constitutes a waiver of immunity for the tribe as a corporate entity, although it does not waive the sovereign immunity of the tribe as a political entity. *Boe v. Fort Belknap Indian Community*, 455 F. Supp. 462 (D. Mont.1978), *aff'd*, 642 F.2d 276 (9th Cir.1981). However, the Pueblo of Acoma never has availed itself of the opportunity to adopt a constitution and incorporate under the Act. *See* An Ordinance Prescribing a Code of Law and Order for the Pueblo de Acoma Indian Reservation (1971). Consequently, the Pueblo has no legislative ordinance enacted under a tribal constitution or a corporate charter that arguably could provide the basis for an express waiver of sovereign immunity. *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir.1980) *aff'd* 455 U.S. 130, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir.1982).

{11} It is further urged that the State's exercise of jurisdiction over Sky City should be evaluated under the infringement test formulated in *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959), and applied in *Chino v. Chino*, 90 N.M. 203, 561 P.2d 476 (1977). *See also Foundation Reserve Ins. Co. v. Garcia*, 105 N.M. 514, 734 P.2d 754 (1987). The infringement test determines whether the application of state law over Indian affairs would infringe upon the self-government of the Indians. *Chino*, 90 N.M. at 206, 561 P.2d at 479. In applying the test, the court considers the following criteria: (1) whether the parties are Indian or non-Indian; (2) whether the cause of action arose within Indian country; and (3) what is the nature of the interest to be protected. *Foundation Reserve Ins. Co.*, 105 N.M. at 515, 734 P.2d at 755.

{12} Padilla argues that under the infringement test state jurisdiction over this cause of action is warranted because no unique Indian customs or laws are at stake, the cause of action arose off of Pueblo lands, and the interest to be protected is to guarantee the right to a remedy in state court for breach of contract to those who transact business with a tribal commercial entity outside

Indian territory. The inherent weakness in Padilla's argument is that the infringement test applies to individual Indians and is inapplicable to the exercise of state court jurisdiction over an Indian tribe that has invoked its sovereign immunity. In *Santa Clara Pueblo*, the United States Supreme Court recognized the dichotomy between state jurisdiction over individual tribal members and jurisdiction over the tribe *qua* tribe. 436 U.S. at 58-59, 98 S. Ct. at 1677. The court in *Puyallup Tribe, Inc.* also made the same distinction. 433 U.S. at 172-73, 97 S. Ct. at 2621.

{13} Padilla has made no allegations that the contract waives immunity and that, therefore, it confers subject matter jurisdiction upon the district court. Rather, Padilla argues that Pueblo of Acoma d/b/a Sky City Contractors is amenable to suit because it held itself out as a commercial entity to the outside business world and should be estopped from shirking its contractual obligations by cloaking itself with tribal immunity.

{14} Padilla's contention that Pueblo of Acoma d/b/a Sky City Contractors is estopped from enjoying the same immunity as the tribe itself cannot withstand scrutiny. We accept the allegations in the complaint that Sky City is an unincorporated association registered to do business in New Mexico. Simply put, it is a subordinate economic organization of the tribe created for commercial purposes. *See White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971). No representations to the contrary appear of record. This is not a case in which an Indian tribe has concealed or misrepresented that it was doing business itself off of the reservation. Padilla makes no such claim.

{15} At oral argument, counsel for Acoma disclosed that a non-Indian agent obtained the state contractor's license that was necessary for Sky City to do business in the state. *See* NMSA 1978, § 60-13-12 (Repl. Pamp.1984). From this information, it was surmised further that Padilla might have negotiated his contract with the non-Indian agent. Even if Padilla did negotiate with Sky City's non-Indian agent, a fact not supported by the record, there is nothing in the record to suggest that Sky City hid from Padilla that it was doing the business of the Pueblo. Once the Pueblo asserted its sovereign immunity, it was incumbent upon Padilla to show that the Pueblo should be equitably estopped to assert immunity from suit. The record says nothing of any representation upon which Padilla reasonably could rely that Sky City either waived its immunity or was acting in a capacity separate and distinct from the tribe. Moreover, given the requirement that waiver of tribal immunity be express and unequivocal, *Santa Clara Pueblo*, 436 U.S. at 58, 98 S. Ct. at 1677, it would be difficult at best to support a claim that a tribe could, through other than express and unequivocal conduct, be equitably estopped to assert its immunity.

{16} We turn finally to a consideration of whether business conduct engaged in by a sovereign Indian tribe *off of its reservation* is clothed with the immunity which has been the subject of the foregoing discussion. We believe not. We know of no controlling law that divests the New Mexico courts of jurisdiction over Indian tribes for off-reservation business conduct.[2]

{17} The United States Supreme Court has held the doctrine that "no sovereign may be sued in its own courts without its consent" does not necessarily support a claim of immunity in another sovereign's courts. *Nevada v. Hall* 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979), *aff'g Hall v. University of Nevada*, 74 Cal. App.3d 280,

[2] We note that the extra-territorial nature of tribal conduct is relevant in determining the applicability of state regulation of tribal activities. Tribal activity beyond reservation boundaries would be susceptible to taxation by the state in the "absence of express federal law to the contrary." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114 (1973). Consequently, we would assume that when engaged in off-reservation construction projects the Pueblo of Acoma d/b/a Sky City Contractors, working under a state contractor's license, would be subject to the same regulatory regime as would any other licensed contractor. *See* Construction Indus. Licensing Act, NMSA 1978, §§ 60-13-1 to 59 (Repl. Pamp.1984 & Cum. Supp.1987). Here, however, the issue is not state regulation of the Pueblo's construction projects but, rather, state exercise of jurisdiction over the Pueblo of Acoma once the Pueblo has asserted sovereign immunity from suit brought by a private individual. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978).

141 Cal. Rptr. 439 (1977) (*Hall II*). For reasons well articulated in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975), the doctrine of sovereign immunity does not find favor in the common law of this state. It is not necessary to support in the courts of this state any immunity to which another sovereign is not entitled under either acts of Congress or our legislature, or under a specific holding of the United State Supreme Court.

{18} In *Hall v. University of Nevada*, 8 Cal.3d 522, 105 Cal. Rptr. 355, 503 P.2d 1363 (1972), *cert. denied*, 414 U.S. 820, 94 S. Ct. 114, 38 L. Ed. 2d 52 (1973) (*Hall I*), the California Supreme Court, reversing the trial court, had held Nevada amenable to suit in California courts on the grounds that sovereignty stops at the state's border. The case was remanded for trial. On certiorari from *Hall II*, the United States Supreme Court did not accept the rationale that sovereignty stops at the state's border, but affirmed, holding that there is no constitutional provision that prohibits a state's exercise of jurisdiction over sovereign sister states. 440 U.S. at 426, 99 S. Ct. at 1191. Therefore, the policy of a state to refrain from the exercise of jurisdiction over a sister state is solely a matter of comity. Because it was the policy of California to allow full tort compensation against itself, California could refuse to recognize a sister state's claim to sovereign immunity for a wrong committed by that state in California.

{19} Having found no provision under the supreme law of the land that prohibits a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct, we believe the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity. It is the policy of New Mexico to allow breach of written contract actions against the state. NMSA 1978, § 37-1-23. Therefore, we hold that, regardless of where the contract was executed, the district court may exercise jurisdiction over an Indian tribe when the tribe is engaged in activity off of the reservation as an unincorporated association registered and authorized to do business in this state and is sued in that capacity for breach of a written contract to pay for the performance of contractual obligations accomplished or intended to be accomplished in connection with this off-reservation activity of the tribe.

{20} The dismissal is reversed. We remand to the trial court to proceed in accordance with this opinion.

{21} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

HARRY E. STOWERS,
JR., Justice

MARY C. WALTERS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-035

Filing Date: May 10, 1988

Docket No. 16,543

SOUTHWEST COMMUNITY HEALTH SERVICES,

Petitioner,

vs.

HONORABLE W. C. "WOODY" SMITH, District Judge, Second Judicial District, and HONORABLE ROSS SANCHEZ, District Judge, Second Judicial District, Div. VIII,

Respondents.

ORIGINAL PROHIBITION PROCEEDING

Motion for Rehearing Denied June 7, 1988

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OPINION

RANSOM, Justice.

{1} The real parties in interest, Steve and Tammy Greeson, brought separate medical malpractice actions against petitioner Southwest Community Health Services (Southwest) and Dr. Robert Gathings. The cases were consolidated for trial. In motions to compel answers to interrogatories and to compel production of documents, the Greesons sought the credentialing file which Southwest maintained on Dr. Gathings. In response to the motions, Southwest argued that the information requested was confidential under NMSA 1978, Section 41-9-5 (Repl. Pamp.1986).

{2} The court conducted an *in camera* inspection of all documents allegedly immune from discovery under Section 41-9-5, which provides:

> All data and information acquired by a review organization in the exercise of its duties and functions shall be held in confidence and shall not be disclosed to anyone except to the extent necessary to carry out one or more of the purposes of the review organization or in a judicial appeal from the action of a review organization. No person described in Section 4[41-9-4 NMSA 1978] of the Review Organization Immunity Act shall disclose what transpired at a meeting of a review organization except to the extent necessary to carry out one or more of the purposes of a review organization or in a judicial appeal from the action of a review organization. Information, documents or records otherwise available from original sources shall not be immune from discovery or use in any civil action merely because they were presented during proceedings of a review organization, nor shall any person who testified before a review organization or who is a member of a review organization be prevented from

> testifying as to matters within his knowledge, but a witness cannot be asked about opinions formed by him as a result of the review organization's hearings.

Following *in camera* inspection, the court ordered production of the requested documents either because the statute was not applicable to the credentialing file or because the rules of discovery or evidence overrode the statute.

{3} Southwest petitioned this Court for an alternative writ of prohibition or superintending control. Following a hearing, this Court issued a preliminary writ and instructed the parties to address the constitutionality of Section 41-9-5.

{4} Consolidated with this case for consideration was *Raney v. Onuska*, S. Ct. No. 16,540, in which the trial court, following *in camera* inspection, had denied discovery of hospital records constituting minutes of meetings pertaining to the surgery which was the subject of the suit and relevant letters, correspondence, and other documents evincing staff privilege reductions pertaining to the defendant doctor. In *Raney*, the court had found that the statute applied to the documents and had ordered that they not be disclosed. Pending resolution of these cases, the *Raney* case was settled and the writ issued in that case has been quashed. Now, in *Southwest*, we first could address whether the court was correct in finding that the statute is not applicable to the credentials file. However, the record in that regard is not satisfactory for review and we believe it is important for us to resolve the constitutional issue.

{5} In *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), *appeal on other grounds after remand*, 91 N.M. 250, 572 P.2d 1258 (Ct. App.), *cert. denied*, 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied*, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978), this Court held legislation creating a testimonial privilege in a judicial proceeding unconstitutional. The statute constituted an evidentiary rule, traditionally considered to be "adjective law" or "procedural law," the promulgation of which is a power vested in this Court by virtue of its superintending control over all inferior courts under Article VI, Section 3, of the New Mexico Constitution. Article III, Section 1 of the Constitution further provides that:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

{6} Pleading, practice and procedure are of the essence of judicial power. Functions of the judiciary which are essential to its constitutional powers cannot be exercised by another branch of the government in conflict with the judicial branch. While, historically, the judiciary has shared procedural rule-making with the legislature, any conflict between court rules and statutes that relate to procedure are today resolved by this Court in favor of the rules. *Maestas v. Allen*, 97 N.M. 230, 231, 638 P.2d 1075, 1076 (1982); *Salazare v. St. Vincent Hosp.*, 96 N.M. 409, 412, 631 P.2d 315, 318 (Ct. App.), *aff'd in part, rev'd in part*, 95 N.M. 147, 619 P.2d 823 (1980). Therefore, at issue in this case is the effect of any conflict in Section 41-9-5 with existing evidentiary rules.

{7} Unlike the statute in *Ammerman*, Section 41-9-5 cannot be said to be "nothing more or less than [an] attempt to create a rule of evidence, comparable to the other privileges * * *." *Ammerman*, 89 N.M. at 309, 551 P.2d at 1356. Section 41-9-5 is an exercise of the legislature's constitutional authority to enact laws to preserve public health and safety. *See State v. Collins*, 61 N.M. 184, 297 P.2d 325 (1956). It is part of the Review Organization Immunity Act (ROIA), NMSA 1978, Sections 41-9-1 through -7 (Repl. Pamp.1986). The ROIA establishes a medical peer review process to promote the improvement of health care in New Mexico. Further, it

recognizes that candor and objectivity in the critical evaluation of medical professionals by medical professionals is necessary for the efficacy of the review process.

{8} Although promotion of the public welfare is its primary objective and confidentiality of peer review has application far beyond the limited arena of civil litigation, Section 41-9-5 does encroach upon this Court's prerogative "to regulate all pleading, practice and procedure affecting the judicial branch of government." *State ex rel. Anaya v. McBride*, 88 N.M. 244, 246, 539 P.2d 1006, 1008 (1975). There can be no question that the confidentiality provision of ROIA impedes the "judicial machinery administered by the courts for determining the facts upon which the substantive rights of the litigant rest and are resolved." *Ammerman*, 89 N.M. at 310, 551 P.2d at 1357. The measure withholds from discovery otherwise relevant and admissible evidence. *Cf.* SCRA 1986, 17-304 (no express immunity from discovery under confidentiality of disciplinary proceedings in the practice of law).

{9} We do not believe, however, that the statute creates an evidentiary privilege, although statutes similar to Section 41-9-5 have been labeled as such. *See, e.g., Humana Hosp. Desert Valley v. Superior Court of Ariz. in and for Maricopa County*, 154 Ariz. 396, 742 P.2d 1382 (Ct. App.1987); *Posey v. District Court in and for the Second Judicial District*, 196 Colo. 396, 586 P.2d 36 (1978); *Straube v. Larson*, 287 Or. 357, 600 P.2d 371 (1979). Our analysis of the statute reveals that, in the sense that records from the peer review process are excluded from evidence, the confidentiality provision establishes an immunity from discovery. *See Matchett v. Superior Court for County of Yuba*, 40 Cal. App.3d 623, 629, n. 3, 115 Cal. Rptr. 317, 320 n. 3 (1974); *Shelton v. Morehead Memorial Hosp.*, 318 N.C. 76, 347 S.E.2d 824 (1986); *Coburn v. Seda*, 101 Wash.2d 270, 677 P.2d 173 (1984).

{10} A privilege inures to the benefit of a specific interpersonal relationship such as attorney-client (SCRA 1986, 11-503), psychotherapist-patient (SCRA 1986, 11-504), husband-wife (SCRA 1986, 11-505), and priest-penitent (SCRA 1986, 11-506). Moreover, an evidentiary privilege creates in the person holding the privilege a right to disclose or not to disclose otherwise admissible testimony. In contrast, Section 41-9-5 precludes any party from using for purposes of civil litigation the confidential records of peer review proceedings. Unlike a privilege, the statute provides no waiver through voluntary disclosure. *See* SCRA 1986, 11-511. On the contrary, criminal penalties attach for violation of Section 41-9-5. *See* § 41-9-6. Furthermore, we again stress, the confidentiality created by this statute is intended to prevent disclosure in situations extending far beyond the production of evidence in civil litigation.

{11} Because Section 41-9-5 does not purport to create an evidentiary privilege in civil litigation, the statute does not come into direct conflict with SCRA 1986, 11-501 which provides that:

> 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:
>
> A. refuse to be a witness; or
> B. refuse to disclose any matter; or
> C. refuse to produce any object or writing; or
> D. prevent another from being a witness or disclosing any matter or producing any object or writing.

Under *Ammerman* and its progeny, if the statute had created an evidentiary privilege it would be invalid.

{12} When there comes before this Court a conflict between the functions of two branches of government, the Court must resolve that conflict in a manner reasonably assuring that powers exercised by one branch do not conflict with the essence of power exercised by the other branch of government. *See United States v. Nixon*, 418 U.S. 683, 707, 94 S. Ct. 3090, 3107, 41 L. Ed. 2d 1039 (1974). We are mindful that the essential

functions of both the legislative and judicial branches must remain inviolate. It is certain that this Court should not invalidate substantive policy choices made by the legislature under the constitutional exercise of its police powers; and, as discussed above, our decisions leave no doubt that it is the function of this Court to promulgate procedural rules and that the legislature has no authority to enact evidentiary rules which conflict with the rules of this Court.

{13} In *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), the United States Supreme Court grappled with an analogous problem. At issue was the President's invocation of executive privilege to shield certain high-level communications from judicial process in a criminal trial. The Supreme Court recognized that the privilege was "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." 418 U.S. at 708, 94 S. Ct. at 3107.

> But this presumptive privilege must be considered in light of our historic commitment to the rule of law. * * * The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. * * * [E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth.

418 U.S. at 708-10, 94 S. Ct. at 3107-3109.

{14} In balancing the President's assertion of a constitutional privilege of confidentiality against the constitutional need for relevant evidence in a criminal trial, the Supreme Court held that, without more, the former would have to yield to the latter. Subsequently, in the case in which former President Nixon challenged the constitutionality of the Presidential Recordings and Materials Preservation Act on the grounds, *inter alia*, that it violated executive privilege, the Supreme Court discussed its 1974 *Nixon* decision. It noted that a balance was struck there against the claim of constitutional privilege because the Supreme Court determined that intrusion into the confidentiality of Presidential communications was outweighed by the impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the judicial branch. *Nixon v. Administrator of General Services*, 433 U.S. 425, 447, 97 S. Ct. 2777, 2792, 53 L. Ed. 2d 867 (1977) (noting the protection that a district court would be obliged to provide such communications in *in camera* inspection).

{15} While the legislative decision to prohibit notoriety of medical peer review proceedings is a constitutional exercise of the essential legislative function to promote the health and welfare of New Mexico's citizens, the Court cannot ignore an overbroad implementation of the confidentiality provision which would impinge upon the right of litigants to have their disputes decided on relevant and material evidence. It is not a matter of the statute being unconstitutional but rather a recognition, *when litigation is at issue*, that conflicting constitutional powers by two separate and independent branches of government are being exercised. Which branch must yield to the other depends upon the circumstances of each individual case.

{16} An exercise of judicial discretion is called upon in the balancing of those interests. It is well-settled that it is the unique responsibility of the courts, not the executive or legislature, to resolve a conflict between two competing constitutional interests. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is.") *Baker v. Carr*, 369 U.S. 186, 211, 82 S. Ct. 691, 706, 7 L. Ed. 2d 663 (1962) ("Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed * * * is a responsibility of this Court as ultimate interpreter of the Constitution."); *United States v. Nixon*, 418 U.S. at 703-05, 94 S. Ct. at 3105-3106. The responsibility of the courts to balance conflicting constitutional interests

was recognized by this Court in *State ex rel. Attorney General v. First Judicial District of New Mexico*, 96 N.M. 254, 629 P.2d 330 (1981), in which it was held that when an executive privilege of constitutional origin comes into confrontation with the constitutional duty of the judiciary to do justice in matters brought before it, a balancing of the protected interests must be undertaken by the courts. *Id*. at 258, 629 P.2d at 334.

{17} Consequently, we hold that all data and information acquired by a review organization in the exercise of its duties and functions, and opinions formed as a result of the review organization's hearings, shall be governed by Section 41-9-5. When a party invokes Section 41-9-5 to immunize evidence from discovery, the burden rests upon that party to prove that the data or information was generated exclusively for peer review and for no other purpose, and that opinions were formed exclusively as a result of peer review deliberations. If the evidence was neither generated nor formed exclusively for or as a result of peer review, it shall not be immune from discovery unless it is shown to be otherwise available by the exercise of reasonable diligence. Of course, under SCRA 1986, 1-026(B)(1) and 1-037(A), the party seeking to compel discovery would have had the initial burden of proving relevance to the subject matter. The procedure will entail the trial court's *in camera* examination of the information and, perhaps, an evidentiary hearing to determine whether it properly falls within the parameters of Section 41-9-5 as announced by the Court today.

{18} We further hold that, if the information is ruled to be confidential, the party seeking access must then satisfy the trial court that the information constitutes evidence which is critical to the cause of action or defense. If the trial court determines that the success or failure of a litigant's cause of action or defense would likely turn on the evidence adjudged to fall within the scope of Section 41-9-5, then the trial court shall compel production of such evidence. It is the trial judge who will be entrusted with balancing the need to ensure the confidentiality of peer review against the need of litigants to discover evidence essential to the merits of their case. *Cf. Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir.1984).

{19} Some courts have seen the resolution of the conflict inherent in peer review confidentiality as being a political or public policy question to be resolved by the legislature. *See, e.g., Humana Hosp. Desert Valley v. Superior Court of Ariz. in and for the County of Maricopa*, 154 Ariz. 396, 742 P.2d 1382 (Ct. App.1987); *Holly v. Auld*, 450 So.2d 217 (Fla.1984); *Shelton v. Morehead Memorial Hosp.*, 318 N.C. 76, 347 S.E.2d 824 (1986). For this Court to take that tack, however, would require us to deny the clear holding of *Ammerman* that the promulgation of adjective or procedural law ultimately is the constitutional prerogative of the judiciary. We hold that the legislature has no power to decide that it is in the public's interest to diminish that power under any circumstances.

{20} Finally, we find that the application of this statute as construed today by this Court to the case at bar does no violence to *Marquez v. Wiley*, 78 N.M. 544, 434 P.2d 69 (1967), which held that rules adopted by this Court are not effective to change the procedure in any pending case. *Id.* at 546, 434 P.2d at 71. This is not a case where the rules of the game were changed without notification to the parties. Section 41-9-5 was in effect prior to the initiation of this litigation. Our opinion today merely construes a pre-existing statute; it does not adopt a change in procedural rules as in *Marquez*.

{21} We quash the alternative writ previously issued and remand with instructions that the court determines whether Section 41-9-5 is applicable to the credentialing file and, if it is, to proceed in a manner consistent with this opinion.

{22} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

TONY SCARBOROUGH,
Chief Justice, and

HARRY E. STOWERS,
JR., Justice, dissent

SCARBOROUGH,
Chief Justice, dissenting.

{23} I respectfully dissent. I would make the alternative writ permanent, uphold the constitutionality of NMSA 1978, Section 41-9-5, (Repl. Pamp.1986), and overrule *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 354 (1976), *cert. denied*, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978) to the extent it held that statutory privileges created by the legislature are unconstitutional.

{24} I agree with the majority that historically the judiciary has shared procedural rule-making authority under the constitution with the legislature, therefore, I would uphold the confidentiality provisions of Section 41-9-5 as written and in their entirety.

{25} Section 41-9-5 provides that all data and information acquired by a peer review organization is confidential except for circumstances that are unrelated to the issue involved here. The majority recognizes that similar statutes have been interpreted as creating privileges. *See Humana Hosp. Desert Valley v. Superior Court of Maricopa County*, 154 Ariz. 396, 742 P.2d 1382 (Ct. App.1987). The majority also recognizes that Section 41-9-5 withholds from discovery otherwise relevant and admissible evidence. *Ammerman* requires that we invalidate Section 41-9-5. Under *Ammerman*, statutory privileges are unconstitutional to the extent they impact judiciary proceedings. In *Ammerman*, the Supreme Court struck down as unconstitutional a statute by which the legislature provided that certain communications of journalists were privileged and not subject to disclosure in judicial proceedings. The statute here is strikingly similar to the statute involved in *Ammerman. Ammerman* has been criticized by scholars. *See* 2 Weinstein & Berger, *Weinstein's Evidence* para. 501[07] (1985); Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints*, 15 N.M.L. Rev. 407 (1985); Note, *Evidence-Newsman's Privilege—Legislatively Enacted Newsman's Privilege Invalid as Infringement on Judicial Rule-Making Power*, 1977 B.Y.U.L. Rev. 493. I would overrule *Ammerman* to the extent it held that statutory privileges are unconstitutional.

{26} In *St. Vincent Hospital v. Salazar*, 95 N.M. 147, 619 P.2d 823 (1980), we upheld a privilege similar to that of Section 41-9-5 which was conferred by the Medical Malpractice Act, NMSA 1978, Section 41-5-20 (Repl. Pamp.1986). There, we upheld the statutory privilege to the extent it protected medical review panel "deliberations and any report made by the panel." *St. Vincent*, 95 N.M. at 148, 619 P.2d at 824. Although the privilege which we upheld in *St. Vincent* pertained to deliberations and reports of medical review panels (as contrasted with the deliberations and reports of peer review organizations), the history of the medical review process is instructive. Since 1976, 732 cases have been resolved following a medical review panel hearing. Of these cases, only 143 resulted in litigation. It is clear that activity of the Legislature in the area of medical malpractice has resulted in the early conclusion of hundreds of malpractice lawsuits. Similarly, peer review is intended to reduce the number of cases of medical malpractice by identifying and eliminating incompetent physicians. Consequently, I believe that we should uphold Section 41-9-5 to the same extent we upheld Section 41-5-20.

{27} The privilege created by Section 41-9-5 reflects a public policy decision appropriately made by the Legislature in favor of confidentiality of review organization proceedings for the preservation of the public health and safety. There is no question that the Legislature has constitutional authority to enact laws in the exercise of its police power for the preservation of the public health

and safety, including laws that provide evidentiary privileges.

{28} The majority discusses the burden of proof required when a privilege is asserted under Section 41-9-5. They hold that the burden rests upon the party asserting the privilege to prove the requested evidence should be considered confidential. This discussion is inappropriate because the issue was not briefed by the litigants. Contrast the position of the majority with the reasoning set forth in *State Ex. Rel. Atty. Gen. v. First Judicial District of New Mexico*, 96 N.M. 254, 258, 629 P.2d 330, 334 (1981), reh'g denied.

{29} The majority also discusses circumstances where full disclosure of all data and information acquired by a peer review organization is contemplated. Such a result would render meaningless the entire statutory scheme set forth in Section 41-9-5. I am unable to support such a proposition. I doubt that we would reach similar results in two other situations that come to mind. By way of comparison, consider the constitutional privilege against disclosure afforded judges whose conduct is subject to examination by the Judicial Standards Commission. N.M. Const. art. VI § 32. Also, we have clearly, by rule, afforded attorneys confidentiality when inquiry is made into their conduct by disciplinary counsel acting for the Supreme Court. SCRA 1986, 17-304. Are we creating a separate standard for physicians and hospitals? Since this Court has been fit to reject the privileges granted under Section 41-9-5, we should at least provide physicians with the confidentiality of Section 41-9-5 peer review proceedings by Supreme Court rule to the same extent such privileges are extended to attorneys by SCRA 1986, 17-304.

{30} For these reasons I dissent.

STOWERS,
Justice, dissenting.

{31} This case is before this court on whether to grant a permanent writ of prohibition. At the preliminary arguments, we requested that the parties brief the constitutionality of Section 41-9-5 of the Review Organization Immunity Act (ROIA), NMSA 1978, Sections 41-9-1 through -7 (Repl. Pamp.1986). Nothing was presented to rebut the presumptive validity and constitutionality of that section; therefore, I am persuaded that it is constitutional and agree with the majority's conclusion to that effect. *See Aetna Finance Co. v. Gutierrez*, 96 N.M. 538, 632 P.2d 1176 (1981); *City of Albuquerque v. Jones*, 87 N.M. 486, 535 P.2d 1337 (1975).

{32} I do not agree, however, with the majority's narrow construction of the peer review privilege in Section 41-9-5 limiting that privilege to data and information "generated exclusively" for peer review, and as a result of peer review deliberations. Such a construction, I believe, is contrary to the language and purposes of ROIA.

{33} ROIA represents an attempt to improve the quality of health care services rendered by health care providers in New Mexico. To achieve this purpose, peer review is vital. The statute endeavors to make the peer review process work; hence, the reason for the provision of confidentiality. Meaningful peer review cannot be possible without this guarantee of confidentiality for the information acquired and opinions elicited from the medical community regarding the competence of other health care providers. Without a statutory peer review privilege or with substantial restrictions imposed on the privilege, persons involved in health care would be undoubtedly reluctant to engage in frank and candid evaluations of their colleagues. The result could be a concomitant deterioration in the quality of health care available in this state.

{34} A discovery privilege will impinge inevitably upon the rights of some civil litigants to discovery of information which might be helpful to their causes of action. This, however, is not unusual in the field of law. Thus, although we recognize that discovery procedures are to be liberally construed, they are not without certain limitations. For example, the following relationships: attorney-client, SCRA 1986, 11-503, psychotherapist-patient, SCRA 1986, 11-504, husband-wife, SCRA 1986, 11-505, priest-penitent, SCRA 1986, 11-505, each establish a

privilege immune from discovery. The legislature, in Section 41-9-5, has properly balanced the competing interests: the right of a litigant's access to information with the need for confidentiality in peer review proceedings.

{35} The language in Section 41-9-5 effectuates the purposes of ROIA. The provisions therein set out what materials are discoverable and when the peer review privilege prohibits discovery. The statute allows discovery of all data and information acquired by a peer review organization when necessary to carry out any of the purposes of the review organization stated in Section 41-9-2(E)(1) through (8), or when there is a judicial appeal from the action of the review committee. It also allows for disclosure of what transpired at a meeting of the review organization by a member of the review organization for these same two reasons. In addition, the statute provides for discovery of data and information if otherwise available from original sources. That means that information, in whatever form available, from original sources other than the medical review organization is not immune from discovery or use at trial merely because it was presented during a medical review proceeding; neither is one who is a member of the review organization prevented from testifying regarding information he learned from sources other than the review organization itself, even though that information might have been shared by the committee. The statute only prohibits discovery of "data and information *acquired* by a review organization in the exercise of its duties." (emphasis added). It is therefore unnecessary to further confine the peer review privilege to "exclusively generated" data and information by the review organization as the majority opinion does.

{36} Moreover, the majority's inclusion of a second level of review effectively destroys any concept of confidentiality in the statute. The majority holds that even after the trial court has initially concluded that certain evidence is confidential, the court can still compel production of this privileged evidence if the success or failure of a litigant's cause of action would likely turn on that evidence. This gives a party a second bite of the apple and, in essence, permits *all* information to be discoverable. Furthermore, a second level of review is so contrary to the language and purposes of the statute that in effect it is judicial legislation; and this, we have said repeatedly we will not do. *See Thomas v. Henson*, 102 N.M. 326, 695 P.2d 476 (1985); *Bolles v. Smith*, 92 N.M. 524, 591 P.2d 278 (1979); *Varos v. Union Oil Co. of California*, 101 N.M. 713, 688 P.2d 31 (Ct. App. 1984).

{37} For the above stated reasons, I find that Section 41-9-5 is constitutional and would grant a permanent writ of prohibition.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-037

Filing Date: May 12, 1988

Docket No. 17,243

VIRGINIA CASTILLO, as mother and next friend of R. Daniel Castillo and Manuel M. Castillo,

Petitioner,

vs.

COUNTY OF SANTA FE, COUNTY OF SANTA FE HOUSING AUTHORITY, RUDY R. FERNANDEZ, SAMUEL J. GARCIA, JEROME BLOCK, PATRICK ORTIZ and PAUL ARELLANO, in their official capacities and individually,

Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Art Encinias, District Judge

Susan Weckesser,
Santa Fe, New Mexico,

for Petitioner.

White, Koch, Kelly & McCarthy, P.A.,
Bruce J. Fort,
Santa Fe, New Mexico,

for Respondent Arellano.

Butt, Thornton & Baehr, P.C.,
Karen C. Kennedy,
Albuquerque, New Mexico,

for Respondents.

OPINION

RANSOM, Justice.

{1} We granted certiorari to examine the waiver of immunity under Section 41-4-6 of the Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (Repl. Pamp.1986). The immunity from tort liability granted a governmental entity and its employees pursuant to Section 41-4-4 of the Tort Claims Act does not apply "to liability for damages resulting from bodily injury * * * 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." § 41-4-6. At issue is whether the maintenance of any building includes keeping the grounds of a public housing project safe from unreasonable risk of harm to its residents and invitees. Although the court of appeals affirmed the trial court's dismissal of all named defendants under the immunity granted by the Tort Claims Act, Castillo specifically requested that this Court only review the dismissal of the cause of action against defendant County of Santa Fe Housing Authority, the governmental agency authorized by the County of Santa Fe to operate county-owned and publicly-funded housing within the county.

{2} On October 23, 1983, three-year-old R. Daniel Castillo was severely bitten by a dog roaming loose on the grounds of the Valle Vista Housing Project, which is a residential complex owned by the County of Santa Fe and operated by the County of Santa Fe Housing Authority. Daniel was in the care of his aunt, a resident of Valle Vista, and the dog allegedly belonged to another resident.

{3} Virginia Castillo, as Daniel's mother and next friend, sued the defendants for their alleged failure to keep the premises of Valle Vista safe and for their alleged failure to enforce the county's animal control ordinances. The trial court dismissed the complaint against all defendants for failure to state a claim upon which relief could be granted. *See* SCRA 1986, 1-012(B)(6) (commonly known as Rule 12(B)(6)). The court of appeals affirmed, holding that it was not within

the contemplation of Section 41-4-6 for the maintenance of any building to include keeping the grounds safe from roaming dogs or requiring enforcement of animal control statutes. Without any specific regard to animal control statutes, we find that Section 41-4-6 does contemplate waiver of immunity where due to the alleged negligence of public employees an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government, and for that reason we reverse.

{4} For purposes of a motion to dismiss under Rule 12(B)(6), this Court assumes the truth of the facts alleged in the complaint. *Schear v. Board of County Comm'rs of Bernalillo County*, 101 N.M. 671, 687 P.2d 728 (1984). A motion to dismiss should be granted *only* if it appears that upon no facts provable under the complaint could the plaintiff recover or be entitled to relief. *Environmental Improvement Div. of N.M. Health & Env't Dep't v. Aguayo*, 99 N.M. 497, 660 P.2d 587 (1983). Under the allegations of her complaint, it appears that Castillo could prove that the Housing Authority was aware or should have been aware of the continuing problem of loose-running dogs and the resulting danger this condition posed for the common area of Valle Vista which the Housing Authority had the duty to maintain in a safe condition.

{5} The defendant claims that it is immune from suit pursuant to Section 41-4-4 and that dismissal under Rule 12(B)(6) is proper. It contends that the waiver of immunity under Section 41-4-6 is inapplicable because the failure to control loose-running dogs bears no relationship to the maintenance of a public building. The defendant argues that the injuries complained of did not occur due to a defect in a public building. *See Wittkowski v. State*, 103 N.M. 526, 710 P.2d 93 (Ct. App.), *cert. quashed*, 103 N.M. 446, 708 P.2d 1047 (1985), *overruled on other grounds, Silva v. State*, 106 N.M. 472, 745 P.2d 380 (1987). Moreover, even assuming Section 41-4-6 extends to premises liability, the defendant maintains that the injury did not arise from a defective condition existing upon the land of the housing project.

{6} The *Wittkowski* court held that maintenance of the state penitentiary building did not include the security, custody, and classification of inmates. *Id.* at 103 N.M. 530, 710 P.2d at 97. *Wittkowski* did not fully answer whether the property surrounding buildings owned and operated by the government falls within the waiver of Section 41-4-6. In resolving that issue, we must interpret the words used in that section in light of the intended purpose of the provision. *See Miller v. Department of Transp.*, 106 N.M. 253, 254, 741 P.2d 1374, 1375 (1987). "We consistently have given a construction to the Act that would effect its remedial intentions." *Id.* at 254, 741 P.2d at 1375.

{7} A plain reading of Section 41-4-6 convinces us that the legislature intended to ensure the safety of the general public by imposing upon public employees a duty to exercise reasonable care in maintaining premises owned and operated by governmental entities. By the legislature's inclusion of both buildings and parks within the waiver provision, we discern no intent to exclude from that waiver liability for injuries arising from defective or dangerous conditions on the property surrounding a public building. *See Tilford v. Wayne County Gen. Hosp.*, 403 Mich. 293, 269 N.W.2d 153 (1978). We hold that the common grounds upon which the county-owned and operated Valle Vista Housing Project is situated falls within the definition of any building under Section 41-4-6.

{8} The defendant argues that maintenance, *i.e.*, the care and upkeep of something, cannot be read to include keeping residents of Valle Vista safe from attacks by loose-running dogs. The court of appeals agreed, citing *Smith v. Village of Corrales*, 103 N.M. 734, 713 P.2d 4 (Ct. App.1985), *cert. denied*, 103 N.M. 740, 713 P.2d 556 (1986) (where the failure of Corrales to hire an animal control officer was found not to be conduct falling under Section 41-4-11(A), which waives sovereign immunity for damages caused by the negligence of public employees in the maintenance of highways, roadways and

streets).[1] In *Miller*, however, this Court made clear that we look not only to a selective dictionary definition of "maintenance" as that word is used in waiver of immunity provisions under the Act. *Id.* at 255, 741 P.2d at 1376. "Statutes are to be read in a way that facilitates their operation and the achievement of their goals." *Id.* One goal of Section 41-4-6 is to ensure that buildings and property owned and operated by the government are kept safe for the public's use.

{9} The existence of a duty in this case rests upon whether dogs roaming loose upon the common grounds of a government-operated residential complex could represent an unsafe condition. *See* NMSA 1978, § 47-8-20(A)(3) (Cum. Supp.1987); SCRA 1986, 13-1315. Given the potential for the safety of Valle Vista residents and invitees to be compromised by this situation, we find that, under the right circumstances, loose-running dogs could represent an unsafe condition upon the land. *See Rhabb v. New York City Hous. Auth.*, 41 N.Y.2d 200, 359 N.E.2d 1335, 391 N.Y.S.2d 540 (1976) (where the court held that the defendant could be liable for a dog-bite injury to a twelve-year-old where the defendant had constructive notice of a dangerous condition, *i.e.*, the presence of a dog that chased children using the housing project's playground, and the defendant ignored this condition and failed to remove or prevent the danger).

{10} The complaint alleged knowledge on the part of the defendant of the unsafe condition represented by dogs running loose within the project. As landlord, the defendant was under a duty to maintain safely those areas expressly reserved for the use in common of the different tenants. *See Torres v. Piggly Wiggly Shoprite Foods, Inc.*, 93 N.M. 408, 600 P.2d 1198 (Ct. App.), *cert. denied*, 93 N.M. 683, 604 P.2d 821 (1979). Whether the defendant exercised reasonable care in maintaining the common grounds of Valle Vista under the circumstances would depend on what the Housing Authority knew or should have known about loose-running dogs in the common area, whether such loose-running dogs should have been foreseen as a threat to the safety of the residents and invitees, and the means at the disposal of the Housing Authority to control the presence of loose-running dogs. These factual issues await resolution after fuller development of the record. We hold that the complaint sufficiently alleges facts that state a claim upon which relief could be granted. We reverse as to the Housing Authority and remand to the trial court.

{11} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

TONY SCARBOROUGH,
Chief Justice, and

HARRY E. STOWERS, JR.,
Justice, dissent.

STOWERS,
Justice, dissenting.

{12} In line with the reasons I espoused in *Miller v. New Mexico Department of Transportation*, 106 N.M. 253, 256, 741 P.2d 1374, 1377 (1987) (Stowers, J., dissenting), I must dissent in this case. In *Miller* the majority held that issuing a permit for an oversized vehicle constituted the maintenance of a highway so as to fall within the statutory waiver of sovereign immunity in Section 41-4-11(A) of the Tort Claims Act, Sections 41-4-1 to -29 (Repl. Pamp. 1986). In this case, the majority opinion holds that a dog bite

[1] Because animal control statutes are not enacted to accomplish the intent of Section 41-4-11(A) that the highways be made and kept safe for the traveling public, *see Miller*, 106 N.M. 253, 256, 741 P.2d at 1376, there was no connection between the allegedly negligent conduct at issue in *Smith* and the waiver of immunity under Section 41-4-11(A). Here, there is a nexus between the defendant's obligation to maintain the common premises of the Valle Vista Housing Project in a safe condition and the intent behind the waiver of immunity under Section 41-4-6.

is within the purview of the operation or maintenance of any building, public park, machinery, equipment or furnishings so as to come within the waiver of immunity in Section 41-4-6. Once again, as in the *Miller* case, to ask the question—does a dog bite constitute the operation or maintenance of any building?—is to answer it, and the answer must be no. In the instant case, the majority opinion clearly ignores the legislative intent of the Tort Claims Act and the clear meaning of the language contained therein.

{13} In New Mexico, governmental immunity exists *except with respect to eight classes of activities* which are specifically set out as exemptions in the Tort Claims Act, Sections 41-4-5 to -12. The legislative declaration embodied within Section 41-4-2(A) states: "[I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act * * *." In addition, Section 41-4-4 states that governmental entities and public employees, while acting within the scope of their duties, shall be immune from liability for any tort except as waived by the Act. The public policy declaration of Section 41-4-2, and the immunities provision of Section 41-4-4, taken together, require that a plaintiff's cause of action must fit within one of the exceptions to the immunity granted to governmental entities and public employees. Only if immunity has been waived may the particular agency that caused the harm be held liable for the negligent act or omission of the public employee.

{14} Castillo claims that the waiver of immunity in Section 41-4-6 should apply in this case to allow a cause of action against the County of Santa Fe Housing Authority. That section waives immunity for injuries "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." (emphasis added). As correctly interpreted in *Wittkowski v. State*, 103 N.M. 526, 530, 710 P.2d 93, 97 (Ct. App.), *cert. quashed*, 103 N.M. 446, 708 P.2d 1047 (1985), *overruled on other grounds, Silva v. State*, 106 N.M. 472, 745 P.2d 380 (1987), this section covers injuries which have occurred as a result of a physical defect in the building.

{15} In interpreting a statute, the words used will be given their ordinary and usual meaning unless the contrary is apparent. *See Methola v. County of Eddy*, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980). Thus, I must agree with the holding of the court of appeals that, according to the plain meaning of Section 41-4-6, it is not within the contemplation of that section to include in the "operation or maintenance of any building [or] public park" the enforcement of animal control statutes. To hold otherwise would expand the "operation or maintenance of any building" exception far beyond its purpose and intent and do violence to the will of the legislature.

{16} Today's decision overextends the waiver of immunity provision in § 41-4-6 to include a cause of action never contemplated therein, and, it comes close to transforming the county housing authority into an insurer for injuries caused by domesticated animals who might roam the public areas. In essence, it constitutes judicial legislation, which we have stated repeatedly we will not do.

{17} For these reasons, I dissent.

SCARBOROUGH,
Chief Justice, joins in dissent.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-045

Filing Date: June 2, 1988

Docket No. 17,253

JAMES CROSS, Personal Representative of the Estate of Alan Gait "Gaitor" Cross, Deceased,

Petitioner,

vs.

CITY OF CLOVIS,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Rueben E. Nieves, District Judge

Charles A. Deason, Jr.,
El Paso, Texas,
Lamar D. Treadwell, II,
Santa Fe, New Mexico,

for Petitioner.

Keleher & McLeod, P.A.,
Phil Krehbiel,
Paula Z. Hanson,
Albuquerque, New Mexico,

for Respondent.

OPINION

RANSOM, Justice.

{1} In this action for the wrongful death of plaintiff's thirteen-year-old son, Alan Cross, we granted certiorari to review the decision of the court of appeals that upheld a directed verdict for defendant City of Clovis. As personal representative, James Cross had brought suit under the Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (Repl. Pamp.1986), alleging negligence of two city police officers in maintaining a police roadblock.

{2} On September 30, 1983, Alan was fatally struck by a stolen Mercedes after it crashed through a police roadblock, veered around another vehicle, and then careened off the road, striking and killing Alan instantly. The automobile had been speeding at 100 miles per hour. Prior to the crash, Alan had been standing next to his motorbike, approximately 400 feet behind the roadblock, about thirty to forty-five feet off the roadway alongside a ditch.

{3} The roadblock had been established on State Highway 18, at the north end of the city of Clovis, by two Clovis police officers, David Williams and Kevin Clements. They had responded to a request by the Curry County Sheriff's Department for assistance in apprehending the driver of the stolen vehicle. The officers initially set up a roadblock further south on State Highway 18 at Pleasant Hill Road but abandoned their efforts after a request to proceed to a roadblock being established by a deputy north of the city. While enroute, the officers were informed that the suspect had already broken through the deputy's roadblock; therefore, they established a roadblock at the next available intersection a mile north of Pleasant Hill Road.

{4} During the less than two minutes which elapsed before the Mercedes was on the scene, both officers reconnoitered the area behind the roadblock. Officer Clements testified that during his initial surveillance he observed a vehicle which Officer Williams was diverting. He did not remember looking toward the area where Alan would have been standing. When he looked back a second time, Officer Clements saw Alan standing next to his motorbike. He did nothing to alert Alan to vacate the area. After seeing Alan, he returned his gaze toward the oncoming Mercedes. Officer Williams did not see Alan until after the accident.

{5} The immunity from tort liability granted a governmental entity and its employees pursuant to Section 41-4-4 of the Tort Claims Act does not apply to liability for wrongful death "resulting from assault * * * or deprivation of any rights * * * secured by the * * * laws of * * * New Mexico when caused by law of * * * New Mexico when caused by law enforcement officers while acting within the scope of their duties." § 41-4-12. It is clear that the phrase "when caused by law enforcement officers" includes "those [third-party] acts enumerated in * * * [Section 41-4-12] which were caused by the *negligence* of law enforcement officers while acting within the scope of their duties." *Methola v. County of Eddy*, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980).[1] "A finding of negligence, however, is dependent upon the existence of a duty * * *. Whether a duty exists is a question of law for the courts to decide." *Schear v. Board of County Comm'rs*, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984) (citations omitted).

{6} In a lengthy 2-to-1 unpublished majority opinion, the court of appeals attempted to articulate a complete statement as to what responsibilities law enforcement officers have to members of the public who are at risk of injury by a criminal offender when the officers are performing or attempting to perform their duties. As developed more fully in this opinion, we hold quite simply that a law enforcement officer has the duty in any activity actually undertaken[2] to exercise for the safety of others that care ordinarily exercised by a reasonably prudent and qualified officer in light of the nature of what is being done.[3] The jury should be so instructed as a modification of SCRA 1986, 13-1604 ("Every person has a duty to exercise ordinary care for the safety and the property of others.").

{7} At issue on this appeal is whether a jury reasonably could have found that Alan's death was proximately caused by negligence of the law enforcement officers. *See Archuleta v. Pina*, 86 N.M. 94, 95, 519 P.2d 1175, 1176 (1974) (the evidence, together with all reasonable inferences deducible therefrom, must be viewed in the light most favorable to the party resisting a directed verdict).

{8} The plaintiff claims that Officers Clements and Williams were negligent at the initial roadblock in failing to keep a proper lookout for motorists, such as Alan, who were traveling toward the danger, and in failing to warn or divert such traffic. The plaintiff further maintains that these officers were negligent at their second roadblock in failing to utilize citizens to warn or divert others approaching the roadblock,[4] in failing to maintain a proper lookout, and, after observing

[1] The parties do not question whether this death resulted from one of the acts enumerated in Section 41-4-12, and we consequently do not address whether a person killed by a recklessly operated motor vehicle, regardless of whether he is the victim of an assault in any technical sense, has been deprived of a right secured by the laws of New Mexico within the legislative intent of the waiver provision. *See Wittkowski v. State*, 103 N.M. 526, 529 n.1, 710 P.2d 93, 96 n. 1, (Ct. App.), *cert. quashed*, 103 N.M. 446, 708 P.2d 1047 (1985) *overruled on other grounds, Silva v. State*, 106 N.M. 472, 745 P.2d 380 (1987); 6 Am. Jur.2d *Assault and Battery* § 117 (1963). This issue must be definitively addressed when properly raised, briefed and argued under appropriate facts.

[2] As to any specific duty to undertake positive action, see, *e.g., Schear v. Board of County Comm'rs*, 101 N.M. 671, 687 P.2d 728 (1984) (an officer's statutory duty to investigate violations of the criminal law called to his attention, *e.g.*, a call reporting a crime in progress and requesting assistance).

[3] The City does not dispute that it owed a duty of reasonable care in its undertakings. Specifically, law enforcement officers maintaining a roadblock in the performance of their duties owe a duty to exercise ordinary care for the safety of others. *See, e.g., Brooks v. Lundeen*, 49 Ill. App.3d 1, 7 Ill. Dec. 262, 364 N.E.2d 423 (1977). In their testimony, the officers here acknowledged that in manning a roadblock they had a duty to maintain a proper lookout in order to warn approaching people of impending danger and to divert them from the protected area. We do not agree with the court of appeals that financial limitations within which a governmental entity must exercise authority determines the standard of care. While we do not pass on whether evidence of financial limitations may in the appropriate case be admitted as relevant and material to the issue of ordinary care under the circumstances, we agree with the court of appeals' dissent to the effect that no issue concerning financial limitations was presented here so as to give meaning to the majority's statement that "[d]etermination of the standard of care should be made with the knowledge that each governmental entity has financial limitations within which it must exercise authority."

[4] Under NMSA 1978, Section 30-22-2 (Repl. Pamp.1984), a citizen who refuses to assist any peace officer in the preservation of peace when called upon by such officer in the name of the state of New Mexico is guilty of a petty misdemeanor.

Alan, in failing to use the police car's public address system, wave, or otherwise warn him of the approaching Mercedes.

{9} A witness, Danny Henry, who had observed the officers' initial roadblock attempt, testified that one of the officers removed a shotgun from his trunk and pointed it north. Henry testified further that Alan had been riding his motorbike in the vicinity and opined that the path of Cross' motorbike crossed the field of vision of the police officers. Both officers, however, denied seeing Alan at the Pleasant Hill intersection. We believe that if there is a cause of action in this case, it is based upon the acts and omissions of the officers at the second roadblock, and that their conduct at the initial roadblock is too remote for a finding of liability independent of conduct at the second roadblock. We therefore limit our consideration of negligence and proximate cause to the plaintiff's claims regarding conduct of the officers at the second roadblock.

{10} With respect to failure to utilize citizen assistance, failure to maintain a proper lookout, and, after observing Alan, failure to use the police car's public address system, wave, or otherwise warn him of the approaching Mercedes, we are mindful that a failure to act, to be negligent, must be a failure to do an act which a reasonably prudent and qualified law enforcement officer, in the exercise of ordinary care, would do in order to prevent injury to a person whom the officer would foresee to be exposed to risk of injury. As the risk of danger that reasonably should be foreseen increases, the amount of care required also increases. If, without negligence on his part, the officer is suddenly and unexpectedly confronted with peril and does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might have been followed by any reasonably prudent and qualified officer under the same conditions, then he has done all that the law requires of him, even though, in the light of after events, it might appear that a different course would have been better and safer. This statement of the law appears clear enough from Uniform Jury Instructions, SCRA 1986, 13-1601, 1603 and 1617.

{11} From evidence of the nature of what the law enforcement officer was doing, in light of all the surrounding circumstances, counsel may argue liability and freedom from liability. With appropriate modifications to Uniform Jury Instructions 13-1601, 1603, and 1617, jurors can be relied upon to understand that law enforcement officers can be expected to exercise only the care that a reasonably prudent and qualified officer would exercise in the same situation. Evidence relevant and material to that issue, including expert testimony, is to be admitted.

{12} We cannot agree with the court of appeals that the evidence established, as a matter of law, that Alan's death was not proximately caused by any failure of the officers to exercise reasonable care in maintaining the second roadblock. In determining the reasonableness of the officers' conduct, the court of appeals narrowly concentrated on the seconds between Officer Clements' sighting of Alan and the Mercedes' collision with the roadblock. However, it was not undisputed that Officer Clements had only a few seconds in which to warn Alan. His testimony was that a few seconds transpired between the moment he initially saw Alan and the time he returned his gaze toward the oncoming car.

> Q: How much time did that take for you to look around and actually see the Cross boy and then turn around and see what was coming toward you?
>
> A: Just a matter of a few seconds.

{13} At that point in time, the Mercedes was between one-quarter and one-half mile away; several more seconds must have elapsed before the car crashed through the roadblock. The reasonableness of Officer Clements' decision to do nothing to warn Alan under these circumstances cannot be established as a matter of law. The evidence indicates that Officer Clements was aware of the Mercedes' position through the radioed communications of the pursuing officer. When he first saw the boy, Officer Clements knew or should have known that the Mercedes was approaching some distance away. Rather than make any attempt to

alert Alan of the impending danger, Officer Clements turned around to observe the approach of the speeding Mercedes. Officer Clements' deposition testimony indicates that he did not warn Alan because he did not think it was necessary, not because there was insufficient time.

> Q: "[I]f the little boy would have been on the shoulder of the road, would you have felt the need to tell him something?
>
> A: "If he had been right next to the roadway, it's possible that I would have said something to him."

{14} Furthermore, the breach of duty here was not only whether there was sufficient time for Officer Clements to warn Alan once he was spotted, but also whether a proper lookout by either officer would have revealed his presence sooner. The plaintiff presented testimony from which it reasonably could be inferred that the officers were on notice that Alan was traveling toward the area where they eventually established their second roadblock. As pointed out in the dissent of Judge Apodaca of the court of appeals, a jury could find that with such notice the officers should have watched for the arrival of the boy. Alan was either already in the area during Officer Clements' initial surveillance, or he was able to approach within approximately 400 feet of the roadblock, to dismount, and to stand alongside his motorbike without either officer seeing or hearing him.

{15} The court of appeals concluded that evidence that the officers waved two or three cars through the roadblock and diverted another vehicle away from it demonstrates the officers maintained a proper lookout. The fact that the officers may have kept some lookout does not establish conclusively that they maintained a proper lookout with respect to Alan.

{16} In resolving all reasonable inferences to be drawn from the evidence in favor of the party resisting the motion for a directed verdict, we conclude that the evidence reasonably could indicate a breach of duty. A jury reasonably could have found that the officers failed to maintain a proper lookout because Alan was able to enter the zone of foreseeable danger unnoticed. Further, a jury reasonably could have found it was negligent not to have attempted to warn Alan of impending danger once Officer Clements finally spotted him.

{17} There still remains the issue of causation. The issue of proximate cause should be removed from the fact finder only when the facts are undisputed and all reasonable inferences are plain, consistent, and uncontradictory. *Chavira v. Carnahan*, 77 N.M. 467, 423 P.2d 988 (1967). The directed verdict can be sustained only if reasonable minds could not differ on whether the officers' failure to exercise reasonable care was an actual and proximate cause of Alan's death. *See New Mexico State Highway Dep't v. Van Dyke*, 90 N.M. 357, 563 P.2d 1150 (1977).

{18} Officer Williams himself testified that the area where Alan was standing was within the zone of foreseeable danger. A proximate cause requires only a result that proceeds in a natural and continuous sequence from the act or omission in question. SCRA 1986, 13-305. The jury reasonably could have found that the officers' failure to keep a proper lookout and failure to warn Alan proximately caused the death of one in the zone of the danger in question. If the officers negligently deprived Alan of a chance to escape harm, they cannot argue that the jury could only speculate as to whether Alan would have responded successfully to their warnings or directions.

{19} Because the issue of breach and proximate cause cannot be decided as a matter of law, the trial court erred in removing those issues from the jury. We reverse the court of appeals and remand to the trial court.

{20} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

TONY SCARBOROUGH,
Chief Justice,

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

HARRY E. STOWERS, JR.,
Justice, dissents.

STOWERS,
Justice, dissenting.

{21} I respectfully dissent and would affirm the judgment of the trial court, which granted a directed verdict in favor of defendant City of Clovis, after plaintiff presented all of his evidence. I am of the opinion that the evidence established, as a matter of law, that the officers were not negligent under the circumstances and facts of this case. The majority opinion, by extending the liability of the police officers for the negligence of third party actions, creates an additional exception within Section 41-4-12 of the Tort Claims Act, NMSA 1978, Sections 41-4-1 to -29 (Repl. Pamp. 1986). A party claiming an exception to the Tort Claims Act must establish that the exception is within the words of and the reason for the exception. *Smith v. Village of Corrales*, 103 N.M. 734, 737, 713 P.2d 4, 7 (Ct. App. 1985), *cert. denied*, 103 N.M. 740, 713 P.2d 556 (1986).

{22} An appellate court in reviewing the evidence on appeal from a judgment pursuant to a directed verdict must review all the evidence, but, where there are conflicts or contradictions in the evidence, these conflicts must be resolved in favor of the party resisting the motion. *Skyhook Corp. v. Jasper*, 90 N.M. 143, 146, 560 P.2d 934, 937 (1977). Thus, the question for us to resolve is whether plaintiff's claim was legally sufficient, as a matter of law, to withstand a directed verdict. *See Hood v. Fulkerson*, 102 N.M. 677, 681, 699 P.2d 608, 612 (1985). I agree with the majority opinion of the court of appeals that the record is devoid of evidence to indicate that the City of Clovis' police officers were negligent in the manner in which they set up the roadblocks.

{23} Plaintiff has raised the following two issues: The officers were negligent at the first roadblock by failing to keep a proper lookout for motorists travelling north toward the danger and in failing to warn or divert such traffic; and the officers were negligent at the second roadblock by failing to utilize citizens to warn or divert motorists or others coming from the south, and, after observing the victim, for their failure to warn him of the approaching vehicle.

{24} Whether the officers were negligent depends upon the existence of a duty of care owed plaintiff. *See Schear v. Board of County Comm'rs*, 101 N.M. 671, 687 P.2d 728 (1984). Police officers have a duty to exercise reasonable care under the circumstances, *i.e.*, maintain a proper lookout, divert traffic and protect the people. This, however, must be balanced against their paramount duty to apprehend violators of the law by utilizing all reasonable means at their disposal.

{25} Officers Williams and Clements proceeded to the intersection of Pleasant Hill highway and State Road 18 to set up the first roadblock. When they arrived at the intersection, Officer Williams got his gun from the trunk and Clements got his from the front passenger area. But, before they established this roadblock, the officers received a radioed request to assist another officer, Deputy Hamner, at a roadblock being set up north of the city. During the few minutes spent setting up the first roadblock, neither officer saw the plaintiff. A truckdriver, who knew the victim's family, observed plaintiff riding his off-the-road motorbike on Pleasant Hill highway. Nonetheless, before plaintiff reached the intersection of State Road 18, he veered off to the north cutting across a parking lot, which prevented the officers from seeing him. There was no evidence presented at trial from which a jury could have found a breach of duty of care by the officers at this first roadblock.

{26} While en route to assist Deputy Hamner, Officers Clements and Williams were advised by radio that Muhammad, the driver of the oncoming Mercedes, had already broken through the roadblock set up by Deputy Hamner. The two officers immediately began to establish a roadblock at the next intersection, one mile north of Pleasant Hill highway and State

Road 18, in accordance with proper police procedures. This second roadblock was north of the intersection to permit northbound traffic to be diverted onto the section line road. The officers positioned their vehicles in such a way that enough room was left between the vehicles for a car to pass in the middle of the road. Less than two minutes elapsed between the time the Mercedes crashed through the roadblock set up by Deputy Hamner and when the officers looked toward the area behind the roadblock they set up. Officer Williams observed one vehicle, which he diverted off onto the section line road, but he never saw the plaintiff. Officer Clements observed two vehicles and waived them through the roadblock. When he glanced back again to the area behind the roadblock, he observed the plaintiff for the first time. Plaintiff was more than 400 feet from the roadblock, standing opposite the northbound lane thirty feet off the roadway in the bar ditch behind a telephone pole. Immediately upon observing the plaintiff, Clements looked to the north and saw the Mercedes approaching. The Mercedes had been travelling in the southbound lane hidden from view behind another vehicle. After pulling out to pass that vehicle, the Mercedes straddled the centerline. Travelling at excessive speed, it crashed through the roadblock, veered around a hay truck, then headed off the roadway. The plaintiff turned around, took several steps in the direction of the oncoming vehicle and was struck and killed.

{27} The total time the officers were at this second roadblock was less than two minutes. There was no time for the officers to use their public address system to warn or to otherwise attempt to divert the victim from the area. From the time Officer Clements saw the victim, turned forward, saw the Mercedes and then watched it travel through the roadblock, a few seconds had elapsed, which was not time enough to have warned plaintiff. There can be no liability based on the officer's failure to have acted differently in this stressful, emergency situation when only a few moments elapsed between the time the officer first saw plaintiff and the time the car crashed through the roadblock.

{28} Although generally, questions of negligence are determined by the fact finder, where reasonable minds cannot differ the question is one of law to be resolved by the trial judge as was done in this case. *Montoya v. Williamson*, 79 N.M. 566, 568, 446 P.2d 214, 216 (1968); *Bouldin v. Sategna*, 71 N.M. 329, 334, 378 P.2d 370, 373 (1963). Under the facts herein, the officers were not negligent.

{29} Section 41-4-12 of the Tort Claims Act provides an exception for law enforcement officers to the immunity granted governmental entities in Subsection A of Section 41-4-4. This immunity "does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault * * * or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties." NMSA 1978, § 41-4-12 (Repl. Pamp.1986). The term "caused by" in Section 41-4-12 includes those acts enumerated in that section which were caused by the negligence of law enforcement officers while acting within the scope of their duties. *Methola v. County of Eddy*, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980). Nowhere is it stated in that section that an officer's liability extends to the negligence of third party actions as suggested in the majority opinion. The majority attempts to interject causes of action into an exception to the Tort Claims Act where none exists. And, as I previously noted, any party claiming an exception to the Tort Claims Act must show that this exception exists within the words of and reason for that exception.

{30} Since the officers in the instant case were not negligent, as a matter of law, the City of Clovis is immune from liability pursuant to Section 41-4-4(A) of the Tort Claims Act.

{31} For these reasons, I would affirm the judgment of the trial court.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-092

Filing Date: November 30, 1988

Docket No. 16,965

LOUIS KESTENBAUM,

Plaintiff-Appellee and Cross-Appellant,

vs.

PENNZOIL COMPANY and VERMEJO PARK CORPORATION,

Defendants-Appellants and Cross-Appellees.

APPEAL FROM THE DISTRICT COURT OF COLFAX COUNTY
Leon Karelitz, District Judge

Motion for Rehearing Denied January 13, 1989

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Amicus Curiae.

OPINION

RANSOM, Justice.

{1} Plaintiff Louis Kestenbaum was awarded damages for breach of an employment contract. The trial was had before a jury which found by special verdict that the employment was not terminable at will, but rather was subject to an implied contract requiring a good reason for termination, and that there was no good reason to discharge Kestenbaum. We affirm.

{2} Kestenbaum was employed in March of 1977 by defendants Pennzoil Company and its subsidiary, Vermejo Park Corporation, as the vice president in charge of guest operations at a secluded ranch in northern New Mexico. The ranch maintains guest facilities and services for lodging, hunting, fishing, and other recreational activities.

{3} By anonymous letter in January of 1984, Kestenbaum was accused of sexual harassment, illegal conduct, and mismanagement of the ranch. Pennzoil initiated an investigation in which information was gathered through interviews of Vermejo Park female employees, past and present. Subsequently, the investigators presented to Pennzoil officials an oral briefing and a written report that summarized the evidence. On February 13, 1984, Pennzoil summoned Kestenbaum to its headquarters in Houston where he met with the investigators who confronted him with the allegations concerning sexual harassment, which he denied. Thereafter, Pennzoil officials informed Kestenbaum of the names of the persons interviewed and he was given the opportunity to comment about each. Pennzoil also permitted Kestenbaum to name witnesses who would speak on his behalf. Kestenbaum met one more time with Pennzoil vice-president Rundle and again denied the allegations, but to no avail. On February 17, Kestenbaum's employment was terminated.

{4} Kestenbaum claimed that, without fair investigation and consideration of the allegations

and his response, he was terminated on the grounds of sexual harassment for which he was innocent. Pennzoil denied Kestenbaum's claim and affirmatively asserted that Kestenbaum was an employee at will and was dischargeable for any or no reason. Alternatively, if a good reason was required to discharge Kestenbaum, Pennzoil asserted that it had reasonable grounds to believe that sufficient cause existed to justify its actions.

{5} By Instruction No. 8, the jury was instructed on Kestenbaum's claim that, by words and conduct, the parties entered into an employment contract which included among its terms that (1) in addition to a salary for Kestenbaum's labor and best job efforts, he would receive various fringe benefits, including but not limited to a retirement program, a stock purchase program, and health and other insurance; (2) the employment would be of a long-term nature, but subject to the normal contingencies of work life, such as a sale of the ranch, early voluntary retirement, layoffs and so on; and (3) with regard to involuntary termination of employment, Kestenbaum would be terminated only for just cause or, in other words, for a good reason, he would be treated fairly, have the opportunity to know some specifics of the charges against him, be given a chance to defend himself, and his supervisors would not determine whether there was just cause for the termination until hearing and fairly considering Kestenbaum's side of the story. Whether these claimed terms and conditions applied to the employment contract was left for the jury to determine on disputed evidence.

{6} Without objection, the court instructed the jury on the applicable law of employment contracts, as follows:

> INSTRUCTION No. 9
>
> An implied contract is an agreement in which the parties, by a course of conduct, have shown an intention to be bound by such agreement.
>
> INSTRUCTION No. 10
>
> Under New Mexico law, the general rule is that a contract for permanent employment, calling only for the performance of duties and payment of wages, is a contract for an indefinite period. It is terminable at the will of either party. A discharge without reason is not a breach of such an at will employment.
>
> INSTRUCTION No. 11
>
> In every contract the law implies a covenant of good faith and fair dealing between the parties . . .

The implied covenant of good faith and fair dealing, however, is not to be used by you in determining whether or not there was a term of an implied contract calling for discharge for just cause only. You must first find from the words and conduct of the parties that they intended that the plaintiff's discharge would be made for just cause only.

If you find that there was an implied contract of employment between the parties which included a good-reason standard for termination, then the implied covenant of good faith and fair dealing requires in the traditional sense a moral quality equated with honesty of purpose, freedom from fraudulent intent and faithfulness to duty or obligation.

{7} The jury also was instructed that, for purposes of guidance, it could properly resort to Equal Employment Opportunity Commission guidelines that define what constitutes sexual harassment under the "totality of the circumstances" rule. The guidelines describe the strict responsibility of an employer for the acts of its supervisory employees with respect to sexual harassment and state that an employer should develop appropriate sanctions and take all steps necessary to prevent sexual harassment. The court further instructed the jury that sexual harassment by a supervisor is a violation of law and

that, where an employer receives allegations of conduct that could amount to sexual harassment, the employer has a legal duty and obligation to investigate and promptly take appropriate remedial action. Finally, the court instructed that evidence in a case involving sexual harassment is typically contradictory. Nonetheless, the employer still has the duty to take action to prevent sexual harassment.

{8} We address the following issues raised by Pennzoil in this appeal: (1) Whether the claim for breach of an implied employment contract was barred by the statute of frauds? (2) Whether there was substantial evidence to support the jury's finding of an implied employment contract requiring a good reason for termination? (3) Whether the law applied by the court unduly restricted Pennzoil's showing that there was a good reason for the discharge? (4) In terminating employment for good reason, what is the standard for judging the conduct of the employer? (5) Whether the court committed reversible error in refusing to instruct specifically on asserted defense theories as requested by Pennzoil? (6) Whether Pennzoil was entitled to a new trial by reason of inflammatory closing arguments, by reason of the receipt of evidence germane to claims dismissed on directed verdicts, but irrelevant and immaterial to the claims finally submitted, or by reason of a verdict contrary to the weight of the evidence?

{9} Statute of Frauds. Pennzoil contends that the trial court erred in denying its motion for directed verdict on the breach of contract claim. Pennzoil asserts that, because the action was based on an oral employment contract that could not be performed within one year, the action was barred by the statute of frauds. *See Skarda v. Skarda*, 87 N.M. 497, 501, 536 P.2d 257, 261 (1975). At the least, Pennzoil argues, the court erred in keeping the issue from the jury. Pennzoil maintains that an agreement for employment until Kestenbaum's retirement would have been for a specific term more than one year, rather than for life or for an indefinite period. Pennzoil concedes that the statute of frauds does not apply to a contract under the latter circumstances. *See Hodge v. Evans Fin. Corp.*, 823 F.2d 559,561-65 (D.C. Cir.1987). Nor does it apply to a contract for employment until retirement.

> There is no indication in local law or elsewhere that a permanent employment contract should be construed as a contract for an expressly stated, fixed term of years by virtue of an employee's expectation that he or she will retire at some point. No court or commentator has ever suggested that the possibility of the employee's death within one year would "defeat" rather than "complete" such a contract. To the contrary, courts and commentators have consistently accepted the view that indefinite permanent employment contracts such as Hodge's fall outside the statute because they are capable of full performance within one year. *See, e.g.*, 2 *Corbin on Contracts* 446, at 549-50 (Permanent employment contracts fall outside the statute because [t]he word 'permanent' has, in this connection, no more extended meaning than 'for life.' "); 3 *Williston on Contracts* § 495, at 582 ("A promise of permanent personal performance is on a fair interpretation a promise of performance for life, and therefore not within the Statute.").

823 F.2d at 564 (footnote omitted). As with Hodge, Kestenbaum unequivocally alleged a contract for permanent employment, not a contract until he reached a specified age of retirement.

{10} Further, Pennzoil bore the burden of pleading and proving the affirmative defense of the statute of frauds. *See* SCRA 1986, 1-008(C). As a general rule, determination of the applicability of the defense of the statute of frauds is a question of law for the court, not the jury. *Sanchez v. Martinez*, 99 N.M. 66, 653 P.2d 897 (Ct. App.1982). However, a factual question concerning the particulars of a contract may prevent a ruling on the statute's applicability as a matter of law. *Sierra Blanca Sales Co. v. Newco Indus., Inc.*, 84 N.M. 524, 505 P.2d 867 (Ct. App.), *cert. denied*, 84 N.M. 512, 505 P.2d 855 (1972). That

is not the case here. Pennzoil presented no affirmative evidence on the issue, and Kestenbaum's evidence established that his employment contract was indefinite in duration.

{11} Substantial Evidence to Support Jury Finding of Implied Employment Contract Allowing Discharge Only for Good Reason. Seeking support in *Gonzales v. United Southwest Nat'l Bank*, 93 N.M. 522, 602 P.2d 619 (1979), and *Garza v. United Child Care, Inc.*, 88 N.M. 30, 536 P.2d 1086 (Ct. App.1975), Pennzoil argues that, because Kestenbaum's oral employment agreement was for an indefinite period, he was an employee at will, dischargeable for any or no reason. Although Pennzoil recognizes an exception to at-will employment exists for an implied contract term based on the words and conduct of the parties, it maintains that, in New Mexico, this exception has been based only upon provisions included in an employee handbook or personnel manual *See Forrester v. Parker*, 93 N.M. 781, 606 P.2d 191 (1980); *Francis v. Memorial Gen. Hosp.*, 104 N.M. 698, 726 P.2d 852 (1986). Even where a policy manual exists it will not always change the at-will employment relationship if the manual is not sufficiently specific. *Sanchez v. The New Mexican*, 106 N.M. 76, 738 P.2d 1321 (1987); *cf. Lukoski v. Sandia Indian Management Co.*, 106 N.M. 664, 748 P.2d 507 (1988) (where handbook represented an established policy regarding terminations and failed to alert employees against placing reliance upon it, policy properly could be found part of employment agreement).

{12} Several jurisdictions quite properly have been willing to impose implied contractual duties based upon particular representations or conduct of an employer, without limitation to handbooks or manuals. These courts recognize that oral statements made by an employer may be sufficient to create an implied contract which provides that an employee shall not be discharged except for cause. We agree. *See e.g., Toussaint v. Blue Cross Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980); *Pugh v. See's Candies, Inc.*, 116 Cal. App.3d 311, 327, 171 Cal. Rptr. 917, 925-26 (1981) ("In determining whether there exists an implied-in-fact promise . . . courts have considered . . . personnel policies or practices of the employer . . . [and] actions or communications by the employer reflecting assurances of continued employment. . . ." (footnotes omitted)). Other courts that have restricted the right to freely discharge at-will employees because of an employment policy or procedure recognize the traditional at-will rule to be a rebuttable presumption. *See, e.g., Weiner v. McGraw-Hill Inc.*, 57 N.Y.2d 458, 466, 443 N.E.2d 441, 446, 457 N.Y.S.2d 193, 198 (1982) (at-will rule affords no greater status than that of a rebuttable presumption and trier of fact should consider course of conduct of the parties, including the writings and antecedent negotiations); *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984) (en banc).

{13} In the consolidated cases of *Toussaint* and *Ebling*, two employees, one employed for five years and the other for two years, brought wrongful discharge actions against their respective former employers. Toussaint received an oral assurance that "he would be with the company 'as long as I did my job,"' and Ebling "was told that if he was 'doing the job' he would not be discharged." Each employee asserted that the statements made by the employer constituted an agreement not to discharge except for good cause. 408 Mich. at 597, 292 N.W.2d at 884. The employers argued, as does Pennzoil, that employment contracts for an indefinite term are terminable at the will of either party unless the employee has furnished consideration independent of his services to his employer.

{14} Toussaint's case was strengthened because upon being hired he was handed a personnel manual that reinforced the oral assurance of job security. The court, however, did not rest its decision on the presence of the personnel manual. It ruled that (1) a provision of an employment contract providing that an employee shall not be discharged except for cause is legally enforceable although the contract is not for a definite term, and (2) such a provision may become part of the contract either by express agreement, oral or written, or as a result of an employee's legitimate expectations grounded in an employer's policy statements.

The court further held that "[e]mployers are most assuredly free to enter into employment contracts terminable at will without assigning cause. We hold only that an employer's express agreement to terminate only for cause, or statements of company policy and procedure to that effect, can give rise to rights enforceable in contract." 408 Mich. at 610, 292 N.W.2d at 890. The court concluded that when a prospective employee inquires about job security and the employer agrees that the employee shall be employed so long as he does the job, a fair construction is that the employer has agreed to give up his right to discharge at will and may discharge only for "good or just cause." *Id.*

{15} Pennzoil claims that the evidence presented by Kestenbaum was insufficient as a matter of law to establish an implied contract that required a good reason to terminate the employment relationship. We believe, however, that the evidence was sufficient to overcome the presumption that the employment contract was terminable at will. There was substantial evidence from which a jury reasonably could find that the parties agreed to a contract that permitted termination only for a good reason.

{16} Kestenbaum presented the following evidence to establish that his employment contract was for an indefinite period of time, and allowed involuntary removal only for a good reason. During initial employment negotiations, Kestenbaum's immediate supervisor at Vermejo Park made clear that the employment would be long term and permanent as long as Kestenbaum did his job. This was uncontroverted. Further, Kestenbaum testified that those assurances were consistent with his needs for long-term job security and the fact that he would not have considered the job if offered only on a short-term basis.

{17} Mr. Wolfe, former operations manager at Vermejo Park, testified that Pennzoil only released permanent employees for "a good reason, a just cause." Mr. Lew, an investigator, stated that he presumed that Pennzoil only terminated employees for just cause. Vice-president Rundle confirmed this policy, as did Mr. Charlesworth, Kestenbaum's successor supervisor, who testified that Pennzoil believed it had to "have a good reason to terminate an employee" and that the Houston office always required good cause. Pennzoil presented no evidence that it maintained a "fire-at-will" management practice.

{18} The insurance benefits manual and the policy manual also provided additional evidence regarding Pennzoil's policy and practice to forego its common-law right to fire at will. The insurance benefits manual contained a provision describing conversion privileges after termination of employment. The manual made no mention of a termination without cause. Neither did the severance pay plan in the policy manual address the effect of a without-cause termination of employment.

{19} Pennzoil attempts to refute the sufficiency of the evidence by attacking each element individually. First, Pennzoil maintains that an implied employment contract altering the at-will presumption cannot be premised upon Kestenbaum's subjective understanding about statements made at the inception of the employment relationship. *See Thompson v. St. Regis Paper Co.*, 102 Wash. 2d 219, 685 P.2d 1081 (1984) (en banc). Pennzoil further asserts that the insurance benefits policy and severance pay plan are insufficient to create an implied contract because neither specifically altered the at-will relationship. Finally, Pennzoil contends that management practice has never been recognized in New Mexico as a sufficient basis from which to imply an employment contract allowing discharge for cause only.

{20} We are unwilling to test the sufficiency of each piece of evidence standing on its own in a vacuum and rule, as a matter of law, that each alone fails to support a finding of an implied employment contract. In overcoming the presumption, it is not any single act, phrase or expression, but the totality of all of these, given the circumstances and the parties' situation and objectives, which will control. *Weiner*, 57 N.Y.2d at 466-67, 443 N.E.2d at 446, 457 N.Y.S.2d at 198; *Pugh*, 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927 ("While oblique language will not,

standing alone, be sufficient to establish agreement . . . it is appropriate to consider the totality of the parties' relationship. . . ." (citation omitted)). Undoubtedly, under *Sanchez v. The New Mexican*, the policy statements addressing insurance benefits and severance pay would, without more, be inadequate to alter the at-will relationship. However, when coupled with uncontroverted testimony describing the negotiations between Kestenbaum and Pennzoil's agent and with Pennzoil's concession that there was a management practice followed by Pennzoil not to terminate employment except for a good reason, there is substantial evidence to support the jury finding that an implied employment provision for discharge only for a good reason was in effect between Pennzoil and Kestenbaum.

{21} Law Applied as to Good Reason for Discharge. Pennzoil argues that good reason for discharge existed as a matter of law and contends that the jury was misinstructed on applicable rules of implied contract. In reviewing alleged errors relating to jury instructions, this Court will consider whether all of the instructions, when read and considered together, fairly present the issues and the law applicable thereto. *Webb v. Webb*, 87 N.M. 353, 533 P.2d 586 (1975). We recognize that the Uniform Jury Instructions contemplate that instructions should be concise and should not comment on the evidence. *See* SCRA 1986, Judicial Pamp. 13 - The Concept of Jury Instructions; *Kinney v. Luther*, 97 N.M. 475, 641 P.2d 506 (1982).

{22} The first instruction we address that was objected to by Pennzoil is Instruction No. 12, which read as follows:

> INSTRUCTION NO. 12
>
> Where the terms of an implied contract of employment between the parties include provision for the employer to give the employee a chance to defend himself and to have some specifics of the charge, then you are instructed that the reasons given by the employer at the time of termination are the only reasons that the defendants may rely upon to show there was a good reason for the plaintiff's discharge.

{23} Pennzoil objected to and appeals from the court's refusal to instruct to the contrary that, in an action for wrongful discharge, the employer may claim in defense any sufficient cause for terminating the employment. Pennzoil's requested instruction was based upon the law in *Kiker v. Bank Sav. Life Ins. Co.*, 37 N.M. 346, 23 P.2d 366 (1933), and provided that, "in an action for wrongful discharge, the employer may claim in defense any sufficient cause for terminating the employment, (i) even if it may have been unknown to him at the time of termination, (ii) even if his real reason or motive may have been something else, or (iii) even if another reason was expreslly [sic] [expressly] given." However, the language quoted from *Kiker* does not purport to apply to the circumstances of this case. Here, if the jury were to find that the employment contract required Pennzoil to give Kestenbaum notice of specifics of the charge, and a chance for him to defend, indeed, the reasons given by Pennzoil to Kestenbaum are the only reasons that it could rely upon. Where parties stipulate that the employer will terminate by notice specifying cause, "a discharge specifying no cause, or an insufficient cause, would be wrongful. It follows that, under such a contract, a cause not specified would not be available in defense." *Id.* at 349, 23 P.2d at 368. In the present case, no issue was raised contesting the right to notice and a hearing if the employment were not found to be at will. The trial court was correct to refuse Pennzoil's requested instruction.

{24} Pennzoil's next contention is that the court erred in refusing its requested instruction that any finding of illegal conduct on the part of an employee is good cause for discharge. Pennzoil maintains that its requested instruction was necessary to inform the jury of the possible consequences of Kestenbaum's alleged illegal conduct in connection with the service and consumption of alcoholic beverages by minors. The record indicates that the requested instruction was a proper subject for argument but a misstatement

of the law as applied to these facts. Pennzoil presented evidence at trial that Kestenbaum permitted minors to serve and to consume alcohol. Evidence also was presented that this practice existed prior to Kestenbaum's management of Vermejo Park and continued after his termination. Moreover, Kestenbaum's superiors were aware that under-age waitresses served alcohol to the guests, and expressed no concern. Given this evidence, the jury could have found that Kestenbaum's conduct was in the furtherance of the interests of the corporation and authorized by corporate superiors. The trial court properly concluded that the jury could in one context find that illegal conduct in performance of the job is good reason for firing, and in another context find it is not. It would have been error for the court to compel the jury to find that, under these circumstances, this conduct represented a good reason for discharge.

{25} Standard for Judging Conduct of Employer in Terminating Employment for a Good Reason. Pennzoil objected to and appeals from the court's refusal to instruct that, where an employee is terminated for a good reason, the employer does not have to prove that the reason in fact existed. Pennzoil argues that the employer need only in good faith believe that the employee engaged in conduct that was inappropriate in the work place. *See Simpson v. Western Graphics Corp.*, 293 Or. 96, 643 P.2d 1276 (1982) (en banc) (absent evidence of express or implied agreement whereby employer contracted away its fact-finding prerogative, in discharge for good cause, there need only be substantial evidence to support employer's decision and that employer believed evidence and acted in good faith). Pennzoil contends that its requested Instruction No. 15 was essential to inform the jury of the employer's position at the time of Kestenbaum's discharge. Unless a jury is instructed that an employer only is required to demonstrate a good faith belief that cause existed to terminate, Pennzoil seems to suggest that the only alternative is to instruct the jury that the employer must prove good cause in fact.

{26} Pennzoil maintains that to require an employer to have a preponderance of evidence establishing good cause in fact prior to making a decision to terminate an employee would place an unrealistic burden on the employer. Pennzoil points out that an employer does not have the benefit of extended discovery but must base his decision on information available at the time of discharge.

{27} We agree, but we do not perceive the issue in the bipolar manner fashioned by Pennzoil. We believe that a middle position exists under these circumstances, and, further, that the jury properly was instructed on this middle position. The issue upon which the jury was instructed was whether Pennzoil "had reasonable grounds to believe that sufficient cause existed to justify the defendants' actions in discharging the plaintiff." Accordingly, the jury could have absolved Pennzoil of liability under its implied contract with Kestenbaum provided that Pennzoil had reasonable grounds to believe that sufficient cause existed to justify his termination. *See Crimm v. Missouri Pac. R.R.*, 750 F.2d 703, 713 (8th Cir. 1984) (under Title VII, employer need not prove that employee committed sexual harassment, employer only needs a reasonable belief that sexual harassment occurred). The trial court correctly denied Pennzoil's requested Instruction No. 15 because it erroneously suggested the jury could find good cause from the employer's subjective good faith belief as opposed to an objective standard of reasonable belief.

{28} Furthermore, there was substantial evidence to support the jury finding that Pennzoil did not act upon reasonable grounds. In her deposition, Pennzoil's investigator admitted on cross-examination that her summary was not intended to stand alone, that it failed to differentiate between first-hand knowledge, attributed hearsay, or mere gossip or rumor, and no attempt was made to evaluate the credibility of the persons interviewed. Nevertheless, the only document reviewed by vice-president Rundle before he fired Kestenbaum was his investigator's summary of interviews. Moreover, he did not take a close look at the way the investigation had been handled, but relied upon the professionalism of his investigators. At trial, Kestenbaum presented

an expert who testified that Pennzoil's investigators did not observe the standards of good investigative practice and who identified numerous deficiencies in the investigation.

{29} Pennzoil claims further that the court erred in refusing to instruct the jury on "wide latitude" and "great scope" as standards for judging an employer's conduct when dealing with managerial employees. Pennzoil asserts Instruction No. 12 severely limited the potential conduct of the employer. Pennzoil argues that an instruction on "wide latitude" and "great scope," like Pennzoil's requested instruction concerning good faith belief, was necessary to inform the jury of the employer's position when determining the existence of good cause. We hold, however, that the trial court properly exercised its discretion in refusing the instruction because it did not supply any needed guidance to the jury. The requested instruction was properly the subject of argument for counsel. *See* SCRA 1986, 1-051

{30} Refusal to Instruct on Asserted Defense Theories as Requested by Pennzoil.

{31} Pennzoil challenges the court's refusal of its requested Instruction No. 100, or alternatively, No. 101, and claims the court erred in giving Instruction No. 8 instead. Pennzoil maintains that Instruction No. 8 was prejudicial in that it allegedly permitted Kestenbaum to present a statement of his case, while denying Pennzoil the opportunity to state its theory of the case. Instruction No. 8 explained the burdens of proof and the contentions of the parties in conformity with SCRA 1986, 13-302B. The portion of Pennzoil's requested instructions excluded from Instruction No. 8 were statements asserting that (1) the defendants had an obligation to investigate the charges of sexual harassment and to take appropriate and remedial action, (2) the investigation by Pennzoil was more thorough and was conducted by more experienced investigators than is normal in a personnel investigation, (3) the investigation revealed conduct inappropriate for the workplace which would constitute sexual harassment, and (4) Pennzoil's presentation of the charges against Kestenbaum were in sufficient detail so that he could understand them and he was given adequate opportunity to defend himself. We agree with the trial court that these statements simply constituted denials of tile claims articulated by Kestenbaum. The trial court acted within its discretion in ruling that the statement, "[t]he defendants deny the contentions of the plaintiff", was sufficient and it was unnecessary to incorporate Pennzoil's requested instructions into the format of SCRA 1986, 13-302C. It is not error to deny requested instructions where the court gave instructions that adequately covered the issue. *Hudson v. Otero*, 80 N.M. 668, 459 P.2d 830 (1969). Early in this opinion we discussed the detailed instruction by which the jury was guided on the employer's required response to charges of sexual harassment.

{32} The record indicates that Pennzoil had ample opportunity to express its affirmative theories which were clearly stated in Instruction No. 8. We hold, therefore, that the instructions as given did not deprive Pennzoil of an opportunity to fairly state its theory of the case. Based upon our review of the instructions as a whole, we find that no prejudice resulted to Pennzoil.

{33} Refusal to Grant Pennzoil's Motion for New Trial. The granting of a new trial is discretionary with the trial court. *State ex rel. State Highway Dep't v. Robinson*, 84 N.M. 628, 506 P.2d 785 (1973). Refusal to grant a new trial will only be reversed where it is found to be an abuse of discretion. *Id.*

{34} Pennzoil first claims that several remarks during Kestenbaum's closing argument were inflammatory, misleading, and prejudicial. Specifically, Pennzoil refers to remarks made that referred to (1) Pennzoil's relation to the local community, (2) the court's grant of Pennzoil's motion for directed verdict on only six of the eight claims brought by Kestenbaum, and (3) the non-appearance of some of Pennzoil's witnesses. During Kestenbaum's closing, Pennzoil failed to raise any objection. "[A]ny objections to the argument of counsel should be made in time for the court to rule on them, and, if necessary, to correct them before the jury

retires. . . ." *Jackson v. Southwestern Pub. Serv. Co.*, 66 N.M. 458, 474, 349 P.2d 1029, 1039 (1960). This Court has recognized that in the proper case improper remarks made by counsel could necessitate reversal and award of a new trial, notwithstanding a failure to object. *Griego v. Conwell*, 54 N.M. 287, 222 P.2d 606 (1950). Pennzoil, however, had the burden to demonstrate to the trial court that its rights were prejudiced because the argument was improper and because the remarks were "reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case." *Apodaca v. United States Fidelity and Guar. Co.*, 78 N.M. 501, 502, 433 P.2d 86, 87 (1967) (quoting *Aultman v. Dallas Ry. & Terminal Co.*, 152 Tex. 509, 516, 260 S.W.2d 596, 600 (1953)). It was within the sound discretion of the trial court to conclude that Pennzoil failed to meet its requisite burden. In its order denying Pennzoil's motion for a new trial, the court opined that had Pennzoil timely objected a curative instruction could have been conveyed to the jury. Our review of Kestenbaum's closing argument supports the reasonableness of the trial court's conclusion that any alleged prejudicial effect of the improper remarks could have been cured by proper instruction. *See Jackson*, 66 N.M. at 474, 349 P.2d at 1039 (any objections to counsel's argument should be timely made, unless they are of such serious nature that a cautionary instruction would not cure the error).

{35} Pennzoil also complains that relevant evidence admitted at trial caused prejudice to its case, in light of the fact that the court ultimately granted Pennzoil's motion for directed verdict on these issues. Pennzoil contends that, because evidence subsequently rendered irrelevant infected the record, it was deprived of a fair trial and, therefore, was entitled to a new one. Pennzoil relies upon (1) testimony regarding Pennzoil's subsequent treatment of certain Vermejo Park employees who were deposed by Kestenbaum and provided testimony unfavorable to Pennzoil's interest and (2) evidence regarding the value of land donated to the United States by Pennzoil and witness testimony which opined that the valuations were excessive and adverse to taxpayers' interests. The transcript references cited by Pennzoil fail to demonstrate evidence sufficiently prejudicial to support a finding that the trial court abused its discretion. Nothing pointed out by Pennzoil convinces us that the trial court acted unreasonably in determining that Pennzoil received a fair trial and was not entitled to a new one. *See Paternoster v. La Cuesta Cabinets, Inc.*, 101 N.M. 773, 689 P.2d 289 (Ct. App. 1984) (abuse of discretion occurs when action taken is arbitrary and capricious or in excess of the bounds of reason).

{36} Pennzoil's remaining claim, that the verdict is contrary to the weight of the evidence, is without merit. We have demonstrated earlier in this opinion that substantial evidence existed to support the jury's decision. The trial court properly denied Pennzoil's motion for new trial. The appraisal of prejudice, if any, and the appraisal of the clear weight of the evidence are most appropriately left to the discretion of the court that observed the trial, heard the complaints and arguments of the movant, and, fortified with the necessary personal judgment and professional skills, passed upon the merits of the motion for a new trial.

{37} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-103

Filing Date: December 22, 1988

Docket No. 18,091

STATE OF NEW MEXICO, ex rel. THE HONORABLE BENJAMIN ANTHONY CHAVEZ and THE HONORABLE PETRA JIMENEZ MAES,

Petitioners,

vs.

THE HONORABLE REBECCA VIGIL-GIRON, Secretary of State, THE HONORABLE TONY SCARBOROUGH, Chief Justice of the Supreme Court, THE HONORABLE THOMAS A. DONNELLY, Chief Judge of the Court of Appeals, THE HONORABLE GARREY CARRUTHERS, Governor, THE HONORABLE RAYMOND SANCHEZ, Speaker of the House of Representatives, and THE HONORABLE MANNY ARAGON, President Pro Tempore of the Senate,

Respondents.

ORIGINAL MANDAMUS PROCEEDINGS

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OPINION

RANSOM, Justice.

{1} Petitioners, a judge-elect of the court of appeals and a district court judge, seek a writ of mandamus directed against various state officials charged with the implementation of constitutional amendment 6, which was approved by the voters of the state on November 8, 1988. The petition alleges that the amendment was adopted unconstitutionally because it contained a number of independent proposals which should have been presented to the voters as separate amendments under Article XIX, Section 1 of the New Mexico Constitution. The petition further alleges that the legislature acted without authority when it adopted the resolution placing the amendment

on the ballot in an even-numbered year. Petitioners allege this was in violation of the "regular session" provisions of Article XIX, Sections 1 and 5, and Article IV, Section 5 of the Constitution.

{2} Several individuals and private organizations moved to intervene and respond to the petition as real parties in interest. They included the Honorable W. John Brennan, Rebecca Sue Sitterly, Joseph E. Caldwell, district court judges, Mr. Joe Jolly, People for Judicial Reform, the League of Women Voters of New Mexico, the New Mexico Council on Crime and Delinquency, and Common Cause. They were heard as friends of the Court.

{3} The amendment was entitled "Proposing to Amend Articles 6 and 20 of the Constitution of New Mexico to Provide for Judicial Reform." By joint resolution, the legislature voted in February 1988 to present the proposed amendment to the voters. Prior to the November election, the amendment was debated widely by members of the state judiciary, the state bar, and concerned voters. The chief justice, the senior justice, and two associate justices of this Court recused themselves from considering the petition filed in this case to avoid the appearance of any impropriety in hearing a question of constitutionality after they had taken a public stand on the merits of the amendment during the pre-election debate. Pursuant to Article VI, Section 6 of the Constitution, four senior district court judges were called in to act as justices of the Court.

{4} We recognize the question of the constitutionality of this amendment to be one of great public importance and interest, *see State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 524 P.2d 975 (1974), and, no objection having been raised or argued as to the propriety of the parties or the jurisdiction of this Court, we proceed to the merits of the issues before us.

{5} *The amendment.* The amendment contains a method other than by partisan election to select and retain justices of the supreme court and judges of the court of appeals, district courts and metropolitan courts (§§ 7 and 9-13); an increase in the minimum age and years of legal practice required to be a justice or judge (§§ 2 and 4); provisions that the chief justice of the supreme court be selected as provided by law and that the presiding judges in each judicial district and metropolitan court be selected by their peers (§§ 1 and 14); an increase in the minimum number of court of appeals judges from three to seven (§ 8); and legislative authority to redraw annually (rather than every ten years) the boundaries of judicial districts, to increase the number of judicial districts, and to provide for additional judges in those districts (§ 5). The provision for selection of the chief justice replaced provisions that no justice appointed or elected to fill a vacancy shall be chief justice and replaced a formula provision for succession to the office of chief justice when not otherwise provided for by law. The replaced section had provided that the initial supreme court consist of three justices, and the new section provides for at least five justices in conformity with Article VI, Section 10, which empowers the legislature to increase the number of justices to five.

{6} *Multiplicity of amendments.* Article XIX, Section 1 of the Constitution provides in part that "[i]f two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately." At least thirty-two other states have or have had similar provisions in their state constitutions. *City of Raton v. Sproule*, 78 N.M. 138, 143, 429 P.2d 336, 341 (1967). As recognized by consensus at oral argument in this case, the purpose of such provisions is to prevent "logrolling," a legislative practice of joining together two or more independent measures so those who support any one measure will feel obliged to vote for the others in order to secure passage of the measure they favor. *Id.* at 144, 429 P.2d at 342; *Kerby v. Luhrs*, 44 Ariz. 208, 36 P.2d 549 (1934); *State ex rel. Pike County v. Gordon*, 268 Mo. 321, 188 S.W. 88 (1916). However, it is also widely recognized that, as the branch of government empowered to initiate constitutional amendments, the legislature should be afforded substantial deference to determine both the overall object of a proposed amendment and the changes "incidental

to and necessarily connected with the object intended." *Barnhart v. Herseth*, 88 S.D. 503, 511, 222 N.W.2d 131, 135 (1974) (quoting *State ex rel. Adams v. Herried*, 10 S.D. 109, 121, 72 N.W. 93, 97 (1897)); *see also Sproule*, 78 N.M. at 144, 429 P.2d at 342; *Keenan v. Price*, 68 Idaho 423, 447-48, 195 P.2d 662, 676 (1948) (quoting *State ex rel. Hudd v. Timme*, 54 Wis. 318, 335-37, 11 N.W. 785, 790 (1882)); *Hillman v. Stockett*, 183 Md. 641, 652-53, 39 A.2d 803, 808 (1944); *cf. Renck v. Superior Court,* 66 Ariz. 320, 326, 187 P.2d 656, 660 (1947). Accordingly, this Court held in *Sproule* that, as with legislative enactments, every presumption is to be indulged in favor of the validity and regularity of a constitutional amendment, 78 N.M. at 142, 429 P.2d at 340, and we must therefore hesitate to overturn a legislative determination that a proposal actually constitutes but one amendment. *Id.* at 144, 429 P.2d at 342.

{7} It was also acknowledged at oral argument, as this Court recognized in *Sproule*, that: (1) the issue of whether logrolling or joinder of multiple amendments indeed has taken place is not a political question but is rather a justiciable constitutional question, notwithstanding the absence of any challenge to the constitutionality until after the voters have approved the amendment; and (2) the standard of review to be applied is the reasonable or rational basis test utilized in most jurisdictions. Whether using the terms "reasonable" or "rational" basis, "beyond a reasonable doubt," or "clear violation," the authorities are in general agreement as to the standard of review to be applied. "'[T]he question presented is, not whether it is possible to condemn, but whether it is possible to uphold [the amendment]. . . .'" *Sproule*, 78 N.M. at 142, 429 P.2d at 340 (quoting *State ex rel. Kemp v. City of Baton Rouge*, 215 La. 315, 325, 40 So.2d 477, 480 (1949)); *see also Kahalekai v. Doi*, 60 Haw. 324, 331, 590 P.2d 543, 549 (1979); *Hillman*, 183 Md. at 653, 39 A.2d at 808; *Barnhart*, 88 S.D. at 512, 222 N.W.2d at 136.

{8} Petitioners argue that in this case more than one amendment was involved because two articles and many sections of the Constitution were affected by the proposed changes. Petitioners also argue that it is inappropriate to presume the validity of an amendment when it is challenged for containing multiple objects. In such cases, it is argued, this very defect makes it impossible to ensure that the adoption of the proposed changes truly expresses the will of the people.

{9} We agree that the joinder of two or more amendments is no mere irregularity, and that the constitutional prohibition against joinder goes to the heart of the amendment process mandated by the people in the adoption of their Constitution, a process which itself may be amended only by constitutional convention. N.M. Const. art. XIX, §§ 1, 5. Nonetheless, while *Sproule* recognized that the number of articles and sections affected by an amendment is not entirely immaterial, 78 N.M. at 145, 429 P.2d at 343, the main inquiry in cases such as this is not how the present Constitution, which stands to be amended, organizes its subject matter. Rather, the question to be answered is whether the legislature reasonably could have determined that a proposed amendment embraces but one object.

{10} In rejecting the second argument put forth by the petitioners, the Court in *Sproule* stated:

> The fact that two points of change are involved, the fact that either might have been presented . . . separately, and the fact that there may be reasons why an elector might have desired one change, and not the other, are not in themselves sufficient to hold the adoption of the amendment invalid.

Id. As the Supreme Court of Hawaii noted:

> [It is] incumbent upon members of the public to educate and familiarize themselves with the contents and effect of . . . proposed amendments before expressing themselves at the polls. . . . This [is] a non-delegable responsibility which [is] magnified, rather than diminished, by [the complexity of] amendments presented to them. . . . [W]here information placed before the electorate is neither deceptive nor

> misleading, and they are given sufficient time within which to familiarize themselves with the contents and effect of proposed amendments, they will be deemed to have cast informed ballots.

Kahalekai v. Doi, 60 Haw. at 339-40, 590 P.2d at 553 (1979) (citations omitted). *See Sproule*, 78 N.M. at 142, 429 P.2d at 340 (presumption of validity strengthened by approval of the qualified voters of the state at a regularly-called election).

{11} Petitioners argue that when two or more changes could be adopted without in any way being controlled, modified or qualified by the other, they must be presented separately, quoting *McBee v. Brady*, 15 Idaho 761, 779, 100 P. 97, 103 (1909). *Cf., Kerby v. Luhrs*, 44 Ariz. 208, 221, 36 P.2d 549, 554 (1934). We decline to adopt any such mechanical rule. While petitioners argue that the *McBee* test can and should be applied rationally to avoid the joinder of clearly independent amendments, not mechanically to dissect to absurdity an amendment with a single object or purpose, we believe it comports better with the doctrine of separation of powers to decide what rationally may be joined rather than what rationally may be separated.

{12} When, as here, the passage or rejection of one or more of the parts of an amendment may well have no effect on the operation of the whole, the "rational" application of the *McBee* test urged by petitioners invites subjective evaluation of the legislative determination by the courts. The separation of powers doctrine, however, dictates that strong deference should be shown to the legislature. This strong deference is the very premise on which an objective rational basis test rests. Yes, the framers did intend that when distinct changes to the Constitution are not dependent on each other, and there is no direct, necessary or logical connection between the operation of each, they should be submitted separately to the voters; but the legislature must be deemed to appreciate this intent no less than we.

{13} In aid of the application of the reasonable or rational basis test, we look to the opinions of other jurisdictions. In *Hillman*, 183 Md. at 650-51, 39 A.2d at 807, a Maryland court was asked to invalidate an amendment very similar in topic and scope to the one before us today. In analyzing the problem before it, the court noted that the legislature was empowered in the first instance to determine what changes it deemed advisable and to put these changes in one bill, and wrote:

> We cannot assume that the Legislature would propose an amendment, which might contain matters obviously not related, but if it did, then the Courts would have the power to pass upon the proposal and to determine whether or not [the Constitution] had been followed. In the absence of a clear violation, the judgment of the Legislature . . . should be respected, and the Courts should not interfere.

Id. at 653, 39 A.2d at 808. *Cf. Barnhart*, 88 S.D. at 504-509, 222 N.W.2d at 132-134 (sweeping change made to entire executive branch).

{14} In the present case, the changes proposed are germane to an overarching theme of "judicial reform." We cannot ignore the rational linchpin that joins the qualifications and merit selection of judges, their numbers, their districting, and the selection of their chief administrative officers. Hence, we conclude that amendment 6 does not violate the provisions of Article XIX, Section 1 of the Constitution. If legislative power to redistrict annually can be joined with merit selection of judges, it may be asked whether anything proposed by the legislature which touches upon the judiciary would likewise be germane. In answer, we note that it is not our intention to broaden the limits of constitutional joinder; we are holding that, although perhaps testing the limits of joinder, the provisions in this amendment are not devoid of a reasonable or rational basis of commonality.

{15} *Regular sessions.* Petitioners next argue that the amendment is a nullity because the legislature has no authority to propose constitutional

amendments during regular sessions held in even-numbered years. This argument takes two forms, the gist of which are also contained in two opinions by the attorney general issued in 1965 and 1969. *See* Att'y Gen. Ops. No. 65-212 (1965), 69-151 (1969). We note that at oral argument in this case the attorney general has repudiated these earlier opinions.

{16} One form of the argument is based on Article IV, Section 5. This section was amended in 1964 to provide for 30-day regular sessions in even-numbered years. From 1911 to 1964 the only regular sessions were 60-day, odd-numbered-year sessions. The 1964 amendment provides that during even-numbered-year regular sessions, unlike odd-numbered-year regular sessions, the matters which the legislature may consider are limited to: (1) budgets, appropriations and revenue bills; (2) bills drawn pursuant to special messages of the governor; and (3) bills of the last regular session vetoed by the governor. N.M. Const. art. IV, § 5(B). Petitioners argue that since the matters which may be considered in an even-numbered-year regular session are specified, and the list does not include constitutional amendments, the legislature may not propose constitutional amendments during regular sessions held in even-numbered years. Petitioners acknowledge that Article XIX, Section 1 provides for the proposal of amendments in "any regular session," but maintain that because the amendment to Article IV, Section 5 was adopted after the provisions of Article XIX, Section 1, it controls over the earlier provisions.

{17} This argument fails to take into account the limited scope of Article IV. In *Hutcheson v. Gonzales*, 41 N.M. 474, 485-87, 71 P.2d 140, 147-48 (1937), this Court held that when the legislature acts in its law-making capacity, it does so pursuant to Article IV; however, when the legislature acts to propose constitutional amendments to the electorate, it does not act pursuant to its law-making capacity under Article IV, but rather acts pursuant to its capacity as a constitutional "convention" under Article XIX. Therefore, the two articles must be construed as functionally independent. Given the limited scope of Article IV, we conclude the 1964 amendment makes no mention of resolutions proposing constitutional amendments because this subject is not included within the scope of Article IV, not because the framers of the 1964 amendment sought to exclude such resolutions. Moreover, had they sought to exclude such resolutions by amending Article IV, Section 5, their efforts would be without effect. When the legislature acts to put a proposed constitutional amendment before the people, it does so pursuant to Article XIX, not Article IV. Therefore, its authority to consider the subject of constitutional amendments is not affected by the list of legislative topics in Article IV, Section 5(B). For these reasons, petitioners' first argument on this question must fail.

{18} Petitioners next argue that the legislature may only consider constitutional amendments in "unlimited" 60-day regular sessions under Article XIX, Sections 1 and 5. Section 1 provides that constitutional amendments may be proposed "at any regular session." Section 5 provides that the procedures for amending the Constitution contained in Section 1 may not themselves be changed except through the extraordinary procedure of calling a general constitutional convention under Article XIX, Section 2. Petitioners argue that the term "regular session" must therefore be given the same "meaning" today as it received in 1911, when Article XIX was drafted.

{19} Legislative sessions are classified by the Constitution as "regular," "extraordinary," and "special." N.M. Const. art. IV, §§ 5-6. The legislature, which has the primary responsibility to adhere to constitutional processes in proposing amendments, consistently has interpreted the term "any regular session" to mean "other than a special or extraordinary session." Extraordinary sessions initiated by the legislature were first adopted by amendment in 1948. Provision was made in the 1911 Constitution for special sessions to be initiated by the governor. It has not been argued that the 30-day, even-numbered-year session initiated under the 1964 amendment is either an extraordinary or special session. The argument is that, since there was

no even-numbered-year regular session under the 1911 Constitution, the limitation to regular sessions for introduction of amendments could only have been intended to mean either the odd-numbered-year or the unrestricted regular sessions for which provision was then made.

{20} We believe, however, that the purpose and intent of the framers of the Constitution was to limit introduction of amendments to regular as opposed to special sessions, rather than to limit amendments to odd-numbered rather than even-numbered years or to unrestricted rather than restricted regular sessions. It was certainly foreseeable to the framers that the readily amendable provisions defining regular sessions in Article IV would be expanded to include sessions other than 60-day, odd-numbered-year sessions or to include sessions limited in subject matter. On the other hand, the Article XIX amendment process itself cannot be changed except through a general convention. Had the framers intended that the amendment process be limited to 60-day, odd-numbered-year sessions or regular sessions not limited in subject matter, they could have said so quite plainly in Article XIX.

{21} *Conclusion.* Both the body politic of the United States and the Constitution under which it is organized have proved themselves dynamic in meeting the challenges of changing times. We can expect no more and no less of the people of New Mexico and of their Constitution. With respect to the test of "two or more amendments—separate vote" and with respect to the meaning of "regular session," persuasive arguments have been made and authorities cited in this case in support of both sides. When, as here, competing interpretations or applications of the Constitution's amendment process do not present one singularly clear and plain mandate, it is to the people and their elected representatives that the Court must turn for the dynamic meaning which most comports with the purpose and intent of a Constitution in which the framers recognize that all political power is vested in and derived from a people who have the sole and exclusive right to govern themselves. The petition is denied.

{22} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
District Judge

ROZIER E. SANCHEZ,
District Judge

JAMES L. BROWN,
District Judge

JOE H. GALVAN,
District Judge, specially concurs.

GALVAN,
District Judge (specially concurring).

{23} I concur in the result and the analysis so ably expressed by Justice Ransom.

{24} However, since the opportunity may never again present itself and for the reason that thoughts and ideas harbored but not expressed become part of the cosmos without contributing to its order, I feel compelled to add the following. Needless to say, these observations are not in any way to be construed as a statement of policy or opinion of the Court, the Justices of the Court, or the District Judges sitting on the Court for this case. This is merely the opinion of the writer as a District Judge who by happenstance was selected to sit on this case and whose humble opinion is that extending an olive branch is always conducive to mutual understanding.

{25} Beyond cavil is the proposition that this case will have a far-reaching impact on the constitutional jurisprudence of this State. It is therefore appropriate for this Court to discuss the interrelationship among the "three equal and co-ordinate branches" of government. *Renck v. Superior Court*, 66 Ariz. 320, 326, 187 P.2d 656, 660 (1947).

{26} The salutary scheme of "checks and balances" does not contemplate a constant or recurring tension among the departments in accomplishing

their constitutional mandate. It does not envision power struggles or one-upmanship. To the contrary, there is a prohibition against any of the departments exercising any powers properly belonging to either of the others, except as provided by the Constitution. N.M. Const. art. III, Section I. Rather, like a well-oiled machine whose disparate parts independently but in harmony with each other accomplish their unified purpose, so the three departments together strive for one goal—good government.

{27} This Court does not intend to create law, but to interpret it; and in a spirit of solidarity invites the legislative branch to create the law but leave to the courts to say what the law is. Finally, I respectfully enjoin the executive branch in implementing the law to accord to its sister branches the deference and respect to which they are entitled. For government functions at its best when the three branches of government, while not in any way abrogating their constitutional prerogatives, operate on the basis of mutual respect and self-imposed restraint.

{28} As we rapidly approach the unimagined wonders of the twenty-first century, all public servants should be ever cognizant of the unalterable fact that a strong and independent judiciary, a conscientious and concerned legislature, and an efficient and effective executive make for what our Constitution represents—good government.

{29} The people of the State of New Mexico deserve, nay, demand nothing less.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-029

Filing Date: May 16, 1989

Docket No. 17,788

LONNIE K. MANLOVE,

Petitioner-Appellee,

vs.

GEORGE W. SULLIVAN, Warden,

Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Sandra Grisham, District Judge

Motion for Rehearing Denied July 3, 1989

Hal Stratton, Attorney General,
Patricia A. Gandert, Assistant Attorney General,
Santa Fe, New Mexico,

for Appellant.

Jacquelyn Robins, Chief Public Defender,
Susan Gibbs, Assistant Appellate Defender,
Santa Fe, New Mexico,

for Appellee.

OPINION

RANSOM, Justice.

{1} A petition for writ of habeas corpus was filed with this Court in 1986 by Lonnie K. Manlove. We remanded to the district court to conduct hearings on allegations that the transcript of his original trial had been altered and that this denied Manlove an adequate record on appeal. The State appeals from the district court's order granting a new trial for Manlove. We reverse the district court and deny the petition for writ of habeas corpus.

{2} In 1979, Manlove was tried and convicted of aggravated assault, kidnapping, and criminal sexual penetration. At his trial, the chief evidence against him was the testimony of the prosecutrix, along with circumstantial evidence that his car and a handgun in his possession were similar to those said to have been used in the commission of the crime. In his defense, petitioner presented alibi testimony by family and friends. On Friday afternoon, July 6, Tom Cherryhomes, Manlove's defense attorney, announced that a witness who had previously agreed to testify on behalf of his client had left town, and he was unable to serve her with a subpoena. He requested a continuance over the weekend to serve her.

{3} The witness, Elizabeth Pike, had been mentioned in a preliminary hearing in February, at which time Manlove was represented by the public defender's office. Cherryhomes took over the defense a little more than a month before trial and apparently did not learn of the existence of Pike until late June, when the transcript of the preliminary hearing was transcribed by his office. After interviewing Pike on July 3, Cherryhomes discovered that her testimony was potentially crucial to his client's defense. Pike, a former roommate of the prosecutrix, was expected to testify that the prosecutrix had concocted stories of abduction and molestation several times in the past, that these stories resembled the facts alleged in the present case, that she had once been forced to recant such a story, and that, in Pike's opinion, the prosecutrix was the type of person who would not hesitate to see an innocent person convicted of a crime.

{4} The trial judge, the Honorable Harvey Fort, criticized Cherryhomes for failing to subpoena Pike earlier. He noted that under the local rules of procedure, unless a witness was subpoenaed within ten days after notice of the trial date, the trial court at its discretion could refuse to grant a continuance to allow time to obtain the witness'

presence. He also noted that although Cherryhomes knew on July 3 he intended to call Pike as a witness, he had mailed notice to the district attorney's office rather than placing a phone call. This, Judge Fort believed, had prejudiced the prosecution by depriving it of the opportunity to examine the witness prior to trial.

{5} The trial court denied the request for a continuance, despite repeated attempts by Cherryhomes to persuade the court that Pike's testimony was crucial to his client's defense. Cherryhomes placed a criminal investigator from the district attorney's office on the stand to establish that the prosecution was aware of the existence of Pike and her relationship with the prosecutrix, and that Pike's testimony might cause problems for the State's case. Cherryhomes also presented testimony by Charles Wyman, an attorney with the public defender's office who knew Pike personally and had talked with her before she left town. Wyman testified that Pike left town out of fear the prosecutrix would harm her family or one of her animals if she testified for the defense.

{6} In spite of Cherryhomes' continued requests for a continuance and the testimony of these witnesses, Judge Fort adhered to his denial of the motion. The jury was held over late Friday evening to complete presentation of testimony and reconvened on Saturday to deliberate. It found Manlove guilty as charged.

{7} Manlove appealed, and the court of appeals affirmed the conviction in a 1980 memorandum opinion. His appellate attorney had not participated at the trial; and, before the court of appeals' decision was handed down, Manlove filed a *pro se* motion to amend the docketing statement, alleging the transcript of his trial failed to show that Judge Fort had denied the requested continuance because the judge was planning to go on vacation. This *pro se* motion was denied.

{8} Subsequent to his unsuccessful appeal, Manlove has pursued a number of claims for post-conviction relief. In 1982, he brought a habeas corpus action in Santa Fe District Court before Judge Scarborough, alleging with questionable logic that denial of the continuance for improper personal reasons unconstitutionally deprived him of effective assistance of counsel. During the course of the habeas corpus proceeding, Cherryhomes was called to the stand and presented uncontroverted testimony that Judge Fort gave as one of his reasons for denial of the requested continuance that he planned to go fishing. After hearing evidence and argument of counsel, Judge Scarborough filed detailed findings and conclusions. Included in his findings were that Judge Fort denied the requested continuance because he was going fishing, but that the testimony of Pike would have been inadmissible under the New Mexico rape shield law. *See* NMSA 1978, Section 30-9-16 (Repl. Pamp. 1984). Judge Scarborough concluded Manlove had effective assistance of counsel in 1979.

{9} *Posture of case on appeal.* In 1986, Manlove filed his present habeas corpus application directly with this Court, alleging the fishing trip comment found by Judge Scarborough in 1982 was not contained in the original trial transcript filed before the court of appeals in 1980, and that the alteration of the record denied him an adequate record for a full and fair appeal. He also renewed allegations of error in the denial of the continuance and ineffective assistance of counsel. We remanded his claim to the district court for a hearing on the allegation that the record had been altered and to determine whether he had been denied an adequate record for appeal. All other claims were dismissed. Judge Sandra Grisham was eventually designated to hear the case on remand. On September 24, 1987, she held a hearing attended by Manlove, his attorney, another inmate called as a witness for Manlove, and counsel for the State. On January 15, 1988, a second informal conference was held; however, a transcript of those proceedings is not in the appellate record for our review. On February 17, the State filed a motion for an additional evidentiary hearing, attaching affidavits by Judge Fort, his court reported, and the court clerk of Roswell. This motion and the attached affidavits were not accepted for filing because they violated a local rule of procedure, and the motion for an additional hearing was denied by operation of law when thirty days passed without action by the court.

{10} On May 27, 1988, Judge Grisham entered her findings and conclusions. Based on the evidence before her, Judge Grisham concluded the 1982 findings of Judge Scarborough were binding on the parties and found the statement reflecting that Judge Fort refused to grant the requested continuance because he was going fishing appeared nowhere in the record.[1] Judge Grisham concluded that Manlove had been denied an adequate record for appeal, reversed his conviction, and ordered a new trial. (We do not reach the question of whether the grant of a new trial was beyond the fact finding mandate of this Court.)

{11} On appeal, the State argues the Judge Grisham abused her discretion in refusing to hold an additional evidentiary hearing, and that her findings are internally inconsistent and unsupported by substantial evidence. Our analysis differs from that of the State; we conclude Judge Grisham's decision is based upon an erroneous application of the doctrine of issue preclusion, and we must decide the petition for writ of habeas corpus de novo on its merits.

{12} Issue preclusion from 1982 habeas corpus proceeding. In its docketing statement, the State raises as an issue whether Judge Grisham abused her discretion in accepting Judge Scarborough's finding relating to the fishing trip comment, while at the same time refusing to accept Judge Scarborough's conclusion that the evidence of witness Pike was inadmissible. In the State's brief-in-chief this issue is reframed in terms of alleged inconsistency between Judge Grisham's conclusion that the 1982 habeas corpus findings are binding (and not subject to review or rehearing) and her conclusion that Manlove was denied an adequate record for appeal. If Pike's testimony was inadmissible, as Judge Scarborough concluded, then Manlove was not entitled to any relief from the denial of a continuance to secure her presence, and deletion of the fishing trip comment did not prejudice the merits of his subsequent appeal.[2]

{13} At least against the state, we believe collateral estoppel principles may, at the discretion of a subsequent habeas corpus court, prevent relitigation of issues argued and decided on a previous habeas corpus petition if the resolution of such issues was necessary to the previous decision.[3] Yet, the

[1] Judge Grisham further found that voir dire, opening statements and closing arguments were missing. However, we do not consider this finding to be of consequence in the matter before us. Neither his attorney nor Manlove, *pro se*, sought inclusion of these portions of the proceedings in the transcript for original appeal to the court of appeals. *See State v. Moore*, 87 N.M. 412, 534 P.2d 1124 (Ct. App. 1975) (in determining whether new trial is to be granted for inability to produce a transcript, three factors are weighed: whether appellant has complied with all procedural requirements in order to perfect appeal, whether inability to obtain transcript is without fault on the part of appellant, and whether substitute or alternate record exists).

[2] NMSA 1978, Section 30-9-16 (Repl. Pamp. 1984), provides that, in a prosecution for a sexual offense, evidence of the victim's past sexual behavior, opinion evidence thereof, or evidence of reputation is inadmissible unless the court finds that the evidence is material to the case and its probative value outweighs its prejudicial impact. Reviewing the record, we believe that a substantial portion of Pike's testimony did not constitute evidence of sexual conduct; rather, the testimony anticipated was that the prosecutrix in the past had made up stories of rape and abduction that resembled the facts alleged in this case, that she had once recanted such a story, and that, in Pike's opinion, she was the sort of person who would willingly see an innocent man put in jail. This evidence went to the prosecutrix's proclivity for truthfulness and was relevant both to impeach her credibility and as direct evidence in the petitioner's fabrication defense. *See* SCRA 1986, 11-404(A)(2); 11-608(A); *see also State v. Ross*, 88 N.M. 1, 3, 536 P.2d 265, 267 (Ct. App. 1975) (defining collateral issue doctrine). Moreover, although we do not agree that the testimony was closely enough related to sexual conduct to be barred under Section 30-9-16, the discretion of the trial court to exclude such evidence must be weighed against a criminal defendant's constitutional right to confront witnesses. *See Olden v. Kentucky*, 57 U.S.L.W. 3410, 109 S. Ct. 480, 102 L. Ed. 2d 513 (per curiam) (abuse of discretion to prevent impeachment of prosecutrix on cross-examination, to show that she fabricated rape story to prevent boyfriend from discovering she willingly engaged in sexual intercourse with an acquaintance, on grounds that race of boyfriend might inflame jury passions). *See also, State v. Anderson*, 211 Mont. 272, 283-84, 686 P.2d 193, 199-200 (1984) (admission of evidence of prior false accusations in sex crime case does not contravene social policy of protecting victims and is necessary to afford accused full worth of constitutional right to confront witnesses); *Hughes v. Raines*, 641 F.2d 790, 792 (9th Cir. 1981) (habeas corpus action); *People v. Simbolo*, 188 Colo. 49, 532 P.2d 962 (1975); *People v. Hurlburt*, 166 Cal. App. 2d, 333 P.2d 82 (1959).

[3] There is no compelling reason to limit application of issue preclusion principles against the state. *See In re Hochberg*, 2 Cal. 3d 870, 471 P.2d 1, 87 Cal. Rptr. 681 (1970) (when state deliberately bypassed opportunity to present evidence at hearing on habeas corpus petition, state not entitled to second evi-

findings and conclusions of Judge Grisham give us no clue as to whether she exercised any discretion in stating that the fishing trip finding of the previous habeas corpus court was binding and not subject to review or rehearing. In any event, she made no findings as to the applicability of the doctrine of preclusion or the countervailing equities. *See Silva v. State*, 106 N.M. 472, 476, 745 P.2d 380, 384 (1987) (when movant for application of collateral estoppel has introduced sufficient facts for court to rule on applicability of doctrine, decision whether to apply doctrine in face of countervailing equities is left to discretion of trial court).

{14} Judge Grisham has since recused herself from further proceedings, and the interest of this Court in the final resolution of this matter militates against still another remand for fact finding purposes. Judge Grisham apparently took no new evidence on whether that trial court stated the continuance was refused because he had plans to go fishing. We believe Judge Grisham could consider the previous habeas corpus testimony regarding the fishing trip statement; but we do not believe the finding of Judge Scarborough should have preclusive effect because it was only one of several possible bases for denying the ineffective assistance of counsel claim, and in that context the State well could have considered the allegation a non-issue or a logical basis for finding no ineffective assistance of counsel. (The fishing trip allegation was uncontested by the State.) While there is authority for the proposition that, when any one of two or more findings of ultimate fact may have formed the basis for a prior determination, each may be given collateral estoppel effect in a subsequent lawsuit, *In re Westgate-California Corp.*, 642 F.2d 1174 (9th Cir. 1981); *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978); *Irving National Bank v. Law*, 10 F.2d 721 (2d Cir. 1926) (L. Hand, J.); *General Dynamics Corp. v. American Telephone & Telegraph Co.*, 650 F. Supp. 1274 (D.C. Ill. 1986), we believe that better rule is set forth in Restatement (Second) of Judgments § 27 comment i (1983);

> *Alternative determination by court of first instance*. If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.

{15} *Presumption of prejudice, and standard of review.* Article VI, Section 2 of the New Mexico Constitution protects a criminal defendant's right to appeal; instrumental to this right is a record adequate to allow the defendant to demonstrate the

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dentiary hearing and could not argue that if court had found facts its findings would have favored state). Habeas corpus proceedings themselves are afforded full res judicata and collateral estoppel effect in subsequent non-habeas corpus proceedings. *Williams v. Ward*, 556 F.2d 1143 (2d Cir. 1977) (judgment in habeas corpus can effect issue preclusion in state prisoner's civil rights action for deprivation of rights in federal court if issue was litigated and decision was on merits); *cf. State v. Nance*, 77 N.M. 39, 419 P.2d 242 (1966) (state not estopped from relitigating issue of voluntariness of confessions by defendants notwithstanding finding of habeas corpus court that confessions were coerced when said findings were not necessary to the decision of the habeas corpus court). *See generally Silva v. State*, 106 N.M. 472, 745 P.2d 380 (1987); *Adams v. United Steelworkers of America, AFL-CIO*, 97 N.M. 369, 640 P.2d 475 (1982); *Edwards v. First Fed. Sav. & Loan Ass'n of Clovis*, 102 N.M. 396, 696 P.2d 484 (Ct. App. 1985).

Habeas corpus jurisprudence, however, may well limit the application of principles of finality against a petitioner. The writ of habeas corpus is in the nature of a collateral attack on a judgment upon which commitment has issued. *Orosco v. Cox*, 75 N.M. 431, 405 P.2d 668 (1965). Its function is not simply to review the record for errors of the trial court, *see Smith v. People*, 71 N.M. 112, 376 P.2d 54 (1962); rather, habeas corpus inquiry is directed to the fairness of the entire proceeding, and a writ will lie when violations of the petitioner's constitutional rights rendered the judgment void by depriving the court of its jurisdiction. *See 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).

Given the historical role of the writ of habeas corpus as the protector of individual rights, principles of finality have rarely been applied with the same force in habeas corpus proceedings as in ordinary litigation. L. Yackle, *Post-conviction Remedies* § 124 (1981). "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States*, 373 U.S. 1, 8, 83 S. Ct. 1068, 1073, 10 L. Ed. 2d 148 (1963); *see also Adamson v. Ricketts*, 758 F.2d 441, *rehearing granted*, 764 F.2d 1343 (9th Cir. 1985), *cert. granted*, 479 U.S. 812, 107 S. Ct. 62, 93 L. Ed. 2d 21, *reversed*, 483 U.S. 1, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987) (res judicata not absolute bar in habeas corpus petitions); *Johnson v. Lumpkin*, 769 F.2d 630 (9th Cir. 1985), *on remand*, 654 F. Supp. 592 (S.D. Cal. 1987) (Habeas corpus petitioner not collaterally estopped from raising grounds previously dismissed with prejudice); *Johnson v. Wainwright*, 702 F.2d 909 (11th Cir. 1983) (doctrine of res judicata no applicable to habeas corpus relief).

existence of error in the original trial. *State v. Moore*, 87 N.M. 412, 534 P.2d 1124 (Ct. App. 1975). Accordingly, if the fishing trip statement was so substantial and significant that its deletion foreclosed a potential avenue of appeal, a finding that the record had been so altered gives rise to a presumption of prejudice to Manlove's right of appeal. *See United States v. Taylor*, 607 F.2d 153 (5th Cir. 1979), *appeal after remand*, 631 F.2d 419 (1980); *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977); *cf. State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979) (when trial court's order prevented defendant from talking to witness, defendant needed to show no prejudice beyond a reasonable possibility that an avenue of defense was thus made unavailable). Viewing the record, we do not find incredible Cherryhomes' 1982 testimony; therefore, for purposes of our analysis, we assume a fishing trip comment was made, and we accept a presumption of prejudice to Manlove's right of appeal.

{16} When a defendant raises a reasonable possibility of error involving his constitutional rights, the prosecution must rebut the resulting presumption of prejudice beyond a reasonable doubt. *State v. Jones*, 80 N.M. 753, 461 P.2d 235 (Ct. App. 1969); *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *cf. State v. Zamora*, 91 N.M. 470, 575 P.2d 1355 (Ct. App.), *cert. denied*, 91 N.M. 491, 576 P.2d 297 (1978); *State v. Spearman*, 84 N.M. 366, 503 P.2d 649 (Ct. App. 1972) (statutorily created procedural right). The decision whether this presumption has been overcome is left to the sound discretion of the reviewing court. *See State v. Sacoman*, 107 N.M. 588, 762 P.2d 250 (1988). In deciding whether the state has overcome the presumption of prejudice to the right of appeal, the reviewing court must weigh the possible significance of the missing material to a defendant's right of appeal against such facts proffered by the state as would mitigate or eliminate its significance. That is the issue and balancing task with which this Court is now presented.

{17} In our balancing role, we consider affidavits by Judge Fort, his court reporter, and the court clerk of Roswell that were attached to the State's motion for an additional evidentiary hearing. *Cf. Orosco v. Cox*, 75 N.M. 431, 405 P.2d 668 (1965) (in habeas corpus proceeding, court may receive evidence outside the record). The affidavit of the court reporter affirms that the transcript on appeal was a true and correct transcription of the proceedings held, and that, on Monday, July 9, the court reporter accompanied Judge Fort to Roswell, where Judge Fort heard nineteen separate matters. The clerk of the district court in Roswell affirmed that Judge Fort held court there on Monday, July 9, and she attached to her affidavit certified copies of eight separate orders and judgments signed by Judge Fort and filed with the clerk on that date. In his affidavit, Judge Fort affirmed one of the reasons for denying the continuance was the matters to be heard in Roswell on Monday, July 9, as well as jury trials scheduled for July 10 and July 11. Judge Fort categorically denied the fishing trip statement.

{18} Denials of continuance not reviewed on same grounds previously decided. Before venturing to assess the significance of the deleted statement from the transcript of Manlove's trial, we believe it is appropriate to discuss the reasons given on the record for denial of the continuance. The denial of the requested continuance on the grounds that defendant violated local rules assuring timely subpoenas and notice of witnesses has been decided on appeal to have been proper. Although we may question the propriety of that decision, *see McCarty v. State*, 107 N.M. 651, 763 P.2d 360 (1988) (preclusion of important defense testimony not justified as sanction of choice when violation of procedural rule not willful, state was not prejudiced, and preclusion was not necessary to protect the integrity of the adversary system or the efficient administration of justice), we believe principles of finality preclude review of this issue. In *Sanders v. United States*, 373 U.S. 1, 15, 83 S. Ct. 1068, 1077, 10 L. Ed. 2d 148 (1963), the Supreme Court held that federal courts may give preclusive effect to previous determinations adverse to a habeas corpus petitioner only is (1) the same ground presented in the subsequent application was determined adversely in the previous proceeding; (2) the prior determination was on the merits; and (3) reaching the merits in the subsequent petition would not serve the ends of justice. In *Kuhlmann v. Wilson*, 477 U.S. 436,

452-53, 106 S. Ct. 2616, 2626, 91 L. Ed. 2d 364 (1986), a four Justice plurality of the Supreme Court interpreted the phrase "the ends of justice" to require a balancing of a prisoner's interest in relitigating claims of constitutional violations with the state's interest in the finality of criminal judgments, including the efficient administration of justice and the state's legitimate interest in punishment and rehabilitation. Writing for the plurality, Justice Powell concluded federal courts should be required to review habeas corpus claims that raise issues identical to those previously decided when allegations of constitutional violations are supplemented by a colorable claim of innocence. *Id.* at 454, 106 S. Ct. at 2627. Such a showing may be made by demonstrating that in light of all the probative evidence, including evidence alleged to have been wrongfully excluded, the trier of fact would have entertained a reasonable doubt of guilt. *Id.* at 454-55, n.17, 106 S. Ct. at 2627, n.17.

{19} In addition to the factors noted above, petitioner's claim in *Kuhlmann*, like Manlove's claim here, challenges a decision that is questionable in light of presently accepted legal principles. *See Wilson v. Henderson*, 742 F.2d 741 (2d Cir. 1984), *rev'd sub. mon. Kuhlmann v. Wilson*. Although *Kuhlmann*, which interpreted 28 U.S.C. Section 2244(b), is not binding on this Court, the plurality's consideration of the conflicting interests of the state and a habeas corpus petitioner are important to our rationale. Here, the failure to grant a continuance, although depriving the defendant of an opportunity to present evidence probative of the prosecutrix's veracity, does not so strongly implicate the reliability of the original judgment that we believe it necessary to once again review this claim on its merits. In this regard, we view the "reasonable doubt of guilt" standard as akin to the miscarriage of justice standard that we apply in determining fundamental error. *See State v. Escamilla*, 107 N.M. 510, 760 P.2d 1276 (1988).

{20} Moreover, we do not believe we now can second-guess the trial court's observation that Cherryhomes' failure to comply with the local rules of procedure rose to a level of willfulness. *See McCarty*, 107 N.M. at 673, 763 P.2d at 362. We note under the balancing test of *McCarty* it is also relevant that the prosecution did not discover Pike was to be called as a witness until the day trial began, and that the court's calendar would have been upset by a continuance. While the eleventh-hour nature of the request for the continuance may have been justified to some extent by Cherryhomes' late entry into the case, *see State v. March*, 105 N.M. 453, 734 P.2d 231 (1987), on balance we do not conclude the error, if any, in refusing to grant the continuance rose to the level of manifest injustice calling for our reconsideration of petitioner's claim.

{21} *Conclusion.* We, therefore, consider only the significance of the deleted fishing trip statement. Did the court have a motivation for denying the continuance that could have tainted the validity of the procedural sanction applied? Or, was the statement one to be disregarded? We believe it was the latter. *See State v. Saavedra*, 108 N.M. 38, 766 P.2d 298 (1988) (the denial of a one-week continuance and the granting of a mistrial were based on compelling grounds independent of vacation plans alluded to by the court and disregarded on appeal).

{22} We hold that, on balance, deletion of the fishing trip statement (or "vacation" statement as it was posited to the court of appeals in Manlove's motion to amend the docketing statement), which for the purpose of this balancing test we assume to have in fact been made, when considered with the evidence of court activity in Roswell the following Monday, did not significantly affect defendant's right of appeal, and that any presumption of prejudice has been overcome.

{23} The petition is denied.

{24} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

JOSEPH R. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-039

Filing Date: June 22, 1989

Docket No. 17,863

YATES PETROLEUM CORPORATION, a New Mexico corporation,

Plaintiff-Appellant,

vs.

W. G. KENNEDY and BETTY L. KENNEDY, his wife,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
James L. Shuler, District Judge

Dickerson, Fisk & Vandiver,
Rebecca L. Reese,
Artesia, New Mexico,

for Appellant.

McCormick, Forbes, Caraway & Tabor,
John M. Caraway,
Michael E. Dargel,
Carlsbad, New Mexico,

for Appellees.

OPINION

RANSOM, Justice.

{1} Yates Petroleum Corporation (Yates) appeals from the judgment of damages awarded W. G. and Betty L. Kennedy (Kennedy) following a bench trial in a condemnation proceeding. This case is receiving appellate review for the third time. *See Kennedy v. Yates Petroleum Corp.*, 104 N.M. 596, 725 P.2d 572 (1986); *Kennedy v. Yates Petroleum Corp.*, 101 N.M. 268, 681 P.2d 53 (1984). At issue here is whether the trial court erred in the method employed to calculate just compensation, and, if not, whether the judgment awarded is supported by substantial evidence.

{2} On February 16, 1983, Yates filed a proceeding to condemn an easement for a thirty-foot right-of-way for the continuing operation and maintenance of a natural gas pipeline that traverses Kennedy's ranchland for a distance of 9,240 feet. The easement burdens approximately 6.38 acres. The pipeline had been in existence since 1972 and preceded Kennedy's ownership of the ranch by three years. This action is a consequence of Yates' failure to record an easement acquired from the prior owner.

{3} Three commissioners were appointed to assess just compensation. Yates objected to the commissioners' report and appraisal; but, following a hearing, the trial court confirmed the damage award. Pursuant to NMSA 1978, Section 42A-1-21 (Repl. Pamp. 1981), Yates demanded de novo review of the compensation award. It waived trial by jury. The case was tried to the same judge who had confirmed the commissioners' report and judgment.

{4} At trial, Yates presented its evidence first and called an expert real estate appraiser as one of its witnesses. The expert testified that the highest and best use of this property was for ranching, the fair market value of the ranch before the taking of the easement was the same as after the taking, and the fair market value of property comparable to Kennedy's was $55 to $165 per acre.

{5} In presenting his case-in-chief, Kennedy took the stand and recounted problems he had experienced with dust created by traffic along a tract road that ran parallel to the pipeline within the easement right-of-way. Yates' employees would travel this road at least once a week to check the condition of the pipeline. Kennedy testified that

his livestock would not graze on grass that was covered by dust raised by this traffic. While he made no claim for special damages to which he might be entitled (as not duplicative of the statutory measure of damages for the property actually taken, *see* SCRA 1986, 13-705), Kennedy opined that, based upon unspecified past and prospective damage to his cattle operation, the difference in the value of his ranch before the taking compared to after the taking was $40,000. Kennedy testified:

> Q. [D]o you have an opinion as to the *value per acre* of your deeded lands in the area where the taking occurred?
>
> A. Well, *not really*. I didn't set a value on it because I wasn't ready to sell any of it.
>
> Q. Let me ask you this, Mr. Kennedy. Do you have an opinion as to the *difference in value* of your ranch before the taking versus after the taking as of February 1983 in damages?
>
> A. Well, considering all the traffic and the dust, and that kind of stuff that I've put up with on that pipeline * * * I would say more in the neighborhood of $40,000.
>
> Q. Insofar as in *diminution in value* occasioned by the taking?
>
> A. Yes. I've *lost considerable income from the dust* that has been put on the grass, and the *cattle will not graze it until it's washed off*; they just go to the other areas. And it's been *a pretty damaging factor*.
>
> . . . .
>
> A. [I]t's hard to pick a figure and say, "Well, *this is a fair figure for the damage that we're going to do so many years down the road, or what we've already did in the pas***t.**" * * * *
>
> THE COURT: What factors did you use in coming up with the $40,000?
>
> THE WITNESS: Well,—
>
> THE COURT: What did you take into account?
>
> THE WITNESS: The years of use that they have used this pipeline and run up and down it consistently, and the fact that no other pipeline that I've got or anybody else has got in the area, that I know of, has got pits on it that are a possibility for livestock getting in it—and I've had Yates dig other pits that I've had cattle get in and get killed, and all this kind of stuff. And it's kind of—I don't know, *you've just got to pick something out of the blue sky* that you feel like is a just figure. And so that's where I come up with it; I just—
>
> . . . .
>
> THE WITNESS: We've had, you know, we've had considerable damage, and we'll continue to have it as long as they use it. And *if we can stop that usage*, well, *my guesstimate would be lower*.

(Emphasis added.)

{6} Mr. Fred Collins, one of the commissioners called as a witness by Kennedy, corroborated that traffic on the easement tract road creates dust that settles on the grass preventing the livestock from grazing. He gave his opinion that, for grazing purposes, the land injuriously affected by the dust would cover 300 feet in addition to the easement, and that the dust can be blown west a quarter of a mile (1,320 feet). On cross-examination, however, Collins conceded that he had no comprehensive knowledge of the traffic on the tract road and could only testify that "there's some dust."

{7} In the court's second amended findings of fact and conclusions of law, the trial judge made the following findings:

> 11. As a result of the operation, and maintenance of the pipeline, dust is cast into the air in an area approximately 1/4 mile wide

> for the length of the pipeline. This dust interferes with, and consequently greatly diminishes the value of the property, for ranching purposes, because cattle won't eat vegetation with a heavy layer of dust. There has been an injurious effect and "taking" of a strip of land owned by the Plaintiff 1/4 mile wide.
>
> 12. The fair market value of the land "taken" for ranching purposes is $165.00 per acre.
>
> 13. As mandated by 42A-1-26 NMSA 1978, Kennedy has suffered total damages resulting from the taking by Yates equal to the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking in the sum of $46,200.00.

{8} *Burden of proof.* First, Yates complains that the trial court improperly allocated the burdens of proof to establish damages in this case. Following SCRA 1986, 13-701, the court required both Kennedy and Yates to prove their respective contentions by the greater weight of the evidence. Yates maintains that Kennedy had the burden of proving that substantial damages resulted from Yates' taking of the easement. In ruling that Yates should prove its contentions by a preponderance, Yates argues that the trial court improperly required it to prove that the condemnation caused only nominal damages.

{9} In his special concurrence in *Transwestern Pipe Line Co. v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961), Justice Noble stated that the party appealing the commission's judgment has the burden to prove damages or the lack of it. *Id.* at 462, 367 P.2d at 947 (Noble, J., specially concurring). The proposition was stated without any citation to authority and is at odds with the *Yandell* majority's holding that, once confirmation of the commissioner's report is appealed for trial de novo, the report as well as the act of confirmation become functus officio. *Id.* at 453, 367 P.2d at 941. Although the trial de novo is not the beginning of a new action, it is a new and distinct adjudication that requires a fresh presentation of evidence.

{10} In this posture, it is the landowner who has the burden to substantiate by a preponderance his claim of damages. *See* 5 J. Sackman, *Nichols on Eminent Domain* § 18.5 (3d ed. 1985). Regardless of being denominated the defendant, it is the landowner who opens and closes the evidence, as well as the arguments. *See State ex rel. State Highway Comm'n v. Sherman*, 82 N.M. 316, 318, 481 P.2d 104, 106 (1971). After the landowner presents his evidence of damages, the condemnor has three options: (1) under appropriate circumstances, it can move for a directed verdict; (2) it can go forward to discredit the landowner's evidence; and (3) it can offer to prove affirmatively by a preponderance an alternative amount of damages. In the latter instance, the jury would be instructed on the statement of the case pursuant to SCRA 1986, 13-701. Because both Kennedy and Yates structured their case on alternative theories of damages, the trial court here did not err in assigning the burdens of proof as it did. However, we note that Kennedy should have been first to present evidence.

{11} Measure of damages. Yates argues that the trial court failed to apply the proper method for determining just compensation under the circumstances of this case. Under the Eminent Domain Code (NMSA 1978, Sections 42A-1-1 to 42A-1-34 (Repl. Pamp. 1981 & Cum. Supp. 1988)), damages for a partial taking are measured in accordance with Section 42A-1-26. Where there is a partial taking of property,

> the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking. In determining such difference, all elements which would enhance or diminish the fair market value before and after the taking

> shall be considered even though some of the damages sustained by the remaining property, in themselves, might otherwise be deemed noncompensable. Further, in determining such values or differences therein, elements which would enhance or benefit any property not taken shall only be considered for the purpose of offsetting any damages or diminution of value to the property not taken.

§ 42A-1-26. This method of calculating damages is called the "before and after" rule. The rule is a recognition that, in addition to compensation for property actually taken, the landowner should be compensated for any loss of value suffered by the remaining property because of the condemnation of a particular portion. *See State ex rel. State Highway Dep't of N.M. v. Strosnider*, 106 N.M. 608, 611, 747 P.2d 254, 257 (Ct. App. 1987) (rule's purpose is to compensate for any diminution in the fair market value of the remaining property as a result of the taking); *City of Albuquerque v. Chapman*, 76 N.M. 162, 413 P.2d 204 (1966) (landowner entitled to recover the amount his property has depreciated by a taking of a portion).

{12} In *Chapman*, the Court also stated that the rule allows the finding of no damages if there was no depreciation in the fair market value of the property as a result of a taking of a portion. 76 N.M. at 166, 413 P.2d at 206; *Board of Comm'rs v. Gardner*, 57 N.M. 478, 260 P.2d 682 (1953) (holding that benefits accruing to remaining property shall be considered in calculating damages for the value of the part taken as well as any damages to the part remaining). In 1973, the legislature supplemented the "before and after" rule (N.M. Laws 1968, Ch. 30, § 1) to read as follows: "Further, in determining such values or differences therein, elements which would enhance or benefit any property not taken shall only be considered for the purpose of offsetting any damages or diminution of value to the property not taken." N.M. Laws 1973, Ch. 384, 1 (codified at NMSA 1978, § 42-1-10). In 1981, the legislature repealed Section 42-1-10, *see* N.M. Laws 1981, Ch. 125, § 62, but the successor statute, Section 42A-1-26, was a reenactment of the rule and retained the supplemental language.

{13} We believe the supplemental language nullifies the holdings in *Chapman* and I that no damages exist when the fair market value of the remaining property after the taking is equal to or exceeds the fair market value of the entire property before the taking. If the remaining land is enhanced in value as a result of the project requiring the condemnation, that enhancement can only be used to offset damages to the value of the remaining property. § 42A-1-26. Recognized alternatives to the "before and after" rule compute damages by initially determining the value of the land taken and then adding any net damage that results to the remainder after a setoff of benefits. 4A J. Sackman, *Nichols on Eminent Domain* § 14.05 (3d ed. 1985). By modifying the "before and after" rule to allow accrued benefits to be set off only against damages to the property remaining, the legislature has adopted a "before and after" alternative for situations when the remainder is worth as much or more after the taking than the entirety was worth immediately before the taking. When there is not substantial evidence to demonstrate that the property has been diminished in fair market value by reason of a partial taking, the "before and after" rule loses its relevancy and the proper alternative measure of compensation would be the fair market value of the property actually taken.

{14} *Inapplicability of "unity rule."* Yates argues that the trial court erred in calculating damages without reference to the value of Kennedy's entire property, a ranch encompassing 14,749 acres. Approximately 4,000 acres are deeded lands owned in fee as to the surface. The remaining land is leased by Kennedy from the State of New Mexico and the federal Bureau of Land Management, or is deeded to other private individuals. The fee lands, state and federal leases and permits, and lands deeded to other private individuals are scattered throughout the ranch in a "checkerboard" fashion. The pipeline easement touches upon the western boundary of three noncontiguous sections of Kennedy's deeded property. At issue is what constitutes Kennedy's

entire property for purposes of measuring the diminution, if any, in the fair market value of his property due to the imposition of the pipeline easement.

{15} Yates contends that under the unity rule the entire 14,749-acre ranch should be regarded as a single tract. The unity rule is applied to ascertain whether two or more parcels of property constitute a single larger tract for the purpose of calculating the fair market value of the property taken or the severance damages to the remaining land that is not subject to condemnation. *State ex rel. Highway Comm'n v. Gray*, 81 N.M. 399, 400-01, 467 P.2d 725, 726-27 (1970). To apply the unity rule, generally the following three factors should be present: physical contiguity, unity of use, and unity of ownership. *Id.* The combined presence of all three factors, however, is not a prerequisite to the rule's application. *Strosnider*, 106 N.M. at 611, 747 P.2d at 257.

{16} Yates maintains that the entire property is used as one unified ranching operation, notwithstanding the diverse ownership interests represented within the ranch's boundaries. To support its contention, Yates points to the fact that Kennedy has a fence encircling all 14,749 acres and that the ranch is run and accounted for under a single set of books. Because Kennedy uses all the acreage to raise his livestock, Yates argues that this unity of use should be determinative in applying the unity rule and, for purposes of measuring damages due to a partial taking, the entire property constitutes 14,749 acres. Because Kennedy presented no evidence establishing the fair market value of his entire ranch before the easement and the fair market value after the easement's placement, Yates concludes that the trial court erred as a matter of law in calculating Kennedy's damages.

{17} We are not persuaded by Yates' argument or its authority. *See Texas Elec. Serv. Co. v. Linebery*, 327 S.W.2d 657, 662 (Tex. Civ. App. 1959) (trial court did not err in assuming that 22,401 acres of the condemnee's land did constitute a single tract). The purpose of the unity rule is to ensure that the landowner is justly compensated by awarding him any damages that result from condemning a portion of his property that is integral to the value of the highest and best use of the remainder. *See* 4A J. Sackman, *Nichols on Eminent Domain* § 14.26 (3d ed. 1985). The entire property for purposes of before and after valuation can only be that property the value of which is demonstrated by substantial evidence to have been affected by the partial taking. It is a simple question of relevance and materiality. Because the only evidence to suggest the pipeline easement affected the value of Kennedy's ranch was limited to that acreage physically impacted by the easement, the entire property for purposes of ascertaining damages in this case would include only such land as was physically impacted.

{18} *Substantial evidence.* In reviewing the record, it is apparent that the judgment cannot stand because there is no substantial evidence to support the trial court's findings as to diminution of value to land physically impacted beyond the 6.38 acres burdened by this easement, i.e., the portion actually taken. *See Getz v. Equitable Life Assurance Soc'y*, 90 N.M. 195, 198, 561 P.2d 468, 472 (trial court will be reversed if its findings, which have been properly attacked, are not supported by substantial evidence), *cert. denied*, 434 U.S. 834, 98 S. Ct. 121, 54 L. Ed. 2d 95 (1977). We do not doubt the existence of dust along the tract road or that dust could have a deleterious effect on grazing. However, we are unable to discern evidence sufficient that a reasonable mind might accept as adequate to support the conclusion that a quarter-mile strip of land for the length of 9,240 feet has been effectively removed from pasturage due to the dust cast into the air from Yates' traffic on the easement tract road. *See Cave v. Cave*, 81 N.M. 797, 799, 474 P.2d 480, 482 (1970) (defining substantial evidence).

{19} Only Collins gave testimony regarding the amount of dust coverage in terms of distance. However, his estimate was based purely on speculation as he admitted that he was not fully familiar with traffic patterns on the tract road. Kennedy stated that from his ranch house he could see dust rise like a curtain along the road and the dust would not settle quickly. Kennedy

did not testify to any specific amounts of acreage affected by the dust. Furthermore, he acknowledged that at the time of the condemnation action the traffic causing the dust had "slowed down to a considerable degree."

{20} There is no evidence that easement traffic generated dust that covered 280 acres sufficiently to deter all grazing by livestock, that there was any overgrazing of remaining pastures, or as to the frequency and extent to which the affected pasturage was rehabilitated by rain. Without more, testimony as to blowing dust cannot reasonably substantiate a finding that the operation and weekly maintenance of a pipeline easement, which physically burdens 6.38 acres, injuriously affects an additional 273.62 acres to the point of rendering the additional acres valueless or diminishing their value in any reasonably specified amount.

{21} When the landowner fails to present substantial evidence to support a finding of a diminution in the fair market value of the remaining property as a result of a partial taking, as previously discussed, just compensation should equal the fair market value of the property actually taken. The trial court found that $165 per acre was the fair market value of the ranchland taken by Yates for its easement and this amount is supported by substantial evidence. Consequently, Kennedy should be awarded compensation equal to $165 multiplied by the number of acres condemned for the easement.

{22} The judgment is reversed and the case remanded for the trial court to enter a judgment consistent with this opinion.

{23} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

TONY SCARBOROUGH,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-040

Filing Date: June 22, 1989

Docket No. 17,197

LARRY JESSEN and MICHAEL McCOUN,

Plaintiffs-Appellees,

vs.

NATIONAL EXCESS INSURANCE COMPANY, a California corporation, and RUTH K. CORBETT, Individually,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Philip R. Ashby, District Judge

Motion for Rehearing Denied August 8, 1989

Civerolo, Hansen & Wolf,
W. R. Logan,
Albuquerque, New Mexico,

for Appellants.

Roy A. Anuskewicz, Jr.,
Albuquerque, New Mexico,

Turner W. Branch,
Albuquerque, New Mexico,

for Appellees.

OPINION

RANSOM, Justice.

{1} Seeking compensatory and punitive damages, Larry Jessen and Michael McCoun sued National Excess Insurance Company (National) for breach of contract and bad faith failure to pay a first-party claim. The jury returned a verdict in favor of Jessen and McCoun, awarding $25,000 compensatory and $75,000 punitive damages against National. The trial court awarded attorney fees and costs to Jessen and McCoun. National appeals. We affirm.

{2} Jessen and McCoun first were covered as insureds by National when they rented a Cessna 310 airplane in February 1985. To be covered under the lessor's policy with National, Jessen was required to provide information about his experience as a pilot. By telephone, Jessen told Ruth Corbett, an agent for National, that he had a current medical certificate and approximately 1200 hours total flying time. After Jessen took a successful check ride in the Cessna 310, he and McCoun were added to the lessor's owner policy.

{3} In March 1985, Jessen and McCoun decided to buy the Cessna 310. Jessen telephoned Corbett and told her that he and McCoun wanted to continue the same coverage the previous owners had under their National policy. The policy provided $25,000 coverage for physical damage to the airplane. On April 1, Jessen went to Corbett's office, signed an application, and paid one-third of the first year's premium. Two days later, with McCoun as his passenger, Jessen crashed the airplane on takeoff from a dirt airstrip at Ghost Ranch, New Mexico. Although Jessen and McCoun received only minor injuries, the airplane was destroyed. Jessen and McCoun took nothing with them from the airplane after it crashed; but within ninety minutes two Forest Service employees searched the airplane and retrieved a blue bag, which they left at the Ghost Ranch museum for safekeeping.

{4} National hired an independent insurance adjuster, Bill McManaman, to investigate the accident. McManaman searched for but was unable to locate the pilot logbook, which Jessen claimed was in the blue bag at the time of the crash. The logbook contained the only single

source verifying that Jessen had logged 1200 flight hours. It was never recovered.

{5} Both Jessen and McCoun gave sworn statements about the circumstances of the crash. Jessen signed an Airman's Records Release authorizing McManaman to obtain copies of his records from the FAA. Jessen, through his attorney, also offered to give National an affidavit that the 1200 flight hours he stated in his application for insurance from National was an accurate representation of the hours recorded in the missing pilot's logbook.

{6} On October 1, 1985, National offered to settle the claim for $11,000. Jessen and McCoun refused the settlement offer and, on December 27, 1985, filed this lawsuit against National.[1] When the case came to trial two years after the crash of the airplane, National still had neither denied nor paid Jessen and McCoun's claim.

{7} The jury was instructed, to establish the claim of breach of contract, Jessen and McCoun had the burden of proving National failed to pay the claim as required by the terms of the policy and in deviation from acceptable standards of the insurance industry. The jury also was instructed, to establish the claim of bad faith,[2] Jessen and McCoun had the burden of proving National's failure to pay the claim within a reasonable period of time. Bad faith was defined as a refusal to pay or delay in paying the claim for frivolous or unfounded reasons. National does not contest the compensatory award in the amount of physical damage covered by the policy, to which plaintiffs limited their claim under both contract and tort. It argues, however, that the evidence did not warrant an instruction on punitive damages.

{8} *Instruction on punitive damages not error.* Bad faith supports punitive damages upon a finding of entitlement to compensatory damages. *See United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 485, 709 P.2d 649, 654 (1985). Arguably, if it is conceded that substantial evidence supported instructions on compensatory damages for bad faith, then it supported instructions on punitive damages for bad faith. Yet, here, punitive damages were sought exclusively for reckless or grossly negligent conduct, and we limit our considerations to evidence of such conduct. As we discuss below, if supported by substantial evidence, such conduct would justify an award of punitive damages under either the contract or tort claim. Further, under either contract or tort, as the court instructed the jury in this case, an insurer has a right to refuse a claim without exposure to punitive damages if it has a reasonable ground to believe a meritorious defense exists to the claim. *Id.; State Farm Gen. Ins. Co. v. Clifton,* 86 N.M. 757, 527 P.2d 798 (1974).

{9} National argues it acted reasonably in delaying payment or denying the claim until it could verify Jessen had the 1200 hours of flight time as represented. We believe insofar as National argues it acted reasonably, it attempts to have this Court reweigh matters decided by the jury, and this we decline to do. *See Hort v. General Elec. Co.*, 92 N.M. 359, 588 P.2d 560 (Ct. App. 1978), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1979); *Curtiss v. Aetna Life Ins. Co.*, 90 N.M. 105, 107, 560 P.2d 169, 171 (Ct. App.), *cert. denied*, 90 N.M. 7, 588 P.2d 619 (1976).

{10} McManaman testified that, in the two years between the crash and trial, he spent only seventy hours investigating Jessen and McCoun's claim. Moreover, despite the fact McManaman knew of Jessen's previous flying experience and knew of potential sources of information that might have allowed him to verify the number of

[1] Corbett was joined as a defendant under a negligence claim. There is no appeal from the jury's verdict in her favor.

[2] This Court has recognized the tort of bad faith in an insurer's refusal to pay a first-party claim. *State Farm Gen'l Ins. Co. v. Clifton*, 86 N.M. 757, 759, 527 P.2d 798, 800 (1974). The claim for relief may be supported, *inter alia*, by evidence of any frivolous or unfounded refusal to pay or delay in paying the proceeds of the insurance contract. *Id.* However, adoption of the tort of insurance bad faith was not necessary to the *Clifton* decision because, as a matter of law, the insurance company's reasonable and proper actions to establish entitlement to the proceeds justified the time and measures taken. *See also Travelers Ins. Co. v. Montoya*, 90 N.M. 556, 566 P.2d 105 (Ct. App.1977); *Chavez v. Chenoweth*, 89 N.M. 423, 429, 553 P.2d 703, 709 (Ct. App.1976) (claim for unreasonable delay in paying proceeds under an insurance contract stated a tort claim upon which relief could be granted).

flight hours claimed, his check of such sources was incomplete. Additionally, while some of the sources he did check appeared to have been biased against Jessen, McManaman did not attempt to corroborate the information provided by these sources.

{11} The jury also heard testimony from Mr. Wallace, vice president of the company that did the underwriting for National. Wallace testified that if Jessen had been able to produce the logbook of his flight time National probably would have paid the claim without question. Acknowledging that a pilot's logbook may often be lost or destroyed in a crash, Wallace testified National nonetheless believed it should not pay the claim until Jessen's flight experience was verified positively by McManaman. The plaintiffs' expert, Mr. Allen, countered that the conduct of National in delaying payment of the claim for two years pending the outcome of McManaman's investigation was not in keeping with accepted industry standards because it had "put an inappropriate and unduly harsh burden on the insured." Allen testified that McManaman's investigation methods had not produced results of sufficient reliability or conclusiveness to justify a denial of the claim. No misrepresentation by Jessen was established by the investigation, which amounted to no more than a failure to verify Jessen's claimed flying experience, to which Jessen testified in detail.

{12} Given the evidence adduced at trial, we conclude the trial court correctly instructed the jury on the issue of punitive damages. *Cf. Curtiss*, 90 N.M. at 109, 560 P.2d at 173 (punitive damages properly awarded when insurer insisted plaintiff take physical examination before paying claim for medical expenses, knowing that plaintiff was unable to take examination due to heart attack out of which expenses arose); *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 620 P.2d 141, 169 Cal. Rptr. 691 (1979) (inadequate investigation supported award of punitive damages).

{13} In New Mexico, punitive damages have been awarded for breach of contract when the defendant's conduct was malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights. *Green Tree Acceptance, Inc. v Layton*, 108 N.M. 171, 173, 769 P.2d 84, 86 (1989) (quoting *Hood v. Fulkerson*, 102 N.M. 677, 680, 699 P.2d 608, 611 (1985)); *see also Clifton; Curtiss*. In an appropriate case, punitive damages may also be awarded when the defendant's conduct was grossly negligent. *Valdez v. Cillessen & Son, Inc.*, 105 N.M. 575, 734 P.2d 1258 (1987) (personal injury); *Valdez v. Warner*, 106 N.M. 305, 742 P.2d 517 (Ct. App.), *cert. quashed*, 106 N.M. 353, 742 P.2d 1058 (1987) (negligent employment); *see generally*, J. McCarthy, I § 1.51 (4th ed. 1987) (award of punitive damages in bad faith cases depends on jurisdiction's general standard for such award). The words describing culpable conduct are to be taken in the disjunctive; if, for example, a defendant acts recklessly, it is unnecessary to show intentional misconduct. *Green Tree Acceptance*. The Uniform Jury Instructions provide that the appropriate language should be selected as supported by the evidence. SCRA 1986, 13-1827.

{14} Whether under a theory of contract or tort, we believe submission of the issue of punitive damages on language of either gross negligence or reckless disregard for the interests of the insured is especially appropriate when, as here, the evidence shows the insurer utterly failed to exercise care for the interests of the insured in denying or delaying payment on an insurance policy. Here, pursuant to the Uniform Jury Instructions, the jury also was instructed that the limited purpose of punitive damages is to punish wrongdoers and dissuade similar conduct in the future, that it must take into account any aggravating and mitigating circumstances, and that an award must be rationally related to the nature of the wrong committed. *See* SCRA 1986, 13-1827. The instructions on punitive damages were proper.

{15} Instruction as to standard of proof not grounds for reversal. National argues this Court either already has or should adopt the clear and convincing standard of proof for the award of punitive damages, citing *Allendale*. We disagree. In *Allendale*, the four justices sitting on the panel

agreed the preponderance of the evidence standard was appropriate. 103 N.M. at 484, 497, 709 P.2d at 653, 666. Judge Bivins, sitting by designation on the panel, concluded it was unnecessary to reach the standard of proof issue since, in his opinion, the evidence failed to support the award of punitive damages under the lesser standard of preponderance of the evidence. *Id.* at 495, 709 P.2d at 664. National points out that other jurisdictions have adopted the clear and convincing evidence standard. *See, e.g., Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind.1982); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980). Notwithstanding, we are not inclined to readdress the *Allendale* Court's resolution of this issue, nor would we apply a different rule to the plaintiffs in this case, who justifiably relied on the *Allendale* standard. *See Norris v. Saueressig*, 104 N.M. 85, 87, 717 P.2d 61, 63 (Ct. App.1985), *aff'd*, 104 N.M. 76, 717 P.2d 52 (1986).

{16} Here, the trial court instructed the jury that in order to award punitive damages it had to find more than a preponderance of the evidence in favor of Jessen and McCoun. If this instruction was erroneous, the error worked to the favor of National and does not form a basis for reversal.

{17} National not absolved of liability because an independent contractor performed the actual investigation. National argues the only reckless or grossly negligent acts alleged in this case were those of McManaman, and punitive damages cannot be assessed against National for the acts of McManaman because he was an independent contractor and because no evidence was presented that someone in an executive capacity at National ratified his acts. For the reasons discussed below, we disagree with this analysis.

{18} Although one generally is not liable for the conduct of an independent contractor, *see Cillessen & Son*, 105 N.M. at 578, 734 P.2d at 1261, this Court noted in *Budagher v. Amrep Corp.*, 97 N.M. 116, 121, 637 P.2d 547, 552 (1981), (quoting *Pendergrass v. Lovelace*, 57 N.M. 661, 663, 262 P.2d 231, 232 (1953)), *appeal after remand*, 100 N.M. 167, 667 P.2d 972 (Ct. App.), *cert. denied*, 100 N.M. 192, 668 P.2d 308 (1983):

> One who owes * * * an absolute and positive duty to the public or an individual cannot escape the responsibility * * * by delegating it to an independent contractor * * * whether [the duty] is imposed by the common law, by statute, or by municipal ordinance * * *.

(Brackets in original.) *See also Clear v. Patterson*, 80 N.M. 654, 459 P.2d 358 (Ct. App. 1969) (when contract imposes duty, party may delegate work to independent contractor but cannot thereby escape responsibility for results). The duty of good faith dealing by parties to an insurance contract has been recognized as a nondelegable duty, breach of which supports the award of punitive damages. *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982). The duty of the insurance company includes "a duty to the insured to make a reasonably prompt investigation of all relevant facts * * *. And, if the insurance company cannot give its insured a valid reason for denying the claim, it has a final duty to promptly honor it." *Bankers Life & Cas. Co. v. Crenshaw*, 483 So.2d 254, 276 (Miss. 1985), *aff'd* 486 U.S. 71, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988); *see also Mize v. Harford Ins. Co.*, 567 F. Supp. 550 (W. D. Va. 1982); J. McCarthy, *Punitive Damages in Bad Faith Cases* § 1.11 (4th ed. 1987). We hold National was not relieved of liability because McManaman was an independent contractor.

{19} The trial court instructed the jury it could award punitive damages if National authorized, participated in, or ratified the acts of McManaman, *see Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 577 P.2d 1245 (1978); SCRA 1986, 13-1826, or if the acts of National were themselves grossly negligent or committed with reckless disregard for the rights of Jessen and McCoun. National did not object to the instructions on the grounds of insufficient evidence of authorization or participation; consequently, we do not discuss the propriety of instructing the jury on authorization or participation.

{20} For two years, National relied on the inconclusive results of McManaman's investigation as the reason for delaying payment on Jessen and McCoun's claim. We believe the jury properly could find this was an independent wrongful act. The jury also properly could have found this act grossly negligent or committed with reckless disregard for the interests of the insured.

{21} Alternatively, this same evidence provides adequate support for a finding of ratification. *See North v. Public Serv. Co. of N.M.*, 97 N.M. 406, 640 P.2d 512 (Ct. App. 1982) (question of fact precluded summary judgment as to whether employer ratified conduct that was sufficient to support award of punitive damages when employer relied on allegedly wrongful acts of employees as basis for claim against plaintiff), *modified*, 101 N.M. 222, 680 P.2d 603 (Ct. App.1983), *cert. denied*, 101 N.M. 11, 677 P.2d 624 (1984). Ratification requires either knowledge of the material facts or circumstances sufficient to put a reasonable person on notice to inquire into these facts. *See-Tee Mining Corp. v. National Sales, Inc.*, 76 N.M. 677, 417 P.2d 810 (1966). Ratification may be implied by acquiescence in the results of an unauthorized act, *id.* at 681, 417 P.2d at 812, or by retention of the benefits of this act. *Morris Oil Co. v. Rainbow Oilfield Trucking, Inc.*, 106 N.M. 237, 741 P.2d 840 (Ct. App.1987). Here, those officers of National with the authority to deny or honor the claim of Jessen and McCoun delayed payment because, and knowing that, McManaman had neither verified nor disproved Jessen's stated flight experience. From this evidence, uncontroverted by National, the jury properly could find National ratified the conduct of McManaman.

{22} *Refusal to instruct jury on comparative bad faith not error.* National argues the trial court should have instructed the jury on the comparative fault of Jessen and McCoun since the jury was instructed on the law regarding misrepresentations made by an insured on an application for insurance. To support its contentions, National cites *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982), and related New Mexico comparative negligence cases, as well as *California Casualty General Insurance Co. v. Superior Court*, 173 Cal. App.3d 274, 218 Cal. Rptr. 817 (1985) (comparative fault applies in bad faith claims). We do not decide whether such an instruction necessarily would be inappropriate in another case. Here, we hold there was no need to so instruct the jury. National alleged misrepresentation or fraud on the part of Jessen in reporting his flight experience when applying for insurance. Without our passing upon the sufficiency of evidence, we note that the trial court allowed the issue of misrepresentation to go to the jury and that such conduct, had it been demonstrated to the satisfaction of the jury, would have vitiated the insurance policy. In short, this defense would have barred completely the recovery of compensatory and, hence, punitive damages. The jury clearly found no such misrepresentation was made. No evidence was presented in this case to demonstrate Jessen and McCoun failed to cooperate with the investigation or otherwise acted in a manner indicative of bad faith conduct under a valid insurance contract. Therefore, the refusal of National's requested special verdict was not error.

{23} *Award of attorney fees proper.* National argues that it was improper for the trial court to award attorney fees and costs to the plaintiffs in light of NMSA 1978, Section 39-2-1, which, according to National, precludes the award of attorney fees and costs absent a finding by the trial court that the insurer acted unreasonably in failing to pay the claim. *See Allendale*, 103 N.M. at 495, 709 P.2d at 664, *see also Suggs v. State Farm Fire & Cas. Co.,* 833 F.2d 883, 893 (10th Cir. 1987), *cert. denied*, . . . N.M. . . . , 108 S. Ct. 1732, 100 L. Ed. 2d 196 (1988).

{24} In the instant case, the jury awarded both actual and punitive damages. On the issue of punitive damages, the court instructed the jury that, before it could award such damages, it had to find National was reckless or grossly negligent in its failure to pay the claim of Jessen and McCoun. The punitive damages award thus implies a finding of unreasonableness since unreasonable tortious action is subsumed under the more

egregious standards of recklessness or gross negligence and the trial court instructed the jury that reasonableness was a defense to punitive damages. The award of attorney fees is discretionary with the trial court and will not be disturbed absent abuse of discretion. *Keeth Gas Co. v. Jackson Creek Cattle Co.*, 91 N.M. 87, 570 P.2d 918 (1977). Based on the implied finding of unreasonableness, the trial court did not abuse its discretion in awarding attorney fees and costs to the appellees in this action.

{25} Section 39-2-1 does not limit an award of attorney fees and costs only to trial. In the appropriate case, a first party insured who prevails on appeal may be awarded reasonable attorney fees and costs for the appeal. *See Stock v. ADCO Gen'l Corp.*, 96 N.M. 544, 549, 632 P.2d 1182, 1187 (Ct. App.), *cert. denied*, 96 N.M. 543, 632 P.2d 1181 (1981). We conclude Jessen and McCoun should be awarded reasonable attorney fees and costs for this appeal.

{26} The judgment rendered by the district court is affirmed, and the cause remanded to the district court solely to determine reasonable attorney fees and costs for Jessen and McCoun on appeal and to amend the judgment accordingly.

IT IS SO ORDERED:

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

RUDY S. APODACA,
Justice, Court of Appeals

TONY SCARBOROUGH,
Justice (dissents).

SCARBOROUGH,
Justice, dissenting.

{27} The award of $50,000 punitive damages in this case, affirmed by the majority, must fail for a number of reasons. In making its award, the jury was instructed to rely on a negligence standard that is overbroad and an evidence standard that is insufficient.

{28} The negligent failure of an insurer to conclude a claim investigation can subject the insurer to a claim for compensatory damages. Punitive damages depend on the nature of a defendant's mental state and are not recoverable if a defendant's conduct is merely negligent. *See Tuttle v. Raymond*, 494 A.2d 1353, 1360 (Me. 1985); W. Prosser, *Handbook on the Law of Torts* § 2, at 9-10 (4th ed. 1971). In the case before us the trial court determined that the conduct of a defendant insurer was not malicious or fraudulent. Such a determination by a trial court should remove the issue of punitive damages from jury consideration.

{29} The current New Mexico jury instructions on punitive damage awards, SCRA 1986, 13-1827, are confusing to judges and jurors alike. A jury is instructed to award punitive damages if it finds "the acts of defendant were [willful, wanton, malicious, reckless, grossly negligent, fraudulent and in bad faith]." SCRA 1986, 13-1827. In "Directions for Use", the jury is told: "Bracketed words should be selected as supported by the evidence." *Id.* These instructions are poorly drafted and invite misunderstanding. In this regard, I agree with the Arizona court in *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 680 (1986):

> Having juries decide whether to award compensatory vs. punitive damages based on vague verbal distinctions between mere negligence, gross negligence and reckless indifference often futile and nothing more than semantic jousting by opposing attorneys. Further, it leads to misapplication of the extraordinary civil remedy of punitive damages which should be appropriately restricted to only the most egregious of wrongs.

{30} Whether "gross" or "reckless," a negligence standard for punitive damages is overbroad. *Contra Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 418 P.2d 191 (1966). I agree with the Supreme

Judicial Court of Maine that a "gross" negligence standard is too broad and vague and can result in unfair and inefficient punitive damages awards. *Tuttle*, 494 A.2d at 1361. Likewise, a "reckless" negligence standard can "allow virtually limitless imposition of punitive damages." *Id.* Instead, there should be a more narrow focus on a defendant's mental state rather than on outward conduct. D. Dobbs, *Handbook on the Law of Remedies* § 3.9, 205 (1973); *Gurule v. Illinois Mutual Life and Casualty Co.*, 152 Ariz. 600, 734 P.2d 85 (1987); *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986).

{31} The decision of whether to award punitive damages should turn upon a defendant's state of mind. *Gurule*, 152 Ariz. at 602, 734 P.2d at 87. A defendant must have been "consciously aware of the wrongfulness or harmfulness of his conduct . . . in deliberate contravention to the rights" of a plaintiff before punitive damages can be awarded. *Linthicum*, 150 Ariz. at 326, 723 P.2d at 679. If a defendant did not act with what the Arizona Supreme Court has described as an "evil mind", a plaintiff can be awarded compensatory damages but not punitive damages. The requisite "evil mind" can be established by evidence that a defendant, acting with a knowing, culpable mind: (1) intended to injure a plaintiff or (2) consciously pursued a course of conduct despite knowing it created a substantial risk of significant harm to a plaintiff.

{32} Bad faith alone by a plaintiff can sustain a compensatory damages award. Punitive damages, however, should not be awarded "unless there is something more than the conduct required to establish the tort." *Id.* at 332, 723 P.2d at 681. *Contra, Boudar v. E.G. & G., Inc.*, 106 N.M. 279, 742 P.2d 491, (1987). "[I]n bad faith cases, unless the evidence established that, in addition to bad faith, defendant acted with an evil mind, punitive damages are unnecessary because compensatory damages adequately deter." *Gurule*, 152 Ariz. at 601, 734 P.2d at 86.

{33} Awarding punitive damages primarily furthers the same objectives which underlie criminal law. *Id.* Negligence alone cannot support awards of punitive damages because of their quasi-criminal nature. The purpose of punitive damages is not to compensate the plaintiff, but to punish the defendant and to deter "conduct involving some element of outrage similar to that usually found in crime." *Restatement (Second) of Torts*, § 908 Comment b (1979); *see also* W. Prosser, *Handbook on the Law of Torts* § 2, at 9 (4th ed. 1971).

{34} Recently there has been considerable national debate over punitive damages awards in civil cases. *Annotation, Standard of Proof As to Conduct Underlying Punitive Damage Awards - Modern Status*, 58 A.L.R. 4th 878 (1987). Challenges to punitive damages usually focus on whether they violate: (1) the eighth amendment prohibition against excessive fines[3] or (2) the fifth and fourteenth amendments due process guarantees. 5 M. Minzer, J. Nates, C. Kimball, D. Axelrod & R. Goldstein, *Damages in Tort Action*, § 40.15[1]-[3] (1988). Punitive damages awards are similar to criminal convictions, and defendants should be accorded procedural safeguards similar to those in criminal cases, including a burden of proof higher than the civil standard. *Id.* at § 40.15[1]; *see also* J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice*, § 3.03 (1984).

{35} We currently allow a punitive damages award if a plaintiff can meet a preponderance of the evidence burden of proof. *United Nuclear Corp. v. Allendale Mutual Ins.*, 103 N.M. 480, 485, 709 P.2d 649, 654 (1985). I believe a greater burden of proof should be required whereby a plaintiff can recover compensatory damages upon proof by a preponderance of the evidence but can be awarded punitive damages only upon proof by clear and convincing evidence. *E.g., Linthicum*, 150 Ariz. 326, 723 P.2d 675 (1986); *Tuttle v. Raymond*, 494 A.2d 1363 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260,

[3] See Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons From History, 40 Vand. L. Rev. 1234 (1987); Jeffries, A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139 (1986); The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269 (1983).

294 N.W.2d, 437. Before awarding punitive damages a factfinder would thus be required to find there was clear and convincing evidence a defendant acted fraudulently, or with malicious intent as construed in *Curtiss v. Aetna Life Ins. Co.*, 90 N.M. 105, 560 P.2d 169 (Ct. App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976).

{36} For the reasons set forth, I dissent from the majority opinion.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-055

Filing Date: August 21, 1989

Docket No. 17,624

FERNANDO GALLEGOS, et al.,

Plaintiffs-Appellees,

vs.

CITIZENS INSURANCE AGENCY, et al.,

Defendants-Appellants

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY,
Benny Flores, District Judge.

Bryan L. Hunt,
Donaldo Martinez,
Las Vegas, New Mexico,

for Appellants.

Montgomery & Andrews,
Stephen S. Hamilton,
Santa Fe, New Mexico,

for Appellees.

OPINION

RANSOM, Justice.

{1} This matter coming on for consideration by the Court upon motion for reconsideration, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the opinion handed down by the Court on June 27, 1989, is hereby withdrawn and the opinion filed this date substituted therefor.

{2} Fernando and Frances Gallegos sued the following defendants as partners in the Citizens Insurance Agency (Citizens): Emilio Aragon (Aragon) and his wife, Imelda; Amadeo Tenorio, Jr. (Tenorio), and his wife, Mary; Max Sanchez; and Robert Gonzales. The complaint alleged that the defendants wrongfully failed to provide the plaintiffs a policy of automobile insurance, and were liable for the cost of two minor accidents and for punitive damages. Defendants Aragon and Gonzales denied they were partners at the time of the transaction about which plaintiffs complain. Prior to trial, the plaintiffs settled with Tenorio and his wife.

{3} Upon the close of testimony in the ensuing jury trial, the plaintiffs amended their complaint to conform to the evidence, and the jury was instructed on theories of express, implied and quasi-contract, and on tort theories of a negligent or fraudulent misrepresentation that insurance had been provided. The evidence determinative of this appeal may be summarized as follows.

{4} Sanchez and Tenorio were equal partners in Citizens. Sometime prior to May 12, 1984, Gonzales began soliciting insurance business on behalf of Citizens. Gonzales also was discussing with Tenorio the possibility of purchasing the latter's interest in the partnership. On or about May 12, Gonzales procured from Mrs. Gallegos an application and a $600 quarterly premium check for Citizens to provide automobile insurance for eight vehicles. Gonzales testified that he received a price quotation over the telephone from Sanchez. Mrs. Gallegos confirmed that Gonzales received the price information by telephone. Gonzales delivered the application and the check to Citizens. Citizens endorsed and deposited the check on May 14.

{5} On June 15, a purchase agreement was executed for the purchase of Tenorio's interest in Citizens by Gonzales and Aragon. Gonzales

received keys to Citizens and was listed on the signature cards for two of Citizens' bank accounts. Gonzales, however, failed to timely pay his portion of the purchase price and Aragon acquired the entirety of Tenorio's partnership interest. By early July, neither Gonzales nor Tenorio any longer had an interest in Citizens.

{6} On or about June 11 and 12, Gonzales asked Della Valerio, Citizens' secretary, to issue receipts for the insurance premium for each of the plaintiffs' vehicles. Valerio issued eight receipts. Contemporaneously with the issuance of the receipts, Mrs. Gallegos inquired as to the whereabouts of her insurance policy and proofs of financial responsibility. *See* NMSA 1978, §§ 66-5-201 to 66-5-239 (Repl. Pamp. 1984 & Cum. Supp. 1988). Valerio testified further that around this same time she informed both Sanchez and Aragon that plaintiffs had not received a policy. Despite requests by Gonzales that Citizens issue the plaintiffs a policy, it did not provide one to them. During that summer, Mrs. Gallegos made several requests to Citizens for her policy but was told to speak to Gonzales. Gonzales, in turn, would assure her that the policy and proofs were coming.

{7} On July 8, one of the vehicles that was supposed to be insured was involved in a minor accident. Under the instructions of Gonzales, the plaintiffs submitted two repair estimates to Citizens. Citizens never made payment on this claim. On October 2, another of the plaintiffs' automobiles was involved in a minor accident. Mrs. Gallegos telephoned Citizens and was instructed by Valerio to submit two repair estimates to Citizens. Finally, a few weeks after the October 2 accident, Aragon and Sanchez met with Mr. Gallegos. They informed him that Citizens had not procured an insurance policy for the Gallegoses, that they were uninsured, and that the damages resulting from the two accidents would not be reimbursed. Although Citizens did offer to reimburse the plaintiffs' premium, the $600 was never refunded.

{8} *Instructions.* Initially, we are compelled to comment on the instructions. The case was submitted to the jury on fifty-four separately numbered instructions without an integrated and comprehensive statement of the issues. The introduction to Chapter 3 of the Uniform Jury Instructions - Civil, SCRA 1986, 13-101 to 13-2221, states:

> The key to good instruction is the formulation of the issues of the lawsuit.
>
> * * * * * *
>
> It is essential that the trial lawyers and the trial judge realize their duty to thoughtfully draft and clearly present the statement of the issues to the jury * * *. A simple, commonsense, logical presentation of the key issues is the objective.

Under this rubric, it would have been appropriate, for *example*, to instruct the jury on the issues as follows:

The plaintiffs seek compensation under claims of Breach of an Automobile Insurance Contract and of Unfair Acceptance and Retention of an Insurance Premium [i.e., quasi-contract or unjust enrichment], and under claims of Negligent or Fraudulent Misrepresentation. Plaintiffs have the burden of proving the amount of any damages to which they may be entitled.

A. To establish the claim of Breach of Contract, plaintiffs have the burden of proving (1) that plaintiffs had supplied all fleet information required by Citizens before it would enter into an insurance contract, and (2) at least one of the following contentions:

a. Actual Agent: In dealing with the plaintiffs for the automobile insurance policy, Gonzales was the agent of Citizens; or

b. Apparent Agent: Citizens, by its statements, acts or conduct, led plaintiffs reasonably to believe Gonzales was its agent, and plaintiffs dealt with Gonzales in reliance upon the representations of Citizens.

The defendants Aragon and Sanchez deny that all required fleet information was supplied and they also deny that Gonzales was either an actual or an apparent agent of Citizens.

B. To establish the claim of Unfair Acceptance and Retention of an Insurance Premium, plaintiffs have the burden of proving that Citizens accepted and retained the premium under circumstances in which it would not be fair to keep the premium without paying the insurance claim. The defendants deny they acted unfairly under the circumstances.

C. To establish the claim of Misrepresentation on the part of a defendant, the plaintiffs have the burden of proving at least one of the following contentions applicable to that defendant:

1. The defendant made a negligent and material misrepresentation that automobile insurance had been provided; or

2. The defendant made a fraudulent misrepresentation that automobile insurance had been provided; and

plaintiffs also contend and have the burden of proving they relied on such misrepresentation to their damage. The defendants deny these contentions.

D. Related to the claims, plaintiffs contend and have the burden of proving that misconduct of a defendant was an act for which punitive damages should be awarded against that defendant. Defendants deny this contention. Also, defendants Aragon deny they were partners in Citizens at the time of the Gallegos transaction, and defendant Gonzales claims he was an agent, but not a partner. Only defendant Sanchez admits he was a partner; and plaintiffs, therefore, have the burden of proving which of the remaining defendants, if any, were partners in Citizens at the time of the Gallegos transaction.

After considering the evidence and these instructions as a whole, the preliminary question presented for you to answer under Breach of Contract, Part A of the special verdict form, is whether Gonzales was acting for Citizens in dealing with plaintiffs. If you answer, "No," you shall go to Part B of the special verdict form. If, on the other hand, you answer "Yes," that Gonzales was a partner or otherwise acted as an agent of Citizens, you will continue under Part A to decide whether plaintiffs supplied all fleet information required by Citizens before it would enter into the insurance contract, and, if so, you will determine the amount of money that will compensate plaintiffs for damages resulting from Citizens' failure to provide a policy of automobile insurance.

Under Unfair Acceptance and Retention of an Insurance Premium, Part B of the special verdict form, you will answer whether Citizens accepted and retained the premium under circumstances in which it would not be fair to keep the premium without paying the insurance claim. If you answer "No," you will go to Part C of the special verdict form. If, on the other hand, you answer "Yes," and, if you have not already determined damages under Part A, you will continue under Part B to determine the amount of damages to be awarded plaintiffs.

Under Misrepresentation, Part C of the special verdict form, you will answer whether a defendant made to plaintiffs either a negligent or fraudulent misrepresentation that automobile insurance had been provided, and whether plaintiffs relied on any such misrepresentation to their damage. If you answer "No," you will go to Part D of the special verdict form. If, on the other hand, you answer "Yes," you will answer the additional questions requested of you under Part C. [E. g., by whom the misrepresentation was made, whether negligent or fraudulent, and damages if not yet determined.]

Under Punitive Damages, Part D of the special verdict form, you will answer whether, under any of the three preceding Parts, you have found for plaintiffs and against any defendant for acts that were either willful, wanton, reckless, or grossly negligent. If you answer "No," your foreman

will then sign the special verdict form and you will proceed to the Special Interrogatories. If, on the other hand, you answer "Yes," you will find the separate amount of punitive damages to be awarded against any defendant. [See SCRA 1986, 13-302 (Example A, Special Verdict (5-10)).] Your foreman will then sign the special verdict form and you will proceed to the Special Interrogatories.

Finally, if you found damages under any of the first three Parts of the special verdict form, you will answer the Special Interrogatories concerning the partner status of defendants Aragon and defendant Gonzales at the time of the Gallegos transaction.

{9} Having formulated the issues as proposed above, it would thereafter be necessary to give only those duty and definitional instructions left unanswered in the statement of issues, e.g., actual agent, partner, acts and knowledge of a partner or employee as acts or knowledge of the partnership, negligent and fraudulent misrepresentation, and compensatory and punitive damages. Duty and definitional instructions readily incorporated in the statement of issues, e.g., apparent agency and quasi-contract, need not be repeated. Aside from other mandatory instructions, e.g., admonitions and burden of proof, the court should act with circumspection in the choice of additional instructions. Because there was no dispute over whether the damages claimed ($3,033.38) would have been within the contemplation of the parties of the alleged contract or would have been proximately caused by the alleged misrepresentation, it would not be necessary to include those causation issues in the contentions required to be proved by plaintiffs.

{10} We note that Gonzales had a cross-claim against the other defendants for indemnity in the event he were found liable. This claim was included in the court's statement of issues, but not in terms of the passive *versus* active issues giving rise to indemnity between partners or others under circumstances of joint and several vicarious liability. *See Vallejos v. C. E. Glass Co.*, 583 F.2d 507 (10th Cir. 1978). The court gave no duty or definitional instructions following the statement of the cross-claims. These claims, if stating fact issues not otherwise presented to the jury, appropriately could have been incorporated in the instructions as are counterclaims. *See* SCRA 1986, 13-302(D).

{11} Although done without objection, we also note that the court instructed that the standard of proof for assessing punitive damages is one of substantial evidence, defined as evidence such as a reasonable mind might accept as adequate to support a conclusion. This language was apparently taken by error from a publisher's headnote in *United Nuclear Corp. v. Allendale Mutual Insurance Co.*, 103 N.M. 480, 709 P.2d 649 (1985). The language in question refers to the standard on review, whereas the opinion holds that issues of punitive damages are to be determined according to the preponderance of the evidence. *Id.* at 485, 709 P.2d at 654; *see* SCRA 1986, 13-304.

{12} A separate verdict form was provided with respect to compensatory and punitive damages to be awarded against each defendant. The jury found in favor of Imelda Aragon and Robert Gonzales. The jury found for the plaintiffs and against Sanchez in the sum of $2,000 for compensatory damages and $8,000 for punitive damages, and found for the plaintiffs against Aragon separately for the same amounts of compensatory and punitive damages. The total compensatory damages claimed and proved amounted to $3,033.38. The court entered judgment severally against Sanchez and Aragon in the sums of $1,516.69 for one-half of the compensatory damages, and in sums of $8,000 for punitive damages. The liability of the partners should have been joint and several for the compensatory damages awarded. *See* NMSA 1978, 54-1-15 (Repl. Pamp.1988); SCRA 1986, 13-411 (Committee Comment).[1] Under Part C of the special verdict form, proportionate fault may have been decided for tort liability, but, as between partners that finding would affect only

[1] Actually, the jury was so instructed. *See* SCRA 1986, 13-1824, given as Instruction 42, and SCRA 1986, 13-1825, given as Instruction 44.

equitable contribution[2] and not joint and several liability. With respect to punitive damages, when they are awarded against two or more defendants they must be separately determined as to each. *See Vickrey v. Dunivan*, 59 N.M. 90, 279 P.2d 853 (1955). The confusing verdicts could have been avoided if the court had submitted special verdict forms as proposed above (and represented in SCRA 1986, 13-302 (Example A, Special Verdict), except that findings with respect to comparative negligence are inapplicable for breach of contract and the vicarious liability of partners). In a motion for clarification of the verdict, and for remittitur, defendants Sanchez and Aragon questioned whether the jury meant to assess each defendant individually or whether the $2,000 compensatory and the $8,000 punitive assessments were against both. However, no appeal has been taken from the $1,516.69 severally awarded against each defendant and this judgment stands as the law of the case. Likewise, because Sanchez has not appealed, we do not disturb the $8,000 punitive damage judgment entered against him.

{13} *Issues raised.* Only Aragon appeals. He raises the following points: (1) whether Tenorio was a necessary and indispensable party, (2) whether Gonzales was a partner or otherwise an agent of Citizens, (3) whether a contract existed between the plaintiffs and Citizens, (4) whether a verdict in favor of Gonzales and settlement with the Tenorios extinguished the liability of Aragon, (5) whether there was substantial evidence to support a finding of punitive damages or whether there was error in submitting instructions on this issue, (6) whether the admission of plaintiffs' Exhibit 14 was prejudicial error, and (7) whether the trial court erred in denying Sanchez and Aragon each five peremptory challenges. We affirm in part and reverse in part.

{14} *Party not necessary and indispensable.* Aragon argues first that the trial court was without proper jurisdiction because Tenorio, though a necessary and indispensable party, was dismissed from the lawsuit when he settled with plaintiffs prior to trial. *See* SCRA 1986, 1-019 (Rule 19); *Holguin v. Elephant Butte Irrigation Dist.*, 91 N.M. 398, 575 P.2d 88 (1977). According to Aragon, Tenorio was an indispensable party because he was the link between Gonzales and Citizens and his testimony was necessary to shed light on Gonzales' relationship with Citizens. We believe Aragon erroneously has equated an instrumental *witness* with an indispensable *party*.

{15} Rule 19 provides that:

> [a] person * * * shall be joined as a party in the action if: (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the * * * action and * * * [its] disposition in his absence may: (a) * * * impair or impede his ability to protect that interest; or (b) leave * * * persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest.

If the absent party is indeed indispensable, the action must be dismissed, *Holguin*, 91 N.M. at 401, 575 P.2d at 91, but none of the criteria for indispensability has been shown to be present here. Specifically, NMSA 1978, Sections 38-4-3 and 38-4-5 (Repl. Pamp.1987) address suits brought against joint obligors and partners, respectively. By the plain language of these statutes, it is permissible in all cases of joint obligations by partners to bring and to prosecute suit against any one or more of the individual partners, and "when more than one person is joined as defendant in any such suit, such suit may be prosecuted, and judgment rendered against one or more of such defendants." § 38-4-3. The plaintiff is in general under no obligation to sue more than one of multiple persons claimed to be jointly and severally liable on a contract, Section 38-4-2, or claimed to be proportionately liable in tort. *Cf. Tipton v. Texaco, Inc.*, 103 N.M. 689, 712 P.2d 1351 (1985) (allowance of third-party practice under Rule 14 to join parties

[2] Equitable contribution between joint tortfeasors is now statutorily adopted. *See* NMSA 1978, §§ 41-3-2(D), 41-3A-1(C)(3) (Cum. Supp. 1988).

claimed by defendant(s) to be proportionately at fault). The contention that Tenorio was an indispensable party is without merit.

{16} *Agency established.* Aragon next maintains that the plaintiffs failed to establish that Gonzales was a partner or otherwise an agent for Citizens at the time he negotiated the contract with plaintiffs. Aragon asserts that Gonzales was an independent broker and the agent of the plaintiffs. He argues that all liability for the alleged breach of contract and negligent misrepresentations rests with Gonzales. He points to the plaintiffs' testimony that they relied upon Gonzales because he was a family friend and that they only negotiated with Gonzales, and spoke to no one else at Citizens. Aragon argues further that Citizens did not exercise any control over Gonzales or direct or supervise any of his actions. Nor did Citizens ever compensate Gonzales for his activities on its behalf.

{17} The question of agency is normally one of fact and is to be determined from all attendant circumstances, in conjunction with the conduct and the communications of the parties. *Fryar v. Employers Ins. of Wausau*, 94 N.M. 77, 607 P.2d 615 (1980). On appeal, we will not disturb a finding of agency if such finding is supported by substantial evidence. *Id.* We conclude that there was substantial evidence to support a jury verdict for the plaintiffs premised upon a finding that Gonzales acted on behalf of Citizens as either its actual agent, *see Western Elec. Co. v. New Mexico Bureau of Revenue*, 90 N.M. 164, 167, 561 P.2d 26, 29 (Ct. App. 1976) (agent is one authorized by another to act on his behalf and under his control), or under its apparent authority, *see Tabet v. Campbell*, 101 N.M. 334, 337, 681 P.2d 1111, 1114 (1984) (apparent authority is authority principal holds his agent out as possessing or allows agent to exercise or to represent himself as possessing as to estop principal from denying its existence).

{18} Sanchez admitted that Gonzales had access to Citizens' office building and insurance rate books, and, more importantly, that he was involved with Citizens in a "soliciting capacity." Gonzales testified he was an agent of Citizens and that Sanchez relayed to him the price information that Gonzales subsequently quoted to Mrs. Gallegos. *See Ronald A. Coco, Inc. v. St. Paul's Methodist Church, Inc.*, 78 N.M. 97, 99, 428 P.2d 636, 638 (1967) (fact of agency may be established at trial by agent himself). Moreover, it was immaterial whether Gonzales was compensated by Citizens, *see* SCRA 1986, 13-401, or that Citizens claimed that it did not exercise actual control over Gonzales, *see* SCRA 1986, 13-402. Once a principal and agent relationship is established, the principal becomes liable for the acts of his agent when the agent acts "within the scope of his agency; and . . . [t]he principal had the right to control the manner in which the details of the work were to be performed at the time of the occurrence, even though the right of control may not have been exercised." *Id.* Citizens allowed Gonzales to solicit insurance business and it had the power to control his actions. *See Berry v. Pennsylvania Fire Ins. Co.*, 33 N.M. 661, 274 P. 169 (1928).

{19} *Contract existed.* Aragon next claims that missing information from the application, essential to the agreement, negated any alleged contract that existed between Citizens and the plaintiffs. The missing information pertained to the plaintiffs' daughters whose automobiles were among the eight vehicles scheduled for coverage. Aragon contends that the information was necessary to determine the amount of the premium and whether to accept the application for insurance coverage.

{20} Without reaching the issue of whether the missing information was essential to create a binding agreement, *see Trujillo v. Glen Falls Ins. Co.*, 88 N.M. 279, 540 P.2d 209 (1975), we can dispose of this argument based on the testimony presented at trial. Mrs. Gallegos testified that she filled out an insurance application that contained specific information regarding each vehicle to be covered and she submitted it to Gonzales along with the quarterly premium. She further testified that prior to receiving the receipts for her premium she had called Citizens and supplied the omitted data concerning her daughters. There was substantial evidence that a contract existed.

{21} *Liability not extinguished by agent's exoneration.* Aragon also asserts that his liability was extinguished by virtue of the jury verdict in favor of Gonzales and the plaintiffs' settlement with the Tenorios. Relying upon the theory that exoneration of the servant operates in tort to exonerate the principal of vicarious liability *see Harrison v. Lucero*, 86 N.M. 581, 525 P.2d 941 (Ct. App. 1974), Aragon argues that the verdict in favor of Gonzales was inconsistent with the verdict against him. *See also Kinetics, Inc. v. El Paso Prods. Co.*, 99 N.M. 22, 653 P.2d 522 (Ct. App. 1982).

{22} The court in *Harrison*, however, premised its holding on the fact that the master's liability was purely vicarious. Similarly, in *Kinetics*, the liability of the defendant partner El Paso Products was vicarious only, as it had no direct dealings with the plaintiff. Here, however, the plaintiff alleged and adduced evidence that Aragon was directly responsible for the failure to provide them the automobile insurance that they purchased. Furthermore, under breach of contract, it was not inconsistent to place liability upon the principal and to exonerate the agent. *See Barnes v. Sadler Assocs., Inc.*, 95 N.M. 334, 622 P.2d 239 (1981). An agent is not liable for the disclosed principal's breach of contract unless he expressly was made a party to the contract or unless his conduct indicated an intent to be bound. *Id.; Otero v. Wheeler*, 102 N.M. 770, 701 P.2d 369 (1985).

{23} *Liability not extinguished by settlement.* The settlement with Tenorio for any alleged tortious conduct on his part would have had no effect upon the tort liability of Aragon as a consequence of the latter's own actions. The tort liability of Tenorio was either joint and several, or several, depending upon whether he was or was not a partner. Properly raised, that partnership fact issue could have been included in the Special Interrogatories. If Tenorio's liability was joint and several, a release would not discharge other tortfeasors unless the release so provided. NMSA 1978, § 41-3-4 (Repl. Pamp.1986). The issue of release was not raised and preserved below. The motion to dismiss the action because of the dismissal of Tenorio as a party was premised on grounds that Tenorio was an indispensable party, not on grounds that the settlement operated to discharge all joint obligors. Regarding joint contract liability, we likewise do not reach or decide here whether we would follow the common law that a release of one joint obligor on a contract operates to release all other obligors or whether we would adopt the modern view that where two or more obligors are jointly liable for breach, a release of one does not necessarily release the other; whether the other is released depends upon the intent of the parties and whether the injured party has received full satisfaction. *See Sunbird Aviation, Inc. v. Anderson*, 200 Mont. 438, 445, 651 P.2d 622, 626 (1982).

{24} *Punitive damages.* As his fifth point of error, Aragon submits that the trial court erred in submitting instructions on punitive damages to the jury. Aragon argues that the assessment of punitive damages for a breach of an insurance policy must be premised on evidence of bad faith or malice in the insurer's refusal to pay the claim. *See United Nuclear Corp.*, 103 N.M. at 485, 709 P.2d at 654. Bad faith means any frivolous or unfounded refusal to pay. **Id.** As with the insurer in *United Nuclear Corp.*, Aragon argues that Citizens had legitimate reasons to contest the claim. He relies upon his position that Gonzales acted independently of Citizens.

{25} According to Gonzales' testimony, Sanchez was aware from the time that the contract was negotiated that plaintiffs had applied for insurance with Citizens. Valerio testified further that Aragon and Sanchez were on notice in June that the plaintiffs had paid for insurance coverage but had received no policy. Mrs. Gallegos testified that she had made repeated requests to have Citizens send her a policy and proofs of financial responsibility, but to no avail.

{26} After the plaintiffs' first accident in July, repair estimates were submitted to Citizens but it did not pay the claim. Finally, after another accident in October, Citizens acknowledged the existence of a problem regarding plaintiffs' insurance coverage. Citizens disavowed any responsibility to cover the damages of either accident, and only

offered to reimburse the premium. Citizens, however, never did reimburse the plaintiffs' premium. With this testimony, we believe there was sufficient evidence to warrant the jury instruction given on punitive damages under SCRA 1986, 13-1827.

{27} *Hearsay exhibit.* Regarding the admissibility of plaintiffs' Exhibit 14, plaintiffs only gave a cursory response to this point in their answer brief, relying on case law that holds issues not raised in the docketing statement will not be reviewed on appeal. *See State v. Hernandez*, 95 N.M. 125, 619 P.2d 570 (Ct. App.1980); *see also* SCRA 1986, 12-213(A)(3) ("A party shall be restricted to arguing only issues contained in the docketing statement".) The court of appeals requires a docketing statement to implement its calendaring system.

{28} Unlike the court of appeals, this Court has not introduced a calendaring system under which the docketing statement has any import of substance, except to facilitate the designation of a partial stenographic transcript of proceedings pursuant to SCRA 1986, 12-211(C)(1). While the docketing statement required under SCRA 1986, 12-208 remains mandatory for perfecting appeals to this Court, it is not jurisdictional. It is within our discretion to consider error preserved below and presented in appellant's brief after having been omitted from the docketing statement. Obviously, prejudice to the appellee arising out of an incomplete transcript would affect our decision. To the extent our previous decisions have held that issues first raised in the brief in chief automatically warrant no review, they are overruled. *See State v. Taylor*, 107 N.M. 66, 752 P.2d 781 (1988); *State v. Smith*, 104 N.M. 329, 721 P.2d 397 (1986); *State v. Hoxsie*, 101 N.M. 7, 677 P.2d 620 (1984). An answer brief should point out an appellant's failure to comply with the rule, but still respond to all points raised.

{29} On motion for reconsideration, the plaintiffs request us to consider their arguments that the admission of Exhibit 14 was not error, or, if error, that it was harmless. Because, based upon our previous decisions, plaintiffs were reasonable in their belief that the defendant's failure to raise this issue in the docketing statement precluded its review, we now address the arguments raised in their brief in support of their motion for reconsideration.

{30} Exhibit 14 was a letter from an investigator for the state's department of insurance that was addressed to Citizens and Sanchez. The department also sent a copy to the plaintiffs. The letter was in response to the plaintiffs' complaint concerning Citizens' refusal to cover the damages suffered by them due to the accidents. Based upon that information, the investigator found Citizens negligent and in total violation of NMSA 1978, Section 59-11-13 (a compilation of unfair claims settlement practices now codified at NMSA 1978, § 59A-16-20 (Repl. Pamp.1988)). If Citizens did not agree with the department's position, the investigator requested Citizens to notify the department in order to schedule the matter for a formal hearing.

{31} At trial, the plaintiffs' attorney initially moved for the letter's admission during the direct examination of Mr. Gallegos. Counsel for Sanchez and Aragon objected on the grounds of hearsay. Counsel for plaintiffs responded that, "It goes to the issue of bad faith and fraud of Mr. Sanchez—it's not offered for the truth of the matter stated but for the fact that those things were stated to Mr. Sanchez by the insurance commission." In their motion for reconsideration, the plaintiffs reiterate the position taken at trial and contend that the letter was not offered for the truth of the matter asserted. We do not agree.

{32} We conclude that the trial court correctly sustained the objection to the letter's admission because it was an extrajudicial statement offered to prove the truth of the matter asserted, namely that Citizens and Sanchez were negligent and in violation of a statute proscribing unfair insurance practices. Under our rules of evidence, SCRA 1986, 11-802, an out-of-court statement offered to prove the truth of the matter asserted is inadmissible hearsay unless the statement is excluded from the definition of hearsay, SCRA 1986, 11-801(D), or falls under one of the enumerated exceptions to the inadmissibility of hearsay, SCRA 1986, 11-803, 11-804.

{33} The hearsay exception under which the letter arguably could have been admitted was SCRA 1986, 11-803(H) (public records and reports). Under Subsection H(3), extrajudicial statements of a public agency setting forth in a civil action factual findings resulting from an investigation made pursuant to lawful authority are admissible to prove the truth of the matter asserted, unless circumstances indicate a lack of trustworthiness. *See State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct. App.1976). We believe that in this instance the conclusion of negligence was not a trustworthy factual finding inasmuch as it was premised on the ex parte allegations of the plaintiffs, prior to any opportunity of Citizens to respond. *See Tincombe v. Colorado Constr. & Supply Corp.*, 681 P.2d 533 (Colo. Ct. App. 1984); J. Weinstein & M. Berger, *Weinstein's Evidence* para. 803(8) [03] (1988).

{34} The plaintiffs' attorney again moved for the letter's admission during direct examination of Sanchez, an adverse witness. Sanchez was asked, "And that letter told you in effect to pay the Gallegos' some money. Is that correct?" Sanchez replied:

> Sanchez: I don't remember the exact contents of the letter, I don't have a copy with me.
>
> [Plaintiffs' counsel]: Your honor, is Exhibit 14—let me hand you what has been marked as plaintiff's Exhibit 14 and ask you if that refreshes your recollection.—Is that a copy of the letter received from the Commissioner of Insurance?
>
> Sanchez: Yes sir.
>
> [Plaintiffs' counsel]: And that letter tells you to pay some money to Gallegos, does it not?
>
> Sanchez: It says that he alleges that he applied for and paid a premium amount of $600 and let me see here. Oh right, it says down here make arrangements to reimburse his premiums.
>
> [Plaintiffs' counsel]: Read that aloud if you would.
>
> [Defense counsel]: Objection your honor. Getting in hearsay in the backdoor.
>
> The Court: That's allowable if this man denies what's in the letter or can't recall he can use it in cross-examination for impeachment purposes. That's a different rule.
>
> * * * * * *
>
> Sanchez: Let me start all over. In view of your negligence to advise Mr. Gallegos that there was no coverage on his vehicles and your failure to reimburse his premium we feel that the interest of the insured was not properly served by your agency and you have acted in total violation of Section 59-11-13 New Mexico S.A. 1978. We request that you make immediate provisions to satisfy Mr. Gallegos' claim and you make provisions to reimburse these premiums.

{35} Plaintiffs maintain that under SCRA 1986, 11-612 the letter properly was admitted. Plaintiffs rely on the rule's provision that if a witness uses a writing to refresh his memory, an adverse party is entitled to have the writing produced, to inspect it, to cross-examine the witness about it, and to introduce into evidence those portions that relate to the witness' testimony. *See id.* Because plaintiffs and Sanchez were adverse parties, plaintiffs argue that they had a right to introduce the letter and the trial court did not err in admitting it. Production and inspection are not involved in this case, only questions of cross-examination and introduction of this exhibit into evidence for possible impeachment.

{36} In allowing the letter to be admitted, the trial court erred. At the most, the limited, unobjected-to statement regarding the department's request could have been read into the record if Sanchez had denied that the department had made such a request. The letter having refreshed Sanchez' memory, plaintiffs' attorney should have been only allowed to ask his question regarding whether the insurance department had

requested Sanchez to reimburse the plaintiffs' premium. *See State v. Bazan*, 90 N.M. 209, 212, 561 P.2d 482, 485 (Ct. App.) (if recollection not revived, writing may be read into evidence and admitted if it meets test set forth in SCRA 1986, 11-803 (E)), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977). Because the reading of the entire contents into the record and admitting the letter into evidence violated the hearsay rule, Sanchez' objection should have been sustained.

{37} Error having been committed, we must next determine whether it was harmless or prejudicial. Under SCRA 1986, 1-061 (Rule 61), error is not grounds for setting aside a verdict "unless the refusal to take such action appears to the court inconsistent with substantial justice." Any error that does not affect the substantial rights of the parties must be disregarded. *Id.* This rule applies not only to district courts, but also to appellate courts. *El Paso Elec. Co. v. Real Estate Mart., Inc.*, 98 N.M. 570, 651 P.2d 105 (Ct. App.), *cert. denied*, 98 N.M. 590, 651 P.2d 636 (1982).

{38} In their motion for reconsideration, plaintiffs contend that if any error was committed, it was harmless. First, plaintiffs argue that the letter's admission was harmless as to Aragon because the letter was not specifically addressed to him. Since the exhibit was not directed to Aragon and no evidence demonstrated his knowledge of the letter, plaintiffs assert that the exhibit could not have been considered by the jury in assessing punitive damages against him. Plaintiffs miss the point. The prejudicial effect of the letter is that it reflects a determination by a state agency that Citizens acted negligently and in violation of the law. It is immaterial whether Aragon was personally aware of this assessment. The jury nevertheless could have used this evidence to decide that Aragon's actions, i.e., his failure to procure an insurance policy for plaintiffs after being notified in June that plaintiffs had purchased such a policy, were deserving of punitive damages.

{39} Similarly, we cannot agree with plaintiffs' contention that the only damaging aspect of the letter's admission was that it showed the insurance department told Sanchez to reimburse plaintiffs' premium; an allegation already admitted by Sanchez without objection by defense counsel. As previously discussed, we have concluded that the letter was prejudicial because it represented an official assertion that Citizens was negligent and it was admitted for the purpose of proving that assertion. Finally, plaintiffs argue that subsequent testimony by Sanchez negated any harmful effect caused by the letter's introduction. Admittedly, the defense was able to elicit from Sanchez that he responded to the letter, related his position to the insurance department, and that no further action was taken. After defense counsel's objection to the letter's admission was overruled, his attempt to dampen its effect did not serve to waive his objection nor to render its admission harmless.

{40} This Court previously has announced that in jury cases if proper objection is made "the admission of hearsay [evidence] is prejudicial, reasonably calculated to cause and may have caused rendition of an improper verdict, and requires reversal." *Sayner v. Sholer*, 77 N.M. 579, 582, 425 P.2d 743, 745 (1967). The holding in *Sayner* must be reconciled with Rule 61. Not all erroneously admitted hearsay will automatically warrant reversal. There still must be a showing that its admission affected the substantial rights of the objecting party.

{41} We must examine the intended purpose for the admission of the evidence. In *Sayner*, the erroneously admitted evidence went to the heart of the contested issue of negligence. Here, the plaintiffs desired admission of the department's letter to corroborate their theory that Citizens acted in bad faith. This, in turn, would support their prayer for punitive damages. Consequently, we believe the prejudicial impact of its admission is limited to the award of punitive damages. As regards the liability for breach of contract, however, we conclude that there was more than ample evidence to support the jury verdict; the letter was cumulative evidence and, on this issue, its admission was harmless error. *See Tincombe*, 681 P.2d at 535. Accordingly, we reverse the jury verdict on punitive damages only.

{42} *Denial of peremptory challenges.* Aragon's final point concerns the court's alleged error in refusing to allow Sanchez and Aragon five peremptory challenges each. Aragon maintains that his interests were diverse from Sanchez, and under SCRA 1986, 1-038(E) he was entitled to five peremptory challenges. *Carraro v. Wells Fargo Mortgage & Equity*, 106 N.M. 442, 744 P.2d 915, *cert. denied*, 106 N.M. 439, 744 P.2d 912 (1987), outlines those factors a trial court should consider in determining whether to grant additional jury challenges. They are as follows: "(1) whether the parties employed the same attorneys; (2) whether separate answers were filed; (3) whether the parties' interests were antagonistic; and, (4) in a negligence claim, whether different independent acts of negligence are alleged in a suit governed by comparative negligence." 106 N.M. at 445, 744 P.2d at 918. The determination of whether to grant additional jury challenges rests within the sound discretion of the trial court. *Id*. Here, Sanchez and Aragon employed the same counsel and filed the same answer. While their interests in Aragon's partnership status (joint liability) or several tort liability may not have been the same, the court in its discretion well could have found that those antagonisms would not affect significantly the choice of individual jurors, especially when considered in light of the common interests of the defendants as against the interest of the plaintiffs in the choice of jurors. It is clear that the trial court did not abuse its discretion in allowing a total of five challenges to Aragon and Sanchez.

{43} The jury verdict on liability is affirmed, but the judgment is reversed and remanded on the issue of punitive damages against Aragon.

{44} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice.

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

JOSEPH F. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-081

Filing Date: December 19, 1989

Docket No. 18,142

LUCY ROMERO,

Plaintiff-Appellee and Cross-Appellant,

vs.

MERVYN'S and DENNIS WOLF,

Defendants-Appellants and Cross-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Patricio M. Serna, District Judge

Gallagher & Casados,
Michael T. Watkins,
Albuquerque, New Mexico,

for Appellants.

Janet Santillanes,
Albuquerque, New Mexico,

for Appellee.

OPINION

RANSOM, Justice.

{1} This is an appeal by defendant Mervyn's from a verdict in favor of plaintiff Lucy Romero for $2,041 in compensatory and $25,000 in punitive damages on a breach of contract claim. Romero cross-appeals the failure of the court to award certain witness fees as costs. We affirm.

{2} On November 23, 1984, Romero and two of her adult daughters were shopping in Mervyn's Department Store in Albuquerque. It was the day after Thanksgiving and the store was crowded with Christmas shoppers. As Romero and her daughters were descending on an escalator, another customer either intentionally or accidentally pushed her. She fell to her hands and knees, hitting her jaw as she fell. One of her daughters testified that a commotion ensued. When Romero reached the bottom of the escalator, a salesperson at a temporary station helped her to her feet and out of the path of other shoppers. Either this employee or a security guard watching from a two-way mirror summoned the store manager to the scene.

{3} Dennis Wolf, the acting store manager, came in response to this call. His usual job as operations manager of the store entailed responsibility for directing and training employees. It was also his duty to investigate and gather information on incidents involving customer injuries on the premises. Wolf testified that he could tell Romero was in pain and asked her whether she needed a wheelchair or ambulance. Romero replied that she did not. Wolf also testified that Romero's daughters were "very upset, a little bit hysterical," and kept asking who would pay for their mother's medical expenses. Wolf himself, according to Romero's testimony, "seemed to be kind of nervous and in a hurry since the store was busy." According to testimony by Romero and her daughters, Wolf told them that Mervyn's would pay any medical expenses. Wolf testified that, pursuant to company policy, he only told Romero that Mervyn's would submit the claim to its insurer, who would make the decision whether to pay any claims arising from the incident.

{4} Immediately following this conversation, Romero's daughters helped their mother out of the store, brought the car around, and returned to their home in Santa Fe. The following Monday, Romero still was in pain and decided she should seek medical attention. She had another of her daughters, who lived in Albuquerque, call Mervyn's and confirm with Wolf his promise that Mervyn's would pay the expenses. She also asked him if any forms needed to be completed

when her mother went to the doctor. He told her to come down to the store and pick up the necessary forms. When she did so, however, Wolf told her that he was out of the forms and then, according to her testimony, told her to go ahead and have her mother go to the doctor, and Mervyn's would pay the expenses. Wolf testified the "forms" in question were insurance claim forms. Romero's daughter confirmed that Wolf told her the forms were for the insurance company but insisted that Wolf reiterated the promise that Mervyn's would pay the bill.

{5} Thereafter, Romero consulted a physician and underwent physical therapy. The cost of her treatment came to $2,041. Mervyn's, however, refused to pay the bills. Romero filed suit in Santa Fe District Court, alleging liability under theories of negligence and contract. She did not rely on a theory of promissory estoppel.[1] At the first trial, the court granted summary judgment to Mervyn's on the contract claim and the jury returned a verdict in favor of Mervyn's on the negligence claim. The court based summary judgment on the lack of actual or apparent authority on the part of Wolf to bind Mervyn's to a contract. On appeal, this Court affirmed the jury verdict but reversed the summary judgment, holding that the question of Wolf's authority posed a genuine issue of material fact for the jury to decide. Romero v. Mervyn's, 106 N.M. 389, 390, 744 P.2d 164, 165 (1987).

{6} On remand, the jury found in favor of Romero on her contract claim, and awarded punitive damages. Mervyn's appeals, arguing the court erred: (1) in submitting the contract claim to the jury because there was no evidence of consideration for Wolf's alleged promise to pay Romero's medical expenses; (2) in failing to set aside the award of punitive damages absent evidence of ratification of Wolf's acts by Mervyn's; (3) in submitting the question of Wolf's actual or apparent authority to the jury; (4) in failing to grant Mervyn's motion for a directed verdict when the court granted a directed verdict in favor of Wolf; (5) in submitting the issue of punitive damages to the jury when there was no evidence of malice on the part of Mervyn's in refusing to pay Romero's medical bills, or in refusing to grant Mervyn's motions for judgment n.o.v. or for a new trial because the award of punitive damages was based on sympathy, passion, and prejudice; and (6) in admitting the medical bills from Romero's physician and Lovelace Clinic absent expert testimony that the bills were both reasonable and necessary for the injuries Romero suffered in the incident at Mervyn's.

{7} *Issues (1) and (2) not properly preserved for appeal.* Without objection, the jury was instructed under SCRA 1986, 13-802 (Express contracts; definition) and 13-803 (Implied contracts; definition). Mervyn's asserts on appeal, however, that there was *no substantial evidence of consideration* either having been expressly stated or having been shown in the surrounding circumstances, as, for instance, by the parties' words and actions, what they wanted to accomplish, the way they dealt with each other, and how others in the same circumstances customarily deal or would deal. *See Trujillo v. Glen Falls Ins. Co.*, 88 N.M. 279, 540 P.2d 209 (1975) (mutual assent, necessary to formation of contract, may be manifested wholly or partly by written or spoken words or by other acts or conduct).

{8} Although the court improperly instructed the jury (without objection) that Mervyn's had the burden of proving its claim of no consideration for any promise, there was no further definition or reference to consideration in the instructions. Mervyn's had tendered and objected to the refusal of an instruction that "The mere fortuitous presence of circumstances that might constitute consideration for an agreement is not enough, but consideration, like every other element in a contract, must be bargained for by the parties, and their minds must meet upon the consideration which is to support a promise." *See Knoebel v. Chief Pontiac, Inc.*, 61 N.M. 53, 294

[1] When there is no consideration for a promise, it may still be enforceable if the promisor reasonably could foresee that the promisee would rely on the promise and the promisee in fact suffers economic loss as a result of reasonable reliance. *See Eavenson v. Lewis Means, Inc.*, 105 N.M. 161, 730 P.2d 464 (1986); *Capo v. Century Ins. Co.*, 94 N.M. 373, 610 P.2d 1202 (1980).

P.2d 625 (1956) (consideration, like every other element in contract, must be bargained for and agreed upon by the parties). Mervyn's did not object in the trial court that substantial evidence of consideration was lacking,[2] and does not renew on appeal its argument that it was error not to give the tendered instruction defining consideration.

{9} Mervyn's also claims it was error to deny its motion for a directed verdict when there was no evidence of any consideration for the promise. However, the record on Mervyn's motion for a directed verdict is devoid of reference to absence of evidence of consideration. We conclude the consideration issue is not before us in this appeal. We similarly do not consider a *ratification* issue raised for the first time on appeal. *See Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 577 P.2d 1245 (1978) (liability of principal for punitive damages for the acts of an agent requires proof of ratification, participation, or authorization); SCRA 1986 13-1826.

{10} (3) *Trial court correctly submitted issue of actual or apparent authority to jury.* The jury received instructions on actual authority (express or implied) and on apparent authority. In its motion for directed verdict, Mervyn's raised the issue of substantial evidence of actual authority. Mervyn's also objected there was no substantial evidence to support the submission of an instruction of apparent authority. We conclude the court did not err in instructing the jury on the issue of agency.

{11} "Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to [the agent]." *Restatement (Second) of Agency* § 7 (1958). To warrant an instruction on the issue of Wolf's actual authority to enter into a contract with Romero, substantial evidence must have been introduced that such conduct lay within the scope of Wolf's employment.

{12} Besides being liable for acts within the actual authority of an agent, a principal also is responsible for the acts of the agent when the principal has clothed the agent with the appearance of authority. *Chevron Oil Co. v. Sutton*, 85 N.M. 679, 682, 515 P.2d 1283, 1286 (1973). Romero's claim of apparent authority was based on Mervyn's alleged placement of Wolf in a position that would lead a reasonably prudent third party to believe Wolf possessed authority to bind Mervyn's in a contract to pay medical bills. While actual authority is determined in light of the principal's "manifestations of consent" to the agent, apparent authority arises from the principal's manifestations to third parties, *Restatement (Second) of Agency* § 8 (1958), and can be created by appointing a person to a position that carries with it generally recognized duties. *Id.* § 27 comment a.

{13} We believe substantial evidence was presented on the issue of Wolf's actual authority. When Romero was hurt, Mervyn's other employees called for the "manager." Wolf was both acting manager and operations manager. When he appeared on the scene, the employees already present deferred to his handling of the situation. Mervyn's presented testimony that it was indeed part of Wolf's job to deal with customer injuries, that no one else at the store other than Wolf had such authority, and indeed that there was no one else to whom an injured customer could go. Pursuant to his duties, Wolf inquired whether Romero was hurt and gathered information concerning the accident. It was at this point, according to testimony, that the first promises were made.

{14} Mervyn's argues there was no testimony from Wolf or another agent of Mervyn's to suggest that it lay within Wolf's actual authority to bind Mervyn's. Moreover, Mervyn's argues, the evidence supported Mervyn's allegation that store policy in fact prohibited employees from admitting responsibility for customer injuries.

[2] Sufficiency of evidence to submit a case to a jury, or to support a verdict, cannot be raised on appeal unless the lack of substantial evidence on a material issue has been specifically called to the trial court's attention by, e.g., a motion for a directed verdict, objection to instructions, or a motion for j.n.o.v. *See Blacklock v. Fox*, 25 N.M. 391, 183 P. 402 (1919).

Neither of these points mandated a different verdict. The jury was not obliged to believe the testimony concerning store policy. In addition, an agent's actual authority need not be proved by direct testimony; it can be inferred from attending circumstances. *Jameson v. First Saving Bank & Trust Co.*, 40 N.M. 133, 138-39, 55 P.2d 743, 747 (1936).

{15} Mervyn's also argues that Wolf's statements at the time of the accident should not be considered as evidence of his actual authority. Mervyn's theory is that the extrajudicial statements of an agent cannot be used to prove agency, and the admissions of an agent are not binding on the principal unless made within the scope of authority. True, but here it is uncontroverted that Wolf was the acting manager of the store. After prima facie proof of managerial agency, extrajudicial declarations of the agent are admissible and may be considered in determining the scope of the agent's authority. *See id.* The fact that Wolf made an offer to pay Romero's medical expenses could be considered as evidence of authority to make a contract.

{16} We believe substantial evidence also supported an instruction on apparent authority. Mervyn's alleged policy prohibiting employees from admitting responsibility for customer injuries is not controlling because the existence of such a policy was not public knowledge. A third person who deals with an agent is not bound by any secret or private instructions given to the agent by the principal. *Chevron Oil Co. v. Sutton*, 85 N.M. at 682, 515 P.2d at 1286.

{17} The focus of our inquiry, rather, is the existence of substantial evidence from which the jury could find that Mervyn's placed Wolf in such a position and clothed him with such indicia of authority as would lead a third party, such as Romero, reasonably to conclude Wolf had the authority to make the promise at issue. Given the circumstances surrounding the accident itself and the role Wolf played as an employee of Mervyn's upon arriving at the scene, the jury could have concluded that Mervyn's had placed Wolf in such a position.

{18} (4) *Directed verdict in favor of Wolf did not require directed verdict in favor of Mervyn's.* Mervyn's argues that, under principles of respondeat superior, the granting of a directed verdict in favor of Wolf impelled the granting of a directed verdict in favor of Mervyn's. We disagree. Principles of *respondeat superior* apply when the claim is based in tort and the plaintiff alleges the employer is liable for the conduct of an employee because the employee was acting within the scope of employment. *See McCauley v. Ray*, 80 N.M. 171, 180, 453 P.2d 192, 201 (1968).

{19} This case, by contrast, involved a contract claim. When an agent with the authority to do so negotiates a contract for a disclosed principal, the agent is not liable personally unless the agent expressly is made a party to the contract or the agent acts in a manner indicating an intent to be bound personally. *Roller v. Smith*, 88 N.M. 572, 544 P.2d 287 (Ct. App.), *cert. denied*, 89 N.M. 6, 546 P.2d 71 (1975). The issue of substantial evidence of authority has been discussed above. Because there was no evidence that Wolf ever said he *personally* would pay Romero's medical expenses, the directed verdict in favor of Wolf was appropriate. It did not, however, require a directed verdict in favor of Mervyn's.

{20} (5) *Trial court acted correctly in instructing the jury on the issue of punitive damages and in denying j.n.o.v. or new trial.* Over Mervyn's objection, the trial court submitted an instruction that the jury could find Mervyn's liable for punitive damages if it determined the acts of Mervyn's were "maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the Plaintiff's rights." *See* SCRA 1986, 13-1827.

{21} Although Mervyn's agreed to the wording of the instruction, it nevertheless objected that there was no proof of any malicious or wanton conduct in this case. First, Mervyn's objection could be deemed to imply that the instructions on malicious or wanton conduct raised false issues when combined with the other words used to describe the nature of the alleged wrong for which punitive damages were sought, i.e., acts

that were fraudulent, oppressive, or committed recklessly. When a party has submitted to the jury instructions providing alternative bases for relief, it is reversible error to submit any one alternative for which there is no substantial evidence. *Salinas v. John Deere Co. Inc.*, 103 N.M. 336, 707 P.2d 27 (Ct. App. 1984), *cert. quashed*, 103 N.M. 287, 705 P.2d 1138 (1985).

{22} After objecting to the absence of proof of any malicious or wanton conduct, however, Mervyn's also stated it did not believe *any* punitive damage instruction would be proper in such a situation. Thus, secondly, Mervyn's objection may be construed as an argument that malicious or wanton conduct is a prerequisite to punitive damages. We feel this argument raises important questions concerning the meaning and purpose of New Mexico's punitive damage rule when applied to contract cases. In the following two sections, therefore, we discuss these issues. We conclude our discussion on punitive damages with an examination of the evidence supporting an instruction of malice.

{23}—*Malice, wantonness and punitive damages.* Our previous cases clearly establish that, in contract cases not involving insurance, punitive damages may be recovered for breach of contract when the defendant's conduct was malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for the plaintiff's rights. *Green Tree Acceptance, Inc. v. Layton*, 108 N.M. 171, 769 P.2d 84 (1989); *Hood v. Fulkerson*, 102 N.M. 677, 699 P.2d 608 (1985); *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 418 P.2d 191 (1966); *Stewart v. Potter*, 44 N.M. 460, 104 P.2d 736 (1940). *Cf. Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 776 P.2d 1244 (1989) (gross negligence or recklessness provides basis for recovery of punitive damages by insured against insurer on claim for breach of insurance contract); *United Nuclear Corp. v. Allendale Mutual Ins. Co.*, 103 N.M. 480, 480, 709 P.2d 649, 654 (1985) (bad faith refusal to pay proceeds due on insurance contract supports award of punitive damages).[3]

{24} Each of the terms listed, standing alone, will support an award of punitive damages. *See Green Tree Acceptance*, 108 N.M. at 174, 769 P.2d at 87. In a literal sense, therefore, it is incorrect to argue that "malice" or "wantonness" are essential terms to the exclusion of, e.g., fraud or oppression. However, in the sense that malice and wantonness, interpreted broadly, suggest an absence either of a good faith reason or of an innocent mistake, they describe the conduct targeted by our punitive damages rule.

{25} "Malice" as used in our punitive damages instruction does not imply "actual malice" or "malice in fact" in the sense of an intent to harm. *Galindo v. Western States Collection Co.*, 82 N.M. 149, 154, 477 P.2d 325, 330 (Ct. App. 1970). Instead, malice, as defined in *Loucks*, means

> the intentional doing of a wrongful act without just cause or excuse. This means that the defendant not only intended to do the act which is ascertained to be wrongful, but that he knew it was wrong when he did it.

76 N.M. at 747, 418 P.2d at 199. This definition is a broad one and undoubtedly encompasses situations that also connote "fraudulent" or "oppressive" conduct. The term "wanton," as used in our punitive damages instruction, suggests a similar quality of wrongfulness when the evidence demonstrates conduct committed without concern for the consequences, rather than intentionally, and connotes an "utter indifference to or conscious disregard for the rights of others." *See Curtiss v. Aetna Life Ins. Co.*, 90 N.M. 105, 108, 560 P.2d 169, 172 (Ct. App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976).

[3] We have allowed the award of punitive damages in insurance cases under a more relaxed standard in part because of the fiduciary obligations inhering in insurance relationships and because of concerns arising from the bargaining position typically occupied by the insured and insurer. See *Chavez v. Chenoweth*, 89 N.M. 423, 430, 553 P.2d 703, 710 (Ct. App. 1976) (relationship between insurer and insured imposes fiduciary obligation on insurer to deal with insured in good faith in matters pertaining to performance of insurance contract).

{26} Thus, these words broadly distinguish "wrongful" breaches of contract from those committed intentionally for legitimate business reasons or those that are the result of inadvertence. In this sense, it may be argued that "malice" or "wantonness" are prerequisites to punitive damages. Nonetheless, we remain convinced that the nuances distinguishing the terms "malice," "fraud," and "oppression" make it useful to retain these words as distinct standards to guide the jury's exercise of discretion in particular cases.

{27}—*Purpose of punitive damages in contract cases*. Mervyn's argues, even taking the evidence in the light most favorable to Romero, "the only thing shown was that Mr. Wolf said Mervyn's would pay the bill and then refused to do so." Mervyn's argues this conduct does not demonstrate malice or wantonness and, unless we reverse the award of punitive damages, "every breach of contract, even if justified, will result in a claim for punitive damages."

{28} As discussed below, we believe substantial evidence of malicious or wanton behavior was presented in this case. However, Mervyn's argument raises an important issue. Our rule on punitive damages never was intended to make punitive damages available for every intentional breach of a contract. Although our previous cases have articulated clearly the standard for awarding punitive damages, they have not discussed in general terms the purpose of awarding punitive damages in contract cases. Before discussing whether substantial evidence supported submission of the issue of punitive damages to the jury, we undertake such a discussion.

{29} The proposition is often repeated that, in general, "the purpose of awarding [contract] damages is. . . . compensation and not punishment." *Restatement (Second) of Contracts* § 355 comment a (1981).[4] The Supreme Court of California explained its reluctance in contract cases to allow the award of tort damages, including punitive damages, as follows:

> [P]arties of roughly equal bargaining power are free to shape the contours of their agreement and to include provisions for attorney fees and liquidated damages in the event of breach. They may not be permitted to disclaim the covenant of good faith but they are free, within reasonable limits at least, to agree upon the standards by which application of the covenant is to be measured. In such contracts, it may be difficult to distinguish between breach of the covenant and breach of contract, and there is the risk that interjecting tort remedies will intrude upon the expectations of the parties.

Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 36 Cal. 3d 752, 769, 686 P.2d 1158, 1167, 206 Cal. Rptr. 354, 362 (1984) (footnote omitted).[5]

{30} The general rule limiting recovery in contract case to compensatory damages thus seems in part calculated to leave undisturbed the allocation of risks and benefits to which both parties have agreed. Such a policy readily is accommodated by awarding money damages, if the measure of damages is based on the justified expectations of the injured party under the contract. Moreover, in most commercial settings,

> [t]he fact that [compensatory] damages must be paid tends directly to the prevention of breaches of contract. It makes,

[4] Professor Corbin has noted, however, "The truth of such a statement turns on rather nice distinctions between compensation and punishment." 5 A. Corbin, *Corbin on Contracts* § 1077, at 437-38 (1964). Another commentator has lamented that "[t]he functional purposes of contract damages * * * are obscured by a thick overlay of judicial decisions and scholarly commentary which uncritically recite that the object of damages in contract is solely [compensatory]." Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 Minn. L. Rev. 207, 219 (1977).

[5] Some scholars have advanced similar explanations. One commentator has suggested that extension of punitive damages, at least in commercial contracts, would unjustifiably introduce uncertainty and confusion into business transactions. Simpson, *Punitive Damages for Breach of Contract*, 20 Ohio St. L.J. 284 (1959). Another has suggested that, because parties freely create their contractual obligations, "unlike the commission of a tortious act, failure to discharge these self-imposed obligations does not inevitably violate objective standards of societal conduct." *Sullivan; supra* note 4, at 219.

> therefore, for the security of business transactions and helps to make possible the vast structure of credit, upon which so large a part of our modern prosperity depends.

5 A. Corbin, *Corbin on Contracts* § 1002, at 34 (1964).

{31} Notwithstanding the general exclusion of punitive damages from contract cases, however, exceptions long have been recognized. *See, e.g., Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904) (punitive damages allowed for fraudulent breach of contract); *Stewart v. Potter*, 44 N.M. 460, 104 P.2d 736 (1940) (same). Many courts have conceptualized the conduct necessary to afford recovery of punitive damages as consisting of an independent tort. *See, e.g., Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc.*, 437 N.E.2d 1360 (Ind. Ct. App. 1982) (breach of contract may support an award of punitive damages when elements of fraud, malice, gross negligence, or oppression mingle in the controversy); *Consolidated Am. Life Ins. Co. v. Toche*, 410 So. 2d 1303 (Miss. 1982) (punitive damages available when breach attended by intentional wrong, insult, abuse, or such gross negligence as to consist of an independent tort); *see generally*, 1 J. Ghiardi and J. Kircher, *Punitive Damages Law and Practice* § 5.16 (1985); Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 Minn. L. Rev. 207, 236-40 (1977). Similarly, the text of Section 355 of the *Restatement (Second) of Contract*s recognizes an exception when "the conduct constituting the breach is also a tort for which punitive damages are recoverable."

{32} Other jurisdictions, including California, have justified the award of punitive damages in terms of breach of the implied covenant of good faith and fair dealing, particularly in cases involving insurance contracts. *See Gruenberg v. Aetna Ins. Co.*, 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973). "Broadly stated, that covenant requires that neither party do anything which will deprive the other of the benefits of the agreement." *Seaman's Direct Buying Serv.*, 36 Cal. 3d at 768, 686 P.2d at 1166, 206 Cal. Rptr. at 362.

{33} We believe, regardless of whether conceptualized in terms of an independent tort, breach of the implied covenant of good faith, or, as in New Mexico, in terms of the quality of the conduct constituting the breach itself, the award of punitive damages in some cases serves important social ends. In *Seaman's Direct Buying Service*, the court held that tort remedies, including punitive damages, were recoverable against a party who attempted "to avoid all liability on a meritorious contract claim by adopting a 'stonewall' position ('see you in court') without probable cause and with no belief in the existence of a defense." 36 Cal. 3d at 769-70, 686 P.2d at 1167, 206 Cal. Rptr. at 363. In justifying its position, the court noted:

> Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics. Acceptance of tort remedies in much a situation is not likely to intrude upon the reasonable expectations of the contracting parties.

Id. (citation omitted).[6]

{34} Overreaching, malicious, or wanton conduct such as targeted by our rule is inconsistent with legitimate business interests, violates community standards of decency, and tends to undermine the stability of expectations essential to

[6] There is insufficient evidence of the decision making process that led Mervyn's to refuse payment of Romero's medical expenses to warrant a conclusion that it was adopting a "stonewall" position, anticipating that the limited nature of Romero's claim would make it impractical for her to secure legal representation and take her claim to court. Mervyn's well may have believed in good faith that it possessed one or more valid defenses to the claim when it made the decision to litigate. While we have been willing to expose an insurer to punitive damages when it refuses to pay a claim for frivolous or unfounded reasons, *see United Nuclear*, 103 N.M. at 485, 709 P.2d at 654, the fiduciary obligations on which this relaxed standard is based here are lacking. We note, however, that punitive damages long have been recognized as an appropriate remedy in situations in which exposure merely to compensatory damages is an inadequate deterrent to prevent such oppressive conduct. *See A. Corbin, supra*, note 4 § 1077. Although we do not decide this issue in the present case, logic suggests that punitive damages be available when a party has breached a contract believing the wronged party cannot afford to contest the matter in court.

contractual relationships. When this is the case, it is appropriate to allow the jury to determine whether "the public interest will be served by the deterrent effect punitive damages will have upon future conduct." *Jones v. Abriani*, 169 Ind. App. 556, 578, 350 N.E. 2d 635, 649 (1976) (quoting, *Vernon Fire & Cas. Ins. Co. v. Sharp*, 264 Ind. 599, 608, 349 N.E. 2d 173, 180 (1976)).

{35}—*Substantial evidence supported instructions on malice and wanton conduct, denial of j.n.o.v. or new trial not error.* Contrary to Mervyn's argument, we do not believe the evidence demonstrated only that Wolf made a promise which subsequently he did not keep. Consistent with the definition of malice under *Loucks*, the trial court instructed the jury that malice denoted "the intentional doing of a wrongful act without just cause or excuse. This means * * * [Mervyn's] not only intended to do the act which is ascertained to be wrongful, but that it knew it was wrong when it did it." We note that, in closing argument to the jury, Romero's attorney contended Mervyn's made the promise to pay her client's medical bills in order to get her out of the store without causing a disturbance, but had its "fingers crossed" and never intended to keep that promise.

{36} The evidence reasonably could be viewed as indicating the promise was made because, on one of the busiest shopping days of the year, Wolf wanted to get the Romeros out of the store as quickly as reasonably possible without causing a scene. Mervyn's also presented evidence that Wolf's promise was inconsistent with the store's policy regarding customer injuries, and that Wolf subsequently took no action other than to submit the claim to Mervyn's insurer. This evidence reasonably supports the inference that Wolf entered into the contract simply to end his encounter with Romero and her daughters, without intending to follow through on the promise, and with knowledge that his employer thereafter would not perform.[7]

{37} We thus conclude the jury could have inferred knowledge on Wolf's part that his employer would not honor the contract with Romero, and thus that he acted with malice. This determination leads to the conclusion that the jury also could infer Wolf made the promise with a conscious disregard for whether his employer subsequently would perform, and thus that he acted recklessly with a wanton disregard for Romero's rights. We conclude substantial. evidence supported the instructions on malicious or wanton conduct. Consequently, the denial of j.n.o.v. and of a new trial was well within the discretion of the trial court. *See Cienfuegos v. Pacheco*, 56 N.M. 667, 248 P.2d 664 (1952). Furthermore, the amount of the award of punitive damages is not so plainly unrelated to the injury or actual damages, such as to raise a question of sympathy, passion and prejudice as a matter of law. *See Faubion v. Tucker*, 58 N.M. 303, 270 P.2d 713 (1954).

{38} (6) *Admission of medical bills not error.* Mervyn's argues it was error to admit Romero's medical bills without testimony that the treatment received was reasonably necessary as a result of the injury, and that the resulting bills were reasonable in amount. *See Frei v. Brownlee*, 56 N.M. 677, 248 P.2d 671 (1952). Romero responds by pointing out: (1) Romero's physician testified at the first trial as to these issues; and (2) while Mervyn's made an objection to this testimony as it dealt with reasonableness in the amount of the Lovelace Bill, Mervyn's did not object as to the necessity of either bill. Romero argues the doctrine of judicial estoppel should prevent Mervyn's from maintaining on remand following appeal of the first trial that the bills were not necessary for the contract claim. *See Chapman v. Locke*, 63 N.M. 175, 315 P.2d 521 (1957). On the issue of reasonableness, Romero urges us to extend to the facts here present the principle from worker's compensation cases that proof of a bill from a doctor is prima facie proof

[7] Direct evidence of knowledge that an act was wrongful is not necessary to establish malice. *See Galindo*, 82 N.M. at 154, 477 P.2d at 330 (familiarity of defendant with collection claim procedures and his failure to disclose knowledge of plaintiffs' whereabouts permitted inference that he intentionally chose to post notice of a garnishment claim on courthouse bulletin board as method of service because he knew plaintiffs thereby would not receive actual notice).

of its reasonableness. *See, e.g., Pritchard v. Halliburton Servs.*, 104 N.M. 102, 717 P.2d 78 (Ct. App.), *cert. denied*, 103 N.M. 798, 715 P.2d 71 (1986).

{39} In *Pritchard*, the court held that introduction of supplemental medical bills in a second hearing should be prima facie evidence of the reasonableness and necessity of those bills, so long as they relate to the same injury at issue in the prior hearing. Romero, rather than submitting supplemental bills, introduced the original bills themselves without again calling her physician as an expert witness to repeat testimony given at the first trial. As Romero pointed out to the trial court on remand, her claim is for breach of a promise to pay medical bills, not for damages due to the injury; thus, in seeking to establish the extent of her bills, she is in a somewhat analogous position to an injured employee seeking reimbursement for medical expenses, rather than disability.

{40} We do not decide, however, whether principles developed in worker compensation cases necessarily apply under circumstances such as those present here. We note that the sole objection made by Mervyn's to the introduction of the bills was foundational in nature, i.e., the medical bills could not be admitted without testimony that they were reasonable in amount and reasonably necessary. Mervyn's did not object that, absent such testimony, the jury lacked substantial evidence from which to fix the damages incurred by Mervyn's alleged breach of the contract. Under the circumstances, we believe the trial court properly took judicial notice of the testimony in the previous trial and, absent presentation of evidence by Mervyn's disputing the reasonableness and necessity of the bills, properly admitted those bills into evidence.

{41} *Court's refusal to award plaintiff's requested witness fees was not error.* Romero argues the trial court abused its discretion in refusing to award witness fees arising from the testimony of Romero's physician in the first trial, and in fixing too low the amount to be paid the medical records keepers who testified at the second trial. We disagree.

{42} Romero's physician testified only at the first trial, and Romero chose for economic reasons to forego his testimony at the second trial. The first trial ended in a verdict in favor of Mervyn's on the negligence claim, and Romero's physician's testimony was introduced as part of her evidence of damages as to that claim. *See* SCRA 1986, 1-054(E) (costs shall be awarded to prevailing party as a matter of course unless court otherwise directs). Under these circumstances, the trial court did not err in the second trial in refusing to award the cost of testimony in the losing effort at the first trial. *Cf. Mills v. Southwest Builders, Inc.*, 70 N.M. 407, 374 P.2d 289 (1962) (when first trial ended as mistrial and second trial resulted in verdict for plaintiff on the same issues, court did not err in awarding costs arising from first trial).

{43} The trial court fixed the amount of the witness fees for the record keepers in accordance with the statute and regulations applicable at the time they testified. We find no merit in Romero's argument that we should give retroactive effect to subsequent changes in the law, or that we should fix the amount of witness fees in accordance with the law applicable at a time the claim first was filed rather than at the time of their testimony.

{44} For the foregoing reasons, the judgment of the trial court is affirmed in its entirety.

{45} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

JOSEPH F. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-083

Filing Date: December 20, 1989

Docket No. 18,645

STATE OF NEW MEXICO,

Petitioner,

vs.

ESEQUIEL CORDOVA,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Alvin F. Jones, District Judge

Hal Stratton, Attorney General,
Katherine Zinn, Assistant Attorney General,
Santa Fe, New Mexico

for Petitioner.

Jacquelyn Robins, Chief Public Defender,
Jerry Todd Wertheim, Assistant Appellant Defender,
Santa Fe, New Mexico

for Respondent.

OPINION

RANSOM, Justice.

{1} Respondent Cordova was convicted of possession of heroin. He appealed the denial of his motion to suppress evidence seized under an allegedly invalid search warrant. The court of appeals reversed his conviction, holding that the affidavit used to secure the warrant did not provide an adequate basis from which the issuing magistrate could conclude probable cause existed to search the house where Cordova resided at the time of his arrest.

{2} The affidavit submitted to secure the search warrant in this case stated:

1. That within the last 24 hours, Affiant has been contacted by a Confidential Informant, who advised that a subject driving a red Chrysler Cordova with Texas Plates, was currently selling heroin at a residence at 1106 South Cahoon. That Subject John Doe was from out of town and had brought the heroin in.

2. That Said Informant stated that subject was a [S]panish male, approximately 6-0 tall, weighing a little over 200 pounds, having black hair and did have some tattoos on his person.

3. That Said Informant did state that through personal knowledge, several heroin users had been to this residence.

4. That Said Informant has furnished information to Affiant in the past which Affiant did find to be true and correct through personal knowledge and investigation.

5. That based on the information provided by Said Informant, Affiant did drive by the residence and did observe the red Cordova which did have a partial white vinyl roof. Description and the trailer house next to the house are the same as stated by Informant. Also, on checking utilities, it was learned that a Carol Cordova resided at this address.

{3} The court of appeals based its determination that this affidavit was lacking on our rule of criminal procedure governing the issuance of warrants based on affidavits containing hearsay information. *See* SCRA 1986, 5-211(E). The court noted that our interpretations of Rule

5-211(E) have been based on the two-prong test formulated by the Supreme Court in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). However, as also noted by the court of appeals, the United States Supreme Court has since abandoned the *Aguilar-Spinelli* test in favor of a determination based on "the totality of circumstances." *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 2328, 76 L. Ed. 2d 527 (1983). We granted certiorari to determine the impact, if any, of the *Gates* decision on Rule 5-211(E). We conclude that our previous reading of this rule comports both with its plain meaning and with the requirement of the New Mexico Constitution that "no warrant * * * shall issue * * * without a written showing of probable cause, supported by oath or affirmation." N.M. Const. art. II, § 10.[1] Moreover, although our analysis of the facts of this case differs from that of the court of appeals, we affirm the result reached by that court.

{4} *Federal law before Gates—The reasons behind the two-prone test of Aguilar and Spinelli.* The fourth amendment of the federal constitution, like Article II, Section 10 of our state constitution, strongly favors the warrant process. This process requires law enforcement officials to make a showing of probable cause before a "neutral and detached magistrate" in order to obtain a search warrant. *Johnson v. United States*, 333 U.S. 10, 13, 68 S. Ct. 367, 368, 92 L. Ed. 436 (1948); *see also State v. Baca*, 97 N.M. 379, 640 P.2d 485 (1982). The intent of this requirement, and of the protection it affords,

> is not [to deny] law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson, 333 U.S. at 13-14, 68 S. Ct. at 368-69.

{5} The constitutionally mandated role of magistrates and judges in the warrant process requires them to make "an informed and deliberate" determination whether probable cause exists. *Aguilar v. Texas*, 378 U.S. at 110, 84 S. Ct. at 1511 (quoting *United States v. Lefkowitz*, 285 U.S. 452, 464, 52 S. Ct. 420, 423, 76 L. Ed. 877 (1932)). Accordingly, when an application for a search warrant is based on an affidavit, the affidavit must contain sufficient facts to enable the issuing magistrate independently to pass judgment on the existence of probable cause. "Mere affirmance of belief or suspicion [by the affiant] is not enough." *Nathanson v. United States*, 290 U.S. 41, 47, 54 S. Ct. 11, 13, 78 L. Ed. 159 (1933) (warrant improperly issued upon sworn affidavit stating simply that affiant "has cause and does believe" certain liquors were to be found in specified location); *see also Baca*, 97 N.M. at 382, 640 P.2d at 488 (bald and unilluminating assertion that defendant was known by informant to be involved in narcotics transactions is entitled to no weight in appraising judge's decision to issue warrant).

{6} Frequently, applications for search warrants depend on unnamed, confidential, police informants to show the existence of probable cause. To analyze such cases, the *Aguilar* and *Spinelli* Courts refined the basic requirement that applications for search warrants must contain sufficient detail to enable an issuing magistrate to make an independent determination of the existence of probable cause. Although an affidavit may be based wholly or in part on hearsay provided by an unnamed informant, "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that [the facts were as] he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant * * * was 'credible' or his information 'reliable.'" *Aguilar*, 378 U.S. at 114, 84 S. Ct. at 1514 (citations omitted); *see also State v. Snedeker*, 99 N.M. 286, 657 P.2d

[1] Because our holding today is based on our interpretation of the New Mexico Constitution, we do not consider as controlling the principles announced in *Gates* or the other federal precedents cited in the body of this decision, albeit the reasoning of those opinions informs our result.

613 (1982); *State v. Perea*, 85 N.M. 505, 513 P.2d 1287 (Ct. App. 1973) (applying test to "double hearsay" problem). These requirements are often called the "basis of knowledge" and "veracity" (or "credibility") tests. *See, e.g., Gates*, 462 U.S. at 267, 103 S. Ct. at 2347 (White, J., concurring); Kamisar, *Gates*, "*Probable Cause," "Good Faith," and Beyond,* 69 Iowa Law Review 551, 556 (1984).

{7} In *Aguilar*, the Court held an affidavit to be insufficient to support a search warrant when it stated simply that "Affiants have received reliable information from a credible person and do believe" that illegal drugs and paraphernalia were being kept at a particular residence. The Court found this affidavit lacking because it expounded neither the basis for the officers' conclusion that the information was gathered in a reliable way or the basis for the conclusion that the informant was credible.[2]

{8} In *Spinelli*, the Court explored two particular means by which a magistrate reasonably could conclude that an affidavit contained sufficient information to satisfy *Aguilar's* two prongs. First, the Court noted, an affidavit that otherwise would be inadequate nevertheless may support a determination of the existence of probable cause if "it fairly [can] be said that the tip * * * when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration." 393 U.S. at 415, 89 S. Ct. at 588. Under the facts of *Spinelli*, however, Justice Harlan, writing for the Court, concluded that independent police investigation had verified only innocent facts that were not sufficiently suggestive of the illegal bookmaking activity alleged. *Cf. Perea*, 85 N.M. at 508-509, 513 P.2d at 1292-93 (affidavit established probable cause when it alleged that police officer had defendant's premises under surveillance for months, had seen several known narcotics users come and go, had observed fresh needle marks on some whom he stopped, and some whom he stopped admitted purchasing narcotics from defendant).

{9} The *Spinelli* Court also opined that, even when an affidavit does not affirmatively state an informant's basis of knowledge, it may be inferred that an informant who otherwise is known to be credible obtained the information set forth in the affidavit in a reliable fashion *if* the tip contains enough detail to be self-verifying. *Id.* at 417, 89 S. Ct. at 589; *see also Baca*, 97 N.M. at 382, 640 P. 2d at 488. The *Spinelli* Court concluded, however, that there was insufficient detail set forth in the affidavit in question to compensate for its failure to specify the factual basis for the informant's tip.[3]

{10} *New Mexico's rules of criminal procedure.* In New Mexico, this Court has promulgated rules to govern the determination of probable cause for the issuance of a search warrant. Under SCRA 1986, 5-211(E),[4]

[2] In many cases, the affidavit will attempt to satisfy the basis of knowledge and veracity tests by stating that the informant has a reliable "track record" with the police, and that the informant gathered the information from firsthand observation. In other cases, the credibility of an informant may be assumed when the tip constitutes an admission that the informant was involved in the illegal activity. *See Perea*, 85 N.M. at 508, 513 P.2d at 1292; *United States v. Harris*, 403 U.S. 573, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971).

[3] The *Spinelli* Court compared the extent of detail in the case before it to that in *Draper v. United States*, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959). In *Draper*, the informant's tip described in minute detail the time of arrival, dress, and movements of an alleged drug courier. This detail provided police, upon observing the suspect as predicted, with probable cause to make a warrantless arrest. Although the detailed facts in the tip did not themselves give rise to an inference of illegal activity, they were of a kind that generally would have been known only by someone intimately connected with making careful arrangements for meeting the suspect. By analogy, the *Spinelli* Court posited that a magistrate confronted with the tip considered in *Draper* could have concluded that the tip was based on personal knowledge without an affirmative statement to that effect. *Cf. Spinelli*, 393 U.S. at 426, 89 S. Ct. at 594 (White, J., concurring).

[4] Rule 5-211 governs procedures in district court; however, identical provisions govern the determination of probable cause in applications for search warrants made in magistrate courts, *see* SCRA 1986, 6-208(F); in metropolitan courts, *see* SCRA 1986, 7-208(E); and in municipal courts, *see* SCRA 1986 8-208(F).

> "[P]robable 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*. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such additional evidence shall be reduced to writing, supported by oath or affirmation and served with the warrant.

(Emphasis added). As first recognized by the court of appeals in *Perea*, and by this Court in *State v. Turkal*, 93 N.M. 248, 599 P.2d 1045 (1979), our rules of criminal procedure codify the standard set out in *Aguilar* and related Supreme Court cases.

{11} The use of the conjunctive "and" in Rule 5-211(E) clearly contemplates that an affidavit must set forth both: (1) a substantial basis for believing the informant; and (2) a substantial basis for concluding the informant gathered the information of illegal activity in a reliable fashion. It is equally clear that these requirements are formulations of the "veracity" and "basis of knowledge" tests of *Aguilar-Spinelli*. Moreover, we are convinced that these requirements structure the issuing magistrate's inquiry in a manner made necessary by the affidavit's reliance on second or third hand reports from an unnamed informant. As Justice Harlan noted, "It is not possible to argue that since certain information, if true, would be trustworthy, therefore, it must be true. The possibility remains that the information may have been fabricated." *See United States v. Harris*, 403 U.S. 573, 592, 91 S. Ct. 2075, 2086, 29 L. Ed. 2d 723 (1971) (Harlan, J., dissenting, joined by Douglas, Brennan, and Marshall, JJ.).

{12} Conversely, if "the conclusory allegations of a police officer, presumably [truthful] * * * are insufficient to establish probable cause [cf. *Nathanson*], the conclusory allegations of a generally [truthful] informant must be insufficient as well." Kamisar, *supra* at 556. "Truthful persons can be the bearers of hearsay, rumor, gossip, or bare conclusions as surely as can be liars." *State v. Jones*, 706 P.2d 317, 322-23 (Alaska 1985) (quoting *State v. Jackson*, 102 Wash. 2d 432, 441, 688 P.2d 136, 142 (1984)). It is for these reasons that the two prongs of *Aguilar-Spinelli* and of our rule have been characterized as independent and "analytically severable" requirements. *United States v. Harris*, 403 U.S. at 592, 91 S. Ct. at 2086; *State v. Jackson*, 102 Wash. 2d at 437, 688 P.2d at 139; *see also Baca*, 97 N.M. at 381, 640 P.2d at 487 ("[T]he test we apply is two pronged, from which we cannot deviate.").

{13} *The Supreme Court's rejection of the two-prong test in favor of the "totality of the circumstances" test.* In *Illinois v. Gates*, a four justice plurality of the Supreme Court abandoned the *Aguilar-Spinelli* approach in favor of a "totality of the circumstances" test.[5] The Justices seem in large part to have been motivated by a conviction that some lower courts tended to apply the two-prong test in a rigid and technical fashion. They were convinced that such applications did not comport with the fourth amendment principle of probable cause, which was described as a "fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Gates*, 462 U.S. at 232, 103 S. Ct. at 2329.[6]

[5] In *Massachusetts v. Upton*, 466 U.S. 727, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984), *on remand, Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985), the Court applied the *Gates* totality-of-circumstances test in a per curiam opinion, reversing the decision below of the Massachusetts Supreme Court.

[6] Other concerns of the *Gates* plurality, not discussed in the body of this opinion, include the concern that, if courts subject affidavits to great scrutiny, police may resort to warrantless searches, and the concern that rigid application of *Aguilar-Spinelli* unduly diminishes the value of anonymous tips in police work. 462 U.S. at 236-37, 103 S. Ct. at 2331. We note, however, that each of these concerns is itself derived from the plurality's concern that the test sometimes was applied too rigidly. As noted in the body of this opinion, these concerns do not accord with our experience of our court's application of the principles set forth in Rule 5-211(E). Under *Spinelli*, moreover, police corroboration may compensate for an inability to demonstrate that an anonymous tip was from a credible source, and a detailed description may compensate for an inability to show the anonymous informant's basis of

{14} Gates did recognize the continued utility of the basis of knowledge and veracity tests as factors to be considered. *Id.* at 230, 103 S. Ct. at 2328. These factors, however, no longer were to be considered as exclusive or analytically severable requirements under the federal constitution.[7]

{15} *The New Mexico experience.* We believe that what we have identified as the primary reason of the *Gates* plurality for abandoning the two-prong test—its application in too rigid and technical a fashion by some courts—has not proved to be a problem in our state courts' application of the standard set forth in Rule 5-211(E). In *Perea*, for example, the court of appeals was careful to note that affidavits normally are "drafted by non-lawyers . . . in the midst and haste of a criminal investigation, therefore, technical requirements of elaborate specificity have no proper place in a court's evaluation." 85 N.M. at 507, 513 P.2d 1287. The *Perea* Court also noted that affidavits should be tested under less rigorous standards than those governing admissibility at trial. *Id.* Similarly, in *State v. Snedeker*, 99 N.M. 286, 290, 657 P.2d 613, 617 (1982) (quoting *State v. Gutierrez*, 91 N.M. 542, 545, 577 P.2d 440, 443 (Ct. App. 1974)), we noted that on issues of probable cause to support a warrant:

> "(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; [and] (4) great deference should be shown by courts to a magistrate's determination of probable cause."

See also Baca, 97 N.M. at 380, 640 P.2d at 486 (showing of probable cause that a person has committed a crime will permit reasonable inference that evidence of the crime is to be found at his residence); *Turkal*, 93 N.M. at 250, 599 P.2d at 1047 (probable cause established when, reading affidavit as a whole and considering corroboration supplied by second confidential informant, there was substantial evidence that juvenile informant was veracious and her information, based on personal knowledge, was reliable); *Gutierrez*, 91 N.M. at 545, 577 P.2d at 443 (there is no requirement that issuing magistrate conduct independent investigation to determine whether informant is reliable, nor is it necessary for affidavit to state that informant's past tips resulted in conviction when, from verified facts presented, magistrate reasonably could believe source was credible and a factual basis existed for information furnished).

{16} We simply do not believe this tradition to be one of unthinking rigidity or overly technical application of the principles codified in Rule 5-211(E). Moreover, we believe these principles to be firmly and deeply rooted in the fundamental precepts of the constitutional requirement that no warrant issue without a written showing of probable cause before a detached and neutral magistrate. We are convinced that our rules, while providing a flexible, common sense framework, also

knowledge. *See Gates*, 462 U.S. at 284, 103 S. Ct. at 2356 (Brennan, J., dissenting).

[7] For example, the *Gates* majority asserted that if an informant has a particularly good track record in predicting certain types of criminal behavior, it should not stand as an absolute bar to a determination of probable cause that the affiant has failed thoroughly to set forth the basis of this informant's prediction in a particular case. 462 U.S. at 233. This principle has some intuitive appeal as an empirical proposition in close cases, i.e., those in which the informant's veracity is particularly well established and the informant's basis of knowledge has not been omitted entirely. *See* Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 Iowa Law Review 551, 580 (1984). Nevertheless, this empirically acceptable rule-of-thumb implies some abdication of the issuing judge's role in making an *independent* assessment of the affidavit's sufficiency. "By requiring police to provide certain crucial information to magistrates and by structuring magistrates' probable cause inquiries, *Aguilar* and *Spinelli* assure the magistrate's role as an independent arbiter of probable cause." *Gates*, 462 U.S. at 283, 103 S. Ct. at 2356 (Brennan, J., dissenting). Similarly, as a strictly empirical proposition, one can argue that, as a magistrate may know a particular police officer to be an honest and reliable observer of human events, the magistrate reasonably could conclude the officer's summary conclusion in a particular case was truthfully reported and well founded. However, as pointed out in the body of this opinion, the Supreme Court held in *Nathanson* that such an affidavit was constitutionally defective. Surely the secondhand, conclusory report from an anonymous source does not improve the magistrate's ability to make an independent determination. *Cf. Gates*, 462 U.S. at 272, 103 S. Ct. at 2350 (White, J., concurring in judgment, but not in abandonment of *Aguilar-Spinelli*).

provide structure for the inquiry into whether probable cause has been demonstrated. The fact that "non-lawyers" are involved in drafting applications for search warrants underscores rather than obviates the need for such structure.[8]

{17} We conclude that our present court rules better effectuate the principles behind Article II, Section 10 of our Constitution than does the "totality of the circumstances" test set out in *Gates*. *Accord, State v. Jones*, 706 P.2d 317 (Alaska 1985); *State v. Kimbro*, 197 Conn. 219, 496 A.2d 498 (1985); *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985), *on remand from Massachusetts v. Upton*, 466 U.S. 727, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984); *People v. Griminger*, 71 N.Y.2d 635, 529 N.Y. Supp. 2d 55, 524 N.E.2d 409 (1988); *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989); *State v. Jackson*, 102 Wash. 2d 432, 688 P.2d 136 (1984). *See also*, 1 W. LaFave, *Search and Seizure*, § 3.3 (Supp. 1984); Kamisar, *supra. But see People v. Pannebaker*, 714 P.2d 904 (Colo. 1986); *State v. Lang*, 105 Idaho 683, 672 P.2d 561 (1983); *Potts v. State*, 300 Md. 567, 479 A.2d 1335 (1984); *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820 (1984); *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984); *State v. Ringquist*, 433 N.W. 2d 207 (N.D. 1988); *Commonwealth v. Gray*, 509 Pa. 476, 503 A.2d 921 (1986); *State v. Adkins*, 346 S.E.2d 762 (W.Va. 1986); *Bonsness v. State*, 672 P.2d 1291 (Wyo. 1983). *Cf. State v. Swaim*, 412 N.W.2d 568 (Iowa, 1987) (statute set forth express considerations for magistrates and required explication of reasons for issuing warrant under *Gates* totality-of-circumstances test). Therefore, pursuant to our constitutional role in interpreting the provisions of our state constitution and in promulgating rules of procedure to govern criminal proceedings in this state, we hold that the court of appeals was correct in utilizing the *Aguilar-Spinelli* two-prong test.

{18} Affidavit failed to state adequately the basis of informant's knowledge - - deficiency not cured by independent corroboration. Turning to the affidavit at issue in this case, we agree with the court of appeals that it fails to establish probable cause. We disagree, however, that the affidavit fails because it does not set forth adequately the affiant's basis for believing the informant to be credible. Rather, it fails because it did not provide the issuing court with a substantial basis for believing that the information provided was reliable. Since this affidavit contained both hearsay information from an informant and corroborating facts from independent police investigation, we follow the lead of *Spinelli* and analyze, first, the sufficiency of the hearsay report standing alone and, second, whether the facts corroborated by the police cured any deficiencies in the report.

{19} The court of appeals noted that the affiant, while stating that his informant had provided reliable information in the past, did not say "when the informant had provided such information, how frequently, or whether the information provided related to a matter under criminal investigation * * *. [F]or all we know, the statement could refer to nothing more than the fact the informant had correctly provided * * * the time of day * * *." Slip op. at 4. The state argues in its petition for certiorari that it was not necessary for the affiant to detail the information given in the past by the informant. We agree with the state that "technical requirements of elaborate

[8] *Cf. Gates*, 462 U.S. at 288, 103 S. Ct. at 2358 (Brennan, J., dissenting). Our rules do not require us to endorse the somewhat questionable premise, suggested by *Gates*, that a highly credible informant is likely to have gathered his information in a reliable fashion even though there has been an insufficient showing of the informant's basis of knowledge on the face of the affidavit. Rather, our rule encourages a magistrate in close cases to inquire further of the officer or to call the informant as a witness. Not only does such a procedure comport better with the constitutional duty of the issuing magistrate to make an independent evaluation, it eliminates the need to make that determination on the basis of assumptions which, in any given case, well may be incorrect. We are mindful of Justice Harlan's observation that "in order to leave some room for the States to cope with their own diverse problems, there has been a tendency to relax federal requirements under the Fourth Amendment, which now govern state procedures as well." *Coolidge v. New Hampshire*, 403 U.S. 443, 491, 91 S. Ct. 2022, 2050, 29 L. Ed. 2d 564 (1971) (Harlan, J., concurring). In this respect, our rejection of *Gates* as a guide in interpreting the New Mexico Constitution is not entirely a rejection of the concerns of the *Gates* majority. Our holding today also reflects our close acquaintance with the problems and traditions of our state. By necessity, we are better acquainted with these factors than is the United States Supreme Court.

specificity have no proper place in a court's evaluation" of probable cause, *Perea*, 85 N.M. at 507, 513 P.2d at 1289. In reviewing the issuance of the warrant here, we balance this concession to common sense against the basic constitutional premise that the magistrate, and not the police officer, is to determine whether probable cause exists.

{20} Here, the affidavit stated that the informant had provided information in the past which the affiant "did find to be true and correct from personal knowledge and investigation." It is true that this unadorned statement did not provide a particularly strong basis on which to judge the informant's credibility. *Cf. Turkal*, 93 N.M. at 250, 599 P.2d at 1042 (honest citizen was credible informant); *State v. Cervantes*, 92 N.M. 643, 593 P.2d 478 (Ct. App. 1979) (affiant's statement that informant had provided correct information once before sufficient when statement revealed that information was received the week prior to the affidavit and resulted in recovery of stolen property and indictment); *Perea* 85 N.M. at 510, 513 P.2d at 1294 (statement against interest was credible). Nonetheless, given the great deference that we accord to an issuing court's determination of probable cause, *see Snedeker*, 99 N.M. at 290, 657 P.2d at 617, we conclude the court here reasonably could infer that the reference to information supplied by the informant in the past involved information that was relevant to a police investigation.

{21} Unaddressed by the court of appeals, however, was whether the affidavit, standing alone, adequately stated the informant's basis of knowledge for the allegation that Cordova was selling heroin. The informant reportedly stated that Cordova had brought heroin into town and was selling it at the house in question. However, the affidavit is devoid of any indication of how the informant gathered this information. Similarly, although the affidavit states the informant has personal knowledge that "heroin users" have been at the residence, there is nothing in the affidavit to indicate the source of his knowledge, or even how the informant knows the persons in question to be "heroin users."

{22} In *Spinelli*, the Court held the assertion that Spinelli was a known "gambler and associate of gamblers" was "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." 393 U.S. at 414, 89 S. Ct. at 588; *accord Baca*, 97 N.M. at 382, 640 P.2d at 488. By implication, the allegation that a person said to be a "heroin user" has been to a particular residence, unsupported by any detail as to how the informant knows the person to be a heroin user or how he knows the person has been to the residence, is entitled to little or no weight in determining whether probable cause exists to believe that heroin is to be found at that residence.

{23} We also do not believe the affidavit contained sufficient detail concerning the alleged illegal activity to be self-verifying. Aside from a simple assertion that the heroin was brought to town by respondent, the only details in the affidavit concern a description of a man, a house, and a car parked outside that house. As with the details provided by the informant in *Spinelli*, which stated no more than that Spinelli spent a large amount of his time in an apartment that contained two phones with separate, identified numbers, the details provided in this affidavit relate to innocent facts that do not, either separately or taken as a whole, suggest illegal activity. 393 U.S. at 416, 89 S. Ct. at 589; *see also State v. Herrera*, 102 N.M. 254, 694 P.2d 510 (mere fact that residence was described in minute detail did not give rise to probable cause to believe that suspect made such residence his home), *cert. denied*, 471 U.S. 1103, 105 S. Ct. 2332, 85 L. Ed. 2d 848 (1985).

{24} The affiant's independent corroboration did not serve to establish the reliability of the informant's report. *See State v. Jones*, 96 N.M. 14, 627 P. 2d 409 (1981) (unique information concerning modus operandi of crime supplied by informant and corroborated by police sufficient to establish informant's reliability); *State v. Donaldson*, 100 N.M. 111, 666 P.2d 1258 (Ct. App.), *cert. denied*, 100 N.M. 53, 665 P.2d 809 (1983) (deficiency in affidavit cured when police investigation substantially corroborated detailed

information provided by informant); *Massachusetts v. Upton*, 466 U.S. 727, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984) (under *Gates*, informant's tip and surrounding facts possessed an internal coherence that sustained magistrate's finding of probable cause when informant described goods stolen in recent burglaries, knew of a police raid on a motel room that day, was recognized by police as defendant's girlfriend, and gave detailed description of alleged location of stolen goods that was corroborated by police investigation), *on remand, Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985).

{25} Here, the affiant verified only the informant's description of the house and car.[9] We agree with the court of appeals that the affidavit in essence "asked the magistrate to believe the informant was reliable merely because the house and car existed, and further asked the magistrate to believe that because the house and car existed, the man and the heroin probably did as well." Slip op. at 6. We hold that the affidavit in this case did not establish a substantial basis for believing the informant's report was based on reliable information as required by Rule 5-211(E) and the New Mexico Constitution. Accordingly, the decision of the court of appeals is affirmed.

{26} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice.

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

[9] We do not address the state's contention that the police also verified the description of Cordova himself, as this did not take place until after the warrant issued. It is well settled that probable cause cannot be established by the results of the search. *State v. Baca*, 87 N.M. 12, 528 P.2d 656 (Ct. App.), *cert. denied*, 87 N.M. 5, 528 P.2d 649 (1984). A contrary rule would render the warrant requirement an empty formality, as a warrant could always be justified at trial if the search resulted in the seizure of the evidence, fruits, or instrumentalities of a crime.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-009

Filing Date: January 23, 1990, As Corrected

Docket No. 18,374

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

vs.

DANIEL LEE JENSEN and GARY WAYNE CALDWELL,

Defendants,

v.

JAMES L. BOUTELLE,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
James L. Shuler, District Judge

W. T. Martin, Jr.,
Carlsbad, New Mexico,

For Appellant.

Bradley & McCulloch,
Gordon McCulloch,
Albuquerque, New Mexico,

For Appellee.

OPINION

RANSOM, Justice.

{1} James Boutelle has a personal injury claim against David Jensen. Allstate Insurance Company brought this declaratory judgment action to determine its obligation to defend Jensen under the omnibus or permissive driver clause of an automobile insurance policy issued to Gary Caldwell. Boutelle appeals from a summary judgment in which the district court ruled that Allstate had no duty to defend Jensen. We affirm, but for reasons other than the "significant deviation" rule relied upon by the court below.

{2} In 1984, Jensen and Caldwell were employed on a bridge construction project near Carlsbad, New Mexico. On the night of May 23, Jensen came to Caldwell's motel room in Carlsbad to pay a social call and asked Caldwell if he could borrow his pick-up truck to drive to a nearby convenience store for cigarettes. Caldwell let Jensen borrow the truck, but when Jensen left he headed in the opposite direction from the store. Apparently, Jensen had consumed an enormous amount of beer in the preceding twenty-four hours, as much as three cases. He had socialized with Caldwell that day and had drank another beer in Caldwell's room before taking the truck that evening. Caldwell had questioned him as to whether he thought he was fit to drive, and he said "yes". In his deposition, he stated that after leaving the motel "all of a sudden I wound up on the Hobbs highway with state policeman Hickey trying to pull me over."

{3} A high speed chase ensued, through Carlsbad and the surrounding countryside, involving members of both the state and Carlsbad police. Jensen evaded one roadblock when Carlsbad police officers removed their vehicles from the road after deciding that Jensen had no intention of slowing down as he approached them. Later, James Boutelle, a Carlsbad police officer, pulled up alongside Jensen while they were traveling on the Artesia highway. Jensen rammed the truck into the police vehicle rolling it over and off the road. He was finally apprehended after he rammed a second roadblock and destroyed two police vehicles in the process. He told the police, "I wish I had taken a couple of you with me."

Jensen was charged with multiple criminal violations and was later sentenced to the New Mexico penitentiary.

{4} Boutelle was injured when he was forced off the road. He later filed suit against Jensen for negligent and intentional acts, and against Caldwell for negligent entrustment. Allstate sought a declaratory judgment that, because of Jensen's excessive deviation from his announced purpose for the use of the vehicle, Jensen was not a permissive driver within the meaning of the omnibus clause of Caldwell's insurance policy. In addition to the owner of the vehicle as the named insured, the policy covered "[a]ny other person with respect to the owned automobile, provided the use thereof is with the permission of the insured and within the scope of that permission."

{5} The appellate courts of New Mexico have not addressed the omnibus clause question presented here. *Cf. Gruger v. Western Cas. & Sur. Co.*, 89 N.M. 562, 555 P.2d 683 (1976) (involving whether an owner had given his implied consent to use of his vehicle by a third-party permittee of the original permittee). There is, however, a wealth of decisions from other jurisdictions that address questions regarding the "scope of the permission" which was given, or whether permission was given for the "actual use" of the vehicle at the time of the accident. *See* Annotation, *Automobile liability insurance: permission or consent to employee's use of car within meaning of omnibus coverage clause*, 5 A.L.R.2d 600 (1949 & Later Case Service 1985); Ashlock, *Automobile Liability Insurance: The Omnibus Clause*, 46 Iowa L. Rev. 84 (1960). The approaches taken by these decisions have tended to be grouped within one of three categories: (1) the strict rule requiring use precisely within the scope of permission granted, (2) the initial permission rule covering any deviation short of theft or the like, and (3) the intermediate significant or major/minor deviation rule. *See, e.g., Columbia Cas. Co. v. Hoohuli*, 50 Haw. 212, 216, 437 P.2d 99, 103 (1968).

{6} On appeal, Boutelle argues that in light of public policy evinced in the New Mexico Mandatory Financial Responsibility Act of 1983, NMSA 1978, Sections 66-5-201, to 66-5-239 (Repl. Pamp. 1989), this Court should adopt either the "initial permission" rule, or what Boutelle calls the "social permittee" rule, and reverse the entry of summary judgment. Allstate urges the adoption of the "significant deviation" rule, and argues that Jensen's gross deviation from the scope of permission bars coverage under the omnibus clause. In ruling on the motion for summary judgment, the trial judge stated: "I agree with [Boutelle] that from a policy point of view this should be changed. Nevertheless, we have case law * * * in New Mexico which * * * binds me. [T]here has been a rather significant deviation from the scope of the permission granted * * *."

{7} The parties agree that coverage under a contract for automobile liability insurance is not solely a function of the intent of the parties and the terms of the contract. Under the Mandatory Financial Responsibility Act, effective January 1, 1984, an owner's certified motor vehicle liability policy must "insure the person named in the policy and any other person, as insured, using any such motor vehicle with the express or implied permission of the named insured." NMSA 1978, § 66-5-221(A)(2).[1] Both parties assume that this statutory omnibus clause is applicable to the present case. If so, the Allstate contract for liability insurance cannot be more restrictive than the statutory clause.[2] At issue, then, is the extent

[1] The Mandatory Financial Responsibility Act conditions motor vehicle registration on evidence of financial responsibility. NMSA 1978, §§ 66-5-206, -234. A motor vehicle must be covered by a liability insurance policy or a $60,000 cash deposit with the state treasurer, or a surety bond in the same amount. NMSA 1978, §§ 66-5-205, -225, -226.

[2] Allstate argues that its omnibus clause does no more than clarify what is meant by "permission" in Section 66-5-221(A) (2). However, it is not at all clear to us that, after the passage of the Mandatory Financial Responsibility Act, the provisions of Section 66-5-221 were intended to be applicable to *all* motor vehicle liability policies. We will proceed as if that were the case, but as the issue has not been briefed and argued we will reserve judgment on the question for resolution when appropriate.

The uncertainty concerning the applicability of Section 66-5-221 arises from changes made to the New Mexico financial responsibility laws in 1984. Prior to 1984, registration of motor vehicles was not conditioned upon a showing of financial responsibility. Rather, such a showing was required only in certain cases such as an unsatisfied judgment against a motorist. 1978 N.M. Laws, ch. 35, § 281. A motorist might avoid

to which the phrase "with the express or implied permission of the named insured" was intended by the legislature to modify the word "using".

the suspension of his driver's license and vehicle registration by filing a certificate of insurance with the division of motor vehicles, verifying that the motorist had in effect at the time of the accident a policy meeting the minimum liability coverage provisions of the Financial Responsibility Act. *See* 1978 N.M. Laws, ch. 35, §§ 295, 303, 306. After a policy was certified by such a filing, it could not be canceled without notice to the division. 1978 N.M. Laws, ch. 35, § 308. We decided in *Estep v. State Farm Mutual Insurance Co.*, 103 N.M. 105, 703 P.2d 882 (1985), that *all* motor vehicle liability policies, whether certified or not, were subject to the minimum liability coverage provisions of that act. This was because a motorist could avoid suspension only by certifying that the policy *in effect at the time of the accident* met the minimum requirements of the act. These requirements would include the statutory omnibus clause in effect at that time. *See Estep*, at 108, 703 P.2d at 885.

Under our present statutory scheme, an owner of a motor vehicle applying for registration may give evidence of financial responsibility by having either a "motor vehicle liability policy," or a "*certified* motor vehicle liability policy." NMSA 1978, § 66-5-218 (emphasis added). Significantly, the 1984 Act eliminated all provisions that would require a motorist to file a certified policy with the division. In this present Act, while the definition of a certified policy is tied to the minimum coverage requirements of Section 66-5-221 (including the statutory omnibus clause), *see* Section 66-5-202(A), the definition of a "motor vehicle liability policy" is not. *See* NMSA 1978, § 66-5-202(H). The latter is simply defined as an owner's policy meeting the minimum dollar amounts set forth in Section 66-5-208. *Id.* Under these circumstances, we are not willing to accept on its face that "evidence of a motor vehicle liability policy" under Section 66-5-218(A) necessarily incorporates all of the requirements concerning certified policies under Section 66-5-221.

In order to give any meaning at all to Section 66-5-221, these provisions might seem applicable to particular policies when a "certificate of liability insurance" is issued to a policy holder to be carried in his vehicle, in lieu of the policy itself, as evidence of financial responsibility as required by Section 66-5-229(C). In this way, absent an actual policy, certain standard provisions would be known to exist. The motor vehicle division has promulgated an administrative rule which recognizes that a "certificate" which contains certain minimum information is sufficient to meet the requirement of having evidence of financial responsibility carried in the vehicle at all times. Transportation Rule No. 84-1-MVD. However, anomalously, in the absence of filing the certificate with the motor vehicle division, such a policy cannot be considered a certified policy. *See* Section 66-5-202(A), -219. The use of the term "certified" in this context is foreign to the meaning of that term as it is used both in the present Act and its predecessor. While the present Act still requires that an insurance company notify the motor vehicle division prior to canceling a certified policy, NMSA 1978, Section 66-5-223, we question whether today the division ever receives such notification regarding any policy.

{8} Under the statutory clause, coverage is extended to any person merely "using" the motor vehicle with the express or implied permission of the named insured.[3] Under the Allstate policy, other persons are insured provided the "use" is within "the scope of such permission." While the Allstate policy clearly indicates that permission to use the vehicle is defined by the particular use being made of it at the time of the accident, we do not believe that the statutory provision is so qualified. The purpose of the Mandatory Financial Responsibility Act was stated by the legislature as follows:

> The legislature is aware that motor vehicle accidents in the state of New Mexico can result in catastrophic financial hardship. The purpose of the Mandatory Financial Responsibility Act is to require and encourage residents of the state of New Mexico who own and operate motor vehicles upon the highways of the state to have the ability to respond in damages to accidents arising out of the use and operation of a motor vehicle. It is the intent that the risks and financial burdens of motor vehicle accidents be equitably distributed among all owners and operators of motor vehicles within the state.

NMSA 1978, § 66-5-201.1. This statement of legislative purpose reflects the view that the required automobile liability insurance is for the benefit of the public generally, innocent victims of automobile accidents, as well as the insured. *See Estep v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 105, 703 P.2d 882 (1985). In order to effectuate such legislative policy the statutory omnibus clause must be interpreted broadly.

{9} In Section 66-5-201.1, the legislature has expressed its concern that *operators* of motor

[3] Implied permission to use a motor vehicle can be inferred from a course of conduct or relationship between the parties, or other facts and circumstances signifying the assent of the owner. *See Grub v. Western Cas. & Sur. Co*, 89 N.M. 562, 555 P.2d 683 (1976); *Western Cas. & Sur. Co. v. Grice*, 422 F.2d 921 (10th Cir. 1970); *see also* 8 P. Kelley, *Blashfield Automobile Law and Practice* §§ 321.7 & 321.10 (rev. 3d ed. 1987).

vehicles be able to respond in damages. The act defines "operator" as every person who drives or is in physical control of a motor vehicle. *See* NMSA 1978, § 66-5-202(K) & (D). In many instances, an operator's ability to respond in damages will be dependent upon the vehicle owner's contract for liability insurance. This is because the entire focus of the required liability coverage in the act is on liability coverage for motor vehicles. *See* NMSA 1978, §§ 66-5-205, -206. Motor vehicle registration, not a driver's license, is conditioned on meeting the financial responsibility requirements. *See* NMSA 1978, §§ 66-5-206, -234.

{10} An owner may certainly impose restrictions on the particular use of a loaned vehicle, and we do not mean to discourage such agreements between individuals. However, we do not believe the legislature intended that the owner's liability coverage for the motor vehicle be affected by such understandings. Instead, based upon the provisions of the Mandatory Financial Responsibility Act, we conclude that the omnibus clause of the Allstate liability policy must provide coverage to any person using the insured vehicle with the owner's consent, without regard to any restrictions or understanding between the parties on the particular use for which the permission was given.

{11} We wish to emphasize that we construe Section 66-5-221(A) (2) to adopt what may be called the initial permission rule because we believe the legislature intended to accomplish this result. We do not view our decision as a choice among various "rules" employed for the interpretation and application of an omnibus clause in a contract for insurance. We likewise express no opinion on whether the decision in this case and the provisions of the Mandatory Financial Responsibility Act should affect our decision in *Gruger* concerning the coverage afforded a third person using a motor vehicle with the consent of the original permittee of the named insured.

{12} In arguing against the adoption of the initial permission rule, Allstate directs our attention to the statutory omnibus clause adopted in New Hampshire which provides that:

> The Insurance applies to any person who has obtained possession or control of the motor vehicle of the insured with his express or implied consent even though the use in the course of which liability to pay damages arises has been expressly or impliedly forbidden by the insured or is otherwise unauthorized. This provision, however, shall not apply to the use of a vehicle converted with the intent to wrongfully deprive the owner of his property therein.

N.H. Rev. Stat. Ann. § 264:18 VI (1982). This statute leaves little doubt that the New Hampshire legislature intended to extend coverage to permissive users even when the operation of the vehicle was clearly outside of the scope of permission which was granted. *Concord Gen. Mut. Ins. Co. v. Haynes*, 110 N.H. 76, 260 A.2d 99 (1969). Allstate argues that the New Mexico legislature chose not to include such a provision, and that to graft one onto our statute is unwarranted.

{13} While the clarity of the New Hampshire statute is enviable, the wording of our own statute certainly points to the construction we have given it. In examining decisions of other jurisdictions said to have adopted the initial permission rule, we find that in a number of cases those jurisdictions have statutory omnibus clauses very similar to our own. *See, e.g., Commercial Union Ins. Co. v. Johnson*, 294 Ark. 444, 745 S.W.2d 589 (1988); *Farm Bureau Mut. Ins. Co. of Idaho v. Hmelevsky*, 97 Idaho 46, 539 P.2d 598 (1975); *Konrad v. Hartford Accident & Indem. Co.*, 11 Ill. App.2d 503, 137 N.E.2d 855 (1956); *United States Fidelity & Guar. Co. v. Fisher*, 88 Nev. 155, 494 P.2d 549 (1972). In addition to public policy considerations underlying the statutory omnibus clause, to greater and lesser degrees, the wording of these statutes has been a significant factor in the adoption of the initial permission rule in those jurisdictions. *See, e.g., Protective Fire & Cas. Co. v. Cornelius*, 176 Neb. 75, 125 N.W.2d 179 (1963).

{14} Also, we note that in California the legislature added to its statutory omnibus clause

language to the effect that the use of the loaned vehicle must be within the scope of the permission granted by the named insured. The earlier version of the statute was like our own and was interpreted to adopt the initial permission rule. *See Jordan v. Consolidated Mut. Ins. Co.*, 59 Cal. App.3d 26, 130 Cal. Rptr. 446 (1976). Only with the statutory change was coverage restricted to those situations in which the permissive user was acting within the parameters set by the owner of the vehicle. *Hartford Accident & Indem. v. Abdullah*, 94 Cal. App.3d 81, 156 Cal. Rptr. 254 (1979).

{15} Allstate also cites the court of appeals decision in *Benham v. All Seasons Child Care, Inc.*, 101 N.M. 636, 686 P.2d 978 (Ct. App.), *cert. denied*, 101 N.M. 686, 687 P.2d 743 (1984), and states that this case stands for the proposition that permission to use an automobile can be limited in scope. In *Benham*, an employee was involved in an accident while on a personal mission with his employer's van, which he was authorized to use. The decision was concerned with the question of the liability of the employer under the doctrine of respondeat superior. Such liability is premised upon whether or not an employee is acting within the scope of his employment. *Id.* at 638, 686 P.2d at 980. But, this factor is not the primary test of omnibus clause coverage, although in jurisdictions which do not follow the initial permission rule the "scope of employment" may, in certain cases, be co-extensive with the "scope of permission." *See Columbia Cas. Co. v. Hoohuli*, 50 Haw. 212, 215, 437 P.2d 99, 103 (1968). We see no reason to equate the two. As the *Hoohuli* Court pointed out, the policy considerations which determine whether an employer will be held vicariously liable for the acts of his employee are completely different from the policy considerations involved in determining whether a permittee is an insured under a statutory omnibus clause. *See Id.* at 215 n. 2, 437 P.2d at 103 n. 2.

{16} Our reading of the statutory omnibus clause in Section 66-5-221(A) (2) does not, however, suggest that the owner's motor vehicle liability insurance was intended to extend to any and all persons who might come to operate the vehicle. By conditioning insurance coverage on the word "permission", we believe that the legislature meant to exclude unlawful takings such as theft. In decisions adopting the initial permission rule this has been a recognized limitation. *See, e.g., Matits v. Nationwide Mut. Ins. Co.*, 33 N.J. 488, 166 A.2d 345 (1960) (barring theft or the like); *Maryland Cas. Co. v. Iowa Nat'l Mut. Ins. Co.*, 54 Ill.2d 333, 297 N.E.2d 163 (1973) (same). We hold that wrongful intent to deprive the owner of his property bars coverage.[4]

{17} In addition, an intent to deprive the owner of his property may be shown by the intentional destruction of the vehicle, or that state of mind which evinces an utter disregard for the

[4] In addition to excluding cases of "theft or the like," some jurisdictions that have adopted the initial permission rule have also made exception for cases involving "conversion". *See, e.g., Commercial Union Ins. Co. v. Johnson*, 294 Ark. 444, 745 S.W.2d 589 (1988); *Milbank Mut. Ins. Co. v. United States Fidelity & Guar. Co.*, 332 N.W.2d 160 (Minn. 1983). Our research indicates, however, that only one court has addressed the meaning of conversion in this context and has rejected the application of the definition of tortious conversion to the exception recognized. *Western States Mut. Ins. Co. v. Verucchi*, 66 Ill.2d 527, 6 Ill. Dec. 879, 363 N.E.2d 826 (1977) (only the intent to permanently or indefinitely deprive the owner of his rights in the property will bar insurance coverage, notwithstanding the fact that the action may have constituted a technical conversion). Similarly, we believe that the rigid use of the elements of this tort would be counterproductive as a standard against which to measure permission.

Under New Mexico law, tortious conversion of property has been defined to include, *inter alia*, the wrongful possession of, or the exercise of dominion over, a chattel to the exclusion or in defiance of the owner's rights. *Ross v. Lewis*, 23 N.M. 524, 169 P. 468 (1917); *see also Mine Supply, Inc. v. Elayer Co.*, 75 N.M. 772, 411 P.2d 354 (1966); *Taylor v. McBee*, 78 N.M. 503, 433 P.2d 88 (Ct. App. 1967). If we were to recognize the tort of conversion as an exception to liability coverage under the statutory omnibus clause, we would reduce our inquiry to a form of the major/minor deviation rule. *See Gelder v. Puritan Ins. Co.*, 100 N.M. 240, 668 P.2d 1117 (Ct. App. 1983). This would defeat the general uniformity of coverage for all permissive drivers for the benefit of the public as was intended by the legislature. For this reason, we reject the idea that the tort of conversion will bar coverage under the omnibus clause. The owner may well have a valid claim in tort based upon the injurious misuse of his vehicle, but unless the case rises to the level of theft (larceny) or *criminal* conversion (embezzlement), omnibus clause coverage is unaffected.

return of the vehicle or for its safekeeping. The facts of this case raise no genuine issue of fact on that score. No reasonable juror could find that Jensen was innocent of that state of mind which we here hold to vitiate initial permission. We caution, however, that it is not the act of driving while intoxicated that is determinative. Here, it is significant that the owner granted permission with the apparent awareness of the impairment, but we also believe that it was the intention of the legislature that permittees who are guilty of that or similar transgressions be deemed insured under the financial responsibility policies of this state.

{18} For these reasons, we affirm the judgment of the district court.

{19} **IT IS SO ORDERED.**

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

KENNETH B. WILSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-015

Filing Date: February 8, 1990, As Corrected February 12, 1990

Docket No. 17,673

E. W. RICHARDSON and RICHARDSON PROPERTIES, INC., d/b/a RICHARDSON RANCH,

Plaintiffs-Appellees and Cross-Appellants,

vs.

ROGER RUTHERFORD, GLENDA RUTHERFORD and RANDALL RUTHERFORD,

Defendants-Appellants and Cross-Appellees.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
V. Lee Vesely, District Judge

Motion for Rehearing Granted February 19, 1990; As Corrected February 22, 1990 and March 19, 1990

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OPINION

RANSOM, Justice.

{1} E. W. Richardson, an absentee ranch owner, and Richardson Properties Inc, doing business as Richardson Ranch, brought suit against the manager of their ranch on sixty-one counts of conversion of property, fraud, and for misuse, abuse or neglect of buildings and equipment.

{2} (Unless otherwise indicated, E. W. Richardson and Richardson Properties, Inc., are referred to herein jointly as "Richardson.") Joined as defendants with the ranch manager, Roger Rutherford, were his wife Glenda and their son Randall. The complaint, first filed in Bernalillo County for $2,000,000 compensatory plus punitive damages, and then dismissed on grounds of forum non conveniens, was refiled for $3,000,000 in Grant County. (Richardson's counsel of record on this appeal and at trial were not his counsel prior to or at the time his lawsuit was filed and then refiled.)

{3} Preceding the filing of these complaints, however, Mr. Richardson personally had confronted Rutherfords, accusing them of various acts of theft and embezzlement. Rutherfords alleged at trial that Richardson threatened them with physical violence. Although, Rutherfords contend, they protested to Richardson that his allegations of wholesale corruption were unfounded, Richardson nevertheless forced them to accompany him to Silver City, New Mexico, and forced them to enter into a "debt settlement agreement" by which Glenda and Randall conveyed to Richardson 636 unencumbered and 1200 encumbered acres of Arizona ranch land. In return, Richardson promised to pay $183,000 to secure the land from foreclosure and to forego legal action on his various allegations of impropriety in the management of Richardson Ranch. Richardson also promised to split with Glenda and Randall any net profit from the resale of the Arizona land, after deducting Richardson's expenses and the value of anything "missing" from

Richardson Ranch. Rutherfords were to cooperate in determining the value of missing or damaged ranch property.

{4} After the agreement was signed, Richardson terminated Rutherfords' employment and ejected them from Richardson Ranch. Rutherfords, apparently penniless, spent the next several months living in their car. Although Roger Rutherford did admit responsibility for the removal of some timber from ranch property, Rutherfords did not admit to any further improprieties nor help to compile a list of missing or damaged property subsequent to the signing of the agreement.

{5} Richardson's complaints were filed within six months after the debt settlement agreement was signed. Roger and Glenda Rutherford counterclaimed for assault and false imprisonment, and all three Rutherfords counterclaimed for conversion of personal property and abuse of civil process. Also, Roger sought damages for defamation, and Glenda sought damages for intentional infliction of emotional distress. Rutherfords additionally claimed that Richardson used duress to obtain real property interests from Glenda and Randall.

{6} The jury awarded $3,000 compensatory damages to Richardson as against Roger only, for conversion of property; $10,000 compensatory damages to Roger as against Richardson, plus $50,000 in punitive damages as against each plaintiff, Richardson and Richardson Properties, Inc.; $25,000 in compensatory damages to Glenda, plus $37,500 in punitive damages as against each plaintiff; and $10,000 in compensatory damages to Randall, plus $25,000 in punitive damages as against each plaintiff. Each of the Rutherfords were specially awarded their attorney's fees and expenses for defending the action. With respect to the claim of duress to obtain real property, the jury found that the fair market value of the Arizona land in question was $508,800. The jury's awards of compensatory and punitive damages in favor of Roger were lump sums unspecified as to whether for defamation *or abuse of process*. The jury's awards of compensatory and punitive damages in favor of Glenda were lump sums unspecified as to whether for assault, false imprisonment, intentional infliction of emotional distress, *or abuse of process*. The jury's awards of compensatory and punitive damages in favor of Randall were lump sums unspecified as to whether for conversion of personal property *or abuse of process*.

{7} On Rutherfords' respective claims of abuse of process, the trial court granted to Richardson a judgment notwithstanding the verdicts (j.n.o.v.). On the claims of Glenda and Randall that Richardson was liable for duress to obtain real property, a set-off of $183,000 was granted to Richardson for trust fees, expenses and other payments made to get clear title. The fair market value of $508,800 reduced by $183,000 amounted to $325,800, or $162,900 each for Glenda and Randall. On his jury verdict of $25,000 in punitive damages against each plaintiff, Randall accepted a remittitur in the amount of $25,000 from the $50,000 total. With respect to Roger's claim of defamation, a new trial was granted to Richardson.

{8} Richardson has fully and completely satisfied the judgment in favor of Glenda and Randall.[1] Although it would appear that Glenda and

[1] Richardson did not object to the court's entry of judgment on the jury's single award of compensatory and punitive damages under all claims, including the abuse of process claims on which the court granted j.n.o.v. When a j.n.o.v. is granted on one or more of multiple claims for relief, judgment for damages cannot be entered on the remaining claim or claims unless the jury has specified the damage award for the remaining claim or claims. *See Jackson v. Deming Ice and Elec. Co.*, 26 N.M. 3, 189 P. 654 (1919) (submission of false issue to jury assumes a state of facts not supported by evidence and requires reversal); *Salinas v. John Deere Co.*, 103 N.M. 336, 707 P.2d 27 (Ct. App. 1984) (fact that other evidence supports a general verdict does not allow appellate court to affirm that verdict if an erroneous instruction was given), *cert. quashed*, 103 N.M. 287, 705 P.2d 1138 (1985); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Smith*, 406 So. 2d 913 (Ala. Ct. App.) (reversible error when instruction on mental anguish as an element of damages was improper and jury has rendered general verdict making it impossible to determine from record the basis of the award), *writ denied, ex parte Smith*, 406 So. 2d 916 (Ala. 1981) *Olmstead v. Miller*, 383 N.W.2d 817 (N.D. 1986) (error in instructing on future damages required reversal when it was impossible to determine from general verdict the amount attributed to property damage, personal injury up to the time of trial, and future damages). Although

Randall have joined with Roger in claiming that it was error to grant j.n.o.v. on the Rutherfords' respective claims of abuse of process, satisfaction of the judgment in favor of Glenda and Randall has made moot their claim to error in that regard, unless we were to grant a new trial on the cross-appeal. As discussed below, we affirm the court on all cross-appeal issues. The determinative point on appeal, therefore, is Roger's claim of error in the grant of j.n.o.v. on abuse of process. First, however, we address Richardson's cross-appeal.[2] Richardson seeks a new trial based upon allegations that opposing counsel was guilty of improper conduct that inflamed the jury, and because evidence was presented through leading questions.

{9} *Trial court did not abuse discretion in allowing argument as to relative wealth of the parties.* As specifically acknowledged by Rutherfords in their answer brief, the issue of wealth and poverty was used to argue to the jury that Richardson's motive in filing a three million dollar lawsuit was to gain clear title to Glenda and Randall's land in Arizona by coercing them to settle. Indeed, Rutherford's attorneys *had commented* on the relative wealth and poverty of the parties prior to a ruling by the trial court that it would allow the introduction of *evidence* of Richardson's wealth *on the issue of punitive damages*. Richardson contends that these comments improperly inflamed the passions of the jury, and, therefore, that the court erred in refusing to grant a new trial. We disagree.

{10} Even Richardson cites authority for the unquestioned proposition that reference to wealth or poverty is proper when relevant to the issues in a particular case. Richardson fails, however, to acknowledge what we see as the relevance of wealth and poverty to Rutherfords' counterclaim. We conclude the trial court did not err in this regard.

{11} *Use of leading questions generally within the trial court's discretion.* Richardson also argues the court abused its discretion in allowing leading questions by Rutherfords' counsel. With cursory analysis, Richardson's brief in chief sets forth numerous examples of the use of leading questions. Rutherfords argue in their answer brief that many of these examples are from cross-examination, some involve matters already raised in previous testimony, some were questions as to which no objection was made, and, in some instances, the district court sustained the objection. It lay within the trial court's discretion, Rutherfords argue, to allow the use of leading questions. *See Jim v. Budd*, 107 N.M. 489, 760 P.2d 782 (Ct. App.), *cert. denied*, 106 N.M 95, 739 P.2d 509 (1987); *Jojola v. Baldridge Lumber Co.*, 96 N.M. 761, 635 P.2d 316 (Ct. App. 1981); SCRA 1986, 11-611(C).

no error has been preserved for appeal, the problem is alluded to under Randall's point that it was error to order remittitur on the punitive damage. He argues, "The District Court reduced Randall's punitive damages by 50%, presumably because half was for abuse of process and half for conversion. The jury could easily have awarded all $50,000.00 for Richardson's malicious conversion." Actually, no presumption is possible for allocation of an unspecified award.

[2] Although not raised by Rutherfords in their answer brief to the cross-appeal, we note that in some instances, but by no means in all instances, satisfaction of the judgment by an appellant may operate to cut off that party's right of appeal. The majority rule appears to be that voluntary satisfaction of judgment renders an appeal moot. *See, e.g., Lytle v. Citizen's Bank*, 4 Ark. App. 294, 630 S.W.2d 546 (1982); *Paulu v. Lower Arkansas Valley Council of Gov'ts*, 655 P.2d 1391 (Colo. Ct. App. 1982); *International Business Mach. Corp. v. Lawhorn*, 106 Idaho 194, 677 P.2d 507 (Ct. App. 1984); *Vap v. Diamond Oil Producers, Inc.*, 9 Kan. App. 2d 58, 671 P.2d 1126 (1983); *First Sec. Bank v. Income Props., Inc.*, 208 Mont. 121, 675 P.2d 982 (1984). *But see Briarcliffe West Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 118 Ill. App. 3d 163, 73 Ill. Dec. 503, 454 N.E.2d 363 (1983), *appeal after remand*, 134 Ill. App. 3d 402, 98 Ill. Dec. 351, 480 N.E.2d 833 (1985). In *Culp v. Sandoval*, 22 N.M. 71, 159 P. 956 (1916), this Court held that satisfaction of a judgment subsequent to posting of a supersedeas bond by appellant showed that appellant had acquiesced in the judgment and thus precluded the appeal. We concluded that since the filing of the supersedeas bond effectively removed the possibility of any legal compulsion on the appellant to satisfy the judgment pending appeal, the appellant's subsequent satisfaction of the judgment was voluntary. *Culp*, 22 N.M. at 83, 159 P. at 960-61. We reaffirm our holding in *Culp* that certain circumstances exist in which an appellant's satisfaction of the judgment demonstrates an acquiescence in that judgment that is inconsistent with the right of appeal. Additionally, equities may intervene after satisfaction of the judgment, militating against the maintenance of an appeal. However, absent proper presentation of this issue by the parties, we decline to address this point further.

{12} Moreover, as Rutherfords point out, by agreement of the parties, Rutherfords presented their case in chief on the counterclaims simultaneously with their defense. It is true that a party should not by means of leading questions on cross-examination present its case in chief or substitute its words for those of a witness. *Jojola*, 96 N.M. at 764, 635 P.2d at 319; *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979). However, it is also true that, when the issues relevant to the opposing party's theory of the case overlap significantly with the issues relevant to cross-examination, it may be difficult to distinguish between permissible cross-examination and impermissible use of leading questions to present new evidence. *Jojola*, 96 N.M. at 764, 635 P.2d at 319. We cannot say on the basis of the portions of the record cited by Richardson that the trial court abused its discretion in most of the instances in which leading questions were used. Absent specific analysis by Richardson as to why these questions were improper, we conclude the trial court did not act improperly in these instances.

{13} *References to value of golf course and admission of documents of value of other properties was harmless error.* One of the leading questions asked at several points by Rutherfords' counsel, however, was improper. Several of Richardson's witnesses were asked if they were aware that property "just across the road" from Glenda and Randall's land had been sold for $1000 per acre for use as a golf course. Rutherfords never properly established that this land was comparable for valuation purposes.

{14} The trial court also allowed the introduction of several documents purporting to show the price received for other pieces of property in the same area. The only expert testimony on these properties was given by Richardson's expert on cross-examination, and he denied that the properties were comparable. Richardson timely objected to the introduction of these documents on grounds of relevance. Rutherfords offered no expert testimony to rebut that of Richardson's expert.

{15} Rutherfords assert that use of the documents for purposes of cross-examination was not error, even absent a foundation to show they were comparable to Glenda and Randall's property. We disagree. Although the question of whether a foundation to establish relevance must be laid prior to the introduction of evidence lies within the discretion of the trial court, see SCRA 1986 11-104(B) and -401, we believe the court acted improperly here in allowing this evidence to go to the jury without a showing that the properties were comparable.

{16} However, under the facts of this case we conclude that Richardson has failed to show he was prejudiced by admission of this evidence. The jury valued the unencumbered portion of Glenda and Randall's property at $800 per acre. Evidence properly was admitted that this was the value placed on the estate by Richardson himself in response to an inquiry. *See City of Albuquerque v. Ackerman*, 82 N.M. 360, 482 P.2d 63 (1971) (owner of real property is presumed to have special knowledge as to its value by reason of ownership and therefore is competent to testify to value). Although Richardson's expert testified that the land was worth only $300 per acre, the jury was not obligated to accept this estimate as final. Moreover, the only testimony heard by the jury regarding the evidence that had been admitted improperly was that of Richardson's expert, who denied that each of the properties was comparable. We conclude Richardson has failed to show that he was prejudiced by admission of this evidence.

{17} *Remarks by Rutherfords' attorneys not shown to necessitate a new trial; no cumulative error.* Richardson argues that various remarks by Rutherfords' attorney (other than those that concerned relative wealth or poverty) were inflammatory, constituted attorney misconduct, and required the trial court to order a new trial. Although Richardson acknowledges that attorney misconduct does not require a new trial unless "glaringly improper or unethical", *Wirth v. Commercial Resources, Inc.*, 96 N.M. 340, 347, 630 P.2d 292, 299 (Ct. App.), *cert. denied*, 96 N.M. 543, 632 P.2d 1181 (1981), he again falls to present a specific argument showing that the comments at issue violate this standard.

Instead, Richardson simply posits that the comments were "glaringly unethical" and that they influenced the jury's verdict. Absent an explication of why the comments were improper, and a showing of prejudice, we do not reach this issue. Given our resolution of the above issues, we also conclude that Richardson failed to show the existence of cumulative error. *See State v. Martin*, 101 N.M. 595, 686 P.2d 937 (1984).

{18} Trial court erred in granting j.n.o.v. on abuse of process claim. On the claim of abuse of process on the part of Richardson, the jury was instructed that Rutherfords had the burden of proving that Richardson filed the lawsuit with an ulterior motive, using the complaint for reasons other than the regular prosecution of his charge. It was further explained that an abuse of process arises when there has been a perversion of the court processes to accomplish some end which the process was not intended by law to accomplish, or which compels the party against whom it has been used to perform some collateral act which he legally and regularly would not be compelled to do.

{19} Rutherfords argue that "[t]he filing of the suit itself, under the circumstances of this case, is an attempt to misuse process for collateral purposes * * *. The attempt completes the tort * * *. The attempts to misuse the process in this case include filing suit under such circumstances, the nature of the suit, the parties named, the parties not named, misusing exhibits [attached to the complaint], and the amounts sought, all of which lead to the conclusion that the suit itself was the improper act." *See Meyers v. Cohen*, 5 Haw. App. 232, 687 P.2d 6 (attempt to achieve improper collateral objective completes tort of abuse of process), *overruled on other grounds*, 67 Haw. 389, 688 P.2d 1145 (1984).

{20} Richardson requested an instruction that, in order to prove their claim of abuse of process, Rutherfords had to prove specifically that Richardson committed some act outside the regular and legitimate use of process resulting in interference with either the person or the property of Rutherfords. The trial court refused this request. "Some act outside the regular and legitimate use of process" and "interference with either the person or the property" have been referred to in the brief-in-chief as "subsequent acts" and "special damages,"[3] respectively. In granting the j.n.o.v., the trial court held that the misuse of process must be *subsequent* to issuance of process. It is because of failure to instruct on such an element or elements of abuse of process, and the absence of substantial evidence to support a showing of such element or elements, that the trial court granted j.n.o.v. The trial court specifically found

[3] The phrase "an interference with either the person or property of the plaintiff" appears in a number of New Mexico cases on abuse of process. *See, e.g., Farmer's Gin Co. v. Ward*, 73 N.M. 405, 407, 389 P.2d 9, 11 (1964); *Hertz Corp. v. Paloni*, 95 N.M. 212, 215, 619 P.2d 1256, 1259 (Ct. App. 1980). The parties' debate concerning the necessity of proving "special damages" centers around this phrase, with Richardson equating it with the necessity of showing the "arrest of the person or seizure of property" required in malicious prosecution cases.

Although some authority exists requiring the plaintiff in abuse of process cases to make the latter showing, other courts have rejected this requirement as inconsistent with the approach of the *Restatement of Torts (Second)*. *See, e.g., Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876 (Ct. App. 1982); *cf. Mills County State Bank v. Roure*, 291 N.W. 2d 1 (Iowa 1980) (loss of income sufficient to satisfy any special injury rule in abuse of process cases). We do not agree with the parties that our courts have used "interference with the person or property" and "arrest of the person or seizure of property" synonymously. In *Farmer's Gin Co.*, we distinguished between those two phrases. 73 N.M. at 407, 409, 389 P.2d at 11, 12. In fact, we gave the second situation as merely one example of the first. *Id.* at 407, 389 P.2d at 11. In *Paloni*, the court of appeals held that the counterplaintiff had not been damaged by Hertz' repossession of the car held by the counterplaintiff in constructive bailment. The decision, however, did not rest on the fact that the counterplaintiff's property had not been subjected to seizure, but rather on the fact that he had suffered no injury at all. The court also described the "interference" standard simply as resulting damages. 95 N.M. at 215, 619 P.2d at 1259; *see also Datacom Interface, Inc. v. Computer World, Inc.*, 396 Mass. 760, 489 N.E.2d 185, 195 (1986).

We do not reach, however, the question of whether "special damages" had to be shown in the present case. Richardson acknowledged to the district court that, absent a requirement for a "subsequent act," evidence existed from which the jury could have found damages. The argument for special damages was raised only in the context of the contention that there was no evidence of a subsequent act that gave rise to such damages. Since we conclude in the body of the opinion that a subsequent act is not required, we do not address this issue further.

that *subsequent* misuse of process was not established by the evidence.

{21} Consistent with the trial court's instruction in this case, we held in *Farmer's Gin Co. v. Ward*, 73 N.M. 405, 407, 389 P.2d 9, 11 (1964), that "[i]n order to sustain an action for abuse of process two elements are essential, (1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge." Similarly, the *Restatement (Second) of Torts* § 682 (1976) provides:

> One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

{22} In ruling that a "subsequent act" was necessary for an abuse of process claim, the court relied on Arizona case law. *See, e.g., Morn v. City of Phoenix*, 152 Ariz. 164, 730 P.2d 873 (Ct. App. 1986); *Joseph v. Markovitz*, 27 Ariz. App. 122, 551 P.2d 571 (1976); *see also* W. P. Keeton, D. B. Dobbs, R. E. Keeton, & D. G. Owen, *Prosser and Keeton on the Law of Torts* § 121 (5th ed. 1984) [hereinafter *Prosser and Keeton*]. Although *Markovitz* does hold that abuse of process requires an overt act other than the initiation of a lawsuit, other authority relied upon by the district court does not support its ruling. Moreover, we find persuasive the reasoning of those courts that hold a claim for abuse of process may be maintained in some cases when the only overt act is the initiation of litigation.

{23} Although closely related to the tort of malicious prosecution, abuse of process serves to protect different interests. Prosser writes:

> The action for malicious prosecution, whether it be permitted for criminal or civil proceedings, has failed to provide a remedy for a group of cases in which legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed. In such cases, a tort action has been developed for what is called abuse of process.

Prosser and Keeton, supra, § 121, at 897. Prosser goes on to note:

> Some definite *act* or threat not authorized by the process, or *aimed at an objective not legitimate in the use of the process, is required*; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions * * *. Some of the decisions have said that there must be an improper act, such as an extortion attempt, after the process has been issued and that an act committed beforehand is not enough. Most of these cases probably stand for the narrower proposition that there must be an overt act and that bad purpose alone is insufficient. Thus a demand for collateral advantage that occurs before the issuance of process may be actionable * * *.

Id. at 898 (emphasis added). Similarly, another commentator has written:

> [I]nitiation of litigation itself can constitute a misuse of the system if * * * sufficiently illegitimate * * *. It should not matter that the only 'process' that has been issued is a complaint. It is the abuse of the legal system that is at issue, not of writs * * *. The actor whose perversity is so proved, and who, by initiating litigation, is in fact doing more than merely initiating that litigation, does not deserve the protection of the prophylactic barriers to the malicious prosecution action, which were designed to assure that liability is imposed only on the perverse.

1 F. V. Harper, F. J. James & O. S. Grey, *The Law of Torts* § 4.9 (2d ed. 1986).

{24} Notwithstanding the different interests being protected by recognition of the tort of

malicious prosecution and by recognition of the tort of abuse of process, Rutherfords acknowledge that assuring continued access to the courts is an important consideration limiting the expansion of liability for abuse of process. We agree. We believe this policy is served adequately by requiring proof that (1), as set out in the *Restatement (Second)*, the defendant's *primary motive* was to accomplish an illegitimate end, and (2), as emphasized by Prosser, *an overt act* was committed designed to effect this end.

{25} While a subsequent act may suffice to prove an abuse of process which was appropriate when issued, it is not an essential element. The initial use of process itself may constitute the required overt act under the facts. *See Mills County State Bank v. Roure*, 291 N.W.2d 1 (Iowa 1980); *Fishman v. Brooks*, 396 Mass. 643, 487 N.E.2d 1377 (1986). We believe the trial court's instruction, drawn from *Farmer's Gin Co.*, effectively stated this requirement. We thus are in agreement with the court in *Mills*, when it wrote:

> The existence of this cause of action recognizes that even in meritorious cases the legal process may be abused. That abuse involves using the process to secure a purpose for which it was not intended. We can see no reason why there must be subsequent activity to support the cause of action. *Such activity may be very probative in determining the intent to abuse; however, there need not be such a subsequent action to commit the tort.* To rule otherwise would protect the tortfeasor when the abuse is most effective—where the issuance of the process alone is sufficient to accomplish the collateral purpose.

Mills, 291 N.W. 2d at 5 (emphasis added).

{26} Richardson acknowledged after trial that evidence existed from which the jury could find the existence of an ulterior motive. At issue in this case, therefore, is whether the filing of a three million dollar lawsuit for an improper ulterior motive was an act upon which the jury could find abuse of process, not whether such a motive existed.[4] From the lack of investigation reasonably necessary to identify the probable extent of the alleged injury, a damage claim upon refiling of the complaint that exceeded the total value of the Richardson Ranch, and the excessive, unreasonable attachment of the exhibits to the complaint, the jury could have concluded that the filing of the lawsuit was itself an overt act designed to intimidate Rutherfords into a settlement. *Cf. Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876 (Ct. App. 1982) (filing of "counter-counterclaim" that repeated essence of original complaint and other pretrial activities were evidence that supported inference of an intent to make litigation so extensive and tiresome that other party would settle); *Fishman v. Brooks*, 396 Mass. 643, 487 N.E.2d 1377 (1986) (the fact that defendant knew or had reason to know of groundlessness of suit was evidence tending to show the filing of the claim was used for ulterior purpose); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980) (failure to investigate suit adequately and total absence of expert testimony on medical malpractice claim constituted evidence supporting inference that attorney intended to coerce nuisance settlement from doctor), *overruled in part on other grounds, Ace Truck and Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987).

{27} We therefore conclude the trial court erred in granting j.n.o.v. *See generally Bookout v. Griffin*, 97 N.M. 336, 639 P.2d 1190 (1982) (j.n.o.v. proper only when jury could not have reached verdict based on evidence or permissible inference). Accordingly, we remand Roger's claim of abuse of process for a new trial.[5]

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[4] In cases in which the identification of the defendant's primary motive for filing suit is disputed, the best procedure may be, once the plaintiff has presented prima facie evidence of improper motive, to then shift the burden of producing evidence to the defendant to show the existence of another, proper motive that was the primary reason for the decision to file suit. If the defendant produces such evidence, a court then would afford the plaintiff an opportunity to rebut the proffered explanation. *See, e.g, Chavez v. Manville Products Corp.*, 108 N.M. 643, 648, 777 P.2d 371, 376, n.2 (1989) (shifting burden of production in retaliatory discharge cases). We do not, however, reach this question here.

[5] As explained elsewhere in this opinion in the context of the claims of Glenda and Randall, since the jury returned a general verdict in favor of Roger, we cannot determine whether

{28} *Issue of error in ordering a remittitur or, in the alternative, a new trial, not reached on appeal.* With regard to Randall's appeal of the remittitur, it has long been the law of this state that the trial court may require a remittitur as an alternative to the grant of a new trial to the unsuccessful party. *Henderson v. Dreyfus*, 26 N.M. 541, 556-57, 191 P. 442, 448 (1919). Cases of unliquidated damages, and likewise cases where exemplary or punitive damages have been awarded, are included in the rule. *Id.* In *Montgomery v. Vigil*, 65 N.M. 107, 113, 332 P.2d 1023, 1027 (1958) (quoting *Hall v. Stiles*, 57 N.M. 281, 285, 258 P.2d 386, 389 (1953)), we stated:

> [T]he findings of the jury should not be disturbed as excessive, except in extreme cases, as where it results from passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive where palpable error is committed by the jury, or where the jury has mistaken the measure of damages. However, the mere fact that a jury's award is possibly larger than the court would have given is not sufficient to disturb a verdict.

When the evidence, viewed in the light most favorable to the verdict, does not support the amount of damages awarded by the jury, but there is no indication that passion or prejudice existed such as would vitiate the verdict on the question of liability, a court in its discretion may order remittitur as an alternative to a new trial. *Id. Chavez-Rey v. Miller*, 99 N.M. 377, 379, 658 P.2d 452, 454 (Ct. App.), *cert. denied*, 99 N.M. 358, 658 P.2d 433 (1983). In determining whether a jury verdict is excessive, the court does not weigh the evidence, but determines the excessiveness as a matter of law. *See Transwestern Pipeline Co. v. Yandell*, 69 N.M. 448, 367 P.2d 938 (1961); *Chavez-Rey*, 99 N.M. at 379, 658 P.2d at 454.

{29} In *Hudson v. Otero*, 80 N.M. 668, 459 P.2d 830 (1969), however, this Court held that appeals by a party accepting a remitted judgment are disallowed, thus encouraging both offers and acceptances of remittitur and tending to terminate litigation. *Accord, Chavez-Rey*, 99 N.M. at 379, 658 P.2d at 454. In this case, Randall accepted the remitted judgment, and that judgment since has been satisfied by Richardson. We conclude that the propriety of the remittitur is not before us on appeal.

{30} This case is remanded for further proceedings consistent with this opinion.

{31} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

JOSEPH F. BACA,
Justice

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they found liability based on the abuse of process claim that was properly before them, or on the defamation claim, as to which the court granted a new trial. Thus, a new trial on the abuse of process claim also is in order. *See* n. 1.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-075

Filing Date: August 8, 1990, As Corrected

Docket No. 18,029

DOROTHY M. FOLZ, as Personal Representative of Sylvester C. Folz, Deceased, Steve D. Folz, Deceased, DOROTHY M. FOLZ, Individually, and RITA GARCIA, as Personal Representative of the Estate of Leo L. Garcia, Deceased,

Petitioners,

vs.

THE STATE OF NEW MEXICO and THE NEW MEXICO HIGHWAY DEPARTMENT, an agency,

Respondents.

ORIGINAL PROCEEDINGS ON CERTIORARI
Lorenzo R. Garcia, District Judge

Louis Marjon,
Albuquerque, New Mexico,

James P. Cunningham,
Phoenix, Arizona,

Civerolo, Hansen & Wolf,
William P. Gralow,
Albuquerque, New Mexico,

Gallagher & Casados,
J. E. Casados,
Albuquerque, New Mexico,

for Petitioners.

Butt, Thornton & Baehr,
J. Duke Thornton,
Albuquerque, New Mexico,

Carpenter & Goldberg,
William H. Carpenter,
Albuquerque, New Mexico,

for Respondents.

Michael B. Browde,
Albuquerque, New Mexico,

for Amicus Curiae New Mexico Trial Lawyers Association.

Atwood, Malone, Mann & Turner,
Steven L. Bell,
Roswell, New Mexico,

for Amicus Curiae New Mexico Defense Lawyers Association.

Simons, Cuddy & Friedman,
Charlotte H. Hetherington,
Santa Fe, New Mexico,

for Amicus Curiae Risk Management.

OPINION

RANSOM, Justice.

{1} This wrongful death and personal injury action was brought against the state and its agency, the Highway Department, and against Slurry Seal, Inc., a highway construction company. Plaintiffs claimed that negligence in the control of traffic at a mountain-site construction project contributed to deaths and injuries from a runaway truck driven by Enrique Peters. A verdict of $651,686.85 was rendered against the Department. Under the Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (Repl. Pamp. 1989), the statutory immunity from tort liability enjoyed by a governmental entity does not apply to highway maintenance. Section 41-4-11(A). Liability, however, is limited to $500,000 "for all claims arising out of a single occurrence," Section 41-4-19(A)(3), and no judgment may include an

award for exemplary or punitive damages. Section 41-4-19(B).

{2} We issued our writ of certiorari to the court of appeals to review (1) whether the "single occurrence" limit of $500,000 applies to the sum of damages caused by the runaway truck's successive and separate collisions with multiple vehicles; (2) whether the bar to punitive damages against the Department affects the mandate of the New Mexico uniform jury instruction on wrongful death that, in fixing the amount of damages it deems fair and just, the jury should include in its award compensation for "mitigating or aggravating circumstances" attending the wrongful act, neglect, or default, SCRA 1986, § 13-1830; and (3) whether, to recover for severe shock from witnessing the death of her husband and fatal injuries to her son, an injured passenger in one of the automobiles was required to prove by expert medical testimony, or otherwise, a physical manifestation of her emotional injury.

{3} We affirm the court of appeals in its application of the "single occurrence" limit of $500,000; we reverse its finding of error in the trial court's wrongful death instruction that included a reference to "aggravating circumstances;" and we take this opportunity to reexamine the tort of negligent infliction of emotional distress articulated in *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983). Specifically, we reject the *Ramirez* requirement that "[t]here must be some physical manifestation of, or physical injury to the plaintiff resulting from the emotional injury." *Id.* at 542, 673 P.2d at 826.

{4} In 1981 the Department contracted with Slurry Seal to resurface a mountainous portion of Highway 82 between Cloudcroft and Alamogordo. Plaintiffs alleged that defendants knew or should have known this portion of the highway contained steep downhill grades and had a history of runaway trucks, and that they were negligent in failing to design and implement an appropriate traffic-control plan for the project. On July 22, 1981, Slurry Seal was working on a stretch of highway that ran between milepost 8.1 to the east and a tunnel to the west. For some distance east and west beyond milepost 8.1 and the tunnel, the construction company had placed a series of signs warning motorists to be prepared to stop. As the work crew resurfaced the eastbound (uphill) lane, an escort vehicle was to shuttle traffic alternately up and down the westbound lane.

{5} At the time of the tragedy giving rise to this lawsuit, the escort vehicle was proceeding uphill through the construction site, leading a line of seven to twelve eastbound vehicles. A flagman at the uphill end of the construction had stopped about ten westbound cars when there came into view a heavily-laden truck proceeding at great speed downhill in the westbound lane. Its wheels were smoking. The truck, driven by Peters, had experienced brake failure and was out of control. Peters managed to swerve around the stopped, westbound vehicles and back into the westbound lane. By this time the escort vehicle and the first two cars in the line of vehicles proceeding uphill had cleared the construction area and had returned to the eastbound lane. Peters, unable to stop or avoid the oncoming traffic, sideswiped the third vehicle as its driver, Nette Motten, attempted to maneuver into the uphill lane and out of the path of the runaway truck. Peters' truck continued downhill and collided with three other vehicles, one driven by George Allegar, another by Sylvester Folz, and a third by Sherri Calkins. Finally, the truck struck a Slurry Seal construction vehicle and came to a stop. In striking these five vehicles, Peters' truck had travelled a distance of 500 to 600 feet. The jury allocated twenty percent of the fault to Peters, thirty-five percent to Slurry Seal, and forty-five percent to the Department.

{6} Thomas Tallant, the minor son of Nettye Motten, was injured. Sylvester Folz died at the scene of the accident. His wife, plaintiff Dorothy Folz, suffered multiple injuries, while their son Steven died several days later as the result of his injuries. Leo Garcia, an employee of Slurry Seal, was thrown from the construction vehicle and burned to death in a fire caused by a ruptured gasoline tank. The jury awarded damages as follows: Dorothy Folz, individually, $306,907.10;

Dorothy Folz, as personal representative of the estate of Sylvester Folz, $206,203.18; Dorothy Folz, as personal representative of the estate of Stephen Folz, $329,107.02; Rita Garcia, as personal representative of the estate of Leo Garcia, $500,000; and Nettye Motten, on behalf of Thomas Tallant, $105,975.76. The verdict against the state was $651,686.85, or forty-five percent of the total. The court entered judgment for plaintiffs but limited the damages recoverable against the state to a total of $500,000 on the basis of the liability cap.[1]

{7} *Department's acts gave rise to a single occurrence.* Plaintiffs contend each collision of the runaway truck was a separate occurrence, and, therefore, the statutory limitation of $500,000 applies separately to all victims injured as a result of each of five occurrences. The court of appeals concluded that plaintiffs' aggregate recovery against the state must be limited to $500,000 because plaintiffs' injuries arose from a single occurrence as that term is used in Section 41-4-19(A)(3).[2] We agree.

{8} The term "single occurrence" is not defined in the Tort Claims Act. In its opinion, the court of appeals drew upon the interpretation given that term in the judicial decisions of other jurisdictions concerned with the meaning of liability insurance contracts. Within that context three approaches have been used: (1) looking to *the effects of the accident*, that is, the number of injured persons, *e.g., Kuhn's of Brownsville, Inc. v. Bituminous Casualty Co.*, 197 Tenn. 60, 270 S.W.2d 358 (1954); (2) looking to *the proximate cause or causes* of the injury or injuries, *e.g., Home Indemnity Co. v. City of Mobile*, 749 F.2d 659 (11th Cir. 1984); and (3) looking to *the event which triggered liability*, that is, the one event of an unfortunate character that takes place without foresight or expectation and subjects the insured to liability. *See, e.g., Shamblin v. Nationwide Mut. Ins. Co.*, 332 S.E.2d 639 (W. Va. 1985). *See generally* Annotation, *What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specified Amount per Accident or Occurrence*, 64 A.L.R. 4th 668 (1988).[3]

[1] Section 41-4-19(A) of the New Mexico Tort Claims Act provides:

In any action for damages against a governmental entity or a public employee while acting within the scope of his duties as provided in the Tort Claims Act, the liability shall not exceed:

(1) the sum of one hundred thousand dollars ($100,000) for damages to or destruction of property arising out of a single occurrence;

(2) the sum of three hundred thousand dollars ($300,000) to any person for any number of claims arising out of a single occurrence for all damages other than property damage as permitted under the Tort Claims Act; or

(3) the sum of five hundred thousand dollars ($500,000) for all claims arising out of a single occurrence.

[2] Although not at issue in this case and not necessary to our decision here, Section 41-4-19 does not purport to limit the liability of the state and its entities in the aggregate. Rather, this Section specifically applies to the liability of "a governmental entity or public employee." "[I]t is only when the public entity is itself acting through its employee . . . that the Tort Claims Act comes into play. The public entity can act only through its employees, and the act of the offending employee is the act of the public entity under [the] traditional tort [doctrine of *respondeat superior*]." *Silva v. State*, 106 N.M. 472, 477, 745 P.2d 380, 385 (1987). It thus would appear that multiple governmental entities each could be liable for concurrent negligence to the limits of the Act under consideration here, but only for that portion of the total liability attributed to the entity or its employees.

[3] It must be acknowledged that the legislature certainly might have used the term "single occurrence" in a different sense than the one used in the insurance industry. In addition, principles of statutory construction and contract circumstances may lead to differing interpretations of similar terms. The Tort Claims Act is in derogation of plaintiffs' common-law right to sue the defendants and, therefore, is strictly construed *Methola v. County of Eddy*, 95 N.M. 329, 622 P.2d 234 (1980); *see also Holiday Management Co. v. City of Santa Fe*, 94 N.M. 368, 610 P.2d 1197 (1980) (declining to construe waiver provisions of Tort Claims Act in a manner inconsistent with remedial purpose of common-law abrogation of sovereign immunity). While the limitation of liability may form one of the objectives of both insurance companies and the New Mexico legislature, the Tort Claims Act also embodies a governmental desire to balance with this objective the needs of citizens for compensation and the need to impose duties of reasonable care on public employees. *See* NMSA 1978, § 41-4-2 (Repl. Pamp. 1989). Nevertheless, when the legislature does not provide an express definition of an essential statutory term, it must be assumed that the legislature was aware of the construction given that term in the judicial decisions of other jurisdictions. *Cf. Buzbee v. Donnelly*, 96 N.M. 692, 699-700, 634 P.2d 1244, 1251-52 (1981) (interpreting undefined statutory term "directly negat[ing] . . . guilt" in terms of case-law interpretation of the term "direct evidence"). Cases that determine what constitutes a "single occurrence" within the financial limitations of a contract for liability insurance are, therefore, of some relevance.

{9}—*"Effects" (number of injured persons) does not determine number of occurrences.* With regard to statutory maximum awards, legislatures have used three approaches to address recovery for multiple plaintiffs or claims: the "per incident or occurrence" standard; the "per person or claimant" standard; and the "per claim" standard. *See* Annotation, *Validity and Construction of Statute or Ordinance Limiting the Kinds or Amount of Actual Dies Recoverable in Tort Action Against Governmental Unit*, 43 A.L.R. 4th 19, 26 (1986).[4] New Mexico utilizes a "per person" standard permitting an award of damages up to $300,000 to each person for all claims arising out of a single occurrence, *see* Section 41-4-19(A)(2), subject further to a higher $500,000 limit for all claims arising out of a single occurrence. I § 41-4-19(A)(3).

{10} Under the New Mexico scheme it cannot be argued that the number of injured persons was intended to determine the number of occurrences, *i.e.*, that the legislature intended to adopt the so-called "effects" approach in articulating the "single occurrence" standard. While the limitation on all claims of individual persons is determined by subsection (A)(2), subsection (A)(3) clearly addresses the aggregate claims of multiple plaintiffs with any number of claims arising out of the same occurrence. This interpretation is consistent with both the express and implicit interpretations given similar "per person" and "per occurrence" limitation provisions in other jurisdictions. *See, e.g., Gleason v. City of Oklahoma City*, 666 P.2d 786 (Okla. Ct. App.) (when aggregate limitation on damages not reached, multiple claimants were each entitled to recover up to "any claimant" limitation for all claims arising out of a single occurrence because aggregate limitation "obviously" contemplated multiple claimants in single occurrence), *cert. denied*, 666 P.2d 786 (1983).

{11}—*"Proximate cause" alone does not determine number of occurrences.* The court of appeals purported to adopt the general view of a large number of jurisdictions that look to the proximate cause or causes of the accident to determine whether the accident constitutes a single occurrence or multiple occurrences. It would look to the concurrent cause attributable to the governmental entity and include within a "single occurrence" all resulting harm closely connected in time and location. The court stated:

> The term "single occurrence," contained in Section 41-4-19, refers to "the act or omission" of the governmental entity or public employee . . . and applies to claims which arose from the same proximate cause [and] embrace[s] those situations where the events resulting from the negligent act or acts of a governmental entity or public employee are closely linked together in time and location.

Because the sequence of events in this case all "derived from the same proximate cause and were closely connected in both time and location," the court concluded there was but a single occurrence. The court did not analyze, however, how the successive acts of design (planning) and of implementation or supervision were to be treated as the "same proximate cause" when they concurred to contribute to the accident. In light of this latter consideration, we do not base our application of the statute under the facts here on the notion that the sequence of events giving rise to liability "derived from the same proximate cause."

{12} We believe the suggestion of the court of appeals that the term "single occurrence" refers to the "act or omission of the governmental entity" which gave rise to the action is misleading. In some cases, a single, negligent act on the part of the state may coincide with the event that gives rise to damages and liability, such as in

[4] The doctrine of governmental sovereign immunity has been abolished or substantially abridged in virtually all jurisdictions either through legislation or judicial decision. In conjunction with abolition of immunity (and sometimes in response), numerous jurisdictions, including New Mexico, have passed legislation limiting the damages recoverable against governmental tortfeasors. As with examination of the cases interpreting the term "occurrence" in liability insurance contexts, it also is instructive to compare the New Mexico damage limitation with the limiting legislation of other jurisdictions.

the negligent operation of a motor vehicle by an agent of the state. In many other cases, multiple negligent acts or omissions of the state will antedate the event giving rise to liability. In such a case, the term "single occurrence" refers to all harm that, although proximately caused by a particular risk arising from the concurrent operation of one or more successive acts or omissions on the part of a governmental entity, was triggered by a particular event giving rise to liability.[5]

{13}—*"Triggering event" for injuries within singular risk of harm determines occurrence.* Our construction of the meaning of "single occurrence" and our application of that term here are based on the fact that all the injuries (1) lay within a singular risk of harm created by the concurrent operation of the Department's negligent acts and omissions, and (2) were triggered by a discrete event[6]—the runaway truck. The Department committed at least two negligent acts or omissions (planning and implementation) that, although committed successively, combined concurrently with the negligence of the other tortfeasors to proximately cause indivisible harm to each of multiple persons facing the singular risk of a runaway truck. In contrast, Peters, the driver of the runaway truck, may have committed one or more discrete torts with respect to each of the five collisions. Each such discrete tort would have been separated in time, place, and (perhaps) nature, and each in succession would have combined with the negligence of the Department and Slurry Seal to proximately cause the same harm.

{14} We are concerned, however, with the relationship of the Department's negligent conduct to this accident scene, not that of Peters, and we define the scope of a "single occurrence" accordingly. The negligent acts and omissions of the Department and Slurry Seal, although taking place at different points in time, combined to form but a singular, unitary, ongoing risk—that a runaway truck would strike one or more vehicles in an escorted caravan as the result of the collective failure of these parties to design and implement an effective traffic-control plan. Moreover, although the Department could have taken steps to eliminate the danger from runaway trucks, it had no control over whether the driver of a runaway truck would commit additional, independent tortious acts once the truck went out of control. Thus, from the perspective of the governmental entity, there was but a "single occurrence," because the collisions between the truck and each of the five vehicles lay within the scope of consequences portended by its negligence, and because the driver's loss of control was the triggering event that brought this negligence to its tragic fruition.[7]

[5] From this perspective it is apparent that the state's total potential liability for an ongoing risk of harm attending a project like this construction project never would be limited to $500,000 for the duration of the project. Here, a separate occurrence would have existed had the events in this case been repeated by a second runaway truck that same day, regardless of whether a subsequent negligent act was committed by the Department. *See Mason v. Home Ins. Co.*, 177 Ill. App. 3d 454, 532 N.E.2d 526 (1988) (finding a separate occurrence each time another customer was served contaminated food), *appeal denied*, 125 Ill. 2d 567, 537 N.E.2d 811 (1989).

[6] The event that triggers liability may be a discrete act or omission of the governmental entity, as with the negligence of a public employee that coincides with injury, or the triggering event may be attributable to other persons or forces regardless of whether that event itself constitutes concurring fault.

[7] The court of appeals suggested that, when multiple parties suffer injury, the sequence of events, *e.g.*, the successive acts of the driver in this case, must be linked together closely in time and space to be considered a single occurrence. Other courts likewise have relied upon the time and space *See Shamblin v. Nationwide Mut. Ins. Co.*, 332 S.E.2d 639 (W.Va. 1985) (one occurrence held to exist when one employee driver of insured negligently radioed second employee driver that it was safe to pass truck, and second employee's negligent attempt to pass resulted in an accident, because acts were closely related in time and concurrently caused the accident); *Olsen v. Moore*, 56 Wis. 2d 340, 202 N.W.2d 236 (1972) (one occurrence held to exist when insured's vehicle struck two vehicles almost simultaneously, there was virtually no time or space interval between impacts, and insured never regained control over the vehicle prior to striking second automobile). Petitioner points out the anomaly of a factor requiring events to be "closely linked in time and space," given the court of appeals' purported adoption of a causation approach to the interpretation of a "single occurrence." *Cf.* W.P. Keeton, D.B. Dobbs, R.E. Keeton & D. G. Owen, *Prosser and Keeton on the Law of Torts*, 43 at 283 (5th ed. 1984) (on unforeseeable consequences: "Remoteness in time or space may give rise to the likelihood that other intervening causes have taken over the responsibility. But when causation is found . . . it is not easy to discover any merit whatever in the contention that such physical remoteness should of itself be dispositive].").

{15} Although not directly at issue here, it is useful to note a case that held more than one occurrence existed when successive acts of negligence concurred to create multiple risks. In *Home Indemnity Co. v. City of Mobile*, 749 F.2d 659 (11th Cir. 1984), an insurer brought a declaratory judgment action in federal district court, seeking adjudication of the meaning of the term "occurrence" in its policy with the City. Significantly, this policy was purchased in response to the City's exposure to limited liability as a result of the state legislature's partial abrogation of sovereign immunity. The "per occurrence", term in the insurance policy was intended by the parties to cover the City's exposure to $100,000 of liability for property damages "arising out of a single occurrence."

{16} The controversy over the meaning of this provision arose when the City's storm drain system overflowed and caused extensive flooding after three heavy rains in 1980 and 1981.[8] In over 200 different lawsuits, homeowners whose property was damaged by the flooding had alleged that the City was negligent in the planning, construction, operation, and maintenance of its surface water drainage system. The court rejected as too narrow the insurer's argument that equated a separate "occurrence" with all flooding caused by each rainfall, and the court rejected as too broad the homeowners' argument that equated a separate "occurrence" with each incident of property damage.

{17} As in this case, the governmental entity's alleged negligence involved more than one act or omission. Although these acts and omissions occurred at separate times, they created risks that, in various combinations, operated concurrently. Unlike this case, however, the risk created by the alleged negligent construction and maintenance of *each particular storm drain*, although operating concurrently with other acts of negligence by the City, *created a separate risk* of flood damage. Each storm drain represented a singular or unitary risk. Faced with these facts, the Eleventh Circuit Court of Appeals held that:

> [E]ach discrete act or omission, *or series of acts or omissions*, . . . which caused water to flood and damage properties . . . is a single "occurrence" within the terms of the insurance policy. Thus, if on account of the City's negligence a drain on one street was blocked so that water flooded ten houses, . . . that would be one "occurrence". . . . If, at some other location, on account of negligence on the part of the City, a storm sewer spilled over, . . . that would be another occurrence. . . .

749 F.2d at 663 (emphasis added).[9] In the present case, while a series of acts or omissions on the part of the Department created an undue risk of injury, these acts contributed to a unitary risk, and only one triggering event occurred giving rise to liability. *Cf. Maurice Pincoffs Co. v. St. Paul Fire and Marine Ins. Co.*, 447 F.2d 204 (5th Cir. 1971) (each of eight different instances

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Further, petitioner argues, a time and space factor quite probably would call on fact finders to make subjective and unprincipled decisions. For example, had the truck in this case proceeded another quarter mile down the road, still out of control, before striking a sixth vehicle, would this collision have constituted a separate occurrence? Under the theory we adopt today, the same negligent acts and omissions on the part of the Department would have subjected it to "single occurrence" liability for a (hypothetical) sixth collision with the same runaway truck. To the extent no independent, intervening cause cut the chain of causation flowing from the Department's negligence, the sixth collision would have lain within the scope of the same risk of harm that subjected the Department to liability for the previous five collisions.

[8] *City of Mobile* concerned the same facts at issue in *Home Indemnity Co. v. Anders,* 459 So. 2d 836 (Ala. 1984), *appeal after remand sub nom., Home Indemnity Co. of New York v. City of Mobile*, 477 So.2d 312 (Ala. 1985), in which the Alabama Supreme Court interpreted the term "occurrence" under the state's tort claims act to refer to all injuries resulting from the same proximate cause. *Anders*, however, declined to decide the facts under this definition, holding that, in light of the pendency of over 200 other suits by injured homeowners, such a determination lay beyond the jurisdictional scope of the declaratory action brought by the City and its insurer. *Anders*, 459 So.2d at 843-44.

[9] The court was not clear as to whether it would find three occurrences to exist if, *e.g.*, a single, negligently maintained storm drain had flooded a certain number of houses during each of the heavy rains. However, in light of the court's discussion of *United States Fire Insurance Co. v. Safeco Insurance Co.*, 444 So. 2d 844 (Ala. 1983), such a conclusion seems likely. *See* 749 F.2d at 662.

in which the insured sold contaminated bird seed was a separate occurrence subjecting the insured to liability).

{18} We hold, therefore, that all injuries proximately caused by the governmental agency's successive negligent acts or omissions that combined concurrently to create a singular, separate, and unitary risk of harm fell within the meaning of a "single occurrence" when triggered by the discrete event of one runaway truck.

{19} *Wrong death instruction not error.* Defendants objected to the jury instruction on damages for wrongful death, UJI Civ. 18.30 (Repl. Pamp. 1980), because the instruction directs the jury to consider, among other factors, the "mitigating or aggravating circumstances attending the conduct which results in death."[10] This instruction is based on the New Mexico wrongful death statute, NMSA 1978, Section 41-2-3 (Repl. Pamp. 1989), which provides in part:

> [T]he jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default.

{20} Defendants contend that the language of UJI Civ. 18.30, directing the jury to consider mitigating or aggravating circumstances in awarding damages, is contrary to the Tort Claims Act, which provides that no judgment against a governmental entity under the Act shall include an award of exemplary or punitive damages. Section 41-4-19(B). The court of appeals agreed that UJI Civ. 18.30 improperly allowed for the imposition of punitive damages against the state. The court based this conclusion on: (1) the interpretation given similar language in the wrongful death statutes of certain other jurisdictions, and (2) the close parallel between the language in the instruction given and the "aggravating and mitigating circumstances" element in SCRA 1986, § 13-1827, the uniform instruction on punitive damages. We find neither of these considerations persuasive.

{21} The court of appeals opinion relied heavily on the Arizona Supreme Court's interpretation of that state's wrongful death statute."[11] The court of appeals' reliance on Arizona law was misplaced. The Arizona court based its interpretation on the legislative history of the Arizona

[10] UJI Civ. 18.30 has been amended since the time of the Folz trial in August 1984. The uniform instruction now refers to the "mitigating or aggravating circumstances attending the wrongful act, neglect or default." SCRA 1986, 13-1830.

[11] Three jurisdictions in addition to New Mexico appear to have statutes that use the term "mitigating or aggravating circumstances" in defining the measure of damages that may be recovered in a wrongful death action: Arizona, Missouri, and Colorado. *See generally* 1 S. Speiser, *Recovery for Wrongful Death* 3:4 (2d ed. 1975 & Cum Supp. 1988). Although we do not discuss the Missouri and Colorado statutes in detail in the body of this opinion, we describe them briefly below.

Missouri provides for the recovery of damages as the jury deems "fair and just" having regard for pecuniary losses and the value of services, consortium, companionship, comfort, instruction, guidance, counsel, *training and support*. Additionally, the pain and suffering of the decedent expressly is included in the measure of recovery. Finally, "[t]he mitigating or aggravating circumstances attending the death may be considered by the trier of the facts." *See* Mo. Rev. Stat. § 537.090 (1986). The Missouri Supreme Court has held that, while damages for aggravating circumstances in a sense may be considered punitive in nature, there can be no recovery in a wrongful death case for punitive damages as such. *Glick v. Ballentine Produce, Inc.*, 396 S.W.2d 609, 616 (Mo. 1965), *appeal dismissed*, 385 U.S. 5 (1966). A party may, however, plead and submit appropriate instructions on the question of mitigating or aggravating circumstances, if the evidence justifies it. To submit the issue to the jury, Missouri requires "a showing of willful misconduct, wantonness, recklessness, or a want of care indicative of indifference to consequences." *Richeson v. Hunziker*, 349 S.W.2d 50, 53 (Mo. 1961). *Cf. Morrissey v. Welsh Co.*, 821 F.2d 1294, 1302 (8th Cir. 1987) (purpose of Missouri statute is to punish wrongdoer).

By contrast, the Colorado statute, like the Arizona statute, provides for damages the jury deems "fair and just . . . having regard to the mitigating or aggravating stances attending any such wrongful act, neglect or default. . . ." Colo. Rev. Stat. 13-21-203 (Repl. Pamp. 1987). Unlike Arizona, however, the Colorado statute has been interpreted to allow the award of compensatory damages only. *Moffat v. Tenney*, 17 Colo. 189, 30 P. 348 (1892).

wrongful death statute; however, New Mexico courts previously have considered the meaning of the "mitigating or aggravating circumstances" language in our statute in light of its history and have come to a contrary conclusion.

{22} In *Boies v. Cole*, 99 Ariz. 198, 407 P.2d 917 (1965) (en banc), the Arizona Supreme Court reinstated a punitive award in a wrongful death action. The court began its analysis with the observation that, at one time, Arizona's wrongful death statute expressly had allowed for exemplary damages, Ariz. Rev. Stat. § 2147 (1887), but that this provision thereafter had been eliminated. The amended statute, providing for such damages as the jury deemed "fair and just," was held to provide for recovery of compensatory damages only. *See Downs v. Sulphur Spring Valley Elect. Coop.*, 80 Ariz. 286, 297 P.2d 339 (1956).

{23} In July 1956, however, the Arizona legislature again amended the statute. The amended statute provides for the award of such damages as are "fair and just . . . also hav[ing] regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default." *See Boies*, 99 Ariz. at 204, 407 P.2d at 920 (quoting Ariz. Rev. Stat. §§ 12-611, -613). The *Boies* court reasoned that this additional phrase, coming so close on the heels of its decision in *Downs*, indicated a legislative intent once again to provide for punitive damages.[12]

{24} New Mexico's wrongful death statute has a different history. The original New Mexico statute was, in pertinent part, identical to the Arizona statute construed in *Boies*: the jury was to award such damages as it deemed "fair and just . . . having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default." 1882 N.M. Laws, Ch. 61, § 3. To this statute, New Mexico then *added* an express provision *allowing for punitive damages. See* 1891 N.M. Laws, Ch. 49, § 2. These provisions of the statute have not been amended subsequent to 1891. *Cf.* § 41-2-3.

{25} In 1969, based on this sequence of events, the court of appeals itself rejected the argument that "the reference to mitigating or aggravating circumstances refers only to exemplary damages." *Stang v. Hertz Corp.*, 81 N.M. 69, 78, 463 P.2d 45, 54 (Ct. App. 1969), *aff'd*, 81 N.M. 348, 467 P.2d 14 (1970). A different interpretation, the court reasoned, would have rendered superfluous the addition of the express provision for punitive damages. *Id. Stang* noted the effect given this statutory language in *Kilkenny v. Kenney*, 68 N.M. 266, 361 P.2d 149 (1961). *Kilkenny* held, based in part on this language, that there may be recovery for the decedent's pain and suffering and for the cost of medical care between the time of the injury and death, in addition to damages based on the present worth of the life of the decedent to the decedent's estate (including both pecuniary and non-pecuniary value). *Cf. Mangus v. Miller*, 35 Colo. App. 335, 535 P.2d 219 (phrase "mitigating or aggravating circumstances" in Colorado wrongful death statute contemplates circumstances not relating to the wrongful act itself; rather language contemplates circumstances affecting actual damages suffered by the surviving party entitled to sue, either by way of diminishment or enhancement), *cert. dismissed*, 189 Colo. 481, 569 P.2d 1390 (1975).

{26} Although a jury usually is not instructed to consider "mitigating or aggravating circumstances" in determining compensatory damages, it must be remembered that a wrongful death action, as a statutory action, is *sui generis*. Common law concepts, while informative, are not dispositive of statutory law. Irrespective of exemplary damages, this Court has long recognized that:

> The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety

[12] In Arizona, unlike New Mexico, the plaintiff is not entitled to a separate instruction on punitive damages once the jury has been instructed in accordance with the "aggravating circumstance" language of the wrongful death statute, since the two instructions deal "with the same subject matter." *Quinonez v. Andersen*, 144 Ariz. 193, 199, 696 P.2d 1342, 1348 (Ct. App. 1984).

> of life and limb by making negligence that causes death costly to the wrongdoer. *Hogsett v. Hanna, supra; Trujillo v. Prince*, 42 N.M. 337, 78 P.2d 145 (1938); *Tauch v. Ferguson-Steere Motor Co.*, 62 N.M. 429, 312 P.2d 83 (1957).

Stang v. Hertz Corp., 81 N.M. at 350-51, 467 P.2d at 16-17. Our statute plainly distinguishes between compensatory and exemplary damages but does not restrict the required consideration of mitigating or aggravating circumstances to the latter. Moreover, the statute's specific allowance of such consideration comports well with common trial experience that mitigating and aggravating circumstances indeed do have an effect on jury awards of compensatory damages. Under our fault system, there is a policy of deterrence associated with responsibility for compensatory damages. This fact is at the heart of fault versus no-fault policy considerations. It is a question separate from that of punitive damages.

{27} Significantly, there is an established practice in this state to instruct juries on "mitigating or aggravating" circumstances bearing on wrongful death damages. If the statutory construction expressed by this experience is to give way to the pure logic that separates damages from fault as argued in the special concurrence of Justice Montgomery, then it should be for the legislature and not this Court to express a legislative intent contrary to the construction given the statute by existing appellate decisions and by the uniform jury instructions mandated by this Court.

{28} By virtue of the statute's failure to restrict the required consideration of mitigating or aggravating circumstances to exemplary damages, and by virtue of the purpose and meaning of the statute as construed in our previous cases and uniform jury instructions, we conclude that consideration by the jury of mitigating or aggravating circumstances in setting compensatory damages comports with Section 41-2-3.

{29} What is more important here, however, is that the instructions in this case did not fail to provide adequate guidance to the jury on the task that lay before it. The prohibition in Section 41-4-19(B) barring award of exemplary damages against the state was made quite clear. In reviewing claimed error in jury instructions, appellate courts should consider the instructions as a whole. Instructions will be held adequate if they fairly represent the law applicable to the issue in question. *See Sturgeon v. Clark*, 69 N.M. 132, 138, 364 P.2d 757, 761 (1961). As discussed above, the wrongful death instruction given in this case was an adequate statement of the law. We note that no punitive damage instruction was submitted to the jury as to any defendant, and, moreover, that the trial court orally advised the jury on two different occasions that it was not to award punitive damages against the state. In a wrongful death action in which the state is a defendant and punitive damages are sought against another party, it may prove helpful for the court specifically to instruct the jury that, as to the state, no damages may be awarded under UJI Civ. 13-1827 to punish for acts that were willful, wanton, malicious, reckless, grossly negligent, fraudulent, or in bad faith. Here, however, we believe it unlikely that, having been cautioned by the judge and having before it no instruction on punitive damages, the jury was confused by the "mitigating or aggravating circumstances" language as applied to the Department, and we conclude there was no error.

{30} *Emotional distress of family member.* Following the collision, Dorothy Folz removed herself from the wreckage and witnessed her husband take his last breath. As she unsuccessfully tried to remove their son Steven, she heard him screaming, "Daddy, don't die, Daddy, please don't die." As a rescuer led Folz away from the wreck, she could still hear her son imploring his father not to die. Steven had suffered a severed spinal cord from which he died a few days later. Folz, herself, suffered multiple injuries.

{31} Folz was taken by ambulance to a hospital in Alamogordo where she was reunited immediately with her son. Both subsequently were evacuated by helicopter to a hospital in El Paso. The hospital physician who treated Folz testified that she was shaken and pale, that she complained

of a headache and backache, and that she had scratches on her body and forehead. The doctor's diagnosis was that she had sustained a mild head injury and a mild cervical spine injury. In addition, the doctor administered medication to calm her because she was upset about Steven. Folz remained in the hospital for forty-eight hours and was discharged.

{32} A few days later, Folz was rehospitalized complaining of headaches and pains in her chest and abdomen. Upon examination, it was discovered that she had a fractured rib and was suffering from ileus, which is a blockage of the intestinal tract. The doctor stated that the ileus was "secondary to possible fracture of the rib." At trial, the doctor opined as lying within a reasonable medical probability that the ileus also could have been induced by stress.

{33} In *Ramirez* this Court articulated the elements necessary to establish a claim for the recovery of damages due to the negligent infliction of emotional distress. The Court adopted the following standards:

1. There must be a marital or intimate family relationship between the victim and the plaintiff, limited to husband and wife, parent and child, grandparent and grandchild, brother and sister, and to those persons who occupy a legitimate position in loco parentis;

2. The shock to the plaintiff must be severe and must result in a direct emotional impact upon the plaintiff from the contemporaneous sensory perception of the accident, as contrasted with learning of the accident by means other than contemporaneous sensory perception or learning of the accident after its occurrence;

3. There must be some physical manifestation of, or physical injury to the plaintiff resulting from the emotional injury;

4. The accident must result in physical injury or death to the victim.

100 N.M. at 541-42, 673 P.2d at 826-27. In addition, the plaintiff must prove the requisite elements of a cause of action in negligence.

{34} The *Ramirez* court specifically addressed whether a bystander, *not in any physical danger*, could recover from the emotional shock of witnessing a person injured through the negligence of another. The Court began its analysis by listing the three rules that had been utilized by other jurisdictions to circumscribe the liability for negligent infliction of emotional distress to a bystander: (1) the "impact" rule, (2) the "zone of danger" rule, and (3) the *Dillon* rule. *Id.* at 540, 673 P.2d at 825.

{35} Under the impact rule, liability for emotional distress due to witnessing injury to a third person exists only when the plaintiff also suffers physical injury from the same force that injured the third person. *See Saechao v. Matsakoun*, 78 Or. App. 340, 717 P.2d 165 (en banc) (adopting impact rule because it provides clear relationship between compensability and the plaintiff's status as a victim of a breach of duty), *rev. dismissed*, 302 Or. 155, 727 P.2d 126 (1986). *But see Gates v. Richardson*, 719 P.2d 193, 195 n.1 (Wyo. 1986) listing the numerous jurisdictions that have abolished the impact rule). The zone of danger rule would allow recovery if the plaintiff. personally was within the zone of danger of physical impact. *See Bovsun v. Sanperi*, 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984); *see also Restatement (Second) of Torts* 436 (1965) (endorsing zone of danger rule). The *Bovsun* court held that a plaintiff may recover damages for injuries caused by witnessing serious injury or death of an immediate family member, when the defendant also negligently exposed the plaintiff to the same risk of bodily injury or death. 61 N.Y.2d at 230-31, 461 N.E.2d at 848, 473 N.Y.S.2d at 362.

{36} In rejecting the limitations of both the impact and zone of danger rules, the court in *Dillon v. Legg*, 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (en banc), premised liability for negligent infliction of emotional distress on the foreseeability of the risk of injury. The *Dillon* court developed three factors to determine

liability—the plaintiff's proximity to the accident, contemporaneous observation of the accident, and relationship to the accident victim. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The standards adopted in *Ramirez* were modeled upon these factors. Since *Ramirez*, at least one jurisdiction has eschewed even the restrictions of *Dillon* and would permit compensation of psychic injury simply on the basis of its reasonable foreseeability. *Paul v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

{37} The court in *Paugh* also rejected as artificial the requirement that there must be some manifestation of physical injury proximately related to the mental distress in order for the emotional injury to be compensable. The necessity that some sort of physical injury result from the emotional harm has been seen as a mechanism to ensure that the emotional distress is serious enough to be compensable. *See, e.g., Payton v. Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982). In rejecting the requirement of physical manifestation, the *Paugh* court, 6 Ohio St. 3d at 77, 451 N.E.2d at 765, embraced the reasoning of *Leong v. Takasaki*, 55 Haw. 398, 403, 520 P.2d 758, 762 (1974):

> Because other standards exist to test the authenticity of plaintiff's claim for relief, the requirement of resulting physical injury, like the requirement of physical impact, should not stand as another artificial bar to recovery, but merely be admissible as evidence of the degree of mental or emotional distress suffered.

{38} *Paugh* focused on the seriousness of the emotional distress as a prerequisite for stating a claim for relief. It held emotional injury may be redressed if: (1) it were severe and debilitating, and (2) "a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." *Paugh*, 6 Ohio St. 3d at 78, 451 N.E.2d at 765 (citing *Rodrigues v. State*, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970)). In *Binns v. Fredendall*, 32 Ohio St. 3d 244, 245, 513 N.E.2d 278, 280 (1987), the Ohio Supreme Court further held that, when the plaintiff also suffered contemporaneous physical injury, negligently inflicted emotional injury "need not be severe and debilitating in order to be compensable."

{39} Other jurisdictions have declared objective manifestation of physical injury to be an artificial barrier to recovery for negligent infliction of emotional distress. *See, e.g., Molien v. Kaiser Foundation Hosps.*, 27 Cal.3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (en banc); *Gammon v. Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282 (Me. 1987); *Gates*, 719 P.2d at 200. *But see Payton*, 386 Mass. at . . . , 437 N.E.2d at 175 n. 5 (listing the numerous jurisdictions that require a showing of physical manifestation as a precondition to recovery for emotional distress).

{40} We are convinced the genuineness of such a claim adequately is guaranteed by the threshold requirements that (1) a marital or intimate family relationship existed between the plaintiff and the victim, (2) the severe emotional trauma suffered by the plaintiff was a consequence of contemporaneous sensory perception of the accident, and (3) the victim suffered physical injury or death. *See Ramirez*, 100 N.M. at 541-42, 673 P.2d at 826-27. "It is hard to imagine a mental injury that is more believable than one suffered by a person who witnesses the serious injury or death of a family member." *Gates*, 719 P.2d at 197. In *Ramirez* this Court articulated the interest that was deserving of legal protection when we noted that "[t]he tort of negligent infliction of emotional distress is a tort against the integrity of the family unit." 100 N.M. at 541, 673 P.2d at 825. The prerequisites stated above are sufficient to ensure the legitimacy of a claim that seeks redress for such a tort. *See Gates*, 719 P.2d at 200.

{41} As with any negligence action, the plaintiff has the burden to prove damages. Physical manifestation of the emotional trauma would be relevant toward establishing the extent of the injury. *Paugh*, 6 Ohio St. 3d at 77, 451 N.E.2d at 765 ("Proof of a resulting physical injury is admissible as evidence of the degree of emotional distress suffered."). However, physical manifestation should not be the sine qua non by which to establish damages resulting from

emotional trauma. Modern advances in medical and psychiatric science have eliminated the practical necessity that led to the requirement of evidence of resulting physical injury to validate a claim of emotional distress. *See Gammon*, 534 A.2d at 1284 ("'[T]he state of modern medical science' plus the factors deemed relevant in determining foreseeability provide sufficient guarantee against fraudulent claims and against undue burden on defendants.") (quoting *Culbert v. Sampson's Supermarkets, Inc.*, 444 A.2d 433, 436-37 (Me. 1982)). Moreover, the requirement of physical manifestation is in different cases over-inclusive (allowing recovery for trivial distress if accompanied by physical symptoms) and underinclusive (denying recovery for severe distress if not accompanied by physical symptoms). *Molien*, 27 Cal.3d at 929-30, 616 P.2d at 820, 167 Cal. Rptr. at 838.

> The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme. . . . [T]he jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience. . . . [T]his is a matter of proof to be presented to the trier of fact. The screening of claims on this basis [*i.e.*, resulting physical injury] . . . is a usurpation of the jury's function.

Id. at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839 (citations omitted).

{42} The case at bar amply demonstrates the illogic of requiring as a threshold element the presence of physical injury to manifest the emotional trauma induced by the contemporaneous sensory perception of the death or physical injury of a close loved one. In their motion for directed verdict, defendants maintained that Folz failed to present any evidence of physical gestation of her emotional injury. Defendants[13] further asserted that, because Folz received injuries of her own and suffered stress from all of the events following the accident, it was not possible to identify specific physical injury caused by having perceived death or injury to her husband or son. We agree, but we do not conclude that Folz therefore failed to establish the prima facie elements of her claim.

{43} The irony of this case is that Folz satisfies the impact rule allowing recovery by a nonfamily member for emotional distress, i.e., the most narrow standard upon which to base a claim for negligent infliction of emotional distress. Unlike the children in *Ramirez*, who were pure bystanders, Folz was a direct victim of the negligence of the defendants. "As such, the emotional . . . injuries which have den as a proximate result of the defendant[s'] tortious act are compensable under the traditional rule for recovery. The tortfeasor takes his victim as he finds him, the effect of his tortious act upon the person being the measure of damages." *Binns*, 32 Ohio St. 3d at 246, 513 N.E.2d at 280. In denying defendants' motion for directed verdict in this case, then-District Judge Lorenzo Garcia correctly observed that, in effect:

> Where the bystander receives a physical injury, apart from the emotional injury, you have a merging of the evidence, a merging of the issues, and should the court impose such a stringent standard as to require the doctor to say, well, this percent of the emotional injury came from viewing the loss of a loved one, and this percent came from pain and suffering in the accident or physical trauma in the accident, it would place an unreasonable burden on a plaintiff.

{44} Nor do we believe it mandatory for the plaintiff to produce expert medical testimony in order to establish the claim for emotional injury. The court of appeals erroneously proceeded on the assumption that such testimony is required. Although in many cases expert testimony will be required to establish causation and damages,

[13] This argument actually was made by a party who did not participate in the appeal. However, defendants here joined in this party's motion during the argument on directed verdict. Consequently, we do not find it inappropriate to attribute this line of argument to these defendants.

such testimony is not always necessary. *See Leong*, 55 Haw. at 411-13, 520 P.2d at 766-67 (discussing role of expert). As we stated in *Gerety v. Demers*, 92 N.M. 396, 411, 589 P.2d 180, 195 (1978), "the use of expert medical testimony should be employed when the trial court reasonably decides that it is necessary to properly inform the jurors on the issues."

{45} Upon revisiting *Ramirez* we hold, as a threshold requirement to establish the genuineness of a claim for negligent infliction of emotional distress, it is sufficient to allege and prove that (1) the plaintiff and the victim enjoyed a marital or intimate family relationship, (2) the plaintiff suffered severe shock from the contemporaneous sensory perception of the accident, and (3) the accident caused physical injury or death to the victim. When the plaintiff suffers physical injury, apart from the emotional injury, the severe shock from contemporaneous sensory perception involving a family member need not be distinguished from distress attributable to the plaintiff's physical injury. In any event, damages are not recoverable for grief or sorrow normally attending the death of a family member. *See* SCRA 1986, § 13-1830.

{46} The testimony of Folz and her physician and the facts and circumstances of this case provided substantial evidence to satisfy each threshold requirement as well as the requisite elements of negligence. Therefore, the trial court properly submitted the claim for resolution by the jury.

{47} For the foregoing reasons, we affirm the court of appeals' application of the "single occurrence" provisions of Section 41-4-19(A)(3) of the Tort Claims Act. We reverse the court on its interpretation of the wrongful death instructions given in this case, and we reverse the court's conclusions regarding Folz' claim for negligent infliction of emotional distress. We remand for entry of judgment consistent with this opinion.

{48} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Justice, concurring

JOSEPH BACA,
Justice, concurring

SETH D. MONTGOMERY,
specially concurring

KENNETH B. WILSON,
Justice, dissenting in part

SETH D. MONTGOMERY,
Justice (specially concurring).

{49} I join in the Court's opinion dealing with the single-occurrence and emotional-distress issues. In addition, I concur in the Court's reversal of the court of appeals on the compensatory-damage instruction issue because, as intimated by the majority, the defendants have not shown that they were prejudiced by the trial court's instructions—that, in other words, the jury included, as part of the damage awards to the petitioners for their respective decedents' wrongful deaths, amounts representing punitive or exemplary damages. I disagree, however, that the instruction given in this case, and the Uniform Jury Instruction on wrongful death generally, represent a correct statement of the law. In an appropriate case I would vote to reverse a damage verdict based on that instruction.

{50} UJI 13-1830 instructs the jury that in fixing the amount of damages which it deems fair and just it shall include *compensation* for the following elements of damages proved by the plaintiff: (1) reasonable expenses of necessary medical care and treatment (including funeral and burial expenses); (2) pain and suffering experienced by the decedent between the time of injury and death; (3) the monetary worth the decedent's life; and (4) the mitigating or aggravating circumstances attending the (defendant's) wrongful act, neglect or default. This is an incorrect statement of the law. The plaintiff in a wrongful death case is entitled to compensation for the *losses* resulting from the defendant's acts or omissions; the plaintiff is not entitled to

compensation for any mitigating or aggravating circumstances attending those acts or omissions, unless such "compensation" is awarded by way of punitive or exemplary damages. The whole theory of our tort law is to compensate the victim for his or her losses, not (unless punitive damages are awarded) to punish the tortfeasor. *See Restatement (Second) of Torts* 903 (1977) (damages represent *compensation* for harm sustained by victim); *cf. Fredenburgh v. Allied Van Lines*, 79 N.M. 593, 596, 446 P.2d 868, 871 (1968) (measure of compensatory damages is that which fully and fairly *compensates* for injuries received). This is, or should be, as true for wrongful death actions as it is for other actions founded on negligence, with respect to *all* of which (not just *"sui generis"* claims for wrongful death) our tort law has the dual objectives of compensating victims and deterring negligence. *See Restatement (Second) of Torts, supra*, 901; W. Keeton, D. Dobbs, R. Keeton, D., Owen, *Prosser and Keeton on Torts* 4, at 25 (5th ed. 1984). When compensatory damages are assessed these objectives are achieved by measuring the extent of the victim's losses and imposing liability on the tortfeasor for those losses, not by assessing the culpability of the tortfeasor's conduct and adjusting damages up or down depending upon the degree of the tortfeasor's fault.

{51} The purpose of punitive damages, on the other hand, is only to punish the wrongdoer. *Montoya v. Moore*, 77 N.M. 326, 330-31, 422 P.2d 363, 366 (1967); *cf. Fredenburgh*, 79 N.M. at 598, 446 P.2d at 873. This purpose is achieved, in an appropriate case (when there has been the requisite proof of opprobrious conduct—malicious or willful, wanton, etc., behavior—and when punitive damages may lawfully be recovered from the tortfeasor), by making it clear that in addition to the sum necessary to compensate the victim for the losses resulting from the tortfeasor's conduct, a separate amount is being assessed by way of punishment and as an example to deter others from such conduct. When there is an appropriate case, the trial judge must determine whether the jury should be permitted to award punitive damages and, if so, he or she must instruct the jury under UJI 13-1827.

{52} In fixing an award of compensatory damages, it makes no sense for the jury to consider the "mitigating circumstances" of the tortfeasor's conduct. The jury's task is to determine the amount of money necessary to make the plaintiff whole (insofar as that can be done by an award of money) and to fix the compensatory damages accordingly. It does not matter, under our scheme of tort law, that the defendant's conduct is serious or trivial; if the plaintiff has been harmed end the defendant is legally responsible, at least in part, for that harm, the plaintiff is entitled to recover his or her damages. (Of course, if the defendant's conduct is not the sole cause of the harm, his or her liability may be reduced under principles of comparative fault.) The same is true of "aggravating circumstances" attending the tortfeasor's conduct. The plaintiff is entitled to, and required to accept, a determination of the amount of his or her loss; and the aggravation, or lack of it, attending the defendant's conduct is relevant, if at all, only in determining comparative fault and in assessing punitive damages if the trial judge so permits.

{53} I therefore believe UJI 13-1830 should be revised to delete the defendant's "mitigating or aggravating circumstances" as an element of the damages for which a wrongful-death plaintiff is entitled to compensation. Nor should the jury be allowed to "consider" such circumstances in fixing the otherwise proper elements of compensatory damages, as it was in this case. The circumstances surrounding the defendant's conduct, whether mitigating or aggravating, have no place in fixing the amount of the plaintiff's loss.

{54} Our wrongful death act, Section 41-2-3, does not require a different conclusion. Since 1891, the statute has authorized both compensatory and exemplary damages in a wrongful death case. (The legislature made an exception, for wrongful death claims against the state, when it passed the Tort Claims Act and decreed in Section 41-4-19(B) that there could be no exemplary or punitive damages against a governmental entity.) In *Cerrillos Coal R.R. v. Deserant*, 9 N.M. 49, 49 P. 807 (1897), this Court construed the act as follows:

> Neither does the question of mitigating or aggravating circumstances have any weight so far as the damages denominated by our statute "compensatory" are concerned. If there should be a recovery full compensation should be awarded, mitigating or aggravating circumstances having effect only on the question of allowing or not allowing exemplary damages in addition to full compensation.
>
> Our statute appears to mean, that if there are "aggravating circumstances attending the wrongful act, neglect or default" for which the defendant is responsible, then exemplary damages should be added to those which are merely compensatory.

9 N.M. at 68, 49 P. at 813. Contrary to the majority's reading of the subsequent case law concerning the "mitigating or aggravating circumstances" language in the statute, nothing establishes that this early interpretation of the act was incorrect.

{55} In *Kilkenny v. Kenney*, the only reference to the statutory phrase in question was the following:

> [W]e are of the opinion that the provision in [§ 41-2-3], which allows a consideration of the mitigating or aggravating circumstances attending the wrongful act, when considered with the language contained in [§ 41-2-1], warrants the allowance to the administrator of the decedent's damages prior to death, provided they are not the same as those for which the husband, individually, has a right of recovery.

68 N.M. at 270, 361 P.2d at 152. The only issue in *Kilkenny* addressed in this connection, then, was whether or not damages sustained by the decedent between the date of injury and the date of death were recoverable. The Court gave no indication of why or how the statutory phrase "mitigating or aggravating circumstances" bore any relationship to this question; the reference to that phrase in the opinion seems to have been dictum of the purest sort.

{56} Similarly, when the court of appeals said in *Stang v. Hertz Corp.*, 81 N.M. at 78, 463 P.2d at 54, that *Kilkenny* and *Cerrillos* cannot be reconciled in the effect given to the statutory phrase, the court was referring to a conflict that does not exist. *Kilkenny* had indeed held that damages prior to death might be recovered and this did indeed conflict with the holding in *Cerrillos* that damages for the decedent's pain and suffering could not be recovered. To that extent *Kilkenny* overruled *Cerrillos sub silentio*, and that disavowal was made express by this Court on appeal in *Stang v. Hertz Corp.*, 81 N.M. at 352, 467 P.2d at 18. But in construing the statutory phrase "mitigating or aggravating circumstances" as superfluous if limited to the conditions for awarding punitive damages, the court of appeals in *Stang* went much further than necessary; its statements on this score are dicta like those in *Kilkenny*, and they were not approved by this Court (except by very oblique inference) on the appeal in *Stang*.

{57} This reading of our wrongful death act is consistent with that in Missouri, where the courts have held that an increase in damages by reason of aggravating circumstances is punitive in nature. *See Wiseman v. Missouri Pac. R.R.*, 575 S.W.2d 742 (Mo. App. 1978); *Williams v. Excavating & Foundation Co.*, 230 Mo. App. 973, 93 S.W.2d 123 (1936). As this Court has noted a number of times, our wrongful death act was taken from Missouri, and the views of the Missouri courts are persuasive in interpreting the act. *See Langham v. Beech Aircraft Corp.*, 88 N.M. 516, 520, 543 P.2d 484, 488 (1975) (citing cases); *Cain v. Bowlby*, 114 F.2d 519, 523 (10th Cir.), *cert. denied*, 311 U.S. 710 (1940).

{58} I would thus hold, in an appropriate case, that it is error to permit the jury, in effect, to award punitive damages against the state by considering any aggravating circumstances attending the state's conduct. However, there is no showing that the jury did this in the present case. On the contrary, the instructions the court

gave informed the jury with reasonable clarity that it was not to award punitive damages against the state, and there is no indication on this record that the jury nonetheless did so by burying a punitive-damage award in its compensatory-damage determination.

{59} In the first place, the trial court's compensatory-damage instructions modified UJI 13-1830 by authorizing only indisputably permissible damage elements: (1) reasonable medical and funeral expenses, (2) pain and suffering of the decedent, and (3) the monetary worth the decedent's life. It is true that the court's instructions went on, incorrectly in my view, to permit the jury to *consider* the aggravating or mitigating circumstances attending the conduct which resulted in the decedent's death. Whether the jury did so or not is purely a matter of conjecture. It was, in any event, instructed that the only allowable elements of damage were those intended to compensate for losses suffered by the decedent or his family. In addition, as the majority opinion notes, the jury was admonished not to award punitive damages against the state. It is presumed that the jury properly followed the court's instructions. *See Rancheros Exploration & Dev. Corp. v. Miles*, 102 N.M. 387, 390, 696 P.2d 475, 478 (1985).

{60} This Court has said that the appellant has the burden of showing he has been prejudiced by an erroneous instruction—that the Court does not correct harmless error. *Jewell v. Seidenberg*, 82 N.M. 120, 124, 477 P.2d 296, 300 (1970); *see also Johnson v. Nickels*, 66 N.M. 181, 183-84, 344 P.2d 697, 699 (1959) (errors not shown to be prejudicial to a substantial right of complaining party will be disregarded). While this rule might not operate unfailingly in all cases, in this case the defendants are asking us to speculate on the effect of the trial court's wrongful-death instruction. The evidence at trial included the following amounts for lost earnings: (1) Sylvester Folz, $390,458.00; (2) Steven Folz, $225,501.00; and (3) Leo Garcia, $263,173.00. The damage awards were, respectively: (1) $206,203.00, (2) $329,107.00, and (3) $500,000.00. In the case of Sylvester Folz, the award was less than the evidence as to loss of earnings. In the cases of Steven Folz and Leo Garcia, while the damage awards exceeded the amounts claimed as lost earnings, significant sums could well have been awarded for other components of each decedent's monetary worth and for the pain and suffering experienced by each, as well as for Steven's medical expenses. We cannot say from the figures alone that the damage awards exceeded the amounts reasonably allowable as compensation under the court's instructions; we might speculate just as easily that the jury *reduced* its determination of compensatory damages on account of mitigating circumstances. In any event, the defendants have not even attempted to carry their burden to show that the awards were excessive or, if they were, that such excessiveness represented punitive damages.

{61} I therefore conclude that reversible error by the trial court has not been shown and that it was error for the court of appeals to reverse on this ground.

KENNETH B. WILSON, Justice, concurring in part and dissenting in part.

{62} I join in the majority opinion with respect to the emotional distress issue. Further, I agree with and adopt Justice Montgomery's special concurrence regarding the uniform jury instruction on damages for wrongful death. I disagree, however, with the majority's determination that the Department's negligent acts and omissions gave rise to a single occurrence.

{63} The term "occurrence" is not defined in the Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (Repl. Pamp. 1989); we are required, therefore, to interpret it in its ordinary, everyday sense. *See United States v. Mayberry*, 774 F.2d 1018, 1020 (10th Cir. 1985) (word to be interpreted in its ordinary, everyday sense if not defined in statute). *Webster's Third New International Dictionary* 1561 (1971) defines "occurrence" as "something that happens unexpectedly and without design." This definition is consistent with the common usage of the words "accident" or "events" as explained in *Saint Paul-Mercury Indem. Co. v.*

Rutland, 225 F.2d 689, 691 (5th Cir. 1955): "It can hardly be denied that when ordinary people speak of an 'accident' in the usual sense, they are referring to a single, sudden, unintentional occurrence. They normally use the word 'accident' to describe the *event* [emphasis in the original], no matter how many persons or things are involved." *See also Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 135 (2d Cir. 1986) ("occurrence" ordinarily understood to denote something that happens without design or expectation); *but cf. Uniroyal, Inc. v. Home Ins. Co.*, 707 F. Supp. 1368, 1379-1390 (E.D.N.Y. 1988) (policy language reflecting intent of parties included new definition of "occurrence" to provide coverage for gradual, prolonged events that may be excluded by instantaneous connotation of "accident"; court therefore adopted standard for number of "occurrences" that was not result-oriented).

{64} These three terms, "occurrence," "accident," or "event," have been used synonymously by courts dealing with questions of interpretation similar to the issue before us today. *See, e.g., Newmont Mines Ltd.*, 784 F.2d 127, 135 (2d Cir. 1986) ("event" and "incident" correctly used interchangeably and synonymously with "occurrence"); *Hartford Accident & Indem. Co. v. Wesolowski*, 33 N.Y.2d 169, 172, 305 N.E.2d 907, 910, 350 N.Y.S.2d 895, 899 (1973) ("accident" and "occurrence" synonymous); *Shamblin v. Nationwide Mut. Ins. Co.*, 332 S.E.2d 639, 644 (W. Va. 1985) ("occurrence" was the "event," the "collision," or the "accident" from which liability arose). The facts and issues of the present case provide another appropriate context in which to discuss the meaning of these words within the framework of the classic dichotomy between cause and effect.

{65} The majority combines two of the possible approaches suggested by *Hartford Accident*, namely, the proximate cause test and the event test, to create a new definition of occurrence. Its hybrid definition of "single occurrence" is as follows: "[A]ll injuries *proximately caused* by the governmental agency's successive negligent acts or omissions that combined concurrently to create a singular, separate, and unitary risk of harm fell within the meaning of a 'single occurrence' when triggered by the discrete *event* of one runaway truck." (Emphasis added.)

{66} I believe a simpler and more practical approach is to determine whether there has been but "one event of an unfortunate character that takes place without one's foresight or expectation." *Shamblin*, 332 S.E.2d at 644. Regardless of who or what created the risk of harm, the question is whether there was only one resulting "occurrence"; liability did not arise until there was an event, or in this case, a traffic accident.

{67} In *Shamblin* the insured argued that the two separate acts of negligence by two of its employee-drivers in two of its insured vehicles required a conclusion that there were two "occurrences." The Supreme Court of Appeals of West Virginia disagreed, stating:

> In the case before this Court there may or may not have been two antecedent negligent acts but there was only one resulting "occurrence," the event from which liability arises, namely, the collision. The subject matter of the insurance is not "cause[s]" but "liability" and the basis for liability is an event (the collision) resulting in bodily injury or property damage. "[A]n occurrence means one event, not several events, and the question here is which event is the occurrence contemplated by the policy definition. The cases have consistently construed 'occurrence' or 'accident' in liability policies to mean the event for which the insured becomes liable, and not some antecedent cause of the injury."

Shamblin, 332 S.E.2d at 644 (quoting *Champion Int'l Corp. v. Continental Casualty Co.*, 546 F.2d 502, 508 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1977)). The *Shamblin* court also cited *Hartford Accident* as "[a]nother case equating 'occurrence' with a single liability-triggering 'event,' regardless of the details of how or why the event happened." *Shamblin*, 332 S.E.2d at

644. Quoting *Hartford Accident* with approval, the *Shamblin* court reflected:

> The [*Hartford Accident*] court therein held that there was only one "occurrence," not two occurrences, within the meaning of an automobile liability insurance policy, when an insured vehicle struck one oncoming vehicle and then ricocheted off and struck a second vehicle more than 130 feet away. The court recognized three approaches to determining whether there was one or more than one "occurrence" for liability insurance purposes: (1) looking to the proximate cause of the injuries or damages, (2) looking to the number of persons suffering a loss, and (3) looking to that one event of an unfortunate character that takes place without one's foresight or expectation and which is objectively descriptive of what happened. The court concluded that the third approach was the most practical of the three approaches. In applying this "event" test the court examined the closeness in time of the two impacts (only instants apart) and stated: "We think in common understanding and parlance there was here but a single, inseparable 'three-car accident.'"

Shamblin, 332 S.E.2d at 644 (quoting *Hartford Accident*, 33 N.Y.2d at 174, 305 N.E.2d at 910, 350 N.Y.S.2d at 899-900).

{68} In its opinion in the present case the majority concludes that the one event of an unfortunate character which took place without foresight or expectation and which is objectively descriptive of what happened was a runaway truck. While I agree that the runaway truck, as well as the construction operation and the vehicle escort procedure, caused the accident, none of these circumstances alone was the event from which the liability arose nor are they objectively descriptive of what happened. Instead, I am convinced by the analysis in the *Shamblin* case that, despite the many antecedent causes, the resulting occurrence from which liability arose was the collision or the traffic accident.

{69} In determining whether there was a single accident (occurrence) or a series of accidents (occurrences), it is appropriate and helpful to examine the anatomy of a traffic accident. Fortunately, we have the benefit of a great body of knowledge from the study and experience of experts in this field. Authorities agree that a traffic accident may be broken down into at least four segments as follows: (1) point of perception; (2) period of evasion; (3) point of no escape; and (4) point of impact (first contact). The point of perception occurs when a driver perceives that an accident is imminent. The period of evasion is that period of time when the driver takes evasive action to avoid the accident. The point of no escape is that point reached when evasive tactics are superfluous and an accident is unavoidable. The point of first impact, or first contact, is when the vehicle or vehicles actually collide. *See* J. Baker & L. Fricke, *The Traffic-Accident Investigation Manual* 15-26 (9th ed. 1986).

{70} By analyzing an accident through its various segments, it is possible to determine whether an accident was a single occurrence with its segments identical or whether the accident was a series of occurrences with its segments separate and distinct. Two comparative hypotheticals are illustrative.

{71} Assume that an obstruction blocks the traffic lane of a highway. Driver A approaches the obstruction and stops in the traffic lane; Driver B approaches and stops behind Driver A. Driver C approaches, is unable to stop, and crashes into Driver B. Driver B is carried forward into Driver A; Driver A is carried forward into the obstruction. In this hypothetical, the only point of perception is the point of time at which Driver C perceives that a collision is imminent. Drivers A and B may not perceive any danger at all. The period of evasion is when Driver C attempts to stop or avoid colliding with Driver B. Neither Driver A nor Driver B may be in positions to take evasive action as they are already stopped by the obstruction. The point of no escape is that point of time when Driver C cannot stop or turn and collides with Driver B. This point is, effectively, the same for all of the

drivers and vehicles as the impacts are, for all intents and purposes, simultaneous, overlapping, or otherwise indistinguishable. From my analysis, this was a single accident or occurrence.

{72} Assume, however, that Driver A approaches the obstruction and crashes into it. Driver B approaches and crashes into Driver A. Driver C now approaches and crashes into Driver B. In this hypothetical, the point of perception is the point of time that each individual driver sees that the highway is obstructed and a collision is imminent. The period of evasion for each driver is when each is attempting to stop or avoid the collision. The point of no escape for each driver is that point of time when each cannot avoid a collision. Likewise, the impacts are clearly separate and distinct. From my analysis, the second hypothetical was a series of distinguishable accidents or occurrences.

{73} The task now is to determine whether the accident in the case before us more closely fits the first hypothetical or the second. Conveniently, the accident under discussion is an excellent example to make this analysis. The runaway truck came downhill in the westbound lane where a series of cars had stopped at the construction site. Had the truck collided into the rear car causing an accordion-type crash, this accident, like the first hypothetical, would meet the criteria for a single occurrence. However, the runaway truck managed to pass the cars stopped in the westbound lane and continued on to sideswipe an oncoming vehicle which was attempting to regain the eastbound lane. The truck then continued downhill, striking three other vehicles before colliding with a construction vehicle which burst into flames. Each of the five vehicles involved in the collisions had different points of perception, had varying periods of evasion, had successive points of no escape, and had separate and distinguishable points of impact.

{74} For the reasons stated above, I respectfully dissent from the majority's definition of "single occurrence" as used in Section 41-4-19(A)(3) of the Tort Claims Act.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-083

Filing Date: August 27, 1990, As Corrected August 31, 1990, As Corrected October 23, 1990, As Corrected October 25, 1990

Docket No. 18,296

LAWRENCE TRUJILLO,

Petitioner,

vs.

THE CITY OF ALBUQUERQUE, et al.,

Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Albert S. "Pat" Murdoch, District Judge

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OPINION

RANSOM, Justice.

{1} Lawrence Trujillo obtained a personal injury judgment of $547,905.80 against the City of Albuquerque. His injuries occurred when a City employee, Clarence M. Wright, drove a City crane through a red light and collided with a cement truck driven by Trujillo. Negligent maintenance of the crane's brakes and its negligent operation were found by the court in this non-jury trial to be concurrent proximate causes of the collision.

{2} The trial court determined that, under Section 41-4-19(A)(2) of the Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (Repl. Pamp. 1986), the accident involved two occurrences, and thus

that the limit of the City's liability under the Tort Claims Act was twice the $300,000 cap for "any person for any number of claims arising out of a single occurrence." The court of appeals reversed this determination. The court of appeals also reversed the trial court's ruling that the damage provisions in question violated Trujillo's right to equal protection under the federal and state constitutions. We granted certiorari to review these issues. Amicus briefs were filed in this Court and before the court of appeals by the New Mexico Trial Lawyers Association (NMTLA), the New Mexico Municipal League, the New Mexico Medical Society, and the Risk Management Division of the State General Services Department (Risk Management). Upon review of the opinion of the court of appeals, the briefs, and the record, we affirm in part, reverse in part, and remand with instructions.

{3} Negligent maintenance and negligent operation of vehicle gave rise to a since occurrence. The trial court found two proximate causes produced the accident: (1) the City's negligent maintenance of the crane's brakes, and (2) Wright's negligent operation of the crane. Trujillo argues that under a causation theory there are two occurrences. However, in *Folz v. State*, 110 N.M. 457, 797 P.2d 246 (1990), this Court rejected a causation rationale relied upon by the court of appeals to define a single occurrence in that case. In *Folz* we held that, when a governmental entity has committed successive negligent acts or omissions, the determination of the number of occurrences cannot be made simply by counting the number of such acts or omissions. As did the court of appeals in the present case, we specifically noted in *Folz* that multiple proximate causes attributable to the governmental entity may combine with other concurrent causes to produce but a single occurrence.

{4} Here, the City's negligent maintenance of the crane's brakes produced a risk of harm that was concurred in and triggered by Wright's negligent operation of the crane. The risk created by the faulty brakes gave rise to liability only when Wright drove the crane into the intersection. Therefore, we hold there was but a single occurrence when successive negligent acts or omissions of the governmental entity combined concurrently to create a singular risk (of collision) and to proximately cause injury triggered by a discrete event (the crane's entry into the intersection).[1]

{5} *Constitutionality of individual cap—nature of the issue.* The trial court found Section 41-4-19 to be unconstitutional because "no rational distinction [exists] between victims of a tort inflicted by a private person and victims of a tort inflicted by a public employee or [a governmental] entity." The court of appeals (applying heightened or intermediate scrutiny rather than the rational basis test employed by the trial court) reversed, stating "the Act's limitation on damages does substantially further an important state interest—the need to protect the public treasury from large awards." *See Richardson v. Carnegie Library Restaurant*, 107 N.M. 688, 692-98, 763 P.2d 1153, 1157-63 (1988) (discussing rational basis, intermediate scrutiny, and strict scrutiny tests under equal protection analysis). Because we do not believe a sufficient factual basis exists for the court of appeals' determination, we reverse and remand for further proceedings.

{6} Interest of tort victims in "full recovery of damages" calls for intermediate scrutiny of Section 41-4-19(A)(2) under Article II, Section 18 of the New Mexico Constitution. As we use the term, "full recovery of damages" is delimited only by the measure of damages recognized in law as recoverable by any person wronged by the conduct of another. In *Richardson* we held that a tort victim's interest in full recovery of damages implicitly was protected under the state constitutional right of access to the courts. 107 N.M. at 692, 763 P.2d at 1157. We previously have recognized the right of access to the courts as a protected interest under the due process clause of Article II, Section 18 of the New Mexico Constitution. *See id.* at 696, 763 P.2d at 1161

[1] Although the court found Wright failed to yield the right-of-way, failed to stop for a red light, failed to maintain a proper lookout, and drove inattentively, these were not separate triggering events but were acts and omissions that concurred to constitute a discrete triggering event.

(quoting *Jiron v. Mahlab*, 99 N.M. 425, 426, 659 P.2d 311, 312 (1983)). *Richardson* applied the equal protection clause of Section 18 to determine whether the damage cap in the dram shop act, NMSA 1978, 41-11-1 (Repl. Pamp. 1986), discriminated between different classes of tort victims on an impermissible basis. *Id.* 107 N.M. at 698, 763 P.2d at 1162; *see* N.M. Const. art. II, 18 ("No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.").

{7} We declined to decide in *Richardson*, however, whether to apply strict scrutiny to such equal protection challenges in the future, "principally because we concluded that the damage cap [in the dram shop act] is constitutionally invalid under the lesser, intermediate scrutiny test." *Id.* at 696, 763 P.2d at 1161.[2] The plurality came to this conclusion because "no argument [was] presented . . . to persuade us that the classifications created by the legislation are constitutionally legitimate." *Id.* at 699, 763 P.2d at 1164. *Cf. id.* at 702, 763 P.2d at 1167 (Ransom, J., specially concurring in result, but reserving judgment on ultimate question of statute's constitutionality) ("This case does not demonstrate . . . that a substantial state interest might not have been shown if the defendant had pressed forward responsibly with the burden enunciated by this Court today."). Because this case is to be remanded for further proceedings, we find it necessary to decide the question avoided in *Richardson*—whether to apply strict or merely intermediate scrutiny.

{8}—When particular closes of tort victims receive unequal treatment, importance of right to full recovery of damages requires more than rational basis review. Richardson appeared to base its interpretation of Article II, Section 18 in part on the history of tort recovery in New Mexico as an aspect of the right of access to the courts. 107 N.M. at 691, 692, 763 P.2d at 1156, 1157 (approving as correct the amicus curiae analysis that traced jury and access-to-court rights to their roots in Spanish and Mexican laws, *Siete Partidas, Fuero Juzgo*, and Kearney Code; such rights, amicus argued, formed an integral part of civil law prior to statehood and were incorporated into the New Mexico Constitution).[3] The right to recover monetary damages for tortious injury has played a vital role in New Mexico since before the time of statehood as one aspect of the individual right to petition for redress of grievances. *See id.* at 696, 763 P.2d at 1161.

{9} However, we do not interpret *Richardson's* rejection of minimum rationality review as resting on the bare fact that monetary damages for tortiously inflicted injury were awarded prior to statehood. Instead, *Richardson's* application of heightened scrutiny ultimately rests on the continued importance of the right to such compensation today and on the possibility that the rights of particular classes of tort victims will be sacrificed to social expediency in the legislative process. *See id.* at 698-99, 763 P.2d at 1163-64 (tort victim's right to be compensated for injury and the sensitivity of particular classes of tort victims to injustice wrought by legislation limiting this right justify application of heightened scrutiny).

{10} Our fault system of recovery, while by no means indispensable to our society in an abstract

[2] Some form of strict or heightened scrutiny will be employed when legislation affects a fundamental right or an important individual interest, or when the legislature classifies on the basis of membership in a suspect or semi-suspect class of persons. *See Richardson*, 107 N.M. at 693, 763 P.2d at 1158. Legislative classifications will be upheld under strict scrutiny only if the proponent of a classification's validity demonstrates that "the law . . . advances a compelling state interest by the least restrictive means available." *Bernal v. Fainter*, 487 U.S. 216, 219 (1984). Under intermediate scrutiny the proponent must demonstrate that the legislative classification is substantially related to an important governmental interest. *Richardson*, 107 N.M. at 695, 763 P.2d at 1160.

[3] Before the court of appeals in the present case, NMTLA argued that a right to full legal redress was incorporated into New Mexico law by way of the Kearney Code provision guaranteeing "just remedy" for legal wrongs. NMSA 1978, "Bill of Rights," Territorial Laws and Treaties, Pamp. 3, at 1. While, as discussed in the text of this opinion, we do not elevate a tort victim's interest in full recovery of damages to the level of a fundamental right as urged by NMTLA, we base our determination of the appropriate level of scrutiny in part on our state's traditional solicitude for such interests.

sense,[4] today serves the important social functions of redistributing the economic burden of loss from the injured individuals on whom it originally fell, deterring conduct that society regards as unreasonable or immoral, and providing a vehicle by which injured victims may obtain some degree of compensation and satisfaction for wrongs committed against them and by which society may give voice and form to its condemnation of the wrongdoer. The debate over the policy question of whether the tort system is the best mechanism for performing the functions currently allocated to it is one of great current concern and importance. It is entirely appropriate that policy choices flowing from such debate take place in the legislative sphere. However, counterposed to society's interest in the workings of the tort system are undeniably important and substantial individual interests.

{11} While, as explained below, we decline to express an opinion on the constitutionality of this particular statute, we firmly adhere to the proposition that the legislature, in effecting its policy choices, may not disregard lightly the important and substantial individual interests served by the recovery of tort damages. We are satisfied that we "neither trample arbitrarily upon the legislature's preferred position of direct, political accountability . . . nor do we forsake our duty to protect individuals" when we employ heighten scrutiny "in those limited circumstances when the class implicated is so sensitive to injustice and the rights affected are so substantial and important" as they are here. *Richardson,* 107 N.M. at 698, 763 P.2d at 1163.

[4] We note that a number of jurisdictions consider the constitutionality of legislative modifications of common-law rights in terms of whether the legislature has provided a quid pro quo to plaintiffs in the form of an adequate substitute remedy or corresponding benefit. *See, e.g., Smith v. Department of Ins.*, 507 So. 2d 1080, 1088-89 (Fla. 1987); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 328, 347 N.E.2d 736, 742 (1976); *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 344, 757 P.2d 251, 258-59 (1988); *Carson v. Maurer*, 120 N.H. 925, 943, 424 A.2d 825, 837-38 (1980); *Lucas v. United States*, 757 S.W.2d 687, 690-91 (Tex. 1988). Legislative provision for a quid pro quo is not an essential requirement under our equal protection analysis; however, as explained in footnote 6 of this opinion, such provision may affect the ultimate balancing to be performed under heightened scrutiny.

{12} Although the distinctive features of our Constitution's text and history always must play an important role in this Court's interpretation of the scope and meaning of its provisions, the ample authority cited in *Richardson* from other jurisdictions also supports our decision to apply at least some form of intermediate scrutiny to damage caps such as those contained in the Tort Claims Act. *Id.* at 695 n. 5, 763 P.2d at 1160 n. 5 (citing *Coburn v. Agustin*, 627 F. Supp. 983, 995 (D. Kan. 1985) (medical malpractice); *Farley v. Engelken*, 241 Kan. 663, 672, 740 P.2d 1058, 1064 (1987) (medical malpractice); *Sibley v. Board of Supervisors of La. State Univ.*, 477 So. 2d 1094, 1107 (La. 1985) (medical malpractice); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (medical malpractice)). *See also Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 730 P.2d 186 (1986) (media defamation statute), *cert. denied*, 481 U.S. 1029 (1987); *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (1984) (statute abolishing "discovery rule" in medical malpractice actions); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (medical malpractice); *Kansas Malpractice Victims Coalition v. Bell*, 243 Kan. 333, 757 P.2d 251 (1988) (medical malpractice); *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (1985) (medical malpractice); *Lyles v. Commonwealth Dep't of Transp.*, 512 Pa. 322, 516 A.2d 701 (1986) (tort claims act); *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988) (medical malpractice); *Condemarin v. University Hosp.*, 775 P.2d 348 (Utah 1989) (provisions of Utah governmental immunity act that applied to government-run hospitals); *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (tort reform bill), *modified on other grounds* . . . Wash. 2d . . . , 780 P.2d 260 (1989).

{13}*—Principle of equal access to the courts limits power of the legislature.* In listing jurisdictions that applied strict scrutiny to damage caps, *Richardson*, 107 N.M. at 695, 763 P.2d at 1160, cited the 1985 Montana case of *Pfost v. State*, 219 Mont. 206, 713 P.2d 495 (1985) (tort claims act limit on damages). *See also White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983) (pre- *Pfost* tort claims act limit on economic and

noneconomic damages). In *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488 (1989), the Montana Supreme Court overruled *Pfost* and *White*. These two cases had based the existence of a fundamental right to recovery of tort damages on the "speedy remedy" provisions of the Montana Constitution. *Meech*, 238 Mont at 27-30, 776 P.2d at 491-92, traced such access-to-court provisions of state constitutions back to the Magna Carta and, relying on Montana precedent predating *Pfost*, held that this article of the Montana Constitution "did not constrict legislative powers because [it] only provided a mandate to the courts to provide equal access to causes of action recognized at law." 238 Mont. at 27, 776 P.2d at 491-92 (citing *Shea v. North-Butte Mining Co.*, 55 Mont. 522, 179 P. 499 (1919); *Stewart v. Standard Pub. Co.*, 102 Mont. 43, 55 P.2d 694 (1936); *Reeves v. Ille Elec. Co.*, 170 Mont. 104, 551 P.2d 647 (1976)). *But see Lucas*, 757 S.W.2d at 690 (open court guarantee of Texas Constitution based on provisions of Magna Carta and necessitated judicial review of medical malpractice cap).

{14} We do not interpret the New Mexico Constitution creating a mandate only to the judicial branch to provide equal access to the courts. In our tripartite system of state government, each branch at times properly may exercise its constitutional authority in matters that affect the word of a coordinate branch. *See, e.g., State ex rel. Chavez v. Vigil-Giron*, 108 N.M. 45, 766 P.2d 305 (1988) (judicial review of constitutional amendment on judicial reform that was drafted by the legislature and ratified by the voters). We adhere to the view expressed by the Kansas Supreme Court, among others, that "our constitution does not make this court the critic of the legislature; rather, this court is the guardian of the constitution." *Samsel v. Wheeler Transp. Servs., Inc.*, 246 Kan. 336, 338, 789 P.2d 541, 549 (1990) (finding statutory limit on noneconomic tort damages constitutional under a form of intermediate scrutiny). We would ill serve our role as guardian of the constitution were we to exclude the legislature from the reach of the constitutional guarantee of equal access to the courts: Thus restricted, that guarantee would become largely "toothless." *Meech*, 238 Mont. at 64, 776 P.2d at 514 (Sheehy, J., dissenting).

{15}—*Nature of the individual interest and nature of the classification are the sole determinate of level of scrutiny.* Risk Management argues that we should apply a different level of scrutiny to the Tort Claims Act than we did to the dram shop act, because "damage limitations [in tort claims acts] typically [bind] governmental waivers of immunity within reasonable parameters." Risk Management points out that courts in other states have applied a less strict standard when reviewing equal protection challenges to legislation limiting governmental liability. *Compare Cauley v. City of Jacksonville*, 403 So. 2d 379 (Fla. 1981) ($50,000 limit on liability of state or subdivision upheld under rational basis review) *with Smith v. Department of Ins.* 507 So. 2d 1080 (Fla. 1987) ($450,000 cap on recovery of noneconomic damages in general tort reform statute found unconstitutional under a form of heightened scrutiny); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976) (intermediate, "means-focus" scrutiny applied to medical malpractice cap), *cert. denied*, 431 U.S. 914 (1977) *with Leliefeld v. Johnson*, 104 Idaho 357, 659 P.2d 111 (1983) (rational basis applied to tort claims act); *Estate of Cargill v. City of Rochester*, 119 N.H. 661, 406 A.2d 704 (1979) (governmental tort cap upheld under rational basis standard), *appeal dismissed*, 445 U.S. 921 (1980) *with Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980) invalidating medical malpractice cap under form of intermediate scrutiny).

{16} We are not persuaded. We note first that Idaho's "means-focus" standard of review, unlike the variety of heightened scrutiny adopted in *Richardson*, is triggered only when the legislative classification patently lacks a reasonable relationship to the legislative purpose *and* is discriminatory on its face. *Leliefeld* applied rational basis review to the statutory limit on governmental liability because the purpose of the statute under consideration appeared to bear a reasonable relationship to the classification scheme created. 104 Idaho at 373, 659 P.2d at 127 (citing

Jones, 97 Idaho at 871, 555 P.2d at 411). By contrast, in terms of the threshold inquiry established in *Richardson*, the damage cap contained in Section 41-4-19(A)(2) is identical to the damage cap contained in the dram shop act.

{17} Second, the New Hampshire Supreme Court applied minimum rationality review in *Estate of Cargill* solely because the damage cap in New Hampshire's tort claims act implicated neither a suspect class nor a fundamental right. 119 N.H. at 666-67, 406 A.2d at 707. The court did not discuss the possibility of an intermediate level of review. That the damage cap applied to the *government* was considered by the court only in determining whether the classification bore a rational relationship to its purpose, not in deciding which level of scrutiny to apply. *Id.* at 666-68, 406 A.2d at 706-07. The court's application of a type of "heightened scrutiny" to the medical malpractice cap in *Carson,* therefore, appears to have modified the law:

> In [*Estate of Cargill*] we applied the rational basis test in evaluating classifications which . . . place restrictions on an individual's right to recover in tort. *We now conclude, however, that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.*

Carson, 120 N.H. at 932, 424 A.2d at 830 (emphasis added). *See also State v. Brosseau*, 124 N.H. 184, 197, 470 A.2d 869, 877 (1983) (Douglas and Batchelder, JJ., specially concurring) (under *Carson*, right of tort victim to recover for injuries is an important substantive right, and doctrine of sovereign immunity should be declared unconstitutional to the extent it denies a just remedy to an injured party).

{18} By contrast, the Florida Supreme Court clearly relied on the fact that the damage cap at issue limited governmental liability when it applied a different level of review in *Cauley*. The court noted, 403 So. 2d at 384-85, that under the rule set forth in *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Constitution limited the state legislature's authority to cap tort damages only when (1) the right affected was statutory and predated the enactment of the Florida Constitution, or (2) the right had become part of the state's common law prior to that time. Since there existed no common law or statutory right to sue a municipality at the time of the enactment of the state constitution, the court concluded that the state constitution did not limit the legislature's plenary authority to abrogate sovereign immunity. 403 So. 2d at 385; *see also* Fla. Const. art. X, § 13 (right to authorize suit against the state reserved for legislature). *Cf. Smith v. Department of Ins.*, 507 So. 2d at 1088 (under *Kluger*, legislation capping medical malpractice damages would be upheld only if (1) it provided a reasonable alternative remedy or commensurate benefit, or (2) there was a showing of overpowering public necessity and no alternate method for meeting such public necessity).

{19} We decline to follow Florida's "vested rights" approach. Our equal protection inquiry does not seek to identify particular causes of action (or particular legal remedies) as being "so important that they must be insulated from whatever inhibition the political process might impose." J. Fly, *Democracy and Distrust: A Theory of Judicial Review*, 75 n.*. Our inquiry instead concerns itself with how decisions effecting policy choices between *existing* rights and governmental goals distribute their resultant costs and benefits. *See id.; see also Lucas*, 757 S.W.2d at 690 (litigant's right of redress under state constitution measured in terms of whether litigant possessed cognizable cause of action presently recognized at common law). The nature of the individual interest and of the legislative classification determines the appropriate level of scrutiny, not the importance of the government's goal or the vagaries of history.

{20} This case presents no issue, nor do we purport to decide, whether the New Mexico Constitution requires judicial or legislative recognition of liability for a particular type of tort. However, our common and statutory law presently

recognize a right to recover damages for persons injured by the torts committed in INS case. So long as the state chooses to provide particular rights to litigants, it must allow litigants to exercise these rights in a manner that comports with principles of equal protection and equal access to the courts, and it may not limit the exercise of such rights selectively unless the limitation is justified by a counterbalanced state interest of sufficient weight. *See generally Griffin v. Illinois*, 351 U.S. 12 (1956) (right of criminal appeal); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (state law regarding divorce); L. Tribe, *American Constitutional Law* 16-11 (2d ed. 1988).

{21}—*Constitutionality of Section 41-4-19(A)(2) to be determined under intermediate rather than strict scrutiny.* Strict scrutiny is appropriate when the classification involves a fundamental right or a suspect class. *Richardson*, 107 N.M. at 693, 763 P.2d at 1158. As noted in *Richardson*, the tort victim's interest in full recovery of damages is protected only implicitly by the right of access to the courts. 107 N.M. at 692, 763 P.2d at 1157. *Cf. Plyler v. Doe*, 457 U. S. 202 (1982) (recognizing education as an important interest but not a fundamental right). Moreover, tort victims do not fit the criteria of a "suspect class". See United States v. Carolene Prods. Co.) 304 U.S. 144, 152-53 (1938) (defining suspect class); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985) declining to afford suspect class status to mentally retarded persons because "mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions"). We conclude strict scrutiny should not be applied to the cap contained in Section 41-4-19(A)(2). A tort victim's interest in full recovery of damages calls instead for a form of scrutiny somewhere between "the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny." *Richardson*, 107 N.M. at 697, 763 P.2d at 1162 (quoting *L. Tribe, supra* 16-32, at 1601). We hold, therefore, that intermediate scrutiny should be applied in this case.

{22} Article II, Section 4 does not require application of strict scrutiny. Trujillo and amicus curiae NMTLA argue that, in addition to Article II, Section 18 of the state constitution, a plaintiff's right to full recovery of tort damages is protected under Article II, Section 4, which provides:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

{23} We do not believe this provision provides additional support to Trujillo. We find somewhat nebulous any connection that may exist between it and the damage cap contained in Section 41-4-19(A)(2). Even were we to assume that the damage cap implicates the constitutional provisions of Article II, Section 4, here we do not believe these provisions afford more protection to victims of governmental torts than do the provisions of Article II, Section 18.

{24} Existence of alternative means of achieving governmental goal is material to determination of whether classification is substantially related to important governmental interest; issue of constitutionality not fully litigated below. Under the rational basis test, the opponent of the legislative classification has the burden to demonstrate that the law at issue treats like-situated persons unequally on the basis of a classification scheme unrelated to some real distinction, or that the legislation lacks a reasonable relationship to a legitimate governmental purpose. *Richardson*, 107 N.M. at 695, 763 P.2d at 1160. When, by contrast, the opponent of a statute has established that the validity of the statute is to be tested under heightened scrutiny, it is the party maintaining the statute's validity who "must prove that the classification is substantially related to an important governmental interest." **Id.**

{25} Here, we are inclined to take it as self-evident that "preservation of the public treasury" constitutes an important governmental interest. *See, e.g., Smith v. City of Philadelphia*, 512 Pa. 129, 139, 516 A.2d 306, 311 (1986), *appeal*

dismissed, 479 U.S. 1074 (1987). However, a determination that the classification is aimed at furthering an important governmental interest does not necessarily imply that the classification is "substantially related" to the interest so identified. *See Jones*, 97 Idaho at 871-74, 555 P.2d at 411-14 (record demonstrated neither the existence of a medical malpractice insurance crisis nor the relationship between the legislatively created limit on tort damages and any abatement of alleged crisis); *Sibley*, 477 So. 2d at 1109 (proponent of legislative classification must demonstrate that it substantially furthers legitimate governmental interest); *Arneson*, 270 N.W.2d at 136 (evidence at trial supported trial court's finding that medical malpractice cap was not related to any real cost crisis in obtaining malpractice insurance); *Condemarin*, 775 P.2d at 366, 369, 373 (with each justice writing separately, a majority held that proponents of damage cap on malpractice actions against government-run hospitals failed to demonstrate that statute had a substantial effect on protecting state treasury). Relying on *City of Philadelphia*, the court of appeals in this case concluded that such a substantial relationship existed because placing a cap on damages necessarily limited the impact of large jury awards on public funds. We do not believe sufficient facts are known from which the court reasonably could reach this conclusion. Accordingly, we reverse the court of appeals.

{26}—*Requirement of a substantial relationship and the existence of less restrictive alternatives.* Trujillo and NMTLA contend the damage cap is unconstitutional because it burdens *only* the constitutionally protected interests of those who have suffered catastrophic injuries and who, therefore, are in greatest need of compensation. The damage cap, they contend, thus impermissibly relies on the most discriminatory means to achieve the legislative ends, while other, less burdensome means exist that equally would further the legislative purpose.

{27} The City and Risk Management argue that, under intermediate scrutiny, the state has no burden to show that less restrictive alternatives would not serve its purpose as well as the means chosen, so long as the means chosen do materially advance this purpose. They contend the court of appeals was correct in its determination that the legislative classification substantially furthered the government's important purpose since large individual awards in excess of present municipal insurance policies would have a devastating, destabilizing impact on government finances. Moreover, Risk Management argues, "each dollar protected under the tort claims limit is a dollar's worth of preservation of governmental funds."

{28} We do not agree entirely with either formulation of the requirement that a "substantial relationship" exist between the government's classification scheme and its declared purpose. Trujillo and NMTLA suggest the required fit between means and ends under intermediate scrutiny is the same as the required fit under strict scrutiny; the City and Risk Management suggest the fit need be no tighter than that required under the test of minimum rationality. Intermediate scrutiny, while allowing for a more flexible accommodation of legislative purposes than strict scrutiny, does not abandon totally the concern with over- and under-inclusiveness that, under strict scrutiny, is given form as the least restrictive alternative test.[5]

{29} "An insistence on assessing the importance of the state interest by balancing it against the burdens imposed on the individual and on society . . . seems a hallmark of a new form of heightened scrutiny." L. Tribe, *supra* 16-32,

[5] For example, in *Craig v. Boren*, 429 U.S. 190 (1976), the Supreme Court applied intermediate scrutiny to invalidate legislation that banned the sale of 3.2% beer to males under twenty-one, but allowed sale of such beer to females over eighteen. The Court rejected the argument that the statute bore a substantial relationship to the government's important purpose in promoting public safety because "the [statistical] showing offered by the appellees does not satisfy us that sex represents a legitimate, *accurate* proxy for the regulation of drinking and driving." 429 U.S. at 204 (emphasis added). *Craig* does not control our development of intermediate scrutiny under the New Mexico Constitution. Nonetheless, *Craig* is informative and cannot be reconciled with the notion that, under intermediate scrutiny, a classification only need further to some extent the important governmental interest being pursued.

at 1602; *see, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (state's interest in preserving limited educational funds for legal residents did not justify statute's burden on the interests of children of illegal aliens). An indirect means by which courts may assess this balance is to determine whether alternatives exist that would not burden protected interests as heavily as the classification scheme chosen. *See, e.g., Caban v. Mohammed*, 441 U.S. 380 (1979); *Craig v. Boren*, 429 U.S. 190 (1976); *see generally* L. Tribe, *supra* 16-32, at 1603.

{30} Indeed, perhaps the most objective method by which a court may assess the balance struck by the legislature consists in determining the extent to which the government's goals might be advanced by means that burden protected interests less than the means chosen. Such a method eschews reliance on subjective notions of the importance of particular individual interests versus the importance of particular governmental purposes. While the "least restrictive alternative" need not be selected if it poses serious practical difficulties in implementation, the existence of "less restrictive alternatives" is material to the determination of whether the classification substantially furthers an important governmental interest.[6]

{31}—*Facts were not developed sufficiently to allow a determination of substantial relationship between classification and important governmental interest.* Given the nature of the substantial relationship requirement as applied to the issues in this case, we do not believe a reviewing court should content itself merely with anecdotal or speculative showings of a fit between means and ends. *See Schlieter v. Carlos*, 108 N.M. 507, 510, 775 P.2d 709, 712 (1989) (per curiam) (declining to accept certification by federal district court of equal protection challenge to damage cap in Medical Malpractice Act when facts had not been developed at trial to show whether damage cap was substantially related to important governmental interest); *see also Sibley*, 477 So. 2d at 1109 (proponent of constitutionality of statute discriminating between tort victims on the basis of their physical condition was obliged to produce evidence to establish that classification at issue substantially furthered a legitimate state interest); *Jones*, 97 Idaho at 871-74, 555 P.2d at 411-14 (remanding for full development of record as to any real health care industry crisis to which a cap on medical malpractice recoveries may bear a fair and substantial relationship).

{32} Here, the individual damage cap in the Tort Claims Act discriminates between tort victims, first, on the basis of the identity of the tortfeasor and, second, on the basis of the amount of damages. On the basis of this classification, the legislature chose to burden the interests of only those individual tort victims whose injuries are caused by a governmental tortfeasor and whose damages exceed $300,000 for all claims.[7] *Cf. Richardson*, 107 N.M. at 698, 763 P.2d at 1163 (on classifications created by damage cap under the dram shop act).

{33} It may appear obvious that the victims of governmental torts who suffer catastrophic injury place the greatest drain on the treasury *individually*, and that the damage cap therefore is substantially related to the goal of protecting governmental funds for other services. However, this obvious proposition does not establish whether large damage awards to such individuals would create a real problem for entities of state government, or *the extent of that problem*. Nor does this proposition establish the effect on the state treasury of *the claims of this class of tort victims in the aggregate* as compared to the

[6] As noted in footnote 4 of this opinion, legislative provision for a quid pro quo to plaintiffs in the form of an adequate substitute remedy may affect the balancing process described in *Richardson* and developed further in the body of this opinion. To the extent the proponent of the legislative classification shows that an adequate substitute remedy has been provided to tort victims affected by a legislatively enacted cap, it becomes doubtful whether less restrictive alternatives exist that would further the legislative goal as well or better than the means chosen.

[7] One additional level of classification would be applicable to discussion of the aggregate damage cap contained in Section 41-4-19(A)(3), as it provides for further limits on damages recoverable by multiple victims of governmental torts whose injuries stem from the same "occurrence." An analysis of the constitutionality of that Section therefore may present considerations not addressed in this opinion.

aggregated claims of those with individual claims of $300,000 or less. These latter questions must be answered if we are to determine whether the individual damage cap substantially advances the state's chosen goal.[8] While it may be that in other cases this Court can assess whether a substantial nexus exists between legislative means and ends without the benefit of such an evidentiary record, here the government's putative goal inextricably is tied to the risk of large damage awards. The existence, nature, and magnitude of this risk, as well as the justification for the means chosen to deal with it, ultimately depend on empirical data.

{34} Risk Management presents statistics to show that, assuming insurance policies providing $300,000 coverage for single occurrences, many municipalities in this state currently lack the resources to satisfy the $247,906 judgment awarded in this case in excess of the $300,000 limit. However, no evidence properly has been developed to show that greater insurance coverage is unavailable, or to show the likelihood that juries will award damages in excess of insurance policies which, practically speaking, these municipalities could obtain, or to show whether other risk spreading means exist to protect municipalities from large awards. Moreover, since, unlike some states, New Mexico has not created separate statutes for municipalities as opposed to other entities of state government, any determination that the cap is constitutional as applied to municipalities would not necessarily amount to a determination that the same cap is constitutional as applied to such other entities. *See City of Cleburne*, 473 U.S. at 447-50 (zoning ordinance unconstitutional as applied). At most, Risk Management's argument constitutes a justification for giving some form of prospective application to any final determination that the damage cap at issue in this case is unconstitutional. *Cf Hicks v. State*, 88 N.M. 588, 593-94, 544 P.2d 1153, 1158-59 (1975) (decision abolishing sovereign immunity to be applied prospectively); *Norris v Saueressig*, 104 N.M. 85, 717 P.2d 61 (Ct. App. 1985) (prospective application of rule declaring military benefits to be community property), *aff'd*, 104 N.M. 76, 717 P.2d 52 (1986).

{35} Here, the district court made its ruling on the assumption that the statute was subject to rational basis review prior to our decisions in *Richardson* and *Schlieter*. The City then did not have notice that it bore the burden to present evidence in support of the constitutionality of the statute, nor does it appear that it was given an opportunity to do so. As did the Supreme Court of Louisiana under similar circumstances, we decline to "penalize the defendant for its failure to anticipate our interpretation" of the requirement of proof it bears in this case. *Sibley*, 477 So. 2d at 1109. *See generally Montoya v. Ortiz*, 24 N.M. 616, 175 P. 335 (1918) (appellate court vested with broad discretion to remand case for a new trial or other proceedings, and such will be ordered when it appears that justice so requires). *Cf. McGrail v. Fields*, 53 N.M. 158, 203 P.2d 1000 (1949) (when trial court's erroneous application of statute of limitations in quiet title action prevented it from reaching question of laches, new trial allowed solely on that issue). We therefore conclude that this case should be remanded

[8] Although we do not attempt to catalog all the variables that may affect the closeness in fit between the state's chosen means and ends, we give the following examples to demonstrate the impossibility of judging this question in the abstract. It is statistically possible, for instance, that the number of persons with claims in excess of $300,000 is so small relative to the class of persons with damage claims less than or equal to $300,000 that the state treasury would be better protected by allowing only those persons with claims over the present liability cap to recover, by limiting all persons with claims against the state to recovery of a certain percentage of their incurred damages, or by some other means. Wisconsin's health care liability statute, for example, apparently does not place an absolute cap on recoverable damages. *See State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 511, 261 N.W.2d 434, 443 (1978). Instead, it limits to $500,000 the amount a victim may collect from judgments in excess of $1,000,000 per year, with a further $500,000 cap on recovery that is triggered only if the legislatively created compensation fund should fall below a certain level. This latter $500,000 limit does not apply to medical expenses. *Id.* Additionally, as the trial court noted in this case, the fact that the legislature did not provide a mechanism for adjusting the damage cap to account for inflation or other financial variables could mean that, regardless of whether the damage cap was constitutionally sound when passed, it is by now constitutionally infirm. *Cf. Carolene Prods.*, 304 U.S. at 153 (under rational basis review, 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).

to the district court for development of the factual record.

{36} In remanding this case we do not intend, as intimated by the dissent of Justice Montgomery, that the trial court will bind us with ultimate findings of legislative fact relevant to the constitutionality of the individual cap contained in Section 41-4-19(A)(2) of the Tort Claims Act. Such legislative facts, as so well described by Justice Montgomery, are determinative of policy questions that affect the common law, statutory construction, and constitutional review. This Court is not bound by the weight or determinative character assigned legislative facts by the trial court.

{37} Although we do not know what will be forthcoming from competent advocacy before the trial court, the majority of this Court believes that the empirical data relevant to the State of New Mexico more likely will be developed through expert testimony and other evidence in an adversary evidentiary hearing than through "Brandeis briefs" submitted by the parties on appeal. Given the magnitude of the constitutional issue before us today, we believe it unwise to rush to a premature decision. The advocates of constitutionality in cases involving heightened scrutiny should provide this Court with the best evidence available to support or rebut studies, reports, findings, anecdotes, and speculation that might otherwise be available to us.

{38} Moreover, this Court is not limited to consideration of the legislative facts developed at trial, and remand of this case for an evidentiary hearing does not preclude us from mailing use of the judicial-notice procedure described by Justice Montgomery. Additionally, if the parties cannot provide the appropriate foundation of legislative facts either at trial or on appeal, we may choose to limit our decision to the case at bar and defer the ultimate resolution of the constitutional question until such a foundation is presented. *See Richardson*, 107 N.M. at 702, 763 P.2d at 1167 (Ransom, J., specially concurring in result, but reserving judgment on ultimate question of statute's constitutionality).

{39} For the foregoing reasons, this case is remanded to the district court for further proceedings consistent with this opinion.

{40} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Justice, concurring

JOSEPH F. BACA,
Justice, concurring

KENNETH B. WILSON,
Justice, specially concurring

SETH D. MONTGOMERY,
Justice, concurring in part, dissenting in part

WILSON,
Justice, specially concurring.

{41} I concur that it is appropriate to remand this case to develop additional facts. However, I am not convinced that this is the appropriate time to decide the issue of heightened scrutiny, and like Justice Montgomery, would prefer to leave those doubts for another day.

{42} Further, while I concur that this case involves a single occurrence, in light of my recent dissent in *Folz v. State*, 110 N.M. 457, 797 P.2d 246 (1990), I take exception to the analysis used by the majority in reaching that conclusion.

MONTGOMERY, Justice, concurring in part, dissenting in part.

{43} I join in the Court's opinion and ruling on the single-occurrence issue in this case. I dissent from the disposition of the constitutional issue. Since the Court does not rule on the constitutionality of the statute imposing the damage Lap, I will not express a view on that question either. I confess to some skepticism about the Court's linchpin proposition that a tort victim's interest in "full recovery of damages" is entitled

to constitutional protection in this state; but it will be time enough to develop a definitive opinion on this issue when, and if, a majority of the Court actually decides it in a case in which I participate.[9]

{44} I recognize that the proposition was articulated in *Richardson v. Carnegie Library Restaurant*, as a predicate for applying heightened scrutiny analysis to the dram-shop liability limitation in that case. In light of the Court's opinions in the case, however, it is difficult to understand why heightened scrutiny was necessary. Under the reasoning in the plurality and dissenting opinions not even minimal scrutiny would have saved the statute. For the plurality, Justice Walters was "unable to discern or discover" any "legitimate or substantial reason" for limiting the liability of a tavernkeeper. 107 N.M. at 699, 763 P.2d at 1164. The only justification offered in Justice Stowers' dissent was that the statute avoided "overburdening" tavernkeepers. *Id.* at 704, 763 P.2d at 1169. The plurality, in other words, was unable to find *any* public purpose in the statute; the dissent offered only protection of a certain class of tortfeasors, without any explanation of why or how that purpose satisfied even a rational-basis test.

{45} Both the plurality opinion in *Richardson* and the majority opinion in this case anchor a victim's interest in full recovery in the constitutional right of access to the courts. *See id.* at 692, 696, 763 P.2d at 1157, 1161. As recognized by the majority here, however, some state constitutional provisions that the courts shall be open to every person, that a speedy remedy shall be afforded for every injury, and that no person shall be deprived of full legal redress have been construed as mandating only that the courts shall provide equal access to causes of action and remedies established by the courts or the legislature, not that the legislature's power to limit causes of action is constricted. *See, e.g., Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 37-42, 776 P.2d 488, 498-500 (1989). The majority embraces a more expansive view of the right of equal access to the courts, apparently holding (though never explicitly saying) that the right of access entails also a right to some unspecified amount of money—"full recovery"—and that our state Constitution limits the power of the legislature to place restrictions on this expanded right.

{46} Neither the plurality opinion in *Richardson* nor the majority opinion here ever explains why our Constitution should be construed as affording an injured person a right to any monetary recovery, much less "full" recovery.[10] *Richardson* and the Court here merely posit that there is some sort of right in the Constitution, emanating from or related to the right of equal access to the courts—which I certainly agree *is* fundamental and unquestionably present in several clauses of our Constitution—entitling an aggrieved party to remuneration and constraining the power of the legislature to limit or qualify it.

{47} The majority notes that the power of our state legislature is confined by the Constitution and that the courts, as guardians of the Constitution, have the authority and responsibility to determine when and to what extent legislation has exceeded the bounds imposed by it. But the question before us does not turn on any such elementary principle; it rather depends on whether we read the Constitution as extending to certain litigants a "substantial and important" (*Richardson*, 107 N.M. at 698, 763 P.2d at 1163) right to full recovery. Along with the majority, I believe that no specific right to recovery, no cause of action, no entitlement to monetary redress is "so important" that it must be "elevated . . . to the level of a fundamental right," as it would be if it

[9] The majority says near the end of its opinion that if and when this case returns to us after development of a fuller evidentiary record on remand, decision of the constitutional issue may be limited to the case at bar and "ultimate resolution" of that issue deferred to another case. To a considerable extent, therefore, the majority's pronouncements in its opinion in this case represent *obiter dicta*.

[10] Contrary to the majority's intimation, *Richardson* did not trace a right of full recovery to the due process and equal protection clauses of our Constitution or to the constitutional rights to jury trial and equal access to the courts; it merely described how an *amicus curiae*, the Trial Lawyers Association, had made this argument, purporting to found it on our Constitution's antecedents in Spanish and Mexican law and the Kearney Code. *See* 107 N.M. at 691, 763 P.2d at 1156.

were found, expressly or impliedly, in the Constitution.[11] The questions of how much money an individual receives, and from whom he or she receives it and under what circumstances, are for the legislature (and, when it has not acted, the courts through common-law adjudication) to prescribe in regulating the economic affairs of our society.

{48} I thus am highly dubious over the basic predicate to the majority's entire heightened scrutiny analysis in this case. However, as I say, I prefer to leave those doubts for another day. For present purposes I am concerned that the Court has ducked the constitutional issue and sent it back to the district court for a trial on whether the legislature properly devised the legislation at issue to accomplish its purpose.

{49} The majority says that sufficient facts were not developed at trial from which the court of appeals could conclude that the statutory damage cap is substantially related to the admittedly important governmental interest in preserving the public treasury. I am at a loss to know what "facts," within the abilities of the parties to this lawsuit to prove, are supposed to be established on remand. Presumably those "facts" will relate to the impact on municipalities' treasuries (and perhaps the treasury of the state at large) from large damage awards. Perhaps they will also relate to the ability of municipalities to obtain liability insurance with certain dollar limits and the variable cost of such insurance at greater and lesser limits. The majority suggests that the parties should provide evidence on whether large damage awards to individuals who suffer catastrophic injury do in fact create problems for governmental entities, what the extent of those problems may be, and what the effects of large damage claims may be in the aggregate, as compared to an aggregation of smaller claims. Similarly, evidence is to be adduced, or may be adduced, on the effects of inflation and whether or not some adjusting mechanism in the statute could have been implemented.

{50} In my view, the existence of these and similar fact questions does not provide us with an adequate excuse to avoid deciding the constitutional question on this appeal. While development of the kind of record desired by the majority may always or usually be proper to facilitate constitutional adjudication of the sort involved here, I do not believe that we should suggest that it is required to enable us to fulfill our responsibility. We should decide the case on the basis of such facts as are available to us from the record, from parties' briefs (including the voluminous and able briefs of the several *amici*), and from such other sources, including our own experience, as may occur to us. To remand for a trial—even a trial before a district judge, as opposed to a jury of six or twelve laypersons—is to prolong the course of litigation unnecessarily, to tax the parties' resources unfairly, and to ask for a record on facts which may or may not have been considered by the legislature when it adopted the statute and in any case may not enable any member of this Court to come to a more confident decision than any of us might reach without such supra-legislative scrutiny.

{51} It seems to me that the majority is asking for development of a record containing legislative facts, as that term has been developed by Professor Kenneth Culp Davis and as it is otherwise used in the literature. *See, e.g.*, G. Currie, *Appellate Court Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 Wis. L. Rev. 39, K. Davis, *Judicial Notice*, 55 Colum. L. Rev. 951 (1955); C. McCormick, *Judicial Notice*, 5 Vand. L. Rev. 296 (1952).

> When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is

[11] The majority states that the right to recover monetary damages is one aspect of the right to petition for redress of grievances, citing *Richardson*, 107 N.M. at 696, 763 P.2d at 1161. Of course, while *Richardson* did declare the right to full recovery to be a right entitled to constitutional protection—a declaration with which I disagree—the opinion in that case links the right to petition for redress of grievances to the right of equal access to the courts, *not* to the putative right to recover monetary damages.

> performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts.
>
> Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take. . . .
>
> The exceedingly practical difference between legislative and adjudicative facts is that, apart from facts properly noticed, the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts need not, frequently are not, and sometimes cannot be supported by evidence.

K. Davis, *supra*, 55 Colum. L. Rev. at 952-53.

{52} Assuming that we do have need for additional "legislative facts" to decide this appeal, the next question is: How are such facts to be established? Professor McCormick quotes from *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938):

> "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, *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194 [(1934)], 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. *Chastleton Corp. v. Sinclair*, 264 U.S. 543 [(1924)]."

C. McCormick, *supra*, 5 Vand. L. Rev. at 316. He goes on to say:

> The usual resort, however, for ascertainment of legislative facts is not through formal proof by sworn witnesses and authenticated documents but by the process of judicial notice. Is judicial notice here trammeled by the usual requirement that the facts noticed must be certain and indisputable? Such a requirement seems inappropriate here where the facts are often generalized and statistical and where their use is more nearly argumentative, or as a help to value-judgments, than conclusive or demonstrative.

Id.

{53} This position—that legislative facts, in order to be judicially noticed, need not be certain and indisputable—is reflected in the comments of the Advisory Committee for the Federal Rules of Evidence concerning Fed. R. Evid. 201.

> The Advisory Committee . . . embraced the general rule that legislative facts need not be developed through evidentiary hearings. Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts. No evidentiary rule refers to judicial notice of legislative facts because, as the Advisory Committee noted, "any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level" are inappropriate to judicial access to legislative facts. Fed.R. Evid. 201 note.

Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151, 1163 n. 24 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). The District of

Columbia Circuit Court of Appeals goes on to point out that courts consistently have considered legislative facts that were not the product of trial-type proceedings, citing as examples *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (in which Louis D. Brandeis filed one of his famous briefs); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

{54} Our own rule of evidence on judicial notice, SCRA 1986, 11-201, taken from the federal rule, also applies only to judicial notice of adjudicative facts.

{55} It would seem, then, that this Court—or any court, trial or appellate—may take judicial notice of legislative facts by resorting to whatever materials it may have at its disposal establishing or tending to establish those facts. Of course, when a trial court takes notice of such facts, it should insure that they are made part of the record so that their ascertainment and effect can be reviewed on appeal. Similarly, if an appellate court judicially notices certain legislative facts as supporting a particular ruling—whether of constitutional law, statutory interpretation or common-law adjudication—the facts so noticed should probably be set out in the opinion, so that the bar and the public may likewise evaluate the correctness of and the implications flowing from those facts.

{56} It would be inappropriate, however, for a trial court to "find" the legislative facts leading to a ruling on a question of law. Unlike the operative facts affecting the particular parties in the particular circumstances of a particular lawsuit—the adjudicative facts—the legislative facts relevant to a question of law cannot be binding on an appellate court and must always be open to redetermination and reevaluation.

{57} It is considerations like these that lead me to the conclusion that remand for an evidentiary hearing on the "facts" relating to the "fit" between legislative classification and legislative purpose in this case is inappropriate. The trial court cannot find the facts and foreclose this Court from finding different facts. The trial court's evaluation of the import of whatever facts it takes notice of may be quite different from the one adopted by an appellate court on review.

{58} Then there are other, but similar, practical considerations. On remand, who will have the burden of proof? There are several indications in the majority opinion that, despite the presumption of constitutionality that usually attaches to legislation, the City will have the burden both to produce evidence and to persuade the trial court that the missing "facts" are as it, as proponent of the legislation, claims them to be. What facts must the City prove? It must prove—I assume, but am not sure—that there is a substantial relationship between the legislative purpose of conserving public funds (so that they may be allocated among competing demands for public resources and so that taxes may be kept low) and the means chosen to effectuate this purpose (the limitation on recovery). What if the City does not carry its burden? What if the evidence is evenly balanced, so that the City fails to persuade the fact-finder that there is the required substantial relationship? Then not only will the City lose this particular lawsuit; the statute will be declared unconstitutional and the damage limitation—for the City of Albuquerque, for all other municipalities in the state, and for the state itself—presumably will fall.

{59} It is one thing to place the burden of persuasion upon a party to a lawsuit when the effect of not carrying that burden will be limited to the outcome of the particular lawsuit. It is quite another to make the constitutionality of legislation depend upon whether a single party does or does not carry his, her or its burden of proof in that suit.

{60} Why should the constitutionality of legislation depend upon how well a party performs the evidence-producing function in a particular case? If the issue is the constitutionality of a statute *as applied* to the particular parties in the particular circumstances, it may well make sense for the outcome to depend on proof of specific facts as to how the statute operates in the

specific circumstances. Where the issue is not limited to the statute's validity or invalidity as applied, there is far too much at stake to leave the question in the hands of the parties to a given lawsuit.

{61} Suppose the parties lack the resources to provide the requisite demonstration, through evidence, of the fit between ends and means? The parties may not only lack the resources and the ability to adduce the relevant evidence; what resources they have may be dissipated or significantly diluted through the Court's requirement that they go back to trial and prove the imponderables with which they are now saddled. Part of the damage award to Mr. Trujillo will now be used up in proving that the legislature was not sufficiently careful in devising alternative means for accomplishing its admittedly important public purpose. When the occurrences and other specific facts surrounding a dispute must be proved to the satisfaction of the fact-finder, it is appropriate to make one or the other of the disputants carry the burden of establishing or disproving those facts at the risk of losing; but when the validity of a legislative enactment of general application, based on facts and value judgments quite outside the details of a particular dispute, depends on what those parties can prove, the court in which the dispute is tried becomes a mini-, and in some ways a super-, legislature.

{62} This dispute has been in court since 1985. The parties are entitled to an answer. They should not be sent back to the trial court for more discovery, investigation of the reasons why the legislature might or might not have acted as it did, a trial on that question, and another inevitable appeal. If, in order to decide *this* appeal, we feel that we need additional information, we should ask the parties to supplement their briefs and provide it to us. We should not defer the question; it is the kind of question this Court and appellate courts all over the country answer every day.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-089

Filing Date: October 4, 1990, As Corrected November 8, 1990, As Corrected December 31, 1990

Docket No. 17,889

J.R. HALE CONTRACTING CO., INC., a New Mexico corporation,

Plaintiff-Appellant,

vs.

UNITED NEW MEXICO BANK AT ALBUQUERQUE, f/k/a AMERICAN BANK OF COMMERCE,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Rozier E. Sanchez, District Judge

Mathews, Crider, Calvert & Bingham, P.C.,
Carl A. Calvert,
David G. Reynolds,
Albuquerque, New Mexico,

For Appellant.

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Russell Moore,
Phil M. Krehbiel,
Kurt Wihl,
Albuquerque, New Mexico,

For Appellee.

OPINION

RANSOM, Justice.

{1} This suit involves the claimed wrongful acceleration of a $400,000 promissory note given by J.R. Hale Contracting Company (the company) to the United New Mexico Bank at Albuquerque. At a trial on the merits the district court granted the bank's motion for a directed verdict, finding that the acceleration was justified because an interest payment was twenty-three days past due when the decision to accelerate was made. The company appeals and we reverse, holding that a factual question exists on whether the bank is estopped from using the default clause in the contract in order to justify acceleration without prior notice and an opportunity to cure.

{2} In addition to its defense under the default provision in the contract regarding past due payments, the bank relied upon an insecurity clause and asserted that the company had failed to make a prima facie showing that the bank lacked good faith in accelerating payment under that clause. We agree with the trial court that sufficient facts were introduced on this issue to raise a jury question. Therefore, denial of the bank's motion for a directed verdict on this basis was proper. We remand the cause for a new trial to encompass both the estoppel and lack of good faith issues. The company must prevail on both issues in order to recover on its claim for damages.

{3} The company had been a customer of the bank for about eleven years prior to the circumstances that gave rise to this suit. During this period of time the company entered into numerous revolving credit notes with the bank in gradually increasing amounts. These notes routinely were renewed on or about the due date despite the fact that the company frequently was late a number of days or even weeks in making its payments. The bank seems not to have been troubled by the payments being past due and took no action in each instance other than possibly contacting the company to request that the payments be brought up to date. The company would send a check or the bank simply would deduct the payment from one of the company's accounts at the bank and send a notice of advice regarding the transaction.

{4} The note at issue in this case was executed in November 1982 in the amount of $400,000. This was double the amount of any previous note. The first and only interest payment on the note was due March 1, 1983, and the note itself was due on July 31, 1983. The note provided that:

> If ANY installment of principal and/or interest on this note is not paid when due . . . or if Bank in good faith deems itself insecure or believes that the prospect of receiving payment required by this note is impaired; thereupon, at the option of Bank, this note and any and all other indebtedness of Maker to Bank shall become and be due and payable forthwith without demand, notice of nonpayment, presentment, protest or notice of dishonor, all of which are hereby expressly waived by Maker. . . .

{5} Toward the end of February 1983, J.R. and Bruce Hale, on behalf of the company, approached the bank to borrow additional funds to cover contracting expenses associated with construction at the Double Eagle II Airport in Albuquerque. The existing $400,000 line of credit was fully drawn. Beginning in the first week in March, the Hales met with the bankers several times a week hoping to arrange for additional financing. The company had not made the March 1 interest payment on the existing loan. J.R. and Bruce Hale stated that no one ever contacted them concerning the delinquent payment and the matter never came up during the March meetings. J.R. Hale carried a blank check to these meetings for the purpose of making the interest payment but stated that he forgot to do so. He stated that on one occasion he called the bank officer assigned to his account and asked the officer to remind him at the next meeting and he would make the payment, but the officer had not done so. Apparently, it was necessary for the bank to calculate the interest payment in order to know the specific amount to be paid.

{6} At the same time that the company was seeking to secure additional financing, the bankers had become concerned about the existing $400,000 loan. The financial statements that the company periodically supplied the bank indicated that the company had lost approximately $800,000 during the last six to seven months. While the Hales were under the impression that additional financing was in the works (a loan application to this effect had been prepared and had been taken to the loan committee for discussion), the bank seriously was considering calling in the company's existing obligations. This possibility never was communicated to the Hales as the bank wished them to remain cooperative. After a meeting on March 22 the bank requested and received from the Hales a list of customers for the undisclosed purpose of using it to collect directly the company's accounts.

{7} The bank called a meeting on March 24 and presented the Hales with a letter stating that all amounts due on the $400,000 revolving line of credit were due and payable immediately. The grounds for the acceleration were stated to be that "The promissory note is in default due to your failure to pay the March 1, 1983 interest payment when due, and also due to the Bank's review of your financial situation which causes the Bank to believe that its prospect for receiving payment of the note is impaired." J.R. Hale produced a blank check and offered to pay the delinquent interest charges but the bank would not reconsider. The bank was able to collect the balance of the note with interest, $418,801.86, in about two weeks after exercising its right to set off the company's accounts at the bank and after receiving payments from the company's customers on their outstanding accounts.

{8} As mentioned, the court directed a verdict for the bank stating that, although a jury issue existed regarding the bank's acceleration under the insecurity clause, none existed regarding the bank's right to accelerate payments under the interest default clause. The company claims on appeal, as it did before the trial court, that a jury issue existed on whether the bank had waived the interest default clause, or whether there was an implied modification of the note to require notice and demand prior to exercising the clause,

or whether the bank was estopped to assert the clause. The bank answers that there was no evidence to show waiver, modification, or estoppel and, in any case, the entry of a directed verdict can be upheld under the insecurity clause since there was no genuine issue over the fact that the bank acted in good faith in concluding that its prospect for repayment was impaired.

{9} *Waiver, modification, and estoppel distinguished.* The company's arguments regarding waiver, modification, and estoppel are intertwined and rely upon the same root proposition: that the conduct of the bank negated the express default provision in the note. The distinctions to be made in the application of these concepts, especially in that of waiver and estoppel, have not always been clear in our cases and some discussion on the point is warranted.

{10} Professor Corbin states that waiver cannot be defined without reference to the particular circumstances to which it is being related, nor can one determine the legal effect of a "waiver" without knowing the facts the term is being used to describe. 3A A.L. Corbin, *Corbin on Contracts* § 752 (1960). To illustrate the concept of waiver of contractual obligations or conditions, he presents the following example within the context of a land conveyance:

> The vendor's "waiver" . . . is his own voluntary action; and in order to be legally effective, it is not necessary that the purchaser shall have given any consideration for it or shall have changed his position in reliance upon it. If the vendor offers to eliminate the condition in exchange for a requested consideration, and the purchaser gives that consideration, the case can still be described as a "waiver"; but it is also a modification by mutual agreement—by a substituted contract—a modification that is not subject to retraction by the vendor.
>
> If the vendor requests and receives no consideration for his waiver, but, as he had reason to foresee, it causes the purchaser to change his position materially in reliance upon it, this too deprives the vendor of his power of retraction for, at the least, a reasonable time. The vendor is then said to be estopped; his own action can still be described as a "waiver", while the resulting action of the purchaser justifies the added description of estoppel.

Id. at § 752 p.481 (footnote omitted). As Professor Corbin also acknowledges, expressions or conduct that lead a party reasonably to believe that certain conditions or obligations will not be insisted upon may operate as a waiver, and courts will then speak in terms of estoppel as well as waiver. *Id.* at § 754 p.494-96. In this last situation, where one party has induced material changes of position in the other, a waiver of a contractual obligation or condition actually may not have been intended. There is no requirement that this be the case. While waiver depends upon what one himself intends to do, estoppel depends only upon what one's conduct has caused another party to do. *Id.* at § 752 p.481, n.2. Professor Corbin also notes that a party may re-establish a condition or obligation that had been eliminated by waiver in the absence of an exchange of consideration or factors that support estoppel. *Id.* at § 764.

{11} Generally, New Mexico cases have defined waiver as the intentional relinquishment or abandonment of a known right. *E.g., Young v. Seven Bar Flying Serv., Inc.*, 101 N.M. 545, 685 P.2d 953 (1984). Our decisions recognize that the intent to waive contractual obligations or conditions may be implied from a party's representations that fall short of an express declaration of waiver, or from his conduct. *See Elephant Butte Resort Marina, Inc. v. Wooldridge*, 102 N.M. 286, 289, 694 P.2d 1351, 1354 (1985); *Cooper v. Albuquerque City Comm'n*, 85 N.M. 786, 790, 518 P.2d 275, 279 (1974); *see also C & H Constr. & Paving Co. v. Citizens Bank*, 93 N.M. 150, 161, 597 P.2d 1190, 1201 (Ct. App. 1979). While not express, these types of "implied in fact" waivers still represent a voluntary act whose effect is intended.

{12} In *Ed Black's Chevrolet Center, Inc. v. Melichar*, 81 N.M. 602, 471 P.2d 172 (1970), we stated that, based upon the honest belief of the other party that a waiver was intended, a waiver might be presumed or implied contrary to the intention of the party waiving certain rights. *Id.* at 604, 471 P.2d at 174. Following that decision a number of our opinions discussed a waiver "implied" from a course of conduct in terms of estoppel. These cases represent what we would term here as waiver by estoppel. *See, e.g., Easterling v. Peterson*, 107 N.M. 123, 753 P.2d 902 (1988); *Green v. General Accident Ins. Co. of Am.*, 106 N.M. 523, 746 P.2d 152 (1987); *Shaeffer v. Kelton*, 95 N.M. 182, 619 P.2d 1226 (1980). To prove waiver by estoppel the party need only show that he was misled to his prejudice by the conduct of the other party into the honest and reasonable belief that such waiver was intended.[1] The estoppel is justified because the estopped party reasonably could expect that his actions would induce the reliance of the other party. However, unlike the case of a voluntary waiver, either express or implied in fact, the waiver of the contractual obligation or condition and the effect of the conduct upon the opposite party may have been unintentional.

{13} The law of waiver as discussed by Professor Corbin and our own cases suggests several possible situations: (1) actual waiver, either express or implied in fact, not supported by consideration, which may be retracted in the absence of detrimental reliance; (2) modification, which is not subject to retraction, based upon mutual agreement to waive certain obligations or conditions and the exchange of consideration; or (3) waiver by estoppel based upon either an actual waiver or certain "expressions or conduct" where the reliance of the opposite party and his change of position justifies the inhibition to assert the obligation or condition. We think these distinctions will clarify what appears to be some confusion of definition and expression in our cases.

{14} *Course of conduct in prior commercial dealings.* The company's waiver argument relies, in the main, on our decision in *Clovis National Bank v. Thomas*, 77 N.M. 554, 425 P.2d 725 (1967). The Court in *Thomas* held that a creditor with a perfected security interest in certain cattle had consented to a sale of the cattle, if not expressly, then "certainly impliedly." *Id.* at 560, 425 P.2d at 730. The Court decided that under the Uniform Commercial Code consent to the sale of the collateral constituted a waiver of the creditor's security interest. *Id.* at 563, 425 P.2d at 735. The Court treated the consent issue as an election on the part of the creditor and found no evidence to support estoppel.

{15} The evidence cited by the *Thomas* Court to support a finding of consent involved an extended course of commercial conduct between the parties. Specifically, the creditor on a number of occasions previously had allowed the debtor to sell cattle without the written authorization called for in his contracts. This had occurred under numerous earlier financing agreements as well as on a number of occasions under the particular financing agreement creating the security interest at issue in the *Thomas* case. The Court also referred to the similar custom and practice of the creditor generally with regard to all debtors.

{16} Based upon its reading of *Thomas,* the company would look to the series of financing agreements between it and the bank prior to execution of the $400,000 note, and find, in the bank's willingness to accept late payments without reproach on those *earlier* obligations, a waiver of the clause giving the bank the right to declare a default due to delinquent payments without prior notice in the *current* note. We

[1] Although it was not raised and argued to this Court by the parties we wish to reject certain language in *Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.,* 99 N.M. 95, 101, 654 P.2d 548, 554 (1982), regarding estoppel and the waiver of contractual provisions for timely payments. A party asserting such a claim need not establish that the conduct or silence relied on to create the estoppel was willfully intended to cause the party to act on a false representation or concealment. It is sufficient if any representation by conduct or silence would induce a reasonable and prudent person to believe it was intended to be acted on, or the estopped party should have known that it was both natural and probable that the other party would act upon the conduct or silence under the circumstances.

cannot agree that *Thomas* should be read and applied as broadly as the company suggests.

{17} The facts on which the *Thomas* Court relied to find implied consent related to the performance of the particular contract at issue as well as earlier ones. We think that the multiple instances of acquiescence to the sale of cattle under the *one* financing agreement at issue were sufficient to uphold the judgment without reliance upon the conduct of the parties in performing other agreements. In addition, there was evidence to which the Court referred that the creditor expressly had consented to the sale, indeed that the creditor had "requested" that the sale take place. The decision should not be read to suggest that consent (or waiver) can be implied solely from general custom and usage or the course of conduct between two parties *prior* to the execution of a particular contractual agreement. We think that any suggestion to the contrary in *Thomas* was unnecessary to the Court's decision and should not be followed.

{18} In the present case the company was in default on the first and only payment that was due on the obligation. Any previous conduct of the bank in accepting late payments involved other obligations. An actual intent to waive the requirement for timely payment, or to waive the contractual right to declare a default without notice, as provided for in their agreement, must be implied from the parties conduct in the performance of that obligation. *Cf. Continental Nat'l Bank of Fort Worth v. Schiller*, 89 Ill. App. 3d 216, 411 N.E.2d 593 (1980) (evidence that bank had accepted late payments on earlier debts insufficient to show a waiver, express or implied, of timely payments on present debt). Otherwise the express terms of the agreement would have no meaning at the time of its execution. While conduct under previous contracts may be relevant to show the intent meant to be expressed by provisions in a current contract, here we must assume that the parties intended the unequivocal import of their agreement. Whether their conduct *after* the execution of the agreement indicates an intention to waive a particular provision is another question.

{19} We believe our treatment of this issue comports with relevant provisions of the Uniform Commercial Code. NMSA 1978, Section 55-1-205 of the UCC states in pertinent part:

> (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
>
> . . .
>
> (3) A course of dealing between parties and any usage of trade . . . give particular meaning to and supplement or qualify terms of an agreement. . . .
>
> (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but, when such construction is unreasonable, express terms control both course of dealing and usage of trade. . . .

Thus, when the previous conduct of the parties is in direct conflict with the unequivocal express terms of an agreement, the latter is determinative as to the nature of their agreement. *See* NMSA 1978, § 55-1-205(4); *Celebrity, Inc. v. Kemper*, 96 N.M. 508, 632 P.2d 743 (1981).

{20} By contrast, the UCC recognizes that the conduct of the parties in *performing* an agreement may be relevant to show a modification or waiver of a provision inconsistent with their conduct in the performance of that agreement. *See* NMSA 1978, § 55-2-208. While this particular UCC provision appears in Article 2 which involves the sale of goods, we find its principles are consistent with our own cases regarding performance. *E.g., Cowan v. Chalamidas*, 98 N.M. 14, 644 P.2d 528 (1982) ("When a contract payee accepts late [rental] payments without objection as to their timeliness, he impliedly leads the payor

to believe that late payments are acceptable."); *see also Easterling v. Peterson*, 107 N.M. 123, 753 P.2d 902 (1988) (rental payments); *Giannini v. Wilson*, 43 N.M. 460, 95 P.2d 209 (1939) (installment sales contract).

{21} *No actual waiver, express or implied in fact.* Here, any inference that the bank actually intended to waive its right under the contract to declare a default without notice must rest on postagreement events. We believe that the postagreement conduct of the bank does not suggest that the bank actually intended to waive its rights under the contract. When a party accepts a late payment on a contract without comment he waives the default that existed. With repetition his actions may suggest an intention to accept late payments generally. In this case, the overdue interest payment was the first payment due under the contract; the bank had not accepted any earlier late payments on that contract. The payment was overdue, the company did not request an extension, and after twenty-three days the bank declared a default. The parties agree that the matter of the overdue interest payment was not discussed during the series of meetings when the company sought to obtain additional financing. For good reasons, the fact that the bank would declare a default based upon the unpaid interest payment may have come as a surprise to the Hales, the bank's silence may have been misleading in the light of the earlier commercial behavior of the parties, but we do not believe that the bank's conduct during the month of March gives rise to a factual question that it was the bank's actual intention to relinquish any contractual rights. At most, the bank's conduct indicated an intention simply to ignore the delinquency for about three weeks.

{22} *No modification.* Likewise, we agree with the trial court that the facts of this case do not raise an issue of contract modification. We have concluded in our discussion of the waiver issue that no factual question exists on whether the bank for its part actually intended to waive its right to declare a default based upon the past due interest payment. It follows that there can be no issue of whether the parties intended to substitute a new agreement for their earlier one, or whether the parties mutually agreed to amend the contractual provision concerning default and acceleration, and whether this agreement was supported by consideration. An issue of contract modification should be approached in these terms. *See Michelson v. House*, 54 N.M. 197, 218 P.2d 861 (1950); *Cole v. Casabonne*, 39 N.M. 171, 42 P.2d 1115 (1935); *Raynolds v. Staab*, 4 N.M. 603, 17 P. 136 (1888).

{23} *"Waiver by estoppel" presented an issue of fact.* The company's estoppel argument rests upon an important distinction from actual waiver. Here the previous course of dealings between the parties is relevant to show the meaning that the company reasonably might attribute to the bank's conduct in not mentioning the overdue interest payment. Implicit in Section 55-1-205(1) of the UCC is the recognition that, as a practical matter, one party to a contract will use his past commercial dealings with another party as a basis for the interpretation of the other party's conduct. Thus it is to be expected that the company would interpret the bank's behavior during the month of March in light of their earlier dealings and we believe the bank should have been aware of this consideration.

{24} As we have discussed, to prove waiver by estoppel the company only need show that by the conduct of the bank it was misled to its prejudice into an honest and reasonable belief that the bank would not assert its right under the contract to declare a default without first notifying the company and providing an opportunity to make the payment. The conduct of the bank during the month of March, reasonably interpreted in light of their earlier commercial dealings, is sufficient to create a jury question on this issue. *See Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 749 P.2d 1105 (1988) (in reviewing directed verdict judgment, court must consider all evidence and reasonable inferences deducible therefrom, resolving any conflicts or contradictions in favor of party resisting motion).

{25} The company introduced evidence to show that the parties had extensive contact during

the month of March in order to discuss the company's financial status. Despite ample opportunity, the bank did nothing to alert the company that it was concerned about the past due payment or that the nature of their financial relationship might take a new course. In the words of one bank officer, the bank wished the company to remain "cooperative." J.R. Hale mentioned the interest payment to a bank officer and it is not recorded that the officer in return indicated that the bank attached any importance whatsoever to the matter. His failure to calculate the exact amount due and then remind Hale of the payment at the next conference would communicate just the opposite impression. Additionally, on March 18 the bank gave a written financial reference to Bruce Hale who apparently intended to use the credit reference in seeking financial assistance from other institutions. The reference stated: "All experience with J.R. Hale Contracting Company has been satisfactory." We believe it would not be unreasonable for the Hales to interpret this conduct as an indication that the bank was unconcerned about the past due payment and intended to conduct its business with the company in the same fashion as it had previously. That is, the bank would approach the Hales about any overdue payment and ask how they would care to arrange for payment.

{26} Some of the facts to which we refer can be regarded as silence on the bank's part in the face of an apparent false sense of security of the company. Silence may form the basis for estoppel if a party stands mute when he has a duty to speak. *See McCallister v. Lusk*, 102 N.M. 209, 693 P.2d 575 (1984); *see also Yates v. American Republics Corp.*, 163 F.2d 178 (10th Cir. 1947). As we have discussed, the circumstances here suggest that the bank reasonably could expect that the company would rely on the bank's failure to request the interest payment. Under these circumstances we believe the bank had a duty to inform the company that the bank would enforce performance under the contract according to the letter of their agreement.

{27} On the question of detrimental reliance we note that the company cannot be said to have been lulled by the postagreement conduct into missing the payment when it was first due on March 1. However, we believe the company reasonably might have been induced into not taking the initiative to correct the delinquency and waiting instead for the bank to request the payment or in some fashion draw the matter to the company's attention. Certainly to have the bank declare a default without warning and then accelerate all payments can be considered the detrimental result of the reliance on the impression that the bank's conduct reasonably might have conveyed.

{28} *"Lack of good faith" presented an issue of fact under clause providing for acceleration because of insecurity.* At trial the bank moved for a directed verdict on a second ground, that the company failed to introduce sufficient evidence showing the bank lacked a good faith belief that its prospect for repayment was impaired. The company had the burden of proof on that issue. NMSA 1978, § 55-1-208. The trial judge denied the bank's motion, stating that he believed there were facts in the record from which a jury could conclude that the bank lacked good faith. The bank asserts that the judge applied the wrong standard regarding "good faith" as used in an insecurity clause giving a secured party the power to accelerate payments.

{29} Section 55-1-208 governs the acceleration of notes. It provides that a party may accelerate payment or performance "only if he in good faith believes that the prospect of payment or performance is impaired." *Id.* "Good faith" is defined by Section 55-1-201(19) as "honesty in fact in the conduct or transaction concerned."

{30} There are two schools of thought and corresponding lines of cases addressing the standard of good faith under Section 1-208 of the UCC. The first requires only that a creditor genuinely believe the prospect for repayment is impaired; he need not be reasonable in that belief. This standard is purely subjective and has been described as "the pure heart and the empty head" standard. *Van Horn v. Van De Wol, Inc.*, 6 Wash. App. 959, 960, 497 P.2d 252, 253 (1972). The

second standard includes an objective element of whether the creditor was reasonable under the circumstances in believing that the prospect for repayment was impaired.

{31} The subjective standard is probably the majority view today, *e.g., Quest v. Barnett Bank of Pensacola*, 397 So.2d 1020 (Fla. Dist. Ct. App. 1981); *Farmers Coop. Elevator, Inc., Duncombe v. State Bank*, 236 N.W.2d 674 (Iowa 1975); *Karner v. Willis*, 238 Kan. 246, 710 P.2d 21 (1985); *Fort Knox Nat'l Bank v. Gustafson*, 385 S.W.2d 196 (Ky. Ct. App. 1964); *State Bank of Lehi v. Woolsey*, 565 P.2d 413 (Utah 1977); *Sturman v. First Nat'l Bank*, 729 P.2d 667 (Wyo. 1986), but the standard has been criticized strongly as allowing the creditor excessive latitude that imposes a heavy burden of proof on the debtor. *See Black v. Peoples Bank & Trust Co.*, 437 So. 2d 26 (Miss. 1983); *Universal C.I.T. Credit Corp. v. Shepler*, 164 Ind. App. 516, 329 N.E.2d 620 (1975) (Garrard, J., concurring). In his concurrence in *Universal C.I.T.*, Judge Garrard stated:

> [A] purely subjective test is subject to arbitrary abuse. It would allow a creditor to be unreasonable and place the debtor in an unjust position since the creditor might at any time call the entire debt and require the debtor to prove the non-existent state of mind of the creditor. Thus, under this interpretation, the code would permit a creditor to destroy a viable contractual relationship without requiring him to justify his actions.

164 Ind. App. at 524-25, 329 N.E.2d at 626 (footnotes omitted). The subjective standard also has been criticized because:

> [a] declaration of insecurity is a unilateral decision made by the creditor which places a severe hardship upon the debtor. This hardship is unjust if the creditor's decision is unreasonable or based upon mistaken facts which the creditor may honestly believe to be true.

Richards Engrs., Inc. v. Spanel, 745 P.2d 1031, 1033 (Colo. Ct. App. 1987); *see also Watseka First Nat'l Bank v. Ruda*, 175 Ill. App. 3d 753, 531 N.E.2d 28 (1988); Annotation, *What Constitutes "Good Faith" Under Uniform Commercial Code § 1-208 Dealing With "Insecure" or "At-will" Acceleration Clauses*, 61 A.L.R.3d 244 (1975); Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666 (1963) (discussing origins of subjective and objective standards and their applicability to "good faith purchasers" and "good faith performance" under Code).

{32} The original definition for "good faith" in the Proposed Final Draft of the Uniform Commercial Code, published in 1950, differed significantly from the present one. In addition to "honesty in fact," the general definition of good faith in Article 1 was to include "observance of reasonable commercial standards of any business or trade in which [a party] is engaged." *See* The American Law Institute, *Uniform Commercial Code* § 1-201(18) (Proposed Final Draft, 1950). The requirement of reasonable commercial standards was dropped in the Proposed Final Draft No. 2, published in 1951. *See* The American Law Institute, *Uniform Commercial Code* § 1-201(19) (Proposed Final Draft, 1951). A provision for commercial reasonableness thereafter has been included only in other scattered sections of the Code, notably the definition of good faith applicable to merchants. *See* § 55-2-103(1)(B); *see also* §§ 55-2-311(1), 55-3-406, 55-3-419(3), 55-9-318(2). This history suggests an intention to adopt an objective standard of good faith based upon commercial reasonableness only in particular types of transactions and commercial situations.

{33} The only New Mexico case addressing the standard of good faith under an insecurity clause is *McKay v. Farmers & Stockmens Bank of Clayton*, 92 N.M. 181, 585 P.2d 325 (Ct. App.), *writ quashed*, 92 N.M. 79, 582 P.2d 1292 (1978). By a vote of two to one the panel reversed the summary judgment entered on behalf of a bank on the issue of whether the bank in good faith deemed

itself insecure in the acceleration of a note. Judge Sutin's special concurrence expressed his view that Section 55-1-208 has both subjective and objective elements. *See id.* at 184, 585 P.2d at 328. The opinion of the court stated little more on the issue of the meaning of "good faith" under Section 55-1-208 than to conclude that the question is usually one of fact rather than a question of law that is amenable to summary judgment. *See id.* at 182-83, 585 P.2d at 326-27.

{34} After an examination of the decisions to which we have referred, and the various provisions in the UCC concerning good faith, we find that the Code does not impose an objective standard of commercial reasonableness on the decision of the bank to accelerate when the bank was honest in its belief that its prospect for repayment was impaired. The requirement of good faith under Section 55-1-208 is quite specifically a standard of honesty in fact. This standard is, however, a minimum one that the parties are free to supplement by agreement. *See* § 55-1-102(3). The company in this case certainly possessed a level of sophistication to have bargained for an agreement more specifically addressing the circumstances under which an acceleration of payments would be allowed. The company does not suggest that the agreement was a contract of adhesion between parties of unequal bargaining position.

{35} In essence, the requirement of honesty in fact is subjective and is concerned with the actual state of mind of the creditor. Nevertheless, the determination of ultimate fact, whether or not the bank lacked a good faith belief in the impairment of its prospect for repayment, should be based on the facts and circumstances surrounding the acceleration and not solely on the bank's testimony concerning its state of mind. Even under a subjective test of good faith the trier of fact may evaluate the credibility of a creditor's claim and in doing so may take into account the reasonableness of that claim. Thus, the conduct and credibility of the creditor may be tested by objective standards subject to proof and conducive to the application of reasonable expectations in commercial affairs.

{36} We do not mean to suggest that *dual* elements of reasonableness and good faith are required. Put simply, in the absence of an objective basis upon which a reasonable person would have accelerated the note, the fact finder could infer that the creditor really did not perceive his prospect for repayment to be impaired. This inquiry necessarily will focus on the facts and circumstances that were known to the creditor. As Judge Sutin noted in *McKay*, expert testimony may be necessary to assist the trier of fact. 92 N.M. at 185, 585 P.2d at 329.

{37} Additionally, honesty is inconsistent with willful ignorance of the facts and circumstances available to the creditor, and thus the facts and circumstances that reasonable investigation would have disclosed may be relevant. While "honesty" may require no more than a pure heart, it is questionable that a pure heart can co-exist with closed eyes. It is not honest to close one's eyes so as to maintain an empty head.

{38} We hold that a fact finder can find that a creditor acted without a good faith belief that its prospect for repayment was impaired when (1), under the facts and circumstances that were known to the creditor, there existed a reasonable inference that the creditor in fact did not conclude that its prospect for repayment was impaired and that acceleration was necessary to protect its interests, or (2) there existed a reasonable inference that the creditor chose not to undertake such investigation as (a) was necessary to make an informed decision and (b) would have shown that the foreseeable risk of nonpayment was not materially greater than when the loan was made.

{39} We agree with the trial court that the company introduced sufficient evidence to establish a prima facie case on the lack of good faith on the part of the bank. Notwithstanding the company's profitability problems and declining working capital position, a banking expert testified that the bank's collateral position was more than adequate. Additionally, between March 1 and 23 the company had on deposit with the bank more than enough funds to cover the interest payment. This evidence is sufficient to require that the issue be resolved by the fact finder under the standard of

good faith necessary to justify acceleration of payments under an insecurity clause.

{40} *Conclusion.* For the reasons stated above, we reverse the district court's grant of a directed verdict in favor of the bank based on the interest default clause and hold that an issue of waiver by estoppel exists to be resolved by the jury. In addition, the company also must prove that the bank lacked a good faith belief that its prospect for repayment was impaired.

{41} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

STEVE HERRERA,
District Judge, sitting by designation

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-106

Filing Date: November 28, 1990, As Corrected

Docket No. 18,752

CALIFORNIA FIRST BANK, Administrator and Personal Representative of the Estate of Laurence Henry McKeen, Shelby McKeen, Kimberly McKeen, all deceased, as Guardian of the person and Estate of Molly Lynn McKeen, a minor,

Petitioner,

vs.

STATE OF NEW MEXICO, DEPARTMENT OF ALCOHOL BEVERAGE CONTROL, BOARD OF COMMISSIONERS OF THE COUNTY OF McKINLEY, and THE CITY OF GALLUP,

Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Art Encinias, District Judge

Carpenter & Goldberg,
William H. Carpenter,
Joseph Goldberg,
Daymon B. Ely,
David J. Stout,
Albuquerque, New Mexico,

for Petitioner.
Montgomery & Andrews,
Stephen S. Hamilton,
Santa Fe, New Mexico,

for Respondents.

OPINION

RANSOM, Justice.

{1} California First Bank, as personal representative of the estates of Laurence Henry McKeen, Shelby McKeen, and Kimberly McKeen, and as guardian of Molly Lynn McKeen, filed suit for wrongful death and personal injury against defendants, the New Mexico State Highway Department, the Department of Alcohol Beverage Control (ABC), The Board of Commissioners of the County of McKinley (County), and the City of Gallup (City). The court of appeals reversed a dismissal of the complaint as to the County and affirmed a dismissal as to ABC and the City.[1] We granted certiorari and affirm the court of appeals in part, reverse in part, and remand with instructions.

{2} *Standard of review.* As did the court of appeals, in reviewing the dismissal of the complaint for failure to state a claim upon which relief may be granted, *see* SCRA 1986, 1-012(B)(6), we "accept as true all facts well pleaded and question only whether the plaintiff might prevail under any state of facts provable under the claim." *Gomez v. Board of Educ.*, 85 N.M. 708, 710, 516 P.2d 679, 681 (1973).

{3} *The complaint.* It is alleged that, on the evening of July 16 and in the early morning hours of July 17, 1983, employees at Eddie's Bar in Gallup sold alcoholic beverages to Harrison Shorty, a Navajo Indian, knowing that he was an intoxicated person. At some point in the evening, Shorty fired several gun shots outside the bar. Sheriff deputies observed Shorty do this but failed to apprehend or arrest him.

{4} Not long after the shooting incident, Shorty allegedly left Eddie's Bar and drove north on U.S. Road 666. At the intersection of U.S. Road

[1] The claim against the State Highway Department remains pending in district court.

666 and State Road 264, Shorty crossed the center line of the highway in his truck and collided with a vehicle driven by Laurence McKeen, who was on vacation with his wife Shelby McKeen and daughters Kimberly and Molly McKeen. Laurence, Shelby, and Kimberly were killed and Molly was seriously injured.

{5} The complaint alleges the Gallup Police Department and its employees were acting in the capacity of agents, servants, or employees of the City, and the Sheriff's Department and its employees were acting as agents, servants, or employees of the County. Although Eddie's Bar and other drinking establishments in Gallup were notorious as "Indian Bars" with drinking excesses, the City and County had articulated a policy not to interfere with the drinking activity inside these establishments and instructed law enforcement officers under their control not to enter bars for the purpose of enforcing the liquor control laws. The City and County also instructed law enforcement officers not to apprehend or arrest persons driving while under the influence of alcohol.

{6} It is further alleged that, in their implementation of the policies promulgated by the City, the Gallup police refused to enforce the liquor control laws so as to prevent Shorty from being served alcohol on the night of the accident or from driving while intoxicated, and that, following these policies and instructions, officers of the Sheriff's Department failed to pursue Shorty into the bar despite knowledge that he posed a threat to the safety of others.

{7} *Issues.* This case requires us once again to consider application of the waiver of sovereign immunity for injury caused by law enforcement officers. The waiver is contained in Section §41-4-12 of the Tort Claims Act, NMSA 1978, Sections §41-4-1 to -27 (Repl. Pamp. 1989). The court of appeals determined that defendants were not *directly liable* for the deaths and injuries in this case, because they are not law enforcement officers within the scope of the waiver of immunity. *See Anchondo v. Corrections Dep't*, 100 N.M. 108, 666 P.2d 1255 (1983) (construing meaning of "law enforcement officer"); *Abalos v. Bernalillo County Dist. Attorney's Office*, 105 N.M. 554, 734 P.2d 794 (Ct. App.) (construing meaning of "law enforcement officer"), *cert. quashed*, 106 N.M. 35, 738 P.2d 907 (1987). The court also reasoned that defendants were not directly liable because they owed no duty to the plaintiff to promulgate policies of active enforcement of liquor-control and drunk driving laws. *Cf. Schear v. Board of County Comm'rs*, 101 N.M. 671, 687 P.2d 728 (1984) (duty of police officers to investigate report of ongoing crime).

{8} However, the court further held the County might be *vicariously liable* under "traditional principles of respondeat superior" if plaintiff can prove that the McKinley County Board of County Commissioners "exercised immediate supervisory authority over sheriff's deputies" whose negligence was alleged to have caused a battery. *See Silva v. State*, 106 N.M. 472, 745 P.2d 380 (1987) (immunity waived for governmental entity if it would be vicariously liable for non-immune acts of public employee under traditional notions of respondeat superior); *Methola v. County of Eddy*, 95 N.M. 329, 622 P.2d 234 (1980) (waiver of immunity for battery extends to battery committed by third party when battery was proximately caused by negligence of law enforcement officers).

{9} The court also determined that, in order to fall within the waiver of immunity in Section §41-4-12 for a battery "caused by law enforcement officers," plaintiff must prove that the perpetrator of the alleged battery specifically intended the offensive or harmful touching. *Cf. Cross v. City of Clovis*, 107 N.M. 251, 252-53 n.1, 755 P.2d 589, 590-91 n.1 (1988) (expressly reserving judgment on whether battery existed under the facts).

{10} Finally, in response to our request for briefs on specific issues, the parties have addressed whether the complaint alleges a "violation of rights . . . secured under the constitution and laws of the United States or New Mexico" pursuant to the waiver provisions relative to law enforcement officers in Section §41-4-12.

{11} Section §41-4-12 does not provide a waiver of immunity for concurrent torts of all governmental entities when a police officer causes an occurrence for which immunity of a law enforcement agency is waived. While plaintiff acknowledges that none of the defendants is a "law enforcement officer," it contends that, because of the concurrent negligence of law enforcement officers, Section §41-4-12 provides a waiver of immunity based on defendants' direct liability for promulgating a policy of nonenforcement. Section §41-4-12 is entitled "Liability; law enforcement officers," and provides:

> The immunity granted pursuant to Subsection A of Section §41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

{12} Plaintiff contends in its briefs that this Section does not limit waiver of immunity to any specific governmental entity, e.g., a law enforcement agency, when injury is caused by law enforcement officers. Rather, it is directed to certain types of injury-producing conduct for which liability is waived when "caused by" law enforcement officers. It clearly does not expressly exclude suit against other concurrent governmental tortfeasors. Plaintiff points out that, since the Tort Claims Act is in derogation of the common-law right to sue the government, its provisions are strictly construed. *Methola*, 95 N.M. at 333, 622 P.2d at 238.

{13} Waiver of immunity for all governmental actors whose conduct concurs with that of law enforcement officers to cause injury, defendants contend, conflicts with the plain meaning of Section §41-4-12 and would run counter to the intent of the Legislature to create well defined limits to governmental liability. *See* §41-4-2(A) (declaration of public policy); §41-4-4(A) (governmental entities and public employees acting within scope of duties are immune except as immunity is waived by Sections §41-4-5 to -12). Defendants argue that, simply by tracing the chain of causation to as many governmental actors as possible, a plaintiff could join an indefinite number of defendants as to whom none of the waiver provisions of the Tort Claims Act directly apply.

{14} At oral argument, in response to one of our questions, plaintiff agreed that its theory could be narrowed to include only those governmental actors who concurrently caused *the conduct* for which there is a waiver of immunity, rather than all governmental actors whose conduct concurred to cause *the injury* itself. It is maintained that defendants promulgated a policy of nonenforcement, and, in implementing this policy, conduct of law enforcement officers created a dangerous condition on the public streets and highways in and around Gallup, which condition proximately caused death and injury to the McKeen family.

{15} None of our previous cases have addressed this issue directly.[2] We note, however, that plaintiff's theory runs counter to the court of appeals' opinion in *Abalos*, in which the issue of whether a particular defendant was acting as a law enforcement officer dictated both grant of suit against the director of the Bernalillo County Detention Center and dismissal of suit against employees of the district attorney's office for

[2] In *Anchondo*, 100 N.M. at 111, 666 P.2d at 1258, we held simply that the Secretary of Corrections and the Warden of the State Penitentiary were not "law enforcement officers" within the definition set out in Section §41-4-3(D). However, *Anchondo* does not address whether Section §41-4-12 waives immunity only against defendants who are "law enforcement officers" within the meaning of Section §41-4-3(D). *See also Methola*, 95 N.M. at 332, 622 P.2d at 237 (sheriff, deputies, and jailers at county jail all were law enforcement officers within meaning of statute); *Abalos*, 105 N.M. at 560, 734 P.2d at 800 (director of county detention center was a law enforcement officer). Although the Bernalillo County Board of County Commissioners was a defendant in *Schear*, the County did not raise the issue of whether it was immune from suit.

injury caused by a negligently released prisoner. *Compare Abalos*, 105 N.M. at 560, 734 P.2d at 800 *with id.* at 561, 734 P 2d at 801. We believe *Abalos* was decided correctly.

{16} While in *Methola*, 95 N.M. at 333, 622 P.2d at 238, we held the Section §41-4-12 waiver of immunity for various tortious acts "caused by" law enforcement officers was not limited to acts *committed by* such officers, our focus was on the language of the statute and the particular public employees for whose acts provision was made—law enforcement officers. To interpret Section §41-4-12 to extend its waiver of immunity to any and all governmental actors who caused the injury producing conduct of a law enforcement officer would run counter to the structure of the Act that is quite specific with respect to the employee conduct for which the immunity of an employee and his or her agency is waived. Had the Legislature intended to waive immunity for all governmental entities whose conduct concurrently caused the non-immune act of a law enforcement officer, we believe it would have enacted clear provisions to effect that intent.

{17} Although we strictly construe the provisions of the Tort Claims Act, our primary purpose remains to determine the Legislature's intent. *See Methola*, 95 N.M. at 333, 622 P.2d at 238. To this end, we look first to the language used and we read the Act as a whole to give effect to its parts. **Id.** We conclude plaintiff has failed to state a direct cause of action against ABC, the County, or the City, for which governmental immunity has been waived, and thus we affirm the result reached by the court of appeals. Given our resolution of this issue, we do not reach the question of whether defendants owed a duty of care to the McKeens that was breached by the conduct alleged in the complaint.

{18} *County may be vicariously liable if sheriff deputies, in failing to take reasonable steps to investigate a disturbance, were acting under the actual control of the County in implementing a County policy of nonenforcement of liquor-control and drunk driving laws*. The court of appeals held that the County may be vicariously liable for actions of sheriff deputies if plaintiff shows the County exercised "direct supervisory authority," including the right to control details as to the manner of the deputies' work. The court noted that while NMSA 1978, Section §4-41-6 (Repl. Pamp. 1984) authorizes counties to establish "a merit system for the hiring, promotion, discharge and general regulation of the deputies and the employees of the county sheriff's office," it does not give a County the authority to control the details of a sheriff deputy's work. *See Romero v. Shelton*, 70 N.M. 425, 374 P.2d 301 (1962) (an agent becomes the servant of the principal, who then becomes subject to vicarious liability as the master, when the principal has the right to control agent's physical actions), *overruled on other grounds, Archuleta v. Pina*, 86 N.M. 94, 519 P.2d 1175 (1974); *see generally Restatement (Second) of Agency* 250 (1958). Nevertheless, the court concluded, the allegation in the complaint that the sheriff deputies were acting as "agents, servants, or employees of the McKinley County" precluded judgment on the pleadings in favor of the County and entitled plaintiff "to prove the requisites for application of the doctrine of respondeat superior."

{19} Plaintiff contends the court of appeals too narrowly has construed the scope of the County's vicarious liability. We agree. Applying traditional principles of respondeat superior here, we conclude the court of appeals erred insofar as its opinion may be construed to imply that "direct supervision" and "the right to control" are essential criteria for determining whether the County is vicariously liable in this case. Although the right to control, regardless of whether exercised, may establish the existence of vicarious liability based on a master-servant relationship, *see Silva v. State*, 106 N.M. 472, 477, 745 P.2d 380, 385 (1987), we read the complaint in this case to allege a degree of actual, de facto control which, if proven, also would establish the County's vicarious liability.

{20} As noted by the court of appeals, the *Restatement (Second) of Agency* provides that "[a] servant is a person employed to perform services in the affairs of another and who with respect to

the physical conduct in the performance of the services is subject to the other's control or right to control." *Restatement (Second) of Agency* 220(1), at 485 (1958). *See McCauley v. Ray*, 80 N.M. 171, 180, 453 P.2d 192, 201 (1968) (verdict against corporation under theory of respondeat superior supported by substantial evidence showing that, at time he shot plaintiff, defendant husband was the servant of corporation and performed services with the knowledge and consent of his wife, who was the president of the corporation, and was under her control *or* subject to her right of control); *see also Slagle v. United States*, 612 F.2d 1157 (9th Cir. 1980) (for purposes of federal tort claims act, drug informant was not employee of federal government during gun battle with narcotics dealers in which third party was injured; contract with informant did not give government right to control details of informant's activity, *and* government had not exercised actual control on the day in question); *Kenai Peninsula Borough v. State,* 532 P.2d 1019 (Alaska 1975) (state was not vicariously liable for the acts of a school bus driver employed by the borough because *neither* did the state exercise actual control over borough's provision of transportation services *nor* did statute or contract between borough and state authorized the borough to employ driver on behalf of the state); *see generally* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 70, at 501 (5th ed. 1984) [hereinafter *Prosser*] (servant is person employed to perform services in the affairs of another, whose physical conduct in the performance of the service is controlled, *or* is subject to a right of control, by the other).

{21} Although a master's exercise of control or the right of control typically arises under a contract for employment, a master-servant relationship does not depend on the existence of a contractual relationship. *See Restatement (Second) of Agency* 225 comment a (1958); 2 F. Mechem, *A Treatise on the Law of Agency* 1859 (2d ed. 1914) [hereinafter *Mechem*]**.** A master-servant relationship also may exist when one person volunteers to perform services for another, or when such services are performed under duress. *Restatement (Second) of Agency* §§ 224, 225 (1958); *see McCauley*, 80 N.M. 171, 453 P.2d 192 (fact that individual's services may have been rendered gratuitously did not preclude finding that he was servant of corporation); *see also Kenai Peninsula Borough*, 532 P.2d at 1025 (citing *Restatement (Second) of Agency* Sections 224, 225); *Swearinger v. Fall River Joint Unified Sch. Dist.*, 166 Cal. App. 3d 366, 212 Cal. Rptr. 400 (1985) (reversing summary judgment in favor of defendant school district because of material issue of fact whether student driver who volunteered to act as host to visiting students during basketball tournament was an employee of defendant under traditional concepts of respondeat superior). *See generally Mechem* 1859; W. Seavey, *Handbook on the Law of Agency* 84M (1964). *Cf. United States v. West*, 453 F.2d 1351, 1356 (3d Cir. 1972) (citing the *Restatement (Second) of Agency* Section 224, court noted that illegal acts of private citizen in conducting a search may be attributable to police for fourth amendment purposes when citizen was acting as the agent of the police and within the scope of his instructions, even though the agency relationship was undertaken voluntarily or was induced by duress).

{22} The individual to be held vicariously liable as the master must, however, act in such a manner that reasonably may be interpreted as indicating a willingness that the other perform such services. *Restatement (Second) of Agency* 225 comment c (1958); *see also Scottsdale Jaycees v. Superior Court*, 17 Ariz. App. 571, 499 P.2d 185 (1972). In such cases, the master may or may not have a legal right to control the actions of the servant, and the vicarious liability of the master will turn instead on whether another has submitted to the master's actual control in rendering services, either voluntarily or under duress.

{23} Here, the County may not have possessed statutory authority or a contractual right to control the details of a sheriff deputy's performance of his or her job. Nonetheless, the complaint reasonably may be read to allege that the deputies acted as servants of the County in the specific matter of enforcement of certain laws

because the deputies were implementing an express County policy voluntarily or under some form of duress or compulsion. These allegations extend beyond the claim that a casually articulated desire on the part of the County was implemented unilaterally by sheriff deputies against the County's true wishes. Rather, the complaint details specific instructions by the County not to enforce particular laws. Additionally, the County allegedly failed to train, supervise, or discipline officers regarding the enforcement of these laws. This failure reasonably may be seen as indicating the County's acceptance of the practice allegedly observed by sheriff deputies in implementing what they thought was County policy.

{24} We conclude that the complaint may be read to allege conduct by the County from which the sheriff deputies could reasonably infer the acceptance of "service" rendered by them and a desire that they act precisely as they were alleged to have acted in failing to investigate the disturbance at Eddie's Bar. *Cf. Biedenbach v. Teague*, 194 Pa. Super. 245, 166 A.2d 320, 323-24 (1960) (friend who volunteered to get car for defendant reasonably believed he was acting to the benefit of the defendant and that defendant authorized such service in light of the course of their past dealings with regard to the car). Under traditional principles of respondeat superior as articulated in this opinion, plaintiff has alleged that the sheriff deputies were acting as servants of the County independent of any allegation that the County exercised direct supervisory control.

{25} *Plaintiff has alleged a violation of a right secured under New Mexico law.* In response to one of the questions we asked the parties to brief, plaintiff advanced the argument that failure to enforce liquor-control and drunk driving laws deprived McKeens of a right secured by NMSA 1978, Section §29-1-1 (Repl. Pamp. 1990), which declares it "to be the duty of every sheriff, deputy sheriff, constable and every other peace officer to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware. . . ." We do not reach plaintiff's argument insofar as it contends that Section §29-1-1 creates primary liability on the part of the defendants, as we already have concluded Section §41-4-12 does not waive immunity for claims based on their primary liability.[3] Insofar as plaintiff's argument addresses the vicarious liability of the County for the acts of its sheriff deputies, we hold that plaintiff has alleged a cause of action based on violation of a right secured by the laws of New Mexico.[4]

[3] The court of appeals devotes much of its opinion to a discussion of defendants' primary liability for promulgating a policy of nonenforcement in terms of a distinction between "active" and "passive" enforcement of the law. The court suggests that "full enforcement statutes" such as Section §29-1-1 create only a duty of "passive enforcement," that is, a duty to investigate particular crimes brought to the attention of police officers, as happened in *Schear*. A duty requiring specific allocation of resources to ferret out crime, the court suggested, would create an intolerable interference with the executive's discretion to allocate scarce resources. Our conclusion that defendants were not "law enforcement officers" allows us to avoid deciding whether a cause of action may be stated for promulgation of a policy of nonenforcement of liquor-control and drunk driving laws.

We entertain, however, grave misgivings concerning the rationale articulated by the court of appeals. First, we believe the court mischaracterized the allegations in the complaint, the gist of which are that defendants created a policy directing law enforcement officers to refrain from even *passive enforcement* of certain laws. More importantly, however, we disapprove of the court of appeals' reliance on a theory that, in substance, conflicts with Section §41-4-2(B) in that it resurrects a form of common-law sovereign immunity for policy making activities. That Section abolishes judicially created categories such as "governmental functions-proprietary functions" and "discretionary acts-ministerial acts" in favor of limited liability (under specific waiver provisions) based on common-law concepts of duty and the reasonably prudent person. In *Schear*, it was on this statutory language that we based our refusal to apply the "public duty-special duty" rule. 101 N.M. at 672-75, 687 P.2d at 729-31. We see little difference in principle between the rule rejected in *Schear* and the "active enforcement-passive enforcement" distinction used by the court of appeals in the present case.

[4] Although the complaint contains allegations that otherwise would establish the vicarious liability of the City for the acts of City police officers, we believe the complaint fails to allege a cause of action. The complaint against City police is based on the generalized failure of unnamed City police officers to enforce liquor-control and drunk driving laws on unspecified past occasions, or to apprehend Shorty after he elected to drive. There is no allegation that officers had specific knowledge of Shorty's condition or the danger he posed to the community. Absent such specific knowledge of an intoxicated driver, we believe the causal connection between an officer's past acts and omissions and the accident in this case is too tenuous a basis upon which to fix liability.

{26}—*Section §41-4-12 provides for a waiver of immunity when a law enforcement officer has caused the deprivation of a right secured under New Mexico statutory law.* Section §41-4-12 waives liability when the plaintiff's injury arose from the "deprivation of any rights . . . secured by the constitution and laws of the United States or New Mexico. . . ." In determining the scope of this waiver, we consider, first, the meaning of the term "laws" and, second, the significance of the use of the conjunctive "and" in the phrase "constitution and laws."

{27} Generally, there exist three sources of "laws" that may secure a right of an individual—the common law, positive law enacted by the Legislature, and constitutional law. *See generally Black's Law Dictionary* 795-96 (5th ed. 1979). We eliminate the federal and state constitutions as sources of "laws" as that term is used in Section §41-4-12, since the statute lists these constitutions separately. Similarly, although not at issue in this case, it may be that the Legislature also intended to exclude the common law as a source of "laws," since the provisions of Section §41-4-12 under consideration are preceded by a list of specific common-law causes of action for which immunity has been waived, e.g., assault, battery, false imprisonment. *Cf. Cross*, 107 N.M. at 252-53 n.1, 755 P.2d at 590-91 n. 1 (refusing to address whether complaint alleged the deprivation of a common-law right that was "secured" by the "laws of New Mexico"). In any event, we conclude that the term "laws" refers *at least* to legislative enactments.

{28} The use of the conjunctive "and" may arguably require that a plaintiff's injury arise from violation of a right secured by *both* "the constitution and laws." Although such a construction may seem to comport with the literal sense of the terms used, it has been noted that "the popular use of 'or' and 'and' is so loose and so frequently inaccurate that it has infected statutory enactments." *State ex rel. Board. of Comm'rs v. Bergeron*, 235 La. 879, 898, 106 So. 2d 295, 302 (1958). Moreover, as this Court has recognized, the word "and" sometimes may be used to mean "as well as." *Davis v. Savage*, 50 N.M. 30, 49, 168 P.2d 851, 863 (1946) (word "and" in mortgage provision that authorized mortgagee to take possession of real estate upon default *and* sell it at public auction did not preclude mortgagee from taking possession of real estate for a purpose other than to sell it).

{29} We will not blindly apply a conjunctive meaning to "and," or a disjunctive meaning to "or," when the context of the statute demands otherwise. *See Public Serv. Co. v. New Mexico Pub. Serv. Commtn*, 106 N.M. 622, 624, 747 P.2d 917, 919 (1987) (the word "or" is given a disjunctive meaning unless context of the statute demands otherwise). Although we do not treat these terms as interchangeable, we note that their strict sense is more readily departed from than that of other words. Here, we do not believe the word "and" was intended by the Legislature to limit the scope of the waiver of immunity to only those rights secured by both the constitution and by statutory enactment.

{30} We note that the clause in question is modelled on language in 42 U.S.C. Section 1983—this Section provides that "every person who, under color of [state law, subjects another] to the deprivation of any rights . . . secured by the Constitution and laws [of the United States], shall be liable to the party injured. . . ." *See DeVargas v. State ex rel. New Mexico Dep't of Corrections*, 97 N.M. 447, 451, 640 P.2d 1327, 1331 (Ct. App. 1981) (liability under Section §41-4-12 provision for violation of rights secured by the constitution and laws of the United States is consistent with liability under Section 1983), *cert. quashed by opinion*, 97 N.M. 563, 642 P.2d 166 (1982). The Supreme Court consistently has interpreted the phrase "and laws" in Section 1983 to provide for a cause of action for violations of rights created solely by federal statute. *See, e.g., Wright v. City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987) (Section 1983 provided for suit based on federal right secured by Brooke Amendment to the Housing Act of 1937); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981) (no federal right created by Developmentally Disabled Assistance and Bill of Rights Act on which to base Section 1983 suit); *Maine v.*

Thiboutot, 448 U.S. 1 (1980) (Section 1988 provided for award of attorney fees in Section 1983 suit challenging state's interpretation of federal legislation providing aid to families with dependent children); *Edelman v. Jordan*, 415 U.S. 651, 675 (1974) (suits in federal court under Section 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating states).

{31} Although the federal cases are not binding on this Court, we find the Supreme Court's application of Section 1983 to rights secured by federal statute of considerable value given the similarity in the language and purpose of Section 1983 to the provisions in Section §41-4-12 under consideration. Moreover, we are sensitive to the fact that, as under federal law, many important state rights are secured either by the state constitution or by statute, but not by both. A restrictive construction of Section §41-4-12 based on the use of the word "and" would lend to the statute an obscure meaning since we can not imagine the Legislature could have had in mind any given rights secured by both "the constitution and laws of . . . New Mexico." We believe it evident that Section §41-4-12 waives immunity for injury resulting from a violation of a right secured only under the New Mexico Constitution. To read Section §41-4-12 to require that a state right be secured by *both* the state constitution and by a separate state statute would defeat this intent.[5] We therefore conclude that the addition of the phrase "and laws" was meant to expand the set of rights upon which the state could be sued to include rights created by statute.

{32} We will not read into a statute language that it does not contain. Our goal is to divine the Legislature's intent in terms of the entire statute. *State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 749 P.2d 1111 (1988). Applying these principles here in light of federal precedent on the analogous provisions of Section 1983, we conclude that Section §41-4-12 of the Tort Claims Act waives immunity when injury has resulted from a deprivation of any right secured by the statutory law of the United States or New Mexico as well as any right secured by the federal or state constitution, "if caused by a law enforcement officer."

{33}—*Section §29-1-1 secures a right under New Mexico law that provides a basis for a cause of action against the state.* In *Methola* we held that the custodial relationship between a jailer and an inmate supported a common-law duty of care upon which an injured inmate could base a negligence claim for the jailer's alleged failure to prevent other inmates from committing a battery. 95 N.M. at 333, 622 P.2d at 238. We took note of *Methola* in *Schear* when we rejected the "public duty-private duty" rule and held that Section §29-1-1 created a duty that supported a cause of action in negligence against law enforcement officers who failed to investigate a reported assault in progress. 101 N.M. at 677, 687 P.2d at 734. As a result of this failure to investigate, the plaintiff in *Schear* had been raped and tortured by an intruder. *Id.* at 672, 687 P.2d at 729.

{34} Because the injury in *Schear* undoubtedly resulted from a battery, we did not reach the question of whether Section §29-1-1 secured a right under New Mexico law for the violation of which Section §41-4-12 provides an independent waiver of immunity. The allegations concerning the traffic accident in this case do not necessarily constitute a battery,[6] and thus the issue

[5] Alternatively, the phrase "and laws" would be surplusage if taken to refer to Section §41-4-12 itself, since the statute would have the same meaning if it stated simply that immunity was waived for violations of rights secured by the New Mexico Constitution. In interpreting a statute, we must avoid if possible a construction that renders part of the statute surplusage. *T.W.I.W., Inc. v. Rhudy*, 96 N.M. 354, 630 P.2d 753 (1981).

[6] Although we do not reach this issue given our holding regarding a violation of a right secured under New Mexico law, we note the court of appeals held that, to establish his acts constituted a battery, plaintiff must show Shorty intended to cause contact. We agree with this statement. However, we find misleading the court's further statement in remanding this issue for further proceedings that "intoxication is [not] necessarily inconsistent with an intent to cause offensive contact." We believe Shorty's intoxication would be material to a jury determination of whether a battery was committed in this case. Liability for battery no longer is restricted to acts that are the "direct application of force." *Sanford v. Presto Mfg.*

of whether Section §29-1-1 secures such a right is squarely presented. In deciding this question we note that federal courts use a two-prong test to determine whether a statute secures a right under Section 1983: (1) whether the legislation creates a right on the part of specific individuals; and (2) whether the legislative remedy explicitly or implicitly forecloses enforcement by private individuals through resort to Section 1983. *See* 1 I. Bodensteiner & R. Levinson, *State & Local Government Civil Rights Liability* 1:16 (1987). While we again emphasize that federal precedent does not necessarily control our analysis of state law, we believe this basic test provides a reasonable means to determine whether a state statute secures a right under Section §41-4-12.

{35} *Schear* establishes that Section §29-1-1 created a duty that accrues to the benefit of specific individuals—i.e., that it creates an individual right.[7] The question to be answered, therefore, is whether the remedies provided by Section §29-1-1 explicitly or implicitly preclude a private cause of action under the Tort Claims Act when a law enforcement officer's negligent failure to discharge his legal duty results in personal injury. Section §29-1-1 contains no explicit limitation precluding tort liability, however, it does provide that violations are punishable by fine and removal from office of an offender. We do not believe these remedies preclude tort liability under the Tort Claims Act.

{36} These remedies of punishment by fine and removal from office are not of such a comprehensive nature and scope that they would be frustrated by imposition of tort liability under the waiver provisions of Section §41-4-12. *Compare Middlesex County Sewerage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981) (comprehensive nature of federal Water Pollution Control Act and Marine Protection, Research and Sanctuary Act indicated congressional intent to foreclose private

Co., 92 N.M. 746, 747, 594 P.2d 1202, 1203 (Ct. App. 1979). Nor is the "intent" required under tort law a malicious intent to cause harm or even a desire to bring about a particular set of consequences. *See Spivey v. Battaglia*, 258 So. 2d 815 (Fla. 1972). As acknowledged by the court of appeals, the term "intent" also denotes "that the actor believes that the consequences are substantially certain to result from [the action taken]." *See Restatement (Second) of Torts* 8A (1965).

We believe that under some facts a jury might infer injury or death to have been the "substantially certain outcome" of an intoxicated individual's decision to operate a motor vehicle on a public highway. When evidence exists to support such a conclusion, contrary evidence of the intoxicated driver's lack of subjective appreciation of the magnitude or nature of the risk created is not controlling, and the jury may infer the existence of such an appreciation even in the face of testimony to the contrary. While there is no presumption that the actor intended the consequences of his conduct, "the factfinder need not credit the actor's assertion that the actor did not intend the result in question. . . ." *Prosser* 8, at 36. *Cf. Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970) (when police officer's initial decision to use armed force was not justified or excused, he committed a battery by accidentally pulling trigger of gun while lowering barrel and shooting the plaintiff in the leg after the plaintiff had obeyed the officer's command to halt); *Kaczer v. Marrero*, 324 So. 2d 717 (Fla. Dist. Ct. App. 1976) (unnecessary to show "subjective fault" or "intent to injure" on the part of an insane assailant who stabbed plaintiff if a reasonable person, standing in the assailant's shoes, would realize that harm was a substantially certain outcome of his actions).

Nor do we regard it as crucial whether an intoxicated individual's conscious decision to drive put a particular, known person at risk. *See Brown v. Martinez*, 68 N.M. 271, 281-82, 361 P.2d 152, 159-60 (1961) (it was immaterial whether the defendant intended harmful or offensive contact to the plaintiff, or even whether he knew plaintiff to be in the vicinity, when he shot a high-powered rifle to frighten off trespassers who were stealing watermelons). The decision to drive under the circumstances described above constitutes an intent to engage in unlawful conduct that invades the protected interests of others, and this intent provides sufficient grounds to treat the conduct as an intentional tort. In such cases, we think the better rule is that stated in *Keel v. Hainline*, 331 P.2d 397, 399 (Okla. 1958): "[When] the basis of an action is assault and battery, the intention with which the injury was done is immaterial . . . provided the [intentional] act causing the injury was wrongful. . . ." *See also* 6A C.J.S. *Assault and Battery* 9 (1975) (when defendant otherwise engaged in a trespass or unlawful transaction at the time of the alleged battery that was likely to injure another, the intent to commit the unlawful act provides a sufficient basis upon which to find a battery).

[7] It may be argued that in *Schear* the identity of the victim was known to the police, whereas here the sheriff deputies knew only the identity of the person who was violating the law and did not have specific knowledge of the McKeen family. This distinction is not dispositive of the existence of a right on the part of the McKeen family. *Schear* held that Section §29-1-1 created a duty on the part of law enforcement officers and allowed the imposition of liability for injury proximately caused by negligent breach of that duty. Extension of that duty to the McKeen family rested upon the foreseeability of a risk of injury to the traveling public in the event sheriff deputies failed to apprehend Shorty after they knew of his dangerously intoxicated condition.

enforcement of these statutes by means of Section 1983) *with Wright*, 479 U.S. at 425 (provisions in federal Housing Act allowing federal agency to penalize violators was not of such a nature as to indicate Congressional intent to foreclose resort to Section 1983 by private individuals for violations of rights secured under Act). Indeed, allowing personal injury actions under the Tort Claims Act against the governmental entities employing law enforcement officers encourages the development of better training and supervision programs, rather than simply imposing cumulative punishment on the officers themselves. Absent some clear indication of a contrary legislative intent, we are loathe to exclude violations of the right secured by Section §29-1-1 from the ambit of the waiver of immunity in Section §41-4-12, particularly since such a waiver is consistent with the legislative declaration of public policy regarding the compensation of victims of governmental torts. *See* §41-4-2(A) (declaration of policy).

{37} We hold that the allegations in the complaint that sheriff deputies failed to apprehend Shorty or investigate the disturbance at Eddie's Bar, and that this failure proximately caused personal injury to the McKeen family, suffice to state a cause of action for negligent violation of a right secured under New Mexico law for which Section §41-4-12 waives sovereign immunity. We, therefore, remand this case for further proceedings.

{38} Plaintiff has not alleged a violation of a right secured under the federal constitution. In a separate count under 42 U.S.C. Section 1983, plaintiff alleges that the policy of nonenforcement adopted by defendants deprived the McKeen family of rights secured under the federal constitution. The court of appeals determined that plaintiff's claim in this regard was precluded under *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). We agree.

{39} In *DeShaney*, the plaintiff was a four-year-old boy named Joshua, who had been beaten so severely by his father that it was thought he would spend the rest of his life in an institution for the profoundly retarded. Prior to this incident, the county social workers of the State Department of Social Services had returned Joshua to the custody of his father and had entered into an agreement with the father intended to protect Joshua from further abuse. Despite the agreement, evidence of abuse continued to reach social workers assigned to the case. The record contained a remark by one social worker that "I just knew the phone would ring some day and Joshua would be dead." *Id.* at 209.

{40} The Supreme Court held, however, that the substantive component of the due process clause of the fourteenth amendment that protects one's liberty interest in bodily integrity did not protect Joshua from violence by a private party. Unlike cases in which the state had taken a person into custody and assumed responsibility for that person's well being, here "while the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him more vulnerable to them." *Id.* at 201. Moreover, the Court reasoned:

> But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

Id. at 195.

{41} Plaintiff seeks to avoid the reach of *DeShaney* by contending that defendants here consciously articulated a policy of nonenforcement that was the "driving force" behind the deprivation of interests protected under the federal constitution. We are not convinced that the role of defendants in this case "rendered [McKeens] more vulnerable" to harm from intoxicated drivers *to*

a greater extent than the combination of action and inaction of state employees had rendered Joshua DeShaney susceptible to harm from his father. Moreover, we agree with the court of appeals that the *DeShaney* opinion turns on a lack of duty to protect a citizen from dangers created by private actors, not on whether the state's conduct was the result of a consciously articulated policy. *See id.* at 202 n.10.

{42} Plaintiff seeks support for its interpretation of *DeShaney* from the opinion of the federal court of appeals in *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720 (3d Cir. 1989), *cert. denied sub nom.*, *Smith v. Stoneking*, U.S., 110 St.Ct. 840, 107 L. Ed. 835 (1990). Although *Stoneking* finds a cause of action based on "policies maintained in deliberate indifference to actions taken by their subordinates," *id.* at 725, the individual who was alleged to have sexually molested the plaintiff over a number of years was an employee of the school district. "Unlike DeShaney's father, who was referred to throughout the *DeShaney* opinion as a private third party, Wright was a school district employee subject to defendant's immediate control." *Id.* at 724. Here, as in *DeShaney*, the injury to the McKeen family was effected by a private party. We conclude that plaintiff has failed to state a deprivation of a federally secured right.

{43} *Question of violation of right secured under the New Mexico Constitution not reached.* Finally, plaintiff argues that the conduct alleged in the complaint establishes a violation by defendants of rights secured under Article II, Section 4, of the New Mexico Constitution. Section 4 provides:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

{44} Defendants argue that this Section parallels the language of the due process clause of the fourteenth amendment and should be given the same breadth under these facts as to the Supreme Court gave to the federal constitution in *DeShaney*. We find this argument unpersuasive. The *DeShaney* Court emphasized that "nothing in the language of the Due Process Clause itself requires the State to protect . . . its citizens against [injury] by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. at 195. Unlike the language of the fourteenth amendment, however, Article II, Section 4 expressly guarantees the right "of seeking and obtaining safety. . . ." *Cf.* N.M. Const. art. II, 18. In interpreting the more expansive language of Article II, Section 4, we are mindful of the more intimate relationship existing between a state government and its people, as well as the more expansive role states traditionally have played in keeping and maintaining the peace within the borders. *Cf. Monell v. Department of Social Servs.*, 436 U.S. 658, 673 (1978) (discussing legislative history behind rejection of "Sherman Amendment" to the Civil Rights Act of 1871 based on belief of congressional opponents that federal government constitutionally could not require local governments to create police forces to provide protection to its citizens).

{45} Although the language of Article II, Section 4 militates against a conclusion that *DeShaney* is controlling authority on this subject, we do not reach the issue of whether, and under what circumstances, violation of its provisions gives rise to a cause of action for damages under the provisions of the Tort Claims Act. Plaintiff has raised this claim only as it relates to the primary liability of the defendants, not in terms of whether the actions of the sheriff's deputies amounted to a constitutional tort. As we already have concluded that defendants are immune from suit based on their primary liability, we do not address this issue further.

{46} *Conclusion.* We conclude that plaintiff's complaint states a cause of action for personal injury based on the vicarious liability of the County for negligence of sheriff's deputies alleged to have proximately caused the deprivation of a right secured under New Mexico law. We

remand this case for further proceedings consistent with this opinion.

{47} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

JOSEPH F. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1991-NMSC-006

Filing Date: January 15, 1991, As Corrected

Docket No. 18,584

**PATRICIA ELLINGWOOD,
Individually and as the Personal Representative of the Estate of James M. Streeter, deceased,**

Plaintiff-Appellant,

vs.

N.N. INVESTORS LIFE INSURANCE COMPANY, INC., a foreign corporation authorized to do business in New Mexico, and THEODORE H. BROTHERS, Individually and as Agent for N.N. Investors Life Insurance Company, Inc.,

Defendants-Appellees.

**APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
Fred T. Hensley, District Judge**

The Branch Law Firm,
Turner W. Branch,
Albuquerque, New Mexico,

Floyd W. Lopez,
Albuquerque, New Mexico,

for Appellant.

Rowley & Parker,
Warren F. Frost,
Clovis, New Mexico,

for Appellees.

OPINION

RANSOM, Justice.

{1} This case involves the authority of an insurance agent to bind an insurance company to a contract for temporary insurance on the basis of oral representations concerning immediate coverage upon payment of a premium. Patricia Ellingwood, as personal representative of the estate of James Streeter, brought suit against N.N. Investors Life Insurance Company, Inc. for breach of contract and against the company and its agent for negligence. The trial court granted summary judgment in favor of N.N. Investors because the enrollment application unambiguously stated coverage was not effective unless and until it was approved by the company. The court also concluded that in his application Streeter made material misrepresentations of fact that, in any case, gave N.N. Investors the right of rescission. We reverse, holding that issues of fact exist as to whether the agent had the apparent authority to bind the company to a contract for temporary insurance and whether Streeter made material misrepresentations.

{2} Streeter was twenty-five when, on October 30, 1985, he applied for life and health insurance from N.N. Investors. He had a severe case of scoliosis, a congenital deformity of the spine that was readily apparent but no physical examination or interview with a medical professional was required in connection with the application for insurance. The company's agent conducted an interview at Streeter's place of business where he worked as a self-employed manager of a donut shop. The agent asked Streeter questions printed on enrollment application forms and then filled out the forms after Streeter verbally answered the questions.

{3} The forms did not include a specific question regarding scoliosis and no mention of that condition by name was included on the completed application. However, Streeter's "no" answers to questions 14(b) and 14(h) are asserted to have been misrepresentations in view of Streeter's congenital deformity. These questions read:

14. Has any person proposed for insurance EVER had any indication, diagnosis, or treatment of

. . . .

b. The respiratory system, including but not limited to shortness of breath, persistent hoarseness or cough, asthma, bronchitis, emphysema, tuberculosis, or chronic respiratory disorder? [Answer: No]

. . . .

h. Neuritis, arthritis, gout, disorder of the muscles or bones, including but not limited to spine, back, or joints? [Answer: No]

Following these questions, on lines provided for the explanation of any "yes" answers, with reference to question 14 the agent recorded that Streeter's lower spine had been surgically fused in October 1980. The name, address, and telephone number of the treating physician was provided. The agent also made a notation that Streeter was fully recovered and would accept a rider or limitation of coverage.

{4} Streeter paid the agent the first payment due on the life and health insurance policies. Streeter's grandmother, who was present at the time, later testified that the agent told Streeter that he was fully covered by the policies as soon as he paid the premium. After completing the enrollment application, both the agent and Streeter signed the application. Immediately above Streeter's signature the following language appears:

> I declare that the statement and answers in the application are complete and true to the best of my knowledge and belief and all information given to the representative has been recorded correctly and in its entirety. I agree that (a) this application will form a part of the certificate (b) the representative does not have the authority on behalf of the Company to accept risks, or to make, alter or amend the certificate or to extend the time for making any payment due on such certificate and (c) no insurance will take effect until the application is approved by the Company and the certificate is delivered to the Applicant while the conditions affecting insurability are as described herein and the first premium has been paid in full. I hereby acknowledge receipt of a copy of the Fair Credit Reporting Act and Medical Information Bureau notices.
>
> This authorizes any licensed physician, medical practitioner, hospital, clinic or other medical or medically related facility, insurance company, the Medical Information Bureau or other organization, institution or person, that has any record or knowledge of me or my family, to give N.N. Investors Life Insurance Company, Inc., any such information. A photographic copy of this authorization shall be as valid as the original. I UNDERSTAND THAT COVERAGE IS NOT EFFECTIVE UNLESS AND UNTIL APPROVED AND ISSUED BY THE COMPANY.

{5} Streeter also signed two acknowledgement forms in connection with health insurance, one for a group major medical policy, the other for a group catastrophic hospital expense benefit plan. Both forms contained the following:

> Upon my request, your representative, whose signature appears below, visited me to determine my interest in applying for insurance with your company. Your representative was courteous and fully and completely explained to me from the same certificate, all the provisions as contained in the certificate, including every benefit, exclusion, limitation, waiting period, and deductible, if any. Your representative asked each question on the enrollment application which I signed only after a full review of the provisions and all the answers had been filled in. The answers to the health questions were fully answered to the best of my knowledge, and all the answers on the application are exactly those, with nothing left out, which I in any way related or stated to the representative. I fully understand and

> agree that if any material information is omitted from the application, it could provide the basis for the Company to refuse coverage and to refund all my premiums as though my coverage had never been enforced. In signing this form, I agree that I have carefully examined and understand the provisions of the specimen certificate and application, and that the Company is not bound by any knowledge or statement made by or to the representative, unless set forth here on the application.
>
> I hereby acknowledge receipt of the Outline of Coverage for Group Catastrophic Hospital Expense Benefits. I understand that coverage is not effective unless and until approved by the Company.

{6} The language in the above forms indicates that insurance coverage was not in force until the application was approved. The sample certificate that the agent used during the interview to explain coverage and benefits stated that coverage would begin on the date shown in the certificate schedule once the company had approved the enrollment application.

{7} The application subsequently was forwarded to the underwriting department of N.N. Investors which, based only on the information contained in that application, issued Streeter a certificate of insurance for major medical and catastrophic hospital expenses and term life insurance. The health insurance coverage included a special exceptions rider excluding from coverage "any disorder and/or disease of, or injury to, the cervical, thoracic, lumbar or sacroiliac spine on James Streeter." Both health policies excluded coverage for an illness that was a pre-existing condition as defined by the certificate of insurance.[1] As stated on the certificate schedule, the effective date of coverage for all three policies was to be 12:00 noon, November 12, 1985.

{8} Following a hunting trip, Streeter brought himself to the emergency room of the Clovis High Plains Hospital on November 10, 1985. He was diagnosed as having severe bronchial pneumonia. Shortly thereafter, at 3:40 a.m. on November 12, he died. Upon receiving claims under the life and health insurance policies, N.N. Investors initiated an investigation of Streeter's medical history and for the first time sought and obtained medical records from the family physician and surgeon listed on the application forms. N.N. Investors states that at this time they discovered that the purpose of the 1980 surgery to fuse his spinal column was the correction of a "severe deformity associated with scoliosis which Mr. Streeter had suffered since birth." They stated they also discovered that he had been admitted to the medical intensive care unit due to pulmonary compromise during the 1980 hospitalization.

{9} N.N. Investors refused to pay any benefits under any of the policies stating that Streeter had failed to disclose (1) his scoliosis and (2) the incident of pulmonary compromise. N.N. Investors asserted that the nondisclosure amounted to material misrepresentations that formed the basis for a right of rescission and returned all of Streeter's premiums. In addition to the initial premium Streeter paid in October, N.N. Investors also refunded two premiums they had withdrawn from his bank account in November and December pursuant to an arrangement for automatic withdrawals. Since the initiation of suit, N.N. Investors also claims to have discovered that Streeter was hospitalized at least thirteen other times for treatment of scoliosis and that he suffered from a "severe restrictive pulmonary defect"

[1] A pre-existing condition under the major hospital expense coverage was defined as a medical condition not disclosed on the application for which, prior to the effective date of coverage:

1. Medical advice or treatment was recommended by, or received from a Doctor within the five-year period before the effective date of coverage; or
2. Symptoms existed which would cause an ordinary prudent person to seek diagnosis, care or treatment within the five-year period before the effective date of coverage.

Pre-Existing Conditions are not covered unless the loss for such conditions begins more than two years after the effective date of coverage.

Also, those medical conditions excluded from coverage by name or specific description when the loss begins, are not covered.

that greatly reduced his lung capacity. Records are said to show that he was hospitalized for the treatment of pneumonia three times between the years 1961 and 1962 (when Streeter was approximately eighteen months of age).

{10} N.N. Investors also denies coverage based upon the stated effective date of coverage contained in the certificate of insurance issued for each policy. Streeter died at 3:40 a.m. on November 12 and N.N. Investors claims the life insurance policy did not come into effect until 12:00 noon, about eight hours later. In addition, arguing the health policies were not effective until November 12, N.N. Investors claims Streeter's pneumonia was a pre-existing condition in light of the fact he was admitted for treatment of that condition two days earlier on November 10.

{11} Ellingwood appeals from an order of summary judgment against her on all issues. In reviewing that decision, to determine if genuine issues of material fact are present, we examine affidavits submitted in opposition to the motion, as well as pleadings, interrogatories, depositions, and admissions, if any, in a light most favorable to Ellingwood's claims. *Barber's Super Markets, Inc. v. Stryker*, 81 N.M. 227, 229, 465 P.2d 284, 286 (1970); *Wheeler v. Board of County Comm'rs*, 74 N.M. 165, 171, 391 P.2d 664, 668 (1964). The party opposing the motion is to be given the benefit of all reasonable doubts in determining if a genuine issue exists. *Goodman v. Brock*, 83 N.M. 789, 792, 498 P.2d 676, 679 (1972). Where the evidence is susceptible to reasonable conflicting inferences bearing upon material facts, entry of summary judgment is improper. *Fischer v. Mascarenas*, 93 N.M. 199, 201, 598 P.2d 1159, 1161 (1979); *Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 77 N.M. 730, 732, 427 P.2d 249, 251 (1967); *Hewitt-Robins, Inc. v. Lea County Sand & Gravel, Inc.*, 70 N.M. 144, 148, 371 P.2d 795, 797 (1962).

{12} The threshold issue in this appeal is whether the insurance coverage may be found to have been effective earlier than noon, November 12. Ellingwood claims the facts of this case give rise to an issue of temporary insurance coverage. We agree. Streeter's grandmother, who sat at the table with the agent and Streeter while they discussed the insurance coverage, stated that, when Streeter was signing the forms the agent handed him, Streeter asked when coverage under the three policies would begin. According to Streeter's grandmother the agent stated that the policies would be in force as soon as Streeter wrote a check for payment. She stated that Streeter wrote the check and handed it to the agent who replied, "Coverage is now in effect." N.N. Investors admits that the agent accepted payment but denies that he made any statements regarding immediate coverage. Ellingwood also submitted affidavits from other former customers of this particular agent to show that, despite the language to the contrary in the application forms, it was his usual procedure to represent immediate coverage with payment of the first premium. This evidence is sufficient to create a jury issue on the question of whether the agent acted within his apparent authority to bind N.N. Investors to a contract for temporary insurance based upon his oral representations.[2]

{13} In the absence of a statute to the contrary, an insurance agent may consummate a valid oral contract for immediate coverage in order that an insured will not remain unprotected during the

[2] In general, the cases that Streeter brings to our attention, where the court has found a contract for temporary insurance after payment of the initial premium, are not helpful here. These cases stand for the proposition that where the company has accepted the initial premium and issued a conditional binder or conditional receipt, stating that the insurance is in force *from the date of application*, provided the application is approved and accepted at the home office, such a binder will give rise to a contract of temporary insurance subject only to cancellation by the company. *E.g., Collister v. Nationwide Life Ins. Co.*, 479 Pa. 579, 388 A.2d 1346 (1978), *cert. denied*, 439 U.S. 1089 (1979); *Smith v. Westland Life Ins. Co.*, 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975); *Ransom v. Penn Mut. Life Ins. Co.*, 43 Cal. 2d 420, 274 P.2d 633 (1954).

This rule is not so much based upon the intent of the agent and applicant to form a contract for temporary insurance as upon the belief of the applicant, reasonable under the circumstances in view of the ambiguous language in the application and an absence of any showing that the limiting condition was called to his attention, that he is insured for at least a temporary period when he has paid the initial premium.

interval prior to the issuance and delivery of a policy. *See Western Farm Bureau Mut. Ins. Co. v. Barela*, 79 N.M. 149, 441 P.2d 47 (1968); *Maryland Casualty Co. v. Foster*, 76 N.M. 310, 414 P.2d 672 (1966); *Harden v. St. Paul Fire & Marine Ins. Co.*, 51 N.M. 55, 178 P.2d 578 (1947). Thus, in general, binders for temporary insurance may be made orally as well as in writing. Such a contract for temporary insurance remains in force according to the terms the parties have initially agreed upon, subject only to cancellation of the contract by the insurance carrier. *Cf. Smith v. Westland Life Ins. Co.*, 15 Cal. 3d 111, 539 P.2d 433, 123 Cal. Rptr. 649 (1975) (where contract for temporary insurance arises due to acceptance of initial premium and issuance of conditional receipt, temporary insurance can be terminated only by notice of rejection and refund of the premium).

{14} In NMSA 1978, Section §59A-18-22 (Repl. Pamp. 1988), the Legislature has enacted regulations governing certain written and oral binders for temporary insurance. While this Section limits the validity of an oral binder to no longer than fifteen days from its effective date, NMSA 1978, Section §59A-18-22(B), the provisions of this Section expressly do not apply to a binder for life or health insurance. NMSA 1978, §59A-18-22(D). Thus, a parol agreement for temporary life or health insurance is governed by common-law rules. Under the decisions of this Court, an oral contract for insurance is effected when the parties have agreed upon (1) the subject matter, (2) the risk to be insured against, (3) the duration the risk, (4) the amount of insurance, (5) the rate of premium, and (6) the identity of the parties. *Maryland*, 76 N.M. at 312, 414 P.2d at 673.

{15} An agent nonetheless may bind an insurer by oral agreement for insurance that is to be effective immediately only if such act is within either the actual or apparent authority of the agent. G. Couch, *Couch on Insurance 2d* 14:33 (1984). Whether the agent has the authority to make parol contracts is a question for the jury when the facts are in dispute. *Id.* at 26A:26. By "apparent authority of an agent," we mean such authority as a reasonably prudent person naturally would suppose the agent to possess in view of the insurer's conduct in clothing the agent with the trappings of actual authority. *See id.* at 26:62; *Douglas v. Mutual Ben. Health & Accident Ass'n*, 42 N.M. 190, 195-97, 76 P.2d 453, 456-57 (1937); *see also Romero v. Mervyn's*, 109 N.M. 249, 784 P.2d 992 (1989) (issue concerning apparent authority of store manager to contract for medical expenses of injured customer). The power of an agent to bind the insurer is coextensive with this apparent authority. *Douglas*, 42 N.M. at 195-97, 76 P.2d at 456-57; *see also Huppert v. Wolford*, 91 Idaho 249, 420 P.2d 11 (1966); *Fanning v. Guardian Life Ins. Co. of Am.*, 59 Wash. 2d 101, 366 P.2d 207 (1961); G. Couch, *Couch on Insurance 2d* 26A:23 (1984).

{16} From the affidavits of the former customers of N.N. Investors, a juror could infer that it was the company's practice to allow the agent to collect the initial premium at the time of the enrollment application. Where an insurance company has authorized the agent to accept payment, the agent may well appear to have the authority to effect immediate coverage. We believe a typical customer would have a reasonable belief that in return for a payment of cash, and an authorization for subsequent automatic payments, he has purchased some immediate benefit in return, especially where the consumer questions the agent and is assured that this is the case.

{17} Of course, the language in the enrollment forms to the effect that insurance would not be effective until approved by the company is relevant evidence that it would not have been prudent for Streeter to suppose the agent had authority to effect immediate coverage. Likewise, there is language in the forms which Streeter signed to the effect that the agent did not have the authority to accept risks and the company was not bound by any statements of the agent. But in the absence of other evidence that conclusively establishes these provisions were specifically read to Streeter, and understood by him to preclude immediate coverage, we think an issue of whether the agent had apparent authority to make an oral contract for temporary insurance is

for the jury. Such a contract for temporary insurance may vary or even contradict the language of the written application signed by the applicant. With respect to the sale of insurance, the signing of a written application should not preclude evidence that the agreement of the parties is not integrated in such writing, but rather is the product of the representations of the agent that reasonably have been relied upon and accepted by the applicant. We specifically disapprove of any language to the contrary in *Fierro v. Foundation Reserve Insurance Co.*, 81 N.M. 225, 465 P.2d 282 (1970), and *State Farm Fire & Casualty Co. v. Price*, 101 N.M. 438, 684 P.2d 524 (Ct. App.), *cert. denied*, 101 N.M. 362, 683 P.2d 44 (1984). *Cf. Baker v. St. Paul Fire & Marine Ins. Co.*, 427 S.W.2d 281, 289 (Mo. Ct. App. 1968) (material variance between the terms of an oral contract for insurance and policy as executed precludes merger of oral negotiations into written policy).

{18} We have stated in other cases that an insured is only bound to make such examination of insurance documents as would be reasonable under the circumstances, and that this Court will not simply and mechanically charge the insured with the duty of reading and understanding insurance documents and then bar him from recovery by a literal application of the terms and provisions of those documents. *Pribble v. Aetna Life Ins. Co.*, 84 N.M. 211, 216, 501 P.2d 255, 260 (1972) (whether agent had actual or apparent authority to waive policy provision excluding coverage for occupational injuries was factual issue); *see also Romero v. Dairyland Ins. Co.*, 111 N.M. 154, 803 P.2d 243 (1990). Given the realities of the insurance business in which applications and certificates describe complex rights and obligations, it is to be expected that the average person will depend upon the agent to explain everything. This is the way people buy insurance in the real world. We point out that an insurance company may protect itself in large part from claims such as have been asserted in this case through the improved training and supervision of its agents. The agent, of course, may be held responsible to the company for losses caused by unauthorized conduct.

{19} We also find that the court erred in granting summary judgment in favor of N.N. Investors concerning its assertion of material misrepresentations on Streeter's part. *See Prudential Ins. Co. of Am. v. Anaya*, 78 N.M. 101, 428 P.2d 640 (1967) (generally, insurer may rescind contract for insurance that would not have been issued but for applicant's misrepresentation). The affidavits before the court establish the existence of a question for the jury. We regard the evidence as susceptible to contrary inferences as to whether Streeter misrepresented his medical condition, *i.e.*, scoliosis, and much else of what the company says it later discovered. We first note that the answers in the questionnaire the agent filled out are internally inconsistent. N.N. Investors complains that Streeter answered "no" to questions 14(b) and 14(h). The agent nevertheless included a written explanation for the "no" answers to question 14. Explanations were required only for "yes" answers. Moreover, the fact of the 1980 spinal fusion was noted in the explanation for question 14. A reasonable inference from these facts is that the agent omitted the precise medical terminology which Streeter used to describe his congenital defect, or in some other fashion edited the information that Streeter provided him, contrary to the language in the forms that the answers on the application were "exactly those" related to the agent "with nothing left out."

{20} Additionally, we believe Streeter's physical appearance is relevant to the question of whether his abnormality was disclosed. His condition was readily apparent. Various medical reports in the court record suggest that the curvature of his spine and deformity of his appearance was quite severe. The records indicate he wore a back brace and that he had a very short torso and neck, so much so that the base of his chin rested upon the front of his chest. Certainly the agent might have inferred a connection between Streeter's 1980 spinal fusion and this appearance. Even if we assume, as the agent stated, that the agent did not question Streeter about his deformity out of a desire to avoid embarrassment, we do not think this reluctance should work to Streeter's disadvantage.

{21} Moreover, when an applicant gives sufficient information to alert an insurance company to his particular medical condition or history, the company is bound to make such further inquiry as is reasonable under the circumstances in order to ascertain the facts surrounding the information given. Whether and to what extent the company should be charged with "inquiry notice" may well be issues of fact to be resolved by the jury in deciding if the applicant has misrepresented his condition in applying for insurance. Here, it was for the jury to find whether the information provided to the agent was sufficient to alert the company to Streeter's serious spinal condition. If the company was sufficiently alerted to the serious spinal condition, it either should have availed itself of the opportunity to review the records made available to it by the applicant, or be charged with notice of the information in those records.

{22} We certainly cannot agree that the only use of medical records should be for the insurance company, once a claim has been filed, to sift through them for the purpose of claiming the applicant was somehow derelict in his duty to make a full disclosure at the time of his application for insurance. Streeter provided the name and telephone number of both his family physician and the surgeon who performed the 1980 spinal fusion. He signed a release authorizing N.N. Investors to obtain his medical records in the possession of these physicians. But the company made no effort to review those records prior to the filing of a claim for benefits. We cannot say that Streeter somehow misled the company as to the possible significance of the information in those records. His physical appearance and the notation regarding the 1980 spinal fusion indicate just the opposite.

{23} Regardless of whether an insured is covered under a contract for temporary insurance or a permanent policy, where the jury finds that the insurer has been given sufficient information to alert it to a serious medical condition, and the insurer has failed to investigate the records of that condition made available by the applicant, we hold the insurer is charged with the information in those records. *See Reserve Life Ins. Co. v. McGee*, 444 So. 2d 803, 816 (Miss. 1983) (Robertson, J., specially concurring). If the insurer undertakes an investigation of disclosed medical records after issuing a binder for temporary insurance, any information in those records that might cause the insurer to reevaluate its position may form the basis of a right to cancel the policy, prior to the time an insured files a claim for benefits. However, we believe any risk should be shifted to the insurer with respect to any loss that arises in the interim.

{24} Finally, N.N. Investors seems to equate Streeter's congenital defect, scoliosis, with pre-existing pulmonary disease. In this regard they claim that he failed to disclose: (1) a "restrictive pulmonary defect," (2) approximately a dozen incidents of hospitalization for treatment, (3) an incident of pulmonary compromise during the 1980 hospitalization for spinal fusion, and (4) treatment of pneumonia between 1961 and 1962. We think Ellingwood introduced sufficient evidence on each of these points to preclude summary judgment.

{25} A pulmonary disease specialist stated that nothing in Streeter's medical history revealed a pre-existing pulmonary or respiratory condition. The expert stated that scoliosis may result in smaller lung capacity but this is not in itself pulmonary disease. The expert also stated that the incident of pulmonary compromise in 1980 was explained as an adverse reaction to a narcotic medication given Streeter after the operation to fuse his spinal column. The condition cleared up when the drug was discontinued.

{26} Other affidavits showed the so-called hospitalizations for treatment of scoliosis were nothing more than a number of trips to the hospital for the adjustment of Streeter's back brace. Lastly, we agree with Ellingwood that little, if any, underwriting significance should be attributed to the fact that Streeter contracted pneumonia at about eighteen months of age. He suffered no further episodes until the time he died.

{27} In addition to the claims against defendant N.N. Investors, the trial court granted summary judgment in favor of the company's agent. On appeal, Ellingwood contends the agent's representations of immediate coverage, as well as the agent's negligence in filling out the application forms, show the existence of issues of material fact concerning a claim for negligence against the agent and his principal. Ellingwood's complaint based its negligence claim against the agent and N.N. Investors on purported violations of NMSA 1978, Section §59A-16-20 (Repl. Pamp. 1988) and NMSA 1978, Section §57-12-2(C) (Repl. Pamp. 1987). The first statute prohibits unfair claims practices knowingly committed with such frequency as to indicate a general business practice. The second statute involves specific examples of unfair or deceptive trade practices prohibited under that Section. Ellingwood asserted that the purported violations in both cases constituted negligence per se. At the trial court level the parties' argument in support of and in opposition to the summary judgment motion was restricted to the issues concerning asserted misrepresentations by Streeter, whether he suffered from a pre-existing condition, and the effective date of insurance coverage. Likewise, the trial court in its judgment addressed only these issues. We deem the negligence claims remain before the court on remand.

{28} For the above reasons, we reverse the entry of summary judgment entered on behalf of the defendants. We hold that genuine issues exist concerning whether the agent had the apparent authority to make a contract for temporary insurance and whether Streeter made material misrepresentations in his application.

{29} The entry of summary judgment is reversed.

{30} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1991-NMSC-016

Filing Date: February 11, 1991

Docket No. 18,882

LOUIE SALANDRE,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Frederick M. Mowrer, District Judge

Rothstein, Bennett, Daly, Donatelli & Hughes,
Martha A. Daly,
Santa Fe, New Mexico,

David C. Serna,
Albuquerque, New Mexico,

for Petitioner.

Tom Udall, Attorney General,
Gail MacQuesten, Assistant Attorney General,
Santa Fe, New Mexico,

for Respondent.

OPINION

RANSOM, Justice.

{1} We granted certiorari in this "speedy trial" case because the opinion of the court of appeals implicated the allocation of burden of proof recently addressed in *Zurla v. State*, 109 N.M. 640, 789 P.2d 588 (1990). In *Zurla* we overruled that part of *State v. Tartaglia,* 108 N.M. 411, 773 P.2d 356 (Ct. App.), *cert. denied*, 108 N.M. 318, 772 P.2d 352 (1989) (*Tartaglia I*), which appeared to place the burden of persuasion on the defendant to show actual prejudice resulting from delay deemed "presumptively prejudicial." *See also Work v. State*, 111 N.M. 145, 803 P.2d 234 (1990) (applying *Zurla*). The court of appeals relied on *Tartaglia I* in its opinion in this case, and, after careful review of the record in light of *Zurla*, we conclude the court of appeals erred. We reverse.

{2} On June 19, 1987, approximately fifteen minutes after leaving a dealership where he had bought a used motorcycle, Louie Salandre was stopped by a police officer for an alleged equipment violation. The police officer stated in her report that she instituted a search of Salandre's person and a leather tool pouch attached to the motorcycle. The officer stated she instituted the search after detecting about Salandre a strong odor that later, before a grand jury, she testified smelled "like a methamphetamine lab." In the police report she had said the odor "smelled like the white powdery substance" that she eventually found in a sealed zip lock bag contained in a grey, closed sports bag within the leather tool pouch. Subsequent testing of the white powder identified it as methamphetamine.

{3} The search of the motorcycle also revealed drug paraphernalia and weapons. Salandre was arrested. One day later he posted a $5,000 bond and was released. The police took his motorcycle to a wrecking yard for storage. Although no police hold was placed on the motorcycle, the police did impound its title papers.

{4} At the time of his arrest, Salandre was subject to parole restrictions for a previous conviction. Subsequent to his arrest, Salandre stopped reporting to his parole officer because he feared his parole would be revoked in light of the charges pending against him. In October 1987, after his arrest for another traffic violation Salandre's parole was revoked.

{5} On January 13, 1988, while still incarcerated on his parole revocation, Salandre was indicted for possession of a controlled substance with intent to distribute, possession of a firearm by a felon, possession of drug paraphernalia, and unlawfully carrying concealed weapons. He was arraigned on February 1, and was released from custody on February 11, 1988. Defense counsel filed several pretrial motions on February 19, including a motion to dismiss for violation of Salandre's speedy trial and due process rights, a motion to suppress the evidence obtained in the search, a motion to test the officer's ability to smell methamphetamine "under the same conditions and circumstances in which the alleged methamphetamine in this case was found," and a motion to order the release of the title to the motorcycle and to identify the wrecking yard where it was stored.

{6} The court granted this last motion after a hearing on April 5. That same day, the motorcycle mysteriously was stolen from the wrecking yard and left on bad tracks where a train ran over and destroyed it. At a hearing on the speedy trial motion on May 19, Salandre claimed the loss of the motorcycle prevented him from demonstrating the pretextual nature of the traffic stop and impaired his ability to test the officer's ability to smell the methamphetamine. Specifically, he claimed the destruction of the motorcycle prevented him from showing whether it had the type of defective equipment that would be visible to the officer, and thus impaired his ability to challenge the probable cause justifying the initial traffic stop. He also claimed the officer did not have probable cause to search because she could not have smelled the methamphetamine wrapped and concealed in the leather tool pouch on the motorcycle.

{7} Additionally, Salandre testified that, during the period when he was attempting to evade his parole officer, he stopped seeing his girl friend and generally felt unable to move about freely. He stated he hoped to resolve the charges against him before reporting back to his parole officer. He testified further that, after several months passed, he had begun to believe that he would not be indicted on the pending charges and, when asked how he felt about the charges continuing to drag on unresolved, he stated: "It is a burden to wait, on my mind, and it is slowing me down as far as my productivity, you know. There [are] things that I could be doing that I am not able to do."

{8} Salandre's parents testified their son was unable to find work during the periods before and after incarceration on the parole revocation, except for part-time work in connection with the family watch repair business. Salandre testified on cross-examination, however, that he had applied for only one position subsequent to his release on February 11, 1988. Salandre also testified that he had not held a full-time position since 1982.

{9} Testimony also was presented that, during the same general time period when he was arrested, Salandre had collaborated with his brother and father to produce and market a new type of weapon holster. Salandre claimed that, due to the bond restrictions on his movement, he was unable to attend a number of trade shows where he hoped to make business contacts. His parents testified, however, that most of these trade shows, if not all of them, took place while he was incarcerated on the parole revocation. Salandre's parents and fiancee testified that he had been unable to attend several weddings during the time he was incarcerated.

{10} The trial court found that the delay in prosecuting Salandre was unjustified and excessive, that Salandre had been prejudiced by the destruction of evidence, he had suffered anxiety and concern, and he had been subject to restrictions on his liberty. The court concluded that Salandre's sixth amendment right to a speedy trial had been violated and dismissed the charges against him. The State appealed and the court of appeals reversed.

{11} In deciding whether Salandre's right to a speedy trial had been violated, the court of appeals applied the four factor test of *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) length of

delay, (2) reasons for the delay, (3) assertion of the right, and (4) prejudice to the defendant. The court of appeals assumed for the sake of analysis that the eleven-month delay between Salandre's arrest and the hearing on his motion to dismiss was presumptively prejudicial. We take this opportunity to note our disapproval of the court's assumption on this point, as such an assumption may in another case result in unnecessary constitutional analysis. However, for reasons explained below we conclude that the delay in this case was presumptively prejudicial and triggered inquiry into the other *Barker v. Wingo* factors. We agree with the result reached by the court of appeals in weighing the first three factors in favor of Salandre, but not heavily. We disagree with the court's conclusion that the fourth factor, prejudice to the defendant, weighed against Salandre, and we disagree that on balance Salandre's right to a speedy trial was not violated.

{12} Attachment of the speedy trial right. The parties agree that Salandre's sixth amendment right to a speedy trial was triggered by his arrest. Nevertheless, we take this opportunity to review the test, first discussed in *Kilpatrick v. State*, 103 N.M. 52, 53, 702 P.2d 997, 798 (1985), for determining when the speedy trial right attaches.[1]

{13} The sixth amendment directs that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The right to a speedy trial is implicated when the putative defendant becomes an "accused." *United States v. MacDonald*, 456 U.S. 1, 6 (1982). The Supreme Court in *United States v. Marion*, 404 U.S. 307 (1971), examined the interests at work behind the speedy trial guarantee and, in so doing, explained the conditions under which a person becomes an accused:

> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on ball or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. . . . So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

Id. at 320.

{14} The Court went on to clarify that it would not "extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation." *Id.* at 321. The Court stated that indictment, or the actual restraints of arrest *and* holding for charges,[2] implicates the speedy trial guarantee. In determining whether restraints have been experienced by the putative defendant, our analysis cannot rely on formalistic procedural occurrences. *See United States v. Gouveia*, 467 U.S. 180, 197 (1984) (Stevens, J., concurring in judgment) (when a person is deprived of liberty in order to aid the prosecution in its attempt to convict him, and when the deprivation is likely to have the intended effect, that person is an accused); *see also Work v. State*, 111 N.M. 145, 149, 803 P.2d 234, 238 (1990) (Ransom, J., specially concurring) (interests

[1] Today we are filing an opinion in *Gonzales v. State*, 111 N.M. 363, 805 P.2d 630, *aff'g State v. Gonzales*, 110 N.M. 218, 794 P.2d 361 (Ct. App. 1990), in which we analyze the fourteenth and fifth amendment due process rights applicable to preaccusation delay. The due process guarantees examined in *Gonzales* are to be distinguished from the sixth amendment speedy trial rights discussed in this opinion.

[2] *See, e.g.*, SCRA 1986, 6-203 (probable cause determination to be made within twenty-four hours when arrest is without warrant and the person arrested has not been released).

protected by speedy trial right include more than the person's liberty interest). In the use of the term "actual restraints," we believe the Court evinced an approach sensitive both to deprivations of liberty and other relevant factors including harm to employment, financial resources and association, subjection to public obloquy, and creation of anxiety, all as described by the Supreme Court in *Marion*.

{15} Applying these principles to the instant case, we hold that Salandre became an accused upon arrest. Salandre was arrested and released on bond, the terms of which required personal court appearances and prohibited travel outside the state. Under those circumstances, Salandre suffered sufficient impairment of interests contemplated by the sixth amendment to require the state speedily to proceed to trial. *See United States v. Loud Hawk*, 474 U.S. 302, 311 n.13 (1986) (arrest and release on bail may trigger speedy trial guaranty); *Kilpatrick v. State*, 103 N.M. 52, 53, 702 P.2d 997, 798 (1985) (period of time after arrest and release on surety bond, but prior to indictment, must be considered in evaluating speedy trial claim). Additionally, there is evidence of harm to employment, financial resources, and associations, as well as anxiety arising out of the arrest. While these factors are relevant, we later will describe their significance in another context.

{16} Relationship between delay and prejudice and the recognition of presumptive prejudice arising from undue delay. In light of our opinion in *Zurla*, we requested the parties in the present case to brief the questions of whether the eleven-month delay was presumptively prejudicial, what factors should enter into the determination of a presumptively prejudicial period of time, and whether the other three *Barker v. Wingo* factors affect this determination. *Zurla* recognized that a determination of whether delay is presumptively prejudicial requires consideration of (at least) the length of time between arrest or indictment and prosecution, the complexity of the charges, and the nature of the evidence against the accused. 109 N.M. at 642-43, 789 P.2d at 590-91.

{17} The State, while voicing continued disagreement with our opinion in *Zurla*, argues that if "presumptively prejudicial delay" is considered to create a presumption of prejudice, factors other than those recognized in *Zurla* may have to be considered because the "mere passage of time is a poor indicator of whether a defendant's rights have been prejudiced." The State draws support from the recent dissent by Judge Hartz in *State v. Tartaglia*, 109 N.M. 801, 808, 791 P.2d 76, 83 (Ct. App. 1990) (Hartz, J., dissenting) (*Tartaglia II*), in which he suggested:

> If "presumptive prejudice" meant "probable prejudice," then a court would not start to apply *Barker's* four-factor analysis until it had determined that the delay was sufficiently long that the defendant probably suffered substantial prejudice. Such a result would excessively limit the application of the right to a speedy trial. After all, a defendant may have actually suffered prejudice even though the existence of prejudice would not be a probable result of the delay in itself.

{18} By too narrowly construing the meaning of the presumption recognized in *Zurla*, this argument in essence poses a false dilemma. As counsel for Salandre points out, protecting against prejudice to the defendant at trial is a primary focus of analysis under the due process clause. By contrast, the sixth amendment right to a speedy trial also protects against interference with a defendant's liberty, disruption of employment, curtailment of associations, subjection to obloquy, and creation of undue anxiety. *Kilpatrick v. State*, 103 N.M. 52, 53, 702 P.2d 997, 998 (1985). "Presumptively prejudicial delay" refers to prejudice to the fundamental right to a speedy trial, not to specific prejudice covered by the fourth element, much less simply to impairment of the defense at trial. Indeed, we observed in *Zurla*, 109 N.M. at 646, 789 P.2d at 594, once the defendant demonstrates existence of presumptively prejudicial delay, "the burden of persuasion rests with the state to demonstrate that, on balance, the defendant's speedy trial right was not violated."

{19} Moreover, *Barker v. Wingo* recognized that the speedy trial right is "generically different" from other constitutional rights because it protects societal interests in the prompt prosecution of criminal cases that "exist[] separate from, and at times in opposition to, the interests of the accused." 407 U.S. at 519. Indeed, when the state has delayed trial unnecessarily in neglect of its role as the representative of society's interests, *see id.* at 527, a defendant's speedy trial claim becomes, in effect, the vehicle by which society's interests may be vindicated. It is in this light that we understand the Supreme Court's acceptance of a "balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.* at 530. If the only relevant consideration was whether delay had prejudiced the defendant at trial, it would be difficult to explain the prominence given in this balancing test to the factors of reason for the delay and assertion of the right.

{20} While no exact correlation may exist between delay and prejudice to the defendant at trial, in many cases, if not in most, the passage of time will affect the probability that a defendant's constitutionally protected interests have suffered. *See Zurla*, 109 N.M. at 648, 789 P.2d at 596 (quoting *Barker v. Wingo*, 407 U.S. at 533 (Brennan and White, J.J., concurring)) (most defendants will suffer some prejudice to constitutionally protected interests in a speedy trial case); *Work v. State*, 111 N.M. 145, 148, 803 P.2d 234, 237 (1990) (in some cases delay may be so lengthy that the presumption of prejudice becomes "well-nigh conclusive," citing *United States v. Avalos*, 541 F.2d 1100, 1116 (5th Cir. 1976)). However, the law recognizes presumptions because of policy reasons as well as because of empirical probabilities. *See generally McCormick on Evidence* 343 (E. Cleary 3d ed. 1984). Policy reasons that lie at the heart of the speedy trial guarantee also support shifting the burden of persuasion to the state when it has delayed unnecessarily. It is the state that bears the primary responsibility to bring cases to trial within a reasonable time. *Zurla*, 109 N.M. at 646, 789 P.2d at 594. When a defendant makes a preliminary showing that the state has failed in its responsibilities, we believe it appropriate to require the state to demonstrate affirmatively that, on balance, the interests protected by the right to a speedy trial have not been compromised. As discussed below, however, the preliminary question of whether the presumption exists should be distinguished from the question of its effective weight as applied to the remaining factors of the balancing test.

{21} Threshold showing of presumptively prejudicial delay is determined by consideration of length of delay and complexity of the case; eleven-month delay in the present case requires further inquiry. In deciding what factors are relevant to the preliminary showing of presumptively prejudicial delay, we find persuasive Salandre's argument that inquiry at this stage of a speedy trial claim into the remaining three factors would tangle the courts needlessly in consideration of the minutiae of a case prior to the invocation of the full balancing test. This would, in turn, seriously dilute the usefulness of the preliminary showing as a mechanism for screening out frivolous claims. A primary purpose of such a showing is "to provide the courts and the parties with a rudimentary warning of when speedy trial problems may arise. . . . Length of the delay acts as a rough measure of whether further inquiry is warranted." *State v. Curtis*, 241 Mont. 288, 300, 787 P.2d 306, 313-314 (1990) (rejecting consideration of how much of the delay caused by the state and how much caused by defendant in determination of whether delay is presumptively prejudicial); *accord Grissom*, 106 N.M. at 562, 746 P.2d at 668. While a global inquiry into the other three *Barker v. Wingo* factors undoubtedly would serve as a better initial indicator of those cases in which a speedy trial violation actually was present, we are satisfied that consideration of the length of the delay, complexity of the charges, and nature of the evidence adequately serves this screening function.

{22} As a matter of public policy, we believe it useful to set broad guidelines for determination of whether delay should be considered presumptively prejudicial in particular types of cases. *Barker v. Wingo* recognized that, in a jurisdiction with a six-month rule such as New Mexico,

a nine-month delay may be unacceptable under certain circumstances. 407 U.S. at 528; *see* SCRA 1986, 5-604 (six-month rule); *cf. State v. Tafoya*, 91 N.M. 121, 124, 570 P.2d 1148, 1151 (Ct. App. 1977) (suggesting that nine-month delay in larceny case was presumptively prejudicial). We are of the opinion that nine months marks the minimum length of time that may be considered presumptively prejudicial, even for a case such as this involving simple charges and readily-available evidence.[3]

{23} Therefore, we find the eleven-month delay between the time Salandre was arrested and the hearing on his motion to dismiss of sufficient concern that the State should be required to justify continued prosecution of the charges against him.[4] This case involves simple drug and weapons charges, and the linchpin of the State's case was the testimony of the arresting officer, which was available from the day of Salandre's arrest. The State does not dispute that its investigation in this case was complete within eleven days of the arrest. We hold the eleven-month delay to be presumptively prejudicial.

{24} Presumptively prejudicial delay and shifting the burdens of persuasion and production. In *Zurla* we recognized that, once a defendant has demonstrated presumptively prejudicial delay, the burden of persuasion shifts to the state to show, on balance, that defendant's speedy trial right was not violated. 109 N.M. at 646, 789 P.2d at 594. The State argues in the present case that the nature of the burden it must carry is unclear. We therefore take this opportunity to clarify the principles applicable to this and other speedy trial cases.

{25} In *Work*, subsequent to our opinion in *Zurla*, a majority of this Court adopted the position that the state can discharge its burden of persuasion as to specific elements by showing good reasons for the delay, failure by the defendant to timely assert his right or acquiescence in the delay, or an absence of actual prejudice to the defendant's constitutionally protected interests. *Work*, 111 N.M. at 148, 803 P.2d at 237. Conversely, it may be said, the presumption *guarantees* a dismissal of the charges only in face of the state's failure to advance either evidence or argument in support of its burden to show there has been no violation of the defendant's speedy trial right. In the face of neither evidence nor argument, courts must presume: (1) there is no good reason for the lengthy delay; (2) the defendant timely asserted his right, *cf. Barker v. Wingo*, 407 U.S. at 529 (while defendant has some responsibility to assert a speedy trial right, and assertion of right is entitled to great evidentiary weight, defendant cannot be said to have waived the right through silence); and (3) the delay worked prejudice against the defendant's constitutionally protected interests.

{26} Either party may go forward with evidence relevant to the balancing test. The defendant may bear a burden of producing some evidence to corroborate claims of prejudice pursuant to the fourth prong of the test, but the effect of failure to produce such evidence depends on factors such as the actual length of delay and the arguments and evidence advanced by the state. Less weight must be given the presumption as applied to the fourth prong when supported by no evidence other than the length of delay itself (and the state may overcome the presumption with evidence to the contrary, just as the

[3] At the other end of the spectrum of cases, we are unaware of any New Mexico case that has marked the minimum length of time necessary to trigger the speedy trial analysis for complex cases. We note, however, that in *Grissom* the court of appeals held sixteen months presumptively prejudicial in a complex conspiracy and racketeering case. 106 N.M. at 561-62, 746 P.2d at 667-68. We believe that for complex cases a period of fifteen months after the defendant becomes an "accused" should provide adequate time for the state to marshall its resources and proceed to trial. Accordingly, we believe trial courts should treat delay of fifteen or more months in such cases as requiring further inquiry. Twelve months for cases of intermediate complexity would be appropriate.

[4] The State argued before the court of appeals that the time between Salandre's speedy trial motion and the hearing should not be counted, as the delay during this time was attributable to his attorney's pretrial preparation. Under the rule announced today, however, we consider this factor under our analysis of reasons for the delay, not in determining the length of delay.

defendant may strengthen the presumption with corroborating evidence).[5]

{27} As we stated in *Work*, "if neither party comes forward with facts, the probability of prejudice' will remain just that—a probability; but it may have greater or lesser significance in the balancing process depending on the length of the delay and the weights assigned to the other factors." 111 N.M. at 148, 803 P.2d at 237 (citations omitted). When the state has delayed long past the time considered presumptively prejudicial, its burden to show on the record that defendant's right to a speedy trial was not violated becomes correspondingly heavier.[6] Conversely, a delay just long enough to trigger the balancing test will have a smaller practical effect on the overall balancing.

{28} We stress, however, that we anticipate both parties will seek to develop the facts at the trial court level to corroborate or rebut specific claims of prejudice. Moreover, regardless of whether the state or the defendant prevails on a particular factor, "courts [still] must . . . engage in a difficult and sensitive balancing process" in making a final determination. *Zurla*, 109 N.M. at 642, 789 P.2d at 590 (quoting *Barker v. Wingo*, 407 U.S. at 533). This balancing process should not be done mechanically, and a particularly strong showing on one factor by either party may be dispositive under the facts of a particular case. On appeal, "we now independently balance the factors considered by the trial court in deciding whether a speedy trial violation has taken place." *Id.* at 642, 789 P.2d at 590; *see also State v. Grissom*, 106 N.M. 555, 561, 746 P.2d 661, 667 (Ct. App.), *cert. denied*, 106 N.M. 439, 744 P.2d 912 (1987).

{29} Defendant did not suffer oppressive pretrial incarceration or undue anxiety and concern. The district court found Salandre had been subjected to restraints on his liberty interests and had suffered anxiety and concern. We disagree with whether the same constituted "actual restraints."[7] As the State argued before the court of appeals, the parole restrictions placed on Salandre before his arrest on the charges at issue in this case were more severe than those placed on him as a result of the bond. He apparently lived under the restrictions created by the bond for only about one month following his release from incarceration on the parole violation. This does not amount to oppressive restraint.

{30} Moreover, although *Zurla* held that the loss of the possibility of concurrent sentences may constitute an aspect of oppressive pretrial incarceration, 109 N.M. at 645, 789 P.2d at 593, in that case the defendant was incarcerated on

[5] While it may be feared that placing the burden of persuasion on the state as to the prejudice prong places the state in the unfair position of proving a negative, this is not the case. When the defendant has made specific allegations of prejudice, circumstantial evidence may be presented to demonstrate the improbability of the allegations. For example, as discussed below, the State in this case argued that, regarding Salandre's defense that the original traffic stop was pretextual in nature, records from the motorcycle dealership could have provided an adequate substitute for the motorcycle itself. Had the State introduced these records, they well may have demonstrated the truth of this contention and thus may have established that there was no impairment to Salandre's defense in this regard. Additionally, when specific allegations are made that do not constitute prejudice to the defendant's constitutionally protected interests, or when no specific allegations are advanced at all, any possibility of prejudice to be inferred from the existence of the delay itself well may fall to shift significantly the overall balance of the remaining factors. Moreover, in such cases the state still may present evidence to show, for example, that the defendant has displayed no undue anxiety, that the evidence likely to be relied upon by the defendant at trial has been memorialized, or that likely defense witnesses do not report any significant impairment of their memory, etc. In any event, except in extraordinary cases, we do not anticipate that "presumed prejudice" as applied to the fourth prong will be dispositive absent specific corroboration by the defendant. In this sense, the defendant in the majority of cases will, practically speaking, have a burden of producing evidence to corroborate the existence of such prejudice.

[6] The reasons for the delay and the defendant's assertion of his right also may affect analysis of the prejudice prong of the analysis. For example, as recognized in *Zurla*, early and frequent assertions of the right are indicative of the probable extent to which the defendant's constitutionally protected interests have suffered because of the delay, even in the absence of independent corroborating evidence of such prejudice. 109 N.M. at 644, 789 P.2d at 592.

[7] Although the court of appeals concluded that Salandre waived his argument regarding impairment of his liberty interests, our review of his brief reveals that he did raise this issue, albeit tangentially to his claim of anxiety and concern. We therefore consider both claims.

the parole revocation for sixteen months while awaiting trial on the pending charges. Here, Salandre actively avoided facing a revocation hearing for several months, and was incarcerated for less than five months before being released. Only eight months passed from the date of his arrest to his release on the parole revocation. Since the record in this case establishes that Salandre's release occurred before the delay became inordinate, and since he would have been released earlier but for his attempts to avoid parole revocation, we conclude that he did not suffer loss of the possibility of concurrent sentencing because of lengthy delay in bringing the pending charges to trial. *See Grissom*, 106 N.M. at 563, 746 P.2d at 669 (when documentary evidence was destroyed before delay became inordinate, loss of evidence did not constitute prejudice); *cf. Zurla*, 109 N.M. at 648, 789 P.2d at 596 (when record on appeal failed to establish whether loss of testimony of defense witnesses was due to inordinate delay, State failed to rebut presumption of prejudice simply by pointing to the defendant's failure to establish such a connection).

{31} While we agree with the trial court that Salandre suffered some anxiety and concern, we hold that the anxiety and concern suffered did not substantially tip the prejudice prong in Salandre's favor. Salandre testified that the pending charges hampered his business associations and disrupted his relationship with his fiancee. However, most of Salandre's claims of anxiety and concern grow out of his status as an ex-felon, and his precarious parole situation. Admittedly, these claims stem in some sense from the arrest and release but, because the record permits an equal inference that those claims arose from Salandre's parole concerns during the four months preceding revocation, we accord them lesser weight. Additionally, Salandre did not testify that his anxiety and concern extended for an unacceptably long period. We conclude that the State has carried its burden to show that Salandre suffered no undue anxiety and concern.

{32} We pause here to express our disagreement with the language in *Grissom*, 106 N.M. at 564, 746 P.2d at 670, purportedly requiring a showing of greater anxiety and concern than that attending most criminal prosecutions. We believe that standard is unworkable. It raises the possibility of protracted and unnecessary expert testimony concerning the normal levels of anxiety and concern suffered by an accused. Moreover, that test requires nebulous judicial comparison of an accused's anxiety and concern in a particular case with the established norm. The operative question is whether the anxiety and concern, once proved, has continued for an unacceptably long period. It is for the court to determine whether the emotional trauma suffered by the accused is substantial and to incorporate that factor into the balancing calculus.

{33} State has failed to establish that defense was unimpaired. The district court found Salandre "made a sufficient showing of prejudice . . . including the destruction of evidence necessary for the defense at trial and in pre-trial motions during the period of delay attributable to the State." At the hearing on his speedy trial motion, Salandre made two claims that his defense was impaired because of the destruction of the motorcycle and the leather pouch. As acknowledged by the State in its brief in chief before the court of appeals,' the defense wanted to use the bike to determine whether it had defective equipment justifying Mr. Salandre's traffic stop, and whether the arresting officers could smell the drugs that were found in containers on the bike." Because we hold in defendant's favor on the first issue, we do not reach the second.

{34} Here, unlike Salandre's claim regarding oppressive pretrial incarceration stemming from his parole violation, the evidence shows the existence of a nexus between the undue delay in the case and the prejudice claimed. As noted by Judge Chavez in his court of appeals dissent, despite Salandre's motion of February 19, 1988, to have the documents of title to the motorcycle released, the State failed to act until ordered to do so by the court on April 5. The motorcycle was destroyed the same day. The period of time during which the delay in this case became inordinate was the period during which the State refused to release these documents.

{35} The State argued on appeal that the motorcycle was not necessary to the defense. The State points out that the motorcycle had been in the possession of the dealer until approximately fifteen minutes before Salandre's arrest, and contends that "business records, or the testimony of Cycle West personnel could have established the condition of the bike at the time of the arrest." However, no evidence has been presented that those business records actually were available. Based on the evidence, we cannot say that the State has shown the nonexistence of prejudice stemming from the destruction of the motorcycle to be less likely than the existence of such prejudice. We therefore conclude the State has failed to carry its burden of persuasion on this factor.

{36} *Conclusion.* This is a close case. The length of delay and reasons for delay do not suggest that this is a case in which the State has acted with intentional disregard of, or "indifference" to, defendant's right to a speedy trial. *Cf. Zurla*, 109 N.M. at 644, 789 P.2d at 592. Nevertheless, because the delay is long enough to be presumptively prejudicial and the State offers no excuse or justification for the delay, we must weigh these two factors in defendant's favor. Defendant's assertion of his right was timely and this also weighs somewhat in his favor. Because the State failed to carry its burden of persuasion that there was no impairment of the defense, we conclude the fourth prong of the analysis weighs slightly in Salandre's favor as well. Although the extent of prejudice is slight, and might not justify dismissal of the charges standing alone, on balance we must conclude a speedy trial violation has taken place. Accordingly, we reverse the court of appeals and remand to the district court for entry of an order dismissing the case.

{37} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1991-NMSC-043

Filing Date: May 1, 1991, As Corrected

Docket No. 18,974

RON SWAFFORD,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Fred T. Hensley, District Judge

Robert Jacobs,
Taos, New Mexico,

for Petitioner.

Tom Udall, Attorney General,
Anthony Tupler, Assistant Attorney General,
Santa Fe, New Mexico,

for Respondent.

OPINION

RANSOM, Justice.

{1} Ron Swafford was convicted in the district court on one count of third-degree criminal sexual penetration, NMSA 1978, Section 30-9-11(C) (Repl. Pamp. 1984), one count of incest, NMSA 1978, Section 30-10-3 (Repl. Pamp. 1984), one count of aggravated assault with intent to commit a felony, NMSA 1978, Section 30-3-3 (Repl. Pamp. 1984), and one count of false imprisonment. NMSA 1978, Section 30-4-3 (Repl. Pamp. 1984). Following an unsuccessful appeal, *Swafford v. State*, 109 N.M. 132, 782 P.2d 385 (Ct. App.), *cert. denied*, 109 N.M. 54, 781 F.2d 782 (1989), Swafford filed a pro se petition for post-conviction relief pursuant to SCRA 1986, 5-802. The motion was summarily dismissed by the district court. We granted certiorari under SCRA 1986, 12-501 to address important constitutional questions.[1]

{2} Swafford argues that (1) his conviction and sentence for assault with intent to commit a felony merged with criminal sexual penetration, and (2) it was error for the trial court to aggravate sentences based on Swafford's blood relationship to the victim and on lack of remorse. He also asks us to revisit whether separate consecutive sentences for incest and criminal sexual penetration violate the double jeopardy prohibition against multiple punishments. The central question we address today is under what circumstances a criminal defendant can be charged, tried, and convicted of multiple statutory offenses in a single trial without running afoul of the double jeopardy clause.[2]

{3} *Essential Facts.* On June 5, 1987, the half sister of Ron Swafford arrived for a short visit in Clovis, New Mexico. She stayed with Swafford's parents, and on June 7 she and Swafford spent the evening at home drinking. She went to bed at

[1] Although the issues presented in Swafford's petition for post-conviction relief appear to have been raised for the first time in this collateral proceeding, we nevertheless granted certiorari to consider the questions implicated by the allegedly unconstitutional sentences. We are reluctant to issue certiorari on issues that could have been, but were not, raised on direct appeal, even where the issues raise important constitutional rights. *State v. Gillihan,* 86 N.M. 439, 524 P.2d 1335 (1974). However, sentences the court is without legislative authorization to impose well may implicate the power of the court to have so acted. It is for this fundamental reason, coupled with the important constitutional questions raised, that we granted certiorari in this case.

[2] The multiple punishment prohibition reaches not just cumulative sentences for the same offense, but multiple convictions for the same offense as well. *See State v. Pierce,* 110 N.M. 76, 86-87, 792 P.2d 408, 418-19 (1990) (where the legislature has not authorized multiple punishments for the same offense, the state may charge separate offenses, but the convictions cannot stand).

approximately 3:30 a.m. and was awakened by Swafford pulling on a rope he had tied around her wrist. Frightened and confused, she asked Swafford what he was doing. He responded violently, striking and choking her several times as she attempted to repel his attack. He succeeded in subduing her and then tied her arms and legs to the bed. According to the victim, Swafford then threatened her, stating "he would do everything to her that he always wanted to do to a girl that was tied up." He was charged with having inserted a candle, and then his penis, into her vagina.

{4} On August 2, 1988, the jury acquitted Swafford on one count of third-degree criminal sexual penetration, relating to penetration with the candle, but found him guilty on all other counts as above described. He was sentenced to terms of four years each on the third-degree criminal sexual penetration, incest, and aggravated assault charges, and to two years on the false imprisonment charge. The court ordered the terms to run consecutively, for a total sentence of fourteen years.

{5} Swafford first contends that separate, consecutive sentences for third-degree criminal sexual penetration and incest are violative of the double jeopardy protection against multiple punishments for the same offense. In particular, Swafford urges that because the rape and incest arose out of the same act of sexual intercourse each offense necessarily includes the other and his convictions must merge for sentencing. We disagree, and we take this opportunity to make clear the applicable fifth amendment test for analyzing claims of multiple punishments.

{6} *Multiple punishments.* The double jeopardy clause of the fifth amendment, made applicable to the states by the fourteenth amendment due process clause, *Benton v. Maryland*, 395 U.S. 784 (1969), provides: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb" U.S. Const. amend. V.[3] In an oft-repeated passage, the Supreme Court stated a tripartite model of the double jeopardy clause:

> 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.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted). In *Grady v. Corbin*, 495U.S. 508, 110 S. Ct. 2084 (1990), the Court recently differentiated the analysis applicable to multiple punishment cases from that applicable to successive prosecutions. Successive prosecutions, whether following acquittal or conviction, implicate double jeopardy values beyond those inherent in multiple punishment cases:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . ." Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the same offenses charged.

Id. at 518, 110 S. Ct. at 2091-92 (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)). These concerns in the multiple prosecution context led the Court to adopt a heightened inquiry. *Id.* at 515-524, 110 S. Ct. at 2090-95.

[3] Throughout this case Swafford has used the term "double jeopardy" without specifically referring to either the federal or state double jeopardy clauses. Although we believe a simple claim of "double jeopardy" is sufficient to trigger both the federal and state guarantees, nonetheless we find no suggestion in the briefs of counsel nor in the reported New Mexico case law that the New Mexico double jeopardy clause, in the multiple punishment context, provides further protection than that afforded by the federal clause as interpreted by relevant federal case law. Accordingly, we address Swafford's claim under federal multiple punishment doctrine.

{7} On the other hand, the criminal defendant facing multiple convictions and punishments in the same trial possesses limited expectations. According to the Court, his sole concern is the possibility of an enhanced sentence. *Id.* at, 110 S. Ct. at 2091. The Court stated, "In [the multiple punishment] context, 'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'" *Id.* at, 110 S. Ct. at 2091 (quoting *Missouri v. Hunter*, 459 U.S. 359 (1983)). In that context, the Court has employed as a "rule of statutory construction" the traditional *Blockburger* test for legislative intent, as articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), focusing upon the elements of the statutes at issue. *Corbin*, 495 U.S. at /516, 110 S. Ct. at 2091.

{8}—*Federal multiple punishment doctrine.* The pivotal question in multiple punishment cases is whether the defendant = #8 is being punished twice for the *same offense*. That question, however, has different facets. First are the unit of prosecution cases. In those cases the defendant has been charged with multiple violations of a single statute based on a single course of conduct. The relevant inquiry in those cases is whether the legislature intended punishment for the entire course of conduct or for each discrete act. *See, e.g., Ebeling v. Morgan*, 237 U.S. 625 (1915) (upholding six convictions of defendant based upon defendant's cutting into six mail bags in a single transaction because Congress intended punishment for each act of damage to a mail bag). Later cases have established a presumption of lenity that, absent an express indication to the contrary, the legislature did not intend to fragment a course of conduct into separate offenses. *See Bell v. United States*, 349 U.S. 81, 82-83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."). New Mexico courts have followed that approach. *See Herron v. State*, 111 N.M. 357, 805 P.2d 624 (1991) (criminal sexual penetration); *State v. Edwards*, 102 N.M. 413, 696 P.2d 1006 (Ct. App. 1984) (practicing law without a license).

{9} Second are the double-description cases with which we are concerned today. In those cases, the defendant is charged with violations of multiple statutes that may or may not be deemed the same offense for double jeopardy purposes. The Supreme Court has fashioned a double jeopardy analysis in which the polestar guiding courts is the legislature's intent to authorize multiple punishments for the same offense. Much of the uncertainty concerning the Supreme Court's analysis of multiple punishment questions concerns the relative importance the component parts of the analysis enjoy and in some instances the proper subject of each component part.

{10}—*The Blockburger inquiry.* The *Blockburger* test, or the elements test, formulated most clearly in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), provides that:

> [w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact the other does not.

While there was at first some uncertainty about the proper scope of the *Blockburger* inquiry, later cases clearly have stated that the proper inquiry focuses upon the elements of the statutes in question—the evidence and proof offered at trial are immaterial. *See, e.g., Corbin*, 495 U.S. at 521 n. 12, 110 S. Ct. at 2093 n. 12 (*Blockburger* test has nothing to do with the evidence presented at trial).[4]

[4] *Whalen v. United States,* 445 U.S. 684 (1980), is often cited as an example of departure from the strict elements application of *Blockburger*. In *Whalen*, the Court first faced the multiple punishment problem in the context of a compound statute and predicate offense. The defendant was convicted of murder perpetrated in the course of rape. The felony murder statute at issue listed several predicate felonies of which rape was but one. Thus, had the Court applied the *Blockburger* test to the rape statute and the entire felony murder statute, it would have been led to the conclusion that rape and felony murder each require proof of a fact that the other does not. Proof of felony murder need not necessarily require proof of rape—robbery, arson, housebreaking while armed, or mayhem also would suffice as predicate offenses. The majority in *Whalen*, however, applied the *Blockburger* test only to that

{11}—*The role of legislative intent.* While early manifestations of the *Blockburger* test indicated that the test well may have been a constitutional test for determining the sameness of two offenses, later decisions by the Court have retreated substantially from that position. Beginning with *Prince v. United States*, 352 U.S. 322 (1957) (examining legislative history of Federal Bank Robbery Act for indicia of intent to permit multiple punishment), the Court repeatedly has stated that the question of whether punishments are unconstitutionally multiple depends on whether the legislature has authorized multiple punishment. *See, e.g., Whalen v. United States*, 445 U.S. 684, 688-89 (1980). Indeed, where the legislature has explicitly authorized multiple punishment the judicial inquiry is at an end, multiple punishment is authorized and proper, and the *Blockburger* test is irrelevant. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983).

{12} The necessary corollary to the focus on legislative intent is that the *Blockburger* test is not a constitutional rule, but merely a canon of construction used to guide courts in deciphering legislative intent. *Whalen*, 445 U.S. at 691 (*Blockburger* is a rule of statutory construction). The rationale underlying the *Blockburger* test is that if each statute requires an element of proof not required by the other, it may be inferred that the legislature intended to authorize separate application of each statute. Conversely, if proving violation of one statute always proves a violation of another (one statute is a lesser included offense of another, *i.e.,* it shares all of its elements with another), then it would appear the legislature was creating alternative bases for prosecution, but only a single offense.

{13} Yet another canon of construction occasionally employed by the Court identifies the social evils sought to be addressed by each offense. *See, e.g., United States v. Woodward*, 469 U.S. 105, 109 (1985) (currency reporting and false statement statutes directed to separate evils); *Albernaz v. United States*, 450 U.S. 333, 343 (1981) (separate statutes proscribing conspiracy to import and to distribute marijuana are directed to separate evils). This method assumes the legislature would intend statutes to apply separately only if each statute prohibits a distinct evil.[5] Finally, the Court has looked to the language, structure, and legislative history of statutes to divine legislative intent. *Garrett v. United States*, 471 U.S. 773, 779-86 (1985) (language, structure, and legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970 show that Congress intended a continuing criminal enterprise offense to be a separate offense punishable in addition to the predicate offenses).

{14}—*The rule of lenity.* The rule of lenity, first announced by the Supreme Court in connection with single-statute unit of prosecution cases, raises a presumption against multiplying offenses:

> When Congress has the will it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to

portion of the statute incorporating rape as a predicate offense—effectively treating the felony murder statute as six distinct murder statutes, each with its own predicate offense. The result of that construction was that rape was a lesser included offense of felony murder. Justice Rehnquist accused the majority of distorting the *Blockburger* test by incorporating a fact-dependent analysis. It is clear, however, that the Court did not apply the *Blockburger* test to the evidence adduced at trial, rather the Court focused only upon that provision of the statute under which the defendant was charged in the indictment. Read in context, the majority's approach in *Whalen* perhaps may be understood as an exception to traditional analysis designed to cope more effectively with the complicated problem of compound and predicate offenses. *See also Pandelli v. United States*, 635 F.2d 533, 537 (6th Cir. 1980) ("[A] criminal statute written in the alternative creates separate offenses for each alternative and should therefore be treated for double jeopardy purposes as separate statutes would.").

[5] Justice Rehnquist has suggested that the *Blockburger* test "could be viewed as nothing but a rough proxy for such analysis, since, by asking whether two separate statutes each include an element the other does not, a court is really asking whether the legislature manifested an intention to serve two different interests in enacting the two statutes." *Whalen*, 445 U.S. at 713-14 (Rehnquist, J., dissenting). While the *Blockburger* test may implicate some of the same concerns as a separate evils analysis, as we hold below, we think separate analysis of the social evils proscribed by different statutes is necessary to a clear understanding of legislative intent.

> make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.

Bell v. United States, 349 U.S. 81, 83 (1955).

{15} While application of the rule of lenity to single-statute unit of prosecution cases is well established, *see, e.g., Ladner v. United States*, 358 U.S. 169, 177 (1958) (where two charges are brought based upon injuries to two persons caused by single discharge of gun, Court applies rule of lenity where congressional intent unclear), application of the rule to double definition cases has been spotty. The Court paradoxically appears willing to invoke a presumption of lenity only under circumstances in which the statutes at issue, their legislative history, and their structure raise an implicit indication of lenity. *Compare Jeffers v. United States*, 432 U.S. 137, 156 (1977) (presumption of lenity arises after examination of legislative history and structure of statutes reveals an unrebutted indication of lenity) *and Prince v. United States*, 352 U.S. 322 (1957) (same) *with Gore v. United States*, 357 U.S. 386, 391 (1958) (Congress has manifested an attitude of harshness, not lenity). Thus, according to the Court, the presumption of lenity does not arise as a presupposition of the constitutional proscription of multiple punishment in a single trial, but instead arises only after the language, structure, and legislative history of the statutes at issue raise an indication of leniency.

{16}—*New Mexico multiple punishment theory.* New Mexico multiple punishment theory is marked by a profusion of terms and tests—each with its own formulaic approach—purportedly serving different double jeopardy or policy interests. Perhaps more importantly, courts of this state have failed to distinguish between successive prosecution and multiple punishment cases. The result has been doctrinal confusion and occasionally inconsistent results. The cases roughly can be categorized by the tests employed.

{17}—*The "same evidence" test.* New Mexico double jeopardy theory has its genesis both in the common law and in the constitutional provision. In *Owens v. Abram*, 58 N.M. 682, 274 P.2d 630 (1954), *cert. denied*, 348 U.S. 917 (1955), this Court established a test for determining whether the New Mexico double jeopardy clause bars a second prosecution on a related statutory offense. As stated by the Court, "the test is whether the facts offered in support of one [offense] would sustain a conviction of the other. If either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing." *Id.* at 684, 274 P.2d at 631-32. The Court explained, "'With respect to double jeopardy, it is essential, under common law and various constitutional provisions declaratory thereof, that the second prosecution be for the same act and crime both in law and fact for which the first prosecution was instituted. . . .'" *Id.* (quoting *In re Santillanes*, 47 N.M. 140, 153, 138 P.2d 503, 511 (1943)).

{18} Perhaps because of the ambiguity in the Court's statement of the test, *i.e.,* whether the inquiry focuses upon the evidence adduced at trial, or upon the statutory elements alone, the same evidence test has been applied differently by the courts. *Compare State v. Tanton*, 88 N.M. 333, 335, 540 P.2d 813, 815 (1975) (comparison of facts offered at trial in support of convictions) *with State v. Stephens*, 93 N.M. 458, 463, 601 P.2d 428, 433 (1979) (comparison of elements). Adding to the uncertainty is the wholesale application of the same evidence test to multiple punishment cases, without explanation, despite the same evidence test having been adopted by *Abram* in the context of successive prosecution cases. *See, e.g., Stephens*, 93 N.M. at 458, 601 P.2d at 433 (multiple convictions and punishments under two statutes); *State v. Smith*, 94 N.M. 379, 380-81, 610 P.2d 1208, 1209-10 (1980) (multiple convictions and punishments under single statute).

{19}—*The necessarily involved test.* In *State v. Quintana*, 69 N.M. 51, 364 P.2d 120 (1961), this Court first addressed the multiple punishment

question. In that case the defendant was convicted in the same trial of armed robbery and grand larceny arising out of a single criminal episode. The Court vacated the grand larceny sentence concluding that under the evidence adduced at trial the double jeopardy clause of the New Mexico Constitution required merger of the sentence for grand larceny and the armed robbery sentence. With no explanation of the analysis involved, the Court articulated the test as "'whether one crime *necessarily involves* another.'" *Id.* at 58, 364 P.2d at 124 (quoting *Commonwealth ex rel. Moszczynski v. Ashe*, 343 Pa. 102, 104, 21 A.2d 920, 921 (1941)). The Court stated that the offenses merged because "the offenses arose out of the same transaction, were committed at the same time, and were part of a single criminal act." *Id.* at 59, 364 P.2d at 125. The concluding statement strongly hinted that the analysis was focused on the defendant's conduct rather than the elements of the statutes.[6] *See, e.g., State v. Blackwell*, 76 N.M. 445, 415 P.2d 563 (1966) (rape and assault with intent to rape merged because both charges arose out of the same criminal transaction, were committed at the same time as part of a continuous act, and were inspired by the same criminal intent).

{20} The focus of the necessarily involved test was redirected six years later in *State v. McAfee*, 78 N.M. 108, 428 P.2d 647 (1967), from a factual inquiry into the defendant's conduct to an abstract examination of the statutory elements. The defendant was convicted of one count each of burglary and larceny arising out of a jewelry store break-in. Stating that the appropriate test was whether burglary necessarily involved larceny, the Court affirmed the convictions. Nevertheless, the Court did not examine the defendant's conduct, but instead examined the statutory elements of burglary and larceny and concluded that since stealing, a necessary element of larceny, was not an element of burglary, the convictions did not merge. *Id.* at 111, 428 P.2d at 650; *see also State v. Sandoval*, 90 N.M. 260, 263, 561 P.2d 1353, 1355 (Ct. App. 1977) (aggravated battery conviction not merged with armed robbery conviction after comparison of statutory elements under necessarily involved test). Cast as an examination of the statutory elements in the abstract, the necessarily involved test is equivalent to the same evidence test as interpreted by *Stephens*.

{21}—*The necessarily included test.* In *State v. Medina*, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975), the defendant was convicted of possession of marijuana in magistrate court and later was charged with and convicted of distribution in the district court. The convictions grew out of the same events. The defendant argued that the second conviction was bared by the New Mexico double jeopardy clause because possession was a lesser included offense of distribution. *Id.* at 395, 534 P.2d at 487. The court reversed the second conviction and set forth the test for determining whether an offense is a lesser included offense of another:

> For a lesser offense to be included within the greater offense, it must be 'necessarily included.' For the lesser offense to be 'necessarily included', the greater offense cannot be committed without also committing the lesser. In determining whether an

[6] The conclusion is remarkable because of the authority upon which the Court relied. First, the passage quoted from *Commonwealth ex rel. Moszczynski v. Ashe*, 343 Pa. 102, 21 A.2d 920 (1941), curiously is incomplete. It does not include the Pennsylvania court's description of the methodology of the necessarily included test. Rather, the quoted portion is excerpted from the court's rejection of the defendant's argument that his acts were part of a single transaction. The court expressly limited the same transaction test to cases in which a single act has occurred. In *Moszczynski*, the court went on to describe the necessarily included test as a version of the elements test, applicable to instances involving more than a single act: "Whether a single act or series of acts constitutes two or more separate offenses is determined by whether each offense requires proof of facts additional to those involved in the other." *Id.* at 106, 21 A.2d at 922. Thus, the test established by *Moszczynski* does not examine the defendant's conduct, but focuses instead on the elements of the statutes and asks whether one offense can be committed without necessarily committing the other. *Id.* at 105, 21 A.2d at 921. Second, *Moszczynski* was premised on the common-law merger doctrine, not on double jeopardy principles. While merger and double jeopardy are in many ways related, many jurisdictions treat the doctrines distinctly. *Compare Commonwealth v. Williams*, 344 Pa. Super. 108, 496 A.2d 31 (1985) (treating merger and double jeopardy questions separately) *with State v. Vladovic*, 99 Wash. 2d 413, 662 P.2d 853 (1983) (merger coextensive with double jeopardy).

> offense is necessarily included, we look to the offense charged in the indictment.

Id.; see also State v. Kraul, 90 N.M. 314, 563 P.2d 108 (Ct. App.) (applying test to propriety of lesser included offense instruction), *cert. denied,* 90 N.M. 637, 567 P.2d 486 (1977). The necessarily included test is best understood as a subset of the same evidence and necessarily involved tests, rather than as a distinct test An offense is a true lesser included offense of another if its elements are completely subsumed by another, greater offense. That result follows not from a separate inquiry but from the same analysis of the statutory elements propounded by the same evidence or necessarily included tests. An offense is a lesser included offense of the greater, and, thus, the same offense for double jeopardy purposes (absent a strong legislative indication to the contrary), when comparison of the elements reveals that the elements of one offense are completely subsumed by the other.

{22}—*The DeMary test.* In *State v. DeMary*, 99 N.M. 177, 655 P.2d 1021 (1982), this Court established a hybrid test focusing on the statutory elements in light of the evidence produced at trial to determine the propriety of instructing the jury on a lesser included offense. *DeMary* did not involve the constitutional question of the double jeopardy limitations on multiple punishment. Rather, in response to a different legal problem, the Court simply employed a descriptive term shared in common with double jeopardy jurisprudence. The lesser included offense concept, as applied to jury verdict alternatives, addresses the common-law right of defendants to a jury instruction giving the jury an opportunity to find defendants guilty of an offense lesser in severity of punishment than that with which they were charged. *See* SCRA 1986, 5-611 (jury may, if so instructed, convict of lesser offense); *State v. Duran*, 80 N.M. 406, 456 P.2d 880 (Ct. App. 1969) (if there is some evidence tending to establish the lesser offense, the defendant is entitled to an instruction on the lesser offense); *see also Schmuck v. United States*, 489 U.S. 705 (1989) (adopting a strict elements test for determining the propriety of a lesser included offense instruction). The *DeMary* test bears only tangential relation to the double jeopardy question concerning the propriety of multiple punishment. Rather than to aid in discerning legislative intent to punish cumulatively, the *DeMary* test implements the right of an accused to a lesser offense instruction based on the evidence adduced at trial and the elements of the lesser offense. The evidence adduced at trial has little to do with the central question in multiple punishment cases of the legislature's intent to authorize multiple punishment. Accordingly, we disagree with application of the I test in the multiple punishment context and confine that test to determining the propriety of jury verdict alternatives.

{23}—*Relationship between constitutional multiple punishment theory and the common-law doctrine of merger.* Merger is a common-law doctrine predating the double jeopardy clause. *Commonwealth v. Williams*, 344 Pa. Super. 108, 146, 496 A.2d 31, 51 (1985) (Spaeth, J., concurring). At common law, two offenses were said to merge for sentencing if the underlying offenses were sufficiently the same. *Id.* at 123, 496 A.2d at 39 (discussing various tests for determining whether two offenses merge for sentencing); *see also* Comment, *Double Jeopardy and Pennsylvania's Merger Doctrine*, 62 Temp. L.Q. 663 (1989) (same). If two offenses merge at common law, unlike constitutional double jeopardy, the convictions remain, but the court may sentence the defendant on only the more severe offense. *Commonwealth v. Boerner*, 281 Pa. Super. 505, 518, 49, A.2d 583, 590 (1980). The doctrine of merger has developed along different lines in different jurisdictions. While the Pennsylvania merger doctrine examines the facts and evidence in addition to the elements of the offenses and, thus, may afford broader protection than the double jeopardy clause's prohibition against multiple punishments, *Williams*, 344 Pa. Super. at 124, 496 A.2d at 40), in Washington the doctrine appears coextensive with federal multiple punishment analysis. *State v. Vladovic*, 99 Wash. 2d 413, 416-17, 662 P.2d 851, 856-57 (1983). In either case, common-law merger, like federal multiple punishment analysis, focuses upon the legislature's intent to authorize cumulative

punishment. *Williams*, 344 Pa. Super. at 126, 496 A.2d at 41; *Vladovic*, 99 Wash. 2d at 416, 662 P.2d at 856.

{24} New Mexico courts have discussed merger only in the context of constitutional double jeopardy. *E.g., State v. Pierce*, 110 N.M. 76, 87, 792 P.2d 408, 419 (1990) (where offenses merge, double jeopardy clause precludes punishing defendant more than once). New Mexico courts have not adopted the common-law merger doctrine, and we are not persuaded to do so here today. At this juncture, we are of the opinion that use of the merger doctrine adds to the multiple punishment analysis nothing other than a second level to what is already a complicated analysis.

{25} *Stating the test.* Taking as our cue the repeated admonitions of the Supreme Court that the sole limitation on multiple punishments is legislative intent, *Grady v. Corbin*, 495 U.S. at 578, 110 S. Ct. at 2091; *Missouri v. Hunter*, 459 U.S. 359, 366 (1983), we adopt today a two-part test for determining legislative intent to punish. The first part of our inquiry asks the question that Supreme Court precedents assume to be true: whether the conduct underlying the offenses is unitary, *i.e.,* whether the same conduct violates both statutes. The second part focuses on the statutes at issue to determine whether the legislature intended to create separately punishable offenses. Only if the first part of the test is answered in the affirmative, and the second in the negative, will the double jeopardy clause prohibit multiple punishment in the same trial.

{26} The first part of our inquiry arises from the pragmatic observation that the double jeopardy clause clearly cannot operate to prohibit prosecution, conviction, and punishment in a single trial for discrete acts violative of the same statute (whether actually the same, or the same under the second part of our analysis). *See* Thomas, *A Unified Theory of Multiple Punishment*, 47 U. Pitt. L. Rev. 1, 12-25 (1985) (noting that the multiple punishment question necessarily involves two component issues: whether the conduct was unitary—the factual question—and whether the statutes proscribe the same offense); *Morgan v. Devine*, 237 U.S. 632, 640 (1915) (concluding that burglary of a post office and larceny of a post office were separate offenses because separate acts were committed with the requisite criminal intent and Congress had decided to punish both acts). In this first part of our analysis, we address the question that federal precedent has assumed to be true. *See, e.g., Blockburger*, 284 U.S. at 299 (after stating that it was a single sale of narcotics that triggered prosecution for two statutory offenses Court reaches the statutory question); *Whalen*, 445 U.S. at 684 (before addressing question of legislative intent to authorize multiple punishment, Court notes that rape and murder occurred in "single criminal episode"). Clearly, if the defendant commits two discrete acts violative of the same statutory offense, but separated by sufficient indicia of distinctness, then a court may impose separate, consecutive punishments for each offense. Thus, for example, the double jeopardy clause does not bar separate convictions and sentences for two thefts from the same victim committed on separate days, even though the statutory offenses are identical. The double jeopardy clause bars conviction and punishment only for the same statutory offense based upon unitary conduct.

{27} The conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial. The case law is replete with failed attempts at judicial definitions of the same factual event. Nonetheless, we must endeavor to provide several guiding principles.

{28} If two events are sufficiently separated by either time or space (in the sense of physical distance between the places where the acts occurred), then it is a fairly simple task to distinguish the acts. Time and space considerations, however, cannot resolve every case and resort must be had to the quality and nature of the acts or to the objects and results involved. *See Herron v. State*, 111 N.M. 357, 805 P.2d 624 (1991) (describing factors determinative of whether separate and distinct acts of criminal sexual penetration have occurred). Under the first part of the analysis, it must be kept in mind that the task is merely to determine whether the conduct

for which there are multiple charges is discrete (unitary) or distinguishable. If it reasonably can be said that the conduct is unitary, then one must move to the second part of the inquiry. Otherwise, if the conduct is separate and distinct, inquiry is at an end.

{29} New Mexico courts have grappled with the unitary conduct question primarily in cases implicating criminal sexual penetration, NMSA 1978, Section 30-9-11 (Repl. Pamp. 1984), and kidnapping, Section 30-4-1 (Repl. Pamp. 1984), or false imprisonment, Section 30-4-3 (Repl. Pamp. 1984). *See, e.g., State v. McGuire*, 110 N.M. 304, 795 P.2d 996 (1990) (criminal sexual penetration and kidnapping); *State v. Corneau*, 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989) (criminal sexual penetration and false imprisonment). In those cases, the courts admittedly did not follow the precise analytic framework we establish today, but they nonetheless understood the fundamental problem that similar statutory provisions sharing certain elements may support separate convictions and punishments where examination of the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses. *McGuire*, 110 N.M. at 309, 795 P.2d at 1001.

{30} The second part of our inquiry asks whether the legislature intended multiple punishments for unitary conduct. If the legislature expressly provides for multiple punishments, the double jeopardy inquiry must cease. *Hunter*, 459 U.S. at 368-69. Absent a clear expression of legislative intent, a court first must apply the *Blockburger* test to the elements of each statute. If that test establishes that one statute is subsumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes—punishment cannot be had for both.

{31} Conversely, if the elements of the statutes are not subsumed one within the other, then the *Blockburger* test raises only a presumption that the statutes punish distinct offenses. That presumption, however, is not conclusive and it may be overcome by other indicia of legislative intent. Here, we must turn to traditional means of determining legislative intent: the language, history, and subject of the statutes. In this context we can provide several guiding, but by no means exclusive, principles for divining legislative intent.

{32} Statutes directed toward protecting different social norms and achieving different policies can be viewed as separate and amenable to multiple punishments. The court must identify the particular evil sought to be addressed by each offense. If several statutes are not only usually violated together, but also seem designed to protect the same social interest, the inference becomes strong that the function of the multiple statutes is only to allow alternative means of prosecution. *See, e.g., State v. Hargrove*, 108 N.M. 233, 238, 771 P.2d 166, 171 (1989) (consideration of different policy objectives in context of criminal sexual penetration and incest based on single acts of intercourse). We caution, however, that care must be taken in describing the evils sought to be prevented—social evils can be elusive and subject to diverse interpretation.[7] Accordingly, the social evils proscribed by different statutes must be construed narrowly, bearing in mind the other canons of construction described below.

{33} The quantum of punishment also is probative of legislative intent to punish. Where one statutory provision incorporates many of the elements of a base statute, and extracts a greater penalty than the base statute, it may be inferred that the legislature did not intend punishment under both statutes. If the punishment attached to an offense is enhanced to allow for kindred crimes, these related offenses may be presumed to be punished as a single offense. *See,*

[7] The instant case aptly illustrates the potentially elusive nature of the social evils test. Both rape and incest broadly can be understood as protecting society against a single evil—aberrant sexual behavior. That construction would raise a strong presumption that the legislature intended but one conviction and sentence for a single episode implicating both offenses. Nevertheless, such broad interpretation eviscerates the legislature's intent to proscribe the narrower, distinct evils (described in the body of this opinion below) by way of different statutory schemes.

e.g., People v. Robideau, 419 Mich. 458, 470, 355 N.W.2d 592, 604 (1984).

{34} Unless an intent to punish separately can be found through application of the canons of construction set forth above, lenity is indicated and, in that event, it is to be presumed the legislature did not intend pyramiding punishments for the same offense. *McGuire*, 110 N.M. at 308, 795 P.2d at 1000 (1990).[8]

{35} Separate convictions and consecutive sentences for incest and criminal sexual penetration are permissible. Applying the above-mentioned factors to Swafford's convictions and sentences for incest and criminal sexual penetration, we find no double jeopardy bar to both convictions and to consecutive sentences. At the outset, there is no dispute that the same conduct precipitated both the incest and criminal sexual penetration offenses. Thus, the first part of our test is satisfied.

{36} While no explicit authorization of multiple punishment for criminal sexual penetration and incest appears in the legislative history of the statutes, the second part of our analysis reveals strong indicia of a legislative intent to punish separately each offense. As we recently observed in *Hargrove*, the criminal sexual penetration and incest statutes have different elements and are distinct crimes. *Hargrove*, 108 N.M. at 238, 771 P.2d at 171. Proof of incest, unlike criminal sexual penetration, does not require force or coercion. Incest may be consensual. On the other hand, while the incest statute requires proof that the defendant and victim are within certain degrees of consanguinity, for purposes of the criminal sexual penetration statute the relationship between the victim and the defendant is immaterial. Thus, application of the *Blockburger* test raises a presumption the legislature authorized separate punishments for both incest and criminal sexual penetration arising out of the same conduct.

{37} Moreover, the statutes prohibiting incest and criminal sexual penetration achieve different policy objectives. The sanction against criminal sexual penetration is to prevent forcible, nonconsensual sexual activity and to protect a person's important interests in uncoerced choice of sexual partners. The incest statute, on the other hand, is more narrowly directed toward prohibiting sexual relations, whether consensual or not, between relatives. *Hargrove*, 108 N.M. at 238, 771 P.2d at 171. Accordingly, there is no double jeopardy impediment to convicting and sentencing Swafford to consecutive terms for both incest and criminal sexual penetration arising out of the same act.

{38} Separate convictions and punishments for assault with intent to commit rape and criminal sexual penetration are permissible in this case. Swafford next contends that his convictions for assault with intent to commit a felony (criminal sexual penetration) and for third-degree criminal sexual penetration must merge for sentencing. On application of the above-stated test for multiple punishments, we find no double jeopardy bar to punishment for both offenses. The victim testified at trial that Swafford bound her to the bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. Swafford admitted to the struggle, but denied sexual contact. We think that the assaultive episode was sufficiently distinct from the sexual assault to support separate convictions and punishments both for assault with intent to commit a felony and for criminal sexual penetration. The conduct underlying the offenses was not unitary. The court was not requested to instruct the jury to consider any question of fact to the contrary. Accordingly, we need not reach the second part of our analysis to conclude that the convictions and sentences for assault and criminal sexual penetration were proper.[9]

{39} *Enhanced sentences—use of statutory elements.* At sentencing, the district court increased Swafford's sentence on the criminal sexual

[8] Compare this result with our discussion above of the federal rule of lenity in *Jeffers, Prince,* and *Gore*.

[9] This case would present a closer question had it not been for the fact of bondage. Absent that fact, we would be more inclined to find the conduct was unitary and move to the second part of our analysis.

penetration conviction because Swafford committed the crime against his half sister. Swafford contends, and the State concedes, that enhancement based on an element of a separate offense for which he was convicted in the same trial was error. For the reasons set forth below, we agree.

{40} The trial judge is given broad discretion to enhance or reduce a defendant's sentence based on a finding of aggravating or mitigating circumstances "surrounding the offense and concerning the offender." NMSA 1978, 31-18-15.1 (Repl. Pamp. 1990). While the victim's blood relationship to Swafford arguably was a circumstance surrounding the offense, Section 31-18-15.1, on the other hand, does not by its own terms permit the trial judge to consider the elements of either the offense for which the defendant was sentenced or a separate, but contemporaneous, conviction as an aggravating factor. The court of appeals *recognized in State v. Wilson*, 97 N.M. 534, 538, 641 P.2d 1081, 1085 (Ct. App.), *cert. denied*, 98 N.M. 50, 644 P.2d 1039 (1982), that use alone of the elements of the underlying offense to enhance the sentence for that offense is problematic.[10] The court reasoned that consideration of the elements of the offense lends nothing to the sentencing decision; the elements simply establish the offense, they do not individualize severity or culpability of the criminal conduct. Stated differently, the elements of the offense are ipso facto incorporated by the legislature into the base level sentencing for the offense. Here, the relationship between Swafford and the victim was made part of the sentencing decision for the crime of incest. To permit consideration of that element as an aggravating factor justifying an upward departure in sentencing for criminal sexual penetration would be repetitive of the punishment the legislature has established for the crime of incest.

{41} Furthermore, in the area of criminal punishment, especially with respect to enhanced sentencing, we feel the legislature has an obligation to state its intentions as clearly as possible. When it cannot be said with certainty that the legislature intended to authorize the imposition of an enhanced sentence under particular circumstances, as a corollary to the rule that criminal statutes must be sufficiently clear and definite to inform a person of ordinary intelligence what conduct is punishable, *State v. Prince*, 52 N.M. 15, 18, 189 P.2d 993, 995 (1948), we presume that the legislature did not so intend. For those reasons, it was error for the court to consider the victim's relationship to the defendant as an aggravating factor at sentencing on the criminal sexual penetration count.[11]

{42} *—Lack of Remorse.* Swafford also challenges the trial court's aggravation of all sentences based on his lack of remorse. This Court, in *State v. Segotta*, 100 N.M. 498, 672 P.2d 1129 (1983), articulated the aggravating or mitigating factors that the trial court may consider and weigh in establishing a defendant's sentence. Lack of remorse was not among the listed factors. Nevertheless, lack of remorse arguably is a circumstance "concerning the offender," Section 31-18-15.1(A), and, thus, is a permissible factor in sentencing. We find no error in the trial court's aggravation of Swafford's sentences based on a lack of remorse.

{43} We do recognize that potential exists for a good deal of mischief in allowing courts to

[10] *State v. Cawley*, 110 N.M. 705, 799 P.2d 574 (1990), might be read as confirming the propriety of using an essential element of an offense as an aggravating factor to enhance the same offense. In that case we found no error in enhancing the defendant's sentences for rape of a child and criminal sexual contact of a minor based on the age of the victims, despite the fact that the victims' minority (through age twelve or seventeen) is an essential element of each offense. We reasoned, rightly or wrongly, that the youthfulness of multiple victims was an appropriate consideration in relation to the pattern of the defendant's conduct. The instant case presents a different question. Here, the trial judge considered as an aggravating factor an element—the narrowly defined consanguinity between Swafford and the victim—of a separate offense against a single victim for which Swafford was convicted and sentenced in the same proceeding.

[11] The trial court aggravated the criminal sexual penetration sentence based on the victim's blood relation to the defendant *and* on a lack of remorse. As we discuss below, we find no error in aggravation based on lack of remorse. Because we do not know the relative weights the trial judge attached to lack of remorse and to blood relation, we remand for resentencing on the criminal sexual penetration conviction.

treat a defendant's lack of remorse as a significant consideration in aggravating a sentence. In the abstract, a defendant's lack of remorse as an aggravating factor is not troubling; but the problems inherent in use of that factor are borne out by closer examination. For one, remorse may be equated with a defendant's decision to plead guilty and, accordingly, a lack of remorse might be equated with a decision to proceed to trial. Such an equation raises serious concerns. Because the defendant in this case merely challenged the statutory authority of the trial judge to consider lack of remorse as an aggravating factor, we save for later the question of the reliability of a lack of remorse as a significant factor in sentencing. In the interests of justice, in any event, future sentence enhancements based on a lack of remorse will merit specific findings, and where not so supported will be subject to careful scrutiny on review.

{44} For all of the foregoing reasons, we reverse the order of the district court and remand for resentencing in accordance with this opinion.

{45} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

LESLIE C. SMITH,
District Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1991-NMSC-061

Filing Date: June 26, 1991, As Amended. Second Amendment

Docket No. 19,346

ROANE GOVICH, DANIEL GOVICH and AMERICAN NATIONAL FIRE INSURANCE CO.,

Plaintiffs-Appellants and Cross-Appellees,

vs.

NORTH AMERICAN SYSTEMS, INC. and ARK-LES SWITCH COMPANY,

Defendants-Appellees and Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Art Encinias, District Judge

Motion for Rehearing Denied July 22, 1991

Samantha Dunning,
Santa Fe, New Mexico,

for Appellants.

Lenssen & Mandel,
John L. Lenssen,
Santa Fe, New Mexico,

for Appellee North American Systems.

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for Appellee ARK-Les Switch Company.

OPINION

RANSOM, Justice.

{1} Roane Govich and her adult son, Daniel Govich appeal from the district court's order dismissing their personal injury claims against North American Systems Inc. ("Mr Coffee" and Ark-Les Switch Company. We are called upon to address novel questions concerning the rescue doctrine in the context of comparative negligence. We reverse.

{2} Daniel is hearing impaired. He is assisted by a dog specially trained to alert him to routine sounds of daily life, such as a ringing telephone or a knock at the door. On the evening of November 23, 1983, Daniel and Roane dined at a Santa Fe restaurant. Daniel was not accompanied by his dog. Upon returning to their home after dinner, they noticed smoke issuing from the house. Daniel opened a door to the house, and smoke billowed forth. Roane ran to a neighbor's house to call the fire department.

{3} Daniel's dog was inside the burning house. After first calling his dog from outside the house, Daniel entered the house in repeated, but vain, attempts to rescue the dog. Daniel testified that "at the time of the rescue attempt of my dog I was under severe emotional distress due to the possibility of losing my dog and not knowing if all my possessions in the house would be destroyed." Roane returned, and upon seeing her son enter the burning house, made several entrances attempting to restrain Daniel. She testified that Daniel "was like a person who had lost his sanity. He could not understand the danger he was in." The dog perished, and Daniel and Roane were injured in the fire.

{4} On January 22, 1985, the Goviches sued Mr. Coffee, alleging the fire was caused by a defective coffee maker. Ark-Les, the maker of an electrical component in the coffee maker, was named a defendant by amended complaint.

Based upon theories of strict products liability, negligence, and breach of implied or express warranties, the Goviches sought damages for personal injuries, emotional distress, and lost wages. American National Fire Insurance Company, as the Goviches' subrogated insurer, sought recovery for damages to personal and real property.

{5} Mr. Coffee and Ark-Les moved for partial summary judgment arguing that the Goviches were barred from recovery as a matter of law. The Goviches responded that summary judgment was precluded by the rescue doctrine and bystander recovery for negligent infliction of emotional distress. The rescue doctrine was raised in relation to both Roane and Daniel. The bystander theory has been abandoned on appeal.

{6} On May 10, 1990, the district court[1] entered an order granting partial summary judgment in favor of Mr. Coffee and Ark-Les, dismissing the Goviches' personal injury claims. The court entered the following findings of fact:

> 7. The personal injuries as well as the emotional injuries and lost income of plaintiffs Roane Govich or Daniel Govich resulted entirely from their entry into the burning house.
>
> 8. The actions of plaintiff Daniel Govich in entering a burning home to rescue a dog [are] unreasonable conduct as a matter of law and he may not recover damages for personal injuries, lost income, or emotional damages that he may have suffered.
>
> 9. The actions of plaintiff Roane Govich in entering the burning home to retrieve her son were plainly occasioned by the unreasonable conduct of her son and not any act, omission or conduct of defendants and she is barred to collect damages for personal injuries, lost income, or emotional damages that she may have suffered.
>
> 10 There are no genuine issues of material fact as to causation for personal injuries, emotional distress, and lost income and defendants are entitled to summary judgment as a matter of law.

{7} Accordingly, the court adjudged that:

> 1. The claims for personal injuries, emotional distress and lost income by plaintiffs, Roane Govich and Daniel Govich, be and the same are hereby dismissed.
>
> 2. The only claims remaining to be tried relate to liability of defendants to plaintiffs as to their claims for damages to the real and personal property destroyed or damaged in the fire.

{8} On June 8 the Goviches filed notice of appeal from the May 10 order. On June 12 the district court denied defendants' motion to compel answers to interrogatories from the Goviches. In that order the court stated that the order for partial summary judgment had dismissed all the Goviches' claims. The court then dismissed the Goviches from the suit. On July 10 the Goviches filed notice of appeal from the June 12 order. Both appeals were taken to the court of appeals. The court of appeals transferred the action to this Court pursuant to NMSA 1978, Section 34-5-10 (Repl. Pamp. 1990) (transfer to proper court by the court in which appeal is filed; a final determination of jurisdiction).

{9} *Jurisdiction.* Ark-Les challenges our jurisdiction to hear this appeal, first arguing the partial summary judgment order is not a final order and, thus, cannot form the proper predicate for appeal. Second, citing SCRA 1986, 12-202(B) (notice of appeal shall attach the judgment or order from which appeal is taken) and cases construing the

[1] The defendants' motions were heard and granted orally by Judge Herrera on December 7, 1989. Before entering a written order, Judge Herrera recused himself, and the case was reassigned to Judge Encinias. Judge Encinias, relying upon the record from the earlier hearing, entered the order for partial summary judgment that is now before us.

rule, Ark-Les maintains that the second notice of appeal conferred jurisdiction upon this Court only over the order attached to that notice. While we agree with Ark-Les that the partial summary judgment order was not appealable, we hold that we have jurisdiction over this appeal to review all issues properly preserved below arising from the partial summary judgment order.

{10} The partial summary judgment only dismissed the Goviches' claims for personal injuries, emotional distress, and lost income. It provided that "the only claims remaining to be tried relate to liability of defendants to plaintiffs as to their claims for damages to the real and personal property destroyed by the fire." Rule 54(C) provides that, in the absence of an express determination by the court that there is no just reason for delay, an adjudication of fewer than all the claims "shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims." SCRA 1986, 1-054(C)(1). By its terms, the partial summary judgment order left unresolved the Goviches' property claims[2] and, thus, the May 10 order cannot be a final order from which appeal properly may be taken. *Aetna Casualty & Sur. Co. v. Miles*, 80 N.M. 237, 453 P.2d 757 (1969). Accordingly, the June 8 notice of appeal was ineffective to perfect the Goviches' appeal.

{11} The Goviches timely filed notice of appeal from the June 12 order dismissing them from the suit. Because that order was a final order with respect to the Goviches, their appeal was perfected when the notice was filed. Nonetheless, citing *Mabrey v. Mobil Oil Corp.*, 84 N.M. 272, 502 P.2d 297 (Ct. App.), *cert. denied*, 83 N.M. 740, 497 P.2d 742 (1972), Ark-Les argues that because the second notice of appeal mentioned and attached only the order denying defendants' motion to compel, that notice fails to confer jurisdiction over the partial summary judgment order. We disagree.

{12} While we recently held that appellate rules for the time and place of filing a notice of appeal govern the proper invocation of our jurisdiction, *Lowe v. Bloom*, 110 N.M. 555, 556, 798 P.2d 156, 157 (1990), we also have stated the policy of facilitating the right of appeal by liberally construing technical deficiencies in a notice of appeal otherwise satisfying the time and place of filing requirements. *Marquez v. Gomez*, 111 N.M. 14, 801 P.2d 84 (1990). The constitutional mandate that "an aggrieved party shall have the absolute right to one appeal" evinces the strong policy in this state that courts should facilitate, rather than hinder, the right to one appeal. *See* N.M. Const. art. VI, 2. Justice Montgomery explored this concept eloquently in his dissent to *Lowe*. As a matter of terminology, we properly should refer hereafter to the mandatory sections of our rules of appellate practice as "mandatory" and discard the term "jurisdictional" that has been used over time by most federal and state courts to describe a mandatory precondition to the exercise of jurisdiction. *See Mann v. Lynaugh*, 840 F.2d 1194, 1197 (5th Cir. 1988) (notice requirement under federal rule 4(a) is a mandatory precondition to the exercise of appellate jurisdiction). We strictly adhere to jurisdictional subject matter limits on this Court and we cannot exercise our discretion with respect to such questions. Though we have stated in categorical terms that we cannot entertain an appeal when the notice does not satisfy the requirements for time and place of filing, what we in essence have held is simply that, with respect to the mandates for time and place of filing the notice of appeal, we decline to exercise discretion to excuse or justify any improper attempt to invoke our jurisdiction. It is probably imprecise to say we cannot exercise such discretion.

{13} Once notice of appeal has been timely filed, the specificity requirements of Rule 12-202(B) (content of notice) are meant to inform the appellee and the court of the scope of the

[2] The Goviches' property claims had been subrogated to American National. Thus, despite language in the May 10 order to the contrary, the Goviches arguably were without actionable claims against defendants after entry of partial summary judgment. Nonetheless, because the Goviches approved the order below, we do not review its form and effect. *Pizza Hut of Santa Fe, Inc. v. Branch*, 89 N.M. 325, 328, 552 P.2d 227, 230 (Ct. App. 1976) (party waives appellate review of order by failing to object to form of modified order in court below).

appellate proceeding by delineating the ruling from which appeal is taken. However, under Rule 12-312(C) an appeal timely filed is not to be dismissed for technical violations of Rule 12-202 that do not affect the substantive rights of the parties. The policies in this state, and the purpose of the rule, are vindicated if the intent to appeal a specific judgment fairly can be inferred from the notice of appeal and if the appellee is not prejudiced by any mistake. This long has been the position in this state and in the federal courts. *Baker v. Sojka*, 74 N.M. 587, 588-89, 396 P.2d 195, 196 (1964); *Nevarez v. State Armory Bd.*, 84 N.M. 262, 264, 502 P.2d 282, 289 (1972). *See generally* 9 J.W. Moore, B.J. Ward, & J.D. Lucas, *Moore's Federal Practice* para. 203.17[2] (2d ed. 1991) (discussing federal requirement).

{14} Upon analysis of the record, we are satisfied that the Goviches' intent to appeal the May 10 order fairly can be inferred from their submissions and that Ark-Les was not prejudiced by any mistake. Nothing in the record suggests Ark-Les was misled, nor has Ark-Les so claimed the intent to appeal the order was apparent from the filing of a premature notice of appeal from the partial summary judgment order. Additionally, the June 12 order from which the second notice of appeal was taken refers expressly to the May 10 order. Under these circumstances we will treat the Goviches' second notice of appeal as the functional equivalent of an appeal from the partial summary judgment order and the order of dismissal. *See Nevarez*, 84 N.M. at 264, 502 P.2d at 289 (notice of appeal from final judgment was effective to invoke review of summary judgment where final judgment in its operative provisions "confirmed" summary judgment); *Munoz v. Small Business Admin.*, 644 F.2d 1361, 1364 (9th Cir. 1981) (appeal from final judgment draws in question all earlier nonfinal orders and rulings that produced judgment).

{15} *Rescue doctrine.* The issue in the briefs before this Court is whether the rescue doctrine is applicable under comparative negligence and, if so, whether it may be relied upon by the Goviches to establish a genuine issue of material fact that would preclude summary judgment on their personal injury claims.[3]

{16} The paradigm rescue case is *Wagner v. International Railway*, 232 N.Y. 176, 133 N.E. 437 (1921). In *Wagner*, plaintiff rescuer was seriously injured in an attempt to rescue his cousin who had been thrown from a moving tram as a result of defendant railway company's negligence. The plaintiff lost at trial, and an intermediate appellate court directed judgment on the verdict for defendant. The court of appeals reversed, rejecting the railway's primary arguments (1) that plaintiff's rescue attempt was outside the chain of causation, and (2) that plaintiff was contributorily negligent. As Justice Benjamin Cardozo declaimed with memorable prose:

> *Danger invites rescue.* The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.

Id. at 180, 133 N.E. at 437-38. The *Wagner* rule has gained universal acceptance. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser &*

[3] Ark-Les submits this appeal should not be heard on its merits because the Goviches never pleaded the rescue doctrine in their first amended complaint. It appears from the record that the Goviches raised the rescue doctrine in response to defendants' motion for partial summary judgment. Our first response is that under SCRA 1986, 1-015(B), the pleadings may be deemed amended to conform to the evidence on which the court made specific findings concerning the rescue doctrine (findings Sand 9). *Moya v. Fidelity & Casualty Co. of N.Y.*, 75 N.M. 462, 406 P.2d 173 (1965) (findings and conclusions may determine whether pleadings will be deemed amended). Second, as discussed below in the body of this opinion, we think the rescue doctrine is but an aspect of our rules of proximate cause under comparative fault and as such need not be specifically pleaded.

Keeton on the Law of Torts 44, at 307-08 (5th ed. 1984) [hereinafter *Krosser & Keeton*] (collecting cases); Annotation, *Liability for Death of, or Injury to, One Seeking to Rescue Another*, 158 A.L.R. 189 (1945) (same). New Mexico has recognized the doctrine, but has not examined the effect, if any, of the introduction of comparative negligence on the doctrine. *See, e.g., Mitchell v. Pettigrew*, 65 N.M. 137, 333 P.2d 879 (1958); *Padilla v. Hooks Int'l, Inc.*, 99 N.M. 121, 654 P.2d 574 (Ct. App.), *cert. denied*, 99 N.M. 148, 655 P.2d 160 (1982); *Neff v. Woodmen of the World Life Ins. Soc.*, 87 N.M. 68, 529 P.2d 294 (Ct. App.), *cert. denied*, 87 N.M. 48, 529 P.2d 274 (1974).

{17} Several jurisdictions have considered and reaffirmed the vitality of the rescue doctrine under their respective comparative negligence regimes. *Ryder Truck Rental, Inc. v. Korte*, 357 So. 2d 228 (Fla. Dist. Ct. App. 1978), was the first case to undertake extensive analysis. In *Korte*, the court began by articulating the purposes served by the rescue doctrine: "The rescue doctrine serves a dual purpose: first, to establish the causal connection between the defendant's negligence and the plaintiff's injury, and second, to eliminate the absolute defense of contributory negligence." *Id*. at 230. The court then observed that while the rescue doctrine no longer was required under comparative negligence analysis to insulate the rescuer from the defense of contributory negligence, the doctrine nonetheless was essential to establish the causal nexus between the defendant's negligence and the rescuer's injuries:

> The rescue doctrine is still applicable to establish that the defendant's negligence was the proximate cause of the plaintiff's injury. A basic principle of the doctrine is that where the defendant has created a situation of peril for another the defendant will be held in law to have caused the peril not only to the victim but also to his rescuer, and so to have caused any injury suffered by the rescuer in his rescue attempt.

Id. at 230 (citing Tiley, *The Rescue Principle*, 30 Mod. L. Rev. 25 (1967) (positing that the rescue doctrine is a causation doctrine)).

{18} Korte's dual purpose analysis of the rescue doctrine has been widely accepted by courts that have considered the effect of the adoption of comparative negligence. *See, e.g., Zimny v. Cooper-Jarrett, Inc.*, 8 Conn. App. 407, 420, 513 A.2d 1235, 1243 (causal aspect of rescue doctrine remains viable under comparative negligence), *cert. denied*, 201 Conn. 811, 516 A.2d 887 (1986); *Solomon v. Shuell*, 435 Mich. 104, 135, 457 N.W.2d 669, 683 (1990) (same); *Sweetman v. State Highway Dep't*, 137 Mich. App. 14, 26, 357 N.W.2d 783, 789 (1984) (same); *Pachesky v. Getz*, 353 Pa. Super. 505, 519 n. 8, 510 A.2d 776, 783 n. 8 (1986) (same).

{19} Rather than isolating the purposes of the doctrine, *Korte* and its progeny have identified the means employed to implement the doctrine's purpose. The rescue doctrine, in essence, reflects the assumption that rescue is a commendable human urge to be encouraged, not penalized. To give legal cognizance to that assumption, courts, under the guise of the rescue doctrine, have tinkered with traditional tort concepts. The doctrine has been employed: (1) to establish the duty owed the rescuer by the person creating the peril, *see Prosser & Keeton, supra*, 44, at 308; (2) to relieve the plaintiff of the defenses of contributory negligence and assumption of the risk, otherwise available to the person creating the initial peril, *see id.* 68, at 491; Goodhart, *Rescue and Voluntary Assumption of Risk*, 5 Camb. L.J. 192 (1934); and (3) to help establish the causal nexus between the defendant's negligence and the rescuer's injury. *See Tiley, supra.*

{20} Broadly stated, the issue we face is whether the policies reflected in the rescue doctrine are vindicated by application of our rules of comparative negligence, or whether those policies yet require judicial manipulation of traditional rules of duty and causation. Upon close analysis of causation rules under comparative negligence, we conclude the doctrine now serves

only to establish and identify the duty owed the rescuer.

{21} Whether the person or entity creating the peril owes a duty to the rescuer is a matter of law to be decided by the court. *Calkin v. Cox Estates*, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990). The person or entity creating the peril owes an independent duty of care to the rescuer, which arises from a policy, deeply imbedded in our social fabric, that fosters rescue attempts. *See, e.g., Prosser & Keeton, supra*, 44, at p.308. So far as the rescue doctrine can be understood as shorthand for a public policy, reflected in the law, imposing an independent duty of care owed a rescuer by persons creating unreasonable risks of harm to others, we think that facet of the doctrine remains vital under New Mexico's comparative negligence regime.

{22} The dispositive issue, then, is whether we establish, as in *Korte*, that the negligence precipitating the rescue is in law the proximate cause of the rescuer's injuries. We do not. Rather than to rely on the rescue doctrine's fictive notions of causation as articulated in *Korte*, it is more direct to rely upon the jury's allocation of fault under traditional rules of proximate and independent intervening causation.

{23} In New Mexico, a proximate cause of an injury is an event "which in a natural and continuous sequence [unbroken by an independent intervening cause] produces the injury, and without which the injury would not have occurred." SCRA 1986, 13-305 (uniform civil jury instruction); *Thompson v. Anderman*, 59 N.M. 400, 411, 285 P.2d 507, 514 (1955). In turn, an independent intervening cause is an event that "interrupts and turns aside a course of events and produces that which was not foreseeable as a result of an earlier act or omission." SCRA 1986, 13-306 (uniform civil jury instruction); *Thompson*, 59 N.M. at 411-12, 285 P.2d at 514.

{24} The precise legal grounds upon which the trial court granted summary judgment are difficult to ascertain. With respect to Daniel, the trial court appears to have couched its findings on the determinative issue in terms of "unreasonable conduct as a matter of law." If, as Ark-Les seems to acknowledge in its brief, the dispositive issue ruled upon by the court was proximate cause, not comparative negligence, then the trial court erred. Questions of proximate cause and independent intervening cause are for the jury, except in rare cases in which reasonable minds cannot differ. *See New Mexico State Highway Ass'n v. Van Dyke*, 90 N.M. 357, 360, 563 P.2d 1150, 1153 (1977). In particular, the issue whether Daniel's entry into the burning house to rescue his dog constituted an independent intervening cause of his injuries cannot be resolved as a matter of law. The foreseeability of Daniel's actions, in the context of a superseding intervening cause, is an issue of fact. *See Calkin*, 110 N.M. at 66, 792 P.2d at 43 (Ransom, J., dissenting).

{25} On the other hand, the terms employed by the trial court might be construed to relate to the presence of negligent conduct. If the trial court meant that the conduct of Daniel was so unreasonable as to preclude apportionment of fault to the original wrongdoer, such action on the part of the court constituted an unwarranted usurpation of the jury's factfinding function under comparative negligence. If the trial court was applying a "rash or reckless" threshold for the existence of a duty,[4] we reject that standard. New Mexico courts never have recognized degrees of negligence. Rather, the standard in all cases has been "ordinary care under the circumstances." *Pittard v. Four Seasons Motor Inn, Inc.*, 101 N.M. 723, 729, 688 P.2d 333, 339 (Ct. App.), *cert. quashed*, 101 N.M. 555, 685 P.2d 963 (1984); SCRA 1986,

[4] The cases are divided on the appropriate standard of care to which rescuers are held under comparative negligence rules. At least one federal court and one state have retained the "rash or reckless" standard operative prior to the adoption of comparative negligence. *Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1088-89 (4th Cir. 1985); *Allison v. Sverdrup & Parcel & Assoc.*, 738 S.W.2d 440, 454 (Mo. Ct. App. 1987). The majority of comparative negligence jurisdictions, however, have shifted to a "reasonableness" standard. *See, e.g., Zimny*, 8 Conn. App. at 420, 513 A.2d at 1243; *Korte*, 357 So.2d at 230; *Sweetman*, 137 Mich. App. at 26-7, 357 N.W.2d at 789; *Pachesky*, 353 Pa. Super. at 519, 510 A.2d at 783; *Cords v. Anderson*, 80 Wis. 2d 525, 547, 259 N.W.2d 672, 683 (1977).

13-1603 (uniform civil jury instruction defining ordinary care); *see also Scott v. Rizzo*, 96 N.M. 682, 687, 634 P.2d 1234, 1239 (1981) (abolishing distinction between ordinary and gross negligence). Our jury instructions adequately permit the jury to consider the facts and circumstances surrounding the rescue and to measure those acts in accordance with the standards of reasonableness and ordinary care.

{26} Citing cases from other jurisdictions, Ark-Les argues that rescue of *property* is unforeseeable as a matter of law. Again, we find no compelling reason to so hold. Rather, whether rescue of property is unforeseeable is a question for the jury. We decline to rule there can be no duty owed to one who is summoned to rescue property by reason of danger occasioned by the negligence of another.

{27} With respect to the claims of Daniel's mother, Roane, Ark-Les acknowledges that a rescuer may be rescued. *See, e.g., Grigsby v. Coastal Marine Serv. of Tex., Inc.*, 412 F.2d 1011, 1021-22 (5th Cir. 1969), *cert. denied*, 396 U.S. 1033 1970). Without citation to authority, Ark-Les argues, however, that in the event the jury finds that Daniel cannot recover, Roane must be barred as well. We fail to see the merit in this argument. The tortfeasor owes an independent duty to any foreseeable rescuer. Whether the initial rescuer, or any subsequent rescuer, can recover depends, as we have explained above, upon the jury's determination of proximate cause.

{28} We are aware of no public policy that would compel us to remove from the jury questions of negligence and proximate cause. Accordingly, we reverse the order granting partial summary judgment against Roane and Daniel Govich and remand for trial on the merits. Issues raised on the cross-appeal are rendered moot.

{29} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

JOSEPH F. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1991-NMSC-065

Filing Date: July 9, 1991

Docket No. 18,236

FIRST NATIONAL BANK IN ALBUQUERQUE,

Plaintiff-Appellant and Cross-Appellee,

vs.

PAT SANCHEZ, and SUSAN SANCHEZ, husband and wife, d/b/a P-S CONSTRUCTION COMPANY,

Defendant-Appellees and Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY
Rozier Sanchez, District Judge

Rodey, Dickason, Sloan, Akin & Robb,
Robert M. St. John,
Bruce Hall,
Jo Saxton Brayer,
Albuquerque, New Mexico,

for Appellant.

Peter Everett, IV,
Albuquerque, New Mexico,

for Appellees.

OPINION

RANSOM, Justice.

{1} The First National Bank in Albuquerque appeals from a judgment awarding damages to counterclaimants in the bank's action to collect a promissory note. The bank's collection action had been resolved by a stipulated judgment in its favor for the principal balance owing on the promissory note ($342,080), plus interest, and foreclosure on undeveloped lots securing the debt. First National waived any deficiency judgment. Pat and Susan Sanchez (together Sanchez) and Anthony Tafoya were adjudged jointly and severally liable under the stipulated judgment. Sanchez, doing business as P-S Construction Company, then pursued to judgment a counterclaim against First National. Sanchez and Tafoya were the principals in P-S Construction Company, a partnership.

{2} Tafoya dismissed with prejudice his own counterclaim against First National,[1] but he has filed an amicus brief in support of the cross-appeal taken by Sanchez from a judgment n.o.v. in favor of Sanchez on the latter's counterclaim. By that judgment n. o. v. the trial court reduced the compensatory damages ($1,053,000) by one-half because the court determined that the award was to the partnership and that Tafoya, an equal (50%) partner, had dismissed with prejudice his claim representing a one-half interest in the judgment. Punitive damages of $125,243 also were awarded on the counterclaim, but the award of punitive damages was not reduced by the trial court. Tafoya claims and intends to pursue an interest in the award to the partnership.[2]

{3} The counterclaim was founded upon First National's withholding of $125,243 from a total of $400,000 loaned under the promissory note. The $274,757 in proceeds paid out under the note were disbursed to Sanchez and Tafoya for real estate development purposes in connection with

[1] A release signed by Tafoya provided that dismissal was to be "wholly without prejudice to the counterclaims of Pat Sanchez and Susan Sanchez." The release made no mention of P-S Construction or partnership interests in P-S Construction.

[2] A few months after Sanchez and Tafoya obtained the loan in early 1984, Tafoya was convicted of a federal crime and confined to a federal penitentiary. Although the record is inconclusive, Sanchez claims that the conviction led to Tafoya's relinquishment of his partnership interest in P-S Construction. He purportedly retained only a residual joint interest with Sanchez in certain real property.

sixty-one undeveloped residential lots.[3] When the partners sought the remaining $125,243 needed to complete the development, First National demanded additional financial information as might be required under an "acquisition and development" loan. The partners never complied with the bank's demand. The $125,243 was not forthcoming, and the partnership could not complete the project.

{4} Having been joined in this suit by the bank to collect the promissory note, Sanchez and Tafoya made separate counterclaims for damages under theories of breach of contract and negligent misrepresentation. An additional counterclaim by Sanchez asserted that First National had intentionally interfered with Sanchez' business expectancy. At trial this claim went to the jury under a theory of economic duress or compulsion.

{5} First National appeals on the following grounds: (1) lack of substantial evidence on duress; (2) error in the presentation of damages to the jury; (3) error in allowing a witness qualified as an expert in banking law to testify that because the loan was not in fact an "acquisition and development" loan First National had "no legal right" to withhold the $125,243; (4) the compensatory award was excessive as a matter of law; and (5) lack of substantial evidence to support an award of punitive damages. We address only issues (1) and (2), and we hold that a new trial is required due to inadequate proof of damages upon which the jury was instructed. We also comment on issue (3). Because we remand for a new trial, issue (4) is moot. Issue (5) was not preserved for appeal, but is nonetheless rendered moot. Additionally, in a cross-appeal Sanchez argues that the trial court erred in reducing the compensatory damage award by one-half. We address this issue because it raises important questions of partnership law likely to be present on remand.

{6} *Whether the issue of sufficiency of evidence to show economic duress was preserved for review.* Sanchez asserts First National did not preserve the issue of sufficiency of evidence to show economic duress because it failed to make a motion for a directed verdict on this point. We note that since the adoption of the Federal Rules of Civil Procedure, federal courts uniformly have held that, with certain narrow exceptions, the sufficiency of the evidence to support a jury verdict is not reviewable on appeal in the absence of a motion for directed verdict at the close of all the evidence. 5A J. Moore & J. Lucas, *Moore's Federal Practice* para. 50.05[1] (2d ed. 1991).[4] The New Mexico Rules of Civil Procedure are modeled after the federal rules, and our own decisions regarding the necessity for making a motion for directed verdict have been consistent with federal practice. *E.g., Nally v. Texas-Arizona Motor Freight, Inc.*, 69 N.M. 491, 368 P.2d 806 (1962); *P. V. v. L. W.*, 93 N.M. 577, 603 P.2d 316 (Ct. App. 1980); *see also* SCRA 1986, 1-050 (New Mexico counterpart to Fed R. Civ. P. 50).

{7} In this case, First National did not move for a directed verdict on the claim of duress. It appears from the transcript of the proceedings that, while at the close of all the evidence the bank was prepared to move for a directed verdict of some sort, the court stopped counsel for the bank from making the motion, dismissed the jury from the courtroom, and then retired with counsel to the judge's chambers to confer on jury instructions. The next day, in chambers, the court allowed counsel to make their objections to the instructions that were to be given, and First National objected to the instruction on duress on the grounds that no evidence had been introduced to support such a finding. We think this objection

[3] The $274,757 in proceeds paid out under the note were disbursed approximately as follows: $152,000 and $4,000 to First National Bank to pay off a prior loan and a 1% loan fee, respectively; $28,800 and $90,000 to Plaza National Bank to pay off a prior loan and to the account of Sanchez and Tafoya, respectively.

[4] Additionally, under both the federal and New Mexico rules of civil procedure, a motion for directed verdict at the close of all the evidence is a prerequisite to asking the trial court to consider the legal sufficiency of the evidence in a motion for judgment n.o.v. 5A J. Moore & J. Lucas, *Moore's Federal Practice* para. 50.05[1] (2d ed. 1991); SCRA 1986, 1-050(B).

was sufficient to preserve for review the question of the legal sufficiency of the evidence on duress and to keep open the possibility of reversal and grant of a new trial in the event submission of the claim to the jury was in error.

{8} Our earlier case law suggests that, in raising the question of the sufficiency of the evidence, the attention of the trial court must be called to the fact that it is committing error in allowing a claim to go to the jury. *See Blacklock v. Fox*, 25 N.M. 391, 183 P. 402 (1919). Before the claim is submitted to the jury, the opposing party still has an opportunity to cure any defect in proof that has been brought to that party's attention. In this case, both the trial judge and opposing counsel recognized that First National's objection to the instruction went to the sufficiency of the evidence on the issue of duress. The objection was made prior to closing arguments and opposing counsel yet may have sought to correct the asserted insufficiency. Thus, in this case the objection was the functional equivalent of a motion for directed verdict on the issue of duress. This result comports with federal decisions that have taken a liberal view of what constitutes a motion for a directed verdict to support a later motion for judgment n.o.v. *E.g., Villanueva v. McInnis*, 723 F.2d 414 (5th Cir. 1984) (objection to proposed jury instruction on grounds of evidentiary insufficiency treated as sufficient approximation of renewed motion for directed verdict).

{9} *Economic duress.* In the context of business interests, the doctrine of duress has gone by a number of names—business or economic coercion, compulsion, threats, or duress. *Terrel v. Duke City Lumber Co.*, 86 N.M. 405, 422, 524 P.2d 1021, 1038 (Ct. App. 1974), *aff'd in part, rev'd in part*, 88 N.M. 299, 540 P.2d 229 (1975). As the court of appeals stated in *Terrel*:

> The rationale of the doctrine is to discourage or prevent an individual in a stronger position, usually economic, from abusing that power by presenting an unreasonable choice of alternatives to another person in a weaker or more vulnerable position, in a bargain situation. That is to say the doctrine provides a cause of action so that an individual can protect his economic interests from the unreasonable exercise of power or advantage, usually economic, in a bargain situation.

86 N.M. at 422, 524 P.2d at 1038. A claim of duress can be asserted by way of defense to an action to enforce a contractual agreement, *e.g., B & W Constr. Co. v. N.C. Ribble Co.*, 105 N.M. 448, 734 P.2d 226 (1987) (personal guarantee of debt); *First Nat'l Bank in Clayton v. Wood*, 93 N.M. 467, 601 P.2d 437 (1979) (same), or the claim can itself form the basis for an action, most usually for the return of money or property conveyed under duress. *E.g., Bettini v. City of Las Cruces*, 82 N.M. 633, 485 P.2d 967 (1971).

{10} There are circumstances in which a claim of economic duress has been analyzed as a tort, *see Terrel*, 86 N.M. at 422, 524 P.2d at 1040, although, in its traditional sense, duress is not in and of itself a recognized tort. *See* D. Dobbs, *Handbook on the Law of Remedies* 10.2, at 657 (1973). Under tort analysis the victim of duress may recover "all damages suffered which were proximately caused by the economic compulsion." *Terrel*, 86 N.M. at 423, 524 P.2d at 1039. It should be remembered, however, that the doctrine of duress is in essence a remedy that is restitutionary in nature. *See* D. Dobbs, *Handbook on the Law of Remedies* 10.2 (1973); *see also* Dawson, *Economic Duress—an Essay in Perspective*, 45 Mich. L. Rev. 253, 282 (1947) ("The historical connection between duress and the law of crime and tort has obscured the main function of duress doctrines, the prevention of unjust enrichment.")

{11} *Sufficiency of evidence of economic duress.* Because Sanchez' evidence did not give rise to an issue of economic duress or compulsion, submission of this claim to the jury was in error. Sanchez showed that because of a personnel change at First National after the initial disbursements on the note, the bank began to treat the loan as if it were an acquisition and development loan. This type of loan typically calls for extensive financial and project documentation,

disbursement of funds in stages as completion of the project progresses, and a host of other conditions and requirements. In point of fact, the loan agreement did not contain any of these conditions or requirements. The security for the note was nothing more than a standard residential real estate mortgage covering the sixty-one undeveloped lots.

{12} First National refused to release the refunds unless Sanchez complied with the more stringent requirements of an acquisition and development loan. When confronted with the bank's demand for evidence of work completed on the project, soil reports, and other information, Sanchez refused to comply and instead sought financing from other sources. These efforts failed, and Sanchez and Tafoya were unable to complete the project. After they defaulted on the note, the bank foreclosed on the mortgaged lots and the partnership experienced a general failure. Sanchez, in a counterclaim to the foreclosure action, sought to recover for a variety of losses including the forced sale of both partnership and personal assets, the financial ruin of a once profitable partnership, and to his credit and business rating.

{13} While these facts show that First National may have abused its superior economic position and may have presented Sanchez with an unreasonable choice of alternatives, they do not show that Sanchez buckled under and complied with the demands of the bank. For this reason Sanchez cannot claim to be the victim of any economic duress or compulsion. Any damages that a party is said to have suffered from duress must be caused by his compliance with the asserted coercive and wrongful demands. One cannot recover simply because another has made a demand, coupled with a threat, under coercive circumstances. Of course, where a party makes such a threat and carries it out, that party's actions may form the basis for some separate cause of action, such as breach of contract. We have carefully examined our earlier decisions on duress and find that they go no further. That is, in cases where the plaintiff has recovered "consequential damages," *e.g., Terrel*, 86 N.M. at 422, 524 P.2d at 1038; *Pecos Constr. Co. v. Mortgage Invest. Co.*, 80 N.M. 680, 459 P.2d 842 (1969), the plaintiff had complied with the coercive demands of the defendant. It is only in this sense that the damages suffered can be said to be caused by the economic compulsion practiced upon the plaintiff.

{14} *Questionable harm in submitting to jury an erroneous theory of liability that is in reality an alternate contention under appropriate theory.* First National argues that reversal of the verdict is required because the case was submitted to the jury on three alternate theories of liability, and the jury returned only a general verdict. We recently stated that "when a party has submitted to the jury instructions providing alternative bases for relief, it is reversible error to submit any one alternative for which there is no substantial evidence." *Romero v. Mervyn's*, 109 N.M. 249, 255, 784 P.2d 992, 998 (1989). Under the facts of this case, however, we are inclined to think the erroneous submission of the duress claim to the jury does not present a case of reversible error. The rationale for the rule of law quoted from *Romero v. Mervyn's* is that when a jury returns a general verdict in a case submitted on alternate theories of liability, an appellate court has no way of knowing whether the jury relied upon the invalid basis in making its decision. *See Perfetti v. McGhan Medical*, 99 N.M. 645, 655, 662 P.2d 646, 656 (Ct. App.), *cert. denied*, 99 N.M. 644, 662 P.2d 645 (1983). In this case, although stated as a separate theory of liability, the claim of duress seems merely to have been another way to complain of the same act that formed the basis for the claimed breach of contract. That is, First National threatened not to release the remainder of funds, and then did just that. We question whether there was prejudice to the bank that would justify reversal on the sole basis that duress was submitted to the jury as an alternative claim of liability. However, as we will discuss, reversal and remand for new trial is required for errors involving the award of compensatory damages. The erroneous instruction on duress influences our decision that a new trial should include liability as well as damage

issues. On remand it shall not be open to Sanchez to once again seek to prove the claim of duress.

{15} *Jury incorrectly instructed on damages.* Sanchez submitted a compensatory damage instruction based upon Uniform Jury Instruction 13-827, the basic form for "all damage instructions in contract cases." *See* SCRA 1986, 13-827 (directions for use). However, the instruction omitted the following important language: "Any damages found by you must be damages which, at the time of making the contract, the parties could reasonably have expected to be a consequence of any default." SCRA 1986, 13-827. Under SCRA 1986, 1-051(D), published uniform jury instructions must be used unless under the facts or circumstances of the particular case they are erroneous or otherwise improper, and the trial court states its reasons for refusing to use them. Deviation from required uniform jury instructions is reversible error if the appellant can show that he was prejudiced by the erroneous instruction. *Jewell v. Seidenberg*, 82 N.M. 120, 124, 477 P.2d 296, 300 (1970). Here, the incomplete instruction was an incorrect statement of the law in that it omitted an important limitation on the recovery of damages in contract actions. We do not think an omission of this sort is harmless.

{16} Sanchez argues that any insufficiency in the instruction is cured by consideration of the instructions as a whole. Elsewhere, he states, the Jury was instructed that under the breach of contract claim the plaintiff had the burden of proving that such breach was a "proximate cause of the damages." Additionally, he states the jury was instructed that under a claim of breach of contract "where special circumstances were known to both parties, and from which it must have been apparent that damages would be suffered from a failure to fulfill the obligation, such damages may be recovered, provided such damages are not speculative or remote." We cannot agree that the concept of "proximate cause" may substitute for the requirement in breach of contract cases that consequential damages must be the natural and foreseeable consequences of the breach, as contemplated by the parties at the time of the contract. *See State Farm Gen. Ins. Co. v. Clifton*, 86 N.M. 757, 758, 527 P.2d 798, 799 (1974). Likewise, we think "special circumstances" has real meaning to the jury only in relation to "expected consequences."

{17} *Damages not proved with "approximate accuracy."* The compensatory damage instruction submitted to the jury claimed the following elements of damages: (1) loss of sixty-one lots that were mortgaged to the bank, (2) loss of profit on those same lots, (3) attorney fees in connection with enforcing the loan agreement with the bank, (4) damage to credit, (5) loss of an office building belonging to the partnership, and (6) loss of profit on another forty-four lots that Sanchez was forced to sell below market value.[5] First National argues that Sanchez failed to prove all of the above-claimed elements of damages with approximate accuracy. For the most part we agree.

{18} Under *Fredenburgh v. Allied Van Lines, Inc.*, 79 N.M. 593, 446 P.2d 868 (1968), when it is possible to present accurate evidence on the amount of damages, the party upon whom the burden rests to prove damages must present such evidence. Here, many of the claimed elements of damages could have been measured with relative certainty. However, the evidence introduced to prove these damages was speculative and seems to have rested on no more than mere estimates at best. For instance, the evidence on attorney fees was testimony that the fees were "close to $30,000"; the testimony on the loss of the office building was that the partnership equity "had to be about $50,000"; and the only testimony as to damage to credit was "my credit is shot and that should be worth something." No effort was made to quantify the damage to credit; to establish the equity in the building, or even its cost, through partnership records; or to introduce invoices on the amount of attorney fees that were paid.

[5] It is unclear from the record whether these additional forty-four lots represented partnership property or were the personal property of Sanchez. Additionally, Sanchez in his proposed jury instructions sought to include several elements of damages that were denied by the trial court: e.g., (1) the loss of profit on *houses* that could have been constructed on all of these lots, and (2) the loss of the partnership business itself.

{19} To prove elements (1) and (2) under the court's instruction on damages, Sanchez either could have proved the value of the sixty-one lots prior to improvement plus the profit reasonably to have been expected from development, or he could have proved the value of improved lots less the cost of development. Either method produces the same result. Sanchez chose the latter method, testifying that the value of an improved lot was $10,500 and the cost of development was $2,500. As a result of the foreclosure sale and stipulated judgment, Sanchez was credited with $342,080. (For purposes of our analysis we attribute $85,000 of this amount to the sixteen acres in the foreclosure known as tract C and not included as an element of damages under the court's instructions.) Damages from the loss of sixty-one lots and the profit to have been realized from their development, then, was $230,920 (61 × 8,000 less (342,080 - 85,000)).[6]

{20} Regarding damage element (6), we cannot discern why damages for the forced sale of the additional forty-four lots was limited to loss of profits or otherwise distinguished from the damages for the sixty-one lots in elements (1) and (2). The evidence was the same, that is, value of an improved lot ($10,500) less the cost of development ($2,500) less the below-market, forced-sale price received ($3,000).[7] Claimed damages would then amount to $220,000 (44 × 5,000).

{21} Even accepting as adequate the separate pieces of evidence to which we have referred above, we calculate from this showing that compensatory damages amounted to only $530,920, considerably less than the $1,053,000 award.[8] Moreover, we agree that the jury was left with nothing but speculation on damage to credit, claimed element of damages (4). Consequently, under the evidence, this claim was a false issue. We do not view remaining elements as having been established with approximate accuracy.

{22} Further, we are troubled by the dearth of evidence that loss of profit on the sale of forty-four lots fell within the consequences reasonably to have been expected from the bank's action in withholding $125,243 in loan proceeds.[9] At $2,500 per lot, it first would have cost $152,500 to develop the sixty-one lots. While one may infer that profits from the sale of those lots would provide additional capital for further land development and sales, this entire area of sophisticated business finance and operations was left to speculation by the jury. We consider this claim for lost profits to have been another false damages issue.

{23} For all of these reasons, the submission of false damages issues to the jury, deviation from required uniform jury instructions, reliance on evidence that was largely speculative when more accurate evidence was available, and the fact that the gross amount of the award cannot be justified by the evidence—evidence that in itself is open to question—we think the entire compensatory award must be reversed and redetermined in a new trial.

{24} Sanchez argues that First National not only failed to object to evidence of damages, but, as the trial court noted, it also failed to present any meaningful rebuttal evidence concerning damages. However, when the only evidence

[6] Noticeably lacking was evidence of the cost of sales, including carrying costs, advertising, salaries, and commissions. However, except for the inclusion of the phrase "costs of the transaction" in a *Black's Law Dictionary* definition of "profit" quoted by First National, there is no other objection, requested instruction, argument, or authority cited for a need to subtract cost of sales to determine loss of profit. We, therefore, find the absence of such evidence not dispositive of the damage issues in this appeal.

[7] It is apparent that the "distress sale" of the forty-four unimproved lots at $3,000 per lot realized a return that was approximately ninety percent of what had been paid per lot when the partnership acquired those lots in 1982. The partnership paid $900,000 for 249 lots and a sixteen acre undivided tract zoned R-2.

[8] From the compensatory damage instruction that was submitted to the jury we are able to calculate $230,920 for items (1) and (2), the loss of the sixty-one lots and loss of profit thereon; $30,000 for item (3), attorney fees; nothing for item (4), damage to credit; $50,000 for item (5), loss of the office building; and $220,000 for item (6), loss of profit on the forty-four lots.

[9] In addition to an objection to the lack of any adequate proof of the claimed elements of damage, First National also argued to the trial court that there was no proof the claimed losses were a result of its action in withholding the funds.

in support of a theory of recovery is inadequate or incompetent to support an award, application of the substantial evidence rule is not dependent upon the other party's failure to object to the introduction of that evidence or to offer evidence in rebuttal. What is necessary, as we have stated above, is that the other party object to the sufficiency of the evidence at a time when that objection yet may be met with a production that would satisfy the requirements of substantial evidence. Here, First National timely objected that proof on all elements of damages was insufficient, so that any damage award would be purely speculative.

{25} First National also argues that the court erred by allowing the inclusion of the claim for attorney fees "in connection with the enforcement of the contract" as an element of Sanchez' damages. Whether this objection was made at trial is unclear. However, a party certainly may contract to pay reasonable attorney fees incurred in connection with the enforcement of a contract. Whether Sanchez established the necessary foundation for such a claim at the first trial we do not know. Even if he did not do so, if the bank failed to object to the inclusion of attorney fees as an element of damages, there is no ruling of the trial court on the matter for us to review. Whether in this case damages should include the attorney fees Sanchez incurred in connection with the enforcement of the contract is an issue that may be explored on remand.

{26} *Expert witness testimony.* First National claims the trial court erred in allowing the witness qualified as an expert in banking law to testify that because the loan was not an "acquisition and development" loan the bank had "no legal right" to withhold the $125,243. We agree with the bank that an expert may not testify on the legality of given conduct. It is the exclusive province and responsibility of the court to tell the jury whether conduct falling within the evidence is or is not "legal." Nevertheless, the thrust of the expert's testimony was whether the loan was an acquisition and development loan, a subject of testimony by the bank's three loan officers. Since the loan officers' justification for the bank's insistence on additional financial information in connection with the $125,243 remaining on the loan was based on an acquisition and development loan, it was harmless for the expert to have said it was not "legal" to withhold the $125,243 if the loan was not an acquisition and development loan. Moreover, First National did not object or move to strike the testimony.

{27} *Punitive damages award.* First National argues that the issue of punitive damages never should have been submitted to the jury. The record is quite clear, however, that the bank did not object in any way to Sanchez submitting the claim to the jury. Under these circumstances, while the bank continues to assert that there was no basis for such an award, we will not undertake a review of the evidence to determine its sufficiency because any issue in this regard has not been preserved for our review. Nevertheless, since the compensatory award cannot stand, we will reverse the entire judgment including the award for punitive damages. A punitive award must bear a reasonable relationship to actual damages and injury. *See Romero v. Mervyn's*, 109 N.M. 249, 259, 784 P.2d 992, 1002 (1990); SCRA 1986, 13-1827. Since the compensatory award is subject to redetermination, the same jury on remand should reconsider, as well, the propriety and amount of punitive damages, if the court should determine that the claim should be submitted to the jury.

{28} *Partnership issues on cross-appeal.* The parties disagree as to whether Sanchez' counterclaims were made on behalf of the partnership or were asserted, as Sanchez puts it, as an individual. The partnership never was joined as a party to this litigation. Neither the bank's complaint, the counterclaims, the stipulated judgment, or the release executed by Tafoya referenced claims either against or on behalf of a partnership. Nonetheless, the parties by their conduct at trial assumed that most of the claims for damages were partnership claims.[10] As described above,

[10] Without objection from the First National, the case was submitted to the jury on the understanding that there were two individuals and a partnership making separate claims for

the trial court reduced the damage award by one-half because Tafoya, a partner in P-S Construction, had released his counterclaim against the bank. We think this decision was erroneous from a purely factual standpoint: Tafoya cannot be said to have asserted a counterclaim on behalf of the partnership or to have released any portion of such a claim. Moreover, as a matter of substantive law, we question whether a partner, acting on that partner's own behalf, may release a proportionate share of a partnership claim.

{29} Under our law, a partnership is empowered to sue or to be sued in the name of the partnership, NMSA 1978, 38-4-5 (Repl. Pamp. 1987); *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 742-744, 418 P.2d 191, 198-200 (1966), and a cause of action accruing to the partnership, for damages to partnership property or interests, belongs to the partnership rather than to individual partners. *See Loucks*, 76 N.M. at 744, 418 P.2d at 200; *see also* 1 A. Bromberg & L. Ribstein, *Bromberg and Ribstein on Partnership* 1.03(c)(3) (1988); 59A Am. Jur. 2d *Partnership* 347 (1987). For these reasons, a partner cannot bring suit as an individual on a claim belonging to the partnership. *See Daniels Ins., Inc. v. Daon Corp.*, 106 N.M. 328, 331, 742 P.2d 540, 543 (Ct. App. 1987); *Stephen v. Phillips*, 101 N.M. 790, 792, 689 P.2d 939, 941 (Ct. App. 1984); *see also 1 A. Bromberg & L. Ribstein, Bromberg and Ribstein on Partnership* 1.03(c)(3) (1988); 59A Am. Jur.2d *Partnership* 710 (1987). Nor does an individual partner have a separate cause of action for a proportionate share of a partnership claim. *Id.* 722. Since a partner has no separate right of action, fractional or otherwise, for a partnership claim, a partner has no "individual" partnership claim to release. A partner acts as an agent of the partnership for the purposes of conducting its business in the usual way. NMSA 1978, 54-1-9(A) (Repl. Pamp. 1988). While a partner acting within his or her actual authority may execute a valid release of a partnership claim, we question (but do not decide) whether under Section 54-1-9 of the Uniform Partnership Act there could be implied actual authority or apparent authority for a partner to settle any part of a partnership claim that was not usual to the business. Of course, an individual partner may release personal claims based upon to personal property and interests.

{30} Here, Tafoya's counterclaim clearly cannot be understood to raise a claim belonging to the partnership. Nor does the release of his counterclaim suggest that in so doing he was carrying out a partnership decision to give up one-half of any recovery in consideration of First National's agreement to waive any deficiency judgment. For these reasons we think the action taken by the court to reduce the compensatory award by one-half was in error. The parties at trial may have treated the counterclaim of Sanchez as having been made on behalf of the partnership, and any objection to Sanchez' lack of capacity to raise such a claim thus likely was waived. *See Stephen*, 101 N.M. at 792, 689 P.2d at 941; SCRA 1986, 1-009. With reference to Tafoya, however, the effect of his release is to be determined by the documents existing at the time the release was executed.

{31} We first note that the style of First National's complaint lists the defendants as: "PAT SANCHEZ and SUSAN SANCHEZ, husband and wife; and ANTHONY TAFOYA, individually and d/b/a P-S CONSTRUCTION COMPANY." This is the only reference in the complaint that would suggest that the partnership itself was a party to the suit. In the remainder of the complaint the defendants simply are enumerated as "Pat and Susan Sanchez" or "Anthony Tafoya." Consistently, the complaint prays for judgment against "Defendants Sanchez and Defendant Tafoya, jointly and severally" and makes no mention of a partnership or P-S Construction.[11]

damages. The general verdict form submitted to the jury noted that the jury found "for the plaintiffs on the complaint of Pat Sanchez, Susan Sanchez and P-S Construction." Also, the final judgment awarded damages to "Pat Sanchez and Susan Sanchez, and P-S Construction Company, a partnership."

[11] Pat Sanchez, Susan Sanchez, and Anthony Tafoya all were listed as makers of the note and each signed the note with the First National. Under the Uniform Partnership Act, a partner generally has joint liability for the debts and obligations of the partnership. NMSA 1978, 54-1-15(B) (Repl. Pamp. 1988). *But see* NMSA 1978, 38-4-3 (Repl. Pamp. 1987) (making all contracts joint and several that under the common

Significantly, both Sanchez and Tafoya filed answers as individuals rather than on behalf of the partnership; neither answer makes any reference to P-S Construction or a partnership in the body of the answer. We conclude that the partnership itself was not made a party to the suit. *Cf. Texaco, Inc. v. Wolfe*, 601 S.W.2d 737 (Tex. Ct. App. 1980); *Schwartz v. Lowe*, 546 S.W.2d 74 (Tex. Ct. App. 1977).

{32} Similarly, the stipulated judgment allowing foreclosure on the mortgaged property refers only to an entry of judgment against "Defendants Pat Sanchez and Susan Sanchez, husband and wife, and Anthony Tafoya, jointly and severally" and states that the stipulated judgment is to be without prejudice to the counterclaims of these same defendants. And again, the subsequent release of the counterclaim of "Defendant/Counterplaintiff ANTHONY TAFOYA" makes no mention of a partnership, P-S construction, or a partnership claim. We conclude that Tafoya's counterclaim raised no claim on behalf of the partnership and that the release of that counterclaim had no effect upon such a claim. The express terms of the release, which do not mention a partnership or P-S Construction, suggest nothing to the contrary. Since any partnership claim was unaffected by Tafoya's release, the trial court erred in reducing the damage award by Tafoya's fractional interest in the partnership.

{33} For the foregoing reasons we would reverse the judgment of the district court. However, at the precise time this opinion was being prepared in final form to be filed, the Court was advised that the parties had settled all matters. Consequently, the appeal is dismissed and this opinion will be published for precedential value alone.

{34} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

SETH D. MONTGOMERY,
Justice

law are joint only). However, individual partners may enter into separate obligations to perform a partnership contract, NMSA 1978, 54-1-15(B), and the effect of these separate obligations is to make the partners also severally liable on their individual guarantees. *See Mandan Sec. Bank v. Heinsohn*, 320 N.W.2d 494 (N.D. 1982); A. Bromberg, *Crane and Bromberg on Partnership* ch. 6, 58 (1968).

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1991-NMSC-070

Filing Date: August 9, 1991, As Amended

Docket No. 19,490

**C.R. ANTHONY COMPANY,
an Oklahoma corporation,**

Plaintiff-Appellee,

vs.

**LORETTO MALL PARTNERS,
Defendant-Appellee, v. DARTFORD COMPANY, N.V., Defendant-Appellant, and INTERSHOP HFA MANAGEMENT USA COMPANY,**

Defendant-Cross-Appellant.

**APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY
James T. Martin, District Judge**

Poole, Kelly & Ramo,
Keith S. Burn,
Albuquerque, New Mexico,

for Appellant Dartford Company.

Kemp, Smith, Duncan & Hammond,
Ken Coffman,
El Paso, Texas,

for Cross-Appellant Intershop HFA.

Modrall, Sperling, Roehl, Harris & Sisk,
Janet R. Braziel,
Walter Hart,
Albuquerque, New Mexico,

for Appellee C.R. Anthony Co.

Lloyd O. Bates, Jr. Law Firm,
Kyle Gesswein,
Las Cruces, New Mexico,

for Appellee Loretto Mall Partners.

OPINION

RANSOM, Justice.

{1} This is a suit to recover excess rent claimed to have been paid under an amendment to a lease of retail space in a Las Cruces shopping mall. It was brought by C.R. Anthony Company (Anthony's) against its landlord, Loretto Mall Partners, and against Dartford Company, N.V. Anthony's originally negotiated and concluded the lease amendment with Dartford in 1982. Loretto purchased the shopping mall in 1984 and succeeded to Dartford's interest. Defendants Loretto and Dartford will be referred to collectively as "the Mall."

{2} The trial court found the rental provisions of the lease amendment to be unambiguous and awarded summary judgment in favor of Anthony's for the return of $167,971.02 in payments. The Mall appeals, claiming the lease amendment is ambiguous and that, further, if it is interpreted to require the return of the payments, then a factual issue exists whether the lease amendment as drafted represents a mutual mistake that requires reformation. The Mall also argues that there is a genuine issue of fact whether Anthony's claim for the return of rental payments is barred by laches.

{3} We agree with the trial court that the lease amendment contains no ambiguity. However, we believe the Mall has made a sufficient factual showing to preclude summary judgment on the question of mutual mistake. For that reason we reverse the order of summary judgment and remand for evidentiary proceedings to resolve the mistake issue.

{4} Additionally, Loretto has asserted a cross-claim against Dartford for breach of warranty. At the time Loretto purchased the mall, Dartford

warranted in the purchase and sale agreement that Anthony's rental obligation under the lease amendment conformed with its past payments. The trial court granted summary judgment in favor of Loretto on this claim. Dartford appeals this decision, claiming a factual issue exists whether Loretto actually relied on the warranty. We briefly will address Dartford's reliance argument inasmuch as that question may arise again on remand.

{5} Anthony's original lease required a minimum annual rent of $9,350 in monthly installments of $779. Additionally, Anthony's was required to pay a percentage rent equal to 2.5 percent of its annual sales, less the minimum annual rental. Under this arrangement, Anthony's rental obligation was 2.5 percent of its sales over $374,000 because the minimum rent of $9,350 became 2.5 percent of sales at that point. Sales of $374,000 represent what is called a "natural breakpoint" in the lease. That figure is derived by dividing the minimum annual rental by the percentage rent of 2.5 percent. While a natural breakpoint figure such as $374,000 has a direct mathematical relationship to the minimum and percentage rentals, parties to a lease may negotiate and agree on some alternative breakpoint having no mathematical relation to the minimum or percentage rental figures. For instance, the parties might agree on a base rental of $9,350, but agree to an additional payment of 2.5 percent of annual sales over $500,000, or $1,000,000. The breakpoint figure in that case would be what is termed an "artificial breakpoint."

{6} In 1981 Anthony's became interested in expanding its retail space to include the adjacent available premises. To this end Anthony's began negotiations with John Decker of Intershop HFA Management USA Co., the managing agent for Dartford. The negotiations culminated in the lease amendment dated January 18, 1982. In pertinent part, the lease amendment provides for a minimum rent and a percentage rent as follows:

> 3.1 *Minimum Rental.* A Minimum Rental for the Leased Premises of Fifty-five Thousand Six Hundred Eleven and No/100 Dollars ($55,611.00) per Lease Year payable at the rate of Four Thousand Six Hundred Thirty-four and 25/100 Dollars ($4,634.25) per month in advance beginning on the Commencement Date and continuing thereafter on the first day of each calendar month for the term of the Lease.
>
> 3.2 *Percentage Rental.* A Percentage Rental, which shall be deemed additional rental hereunder, in the sum equal to two and one-half percent (2 1/2%) of the "Net Retail Sales" from transactions made in, on or from the Leased Premises by Tenant during each "Lease Year" in excess of the "Base Net Retail Sales Figure" for the "Lease Year".
>
> . . . .
>
> 3.2.2 *Base Net Retail Sales Figure.* The "Base Net Retail Sales Figure" is the following: Two Million Two Hundred Twenty-four Thousand Four Hundred and No/100 Dollars ($2,224,400.00).

The breakpoint established by the lease amendment, although not so designated, coincides with the natural breakpoint rounded to the nearest one hundred dollars.[1]

{7} At issue here is the operation and effect of a provision making certain adjustments to the lease amendment in the event the anchor tenant at the mall, J.C. Penney Co., failed to renew its lease and left the premises. That section, which adjusts the minimum rental but does not mention percentage rental obligations, provides:

> 9. *Required Lease.* If within nine months after J.C. Penney closes its store in the Shopping Center, Landlord is unable to replace J.C. Penney with a new tenant (approved by Tenant, approval not to be unreasonably withheld) open for business in the space now occupied by J.C. Penney, the Minimum Rental set forth in paragraph 3.1 above shall be reduced to $18,370.00 per

[1] The "Base Net Retail Sales Figure," $2,224,400, established in paragraph 3.2.2 is the same as the natural breakpoint ($55,611 divided by 2.5% equals $2,224,440).

Lease Year payable at the rate of $1,530.83 per month.

{8} J.C. Penney vacated the mall and was not replaced. On April 3, 1983, Anthony's began making reduced minimum rental payments pursuant to paragraph 9 of the lease amendment. Between 1983 and 1988 Anthony's submitted percentage rent payments of 2.5 percent of sales over a natural breakpoint based on the minimum rent set forth in paragraph 9 of the lease amendment. The newly computed breakpoint was $734,800 (the yearly rental obligation, $18,370, divided by the agreed percentage of 2.5 percent).

{9} An internal audit of Anthony's records conducted in 1988 revealed an alternative construction of paragraph 9. Under that interpretation, asserted by Anthony's below, the breakpoint is set forth in paragraph 3.2.2, *i.e.,* $2,224,400, regardless of whether J.C. Penney leaves the mall. Under Anthony's interpretation, it overpaid its percentage rental obligation during the 1983-1988 period by $167,971.02. After hearing all proffered evidence to aid the court in the interpretation of the terms of the amended lease, the trial court entered summary judgment in Anthony's favor for the full amount of the claimed overpayment.

{10} *Contract litigation.* The trial court must decide as a threshold issue the essential terms of a contract in litigation and, by construction, the court must decide what missing terms either are necessarily implied by the contract's express terms or were not contemplated by the agreement at all. In accomplishing this task, the court well may be called upon to decide whether the writing was intended as the contract agreed upon by the parties. If the court decides the writing was intended as the contract, the court is bound by the parol evidence rule from hearing collateral evidence for the purpose of construing the contract in a manner that varies or contradicts the clear and unambiguous language of the writing.

{11} The court may, nonetheless, be called upon to decide if the writing, intended as the contract, is ambiguous or by mistake has stated a term contrary to the intent of the parties. In New Mexico, if the court finds ambiguity, the jury (or court as the fact finder in the absence of a jury) resolves the ambiguity as an issue of ultimate fact before deciding breach and damages. The court decides the ultimate fact of mistake, because of the equitable nature of the reformation remedy, before breach and damages or issues of restitution are decided. In deciding mistake, however, the court is acting as a fact finder and must accord the parties a full evidentiary hearing (unless the absence of a genuine issue of material fact warrants summary judgment). Today we address two of the issues set forth above: contract interpretation and mistake.

{12} *Contract interpretation - ambiguity.* Contract interpretation is the process of giving meaning to the symbols of expression used by the parties. 3 A. Corbin, *Corbin on Contracts* 532 (1960) [hereinafter *Corbin*]. The process often turns upon whether the court determines that the contract is ambiguous. If so, evidence will be admitted to aid in interpreting the parties' expressions. *See, e.g., Hill v. Hart*, 23 N.M. 226, 232, 167 P. 710, 711 (1917) ("It is well settled that, where the terms of a contract are obscure and uncertain, evidence of antecedent negotiations and of the facts and circumstances surrounding the parties is admissible to enable the court to put itself in the place of the parties to the contract and to view it as they viewed it. . . . The principle that parol evidence is not admissible to vary the terms of a written instrument is not infringed when the evidence is used for the purpose of ascertaining the meaning of doubtful expressions in the instrument."); *see also Fancher v. Board of Comm'rs*, 28 N.M. 179, 207, 210 P. 237, 248 (1922) (in determining severability of terms of a contract the operative question is parties' intent and where intent is clearly indicated by terms of contract, inquiry is at an end, otherwise, resort may be had to nature of the subject matter of the contract). On the other hand, If the court determines that the contract is clear and unambiguous on its face, evidence of the circumstances surrounding the transaction is inadmissible *to vary or modify its terms. Franciscan Hotel Co. v. Albuquerque Hotel Co.*, 37 N.M. 456, 462, 24 P.2d 718, 721 (1933).

{13} A series of cases have extended these seminal interpretation rules to exclude evidence

of circumstances surrounding the transaction for the purpose determining whether a contract is ambiguous. These cases have intimated, but have not expressly adopted, a "plain-meaning" or "four-corners" standard: Ambiguity is determined by the court without the admission of evidence of surrounding circumstances to explain the purposes and context of the contract. *See, e.g., Clark v. Sideris*, 99 N.M. 209, 213, 656 P.2d 872, 876 (1982) (court will not look beyond the four corners of the document unless it is ambiguous); *Acquisto v. Joe R. Hahn Enters.*, 95 N.M. 193, 195, 619 P.2d 1237, 1239 (1980) (same).

{14} Recognizing the difficulty of ascribing meaning and content to terms and expressions in the absence of contextual understanding, numerous courts have eschewed strict application of the four-corners standard. *See, e.g., Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968); *Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 577-81, 556 A.2d 81, 83-84 (1988) (citing cases); Annotation, *Comment Note.—The Parol Evidence Rule and Admissibility of Extrinsic Evidence to Establish and Clarify Ambiguity in Written Contract*, 40 A.L.R.3d 1384 (1971) [hereinafter *Annotation*]. In addition, many scholarly authorities have urged rejection of a four-corners standard. *See, e.g.,* 2 E. Farnsworth, *Farnsworth on Contracts* 7.12a, at 279 (1990) [hereinafter *Farnsworth*] ("In determining whether contract language is ambiguous, a court is not limited to the face of the contract itself."); 3 *Corbin* 536, at 28 ("It is invariably necessary, before a court can give any meaning to the words of a contract . . . that extrinsic evidence shall be heard to make the court aware of the 'surrounding circumstances,' including the persons, objects, and events to which the words can be applied and which caused the words to be used.").

{15} In *Levenson v. Mobley*, 106 N.M. 399, 744 P.2d 174 (1987), this Court retreated from strict application of the four-corners standard. In *Levenson* we held that the parol evidence rule did not bar admission of evidence extrinsic to a written contract to determine the circumstances under which the parties contracted and the purpose of the contract. *Id.* at 403, 744 P.2d at 178 (citing *In re Estate of Russell v. Quinn*, 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968)). We quoted with approval language from *Russell* to the effect that evidence of circumstances surrounding the transaction is admissible to aid the court in determining whether chosen terms are clear, but did not expressly overrule New Mexico cases to the contrary. We hold today that in determining whether a term or expression to which the parties have agreed is unclear,[2] a court may hear evidence of the circumstances surrounding the making of the contract and of any relevant usage of trade, course of dealing, and course of performance. *See, e.g., Eskimo Pie Corp. v. Whitelawn Dairies*, 284 F. Supp. 987, 995 (S.D.N.Y. 1968).[3] New Mexico case law to the contrary is hereby overruled. It is important to bear in mind that the meaning the court seeks to determine is the meaning one party (or both parties, as the circumstances may require) attached to a particular term or expression at the time the parties agreed to those provisions. *See* 3 *Corbin* 537 (rules governing admissibility of proof of surrounding circumstances depend upon person whose meaning is at issue).

{16} *Parol evidence rule addresses modifications and contradictions.* The parol evidence rule is a rule of substantive law that bars admission of evidence extrinsic to the contract to contradict and perhaps even to supplement the writing. *See Bell v. Lammon*, 51 N.M. 113, 179 P.2d

[2] Ambiguity, as it has been used in this state, is best understood as a proxy for describing lack of clarity in the parties' expressions of mutual assent. The term, as it has been employed, incorporates a variety of conceptual problems including the distinctive notions of ambiguous syntax, ambiguous terms, vagueness, and general lack of clarity.

[3] In this regard, we join with the *Restatement (Second) of Contracts*, Professors Corbin and Farnsworth, and the developing law in other jurisdictions. *Restatement (Second) of Contracts* 212 comment b (1979) (any determination of meaning or ambiguity should only be made in the light of the preliminary negotiations and other factors); 3 *Corbin* 579 (the parol evidence rule does not apply to matters of interpretation); 2 *Farnsworth* 7.12, at 277 ("it has become increasingly difficult to defend the restrictive view"); *see, e.g., Pacific Gas & Elec.*, 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968); *Garden State Plaza Corp. v. S.S. Kresge Co.*, 78 N.J. Super. 485, 496-98, 189 A.2d 448, 454-55 (1963); *see also Annotation,* 40 A.L.R.3d 1384 (especially Section 4).

757 (1947) (discussing parol evidence rule). The rule should not bar introduction of evidence to explain terms. As Professor Corbin observes, "No parol evidence that is offered can be said to vary or contradict a writing until by process of interpretation the meaning of the writing is determined." Corbin, *The Parol Evidence Rule*, 53 Yale L.J. 603, 622 (1944). The operative question then becomes whether the evidence is offered to contradict the writing or to aid in its interpretation.[4] We leave these distinctions to case-by-case development by our lower courts.

{17} *Interpretation question of law or fact.* New Mexico courts long have held that the question of whether a contractual term or provision is susceptible to reasonable but conflicting meanings, *i.e.,* whether there is ambiguity, is one of law. *See, e.g., Young v. Thomas,* 93 N.M. 677, 679, 604 P.2d 370, 372 (1979). We also have held, however, that if the court finds ambiguity, the jury (or the court as the fact finder in the absence of a jury) resolves the ambiguity as an issue of ultimate fact before deciding issues of breach and damages. *Paperchase Partnership v. Bruckner*, 102 N.M. 221, 223, 693 P.2d 587, 589 (1985). The question of interpretation of language and conduct (the question of the meaning to be given the words of the contract) is a question of fact where that meaning depends on reasonable but conflicting inferences to be drawn from events occurring or circumstances existing before, during, or after negotiation of the contract. There is, as Professor Corbin points out, "no 'legal' meaning, separate and distinct from some person's meaning in fact." 3 *Corbin* 554, at 219. It may be that the evidence presented is so clear that no reasonable person would determine the issue before the court in any way but one. In that case, to the extent the court decides the issue, the question then may be described as one of law.[5] *See Owen v. Burn Constr. Co.*, 90 N.M. 297, 301, 563 P.2d 91, 95 (1977); *see also Ram Constr. Co. v. American States Ins. Co.*, 749 F.2d 1049 (3d Cir. 1984) (discussing distinction between questions of law and fact in cases of contract interpretation and construction). However, if the proffered evidence is in dispute, turns on witness credibility, or is susceptible of conflicting inferences, the ultimate factual issues must be resolved by the appropriate fact finder with the benefit of a full evidentiary hearing. To hold otherwise would be to relegate to judicial divination the determinative issues of many contract disputes.

{18} *Appellate review of contract interpretation.* We often have said that an appellate court is not bound by the trial court's conclusions of law. *See, e.g., Whitehurst v. Rainbo Baking Co.*, 70 N.M. 468, 470, 374 P.2d 849, 850 (1962) (appellate court may independently draw its own legal conclusions). That is, an appellate court need not defer to the trial court's conclusions of law and, upon analysis of the record as established below, may reach a conclusion different from that of the trial court. On the other hand, we review findings of ultimate fact, whether by court or by jury, under the substantial evidence standard. *Whorton v. Mr. C's*, 101 N.M. 651, 653, 687 P.2d 86, 88 (1984). Here, we are satisfied that the trial court considered all evidence adduced in response to the motion for summary judgment, including collateral or

[4] We point out that protective devices are available to preserve the integrity of the interpretation process. For example, as the court in *Isbrandtsen* suggested, evidence can be presented to the court through an offer of proof, or conditionally admitted subject to a motion to strike. *Isbrandtsen*, 150 Vt. at 579 n.*, 556 A.2d at 84 n.*. Alternatively, California has adopted a two-step process for contract interpretation. First, the court provisionally receives, without actually admitting, all credible evidence concerning the intention of the parties. Second, and only if the court decides in light of this extrinsic evidence that the contract is reasonably susceptible to the offered interpretation, the court admits the evidence in order to interpret the contract. *Blumenfeld v. R.H. Macy & Co.*, 92 Cal. App. 3d 38, 45, 154 Cal. Rptr. 652, 655 (1979). In any case, the screening of proffered evidence by the court should occur outside the presence of a jury.

[5] A court may employ the many rules of contract interpretation that do not depend on evidence extrinsic to the contract. *See, e.g., Smith v. Tinley*, 100 N.M. 663, 665, 674 P.2d 1123, 1125 (1984) (reasonable interpretation of contract is favored); *Schultz & Lindsay Constr. Co. v. State*, 83 N.M. 534, 536, 494 P.2d 612, 614 (1972) (uncertainties construed strictly against drafter); *Id.* at 535, 494 P.2d at 613 (each part of contract is to be given significance according to its place in the contract so as to give effect to the intentions of the parties). To the extent a court resolves an issue of contract interpretation solely by reference to such aids, or by traditional rules of grammar and punctuation, without resort to evidence of surrounding facts and circumstances, then that issue, as well, may be described as one of law.

extrinsic evidence of the circumstances surrounding the execution of the lease amendment, and quite properly found no ambiguity. As we have explained, extrinsic evidence may be offered to aid the court in the threshold determination involving the interpretation of contract terms.

{19} The appellants argue that ambiguity in the lease amendment is revealed by a series of letters, between John Decker of Intershop and Berle Miller of Anthony's, sent prior to execution of the lease amendment in January 1982. The letters showed that the thrust of the bargaining concerned the minimum rental expressed in dollars per square foot. It appears that the parties had tentatively agreed to a percentage rent of "2.5% less base rent."[6] Sometime in November 1981, after Miller expressed his concern to Decker that J.C. Penney, the anchor tenant, might not renew its lease with the Mall, the parties began to negotiate lease terms addressing that contingency. In a telex dated November 23, 1981, Decker advised Dartford that Anthony's wished to be able to cancel its lease and vacate the premises if J.C. Penney were to leave, and if Dartford were to have been unable to secure another anchor tenant. Decker advised Dartford that instead of cancellation Dartford should agree to a reduction in minimum rent and that a new "percentage rent breakpoint would be computed on [the] reduced base [rent]." Dartford agreed; and on the same date, November 23, Decker sent Miller a letter stating that if J.C. Penney left, and if the Mall failed to secure a new anchor tenant within nine months, the minimum rent would be reduced. Significantly, the letter to Miller did not mention any recomputation of the breakpoint.

{20} Miller then prepared a written expansion proposal, which was approved by Anthony's executive committee on November 28, 1981. With respect to J.C Penney's departure, the expansion proposal simply referred to the November 23 letter from Decker to Miller which, as described above, made no mention of percentage rental obligations. The expansion proposal and the letters mentioned above were forwarded to Anthony's real estate counsel who drafted the lease amendment.

{21} This evidence, and other evidence explaining the nature of natural and artificial breakpoints, explains the nature of commercial retail leasing and the circumstances leading up to the lease amendment in this case. It does not, however, reveal any ambiguity in the sense that the terms employed in the lease amendment regarding "percentage rental" and "base net retail sales figure" ($2,224,400) may be understood to be vague, uncertain, or reasonably susceptible to more than one interpretation. To the contrary, the lease amendment requires Anthony's each year to pay a sum equal to 2.5 percent of its net retail sales in excess of $2,224,400. Paragraph 9, providing for a reduction in the minimum rental in the event J.C. Penney were to vacate the premises and Dartford were to have been unable to find a replacement tenant within nine months, simply fails to provide that the base net retail sales figure of $2,244,400 will be recalculated or changed in any way in the event the Mall loses its anchor tenant. Thus, the offered evidence does not clarify or explain the percentage rental provisions in the lease amendment. It would add to the lease amendment a new provision providing for the recalculation of the base net retail sales figure. This added provision would contradict the only provision in the executed lease amendment regarding the percentage rental obligation. Rather than show ambiguity in the lease amendment, or clarify its provisions, the evidence, as explained below, raises a factual issue whether the parties mistakenly omitted from the lease amendment an agreement to adjust the base net retail sales figure in the event the minimum rent was reduced to $18,370.

{22} *Reformation based upon mistake.* In *Cleveland v. Bateman*, 21 N.M. 675, 158 P. 648 (1916), this Court held reformation of a written instrument proper upon a finding that "'there is a mutual mistake; that is, where there has been a meeting of minds, an agreement actually entered

[6] By letter to Miller dated June 4, 1981, Decker proposed minimum rent of $4.00 per square foot and percentage rent of 2.5%. On August 26, 1981, Miller agreed to the 2.5% percentage rent, but countered with minimum rent of $3.15 per square foot. On October 9, 1981, Decker confirmed the percentage rent of "2.5% less base for minimum] rent" and proposed minimum rent of $3.33 per square foot.

into, but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto.'" *Id.* at 684, 158 P. at 650 (quoting 4 J. Pomeroy, *Pomeroy's Equity Jurisprudence* 1376); *see also Morris v. Merchant*, 77 N.M. 411, 423 P.2d 606 (1967) (same).[7] In determining whether reformation is appropriate because the agreement is at variance with the mutual understanding of the parties, the parol evidence rule does not bar evidence of prior negotiations for the purpose of establishing the claimed mistake. 2 *Farnsworth* 7.5, at 225; *see also Drink, Inc. v. Martinez*, 89 N.M. 662, 556 P.2d 348 (1976) (parol evidence rule does not bar extrinsic evidence for purpose of determining whether by mistake there was no consent to the apparent agreement); 3 *Corbin* 580 (same). Indeed, all relevant evidence tending to establish that the writing does not conform to the parties' mutual agreement is admissible.

{23} A genuine issue of material fact concerning the existence of an agreement, antecedent to the execution of the lease amendment, that the percentage rental obligation in J.C. Penney's absence would be based upon a natural breakpoint, is presented by evidence of the negotiations leading up to the lease amendment and by the conduct of the parties in using, for a period of five years, a natural breakpoint for the computation of percentage rental payments.[8] Industry practice suggests that, in percentage rental leases, the breakpoint will be a natural breakpoint unless some other breakpoint is specifically negotiated by the parties. Anthony's makes an argument, but not a conclusive one, that the base net retail sales figure of $2,224,400 was the breakpoint actually negotiated by the parties as reflected by the unambiguous language of the lease amendment. Yet, there is no evidence showing explicit negotiation of an artificial breakpoint. The conflicting inferences to be drawn from the evidence regarding the parties' intent ought to be resolved by the fact finder after a full evidentiary hearing.

{24} *Issue raised on cross-appeal: reliance upon written warranties.* Pursuant to the 1984 purchase and sale agreement, Dartford warranted to Loretto that a synopsis of leases attached to the agreement contained a correct description of the leases affecting the mall. The synopsis showed Anthony's rent to be 2.5 percent of annual sales over $774,800.[9] Loretto brought a cross-claim against Dartford for breach of warranty, and the trial court entered summary judgment in favor of Loretto.

{25} Citing *Steadman v. Turner*, 84 N.M. 738, 507 P.2d 799 (Ct. App. 1973), Dartford and Intershop assert that a factual issue whether Loretto relied on the warranties contained in the sale agreement precludes summary judgment. *Steadman*, which relied upon *Vitro Corp. of America v. Texas Vitrified Supply Co.*, 71 N.M. 95, 376 P.2d 41 (1962), is inapposite. At issue in *Steadman* was whether the seller had given an express warranty,

[7] The legal grounds for reformation based upon mutual mistake are to be distinguished from those which entitle a party to avoid the contract based on mistake. To avoid a contract based on mutual mistake, the party adversely affected by the mistake must show that: (1) The mistake goes to a basic assumption on which the contract was made; (2) the mistake has a material effect on the agreed exchange of performances; and (3) the mistake is not one for which that party bears the risk. *Restatement (Second) of Contracts* 152; *State ex rel. State Highway & Transp. Dep't v. Garley*, 111 N.M. 383, 806 P.2d 32 (1991) (discussing distinction).

[8] Anthony's argues that the payment history is irrelevant because Miller, who negotiated the contract for Anthony's, was unaware of the payment history. That is, the payment history did not make either more or less probable Miller's claimed intent at the time the lease was amended. This argument ignores the fact that Miller's intent is imputed to the corporation. *See Trinity Univ. Ins. Co. v. Rocky Mtn. Wholesale Co.*, 353 F.2d 574, 577 (10th Cir. 1965); *Sawyer v. Mid-Continent Petroleum Corp.*, 236 F.2d 518, 520-21 (10th Cir. 1956). The question then is the intention of Anthony's, not the intention of Miller. An inference that this intention was as claimed by the Mall could be drawn from Anthony's conduct during the five years after the lease was amended.

Additionally, Anthony's argues that there exist only two relevant documents regarding these negotiations, and neither relates to the percentage rental issue. During oral argument we attempted to clarify with counsel for Anthony's why she thought the argument of the Mall depended upon an agreement to a change in the percentage. She had no specific response, and we believe the artificial breakpoint argument is no way dependent upon some explicit understanding that there would be a change in the percentage rate charged.

[9] Curiously, that figure does not correspond to a natural breakpoint as Dartford and Intershop allege. As observed above, the natural breakpoint, under the yearly base rent of $18,370, is $734,800. Neither party has called attention to the significance, if any, of this discrepancy.

and if so, whether the buyers had a right to rely on it, 84 N.M. at 742, 507 P.2d at 803. *Steadman* did not address reliance as an essential element of a claim for breach of an express warranty contained in a written agreement. In *Vitro*, however, we explained that "'if an express warranty has been given in express terms as a part of the contract of sale, no proof of reliance thereon would have been necessary.'" *Vitro*, 71 N.M. at 105, 376 P.2d at 48 (quoting 1 S. Williston, *Williston on Sales* 206, at 534-35 (Rev. ed. 1948)). Accordingly, because reliance is not an element of a claim for breach of an express warranty reduced to writing, there is no material issue of fact thereon.

{26} For these reasons, we affirm in part, reverse in part, and remand the cause to the trial court with instructions to afford the parties a full evidentiary hearing to include the question of mutual mistake. We do not reach the question of laches, and the merits of that issue may be raised in the proceedings on remand.[10] The question would seem relevant both to the Mall's defense of mistake and claim for reformation, as well as to Anthony's action for restitution based upon the express terms of the lease amendment.

{27} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

[10] We do not agree with Anthony's characterization of its suit as an action at law that makes irrelevant certain equitable defenses. For one, a judgment or decree for the restitution of money mistakenly paid was available both at common law and in equity, and the principles applied in either case were the same regardless of the form of the action. *See* 3 *Corbin* 613, at 710 (citing cases).

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1992-NMSC-008

Filing Date: January 8, 1992

Docket No. 19,318

NANCY J. KLOPP,

Petitioner,

vs.

THE WACKENHUT CORPORATION and TRANS WORLD AIRLINES, INC.,

Respondents.

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David Duhigg,
Helena Gorochow,
Albuquerque, NM,

for Petitioner.

William H. Carpenter,
Michael B. Browde,
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Susan L. Snyder,
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D. Michael Johanson,
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for Amicus Curiae NM Defense Lawyers Association.

OPINION

RANSOM, Chief Justice.

{1} Nancy Klopp appealed to the court of appeals from a directed verdict rendered at the conclusion of her case against Trans World Airlines, Inc. and Wackenhut Corporation. Klopp had sued for personal injuries sustained when she tripped over the stanchion base of a metal detector at an airport security station. Wackenhut operated the security station for TWA. Deferring to this Court to resolve whether the open and obvious danger doctrine has been abrogated by comparative negligence, the court of appeals affirmed the directed verdict.

{2} We issued a writ of certiorari to review, with respect to an obvious danger, the duty owed business visitors by TWA as the occupier of the premises, and by Wackenhut as the operator of the station. We also consider whether it may be inferred from the evidence that either defendant reasonably should have anticipated that persons passing through the station would be distracted from the dangerous condition. We are aided in this appeal by the able amicus curiae briefs of the New Mexico Defense Lawyers Association and the New Mexico Trial Lawyers Association.

{3} *Standard of review.* Just as the trial court must consider all of the evidence in ruling upon a motion for directed verdict, this Court must do likewise on appeal from a judgment entered pursuant to a directed verdict; both courts must resolve

in favor of the party resisting the motion any conflicts or contradictions in the evidence, and the interpretation most favorable to such party must be accepted in the face of reasonable but conflicting inferences deducible from uncontradicted evidence. *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 728-29, 749 P.2d 1105, 1107-08 (adopting, inter alia, the standard announced in *Skyhook Corp. v. Jasper*, 90 N.M. 143, 146, 560 P.2d 934, 937 (1977)), *cert. denied*, 488 U.S. 822 (1988). In applying this standard of review, the principal consideration is to minimize interference with the jury function so as not to erode a litigant's right to trial by jury. *Melnick*, 106 N.M. at 729, 749 P.2d at 1108. A plaintiff may not be deprived of a jury determination simply because the possibility of a recovery may appear remote; rather, a directed verdict is proper only when there is no pretense of a prima facie case. There must be no substantial evidence supporting one or more essential elements of the case. *Id.*

{4} *Most favorable facts.* Accordingly, Klopp summarizes the evidence adduced at trial as follows. On February 27, 1988, she was proceeding through the Albuquerque International Airport to board an airplane when she passed through an airport security station. The station consisted of an upright metal detector, to the side of which was a baggage table. The station was operated by Wackenhut under contract with TWA. The latter owned the equipment and had arranged its particular configuration. The alarm sounded as Klopp stepped through the metal detector. Having activated the alarm, Klopp removed her bracelets, placed them on a tray on the table, and stepped through the detector again. The alarm was not triggered, and she moved to the left to retrieve her bracelets. In so doing, she tripped over the protruding stanchion base of the metal detector. She fell, injuring her left leg and right knee. The stanchion base protruded approximately eighteen inches. Preoccupied with retrieving her belongings, Klopp's attention was distracted from this base.

{5} *The issues.* In their motions for directed verdict, TWA and Wackenhut argued that the stanchion base of the metal detector was open and obvious and, because there was no reason to believe it constituted a danger, no duty of care was owed to Klopp. TWA relied upon the rule of law set forth in Uniform Jury Instruction (UJI) 13-1310:

> An [owner] [occupant] owes a duty to a business visitor, with respect to known or obvious dangers, if and only if:
>
> (1) The [owner] [occupant] knows or has reason to know of a dangerous condition on his premises involving an unreasonable risk of danger to a business visitor; and
>
> (2) The [owner] [occupant] should reasonably anticipate that the business visitor will not discover or realize the danger [or that harm will result to the business visitor, even though the business visitor knows or has reason to know of the danger].
>
> If both of these conditions are found to exist, then the [owner] [occupant] had a duty to use ordinary care to protect the business visitor from harm.

SCRA 1986, 13-1310.

{6} Klopp contends that, under the evidence as recited, fact questions existed whether the protruding stanchion base involved an unreasonable risk of danger, and whether TWA reasonably could have anticipated that a passenger's attention may be distracted from that danger, or that such person would forget the danger she had discovered. Klopp also argues that the open and obvious danger rule as set forth in UJI 13-1310 is, in essence, a contributory negligence bar to her cause of action, and thus, the instruction is incompatible with the doctrine of comparative negligence adopted in *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981). Klopp submits that since abrogation of the open and obvious danger rule would impose no significant new duties and conditions, or take away previously existing rights, retrospective disapproval of the doctrine is appropriate. *See Lopez v. Maez*, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982). TWA takes issue with Klopp's statement of the evidence and argues that the open and obvious danger rule is

strictly one of duty without regard to any fault of the business visitor.

{7} TWA submits, further, that Klopp failed to preserve a claim of error in regard to the incompatibility of the open and obvious danger rule with comparative negligence. The record reflects to the contrary that, at the conclusion of Klopp's case in chief and in response to the motion for directed verdict, Klopp argued that any negligence on her part in the face of an open and obvious danger should not eliminate the duty of care owed by the occupier of the premises. "[New Mexico is] a comparative negligence state, so consequently whether or not plaintiff may or may not have been negligent does not eliminate . . . the duty the defendant was talking about [in relation to an open and obvious danger]." We agree with Klopp that she raised the question of the jury's role in comparing negligence and apportioning liability and that the issue of the open and obvious danger rule under comparative negligence is properly before this Court.

{8} *Duty to warn distinguished.* The Defense Lawyers Association argues that, in both premises liability and products liability cases, New Mexico courts long have considered that the open and obvious danger rule applies to that portion of the negligence formula concerning the duty of the landowner or supplier *to warn* of known, or open and obvious dangers. *Skyhook Corp. v. Jasper*, 90 N.M. 143, 560 P.2d 934 (1977); *Proctor v. Waxler*, 84 N.M. 361, 503 P.2d 644 (1972); *Garrett v. Nissen Corp.*, 84 N.M. 16, 498 P.2d 1359 (1972); *Villanueva v. Nowlin*, 77 N.M. 174, 420 P.2d 764 (1966); *Romero v. Kendricks*, 74 N.M. 24, 390 P.2d 269 (1964); *Burgi v. Acid Eng'g, Inc.*, 104 N.M. 557, 724 P.2d 765 (Ct. App.), *cert. denied*, 104 N.M. 460, 722 P.2d 1182 (1986); *Jones v. Minnesota Mining & Mfg. Co.*, 100 N.M. 268, 669 P.2d 744 (Ct. App. 1983); *Arenivas v. Continental Oil Co.*, 102 N.M. 106, 692 P.2d 31 (Ct. App. 1983), *cert. quashed*, 102 N.M. 88, 691 P.2d 881 (1984); *Michael v. Warner/Chilcott*, 91 N.M. 651, 579 P.2d 183 (Ct. App.), *cert. denied*, 91 N.M. 610, 577 P.2d 1256 (1978); *Perry v. Color Tile of New Mexico*, 81 N.M. 143, 464 P.2d 562 (Ct. App. 1970).[1] In this case, however, we address the duty issue irrespective of a specific duty to warn. If the nature of the risk would not be made more obvious through the giving of additional warning, then the giving of a warning would be a false issue. But this is not dispositive of whether ordinary care has been exercised to keep the premises safe.

{9} *Duty to exercise ordinary care without regard to whether persons invited on premises are themselves negligent in some way.* Since deciding the case before us, the court of appeals has filed an opinion in *Davis v. Gabriel*, 111 N.M. 289, 804 P.2d 1108 (Ct. App. 1990), addressing whether recovery against a contractor was barred by a business visitor's knowledge of the risk of injury from debris left in a hallway by the contractor who was remodeling an office building. Initially, the court correctly applied the rule that one who, on behalf of the possessor of realty, creates a dangerous condition is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the realty. *Id.* at 291, 804 P.2d at 1110; *see also Tipton v. Texaco, Inc.*, 103 N.M. 689, 695-96, 712 P.2d 1351, 1357-58 (1985) (approving *Restatement (Second) of Torts* 384 (1964)). However, in applying the rule of liability for a possessor of land, the court of appeals stated that the possessor of land has no duty to take steps that are necessary only to protect business visitors who are negligent. *Davis*, 111 N.M. at 291, 804 P.2d at 1110.

{10} In *Davis* the court of appeals conditioned the duty owed invitees upon whether (1) the possessor of land reasonably could have foreseen that invitees *exercising due care* would be injured by the condition of the land, and (2) such risk made it unreasonable for the possessor not

[1] The Defense Lawyers also acknowledge the few New Mexico cases that have held, in fact situations in which plaintiff encountered a known and obvious danger, that plaintiff assumed the risk, *Dempsey v. Alamo Hotels, Inc.*, 76 N.M. 712, 418 P.2d 58 (1966); *Bogart v. Hester*, 66 N.M. 311, 347 P.2d 327 (1959), or that plaintiff was contributorily negligent. *Boyce v. Brewington*, 49 N.M. 107, 158 P.2d 124 (1945); *Wood v. Southwestern Pub. Serv. Co.*, 80 N.M. 164, 452 P.2d 692 (Ct. App. 1969).

to take certain precautions. *Id.* at 292, 804 P.2d at 1111. Following a similar rationale, in oral argument in the case before us, TWA contended it had no duty to design the security station "for klutzes and total idiots." We disagree with this analysis and with the inferences drawn from the recent opinion of the court of appeals in *Davis*. We hold that, in a place of public accommodation, an occupier of the premises owes a duty to safeguard each business visitor whom the occupier reasonably may foresee could be injured by a danger avoidable through reasonable precautions available to the occupier of the premises.

{11} In *Davis* the court of appeals held that "the scope of the duty is determined by reference to the foreseeable behavior of reasonably careful invitees, considered as a class." *Id.* If we were to accept that no duty is owed to invitees foreseeably injured only through contributory negligence, we would vitiate the ameliorating effect of comparative fault. While we fully understand that, absent a breach of duty, in logic there can be no fault to compare, the fallacy in that argument is that it is premised not on the foreseeable behavior of business visitors, but on the foreseeable behavior of reasonably careful visitors. On that premise, the negligence of a particular visitor is preclusive if outside the ambit of the foreseeable behavior of reasonably careful visitors.

{12} Simply by making hazards obvious to reasonably prudent persons, the occupier of premises cannot avoid liability to a business visitor for injuries caused by dangers that otherwise may be made safe through reasonable means. A risk is not made reasonable simply because it is made open and obvious to persons exercising ordinary care. *See Fabian v. E. W. Bliss Co.*, 582 F.2d 1257, 1263 (10th Cir. 1978) (manufacturer has duty to use reasonable care in design of its products, and that duty is not changed because any risk from use of products might be obvious). Cases that appear to have held the duty to avoid unreasonable risk of injury to others is satisfied by an adequate warning are overruled by us today. *E.g., Skyhook Corp. v. Jasper*, 90 N.M. at 148, 560 P.2d at 939 (no duty to make product safe when risk is obvious, known, and specifically warned against); *Garrett v. Nissen Corp.*, 84 N.M. at 20, 498 P.2d at 1363 (if duty to warn is satisfied, then there is no defect in product). Moreover, we think that some degree of negligence on the part of all persons is foreseeable, just like the inquisitive propensities of children, and thus, should be taken into account by the occupant in the exercise of ordinary care.[2]

{13} *Unforeseeable encounter with a known danger.* If the contributory negligence of a business visitor has been so extraordinary as to have been unforeseeable, then it would not have been a breach of duty for the occupier not to have taken precautions against an open and obvious risk. We do not read UJI 13-1310 to say anything to the contrary. There is no duty in relation to known or obvious dangers if the occupier of the premises has no reason to know of an unreasonable risk of danger to a business visitor. "'If people who are likely to encounter a condition may be expected to take perfectly good care of themselves without further precautions, then the condition is not unreasonably dangerous because the likelihood of harm is slight.'" *Proctor v. Waxler*, 84 N.M. 361, 364, 503 P.2d 644, 647 (1972) (quoting 2 Fowler V. Harper & Fleming James, Jr., *The Law of Torts* 27.13, at 1489-90 (1956)).

{14} Court rarely decides existence of unreasonable risk. Recently, in *Calkins v. Cox Estates*,

[2] The Defense Lawyers Association points out that UJI 13-1310 (open and obvious danger rule) does not define the term "dangerous condition." The Defense Lawyers submit that the definition of that term given in UJI 13-1319 (duty of occupant to keep premises free from "dangerous condition") could apply to UJI 13-1310. A dangerous condition is defined in UJI 13-1319 as "a condition which a person exercising ordinary care would foresee as likely to cause injury to one exercising ordinary care for his own safety." SCRA 1986, 13-1319. Thus, as the Defense Lawyers argue, when UJI 13-1310(1) is read in light of the definition in UJI 13-1319 and in light of our earlier New Mexico cases involving the open and obvious danger rule, the person in possession of premises owes a duty to invitees where the proprietor should foresee that the danger is one that is likely to cause injury to persons *exercising ordinary care* for their own safety. Suffice to say that we see the same problem with the definition of dangerous condition in UJI 13-1319 (and UJI 13-1318) after the adoption of comparative negligence that we see with the approach taken in *Davis* limiting duty by the foreseeable behavior of reasonably careful visitors.

110 N.M. 59, 792 P.2d 36 (1990), we explored the duty of a landowner to maintain a common area:

> A duty to an individual is closely intertwined with the foreseeability of injury to *that individual* resulting from an activity conducted with less than reasonable care by the alleged tort-feasor. *See* [*Ramirez v. Armstrong*, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983)]; *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928). "If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant." *Ramirez*, 100 N.M. at 541, 673 P.2d at 825.
>
> A plaintiff must show that defendant's actions constituted a wrong against him, not merely that defendant acted beneath a required standard of care and that plaintiff was injured thereby. He must show that a relationship existed by which defendant was legally obliged to protect the interest of plaintiff. This concept limits liability for negligent conduct—a potential plaintiff must be reasonably foreseeable to the defendant because of defendant's actions. *See Palsgraf*, 248 N.Y. at 342, 162 N.E. at 100.

Id. at 62, 792 P.2d at 39. Further:

> In New Mexico, as stated in the majority opinion, we define negligence as an act foreseeably involving an unreasonable risk to that individual who complains of injury. *See also* SCRA 1986, 13-1601. Foreseeability is most often a question of fact and only rarely, as in *Palsgraf*, may foreseeability be considered a false jury issue.

Id. at 67, 792 P.2d at 44 (Ransom, J., dissenting).

{15} *Jury to decide whether risk is unreasonable.* We hold that it is for the jury to decide in virtually every case whether a dangerous condition on the premises involved "an unreasonable risk of danger to a business visitor" and whether the occupier "should reasonably anticipate that the business visitor will not discover or realize the [obvious] danger." *Accord Harrison v. Taylor*, 768 P.2d 1321 (Idaho 1989) (abolishing open and obvious danger doctrine in light of adoption of comparative negligence); *Riddle v. McLouth Steel Prods. Corp.*, 451 N.W.2d 590 (Mich. Ct. App. 1990) (same); *Cox v. J.C. Penney Co.*, 741 S.W.2d 28 (Mo. 1987) (en banc) (same); *Woolston v. Wells*, 687 P.2d 144 (Or. 1984) (en banc) (same); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978) (same); *Donahue v. Durfee*, 780 P.2d 1275 (Utah Ct. App. 1989) (same), *cert. denied*, 789 P.2d 33 (Utah 1990); *O'Donnell v. City of Casper*, 696 P.2d 1278 (Wyo. 1985) (same).

{16} *UJI 13-1310 disapproved.* Here, as we discuss below, the trial court could not have determined that the contributory negligence of the business visitor was so extraordinary as to be unforeseeable and to obviate any duty owed by the occupier of the premises with respect to known or obvious dangers.[3] Therefore, we now must decide a policy question specifically put to us in this appeal. Should we continue under UJI 13-1310 also to have the jury decide whether the occupier of the premises owed a duty to the business visitor based upon the jury's decision whether the occupier knew or had reason to know that the risk of the obvious danger was unreasonable to that business visitor?

{17} Because "the court must determine *as a matter of law* whether a particular defendant owes a duty to a particular plaintiff," *Calkins*, 110 N.M. at 62, 792 P.2d at 39, we believe it becomes apparent under principles of comparative fault that it is inappropriate that a case like this be submitted to the jury under the present

[3] Considerations for the trial court include, among others, whether the hazardous condition was such that it could not be encountered safely even if the visitor had been warned or otherwise was aware of and appreciated the danger, whether serious bodily injury or death is possible, whether the attention of the visitor may be distracted or diverted as he or she approached the dangerous condition, whether the condition was in a place where the visitor may have a lapse of memory. *See, e.g., Greiser v. Brown*, 102 N.M. 11, 690 P.2d 454 (Ct. App. 1984) (lapse of memory); *see also* 5 Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, *The Law of Torts* 27.13, at 244-49 (2d ed. 1986) (listing factors to be considered in determining whether an obvious condition is unreasonably dangerous).

UJI 13-1310. Once the court has decided that the contributory negligence of the business visitor was foreseeable in the face of known or obvious dangers, the jury should be instructed that, with respect to an obviously dangerous condition of which the occupier of the premises has knowledge, or has reason to know, the occupier has a duty to use ordinary care to keep the premises safe for use by the business visitor. SCRA 1986, 13-1309 (duty to business visitor). Ordinary care will be defined for the jury as the care that a reasonably prudent person would use in the conduct of his own affairs, and the jury will be instructed that what constitutes ordinary care varies with the nature of what is being done.

> As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.

SCRA 1986, 13-1603 (ordinary care). Further, the jury will be instructed that to rise to the level of negligence an act must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to another. SCRA 1986, 13-1601 (negligence). These simple instructions will give the occupier of the premises an ample basis on which to argue that the known or obvious nature of a condition on the premises did not involve an unreasonable risk of danger to a business visitor, or that the occupier reasonably should not have anticipated either that the business visitor would not discover the danger or that the danger could not be encountered with reasonable safety even when known and appreciated.

{18} *Genuine issues of material fact under the evidence.* On whether the trial court properly could have directed a verdict because the contributory negligence of Klopp was so extraordinary as to have obviated any duty on the part of the occupier to take precautions against the open and obvious danger, one that was appreciable and in plain sight, TWA argues that it neither knew nor had reason to know that the particular condition of the stanchion base on the metal detector created or involved an unreasonable risk of danger to a business visitor passing through it. In 1987 and again in 1988, at least 540,000 persons passed through that metal detector set up in that specific configuration without any incident whatsoever. The particular equipment at the security station and the configuration of the security station had been approved and certified by the Federal Aviation Authority. Other airlines used the same type of metal detector and the same configuration at other areas in the airport. Prior to Klopp's accident, no one ever had fallen, slipped, or tripped while passing through the metal detectors.

{19} While the facts recited by TWA well may have persuaded the jury that TWA did not breach its duty or that any fault to be apportioned to TWA should be minimal, we believe the trial court erred when, in essence, it found no substantial evidence to support the foreseeability of harm to a business visitor. The eighteen-inch extension of the stanchion base of the metal detector created a danger of tripping as obvious to us as TWA argues it to have been obvious to Klopp. Like TWA, we have had considerably more time to contemplate this danger and to study the security station's configuration than did Nancy Klopp.

{20} In response to the alarm that sounded when she stepped through the metal detector, Klopp was required to remove her jewelry and place it in a tray on a table open to the public. As Klopp reentered the metal detector her jewelry was most readily accessible to her on a line across the stanchion base. Despite the safety record, the fact that Klopp was distracted from the presence of the stanchion base appears to us not so extraordinary as to be unforeseeable. We conclude that TWA owed Klopp a duty to use ordinary care to protect her from tripping over the stanchion base while preoccupied with recovering her jewelry. For exactly the same reasons that the court erred in finding no duty, as this case has been postured by the parties, the court erred in not allowing the jury to decide under all the circumstances whether TWA breached the duty to use ordinary care to protect Klopp from harm. Negligence, proximate cause, and comparative fault are issues to be decided by the jury whenever reasonable minds may differ.

See City of Belen v. Harrell, 93 N.M. 601, 604, 603 P.2d 711, 714 (1979); *Gilbert v. New Mexico Constr. Co.*, 39 N.M. 216, 224, 44 P.2d 489, 494 (1935); *Guitard v. Gulf Oil Co.*, 100 N.M. 358, 363, 670 P.2d 969, 974 (Ct. App.), *cert. denied*, 100 N.M. 327, 670 P.2d 581 (1983).

{21} *Liability of Wackenhut.* TWA hired Wackenhut to provide security personnel to operate the airport security station. TWA provided all necessary equipment and positioned that equipment. Once the equipment was positioned, and after the FAA had certified its proper operation, the equipment could not be repositioned without first obtaining recertification. Wackenhut was forbidden to make any alterations to the configuration.

{22} Wackenhut states that in ruling in its favor the trial judge found it unnecessary to consider the open and obvious danger rule. Wackenhut asserts that the court properly ruled that its only duty to Klopp was a duty to prevent deadly or dangerous weapons from being carried aboard an airliner, and that, as a matter of law, Wackenhut owed no duty to Klopp regarding the positioning, operation, or maintenance of the security station. The relevant statements of the trial court on this matter are:

> There is just no prima facie case that there has been established with reference to Wackenhut. . . . In this case, we don't have a standard of care which is imposed upon Wackenhut that was a security agent for doing anything more than managing the equipment that was given to the company and to its agents. There's no testimony or evidence that Wackenhut breached any of the duties imposed upon them for maintaining that security.

The rationale of the trial court seems to confuse duties imposed on an employee or agent by contract (*e.g.*, to provide airport security) and duties imposed by the law of negligence.

{23} *Liability of an agent for injuries caused by dangerous condition of premises or chattels.* The tort liability of an employee or an agent for an omission is determined by the law of negligence and is not limited to the affirmative obligations of the contract of service. *See S. H. Kress & Co. v. Selph*, 250 S.W.2d 883, 892 (Tex. Civ. App. 1952). Nevertheless, the liability of an employee or agent for injuries caused by dangerous conditions on occupied premises is directly related to actual control over the premises. The *Restatement (Second) of Agency* states the rule as follows:

> An agent who has the custody of land or chattels and who should realize that there is an undue risk that their condition will cause harm to the person, land, or chattels of others is subject to liability for such harm caused during the continuance of his custody, by his failure to use care to take such reasonable precautions as he is authorized to take.

Restatement (Second) of Agency 355 (1957). Comment (b) of that section reads in part: "If an agent has only a limited control over land or chattels, he is subject to liability only to the extent that he is authorized to exercise such control." *Restatement (Second) of Agency* 355 comment b (1957); *see also Restatement (Second) of Torts* 387 (1964) (liability of independent contractor or servant taking over entire charge of land); 1 Floyd R. Mechem, *A Treatise on the Law of Agency* 1474 (2d ed. 1914) (liability of an agent for condition of premises over which he has control); *Richland County v. Anderson*, 291 P.2d 267 (Mont. 1955) (husband, who on occasion acted as the agent of his wife in connection with a certain dam and reservoir, had no liability for damages caused by flooding where wife was responsible for maintenance and repair and husband had no control over dam and reservoir); *Jacobs v. Mutual Mort. & Invest. Co.*, 216 N.E.2d 49 (Ohio 1966) (manager of rental premises found to have sufficient control of premises to fix liability upon manager for unsafe condition in hallway; finding by lower appellate court that contract with owner did not invest management company with exclusive control not determinative).

{24} *Wackenhut had no liability for injuries caused by configuration of equipment when it lacked authority to rearrange the station.* The

above authorities would suggest that although Wackenhut's duty and liability in many respects may have paralleled that of the owner or person in possession of the commercial premises (TWA in this case), with regard to liability for harm caused by the configuration of the table and screening device, Wackenhut has no liability due to its limited control over those chattels. Wackenhut had no control over the configuration that was to be employed and, in point of fact, was forbidden to change the configuration that was to be employed and, in point of fact, was forbidden to change the configuration of the station. Klopp does not take issue with that assertion, but argues that Wackenhut on several occasions placed a wastebasket alongside the metal detector, forcing persons to go around the protrusion.[4] We believe, however, that while Wackenhut certainly had a greater duty to passengers than merely to search for weapons,[5] that duty was limited by the extent of its control over the chattels in its custody or over the area that it occupied. For this reason, we hold that Wackenhut was relieved of liability for harm caused by the configuration of equipment that it lacked authority to rearrange.[6]

{25} *Conclusion.* For the above reasons, we reverse the judgment of the court of appeals and the directed verdict in favor of TWA. We affirm the directed verdict in favor of Wackenhut. The cause shall be remanded to the district court for trial on the merits and further proceedings consistent with this opinion.

{26} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

GENE E. FRANCHINI,
Justice

[4] Klopp submits that the testimony of Wackenhut's security guard, that a trash bin had been placed on several occasions adjacent to the protruding stanchion base, was proof that Wackenhut was aware of the unreasonably dangerous condition of the protruding base. Klopp's interpretation of that testimony is strained, but giving that evidence its most beneficial interpretation, the issue remains not whether a person with limited control has knowledge of a risk, but whether such person has a duty to ameliorate a risk from the configuration of premises which that person is not authorized to control. Evidence of Wackenhut's knowledge of the risk may be relevant to determining whether Wackenhut owed a duty to warn or to otherwise ameliorate the known risk. As discussed below in footnote six, we offer no opinion on those issues.

[5] For example, Wackenhut might breach a duty of ordinary care owed to the public if it allowed its employees to leave suitcases where passengers might trip and fall over them.

[6] We leave open the question whether an agent with limited control over occupied premises should take, in the exercise of ordinary care, measures other than to directly correct a dangerous condition existing on the premises. For instance, it could be argued that the fact that Wackenhut had no authority to change the configuration should not relieve it of a duty to guard against the harm by warning persons of the protruding base, by placing a barrier forcing persons around the protrusion, or by notifying TWA of any dangerous condition of which it was aware. However, given the posture of this case, we do not reach those questions. Klopp argues only that both TWA and Wackenhut were responsible for the unsafe design and configuration of the security station. Due to Wackenhut's undisputed lack of control over the choice of equipment and its configuration at the checkpoint, it is relieved of any liability for harm caused by the design and configuration of that equipment. Moreover, in this appeal, Klopp for the most part has directed her argument to the incompatibility between the open and obvious danger rule and comparative negligence. Without the benefit and guidance of briefing on these other issues, we hesitate to consider any changes in established common-law principles.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1992-NMSC-013

Filing Date: February 5, 1992, Decided

Docket No. 19,792

ROSITA BOYD, individually and as mother and personal representative of the Estate of Tracy Shain Boyd, her son, deceased,

Plaintiff-Appellant,

vs.

PERMIAN SERVICING COMPANY, INC.,

Defendant-Appellee.

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OPINION

RANSOM, Chief Justice.

{1} Rosita Boyd sued Permian Servicing Company, Inc. to recover damages for the wrongful death of her son, Tracy Shain Boyd, who died from injuries incurred while working for Permian. Permian filed a motion to dismiss for lack of subject matter jurisdiction under SCRA 1986, 1-012(B)(1), contending the case was governed by the Workers' Compensation Act.[1] Plaintiff claimed that the Act did not apply because her sixteen-year-old son was working illegally on a power-driven hoisting device in violation of Sections 212, 215, and 216 of the Fair Labor Standards Act of 1938. 29 U.S.C. §§ 201 to - 19 (1988 & Supp. 1989).

{2} The trial court, based on evidence outside the pleadings, found that Boyd was legally employed by Permian and that the injuries arose out of and in the course of Boyd's employment. Based on those findings the court concluded that the requirements of coverage under the Act had been met, and that it lacked subject matter jurisdiction. Consequently, the court dismissed plaintiff's claims.

{3} Permian's motion should have been considered as one for dismissal under SCRA 1986, 1-012(B)(6), alleging failure to state a claim upon which relief could be granted. The suit was filed as a claim for wrongful death over which the district courts in New Mexico clearly have jurisdiction. While a death case under the Workers' Compensation Act cannot be brought originally in the district court, that is not because the legislature has removed jurisdiction from the district court over death cases, but rather because the exclusivity provision of the Act is a total bar to an action by an employee against an employer. Further, because the court heard evidence outside the pleadings, the motion should have been analyzed as a motion for summary judgment. SCRA 1986, 1-012(B).

{4} The parties agree the employment of Boyd was not a violation of the New Mexico Child Labor Law. Therefore, we are asked to decide whether employment in violation of the Federal Fair Labor Standards Act would affect exclusivity when there is not a violation of state law.

[1] The New Mexico Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to 52-6-25 (Repl. Pamp. 1987), provides that its procedures and remedies are exclusive for job related injuries and death, and that the employer and employee are conclusively presumed to have surrendered their rights to procedures and remedies other than those provided in the Act. NMSA 1978, 52-1-6.

{5} We affirm the dismissal. In New Mexico, a minor employed under a contract made invalid by the State Child Labor Law may sue for personal injury under the common law. *Maynerich v. Little Bear Enters.*, 82 N.M. 650, 652, 485 P.2d 984, 986 (Ct. App. 1971). New Mexico case law does not deal with illegality under federal law, and the question of whether a contract of employment made invalid under federal law would affect the exclusivity of workers' compensation is a matter of first impression. The three jurisdictions apparently deciding this question to date have held violation of the Federal Fair Labor Standards Act is not controlling so as to render employment voidable and outside of the exclusivity of workers' compensation laws.

{6} Most recently, in *Bruley v. Fonda Group, Inc.*, 595 A.2d 269 (Vt. 1991), a divided court held:

> Although plaintiffs cite numerous cases holding that illegally employed minors who have been injured may sue the employer in a damage suit, all involve violations of *state* child labor laws. No Vermont statute was violated here. Moreover, plaintiffs cite no cases holding that the child labor provisions of the federal Fair Labor Standards Act apply in determining whether employment of a minor is lawful for purposes of workers' compensation coverage. To the contrary, two courts have explicitly rejected application of the federal act. *See Estep* . . . [and] *Gaston*. . . .

Id. at 271 (citations omitted).

{7} In *Estep v. Janler Plastic Mold Corp.*, 297 N.E.2d 341 (Ill. App. Ct. 1973), *aff'd*, 312 N.E.2d 618 (Ill. 1974), *cert. denied*, 419 U.S. 1109 (1975), the court had simply stated:

> We cannot accept plaintiff's contention that the federal Fair Labor Standards Act definition of the term "oppressive child labor" is controlling in our interpretation of the Illinois Workmen's Compensation Act's use of the term "illegally employed minor." Rather do we look for such assistance to the Illinois Child Labor Law which provides that a minor under 16 years of age cannot be lawfully employed to do the kind of work engaged in by plaintiff. Since plaintiff was 17 at the time of the injury, he was not an "illegally employed minor."

Id. at 342-43 (citation omitted).

{8} In *Gaston v. San Ore Construction Co.*, 477 P.2d 956 (Kan. 1970), the court specifically asked whether the Federal Fair Labor Standards Act and the child labor provisions thereunder control as to the legality of employment under the Kansas Workmen's Compensation Act. Noting that the Kansas Supreme Court had held to the contrary in *Neville v. Wichita Eagle, Inc.*, 294 P.2d 248 (1956), the court quoted, with approval, from that opinion:

> We hold that the test of the minor's capacity to enter into an employment contract is that fixed by the laws of this state; that the employment was a lawful one under our workmen's compensation act, and that the liabilities of the employer for injury resulting in the workman's death are measured by that act.

Gaston, 477 P.2d at 958 (quoting *Neville*, 294 P.2d at 252). The court went on to reiterate that "the test of whether employment is lawful under the provisions of our Workmen's Compensation Act is determined by the laws of our state and not those of the federal government." *Gaston*, 477 P.2d at 958.

{9} Also, the United States Court of Appeals for the Fifth Circuit, in a diversity case on appeal from summary judgment that a wrongful death claim was barred by Georgia workmen's compensation law, held in four lines that: "Appellants argue . . . that their state law wrongful death claim is not precluded by the Georgia workmen's compensation statute. The . . . contention is without merit. . . ." *Breitwieser v. KMS Industries, Inc.*, 467 F.2d 1391, 1392 (5th Cir. 1972) (the entire opinion actually being directed to denial of any separate basis for liability under the Federal

Fair Labor Standards Act which was held not to create an independent cause of action for wrongful death), *cert. denied*, 410 U.S. 969 (1973).

{10} None of these cases enunciate rationale for their holdings. Notable is the dissent of Justice Dooley in *Bruley:*

> Illegality is a matter of contract law. Where illegality is based on a violation of statutory law, the statute can be state or federal. Thus, it makes no difference whether the employment is illegal under the Vermont Child Labor Law or the federal Fair Labor Standards Act, as long as it is illegal.

Bruley, 595 A.2d at 271 (citation omitted). The question, however, is not simply one of illegality—it is one of whether the illegality allows for the avoidance of the exclusivity of workers' compensation under state policy.

{11} The workers' compensation statutes of some states specifically provide that illegally employed minors are included within the exclusivity of workers' compensation, *e.g., Lemmerman v. A.T. Williams Oil Co.*, 350 S.E.2d 83, 85 (N.C. 1986), or that the minor is given an option of which remedy to pursue, *e.g., Thompson v. Family Godfather, Inc.*, 514 A.2d 875, 876 (N.J. Super. Ct. Law Div. 1986). It is a matter of state workers' compensation policy. That is clear. When the legislature has made no specific provision, the courts have inferred a state policy either in favor of exclusivity, *e.g., Jensen v. Sport Bowl, Inc.*, 469 N.W.2d 370 (S.D. 1991), or in favor of the worker's right to sue at common law. *E.g., Maynerich*, 82 N.M. at 652, 485 P.2d at 986.

{12} The New Mexico Legislature has enacted child labor laws under which the employment in question is legal for sixteen-year-old workers. NMSA 1978, 50-6-4 (Repl. Pamp. 1988) (no child *under* the age of sixteen shall be employed, *inter alia*, on or around a power-driven hoisting apparatus). On this point, the state and federal laws are in conflict. When employment that is illegal under federal penal statutes is not the subject of specific state legislative policy to the contrary, we likely will be disposed to apply the I doctrine in favor of the worker's option. We would infer that to be the intention of the legislature. We cannot, of course, recognize a policy inconsistent with a declaration of the legislature. Here, we conclude the legislature's specific consideration of the employment of sixteen-year-old workers was sufficient to reflect an intent that the exclusivity of the Workers' Compensation Act apply to such employment. Accordingly, we affirm the district court's dismissal of this wrongful death action as falling within the exclusivity of the Workers' Compensation Act.

{13} IT IS SO ORDERED

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

GERALD R. COLE,
District Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1992-NMSC-018

Filing Date: February 21, 1992, Decided

Docket No. 19,124

LORENZO SAIZ, as Personal Representative of the Estate of Jerry Saiz, Deceased,

Petitioner,

vs.

BELEN SCHOOL DISTRICT, a governmental entity,

Respondent.

James A. Thompson,
Alameda, NM,

for Petitioner.

William H. Carpenter,
Michael B. Browde,
Albuquerque, NM,

for Amicus Curiae NM Trial Lawyers Association.

Kevin M. Brown,
Albuquerque, NM,

for Respondent.

Paul M. Schneider,
Albuquerque, NM,

for Amicus Curiae Risk Management, Division of the General Services, Department of the State of NM.

OPINION

RANSOM, Chief Justice.

{1} This is a wrongful death action brought against the Belen School District by the personal representative of a young boy who was electrocuted by a high-voltage lighting system at a high school football game. The accident occurred about twenty-five years after the system was installed. Plaintiff was awarded only a judgment against the school district for its proportionate fault in negligent maintenance subsequent to the installation of the system. That judgment is not at issue and remains undisturbed.

{2} We issued a writ of certiorari to the court of appeals to decide whether, additionally, the school district can be held responsible for the faulty lighting system as initially installed and inspected by independent contractors.[1] The court of appeals had affirmed the trial court's ruling against the vesting of such responsibility in the school district. We conclude, to the contrary, that the school district is directly responsible for injuries that were caused by the absence of precautions required in the face of peculiar risks of harm created by locating a high-voltage electrical supply line in an area of public accommodation. However, responsibility is based not upon vicarious liability, but on strict liability for which the school district is granted immunity under the Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (Repl. Pamp. 1989).[2] Therefore, we affirm on a rationale different than was employed by the trial court or the court of appeals.

{3} *Facts.* This case has its origin in a series of contracts made in 1964. At that time the Belen School District contracted with its chief architect, Kruger, Lake & Henderson, to provide

[1] Leave to file amicus briefs was granted to the New Mexico Trial Lawyers Association, aligned with Saiz, and to the Risk Management Division of the General Services Department of the State of New Mexico, aligned with the school district.

[2] We also note in the course of our analysis that there is no time bar to the action brought against the school district and that the personal representative preserved the principal claim of error addressed by us. We reach the dispositive question of immunity raised under the Tort Claims Act only because of the manner in which we first find that liability is otherwise precluded by neither the interposition of independent contractors nor the other issues preserved, briefed, and argued.

outdoor lighting for its high school football field. Dean Powell, an electrical engineer, was engaged to design the system, and the school district contracted with Yearout Electric Company to build it. As installed, the 250-ampere, 480-volt system consisted of a series of wooden light poles serviced by underground electrical cable. Some of the poles were installed directly in front of bleachers. In about 1973, in order to keep spectators off the playing field, the school district built a metal cyclone fence in front of the bleachers and close to some of the light poles.

{4} On September 2, 1988, thirteen-year-old Jerry Saiz attended a night football game at the high school field. While standing by one of the light poles at halftime, he touched both the metal electrical conduit running up one of the poles and the metal cyclone fence. He was electrocuted and died a few minutes later. The insulation around the buried cable had been damaged by the sharp metal edge of the conduit, and the metal conduit running up the pole was electrified by the high-voltage current. The failure to install a smooth plastic bushing, required under the state electrical code, where the buried insulated cable entered the metal conduit, had caused an electrical short and the electrocution of Jerry Saiz.

{5} *Proceedings.* Lorenzo Saiz, as personal representative of the estate of Jerry Saiz, brought suit against the school district under the Tort Claims Act, alleging the school district was negligent in the installation and maintenance of the electrical system. Saiz did not sue the architect, the design engineer, or the electrical contractor. His action against these parties was precluded by NMSA 1978, Section 37-1-27 (Repl. Pamp. 1990) (suits against builders and other parties furnishing construction services are barred after ten years from date of project's completion).

{6} In its answer to the complaint, the school district raised as an affirmative defense the fault of others. Who was at fault, or how, was not specified. At trial the school district sought to lay off damages against various nonparties, among whom were both the electrical contractor who had failed to install the plastic bushing and the architect for his negligent supervision and inspection of the system. Saiz focused his attention on evidence suggesting the school district was negligent in the installation of the cyclone fence, as well as on evidence indicating the school district should have been aware the lighting system was faulty. For a number of years the school district had experienced serious problems with the lighting system and had made various attempts to correct those problems. Saiz claimed at trial that the school district was negligent in failing to test the system properly and in failing to detect the short circuit that caused the electrocution.

{7} Upon close of the evidence, Saiz tendered a uniform jury instruction on agency, SCRA 1986, 13-405, alleging that the school district, as the employer, was liable for the wrongful acts of various individuals including the electrical contractor. The school district tendered SCRA 1986, 13-404, an instruction that ultimately was given, reciting the general principle of law that an employer is not responsible for the acts of an independent contractor. In response, Saiz tendered an instruction on a common-law exception to nonliability. Citing *Montanez v. Cass*, 89 N.M. 32, 546 P.2d 1189 (Ct. App. 1975), *aff'd in part and rev'd in part on other grounds sub nom. New Mexico Electric Service Co. v. Montanez*, 89 N.M. 278, 551 P.2d 634 (1976), Saiz claimed that an employer is responsible to third persons for harm caused by the negligence of an independent contractor engaged in an inherently dangerous activity. The trial court refused the latter instruction for the reason that the exception did not apply in this case.[3] The jury was instructed that, should it find the electrical contractor violated the state electrical code in omitting the plastic bushing, it was to find him negligent as a matter of law.

{8} Thus instructed, the jury returned a verdict for the plaintiff and allocated fault as follows: to the electrical contractor, sixty percent; to the

[3] We recognize that, in any event, the exception did not give rise to a fact issue for the jury, but we later discuss the effect of the tender in raising an issue of law.

architect, twenty-five percent; to the school district, fifteen percent; to the design engineer and the deceased, zero percent each. The judgment entered against the school district, $169,902.73, represented fifteen percent of the total damages ($1,250,000.00), less a voluntary payment for hospital and burial expenses previously paid by the school district's insurance carrier.

{9} *Disposition below.* Saiz filed a posttrial motion under SCRA 1986, 1-059(E), to amend the judgment and to impose joint and several liability against the school district under two theories: (1) for vicarious liability pursuant to NMSA 1978, Section 41-3A-1(C)(2) (Repl. Pamp. 1989), for the acts of its independent contractors; and (2) under the "public policy" exception to several liability provided in Section 41-3A-1(C)(4).[4] The trial court scheduled the hearing for posttrial motions beyond the thirty-day time limit to appeal the judgment, *see* SCRA 1986, 12-201(A) and (D), and Saiz timely filed a notice of appeal. The motions were not ruled upon. Saiz pursued in the court of appeals his argument that the independent contractors were engaged in inherently dangerous work and that the school district consequently was jointly and severally liable for the negligence of the contractor and architect. The court of appeals affirmed the judgment by an unpublished opinion, stating that the school district cannot be held vicariously liable for acts of an independent contractor performed twenty-five years earlier. The court also stated that because joint and several liability applies only in certain limited situations, the claim must be raised in the plaintiffs pleadings.

{10} *Inherently dangerous activities and nondelegable duties.* As a general rule, an employer of an independent contractor is not responsible for the negligence of the contractor or his employees. *Scott v. Murphy Corp.*, 79 N.M. 697, 448 P.2d 803 (1968); *Restatement (Second) of Torts* 409 (1964) [hereinafter *Restatement*]. The absence of a right of control over the manner in which the work is to be done is the most commonly accepted criterion for distinguishing independent contractors from employees for whose negligence the employer is vicariously liable. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 71, at 509 (5th ed. 1984) [hereinafter *Prosser & Keeton*]; *see also* SCRA 1986, 13-403 (Uniform Jury Instruction: definition of employee-employer); SCRA 1986, 13-404 (definition of independent contractor). The general rule has no application where the employer has nondelegable duties (1) arising out of some relation toward the public or the particular plaintiff (*e.g.*, duty of lessor to lessee), or (2) because of work that is specially, peculiarly, or inherently dangerous.[5] *See Restatement* ch. 15, Topic 2, at 394-423. Only the latter type of duty has been raised for consideration here.

{11} The *Restatement* acknowledges that rules regarding liability of the employer under nondelegable duties tend to overlap and that it may be premature to enunciate any general principles. *See id.* at 394-95. Understandably, confusion and uncertainty exist, for there has been a tendency for courts (this one included) to rely on several distinctive theories to justify their decisions, to characterize the employer's nondelegable duties as exceptions to the general rule, and to use language from these "exceptions" more or less

[4] In 1987 the New Mexico Legislature adopted the doctrine of several liability. Nonetheless, liability remained joint and several for certain enumerated exceptions:

> (1) to any person or persons who acted with the intention of inflicting injury or damage;
>
> (2) to any persons whose relationship to each other would make one person vicariously liable for the acts of the other, but only to that portion of the total liability attributed to those persons;
>
> (3) to any persons strictly liable for the manufacture and sale of a defective product, but only to that portion of the total liability attributed to those persons; or
>
> (4) to situations not covered by any of the foregoing and having a sound basis in public policy.

NMSA 1978, 41-3A-1(C) (Repl. Pamp. 1989).

[5] We do not reach the question whether liability under either of these theories falls within the immunity afforded governmental entities by the exclusion of independent contractors from the definition of public employees for whose torts the entity's immunity is waived. See footnote 13, *infra.*

indiscriminately. In this opinion we focus on the nature of nondelegable duties and of liability for inherently dangerous activities. In relation to independent contractors, in prior opinions we have addressed "peculiar risks" and "inherently dangerous activities" in only a small number of cases as discussed below, and then not in detail and not in a situation where it made any difference to analyze the nature of a nondelegable duty. Today we address whether a nondelegable duty gives rise to direct strict liability for the absence of required precautions or whether it gives rise to vicarious liability for the negligence of the independent contractor. The question is whether liability is dependent upon an *employer's breach of duty* to ensure the taking of precautions made reasonably necessary as a matter of law, or whether liability is imputed to the employer by reason of *another's breach of duty* to exercise ordinary care.

{12} - *Nondelegable duty.* In *Pendergrass v. Lovelace*, 57 N.M. 661, 262 P.2d 231 (1953), a cropdusting case involving liability for the negligent spraying of an herbicide, this Court stated that "work that is intrinsically and inherently dangerous in performance is not delegable so as to escape liability." **Id.** at 663, 262 P.2d at 232. The Court next addressed these concepts in *Budagher v. Amrep Corp.*, 97 N.M. 116, 637 P.2d 547 (1981), a case involving the collection and discharge of surface waters. The Court referred to several exceptions to the general rule of nonliability, including both the "peculiar risk" (416) and the "special danger" (427) exceptions of the *Restatement*.[6] *Budagher*, 97 N.M. at 119-20, 637 P.2d at 550-51. In deciding that the defendant landowner owed a nondelegable duty to adjoining property owners to ensure that the volume and rate of the natural flow of surface water remained unchanged, the Court recognized the applicability both of Section 416 and Section 427 of the *Restatement*, but explained only the former in relation to the facts of the case. The Court stated that the construction of certain dams and the location of drainage culverts "created a peculiar risk of harm (*i.e.,* flooding) to Budaghers' property which might have been anticipated [by defendant] as a direct or probable consequence of the construction of the dams, had reasonable care been omitted." *Id.* at 120, 637 P.2d at 551.

{13} Section 416 of the *Restatement* pertains to one who employs an independent contractor to do work that the employer should recognize as likely to create a peculiar risk of physical harm to others unless special precautions are taken. The employer is subject to liability for physical harm caused by the failure of the independent contractor to exercise reasonable care to take the necessary precautions, even though the employer has provided, in the contract or otherwise, that such precautions be taken. Section 427 of the *Restatement* pertains to one who employs an independent contractor to do work involving a special danger to others, that the employer knows or has reason to know to be inherent in or normal to the work, or that the employer contemplates or has reason to contemplate when making the contract. The employer is subject to liability for physical harm caused by the independent contractor's failure to take reasonable precautions against the danger.[7]

{14} As the *Restatement* recognizes, these two rules represent different formulations of the same principle: the employer remains liable for injuries resulting from dangers the employer should have anticipated at the time the employer entered into the contract. *Id.* 416 cmt. a. Both of these rules can be traced to the leading English case of *Bower v. Peate*, [1876] 1 Q.B. 321, in which the walls and foundation of the plaintiffs house were undermined by excavation on the adjoining property. The explanation given by the court, in

[6] The activity is inherently dangerous because it involves a "peculiar risk" in the absence of special precautions, or because it involves a "special danger" inherent in the work. We note that the *Restatement* uses the two phrases "peculiar risk" and "special danger" almost interchangeably. *See Restatement* §§ 413 cmt. b, 427 cmt. a. We will treat them as being equivalent.

[7] We treat as equivalent the concepts of "reasonable care to take special precautions" and "reasonable precautions against special dangers." These phrases both refer to precautions made reasonably necessary by a peculiar risk or a special danger.

holding the adjacent landowner responsible for harm caused by the absence of adequate preventative measures, is as informative as any we have read:

> [A] man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else . . . to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

Id. at 326. We think it important that in *Bower* the employer was directly responsible to do what was necessary to prevent injurious consequences. Vicarious liability for the negligence of an independent contractor, as for an employee, was not the rationale:

> There is . . . good ground for holding [the employer] liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, *no matter through whose default* the omission to take the necessary measures for such prevention may arise.
>
> . . . .
>
> . . . The agent may no doubt be responsible, but the responsibility of the principal is none the less.

Id. at 327 (emphasis added).

{15} We hold that one who employs an independent contractor to do work that the employer as a matter of law should recognize as likely to create a peculiar risk of physical harm to others unless reasonable precautions are taken is liable for physical harm to others caused by an absence of those precautions. The employer cannot delegate the responsibility for taking the precautions. As our previous cases have indicated, the employer has a nondelegable duty to ensure the precautions are taken. *See Pendergrass*, 57 N.M. at 663, 262 P.2d at 232; *Budagher*, 97 N.M. at 121, 637 P.2d at 551 (landowner has nondelegable duty with reference to surface waters and "[landowner's] negligence is established" once it is proved surface water was collected and then discharged in a greater volume or rate than normal). Thus, when an employer hires an independent contractor to do work that the law recognizes as likely to create a peculiar risk of harm, the employer is directly responsible if reasonable precautions are not taken against the risk. This liability is direct, not vicarious. Proof of liability or even negligence of the independent contractor is not an essential element of the employer's liability.

{16} As we explain in our conclusion to this opinion, we reject any requirement apparent from Section 416 of the *Restatement* that liability of the employer is dependent upon failure of the independent contractor to exercise reasonable care. The *focus* is on the presence or absence of a necessary precaution, not on whether an independent contractor's failure to take the precaution may be excused or justified under a reasonably prudent person standard. The test of liability is the presence or absence of precautions that would be deemed reasonably necessary by one to whom knowledge of all the circumstances is attributed; and liability is dependent on neither the lack of care taken by the contractor nor the lack of care taken by the employer to ensure that the contractor takes necessary precautions.

{17} We also believe that whether work is inherently dangerous is a question of law, even though we recognize there may be gray areas requiring fact-finding. As discussed below, the court decides whether the established facts gives rise to an inherently dangerous activity. If so, the jury decides under the evidence and by expert and lay testimony: (1) what precautions would be deemed reasonably necessary by one to whom knowledge of all the circumstances is attributed, and (2) whether the absence of a necessary precaution was a proximate cause of injury. Because the precaution must be reasonable, liability for inherently dangerous activities is distinguished

from absolute liability for abnormally dangerous or ultrahazardous activities as discussed below. There may be reasons for the jury also to decide and apportion fault among independent contractors and others, but if the only question is the liability of an employer for injury proximately caused by the absence of a necessary precaution against the peculiar risks of an inherently dangerous activity, fixing fault of the independent contractor is not required. The employer's liability for breach of a nondelegable duty is direct, not vicarious.

{18} - *Peculiar risks.* By "peculiar risk" we mean a risk that is unusual or "not a normal, routine matter of customary human activity," *Restatement* 413 cmt. b, and that is different from one to which persons commonly are subjected by ordinary forms of negligence. *Id.* 416 cmt. d. This is not to suggest that the risk is one not to be expected from the type of work the contractor has been hired to perform. Quite to the contrary, the concept is concerned with "special risks" arising out of the work itself, its character, or manner of performance, against which a reasonable person would recognize the necessity of taking "special precautions." *Id.* 413 cmt. b.

{19} To recover for injury from a peculiar risk or special danger, a plaintiff need not show that some hazard was the inevitable consequence of performing the work, or that the hazard could not be eliminated by the exercise of reasonable care. *See id.* §§ 416 cmt. e, 427 cmt. b. Rather, work is inherently or intrinsically dangerous because the commission of the work, either the work activity itself or the object sought to be attained, is very likely to cause harm if a reasonable precaution against the peculiar risk or special danger is not taken. *See Deitz v. Jackson*, 291 S.E.2d 282, 286 (N.C. Ct. App. 1982). We emphasize that more than mere foreseeability of injury is required. The hazard must be substantial. That is, there must exist a strong probability that harm will result in the absence of reasonable precautions. *Cf. Florida Power & Light Co. v. Price*, 170 So. 2d 293, 295 (Fla. 1964) (holding that work is inherently dangerous if "of such a nature that in the ordinary course of events its performance would probably, and not merely possibly, cause injury if proper precautions were not taken").

{20} Activities that are "inherently dangerous" represent an intermediate category of hazardous activity between those that are nonhazardous (or only slightly so), in which harm is merely a foreseeable consequence of negligence, and activities that are ultrahazardous, in which the potential for harm cannot be eliminated by the highest degree of care. We believe the high probability or relative certainty that harm will arise in the absence of reasonable precautions distinguishes this intermediate category.

{21} It has been suggested that some courts have expanded the inherently dangerous activity doctrine so far as to leave little room for operation of the general rule that an employer is not liable for negligence of an independent contractor. *Prosser & Keeton* 71, at 514 n.60. For instance, the Supreme Court of Colorado has defined an inherently dangerous activity simply as an activity that "present[s] a foreseeable and significant risk of harm to others if not carefully carried out." *Western Stock Ctr., Inc. v. Sevit, Inc.*, 578 P.2d 1045, 1050 (Colo. 1978) (en banc). As we have defined it, however, we do not think a nondelegable duty for inherently dangerous activities will swallow the general rule. The doctrine of nondelegable duty applies only in cases in which, in the absence of reasonable precautions, a strong probability exists that harm will result from an unusual type of risk.

{22} - *Abnormally dangerous activity distinguished.* Additionally, there is an important distinction to be drawn between the peculiar risk or inherently dangerous activity exception and other doctrines such as work that is "ultrahazardous" or "abnormally dangerous." Some confusion of terminology is readily apparent in the proceedings of this case. The doctrine of ultrahazardous activities (now "abnormally dangerous activities" under the *Restatement*)[8] imposes responsibility

[8] The *Restatement* has substituted "abnormally dangerous" for the term "ultrahazardous" used in the first edition. In some respects the definition of the new term is significantly different. *Compare Restatement (Second) of Torts* §§ 519-520 (1976) *with Restatement of Torts* §§ 519-520 (1938). For our purpos-

upon persons engaged in such activities for any resulting harm even though all reasonable precautions have been taken against the risk of harm the activity creates. *See Thigpen v. Skousen & Hise*, 64 N.M. 290, 292-94, 327 P.2d 802, 804-05 (1958). The doctrine applies to those situations where the risks involved cannot be eliminated by the exercise of reasonable care, or even the utmost care. *See id.* at 294, 327 P.2d at 805. Application of the ultrahazardous activity doctrine has been restricted in our decisions to the use of explosives in blasting. *E.g., Thigpen.*

{23} - *Collateral negligence.* A corollary to the nondelegable duty doctrine in relation to peculiar risk or special danger is that an employer is not responsible for the "collateral" negligence of the independent contractor, meaning negligence collateral to the contemplated risk. *See Restatement* 426.[9] This defense has been described as negligence in the operative detail of the work as distinguished from the general plan or result to be accomplished. *See id.* cmt. a. While this distinction sometimes can be drawn, it should not be regarded as a definitive test. Rather, the distinction is between negligence that is foreign to the contemplated risk of doing the work and negligence in failing to take precautions necessary to avoid the contemplated risk. *See id.* The employer's nondelegable duty runs only to a hazard associated with a peculiar risk or special danger the employer as a matter of law had reason to anticipate. It requires the employer to see that the contractor takes reasonable precautions to eliminate that risk. The employer definitely has the authority to control the manner in which the work is performed with reference to this danger or risk. In fact, the employer has the duty to control this aspect of the work, even the operative details if necessary, to ensure that reasonable precautions are taken. Similarly, to the extent a manufacturer is the ultimate party strictly liable for supply of a defective product, it is often stated that this is because the manufacturer is in a position to avoid defective products.

{24} - *Existence of nondelegable duty is a question of law.* There is no clear consensus on whether the applicability of the inherently dangerous activity doctrine is a question of law or fact. *See* James Lockhart, *Cause of Action Against Employer for Negligence of Independent Contractor Engaged in "Inherently Dangerous" Activity*, 11 Causes of Action 393, 415 (1986). In many cases the determination will be influenced by the particular circumstances under which work is performed as well as the nature of the work itself. For instance, in this case it is significant that the light pole and conduit were located in an area for spectators.

{25} Judge Sutin, writing for the court of appeals in *Montanez v. Cass*, 89 N.M. 32, 546 P.2d 1189 (Ct. App. 1975), *rev'd in part on other grounds sub nom. New Mexico Electric Service Co. v. Montanez*, 89 N.M. 278, 551 P.2d 634 (1976), stated that whether a nondelegable duty exists, because a contractor is engaged in an inherently dangerous activity, is a pure question of law. *Id.* at 36, 546 P.2d at 1193. Also, like a number of other courts, he explained the basis for the doctrine as the idea that third persons placed in an area of inherent danger should be protected as a matter of public policy. *Id.* at 37, 546 P.2d at 1194. We agree with these conclusions.

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es, however, it is important only to note that either concept involves a serious risk of harm that cannot be eliminated by adequate precautions—either the exercise of "reasonable care" or "utmost care" depending upon the present or earlier formulation of the rule. The principles expressed in the first and second editions of the *Restatement of Torts* are based upon the classic English case of *Rylands v. Fletcher*, [1861-73] All E.R. Rep. 1 (H.L. 1868) (appeal taken from England), which itself involved the work of an independent contractor. This important case, and the incorporation of its principles into the *Restatement of Torts*, is discussed at some length in *Prosser & Keeton* Section 78. The ultrahazardous activity doctrine is, of course, another exception to the independent contractor rule. *See Restatement* 427A.

[9] That Section of the *Restatement* is as follows:

426. Negligence Collateral to Risk of Doing the Work.

Except as stated in §§ 428 and 429, an employer of an independent contractor, unless he is himself negligent, is not liable for physical harm caused by any negligence of the contractor if

(a) the contractor's negligence consists solely in the improper manner in which he does the work, and

(b) it creates a risk of such harm which is not inherent in or normal to the work, and

(c) the employer had no reason to contemplate the contractor's negligence when the contract was made.

{26} It is a well-recognized principle of tort law that whether a duty exists is a question of law for the court, involving legal precedent, statutes, and the recognition of society's interest in general security. The court's statement of duty is a policy determination that the obligation of the defendant is one to which the law will give recognition and effect. *See Ramirez v. Armstrong*, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983). In this regard it should be remembered that the policy behind the law of torts does more than compensate victims—it encourages reasonable safeguards against the risk of harm. The determination by the court that an employer is under a nondelegable duty to ensure that reasonable precautions are taken against a peculiar risk is a decision that, in a situation with a strong probability of injury, the public interest in safety demands an increased regard for precautions.

{27} - *High-voltage in an area of public accommodation.* Locating a high-voltage electrical supply line in an area of public accommodation creates a peculiar risk of physical harm. *Cf. Nationwide Mut. Ins. Co. v. Philadelphia Elec. Co.*, 443 F. Supp. 1140 (E.D. Pa. 1977) (independent contractor's failure to insulate overhead power line at construction site creates peculiar risk of harm). It would seem beyond dispute that electricity has certain well-known inherent dangers. It gives no warning of its presence, and if amperage and voltage are sufficiently high its discovery can be attended by fatal consequences. This case involves high-voltage electricity. We do not regard possible exposure to electrical currents of this level a matter of routine human activity. The hazard is distinctly different from hazards to which persons commonly are subjected to—it represents a very special danger or peculiar risk. Whatever may be said regarding a "household" level of current is not applicable here, and on household current we offer no opinion.

{28} It is reasonably necessary to reduce the hazard associated with a high-voltage supply line by placing bare electrical conductors where they remain inaccessible, or by insulating them adequately, or both. *See, e.g., Cantu v. Utility Dynamics Corp.*, 387 N.E.2d 990 (Ill. App. Ct. 1979) (finding that installation of electrical lines is an inherently dangerous activity, and holding that persons handling electricity must protect the public against the danger by proper insulation of its wires where the public is likely to come into contact with them); *Lancaster v. Potomac Edison Co.*, 192 S.E.2d 234 (W. Va. 1972) (holding that power company which maintains electric lines of high or dangerous voltage in a place it knows or should anticipate others may lawfully be for any reason, and in such a manner as exposes them to danger of contact, is bound to take precautions for their safety by insulation or other adequate means).[10]

{29} When insulated cable is placed in an accessible area, reasonable measures also must be taken to protect that insulation. Each situation calls for its own precautions, and the specifications of the state electrical code were intended to address the potential hazards involved in particular installations and situations. When these standards are not followed, we believe it to be highly probable that harm will occur. To one hiring an independent contractor to install high-voltage supply lines in an area accessible to the public, there is imputed in law the knowledge that members of the public will be exposed to a peculiar risk of harm if these standards are not met. In this case the supply line was not located in an area merely accessible to the public, but in an area where the public could be expected to be crowded closely together and where extensive

[10] The inherent dangers of high-voltage electricity have been recognized in *Montanez v. Cass*, 89 N.M. 32, 546 P.2d 1189 (Ct. App. 1975), *rev'd in part on other grounds sub nom. New Mexico Elec. Serv. Co. v. Montanez*, 89 N.M. 278, 551 P.2d 634 (1976). That case involved the liability of an employer for injuries caused by the negligent installation of an electrical transformer and a secondary electrical system by an independent contractor. Later, a second independent contractor was hired to remove the system and an employee of that contractor was injured. The court of appeals determined that the employer was responsible for the injuries under the inherently dangerous activity doctrine. 89 N.M. at 37-39, 546 P.2d at 1194-96. This Court reviewed that decision, and while it agreed that the installation was imminently dangerous to others, the Court declined to expand the duty of the employer to encompass the employees of independent contractors. *New Mexico Elec. Serv. Co.*, 89 N.M. at 281-82, 551 P.2d at 637-38.

physical contact with the electrical conduit running up the light pole was a certainty.

{30} Additionally, we cannot view the inclusion of the plastic bushing as merely an operative detail of the work, so that its omission was merely "collateral" negligence for which the school district bore no responsibility. The electrical code specified its inclusion to guard against the danger inherent in, or peculiar to, the transmission of electricity. The negligence of the contractor created the very risk the requirement was intended to prevent—the escape of the current into the metal conduit and the electrocution of a member of the public.

{31} *Nature of the school district's liability.* As we have stated above, the establishment of liability under a nondelegable duty does not give rise to vicarious liability. Under vicarious liability, one person, although entirely innocent of any wrongdoing and *without regard to duty*, is nonetheless held responsible for harm caused by the wrongful act of another. We acknowledge that commentators and cases speak of vicarious liability under the doctrine of a nondelegable duty. *See, e.g., Prosser & Keeton* 71, at 511; 5 Fowler V. Harper et al., *The Law of Torts* 26.11, at 84-93 (2d ed. 1986). "Vicarious liability" and "negligence of the contractor" are terms common to many of the authorities we have discussed. We reject any coupling of the concept of vicarious liability and nondelegable duty.

{32} The common law develops by steps manifesting the imprint of established doctrines. Courts that lengthen the stride of the common law are wont to do so in well-worn and familiar doctrines. So we believe is the character of the imprint on nondelegable duty left by the rationale encompassing "vicarious liability to the same extent as the independent contractor." It should not be required that the contractor be liable. That is not the point. The court determines the presence of a peculiar risk and the need for precautions. The fact-finder defines what reasonable precautions were necessary. Liability is based upon a showing of injury proximately caused by the absence of the necessary precautions. What the independent contractor knew or should have known is not at issue.

{33} The doctrine with the proper fit is that of strict liability as developed in products liability cases. The liability of the owner or occupier of land rests upon injury proximately caused by defective work thereon as defined by the absence of a precaution made reasonably necessary in the face of peculiar risks inherent in the work. Once the court has found the need for precautions, it serves the policy underlying nondelegable duties to impose liability on the owner or occupier of land for injury proximately caused by any failure to take reasonable precautions.

{34} - *Joint and several liability.* Under our system of pure comparative fault, concurrent tortfeasors, generally, are severally liable for damages apportioned on the basis of the percentage of each tortfeasor's fault to the total fault attributed to all persons. *See* NMSA 1978, 41-3A-1. Exceptions are made for intentional torts, vicarious liability, products liability cases, and other situations "having a sound basis in public policy." Section 41-3A-1(C). To these exceptions, joint and several liability applies. *Id.* This Court has not had occasion to add to the express exceptions of the Statute under the public policy grounds of Subsection (C)(4). We do so today.

{35} The liability for a nondelegable duty that we impose directly upon the employer of an independent contractor is grounded in a special public policy to protect third persons in an area of inherent danger and to encourage conscientious adherence to standards of safety where injury likely will result in the absence of precautions. The test of liability is the presence or absence of reasonable precautions; and direct liability is not dependent upon any apportionment to an employer of his or her concurrent negligence in failure to ensure that an independent contractor takes necessary precautions.

{36} Therefore, we hold that when precautions are not taken against inherent danger, the employer is jointly and severally liable for harm apportioned to any independent contractor for

failure to take precautions reasonably necessary to prevent injury to third parties arising from the peculiar risk. Unless immune pursuant to the Tort Claims Act, the school district in this case is jointly and severally liable for that portion of the damages attributed to both the electrical contractor, whose installation violated minimum state standards, and the architect, who failed properly to supervise the project and inspect the system. In this case, that is the proportion of fault attributable to the failure to take the necessary precaution. This liability would be in addition to any fault apportioned by the jury to the school district for negligent maintenance.

{37} *Jury instructions not necessary.* The question of whether an employer has a nondelegable duty is one for the trial judge after hearing all of the evidence. The finding of a nondelegable duty dictates the imposition of joint and several liability. While it would not be improper for the court to instruct the jury on the presence and effect of a nondelegable duty, there is no error in failing to do so. In this case Saiz tendered SCRA 1986, 13-405 (employer sued; no issue of employment, scope of employment, or agency), a general Uniform Jury Instruction on agency. Although UJI 13-405 was not intended for cases involving independent contractors generally, it is a correct abstract statement of the law concerning the legal effect of a nondelegable duty. That is, the employer is to be held responsible for the wrongful act of the employer's employee or agent. The reverse is true of UJI 13-404 (independent contractor). The trial court refused to give UJI 13-405, but gave UJI 13-404. We do not believe, however, that the latter statement of abstract law prejudiced the jury in its instructed duty to find and apportion fault.[11]

[11] As we have stated, it is not necessary for the establishment of the liability of the owner or occupier of land, based upon the absence of required precautions in the face of a peculiar risk, that the proportionate fault of independent contractors be established. Parties may nonetheless establish such proportionate fault for purposes of the several liability of independent contractors to the plaintiff or for claims of contribution or indemnity among the employer and the independent contractors.

{38} *Error preserved.* Further, the instruction requested by Saiz in this case concerning inherently dangerous activities, though not drafted so as to fully inform the court of the import of its terms, was another fairly accurate abstract statement of the law of nondelegable duty and was sufficient to call to the attention of the trial judge the applicability of that exception to the independent contractor rule. *See Budagher*, 97 N.M. at 118-21, 637 P.2d at 549-52 ("Once the judge accepted Amrep's defense of independent contractor, he should have realized that the exceptions to the general rule of independent contractors [were] applicable."). The trial judge ruled as a matter of law that the exception was inapplicable. This was incorrect.

{39} Moreover, we cannot agree that, under the facts of this case, Saiz was required to raise the issue of joint and several liability in his pleadings as stated by the court of appeals. This is because the thrust of Saiz' theory of recovery, as presented at trial, was that the school district was completely responsible for the decedent's injuries based upon its own maintenance of the lighting system since the time it was installed.

{40} A plaintiff is entitled to pursue at trial the plaintiffs theory of the case. This does not preclude the plaintiff from rebutting any other theory offered by way of defense. Where a defendant seeks to avoid liability through the apportionment of fault to other tortfeasors, the defendant should anticipate that, for any number of reasons, the defense may be subject to attack at trial. Rule 1-012(B) specifically provides a party may raise at trial any issue in law or fact raised by a pleading to which that party is not required to respond.

{41} No time bar under Section 37-1-27. We briefly consider whether Saiz' recovery against the school district for breach of a nondelegable duty is subject to any time bar because the independent contractors in effect are immune from Saiz' direct suit under NMSA 1978, Section 37-1-27, a statute of repose.[12] We see no

[12] The Statute provides, in pertinent part:

> No action to recover damages for any injury to property, real or personal, or for injury to the person, or for

reason not to impose full responsibility on a joint tortfeasor subject to strict liability for breach of a nondelegable duty despite the fact that the plaintiffs direct suit against other tortfeasors is barred, and despite the fact that the joint tortfeasor upon whom full responsibility falls may lack a right of contribution from those granted the immunity. As we understand Section 37-1-27 and the circumstances surrounding its passage, the legislature intended to shift liability from builders to property owners (or other joint tortfeasors) for dangerous conditions arising out of improvements to real property ten years after the completion of a project. As explicitly stated in *Howell v. Burk*, 90 N.M. 688, 693, 568 P.2d 214, 219 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977), this Statute was not intended to benefit the owner of real property. Rather than abrogate liability for all parties, the statutory immunity applies only to a select group—builders, architects, engineers, and other parties that furnish construction services.

{42} Significantly, at the time this Statute was passed the liability of joint tortfeasors was joint and several. Thus, the effect of the Statute when passed was to make landowners potentially responsible for *all* damages.[13] When a landowner has responsibility as a joint tortfeasor based upon strict liability for breach of a nondelegable duty, we see no reason not to impose the same level of liability today. This would seem to have been exactly the level of responsibility the legislature had in mind when it passed Section 37-1-27 granting builders and other parties the immunity.

{43} *Immunity under Tort Claims Act.* Waiver of immunity under the Tort Claims Act does not encompass strict liability, and liability is based solely on a reasonably prudent person standard of care in the performance of traditional tort concepts of duty. The Act specifically provides:

> Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty. The Tort Claims Act in no way imposes a strict liability for injuries upon governmental entities or public employees.

NMSA 1978, 41-4-2(B). While a nondelegable duty is a traditional tort concept, our analysis demonstrates that it is based upon injury proximately caused by defective work and not upon the reasonably prudent person standard of care. It is strict liability. The feature of strict liability that distinguishes it from negligence is that the reasonableness of acts or omissions of the party to be charged (*e.g.,* the possessor of land or the supplier of a product) is not a consideration. Specifically, as in the case of strict products liability, the question is whether injury was proximately caused by a risk that a hypothetical reasonably prudent person having full knowledge of the risk would find unacceptable *even though the person to be charged in fact neither knew nor could have known of such risk at the time of the work. See, e.g.*, SCRA 1986, 13-1407 (Uniform Jury Instructions—Strict products liability;

> bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, *shall be brought after ten years from the date of substantial completion of such improvements***;** provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith.

NMSA 1978, 37-1-27 (emphasis added).

We refer to this provision as a statute of repose because, unlike a statute of limitations, this Statute begins to run from a specific date unrelated to the date of injury and thus may abrogate a cause of action before it accrues. In contrast, a statute of limitations begins to run when a plaintiffs cause of action accrues or is discovered. *See Terry v. New Mexico State Highway Comm'n*, 98 N.M. 119, 121-22, 645 P.2d 1375, 1377-78 (1982). The constitutionality of Section 37-1-27 was upheld in *Howell v. Burk*, 90 N.M. 688, 568 P.2d 214 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977).

[13] Nevertheless, the statute leaves open the possibility that a party can protect himself from the effect of the shift in liability by expressly contracting for a right of contribution not subject to the ten-year limitation. 37-1-27 ("This limitation shall not apply to any action based upon a contract, warranty or guarantee which contains express terms inconsistent herewith.").

unreasonable risk of injury, and committee comment).

{44} The distinctive test under the reasonably prudent person standard of care, on the other hand, is the foreseeability, *to one who has or should have knowledge*, that his or her act or failure to act will result in an unreasonable risk of injury. Traditionally, with the exception of certain fictions formerly attaching to the doctrine of contributory negligence, direct liability (as distinguished from vicarious liability) has depended on what the party to be charged knew or should have known.

{45} Direct liability of the possessor of land under a nondelegable duty to ensure against an unreasonable risk of injury from a special danger is based not on what the possessor knew or should have known, but upon breach of duty imputed as a matter of law. This is strict liability for which we believe the legislature granted immunity under the Tort Claims Act. To hold that liability for a nondelegable duty is not within the immunity of the Tort Claims Act would require that we limit the legislature's use of "strict liability" to blasting cases, products liability, or to new doctrines unknown to traditional tort law. The legislature enunciated no such limitation, and it in fact declared that liability is to be based solely on a reasonably prudent person standard of care. Consequently, we hold the school district was immune from its joint and several liability for the acts of the independent contractors.[14] We affirm only the judgment for fifteen percent of total damages apportioned for the school district's fault in negligent maintenance subsequent to installation of the lighting system.

{46} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

[14] Because it begs the issue of direct versus vicarious liability, as we have posed it, we do not rely on Section 41-4-4(D)(1) for our conclusion that the school district is immune from suit in this case. Section 41-4-4(D)(1) imposes liability on the governmental entity for "any tort which was committed by the public employee while acting within the scope of his duty." "Public employee," in turn, means "any officer, employee or servant of a governmental entity, *excluding independent contractors*." Section 41-4-3(E) (emphasis added). Thus, by specifically excluding independent contractors from the definition of "public employee" (and thereby omitting from the financial responsibility assumed in Section 41-4-4(D)(1) liability for the torts of independent contractors), we can infer that the legislature retained immunity for the tortious acts of independent contractors committed within the scope of their duties.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1992-NMSC-040

Filing Date: July 7, 1992

Docket No. 20,481

**STATE OF NEW MEXICO, ex rel.
LEE DESCHAMPS, District Attorney,**

Petitioner,

vs.

HON. EDMUND H. KASE, III,

Respondent.

Lee Deschamps, District Attorney,
Socorro, NM,

Pro Se.

Hon. Edmund H. Kase, III, District Judge,
Socorro, NM,

Pro Se.

OPINION

ORIGINAL MANDAMUS/SUPERINTENDING CONTROL PROCEEDING

RANSOM, Chief Justice.

{1} Catron County voters petitioned for a grand jury investigation into the death of Michael Ray Lozano. The petition apparently was submitted first to District Attorney Lee Deschamps, who filed the petition in district court on behalf of the signatories. Deschamps, however, sought an investigative prerogative for the grand jury that was broader than the specific Lozano incident. He wanted the grand jury "to conduct an investigation into the shotgun-death of Michael Ray Lozano, on May 6, 1989, . . . and into such other and further matters as may be authorized or prescribed by law." The court convened a grand jury and instructed the jurors that they were to investigate, in addition to the condition of county jails and inmates therein, only the specific incident identified by the petition.

{2} Deschamps petitioned this Court for a writ of mandamus compelling the district court to charge the grand jury, in accordance with NMSA 1978, Section 31-6-9 (Repl. Pamp. 1984), with authority to investigate any public offense. Clearly, a grand jury may be convened by public petition, N.M. Const. art. II, § 14, and in *Cook v. Smith*, 114 N.M. 41, 834 P.2d 418 (1992), also filed today, we hold that a district court possesses no discretion to deny a constitutionally sufficient petition for a grand jury. Here, we are asked to decide whether the district court possesses discretion to limit the investigative prerogative of the grand jury. We believe it does not. Having assumed original jurisdiction over this matter, we now issue a writ of mandamus directing the district court to charge the grand jury in accordance with the mandate of Section 31-6-9.

{3} The New Mexico Bill of Rights authorizes prosecution to proceed by grand jury indictment or by information. N.M. Const. art. II, § 14; *see also* N.M. Const. art. XX, § 20 (stating that an accused may waive prosecution by indictment). Article II, Section 14 details the composition of the grand jury, the concurrence necessary for indictment, and the method by which the grand jury shall be convened. legislation governs many of the procedural issues of grand jury practice. NMSA 1978, §§ 31-6-1 to -15 (Repl. Pamp. 1984). At issue here is the statute requiring the court to charge the grand jury with certain enumerated duties:

> The district judge convening a grand jury shall charge them with their duties and direct them as to any special inquiry into violations of law that he wishes them to make. The grand jury need not make special inquiry into the general existence or

> occurrence of violations of any particular statute notwithstanding any other provision of the law. *The grand jury is obliged, and the district judge shall charge that they are, to inquire into:*
>
> A. *any public offense* against the state committed and triable in the county which is not barred from prosection by statute of limitations and upon which no valid indictment or information has theretofore been filed;
>
> B. the condition of every person imprisoned in the county not lawfully committed by a court and not indicted or informed against; and
>
> C. the condition and management of every public jail or prison within the county.

NMSA 1978, § 31-6-9 (emphasis added).

{4} As best we can discern, Section 31-6-9 has a composite purpose. The statute unequivocally places the duty upon the district court to charge the grand jury with their duties. The judge may direct special inquiries as he or she wishes; and, while the statute's second sentence makes it clear that the grand jury need not embark on an undirected fishing expedition, the jurors are obliged to inquire into any public offense of which they have knowledge. That is, the phrase "any public offense" is read to exclude unknown offenses that are the subject of the second sentence. This comports with the common law. *See, e.g., In re McNair*, 187 A. 498, 504-05 (Pa. 1936) (holding that grand jury investigations for speculative purposes are "odious and oppressive" and that before investigation may be instituted there must be knowledge or information that a crime has been committed).

{5} The statute articulates the minimum scope of the grand jury's duty of inquiry by requiring the court to instruct the grand jury that it is obliged to inquire into the offenses enumerated in subsections (A), (B), and (C). This, for us, is the nub of the issue in this case. The legislature, in mandatory terms, has articulated the charge to be given the grand jury. The trial judge is without discretion to depart from the mandatory language of the charge. In New Mexico, our legislature has stated that the term "shall" is mandatory, unless that meaning is "inconsistent with the manifest intent of the legislature or repugnant to the context of the . . . statute." NMSA 1978, § 12-2-2(A)(I) (Repl. Pamp. 1988). No such inconsistency or repugnancy is claimed to exist in this case.

{6} Although not raised or argued in the briefs of the parties, we have considered whether the statutory charge of Section 31-6-9 was intended by the legislature to apply to a grand jury summoned in response to a public petition. As we explain in *Cook*, 114 N.M. at 42, 834 P.2d at 419, the grand jury convened by the court upon the filing of a public petition is a distinctive feature of the grand jury scheme established by the New Mexico Constitution. It may be argued that, if Section 31-6-9 were intended to apply, the legislature would have made clear that a grand jury convened in response to a public petition requesting investigation of a particular matter could not be charged under Section 31-6-9 to inquire into "any public offense" without making known the offense for which the grand jury was convened. We believe, however, that the better argument is that it is implicit in the public-petition scheme that the court include the particular matter in its directions as to special inquiries the grand jury is obliged to make. Were the court not so required, the purpose of the public petition would be subverted. We further believe that, if Section 31-6-9 were not intended to apply to a public petition, the legislature would have said so as an exception to a statute of otherwise general application. We see no incongruity in the legislative intent that, once convened for a specific inquiry, a grand jury should be obliged likewise to inquire into other offenses of which it may have knowledge.

{7} Accepting the applicability of Section 31-6-9, it is respondent's contention simply that, by employing the term "any public offense," the legislature did not intend to preclude single-inquiry

or special grand juries. Had the legislature intended to vest every grand jury with plenary investigative powers, according to respondent, the legislature should have mandated that grand juries be instructed to inquire into "any and all public offenses" or "every public offense." We think not. Unless modified, "any public offense" can mean a single offense, many offenses, or all offenses. Its meaning is dependent on the context in which it is employed. Here, when the phrase is preceded by a mandate that the grand jury is "obliged" to inquire into any public offense, we cannot gratuitously interpret the legislative intent as limiting the inquiry to just the public offenses to which the court directed the grand jury.

{8} Indeed, examination of the grand jury schemes of other states satisfies us that had the New Mexico legislature intended a special-inquiry grand jury, several statutory mechanisms would have been available for reference. Nevada, for example, has enacted a detailed scheme of grand jury practice and procedure. Nev. Rev. Stat. §§ 172.045—.305 (1991). The Nevada regime empowers the grand jury to inquire into "all public offenses triable in the district court . . . committed within the territorial jurisdiction of the district court for which it is impaneled." Section 172.105. The Nevada legislature has articulated several matters into which a grand jury shall and may inquire. Section 172.175. Under Section 172.047, the Nevada legislature has made explicit provision for the convening of a grand jury for a limited purpose. Under that section, a "district judge may impanel a grand jury to inquire into a specific limited matter among those set forth in [Section 172.175]." The marked absence of New Mexico legislation authorizing the district court to impanel a grand jury for a limited purpose, coupled with the mandate of Section 31-6-9 requiring instruction that the grand jury is obliged to inquire into each subject enumerated in subsections (A), (B), and (C), makes it apparent to us that the legislature did not contemplate the limited or special-inquiry grand jury.

{9} For all of the foregoing reasons, we grant Deschamps the relief he has requested. The trial court is directed to charge the grand jury according to the precise mandate of Section 31-6-9.

{10} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1992-NMSC-041

Filing Date: July 7, 1992

Docket No. 20,517

ELIZABETH H. COOK, FRANK BOWDEN, JAMES T. COOPER, JAMES HARE and BILLY JOHNSON,

Petitioners,

vs.

HON. W.C. "WOODY" SMITH, District Judge,

Respondent.

Oman, Gentry & Yntema, PA,
Hessel E. Yntema, III,
Albuquerque, NM,

for Petitioner Cook, et al.,

Hon. Robert M. Schwartz, District Attorney,
Steven S. Suttle, Assistant Chief Deputy,
District Attorney,
Albuquerque, NM.

Jones, Snead, Wertheim, Rodriguez & Wentworth, PA,
John Wentworth,
Santa Fe, NM,

for Respondent Smith.

OPINION

ORIGINAL MANDAMUS/SUPERINTENDING CONTROL PROCEEDING

RANSOM, Chief Justice.

{1} Article II, Section 14 of the New Mexico Constitution states that "a grand jury shall be ordered to convene . . . upon the filing of a petition therefor signed by not less than the lesser of two hundred registered voters or five percent of the registered voters of the county." In this mandamus action we assumed original jurisdiction, N.M. Const. art. VI, § 3, to decide whether a district judge enjoys discretionary authority to refuse to convene a grand jury requested by petition. We conclude a judge is mandated to convene the grand jury or otherwise substantially comply with the request.

{2} Facts and proceedings. Registered voters of Bernalillo County filed a petition in district court requesting that the court convene a grand jury and appoint a special prosecutor[1] to investigate alleged misconduct of unspecified persons at the Albuquerque Technical-Vocational Institute. The petition stated:

> We the undersigned registered voters in the county of Bernalillo, hereby petition the judges(s) of the Second Judicial District Court, pursuant to Article II, Sec. 14 of the New Mexico State Constitution, to convene a grand jury to investigate allegations of malfeasance, misappropriation of public money, and any other illegal acts committed by any individual associated with or employed at any time by the Albuquerque Technical-Vocational Institute.
>
> These allegations include, but are not limited to, the following: fraud, malfeasance, improper disbursement and handling of public funds, improper employment practices, destruction of public records to hide improper and questionable financial transactions from public view, authorizing T-VI personnel to make trips for personal reasons and reimbursing their expenses from T-VI funds, procurement of life insurance for select T-VI management that

[1] The propriety of appointing a special prosecutor is not before us in this mandamus proceeding.

violates New Mexico anti-donation statutes, concealment from the New Mexico Legislature of balances in accounts at fiscal year end, and illegal disposal of T-VI leased vehicles to accommodate T-VI management.

{3} The district court denied the petition without the benefit of a hearing. The denial was premised on the court's "Constitutional and Statutory authority and obligations . . . [to] determine that matters in the petition are reasonably within the lawful scope of Grand Jury inquiry." The court then articulated certain reasons why the petition should be denied. According to the court, inquiries into the matters raised in the petition were "being conducted by the appropriate authorities" and the New Mexico Attorney General's office had "elected to pursue matters in the Grand Jury petition by civil suit rather than by criminal charges." The court stated that the grand jury should "not be used as a 'watchdog' for specific government agencies and should not and may not be used to conduct fishing expeditions." Finally, convening a grand jury "would not be in the public interest and would be legally inappropriate under present circumstances."

{4} Petitioners filed an original action in this Court seeking a writ of mandamus or, in the alternative, a writ of superintending control to require the district court to convene the grand jury as requested.

{5} *Mandamus, nature of issue.* Mandamus will compel only the performance of ministerial acts. NMSA 1978, § 44-2-4; *Lovato v. City of Albuquerque*, 106 N.M. 287, 289, 742 P.2d 499, 501 (1987). Discretionary acts are beyond the reach of the writ. *Id.* Consequently, the issue framed by this action is whether the district court has any discretion under Article II, Section 14 not to convene a grand jury when presented with a public petition conceded to have met the requirements of Section 14.

{6} *Constitution is mandatory.* We begin with the text of Article II, Section 14: "[A] grand jury shall be ordered to convene . . . upon the filing of a petition therefor" signed by the requisite number of voters.[2] By its plain terms, Section 14 is mandatory. While the court impliedly must determine the legality of the inquiry proposed by the petition, the sole issue committed to the discretion of the court appears to be verification that the petition meets the constitutional conditions, namely whether the petition contains the requisite number of signatures and whether the signatories are registered voters of the county. Section 14 vests no further discretion in the district judge.

{7} Here, the court expressly found that the petition contained the threshold number of signatures, and the parties have not questioned the number of signatories or their legitimacy. The constitutional conditions being satisfied in all respects, the district court was under a duty to convene the grand jury.

{8} - *Constitution reflects populist values.* We find further support for our conclusion in the policies advanced by Section 14. The citizens of New Mexico have seen fit to elevate to constitutional stature two mechanisms for convening a grand jury. The first expressly vests the judiciary with authority to decide whether to convene a grand jury. The court shall convene a grand jury

[2] The full text of the second paragraph of Article II, Section 14 provides:

A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury. Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the lesser of two hundred registered voters or five percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

N.M. Const. art. II, § 14.

"at such times as to him shall be deemed necessary." The second, at issue here, is of a different sort. The petition method provides a mechanism for convening a grand jury that is directly responsive to the public. In so doing, Section 14 reflects populist values. The citizens have reserved for themselves direct access to the criminal process. The petition-initiated grand jury checks the traditional process by permitting the citizens to trigger inquiry into matters that for reasons of political acquiescence, oversight, or impasse evade traditional means of inquiry.[3]

{9} As such, Section 14 cannot suffer discretionary screening of the scope, nature, or subject matter of inquiry. To do so would subvert the very purpose that Section 14 seeks to advance. It is the grand jurors, under the oath of NMSA 1978, Section 31-6-6(A)(1) (Repl. Pamp. 1984), and properly charged with their statutory duties according to Section 31-6-9, who must decide, after full and rigorous inquiry, whether probable cause exists to initiate prosecution against any persons associated with the misconduct identified in the petition. To hold otherwise would disparage the critical values of public participation that we identify in Article II, Section 14.

{10} - *Oklahoma courts are deemed to have no discretion to deny a constitutionally sufficient petition request for a grand jury.* The petition method for convening a grand jury contemplated by Article II, Section 14 is relatively rare in the United States. But, in Oklahoma, the only other state in which the public-initiated grand jury enjoys constitutional status,[4] the supreme court has held that a district court has no discretion to deny a constitutionally sufficient petition request. *State ex rel. Ogden v. Hunt*, 286 P.2d 1088, 1093 (Okla. 1955). The Oklahoma constitutional provision, as a practical matter identical to ours, provides:

> A grand jury shall be convened upon the order of a district judge upon his own motion; or such grand jury shall be ordered by a district judge upon the filing of a petition therefor signed by qualified electors of the county equal to one percent (1%) of the population of the county according to the last preceding Federal Decennial Census, with the minimum number of required signatures being two hundred (200) and the maximum being five hundred (500).

Okla. Const. art. II, § 18.

{11} The court in *Ogden*, faced with a factual predicate similar to the one we face today, focused on the term "shall" and reasoned that use of the mandatory term clearly precluded any discretionary authority on the part of the district court to deny a valid petition request for a grand jury:

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[3] The petition-initiated grand jury is not a forgotten constitutional relic. First effective in 1925, Section 14 was recently amended in 1980. The 1980 amendment changed the petition requirement from "not less than seventy-five resident taxpayers" to "not less than the lesser of two hundred registered voters or five percent of the registered voters."

[4] Three other states, North Dakota, Nebraska, and Nevada, address the petition process by statute, each with particular differences. The Nebraska legislation appears to preclude discretionary review by the court:

> It shall be mandatory for such district courts to call a grand jury in each case upon the petition of the registered voters of the county of the number of not less than ten percent of the total vote cast for the office of Governor in such county at the most recent general election held for such office.

Neb. Rev. Stat. § 29-1401 (1989).

North Dakota, as well, appears to impose a duty on the court to convene a grand jury when presented with an otherwise sufficient petition:

> Any judge of the district court for any county must direct . . . that a grand jury be drawn and summoned to attend whenever . . . [a] petition in writing requesting the same is presented to the judge, signed by qualified electors of the county equal in number to at least ten percent of the total vote cast in the county for the office of governor of the state at the last general election.

N.D. Cent. Code § 29-10.1-02 (1991).

Of the three, only the Nevada statute suggests that a court may deny a petition requesting that a grand jury be convened:

> The district judge shall summon a grand jury whenever a verified petition is presented to the clerk of the district containing the signatures of registered voters equal in number to 25 percent of the number of voters voting within the county at the last preceding general election which specifically sets forth the fact or facts constituting the necessity of convening a grand jury.

Nev. Rev. Sat. § 6.130(1)(1991).

We are aware of no reported opinions construing the operative language of the above-quoted statutory provisions in the context at issue before us today.

> When so initiated, it is plain that the judge is without the power or discretion to decline or refuse to make the order, but must do so if the petition meets the requirements of said section, as the one here admittedly does. This does not mean that he must act instanter or that he is wholly without any reasonable discretion as to when he will order the grand jury convened. It does mean, however, that when a sufficient petition is filed, it lies beyond his prerogative to determine the necessity of having a grand jury, or to refuse to order one because he feels that "no emergency exists" or that "the prosecuting officers" of the county will investigate and prosecute any law violations coming to their attention, as the district judges here did. The framers of the Constitution did not intend to leave it to any one, or group of, officers or officials to determine finally, or at all times, whether other officers would do their duty or whether a grand jury was needed. In accord with our people's historic fear of too much power or tyranny in government (as evidenced by the Bill of Rights and many provisions of both the U.S. and Oklahoma Constitutions) these men deliberately left that prerogative to be exercised by the people in the manner provided.

Ogden, 286 P.2d 1088, 1093.

{12} *Court must determine the legality of the inquiry proposed by the petition.* Article II, Section 14 does not specifically restrict the scope of grand jury inquiry. As a matter of interstitial interpretation, however, we think it clear that the judge must make a legal, nondiscretionary determination that the inquiry proposed by the petition is valid. We reach our conclusion based on the scope of grand jury inquiry we find implicit in the laws of this state since the territorial legislature of 1853, in the common law, and on the implied supervisory power of the courts over grand jury practice.

{13} The New Mexico statutory scheme for grand jury practice historically has addressed the scope of inquiry. The oath required to be given the grand jury instructs the jurors that they are to "diligently inquire and true indictment make, of all public offenses against the people of this state, committed or triable within this county, of which you shall receive legal evidence." Section 31-6-6(A)(1); *see also* 1853 N.M. Laws, ch. 1, § 26 (oath to be administered to grand jurors same as that given foreman). Similarly, the mandatory charge to be given the grand jury requires inquiry into "any public offense against the state committed and triable in the county which is not barred from prosecution by statute of limitations and upon which no valid indictment or information has theretofore been filed." Section 31-6-9(A); *see also* 1853 N.M. Laws ch. 1, § 28, ch. 2, §§ 1-15 (charge to be given grand jury and necessary components thereof). From the statutory scheme, it is clear that a grand jury always has been able to investigate only public offenses, that is, criminal conduct or malfeasance proscribed by state law, subject to the limitation on geographic scope of inquiry, the prohibition on duplicative prosecution, and any applicable limitations period. In addition, as we state in *Deschamps v. Kase*, 114 N.M. 38, 834 P.2d 415 (1992), also filed today, the common law does not endow a grand jury with an unlimited charter to forage for unlawful conduct on speculative whim. *Id.* at 39, 834 P.2d at 416. The grand jury will not be convened to engage in a fishing expedition. *Id.*

{14} While, for the most part, these limitations are committed to the self-regulation of the jury, in that the statutes require the court to instruct the grand jury on its duties, but do not authorize the court to enforce the limitations, we are satisfied that the district court is endowed with a residuum of supervisory authority over the convening of the grand jury. We find such authority implicit in the statutory grand jury scheme which historically has committed many supervisory functions to the district court.[5] *See* Op. N.M. Att'y Gen.

[5] Throughout history, the New Mexico grand jury scheme has been replete with references to court supervision. Under Article II, Section 14 the court convenes the grand jury. The court administers the oath to the jurors, § 31-6-6, and charges the grand jury with its statutory duties. Section 31-6-9;

82-14 (1982)(concluding that the district court possesses the "discretion" to determine whether the matters stated in the petition are reasonably within the lawful scope of grand jury inquiry). Common sense also informs our conclusion. Clearly a grand jury cannot be convened to investigate conduct that is not proscribed by New Mexico law or to investigate criminal conduct alleged to have occurred in another jurisdiction. Nor may a grand jury indulge in vexatious investigation based on speculation or conjecture that a crime has been committed. We hold that the district court must make, in the first instance, a determination of the legality of the proposed grand jury inquisition. This is not a discretionary determination, but a legal one made with due regard to the importance of the petition-initiated grand jury. In that connection, we hasten to add that the petition need not articulate specific allegations of crime. Rather it is sufficient that the petition on its face delimit an area of inquiry that colorably lies within the permissible scope of grand jury inquiry.

{15} The Supreme Court of Oklahoma, under a similar statutory and constitutional scheme has reached the same result. In *State ex rel. Harris v. Harris*, 541 P.2d 171 (Okla. 1975), the district court denied a petition request for a grand jury on the theory that the petition failed to state adequate grounds to merit grand jury investigation *Id.* at 171-72.[6] The high court reaffirmed the primacy of the will of the citizenry in the convening of a petition-initiated grand jury, but added that the court may review, under a generous standard, the legal sufficiency of the petition:

> At no time, has the people or the legislature seen fit to require specific allegations of crime or offense in the content of a grand jury petition. Therefore, the sufficiency of a grand jury petition should be liberally construed.
>
> . . . .
>
> We cannot determine as a matter of law that the petition for grand jury is a witch hunt based upon speculation or conjecture by the circulators and signers of the petition, nor can we carte blanche impugn their motive. *This is the function of the grand jury*. . . . In any event, *the discretion and authority [to indict] lies with the grand jury as an inquisitorial body*.
>
> If we were to require that a grand jury petition must contain specific allegations of crime and offenses, then we would by judicial fiat severely limit the function of the grand jury system.

Id. at 173 (emphasis added).

{16} Here, we hold that the petition sufficiently states conduct within the proper scope of inquiry. True, as respondent observes, the petition may be overly broad to the extent it requests investigation into matters beyond the scope of inquiry, as when the applicable limitations period has run or the conduct is not proscribed by law. However, the petition is not "totally without form or content." *Id.* at 173. The petition requests investigation into highly-publicized, alleged acts of malfeasance of public officials. Properly sworn and charged, it is for the grand jury, not the court, to determine the existence of probable cause with respect to any public offense.

{17} *Constitutional mandate is effectuated by instructing existing grand jury.* At the time the petition was filed, three grand juries were convened and sitting in Bernalillo County. As

see also 1853 N.M. Laws, ch. 1, § 26 (oath), § 28 (charge). The court or the attorney general, upon the court's request, may assist the grand jury. Section 31-6-7; *see also* 1853 N.M. Laws, ch. 2, § 12 (grand jury may ask advice of court or prosecutor). Under territorial law, the court was required to appoint the foreperson of the grand jury. *Compare* 1853 N.M. Laws, ch. 1, § 24 *with* § 31-6-2 (stating that jurors shall select the foreperson).

[6] The reasons articulated by the trial court in *Harris* bear marked similarity to those stated by the judge in this case. The trial court adjudged the petition deficient in the following respects: (1) the petition failed to set forth "allegations of corruption in office, malfeasance of public officials or violation of the criminal laws;" (2) the request did not state "what should be investigated." *Id.* at 172. The trial court also stated that "the calling of a Grand Jury is an emergency measure and should not be called for light or transient reasons." *Id.*

respondent suggested in his response to the petition for writ of mandamus and later made clear at oral argument, the convening of an additional grand jury to investigate the matters stated in the petition would be "redundant and a waste and misuse of public funds." Respondent apparently deemed those factors sufficient to deny the petition request. We disagree, but add that the court may substantially comply with the mandate of Section 14 by charging a sitting grand jury in accordance with the petition request.

{18} Article II, Section 14 states that the district court shall "convene" a grand jury when presented with a petition request. As we have stated above, Section 14 reflects the desire of the citizens of this state to reserve for themselves direct access to the criminal process. To permit the district judge to refuse to convene a constitutionally sufficient grand jury because the grand jury "would be redundant and a waste of public funds" would do violence to the clear mandate of Section 14 and would undermine its intended purpose. We must not, however, lose sight of the purpose of Section 14. The Constitution seeks not to convene a special or new grand jury, but to secure the right to grand jury investigation of matters of public interest. We are satisfied that this broader purpose is fully and fairly effectuated by convening a new grand jury, by submitting the matters stated in the petition to an existing grand jury, or by recognizing that an existing grand jury in fact already has been charged appropriately. The district judge may exercise limited discretion to choose the best recourse, and absent some claimed injustice or prejudice arising from the use of an existing grand jury, we are satisfied that the constitutional mandate is complied with by such practice.

{19} Accordingly, we conclude that the petition for writ of mandamus is well taken, and now direct the district court to either convene the grand jury as requested in the petition or to charge a sitting grand jury with the duty to investigate the matters set forth in the petition.

{20} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1992-NMSC-056

Filing Date: September 2, 1992, As Corrected

Docket No. 20,116

CARMELLA M. MONTOYA,

Petitioner,

vs.

AKAL SECURITY, INC. and ROYAL INSURANCE CO.,

Respondents.

ORIGINAL PROCEEDING ON CERTIORARI,
John W. Pope, Workers' Compensation Judge

For Appellant:

Charles A. Purdy,
Santa Fe, NM.

For Appellee:

Montgomery & Andrews,
Katherine W. Hall,
Santa Fe, NM.

OPINION

RANSOM, Chief Justice.

{1} We issued our writ of certiorari to the Court of Appeals to reconsider the rule that satisfaction of a claim against a third-party tortfeasor extinguishes a worker's right to compensation and related benefits arising from the same circumstances as the third-party claim. That rule derives from *Castro v. Bass*, 74 N.M. 254, 392 P.2d 668 (1964), and NMSA 1978, Section 52-5-17 (Cum. Supp. 1986). In an unpublished opinion founded on *Castro*, the Court of Appeals affirmed a denial of benefits by the workers' compensation judge. We reverse.

{2} *Facts and proceedings.* On June 3, 1987, Carmella Montoya was attacked and severely injured at the Santa Fe Vocational Technical School while performing her duties as a security guard in the employ of AKAL Security, Inc. Montoya received medical benefits from Royal Insurance Company, the workers' compensation insurance carrier for AKAL, and, on May 15, 1988, Royal began payment of temporary total disability benefits.

{3} On June 1, 1989, Montoya brought suit against the school to recover damages for her injuries. Later that year, Montoya alerted Royal to the third-party action, and in early 1990 she notified Royal of her intention to settle that action. On April 27, 1990, Montoya settled for $ 7,500 and executed a release in favor of the school. The suit was dismissed with prejudice on May 4, and on June 16 Royal terminated the workers' compensation benefits Montoya had been receiving. Shortly thereafter, Montoya filed a claim to reinstate the benefits. AKAL and Royal successfully moved for summary judgment on the grounds that Montoya's claim for workers' compensation benefits was barred by *Castro* and Section 52-5-17.

{4} *Historical interpretation of Section 52-5-17.* Montoya contends that the *Castro* rule should be reconsidered in light of comparative negligence principles. To do so, we must examine *Castro* along with the historical interpretation of Section 52-5-17. That statute, in pertinent part, provides:

> The right of any worker or employee . . . to receive payment or damages for injuries or disablement occasioned to him by the negligence or wrong of any person other than the employer . . . shall not be affected by the Workers' Compensation Act . . . , but the claimant shall not be allowed to receive payment or recover damages for those injuries or disablement and also claim

> compensation from the employer. In such case, the receipt of compensation from the employer shall operate as an assignment to the employer or his insurer, guarantor or surety of any cause of action, to the extent of payment by the employer to or on behalf of the worker or employee for compensation or any other benefits to which the worker or employee was entitled. . . .

NMSA 1978, 52-5-17. Two concerns said to be embodied in Section 52-5-17 drive the case law of third-party actions: (1) prohibition against double recovery, and (2) protection of the employer's right to reimbursement from the proceeds of the third-party action. *Brown v. Arapahoe Drilling Co.*, 70 N.M. 99, 104-05, 370 P.2d 816, 820 (1962).

{5} In *White v. New Mexico Highway Commission*, 42 N.M. 626, 83 P.2d 457 (1938), this Court held that the predecessor to Section 52-5-17 forbade a worker from subsequently claiming benefits under the Act if the worker, without the consent or knowledge of the employer or the employer's insurer, first executed a third-party release for less than the worker was entitled to under the Act. The Court stated:

> The plaintiff undoubtedly had the right to settle with the tort feasor on any terms satisfactory to him. But when he elected to "receive payment or recover damages" from the tort feasor without the knowledge or consent of his employer he no longer came under the act, which provides that he "shall not be allowed to . . . also claim compensation from such employer hereunder." There is but one cause of action and when that is satisfied there is nothing to be assigned to the employer or its insurer by operation of the statute.

Id. at 628, 83 P.2d at 458. Although the reasoning is sparse, the Court apparently was concerned with possible prejudice to the employer's statutory assignment of the third-party action. *See Brown,* 70 N.M. at 104, 370 P.2d at 820 (characterizing *White* as concerned with estoppel). It had been established, nonetheless, that a worker is not barred from pursuing a third-party-tortfeasor action in the worker's own name after receiving benefits under the Act. This is because receipt of benefits does not make the worker financially whole and, since the worker's cause of action is assigned pro tanto to the employer, there is no double recovery. *Kandelin v. Lee Moor Contracting Co.*, 37 N.M. 479, 486, 24 P.2d 731, 734-35 (1933).

{6} Despite the "assignment" language of Section 52-5-17, the statute contemplates *reimbursement* of the employer. *Id.* at 489, 24 P.2d at 736. "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." *Royal Indem. Co. v. Southern Cal. Petroleum Corp.***,** 67 N.M. 137, 144, 353 P.2d 358, 363 (1960)(citing *Kandelin*).

{7} *Castro v. Bass*. Later, in *Castro*, the Court suggested that Section 52-5-17 embodies a rule of election and we held that when the worker collects in full a judgment from a third-party tortfeasor in an amount that is less than the maximum the worker would have been entitled to receive under the Act the worker is barred from subsequently recovering workers' compensation. *Castro*, 74 N.M. at 259-60, 392 P.2d at 672-73. We rejected the worker's argument that recovery in the tort action was inadequate and we stated that, since no appeal was taken in that action and the judgment was satisfied, the plaintiff could not be heard to complain of inadequacy in the recovery. *Id.* at 258, 392 P.2d at 671-72.

{8} Justice Noble, dissenting in *Castro*, approached the issue from the view of the subrogation or reimbursement rights of the employer. He first observed that the statute permits the employer to share in any recovery by the employee from a third-party tortfeasor immediately upon payment of compensation, and that the employer is entitled to receive an amount equal to the employer's full liability. *Castro*, 74 N.M. at 261, 392 P.2d at 674 (Noble, J., dissenting). He noted also that the statute gives the worker the opportunity to obtain one full recovery, but prohibits the worker from receiving two recoveries for the worker's own benefit.

Id. Since the employee had received compensation benefits prior to instituting the third-party action, *Id.* at 255, 392 P.2d at 669, and because the employer had participated in the third-party action and was specifically subrogated in the judgment pursuant to statute, Justice Noble reasoned that the employer's right to reimbursement was not compromised and the worker would receive only a single recovery for his own benefit. *Id.* at 263, 392 P.2d at 675 (Noble, J., dissenting).

{9} In addition, Justice Noble would shun any interpretation of the statute that would limit receipt of benefits only to those instances in which the worker obtains a worker's compensation award prior to instituting a third-party action. *Id.* Rather than adopting a technical rule of forfeiture, he apparently would focus on whether the employer's right to reimbursement was compromised by some action of the worker. *Id.* at 262, 392 P.2d at 674 (Noble, J., dissenting).

{10} The reasoning of the *Castro* Court's majority, however, focused on the purported double recovery that would arise should the plaintiff be permitted to receive compensation. The Court relied on the presumption that "when damages are sought and recovered from the tortfeasor, the amount of the recovery is for the full loss or detriment suffered by the injured party and makes him financially whole." *Id.* at 258, 392 P.2d at 671. To permit subsequent recovery of compensation would "amount to a receipt of payment or recovery of damages while at the same time claiming compensation which is specifically prohibited by the statute." *Id.* at 259, 392 P.2d at 672. Later cases have understood *Castro* to require and impose an election of remedies. *See, e.g., Britz v. Joy Mfg., Co.*, 97 N.M. 595, 597, 642 P.2d 198, 200 (Ct. App.), *writ quashed*, 98 N.M. 51, 644 P.2d 1040 (1982); *Seminara v. Frank Seminara Pontiac-Buick, Inc.,* 95 N.M. 22, 24-25, 618 P.2d 366, 368-69 (Ct. App. 1980).

{11} *Castro progeny.* Even when a worker prosecuted a third-party action to judgment and the jury returned a verdict in favor of the worker but awarded no damages, the Court of Appeals subsequently affirmed summary judgment in favor of the employer in the worker's claim for benefits under the Act. *Seminara*, 95 N.M. at 22, 618 P.2d 366. The Court refused to deem as a nonexistent remedy an election that results in no award. *Id.* at 25, 618 P.2d at 369. The Court apparently interpreted *Castro* to mean that a jury determination of damages, regardless of the amount awarded or recovered, "is an award for all injuries," *Seminara*, 95 N.M. at 24, 618 P.2d at 368, and that the worker is thereafter barred from claiming compensation.

{12} The *Castro* rule has been applied so that a third-party settlement prior to receipt of any benefits under the Act bars any subsequent claim to compensation benefits. *Apodaca v. Formwork Specialists*, 110 N.M. 778, 779-80, 800 P.2d 212, 213-14 (Ct. App.) (even when employer's right of reimbursement has not been compromised, subsequent claim to compensation is barred by settlement with third-party tortfeasor), *cert. denied*, 110 N.M. 749, 799 P.2d 1121 (1990); *Garcia v. Middle Rio Grande Conservancy*, 99 N.M. 802, 805-06, 664 P.2d 1000, 1003-04 (Ct. App.) (same), *cert. denied*, 99 N.M. 740, 663 P.2d 1197 (1983); *Britz*, 97 N.M. at 597-98, 642 P.2d at 200-01. These cases should be reconsidered. In so doing, principles of comparative negligence bolster, but are not dispositive of our decision.

{13} *Analysis.* We begin with the plain language of Section 52-5-17. That Section does not require an "election." The *Castro* Court has observed that Section 52-5-17 cautions against double recovery of damages, *Castro*, 74 N.M. at 259, 392 P.2d at 672, and the statute by its own terms evinces a legislative intention to prevent windfall recoveries to injured workers: "the claimant shall not be allowed to receive payment or recover damages for those injuries or disablement and also claim compensation from the employer." Section 52-5-17. But the broader objective of the statute is to achieve an equitable distribution of the risk of loss. Thus, once the employer has begun payment of compensation benefits to the employee, such payment operates as an assignment of the cause of action against the third-party tortfeasor, pro tanto for payments made under the Act.

{14} The focus of *Castro* on double recovery skews the purpose of Section 52-5-17 from equitable allocation of responsibility toward an unnecessarily harsh rule of election. Since payment of benefits effects an assignment of the third-party cause of action to the employer, and by virtue of such assignment the employer is reimbursed from the proceeds of the action, it is difficult to perceive any danger of double recovery under Section 52-5-17. That is, Section 52-5-17 itself addresses the problem of double recovery by statutory assignment and reimbursement. Accordingly, we reject the *Castro* rule that has rendered prosecution to judgment of a third-party action a bar to subsequent collection of benefits. *Castro* and its progeny hereby are overruled to the extent they are inconsistent with this opinion.

{15} Moreover, the ameliorative principles of comparative negligence erode the fear of double recovery that gave rise to imposition of the fiction that a worker elected to be made financially whole from satisfaction of a third-party claim. In 1981, this Court adopted the principles of comparative negligence. *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981). The following year, the Court of Appeals in *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 646 P.2d 579 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982), abrogated the doctrine of joint and several liability in favor of several liability. In so doing, the Court rejected any notion that a cause of action is indivisible. *Id.* at 157, 646 P.2d at 584. An employee executing a release in favor of one third-party tortfeasor no longer can be said, as a matter of law, to have been made financially whole. Other parties may have been responsible for the injuries, or for that matter the employer may have been partially at fault.[1] Yet, it is not upon the doctrine of comparative negligence that we conclude *Castro* was wrong. We reject the fiction that a worker has been made financially whole when the worker has received less than the compensation and related benefits to which entitled under the Act. If there is a problem with a satisfaction of the third-party claim, it does not go to double recovery. Rather, it goes to the amount of reimbursement or credit to which the employer is entitled.

{16} *Conclusion.* The burden lies with the worker to show that a third-party release or satisfaction of judgment has not discharged fully the employer's liability to pay benefits. However, if the worker has dealt with the third party in good faith and at arm's length, then the net amount paid presumptively would be the amount by which the employer's liability is reduced. *See 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) (expenses of third-party action to be prorated). If fairness of the amount is contested, the workers' compensation judge must hold a hearing to determine whether the amount paid to satisfy the third-party claim comports with the proportionate fault of the third party and with a reasonable compromise of the liability of that party. In such a contest, it is for the workers' compensation judge to decide the employer's right to reimbursement and credit, if any, against liability for future compensation and related benefits.

{17} The judgment of the Court of Appeals is reversed, and the cause is remanded to the workers' compensation judge for proceedings consistent with this opinion.

[1] In their dissenting opinion in *Taylor v. Delgarno Transportation, Inc.*, 100 N.M. 138, 667 P.2d 445 (1983), Chief Justice Payne and Justice Sosa observed: "The cases which were decided under the doctrine of contributory negligence and under joint and several liability principles were correct in providing that the employer or its insurer must be reimbursed for workmen's compensation benefits paid because in those cases the workman could have recovered 100% of his damages from a third-party tort-feasor in addition to receiving workmen's compensation benefits. That would clearly have been a double recovery. Under current New Mexico law, a workman will not recover the entire amount of his damages from a third-party tort-feasor if the employer was partially negligent. Double recovery can occur only if the workmen's compensation benefits paid exceed the negligent employer's proportionate share of liability." *Id.* at 142, 667 P.2d at 449 (Payne, C.J. & Sosa, J., dissenting) (citation omitted). The dissenters' concerns were vindicated by passage of NMSA 1978, Section 52-1-10.1 (Repl. Pamp. 1991), which effectively overruled the majority in *Taylor* and adopted the rationale of the dissenters.

{18} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

SETH D. MONTGOMERY,
Justice (not participating)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1993-NMSC-017

Filing Date: March 25, 1993, Decided

Docket No. 21,072

GLORIA TRUJILLO,

Petitioner,

vs.

HILTON OF SANTA FE and Crawford & Company,

Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
MaryAnn Lunderman, Workers' Compensation Judge

Motion for Rehearing Denied May 8, 1993

James A. Burke,
Santa Fe,

for Petitioner.

Stirling & Stepleton,
Todd M. Aakhus,
Albuquerque,

for Respondents.

OPINION

RANSOM, Chief Justice.

{1} We issued our writ of certiorari to the Court of Appeals to review its dismissal of an appeal taken by Gloria Trujillo from a compensation order entered by the workers' compensation judge. Dismissal was entered on the ground that notice of appeal was not timely when filed within thirty days of a subsequent order awarding attorney's fees but more than thirty days from the compensation order. *See* SCRA 1986, 12-201(A) (Repl. Pamp.1992) (mandating notice of appeal within thirty days of the filing of final order). The dispositive issue before the Court of Appeals was whether, under *Kelly Inn No. 102, Inc. v. Kapnison*, 113 N.M. 231, 824 P.2d 1033 (1992), an order awarding compensation and medical benefits but not resolving the issue of attorney's fees is a final order for purposes of appeal. The Court of Appeals held that the order was final and that the worker's time to file her notice of appeal ran from the date of the compensation order, 115 N.M. 398, 851 P.2d 1065. We reverse.

{2} Kelly Inn held that a judgment declaring the rights and liabilities of the parties (ruling that lessors had properly terminated a lease) and awarding attorney's fees, but reserving for future determination the amount of the fees, is final; and that the trial court had jurisdiction to fix the amount of fees after more than thirty days had passed following entry of the initial judgment and after the losing party had appealed. *Kelly Inn* relied on *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988), and opinions from the supreme courts of Connecticut, Colorado, and Kansas that "a bright-line rule regarding the finality of a decision on the merits, regardless of the pendency of a request for attorney's fees, is preferable to a case-by-case approach." *Kelly Inn,* 113 N.M. at 235, 824 P.2d at 1037. Regardless of how a claim for attorney's fees might be justified or raised, *Budinich* favored "'a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.'" *Id.* at 239, 824 P.2d at 1041 (quoting *Budinich*, 486 U.S. at 202, 108 S. Ct. at 1722).

{3} Although the rationale in support of the holding in *Kelly Inn* may apply to other proceedings, the holding is nonetheless limited to attorney's fees. The rationale is that the term "finality" is to be given a practical, rather than a technical,

construction to satisfy the policies of facilitating meaningful appellate review and of achieving judicial efficiency. These policies may be served by appeals from judgments declaring the rights and liabilities of the parties to the underlying controversy when resolution of supplemental questions will not alter the judgment or moot or revise decisions embodied therein. Issues "collateral to" and "separate from" the decision on the merits fall within a twilight zone of similarity to proceedings that carry out or give effect to the judgment. The rule that an adjudication of fewer than all the claims of a party is not final without an express determination that there is no just reason for delay, *see* SCRA 1986, 1-054(C)(1) (Repl.Pamp.1992), never has applied when the remaining questions involve proceedings to carry out or give effect to a judgment, such as the disposition and distribution of assets in accordance with an adjudication, ancillary writs to enforce a judgment, or the judicial sale of property following a decree of foreclosure on a mortgage.

{4} In *Kelly Inn*, we specifically recognized that it is impossible to devise a formula to resolve all marginal cases coming within the twilight zone of finality, and we discussed ways that the trial courts can be of significant help to the appellate courts in promoting the policy against piecemeal appeals. What we did not say, and now wish to make clear, is that when the policies of facilitating meaningful appellate review and of achieving judicial efficiency outweigh the policy against piecemeal appeals, and appeal of a "marginal case" would be proper, we would not in the same case refuse the appeal if the aggrieved party were to delay the giving of a timely notice of appeal until resolution of the matters supplemental to the underlying controversy.

{5} We now retreat from language in *Kelly Inn* that suggested a bright-line rule for notices of appeal in cases involving attorney's fees. Rather, we recognize that in the twilight zone a party should be allowed to choose the appropriate time for appeal, guided by considerations in the trial court that impact on meaningful and efficient appellate review. In the twilight of marginal cases, the zone of appeal should be one of practical choice and not one of procedural danger against which a bright-line rule would appear not to serve as a shield. Consequently, we reverse the order of the Court of Appeals that dismissed the appeal taken from the compensation order, and we remand this case to the Court of Appeals for further proceedings consistent with this opinion.

{6} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH E. BACA,
Justice

SETH D. MONTGOMERY,
Justice

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1993-NMSC-029

Filing Date: June 14, 1993, Decided

Docket No. 19,913

BILL HARTBARGER,

Plaintiff-Appellee,

vs.

FRANK PAXTON COMPANY,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Philip R. Ashby, District Judge

Motion for Rehearing Denied July 21, 1993

Albert N. Thiel, Jr.,
Albuquerque,

for Defendant-Appellant.

Jeffrey Romero,
Albuquerque,

for Plaintiff-Appellee.

OPINION

RANSOM, Chief Justice.

{1} This appeal is taken from a judgment entered on a jury verdict in favor of Bill Hartbarger in his action against his former employer, Frank Paxton Company, and the supervisor who fired him, Alan Crownover, for breach of an implied contract of employment. Hartbarger worked as an outside salesperson and was terminated after refusing to accept a lower rate of commission on his sales. Paxton argued there was no implied contract and, therefore, Hartbarger was an at-will employee and no justification was needed for the firing, or alternatively, if there was an implied contract, sufficient justification existed to fire Hartbarger. The jury found there was an implied contract requiring just cause for termination and that the contract was breached, and awarded Hartbarger $ 400,000 in compensatory damages and $ 100,000 in punitive damages. Paxton raises numerous points on appeal, essentially arguing that a reasonable jury could not have found there was an implied contract of employment, that if there was a contract it was not breached, and that there was no basis for the award of punitive damages. We reverse.

{2} *Facts surrounding termination.* Hartbarger worked for Paxton for more than twenty years during two periods, the last one beginning in 1977 and ending with his termination in 1987. At the time of his termination, Hartbarger was employed as one of several salespersons working out of Paxton's Albuquerque operation. Paxton paid its outside sales staff a base salary plus a commission for sales that exceeded a particular amount per month. The commission percentage had varied over the course of Hartbarger's employment from as high as 4 3/4 percent to as low as 2 percent. Hartbarger's commission had been cut before, once for disciplinary reasons and on another occasion to bring the Albuquerque commission structure more in line with the commissions paid at Paxton's other locations around the country. Just before his termination, Hartbarger's commission rate was 21/2 percent, while the commissions of Paxton's other Albuquerque salespersons were 2 percent. Paxton does not dispute that Hartbarger often had the highest sales of the three Albuquerque-based salespersons and that his sales were the highest in the Albuquerque office at the time of his termination. Hartbarger's sales volume was one reason why Hartbarger had a higher commission rate than the other Albuquerque-based salespersons.

{3} Crownover testified that in the months before the termination he had become dissatisfied

with the quality of Hartbarger's work effort and recounted several of Hartbarger's perceived improprieties. In February 1987, Crownover wrote an employee evaluation, which he gave to Hartbarger at a March meeting, along with an oral evaluation. Hartbarger testified that Crownover told him that he was (1) not putting forth 100 percent effort, (2) not cooperating, (3) not observing company policies, (4) not taking the initiative (had to be forced), and that (5) his dependability was lacking. After Hartbarger signed the evaluation form, Crownover told him that "it's going to cost you another half percent of your commission." Hartbarger told Crownover that he could not take a cut like that. (When Hartbarger's commission rate had been cut to 2 percent before, after a few months he told Crownover that he needed more money, and Crownover responded with an increase to 2 1/2 percent.) Crownover offered Hartbarger three choices: accept the cut, resign, or be fired. After a pause, Crownover asked what it was going to be. Hartbarger replied that he could not take the first two choices and Crownover said, "Then I guess you're fired." The parties agree that Paxton could change the commission rate at any time and did not need the employee's permission to do so, but Hartbarger argues that implied in the choices presented to him by Crownover was an expectation for productive negotiation and that there was no good cause for an abrupt firing.

{4} *Implied employment contracts.* The general rule in New Mexico is that an employment contract is for an indefinite period and is terminable at the will of either party unless the contract is supported by consideration beyond the performance of duties and payment of wages or there is an express contractual provision stating otherwise. *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 730, 749 P.2d 1105, 1109, *cert. denied*, 488 U.S. 822, 109 S. Ct. 67, 102 L. Ed. 2d 44 (1988). An at-will employment relationship can be terminated by either party at any time for any reason or no reason, without liability. *Id.* New Mexico courts have recognized two additional exceptions to the general rule of at-will employment: wrongful discharge in violation of public policy (retaliatory discharge), and an implied contract term that restricts the employer's power to discharge. *Id.* The jury below found that there was an implied employment contract between Hartbarger and Paxton permitting termination only for just cause.

{5} This Court has upheld findings of an implied employment contract provision that restricted the employer's power to discharge where the facts showed that the employer either has made a direct or indirect reference that termination would be only for just cause or has established procedures for termination that include elements such as a probationary period, warnings for proscribed conduct, or procedures for employees to air grievances. *See Newberry v. Allied Stores, Inc.*, 108 N.M. 424, 427, 773 P.2d 1231, 1234 (1989) (upholding finding of implied contract based on employee manual, words, and conduct of parties); *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 24-26, 766 P.2d 280, 284-86 (1988) (affirming finding of implied contract based on words and conduct of parties), *cert. denied*, 490 U.S. 1109, 109 S. Ct. 3163, 104 L. Ed. 2d 1026 (1989); *Lukoski v. Sandia Indian Management Co.*, 106 N.M. 664, 667, 748 P.2d 507-510 (1988) (upholding finding of oral contract amended by employee handbook); *Forrester v. Parker*, 93 N.M. 781, 782, 606 P.2d 191, 192 (1980) (holding that, when terminating non-probationary employee, employer is bound by policies established in "personnel policy guide" that control the employer-employee relationship). We have upheld findings that there was no implied contract in cases where the alleged promise by the employer was not sufficiently explicit. *See Shull v. New Mexico Potash Corp.*, 111 N.M. 132, 135, 802 P.2d 641, 644 (1990) (affirming summary judgment in favor of employer where employee had no bargained-for expectations and employee handbook did nothing to alter at-will relationship); *Sanchez v. The New Mexican*, 106 N.M. 76, 79, 738 P.2d 1321, 1324 (1987) (affirming grant of directed verdict in favor of employer where language in employee handbook was of a non-promissory nature and was merely a declaration of employer's general approach to the subject matter discussed).

{6} *Implied employment contract restricting employer's power to discharge employee is an implied-in-fact contract.* The question whether an employment relationship has been modified is a question of fact. *Lukoski*, 106 N.M. at 666, 748 P.2d at 509. A promise, or offer, that supports an implied contract might be found in written representations such as an employee handbook, in oral representations, in the conduct of the parties, or in a combination of representations and conduct. *See Newberry*, 108 N.M. at 427, 773 P.2d at 1234 (totality of the parties' relationship, circumstances, and objectives are to be considered in determining whether presumption of at-will employment has been rebutted); *Kestenbaum*, 108 N.M. at 24, 766 P.2d at 284 (same). When such a contract is implied, it is implied in fact. *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 381, 710 P.2d 1025, 1036 (1985) (en banc) ("An implied-in-fact contract term . . . is one that is inferred from the statements or conduct of the parties. It is not a promise defined by the law, but one made by the parties, though not expressly." (citation omitted)).

{7} *Implied employment contracts do not require a factual showing of additional consideration or mutual assent to the implied term.* Ordinarily, to be legally enforceable, a contract must be factually supported by an offer, an acceptance, consideration, and mutual assent. *See* SCRA 1986, 13-801 (Repl.Pamp.1991) (definition of contract); *Romero v. Earl*, 111 N.M. 789, 791, 810 P.2d 808, 811 (1991) (stating consideration adequate to support a promise is essential to enforcement of the contract and must be bargained for by the parties); *Trujillo v. Glen Falls Ins. Co.*, 88 N.M. 279, 280, 540 P.2d 209, 210 (1975) (holding mutual assent in contract law is elementary and it must be expressed by the parties).

{8}—*Consideration.* Paxton challenges the sufficiency of the evidence to support an implied contract because there was no evidence that Hartbarger gave additional consideration for any agreement beyond at-will employment.[1] *See Gonzales v. United Southwest Nat'l Bank*, 93 N.M. 522, 524, 602 P.2d 619, 621 (1979) (noting uniform rule, in 1979, that an employment contract for permanent employment not supported by consideration other than performance of duties and payment of wages is terminable at will).[2] However, since 1980 when we recognized an implied employment contract in *Forrester v. Parker*, 93 N.M. at 782, 606 P.2d at 192, we have not required that additional consideration be shown factually. In *Forrester*, a personnel policy guide that set out termination procedures gave rise to an implied employment contract. *Id.; see also Kestenbaum*, 108 N.M. at 24, 766 P.2d at 284 (agreeing that conduct of employer may be sufficient to create an implied contract requiring just cause for discharge) (citing *Pugh v. See's Candies, Inc.*, 116 Cal.App.3d 311, 171 Cal.Rptr. 917, 925-26 (1981); *Toussaint v. Blue Cross & Blue Shield,* 408 Mich. 579, 292 N.W.2d 880 (1980)).

{9} In *Kestenbaum*, we alluded to the principle that additional, independent consideration was not necessary to establish an agreement not to discharge except for good cause, but we did not fully develop the principle. 108 N.M. at 24, 766 P.2d at 284. We cited *Toussaint*, 408 Mich. 579, 292 N.W.2d 880, which did discuss the principle to some extent. The court there explained that in determining the termination rights of the parties, job security could be proven by the conduct of the parties, and consideration could be implied from construing that the employer gave up his right to discharge at will as part of the original agreement. *See Toussaint*, 292 N.W.2d at 890-92. The court rejected the "defendant's claim that the element of consideration . . . limits the enforceability of the employer's promise to those

[1] Paxton requested no instruction on consideration and none was given. While failure to raise the issue below should be dispositive, we address the argument as presented on appeal.

[2] The term "permanent employment" is susceptible to a variety of interpretations. In one sense, it might refer to employment for an indefinite period. *See Gonzales*, 93 N.M. at 524, 602 P.2d at 621. In another sense it might refer to employment that is terminable only for just cause. In this opinion, the term "permanent employment" is used in the latter sense and is meant to be interchangeable with "terminable only for just cause." *See Toussaint v. Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880, 885-90 (Mich.1980) (discussing interpretation of the term "permanent employment").

instances in which the employee provides some consideration in addition to the services to be rendered." I at 900 (Ryan, J., specially concurring). We hold today that where there is proof of a promise sufficient to support an implied contract, the consideration sufficient to support the implied contract will be implied as a matter of law by the court whether the promise was part of the original employment agreement or was made later in modifying the employment relationship.[3]

{10}—*Mutual assent.* Paxton next challenges the verdict on the ground that there was insufficient evidence to support a finding of the contract element of mutual assent. The jury in this case was given an instruction requiring mutual assent. No objection was made to that instruction,[4] and it is, therefore, the law of this case.

{11} We have not addressed previously the issue of mutual assent in the context of an implied employment contract. In *Kestenbaum*, this Court held, under the same instruction requiring an intention to be bound, that there was substantial evidence to support a finding that the parties agreed to a contract that permitted termination only for good cause. There was no evidence, and no requirement, to prove that the parties overtly manifested their mutual assent to the just cause term of employment. We stated that we agreed with the proposition that *oral statements made by an employer may be sufficient to create an implied contract. See Kestenbaum*, 108 N.M. at 24-26, 766 P.2d at 284-286. Similarly, an explicit promise would support the jury's finding of mutual assent here. Further, in *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 791 P.2d 452 (1990), we determined that the verdict finding an implied contract was supported by evidence sufficient to find an express contract, and that the theory submitted to the jury was broad enough to encompass a finding of express agreement. We then

[3] Additional consideration may serve an evidentiary function in implied employment contracts, indicating that the parties intended to place a limitation on the employer's right to discharge, *see Pugh*, 171 Cal.Rptr. at 925, but the evidentiary function is something distinct from the showing of consideration as an essential element of contract. In stating that a contract with an express or implied term restricting the employer's power to terminate need not be supported by consideration beyond the employee's service, *Pugh* quoted from *Drzewiecki v. H & R Block, Inc.*, 24 Cal.App.3d 695, 101 Cal.Rptr. 169 (1972), a case cited with approval in the earlier New Mexico Court of Appeals case of *Garza v. United Child Care, Inc.*, 88 N.M. 30, 31, 536 P.2d 1086, 1087 (Ct.App.1975). In *Drzewiecki*, the court held the rule that should be followed in California is the one set out in *Littell v. Evening Star Newspaper Co.*, 120 F.2d 36 (D.C.Cir.1941). *Drzewiecki*, 101 Cal. Rptr. at 174.

> [W]hen one who enters into a contract of employment[] promises not only that he will give his services but also additional consideration . . . such facts may be sufficient, in each case, to show the intent of the parties to enter into a contract for permanent employment.
>
> . . . [W]here no . . . intent [for permanent employment not terminable except pursuant to express terms] is clearly expressed and, absent evidence which shows other consideration than a promise to render services, the assumption will be that—even though they speak in terms of "permanent" employment—the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party.

Littell, 120 F.2d at 37. In addition to California, a number of courts have adopted that rationale in recent years. *See Hartman v. C.W. Travel, Inc.*, 792 F.2d 1179, 1180-81 (D.C. Cir.1986) (explaining that presumption that employment is at will applies only when there is no evidence of parties' intent; to determine intent courts look to "such factors as the express terms of the contract, evidence of surrounding circumstances, or the payment of additional consideration"); *Eales v. Tanana Valley Medical-Surgical Group, Inc.*, 663 P.2d 958, 959-960 (Alaska 1983) (stating that the rule that contract for permanent employment is at will unless supported by additional consideration is based on an unsound foundation); *Coelho v. Posi-Seal Int'l, Inc.*, 208 Conn. 106, 544 A.2d 170, 176 (1988) (adopting position that absence of additional consideration does not invalidate a contract expressing intention that employment not be terminable at will); *Shah v. American Synthetic Rubber Corp.*, 655 S.W.2d 489, 492, (Ky.1983) (joining "a number of other jurisdictions" in following the rationale of *Littell*); *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 99-100 (Me.1984) (holding parties may create employment contract terminable only pursuant to its express terms by clearly stating intention to do so); *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 629 (Minn.1983) (holding requirement of additional consideration and presumption of at-will employment are both rules of construction rather than substance and implied contract needs no additional consideration where intention of parties is clear); *see also Eilen v. Tappin's, Inc.*, 16 N.J.Super. 53, 83 A.2d 817, 818-19 (Law Div.1951) (explaining that New Jersey had never adopted the additional consideration rule and that the rule "is merely a device created by the courts to test whether or not the parties specifically and definitely intended to make such a contract").

[4] The jury was instructed that it could find an implied contract if it found that "the parties by a course of conduct have shown an intention to be bound." Instruction 14, based on SCRA 1986, 13-803 (Orig.Pamp.).

held that "the parties' conduct was sufficient to manifest an intention to be bound by the agreement." *Id.* at 5, 791 P.2d at 456. The employer there established certain policies and procedures to be followed in termination and prepared an employment agreement stating that employment was subject to applicable personnel practices published to employees. The only evidence of the employee's assent to the policies was the signing of the agreement and that the employee commenced and continued to work. *Id.* at 2, 791 P.2d at 453. In *Forrester, Newberry*, and *Lukoski*, the implied contracts were based on employee manuals and the employers' courses of conduct and oral representations. In those cases, the employers issued policy statements and encouraged the employees to rely upon them. However, in each of those cases there was no evidence presented (beyond the fact that the employees commenced or continued to work) that the employees assented to the policies.

{12} When an employer offers to restrict its power to discharge, the employee's assent to the restriction need not be evinced by anything more than commencing or continuing employment. As a matter of public policy, we see no need for any further manifestation of assent. Once the employee has successfully shown that the employer has demonstrated an intent to restrict its power to discharge, absent evidence to the contrary, the court will imply in law that the requirement of mutual assent has been met. There need be no separate factual finding of mutual assent.[5] *Accord Toussaint*, 292 N.W.2d at 892 (holding employer statements of policy can give rise to contractual rights without evidence of mutual agreement). In this case, *if* Paxton made a sufficiently explicit offer to terminate Hartbarger only for just cause, the same evidence will support a finding of mutual assent. An employer does not have to issue a policy statement limiting its power to discharge, but if the employer chooses to do so and creates a reasonable expectation on the part of the employee, it is bound to fulfill that expectation.

{13} To create an implied contract, the offer or promise must be sufficiently explicit to give rise to reasonable expectations. The at-will presumption that the employee has no reasonable expectation of continued employment applies only to a single term of an employment relationship—that of the employer's unabridged right to terminate the employee. *See Sheets v. Knight*, 308 Or. 220, 779 P.2d 1000, 1008 n. 13 (1989) (at-will employee is one who has no reasonable expectation of continued employment); *Wagenseller*, 147 Ariz. at 381, 710 P.2d at 1036 (discussing exception to at-will presumption as "implied-in-fact contract *term* " (emphasis added)). The right to terminate is the only provision of an employment relationship that is challenged in a case such as the one at bar, where the employee claims that the employer promised that the employee would be discharged only for good cause. In recognizing the so-called "implied employment contract," we actually have recognized only that an implied-in-fact contract term limiting the employer's right to terminate at will may modify the underlying employment relationship.

{14} In examining implied employment contract cases, we always have required that the *promise* that is claimed to have altered the presumed at-will term *be sufficiently explicit* to give rise to reasonable expectations of termination

[5] Although in an employment contract, terms of consideration and mutual assent may be implied in law, we reiterate that an implied employment contract providing for termination only for just cause is a contract implied in fact; it is based on explicit representations or conduct. An implied-in-law contract, on the other hand, is a duty imposed by law and requires no assent. Restatement (Second) of Contracts § 4 cmt. b (1979) (using the term "quasi contract"). It is not really a contract at all. *See Hydro Conduit Corp. v. Kemble*, 110 N.M. 173, 178-79, 793 P.2d 855, 860-61 (1990) (distinguishing between contract implied in law based on obligations created by law for reasons of justice, and contract implied in fact based on parties' mutual assent as manifested by their conduct). An action for retaliatory discharge, for example, lies not as a breach of contract, but as a tort. *See Vigil v. Arzola*, 102 N.M. 682, 688, 699 P.2d 613, 619 (Ct.App.1983) (recognizing the tort of retaliatory discharge), *rev'd in part on other grounds*, 101 N.M. 687, 687 P.2d 1038 (1984), *modified by Boudar v. E.G. & G., Inc.*, 106 N.M. 279, 280-81, 742 P.2d 491, 492-93 (1987) (allowing retroactive application), *and overruled in part on other grounds by Chavez v. Manville Prods. Corp.*, 108 N.M. 643, 649-50, 777 P.2d 371, 377-78 (1989) (lowering the burden of proof for retaliatory discharge and allowing recovery of damages for emotional distress).

for good cause only. Where the alleged term has arisen in a personnel manual, we have required that the manual control the employment relationship to the point that an employee could reasonably expect his employer to conform to the procedures it outlined. *Newberry*, 108 N.M. at 427, 773 P.2d at 1234. We also have stated that "'if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it.'" *Lukoski*, 106 N.M. at 667, 748 P.2d at 510 (quoting *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984) (en banc)); *see also Rowe v. Montgomery Ward & Co.*, 437 Mich. 627, 473 N.W.2d 268, 275 (1991) (holding that oral statements of job security must be clear and unequivocal to overcome presumption of at-will employment). An employer creates expectations by establishing policies or making promises. An implied contract is created only where an employer creates a reasonable expectation. The reasonableness of expectations is measured by just how definite, specific, or explicit has been the representation or conduct relied upon.

{15} The evidence in this case does not show a sufficiently explicit offer or promise to terminate only for just cause. "On appeal, we resolve all disputed facts in favor of the successful party, indulge all reasonable inferences in support of a verdict, and disregard all evidences and inferences to the contrary." *Newberry*, 108 N.M. at 428, 773 P.2d at 1235. We are to consider the totality of the parties' relationship, circumstances, and objectives in determining whether the presumption of at-will employment has been rebutted. Hartbarger has directed this Court's attention to many aspects of the parties' employment relationship, arguing that in totality they demonstrate a sufficient promise to support an implied contract. Under the challenges raised by Paxton, we look only to see if the evidence is sufficient to support a finding that Paxton, by its course of conduct, evinced an intention to discharge Hartbarger only for just cause. There is no assertion that Paxton established policies and procedures for terminations; Hartbarger relies on alleged representations that he would be fired only for just cause.

{16}—*The yellow employee handbook.* Paxton published at least two employee handbooks, one in 1975 or 1976 with a yellow cover and one in 1983 with a red cover. Hartbarger acknowledged receiving a copy of the yellow handbook when he rejoined the company in 1977, but denied having received the red handbook. Both handbooks set out company policies regarding compensation and reasons for discipline, outline the company's retirement plan, and contain other sections of information and advice. The evidence is sufficient to support the finding that Hartbarger received the yellow handbook and not the red handbook that contains a disclaimer stating that: "The policies in this book are subject to change. . . . They are not conditions of employment, and the language is not to be construed as a contract between [Paxton] and [its] employees. Employment is terminable at the will of either the employee or the Paxton division for which he or she works." For purposes of this appeal, we will accept the finding that only the yellow handbook affected the employment relationship between the parties. *Cf. McGinnis*, 110 N.M. at 4-5, 791 P.2d at 455-56 (holding handbook binding on employment relationship where employee had not been issued a copy but employee helped draft the guide, a copy was available in the department where she worked, employees could review guide on request, and it was published to employees in sense of having been made generally known to them and proclaimed officially by employer).

{17} Page 10 of the yellow handbook is labeled "Fair and Square Policies." On that page are statements to the effect that Paxton will pay wages that "equal or exceed generally recognized levels prevailing in the area of employment," and that "[e]mployees will be paid and promoted commensurate with ability previously displayed and on length of service." While relating to Paxton's policy of compensation, the "Fair and Square Policies" do not relate to an implied contract requiring just cause for termination. There is no reference to termination on page 10,

only general statements relating to Paxton's compensation rates.

{18} Page 11 of the yellow handbook is labeled "Logical and Practical Rules." Near the bottom of the page is a list of "[a]ctions leading to severe disciplinary action or discharge." The list includes, inter alia: dishonesty, insubordination, excessive absenteeism, loafing after previous warnings, abuse of company property, and falsification of any company record for personal benefit. Hartbarger argues that nothing he did is encompassed by any of the categories in that list. We see no reason why the list should be deemed inclusive of all reasons for which an employee might be disciplined or terminated, or indeed, why the list should preclude discharge for no reason at all. There is no statement in the yellow handbook to the effect that the handbook reflects "established procedure regarding suspension of problem employees and termination for those who cannot conform to Company Policy," as there was in the handbook at issue in *Lukoski*, 106 N.M. at 666, 748 P.2d at 509. Neither is there anything suggesting "that the enumerated conduct was the only basis for dismissal, and the rules were consistent with a termination-at-will policy." *Rowe*, 473 N.W.2d at 275 (holding evidence insufficient to support finding of implied contract). We find that there is no language in the yellow handbook that directly or indirectly refers to a policy that Paxton will fire employees only for just cause.

{19}—*Paxton's custom of retaining employees for a long time and Crownover's practice of usually only firing employees for a good reason.* Paxton had a history of maintaining long-term employment relationships. During the time that Hartbarger worked for Paxton, no outside salesperson had been terminated. Crownover testified that it was not his custom and practice to go around firing people and that when he did fire someone, he usually had a good reason. Hartbarger points to this history of long-term employment and Crownover's testimony as an indication that Paxton did not maintain an at-will employment policy. Paxton responds that long-time employment is not inconsistent with an at-will policy and that it should not be penalized for not having fired employees for no reason. We agree. Paxton's retention of other employees for a long time is in itself no indication that Hartbarger had an implied contract requiring that termination be only for just cause. As a matter of policy, this Court will not consider evidence that a company does not usually fire employees without a good reason as *by itself* establishing that the company does not maintain an at-will employment policy. To do otherwise would encourage employers to occasionally fire employees for no other reason than to show that they maintain the freedom to do so.

{20}—*Oral statements by Crownover.* The only oral statements in evidence by any agent of Paxton are statements Crownover made when Hartbarger approached him out of concern that the family-owned Paxton Company was to be sold. Hartbarger recalled asking Crownover what would happen to the employees if the company were sold. Hartbarger testified that Crownover told him in reply that as long as he kept up his sales and took care of what he was doing he would not have anything to worry about. Hartbarger said Crownover assured him that the company was not the kind of company that would sell out and just leave its employees hanging.

{21} Hartbarger argues that these statements could be, and on appeal should be, interpreted as meaning that he would not be terminated as long as he kept up his sales and took care of his job, i.e., unless Paxton had just cause. Because we are to consider the totality of the parties' relationship, circumstances, and objectives, we can consider the context in which this assurance was made and evaluate whether the statement was intended, or reasonably could be interpreted by Hartbarger, to be confirmation of an implied contract or a modification of the employment relationship.

{22} The context was that a concerned employee was discussing with his supervisor what might happen to current employees if the company were to be sold. The supervisor's response to the employee's concerns was to reassure the employee. Hartbarger admitted that he was on a friendly basis with Crownover at the time, that the conversation may have been "off the record,"

that he knew Crownover had no authority to bind the potential new owners if the sale did occur, and that the entire conversation concerned the new owners, not the current ownership. The assurance was not expressed in terms of a contractual promise. *See Sanchez v. The New Mexican*, 106 N.M. at 79, 738 P.2d at 1324 (language of a non-promissory nature and merely a declaration of employer's general approach lacks specific contractual terms which might evidence intent to form a contract).

{23} The comments by Crownover, on their face, resemble statements made in *Toussaint* and quoted in *Kestenbaum*, 108 N.M. at 24, 766 P.2d at 284. In *Toussaint*, as in *Kestenbaum*, assurances of job security were made to the employees during the hiring process and might legitimately have given the employee an expectation that he would not be fired without just cause. The *Toussaint* court held that an employer's statements of company policy and procedure that it will terminate only for cause can give rise to rights enforceable in contract. *See Kestenbaum*, 108 N.M. at 24-25, 766 P.2d at 284-85. In contrast, Crownover was not making a statement of current or future company policy regarding its employment relationship with Hartbarger; he was expressing an opinion as to job security if the company were to be sold.

{24} Looking at the conversation in context, there is no reasonable interpretation of Crownover's comments that would lead one to believe that Crownover was either making a promise or reaffirming an earlier promise that Hartbarger was anything other than an at-will employee. Hartbarger's testimony cannot be construed as describing a bargaining for a change in the employment relationship between Hartbarger and the Paxton ownership at that time.

{25}—*Written statements by Crownover.* About three months before he was fired, Hartbarger applied for a loan. The lender asked Crownover to fill out a verification of employment form in connection with the loan approval process. Crownover stated on the form that Hartbarger's probability of continued employment was "excellent" and that Hartbarger was "likely" to continue to receive overtime or bonus pay, by which Crownover said he meant commissions. Hartbarger points to the verification statement as indicative of an implied contract requiring just cause for termination. We disagree.

{26} The statements were made to the lender, not to Hartbarger, and clearly could not indicate a modification of the employment relationship. The comments made were the same as might be given for an at-will employee who has been with the company a long time and has been a steady employee. They are not indicative of a modified employment relationship. The comments are no indication that Hartbarger could be terminated only for just cause. They indicate only that, at that time, Crownover did not contemplate firing Hartbarger and thought that he would continue to receive bonuses in the form of commissions. *See Rowe*, 473 N.W.2d at 273 (orally grounded contractual obligation for permanent employment "'must be based on *more than* an expression of an optimistic hope of a long relationship'") (emphasis added in *Rowe*) (quoting *Carpenter v. American Excelsior Co.*, 650 F. Supp. 933, 936 n. 6 (E.D.Mich.1987)).

{27} The other written statement that Hartbarger points to as evidence of an implied contract is the evaluation form that was given to Hartbarger at the meeting where Hartbarger was terminated. That written statement cannot be construed as modifying the employment contract or as an indication of an implied contract because it contains no statements regarding future employment conditions and was not given to Hartbarger until the meeting that concluded with his termination.

{28}—*Paxton's retirement plan.* Pages 20 and 21 of the yellow handbook give a brief description of the employee retirement program that was in place at the time. On page 20, the handbook points out that Paxton "will vigorously resist pension claims presented by any employee involved in theft, conversion or embezzlement of company property." On page 21 there is a paragraph providing that employees who are vested

in the pension plan may be entitled to receive their retirement benefits from the Paxton plan at their normal retirement date. Benefits claimed in that manner are subject to forfeiture if the employee was "discharge[d] for theft of company property." There are no references in the retirement program to discharge for any other reason or for voluntary separation.

{29} Hartbarger argues that the retirement plan's policy of contesting benefits if the employee was involved in theft from the company is contra-indicative of an at-will employment policy. We see nothing in the retirement plan that supports Hartbarger's position. The statement that Paxton will contest retirement benefits if termination was for theft of company property is no indication that employees will not be terminated for other reasons. The statement only indicates that a termination for any other reason will not result in a contest of accrued retirement benefits, and that position is consistent with an at-will termination policy.

{30} Totality of the evidence insufficient to support a finding of a promise that employment could be terminated only for just cause. Viewing all of the circumstances of this employment relationship, we hold that the evidence does not support a finding that Paxton made an offer or promise sufficiently explicit to establish an implied contract. There was no representation sufficiently explicit to constitute an offer not to terminate Hartbarger except for just cause, thus there could be no implied contract to that effect. Therefore, we reverse the judgment against Paxton and remand with instructions to enter judgment in Paxton's favor.

{31} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

SETH D. MONTGOMERY,
Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1993-NMSC-062

Filing Date: October 27, 1993, Decided, As Corrected February 9, 1994

Docket No. 19,893

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

GLORIA GUTIERREZ, REYMUNDO GUTIERREZ, and JOHNNY GARCIA,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Woody Smith, District Judge

Petition for Writ of Certiorari filed June 3, 1991, Granted June 24, 1991

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OPINION

RANSOM, Chief Justice.

{1} We granted the State's petition for a writ of certiorari to review an opinion of the Court of Appeals that affirmed the district court's order suppressing certain evidence obtained through unannounced entry of defendants' residence as authorized in a search warrant. *See State v. Gutierrez*, 112 N.M. 774, 819 P.2d 1332 (Ct. App.1991). The issue presented to this Court is whether evidence obtained by virtue of an invalid search warrant nevertheless may be admitted under the exclusionary rule's "good-faith" exception as articulated by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). We agree with the Court of Appeals that the good-faith exception is incompatible with the guarantees of the New Mexico Constitution that prohibit unreasonable searches and seizures and that mandate the issuance of search warrants only upon probable cause. Therefore, we affirm.

{2} *Facts and proceedings.* On August 4, 1989, the district judge issued a warrant authorizing the search of an apartment in Albuquerque for methamphetamine and other controlled substances, along with drug distribution paraphernalia and evidence of the purchase and sale of controlled substances. In his own hand near the bottom of the page, the district judge wrote that "unannounced entry is authorized for the protection of the officers and for the preservation of evidence."

{3} Officer Carla Gandara swore to the following facts contained in the affidavit supporting her request for the warrant: A reliable informant reported that Reymundo and Gloria Gutierrez were

selling "crank", or methamphetamine, from the apartment. Shortly before executing the affidavit, Officer Gandara supervised the informant's purchase of methamphetamine from the apartment. In addition, the police had received complaints from neighbors about suspected drug activity in the apartment and had observed frequent pedestrian and vehicular traffic of the type "consistent with persons who either buy or sell drugs."

{4} Officer Gandara requested that the warrant authorize unannounced entry and submitted the following recital in support of this request:

> Affiant has learned through previous investigations and search warrants that when a search warrant for drugs is announced, the persons in possession of the drugs often destroyed the evidence before officers can enter. This is usually done by either swallowing or flushing the evidence. Based on this information, affiant requests that the search warrant be considered a no-knock warrant.[1]

The affidavit contained no particularized showing that the defendants were apt to destroy evidence. Moreover, although the warrant stated that no-knock entry was authorized both to preserve evidence and for officer safety, concerns for officer safety were absent from the affidavit. Officer Gandara testified at the suppression hearing that the warrant had been reviewed by a representative of the district attorney's office.

{5} On August 14, 1989, Officer Gandara, Sergeant Ray Ortiz, Detective Shawn, and three other Albuquerque police officers executed the warrant.[2] The officers did not announce their presence and purpose prior to entry. Officer Gandara, leading the raid, opened the door and ran into the apartment shouting, "Police, down!"[3] The other officers followed her into the apartment. She then ran directly to the back of the apartment. The search recovered eleven bags of methamphetamine from the kitchen table, paraphernalia for distribution, and a portion of the money used for the informant's controlled purchase. Nothing in the record suggests that the officers discovered weapons of any sort.

{6} Reymundo and Gloria Gutierrez, husband and wife, and Gloria's son, Johnny Garcia, all resided in the apartment and were present during the search. They were arrested and a grand jury indicted them on three counts: possession of a controlled substance with intent to distribute under NMSA 1978, Section 30-31-22(A) (Repl. Pamp.1989), conspiracy to commit possession of a controlled substance with intent to distribute under NMSA 1978, Sections 30-28-2, 30-31-22(A) (Repl.Pamp.1984), and possession of drug paraphernalia under NMSA 1978, Section 30-31-25.1(A) (Repl.Pamp.1989).

{7} Defendants moved to suppress the evidence recovered from the apartment during the search, asserting it was obtained in violation of the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. They challenged both the sufficiency of the showing of probable cause and the propriety of unannounced entry. The State, citing *Leon,* urged adoption of a good-faith exception to the exclusionary rule under the Fourth Amendment and Article II, Section 10. In granting the defendants' motions to suppress, the trial court explained:

> 1. The Fourth Amendment and the New Mexico Constitution require that for a search to be valid it must be "reasonable".

[1] Warrants that authorize unannounced entry by executing officers have come to be known as "no-knock" warrants.

[2] It appears that all the officers involved were members of the Field Services Bureau, Valley Area Impact Command (or Team), Narcotics Unit of the Albuquerque Police Department.

[3] Apparently, there was a screen door and an entry door. Some conflict arose at the suppression hearing as to whether the screen door was open, unlocked, both, or neither. Johnny Garcia testified that both the screen door and the entry door were closed and locked. Officer Gandara testified that the screen door was closed but unlocked, and that the entry door was open. Except for Garcia's testimony at the suppression hearing that he was knocked to the floor when Officer Gandara burst into the apartment, there is no claim that the officers used unreasonable force after entry.

> To be reasonable, the officer(s) serving the warrant must "knock and announce", unless sufficient exigent circumstances exist to forgo this requirement.
>
> 2. Most jurisdictions do not allow a predetermination of these exigent circumstances. The officer serving the warrant must make that determination at the time the warrant is served.
>
> 3. New Mexico has not adopted the "good-faith exception" to the requirement of probable cause or exigent circumstances. If such were the case, under the particular circumstances of this case, the "good-faith exception" would apply.
>
> 4. Sufficient exigent circumstance[s] were not articulated at the hearing on this motion to allow a "no-knock entry".

The court entered no findings and drew no conclusions on probable cause.

{8} Within ten days, the State appealed the suppression order as authorized by NMSA 1978, Section 39-3-3(B)(2) (Repl.Pamp.1991). The Court of Appeals affirmed. Writing for a two-judge majority, Judge Chavez held that the New Mexico Constitution does not embody a good-faith exception to the rule requiring exclusion of evidence seized pursuant to a constitutionally deficient search. *Gutierrez*, 112 N.M. at 780, 819 P.2d at 1338. The Court criticized the *Leon* Court's cost-benefit analysis of the exclusionary rule, stating that the costs of the rule are exaggerated. *Id.* at 778-80, 819 P.2d at 1336-38. In addition, the Court stated that the good-faith exception swallowed the constitutional requirement of probable cause. *Id.* at 780, 819 P.2d at 1338. Judge Bivins dissented and suggested a case-by-case adoption of a good-faith exception to the exclusionary rule. *Id.* at 782, 819 P.2d at 1340. Judge Bivins took issue with the majority's preoccupation with the sanctity of the probable cause requirement. He noted that the warrant was deemed invalid not because of lack of probable cause, but because of the nature of the entry it authorized. *Id.* at 784, 819 P.2d at 1342.

{9} *Preliminary discussion—invalidity of no-knock warrant gives rise to good-faith exception issue.* We first consider whether we are faced with a question that is real or one that is hypothetical. On appeal, the State assumes, and apparently would have us assume, that the trial court declared the warrant to be invalid.[4] Although the trial court did not expressly declare the warrant to be invalid, it noted that most jurisdictions do not allow the predetermination of exigent circumstances. The State, on the other hand, assumes that the warrant was invalid because facts justifying unannounced entry were not established with particularity in the affidavit. The State thus implies that, upon a proper factual showing, unannounced entry may be authorized by warrant. We have considered the validity of predetermination of exigent circumstances but expressly withhold any statement of an opinion in that regard. We see the issue on appeal as being founded on the absence of particularized facts in the affidavit.

{10} The widespread use of no-knock warrants that was revealed at the hearing below,[5] their po-

[4] In its brief in chief before the Court of Appeals, the State conceded that "The warrant was not supported by a particularized showing of facts specific to these defendants indicating that they personally would be likely to flush their drugs down the toilet, or otherwise dispose of them, or use weapons to endanger themselves and the police." In addition, the State "acknowledge[d] that such specific facts did not become apparent to the officers at the time of execution of the warrant." For "the purpose of argument," the State assumes that the "warrant was invalid, [and argues that] the exclusionary rule should not be applied because the police acted on the basis of an objectively reasonable good faith belief that the warrant was valid." At oral argument before this Court, counsel for the State stated that he did not concede that the warrant was invalid; rather, he was not challenging the finding of invalidity.

[5] Detective Shawn testified that in the eighteen months he had spent with the Valley Impact Team, ninety-five percent of the approximately 100 warrants he had executed were no-knock warrants. When asked whether evidence ever had been destroyed during a knock and announce search, Detective Shawn replied, "We haven't done any warrants where we knock and announce first. On several occasions the stuff has been destroyed, yes, but none that we've knocked and announced."

tential impact on important interests of both the state and the public, and the unsettled issue of the legality of their use under the law of this state[6] require that we one day address the validity of a judicial predetermination of necessity for unannounced entry. It would be inappropriate, however, to set forth here a position on a point not discussed by the parties in their briefs.

{11} Suffice to say, we believe the issue is not whether a judicial officer has the authority or power to authorize no-knock entry, since such authority is seemingly present in the inherent powers of judicial officers; rather it is the wisdom of judicial determination of the reasonableness of police conduct that has yet to occur. That is, the issue is whether to favor prescreening of the reasonableness of the officer's conduct over after-the-fact judicial review of such conduct. Prescreening of conduct is a burdensome and rare phenomenon in our legal system. Our system tends to favor after-the-fact, adversarial judicial review of police conduct, rather than ex-parte prescreening. The warrant process is one notable exception. There we require a judicial officer to review, in advance, whether probable cause is present to justify police action. We often have stated that we require such prescreening because it interjects a detached and neutral decisionmaker between the police and the person to be searched. *See, e.g., State v. Cordova*, 109 N.M. 211, 212, 784 P.2d 30, 31 (1989). But the constitutional requirements of probable cause and reasonableness are distinct. Probable cause serves as the *justification* for mobilizing police action. Once probable cause has been determined by a detached and neutral judicial officer, the executing officers' right to enter the premises matures. They must enter the premises reasonably, which in some cases may require force. The constitutional requirement of reasonableness governs the *conduct* of the search, and traditionally we have relied on after-the-fact, adversarial judicial review of the actual conduct for constitutional regulation of police entries.

{12} The inevitable result of prescreening of police conduct is that officers may rely on the judge's determination of the need for unannounced entry. The conduct of the search will be influenced by the judicial officer's authorization, and judicial review will be deflected from the reasonableness of the search to the reasonableness of the judicial officer's authorization of unannounced entry. Moreover, prescreening is likely to hinder law enforcement. Officers who are unsuccessful in obtaining a no-knock warrant but who are justified at the scene of the search to enter without announcement may be hesitant, to the detriment of their safety (and that of the occupants), to enter unannounced.

{13} We recognize that there may be circumstances in which officers know in advance that unannounced entry may be justified and those cases speak most strongly to advance authorization. At the very least, that authorization would assist after-the-fact review of the reasonableness of the method of entry by establishing well in advance the facts justifying the method of entry. In those cases, however, officers can begin to document the factors justifying the reasonableness of forcible, unannounced entry just as well

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The following colloquy elicited by Mr. Davis, counsel for defendants, highlights Officer Gandara's experiences with no-knock entry:

Davis: Of the 20 or more search warrants that you have prepared the affidavits for, have you executed those warrants as well?

Gandara: Yes, I have.

Davis: Of those warrants, do you know how many of those were no-knock warrants?

Gandara: I would say maybe half of them.

[6] The following testimony elicited at the suppression hearing underscores the unsettled nature of the legal issue:

Court: Is it your understanding that as long as a judge says it's okay no matter what occurs that the . . .

Shawn: Yes.

Court: That the home . . . that you've got sort of carte blanche to break into the house?

Shawn: Yes. If exigent circumstances are either suspected or arise on your arrival, I understand that you don't need it specifically, but . . .

Court: Let me tell you something just for your own information here. That's wrong.

Shawn: Okay.

Court: I think somebody . . . the D.A.'s office or somebody needs to get with you and explain that to you. That's not the law in New Mexico.

Shawn: I have since learned that. I have left the unit and since learned that, but the information I got it from was a Judge.

by making such facts part of the case file. From the standpoint of after-the-fact review, prior authorization simply may be unnecessary, but we defer our answer to this question until it is raised and fully briefed in another case. Even were we to adopt a general rule against judicial predetermination, exceptional facts well might justify exceptions to a general prohibition.

{14} We accept the State's suggestion that no exigencies were particularized in the affidavit for the warrant and, were the issue before us, we would hold that the no-knock warrant was invalid for want of particularized facts in the affidavit. There is no contention that the officers perceived any exigencies justifying unannounced entry irrespective of the warrant's no-knock authorization. It follows from the invalidity of the warrant and the absence of perceived exigencies that we are not presented with an unfounded request for an advisory opinion on constitutional law.[7]

{15} *Good-faith exception to the exclusionary rule.* The issue squarely presented by the opinion of the Court of Appeals and by the State in its brief in chief is whether the New Mexico Constitution contemplates a good-faith exception to the exclusionary rule. The Court of Appeals rejected the federal good-faith exception as a matter of state constitutional law. *Gutierrez*, 112 N.M. at 780, 819 P.2d at 1338. We first examine why our constitution requires exclusion of illegally obtained evidence. Only then do we determine the question at issue here: whether the exception articulated in *Leon* may coexist with our rule of exclusion.

{16}—*The exclusionary rule under the New Mexico Constitution.* Consideration of the *Leon* good-faith exception can be undertaken only in the context of the history and application of the exclusionary rule prior to *Leon*. We reiterate that in exercising our constitutional duty to interpret the organic laws of this state, we independently analyze the New Mexico constitutional proscription against unreasonable searches and seizures. In so doing, we seek guidance from decisions of the United States Supreme Court interpreting the federal search and seizure provision, from the decisions of courts of our sister states interpreting their correlative state constitutional guarantees, and from the common law. However, when this Court cites federal opinions, or opinions from courts of sister states, in interpreting a New Mexico constitutional provision we do so not because we consider ourselves bound to do so by our understanding of federal or state doctrines, but because we find the views expressed persuasive and because we recognize the responsibility of state courts to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions.

{17}—*The federal exclusionary rule.* The federal exclusionary rule first evolved as a rule of constitutional dimension, but has been steadily reinterpreted so that today the rule stands as a deterrent safeguard of only minimal constitutional significance. The exclusionary rule saw its genesis in *Weeks v. United States*, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1914), when the Court, in vivid, but oblique language, explained its rationale for excluding from trial evidence obtained in violation of the Fourth Amendment:[8]

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring the right to be secure against such searches and seizures, is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution. . . . To sanction such proceedings would be to affirm by judicial decision a

[7] We note, however, that the objective good faith of the officers executing the warrant is a different question when based on a faulty affidavit than when based on the legal impropriety of *any* no-knock warrant. The faulty affidavit question is one we would prefer to have had the trial court decide in the first instance.

[8] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

> manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Weeks, 232 U.S. at 393-94, 34 S. Ct. at 344-45.

{18} In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920), Justice Holmes rejected the government's contention that *Weeks* and the Fourth Amendment protect only physical possession of the documents and do not immunize the defendant from prosecution based on information obtained in the search.

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. . . . If knowledge of [the unconstitutionally acquired facts] is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Silverthorne, 251 U.S. at 392, 40 S. Ct. at 183.

{19} Eight years later, Chief Justice Taft, writing for the majority in *Olmstead v. United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928), *majority opinion overruled by Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), restated the I rule in language proclaiming its constitutional basis:

> The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment.

Olmstead, 277 U.S. at 462, 48 S. Ct. at 567.

{20} The last suggestion that the exclusionary rule was of constitutional dimension appeared in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). The Court held that, as an "essential part of both the Fourth and Fourteenth Amendments," the exclusionary rule is binding upon the states. *Id.* at 657, 81 S. Ct. at 1692. In so doing, the Court returned to the *Weeks* rationale for what was to be the last time. Describing the basis of the *Weeks* rule, the Court in *Mapp* stated:

> There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.

Mapp, 367 U.S. at 649, 81 S. Ct. at 1688.

{21} Beginning with *Wolf v. Colorado*, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949), *overruled by Mapp*, and continuing through *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974), the Court gradually moved away from the constitutional theory of the exclusionary rule in *Weeks* and *Mapp* to a view premised on deterrence, in which practical considerations of the costs and benefits of the rule govern its scope and application. *See* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 Creighton L.Rev. 565, 627-45 (1983) (explaining development of deterrence rationale and cost-benefit analysis).

{22} In *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), these deterrence theories were comprehensively developed. California police officers obtained and executed a search warrant that later was deemed to be invalid for lack of probable cause. The Court held that when an officer's reliance on a warrant that is later invalidated is objectively reasonable, exclusion of the evidence is not necessary. *Id.* at 922, 104 S. Ct. at 3420. The operative question under *Leon* is not whether the officer subjectively believed in the validity of the warrant, but whether it was understandable for a reasonably well-trained officer, conversant in "what the law prohibits," *id.* at 919 n. 20, 104 S. Ct. at

3418 n. 20, to think that the warrant application comported with the requirements of the Fourth Amendment:

> [O]ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization. In making this determination, all of the circumstances—including whether the warrant application had previously been rejected by a different magistrate—may be considered.

Id. at 922 n. 23, 104 S. Ct. at 3420 n. 23.

{23} The Court described several instances in which the exception would not apply:

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. The exception . . . will also not apply in cases where the issuing magistrate wholly abandoned his judicial role. . . . Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

Id. at 923, 104 S. Ct. at 3420 (citations omitted) (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11, 95 S. Ct. 2254, 2265-66, 45 L. Ed. 2d 416 (1975) (Powell, J., concurring in part)).

{24} The *Leon* majority founded its exception on several critical premises derived from the post- *Mapp* cases. First, the Court was quick to dispel any notion that the exclusionary rule is a "necessary corollary of the Fourth Amendment." 468 U.S. at 905, 104 S. Ct. at 3411. Despite statements to the contrary in *Olmstead*, 277 U.S. at 462-63, 48 S. Ct. at 567, and *Mapp*, 367 U.S. at 651, 655-57, 81 S. Ct. at 1689, 1691-93, the Court reiterated the position it took in *Calandra* that the exclusionary rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Leon*, 468 U.S. at 906, 104 S. Ct. at 3411 (quoting *Calandra*, 414 U.S. at 348, 94 S. Ct. at 620). Responding to concerns that admission of illegally seized evidence would sully the integrity of the judiciary, the Court also stated that "the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" *Leon*, 468 U.S. at 906, 104 S. Ct. at 3411 (quoting *Calandra*, 414 U.S. at 354, 94 S. Ct. at 623). The Court then laid the cornerstone of the *Leon* exception: The exclusionary rule "is designed to deter police misconduct rather than to punish the errors of judges and magistrates." 468 U.S. at 916, 104 S. Ct. at 3417.

{25} According to the Court, the preeminent (if not the sole) policy driving the interpretation of the exclusionary rule is whether application of the rule in the case at bar would specifically deter the particular police and judicial officers; should suppression of the evidence not have that effect, the exclusionary rule will not apply.

> If exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect, therefore, it must alter the behavior of individual law enforcement officers or the policies of their departments.
>
> . . . .
>
> We have frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment. . . . But even assuming that the rule effectively deters some

> police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.
>
> . . . .
>
> This is particularly true, we believe, when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

Leon, 468 U.S. at 918-21, 104 S. Ct. at 3418-20 (footnotes and citations omitted) (quoting *Stone v. Powell*, 428 U.S. 465, 498, 96 S. Ct. 3037, 3054, 49 L. Ed. 2d 1067 (1976) (Burger, C.J., concurring)).

{26}—*New Mexico search and seizure jurisprudence.* Prior to *Mapp*, New Mexico, like many jurisdictions, subscribed to the rule that the means by which the evidence is obtained does not render it inadmissible. *See State v. Dillon*, 34 N.M. 366, 375, 281 P. 474, 478 (1929) (refusing to adopt the federal exclusionary rule of *Weeks*); *see also Breithaupt v. Abram*, 58 N.M. 385, 388-89, 271 P.2d 827, 829 (1954) (not so holding, but noting that United States Supreme Court in *Wolf* held the due process clause was not violated by admission in state court of evidence seized in violation of Fourth Amendment), *aff'd,* 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957).

{27} In *Dillon*, this Court determined that the New Mexico Constitution does not require exclusion of illegally obtained evidence. The Court affirmed the trial court's order denying defendant's motion to suppress evidence seized under a legally deficient search warrant. According to the Court, neither the constitutional prohibition of unreasonable searches and seizures, N.M. Const. art. II, § 10, nor the constitutional prohibition against compulsory self-incrimination, N.M. Const. art. II, § 15, barred admission of the evidence. The Court reasoned:

> It appears to us that the correct solution of the problem depends on a determination of the object sought to be attained by the people in adopting the guaranty against unreasonable searches and seizures. If the object was to "prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and to give remedy against such usurpations when attempted," then the violation of the citizen's constitutional right has been completed with the completion of the invasion, and the evidence so obtained stands on the same basis as any other evidence obtained unlawfully. If, on the other hand, the object was to guarantee the citizen against conviction by evidence obtained through an unreasonable search and seizure, the evidence so obtained stands on an altogether different footing, and its admission becomes the gist of the violation, and the violator would be, not the officer who made search, but the judge who admits the evidence.

Dillon, 34 N.M. at 371, 281 P. at 476 (citation omitted) (quoting *Adams v. New York*, 192 U.S. 585, 598, 24 S. Ct. 372, 375, 48 L. Ed. 575 (1904)). Choosing the rationale first posited, the

Court expressed consternation that the exclusionary rule benefitted only the guilty:

> [W]e have been brought to the conclusion that the object of the constitutional guaranty against unreasonable searches and seizures is not to prevent the use of a citizen's private papers as evidence against him, but to make unlawful the governmental invasion of his premises and privacy and the taking of his goods, irrespective of what is done with or the use made of them. The innocent could derive no benefit from an interpretation of the constitutional guaranty into the rule of evidence contended for, and surely the guilty are not entitled to, and were never intended to be given a benefit and protection which are not shared equally by the innocent.

Dillon, 34 N.M. at 375, 281 P. at 478. Again focusing on guilt or innocence, the Court saw little remedial justification for the rule:

> When called upon to determine the guilt or innocence of an accused person, we need the evidence. It seems illogical to suppress it, either as compensation for a trespass, for which the law affords another remedy, or as a punishment for "dirty business" by court officials, whom the courts have other means of disciplining. If other remedies are required, let the Legislature devise them.

Id. at 377, 281 P. at 479. This Court never returned to the issue after *Dillon*.

{28} New Mexico search and seizure jurisprudence after *Mapp* can be characterized by its grudging acceptance of the federal exclusionary rule and, until recently, by the absence of independent analysis of the New Mexico constitutional proscription of unreasonable searches and seizures. In two of the first three search and seizure cases to reach this Court after *Mapp*, we acknowledged that *Mapp* would require suppression of evidence illegally seized, but in each case determined that suppression was not required since the searches were constitutionally reasonable under applicable federal standards. *See State v. Garcia*, 76 N.M. 171, 174-75, 413 P.2d 210, 212-13 (1966) (holding it is not a search to observe that which occurs in a public place); *State v. Lucero*, 70 N.M. 268, 275, 372 P.2d 837, 842 (1962) (no suppression under federal rule that a warrant is not required for the search of a movable vehicle if officers have reasonable cause to believe that it contains contraband); *see also State v. Rascon*, 89 N.M. 254, 261, 550 P.2d 266, 273 (1976) ("[W]e have no intention of expanding upon the suppression of evidence one whit further that is required of us."). *But see State v. Miller*, 76 N.M. 62, 65-68, 412 P.2d 240, 241-44 (1966) (suppressing evidence when complaint upon which arrest warrant was based was deficient).

{29} In comparison, in *State v. Herrera*, 102 N.M. 254, 694 P.2d 510, *cert. denied*, 471 U.S. 1103, 105 S. Ct. 2332, 85 L. Ed. 2d 848 (1985), the Court held a search illegal under both the state and federal constitutions but deemed the admission of the illegally obtained evidence harmless and affirmed the conviction. In examining the legality of the search, the Court relied exclusively upon New Mexico precedent and at no point signaled a departure from federal law. The Court implied that, but for the harmlessness of the error, admission of the illegally seized evidence was erroneous as a matter both of state and federal *constitutional* law. *Id.* at 258-59, 694 P.2d at 514-15. The Court went no further to explain why the New Mexico Constitution would forbid use of the evidence.

{30} Additionally, without reference to *Dillon*, several cases decided by our Court of Appeals have intimated that Article II, Section 10 of our constitution requires exclusion. For example, in *State v. Richerson*, 87 N.M. 437, 441, 535 P.2d 644, 648 (Ct.App.), *cert. denied*, 87 N.M. 450, 535 P.2d 657 (1975), the Court of Appeals held that admission of the results of an involuntary blood test not made after an arrest violates both the Fourth Amendment and Article II, Section 10 of the New Mexico Constitution. *See also State v. Lewis*, 80 N.M. 274, 277-78, 454 P.2d 360, 363-64 (Ct.App.1969) (citing only New Mexico

Constitution and suppressing evidence because warrant failed to show probable cause), *overruled on other grounds by State v. Nemrod*, 85 N.M. 118, 509 P.2d 885 (Ct.App.1973); *Boone v. State*, 105 N.M. 223, 227, 731 P.2d 366, 370 (1986) (citing *Lewis*). These cases, however, do not independently explore the reach of Article II, Section 10.

{31} For the most part, during the period since *Mapp*, when the United States Supreme Court reinterpreted the exclusionary rule this Court embraced the federal exceptions and the Supreme Court's evolving deemphasis of the Fourth Amendment. Thus, in *State v. Snedeker*, 99 N.M. 286, 657 P.2d 613 (1982), the Court reversed the trial court's finding that an affidavit for a search warrant did not establish probable cause. In so doing, the Court reiterated, in dictum, the views of the United States Supreme Court on the purposes of the federal exclusionary rule: "[T]he concept of 'preserving the integrity of the judicial process . . . has limited force as a justification for the exclusion of highly probative evidence.' . . . The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights." *Id.* at 288-89, 657 P.2d at 615-16 (quoting *Stone v. Powell*, 428 U.S. 465, 485, 486, 96 S. Ct. 3037, 3048, 3048, 49 L. Ed. 2d 1067 (1976)). The Court applied the Supreme Court's cost-benefit analysis of Fourth Amendment suppression claims: "The public interest in the determination of the truth at trial must be weighed against the incremental benefit of applying the rule." *Snedeker*, 99 N.M. at 289, 657 P.2d at 616. Because *Snedeker* only expounds our view of the Fourth Amendment underpinnings of the federal exclusionary rule, however, it offers little guidance to our review of Article II, Section 10.

{32} Recently this Court has demonstrated a willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees. In *State v. Cordova*, 109 N.M. 211, 784 P.2d 30 (1989), this Court marked its first departure from federal Fourth Amendment jurisprudence by rejecting the totality of the circumstances analysis of probable cause announced in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). We established that the requirement of Article II, Section 10 that "no warrant . . . shall issue . . . without a written showing of probable cause, supported by oath or affirmation," was served better by the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). We based our conclusion in part on our belief that the two-pronged test reflected "principles . . . firmly and deeply rooted in the fundamental precepts of [our] constitutional requirement that no warrant issue without a written showing of probable cause" and in part on our observation that the rigid application of the two-pronged test that prompted the Supreme Court to change its course in *Gates* was not present in New Mexico. *Cordova*, 109 N.M. at 216, 784 P.2d at 35.

{33}—*Analysis of Article II, Section 10.—Framers' intent.* The New Mexico Constitution was drafted at a convention meeting in Santa Fe from October 3 through November 21, 1910. The constitution was approved by the voters on January 21, 1911, and became effective January 6, 1912, upon New Mexico's admission as a state. *See* Robert W. Larson, *New Mexico's Quest for Statehood 1846-1912* 272-304 (1968); *Proceedings of the Constitutional Convention of the Proposed State of New Mexico* (1910). We have reviewed the proceedings of the constitutional convention and are aware of no direct evidence establishing what the framers believed to be the scope, meaning, and effect of Article II, Section 10. Unlike the relatively clear evidence that American colonists were concerned with abusive British search and seizure practices, and the recorded debate and discussion by the federal framers concerning the Fourth Amendment, the transcriptions of the New Mexico Constitutional Convention of 1910 contain no debate or discussion of the New Mexico search and seizure provision.

{34} British abuses of individual liberty carried out by execution of the general warrant and the writ of assistance that appear to have

prompted response in the Fourth Amendment certainly are relevant to our interpretation of Article II, Section 10—indeed, it is likely that such concerns still played a role in drafting Article II, Section 10 in 1910. *See* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum.L.Rev. 1365, 1369-72 (1983) (discussing early colonial repugnance to general warrants and writs of assistance); Kamisar, *supra*, at 571-79 (discussing sources of the dual concerns embodied in the Fourth Amendment: abolishment of general warrants and prevention of unreasonable searches and seizures). However, we would be blind to the progress of our national history and to the historical context in which New Mexico achieved state-hood to label such factors the sole or primary indicia of our framers' intent. At the time the New Mexico Constitution was adopted in 1911, over 100 years had elapsed since the national framers embodied their concerns in the Fourth Amendment. In 1911, the general warrant and writ of assistance had all but disappeared from the American landscape. While it is likely that the framers of the New Mexico Constitution still bore in mind the threats to individual liberty brought about by the general warrant and writ of assistance, it is just as likely that the framers simply adopted Article II, Section 10 after having given little new contemplation to its scope, meaning, or effect. Indeed, that hypothesis is supported by the dearth of debate or discussion in the constitutional proceedings and by the absence in early twentieth-century New Mexico of any evidence of the same abusive police and governmental practices that plagued American colonists.

{35}—*Search and seizure law in 1911.* Also relevant to our interpretation of Article II, Section 10 is the milieu from which the New Mexico search and seizure provision emerged. We are aware of no territorial judicial opinions concerning search and seizure law antedating the New Mexico Constitution. Through the latter part of the nineteenth century and into the first decade of the twentieth century, the prevalent view, often attributed to *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329 (1841), was that a trial court would not pause to consider collateral issues concerning the legality of the method by which evidence was seized.

{36} Against the great body of precedent in place at the turn of the century, we must consider the countervailing factors—any case law to the contrary and the trend in legal discourse. At the time the text of the New Mexico Constitution was under consideration, at least one federal district court and two state supreme courts had held inadmissible evidence obtained in violation of the constitutional right to be free from unreasonable searches and seizures. It was, perhaps, the sweeping language in *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886), that planted the seeds of the exclusionary rule. Admittedly, *Boyd* concerned the validity of a subpoena issued pursuant to statute that required one accused of violating certain revenue laws to produce evidence sought by the government in the forfeiture proceeding and that deemed a refusal to so produce a confession of the allegations set forth in the subpoena. *Boyd*, 116 U.S. at 619-20, 6 S. Ct. at 526-27. But, the Court reasoned that such proceedings violated both the Fourth and Fifth Amendments:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Boyd, 116 U.S. at 630, 6 S. Ct. at 532.

{37} In *United States v. Wong Quong Wong*, 94 F. 832 (D.Vt.1899), the government instituted deportation proceedings against two Asian men. At the hearing, the government produced letters, written by the men, that purported to contradict their claims to United States citizenship. The letters were obtained by unlawful search and seizure. The district court reversed and in

unequivocal language reasoned that exclusion of the letters was a necessary concomitant of, and indeed implicit in, the Fourth Amendment right to be free from unreasonable searches and seizures. According to the court, to deny exclusion would trivialize the rights guaranteed by the Fourth Amendment and the Fifth Amendment right against self-incrimination:

> The opening of the envelopes, and taking these letters from them, was a seizure of papers of the appellants that was unreasonable and contrary to the spirit of these amendments; and such papers, procured in that way, cannot be used in evidence against persons from whom they are procured without violating the protection afforded by the amendments to all persons in this country. It has been said that the manner of obtaining such evidence, whether by force or fraud, does not affect its admissibility; *but these constitutional safeguards would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for protection against its use*.

Wong Quong Wong, 94 F. at 833-34 (emphasis added).

{38} Similarly, the Supreme Court of Vermont, in *State v. Slamon*, 73 Vt. 212, 50 A. 1097 (1901), excluded from trial evidence obtained in violation of the Vermont constitutional guarantee that its citizens be free from unreasonable searches and seizures. At trial on a charge of larceny the state sought to introduce a letter that was unlawfully obtained from the defendant. *Id.*, 50 A. at 1098. In a terse paragraph, the court rejected the *Dana* rule and held that violation of the state search and seizure guarantee rendered the letter inadmissible:

> It is generally considered immaterial how a paper passes into the possession of the one offering it in evidence. But this rule is subject to another rule which is applicable,—that, when a party invokes the constitutional right of freedom from unlawful search and seizure, the court will take notice of the question and determine it.

Id., 50 A. at 1098. Apparently, the court viewed violation of the state search and seizure provision to require exclusion. The principle articulated in *Slamon* remains the law in Vermont today. *See State v. Badger*, 141 Vt. 430, 450 A.2d 336, 348-50 (1982) (reaffirming *Slamon*).

{39} Two years later, in *State v. Sheridan*, 121 Iowa 164, 96 N.W. 730 (1903), officers obtained a search warrant in a manner conceded to violate the state constitution and in searching the defendant's home found potentially incriminating evidence. The Iowa Supreme Court held that evidence obtained in violation of the Iowa search and seizure provision is to be excluded from trial:

> "[A] party to a suit can gain nothing by virtue of violence under the pretense of process, nor will a fraudulent or unlawful use of process be sanctioned by the courts. In such cases parties will be restored to the rights and positions they possessed before they were deprived thereof by the fraud, violence, or abuse of legal process." . . . The search was for the mere purpose of securing evidence by the invasion of the private residence of the defendant. The sacredness of his person against such an act is protected by no higher or stronger guaranty than that of his home, his papers, and effects.

Sheridan, 96 N.W. at 731 (quoting *State v. Height*, 117 Iowa 650, 91 N.W. 935, 939-40 (1902)).

{40} The court responded to the *Dana* rule and explained the basis for exclusion:

> It is said, however, that the court will not inquire how the offered evidence has been procured, and, even if obtained by a search warrant in violation of the defendant's constitutional or legal rights, it will still be admitted, if otherwise competent; and that defendant's only redress is an action for damages against the officer or person committing the trespass. . . . *To so hold is to emasculate the constitutional guaranty,*

> *and deprive it of all beneficial force or effect in preventing unreasonable searches and seizures. We think the evidence should have been excluded.*

Id. (emphasis added).

{41} In Georgia, a series of intermediate appellate opinions beginning in 1907 established that the search and seizure and self-incrimination provisions of the Georgia Constitution required exclusion of evidence seized by search of the person pursuant to an illegal arrest. *See, e.g., Hammock v. State*, 1 Ga.App. 126, 58 S.E. 66 (1907); *Glover v. State*, 4 Ga.App. 455, 61 S.E. 862 (1908); *Scott v. State*, 14 Ga.App. 806, 82 S.E. 376 (1914). In *Hammock* the court reasoned that the law recognizes

> a public policy which would rather see the guilty go unpunished than have the guilt of the accused established by violently and unlawfully compelling him to furnish evidence against himself. To say, in a case such as this, that the officer furnishes the testimony, and that the defendant, therefore, has not been compelled to give evidence tending to incriminate himself, can be justified only by skimming the surface and neglecting to consider the penetralia of the transaction.

Hammock, 58 S.E. at 67. Georgia courts followed that rule until 1916 when the Georgia Supreme Court, in *Calhoun v. State*, 144 Ga. 679, 87 S.E. 893 (1916), overruled the *Hammock* line of cases. (As it applies to evidence obtained without sanction of judicial process, *Hammock* was disapproved of in *State v. Barela*, 23 N.M. 395, 403-04, 168 P. 545, 548 (1917)).

{42} The period spanning the last decade of the nineteenth century and the first two decades of the twentieth century saw increasing legal challenges to the admissibility of evidence seized in violation of either state or federal constitutions. *See* Annotation, *Admissibility of Evidence Obtained by Illegal Search and Seizure*, 24 A.L.R. 1408 (1923) (collecting cases). The Supreme Court did not expressly require exclusion of evidence seized in contravention of the Fourth Amendment until 1914 when it decided *Weeks*. But the turn of the century surge in the number of challenges to the admissibility of illegally obtained evidence suggests that the issue loomed large in the legal community at the time the New Mexico Constitution was under consideration. *See* Annotation, *supra* (collecting cases from relevant time period).

{43} From the above-mentioned historical context, it is difficult to draw any definitive conclusion about the framers' intent. We can speculate, based on the weight of authority in place at the time, that the framers determined that the *Dana* rule was well settled, and that Article II, Section 10 need do no more than proscribe unreasonable searches and seizures and state the probable cause requirements for a warrant. This Court, in 1917, noted the majority doctrine: Evidence that "is the result of an unlawful search or seizure . . . *not under sanction of judicial process*, ordinarily has no effect whatever upon its admissibility." *Barela*, 23 N.M. at 404-405, 168 P. at 548 (emphasis added). The *Barela* court nonetheless acknowledged "the general doctrine that, where the evidence is secured by means of process of the court, in whatever form, it is inadmissible." *Id.* at 404, 168 P. at 548. We could assume that the framers either were unaware of the controversy surrounding the constitutional guaranty or that the framers were aware of the controversy and simply deemed it insignificant. It also may be, however, that the framers were aware of the controversy and left interpretation to the courts rather than address the exclusion issue directly in the text of the constitution. This, we believe, is the most reasonable inference to be drawn from the history of the adoption of Article II, Section 10.

{44} We conclude that the people of New Mexico left to the courts the task of interpreting the language of Article II, Section 10, which provides:

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant

> to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

{45}—*Core of interpretation.* Like its federal counterpart, Article II, Section 10 simply states a right—the right to be free from unreasonable searches and seizures. Article II, Section 10 does not by its express terms provide any guidance on how to preserve the right to be free from unreasonable searches and seizures or how to remedy its violations. We are satisfied, nonetheless, that the New Mexico constitutional prohibition against unreasonable searches and seizures requires that we deny the state the use of evidence obtained in violation of Article II, Section 10 in a criminal proceeding.

{46} As a starting point, we observe that Article II, Section 10 expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions. This broad right that we find implicit in Article II, Section 10, considered in the context of criminal prosecution brought to bear after violation of that right, is the paramount principle that underlies our conclusion.

{47} While the federal exclusionary rule saw its beginnings in *Weeks*, as noted above, state courts prior to *Weeks* had articulated a rule of exclusion based on state constitutional guarantees. *See Sheridan*, 96 N.W. at 731; *Slamon*, 50 A. at 1097. The early state cases often were terse. The federal cases predating *Weeks* flesh out the early state rationales and provide the reasoning we find most persuasive today.

{48} Perhaps most illuminating is *United States v. Mounday*, 208 F. 186 (D.Kan.1913), decided just before *Weeks* and quoted in its entirety in the appellant's brief in *Weeks*. After arrest, but prior to grand jury indictment, defendants in Mounday filed an application with the district court requesting the return of property seized pursuant to an illegal search. The court granted the application and ordered the property returned. In so doing, the court framed the issue and stated its rationale for excluding evidence obtained pursuant to an illegal search:

> How, therefore, can the rights of defendants "to be secure in their persons, houses, papers and effects" be asserted by and granted to them, as the Constitution guarantees, in this court? Can it be done by placing in the hands of the government officials charged by law with the prosecution of defendants as offenders against its laws the fruits of this unlawful invasion of constitutional rights of defendants by the agents of the government, and this in the very teeth of that provision of article 5 above quoted, which declares "no person . . . shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law"? As yet, defendants stand charged with the commission of no criminal offense in this court. Even if so charged, this court must and will presume their innocence until the contrary is proven beyond a reasonable doubt. In order to secure such proof and assist the government in overcoming the presumption of innocence which attends upon defendants and all other citizens until lawful conviction had, shall this court wink at the unlawful manner in which the government secured the proofs now desired to be used, and condone the wrong done defendants by the ruthless invasion of their constitutional rights, and become a party to the wrongful act by permitting the use of the fruits of such act? Such is not my conception of the sanctity of rights expressly guaranteed by the Constitution to a citizen.

Mounday, 208 F. at 189.

{49} In response to the *Dana* rule, the court stated:

> While I neither doubt nor deny the duty of all good men, and courts as well, to uphold

> the lawful enforcement of the criminal laws of our country, to the end that justice may be done and the guilty not go unpunished, yet, it is my belief the constitutional safeguards, deliberately framed for the purpose of protecting the rights of the individual citizen, are of equal, if not more, concern than the conviction of any one accused of the commission of a criminal act, no matter how guilty in fact he may be. No one, under our Constitution and laws may be adjudged guilty until the presumption of his innocence is overcome by evidence lawfully offered and lawfully received against him in open trial in a court of justice, as provided by and in accordance with the Constitution and laws of our country. . . . In this case it is the object of the government to cause defendants to be punished, if convicted, and to use such evidence now in the custody of the court to aid in securing such conviction. Surely such a flagrant violation of defendants' conceded constitutional rights should not in justice be permitted to be used to their prejudice. One wrong plus another does not make a right.

Id.; accord Wong Quong Wong, 94 F. at 833-34.

{50}—*The constitutional right to be free from unreasonable search and seizure includes the exclusionary rule and precludes a good-faith exception.* The preceding cases suggest the essential core of our interpretation of Article II, Section 10. Interpretation occurs only in the context of a contested case, when the government has brought its resources to bear on an individual accused of a crime. We ask, much as the court in *Mounday* asked, how this Court can effectuate the constitutional right to be free from unreasonable search and seizure. The answer to us is clear: to deny the government the use of evidence obtained pursuant to an unlawful search. This, we believe, is the rationale at work in *Weeks*.

{51} In *Weeks*, while Justice Day articulated concerns that the integrity of the judiciary would suffer by admitting illegally seized evidence, the essence of his reasoning rested upon the view that the exclusionary rule is of constitutional magnitude:

> We therefore reach the conclusion that . . . there was involved in the order refusing the application [for return of the seized property] *a denial of the constitutional rights of the accused*, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed.

Weeks, 232 U.S. at 398, 34 S. Ct. at 346 (emphasis added).

{52} In *State v. Davis*, 295 Or. 227, 666 P.2d 802 (1983) (en banc), the Supreme Court of Oregon, in explaining why exclusion of evidence illegally obtained is required under the Oregon Constitution, similarly did not rely upon deterrence or judicial integrity, nor did that court deem exclusion a judicial remedy. *Id.*, 666 P.2d at 805-07. Rather, the court reasoned that the exclusionary rule "effectuate[s] the law in the pending case." *Id.* at 806. The court explained:

> The object of denying the government the fruits of its transgression against the person whose rights it has invaded is not to preserve the self-regard of judges but to preserve that person's rights to the same extent as if the government's officers had stayed within the law.

Id. at 806-07; *accord State v. Colson*, 274 N.C. 295, 163 S.E.2d 376, 384 (1968) ("Evidence unconstitutionally obtained is excluded in both state and federal courts as an essential to due process, not as a rule of evidence but as a matter of constitutional law."), *cert. denied*, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969).

{53} The approach we adopt today focuses not on deterrence or judicial integrity, nor do we propose a judicial remedy; instead, our focus is to effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure. *See* Thomas S. Schrock & Robert C. Welsh, *Up from Calandra:*

The Exclusionary Rule as a Constitutional Requirement, 59 Minn.L.Rev. 251, 324-26 (1974) (suggesting that the exclusionary rule is not a separate rule but is simply another name for judicial review of executive conduct). If, after consideration of the substantive constitutional issue, the court decides that the state has transgressed the constitutional rights of a person accused of a crime, we will not sanction that conduct by turning the other cheek.

{54} The right to be free from unreasonable searches and seizures is in a sense a passive right, unlike the active rights of free speech and free exercise of religion. It is perhaps this nature of the right and the context in which it arises that make troublesome judicial review of violations. While the right to speak freely is the right to actively engage in public discourse without governmental restraint, one does not actively engage in freedom from governmental intrusion; that right lies in waiting, to curb the state's zeal in execution of the criminal laws. When a court finds the government has unconstitutionally restricted a person's speech, the court orders the restraint lifted and enjoins further restraint. What we propose today does no more. Once violation of Article II, Section 10 has been established, we do no more than return the parties to where they stood before the right was violated. We do not deem judicial review of unconstitutional restraints on speech a mere "judicial remedy," nor should we so deem the exclusion of unconstitutionally seized evidence that Article II, Section 10 requires.

{55} Surely, the framers of the Bill of Rights of the New Mexico Constitution meant to create more than "a code of ethics under an honor system." Stewart, *supra*, at 1383-84. We think it implicit in a regime of enumerated privileges and immunities that the framers intended to create rights and duties and that they made it imperative upon the judiciary to give meaning to those rights through judicial review of the conduct of the separate governmental bodies. As Justice Stewart has observed, "[t]he primary responsibility for enforcing the Constitution's limits on government, at least since the time of *Marbury v. Madison*, [5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803),] has been vested in the judicial branch." Stewart, *supra*, at 1384. The very backbone of our role in a tripartite system of government is to give vitality to the organic laws of this state by construing constitutional guarantees in the context of the exigencies and the needs of everyday life. Denying the government the fruits of unconstitutional conduct at trial best effectuates the constitutional proscription of unreasonable searches and seizures by preserving the rights of the accused to the same extent as if the government's officers had stayed within the law.[9] The basis we articulate today for the exclusionary rule in this state—to effectuate the constitutional right in the pending case—is incompatible with any exception based on the good-faith reliance of the officer on the magistrate's determination either of probable cause or of the reasonableness of the search.[10]

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[9] We hasten to add that the narrow issue before us is the constitutionality of the admission of evidence seized in violation of Article II, Section 10 in a criminal action founded on illegal governmental conduct. Accordingly, criticism that the exclusionary rule benefits only the guilty misses the point. The exclusionary rule, as we have noted above, is the necessary corollary of the constitutional mandate. It arises out of criminal actions founded on illegally seized evidence. The constitutional issue of illegal searches that do not lead to criminal prosecution simply is not before us. It may be that in that context the constitutional guarantee will require a different response. The answer must await the proper case.

Criticism that the exclusionary rule benefits only the guilty has imposed a skewed perspective that has haunted analysis of search and seizure law from the time of *Dillon*. The issue is the interpretation of the New Mexico Constitution in this case to effectuate its mandate, not whether the person accused should or should not be convicted. To the extent that *Dillon* reflects the latter perspective and to the extent it conflicts with our holding concerning the exclusionary rule under Article II, Section 10, it is hereby overruled.

[10] We are not alone in rejecting as a matter of state constitutional law the federal good-faith exception. The highest courts of at least seven states—Connecticut, Idaho, New Jersey, New York, North Carolina, Pennsylvania, and Vermont—have rejected the good-faith exception on state constitutional grounds. *See State v. Marsala*, 216 Conn. 150, 579 A.2d 58 (1990); *State v. Guzman*, 122 Idaho 981, 842 P.2d 660 (1992); *State v. Novembrino*, 105 N.J. 95, 519 A.2d 820 (1987); *People v. Bigelow*, 66 N.Y.2d 417, 497 N.Y.S.2d 630, 488 N.E.2d 451 (1985); *State v. Carter*, 322 N.C. 709, 370 S.E.2d 553 (1988); *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991); *State v. Oakes*, 157 Vt. 171, 598 A.2d 119 (1991); *see also Mason v. State*, 534 A.2d 242 (Del.1987) (rejecting good-faith exception on statutory grounds); *Gary v. State*, 262 Ga. 573, 422 S.E.2d 426 (1992)

{56} Although the rule we announce today is not premised on policy concerns of judicial integrity or deterrence, we cannot deny that the rule advances those important state policies. Implicit in the rationales of *Sheridan, Weeks*, and *Silverthorne* is the notion that admission of improperly seized evidence denigrates the integrity of the judiciary—judges become accomplices to unconstitutional executive conduct. The real and perceived affront to the integrity of the New Mexico judiciary is a critical state interest that militates in favor of the exclusionary rule. Similarly, deterrence of future constitutional violations is a critical state interest that is a by-product of the exclusionary rule. Deterrence, however, is not the talisman asserted in recent Supreme Court pronouncements. *See, e.g., Leon*, 468 U.S. at 916, 104 S. Ct. at 3417 ("[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."). To be sure, in no sense does the "rule's *survival* depend[] on proof that it is significantly influencing police behavior." Kamisar, *supra*, at 598-600 (arguing that the exclusionary rule is founded on principled constitutional interpretation). Additionally, the deterrence effectuated by the exclusionary rule reaches not only, as *Leon* asserts, the particular officer involved, but this process. The exclusionary rule imposes the template of the constitution on the entire warrant-issuing process. Because the good-faith exception to the federal exclusionary rule is incompatible with the constitutional protections found under Article II, Section 10, the fruits of the search conducted in violation of the New Mexico Constitution in this case must be suppressed. For all of the foregoing reasons, we affirm the judgment of the Court of Appeals upholding the trial court's order suppressing the evidence.

{57} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

(same); *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985) (same); *Stringer v. State*, 491 So.2d 837 (Miss.1986) (Robertson, J., concurring) (urging that good-faith exception is incompatible with state constitutional search and seizure jurisprudence); *Lockett v. State*, 852 S.W.2d 636 (Tex.Ct.App.1993) (holding that statutory good-faith exception applies only if affidavit sets forth probable cause). Michigan's intermediate appellate court likewise has held the good-faith exception incompatible with its state constitution. *People v. Sundling*, 153 Mich.App. 277, 395 N.W.2d 308 (1986), *leave for appeal denied*, 428 Mich. 887 (1987); *see also State v. Grawien*, 123 Wis.2d 428, 367 N.W.2d 816 (1985) (stating it was not the function of the court of appeals to adopt a good-faith exception that would conflict with the Wisconsin Supreme Court's interpretation of the Wisconsin Constitution).

To date, the highest courts of at least five states—Arkansas, California, Kentucky, Missouri, and Ohio—have embraced the federal good-faith exception. *Jackson v. State*, 291 Ark. 98, 722 S.W.2d 831 (1987); *People v. Camarella*, 54 Cal.3d 592, 286 Cal.Rptr. 780, 818 P.2d 63 (1991); *Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky.1992) (petition for cert. filed); *State v. Sweeney*, 701 S.W.2d 420 (Mo.1985) (en banc); *State v. Wilmoth*, 22 Ohio St.3d 251, 22 OBR 427, 490 N.E.2d 1236 (1986); *See also Ewing v. State*, 613 N.E.2d 53 (Ind.Ct.App.1993) (applying exception); *West v. Commonwealth*, 432 S.E.2d 730 (Va.Ct.App.1993) (holding good faith exception applies in Virginia). Florida's constitution expressly applies federal standards. *See State v. Kingston*, 617 So.2d 414 (Fla.Ct.App.1993) (applying *Leon* exception).

Justice Richard E. Ransom

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1993-NMSC-070

Filing Date: November 16, 1993, Decided

Docket No. 20,027

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

JERRY VERNON,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
H. Richard Blackhurst, District Judge

Motion for Rehearing Denied December 16, 1993

Annette Reese Quintana,
Las Vegas, Nevada,

Paul J. Kennedy,
Albuquerque,

for Appellant.

Tom Udall, Atty. Gen.,
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Santa Fe,

for Appellee.

OPINION

RANSOM, Chief Justice.

{1} Jerry Vernon appeals his convictions for first-degree murder (deliberate) under NMSA 1978, Section 30-2-1(A)(1) (Repl.Pamp.1984) and for kidnapping resulting in great bodily harm under NMSA 1978, Section 30-4-1 (Repl. Pamp.1984). He also appeals the enhancement of his sentence due to the use of a gun in the course of kidnapping under NMSA 1978, Section 31-18-16 (Repl.Pamp.1990). This Court has jurisdiction of the appeal under Article VI, Section 2 of the New Mexico Constitution and SCRA 1986, 12-102(A)(2) (Repl.Pamp.1992).

{2} On appeal, Vernon challenges the sufficiency of the evidence to support his convictions, argues that the jury was not properly instructed, challenges several evidentiary rulings by the trial court, and argues that he had ineffective assistance of counsel. We address only the sufficiency of the evidence question in this opinion; the other issues are addressed in an unpublished decision issued concurrently with this opinion. We affirm the conviction for murder and reverse the conviction for kidnapping. Because of our disposition of the kidnapping conviction, we need not address the enhancement of sentence question.

{3} *Sufficiency of the evidence issues.—Standard of review*. In examining a challenge to the sufficiency of the evidence, this Court is to "view the evidence in a light most favorable to the jury's verdict; all reasonable, permissible inferences are indulged to supof the verdict." *State v. Litteral*, 110 N.M. 138, 143, 793 P.2d 268, 273 (1990). "This [C]ourt does not weigh the evidence and may not substitute its judgment for that of the fact finder so long as there is sufficient evidence to support the verdict. The fact finder may reject defendant's version of the incident." *State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988) (citation omitted). The following is a recitation of the evidence in accordance with this standard of review.

{4}—*Facts.* Jerry Vernon was convicted for the murder and kidnapping of Larry Stevens. Vernon and Stevens had been acquainted for some time prior to Stevens's death. Just prior to Stevens's death, Stevens had occasionally stayed

at Vernon's home. Sharman Sategna Stanley, a witness in this case, was staying with Vernon at the time of Stevens's death. A few days before Stevens was killed, Vernon accused Stevens of stealing and told him to leave and never return to his house. On the day of the murder, Vernon and Stanley were returning home when they saw Stevens come out of the house and leave in his van. It was, Vernon believed, the third day in a row that Stevens had been at Vernon's house after having been told not to return.

{5} Vernon and Stanley followed Stevens to a 7-11 convenience store. Vernon claims that he wanted to talk to Stevens about the missing items and to convince Stevens to stop "pestering" him. When Vernon located Stevens, the two men talked and argued loudly in the parking lot while Stanley stayed in Vernon's vehicle. The men then walked around to the passenger side of Vernon's car, and Vernon, in a loud voice, ordered Stevens to get in. Stanley testified that Vernon shoved Stevens into the back seat. Following Vernon's directions, Stanley drove away while the two men talked and argued. There is some evidence that Stevens was handcuffed in the back seat. While in the car, Vernon held a beer that Stevens had been drinking and at times would reach over the seat and give Stevens a drink of it. The State also introduced prior statements in which Stanley consistently averred that Stevens was handcuffed in the back seat.

{6} Vernon directed Stanley to drive to a remote street in the northeast part of Albuquerque. Stanley testified that Vernon yelled at her to find a key to some handcuffs before the two men got out of the car. Stanley walked around to the passenger side of the car, where she saw Stevens with his hands up in the air in what may be inferred as the universal posture of a prisoner. The two men were arguing; Vernon was holding a shotgun and a kubotan stick. He apparently had taken the latter from Stevens.[1] Vernon told Stanley to turn away, and she went to the back of the car. The two men walked to the front of the car with Stevens leading and Vernon carrying the shotgun. A few moments later Stanley heard two shots. Vernon came back to the car, stating, "It was either him or me," and the two left the scene.

{7} The body of the victim was found on June 21, 1989, having suffered two shotgun wounds to the head. Forensic evidence indicated that the first shot was fired with the muzzle of the shotgun pressed against Stevens's upper lip, causing death instantaneously. The second shot was fired into Stevens's right temple from a distance of less than twelve inches while Stevens's head was lying on the ground.

{8}—*Murder.* Vernon was convicted of willful and deliberate murder. The statute defines this type of first-degree murder as a killing without lawful justification or excuse caused "by any kind of willful, deliberate and premeditated killing." Section 30-2-1(A)(1). The jury was instructed that it could find Vernon guilty of willful and deliberate murder if it found that the killing was with the deliberate intention to take away the life of Stevens. Deliberate intention was defined with reference to Vernon's state of mind:

> The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.

See SCRA 1986, 14-201 (jury instruction for willful and deliberate murder).

{9} Vernon presented a theory of self-defense. He claimed that Stevens first attacked him with the kubotan, and then the two of them ran to the gun and struggled over it. Vernon testified that he wanted to shoot Stevens and that pulling the

[1] Stevens habitually carried a kubotan, which, according to the parties, was similar to a police nightstick and was capable of being wielded as a dangerous weapon.

trigger "might" have been deliberate. While Stanley did not see the shooting, as described earlier, her version of the events contradict Vernon's selfdefense claim. The testimony regarding handcuffs is sufficient to support a finding that Stevens was confined against his will in the back seat of the car. In addition, there is sufficient evidence to show that Vernon held Stevens at gunpoint when the two men exited the car. Even if Stevens did attack Vernon at this point, Stevens would have been acting in self-defense. Because he created the danger, Vernon cannot claim that he too was acting in self-defense. *See State v. Chavez*, 99 N.M. 609, 611, 661 P.2d 887, 889 (1983) ("defendant who provokes an encounter . . . cannot avail himself of the claim that he was acting in self-defense"). Viewed in the light most favorable to the verdict, Stanley's testimony is sufficient to support the conviction for first-degree murder.

{10}—*Kidnapping.* Kidnapping in New Mexico, as applicable to this case, is an "unlawful taking, restraining or confining of a person, by force or deception, with intent that the victim . . . be held to service against the victim's will." Section 30-4-1(A)(3). Accepting that Vernon formed the intent to kill Stevens either before or shortly after the two men got into Vernon's car and that Stevens was confined by handcuffs in the back seat, we are left with the question of whether there is sufficient evidence to support a finding that Stevens was "held to service against his will." We find that Stevens was not held to service. At most, Stevens may have been the victim of false imprisonment, which is defined as "intentionally confining or restraining another person without [the victim's] consent and with knowledge that he has no lawful authority to do so." Section 30-4-3. The jury was given an instruction on false imprisonment as a lesser included offense of kidnapping.[2]

[2] Neither party has requested this Court to exercise inherent authority to order entry of judgment on the lesser included offense of false imprisonment on the grounds that the record supports a conclusion that the lesser included offense necessarily has been proven by the conviction for the greater offense. *See Dickenson v. Israel*, 482 F. Supp. 1223, 1225-26 (E.D.Wis.1980), *aff'd*, 644 F.2d 308, 309 (7th Cir.1981) (cited in *State v. Garcia*, 114 N.M. 269, 276, 837 P.2d 862, 869 (1992)). We do not address that issue.

{11} We have held that the phrase "held to service against the victim's will" contains no words that are unusual or difficult to define or understand. *State v. Aguirre*, 84 N.M. 376, 381, 503 P.2d 1154, 1159 (1972). Still, the phrase seems to raise difficult questions in case after case. We explained in *State v. Ortega*, 112 N.M. 554, 817 P.2d 1196 (1991), that "held to service" occurs when one "is made to submit his or her will to the direction and control of another . . . 'for the purpose of assisting or benefitting someone or something.'" *Id.* at 570, 817 P.2d at 1212 (quoting *Webster's Third New International Dictionary* 2075 (1961)). In addition, the phrase should be "construed to effectuate the same overall scheme as . . . holding for ransom and as a hostage—namely, to accomplish some goal that the perpetrator may view as beneficial to himself or herself."[3] *Id.* We quoted dictionary definitions of "service" to the effect that service consists of an act, action, conduct or performance, duty, or labor. *Id.*

{12} We held in *State v. McGuire*, 110 N.M. 304, 309, 795 P.2d 996, 1001 (1990), that a victim was held for service because the evidence supported the inference that the defendant, at the moment of the abduction, had intent to commit criminal sexual penetration at a later time. "Once defendant restrained the victim with the requisite intent to hold her for service against her will, he had committed the crime of kidnapping, although the kidnapping continued throughout the course of defendant's other crimes and until the time of the victim's death." *Id.* In *Ortega*, we affirmed a conviction for kidnapping because the defendant deceived two victims into assisting him in carrying out his objective—robbery. One of the victims drove a friend of hers (the other victim), the defendant, and his friend in the victim's car to a remote area where the defendant intended, at the least, to rob the victims and steal their car. 112 N.M. at 570-71, 817 P.2d at 1212-13. We affirmed the kidnapping convictions as to both victims, accepting that both victims were induced

[3] We suggested in *Ortega* that the uniform jury instruction be revised to provide an explanation of the phrase. *See id.* at 570, 817 P.2d at 1212. That has not been done, however, and the jury in this case was given no explanation of the phrase.

by deception into accompanying the defendant and his accomplice to a remote area as part of an overall plan. We stated that "both [victims] were deceived into assisting them in carrying out their objective." *Id.* at 571, 817 P.2d at 1213.

{13} In recent years, our sister states have wrestled with the question of what constitutes holding for service under their kidnapping statutes. Based on an historical analysis of its statute and the common meanings of the words, an Oklahoma court recently held that the phrase "hold to service" encompasses an "involuntary servitude" element. *Perry v. State*, 853 P.2d 198, 202 (Okla.Crim.App.1993). "Inherent in said element are any acts or services, or the forbearance of same, done at the command of the perpetrator, through force, inveiglement or coercion, *for the benefit of the perpetrator*." *Id.* (emphasis added). The Supreme Court of Vermont also concluded that "[t]he hold to service element . . . requires that the victim be forced, compelled or coerced to engage in an act, or to forego engaging in an act, *which act or forbearance inures to the benefit of the perpetrator of the crime*." *State v. McLaren*, 135 Vt. 291, 376 A.2d 34, 38 (1977) (emphasis added); *see also State v. Barr*, 126 Vt. 112, 223 A.2d 462 (1966) (victim held for service when defendant forced her to make several phone calls on his behalf and forced her to knock on a door of a store so that defendant could gain entry). Based on this, we reaffirm our holding in *Ortega* that the "hold to service" element of kidnapping requires that the victim be held against his or her will to perform some act, or to forego performance of some act, for the benefit of someone or something.

{14} The State argues that under either of two scenarios Vernon could have been found guilty of holding Stevens for service. The first scenario is based on Vernon's testimony that he thought Stevens had stolen and damaged items in his house and had done other irritating things. Vernon testified that he wanted to learn why Stevens was doing those things and to be assured that he would no longer pester Vernon. The State's theory is that Stevens performed a service by discussing the problem with Vernon. This scenario would require us to accept that two men discussing their problems constitutes the type of service that would support a kidnapping conviction. While Vernon may have perceived it beneficial to discuss or resolve problems, that is a rather benign service to support the penalty assessed for kidnapping. There was no other act or service done by Stevens for the purpose of assisting or benefitting Vernon and thus no kidnapping. *See Ortega*, 112 N.M. at 570, 817 P.2d at 1212; *Perry,* 853 P.2d at 202 (service encompasses an element of involuntary servitude).

{15} The second scenario offered by the State is that Vernon restrained and confined Stevens for the purpose of eventually killing him. The evidence does support a finding that Vernon intended to kill Stevens from the time that they both got into the car and started driving around. The transportation, under this theory, was for the purpose of removing Stevens to a more remote location where there would be no witnesses to the killing other than Stanley. We agree, however, with the holding of the Washington Supreme Court in *State v. Green*, 94 Wash.2d 216, 616 P.2d 628 (1980) (en banc), that "the mere incidental restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping." *Id.* 616 P.2d at 635. In this case, Vernon took Stevens to a more remote location to facilitate the murder. Vernon may well have thought that killing Stevens would be to his benefit and that it would be better to kill him in a location where there would be fewer witnesses than at the 7-11. Still, whatever benefit Vernon saw in taking Stevens to a remote location, the movement was merely incidental to the murder. Unlike cases involving criminal sexual penetration or robbery, no "service" is performed by the victim of a shooting with intent to kill because the victim does not confer any independent assistance or benefit to the perpetrator of the crime.

{16} If we accept the State's construction of the kidnapping statute, then we effectively would allow any murder when there is incidental movement of the victim to be punishable as first-degree murder, even without proof of

premeditation or perpetration of a felony. *See* § 30-2-1(A)(2) (felony-murder statute). In essence, we would allow the State to convict a defendant of kidnapping simply by proving that the defendant committed a murder and that the defendant moved the victim. The legislature, however, did not intend that this scenario be construed as kidnapping, as evidenced by the specific enumeration of elements in our kidnapping statute. *See* § 30-4-1. In addition, we agree with Justice Levin's dissent in *People v. Wesley*, 421 Mich. 375, 365 N.W.2d 692, 710 (1984) (Levin, J., dissenting), that "[s]ubjecting a second-degree murderer who incidentally moves the victim to punishment for first-degree murder aggravates the degree of the offense where there is no additional culpability and, hence, no need to provide a disincentive to commission of an aggravated offense." Here, for example, if the jury had found that Vernon had taken Stevens against his will to resolve their problems (which constitutes kidnapping under the State's first scenario), and further found that Vernon's culpability was only that he knew that his acts created a strong probability of death or great bodily harm (which generally constitutes only second-degree murder), Vernon could have been convicted of felony murder. *See* § 30-2-1(A)(2). We do not believe the legislature intended such a result. Therefore, we must reject the State's contention that incidental movement in the course of a murder constitutes kidnapping.

{17} Our decision in this case conforms with our decision in *State v. Pierce*, 109 N.M. 596, 788 P.2d 352 (1990), *modified on other grounds, State v. Ortega*, 112 N.M. 554, 563, 817 N.M. 1196, 1205 (1991). In *Pierce*, we upheld the kidnapping conviction of a defendant who took a victim to a remote location against her will and stole the victim's unborn child by performing a crude cesarean section. The victim was "held for service" because the purpose of the detention was to confer a benefit upon the defendant—namely, to obtain a baby. *Id.* at 601, 788 P.2d at 357. In addition, the victim's death did not confer any assistance or benefit to the defendant. Thus, the murder could not be used as a basis for the kidnapping charge. *See id.* ("The kidnapping and the murder were separate acts.").

{18} Conclusion. The rest of the issues raised by Vernon on this appeal are addressed in an unpublished decision we file separately and in which we affirm the trial court on all points. We reverse the conviction for kidnapping and affirm the guilty verdict on the charge of first-degree murder. We remand this case to the district court for entry of acquittal on the kidnapping and gun-enhancement convictions and resentencing.

{19} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

SETH D. MONTGOMERY,
Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1993-NMSC-071

Filing Date: November 18, 1993, Decided, As Corrected January 11, 1994

Docket No. 19,781

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

MATTHEW JAMES GRIFFIN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Frank H. Allen, Jr., District Judge

Sammy Quintana, Chief Public Defender and Susan Gibbs, Asst. Appellate Defender, Santa Fe,

for Defendant-Appellant.

Tom Udall, Atty. Gen. and Elizabeth Blaisdell, Asst. Atty. Gen., Santa Fe,

for Plaintiff-Appellee.

OPINION

RANSOM, Chief Justice.

{1} Matthew James Griffin appeals his convictions of felony murder, aggravated burglary, five counts of armed robbery, and tampering with evidence. The five armed robberies were bank holdups; the aggravated burglary was an attempted car theft; the felony murder occurred in the course of the attempted car theft; and the tampering-with-evidence conviction involved the dismantling of a gun. The armed robbery and aggravated burglary sentences were enhanced due to use of a firearm. Griffin was sentenced to life imprisonment for the murder and, consecutively, to fifty years imprisonment for the enhanced burglary and robbery convictions. We affirm.

{2} Operative Facts. On January 21, 1988, a grey Camaro with a National Guard license plate was stolen in Albuquerque. The next day, an Albuquerque branch of New Mexico Federal Savings and Loan was robbed. The robber wore clothing that covered his entire body, including gloves, sunglasses, and a mask, and he carried a black automatic-type pistol and a walkie-talkie or radio. The robber jumped onto and then over the teller counter and told the tellers to put money in his gym bag. He drove away in a grey Camaro with a license plate similar to the one on the stolen Camaro. Witnesses described the robber as being five feet, ten inches to six feet tall, weighing between 150 and 180 pounds, athletic, and light-skinned. Griffin is five feet, eleven inches tall, weighs 160 pounds, and is anglo.

{3} The second bank robbery was of a Sun Country Savings Bank on June 28, 1988. The robber again jumped onto and then behind the teller counter. He wore black clothing, gloves, sunglasses, and a ski mask. He had a "radio-type thing" on his belt with a wire attached to a set of earphones. The robber put the money into his gym bag and made his escape in a grey or silver Camaro with a Colorado license plate. Two witnesses testified that the getaway car matched a photograph of the stolen grey Camaro.

{4} The third bank robbery occurred on September 21, 1988 at a Western Bank location. The robber wore dark clothing, gloves, a ski mask, and headphones, and he had the money put into a knapsack or gym bag. He carried an Uzi-type gun with a shroud and a brass catcher (a basket-type attachment to catch empty shell casings). Griffin had purchased a weapon of that type in 1988. The robber left the bank in a grey, silver, or

black Camaro with a Colorado license plate, but the license number was different than that seen in the second bank robbery. Again, two witnesses testified that the car used by the robber matched a photograph of the stolen grey Camaro.

{5} Authorities recovered the grey Camaro on November 10, 1988. On December 30, 1988, a rust-colored Camaro was stolen. When the rust Camaro was recovered on February 13, 1989, it had a hole drilled into the plastic molding on the driver-side window that had not been there previously, and the ignitionswitch area of the steering column was broken out.

{6} In the meantime, the fourth bank robbery occurred at a First Interstate Bank on January 19, 1989. The robber wore black clothes, gloves, sunglasses, a ski mask, and a gun and holster on a black webbed belt. The gun was a semi-automatic or automatic-type pistol that looked like a Glock pistol. The robber jumped over the counter and ordered the tellers to place money into his gym bag. He left the bank in a rust or maroon Camaro with no license plate. Present at the bank during this robbery was Willis Drake, a convenience store manager. Drake told an FBI agent at the scene that he recognized the robber's voice, but could not yet place it. When he returned to work, he told an employee that the voice was that of Matt Griffin, who had been coming into the store two or three times a week for several months to buy coffee and donuts.

{7} On April 3, 1989, an unsuccessful attempt was made to steal a Trans Am in the parking lot of an apartment building. The Trans Am had a hole drilled into the plastic molding on the driver-side window and the ignitionswitch area was broken out. A resident of the apartment building, Michael Howard, was found shot to death next to the car, apparently having approached the car before the theft could be completed. Howard had been shot four times with a .9 millimeter pistol.

{8} The fifth robbery occurred when the Sun Country Savings that had been robbed the previous June was robbed again on April 17, 1989. Again the robber was dressed in black clothes, gloves, sunglasses, and a ski mask, wore earphones, and had a box on his hip. He used a gym-type bag for the money. The robber drove away in a wine or maroon-colored Camaro with no license plate. Later that day, FBI agents investigating the robbery spotted a car matching the description, but with a license plate, in the driveway of Griffin's home. Griffin told the agents that the car was his. Witnesses identified a photograph of Griffin's Camaro as the car driven by the April 17 robber.

{9} - *The bank robberies were similar and distinctive.* All of the bank robberies took place on or near Juan Tabo Boulevard in the Northeast section of Albuquerque. Griffin was not at work on any of the dates when the bank robberies occurred. The robber in each case used a similar method of operation and drove away in a car that in the first four robberies matched the description of recently-stolen cars, and in the fifth matched the description of Griffin's car.

{10} Julian Gonzales, an FBI agent, testified that the five bank robberies were the first ones using that particular modus operandi in Albuquerque or other western locations. Between the time of Griffin's arrest and the trial, no robberies using the same method of operation occurred. The total amount taken from the five banks was over $ 35,000.

{11} - *Two of the car thefts were similar and distinctive.* The grey Camaro was stolen while it was unlocked and the keys were in it, so there was no need for the thief to break in and start the engine without a key. However, the modi operandi of the theft of the rust Camaro and the attempted theft of the Trans Am were identical. An expert witness with fifteen years of experience investigating car thefts testified that he had never before seen that method of drilling a hole into the plastic molding, and no reference to such a method was found on file in the National Automobile Theft Bureau. A bent rod that could be inserted through the hole to reach the electric door-lock release was found among the items seized from Griffin's house, as was a cordless drill and a drill bit with plastic residue matching the plastic molding on the two stolen cars.

{12} - *The guns*. The five bank robberies involved different guns, including a Glock pistol and an Uzi handgun. Sometime between December 1987 and February 1989, a Glock 17 pistol disappeared from the evidence room of the Albuquerque Police Department ("APD"). Griffin worked in the evidence room during the summer of 1988. Griffin had at least three New Mexico driver's licenses (two with false names and addresses), and he had used false identification in purchasing one or more guns. In early 1989 Griffin purchased two Glock 19 pistols. An expert testified that Glock pistols are very easy to take apart, that the serial number is stamped on three places on each gun (on the frame, the slide, and the barrel), and that some parts of the gun are interchangeable.

{13} Before his arrest, Griffin contacted Dave McCutcheon. He told McCutcheon that he was concerned that he was under investigation and asked McCutcheon to hold some guns for safekeeping. McCutcheon agreed, and Griffin gave him a Glock pistol, an Uzi, and a shotgun. McCutcheon contacted the police and turned the guns over to them. The serial numbers stamped on the Glock's frame and slide were the same, but the barrel was stamped with a different number. Marks on shell casings found by Howard's body matched marks made by the ejector on the Glock to the exclusion of all other slides. Marks on casings made by the firing pin in the Glock also matched marks made by the firing pin of the pistol that had disappeared from the APD evidence room.

{14} - *Miscellaneous evidence*. When Griffin was arrested, the police seized articles of clothing like those worn by the robber including a ski mask, a black webbed belt with a holster for a Glock pistol, guns that matched descriptions of those used in the robberies, a police scanner and a set of headphones, a toolbox containing keys that fit the stolen grey Camaro, and black canvas bags. In addition, between the time of the first bank robbery and his arrest, Griffin had used cash to make several large purchases, including guns and several cars.

{15} It was not error to deny the motion to sever the charges. Before the trial began, the trial court denied Griffin's motion asking that the charges for armed robbery be severed and tried separately. Our rules of criminal procedure authorize joinder of two or more offenses in one complaint, indictment, or information if the offenses "are of the same or similar character, even if not part of a single scheme or plan" or if the offenses are "based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan." SCRA 1986, 5-203(A) (Repl. Pamp.1992). As noted in our recitation of the facts, the bank robberies were similar and distinctive and the cars used in the bank robberies were stolen using a distinctive method. The tampering-with-evidence charge involved altering or hiding a gun allegedly used in both the murder and the bank robberies. All of the charges were clearly related to crimes that were the same, similar, a series of connected acts, or part of a single scheme or plan. Thus, all of the crimes charged were subject to joinder under Rule 5-203(A).

{16} A motion for severance should be granted by the trial court if it appears that either a defendant or the state will be prejudiced by joinder of offenses. SCRA 1986, 5-203(C). We will not overturn an exercise of the court's discretion in denying the motion unless there was prejudice to the defendant. *State v. Burdex*, 100 N.M. 197, 203-04, 668 P.2d 313, 319-20 (Ct.App.), *cert. denied*, 100 N.M. 192, 668 P.2d 308 (1983). We have stated:

> It is no abuse of discretion to deny a motion to sever multiple counts . . . when [the defendant] contends that a single trial is violative of the "other crimes" test set out in [SCRA 1986, 11-404(B)], if substantial evidence supports each conviction, the evidence is relevant to each of the charges being tried, and the jury evaluates the evidence in terms of each count.

Burdex, 100 N.M. at 203, 668 P.2d at 319 (citation omitted). Here, the evidence is sufficient to support each conviction and there is no allegation that the jury failed to evaluate the evidence in terms of each count. There is nothing in the various charges that unfairly prejudiced Griffin. Much of the evidence of the various crimes

would have been admissible in each separate trial for the same reasons that support joinder of the charges. *See* SCRA 1986, 11-404(B) (evidence of other crimes is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, or identity); *see also State v. Garcia*, 80 N.M. 21, 23, 450 P.2d 621, 623 (1969) (evidence of collateral offenses, even if prejudicial, is admissible if it tends to identify person on trial). Therefore, we find no abuse of the trial court's discretion in denying Griffin's motion for severance.

{17} Substantial evidence arguments. Griffin alleges that the evidence is insufficient to support the findings that he was the perpetrator of the crimes, and insufficient to prove two elements necessary for a felony murder conviction—the existence of an underlying, inherently dangerous felony and intent to kill. "Substantial evidence is that evidence which is acceptable to a reasonable mind as adequate support for a conclusion." *State v. Isiah*, 109 N.M. 21, 30, 781 P.2d 293, 302 (1989).

> [T]he test to determine the sufficiency of evidence . . . is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction. A reviewing court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict. This court does not weigh the evidence and may not substitute its judgment for that of the fact finder so long as there is sufficient evidence to support the verdict.

State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988) (citations omitted).

{18} - *Evidence linking Griffin to the crimes is sufficient to support the verdicts.* Griffin attacks his identification as the bank robber and murderer by attacking the credibility of Drake and other eyewitnesses and by reciting some of the weaker evidence presented by the State. He fails to acknowledge, however, testimony by two tellers at New Mexico Federal that they recognized the robber as a man who had been in the bank the week before the robbery and that they believed Griffin was that man, the evidence that the gun seized from his possession was linked to Howard's murder, and other evidence that linked him to the crimes. We do not acknowledge Griffin's challenges to the credibility of witnesses or his arguments about the weight to be given their testimony. *See State ex rel. Moreno v. Floyd*, 85 N.M. 699, 703, 516 P.2d 670, 674 (1973) (noting that this Court has long recognized that the trier of fact is better able to determine witness credibility and the weight to be given witness testimony than an appellate court). Although Griffin failed to set out fully the substance of the evidence against him, *see* SCRA 1986, 12-213(A)(3) (Repl. Pamp.1992), the overwhelming evidence against him as recited above is adequate for this Court's review. Viewing the evidence in the light most favorable to the verdict, *see Sutphin*, 107 N.M. at 131, 753 P.2d at 1319, we find that there was sufficient evidence to support identification of Griffin as perpetrator of the crimes for which he was convicted.

{19} - *Evidence in support of felony murder.* Griffin makes two challenges to the sufficiency of the evidence to support his conviction for felony murder. He argues that the evidence supports neither the use of aggravated burglary as the predicate felony nor a finding of intent.

{20}—*The evidence supports a finding that Griffin committed aggravated burglary.* The felony underlying Griffin's felony-murder conviction is the crime of aggravated burglary, set out in NMSA 1978, Section 30-16-4 (Repl. Pamp.1984). That section defines the crime, in relevant parts, as "the unauthorized entry of any vehicle . . . with intent to commit any felony or theft therein and the person either: A. is armed with a deadly weapon . . . [or] C. commits a battery upon any person while in such place, or in entering or leaving such place." Griffin argues that, while the State may have proved that he broke into the Trans Am and that he intended to steal it, the State failed to prove that he intended to commit a felony or theft "in" the car. The central point of his argument is that "therein"

refers only to property within the vehicle and not the vehicle itself. "Therein" means "in that place." *State v. Stephens*, 601 So.2d 1195, 1196 (Fla.1992) (holding "therein" in Florida burglary statute encompasses entering a car with intent to steal the car). If we substitute "in that place" for "therein" in the statute, we find that one element of the crime is an unauthorized entry with intent to commit a felony or theft in a car.

> The use of the word "therein" plainly indicates that the crime of burglary can exist if the defendant formed an intent to commit a crime "in that place." There is no requirement that the crime must be one that can be completed solely within the fixed limits of that particular place, only that the crime is intended to be committed there. This obviously can include an intent to commit car theft, because such a crime can be committed "in that place."

Stephens, 601 So.2d at 1196; *see also People v. Sansone*, 94 Ill.App.3d 271, 49 Ill.Dec. 842, 844, 418 N.E.2d 862, 864 (1981). Breaking into a car with the intent to steal the car qualifies as an intent to commit a theft "therein."

{21} - *The facts demonstrate conclusively that Griffin had sufficient intent to support his conviction for felony murder.* In previous cases, this Court has held that failure to instruct the jury on an essential element of a crime for which the defendant has been convicted may constitute fundamental error. *See, e.g., State v. Osborne,* 111 N.M. 654, 661-62, 808 P.2d 624, 631-32 (1991). Such a failure does not necessarily amount to fundamental error.

> Clearly, when a jury's finding that a defendant committed the alleged act, under the evidence in the case, necessarily includes or amounts to a finding on an element omitted from the jury's instructions, any doubt as to the reliability of the conviction is eliminated and the error cannot be said to be fundamental. The trial court's error in failing to instruct on an essential element of a crime for which defendant has been convicted, where there can be no dispute that the element was established, therefore does not require reversal of the conviction.

State v. Orosco, 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992).

{22} Griffin argues that the evidence is insufficient to support his conviction for felony murder on the element of intent. *See State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1205 (1991) (holding that proof of intent to kill is required to support a conviction for felony murder). Since this case had gone to trial before our opinion in *Ortega* issued, the jury was not instructed that it had to find intent, but was given the same Uniform Jury Instruction for felony murder as had been given in *Ortega* and *State v. Hernandez*, 115 N.M. 6, 846 P.2d 312 (1993). In addition to the deficient instruction on felony murder, the juries in this case, *Ortega,* and *Hernandez* were given a jury instruction for willful and deliberate murder in the first degree.

{23} The felony-murder intent requirement is satisfied if there is proof that the defendant intended to kill, knew that his actions created a strong probability of death or great bodily harm to the victim or another person (as required for second-degree murder, *see* NMSA 1978, § 30-2-1(B) (Repl.Pamp.1984)), or acted in a manner greatly dangerous to the lives of others. *Ortega*, 112 N.M. at 566, 817 P.2d at 1208. In other words, intent sufficient to support a conviction for another type of murder generally would support a felony-murder conviction. *See Ortega*, 112 N.M. at 563, 817 P.2d at 1205.

{24} As in *Ortega* and *Hernandez*, the jury here returned a not-guilty verdict on willful and deliberate murder and a guilty verdict on felony murder. We affirmed the convictions in both *Ortega* and *Hernandez*, finding that even though the juries were not instructed on the element of intent, the jury in each case undoubtedly would have found intent had it been correctly instructed. *See Ortega* 112 N.M. at 566-67, 817 P.2d at 1208-09 (holding facts of case did not require re-trial for failure to instruct on intent because the result

surely would be the same); *Hernandez*, 115 N.M. at 24, 846 P.2d at 330 (holding that act of holding pillow over victim's face for several minutes created a strong probability of death or great bodily harm).

{25} We face the same situation here. The jury found that Griffin, while attempting to steal the Trans Am, shot Michael Howard four times in the chest and neck at close range. This finding necessarily established that Griffin did so with knowledge that his actions created a strong probability of death or great bodily harm to the victim.[1] We "not only have confidence in the jury's verdict . . . we think it would be a miscarriage of justice to upset the verdicts and remand for a new trial, the outcome of which most assuredly would be the same." *Ortega*, 112 N.M. at 566-67, 817 P.2d at 1208-09; *see also Payne v. LeFevre*, 825 F.2d 702, 708-09 (2nd Cir.), *cert. denied*, 484 U.S. 988, 108 S. Ct. 508, 98 L. Ed. 2d 506 (1987) (holding no rational jury could fail to find intent to seriously injure or kill when defendant fired a shotgun at his victim at point-blank range). We hold that the jury's finding that Griffin shot Howard at close range necessarily established an indisputable finding that Griffin intended death or great bodily harm to Howard.

{26} *Dismissal of juror and replacement with alternative juror.* The court had at least one alternate juror seated at the jury selection phase of the trial. Near the end of the trial, the court dismissed a seated juror for cause and replaced her with an alternate juror for the jury's deliberations. *See* SCRA 1986, 5-605(B) (Repl.Pamp.1992) (when alternate jurors have been impanelled, court shall replace any juror that becomes or is found to be unable or disqualified to perform juror's duties with alternate before the jury retires to consider its verdict). Griffin challenges the procedure followed by the court and the grounds for dismissing the juror.

{27} According to the record, the court spoke to the replaced juror about her behavior on several occasions. On the last day of trial, the juror requested permission to leave the courthouse and was seen roaming the courthouse halls in violation of the court's sequestration order. The court excused the juror and selected an alternate. Griffin asked the court to investigate the latest allegation and objected to the excusal. Griffin argues on appeal that the excusal was improper because communications with a juror should be on the record. *See Hovey v. State*, 104 N.M. 667, 669-70, 726 P.2d 344, 346-47 (1986) (stating that defendant has a right to be present for all communications with the jury concerning issues in the case and any improper communication raises presumption of prejudice). He apparently objects to the fact that the juror had an off-the-record conversation with the bailiff about personal matters that the court may have considered in excusing the juror.

{28} Griffin does not allege that the alternate juror was unfair or that the jury that decided the case was unfair. Absent an allegation of prejudice or an off-the-record conversation involving the subject matter of the court's proceedings, this Court will not examine whether the court abused its discretion in replacing the juror. *Cf. State v. Gilbert*, 100 N.M. 392, 397, 671 P.2d 640, 645 (1983) (affirming trial court's removal of juror and replacement with alternate where there was no prejudice to defendant and no abuse of court's discretion), *cert. denied*, 465 U.S. 1073, 104 S. Ct. 1429, 79 L. Ed. 2d 753 (1984); *State v. Bojorquez*, 88 N.M. 154, 156, 538 P.2d 796, 798 (Ct.App.) (stating that when defendant failed to establish prejudice caused by the inability of a juror to perform his duties, he could not challenge court's ruling regarding replacement of juror with alternate), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975).

{29} Jury "experimentation" not error. At the beginning of the trial the jury was instructed that

[1] We do not rely specifically on it, but the jury did make a finding that Griffin intended to kill Howard. After the jury had returned its verdict on Griffin's guilt, a separate sentencing proceeding was held to determine whether Griffin should receive the death penalty for the felony murder. In that proceeding, no additional evidence was heard and the jury was asked if it found aggravating circumstances that might justify the death penalty. While it did not return the death penalty, the jury unanimously found that Griffin intended to kill Howard.

it could not "make experiments with reference to the case." *See* SCRA 1986, 14-101 (Cum. Supp.1993). During deliberations the jury requested and was sent, over Griffin's objection, a magnifying glass. At the same time, the jury asked to see photos of the robberies taken by the bank surveillance cameras. Griffin argues that use of the magnifying glass introduced extraneous information and constituted improper experimentation by the jury. A jury's verdict should be based solely on the evidence admitted, not on the jury's knowledge obtained from extraneous sources. *See State v. Sacoman*, 107 N.M. 588, 591, 762 P.2d 250, 253 (1988).

{30} The magnifying glass allowed the jurors to more closely examine evidence that was introduced, presumably the photographs. Enhancement of the jury's visual acuity through use of a magnifying glass is not experimentation unless there is some indication that the magnification produced additional evidence. *See Taylor v. Reo Motors, Inc.*, 275 F.2d 699, 705 (10th Cir.1960) (explaining that the salient question is whether a jury's investigation or experiment out of the presence of the parties is within the scope or purview of the evidence introduced or amounts to taking evidence); *People v. Turner*, 22 Cal. App.3d 174, 99 Cal.Rptr. 186, 191 (1971) (reasoning that jurors' use of magnifying glass to examine photographs admitted into evidence was only extension of jurors' sense of sight); *see also* Carroll J. Miller, *Propriety of Juror's Tests or Experiments in Jury Room*, 31 A.L.R. 4th 566 (1984) and cases cited therein. There is no indication that the glass was used experimentally or that it distorted any of the evidence, thus there was no error in allowing the jury to use the magnifying glass.

{31} Firearm enhancement does not implicate double jeopardy. Griffin's sentences for armed robbery and aggravated burglary were enhanced due to the use of a firearm in their commission. *See* NMSA 1978, § 31-18-16(A) (Cum.Supp.1993) (upon separate finding of fact that firearm was used in a noncapital felony, the basic sentence is increased; the increased portion of the sentence cannot be suspended or deferred). Griffin urges this Court to find that firearm enhancement constitutes double jeopardy under the analysis set out in *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991). Following that analysis, we find no violation of double jeopardy because Section 31-18-16 is a clear expression that the legislature intends increased punishment when a firearm is used in a robbery or burglary. *See State v. Gabaldon*, 92 N.M. 230, 234, 585 P.2d 1352, 1356 (Ct. App.) (holding firearm enhancement statute shows legislative intent to increase punishment for firearms as compared to other deadly weapons), *cert. denied*, 92 N.M. 260, 586 P.2d 1089 (1978); *see generally Swafford*, 112 N.M. at 14, 810 P.2d at 1234 (upon finding of express legislative provision for multiple punishment, double jeopardy inquiry ceases).

{32} Cumulative error. Griffin argues that several evidentiary and motion rulings that might be harmless individually constitute prejudicial error when taken as a whole. The doctrine of cumulative error "requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." *State v. Martin*, 101 N.M. 595, 600-01, 686 P.2d 937, 942-43 (1984). When there is no error, however, there can be no accumulation. *See id.* We examine each of the alleged errors to see if they were in fact error, then determine if the actual errors accumulated to deprive Griffin of a fair trial. The first four of these alleged errors concern evidentiary questions. Admission of evidence generally is within the discretion of the trial court and is reversed only for clear abuse of that discretion. *See State v. Worley*, 100 N.M. 720, 723, 676 P.2d 247, 250 (1984).

{33} *The car keys.* A set of car keys that fit the stolen grey Camaro was found in Griffin's residence and introduced into evidence. Griffin argues that the State failed to show a proper chain of custody for the keys. After a chain-of-custody hearing outside the presence of the jury, the court, satisfied that the State met its burden, admitted the evidence. Griffin had the opportunity to cast doubt on the credibility of the evidence.

We have reviewed the record and hold that the trial court did not abuse its discretion in admitting the evidence.

{34} *Evidence as to "similarity."* There was physical evidence admitted and testimony given to the effect that articles of clothing found in Griffin's possession, photographs of cars, and guns were "similar" to those seen by witnesses at the bank robberies even though the witnesses could not definitively state that they were the same ones used. Griffin attacks this evidence as irrelevant and unfairly prejudicial. We agree with the State that the evidence was properly used as circumstantial evidence to show that Griffin had the ability or opportunity to commit the crimes. Without close inspection at both the crime scene and the trial, no witness could state unequivocally that a particular gun, article of clothing, or common model of car was exactly the same one seen at the crime. Griffin's argument goes not to the admissibility of the items, but to their weight. We find no abuse of discretion in admitting the exhibits and the testimony regarding their similarity to items used in the crimes.

{35} *Willis Drake's testimony.* Willis Drake, who managed a Circle K convenience store, was a witness to one of the bank robberies. He testified that he recognized the robber's voice as that of Griffin, whom he knew as a customer. Griffin's challenge again goes not to the admissibility of the testimony, but to its credibility, which Griffin had ample opportunity to attack at trial. The trial court did not abuse its discretion in allowing the testimony.

{36} Griffin asked the trial court to allow him to attack the credibility of Drake's identification of Griffin's voice by using a tape recording of Griffin's voice along with other voices. The trial court initially denied the request, but expressly left open the possibility that Griffin might be able to establish a sufficient foundation to make the recording admissible. Griffin made no further efforts to establish such a foundation and now asserts that the trial court erred. We find no abuse of discretion in the trial court's refusal to admit evidence it deemed unreliable. Griffin's failure to take the opportunity to establish a proper foundation supports the court's ruling.

{37} *Cross-examination of Dave McCutcheon.* The credibility of any witness may be challenged. SCRA 1986, 11-607, 11-608(A). Dave McCutcheon was a witness for the State. The State filed a motion in limine to restrict his cross-examination. The trial court heard argument as to what areas of McCutcheon's past could be addressed on cross-examination and ruled that Griffin's attorney should approach the bench before he inquired into any of those areas. On appeal, however, Griffin does not point to any specific instance when he attempted to question McCutcheon but was restricted by the court. Because Griffin's attorney was not restricted in his questioning at trial, we cannot find error.

{38} *Phone conversations between Griffin and McCutcheon.* Griffin objects to the admission of two telephone conversations between himself and McCutcheon. Both conversations occurred before Griffin had been taken into custody and before any judicial proceedings of any sort had been initiated in this case, although he had retained counsel. The first conversation was initiated by McCutcheon and was heard over a speakerphone by police officers, and the second was initiated by McCutcheon at police request and was tape recorded. Properly, the court ruled that Griffin was not entitled to *Miranda* warnings before he had the conversations, *see Illinois v. Perkins*, 496 U.S. 292, 294, 110 S. Ct. 2394, 2395-96, 110 L. Ed. 2d 243 (1990) (holding *Miranda* warnings not required when suspect is unaware he is speaking to law enforcement officer and gives a voluntary statement), and that because there were no pending formal charges against Griffin, his right to counsel had not attached, *see Maine v. Moulton*, 474 U.S. 159, 170, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481 (1985); *State v. Aragon*, 109 N.M. 632, 635-36, 788 P.2d 932, 935-36 (Ct.App.), *cert. denied*, 109 N.M. 563, 787 P.2d 1246 (1990). As to one comment made on a tape-recorded conversation regarding another shooting, Griffin agreed to a limiting instruction that was given. We find no abuse of the court's discretion in admitting the two conversations.

{39} *Comments by prosecution during closing argument.* Griffin did not object to comments made by the State during its closing arguments, yet he now asks this Court to review portions of that statement as part of his allegation of cumulative error. Error in allowing statements made in closing argument without objection does not require reversal unless it amounts to fundamental error. *State v. Chamberlain*, 112 N.M. 723, 730, 819 P.2d 673, 680 (1991). We review comments made during closing arguments in context so that we may understand the comments and their potential effect on the jury. *See e.g., State v. Compton*, 104 N.M. 683, 687-92, 726 P.2d 837, 841-46, *cert. denied*, 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986). Griffin argues that the State shifted the burden of proof to Griffin, commented on inadmissible evidence, and injected extraneous matter into the case. Reviewing the full context of the closing argument, we find no fundamental error in allowing the statements themselves. We also find no accumulation of errors amounting to fundamental error in this case.

{40} *Error alleged in court's refusal to change venue or, alternatively, to completely sequester the jury.* Griffin argues that it was an abuse of discretion for the trial court to refuse his request to change venue. He points out that the case was highly publicized both before and during trial. We have held that "exposure to pretrial publicity, by itself, does not require a change of venue and does not raise a presumption of prejudice." *Hernandez*, 115 N.M. at 21, 846 P.2d at 327 (citing *Chamberlain*, 112 N.M. at 726, 819 P.2d at 676). While alleging that the jurors were aware of the case, Griffin made no allegation and offered no evidence that the publicity affected the jury's ability to impartially judge his guilt or innocence. Nor has he shown how failure to sequester the jury during a trial that lasted from the end of October until the middle of January caused the jury to lose its impartiality. Because he has failed to show or even allege specifically that he was prejudiced by the court's actions, we find no abuse of discretion. *See Hernandez*, 115 N.M. at 21-22, 846 P.2d at 327-28 (holding that defendant who failed to meet burden of showing abuse of discretion cannot prevail on challenge to court's refusal to change venue).

{41} *Error in drawing the pool of jurors on the grand jury or the trial jury from the list of registered voters rather than from driver's license records.* This issue is controlled by *State ex rel. Stratton v. Serna*, 109 N.M. 1, 3, 780 P.2d 1148, 1150 (1989), and *State v. Gonzales*, 112 N.M. 544, 548-49, 817 P.2d 1186, 1190-91 (1991), where this Court held that it was not error for jurors to be pulled from the list of registered voters for trials before the new law, NMSA 1978, § 38-5-3 (Cum.Supp.1993), went into effect.

{42} Ineffective assistance of counsel. Griffin perfunctorily asks this Court to review a question of ineffective assistance of counsel on the face of the record in this case. Because he did not specify which acts or omissions were ineffective, he has not carried his burden. *See* SCRA 1986, 12-213(A)(3) (argument must contain the contention with parts of record proper, transcript, or exhibits relied on); *Hernandez*, 115 N.M. at 16, 846 P.2d at 322 (stating that defendant has burden of proving that his attorney's acts or omissions fell below standard of competency).

{43} Conclusion. We affirm the convictions of Matthew J. Griffin on all counts.

{44} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

STANLEY F. FROST,
Justice

Justice Richard E. Ransom

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1993-NMSC-076

Filing Date: December 7, 1993, Decided, As Corrected March 29, 1994

Docket No. 21,045

JOHN B. CASTLE, J. BOB HERELL, and ELLWADE CORPORATION, a Texas corporation,

Plaintiffs-Appellants,

vs.

J.P. MCKNIGHT, A/K/A JUD P. MCKNIGHT, and BEULAH M. MCKNIGHT,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
W. J. Schnedar, District Judge

Hinkle, Cox, Eaton, Coffield & Hensley,
Harold L. Hensley, Jr.,
Andrew J. Cloutier,
Roswell,

for Appellants.

Kenneth B. Wilson,
Roswell,

for Appellees.

OPINION

RANSOM, Chief Justice.

{1} Plaintiffs-appellants John B. Castle, J. Bob Herell, and the Ellwade Corporation (collectively referred to in the singular as "Castle") appeal from a declaratory judgment entered against them and in favor of defendants-appellees J.P. McKnight and Beulah M. McKnight ("McKnights"). The trial court decided that a consent clause in a boundary line agreement placed no limitation on the McKnights from withholding consent to allow Castle to move established internal fences and that, in the absence of consent, the clause thus prohibited Castle from constructing a fence at a location consistent with the true boundaries of Castle's property. Finding that the agreement implies that withholding of consent be reasonable, we reverse and remand to the trial court for determination of whether the McKnights acted reasonably in withholding consent to erect the fences.

{2} *Facts.* The Upper McKnight Ranch was operated by two brothers as a single ranching unit until February 10, 1977, when Joe W. McKnight and J.P. McKnight, along with their wives and other interested parties, divided the ranch by a series of special warranty deeds. On March 18, 1985, Joe W. McKnight and his wife sold their part to Herell, the Ellwade Corporation, Thomas F. Thaggard, and James W. Johnson (collectively, "the Ellwade group"). Thaggard and Johnson later sold their interest to John B. Castle. As part of the transaction between Joe McKnight and the Ellwade group, the latter requested that the McKnight brothers execute a "standard" boundary line agreement, the purpose of which was to confirm ownership of their respective ranches based not upon the fences but upon the true boundaries. The agreement specified that "[t]he location of any fences elsewhere than on the legal boundary . . . shall not change the ownership . . . by prescription, adverse possession, waiver, acquiescence or otherwise." The agreement also provided that "[t]he parties agree with one another that one party will not change the location of the boundary line fences between the Joe W. McKnight Ranch and the J.P. McKnight Ranch without the express written consent of the other party." There were no discussions or negotiations regarding this second provision; the attorney who drafted the agreement testified that he left it in as a "good neighbor" provision and J.P. McKnight testified that

he did not rely on the "no change" provision in determining whether to sign the boundary line agreement.

{3} For over fifty years prior to the 1985 agreement there existed an "internal cross fence" on the Upper McKnight Ranch that served the purpose of funneling livestock from pastures above one section of the ranch (section thirteen) to pastures on the other side of a sizeable ridge. When the ranch was divided, the fenceline in section thirteen formed a dip at the base of the ridge that protruded inside the true boundaries of the property now owned by Castle. The McKnights had been given an express easement across Castle's land in that section for roadway and pipeline purposes. Further over (in section eighteen), the internal cross fence again varied from the true boundaries of the Castle ranch. This fence served to funnel livestock to a well located on one acre that was deeded to the McKnights but is surrounded by land owned by Castle. The McKnights and Castle each own a one-half interest in the well. In 1992, Castle began erecting new fences along the true boundary in section eighteen so that he could take advantage of grazing his sheep on approximately forty-four acres of his unfenced pasture. The McKnights intervened, preventing the construction, and later refused to grant consent after formal negotiations. This declaratory judgment action ensued.

{4} The trial court found that the removal of the dip in the section thirteen boundary fence "would significantly impede the operation of the McKnight Ranch," but also found that the relocation of the fence in section eighteen "would not have significant impact on the operation of the McKnight Ranch" if Castle provided reasonable access to the well (a condition to which Castle has agreed). Ultimately, however, the court decided that the boundary line agreement placed no limitation on the refusal to consent to relocation of the fence. "The tenor of the Boundary Line Agreement would be materially changed by adding a provision that consent to move the fence could not be unreasonably withheld."

{5} The McKnights waived their right to challenge the propriety of existing fences. In 1985, without objection from the McKnights, Castle erected a fence (conforming to the true boundaries) that removed a portion of the dip in section thirteen. The court found that the McKnights have abandoned any claim to use the land encompassed by the 1985 fence in section thirteen except as permitted by express easement. The McKnights have not challenged that finding and thus cannot challenge on appeal the propriety of the existing fence in section thirteen. *See Springer Corp. v. Kirkeby-Natus*, 80 N.M. 206, 208, 453 P.2d 376, 378 (1969) (stating that findings not attacked on appeal are binding on the Supreme Court). Therefore, we limit our discussion to the question of consent regarding the building of new fences along the true boundary line.

{6} No evidence exists to support claim that for the unrestricted right of consent, the McKnights bargained away any possible ownership rights by acquiescence. The McKnights argue that they bargained for the benefit of using Castle's land and should not lose the benefit of this bargain. They argue that under the doctrine of acquiescence established in *Sachs v. Board of Trustees*, 89 N.M. 712, 557 P.2d 209 (1976), they had a right to claim as their own the land up to the fence at the time of the sale to the Ellwade group, and that they bargained that right away in exchange for the agreement not to change the fenceline. In *Sachs*, this Court held that when "adjoining landowners acquiesce in a fence as a boundary for all of the purposes to which a property was placed during the period involved, as a matter of law the doctrine of acquiescence applies to make that fence the boundary for subsequent uses of the property." 89 N.M. at 719, 557 P.2d at 216. The adjoining landowners had recognized the fence as the boundary for more than twenty years and the Court found that it was built for the purpose of establishing the boundary line between the two tracts of land. *Id.* at 720, 557 P.2d at 217. The length of time that the fence was recognized as the boundary was a primary factor in the Court's determination that ownership changed by acquiescence. *See id.*

{7} In *Tresemer v. Albuquerque Public School District*, 95 N.M. 143, 144, 619 P.2d 819, 820 (1980), this Court interpreted *Sachs* as requiring four elements to prove acquiescence and stated that parties cannot claim that a boundary is not a true boundary when there are: "(1) adjoining 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." We determined that because the deed in *Tresemer* described an arroyo and not an existing fence as the boundary between the tracts and because the evidence did not support a finding that the owners consented to the fence as a boundary, the owners had not acquiesced in recognizing the fence as the true boundary. *Id.* at 145, 619 P.2d at 821.

{8} In the instant case, the internal cross fence was not built as a boundary line between two separately-owned parcels of land. The McKnight brothers divided the original ranch according to section lines as described in the warranty deed that transferred ownership of part to Joe McKnight, even though the internal cross fence already existed. As in *Tresemer*, this fact shows that J.P. and Joe did not recognize the fences as the true boundaries between the two newly-formed ranches. Further, there is no evidence to support the argument that the McKnights bargained away a claim to ownership of the land. As stated above, J.P. testified that he did not rely on the "no change" provision in determining whether to sign the boundary line agreement.

{9} The consent clause contains an implied covenant of reasonableness. While a court will not imply a standard of reasonableness in the face of the parties' expressed intent to the contrary, if a contract is silent regarding the manner of performance, "a term which is reasonable in the circumstances is supplied by the court." Restatement (Second) of Contracts § 204 (1981); *see, e.g., Smith v. Galio*, 95 N.M. 4, 7, 617 P.2d 1325, 1328 (Ct.App.1980) (holding that where contract is silent as to the time for performance, a reasonable time will be implied).

> In searching for what [may be] called "the essence of the agreement," a court seeks a fair bargain. It may . . . justify the term it supplies on the ground that the term prevents one party from being in a position of "economic servility" and "completely at the mercy" of the other.

2 E. Allen Farnsworth, *Farnsworth on Contracts* § 7.16, at 307 (1990) (footnote omitted). A standard of reasonableness is often implied in a variety of circumstances. In *Clayburgh v. Clayburgh*, 218 A.D. 411, 218 N.Y.S. 457 (1926), a husband and wife executed a separation agreement wherein the wife agreed not to remove property from the husband's residence without his prior consent. When she tried to remove property that she proved belonged to her, the husband prevented its removal, and the wife brought suit for conversion. The court examined whether allowing the husband to withhold consent arbitrarily would make the contract unreasonable and place one of the parties at the mercy of the other and found that "[t]he covenant . . . on the part of the plaintiff not to remove her property without the consent of the defendant, implied a reciprocal obligation on the part of the defendant not to withhold such consent arbitrarily or for an unreasonable time." 218 N.Y.S.2d at 463. The court held that executing the agreement with that clause did not result in the husband gaining title to the wife's property, but that it only meant that she could not remove property immediately or remove property without judicial approval. *See also Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991) ("[C]ontract will not be interpreted giving discretion to one party in a manner which would put one party at the mercy of another, unless the contract clearly requires such an interpretation.").

{10} In New Mexico, we have implied in fact the term of reasonableness in withholding of consent when a lease agreement contains a provision requiring the landlord's consent before a tenant may sublease the property. *See Economy Rentals, Inc. v. Garcia*, 112 N.M. 748, 759, 819 P.2d 1306, 1317 (1991); *Boss Barbara, Inc. v.*

Newbill, 97 N.M. 239, 240-41, 638 P.2d 1084, 1085-86 (1982). Our rationale in requiring reasonableness in lease cases is two-fold: the lease contract is subject to the covenant of good faith and fair dealing and is subject to the covenant that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Economy Rentals*, 112 N.M. at 759, 819 P.2d at 1317 (quoting *Kendall v. Ernest Pestana, Inc.*, 40 Cal.3d 488, 220 Cal.Rptr. 818, 823, 709 P.2d 837, 842 (1985) (in bank)).

{11} Reasonableness in performance of a contract may be implied to prevent frustration of the primary purpose of the agreement by a collateral clause. For example, in *Sun Insurance Services, Inc. v. 260 Peachtree Street, Inc.*, 192 Ga.App. 482, 385 S.E.2d 127 (1989), *cert. denied*, a clause in a lease required consent of the landlord before the tenant was allowed to make repairs. A separate clause required that any repairs or improvements be equal in quality to the original condition of the premises. The court found that "[t]he coupling of the second clause to the first impliedly creates a standard of reasonableness to be applied to the issue of consent." 385 S.E.2d at 128. The court balanced the interests of the lessee in maximizing the use of its leasehold with the interests of the lessor in maximizing its capital asset. "If the landlord reserved the absolute right to refuse consent, the clause pertaining to equal quality would be mere surplusage." *Id.*

{12} Applying that principle to this case, there is no question that the primary purpose of the boundary line agreement was to establish absolute ownership in Castle of the unfenced areas of his property. If the McKnights arbitrarily may refuse to allow Castle to exercise his ownership rights, the boundary line agreement provision would have no practical meaning. The coupling of the consent clause to the agreement requires that the court balance the interests of the parties and impose the standard of reasonableness so that the primary purpose of the agreement may be achieved.

{13} Our holding today does not imply that parties are not entitled to contract for rigid rights and obligations; in fact, we prefer that parties do not leave for implication their respective duties. Where there are reciprocal obligations, however, the Court will look at the primary purpose of the contract and, absent language or conditions imposing a contrary result, will infer a standard of reasonableness in the performance of a consent clause.

{14} *Conclusion.* We hold today that reasonableness in performance will be implied in fact by this Court in a contract dispute if a requirement of reasonableness in performance will achieve the apparent intent of the parties and the purposes of the contract, and so long as the parties do not expressly state a contrary intention. In this case, the trial court did not expressly find that the McKnights's refusal to consent was unreasonable under the circumstances. The court did find, however, that "[t]he removal of the dip in the boundary fence [in section thirteen] would significantly impede the operation of the McKnight Ranch" and that "[t]he relocation of the boundary fence to the true boundary in Section 18 would not have significant impact on the operation of the McKnight ranch if reasonable access to the Partnership Well were provided." Although these findings impliedly establish that the trial court believed that it was reasonable for the McKnights to withhold consent with respect to section thirteen but not reasonable for the McKnights to withhold consent with respect to section eighteen, the trial court did not make an express determination of reasonableness. Therefore, we reverse and remand this case so that the trial court can make a determination of reasonableness and enter judgment accordingly.

{15} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

SETH D. MONTGOMERY,
Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-002

Filing Date: January 5, 1994, Decided, As Corrected April 13, 1994

Docket No. 20,936

ERIC DRAPER,

Plaintiff-Appellant,

vs.

MOUNTAIN STATES MUTUAL CASUALTY COMPANY, a New Mexico corporation,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Rozier E. Sanchez, District Judge

Flinn Wold Attorneys,
Alexander A. Wold, Jr.,
Albuquerque,

for Appellant.

Bradley & McCulloch, P.A.,
Gordon J. McCulloch and
Lisa M. Tourek,
Albuquerque,

for Appellee.

OPINION

RANSOM, Chief Justice.

{1} Eric Draper appeals from a summary judgment dismissing his uninsured motorist claim against Mountain States Mutual Casualty Company. The trial court ruled that the claim was precluded by Section 52-5-17 of the Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (Repl.Pamp.1991 & Supp.1992). We reverse.

{2} *Facts and proceedings.* On November 21, 1991, Draper was involved in an automobile accident with an uninsured motorist while driving a vehicle owned by his employer, Albuquerque Publishing Company. Coverage for Draper's injuries was provided both by the uninsured motorist provisions of the insurance on the vehicle he was driving and by workers' compensation insurance. Mountain States issued each of these insurance policies to Albuquerque Publishing.

{3} Mountain States denied Draper's claim under the uninsured motorist coverage and contended that Draper's sole remedy was through the workers' compensation policy. Draper filed a declaratory judgment action against Mountain States seeking the uninsured motorist benefits. Upon stipulated facts, the parties filed a motion and a crossmotion for summary judgment. The trial court held that the provisions of Section 52-5-17(C) of the Workers' Compensation Act foreclosed Draper's right to make an uninsured motorist claim because he was entitled to workers' compensation benefits.

{4} *Standard of review and rules of statutory interpretation.* This appeal turns on the purpose and effect of Section 52-5-17(C). When reviewing statutes, our primary goal is to give effect to the intent of the legislature. *State ex rel. Klineline v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). To determine legislative intent we look first to the plain language of the statute and give words their ordinary meaning unless a different meaning is indicated. *Id.; Schmick v. State Farm Mut. Auto. Ins. Co.*, 103 N.M. 216, 219, 704 P.2d 1092, 1095 (1985). We also may look to the history and background of the statute to determine the meaning of the language. *Blackhurst*, 106 N.M. at 735, 749 P.2d at 1114. If the language of the statute is clear and unambiguous it is to be given effect, *see State v. Jonathan M.*, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990), with

the exception that "the intention of the lawmaker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter." *Martinez v. Research Park,* 75 N.M. 672, 677, 410 P.2d 200, 203 (1965). We examine the act in its entirety, construing each section in connection with every other section, *id.; accord Blackhurst,* 106 N.M. at 735, 749 P.2d at 1114, and we will construe the act in harmony with other statutes when possible, *Blackhurst,* 106 N.M. at 735, 749 P.2d at 1114; *see also Quintana v. New Mexico Dep't of Corrections,* 100 N.M. 224, 227, 668 P.2d 1101, 1104 (1983) (the legislature is presumed not to enact one law that is inconsistent with another existing law).

{5} *Section 52-5-17 is a reimbursement statute.* Section 52-5-17 of the Workers' Compensation Act states:

> A. The right of any worker . . . to receive payment or damages for injuries or disablement occasioned to him by the negligence or wrong of any person other than the employer or any other employee of the employer . . . shall not be affected by the Workers' Compensation Act . . . , but the claimant shall not be allowed to receive payment or recover damages for those injuries or disablement and also claim compensation from the employer, except as provided in Subsection C of this section.
>
> B. In a circumstance covered by Subsection A of this section, the receipt of compensation from the employer shall operate as an assignment to the employer or his insurer, guarantor or surety of any cause of action, to the extent of payment by the employer to or on behalf of the worker for compensation or any other benefits to which the worker was entitled under the Workers' Compensation Act . . . that were occasioned by the injury or disablement, that the worker or his legal representative or others may have against any other party for the injury or disablement.
>
> C. The worker or his legal representative may retain any compensation due under the uninsured motorist coverage provided in [the uninsured motorist statute, NMSA 1978, § 66-5-301 (Repl.Pamp.1989)] if the worker paid the premium for that coverage. If the employer paid the premium, the worker or his legal representative may not retain any compensation due under [the uninsured motorist statute] and that amount shall be due to the employer.

The statute originally was comprised of a single paragraph that encompassed Subsections (A) and (B), but in 1990 the legislature divided the statute into Subsections (A) and (B) and added Subsection (C). *See* 1990 N.M. Laws (2d S.S.), ch. 2, § 59.

{6} Mountain States argues that the purpose of Section 52-5-17(C) is to prevent an employee from receiving a double recovery *from the employer* by receiving both workers' compensation benefits and uninsured motorist benefits provided by the employer. Draper argues that he is not seeking a double recovery and that he should be entitled to retain the difference between the uninsured motorist benefits and a lesser sum that is due as workers' compensation from the employer or the workers' compensation insurance carrier.

{7} This Court has not interpreted Section 52-5-17 in its current form. We have held, however, that one purpose of Section 52-5-17 is to secure an employer's right to reimbursement. *See Montoya v. AKAL Sec., Inc.,* 114 N.M. 354, 355, 838 P.2d 971, 972 (1992); *see also Continental Ins. Co. v. Fahey,* 106 N.M. 603, 606, 747 P.2d 249, 252 (1987) (explaining that under Section 52-5-17, prior to 1990, injured worker was required to reimburse employer or workers' compensation carrier for duplicative compensation received from third-party tortfeasor but not from discrete and independent insurance coverage). The plain language of the post- *Continental Insurance* statute is evidence that the legislature intended to prevent an employee's double recovery from discrete and independent insurance coverage provided by the employer. This is consistent with what we have identified as the broader objective of the statute which is "to achieve an equitable

distribution of the risk of loss." *See Montoya,* 114 N.M. at 357, 838 P.2d at 974.

{8} The legislature must have intended that the employee retain uninsured motorist benefits in excess of workers' compensation and related benefits. Although the statute states that "*any* [uninsured motorist] compensation . . . shall be due to the employer" if the employer pays the premium for the uninsured motorist coverage, this Court cannot ignore the clear purposes of Section 52-5-17: reimbursement and equitable distribution of the risk of loss. *See Martinez,* 75 N.M. at 677, 410 P.2d at 203 (stating that the purpose of the statute and intent of the legislature "will prevail over the literal sense of the terms"). The legislature could not have intended that the employer receive more money than it is paying its employee in workers' compensation benefits when it is the employee who suffered the injury.

{9} In *Continental Insurance,* this Court held that the legislature could not have intended to preclude an injured employee from receiving full or additional compensation when it is available from sources other than workers' compensation. 106 N.M. at 606, 747 P.2d at 252. "We emphasize that we have never declared a worker's compensation judgment to be the full and actual value of the worker's damages." *Id.* If precluded from pursuing his claim in this case, Draper would receive less benefits toward making him financially whole than he is entitled to under the uninsured motorist coverage. Thus, we hold that Draper may receive and retain uninsured motorist benefits in excess of what he must reimburse his employer for workers' compensation. To state our holding in the terms used in *Montoya,* 114 N.M. at 358, 838 P.2d at 975, the employer's liability for workers' compensation is reduced by the net amount an employee receives in uninsured motorist benefits under coverage provided by the employer.

{10} *Conclusion.* Section 52-5-17(C) does not preclude an employee from retaining the difference between uninsured motorist benefits and workers' compensation benefits, notwithstanding that the employer has paid the premiums for each coverage. The fact that the same insurer issued both policies to the employer is immaterial. If Draper is an insured occupant of the vehicle under the terms of the automobile policy, he is entitled to recover the proceeds of the uninsured motorist coverage subject only to his employer's statutory right to reimbursement for the workers' compensation benefits that it has paid to Draper. It is not determinative that this reimbursement may be no more than a bookkeeping set-off by the insurer, and we find no merit in Mountain States's argument that Draper was indirectly suing his employer in contravention of the Act. Thus, we reverse the summary judgment in favor of Mountain States and remand this case for proceedings consistent with this opinion.

{11} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-011

Filing Date: February 2, 1994

Docket No. 20,540

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

LYONAL RAY ATTAWAY,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
David W. Bonem, District Judge

Sammy J. Quintana, Chief Public Defender,
Bruce Rogoff, Assistant Appellate Defender,
Santa Fe, NM,

for Defendant-Petitioner.

Tom Udall, Attorney General,
Elizabeth Blaisdell, Assistant Attorney General,
Santa Fe, NM,

for Plaintiff-Respondent.

OPINION

RANSOM, Chief Justice.

{1} We issued a writ of certiorari to the Court of Appeals to review an opinion of that Court sanctioning forcible police entry pursuant to a warrant within ten to fifteen seconds after the executing officer announced his authority and purpose. *See State v. Attaway,* 114 N.M. 83, 835 P.2d 81 (Ct. App. 1992). In this opinion, we discuss the standard by which we review a district court's determination that exigent circumstances were present, examine the basis for the "knock and announce" rule under federal and state law, and review the state and federal constitutional arguments asserted below.[1] We affirm.

{2} *Facts.* On January 5, 1990, Clovis Police Department Detective Robert Littlejohn requested SWAT team assistance to execute arrest and search warrants on Lyonal Attaway. The search warrant authorized the search of Attaway's residence for drugs, drug paraphernalia, and weapons. Littlejohn briefed the SWAT team sometime prior to the operation. At 6:00 Saturday morning, January 6, the SWAT team approached the front door to the Attaway home with the warrants. Officer Wayne Atchley opened the storm door to the house, knocked on the inner door, and announced both his purpose and authority. The officers testified at a suppression hearing that they noticed a light on in the front of the house. After approximately ten to fifteen seconds passed without response, the officers forcibly breached the front door and set off a diversionary device inside the house. The officers apprehended a woman, later identified as Attaway's spouse, as she fled from the front part of the house, The officers discovered and apprehended Attaway in his bedroom. Pursuant to the arrest and subsequent search, the officers seized from the house several weapons, including a submachine gun and a sawed-off shotgun, methamphetamines, drug paraphernalia, and a videocassette recording.

{3} Attaway moved to suppress all the evidence seized. He contended that the officers failed to comply with the knock-and-announce rule and that this failure rendered the search unreasonable under the United States and New Mexico constitutions. *See* U.S. Const. amend. IV; N.M. Const. art. II, § 10. The trial court denied the motion and

[1] The opinion of the Court of Appeals does not articulate the constitutional predicate for its analysis. At the suppression hearing, both the trial court and the defendant relied on *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (Ct. App.) (explication of rule of announcement and exceptions based on exigent circumstances), *cert. denied,* 87 N.M. 5, 528 P.2d 649 (1974), and on relevant Fourth Amendment jurisprudence.

Attaway was convicted on one count of distribution of a controlled substance under NMSA 1978, Section 30-31-22(A)(2) (Repl. Pamp. 1989) and one count of possession of a controlled substance under NMSA 1978, Section 30-31-23(B)(4) (Repl. Pamp. 1989). The Court of Appeals affirmed and Attaway petitioned this Court for a writ of certiorari.

{4} *Standard for reviewing determination of exigent circumstances.* In *State v. Sanchez,* 88 N.M. 402, 540 P.2d 1291 (1975), this Court held that a district court's determination of exigent circumstances was a question of fact, subject to the deferential substantial evidence standard of review:

> The questions of "good faith belief" and "exigent circumstances" are questions of fact for the trial court to determine, and the findings of the trial court in these regards are entitled to be accorded the same weight and given the same consideration as is generally accorded a trial court's findings by appellate courts. Substantial evidence is the measure of proof, or the quality and quantity of the evidence, required to support the findings of the trial court.

88 N.M. at 403, 540 P.2d at 1292 (citations omitted). In the Court of Appeals, Attaway contended that review of the trial court's exigency determination should not be simply one of substantial evidence. The Court of Appeals appears to have agreed, *see* 114 N.M. at 86, 835 P.2d at 84, but offered no rationale for its conclusion. We likewise agree and offer the following rationale.

{5} - *Fact-finding.* Initially, the trial court must establish the historical facts that animate the transaction to be evaluated. The court performs this fact-finding role by reciting events and assessing the credibility of the testimony offered. This component of the analysis is purely factual, and a trial court is to be given wide latitude in determining that an historical fact has been proven. We review these purely factual assessments to determine if the fact-finder's conclusion is supported in the record by substantial evidence. *See State v. Bloom,* 90 N.M. 192, 194, 561 P.2d 465, 467 (1977) (stating that appellate court must limit itself "to a consideration of whether the evidence substantially supports the trial court's finding").

{6} - *Application of law to the facts, the mixed question of law and fact.* As to review of the trial court's application of law to the facts in its decision-making process, we find most useful the analysis in the oft-cited case of *United States v. McConney,* 728 F.2d 1195 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824, 83 L. Ed. 2d 46, 105 S. Ct. 101 (1984). There, the court invoked principles of appellate review and erected a framework, based on policy considerations, for determining whether a mixed question is to be reviewed de novo or under a more deferential standard:

> The appropriate standard of review for a district judge's application of law to fact may be determined, in our view, by reference to the sound principles which underlie the settled rules of appellate review. . . . If the concerns of judicial administration—efficiency, accuracy, and precedential weight—make it more appropriate for a district judge to determine whether the established facts fall within the relevant legal definition, we should subject his determination to deferential, clearly erroneous review. If, on the other hand, the concerns of judicial administration favor the appellate court, we should subject the district judge's finding to de novo review. . . . The pivotal question is do the concerns of judicial administration favor the district court or . . . the appellate court.
>
> . . . .
>
> If application of the rule of law to the facts requires an inquiry that is "essentially factual[]" . . . —one that is founded "on the application of the factfinding tribunal's experience with the mainsprings of human conduct[]" . . . —the concerns of judicial administration will favor the district court, and the district court's determination should be classified as one of fact

> reviewable under the clearly erroneous standard. If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.

Id. at 1202 (quoting *Pullman-Standard v. Swint,* 456 U.S. 273, 288, 289-90 n.19, 72 L. Ed. 2d 66 n.19 (1902), 102 S. Ct. 1781,1789, 1790-91 (1982); *Commissioner v. Duberstein,* 363 U.S. 278, 289, 4 L. Ed. 2d 1218, 80 S. Ct. 1190 (1960)).

{7} The court identified two interests behind the deferential standard applied to questions of fact. First, by assigning primary responsibility for resolving factual disputes to the court in the superior position—the trial court—the risk of judicial error is minimized. *McConney,* 728 F.2d at 1201. Second, the deferential standard relieves the appellate court "of the burden of a full-scale independent review and evaluation of the evidence." *Id.* In comparison, with respect to de novo review, appellate judges are better able to concentrate their resources on legal questions because they are free from the time-consuming process of hearing evidence. *Id.* In addition, the "judgment of at least three members of an appellate panel is brought to bear on every case" and the "collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law." The court observed that the binding nature of an appellate ruling, contrasted with the limited force of a factual determination, militates in favor of concentrating combined appellate resources on the issue to ensure the correctness of the legal result. *Id.*

{8} The court applied that methodology to conclude that the mixed question of exigent circumstances should be subject to de novo review as a question of law. *Id.* at 1205. According to the court, deciding whether the facts present exigencies "goes beyond the historical facts." *Id.* "The mixed question of exigency is rooted in constitutional principles and policies. . . . Its resolution requires us to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests." *Id.* (footnotes omitted). We likewise have applied de novo review to threshold constitutional issues such as the voluntariness of confessions, *see Aguilar v. State,* 106 N.M. 798, 799, 751 P.2d 178, 179 (1988), and to the validity of search warrants. *See State v. Snedeker,* 99 N.M. 286, 290, 657 P.2d 613, 617 (1982).

{9} The myriad rules, exceptions, and exceptions to exceptions that flourish in the jurisprudence of search and seizure are often no more than factual manifestations of the constitutional requirement that searches and seizures be reasonable. The rules and tests, based as they are on careful balancing of the underlying constitutional values, reflect the efforts of appellate judges to establish objective standards to measure and inform law enforcement practices. In this sense, none of the rules or their exceptions is talismanic. Rather, each is a proxy for reasonableness, generally applicable, but inherently factual. As the court in *McConney* observed, "the essential and difficult question raised by this balancing is how much risk police officers can reasonably be expected to assume before disregarding the rules society has adopted to otherwise circumscribe the exercise of their considerable discretionary authority in carrying out their vital law enforcement duties." 728 F.2d at 1205. This question is one that extends beyond fact-finding and implicates an assessment of broader legal policies that the New Mexico Constitution entrusts to the reasoned judgment of the appellate courts of this state. *See* N.M. Const. art. VI, §§ 1, 2, 28, 29.

{10} When, as here, "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case," an appellate court is "reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip . . . [an] appellate court of its primary function as an expositor of law." *Miller v. Fenton,* 474 U.S. 104, 114, 88 L. Ed. 2d 405, 106 S. Ct. 445 (1985) (citing other factors). It is the duty of

appellate courts to shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context and we can discharge that duty only through meaningful review of lower court determinations. Thus, we conclude that the mixed question involved in determining exigency lies closest in proximity to a conclusion of law, and hold that such determinations are to be reviewed de novo.[2] *See McConney,* 728 F.2d at 1203 (stating that factors favoring de novo review are most predominate when the mixed question implicates constitutional rights). To the extent that *State v. Sanchez* is inconsistent with this opinion, it is overruled.

{11} *The rule of announcement and forced entry.* - Common law beginnings and acceptance in the federal and state courts. Commentators and courts have traced the rule of announcement to early common-law decisions describing the legal limitations on the execution of civil process. *See, e.g.,* (G. Robert Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California,* 112 U. Pa. L. Rev. 499, 500-08 (1964); Michael R. Sonnenreich & Stanley Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem,* 44 St. John's L. Rev. 626, 627-29 (1970); *Ker v. California,* 374 U.S. 23, 47-48, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963) (Brennan, J., concurring in part and dissenting in part); *Miller v. United States,* 357 U.S. 301, 307-09, 2 L. Ed. 2d 1332, 78 S. Ct. 1190 (1958); *Accarino v. United States,* 85 U.S. App. D.C. 394, 179 F.2d 456, 460-64 (D.C. Cir. 1949); *Commonwealth v. Cundriff,* 382 Mass. 137, 415 N.E.2d 172, 174-78 (Mass. 1980) (rule in context of arrest warrant), *cert. denied,* 451 U.S. 973, 68 L. Ed. 2d 353, 101 S. Ct. 2054 (1981); *State v. Parker,* 283 Minn. 127, 166 N.W.2d 347, 350 (Minn. 1969). The rule of announcement first was articulated in that context in *Semayne's Case,* 77 Eng. Rep. 194 (K.B. 1603):

> In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors. . . .

Id. at 195 (footnotes omitted).

{12} The rule of *Semayne's Case* was followed by early English and American courts in cases involving the execution of an arrest warrant. *See* Sonnenreich & Ebner, *supra,* at 629 (discussing cases). There was, however, little discussion in the early cases of the rule's applicability to forcible entry pursuant to a search warrant.[3] *See* Blakey, *supra,* at 503-08. The first American opinion to discuss the rule in the context of a search warrant was *Bell v. Clapp,* 10 Johns. 263 (N.Y. Sup. Ct. 1813). Although announcement was not at issue in *Bell* because the officers did announce their identity and purpose, the court affirmed the right of the officers, upon due demand, to break and enter. *Id.* at 265-66. Since *Bell,* many states have codified the rule of announcement as part of state search and seizure practice[4]

[2] While we require findings of fact and conclusions of law in civil actions tried to the court, we have no such requirement, civil or criminal, for rulings on motions to suppress. Thus, in most cases, an appellate court is presented only with a conclusion that the search was reasonable or unreasonable, often articulated in shorthand (*e.g.,* exigent circumstances or noncompliance with the rule of announcement). The interests of judicial administration, however, require de novo review of the trial court's determination of exigency. While it would be helpful for the trial court to enter findings of fact and conclusions of law in suppression hearings, the failure to do so will not preclude de novo review.

[3] We recognize that our legal tradition often has drawn a sharp distinction between arrest and search and seizure. *See* Blakey, *supra,* at 511 n.89 (discussing historical roots of distinction). We do not, however, rule on the soundness of this distinction in this opinion.

[4] The state statutes typically establish only the right, upon due demand, of officers to enter forcibly. Few profess to codify the common-law exceptions to the rule. Those authorizing forcible entry after notice include: Ala. Code § 15-5-9 (1982); Alaska Stat. § 12.35.040 (1990); Ariz. Rev. Stat. Ann. § 13-3916 (1989); Cal. Penal Code § 1531 (West 1982); D.C. Code Ann. § 25-129(g) (1991) (searches for alcohol), § 33-565(g) (1993) (searches for narcotics); Fla. Stat. § 933.09 (1991); Ga. Code Ann. § 17-5-27 (Harrison 1990); Haw. Rev. Stat. § 803-37 (1985); Idaho Code §§ 19-4409, 4410 (1987); Ind. Code Ann. § 35-33-5-7 (Burns 1985); Iowa Code § 808.6 (1991); Ky. Rev. Stat. Ann. § 70.077 (execution of process for recovery of property), § 70.078 (arrest) (1980); Mich. Comp. Laws Ann. § 780.656 (West 1982); Neb. Rev. Stat. § 29-411 (1989); Nev.

and the rule has become embedded firmly in the common law. Congress, as well, requires adherence to the rule in a statute that parallels many state statutory formulations:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109 (1988); *see also* Sonnenreich & Ebner, *supra,* at 630-39 (reviewing statutory and common-law rules in several states).

{13} *The common-law rule serves diverse purposes.* It prevents the needless destruction of the homeowner's property—an act with potentially devastating human consequences in pre-industrialized society. *See Lee v. Gansel,* 98 Eng. Rep. 935, 938 (K.B. 1774) (stating that a contrary rule "would leave the family within[] naked and exposed to thieves and robbers"). In addition, the rule protects the sanctity of the home and individual privacy. *Ker,* 374 U.S. at 52 (Brennan, J., concurring in part and dissenting in part). Finally, the rule protects both the occupant and police from the possible violent response of a startled occupant suddenly confronted with an unannounced entry by an unknown person. *People v. Dumas,* 9 Cal. 3d 871, 512 P.2d 1208, 1213, 109 Cal. Rptr. 304 (Cal. 1973) (in bank).

{14} - *Federal law.* The Supreme Court has not determined whether officers executing a search warrant must knock and announce prior to entry. The Court follows the general rule that the Fourth Amendment prohibits only unreasonable searches. *Bell v. Wolfish,* 441 U.S. 520, 558, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). The test of reasonableness does not lend itself to "precise definition or mechanical application." *Id.* at 559. In each case, the need for the particular search must be weighed against the intrusion into the privacy rights of individuals. *Id.* In this case, Attaway argues that his Fourth Amendment right was violated because the police executed a search of his home without first knocking, announcing their presence, and allowing adequate time for him to answer the door. We must determine whether the conduct of the police officers was reasonable in light of the facts known to them at the time they executed the warrant.

{15} In *Ker v. California,* the Supreme Court held that the method of entry incident to lawful arrest accompanied by a search is governed by Fourth Amendment reasonableness standards. 374 U.S. at 40-41. In a plurality opinion, eight justices agreed that a police officer's manner of entry is subject to the Fourth Amendment standards of reasonableness with four of the eight concluding that the unannounced entry was reasonable and four concluding it was unreasonable, *id.* at 46; the ninth upheld the entry using a Fourteenth Amendment due process analysis. *Id.* at 44-45. The dispute centered on the circumstances that would justify abandonment of the notice requirement. From the various opinions in *Ker,* three elements of the rule of announcement emerge: (1) notice of presence; (2) identification of authority; and (3) statement of lawful purpose.

{16} After first determining that the arrests were lawful, Justice Clark examined the method of entry under Fourth Amendment reasonableness principles. *Ker*, 374 U.S. at 38-41. The officers had entered without knock or notice, but the Court concluded that under the specific facts of the case

Rev. Stat. § 179.055 (1991); N.Y. Crim. Proc. Law § 690.50 (Consol. 1986); N.C. Gen. Stat. § 15A-251 (1988); N.D. Cent. Code § 29-29-08 (1991); Ohio Rev. Code Ann. § 2935.12 (Baldwin 1992); Okla. Stat. Ann. tit. 22, § 1228 (West 1991); Or. Rev. Stat. § 133.605 (1991); 42 Pa. Cons. Stat. Ann. § 2007 (1989); S.C. Code Ann. § 23-15-60 (Law. Co-op. 1989); S.D. Codified Laws Ann. § 23A-35-8 (1988); Tex. Penal Code Ann. § 9.51 (West 1974); Utah Code Ann. § 77-23-10 (1990); W. Va. Code § 62-1A-5 (1992); Wyo. Stat. § 7-7-104 (1987); *see also* Model Code of Pre-Arraignment Procedure § SS 220.3 (Proposed Official Draft 1975).

Many state statutes authorize the use of reasonable and necessary force in executing a search warrant, without expressly requiring announcement: 725 ILCS 5/108-8 (1992 State Bar Ed.); Kan. Stat. Ann. § 22-2508 (1988); La. Code Crim. Proc. Ann. art. 164 (West 1991); Miss. Code Ann. § 99-27-15 (1972); Mont. Code Ann. § 46-5-228 (1993); Wis. Stat. § 968.14 (1985).

the method of entry was reasonable: "In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police." *Id.* at 40. Apparently, Justice Clark viewed compliance or noncompliance with the rule of announcement as an indicator of the reasonableness of the officer's conduct under the circumstances. *See id.* at 37-38. Justice Clark appeared to accept an inevitable discovery rationale, stating that the constitution would not be violated if an officer discovers evidence more quickly than he would have had he followed the rules.[5]

> It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to more quickly than he would, had he complied with section 844. Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance.

Maddox, 294 P.2d at 9 (citations omitted).

[5] For support, Justice Clark quoted a passage from Justice Traynor's opinion in *People v. Maddox,* 46 Cal. 2d 301, 294 P.2d 6 (Cal.), *cert. denied,* 352 U.S. 858 (1956). *See Ker,* 374 U.S. at 39-40. Justice Traynor wrote:

{17} Concurring in part and dissenting in part, Justice Brennan reasoned that the rule is part of the constitutional requirement that searches be reasonable:

> The protections of individual freedom carried into the Fourth Amendment undoubtedly included this firmly established requirement of an announcement by police officers of purpose and authority before breaking into an individual's home. The requirement is no mere procedural nicety or formality attendant upon the service of a warrant. Decisions in both the federal and state courts have recognized, as did the English courts, that the requirement is of the essence of the substantive protections which safeguard individual liberty.
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> . . . .
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> It is much too late in the day to deny that a lawful entry is as essential to vindication of the protections of the Fourth Amendment as, for example, probable cause to arrest or a search warrant for a search not incidental to an arrest.

Ker, 374 U.S. at 49, 53 (citation omitted) (footnote omitted). In his view, failure to comply with the rule of announcement is per se unreasonable except in three narrow circumstances:

> The Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

Id. at 47. Only the second exception does not rest on the occupant's awareness of the officer's presence. Justice Brennan refused to recognize any further exceptions to the rule. *Id.* at 55. First, any exception not requiring a showing of awareness of presence "necessarily implies a rejection of the inviolable presumption of innocence." *Id.* at 56. Second, loud noises or running within the house amount "only to ambiguous conduct," insufficient to form a basis for belief that an escape is being attempted or evidence is being destroyed. *Id.* at 57. Finally, announcement minimizes the danger both to officers and occupants that likely would attend a surprise entry and it decreases the probable impact of forcible entry in cases of mistaken identity. *Id.* at 57-58.

{18} Justice Brennan found that because no exception to the rule of announcement was present under the facts in *Ker,* the search was unreasonable and the evidence should have been suppressed. He reasoned that the officers' general knowledge, gained through their experience with drug dealers, did not satisfy the constitutional test for application of the destruction of evidence exception: "The subjective judgment of the police officers cannot constitutionally be a substitute for what has always been considered a necessarily objective inquiry, namely, whether circumstances exist in the *particular* case which allow an unannounced police entry." *Id.* at 63 (footnote omitted).

{19} Lower federal courts have applied the principles of *Ker* to searches under a warrant. In *United States v. Francis,* 646 F.2d 251 (6th Cir.), *cert. denied,* 454 U.S. 1082, 70 L. Ed. 2d 616, 102 S. Ct. 637 (1981), the court summed up the state of the law:

> Although the Supreme Court has not addressed the issue [of whether the Fourth Amendment requires officers executing a search warrant to knock, announce, and be refused admittance before entering] many federal courts have. . . . Though each case by itself is less than compelling, their conclusion has been unanimous: the Fourth Amendment forbids the unannounced, forcible entry of a dwelling in the absence of exigent circumstances.

Id. at 257-58 (footnote omitted); *see also Rivera v. United States,* 928 F.2d 592, 606 (2d Cir. 1991) (holding Fourth Amendment requires officers executing search warrant to make a reasonable effort to provide actual, not merely *pro forma,* notice of their identity and purpose); *United States v. Andrus,* 775 F.2d 825, 844 (7th Cir. 1985) (holding that the "Fourth Amendment requires that the state officers' conduct in enforcing a search warrant be reasonable"); *United States v. Baker,* 638 F.2d 198, 202 n.7 (10th Cir. 1980) (knock-and-announce rule incorporated "to some extent" in Fourth Amendment). *But see United States v. Sagaribay,* 982 F.2d 906, 910 (5th Cir.) (knock-and-announce rule only a factor in determining reasonableness but not an inflexible part of the Fourth Amendment), *cert. denied,* 114 S. Ct. 160 (1993); *United States v. Nolan,* 718 F.2d 589, 600-02 (3d Cir. 1983) (holding that the Fourth Amendment and the federal knock-and-announce statute overlap, but do not coincide). Thus, at the very least it appears that the rule of announcement is an important component of a reasonable search under the Fourth Amendment.

{20} *New Mexico law.—The New Mexico Constitution embodies a knock-and-announce requirement.* In New Mexico, the ultimate question in all cases regarding alleged search and seizure violations is whether the search and seizure was reasonable. *State v. Martinez,* 94 N.M. 436, 440, 612 P.2d 228, 232, *cert. denied,* 449 U.S. 959, 66 L. Ed. 2d 226, 101 S. Ct. 371 (1980). This rule of law is best served by the application of certain objective criteria in deciding the reasonableness of any search and seizure. The application of objective criteria in determining whether officers have violated the knock and announce requirements will secure the right of each citizen to be free from unreasonable searches and seizures and, at the same time, will provide law enforcement with clear standards of conduct.

{21} New Mexico has no statute setting forth the requirements of announcement prior to a forcible entry when executing a search warrant nor

do we have a deep history of common-law decisions on the question. Yet, recent opinions from our intermediate appellate court have suggested that Article II, Section 10 incorporates a knock-and-announce requirement. In *State v. Baca,* 87 N.M. 12, 528 P.2d 656 (Ct. App.), *cert. denied,* 87 N.M. 5, 528 P.2d 649 (1974), the Court of Appeals sought guidance from the common law in determining whether the New Mexico constitutional provision prohibiting unreasonable searches placed limitations on the method of entry that police employ when executing a search warrant. After quoting the text of Article II, Section 10, the Court observed:

> We are obliged to look to the common law to determine what procedure must be followed prior to a forced entry. We recognize that some uncertainty exists as to common law requirements. Our view is that an officer, prior to forcible entry, must give notice of authority and purpose, and be denied admittance. This is a general standard. Noncompliance with this standard is justified if exigent circumstances exist.

Id. at 13-14, 528 P.2d at 657-58 (citations omitted). Because the circumstances in *Baca* suggested exigencies sufficient to justify forcible entry, the Court concluded that "the defendant's constitutional right to freedom from unreasonable search and seizure was not violated." *Id.* at 14, 528 P.2d at 658.

{22} We believe that the rule of announcement in *Baca* rests on state constitutional grounds. The requirement that officers executing a search warrant announce their identity and purpose and be denied admission is a critical component of a reasonable search under Article II, Section 10.[6] As we stated in *State v. Gutierrez,* 116 N.M. 431, 444, 863 P.2d 1052, 1053 (1993), "we observe that Article II, Section 10 expresses the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions." The announcement requirement advances important Article II, Section 10 values by preventing needless destruction of private property, eliminating unnecessary intrusions upon privacy, and reducing the risk of violence both to police and occupants. Recognizing that the rule of announcement has a basis in our constitution "best effectuates the constitutional proscription of unreasonable searches and seizures." *See id.* at 863 P.2d at 1067. Thus, if an officer attempts to execute a search warrant without complying with the announcement rule and exigent circumstances are not present, the entry is unreasonable and the officer commits an "unwarranted governmental intrusion" in violation of the accused's Article II, Section 10 rights.

{23} We are aware that courts and commentators have criticized elevation of the common-law rule to constitutional status. *See State v. Valentine,* 264 Ore. 54, 504 P.2d 84 (Or. 1972) (in banc), *cert. denied,* 412 U.S. 948, 37 L. Ed. 2d 1000, 93 S. Ct. 3001 (1973); Sonnenreich & Ebner, *supra,* at 647 (arguing that elevation of rule of announcement to constitutional dimension in *Ker* was "historically unsound"). In *Valentine,* the court reasoned that "the interest of the momentary protection of the privacy of the householder . . . [is] not of sufficient substance to rise to constitutional stature and require the exclusion of otherwise competent evidence." 504 P.2d at 89. If the constitutional requirement that searches be "reasonable" reaches no more than privacy—the right to be let alone—the rule of announcement does little to protect that privacy. *See id.* at 87. As Sonnenreich and Ebner observe: "Once identity and purpose are stated,

[6] As the law in New Mexico stands now, if an officer does not knock and announce his presence prior to entering a dwelling, the entry presumptively is unreasonable because *Baca* states that "prior to forcible entry, [an officer] *must* give notice of authority and purpose, and be denied admittance." 87 N.M. at 13, 528 P.2d at 657 (emphasis added). If an officer does not knock and announce prior to forcible entry and exigent circumstances are not present, the fruits of that search would be excluded as a violation of the general constitutional reasonableness requirement. In essence, *Baca* gives the knock and announce rule constitutional significance because failure to comply with the rule leads to exclusion of the evidence under the general reasonableness requirement. The effect of recognizing that the rule exists on a constitutional level does not change the current status of the law and it emphasizes the Court's strong belief in the protection of individual privacy and in the reasonable execution of warrants.

entry must always be permitted; if permission is denied, or even delayed for an inordinate amount of time, entry may be forced, provided the officer has a valid purpose in gaining admission." Sonnenreich & Ebner, *supra,* at 647. Under this view, privacy interests are limited to a few seconds in which to respond to the officer's call.

{24} Under Article II, Section 10, however, the concept of reasonableness cannot be defined so narrowly. "Reasonableness" is given life by the factual matrix in which events take place. Justice Frankfurter's observations on this point are particularly apt:

> To say that the search must be reasonable is to require some criterion of reason. It is no guide at all . . . to say that an "unreasonable search" is forbidden—that the search must be reasonable. What is the test of reason which makes a search reasonable? The test is the reason underlying and expressed by the Fourth Amendment: the history and the experience which it embodies and the safeguards afforded by it against the evils to which it was a response.

United States v. Rabinowitz, 339 U.S. 56, 83, 94 L. Ed. 653, 70 S. Ct. 430 (1950) (Frankfurter, J., dissenting), *overruled by Chimel v. California,* 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969) (accepting Justice Frankfurter's language as the rule). We agree that the knock-and-announce criterion is vital to the constitutional constraint against unreasonable search and seizure; and we agree with the many federal courts that construe the rule of announcement as being constitutionally based. Article II, Section 10 embodies the disparate values of privacy, sanctity of the home, occupant safety, and police expedience and safety. We believe, therefore, that the knock-and-announce criterion is more than just another circumstance to be considered in evaluating the reasonableness of the execution of a warrant.

{25} In addition to the federal cases cited construing the rule of announcement in *Ker* as part of the Fourth Amendment, several state courts view compliance with the rule of announcement as part of the state constitutional proscription against unreasonable searches and seizures. *See, e.g., State v. Dusch,* 259 Ind. 507, 289 N.E.2d 515, 517 (Ind. 1972) (holding that state constitution requires announcement of authority before conducting search); *State v. Sakellson,* 379 N.W.2d 779, 784 (N.D. 1985) (holding that unannounced entry violates state constitution if the entry is not reasonable "under special circumstances"). In *Dusch,* the Indiana Supreme Court recognized that eight of the nine justices in *Ker* believed the Fourth Amendment embodied an announcement of authority requirement. 289 N.E.2d at 516. The court also found that cases from its jurisdiction indicated the rule of announcement was part of the constitutional proscription against unreasonable searches and seizures. *Id.* at 517. Based on this, the court held that the rule of announcement was required by the Indiana Constitution. *Id.* We also rely on *Ker* and on past case law from our jurisdiction, *see, e.g., Baca,* 87 N.M. at 12, 528 P.2d at 656, to support our belief that the New Mexico Constitution requires law enforcement personnel to knock and announce their authority when executing a warrant.

{26}—*Constitutional knock-and-announce requirement to be balanced against countervailing exigencies.* Noncompliance with the rule of announcement is not per se violative of Article II, Section 10. The essence of the reasonableness requirement of Article II, Section 10 does not require rigid adherence to the rule. The interests served by the rule of announcement must be balanced against potentially countervailing, legitimate government interests. In the context of search and seizure, a balance must be struck against the backdrop of probable cause to search. The right of the officers to enter the premises matures the moment a detached and neutral judicial officer determines that there is probable cause to search the premises. From that moment, governmental interests in the expeditious and safe execution of a search warrant are legitimate and strong. An otherwise legal search pursuant to a warrant is not made unreasonable by an unannounced entry when privacy and occupant safety interests are minimal and the interests of law enforcement are strong. Thus, partial compliance or

non-compliance with the rule of announcement may be excused if exigent circumstances exist.

{27} We expressly endorse the widely accepted, general exception to the rule of announcement based on an officer's objectively reasonable belief that full or partial compliance with the rule of announcement would increase the risk of danger to the officers effectuating the warrant. *See* 2 Wayne R. LaFave, *Search and Seizure* § 4.8(e) (2d ed. 1987 & Supp. 1994) (discussing danger to person exceptions).[7] The risk of peril exception is consistent with the balance of interests that we have identified above. The state's interests in safe execution of a warrant, when coupled with specific knowledge that the occupants of the place to be searched pose a serious risk to the officers, outweigh the occupants' interests in privacy of the home.

{28} Exigent circumstances, while measured at the time of the entry, may be established by facts known to the officers prior to entry. *See People v. Dumas,* 9 Cal. 3d 871, 512 P.2d 1208, 1213, 109 Cal. Rptr. 304 (Cal. 1973) (in bank) (stating that "unannounced entry may be excused on the basis of information received before reaching the location at which entry is to be effected when the information reasonably leads the officer to believe that compliance would increase his peril or frustrate the arrest"); *Sanchez,* 88 N.M. at 404, 540 P.2d at 1293 (validating unannounced entry based on facts known to the officers beforehand). To hold otherwise, especially when the exception is based on peril to the officers or occupants, makes little practical sense. If the police, through reliable sources, obtain in advance specific information suggesting that the particular defendant will likely respond with violence to a search or arrest warrant, those facts are probative of whether the officers reasonably believed that compliance with the rule of announcement would increase peril to themselves.

{29} One inevitable question that must be addressed is whether the mere ownership or possession of firearms is insufficient to give rise to a risk of peril exigency. In *Dumas,* the court stated:

> Police knowledge of the existence of a firearm excuses compliance with announcement requirements only where the officers reasonably believe the weapon will be used against them if they proceed with the ordinary announcements. This belief must be based on specific facts and not on broad, unsupported presumptions.

512 P.2d at 1213 (citations omitted). In *State v. Williams,* 168 Wis. 2d 970, 485 N.W.2d 42 (Wis. 1992), however, the Wisconsin Supreme Court criticized the implicit belief of the court in *Dumas* that individuals are more likely to shoot unknown intruders and less likely to shoot identified police officers, and stated that the *Dumas* rationale "is outdated as applied to armed drug dealers in the 1990s." *Id.* at 47. The *Williams* court believed that "guns are tools of the illegal drug trade" and concluded that "a person in possession of both firearms and large quantities of illegal drugs poses a significant threat to the safety of law enforcement officers." *Id.* at 48. Based on this, the *Williams* court concluded that the mere presence of firearms and drugs together gives rise to exigent circumstances because of the "violence associated with drug trafficking today." *See id.* at 47-48.

{30} We do not believe that giving notice and announcement of purpose necessarily is more compelling when an officer knows that a suspect possesses weapons. *Cf. Dumas,* 512 P.2d at 1213 (stating that compliance with rule is more compelling when officers are aware of weapons). We do believe, however, that our constitution requires an officer to have knowledge of the specific individual's propensity to use violence before an unannounced entry would be considered

[7] We recognize that other circumstances might create sufficient exigency to justify noncompliance with the rule of announcement. *See Baca,* 87 N.M. at 14, 528 P.2d at 658 (stating that officer peril, fleeing suspect, and possible destruction of evidence are examples of exigent circumstances); *United States v. Dohm,* 597 F.2d 535, 538 (5th Cir. 1979) (stating that if suspect knows of officer's presence and purpose before compliance with knock and announce rule, then officer need not comply with rule). We list these possible circumstances to place the term "exigency" in perspective, but because we are not faced with these factual situations in the current case, we do not fully address their validity.

reasonable. General knowledge regarding the propensity of armed drug dealers is not sufficient to excuse compliance with announcement requirements. *See People v. Gastelo,* 67 Cal. 2d 586, 432 P.2d 706, 708, 63 Cal. Rptr. 10 (Cal. 1967). "Exceptions to the entry requirement must be founded on particularity and not on generality." *Dusch,* 289 N.E.2d at 518.

{31} The requirement of specificity is to be liberally construed because direct evidence of a suspect's propensity rarely will be available. Specific evidence that might give the officers reason to believe that a particular suspect known to possess weapons presents a danger to the officers may be factored into the reasonableness determination. Thus, for example, knowledge that a suspect owns weapons and knowledge that the suspect has committed a crime of violence may be sufficient to reasonably conclude that the suspect is likely to use those weapons. The same might be true if the police have knowledge that the suspect possesses a large cache of illegal or unusually dangerous weapons, or that the suspect possesses weapons coupled with other circumstances tending to show violent or unpredictable behavior.

{32} The method of entry was reasonable as a matter of New Mexico Constitutional law. In reviewing the risk of peril exception we follow the view that endorses an objective test of whether, under the facts established, a reasonable, well-trained, and prudent police officer would believe that full or partial compliance with the rule of announcement would create or enhance the danger to the entering officers. *See State v. Ford,* 310 Ore. 623, 801 P.2d 754, 763 (Or. 1990). In so doing, we consider all of the circumstances as found or impliedly found by the trial court to be present at the time of entry.

{33} Here, the trial court entered no findings of fact. In denying the motion to suppress in an oral order from the bench, the trial court judge only stated:

> It is my finding and my determination that the officers had a reasonable cause for the method of entry chosen based on the information related to them by the various officers who had been in charge of collecting information, that they had a reasonable cause to believe that they might be in jeopardy if they waited a length of time for announcement and answer. So the breach and the entry was justified in my determination.

Thus, under a de novo review, we must draw from the record to derive findings based on reasonable facts and inferences and determine whether those facts and inferences support the conclusion reached by the court. The record fully supports a finding that shortly before the search Detective Littlejohn supplied the SWAT team members with the following information:

1. Attaway was believed to be both an amphetamine user and a dealer of substantial quantity;

2. There was an outstanding California warrant for Attaway's arrest;

3. Attaway had been convicted of weapons and drug charges in the past;

4. Attaway possessed a large arsenal of weapons including an automatic weapon, two sawed-off shotguns, a couple of rifles, and numerous handguns; and

5. Attaway had threatened police officers.[8]

In addition, it is uncontroverted that the officers did knock, announce their authority, and

[8] We disagree with the conclusion of the Court of Appeals that it was not clear whether the officers who executed the warrant knew of the threats Attaway had made against police officers. We have reviewed the record, and conclude that the following uncontroverted colloquy establishes to our satisfaction that Littlejohn informed the SWAT team members of the threats:

The Court: With regard to the generic threats toward police officers, what did you advise the SWAT team officers?

Littlejohn: I told the police officers that I had information from an informant that Mr. Attaway had made specific threats against police officers, myself included.

Therefore, the threats can be used as evidence that exigent circumstances did exist that gave the officers a reasonable belief that their lives would be in peril if they waited any longer than ten to fifteen seconds.

wait a short period of time before entering the residence. Finally, Officer Samuel Haddy, commander of the SWAT team, testified that after announcement of purpose and authority, the team was in an exposed and vulnerable position on the front porch of the Attaway home and there was no place to seek "cover" from any hostile action.

{34} Given these facts, we are satisfied that the ten to fifteen second pause in this case was sufficient time for the officers to wait before executing their forcible entry into the house. In assessing these factors, Officer Haddy testified that "I fully expected to be involved in an armed confrontation due to the fact of the past arrests that we were shown for weapons and narcotics and the fact that the gentleman was wanted in California and he had made threats against police officers." The time interval, while extremely short for 6:00 A.M. on a Saturday morning, was sufficiently long given the highly specific indicia that Attaway posed a menace to police executing the warrant. Therefore, we hold that the method of entry was reasonable under Article II, Section 10 of the New Mexico Constitution.

{35} The entry was reasonable under federal law. For the same reasons, we are satisfied that the Fourth Amendment reasonableness requirement was not violated in this case. The Supreme Court has not expressly recognized that an officer's reasonable apprehension of peril will excuse noncompliance with any knock-and-announce rule that might exist under the Fourth Amendment. *See Ker,* 374 U.S. at 39-41. As we noted, however, lower federal courts have held with substantial uniformity that the Fourth Amendment embodies a knock-and-announce requirement and its attendant exceptions. *See, e.g., Rivera,* 928 F.2d at 606; *Andrus,* 775 F.2d at 844; *Francis,* 646 F.2d at 257-58; *Baker,* 638 F.2d at 202 n.7; *cf. Minnesota v. Olson,* 495 U.S. 91, 100, 109 L. Ed. 2d 85, 110 S. Ct. 1684 (1990) (endorsing state court statement that risk of danger is an exigent circumstance that may justify warrantless entry to arrest or search).

{36} Federal courts, under circumstances that are similar and perhaps less compelling have found no violation of the federal knock-and-announce statute requiring exclusion of evidence. *See, e.g., United States v. Nabors,* 901 F.2d 1351, 1354 (6th Cir.) (holding suppression not required under federal statute when officers waited only briefly after announcement before forcible entry when police knew that defendant was suspected of trafficking in narcotics, was a felon in possession of "an array of firearms," and wore a bullet proof vest), *cert. denied,* 498 U.S. 871, 112 L. Ed. 2d 154, 111 S. Ct. 192 (1990); *see also* Marvin O. Meier, Annotation, *What Constitutes Violation of 18 USCS § 3109 Requiring Federal Officer to Give Notice of His Authority and Purpose Prior to Breaking Open Door or Window or Other Part of House to Execute Search Warrant,* 21 A.L.R. Fed. 820, 856-61, 867-77 (1974 & Supp. 1993) (citing cases applying "apprehension of peril" exception and cases in which police announced both authority and purpose before forcible entry). Therefore, we hold that the method of entry was reasonable under the Fourth Amendment.

{37} *Conclusion.* For all of the foregoing reasons, we affirm that part of the judgment of the Court of Appeals concluding that the method of entry was reasonable under the facts of this case. In addition, we adopt the reasoning of the Court of Appeals on all other points raised in the petition and, accordingly, affirm the judgments of conviction in their entirety.

{38} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

STANLEY F. FROST,
Justice

JOSEPH F. BACA,
Justice (specially concurring)

SPECIAL CONCURRENCE

BACA, Justice (specially concurring).

{39} While I concur in the foregoing opinion affirming Attaway's conviction, I write specially

to express my misgivings regarding the majority's elevation of the knock and announce rule to constitutional status. I also write separately to emphasize that this Court, when faced with the factual reality of the violence associated with the drug trade, should strongly consider the factors discussed in *Williams* when determining the reasonableness of no-knock warrants.

{40} The majority, in my opinion, goes further than it should in elevating the knock and announce requirement to constitutional status. The Fourth Amendment prohibits only unreasonable searches. *Bell v. Wolfish,* 441 U.S. 520, 558, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. *Id.* at 559. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. *Id.* In this case, Defendant argues that his Fourth Amendment right was violated because the police executed a search of his home without first knocking, announcing their presence, and allowing adequate time for Defendant to answer the door. Our analysis must be to determine whether the conduct of the police officers was reasonable in light of the facts known to them at the time they executed the warrant.

{41} Similarly, under the New Mexico Constitution, Article II, Section 10, the test for determining whether there has been a constitutional violation is whether a search and seizure was unreasonable. Although the opinion, in footnote 6, attempts to explain its rationale for elevating knock and announce requirements to constitutional status, I feel it fails to be convincing. The sole basis for elevating the knock and announce requirement to constitutional status, as far as I can tell, is that in *State v. Baca* this Court held that "an officer, prior to forcible entry, must give notice of authority and purpose, and be denied admittance." 87 N.M. 5, 13 528 P.2d 649, 657 (Ct. App.), *cert. denied,* 87 N.M. 5, 528 P.2d 649 (1974). The opinion fails to point out, however, that preceding this statement the *Baca* court stated that "New Mexico has neither statute nor decision stating what is 'unreasonable' in circumstances such as these." *Id.* The *Baca* court also qualified its view that an officer must give notice, authority and purpose and then be denied admittance by stating that this is a "general standard" *id.* and that "the reasonableness of each search and seizure is to be decided upon its own facts and circumstances in light of these general standards." *Id.* at 14, 528 P.2d at 658. Thus, the *Baca* court actually held that violations of New Mexico Constitution, Article II, Section 10 are to be determined based on a reasonableness standard, and did not, as the opinion attempts to explain, elevate the knock and announce requirement to constitutional status.

{42} I also find that the opinion underemphasizes the factual realities of today's drug trade. I believe that this court should strongly consider factors as outlined in *State v. Williams,* 168 Wis. 2d 970, 485 N.W.2d 42 (Wis. 1992), when determining the reasonableness of law enforcement actions in executing a search warrant. The Wisconsin Supreme Court found that

> the violence associated with drug trafficking today places law enforcement officers in extreme danger. Much of the fuel for such violence stems from street gangs and the profitability associated with dealing illegal drugs. . . . Bitter experience has illustrated that guns are tools of the illegal drug trade. Therefore, we conclude . . . that a person in possession of both firearms and large quantities of illegal drugs poses a significant threat to the safety of law enforcement officers attempting to arrest the suspected drug dealer and seize the illicit drugs. Such volatile circumstances are sufficient to constitute "exigent circumstances" justifying an unannounced entry by the officers.

Williams, 485 N.W.2d at 47-48. Given the realities of the drug trade, it may be requiring too much to insist that officers executing a warrant for large quantities of illegal drugs and large quantities of firearms from suspected drug dealers should specifically know of the suspects' violent propensity before executing a no-knock

warrant. Our determination should be whether the officers' conduct was objectively reasonable. Needless exposure of police to the violence and death commonly associated with the drug trade today and protection of citizens' rights to be safe and secure in their homes can be melded. This acknowledgement of the realities of the drug trade does not violate the Fourth Amendment's nor New Mexico's constitutional requirement that searches and seizures be reasonable.

{43} I concur in that portion of the opinion that affirms Attaway's conviction.

JOSEPH F. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-012

Filing Date: February 2, 1994

Docket No. 20,193

FRANK MARTIN CAMPOS,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Alvin F. Jones, District Judge

Sammy J. Quintana, Chief Public Defender,
Hugh W. Dangler, Assistant Public Defender,
Santa Fe, NM

for Petitioner.

Tom Udall, Attorney General,
Katherine Zinn, Assistant Attorney General,
Santa Fe, NM

for Respondent.

OPINION

RANSOM, Chief Justice.

{1} Frank Martin Campos was convicted of illegal possession of heroin under NMSA 1978, Section 30-31-23(B)(4) (Repl. Pamp. 1989). Campos appealed his conviction to the Court of Appeals, which affirmed. *State v. Campos,* 113 N.M. 421, 827 P.2d 136 (Ct. App. 1991). This Court issued its writ of certiorari to address whether, under Article II, Section 10 of the New Mexico Constitution, the propriety of warrantless arrests in public places is dependent on exigent circumstances. For a warrantless arrest to be reasonable it must be based upon both probable cause and sufficient exigent circumstances. Because sufficient exigent circumstances were not present in this case, we reverse.

{2} *Facts and proceedings.* On December 7, 1989, Officer Luis Lara received information from a confidential informant that Campos would be conducting a drug transaction the following morning. The informant told Officer Lara that Campos would be driving either a silver and black pickup truck or a small blue car down one of two routes to a location on East Deming Street in Roswell at about 8:00 a.m. Acting on this information, Officer Lara set up a surveillance team in the area. Officer Lara had been investigating Campos for approximately one year, knew that Campos used vehicles like those described by the informant, and believed that Campos engaged in illegal drug activity.

{3} On December 8, a member of the surveillance team observed Campos approaching the location described by the informant in a small blue car. The officers stopped Campos, ordered him out of his car, and arrested him without a warrant. The officers searched both Campos and his car and discovered seven packages of heroin. Campos was charged with possession of heroin with intent to distribute. Prior to trial, Campos moved to suppress all of the evidence seized pursuant to the warrantless arrest and search. The trial court denied Campos's motion. Campos plead guilty to possession of heroin but reserved his right to appeal.

{4} The legislature has authorized warrantless arrests in situations like this. New Mexico statutory law authorizes an officer to:

> make arrests without warrant for any offense under the Controlled Substance Act [NMSA 1978, Sections 30-31-1 to -41 (Repl. Pamp. 1989)] committed in his presence, or if he has probable cause to believe that the person to be arrested has committed

> or is committing a violation of the Controlled Substances Act which may constitute a felony. . . .

NMSA 1978, Section 30-31-30(B) (Repl. Pamp. 1989). "Probable cause requires that the officer believe, and have good reason to believe, that the person he arrests has committed [or is committing] a felony." *State v. Jones,* 96 N.M. 14, 15, 627 P.2d 409, 410 (1981). In this case, the record states clearly that a credible informant supplied Officer Lara with accurate information regarding the Campos car, path of travel, time of travel, and possession of heroin. In addition, Officer Lara had been investigating Campos for some time and strongly believed that Campos was selling heroin. Therefore, Officer Lara had probable cause to believe that Campos was committing a violation of the Controlled Substances Act and had statutory authority to make a warrantless arrest.

{5} All warrantless arrests must comply with the "reasonableness" component of Article II, Section 10 of the New Mexico Constitution. Our inquiry, however, cannot end with a simple determination of probable cause. We must remember that "the people shall be secure from unreasonable searches and seizures. . . ." N.M. Const. art. II, § 10. We consistently have stated that "in all cases [regarding alleged search and seizure violations] the ultimate question is whether the search and seizure was reasonable." *State v. Martinez,* 94 N.M. 436, 440, 612 P.2d 228, 232, *cert. denied,* 449 U.S. 959, 66 L. Ed. 2d 226, 101 S. Ct. 371 (1980). We recently expanded on this concept in *State v. Attaway,* 117 N.M. 141, 870 P.2d 103 (1994), in which we said: "The myriad rules, exceptions, and exceptions to exceptions that flourish in the jurisprudence of search and seizure are often no more than factual manifestations of the constitutional requirement that searches and seizures be reasonable." *Id.* at 145, 870 P.2d at 107. Therefore, we must examine whether the warrantless arrest was reasonable under Article II, Section 10 of our constitution.

{6} -*Statute gives warrantless arrest presumption of reasonableness.* In *United States v. Watson,* 423 U.S. 411, 46 L. Ed. 2d 598, 96 S. Ct. 820 (1976), the Supreme Court addressed the question whether warrantless arrests based on statutory authority are reasonable. The Court held that a federal statute authorizing postal workers to effect warrantless arrests based only on probable cause constituted legislative judgment that such warrantless arrests are reasonable. *Id.* at 415-16. The determination of reasonableness did not change even though the arresting officers in *Watson* were aware that the defendant had committed the crime six days before he was arrested and could have secured an arrest warrant. *Id.* at 412-13. Following this reasoning, Section 30-31-30(B) could represent legislative judgment that it is reasonable under Article II, Section 10 for law enforcement officers to make warrantless drug arrests provided they have probable cause.

{7} We have long held, however, that statutory provisions regarding warrants must be considered *in pari materia* with Article II, Section 10 of our constitution. *See State v. Trujillo,* 33 N.M. 370, 373, 266 P. 922, 923-24 (1928). Section 30-31-30(B) cannot establish conclusively that an arrest based on such authority comports with the constitutional protection afforded by Article II, Section 10. Warrantless arrests made under the authority of the statute may be presumed reasonable but that presumption may be rebutted under our interpretation of what is constitutional. To give the statute conclusive effect would be to abdicate our duty as the primary interpreters of our constitution and would give the legislative branch the power to define constitutional provisions in violation of separation of powers. *See Watson,* 423 U.S. at 455 (Marshall, J., dissenting) (criticizing the majority's decision as according "constitutional status to a distinction that can be readily changed by legislative fiat").

{8} *Reasonableness under Article II, Section 10 of the New Mexico Constitution.* The question of whether exigent circumstances are necessary before warrantless public arrests are constitutionally permissible is an issue of first impression in our Court. Although we have stated the general rule regarding warrantless arrests based on probable cause several times, *see, e.g., Jones,* 96 N.M.

at 15, 627 P.2d at 410, we have never fully addressed the issue of whether exigent circumstances are required.

{9} -*Federal law.* The U.S. Supreme Court has held that warrantless arrests of felons based on probable cause are constitutionally permissible even without exigent circumstances because "the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances. . . ." *Watson,* 423 U.S. at 423. In essence, the federal rule is that a warrantless public arrest of a felon based on probable cause will be upheld regardless of whether the officer could have secured an arrest warrant. *But cf. Payton v. New York,* 445 U.S. 573, 383 (1980) (stating that probable cause and exigent circumstances both needed for warrantless arrest in individual's home).

{10} -*New Mexico law.* We recently have shown our willingness to accord defendants more protection under our search and seizure provision than the federal courts accord under the Fourth Amendment. *See Attaway,* 117 N.M. 141, 870 P.2d 103; *State v. Gutierrez,* 116 N.M. 431, 863 P.2d 1052 (1993); *State v. Cordova,* 109 N.M. 211, 784 P.2d 30 (1989). In light of these decisions, we must decline to adopt the blanket federal rule that all warrantless arrests of felons based on probable cause are constitutionally permissible in public places. We do this because we believe that each case must be reviewed in light of its own facts and circumstances. *Attaway,* 117 N.M. at 145, 870 P.2d at 107 (stating that it is the duty of appellate courts to "shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context"). Therefore, we will not assume that warrantless public arrests of felons are constitutionally reasonable.

{11} Campos urges this Court to adopt a rule that a warrantless arrest is justified only when, in addition to probable cause, exigent circumstances are present that make obtaining a warrant unreasonable. "Exigent circumstances means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." *State v. Copeland,* 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct. App.), *cert. denied,* 104 N.M. 702, 726 P.2d 856 (1986). It is the State's position that neither the New Mexico Constitution nor New Mexico case law require anything more than probable cause to justify a felony arrest outside of a home.

{12} In *State v. Jones* this Court found that, based upon partial corroboration of an informant's tip, officers had probable cause to believe that the defendant had been involved in several burglaries. 96 N.M. at 16, 627 P.2d at 411. The Court did not discuss exigent circumstances although it was evident from the facts of the case that some exigency existed. *See id.* 15, 627 P.2d at 410 (while verifying an anonymous tip, officers observed defendant leaving area in a car). Similarly, in *State v. Garcia,* 100 N.M. 120, 126, 666 P.2d 1267, 1273 (Ct. App.), *cert. denied,* 100 N.M. 192, 668 P.2d 308 (1983), the Court of Appeals found probable cause to support a warrantless arrest and the facts of the case show that some exigency could be implied (defendant attempted to flee). As a matter of fact, in every case that has been drawn to our attention, some evidence of exigency has been found or could be implied to support the warrantless arrest. *See, e.g., Rodriquez v. State,* 91 N.M. 700, 701, 580 P.2d 126, 127 (1978) (officers observed crime in progress and saw defendant holding a rifle), *overruled on other grounds by State v. Martinez,* 94 N.M. 436, 439, 612 P.2d 228, 231 (1980); *State v. Deltenre,* 77 N.M. 497, 500, 424 P.2d 782, 784 (1966) (officers, acting on information that defendant was packaging marijuana for sale, heard defendants running around house after officers announced their presence), *cert. denied,* 386 U.S. 976, 18 L. Ed. 2d 136, 87 S. Ct. 1171 (1967), *overruled on other grounds by State v. Martinez,* 94 N.M. 436, 439, 612 P.2d 228, 231 (1980); *State v. Kaiser,* 91 N.M. 611, 612, 577 P.2d 1257, 1258 (Ct. App.) (stating that arrest was lawful because officers suspected train passengers were transporting drugs and train was leaving, but subsequent warrantless search of luggage was unlawful because

sufficient exigent circumstances did not exist), *cert. denied,* 91 N.M. 491, 576 P.2d 297 (1978).

{13} While most New Mexico cases tend to state only that warrantless arrests must be supported by probable cause, some cases hold that both probable cause and exigent circumstances are required. In *Martinez,* 94 N.M. at 440, 612 P.2d at 232, this Court held that a warrantless arrest based upon information received by a radio dispatch must be supported by probable cause and exigent circumstances. Also, in *In re One 1967 Peterbilt Tractor,* 84 N.M. 655-56, 506 P.2d 1199, 1202-03 (1973), this Court stated that warrantless searches may be undertaken when an officer has probable cause and exigent circumstances are present. We can find no case in which the results would have differed had there been a rule requiring more than probable cause to justify a warrantless arrest.

{14} We strongly favor the warrant requirement. *See Cordova,* 109 N.M. at 216, 784 P.2d at 35 (stating that principles of warrant requirement are firmly rooted in constitution). Our constitution preserves "the fundamental notion that every person in this state is entitled to be free from unwarranted governmental intrusions." *Gutierrez,* 116 N.M. at 444, 863 P.2d at 1065. Thus, our constitution and case law lead us to hold that for a warrantless arrest to be reasonable the arresting officer must show that the officer had probable cause to believe that the person arrested had committed or was about to commit a felony and some exigency existed that precluded the officer from securing a warrant. If an officer observes the person arrested committing a felony, exigency will be presumed.

{15} *Standard in practice.* To set forth a clear rule for police officers, we limit our inquiry in reviewing warrantless arrests to whether it was reasonable for the officer not to procure an arrest warrant. *See Watson,* 423 U.S. at 444 (Marshall, J., dissenting) (stating that test adopted by majority inappropriately focused only on whether arrest was reasonable, disregarding the warrant requirement entirely). We understand that an officer may wish to forego an arrest temporarily in order to gather evidence, even though legally he may have probable cause to obtain a warrant. We do not wish to interfere unduly with the officer's investigation and as a matter of policy would prefer that officers have more rather than less evidence before making arrests. We will not hesitate, however, to find a warrantless arrest unreasonable if no exigencies existed to excuse the officer's failure to obtain a warrant.

{16} *The arrest of Campos without a warrant was unreasonable.* The record clearly supports a finding that Officer Lara had probable cause to arrest Campos. We will not disturb the finding of probable cause made by both the trial court and the Court of Appeals. Our inquiry thus turns to whether it was reasonable for Officer Lara not to secure a warrant. According to the facts presented, Officer Lara had probable cause to obtain a warrant on December 7 for the arrest of Campos on December 8. We cannot say that it was unreasonable for Officer Lara to continue his investigation of Campos without securing a warrant. As stated above, this Court does not wish to interfere unduly with an investigation by requiring officers to secure a warrant the moment they have probable cause.

{17} We cannot find, however, sufficient exigent circumstances that would make Officer Lara's warrantless arrest reasonable. The type of "emergency situation" defined in *Copeland* is not present in this case. The only exigency that the record might support is the fact that Campos was driving an automobile. We previously have held that it is not practical to secure a warrant when an automobile is involved. *See, e.g., State v. Capps,* 97 N.M. 453, 455-56, 641 P.2d 484, 486-87, *cert. denied,* 458 U.S. 1107, 73 L. Ed. 2d 1368, 102 S. Ct. 3486 (1982). Yet, Officer Lara knew on December 7 that Campos would be driving an automobile and cannot now reasonably argue that, on December 8, he was faced with an "emergency situation." If we were to find that Campos's use of an automobile constituted an exigent circumstance in this case, we effectively would make the *Copeland* definition meaningless and erode the constitutional right to be free from unreasonable searches and seizures. Officer Lara has not provided good reason for failing to procure a warrant for Campos's arrest because Lara expected

Campos to be driving under the exact scenario giving rise on the previous day to probable cause. Therefore, we find that the arrest and subsequent search were unreasonable.

{18} *Conclusion.* There not having been sufficient exigent circumstances to make the warrantless arrest of Campos reasonable, Campos's conviction for possession of heroin is reversed and this case is remanded to the district court for proceedings consistent with this opinion.

{19} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

SETH D. MONTGOMERY,
Justice

STANLEY F. FROST,
Justice

Justice Richard E. Ransom

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-013

Filing Date: February 2, 1994

Docket No. 20,493

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

REYNALDO ORTEGA,

Defendant-Petitioner.

ORIGINAL PROCEEDINGS ON CERTIORARI
William J. Schnedar, District Judge

Sammy J. Quintana, Chief Public Defender,
Susan Roth, Assistant Appellate Defender,
Santa Fe, New Mexico,

for Defendant-Petitioner.

Tom Udall, Attorney General,
Max Shepard, Assistant Attorney General,
Santa Fe, New Mexico,

for Plaintiff-Respondent.

OPINION

RANSOM, Chief Justice.

{1} Reynaldo Ortega was convicted of illegal possession of heroin with intent to distribute under NMSA 1978, Section 30-31-20(A)(3) (Repl. Pamp. 1989). Ortega appealed his conviction to the Court of Appeals raising several issues, among which was whether exigent circumstances justified an officer's unannounced entry into Ortega's residence to execute a search warrant. The Court of Appeals found that exigent circumstances did justify the unannounced entry but reversed the conviction and remanded for a new trial because the search warrant was overbroad. *State v. Ortega,* 114 N.M. 193, 836 P.2d 639 (Ct. App. 1992). We granted Ortega's petition for a writ of certiorari to address the issue of exigent circumstances. We agree with the Court of Appeals that there were exigent circumstances justifying the unannounced entry, and we affirm.

{2} *Facts.* Some time prior to December 20, 1989, Officer Luis Lara received information from a confidential informant that Robert Jimenez was selling heroin out of his home. The informant told Officer Lara that Ortega, who was residing with Jimenez, was supplying Jimenez with the heroin and that the evidence would be destroyed if the occupants of the house knew that the police were coming. Officer Lara verified this information through other informants and secured a search warrant. The search warrant authorized an unannounced entry into Ortega's residence.

{3} At approximately 4:30 p.m. on December 20, Officer Lara and five to seven other officers went to the Jimenez residence to execute the search warrant. When they reached the house, they noticed several young children playing in the front yard. Lara testified at a suppression hearing that when the children noticed the police officers they started yelling "Cops! Cops!" and screaming. One child ran toward the front door of the house yelling "Cops! Cops!"

{4} Officer Lara followed the child toward the house. The child opened the screen door (the front door was already open) and ran into the house with Officer Lara following. As he entered, Officer Lara saw Ortega drop something onto the couch where he had been sitting and rush for the back door. Other officers apprehended Ortega before he could exit the house. Officers recovered the dropped item and determined that it was a bag of marijuana. The officers also recovered a pill bottle containing 2.082 grams of heroin near the location where Ortega had been sitting.

{5} It is uncontroverted that Officer Lara did not knock and announce his presence before entering the house. Ortega moved to suppress the evidence recovered from within the house, arguing that Officer Lara's failure to knock and announce violated Ortega's constitutional rights. The district court denied Ortega's motion, finding that the officers did not rely upon the "no-knock" authority in the warrant and that exigent circumstances existed that justified the officers' unannounced entry into the residence. The jury convicted Ortega of one count of possession of heroin with intent to distribute.

{6} *Standard for reviewing determination and sufficiency of exigent circumstances.* We examine determinations of exigent circumstances using a de novo standard of review. *State v. Attaway,* 117 N.M. at 141, 144, 870 P.2d at 103, 106 (1994). We review the sufficiency of exigent circumstances by determining whether "a reasonable, well-trained, and prudent police officer" could conclude that swift action was necessary. *See id.* at 153, 870 P.2d at 115; *State v. Sanchez,* 88 N.M. 402, 403, 540 P.2d 1291, 1292 (1975) (holding that exigent circumstances "must be evaluated from the point of view of a prudent, cautious and trained police officer"), *overruled in part on other grounds by Attaway,* 117 N.M. at 146, 870 P.2d at 108. "In all cases the ultimate question is whether the search and seizure was reasonable." *State v. Martinez,* 94 N.M. 436, 440, 612 P.2d 228, 232, *cert. denied,* 449 U.S. 959, 66 L. Ed. 2d 226, 101 S. Ct. 371 (1980).

{7} *Exigent circumstances based on destruction of evidence.* We agree with the cogent rationale expressed by Judge Chavez in his dissent below to the effect that the mere potential for destruction of evidence does not in itself give rise to any exigency. See *Ortega,* 114 N.M. at 201-02, 836 P.2d at 647-48. The federal courts and our state courts have long held that an unannounced entry is justified if, prior to entry, the officer has a reasonable belief that evidence is being or is about to be destroyed. *See Ker v. California,* 374 U.S. 23, 40-41, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963) (plurality opinion); *Sanchez,* 88 N.M. at 403, 540 P.2d at 1292. Since *Sanchez,* however, this Court has stated that the knock and announce rule is of constitutional dimension. *See Attaway,* 117 N.M. at 145-46, P.2d at 107-08.

{8} *The purpose of a search warrant is to prevent unreasonable invasions of the privacy rights of individuals. See Ker,* 374 U.S. at 39 (citing *People v. Maddox,* 46 Cal. 2d 301, 294 P.2d 6, 9 (Cal.) (in bank), *cert. denied,* 352 U.S. 858 (1956)). We hold these privacy rights in such high regard that we require that every warrant be supported by probable cause. *E.g., State v. Cordova,* 109 N.M. 211, 213, 784 P.2d 30, 32 (1989). Evidence seized pursuant to an invalid warrant will be excluded, even if the officers relied in good faith on the warrant. *E.g., State v. Gutierrez,* 116 N.M. at 431, 863 P.2d at 1052. However, once an officer establishes probable cause and secures a warrant, that officer has the right to enter the premises of the place to be searched. *E.g., Attaway,* 117 N.M. at 151, 870 P.2d at 113. The purpose of the search is to secure evidence that the officer has probable cause to believe exists. When a detached and neutral magistrate makes a determination that there is probable cause to support a search, that magistrate is making, in effect, a determination that the interests of law enforcement outweigh the privacy interests of the individual. The issue then becomes whether it was reasonable for the officer to make an unannounced entry into the premises. We stated in *Attaway* that "an otherwise legal search pursuant to a warrant is not made unreasonable by an unannounced entry when privacy and occupant safety interests are minimal and the interests of law enforcement are strong." *Id.* at, 151, 870 P.2d at 113.

{9} *Law enforcement officials have a strong interest in preserving evidence.* The interest is so strong that the legislature made tampering with evidence a crime punishable as a felony. *See* NMSA 1978, § 30-22-5 (Repl. Pamp. 1984). In situations of search and seizure, for an officer to form the reasonable belief that the occupant of a residence is destroying or will destroy evidence, the officer necessarily must believe that the occupants of the residence either know that the police are present or the officer must have good reason to believe that the occupants will destroy the evidence upon discovering that the police are present. If we require an officer to knock

and announce his authority and purpose before executing a search warrant when the officer has good reason to believe that evidence will be destroyed, we would impair the officer's ability to preserve the evidence. By knocking and announcing, the officer gives the suspect sufficient notice and time to destroy the evidence and undermine the purpose of the search. We cannot believe that this is consistent with the purpose of the search and seizure provision of our constitution. *See* N.M. Const. art. II, § 10. Therefore, we hold that if an officer has good reason to believe that evidence will be destroyed, that officer is justified in making an unannounced entry into a person's residence. "Good reason" will be defined by whether it was objectively reasonable for the officer to believe that evidence is being or will be destroyed based upon the particular circumstances surrounding the search. *See Attaway,* 117 N.M. at 151, 870 P.2d at 113 (stating that "officer peril" exception to rule of announcement is based on "officer's objectively reasonable belief").

{10} We place little stock in Officer Lara's fourteen years of experience and general knowledge regarding the destruction of narcotics. Instead, we rely on the facts that Officer Lara had particularized reason to believe that the occupants of the house would destroy the evidence and that the children alerted the occupants to the presence of the police. We find that it was objectively reasonable for Officer Lara to believe evidence would be destroyed because he had information to that effect from three different informants who had been in contact with Ortega to support that belief. Therefore the unannounced entry in this case was reasonable under Article II, Section 10 of the New Mexico Constitution.

{11} *Conclusion.* We agree with the analysis of the Court of Appeals on all other issues. Therefore, we affirm the ruling of the Court of Appeals and remand this case to the district court for proceedings consistent with this opinion.

{12} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

SETH D. MONTGOMERY,
Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-018

Filing Date: February 16, 1994, As Corrected June 28, 1994

Docket No. 20,191

EUGENE JARAMILLO, Personal Representative of the Estate of Theodore R. Jaramillo, deceased,

Plaintiff-Appellee,

and

JOE E. KING and LINDA KING, as co-personal representatives of the Estate of Loreen King,

Plaintiffs-Appellees,

and

NORMAN LOVATO,

Plaintiff-in-Intervention-Appellant,

and

MARY FRANCES DIMAS,

Plaintiff-in-Intervention-Appellant and Cross-Appellee,

vs.

PROVIDENCE WASHINGTON INSURANCE COMPANY,

Defendant-Appellant, Cross-Appellant and Appellee.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Art Encinias, District Judge

Five Motions for Rehearing Denied February 16, 1994, by Order and Opinion.

Civerolo, Wolf, Gralow & Hill, P.A.,
Ellen M. Kelly,
Albuquerque, NM,

for Appellant Providence Washington Ins. Co.

Montoya, Murphy & Garcia,
Donald D. Montoya,
Santa Fe, NM,

for Appellant Lovato.

Jones, Snead, Wertheim, Rodriguez & Wentworth, P.A.,
Arthur L. Jaramillo,
Santa Fe, NM,

for Appellee Jaramillo.

Berardinelli & Associates,
David J. Berardinelli,
Santa Fe, NM,

for Appellees Joe E. & Linda King.

Simons, Cuddy & Friedman,
Robert D. Castille,
Santa Fe, NM,

for Appellant Dimas.

OPINION

RANSOM, Chief Justice.

{1} Each of the parties to this appeal having moved for rehearing on the filing of our opinion on January 19, 1994, which motions we deny, we withdraw that original opinion and substitute the following. We wish to state that it is not our intention to retreat from long-standing principles and rules of construction in the application and interpretation of insurance policies. Special rules quite rightly apply to such contracts in favor of persons who show that they are within the class of insureds that the provisions to be enforced

were intended to benefit. We also wish to state why, despite the urging of both Appellant Providence Washington Insurance Company and Appellee Eugene Jaramillo, we do not believe it is appropriate to decide this case on the present state of the record and briefs of the parties.

{2} This appeal involves uninsured motorist (UM) provisions of a commercial insurance policy. Coverage disputes arose as a result of a head-on collision between two vehicles during the early morning hours of December 16, 1990. One vehicle was owned by Capron Rentals, Inc., a company in the business of renting vehicles to the general public. Loreen King was the driver of the Capron vehicle. King and passenger Theodore Jaramillo were Capron employees and both were killed in the accident. Two other passengers, Mary Frances Dimas and Norman Lovato, were not Capron employees and both were injured.

{3} Joe and Linda King, personal representatives of the estate of Loreen King, and Eugene Jaramillo, personal representative of the estate of Theodore Jaramillo, filed separate complaints for declaratory relief and motions for summary judgment seeking a determination that King and Jaramillo were entitled to stack uninsured motorist bodily injury coverages as named insureds in a policy issued by Providence Washington Insurance Company. The cases were consolidated below. Dimas and Lovato subsequently intervened in the consolidated proceedings to state their separate claims against Providence. In motions for summary judgment, Dimas and Lovato claimed that under the policy they also were expressly entitled to a share of any stacked coverage. Dimas additionally claimed that she was entitled to recover punitive damages under the policy regardless of the death of the tortfeasor.

{4} The trial court ruled that the Providence policy expressly promises stacking of uninsured motorist bodily injury coverages and that the policy's definition of who is entitled to stack is ambiguous as a matter of law.[1] Believing that it was obliged by precedent, the court then construed this definitional ambiguity against Providence and in favor of King and Jaramillo, ruling that the employees were entitled to stack coverage on Capron's fleet of 100 cars. In separate decisions, the trial court denied the motions of Dimas and Lovato for summary judgment on the stacking issue, foreclosing their claim to a pro-rata share of the stacked policy benefits, and ruled that Dimas could make a claim for punitive damages notwithstanding the fact that the uninsured motorist was killed in the accident.

{5} Under SCRA 1986, 12-201 (Repl. Pamp. 1992) (appeal as of right), Providence has appealed from the judgment in favor of King and cross-appealed from the final order allowing Dimas to pursue a claim for punitive damages. Dimas and Lovato have appealed from the summary judgment in favor of Providence on the issue of stacking. Under SCRA 1986, 12-203 (Repl. Pamp. 1992) (interlocutory appeals), Providence has been granted an appeal from a partial summary judgment in favor of Jaramillo. Finding that Providence is entitled to a trial on the merits of the stacking issue, we reverse the summary judgments in favor of King and Jaramillo. We affirm the trial court's judgments in favor of Providence and against Dimas and Lovato on the issue of stacking, and reverse on the issue of punitive damages.

{6} Once ambiguity is determined to exist, grant of summary judgment is improper. On appeal from summary judgment, this Court must determine the applicable law and whether there exist genuine issues of material fact that preclude summary judgment under that law. *See* SCRA 1986, 1-056

[1] This is a "policy stacking" and not a "judicial stacking" case. "Judicial stacking" is a rule of construction applied by the courts based on public policy. Under judicial stacking, a class-one insured is entitled, as a matter of law, to aggregate all UM coverages purchased with separate premiums. *See Morro v. Farmers Ins. Group,* 106 N.M. 669, 670-71, 748 P.2d 512, 513-14 (1988). A class-one insured in judicial stacking refers generally to those persons who are "named insureds" under a UM policy. *Permian Basin,* 63 N.M. at 7, 312 P.2d at 537. In contrast, "policy stacking" refers to a policy which by its own terms expressly grants a right to stack coverages. If the policy is unambiguous, the "insured" who is entitled to policy stacking is determined by the policy's language and definitions, and the coverage is enforced as written. *See Richardson v. Farmers Ins. Co. of Ariz.,* 112 N.M. 73, 74, 811 P.2d 571, 572 (1991).

(Repl. Pamp. 1992); *Agnew v. Libby,* 53 N.M. 56, 57-58, 201 P.2d 775, 776 (1949). In the summary judgments granted in favor of King and Jaramillo, the trial court found that an ambiguity exists in the contract for uninsured motorist coverage. Providence argues that the court used an improper standard by which to resolve the ambiguity, and that the court erred in refusing to consider extrinsic evidence of the intentions of the parties (e.g., specific facts at issue under affidavits).

{7} The court stated that it was bound to construe the ambiguity against the insurer and in favor of coverage, citing to *Horne v. United States Fidelity & Guaranty Co.,* 109 N.M. 786, 791 P.2d 61 (1990), and *Safeco Insurance Co. of America v. McKenna,* 90 N.M. 516, 565 P.2d 1033 (1977), and that it was ignoring the affidavits submitted by Providence that evinced the intent of Capron (the named insured) and Providence. We believe that the trial court did, in fact, base its ultimate disposition of the King and Jaramillo summary judgment motions on an improper rule of construction. The trial court should have denied the motions and allowed the parties to go forward with evidence that would enable the court to determine the meaning of the contract during a trial on the merits.

{8} Under the facts of this case, Horne does not control the interpretation of "named insured". It is well settled that the construction of an insurance policy is governed generally by the law of contracts. *Vargas v. Pacific Nat'l Life Assurance Co.,* 79 N.M. 152, 155, 441 P.2d 50, 53 (1968). In this case, the trial court concluded that the insurance policy is ambiguous as to whether employees of Capron are entitled to stack coverage on Capron's fleet of vehicles. Applying *Horne,* the trial court construed the ambiguous policy language against Providence and allowed King and Jaramillo to stack coverage. In *Horne,* however, the issue of contract interpretation was whether an employee injured while occupying an insured business vehicle can stack benefits on other covered vehicles when class-one insureds under the policy are defined as "you or any family member." *See Horne,* 109 N.M. at 787, 791 P.2d at 62. There, a corporation as the named insured was "you", and this gave rise to an ambiguity as to whether "any family member" referred to employees of the company. *Id.* at 786-88, 791 P.2d at 61-63. The Court construed the ambiguity in favor of the employees, allowing them to stack coverage as "family members".

{9} The Providence policy, on the other hand, defines class-one insureds as "you" and, *if* "you" is an individual, then family members are included as class-one insureds. "You" is defined as the named insured, Capron Rentals, Inc. The trial court, in its judgments on the motions of King and Jaramillo, found that neither were "family members" because the policy expressly limits coverage for family members to those situations where "you" is an individual rather than a corporation. We agree with the trial court that the Providence policy gives rise to no ambiguity under coverage for family members as found by the majority to exist in *Horne.* Nonetheless, the trial court concluded that the policy's language is ambiguous because the word "you" as applied to a corporation is susceptible to different meanings and, applying *Horne,* construed the ambiguous language against Providence thus permitting King and Jaramillo to stack coverage. We find that the trial court's application of *Horne* under the facts of this case is problematic and we set forth alternative principles of law to be applied to this case on remand and in future cases of this type.

{10} Court may consider extrinsic evidence to make preliminary finding on question of ambiguity. Providence argues that the court erroneously concluded that the policy is ambiguous. It contends that because "you" is defined as the named insured and the corporation is the named insured, and because only the named insured is entitled to stack coverage, no ambiguity exists—the employees clearly are insured only as occupants of the vehicle. The court concluded that an ambiguity exists because the uninsured motorist provisions expressly allow the named insured to stack, but the named insured is a corporation not capable of sustaining bodily injury. The court refused to consider extrinsic evidence as to circumstances under which the parties contracted.

{11} The court's decision having been reached before publication of our opinions in *C.R. Anthony*

Co. v. Loretto Mall Partners, 112 N.M. 504, 817 P.2d 238 (1991), and *Mark V, Inc. v. Mellekas,* 114 N.M. 778, 845 P.2d 1232 (1993), it appears that the court considered only the contract language in arriving at its conclusion that an ambiguity exists. In *C.R. Anthony* and *Mark V* we held that a court may consider the context in which a contract was made to determine whether the parties' words are ambiguous, and we overruled cases to the contrary. *See C.R. Anthony,* 112 N.M. at 508-09, 817 P.2d at 242-43; *Mark V,* 114 N.M. at 781, 845 P.2d at 1235. We earlier had retreated from the "four-corners" standard in holding that the parol evidence rule did not bar admission of extrinsic evidence to determine the circumstances under which the parties contracted and the purpose of the contract. *See Levenson v. Mobley,* 106 N.M. 399, 403, 744 P.2d 174, 178 (1987). We believe the court may have limited its review to the "four corners" of the agreement. While we are reversing the trial court on other grounds, on remand the court may allow extrinsic evidence and reconsider whether an ambiguity exists. Although, as we held in *Herrera v. Mountain States Mutual Casualty Co.,* 115 N.M. 57, 846 P.2d 1066 (1993), "you" quite unambiguously is the corporate entity, the applicability of stacking to employees as intended beneficiaries may or may not be found ambiguous when considering circumstances other than the contract language.

{12} Ambiguities need not be construed in favor of coverage when question is who is to be included as a named insured qualifying for class-one coverage. Citing to *McKenna,* the *Horne* opinion stated: "It is axiomatic in New Mexico insurance law that ambiguities in an insurance policy are to be construed against the insurer." *Horne,* 109 N.M. at 787, 791 P.2d at 62. While that is a correct statement of the general rule of construction, that general rule is not applicable to situations in which a third party who is not expressly named as the insured or who is not an acknowledged family member is seeking coverage under a policy that has not been purchased by the third party. A careful analysis of *McKenna* and other New Mexico cases that have adopted the general rule reveals that all of the cases applying the construction except *Horne* concerned the rights of an expressly named insured or acknowledged family member. Even when an ambiguity concerns an expressly named insured, we have held that the rule "does not preclude a court from examining the facts of a case to determine what the parties intended the contractual language to mean." *Crawford Chevrolet, Inc. v. National Hole-in-One Ass'n,* 113 N.M. 519, 521, 828 P.2d 952, 954 (1992) (footnote omitted); *see also Herrera,* 115 N.M. at 59, 846 P.2d at 1068 (citing with approval *Atlas Assurance Co. v. General Builders,* 93 N.M. 398, 401, 600 P.2d 850, 853 (Ct. App. 1979) (holding that third persons not parties to a contract of insurance usually are not entitled to a construction in their favor "in determining whether that third person is an insured under the policy")). To the extent that *Horne* implies that all insurance contracts *must* be construed in favor of coverage, or that the general rule applies in *all* situations, it is overruled.

{13} "In order to determine the meaning of the ambiguous terms, the fact finder may consider extrinsic evidence of the language and conduct of the parties and the circumstances surrounding the agreement, as well as oral evidence of the parties' intent." *Mark V,* 114 N.M. at 782, 845 P.2d at 1236. In cases in which the question is whether a third-party beneficiary is entitled to coverage, if the premium-paying insured and the insurer agree as to what they intended, that should be controlling. *See Crawford Chevrolet,* 113 N.M. at 521, 828 P.2d at 954. However, if the premium-paying insured had no intent one way or the other (and it appears the trial court has not addressed that issue), testimony of the insurer that it had a unilateral, subjective intent not to include employees or other third parties as class-one beneficiaries is not determinative. The parties must adduce evidence of the objective intentions of the parties to the contract, such as premiums paid for coverage. In the absence of extrinsic evidence of intent, the third-party beneficiary may well take advantage of applicable rules of contract construction. *See Mark V,* 114 N.M. at 782, 845 P.2d at 1236. As stated above, however, if the ambiguity gives rise to the question [TEXT DELETED BY COURT EMENDATION] whether a third party is or is not the intended beneficiary of specific stacking provisions, the third party is not entitled to the rule

of construction that ambiguities must be decided against the insurer. The third party has the burden of proof.

{14} On motions for rehearing, Jaramillo and Providence argue a point that from the beginning has been particularly difficult for this Court to resolve: What useful purpose does a remand of this cause serve? If the only evidence of the objective intentions of the parties lies in the ambiguous language of the policy itself, then must not this Court "resolve any ambiguity as a matter of law by interpreting the contract using accepted canons of contract construction and traditional rules of grammar and punctuation"? *Id.* (citing *C.R. Anthony,* 112 N.M. at 510 n.5, 817 P.2d at 244 n.5 (court's resolution of ambiguity is one of law when employing rules of contract interpretation without benefit of evidence of surrounding facts and circumstances)). How could coverage about which the employer had no understanding have been contemplated by the employer to benefit the employees of Capron? In the final analysis, as stated above under the heading "Once ambiguity is determined to exist, grant of summary judgment is improper," we do not believe all *material* facts before the court necessarily dictated application of accepted canons of contract construction in lieu of a trial on the merits. Further, while we will uphold or reverse a judgment of the trial court when legally mandated regardless of the trial court's rationale, we will not do so if the mandate has been clouded by proceedings that were truncated or misdirected by reason of the trial court's erroneous conclusions. It is far preferable for this Court, even on a question of law, to have the advantage of a record on dispositive issues that are thoughtfully developed in the lower court and briefed by the parties. Here, the parties basically have favored us only with argument and authorities on questions of ambiguity and the controlling effect of *Horne.*

{15} We further note that the trial court arrived at its conclusion that the employees must be entitled to stack because it believed that, if the employees could not stack, then no one could take advantage of the express policy-stacking language. This, in the court's mind, would result in the corporation having paid for nothing. This is an erroneous conclusion. The corporation paid for and received statutory minimum limits of uninsured motorist coverage on all vehicles and their occupants[2] and also was entitled to stack the policies for property damage. King contends that because the policy expressly provides stacking of bodily injury coverage, the trial court *must* find someone who may stack—an "insured class". The question for the court, however, is not *who* may stack—it is whether *employees* may stack. It is possible that the parties intended the corporate officers and directors or shareholders to be covered by the policy, for example, although that is not the question before the court. *See, e.g., Hager v. American West Ins. Co.,* 732 F. Supp. 1072, 1075 (D. Mont. 1989) (holding that shareholder in closely-held corporation was additional named insured under UM provisions of corporate policy); *Holloway v. Nationwide Mut. Ins. Co.,* 376 So. 2d 690, 694 (Ala. 1979) (stating that executive officer of corporation would be class-one insured even though corporation was named insured). Just because stacked bodily-injury coverage was expressly provided does not conclusively mean that employees were entitled to the coverage.

{16} At trial, King and Jaramillo have burden of proving that they were intended beneficiaries of the stacking provisions. King and Jaramillo, who are not parties to the contract, essentially claim that they are entitled to the stacking provisions of the policy as donee third-party beneficiaries. In *Permian Basin Investment Corp. v. Lloyd,* 63 N.M. 1, 7, 312 P.2d 533, 537 (1957), we approved the following statement from 4 Arthur L. Corbin, *Corbin on Contracts* § 776, at 18-19 (1951):

> A third party who is not a promisee and who gave no consideration has an enforceable right by reason of a contract made by two others (1) if he is a creditor of the promisee . . . or (2) if the promised performance will be of pecuniary benefit to him and the contract is so expressed as to give the promisor reason to know that such benefit is contemplated by the promisee as

[2] The pro-rata shares of the "per accident" policy limits for the accident vehicle have been paid to the parties.

> one of the motivating causes of his making the contract. A third party may be included within both of these provisions at once, but need not be. One who is included within neither of them has no right, even though performance will incidentally benefit him. [Footnotes omitted.]

We supplemented the above principle with the proviso that "the third party can show by evidence extrinsic to a contract which contains no indication of intent to benefit him that its provisions were in fact intended for his benefit." *Id.* We also expressed that implicit within the above general statements is that

> the promisor should not be held liable in damages for breach of his contract with the promisee by one whose detriment by its nonperformance could not reasonably have been foreseen by the promisor and by one whose existence (whether specific or general) and interest in the contracted-for performance (whether contingent or direct) was not within the reasonable contemplation of the promisor when the promise was made.

Permian Basin, 63 N.M. at 7, 312 P.2d at 537.

{17} Intent to benefit a third party must appear either from the contract itself or from other evidence that the person claiming to be the beneficiary is an intended beneficiary. *Valdez v. Cillessen & Son, Inc.,* 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987). The burden of proof is on the claimant to show that he or she belongs to the class of intended beneficiaries. *Hoge v. Farmers Mkt. & Supply Co.,* 61 N.M. 138, 143, 296 P.2d 476, 479 (1956). The intent to benefit third parties as occupants of an insured vehicle does not prove an intent to benefit third parties as named insureds entitled to stack coverage. A third party is not entitled to rules of construction afforded a class of insureds until the third party has established that he or she is a member of the class.

{18} No ambiguity in policy regarding nonemployee occupants: summary judgment appropriate. In denying the motions for summary judgment of Dimas and Lovato, the trial court found that there is no policy ambiguity that would give them the reasonable expectation that they could stack or that they are not excluded from the description of persons eligible to stack. Dimas and Lovato urge that ambiguity exists not only in who is the named insured, but also in the policy provisions setting out the limits of insurance. They claim that there is an irreconcilable conflict between the paragraph which states that the most the company will pay for bodily injury is the limit for each person shown in the schedule applicable to each covered auto ($ 25,000), and its subparagraph which states that the limit is the sum of the limits of the bodily injury for each person if there is more than one covered auto. They urge this Court to follow Curtis v. Home Insurance Co., 392 N.W.2d 44, 45-46 (Minn. Ct. App. 1986), wherein the court found two similar provisions to be ambiguous. In regard to *Curtis* we note the court there found that the employees had no reasonable expectation to entitlement of stacked benefits even in the face of the ambiguity in the policy.

{19} Dimas and Lovato also urge application of *Federal Insurance Co. v. Century Federal Savings & Loan Ass'n,* 113 N.M. 162, 824 P.2d 302 (1992). The holding of *Federal* is that no construction is required when two clauses are unambiguous, but rather are repugnant to one another; the court should "refuse to apply the clause that deprives the insured of the insurance coverage which the insured reasonably understood was afforded by the policy for which premiums were paid." *Id.* at 169, 824 P.2d at 309. Implicit within this principle is the understanding that where one clause provides an exception to a clause of general application *without* making meaningless the general clause granting coverage, the exception will be effective.

{20} In this case, the clause of general application states that the maximum UM coverage for bodily injury to a single person is $ 25,000. The subparagraph that provides stacking, if there is more than one covered auto, quite specifically is limited to bodily injury sustained by "you or any 'family member'" and states:

> The most we will pay for "bodily injury" sustained . . . by an "insured" other than you or any "family member" is that "insured's" pro-rata share of the "Bodily Injury" for each person limit shown *in the Schedule for this coverage* [in which you or any family member will also be entitled to a pro-rata share].

(Emphasis added.) We construe the phrase "in the Schedule for this coverage" to apply to the $ 25,000 each person limit as distinguished from "*the sum* of the limits for 'Bodily Injury' for each person shown in the Schedule applicable to each covered 'auto'" in the stacking provision for "you or any 'family member'." The subparagraph is not repugnant to the general granting clause. Dimas and Lovato further argue that if stacking is not allowed, then the premium paid for bodily injury coverage was a nullity. As mentioned above, that is not factually correct. The policy provided for bodily injury coverage for all occupants in the amounts required by statute.

{21} Punitive damages not recoverable from estate of deceased tortfeasor. Dimas argues that an insured's right to recover punitive damages under the UM provision is a matter of contract, so whether the tortfeasor survives an accident is inconsequential. Dimas relies on *Stinbrink v. Farmers Insurance Co. of Arizona,* 111 N.M. 179, 180-81, 803 P.2d 664, 665-66 (1990), in which this Court held that a contract clause excluding coverage for punitive damages against uninsured motorists conflicted with statutory law, and that right to recovery could not be contracted away. We believe that Dimas has misconstrued *Stinbrink,* as that case does not require recovery for claims that are barred as a matter of law.

{22} The UM statute provides that UM insurance must be provided in at least the minimum limits for bodily injury or death and for injury to or destruction of property "for the protection of persons insured thereunder who are *legally entitled* to recover damages from owners or operators of uninsured motor vehicles. . . ." NMSA 1978, § 66-5-301(A) (Repl. Pamp. 1989) (emphasis added). If Dimas is not legally entitled to sue the tortfeasor's estate for punitive damages, her claim for UM coverage for those damages must fail.

{23} Although this Court never has passed on the issue of whether the death of a tortfeasor serves as a bar to recovery of punitive damages, the Court of Appeals in *State Farm Mutual Automobile Insurance Co. v. Maidment,* 107 N.M. 568, 574, 761 P.2d 446, 452 (Ct. App.), *cert. denied,* 107 N.M. 413, 759 P.2d 200 (1988), held that an insurer "may assert the death of the uninsured motorist as a bar to recovery of punitive damages." 107 N.M. at 574, 761 P.2d at 452. According to *Maidment,* to hold otherwise would undermine the rationale of *Stewart v. State Farm Mutual Automobile Insurance Co.,* 104 N.M. 744, 726 P.2d 1374 (1986), *modified on other grounds by Stinbrink v. Farmers Ins. Co. of Ariz.,* 111 N.M. 179, 803 P.2d 664 (1990). We held in *Stewart* that "an insured may recover punitive damages from his insurer if he would be legally entitled to recover them from the uninsured tortfeasor," and we stated that the public policy underlying the award of punitive damages was to punish the tortfeasor. 104 N.M. at 746-47, 726 P.2d at 1376-77.

{24} The purpose of requiring an insurer to provide UM coverage is to be sure that an injured insured is compensated for injuries even when the tortfeasor is financially irresponsible. *See Padilla v. Dairyland Ins. Co.,* 109 N.M. 555, 557, 787 P.2d 835, 837 (1990); *Stewart,* 104 N.M. at 746, 726 P.2d at 1376; *Chavez v. State Farm Mut. Auto. Ins. Co.,* 87 N.M. 327, 329, 533 P.2d 100, 102 (1975). In the past, when holding that insurance policies may cover punitive damages, we have relied on the principle that the purpose of punitive damages (to punish the tortfeasor) is not diluted by requiring the insurance company to pay the damages because the insurer can always sue the tortfeasor for recovery of the damages. *See Baker v. Armstrong,* 106 N.M. 395, 397, 744 P.2d 170, 172 (1987); *Stewart,* 104 N.M. at 747, 726 P.2d at 1377. When the tortfeasor cannot be punished for his culpable behavior, punitive damages no longer have the desired effect and, therefore, the victim loses the legal entitlement to recover those damages.

{25} We are supported in reaching this conclusion by a majority of the states that also have passed on this issue. Several states have statutes that explicitly preclude recovery of punitive damages from the estate of a deceased tortfeasor. *See Hofer v. Lavender,* 679 S.W.2d 470, 472 n.2 (Tex. 1984). In those states in which there is no such statute, the decisions most often turn on the reasons why each state assesses punitive damages. For example, in Texas the purposes of punitive damages include punishment of the tortfeasor, to serve as an example to others, to reimburse for losses too remote to be considered as elements for strict compensation, as an example for the good of the public, to compensate for inconvenience and attorney's fees, and as compensation to the sufferer. *See id.* at 474-75. Because of these varied reasons for assessing punitive damages, the Texas court held that there exists a right to collect punitive damages from the estate of a deceased tortfeasor. *Id.* at 475; *see also Perry v. Melton,* 171 W.Va. 397, 299 S.E.2d 8, 12 (W. Va. 1982) (holding that the right continues after tortfeasor's death because the damages serve other equally important functions other than punishment of the wrongdoer). The majority of states, however, bar the recovery of those damages, concluding that to punish the estate ignores the central purpose of punitive damages, which is to punish the tortfeasor and to deter him from repeating the wrongful act. *See, e.g., Barnes v. Smith,* 305 F.2d 226, 231 (10th Cir. 1962) (applying the majority view in a New Mexico diversity of citizenship case); *Fehrenbacher v. Quackenbush,* 759 F. Supp. 1516, 1521-22 (D. Kan. 1991); *Lohr v. Byrd,* 522 So. 2d 845, 846-47 (Fla. 1988); *Rowen v. Le Mars Mut. Ins. Co. of Iowa,* 282 N.W.2d 639, 661 (Iowa 1979); *Thompson v. Estate of Petroff,* 319 N.W.2d 400, 408 (Minn. 1982); *Allen v. Anderson,* 93 Nev. 204, 562 P.2d 487, 489-90 (Nev. 1977); *see also* Restatement (Second) of Torts § 926 (1977) ("Under statutes providing for the survival . . . of tort actions, the damages . . . for which the tortfeasor is responsible are not affected by the death of either party before or during trial except that . . . the death of the tortfeasor terminates liability for punitive damages."); Jay M. Zitter, Annotation, *Claim for Punitive Damages in Tort Action as Surviving Death of Tortfeasor or Person Wronged,* 30 A.L.R.4th 707 § 4 (1984 & 1992 Supp.).

{26} In New Mexico, the purpose of punitive damages is two-fold: "Such additional damages are awarded for the limited purposes of punishment and to deter others from the commission of like offenses." SCRA 1986, 13-1827 (Repl. Pamp. 1991); *see also Stewart,* 104 N.M. at 746, 726 P.2d at 1376 (recognizing that purpose of punitive damage recovery is punishment of the tortfeasor, not compensation of the victim). We believe that the purposes of punishment and deterrence are not accomplished by enabling recovery of punitive damages from the estate of deceased tortfeasors. We affirm *Maidment.* Therefore, the partial grant of summary judgment in favor of Dimas and against Providence on this issue is reversed.

{27} Conclusion. We reverse the summary judgments in favor of King and Jaramillo, affirm the judgments in favor of Providence and against Dimas and Lovato, reverse on the issue of recovery of punitive damages, and remand for further disposition consistent with this opinion.

{28} IT IS SO ORDERED.

RICHARD E. RANSOM,
Chief Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-080

Filing Date: August 1, 1994

Docket Nos. 20,701, 20,705

ROYCE CLAY, Plaintiff-Petitioner, and SHELLA SNIDER,

Defendant and Third-Party-Plaintiff-Petitioner,

vs.

FERRELLGAS, INC., and GILBERT CANDELARIA,

Defendants-Respondents.

ORIGINAL PROCEEDINGS ON CERTIORARI
Rebecca Sitterly, District Judge

Motion for Denied September 16, 1994

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OPINION

RANSOM, Justice.

{1} Ferrellgas, Inc., and Gilbert Candelaria appealed to the Court of Appeals from a personal injury judgment entered on a jury verdict awarding compensatory and punitive damages to Royce Clay and Shella Snider. The Court of Appeals affirmed the award of compensatory damages but reversed the award of punitive damages. *Clay v. Ferrellgas, Inc.,* 114 N.M. 333, 838 P.2d 487 (Ct. App. 1992). We issued a writ of certiorari to the Court of Appeals to review the reversal of the award of punitive damages. Finding substantial evidence to Support the jury verdict, we reverse the Court of Appeals.

{2} Facts. Although there was conflicting evidence throughout the trial we will view the evidence in the light most favorable to support the verdict. *Tapia v. Panhandle Steel Erectors Co.,* 78 N.M. 86, 89, 428 P.2d 625, 628 (1967). We draw all reasonable inferences and resolve all disputed facts in favor of the successful party

and disregard all evidence and inferences to the contrary. *Id.* Applying this standard, we discern the following facts.

{3} In July 1986 Snider received a car as a gift from her companion, Boyd Clement. Soon thereafter Snider and Clement decided to have the vehicle converted to run on liquid propane as well as on gasoline. Clement took the car to Ferrellgas, which had previously converted several other vehicles to propane use for him. He spoke with office manager Gerald Schell about the arrangements and left the car with Ferrellgas. As part of the deal, Clement purchased a used propane tank from Candelaria, a Ferrellgas employee. Candelaria proceeded to install the tank in the trunk of Snider's car. Candelaria testified that it was his practice to "leak-test" each tank he installed, but he could not recall if he leak-tested this tank. A tank cannot be tested for leaks unless it contains propane, and, to remove all of the propane after testing, the tank must be purged using an inert, nonflammable gas such as nitrogen. None of the Ferrellgas employees purged the tank at any time.

{4} For safety reasons, state law requires that the area inside the vehicle where the tank is mounted be "gastight with respect to driver or passenger compartments and to any space containing . . . spark-producing equipment" and the area must be "vented outside the vehicle." Standards for the Storage and Handling of Liquefied Petroleum Gases, N.M. Liquefied Petroleum Gas Bureau, Engine Fuel Sys. Reg. 8-2.7(a)(1), 4 N.M. Reg. 282 (Jan. 27, 1993). Thus, before a tank may be mounted, the installer must place a sealed vapor barrier between the passenger compartment and the enclosure containing the tank (the trunk of the car in this case) and install an outside vent to protect vehicle occupants from the dangers of leaking gas. State law also requires that the tank be placed so that it may be filled from the outside of the vehicle "by permanently installing the remote filling connections . . . to the outside of the vehicle." *Id.* Reg. 8-2.7(b). Finally, according to the testimony of Ray Engstrom, the Liquefied Petroleum Gas Bureau Chief for New Mexico, a form detailing the work done on a vehicle ("Form 6") is to be filed with the state inspector's office when a tank is installed. The purpose of this requirement is to give the inspector an opportunity to double-check the installer's work and make sure it was done correctly. If more than one installer worked on the vehicle, the inspector checks to make sure each part of the work has been done properly.

{5} Ferrellgas admitted that it knew of these safety requirements when it began the conversion of Snider's vehicle. In addition, Candelaria stated that he believed he was to do a complete conversion on Snider's vehicle. Sometime in April, however, Ferrellgas told Clement that completion of the job would be delayed because some parts were not available. After waiting for the parts for a few months, Clement went to pick up the vehicle. At this point Ferrellgas had not installed the vapor barrier between the passenger compartment and the trunk, had not vented the compartment with an outside vent, and had not completed the work necessary so that the tank could be remote-filled. Ferrellgas told Clement that the tank had been installed and informed him that the car would not yet run on propane because the conversion had not been completed. Ferrellgas did not, however, inform Clement that the tank might be dangerous or that the trunk had not been sealed.

{6} Ferrellgas also did not file a Form 6 reporting the installation of the tank. Schell testified that he did not believe a form needed to be filed because the installation had not been completed. Engstrom, however, testified that a form should have been filed. Further, although Schell contended that he had completed over 100 propane tank installations, the state inspector's office could not find a single Form 6 filed by Ferrellgas. Ferrellgas did not offer any excuse for its failure to file the requisite forms.

{7} Snider drove the vehicle for almost four months while waiting for the conversion parts. Because Ferrellgas was unable to obtain the parts, Clement took the car to Gary Roybal to complete the conversion. Roybal completed the adaptation of the car's carburetion system and removed the tank, repainted it, and repositioned

it in the same place that Candelaria had installed it. Roybal leak-tested the parts of the conversion system that he had installed but did not test the tank or check to see if a vapor barrier was in place. Roybal testified that he did not check for a vapor barrier because he assumed that Ferrellgas had installed one when it installed the tank. He based this assumption on his belief that the propane tank had some fuel in it when Clement brought in the vehicle.

{8} Although Roybal's work made it possible for the vehicle to be run on propane, Snider did not operate it in that manner because Clement was going to return the vehicle to Ferrellgas so that Ferrellgas could adapt the tank for remote filling. Clement and Snider testified that they did not put propane in the tank at any time. Roybal also testified that he did not put propane in the tank.

{9} On September 20, 1987, Snider and Clay got into the vehicle and attempted to start it. When Snider turned the key in the ignition, the car exploded and the ensuing burst of flames severely burned both Snider and Clay. The explosion occurred because the spark from the ignition ignited propane gas that had leaked from a faulty valve on the tank and migrated into the passenger compartment of the car. According to expert testimony, the vehicle was unsafe from the time it was picked up from Ferrellgas because there was propane in the tank and because the vehicle lacked a vapor barrier and proper venting.

{10} Proceedings. Snider and Clay both brought actions against Ferrellgas and Roybal based on negligence and failure to warn. They each sought compensatory and punitive damages. Prior to trial Snider and Clay settled their claims against Roybal. At the conclusion of the trial the jury determined that Ferrellgas was eighty-nine percent at fault and Roybal was eleven percent at fault. The jury awarded Snider $ 345,000 in total compensatory damages and awarded Clay $ 250,000 in total compensatory damages. The jury also determined that the actions of Ferrellgas were reckless and grossly negligent and awarded each woman $ 375,000 in punitive damages.

{11} Ferrellgas may be held liable for punitive damages. The Court of Appeals reversed the award of punitive damages because it did not believe that Ferrellgas had the requisite "culpable mental state" to he held liable for punitive damages.[1] 114 N.M. at 337-38, 838 P.2d at 491-92. The Court's belief appears to be based upon the absence of evidence showing that any single employee knew that the car was being released with propane in the tank and without the installation of a vapor barrier or proper venting. *Id.* at 338, 838 P.2d at 492. The Court also adopted the rule that the nature of conduct required to demonstrate a culpable mental state does not decrease as the risk of danger increases, citing for support *Gleave v. Denver & Rio Grande Western Railroad,* 749 P.2d 660 (Utah Ct. App. 1988). 114 N.M. at 338-39, 838 P.2d at 492-93. We disagree with the interpretation of the facts and the rule adopted by the Court of Appeals.

{12} - The culpable mental state of a party may be characterized by the risk of danger. The purpose of punitive damages is to punish a wrongdoer. *Sanchez v. Dale Bellamah Homes of New Mexico, Inc.,* 76 N.M. 526, 531, 417 P.2d 25, 29 (1966). To be liable for punitive damages, a wrongdoer must have some culpable mental state, *McGinnis v. Honeywell, Inc.,* 110 N.M. 1, 9, 791 P.2d 452, 460 (1990), and the wrongdoer's conduct must rise to a willful, wanton, malicious, reckless, oppressive, or fraudulent level, *Loucks v. Albuquerque Nat'l Bank,* 76 N.M. 735, 747, 418 P.2d 191, 200 (1966). The Court of Appeals recognized these standards and adopted the rule in *Gleave* after inferring the trial court had ruled that "a less culpable mental state would be sufficient if there was a high degree of danger." 114 N.M. at 338, 838 P.2d at 492. We question the Court's inference in light of the trial court's

[1] Because the parties stipulated that liability would not be separated between Ferrellgas and its employees, this opinion has made reference to the specific employees only if necessary for clarity; all other references to Ferrellgas are general in nature and are intended to encompass the knowledge and actions of the employees that constituted the corporation's mental state and participation. The Court of Appeals properly took this same view of the corporate participation issue. 114 N.M. at 337, 838 P.2d at 491.

finding in a post-trial hearing that the conduct of Ferrellgas rose to a level of recklessness. We need not address this inference, however, because we do not find it dispositive.

{13} The adoption of *Gleave* by the Court of Appeals may be correct insofar as it holds that conduct falling below a level of recklessness would not support an award of punitive damages regardless of the risk of danger. Yet, as the risk of danger increases, the duty of care also increases, *Cross v. City of Clovis,* 107 N.M. 251, 254, 755 P.2d 589, 592 (1988). Thus, as the risk of danger increases, conduct that amounts to a breach of duty is more likely to demonstrate a culpable mental state. The circumstances define the conduct; a cavalier attitude toward the lawful management of a dangerous product may raise the wrongdoer's level of conduct to recklessness, whereas a cavalier attitude toward the lawful management of a nondangerous product may be mere negligence. In measuring punitive damages "the enormity and nature of the wrong" must be assessed. *Green Tree Acceptance, Inc. v. Layton,* 108 N.M. 171, 174, 769 P.2d 84, 87 (1989). We believe this is what the trial court had in mind when it indicated that the conduct of Ferrellgas rose to a level of recklessness because of the dangerousness of the product. Because of this, adoption of the rule in *Gleave* is unwarranted and we reverse the Court of Appeals on this point.

{14} - Substantial evidence supports the award of punitive damages. The Court of Appeals determined that while there was evidence to support a finding that Ferrellgas was negligent, that negligence did not rise "to the level of culpability required for imposition of punitive damages." 114 N.M. at 338, 838 P.2d at 492. We disagree.

{15} In this ease the jury was instructed that for it to find Ferrellgas liable for punitive damages it had to find that the acts of Ferrellgas were reckless *and* grossly negligent. Because the jury presumably followed this instruction, *see* SCRA 1986, 13-2002 (Repl. Pamp. 1991) (duty to follow instructions); *Britton v. Boulden,* 87 N.M. 474, 475, 535 P.2d 1325, 1326 (1975) ("It must be presumed that the jury understood and complied with the court's instructions."), it necessarily found that the conduct of Ferrellgas was reckless.[2] For punitive damages, "reckless" is defined as "the intentional doing of an act with utter indifference to the consequences. *See* SCRA 1986, 13-1827 (Repl. Pamp. 1991). The Court of Appeals determined that the conduct of Ferrellgas did not demonstrate a culpable mental state because the conduct of no individual employee demonstrated the requisite culpable mental state. The Court did not consider the cumulative effects of their actions.

{16} The Court of Appeals incorrectly compartmentalized the conduct of the Ferrellgas employees. It should have viewed the actions of the employees in the aggregate to determine whether Ferrellgas had the requisite culpable mental state because of the cumulative conduct of the employees. We believe that *Horton v. Union Light, Heat & Power Co.,* 690 S.W.2d 382, 389 (Ky. 1985), illustrates how the "cumulative conduct" of employees may demonstrate corporate recklessness. *Cf. Warford v. Lexington Herald-Leader Co.,* 789 S.W.2d 758, 772 (Ky. 1990) (allowing evidence to be "viewed cumulatively" to prove malice in a libel action); *Herron v. Tribune Publishing Co.,* 108 Wash. 2d 162, 736 P.2d 249, 256 (Wash. 1987) (en banc) ("Although negligence, a failure to investigate, anger or hostility towards that plaintiff, or reliance on sources known to be unreliable would each alone be insufficient proof, when viewed cumulatively and in appropriate circumstances they may establish a clear and convincing inference of actual malice.").

[2] We are urged by the New Mexico Defense Lawyers Association to eliminate the term "grossly negligent" because, notwithstanding the confusing inclusion of the word "negligence" in the term, it is synonymous with "reckless". The NMDLA would have us hold that conduct must be reckless to support an award of punitive damages. We need not discuss that issue in this ease because we conclude that the conduct of Ferrellgas was reckless and the jury was instructed it had to find both reckless and grossly negligent conduct. Moreover, Ferrellgas conceded in its response to the petitions for certiorari: "Whether 'gross negligence' provides a basis for submission of punitive damages to the jury was not disputed in this ease; it unquestionably does." Amicus, of course, "must take the case . . . as it stands on appeal and amicus cannot assume the functions of a party." *Nall v. Baca,* 95 N.M. 783, 785-86, 626 P.2d 1280, 1282-83 (1980).

{17} In *Horton,* a family was awarded punitive damages after their house exploded because of the negligence of a gas company. In the early morning hours, the mother of the family had smelled gas and called the gas company to check for leaks. A service representative went to the house, determined that there was a leak outside the house, and concluded after a superficial inspection that closing the chimney damper would stop any gas from entering the house. He called the company to order a repair crew for the leak outside the house. The field supervisor of the repair crew arrived but did not inspect the house, even though he had been told that there was a slight odor of gas inside the house. The supervisor had the authority to order that the gas be turned off and could have evacuated the family, but he took neither of those actions The house exploded approximately twenty minutes after the field supervisor arrived. The gas leaking from the break in the line outside the house had traveled along the gas lines to the inside of the house 690 S.W.2d at 385-86.

{18} The family presented evidence that for some months prior to the explosion the chief utility inspector for the state had urged the gas company to revise an emergency plan established to direct the handling of gas leak situations. The chief inspector provided the gas company with a model plan based on national standards that included the requirement that gas company personnel use gas detection meters instead of relying on their sense of smell. The court determined that had the gas company adopted the model plan the explosion would have been prevented. 690 S.W.2d at 387. The court stated:

> While no one suggests that the gas company or its employees intentionally injured the Hortons, these actions of the employees at the scene must be considered together with the policy and procedures of the gas company in training its employees to handle such emergencies. . . . Viewed cumulatively the evidence was sufficient for the jury to conclude that the totality of circumstances indicated "a wanton or reckless disregard for the lives, safety or property of other persons".

690 S.W.2d at 387-88 (quoting standard by which jury was instructed for imposition of punitive damages). Based on this rationale, the court upheld the punitive damages award.

{19} A dissenting justice argued against what he considered to be "the novel theory of adding together several ordinary negligence factors to make out a case of gross negligence." *Id.* at 391 (Stephenson, J., dissenting). We believe, however, that the dissent missed the focus of the majority's rationale.

> Here the acts of the managerial employees in establishing policy and procedures and in failing to do so, in training their personnel to handle situations such as the present one, and in their interaction with the Public Service Commission as indicated by their dealings with [the chief utility inspector] and their correspondence with the Commission, implicated the company as a whole in the charge of wanton or reckless disregard for the safety of others. Here liability for punitive damages is not based on a single, isolated unauthorized and unexpected act of negligence by an employee. The situation is not subject to the charge that the respondent is being punished when completely innocent and liable only vicariously.

Id. at 390. This rationale explains why "corporate indifference" in the face of serious risks of danger that should reasonably be foreseen in the handling of explosive gases justifies a finding of "utter indifference to the consequences."

{20} The case at bar, like *Horton,* provides a perfect example of why the acts of the employees should be viewed cumulatively to determine the mental state of a corporation. The Court of Appeals exonerated Ferrellgas from paying punitive damages because neither Candelaria nor Schell knew what the other was doing. 114 N.M. at 338, 838 P.2d at 492. If we follow this analysis, Ferrellgas escapes liability because its employees failed to communicate with each other. The culpable mental state of the corporation,

however, may be inferred from the very fact that one employee could be ignorant of the acts or omissions of other employees with potentially disastrous consequences. In this ease Ferrellgas cannot be said to have been an innocent party; through its corporate policy (or lack thereof) it allowed Schell to be unaware of the conduct of Candelaria, and vice-versa, despite the fact that in all probability this ignorance would result in severe harm.

{21} Viewed cumulatively, the evidence in this ease supports an award of punitive damages. Ferrellgas employees testified that they knew of the state laws that required them to install a vapor barrier and to properly vent the trunk of the car when they installed the tank. Reading the requirements carefully shows that these steps must be taken *before* the tank is installed. *See* Engine Fuel Sys. Reg. 8-2.7. There is no question that they did not comply with these requirements. Further, in accordance with his usual practice, Candelaria leak-tested the tank when he installed it in the trunk and must have put some propane in it. No Ferrellgas employee, however, purged the tank of propane at any time. Thus, Candelaria knew or should have known that the tank contained propane.

{22} After Candelaria installed the tank, some Ferrellgas employee telephoned Clement and told him to pick up his vehicle because Ferrellgas did not have the necessary parts to complete the conversion. Presumably, this was either Candelaria, who was working on the car, or Schell, who was the office manager and who had arranged the details of the propane conversion with Clement. At any rate, Schell released the vehicle to Clement with the tank installed. When Clement picked up the car, Schell did not tell him that the vapor barrier had not been installed and that the trunk had not been properly vented. Schell also did not check to see if the tank had been filled other than by opening a valve and smelling for gas.[3] He did not ask Candelaria if propane had been placed in the tank nor did he make sure that the tank had been purged. Similarly, Candelaria believed that he was to complete the conversion and thus knew or should have known that the vehicle had been released. Despite this, he did nothing to retrieve the vehicle or to warn Snider and Clement, even though he knew the risk of harm of releasing a vehicle in that unsafe condition. The net effect of these omissions was that Schell released a vehicle that was dangerously unsafe and in violation of state law.

{23} Finally, there was sufficient evidence to prove that as a corporation Ferrellgas "displayed a cavalier attitude toward[] safety regulations." 114 N.M. at 338, 838 P.2d at 492. The fact that Schell had done over 100 conversions without ever filing a Form 6 shows that Ferrellgas did not care to have the state inspector's office double-check the work of its employees.[4] This cavalier

[3] Schell testified at trial that a person could not detect small amounts of propane by smelling the tank. Because Schell was trained and licensed in propane conversions, he may be presumed to have known that his actions would not suffice to determine if there actually was propane in the tank.

[4] The Court of Appeals acknowledged evidence from which the jury could have inferred that Ferrellgas employees displayed a cavalier attitude toward safety regulations, "including routinely failing to file forms designed to ensure that inspectors check gas installations for safety." The Court then held, however, that "the jury was not instructed on this theory of liability and, therefore, it cannot form the basis of a punitive damage award." 114 N.M. at 338, 838 P.2d at 492. The Court cited *Gonzales v. Sansoy,* 103 N.M. 127, 130, 703 P.2d 904, 907 (Ct. App. 1984), for the proposition that conduct giving rise to a claim for punitive damages must be the same conduct for which compensatory damages are allowed. *Cf. Sanchez v. Clayton,* 117 N.M. 761, 877 P.2d 567 (1994) (holding that it is the establishment of a *cause of action* for compensatory or nominal damages that is determinative of the right to punitive damages).

We do not consider whether in the statement of a plaintiff's contentions, *see* SCRA 1986, 13-302(B) (Repl. Pamp. 1991), it is necessary to itemize each act or omission that the Plaintiff argues and relies upon as constituting negligence that was the proximate cause of injury. Here, the jury properly was instructed in accordance with UJI 13-302(B) that the plaintiffs had the burden of proving that at least one of their itemized contentions was a proximate cause of the injuries and damages. As long as a jury finds in favor of a plaintiff on one such contention, the plaintiff's burden is satisfied. The jury is not logically precluded from considering evidence of other acts or omissions that were introduced and argued to the jury without objection, as occurred here in relation to the routine practice of ignoring forms. But that is not the point. The matter of ignoring forms constituted evidence, not of a contention of negligence and proximate cause, but of a mental state that was not an essential element of the underlying cause of action on which the jury was instructed.

attitude must be viewed in light of the foreseeable risk of harm. An expert testified at trial that it would take approximately three ounces of propane (the equivalent of one-quarter of one can of soda) to make the trunk flammable. Further, it would take approximately three cups of propane (the equivalent of two cans of soda) to make the entire passenger compartment flammable. Thus, even residual propane left in a tank creates a potentially volatile and dangerous situation.

{24} In *Horton* the court determined that the negligence of the employees coupled with the fact that the company ignored repeated suggestions to revise investigatory procedures constituted conduct that amounted to a wanton or reckless disregard for the lives, safety, or property of others. In this case Candelaria and Schell negligently allowed an unsafe vehicle to leave their possession. Further, Ferrellgas allowed its employees to violate state law by mounting propane tanks before installing the vapor barrier and proper venting and authorized or participated in Schell's continuing failure to file the proper forms which, had they been filed, probably would have prevented the harm to Snider and Clay. Given the high risk of harm that accompanies the handling of propane gas, the negligence of Schell and Candelaria and regular violation of safety regulations by Ferrellgas amounts to corporate indifference and reckless conduct. *Cf. Horton,* 690 S.W.2d at 387-88.

{25} Conclusion. We conclude that the Court of Appeals was incorrect in its adoption of the rule set out by the Utah court in *Gleave.* In addition, we believe that the Court was incorrect in its determination that the evidence did not support the assessment of punitive damages. Thus, we reverse the Court of Appeals and affirm the judgment entered on the jury verdict awarding Clay and Snider punitive damages.

{26} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

SETH D. MONTGOMERY,
Chief Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-098

Filing Date: September 7, 1994

Docket No. 19,931

TERRY D. CLARK,

Petitioner,

vs.

ROBERT TANSY, Warden,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Stanley F. Frost, District Judge

Motion for Rehearing Denied October 3, 1994

Gary C. Mitchell,
Ruidoso, NM,

for Petitioner.

Hon. Tom Udall, Attorney General,
Bill McEuen, Assistant Attorney General,
Santa Fe, NM,

for Respondent.

OPINION

RANSOM, Justice.

{1} In 1987 Terry Clark was sentenced to death for the kidnapping and murder of nine-year-old Dena Lynn Gore. On direct appeal a divided Court upheld this death sentence even though the prosecutor stressed Clark's future dangerousness and the jury was not informed as to the length of time Clark would serve in prison if he was not sentenced to death. *State v. Clark,* 108 N.M. 288, 772 P.2d 322, *cert. denied,* 493 U.S. 923, 107 L. Ed. 2d 271, 110 S. Ct. 291 (1989). Pursuant to SCRA 1986, 5-802 (Repl. Pamp. 1992), Clark filed a petition for a writ of habeas corpus in the district court, reiterating claims of fundamental error in his sentencing, raising the effect of our decision in *State v. Henderson,* 109 N.M. 655, 658, 789 P.2d 603, 606 (1990) (holding that "fundamental fairness, due process and eighth amendment rationales" require that the jury be given accurate information on the actual meaning of a life sentence), and claiming ineffective assistance of counsel. After a hearing on the habeas corpus petition, the district court entered findings of fact and conclusions of law denying Clark relief. Pursuant to SCRA 1986, 12-501 (Repl. Pamp. 1992), Clark filed, and we granted, his petition for a writ of certiorari.

{2} On June 17 of this year the U.S. Supreme Court held that when the prosecution urges a defendant's future dangerousness as cause for the death sentence, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution requires that the defendant be given an opportunity to inform the sentencing jury he is parole ineligible. *Simmons v. South Carolina,* 129 L. Ed. 2d 133, 114 S. Ct. 2187 (1994) (Ginsburg, J., concurring) (noting the agreement of the seven member majority of the Court). Consequently, we reverse and remand for new sentencing proceedings.

{3} We recognize fully that Clark is guilty of shocking crimes that well may merit forfeiture of his life. We are nonetheless compelled to recognize that "law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective." *Watts v. Indiana,* 338 U.S. 49, 55, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949) (plurality opinion).

{4} The problem. In this case the prosecutor specifically relied on Clark's future dangerousness in his argument for the death penalty. He argued:

> [Defense counsel] talked briefly about sentencing in this case and the possible length

> of time. The question is not when Terry Clark will get out—it's, I'm sorry, it's not if Terry Clark will get out, it's when he'll get out. It is inevitable. And as we tried to point out to you on cross-examination when this man, if this man, is sentenced to life, there are no guarantees. No guarantees. Somewhere down the road is another victim. Whether it's ten years from tomorrow, twenty years from tomorrow, or longer, she's out there, or she will be out there.

Clark, 108 N.M. at 296, 772 P.2d at 330 (alteration in original). The prosecutor invited the jury to conclude that Clark posed a future threat to young girls and that the only sure way to avert this threat was to sentence Clark to death. Based on the prosecutor's argument the jury reasonably could have concluded (hat Clark would be on the streets in as little as ten years, at age forty-one. This conclusion was incorrect. Assuming maximum good time for the noncapital offenses of kidnapping and criminal sexual penetration, a life sentence would have assured incarceration to age eighty-six.

{5} Simmons v. South Carolina. In *Simmons* a strong majority of the U.S. Supreme Court reversed a death-penalty judgment of the South Carolina Supreme Court on the ground that the defendant was denied due process of law. Justice Blackmun, announcing the judgment of the Court in language with clear applicability to Clark's efforts to provide his jury with accurate information regarding his parole ineligibility, described the mandate of the Due Process Clause as follows:

> In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the Jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed.

512 U.S. at——, 114 S.Ct. at 2193.

{6} In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause. Id. at——, 114 S.Ct. at 2194.

{7} While Justice Blackmun specifically noted that "we express no opinion on the question whether the result we reach today is also compelled by the Eighth Amendment," id. at——n. 4, 114 S.Ct. at 2193, Justice Souter, with whom Justice Stevens joined, expressed the opinion that

> The [Eighth] Amendment imposes a heightened standard "for reliability in the determination that death is the appropriate punishment in a specific case." Thus, it requires provision of "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." . . . .
>
> That same need for heightened reliability also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between

> sentencing alternatives. Thus, whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been "arbitrarily or capriciously" and "wantonly and . . . freakishly imposed."

Simmons, 512 U.S. at——, 114 S.Ct. at 2198 (Souter and Stevens, JJ., concurring) (citations omitted). Justice Souter concluded that "on matters of law, arguments of counsel do not effectively substitute for statements by the court. . . . Because . . . juries in general are likely to misunderstand the meaning of the term 'life imprisonment' in a given context, the judge must tell the jury what the term means, when the defendant so requests." 114 S. Ct. at 2199 (citation omitted).

{8} In dissent Justice Scalia, joined by Justice Thomas, succinctly declared the holding of the majority to be that "*the Due Process Clause overrides state law* limiting the admissibility of information concerning parole whenever the prosecution argues future dangerousness." Id. at——, 114 S.Ct. at 2203 (emphasis added). According to Justice Scalia, "the regime imposed by today's judgment is undoubtedly reasonable as a matter of policy, but I see nothing to indicate that the Constitution requires it to be followed coast-to-coast. I fear we have read today the first page of a whole new chapter in the 'death-is-different' jurisprudence. . . ." Id. at——, 114 S. Ct. at 2205.

{9} As discussed below, this Court believes that death indeed is different from other sanctions and thus requires greater scrutiny. Furthermore, a majority of this Court now concurs with Justice Souter that the Eighth Amendment requires the jury to be advised of the legal and factual significance of a life sentence in death-penalty proceedings. However, because *Simmons* points to a resolution of Clark's habeas petition on due process grounds, and because we hesitate to decide his petition according to the very Eighth Amendment principles on which a majority of the Supreme Court specifically declined to express an opinion, we decline to decide Clark's petition under the "cruel and unusual punishment" provision of the Eighth Amendment or of Article II, Section 13 of the New Mexico Constitution.

{10} Propriety of relief under habeas corpus. In this habeas proceeding Clark raises numerous arguments identical to those rejected on direct appeal to this Court. The State cites *Manlove v. Sullivan,* 108 N.M. 471, 775 P.2d 237 (1989), for the proposition that principles of finality prevent a habeas petitioner from relitigating issues decided against him in a prior proceeding. We believe that the State reads *Manlove* too broadly.

{11} In *Manlove* this Court stated that "collateral estoppel principles may, at the discretion of a subsequent habeas corpus court, prevent relitigation of issues argued and decided *on a previous habeas corpus petition.* " *Id.* at 475, 775 P.2d at 241 (emphasis added). *Manlove* specifically addressed the preclusive effect to be given issues raised in successive habeas petitions rather than the preclusive effect to be given issues previously raised on direct appeal. As we observed in *Duncan v. Kerby,* 115 N.M. 344, 347, 851 P.2d 466, 469 (1993), the *Manlove* preclusion principle recognizes that "[t]he successive-writ petitioner has already enjoyed the opportunity to fully explore his constitutional claims in the post-conviction setting . . . and consequently . . . is in a weaker position to argue that equity confers yet another postconviction opportunity to make his claim." The same considerations do not inhere in the reexamination of issues raised in a first petition for habeas relief. *Id.*

{12} Historically the writ of habeas corpus has been used to protect individual rights from erroneous deprivation. *Manlove,* 108 N.M. at 475-76 n.3, 775 P.2d at 241-42 n.3. It "has become a procedure for assuring that one is not deprived of life or liberty in derogation of a constitutional right." *Hurst v. Cook,* 777 P.2d 1029, 1034 (Utah 1989). In light of the essential role played by the writ of habeas corpus, courts rarely apply principles of finality in habeas corpus proceedings with the same force as they do in ordinary litigation.

See Larry W. Yackle, *Postconviction Remedies* § 124, at 479 (1981). "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders v. United States,* 373 U.S. 1, 8, 10 L. Ed. 2d 148, 83 S. Ct. 1068 (1963).

{13} With these principles in mind, the Supreme Court has held that a habeas petitioner may relitigate an issue decided against him on direct appeal when there has been an intervening change in the law; principles of finality do not bar such relitigation. *Davis v. United States,* 417 U.S. 333, 342, 41 L. Ed. 2d 109, 94 S. Ct. 2298 (1974); *see also Chapman v. United States,* 547 F.2d 1240, 1242-43 (5th Cir.) (reviewing habeas claim that prosecution's reference to defendant's post-arrest silence during trial violated his due process rights despite adverse decision on direct appeal), *cert. denied,* 431 U.S. 908, 52 L. Ed. 2d 393, 97 S. Ct. 1705 (1977). Other courts have endorsed a rule allowing relitigation of issues in postconviction settings that were determined previously on direct appeal when there has been an intervening change in the law *or* the facts. *See, e.g., Norris v. United States,* 687 F.2d 899, 900 (7th Cir. 1982); *Hurst,* 777 P.2d at 1036; *cf. Taylor v. United States,* 798 F.2d 271, 273-74 (7th Cir. 1986) (reviewing petitioner's claims of selective prosecution even though not raised on appeal when facts would not have been adequately developed at time of appeal), *cert. denied,* 479 U.S. 1056, 93 L. Ed. 2d 983, 107 S. Ct. 933 (1987). This Court adopted a similar rule in *Duncan,* 115 N.M. at 346, 851 P.2d at 468: "A habeas corpus petitioner will not be precluded . . . from raising issues in habeas corpus proceedings that could have been raised on direct appeal either when fundamental error has occurred or when an adequate record to address the claim properly was not available on direct appeal." (Citation omitted.)

{14} We hold that when a habeas petitioner can show that there has been an intervening change of law or fact, or that the ends of justice would otherwise be served, principles of finality do not bar relitigation of an issue adversely decided on direct appeal. *See Sanders,* 373 U.S. at 16 (stating that habeas petitioner should be permitted to show that ends of justice require redetermination of a previously considered ground for relief). A petitioner's presentation of a claim in his first application for postconviction relief does not *require* either a trial or an appellate court to readdress the merits of an issue squarely addressed and decided against the petitioner on direct appeal. Nonetheless, when a claim has not been previously addressed in a postconviction proceeding there is less reason for the habeas-corpus policy of preserving life and liberty against illegal deprivation to be subordinated to the policy of adjudicative finality. *Cf. Reese v. State,* 106 N.M. 505, 507, 745 P.2d 1153, 1155 (1987) (stating that court may deviate from doctrine of law of the case in order to avoid manifest injustice).

{15} After Clark's direct appeal to this Court the Supreme Court held in *Simmons* that when the prosecution urges a defendant's future dangerousness as cause for the death sentence, the defendant must be given an opportunity to inform the sentencing jury he is parole ineligible. 512 U.S. at——, 114 S. Ct. at 2194. Because under *Simmons* it now has become clear that the Due Process Clause assures the defendant a right to have the jury informed of the period of his parole ineligibility, because of the nature of the writ of habeas corpus, and because "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination," *California v. Ramos,* 463 U.S. 992, 998-99, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983), *quoted in State v. Henderson,* 109 N.M. 655, 659, 789 P.2d 603, 607 (1990), we readdress whether the length of Clark's incarceration without the possibility of parole (in the event he was not to be sentenced to death) must necessarily have been disclosed to the jury prior to its capital sentencing deliberations and whether the court must necessarily have imposed sentence for Clark's noncapital crimes before the jury deliberated.

{16} The meaning of a life sentence. In Clark's direct appeal this Court acknowledged that "in capital cases the defendant is entitled to have the

sentencing jury consider any relevant mitigating evidence." *Clark,* 108 N.M. at 306, 772 P.2d at 340. Under SCRA 1986, 14-7029, the jury is instructed that "[a] mitigating circumstance is any conduct, circumstance or thing which would lead you to decide not to impose the death penalty. " This Court specifically agreed with Clark that the terms of his sentence for the kidnapping charge would affect significantly when he would be eligible for parole. 108 N.M. at 294, 772 P.2d at 328. The Court divided, however, over whether the meaning of a life sentence was relevant mitigating information under the Eighth Amendment. Whether it was relevant mitigating information under the Due Process Clause was not considered.

{17} The Supreme Court has held that future dangerousness is an appropriate consideration for capital sentencing juries. *E.g., Jurek v. Texas,* 428 U.S. 262, 275, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976) (plurality opinion) (noting that "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose"); *Ramos,* 463 U.S. 992, 1003 n. 17, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (explaining that it is proper for sentencing jury in capital case to consider "the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society"). When the prosecution relies on future dangerousness as part of its case for death, however, due process requires that the defendant be given an opportunity to present evidence in rebuttal. *Skipper v. South Carolina,* 476 U.S. 1, 5 n.1, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (1986) (stating requirement that defendant be allowed to present evidence in rebuttal stems from "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" (quoting *Gardner v. Florida,* 430 U.S. 349, 362, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977))). It was the import of *Jurek, Ramps,* and *Skipper* that divided the Court in *Clark.* Although *Simmons* did not decide whether the Eighth Amendment requires a jury to be informed of the meaning of a life sentence, it reveals that notions of fundamental fairness embodied in the Due Process Clause require that the defendant be allowed to rebut, with all relevant mitigating evidence, the prosecutor's argument that the defendant's future dangerousness is cause for the death penalty, and relevant mitigating evidence includes the length of incarceration facing the defendant if he is not sentenced to death. 512 U.S. at——, 114 S. Ct. at 2193.

{18} We have already stated the problem in this case: the prosecutor specifically relied on Clark's future dangerousness in his argument for the death penalty. Assuming maximum good time for the noncapital offenses, a life sentence would have assured incarceration to age eighty-six, not age forty-one as argued by the prosecutor. The jury must have had a fundamental misunderstanding of the alternatives it faced. "The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative." *Simmons,* 512 U.S. at——, 114 S. Ct. at 2193.

{19} The length of incarceration facing a capital defendant before he can be considered for parole, as an alternative to a death sentence, is information that must be provided to a jury before it deliberates on the capital charge if the defendant decides it is in his best interest to have the jury apprised of this information. To withhold this information after it is requested violates the petitioner's due process right to have accurate information presented to the jury to rebut the prosecution's case for death. In *Henderson,* 109 N.M. at 659, 789 P.2d at 607, we recognized that accurate information on the meaning of a life sentence under New Mexico law is relevant evidence in mitigation because it might cause the jury to decline to impose the death sentence. Under *Simmons,* although the states may choose whether to allow jury consideration of a defendant's eligibility for release from incarceration, the Due Process Clause assures that when the prosecutor urges the defendant's future dangerousness as cause for the death penalty the jury will be accurately informed of the period of his parole ineligibility.

The failure to provide the jury with such accurate information violated Clark's due process rights, and therefore, under *Simmons* and *Henderson,* his death sentence must be vacated.

{20} Right to have noncapital sentences imposed prior to jury deliberation. Our holding raises a related issue: Must a court impose sentence for noncapital offenses before jury deliberations on a capital sentence if requested to do so by the defendant? The defendant in *Henderson,* like Clark, had requested that he be sentenced on noncapital charges prior to jury deliberation on the death penalty. 109 N.M. at 659, 789 P.2d at 607. The *Henderson* Court found no error in refusing to impose sentence if the jury is instructed on the range of sentences available. *Id.* The Court indicated, however, "that the better course of conduct for a trial court to follow would be first to sentence the defendant on the noncapital offenses if requested." *Id.*

{21} Because the length of incarceration facing a defendant if he is not sentenced to death is accurate and relevant information that must be presented to a capital jury to rebut the prosecution's case for death, we conclude that the trial court has no discretion to delay imposing sentence on noncapital charges. If the defendant is sentenced by a judge, the judge will know the precise terms of the noncapital sentence facing the defendant and will consider this in deciding whether to impose the death penalty. Because the precise terms of a defendant's noncapital sentence may affect when he is eligible for parole, and because this may help the defendant rebut the prosecution's case for death, we hold that once the length of incarceration facing a convicted capital felon is asserted by the defendant to be mitigating evidence, the court cannot choose between an instruction detailing the actual sentence imposed for noncapital offenses and an instruction detailing the range of sentencing alternatives; the trial court must impose sentence on noncapital charges before jury deliberations on the capital charge. We overrule *Henderson* on this point.

{22} Although the majority in *Clark* refused to apply the doctrine of fundamental error, it did indicate that placing the issue of the parole laws before the jury was error. *Id.* at 297, 772 P.2d at 331. To the extent that the majority was referring to the extensive testimony and argument over whether good-time awards were applicable toward a life sentence and whether the legislature or some other governmental entity could affect such awards in the future, the *Clark* majority certainly was correct. Allowing the prosecution to argue about the possibility of executive commutation or pardon, or possible legislative change, invites juror speculation about matters that cannot be proven. As the Ninth Circuit recently observed in striking down a jury instruction about possible commutation

> the requirements of the Eighth and Fourteenth Amendments dictate that: "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Hamilton v. Vasquez, 17 F.3d 1149, 1159 (9th Cir.) (quoting *Gregg v. Georgia,* 428 U.S. 153, 159, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976) (plurality opinion)), *cert. denied,* 114 S. Ct. 2706 (1994). Allowing the jury to speculate about *possible* future executive or legislative actions cannot be reconciled with the requirement that the jury's sentencing discretion be limited and directed or the requirement that the jury have accurate information about the sentencing alternatives it is to consider. What constitutes a life sentence, and the earliest date a convicted capital felon might be considered for parole under *existing* legislation, are questions of law; the trial court can determine the answers to these questions and should, if requested, instruct the sentencing jury accordingly.

{23} Clark now has been sentenced on his noncapital offense for kidnapping (twenty-six years of imprisonment), and the trial court has ordered that sentence to be served consecutively to his existing sentence for criminal sexual penetration in the course of a kidnapping (twenty-four years). On remand the sentencing jury shall be apprised

of the earliest point in time that Clark can be considered for parole should the jury choose to sentence him to life imprisonment. *Cf. Martinez v. State,* 108 N.M. 382, 772 P.2d 1305 (1989) (holding that capital felons must be imprisoned for at least thirty years before being given a parole hearing, regardless of any meritorious deductions allowed to noncapital felons).

{24} Other issues. While most of the other issues Clark raises are now moot, some bear comment if only to express our satisfaction with the prior resolution of those issues and to remove any lingering uncertainty. Specifically, Clark argues that the jury instructions used in his sentencing "impermissibly skewed the process toward a return of a death sentence." Clark's objections are the same as those he raised in the direct appeal, and we are satisfied with the treatment of those claims. On the question whether the instructions precluded consideration of any proffered mitigating circumstance unless the jury agreed unanimously on its presence, *see Mills v. Maryland,* 486 U.S. 367, 374-75, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988), we reaffirm our earlier conclusion that reversal on this point was unnecessary, *see Clark,* 108 N.M. at 309-10, 772 P.2d at 343-44. In order to increase the reliability of the proceedings, however, the jury should be instructed that it need not unanimously agree on the presence of a mitigating circumstance before considering it. *See Henderson,* 109 N.M. at 664, 789 P.2d at 612.

{25} Clark again argues that the aggravating circumstance of murder of a witness to a crime for the purpose of preventing the reporting of that crime, *see* NMSA 1978, § 31-20A-5(G) (Repl. Pamp. 1994), is overbroad and unconstitutional. There is no merit to this argument. As indicated in *Clark,* in order to prove the existence of this aggravating circumstance the state must prove that the killing was motivated by a desire to escape criminal prosecution for an earlier felony committed against the victim or some other person. *See Clark,* 108 N.M. at 304, 772 P.2d at 338. The need for proof of motivation is sufficient to distinguish between this aggravating circumstance and that of a killing committed during the commission of a kidnapping, the second statutory aggravating circumstance submitted to the jury in Clark's case. *See* § 31-20A-5(B).

{26} Clark also argues that the guidelines for proportionality review established in *State v. Garcia,* 99 N.M. 771, 780, 664 P.2d 969, 978, *cert. denied,* 462 U.S. 1112, 77 L. Ed. 2d 1341, 103 S. Ct. 2464 (1983), are unduly restrictive and that no mechanism currently exists to provide this Court with proportionality information. The merits of these arguments can be taken up after Clark's resentencing if this Court is called upon to review a sentence of death in order to determine whether it is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Section 3 1-20A-4(C)(4).

{27} Finally, Clark raises for the first time an issue of ineffective assistance of counsel. We stated recently that we are reluctant to grant review in postconviction proceedings on issues that could have been, but were not, raised on direct appeal, even when those issues involve important constitutional questions. *Swafford v. State,* 112 N.M. 3, 6 n.1, 810 P.2d 1223, 1226 n.1 (1991). Nevertheless, we will sometimes exercise our discretion to engage in such review of questions that involve the jurisdictional power of the lower court or important constitutional questions. *See id.*

{28} With an order for new sentencing proceedings Clark's claims of ineffective assistance of counsel become largely moot. Only two of the specific claims of inadequate performance have any relationship to the entry of his guilty plea. Clark complains that his attorneys advised him to plead guilty "rather than to attempt to enter a qualified or no-contest plea," and that his attorneys failed until February 1987 to move to withdraw his plea, despite the governor's decision on December 30, 1986, to deny clemency. We are satisfied, however, for the reasons stated in *Clark,* that the trial court committed no error in refusing to allow him to withdraw his guilty plea. *See* 108 N.M. at 292-93, 772 P.2d at 326-27. No new evidence has been presented that would cause us to reevaluate that disposition. For similar reasons,

the two claims Clark makes regarding his attorneys' performance in connection with that plea do not merit further examination.

{29} Conclusion. Under *Simmons v. South Carolina,* and in light of our previous decision in *Henderson,* to allow the penalty of death to be imposed under these circumstances would be a violation of the Due Process Clause. We therefore vacate Clark's death sentence and remand the cause to the district court for resentencing.

{30} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

SETH D. MONTGOMERY,
Chief Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1995-NMSC-019

Filing Date: March 2, 1995

Docket No. 22,160

ANTHONY THEODORE GARCIA and DEBBIE LUCILLE GARCIA, on behalf of ANTHONY DAVID GARCIA, their minor and incapacitated son, and on behalf of themselves,

Plaintiffs-Appellants,

vs.

C. GRANT La FARGE, M.D.,

Defendant-Appellee.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Steve Herrera, District Judge

Motion for Rehearing Denied April 10, 1995

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for Appellee.

OPINION

RANSOM, Justice.

{1} On February 24, 1992, Anthony Theodore Garcia and Debbie Lucille Garcia made application to the Medical Review Commission, and on November 17 they sued C. Grant La Farge, M.D., for medical malpractice, negligence, and misrepresentation in the making of a diagnosis of the condition of their minor son, Anthony David Garcia. Dr. La Farge moved for summary judgment under the three-year statute of limitations in the Medical Malpractice Act, NMSA 1978, § 41-5-13 (Repl. Pamp. 1989). Dr. La Farge had neither examined nor evaluated Anthony after February 8, 1989, nor had he made any representations concerning Anthony's condition after that date. Anthony's cause of action arose out of a cardiac arrest on November 16, 1991. The Garcias challenged Section 41-5-13 as a violation of due process and equal protection, and as prohibited special legislation. In the alternative, the Garcias urged that the statute of limitations should be tolled because Dr. La Farge had misrepresented his qualifications and had fraudulently concealed Anthony's condition. The district court rejected the Garcias' constitutional claims, found no genuine issue of material fact on the Garcias' claim that the statute of limitations should be tolled, and granted summary judgment in favor of Dr. La Farge.

{2} The Garcias timely filed a notice of appeal in the Court of Appeals, reasserting their constitutional claims and their claim that the statute of limitations should be tolled. The Court of Appeals certified the Garcias' appeal to this Court pursuant to NMSA 1978, Section 34-5-14(C) (Repl. Pamp. 1990). Because Section 41-5-13 left an unreasonably short period of time within which the Garcias could file their claims after Anthony's cause of action accrued, we hold under the precedent of *Terry v. New Mexico State Highway Commission*, 98 N.M. 119, 645 P.2d 1375 (1982), that Section 41-5-13 deprived the Garcias of due process.

{3} *Facts.* On December 6, 1988, while running on the playground at his school, nine-year-old Anthony Garcia became dizzy and nearly fainted. Soon thereafter Anthony's parents took him to his pediatrician, Dr. Jacqueline Krohn,

who examined Anthony and recommended that he see a cardiologist. Dr. Krohn referred the Garcias to Dr. La Farge who, on December 12, took a history and examined Anthony. Dr. La Farge did not run an electrocardiogram (EKG) that day, but he assured the Garcias that Anthony was fine. He instructed the Garcias to watch for spells of fainting and to report to Dr. Krohn if they noticed "anything unusual about a pattern of fainting." Dr. La Farge reported his conclusions to Dr. Krohn by letter stating that he "did not schedule . . . [an] ECG or echo, since he did not think it warranted at this point" and that he "could not in all honesty think other than that [Anthony] has an innocent pulmonic ejection murmur."

{4} On January 24, 1989, Anthony fainted again-this time while running during a physical education class. The Garcias took Anthony back to Dr. Krohn who had an EKG run and made an appointment for Anthony to see Dr. La Farge. Dr. La Farge examined Anthony on February 8 and conducted a treadmill exercise test. After viewing the results of this test, Dr. La Farge determined that Anthony was "borderline" but informed the Garcias that Anthony was fine and that there was no need for him to limit his activities in any way. Dr. La Farge informed Dr. Krohn by letter that he believed "we have eliminated enough of the important negatives for us to be able to relax for a while and simply observe the passing scene." Regarding Anthony's continued episodes of fainting, Dr. La Farge concluded that "I continue to have to ascribe this to some form of vasovagal syncope, quite likely related to some element of hyperventilation." February 8, 1989, was the last occasion on which Dr. La Farge examined Anthony and the last occasion on which Dr. La Farge made any representations regarding Anthony's health to Anthony, his family, or his physicians.

{5} After February 8, Anthony experienced two more fainting spells, the first on September 29, 1989, and the second on September 27, 1990. Relying on Dr. La Farge's conclusion that Anthony did not have a heart condition, Dr. Krohn sought a neurological explanation for Anthony's fainting spells. After having an electroencephalogram (EEG) run on Anthony, she referred him to Dr. Ruth Atkinson, an Albuquerque neurologist. Relying on the results of the EEG, which showed Anthony's neurological condition to be normal, and relying on Dr. La Farge's conclusions about Anthony's heart, Dr. Atkinson informed the Garcias that Anthony was fine and that they should no longer worry.

{6} On November 16, 1991, while swimming with his father at a hotel in Albuquerque, Anthony again fainted, but this time he went into cardiac arrest. Rescue personnel resuscitated him approximately twenty minutes later. By the time Anthony was resuscitated, however, he had suffered irreversible brain damage.

{7} Anthony was taken to the University of New Mexico Medical Center where he was examined by pediatric cardiologists, Drs. Stuart Rowe and William Berman, Jr. These doctors had an EKG run on Anthony and immediately diagnosed Long QT syndrome. We are advised that Long QT syndrome is an elongation of the Q-T interval, which measures the duration of the electrical activity of the ventricles, the lower chambers of the heart. The syndrome is sometimes characterized by exercise-induced fainting and may produce a heart arrhythmia that in turn often leads to cardiac arrest and resulting brain damage. The syndrome is treatable with oral medication. Left untreated, it results in death or cardiac arrest and brain damage in nearly seventy-five percent of afflicted persons. The Garcias contend that evidence of Long QT syndrome can be found on every page of the EKG tracing reviewed by Dr. La Farge on February 8, 1989.

{8} *Proceedings*. On February 24, 1992, the Garcias filed an application with the Medical Review Commission. *See* NMSA 1978, § 41-5-15(A) (Repl. Pamp. 1989) (requiring application to Medical Review Commission before medical malpractice action may be filed). They complained that acts of malpractice were committed by Dr. La Farge in December 1988 and February 1989. On November 17, 1992, the Garcias

filed a complaint in district court alleging that Dr. La Farge, together with Drs. Krohn and Atkinson, failed to possess and apply the knowledge and to use the skill and care ordinarily used by well-qualified specialists. The Garcias also claimed that each of these doctors negligently failed to rule in or rule out Long QT syndrome as the cause of Anthony's fainting, negligently failed to consult with one another, and failed to prevent Anthony's cardiac arrest and resulting brain damage. Finally, the Garcias claimed that Dr. La Farge materially misrepresented his qualifications as a pediatric cardiologist and negligently represented as his diagnosis of Anthony's condition that he was just a "fainter".

{9} On March 9, 1993, Dr. La Farge filed his motion for summary judgment. The Garcias responded by filing a motion to declare the New Mexico Medical Malpractice Act unconstitutional, together with an accompanying memorandum. The Garcias specifically claimed that because Section 41-5-13 bars a plaintiff's claims three years after the underlying act of malpractice regardless of his or her inability to discover the malpractice until an injury manifests itself, it deprives persons such as the Garcias of equal protection and due process. The Garcias also claimed that Section 41-5-13 confers a benefit in the form of an abbreviated limitations period on a select group ("qualified health care providers") for the purpose of securing to that group lower insurance rates at the expense of malpractice victims. The Garcias argued that conferring such a benefit violates Article IV, Section 24 of the New Mexico Constitution, which prohibits the legislature from enacting a "special law" when a general law may be enacted and from enacting special laws pertaining to the limitation of actions.

{10} The district court heard argument and orally granted Dr. La Farge's motion for summary judgment. Thereafter, Dr. La Farge prepared for presentment an order reflecting the court's decision that Section 41-5-13 was not a violation of the Equal Protection or Due Process Clauses, nor of the prohibition against special legislation, and that there was no issue of material fact regarding the Garcias' fraudulent concealment claims. The Garcias indicated that they intended to move for reconsideration of the district court's decision, and at the hearing for presentment of the order the district court again heard argument on the summary judgment issues.

{11} At the presentment hearing the district court determined that its initial decision was correct and entered an order concluding that there was no genuine issue of fact as to whether the statute of limitations had run and whether there was fraudulent concealment. Further, relying on *Armijo v. Tandysh*, 98 N.M. 181, 183-84, 646 P.2d 1245, 1247-48 (Ct. App. 1981) (holding that the limitations period provided in Section 41-5-13 is not an equal protection or due process violation), *cert. quashed*, 98 N.M. 336, 648 P.2d 794 (1982), *cert. denied*, 459 U.S. 1016 (1982), and *Kern ex rel. Kern v. St. Joseph Hospital, Inc.,* 102 N.M. 452, 455, 697 P.2d 135, 138 (1985) (same), the court concluded that the Garcias' constitutional claims must be rejected.

{12} *Fraudulent concealment not dispositive.* The Garcias argue that if application of the Section 41-5-13 limitations period is otherwise constitutionally valid-and, consequently, the three-year period for filing Anthony's medical malpractice claim expired February 8, 1992-then the limitations period for Anthony's claims should be tolled under the doctrine of fraudulent concealment. Specifically, the Garcias argue that Dr. La Farge materially misrepresented his medical qualifications as well as Anthony's medical condition and thus should be prevented from asserting any limitations defense.

{13} Under principles of equitable estoppel, this Court recognizes the doctrine of fraudulent concealment to toll a statute of limitations. *Kern*, 102 N.M. at 455-56, 697 P.2d at 138-39. To toll the statute applicable here, the plaintiff must establish that the physician knew of his or her alleged wrongful act and concealed that act from the patient, or that the physician had material information pertinent to the discovery of his or her wrongful act and failed, under a duty to do so, to disclose that information. Because equity tolls the statute, it does so only as long as the

patient is not guilty of failing to exercise ordinary diligence in pursuit of a cause of action.[1] As discussed later in this opinion, regardless of the nondisclosures, Anthony's cause of action is acknowledged to have accrued eighty-five days short of the running of the limitations period and due process requires that he have a reasonable time within which to bring suit. Consequently, we deem the concealment issue to be moot.

{14} Section 41-5-13 is a statute of limitations or a statute of repose depending upon its application. The purpose of a statute of limitations is to protect prospective defendants from the burden of defending against stale claims while providing an adequate period of time for a person of ordinary diligence to pursue lawful claims. *Roberts v. Southwest Community Health Servs.,* 114 N.M. 248, 256, 837 P.2d 442, 450 (1992). By contrast, the purpose of a statute of repose is to put an end to prospective liability for wrongful acts that, after the passage of a period of time, have yet to give rise to a justifiable claim. Statutes of repose begin to run from a statutorily determined time defined without regard to when the underlying cause of action accrues and without regard to the discovery of injury or damages. *See Saiz v. Belen Sch. Dist.,* 113 N.M. 387, 401 n.12, 827 P.2d 102, 116 n.12 (1992). Statutes of limitation begin to run when an action accrues or is discovered. *See id.* Because the triggering event under Section 41-5-13 is the act of malpractice, and because the statute began to run long before Anthony's cause of action accrued, we will analyze Section 41-5-13 as a statute of repose.

{15} *Equal protection rights of medical malpractice plaintiffs.* The Garcias challenge Section 41-5-13 as a violation of the equal protection guarantee of the New Mexico Constitution. N.M. Const. art. II, § 18. Specifically, the Garcias claim that by requiring plaintiffs to file medical malpractice claims within three years of the act of malpractice regardless of the time at which the plaintiff discovers his or her injury, Section 41-5-13 infringes Anthony's important interest in access to the courts. Further, the Garcias claim that the statute of repose conferred upon qualified health care providers does not bear a substantial relationship to the legislature's professed goal of alleviating the insurance crisis. *See Roberts*, 114 N.M. at 252, 257, 837 P.2d at 446, 451 (holding that the limitations period contained within Medical Malpractice Act is a "benefit" of the Act available only to qualified health care providers and holding that a cause of action for medical malpractice against a nonqualified health care provider is governed by the discovery rule). We conclude that Section 41-5-13 does not implicate the equal protection rights of medical malpractice plaintiffs.

{16} - *Discriminatory classifications.* The basic guarantee of the Equal Protection Clause of the New Mexico Constitution is that the legislature may not enact a statute which treats similarly situated persons differently. *See Gruschus v. Bureau of Revenue*, 74 N.M. 775, 778, 399 P.2d 105, 107 (1965) (stating that to satisfy mandates of equal protection, legislative classifications must be "so framed as to embrace equally all who may be in like circumstances and situations"). In order to raise a claim that a statute has violated this basic guarantee, the plaintiff must show that the statute draws classifications that discriminate against a group of persons to which the plaintiff belongs. *State v. Hines*, 78 N.M. 471, 473, 432 P.2d 827, 829 (1967) ("The denial of equal rights can be urged only by those who can show they belong to the class discriminated

[1] In *Kern*, the diligence requirement was stated to be "that the patient did not know, or could not have known through the exercise of reasonable diligence, of his cause of action *within the statutory period*." 102 N.M. at 456, 697 P.2d at 139 (emphasis added). *Kern* relied on *Garcia v. Presbyterian Hospital Center*, 92 N.M. 652, 593 P.2d 487 (Ct. App. 1979), for the proposition that the statute of limitations is not tolled if the patient knew of the cause of action within the statutory period. 102 N.M. at 456, 697 P.2d at 139. In *Garcia*, however, the patient did learn of the nondisclosure *within* the statutory period and the court tolled the limitations period until that discovery and allowed the plaintiff three years from that time to file suit. In *Kern* the patient did not discover the concealment until after the statutory period had expired, and thus the phrase "within the statutory period" was not dispositive. Here, the Garcias arguably learned of Dr. La Farge's nondisclosures at the time of Anthony's cardiac arrest and hence within the statutory period. Neither party adequately briefed nor argued whether *Kern* limits the doctrine of fraudulent concealment to cases in which the alleged concealment is not discovered until the applicable limitations period has expired.

against.") The plaintiff may carry this burden by showing that the challenged statute draws classifications on its face, in its application, or in its purpose and effect. *See* 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 18.4, at 41-42 (2d ed. 1992) ("Establishing and Testing Classifications of a Law").

{17} - Equal protection challenge to Section 41-5-13. The Garcias cannot demonstrate that Section 41-5-13 draws a classification which discriminates against them in the exercise of their claimed interest in access to the courts. An examination of this statute of repose reveals that it does not discriminate against Anthony Garcia based on his status as a medical malpractice plaintiff. The statute merely provides a statute of repose within which all claimants must file *against* a health care provider. This statute thus classifies claims not according to the status or character of the plaintiff but according to the status or character of the *defendant*. While such a classification may be challenged on equal protection grounds by other tortfeasors or by nonqualified health care providers, it does not implicate the equal protection rights of medical malpractice plaintiffs.

{18} As a statute of repose, Section 41-5-13 defines only the time within which a substantive right may accrue and be asserted in court. Each medical malpractice plaintiff who brings a claim after this statute of repose has run is treated the same. *Cf. Trujillo v. City of Albuquerque*, 110 N.M. 621, 630, 798 P.2d 571, 580 (1990) (finding that tort damages cap discriminated against only certain victims of a given tortfeasor depending upon the amount of damages suffered). While a procedural limitation on the right of access to the courts does implicate constitutional due process considerations, it does not implicate equal protection considerations because Section 41-5-13 operates uniformly upon all similarly situated plaintiffs. Hence the trial court properly rejected the Garcias' equal protection challenge.

{19} Section 41-5-13 does not violate the prohibition against "special legislation." Article IV, Section 24 of the New Mexico Constitution prohibits the enactment of a "special law" when a "general law can be made applicable." Article IV, Section 24 also specifically prohibits the enactment of special laws pertaining to the limitation of actions. The Garcias contend that Section 41-5-13 is prohibited special legislation because it creates a class of health care providers and confers a benefit upon that class-a shorter period of exposure to claims-not conferred upon tortfeasors generally. Further, the Garcias claim that because this Court has interpreted Section 41-5-13 as a benefit of the Medical Malpractice Act available only to "qualified" health care providers, *see Roberts*, 114 N.M. at 254, 837 P.2d at 448, Section 41-5-13 confers a benefit upon less than the entire class of health care providers in violation of the prohibition against special legislation.

{20} - *Standard of review.* Like the Equal Protection and Privileges and Immunities Clauses of the New Mexico Constitution, the prohibition against special legislation limits the power of the legislature to draw classifications such as the Garcias allege were drawn here. But also like those clauses, the prohibition against special legislation does not forbid all legislative classifications. *See, e.g., State v. Atchison, T. & S.F. Ry.*, 20 N.M. 562, 568, 151 P. 305, 307 (1915) (noting that the legislature may draw classifications and that the presence of such classifications does not automatically make a statute prohibited special legislation). The legislature properly may determine that particular circumstances require the enactment of a statute which applies to a specific class only. *See Scarbrough v. Wooten*, 23 N.M. 616, 620-21, 170 P. 743, 744 (1918) (holding that legislature had discretion to determine whether enactment of a special law balancing competing agricultural and grazing interests in certain areas of the state was necessary).

{21} While a statute may be special in the sense that it is not universally applicable, we will not find that such a statute violates the constitutional prohibition simply because the legislature has chosen to confer a benefit upon or allocate a burden to less than all inhabitants of the state. As

long as the statute applies to all persons whose particular circumstances, now or in the future, coincide with the particular circumstances that prompted the enactment of the statute, the statute retains its general character, and we will uphold the legislative classification.

{22} Legislative classifications cannot be arbitrary, however, and must be based upon real differences between those to whom the statute applies and those to whom it does not. *Atchison, T. & S.F. Ry.*, 20 N.M. at 568-69, 151 P. at 307. To determine whether the legislature has acted arbitrarily, we need inquire only whether there are some circumstances peculiar to the persons benefitted or burdened that make it reasonable to distinguish those persons from the persons not so benefitted or burdened. *Compare Thompson v. McKinley County*, 112 N.M. 425, 429, 816 P.2d 494, 498 (1991) (upholding a statute that authorized local elections in McKinley County to determine whether alcoholic beverages should be sold from drive-up windows because special circumstances in McKinley County required special remedial measures) *with Keiderling v. Sanchez*, 91 N.M. 198, 200, 572 P.2d 545, 547 (1977) (striking down as special legislation a statute that gave litigants in the second judicial district the right to disqualify three judges while giving all other litigants in the state the right to disqualify only one judge).

{23} We accord great weight to legislative classifications and will presume the constitutionality of a statute. *Board of Trustees v. Montano*, 82 N.M. 340, 343, 481 P.2d 702, 705 (1971). Only if we are satisfied that the "statutory classification is so devoid of reason to support it, as to amount to mere caprice" will we declare a statute unconstitutional. *Id.; see also Thompson*, 112 N.M. at 427, 816 P.2d at 496. As the party challenging the constitutionality of Section 41-5-13, the Garcias had the burden of producing evidence demonstrating the absence of a rational basis for the legislative decision to classify health care providers differently from other tortfeasors for limitation of action purposes. *Cf. Thompson*, 112 N.M. at 430, 816 P.2d at 499 (stating that party making equal protection challenge bears burden of demonstrating that statute is arbitrary and capricious); *State ex rel. Gonzales v. Manzagol*, 87 N.M. 230, 234, 531 P.2d 1203, 1207 (1975) (stating that burden is on party challenging statute to show that similarly situated persons are treated differently).

{24} *Application to the Garcias' claims.* The asserted purpose of the Medical Malpractice Act "is to promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." Section 41-5-2. It is within the competence of the legislature to determine that the high costs of malpractice insurance distinguish the class of health care providers from the class of tortfeasors generally. The high cost of insurance justifies the legislative conclusion that a shorter limitations period for medical malpractice claims was and is necessary to make malpractice insurance more affordable and thereby encourage more physicians to carry such insurance. *See id.*

{25} Similarly, the legislature reasonably could determine that providing the benefit of a shorter period of exposure to malpractice claims only to qualified health care providers was and is necessary to encourage all health care providers to "qualify" under the Medical Malpractice Act. Section 41-5-13 may be viewed as a reasonable benefit accorded to those health care providers who accept the concomitant burden of obtaining occurrence-based malpractice insurance, Section 41-5-5(A)(1) (requiring health care providers to prove coverage by a one hundred thousand dollar per occurrence policy in order to qualify for benefits of Medical Malpractice Act), and of ensuring the solvency of the Patient's Compensation Fund, Section 41-5-25 (levying an annual surcharge on health care providers to maintain a fund to compensate plaintiffs with judgments or settlements in excess of one hundred thousand dollars). The Garcias have adduced no facts that would demonstrate unreasonableness in the legislature's determinations. Thus we conclude that Section 41-5-13 does not violate the prohibition against special legislation.

{26} *Section 41-5-13 violates the due process rights of those persons whose causes of action*

accrue shortly before this three-year statute of limitations runs. The Garcias argue that Section 41-5-13 violates substantive due process. Dr. La Farge, while maintaining that the Section 41-5-13 limitations period is constitutional, counters that the Garcias' substantive due process claim was not preserved for review. We believe that the Garcias preserved their due process argument, and we conclude that Section 41-5-13 left an unconstitutionally short period of time within which the Garcias could file suit after Anthony's cause of action accrued. Hence we reverse the entry of summary judgment.

{27} *The Garcias' substantive due process claim was preserved.* To preserve an issue for appeal, "it must appear that a ruling or decision by the district court was fairly invoked." SCRA 1986, 12-216(A) (Repl. Pamp. 1992); *see also* SCRA 1986, 1-046 (Repl. Pamp. 1992) (preserving questions for judicial review). One purpose of the preservation rule is to alert the trial judge to a claim of error and give the judge an opportunity to correct any mistake. *Madrid v. Roybal*, 112 N.M. 354, 356, 815 P.2d 650, 652 (Ct. App.), *cert. denied*, 112 N.M. 308, 815 P.2d 161 (1991); *see also Cockrell v. Cockrell*, 117 N.M. 321, 323-24, 871 P.2d 977, 979-80 (1994) (holding that challenge to sufficiency of evidence was not brought to the attention of trial court and thus was not preserved). A second purpose of the preservation rule is to give the opposing party a fair opportunity to meet the case presented by the objector and show why the court should rule against the objector and in the opposing party's favor. *See Fullen v. Fullen*, 21 N.M. 212, 226, 153 P. 294, 298 (1915).

{28} In their memorandum accompanying a motion to declare the Medical Malpractice Act unconstitutional, the Garcias stated that "[s]ubstantive due process and equal protection are complimentary concepts: `In both substantive due process and equal protection cases, the judiciary is called upon to review the substance of a law and whether the law is constitutionally permissible'" (quoting John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 11.4, at 369 (4th ed. 1991)). The Garcias went on to argue that Section 41-5-13 deprived them of access to the courts in violation of due process. As part of their argument, the Garcias provided the court and opposing counsel with citation to decisions from other courts striking down medical malpractice statutes of limitation on due process grounds. Finally, counsel for Dr. La Farge devoted extensive time at the summary judgment hearings arguing that Section 41-5-13 was consistent with due process. Although plaintiffs' due process arguments were not a model of clarity, and certainly could have been made with more specificity, they were sufficient to alert the trial court and opposing counsel to the substance of the argument being made. As such, we conclude that the due process challenge to Section 41-5-13 was preserved.

{29} In a motion for rehearing filed after this opinion was first entered, Dr. La Farge points out that at oral argument counsel for the Garcias conceded he had not raised, briefed, or argued the due process issue in reliance on *Terry v. New Mexico State Highway Commission*, 98 N.M. 119, 645 P.2d 1375 (1982), the case that we find dispositive in the next part of this opinion. Counsel for the Garcias acknowledged that "we became aware of [*Terry v. Highway Commission*] when the *Coleman* decision came down." *See Coleman v. United Engineers and Constructors, Inc.,* 118 N.M. 47, 878 P.2d 996 (1994) (noting in footnote 2 that in *Terry v. Highway Commission* we held that "fundamental considerations of due process require that the ten-year limitation [of Section 37-1-27] not be applied to actions accruing within but close to the end of the ten-year period"). We issued the *Coleman* decision after all the briefs had been filed in this case. Dr. La Farge argues that

{30} Plaintiffs' attorney . . . missed the dispositive constitutional challenge. He failed to make it on a number of occasions when he could have done so, and even at the time of oral argument did not appear to be able to distinguish the "due process as applied" argument from other types of constitutional challenges. This is no different from a doctor who has missed a diagnosis, as Dr. La Farge is alleged to have done.

{31} Dr. La Farge thus argues that Plaintiffs should be denied their day in court because their counsel failed to rely on a dispositive case when arguing constitutional substantive due process law in opposition to a motion for summary dismissal of the complaint.

{32} The alleged medical error, however, went unaddressed until *after* Anthony suffered irreversible harm. At worst, the harm from any failure on the part of Plaintiffs' attorney is that the trial court ruled on a threshold substantive due process question without benefit of argument on a dispositive case. The rules that govern the preservation of error for appellate review are not an end in themselves, rather they are instruments for doing justice. *Cf. State v. Alingog*, 117 N.M. 756, 760, 877 P.2d 562, 566 (1994) (observing that "[o]ur rules requiring the preservation of questions for review are designed to do justice, and it is only when the merits of applying those rules clearly are outweighed by other principles of substantial justice that we will apply the doctrine of fundamental error"). Here, we need not apply the doctrine of fundamental error; we find that justice is served by a not-too-stringent analysis of the substantive due process objection that in fact was interposed to Dr. La Farge's request for summary dismissal.

{33} *Due process requires a limitations statute to provide a reasonable period within which an accrued right may be exercised.* The United States Supreme Court has long held that the legislature may, consistent with due process, impose a statutory time deadline for commencing an accrued action where no limit existed before, *see, e.g., Hawkins v. Joshua Barney's Lessee*, 30 U.S. 294, 300 (5 Pet.) (1831), and may, consistent with due process, shorten the time period within which existing claims may be brought as long as a reasonable time is provided for commencing suit, *see e.g., Terry v. Anderson*, 95 U.S. 628, 632-33 (1877). As the Court explained in *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902):

> It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action. . . .

{34} This Court has long recognized these principles as affecting the power of the legislature to enact statutes of limitations. *See, e.g., Davis v. Savage*, 50 N.M. 30, 42-43, 168 P.2d 851, 859 (1946) ("It is now settled that the Legislature may prescribe a limitation for the bringing of suits *where none previously existed*, and may shorten the time within which suits to enforce existing causes of action may be commenced, if a reasonable time, under the circumstances, be given by the new law for commencing suit before the bar takes effect." (quoting Horace G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 12b, at 76 (4th ed. 1916))). However, rather than treating these principles as a limitation only on legislative power to apply retroactively a new limitations period to existing rights, we have adopted these principles as a general limitation on legislative power to enact any limitations period. *Terry v. New Mexico State Highway Comm'n*, 98 N.M. 119, 122-23, 645 P.2d 1375, 1378-79 (1982).

{35} Thus in *Terry v. Highway Commission* this Court refused enforcement of a statute of repose requiring that actions for bodily injury arising from the defective or unsafe condition of a physical improvement to real property be brought within ten years from the date of substantial completion of such improvement. The Court held that, as applied to a plaintiff whose cause of action accrued approximately three months before the ten-year limitations period was set to expire, the statute of repose violated due process because it left an unreasonably short period of time within which to bring a cause of action. *Id.* at 123, 645 P.2d at 1379.

{36} We reaffirm the principle that considerations of fairness implicit in the Due Process Clauses of the United States and New Mexico Constitutions dictate that when the legislature enacts a limitations period it must allow a reasonable time within which existing or accruing causes of action may be brought. It is no less arbitrary when an existing statute of repose is applied to bar a claim accruing near the end of the limitations period than when a newly enacted limitations period is applied to a cause of action existing at the time of the enactment. We thus hold that a statute of repose that allows an unreasonably short period of time within which to bring an accrued cause of action violates the Due Process Clause of the New Mexico Constitution.

{37} In light of this holding, we conclude that as applied to Anthony Garcia's malpractice claims, Section 41-5-13 violates due process. When Anthony Garcia suffered cardiac arrest on November 16, 1991, there were eighty-five days remaining before the limitations period was scheduled to expire on his malpractice claims against Dr. La Farge. While it is generally a matter for the legislature to establish limitations periods, this Court may determine that the limitations period selected is unreasonably short. *Terry v. Highway Comm'n*, 98 N.M. at 123, 645 P.2d at 1379. Because the legislature has not otherwise specified a reasonable period of time within which to bring claims such as Anthony's that accrue near the end of the period provided in Section 41-5-13, we will apply the three-year accrual-based limitation of NMSA 1978, Section 37-1-8 (Repl. Pamp. 1990), the statute of limitations which would be applicable to Anthony's claims if Section 41-5-13 had not been enacted. *See id.*

{38} *Conclusion.* Because, as applied to his medical malpractice claims, Section 41-5-13 left an unreasonably short period of time within which Anthony could exercise his accrued rights, we find that allowing the statute to bar Anthony's claims would violate the Due Process Clause of the New Mexico Constitution. Anthony's suit having been brought within three years of the date on which his medical malpractice claims accrued, it should be deemed timely. Hence we reverse the summary judgment entered in favor of Dr. La Farge and remand for proceedings consistent with this opinion.

{39} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
Chief Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1995-NMSC-020

Filing Date: March 6, 1995

Docket No. 21,889

IN RE CONSOLIDATED VISTA HILLS RETAINING WALL LITIGATION, AMREP SOUTHWEST, INC.,

Defendant-Third-Party-Plaintiff-Appellant,

vs.

SHOLLENBARGER WOOD TREATING, INC.,

Third-Party-Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY
Louis P. McDonald, District Judge

Motion for Rehearing Denied March 23, 1995

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OPINION

RANSOM, Justice.

{1} Amrep Southwest, Inc., appeals from a district court order granting summary judgment in favor of Shollenbarger Wood Treating, Inc., on Amrep's third-party complaint seeking indemnification and damages for negligence and strict liability in the supply of inadequate building materials. Amrep had used the materials in the construction of homes that were thereby rendered defective to the damage of the homeowners. The trial court concluded that because Amrep was partially at fault for any damages awarded against it in favor of the homeowners, it was precluded from seeking indemnification from the supplier. The court also concluded that the economic-loss rule barred Amrep's claim for indemnification and other business-loss damages. Because we believe there is a factual issue yet to be resolved, and because we adopt a doctrine of proportional indemnification, we reverse and remand.

{2} *Facts.* Amrep built 180 homes into the slope of a hill in a Rio Rancho development. Amrep designed the exterior wall of the homes to support and retain six to thirty-six inches of soil on the uphill side of each home. To prevent rot and attack by insects, the portion of the exterior wall below the soil was to be built with pressure-treated wood. The pressure treatment process involves the infusion of chemicals into wood. Amrep contracted with Baldridge Lumber Company to provide the pressure-treated wood for most of the homes. Baldridge, in turn, contracted with Shollenbarger either to supply already treated wood or to treat wood supplied by Baldridge. Amrep did not have a contract with Shollenbarger.

{3} By May 1986 Amrep had entered into purchase agreements for ten of the homes and had closed on the sale of five others. On May 5 representatives from Amrep and Baldridge met with Donn Keefe, a representative of the American Wood Preservers Bureau ("AWPB"). Keefe informed Amrep that he believed the wood being used for the retaining walls was not adequately treated. The type of wood being used was spruce, and spruce generally is untreatable. After the

meeting Amrep asked Baldridge to investigate whether the treatment level of the wood in question was adequate. Baldridge consulted with Shollenbarger and then gave oral and written assurances to Amrep that the supplied lumber was acceptable for use in retaining walls. Baldridge gave the same assurances to the Construction Industries Division inspector who approved Amrep's construction of the homes. Relying on Baldridge's assurances, Amrep took no further action.

{4} *Proceedings.* In 1990 the New Mexico Attorney General sued Amrep under the Unfair Practices Act, NMSA 1978, §§ 57-12-1 to -22 (Repl. Pamp. 1987 & Cum. Supp. 1994). The Attorney General alleged that Amrep made misleading statements regarding the quality of wood used in its homebuilding. In 1992 the parties settled the lawsuit. In exchange for the Attorney General dropping the charges, Amrep agreed to offer to inspect all of the 180 homes and to perform necessary repairs on any home that showed test results below a certain level. Individual homeowners could reject this offer and pursue individual claims; however, if the homeowners accepted the offer, they waived any other claims that they might pursue against Amrep. All but nineteen homeowners accepted the offer, and the others pursued individual litigation. Two of the nineteen settled their claims with Amrep; the remaining seventeen are still pursuing their actions, alleging breach of warranty, negligence, fraud, negligent misrepresentation, and violation of the Unfair Practices Act. One plaintiff also has alleged strict liability in tort. None of the homeowners have sued Baldridge or Shollenbarger.

{5} In its third-party complaint against Baldridge and Shollenbarger, Amrep seeks traditional indemnification or proportional indemnification for any liability that it may have to the homeowners and for its expenses in carrying out the terms of the settlement agreement with the Attorney General. Amrep also seeks punitive damages and attorney's fees. Amrep sought compensatory business-loss damages against either Baldridge or Shollenbarger but has not pursued an appeal from dismissal of that claim.

{6} Shollenbarger filed several motions for summary judgment, arguing that it had no duty to indemnify Amrep and that the economic-loss rule barred Amrep's compensatory business-loss claims. The trial court dismissed all of Amrep's claims against Shollenbarger on the basis that Amrep participated with Shollenbarger in any alleged wrongdoing and was not entitled to indemnification. The trial court also concluded that the economic-loss rule prevented recovery of both strict liability and negligence damages, *including indemnification*. Amrep appeals to this Court pursuant to SCRA 1986, 1-054(C)(2) (Repl. Pamp. 1992) (stating that judgment dismissing all claims against one party in multiple-party litigation is a final judgment), and SCRA 1986, 12-102(A)(1) (Repl. Pamp. 1992) (giving Supreme Court jurisdiction over claims sounding in contract).

{7} *Traditional indemnification.* Under traditional indemnification an indemnitee is entitled to be made whole by a third party such as the primary wrongdoer. *Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 436, 457 P.2d 364, 368 (1969). Traditional indemnification differs from contribution in that contribution requires each joint tortfeasor to share a common liability. *See id.* Further, contribution was not recognized at common law. *See id.* at 434, 457 P.2d at 366. In essence, traditional indemnification is a judicially created common-law right that grants to one who is held liable an all-or-nothing right of recovery from a third party; contribution is a statutorily created right that allows proportional distribution of liability as between the parties at fault.

{8} Traditional indemnification would appear to apply only when there is some independent, preexisting legal relationship between the indemnitee and indemnitor.[1] *See Peak Drilling Co.*

[1] Some courts and commentators have suggested that in exceptional circumstances indemnification should be allowed between concurrent tortfeasors who do not have an independent, preexisting legal relationship. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 51, at 343-44 (5th ed. 1984). These exceptional circumstances typically are defined as when there is a great difference in the degree of

v. Halliburton Oil Well Cementing Co., 215 F.2d 368, 370 (10th Cir. 1954) (stating relationship is one "under which the indemnitor owes a duty either in contract or tort to the indemnitee apart from the joint duty they owe to the injured party"). The right to indemnification may be established through an express or implied contract, or "may . . . arise without agreement, and by operation of law to prevent a result which is regarded as unjust or unsatisfactory." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 51, at 341 (5th ed. 1984); *see also* 42 C.J.S. *Indemnity* § 3, at 74 (1991) (stating that indemnification is based on equitable principles).

{9} The right to indemnification may arise through vicarious or derivative liability, as when an employer must pay for the negligent conduct of its employee under the doctrine of respondeat superior or when a person is directed by another to do something that appears innocent but is in fact wrongful. *Rio Grande Gas Co.*, 80 N.M. at 436, 457 P.2d at 368. Further, traditional indemnification principles apply in both negligence and strict liability cases involving persons in the chain of supply of a product, 2A Louis R. Frumer & Melvin I. Friedman, *Products Liability § 15.03[1], at 15-32 to -34 (1990), and in breach of warranty cases, Schneider Nat'l, Inc. v. Holland Hitch Co.*, 843 P.2d 561, 587 (Wyo. 1992). *See generally* Restatement (Second) of Torts § 886B (1977) (listing situations in which parties may be entitled to indemnification). In this case an independent, preexisting legal relationship between Amrep and Shollenbarger is established by their respective positions in the chain of distribution of a product. Thus, provided it could prove all of the requisite elements, Amrep would be entitled to seek indemnification.

{10} The purpose of traditional indemnification is to allow a party who has been held liable without active fault to seek recovery from one who was actively at fault. Thus the right to indemnification involves whether the conduct of the party seeking indemnification was passive and not active or in pari delicto with the indemnitor. New Mexico first adopted the active/passive and in pari delicto tests in *Krametbauer v. McDonald*, 44 N.M. 473, 104 P.2d 900 (1940). *Krametbauer* involved a situation in which a child, crossing a highway after exiting a school bus, was struck and killed by a speeding motorist. The trial court found that the negligence of both the bus driver and the motorist had contributed to the death of the child. The bus driver sought indemnification from the motorist claiming the former was only "passively negligent" whereas the latter was "actively negligent and therefore primarily liable." *Id.* at 480, 104 P.2d at 904. The Court held each was an active tortfeasor and therefore in pari delicto and primarily liable. *Id.* at 481, 104 P.2d at 905. The Court denied indemnification for that reason without consideration of whether active/passive concurrent tortfeasors must nonetheless have some independent, preexisting legal relationship to support indemnification. Although we find such a relationship in the chain of supply of the product in question here, we do observe that no New Mexico case actually has denied indemnification to a passive wrongdoer because of the absence of an independent, preexisting legal relationship.

{11} Other cases from New Mexico and from the Tenth Circuit Court of Appeals interpreting New Mexico law have held that New Mexico continues to follow the *Krametbauer* active/passive and in pari delicto doctrines. The doctrine of in pari delicto, we note, has reference to nothing more than the active fault of each wrongdoer or the passive fault of each. *See, e.g., Rio Grande Gas Co.*, 80 N.M. at 436-37, 457 P.2d at 368-69; *Trujillo v. Berry*, 106 N.M. 86, 88-89, 738 P.2d 1331, 1333-34 (Ct. App.) (stating that New Mexico adheres to traditional indemnification principles in some circumstances), *cert. denied*, 106 N.M. 24, 738 P.2d 518 (1987); *cf. Morris v. Uhl & Lopez Eng'rs, Inc.*, 442 F.2d 1247, 1254 (10th Cir. 1971) (stating that under New Mexico law party could not recover indemnification because its negligence was of the same kind as that of another party and therefore the parties were in pari delicto); *United States v. Reilly*, 385 F.2d 225, 229 (10th Cir. 1967)

fault between concurrent tortfeasors or when the character of the duties owed by the tortfeasor to the plaintiffs is vastly different or disproportionate. *Id.*

(following New Mexico law as established in *Krametbauer*). In one case, however, the Tenth Circuit anticipated that, if given the chance, New Mexico would eliminate the active/passive distinction in favor of proportional indemnification principles. *Herndon v. Seven Bar Flying Serv., Inc.,* 716 F.2d 1322, 1332 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984). The *Herndon* court based its opinion on the fact that New Mexico adopted comparative negligence and other states that have adopted comparative negligence have adopted comparative indemnification. *Id.*

{12} *Active and passive conduct defined.* Active conduct "is found if an indemnitee has personally participated in an affirmative act of negligence, was connected with negligent acts or omissions by knowledge or acquiescence, or has failed to perform a precise duty which the indemnatee had agreed to perform." *Schneider Nat'l, Inc.,* 843 P.2d at 574 (quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc.*, 532 P.2d 97, 101 (Cal. 1975) (in bank)). Passive conduct occurs when the party seeking indemnification fails to discover and remedy a dangerous situation created by the negligence or wrongdoing of another. *See Rio Grande Gas Co.*, 80 N.M. at 436, 457 P.2d at 368; Robert A. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130, 154 (1932). Passive conduct may also occur when a party is nothing more than the retailer in the chain of distribution of a product. *See Trujillo*, 106 N.M. at 90, 738 P.2d at 1335.

{13} There is a subtle distinction between the situation in which a party fails to discover and remedy a dangerous condition and the situation in which a party discovers a dangerous condition created by another but does nothing to remedy it. In the first instance, the conduct of the party not discovering the dangerous condition is passive. That party is entitled to indemnification from the one creating the condition because "as between the two parties the courts have clearly seen the greater responsibility of the one who created the dangerous situation." Leflar at 157. In the second instance, the conduct of the party who does nothing after discovering the dangerous condition is active. That party is not entitled to traditional indemnification from the one creating the condition because to do so "would be to shift the whole burden of loss onto one tortfeasor from another whose improper conduct is fully as odious." *Id.* at 158.[2]

{14} Amrep's traditional indemnification claim. Amrep argues that the trial court erred by dismissing its traditional indemnification claim because there still exists a question of fact whether Amrep's conduct was active or passive. Alternatively, Amrep contends that it would still be entitled to indemnification under a strict liability theory even if its conduct was active. Shollenbarger argues that Amrep's negligence was determined conclusively in companion litigation, and Amrep is barred by the doctrine of collateral estoppel from relitigating this claim. Shollenbarger also argues that, as a matter of law, Amrep's conduct was active, and this conduct bars traditional indemnification for both negligence and strict liability damages.

{15} - *Collateral estoppel.* In the companion litigation, *Hicks v. Amrep Construction Corp.*, No. 20,690 (N.M. Apr. 5, 1994), this Court filed an unpublished decision reviewing, among other issues, whether a jury verdict entered against Amrep was supported by substantial evidence. We held that the award of compensatory damages for breach of contract and negligence was supported by the evidence, and we affirmed the jury verdict. In particular, we stated that "Amrep does not dispute the validity of the jury's award for breach of contract on appeal [and] Amrep does not argue that the jury wrongfully determined that it was liable for negligence." *Id.* at 11.

{16} Shollenbarger posits that this Court should give collateral estoppel effect to *Hicks* and hold that Amrep is precluded from contesting its negligence in this case. For collateral estoppel to apply, an issue must have been "actually and necessarily determined" in a prior action. *Silva v. State*, 106 N.M. 472, 474, 745 P.2d 380, 382 (1987). Collateral estoppel will not apply if "the record is insufficient to determine

[2] We note that we are not here dealing with a contractual right to indemnification for active conduct.

what issues were actually and necessarily determined by prior litigation." *Id.* at 476, 745 P.2d at 384. Shollenbarger specifically attempts to use *Hicks* to preclude Amrep from arguing that its conduct was not active. The *Hicks* decision, however, does not discuss the active/passive distinction in any way. As discussed below, it is not known whether liability in *Hicks* was based on a passive negligent failure to discover or an active negligent omission to correct a known defect. Although the decision involved an indemnification claim against Baldridge, the Court did not discuss that issue in the context of whether Amrep's conduct was active. A finding of negligence is not necessarily a finding of active conduct. Thus the record is insufficient to determine whether the issue of Amrep's active conduct was actually and necessarily determined; collateral estoppel does not apply.

{17} - *Factual issue: active and passive conduct.* Shollenbarger cites ten facts to support its argument that Amrep's conduct was active as a matter of law. In particular, Shollenbarger alleges that Amrep owned and developed the real estate known as the Vista Hills Subdivision; Amrep designed the retaining walls for the houses; Amrep built all of the houses; Amrep's plans required wood that would be pressure treated to a certain retention level; lumber treated to the requisite level should be stamped with an AWPB-FDN stamp (signifying that the wood is "foundation" quality) that would be clearly visible (although wood may be treated to the requisite level without the stamp); Shollenbarger carried wood that had been treated to the requisite level in its inventory; Amrep did not give a copy of its plans to Baldridge; Amrep contracted with Baldridge to supply framing packages for the houses; Amrep did not have a contract with Shollenbarger; and Baldridge did not tell Shollenbarger that the wood was to be used below the level of the soil. Amrep does not dispute the facts but argues that the facts lead to several possible interpretations, including the conclusion that Amrep's conduct was passive.

{18} Whether a factual issue exists depends on application of the definitions of active and passive conduct to the facts of this case. Applying these definitions to the facts provided, it is difficult for this Court to determine whether Amrep's conduct was active or passive. Many of the facts alleged by Shollenbarger are inapposite to whether Amrep's conduct was active, including the facts that Amrep owned and developed the real estate, that Amrep designed the retaining walls (the design is not at issue, the wood used is at issue), and that Amrep did not have a contract with Shollenbarger. Other facts tend to show that Shollenbarger was not negligent, including the facts that Amrep did not give a copy of its plans to Baldridge, that Amrep contracted with Baldridge, and that Shollenbarger was not told that the wood would be used below the soil. Shollenbarger's negligence, however, is not at issue in this appeal.

{19} The remaining facts may be interpreted as active conduct or they may be interpreted as passive failure to discover and remedy a dangerous condition. The facts all relate to whether Amrep knew or should have known that it was using the wrong wood in building the retaining walls. None of the facts, however, conclusively prove that Amrep knew or should have known that it was using the wrong wood. As Shollenbarger admits, the wood could have been of adequate quality even though it did not carry the requisite stamps. Further, other facts show that Amrep investigated the adequacy of the wood after it was alleged that the wood did not meet the requisite standards.

{20} Thus, on the one hand, Amrep may have knowingly used inadequate wood, and it would not be proper under the principles of traditional indemnification to hold Shollenbarger responsible for something that was at least partially the fault of Amrep. On the other hand, Amrep may have conducted a thorough investigation of the quality of the wood, satisfied itself that the wood was adequate, and may not thereafter have knowingly used poor materials. While such use of inadequate materials may subject Amrep to liability because of its position as contractor or because it nonetheless should have known the materials were inadequate, neither theory of liability would bar Amrep's claim for indemnification. Because the facts are open to contradictory interpretations, the trial court improperly granted

summary judgment in favor of Shollenbarger on Amrep's traditional indemnification claim.

{21} - *Indemnification in strict liability.* Amrep cites several cases for the proposition that it may seek indemnification from the original manufacturer under a theory of strict liability, even if its conduct is found to be "active". The basis for its argument is that a manufacturer may be held strictly liable without proof of fault or negligence, and thus concepts of fault or negligence or active/passive conduct should not be considered in determining indemnification claims based on strict liability.

{22} In *Trujillo*, 106 N.M. at 89, 738 P.2d at 1334, our Court of Appeals addressed the question whether a retailer could seek indemnification from a manufacturer if the retailer was found strictly liable for injuries caused by a defective product. The Court held that "[when] the manufacturer and retailer are held strictly liable in tort and the latter's liability resulted solely from its passive role as the retailer of the product furnished it by the manufacturer, indemni[fication] may lie in favor of the retailer against the manufacturer." *Id.* at 90, 738 P.2d at 1335. Although the Court recognized that there may be situations in which a retailer could not recover indemnification against a manufacturer, it specifically held that the retailer may recover indemnification when its conduct was passive. *Id.*

{23} Amrep relies on *Trujillo* for support because the Court stated that "concepts such as active-passive negligence are the antithesis of strict liability." *Id.* at 89, 738 P.2d at 1334. Indeed, other authorities have stated that "[t]he active-passive negligence distinction does not apply to strict liability in tort." 2A Frumer & Friedman § 15.03[1], at 15-34 (citing cases for same proposition). These statements are made, however, in the context of determining liability to the victim. *See Trujillo*, 106 N.M. at 89, 738 P.2d at 1334; 2A Frumer & Friedman § 15.03[1], at 15-34. In that sense, a court is not trying to determine fault because "liability may be imputed to the supplier of the product without the presence of negligence, or fault, on his part." *Trujillo*, 106 N.M. at 89, 738 P.2d at 1334. Rather, the purpose of strict liability is to provide an injured party with several sources from which the victim may recover damages without proving negligence. *Id.* at 88, 738 P.2d at 1333. Thus in determining liability to the victim in strict liability, the active/passive distinction does not apply.

{24} By contrast, the whole purpose of traditional indemnification is to shift liability from one who is not at fault to one who is at fault. Thus the active/passive distinction does apply. Traditional indemnification has its genesis in equitable principles of unjust enrichment and restitution. 2 George E. Palmer, *The Law of Restitution* § 10.6(c), at 410-11 (1978). It would be improper to allow full indemnification in strict liability when the party seeking indemnification is partially at fault; one is not entitled to restitution for that part of the damages for which the party is responsible. Therefore, in all strict liability cases the conduct of the party seeking traditional indemnification must have been passive before that party may recover full indemnification from the manufacturer of a defective product.

{25} *Economic-loss rule.* The trial court dismissed Amrep's negligence and strict liability action against Shollenbarger for business losses, other than damages and expenses paid on third-party claims, ruling that such an action is barred by the economic-loss rule. Amrep does not appeal that dismissal, and we do not address the validity of the trial court's ruling on that issue. Amrep argues, however, that the trial court also relied on the economic-loss rule to dismiss Amrep's claims for indemnification. Although it is not clear whether, in moving for summary judgment, Shollenbarger argued that the economic-loss rule barred Amrep's claim for indemnification, and although the trial court did rule at one point that Amrep's claim for indemnification was barred because its conduct was active, the court later elaborated on this ruling by stating that "the economic-loss doctrine prohibits . . . an indemnification claim." We now address the merits of that ruling.[3]

[3] We have carefully reviewed the whole record in this case and it is not clear to us whether the trial court made alternative rulings or whether the court applied different doctrines to different counts. Our resolution of the issue before us, however, makes the distinction immaterial.

{26} Our Court of Appeals adopted the economic-loss rule in *Utah International, Inc. v. Caterpillar Tractor Co.*, 108 N.M. 539, 775 P.2d 741 (Ct. App.), *cert. denied*, 108 N.M. 354, 772 P.2d 884 (1989). The Court held that "in commercial transactions, when there is no great disparity in bargaining power of the parties, economic losses from injury of a product to itself are not recoverable in tort actions; damages for such economic losses in commercial settings in New Mexico may only be recovered in contract actions." *Id.* at 542, 775 P.2d at 744 (citation omitted). The Court adopted the rule "in order to allow commercial parties to freely contract and allocate the risk of defective products as they wish." *Id.*

{27} Amrep argues that this Court should overrule *Utah International* because it is inconsistent with New Mexico law regarding strict liability and negligence. Citing for support SCRA 1986, 13-1406 (Repl. Pamp. 1991) (holding supplier "liable for harm proximately caused by an unreasonable risk of injury"), Amrep contends that a party is entitled to recover in strict liability all damages, including economic loss. In addition, citing for support *Solon v. WEK Drilling Co.*, 113 N.M. 566, 829 P.2d 645 (1992), Amrep contends that a party is entitled to recover all foreseeable damages, including economic loss.

{28} The purpose of the economic-loss rule, however, is "to preserve the bedrock principle that contract damages be limited to those `within the contemplation and control of the parties in framing their agreement.'" *City of Richmond v. Madison Management Group, Inc.*, 918 F.2d 438, 446 (4th Cir. 1990) (quoting *Kamlar Corp. v. Haley*, 299 S.E.2d 514, 517 (Va. 1983)). The law of contract allows parties to bargain and allocate the risk that the product will self-destruct. As a matter of policy, the parties should not be allowed to use tort law to alter or avoid the bargain struck in the contract. The law of contract provides an adequate remedy. If we overrule *Utah International*, contract law would be subsumed by strict liability and negligence. In order to preserve the line between contract law and tort law, we decline to overrule *Utah International*.

{29} Only a handful of courts have ruled on whether the economic-loss rule prohibits a party from seeking indemnification. Amrep cites two California cases for the proposition that an indemnification claim differs from a claim for economic-loss damages. *See GEM Developers v. Hallcraft Homes of San Diego, Inc.*, 261 Cal. Rptr. 626, 631 (Ct. App.), *review denied* (Nov. 15, 1989); *Gentry Constr. Co. v. Superior Court*, 260 Cal. Rptr. 421, 423 (Ct. App. 1989). In these cases the California Court of Appeals determined that if concurrent tortfeasors were held liable to a consumer for damages caused by a defective product, the economic-loss rule would not prevent one tortfeasor from seeking indemnification from another tortfeasor for the latter's proportional share of all damages. The California system of "equitable indemnification," oowever, is the equivalent of "contribution" in New Mexico under the Uniform Contribution Among Tortfeasors Act, NMSA 1978, §§ 41-3-1 to -8 (Repl. Pamp. 1989 & Cum. Supp. 1994). Thus those cases are instructive but distinguishable.

{30} Given the paucity of authority in this area, we must turn to policy considerations to determine whether the economic-loss rule bars indemnification claims. As stated above, the purpose of indemnification is to allow a party who has been held liable for an injury but who was not at fault to seek recovery from one who was at fault. Indemnification is based on the fact of liability. As a matter of policy, if there is liability, the one held liable but not at fault should be entitled to recover from the one at fault. *Cf. East Miss. Elec. Power Ass'n v. Porcelain Prods. Co.*, 757 F. Supp. 748, 751-52 (S.D. Miss. 1990) (dismissing indemnification claim because party seeking indemnification was not liable to plaintiff); 41 Am. Jur. 2d *Indemnity* § 33, at 723 (1968) ("Indemnity against losses does not cover losses for which the indemnitee is not liable to a third person, and which he improperly pays.").

{31} The purpose of the economic-loss rule is not to bar the recovery of economic-loss damages; rather, the rule bars recovery of such damages in tort. An indemnitee thus may be held liable for economic-loss damages under a contract-based

theory. By contrast, the purpose of indemnification is to prevent an unjust result by shifting liability from one not at fault to one at fault. *See* Keeton et al. § 51, at 341. Although a person cannot be held liable for economic-loss damages in tort because of the economic-loss rule, when that person is held liable for economic-loss damages in contract, and that person's liability is attributable to the fault of another, it would be unjust not to allow indemnification. We therefore hold that the economic-loss rule does not bar a claim for indemnification. If a party is held liable for damages that are the fault of another, the former may seek indemnification from the latter regardless of the basis for the former's liability.[4] This does not abrogate the economic-loss rule because parties are still bound by their contractual agreements (including indemnification agreements) and because allowing indemnification in this context would in no way blur the line between contract and tort.

{32} *Proportional indemnification.* A growing number of courts are applying comparative fault principles to indemnification claims and replacing the all-or-nothing rule of traditional indemnification with a system of apportioning damages according to relative fault. *See, e.g., Allison v. Shell Oil Co.*, 495 N.E.2d 496, 500-01 (Ill. 1986) (declaring that active/passive doctrine is replaced by system applying comparative-fault principles); *Schneider Nat'l, Inc. v. Holland Hitch Co.*, 843 P.2d 561, 576-77 (Wyo. 1992) (recognizing Wyoming's acceptance of relative-fault doctrine over the "all-or-nothing rule"). Amrep refers to the application of comparative fault to indemnification claims as "comparative indemnification"; Shollenbarger entitles it "equitable implied comparative indemnity"; we shall refer to the doctrine as "proportional indemnification".

{33} Proportional indemnification has its genesis in jurisdictions that did not adopt a system of contribution among tortfeasors. *See Schneider Nat'l, Inc.*, 843 P.2d at 573. Other state courts adopted proportional indemnification because they were frustrated with inadequate contribution statutes. Restatement (Second) of Torts § 886B cmt. m (1977). In most cases the adoption of proportional indemnification has followed a state's legislative or judicial rejection of contributory negligence and adoption of comparative fault. *See, e.g., American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 918 (Cal. 1978) (in bank); *Allison*, 495 N.E.2d at 501 ("Active-passive indemnity, like contributory negligence, perpetuates inequality by its inability to apportion loss and its refusal to grant any relief whatsoever to a party whose conduct is considered "active' regardless of how much or little other tortfeasors are at fault."); *cf. Herndon*, 716 F.2d at 1332 (stating that when "states have adopted the comparative negligence approach, the indemnity principles in those states have changed from the traditional all or nothing approach [to] damages measured by the degree of comparative fault of all the parties").

{34} New Mexico has adopted by judicial fiat a system of comparative fault. *See Scott v. Rizzo*, 96 N.M. 682, 690, 634 P.2d 1234, 1242 (1981). In *Scott* the Court based its abandonment of contributory negligence "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." *Id.* at 689, 634 P.2d at 1241. The Court concluded that "justice is not achieved by the anachronistic and inequitable contributory negligence rule of law." *Id.*

{35} Following *Scott*, our Court of Appeals abrogated joint and several liability among concurrent tortfeasors. *See Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 159, 646 P.2d 579, 586 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982). The Court determined that joint and several liability could not survive our adoption of pure comparative negligence and explained that "damages are to be apportioned on the basis of fault." *Id.*

[4] The right to indemnification may arise simply from the fact that the indemnitee had to defend the action brought by the third-party and the proposed indemnitor refused or failed to proffer a defense. *See Bloom v. Hendricks*, 111 N.M. 250, 256, 804 P.2d 1069, 1075 (1991). The innocent indemnitee should not have to bear the burden of defending the claim.

{36} Thus, to establish an equitable system in which a plaintiff would not have to bear the whole burden of a loss when another was also at fault, we adopted in *Scott* the doctrine of comparative negligence. To establish an equitable system in which in most cases a party is only liable to the extent that it was to blame for the damages to the victim, our Court of Appeals adopted in *Bartlett* the doctrine of several liability. Now, to establish an equitable system in which a defendant who cannot raise the fault of a concurrent tortfeasor as a defense because of the plaintiff's choice of remedy, we adopt the doctrine of proportional indemnification under which a defendant who is otherwise denied apportionment of fault may seek partial recovery from another at fault.

{37} *Proportional indemnification applies in limited circumstances only.* Shollenbarger argues that this Court should not adopt proportional indemnification because fault is already apportioned among joint tortfeasors through our doctrines of comparative fault and several liability and through the Uniform Contribution Among Tortfeasors Act, NMSA 1978, §§ 41-3-1 to -8 (Repl. Pamp. 1989 & Cum. Supp. 1994). We agree with Shollenbarger that proportional indemnification need not apply when a fact-finder makes a determination that a concurrent tortfeasor is proportionally liable to an injured party. By adopting pure comparative negligence in *Scott* and several liability in *Bartlett*, we have already created a system in which each concurrent tortfeasor is liable only for the percentage of damages that is attributable to his or her fault. Similarly, proportional indemnification does not apply when the Act provides for proration of damages among joint tortfeasors. *See* § 41-3-2. Under the Act, if one tortfeasor has been held liable for more than that his or her share of the fault, that tortfeasor may seek contribution from others who were at fault. *Id.*

{38} Amrep argues that neither proportional liability nor the Act encompass situations in which the one seeking indemnification has been adjudged liable for full damages on a third-party claim that is not susceptible under law to proration of fault among joint tortfeasors. This situation is created, as here, when the plaintiff chooses to sue only one defendant and sues that defendant on a contract theory. Here the homeowners have sued Amrep under theories of breach of contract and breach of warranty.

{39} Regardless of whether the Act is available for proportional contribution,[5] in order to establish an equitable system in which all parties are held liable for damages in proportion to their respective fault, we must modify the common-law right to indemnification when an indemnitee has been adjudged liable for full damages on a third-party claim that was not susceptible under law to proration of fault among concurrent tortfeasors. Such proportional indemnification applies only when contribution or some other form of proration of fault among tortfeasors is not available.

{40} Amrep urges this Court to replace completely traditional indemnification with proportional indemnification, but we decline to do so. Traditional indemnification addresses other considerations of contractual right or of restitution to which a passive wrongdoer is entitled. With the adoption of proportional indemnification we are filling a void in the overall picture that contemplates proration of liability among all those

[5] The Act defines "joint tortfeasors" as two or more persons jointly or severally liable in tort for the same injury *irrespective of any adjudication*. Section 41-3-1. It does appear this Court has held that parties who have been sued under different theories (tort and non-tort) are not joint tortfeasors when one enters into a prejudgment settlement and the other is held liable under the different cause of action. *See Sanchez v. Clayton*, 117 N.M. 761, 765, 877 P.2d 567, 571 (1994) (interpreting prior case as holding that a party making a prejudgment settlement of negligence claim was not a joint tortfeasor with one held liable by jury for breach of contract); *McConal Aviation, Inc. v. Commercial Aviation Ins. Co.*, 110 N.M. 697, 699-700, 799 P.2d 133, 135-36 (1990) (holding that party liable in contract was not entitled to credit prejudgment settlement of another defendant who was sued in tort); *Exum v. Ferguson*, 97 N.M. 122, 125, 637 P.2d 553, 556 (1981) (holding that party liable in tort was not entitled to credit prejudgment settlement of another who was sued only in contract). Under the Act a tortfeasor is entitled to proportional contribution if that tortfeasor has discharged liability of a joint tortfeasor. Sections 41-3-2. If the Act is not applicable here, an issue we do not further address, we nonetheless provide the same relief under proportional indemnification as contemplated by the Act.

at fault. That void occurs in this case because the homeowners chose to sue only Amrep under a cause of action that does not allow proration.

{41} By embracing proportional indemnification, this Court takes comparative fault and several liability another logical step. We now have a system in which, in almost every instance, liability among concurrent tortfeasors will be apportioned according to fault, regardless of the plaintiff's choice of remedy. As applied to this case, if Shollenbarger's alleged negligence caused Amrep to breach its contract with the homeowners, Amrep should be able to seek proportional indemnification for that percentage of fault attributable to Shollenbarger.

{42} Application of indemnification to Unfair Practices Act claim. As to the Unfair Practices Act claim, we agree with Shollenbarger that Amrep does not have the right to seek indemnification for any portion of its settlement with the Attorney General that would constitute civil penalties. One purpose of any penalty is to punish the wrongdoer; another is to prevent the wrongdoer from engaging in similar wrongful conduct. Both of these goals would be undermined if a party could seek indemnification for damages imposed as punishment. In this case, however, Amrep settled the unfair practices claim with the Attorney General pursuant to NMSA 1978, Section 57-12-9(A) (Repl. Pamp. 1987). It is unclear whether the terms of the settlement included assessment of a civil penalty or whether Amrep volunteered to repair the homes in exchange for the Attorney General dropping the charges. To the extent the settlement did not include the assessment of civil penalties and Shollenbarger is responsible for the damage to the homes, Amrep may seek indemnification against Shollenbarger.

{43} We note that we are not here dealing with a contractual right to indemnification for civil penalties.

{44} *Punitive damages.* Amrep also seeks punitive damages from Shollenbarger. It is unclear whether Amrep seeks indemnification for punitive damages assessed against it or seeks punitive damages in addition to its indemnification claim.

{45} Amrep may not seek indemnification for punitive damages assessed against it. To be found liable for punitive damages, a party must engage in wrongful conduct that rises to a willful, wanton, malicious, reckless, oppressive, or fraudulent level. *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 747, 418 P.2d 191, 199 (1966). Under both traditional and proportional indemnification a party is barred because of unclean hands from seeking indemnification for punitive damages, just as it is barred from seeking civil penalties. *See* 2 James D. Ghiardi & John J. Kircher, *Punitive Damages* § 16.07 (1985) (discussing cases that find that allowing apportionment of punitive damages would defeat purpose of award).

{46} It is more likely, however, that Amrep is seeking punitive damages in addition to its indemnification claim. Amrep contends that indemnification is a form of compensatory damages and an award of indemnification would support an award of punitive damages, citing for support *Gonzales v. Sansoy*, 103 N.M. 127, 129, 703 P.2d 904, 906 (Ct. App. 1984) (stating that award of punitive damages must be supported by award of compensatory damages). *See also Sanchez v. Clayton*, 117 N.M. 760, 765-67, 877 P.2d 567, 572-74 (1994) (stating that award of punitive damages must be supported by cause of action for compensatory or nominal damages). While we agree that indemnification is a form of compensatory damages, generally a party entitled to indemnification may recover only damages paid to the injured party and reasonable attorney's fees and costs. *See* 6 Marilyn Minzer et al., *Damages in Tort Actions* § 50.02, at 50-8 (1994). We cannot find any support, and none has been provided, for the proposition that punitive damages are available to one seeking indemnification. Because the purpose of indemnification is merely to reimburse one who has paid damages to an injured party, we hold that an award of indemnification does not support an award for punitive damages.

{47} *Conclusion.* Because a factual issue exists whether Amrep's conduct was active or passive,

the trial court erroneously dismissed Amrep's traditional indemnification claim. Further, the economic-loss rule does not bar Amrep's claim for indemnification. Finally, Amrep may pursue a claim of proportional indemnihication for compensation and costs based on any damages incurred by and paid to the homeowners on contract claims but may not pursue a punitive damages award. Thus the judgment of the trial court is reversed and this matter is remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

Justice Richard E. Ransom

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1995-NMSC-025

Filing Date: March 23, 1995

Docket No. 21,535

ESPERIO TORRES, personal representative of the Estate of Armando Torres, deceased, and JOHN BEEKS, personal representative of the Estate of Jeren Beeks, deceased,

Plaintiffs-Petitioners,

vs.

STATE OF NEW MEXICO, NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, CITY OF ALBUQUERQUE, ALBUQUERQUE POLICE DEPARTMENT, ROBERT VANDERHEE, RUTH LOWE, and SAM BACA.

Defendants-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Gerard W. Thomson, District Judge

Motion for Rehearing: None

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OPINION

RANSOM, Justice.

{1} We issued a writ of certiorari to the Court of Appeals to review that Court's opinion in *Torres v. State*, 116 N.M. 379, 862 P.2d 1238 (Ct. App.), *cert. granted*, 117 N.M. 802, 877 P.2d 1105 (1993), in which the Court of Appeals affirmed the dismissal of a complaint brought by Esperio Torres and John Beeks as personal representatives of the estates of their adult sons. Torres and Beeks sought wrongful-death damages against the Albuquerque Police Department and others under the New Mexico Tort Claims Act, NMSA 1978, 41-4-1 to -27 (Repl. Pamp. 1989 & Cum. Supp. 1994). The district court dismissed the action for failure to state a claim upon which relief could be granted. Accepting as true all facts well pleaded, *see Jones v. International Union of Operating Eng'rs*, 72 N.M. 322, 325, 383 P.2d 571, 573 (1963), we reverse.

{2} *Facts and proceedings.* On the morning of November 29, 1988, a gunman entered an Albuquerque bagel shop and killed three people. Witnesses described the gunman to the Albuquerque Police Department ("APD"), and the description appeared in the news media later that day. Albuquerque Mayor Ken Schultz instructed Chief of Police Sam Baca to put as many officers as needed on the investigation and authorized all overtime needed to arrest the murderer. In an effort to prevent the gunman from leaving town, APD informed the media that officers were guarding the airport, train depot, and bus station.

{3} On the afternoon of November 29 an employee at an Albuquerque gun shop telephoned the New Mexico Department of Public Safety ("DPS") and spoke with Officer Robert Vanderhee. The employee informed Vanderhee that a man by the name of Nathan Trupp matched the description of the gunman and that Trupp had purchased a handgun on November 28. The employee gave Trupp's address to Vanderhee.

Vanderhee attempted to reach his liaison at APD, Sergeant Desi Garcia, but Garcia was not in. He then tried to reach Officer Ruth Lowe, who was in charge of the investigation, but Lowe had left for the day. Vanderhee left a message for Lowe and went home without following up on the information he had received. Lowe received Vanderhee's message on the evening of November 29 but was unable to reach him at his office.

{4} At 8:30 the next morning (November 30) Vanderhee reached either Garcia or Lowe and relayed the information he had received. That same morning a taxi driver informed Lowe and Vanderhee that, on November 28, he had driven Trupp to several Albuquerque gun shops and then to do target shooting. The taxi driver gave Lowe and Vanderhee a description of Trupp, Trupp's address, and a summary of Trupp's activities, including the purchase of the handgun. The driver believed Trupp was mentally unstable.

{5} At approximately 10:15 that morning APD sent officers to Trupp's apartment complex. The officers observed the complex until approximately 1:30, at which time they forcibly entered Trupp's apartment. Trupp was not in his apartment and could not be located. Fearing that Trupp would flee, APD stationed police officers at the airport, train depot, and bus station.

{6} A subsequent investigation revealed that Trupp had committed the murders in the bagel shop. Trupp spent the night of November 29 in his apartment and stayed there until approximately 9:00 the next morning, at which time he paid his rent. After paying rent, Trupp went to the bus station and boarded a 12:30 bus for Los Angeles. He arrived in Los Angeles on December 1. At approximately 6:45 that evening Trupp shot and killed Armando Torres and Jeren Beeks, who were both security guards at Universal Studios. Trupp used the same handgun that was used in the bagel-shop murders.

{7} On November 29, 1990, Esperio Torres and John Beeks filed an action under the Tort Claims Act. In addition to the facts set out above, the complaint alleged that Trupp was delusional and hearing non-existent voices from November 28 to December 1. The complaint also alleged that APD did not request an interstate warrant for Trupp nor did it ask the Federal Bureau of Investigation to become involved in the search. Finally, the complaint alleged that APD failed to notify out-of-state law enforcement authorities of the murders or of Trupp's unknown whereabouts. According to Torres and Beeks, these failures amounted to a breach by APD and DPS of their statutory duty to investigate and their common-law duty to exercise for the safety of others foreseeably at risk from assault by the same gunman that care ordinarily exercised by reasonably prudent and qualified officers in light of the nature of the crime and the urgency of the investigation. They argue that such breaches proximately caused the deaths of their sons.

{8} On April 8, 1991, the district court dismissed with prejudice the complaint, holding that "as a matter of law, the injured parties were not foreseeable plaintiffs and the defendants owed no duty to plaintiffs." The Court of Appeals affirmed.

{9} *Policy reasons advanced by the Court of Appeals are not determinative.* The Court of Appeals held that as a matter of policy the duty to investigate and the duty to exercise ordinary care should not be extended to the victims in this case because it would be "unrealistic in light of rising criminal activity and limited public resources." 116 N.M. at 384, 862 P.2d at 1243. Although "rising criminal activity" and "limited public resources" may be factors for the jury to consider in determining whether APD or DPS breached its duties, we do note that Mayor Schultz here ordered Police Chief Baca to put as many officers as needed on the case, authorizing as much overtime as needed to apprehend the killer; and while these factors may bear upon the discharge of duty, they do not bear upon the existence of the statutory duty of law enforcement officers to investigate crimes.

{10} Policy determines duty. With deference always to constitutional principles, it is the particular domain of the legislature, as the voice

of the people, to make public policy. Elected executive officials and executive agencies also make policy, to a lesser extent, as authorized by the constitution or the legislature. The judiciary, however, is not as directly and politically responsible to the people as are the legislative and executive branches of government. Courts should make policy in order to determine duty only when the body politic has not spoken and only with the understanding that any misperception of the public mind may be corrected shortly by the legislature.

{11} What is the existing public policy with respect to governmental liability for the acts or omissions of law enforcement officers? The legislature specifically has waived immunity from liability under "traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty." Section 41-4-2(B). This waiver of immunity applies to actions for wrongful death from battery "caused by law enforcement officers while acting within the scope of their duties." Section 41-4-12; *Methola v. County of Eddy*, 95 N.M. 329, 333, 622 P.2d 234, 238 (1980) (holding that under Section 41-4-12 officer's negligence may proximately "cause" battery by third person against another); *Blea v. City of Espannola*, 117 N.M. 217, 221, 870 P.2d 755, 759 (Ct. App.) (holding battery committed by intoxicated driver gave rise to action against law enforcement officers claimed to have been negligent in failing to detain driver earlier), *cert. denied*, 117 N.M. 328, 871 P.2d 984 (1994); *Ortiz v. New Mexico State Police*, 112 N.M. 249, 252, 814 P.2d 117, 120 (Ct. App. 1991) (holding law enforcement officers liable when negligent supervision and training of subordinates leads to battery), *cert. quashed*, 113 N.M. 352, 826 P.2d 573 (1992). With NMSA 1978, Section 29-1-1 (Repl. Pamp. 1994), the legislature has imposed on law enforcement officers a duty to investigate crimes called to their attention, and an action for injuries proximately caused by an officer's negligent breach of this duty is within the contemplation of Section 41- 4-12. *Schear v. Board of County Comm'rs.*, 101 N.M. 671, 676, 687 P.2d 728, 733 (1984); *see California First Bank v. State*, 111 N.M. 64, 801 P.2d 646 (1990) (recognizing private cause of action under Section 41-4-12 when law enforcement officer's negligent failure to discharge duties under Section 29-1-1 results in personal injury).

{12} In this case the Court of Appeals has formulated public policy by which it restricts the statutory duty of law enforcement officers. It is not necessary, however, for the courts to formulate policy in order to apply the law to this case. Because the trial court dismissed the complaint for failure to state a claim, we need only recognize the statutory duty and examine the complaint for any set of facts provable under the claim that may show breach under traditional tort concepts of ordinary care required for the safety of persons foreseeably at risk. *See California First Bank*, 111 N.M. at 66, 801 P.2d at 648.

{13} We apply New Mexico tort law in this case. Although neither party argued that the district court applied the wrong law, we feel it necessary to review which state's law applies in this case because the deaths occurred in California. In determining this issue, this Court generally follows the doctrine of *lex loci delicti* and applies the law of the state in which the wrongful conduct occurred. *See Zamora v. Smalley*, 68 N.M. 45, 47, 358 P.2d 362, 363 (1961) (stating that because accident occurred in Colorado, the law of that state applied); *First Nat'l Bank in Albuquerque v. Benson*, 89 N.M. 481, 481-82, 553 P.2d 1288, 1288-89 (Ct. App.) (applying *Zamora*), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976). The "place of the wrong" under this rule is "the location of the last act necessary to complete the injury." *Wittkowski v. State*, 103 N.M. 526, 528, 710 P.2d 93, 95 (Ct. App.), *cert. quashed*, 103 N.M. 446, 708 P.2d 1047 (1985), *overruled on other grounds by Silva v. State*, 106 N.M. 472, 477, 745 P.2d 380, 385 (1987). This rule is not utilized, however, if such application would violate New Mexico public policy. *Id.*

{14} In this case the shooting in California was the "last act necessary to complete the injury," and one could argue that this Court should apply California law. This is not, however, an action against Trupp for the murder; it is an action

against various defendants for failure to investigate a crime in New Mexico and for failure to exercise ordinary care to prevent Trupp from leaving New Mexico. As stated in *Wittkowski*, the duties of law enforcement personnel are defined by the Tort Claims Act and by decisional law. *Id.* Thus "[p]ublic policy dictates that New Mexico law determine the existence of duties and immunities on the part of New Mexico officials." *Id.* at 529, 710 P.2d at 96.

{15} *The issue of foreseeability is a question for the jury.* The district court determined that the victims in this case were not foreseeable, and thus APD and DPS did not owe them a duty. Foreseeability is a question of law when a court, in reviewing whether a duty exists, can determine that the victim was unforeseeable to any reasonable mind. *Calkins v. Cox Estates*, 110 N.M. 59, 61-62, 792 P.2d 36, 38-39 (1990); *Palsgraf v. Long Island R.R.*, 162 N.E. 99, 100 (N.Y. 1928) (holding that a court cannot impose a tort duty in relation to another person absent foreseeability); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 43, at 284-85 (5th ed. 1984). In light of its holding that as a matter of policy APD and DPS did not owe a duty to the victims, the Court of Appeals did not address the issue of foreseeability. We believe that the trial court erred in finding that, as a matter of law, the victims were not foreseeable.

{16} APD and DPS argue that the victims were so removed from the alleged wrongful conduct that they were unforeseeable as a matter of law. In particular, APD argues that a victim is not foreseeable unless he or she is in imminent danger, citing for support *Schear*, 101 N.M. at 676, 687 P.2d at 733, and *California First Bank*, 111 N.M. at 71-75, 801 P.2d at 653-57. In *Schear* the plaintiff was the victim of a crime that the police knew to be taking place. There was a foreseeable risk of injury if the officers did not respond to the call for help. In *California First Bank* the victims were members of the traveling public and there was a foreseeable risk of injury "to the traveling public in the event sheriff deputies failed to apprehend [a drunk driver] after they knew of his dangerously intoxicated condition." 111 N.M. at 74 n.7, 801 P.2d at 656 n.7.

{17} In point of fact, neither *Schear* nor *California First Bank* discuss foreseeability in terms of imminent danger. Although in both cases the victims were injured either concurrently with or immediately after the alleged act of negligence, this Court did not base the scope of the officers' duty on considerations of time and place. As discussed later in this opinion, the legislature has enunciated no policy that gives rise to arbitrary time and place restrictions on the duty of law enforcement officers. Traditionally, time and place factors are left to the jury in its determination of proximate cause and breach of duty. *See* Keeton et al. § 43, at 283 ("[W]hen causation is found, and other factors are eliminated, it is not easy to discover any merit whatever in the contention that . . . physical remoteness [of time or space] should of itself bar recovery.").

{18} DPS further tries to distinguish this case from *California First Bank* by arguing that there the police knew the identity and condition of the criminal. The knowledge of the identity and condition of the criminal, however, is not determinative in defining duty. In *Schear* the police were told only that an armed intruder had entered a house and refused to allow the victim to leave. The police did not know the identity of the intruder and did not know of the criminal's physical or mental condition, other than knowing that he was armed. Despite this, we held that the police had a duty to the victim. 101 N.M. at 676, 687 P.2d at 733. Thus, foreseeability does not turn on the officer's knowledge of the true identity or condition of the criminal if there is a possible risk of injury to some victim and the officer knows of that risk.

{19} The amended complaint has stated a set of facts under which Torres and Beeks might prevail on the issue of foreseeability. It is not unlikely that a murderer would flee the city in which he committed the crime and, given modern-day transportation, that this person would flee across state lines. Further, the police knew or should have known that it is possible that a person who kills randomly with no motive would kill again; it is the very irrationality of the random killing that portends danger to others. The harm in this case

was not so removed from the conduct of the Defendants that we may say as a matter of law that the victims were unforeseeable. Thus foreseeability is a question for the jury to determine by giving thought to, among other things, the time, space, and distance between the alleged failure to investigate and the deaths of the two security guards. *See Calkins*, 110 N.M. at 66, 792 P.2d at 43.

{20} APD and DPS officers have a duty to exercise that care ordinarily exercised by reasonably prudent officers in similar circumstances. - Duty to investigate. In *Schear*, 101 N.M. at 676, 687 P.2d at 733, and *California First Bank*, 111 N.M. at 71-75, 801 P.2d at 653-57, this Court established that law enforcement officers are liable for harm caused by the negligent performance of their statutory duty to investigate crimes. In this case Torres and Beeks allege that the officers failed to investigate the bagel-shop murders in a reasonable fashion. As we said in *Cross v. City of Clovis*, 107 N.M. 251, 254, 755 P.2d 589, 592 (1988),

> a failure to act, to be negligent, must be a failure to do an act which a reasonably prudent and qualified law enforcement officer, in the exercise of ordinary care, would do in order to prevent injury to a person whom the officer would foresee to be exposed to risk of injury.

Thus the officers had a duty to exercise that care ordinarily exercised by reasonably prudent and qualified law enforcement officers as they investigated the murders.

{21} - *Persons for whose benefit or protection the statutory duty of investigation is intended.* APD and DPS argue that, aside from the foreseeability issue discussed above, the duty of law enforcement officers extends only to known victims of a crime in progress or specific segments of the public in imminent danger and, then, only for the benefit of persons within the political boundaries of New Mexico. In essence, APD and DPS argue that the victims in this case were not within the class of persons to be protected by the statutory duty to investigate.

{22} In *Schear* this Court held that officers may be liable for their failure to investigate when they know the identity of the victim of a crime in progress. 101 N.M. at 676, 687 P.2d at 733. Similarly, in *California First Bank* we held that law enforcement officers may be liable for failure to arrest a drunken driver because their omission places a specific segment of the population (the traveling public) in imminent danger. 111 N.M. at 75, 801 P.2d at 657. In both cases this Court extended the duty of law enforcement officers to foreseeable victims; neither case specifically limited their duty to identified victims or a specific segment of the population imminently at risk. *See California First Bank*, 111 N.M. at 74 n.7, 801 P.2d at 656 n.7 (stating that liability rested upon foreseeability of the victims and not specific knowledge of investigating police). As the Court of Appeals correctly stated in *Wittkowski*, the statutory duty to investigate "is for the benefit and protection of the public." 103 N.M. at 531, 710 P.2d at 98. In creating the duty, the legislature did not limit the traditional tort concept of foreseeability that would otherwise define the intended beneficiaries of the statute. All persons who are foreseeably at risk within the general population are within the class of persons to be protected by the duty to investigate. *See* Keeton et al. § 36, at 224 ("The class of persons to be protected . . . extend[s] to all those likely to be injured by the violation [of the statute].").

{23} As to the argument regarding political boundaries, the Court of Appeals rejected this contention, stating that "the scope of [a] duty is determined by the foreseeability of the injury, and not by reference to geographical boundaries." *Torres*, 116 N.M. at 383, 862 P.2d at 1242. We agree because, although the class of persons the legislature sought to protect is not stated explicitly, to limit the class to those within the state would lead to illogical results. We interpret statutes to avoid implied limitations that are not warranted by sound reason. *Cf. Sandoval v. Rodriguez*, 77 N.M. 160,163, 420 P.2d 308, 310 (1966) (stating that legislative enactments "must be interpreted to accord with common sense and reason"). If we were to hold that the duty to investigate was limited 'by

state boundaries, we must infer that the legislature intended to discriminate against foreseeable victims a stone's throw across the border in favor of foreseeable victims 300 miles across the state. We need not address whether the legislature could thus classify persons intended to be benefitted by the statute. There is no reason to believe that they did so. *Cf. Udy v. Calvary Corp.*, 162 Ariz. 7, 780 P.2d 1055, 1059 (Ct. App.1989) (holding landlord had duty to protect tenant from injury that occurred off landlord's premise and rejecting notion that "geographic limits . . . necessarily delimit the scope of any duty of care imposed upon the parties to [a] relationship").

{24} When the duty to investigate is breached and the wrongdoer is not apprehended, the risk of injury may extend to a known individual, as in *Schear*, or to a class of individuals, as in *California First Bank*. In most circumstances, however, the identity of potential victims will not be known to the investigating officers. Because it is now as easy to travel from Albuquerque to Los Angeles as it is to travel from Albuquerque to Las Cruces, New Mexico, the statutory duty to investigate logically must extend to benefit or protect all foreseeable victims, including those persons outside the state. *E.g., Keeton et al.* § 36, at 227 ("[I]n the absence of any other guide, a statute may well be assumed to include all risks that reasonably may be anticipated as likely to follow from its violation."). If the owner of a motor vehicle learns that a permitted driver is incompetent or even a madman (as here) with the most reckless and wanton propensities behind the wheel, it hardly could be argued that proportional liability of the owner for taking inadequate steps to intervene would attach only to specifically identifiable victims of highway mayhem or within some geographic boundary.

{25} Based on *Schear* and *California First Bank*, we hold that when any person "of the public" (regardless of geographic location) is foreseeably at risk of injury by a party reported to be in violation of the criminal law, officers undertaking an investigation of the crime owe that person a duty to exercise the care ordinarily exercised by prudent and qualified officers. Although APD and DPS did investigate and attempt to apprehend Trupp in this case, the question whether the investigation and attempt to apprehend was reasonable and done with due care is to be decided by the factfinder, keeping in mind that "[a]s the risk of danger that reasonably should be foreseen increases, the amount of care required also increases." *Cross*, 107 N.M. at 254, 755 P.2d at 592.

{26} The conduct of APD and DPS must be compared to the conduct of Trupp. The trial court should be aware of our recent holdings in *Reichert v. Atler*, 117 N.M. 623, 875 P.2d 379 (1994), and *Barth v. Coleman*, 118 N.M. 1, 878 P.2d 319 (1994), in which we analyzed our comparative-liability jurisprudence. In those cases we reaffirmed that bar owners or operators could be held liable for breaching their duty to protect patrons from foreseeable harm and held that the negligent conduct of the owner or operator could be compared to the conduct of the third party who was actually responsible for the injury. This case is similar in that if a jury finds that APD and DPS have breached their duty to investigate and their duty to exercise ordinary care, it must compare that breach with Trupp's conduct in determining liability.

{27} *Conclusion.* We hold that police officers have a statutory duty to investigate and a common-law duty to exercise, for the safety of others foreseeably at risk, that care ordinarily exercised by reasonably prudent and qualified officers. Because foreseeability, breach, proximate cause, and comparative liability are questions for the jury, we reverse the district court and Court of Appeals and remand this case for proceedings consistent with this opinion.

{28} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER,
Justice

Justice Richard E. Ransom

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1995-NMSC-043

Filing Date: June 28, 1995

Docket No. 21,728

VIRGINIA BROOKS, as personal representative of THOMAS WILLIAM BROOKS, deceased,

Plaintiff-Appellant,

vs.

BEECH AIRCRAFT CORPORATION,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF COLFAX COUNTY
Peggy J. Nelson, District Judge

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RANSOM, Justice.

OPINION

{1} As personal representative of her deceased husband, Virginia Brooks brought a wrongful death action against Beech Aircraft Corporation in connection with a 1988 plane crash. In relevant part Brooks sued in negligence and strict liability for an alleged design defect, claiming that the absence of shoulder harnesses caused the death of Thomas Brooks. The trial court granted Beech Aircraft's motion for summary judgment and Brooks appeals pursuant to SCRA 1986, 12-102(A)(1) (Repl. Pamp. 1992) (warranty count sounding in contract). We hold that a design-defect claim may be brought in both negligence and strict liability, and we further hold that such claim may be proved without showing that the manufacturer has violated regulations, codes, or standards applicable to the 1968 plane that crashed. Finding disputed issues of material fact precluding summary judgment on the questions of negligence and unreasonable risk, we reverse and remand.

{2} *Facts and proceedings.* Thomas Brooks died on August 2, 1988, when the 1968 Beech

Musketeer he was piloting crashed near Cimarron, New Mexico. Mr. Brooks bought his Musketeer used in 1984. Although his plane was equipped with lap belts, it was neither designed nor equipped with shoulder harnesses. When the Musketeer was designed, manufactured, and sold in 1968, Federal Aviation Administration (FAA) regulations did not require the installation of shoulder harnesses in "general aviation" aircraft such as the Musketeer. Further, no aircraft industry standard or guideline applicable at that time required the installation of such harnesses. The FAA did not adopt a regulation requiring the installation of shoulder harnesses in the front seats of general aviation aircraft until 1977, and this regulation applied only to planes manufactured after July 18, 1978. At no time did the FAA require manufacturers to install shoulder harnesses in older planes.

{3} Brooks filed suit in 1990, claiming that a defect in the Musketeer's engine had caused her husband's plane to crash. She also claimed that the absence of shoulder harnesses rendered the plane not crashworthy and that, while not causing her husband's plane to crash, the absence of shoulder harnesses proximately caused enhanced injury resulting in her husband's death. At the close of discovery Beech moved for summary' judgment on all of Brooks' claims.

{4} In response to the motion for summary judgment, Brooks presented the deposition of Dr. Richard G. Snyder, a forensic anthropologist who testified that Beech Aircraft had developed a workable shoulder harness as early as 1951. Dr. Snyder also testified that Beech had included shoulder restraints as standard equipment on some of its aircraft before 1968. Finally, stating that he had considered the "state of the art" in 1968 and that he had determined shoulder harnesses were available when Mr. Brooks' plane was designed and manufactured, Dr. Snyder expressed the opinion that the Musketeer was not crashworthy without shoulder harnesses and that Beech was negligent not to include harnesses in the Musketeer's design.

{5} The trial court entered summary judgment in favor of Beech on Brooks' warranty claims, claims of misrepresentation under Restatement (Second) of Torts § 402B (1964), and on Brooks' claim that an engine defect caused her husband's plane to crash. Brooks does not challenge these judgments on appeal. The trial court also concluded that enhanced-injury claims sound only in negligence and that negligence in design must be proved by showing the product violated the government regulations or industry standards applicable at the time of design, relying for support on *Duran v. General Motors Corp.*, 101 N.M. 742, 744-49, 688 P.2d 779, 781-86 (Ct. App. 1983), *cert. quashed*, 101 N.M. 555, 685 P.2d 963 (1984). Because the undisputed evidence showed that in 1968 none of the applicable government regulations or industry standards required installation of shoulder harnesses in planes like Mr. Brooks' Musketeer, the trial court entered summary judgment in favor of Beech on Brooks' design-defect claims. Brooks appeals.

{6} *Design-defect liability. - Crashworthiness.* The Eighth Circuit Court of Appeals became the first to adopt the "crashworthiness" theory of liability with the landmark decision of *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968). Reasoning that it is readily foreseeable that an automobile will be involved in an accident and that a user will be injured—often as a result of a "second collision" with the interior of the automobile—the court held that a user may recover damages for enhanced injury if, even though an alleged design defect did not cause the injury-producing accident, the victim can show that the defect proximately caused an injury more severe in degree than would have resulted had the defect not been present. *Id.*

{7} In *Duran* our Court of Appeals "joined the majority of jurisdictions in adopting 'crashworthiness', 'second collision' or 'enhanced injury' as actionable." 101 N.M. at 745, 688 P.2d at 782. Citing a fear that case-by-case adjudication of strict design liability for injuries caused or enhanced by what a jury may determine to be an unreasonable risk would impose hopelessly conflicting design requirements on manufacturers,

and noting that *Larsen* (being a negligence case) refrained from commenting on strict liability, the Court of Appeals held that such claims sound only in negligence. *Id.* at 745-47, 688 P.2d 782-84. "In addition to promoting uniformity, the use of negligence principles [based on extrajudicial standards] would relieve the jury of having to second guess what a proper design should have been." *Id.* at 747, 688 P.2d at 784. This case presents us with an opportunity to review the soundness of the Court of Appeals' determinations.

{8} - *Crashworthiness as a subdivision both of design-effect and of manufacturing-flaw liability.* The *Duran* Court ruled that crashworthiness claims sound only in negligence regardless of whether the injury in the second collision was caused or enhanced by a design defect or by a manufacturing flaw. In *Duran* the injury enhancing defects were both a lack of door header rigidity (design defect) and faulty welds (manufacturing flaw). The death of Thomas Brooks is attributed only to a design defect and the issue before us has been briefed and argued not so much as whether all crashworthiness liability should be limited to negligence, but whether all design-defect liability should be so limited. We see no merit in limiting to negligence the liability of a product supplier for a second-collision injury caused by a manufacturing flaw, *cf. Duran,* 101 N.M. at 749, 688 P.2d at 786; and we agree with the parties that the real issue here is the proper standard of liability for injuries caused by a design defect regardless of whether those injuries occur in a second collision.

{9} - *Policies supporting the limitation of design-defect claims to negligence.* Brooks contends that whether a product is alleged to contain a manufacturing flaw or a design defect, the standard by which the supplier's liability is measured should be the same. Beech acknowledges that "[a] system of strict liability for manufacturing defects serves a number of worthy objectives." Beech argues, however, that "design is a creature of conscious choice between safety and . . . a host of imperatives against which safety must be traded off." Accordingly, Beech submits that strict liability is an inappropriate standard by which to measure a supplier's liability for design-defect injuries.

{10} Beech and supporting amici point out that in determining whether a product is defectively designed there is an inherent difficulty that does not arise when determining whether that same product contains a manufacturing flaw. In the case of a manufacturing flaw the product leaves the manufacturer's hands in a condition unintended by the manufacturer. Thus to ascertain whether the product contains a defect, the jury need only "compare the injury-producing product with the manufacturer's plans or with other units of the same product line." *Barker v. Lull Eng'g Co.,* 573 P.2d 443, 454 (Cal. 1978). By contrast, in the case of a design defect, the product leaves the manufacturer's hands in the exact condition intended by the manufacturer. Thus, "while manufacturing flaws can be evaluated against the intended design of the product, no such objective standard exists in the design defect context." *Caterpillar Tractor Co. v. Beck,* 593 P.2d 871, 880 (Alaska 1979).

{11} Beech contends that precisely because there is no objective standard of defectiveness in the design context, the concept of defect may be understood only by reference to the manufacturer's conduct; whether a design is "safe enough" depends on the reasonableness of the manufacturer's choice between safety and other imperatives such as price and product utility. Thus Beech contends that negligence is the appropriate standard by which to measure a supplier's liability for defective design.

{12} Beech also contends that negligence must be adopted as the sole standard of liability to avoid depriving the public of useful and beneficial products. In this regard Beech quotes the Michigan Supreme Court, reasoning:

> [A] verdict for the plaintiff in a design defect case is the equivalent of a determination that an entire product line is defective. It usually will involve a significant portion of the manufacturer's assets and the public may be deprived of a product. Thus,

> the plaintiff should be required to pass the higher threshold of a fault test in order to threaten an entire product line.

Prentis v. Yale Mfg. Co., 421 Mich. 670, 365 N.W.2d 176, 185 (Mich. 1984).

{13} Finally, Beech contends that judging a manufacturer's product defective based on generational changes in attitudes about safety and generational advances in technology works an unfair hardship on manufacturers and does not serve the goals of strict products liability. In particular, Beech notes that "the average piston-engine aircraft is over 27 years old and one-third of the fleet is over 32 years old." *See* S. Rep. No. 202, 103d Cong., 1st Sess. 3 (1993). If this Court were to apply strict products liability in cases alleging defective design, Beech cautions, manufacturers would be "whipsawed . . . between the standards of different generations."

{14} - *Policies supporting the imposition of strict products liability generally.* Since *Greenman v. Yuba Power Products, Inc.,* 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (Cal. 1962) (in bank), nearly every American jurisdiction has adopted some form of strict liability in tort as a measure of manufacturer responsibility for injuries caused by defective products. *See, e.g., Stang v. Hertz Corp.,* 83 N.M. 730, 735, 497 P.2d 732, 737 (1972) (adopting strict liability in tort). In deciding to apply strict liability to the manufacturer of a wood lathe, the *Greenman* court turned to Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.,* 24 Cal. 2d 453, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring). *Greenman,* 377 P.2d at 901. In *Escola* Justice Traynor stated that he would hold the manufacturer of a bottle which exploded strictly liable for the resulting injuries because "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." 150 P.2d at 441.

{15} The policy of risk- or cost-distribution continues to serve as a primary basis for imposing strict products liability. Thus, in adhering to strict liability as an appropriate standard of liability for a manufacturer's failure to include a safety device in the design of a sheet metal rolling machine, the New Jersey Supreme Court observed that "strict liability in a sense is but an attempt to minimize the costs of accidents and to consider who should bear those costs." *Suter v. San Angelo Foundry & Mach. Co.,* 81 N.J. 150, 406 A.2d 140, 151 (N.J. 1979); *see also Azzarello v. Black Bros. Co.,* 480 Pa. 547, 391 A.2d 1020, 1023 (Pa. 1978) (concluding that "the realities of our economic society as it exists today forces the conclusion that the risk of loss for injury resulting from defective products should be borne by the suppliers, principally because they are in a position to absorb the loss by distributing it as a cost of doing business").

{16} In addition to the cost-distribution rationale of *Greenman,* other courts have approved specifically the rationale that imposing strict liability relieves plaintiffs of the burden of proving ordinary negligence under circumstances in which such negligence is likely to be present but difficult to prove. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 98, at 693 (5th ed. 1984). As observed by one commentator:

> It is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, res ipsa loquitur often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This is often not present, and strict liability eliminates the need of the proof.

John W. Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss. L.J. 825, 826 (1973); *cf. O'Brien v. Muskin Corp.,* 94 N.J. 169, 463 A.2d 298, 303 (N.J. 1983) (noting in case involving alleged defective design of swimming pool that "one of the policy considerations supporting the imposition of strict liability is easing the burden of proof"); *Barker,* 573 P.2d at 455 (allocating burden of proof to manufacturer

to show that product not defectively designed because "the feasibility and cost of alternative designs . . . involve technical matters peculiarly within the knowledge of the manufacturer").

{17} The third policy cited for the imposition of strict liability is that suppliers who otherwise might not be liable because of a passive role in the chain of supply should be encouraged to select reputable and responsible manufacturers who generally design and construct safe products and who generally accept financial responsibility for injuries caused by their defective products. *Vandermark v. Ford Motor Co.,* 61 Cal. 2d 256, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896 (Cal. 1964) (in bank) (noting that retailers are in position to exert pressure on manufacturers and thereby ensure product safety); *Hammond v. North Am. Asbestos Corp.,* 97 Ill. 2d 195, 454 N.E.2d 210, 216, 73 Ill. Dec. 350 (Ill. 1983) (same); W. Page Keeton et al. § 100, at 707 (stating that goal of accident prevention is best served by imposing strict liability on retailer who can select manufacturers which produce safe products). Because suppliers are in a better economic bargaining position, they may be more likely than individual consumers to get a manufacturer to bear financial responsibility for product-related injuries. *See* 1 Timothy E. Travers et al. *American Law of Products Liability 3d* § 5:7, at 21-22 (1994). At any rate, the injured consumer is thus provided with an alternative remedy in the event that the manufacturer is insolvent, out of business, or so remote that it is either impossible to obtain jurisdiction or unduly burdensome to bring suit. *Vandermark,* 391 P.2d at 171; W. Page Keeton et al. § 100, at 706.

{18} Fourth and finally,[1] imposing strict products liability serves the interests of fairness. As articulated by the New Jersey Supreme Court in *Beshada v. Johns-Manville Products Corp.,* 90 N.J. 191, 447 A.2d 539, 549 (N.J. 1982):

> The burden of illness from dangerous products such as asbestos should be placed upon those who profit from its production and, more generally, upon society at large, which reaps the benefits of the various products our economy manufactures. That burden should not be imposed exclusively on the innocent victim.

The fairness rationale embodies a normative judgment that plaintiffs injured by an *unreasonably* dangerous product should be compensated for their injuries. At the heart of this judgment lies the conclusion that although the manufacturer has provided a valuable service by supplying the public with a product that it wants or needs, it is more fair that the cost of an *unreasonably* risk of harm lie with the product and its possibly innocent manufacturer than it is to visit the entire loss upon the often unsuspecting consumer who has relied upon the expertise of the manufacturer when selecting the injury-producing product.

{19} Beginning with this Court's decision in *Stang,* 83 N.M. at 735, 497 P.2d at 737, these policy considerations became part of the rationale supporting the imposition of strict products liability in New Mexico. In *Stang* we held that the lessor of an automobile could be held strictly liable for the death of a passenger killed when a tire with hidden and pre-existing road-hazard damage blew out, causing the automobile to crash. In adopting strict liability in tort, this Court noted that the doctrine had been justified on the grounds that "the loss should be placed on those most able to bear it and they could then distribute the risk loss to users of the product in

[1] Arguably, there is a fifth policy objective underlying the imposition of strict products liability. As stated by this Court in *Rudisaile v. Hawk Aviation, Inc.,* 92 N.M. 575, 576, 592 P.2d 175, 176 (1979), imposing strict products liability may cause manufacturers to take more care in designing and manufacturing a product and in the warnings they give to consumers about using that product. Some courts have posited that strict liability encourages manufacturers to increase spending on research and development, thereby promoting the development of safer products. *See, e.g., Beshada v. Johns-Manville Prods. Corp.,* 90 N.J. 191, 447 A.2d 539, 548 (N.J. 1982) ("By imposing on manufacturers the costs of failure to discover hazards, we create an incentive for them to invest more actively in safety research."). We, however, do not base our decision today on whether imposing strict liability for defective design increases manufacturer care in this manner.

the form of higher prices." *Id.* at 733, 497 P.2d at 735. As part of its rationale, this Court specifically relied on the formulation of strict products liability articulated by the California Supreme Court in *Greenman. Id.*

{20} This Court also noted that adoption of strict products liability was borne largely out of dissatisfaction with the remedies afforded consumers under warranty and negligence law. *Stang,* 83 N.M. at 731, 497 P.2d at 733. Specifically with regard to the negligence cause of action, this Court stated that "the main problem with the negligence theory was the practical one of establishing the failure to exercise due care." *Id.* The importance of this rationale to the adoption of strict products liability in New Mexico has been echoed in other New Mexico cases. *See, e.g., Aalco Mfg. Co. v. City of Espanola,* 95 N.M. 66, 67, 618 P.2d 1230, 1231 (1980) ("The purpose behind strict products liability . . . is to allow an injured consumer to recover against a seller or manufacturer without the requirement of proving ordinary negligence."); *Trujillo v. Berry,* 106 N.M. 86, 88, 738 P.2d 1331, 1333 (Ct. App.) (same), *cert. denied,* 106 N.M. 24, 738 P.2d 518 (1987). In fact, in holding that a hotelier could not be held strictly liable for the allegedly unsafe design of a hotel room, this Court stated that "the rationales behind the application of strict liability do not apply when . . . proof of negligence is not difficult." *Livingston v. Begay,* 98 N.M. 712, 716, 652 P.2d 734, 738 (1982).

{21} Finally, this Court has noted that "the extension of strict liability to non-negligent retailers provides two pockets from which the injured consumer can obtain relief, one being the usually local and more accessible retailer." *Aalco,* 95 N.M. at 67, 618 P.2d at 1231; *see also Trujillo,* 106 N.M. at 88, 738 P.2d at 1333 (same).

{22} Thus the law of New Mexico and the law of other jurisdictions disclose four primary policies supporting the imposition of strict products liability: placing the cost of injuries caused by *defective* products on the manufacturer who is in a better position to pass the true product cost on to all distributors, retailers, and consumers of the product; relieving the injured plaintiff of the onerous burden of establishing the manufacturer's negligence; providing full chain of supply protection; and, in the interest of fairness, providing relief against the manufacturer who—while perhaps innocent of negligence—cast the defective product into the stream of commerce and profited thereby.

{23} The standard of liability depends upon a balancing of conflicting policy considerations. Whether strict products liability doctrine should be the standard of liability for injuries caused or enhanced by a design defect, and hence whether we should overrule *Duran,* depends on whether doing so would further the policies generally supporting the imposition of strict products liability. If it would, we also must decide whether it is nonetheless better to restrict liability for design-defect injuries to negligence because, as a function of conscious choice, design is conduct dependent, because imposing strict liability for design-defect injuries has societal and economic consequences different from imposing such liability for injuries caused by unintended flaws, and because it is especially unfair to suppliers to determine liability for a design choice based on temporal changes in technology and attitudes about safety.

{24} - *Analysis of design-defect claims in light of policy goals.* Beech contends that in the case of injuries caused by defectively designed products, manufacturers are neither able to pass on to consumers the cost of such injuries nor able to insure themselves against losses occasioned by such injuries. Beech speculates that injuries caused by a design defect are more likely to occur several years after the injury-producing product has hit the market than are injuries caused by a manufacturing flaw. In the interim the manufacturer may have replaced the injury-producing design with an alternative design that does not pose the same risk of injury. Beech thus argues that it is impossible for the manufacturer to pass on the cost of injury from a replaced product. Similarly, Beech argues that manufacturers cannot insure themselves against losses occasioned by design-defect injuries because, unlike manufacturing flaws which are usually present in a small and

discrete percentage of a particular product line, a design defect will affect the entire product line. *Cf. Prentis,* 365 N.W.2d at 185 (stating that "a verdict for the plaintiff in a design defect case is the equivalent of a determination that an entire product line is defective"). Beech does not address the availability of insurance against liability for negligent design.

{25} While attractive in the abstract, Beech's arguments are undermined by recognized behavior of manufacturers since the widespread adoption of strict products liability. Inherent in these arguments is the assumption that manufacturers will not pass on the costs of design-defect injuries caused by a particular product or insure against losses caused by such injuries until consumers have been injured by the particular product. Again, Beech does not distinguish between negligent design and strict liability for an unreasonable risk in design. As noted by West Virginia's highest court, however, actual behavior demonstrates that manufacturers collect a "product liability premium" at the time of sale. *Blankenship v. General Motors Corp.,* 185 W. Va. 350, 406 S.E.2d 781, 784 (W.Va. 1991) (noting that General Motors collects a "product liability premium" each time it sells a vehicle). Because "product liability is concerned with *spreading the cost of inevitable accidents* " and because such cost spreading actually occurs, *id.* at 784-85, West Virginia has adopted strict products liability as the standard in design-defect cases. *Id.* at 786; *see also Toliver v. General Motors Corp.,* 482 So. 2d 213, 216 (Miss. 1985) (en banc) (adopting strict products liability in case involving claims for defective design of automobile gasoline tank based in part on the cost-distribution rationale). As long as the price of a defective product line or successive product lines reflect some element of injury costs, the policy goal of cost distribution has been served.

{26} Despite Beech's contention to the contrary, design cases present plaintiffs with the same proof problems that manufacturing flaw cases do. Negligence focuses on *conduct.* Strict liability focuses on the *product.* Proof of what a manufacturer knew or should have known is the measure of conduct. It is largely dependent upon memories of employees and consultants, and upon the retention and production of business records. Proof of the risks of harm from a product's condition or from the manner of its use is the measure of a product defect. The Mississippi Supreme Court partially justified its decision to adopt a cause of action sounding in strict liability for the defective design of an automobile gasoline tank with the observation that in a negligence cause of action "the plaintiff would face the insurmountable burden of proving exactly at what point [the product] became defective, and which agent of the defendant was negligent either in causing the condition, or in failing to detect it." *Toliver,* 482 So. 2d at 216. Hence, adopting strict liability for defective design removes an onerous burden of proving negligence.

{27} With regard to the third policy rationale—providing full chain of supply protection—we see nothing about design defects that would diminish the effect that strict products liability has on product safety. Suppliers should be encouraged to exercise great care in selecting the manufacturers whose products they choose to distribute and to pressure manufacturers to accept financial responsibility for injuries caused by their products. Such a result cannot be achieved through negligence law. "A supplier who did not make a product . . . is ordinarily under no obligation to inspect it for conditions which expose users [bystanders] to risk of injury." SCRA 1986, 13-1414 (Repl. Pamp. 1991) (uniform jury instruction—no duty to inspect). Nor is there a distinction between an insolvent or remote manufacturer of a product that is defective by reason of design and one of a product defective by reason of a manufacturing flaw. When considering the applicability of policy to an established aircraft manufacturer we must not lose sight of the fact that there are countless small, remote manufacturers whose shoestring operations place questionable products on the market. Thus the goal of providing greater consumer protection is served by imposing strict products liability.

{28} Finally, imposition of strict liability against manufacturers for injuries caused by

defective product design also furthers the goal of achieving a fair allocation of the risk of loss. The precise nature of the product defect does not alter the balance of equities present in the relationship between the manufacturer and the injured user of a product. Whether the product user's injury is caused by a manufacturing flaw or a design defect, this Court must still answer a fundamental policy question: To whom as between two innocent parties should the risk of loss from product-related injuries be allocated? When answering this policy question in cases involving manufacturing flaws, courts have concluded almost unanimously that although the manufacturer may have exercised reasonable care in its manufacturing and quality control operations, because the manufacturer is in a better position than the consumer to control product risks and because the manufacturer has profited from the sale of the injury-producing product, the manufacturer should bear the risk of loss.

{29} We find nothing in the difference between manufacturing flaws and design defects that would alter this conclusion. In the case of design defects, as in the case of manufacturing flaws, the manufacturer controls the design decision and is in a better position than the consumer to control the amount of risk that the product contains. Similarly, as in the case of a defectively manufactured product, the manufacturer of a defectively designed product has profited from its sale. Under these circumstances, it is only fair that the manufacturer bear the loss from product related injuries that are proved to result from an unreasonable risk of injury attributable to product design.

{30} - *Countervailing considerations do not outweigh benefits gained by imposing strict liability.* Although we have concluded that imposing strict liability for injuries caused by defectively designed products would further the policies underlying the adoption of strict liability generally, we must determine whether there are countervailing considerations that outweigh such benefits. We conclude that the considerations cited by Beech are insufficient to outweigh the benefits gained by imposing strict liability.

{31} When it argues that design is conduct dependent, Beech refers to the fact that, in the case of a design defect, the product leaves the manufacturer's hands in the exact condition intended by the manufacturer. Beech distinguishes the unintended manufacturing flaw that may be proved by comparing the injury-producing product with the prototype. In New Mexico, however, a defect giving rise to strict products liability is not measured by comparison with a prototype. We have for fifteen years rejected the definitions of "defect"—"defect is defect," "consumer expectations," "risk-utility," "reasonable alternative"—that have fueled much of the controversy as product-supply interests strike back at liability for defective products. Our "unreasonable-risk-of-injury" test seems to have allowed for proof and argument under any rational theory of defect.

{32} Under the current product liability jury instructions, SCRA 1986, 13-1401 to 13-1433 (Repl. Pamp. 1991), the jury is instructed that a supplier's liability is measured by "an unreasonable risk of injury resulting from a condition of the product or from a manner of its use." UJI 13-1406. As to either flaw or design, the jury is informed that "an unreasonable risk of injury is a risk which a reasonably prudent person having full knowledge of the risk would find unacceptable." UJI 13-1407. Lastly, the jury is instructed specifically that in determining whether a product design poses an unreasonable risk of injury, "you should consider the ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive." *Id*.[2] By requiring the jury to make a risk-benefit

[2] The Committee Comment for UJI 13-1407 lists seven risk-benefit criteria to be weighed by the jury which were suggested by John Wade in his article, *On the Nature of Strict Tort Liability for Products,* 44 Miss. L.J. 825, 837-38 (1973). These are: (1) the usefulness and desirability of the product; (2) the availability of other and safer products to meet the same need; (3) the likelihood of injury and its probable seriousness, i.e., "risk"; (4) the obviousness of the danger; (5) common knowledge and normal public expectation of the danger (particularly for established products); (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings); and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

calculation, these instructions adequately define "defect" so as to focus jury attention on evidence reflecting meritorious choices made by the manufacturer on alternative design and so as to minimize the risk that the public will be deprived needlessly of beneficial products for the sake of compensating injured victims.

{33} When UJI 13-1407 was published for the first time in 1981, the trial judge was directed to determine, based upon developing law, whether it was relevant to design-defect cases that, at the time of supplying the product, the supplier could not have known of an unreasonable risk in the design. This Court had not yet addressed whether strict products liability for an unreasonably dangerous design should be restricted to what the supplier could reasonably know at the time the product was placed on the market. The UJI approach to analyzing the question of defect is that

> [a] product is defective if it is unreasonably dangerous as marketed. It is unreasonably dangerous if a reasonable person would conclude that the magnitude of the scientifically perceived danger as it is proved to be at the time of the trial outweighed the benefit of the way the product was so designed and marketed.

UJI 13-1407 comm. cmt. (quoting, with removal of underscoring, Page Keeton, *Product Liability and the Meaning of Defect,* 5 St. Mary's L.J. 30, 37-38 (1973)). Further,

> the way to remedy the problem inherent in foreseeability is to supply knowledge as a matter of law, even if the defect was scientifically unknowable at the time of manufacture, and to allow the jury to decide if the ordinary person would have put the product on the market as designed.

Id. This method of analyzing whether a product is defective—using evidence of product risk available at the time of trial—has been called the Wade-Keeton approach.

{34} Our research reveals that in cases involving an alleged design defect, this appellation is a misnomer. Both Wade and Keeton have indicated that in cases in which the design of a product is alleged to be unreasonably dangerous, a risk-utility calculation like the one required by our jury instructions should be done in light of the technology available at the time of design or distribution. *See* John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing,* 58 N.Y.U. L. Rev. 734, 760 (1983) (time of distribution); W. Page Keeton, *The Meaning of Defect in Products Liability Law,* 45 Mo. L. Rev. 579, 595 (1980) (time of design). The proposed Restatement (Third) of Torts: Products Liability § 2(b), at 9, 13 cmt. a (Tentative Draft No. 1, 1994) adopts a similar position, reasoning that

> For the liability system to be fair and efficient, most observers agree that the balancing of risk in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution. . . . Imposing liability for [unforeseeable or incalculable risks] would arguably violate a manufacturer's right, in fairness, to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform.

Hence, Wade, Keeton, and the proposed Restatement advocate a negligence approach to design defects.

{35} At the heart of this issue lies a scenario not present in this case—a defect in design or formulation about which a prudent supplier should not be expected to have had knowledge at the time of supply. As observed above, our existing uniform jury instructions allow proof and argument on all of the factors suggested by the Restatement (Third) of Torts as relevant in determining whether the omission of a reasonable alternative gave rise to an unreasonable risk of injury. *See Restatement (Third) of Torts: Products Liability § 2, cmt. d, at 19-20 (Tentative Draft No. 1, 1994); Duran,* 101 N.M. at 747, 688 P.2d at 784. The distinction between the negligence approach

proposed by the Restatement and strict liability is the time frame in which the risk-benefit calculation is made. *See Saiz v. Belen School Dist.,* 113 N.M. 387, 402, 827 P.2d 102, 117 (1992). As stated by the Arizona Supreme Court in *Dart v. Wiebe Manufacturing, Inc.,* 147 Ariz. 242, 709 P.2d 876, 881 (Ariz. 1985) (en banc):

> In a strict liability risk/benefit analysis . . . it is not the conduct of the manufacturer or designer which is primarily in question, but rather the quality of the end result; the product is the focus of the inquiry. The quality of the product may be measured not only by the information available to the manufacturer at the time of design, but also by the information available to the trier of fact at the time of trial.

See also Phillips v. Kimwood Machine Co., 269 Ore. 485, 525 P.2d 1033, 1036 (Or. 1974) (in banc) ("Strict liability imposes what amounts to constructive knowledge of the condition of the product.").

{36} In most instances a manufacturer is aware of the risks posed by any given design and of the availability of an alternative design. This case is a perfect example; Dr. Snyder testified that Beech had developed and used a workable shoulder harness prior to the design and manufacture of Mr. Brooks' plane. Thus we disagree with the premise that fairness requires the rejection of strict liability in design cases; when the manufacturer is aware of product risk and alternative designs at the time of supply, it is certainly not unfair to judge the manufacturer's design according to principles of strict liability rather than by conduct at the time of supply.

{37} Further, in those hypothetical instances in which technology known at the time of trial and technology knowable at the time of distribution differ—and outside of academic rationale we find little to suggest the existence in practice of unknowable design considerations—it is more fair that the manufacturers and suppliers who have profited from the sale of the product bear the risk of loss. Given the risk-benefit calculation on which the jury is instructed in New Mexico, and the policy considerations that favor strict products liability, we believe that it is logical and consistent to take the same approach to design defects as to manufacturing flaws. If in some future case we are confronted directly with a proffer of evidence on an advancement or change in the state of the art that was neither known nor knowable at the time the product was supplied, we may at that time reconsider application of a state-of-the-art defense to those real circumstances, properly developed under the proffer with applicable briefs and argument.

{38} Regulations, codes, or standards not determinative in design-defect cases. In *Lopez v. Heesen,* 69 N.M. 206, 213-14, 365 P.2d 448, 453 (1961), this Court recognized that industry customs and usage are relevant though not conclusive evidence on the question of product liability. We adhere to the principle that evidence of industry custom or usage, and evidence of compliance with applicable regulations, is relevant to whether the manufacturer was negligent or whether the product poses an unreasonable risk of injury, but that such evidence should not conclusively demonstrate whether the manufacturer was negligent or the product was defective. We overrule *Duran* on this point as well.

{39} Echoing concerns similar to those articulated by the Court of Appeals in *Duran,* Beech cautions that allowing juries to determine on a case-by-case basis whether a manufacturer is liable for adopting a particular design "'permits individual juries applying varying laws in different jurisdictions to set nationwide . . . safety standards and to impose on . . . manufacturers conflicting requirements.'" *Duran,* 101 N.M. at 745, 688 P.2d at 782 (quoting *Dawson v. Chrysler Corp.,* 630 F.2d 950, 962 (3d Cir. 1980), *cert. denied,* 450 U.S. 959, 67 L. Ed. 2d 383, 101 S. Ct. 1418 (1981)). It is speculated that a manufacturer held liable in one case for designing an excessively rigid frame may be held liable in another case because the frame was not rigid enough; one jury may decide that a windshield should have been designed to "pop out" on impact, while another may determine that the

windshield should have been designed to stay in place. *Id.*

{40} We are persuaded to the contrary, that—unless Congress or the New Mexico Legislature were to preempt the standard against which to measure products liability—the courts should continue to apply to products the general and traditional rules of relevance and materiality for all evidence upon which negligence and unreasonable risk of harm is to be decided. In such cases, we agree with the general principle established by the United States Supreme Court regarding the weight to be given industry custom and usage.

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

Texas & Pacific Railway Co. v. Behymer, 189 U.S. 468, 470, 47 L. Ed. 905, 23 S. Ct. 622 (1903). We hesitate to embrace a standard that would allow an industry to set its own standard of reasonable care and to determine how much product-related risk is reasonable. As noted by Judge Learned Hand in *The T.J. Hooper,* 60 F.2d 737, 740 (2d Cir.), *cert. denied,* 287 U.S. 662 (1932):

> Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages.

{41} We conclude that in assessing whether a manufacturer was negligent in adopting a particular product design or whether the product design poses an unreasonable risk of injury, a court should not be restricted to determining whether the manufacturer's design complied with any applicable government regulations and industry standards. Such regulations and standards, while probative of what a reasonably prudent manufacturer would do, should not be conclusive. The general instruction on ordinary care in products liability actions, UJI 13-1405, provides in relevant part: "Industry customs [standards] [codes] [rules] are evidence of ordinary care, but they are not conclusive." Similarly, the general instruction on unreasonable risk provides: "Industry customs [standards] [codes] [rules] are evidence of the acceptability of the risk, but they are not conclusive." UJI 13-1408. These instructions should be given in cases involving a claimed defect in design.

{42} Testimony by expert created an issue of material fact on negligence claim. Beech and supporting amici contend that even if we decide that negligence may be proved without a showing that the manufacturer violated applicable extrajudicial standards, it was within the trial court's discretion to accept applicable extrajudicial standards "as sufficient for the occasion." *See* Restatement (Second) of Torts § 288C cmt. a (1964). As an example of this approach, amicus NMDLA cites *Bruce v. Martin-Marietta Corp.,* 544 F.2d 442, 444 (10th Cir. 1976), in which plaintiffs sued the manufacturer of an airplane that had crashed, killing thirty-two of the forty passengers on board. On impact, the seats in the passenger cabin broke loose from the floor and were thrown forward, blocking the exit. A fire then developed. Plaintiffs alleged that inadequate seat fastenings and the lack of fire protection caused the deaths of the passengers or enhanced their injuries. *Id.* Martin-Marietta, the manufacturer, moved for summary judgment based on the affidavit of its assistant secretary in which he stated that "the plane was designed 'to meet or exceed all applicable design requirements, safety requirements and other criteria prescribed by the Civil Aeronautics Administration.'" *Id.* at 446.

{43} In response to the motion for summary judgment in *Bruce***,** an aircraft accident investigator testified there were seats available on October 2, 1970 (date of the fatal crash, *eighteen years after manufacture)***,** which, if they had been installed in the defendant's plane, would have remained in place and would not have prevented people from exiting the burning aircraft. *Id.* The appellate court affirmed the entry of summary judgment, holding, in part, that the plaintiffs had

not responded with sufficient evidence of *negligence. Id.* at 448. Here, if strict liability were not applicable, Brooks nonetheless presented evidence sufficient to establish a prima facie case that Beech was negligent. Brooks' expert, Dr. Snyder, testified that he had considered the state of the art in 1968 when Mr. Brooks' plane was designed and manufactured, had determined that shoulder harnesses were available, and had determined that Beech had installed shoulder harnesses as standard equipment on some of its planes prior to the construction of Mr. Brooks' plane. On this basis he expressed the opinion that the Musketeer was not crashworthy without shoulder harnesses and that Beech was negligent. Because Dr. Snyder's opinion was based on technology available at the time Mr. Brooks' plane was designed, a jury reasonably could conclude that Beech was indeed negligent. Hence summary judgment was improper on Brooks' negligence claim.

{44} *Conclusion.* Because recognition of design-defect claims sounding in strict products liability would further the policy considerations that prompted this Court to adopt the doctrine in *Stang v. Hertz Corp.,* we overrule *Duran v. General Motors Corp.* and hold that plaintiffs may pursue design-defect claims sounding in strict liability. Further, we hold that design-defect claims may be proved without showing that the manufacturer's design violated any applicable regulations, codes, or standards. The judgment of the trial court is therefore reversed and this cause remanded for proceedings consistent with this opinion.

{45} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
Chief Justice

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

PAMELA B. MINZNER,
Justice (not participating)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1995-NMSC-044

Filing Date: July 7, 1995

Docket No. 21,987

BRENDA K. HANSEN, f/k/a Brenda K. Sims,

Plaintiff-Appellant,

vs.

FORD MOTOR COMPANY, a Delaware corporation, AL ALLRED FORD LINCOLN-MERCURY, INC., a New Mexico corporation, and TRW, INC., an Ohio corporation,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY
Graden W. Beal, District Judge

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OPINION

RANSOM, Justice.

{1} Brenda Hansen was injured in January 1990 when the car she was driving collided with a car driven by Della Irene Pease. In settlement of her claims against Pease, Hansen executed a general release in April 1991. Two years later Hansen sued Ford Motor Company, Al Allred Ford Lincoln-Mercury, Inc., and TRW, Inc. (collectively, "Ford"), claiming that the airbag in her automobile malfunctioned during the collision, causing her injury. Ford moved for summary judgment, claiming that the general release signed by Hansen released Ford from all liability arising from the accident.

{2} Ruling that the release unambiguously includes Ford, the trial court entered summary judgment. Hansen appeals to this Court pursuant to SCRA 1986, Section 12-102(A)(1) (Repl. Pamp. 1992) (count sounding in contract). We

question whether under principles of traditional contract law the terms of a general release facially and unambiguously include third parties who are not specifically identified as beneficiaries. The better policy, in any event, is to recognize an inherent circumstantial ambiguity as to the intentions of the parties to a general release. Because boilerplate language purporting to discharge all persons whose conduct may have contributed to Hansen's injuries is not sufficiently specific to identify Ford as a third-party beneficiary of the release, we reverse and remand for a determination of the parties' intentions under a rebuttable presumption that the release benefits only those persons specifically designated.

{3} *Facts and proceedings.* The release in question—a standard form which includes blanks for entering the amount of consideration paid, the names of releasees, and the date and location of the accident—provides:

> For the Sole Consideration of [$ 29,000] to be paid the undersigned hereby releases and forever discharges Paul M. Pease, Della Irene Pease, and American National Property and Casualty Company[,] their heirs, executors, administrators, agents and assigns, *and all other persons, firms or corporations liable or, who might be claimed to be liable* . . . from any and all claims, demands, damages, actions, causes of action or suits . . . *on account of all injuries*. . . . *which have resulted or may in the future develop from an accident which occurred on or about the 31st day of January*. . . .
>
> . . . .
>
> Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted . . . for the express purpose of precluding forever any further or additional claims arising out of the aforesaid accident. (Emphasis added.)

{4} Hansen has conceded that she had seen releases of this type before and routinely used them as part of her job as an insurance claims adjuster for State Farm. She argues that the release is ambiguous because it is "reasonably and fairly susceptible of different constructions" and that she in fact had intended to release only the persons specifically named in the release—Paul Pease, Della Pease, and the Peases' insurance company, American National Property and Casualty Company. Hansen proffered her deposition testimony as to her intent and also requested the court to hold an evidentiary hearing to determine the intent of the parties to the release. Ford countered that Hansen's products-liability claims arose out of the accident and that it was thus included within the language of the general release. Relying on *Hendren v. Allstate Insurance Co.*, 100 N.M. 506, 672 P.2d 1137 (Ct. App. 1983), the trial court stated that it was "convinced that the law in New Mexico declares that the general release signed by Plaintiff . . . necessarily includes all Defendants in the case at bar."

{5} Hansen appeals the entry of summary judgment, citing four grounds for reversal: the trial court erroneously applied the "four-corners" standard of contract interpretation; the terms of the release are ambiguous, and the trial court should have held an evidentiary hearing to determine the intent of the parties; the release should be rescinded or reformed because there was a mutual mistake; and the release should be rescinded because there was no "meeting of the minds."

{6} *Burden is on third party who neither negotiated nor gave consideration for release to prove that it was an intended beneficiary of the release.* Ford seeks to be discharged as a third-party beneficiary of the general release. It is undisputed Ford neither took part in the settlement negotiations that culminated in the execution of this release nor contributed any money to the consideration paid for the release. Hansen contends that Ford had the burden to prove that she and the Peases intended by the release to discharge Ford from liability.

{7} In *Hoge v. Farmers Market & Supply Co.,* 61 N.M. 138, 143, 296 P.2d 476, 479 (1956), this Court agreed that "one claiming to be a third party beneficiary of an agreement made by others has the burden of proving that he was intended by the makers of the agreement to be such beneficiary." A prospective third-party beneficiary may prove the intent of the parties to an agreement by relying on the unambiguous language of the agreement itself, *Valdez v. Cillessen & Son, Inc.,* 105 N.M. 575, 581, 734 P.2d 1258, 1264 (1987), or, in the absence of such language, on extrinsic evidence such as the circumstances surrounding the execution of the agreement, *Permian Basin Inv. Corp. v. Lloyd,* 63 N.M. 1, 7, 312 P.2d 533, 537 (1957).

{8} A number of courts have applied these general principles of contract law in cases involving the scope of a general release. *See, e.g., Neves v. Potter,* 769 P.2d 1047, 1053-54 (Colo. 1989) (en banc) (holding that parol evidence is admissible to determine intent of parties); *Harris v. Grizzle,* 599 P.2d 580, 586 (Wyo. 1979) (allocating burden of proof to prospective third-party beneficiaries). We agree that "alleged wrongdoers who were not parties to the release and made no payment toward satisfaction can fairly be called on to show that . . . the release which they rely on was intended to discharge them." *Harris,* 599 P.2d at 586. Hence, consistent with well-established principles applicable to contracts in general, and releases in particular, Ford had the burden to prove that it was an intended beneficiary of the release executed by Hansen and the Peases.

{9} An inherent ambiguity in any general release is recognized as a matter of policy. Hansen asserts that the trial court committed error by refusing to consider parol evidence to determine whether the terms of the release were ambiguous. Ford counters that the trial court did consider parol evidence but that the evidence adduced was insufficient to show an ambiguity, grounds to void the release, or grounds to reform the release. Hence, argues Ford, the court properly entered summary judgment.

{10} Under previous New Mexico decisions, releases have been interpreted using general contract law principles. *See, e.g., Ratzlaff v. Seven Bar Flying Serv., Inc.,* 98 N.M. 159, 162, 646 P.2d 586, 589 (Ct. App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982). Hansen thus correctly asserts that under this Court's decisions in *Mark V, Inc. v. Mellekas,* 114 N.M. 778, 781, 845 P.2d 1232, 1235 (1993), and *C.R. Anthony Co. v. Loretto Mall Partners,* 112 N.M. 504, 508-09, 817 P.2d 238, 242-43 (1991), the trial court could consider extrinsic evidence to determine whether the facially unambiguous terms of the release are in fact ambiguous. Hansen incorrectly asserts, however, that her deposition testimony established an ambiguity and that it was thus error for the court not to consider it.

{11} On the third-party-beneficiary issue—whether the general release executed by Hansen and the Peases inures to the benefit of Ford—the intent of the parties controls. *Neves,* 769 P.2d at 1053-55. Hansen presented evidence that discloses her subjective understanding that the release did not include Ford. Nothing indicates that the Peases thought so or knew this to be Hansen's understanding. A "unilateral, subjective intent not to include" third parties as beneficiaries of the agreement is not determinative. *Jaramillo v. Providence Washington Ins. Co.,* 117 N.M. 337, 342, 871 P.2d 1343, 1348 (1994). From the deposition testimony presented by Hansen, we are able to discern nothing new about the meaning attributed to the language of the release by the Peases and their insurance company.

{12} Because Hansen's deposition discloses only her unilateral, subjective intent, it was insufficient in itself to establish an ambiguity in the terms of the release. For similar reasons, Hansen's testimony was insufficient to establish a mutual mistake. Finally, Hansen did not adduce any evidence of fraud or overreaching that would establish grounds to void the release. Thus, even if the trial court refused to consider Hansen's deposition testimony, we would not reverse the entry of summary judgment on this ground. *Tsosie v. Foundation Reserve Ins. Co,* 77 N.M. 671, 676, 427 P.2d 29, 32 (1967) (stating that court

will not be reversed when it reaches right result for wrong reason).

{13} Although Hansen's deposition testimony standing alone was insufficient to overcome the apparent import of the "arising out of the accident" language, for reasons of policy discussed below we conclude that boilerplate universal release language such as that used here is circumstantially ambiguous. The best way of determining and enforcing the actual intent of the parties expressed in boilerplate language is to adopt a rebuttable presumption that a general release benefits only those persons specifically designated in the release document.

{14} *There is a rebuttable presumption that a general release benefits only those persons specifically designated.* As noted recently by our Court of Appeals, there are three approaches to determining the scope of a general release. *See Perea v. Snyder,* 117 N.M. 774, 778, 877 P.2d 580, 584 (Ct. App.), *cert. denied,* 118 N.M. 90, 879 P.2d 91 (1994). These three approaches are known as the absolute or flat bar rule, the intent rule, and the specific identity rule. *See id.* at 778-79, 877 P.2d at 584-85 (discussing the three approaches). In *Perea* the Court of Appeals reasoned that our decisions in *Mark V* and *C.R. Anthony* indicated New Mexico should follow the intent rule. The Court went on to hold that "an absolute bar will be presumed to be the intent of the parties to a general release unless an ambiguity is shown to exist by extrinsic evidence." *Id.* at 779, 877 P.2d at 585.

{15} Ford relies extensively on the Court of Appeals' analysis in *Perea* to support the trial court's entry of summary judgment. Hansen replies that the district court's decision is erroneous under *Perea.* Because the arguments in support of and against the Court of Appeals' reasoning and conclusions have been fully briefed, we take this opportunity to review the *Perea* decision.

{16} Amicus New Mexico Trial Lawyers Association argues that the formulation of the intent rule in *Perea* is closer to the "flat bar" rule than the "intent of the parties" rule formulated in other jurisdictions. The Trial Lawyers ask this Court to adopt a "specific identity" rule. In particular, they urge this Court to adopt as a matter of public policy a rule of release interpretation under which every general release will be deemed to contain a term implied in law limiting the effect of general language. Under this rule, a releasee could obtain the release of other possible tortfeasors only by specifically naming those tortfeasors or by using some other specific identifying terminology. Because no such language was included in this release, under the specific identity rule Hansen's release does not bar her claims against Ford.

{17} Ford counters that adoption of a specific identity rule ignores the unambiguous language of the release and ignores the intentions of the parties. Ford also argues that adoption of the specific identity rule would deprive the settling defendant of important rights, including contribution rights and the right to be free from further litigation. Finally, Ford argues that *Perea* correctly concluded that releases should be interpreted according to general contract law principles and thus urges us to affirm the trial court's entry of summary judgment.

{18} Those courts adopting the flat bar rule hold that language such as "all other persons, firms or corporations liable" is unambiguous and discharges all potential tortfeasors from liability. *See, e.g., Battle v. Clanton,* 27 N.C. App. 616, 220 S.E.2d 97, 99 (N.C. Ct. App.), *cert. denied,* 289 N.C. 613, 223 S.E.2d 391 (N.C. 1975); *Hasselrode v. Gnagey,* 404 Pa. 549, 172 A.2d 764, 765 (Pa. 1961). The parties to a general release containing "all other persons" language are deemed as a matter of law to have expressed their intent to discharge all potential tortfeasors. Flat bar courts thus look only to the four corners of the release document and do not allow consideration of extrinsic evidence.

{19} Jurisdictions adopting the intent rule have developed two formulations with similar purposes. Some jurisdictions hold that the parol evidence rule is inapplicable in an action by a party to a release and a stranger to that agreement. *See,*

e.g., Neves, 769 P.2d at 1054; *Sims v. Honda Motor Co.,* 225 Conn. 401, 623 A.2d 995, 1003 (Conn. 1993). Under this formulation of the intent rule, parol evidence of the parties' intentions is admissible even when the terms of the release are facially unambiguous. *See, e.g., Sims,* 623 A.2d at 1004 n. 12. Other jurisdictions hold that extrinsic evidence of the parties intent is admissible only when the court determines as a matter of law that the terms of the release agreement are ambiguous. *See, e.g., Wells v. Shearson Lehman/Am. Express, Inc.,* 72 N.Y.2d 11, 526 N.E.2d 8, 14-15, 530 N.Y.S.2d 517 (N.Y. 1988); *Krauss v. Utah State Dep't of Transp.,* 852 P.2d 1014, 1019-20 (Utah Ct. App.), *cert. denied,* 862 P.2d 1356 (Utah 1993).

{20} Jurisdictions adopting the specific identity rule conclusively presume that the liability of a party not named or otherwise specifically identified by the terms of the release is not discharged. The specific identity rule compels the settling parties either to name nonsettling tortfeasors, *see, e.g., Young v. State,* 455 P.2d 889, 893 (Alaska 1969), or to include such terms or descriptions as make the identity of the unnamed beneficiaries or the class thereof reasonably apparent, *see, e.g., Aid Ins. Co. v. Davis County,* 426 N.W.2d 631, 633 (Iowa 1988) (holding that terms identifying persons "in a manner that the parties to the release would know who was to be benefitted" sufficient under specific identity rule); *Pakulski v. Garber,* 6 Ohio St. 3d 252, 452 N.E.2d 1300, 1303 (Ohio 1983) (holding that release which discharged agents and employees sufficiently identified law firm and individual member thereof who had represented specifically named releasees).

{21} A distinct minority of jurisdictions continues to adhere to the flat bar rule. As between the remaining two approaches—the intent rule and the specific identity rule—the intent rule has been adopted by a bare majority of courts. *See, e.g., McInnis v. Harley Davidson Motor Co.,* 625 F. Supp. 943, 956-57 (D.R.I. 1986) (predicting Rhode Island would adopt intent rule); *General Motors Corp. v. Superior Court,* 12 Cal. App. 4th 435, 15 Cal. Rptr. 2d 622, 625-27 (Cal. Ct. App. 1993) (applying traditional rules of contract construction and determining that terms of release were facially unambiguous); *Neves,* 769 P.2d at 1053 (holding that extrinsic evidence admissible to determine intent of parties); *Sims,* 623 A.2d at 1001-02 (holding that extrinsic evidence of intent must be considered); *Hurt v. Leatherby Ins. Co.,* 380 So. 2d 432, 433-34 (Fla. 1980) (adopting intent rule and holding that release containing handwritten and preprinted terms was inherently ambiguous); *Cram v. Town of Northbridge,* 410 Mass. 800, 575 N.E.2d 747, 749 (Mass. 1991) (reversing summary judgment because accident victim filed an affidavit in which she stated she intended to discharge only the driver who injured her); *Wells,* 526 N.E.2d at 12 (holding that court must determine intent of parties by reference to language of release, turning to extrinsic evidence only when it determines as a matter of law that terms are ambiguous); *Krauss,* 852 P.2d at 1019-20 (same).

{22} A significant number of courts, however, have opted for the specific identity rule. *See, e.g., Young,* 455 P.2d at 893 (holding that release discharges only those tortfeasors specifically named in the release agreement); *Moore v. Missouri Pac. R.R.,* 299 Ark. 232, 773 S.W.2d 78, 82 (Ark. 1989) (holding that release must specifically name or otherwise specifically identify the persons to be discharged); *Lackey v. McDowell,* 262 Ga. 185, 415 S.E.2d 902, 903 & n.3 (Ga. 1992) (noting that rule that only specifically identified tortfeasors are released eliminates need to inquire into intent); *Saranillio v. Silva,* 78 Haw. 1, 889 P.2d 685, 700 (Haw. 1995) (holding that release discharges only persons named in or sufficiently described by terms of release); *Alsup v. Firestone Tire & Rubber Co.,* 101 Ill. 2d 196, 461 N.E.2d 361, 363-64, 77 Ill. Dec. 738 (Ill. 1984) (holding that in order to fulfill legislative intent to abolish common-law release rule, general release must specifically identify parties to be released); *Aid Ins. Co.,* 426 N.W.2d at 633-34 (holding that release must identify persons in such a manner that parties to release would know who was to be benefitted); *Beck v. Cianchetti,* 1 Ohio St. 3d 231, 439 N.E.2d 417, 420 (Ohio 1982) (holding that general release must name

or specifically describe parties to be discharged); *McMillen v. Klingensmith,* 467 S.W.2d 193, 196 (Tex. 1971) (holding that parties not specifically identified are not released); *Bjork v. Chrysler Corp.,* 702 P.2d 146, 162-63 (Wyo. 1985) (holding that release must specifically identify persons to be discharged in order to ensure that intent of parties is fulfilled).

{23} In deciding which of these three approaches we should adopt, we are not obligated to choose the position that has garnered the support of more courts. Rather, we will adopt the position that reason and logic counsel is the better choice under the law of New Mexico. *Griego v. New York Life Ins. Co.,* 44 N.M. 330, 338, 102 P.2d 31, 36 (1940) (noting that goal of court is to make choice compatible with justice, reason, and logic even if the choice represents a minority view).

{24} Support for a flat bar has its roots in the common-law rule that the release of one joint tortfeasor discharges other joint tortfeasors as a matter of law. *See, e.g., Young,* 455 P.2d at 891; *McMillen,* 467 S.W.2d at 195. The "unity of discharge" rule, as it is known, was based in turn on the notion that in cases involving joint tortfeasors, the plaintiff had suffered a single and indivisible wrong, the damages for which could not be apportioned among defendants. *Missouri, K. & T. Ry. v. McWherter,* 59 Kan. 345, 53 P. 135, 137 (Kan. 1898); *Muse v. De Vito,* 243 Mass. 384, 137 N.E. 730, 731 (Mass. 1923); *McBride v. Scott,* 132 Mich. 176, 93 N.W. 243, 245 (Mich. 1903). Under early American rules of joinder, a plaintiff could join all claims against concurrent tortfeasors in a single suit. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 47, at 326 (5th ed. 1984). Because concurrent tortfeasors could be joined in the same suit they came to be called joint tortfeasors. William L. Prosser, *Joint Torts and Several Liability,* 25 Cal. L. Rev. 413, 419-21 (1937). In cases involving such tortfeasors, because the plaintiff was considered to have suffered a single wrong, and because defendants were considered joint tortfeasors entirely liable for a single harm, once plaintiff had surrendered his or her cause of action in favor of one of the joint tortfeasors, he or she was conclusively presumed to have surrendered it as against all others. *See, e.g., Whitt v. Hutchison,* 43 Ohio St. 2d 53, 330 N.E.2d 678, 681 (Ohio 1975) (discussing bases for common-law release rule).

{25} In *Bartlett v. New Mexico Welding Supply, Inc.,* 98 N.M. 152, 158, 646 P.2d 579, 585 (Ct. App.), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982), our Court of Appeals held that "joint and several liability is not to be retained in our pure comparative negligence system on a theory of one indivisible wrong," reasoning "the concept of one indivisible wrong . . . is obsolete." *Id.* As recognized in *Bartlett,* with the adoption of comparative fault came the ability to divide a previously indivisible injury. *Id.* at 159, 646 P.2d at 586. Damages for a singular wrong to the plaintiff could be apportioned among the wrongdoers according to fault.

{26} The notion that a person injured by concurrent tortfeasors has suffered an indivisible wrong that gives rise to a single cause of action is erroneous for the reasons stated in *Bartlett* and its progeny. Further, giving effect only to the abstractly unambiguous words of an agreement without regard to the actual intent of the parties elevates form over substance. A tortfeasor who has taken no part in the satisfaction of a plaintiff's claim should not gratuitously benefit from settlement arrangements undertaken at the time and expense of others. Only when the parties to a release intend to discharge the liability of others not parties thereto should the release be given such effect. Interpreting a release by looking only to the four corners of the document poses too great a risk that a plaintiff will be trapped into surrendering a separate cause of action when this was not his or her intent. We thus join the majority of jurisdictions in rejecting the flat bar rule.

{27} Most courts that require "specific identity" have relied as justification for the rule, at least partially, on legislative adoption in their state of some form of the Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 57 (1975).

See, e.g., Moore, 773 S.W.2d at 81-82; *Saranillio,* 889 P.2d at 700; *Alsup,* 461 N.E.2d at 364; *Aid,* 426 N.W.2d at 634; *Beck,* 439 N.E.2d at 420; *Bjork,* 702 P.2d at 161-62. Section 4 of the Uniform Act governs the effect of a release in cases involving joint tortfeasors. *See, e.g.,* NMSA 1978, § 41-3-4 (Repl. Pamp. 1989). Under that Section, "[a] release by the injured person of one joint tortfeasor . . . does not discharge the other tortfeasors unless the release so provides." *Id.* Those courts adopting the specific identity rule have noted initially that the purpose behind the Uniform Act was to abrogate the common-law release rule. *See, e.g., Alsup,* 461 N.E.2d at 363; " *Beck,* 439 N.E.2d at 420. This Court has noted a similar purpose. *See Herrera v. Uhl,* 80 N.M. 140, 141, 452 P.2d 474, 475 (1969). In order to ensure that this legislative purpose is satisfied and to eliminate the harsh, unwarranted effects of the common-law release rule, some courts have concluded that it is necessary to construe narrowly the statutory language "unless the release so provides." *See, e.g., Beck,* 439 N.E.2d at 420 ("The thrust of [Section 4] is to retain the liability of tortfeasors and, thus, the phrase 'unless its terms otherwise provide' should be narrowly construed and require a degree of specificity."); *Bjork,* 702 P.2d at 162-63 ("To permit discharge of noncontributing tortfeasors . . . based upon broad, general language which does not identify the tortfeasors[] effectively perpetuates the [common-law rule] in contravention of the legislature's intention.").

{28} Courts rejecting the specific identity rule in favor of the intent rule have reasoned that the touchstone in interpreting any agreement is that the intent of the parties should prevail. *See, e.g., Neves,* 769 P.2d at 1053-55; *Sims,* 623 A.2d at 1001-03. Many such courts have noted that a specific identity rule swings the pendulum too far in favor of plaintiffs; while the common-law release rule often unfairly deprives a plaintiff of a separate cause of action by artificially presuming that the release of one joint tortfeasor releases all others, the specific identity rule artificially presumes that parties who have not included specific names or identifying terminology did not intend to discharge others. *McInnis,* 625 F. Supp. at 955; *Neves,* 769 P.2d at 1052-53; *Sims,* 623 A.2d at 1000-01. These courts have reasoned that while a plaintiff should not be unwittingly duped into surrendering a cause of action, defendants also have rights—contribution rights among them—that would be sacrificed if a specific identity rule were adopted. *McInnis,* 625 F. Supp. at 955.

{29} For general applicability, it would be inappropriate to decide whether to adopt the specific identity rule or the intent rule based on a statutory construction of the New Mexico Uniform Contribution Among Tortfeasors Act, NMSA 1978, §§ 41-3-1 to -8 (Repl. Pamp. 1989). That Act applies only to cases involving joint tortfeasors as that term is defined in Section 41-3-1. Under that Section joint tortfeasors "means two or more persons jointly or severally liable in tort for the *same injury. " Id.* (emphasis added). For purposes of general discussion, we assume as did the parties that the respective liabilities of Pease and Ford would be determined according to principles of proportionate fault.[1] *See Bartlett,* 98 N.M. at 158-59, 646 P.2d at 585-86. As we observed in *Sanchez v. Clayton,* 117 N.M. 761, 765, 877 P.2d 567, 571 (1994), "liability for proportionate fault is a liability for a distinct part of the damages and not for the same damages that may be apportioned to others.

{30} If the Uniform Act is not applicable to this action, the rationale for a narrow construction of the statutory provision that other tortfeasors are not discharged "unless the release so provides" is nonetheless generally applicable to New Mexico's abrogation of contribution among concurrent tortfeasors. The Trial Lawyers

[1] We recognize that principles of enhanced injury may affect the application of concurrent tortfeasor law under the facts of this specific case and we do not intend by our general discussion of release law to restrict consideration on remand of issues raised by facts of an enhanced injury. *See Duran v. General Motors Corp.,* 101 N.M. 742, 749, 688 P.2d 779, 786 (Ct. App. 1983) (stating that "because crashworthiness liability is based only on enhanced or additional injuries, the concurrent tortfeasor concept is not applicable"), *cert. quashed,* 101 N.M. 555, 685 P.2d 963 (1984), *and overruled on other grounds by Brooks v. Beech Aircraft Corp.,* 88 N.M. 516, 543 P.2d 484 (1995).

argue that adopting a specific identity rule is the better-reasoned and more appropriate approach to interpreting the scope of general releases in a jurisdiction that has adopted comparative negligence and abolished joint and several liability for concurrent tortfeasors. The fact that each concurrent tortfeasor is liable only for a distinct portion of the damages lies at the heart of the Court of Appeals' conclusion in *Wilson v. Galt,* 100 N.M. 227, 231, 668 P.2d 1104, 1108 (Ct. App.), *cert. quashed,* 100 N.M. 192, 668 P.2d 308 (1983), that "*Bartlett* effectively eliminates any basis for contribution among concurrent tortfeasors." The pre-Bartlett/Wilson need for concurrent tortfeasors to secure the release of other tortfeasors in order to secure the former's right to contribution and in order to insulate themselves from a later action for contribution by unreleased tortfeasors explains the prevalence of release language purporting to discharge the entire world from liability. The Trial Lawyers argue that courts in the past felt constrained to give far-reaching effect to such broad language in order to facilitate the policy favoring settlement. Because concurrent tortfeasors no longer have a right to contribution, argue the Trial Lawyers, courts should construe general release language narrowly to avoid perpetuating the harsh, unwarranted effects of the common-law rule.

{31} We agree that with the adoption of comparative fault the need to obtain the release of other concurrent tortfeasors has disappeared except for circumstances in which joint and several liability may yet obtain or in which potential indemnitees exist. Even without the release of other concurrent tortfeasors, the settling tortfeasor remains free of further liability both to the plaintiff for damages and to the nonsettling tortfeasors for contribution. *See Wilson,* 100 N.M. at 231, 668 P.2d at 1108. Relying on Kansas' adoption of comparative fault and abrogation of joint and several liability, the Kansas Court of Appeals held that "the type of release given will have no effect on any party not specifically named in the instrument." *Geier v. Wikel,* 4 Kan. App. 2d 188, 603 P.2d 1028, 1030 (Kan. Ct. App. 1979). The current state of the law has led to our conclusion that boilerplate universal release language is circumstantially ambiguous and serves only to trap unwary plaintiffs into surrendering claims when it is not necessary to do so in order to protect the party with whom they are settling.

{32} A release is contractual in nature and as such our primary objective in construing its terms is to give effect to the intent of the parties. *Shaeffer v. Kelton,* 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980). We agree with those courts which have observed that adopting a pure specific identity rule entirely ignores the actual intent of the parties to a general release. As we indicated when rejecting the flat bar rule, we should not elevate form over substance. We conclude that sound policy requires more evidence of intent to release potential tortfeasors not named in a release agreement than boilerplate language that objectively purports to release the entire world from liability. *See Hurt,* 380 So. 2d at 434 (stating that "manifestation of intent must be more explicit than signing a printed form . . . providing spaces for the specifically discharged parties"). As a matter of policy, those persons whose wrongful acts cause injury to another should be called upon to answer in damages for those wrongful acts. Having contributed nothing to the settlement of plaintiff's claims, a nonsettling tortfeasor should not be allowed to claim gratuitously a benefit for which he or she did not bargain and for which other parties did not bargain on his or her behalf. *Cf. Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 422 (Tex. 1984) ("A nonsettling tortfeasor should not fortuitously escape compensating his . . . victim simply because of settlement arrangements that did not encompass him or his conduct and to which he contributed nothing.").

{33} It is therefore because release agreements are most often drafted by the party seeking to be released, because the attorneys who draft these agreements and the insurance companies they represent are laboring under the influence of a bygone era, and because the victim's interest in obtaining recompense frequently overshadows concerns with boilerplate language that is often introduced for the first time in a release prepared after the specific parties have agreed to a

settlement, that we have concluded boilerplate release language like that used here is inherently ambiguous. We hold that a general release raises a rebuttable presumption that only those persons specifically designated by name or by some other specific identifying terminology are discharged. *See Stueve v. American Honda Motors Co.,* 457 F. Supp. 740, 747 (D. Kan. 1978) (applying Kansas law and adopting presumption that third parties not discharged by general release silent as to other tortfeasors). In the absence of such specific terminology, the person seeking to be discharged must prove by extrinsic evidence that the parties to the agreement actually intended to discharge him or her from liability. Such a rule best mitigates the harsh effects of the common-law release rule, insures that injured parties have in fact intentionally released claims against third parties, and works no unfair hardship on the party negotiating and receiving the release or the prospective third-party beneficiary.

{34} The Court of Appeals was persuaded in *Perea* that any specific identity requirement must be rejected in order to preserve the freedom of parties to contract as they wish. *See* 117 N.M. at 778-79, 877 P.2d at 584-85. We do not agree. Even in those jurisdictions that have adopted a specific identity rule, a settling party remains free to obtain the release of non settling parties, such as potential indemnitees, by including specific identifying terminology in the release. In this case, for example, Hansen and Pease could have discharged Ford by including language like "and the manufacturers and suppliers of the Releasor's car and its component parts." In an ordinary automobile accident involving three cars, the owner and/or operator of one of which is unknown to the other two, the settling parties could release the phantom driver by including terminology such as "and the driver and persons responsible for the operation and maintenance of the blue car." Finally, in the case of an automobile accident that appears partially attributable to the presence of foliage obscuring a stop sign, the settling parties could release the persons responsible for the foliage by including terminology like "and the owners, occupiers, and any other persons responsible for the upkeep or maintenance of the premises on which the shrubs that obscured Releasee's view of the stop sign were growing."

{35} We recognize that general release clauses without specific identifying terminology have been used extensively and have been relied on as full and final settlement of all claims. Our ruling today shall, therefore, apply only prospectively, except that we will also apply it to this case and to all other cases in which the issue is preserved. *Cf. Alsup,* 461 S.W.2d at 364-65 (holding that because of widespread use of and reliance on general language, specific identity rule would apply prospectively only).

{36} *Conclusion.* Because of the circumstantially ambiguous terms of any general release such as the one executed here by Hansen, we today adopt a rebuttable presumption that a general release benefits only those persons specifically designated. Applying that rule to this case, we conclude that the boilerplate language purporting to release all persons from liability for injuries resulting from the January 1990 automobile accident is not sufficiently specific to identify Defendants as third-party beneficiaries of the general release. The summary judgment entered by the trial court is therefore reversed and this cause is remanded for further proceedings.

{37} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
Chief Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1995-NMSC-057

Filing Date: August 28, 1995, As Corrected November 20, 1995

Docket No. 22,435

IRENE LUJAN, individually and as next friend of her minor son, MARTIN LUJAN,

Plaintiff-Petitioner,

vs.

HEALTHSOUTH REHABILITATION CORPORATION, HEALTHSOUTH OF NEW MEXICO, INC., and MERCEDES CHAVEZ,

Defendants-Respondents.

ORIGINAL PROCEEDING ON CERTIORARI
Gerald R. Cole, District Judge

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OPINION

RANSOM, Justice.

{1} Irene Lujan sued Nancy Jaramillo for injuries that Lujan's son Martin sustained in a motorcycle collision with Jaramillo's automobile on January 27, 1990. In settlement of that suit, Lujan signed a release of claims in February 1991. In March 1993 Lujan sued Healthsouth Rehabilitation Corporation, Healthsouth of New Mexico, Inc., and Mercedes Chavez (collectively, "Healthsouth") for medical malpractice in connection with treatment of the femoral fracture that Martin suffered in the accident with Jaramillo. Healthsouth moved for summary judgment, arguing that the release signed by Lujan in settlement of her suit against Jaramillo barred her medical malpractice claims. The trial court granted Healthsouth's motion, and the Court of Appeals affirmed. *Lujan v. Healthsouth Rehabilitation Corp.,* 118 N.M. 691, 884 P.2d 847 (Ct. App. 1994).

{2} We granted Lujan's petition for certiorari and now hold that the general release of a named tortfeasor who causes injury requiring subsequent medical treatment does not as a matter of law bar an action by the releasor against the medical care provider for negligent treatment. We further conclude that the general release executed by Lujan does not purport to bar her claims against a successive tortfeasor whose liability is limited to an injury enhancement *arising out of the subsequent malpractice.* We therefore reverse.

{3} *Facts and Proceedings.* The release at issue here provides, in part:

> IN CONSIDERATION of the sum of One Hundred Thousand Dollars ($ 100,000) the receipt and sufficiency of which is hereby acknowledged by IRENE LUJAN, individually and as the mother, guardian, and next best friend of her minor son []MARTIN LUJAN . . . [hereinafter called "Releasors"], Releasor individually and for their heirs, executors, administrators and assigns does hereby forever release and

> discharge NANCY JARAMILLO, and her agents, servants, employees, representatives, insurance companies, attorneys, successors and assigns, and also any and all *other persons,* associates, or corporations, whether herein named or referred to or not, and *who together with the above-named parties may be jointly or severally liable* to the Releasors, or anyone else acting on behalf of or through the derivative rights of the Releasors, [hereinafter "Releasee"] of and from any and all claims, causes of action, rights suits, covenants, contracts, agreements, judgments and demands of whatsoever kind or nature that Releasors have or may have against Releasee *for damages* to Releasors' person or property *arising out of an accident on or about January 27, 1990,* at the intersection of Blake and Tapia, SW, Albuquerque, New Mexico.

(Emphasis added). After executing this release, Lujan sued Healthsouth, alleging that in March 1990 Healthsouth employee Mercedes Chavez improperly manipulated Martin's left leg, refracturing the original femoral fracture site. Healthsouth moved for summary judgment, arguing that because *Jaramillo* might be "jointly or severally liable" with Healthsouth for Martin's *March 1990 injuries,* the general release barred Lujan's malpractice claims.

{4} The trial court found that the release was unambiguous as a matter of law, determined that Lujan's malpractice claims were included within the terms of the release, and granted Healthsouth's summary judgment motion. The Court of Appeals affirmed, holding that the release barred Lujan's malpractice claims because *Healthsouth* may have been "severally liable" with Jaramillo for malpractice damages that "arose out of" *Martin's accident with Jaramillo. Lujan,* 118 N.M. at 693, 884 P.2d at 849. We agree that the dispositive issue here is not whether *Jaramillo* was jointly or severally liable for the March 1990 enhanced injury. Jaramillo's liability for that claim undisputedly was settled. The issue is whether *Healthsouth* falls within the category of "other person" who together with Jaramillo may be "jointly or severally liable" to Lujan for injuries *arising out of the January 1990 accident.*

{5} General release of a tortfeasor who causes an injury that requires medical treatment does not as a matter of law also release an allegedly negligent *medical care provider.* Lujan argues that because Jaramillo can no longer be liable with Healthsouth for the enhanced injury to Martin's leg, the trial court erred as a matter of law when it concluded that the release included Healthsouth. Healthsouth counters that Jaramillo may be exposed to further claims or to harassment as a witness or deponent if Lujan is allowed to sue Healthsouth for negligent treatment of Martin's injuries. Healthsouth contends that because Lujan agreed to release "all other persons . . . who together with [Jaramillo] may be jointly or severally liable to [Lujan]," the trial court correctly found that Healthsouth was a third-party beneficiary of the release. Healthsouth relies for support on *Martinez v. First National Bank of Santa Fe,* 107 N.M. 268, 755 P.2d 606 (Ct. App. 1987) (suggesting fault may be apportioned between negligent physician and initial tortfeasor), *cert. quashed,* 107 N.M. 308, 756 P.2d 1263 (1988).

{6} - *The Martinez decision.* In *Martinez* the Court of Appeals considered whether the trial court erred by instructing the jury in a medical malpractice action that when assessing the defendant physician's liability for causing an enhanced injury, it could apportion fault between the physician and the driver of a pickup truck whose alleged negligence caused the plaintiffs original injury. 107 N.M. 268 at 269-70, 755 P.2d at 607-08. In deciding this issue, the Court concluded that while a physician "should not be liable in malpractice for [a plaintiffs] harm in the original injury, . . . damages *should be apportioned* among those negligently contributing to the [enhanced] injury if that negligence was a proximate cause of the injury." *Id.* at 270, 755 P.2d at 608 (emphasis added). The Court ultimately held that because trial testimony was insufficient to establish the negligence of the pickup driver, the trial court erred when it instructed the jury that it could apportion fault between the driver and the

physician. *Id.* at 271, 755 P.2d at 609. The Court strongly suggested, however, that if the negligence of the pickup truck driver had been established, the jury properly could have apportioned his fault with that of the treating physician and then could have reduced the physician's liability for the plaintiffs enhanced injury in proportion to the driver's fault. *Id.*

{7} Healthsouth contends that in order for Jaramillo to receive the benefit of the release she obtained from Lujan, we must construe the release to bar Lujan's malpractice claims. Healthsouth reasons that in defending against a malpractice suit by Lujan, it would be obligated to join Jaramillo to establish her negligence and reduce its own liability. *See Tipton v. Texaco,* 103 N.M. 689, 693, 712 P.2d 1351, 1355 (1985) ("The rules of third-party practice and joinder of missing parties . . . [will] be liberally applied when comparative fault or liability of multiple parties surfaces in the pleadings."); *Guitard v. Gulf Oil Co.,* 100 N.M. 358, 363, 670 P.2d 969, 974 (Ct. App.) ("[A] defendant is not bound by the plaintiffs selection of parties."), *cert. denied,* 100 N.M. 327, 670 P.2d 581 (1983). We thus begin our assessment of Healthsouth's argument that the release must be construed to bar Lujan's malpractice claims by revisiting the suggestion in *Martinez* that a jury may apportion fault between a negligent original tortfeasor and a subsequently negligent physician for purposes of determining the amount of the latter's liability for enhancement of the original injury.

{8} - *Fault of an original tortfeasor may not be apportioned for purposes of reducing the liability of a successive tortfeasor whose negligence caused an enhanced injury.* When the negligent acts or omissions of two or more persons combine to produce a single injury, the law considers those persons concurrent tortfeasors. Under traditional principles of causation, if the plaintiff could not prove what portion of a single injury each of two concurrent tortfeasors had caused, that plaintiff could not recover damages from either wrongdoer. *See, e.g., Tucker Oil Co. v. Matthews,* 119 S.W.2d 606, 608 (Tex. Civ. App. 1938) (directing verdict for one of several defendants who had polluted stream because plaintiff could not prove how much damage was caused by that defendant). *See generally* 3 Fowler V. Harper et al., *The Law of Torts* § 10.1, at 23-29 (2d ed. 1986) (describing origins of rule of joint and several liability in cases involving concurrent tortfeasors).

{9} Rather than permit wrongdoers to escape without liability, American jurisdictions, including New Mexico, adopted the rule that each concurrent tortfeasor is jointly and severally liable for the entire harm. *See Crespin v. Albuquerque Gas & Elec. Co.,* 39 N.M. 473, 478, 50 P.2d 259, 262 (1935) (upholding instruction informing jury that if defendant's negligence had combined and united with negligence of another to proximately cause plaintiff's injury, plaintiff is entitled to recover entire damages from defendant); W. Pading concurrent tortfeasors jointly and severally liable rested on the "concept that a plaintiff's *injury* is 'indivisible.'" *Id.* at 157, 646 P.2d at 584 (emphasis added). Relying on *Scott v. Rizzo,* 96 N.M. 682, 634 P.2d 1234 (1981), the Court concluded that "joint and several liability is not to be retained in our pure comparative negligence system on a theory of one indivisible *wrong." Bartlett,* 98 N.M. at 158, 646 P.2d at 585 (emphasis added).

{10} New Mexico has abolished joint and several liability in cases involving concurrent tortfeasors. *Bartlett v. New Mexico Welding Supply Inc.,* 98 N.M. 152, 158, 646 P.2d 579, 585 (Ct. App), *cert. denied,* 98 N.M. 336, 648 P.2d 794 (1982). In *Bartlett* the Court of Appeals noted that the rule holding concurrent tortfeasors jointly and severally liable rested on the "concept that a plaintiff's *injury* is 'indivisible.'" *Id.* 98 N.M. at 157, 646 P.2d at 584 (emphasis added). Relying on *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981), the Court concluded that "[j]oint and several liability is not to be retained in our pure comparative negligence system on a theory of one indivisible *wrong.*" *Bartlett*, 98 N.M. at 158, 646 P.2d at 585 (emphasis added).[1]

[1] In *Scott* this Court rejected the "all or nothing" rule of contributory negligence in favor of pure comparative negligence.

{11} Here Jaramillo and Healthsouth are not concurrent tortfeasors; they are successive tortfeasors by reason of divisible and causally-distinct injuries. In defining tortfeasors as successive rather than concurrent, courts have considered several other factors that are relevant, including: 1) the identity of time and place between the acts of alleged negligence; 2) the nature of the cause of action brought against each defendant; 3) the similarity or differences in the evidence relevant to the causes of action; 4) the nature of the duties allegedly breached by each defendant; and 5) the nature of the harm or damages caused by each defendant. *See. e.g., Voyles v. Corwin***,** 295 Pa. Super. 126, 441 A.2d 381, 383 (Pa. Super. Ct. 1982) (quoting William L. Prosser, *Handbook of the Law of Torts* § 46 n.2 (4th ed. 1971)). Even if we accept Healthsouth's characterization of the injury caused by its alleged negligence as an aggravation, the original injury and the subsequent enhancement of that injury are separate and causally-distinct injuries. Thus the wrongs of Jaramillo and Healthsouth are not concurrent but successive.

{12}—*Concurrent tortfeasor concept not applicable.* A *Bartlett* -style apportionment of fault is inapplicable to a successive and distinct enhancement of an original injury at the hands of a subsequently negligent physician. This is apparent both by reference to the text of the *Bartlett* decision and to subsequent decisional law defining the scope of *Bartlett*. The *Bartlett* decision did not mandate fault-based apportionment between all tortfeasors. In *Bartlett* the court carefully confined the issue presented to "whether, in a comparative negligence case, a concurrent tortfeasor is liable for the entire damage *caused by concurrent tortfeasors.* " 98 N.M. at 154, 646 P.2d at 581 (emphasis added).

{13} In *Duran v. General Motors Corp.,* 101 N.M. 742, 688 P.2d 779 (Ct. App. 1983), *cert. quashed,* 101 N.M. 555, 685 P.2d 963 (1984), *and overruled on other grounds by Brooks v. Beech Aircraft Corp.,* 120 N.M. 372, 902 P.2d 54 (1995), the Court of Appeals rejected the application of concurrent-tortfeasor principles to a crashworthiness claim involving a second collision that produced an enhanced injury. The Court adopted the rule that "a claimant in an enhanced injury case must prove that the defective design caused injuries over and above those which otherwise would have been sustained, must demonstrate the degree of 'enhancement', and 'must offer proof of what injuries, if any, would have resulted [in any event].'" 101 N.M. 742 at 749-50, 688 P.2d at 786-87 (quoting *Huddell v. Levin,* 537 F.2d 726, 737 (3d Cir. 1976)). "Because crashworthiness liability is based only on enhanced or additional injuries, the concurrent tortfeasor concept is not applicable." *Id.* Similarly, as we demonstrate below, Healthsouth's liability, if any, would be limited to the enhanced injuries caused by its negligence.

{14}—*Successive tortfeasor ultimately is responsible for entirety of enhanced injury.* When a person causes an injury to another which requires medical treatment, it is foreseeable that the treatment, whether provided properly or negligently, will cause additional harm. *Ash v. Mortensen,* 24 Cal. 2d 654, 150 P.2d 876, 877 (Cal. 1944); *see also* Keeton et al. § 44, at 309 ("It would be an undue compliment to the medical profession to say that bad surgery is no part of the risk of a broken leg."). Thus, premised upon the concept that the original tort is a proximate cause of the harm attributable to negligent treatment, courts have held the original tortfeasor liable both for the original injury and for the harm caused by negligent medical treatment. *See* V. Woerner, Annotation, *Civil Liability of One Causing Personal Injury for*

96 N.M. at 687, 634 P.2d at 1239. We rejected contributory negligence because of "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." *Id.* at 689, 634 P.2d at 1241. As implied by the Court of Appeals in *Bartlett,* if a factfinder fairly can assess liability for plaintiff's single and causally-indivisible injury in proportion to the relative fault of plaintiff and a single defendant, it follows that the factfinder fairly can assess liability for a causally-indivisible injury in proportion to the relative fault of multiple defendants whose separate acts or omissions had united to produce the single result. *See Bartlett,* 98 N.M. at 158, 646 P.2d at 585. Thus, although seemingly irrelevant to the question whether concurrent tortfeasors should be held jointly and severally liable, the decision to adopt comparative negligence in *Scott* provided the theoretical basis for the abolition of this form of liability.

Consequences of Negligence, Mistake, or Lack of Skill of Physician or Surgeon, 100 A.L.R.2d 808, 813-20 (1965); *see also* Restatement (Second) of Torts § 457 cmt. a, at 496-97 (1964) (stating that person liable for injury will also be liable for additional harm caused by negligent treatment).

{15} New Mexico follows the general rule that an original tortfeasor will be held liable for the "concurrent or succeeding negligence of a third person which does not break the sequence of events." *Thompson v. Anderman,* 59 N.M. 400, 412, 285 P.2d 507, 514 (1955). Hence, if negligent treatment was the foreseeable result of the January 1990 collision, Jaramillo could have been held liable for the total harm suffered by Martin Lujan; both the injury she caused in the collision and the aggravation of that injury by Healthsouth. Negligent treatment is thus a successive tort for which the original tortfeasor is jointly liable. *See. e.g., Morgan v. Cohen,* 309 Md. 304, 523 A.2d 1003, 1006 (Md. 1987) (stating that courts have correctly characterized negligent treatment as a subsequent tort for which the original tortfeasor is jointly liable).

{16} Although an original tortfeasor may be held liable for plaintiff's entire harm, a medical care provider who negligently aggravates the plaintiff's initial injuries is not jointly and severally liable for the entire harm, but is liable only for the additional harm caused by the negligent treatment. (*Gertz v. Campbell,* 55 Ill. 2d 84, 302 N.E.2d 40, 43 (Ill. 1973); *Gagnon v. Lakes Region Gen. Hosp.,* 123 N.H. 760, 465 A.2d 1221, 1223 (N.H. 1983) (noting that physicians are not jointly liable with original tortfeasors because physicians' liability "arises solely from their alleged negligent conduct which aggravated the plaintiff's existing injury"); Keeton et al. § 52, at 352. The medical care provider is liable only for the enhanced injury because the total harm is divisible into separate injuries—that which the patient suffered before being treated by the medical care provider and that which was caused by the medical care provider in the course of treatment. In cases involving successive tortfeasors whose separate causal contributions to the plaintiff's harm can be measured, the doctrine of joint and several liability applies only to the enhanced portion of the injury. **See** Keeton et al. § 52, at 352 (discussing distinction between original tortfeasor's liability, which encompasses entire injury, and treating physician's liability, which extends only to negligent treatment); *Restatement (Second) of Torts* § 433A cmt. c.

{17} Even though the original tortfeasor may be held liable for both the original and the enhanced injury, *the imposition of entire liability is only temporary.* The original tortfeasor, whose duty is of a different character and who is not in pari delicto with a successive medical care provider with respect to the negligent treatment, can shift through indemnification the responsibility for an enhanced injury. *See Herrero v. Atkinson,* 227 Cal. App. 2d 69, 38 Cal. Rptr. 490, 493-94 (Dist. Ct. App. 1964); *Gertz,* 302 N.E.2d at 43-44; *Hunt v. Ernzen,* 252 N.W.2d 445, 448 (Iowa 1977); *New Milford Bd. of Educ. v. Juliano,* 219 N.J. Super. 182, 530 A.2d 43, 45 (N.J. Super. Ct. App. Div. 1987); *Musco v. Conte,* 22 A.D.2d 121, 254 N.Y.S.2d 589, 594 (1964); *see also Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc. (In re Consolidated Vista Hills Retaining Wall Litigation),* 119 N.M. 542, , 893 P.2d 438, 441-42 (1995) (discussing circumstances in which traditional indemnification arises between parties not in pari delicto). *But see Transcon Lines v. Barnes,* 17 Ariz. App. 428, 498 P.2d 502, 509 (Ariz. Ct. App. 1972) (holding original tortfeasor had no right to indemnification because it was not an innocent party); *Teepak, Inc. v. Learned,* 237 Kan. 320, 699 P.2d 35, 42 (Kan. 1985) (holding original tortfeasor had no right to indemnification because claim properly was for contribution). Thus liability for the enhanced injury may be shifted to the successive tortfeasor alone, regardless of who plaintiff chooses to pursue for damages.[2]

{18} - *Effect of tort law on law of general releases.* The issue then becomes this: Given that Jaramillo may have been jointly and severally

[2] We are not addressing here, however, the specific right that Jaramillo may have had to indemnification from Healthsouth following Jaramillo's February 1991 settlement of her liability for the injury enhancement at Healthsouth in March 1991.

liable for the entire harm suffered by Martin, and given that Healthsouth is a successive rather than a concurrent tortfeasor, what effect does the general release given to Jaramillo have on the liability of Health south? In light of the original tortfeasor's liability for harm caused by negligent medical treatment, a number of courts adopted a traditional rule that a general release of the original tortfeasor bars a subsequent action by the releaser for negligent treatment by a medical care provider. Peter G. Guthrie, Annotation, *Release of One Responsible for Injury as Affecting Liability of Physician or Surgeon for Negligent Treatment of Injury,* 39 A.L.R.3d 260, 266-73 (1971). These courts recognized an exception to the traditional rule when the negligence of the medical care provider caused a new injury. *Id.* at 270-73.

{19} A significant number of courts have rejected the traditional rule in favor of a modern rule that a general release of an original tortfeasor does not preclude an action by the releasor against a medical care provider for negligent treatment of the injuries caused by the original tortfeasor unless a contrary intention affirmatively appears in the release or the releaser has received from the releasee full compensation in fact for all injuries. *Id.* at 273-79. This modern rule best comports with New Mexico tort law. *See. e.g., Hansen v. Ford Motor Co.,* 120 N.M. 203, 900 P.2d 952 (1995). The traditional rule does not take into account the fact the original tortfeasor is neither subject to liability for contribution to the subsequent tortfeasor nor subject to apportionment of fault in reduction of the successive tortfeasor's responsibility. Similarly, Jaramillo would not be a necessary witness or deponent in Lujan's suit against Healthsouth except incidentally as an unlikely witness to the nature and extent of the original injury for which Healthsouth is not responsible. Therefore, we today reject the traditional rule in favor of the rule that a general release of the original tortfeasor does not as a matter of law release a medical care provider from claims for negligent treatment.

{20} *The release at issue here.* Turning to the release at issue here, no one disputes that Lujan released Jaramillo from claims and liability for both the original and enhanced injuries proximately caused by the collision. The release does not specifically discharge successive tortfeasors whose liability for a separate and distinct injury arises from a separate and distinct tort. In addition to releasing Jaramillo, however, the release discharges "any and all other persons . . . who together with [Jaramillo] may be jointly or severally liable to [Lujan] from any and all claims . . . and demands of whatsoever kind or nature . . . for damages to [Lujan's] person or property *arising out of an accident on or about January 27, 1990.* " (Emphasis added.)

{21} From the quoted language it is apparent that Lujan released claims arising from a specific accident occurring on a specific date. It is true that from the perspective of Jaramillo, her liability for the enhanced injury suffered by Martin and caused by the alleged malpractice of Healthsouth does arise from the January 1990 accident. It is also true that "but for" the accident, Martin would not have been subject to Healthsouth's treatment. Nevertheless, factually, Martin's separate enhanced injury was caused by the alleged negligence of Healthsouth in March 1990, for which injury Healthsouth ultimately would be responsible in its entirety without reduction based on the fault of Jaramillo in the original accident. Thus from the perspective of Healthsouth, the would be "other person," *its liability* for the enhanced injury suffered by Martin *arises solely from its alleged negligence* and not the January 1990 accident.

{22} Maryland's highest court considered the effect of very similar release language in *Morgan v. Cohen,* which involved the consolidated cases of two parties injured in separate automobile accidents and subsequently treated by the same physician. 523 A.2d at 1005. The two parties settled with the respective original tortfeasors, each signing a separate release of claims. The specific issue addressed by the court was "whether a general release, executed in settlement of a damage

claim against the operator of a motor vehicle whose negligence caused injury, also releases a physician who subsequently treats the injury." *Id.* at 1004.

{23} The first release specifically named the operator of the motor vehicle (original tortfeasor) and the operator's insurer and also purported to release " 'all other persons . . . of and from any and all claims, [and] damages which the undersigned now has . . . or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries . . . and the consequences thereof, *resulting or to result from the accident*' of 20 July 1982." *Id.* at 1009 (alteration in original). The second release specifically named the original tortfeasor and also purported to release "all other persons . . . from any and all claims [and] damages . . . of whatsoever kind or nature, and particularly on account of . . . bodily injuries, known and unknown and which have resulted or may in the future develop, sustained by [the victim] *in consequence of [the] accident*. . . ." *Id.* (first and third alterations in original).

{24} Prior to construing the language of these releases, the Maryland court recognized that the operator of a motor vehicle who negligently causes injuries requiring medical treatment and a physician who negligently provides that treatment are successive tortfeasors. *Morgan,* 523 A.2d at 1006. The Court also emphasized that the operator of the motor vehicle could be held liable for the entire harm because of the operation of the doctrine of proximate cause, *id.* at 1005-06, and that at one time the majority rule was that a general release given to the original tortfeasor also released the allegedly negligent physician, *id.* at 1005 n.3. Against this factual and legal backdrop, the court reversed summary judgments in favor of the physician, holding that the releases were ambiguous. Of particular importance to the court was the use of the phrases "resulting or to result from the accident" and "in consequence of [the] accident." Based on this language, the court stated that "what are released are claims for injuries 'resulting from' or 'sustained . . . in consequence of' specific accidents." *Id.* at 1009.

{25} In light of what has been said about Jaramillo's lack of exposure to claims from Healthsouth or to third-party litigation in Lujan's claims against Healthsouth, the language "arising from the January 27, 1990, automobile accident" is, as in *Morgan,* simply insufficient to alert Lujan that Jaramillo was bargaining for the release of Healthsouth in addition to her own release. Further, there is no extrinsic evidence that the parties intended otherwise. Even though it may have been advisable for Lujan to include specific language in the release reserving her claim against Healthsouth, in light of the language used, it was not incumbent upon her to do so. We hold that Healthsouth does not fall within the category of "other person" liable for injuries arising out of the January 1990 motorcycle accident.

{26} *Double recovery.* Because we have held as a matter of law that the general release of Jaramillo did not include Healthsouth, we must address the possibility of double recovery. This possibility arises because, with respect to the enhanced injury, Jaramillo and Healthsouth would be jointly and severally liable for the same damages. Therefore, the effect of Lujan's release is governed by Section 4 of the Uniform Contribution Among Tortfeasors Act. NMSA 1978, § 41-3-4 (Repl. Pamp. 1989). Under that Section, "[a] release by the injured person of one joint tortfeasor . . . reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid." *Id.*

{27} There is no specification in the Lujan release as to how the consideration paid by Jaramillo is to be divided between the original injury (which does not implicate the Act) and the enhanced injury (which does implicate the Act). In *Sanchez v. Clayton,* 117 N.M. 761, 768, 877 P.2d 567, 574 (1994), we stated that "the plaintiff settling the judgment . . . has an obligation to establish what compensatory damages he is

foregoing in the settlement if he later wishes to show a right to recover compensatory damages in successive litigation." Applying that principle here, we hold that on remand Lujan will have the burden to show what portion of the $ 100,000 settlement obtained from Jaramillo reasonably is attributable to the original injury. Absent evidence affirmatively establishing such an amount, the entire $ 100,000 must be set off against any judgment obtained against Healthsouth.[3]

{28} *Conclusion.* We conclude that the phrase "arising from the January 27, 1990, automobile accident" is unambiguous and does not include Lujan's malpractice claims against Healthsouth. When, as in this case, no articulable theory exists under which the releasee will either be exposed to liability to a third party or be subject to harassment as a litigant, the releasee must use specific language indicating that he or she also is bargaining for the release of another tortfeasor. A releasee may, of course, bargain for the release of a tortfeasor to whom the releasee will not be liable. But if this is the result for which the named releasee bargains, then it is incumbent on that releasee to make this intention very clear in the language of the release.

{29} This case also would be reversible under the rebuttable presumption that only specifically designated persons are discharged by a general release. As stated when we recently adopted that presumption in *Hansen,* 120 N.M. at 212, 900 P.2d at 961, however, that rule is applicable only in those cases in which the issue is preserved. The issue was not raised here, and thus we decline to decide this case under that rule.

{30} Having held that the trial court erred and that the general release unambiguously barred only those claims against unnamed persons *whose liability arises from negligence that caused the automobile accident* (not some subsequent event), we need not address Lujan's argument that her affidavit established an ambiguity in the terms of the release. The judgment of the trial court is reversed and this case is remanded for further proceedings consistent with this opinion.

{31} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
Chief Justice

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

[3] The symmetry of the law would seem to dictate that, generally speaking, the original tortfeasors would be indispensable parties. To the extent indemnification rights survive, the allocation of the successive tortfeasor's ultimate responsibility for the entirety of the enhanced injury otherwise may leave the successive tortfeasor subject to inconsistent obligations. *See* SCRA 1986, 1-019(A)(2) (Repl. Pamp. 1992) (joinder of persons needed for just adjudication). The fact that a releasee may be brought into subsequent litigation to determine the releasee's *rights* to indemnification does not raise the considerations cited by Health south regarding vexatious and potentially costly litigation involving "other persons." We recognize that if the statute of limitations has run on an indemnification claim, then litigation regarding allocation could be vexatious. The problems created by a particular indemnitee's failure to file an indemnification action within the statute of limitations should not, however, be determinative of the principled resolution of the question raised by the erroneous application of *Martinez.*

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1996-NMSC-023

Filing Date: May 20, 1996

Docket No. 22,704

RAY TWOHIG, Attorney for Gordon House, GORDON HOUSE, and CAROLYN HOUSE,

Petitioners,

vs.

THE HON. JAMES F. BLACKMER, Judge, Division II, District Court of the Second Judicial District, Bernalillo County, State of New Mexico,

Respondent,

and

STATE OF NEW MEXICO, Real Party in Interest.

Released for Publication May 20, 1996. As Corrected June 4, 1996.

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for Real Party in Interest.

OPINION

ORIGINAL SUPERINTENDING CONTROL PROCEEDING

RANSOM, Justice.

{1} Attorney Ray Twohig petitioned this Court for a writ of superintending control vacating a trial court order prohibiting all trial participants from communicating with the media about the third trial of Twohig's client, Gordon House. As grounds for his petition, Twohig claimed that this "gag order" impermissibly restricted his rights of free speech in violation of Article II, Section 17 of the New Mexico Constitution and our recently amended rule governing trial publicity, SCRA 1986, 16-306 (Repl. Pamp. 1995). We assumed jurisdiction over Twohig's petition under the New Mexico Constitution, Article VI, Section 3 (providing that Supreme Court shall have power of superintending control over all inferior courts). *See* SCRA 1986, 12-504 (Cum. Supp. 1995) (establishing procedure for issuance of extraordinary writs). At a hearing held before us on March 22, 1995, we issued our writ vacating the order in question. In this opinion we explain the reasons for our earlier ruling and hold, in the absence of certain requisite findings of fact supporting a conclusion that a universal restriction of speech was necessary to meet a clear and present danger of infringing House's and the State's right to a fair trial, the gag order issued here violated Article II, Section 17 and Rule 16-306.

{2} *Facts and Proceedings.* The amount of publicity surrounding a fatal 1992 Christmas Eve accident and the three trials of House on vehicular-homicide charges well may be unprecedented in New Mexico. From the beginning it was made generally known that House had been involved in a wreck that claimed the lives of Melanie Cravens and her three daughters. It was also made known that when the accident occurred, House was driving at nighttime at a high rate of speed in the wrong direction on Interstate

40. *See* Steve Shoup, *Police Suspect Alcohol in Christmas Eve Wreck,* Albuquerque J., Dec. 26, 1992, at A1, A8. It was speculated that House had been drinking, *see id.*, and test results made public by the Albuquerque Police Department (APD) soon after the accident indicated that five hours after the fatal crash House had a blood alcohol level of 0.1 percent, *see* Robert Rodriguez, *Test Says House Legally Drunk,* Albuquerque J., Dec. 30, 1992, at A1.

{3} Long before the first trial, prosecution and defense attorneys commented extensively in the media about the case and the issues presented by it. The strategies and opinions of the lawyers received early press coverage. An article appearing in the Albuquerque Journal quoted Twohig as saying "'experts will be used' to determine whether the signs on the Volcan offramp were confusing or insufficient." Patricia Gabbett Snow, *Officer: Pickup Sped Wrong Way 10 Miles,* Albuquerque J., Jan. 9, 1993, at A1, A3. In this same article, Chief Deputy District Attorney Alan Rackstraw was quoted to the effect that, although he would not release results of a blood sample taken from House by University Hospital staff members on the evening of the crash, "I don't deny that they are consistent with the tests from APD." *Id.*

{4} Twohig attacked the blood-test results almost immediately. In an article appearing in the Navajo Times—a paper published in Window Rock, Arizona—Twohig hinted that "some important facts" in House's case had not been made public. Valerie Taliman, *Family Seeks Fair Justice,* Navajo Times, Jan. 14, 1993, at 1. He also stated that the blood-alcohol test taken by APD may not have been accurate because testing equipment at the APD lab was broken within a two-day period prior to testing and there was no proof that the instruments had been fixed. *Id.* at 3.

{5} Another theme that surfaced early on was Twohig's contention that charges against his client were racially motivated. Prior to House's first trial, Twohig said, "I can tell you this, if Gordon House was not Native American and if the victims were not Anglos, despite tragedy, [this case] would not have received any where near the kind of media attention it has generated." *Id.* at 1. Further, commenting on the fact that a police report still had not been filed nearly three weeks after the accident, Twohig said, "It appears to me that the only reason the police department has not filed a report is that they are attempting to leak information selectively to press people in order to get their story before the public as effectively as possible." *Id.* at 3. He concluded that "the public and press have already convicted Gordon House and they've got the noose ready for him." *Id.*

{6} Allegations of racial bias reached their zenith when District Attorney Robert Schwartz announced his intention to pursue first-degree depraved-mind murder charges against House. *See* Leslie Linthicum, *House May Face Murder Charges,* The Sunday J., Mar. 21, 1993, at A1. Explaining why the State had decided to pursue these charges, Schwartz stated that "the case [had] turned up 'information that takes us way beyond vehicular homicide.'" *Id.* He elaborated further, stating, "The big difference is we now have a report with all kinds of information we didn't have then. . . . It's not simply the raw fact of being in the wrong lane of the freeway and going the wrong way. There's more." *Id.* at A5. Twohig disagreed, accusing the District Attorney of "prosecutorial overreaching." *Id.* at A1. In a separate article reporting the District Attorney's decision to add first-degree murder charges to charges of vehicular homicide and driving while intoxicated, Schwartz stated that "there is evidence that House had the opportunity to avoid the accident." Laura Bendix, *DWI Defense Denounces Murder Charges,* Albuquerque Trib., Mar. 22, 1993, at A1.

{7} Following the jury's verdict in House's first trial—guilty of driving while intoxicated, hung jury on charges of reckless driving, vehicular homicide, and causing great bodily harm—there was extensive comment by the attorneys in the case and by relatives of the victims and of the defendant. Bob Milford, Melanie Cravens' father, said: "The system is flawed. A child could

have figured it out. If they believed he was drunk and he was on the wrong side of the road, why doesn't the rest fall into place?" Leslie Linthicum, *DWI Only Guilty Count,* Albuquerque J., June 19, 1994, at A1, A14.

{8} On November 23, 1994, after a second trial on charges of vehicular homicide had resulted in a hung jury, District Attorney Robert Schwartz announced his intention to try House for a third time. Ed Asher, *House Trial Ends in Hung Jury,* Albuquerque Trib., Nov. 23, 1994, at A1. When he made this announcement, Schwartz, echoing sentiments he had expressed following the first trial, stated that those members of the House jury who had voted to acquit could have done so only out of sympathy for House. Schwartz also stated that House should take responsibility for his actions.

{9} In response to Schwartz's comments, Twohig wrote an article that was published in the Albuquerque Journal. Ray Twohig, *Justice Would Not Be Served by Third Trial for Gordon House,* Albuquerque J., Dec. 2, 1994, at A15. In that article Twohig wrote: "by trying to force the case to go to trial a third time, the district attorney continues to ignore his responsibility to seek justice in this case. Instead, he has adopted the lust for vengeance of some who speak for the Cravens, Woodard, and Milford families." Twohig also appeared as a guest on several radio talk shows. During these talk shows he responded to questions about issues of evidence and law presented at the first two trials and also responded to questions from citizen callers.

{10} Soon after Twohig's newspaper article and radio talk-show appearances, the State filed a motion for an injunction prohibiting all attorneys, parties, and related persons "from making any comment in the media . . . regarding any substantive issue dealing with [the House] case." The ostensible purpose of this motion was to preserve the parties' right to a fair trial. Twohig filed a response in which he argued:

> The statements of the District Attorney have created a strong sentiment against the Defendant in the public arena.
>
> . . . .
>
> The attorney for the Defendant has a First Amendment right to speak about this case, which is unquestionably a matter of great public interest in New Mexico. Counsel for Defendant insists upon his right to speak in response to the misleading and inaccurate statements of the District Attorney and his assistants concerning this case.
>
> . . . .
>
> The Code of Professional Responsibility only restricts comment which is false or creates a clear and present danger of prejudicing the proceeding. SCRA 1986, 16-306 (Cum. Supp. 1994).

On December 16, 1994, the Honorable James F. Blackmer conducted a hearing on the State's motion. At this hearing Twohig introduced several newspaper articles and videotaped news broadcasts. Relying upon its inherent authority and citing the strictures in Rule 16-306 of the Rules of Professional Conduct, the court granted the State's motion. The resulting gag order prohibited counsel for both parties "from making any extrajudicial oral or written statement, comment, opinion, press release, letter or other communication to or through any media or public fora, . . . on any substantive matters or substantive issues of this case." The order also directed counsel to refrain from releasing motions and pleadings to the press without the court's prior approval.

{11} *Rule 16-306 requires facts demonstrating a clear and present danger to the judicial process.* SCRA 1986, 16-306 (Repl. Pamp. 1995) provides that "[a] lawyer shall not make any extrajudicial . . . statement in a criminal proceeding that may be tried to a jury that the lawyer knows or reasonably should know . . . creates a clear and present danger of prejudicing the proceeding." The clear and present danger standard

adopted in this rule is based upon the premise that "the well-being of the judicial, administrative and legislative systems, and of the larger society of which they are parts, requires a public informed of matters arising in law practice and of matters pertaining to proceedings of public interest." SCRA 16-306 cmt. As observed by the U.S. Supreme Court, "The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'" *Sheppard v. Maxwell,* 384 U.S. 333, 349, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966) (quoting *In re Oliver,* 333 U.S. 257, 268, 92 L. Ed. 682, 68 S. Ct. 499 (1948)). As we explain below, to ensure that an appropriate balance is struck between rights of free speech and the interest in fair and impartial adjudication, any prior restraint on public comment by trial participants must be accompanied by specific factual findings supporting the conclusion that further extrajudicial statements would pose a clear and present danger to the administration of justice.

{12} *Constitutional underpinnings of Rule 16-306.* Article II, Section 17 of the New Mexico Constitution provides:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

By its terms, Article II, Section 17 protects the right of each person to disseminate his or her ideas on any number of subjects and prohibits legislation that restricts the right of free speech. Although Article II, Section 17 expressly prohibits only the legislature from abridging freedom of speech, "there is no reason why the courts [should] be given greater power" in this regard. *Blount v. T.D. Publishing Corp.,* 77 N.M. 384, 388, 423 P.2d 421, 424 (1966). Therefore, the gag order issued by the trial court is subject to constitutional scrutiny.

{13} An order such as the one issued here, which prohibits trial participants from speaking with anyone about the case, is a prior restraint. *See, e.g., Breiner v. Takao,* 73 Haw. 499, 835 P.2d 637, 640-41 (Haw. 1992) (analyzing as a prior restraint order which prohibited parties from talking with media about pending murder trial); *Kemner v. Monsanto Co.,* 112 Ill. 2d 223, 492 N.E.2d 1327, 1336, 97 Ill. Dec. 454 (Ill. 1986) (analyzing as a prior restraint order that prohibited all communication between a party and the media about civil trial involving claims against chemical manufacturer); *Davenport v. Garcia,* 834 S.W.2d 4, 9-11 (Tex. 1992) (analyzing as a prior restraint order that prohibited trial participants from discussing pending civil suit outside of courtroom). A prior restraint requires special judicial attention. Thus we have observed that "any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *State ex rel. New Mexico Press Ass'n v. Kaufman,* 98 N.M. 261, 264, 648 P.2d 300, 303 (1982) (alteration in original) (quoting *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419, 29 L. Ed. 2d 1, 91 S. Ct. 1575 (1971)).

{14} Nevertheless, a prior restraint is not unconstitutional per se. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 558, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975). Courts agree that, "in order to achieve the delicate balance between the desirability of free discussion and the necessity for fair adjudication, . . . a trial court can restrain parties and their attorneys from making extrajudicial comments." *Kemner,* 492 N.E.2d at 133-37. New Mexico's Rule 16-306 and similar provisions in effect in other states—" substantial likelihood" or "serious and imminent threat" of prejudicing a fair and impartial trial—are an articulation of the abstract considerations that go into striking this delicate balance. Various precedents of the United States Supreme Court and of the courts of other states have outlined the constitutional limitations on a court's power to impose speech restrictions on attorneys and other trial participants under particular factual circumstances. The thrust of prior-restraint cases in general, and of cases involving limitations on the speech of trial participants in particular, is that post-speech remedies are favored over prior

restraints. *See, e.g., Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559, 49 L. Ed. 2d 683, 96 S. Ct. 2791 (1976) (distinguishing criminal punishments for speech from prior restraints in case involving restrictive order entered against press); *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 713-15, 75 L. Ed. 1357, 51 S. Ct. 625 (1931) (noting that punishment for libel or slander is permissible and preferable to system of prior restraint).

{15} The U.S. Supreme Court decision in *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991), underlies the analysis in most attorney political speech cases decided in recent years. Writing for the Court, Chief Justice Rehnquist noted that "membership in the bar is a privilege burdened with conditions." *Id.* at 1066 (quoting *In re Rouss,* 221 N.Y. 81, 116 N.E. 782, 783 (N.Y. 1917), *cert. denied,* 246 U.S. 661, 62 L. Ed. 927, 38 S. Ct. 332 (1918)). Reasoning that "the outcome of a criminal trial is to be decided by impartial jurors . . . based on material admitted into evidence before them in a court proceeding," *id.* at 1070, and that, "as officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice," *id.* at 1074 (alteration in original) (quoting *Nebraska Press Ass'n,* 427 U.S. at 601 n.27 (Brennan, J., specially concurring)), the Court held that the "substantial likelihood" standard adopted by Nevada was sufficient to safeguard constitutionally protected speech, *id.* at 1075. The Court nevertheless held that the Nevada disciplinary rule was void for vagueness because under Section 177(3) of the Nevada disciplinary rule an attorney could "state without elaboration . . . the general nature of the . . . defense" notwithstanding express prohibitions contained in subsections (1) and (2) of Section 177. *Id.* at 1048. Thus, because Section 177(3) failed to provide adequate guidance as to what statements were permissible and what statements were not, sanctions were improper against an attorney who had asserted that the state had sought indictment of an innocent man and had not "been honest enough to indict the people who did it; the police department, crooked cops." *Id.* at 1034.

{16} After *Gentile* was decided, this Court amended the New Mexico disciplinary rule governing pretrial publicity. Our rule adopted the "clear and present danger" standard, which differs semantically from the "substantial likelihood of material prejudice" standard that the U.S. Supreme Court found constitutionally adequate as a general formulation of the test for permissible restrictions on attorney speech. *Gentile* and the precedents upon which it relies make clear, however, that whatever particular articulation of the test is adopted, the essential inquiry remains unchanged: "a court [must] make its own inquiry into the imminence and magnitude of the danger said to flow from [a] particular utterance and then . . . balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Gentile,* 501 U.S. at 1036 (plurality opinion) (quoting *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 843, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978)). Further, the inquiry is the same regardless of whether a court is analyzing the constitutionality of a gag order, *see Nebraska Press Ass'n,* 427 U.S. at 562-69 (striking down order prohibiting press from publishing confessions and admissions of defendant as well as other facts "strongly implicative" of defendant), considering the propriety of disciplinary action, *see Gentile,* 501 U.S. at 1048-51 (proposed sanctions), or determining whether pretrial publicity was so pervasive as to deprive a criminal defendant of a fair trial, *see Sheppard,* 384 U.S. at 363 (remanding for new trial). Thus when analyzing whether the gag order issued here was appropriate, we legitimately may resort to each of these three types of cases.

{17} *Cases considering gag orders.* Our research has uncovered about an equal number of cases upholding and striking down gag orders. A close examination of the factual circumstances underlying the courts' conclusions in these cases should aid members of the bar in determining the type of statements that will support a gag order and those that will not. From these cases emerge five considerations that the trial court

specifically must address prior to the issuance of any gag order: what may not be said, when it may not be said, where it may not be said, who may not say it, and whether alternatives less restrictive of free speech than an outright ban would suffice to alleviate any prejudice caused by further speech.

{18} *Cases upholding gag orders.* In *Levine v. United States District Court,* 764 F.2d 590, 600-01 (9th Cir. 1985), *cert. denied,* 476 U.S. 1158, 90 L. Ed. 2d 719, 106 S. Ct. 2276 (1986), the Ninth Circuit concluded that there were sufficient facts to justify entry of a gag order to safeguard the defendant's right to a fair trial, although it struck down as overbroad the particular gag order in that case. *Levine* involved a highly publicized espionage trial in which the defendant, a former special agent with the Federal Bureau of Investigation, was charged with passing classified documents to two Russian emigres. *Id.* at 591. While the trial of the Russians was proceeding and before trial of the FBI agent had begun, an attorney for the former, commenting on the government's decision to drop four counts of aiding and abetting espionage, stated: "The dismissal of these charges means the government has now conceded that no documents were ever passed. It's also a concession that there's been no damage to national security." *Id.* at 592 (quoting William Overend, *Lawyers Contend FBI Exaggerated Evidence in Spy Case,* L.A. Times, Mar. 3, 1985, pt. 1., at 3). Attorneys for the FBI agent were characterized as agreeing with this assessment, stating, "To a large extent, the FBI misled the U.S. attorney's office about the strength of the case until it was too late." *Id.* The attorneys also added comments of their own.

> The only reason [our client] is still charged with passing documents is that he admitted it alter five days of questioning, and he'd already told them he'd say anything just to end the questioning.
>
> If he had admitted passing pumpkin papers from the Alger Hiss case, I think he'd be charged with it.

Id. Following publication of this article and upon the government's motion, the district court issued a restraining order prohibiting the attorneys from talking to the media about "any aspect of [the] case that bears upon the merits to be resolved by the jury." *Id.* at 593.

{19} After concluding that the trial court's order was properly characterized as a prior restraint, *id.* at 595, the Ninth Circuit went on to analyze whether there were sufficient facts to justify the trial court's conclusion that further extrajudicial statements would pose "a serious and imminent threat to the administration of justice," *id.* at 597. In its recitation of the facts, the Ninth Circuit noted that lawyers for the defendant had indicated to the court that they might "at some future time deem it necessary in the interest of our client to make a statement outside the courtroom." *Id.* at 592. Of particular importance to the Ninth Circuit was the fact that the defense attorneys had chosen to directly attack the prosecution's case in the media "*during, or immediately before, trial. " Id.* at 598 (emphasis added). Quoting from the trial court's findings, the Ninth Circuit agreed that "neither the press nor the public has the right to hear counsel argue their case prior to this court and the impanelled jury hearing the evidence." *Id.* at 597. Finally, the court stated that "while we have focused on the article in the *Los Angeles Times,* it is apparent that this case has received widespread publicity. The district court found that the level of publicity would increase as the trial approached. We conclude that the district court's findings in this regard were appropriate." *Id.* at 598.

{20} Similarly, in *United States v. Tijerina,* 412 F.2d 661, 666 (10th Cir.), *cert. denied,* 396 U.S. 990, 24 L. Ed. 2d 452, 90 S. Ct. 478 (1969), the Tenth Circuit upheld a gag order because of the "'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial." In that case the defendants had made public statements to large groups. Among these statements was a boast that one of the defendants had "told the witnesses what to say and what to do." *Id.*

at 665. This defendant had also charged that the judge in his case was "using the law to take vengeance and drink blood and humiliate our race." *Id.* A codefendant had said that "the United States has declared that he and his co-defendants 'are criminals and that it was going to try [them] and put [them] to death.'" *Id.* at 665-66. Finally, the first defendant had "urged a 'march around the court house'," while his codefendant suggested "a scorched earth policy." *Id.* at 666. The Tenth Circuit concluded that such statements made "*while [the] criminal trial was pending* [were] not compatible with the concept of a fair trial." *Id.* (emphasis added); *see also In re Russell,* 726 F.2d 1007, 1010 (4th Cir.) (upholding trial court order prohibiting potential witnesses in a criminal case from discussing their proposed testimony with members of the media because of "tremendous publicity[,] the potentially inflammatory and highly prejudicial statements . . . , and the relative ineffectiveness of the *considered* alternatives" (emphasis added)), *cert. denied,* 469 U.S. 837, 83 L. Ed. 2d 74, 105 S. Ct. 134 (1984); *In re San Juan Star Co. (Soto v. Barcelo),* 662 F.2d 108, 116-17 (1st Cir. 1981) (upholding district court order insofar as it prohibited disclosure of deposition contents to press in a pending civil rights action arising out of the shooting of two alleged terrorists because "the community had been fully saturated by . . . reports of the proceedings" and because "Puerto Rico is singularly *unsuited to a change of venue*" (emphasis added)).

{21} *Cases striking down gag orders. Breiner v. Takao,* 73 Haw. 499, 835 P.2d 637, 639 (Haw. 1992), involved the fourth retrial of a defendant charged with murdering his infant son. In that case, upon a prosecution motion made after advisory counsel for defendant had been seen talking to a reporter, the trial court had issued an order prohibiting the attorneys and the defendant "from making any extrajudicial statement to any member of the media relating to the trial, parties, or issues in the trial." *Id.* at 640. After noting that "extrajudicial statements of attorneys may be subject to prior restraint by a trial court upon a demonstration that the activity restrained poses a serious and imminent threat to a defendant's right to a fair trial," *id.* at 641, the Hawaii Supreme Court concluded that the trial court's order was "constitutionally impermissible," *id.* at 642. The court based its conclusion upon the fact that "the record is devoid of any evidence showing that [advisory counsel for the defendant] made any statements to the media regarding the trial." *Id.* (emphasis added). Further, the court noted that the *trial court had made no findings* indicating that a gag order was the least restrictive alternative. *Id.*

{22} In *Kemner,* 492 N.E.2d at 1328, the Illinois Supreme Court considered the propriety of a gag order issued in twenty-two consolidated cases involving claims for injuries and property damage resulting from exposure to dioxin following a train derailment. About a month after the trial had started, the National Institute of Occupational Safety and Health (NIOSH) held a press conference in St. Louis, Missouri, at which officials announced that a former truck driver had developed a rare form of cancer possibly linked to dioxin exposure at three separate St. Louis trucking terminals. *Id.* at 1331. In response to this news conference, and while the case against it was proceeding in St. Clair County, Illinois, Monsanto (the defendant corporation) issued a press release in which it stated:

> We have no involvement in the truck terminal issue per se. But we are currently a defendant in a lawsuit in St. Clair County, Illinois, in which several residents of Surgeon, Mo., claim they are suffering or will in the future suffer health problems from alleged exposure to dioxin stemming from a 1979 train derailment and chemical spill.
>
> The jury, which is presently hearing this case, is *not* sequestered, i.e., they are free to view and listen to local news reports. Obviously we're concerned that the jurors may have heard or read some of the exaggerated NIOSH pronouncements stemming from the March 1 news conference. . . . We . . . hope that by calling your attention to the basic facts that relate specifically

> to the March 1 NIOSH announcement, we can sensitize you to the need to be careful, responsible and accurate in the way dioxin subjects are reported in the future. *Id.* Soon after this press release, an article appeared in the *Belleville News Democrat* entitled "Monsanto Takes Aim at Government Report." *Id.* This article discussed the NIOSH news conference, the information contained in Monsanto's press release, and the St. Clair County litigation. *Id.*

{23} The Illinois Supreme Court stated that, to withstand constitutional scrutiny, the gag order would have to "fit within one of the narrowly defined exceptions to the prohibition against prior restraints," such that disclosure of further information about the pending litigation would substantially affect the parties' right to a fair trial. *Id.* at 1336. An Illinois appellate court had upheld the gag order, relying on the fact that Monsanto had in its press release specifically referred to the St. Clair County litigation as its rationale for providing information to the press and had noted its vested interest in ensuring that jurors in that litigation were not given a biased view of the effects of dioxin. *Id.* at 1337. On this basis the appellate court concluded that Monsanto had distributed the press release with the intent to influence jurors. *Id.* The Illinois Supreme Court disagreed with the lower court and held that there were insufficient facts to sustain the gag order. *Id.* The court specifically noted that the *plaintiffs had not demonstrated that any juror had even read* the *Belleville News Democrat* story, concluding that mere "possibilities" were insufficient to justify a prior restraint.

{24} Finally, in *Chase v. Robson,* 435 F.2d 1059, 1061-62 (7th Cir. 1970) (per curiam), the Seventh Circuit Court of Appeals issued a writ of mandamus striking down a pretrial order that prohibited attorneys and defendants in a pending criminal trial from making any public statements regarding the case. The court held that "whether approached on its individual bases or construed as a whole, [the order] is devoid of sufficient findings to satisfy either the 'clear and present danger' or 'reasonable likelihood' tests of a 'serious and imminent threat to the administration of justice.'" *Id.* at 1061. The facts in *Chase* were set out by the district court in *United States v. Chase,* 309 F. Supp. 430 (N.D. Ill. 1970), *mandamus granted and appeal dismissed sub nom. Chase v. Robson,* 435 F.2d 1059. *Chase* involved the indictment of several defendants for allegedly destroying government records and hindering the administration of the Military Selective Service Act. *Id.* at 432. The trial court had based its restrictive order on the observation that the defendants had sought publicity by contacting the press and issuing press releases. The court relied upon accounts in articles the defendants had appended to a motion for a continuance. Even though the majority of the articles reviewed by the court appeared in newspapers published outside the Northern District of Illinois, and although the last article involving the defendants was published almost one year before the projected beginning of the trial, the trial court concluded that an order prohibiting communication with the media by trial participants was necessary. *Id.* at 437. In justifying its order, the court also noted the association of one defense counsel with an attorney not involved in the case but whom the trial judge considered to have "repeatedly and brazenly transgressed the local rules" regarding extrajudicial statements. *Id.* at 436.

{25} The Seventh Circuit concluded that newspaper articles that had been *published outside the jurisdiction* more than *seven months before the gag order was issued* and association by one of defendant's counsel with another attorney not involved in the pending criminal matter were irrelevant. *Chase*, 435 F.2d at 1061 & n.1. While the Seventh Circuit agreed that cases should be tried in the courts rather than in the media, it did not agree that the trial court had found specific facts sufficient to justify a complete ban on all further speech. *Id. See also Davenport v. Garcia,* 834 S.W.2d 4, 10, 11 (Tex. 1992) (holding that there must be "specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and

(2) the judicial action represents the least restrictive means to prevent that harm," and striking down gag order because it *failed to identify* any miscommunication, did not indicate any specific harm to the judicial process, and did not indicate why any harm caused by further statements could not be remedied by less drastic measures).

{26} *The findings in this case did not warrant imposition of a gag order.* The gag order issued in this case contains no specific findings to support the generalized conclusion that "extrajudicial statements . . . must be restricted by this Court to protect the RIGHT of BOTH the Defendant AND the citizenry of New Mexico to fair and impartial JURY trial(s)." The court nowhere laid out the factual foundation for finding a substantial likelihood of prejudice or clear and present danger to a fair and impartial trial. The order merely draws the conclusion that "Counsel for both sides have made numerous extrajudicial statements to the media and in public fora which they knew—or reasonably should [have known—will have a SUBSTANTIAL LIKELIHOOD of MATERIALLY PREJUDICING . . . JURY trial(s) in this case." The order does not contain any analysis of the facts supporting the court's conclusion that a gag order was necessary. Nor does the order indicate that the court considered alternatives less restrictive of free speech rights than an outright ban on all communication with the media—what may not be said, when it may not be said, where it may not be said, who may not say it, and why less restrictive alternatives would not suffice.

{27} Unlike the defendant in *Sheppard,* House was not to be tried where a majority of the publicity was generated. News stories published at the time of jury selection in House's first trial suggest that despite the tremendous amount of publicity the case had received in Albuquerque, residents of Taos, where House's first and second trials were held, knew almost nothing about the case. *See* Ed Asher, *Gordon House? Who's That? Taos Asks*, Albuquerque Trib., June 7, 1994, at A1. Further, the court, attorneys for the State, and attorneys for House had used another tool to combat potential prejudice caused by pretrial publicity—extensive voir dire—which also was available for use in the third trial. Jurors in House's first trial were selected from a venire of ninety persons. These ninety persons were questioned at length about their opinions on drinking and driving, migraine headaches, possible prejudices against Native Americans, and what they knew and thought about Gordon House. Leslie Linthicum, *Potential House Jurors Questioned,* Albuquerque J., June 7, 1994, at C3.

{28} *Conclusion.* We conclude that to have allowed the gag order to stand in the face of a complete lack of factual findings to support the conclusion that such an order was necessary to preserve the parties' right to a fair trial would have done serious injustice to the principle that post-speech remedies are favored over prior restraints. For the foregoing reasons we issued our writ of superintending control vacating the gag order entered by the trial court.

{29} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

STANLEY F. FROST,
Chief Justice

JOSEPH F. BACA,
Justice

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1996-NMSC-028

Filing Date: May 20, 1996

Docket No. 23,267

STATE OF NEW MEXICO,

Plaintiff-Appellant,

vs.

VENTURA MANZANARES,

Defendant-Appellee.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Art Encinias, District Judge

Released for Publication June 7, 1996.

Hon. Tom Udall, Attorney General,
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Santa Fe, NM,

for Appellant.

T. Glenn Ellington, Chief Public Defender,
Karl Erich Martell, Assistant Appellate Defender,
Santa Fe, NM,

for Appellee.

OPINION

RANSOM, Justice.

{1} The State appealed to the Court of Appeals from the district court's dismissal of criminal proceedings against Ventura Manzanares for violation of his right to a speedy trial. The district court had concluded that because almost eleven months passed since the indictment of Manzanares, his right to a speedy trial was presumptively violated. The Court of Appeals deemed the appeal to present a significant question of law under the New Mexico Constitution, namely whether this Court's grant of an extension of time for trial beyond the six-month limit of SCRA 1986, 5-604 (Repl. Pamp. 1992) prohibits a lower court from reviewing a claim of violation of the right to a speedy trial. The Court of Appeals consequently certified the appeal to this Court pursuant to NMSA 1978, Section 34-5-14(C)(1) (Repl. Pamp. 1990) and SCRA 1986, 12-606 (Repl. Pamp. 1992). We hold that the grant of an extension by this Court does not preclude a lower court's review of the right to speedy trial, and the district court's findings being supported by substantial evidence, we weigh those findings de novo, *see Zurla v. State,* 109 N.M. 640, 642, 789 P.2d 588, 590 (1990), and we affirm the ruling of the district court.

{2} *Proceedings.* On August 13, 1993, Manzanares was involved in a head-on automobile collision that resulted in the death of Stacy Kern Hill. On November 8, the Rio Arriba County grand jury indicted Manzanares on charges of vehicular homicide, driving while intoxicated, and driving recklessly. Manzanares was arraigned and released on December 2, 1993. The arraignment started the six-month period within which Rule 5-604 provides that trial must be commenced. The trial was set for April 11, 1994. Due to an insufficient juror pool, the April 11 trial date was vacated. On April 19, the State filed for a Rule 5-604 extension from the district court, seeking an extension to November 2, 1994. The Supreme Court has given the district court power to grant extensions of up to four months. This would have allowed the district court to grant an extension to October 2, not November 2. However, on May 23 the district court purported to grant an extension to November 2.

{3} At a hearing on April 28, the district court entered an order setting the trial for August 8. The court noted that there was an extension in the case until November 2, even though the grant

of that extension was not entered of record until May 23. Manzanares objected to the August court date and requested that the trial be set for an earlier date. The trial was then scheduled for May 31. At a pretrial conference on May 13, the court suggested that the trial be set for early June, but the parties were unable to agree on a date. On May 25, two days after the order granting the November 2 extension was entered, the district court set October 3 as the date for jury trial. October 3 was one day beyond the four-month-extension period that was within the power of the district court to grant. On August 17, the State filed a petition with this Court requesting an extension. Defense counsel was apparently on vacation at this time, and the petition incorrectly stated that Manzanares had stipulated to the extension. We granted an extension to November 11. Manzanares petitioned this Court for reconsideration, and we denied the motion.

{4} On August 22, before we had granted the extension and before he was even aware that the State's petition had been submitted to us or, apparently, that the district court had entered an extension order, Manzanares moved to dismiss the indictment against him on grounds that the district court no longer had jurisdiction. A hearing was held on this motion on September 26, the date that we denied Manzanares's motion for reconsideration. The court, noting our decision, denied the motion to dismiss. Manzanares specifically raised the issue of speedy trial and on September 29 he filed another motion to dismiss, citing his right to a speedy trial. This motion was denied on October 3, on grounds that the court was without authority to "overrule" the Supreme Court's extension and dismiss the action. Manzanares moved for reconsideration, and the court granted the motion to dismiss on October 6. Specifically, the court found that the granting of an extension by the Supreme Court, without a showing that the Court expressly considered speedy-trial issues, did not preclude review of speedy-trial claims by lower courts. The court found the case to be a "simple" one and held that the eleven-month delay from indictment to trial was in violation of Manzanares's right to a speedy trial.

{5} *Issues.* This appeal presents us with two issues. First, does the grant of an extension by the Supreme Court pursuant to Rule 5-604 preclude a lower court from subsequently reviewing speedy-trial claims by the criminal defendant? Second, was dismissal for violation of constitutional speedy-trial rights proper in this case?

{6} *Rule 5-604 extensions.* The State argues that our grant of an extension under Rule 5-604 was an implicit finding by this Court that Manzanares's right to speedy trial had not been violated. This is a mischaracterization of the role of the Court in the grant of extensions, and a misreading of Rule 5-604, which is not intended or designed as an implementation of the constitutional right to speedy trial. *See, e.g., State v. Mendoza,* 108 N.M. 446, 450, 774 P.2d 440, 444 (1989) ("We should avoid engrafting principles of constitutional analysis onto the operation of the rule." Ransom, J., specially concurring). The rule is a case-management tool and only incidentally may its implementation turn on factors determinative of constitutional rights. This Court annually considers well in excess of 1000 petitions for rule extensions. Signed stipulations for extensions are seldom, if ever, questioned. When the nonmoving party is said to concur, or simply enters no written objection to a petition, we will set the shortest period of extension consistent with the circumstances, mindful of the apparent complexity of the case. We nonetheless expect, whether the extension is granted under stipulation or concurrence, express or tacit, that the court will proceed expeditiously with trial. The limit on an extension is not the target for a trial. Where a written objection is interposed, we consider the merits of the request—with little regard for "press of other business" or "congested court dockets," it being the resolution of such conflicts in a manner compatible with the rule that we wish to encourage—and we rule accordingly, often seeking from the trial court an early definite setting on which to base an extension. We do not resolve factual issues, and ordinarily we would not weigh the factors implicated in constitutional speedy-trial analysis.

{7} An appropriate motion to protect constitutional speedy-trial rights, requiring the weighing of factors that are factually based, must be presented in the first instance to the trial court and not to this Court under Rule 5-604. We affirm *State v. Garcia,* 110 N.M. 419, 422, 796 P.2d 1115, 1118 (Ct. App.), *cert. denied,* 110 N.M. 282, 795 P.2d 87 (1990), to the effect that our ruling on a Rule 5-604 motion is not determinative of a subsequent speedy-trial motion except in the unlikely event the record specifically reflects our analysis and decision on the issue being raised again below. Therefore, we affirm the order of the district court as it relates to the effect of Rule 5-604 extensions on a lower court's subsequent review of speedy-trial claims.

{8} *The right to a speedy trial.* The Sixth Amendment mandates that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. As we noted in *Salandre v. State,* 111 N.M. 422, 806 P.2d 562 (1991), the right attaches "when the putative defendant becomes an 'accused,'" and this occurs when there is "either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge." *Id.* at 425, 806 P.2d at 565 (quoting *United States v. Marion,* 404 U.S. 307, 320, 30 L. Ed. 2d 468, 92 S. Ct. 455 (1971)). We have set forth guidelines, as a matter of public policy, for determining whether delay should be deemed "presumptively prejudicial" in different types of cases. *Id.* at 428, 806 P.2d at 568. In determining whether the right to speedy trial has been violated, a reviewing court must apply the four-factor balancing test from *Barker v. Wingo,* 407 U.S. 514, 530, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972). The four factors of this test are the "(1) length of delay, (2) reasons for the delay, (3) assertion of the right, and (4) prejudice to the defendant." *Salandre,* 111 N.M. at 425, 806 P.2d at 565. If the delay is found to be presumptively prejudicial, then the state bears the burden to show that the *Barker* factors do not weigh in favor of dismissal. *Zurla,* 109 N.M. at 646, 789 P.2d at 594. While the defendant's stipulation or concurrence that an extension be granted under Rule 5-604, on the one hand, or, on the other hand, the defendant's objection to any such delay, would constitute persuasive evidence of the reason for the delay and the assertion of the right to speedy trial, such factors would not necessarily be conclusive to the exclusion of the factors of length of delay and actual prejudice.

{9} *Presumptive prejudice.* The guidelines set forth in *Salandre* for what constitutes presumptively prejudicial delay in cases of various complexity are found at footnote 3:

> We are of the opinion that nine months marks the minimum length of time that may be considered presumptively prejudicial, even for a case such as this involving simple charges and readily-available evidence. . . . We believe that for complex cases a period of fifteen months after the defendant becomes an 'accused' should provide adequate time for the state to marshall its resources and proceed to trial. Accordingly, we believe trial courts should treat delay of fifteen or more months in such cases as requiring further inquiry. Twelve months for cases of intermediate complexity would be appropriate.

111 N.M. at 428, 806 P.2d at 568. The question of the complexity of a case is best answered by a trial court familiar with the factual circumstances, the contested issues and available evidence, the local judicial machinery, and reasonable expectations for the discharge of law enforcement and prosecutorial responsibilities. The determination of complexity is, of course, not a determination of the importance of the case to the defendant, to the victim, or to society. The district court found this important case of vehicular homicide to be a "simple case," thus making the delay presumptively prejudicial after nine months. The factual findings of the district court are supported by substantial evidence, and, because we give due deference to the findings, we conclude that the delay in this case was presumptively prejudicial to Manzanares, and we look to the factors from the *Barker* test.

{10} The district court found that the *Barker* factors balanced in favor of dismissal. The reason for most of the delay in the case, the district court found, was attributable to actions of the state or to neutral factors like congestion of the court docket. The court also found that Manzanares "timely and vigorously asserted the right to speedy trial." Also, the court found that Manzanares was particularly prejudiced by the delay because an "important" witness had moved to Idaho during the interim, and an expert witness, who had been prepared twice for trial, would have to provide only deposition testimony because of scheduling conflicts. In balancing the *Barker* factors, the court held that "the evils of delay . . . [worked] not only to the Defendant's prejudice but to the detriment of the court's goal for prompt justice." Again, we find the factual findings of the district court are supported by substantial evidence, and we agree with the court's weighing of the *Barker* factors. Therefore, we affirm the dismissal for violation of Manzanares's right to a speedy trial.

{11} *Conclusion.* We affirm the district court with regard to the affect of a Rule 5-604 extension on lower court review of speedy trial claims. We also affirm the district court's dismissal of the action as a violation of Manzanares's constitutional right to a speedy trial.

{12} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

STANLEY F. FROST,
Chief Justice

JOSEPH F. BACA,
Justice

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER,
Justice

Justice Richard E. Ransom

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1996-NMSC-047

Filing Date: July 25, 1996

Docket No. 22,841

JOHN OTERO,

Plaintiff-Respondent,

vs.

JORDAN RESTAURANT ENTERPRISES, a New Mexico Corporation,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Philip R. Ashby, District Judge

Released for Publication August 12, 1996. As Corrected September 9, 1996.

Wycliffe V. Butler,
Butler & Butler, P.A.,
Albuquerque, NM,

for Respondent.

Donald C. Schutte,
Schutte & Associates, P.C.,
Albuquerque, NM,

for Petitioner.

OPINION

RANSOM, Justice.

{1} John Otero sued Jordan Restaurant Enterprises for personal injuries he suffered in the collapse of metal bleachers on which he was seated. The bleachers had been assembled by Gary Marquart, doing business as Desert Hawk, Inc., an independent contractor hired by Jordan to make improvements to its restaurant and sports bar. Prior to trial the district court granted Otero's motion for partial summary judgment against Jordan on the issue of its liability for Marquart's negligence. At a trial on the issue of damages, Jordan requested instructions which would have allowed the jury to compare Jordan's fault with that of the project's architect, who failed to provide specifications for the bleachers, and the City of Albuquerque, which issued a building permit to Marquart even though he was not properly licensed to perform renovations on commercial premises. The district court refused these instructions, and the jury returned a verdict in favor of Otero for $ 47,000.

{2} Jordan appealed to the Court of Appeals, arguing that the trial court erroneously entered summary judgment on the issue of Jordan's liability for Marquart's acts and that the court erred by not instructing the jury on comparative fault. The Court of Appeals adopted Restatement (Second) of Torts Section 422(b) (1965) and held that Jordan had a nondelegable duty to maintain its business premises in a reasonably safe condition, which made Jordan liable to Otero to the same extent as Marquart and the architect. *Otero v. Jordon Restaurant Enters.*, 119 N.M. 721, 723, 895 P.2d 243, 245 (Ct. App.), *cert. denied*, 119 N.M. 617, 894 P.2d 394, *and cert. granted*, 119 N.M. 810, 896 P.2d 490 (1995).[1] Because Jordan would be liable for the negligence of the architect to the same extent as it would be liable for the negligence of Marquart, *see* Section 422 cmt. d, Jordan could not have its liability to Otero

[1] The Court of Appeals, consistent with the original complaint, styled this case "Otero v. Jord**o** n Enterprises." The table of cases and tables of denials and grants of certiorari in volume 119 of New Mexico Reports refer to "Jord**o** n," while the name at the head of each even-numbered page of the reported opinion is spelled "Jord**a** n." In the petition for writ of certiorari Jordan styled this case "Otero v. Jordan Restaurant Enterprises" and each of the briefs filed in this matter refer to "Jord**a** n." Because this an original proceeding on certiorari we will use the spelling "Jord**a** n."

reduced in proportion with the fault of the architect. *Otero*, 119 N.M. at 725, 895 P.2d at 247.

{3} The Court of Appeals also held that it was not error to refuse Jordan's tendered instructions on comparative fault of the City because, had the City been sued by Otero and found liable, it would be entitled to indemnification from Jordan for any damages awarded against it. *Id.* at 725-26, 895 P.2d at 247-48. We granted certiorari to consider whether the City arguably would have been entitled to such indemnification and any effect that would have on comparative fault. Questions regarding the adoption of Section 422(b) and Jordan's nondelegable duty are not before this Court. We hold that the City would not be entitled to indemnification from Jordan. Nevertheless, we affirm the trial court because, for purposes of determining liability to Otero, Jordan stands in the shoes of Marquart, and Marquart would not be entitled to an instruction on comparative fault.[2]

{4} *Facts and Proceedings.* Jordan operates a restaurant in Albuquerque formerly known as Champion's Sports Bar and Grill and now known as Spectators. In July 1989 Jordan entered into a contract with Marquart for the construction of certain tenant improvements to the restaurant. Among these improvements was a set of metal bleachers to be used by patrons while watching sporting events on a big screen television in the sports bar. After the bleachers had been installed, employees of Jordan had been on the bleachers and observed no structural weaknesses. Approximately four months after the improvements were completed, the metal bleachers collapsed. Otero, who was then sitting at or near the top of the bleachers, fell and injured his back. Jordan conceded that the bleachers collapsed because they were negligently installed by Marquart. Testimony showed that the bleacher manufacturer's assembly instructions called for metal cross-bracing to be installed across the back of the bleachers in an "X" and that the metal supports were instead fastened in a vertical position.

{5} During a jury trial on the issue of damages, Jordan presented evidence that, had the City investigated Marquart's permit application, it would have discovered that Marquart was licensed to conduct residential installations but not commercial installations such as the one contracted for by Jordan. Based on this evidence Jordan tendered an instruction that would have allowed the jury to compare Marquart's negligence and the City's negligence in issuing a permit to Marquart. The trial court refused this instruction.

{6} The Court of Appeals held that the trial court did not err by refusing the tendered instruction, adopting the following chain of reasoning.[3] First, the Court reasoned, under our decision in *Amrep Southwest, Inc. v. Shollenbarger Wood Treating, Inc. (In re Consolidated Vista Hills Retaining Wall Litigation)*, 119 N.M. 542, 893 P.2d 438 (1995), the City would be entitled to indemnification from Marquart for any damages awarded to Otero because the City's minimal negligence in issuing a permit to Marquart was passive while Marquart's disproportionately greater degree of negligence in installing the bleachers was active. Second, based upon a nondelegable duty to maintain its premises in a safe condition, Jordan would be liable to the City for indemnification to the same extent as Marquart. Finally, because Jordan would bear ultimate responsibility for all damages awarded to Otero based upon the fault of the City, Otero should be permitted to proceed directly against Jordan without need to apportion fault to the City.

[2] As found by the trial court, Jordan would be entitled to indemnification from the contractor and architect for whose negligence Jordan is liable under Restatement (Second) of Torts Section 422(b).

[3] The Court of Appeals declined to decide whether the City had waived any governmental immunity under the Tort Claims Act for negligence in the issuance of construction permits. *Otero*, 119 N.M. at 727, 895 P.2d at 249. We likewise find it unnecessary to decide this issue or whether, even if we assume that the City has not waived its immunity, such lack of waiver affects Jordan's right to attribute fault to the City under a comparative negligence theory. *See Wilson v. Probst*, 224 Kan. 459, 581 P.2d 380, 384 (Kan. 1978) (holding that alleged negligence of state highway department had to be compared to alleged negligence of other defendants even though department was immune from liability).

{7} The Court of Appeals' conclusion that Marquart would have to indemnify the City is based upon its interpretation of *Amrep* to the effect that "the Supreme Court did note that an independent, preexisting legal relationship between indemnitor and indemnitee is sometimes necessary to support a claim for indemnification, but suggested that such a relationship is not necessary where there are exceptional circumstances." *Otero*, 119 N.M. at 726, 895 P.2d at 248. Based on this interpretation of *Amrep,* the Court concluded that such exceptional circumstances exist here because "the City's negligence in this case, if any, was entirely passive and minimal in degree compared to the negligence of [Marquart]." *Id.* Under the facts of *Amrep,* however, it was not necessary for this Court to decide whether a claim for traditional indemnification would lie in the absence of an independent, preexisting relationship between indemnitor and indemnitee. As we observed, "an independent, preexisting legal relationship between Amrep and Shollenbarger is established by their respective positions in the chain of distribution of a product." *Amrep,* 119 N.M. at 546, 893 P.2d at 442.

{8} *Amrep does not give the City a right of indemnification against Jordan.* In cases which involve concurrent tortfeasors, such as this one, the general rule is that an action for traditional indemnification does not lie in favor of either tortfeasor in the absence of some preexisting relationship between them that gives rise to an independent duty flowing from the putative indemnitor to the putative indemnitee. *See, e.g., Atkinson v. Berloni*, 23 Conn. App. 325, 580 A.2d 84, 85 (Conn. App. Ct. 1990) (affirming dismissal of indemnification claim because no independent legal relationship existed between two motorists whose separate negligent acts had united to injure the driver and passenger of a motorcycle); *Builders Supply Co. v. McCabe*, 366 Pa. 322, 77 A.2d 368, 371 (Pa. 1951) (holding that building supply company whose employee's negligence in avoiding automobile contributed to accident between two trucks could not recover indemnification from automobile driver). However, as we noted in *Amrep*, 119 N.M. at 545 n.1, 893 P.2d at 441 n.1, some courts have permitted an action for traditional indemnification when there is a great difference in the degree of fault between concurrent tortfeasors, *see, e.g., Missouri, K & T Ry. Co. v. Missouri Pac. Ry. Co.*, 103 Kan. 1, 175 P. 97, 104 (Kan. 1918) (holding that employer of train engineer who was negligent could recover indemnification from employer of another engineer who was wanton and reckless), and some have permitted an action for indemnification when the character of the duties owed to the plaintiff by the tortfeasors is vastly different or disproportionate, *see, e.g., Burbage v. Boiler Eng'g & Supply Co.*, 433 Pa. 319, 249 A.2d 563, 567 (Pa. 1969) (noting that right to indemnification arises from "difference in the *character* or *kind* of the wrongs which cause the injury," and holding that boiler manufacturer had indemnification claim against valve manufacturer (quoting *McCabe*, 77 A.2d at 370)).

{9} After examining the origins and evolution of the action for traditional indemnification, we conclude that exceptions to the general rule are a byproduct of a system which prohibited contribution among jointly and severally liable tortfeasors.[4] The common law did not permit either pro rata or fault-based contribution among tortfeasors, *see Rio Grande Gas Co. v. Stahmann Farms, Inc.*, 80 N.M. 432, 434, 457 P.2d 364, 366 (1969), and courts early on realized that the bar against contribution often worked inequities. This led to the recognition of actions for indemnification which "provided for a *complete* shifting of liability from one party to another in cases where a party was held only vicariously liable." *Vertecs Corp. v. Reichhold Chems., Inc.*, 661 P.2d 619, 621 (Alaska 1983) (emphasis added). As the action was originally formulated, the one seeking indemnification had to be entirely free from fault. This too worked inequities under the facts of some cases, and thus courts began to engraft exceptions onto the no-fault indemnification action. *See generally Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 292-95,

[4] In New Mexico, with limited exceptions, joint and several liability has been abolished, NMSA 1978, § 41-3A-1 (Repl. Pamp. 1989), and when joint and several liability does exist there is the right of contribution, NMSA 1978, § 41-3-2(A) (Repl. Pamp. 1989).

331 N.Y.S.2d 382 (N.Y. 1972) (discussing origins of distinction between active and passive tortfeasors and role played by common-law lack of contribution).

{10} In New Mexico, as we noted in *Amrep*, 119 N.M. at 552, 893 P.2d at 448, "to establish an equitable system in which in most cases a party is only liable to the extent that it was to blame for the damages to the victim, our Court of Appeals adopted in *Bartlett* [v. New Mexico Welding Supply, Inc., 98 N.M. 152, 158, 646 P.2d 579, 585 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982),] the doctrine of several liability." Based on these same equitable considerations we adopted proportional indemnification as a means of equitably adjusting liability between concurrent tortfeasors in those cases in which a defendant is denied the ability to "raise the fault of a concurrent tortfeasor as a defense because of the plaintiff's choice of remedy." *Amrep,* 119 N.M. at 552, 893 P.2d at 448. We cautioned, however, that "such proportional indemnification applies only when contribution or some other form of proration of fault among tortfeasors is not available." *Id.* at 552-53, 893 P.2d at 448-49.

{11} In this case Otero sued Marquart and Jordan in tort. Thus, plaintiff's theory of the case provides a ready mechanism by which to fairly apportion liability for damages among all those at fault under the doctrine of comparative negligence, and proportional indemnification would not be warranted. Further, because New Mexico tort law is premised on the notion that each concurrent tortfeasor should bear responsibility for an accident in accordance with his or her fault, we hold that in the absence of an independent, preexisting relationship the City would not be entitled to traditional indemnification if its negligence were a proximate cause of Otero's damages, regardless of whether one might say that as compared to Marquart or Jordan its negligence was "minimal."[5] *Cf. Dole*, 282 N.E.2d at 294-95 (holding that liability should be apportioned among joint tortfeasors according to relative fault).

{12} *Jordan's liability under Restatement Section 422(b).* By ruling that because the City could recover indemnification from Marquart it could also recover indemnification from Jordan, the Court of Appeals implicitly held that Jordan was an active tortfeasor. This holding follows from the reasoning that the City's indemnification rights against Marquart arise because its negligence, if any, was "passive and minimal in degree." Any suggestion that the liability of a landowner to a business invitee for an unsafe condition on the premises created by a contractor and not discovered by the landowner arises from the active negligence of the landowner is incorrect.

{13} The rule stated in the Restatement of Restitution is that

> Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land[,] . . . which was created by the misconduct of the other[,] . . . he is entitled to restitution from the other . . . unless after discovery of the danger, he acquiesced in the continuation of the condition.

Restatement of Restitution § 95 (1937). The Vermont Supreme Court applied this rule in *Bardwell Motor Inn, Inc. v. Accavallo*, 135 Vt.

[5] This is not to say that under no circumstance will one tortfeasor be entitled to indemnification from another in the absence of an independent, preexisting relationship. The successive-tortfeasor situation which will give rise to indemnification in favor of one tortfeasor against another without such a relationship is typified by *Lujan v. Healthsouth Rehabilitation Corp.*, 120 N.M. 422, 902 P.2d 1025 (1995). In that case a negligent automobile driver could have been held liable *by operation of law* for all of an accident victim's damages—even those caused by a negligent treating physician. Because the driver's liability for the damages caused by negligent treatment is derivative of the physician's liability and arises only by operation of the doctrine of proximate cause, it is equitable that, as between the driver and the physician, the latter should bear complete responsibility for the damages attributable to the negligent treatment. Equities likewise exist here, as we discuss later, but not for the reasons adopted by the Court of Appeals.

571, 381 A.2d 1061, 1062 (Vt. 1977), and held that a hotel owner could recover traditional indemnification from a contractor for damages the former had to pay to a hotel patron who was injured in a fall while attempting to open an exterior door of the hotel. The court reasoned that "while, as against the person injured, plaintiff here had a nondelegable duty to keep its premises reasonably safe, the violation of that duty was clearly the primary fault of the defendants." *Id. ; see also Lipman Wolfe & Co. v. Teeples & Thatcher, Inc.*, 268 Ore. 578, 522 P.2d 467, 471-72 (Or. 1974) (concluding that storekeeper held liable under Section 422(b) could recover indemnification from contractor whose negligence rendered premises unsafe).

{14} This reasoning accords with the general rule that one held vicariously liable has an action for traditional indemnification against the person whose act or omission gave rise to the vicarious liability. *See, e.g., Amrep*, 119 N.M. at 546, 893 P.2d at 442 (noting that right of indemnification may arise from vicarious or derivative liability). Here, Jordan's liability to Otero arises by operation of law because of a policy-based decision that landowners should be held responsible for unsafe conditions on their premises whether or not they directly created them. It is not disputed that Marquart's negligence in failing to correctly assemble the bleachers caused Otero's damages. It is also undisputed that Jordan did not discover that the bleachers were unsafe. Under these circumstances, Jordan's liability does not arise from its active negligence, and it would not be liable to indemnify concurrent tortfeasors.

{15} *The trial court nonetheless properly refused instructions on comparative fault.* While we would ordinarily remand this case for a determination by the factfinder whether the evidence adduced by Jordan demonstrated that the City had breached its duty to Otero, and, if so, using principles of comparative fault, a determination of the extent to which this breach contributed to Otero's injuries, *cf. Reichert v. Atler*, 117 N.M. 623, 626, 875 P.2d 379, 382 (1994) (holding that bar owner's failure to perform duty to keep premises safe for patrons should be compared with harmful conduct of third party), here it is important that Jordan, as the owner of unsafe premises, is vicariously responsible to Otero for the entire liability of the independent contractor, Marquart. The real issue, therefore, in determining whether the trial court properly refused Jordan's tendered instructions on comparative fault is whether Marquart should be allowed to reduce his liability to Otero by claiming that the City was negligent in issuing him a building permit. Of particular relevance in resolving this issue is Marquart's knowledge when he made application to the City that he did not have a license to perform non-residential installations.

{16} A misrepresentation of fact, known by the maker to be untrue, made with the intent to deceive the party to whom the representation was made and to induce that other party to act, is actionable fraud when the other party does act upon the misrepresentation to its detriment. *Sauter v. St. Michael's College*, 70 N.M. 380, 384-85, 374 P.2d 134, 138 (1962). Failure to disclose facts may be a misrepresentation under some circumstances. *See Gouveia v. Citicorp Person-to-Person Fin. Ctr., Inc.*, 101 N.M. 572, 576, 686 P.2d 262, 266 (1984). Here, Marquart not only failed to disclose that he did not have a contractor's license to perform the type of work proposed in his application, merely by filing the application he represented that he did have a valid license. *See* NMSA 1978, § 60-13-12(A) (Repl. Pamp. 1989).

{17} As we observed in *Reichert*, 117 N.M. at 625, 875 P.2d at 381, "in New Mexico, comparative-fault principles apply unless such application would be inconsistent with public policy." One guilty of fraud cannot be allowed by operation of law to profit by that fraud. *See Sauter*, 70 N.M. at 388-389, 374 P.2d at 140 (holding that one guilty of fraud could not invoke doctrine of estoppel based upon that fraud). Therefore, Marquart, whose tacit representation that he had a license to perform commercial installations lay at the root of the City's alleged negligence, could not have been allowed to attribute blame for Otero's injuries to the City. *See, e.g., Tratchel v. Essex Group, Inc.*, 452 N.W.2d 171, 180-81

(Iowa 1990) (holding that instruction on comparative fault of plaintiff properly denied to defendant guilty of fraud); *Cruise v. Graham*, 622 So. 2d 37, 40 (Fla. Dist. Ct. App. 1993) (holding that denial of comparative fault instructions in fraud action not error); *cf. Neff v. Bud Lewis Co.*, 89 N.M. 145, 149, 548 P.2d 107, 111 (Ct. App.) (holding contributory negligence not a defense to claim for negligent misrepresentation by building owner against real estate broker and salesmen having fiduciary relationship to plaintiff), *cert. denied*, 89 N.M. 321, 551 P.2d 1368 (1976); *Estate of Braswell v. People's Credit Union*, 602 A.2d 510, 515 (R.I. 1992) (holding comparative negligence principles inapplicable in action for negligent misrepresentation against credit union). Further, issues of sovereign immunity aside, had Otero sued the City, the City would have been entitled to indemnification from Marquart for any damages awarded to Otero against it because of Marquart's fraudulent permit application. *See Smith v. Herco, Inc.*, 900 S.W.2d 852, 863 (Tex. Ct. App. 1995) (upholding indemnification in favor of one of two joint tortfeasors because one had committed fraud against the other).

{18} *Conclusion.* The Court of Appeals correctly concluded that the City would be entitled to indemnification from Marquart for any damages the City was liable to pay Otero. The basis for this right of indemnification, however, is Marquart's fraudulent permit application, which also prevents him from attributing fault to the City under principles adopted in *Bartlett*. Jordan does stand in the shoes of its independent contractor, Marquart, for purposes of determining liability to Otero; however, Jordan does not stand in Marquart's shoes for purposes of determining liability to the City for indemnification as the Court of Appeals concluded. Jordan has a landowner's duty that imposes vicarious liability to invitees injured by an unsafe condition on the premises. Jordan has no duty to the City. Any complaint the City (as a concurrent tortfeasor) might have for indemnification by reason of Marquart's fraud would be between the City and Marquart, not the City and Jordan. We therefore overrule the Court of Appeals' holding that Jordan would have been liable to the City for indemnification. We nevertheless affirm the trial court because comparative fault instructions were not appropriate under the facts of this case; as a matter of policy Marquart cannot reduce his liability to Otero based upon his fraudulent permit application, and as a matter of policy Jordan is vicariously responsible to Otero for Marquart's liability.

{19} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
Chief Justice

PAMELA B. MINZNER,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1996-NMSC-049

Filing Date: August 21, 1996

Docket No. 23,259

SONIA MADRID,

Plaintiff-Respondent,

vs.

LINCOLN COUNTY MEDICAL CENTER, a New Mexico corporation,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Gerard W. Thomson, District Judge

Released for Publication September 6, 1996. As Corrected November 12, 1996.

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OPINION

RANSOM, Justice.

{1} Sonia Madrid sued the Lincoln County Medical Center for negligent infliction of emotional distress arising from her fear that she might have contracted acquired immunodeficiency syndrome (AIDS) when exposed to bloody fluids while transporting medical samples from the Medical Center to laboratories in Albuquerque. She sought damages for medical and other expenses, lost earnings, and for pain and suffering. The Medical Center moved for summary judgment, arguing that as a matter of law Madrid could not recover because she could not prove the human immunodeficiency virus (HIV) was present in the medical sample that leaked. The trial court adopted the Medical Center's position that the presence of HIV must be proved and entered summary judgment. Madrid appealed.

{2} The Court of Appeals reversed the summary judgment, holding that, in light of current New Mexico tort law, proof of actual HIV exposure is not required in a suit seeking emotional-distress damages resulting from a negligently caused fear of contracting AIDS through a medically sound channel of transmission. *Madrid v. Lincoln County Medical Ctr.*, 121 N.M. 133, 138, 909 P.2d 14, 19 (Ct. App.), *cert. granted*, 120 N.M. 828, 907 P.2d 1009 (1995). We granted the Medical Center's petition for a writ of certiorari because of our concern over apparent misinterpretation of current New Mexico tort law by the Court of Appeals.

{3} We review the New Mexico tort law cited by the Court of Appeals, and—given the current medical impossibility of confirming or ruling out HIV infection for six months to a year after a possible exposure and the foreseeability to parties in the healthcare industry that in today's climate of heightened anxiety over AIDS a person exposed to blood or other bodily fluids will suffer emotional distress which cannot readily be alleviated—we affirm that Court's rejection of an actual-exposure test.

{4} *Facts and proceedings.* In September 1992 Sonia Madrid was transporting medical samples from the Medical Center to laboratories in Albuquerque. During transport one of the sample containers leaked, and Madrid was splashed with

bloody fluid. Madrid claims that at the time of this incident she had unhealed paper cuts on her hands which came in contact with the bloody fluid and that any or all of two to four containers may have been the source of the leakage. Based on widespread publicity about the AIDS virus, Madrid knew that it was possible to contract AIDS by contact with blood or other bodily fluids through unhealed cuts. She had been advised by healthcare providers whom she had consulted following her contact with the bloody fluid that she should be tested for HIV several times over a six-month to one-year period.

{5} Madrid learned approximately two months after she had come in contact with the bloody fluid that a patient from whom one of the samples had come had tested HIV-negative.[1] However, because she did not discover that only one specimen container had leaked until an affidavit was filed by the Medical Center in July 1994, and because she had been instructed that under the current medical state of the art HIV could go undetected for at least six months, Madrid did not accept the test results as conclusively ruling out infection.

{6} In its motion for summary judgment the Medical Center urged the district court to adopt the rule accepted by a majority of courts and conclude that actual exposure to HIV is a threshold requirement in any claim for emotional-distress damages arising out of a fear of having contracted AIDS. Madrid countered by arguing that summary judgment was improper as long as a jury could determine that her fear of having contracted AIDS was reasonable. The district court found it determinative that the bloody fluid splashed on Madrid had not been proved to contain HIV, concluding that "based upon the record . . . and the state of the law that exists in other jurisdictions . . . the motion for summary judgment has merit."

{7} The Court of Appeals reversed the entry of summary judgment. Although the Court noted that "the actual exposure test has been adopted by the majority of courts," it concluded that "in the overall context of New Mexico tort law" threshold proof of the presence of HIV in the disease-transmitting agent would not be required. *Madrid*, 121 N.M. at 138, 909 P.2d at 19. In reaching this conclusion, the Court first reasoned that New Mexico "no longer requires a plaintiff to suffer a physical impact in order to recover emotional distress damages." *Madrid*, 121 N.M. at 138, 909 P.2d at 19 (citing *Folz v. State*, 110 N.M. 457, 471, 797 P.2d 246, 260 (1990)). The Court then reasoned that "emotional distress damages are recoverable, even if they are the only damages alleged, as long as the plaintiff proves that they are 'severe.'" *Id.* at 139, 909 P.2d at 20 (citing *Flores v. Baca*, 117 N.M. 306, 313, 871 P.2d 962, 969 (1994)). Finally, the Court concluded that the Medical Center owes a duty to persons like Madrid to use ordinary care "to package the medical samples in such a way as to prevent leakage during transport." *Id.* at 141, 909 P.2d at 22 (citing *Torres v. State*, 119 N.M. 609, 615, 894 P.2d 386, 392 (1995), for proposition that New Mexico now rejects "zone of danger rule" for determining duty).

{8} *New Mexico precedent is not determinative of this case.* While we first wish to emphasize that this is not a bystander-liability case, the Court of Appeals' reliance on bystander cases and their related rationale does require us to review such cases in order to clarify apparent confusion in terminology and in policies applicable to recovery for emotional distress. In *Ramirez v. Armstrong* we considered "whether a cause of action exists in New Mexico for negligent infliction of emotional distress to bystanders." 100 N.M. 538, 539, 673 P.2d 822, 823 (1983). There, members of the Santana Ramirez family sued the driver of an automobile for emotional distress they suffered in either witnessing or being told of Santana's death. Santana was killed when he was struck by an automobile while crossing a Gallup

[1] An employee of the laboratory to which Madrid was transporting the sample containers examined the shipment when it arrived in Albuquerque. He determined that a single container—holding a placenta—had leaked fluid. On October 9, 1992, a technician at the Medical Center arranged for the patient who was the source of the placenta to be tested for HIV. The test results were reported to the Medical Center on October 13, 1992, and they were negative.

street. Two of his children and a minor child living with him witnessed his death. A third child, who was not present at the scene of the accident, contended that she suffered severe emotional distress upon being told of her father's death.

{9} In deciding whether to recognize a cause of action for negligent infliction of emotional distress to bystanders, we noted that three rules had been adopted in other jurisdictions "in an attempt to define the liability for negligence to a bystander: the 'impact rule,' the 'zone of danger rule,' and the '*Dillon* rule.'" *Id.* at 540, 673 P.2d at 824. Under the *Dillon* rule, a plaintiff who suffers shock or emotional distress from the contemporaneous observation of an accident involving a close family member is entitled to damages. *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 920-21, 69 Cal. Rptr. 72 (Cal. 1968) (in banc). In *Ramirez* we rejected the prerequisite of an impact suffered by the plaintiff or the plaintiff's presence in the zone of danger, and we adopted the *Dillon* rule with the modification that, in order to ensure the genuineness of emotional distress claims, the plaintiff would have to show some "physical manifestation of, or physical injury . . . resulting from the emotional injury." 100 N.M. at 542, 673 P.2d at 826.

{10} In *Folz* we took the "opportunity to reexamine the tort of negligent infliction of emotional distress articulated in *Ramirez*." 110 N.M. at 460, 797 P.2d at 249. The precise issue we considered was "whether, to recover for severe shock from witnessing the death of her husband and fatal injuries to her son, an injured passenger in one of the automobiles was required to prove by expert medical testimony, or otherwise, a *physical manifestation* of her emotional injury." *Id.* (emphasis added). Ultimately, we concluded that

> to establish the genuineness of a claim for negligent infliction of emotional distress, it is sufficient to allege and prove that (1) the plaintiff and the victim enjoyed a marital or intimate family relationship, (2) the plaintiff suffered severe shock from the contemporaneous sensory perception of the accident, and (3) the accident caused physical injury or death to the victim.

Folz, 110 N.M. at 471, 797 P.2d at 260.

{11} Thus, the only change in the rule permitting bystander recovery for emotional distress following our decision in *Folz* was that the genuineness of a plaintiff's claim would no longer be measured by proof of some *subsequent* physical manifestation of an emotional trauma suffered as a result of witnessing the death of or great bodily injury to a close family member. Even in the interim between our decisions in *Ramirez* and *Folz,* no decision by this Court ever required that a bystander seeking damages for emotional distress suffer some physical *impact* in the death or injury-producing accident giving rise to his or her emotional-distress claims. Nor has this Court ever resolved whether, for example, a person involved in a car accident who suffers some physical injury may recover damages for the emotional distress associated with witnessing the death of or great bodily injury to another in that accident.

{12} What we did say in *Folz* was

> The irony of this case is that Folz satisfies the impact rule allowing recovery by a nonfamily member for emotional distress, i.e., the most narrow standard upon which to base a claim for negligent infliction of emotional distress. Unlike the children in *Ramirez*, who were pure bystanders, Folz was a direct victim of the negligence of the defendants. "As such, the emotional . . . injuries which have arisen as a proximate result of the defendant[s'] tortious act are compensable under the traditional rule for recovery. The tortfeasor takes his victim as he finds him, the effect of his tortious act upon the person being the measure of damages."

110 N.M. at 471, 797 P.2d at 260 (quoting *Binns v. Fredendall*, 32 Ohio St. 3d 244, 513 N.E.2d 278, 280 (Ohio 1987)). Although the Medical Center does not argue against recognition of claims for

emotional distress from fear of contracting AIDS by "impact", from a disease-transmitting agent to which a victim is negligently exposed through a medically sound channel of transmission, it does argue that New Mexico should limit recovery by requiring threshold proof of "actual exposure." It is the invasive "impact" of the bloody fluid that gives rise to Madrid's claim for damages under the general rule that emotional injuries suffered by the victim of tortious impact are recoverable. *See Marchica v. Long Island R.R. Co.*, 31 F.3d 1197, 1204 (2d Cir. 1994) (holding that because plaintiff "suffered an actual physical injury [when he was stuck by a discarded hypodermic needle], the rule governing fear of future disease is inapposite and the traditional negligent infliction of emotional distress analysis applies"). We therefore analyze this case as a request by the Medical Center to impose an actual-HIV-exposure test for recovery of emotional-distress damages in the face of negligence causing an invasive contact with AIDS-related contaminants.

{13} Consequently, while cases involving negligent infliction of emotional distress without "impact" are not relevant to the controlling issue, we note further that, contrary to the Court of Appeals suggestion in *Madrid*, this Court's decision in *Flores v. Baca* does not hold that outside of the bystander context there exists *in tort* a cause of action for negligent infliction of severe emotional distress. In *Flores* we decided whether damages for mental anguish caused by the breach of a funeral *contract* were within the contemplation of the parties. 117 N.M. at 311, 871 P.2d at 966. We expressly noted that "there exists in New Mexico no recognized cause of action for negligent infliction of emotional distress except for bystander liability." *Id.* at 310, 871 P.2d at 965. Further, we expressly declined to decide outside of bystander liability "whether to recognize a cause of action in tort for . . . negligent infliction of mental distress to family members." *Id.*

{14} Finally, the Court of Appeals' suggestion that the Medical Center owed a duty of reasonable care to Madrid because this Court abandoned the zone-of-danger rule in *Torres* is also misplaced. In *Torres* we held that police officers, charged by statute with investigating crimes, owe to persons of the public foreseeably at risk of injury by a party reported to be in violation of the criminal law "a duty to exercise the care ordinarily exercised by prudent and qualified officers." 119 N.M. at 615, 894 P.2d at 392. In reaching this conclusion, we considered and rejected the argument that the duty to investigate was owed only to persons within the state's political or geographical boundaries.

{15} Apparently our statement that "the statutory duty to investigate logically must extend to benefit or protect all foreseeable victims, *including those persons outside the state,*" *id.* (emphasis added), lies at the heart of the Court of Appeals' conclusion that "we no longer follow the 'zone of danger rule' for determining duty," *Madrid*, 121 N.M. at 138, 909 P.2d at 19. Nowhere in *Torres*, however, did we use the phrase "zone of danger rule" to distinguish the class of foreseeable plaintiffs residing within New Mexico from the class of foreseeable plaintiffs residing outside of New Mexico. Nor can the phrase properly be used to distinguish these classes of persons.

{16} Other than the Court of Appeals' opinion in *Madrid*, the phrase "zone of danger rule" appears in only two New Mexico opinions—*Ramirez* and *Folz.* In *Ramirez*, when adopting a cause of action for bystander recovery, we noted that those jurisdictions adopting the zone-of-danger rule take the position that bystanders who are not in any danger of suffering the same physical impact they witnessed the victim suffer cannot recover emotional distress damages because the elements of foreseeability of harm and duty of care are absent. 100 N.M. at 541, 673 P.2d at 825. In *Folz* we noted that the zone-of-danger rule was one of three rules "utilized by other jurisdictions to *circumscribe the liability* for negligent infliction of emotional distress to a bystander." 110 N.M. at 469, 797 P.2d at 258 (emphasis added). Describing this rule, we stated that it "would allow recovery if the plaintiff personally was within the zone of danger of physical

impact," explaining that a court applying this rule had "held that a plaintiff may recover damages for injuries caused by witnessing serious injury or death of an immediate family member, when the defendant also negligently exposed the plaintiff to the same risk of bodily injury or death." *Id.* (citing *Bovsun v. Sanperi,* 61 N.Y.2d 219, 461 N.E.2d 843, 848, 473 N.Y.S.2d 357 (N.Y. 1984)).

{17} The phrase "zone of danger," when not used to describe a "rule," has appeared in seven New Mexico decisions. In both *Stambaugh v. Hayes*, 44 N.M. 443, 103 P.2d 640 (1940), and *Wilson v. Wylie*, 86 N.M. 9, 518 P.2d 1213, *cert. denied*, 86 N.M. 5, 518 P.2d 1209 (1974), the Court considered a case in which a minor bicyclist was struck and killed by a motorist. In *Stambaugh*, this Court analyzed whether it was error for the trial court to have refused the defendant's request to instruct the jury that he had no legal duty to anticipate or expect that there was a bicycle on the other side of a pickup truck in light of his contention that the decedent's bicycle was hidden from view by that truck. As grounds for the instruction, the defendant relied upon an Iowa case to the effect that "a driver of a motor vehicle is not legally bound to anticipate or know the intention or purpose of a person who, being in a zone of safety, suddenly and without warning enters a zone of danger and is struck by such vehicle." *Stambaugh*, 44 N.M. at 447, 103 P.2d at 642 (citing *Klink v. Bany*, 207 Iowa 1241, 224 N.W. 540 (Iowa 1929)). This Court held that, as a matter of law, "A driver of an automobile on a busy street must anticipate that bicycles may follow automobiles, as the latter may follow large trucks and thus be hidden from view." *Id.* There, the terms "zone of safety" and "zone of danger" were used not in relation to the foreseeability of intention or purpose, but rather as a description of the convergent courses traveled by the vehicles. When used again in *Wilson,* 86 N.M. at 13, 518 P.2d at 1217, the phrase "zone of danger" referred to the intersection in which a collision occurred. In neither *Stambaugh* nor *Wilson* was the term "zone of danger" used in relation to a "rule".

{18} In *Calkins v. Cox Estates*, 110 N.M. 59, 792 P.2d 36 (1990), the phrase "zone of danger" was specifically used in relation to foreseeability: "In determining duty, it must be determined that the injured party was a foreseeable plaintiff—that he was within the zone of danger created by respondent's actions. . . ." *Id.* at 61, 792 P.2d at 38; *see also Romero v. Byers*, 117 N.M. 422, 426, 872 P.2d 840, 844 (1994) (quoting *Calkins*); *Solon v. WEK Drilling Co*., 113 N.M. 566, 569, 829 P.2d 645, 648 (1992) (same); *Narney v. Daniels*, 115 N.M. 41, 51, 846 P.2d 347, 357 (same), *cert. denied*, 114 N.M. 720, 845 P.2d 814 (1993); *Johnson v. Sears, Roebuck & Co.*, 113 N.M. 736, 737, 832 P.2d 797, 798 (Ct. App.) (same), *cert. denied*, 113 N.M. 744, 832 P.2d 1223 (1992). In *Calkins* Justice Baca was not using "zone of danger" as a description of persons having some physical proximity to the tortfeasor or the accident; rather he was using the phrase as a description of the class of persons that a reasonable person would conclude based on the circumstances was subject to a risk by the defendant's acts or omissions. We did not abrogate this test of foreseeability in *Torres*; indeed, we reaffirmed it.

{19} "Impact" or "wound" and "zone of danger or risk," as terminology and policy relative to foreseeability of emotional-distress injury from careless acts or omissions, are well stated in *Williamson v. Waldman*, 291 N.J. Super. 600, 677 A.2d 1179, 1180-81 (N.J. Super. Ct. App. Div. 1996):

> The court [in *De Milio v. Schrager*, 285 N.J. Super. 183, 666 A.2d 627 (N.J. Super. Ct. Law Div. 1995)] stressed the approach in 2 Fowler V. Harper & Fleming James, Jr., *The Law of Torts*, § 18.4 at 1036 (1956), which was at the heart of the governing principle of *Caputzal*[*v. The Lindsay Co.*, 48 N.J. 69, 222 A.2d 513 (N.J. 1966)]: "in the case of injury or sickness brought on by emotional disturbance, liability should depend on the defendant's foreseeing fright or shock severe enough to cause substantial injury in a person normally constituted, thus then bringing the plaintiff within the 'zone of risk.'" We take

> the *De Milio* analysis to embody the idea that where a defendant's negligent act or omission provides an occasion from which a reasonable apprehension of contracting a deadly disease may eventuate, and where the quality of the conduct is such to create a presumption of exposure, the resulting claim for damages by reason of emotional injury may not be dismissed on summary judgment.
>
> It cannot validly be said, as a matter of law, in the light of common knowledge, that a person who receives a puncture wound from medical waste reacts unreasonably in suffering serious psychic injury from contemplating the possibility of developing AIDS, even if only for some period of time, until it is no longer reasonable, following a series of negative tests, to apprehend that result. Indeed, one need not have actually acquired the HIV virus to be so affected by such a fear for a period, especially since some time must pass before an accurate test can be administered. We know of no reason, given existing circumstances and the realities of the times, as well as the policies that underlie tort law doctrine in this state, to require as a prerequisite to recovery for infliction of emotional distress that the plaintiff first establish actual exposure to the feared disease. . . .
>
> . . . .
>
> . . . The idea is that courts ought not to be unduly reluctant to reach results consonant with the reasonable reactions of real people as long as basic principles of tort law are preserved, including those that preclude the creation of duties that reasonably thoughtful defendants would not foresee.

{20} *The cause of action for emotional-distress damages based upon a fear of contracting AIDS.* As we pointed out earlier, the Medical Center does not argue against recognition of claims for emotional distress arising out of a fear of contracting AIDS, but it does argue that New Mexico should limit recovery by requiring threshold proof of "actual exposure." This would compel claimants to prove both that HIV was present in the alleged disease-transmitting agent (blood, semen, vaginal secretions, etc.) and that a medically sound channel of transmission existed. The Medical Center cautions that recognizing a cause of action for all genuine emotional injuries "could impose heavy and disproportionate financial burdens upon defendants." Madrid counters that the Court of Appeals' decision requiring a sound channel of transmission, such as unhealed paper cuts, sufficiently limits liability and that a further requirement of proof of the presence of HIV would constitute an unnecessary impediment to genuine claims.

{21} —*Contentions of the Medical Center.* The Medical Center cites a number of policy considerations that it claims support adoption of the majority actual-exposure rule. First, it notes that a potentially large class of plaintiffs with claims not limited by the requirement of actual exposure to HIV will substantially increase liability insurance premiums and may cause some individuals and businesses to forego insurance altogether. Second, the Medical Center contends that the Court of Appeals' decision here will have an especially detrimental impact in the health care field by increasing the cost of malpractice insurance and, in some instances, severely limiting the availability of health care. Third, the Medical Center cautions that without recognition of the additional threshold proof requirement that HIV be present "defendants and their insurers will be unable to ensure adequate compensation for those victims who actually develop [AIDS]." Fourth and finally, the Medical Center contends that a threshold requirement is necessary to produce consistent results and encourage early settlement.

{22} As support for these contentions, the Medical Center relies in part on *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795, 812 (Cal. 1993) (in bank). There, the California Supreme Court held that plaintiffs seeking to recover emotional-distress damages for fear of contracting cancer must establish as a medical

probability that "the feared cancer will develop in the future due to the toxic exposure," 863 P.2d at 800, and rejected a rule that would have required a plaintiff to demonstrate only that his or her fear of contracting cancer was reasonable, 863 P.2d at 810. Although the court acknowledged that it "would be very hard pressed to find that, as a matter of law, a plaintiff faced with a 20 percent or 30 percent chance of developing cancer cannot genuinely, seriously and reasonably fear the prospect of cancer," 863 P.2d at 811, for policy reasons it held that such fears were not legally compensable. Of particular importance to the court was the fact that "all of us are potential fear of cancer plaintiffs" because "all of us are exposed to carcinogens every day." 863 P.2d at 811-12.

{23} Relying on the California Supreme Court's decision in *Potter*, a California Court of Appeal held that a plaintiff cannot recover emotional-distress damages for a fear of contracting AIDS unless he or she can demonstrate two things:

> exposure to HIV or AIDS as a result of defendant's negligent breach of a duty owed to the plaintiff, and [his or her] fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not he or she will become HIV seropositive and develop AIDS due to the exposure.

Kerins v. Hartley, 27 Cal. App. 4th 1062, 33 Cal. Rptr. 2d 172, 179. The *Kerins* court reasoned that "all of the policy concerns expressed in *Potter* apply with equal force in the fear of AIDS context." 33 Cal. Rptr. 2d at 178. Specifically, the court cited the "risk of compromising the availability and affordability of medical, dental and malpractice insurance" and speculated that "the coffers of defendants and their insurers would risk being emptied to pay for the emotional suffering of the many plaintiffs uninfected by exposure to HIV or AIDS, possibly leaving inadequate compensation for plaintiffs to whom the fatal AIDS virus was actually transmitted." 33 Cal. Rptr. 2d at 179.

{24} The Medical Center further points us to the Real Estate Disclosure Act, NMSA 1978, §§ 47-13-1 to -3 (Repl. Pamp. 1995), as an expression of New Mexico public policy supporting our adoption of a two-pronged "actual exposure" requirement. Under Section 47-13-2(C) of that Act

> [a] seller, lessor or landlord of real property, including a participant in an exchange of real property and any agent involved in such a transaction, shall not be liable for failure to disclose and shall not have a duty to disclose . . . the fact or suspicion that the real property is or has been:
>
> . . . .
>
> C. owned or occupied by a person who was exposed to, infected with or suspected to be infected with the human immunodeficiency virus or diagnosed to be suffering from acquired immune deficiency syndrome or any other disease that has been determined by medical evidence as highly unlikely to be transmittable to others through the occupancy of improvements to real property. . . .

The Medical Center argues that "the statute reflects a policy that fear of AIDS that is not rationally grounded in medical fact should not be given effect as a basis for legal relief." We agree; however, this does not dictate that we adopt a requirement that HIV be present in the disease-transmitting agent.

{25} The Medical Center contends that "[a] fear of AIDS stemming from exposure to a substance that does not contain the AIDS virus has no more rational medical basis than does a fear of occupying living quarters formerly occupied by an AIDS patient." While this is true in hindsight, after confirming the absence of HIV infection, we cannot say as a matter of law that at the time a person is negligently exposed to a disease-transmitting agent (blood) through a medically sound channel of transmission (open wounds) a fear of contracting AIDS is irrational. Living

quarters, on the other hand, are not known to be a disease-transmitting agent.[2]

{26} *Response of Madrid.* Madrid disagrees that threshold proof of the presence of HIV in the alleged disease-transmitting agent is necessary to address the policy concerns cited by the Medical Center and contends that recognition of emotional-distress claims arising out of a fear of contracting AIDS will not produce a flood of litigation. She argues that sufficient limitations on prospective claims would accrue from the requirement of a medically sound channel of transmission and from the fact that there is a limited or finite period of time during which a reasonable person might become legitimately fearful (without actual HIV infection). While the policy considerations cited by *Potter* in the context of fear of cancer are not entirely inapplicable when considering fear of AIDS, they are not as compelling. For example, it is not true that each of us is exposed to the HIV virus every day. We also note that applying the rule we adopt today to the undisputed facts in *Kerins* we would dismiss that plaintiff's suit. The *Kerins* court noted that "the detailed operative report of the surgery does not indicate that any cuts were sustained by [the doctor]," 33 Cal. Rptr. 2d at 174, and thus there was no medically sound channel of transmission. Under the current state of medical knowledge, the absence of actual HIV infection will be known within six months after an exposure incident. Therefore, Madrid persuasively argues, as compared to the indefinite period in either *Potter* or *Kerins,* the period during which emotional distress may arise without actual HIV exposure will be much shorter. Madrid also argues that with the channel-of-transmission test making the size of the class of potential plaintiffs much smaller, there is little likelihood of disaster in the recognition of a cause of action for genuine cases of emotional distress without requiring proof that HIV was present.

{27} Madrid further notes that not all cases in which a channel of transmission exists will yield a case for compensation. Under the Court of Appeals opinion, a plaintiff seeking damages still must prove all the elements of an ordinary negligence case. Recognition of a cause of action for emotional-distress damages is not therefore a matter of strict liability for persons dealing with potential disease-transmitting agents such as blood. Only those persons whose conduct departs from the standard of reasonable care and results in an exposure through a medically sound channel of transmission will be held liable.

{28} *Policy considerations.* The requirement of negligence will reduce the incidence of claims; the recognition of duty will reduce the incidence of negligence. As we observed in *Trujillo v. City of Albuquerque*:

> Our fault system of recovery, while by no means indispensable to our society in an abstract sense, today serves the important social functions of redistributing the economic burden of loss from the injured individuals on whom it originally fell, deterring conduct that society regards as unreasonable or immoral, and providing a vehicle by which injured victims may obtain some degree of compensation and satisfaction for wrongs committed against them and by which society may give voice and form to its condemnation of the wrongdoer.

110 N.M. 621, 624, 798 P.2d 571, 574 (1990) (footnote omitted).

[2] Perhaps more relevant is the 1993 statute that allows sexually-transmitted-disease testing of offenders convicted of certain crimes. NMSA 1978, § 24-1-9.1(A) (Repl. Pamp. 1994). Later, during the 1996 session, the legislature passed "an act . . . requiring a person formally charged for allegedly committing certain criminal offenses to undergo tests to identify sexually transmitted diseases *and the human immunodeficiency virus*." 1996 N.M. Laws ch. 80 (emphasis added). Under this Act "[a] test designed to identify any sexually transmitted disease may be performed on a person, upon the filing of a complaint, information or an indictment alleging that the person committed a state criminal [sex] offense." NMSA 1978, § 24-1-9.2(A) (Cum. Supp. 1996) (effective July 1, 1996). By requiring testing for sexually transmitted diseases, including HIV, under circumstances in which a channel of transmission exists, the legislature specifically has recognized the fears to be expected in persons potentially exposed to sexually transmitted diseases. This public policy supports the recognition of a duty on the part of individuals and entities such as the Medical Center to avoid negligent conduct that causes fear of HIV infection.

{29} Of the functions of the tort system cited in *Trujillo*, the goal of deterring unreasonable conduct is of primary relevance here. In light of the deadly nature of the AIDS virus, reasonable care should be encouraged, for example, in the handling of potential disease-transmitting agents such as blood products. The potential for liability encourages those engaged in conduct that may result in an exposure incident to use reasonable care. Further, the imposition of liability for unreasonable conduct deters others from repeating such conduct. To the extent that such a system of incentives and disincentives serves to decrease the number of exposure incidents, recognition of a cause of action for negligent infliction of emotional distress serves the laudable goal of promoting public health.

{30} Essentially, the Medical Center invites us to conclude that recognition of a cause of action for emotional-distress damages without requiring proof that HIV was present in the alleged disease-transmitting agent will so dramatically increase costs that companies will be unable to afford insurance, will cease providing health care services, or will go bankrupt paying for emotional-distress claims. Such conclusions are speculative at best. The Medical Center does not cite any evidence of an insurance crisis in those jurisdictions that have rejected the actual exposure requirement that it advocates. While it may sound reasonable that recognition of a cause of action for damages will increase insurance premiums, without appropriate data or reference to actual experience, determining the precise extent of such an increase, if in fact there would be one, is purely a matter of conjecture. Because important policy goals are furthered by recognizing a cause of action for emotional distress from an invasive impact caused by negligence, we will not rely on unsubstantiated predictions of an insurance crisis as grounds for defeating such a cause of action.

{31} *Conclusion.* Sound public policy supports recognition of a cause of action for emotional-distress damages in favor of one who fears that the negligence of another has caused him or her to contract HIV through a medically sound channel of transmission. Persons whose conduct may expose another to the HIV virus should be encouraged to use reasonable care. Madrid presented evidence that she was exposed to bloody fluids through unhealed paper cuts on her hands. It is also unclear whether or when she may have received information about how may sample containers may have leaked and the HIV status of the samples in those containers. On this record summary judgment was therefore inappropriate. We affirm the Court of Appeals and remand this matter to the trial court for further proceedings consistent with this opinion.

{32} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
Chief Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1996-NMSC-051

Filing Date: September 9, 1996

Docket No. 21,259

BOGLE FARMS, INC., et al.,

Plaintiffs-Appellees,

vs.

JIM BACA, Commissioner of Public Lands for the State of New Mexico,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Steve Herrera, District Judge

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OPINION

RANSOM, Justice.

{1} The Commissioner of Public Lands appeals from a partial summary judgment in favor of twenty-six plaintiffs who seek a declaratory judgment that their installment contracts for the purchase of state trust lands do not reserve sand and gravel to the state. The trial court ruled that the Commissioner is collaterally estopped from arguing that the general mineral reservations included within the contracts effectively reserved sand and gravel rights to the state. The court certified this as a proper case for interlocutory appeal under NMSA 1978, Section 39-3-4(A) (Repl. Pamp. 1991). We accepted jurisdiction over the appeal pursuant to SCRA 1986, 12-203 (Repl. Pamp. 1992). The collateral estoppel issue arises from *Roe v. State ex rel. State Highway Department*, 103 N.M. 517, 521, 710 P.2d 84, 88 (1985), *cert. denied*, 476 U.S. 1141, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986), in which this Court ruled that because a purchase contract and a patent did not specifically reserve sand and gravel to the state, title to these items passed to the purchaser along with the surface estate.

{2} In a prior opinion filed in this case on August 15, 1995, a majority of this Court concluded that *Roe* does not collaterally estop the Commissioner from litigating whether sand and gravel are minerals within the meaning of the general mineral reservations in question. On motion for rehearing, Plaintiffs urged us to conclude that *Roe* established a rule of property and to affirm the trial court under principles of stare decisis, notwithstanding the inapplicability of the

collateral-estoppel doctrine. We withdrew our prior opinion and directed the Commissioner to respond to Plantiffs' rule-of-property argument. Hinkle, Cox, Eaton, Coffield and Hensley, P.L.L.C., filed an amicus curiae brief on behalf of New Mexico title attorneys. The case was reargued before the full Court. We reverse and remand with instructions.

{3} *Facts and proceedings.* Plaintiffs are original purchasers of or successors in interest to land sold by the Commissioner of Public Lands pursuant to installment contracts executed in the early 1960s. Each original purchaser, prior to entering into an installment contract, signed under oath an application for purchase which recited that "this application is not made for the purpose of obtaining title to mineral, including but not limited to . . . sand and gravel . . . but with the sole object of obtaining title to the surface of the land."

{4} Several of the plaintiffs have fulfilled their contractual payment obligations and received patents from the Commissioner transferring legal title. In these patents the Commissioner included a specific reservation of sand and gravel rights. One of the plaintiffs, Joe Helm, complained that the purchase contract had not included a specific reservation of sand and gravel and requested that the Commissioner delete from his patent all specific reservations that had not been expressly stated in the purchase contract. The Commissioner refused.

{5} Plaintiffs brought this action against the Commissioner, claiming that sand and gravel were not within the general mineral reservation of their purchase contracts and seeking a declaratory judgment that their patents should not include a specific reservation of sand and gravel. Those plaintiffs who had fulfilled their payment obligations and received patents containing the specific reservation asked the trial court to order the Commissioner to issue new patents that do not contain this reservation. Those plaintiffs who were still making payments asked the court to order the Commissioner, upon receipt of full payment, to issue patents not containing the specific reservation.

{6} Plaintiffs moved for partial summary judgment, asking the trial court to determine that the general mineral reservation in the purchase contract did not include sand and gravel. Plaintiffs based their request on the doctrine of equitable conversion, arguing that the purchase contracts gave them equitable title to all property interests not specifically reserved, and thus, upon full execution of the purchase contract, each was entitled to a patent conveying legal title to such property interests. Plaintiffs alternatively based their request on the doctrine of offensive collateral estoppel, contending that the Commissioner had a full and fair opportunity to argue the mineral reservation issue in *Roe*.

{7} The trial court entered partial summary judgment, determining that the Commissioner was "collaterally estopped under [*Roe*] from litigating whether sand and gravel are minerals, as that term is used in purchase contracts for state lands," but also determining that the Commissioner was free to pursue all issues regarding his counterclaims and affirmative defenses.[1] In its order the court expressly stated that the collateral estoppel issue involved "a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this decision or order may materially advance the ultimate termination of the litigation." This Court has addressed many times the question whether sand and gravel fall within a general mineral reservation in a state land purchase contract. Our opinions have been inconsistent, leaving room for debate on this issue. We consequently agreed with the trial court's assessment and granted the Commissioner's application for interlocutory appeal of the collateral estoppel issue.

[1] In his answer to the complaint the Commissioner asserted counterclaims for rescission based on mutual mistake, fraud, lack of capacity, and failure of consideration, and for reformation and damages. He also asserted the affirmative defenses of estoppel, acquiescence, laches, capacity, want of consideration, waiver, merger, and acceptance.

{8} *Partial summary judgment as an effective case-management tool.* The Commissioner argues that partial summary judgment was improper because the trial court did not consider his counterclaims and affirmative defenses; but, here, partial summary judgment was an effective case-management tool because it allowed the court to define the course of litigation. A primary issue in this case is whether this Court's holding in *Roe* is entitled to collateral estoppel effect. If *Roe* is entitled to collateral estoppel effect, the Commissioner cannot rely on evidence outside the purchase contract's general mineral reservation to resolve a purported ambiguity in favor of a reservation of sand and gravel. "For the State to reserve sand and gravel, a provision so specifying must be included in [the purchase contract]." *Roe*, 103 N.M. at 521, 710 P.2d at 88. Alternatively, if there is no collateral estoppel, the Commissioner may litigate the meaning of the term "mineral" in each individual contract, and, if he were to prevail, the trial court would not reach the Commissioner's counterclaims or affirmative defenses. Under either scenario, substantial litigation may be avoided through the entry of partial summary judgment.

{9} *History of sand and gravel litigation in New Mexico.* When New Mexico attained statehood, the federal government transferred to the state government control over vast areas of land. This land was to be held in trust for schools and other public institutions. *See* Act of June 20, 1910, ch. 310, § 10, 36 Stat. 557, 563 (Enabling Act). The state has authority to dispose of this trust land "in whole or in part" as long as it uses the value received therefor in a manner consistent with the Enabling Act. Operating under this authority, the Commissioner entered into several installment purchase contracts, some of which are the subject of this dispute.

{10} By the time the Commissioner entered into the disputed contracts, the New Mexico State Land Office had promulgated rules governing the sale of state trust lands. Under these rules the state is required to reserve rights to "all minerals of whatsoever kind, including oil, gas, *commercial sand, gravel* and caliche." General Information & Rules & Regulations: Rules Relating to State Land Sales, N.M. State Land Office, Rule 2 (Jan. 22, 1965) (emphasis added). The Commissioner contends that the definition of "mineral" in this rule reflects the law in effect at the time the disputed contracts were executed and that this law governs the meaning of the general mineral reservation, relying in part on *Board of County Commissioners v. Good*, 44 N.M. 495, 105 P.2d 470 (1940). In *Good* this Court considered the appropriate measure of damages in an inverse condemnation proceeding when the state has entered land and removed caliche. In determining that the trial court should have received and considered evidence of the value of the caliche taken based upon all uses to which it could be put, we stated that sand, gravel, ordinary clay, and caliche fall within the term "mineral." *Id.* at 498, 105 P.2d at 472.

{11} The Commissioner also cites three Attorney General opinions in which the Attorney General's Office stated its position that sand and gravel were "minerals" within the common meaning of that term. *See* N.M. Att'y Gen. Op. 61-12 (1961) (stating that sand and gravel were minerals as that term was used in a general reservation clause contained in a "Grant of Material Site" issued to state highway department); N.M. Att'y Gen. Op. 5568 (1952) (stating that the State Inspector of Mines has jurisdiction over sand and gravel pits because sand and gravel are minerals and the inspector has jurisdiction over all mineral mining); N.M. Att'y Gen. Op. 4816 (1945) (noting that a majority of cases had determined that sand and gravel are minerals and opining that sand and gravel were included in general mineral reservations found in state land purchase contracts). However, Attorney General opinions do not bind this Court, and in one of the opinions cited by the Commissioner—No. 4816—the Attorney General's Office recommended filing a declaratory judgment action to definitively resolve whether sand and gravel were minerals.

{12} This Court specifically addressed whether the term "mineral" as used in a reservation included sand and gravel for the first time in *State ex rel. State Highway Commission v. Trujillo*,

82 N.M. 694, 487 P.2d 122 (1971), *overruled by Champlin Petroleum Co. v. Lyman*, 103 N.M. 407, 410, 708 P.2d 319, 322 (1985). Basing our holding on a review of the Federal Stock-Raising Homestead Act, 43 U.S.C. §§ 291-302 (1982) (repealed in part in 1976), we concluded that the federal government did not intend to include sand and gravel within the term "mineral" as it was used in a federal patent. *Trujillo*, 82 N.M. at 696-97, 487 P.2d at 124-25. The United States Supreme Court indirectly overruled this conclusion in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 55, 76 L. Ed. 2d 400, 103 S. Ct. 2218 (1983) (determining that gravel was included within the scope of the mineral reservation contained in a federal patent issued under the Stock-Raising Homestead Act). Relying on *Watt*, this Court expressly overruled *Trujillo in Champlin Petroleum Co.*, wherein we determined that caliche was "a mineral similar to sand, gravel, clay, and limestone," *Champlin Petroleum Co.*, 103 N.M. at 409, 708 P.2d at 321, and was therefore included within the general mineral reservation of a federal patent, *id.* at 410, 708 P.2d at 322.

{13} In 1975 this Court first addressed whether an owner of land purchased from the state pursuant to contract was entitled to inverse condemnation damages after the State Highway Department entered the land and removed sand and gravel. *Burris v. State ex rel. State Highway Comm'n*, 88 N.M. 146, 538 P.2d 418 (1975), *overruled in part by Roe*, 103 N.M. at 521, 710 P.2d at 88. The purchase contract at issue in *Burris* did not include a specific reservation of sand and gravel. An application for purchase, however, contained a statement in which the applicant swore that he did not intend to purchase sand and gravel[2], and the patent issued by the state contained a reservation of "all minerals of whatsoever kind." *Id.* at 147, 538 P.2d at 419. Based on these documents and other relevant evidence, this Court determined that the parties intended to include sand and gravel within the general mineral reservation of the purchase contract. *Id.* at 147-48, 538 P.2d at 419-20.

{14} In reaching its decision, the *Burris* Court held that whether sand and gravel are minerals "is to be resolved according to the applicable statutes and the facts of each case." *Id.* at 147, 538 P.2d at 419. In essence, the Court determined that whether the term "mineral" includes sand and gravel is an inherently factual question to be decided on a case-by-case basis by ascertaining the intent of the parties. The Court distinguished its earlier decision in *Trujillo* wherein the parties had not provided evidence showing an intent to include sand and gravel within the general reservation of the federal patent. *Id.* Because the parties in *Burris* had provided such evidence, we held that the term "mineral" included sand and gravel.

{15} After *Burris* this Court decided *Rickelton v. Universal Constructors, Inc.*, 91 N.M. 479, 576 P.2d 285 (1978), in which a landowner brought suit to cancel certain sand and gravel leases entered into between the state and a contractor. *Id.* at 479, 576 P.2d at 285. In *Rickelton* the record did not contain evidence that the owner had signed an application for purchase containing a disclaimer of sand and gravel rights. *See id.* at 480-81, 576 P.2d at 286-87. The Court reiterated the rule that "whether sand and gravel are 'minerals' as that term is used in a mineral reservation or grant depends upon the specific facts in each case" and determined that, under the facts before it, the parties did not intend to include sand and gravel in the definition of "minerals." *Id.* at 481, 576 P.2d at 287.

In *Jensen v. State Highway Commission*, 97 N.M. 630, 642 P.2d 1089, *cert. denied*, 459 U.S. 838, 103 S. Ct. 86, 74 L. Ed. 2d 80 (1982), the Court revisited the issue whether an owner could recover inverse condemnation damages after the State Highway Commission entered the land and removed sand and gravel. Relying on *Trujillo* and *Rickelton*, the Court determined that, absent a specific reservation to the contrary, sand and gravel were not "minerals" as that term was used in general mineral

[2] The language in the purchase contract and in the application for purchase in *Burris* is identical to the language in the purchase contracts and the original applications for purchase in this case.

reservations contained in purchase contracts. *Id.* at 631, 642 P.2d at 1090. Because the plaintiff's purchase contract did not contain a specific reservation, the Court held that the parties did not intend to include sand and gravel within the definition of "mineral." *Id.*

{16} Finally, in *Roe*, 103 N.M. at 518, 710 P.2d at 85, this Court decided the issue "whether the gravel on the subject property belongs to the surface estate owner or was reserved to the [state] under a general mineral reservation contained in the contract of purchase and the patent for the property." The plaintiff was a successor in interest to a patent issued after a purchase contract for state lands had been paid in full. Although as in *Burris* the original purchaser had signed an application stating that he did not intend to buy sand and gravel rights, neither the purchase contract nor the patent contained anything more than a general reservation of mineral rights. Relying on *Jensen*, the Court determined that the language of the purchase contract or patent should control because "an application is merely a request to purchase, and its provisions do not affect . . . title." *Id.* at 521, 710 P.2d at 88. "The title that passes is determined by the conveyances themselves, the purchase contract and the patent." *Id.* Because neither the purchase contract nor the patent contained a specific reservation of sand and gravel, the Court reversed summary judgment in favor of the State. *Id.*

{17} *Collateral estoppel does not apply.* Here, the trial court ruled that, because the Commissioner had unsuccessfully litigated the issue in *Roe*, he is collaterally estopped from arguing that sand and gravel are "minerals" as that term is used in state land contracts. In deciding whether the Commissioner is collaterally estopped from litigating the mineral reservation issue against Plaintiffs, it is irrelevant that Plaintiffs were not privy to the *Roe* litigation. *See Silva v. State*, 106 N.M. 472, 476, 745 P.2d 380, 384 (1987). We first must determine whether *Roe* "actually and necessarily decided" the mineral reservation issue. *Id.* at 474, 745 P.2d at 382. If it did, we then consider whether there are countervailing equities that preclude the application of collateral estoppel. *Id.*

{18} *—What Roe actually and necessarily decided. Roe* was an inverse condemnation action and, like the instant appeal, it involved the question whether a land sales contract with a general mineral reservation clause had transferred sand and gravel rights to the purchasers. The procedural posture of *Roe* was, however, quite distinct from this appeal. There, relying on *Watt*, 462 U.S. at 56, in which the United States Supreme Court held that sand and gravel were included within a general mineral reservation in a federally-issued patent, the trial court granted the state summary judgment. *Roe*, 103 N.M. at 519, 710 P.2d at 86. In reversing summary judgment, the *Roe* Court concluded that the trial court erroneously had applied federal law. *Id.* The Court also determined that a general reservation clause and a land purchase application are, without more, insufficient to show that the state has reserved sand and gravel. *Id.* at 521, 710 P.2d at 88.

{19} Because the *Roe* Court had before it an appeal from summary judgment, it was necessary to determine only whether a question of fact existed regarding the State's reservation of sand and gravel in that case. There was no need to determine whether the State might ever reserve sand and gravel without an express reservation. Nonetheless, the *Roe* Court stated flatly, "For the State to reserve sand and gravel, a provision so specifying must be included in these conveyances." *Id.* With this broad language, the *Roe* Court may have been attempting to resolve the ambiguity once and for all and to put to rest an issue that had given rise to a great deal of litigation. Perhaps it was suggesting that a general reservation clause cannot be shown to be ambiguous. We will assume for purposes of this appeal that *Roe* necessarily held that sand and gravel are not reserved unless there is a specific reservation. The question then is whether countervailing equities militate against the application of collateral estoppel.

{20} *—Fact-specific nature of necessary inquiry.* As demonstrated by the foregoing history

of sand and gravel litigation in New Mexico, the question often has arisen whether the term "mineral" includes sand and gravel. Generally, we have resolved this issue on a case-by-case basis. We established this principle in *Burris, see* 88 N.M. at 147, 538 P.2d at 419, and restated the principle in *Rickelton*, *see* 91 N.M. at 481, 576 P.2d at 287. After *Rickelton* this Court did not expressly restate the rule, but in both *Jensen* and *Roe* we framed the issue to be decided in terms of the particular facts of the case. *See Jensen*, 97 N.M. at 631, 642 P.2d at 1090 (framing the issue as "whether sand and gravel are minerals within a reservation of minerals to the State *contained in the purchase contract between Jensen and the State*" (emphasis added)); *Roe*, 103 N.M. at 518, 710 P.2d at 85 (framing the issue as "whether the gravel *on the subject property* belongs to the surface estate owner . . . under a general mineral reservation contained in the contract of purchase and the patent for the property" (emphasis added)).

{21} The case-by-case rule adopted in *Burris* is based on the principle that in contract cases the role of the court is to give effect to the intention of the contracting parties. The role of the court is to determine whether the parties intended to include sand and gravel within the term "mineral." *E.g., Jensen*, 97 N.M. at 631, 642 P.2d at 1090 (holding that state did not intend to reserve sand and gravel because it did not do so by specific reservation in purchase contract); *Burris*, 88 N.M. at 147, 538 P.2d at 419 ("The issue is whether the parties intended that sand and gravel are, or are not, to be . . . classified [as minerals]."). "The primary objective in construing a contract is not to label it with specific definitions or to look at form above substance, but to ascertain and enforce the intent of the parties as shown by the contents of the instrument." *Shaeffer v. Kelton*, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980). The determination whether sand and gravel are included within a general mineral reservation must be done on a case-by-case basis because the intent of parties to one contract may not be the same as the intent of parties to another contract. Thus, the fact-specific nature of the necessary inquiry militates against giving collateral-estoppel effect to *Roe*.

{22} *—Involvement of state trust lands is a countervailing equity.* Also militating against the applicability of collateral estoppel in this case is the great public importance of state trust lands. In *United States v. Mendoza*, 464 U.S. 154, 162, 78 L. Ed. 2d 379, 104 S. Ct. 568 (1984), the Supreme Court held that collateral estoppel should not be applied to preclude the U.S. government from litigating the constitutionality of a decision to withdraw a naturalization examiner from the Philippines in 1945. The Court reasoned that the development of important questions of law in areas involving public policy should not be stifled by freezing as final the first decision on a particular issue. Of particular importance to the Court was the fact that different administrations make differing policy choices. The Court stated:

> The conduct of Government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the Government.

Id. at 162-63.

{23} Prior to *Mendoza* the Supreme Court had applied similar principles in holding that equitable doctrines such as laches and acquiescence would not preclude the federal government from claiming ownership of the ocean basin in a dispute with the state of California over offshore drilling rights. *United States v. California*, 332 U.S. 19, 40, 91 L. Ed. 1889, 67 S. Ct. 1658 (1947). The Court reasoned: "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property. . . ." *Id.* Thus, following *Mendoza* and *United States v. California*, federal district courts must weigh public policy

considerations before applying against the federal government equitable doctrines such as nonmutual collateral estoppel. *See Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 666 F. Supp. 1475, 1477-78 (D. Colo. 1987) (agreeing that *Mendoza* requires consideration of public policy issues before imposing collateral estoppel against government).

{24} A number of state courts also have noted "a sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest." *Chern v. Bank of America*, 15 Cal. 3d 866, 544 P.2d 1310, 1313, 127 Cal. Rptr. 110 (Cal. 1976); *see also White v. Adler*, 289 N.Y. 34, 43 N.E.2d 798 (N.Y. 1942). Hence, in *City of Berkeley v. Superior Court of Alameda County*, 26 Cal. 3d 515, 606 P.2d 362, 364 n.5, 162 Cal. Rptr. 327 (Cal.), *cert. denied*, 449 U.S. 840, 101 S. Ct. 119, 66 L. Ed. 2d 48 (1980), the California Supreme Court ruled that the state, which upon attaining statehood had succeeded to title in all tidelands within its borders as trustee for the public, was not estopped from arguing that private parties who had been granted title to certain tidelands held such title subject to the public trust. Likewise, in *City of Plainfield v. Public Service Electric & Gas Co.*, 82 N.J. 245, 412 A.2d 759, 766 (N.J. 1980), the New Jersey Supreme Court held that the doctrine of collateral estoppel would not bar relitigation of the validity of a contract which required a utility to provide electricity to municipal buildings without charge. Because a New Jersey statute prohibited "unjustly discriminatory utility rates and unreasonable preferences," and because the earlier decision had "a potential adverse impact upon the public interest," the court reasoned that the issue, which involved only a question of law, should be reconsidered. *Id.* And finally, in *Edwards v. Board of County Commissioners*, 119 N.M. 114, 116, 888 P.2d 996, 998, our Court of Appeals upheld a trial court ruling that precluded the application of collateral estoppel and allowed Bernalillo County to relitigate the validity of a zoning ordinance. *See generally* Restatement (Second) of Judgments § 28(5)(a) (1982) (stating that relitigation of an issue is not precluded when a new determination is needed "because of the potential adverse impact of the determination on the public interest").

{25} Here, there is a strong public interest in the protection of state land and its products, as reflected in the Enabling Act's requirement that "no sale or other disposal [of state land or its natural productions] shall be made for a consideration less than the [appraised true] value." Act of June 20, 1910, ch. 310, § 10, 36 Stat. 557, 564. The State has a nondelegable duty to hold as trustee state lands and their products—as well as the proceeds from the sale of state lands and their products—for the development of state schools and other public institutions. *See* N.M. Const. art. XXIV, § 1 (providing that leases and land sales contracts may reserve royalties to the state "as may be provided by act of the legislature"). The Commissioner has presented some evidence that if sand and gravel are not included within general mineral reservations, certain properties have been sold for less than their appraised value in violation of the trust and public policy. Because such strong public interests are at issue, the need to reexamine this question outweighs the interests of judicial economy embodied in the collateral estoppel doctrine. Therefore, the Commissioner's arguments that sand and gravel are included within the general mineral reservations at issue here are not barred by the doctrine of collateral estoppel.

{26} *Rules of property.—Stare decisis.* In the motion for rehearing Plaintiffs argue that, notwithstanding the inapplicability of collateral estoppel, the specific-reservation requirement adopted in *Roe* should be given stare decisis effect to avoid creating title uncertainty. In *Duncan v. Brown*, 18 N.M. 579, 585-86, 139 P. 140, 141 (1914), this Court stated that judicial decisions affecting title to real estate "should not be disturbed or departed from except for the most cogent reasons." We reiterated this principle in *English v. Sanchez*, 110 N.M. 343, 347, 796 P.2d 236, 240 (1990), and held that "the proper initiative for a departure from [court precedent holding that contracts to convey community real property not joined by both spouses are void and of no effect] lies with the legislature." Relying on *Duncan* and *English*, Plaintiffs argue that *Roe*

established the specific-reservation requirement as a "rule of property" and that no cogent reasons exist for departing therefrom.

{27} The rule-of-property doctrine has ancient roots, *see* 1 James Kent, *Commentaries on American Law* *475-76 (14th ed. 1896), and was first recognized by this Court in *Arellano v. Chacon*, 1 N.M. 269 (1859). That case considered whether an appeal lies from a court determination of an election contest. This Court ultimately overruled a previous decision which had allowed such appeals. *Id.* at 272, 278. Writing for the Court, Chief Justice Benedict stated:

> In overruling the decision of this court, . . . we are not discouraged in our sense of duty by the reflection that heavy and important interests as to property and persons have grown up, under the protection, and by virtue of that decision, which our present rulings would disturb, embarrass, and destroy. No such interests have arisen. If they had, we would long have hesitated touching the question discussed, let our opinions have been as they may. Circumstances may sometimes exist, when a court should pass previous adjudications as a "sealed book" though they may have been erroneously made at the beginning.

Id. at 278-79.

{28} The California Supreme Court explained the role of a rule of property in the application of stare decisis in *Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 326 P.2d 484, 494-95 (Cal. 1958) (in bank). There, the City of Los Angeles argued that its decision to switch from variable to fixed pensions for members of its police and fire departments was a rule of property and thus should not be disturbed. The court explained the rule-of-property doctrine thus:

> Decisions long acquiesced in, which constitute rules of property or trade or upon which important rights are based, should not be disturbed, even though a different conclusion might have been reached if the question presented were an open one, inasmuch as uniformity and certainty in rules of property are often more important and desirable than technical correctness. Thus, judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, as where the evils of the principle laid down will be more injurious to the community than can possibly result from a change, or upon the clearest grounds of error.

Id. (quoting 14 Am. Jur. *Courts* § 65, at 286 (1941)); *see also Barrows v. McDermott*, 73 Me. 441, 448-49 (1882) (stating that rule should not be overturned when "it has been so largely accepted and acted upon by the community as law that it would be fraught with mischief to set it aside"). The *Abbott* court ultimately concluded that the city's reliance upon the rule-of-property doctrine was misplaced, reasoning "that defendants have not relied upon any 'long line of cases' in either adopting the charter amendments here under attack, in failing to pay fluctuating rather than fixed pensions to plaintiffs, or in adding to its pension system certain benefits." 326 P.2d at 495.

{29} Insofar as *Roe* pronounced a rule that affects title to real estate, it did adopt a "rule of property." Whether we should adhere to *Roe* as a matter of stare decisis, however, involves more than mere talismanic invocation of a phrase. The especial importance of stare decisis in cases involving a rule of property is twofold. First, and more generally, the anti-majoritarian nature of the judicial system makes adherence to precedent essential to promote public confidence in the law and its administration. *Hart v. Burnett*, 15 Cal. 530, 601 (1860) (noting "the importance of consistency and stability in [court] decisions, and the uneasiness and uncertainty which changes of them produce in the public mind"). Second, and more specific to rules affecting property or commercial transactions, adherence to precedent is necessary to the stability of land titles and commercial transactions entered into in reliance on the settled nature of the law. *Giles v. Adobe Royalty, Inc.*, 235 Kan. 758, 684 P.2d 406, 413 (Kan. 1984) (declining to give decision

retroactive effect because "such action would force a re-examination of the title to all Kansas real estate"); *Bott v. Commission of Natural Resources of Michigan*, 415 Mich. 45, 327 N.W.2d 838, 849 (Mich. 1982) (stating that "stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance"); *see also City of Las Vegas v. Oman*, 110 N.M. 425, 433, 796 P.2d 1121, 1129 (Ct. App.) (noting the particular force of stare decisis in cases which seek to overturn decisions affecting property rights), *cert. denied*, 110 N.M. 282, 795 P.2d 87 (1990).

{30} The crucial inquiry, then, when it is advocated that a proposition must be adhered to as a rule of property, is likewise twofold. First, to what extent has the proposition cited as a rule of property become settled or fixed? As the California Supreme Court explained in *Hart*:

> "The *rule of property*," then, is not necessarily created or shown by the mere decision, or two or three decisions of a Court. It is the settled, fixed, stable principle regulating titles and the estimate of their validity and value in the minds of practical men, who draw their conclusions from judgments which have been commonly acquiesced in as settled law, or the general titles affirmed, by which they have passed beyond contention and dispute.

15 Cal. at 609. Second, we must assess the extent to which a proposition cited as a rule of property has induced persons to enter into transactions in actual or demonstrable reliance thereon.

> Nor is the loose expression "*that rights have vested*" under such decisions, to be construed in the sense supposed, if by this phrase be meant that the vesting of any rights under a judgment—however limited in extent or the number of persons claiming—makes the principle therein asserted irreversible; for probably no judgment such as this is ever without *some* effect on the transfer of property; and therefore, if this were the criterion, *every* judgment affirming a title would be protected.

{31} *Id.* at 609-10; *see also Bott*, 327 N.W.2d at 850 (refusing to reject log-flotation and commercial-shipping tests of navigability in favor of recreational-boating test because the former two tests had been applied "long enough to give rise to a fixed conception of the public's navigational rights" and because "landowners had invested their savings or wealth in reliance on a long-established definition of navigability").

{32} Returning to *City of Berkeley*, in which the California Supreme Court overturned two prior opinions that had held that deeds issued by the California Board of Tide Land Commissioners pursuant to an 1870 legislative act conveyed absolute title to the grantees, 606 P.2d at 372-73 (overruling *Knudson v. Kearney*, 171 Cal. 250, 152 P. 541 (Cal. 1915) and *Alameda Conservation Ass'n v. City of Alameda*, 264 Cal. App. 2d 284, 70 Cal. Rptr. 264, *cert. denied*, 394 U.S. 906, 22 L. Ed. 2d 217, 89 S. Ct. 1013 (1969)), we note there is a public-interest aspect to rejection of stare decisis as well as to the rejection of collateral estoppel. There, the court concluded that "most cogent reasons" existed for overturning the decisions. 606 P.2d at 372. First, the decision would not deprive anyone of title entirely; rather, "some landowners whose predecessors in interest had acquired property under the 1870 act will . . . hold it subject to the public trust." *Id.* Further, the two decisions that were overturned were the only opinions on the issue, "and it was apparent from the face of the *Knudson* opinion that although the public's right to large tracts of tidelands in the Bay was at stake, the state as trustee of those rights was not a party to the action." *Id.* Finally, the court stated that *Knudson* was virtually devoid of reasoning and that both *Knudson* and *Alameda Conservation* were "wholly in error." *Id.* Therefore, the court concluded:

> The consequences of allowing the patently erroneous decisions to stand in the present case would be to deprive the people of the state of full control over many thousand acres

> of tidelands acquired by them at the time of statehood. In these circumstances, . . . we do not doubt that it would be more injurious to the public interest to perpetuate the error of *Knudson* and *Alameda Conservation* than to overturn those decisions.

606 P.2d at 373.

{33} *—Application of the law to these facts. Roe* was decided in 1985, and this suit was initiated in 1992. As we discussed in the history of sand and gravel litigation section of this opinion, prior to *Roe* this Court had held in *Burris* that a general mineral reservation included sand and gravel. While at the very least, at the time the original purchase contracts were entered into in the 1960s it was unclear whether sand and gravel were included in a general mineral reservation, the original purchasers did sign applications disavowing an intent to obtain sand and gravel rights. More importantly, under a rule-of-property analysis, these original purchasers can hardly claim that they entered into purchase contracts in reliance on *Roe*. As for their successors in interest, we have not been referred to any record evidence indicating the number of contracts which may have been entered into in reliance on the *Roe* specific-reservation requirement. Reliance on *Roe* as a rule of property may be a factual issue with respect to some of the interests in question.

{34} The polestar of deed construction is the parties' intent. 6A Richard R. Powell, *Powell on Real Property* P 899[3], at 81A-108 (Patrick J. Rohan ed. 1994). In light of this principle, and because title to state trust lands should not be conveyed by implication, *see City of Berkeley*, 606 P.2d at 369 (stating that "statutes purporting to abandon the public trust are to be strictly construed; the intent to abandon must be clearly expressed or necessarily implied"), we now retreat from the statement in *Roe* which suggests that we will disregard the mutual intent of the contracting parties and instead look for certain required language. If we were to hold that the definition of "minerals" set out in *Roe* applied to all land sales contracts, we would indeed exalt form over substance. The intent of the contracting parties would be abrogated by rule of law in favor of a strict definition. Our legal history, however, favors substance over form, and thus we will not dispense with the intentions of the contracting parties by holding them to a definition that they did not accept. We will not allow parties to a contract to gain something for which they did not bargain and for which they did not pay. Nor will we take away the right of the parties to agree mutually to the meaning of the terms of a contract.

{35} Thus, we remand this case for evidentiary proceedings under the following guidelines.

{36} Obviously, anyone purchasing land under a purchase contract or a patent with a specific reservation would be bound by the terms of that reservation. If there is not a specific reservation, the trial court must look to evidence outside the face of the contract to determine the meaning intended for the term "mineral" when that term has been shown under the circumstances to be ambiguous. In those cases involving successors in interest to original purchasers, the relevant inquiry will be the extent to which the purchase was made in reliance on *Roe*. Absent such reliance, the issue is whether the parties to the original contract intended that the State reserve sand and gravel. If the original purchaser did not purchase sand and gravel rights from the State, that purchaser could not have conveyed sand and gravel to a subsequent purchaser, regardless of the intent, lack of notice, or good faith of the parties to the later transaction. *See* 7 Powell, *supra*, P 938.21[5], at 84D-31 (stating that assignees may not take more than what assignor possessed). Absent reliance, any effect of *Roe* as a rule of property is hereby overruled.

{37} *Conclusion.* Collateral estoppel does not apply to this case because the question whether sand and gravel are "minerals" as that term is used in general mineral reservations is to be answered on a case-by-case basis by examining the intent of the parties and because public policy considerations here militate against application of collateral estoppel offensively against the government. As far as a rule of property, there cannot have been reliance on a long line of settled decisions by the

original purchasers. Reliance by successors in interest is a factual issue. The trial court's entry of summary judgment is reversed; we remand for proceedings consistent with this opinion.

{38} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
Chief Justice

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER,
Justice

CONCURRENCE

McKINNON, III, Justice
(specially concurring).

{39} I concur in Justice Ransom's well-reasoned opinion and write primarily to emphasize that the dispute here was between the government and private parties. Because of public policy considerations in its role as trustee for the public lands, the government could not be collaterally estopped by the decision in *Roe v. State ex rel. State Highway Department*, 103 N.M. 517, 710 P.2d 84 (1985), *cert. denied*, 476 U.S. 1141, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986), to claim an interest in sand and gravel even though the purchase contracts did not expressly reserve these materials. Similarly, the rule of law requiring a specific reservation under *Roe* should not be applicable; instead the intention of the parties should be controlling. However, these public policy considerations are not present in similar disputes between private parties. Thus, for a private grantor to reserve sand and gravel, a provision so specifying must continue to be included in the purchase contract.

DAN A. McKINNON, III,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1996-NMSC-066

Filing Date: November 26, 1996

Docket No. 23,285

DAVID RHEIN and TIMOTHY MICHAELS,

Plaintiff-Appellants,

vs.

ADT AUTOMOTIVE, INC., d/b/a, ALBUQUERQUE AUTO AUCTION,

Defendant-Appellee.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Gerald J. Cole, District Judge

Released for Publication December 17, 1996.
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OPINION

RANSOM, Justice.

{1} This is a retaliatory-discharge suit against ADT Automotive, Inc. David Rhein claimed that he was terminated because he alerted the New Mexico Department of Occupational Health & Safety (OSHA) about respiratory-safety violations at ADT's paint and body shop, and Timothy Michaels claimed that he was terminated because he was about to file a workers' compensation claim for injuries resulting from these safety violations.[1] At trial, the jury returned verdicts for compensatory damages of $ 235,000 for Rhein and $ 75,000 for Michaels. The court had refused to instruct on punitive damages. In post-trial proceedings, the court granted ADT's motion for new trial against Rhein, and ADT's motion for judgment notwithstanding the verdict against Michaels. The trial court denied Plaintiffs' motion for a new trial on the issue of punitive damages.

{2} Rhein and Michaels appealed to the Court of Appeals, which, in turn, certified the case to this Court pursuant to NMSA 1978, § 34-5-14(C)(2) (Repl. Pamp. 1990), noting an issue of "substantial public interest" relating to the appealability of an order for new trial when a final order has been entered with respect to another party. On certification from the Court of Appeals we decide the entire case in which the appeal is taken. *Collins v. Tabet*, 111 N.M. 391, 404 n.10, 806 P.2d 40, 53 n.10 (1991). We hold that the grant of a new trial is not appealable except when this Court issues a writ of superintending control under circumstances calling for extraordinary relief. We also hold that the trial court erred in refusing to instruct on punitive damages and in granting the motions for new trial and for a judgment notwithstanding the verdict.

{3} *Facts and proceedings.* ADT operates a large automobile reconditioning facility. Almost 30,000

[1] The trial court originally dismissed Michaels' complaint for failure to state a claim on the basis that workers' compensation is the exclusive remedy. Michaels appealed this decision, and the appeal was certified to this Court. In *Michaels v. Anglo American Auto Auctions*, 117 N.M. 91, 869 P.2d 279 (1994), we held that Michaels could pursue an action for retaliatory discharge independently of the Workers' Compensation Act. We remanded the case to the trial court for a trial on the merits. *Id.* at 94, 869 P.2d at 282. It also should be noted that Plaintiffs had originally filed suit against Anglo American Auto Auctions, Inc., which was doing business as the Albuquerque Auto Auction, but they substituted ADT when it purchased Anglo American.

cars annually pass through the Albuquerque facility, the majority of these vehicles being "program" cars that automobile manufacturers previously had leased to rental car companies. At the end of the lease term, these cars are brought to ADT by rail and, after reconditioning, are sold in auctions to retail dealers. A second shift at the body shop was created to meet increased business demands. Rhein was hired in late 1990 to work as a body man to prepare collision-damaged vehicles for repainting. Michaels was hired several months later as an automobile painter. Both men were hired to work on the second shift, and both remained on this shift for their entire employment at ADT. The evidence supports the following facts and inferences relevant to this appeal.

{4} The ADT facility had two painting booths equipped with ventilation systems necessary to keep dangerous toxic "overspray" out of the body shop. Due to a backlog of vehicles, however, ADT management instructed employees to apply paint outside of these controlled areas. The resulting fog from these operations was often so thick that "you could not see across the room" and fresh air respirators were required to protect against the toxins. ADT did provide charcoal mask respirators, but these are not suitable to prevent exposure to the automobile paints being used.

{5} Michaels alerted ADT to the health and safety risks posed by the overspray, as well as other safety violations. ADT failed to act on these complaints. Soon afterward, both Rhein and Michaels began to suffer from health problems related to exposure to airborne toxins. Rhein began to suffer upper respiratory problems and skin rashes, and believed that he was developing both liver problems and toxic hepatitis as a result of his exposure. Michaels' reaction to the toxins was even more severe. He began to lose his hair, run high fevers, and developed a kidney condition. After working his twelve hour shift his face would swell and his skin would crack and bleed.

{6} Rhein also took several steps to bring these health and safety problems to the attention of ADT. He met with the personnel director and explained his concerns. He also showed the director a note from his physician regarding toxic hepatitis. The personnel director took Rhein to the general manager, Ken Osborn. Rhein explained his concerns again to Osborn, but Osborn apparently did not seem interested. Later that day Rhein telephoned the New Mexico office of OSHA. Rhein spoke to an OSHA representative about the health risks posed by the current operation of the body shop, and he then mailed in a written complaint. OSHA records indicate that the complaint against ADT was initiated on February 18, 1992.

{7} A site inspection of the repair shop was made by OSHA on March 9, 1992. Both Danny Valdez, the reconditioning department manager prior to May 18, 1992, and Les Newman, who was the body shop manager until he replaced Valdez as department manager after May 18, may have seen Rhein's name on a written complaint in the briefcase of the OSHA inspector. ADT, however, denies having any knowledge of which employee had filed the complaint with OSHA. Rhein nonetheless began receiving threats of termination almost immediately after the OSHA inspection. Newman told Rhein on several occasions that upper management wanted him "out of there," and that Rhein should "keep [his] mouth shut and just do [his] work." Also, Valdez accused Rhein of stealing tools from ADT, an offense that would warrant termination.

{8} OSHA returned to ADT on May 5, 1992, and issued several health and safety citations. In response, ADT proposed several new policies for the body shop. One of the policy changes was to prohibit the spraying of primer or paint in the body shop, limiting spraying to the controlled spray booths. This policy was not only unenforced, but management quickly ordered the body shop employees to spray primer and paint in the body shop to keep up with the workload. Another policy change was that all body shop employees must take a physical examination by a physician. All employees that failed this examination were to be terminated by ADT. Michaels believed that through this policy he was being

singled out for termination. He contacted OSHA about the apparent retaliation against him for his health problems. Rhein also called OSHA to report his fears of retaliatory termination.

{9} Rhein and Michaels both were terminated on May 18, 1992. Witnesses for ADT testified that both men were laid off because the second shift of the body shop was being phased out, either through lay-offs or attrition. ADT was experiencing a downturn in business, and this eliminated the need of the second shift. ADT contends that the decision to eliminate the second shift was made at a management meeting on May 18, and the employees were then informed at a general employee meeting later in the morning. Rhein testified to the contrary that Newman told him that he was being laid off because he had gone back to school, because he had refused to do "priming work," and because of his health problems. Michaels was not present for the employee meeting, but arrived later in the day with a note from his physician recommending that he avoid work in the body shop for a period of thirty days. Newman informed Michaels that he had been laid off and recommended that he file for unemployment instead of workers' compensation. Michaels insisted on filing for workers' compensation, and the personnel director assisted him with the paperwork for this claim.

{10} It is the policy of ADT to rehire laid-off employees when positions become available. Michaels never was contacted by ADT even though positions became available. ADT contended that this is because they had received medical reports indicating that Michaels could not return to a work environment where he was exposed to automobile paint. Rhein was offered a position by ADT as a "color sander buffer" approximately six months after he was laid off. Rhein refused this position because it offered less pay and prestige than his former position. The position that Rhein had held, that of a body man, did open up a few weeks after this, and the position was filled by the employee that had accepted the position as color sander buffer.

{11} At the end of the five-day trial, plaintiffs submitted a jury instruction for punitive damages. The trial court refused to give this instruction, and instructed on compensatory damages alone. After deliberating for eight hours the jury returned its compensatory damages verdicts of $ 235,000 for Rhein and of $ 75,000 for Michaels. The court heard several post-trial motions and granted ADT judgment notwithstanding the verdict against Michaels and a new trial against Rhein. The court denied Plaintiffs' motion for a new trial based on failure to instruct the jury on punitive damages. In a written decision, the court explained in detail its reasons for granting or denying the motions. Michaels appealed this decision. Rhein was aware that Rule 12-201(D) NMRA 1996 prohibits the immediate appeal of an order granting a new trial, and he filed a petition before this Court for a writ of superintending control allowing an immediate appeal to the Court of Appeals. We granted this extraordinary relief because the issues in Rhein's case "are similar and mutually involved with those of the Michaels appeal." Plaintiffs' appeals were consolidated, and the Court of Appeals then certified the appeal to this Court.

{12} *The new trial.—Immediate appealability.* In light of our writ of superintending control, the Court of Appeals certified this case to our Court to address whether an order granting a motion for a new trial is immediately appealable when a final order has been entered with respect to a coparty. In *Scott v. J.C. Penney Co.*, we stated that when a "motion for a new trial is granted, it merely means the case stands as never tried, and until retried and a judgment entered, there is no final judgment." 67 N.M. 219, 220, 354 P.2d 147, 149 (1960). Since only final judgments are appealable, "an order granting a new trial following a jury verdict but before entry of judgment on the verdict is not appealable." *Warren v. Zimmerman*, 82 N.M. 583, 583-84, 484 P.2d 1293, 1293-94 (Ct. App.), *cert. denied*, 82 N.M. 562, 484 P.2d 1272 (1971).

> A motion for new trial that is timely and properly made suspends the finality of the judgment and tolls the running of the time

> for taking an appeal. If the motion is denied, the full time for appeal commences to run anew from the date of the entry of the order denying the motion. If the motion is granted, or if the court orders a new trial on its own initiative, the finality of the judgment is destroyed and an appeal may not be taken until the entry of a final judgment following the new trial.

6A Jeremy C. Moore et al., *Moore's Federal Practice*, P 59.15[1] (2d ed. 1985). This common-law concept was then codified into our Rules of Appellate Procedure with a 1991 amendment to Rule 12-201(D) NMRA 1996, which states that "an order granting a motion for new trial in civil cases is not appealable and renders any prior judgment non-appealable."

{13} We recognize that some jurisdictions have permitted the immediate appeal of an order granting a new trial. *See, e.g., Franklin v. Gupta*, 81 Md. App. 345, 567 A.2d 524, 533 (Md. Ct. Spec. App. 1990) (stating that the more recent view is that the grant of a new trial is immediately appealable on an abuse of discretion standard). Such appeals also have been approved in other jurisdictions through rules of appellate procedure contrary to those in New Mexico. *See, e.g., Wells v. Tanner Bros. Contracting Co.*, 103 Ariz. 217, 439 P.2d 489, 492 (Ariz. 1968) ("It is quite clear that under this [statutory] provision an order granting a new trial is substantively an appealable order."); *Smallwood v. Dick*, 114 Idaho 860, 761 P.2d 1212, 1215 (Idaho 1988) (holding that the rules of appellate procedure gave the party "the right to appeal the trial court's order granting a new trial"); *Carlson v. Locatelli*, 109 Nev. 257, 849 P.2d 313, 315 (Nev. 1993) (holding that the court could hear the appeal "since an order granting or refusing a new trial is appealable" by statute).

{14} New Mexico nonetheless is not alone in holding that the grant of a new civil trial is not immediately appealable. *See, e.g., Nelson v. Hammon*, 802 P.2d 452, 458 (Colo. 1990) (stating that "the trial court's order granting a new trial is not an appealable order" under Rule 59 of the Colorado Rules of Civil Procedure); *Louisiana Nat'l Bank v. LaBorde*, 527 So. 2d 41, 44 (La. Ct. App. 1988) ("A judgment granting a new trial is an interlocutory judgment, not a final one, and it does not cause irreparable injury; hence, it is not an appealable judgment."); *Lamberti v. Tschoepe*, 776 S.W.2d 651, 652 (Tex. Ct. App. 1989) ("An order granting a new trial is not subject to review either by direct appeal from that order, or from a final judgment rendered after further proceedings in the trial court.").

{15} *—The granting of the writ of superintending control.* While we believe the proper rule in New Mexico is that an order granting a motion for new trial is not immediately appealable as a matter of right, we can grant an appeal under extraordinary circumstances by writ of superintending control. Rhein petitioned this Court for just such a writ because he recognized there indeed was no right of immediate direct appeal from the order. We granted the writ and directed Rhein to file a notice of appeal with the Court of Appeals.

{16} The New Mexico Constitution empowers the Supreme Court with superintending control over all inferior courts. N.M. Const. art. VI, § 3. The exercise of this power "is the power to control the course of ordinary litigation in inferior courts." *State v. Roy*, 40 N.M. 397, 421, 60 P.2d 646, 661 (1936). "We exercise this authority by promulgating rules that regulate pleading, practice, and procedure, by issuing opinions or decisions, by issuing administrative orders, and by issuing extraordinary writs." *District Court of Second Judicial Dist. v. McKenna,* 118 N.M. 402, 405, 881 P.2d 1387, 1390 (1994) (citations omitted). In *State ex rel. Transcontinental Bus Service, Inc. v. Carmody*, we stated that the Supreme Court "may intervene by an appropriate writ in an exercise of its power of superintending control, if the remedy by appeal seems wholly inadequate . . . or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship; costly delays and unusual burdens of expense." 53 N.M. 367, 378, 208 P.2d 1073, 1080 (1949).

{17} In this case, we granted our writ of superintending control because we believed that to do otherwise would amount to a denial of justice. Rhein and Michaels are co-plaintiffs in this action, and both wished to appeal from the decision of the trial court. Michaels is able to appeal his case to the Court of Appeals as a matter of right because his case was dismissed under a judgment notwithstanding the verdict. As we noted in the writ,

> Whereas, it appearing that the issues that petitioner seeks to appeal from the grant of a new trial are similar and mutually involved with those of Michaels' appeal, the two cases having been tried jointly, and there appearing to be mixed questions of law and discretion in the grant of the new trial, this Court deems extraordinary relief to be warranted to serve the purpose of fairness and judicial economy.

For these reasons, we determined that Rhein should be granted the *extraordinary* relief of an immediate appeal.

{18} *—The trial court abused its discretion in granting a new trial.* We acknowledge that the "trial court has broad discretion in granting or denying a motion for new trial, and such an order will not be reversed absent clear and manifest abuse of that discretion." *State v. Chavez*, 98 N.M. 682, 684, 652 P.2d 232, 234 (1982). We apply this abuse-of-discretion standard "because the trial judge has observed the demeanor of the witnesses and has heard all the evidence . . . [and thus] the function of passing on motions for new trial belongs naturally and peculiarly to the trial court." *State v. Smith*, 104 N.M. 329, 333, 721 P.2d 397, 401 (1986). This does not mean that the trial court has an unrestricted ability to grant a motion for a new trial. It is proper for the trial court to grant a motion for a new trial in a civil case only when certain conditions are met.

{19} The trial court here set out several reasons for granting the motion for a new trial. First, the court stated that the verdict in favor of Rhein, and the amount of damages awarded, was "contrary to the great weight of the evidence." Second, the court found that the jury's award to Rhein of over three times the damages that Michaels received was inconsistent with the evidence presented, which tended to show that Michaels would be entitled to twice the damages of Rhein. Third, Plaintiffs' counsel made several remarks during closing arguments which prejudiced the jury against ADT. Plaintiffs assert that each of these three findings was made in error.

{20} Rhein asserts that there was sufficient evidence in his case to support the jury's verdict. Rhein had contacted several members of ADT's management and informed them of the dangers posed by health and safety violations. Rhein alleges that at least two managers discovered that he had informed OSHA of these problems, and they held him responsible for the two visits from OSHA.[2] He was threatened immediately after the first visit, and he was terminated less than two weeks after OSHA returned and cited ADT for these violations. He contacted OSHA one week before his termination and informed them of his fears of retaliatory termination. Also, Rhein presented evidence at trial that he was earning $ 35,000 at ADT and was forced to take employment at half that salary after his termination. Rhein argues that all of this evidence supports the jury's verdict.

{21} Rhein further argues that the disparity in damages shows that the jury considered the case in detail. At trial, ADT asserted against Michaels the defense of failure to mitigate damages. Michaels had worked as an automobile painter at

[2] In its answer brief, ADT asserts that the OSHA violations were not relevant to the retaliatory discharge claims. The trial court apparently agreed with ADT, noting in its decision letter that "in argument, it was never pointed out how such asserted facts supported the claim of retaliatory discharge or the amount of damages. Much of the evidence went only to the violations of OSHA regulations. Most of the above had no or very little relevance to retaliatory discharge." The Plaintiffs' theory of the case, however, was that ADT had terminated Rhein because he had alerted OSHA to health and safety violations. We cannot agree with the trial court that evidence of OSHA violations is irrelevant to Plaintiffs' claim of retaliatory discharge.

ADT, but had failed to return to auto painting after his termination. He had chosen instead to become self-employed at a fraction of his previous wages. Additionally, ADT informed the jury that Michaels was receiving workers' compensation for his injuries. Rhein argues that the jury may have reduced Michaels' recovery because he was already being compensated for injuries attributable to ADT.

{22} Finally, Rhein asserts that comments made during closing were proper and did not prejudice the jury. During closing, Plaintiffs presented the jury with several inferences to be drawn by the jury, including, for example, that Danny Valdez was acting as a pawn for ADT management, and that Valdez had attempted to "set up" Rhein by accusing him of stealing tools. The comments were proper attempts to "reconcile the conflicting evidence." Furthermore, there were no objections made by opposing counsel, nor admonitions by the court, on the issues of prejudice relied upon by the trial court in its decision letter.

{23} It is readily apparent that the trial court in this case came to different conclusions than the jury. The court determined that the jury's verdict was inconsistent with the evidence and the credibility of the witnesses. Without more, however, it is improper for the trial court to grant a new trial. A trial court can grant a motion for new trial only when there is evidence of jury tampering or other contamination of the process, *e.g., Martinez v. Ponderosa Prods. Inc.*, 108 N.M. 385, 772 P.2d 1308, *cert. denied*, 108 N.M. 273, 771 P.2d 981 (1989) (holding that it was proper for the trial court to grant a motion for a new trial when one of the parties had approached a prospective juror and sought a favorable verdict), or when the weight of the evidence is clearly and palpably contrary to the jury's verdict, *Ruhe v. Abren*, 1 N.M. 247, 250 (1857) ("The weight of the evidence must be clearly and palpably contrary to the verdict, and a new trial will only be granted where it is manifest to a reasonable certainty that justice has not been done.").

{24} A court can never grant a new trial merely because it doubted the credibility of the witnesses. The jury must be the exclusive evaluator of the evidence and the credibility of witnesses, with the trial court only intervening when then jury's verdict is so against the weight of evidence that it would be a grave injustice to allow the verdict to stand.[3] A review of the evidence set forth in detail above reveals that the jury's verdict was not "clearly and palpably contrary" to the weight of the evidence, and that the trial court abused its discretion by granting the motion for a new trial. Therefore, we reverse the trial court on this issue.

{25} *Judgment notwithstanding the verdict.* Michaels argues that the trial court erred in granting ADT's motion for judgment notwithstanding the verdict.[4] When considering a motion for judgment notwithstanding the verdict, "this Court has always considered the testimony in a light most favorable to the prevailing party."

[3] In *Townsend v. United States Rubber Co.*, we held that a court could not grant a motion for a judgment n.o.v. based upon the evidence or credibility of the witnesses, and that it "had no alternative but to grant a new trial rather than the motion for judgment notwithstanding the verdict." 74 N.M. 206, 210, 392 P.2d 404, 407 (1964). For the reasons mentioned above, we now believe that it is improper for the trial court to grant a motion for a new trial in this situation. Any language from *Townsend* that is inconsistent with this opinion is hereby overruled.

[4] We recognize that, while a trial court must already have denied a directed verdict, *e.g., Bondanza v. Matteucci*, 59 N.M. 354, 356, 284 P.2d 1024, 1025 (1955) (stating that "we think it beyond question that a motion for a directed verdict at the close of all the evidence is a prerequisite to a motion for judgment notwithstanding verdict"), trial courts otherwise disposed to direct a verdict often allow a case to go to the jury as a matter of judicial economy. If the court grants a motion for directed verdict and that directed verdict is reversed by an appellate court, there must be an entirely new trial. *See Tafoya v. Seay Bros. Corp.*, 119 N.M. 350, 353, 890 P.2d 803, 806 (1995) (remanding for new trial after reversing order granting directed verdict); *Flores v. Baca*, 117 N.M. 306, 314, 871 P.2d 962, 970 (1994) (same); *Davis v. Gabriel*, 111 N.M. 289, 292, 804 P.2d 1108, 1111 (same). However, if the court grants a motion for j.n.o.v. and it is reversed, the jury verdict is then merely reinstated. *See Leonard Motor Co. v. Roberts Corp.*, 85 N.M. 320, 323, 512 P.2d 80, 83 (1973) (reinstating jury verdict after reversing order granting judgment notwithstanding verdict); *Montoya v. General Motors Corp.*, 88 N.M. 583, 587, 544 P.2d 723, 727 (Ct. App. 1975) (same), *cert. denied*, 89 N.M. 5, 546 P.2d 70 (1976).

Adams v. United Steelworkers of Am., 97 N.M. 369, 372, 640 P.2d 475, 478 (1982) (citing *Montoya v. General Motors Corp.*, 88 N.M. 583, 544 P.2d 723, *cert. denied*, 89 N.M. 5, 546 P.2d 70 (1976), and *cert. denied, Montoya v. Mountain States Tel. & Telegraph Co.*, 90 N.M. 8, 558 P.2d 620 (1976)). "In testing the propriety of a judgment notwithstanding the verdict, the evidence favorable to the successful party, together with all inferences as may be reasonably drawn therefrom, will be accepted as true and all evidence to the contrary will be disregarded." *Scott v. McWood Corp.*, 82 N.M. 776, 777, 487 P.2d 478, 479 (1971). Upon analysis, we "should be able to say that there is neither evidence nor inference from which the jury could have arrived at its verdict." *Townsend*, 74 N.M. at 209, 392 P.2d at 407 (citing *Michelson v. House*, 54 N.M. 197, 218 P.2d 861 (1950)).

{26} The evidence favoring the verdict includes testimony that Michaels had been suffering from continued health problems which had noticeable physical manifestations. He had been seeing a physician about his health problems, and had informed his supervisor that his sickness was likely related to exposure to toxins in the work place. On May 15, 1992, the Friday before his termination, Michaels had another strong reaction to the paint fumes and his physician placed him on a thirty-day work restriction. Michaels called his supervisor, Valdez, and informed him that he would come to work on Monday with the letter from his doctor. When he returned to work with the note he discovered that he had been terminated. Because ADT was aware of Michaels' work-related health problems and Valdez had been informed that Michaels would be unable to work in the body shop for thirty days, it can be inferred that ADT knew that Michaels would be filing a worker's compensation claim on May 18, and they choose to terminate him and attempt to persuade him to file for unemployment instead of workers' compensation.

{27} ADT asserts that Valdez was not informed that Michaels would be bringing in a note from his physician. Further, Valdez was replaced as supervisor on Monday morning, and the decision to eliminate the second shift was made on that morning by upper management. ADT asserts that no one with the power to terminate Michaels was aware of his intention to file a worker's compensation claim. He was simply a member of the second shift, a shift that had to be eliminated because of reduced business. The trial court apparently agreed with ADT. The court stated that

> The evidence is undisputed that (1) there were other workers' compensation cases and no one was fired relative to them; (2) Mr. Michaels was to be terminated when he arrived at work on May 18, 1992; (3) After Mr. Michaels arrived at work and informed defendant of his medical condition, defendant's employees initiated the filing of the compensation claim and helped Mr. Michaels with the paper work to get the claim filed, all *after he was to be terminated*. The facts as asserted by Plaintiffs' counsel in closing argument and in various briefs to support the jury verdict are either inaccurate, partial statements, statements out of context, or facts which equally support several hypotheses and, therefore, prove nothing.

{28} The evaluation of competing theories, whether they *equally* support several hypotheses, is a proper determination for the jury, not the judge. A jury could have determined that Michaels simply was the victim of corporate downsizing, or it could have determined that ADT intentionally terminated an employee that it viewed as a troublemaker and a potential liability. The existence of several hypotheses is not a proper standard for granting a motion for judgment notwithstanding the verdict. ADT would have had to show that there was "*neither evidence nor inference* from which the jury could have arrived at its verdict." *Townsend*, 74 N.M. at 209, 392 P.2d at 407. In this case there was evidence that ADT knew Michaels would likely be filing for worker's compensation, and it is reasonable for the jury to have inferred that ADT chose to terminate Michaels in anticipation of this claim.

{29} Additionally, we believe the three contrary inferences drawn by the trial court to be in error. First, we cannot infer that Michaels was not the victim of retaliatory discharge merely because other employees had filed workers' compensation claims and had not been terminated. Michaels' health problems apparently were related directly to unsafe conditions at ADT, conditions that were in violation of OSHA. Unless it can be shown that the other employees who had filed workers' compensation claims were also victims of similarly unsafe conditions, all inferences comparing these instances are questionable. Second, the fact that an ill employee was to be terminated on the day that he showed up with a doctor's note recommending avoidance of work for an extended period, a letter of which ADT was aware, is not merely coincidental. Third, we cannot infer that ADT did not commit retaliatory discharge merely because they assisted Michaels in filing for workers' compensation. Newman had attempted to talk Michaels out of filing for workers' compensation, and when ADT did assist Michaels, it was merely complying with a legal obligation, *see* NMSA 1978, § 52-1-58 (Repl. Pamp. 1991). We therefore reverse the trial court and hold that judgment notwithstanding the verdict was improperly granted.

{30} *Punitive damages.* Plaintiffs are correct in their assertion that punitive damages are allowable in all retaliatory discharge cases. The tort of retaliatory discharge is an intentional tort, *Chavez v. Manville Products Corp.*, 108 N.M. 643, 649, 777 P.2d 371, 377 (1989), and as our Court of Appeals previously has noted, "Without punitive damages there may be little to discourage an employer from discharging an employee if the pecuniary losses are insignificant. Further, the threat of a petty misdemeanor . . . might in some instances provide insufficient deterrence to retaliatory discharge. The ability to recover punitive damages should offer a sufficient deterrent." *Vigil v. Arzola*, 102 N.M. 682, 690, 699 P.2d 613, 621, *overruled on other grounds, Chavez v. Manville Products Corp.*, 108 N.M. 643, 647, 777 P.2d 371, 375 (1989). "The purpose of punitive damages is to punish the wrongdoer and to deter the wrongdoer and others in a similar position from such misconduct in the future." *Conant v. Rodriguez*, 113 N.M. 513, 517, 828 P.2d 425, 429 (Ct. App. 1992).

{31} "It is a well-established rule in New Mexico that a principal may be held liable for punitive damages when the principal has in some way authorized, ratified, or participated in the wanton, oppressive, malicious, fraudulent, or criminal acts of its agent." *Albuquerque Concrete Coring Co. v. Pan Am World Servs., Inc.*, 118 N.M. 140, 143, 879 P.2d 772, 775 (1994) (citing *Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 601, 577 P.2d 1245, 1247 (1978)). According to the Restatement, "punitive damages can properly be awarded against a master or other principal because of an act by an agent if . . . the agent was employed in a managerial capacity and was acting in the scope of employment." Restatement (Second) of Agency § 217(C) (1957). We adopted the Restatement standard in *Albuquerque Concrete*, noting that "when a corporate agent with managerial capacity acts on behalf of the corporation, pursuant to the theoretical underpinnings of the Restatement rule of managerial capacity, his acts are the acts of the corporation; the corporation has participated." *Albuquerque Concrete*, 118 N.M. at 146, 879 P.2d at 778. A managerial employee has been defined "as one who 'formulates, determines and effectuates his employer's policies, one with discretion or authority to make ultimate determinations independent of company consideration and approval of whether a policy should be adopted.'" *Id.* at 145, 879 P.2d at 777 (quoting *Abshire v. Stoller*, 235 Ill. App. 3d 849, 601 N.E.2d 1257, 1263, 176 Ill. Dec. 559 (Ill. Ct. App. 1992), *appeal denied*, 610 N.E.2d 1259 (1993)).

{32} Plaintiffs allege that every person involved in the decision to terminate them had managerial authority. Valdez, as the manager of the reconditioning department, had the authority to fire Plaintiffs, and there was some testimony presented that he was involved in the terminations. Newman was present at the meeting on May 18, and he also had the same authority as Valdez. Osborn stated in his deposition that he had the "ultimate authority" to hire and fire employees, and that he made the decision to

terminate Plaintiffs at the May 18 meeting. ADT disagrees, arguing that neither Valdez nor Newman had authority to fire plaintiffs, that Osborn was the only person with this authority. However, all three men could make ADT liable for punitive damages under the Restatement standard that we adopted in *Albuquerque Concrete*, 118 N.M. at 146, 879 P.2d at 778. They each were employed in managerial capacities with varying degrees of authority, and each acted within the scope of that authority. Therefore, the trial court should have given the instruction on punitive damages.

{33} *Conclusion.* An order granting a motion for a new trial in a civil case is not immediately appealable in New Mexico except when this Court has granted a writ of superintending control under circumstances demanding extraordinary relief. In light of the evidence presented, and reasonable inferences drawn from that evidence, we find that the trial court improperly granted the motions for new trial and for judgment notwithstanding the verdict. We therefore reverse the trial court and remand for entry of judgment on the verdicts of the jury. The trial court also erred in refusing to instruct the jury on punitive damages. Plaintiffs are entitled to a new trial on the issue of punitive damages which, if awarded, must be "reasonably related to the injury and to the damages given as compensation and not disproportionate to the circumstances." *See* UJI 13-1827 NMRA 1996 (punitive damages instruction).

{34} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

JOSEPH F. BACA,
Chief Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1997-NMSC-006

Filing Date: January 7, 1997

Docket No. 23,224

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

ALFREDO GOMEZ,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Ralph W. Gallini, District Judge

As Corrected February 11, 1997.

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for Petitioner.

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OPINION

RANSOM, Justice.

{1} Alfredo Gomez was charged with possession of lysergic acid diethylamide (LSD), a Schedule I controlled substance prohibited under NMSA 1978, Section 30-31-23 (Repl. Pamp. 1989). The trial court denied a motion to suppress evidence obtained from the warrantless search of Gomez's automobile while he was under arrest. Gomez pleaded nolo contendere and reserved the right to appeal the denial of his suppression motion. In an unpublished memorandum opinion, the Court of Appeals affirmed the conviction, holding that Gomez had failed to preserve in the trial court his argument that the search was invalid under Article II, Section 10 of the New Mexico Constitution, which proscribes unreasonable searches and seizures and requires specificity and probable cause for warrants, even if permitted under the virtually same Fourth Amendment to the United States Constitution. We issued our writ of certiorari to address, first, what is required to "fairly invoke" and preserve for appellate review a search and seizure claim under Article II, Section 10; and, second, what the State must show to justify the warrantless search of an automobile.

{2} We hold that a state constitutional claim was preserved because Gomez both invoked a principle of exigency previously recognized under the New Mexico Constitution and developed the facts needed for a ruling on that question. He thus met the requirements of Rule 12-216(A) NMRA 1996 (mandating that to preserve a question for review "it must appear that a ruling or decision by the district court was fairly invoked"). We also hold that to justify the warrantless search of Gomez's automobile, the State must show reasonable grounds for the belief that exigent circumstances existed. In this case, it was reasonable for the officer to believe exigent circumstances existed. Therefore, we affirm the conviction.

{3} *Facts and Proceedings.* In his motion to suppress, Gomez alleged that "Lea County Deputy Sheriff Guy Payne searched Alfredo Gomez's car—including a closed container in the car—without a search warrant, or exigent circumstances to justify a warrantless search . . . [and

this was] violative of the Fourth Amendment to the United States Constitution, and Section 10, Article II of the New Mexico Constitution." The trial court held a hearing on the motion, at which Deputy Payne was the sole witness. A summary of his testimony follows.

{4} Late at night on June 13, 1994, Payne was dispatched to a "party disturbance" near Lovington, New Mexico. Arriving at the scene, Payne observed cars parked on both sides of a dirt road and fifty to sixty people walking in the road and yards. He spoke to several men to inquire whether there was a problem. They told him that if there were a problem, it would be at Alfredo Gomez's car where some "juveniles" had gathered. He drove his patrol car slowly towards Gomez's car, which was parked on the left side of the road with the passenger side closest to Payne. As he approached, Payne observed some beer on the trunk of Gomez's car, but observed no disturbance. He stopped his patrol car about eight feet away from and parallel to Gomez's car. Three men were leaning towards the passenger side of the car and focussing their attention on Gomez, who was sitting in the passenger seat.

{5} As Payne watched, one of the men outside Gomez's car glanced around, noticed the patrol car with Payne in it, and said, "The cops!" Gomez made eye contact with Payne and began to move about frantically. Payne heard the sound of a tin container being shut and saw Gomez furtively stuff something under the front seat. Payne got out of the patrol car and Gomez got out of his car locking the opened passenger door. Payne smelled the odor of burned and unburned marijuana, and, before Gomez was able to shut the passenger door, Payne grabbed it and the two struggled briefly as Payne tried to keep the door open and Gomez attempted to shut it.

{6} Payne handcuffed Gomez, "Mirandized" him, searched him, and secured him in the patrol car. Payne's search of Gomez's person uncovered some money and cigarette papers. By the time Gomez had been arrested and secured, additional officers had arrived on the scene. Then, looking inside Gomez's car, Payne observed marijuana scattered on the console, seat, and floorboard. He also saw a brass pipe and a pair of hemostats, items commonly used for smoking marijuana. Payne opened the door, searched the interior of the car, and seized the pipe, hemostats, marijuana, a tin container, and a fanny pack. He unzipped the fanny pack and inside it found perforated tabs of white paper, which from experience he believed to contain LSD. He also found some small "baggies" inside the fanny pack.

{7} On cross-examination, defense counsel asked Payne whether an emergency existed to justify his warrantless search of Gomez's car. The State objected on the grounds that *United States v. Ross*, 456 U.S. 798, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982), allows a search of an automobile with probable cause alone. The State asserted Payne's warrantless search was valid because New Mexico courts have followed *Ross*. Defense counsel responded that there was contrary New Mexico precedent. The trial court allowed Payne to answer the question and postponed argument on the legal issue raised by the State's objection until after Payne's testimony.

{8} Payne testified further that he felt no threat to his safety after he secured Gomez in his patrol car. He felt, however, that he and the other officers had to be careful because their activities had drawn the attention of as many as one hundred onlookers. He did not believe that taking the car keys would suffice to secure the car, nor that the other officers at the scene could pay attention to the car while dealing with developing problems and with what easily could have turned into a hostile crowd. He believed the car would not have remained at the scene if he had left it unattended to obtain a search warrant. He did not know when he could get a tow truck to the scene. After the search, he did call a tow truck and, when Gomez's car was impounded, Payne returned to the police station where he turned over the drugs and paraphernalia from Gomez's car to a narcotics officer for testing.

{9} Following Payne's testimony, the court entertained argument in which the State asserted that, from Payne's vantage point while stopped

parallel to Gomez's automobile, he observed facts sufficient to establish reasonable suspicion justifying further investigation. Once Payne smelled marijuana, he had probable cause to search Gomez's automobile and its closed containers. In support of its argument that the warrant requirement does not apply to a lawfully stopped vehicle, the State cited *Ross* together with *State v. Pena*, 108 N.M. 760, 779 P.2d 538 (1989), and *State v. Apodaca*, 112 N.M. 302, 814 P.2d 1030 . It argued that probable cause alone justifies searching a movable vehicle and its closed containers. The State acknowledged, however, that a "recent case from Roswell" required police to obtain a warrant for the **arrest** of the operator of a moving vehicle unless there are exigent circumstances. *See Campos v. State*, 117 N.M. 155, 870 P.2d 117 (1994) (*Campos II*) (reversing *State v. Campos*, 113 N.M. 421, 827 P.2d 136 (Ct. App. 1991) (*Campos I*)).

{10} Defense counsel noted that the fanny pack, a closed container, was not in plain view when Gomez was arrested. He cited *State v. Coleman*, 87 N.M. 153, 530 P.2d 947, for the proposition that exigent circumstances were required to justify this warrantless search. In *Coleman*, an officer stopped the defendant's speeding car, which was being driven by an unlicensed occupant of the car. At the officer's request, the defendant followed the officer in the defendant's car to the sheriff's office where the defendant and the other occupants of the car were arrested. The officer then conducted a warrantless search of the car securely parked outside the sheriff's office. The search was held invalid because there were no exigent circumstances. *Id.* at 155, 530 P.2d at 949.

{11} The State replied that Payne's testimony was reasonable and believable, noted that *Pena* and *Apodaca* were decided more recently than *Coleman*, and observed that whereas *Pena* was decided by the New Mexico Supreme Court, *Coleman* was a Court of Appeals opinion. Adopting Payne's testimony as factual, the court ruled that, while it did not disagree with the holding in *Coleman*, it regarded *Coleman* as distinguishable from the facts of this case. The court denied the motion to suppress, explaining that with the marijuana and paraphernalia in plain view Payne had probable cause under *Pena* and *Apodaca* to search the entire vehicle, including closed containers therein such as the fanny pack.

{12} *Preservation of Article II, Section 10 claim.* The Court of Appeals refused to review Gomez's Article II, Section 10 claim because "[his] argument below not only failed to articulate why the New Mexico Constitution affords greater protection under these circumstances, but failed to even mention the state constitution." The State contends that New Mexico's independent search and seizure law does not obviate the requirements of Rule 12-216(A); that Gomez's citation to *Coleman* was not enough to alert the trial court to the broader-protection issue; that Gomez made less of a showing than the defendant in *State v. De Jesus-Santibanez*, 119 N.M. 578, 893 P.2d 474 (Ct. App.), *cert. denied*, 891 P.2d 1218 (1995) (refusing to review state constitutional claim on appeal where defendant argued in trial court that state constitution provided more protection than federal constitution but failed to make specific argument advanced on appeal); and that the trial court did not rule on the issue whether there were exigent circumstances. The State urges this Court to adopt the approach taken by the Court of Appeals below and rule that Gomez failed to preserve the issue because of his failure to cite to the specific cases in which Article II, Section 10 was interpreted to provide broader protection than the Fourth Amendment.

{13} Gomez responds that the fundamental goals underlying Rule 12-216 were met because the facts needed for a ruling on the existence of exigent circumstances were developed adequately and the trial court ruled on that issue. He contends that the Court of Appeals created for state constitutional claims a "special preservation rule" that treats the New Mexico Constitution as a "poor cousin" of the United States Constitution. Under this special rule, arguments in the trial court sufficed to preserve the Fourth Amendment issue but failed to preserve the broader-protection issue. Gomez contends this frustrates the role of New Mexico appellate

courts in interpreting the state constitution and diminishes the force of decisions interpreting the state constitution independently. Gomez argues that the requirements for preserving a state constitutional claim should be identical to those for preserving a federal constitutional claim.[1]

{14} *—Origins of Rule 12-216.* Rule 12-216 may be traced to the earliest decisions of this Court. In *Fullen v. Fullen*, 21 N.M. 212, 153 P. 294 (1915), this Court surveyed appellate preservation rules of other jurisdictions and noted that "it is a fundamental rule of appellate practice and procedure that an appellate court will consider only such questions as were raised in the lower court." *Id.* at 225, 153 P. at 297. Rule 12-216(A) updates and codifies this rule. A trial is first and foremost to *resolve* a complaint in controversy, and the rule recognizes that a trial court can be expected to decide only the case presented under issues fairly invoked.[2]

{15} In *Sais v. City Electric Co.*, 26 N.M. 66, 68-69, 188 P. 1110, 1111 (1920), we recognized three exceptions to the rule announced in *Fullen*: jurisdictional questions, questions of a general public nature, and questions involving fundamental rights of a party. With minor adjustments and modifications, these exceptions essentially are unchanged from 1920. *Compare Sais*, 26 N.M. at 68-69, 188 P. at 1111, *with* Rule 12-216(B) (excepting "jurisdictional questions" and questions of "general public interest" or of "fundamental error or fundamental rights of a party" from preservation rule).

[1] In *Campos I*, the majority opinion and dissent of Chief Judge Apodaca discussed at some length different positions on whether the state constitutional issue had been preserved. *See* 113 N.M. at 426, 429-30, 827 P.2d at 141, 144-45. No preservation issue was presented to the Supreme Court for review on certiorari, and we did not address the preservation requirement *sua sponte*.

[2] The rule requiring preservation of issues for consideration on appeal places limitations on parties, but not on courts. *See, e.g., Kellan v. Firemen's Pension Fund*, 194 Ill. App. 3d 573, 551 N.E.2d 264, 141 Ill. Dec. 271 (Ill. App. Ct. 1990); *Town of South Tucson v. Board of Supervisors*, 52 Ariz. 575, 84 P.2d 581, 584 (Ariz. 1938), *quoted in Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 733 P.2d 1073 (Ariz. 1987) (question whether court will review question not raised at trial is "one of administration, not of power").

{16} *—Lock-step with federal precedent.* When *Fullen* and *Sais* were decided, and for several decades thereafter, the New Mexico Constitution was interpreted in "lock-step" with federal precedent interpreting the United States Constitution when parallel provisions were involved. If the federal constitution provided protection against deprivation of an individual right, then New Mexico courts followed federal precedent, as required by the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, § 2. Furthermore, where the federal constitution did not provide such protection, we would follow that precedent without interpreting independently the parallel provision of the New Mexico Constitution. *See, e.g., State v. Garcia*, 76 N.M. 171, 174, 413 P.2d 210, 212 (1966) (referring to Article II, Section 10 as "almost identical" with Fourth Amendment).

{17} *—Power of independent constitutional interpretation.* In *State ex rel. Serna v. Hodges*, 89 N.M. 351, 356, 552 P.2d 787, 792 (1976), *overruled in part on other grounds by State v. Rondeau*, 89 N.M. 408, 412, 553 P.2d 688, 692 (1976), in considering the constitutionality of the death penalty, this Court observed that the states have inherent power as separate sovereigns in our federalist system to provide *more* liberty than is mandated by the United States Constitution:

> We [consider Article II, § 13 of the New Mexico Constitution] as the ultimate arbiters of the law of New Mexico. We are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, "unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter."

89 N.M. at 356, 552 P.2d at 792 (citation omitted). Though at the time of *Hodges* no result had been altered by an analysis of the state constitution, *see, e.g., State v. Deltenre*, 77 N.M. 497,

503-04, 424 P.2d 782, 786 (1967) (recognizing that a warrantless arrest valid under federal standards "must still be tested by New Mexico standards," but finding "nothing in New Mexico cases which vitiates the validity of the arrest"), more recently a right not protected under the federal constitution has been protected under the state constitution, *see, e.g., Campos II; State v. Attaway*, 117 N.M. 141, 870 P.2d 103 (1994); *State v. Gutierrez*, 116 N.M. 431, 863 P.2d 1052 (1993); *Cordova v. State*, 109 N.M. 211, 784 P.2d 30 (1989).

{18} *—Approaches to independent constitutional interpretation.* Commentators classify the interpretation of state constitutions as lock-step, primacy, or interstitial. As stated above, we no longer follow the lock-step approach. Under the primacy approach, "if a defendant's rights are protected under state law, the court need not examine the federal question. If a defendant's rights are not protected under state law, the court must review the matter in light of the federal constitution." Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1170 (1985). Several states have followed this path. *See, e.g., State v. Rowe*, 480 A.2d 778 (Me. 1984); *State v. Chaisson*, 125 N.H. 810, 486 A.2d 297 (N.H. 1984); *State v. Soriano*, 68 Ore. App. 642, 684 P.2d 1220 (Or. Ct. App. 1984); *State v. Jackson*, 102 Wash. 2d 432, 688 P.2d 136 (Wash. 1984).

{19} Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined. *See Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1358 (1982) [hereinafter "*Developments*"]. A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics. *Id.* at 1359.

{20} *—The interstitial approach adopted.* Since abandoning the lock-step model, our tacit approach to interpretation of the New Mexico Constitution has been interstitial, providing broader protection where we have found the federal analysis unpersuasive either because we deemed it flawed, *e.g., Campos II*, 117 N.M. at 158, 870 P.2d at 120 ("We must decline to adopt the blanket federal rule that all warrantless arrests of felons based on probable cause are constitutionally permissible in public places. . . . We believe that each case must be reviewed in light of its own facts and circumstances."); *Gutierrez*, 116 N.M. at 446-47, 863 P.2d at 1067-68 (rejecting "good faith" exception to exclusionary rule), or because of distinctive state characteristics, *e.g., Cordova*, 109 N.M. at 216-17, 784 P.2d at 35-36 (concluding that New Mexico has not experienced rigidity and technicalities leading to federal abandonment of two-part test of informer's veracity and basis of knowledge as probable cause to issue warrant); *State v. Sutton*, 112 N.M. 449, 455, 816 P.2d 518, 524 (noting in dicta that the federal "open fields" doctrine might clash with privacy exceptions in New Mexico where "lot sizes in rural areas are often large, and land is still plentiful"), or because of undeveloped federal analogs, *e.g., Attaway*, 117 N.M. at 151, 870 P.2d at 113 (holding New Mexico Constitution embodies a knock-and-announce requirement for entry to execute warrant—federal constitution only later interpreted similarly in *Wilson v. Arkansas*, 514 U.S. 927, 131 L. Ed. 2d 976, 115 S. Ct. 1914, 1916 (1995)).

{21} We today specifically adopt the interstitial in preference to the primacy approach because

> when federal protections are extensive and well-articulated, state court decisionmaking that eschews consideration of, or reliance on, federal doctrine not only will often be an inefficient route to an inevitable result, but also will lack the cogency that a reasoned reaction to the federal view could provide, particularly when parallel federal issues have been exhaustively discussed by the United States Supreme Court and commentators.

Developments, supra, at 1357. As we stated in *Gutierrez*, "we recognize the responsibility of state courts to preserve national uniformity in development and application of fundamental rights guaranteed by our state and federal constitutions." 116 N.M. at 436, 863 P.2d at 1057. The interstitial approach effectively advances this goal. As Justice Handler of the New Jersey Supreme Court noted,

> Our national judicial history and traditions closely wed federal and state constitutional doctrine. . . . [A] considerable measure of cooperation must exist in a truly effective federalist system. Both federal and state courts share the goal of working for the good of the people to ensure order and freedom under what is publicly perceived as a single system of law. . . . Moreover, while a natural monolithic legal system is not contemplated, some consistency and uniformity between state and federal governments in certain areas of judicial administration is desirable.
>
> For these reasons, state courts should be sensitive to developments in federal law. Federal precedent in areas addressed by similar provisions in our state constitutions can be meaningful and instructive.

State v. Hunt, 91 N.J. 338, 450 A.2d 952, 964 (Handler, J., concurring).

{22} *—Interstitial approach to preserving question of broader protection under state constitution.—Established precedent.* When a litigant asserts protection under a New Mexico Constitutional provision that has a parallel or analogous provision in the United States Constitution, the requirements for preserving the claim for appellate review depend on current New Mexico precedent construing that state constitutional provision. If established precedent construes the provision to provide more protection than its federal counterpart, the claim may be preserved by (1) asserting the constitutional principle that provides the protection sought under the New Mexico Constitution, and (2) showing the factual basis needed for the trial court to rule on the issue. This is no more than is required of litigants asserting a right under the federal constitution, a federal statute, a state statute, or common law. That is, Rule 12-216 requires that litigants "fairly invoke" a ruling by the trial court in order to raise that question on appeal. Assertion of the legal principle and development of the facts are generally the only requirement to assert a claim on appeal.

{23} *—No precedent.* However, when a party asserts a state constitutional right that has *not* been interpreted differently than its federal analog, a party also must assert *in the trial court* that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart **and** provide reasons for interpreting the state provision differently from the federal provision.[3] This will enable the trial court to tailor proceedings and to effectuate an appropriate ruling on the issue.

{24} *—Gomez met requirements of Rule 12-216(A).* In his motion to suppress, Gomez asserted that Article II, Section 10 invalidates the search and seizure of his car and fanny pack because the search was conducted "without a search warrant, [and without] exigent circumstances to justify a warrantless search." Gomez urged the trial court to suppress the evidence seized "as the fruits of an arrest and search violative of the Fourth Amendment to the United States Constitution, and Section 10, Article II of the New Mexico Constitution." There is established New Mexico law interpreting Article II, Section 10 more expansively than the Fourth Amendment. *See, e.g., Campos II; Attaway; Gutierrez; Cordova*.

[3] We decline to follow those states that require litigants to address in the trial court specified criteria for departing from federal interpretation of the federal counterpart. However, we note that several state courts have outlined a number of criteria that trial counsel in New Mexico might profitably consult in framing state constitutional arguments. *See, e.g., Hunt*, 450 A.2d at 962-67 (N.J. 1982) (Handler, J., concurring); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (N.Y. 1986); *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887, 895 (Pa. 1991); *State v. Jewett*, 146 Vt. 221, 500 A.2d 233, 236-38 (Vt. 1985).

{25} Therefore, Gomez need not have asserted in the trial court that Article II, Section 10 should be interpreted differently from the Fourth Amendment. In oral argument before the trial court, he referred to *Coleman*, thus alerting the court and the opposing party to the constitutional principle that, in the absence of exigent circumstances, the police must obtain a warrant to search a vehicle and closed containers therein. Gomez's written and oral references combine to satisfy the first step required under Rule 12-216.

See Garcia v. La Farge, 119 N.M. 532, 540-41, 893 P.2d 428, 436-37 (1995) (reviewing due process claim on appeal where arguments in trial court, though lacking in specificity, "were sufficient to alert the trial court and opposing counsel to the substance of the argument being made").

{26} The Court of Appeals faults Gomez for not citing *Campos II* to the trial court. The Court of Appeals rationalized that "a Defendant may not rely on the State to preserve issues for appeal," citing *State v. James*, 85 N.M. 230, 233, 511 P.2d 556, 559 (refusing to address defendant's argument that jury instruction was incorrect where only the State objected to the instruction at trial). Here, however, Gomez based his motion to suppress on the absence of exigent circumstances in violation of Article II, Section 10. The State's reference to *Campos II* significantly informed the issue raised by Gomez. Opposing counsel has no duty to invoke a ruling, but all counsel have a duty to aid the court in a fair resolution of an issue once invoked. Rule 16-303 NMRA 1996 provides that "[a] lawyer should not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

{27} In addition to raising the exigency principle, Gomez developed the facts needed for a ruling. The State questioned Deputy Payne in considerable depth about the circumstances leading up to and following the search. Payne's testimony on cross-examination directly addressed the question concerning exigencies. On re-direct and on re-cross-examination, questions and answers squarely focussed on exigent circumstances. Whereas in *De Jesus-Santibanez* and *State v. Ramzy*, 116 N.M. 748, 867 P.2d 418, the opposing party was deprived of the chance to develop facts relevant to the claim, in this case all relevant facts are present in the record to determine the existence of exigent circumstances. The State's reference to *Campos II* and argument that exigent circumstances existed in this case indicate the State believed the factual record was sufficient to support a finding of exigent circumstances.

{28} Furthermore, the record indicates the trial court ruled on the issue of exigent circumstances. The judge requested a copy of the *Coleman* opinion and read it. In rebuttal, the State maintained that exigent circumstances were not required but were present in this case. The judge ruled from the bench:

> Reading *Coleman*, I certainly don't disagree with the conclusion and holding in *Coleman*, but I think the facts are different than this particular case. It talks about exigent circumstances, in that particular case, it dealt with something totally different than what we have here and, like I said, I think for the facts of that case or others close to it, it is certainly correct.

Finding Deputy Payne's testimony regarding the conditions justifying the warrantless search of Gomez's automobile to be credible, the trial court denied Gomez's motion.

{29} Neither of the primary purposes animating Rule 12-216(A) is served by precluding Gomez from raising Article II, Section 10 on appeal. We require parties to assert the legal principle upon which their claims are based and to develop the facts in the trial court primarily for two reasons: (1) to alert the trial court to a claim of error so that it has an opportunity to correct any mistake, and (2) to give the opposing party a fair opportunity to respond and show why the court should rule against the objector. *See Garcia v. La Farge*, 119 N.M. at 540, 893 P.2d at 436.

{30} In this case, Gomez's failure to cite to our cases interpreting Article II, Section 10 more expansively than the Fourth Amendment did not operate to prejudice the State in any way. *See id.* at 541, 893 P.2d at 437 (observing that these rules are "instruments for doing justice" and "not an end in themselves"). The trial court is charged with knowing and correctly applying established New Mexico precedent interpreting the state constitution. Where New Mexico courts have taken a different path than federal courts, our precedent governs regardless of whether a party cites specific cases in support of a constitutional principle, so long as the party has asserted the principle recognized in the cases and has developed the facts adequately to give the opposing party an opportunity to respond and to give the court an opportunity to rule.

{31} The rule announced today is also a recognition of realities separating trial and appellate practice. Although we expect trial counsel to be well-advised of state constitutional law on a particular subject affecting his or her client's interests, we also recognize that the arguments a trial lawyer reasonably can be expected to articulate on an issue arising in the heat of trial are far different from what an appellate lawyer may develop after reflection, research, and substantial briefing. It is impractical to require trial counsel to develop the arguments, articulate rationale, and cite authorities that may appear in an appellate brief. Here, the record establishes unambiguously that Gomez invoked a principle recognized under the New Mexico Constitution, the facts needed for a ruling on exigent circumstances were developed, and the trial court made a ruling on exigent circumstances. Therefore, the issue was preserved.[4]

[4] Even if Gomez's contentions before the trial court had failed to preserve the state constitutional claim, we could nevertheless consider it because freedom from illegal search and seizure is a fundamental right. *See* Rule 12-216(B)(2). *See also DesGeorges v. Grainger*, 76 N.M. 52, 59, 412 P.2d 6, 11 (1966); Robert L. Stern, *Appellate Practice in the United States* § 3.1 at 65 (2d ed. 1989). *Cf. Sutton*, 112 N.M. at 454, 816 P.2d at 523 (discussing search and seizure protections under Article II, Section 10 as matter of general public interest despite defendant's failure to preserve claim for appellate review).

{32} The rule announced in this case represents a refinement of the requirements previously applied by our appellate courts. In *Sutton*, 112 N.M. at 454, 816 P.2d at 523, the Court of Appeals stated

> References to the state constitution, without some discussion or argument concerning the scope of its protections, are not enough to alert the trial court to the issue of a possible difference between the rights afforded by the state constitution and those provided by the fourth amendment.

This rule has been followed in a number of cases. *See, e.g., De Jesus-Santibanez*, 119 N.M. at 580, 893 P.2d at 476; *State v. Ongley*, 118 N.M. 431, 432, 882 P.2d 22, 23; *State v. Montoya*, 116 N.M. 297, 301, 861 P.2d 978, 982 (Ct. App. 1993); *State v. Ramos*, 115 N.M. 718, 721-22, 858 P.2d 94, 97-98 (Ct. App. 1993); *State v. Allen*, 114 N.M. 146, 147, 835 P.2d 862, 863 (Ct. App. 1992). The rule in *Sutton* appears to have provided adequate guidance in the cases in which it has been applied, when state constitutional claims were either novel or interchangeable with federal constitutional claims, but this case requires a refinement of that rule. Our own constitutional law has matured, and we today adopt preservation requirements that reflect that fact. To the extent *Sutton* and any of the cases that have relied on *Sutton* are irreconcilable with this opinion, they are hereby modified.

{33} *Search and seizure.* We turn to the substantive question which was not reached by the Court of Appeals: whether the State must make a particularized showing of exigent circumstances to justify the warrantless search of an automobile. In accordance with our interstitial approach, before examining our state constitution we look at the applicable federal law to determine whether the protection sought here is accorded motorists under federal constitutional law.

{34} *—Federally-recognized automobile exception.* Under current federal interpretation of the Fourth Amendment, the constitutional protection against warrantless searches and seizures

admits of a bright-line exception that permits a warrantless search of a lawfully stopped automobile and any closed containers within the automobile. *California v. Acevedo*, 500 U.S. 565, 575-76, 114 L. Ed. 2d 619, 111 S. Ct. 1982 (1991); *United States v. Ross*, 456 U.S. 798, 800, 72 L. Ed. 2d 572, 102 S. Ct. 2157 (1982). *See also Carroll v. United States*, 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280 (1925) (creating an exception to the warrant requirement for searches of automobiles). The exception for automobiles is grounded in two propositions: (1) the inherent mobility of automobiles creates exigent circumstances, *Chambers v. Maroney*, 399 U.S. 42, 50-51, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1975); and (2) a lesser expectation of privacy attaches to the contents of a motor vehicle because of "the pervasive regulation of vehicles capable of traveling on the public highways," *California v. Carney*, 471 U.S. 386, 392, 85 L. Ed. 2d 406, 105 S. Ct. 2066 (1985). Under the federal bright-line exception, Gomez's motion to suppress fails. In *State v. Pena*, 108 N.M. 760, 762, 779 P.2d 538, 540 (1989), and *State v. Apodaca*, 112 N.M. 302, 305-06, 814 P.2d 1030, 1033-34, New Mexico courts, relying on *Ross*, acknowledged that a warrantless search of an automobile and its contents is permitted under the Fourth Amendment.

{35} *—Pena is not controlling precedent.* The State has argued that our prior decision in *Pena* is controlling in this case and does not require a showing of exigent circumstances to search an automobile without a warrant so long as the probable cause standard is met. *Pena* represents the high-water mark of our interpretation of Article II, Section 10 in lock-step with United States Supreme Court interpretation of the Fourth Amendment. In *Pena*, we treated the two search and seizure provisions interchangeably and in effect regarded Fourth Amendment precedent as binding on us in interpreting Article II, Section 10. Since *Cordova*, decided seven months after *Pena*, we have given independent meaning to the protections from unreasonable searches and seizures articulated in Article II, Section 10. The fact that *Pena* would not require a showing of exigent circumstances to justify a warrantless search of an automobile does not compel us to hold that such a showing is not required. We no longer follow United States Supreme Court interpretation of the Fourth Amendment in our interpretation of Article II, Section 10. Therefore, *Pena* is not controlling in this case.

{36} *—New Mexico search and seizure jurisprudence.* Article II, Section 10 of the New Mexico Constitution states "the people shall be secure . . . from unreasonable searches and seizures, and no warrant shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause." In interpreting our search and seizure provision, this Court consistently has expressed a strong preference for warrants. *See Campos II*, 117 N.M. at 159, 870 P.2d at 121; *Gutierrez*, 116 N.M. at 444, 863 P.2d at 1065; *Cordova*, 109 N.M. at 216, 784 P.2d at 35. As stated in *United States v. Chadwick*, 433 U.S. 1, 53 L. Ed. 2d 538, 97 S. Ct. 2476 (1977):

> The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization "particularly describing the place to be searched and the persons and things to be seized." Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.

Id. at 9 (citations omitted).

{37} The State urges us to relax the warrant requirement in cases such as this on the grounds that there is no net benefit to the citizen by requiring a warrant where the officer has probable cause to search the vehicle. The State cites Oregon authority for the proposition that, assuming police have probable cause to search a vehicle, "the privacy rights of our citizens are subjected to no greater

governmental intrusion if the police are authorized to conduct an immediate on-the-scene search of the vehicle than to seize the vehicle and hold it until a warrant is obtained." *State v. Brown*, 301 Ore. 268, 721 P.2d 1357, 1361 (Or. 1986).

{38} By injecting a neutral magistrate into the process of searching a vehicle or containers within it, however, the law provides a layer of protection from unreasonable searches and seizures. By compelling the officer to show to a neutral magistrate facts from which that impartial judicial representative could conclude that probable cause exists to justify searching that vehicle and its containers for contraband, the law enforcement organizations of this state are prevented from allowing the competitive pressures of fighting crime to compromise their judgment about whether or not to carry out a given search.

{39} *—Warrantless searches of automobiles require a showing of exigent circumstances.* In accordance with the principles underlying Article II, Section 10 and the cases over the last seven years interpreting that provision independently from its federal counterpart, we announce today that a warrantless search of an automobile and its contents requires a particularized showing of exigent circumstances. In *State v. Copeland*, the Court of Appeals defined exigent circumstances as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." 105 N.M. 27, 31, 727 P.2d 1342, 1346.

{40} A warrantless search is valid where the officer reasonably has determined that exigent circumstances exist. A warrantless search is invalid if, in the court's estimation, the officer's judgment that exigent circumstances existed was not reasonable. The inquiry is an objective test, not a subjective one, into whether a reasonable, well-trained officer would have made the judgment this officer made. If reasonable people might differ about whether exigent circumstances existed, we defer to the officer's good judgment. On appeal, we may review de novo the trial court's determination of exigent circumstances.

{41} *—Application of the rule.* In this case, Deputy Payne felt he and the other officers had to be careful in the presence of the party-goers who were milling about at the scene. He believed that the car would not have remained at the scene if he had left it unattended to obtain a warrant and he did not believe taking the car keys would have sufficed to secure the car. It was late at night and he did not know when a tow truck would arrive. Since he had probable cause to believe the car contained contraband and perhaps other evidence of illegal activity, and he believed the evidence would be destroyed or removed unless he searched the vehicle immediately, the search was reasonable despite the absence of a judicial warrant.

{42} In reviewing the officer's judgment concerning the presence of exigent circumstances, we will keep in mind this Court's approach in *State v. Ortega*, 117 N.M. 160, 870 P.2d 122, (1994). In that case we held that "if an officer has good reason to believe that evidence will be destroyed, that officer is justified in making an unannounced entry into a person's residence. 'Good reason' will be defined by whether it was objectively reasonable for the officer to believe that evidence is being or will be destroyed based upon the particular circumstances surrounding the search." *Id.* at 160, 870 P.2d at 125. Where the officer has an objectively reasonable basis for believing exigent circumstances require an immediate warrantless search, then the search is valid. In this case, it was not unreasonable for Deputy Payne to believe a warrantless search was required to avoid removal or destruction of evidence of illegal activity which he had probable cause to believe was inside the car.

{43} It would have been reasonable—and perhaps preferable—for Deputy Payne to have refrained from searching the vehicle and closed containers within it until after it was impounded, at which point he could have obtained a warrant. This course of action would have shown more deference to the warrant process. However, while this would have been acceptable and even desirable, failure to have done so does not affect our ruling that it was reasonable for Payne to search the vehicle under circumstances giving rise to a

reasonable belief that exigencies required an immediate search. That is, in this case, he was not required to obtain a warrant to search Gomez's automobile because it was reasonable for him to believe that exigencies required a warrantless search. The fact that a different course of action also would have been reasonable does not mean that Payne's conduct was unreasonable.

{44} *—Reasons for departing from federal precedent.* Quite simply, if there is no *reasonable* basis for believing an automobile will be moved or its search will otherwise be compromised by delay, then a warrant is required. While it may be true that in most cases involving vehicles there will be exigent circumstances justifying a warrantless search, we do not accept the federal bright-line automobile exception.

{45} There is some tension between the blanket automobile exception and the U.S. Supreme Court's recent pronouncements. In *Ohio v. Robinette*, 136 L. Ed. 2d 347, 65 U.S.L.W. 4013, 4014-15, 117 S. Ct. 417 (U.S. Nov. 18, 1996), the Court states, "We have eschewed bright-line rules [in applying the totality-of-circumstances test], instead emphasizing the fact-specific nature of the reasonableness inquiry. . . . We expressly disavowed any 'litmus-paper test' . . . in recognition of the 'endless variations in the facts and circumstances' implicating the Fourth Amendment." We regard the automobile exception as a failure to recognize such variations.

{46} *Conclusion.* Gomez preserved the state constitutional issue on appeal where he raised the principle of exigent circumstances required under Article II, Section 10 of the New Mexico Constitution and where the facts necessary to the state constitutional inquiry were developed in the trial court. A warrantless search of an automobile and closed containers within it is invalid under Article II, Section 10 unless it is reasonable for the officer to believe that exigent circumstances exist to justify a departure from the warrant requirement. In this case, it was reasonable for Deputy Payne to believe exigent circumstances required a search of Gomez's automobile without a warrant. Denial of Gomez's motion to suppress is affirmed.

{47} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER,
Justice