SUPREME COURT
STATE OF NEW MEXICO
COMMEMORATIVE
APPELLATE OPINIONS

VOLUME 3

JUSTICE TONY SCARBOROUGH

1987–1989

BIOGRAPHY

Justice Tony Scarborough was born on December 27, 1938, in Russellville, Kentucky. He moved to Española, New Mexico with his family when he was one year old. His father was First District Court Judge James Scarborough.

Justice Scarborough graduated from New Mexico Military Institute in Roswell before receiving his Bachelor of Arts in Zoology from the University of Arizona and law degree from Southern Methodist University in Dallas, Texas. He was admitted to practice law in New Mexico in 1965. Before becoming a judge, he was a Special Agent with the FBI for about two years.

When Justice Scarborough returned to New Mexico from his work with the FBI, a job that required travel, he worked as a City Attorney for Española and Assistant District Attorney in the First Judicial District. He won his first election to become a judge in the First Judicial District Court—a position he held from 1979 to 1986. He left that position when he was elected to the New Mexico Supreme Court, beginning his term on January 1, 1987.

During his tenure, Justice Scarborough held the Catron seat. He served as Chief Justice from January 6, 1987, until January 23, 1989. He resigned from the Supreme Court effective July 5, 1989.

After leaving the bench, Justice Scarborough campaigned for Governor and, later, U.S. Representative for New Mexico's Third Congressional District. He worked in private practice in Española for many years, mainly doing criminal defense work.

NEW MEXICO SUPREME COURT OFFICIAL CITATIONS

JUSTICE TONY SCARBOROUGH

NEW MEXICO SUPREME COURT CASES REPORTED

JUSTICE TONY SCARBOROUGH

CASE NAME **Page No.**

Justice Tony Scarborough

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-010

Filing Date: February 20, 1987

Docket No. 15,878

HARPER OIL COMPANY,

Plaintiff-Appellant,

v.

YATES PETROLEUM CORPORATION, YATES DRILLING COMPANY, ABO PETROLEUM CORPORATION, and MYCO INDUSTRIES, INC.,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY,
WILLIAM J. SCHNEDAR, District Judge

Motion for Rehearing Denied March 23, 1987

Hinkle, Cox, Eaton, Coffield & Hensley,
Harold L. Hensley, Jr.,
Michael F. Millerick,
Thomas D. Haines,

for Appellant.

Dickerson, Fisk & Vandiver,
Chad Dickerson,
Rebecca Dickerson,

for Appellees.

OPINION

SCARBOROUGH, Chief Justice.

{1} Harper Oil Company (Harper) brought suit against Yates Petroleum Corporation, Yates Drilling Company, ABO Petroleum Corporation, and MYCO Industries, Inc. (Yates), seeking declaratory judgment, accounting and punitive damages. After trial, judgment was entered in favor of Yates. Harper appeals. We affirm.

{2} Harper, Yates, Phillips Petroleum Co. (Phillips), and other parties entered into a joint operating agreement for the purpose of drilling oil wells. Although the joint operating agreement was dated December 18, 1978, it was not executed at that time. Rather, it was executed by each party on the date of the acknowledgment to that party's signature on the agreement. Negotiations with each party concerning the details of the agreement continued until the last party (Phillips) executed it and returned it to Yates on January 31, 1979. Harper executed the agreement and returned it to Yates on January 25, 1979. Yates commenced drilling the initial well on January 14, 1979, because it was confident that all parties would in fact execute the joint operating agreement. Phillips insisted upon an amendment to the joint operating agreement whereby Phillips retained the option to either participate in subsequent wells or assign its interest in subsequent wells to Yates, reserving a royalty interest. Harper insisted upon an amendment specifically limiting its interest in "the initial test well or subsequent wells" to 7.608696% of 87.5%.

{3} Upon successful completion of the initial well, Yates earned certain acreage interests of Phillips and other contributing parties.[1] Yates bore the entire burden of the cost necessary to earn the Phillips interest. Harper did not bear any portion of such cost. Phillips elected not to participate in subsequent wells and assigned a

[1] When one party to a joint operating agreement of this kind agrees to bear more than its share of costs on a particular well in exchange for acreage interests of other parties, the exchange is referred to as a "farmout." Webster's Third New International Dictionary 824 (1976) defines "farmout" as "a sublease granted by an oil company to another for drilling on partially proven ground."

further interest to Yates pursuant to the terms of the Phillips amendment.

{4} Harper contends that the joint operating agreement gave Harper the right to share pro-rata in the interest that was assigned to Yates by Phillips pursuant to the Phillips amendment. The trial court concluded that the joint operating agreement was ambiguous on this point.

{5} The issues presented by this appeal are: (1) Whether the trial court's findings of fact numbers eighteen through twenty, twenty-two, and thirty-three are supported by substantial evidence; and (2) Whether the trial court's conclusions of law are supported by the findings of fact.

{6} The function of an appellate court is to review evidence considered by a trial court, not to weigh it; if there is "substantial evidence" (i.e., evidence which a reasonable mind accepts as adequate to support a conclusion) to support the trial court's findings, the findings shall not be disturbed. **Sandoval v. Dep't of Employment Sec.**, 96 N.M. 717, 718, 634 P.2d 1269, 1270 (1981). If the findings of fact are supported by substantial evidence, and if the findings of fact support the conclusions of law upon which the judgment rests, then the judgment will be sustained on appeal. **See Watson Land Co. v. Lucero**, 85 N.M. 776, 517 P.2d 1302 (1974).

{7} There was substantial evidence to support challenged finding number eighteen. Finding number eighteen states: "Yates did not intentionally withhold any information regarding the terms of the Phillips Farmout Agreement from Harper." The trial court heard evidence that there was no conscious decision on the part of Yates' management to withhold information from Harper. The trial court also heard evidence that Yates was understaffed at the time Harper requested information concerning the Phillips amendment. Based upon this evidence, the trial court could have reasonably found that Yates did not intentionally withhold information from Harper.

{8} There was substantial evidence to support challenged finding number nineteen. Finding number nineteen states: "Harper's decision to enter into the Operating Agreement was not influenced nor induced by Harper's failure to know every term of the Phillips Farmout Agreement." Yates offered Harper the opportunity to participate in acquiring Phillips farmout acreage. Harper understood that its participation in subsequent wells was tied to its participation in the farmout on the initial well. Moreover, Harper insisted that the joint operating agreement be amended to limit Harper's interest in the initial test well or subsequent wells to 7.608696% of 87.5%. Based upon this evidence, the trial court could have reasonably found that Harper's decision to enter into the joint operating agreement was not influenced nor induced by Harper's failure to know every term of the Phillips amendment.

{9} There was substantial evidence to support challenged finding number twenty. Finding number twenty states: "Harper's failure to know of the full terms of the Phillips Farmout Agreement was not caused by any intentional, fraudulent, reckless or negligent conduct on the part of Yates." The same evidence which supports finding number eighteen supports finding number twenty.

{10} Challenged finding number twenty-two states: "The acreage farmed out by Phillips at the time of the drilling of subsequent wells was not an 'acreage contribution' to the drilling of such subsequent wells, but was a part of Phillips' contribution to the drilling of the initial test well." This finding should be read in conjunction with article VIII(C) of the joint operating agreement, a provision which Harper alleges was breached by Yates. Article VIII(C) contains the following pertinent language:

> While this agreement is in force, if any party contracts for a contribution [in the form of acreage toward the drilling of a well], the party to whom the contribution is made shall promptly tender an assignment of the acreage, without warranty of title, to the Drilling Parties in the proportions said Drilling Parties shared the cost of drilling the well. If all parties hereto are Drilling

> Parties and accept such tender, such acreage shall become a part of the Contract Area and be governed by the provisions of this agreement.

{11} There was substantial evidence to support finding number twenty-two. The trial court heard evidence that the contribution clause would only apply when an individual not a party to the joint operating agreement, but who owned land adjacent to the contract area, offered to make an acreage contribution. Moreover, the trial court relied on **Superior Oil Co. v. Cox**, 307 So.2d 350 (La.1975), where the Louisiana Supreme Court interpreted a similar clause to apply only to contributions "by outsiders—those not party to the joint operating agreement." **Id**. at 356.

{12} Challenged finding number thirty-three states: "Phillips was not a 'non-consenting' party under Article VI.B(2) of the Operating Agreement in the drilling of any of the subsequent wells." Article VI(B)(2) is entitled "[Subsequent] Operations by Less than All Parties" and state in part:

> If any party receiving such notice as provided in Article VI.B.1 or VI.E.1 elects not to participate in the proposed [subsequent] operation, then . . . the party of parties giving the notice and such other parties as shall elect to participate in the operation shall, within sixty (60) days after the expiration of the notice period of thirty (30) days * * * actually commence work on the proposed operation and complete it with due diligence. Operator shall perform all work for the account of the Consenting Parties * * *.
>
> If less than all parties approve any proposed operation, the proposing party, immediately after the expiration of the applicable notice period, shall advise the Consenting Parties of (a) the total interest of the parties approving such operation, and (b) its recommendation as to whether the Consenting Parties should proceed with the operation as proposed. Each Consenting Part, within forty-eight (48) hours . . . after receipt of such notice, shall advise the proposing party of its desire to (a) limit participation to such party's interest as shown on Exhibit "A", or (b) carry its proportionate part of Non-Consenting Parties' interest.

By finding that Phillips was not a "Non-Consenting Party" under article VI(B)(2), the trial court in essence found that Harper was not entitled to participate in acreage farmed out to Yates pursuant to the Phillips amendment.

{13} Substantial evidence supported finding number thirty-three. The Phillips amendment is substantial evidence that Phillips bargained to exclude itself from the operation of article VI(B)(2). The Phillips amendment provides in pertinent part:

> 3. In the event Yates shall elect to drill any additional well after completion of the initial well, a substitute well or the option well as set out in Articles VI, XV-A, or XV-B of the Operating Agreement, it shall immediately notify Phillips in writing of such election and shall furnish Phillips [certain enumerated information].
>
> Phillips shall have fifteen (15) days after the receipt of the notice of Yates' election to drill such well or wells, and the information set out above, to elect whether to join Yates in the drilling of such well or wells with a twenty-five percent (25%) interest or to relinquish its right to join in such well or wells.
>
> Failure of Phillips to respond to Yates' notice of election to drill within fifteen (15) day period set out above shall be deemed an election not to join in the drilling of such well. In the event Phillips shall not elect to join Yates in the drilling of any such well, Phillips shall assign to Yates its interest in the proration unit, and shall reserve to itself an overriding royalty of 3.75% of all production allocated to such proration unit.

Since Phillips bargained to exclude itself from the operation of article VI(B)(2), it was not a "Non-Consenting Party" within the contemplation of that provision.

{14} Harper also attacks the trial court's conclusions of law. They state respectively:

> 1. The Operating Agreement as executed by the parties is ambiguous.
>
> 2. Reading the Operating Agreement as a whole, including the conditions by Harper and Phillips, and considering the extrinsic evidence of the parties' intention, Yates did not breach the Operating Agreement.
>
> 3. Harper has not been damaged by Yates' conduct and is not entitled to damages.

{15} We agree that the joint operating agreement is ambiguous. Whether ambiguity exists in an agreement is a matter of law. **Young v. Thomas**, 93 N.M. 677, 679, 604 P.2d 370, 372 (1979). When the language of a contract can be fairly and reasonably construed in different ways, the contract is ambiguous. **Vickers v. N. Am. Land Devs., Inc.**, 94 N.M. 65, 68, 607 P.2d 603, 606 (1980). Articles VI and VIII, read in conjunction with the Harper and Phillips amendments, are ambiguous. Findings of fact numbers thirteen (referring to the Harper amendment), fifteen (referring to the manner in which the joint operating agreement was executed), sixteen (referring to the Phillips amendment), twenty-two, and thirty-three support conclusion of law number one.

{16} We also agree that Yates did not breach the joint operating agreement. In view of the fact that Articles VI and VIII are ambiguous, the trial court reasonably concluded on the basis of all the evidence that Harper was not entitled to participate in any Phillips farmout. Findings of fact eleven (referring to a statement that Harper did not wish to participate in the farmouts), thirteen, fifteen, thirty-three, and thirty-four (referring to the fact that Harper's interest in all wells is consistent with the terms of the Harper amendment) support conclusion of law number two. Conclusion of law number three follows from conclusion of law number two.

{17} The judgment of the trial court is affirmed.

{18} IT IS SO ORDERED.

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-020

Filing Date: March 9, 1987

Docket No. 16,691

ALFRED WAYNE MARCH,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI,
ALVIN JONES, District Judge.

Motion for Rehearing Denied March 25, 1987

Jacquelyn Robins, Chief Public Defender,
Bruce Rogoff, Assistant Public Defender,

for Petitioner.

Hal Stratton, Attorney General,
Anthony Tupler, Assistant Attorney General,

for Respondent.

OPINION

WALTERS, Justice.

{1} Defendant was convicted of burglary, and he appealed. The court of appeals affirmed his conviction; we granted certiorari. We reverse the court of appeals on the issue of abuse of discretion in the trial court's denial of a continuance which allegedly deprived defendant of his right to present a meaningful defense. We affirm the court of appeals on the remaining issues.

{2} This was defendant's second trial, his previous conviction having been reversed and a new trial granted. Upon remand, an attorney from the public defendant's office entered an appearance as new defense counsel, on March 4, 1986. The new trial was scheduled for April 3, 1986. On April 2nd, defense counsel moved for a continuance to permit a forensic evaluation to determine whether or not defendant had the viable defense of lack of capacity to form a specific intent. Incapacity had not been raised by defendant's previous counsel in the first trial.

{3} The State, in its response to defendant's petition for certiorari, asserts that "[d]efendant's motion for a continuance was late and correctly denied on that basis alone."

{4} As in the case of **State v. Ramirez**, 92 N.M. 206, 585 P.2d 651 (Ct. App.1978), the State ignores the fact that the trial court denied the motion on the merits, not because it was untimely. In ruling on defendant's request, the judge remarked:

> Well, my brief impression of this case from reading the Memorandum Opinion from the court of appeals is that . . . well, I can understand how this issue would have gone past the previous defense counsel because I did not see any indication that there was some reason to be concerned that the defendant was not in full possession of his faculties at the time this earlier offense occurred. I think under the circumstances I am going to deny the motion for continuance * * *.

{5} The State also claims that there is "not a suggestion of merit" to defendant's claim. We disagree. Defendant's medical records from an earlier period of confinement had been received by new defense counsel between the time of counsel's appointment and the filing of the motion for continuance. Those records reflected

that in 1982 and 1983 defendant had suffered uncontrollable behavioral outbreaks and undifferentiated schizophrenia, and had been treated with Thorazine to control his conduct. Evidence presented at the continuance hearing disclosed that defendant also suffered from hypoglycemia, and just three months before the scheduled trial date he had undergone surgery for removal of a cancerous brain tumor. The medical records are sufficient to suggest that defendant might have had the tumor at the time he committed the offense charged. Because of the recent surgery and doctor's appointments outside of the penitentiary, defendant had had difficulty in scheduling a psychiatric evaluation with the penitentiary psychiatrist; consequently there had been no recent forensic evaluation of defendant.

{6} The presumption in criminal cases in that the defendant is sane, **see, e.g., State v. Najar**, 104 N.M. 540, 724 P.2d 249 (Ct. App.), **cert. denied**, 104 N.M. 460, 722 P.2d 1182 (1986), and to establish the defense of lack of capacity to form a specific intent, the defendant has the burden of introducing some evidence to support that defense. **Id.**

{7} By denying the motion for a continuance, the trial court denied the defendant the opportunity to introduce some competent evidence, at the same time denying the opportunity for an examination. In offering defendant's past medical records to the trial court at the motion hearing, the defendant attempted to demonstrate that there was a sufficient basis for his motion. The State suggests that it was "an eleventh hour" request for continuance, and so it was. But the "eleventh hour" within the context of less that 30 days' trial preparation time for personnel of an already overburdened public defender's office, is not really meaningful if the claim is intended to suggest unwarranted delay or something equally opprobrious.

{8} While it is true that a denial of a motion for continuance rests in the sound discretion of the court, and the defendant has the burden of showing an abuse of that discretion, **State v. Pruett**, 100 N.M. 686, 675 P.2d 418 (1984), it is also true that the defendant has a fundamental, constitutional right to due process of the law. U.S. Const. amend. XIV, § 1; N.M. Const. art. II, § 18. The due process right carries with it the right to a reasonable amount of time to prepare a defense and, when the issue of incapacity has been fairly raised, to have "a psychiatric examination . . . provided at public expense, coupled with the right to compulsory process for the attendance of necessary witnesses." **State v. Webb**, 67 N.M. 293, 297, 354 P.2d 1112, 1114 (1960), **cert. denied**, 365 U.S. 804, 81 S. Ct. 470, 5 L. Ed. 2d 461 (1961). To deny those rights is more than an abuse of the trial court's discretion; it is a denial of due process. **See State v. Sain**, 34 Wash. App. 553, 663 P.2d 493 (1983).

{9} The trial court not only overruled defendant's motion for continuance so that a forensic evaluation could be made; it also ruled that defendant's doctor could not be subpoenaed to authenticate medical record made by him, nor would the medical record be admissible at trial. On the other hand, the court granted the State's motion to exclude any reference to schizophrenia and the brain tumor. The end result of the trial court's rulings was to completely deprive defendant of any potential defense of incapacity.

{10} The State urges us to accept the argument that defendant was not prejudiced by the court's rulings. Denial of a likely defense cannot be anything other than prejudicial. A basic tenet of American jurisprudence is that a defendant is entitled to a fair trial with the right to appear and defend himself. U.S. Const. amend. XIV, § 1, N.M. Const. art. II, §§ 14, 18. Moreover, the prejudice which must be raised in a case such as this is minimal. "No more prejudice need be shown than that the trial court's order may have made a potential avenue of defense unavailable to the defendant." **State v. Orona**, 92 N.M. 450, 452, 589 P.2d 1041, 1043 (1979). The **Orona** standard accords with both the federal and the state constitutional requirements.

{11} In deciding whether denial of a continuance violates due process, an appellate court looks to the circumstances of each case as those

circumstances appear from the reasons presented to the trial judge at the time the request was made and denied. **People v. Crovedi**, 65 Cal.2d 199, 204-05, 53 Cal. Rptr. 284, 289-90, 417 P.2d 868, 873-74 (1966) (quoting **Ungar v. Sarafite**, 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964)). Failure to grant a continuance here to allow the defendant a reasonable time to prepare and present a defense, **see People v. Courts**, 37 Cal.3d 784, 210 Cal. Rptr. 193, 693 P.2d 778 (1985); denial of his rights to subpoena witnesses and to have medical records produced; and granting the State's motion to suppress any evidence going to defendant's mental or physical condition, invaded defendant's constitutional rights to due process and a fair trial.

{12} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, SR.,
Senior Justice

RICHARD E. RANSOM,
Justice

TONY SCARBOROUGH,
Chief Justice (Dissenting)

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

DISSENT

SCARBOROUGH,
Chief Justice, dissenting

{13} I respectfully dissent.

{14} I agree with the panel of the Court of Appeals that the trial court did not err in denying the motion for continuance. The grant or denial of a motion for continuance rests in the sound discretion of the trial court. **State v. Pruett**, 100 N.M. 686, 675 P.2d 418 (1984). The trial court does not abuse its discretion when it denies a motion for continuance which is based upon speculation and conjecture concerning what might turn up upon further investigation. Moreover, defense counsel received defendant's medical records three to four weeks prior to trial court did not request a continuance until the day before trial.

STOWERS,
Justice, dissenting

{15} I dissent.

{16} I concur in the dissent filed by Chief Justice Scarborough and further with the opinion filed by the court of Appeals and request that the Court of Appeals' opinion be filed in its entirety as a further part of my dissent.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-021

Filing Date: March 18, 1987

Docket No. 16,475

BANQUEST/FIRST NATIONAL BANK OF SANTA FE, A NATIONAL BANKING CORPORATION,

Plaintiff-Appellee,

v.

LMT, INC., TED C. LUNA, and FERN KIMBALL LUNA, et al.,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, BRUCE E. KAUFMAN, District Judge.

Motion for Rehearing Denied April 9, 1987

Popejoy & Leach,
Thomas L. Popejoy,
Albuquerque,

for Appellants.

White, Koch, Kelly & McCarthy,
John F. McCarthy,
Larry White,
Santa Fe,

for Plaintiff-Appellee.

Johnson & Lanphere,
Robin Dozier Otten,
Albuquerque,

for Defendant Albuquerque Federal Saving and Loan.

OPINION

SCARBOROUGH, Chief Justice.

{1} Banquest/First National Bank of Santa Fe (bank) brought suit against LMT, Inc., Ted. C. Luna, and Fern Kimball Luna (Lunas) to recover judgment on a promissory note and personal guarantees and to foreclose a mortgage. Lunas answered and counterclaimed on grounds of fraud, fraud in the inducement, fraudulent and negligent misrepresentation, and other claims. The trial court granted the bank summary judgment on the note and personal guarantees, ordered foreclosure, and entered several other orders relating to costs and attorney's fees, but reversed ruling on the counterclaim. We reverse.

{2} In 1979, Ted Luna, a Santa Fe architect, began work to build an eleven unit solar condominium project in Santa Fe. In seeking permanent financing for the project, Luna contacted several Santa Fe financial institutions. He also undertook to negotiate a construction contract with two Santa Fe contractors, neither of whom proved satisfactory. Luna contacted Gene Jones, a lending officer at the bank, and was referred to Larry Eastridge, a local contractor engaged in home construction. Luna asked Eastridge for credit references and was referred to the bank where Luna spoke to loan officer Charles Gerrell. Gerrell told Luna that Eastridge was financially stable and that the bank would finance the project.

{3} On June 1, 1981, Lunas borrowed $400,000 from the bank. Additional funds were advanced to Lunas in the sum of $140,000. The bank required Lunas to mortgage their personal residence to obtain the additional money. Much of this money was paid to Eastridge.

{4} Eastridge eventually abandoned the project and declared bankruptcy. Negotiations between the bank and Lunas followed in an attempt to save the project. Lunas fell behind on payments.

The bank filed suit on the note and personal guarantees, and to foreclose the mortgage. Lunas then renegotiated their loan with the bank, signing a new note for $687,000, and the bank dismissed the lawsuit.

{5} In 1983, Lunas began to investigate the relationship between the bank and Eastridge. They learned that the bank had made loans to Eastridge; that the bank had recommended him for other projects; that he had built homes for bank officers; that he had declared bankruptcy before; and that his credit was questionable. This information was known to the bank but was not disclosed by the bank to Lunas prior to their loan transactions. In fact, must of this information was not acquired by Lunas until January 1984, when they obtained the loan filed from the bank.

{6} Lunas again fell behind in payments. They initiated further negotiations with the bank. The negotiations proved fruitless and the bank again filed suit against the Lunas on the new note and mortgage. After Lunas answered and counterclaimed for fraud, fraud in the inducement, misrepresentation, and emotional distress, the bank moved for summary judgment.

{7} The trial court granted the bank's motion for summary judgment on the note and mortgage, but reserved ruling on the counterclaim. This appeal followed. Lunas seek reversal of the partial summary judgment and decree of foreclosure, as well as reversal of several orders relating to costs and collection activity.

{8} Lunas claim they were induced to borrow from the bank because the bank, through its officers, in effect sponsored Eastridge and misrepresented Eastridge's financial condition. Lunas advance this position as a defense to the suit on the note and as a part of their counterclaim against the bank. Lunas also complain about the trial court's entry of an order awarding attorney's fees to the bank for its work on the counterclaim as well as for work in the suit on the note. The bank argues that the trial court, by entering judgment on the note, found as a matter of law that there was no support for Luna's defense to the note. Yet the trial court reversed ruling on the same features of the Luna counterclaim. Lunas argue that there are material controverted facts which preclude the entry of summary judgment. The bank disagrees. Several other conflicting claims remain unresolved. We do not reach the merits of these contentions, but reverse on policy grounds.

{9} It may have been proper for the trial court to grant partial summary judgment in this case, but our analysis suggests that that the trial court's decision to do so may have a substantial impact on the Luna counterclaim which remains unresolved. It appears likely that there may be a need for future review of this case if we address the merits of this appeal. We may be required to consider the same issues a second time.

{10} We are not unmindful of a counterclaim which might result in a substantial setoff against the bank's judgment. Questions remain concerning the trial court's award of attorney's fees for work on the counterclaim. What will happen if the trial court, on further consideration of the counterclaim, determines that it is meritorious?

{11} We are not faced here with an appeal from a final order disposing of entirely separate claims. The claims and counterclaims asserted by the parties are intertwined in many respects. As a matter of policy, we wish to avoid "fragmentation in the adjudication of related legal or factual issues." **Allis-Chalmers Corp. v. Philadelphia Electric Co.**, 521 F.2d 360, 370 (3d Cir. 1985) (Gibbons, J., dissenting); **see also TPO Inc. v. FDIC**, 487 F.2d 131, 134 (3rd Cir. 1973).

{12} The proper resolution of these issues rests within the sound discretion of the trial court. In the absence of abuse, the decision of the trial court will not be disturbed. We feel, however, that the trial court abused its discretion in this case by finding that there was no just reason for delay of entry of judgment. **See** NMSA 1978, Civ.P.R. 1-054(C) (Recomp. 1986). All the issues in this case should be resolved by the trial court before any judgment becomes final.

{13} Moreover, as a matter of policy, this Court does not favor piecemeal appeals. **Cf. Allis-Chalmers Corp. v. Philadelphia Electric Co.** (referring to the undesirability of piecemeal appeals). We are not inclined to allow this case to be appealed on a piecemeal basis.

{14} The decision of the trial court is reversed and this case is remanded for further proceedings consistent herewith.

{15} IT IS SO ORDERED.

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-023

Filing Date: March 18, 1987

Docket No. 15,162

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

RALPH R. EARNEST,

Defendant-Appellant.

ON REMAND FROM THE UNITED STATES SUPREME COURT

Motion for Rehearing Denied April 9, 1987. Certiorari denied Nov. 5, 1987. *See*, 108 S. Ct. 284

Jacquelyn Robbins, Chief Public Defender,
Lynn Fagan, Appellate Defender,
J. Thomas Sullivan, Special Assistant Appellate Defender,
Santa Fe,

for Appellant.

Hal Stratton, Attorney General,
William McEuen, Assistant Attorney General,
Santa Fe,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} This case is before us on remand from the Supreme Court of the United States. In **State v. Earnest**, 103 N.M. 95, 703 P.2d 872 (1985), this Court held that defendant was entitled to a new trial because the trial court admitted into evidence against defendant a statement made by an accomplice who was not subject to cross-examination. In **New Mexico v. Earnest**, 477 U.S. 648, 106 S. Ct. 2734, 91 L. Ed. 2d 539 (1986), the Supreme Court vacated our judgment and remanded for proceedings "not inconsistent with the opinion in **Lee v. Illinois**, 476 U.S. 530, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986)." We reverse our prior opinion and affirm defendant's conviction.

{2} In **Lee v. Illinois**, the Supreme Court held that the trial court's reliance on a codefendant's confession as substantive evidence against the petitioner violated the petitioner's rights under the confrontation clause of the sixth amendment. In **Lee v. Illinois**, the codefendant was not subject to cross-examination. The Supreme Court reasoned that accomplices' confessions which incriminate defendants are presumptively unreliable and that the codefendant's confession did not bear sufficient independent "indicia of reliability" to rebut the presumption of unreliability.

{3} Presumably, in the case before us, it is intended that we give the State "an opportunity to overcome the weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns." **New Mexico v. Earnest**, 477 U.S. at 650, 106 S. Ct. at 2735, 91 L. Ed. 2d at 540 (Rehnquist, J., concurring). Having considered the excellent briefs and oral arguments of both parties on remand, we conclude that the statement at issue bears sufficient "indicia of reliability" to satisfy Confrontation Clause concerns. We therefore hold that the trial court did not err in admitting the statement as substantive evidence against defendant.

{4} The statement at issue was given by one Boeglin after defendant, Boeglin, and another person (Perry Conner) were arrested and charged in connection with a murder. Boeglin's statement detailed the events surrounding the murder. Boeglin admitted to having attempted to cut the victim's throat. Boeglin also stated that defendant shot the victim in the head.

{5} At defendant's trial, Boeglin refused to testify. **See State v. Earnest**, 103 N.M. at 98, 703 P.2d at 875. Finding that the statement given by Boeglin was reliable, the trial court allowed it to be admitted into evidence.

{6} Boeglin's statement was reliable. It was reliable, first, because the colloquy between Boeglin and the investigating officers reflects the fact that Boeglin was not offered any leniency in exchange for his statement. In fact, Boeglin was convicted of murder and is serving a life sentence. It was reliable, second, because the statement was strongly against Boeglin's penal interest. Boeglin admitted that it was he who tried to cut the victim's throat and it is clear from the colloquy that at the time the statement was given the wounds to the throat were thought to have been the cause of death. Moreover, Boeglin was exposed to a possible sentence of death as a result of his admitted participation in a murder committed under aggravating circumstances, i.e., during the course of a kidnapping and with the purpose of killing a witness. The statement was reliable, third, because Boeglin did not attempt in the statement to shift responsibility from himself to his accomplices. He told a gruesome story which equally implicated all three men. And the statement was reliable, finally, because there was independent evidence presented at trial which substantially corroborated Boeglin's description of events surrounding the murder. For example: Boeglin's description of a drug deal involving fourteen grams of methamphetamine was corroborated by Michael Blount; Boeglin's description of the accomplices' belief that the victim was an informant was corroborated by Dana Boeglin; Boeglin's description of an attempt to kill the victim with an overdose of methamphetamine was corroborated by the testimony of a toxicologist; and Boeglin's description of where the gun used to kill the victim was hidden led to recovery of the gun. In sum, Boeglin's statement bore sufficient independent indicia of reliability to rebut the weighty presumption of unreliability; the trial court therefore did not err in admitting it into evidence.

{7} Defendant also contends that the trial court deprived defendant of a fair trial by questioning defense witness Perry Conner concerning drug transactions at the New Mexico State Penitentiary. Conner was called as a defense witness. He testified that he was serving a life sentence for the murder of the victim. He also testified that defendant was not involved in the murder. To discredit Conner, the prosecutor reminded Conner of allegedly inconsistent statements made by Conner when the prosecutor interviewed him in prison. Conner claimed that he did not remember what he said during the prison interview because he was high on drugs at the time. Later, the trial judge inquired of Conner concerning drug use and trafficking in the penitentiary. The trial judge's questions were concerned solely with Conner's independent activities in prison. The questions did not suggest bias against defendant and did not involve defendant in any way.

{8} Under the circumstances, we fail to see how defendant was prejudiced by the trial judge's questioning. The questions did not impeach Conner's testimony; on the contrary, they assumed its truthfulness. Moreover, the jury was already aware of Conner's history of drug abuse. Defense counsel elicited statements to that effect during direct examination. In sum, the trial judge's questions were not inappropriate and did not display bias against defendant. We therefore conclude that the trial court did not err on this point. **See State v. Sedillo**, 76 N.M. 273, 414 P.2d 500 (1966).

{9} Defendant's conviction is affirmed.

{10} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice,

HARRY E. STOWERS, JR.,
Justice,

MARY C. WALTERS,
Justice,

RICHARD E. RANSOM,
Justice.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-025

Filing Date: March 24, 1987

Docket No. 16,638

LUBBOCK STEEL & SUPPLY, INC., a DIVISION OF LUBBOCK AMERICAN IRON & METAL, INC., a Texas Corporation,

Plaintiff-Appellee,

v.

MARY HELEN GOMEZ and PHYLLIS MACKEY,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY, WILLIAM J. SCHNEDAR, District Judge.

Ortega & Snead,
Charles P. Reynolds,

for Appellants.

Bozart, Craig & Vickers,
Marion J. Craig, III,
Jones, Gallegos, Snead & Wertheim,
Steven L. Tucker,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Lubbock Steel & Supply, Inc., appellee, filed suit on a note against appellants. Appellants' motion to dismiss was denied. We affirm.

{2} This case is before the Court on interlocutory appeal from the District Court of Chaves County, New Mexico. The facts are undisputed and were framed by the district court as stipulated findings as follows:

1. Gomac, Inc., a New Mexico corporation, purchased steel on an open account from Plaintiff Lubbock Steel between March of 1984 and August 21, 1984.

2. On August 21, 1984, upon the request of employees of Lubbock Steel, Paul Mackey and Ruben Gomez (officers, directors and employees of Gomac, Inc.) signed a promissory note in an amount equal to the then outstanding indebtedness of Gomac, Inc., owed to Lubbock Steel on the open account.

3. The promissory note was intended to act as a collateral contract or assurance by which Paul Mackey and Ruben Gomez engaged to secure Lubbock Steel against the possibility that Gomac, Inc. would fail to pay its indebtedness to Lubbock Steel on the open account.

4. Gomac, Inc. subsequently went out of business and failed to pay its indebtedness on the open account to Lubbock Steel.

5. At all times pertinent hereto, Paul Mackey was married to Defendant Phyllis Mackey and Ruben Gomez was married to Defendant Helen Gomez.

6. Neither wife signed the promissory note; neither wife had any knowledge of the promissory note until Lubbock Steel brought suit on the note against their husbands in June of 1985.

7. Both Paul Mackey and Ruben Gomez filed for bankruptcy and each has discharged in bankruptcy any personal liability which might have been created under the promissory note.

8. The Plaintiff Lubbock Steel seeks, in the present action, to recover from the wives on the above-mentioned promissory note signed by their husbands.

{3} The only issue before this Court is the application of NMSA 1978, Section 40-3-4 (Repl. Pamp.1986) to the above facts.

{4} Appellants-defendants argue that recovery against them on the note signed by their husbands is barred by Section 40-3-4. This section was originally enacted as Chapter 74 of the Laws of the State of New Mexico, 1965. The title to the act contains the following language: "An act relating to contracts of indemnity of surety companies; and declaring that no community property shall be liable under a contract of indemnity with a surety company, unless signed by both husband and wife." **See** NMSA 1953, § 57-4-10 (Supp.1975). Section 40-3-4 provides:

> It is against the public policy of this state to allow one spouse to obligate community property by entering into a contract of indemnity whereby he will indemnify a surety company in case of default of the principal upon a bond or undertaking issued in consideration of the contract of indemnity. No community property shall be liable for any indebtedness incurred as a result of any contract of indemnity made after the effective date of this section, unless both husband and wife sign the contract of indemnity.

{5} Appellee argues that the note signed by the spouses of appellants was not a proscribed contract of indemnity, and that recovery on the note is not barred by Section 40-3-4. They argue that Section 40-3-4 is inapplicable to this case as it is "a simple suit on a note against the remaining members of the marital community." We agree. What we have here is a community debt as defined in NMSA 1978, Section 40-3-9(B) (Repl. Pamp.1986). It is quite clear that this is not a contract of indemnification with a surety company in which both spouses must join to obligate their community estate.

{6} Appellants further argue that the general language of the second sentence of Section 40-3-4 should control over the more specific language of the first sentence of the statute. As a general rule of statutory construction, however, general language in a statute is limited by specific language. **Postal Finance Co. v. Sisneros,** 84 N.M. 724, 507 P.2d 785 (1973). Moreover, we are bound to give effect to the intention of the Legislature, **Board of Education v. Jennings,** 102 N.M. 762, 701 P.2d 361 (1985), and we are of the opinion that a reading of the title of the act together with the entire statute clearly indicates the intent of the Legislature was to prevent one spouse from obligating community property by entering into contracts of indemnity with surety companies unless the contract is signed by both spouses.

{7} We affirm the order of the district court denying appellants' motion to dismiss.

{8} IT IS SO ORDERED.

WE CONCUR:

MARY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-029

Filing Date: April 8, 1987

Docket No. 16,770

STATE OF NEW MEXICO, and GENE BACA, DIRECTOR, PURCHASING DIVISION, AND MICHAEL TRUJILLO, DIRECTOR, PROPERTY CONTROL DIVISION, GENERAL SERVICES DEPARTMENT, STATE OF NEW MEXICO

Plaintiff-Appellees,

v.

INTEGON INDEMNITY CORPORATION AND LUIS ARAIZA, D/B/A HOT SPRINGS ELECTRIC,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, ART ENCINIAS, District Judge.

Simms & Garcia,
Janice D. Paster,
Albuquerque,

for Appellant Integon Indemnity.

Stout & Rubin,
Jay Rubin,
Truth or Consequences,

for Appellant Araiza.

Hal Stratton, Attorney General,
Mary L. Marlowe, Assistant Attorney General,
Santa Fe,

for Appellees.

OPINION

SCARBOROUGH, Chief Justice.

{1} The State of New Mexico, appellee, sought competitive bids for electrical work at the Los Lunas Central New Mexico Correctional Facility. Bids were solicited by an Invitation to Bid which provided as follows:

> Each bid shall be accompanied by a bid security in the amount of five percent (5 %) of the bid amount pledging that the bidder will enter into a contract with the Owner on the terms stated in his bid and will furnish bonds covering the faithful performance of the contract and the payment of all obligations arising thereunder. Should the bidder refuse to enter into such contract or fail to furnish such bonds, the amount of the bid security shall be forfeited to the Owner as liquidated damages, not as a penalty.

{2} Appellant Luis Araiza submitted a bid accompanied by a bond as bid security conditioned as required by the Invitation to Bid, on his behalf as principal and for Appellant Integon Indemnity Corporation as surety. The bond was not signed by Araiza.

{3} At the public bid opening, Araiza was informed that he had submitted the low bid, but he failed to provide the performance and payment bonds as required in the Invitation to Bid. Araiza also subsequently signed a letter requesting that his bid be withdrawn. Ultimately, Araiza failed to enter into the contract for the electrical work. This litigation was initiated by the State to recover from Araiza and Integon, his surety, on the bond pledged by both as required by the Invitation to Bid. The trial court granted the State's motion for summary judgment. We affirm.

{4} Appellant's first point asserts that the State failed to establish a prima facie case

showing it is entitled to summary judgment as a matter of law. The facts in this case were submitted to the trial court on the record below by means of admissions of the parties and affidavits. The salient facts are not in conflict. Under SCRA 1986, 1-056(C), a summary judgment is proper if it is shown that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. The movant must establish a prima facie case showing there is no genuine issue of material fact in order to be entitled to summary judgment. **Lackey v. Mesa Petroleum Co.,** 90 N.M. 65, 559 P.2d 1192 (Ct. App.1976). The trial court is obliged to view the pleadings, affidavits and depositions in the light most favorable to the party opposing the motion. **Las Cruces Country Club, Inc. v. City of Las Cruces,** 81 N.M. 387, 467 P.2d 403 (1970).

{5} The applicable law, since repealed, is found in NMSA 1978, Section 13-1-1, **et seq.**, the Public Purchases Act. Section 13-1-10 provides that the contract award shall be made by the governing authority of the user. Appellants argue that the contract was to have been awarded only by the Department of Corrections as the governing authority of the user, Los Lunas Central Correctional Facility. We disagree.

{6} The award was actually made by Roy Laub, the State's construction manager. Section 13-1-10 does not preclude the Department of Corrections from using the services of the State construction manager for the purpose of awarding the electrical contract in this case. Appellants now attempt to attach rigidity and inflexibility to the bidding process by a stilted reading of the Public Purchases Act. However, appellants expressed no objection to the bidding procedures until after Araiza withdrew his bid and was faced with the State's efforts to secure forfeiture of the bid bond; nor was there any objection in the record that the State's construction manager lacked authority to handle the bid opening and make the award on behalf of the State. We find that it is not inappropriate for the Corrections Department to act through its designated agent in awarding the contract.

{7} Appellants also object that the State gave no formal notice to Araiza that he was the lowest bidder or that the contract was awarded to him. Appellants assert that a formal notice of award should have been mailed to the bidder, Araiza, and the State's construction manager, under Section 13-1-10. This objection is without merit. The State argues that the actual notice which was given was adequate notice. We agree. The bids were opened at a public hearing and Araiza was informed at the time that he was the low bidder. No other formality was required.

{8} Appellants argue that the trial court erred in granting summary judgment because the State failed to produce evidence that it had reviewed Araiza's bid for legal sufficiency. No authority is cited as support and we decline to review this point.

{9} Appellants also argue that Laub wrongfully induced Araiza to sign the letter requesting withdrawal of his bid. The record does not support this contention. In fact, Araiza had submitted an earlier bid for the same contract which he had also withdrawn. Laub helped Araiza withdraw his first bid without a bond forfeiture. Within ten days of the second bid opening, Laub spoke to Araiza several times and learned that Araiza had not secured the performance and payment bonds required by the Invitation to Bid. Laub admits that he decided to "exact" a withdrawal of the bid from Araiza so the contract could be awarded to another bidder. This was done. There is nothing sinister in this process. Laub was justifiably concerned about the ability of Araiza to perform the construction contract and Laub took a reasonable course of action to protect the State's interest. Nowhere in appellant's brief is it stated that Araiza was at any time ready, willing or able to perform the work for which he submitted the low bid. Appellants' argument is totally lacking in merit. Indeed it is spurious.

{10} Araiza failed to sign the bond he submitted as bid security to comply with the Invitation to Bid. Appellants argue that a fact question exists as to whether the absence of Araiza's signature on the bid bond rendered the bond

unenforceable. We disagree. The bond bound Araiza and Integon in the amount of the bond, jointly as severally, to pay the State 5% of the bid amount unless Araiza entered into a contract with Los Lunas Correctional Facility on the terms stated in his bid and furnished the requisite performance and payment bonds covering the contract.

{11} The State argues that the absence of the signature did not affect the validity of the bond. We approve the rule which provides that the failure of the principal to sign a bond or similar undertaking does not render the bond unenforceable absent a showing that the surety's obligation was in some way conditioned upon the signature of the principal. **Johnson v. Gray**, 75 N.M. 726, 729, 410 P.2d 948, 950 (1966). The State was not put on notice to make further inquiry because Araiza's signature was missing from the bond. Integon has not shown that its obligation as surety on the bond was conditioned upon the signature of the principal and Integon's obligation on the bond is not in dispute otherwise. There were no factual issues in dispute here. The question is one of law which the trial court correctly decided. We note that the appellants' citations to **M.J. O'Fallon Supply Co. v. Tagliaferro**, 29 N.M. 562, 224 P. 394 (1924) and **Hendry v. Cartwright,** 14 N.M. 72, 89 P. 309 (1907) are misleading in that those cases involved the absence of the surety's signature on the bond in contrast to the present case in which the principal's signature is missing.

{12} The trial court's award of summary judgment was proper and we affirm.

{13} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice,

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-033

Filing Date: April 16, 1987

Docket No. 16,404

NAVAJO REFINING COMPANY, and NAVAJO PIPELINE COMPANY,

Plaintiffs-Appellees,

v.

SOUTHERN UNION REFINING COMPANY and MIDLAND-LEA, INC., (formerly MIDLAND-LEA PIPELINE COMPANY),

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY,
JOHN B. WALKER, District Judge.

Atwood, Malone, Mann & Turner,
John S. Nelson,
Russell D. Mann,
Roswell,

for Appellants.

Losee & Carson,
A. J. Losee,
Ernest L. Carroll,
Artesia,

for Appellees.

OPINION

SCARBOROUGH, Chief Justice.

{1} Navajo Refining Company and Navajo Pipeline Company (plaintiffs) sued Southern Union Refining Company and Midland-Lea, Inc. (defendants) for sums alleged to be due and owing under the provisions of contracts and agreements entered into by the parties. Plaintiffs' original complaint contained seven counts. Defendants counterclaimed. Defendants' first amended counterclaim contained eight counts. The claims and counterclaims are interrelated. The trial court granted partial summary judgment on two of the counts raised by the complaint in favor of plaintiffs and, finding that there was no just reason for delay, made the partial summary judgment a final judgment. After partial summary judgment was entered, a second amended counterclaim and an amended complaint were filed. Defendants appealed from the partial summary judgment and determination of finality; we hold that the trial court abused its discretion in entering final judgment.

{2} This case presents two issues:

> (1) Did the trial court abuse its discretion in entering final judgment?
>
> (2) Did the trial court err in entering partial summary judgment in favor of plaintiffs?

As a result of our disposition of the first issue, we do not reach the second issue.

{3} SCRA 1986, Rule 1-054(C)(1) provides in part:

> [W]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay.

The determination of whether there is no just reason for delay lies in the sound discretion of the trial court, and the trial court's determination

will not be disturbed absent an abuse of discretion. **Banquest/First Nat'l Bank v. LMT, Inc.,** 105 N.M. 583, 734 P.2d 1266 (1987).

{4} In **Banquest/First Nat'l Bank v. LMT, Inc.,** we stated that we disfavor "'fragmentation in the adjudication of related legal or factual issues."' **Id.** (quoting **Allis-Chalmers Corp. v. Philadelphia Elec. Co.,** 521 F.2d 360, 370 (3d Cir.1975) (Gibbons, J., dissenting)). We also stated that we disfavor piecemeal appeals. **Id.** Relying on three factors, i.e., the interrelation of adjudicated and unadjudicated claims, the presence of claims which might result in setoffs against the judgment sought to be made final, and the possibility that if the judgment were made final we might be obliged to consider the same issues more than once, we held that the trial court abused its discretion by finding that there was no just reason for delay. **Id.** In this case, the same three factors and one additional factor lead us to a similar conclusion.

{5} The issues determined by the summary judgment and some of the unadjudicated issues in this case are interrelated. Because of the numerous claims and counterclaims, the amounts which may ultimately be owed after setoff are uncertain. The complexity of this case makes it possible that we may be obliged to consider some issues more than once if we now review the partial summary judgment on its merits. Additionally, in this case, amended claims and counterclaims continue to be filed even after entry of partial summary judgment. Under these circumstances, the trial court's attempt to finally settle only some of the claims was premature.

{6} The trial court abused its discretion in making the Rule 1-054(C)(1) determination that there was no just reason to delay entering final judgment. We reverse and remand to the trial court for proceedings consistent with this opinion.

{7} IT IS SO ORDERED.

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-034

Filing Date: April 16, 1987

Docket No. 16,670

JIMMY FUSON,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
HARVEY W. FORT, District Judge.

Jacquelyn Robins, Chief Public Defender,
Kerry Kiernan, Assistant, Appellate Defender,
Santa Fe, New Mexico,

Attorneys for Petitioner.

Paul Bardacke, Attorney General,
Santa Fe, New Mexico,

Attorney for Respondent.

OPINION

SCARBOROUGH, Chief Justice.

{1} Petitioner was convicted of aggravated battery and as an habitual offender. He appealed, contending that the trial court abused its discretion in failing to excuse a particular prospective juror for cause, thereby compelling him to exercise a peremptory challenge, and thus violated his sixth amendment right to an impartial jury.[1] Petitioner did not allege that the jury which finally sat in the case was in any way biased. Nor did petitioner allege that he would have used the peremptory challenge to remove a juror who ultimately sat in the case if he had not been compelled to exercise it on the person in question. Considering itself bound by **State v. Martinez,** 95 N.M. 445, 623 P.2d 565 (1981), the Court of Appeals affirmed. We reverse the Court of Appeals and the trial court and overrule Martinez to the extent it is inconsistent with this opinion.

{2} The issue in this case is whether the trial court abused its discretion in failing to excuse a particular prospective juror for cause, and if so, what consequences follow from the error.

{3} During the trial court's voir dire of the jury panel, one of the prospective jurors indicated that he knew "about half" of the witnesses in the case. When asked by the court if it would embarrass him to sit as a juror, he responded: "Probably not." During defense counsel's voir dire, the person was asked to explain his answer "Probably not." He replied: "I think I'm probably too familiar with all the individuals involved in this case to say with certainty that I could be totally impartial." Defense counsel further inquired if the person's knowledge of these individuals would affect the way he decided the case. He responded: "I think that there is a possibility that that could occur."

{4} In chambers, defense counsel requested the court to excuse the person for cause. The court denied the request. Defense counsel then exercised a peremptory challenge. Petitioner ultimately exercised all five of his peremptory challenges before the court completed the venire.

[1] The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *." U.S. Const. amend. VI.

The names of some jurors were called after petitioner exercised his final peremptory challenge.

{5} The New Mexico Constitution guarantees the right to trial by an impartial jury. N.M. Const. art. II, § 14. An impartial jury is one in which each and every juror is "totally free from any impartiality whatsoever." State v. McFall, 67 N.M. 260, 263, 354 P.2d 547, 548-49 (1960). A prospective juror who cannot be impartial should be excused for cause. **See id.** Although we recognize that the trial court has discretion in dismissing a juror for cause, under the facts in this case, the trial court clearly abused its discretion. It is manifest from the person's responses to questions asked during voir dire that he could not be impartial. He should have been excused for cause.

{6} In affirming the trial court, the Court of Appeals relied on **Martinez.** In **Martinez,** the Court held that even if the trial court abused its discretion in failing to excuse two persons for cause, the error was harmless since there was no allegation that the impartiality of the jury panel which finally heard the case was affected by the error. **Martinez** requires that the complaining party allege that the jury which finally heard the case was biased or unfair. **Martinez** also requires that the complaining party allege that he or she would have used peremptory challenges to remove jurors who ultimately sat in the case if he or she had not been compelled to use them on persons who should have been excused for cause. To put it another way, **Martinez** requires that the complaining party allege that he or she was prejudiced by the trial court's error.

{7} Petitioner contends that **Martinez** is at odds with federal cases which dictate that the right of peremptory challenge is a derivative of the sixth amendment right to an impartial jury and that impairment of the right is reversible error without a showing of prejudice. In **Swain v. Alabama,** 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), **overruled on other grounds, Batson v. Kentucky,** 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Supreme Court of the United States characterized the right to peremptory challenge as "'one of the most important of the rights secured to the accused'" (quoting **Pointer v. United States,** 151 U.S. 396, 14 S. Ct. 410, 38 L. Ed. 208 (1894)), and as "'an arbitrary and capricious right [that] must be exercised with full freedom, or it fails of its full purpose'" (quoting **Lewis v. United States,** 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)). The Court stated that "[t]he denial or impairment of the right is reversible error without a showing of prejudice." **Swain,** 380 U.S. at 219, 85 S. Ct. at 835.

{8} A host of federal cases have followed **Swain.** In **United States v. Nell,** 526 F.2d 1223, 1229 (5th Cir.1976), the Fifth Circuit stated: "[I]t is error for a court to force a party to exhaust his peremptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise peremptory challenges." And in **United States v. Allsup,** 566 F.2d 68, 71 (9th Cir.1977), the Ninth Circuit stated: "Inhibition of the right to challenge peremptorily or for cause is usually deemed prejudicial error, without a showing of actual prejudice." See also **United States v. Hill,** 738 F.2d 152 (6th Cir.1984); **United States v. Gonzalez Vargas,** 585 F.2d 546 (1st Cir.1978).

{9} The federal cases declare that prejudice is presumed when the right of peremptory challenge is denied or impaired. We overrule Martinez to the extent that case fails to recognize the presumption of prejudice announced in the federal cases.

{10} In the present case, the names of some jurors were called after petitioner exercised his final peremptory challenge. Under these circumstances, petitioner's right of peremptory challenge was necessarily impaired by the trial court's failure to excuse the person for cause; therefore, prejudice is presumed. **See Swain v. Alabama; United States v. Allsup; United States v. Nell.** The presumption of prejudice was not rebutted. Petitioner is therefore entitled to a new trial.

{11} We hold that prejudice is presumed where, as here, a party is compelled to use peremptory

challenges on persons who should be excused for cause and that party exercises all of his or her peremptory challenges before the court completes the venire. We reverse the trial court and the Court of Appeals, and remand this case for a new trial.

{12} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice,

MARY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice, dissents.

HARRY E. STOWERS, JR.,
Justice, concurs in result only.

DISSENT

RANSOM, Justice.

{13} I DISSENT. If I had been the trial judge, I likely would have excused the juror. But Judge Fort was the trial judge, not I. The trial court has "a great deal of discretion," **State v. Martinez,** 95 N.M. 445, 450, 623 P.2d 565, 570 (1981), in determining whether a prospective juror is "totally free from any partiality whatsoever." **State v. McFall,** 67 N.M. 260, 263, 354 P.2d 547, 548-49 (1960). Arbitrary and unreasonable action on the part of the court is the test for abuse of discretion. **Richins v. Mayfield,** 85 N.M. 578, 514 P.2d 854 (1973). For the court to have abused its discretion, there must have been **no reason to believe** that the prospective juror was totally free from any partiality whatsoever.

{14} Therefore, the majority seems to hold that, when a juror states that he cannot say with certainty that he could be totally impartial, and that there is a possibility that his knowledge of "about half" of the witnesses would affect the way he decides the case, then there is no reason for the court to believe that the prospective juror is totally free from any partiality whatsoever. I do not want to dilute a "great deal of discretion" by holding that "lack of certainty" and "possibilities" skillfully elicited in voir dire shall require that the court dismiss prospective jurors on challenge for cause, or face the likely prospect of a new trial after appeal. What honest man can be "certain"? Is not partiality always a "possibility"? Should not the trial judge take the measure of the man?

{15} It is for the trial court to determine whether a prospective juror's statements regarding **lack of certainty** and **possibilities** are cause to excuse the juror. The manner and circumstances in which the words are expressed are as important as their literal meaning.

{16} For the above reasons, I dissent.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-035

Filing Date: April 17, 1987

Docket Nos. 16,030, 16,031

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 8611,

Plaintiff-Appellant and Cross-Appellee,

v.

ALVINITA ARCHIBEQUE, ET AL., DEFENDANTS and CROSS-APPELLANTS, and ALICE F. HOPPES,

Defendant-Appellee.

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

Motion for Rehearing Denied May 11, 1987

Kool, Kool, Bloomfield & Hollis,
Gerald R. Bloomfield,
Tara Selver,
Albuquerque, NM,

Adair, Scanlon & McHugh,
Patricia M. Shea,
Patrick M. Scanlon,
Washington, D.C.

for Communications Workers of America, Local 8611.

Alan F. Zvolanek,
Albuquerque, NM,

for Archibeque, et al.

Hanna B. Best,
Albuquerque, NM,

for Hoppes.

OPINION

SCARBOROUGH, Chief Justice.

{1} This action was commenced by Communications Workers of America, Local 8611 (appellant/cross-appellee) to collect fines imposed against union members for strikebreaking activity. Defendant Hoppes (appellee) counterclaimed for defamation and invasion of privacy. The jury returned a verdict for Hoppes in the amount of $15,000 actual damages and $50,000 punitive damages.[1] Local 8611 appealed that part of the judgment which awarded Hoppes affirmative relief. The jury returned verdicts in favor of Local 8611 on the local's claims against various of Hoppes' codefendants. Some of them appealed (cross-appellants). The appeals were consolidated. We affirm in part and reverse in part.

{2} On August 6, 1983, Local 8611 (union) went on strike. Hoppes resigned from the union on August 12, 1983. On August 15, 1983, Hoppes crossed the union's picket line and returned to work. On August 24, 1983, James Tricoli, New Mexico Director of the international union with which Local 8611 is affiliated, wrote Alfred Rucks, New Mexico President of the National Association for the Advancement of Colored People (NAACP). Hoppes was an officer of the New Mexico NAACP. Tricoli's letter stated that Hoppes, "who concurrently

[1] It is not clear from the verdict whether the jury based its award on the defamation claim or the invasion of privacy claim. Two other defendants, however, raised identical invasion of privacy claims and the jury did not return verdicts in their favor. We therefore conclude that the jury's verdict in favor of Hoppes was based on the defamation claim. We note that appellant and Hoppes have devoted their entire argument to the defamation claim.

is a member of Local 8611 * * * has and continues to cross authorized picket lines in connection with a membership-approved strike." The letter described Hoppes as "amoral," as "totally void of character," as "an embarrassment" to the NAACP, and likened her to Judas Iscariot. The letter concluded by urging Rucks to take action to remove Hoppes from her NAACP office. Later, Rucks received a telephone call from someone identifying himself as the president of Local 8611, who urged Rucks to take the action requested in the letter.

{3} Hoppes' defamation counterclaim was based upon Tricoli's letter. Local 8611 contends that the jury was improperly instructed inasmuch as it was allowed to find the union liable to Hoppes for defamation upon proof of negligence rather than upon proof of actual malice.

{4} Cross-appellants were both suspended from membership in the union and fined as a result of their strikebreaking activity. Cross-appellants contend the union cannot both suspend from union membership and impose fines for the same infraction of union rules. Cross-appellants also contend the union breached its fiduciary duty to deal fairly with them by failing to provide them with copies of the union constitution and bylaws prior to imposing sanctions.

{5} The case, as consolidated, presents three issues for decision:

> (1) Did the trial court err in instructing the jury that Local 8611 would be liable to Hoppes for defamation upon proof of negligence?
>
> (2) Was the language of Tricoli's letter actionable?
>
> (3) Did the trial court in refusing to dismiss Local 8611's complaint against cross-appellants?

ISSUE (1):

{6} Local 8611 contends that under **National Association of Letter Carriers v. Austin**, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974), and **Linn v. United Plant Guard Workers**, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966), it could only be found liable to Hoppes upon clear and convincing proof of actual malice (knowledge of falsity or reckless disregard of the truth). **See New York Times Co. v. Sullivan**, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). As already stated, the jury was instructed that it could find the union liable to Hoppes upon proof of negligence. We conclude that the jury was improperly instructed.

{7} In **Linn**, defamatory statements about a company manager were published to union members and prospective union members during a union organizing campaign. The manager sued the union for defamation. The Supreme Court acknowledged the federal policy encouraging free debate on issues dividing labor and management and implied that this debate "should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks.'" 383 U.S. at 62, 86 S. Ct. at 663 (quoting **New York Times Co. v. Sullivan**, 376 U.S. at 270, 84 S. Ct. at 721). The Court concluded that "the most repulsive speech [in the context of a labor dispute] enjoys immunity provided it falls short of a deliberate or reckless untruth." **Id.** 383 U.S. at 63, 86 S. Ct. at 663. Thus, the Court adopted **New York Times Co. v. Sullivan** 's actual malice standard to determine whether libels published in the context of a labor dispute were actionable.

{8} In **Letter Carriers**, the union regularly published in its newsletter a "List of Scabs," i.e., nonunion postal workers. The nonunion workers sued the union for defamation. The Supreme Court reiterated **Linn's** holding that state libel laws may be applied to penalize statements made in the course of labor disputes only if the statements were known to be false or were made with reckless disregard of whether they were false or not. Holding that the dispute between nonunion workers and the union was a labor dispute, the Court applied the actual malice standard.

{9} We must determine whether **Linn's** partial preemption of state libel remedies is applicable in this case. In **Letter Carriers**, the Court stated:

> [W]hether **Linn** 's partial pre-emption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a "labor dispute"; rather, application of **Linn** must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated.

418 U.S. at 279, 94 S. Ct. at 2778.

{10} Linn's partial preemption of state libel laws is applicable in this case since Tricoli's letter was published in a context where the policies of the federal labor laws leading to protection for freedom of speech were significantly implicated. Tricoli's letter was written in the course of a strike; the letter was an expression of union contempt for strikebreakers. Since Tricoli's letter was published in context where the policies of the federal labor laws leading to protection for freedom of speech were significantly implicated (i.e., a strike), the jury should have been instructed that the union would be liable to Hoppes for defamation only upon clear and convincing proof of actual malice.

{11} We note that **Letter Carriers** expanded the scope of **Linn's** partial preemption. **See** Christie, **Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches**, 75 Mich. L. Rev. 43, 51 n. 55 (1976). In **Letter Carriers**, the dispute was one between nonunion workers and a union; whereas in **Linn**, the dispute was one between management and a union. The facts in **Linn** more clearly implicate the federal policy of encouraging free debate on issues dividing labor and management. By defining a dispute between a union and nonunion workers as a "labor dispute," **Letter Carriers** implied that we must liberally construe **Linn's** partial preemption. **Accord Tosti v. Ayik,** 386 Mass. 721, 437 N.E.2d 1062 (1982) ("labor dispute" should be broadly construed).

{12} Hoppes contends that even if the actual malice standard applies, the jury's verdict should stand because the jury was instructed that it could award punitive damages upon proof of actual malice and the jury awarded Hoppes punitive damages. The problem with Hoppes' theory is that the jury was instructed that malice could be proven "by the greater weight of the evidence" rather than by "clear and convincing proof." **See New York Times Co. v. Sullivan**.

{13} In sum, the jury was improperly instructed and its verdict in Hoppes' favor cannot stand.

ISSUE (2):

{14} Our disposition of the first issue would warrant a new trial but for another problem with the counterclaim; the language used in Tricoli's letter is not actionable as a matter of law.

{15} In **Letter Carriers**, the Court stated that "[t]he **sine qua non** of recovery for defamation in a labor dispute under **Linn** is the existence of falsehood." 418 U.S. at 283, 94 S. Ct. at 2781. Rhetorical hyperbole and lusty and imaginative expressions of contempt fail to satisfy the requirement of knowing of reckless falsehood. **See id.** at 282-87, 94 S. Ct. at 2780-82. Characterizations such as "amoral," "totally void of character," and "an embarrassment" are rhetorical hyperbole and will not support recovery for defamation in the context of a labor dispute.

{16} Hoppes makes much of the misrepresentation contained in the letter that she, at the time the letter was written, was a union member. Hoppes' counterclaim, however, did not allege that she was damaged by this misrepresentation; rather, the counterclaim alleged damage by use of the characterization "amoral." Furthermore, the misrepresentation is not defamatory, either on its face or in the context of the letter, and its presence does not convert rhetorical hyperbole contained in the letter into misstatements of fact.

{17} Since the jury was improperly instructed and since the language of Tricoli's letter was not

actionable, we reverse the jury verdict in favor of Hoppes. Our disposition of this issue renders moot appellant's claims that there was insufficient evidence to establish that Tricoli was Local 8611's agent and that the trial court erred in admitting Tricoli's letter into evidence.

ISSUE (3):

{18} Cross-appellants moved to dismiss prior to trial on the ground that Local 8611 did not have authority to both suspend and fine its members for the same infraction of union rules and therefore failed to state a claim upon which relief could be granted. **See** SCRA 1986, 1-012(B)(6). The union constitution provides that "[m]embers may be fined, suspended or expelled by locals in the manner provided in the Constitution." The union bylaws similarly provide that "[m]embers of this Local may be fined, suspended or expelled in the manner provided in these Bylaws." Cross-appellants contend that these clauses can only be read to provide mutually exclusive remedies and that since cross-appellants were suspended from membership in the union they could not be fined for the same infraction. The constitution and bylaws, however, can be read to permit suspension, fines, **and** expulsion. The trial court, therefore, did not err in denying the trial motion to dismiss.

{19} Nor did the trial court err in denying cross-appellants' motion to dismiss at trial which was based upon Local 8611's failure to provide cross-appellants with copies of the union constitution and bylaws prior to imposing sanctions. Cross-appellants have cited no authority for the proposition that Local 8611 was obligated to provide cross-appellants with copies of the union constitution and bylaws prior to imposing sanctions and we do not believe that such a requirement is called for by the circumstances of this case.

{20} Finally, cross-appellants contend that the trial court erred in refusing to submit particular tendered instructions to the jury. In view of our disposition of the prior points raised by cross-appellants, this point is meritless.

{21} The judgment of the trial court is affirmed in part and reversed in part; we remand for entry of judgment in Local 8611 on Hoppes' counterclaim.

{22} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice,

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-038

Filing Date: April 23, 1987

Docket No. 16,072

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

HERMAN JERRY SENA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY,
ART ENCINIAS, District Judge.

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

for Appellant.

Winston Roberts-Hohl,
Santa Fe,

for Trial Counsel.

Hal Stratton, Attorney General,
Charles H. Rennick, Assistant Attorney General,
Santa Fe,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Defendant was convicted of first degree murder, aggravated burglary, and tampering with evidence. He moved for a new trial based on newly discovered evidence—a key prosecution witness recanted subsequent to trial. The trial court denied the motion; defendant appealed. We affirm.

{2} The State relied on the testimony of Elva Martinez (Martinez) and Chris Sena to link defendant to the murder of Ignacita Escudero. Other circumstantial evidence linked defendant to the murder, but there was no direct evidence implicating defendant. Martinez and Chris Sena testified that defendant confessed to them that he murdered Escudero. The State theorized that details of the crime given by Martinez and Chris Sena could only have been known to the killer. The descriptions of the crime given by Martinez and Chris Sena were very similar. After trial, Martinez recanted and testified that she committed perjury in her trial testimony and that defendant never confessed to her. Martinez said she fabricated the confession story in order to get revenge against defendant.

{3} Defendant contends that the trial court erred in denying the motion for new trial. Defendant also contends that the trial court erred in failing to inquire into alleged jurors misconduct. A third contention, concerning prosecutorial misconduct, was not preserved for review.

{4} This case presents two issues:

(1) Did the trial court err in denying defendant's motion for new trial based on newly discovered evidence?

(2) Did the trial court err in refusing to inquire into alleged juror misconduct?

ISSUE (1):

{5} In order to warrant a new trial, newly discovered evidence must satisfy the following

conditions: (1) it will probably change the result if a new trial is granted; (2) it must have been discovered since trial; (3) it could not have been discovered before trial by exercise of due diligence; (4) it must be material; (5) it must not be merely cumulative; and (6) it must not be merely impeaching or contradictory. **State v. Volpato**, 102 N.M. 383, 384-85, 696 P.2d 471, 472-473 (1985). In this case, only the existence of the first condition is at issue.

{6} Motions for new trial based on newly discovered evidence rest in the sound discretion of the trial court. **Id**. at 385, 696 P.2d at 473. When newly discovered evidence concerns the recantation of a prosecution witness, the following factors indicate that a new trial should be granted: (1) the original verdict was based upon uncorroborated testimony; (2) the recantation occurred under circumstances free from suspicion of undue influence or pressure from any source; (3) the record fails to disclose any possibility of collusion between the defendant and the witness between the time of the trial and the retraction; and (4) the witness admitted her perjury on the witness stand and thereby subjected herself to prosecution. **State v. Fuentes**, 67 N.M. 31, 33, 351 P.2d 209, 210 (1960).

{7} In this case, not only was Martinez's testimony corroborated by Chris Sena's testimony and circumstantial evidence, but Martinez's recantation did not occur under circumstances free from suspicion of undue influence. There was considerable evidence that defendant's family intimidated Martinez with threats and acts of physical violence and thereby coerced her recantation. Under these circumstances, we hold that the trial court did not abuse its discretion in denying the motion for a new trial.

ISSUE (2):

{8} Defendant complained of two instances of alleged juror misconduct and introduced affidavits in support of his complaints. According to the affidavit of another juror, juror Stone stated during deliberations that "he knew the defendant was guilty, but that he could not base his conviction on anything he heard in the courtroom." According to the affidavit of defendant's sister, she observed a female juror sleeping during trial. Relying upon SCRA 1986, 11-606(B), the trial judge refused to hear evidence of juror misconduct.

{9} Rule 606(B) states in part:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

In **State v. Doe**, 101 N.M. 363, 366, 683 P.2d 45, 48 (Ct. App.1983), **cert. denied**, 101 N.M. 276, 681 P.2d 61 (1984), the Court of Appeals stated:

The party seeking a new trial on the basis that extraneous to the trial actually reached the jury. If the party makes such a showing, and if there is a reasonable possibility the material prejudiced the defendant, the trial court should grant a new trial. The trial court has a duty to inquire into the possibility of prejudice. In an appropriate case, the trial court should conduct an evidentiary hearing.

(Citations omitted.) Defendant failed to show that he had competent evidence that extraneous material reached the jury. Defendant produced nothing more than the statement of juror Stone quoted above. That statement alone does not indicate that extraneous material reached the jury. Therefore, the trial court did not err in refusing to inquire further into juror Stone's remark. Likewise, the trial court did not err in refusing to inquire further into the alleged inattentiveness of a juror. The allegation of inattentiveness is vague and uncorroborated.

{10} We affirm defendant's conviction.

RICHARD E. RANSOM,
Justice

{11} IT IS SO ORDERED.

WE CONCUR:

HARRY E. STOWERS, JR.,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-042

Filing Date: May 13, 1987

Docket No. 16,612

WESTERN BANK, A NEW MEXICO CORPORATION,

Plaintiff-Appellant,

v.

AQUA LEISURE, LTD., a New Mexico Limited Partnership, Daniel Angelini,

Defendants,

v.

WILLIAM F. BARNHART, Pool Enterprises, Inc., Dudden Elevators, Inc. and Richard Dudden, Gregory L. Bamford, J. Kent Bamford and Bamford Land Company,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, H. RICHARD BLACKHURST, District Judge.

Motion for Rehearing Denied June 4, 1987

Civerolo, Hansen & Wolf,
Dennis E. Jontz,
Ross L. Crown

for appellant.

Johnson & Lanphere,
Gerald R. Cole

for appellees Pool Enterprises, et al.

Bruce E. Pasternack,
Nancy Augustus

for appellee Barnhart.

OPINION

SCARBOROUGH, Chief Justice.

{1} Western Bank (Western) appeals a district court order denying Western's motion for summary judgment and granting appellee's cross-motions for summary judgment. Western brought suit on two promissory notes originally executed by Malibu Pools of New Mexico, Inc. (Malibu) and accompanying guaranty agreements signed by William Barnhart, Pool Enterprises, Inc. (not subject to Western's motion for summary judgment), Dudden Elevators, Inc., Richard Dudden, Gregory Bamford, J. Kent Bamford, and Bamford Land Company (appellees). We reverse the summary judgment in favor of appellees.

{2} In 1978 and again in 1980, Malibu borrowed money from Western as evidence by two notes, the repayment of which was secured by Western's perfected security interest in Malibu collateral. Between February 1978 and September 1981, appellees individually executed continuing guaranty agreements to Western guaranteeing payment of the two notes. On October 21, 1981, without the prior consent of appellees, Western released Roger Rankin (Rankin), a co-guarantor on the Malibu notes, from any further guarantor obligation. Malibu later defaulted on the notes and was placed in bankruptcy.

{3} On October 18, 1983, in conjunction with the purchase of Malibu's assets, Aqua Leisure, Ltd. (Aqua) entered into a written agreement with Malibu and Western in which Aqua agreed to assume and be responsible for the Malibu notes. Pursuant to the assumption agreement (Aqua agreement), interest and payment terms

on the Malibu notes were changed. New guarantors with additional security were brought in, and Malibu conveyed its interest in the Malibu collateral to Aqua subject to Western's security interest. Paragraph seven of the Aqua agreement provided that existing guaranties should remain in place as they then currently applied. With the exception of Pool Enterprises, Inc. (Pool), all appellees approved and signed the agreement.

{4} This case presents four issues for decision:

> 1. Were appellees released from their guaranty obligations by the release of co-guarantor Rankin; and if so, to what extent?
>
> 2. Were appellees released from their guaranty obligations by Aqua's assumption of Malibu's debts?
>
> 3. Was summary judgment in favor of Western precluded by appellees' allegations that Western disposed of collateral in a commercially unreasonable manner?
>
> 4. Was summary judgment in favor of Western against appellee Dudden Elevators, Inc. (Dudden) precluded by Dudden's claim of economic coercion?

ISSUE (1):

{5} Paragraph seven of the Aqua agreement is silent as to the consequences of the release of Rankin as a co-guarantor. Western argues that this paragraph establishes appellees' after-the-fact consent to the Rankin release. Appellees disagree and claim they were discharged as guarantors of the Malibu notes because Rankin was discharged without their consent. We agree with appellees.

{6} A guarantor is discharged from his obligation if there is a material change in the obligation unless the guarantor consents to the change. **See Pacific Nat'l Agric. Credit Corp. v. Hagerman**, 39 N.M. 549, 51 P.2d 857 (1935). Rankin's release materially changed appellees' guaranty obligations. In view of the favored status of guarantors and of the principle that a guarantor's liability will not be extended by implication (**see Shirley v. Venaglia**, 86 N.M. 721, 724, 527 P.2d 316, 319 (1974)), we do not read paragraph seven of the Aqua agreement to constitute after-the-fact consent to the release of Rankin; the agreement does not mention the Rankin release. Therefore, at the time the parties entered into the Aqua agreement, appellees had already been discharged as guarantors on the two Malibu notes to the extent allowed by law.

{7} Appellees contend that they were completely discharged as guarantors by virtue of their lack of consent to Rankin's release. Western, on the other hand, contends that appellees were discharged only to the extent of their right of contribution from Rankin. We are of the opinion that appellees are not entitled to a complete release from their guaranty agreements; rather, they are entitled to discharge only to the extent of their right to contribution from Rankin.

{8} At common law, the release of one surety without the consent of co-sureties operated to totally discharge the remaining sureties;

> [b]ut in most jurisdictions this common-law rule has been modified or departed from by the interposition of equitable principles according to which the co-surety is granted a release from liability to the extent to which he suffered actual prejudice * * * exonerating him to the extent to which he could have claimed contribution from his co-surety had the latter not been released.

74 Am. Jur.2d **Suretyship** § 83 (1974); **see also** Restatement of Security § 135 (1941); **cf. Clark Leasing Corp. v. White Sands Forest Prods., Inc.**, 87 N.M. 451, 455-56, 535 P.2d 1077, 1081-82 (1975) (secured party's failure to dispose of collateral in a commercially reasonable manner does not result in forfeiture of right to deficiency, but only requires reduction of the claimed deficiency by the amount of any loss occasioned by such failure). Equity is best served by the modified rule. We therefore adopt the rule that where a surety is released without the consent of

co-sureties, the co-sureties are discharged only to the extent that they were prejudiced by the release, i.e., to the extent of their right to contribution from the released surety. Appellees therefore remained liable on the Malibu guaranties and were discharged only to the extent of their right to contribution from Rankin.

ISSUE (2):

{9} Appellees claim the Aqua agreement was a new contract with a new debtor, Aqua, and argue that the Aqua agreement extinguished the Malibu debts and discharged appellees as Malibu guarantors by operation of law. The trial court was obviously persuaded by appellees' arguments. It found there was a novation, a substituted contract with Aqua, which discharged appellees as guarantors of the Malibu debt. If there was a novation, it must be inferred from the conduct of the parties; substitution of one contract for the other was not mentioned in the Aqua agreement. Western denies that there was a novation and argues that it had no intention of releasing appellees by executing the Aqua agreement.

{10} There are several features of a novation. **See Sims v. Craig**, 96 N.M. 33, 35, 627 P.2d 875, 877 (1981). One feature is the extinguishment of the old obligation. Moreover, "'[i]n order to effect a novation there must be a clear and definite intention on the part of all concerned [that a novation take place].'" **Id.** (quoting 58 Am. Jur.2d **Novation** § 20 (1971)). There was no express extinguishment of the Malibu notes, and there is no evidence in the record to suggest that Western intended to extinguish the Malibu debt: the Malibu notes were not marked paid; they are the basis of and are attached to Western's complaint. We therefore decline to infer a novation from the facts of this case.

{11} Importantly, all appellees except Pool signed the Aqua agreement in which they expressly agreed to be Aqua's guarantors to the extent they were then Malibu's guarantors, i.e., according to the terms of their guaranties and taking into account their partial discharges resulting from Rankin's release. In sum, the Aqua agreement was an assumption agreement and not a substitute contract or novation. The trial court erred in reaching a contrary conclusion.

{12} Appellee Pool was granted summary judgment on its cross-motion against Western. Pool was a guarantor of the Malibu notes but did not sign the Aqua agreement. As already stated, Pool is entitled to discharge from its guaranty of the Malibu notes to the extent of its right to contribution from Rankin. Although we have concluded that the Aqua agreement did not constitute a novation, questions of fact remain concerning whether Pool consented to the terms of the Aqua agreement and whether, absent consent, the Aqua agreement materially changed the nature of Pool's obligation so as to completely discharge Pool from liability. The trial court erred in ruling as a matter of law that Pool was discharged from its guaranty obligation.

ISSUE (3):

{13} Appellees argue that Western was obligated to dispose of the Malibu collateral in a commercially reasonable manner. A similar argument was rejected by us in **American Bank of Commerce v. Covolo**, 88 N.M. 405, 540 P.2d 1294 (1975). The rights of the guarantor as against the creditor are determined by the terms of the contract between them. **Id.** at 408, 540 P.2d at 1297. The continuing guaranty agreement signed by each appellee specifically provides that Western may "sell, at public or private sale, and for such price and upon such terms as it may deem reasonable, any collateral now or hereafter held by it . . . without in any manner affecting the liability of the [guarantor]." The language of the contract between the parties affords appellees none of the rights they assert in connection with Western's disposal of the Malibu collateral. Western's alleged failure to dispose of collateral in a commercially reasonable manner therefore should not preclude entry of summary judgment in favor of Western.

ISSUE (4):

{14} Appellee Dudden claims there are further unresolved factual issues which preclude

entry of summary judgment against it. Dudden claims there is a factual dispute concerning the signature on the guaranty agreement, and it claims evidence exists showing that the Dudden guaranty was secured by economic coercion or duress. Western says Dudden never raised these defenses in the trial court. We observe that Dudden admitted execution of the guaranty in its answer to Western's complaint. Deposition testimony of Richard Dudden, who signed the guaranty on behalf of Dudden, indicated the guaranty was signed to forestall Western from instituting collection action against Malibu on a delinquent account. Agreeing to forbear from collection action on a delinquent account in exchange for a guaranty does not constitute economic coercion or duress. **See B & W Construction Co. v. N.C. Ribble Co**., 105 N.M. 448, 734 P.2d 226 (1987). Dudden's arguments are frivolous and should not preclude entry of summary judgment in favor of Western.

{15} Costs of this appeal are assessed against appellees. The summary judgment in favor of appellees is reversed, and this case is reinstated on the docket of the district court for action consistent with this opinion.

{16} IT IS SO ORDERED.

WE CONCUR:

HARRY E. STOWERS, JR.,
Justice

MARY C. WALTERS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-045

Filing Date: May 28, 1987

Docket No. 16,323

GLORIA SILVA,

Plaintiff-Appellant,

v.

ALBUQUERQUE ASSEMBLY & DISTRIBUTION FREEPORT WAREHOUSE CORPORATION,

Defendant-Appellee.

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

Eric Isbell-Sirotkin,
Albuquerque, New Mexico,

for Appellant.

Cherpelis & Associates,
George Cherpelis,
Laurie A. Vogel,
Albuquerque, New Mexico,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Gloria Silva (appellant) filed a complaint in the District Court of Bernalillo County against her former employer, Albuquerque Assembly & Distribution Freeport Warehouse Corporation (appellee). The two count complaint alleged breach of an implied contract of employment based upon a personnel manual and commission of the tort of retaliatory discharge. Damages for emotional distress were sought only in connection with a breach of contract claim. However, the trial court prohibited the admission of evidence on the claim of emotional distress pursuant to appellee's pretrial motion in limine.

{2} The jury found in favor of appellant on the breach of contract claim and against her on the retaliatory discharge claim. This appeal followed, and we now affirm the judgment of the trial court.

{3} The relevant facts are as follows. A personnel manual issued by the employer-appellee provided that employer-appellee would maintain group health insurance for its employees. While appellant was on a leave of absence, during which she incurred medical expenses, appellee's group health insurance policy covering appellant's medical expenses lapsed. Appellee's new insurance policy did not provide coverage for appellant.

{4} Appellant was also terminated from her employment, purportedly due to her complaints regarding alleged unhealthy working conditions and alleged fraudulent charging practices of appellee. This was the basis for appellant's retaliatory discharge claim; it was also argued to be a breach of the implied contract of employment.

{5} The following issues are presented on appeal:

1. Whether emotional distress damages are recoverable in a breach of employment contract action;

2. Whether the trial court erred in instructing the jury that retaliatory discharge must be proved by clear and convincing evidence;

3. Whether it was error for the trial court to instruct the jury that they could find either

breach of contract or retaliatory discharge, but not both;

4. Whether the trial court erred in instructing the jury that plaintiff must prove defendant engaged in the allegations underlying the retaliatory discharge claim; and

5. Whether the trial court's jury instructions on the requisite causation for finding a retaliatory discharge were erroneous.

DISCUSSION

{6} Appellant's first argument is that the trial court's exclusion of evidence relating to emotional distress damages was error and raises the legal issue of whether such damages are recoverable in an action for breach of an implied contract of employment. Appellant submits that appellee's failure to provide medical insurance coverage was a breach of the employment contract giving rise to a claim for tort-like emotional distress damages. We disagree.

{7} Appellant relies on **Noble v. National American Life Insurance Co.**, 128 Ariz. 196, 624 P.2d 874 (App.1979), **vacated**, 128 Ariz. 188, 624 P.2d 866 (1981) and **Chavez v. Chenoweth**, 89 N.M. 423, 553 P.2d 703 (Ct. App.1976). Appellant's reliance is misplaced in that those cases involve insurance contracts. In contrast, the case at bar involves an implied contract of employment. The jury found, by special verdict, that defendant-appellee breached an implied contract of employment. That finding is not challenged on appeal and is therefore deemed conclusive and accepted as true by this Court. NMSA 1978, Civ. App. R. 9(a)(3)(ii) (Supp.1985); **City of Roswell v. Reynolds**, 86 N.M. 249, 522 P.2d 796 (1974).

{8} We hold that damages for emotional distress are not recoverable in an action for breach of an employment contract, whether express or implied, in the absence of a showing that the parties contemplated such damages at the time the contract was made. **See Fogleman v. Peruvian Associates**, 127 Ariz. 504, 622 P.2d 63 (App.1980), **disapproved on other grounds, Fleming v. Pima County**, 141 Ariz. 149, 156 n. 5, 685 P.2d 1301, 1308 n. 5 (1984); **accord Fisher v. General Tel. Co.**, 510 F. Supp. 347 (E.D. Mich.1980); **Henry Morrison Flagler Museum v. Lee**, 268 So.2d 434 (Fla. App.1972); **Cowdrey v. A.T. Transp**., 141 Mich. App. 617, 367 N.W.2d 433 (1984). Accordingly, we find that the trial court's exclusion of evidence as to appellant's claim for emotional distress damages in the present case was proper.

{9} "'[T]he purpose of allowing damages in a breach of contract case is the restoration to the injured of what he has lost by the breach, and what he reasonably could have expected to gain if there had been no breach.'" **Board of Educ. v. Jennings**, 102 N.M. 762, 765, 701 P.2d 361, 364 (1985) (quoting **Allen v. Allen Title Co.**, 77 N.M. 796, 798, 427 P.2d 673, 675 (1967)). The underlying principle is compensation. **Id**. In discussing the measure of damages for breach of an employment contract, this Court has stated that "'[a] party whose contract has been breached is not entitled to be placed in a better position because of the breach than he would have been in had the contract been performed.'" **Id**. (quoting **Blair v. United States ex rel. Hogan**, 150 F.2d 676, 678 (8th Cir.1945)).

{10} In the present case the jury found, by special verdict, that plaintiff-appellant suffered damages in the amount of five hundred dollars ($500.00) due to appellee's breach of the implied contract of employment. Plaintiff has been restored, by the damages award, to the position she would have enjoyed had there been no breach.

{11} Appellant next urges this Court to overrule **Vigil v. Arzola**, 102 N.M. 682, 699 P.2d 613 (Ct. App.1983), **rev'd in part on other grounds and remanded**, 101 N.M. 687, 687 P.2d 1038 (1984), to the extent that it requires proof of a claim of retaliatory discharge by clear and convincing evidence. This we are not willing to do. We hold that the trial court's jury instructions regarding the standard of proof applied in retaliatory discharge actions were correct and consistent with **Vigil v. Arzola. See**

Vigil, 102 N.M. at 689, 699 P.2d at 620. We therefore reject appellant's allegation of error in the trial court's refusal of her "preponderance of the evidence" instruction. **See generally Kirk Co. v. Ashcraft**, 101 N.M. 462, 684 P.2d 1127 (1984) (not error to deny requested instructions when instructions given adequately cover the law to be applied).

{12} The third issue on appeal is whether the trial court erred in instructing the jury that they could find either a breach of contract or retaliatory discharge, but not both. We hold that the instruction given was not erroneous.

> "[I]t has been held by the overwhelming weight of authority that the discharge of an employee in violation of his contract irrespective of the motive therefor constitutes only a breach of contract and not a tort. . . . The only exception to the rule is where the wrongful discharge is tinctured with fraud. But for obvious reasons motive for discharge alone does not partake of any of the elements necessary to constitute fraud."

Bottijliso v. Hutchison Fruit Co., 96 N.M. 789, 791, 635 P.2d 992, 994 (Ct. App.1981) (quoting **Odell v. Humble Oil & Ref. Co.**, 201 F.2d 123, 128 (10th Cir.), **cert. denied**, 345 U.S. 941, 73 S. Ct. 833, 97 L. Ed. 1367 (1953)). The subsequent judicial recognition of the tort of retaliatory discharge in **Vigil** does not affect this proposition.

{13} A retaliatory discharge cause of action was recognized in New Mexico as a narrow exception to the terminable at-will rule; its genesis and sole application has been in regard to employment at-will. **Vasquez v. Mason & Hanger - Silas Mason Co.**, No. CIV 85-0150 HB (D.N.M. Aug. 1, 1985) (WESTLAW, DCTU database, enter "Vasquez v. Mason"). The express reason for recognizing this tort, and thus modifying the terminable at-will rule, was "the need to encourage job security" for those employees not protected from wrongful discharge by an employment contract. **See Vigil**, 102 N.M. at 688, 699 P.2d at 619. Obviously, if an employee is protected from wrongful discharge by an employment contract, the intended protection afforded by the retaliatory discharge action is unnecessary and inapplicable.

{14} Our holding on this issue is also consistent with recent federal court interpretations of New Mexico law in cases addressing the scope and applicability of a retaliatory discharge action. **See, e.g., Vasquez** (where employee is working under a union contract, no wrongful discharge action will lie against the employer because protection against wrongful discharge is already enjoyed by such employee); **Salazar v. Furr's Inc.**, 629 F. Supp. 1403 (D.N.M.1986) (if employee has protection either because of employment contract or through another cause of action, the tort is unnecessary and will not be recognized); **accord Lamb v. Briggs Mfg.**, 700 F.2d 1092 (7th Cir.1983) (judicially created retaliatory discharge action applies only to at-will employees and is not available to employees covered by contract). We decline to extend the tort of retaliatory discharge beyond the limited context in which it has been recognized.

{15} The remaining issues raised in this appeal are based upon allegations of erroneous jury instructions regarding the retaliatory discharge claim. Having reviewed the record, we find the instructions given were correct and adequate. Accordingly, those issues will not be addressed. **See Kirk Co. v. Ashcraft**.

{16} The judgment entered by the trial court is affirmed.

{17} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

HARRY E. STOWERS,
JR., Justice

MARY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice, not participating.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-060

Filing Date: July 17, 1987

Docket No. 16,263

DOROTHY COLBORNE,

Plaintiff-Appellant,

v.

VILLAGE OF CORRALES,

Defendant-Appellee.

**APPEAL FROM THE DISTRICT COURT OF SANDOVAL COUNTY,
KENNETH G. BROWN, District Judge.**

Singer, Smith & Williams,
Robert N. Singer,
Albuquerque,

for Plaintiff-Appellant.

Peter Everett IV,
Ralph W. Steele,
Albuquerque,

for Defendant-Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} The district court of Sandoval County refused to order approval of appellant's proposed subdivision and refused to rule on appellant's claim of full legal and public access to the property. We affirm.

{2} We summarize the trial court's findings of fact. In June 1983, appellant, Dorothy Colborne, sought approval from appellee, Village of Corrales (Village), for a subdivision of land within the planning and platting jurisdiction of the Village. Appellant's land is adjacent to the Corrales Main Canal. Appellant was informed at the time she requested subdivision approval that it was Village policy to require landowners to dedicate a sixty-foot easement along the canal for a potential north/south road as a condition for subdivision approval. The Village has had such a policy since 1973. The Village has demonstrated an overall and consistent policy of recognizing the need for a north/south road as a means of channeling future Village growth in an orderly manner. From 1973 to the present, the Village has approved nine subdivisions along the canal conditioned upon the dedication of similar easements to the Village.

{3} In July 1983, the Corrales Planning and Zoning Commission voted to approve appellant's subdivision upon the conditions that appellant publicly dedicate the sixty-foot easement (with the option for a reversion to appellant of any land not required for the north/south road), and that the subdivision be permitted without full public access. Appellant initially agreed to dedicate the easement in exchange for subdivision approval. In July 1984, however, appellant notified the planning and Zoning Commission that she would not dedicate the sixty-foot easement to the Village. Based upon appellant's refusal to grant the easement, the Planning and Zoning Commission denied her request for approval of the subdivision. The Village Council upheld the decision of the Planning and Zoning Commission. Appellant does not challenge the above summarized findings of fact.

{4} Appellant challenges the trial court's conclusion of law that appellee, in conditioning approval of appellant's subdivision upon her dedicating a portion of her land to the Village, acted reasonably, and hence, validly exercised its police power.

{5} In **City of Albuquerque v. Chapman**, 77 N.M. 86, 91, 419 P.2d 460, 464 (1966), we stated that in order to acquire the advantage of lot subdivision "the property owner must comply with reasonable conditions imposed by the city within its authority." Consistent with **Chapman**, we must decide whether it was reasonable for appellee to condition subdivision approval upon dedication of an easement to accommodate the potential north/south road.

{6} Land subdivision regulations of the Village permit requests for dedication of land in exchange for subdivision approval. The Village has demonstrated an overall and consistent policy of recognizing a need for a north/south road along the canal as a means of channeling future growth of the Village in an orderly manner. The Village was prepared to give appellant the option for a reversion of any land not required for the north/south road. Under these circumstances, it was a reasonable, and hence valid, exercise of police power for appellee to condition subdivision approval upon the dedication of an easement to accommodate the potential north/south road.

{7} Appellant also contends that the Village could not require dedication of the easement since the potential north/south road was not a "planned" street, i.e., it was not expressly incorporated into the Village's master plan. "Every plat approved by the planning authority," however, "is an amendment, addition or a detail of the master plan." NMSA 1978, § 3-19-12 (Repl. Pamp. 1985). Since the Village approved nine subdivisions along the canal conditioned upon dedication of easements to the Village, the master plan was effectively amended to include the potential north/south road. Therefore, the potential north/south road was a planned street and appellant's argument fails.

{8} Appellant also argues that the trial court erred in refusing to rule on her claim that there existed full legal and public access to her property. We disagree. The trial court is vested with broad discretion to grant or refuse claims for declaratory relief. NMSA 1978, § 44-6-7. Since a ruling that there existed full legal and public access to appellant's property would not have terminated the controversy giving rise to this action, the trial court did not abuse its discretion in refusing to rule on the matter.

{9} The judgment of the trial court is affirmed.

{10} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

HARRY E. STOWERS, JR.,
Justice

MARY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-061

Filing Date: July 17, 1987

Docket No. 17,190

STATE OF NEW MEXICO, ex rel. MERCEDES C. RIVERA,

Petitioner,

v.

HONORABLE SUSAN CONWAY, District Judge, Second Judicial District,

Respondent.

ORIGINAL PROCEEDING ON PETITION FOR WRIT OF PROHIBITION

Petition for Writ of Certiorari Withdrawn, September 3, 1987. Opinion reinstated, 106 N.M. 259, 741 P.2d 1380.

Walter R. Kegel,
Santa Fe, New Mexico,

for Petitioner.

Raymond W. Schowers, Sutin, Thayer & Browne,
Albuquerque, New Mexico,

for Real Party in Interest.

OPINION

SCARBOROUGH, Chief Justice.

{1} Petitioner sought a writ of prohibition to prohibit respondent district judge from proceeding further in Bernalillo County Cause No. DR 85-01388. We issue a peremptory writ of prohibition and thereby prohibit respondent from proceeding further in Cause No. DR 85-01388, except that respondent should take whatever steps necessary to dismiss the case with prejudice.

{2} Petitioner filed an action for divorce, Cause No. DR 85-01388, on April 10, 1985. The case was heard on February 4, 1986, but no further action was taken by the trial court until May 19, 1986, when the parties were invited to submit proposed findings of fact and conclusions of law. On June 28, 1986, petitioner's husband died. The trial court then allowed the estate of petitioner's deceased husband to substitute as a party for the deceased husband. No order or decree of divorce has yet been entered in Cause No. DR 85-01388. Nevertheless, the trial court has indicated that it intends to enter a divorce decree and divide property nunc pro tunc.

{3} Prohibition is the proper remedy to prevent an inferior court from acting in excess of its jurisdiction. **See State v. Apodaca**, 91 N.M. 279, 573 P.2d 213 (1977). The issue raised by the petition for writ of prohibition, therefore, is whether by proceeding in Cause No. DR 85-01388 the trial court is acting in excess of its jurisdiction.

{4} In **Romine v. Romine**, 100 N.M. 403, 671 P.2d 651 (1983), this Court held that the trial court was without jurisdiction to enter a divorce decree nunc pro tunc where a party to the divorce action had died. **See id**. at 404, 671 P.2d at 652. According to the Court, "'no power can dissolve a marriage which has already been dissolved by act of God.'" **Id.** (quoting **Bell v. Bell**, 181 U.S. 175, 178, 21 S. Ct. 551, 553, 45 L. Ed. 804 (1901)). **Romine** states that a nunc pro tunc order may only be properly entered where "some judicial action [has] taken place," i.e., "nunc pro tunc 'is not to be used to supply some omitted action of the court or counsel, but may be utilized to supply an omission in the record of something really done but omitted through mistake or inadvertence.'" **Id**. (quoting **Mora v. Martinez**, 80 N.M. 88, 89, 451 P.2d 992, 993 (1969)).

{5} In this case there was no judicial action prior to the death of petitioner's husband upon which a nunc pro tunc divorce decree could be predicated. Indeed, the trial court was dilatory in its handling of Cause No. DR 85-01388. The case was heard in February 1986, but no further action appears to have been undertaken until May 19, 1986, when the trial court solicited proposing findings of fact and conclusions of law. The trial court's failure to enter judgment prior to the death of petitioner's husband violated SCRA 1986, Rule 1-054(B)(1), which requires either entry of judgment within sixty days of submission or submission of a written memorandum to this Court explaining the reason for noncompliance with the sixty-day rule. In sum, **Romine** is directly on point; the trial court is without jurisdiction to enter a divorce decree nunc pro tunc because petitioner's husband died before the trial court took action to enter a divorce decree.

{6} Wherefore, a peremptory writ of prohibition shall issue, prohibiting respondent from proceeding further in Bernalillo County Cause No. DR 85-01388, except that respondent should dismiss Cause No. DR 85-01388 with prejudice and at the same time strike the trial court's Findings of Fact and Conclusions of Law and Supplemental Findings of Fact and Conclusions of Law therein. Furthermore, in view of the trial court's violation of SCRA 1986, Rule 1-054(B)(1), we refer this matter to the Judicial Standards Commission for appropriate action.

{7} IT IS SO ORDERED.

WE CONCUR:

HARRY E. STOWERS, JR.,
Justice

MARY C. WALTERS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-062

Filing Date: July 22, 1987

Docket No. 17,084

BOARD OF EDUCATION OF THE SANTA FE PUBLIC SCHOOLS,

Petitioner,

v.

VINCENT SULLIVAN,

Respondent.

ORIGINAL PROCEEDINGS ON CERTIORARI, ADMINISTRATIVE APPEAL FROM THE STATE BOARD OF EDUCATION.

Catron, Catron & Sawtell,
Fletcher R. Catron,

for Petitioner.

Jones, Snead, Wertheim, Rodriguez &
Wentworth, William D. Winter,

for Respondent.

OPINION

SCARBOROUGH, Chief Justice.

{1} This case is before us on certiorari to the Court of Appeals. We reverse.

{2} At the end of the 1984-85 school year, the Board of Education of the Santa Fe Public Schools (petitioner) terminated the teaching contract of Vincent Sullivan (respondent) on grounds of incompetence and insubordination. The State Board of Education (Board of Education) reversed respondent's termination based upon petitioner's failure to comply with the Open Meetings Act in the course of the termination proceedings. The Court of Appeals affirmed the Board of Education's reversal.

{3} Since the Board of Education's reversal was based upon a procedural error, petitioner recommended termination proceedings against respondent. In this second phase of proceedings petitioner relied upon the same alleged misconduct that was relied upon in the previous proceedings and again terminated respondent. Again, the Board of Education reversed respondent's termination, concluding that petitioner's reliance upon the same alleged misconduct in the subsequent proceedings constituted a prejudicial departure from required procedures; and again, the Court of Appeals affirmed the Board of Education's reversal.

{4} The issue before us is whether the Court of Appeals erred in affirming the Board of Education's second reversal, where the second reversal was based upon the determination that reliance upon the same alleged misconduct in the subsequent proceedings constituted a prejudicial departure from required procedures. We hold that the Court of Appeals erred.

{5} The Court of Appeals reasoned that "[t]he local board was not entitled to independently take a second bite at the apple by correcting the procedural defect in a **de novo** hearing. Once [respondent] has been reinstated, a subsequent termination must be based on [respondent's] performance after the reinstatement." In so reasoning, the Court of Appeals relied upon **Roberson v. Board of Education**, 80 N.M. 672, 459 P.2d 834 (1969).

{6} The Court of Appeals' reliance upon **Roberson** is misplaced. **Roberson** stands merely for the proposition that a local school board cannot rely upon past misconduct when it knows of the

past misconduct and nevertheless rehires the teacher. **Roberson** does not absolutely prohibit reliance upon past years' misconduct in current year termination proceedings.

{7} Petitioner did not waive its right to rely upon respondent's past misconduct. The original termination proceedings were reversed based upon a procedural defect. Petitioner was entitled to reinstate termination proceedings, correct the procedural defect, and rely upon the same alleged acts of misconduct that had been relied upon in the original proceedings.

{8} On appeal to the Board of Education, the Board of Education must determine whether there has been a prejudicial departure from required procedures. **See Redman v. Bd. of Regents**, 102 N.M. 234, 693 P.2d 1266 (Ct. App.1984), **cert. denied**, 102 N.M. 225, 693 P.2d 591 (1985). On appeal from a decision of the Board of Education to the Court of Appeals, the Court of Appeals must affirm unless the Board of Education's decision is arbitrary, capricious or unreasonable, not supported by substantial evidence, or otherwise not in accordance with law. **Id.** Since petitioner was entitled to rely upon the same alleged acts of misconduct in the subsequent proceedings, the Board of Education erred in concluding that there had been a prejudicial departure from required procedures in the subsequent proceedings. Likewise, the Court of Appeals erred in affirming the Board of Education's decision since that decision was not in accordance with law.

{9} We reverse the Court of Appeals and the Board of Education.

{10} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

HARRY E. STOWERS, JR.,
Justice

MARCY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-069

Filing Date: August 11, 1987

Docket No. 16,941

R. J. HALL, as Personal Representative of the Estate of Barry Hall, Deceased,

Plaintiff-Appellee,

v.

REGENTS OF THE UNIVERSITY OF NEW MEXICO,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY,
REBECCA SITTERLY,
District Judge.

Edward L. Chavez,
Assistant, University Counsel,
Albuquerque,

for Defendants-Appellants.

Bruce P. Moore, Duhigg, Cronin & Spring,
David L. Duhigg,
Albuquerque,

for Plaintiff-Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} The trial court entered a declaratory judgment declaring that appellants were not entitled to assert a hospital lien against damages recovered by appellee in a wrongful death action. We reverse.

{2} Appellants operate a public hospital (hospital). The hospital provided necessary services to Barry Hall from July 2, 1984 through July 4, 1984. The reasonable, usual, and necessary charges for the hospital's services rendered to Barry Hall equal $6,903.82. The services rendered to Barry Hall by the hospital were for injuries he sustained in a vehicle accident not covered by the state workmen's compensation laws. Barry Hall was declared dead on July 4, 1984 as a result of injuries he sustained in the vehicle accident.

{3} On August 21, 1984, appellants filed a notice of hospital lien containing the information required by NMSA 1978, Section 48-8-2. The hospital's lien was in complete form, properly filed, and properly served on all parties entitled to notice under the Hospital Lien Act, NMSA 1978, Sections 48-8-1 through -7.

{4} Appellee is the duly appointed personal representative of the estate of Barry Hall. There are no assets in the estate of Barry Hall.

{5} Appellee filed a cause of action entitled **Hall v. Slominski**, United States District Court, Cause Number 84-1230-M, for the wrongful death of Barry Hall. The hospital's charges were introduced into evidence as part of the wrongful death damages in **Hall v. Slominski**. On February 5, 1986, appellee obtained a judgment against Roy and Edwin Slominski in the amount of $80,000.00 plus $2,176.30 in costs, plus interest according to law, for the wrongful death of Barry Hall.

{6} When appellants attempted to assert their lien against the proceeds of the wrongful death action, appellee filed this declaratory judgment action.

{7} The issue on appeal is whether the district court erred in ruling that the hospital may not assert a hospital lien under the Hospital Lien Act

against damages recovered by appellee under the Wrongful Death Act, NMSA 1978, Sections 41-2-1 through -4 (Repl. Pamp.1986). The district court erred.

{8} The legal problem presented by this case arises from a conflict between Section 48-8-1(A) of the Hospital Lien Act and Section 41-2-3 of the Wrongful Death Act. NMSA 1978, Section 41-2-3 (Repl. Pamp.1986) provides in part: "The proceeds of any judgment obtained in [a wrongful death action] shall not be liable for any debt of the deceased * * *." NMSA 1978, Section 48-8-1(A) provides:

> Every hospital located within the state that furnishes emergency, medical or other service to any patient injured by reason of an accident not covered by the state workmen's compensation laws is entitled to assert a lien upon that part of the judgment, settlement or compromise going, or belonging to such patient * * * based upon injuries suffered by the patient **or a claim maintained by the heirs or personal representatives of the injured party in the case of the patient's death**. (Emphasis added.)

The conflict between Sections 41-2-3 and 48-8-1(A) is apparent and irreconcilable. On the one hand, the Hospital Lien Act provides that a hospital may assert a lien against a judgment obtained by the decedent's personal representative in order to satisfy a debt of the decedent; on the other hand, the Wrongful Death Act prohibits using the proceeds of a wrongful death action to satisfy the decedent's creditors.

{9} We recognize that repeal by implication is disfavored. **See Clothier v. Lopez**, 103 N.M. 593, 711 P.2d 870 (1985). Nevertheless, when two statutes are inconsistent, the latter enactment repeals the former by implication to the extent of the inconsistency. **Id**. The Wrongful Death Act was enacted in 1882. The Hospital Lien Act was enacted in 1961. The relevant provisions of the two acts have not been amended. Therefore, in view of the inconsistency between Section 41-2-3 and Section 48-8-1(A), the relevant provision of Section 41-2-3 of the Wrongful Death Act is implicitly repealed to the extent it would prevent a hospital from asserting a lien against the proceeds of a wrongful death action.

{10} Moreover, "[c]onflicts between general and specific statutes are resolved by giving effect to the specific statute." **Lopez v. Barreras**, 77 N.M. 52, 54, 419 P.2d 251, 253 (1966). The specific statute, in effect, qualifies the general statute. **Id**. The Hospital Lien Act specifically allows satisfaction of the decedent's hospital debt out of proceeds of an action brought by the decedent's personal representative. This specific provision qualifies the general prohibition in the Wrongful Death Act against using proceeds from a wrongful death action to satisfy the debts of the deceased.

{11} We note the unique nature of a wrongful death action in New Mexico. In New Mexico, not only may a plaintiff recover the value of the life of the decedent, but the plaintiff may also prove up medical and hospital expenses which were incurred by the decedent before death. **See Stang v. Hertz Corp.**, 81 N.M. 348, 467 P.2d 14 (1970). In fact, the hospital's charges were introduced into evidence as part of the wrongful death damages. Under these circumstances, we find further support for our conclusion that the hospital is entitled to assert a lien against the proceeds of the wrongful death action.

{12} The hospital may assert a lien under the Hospital Lien Act against the damages recovered in the wrongful death action. Therefore, the judgment of the district court is reversed.

{13} IT IS SO ORDERED.

WE CONCUR:

MARY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-079

Filing Date: September 1, 1987

Docket No. 16,658

KENNETH REESE,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI,
HARVEY W. FORT, District Judge.

Motion for Rehearing Granted November 3, 1987.

Jacquelyn Robins,
Chief Public Defender,

Lynne Fagan,
Appellate Defender,

for Petitioner.

Hal Stratton,
Attorney General,

for Respondent.

OPINION

SOSA, Senior Justice.

{1} Petitioner Kenneth Reese (Reese) was found guilty by a jury of aggravated assault on a peace officer (count one), and of battery on a peace officer (count two). Judgment and sentence were filed July 7, 1986. In a memorandum opinion the court of appeals affirmed the trial court's judgment. On October 14, 1986 Reese filed his petition for writ of certiorari to the court of appeals. We granted certiorari and, upon review of the petition and record from the court of appeals' file, we reverse the court of appeals.

FACTS

{2} Reese's alleged victim was Officer Troy Grant (Grant) of the Roswell Police Department. Grant had been summoned on his radio by another officer to lend assistance in the apprehension of one Lee Webb (Webb), who had been spotted fleeing from the scene of a stakeout. Both officers were dressed in plain clothes. Officer Grant pursued Webb into a residential backyard where Webb met Reese and handed him a folding pocket knife. When Officer Grant arrived, an altercation ensued in which Grant struck Reese with his fist, whereupon Grant found himself faced by Reese holding the pocket knife, now open. At that moment the other officer arrived on the scene, and Reese was placed under arrest. Grant later testified that while he was pursuing Webb, he (Grant) identified himself as a police officer. Grant testified that he likewise identified himself as a police officer to Reese before Reese threatened him with the open knife. Reese denied that he knew Grant was a police officer, and further testified that he had tried to put the knife into his pants pocket in order to defend himself with his fists, and that the knife snagged on his pants and opened spontaneously.

{3} The jury was not allowed by the court to hear Reese's proffered instructions, patterned on NMSA 1978, UJI Crim. 41.15 (Repl. Pamp.1982 & Repl. Pamp.1985), superseded by SCRA 1986, 14-5120 (Repl. Pamp.1986), and reading as follows:

> Evidence has been presented that the defendant believed that Troy Grant was an

> ordinary citizen, not acting under color of law. If the defendant acted under an honest and reasonable belief in the existence of this fact, you must find him not guilty of Aggravated Assault on a Peace Officer. The burden is on the State to prove beyond a reasonable doubt that the defendant did not act under such belief.

{4} A similar instruction was proffered by Reese as to the second count of the indictment.

The Issue of Scienter

{5} In affirming the trial court, the court of appeals correctly applied the controlling law, as stated in our opinion in **Rutledge v. Fort**, 104 N.M. 7, 715 P.2d 455 (1986), in which we stated, in construing the case of **United States v. Feola,** 420 U.S. 671, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975), "We believe that our Legislature, like Congress, meant to extend maximum protection to peace officers, and did not intend to undercut that protection by imposing an unexpressed requirement of knowledge that the victim was a peace officer." 104 N.M. at 9, 715 P.2d at 457. Thus the court of appeals accurately ruled, in reliance on **Rutledge v. Fort**, that the question of scienter was properly withheld from the jury and that defendant's proffered jury instructions were properly rejected.

{6} Now, however, we have had opportunity to reconsider our holding in **Rutledge** and conclude that our reliance in that case on **United States v. Feola** was misplaced. Consequently, we explicitly overrule our holding in **Rutledge** insofar as it holds that a defendant's knowledge as to the identity of the peace officer assaulted is not a necessary element of the crimes defined in NMSA 1978, Sections 30-22-22 and 30-22-24 (Repl. Pamp.1984 & Cum. Supp.1987). Although those sections do not require knowledge of the victim's identity as an element of the respective crimes, we nonetheless conclude that scienter is a necessary element of these crimes, and thus indispensable to the jury's consideration of the case. We base this conclusion not on our reading of the pertinent statutes, but on requirements of constitutionally mandated due process.

{7} Since our holding in **Rutledge** was largely predicated upon the holding in **Feola**, we must here define the error in judgment which first led us to rely on that case in reaching our decision in **Rutledge. Feola** was initially understood by most commentators as holding that in the case of any prosecution involving assault upon a federal officer in violation of 18 U.S.C. § 111 (1948), the defendant's knowledge as to the identity of the victim was neither necessary nor relevant. Gradually, however, as the federal circuits began to apply the **Feola** ruling to further prosecutions under 18 U.S.C. § 111, the courts began to find nuances in **Feola** that had originally not been recognized.

{8} Thus, for example, in **United States v. Williams,** 604 F.2d 277 (4th Cir.), **cert. denied**, 444 U.S. 967, 100 S. Ct. 457, 62 L. Ed. 2d 381 (1979), the court addressed itself to the **Feola** rule by stating:

> As a general rule, knowledge as to the identity of the victim is unnecessary for a conviction under 18 U.S.C. § 111 [citations omitted]. In certain circumstances, however, knowledge may be a relevant consideration if it goes to disproving the necessary element of mens rea. The Court in **Feola** stated:
>
> > We are not to be understood as implying that the defendant's state of mind is never a relevant consideration under § 111. The statute does require a criminal intent and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might reasonably be justified

> in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent.

604 F.2d at 279 (citation omitted) (quoting **Feola**, 420 U.S. at 686, 95 S. Ct. at 1264-65).

{9} In making distinctions between the **Feola** rule as it was originally understood and the interpretation that is now commonly accepted, other courts have stressed the language quoted above. For example, in **United States v. Manelli**, 667 F.2d 695 (8th Cir.1981), the **Feola** rule was cited as support for the proposition that "[s]pecific intent is an essential element of the crime of assaulting a federal officer in the performance of his duties." 667 F.2d at 696 (citations omitted).

{10} By the time the issue was considered again, in **United States v. Danehy**, 680 F.2d 1311 (11th Cir. 1982), **Feola** was cited as support for the very proposition which the ruling had originally been understood to oppose—namely, that the question of scienter is a proper element in a jury instruction requested by the defendant in a prosecution under 18 U.S.C. § 111. 680 F.2d at 1315. In **United States v. Danehy**, where the defendant was on trial for forcibly interfering with coastguardsmen while they were engaged in the performance of their duties, the trial judge was held to have improperly instructed the jury in stating that it was unnecessary to show that defendant knew people boarding his vessel were federal officers carrying out an official duty. The court in **Danehy** quoted the same passage from **Feola** that had been quoted three years earlier by the court in **United States v. Williams.** The Court in **Danehy** also based its ruling on two circuit court cases relevant to our discussion, **United States v. Ochoa**, 526 F.2d 1278 (5th Cir. 1976), and **United States v. Young**, 464 F.2d 160 (5th Cir. 1972), which, according to **Danehy**, stand for the proposition "that a defendant may not be held absolutely liable for assaulting a government officer when the defendant acts from a mistaken belief that he himself is threatened with an intentional tort by a private citizen." **Danehy**, 680 F.2d at 1315. Thus the Eleventh Circuit has committed itself to reading the **Feola** rule so as to allow the issue of scienter to be presented to a jury in such cases as the one before us.

{11} Nor have the federal circuits been the only courts contributing to the majority interpretation of the **Feola** rule. In **State v. Morey**, 427 A.2d 479 (Me.1981), the court interpreted the **Feola** rule as follows:

> The [**Feola**] Court * * * recognized that the federal statute had two purposes. One was to protect federal officials by granting federal jurisdiction over assaults on them. This jurisdictional purpose, the Court concluded, would best be met by imposing liability without knowledge. In contrast, the other purpose, preventing obstruction of officials, alone would require knowledge. [Citations omitted] * * * [T]he reasoning of both the majority and dissent in **Feola** further persuades us that our statute was intended to require knowledge of the official status of the person assaulted.

427 A.2d at 483-84.

{12} Further opinions from various states support the reading of **Feola** that we advance here: (1) **Celmer v. Quarberg**, 56 Wis.2d 581, 203 N.W.2d 45 (1973), holding: "a private citizen who commits a battery upon a police officer does not incur the additional penalty [imposed under the Wisconsin statute] unless he knows or has reason to know that the person confronting him is, in fact, a peace officer and not another private citizen." **Id.** at 589, 203 N.W.2d at 50. (2) **Dotson v. State**, 358 So.2d 1321 (Miss.1978), holding:

> When there is no doubt of the defendant's unlawful intention, knowledge of the official capacity of the victim is invariably unnecessary; the assailant takes his victim as he finds him. But if the defendant asserts a lack of intention or willfulness based upon ignorance of the identity of the victim and ignorance of the victim's official privilege to interfere with defendant's person or freedom of movement, the jury must be allowed to consider the defendant's evidence

tending to show that he was ignorant of the official capacity of the victim.

358 So.2d at 1323.

{13} See Guevara v. State, 585 S.W.2d 744 (Tex. Cr. App.1979); **People v. Saiz**, 660 P.2d 2 (Colo. App.1982); **State v. Skinner**, 118 Ariz. 517, 578 P.2d 196 (App.1978); **State v. Bailey**, 360 So.2d 772 (Fla.1978); **Lee v. State**, 368 So.2d 395 (Fla. App.) **cert. denied** 378 So.2d 349 (1979); **Evans v. State**, 452 So.2d 1093 (Fla. App.1984).

{14} We hold then that petitioner Reese was improperly denied the right to have the jury instructed as he had requested. To deny him this right was to deny him the right to have the jury fully apprised of a necessary element of the crime for which he was charged, and thus the court's rejection of the instruction amounted to the deprivation of Reese's right to due process of law as guaranteed by the United States Constitution, art. XIV, and by the New Mexico Constitution, art. II, Section 18.

{15} The judgments of the court of appeals and of the trial court are reversed, and this case is remanded to the trial court for a new trial consistent with this opinion.

{16} IT IS SO ORDERED.

MARY C. WALTERS,
Justice, concurring.

RICHARD E. RANSOM,
Justice, specially concurring.

TONY SCARBOROUGH,
Chief Justice, dissent.

HARRY E. STOWERS,
Justice, dissent.

SPECIAL CONCURRENCE

RANSOM, Justice (specially concurring).

{17} I concur with the Court's revisitation of **Rutledge** in view of its misplaced reliance upon **Feola.** I do not, however, see the necessity of deciding this case on constitutional grounds. It is a general rule that ignorance or mistake of fact is a defense when it negates the existence of a mental state essential to the crime charged. This rule of law is recognized in Part D (Mistake) of the New Mexico Uniform Jury Instructions - Criminal. SCRA 1986, 14-5120 and 5121. The rules for construing the criminal intent required by a statute make applicable the defense of ignorance or mistake of fact under the circumstances of this case, as distinguished from others, e.g., **State v. Alva**, 28 N.M. 143, 134 P. 209 (1913) (sexual intercourse with a female child under age). Aside from constitutional grounds, it was essential that the state prove that the defendant did not act under an honest and reasonable belief that the victim of defendant's assault was an ordinary citizen, not acting under color of law.

{18} It has long been the law of this state that the legislature may forbid the doing of an act and make its commission criminal without regard to the intent of the doer. **Id.; State v. Lucero**, 98 N.M. 204, 647 P.2d 406 (1982); **State v. Shedoudy**, 45 N.M. 516, 118 P.2d 280 (1941); and **see State v. Gunter**, 87 N.M. 71, 529 P.2d 297 (Ct. App.), **cert. denied**, 87 N.M. 48, 529 P.2d 274 (1974), **cert. denied,** 421 U.S. 951, 95 S. Ct. 1686, 44 L. Ed. 2d 106 (1975). It is also the rule in New Mexico, however, that where an act is prohibited and made punishable by statute, the statute must be construed in the light of the common law, and the existence of a criminal intent is essential absent the appearance of legislative intent to the contrary. **Alva**, 18 N.M. at 151, 134 P.2d at 211. Such legislative intent must clearly appear from the statute. **Shedoudy**, 45 N.M. at 524, 118 P.2d at 286. In other words, whether the criminal intent of an accused is to be regarded as essential for conviction is a matter of statutory construction, **State v. Craig**, 70 N.M. 176, 372 P.2d 128 (1962), in light of the common law rule that existence of a criminal intent is essential. **Shedoudy**, 45 N.M. at 524, 118 P.2d at 285; **see also State v. Barber**, 91 N.M. 764, 581 P.2d 27 (Ct. App.1978); **State v. Lucero**, 87 N.M. 242, 531 P.2d 1215 (Ct. App.)**, cert. denied,** 87 N.M.

239, 531 P.2d 1212 (1975); **State v. Mascarenas,** 86 N.M. 692, 526 P.2d 1285 (Ct. App.1974); **State v. Fuentes,** 85 N.M. 274, 511 P.2d 760 (Ct. App.), **cert. denied,** 85 N.M. 265, 511 P.2d 751 (1973); **State v. Pedro**, 83 N.M. 212, 490 P.2d 470 (Ct. App.1971); and **State v. Austin**, 80 N.M. 748, 461 P.2d 230 (Ct. App.1969).

{19} Because a defendant who does not have the mental state required by law for the commission of a particular offense cannot be convicted, a determination must be made of what mental element is required by the statute under which Reese was convicted. The statutes in question provide for conviction of aggravated assault, assault with intent to commit a violent felony, or battery **upon a peace officer while he is in the lawful discharge of his duties.** NMSA 1978, §§ 30-22-22 through 24.

{20} In these criminal statutes, there is no language negating a mental state. The legislature did not say, in effect, that no mistake or ignorance of fact or law will suffice to exonerate the accused. Without specific language, the absence of an element of criminal intent must be construed from consideration of the conduct prohibited and the penalty imposed. Guilt of common law crimes has traditionally required knowledge or want of due care; while crimes-without-fault are generally misdemeanors carrying a relatively light penalty. Most often it is the "public welfare offense" that is the crime of no **mens rea. E.g., State v. Barber,** 91 N.M. 764, 581 P.2d 27 (Ct. App.1978). There are, however, notable exceptions. For example, the Model Penal Code position on sex offenses is that when criminality depends on a child's being below the age of ten, it is then no defense that the actor believed the child to be older. W. LaFave & A. Scott, **Criminal Law**, Ch. 5 (Justification and Excuse), § 5.1 (Ignorance or Mistake), (2d Ed. 1986). New Mexico has limited its interpretation of strict liability felonies to child victim crimes. **E.g., State v. Lucero**, 98 N.M. 204, 647 P.2d 406 (1982); **State v. Alva**, 18 N.M. 143, 134 P. 209 (1913); **State v. Lucero**, 87 N.M. 242, 531 P.2d 1215 (Ct. App.), **cert. denied**, 87 N.M. 239, 531 P.2d 1212 (1975); **State v. Gunter,** 87 N.M. 71, 529 P.2d 297 (Ct. App.)**, cert. denied,** 87 N.M. 48, 529 P.2d 274 (1974), **cert. denied**, 421 U.S. 951, 95 S. Ct. 1686, 44 L. Ed. 2d 106 (1975); and **State v. Fuentes**, 85 N.M. 274, 511 P.2d 760 (Ct. App.), **cert. denied**, 85 N.M. 265, 511 P.2d 751 (1973).

{21} LaFave and Scott make the point that imposition of "strict liability as to certain elements of particular crimes" should rest as matters of policy on an offense-by-offense basis. The authors reject an uncritical acceptance of any general policy that the existence of a defense of ignorance or mistake rests ultimately on the defendant's being able to say that he observed the community ethics and was, in fact, guilty of no lesser legal wrong or moral wrong. The argument that any person who confronts another with force or moral turpitude takes his victim as he finds him is to say that a wrongdoer can be convicted of a crime of which he is ignorant or factually mistaken. That argument loses sight of considerations of deterrence, correction and just condemnation of the actor's conduct. LaFave and Scott have enumerated the following factors to be considered in deciding whether the legislature meant to impose liability without fault:

> (1) The legislative history of the statute or its title or context may throw some light on the matter. (2) The legislature may have in some other statute provided guidance as to how a court is to determine whether strict liability was intended. (3) The severity of the punishment provided for the crime is of importance. Other things being equal, the greater the possible punishment, the more likely some fault is required, and, conversely, the lighter the possible punishment, the more likely the legislature meant to impose liability without fault. (4) The seriousness of harm to the public which may be expected to follow from the forbidden conduct is another factor. Other things being equal, the more serious the consequences to the public, the more likely the legislature meant to impose liability without regard to fault, and vice

versa. (5) The defendant's opportunity to ascertain the true facts is yet another factor which may be important in determining whether the legislature really meant to impose liability on one who was without fault because he lacked knowledge of these facts. The harder to find out the truth, the more likely the legislature meant to require fault in not knowing; the easier to ascertain the truth, the more likely failure to know is no excuse. (6) The difficulty prosecuting officials would have in proving a mental state for this type of crime. The greater the difficulty, the more likely it is that the legislature intended to relieve the prosecution of that burden so that the law could be effectively enforced. (7) The number of prosecutions to be expected is another factor of some importance. The fewer the expected prosecutions, the more likely the legislature meant to require the prosecuting officials to go into the issue of fault; the greater the number of prosecutions, the more likely the legislature meant to impose liability without regard to fault. All the above factors have a bearing on the question of the interpretation of the empty statute, but no single factor can be said to be controlling. Thus some statutes have been held to impose liability without fault although the possible punishment was quite severe, generally because one or more of the other factors pointed toward strict liability.

W. La Fave & A. Scott, **Criminal Law** at 244-45.

{22} Although one or more of the above factors arguably may support an interpretation of the statute in question as requiring no mental element of knowledge, taken as a whole the factors do not lead to a construction that the legislature clearly intended to punish without knowledge. Therefore, without relying upon constitutional grounds, I would concur that the judgments of the court of appeals and the trial court be reversed, and that this case be remanded to the trial court for a new trial.

DISSENT

SCARBOROUGH, Chief Justice, dissenting.

{23} I dissent.

{24} Defendant was convicted of aggravated assault and battery upon a peace officer. Defendant seeks a new trial, arguing that knowledge that a victim is a peace officer is an element of the offenses of which he was convicted. Specifically, defendant argues that he was entitled to an instruction that if he did not know his victim was a peace officer, then he is not guilty. Defendant's requested instruction to this effect was denied. The majority concludes that defendant was denied due process of law because the jury was not charged as defendant requested. I disagree with the majority, first, because there is no specific intent requirement in the statutes under which defendant was convicted, and second, because the issue here is not one of constitutional dimension.

{25} The statutes under which defendant was convicted do not require that a defendant know the identity of his victim. **See** NMSA 1978, §§ 30-22-22 and 30-22-24 (Repl. Pamp.1984). The statutes merely require an intent to commit aggravated assault or battery. The purpose of the statutes is to impose a greater penalty for aggravated assault or battery upon a peace officer than the penalty for aggravated assault or battery upon an ordinary citizen. **Cf.** NMSA 1978, §§ 30-3-2 and 30-3-4 (Repl. Pamp. 1984). The majority ignores the clear and unambiguous language of the statutes by holding that a defendant must have specific intent to commit aggravated assault or battery upon a peace officer.

{26} The majority has granted the defendant a new trial based on recent court interpretations of **United States v. Feola**, 420 U.S. 671, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975). **Feola** does not support the position taken by the majority. **Feola** specifically held that knowledge of the victim's identity is not an element of a similar federal offense. In any event, regardless of the treatment some courts have given **Feola**, there is no doubt that we are free to impose enhanced penalties for

offenses against peace officers without first proving that the defendant knew the identity of his victim.

{27} We are not dealing with an issue of constitutional dimension, but rather with a matter of state policy. It is the prerogative of the legislature to establish policy in this area. The majority concedes that the statutes do not require knowledge of the victim's identity. We should not rewrite the statutes under which defendant was convicted to include an element the legislature omitted.

STOWERS, Justice.

{28} I dissent.

{29} In **Rutledge v. Fort**, 104 N.M. 7, 715 P.2d 455 (1986), this Court, interpreting the plain language of NMSA 1978, Sections 30-22-22 and 30-22-24 (Repl. Pamp.1984), held that the offenses of aggravated assault and battery upon a peace officer require proof that the defendant acted with a mental state of conscious wrongdoing (i.e., that he purposefully did an act the law declares to be a crime) but not proof that the defendant had knowledge of the fact that he was assaulting a peace officer who was in the lawful discharge of his duties. In that case, we issued a writ of superintending control prohibiting the district court from giving an instruction requiring the jury to find that the defendant had such knowledge.

{30} The relevant uniform jury instructions issued by this Court have not been revised since we issued our **Rutledge v. Fort** opinion, and they merely require that an aggravated assault or battery was made upon a named victim and proof that the named victim was an officer and was performing his duties. **See** SCRA 1986, 14-2203, 14-2211.

{31} The laws regarding interference with law enforcement were promulgated by one act of the Legislature, 1963 N.M. Laws, ch. 303, Sections 22-1 through 22-19, and strongly indicate a clear purpose to protect peace officers and law enforcement activities. The United States Supreme Court, in **United States v. Feola**, 420 U.S. 671, 95 S. Ct. 1255, 43 L. Ed. 2d 541 (1975), recognized that these were legitimate goals of a similar federal statute and held that that statute required proof only of an "intent to assault, not an intent to assault a federal officer." **Id.** at 684, 95 S. Ct. at 1264. To hold otherwise, it concluded, "would give insufficient protection to the agent enforcing an unpopular law, and none to the agent acting under cover." **Id.** The court did not even consider the possibility that such protection might violate the constitutional rights of those accused. It stated:

> This interpretation poses no risk of unfairness to defendants. It is no snare for the unsuspecting. Although the perpetrator of a narcotics "ripoff," such as the one involved here, may be surprised to find that his intended victim is a federal officer in civilian apparel, he nonetheless knows from the very outset that his planned course of conduct is wrongful. The situation is not one where legitimate conduct becomes unlawful solely because of the identity of the individual or agency affected. In a case of this kind the offender takes his victim as he finds him.

Id. at 685, 95 S. Ct. at 1264.

{32} While the majority points to some federal circuit court cases which attempt to distinguish **Feola**, the Tenth Circuit has consistently followed the **Feola** holding. Furthermore, the United States Supreme Court has not altered or reversed its prior opinion; **Feola** is still good law.

{33} Moreover, the principle that the wrongdoer takes his victim as he finds him underlies many New Mexico criminal statutes, and our Legislature frequently had mandated more severe punishment for offenses committed against members of classes it deems worthy of special protection. For example, peace officers are protected by our capital sentencing laws, which enumerate as an aggravating circumstance the fact that the victim was a peace officer in the lawful discharge of his duties. NMSA 1978,

§ 31-20A-5(A) (Repl. Pamp.1987). Persons sixty years of age and older are protected by NMSA 1978, Section 31-18-16.1 (Repl. Pamp.1987), which requires the sentencing court to increase the sentence of a noncapital felony offender if, in the course of his crime, such a person was intentionally injured. Pregnant women and their unborn fetuses are protected by NMSA 1978, Section 66-8-101.1 (Repl. Pamp.1987), which extends the scope of our vehicular homicide statute, NMSA 1978, Section 66-8-101 (Repl. Pamp.1987), to vehicular injuries resulting in miscarriage or stillbirth.

{34} The best example of a criminal offense based upon conduct directed at a member of a protected class which can be committed without the offender having knowledge that the victim was a member of the protected class is what is commonly known as "statutory rape." This offense, presently codified at NMSA 1978, Subsection 30-9-11(A)(1) (Cum. Supp.1987), makes the unlawful and intentional engaging in sexual intercourse with or sexual penetration of a child under thirteen years of age a first degree felony, without regard to consent or the use of force or coercion. **See also** NMSA 1978, § 30-9-11(B)(1) (Cum. Supp.1987) (criminal sexual penetration is second degree felony if victim is thirteen to sixteen years of age and perpetrator is in a position of authority which he uses to coerce the child to submit). While our statute has been altered several times since territorial days, New Mexico law has consistently recognized some form of statutory rape. Knowledge or belief regarding the victim's age clearly is not an element of either of the present offenses. **See** SCRA 1986, 14-945, 14-957.

{35} Further, the United States Supreme Court has never held that an honest mistake as to the age of the victim is a constitutional defense to statutory rape, and the requisite mental state to sustain criminal convictions has generally been left to the discretion of the states. **Nelson v. Moriarty**, 484 F.2d 1034, 1035 (1st Cir.1973). Numerous state appellate courts have also held that reasonable belief or good faith mistake as to the victim's age is no defense to statutory rape charges. **See, e.g., State v. Superior Court**, 104 Ariz. 440, 454 P.2d 982 (1969); **State v. Silva**, 53 Haw. 232, 491 P.2d 1216 (1971); **Toliver v. State**, 267 Ind. 575, 372 N.E.2d 452 (1978); **Eggleston v. State**, 4 Md. App. 124, 241 A.2d 433 (1968); **State v. Keaten**, 390 A.2d 1043 (Me.1978); **People v. Doyle**, 16 Mich. App. 242, 167 N.W.2d 907 (1969); **State v. Morse**, 281 Minn. 378, 161 N.W.2d 699 (1968).

{36} Like the statutory rape statutes, our statutes regarding battery and assault upon a peace officer by their plain language do not require proof of an additional element of knowledge. These latter statutes meet the clear legislative intention to protect peace officers performing their duties and do not violate any constitutional rights of the defendant. **Rutledge v. Fort** correctly interpreted these statutes and should not be overruled.

{37} Finally, I disagree with the majority's conclusion that because the trial court improperly instructed the jury, the court's error rose to the level of a constitutional violation.

{38} For the foregoing reasons, I respectfully dissent.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-092

Filing Date: September 14, 1987

Docket No. 17,193

RUBEN BACA,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI,
LARRY JOHNSON, District Judge.

Jacquelyn Robins,
Chief Public Defender,

Bruce Rogoff,
Assistant Appellant Defender,
Santa Fe,

for Petitioner.

Hal Stratton,
Attorney General,

Anthony Tupler,
Assistant Attorney General,
Santa Fe,

for Respondent.

OPINION

SOSA, Senior Justice.

{1} This appeal is before us on petition for writ of certiorari to the court of appeals. Defendant-petitioner Ruben Baca (Baca) appeals his conviction on one count of trafficking in cocaine. Specifically, Baca appeals the trial court's denial of his motion for directed verdict, alleging that the state failed to rebut Baca's defense of entrapment. In a memorandum opinion, the court of appeals affirmed the trial court. After reviewing the record, the court of appeals' file, and petitioner's brief, we reverse.

FACTS

{2} Since the trial court gave the requisite instruction to the jury on entrapment, SCRA 1986, 14-5160, Baca is required here to establish as a matter of law that the facts before us constitute the defense of entrapment. We find that Baca meets this requirement.

{3} During the period of March-June, 1986, the New Mexico State Police were using the services of an informer named Billy Granger in conducting undercover operations designed to arrest persons trafficking in narcotics. Baca was at Granger's house on the evening of June 10, 1986, when Granger introduced Baca to Officer Carl Work, an undercover agent who was working with Granger. Baca could not speak English and Work could not speak Spanish. Granger spoke both languages and thus acted as an interpreter, telling Work that Baca could purchase cocaine for Work. Work had never met Baca before.

{4} The sale of cocaine from Baca to Work was conducted in the following manner. Granger and Baca drove with Work to a trailer which the two of them entered as Work waited in the car. The pair returned to the car and drove with Work to a local bar. Baca entered the bar alone, staying so long that Work became impatient, ordering Granger to go into the bar and bring Baca back outside. Upon returning to the car, Baca handed Work a package of material which Work

believed to be cocaine, and for which Work paid Baca $130.

{5} At trial, Baca testified that he had gone to Granger's house to buy marijuana, and had driven around town with Granger, getting progressively inebriated by drinking beer. Baca testified that when they returned to Granger's house Granger proposed that Baca sell cocaine to "a friend" of Granger's, whom Granger was afraid to deal with because Granger owed the friend money. Baca and Granger picked up the cocaine at the trailer, with Granger buying the cocaine and giving it to Baca. Upon arriving at the bar, Baca stayed inside playing pool and drinking beer until Granger asked him to exit and sell the cocaine to Work.

{6} The officer supervising the undercover operation had learned of Granger's record for felony marijuana convictions and had proposed to the local district attorney that Granger be given early release in exchange for Granger's "making" twenty cases for the police. At trial, the supervising officer testified that he mistrusted Granger because the latter had lied while helping the police investigate two earlier cases. Work too testified that he mistrusted Granger, because the latter was "working off charges."

THE DEFENSE OF ENTRAPMENT

{7} The sole issue is whether as a matter of law these facts constitute entrapment. We answer in the affirmative. In reaching this conclusion, we rely on **State v. Fiechter,** 89 N.M. 74, 547 P.2d 557 (1976), the foundational authority in New Mexico on the defense of entrapment. In **State v. Fiechter,** we held that the key issue for the trier of fact where the defense of entrapment is asserted is the defendant's predisposition to commit the crime. We thus opted entirely for the "**subjective** standard" approach, and ignored the "**objective** standard" in which the trier of fact, in determining whether there was entrapment, considers any misconduct of the police. In adopting the former approach, we stated, "[U]nder the subjective standards we approve today, it is rare indeed when entrapment may correctly be held to exist as a matter of law." **Id.** at 77, 547 P.2d at 560. We feel that our opinion in **Fiechter** is correct insofar as it focuses upon a defendant's predisposition to commit a crime, but **Fiechter** needs to be expanded to make allowance for an objective standard.

{8} The objective/subjective debate has continued unchecked since the first entrapment case was decided by the United States Supreme Court in **Sorrells v. United States,** 287 U.S. 435, 53 S. Ct. 210, 77 L. Ed. 413 (1932). In that case the court held, "[T]he Government cannot be permitted to contend that [a defendant] is guilty of a crime where government officials are the instigators of his conduct," **id.** at 452, 53 S. Ct. at 216, a rule which gave rise to the objective criterion for defining entrapment. Yet, because it referred to the defendant's predisposition, **id.** at 451, 53 S. Ct. at 216 the Supreme Court suggested that entrapment was to some extent also based on a subjective standard. As a result, **Sorrells v. United States** set the courts of this country off in an often confusing search for the perfect definition of entrapment—one which would balance the objective prong of **Sorrells** (misconduct of the police) against the subjective prong of that decision (predisposition of defendant). In **Sherman v. United States,** 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848 (1958), the Supreme Court stayed with the rationale established in **Sorrells**, but failed to establish any criteria for determining what conduct would establish the defendant's predisposition.

{9} In **United States v. Russell,** 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973), after concluding that there was no police misconduct, the court held that a finding of predisposition is "fatal to [a] claim of entrapment," **id.** at 436, 93 S. Ct. at 1645. In **Fiechter,** we relied on **United States v. Russell,** overruling **State v. Sainz,** 84 N.M. 259, 501 P.2d 1247 (Ct. App.1972), which in turn had relied on the Ninth Circuit decision overruled in **Russell**. In **Russell** the trial court had not been presented with the question of whether entrapment existed as a matter of law, but with a factual dispute which had to be decided by the jury, and the jury

found that the idea for the commission of the crime originated with the defendant and not with the police. Thus, reading the decision in **Russell** in light of the court's previous decisions, **Russell** merely stands for the proposition that police misconduct is not the sole determinant in defining entrapment.

{10} The Supreme Court's latest ruling on entrapment is **Hampton v. United States,** 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976), a decision which had not clarified the law. The defendant in **Hampton v. United States** did not contest his predisposition to commit the crime. Instead, he argued that police misconduct leading to his arrest violated constitutional due process, an argument rejected by a plurality of the court, who concluded that predisposition is a more crucial element in the definition of entrapment than alleged police misconduct. Because of the split among the justices, **Hampton** added little to the debate over objective versus subjective standards.

{11} As a result, the leading authority for the objective-standard definition of entrapment remains **United States v. Bueno,** 447 F.2d 903 (5th Cir. 1971) **reh'g denied, cert. denied,** 411 U.S. 949, 93 S. Ct. 1931, 36 L. Ed. 2d 411 (1973). In that case, one government agent supplied the illicit drug and another induced the defendant to act as a go-between, giving the defendant the money to be delivered to the first agent. By the subjective standard adopted in **Fiechter,** this factual situation would not lead to a reversal of conviction unless the defendant could negate his predisposition to commit the crime. We feel that the **Fiechter** rule as thus defined is too narrow, and should be expanded to include a factual situation similar to that in **United States v. Bueno,** i.e., a situation which, as the court in **Bueno** stated, "takes on the element of the government buying [narcotics] from itself, though an intermediary, the defendant, and then charging him with the crime." **Id.** at 905.

{12} A number of states have adopted a rule similar to the **Bueno** rule. **See People v. Martin,** 124 Ill. App.3d 590, 79 Ill. Dec. 933, 464 N.E.2d 837 (1984); **State v. Branam,** 161 N.J. Super. 53, 390 A.2d 1186 (1978) **aff'd per curiam,** 79 N.J. 301, 399 A.2d 299 (1979); **Sylar v. State**, 340 So.2d 10 (Miss.1976); **People v. Stanley,** 68 Mich. App. 559, 243 N.W.2d 684 (1976).

{13} The case before us presents a perfect illustration of why something more than a subjective standard is needed to define entrapment. It was the police informant Granger who procured the cocaine, and it was he who arranged for the purported sale between Baca and Work. Baca acted as nothing more than a conduit, conveying cocaine from a police informant to a policeman. Such detailed involvement on the part of the police in the cocaine transaction exceeds proper investigative procedure, and puts the police in the category of "instigators" of the criminal conduct, as defined by the Supreme Court in **United States. v. Sorrells:** "It is not [the duty of the police] to incite to and create crime for the sole purpose of prosecuting and punishing it." **Id.** 287 U.S. at 444, 53 S. Ct. at 213 (quoting **Butts v. United States** 273 F. 35, 38 (8th Cir. 1921)).

{14} Under the objective standard adopted in this opinion we hold that Baca was improperly induced by the police into such criminal conduct as he was found to have committed, and that, as a matter of law, he was entrapped. In expanding the rule adopted in **Fiechter,** we hold that a criminal defendant may successfully assert the defense of entrapment, **either** by showing lack of predisposition to commit the crime for which he is charged, **or**, that the police exceeded the standards of proper investigation, as here where the government was both the supplier and the purchaser of the contraband and defendant was recruited as a mere conduit. Our adoption of the objective standard is to be given modified prospective application, so that only defendants who have asserted the defense of entrapment before their case has proceeded to trial may rely on our decision, and then only so long as their case has not proceeded to trial before the date that this decision has been filed with the clerk of this court.

{15} The court of appeals opinion affirming the trial court is reversed.

{16} IT IS SO ORDERED.

WE CONCUR:

MARY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice

TONY SCARBOROUGH,
Chief Justice, dissenting.

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

DISSENT

SCARBOROUGH, Chief Justice.

{17} I dissent.

{18} In this case, the majority relies upon police "misconduct" in order to reverse a jury verdict. Before examining the conduct of the police, however, we should note that Baca (defendant) admitted the essential facts supporting his conviction for trafficking in cocaine. Furthermore, defendant does not claim he is innocent of the offense, nor does he claim that he was in any manner threatened or coerced by the police into committing the offense.

{19} The majority concludes that defendant was improperly induced to make the drug sale upon which his conviction is based. The evidence relied upon by the majority to support this conclusion consists of instances where the police informer Granger "proposed" that defendant sell cocaine and "asked" defendant to sell cocaine. Such action by a police informer and collaborator, however, is no reason to upset a jury verdict. It was for the jury to decide whether defendant was entrapped, **see State v. Romero,** 86 N.M. 99, 519 P.2d 1180 (Ct. App.1974), and it rejected defendant's entrapment defense. I would therefore affirm the trial court and Court of Appeals.

{20} Moreover, there is substantial evidence to support the jury's verdict and its determination that defendant was predisposed to commit the crime for which he was convicted. It is not as if defendant was set up by the police. Defendant admits he went to the informer's residence in order to purchase drugs for his own use; he admits drinking beer over an extended period of time with the informer; he admits traveling with the informer to another drug transaction; he admits letting the informer inject him with cocaine with no more than a verbal protest; but most important, defendant admits selling cocaine.

{21} In order to get around the substantial evidence of Baca's guilt of trafficking in cocaine, the majority has rewritten the New Mexico law of entrapment. The standard of review adopted by the majority will prevent the state as a matter of law from utilizing undercover agents and collaborators on opposite sides of an illegal drug transaction. **Cf. State v. Alvarez,** 93 N.M. 761, 605 P.2d 1160 (Ct. App.), **rev'd on other grounds,** 92 N.M. 44, 582 P.2d 816 (1978) (use of police informer and undercover agent on opposite sides of an illegal drug transaction did not establish entrapment as a matter of law).

{22} The conduct of the police was properly examined by the jury in this case. The jury's verdict should stand.

STOWERS, Justice, dissenting.

{23} I dissent. I also join in the dissent filed by Chief Justice Scarborough.

{24} The majority in this case indicate that the issue is whether entrapment has been established. They further indicate in reaching this conclusion that they are relying on the case of **State v. Fiechter,** 89 N.M. 74, 547 P.2d 557 (1976). The **Fiechter** case specifically adopted and approved the subjective standard and rejected other concepts previously adopted in other cases. **See State v. Jackson,** 88 N.M. 98, 101, 537 P.2d 706, 709 (Ct. App.1975). A review of the facts in this case indicate that the defendant was seeking marijuana, was willing to associate with Granger the informant, went along with him in the activities in the course of the evening, and eventually, in fact, did sell the drug in question for which he was convicted.

{25} The holding of the **Fiechter** case is clear and specific, and unless it is overruled, continues to be the appropriate law on entrapment. I think that the **Fiechter** case is good law and that it was appropriately applied in this case. Further, I think it appears from the facts in the case that there was sufficient evidence to establish that the defendant intended to commit the offense. **See State v. Hutchinson,** 99 N.M. 616, 624, 661 P.2d 1315, 1323 (1983). As we have said many times, evidence is to be viewed in the light most favorable to the prevailing party, and all conflicts are resolved and all permissible inferences are indulged in favor of the jury's verdict. **See State v. Vigil,** 103 N.M. 643, 647, 711 P.2d 920, 924 (Ct. App.1985), **cert. denied**, 103 N.M. 740, 713 P.2d 556 (1986). For these reasons, I believe that the decision of the court of appeals appropriately dealt with this issue and should be affirmed. Therefore, I dissent from the opinion filed herein.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-094

Filing Date: September 16, 1987

Docket No. 16,987

JIMMY SALAS, d/b/a ZUNI WOODYARD AND LANDSCAPE COMPANY,

Plaintiff-Appellant,

v.

HOMESTAKE ENTERPRISES, INC., a Colorado Corporation,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY,

WOODY SMITH, District Judge.

Motion for Rehearing Denied October 7, 1987

John R. Polk,
Albuquerque,

for Plaintiff-Appellant.

Randal W. Roberts,
Albuquerque,

for Defendant-Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Jimmy Salas (plaintiff) filed an action in district court alleging that Homestake Enterprises, Inc. (defendant breached a contract. Defendant moved to dismiss for lack of jurisdiction. The district court granted defendant's motion. Plaintiff appeals. We affirm.

{2} Kevin Moore (an agent of defendant) telephoned plaintiff from Colorado to inform him that defendant had some railroad ties for sale. Moore requested that plaintiff come to Colorado to look at the ties and enter into negotiations. Plaintiff went to Colorado, inspected the ties, and alleges that he entered into a contract with defendant. Plaintiff then went back to New Mexico and started to fulfill what he considered to be his contractual obligations. Defendant soon afterwards sent two documents to plaintiff. Defendant subsequently telephoned plaintiff to inform him that no contract existed, and that no railroad ties were available for sale. This lawsuit ensued.

{3} The only issue before us is whether defendant's acts warrant the assertion of personal jurisdiction over defendant by New Mexico.

{4} To vest New Mexico courts with personal jurisdiction over an out-of-state, nonresident defendant, the act complained of must meet a three-prong test: (1) the act must be enumerated in the long-arm statute, NMSA 1978, Section 38-1-16(A) (Repl. Pamp. 1987); (2) plaintiff's cause of action must arise from the act, NMSA 1978, Section 38-1-16(C) (Repl. Pamp. 1987); and (3) the act(s) of defendant must establish the minimum contracts necessary to satisfy due process. **Visarraga v. Gates Rubber Co.**, 104 N.M. 143, 717 P.2d 596 (Ct. App.), **cert. quashed**, 104 N.M. 137, 717 P.2d 590 (1986).

{5} Plaintiff claims that defendant "transacted business" in New Mexico and thus performed an act enumerated in the long-arm statute. **See** NMSA 1978, Section 38-1-16(A)(1). Defendant's telephone call, however, was merely an invitation to come to Colorado and negotiate, it was not a business transaction. Neither did sending two documents to plaintiff constitute a business transaction. Since defendant did not transact business

in New Mexico, the requirement of the long-arm statute is not satisfied. Therefore, New Mexico courts lack personal jurisdiction over defendant.

{6} Plaintiff argues that defendant's acts created sufficient minimum contracts with New Mexico to warrant the assertion of personal jurisdiction over defendant. In making this argument, plaintiff relies on the fact that the "transacted business" requirement of the long-arm statute has been construed to reach as far as due process allows. **See Customwood Mfg., Inc., v. Downey Constr. Co.**, 102 N.M. 56, 691 P.2d 57 (1984). Due process considerations, however, likewise preclude New Mexico from asserting jurisdiction over defendant. The fundamental inquiry in minimum contacts/due process analysis is whether a particular state's assertion of jurisdiction comports with "'traditional notions of fair play and substantial justice.'" **International Shoe Co. v. Washington**, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945) (quoting **Milliken v. Meyer**, 311 U.S. 457, 463, 61 S. Ct. 339, 342, 85, L. Ed. 278 (1940)); **cf. Burger King Corp. v. Rudzewicz**, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184, 85 L. Ed. 528 (1985) ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in the light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'"). It would offend this Court's conception of fair play and substantial justice to subject defendant to suit in New Mexico where defendant's only contact with New Mexico was mailing two documents and making a telephone call into the state, and where these contacts arose in the context of an essentially Colorado transaction.

{7} New Mexico courts lack personal jurisdiction over defendant, therefore, the judgment of the district court is affirmed.

{8} IT IS SO ORDERED.

WE CONCUR:

HARRY E. STOWERS, JR.,
Justice

MARY C. WALTERS,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-097

Filing Date: September 23, 1987

Docket No. 17,232

STATE OF NEW MEXICO,

Petitioner,

v.

ANDREW FERGUSON,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI,
EDMUND H. KASE, III, District Judge.

Hal Stratton, Attorney General,
Patricia Frieder, Assistant Attorney General,
Santa Fe,

for Petitioner.

Jacquelyn Robins, Chief Public Defender,
Lynn Fagan, Appellate Defender,
Santa Fe,

for Respondent.

OPINION

SCARBOROUGH, Chief Justice.

{1} This case is before us on certiorari to the Court of Appeals. We reverse the Court of Appeals and the trial court.

{2} Respondent was lawfully confined to the Western New Mexico Correctional Facility following his arrest on charges of burglary and larceny of a clothing store in Truth or Consequences. A co-defendant informed an investigator from the district attorney's office that respondent was wearing a pair of boots stolen during the burglary. The investigator informed corrections facility authorities that respondent was believed to be in possession of stolen property and gave a description of the boots. Respondent was called to the office of a prison official and was observed to be wearing boots that matched the description given by the investigator. The boots were seized from respondent.

{3} Respondent filed a motion to suppress use of the boots as evidence against him in the burglary case. The trial court conducted a hearing and granted the motion to suppress. The trial court based its decision on the following undisputed findings: (1) the seizure was instigated by the prosecutor for the purpose of obtaining evidence for the upcoming trial; (2) no exigent circumstances existed to justify the warrantless procedure; (3) the prosecutor's office had probable cause to seize the boots; (4) the seizure was not incident to a lawful arrest; and (5) prison officials seized the boots only at the direction of the prosecutor, without independent knowledge that the boots constituted evidence of the crime. The Court of Appeals affirmed.

{4} The issue before us is whether the trial court and Court of Appeals erred in concluding that the boots were subject to suppression as evidence where prison officials had reasonable grounds to suspect that the boots were stolen property, where respondent was wearing the boots in plain view, and where prison officials seized the boots without first obtaining a warrant. The trial court and Court of Appeals erred.

{5} The Fourth Amendment protects individual privacy. **Warden v. Hayden**, 387 U.S. 294, 304, 87 S. Ct. 1642, 1648, 18 L. Ed. 2d 782 (1967). The United States Supreme Court has said that "a jail shares none of the attributes of privacy of [such constitutionally protected areas

as] a home, an automobile, an office, or a hotel room. **Lanza v. New York**, 370 U.S. 139, 143, 82 S. Ct. 1218, 1221, 8 L. Ed. 2d 384 (1962). More recently, in **Hudson v. Palmer**, 468 U.S. 517, 538, 104 S. Ct. 3194, 3206, 82 L. Ed. 2d 393 (1984) (O'Connor, J., concurring), Justice O'Connor cited **Lanza** in a concurring opinion for the proposition that "[t]he fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests in personal effects." Thus, when the boots were worn in plain view in an area of, at best, narrow constitutional protection, it is apparent that the respondent had no expectation of privacy whatsoever. Consequently, the warrantless seizure of the boots was proper and the trial court erred in suppressing them as evidence.

{6} Moreover, suspected stolen goods in plain view may be seized without a warrant. **See State v. Foreman**, 97 N.M. 583, 642 P.2d 186 (Ct. App.), **cert. quashed,** 98 N.M. 51, 644 P.2d 1040 (1982). Since the boots were suspected stolen goods, worn in plain view, their warrantless seizure was proper and the trial court erred in suppressing them as evidence.

{7} We do not agree with the majority of the Court of Appeals that a warrantless seizure by prison officials of items meeting the description of stolen goods in plan view requires exigent circumstances. Plain view seizures are clearly distinguished from exigent circumstance seizures. **See State v. Ruffino**, 94 N.M. 500, 612 P.2d 1311 (1980). The Court of Appeals apparently considered itself bound by the trial court's finding that "no exigent circumstances existed to justify the warrantless procedure." A finding of fact induced by a misunderstanding of the law, however, cannot stand on appeal. **Walker v. L.G. Everist, Inc**., 102 N.M. 783, 701 P.2d 382 (Ct. App.1985). Therefore, the Court of Appeals erred in affirming the trial court.

{8} We reverse the trial court and the Court of Appeals.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

HARRY E. STOWERS, JR.,
Justice

MARY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-111

Filing Date: November 24, 1987

Docket No. 16,886

JERRY GREEN,

Plaintiff-Appellee,

v.

GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY,
LALO GARZA, District Judge

Weinbrenner, Richards, Paulowsky & Sandenaw,
David McNeill, Jr.,

for Appellant.

Pickett & Holmes,
Lawrence M. Pickett,

for Appellee.

OPINION

RANSOM, Justice.

{1} This is a suit by Jerry Green to recover benefits under a homeowner's policy insuring against theft of property in his home. Judgment for Green was entered against his insurer, General Accident Insurance Company of America (General Accident).

{2} Green's home was burglarized on two occasions, January 25 and September 17, 1982. In the first burglary Green suffered a loss of $26,750, for which sum judgment was entered. In the second burglary, the stolen property included four silver and turquoise belt buckles valued at $2,525. Judgment was entered for $958.25 on the court's finding that the silver and turquoise buckles were nonscheduled jewelry insured for a maximum of $500 for loss by theft. The sum of $458.25 for additional loss was not in dispute.

{3} The insurance policy required that the insured promptly notify the insurer of a loss and furnish a sworn proof of loss to the insurer within sixty days after the loss occurred. The policy barred suit for recovery unless all requirements of the policy were complied with and suit brought within twelve months after any loss. Further, the policy made invalid any waiver of provisions unless in writing. No written waiver of any policy provision was granted to Green.

{4} General Accident contests the court's conclusion that General Accident, by its own acts, waived any notice, proof of loss, contractual time limitations, or written waiver defenses, and that it is estopped from denying the benefits sought. It argues that none of the court's findings reflect any action by General Accident which reasonably could be regarded as waiving any of its contractual rights.

{5} The twelve months time-to-sue provision is dispositive of the September 17 loss, but not of the January 25 loss. Consequently, we limit to the January 25 loss our discussion of notice, proof of loss and written waiver considerations.

{6} With respect to both notice of loss and proof of loss, the court appears to have found and concluded that Green had substantially complied with those requirements. This, together with the conclusion of waiver, is dispositive of notice and proof of loss issues. In **Robinson v. Palatine Ins. Co.**, 11 N.M. 162, 66 p. 535 (1901), the Court ruled that substantial compliance with

the terms of an insurance policy as to notice and proof of loss is all that is required. When notice and proof of loss are given, even if they are not sworn to, and an adjuster is sent to investigate the loss, unless a verification or further information is demanded, the objection that notice and proof of loss are not verified is waived. **Id**. at 176, 66 P. at 537.

{7} Immediately after the theft on January 25, Green notified the insurance agent, Isidro Gonzales, by personally telling him of the incident and by setting out the loss by way of a letter. Enclosed with this letter of March 15, 1982, were the sheriff's report, the appraisal of jewelry referenced in the report, and a list of additional items that were taken. The list included the fair market value of each item as determined by Green. Gonzales testified that he was completely satisfied that Green had complied with customary practice for reporting information about a theft.

{8} Green sent Gonzales the letter of March 15 within the sixty days required by the insurance contract for submitting **sworn** proofs of loss. In May, Green also gave a statement to John Gohrick, an independent adjuster representing General Accident, but Gohrick never presented the statement for Green's signature. Finally, in October, Green submitted to General Accident a notarized document labeled "sworn statement in proof of loss" which had been provided by Gohrick in September. General Accident responded by informing Green that this "purported" proof of loss was unacceptable but would be retained pending further investigation. During the initial months of the investigation Green was never told that his proof of loss needed verification. Moreover, General Accident's representatives' failure to furnish Green with a formal proof of loss form until eight months after being notified of the loss was inconsistent with an intention to demand exact compliance. **See Western Farm Bureau Mut. Ins. Co. v. Lee**, 63 N.M. 59, 62, 312 P.2d 1068, 1070 (1957).

{9} The principal contention on appeal is that the court made no finding of fact from which it could conclude that General Accident, by its own acts, waived or was estopped from asserting any defense of contractual time limitations. This Court has upheld insurance contract time-to-sue provisions in general, and has considered no case in which a specific public policy reason has been advanced for not enforcing such a provision. **Sanchez v. Kemper Ins. Cos.**, 96 N.M. 466, 632 P.2d 343 (1981); **Wiseman v. Arrow Freightways, Inc.**, 89 N.M. 392, 552 P.2d 1240 (Ct. App.) **cert. denied**, 90 N.M. 9, 558 P.2d 621 (1976); and **see Diebold Contract Servs., Inc. v. Morgan Drive Away, Inc.**, 95 N.M. 9, 617 P.2d 1330 (Ct. App.1980). Where the insurer raises the affirmative defense of violation of a time-to-sue provision, it need not show that it was prejudiced by violation of the provision. It need only show the breach. **Sanchez**, 96 N.M. at 468, 632 P.2d at 345. However, the insurer may be estopped from raising the affirmative defense of a time-to-sue provision. **Peoples State Bank v. Ohio Casualty Ins. Co.**, 96 N.M. 751, 635 P.2d 306 (1981).

{10} "Estoppel arises when an individual has been induced by the conduct of another to do, or forebear from doing, something he would or would not have done but for such conduct." **Young v. Seven Bar Flying Serv., Inc.**, 101 N.M. 545, 547-48, 685 P.2d 953, 955-56 (1984). "The acts and conduct generally held to constitute a waiver of a time-to-sue provision are those acts which would lull the insured into reasonably believing that its claim would be settled without suit. * * *" **Peoples State Bank**, 96 N.M. at 752-53, 635 P.2d at 307-08. (Citations omitted.)

{11} There is substantial evidence to support a finding that General Accident's conduct did lull Green into reasonably believing that his claim for the loss sustained on January 25 would be settled without suit. None of General Accident's communications with the Greens over the course of the year intimated that the claim would not be settled amicably. In a letter dated November 23, 1982, General Accident told Green "we are sorry that this claim is taking so long" and "we are unable to pay the claim **until** all the facts surrounding the claim are clarified." This last remark was

in reference to General Accident's need to obtain a sworn statement from Carolyn Green months after initiating its investigation. General Accident did obtain Mrs. Green's sworn statement on March 17, 1983, almost two month's after the anniversary of the inception of the loss.

{12} In **Peoples State Bank**, the Court said that "[w]aiver [of a time-to-sue provision] may be accomplished by slight acts and circumstances, and must be determined by the facts of the case." 96 N.M. at 752, 635 P.2d at 307. (Citations omitted.) An insurer should not be allowed to induce an insured's participation in an investigation past the twelve month time-to-sue provision and then rely on that contractual provision to bar claimant's recovery. This is especially true where, as here, the insurer does not give any indication that it will deny liability but instead tells the insured only weeks prior to the time bar's applicability that "if you will cooperate with us in investigating the facts surrounding the claim, this matter should be ready for resolution."

{13} A suit, pending negotiations to supply further evidence as requested, would have been inconsistent with the acts of the parties and their apparent intention. If General Accident did not have it in mind, before expiration of twelve months, to waive policy restrictions and negotiate further, it is difficult to understand the effect of Carolyn Green's sworn statement. **Cf. Miller v. Phoenix Assurance Co.**, 52 N.M. 68, 191 P.2d 993 (1948); see also **Anderson v. State Farm Fire & Casualty Co.**, 583 P.2d 101 (Utah 1978).

{14} In either April or May of 1982, Green signed a non-waiver agreement in which he agreed that actions by General Accident and its representatives to investigate, settle, deny or defend any claims arising out of the January 25 loss would not waive any rights of Green or General Accident under the insurance contract. However, the evidence in support of a waiver of the stipulations for notice, proof of loss and time to sue also supports a finding that General Accident could not rely on the non-waiver agreement it executed with Green. "A non-waiver agreement itself may be waived by conduct, the same as stipulations in the policies." **Miller**, 52 N.M. at 73, 191 P.2d at 996.

{15} By its acts and conduct, General Accident could be found to have waived the provisions urged as their affirmative defenses against the January 25 loss. Specifically, the twelve months time-to-sue provision having been waived, it would have been unnecessary that suit be instituted within twelve months next after the loss, or at any other time except within the statute of limitations. **Id**.

{16} As for the September 17 loss, General Accident contests the court's failure to find that General Accident took no action that could reasonably have led Green to believe that General Accident was investigating or negotiating with Green concerning that loss. We agree that the evidence does not support a finding or conclusion that General Accident should be estopped from relying on the twelve month time-to-sue provision to bar Green's suit for recovery.

{17} Unlike the January claim, Green was put on notice within ninety days that General Accident was prepared to offer $958.25 to settle Green's alleged loss of $3,064.11. Green did not submit a counteroffer. Instead, Green informed General Accident that he was "prepared to seek legal action to bring about a satisfactory settlement." General Accident responded that $958.25 was the entire sum to which Green was entitled. Nothing thereafter on the part of General Accident could have induced Green to reasonably believe that the September 17 loss was going to be settled to his satisfaction without suit. Because Green did not bring suit for satisfaction of the September 17 loss until April of 1984, he was barred from recovery under the provisions of the insurance contract.

{18} Finally, General Accident has complained of the denial of its motion for summary judgment, arguing that there was no genuine issue of material fact in light of the failure of Green to have made any timely denial of General Accident's request for admission in advance of the hearing on the motion for summary judgment.

Requests for admissions, SCRA 1986, 1-036, are an important aid to the resolution of litigation, and are not to be treated lightly. Here, Green's failure to timely respond to General Accident's request for admission conclusively established Green's non-compliance with the contract provisions. Summary judgment, however, should be granted as a matter of law when the pleadings, depositions and admissions on file, **together with the affidavits**, demonstrate that there is no genuine issue as to any material fact. SCRA 1986, 1-056. In his affidavit, Green raised the issue of whether General Accident waived or was estopped to rely on Green's non-compliance with the contract provisions as an affirmative defense. A party opposing a summary judgment motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. If there are such reasonable doubts, summary judgment should be denied. **Goodman v. Brock**, 83 N.M. 789, 498 P.2d 676 (1972).

{19} However, we do not need to reach a decision on whether the denial of summary judgment was proper in this case. We hold that a denial of a motion for summary judgment is not reviewable after final judgment on the merits. If a summary judgment motion is improperly denied, the error is not reversible for the result becomes merged in the subsequent trial. **Home Indem. Co. v. Reynolds & Co.**, 38 Ill. App.2d 358, 187 N.E.2d 274 (1962).

{20} The Illinois court conceded that to deny a review of a motion for summary judgment, which arguably should have been granted, may be unjust to the movant because the denial could not be immediately appealed. The court, however, reasoned further that to grant a review after final judgment would be a greater injustice to the respondent who won judgment after the evidence was more completely presented, where cross-examination played its part and where witnesses were seen and appraised.

{21} Although the record supports with substantial evidence the trial court's conclusion that General Accident waived or was estopped to claim the one year limitation on filing suit on the January 25 loss, the court's findings of fact do not support the conclusion. By selectively refusing and adopting by number reference both the plaintiff's and the defendant's requested findings of fact, without actually drafting its own, the trial court failed to make findings sufficient for this Court to review. "[W]hen findings wholly fail to resolve in any meaningful way the basic issues of fact in dispute, they become clearly insufficient to permit the reviewing court to decide the case at all * * *." **Mora v. Martinez**, 80 N.M. 88, 90, 451 P.2d 992, 994 (1969) (**quoting Featherstone v. Barash**, 345 F.2d 246, 250 (10th Cir. 1965)).

{22} Where the ends of justice require, this Court may remand a case to district court for the making of proper findings of fact. SCRA 1986, 1-052(B)(1)(g); **see State ex rel. Human Serv. Dept. v. Coleman**, 104 N.M. 500, 723 P.2d 971 (Ct. App. 1986). At issue is whether General Accident was estopped to deny liability coverage for a $26,750.00 loss sustained by Green when his home was burglarized. The ultimate fact necessary for the conclusion of estoppel is that Green rightfully relied upon the ongoing investigation as a waiver of the twelve months time-to-sue provision. The evidence would support a finding either way. The trial court must decide that ultimate factual issue. In making its findings of fact the trial court must consider the case law, e.g., **Young, Peoples State Bank,** and **Miller**, together with the relevant events and their chronology.

{23} Therefore, the case is remanded to the trial court for further findings of fact and conclusions of law relative to the judgment on the January 25 loss, and for an amended judgment on the January 25 loss which shall be deemed the final judgment pursuant to SCRA 1986, 1-054, all consistent with this opinion. The judgment on the September 17 loss is reversed.

{24} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

TONY SCARBOROUGH,
Chief Justice (dissents).

HARRY E. STOWERS, JR.,
Justice (concurs with dissent)

DISSENT

SCARBOROUGH, Chief Justice, dissenting.

{25} I dissent.

{26} Green brought suit against General Accident, his insurer, on a home owners policy which provided coverage against theft. The policy contained proof of loss and time to sue provisions, neither of which were complied with by Green. General Accident requested admissions from Green to the effect that Green had failed to comply with these two provisions. Green's response to the request for admissions was 168 days late. Green sought no extension of time within which to respond to the request for admissions. General Accident moved for summary judgment which the trial court denied. At trial, the trial court found that Green did not comply with the time to sue provision, but concluded that General Accident had waived this provision along with the provision governing proof of loss. The trial court then entered judgment for Green. I would reverse and remand for entry of summary judgment in favor of General Accident.

{27} We have consistently held that the policy provisions we are dealing with are valid and enforceable. **See Aetna Life Ins. Co. v. Nix**, 85 N.M. 415, 512 P.2d 1251 (1973). By not responding or obtaining an extension of time within which to respond to the request for admissions, Green admitted each matter for which admissions were sought. **See** SCRA 1986, 1-036 (Cum. Supp.1987).

{28} Green's failure to timely respond to the request for admissions entitles General Accident to summary judgment as a matter of law. **See** SCRA 1986, 1-056 (Cum. Supp.1987). The majority's reliance on **Home Indemnity Co. v. Reynolds Co.**, 38 Ill. App. 2d 358, 187 N.E. 2d 274 (1962) is misplaced. **Home Indemnity** deals with the legal fiction of merger rather than the procedural consequences of noncompliance with Rule 36(a).

{29} The majority's reasoning defeats the policy provisions concerning proof of loss and time to sue, and entices noncompliance with SCRA 1986, 1-036 by allowing a party refusing to provide necessary information to benefit by his inaction.

{30} This case should be remanded to the trial court for entry of summary judgment in favor of General Accident.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1987-NMSC-112

Filing Date: November 30, 1987

Docket No. 17,079

LINDA CASUSE, et al.,

Plaintiffs,

v.

CITY OF GALLUP, et al.,

Defendants.

CERTIFICATION FROM UNITED STATES DISTRICT COURT, HOWARD C. BRATTON, Senior Judge U.S. District Court.

Motion for Rehearing Denied December 28, 1984

S. James Anaya,
Albuquerque,
Stanley A. Halpin,
Lafayette, La.,

for Plaintiffs.

Montgomery & Andrews,
Joseph E. Earnest,
Santa Fe,

for Defendants.

Steven Barshov,
Santa Fe,

for Amicus Curiae, N.M. Municipal League.

OPINION

SCARBOROUGH, Chief Justice.

{1} Linda Casuse, Larry Garcia, and Vera Calabaza sued the City of Gallup (Gallup) in the United States District Court in Albuquerque, New Mexico. Plaintiffs alleged that defendant violated the federal Voting Rights Act, 42 U.S.C. Section 1973 (Supp.1986) and a provision of New Mexico's municipal code, NMSA Section 3-12-1.1 (Cum. Supp.1987). Gallup moved for a summary judgment on both issues, or alternatively, that the issue of state law be certified to the New Mexico Supreme Court. The federal district court complied with the request for certification and we accepted the issue as certified. The issue for review is whether the at-large election charter provisions of the City of Gallup, a home rule municipality, are invalidated by NMSA Section 3-12-1.1. We conclude that Section 3-12-1.1 does invalidate Gallup's home rule election charter that allows at-large elections for city councilors.

{2} Gallup argues that its home rule charter was not affected by the New Mexico Legislature's enactment of Section 3-12-1.1 in 1985. As authority for this proposition, defendant relies on N.M. Const. art. X Section 6(D), which states: "A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter." Defendant asserts that Section 3-12-1.1 is not a general law because it does not expressly deny the right of municipalities to establish the manner in which city councilors are elected, thus, it does not invalidate defendant's at-large election charter.

{3} The first issue is whether Section 3-12-1.1 is a general law. Black's defines a general law as one that effects the community at large, as opposed to a local law that deals with a particular locality. Black's Law Dictionary 616 (5th ed.

1979). Section 3-12-1.1 states: "Notwithstanding any other provision of the Municipal Code [Chapter 3 N.M. Stat. Ann. 1978], members of governing bodies, excluding mayors, of municipalities having a population in excess of ten thousand [10,000] shall reside in and be elected from single-member districts." Section 3-12-1.1 is a law that applies to all municipalities throughout the state with populations over 10,000. Therefore, Section 3-12-1.1, which requires city councilors to reside in singe-member districts, is a general law. As such, Section 3-12-1.1 limits home-rule if it also expressly denies municipalities the authority to legislate similar matters, as required by N.M. Const. art. X Section 6(D).

{4} The second issue we must determine is whether Section 3-12-1.1, by requiring city councilors to reside in and be elected from single-member districts, expressly denies the right of defendant to conduct at-large city council elections pursuant to its charter.

{5} The New Mexico Constitution provides that municipalities shall have maximum powers of self-government. N.M. Const. art. Section 6(E). This Court noted in **Apodaca v. Wilson**, 86 N.M. 516, 525 P.2d 876 (1974), that a municipality does not have to look to the legislature for a grant of power to act, but looks only to legislative enactments to see if any express limitations have been placed on its power to act. **Id**. at 521, 525 P.2d at 881. In **Apodaca**, we construed the meaning of "not expressly denied" in N.M. Const. art X Section 6(D) to mean that some express statement of the power denied must be contained in the general law in order to effectively limit a municipality's home-rule power. **Id**. As an example of such a provision, we referred to NMSA 1978 Section 72-4-1.1 (now NMSA 1978, Section 3-18-2 (Repl. Pamp.1985)).

{6} The statute referred to in **Apodaca** restricts the power of municipalities to impose certain types of taxes. It is commonly recognized that a sovereign and its subdivision may tax the same activity without causing an inconsistency in the law. However, when two statutes that are governmental or regulatory in nature conflict, the law of the sovereign controls. We cannot take Gallup's position that N.M. Const. art X Section 6(D) allows a municipality to disregard an express law of the Legislature unless the law specifically states "and no municipality may do otherwise." Therefore, any New Mexico law that clearly intends to preempt a governmental area should be sufficient without necessarily stating that affected municipalities must comply and cannot operate to the contrary. **Westgate Families v. County Clerk of Los Alamos**, 100 N.M. 146, 667 P.2d 453 (1983).

{7} Defendant and Amicus argue that Section 32-12-1.1 is unconstitutional because it only applies to municipalities with over 10,000 population, thus, it does not apply to the whole of the State. There is evidence in the record, based on the 1980 census, that Section 3-12-1.1 applies to thirteen municipalities within the State: Albuquerque, Santa Fe, Las Cruces, Roswell, Farmington, Clovis, Hobbs, Carlsbad, Alamogordo, Gallup, Las Vegas, Grants and Artesia. Based on the 1980 census, the population in these municipalities constitutes more than one-half of the entire State. It is typical for statutes in the Municipal Code to include census cut-off points. Defendant does not argue that the legislature lacked a rational basis for setting the 10,000 population requirement. This Court disagrees that because Section 3-12-1.1 applies only to municipalities of over 10,000 population, the statute is unconstitutional as written.

{8} We conclude that Section 3-12-1.1 sufficiently expresses the intent of the legislature to mandate that all municipalities with a population over 10,000 require their candidates for city council to reside in and be elected from single-member districts. Accordingly, we hold that NMSA Section 3-12-1.1 invalidates Gallup's home rule election charter that allows at-large elections for city councilors.

{9} IT IS SO ORDERED.

DAN SOSA, JR., Senior Justice,

HARRY E. STOWERS, JR., Justice

RICHARD E. RANSOM, Justice

MARY C. WALTERS, Justice (not participating)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-016

Filing Date: February 18, 1988

Docket No. 17,170

JOE GONZALES,

Plaintiff-Appellee,

v.

GIOIA TAMA,

Defendant-Appellant,

v.

PETE GONZALES,

Third-Party Defendant-Appellee.

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY,
ART ENCINIAS, District Judge.**

Motion for Rehearing Denied March 2, 1988

Barry Green,
Santa Fe, New Mexico,

for Appellant.

Campos & Sanchez,
Daniel A. Sanchez,
Santa Fe, New Mexico,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Defendant-Appellant appeals the trial court's grant of judgment in favor of Plaintiff-Appellee on a complaint for foreclosure and denial of counterclaims. We affirm in part and remand in part for findings on the award of attorney's fees.

{2} Defendant-Appellant (buyer) purchased a remote twenty acre tract in Santa Fe County, New Mexico, from Plaintiff-Appellee (seller) and seller's brother, the Third-Party Defendant, for $80,000. Buyer and seller entered into a note and mortgage which provided for a sixty day default period. However, the note did not contain an acceleration clause. Buyer made payments on the note through August 1983 and has made no further payments since then because buyer claimed seller was obligated under the agreement to gravel the road with subgrade preparation and compacted basecourse to allow access by "passenger car" (by which she meant a 1965 Lincoln Continental) for a period of several years without need for maintenance. The property was originally a mining claim serviced by a steep dirt road which suffered erosion following wet weather. Expert witnesses testified at trial that to build such a permanent road would cost between $85,000 and $118,000.

{3} The purchase agreement included the condition, "[s]eller agrees to upgrade existing roadway to allow accessibility by passenger car, prior to closing." The trial court entered a finding in compliance with this obligation, seller cleared obstructions, leveled and widened the road at certain places and cut diversion channels for the annual snow and rain runoff. However, buyer did not maintain the road on a regular basis so the road deteriorated. Buyer then counterclaimed for damages because she could not gain access to the property year round.

{4} The trial court found that seller did not breach the contract with regard to the "upgrading" of the road and no damages were allowed to the buyer on the counterclaims. The court held that seller should

be allowed to recover the principal due on the note in the amount of $54,355.30. We affirm.

{5} Buyer first argues that seller was not entitled to foreclose the mortgage because he did not prove the underlying note to the mortgage. The trial court found that the mortgage incorporated by reference the proffered note and that no other note or contract of any sort was proved by the parties. The trial court concluded that the parties entered into a valid agreement whereby buyer purchased and seller sold a parcel of land and that the agreement was expressed in a promissory note and secured by a mortgage. This court has held that if a note and mortgage are made at the same time and in relation to the same subject as parts of one transaction, they will be construed together as if they were parts of the same instrument. **Comer v. Hargrave,** 93 N.M. 170, 598 P.2d 213 (1979), **Samples v. Robinson,** 58 N.M. 701, 275 P.2d 185 (1954). Here, there is no question that buyer and seller signed the note. The trial court's ruling is correct.

{6} Buyer next argues that because the note did not contain an acceleration clause, seller could not foreclose on the mortgage for the entire unpaid balance of the note. Buyer argues that the seller's only remedy in this case is to bring suit each month as the breach occurs. We disagree. The trial court found that as a matter of law buyer's obligation was to to pay the purchase price of the property in monthly installments after August 1983. The trial court accelerated payment on the entire unpaid balance and allowed foreclosure for that amount. If there is substantial evidence which a reasonable mind accepts as adequate to support a conclusion, the findings of the trial court shall not be disturbed. **Sandoval v. Dep't of Employment Sec.,** 96 N.M. 717, 718, 634 P.2d 1269, 1270 (1981). The verdict of the trial court will stand as long as the findings are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate support for a conclusion. **Anaconda Co. v. Property Tax Dep't,** 94 N.M. 202, 211, 608 P.2d 514, 523 (Ct. App.1979), **cert. denied,** 94 N.M. 628, 614 P.2d 545 (1980). In this case, there is evidence to support the trial court's finding that buyer did have an obligation to pay the mortgage payments and that she was in substantial breach as she made no payments from August 1983 until the present time.

{7} The absence of a specific clause providing for acceleration is no bar to a foreclosure action where there has been absolutely no payment of either interest or principal since August 1983. We have held that, "One who holds a note secured by a mortgage has two separate and independent remedies, which he may pursue successively or concurrently; one is on the note against the person and property of the debtor, and the other is by foreclosure to enforce the mortgage lien upon his real estate." **State ex rel. Hill v. District Court,** 79 N.M. 33, 35, 439 P.2d 551, 553 (1968) (quoting **Porter v. Alamocitos Land & Livestock Co.,** 32 N.M. 344, 353, 256 P. 179, 183 (1927)). In this case, the note provided for a sixty day default period and the seller notified buyer in writing of the breach. Were it not for foreclosure, the seller would have no remedy in this case as buyer is now indigent. **See Carmichael v. Rice.** 49 N.M. 114, 158 P.2d 290 (1945), and **Comer v. Hargrave,** 93 N.M. 170, 598 P.2d 213 (1979).

{8} Finally, buyer argued that the trial court erred in allowing seller to collect attorney's fees and costs. "An attorney is, of course, entitled to recover the reasonable value of his professional services as provided in the note. Among the many factors which properly may be considered in a determination thereof are the nature and extent of the services, the time necessarily consumed, the professional skill and experience of the attorney, and the results accomplished. Each case must be governed by its own facts and circumstances." **Featherstone v. Barash,** 382 F.2d 641, 644 (10th Cir.1967); **Fryar v. Johnsen,** 93 N.M. 485, 601 P.2d 718 (1979); SCRA 1986, 16-105. No evidence is in the record to show how much time was spent, nor what expertise was required in handling this case. There is nothing to support either the reasonableness or excessiveness of the fees.

{9} We remand and order the trial court to hold a hearing on the issue of reasonableness of attorney's fees.

{10} IT IS SO ORDERED.

WE CONCUR:

HARRY E. STOWERS, JR., Justice

RICHARD E. RANSOM, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-019

Filing Date: March 3, 1988

Docket No. 16,650

BILL MCCARTY CONSTRUCTION CO.,

Plaintiff-Appellant,

v.

SEEGEE ENGINEERING COMPANY,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY,
ROBERT M. DOUGHTY, II,
District Judge.

Modrall, Sperling, Roehl, Harris & Sisk,
J. Douglas Foster,
Kathryn D. Lucero,

for Appellant.

Sager, Curran, Sturges & Tepper,
Matthew P. Holt,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Plaintiff-Appellant, Bill McCarty Construction Co., Inc., moved for rehearing of this Court's earlier decision, filed November 9, 1987. This Court granted rehearing solely on the issue of whether McCarty was entitled to prejudgment interest. Our earlier decision on this matter is withdrawn and this opinion is filed in its place.

{2} McCarty contracted with Seegee Engineering Company, Inc. to supply concrete and perform earthwork for the construction of the Ruidoso High School. The concrete was supposed to meet strength requirements, as specified in the plans for the project. After the work was completed, Seegee refused to pay for a portion of the concrete and a portion of the earthwork. McCarty filed suit to collect the balance owed for the concrete and earthwork, which totaled $18,745.24. Seegee counterclaimed that the concrete on the second floor of the school was defective, causing damages in the amount of $27,927.48, the cost of removing and replacing the concrete on the entire second floor. The case was tried to the court without a jury. Both parties proposed findings of fact and conclusions of law, much of which were incorporated into the ruling of the trial court. The damages stated in the complaint and findings of the trial court differ, but the amounts claimed have not been challenged on appeal and we accept them here. The court ordered Seegee to pay McCarty $18,745.25 on the complaint. The court also awarded Seegee the full damages on the counterclaim for removal and replacement of the second floor concrete.

{3} McCarty appealed to this Court on two grounds: (1) the damage award to Seegee was not supported by substantial evidence, and (2) the award to McCarty should have included prejudgment interest. We affirm the trial court's award of damages to Seegee and denial of prejudgment interest to McCarty.

{4} McCarty's initial point on appeal is that the award of damages to Seegee was not supported by substantial evidence. First, McCarty asserts that Seegee's employees were the cause of the concrete being substandard, because they ordered McCarty's truck driver to add water to one load of concrete when the concrete began to set up too fast. In line with this argument, McCarty challenges findings of fact thirty, thirty-four, and thirty-eight, to the effect that the concrete did

not meet contract requirements. There is substantial evidence in the record to support these challenged findings. Seegee's expert, Mr. Dale Decker, testified about the necessity for the supplied concrete to meet the construction standard of 3,000 pounds per square inch (p.s.i.). Mr. Decker also testified that the test results showed varying strengths across the entire second floor, many of which were below 3,000 p.s.i. Seegee's president, a civil engineer, also testified about the substandard test results.

{5} McCarty challenges conclusion of law three, which states: "The concrete was unfit for the purpose supplied." The predicate to this challenge appears to be the above mentioned challenges to findings of fact thirty, thirty-four, and thirty-eight. A puzzling aspect of McCarty's argument is that it does not challenge other findings of fact in the record which establish that McCarty was the party responsible for the quality and consistency of the concrete mix. For example, finding eleven states that McCarty submitted concrete mix designs for the project. Finding twenty states that McCarty's dispatcher arranged a pump for Seegee's use. Finding twenty-one states that the pump so arranged would not pump aggregate larger than 3/4″ in diameter. Finding twenty-two states that McCarty's mix designs required aggregate larger than 3/4″ in diameter. Findings twenty-three through twenty-nine indicate that Seegee relied on McCarty's expertise to provide concrete and that Seegee was unaware that McCarty altered the concrete mix to fit the smaller pump. Further, McCarty does not challenge finding thirty-five, which states: "Trade usage and McCarty's own practices do not permit changes to concrete orders to be made by anyone except the one who orders and pays for the concrete, and the pumper had no authority from Seegee to change the mix." It is our opinion that even if findings thirty, thirty-four, and thirty-eight were stricken, there are sufficient unchallenged findings in the record to support conclusion three. This Court has noted that when a judgment rests on one or more findings of fact, there is substantial evidence to support the judgment. **Watson Land Co. v. Lucero,** 85 N.M. 776, 777, 517 P.2d 1302, 1303 (1974).

{6} Next, McCarty argues that regardless of whether the concrete was defective, the defect was limited to a specific part of the second floor and therefore removal of the entire floor was unnecessary. McCarty challenges finding thirty-six which states: "The concrete failed to meet the 3,000 p.s.i. specification on one-half of the second floor, and three core tests taken on the other half showed an average strength of more then [sic] 3,000 p.s.i. although one of those tests showed a strength of only 2,150 p.s.i." The exhibits offered at trial showed results from core tests taken from the second floor of the school. The results indicated that portions of the entire floor were below standards. McCarty also challenges finding forty-two which states: "The decision to replace the entire second floor was a reasonable one under the circumstances of the widely varying test results." McCarty argues the decision to remove the floor was based solely on a recommendation by the project architect. However, testimony at trial indicated the decision was based not only on the architect's recommendation, but also on the results of the core tests, the expertise of Seegee's president, Mr. Carl Blumenthal, and its supervisor, Mr. Vaughn Ford.

{7} The function of an appellate court is to review the evidence considered by the lower court, not to weigh it. If there is substantial evidence to support the findings of the trial court, they shall not be disturbed. **Sandoval v, Department of Employment Sec.,** 96 N.M. 717, 718, 634 P.2d 1269, 1270 (1981). Substantial evidence is recognized by this Court as that which a reasonable mind accepts as adequate to support a conclusion. **Id.** Even if McCarty were correct in its position that the decision to remove the entire floor was based solely on the architect's recommendation, McCarty provided no evidence that the architect acted unreasonably, or was unable to interpret the test results. Based on the testimony in the record, we conclude that findings thirty-six and forty-two are supported by substantial evidence.

{8} McCarty challenges finding forty-three which states: "The total necessary and reasonable cost to Seegee to remove and replace the

concrete was $27,927.48, and McCarty is responsible for reimbursing Seegee that amount subject to an offset of $6,431.25 for the concrete delivered." There is no dispute in the record that Seegee did suffer damages in the amount of $27,927.48 to remove and replace the concrete. Apparently, McCarty's only challenge to finding forty-three is because it finds McCarty is responsible for paying the damage. Similarly, McCarty challenges finding forty-four which states: "McCarty's breaches of warranty and breach of contract have proximately caused damage to Seegee in the sum of $27,927.48." McCarty also challenges conclusions of law nine and ten, which state that McCarty breached its contract and its warranties to Seegee. Findings forty-three and forty-four and conclusions nine and ten follow the court's earlier findings that McCarty was responsible for the substandard concrete and that removal of the entire floor was reasonable. Although findings forty-three and forty-four have a quality of mixed fact and law, this Court has acknowledged that such findings will be upheld when supported by substantial evidence. **Watson Land Co. v. Lucero,** 85 N.M. 776, 777, 517 P.2d 1302, 1303 (1974). As we stated earlier, there is substantial evidence for the court's underlying findings, and we conclude that findings forty-three and forty-four and conclusions nine and ten flow logically from those findings.

{9} We next address McCarty's second point on appeal, that it was entitled to prejudgment interest as a matter of right. This Court has adopted the view of the **Restatement of Contracts** § 337(a) (1932), that prejudgment interest should be awarded as a matter of right when the amount owed can be ascertained with reasonable certainty. We have held that prejudgment interest should be awarded when an amount is ascertainable, although liability remains to be proven at trial. **O'Meara v. Commercial Ins. Co.,** 71 N.M. 145, 152, 376 P.2d 486, 491 (1962). In **Grynberg v. Roberts,** 102 N.M. 560, 698 P.2d 430 (1985), we held an amount was ascertainable when agreements between the parties "stated the exact percentage of the working interest and the percentage of costs each defendant would owe," and invoices to the defendant "listed dates, invoice numbers, exact amounts due per invoice and the total amount due for each defendant," **Id.** at 563, 698 P.2d at 433. In this case, McCarty's invoices to Seegee met the requirements set forth in **Grynberg,** with one exception. The defendant in **Grynberg** did not file a counterclaim.

{10} The **Restatement of Contracts** § 337(b) states that prejudgment interest is discretionary when the amount owed is not ascertainable. And, we have noted that prejudgment interest should not be "awarded arbitrarily without regard for the equities of each particular situation." **Ledbetter v. Webb,** 103 N.M. 597, 604, 711 P.2d 874, 881 (1985) (citing **Shaeffer v. Kelton,** 95 N.M. 182, 188, 619 P.2d 1226, 1232, (1980)). In this case, McCarty filed a claim against Seegee for $18,745.25, and Seegee filed a counterclaim for $27,927.48. It was unascertainable exactly how much, if anything, McCarty owed until the facts were resolved at trial. Because the amount of any setoff was unascertainable before trial, we hold the award of prejudgment interest by the trial court was, and should have been, discretionary. **See Kennedy v. Moutray,** 91 N.M. 205, 207, 572 P.2d 933, 935 (1977); **Kennedy v. Lynch,** 85 N.M. 479, 482, 513 P.2d 1261, 1264 (1973). We find no abuse of discretion in the trial court's denial of prejudgment interest.

{11} We therefore affirm the trial court's decision to award the full amount of Seegee's counterclaim and to deny prejudgment interest on the amounts awarded to McCarty. The judgment of the trial court is affirmed as entered.

{12} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice,

HARRY E. STOWERS, JR.,
Justice

MARY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-029

Filing Date: April 21, 1988

Docket No. 16,750

TRANSAMERICA INSURANCE COMPANY,

Plaintiff-Appellee,

v.

EMIL SYDOW,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, BURT COSGROVE, District Judge.

Toulouse, Toulouse & Garcia,
James R. Toulouse,
Randy M. Autio,
Albuquerque, New Mexico,

for Appellant.

Gallagher & Casados,
Todd E. Farkas,
Nathan H. Mann,
Albuquerque, New Mexico,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Transamerica Insurance Company brought suit against Emil Sydow for reimbursement of worker's compensation benefits paid to Sydow. Transamerica moved for summary judgment. The court granted the motion and Sydow appeals. We affirm.

{2} Many of the facts of this case are set out in a prior appeal. **See Transamerica Ins. Co. v. Sydow,** 97 N.M. 51, 636 P.2d 322 (Ct. App.1981). We summarize here only those facts that are relevant to this appeal. Sydow was injured at work and filed for worker's compensation benefits. He received benefits for his injury from his employer's insurance carrier, Transamerica. Sydow received several payments from Transamerica and then settled his worker's compensation claim. Later, Sydow pursued a malpractice claim against Dr. Joseph F. Hollinger, the physician who treated him for work-related injuries. The malpractice claim was also settled. Transamerica then filed a claim against Sydow to recover those amounts Transamerica paid Sydow that were not caused by the work-related injury, but were caused by Dr. Hollinger's malpractice in treating Sydow.

{3} The issue before this Court is whether Transamerica was entitled to summary judgment.

{4} Sydow correctly argues that the plaintiff, when moving for summary judgment, has the burden to rebut the defendant's affirmative defenses. **Fidelity Nat'l Bank v. Goff,** 92 N.M. 106, 583 P.2d 470 (1978). Sydow argues that, in moving for summary judgment, Transamerica failed to meet its burden by not disproving Sydow's affirmative defense of accord and satisfaction. We conclude Sydow's defense of accord and satisfaction is without merit. Transamerica settled the worker's compensation claim with Sydow. In New Mexico, a worker who is eligible for worker's compensation benefits, and who has been subsequently injured by a third party, can elect to recover worker's compensation benefits from his employer for that portion of the injury for which the employer is liable and also from the third party for that party's portion of the injury, or the worker can recover the entire amount from the employer. When the worker recovers the entire amount from the employer, he has assigned to his

employer the right to further recover from third parties for the same injury. **See Transamerica,** 97 N.M. at 53, 636 P.2d at 324. Here, Sydow pursued, settled, and received compensation from his employer for the separate malpractice action. In the malpractice action, Sydow's attorney induced Transamerica to refrain from formally intervening and specifically agreed, in exchange for Transamerica's forbearance, to protect any rights of reimbursement Transamerica might have against Sydow. Sydow's attorney refused to live up to his part of the agreement and Transamerica brought this suit against Sydow seeking reimbursement of money it had expended on his behalf. The claim has not been settled, nor have any offers been made or accepted in settlement. There are no facts in the record before us to support the defense of accord and satisfaction. The defense being totally without merit, Transamerica was not obligated to put on proof beyond all reasonable doubt to make a prima facie case for summary judgment. **See Sparks v. Melmar Corp.,** 93 N.M. 201, 598 P.2d 1161 (1979); **Fidelity Nat'l Bank v. Tommy L. Goff, Inc.,** 92 N.M. 106, 583 P.2d 470 (1978). We hold that Transamerica met its burden of disproving the defense by presenting an affidavit showing Sydow had made no reimbursement. The burden then shifted to Sydow to show some issue of fact regarding the defense. As Sydow could not meet this burden, Transamerica was entitled to summary judgment.

{5} Sydow also argues that the trial court improperly struck an affidavit offered by Sydow to oppose Transamerica's motion for summary judgment. The affidavit alleged that Dr. Hollinger did not commit malpractice in his treatment of Sydow. Sydow's attorney introduced the affidavit to raise the issue of malpractice at the hearing for summary judgment. Sydow's attorney was fully aware that the malpractice claim had been settled, and that Schultz's affidavit was prepared for Dr. Hollinger's defense against Sydow. Between Sydow and Transamerica, the issue was not whether malpractice occurred, but whether Sydow's settlement of the malpractice claim amounted to a double recovery. Sydow was therefore estopped from pursuing the malpractice issue in this fashion. We hold the court acted properly when it struck the affidavit.

{6} Finally, Sydow argues that conflicting inferences could have been drawn from the facts presented by Transamerica in support of its motion for summary judgment, and therefore the court erred in granting the motion. We disagree. Sydow correctly states that summary judgment should not be granted when the basic facts are undisputed, but equally logical though conflicting inferences can be drawn therefrom. **Fischer v. Mascarenas,** 93 N.M. 199, 201, 598 P.2d 1159, 1161 (1979). We do not find this to be such a case. Once Transamerica made a prima facie case for summary judgment, Sydow failed to meet his burden by showing that genuine issues of fact remained to prevent the grant of summary judgment. Transamerica was entitled to summary judgment as a matter of law.

{7} Because Transamerica was entitled to summary judgment as ordered by the trial court, we dismiss Sydow's appeal and reinstate the judgment of the trial court with costs of the appeal to Transamerica.

{8} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

HARRY E. STOWERS, JR.,
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,

v.

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

Rodey, Dickason, Sloan, Akin & Robb, P.A.,
W. Robert Lasater, Jr.,
Michael J. Condon,
Albuquerque, New Mexico,

for Petitioner.

Miller, Stratvert, Torgerson & Schlenker, P.A.,
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for Amicus Curiae NM Trial Lawyers Association.

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.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

DISSENT

TONY SCARBOROUGH,
Chief Justice

HARRY E. STOWERS, JR.,
Justice

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.

Justice Tony Scarborough

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-036

Filing Date: May 10, 1988

Docket No. 16,310

NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Petitioner-Appellant,

v.

NEW MEXICO STATE CORPORATION COMMISSION, Eric Serna, John Elliott, Jimmie Glenn, Members, acting as the STATE INSURANCE BOARD, and the SUPERINTENDENT OF INSURANCE, Vincente Jasso,

Respondents-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY,
ART ENCINIAS, District Judge.

Motion for Rehearing Denied June 16, 1988

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OPINION

RANSOM, Justice.

{1} On December 23, 1985, the Insurance Board disapproved a workers' compensation insurance premium increase that was to go into effect January 1, 1986. The National Council on Compensation Insurance (NCCI), which submitted the rate filing, petitioned this Court for review. We declined to accept jurisdiction, and NCCI filed an appropriate appeal of the Board's decision in the District Court of Santa Fe County. **See National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,** 103 N.M. 707, 712 P.2d 1369 (1986). The district court affirmed the order of the Board. NCCI appeals. We affirm.

{2} This appeal is governed by the Insurance Code, NMSA 1978, Sections 59A-1-1 to 59A-53-17 (Orig. Pamp.1984). Article 17 (§§ 59A-17-1 to 59A-17-35) comprises the Insurance Rate Regulation Law, the statutes most specifically applicable to this appeal.

PROCEEDINGS

{3} NCCI is an official rate service organization. **See** §§ 59A-17-4(B), 59A-17-19. On October 17, 1985, NCCI filed a premium rate increase for all workers' compensation carriers operating in New Mexico. The premium increase applied to all policies issued or renewed during the calendar year beginning January 1, 1986.

{4} On October 31, the Superintendent of Insurance informed NCCI by letter that the Board had hired an independent actuary, Allen Kaur, to review the filing. The Superintendent asked NCCI

to cooperate with any request from Mr. Kaur for additional information. The letter also notified NCCI that a hearing had been scheduled to solicit input from employer groups and to allow NCCI to make a presentation of its filing.

{5} On November 15, the Superintendent mailed written notice to NCCI regarding a December 10 public hearing to receive comment and to give consideration to the rate filing in terms of specific statutory criteria under Section 59A-17-8 and other relevant factors described in the notice.[1] Because the filing was not specifically disapproved within fifteen days of its submission, the filing was treated as having become effective prior to the hearing.[2] Following the December 10 hearing, the Board disapproved the rate filing scheduled to go into effect January 1.

STANDARD OF REVIEW

{6} Section 59A-17-35 governs appeals from an order made by the Board disapproving a rate

[1] The notice stated the following:

PLEASE TAKE NOTICE that an informal public hearing will be held on December 10, 1985, to receive written and oral comments of interested persons concerning proposed workmen's compensation rate increases.

The proposed increases filed with the Superintendent of Insurance average 37.1% and range up to increases of approximately 60% over current rates for individual classes of employees. The rate increases will apply to all Workmen's Compensation policies issued in New Mexico on or after January 1, 1986, except for policies issued to public entities which policies are exempted pursuant to rule of the Superintendent.

The hearing will focus on whether the proposed rates are excessive, inadequate or unfairly discriminatory. Rates are deemed to be excessive if they are likely to produce a profit that is unreasonably high in relation to the risks to be covered, or if expenses are unreasonably high in relation to services rendered. Rates will be deemed inadequate if they are clearly insufficient, together with the investment attributable to them to sustain projected losses and expenses. Unfair discrimination exists if one rate fails to reflect equitably the differences in expected losses and expenses in comparison with another rate in the same class. Further consideration will be given in the hearing to the specific issues described in Section 59A-17-8 NMSA 1978 and other applicable law.

Comments will be received in both written and oral form. Written comments should not exceed twenty (20) pages in length, must be received not later than the date of hearing, and should be mailed to the Superintendent of Insurance. * * *

[2] A filing must be on file for a waiting period of 15 days before it becomes effective. § 59A-17-10(C). (The effective date of the "filing" is distinguished from the effective date of the "premium rate.") If, because the insurer has not included supporting manuals and plans required to be filed or the insurer has not released other information upon which the insurer supports the filing, the Superintendent requires the insurer to furnish additional information, then the fifteen-day waiting period does not commence until the information is furnished. § 59A-17-10(A). Within the waiting period, the Superintendent may disapprove the filing by written notice specifying the failure of the filing to meet requirements and stating the filing shall not become effective. § 59A-17-14(A). No hearing is necessary. After a filing has become effective, disapproval is governed by Section 59A-17-14(B), which provides:

If at any time subsequent to the applicable review period provided for as to a workmen's compensation insurance filing the superintendent finds that a filing does not meet the applicable requirements of this article, he shall, after a hearing upon written notice specifying the matters to be considered at the hearing to every insurer and rate service organization which made such filing, issue an order specifying the respects in which he finds that the filing fails to meet such requirements and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. * * *

In adhering to Subsection (B) rather than Subsection (A) of Section 59A-17-14, both the Board and the district court were guided by procedural requirements which respondents now argue to be inapplicable to the facts in this case. It may even be argued that the Superintendent misconstrued the law, when, in his letter of October 31, having determined that the review of the filing within 15 days of its receipt was not possible, he extended the waiting period only an additional 15 days. In that letter, the Superintendent requested that NCCI cooperate with the Board's independent actuary and furnish him with any additional information he may need to complete his review. This language arguably satisfied the statutory intention that:

When a filing is not accompanied by the information upon which the insurer supports the filing, and the superintendent does not have sufficient information to determine whether the filing meets the requirements of those provisions of this article applicable as to workmen's compensation insurance, he shall require the insurer to furnish the information upon which it supports the filing, and **in such event the waiting period shall commence as of the date such information is furnished."**

§ 59A-17-10(A). If supporting information requested by the Superintendent is not forthcoming, a filing clearly could be disapproved under Section 59A-17-14(A) on the grounds that the furnishing of information within a reasonable period of time is mandatory.

While we could consider the disposition of this case on that basis, **see Conwell v. City of Albuquerque,** 97 N.M. 136, 637 P.2d 567 (1981) (while a reviewing court may not substitute its judgment for that of an administrative decision-maker, it may correct the decision-maker's misapplication of the law), we choose to rest our decision on the Board's own assumption that Subsection (B) applied.

filing. **National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,** 103 N.M. 707, 712 P.2d 1369 (1986). The district court is required to sustain the administrative action appealed from unless such action is either unlawful, arbitrary or capricious, or not based upon substantial evidence. § 59A-17-35(C). In reviewing the administrative action, the court should give due consideration to the expertise of the Superintendent and the Board. **Id.**

{7} In **Duke City Lumber Co. v. New Mexico Environmental Improvement Board,** 101 N.M. 291, 681 P.2d 717 (1984), this Court held that for purposes of reviewing administrative decisions the substantial evidence rule is expressly modified to include whole record review. **Id.** at 294, 681 P.2d at 720. Under whole record review, the court views the evidence in the light most favorable to the agency decision, **Wolfley v. Real Estate Comm'n,** 100 N.M. 187, 668 P.2d 303 (1983), but may not view favorable evidence with total disregard to contravening evidence. **New Mexico Human Servs. Dep't v. Garcia,** 94 N.M. 175, 608 P.2d 151 (1980).

{8} To conclude that an administrative decision is supported by substantial evidence in the whole record, the court must be satisfied that the evidence demonstrates the reasonableness of the decision. No part of the evidence may be exclusively relied upon if it would be unreasonable to do so. The reviewing court needs to find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency. **See Sandoval v. Dep't of Employment Sec.,** 96 N.M. 717, 634 P.2d 1269 (1981).

{9} On appeal to this Court, the review of an administrative decision is the same as before the district court. **Jimenez v. Department of Corrections,** 101 N.M. 795, 689 P.2d 1266 (1984). However, our review requires a twofold analysis. **Tapia v. City of Albuquerque,** 104 N.M. 117, 717 P.2d 93 (Ct. App.1986). Ultimately, we must decide whether the district court was correct in finding substantial evidence to support the Board's order. In making that decision, we must independently examine the entire record. **Id.** at 120, 717 P.2d at 96.

{10} NCCI claims numerous separate errors of law and complains that many of the Board's findings are not supported by substantial evidence on the record as a whole. We address its points seriatim, together with relevant substantial evidence questions.

POWERS OF THE BOARD IN RELATION TO ITS SECRETARY

{11} The Insurance Code provides that the Insurance Rate Regulation Law is under the exclusive jurisdiction of the Insurance Board and that it be administered by the Board's Secretary, the Superintendent of Insurance. §§ 59A-3-2, 59A-17-5. All powers relating to state control and supervision of insurance rates and rate practices are under the exclusive control of the Board (§ 59A-2-1), which consists of the chairman and members of the Corporation Commission. § 59A-3-1. Appointed by the Corporation Commission, the Superintendent of Insurance is the chief administrative officer of the Board as well as its Secretary. § 59A-3-3(A). As Secretary, the Board may remove him for cause, and he is automatically removed if the Corporation Commission removes the Superintendent for cause. § 59A-3-3(B). The Secretary certifies the proceedings of the Board under a seal furnished by the Board (§ 59A-3-4), and his general powers as to rules and regulations, enforcement, and otherwise are coextensive with those as Superintendent. § 59A-17-5.

{12} NCCI claims that Section 59A-17-14(B) permits only the Superintendent, not the Board, to make a preliminary finding and then conduct a hearing on a filing. (See Footnote 2 for text of Subsection (B)). At issue is whether the powers and duties specifically prescribed for the Superintendent under that section are intended by the legislature to be his to the exclusion of the Board itself. In support of its argument that the Superintendent's powers and duties are exclusively his, NCCI submits that the legislature intended

a two-tier hearing for any person aggrieved by the Superintendent's action, threatened action or failure to act. Under Section 59A-17-34, any such person is entitled to a hearing before the Superintendent and, if aggrieved by the Superintendent's order on such hearing, or by the Superintendent's refusal to hold the hearing, that person may request a review thereof by the Board.

{13} We agree that Section 59A-17-34(A) mandates the Superintendent hold a hearing upon request by a person aggrieved by the Superintendent's act, threatened act, or failure to act, or by any report, rule, regulation or order of the Superintendent (§ 59A-4-15), and that a request may be made for review by the Board of the Superintendent's order after a hearing or refusal to hold a hearing. § 59A-17-34(B). However, we do not agree that the grievance procedure mandates that the Board, which by statute has exclusive jurisdiction over the rate regulation law and the control and supervision of rates and rate practices, cannot, as a body, exercise its powers to examine a rate filing without first allowing its Secretary to act under specific statutory authorization and direction. Unless any intent of the legislature to the contrary be expressly stated, we cannot infer that powers authorized under Section 59A-17-14(B) for the Superintendent could be exercised only by him to the exclusion of the Board.

PROCEDURAL DUE PROCESS

{14} Notice. NCCI submits that its due process rights under Article 17 were violated. NCCI contends that the notice provided by the Superintendent lacked the specificity required under Section 59A-17-14(B). This section provides that if, following the applicable review period, the Superintendent determines that a filing fails to meet the requirements of Article 17, "he shall, after a hearing upon **written notice specifying the matters to be considered at the hearing** to every rate insurer and rate service organization which made such filing, issue an order * * *." (Emphasis added.) NCCI claims that the Superintendent's notice did not sufficiently apprise NCCI of the issues to be addressed during the hearing. To support its contention that the Superintendent's notice was inadequate, NCCI relies primarily upon **Mountain States Telephone & Telegraph Co. v. New Mexico State Corp. Commission,** 90 N.M. 325, 563 P.2d 588 (1977).

{15} The application of **Mountain States** to the case at bar is inapposite. We note initially that under Article XI of the New Mexico Constitution, the Corporation Commission is mandated to establish the rates charged by telephone companies within the state, whereas the Commission acting as the Insurance Board does not establish rates. The Board merely approves or disapproves rate filings.

{16} In **Mountain States,** the Court reviewed a Corporation Commission order of 1973, regarding cost of service pricing in determining telephone rates. In 1975, the Commission relied upon the 1973 order to gauge the reasonableness of a Mountain State's rate proposal. However, the 1973 order evinced no more than an intention to move toward a cost of service principle of pricing at some indefinite time. Therefore, the Court properly ruled that, as required by due process, the order did not constitute a reasonably definite notice of the subject matter attributed to it by the Commission. **Id.** at 340, 563 P.2d at 603.

{17} In contrast to the order in **Mountain States,** NCCI was given specific notice of the hearing's subject matter. The November 15 notice alerted NCCI that the December 10 hearing would focus on whether the proposed average 37.1 percent premium increase was excessive, inadequate or unfairly discriminatory. Further, the notice clarified those terms by adapting the definitions provided under Section 59A-17 6.

{18} More importantly, the Superintendent's notice served a different function than the order at issue in **Mountain States.** The **Mountain States** order supposedly notified Mountain States of established rate-making methods by which Mountain States was expected to conform its rate proposal. Here, the November 15 notice served to inform all interested parties that written and oral comment would be received at a public

hearing to discuss whether the proposed filing was excessive, inadequate or unfairly discriminatory.

{19} NCCI claims that the notice was insufficient because NCCI was not informed prior to the hearing that the Board would request audited premium schedules, investment income data, and calculations based upon an eight to ten-year insurance cycle as opposed to a two-year cycle. NCCI would have this court conclude that notice under Section 59A-17-14(B) requires the Superintendent to specifically notify the rate maker of all issues which may arise during the hearing. Other than **Mountain States,** the authority relied upon for this proposition is **Woody v. Denver & Rio Grande Railroad Co.,** 17 N.M. 686, 132 P. 250 (1913) and **Transcontinental Bus System, Inc. v. State Corp. Commission,** 56 N.M. 158, 241 P.2d 829 (1952) (where the Court addressed the Commission's improper reliance on evidence adduced outside of the record, and sufficiency of notice was not at issue).

{20} In **Woody,** the Court reviewed a Corporation Commission order requiring the railroad to install a telegraph operator at one of its stations. The Commission issued the order following a hearing whose notice identified the adequacy of station facilities for accommodating passengers as the issue to be addressed. The Court concluded that the order went outside the noticed subject matter because the Commission could only require a telegraph operator for safety reasons and the hearing's notice made no mention of safety as the subject matter. **Woody,** 17 N.M. at 693, 132 P. at 253. Here, the notice clearly identified the subject matter to be considered and the order was consonant with the subject matter addressed.

{21} The November 15 notice satisfied the requirements of Section 59A-17-14(B) and comported with procedural due process. The notice provided NCCI an opportunity to be heard by reasonably informing NCCI of the matters to be addressed at the hearing so that it was able to meet the issues involved. **See Jones v. New Mexico Racing Comm'n,** 100 N.M. 434, 671 P.2d 1145 (1983). The Superintendent mailed written notice to NCCI that specified that the hearing would entail the review of the proposed premium increase under relevant statutory criteria, (see Footnote 1 for text of notice), and provided NCCI twenty-five days for preparation.

{22} We recognize that due process could be denied where statutory notice, although technically adequate, was shown to mislead or prejudice the complaining party. Conversely, if, in addition to statutory notice, a party had actual knowledge of the details to be inquired into at the hearing, that would support the reasonable conclusion that there was no violation of procedural due process. **See North State Tel. Co. v. Alaska Pub. Util. Comm'n,** 522 P.2d 711 Alaska (1974). Prior to the hearing, Mr. Kaur requested investment income data, standard premium callsheets and schedule rating information. The Superintendent's October 31 letter to NCCI and the requests of Mr. Kaur, along with the November 15 notice, provide substantial evidence to support the district court's finding that NCCI was given adequate notice of the subject matter to be addressed at the hearing.

{23} Change in Format of Proceedings. It is also argued that the Board violated due process by changing the format of the proceedings from an informal information-gathering process to a formal rate hearing. After the hearing started, the Board stated that "we are going to proceed as if this is a formal rate hearing." NCCI submits that this statement represented an abrupt and arbitrary change in the nature of the hearing and that, as a result, it suffered prejudice. **See Medical Malpractice Ins. Ass'n v. Lewis,** 112 Misc.2d 103, 445 N.Y.S.2d 1013 (1981) (where a statutorily mandated hearing was improperly denied on the basis of prior informal review proceedings).

{24} NCCI maintains that the November 15 notice of an "informal public hearing" induced it to prepare an informal presentation aimed at a lay audience. At the hearing, NCCI presented a non-technical overview using "net earned premium"

rather than the more technical "standard earned premium" which it had used in the filing itself. NCCI claims that had it received proper notice of the nature of the hearing it would have made a more detailed presentation using "standard earned premium."

{25} Thirteen days after NCCI filed its rate proposal, the Superintendent requested NCCI to be prepared to furnish additional information and to make a presentation of its filing. Through Mr. Kaur's inquiries, NCCI was made aware that the Board wanted to examine investment income, premium callsheets, and schedule rating data. The "informal" format designation cannot be construed to have limited the subject matter or significance of the proceedings. Although one objective of the hearing was solicitation of public input and a lay audience was to be in attendance, NCCI knew or should have known that its presentation needed to satisfy the regulatory body which had called the meeting to consider the rate filing.

{26} The statement of legal issues submitted for the record by NCCI a week prior to the December 10 hearing supports the reasonable inference that NCCI was aware that the hearing could culminate in the approval or disapproval of its rate filing. NCCI, however, maintained that under the statutes such a hearing could not be conducted by the Board.

> [T]he hearing on December 10 before the [Board] can only be for the purposes of information and discussion, not for approving or disapproving the rates themselves.
>
> If a hearing concerns possible disapproval of rates, then it must be conducted by the Superintendent, not the [Board] * * *. Whatever the review procedures may be, it is clear that the [Board] is not empowered by statute to conduct an initial hearing on a rate filing.

{27} NCCI reiterated its position at the hearing. In response, counsel for the Superintendent expressed a contrary statutory interpretation.[3] Following these statements, a discussion was held off the record; then it was announced that "we are going to proceed as if this is a formal rate hearing." Consequently, NCCI enjoyed the right to introduce evidence, to present its own witnesses, to cross-examine witnesses, and to present legal argument. The notice was quite clear that the rate filing was being considered in terms of statutory criteria and other relevant factors regardless of the informal or formal label given the hearing. The point raised by NCCI to the effect that the Board is empowered to do no more than informally receive comments has been addressed above under **Powers Of The Board In Relation To Its Secretary.**

[3] Mr. [Commissioner] ELLIOTT: Now, it is your understanding that this commission cannot act in an informal hearing, or is this commission considering your rates today?

MR. MARSHALL [for NCCI]: Mr. Chairman, I will address that in my opening remarks. It is our position that it is a matter of law that the proper forum to consider this rate increase was the superintendent of insurance. He has a specified time in which to act to disapprove the rates or they become effective. It is our position that the hearing today is an informal one to receive comments. That it is not a formal evidentiary hearing, and that it is basically for the purpose of receiving comments. It is our view that the statutes allow the rates to go into effect unless they have been disapproved after a formal hearing. That is our position.

MR. ELLIOTT: Now, Mr. Carlson [sic], you have a reply?

MR. CARLSON [sic]: Yes, Mr. Commissioner, we do. The insurance Board is given plenty [sic]—absolute control over the rate making process, and it is put in charge of it. This is a rate making issue, and specifically, it's put in charge of everything under article seventeen of our new insurance code. Now, article seventeen is the article pursuant to which this hearing is being held. So it is my opinion that the Board or the—that the Board may step in and exercise the superintendent's power in any rate making proceeding in the first instance.

With regard to the need for a formal hearing, the article seventeen doesn't say that a formal hearing is necessary to act on workmen's comp rates. It simply says that a hearing must be held before any rates are disapproved. So it is not—it is our opinion that—it is our position that a formal hearing does not have to be held. As long as the hearing that is held comports with due process, that is enough.

{28} No rule or regulation denigrates an informal hearing under the Code.[4] What is essential to due process is the reasonableness of notice and procedures followed. **McCoy v. New Mexico Real Estate Comm'n,** 94 N.M. 602, 614 P.2d 14 (1980). From the notice received, NCCI had no reason to believe that the labeling of the hearing as informal diminished its obligation to demonstrate that its rate filing satisfied the requirements of Article 17 or that the labeling meant due process would be absent.

{29} Furthermore, although NCCI claims that it was unprepared for both the style and the scope of the hearing, the record indicates otherwise. NCCI presented two expert witnesses to promote its case, which was presented by both out-of-state and in-state counsel. NCCI has demonstrated no actual prejudice as a result of the Board's actions. **See Jones,** 100 N.M. at 436, 671 P.2d at 1147. We find no merit to its argument that its due process rights were violated.

{30} Time Constraints of Order's Effect. Under Section 59A-17-14(B), an order disapproving a filing must allow a reasonable period before the filing is deemed no longer effective. The order disapproving the filing was issued on December 23 and was to take effect on December 31. NCCI argues that this eight day period was not reasonable especially because it transpired during the Christmas holidays. NCCI recognizes that the statute does not define "a reasonable period" but maintains that, under the circumstances, four working days was insufficient to either recall the rate change or obtain judicial review of the disapproval.

[4] Sections 59A-4-16(E) and 59A-4-18 provide for informal hearings, to be held in accordance with rules and regulations that may be promulgated in accordance with Section 59A-2-9. There is no record of any specific rules and regulations that govern the administration of informal hearings before the Board or the Superintendent acting as Secretary of the Board. On motion for rehearing, NCCI raises issues of specific application of Rules of Procedure of the New Mexico State Corporation Commission. However, we do not find that these rules were made applicable to the Board or that the hearing before the Board was a Commission hearing to which these rules applied. Accordingly, we have not reached the merits of the arguments made in reference to those rules.

{31} The presumption, however, is that the Board's decision was reasonable. **See Garcia,** 94 N.M. at 177, 608 P.2d at 153 (quoting **Quinlan v. Board of Educ. of North Bergen Township,** 73 N.J. Super. 40, 179 A.2d 161 (1962)). Aside from its argument about the holidays, NCCI has shown nothing to rebut that presumption. This Court does not know what premiums were due forthwith on January 1, nor what was needed to be done in four working days to effectuate the Board's order. We note that NCCI could have moved immediately to stay the order and to place in escrow any premiums received after December 31, until a final determination on the Board's order was made by the district court. **See** § 59A-17-35. NCCI also complained it did not have time to cure the defects outlined by the Board in its findings, conclusions and order. However, NCCI was not prohibited from refiling had those defects been cured.

{32} Lack of Specificity of Order. NCCI also claims that the order failed to identify sufficiently the filing's shortcomings. NCCI contends that the Board's order fails to provide guidance to it for future rate filings. NCCI cites **Blue Cross of Kansas, Inc., v. Bell,** 227 Kan. 426, 607 P.2d 498 (1980), for the proposition that an order merely finding fault with a rate filing in general terms of the statute is not sufficient. **See also Nationwide Mut. Ins. Co. v. Commonwealth,** 15 Pa. Commw. 24, 324 A.2d 878 (1974).

{33} In **Blue Cross of Kansas, Inc.,** the Commissioner of Insurance disapproved twenty-one separate rate filings by drafting twenty-one separate letters which gave identical reasons for disapproving each of the twenty-one filings. Each letter contained four brief conclusional statements. There was no expression of the basic facts upon which the Commissioner premised his decision. 227 Kan. at 434, 607 P.2d at 504.

{34} The Board's findings and conclusions do not suffer from the infirmities present in the Commissioner's letter decisions in **Blue Cross of Kansas, Inc..** The Board's December 23 order detailed the evidence upon which it rested its decision to disapprove the filing. The order was

sufficiently specific, if not quite explicit, in giving guidance to NCCI for amending its future rate filings.[5]

SUBSTANTIVE STANDARDS

{35} Statutory Presumption Under § 59A-17-6. In addition to allegations of procedural errors, NCCI maintains the Board failed to abide by substantive standards for reviewing a filing. Initially, NCCI claims that the Board disregarded the statutory presumption that rates in a competitive market are not excessive. **See** § 59A-17-6. However, this statutory presumption is inapplicable in determining workers' compensation rates. § 59A-17-6(F).

{36} Nonetheless, NCCI maintains that the Board should have recognized the presumptions under Section 59A-17-6 because the November 15 notice quoted verbatim from that section. However, the notice did not quote verbatim but only adapted language from Section 59A-17-6 in order to clarify the terms "excessive" "inadequate" and "unfairly discriminatory." Nowhere within the notice did the Superintendent indicate that the filing would be examined under the standards of Section 59A-17-6, nor would it have been proper under the prohibition of Section 59A-17-6(F) had the Superintendent done so.

[5] In the Board's findings, conclusions and order, the Board made the following pertinent findings:

8. At the hearing the Council presented charts in support of the Filing which contained information based on Net Earned Premium. The Council's actuary, Mr. Kevin MacAllister, conceded that Net Earned Premium was not an appropriate basis for and was not relevant to this workmen's compensation rate-making proceeding. Mr. MacAllister stated that only Standard Earned Premium was relevant to the determination of rates in this proceeding.

10. The company "General Expense" percentage and calculations in the filing are based on stock insurance companies. Mr. MacAllister was unable to explain to the Commission's satisfaction why general expenses of insurance companies should not be derived from both stock and mutual companies, particularly when other expenses are derived from both classes of companies.

11. New Mexico permits deviations from Standard Earned Premium on a number of bases, including scheduled rating. Scheduled rating is distinguishable from other types of premium deviations in that it can vary with each and every policy issued.

12. The Superintendent's actuary, Allen Kaur, testified that he had never received a satisfactory verifiable answer to his question as to how the Council assured that schedule rating discounts were converted to Standard Earned Premium. Mr. Kaur explained that this question presented substantial problems in his ability to evaluate the Filing, because without an assured uniform method of conversion, the accuracy of the Standard Earned Premium figure could not be verified. Mr. Kaur stated in response to a hypothetical that the impact of widespread failures to convert scheduled rating discounts to Standard Earned Premiums could result in millions of dollars inaccuracy [sic] and underreporting of the Standard Earned Premium figure used in the Filing.

13. The Council's Mr. Mark Mulvaney acknowledged that no actual audits of companies were being performed to verify that scheduled rating discounts were in fact being properly converted for the 1983 policy year used as a base for the filing. The Insurance Board does not see how the appropriateness of any statistical method can be verified without such an audit.

14. Mr. Allen Kaur stated that he had requested the Standard Earned Premium call sheet from the Council, and that it had not been made available to him. Mr. Kaur stated that this material was needed to verify the Standard Earned Premium used in the Filing.

18. The New Mexico Trial Lawyer's Association's actuary, Mr. Robert Lowe, testified that a large portion of the 37.1% average rate increase proposed in the filing was attributable to development factors. The use of development factors is necessitated by the need to use recent loss information which is necessarily incomplete. However, development factors in this Filing were based on only a short time span. According to Mr. Lowe the insurance industry is cyclical, and this should have been, but was not, considered in establishing development factors in the Filing. The current cycle is now seven to eight years long. The development factors used in this Filing are based on a much shorter period of time, **viz** two years, whereas an entire cycle like the current one would be about ten years long.

19. Mr. Lowe stated that the proposed rate increases in the Filing were based only on losses attributable to benefits. Nonetheless, the rate of increase necessitated by benefits alone was applied to company expenses. Mr. Lowe stated that company expenses did not necessarily increase at the same rate as loss payments. Excluding the 37.1% company expense increase would alone reduce the average rate increase requested in this proceeding from 37.1 to 26.6%, according to Mr. Lowe.

21. Insurance company expenses, and general expenses in particular, are not necessarily tied to the cost of benefits. There is no support in the record for an increase in Company general expenses which is exactly proportionate to the projected increases in benefits to be paid out.

23. One witness stated that rate requests should be based only on those companies which are the best performers, not on all companies.

24. No information concerning company investment income was supplied relating investment income to or showing its impact on the filing. The Notice of Hearing specifically stated that investment income would be considered in connection with the adequacy or inadequacy of rates.

{37} Investment Income. NCCI next maintains that the Board improperly demanded investment income data from NCCI. NCCI refused to submit such data because NCCI interpreted Section 59A-17-8, which pertains solely to workers' compensation rate making, to preclude the Board from obtaining it. NCCI supports this interpretation by comparing Section 59A-17-8 to Section 59A-17-7, which details rate making for types of insurance other than workers' compensation. According to NCCI, the most significant distinction between the two sections is that Section 59A-17-7 allows consideration of investment income and Section 59A-17-8 makes no mention of it. Further, NCCI argues that, by including "underwriting profit" in the calculation of workers' compensation rates, the legislature intended to exclude investment income from consideration. **See Insurance Dep't v. City of Philadelphia,** 196 Pa. Super. 221, 173 A.2d 811 (1961).

{38} NCCI's argument fails to address the legislature's directive to give due consideration "to all other relevant factors." **See** § 59A-17-8(A)(1). Recently, the Oklahoma Supreme Court in **State ex rel. Turpen v. Oklahoma State Board for Property and Casualty Rates,** 731 P.2d 394 (Okla.1986), did address a similar statutory directive as applied to the same fact situation presently before this Court. In determining that investment income was a relevant factor, the court stated that "[t]he necessity for disclosure of information on investment income becomes even more clear in light of the industry-recognized axiom that money is made from investments, not underwriting." **Id.** at 403-404. In recent years, the insurance industry has been engaging in cash flow underwriting whereby insurers write risks without regard to underwriting profits, in the expectation of making a profit through investments. **See Massachusetts Auto. Rating and Accident Prevention Bureau v. Commissioner of Ins.,** 384 Mass. 333, 424 N.E.2d 1127 (1981).

{39} The Oklahoma court assessed the relevancy of investment income under a statute which, unlike New Mexico's, calculated inadequacy of rates by whether continual use of such rates endangered the solvency of the insurer. **Oklahoma State Bd. for Property and Casualty Rates,** 731 P.2d 394, 403. Nonetheless, given the mandate to consider **"all other relevant factors"** to determine the propriety of proposed workers' compensation premiums, we believe it was likewise within the New Mexico Insurance Board's power to request NCCI to submit investment income data under Section 59A-17-8.

{40} If the legislature had intended to exclude investment income from "all other relevant factors," it could have done so explicitly. Instead, it left as a function of the Board to determine what factors may be relevant. We reject the argument that inclusion of a factor in a section not applicable to workers' compensation necessarily, by some rule of logic or construction, makes that factor irrelevant to workers' compensation rates.

{41} Company Expenses. NCCI also maintains that the Board improperly considered NCCI's calculation of insurance company expenses. NCCI relies upon Section 59A-17-8(A)(2), which recognizes that expense provisions may differ to reflect varying operating methods of insurers or groups of insurers. Further, it is argued, Section 59A-17-14(D) prohibits using expense provisions as a grounds for disapproving a rate filing.

{42} Section 59A-17-14(D) precludes disapproval of a rating plan on grounds that it establishes standards for measuring variations in expense provisions, **provided that the rates thereby produced meet the applicable requirements of Article 17.** It is questionable whether this section applies to NCCI's objection to the Board's consideration of projected company expenses. NCCI failed to show this Court that the Board based its disapproval upon the rate filing's inclusion of specific standards of measuring variations in expense provisions. What's more, the rates produced by use of given expense provisions must meet the applicable requirements of Article 17. According to expert testimony, NCCI applied an erroneous

percentage of increase to company expenses because company expenses do not necessarily increase at the same rate as loss payments. The Board concluded that there was no support in the record to substantiate NCCI's projected increase in company expenses. Under Section 59A-17-14(D), the Board properly could consider the accuracy of NCCI's projection for company expenses in determining whether the rate proposal was excessive, inadequate or unfairly discriminatory.

{43} Underwriting Losses. Equally without merit is NCCI's contention that the Board ignored massive underwriting losses contrary to Section 59A-17-8(A)(1). In refusing to approve the rate increase, the Board primarily based its decision upon the inadequacy of data submitted by NCCI in support of its filing. Although NCCI presented evidence that insurers were incurring significant underwriting losses in New Mexico, that did not preclude the Board from disapproving the filing because of other deficiencies in information, such as investment income, which would affect the materiality of underwriting losses. **See Public Serv. Co. of New Mexico v. New Mexico Envtl. Improvement Bd.,** 89 N.M. 223, 549 P.2d 638 (Ct. App.1976).

{44} Burden of Proof. NCCI further asserts that the Board applied the incorrect burden and standard of proof in disapproving the rate filing. NCCI maintains that in a proceeding to cancel previously approved rates the burden falls upon the party opposing the rates to prove they violate the statutory requirements. **See Insurance Dep't v. City of Philadelphia,** 196 Pa. Super. 221, 173 A.2d 811 (1961). Section 59A-17-14(B), however, is silent on who has the burden of proof to demonstrate that an effective filing fails to satisfy the requirements of Article 17. To support its argument, NCCI directs our attention to case authority from North Carolina, Pennsylvania and Wyoming.

{45} NCCI misplaces reliance upon **State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau,** 40 N.C. App. 85, 252 S.E.2d 811, **cert. denied,** 297 N.C. 452, 256 S.E.2d 810 (1979). There, the court stated that, in disapproving a rate filing, the Commissioner's decision must be based upon an affirmative showing that the filing fails to comply with statutory standards. **Id.** at 102, 252 S.E.2d at 822. This statement addressed substantial evidence on the entire record, not burden of proof. "[T]he new statutory scheme ["file and use" procedure] does not shift the ultimate burden of proof from the [rate maker] to the Commissioner." **Id.** at 96, 252 S.E.2d at 819. **See also State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau,** 300 N.C. 381, 455, 269 S.E.2d 547, 592 (1980) ("[T]he underlying burden of proving the need and reasonableness of a rate increase rests upon the [rate maker].").

{46} In **Mortgage Guaranty Insurance Corp. v. Langdon,** 634 P.2d 509 (Wyo.1981), the court ruled that once the filing becomes effective the burden falls upon anyone complaining against the rates, including the Commissioner, to demonstrate that they are wrong. **Id.** at 519. The authority cited for this proposition, however, undermines rather than supports this ruling. In **Massachusetts Medical Service v. Commissioner of Insurance,** 346 Mass. 346, 348, 191 N.E.2d 777, 778 (1963), the court held that the burden of furnishing adequate evidence to enable the Commissioner to establish the reasonableness of a rate proposal falls upon the rate maker. Similarly, in **Insurance Services Office v. Whaland,** 117 N.H. 712, 716, 378 A.2d 743, 747 (1977), the court stated that the burden rests upon the rate filer to furnish such data that supports the filing and that satisfies the Commissioner that the statutory requirements have been met.

{47} Only **Insurance Department v. City of Philadelphia,** 196 Pa. Super. 221, 173 A.2d 811 (1961), speaks to a shifting of the burden of proof once a rate filing becomes effective. However, **City of Philadelphia** is distinguishable on its facts. In **City of Philadelphia,** the Commissioner found no reason to disapprove the filing. After the new rates went into effect, the city complained about the rate increase. The inquiry, therefore, focused upon who had the

burden to prove that the Commissioner erred in approving a rate proposal. The court held that the burden was upon the city to show that the new rates were not in accordance with statutory requirements.

{48} Unlike **City of Philadelphia,** we must resolve whether the procedures for disapproving a filing after it has become effective (§ 59A-17-14(B)) required the Board to prove the filing failed to satisfy statutory requirements, as opposed to requiring NCCI to prove the filing satisfied Article 17. We find persuasive those authorities which recognize that the burden of proof falls upon the rate maker. **See Massachusetts Medical Serv. v. Commissioner of Ins.,** 346 Mass. 346, 191 N.E.2d 777 (1963); **Insurance Servs. Office v. Whaland,** 117 N.H. 712, 378 A.2d 743 (1977); **State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau,** 300 N.C. 381, 269 S.E.2d 547 (1980); **State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau,** 40 N.C. App. 85, 252 S.E.2d 811, **cert. denied,** 297 N.C. 452, 256 S.E.2d 810 (1979). Notwithstanding an effective filing, absent an express legislative mandate to the contrary, **see State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau,** 300 N.C. at 454, 269 S.E.2d at 592, we will not infer that the burden shifted to the Board to prove that the filing did not satisfy the requirements under Article 17.

{49} NCCI also claims that, by requesting the data and information discussed above, the Board applied a standard of perfection against the rate filing, instead of applying the preponderance standard. NCCI argues that, by ruling against the filing because of perceived imperfections in the supporting data, the Board failed to evaluate the filing by a preponderance of the available evidence. NCCI maintains that it provided the Board with all the information it could muster. However, NCCI took issue with the Board's request for investment income data, standard premium callsheets, and schedule ratings. The Board reasonably found that, more likely than not, it was missing data that was necessary to accurately assess the rate filing.

SUBSTANTIAL EVIDENCE

{50} Expert Opinion on Ultimate Facts. NCCI claims no expert testified that the rate increase was excessive or that there was too little information to assess the filing. No such direct testimony was required. The Board's function was to make the ultimate decision based on the evidence heard and upon its own expertise. The order recited the Board's reasoning and the record upon which it made its decision. **See Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n.,** 93 N.M. 546, 603 P.2d 285 (1979). Our review of the whole record convinces us that substantial evidence exists to support the reasonableness of the Board's decision to disapprove the rate filing.

{51} Unsworn Testimony. During the hearing, a number of individuals including then-Governor Anaya and certain state legislators spoke in opposition to the rate increase. NCCI argues that such conduct may be appropriate at an informational hearing, but it is inappropriate in a rate making hearing. **See Connecticut Blue Cross, Inc. v. White,** 31 Conn. Supp. 257, 328 A.2d 442 (1974). NCCI maintains that the Board erred by considering the testimony of those unsworn witnesses. In **Connecticut Blue Cross, Inc.,** the court stated that if evidence demonstrated that the Commissioner of Insurance was unduly or improperly influenced by the Governor or state legislators, the court would have cause to interfere. **Id.** at 265, 328 A.2d at 446.

{52} NCCI contends that the Board was unduly influenced by Governor Anaya and the state legislators, citing the Board's reference to the Governor's testimony in announcing its decision to disapprove the filing. There is nothing in the Board's order to support the claim that any undue or improper influence was exercised over the Board. One purpose of the hearing was to solicit public input. There certainly was no prohibition against the Governor and legislators voicing their opinions. **See id.** The Board's findings, conclusions and order made no reference to comments received from public officials but, rather, clearly demonstrates that the Board

rested its decision upon the testimony of expert witnesses who were under oath and subject to cross-examination.

CONFISCATORY ACTION

{53} Finally, NCCI contends that the Board's action was confiscatory and therefore unconstitutional. NCCI had the burden of proof to demonstrate the confiscatory nature of the current premium rates. NCCI's refusal to disclose investment income data foreclosed any such demonstration **See National Council on Compensation Ins. v. Superintendent of Ins.,** 481 A.2d 775 (Me.1984). **See also Massachusetts Auto. Rating and Accident Prevention Bureau v. Comm'r of Ins.,** 384 Mass. 333, 424 N.E.2d 1127 (1981).

{54} The Board's December 10 hearing complied with the statutory requirements of Article 17 and due process. On the record as a whole, there is substantial evidence to support the district court's order affirming the Board's decision to disapprove NCCI's rate filing. We affirm.

{55} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

TONY SCARBOROUGH,
Chief Justice, dissent

HARRY E. STOWERS, JR.,
Justice, dissent

DISSENT

SCARBOROUGH, Chief Justice.

{56} I respectfully dissent. We are concerned here with the question of procedural due process. The notice given to NCCI was inadequate and thus deprived NCCI of due process under law. Written notice of the public hearing provided for an "informal public hearing * * * to receive written and oral comments of interested persons concerning proposed workmen's compensation rate increases."

{57} Before the start of the hearing, Victor Marshall, attorney for NCCI, addressed Commissioner Serna about NCCI's understanding of the nature of the hearing. The following dialogue is contained in the record:

> MR. MARSHALL: Before we start, my understanding, based on the notice is that this is an informal hearing to receive comments from anyone who wants to speak in this case. It is also my understanding that this is to be an informal procedure not bound by the usual rules of evidence and testimony, so on and so forth. Is that correct?
>
> MR. SERNA: That is correct, Mr. Marshall. If there is any comment that is to be made today that anybody wishes not to be put under oath, that's fine. I can't imagine anybody who wants to make any statement that is not truthful, though. Unless you have an objection, Mr. Marshall—
>
> MR. MARSHALL: No, I have no objection. I just wanted the nature of the proceeding clarified.

{58} After the proceedings had commenced and despite this discussion between Mr. Marshall and Mr. Serna about the nature of the hearing, Mr. Serna declared the rate hearing to be formal.

> MR. SERNA: We are going to proceed as if this is a formal rate hearing. So with that in mind, Mr. Marshall, you may proceed.

Mr. Marshall then made a timely objection to the inadequacy of notice and to the designation of the proceedings as a formal hearing. His objections are preserved in the record.

> MR MARSHALL: Thank you. Mr. Chairman and members of the Commission, my

> comments and objections on that point [proceeding as if it was a formal rate hearing] are in the record so I will just proceed.

{59} Mr. Marshall's objection was sufficient to preserve NCCI's right to this appeal. **See Wolfley v. Real Estate Comm'n,** 100 N.M. 187, 668 P.2d 303 (1983); **Duke City Lumber Co. v. New Mexico Envtl. Improvement Div.,** 101 N.M. 301, 681 P.2d 727 (Ct. App.1983); rev'd 101 N.M. 291, 681 P.2d 717 (1984), on remand 102 N.M. 8, 690 P.2d 451, (1984) **cert. quashed** 101 N.M. 741, 688 P.2d 778 (1984).

{60} The majority characterizes the transformation of the hearings as a "change in format." An abrupt change from an informal to a formal hearing cannot afford a party the procedural protections required by due process of law. Nowhere in the written notice was Marshall or NCCI advised that the informal or even the formal rate hearing would result in a ruling on the merits of the NCCI claim. There was no indication that formal testimony was to be taken, only that "comments of interested persons" would be heard. Contrary to the views of the majority, **Jones v. New Mexico State Racing Comm'n,** 100 N.M. 435, 671 P.2d 1145 (1983) does not support the proposition that NCCI was afforded due process with respect to notice. The oral notice at the hearing that transformed the hearing from an informal one to a formal one lacks the specificity required to give NCCI reasonable notice required by due process. "It is well settled that the fundamental requirements of due process in an administrative context are 'reasonable notice and opportunity to be heard and present any claim or defense.'" **Id.** at 436, 671 P.2d at 1146 (**citing McCoy v. New Mexico Real Estate Comm'n,** 94 N.M. 602, 604, 614 P.2d 14, 16 (1980)). It is generally recognized that the notice must be sufficiently in advance of the hearing to afford a party a reasonable opportunity to prepare an answer, defense, or to summon witnesses. **See McCoy,** 94 N.M. at 603, 614 P.2d at 15.

{61} At the very minimum, due process of law contemplates that litigants must be notified they are facing a ruling on the merits of the respective claim and issues raised by the parties. In this case, the opportunity to present exhibits was never mentioned in the notice. Witnesses, other than "interested persons" were not mentioned. In fact, the list of witnesses who testified reveals that few experts testified. Witnesses included the Governor, NCCI's two witnesses, three state senators, various individuals representing corporations, and members of the public. The thirty public witnesses were afforded three minutes each to testify. In this case, notice of informal proceedings was certain to mislead any attorney who would then be unprepared to present a formal case because of the inherent procedural and evidentiary differences between formal and informal hearings. **See Savina Home Indus. v. Secretary of Labor,** 594 F.2d 1358 (10th Cir. 1979).

{62} Formal hearings differ from informal hearings in that formal hearings contain procedural safeguards that informal ones do not. Formal rules of procedure and evidence are used during formal hearings, witnesses are cross-examined, and exhibits introduced. **Matter of Protest of Miller,** 88 N.M. 492, 496, 542 P.2d 1182, 1186 (Ct. App.1975), reh'g denied, **cert. denied,** 88 N.M. 492, 542 P.2d 1182 (1975).

{63} After concluding that notice was sufficient, the majority states that "[t]he 'informal format' designation cannot be construed to have limited the subject matter or significance of the proceedings." The facts set forth in the opinion do not fully develop the issue, but when the record is viewed in its entirety, I must conclude that the statement is wrong. Both the subject matter and the significance of the proceedings were limited by the written notice and the understanding of the participants that there would be only an informal public hearing "to receive written and oral comments of interested persons." Such was the perception of NCCI in calling only two expert witnesses. Although some exhibits were received in evidence, they were not entered in the fashion required for a formal hearing, as was indicated by Mr. Marshall's objection:

> MR. MARSHALL: If we could just note for the record that these exhibits are being

handed to us for the first time as they are being given to the witness.

MR. SERNA: The record will so note that.

MR. MARSHALL: I would like to note while we have a lull, this entire line of questioning, all these questions would be objectionable if we were proceeding under strict rules of procedure and evidence. * * *

MR. CARLSON: I would like to ask Mr. Marshall what the basis of his objection is for the record.

MR. MARSHALL: Leading, assumes facts not in evidence. Assumes facts without substance. Basically, attempts to have the lawyer testify rather than the witness. Lack of foundation for—a lack of preliminary foundation for each and every one of the questions that has been asked. Assuming hypotheticals not supported by any evidence in the record.

Clearly, although Commissioner Serna declared the hearing to be a formal one, proper formal procedures were not observed.

{64} The gravity of the proposed actions dictates that there should not have been merely an informal hearing, and that adequate notice of the formal hearing should have been afforded all the parties. However, nothing in this dissent should suggest what result the State Corporation Commission should reach after a full hearing on the merits is afforded to the appellant. This case should be reversed and remanded to the State Corporation Commission with instructions to afford NCCI a hearing on the merits of its claims and defenses.

STOWERS,
Justice, joins in dissent.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-042

Filing Date: May 25, 1988

Docket No. 17,488

PHILLIP CORDOVA and CORDY CORDOVA, his wife,

Petitioners,

v.

JOHN L. BROADBENT, et al.,

v.

ARROYO HONDO ARRIBA COMMUNITY LAND GRANT ASSOCIATION,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI,
JOSEPH E. CALDWELL, District Judge.

White, Koch, Kelly & McCarthy,
Sumner S. Koch,
John F. McCarthy, Jr.,
Santa Fe, NM,

for Petitioners.

Lopez, Chavez & Graham, P.C.,
Santiago R. Chavez,
Taos, NM,

for Respondent.

OPINION

SCARBOROUGH, Chief Justice.

{1} Phillip Cordova and his wife, Cordy Cordova, brought suit against all possible claimants to quiet title to 126.562 acres in Taos County. The trial court quieted title in the Cordovas, and an intervening land grant organization, the Arroyo Hondo Arriba Community Land Grant Association, appealed. The Court of Appeals reversed the trial court finding standing in the association, ordered that the Cordovas petition be dismissed, and awarded costs of the appeal to the association, holding the Cordovas' had shown insufficient color of title to prove title to the land. We issued a writ of certiorari to the Court of Appeals. We reverse the Court of Appeals opinion on the standing issue and reinstate the Cordovas' quiet title decree.

{2} Cordova argues that defendant, Arroyo Hondo Arriba Community Land Grant Association, is not a duly constituted community land grant board or committee and has no standing to assert title to the disputed land. In connection with this argument, the trial court found that the association's predecessor defendant, San Antonio Cooperative, Inc., failed to appear at the trial of this case and default was entered by the court against the cooperative. The trial court also found that the association's board of trustees had not called an election by its members or the trustees as required by law and had "not identified the persons having an interest in the lands claimed by the association who have a right to vote at an election and the treasurer had not furnished a surety bond." Whether a board is a Spanish land grant board organized under Section 49-1-1 to -21, or is incorporated under territorial authority pursuant to Section 49-2-1 to -18, the members of the board must be duly elected. NMSA 1978, §§ 49-1-5, 49-2-3 (Orig. Pamp.). And, the board must hold regular meetings. NMSA 1978, §§ 49-1-9, 49-2-7. In light of these requirements and the trial court's rulings, we are struck by the fact that the association failed to challenge in the Court of Appeals the trial court's findings and conclusions on the issue of standing. Unchallenged trial court findings and conclusions are binding on appeal. **Alfred v. Anderson**, 86 N.M. 227, 522 P.2d 79

(1974). As a consequence of such an omission, the trial court's decision that the association was a non-party was final, and the association was not entitled to an appeal. The Court of Appeals felt otherwise and in fact, reversed the trial court on the standing issue. We hold that the trial court correctly concluded that the association lacked standing as a land grant community or board to assert a claim of title to the lands at issue in the case. We now reverse the Court of Appeals and reinstate the ruling of the trial court on this issue.

{3} Our ruling on the standing issue effectively disposes of this appeal. Because the Court of Appeals erred in this regard, its decision is reversed and the decision of the trial court is reinstated and affirmed.

{4} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice,

HARRY E. STOWERS, JR.,
Justice

MARY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-043

Filing Date: May 27, 1988

Docket No. 17,303

LOS ATREVIDOS, a New Mexico Limited Partnership, and L.E. MEYER COMPANY, a New Mexico Corporation,

Plaintiffs-Counterdefendants-Appellees,

v.

PREFERRED RISK LIFE INSURANCE COMPANY,

Defendant-Counterclaimant-Appellant.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, ART ENCINIAS, District Judge.

White, Koch, Kelly & McCarthy,
Kevin V. Reilly,
Santa Fe, New Mexico,

for Appellant.

Sommer, Udall & Hardwick,
Kimball R. Udall,
Santa Fe, New Mexico,

for Appellees.

OPINION

SCARBOROUGH, Chief Justice.

{1} Los Atrevidos and L. E. Meyer brought suit against Preferred Risk for a declaratory judgment on an agreement to sell real estate. Preferred Risk appeals from an adverse judgment of the district court of Santa Fe County. We affirm.

{2} Atrevidos, a New Mexico limited partnership, is the successor in interest on a deed of trust and a promissory note for the purchase of real property located in Durango, Colorado. Preferred, which held title to the property, is a Colorado corporation authorized to do business in New Mexico. Atrevidos sold its interest in the subject property to L. E. Meyer, a New Mexico corporation. Because it did not obtain prior approval for the transfer, thereby breaching the terms of the deed of trust, Atrevidos tendered a check to Preferred, that totalled $185,166.72 to cover the principal plus interest calculated per day through the date Preferred would receive the tender. Accordingly, Atrevidos requested the release of the deed of trust. Preferred refused the tender, returned the check, and demanded an additional five percent fee pursuant to an allegedly enforceable prepayment provision in the contract. Atrevidos retendered its earlier check, which Preferred again refused on the same condition. Again, Atrevidos retendered its earlier check, stating its unequivocal disagreement with Preferred's claimed right to the penalty. Preferred then cashed the check with a restrictive endorsement that stated, "All rights reserved by Preferred Risk Life Insurance Co.", and later informed Atrevidos by letter that it would not release the deed until additional amounts were paid, totalling $29,572.88 ($4,000 in interest, $18,403.69 for the difference between the current loan rates and the amount payable under the note, and $9,201.05 for prepayment penalty). Both parties again restated their positions. This lawsuit ensued whereby Atrevidos requested the court to order release of the deed and Preferred counterclaimed for a declaration that the additional amounts were owing.

{3} Atrevidos argues that it offered the check to Preferred with the condition that it was in full settlement of its debt, thus, Preferred's cashing the check amounted to an accord and satisfaction. Preferred does not argue that it was unaware of the condition Atrevidos placed on the tender,

rather it argues that by placing a restrictive endorsement on the check, Preferred reserved its rights to demand further payment from Atrevidos.

{4} The sole issue before our Court is whether the condition imposed by a debtor on an offer tendered in full satisfaction of the debt that is accepted by the creditor controls the transaction, or whether the creditor may alter the condition. We hold that when an offer is tendered with the condition that it is in full satisfaction of a debt, and the creditor accepts the offer, the condition controls the transaction, regardless of the creditor's attempt to alter the condition upon acceptance.

{5} By agreement of the parties, Colorado law applies. We note that the Colorado law on accord and satisfaction does not differ from the general law on the subject. The principle of accord and satisfaction was well set forth by the Supreme Court of Colorado in the case of **Pitts v. National Independent Fisheries Co.,** 71 Colo. 316, 206 P. 571, 34 A.L.R. 1033 (1922). There, the court stated:

> In order to constitute an accord and satisfaction, it is necessary that the money should be offered in full satisfaction of the demand, and be accompanied by such acts and declarations as amount to a condition that the money, if accepted, is accepted in satisfaction; and it must be such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions.

Id. at 316, 206 P. at 571 (citing 1 C.J. **Accord and Satisfaction** § 80 (1914); **Board of Comm'rs of Rio Grande County v. Hobkirk,** 13 Colo. App. 180, 56 P. 993 (1899). This principle has not been altered by subsequent cases. **See Anderson v. Rosebrook,** 737 P.2d 417 (Colo.1987); **See also Warren v. New York Life Ins. Co.,** 40 N.M. 253, 261, 58 P.2d 1175, 1180 (1936).

{6} Accord and satisfaction is not possible when the amount in question is liquidated. We agree with Preferred that a party cannot "unliquidate" an amount by filing a lawsuit. However, a liquidated amount is one determined by agreement of the parties or by operation of law. Black's Law Dictionary 838 (5th ed. 1979). The deed provision dealing with acceleration of the unpaid balance on default is ambiguous. The circumstances giving rise to the litigation appear not to have been contemplated by the parties. There is a dispute over the amount of the unpaid balance. When an amount is disputed, it is not liquidated. **See Stanley-Thompson Liquor Co. v. Southern Colorado Mercantile Co.,** 65 Colo. 587, 178 P. 577 (1919); **See also Frazier v. Ray,** 29 N.M. 121, 127, 219 P. 492, 495 (1923). We conclude that because the amount owed by Atrevidos was disputed, and therefore not liquidated, the acceptance of the payment constituted an accord and satisfaction.

{7} We find no merit to Preferred's argument that the check from Atrevidos should have been noted "payment in full" in order to meet the legal requirements for accord and satisfaction. The applicable law is clear that the test is whether "the party to whom * * * [the tender] is offered is bound to understand therefrom that, if he takes it, he takes it subject to such conditions." **Pitts,** 71 Colo. at 316, 206 P. at 571. The law does not require the tendered offer to be placed in a particular location or communicated in a particular manner, so long as the recipient understands its terms. **See First Nat'l Bank & Trust Co. v. Fireproof Warehouse & Storage,** 8 Ohio App.3d 253, 456 N.E.2d 1336 (1983). Here, Preferred clearly understood from the surrounding communications that Atrevidos was offering the payment in full satisfaction of its debt. Because Preferred knew of the condition, Atrevidos' notations on the check or lack thereof, were irrelevant.

{8} The dispositive issue, as stated by Preferred, is whether "[t]he negotiation by Preferred Risk of this check in this manner clearly indicates Preferred Risk's intention not to accept the check in full payment and not to waive any of its rights." In essence, Preferred attempted to alter unilaterally the tendered condition by placing a restrictive endorsement on the check and then

informing Atrevidos that additional amounts were owed. Preferred cites no authority for its position that such an alteration is legally binding on the offeror. We find the weight of authority to be to the contrary. Waiver of a tender condition is the prerogative of the debtor, and the debtor must clearly state that the condition is being waived. **See Hartline-Thomas, Inc. v. H. W. Ivey Constr. Co.,** 161 Ga. App. 91, 289 S.E.2d 296 (1982); **First Nat'l Bank & Trust Co. v. Fireproof Warehouse & Storage,** 8 Ohio App.3d 253, 456 N.E.2d 1336 (1983); 1 C.J.S. **Accord and Satisfaction** § 53 (1985). Because Atrevidos did not waive the condition, Preferred cannot now argue that the condition was in fact waived at the time the check was deposited. Thus, when Preferred deposited the check, it accepted the tendered offer and thus consummated an accord and satisfaction of Atrevidos' debt.

{9} There being no merit to the argument that Atrevidos' debt was not fully discharged when Preferred deposited the check, we reinstate the trial court's declaratory judgment that Atrevidos' debt to Preferred is paid in full and order the release of the deed of trust.

{10} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice.

RICHARD E. RANSOM,
Justice, specially concurs.

SPECIAL CONCURRENCE

RANSOM, Justice (specially concurring).

{11} I concur on separate grounds that the judgment of the trial court should be affirmed. Under the unambiguous language of the note and deed of trust **prepared by Preferred Risk,** no prepayment penalty applied to the principal and accrued interest owing in case of a conveyance to which Preferred Risk did not consent. I would not, however, support affirmance on the grounds of accord and satisfaction.

{12} Principal and accrued interest were due promptly in the event of a conveyance to which Preferred Risk did not consent. That fact was not contested by either party. Only an obligation to pay a prepayment penalty was contested. An accord and satisfaction, like any other valid contract, requires a consideration. When Los Atrevidos paid the principal and accrued interest it was paying a liquidated amount, **and no more,** as and when required by the note, all according to the claim of Los Atrevidos. There was, therefore, no consideration for the accord and satisfaction which Los Atrevidos claims was created on the prepayment penalty issue. **See Clark Leasing Corp. v. White Sands Forest Prods., Inc.,** 87 N.M. 451, 535 P.2d 1077 (1975) (the payment by obligor of a liquidated sum he is already legally bound to pay is not a sufficient consideration for the promise of the obligee to accept payment in satisfaction of an unpaid balance that is in dispute). There is no showing that the law of Colorado applicable to this case is any different.

{13} General statements of law supporting the majority opinion are readily available. **See** 1 S. Williston, **A Treatise on the Law of Contracts** § 129 (Payment of Admitted Part of Unliquidated or Disputed Claim) (3d ed. 1957); 6 **Corbin on Contracts** § 1289 (Discharge of Unliquidated Claim by Performance of a Part that is Admittedly Due) (1962). However, a review of the cases does not reflect general recognition of accord and satisfaction where (1) the amount tendered by the obligor is a liquidated sum not in dispute, (2) no more than the undisputed sum is tendered by the obligor and no claim is foregone by the obligor, (3) it is only the liability of the obligor for a liquidated balance that is in dispute, and (4) the tendered sum is accepted under protest. These four criteria are present in the instant case. In my opinion, there is no consideration to support an accord and satisfaction under such circumstances.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-047

Filing Date: June 3, 1988

Docket No. 17,564

HOTELS OF DISTINCTION WEST, INC.

Plaintiff-Appellant,

v.

CITY OF ALBUQUERQUE,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, WILLIAM W. DEATON, District Judge.

Grisham, Lawless & Earl,
Thomas L. Grisham,
Albuquerque, New Mexico,

for Appellant.

James H. Foley, City Attorney,
Edward R. Pearson, Assistant City Attorney,
Civerolo, Hansen & Wolf,
Richard C. Civerolo,
James J. Widland,
Albuquerque, New Mexico,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Hotels of Distinction brought a declaratory judgment action against the City of Albuquerque seeking to have a development agreement between the City and Albuquerque Plaza Partners declared unconstitutional, violative of city ordinances, and improperly enacted. Summary judgment was entered in favor of the City, and Hotels appeals. We affirm.

{2} The agreement in question was executed for the purpose of adding a first-class hotel to the Albuquerque Convention Center. Pursuant to the agreement, the Partners will construct the hotel, partially using funds received by the City from a federal Urban Development Action Grant (UDAG), which will be repaid by the Partners to the City. The grant allows the City to retain the funds provided the City utilizes the money for housing and community development activities as specified by federal guidelines associated with the grant. Additionally, the partners have authority under the agreement to select a hotel operator from a group of four national hoteliers. The selected operator then will have the right to operate a concession at the hotel in return for paying royalties to the City, and will have the right to use the Convention Center on a limited basis for promotional activities at no charge.

{3} Both parties moved for summary judgment. The trial court granted judgment for the City. The issue before this Court is whether there were genuine issues of material fact regarding:

> (1) whether the agreement between the City and the Partners violates the New Mexico Constitution;
>
> (2) whether the agreement violates certain City of Albuquerque ordinances; and,
>
> (3) whether City Resolution 77-1987 and the subsequent agreement at issue here are void because notice of final consideration was not published. We hold that the trial court was correct in granting summary judgment on all issues.

{4} Hotels' first issue is that the agreement violates article IX, section 14, and article IV,

section 32 of the New Mexico Constitution. Article IX, section 14, also known as the antidonation clause, has been construed by this Court to prohibit a municipality from aiding non-governmental enterprises. **See State ex rel. City of Albuquerque v. Lavender,** 69 N.M. 220, 365 P.2d 652 (1961); **State ex rel. Mechem v. Hannah,** 63 N.M. 110, 314 P.2d 714 (1957). However, contracts between municipalities and private enterprises that are beneficial to the community as a whole are not violative of article IX, section 14, when they do not involve municipal investment in the project through the lending of municipal funds. **See State ex rel. State Park & Recreation Comm'n. v. New Mexico State Authority,** 76 N.M. 1, 411 P.2d 984 (1966); **Village of Deming v. Hosdreg Co.,** 62 N.M. 18, 303 P.2d 920 (1956).

{5} This project is funded with ten million dollars in federal funds, approximately eighty-two million dollars in private funds and real estate, and three million dollars in public improvements to be constructed by the City. With regard to the federal contribution, Hotels argues that the City's channeling of federal funds to the project violates the antidonation clause. We do not agree. The antidonation clause prohibits the City to lend or pledge general municipal funds. Here, the City of Albuquerque is to receive ten million federal dollars for the express purpose of contracting for urban development in Albuquerque. The channeling of federal funds through the City does not violate the antidonation clause. Until the contractor commences repayment, those moneys do not become City funds. The trial court was correct in granting summary judgment on this issue for the City.

{6} The UDAG agreement provides that all federal money channeled through the City to the Partners shall be repaid to the City. The agreement between the City and the Partners allows the Partners to use the federal grant money without interest and with no obligation to repay for six years. Hotels argues that the payback agreement violates article IV, section 32 of the New Mexico Constitution. Insofar as may be applicable, that section provides that the payment of any debt owed or owing by any party to a municipality cannot be delayed or postponed by the legislature. It is apparent on its face that the asserted constitutional prohibition has no bearing whatever on this matter. No action by the legislature has occurred with respect to this project, and none is necessary or anticipated. The trial court correctly granted summary judgment on this issue.

{7} With regard to the City contribution to the project, Hotels argues that the three million dollars in public improvements violates the antidonation clause because at least a portion of the City's money is dedicated to the construction of improvements on the private property of the Partners. The antidonation clause clearly proscribes the lending of public funds for private purposes. The City's attorney admitted in open court, however, that its share of the project funds will be dedicated only to the construction of public improvements on public property. The antidonation clause is not violated by an expenditure of municipal funds for public purposes on public property. Therefore, we conclude the court was correct in granting summary judgment on this issue.

{8} Hotels' next issue is that the agreement violates several provisions of Albuquerque's ordinances. Hotels asserts that the City's initial request for bids on the project did not contain language that reflected the City's affirmative action policy, as contained in Revised Ordinances of Albuquerque 1974, Sections 5-2-1, 6 & 7. The cited sections ensure that the City will impose a duty upon contractors to solicit bids from construction firms owned by minorities and women. Hotels is not a minority- or women-owned enterprise and has no standing to raise this issue. The existing law on standing was set forth by our Court in **De-Vargas Savings & Loan Association of Santa Fe v. Campbell,** 87 N.M. 469, 535 P.2d 1320 (1975). There, we held that "to attain standing in a suit arguing the unlawfulness of governmental action, the complainant must allege that he is **injured in fact** or is **imminently threatened with injury, economically or otherwise." Id.** at 473, 535 P.2d 1324 (emphasis added). Here, Hotels has not argued that it was injured in fact

by the City's failure to include the affirmative action mandate in its request for proposals, nor has Hotels shown how inclusion would have avoided imminent threat to Hotels with economic or other injury. **See Runyan v. Jaramillo,** 90 N.M. 629, 632, 567 P.2d 478, 481 (1977). Hotels' nexus of a personal stake in the outcome of the controversy is missing. **State ex rel. Overton v. New Mexico State Tax Comm'n,** 81 N.M. 28, 33, 462 P.2d 613, 618 (1969). On the standing issue alone, summary judgment on the issue sought to be raised was correct.

{9} The agreement provides that the hotelier selected by the Partners will have the right to operate a concession at the hotel. Hotels asserts that this provision of the agreement violates Revised Ordinances of Albuquerque 1974, Section 5-18-15, which requires that all City purchases be approved by the City's Chief Administrative Officer. Concession contracts are exempt from Section 5-18-15 by reason of the express provisions of Section 5-8-17(O). The court was correct in granting summary judgment on this issue.

{10} Hotels' last issue is that they did not receive legal notice of the meeting at which Plaza Partners was selected as the project developer. Hotels' claim is based on the City's alleged violation of NMSA 1978, Section 3-17-3 (Repl. Pamp.1985), which requires notice by publication of any ordinance proposed for adoption by the City at least two weeks prior to such adoption. Hotels argues that City Resolution No. 289, which designated Plaza Partners as the project developer, was not published in accordance with Section 3-17-3. The City was not required to provide notice by publication of the proposed adoption of Resolution 289 because Section 3-17-3 applies only to ordinances and not to resolutions. Moreover, Hotels' representatives were present at the July 20, 1987 meeting at which the City adopted Resolution 289 and cannot complain about the lack of notice. Summary judgment on this issue was appropriate.

{11} Because we find Hotels' arguments without merit, we hold the trial court was correct in entering summary judgment on behalf of the City. We therefore affirm the judgment of the trial court in its entirety.

{12} IT IS SO ORDERED.

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-051

Filing Date: July 11, 1988

Docket No. 17,346

UNITED STATES FIRE INSURANCE COMPANY,

Plaintiff,

v.

AERONAUTICS, INC. and ROBERT CORN,

Defendants-Third-Party Plaintiffs-Appellants and Cross-Appellees,

v.

LEE ROY JONES, et al.,

Defendants.

RBS INSURANCE and BRAD PRETTI,

Third-Party-Defendants-Appellees and Cross-Appellants.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY,
RALPH W. GALLINI, District Judge.

Bozarth, Craig & Vickers,
Marion J. Craig, III,
Roswell, NM,

for Appellants.

Modrall, Sperling, Roehl, Harris & Sisk,
Benjamin Silva, Jr.,
Kevin T. Riedel,
Albuquerque, NM,

for Appellees.

OPINION

SCARBOROUGH, Chief Justice.

{1} United States Fire Insurance Company [USFIC] filed suit on January 10, 1984 against Aeronautics, Inc. and Robert Corn seeking a declaratory judgment that USFIC was not obligated under its policy of insurance to defend or indemnify aeronautics or to otherwise provide coverage for claims arising out of the crash of an aircraft rented from Aeronautics. Aeronautics and Corn filed a third party complaint against RBS Insurance Company and Brad Pretti, respectively, the insurance company and agent who sold them the USFIC policy, alleging that RBS and Pretti failed to procure coverage for aircraft rental operations requested by Aeronautics. The trial court dismissed the third party complaint for improper joinder under SCRA 1986, 1-014. Aeronautics and Corn appeal from the dismissal. We affirm.

{2} Aeronautics is an aircraft charter company that has its principal place of business in Roswell, New Mexico. Corn is the president of Aeronautics. Corn approached agent, Brad Pretti, for the purpose of obtaining insurance for Aeronautics. Pretti is associated with RBS Insurance Company in Roswell. On May 26, 1983, RBS procured for Aeronautics a policy of insurance from USFIC that covered charter operations but not rentals of aircraft. On August 17, 1983, in a Piper aircraft rented from Aeronautics, pilot Jerry Jones crashed in Texas, killing himself, his wife, his grandson, and another passenger. USFIC filed its action for declaratory judgment stating that the policy did not apply to aircraft rentals. The third party complaint alleges that Pretti and RBS negligently failed to procure the proper insurance coverage for Aeronautics.

{3} In dismissing the third party complaint, the trial court cited Our recent opinion, **Grain Dealers Mutual Insurance Co. v. Reed,** 105 N.M.

586, 734 P.2d 1269 (1987) as support for its ruling. In **Grain Dealers,** we held third parties should not be joined if they are not secondarily liable to the plaintiff. In order to support a joinder under Rule 1-014, the third party defendants must be liable to the defendant if the defendant is found to be liable to the plaintiff. No claim was made that either of the third party defendants would be liable to the defendant as a result of the third party action or otherwise. We conclude the trial court was correct in dismissing Aeronautics' and Corn's third party complaint.

{4} Aeronautics and Corn next argue that the trial court, rather than dismiss their third party complaint, should have severed their claim against RBS and Pretti pursuant to SCRA 1978 Section 1-021 because the statute of limitations had run with regard to their cause of action against those parties. Clearly, Rule 1-021 provides that misjoinder of parties is not a ground for dismissal of an action and that any claim against a party may be severed and proceeded with separately. Thus, Aeronautics' and Corn's claim could have been severed. But we do not have to reach this issue since we are of the opinion that the statute of limitations has not run on their claims.

{5} Aeronautics and Corn assert that they are faced with a two year statute of limitations for their cause of action against RBS and Pretti. Aeronautics and Corn argue that because the third party complaint was not dismissed until two and one-half years after the ongoing suit was filed, a new suit by them against RBS and Pretti will be barred by the two year statute of limitations. We disagree. NMSA 1978, Section 37-1-14, (Orig. Pamp.) provides that the statute of limitations on a cause of action is tolled if a new suit setting forth essentially the same cause of action between the same parties is commenced within six months after a dismissal except when the dismissal was based on the plaintiff's failure to pursue his claim, **See Rito Cebolla Inv., Ltd, v. Golden West Land Corp.,** 94 N.M. 121, 127-28, 607 P.2d 659, 666-67 (Ct. App.1980); **Diebold Contract Services, Inc, v. Morgan Drive Away, Inc.,** 95 N.M. 9, 12, 617 P.2d 1330, 1333 (Ct. App.1980). In this case, because Aeronautics and Corn pursued their claims, they would not be barred by the statute of limitations if they refiled them against RBS and Pretti within six months of the dismissal. The statute does not run during the pendency of an appeal. **See Otero v. Zouhar,** 102 N.M. 482, 485, 697 P.2d 482, 485 (1985), and NMSA 1978, Section 37-1-12.

{6} Because the defendants, Aeronautics and Corn, are not prejudiced by the court's dismissal of the third party defendants, and because the dismissal was a proper application of this Court's opinion in **Grain Dealers,** we affirm the decision of the trial court.

{7} IT IS SO ORDERED.

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-054

Filing Date: August 1, 1988

Docket No. 17,400

MICHAEL PATRICK NORMAND and ANDREW JAMES NORMAND, minor, by and through CLYDE P. NORMAND, next friend, and GENEVIEVE J. NORMAND, his wife,

Petitioners-Appellees,

v.

ANDRALENE RAY and JAMES RAY,

Respondents-Appellants.

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY, LALO GARZA, District Judge.

Anthony F. Avallone,
Glenn B. Neumeyer,
Las Cruces, NM,

for Appellants.

Ben A. Longwill,
Las Cruces, NM,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Respondents-appellants, Andralene Ray and James Ray, are the maternal grandparents of two minor children, Michael Patrick Normand and Andrew James Normand. Petitioner-appellee, Clyde Normand, is the natural father of the children. The children were legally adopted by and in the actual physical custody of the Rays. By means of a writ of habeas corpus, Normand sought custody of the children. The trial court granted the writ, awarded physical custody of the children to Normand, voided the adoption decree and reinstated Normand's parental status. The Rays appeal. We affirm in part and reverse and remand in part with instructions.

{2} Clyde Normand and Sharon Normand were married in 1971. They obtained a Texas divorce in 1974. Normand was on active duty in the United States Army and legally resided in Texas. Michael Patrick and Andrew James were born to the marriage. At the time of the divorce, the trial court awarded custody of the children to the mother. Later in 1975, with the consent of Normand, custody was awarded to Andralene Ray. In January 1978, Normand petitioned the Texas district court for custody of his children. The Rays contested the petition and in July 1978, a jury trial was held to decide the question. The jury awarded custody to Normand and the decree was entered August 1, 1978. That same day, the Rays left with the children to Nacogdoches, Texas without informing Normand. Over the course of the next few years, the Rays moved to different cities in Texas several times without informing Normand of their whereabouts. Eventually, in 1982, the Rays returned to Chaparral, New Mexico, with the children. Meanwhile, Normand's many efforts to locate the children were unsuccessful.

{3} In June 1985, the Rays sought to legally adopt the children in New Mexico. The Rays did not inform the New Mexico trial judge of the 1978 Texas child custody decree. They told the judge that Normand had abandoned the children and that they could not locate him. Based on these representations, the New Mexico district court entered an order terminating Normand's parental rights together with a judgment of adoption. In 1987, Normand located the Rays in New

Mexico, and filed a petition for a writ of habeas corpus, the object of which was to obtain physical custody of his children. The New Mexico court granted the writ and held that the 1978 Texas custody judgment was valid and entitled to enforcement in New Mexico under the doctrine of full faith and credit. The trial court held that the Rays committed fraud in procuring the judgment of adoption. The trial court also ruled that the judgment of adoption was null and void.

{4} The Rays first argue that the trial court lacked jurisdiction to set aside the adoption decree. They argue that a judgment of adoption could not be contested on any grounds including fraud more than one year after the entry of judgment. NMSA 1978, Section 40-7-15(C) (Repl. Pamp.1983) (repealed by Laws 1985, Ch. 194, § 39) (current version at 40-7-31 (1986)). Furthermore, the Rays argue that Normand's writ of habeas corpus was an impermissible collateral attack on the judgment of adoption. We disagree. The New Mexico Constitution confers upon the district court the power to issue writs of habeas corpus. N.M. Const. art. VI, § 13. Also, the trial court had personal jurisdiction over the parties. Both the children and the Rays were residing in New Mexico when Normand filed the petition for writ of habeas corpus. **Clark v. LeBlanc,** 92 N.M. 672, 593 P.2d 1075 (1979). By its very nature, a habeas corpus proceeding attacks the basis upon which the "body" is held by another. **See** definitions and annotations in 1 Bouvier's Law Dictionary (3d Rev.Ed. 1914) 1400-07; Black's Law Dictionary (4th Rev.Ed. 1968) 837. We previously held that, "habeas corpus is an available remedy by which to consider controversies involving the issue of custody of infants. This remedy has been recognized in this jurisdiction since early times." **Roberts v. Staples**, 79 N.M. 298, 300, 442 P.2d 788, 790 (1968) (citations omitted). At no time did Normand receive notice of the adoption proceedings. This fact alone warrants the voiding of the adoption decree. **See Eaton v. Cooke,** 74 N.M. 301, 393 P.2d 329 (1964). The Rays failed to provide Normand with notice of the adoption proceedings as required by our rules of civil procedure. **See** NMSA 1978, § 40-7-11(C) (Repl. Pamp.1983). We have held that, "[b]y failing to follow statutory procedures, due process of law was violated and no subsequent act could correct the defect." **Nesbit v. City of Albuquerque,** 91 N.M. 455, 459, 575 P.2d at 1340, 1344 (1977) (citation omitted). Normand was never personally served with a copy of the summons and complaint in the adoption proceedings. Although the Rays published notice in a New Mexico newspaper while Normand was in Texas, substitute or constructive service of process is not acceptable nor is it authorized when notice by personal service is required by statute. SCRA 1986, 1-004. The record before us supports the trial court's conclusion that the Rays knew Normand's whereabouts. They knew he was in the Army and could be reached through the office of a military personnel locator they were in communication with on a regular basis. Yet, the Rays made no meaningful effort to contact Normand. The statute requires that notice of the filing of a petition of adoption shall be given to any parent of the minor child to be adopted even if the parent's consent is excused because of abandonment. NMSA 1978, § 40-7-11(A) and (B) (Repl. Pamp.1983). Furthermore, personal service would be required because Subsection C requires notice to be accomplished in a manner appropriate under the rules of civil procedure for service of process in a civil action in New Mexico. NMSA 1978, § 40-7-11 (Repl. Pamp.1983). The trial court was correct in concluding that substitute service of process by publication was inadequate.

{5} The Rays next argue that Normand abandoned his children and was not entitled to any notice of the adoption proceedings. Respondents confuse the issue of consent to adopt with the necessity for notice. **See** NMSA 1978, § 40-7-7(A) (Repl. Pamp.1983). It is true Normand had no contact with his children for several years. However, this was brought about by no fault of Normand's, but by the Rays who hid the children from him. Normand searched for the children but was unable to locate them. Substantial evidence in the record supports the trial court's conclusion that the adoption judgment was obtained through fraud. We have recognized that in considering whether a parent has abandoned a child,

"'conscious disregard of the obligations owed by a parent to the child' excludes acts which are beyond the control of the parent." **Adoption of Doe v Heim,** 89 N.M. 606, 619, 555 P.2d 906, 919 (Ct. App.1976), **cert. denied,** 90 N.M. 8, 558 P.2d 620 (1976).

{6} The Rays further argue that the trial court erred in voiding the adoption judgment without any notice to them. The Rays had notice of the habeas corpus action, appeared personally at court proceedings, presented testimony, and cross-examined witnesses This claim is frivolous. The trial court did not err in voiding the judgment of adoption on these grounds.

{7} The Rays next argue that the Texas custody judgment is not entitled to full faith and credit in New Mexico. We disagree. New Mexico has long accorded full faith and credit to valid judgments of other states. **See e.g. Ex parte Mylius v. Cargill,** 19 N.M. 278, 142 P. 918 (1914); **Allgood v. Orason,** 85 N.M. 260, 511 P.2d 746 (1973). The Rays did not prove that the Texas custody judgment was void or invalid. Therefore, the trial court properly gave full faith and credit to the Texas custody judgment.

{8} Finally, the Rays argue that the trial court erred in excluding evidence dealing with the fitness of the respective parties to have the custody of the Normand children. Early in the proceedings, the trial court indicated it was disinclined to hear such testimony. Nevertheless, the Rays made at least one effort to tender evidence as to what custodial arrangement would be in the best interests of the minor children. The trial court erred in not allowing evidence on this issue. We have recognized that when a habeas corpus order is "prosecuted as a means of determining custodial rights of children, however, the inquiry is generally broader than that normally involved in habeas corpus [where] [t]he child's welfare becomes a prime consideration irrespective of the parties' interests. . . ." **Roberts,** 79 N.M. at 300, 442 P.2d at 790. This case is remanded with instructions to the trial court to hold a hearing to take evidence and enter an appropriate order to determine what custodial arrangement will be in the best interests of the minor children. In all other respects, the trial court judgment is affirmed.

IT IS SO ORDERED.

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-059

Filing Date: August 9, 1988

Docket No. 17,458

JAMES L'ALLIER,

Plaintiff-Appellee,

v.

BRYAN TURNACLIFF,

Defendant-Appellant,

v.

STATE FARM INSURANCE COMPANY,

Intervenor-Plaintiff-Appellee.

August 9, 1988, Filed. As Amended December 5, 1988. As Amended January 30, 1989.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY,
ART ENCINIAS, ROGER L. COPPLE, District Judge.

James A. Burke,
Santa Fe, NM,

for Appellant.

Simons, Cuddy & Friedman,
Robert D. Castillo,
Santa Fe, NM,

for Appellee SFIC.

Richard C. Bosson,
Santa Fe, NM,

for Appellee L'Allier.

OPINION

SCARBOROUGH, Chief Justice.

{1} James L'Allier filed a complaint against Brian Turnacliff seeking recovery for personal injuries sustained in an automobile accident in which L'Allier alleged Turnacliff operated a 1983 Porsche in an unlawful and tortious manner. Turnacliff had in effect an insurance policy with State Farm Insurance Company which provided liability insurance coverage for a 1985 Pontiac automobile he owned. Turnacliff answered the L'Allier complaint and tendered his defense to State Farm. State Farm intervened and sought a declaratory judgment that it was not obliged either to defend or indemnify Turnacliff. The trial court granted State Farm's motion for summary judgment. Turnacliff appeals and argues that the trial court improperly construed the newly acquired car provision of the State Farm policy. We affirm.

{2} Turnacliff, a Santa Fe County resident, traveled to California and negotiated the purchase of a 1983 Porsche on or around October 21, 1986. As a result of the negotiations, the California seller gave Turnacliff the keys to the Porsche and permitted Turnacliff to drive the car back to New Mexico, agreeing that further financial arrangements for payment would be made with Turnacliff's father. On November 3, the title to the car was transferred to Turnacliff with a notation that payment was made on October 28. On November 26, while driving the Porsche, Turnacliff collided with L'Allier on Cordova Road in Santa Fe. The relevant language in Turnacliff's State Farm insurance policy states:

> **Newly Acquired Car**—means a **car** newly owned by **you** * * * if it * * * is an added **car** and * * * [is] owned by you * * * on the date of its delivery to **you** * * * but only if **you** * * * tell us about it within

> 30 days after its delivery to **you** * * * and pay us any added amount due.

(emphasis in original).

{3} The dispositive issue on appeal is whether, as a matter of law, the thirty-day notice period under the newly acquired car provision in Turnacliff's automobile insurance policy began to run when Turnacliff took delivery of the car. We hold that delivery is a critical element of ownership of a car, and when the circumstances indicate that the parties intended for ownership of the car to pass, delivery of the car is sufficient to trigger the running of the newly acquired car provision in an automobile insurance policy.

{4} In this case, the dispute centers upon whether Turnacliff "owned" the car at the time of delivery on October 21, 1986. Turnacliff argues that although he had accepted delivery of the Porsche on or around October 21, the newly acquired car provision in his policy did not begin to run until he acquired an insurable interest in the car on October 28, the date the parties intended title to pass and Turnacliff became the "legal owner" of the car. Turnacliff points us to the definition of insurable interest set forth in **Universal C.I.T. Corp. v. Foundation Reserve Ins. Co.,** 79 N.M. 785, 450 P.2d 194 (1969).

> It is well settled that any person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself.

Id. at 786, 450 P.2d at 195 (citations omitted). Clearly, a person may have an insurable interest in property without actually having "title" to the property. **See Forsythe v. Central Mut. Ins. Co.,** 84 N.M. 461, 505 P.2d 56 (1973) (ultimate issue is not whereabouts of the legal title, but rather which party or parties have insurable interests).

{5} According to the policy language, the newly acquired car provision began to run when the newly acquired car was "owned" and "delivered" to Turnacliff. Both parties agree that title to property passes when the parties intend it should pass. **See Knotts v. Safeco Ins. Co. of America,** 78 N.M. 395, 432 P.2d 106 (1967). Furthermore, both agree that intent of the parties for title to pass is to be determined by reference to the facts and circumstances of each case. **See Yahnke v. State Farm Fire and Casualty Co.,** 4 Ariz. App. 27, 419 P.2d 548 (1966); **Everly v. Creech,** 139 Cal. App.2d 651, 294 P.2d 109 (1956). The facts and circumstances of this case reveal that Turnacliff took delivery of the Porsche on October 21. Furthermore, the parties clearly intended that a sale take place on October 21. Title passed at the time of delivery. Only the details of payment and delivery of paper title remained to be completed. Turnacliff had an insurable interest at the time of delivery of the Porsche.

{6} Finally, Turnacliff argues that payment of the premium is irrelevant. State Farm concedes that payment of the premium is irrelevant during the thirty-day period after delivery, and states correctly that without notice and premium payment, automatic insurance coverage expires when the thirty-day period ends. Turnacliff accepted delivery of the Porsche on October 21. He did not notify State Farm of the purchase, nor did he pay an additional premium within the thirty day period following delivery. Turnacliff had no coverage at the time of the accident. We affirm.

{7} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

RICHARD R. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-060

Filing Date: August 9, 1988

Docket No. 17,421

ROBERTO MOLINA,

Petitioner-Appellee,

v.

DANA McQUINN and the BOARD OF EXAMINERS IN OPTOMETRY,

Respondents-Appellants.

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY,
JOE H. GALVAN, District Judge.

Hal Stratton, Attorney General,
Kathrin Kinzer-Ellington,
David A. Garcia,
Assistant Attorneys General,
Santa Fe, NM,

for Appellants.

Pedro Palacios,
Las Cruces, NM,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Respondents-appellants are Dana McQuinn and the Board of Examiners in Optometry who suspended petitioner-appellee, Robert Molina's, license to practice optometry for fourteen days. The district court reversed the Board's decision. McQuinn and the Board appeal, we reverse.

{2} The Optometry Act, NMSA 1978, Section 61-2-1 to 61-2-18 (Repl. Pamp.1986) requires that optometrists be certified before they may use topical ocular diagnostic pharmaceutical agents or topical ocular pharmaceutical agents. **Id.** at § 61-2-10. In June 1985, Molina enrolled in a 105 hour course at Pennsylvania College of Pharmacology to be certified pursuant to section 61-2-10. Upon completion of the course the college sent a list of the names of all persons completing the course to the Board. However, Molina's name did not appear on the list. In September 1985, Molina phoned a drug store to prescribe an ocular agent for a patient. The pharmacist checked the list naming all qualified optometrists in the use of ocular agents which was provided by the pharmacology board. Molina's name still was not on the list. After Molina assured the pharmacist that the omission was a mistake and would be corrected by the Board, the prescription was filled. The pharmacist filed a complaint against Molina with the Board of Examiners in Optometry, who then held a hearing and decided to suspend Molina's license for fourteen days because he was not certified as required by statute. Molina appealed the decision to the district court which overruled the Board's decision. We reverse.

{3} We first address McQuinn's argument that the district court erred in reversing the Board's decision. In response, Molina argues that the district court properly concluded the Board exceeded its authority in determining that Molina's license should be suspended. Furthermore, in support of this argument, Molina asserts that the Board failed to provide discovery or to commence the hearing as required by statute. The statute requires the Board to provide discovery within ten days of request for discovery. NMSA 1978, § 61-1-8 (Repl. Pamp.1986). It also requires the board to provide Molina with a hearing, after request, within sixty days of service of notice of contemplated action NMSA 1978 § 61-1-4(D) (Repl. Pamp.1986). The Board did

not comply with either of these requirements and now states that none of these issues were raised in the district court. Unfortunately, we are unable to say whether or not this is the case because the record before us is incomplete. However, we note that section 61-1-9 allows the Board to grant a prehearing continuance to assure that the licensee obtains full and complete discovery. The statute also contemplates a prehearing conference in order to simplify the issues. The evidence we have before us reveals that Molina and the Board held a prehearing telephone conference. Molina argues that he either did not approve a continuance during the conference, or if he did it was for the purpose of obtaining full discovery. Regardless of Molina's understanding of the nature of the conference, the Board granted a continuance to allow him full discovery.

{4} Our recent decision in **Lopez v. Medical Examiners,** 107 N.M. 145, 754 P.2d 522 (1988) deals with the jurisdictional nature of the ninety day time limit within which a decision must be rendered under NMSA 1978, Section 61-1-13 (Repl. Pamp.1986). **Lopez** interpreted section 61-1-13 to require that a case must be disposed of within ninety days of final submission. Here we are concerned with the Board's failure to comply with two sections of the same act which impose time limits for the **commencement** of a case. The statutory scheme provided for the commencement of a case is quite different than that provided for its disposition. The Board had the authority to prehearing continuance, pursuant to section 61-1-9, about which Molina now complains.

{5} We next consider McQuinn's argument that the trial court erred in its conclusion that the Optometry Act does not provide for the manner in which an optometrist may become certified to use topical ocular pharmaceutical agents. The statute does provide a manner in which an optometrist may become certified to use topical ocular pharmaceutical agents. The statute states:

> C. The board shall issue certification for the **use of topical ocular pharmaceutical agents** to optometrists who **have successfully completed an examination and submitted proof** of having satisfactorily completed a course in pharmacology as applied to optometry, with particular emphasis on the application of pharmaceutical agents for the purpose of examination of the human eye, analysis of ocular functions and treatment of visual defects or abnormal conditions of the human eye and its adnexa. The course shall constitute a minimum of one hundred five classroom-clinical hours of instruction in general and ocular pharmacology, including therapeutic pharmacology, as applied to optometry, and shall be taught by an accredited institution and approved by the board.

(Emphasis added) NMSA 1978, § 61-2-10(C) (Repl. Pamp.1986). The statute is not ambiguous. It requires the board to certify an optometrist upon submission of proof that the optometrist has satisfactorily completed an approved course in pharmacology. However, the statute does not specify the manner in which proof of completion of the course requirements should be presented to the Board. In this case, the evidence presented indicated that Pennsylvania College was the source of information relied upon by the Board to certify optometrists to use topical ocular pharmaceutical agents. A list of optometrists ultimately certified by the Board is then sent by the Board to all pharmacists to guide them in filling prescriptions. The statute does not require that the names of all certified optometrists appear on the list circulated to pharmacists by the Board. Rather, an optometrist must pass an examination and **submit proof** of completion of the course in pharmacology to the Board. "An unambiguous statute should be given effect according to its clear language." **Storey v. University of N.M. Hosp./BCMC,** 105 N.M. 205, 207, 730 P.2d 1187, 1189 (1986); **New Mexico Beverage Co. v, Blything,** 102 N.M. 533, 697 P.2d 952 (1985). In this case, the statute clearly directs that the optometrist submit proof to the Board that he has completed the requirements of the statute. To hold otherwise would render the certification process meaningless. The Board

would then have to contact every pharmacology school in the country to ask if any New Mexico optometrists had completed any courses. We have previously held that, "[t]he interpretation of a statute must be consistent with the legislature's intent and must be accomplished by 'adopting a construction which will not render the statute's application absurd, unreasonable, or unjust.'" **City of Las Cruces v. Garcia,** 102 N.M. 25, 26-27, 690 P.2d 1019, 1020-21 (1984), **State v. Santillanes,** 99 N.M. 89, 90, 654 P.2d 542, 543 (1982)). The statute compels an optometrist to submit proof of completion of the course requirement to the Board.

{6} The next question is, did Molina "submit proof" that he had successfully completed the course requirements? The trial court examined the evidence and concluded that Molina successfully completed the course at the Pennsylvania College of Optometry on June 15, 1985. However, the trial court made no finding that Molina submitted such proof to the Board. Furthermore, there is no evidence in the record to establish that Molina submitted proof of completion of the 105 hours of mandatory classroom instruction to the Board. The proper standard for our review is substantial evidence, which is evidence that a reasonable mind accepts as adequate to support a conclusion. **Sandoval v. Department of Employment Sec.,** 96 N.M. 717, 718, 634 P.2d 1269, 1270 (1981). Absent substantial evidence, the judgment must be reversed. **Whorton v. Mr. C's,** 101 N.M. 651, 653, 687 P.2d 86, 88, (1984); **Getz v. Equitable Life Assurance Soc'y,** 90 N.M. 195, 561 P.2d 468 (1977), **cert denied**, 434 U.S. 834, 98 S. Ct. 121, 54 L. Ed. 2d 95 (1977). There being a lack of substantial evidence, we cannot uphold the trial court's reversal of the Board's suspension.

{7} McQuinn next argues that the evidence established that Molina violated the statute prohibiting the use of topical ocular pharmaceutical agents. Molina asserts that "use" should not include prescription because the optometrist himself is not "using" the ocular agent: the patient is. We construe the word "use" to extend to prescribing drugs for patients who are treated by an optometrist. Therefore, Molina "used" a topical ocular agent without being certified in violation of section 61-2-10.

{8} Molina also argues that we may not construe section 61-2-10 because it would violate the separation of powers doctrine. We do not agree with this argument. We have previously ruled, "[n]ot only is it fundamental that interpretation of the law is a judicial matter, but where the question is one of construction of state statutes, the state court may pass upon it as an issue of law." **Madrid v. University of Cal.,** 105 N.M. 715, 718, 737 P.2d 74, 77 (1987); **Pan Am. Petroleum Corp. v. El Paso Natural Gas Co.,** 77 N.M. 481, 424 P.2d 397 (1966). We reverse the trial court and uphold the fourteen day suspension imposed by the Board of Examiners in Optometry against Molina.

{9} IT IS SO ORDERED.

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-061

Filing Date: August 9, 1988

Docket No. 17,273

CAMINO REAL ENTERPRISES, Inc., a New Mexico corporation,

Plaintiff-Appellant,

v.

RICARDO ORTEGA, and ELIZABETH E. ORTEGA, his wife, and JAMES R. PATTON and LOVA BELLE PATTON, his wife,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY, JOE H. GALVAN, District Judge.

Martin, Cresswell, Hubert, Hernandez & Roggow,
Charles W. Cresswell,
Las Cruces, NM,

for Appellant.

Weinbrenner, Richards, Paulowsky & Sandenaw,
Thomas A. Sandenaw, Jr.,
David McNeill, Jr.,
Fred Schiller,
Las Cruces, NM,

for Appellees Ortega.

William F. Webber,
Las Cruces, NM,

for Appellees Patton.

OPINION

SCARBOROUGH, Chief Justice.

{1} Plaintiff subdivider, Camino Real Enterprises, Inc. (Camino) appeals the judgment rendered in favor of defendants purchasers, Ricardo and Elizabeth Ortega, on an action for breach of an improvement agreement that provided for payment of a pro rata share of the cost of improvements in the Majestic Hill subdivision in Las Cruces, New Mexico. The Ortegas purchased Lot 3, Block 15 (Lot 3) in the subdivision in June 1985. The common grantor subdivider/owner was Roadrunner Enterprises, Inc. (Roadrunner). Roadrunner sold the lot to Patton, who in turn sold to Pacheco, who sold the Hayes, who sold to the Ortegas. Roadrunner and Patton entered into the improvement agreement that was binding on the Pattons, their successors, and assigns and required them to reimburse Roadrunner for a pro rata share of the cost of any improvements made in the subdivision. Neither Roadrunner nor Patton recorded the improvement agreement. During the course of subsequent conveyances that ultimately led to the Ortega purchase of Lot 3, no reference was made in the deed of conveyance to the improvement agreement was attached to the contract of sale and recorded on April 14, 1980.

{2} Camino sued Patton and Ortega for recovery of damages for reimbursement of the pro rata cost of improvements placed upon Ortega's Lot by Camino based on the improvement agreement entered into between Roadrunner and Patton. Camino subsequently filed an amended complaint adding a count for unjust enrichment against Ortega. The district court decided the case in favor of Ortega and Patton. Camino appeals the judgment entered in favor of the Ortegas. We reverse.

{3} Camino first argues that the district court erred as a matter of law in ruling that the

recorded Roadrunner contract of sale which referred to the unrecorded improvement agreement was not in the Ortegas' chain of title. We agree. The trial court concluded that the Ortegas did not have constructive notice of the improvement agreement. New Mexico is a notice recording jurisdiction. See NMSA 1978, § 14-9-1. Recorded documents "shall be notice to all the world of the existence and contents of the instruments so recorded from the time of the recording." NMSA 1978, § 14-9-2. The issue in this case was whether Ortega was on inquiry notice and thereby bound by the terms of the improvement agreement entered into between Roadrunner and Patton. We hold that the Ortegas did have constructive notice of the improvement agreement and are bound by it. We find support for this position in **Taylor v. Hanchett Oil Co.,** 37 N.M. 606, 27 P.2d 59 (1933). In **Taylor,** we held there was constructive notice when an unrecorded escrow agreement was referred to in a recorded deed. **Id.** at 609, 27 P.2d at 61. The Ortegas are bound by the terms of documents referred to and attached to the contract of sale from Roadrunner to Camino. The standard for knowledge, as announced in **Sawyer v. Barton,** 55 N.M. 479, 485-86, 236 P.2d 77, 81 (1951) is:

> where the facts brought to the knowledge of the intending purchaser are such that in the exercise of ordinary care he ought to inquire, but does not, and his failure to do so amounts to gross or culpable negligence, he will be charged with a knowledge of all the facts which the inquiry, pursued with reasonable diligence, would have revealed.

In this case, the recorded contract of sale with attachments from Roadrunner to Camino was located by the title company while it was conducting a title search for Ortega. However, the title company simply did not read all the attachments which would have included the recorded improvement agreement.

{4} Camino next argues that the trial court erred as a matter of law in ruling that Camino could not recover damages under a theory of unjust enrichment because it failed to follow condition precedent as set forth in the improvement agreement between Roadrunner and Patton. Because we have reversed the trial court on the breach of contract issue, we do not reach this issue.

{5} The decision of the trial court is reversed and remanded with instructions to enter a judgment for the cost of improvements pursuant to the improvement agreement in favor of Camino.

{6} IT IS SO ORDERED.

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-064

Filing Date: August 10, 1988

Docket No. 16,786

GIORGIO SPADARO,

Petitioner-Appellant,

v.

UNIVERSITY OF NEW MEXICO BOARD OF REGENTS, et al.,

Respondents-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY,
W. JOHN BRENNAN, District Judge.

James Rawley & Associates,
Joy Christenberry,
Albuquerque, NM,

for Appellants.

Edward L. Chavez,
Albuquerque, NM,

for Appellees.

OPINION

SCARBOROUGH, Chief Justice.

{1} Petitioner, Giorgio Spadaro, filed a verified Petition for Writ of Mandamus against Theresa Trahan, respondent, to obtain disclosure of certain documents from the University of New Mexico (UNM) Part-Time Student Employment Office (the Employment Office).

{2} Petitioner alleged that Trahan was the custodian of Employment Office records "required by law to be kept or kept necessarily in discharge of duties imposed by law." Spadaro further alleged that he utilized the services of the Employment Office to obtain domestic help by means of job postings, and that Trahan, without explanation, cancelled his job posting based on complaints by student employees. Spadaro asserted a right of access to the complaints under the New Mexico Inspection of Public Records Act, NMSA 1978, Section 14-2-1, (Orig. Pamp.). Spadaro filed an amended verified petition for writ of mandamus which formally joined the University of New Mexico Board of Regents as an additional respondent and alleged the same cause of action as that alleged in the initial petition. Trahan filed an answer to the amended petition, denied the essential allegations of the amended petition, and affirmatively asserted that Trahan was not the custodian of records of the Employment Office. Trahan also asserted that the records in question were not public records under the New Mexico Inspection of Public Records Act or the Family Education and Privacy Act, 20 USC § 1232(g)(1982); that there was a mandatory duty to refuse to disclose the records; that the records should remain confidential; and that a reasonable explanation had been given to Spadaro regarding Trahan's refusal to disclose the records.

{3} By agreement of the parties, Theresa Trahan was dismissed as a respondent and John Whiteside was substituted in her place as the custodian of all records concerning part-time student employment. No writ of mandamus nor amended writ appears in the court file. Whiteside filed a motion for judgment on the pleadings and the case was submitted to the trial court on stipulated findings of fact. The trial court granted the motion. We affirm.

{4} Spadaro, a citizen of the State of New Mexico, posted a job listing through the Employment Office, a division of the UNM Department of Financial Aid. The University of New Mexico

is not required either by statute or Regents' policy to operate the Employment Office, which is a referral agency providing service at no cost to persons interested in employing UNM students. Job listings are directed only to enrolled UNM students. The Employment Office determines what jobs are appropriate for student referral. Spadaro's job notice sought a female student who was willing to exchange childcare and light housekeeping duties for room and board.

{5} Spadaro interviewed at least two UNM students as a result of the job posting. During September 1983, Trahan informed Spadaro that his job posting was cancelled because she received two separate complaints from interviewees that the required duties were not those specified by the job listing. Spadaro sought copies of the complaints filed against him. Respondents refused to provide copies of the complaints, but the University's President, Tom Farer, responded to the request by stating that the job postings were provided as a convenience for students and would be removed if a complaint was received. Farer further explained that removal of the job posting did not mean that a complaint necessarily had credence, but only that it was no longer convenient to continue a particular posting.

{6} Spadaro seeks to compel disclosure of the complaints or to receive a reasonable explanation regarding the removal of the job listing, and first argues that the trial court erred in concluding that the student complaints are "not public records under the New Mexico Inspection of Public Records Acts, Section 14-2-1 to 14-2-3 NMSA 1978." This issue is dispositive.

{7} NMSA 1978, Section 14-2-1 (Cum. Supp. 1987) provides:

> Every citizen of this state has a right to inspect any public records of this state except:
>
> A. records pertaining to physical or mental examinations and medical treatment of persons confined to any institutions;
>
> B. letters of reference concerning employment, licensing or permits;
>
> C. letters or memorandums which are matters of opinion in personnel files or students' cumulative files;
>
> D. as provided by the Confidential Materials Act [14-3A-1, 14-3A-2 NMSA 1978]; and
>
> E. as otherwise provided by law.

{8} The threshold inquiry we must make is whether the student complaints requested by Spadaro are "public records" within the meaning of Section 14-2-1. We agree with the trial court that the student complaints are not public records. Neither the courts nor the legislature have defined "public records" within the context of the New Mexico Inspection of Public Records Act. However, in 1963, the New Mexico Attorney General defined a "public record" as a record made by a public official who is authorized by law to make it. AG Op. No. 55 (1963). Respondent argues that we should adopt this definition of public records for purposes of disclosure under the New Mexico Inspection of Records Act. We agree that a definition of "public records" for the purposes of the New Mexico Inspection of Public Records Act would be helpful to the courts in deciding what records should be disclosed, but it is for the legislature to provide the definition.

{9} Appellant argues that we should apply **State ex rel. Newsome v. Alarid,** 90 N.M. 790, 568 P.2d 1236 (1977) to the facts of this case. **Newsome** is not authority for Spadaro's claim that student complaints are subject to disclosure. **Newsome** did not define "public records." **Newsome's** basic assumption was that all records there dealt with were public records for purposes of the Inspection of Public Records Act. The Supreme Court in **Newsome** dealt with statutory exceptions to disclosure under the Act, carved out a non-statutory confidentiality exception" to disclosure under the Act, and required the trial court to conduct an **in camera** examination of documents prior to disclosure when a claim of confidentiality had been asserted A "rule of

reason" analysis for each instance where a claim of confidentiality is raised was approved by this Court. This is essentially a balancing test which requires the trial court to balance the fundamental right of all citizens to have reasonable access to public records against countervailing public policy considerations which favor confidentiality and nondisclosure. The rule of reason analysis is applicable only to claims of confidentiality asserted for public records that do not fall into one of the statutory exceptions to disclosure contained in Section 14-2-1. Such an analysis is not available nor applicable to the facts in this case. The trial court properly concluded that the student complaints are not public records. Therefore, they are not subject to discovery under the New Mexico Inspection of Public Records Act. The Act simply does not apply.

{10} The parties have stipulated that UNM is not required by statute or policy to operate the Employment Office. Since the Employment Office is neither a creature of statute nor created by university policy, there is no mandatory obligation or duty to make or keep a record of student complaints received by the Employment Office. The complaints are not before us for review nor were they before the trial court. The content of the complaints is unknown. Whether they are written or verbal is not known. We do know, however, from the stipulated facts before us, that there was no legal mandate for the operation of the Employment Office, where the events complained of took place. Spadaro argues that "[i]t is illogical to assume that the duty to keep records imposed on the Financial Aid Office would not apply to a recognized division maintained by that office, even though there is no specific statute or formal Regents policy to maintain such a subdepartment." No authority is cited for this argument, nor is any authority cited for Spadaro's further argument that employees of the Employment Office are public officers working for the Financial Aid Office." The stipulation before us does not establish that any officers, employees, or agents of any public office ever received or now possess any records of student complaints for which disclosure is now sought by Spadaro. John Whiteside is identified in the stipulation as the custodian of records for the Employment Office. This office is identified as a division of the UNM Department of Financial Aid, but Whiteside is not identified as an employee or agent of the Department of Financial Aid or as an agent of any university department Theresa Trahan, who was initially identified by Spadaro as the custodian of student complaints, has been dismissed from the case. Although she is identified as the person who initially received the two student complaints about which Spadaro complains, her relationship to the University has never been defined or described in the record. It is unclear what became of the complaints after they were received by Trahan. The record does reflect, however, that "Spadaro has been consistently refused access to the students' complaints maintained by the Part-Time Employment Office." Neither this office nor its employees have been identified as a public office or public employees.

{11} The trial court properly granted judgment to Whiteside. This case was submitted to the trial court on an agreed statement of facts. Since the agreed statement of facts go beyond the pleadings, we treat the motion for judgment on the pleadings as though it were a motion for summary judgment. Whiteside made a prima facie showing of entitlement to summary judgment. Whiteside was not obliged to show beyond all possibility that no genuine issue of fact existed. Once a prima facie showing was made, Spadaro had the burden of demonstrating at least a reasonable doubt as to whether a genuine issue of fact existed. **Kerman v. Swafford,** 101 N.M. 241, 243, 680 P.2d 622, 624 (Ct. App.1984). The party opposing the motion carries his burden of proof by setting forth specific facts, admissible in evidence, showing that there is a genuine issue for trial. **Storey v. University of N.M. Hosp./ BCMC,** 105 N.M. 205, 207, 730 P.2d 1187, 1189 (1986). The evidence presented by Spadaro failed to establish that the student complaints were a record made or kept by a public official. In **Sanchez v. Board of Regents of Eastern N.M. Univ.,** 82 N.M. 672, 486 P.2d 608 (1971), the Supreme Court found that a university faculty salary schedule was not a public record within the meaning of Section 14-2-1. Similarly, the student

complaints here are not public records. The judgment of the trial court is affirmed.

{12} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice,

HARRY E. STOWERS, JR.,
Justice

MARY C. WALTERS,
Justice, dissent

RICHARD E. RANSOM,
Justice, dissent

DISSENT

RANSOM, Justice (Dissenting).

{13} I respectfully dissent.

{14} On the premise that no specific statute or formal university policy required UNM to maintain a student employment referral service, the majority concludes that the Employment Office had no mandatory obligation or duty to make or keep a record of student complaints. For purposes of the Inspection of Public Records Act, the majority then appears to require a "legal mandate for operation of the Employment Office," and tacitly accepts a definition of "public records" as those records that public officers are authorized and required by law to keep. UNM urged the adoption of that definition, and the trial court accordingly had concluded that the records in question were not required by law to be kept.

{15} We should reject a definition that would limit public records only to those records which a public officer is authorized and required by law to keep. A canvass of the inspection of public records statutes of other states reveals that "public record" is expansively defined but then narrowed by specifically delineated exemptions. **See** R. Bouchard and J. Franklin, **Guidebook to the Freedom of Information and Privacy Acts,** state statutes appendix (1987).

{16} Under the New Mexico Inspection of Public Records Act, the legislature seems quite rationally to have chosen to consider "public records" universally as records kept by an agency of the government. To this universe of records it has applied specific exceptions as suggested by a rule of reason. Of course, the universe of records is made up of countless parts, each with its unique nature. Because of its many parts, it is very difficult to describe this universe with particularity and considered thought. The parts, on the other hand, rationally may be considered when their appropriateness as an exception is raised in the legislature or in the courts under real circumstances.

{17} The right to inspect records kept by an agency of the government was given universally; the exceptions are to be taken selectively by the legislature or the courts according to the rule of reason. I believe it was to advance this thought, rather than to beg the issue of what comprises a public record, that the Court said in **State ex rel. Newsome v. Alarid,** 90 N.M. 790, 568 P.2d 1236 (1977), that: "We hold that a citizen has a fundamental right to have access to public records. The citizen's right to know is the rule and secrecy is the exception. Where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed." 90 N.M. at 797, 568 P.2d at 1243. Absent legislative delineation, public policy countervailing the right of inspection is to be discerned through application of the rule of reason.

{18} Public business is the business of the public. Every citizen should be entitled to inspect public records unless the records fall within one of the enumerated categories exempt from disclosure or unless public policy militates against disclosure.[1] To initiate an inspection, an individual

[1] As noted in **State ex rel. Attorney General v. First Judicial District,** 96 N.M. 254, 260, 629 P.2d 330, 336 (1981), public records excepted from the public's right to know may be subject, to the same extent as records held in the private sector, to discovery in a case in which the material is relevant

only needs to satisfy the custodian of the public record that he or she is a citizen and that the inspection is for a lawful purpose. 90 N.M. at 798, 568 P.2d at 1244. Once an individual satisfies these prerequisites, a custodian who refuses access has the burden "to justify why the records sought to be examined should not be furnished." **Id.** Justification, to be considered on petition for writ of mandamus, must be supported by evidence in the record. **State ex rel. Blanchard v. City Comm'rs,** 106 N.M. 769, 750 P.2d 469 (Ct. App.1988). The custodian does not satisfy this burden by simply categorizing the requested document as a record exempt from disclosure under the Act. Conspicuously lacking from the record in this case is any factual development by UNM to substantiate its reasons for withholding the documents sought by Spadaro.[2] The trial court did not conduct an **in camera** inspection of the requested public records as recommended by the **Newsome** court. **See** 90 N.M. at 796, 568 P.2d at 1242.

{19} Notwithstanding the majority's tortured reading of the stipulated facts to the contrary, it is clear that the Employment Office is staffed by public employees, funded with public monies, and operated under the auspices of UNM's Department of Student Financial Aid and Career Services. Neither the trial court nor the parties interpreted or argued the stipulation to identify the Employment Office or its employees as other than a public office or public employees. Furthermore, although the complaints were not made by a public employee, they were received and preserved by a public employee of defendant UNM. Under these circumstances, I find to be without merit UNM's argument that the recordation of these complaints did not constitute the making of a public record. The trial court was in error in concluding that the records are not public records. The majority of this Court is in error in concluding that the records are not public records. At issue is whether there was a contrary statute or a public policy that countervailed Spadaro's right of inspection.

{20} I conclude with the following observation. In **Newsome,** this Court discussed at great length the Act at issue here and the appropriate procedure for resolving disputes concerning the right to inspect public records. The **Newsome** court recognized that whether to disclose certain public records would require the trial court to balance "the benefits accruing to the agency from non-disclosure against the harm which may result to the public if such records are not made available for inspection" 90 N.M. at 795, 568 P.2d at 1241 (quoting **MacEwan v. Holm,** 226 Or. 27, 46, 359 P.2d 413, 422 (1961)). In reaching a determination based upon such a balancing of interests,

> the trial judge must ever bear in mind that public policy favors the right of inspection of public records and documents, and, it is only in the exceptional case that inspection should be denied. . . . If . . . disclosure of only a portion [of a record] is found to be prejudicial to the public interest, the trial judge has the power to direct such portion to be taped over before granting inspection.

90 N.M. at 796, 568 P.2d at 1242, (quoting **State ex rel. Youmans v. Owens,** 28 Wisc.2d 672, 682-683, 137 N.W.2d 470, 475 (1965), **modified on denial of rehearing,** 20 Wisc.2d 672, 139 N.W.2d 241 (1966)).

{21} I would reverse and remand to the district court with instructions to proceed to determine whether a public policy does exist that may countervail the right to inspect these public records.

WALTERS,
Justice, concurs.

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to the issues presented. The right to know the public business is a different question from the right of discovery under judicial process in a case where the material is relevant to the issues presented.

[2] Before the trial court, counsel for Spadaro took the position that "only UNM would want to argue facts because basically we say they are public records. They are not obviously an academic file, so it would appear to me to be the burden of UNM to fit them within one of the exceptions."

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-065

Filing Date: August 11, 1988

Docket No. 17,681

REYDESEL ROJO,

Petitioner,

v.

LOEPER LANDSCAPING, INC. and WESTERN CASUALTY AND SURETY COMPANY,

Respondents.

ORIGINAL PROCEEDING ON CERTIORARI, ADMINISTRATIVE APPEAL

Original Dissent Withdrawn and New Dissent Issued August 16, 1988.

Matthew L. Chacon,
Albuquerque, New Mexico,

for Petitioner.

Beall, Pelton,
O'Brien & Brown,
Larry D. Beali,
Maureen S. Reed,
Albuquerque, New Mexico,

for Respondents.

OPINION

WALTERS, Justice.

{1} Reydesel Rojo, an employee of defendant landscaping firm, was injured on January 17, 1987, when he lifted a tree off the bed of a truck. Defendant Western Casualty & Surety Company (Western) made weekly compensation payments to Rojo for his injury. In August of 1987, Western's adjuster and claimant's attorney agreed to the terms of a lump sum compensation settlement agreement. On September 9, 1987, Mr. Rojo signed the settlement documents. The next morning Mr. Rojo was murdered, but before Western found that out it also signed the agreement. On the same day, still without knowledge that Mr. Rojo had died, claimant's attorney filed with the Workers' Compensation Administration the joint petition for approval of payment. Upon discovering prior to a hearing that claimant had died, Western decided to repudiate the agreement. Thus, when the matter came before the administrative officer, Western declared that it no longer agreed to the settlement. The hearing officer thereupon denied the petition for approval of payment of the lump sum settlement, concluding that the respondents at the time of the hearing, "were no longer in agreement on the payment of a lump sum * * * a condition precedent."

{2} Decedent's attorney appealed the hearing officer's decision to the court of appeals which rendered a summary, affirming, memorandum opinion. We granted decedent's petition for certiorari to answer the only issue presented: Whether or not a hearing officer may disapprove payment of a lump sum settlement which has been fairly negotiated, signed, and filed by the parties, solely on grounds that the offeror has elected to repudiate the contract before approval of payment is granted. No question of standing has been raised and we do not address it. **Cf. Chavez v. Regents of University of N.M.,** 103 N.M. 606, 711 P.2d 883 (1985) (suit not barred because not brought by personal representative when situation can be remedied by amendatory pleading under Rules 15(c) and 17(a) of Civil Procedure; overruling **Mackey v.**

Burke, 102 N.M. 294, 694 P.2d 1359 (Ct. App. 1985)).

{3} The statute provides that amounts payable as workers' compensation may be converted to a lump sum settlement by agreement of the parties and after the agreement is approved by the hearing officer. NMSA 1978, § 52-5-14(B)(Repl. Pamp.1987). In its calendaring notice, the court of appeals reasoned that the settlement agreement signed by the parties was without effect until approved by the hearing officer because approval was a condition precedent to a valid agreement between the parties. Because the parties were not in agreement at the time of the hearing, the court of appeals held that the hearing officer correctly denied approval.

{4} Although we concur that the hearing officer must find an agreement between the parties before a lump sum settlement payment may be approved, we reverse the court of appeals and remand to the hearing officer for approval of the settlement, for three reasons: (1) the written and signed petition for approval, filed with the Workers' Compensation Administration and presented to the hearing officer, provided explicit evidence of an agreement between the parties; (2) under Section 52-5-14(A), the hearing officer's decision lacked the necessary grounds for disapproval of payment of the settlement; and, finally, (3) one party's repudiation of the settlement contract does not authorize the hearing officer to provide the remedy of rescission to the repudiating party. Significantly, repudiation is not a basis for disapproving the contract. **See** Section 52-5-14(A).

{5} Section 52-5-12(A) permits the parties to agree to a lump sum settlement payable to the claimant in exchange for claimant's release of the insurer-employer's obligation to make periodic payments. However, nothing in the statute requires that the agreement be in writing. **Esquibel v. Brown Constr. Co.,** 85 N.M. 487, 490, 513 P.2d 1269, 1272 (Ct. App.) **cert. denied,** 85 N.M. 483, 513 P.2d 1265 (1973), expressly so held. Absent a statute of frauds or other cognizable defense, an oral contract may be as binding as a written one. **See Pickett v. Miller,** 76 N.M. 105, 108-09, 412 P.2d 400, 403 (1966). Consequently, a settlement agreement that is reduced to writing and signed by the parties is presumptively conclusive proof of a binding agreement. The record here contains a written settlement contract and petition for approval signed by the parties; that it was signed by both parties is not a matter of dispute. That petition, memorializing the earlier oral agreement of the parties, satisfied the conditions under which approval may be sought for payment of the stipulated sum. **Id.** Section 52-5-13, requiring only that the petition for approval be signed by both parties, was fully complied with. Western may have expressed dissatisfaction with the settlement it had reached, but the hearing officer erred in evaluating Western's hindsight as sufficient to provide a legal basis for concluding that there was no agreement.

{6} Section 52-5-14(A) directs that the hearing officer approve a lump sum payment agreement between the parties if it is fair and equitable and in accord with the Workers' Compensation Act. The hearing officer may disapprove the settlement only if he or she determines that the settlement will not provide substantial justice to the parties. **Id.** The hearing officer made specific findings that in August, 1987, Western and claimant negotiated a settlement agreement; that the agreement was signed by the parties in September; that the settlement was fair and equitable; and that the settlement would provide justice among the parties.

{7} None of those findings was challenged by either party on appeal, and appellant relies on them for reversal. Findings not challenged on appeal are treated as true by the reviewing court. **State ex rel. State Highway Comm'n v. Sherman,** 82 N.M. 316, 317, 481 P.2d 104, 105 (1971). All of the elements mandating approval and precluding disapproval were found to exist when the agreement was presented to the hearing officer, and the officer lacked any statutory basis, as precisely limited by Section 52-5-14(A), to disapprove it.

{8} The hearing officer erroneously concluded that Western was entitled to withdraw its agreement after both offer and acceptance had been reduced to writing and signed. Consequently, there existed a valid agreement reflecting a binding expression of the parties' intent. In view of the officer's findings made following the hearing, he was without any authority to withhold his approval. It was error to do so.

{9} Although the settlement contract was not expressly attacked on the grounds that Mr. Rojo had died, that argument lurks throughout the record and briefs, and we therefore address it.

{10} The contention that a workers' compensation agreement, reached orally in August and committed to paper in September, may be rescinded because the offeree died after acceptance but before payment had been approved is without support in any law to which we have been referred. By agreeing to the lump sum settlement, Western gambled that the claimant might live for the entire periodic payment period, and it thus took the risk that the lump sum settlement would reduce the total benefits that it would have had to pay if, instead, it were to continue making those periodic payments. Periodic payments admittedly would have ceased upon the death of the claimant. § 52-1-47(C). But that death will not occur is also a risk taken by a carrier when it offers to settle long-term compensation payments for a lump sum in order to be released from liability for future payments. **See** NMSA 1978, § 52-5-12 (Repl. Pamp. 1988). We assume that Western weighed those considerations in reaching its agreement with decedent. Although from Western's perspective it is unfortunate that claimant died after the oral agreement had been formally executed by both parties, in the absence of mutual mistake of fact, fraud, failure to express the agreement of the parties, or material breach by the other party, claimant's death does not provide grounds to allow Western's rescission of the contract. **Esquibel; Prudential Ins. Co. of America v. Anaya,** 78 N.M. 101, 428 P.2d 640 (1967); **Smith v. Loos,** 78 N.M. 339, 431 P.2d 72 (Ct. App.), **cert. denied,** 78 N.M. 337, 431 P.2d 70 (1967). Nor does death of a party after agreement has been reached satisfy the sole basis authorized under Section 52-5-14(A) for disapproval of payment of the settlement.

{11} The cause is reversed and remanded to the hearing officer with directions, in light of the findings made by him, to approve payment of the lump sum settlement agreed upon by the parties prior to claimant's death.

{12} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

RICHARD E. RANSOM,
Justice

TONY SCARBOROUGH,
Chief Justice, dissent

HARRY E. STOWERS,
Justice, dissent

DISSENT

SCARBOROUGH, Chief Justice, dissenting.

{13} It is unfortunate that Mr. Rojo died before the lump sum settlement agreement was approved by the hearing officer as required by NMSA 1978, § 52-5-14(B) (Repl. Pamp.1987). However, unlike the compromise of a disputed claim for permanent disability in **Esquibel v. Brown Construction Co.,** 85 N.M 487, 513 P.2d 1269 (Ct. App.1973) cited by the majority, Mr. Rojo sought to exchange his undisputed right to periodic disability payments for a lump sum payment from his employer. This is not merely a matter of negotiation and contract between the parties. Under Section 52-5-14(A) the hearing officer, prior to approving a lump sum payment and release from further liability, must find that the agreement is fair, equitable and otherwise consistent with provisions of the Workers' Compensation Act. The Workers' Compensation Act disfavors lump sum payments. The Act

provides that "It is the stated policy for the administration of the Workers' Compensation Act * * * that it is in the best interest of the injured worker that he receive benefit payments on a periodic basis." NMSA 1978, § 52-5-12(A) (Repl. Pamp.1987). Section 52-5-14(B) only allows for periodic compensation payments to be converted to "lump sum settlement by agreement of the parties **after having been approved** by the hearing officer." NMSA, 1978, § 52-5-14(B) (Repl. Pamp.1987) (emphasis added). I would hold that as a matter of law the approval of the agreement by the hearing officer is a condition precedent to the very existence of a binding agreement between parties negotiating lump sum payment of workers' compensation benefits. Court custom and practice has consistently been that these settlement agreements are not final until after court approval. Prior to obtaining that approval both parties could be able to rescind a proposed agreement at any time. The policy disfavoring lump sum payments supports this position.

{14} However, even taking the contracts approach of the majority, where the approval of the hearing officer might be deemed a mere condition precedent to execution of the agreement, I cannot agree with the majority opinion. The majority rely on a prior oral agreement between Western and Rojo in order to establish a binding settlement agreement. Whether or not parties to an oral agreement intend to be bound to that agreement prior to execution of a contemplated formal writing is a question of fact which depends on the circumstances of the case. **Stites v. Yelverton,** 60 N.M. 190, 289 P.2d 628 (1955). Such a factual determination was not part of the findings of the hearing officer.

{15} If, to the contrary, Western and Rojo intended not to be bound by their oral agreement until after the execution of a formal document, there was no contract between them "until its execution by both parties." 1 A. Corbin, **Corbin on Contracts** § 30 (1963 & Supp. 1980). The formal document prepared in this case, a joint petition to enter into a lump sum payment agreement, actually was signed by both parties. However, Mr. Rojo died prior to the time Western's representative signed the petition. In my opinion, the intervention of Mr. Rojo's death precluded formation of a contract. The situation is analogous to the supervening death of an offeror; no contract can be formed because the death of the offeror terminates the offeror's power of acceptance even though he had no knowledge of the death. 1 A. Corbin, **Corbin on Contracts** § 48 (1963 & Supp. 1980); Restatement (Second) of Contracts § 54 (1981).

{16} I would affirm the decision of the court of appeals. For these reasons, I dissent.

STOWERS, JUSTICE,
dissenting.

{17} I dissent from the majority opinion that an **agreement** to commute periodic workers' compensation payments into a lump sum payment, does not require approval by a hearing officer. The majority opinion directly contradicts legislative intent and New Mexico precedent.

{18} The New Mexico Workers' Compensation Act was intended to serve claimants best interests and prevent them from becoming dependent on welfare. **Codling v. Aztec Well Servicing Co.,** 89 N.M. 213, 215, 549 P.2d 628, 630 (Ct. App. 1976). **See also** 82 Am. Jur. 2d **Workmen's Compensation** § 654(1976). The New Mexico legislature has determined that periodic compensation payments, simulating wages, best serve claimants' interests. NMSA 1978, § 52-5-12(A) (Repl. Pamp. 1987). **See also Codling,** 89 N.M. at 215, 549 P.2d at 630. This comports with the general rule that lump sum awards, instead of periodic payments, in a worker's compensation action are the exception. **Boughton v. W. Nuclear Inc.,** 99 N.M. 723, 724, 663 P.2d 382, 383 (Ct. App. 1983) (citing **Padilla v. Frito-Lay, Inc.,** 97 N.M. 354, 639 P.2d 1208 (Ct. App. 1981). "[L]ump sum payments are justified only when 'exceptional circumstances' exist." **Woodson v. Phillips Petroleum Co.,** 102 N.M. 333, 335, 695 P.2d 483, 485 (1985) (citation omitted).

{19} To further these goals, the legislature established several requirements which must be

met before commuting periodic compensation payments into a lump sum payment. The parties must agree, or special circumstances must exist which clearly demonstrate that a lump sum payment is in the claimant's best interests. NMSA 1978, § 52-5-12(A) (Repl. Pamp. 1987).

{20} Once the parties have agreed, the "lump sum payment **agreement * * * shall be presented to the hearing officer for approval** * * *." NMSA 1978, § 52-5-13 (Repl. Pamp. 1987). Next, the hearing officer determines whether the agreement is "fair, equitable and consistent with provisions of the Workmen's Compensation Act * * *." NMSA 1978, § 52-5-14(A) (Repl. Pamp. 1987). If the agreement meets these criteria, the hearing officer "shall approve the agreement * * *." **Id.** "Amounts payable as compensation may be converted to a lump sum settlement by agreement of the parties **after having been approved by the hearing officer."** NMSA 1978, § 52-5-14(B) (Repl. Pamp. 1987). Only after approval is the agreement binding. The court in **Odom v. Tosco Corp.,** 12 Ark. App. 196, 672 S.W.2d 915 (1984), faced issues similar to those at bar. There, the parties formed a joint petition settlement agreement; however, the claimant died before a hearing to approve the agreement was held. That court determined that the settlement agreement was "not effective because a joint petition hearing had not been conducted and commission approval had not been rendered prior to the claimant's death" **Id.,** 12 Ark. App. at 200, 672 S.W.2d at 919.

{21} In this case, as in **Odom,** an agreement was never approved. In fact, at the hearing, the parties did not even agree. Although Western and Rojo had previously signed a written lump sum settlement agreement, Western rejected the agreement prior to approval. Without an agreement the hearing officer lacked authority to approve the agreement, absent special circumstances not indicated here. NMSA 1978, § 52-5-12(A) (Repl. Pamp. 1978). The mandatory "shall" language used throughout Sections 52-5-12 through 52-5-14, indicates that a hearing officer **must** approve an agreement to commute periodic compensation payments into a lump sum payment. Legislative authority for court approval of lump sum settlement agreements, after a hearing, dates back to 1959. NMSA 1953, § 59-10-5(B) (Pocket Supp. 1959).

{22} The majority focus on the criteria for approving an agreement, Section 52-5-14(A). However, those criteria may only be considered once the parties have agreed and have presented their agreement to the hearing officer for approval. When Section 52-5-14(A) is read in context, the true legislative intent requiring agreement approval becomes clear.

{23} Since the parties failed to agree at the critical hearing stage, the hearing officer properly refused to approve the written settlement agreement and the Court of Appeals properly affirmed. For the foregoing reasons I would affirm the decision of the Workers' Compensation Administration hearing officer and the Court of Appeals. I also concur with the points raised in Chief Justice Scarborough's dissent.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-067

Filing Date: August 22, 1988

Docket No. 17,370

IRENE B. GARTLEY and BARBARA SCHRIBER,

Plaintiffs-Appellees,

v.

PHYLLIS RICKETTS,

Defendant-Appellant.

August 22, 1988, Filed. As Corrected September 6, 1988.

APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY, LALO GARZA, District Judge.

Martin, Cresswell, Hubert, Hernandez & Roggow,
R. Wilson Martin,
Las Cruces, NM,

for Appellant.

Norman E. Todd,
Las Cruces, NM,

for Appellees.

OPINION

SCARBOROUGH, Chief Justice.

{1} In 1983, plaintiffs-appellees Irene Gartley and Barbara Schriber filed a complaint to reform a deed to void certain conditions as being a cloud on their title, as being void under the rule against perpetuities, and being void as restraints on alienation. The defendant-appellant, Phyllis Ricketts, counterclaimed against Gartley and Schriber alleging that Gartley had breached the condition subsequent in the deed when she conveyed an interest in the property to Schriber. The trial court granted final judgment in favor of Gartley and Schriber, holding that the deed was in violation of the rule against perpetuities and was an illegal and unreasonable restraint on alienation. We affirm.

{2} In April 1971, Louise Cunningham, now deceased, gave a warranty deed to her sister Irene Gartley for a .344 acre tract of a 35.67 acre farm in Dona Ana County, New Mexico, A house was to be built on the land shortly after the contract was signed. One was begun but not completed at an approximate cost of $26,790. The agreement and deed contained certain conditions as follows:

> (a) So long as Grantor lives, Grantee nor her heirs or assigns may sell the tract of land, and the home which Grantee will build thereon, to any person or firm, nor shall she or her heirs rent the same to any person or firm; provided, however, each of the same may be done with the written consent of the Grantor.
>
> (b) After grantor dies, Grantee may not sell the above described premises to any person or firm without first offering the same to Phyllis Ricketts [daughter of Cunningham], or if she be not alive to the heirs or devisees of Phyllis Ricketts, for the sum of Twenty-Five Thousand Five Hundred and no/100 ($25,500.00) Dollars.
>
> (c) No house-trailer or mobile home may be located upon the premises conveyed at any time,
>
> (d) Grantee's heirs and devisees, after the death of Grantor and Grantee, shall have

> the same power and authority, and are subject to the same limitations as prescribed for Grantee hereinabove in subparagraphs (a) and (b). In other words, Grantee's heirs are empowered with the same rights as Grantee is empowered with herein, but are also subject to the same restrictions and limitations and conditions placed herein upon Grantee.
>
> (e) In the event that either Grantee or her heirs desire to sell the above described property as set forth in subparagraphs (b) and (d) above, the procedure shall be as follows: Grantee or her heirs shall offer the same to Phyllis Ricketts or her heirs at price required; after receipt of such offer Phyllis Ricketts or her heirs shall have thirty days within which to elect whether to accept the offer or to reject the offer; if not accepted within thirty days the Grantee or her heirs may proceed to sell the property to such person or firms as they elect; if Phyllis Ricketts or her heirs desire to accept the offer they shall, within thirty days, deposit with an Escrow Agent ten percent of the purchase price, and shall thereafter complete the purchase within 120 days from the time that the offer is accepted; Grantee or her heirs will be required to present evidence of merchantable title.

Gartley was aware of the conditions contained in the agreement, and a short time later she conveyed the property for consideration to herself and her daughter Barbara Schriber as joint tenants without notice or consent of Cunningham. The house was never completed and has remained unoccupied. Thirteen years later Gartley and Schriber brought this action to clear title.

{3} The trial court issued conclusions of law stating that the warranty deed was in violation of the rule against perpetuities, that the conditions in the deed were illegal and unreasonable restraints upon alienation, and that the grantor's interest in the deed could not be reformed to approximate the intention of the creator of the interest. The trial court then reformed the deed to convey an interest in fee simple from Cunningham to Gartley.

{4} We first construe the grant in question. Ricketts argued that the deed created a fee simple on condition subsequent with a possibility of reverter in the transferor. In New Mexico,

> [n]o exact language is required to create a determinable fee or condition subsequent, but there must be a clear [indication] in the dedication of an intent that an interest is given or granted as a determinable fee or on condition subsequent.

Wheeler v. Monroe, 86 N.M. 296, 298, 523 P.2d, 540, 542 (1974). The trial court, however, found that the grant contained both conditions subsequent and a pre-emptive right of first refusal. A right of first refusal has been recognized as differing from an option to buy in that

> a pre-emption does not give to the pre-emptioner the power to compel an unwilling owner to sell, but merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-emption at the stipulated price, and upon receiving such an offer, the pre-emptioner may elect whether he will buy, and if he elects not to buy, then the owner of the property may sell to a third party.

Barnhart v. McKinney, 235 Kan. 511, 517, 682 P.2d 112, 117 (1984) **quoting, Anderson v. Armour & Co.,** 205 Kan. 801, 473 P.2d 84, (1970). In this case, the trial court correctly concluded that Cunningham had created a right of first refusal in Ricketts when she conveyed the property to Gartley, but concluded also that it was one of the conditions creating an unreasonable restraint on alienation.

{5} In New Mexico, the rule against perpetuities relates only to a future interest in property. **Price v. Atlantic Refining Co.,** 79 N.M. 629, 630, 447 P.2d 509, 510 (1968). A right of first refusal or pre-emption is not a future interest

and we decline to subject it to the rule. **Robroy Land Co, Inc. v. Prather,** 95 Wash. 2d 66, 69, 622 P.2d 367, 369 (1980). **Feider v. Feider,** 40 Wash. App. 589, 592, 699 P.2d 801, 803 (Wash. App.1985). A possibility of reverter is also not subject to the rule. **Klawitter v. U.S.,** 423 F. Supp. 1349, 1351 (1976). Furthermore, we recognize that the current trend is to "temper the rule [against perpetuities] if possible where its harsh application would obstruct or do violence to an intended scheme of property disposition." **Barnhart,** 235 Kan. at 518, 682 P.2d at 118 (1984); **First Nat'l Bank & Trust Co. v. Sidwell Corp.,** 234 Kan. 867, 678 P.2d 118 (1984); **Smerchek v. Hamilton,** 4 Kan App. 2d 346, 606 P.2d 491 (1980). The applicable statute in New Mexico directs that one "wait and see" whether the period of perpetuities has run because the period of perpetuities is measured by actual rather than possible events. In addition, the statutes directs that if the interest violates the rule, the conveyance should be reformed to approximate most closely the intention of the creator of the interest, NMSA 1978, § 47-1-17.1 (Cum. Supp.1985). Thus, New Mexico has adopted both the wait and see rule and has granted our courts the power of **cy pres. See** P. Minzner, **Property Law,** 17 N.M.L. Rev. 202 (1984). Here, the actual event of Cunningham's death has occurred and sale has taken place before 21 years of the life in being. Therefore, the trial court erred in concluding that the grant in question violated the rule against perpetuities.

{6} However, the trial court correctly held that the conveyance was an unreasonable restraint on alienation. New Mexico has adopted and interpreted the common law rule against restrictions on alienation to mean that "reasonable restraints upon the alienation of property are enforceable, but will be construed to operate within their exact limits." **State ex rel. Bingaman v. Valley Save & Loan,** 97 N.M. 8, 11-12, 636 P.2d 279, 282-83 (1981). We must look to certain factors in each case to determine reasonableness and we find the Restatement of Property helpful in this regard. Counsel, in their briefs, relied upon factors outlined in the Restatement of Property § 406 comment i (1944) as follows:

> The following factors, when found to be present, tend to support the conclusion that the restraint is reasonable:
>
> 1. the one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint;
>
> 2. the restraint is limited in duration;
>
> 3. the enforcement of the restraint accomplishes a worthwhile purpose;
>
> 4. the type of conveyances prohibited are ones not likely to be employed to any substantial degree by the one restrained;
>
> 5. the number of persons to whom alienation is prohibited is small;
>
> 6. the one upon whom the restraint is imposed is a charity.

Of these factors, the only one that might favor upholding the restraint is the first. The remaining factors in this case would not support the conclusion that the restraint is reasonable. The restraint is not limited in duration. The condition remains to bind all successive heirs and devisees into the unlimited future. There seems to be no worthwhile purpose accomplished by the restraint other than to allow Cunningham to "keep the property in the family." However, even this purpose can be avoided because there is no restraint on Grantee and her heirs to prevent them from giving the property away by gift or by a will to someone who is not in the family. Furthermore, the Restatement goes on to direct:

> The following factors, when found to be present, tend to support the conclusion that the restraint is unreasonable:
>
> 1. the restraint is capricious;
>
> 2. the restraint is imposed for spite or malice;

3. the one imposing the restraint has no interest in land that is benefited by the enforcement of the restraint;

4. the restraint is unlimited in duration;

5. the number of persons to whom alienation is prohibited is large.

Here, the first and second factors do not apply; there was no evidence to show that the restraint was either capricious or imposed for spite or malice. The fourth and fifth factors are present because the restraint is unlimited in duration and the number of people to whom alienation is prohibited is large.

{7} The current edition, Restatement (Second) of Property (1981), has revised the factors discussed above, but they are entirely consistent with our foregoing discussion. Section 4.2 of the Restatement Second directs:

> (3) A forfeiture restraint imposed on an interest in property, which restraint is not governed by subsections (1) or (2), is valid if, and only if, under all the circumstances of the case, the restraint is found to be reasonable. The most common factors supporting such a finding are the following:
>
> (a) The restraint is limited in duration;
>
> (b) The restraint is limited to allow a substantial variety of types of transfers to be employed;
>
> (c) The restraint is limited to the number of persons to whom transfer is prohibited;
>
> (d) The restraint is such that it tends to increase the value of the property involved;
>
> (e) The restraint is imposed upon an interest that is not otherwise readily marketable; or
>
> (f) The restraint is imposed upon property that is not readily marketable.

In this case, we place particular emphasis upon factors (a) and (c). With respect to (a), once again, the restraint is not limited in duration because it could continue on as long as there are heirs and devisees of Gartley and Ricketts who would be subject to the requirement. In addition, the number of persons to whom transfer is prohibited is very large, because the property could be sold to anyone. The remaining factors are not present. The absence of factors (a) and (c) are supported by the evidence and are persuasive. We affirm the trial court's ruling that the conveyance is an unreasonable restraint on alienation. We must balance the policy in favor of the freedom of alienation against the policy of permitting reasonable limitations upon the subsequent transfer of property. Although it is evident that Cunningham intended to "keep the property in the family," the means she chose to do so are unreasonable. The trial court correctly reformed the deed to convey an interest in fee simple from Cunningham to Gartley in the subject property.

{8} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

HARRY E. STOWERS, JR.,
Justice

MARY C. WALTERS,
Justice

RICHARD E. RANSOM,
Justice

Justice Tony Scarborough

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-078

Filing Date: September 27, 1988

Docket No. 17,697

CONSOLIDATED OIL AND GAS, INC.,

Plaintiff-Appellee,

v.

SOUTHERN UNION COMPANY, et al.,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY,
ART ENCINIAS, District Judge.

Motion for Rehearing Denied October 31, 1988; Rehearing Denied October 31, 1988.

Montgomery & Andrews,
Victor R. Ortega,
Albuquerque, NM,

Montgomery & Andrews,
Sarah M. Singleton,
Santa Fe, NM,

Bruce E. Henderson, Assistant General Counsel,
Dallas, TX,

for Appellants.

Campbell & Black,
Michael B. Campbell,
Bradford C. Berge,
Santa Fe, NM,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Disposition of this appeal hopefully will mark the final chapter in a suit for negligent misrepresentation between plaintiff-appellee, Consolidated Oil and Gas, Inc. (Consolidated), and defendants-appellants, Southern Union Company and Southern Union Gathering Company (collectively Southern Union). The substance of that suit concerned the tortious misrepresentation of the jurisdictional status of certain natural gas produced by Consolidated and sold under contract to Southern Union. In **Consolidated Oil & Gas, Inc. v. Southern Union Co.,** 106 N.M. 719, 749 P.2d 1098 (1987), this court affirmed a judgment in favor of Consolidated in the principal amount of $8,427,978, but held that the district court incorrectly computed prejudgment interest on the principal award.[1] We remanded the cause to the trial court for the sole purpose of recalculating the amount of prejudgment interest. **Id.** at 725, 749 P.2d at 1104.

{2} On remand Southern Union and Consolidated stipulated that the appropriate prejudgment interest award was $2,177,695. Southern Union now appeals the decision of the trial court to accrue postjudgment interest on the revised prejudgment interest award from the date of the original judgment in the trial court (July 12, 1985). Southern Union argues that postjudgment interest on the revised figure of $2,177,695 should accrue only from the date of entry of final judgment on remand (March 9, 1988).[2]

[1] The trial judge found that Consolidated was "entitled to prejudgment interest on [the damage award of $8,427,978] in the amount of $2,595,989, which is calculated at 6% simple interest." The award, however, was incorrectly calculated using monthly compounding.

[2] Southern union does not dispute that postjudgment interest on the principal amount of the judgment ($8,427,978) accrues from the date of the original judgment (July 12, 1985).

{3} Southern Union relies on this court's decision in **Varney v. Taylor,** 81 N.M. 87, 463 P.2d 511 (1969). In **Varney** we stated that where our

> opinion only requires a **modification** of the former judgment (such as remittitur or additur), interest accrues at the date of the original judgment; but if we have reversed the former judgment, insofar as damages are concerned, and remanded for new findings and computation of the award, such as here, then the interest accrues from the date of the new judgment.

Id. at 88, 463 P.2d at 512 (emphasis in original). Southern Union argues that since the mandate of our earlier decision required the trial court to make additional findings prior to the entry of the judgment on the mandate, interest should accrue only from the date of the new judgment. We disagree, and hold that the entry of the final judgment in this case constitutes a "modification" of the original award as contemplated by **Varney**."

{4} This court first addressed the question of accrual of postjudgment interest in **Bank of New Mexico v. Earl Rice Construction Co.,** 79 N.M. 115, 440 P.2d 790 (1968). There we noted that the appropriate inquiry is whether the action of the appellate court "amounted to actual reversal, having the effect of wiping out the original judgment," **id.** at 116, 440 P.2d at 791 (quoting, Annotation, **Date From Which Interest on Judgment Starts Running as Affected by Modification of Amount of Judgment on Appeal,** 4 A.L.R.3d 1221, 1223 (1965)), or whether "it is to be regarded as pro tanto an affirmance of the original judgment." even though the former judgment was in terms reversed on appeal, **Id.** In **Varney** this court "reversed and set aside," **id.** at 88, 463 P.2d at 512, a portion of the judgment award because the trial court had adopted an incorrect legal standard in measuring those damages; that portion of the judgment was a nullity. The effect of our former opinion in this case was to affirm both the underlying damage award of $8,427,978 and the discretionary award of prejudgment interest **utilizing the legal standard which the trial court had intended.** Thus, the judgment was affirmed pro tanto, and the cause remanded solely to correct a computational error which Consolidated had conceded in the appeal. Mere arithmetic recomputation of prejudgment interest on remand, whether performed by the trial court or the parties themselves, does not preclude accrual of interest on the award from the date of the original judgment. **Cf. Peterson v. Crown Financial Corp.,** 553 F. Supp. 114, 117 (1982) (postjudgment interest paid on prejudgment interest award from date of original judgment after recalculation of prejudgment interest on remand using new interest rate).

{5} We affirm the decision of the trial court to accrue postjudgment interest on the prejudgment interest award of $2,177,695 from July 12, 1985 until paid in full, and remand the cause to the trial court for further proceedings.

{6} IT IS SO ORDERED.

WE CONCUR:

HARRY E. STOWERS, JR.,
Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1988-NMSC-079

Filing Date: September 27, 1988

Docket No. 17,651

MARK McCARTY,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

September 27, 1988, Filed. As Amended November 28, 1988.

ORIGINAL PROCEEDING ON CERTIORARI

Motion for Rehearing Denied November 15, 1988.

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

for Petitioner.

Hal Stratton, Attorney General,
Sharon Walton, Assistant Attorney General,
Santa Fe, New Mexico,

for Respondent.

OPINION

RANSOM, Justice.

{1} We granted certiorari to review the trial court's preclusion of witness testimony as a sanction against defendant Mark McCarty for failure to comply with a demand for notice of alibi. The court of appeals affirmed. Because the trial court abused its discretion in precluding testimony under the facts and circumstances of this case, we reverse.

{2} Sometime between the late hours of May 17 and the early morning hours of May 18, 1986, Schumpert's Music Company (Schumpert's) in Roswell was burglarized. McCarty was arrested and charged with five felony offenses in connection with that burglary. Subsequently, the State filed a demand for notice of alibi pursuant to SCRA 1986, 5-508.[1] The defense did not submit a notice of alibi, but filed a witness list containing the names and addresses of two witnesses, Pat Gordon and Debbie Gilkison, without identifying them as alibi witnesses.

{3} During the trial, defense counsel attempted to offer testimony to impeach the story of the State's key witness, Donny Chapman, to the effect that defendant left Kathy's Arcade with Keith Moore and Chapman around 9:00 p.m. or 10:00 p.m. Gordon would have testified that McCarty was at the arcade until 12:15 a.m. Before Gordon was able to testify to this fact, the State objected on the grounds that this was evidence establishing an alibi defense of which it was not notified. A sidebar conference ensued and defense counsel argued that this was not alibi evidence because the witness would not corroborate the whereabouts of McCarty at the time of the alleged burglary offenses, which the defense asserted occurred after 1:00 a.m. The trial judge ruled that this was evidence of an alibi and he would not

[1] SCRA 1986, 5-508 provides that:

[U]pon the written demand of the district attorney, specifying as particularly as is known to the district attorney, the place, date and time of the commission of the crime charged, a defendant who intends to offer evidence of an alibi in his defense shall, not less than ten (10) days before trial or such other time as the district attorney may direct, serve upon such district attorney a notice in writing of his intention to claim such alibi.

permit Gordon to testify regarding time.[2] When defense counsel continued to protest, the trial judge excused the jury and heard argument on the issue. The trial judge reiterated his position that if Chapman's testimony was that McCarty left the arcade between 9:00 p.m. and 10:00 p.m., drove around a little bit, cased Schumpert's, and then burgled the place, and that Gordon was going to testify that McCarty was at the arcade until after 12:15 a.m., then that would indeed be an alibi defense. Gilkison, the other defense witness, was also precluded from testifying that she was with McCarty until around 12:30 a.m.

{4} Alibi is a shorthand description for a defense that rests on the fact that the accused was elsewhere at the time the alleged offense took place. State v. Horenberger, 119 Wis. 2d 237, 242, 349 N.W.2d 692 (1984); **see State v. Redwine,** 79 Or. App. 25, 27, 717 P.2d 1239, 1241 (Alibi evidence is evidence that the defendant was, at the time of the commission of the alleged offense, at a place other than the place where such offense was committed.), **cert. granted,** 301 Or. 338, 722 P.2d 737 (1986); **State v. Berg,** 697 P.2d 1365, 1367 (Mont. 1985) ("An alibi is a defense that places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for the defendant to be the guilty party."). Alibi evidence focuses on the defendant's activities at the time of a specific act which is itself a violation of the criminal statute. The defendant's whereabouts during the alleged planning stages of the crime do not constitute an alibi defense for the crime itself. **Horenberger,** 119 Wis. 2d at 243-44, 349 N.W.2d at 695-96.

{5} Chapman's testimony elicited on direct examination regarding the actual time of the burglary offenses was as follows:

> Q. Do you have any idea what time it was when you went, actually entered Schumpert's music store?
>
> A. No, I didn't.
>
> Q. Sometime either the 17th or early on the 18th?
>
> A. I guess it was around you know 1:00 or 2:00 on the 18th but I am not sure.

As regards the events that took place after the first entry, Chapman testified that after removing the instruments from the store and placing them in McCarty's car, they drove to Moore's house where they remained for approximately one and one-half to two hours. Chapman and McCarty subsequently returned to Schumpert's and took another keyboard. McCarty then drove to his house where he and Chapman sat in the car and talked awhile before McCarty drove Chapman home at 4:42 a.m.

{6} During the argument to the court, defense counsel agreed to go on record that the challenged testimony would not establish an alibi. McCarty had no witness to corroborate his testimony that he was at home asleep at the time the offenses occurred. Defense counsel argued that the purpose of the testimony of both defense witnesses was to impeach Chapman's testimony that he, McCarty and Moore left the arcade between 9:00 p.m. and 10:00 p.m.

{7} In **Taylor v. Illinois,** 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988), the Supreme Court held that the compulsory process clause of the sixth amendment does not create an absolute bar to the preclusion of a defense witness' testimony as a sanction for violating a discovery rule requiring disclosure of witnesses. Although a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor, "the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests." **Id.** at 655. While this decision put to rest the notion that "the sixth amendment forbids the exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants," **United States v. Davis,** 639 F.2d 239, 243 (5th Cir.

[2] SCRA 1986, 5-508(C) provides that: "If defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi * * *."

1981), the facts underlying the **Taylor** court's holding suggest that preclusion is only appropriate in limited circumstances.

{8} In **Taylor**, on the second day of trial, defense counsel made an oral motion to amend his discovery response to include two more witnesses. Defense counsel represented that he had just been informed about these witnesses and that they probably had seen the entire incident. The trial judge directed counsel to bring the witnesses in the next day, at which time he would decide whether they could testify. At the hearing, the witness "acknowledged that defense counsel had visited him at his home on the Wednesday of the week before the trial began. Thus, his testimony rather dramatically contradicted defense counsel's representations to the trial court." **Taylor**, 108 S. Ct. at 650.

> A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Confrontation Clause simply to exclude the witness' testimony.

Id. at 655-56.

{9} Although the **Taylor** court declined to draft a comprehensive set of standards to guide the exercise of discretion in cases involving preclusion as a sanction, the Court did cite as one example the balancing test announced in **Fendler v. Goldsmith,** 728 F.2d 1181 (9th Cir. 1983). **Taylor**, 108 S. Ct. at 655 n. 19.

> At the outset we emphasize that for a balancing test to meet Sixth Amendment standards, it must begin with a presumption against exclusion of otherwise admissible defense evidence. No other approach adequately protects the right to present a defense. **See Washington v. Texas,** [388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967)].

728 F.2d at 1188. **Fendler** addressed general criminal discovery rules, and specifically noted that the validity of the preclusion provision of the notice-of-alibi discovery rule, which is designed to deal with a particular type of evidence, was not before the court. "[T]he Supreme Court has specifically upheld such rules—though leaving open the question of what sanctions are permissible—because of the special tendency of unexpected alibi defenses to cause unfair surprise and lengthy trial delays." **Id.** at 1188 n. 12, 1190 n. 20. Unlike the dissent in this case, we do not see **Taylor** or **Fendler** as holding the balancing test inapplicable to the notice-of-alibi discovery rule. It simply was not under consideration. No generalization can be made that pretrial notice of an alibi defense is either more or less significant than notice of witnesses to be called.

{10} The **Fendler** court gave consideration to the following factors: (1) the effectiveness of less severe sanctions, (2) the impact of preclusion on the evidence at trial and the outcome of the case, (3) the extent of prosecutorial surprise or prejudice, and (4) whether the violation was willful. **See also Escalera v. Coombe,** 826 F.2d 185 (2d Cir. 1987), **vacated and remanded,** . . . U.S. . . ., 108 S. Ct. 1004, 98 L. Ed. 2d 971 (1988). In deciding whether or not to admit alibi evidence when a proper notice has not been served by the defendant, the trial court should balance the potential for prejudice to the prosecution against the impact on the defense and whether the evidence might have been material to the outcome of the trial. **Id.** at 189-91. However, "[t]he integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence; the interest in the fair and efficient administration of justice; and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance." **Taylor**, 108 S. Ct. at 655.

{11} Under the **Fendler** criteria, the factors here against levying a preclusion sanction predominate.

The impact of the preclusion on the evidence at trial was significant. The jury was denied the opportunity to hear testimony from sworn witnesses that saw McCarty at the arcade during the time that Chapman testified McCarty was cruising the environs around Schumpert's and casing the store. Furthermore, the extent of prosecutorial surprise or prejudice was de minimus. During argument to the court, defense counsel asked how the State was prejudiced because the prosecutor had spoken to each witness about particular times. In response, the prosecutor admitted that it was true that she had spoken with Gordon and, briefly, with Gilkison. The prosecutor then stated she would withdraw her objection. However, the trial judge replied that he would not "make" the prosecutor withdraw the objection, and stated "I will rule in your favor, unless, if you wish to withdraw it fine, if you don't I will hold it is an alibi defense and that notice was not given."

{12} In his explanation for his failure to comply with notice of alibi, defense counsel claimed that the demand was too vague to respond to meaningfully. The notice requested McCarty to give specific information as to the places he claimed to have been between May 17th through June 13th, 1986, in Roswell, Chaves County, during which time he stood accused of burglary, receiving stolen property, contributing to the delinquency of a minor, larceny, and conspiracy. The trial judge responded that given the various charges it would have been impossible to be more particular concerning times of the alleged offenses. Furthermore, the trial judge stated that if defense counsel required more particularity or a breakdown of the charges, he should have requested such assistance from either the district attorney or the court. The trial judge opined that a defense counsel relies at his own peril upon an excuse for failing to comply with a discovery request. We agree, and do not rest our decision on any claim that it was unreasonable for the trial court to characterize the testimony in question as alibi evidence within the scope of the demand for notice.

{13} Although defense counsel in this case may be considered to have failed to comply strictly with the State's notice of alibi, it would not have been unreasonable for the court to have deemed testimony on the whereabouts of the defendant during planning stages for the crime as not constituting alibi evidence. Other factors militate against a finding of willful misconduct on the part of defense counsel. He did disclose McCarty's only witnesses four months prior to trial. Through its interview of McCarty's witnesses, the State was cognizant of the particular times these witnesses would testify that McCarty was present at Kathy's Arcade. Unlike the defense counsel in **Taylor**, McCarty's counsel did not attempt to gain tactical advantage by producing undisclosed witnesses immediately prior to trial. In fact, during its interview of Gordon, the State discovered evidence adverse to McCarty and subsequently called her as a rebuttal witness. "The principal reason for notice rules * * * is prevention of surprise to the state, not punishment of the accused for mere technical errors or omissions." **Alicea v. Gagnon,** 675 F.2d 913, 924 (7th Cir. 1982).

{14} "Notice-of-alibi rules * * * are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial." **Wardius v. Oregon,** 412 U.S. 470, 473, 93 S. Ct. 2208, 2211, 37 L. Ed. 2d 82 (1973). These rules enhance the search for truth by ensuring both the State and the defendant have ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. **Williams v. Florida,** 399 U.S. 78, 82, 90 S. Ct. 1893, 1896, 26 L. Ed. 2d 446 (1970). Neither the purpose nor intent behind the notice-of-alibi rule appears to have been frustrated here. The State had the opportunity to prepare its case by interviewing disclosed witnesses and investigating facts necessary to adjudicate the guilt or innocence of the defendant.

{15} It is clear that a trial court does have the discretion to preclude defense testimony as a sanction for failure to comply with a demand for notice of alibi. SCRA 1986, 5-508(C).

Preclusion, however, constitutes a conscious mandatory distortion of the fact-finding process whenever applied. **See** Weinstein, **Some Difficulties in Devising Rules for Determining Truth in Judicial Trials,** 66 Colum. L. Rev. 223, 227 (1966). Before a defendant's sixth amendment rights are derogated as a sanction for noncompliance, a trial judge must exercise his discretion within recognized parameters. He must consider other available ways to enforce a criminal discovery rule.

{16} Before resorting to preclusion, a trial judge should weigh not only the prejudicial effect of noncompliance on the immediate case, but also the necessity to enforce the rule to preserve the integrity of the trial process. **See Taylor,** 108 S. Ct. at 655. The trial judge should consider whether the noncompliance was a willful attempt to prevent the State from investigating facts necessary for the preparation of its case. The trial judge then must balance the resulting prejudice to the State against the materiality of the precluded testimony to the outcome of the case.

{17} Here, the trial judge abused his discretion because under the facts and circumstances of this case it would be unreasonable to weigh the balance against the defendant. Defense counsel's failure to give notice of his witnesses in the context of the notice-of-alibi rule did not frustrate the presentation of the State's case. The State was able to interview the defendant's only two witnesses to discern the substance of their testimony. There was no prejudice to the State, but the precluded testimony was critical to the defense's ability to impeach the credibility of the State's key witness, Donny Chapman. Unlike the dissent to this opinion, we do not characterize the conduct of defense counsel as willful. No harm is done to the integrity of the notice-of-alibi rule by prohibiting the preclusion of witness testimony as a sanction under such circumstances.

{18} We reverse the conviction of McCarty and remand for a new trial.

{19} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Senior Justice

MARY C. WALTERS,
Justice

TONY SCARBOROUGH,
Chief Justice, dissent

HARRY E. STOWERS, JR.,
Justice, dissent

DISSENT

SCARBOROUGH, Chief Justice (Dissenting).

{20} McCarty was prosecuted for the burglary of Schumpert's Music Company in Roswell. The State filed a demand for notice of alibi. On demand the State is entitled to the pre-trial identification of the defendant's alibi witnesses. SCRA 1986, 5-508. Reciprocal discovery rules are designed to serve the ends of justice by affording both parties, as the majority observe, "the maximum possible amount of information with which to prepare their cases." McCarty failed to respond to the demand and the trial court excluded defendant's alibi evidence. The majority acknowledge that the excluded evidence was alibi evidence.

{21} Defendant willfully failed to comply with the rule. He provided no notice to the State that he intended to introduce alibi evidence. The alibi evidence surfaced for the first time after the State had completed its case-in-chief, during the questioning of the first defense witness. The prosecutor objected and advised the court that as late as that morning she had inquired as to defense counsel's intention to present alibi evidence, and was advised there would be none from that defense witness. Defendant concedes that his noncompliance was intentional. He states that the demand for notice of alibi was so vague he was unable to frame a proper response. Defendant ignored the alibi rule providing for pre-trial discovery for the State. The majority countenance such conduct.

{22} Confronted by the defendant's willful noncompliance with SCRA 1986, 5-508, the trial court fashioned a reasonable response which permitted both defendant's alibi witnesses to testify and excluded only their alibi testimony. The trial court did not abuse its discretion in fashioning such a remedy in light of defendant's total failure to respond to the State's demand for notice of alibi pursuant to SCRA 1986, 5-508. The Supreme Court in **Taylor v. Illinois,** 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988), specifically approved total witness exclusion for intentional noncompliance with state criminal discovery rules, a much harsher remedy than the trial court utilized in this case. It is obvious from a review of the record of the court proceedings in this case that the trial court balanced the defendant's right to a full and fair trial against the competing interests of the State in avoiding surprise and delay.

{23} The majority cites **Fendler v. Goldsmith,** 728 F.2d 1181 (9th Cir 1984), as the source of its balancing test. However, **Fendler,** like **Taylor**, did not impose standards to guide the exercise of a trial court's discretion in applying sanctions for noncompliance with discovery rules designed for specific kinds of evidence. Both **Fendler** and **Taylor** dealt with permissible sanctions for noncompliance with general reciprocal-discovery rules. **Fendler** specifically excluded a reciprocal notice-of-alibi discovery rule from the impact of its holding. **Id.** at 1190 n. 19. Nevertheless, the majority, based upon **Fendler,** create a legal presumption against the exclusion of alibi evidence even when the trial court is confronted with willful noncompliance. Such a presumption was not adopted by the Supreme Court in **Taylor** even where the noncompliance involved general criminal discovery rules. As noted by the court in **Fendler,** unexpected alibi defenses have a special tendency to cause unfair surprise and lengthy trial delays. **Id.** at 1188 n. 12. In such a case the State has an especially strong legitimate interest in securing pretrial disclosure of alibi evidence.

{24} I also take issue with the assertion of the majority that the State had the opportunity to prepare its case without the advance notice contemplated by Rule 5-508 that defendant would introduce an alibi defense. "Given the ease with which an alibi defense can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate." **Williams v. Florida,** 399 U.S. 78, 81, 90 S. Ct. 1893, 1895-1896, 26 L. Ed. 2d 466 (1970). Contrary to the assertion of the majority, the State has no opportunity to adequately prepare to meet an alibi defense injected by a defendant at the eleventh-hour. Even when the State knows the identity of the defense witnesses, the State may still be surprised to learn that they intend to testify about an alibi. **United States v. Barron,** 575 F.2d 752, 758 (9th Cir. 1978). If a trial court should permit introduction of an eleventh-hour alibi, I must presume that a continuance would be granted to allow the prosecutor to meet the defense and to comply with his duty to disclose rebuttal witnesses. **See id.** at 757.

{25} The majority direct a trial judge to "consider other available ways to enforce a criminal discovery rule" before resorting to preclusion. The majority overlook the preventative purpose of preclusion. Preclusion of alibi evidence in the face of willful noncompliance and surprise at trial is a sanction intended not to enforce compliance with the discovery rule after a violation occurs, but to deter willful discovery violations in the first instance. Alternative sanctions would likely prove ineffective to deter violations. **See** Comment, **Alibi Notice Rules: The Preclusion Sanction as Procedural Default,** 51 U. Chi. L. Rev. 254, 276 (1984). The threat of a continuance would hardly deter violations and may even prove to be an attractive strategy to stall the trial after the prosecution has rested its case. As the Supreme Court observed in **Taylor**, "[d]efendants who are willing to fabricate a defense may also be willing to fabricate excuses for failing to comply with a discovery requirement." **Taylor**, 108 S. Ct. at 655. There is no incentive to conform to the rule if an intentional violation results in an automatic continuance or mistrial. The **Taylor** Court observed that more is at stake than just possible prejudice to the prosecution. Compliance with the notice-of-alibi rule is a reasonable requirement needed to ensure the integrity of the judicial process itself.

The rule merely conditions the exercise of a defendant's rights under the sixth amendment upon timely disclosure, that is, upon the assertion of the constitutional right at the appropriate point in the litigation.

{26} The Supreme Court in **Taylor** plainly rejected the contention that every preclusion of testimony distorts the truth-seeking process. The Court recognized that alternative sanctions might well be appropriate in most cases, but concluded that "[t]here are instances in which they would perpetuate rather than limit the prejudice to the State and the adversary process." **Id.** The Court agreed that the severest sanction is appropriate in the case of "willful misconduct." **Id.** at 656. Additionally, the **Taylor** Court affirmed the ruling of the Illinois Appellate Court that "'[t]he decision of the severity of the sanction to impose on a party who violates discovery rules rests within the sound discretion of the trial court'." **Id.** at 651, (quoting, **People v. Taylor,** 141 Ill. App. 3d 839, 844, 96 Ill. Dec. 189, 193, 491 N.E.2d 3, 7 (1986)). I see no abuse of discretion in this case and would, accordingly, affirm the decision of the district court and the court of appeals.

STOWERS,
Justice, (dissenting).

{27} I must disagree with the majority's holding that the trial court abused its discretion in excluding alibi testimony of two defense witnesses as a sanction for defendant's failure to comply with the notice of alibi rule.

{28} SCRA 1986, 5-508(A) provides in relevant part "a defendant who intends to offer evidence of an alibi in his defense **shall,** not less than ten (10) days before trial . . . serve upon [the] district attorney a notice in writing of his intention to claim such alibi." (emphasis added). Defendant in the instant case totally failed to comply with this rule. He did not submit a notice of alibi, but simply filed a witness list containing the names and addresses of the two witnesses in question, without identifying them in any special capacity. Because alibis are most convincing and easy to fabricate, notice of alibi statutes require a defendant to give notice to the prosecution of a defendant's intention to rely on an alibi as a defense. Such notice provides the State with the opportunity to ascertain the facts as to the credibility of the witnesses or to obtain rebuttal testimony. Annotation, **Validity and Construction of Statute Requiring Defendant in Criminal Case to Disclose Matter As To Alibi Defense,** 45 A.L.R. 3d 958, 965 (1972). The alibi rule "is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence." **State v. Smith,** 88 N.M. 541, 543, 543 P.2d 834, 836 (Ct. App. 1975) (quoting **Williams v. Florida,** 399 U.S. 78, 82, 90 S. Ct. 1893, 1896, 26 L. Ed. 2d 446 (1970)). The rationale enunciated in **Williams** exemplifies "the growing realization that disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice." **Dennis v. United States,** 384 U.S. 855, 870, 86 S. Ct. 1840, 1849, 16 L. Ed. 2d 973 (1966). The notice requirement merely compels a defendant to accelerate the timing of his disclosure information which he plans to divulge at trial anyway, **Williams,** 399 U.S. at 85, 90 S. Ct. at 1893, and thereby, provides the judicial system with a better opportunity to determine the truth of the charge.

{29} The notice of alibi rule further provides that the trial court may exclude alibi evidence offered by the defendant at trial, if the defendant failed to comply with the notice requirements. SCRA 1986, 5-508(C). The decision to exclude such testimony is discretionary. **Smith,** 88 N.M. at 544, 543 P.2d at 837. The appropriate standard of review is whether the trial court abused its discretion in ruling as it did. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." **State v. Simonson,** 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983). I find no abuse of discretion here.

{30} The record shows that not until after the State had rested its case did defense counsel make an offer of proof as to the two witnesses'

testimony arguing it was not offered as alibi but rather to impeach the state's witness, Donny Chapman. Since the testimony of both Gordon and Gilkison would have directly refuted the testimony of Chapman indicating that defendant was at a place other than the place where the crimes charged allegedly occurred, their testimony constituted alibi evidence as the trial court determined. Nonetheless, the trial court permitted the impeachment evidence by both witnesses on Chapman's general character for truthfulness. The witnesses indicated that Chapman lied and was not trustworthy.

{31} Although it is true that Rule 5-508 permits the trial court to waive the notice requirements for good cause, defendant made no such showing. SCRA 1986, 5-508(C). First, an adjournment to obtain other witnesses who might have refuted defendant's witnesses would have unnecessarily delayed the proceedings. Defense counsel was aware of the existence of these witnesses and their proffered testimony at the time the State filed its demand for notice of alibi, but totally failed to comply with the rule and identify them as alibi witnesses. Second, both were permitted to testify on Chapman's credibility. Third, defendant did not offer a valid justification for his failure to comply with the notice requirements. Finally, and contrary to defendant's reasoning, the State was prejudiced from the moment defendant failed to notify it of an alibi defense. "Alibi" literally means "elsewhere; in another place" other than the place where the crime charged allegedly occurred. **State v. Nunn,** 113 N.J. Super. 161, 167, 273 A.2d 366, 369 (App. Div. 1971); **State v. Redwine,** 79 Or. App. 25, 717 P.2d 1239, **cert. granted,** 301 Or. 338, 722 P.2d 737 (1986). "The defense of alibi has its evidential efficacy in the physical impossibility of the accused's guilt." **Nunn,** 113 N.J. Super. at 167, 273 A.2d at 369. Moreover, it is used to cast a doubt on proof of the elements of the crime. **See, e.g.**, **People v. Williamson,** 168 Cal. App. 2d 735, 336 P.2d 214 (1959). Thus, in the absence of notice of an alibi defense, it is more onerous for the State to prove that there is no reasonable doubt that defendant was present at the time the crime was committed. **See State v. Smith,** 21 N.M. 173, 153 P. 256 (1915).

{32} I can only conclude that the action of the trial court was not so clearly unreasonable. in light of the surrounding circumstances to warrant interference on the ground of abuse of discretion. Any decision to the contrary renders the force of Rule 5-508, a rule which is clear and specific, a nullity.

{33} By defendant's total failure to comply with the rule, its intent and purpose were completely frustrated and created an unfair situation for the prosecution. The basic premise remains that both sides are equally entitled to a fair trial. The effect of the majority opinion is to tilt that premise in favor of the defense, which result is neither desired or appropriate.

{34} Furthermore, I believe that the majority opinion's reliance on **Taylor v. Illinois,** 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988), and **Fender v. Goldsmith,** 728 F.2d 1181 (9th Cir. 1984), to find an abuse of discretion in the instant case, is misplaced. Both **Taylor** and **Fendler** involved the constitutionality of witness preclusion for failure to obey pretrial discovery rules. The case before us involves the trial court's discretion by excluding the testimony of two defense alibi witnesses as a result of defendant's complete failure to comply with Rule 5-508. **See e.g.**, **United States v. Barron,** 575 F.2d 752 (9th Cir. 1978). We held in **State v. Smith,** 88 N.M. 541, 543 P.2d 834 (Ct. App. 1975), that New Mexico's alibi rule does not violate due process, the right to compulsory process or defendant's privilege against self-incrimination. Therefore, under the appropriate standard of review, abuse of discretion, I must affirm the trial court's exclusion of alibi testimony for defendant's, failure to comply with the notice of alibi rule.

{35} For these reasons, I dissent.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-001

Filing Date: January 9, 1989

Docket No. 17,937

SALOMON MONTANO, Individually and as VALENCIA COUNTY COMMISSIONER,

Plaintiff-Appellant,

v.

PAUL GABALDON, VALENCIA COUNTY COMMISSIONER, and FRANK A. GURULE, VALENCIA COUNTY COMMISSIONER,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY, PAUL MARSHALL, District Judge.

Motion for Rehearing Denied January 31, 1989

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OPINION

SCARBOROUGH, Chief Justice.

{1} This suit involves a constitutional question arising out of the decision of the Board of County Commissioners of Valencia County to enter into a Lease with Option to Purchase Agreement (lease) with a private corporation for the use of a new jail facility to be constructed on county-owned land. Valencia County voters have twice voted down referendums to finance a new jail. Plaintiff-appellant and County Commissioner Salomon Montano brought this declaratory judgment action questioning the legality of the lease given the restrictions in Article IX, Section 10 of the New Mexico Constitution. That provision requires the approval of county voters prior to the creation of county indebtedness for the purpose of erecting public buildings. The district court granted summary judgment in favor of

defendants-appellees, finding that the lease did not create an unconstitutional debt. This appeal follows. We reverse and hold that the lease creates indebtedness within the meaning of Article IX, Section 10 of the New Mexico Constitution.

{2} The lease in question requires Valencia County to make semi-annual payments, denominated as rent, for the use of a new facility which is to be built by a private contractor on county-owned land. Certificates of Participation would be issued by the contractor and sold to private investors to raise the costs of construction ($3,100,000). The private contractor would hold title to the "project," which is defined as the land, the improvements, and the fixtures, until and unless the County exercised its purchase option. The option to purchase the facility could be exercised during the twenty-year term of the lease by payment according to an amortization schedule included in the lease. Or, should the County continue to make the scheduled rental payments for the entire twenty-year term, the County would acquire ownership of the facility, and reacquire ownership of the land, after the final payment on July 1, 2008.

{3} The lease also contains a "non-appropriation" provision which allows for termination of the lease at the end of any fiscal year should the Board of County Commissioners not appropriate sufficient funds to pay the rent. In addition, the lease defines a number of conditions in which the County may be declared in default, including failure to make a scheduled payment for a period of ten business days, failure to observe certain covenants, or filing of voluntary bankruptcy by the County. If the County exercised its termination rights, or if the private contractor terminated the lease upon default by the County, the contractor or its assigns would acquire permanent title to the land and the jail facility.

{4} Article IX, Section 10 of the New Mexico Constitution provides in pertinent part as follows:

> No county shall borrow money except for the following purposes:
>
> A. erecting, remodeling and making additions to necessary public buildings * * *
>
> In such cases, indebtedness shall be incurred only after the proposition to create such debt has been submitted to the qualified electors of the county and approved by a majority of those voting thereon.

N.M. Const. art. IX, § 10 (Cum. Supp. 1988).

{5} This Court will assume that the framers were familiar with similar constitutional provisions from other states and their judicial interpretation when they drafted the New Mexico Constitution. **Jaramillo v. City of Albuquerque,** 64 N.M. 427, 430, 329 P.2d 626, 628 (1958). It is apparent from the cases cited in 1 J. Dillion, **Law of Municipal Corporations,** §§ 193-200 (5th ed. 1911) [hereinafter **Dillon],** that the courts at the turn of the century were familiar with the basic issues involved here. In fact, these constitutional provisions were primarily a response to the heavy borrowing, and subsequent default, engaged in by many states prior to 1840. **In re Constitutionality of Chapter 280, Oregon Laws 1975,** 276 Or. 135, 554 P.2d 126 (1976). Accordingly, indebtedness provisions such as ours were generally given an expansive definition. Dillon writes: "What are debts? In defining these terms it has been declared that the language of the Constitution is exceedingly broad, and should not receive a narrow or strained construction * * * *" **Dillon** § 193 at 349. When a local government pledged property as security for repayment of a debt, this was usually held to constitute the creation of indebtedness. **Id.** § 199.

{6} In keeping with the intent of the framers, a broad interpretation of the debt limitation has long been favored in New Mexico. Regardless of whether an agency of government is bound **in personam** to pay a debt, a borrowing has been deemed to take place within the prohibition of Article IX, Section 10 of the Constitution when, by transfer of legal title and/or the payment of money, the agency of government obtains an equitable interest in property which is subject to

forfeiture in the event future periodic payments are not made as agreed. **See, e.g. Palmer v. City of Albuquerque,** 19 N.M. 285, 142 P. 929 (1914). An agreement that commits the county to make payments out of general revenues in future fiscal years, without voter approval, violates the New Mexico Constitution even if that obligation is merely an "equitable or moral" duty, **State ex rel. Capitol Addition Building Commission v. Connelly,** 39 N.M. 312, 318, 46 P.2d 1097, 1100 (1935) (quoting **Steward v. Bowers,** 37 N.M. 385, 24 P.2d 253 (1933)), or a "contingent" duty, **State Office Building Commission v. Trujillo,** 46 N.M. 29, 45, 120 P.2d 434, 444 (1941) (quoting **City of Santa Fe v. First National Bank,** 41 N.M. 130, 138, 65 P.2d 851, 862 (1937)).

{7} The appellees argue no unconstitutional debt is created by this lease because there is no legal obligation either to continue the lease from year to year or to purchase the facility. However, we are of the opinion that once the County accepted this lease, it would be obligated to continue making rental payments in order to protect a growing equitable interest in the facility, as well as to protect the County's interest in the title to County land.[1] This is the type of future economic commitment that requires the arrangement be approved by the voters.

{8} Additionally, consistent with our conclusion that the obligation in question falls within the intended broad interpretation of indebtedness, we find the lease-purchase agreement to be a "lease" in form only. If an option price is nominal or nonexistent, a purported lease may be treated as a sale. **See Springer Corp. v. American Leasing Co.,** 80 N.M. 609, 611, 459 P.2d 135, 137 (1969); **Transamerica Leasing Corp. v. Bureau of Revenue,** 80 N.M. 48, 53, 450 P.2d 934, 939 (Ct. App. 1969). In this case, the County acquires ownership of the facility simply by making the agreed rental payments over the twenty-year term; however, it loses all interest in the project if it exercises its termination rights or defaults. The only method by which the County may redeem its investment is by tendering the full purchase price of the facility, plus interest. Accordingly, each semi-annual "rental" payment represents more than just a present debt for the use of the facility for a six month period. The arrangement is in essence an installment-purchase agreement for the acquisition of a public building, with outside financing and payments spread over twenty years, and as such it requires voter approval.

{9} Local governments have no authority under our Constitution to borrow money or issue bonds absent a delegation by the legislature of all or part of the legislature's plenary authority to create debts. **See Board of Com'rs v. State,** 43 N.M. 409, 411, 94 P.2d 515, 516 (1939). In the present context, the legislature has provided that counties may enter into lease-purchase agreements. NMSA 1978, § 6-6-12. We recognize that county governments may have entered into lease-purchase agreements similar to the agreement under consideration here, in which the option purchase price is nominal or nonexistent, in reliance upon a 1976 Attorney General's Opinion which misconstrued the language of our decisions in **Connelly** and **Truijillo. See** AG Op. No. 20 (1976). For this reason, this ruling shall have modified prospective effect only. See **Hicks v. State,** 88 N.M. 588, 592-94, 544 P.2d 1153, 1157-59 (1975), as well as the dissent of Montoya, J., **id.** at 595-96, 544 P.2d at 1160-61, for a discussion of prospective versus modified prospective application of a new rule of law.

{10} The order of the district court finding that the lease will not violate Article IX, Section 10 of

[1] The lease divides rental payments into "principal" and "interest" according to a twenty-year amortization schedule. At any time during the lease the County could exercise its purchase option by payment of the initial cost of construction ($3,100,000) less accrued payment of principal. Thus, the lease in question is significantly different from a lease purchase agreement where the option price is tied to the actual fair market value of the facility at the time the option is exercised. We do not accept the appellees' argument that the amortization schedule merely reflects an estimate of the fair market value of the jail facility as it depreciates over time. If the facility were adequately designed and maintained it would be unreasonable to assume that after two decades of use it would have a market value of zero.

the New Mexico Constitution, and granting summary judgment in favor of defendants-appellees, is reversed, and the case is remanded for action consistent with this opinion.

{11} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR,
Senior Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-002

Filing Date: January 24, 1989

Docket No. 17,613

LOS ALAMOS CREDIT UNION,

Plaintiff-Appellee,

v.

STUART BOWLING, et ux.,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF LOS ALAMOS COUNTY, ROGER L. COPPLE, District Judge.

Berardinelli & Martinez,
David J. Berardinelli,
Santa Fe, NM,

for Appellants.

Montgomery & Andrews,
James R. Jurgens,
Santa Fe, NM,

for Appellee.

OPINION

SCARBOROUGH, Justice.

{1} Defendants-appellants, Stuart and Patricia Bowling (Bowlings), appeal the order of summary judgment in favor of plaintiff-appellee, the Los Alamos Credit Union (Credit Union) reinstating a $65,000 residential mortgage and note. We affirm.

{2} Affidavits and supporting documents filed with Credit Union's motion for summary judgment alleged the following facts which were not disputed by the Bowlings in their response to the motion. Uncontroverted facts must be taken as true in support of a motion for summary judgment. **State ex rel. Bardacke v. New Mexico Fed. Sav. & Loan Ass'n**, 102 N.M. 673, 699 P.2d 604 (1985). The Bowlings borrowed $65,000 cash from Los Alamos Credit Union on September 9, 1985, and executed a promissory note and residential first mortgage as security. Payments on the note were to be made pursuant to preauthorized automatic deductions from the Bowlings' account at the Credit Union. Through clerical error involving the transfer of the payment record to another account at the Credit Union at the Bowlings' request, on September 13, 1985, an employee marked the original note and mortgage "Paid." On April 23, 1986, the assistant treasurer, acting under the mistaken belief that the Bowlings had paid the note, executed a release of mortgage and forwarded the original note, mortgage and release documents to the Bowlings. The Bowlings promptly recorded the release a week later. Credit Union discovered its error the following month when the Bowlings failed to make the May 1986 payment. Credit Union then contacted the Bowlings, advised them of the error, and requested that the note be reaffirmed and the mortgage reinstated. However, the Bowlings refused and made no further payments toward the outstanding balance of approximately $64,511.

{3} Credit Union re-recorded the original mortgage on June 5, 1986 and a foreclosure suit followed. In their response to Credit Union's motion for summary judgment the Bowlings attached a copy of the release of mortgage and averred that a lending institution cannot avoid a release properly executed and unambiguous on its face. Upon these facts there was no error in granting Credit Union's motion for summary judgment.

{4} Section 55-3-605 of the New Mexico Commercial code provides that a "holder of an instrument may even without consideration discharge

any party * * * by intentionally cancelling the instrument * * * by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged." NMSA 1978, § 55-3-605. However, a cancellation, release, or surrender of the instrument is ineffective if it is unauthorized, unintentional, or done by mistake. **See, e.g.**, **Guaranty Bank Trust Co. v. Dowling**, 4 Conn. App. 376, 494 A.2d 1216 (1985); **Richardson v. First Nat'l Bank of Louisville**, 660 S.W.2d 678 (Ky. Ct. App. 1983); **First Galesburg Nat'l Bank & Trust Co. v. Martin**, 58 Ill. App. 3d 113, 15 Ill. Dec. 603, 373 N.E.2d 1075 (1978); **Reid v. Cramer**, 24 Wash. App. 742, 603 P.2d 851 (1979).

{5} There is no dispute that through clerical error the Bowlings' original account was closed without the outstanding balance due on the note being transferred to the Bowlings' second account. Credit Union's employees, by affidavit, stated that they would not have marked the original note and mortgage "Paid," executed a release and then surrendered these documents to the Bowlings if they had known that the note, in fact, remained unpaid. Once Credit Union filed these affidavits stating that the cancellation of the obligation was due to clerical error and that the note remained unpaid, it was incumbent upon the Bowlings to dispute these statements. This they did not do. Consequently, there was no genuine issue concerning the existence of the obligation. We conclude that the instrument was cancelled by mistake and unintentionally discharged. Therefore, Credit Union was entitled to summary judgment as a matter of law. While the mistaken discharge may be attributable to Credit Union's negligence, that fact does not permit the Bowlings to retain a gratuitous benefit to which they are not entitled.

{6} The order of the district court, including the award of costs and attorney fees totalling $7,350.44, is affirmed. This cause is remanded for an award of costs and attorney fees on appeal to Credit Union pursuant to the terms of the promissory note.

{7} IT IS SO ORDERED.

WE CONCUR:

HARRY E. STOWERS, JR.,
Justice

JOSEPH F. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-005

Filing Date: February 15, 1989

Docket No. 17,812

BERNICE STANTON,

Plaintiff-Appellee,

v.

GORDON JEWELRY CORPORATION, a Delaware corporation, and GORDON'S QUALITY JEWELERS OF NEW MEXICO,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY, JAMES L. SHULER, District Judge.

Rehearings Denied March 10, 1989.

Rodey, Dickason, Sloan, Akin & Robb,
Rex D. Throckmorton,
Scott D. Gordon,
Albuquerque, NM,

for Appellants.

Paine, Blenden & Diamond,
Dick A. Blenden,
Carlsbad, NM,

for Appellee.

OPINION

SCARBOROUGH, Chief Justice.

{1} Plaintiff-appellee, Bernice Stanton (Stanton), and defendants-appellants, Gordon Jewelry Corporation, a Delaware corporation, and Gordon's Quality Jewelers of New Mexico (Gordon Jewelry), entered into a series of transactions between June and September 1983, at the Gordon Jewelry retail store in Carlsbad, New Mexico. Stanton purchased five pieces of jewelry, and as consideration traded in some jewelry and paid some cash in down payment, leaving an amount due on an open account. The exact amount due on the open account was later disputed in the lawsuit which is now before us on appeal.

{2} Toward the end of September 1983, Gordon Jewelry began an investigation of the Carlsbad store because they suspected the store manager of embezzlement. A security consultant employed by Gordon Jewelry contacted Stanton about her transactions with the Carlsbad store. Stanton cooperated with Gordon Jewelry in their investigation of the Carlsbad store manager. She also cooperated in an investigation by local law enforcement agencies and testified as a witness for the prosecution in criminal proceedings against the Carlsbad manager.

{3} After she was contacted by the Gordon Jewelry investigator, Stanton became increasingly concerned that she had been defrauded in her transactions with the Carlsbad store. She asked that she be permitted to return the jewelry she had purchased and that Gordon Jewelry return the jewelry she had traded in and the money she had paid to Gordon Jewelry. Gordon Jewelry instead offered to pay for an independent appraisal of the jewelry Stanton had purchased.

{4} Stanton returned the jewelry to Gordon Jewelry for the appraisal which concluded that the jewelry was valued at the purchase price. Stanton, nevertheless, persisted in her demand that her contract with Gordon Jewelry be rescinded. Gordon Jewelry could not locate the jewelry traded in by Stanton and refused to rescind the contract. There followed a series of demands by Stanton and Gordon Jewelry respectively.

{5} Stanton sued Gordon Jewelry, alleging fraud and bad faith breach of contract. Stanton sought damages of $10,792.34, which was the purchase price of $13,015.50 less $2,223.16 which she admitted owing on her account. Stanton also sought her attorney's fees and $10,000,000 in punitive damages for fraud and/or bad faith breach of contract by Gordon Jewelry. Gordon Jewelry answered Stanton and counterclaimed for $5,050.32 which they alleged Stanton owed on her account at the Carlsbad store.

{6} The lawsuit was tried without a jury before the Fifth Judicial District Court in Eddy County. After hearing the evidence and argument by the parties, the trial court entered judgment and ordered that the jewelry Stanton purchased from Gordon Jewelry be returned to her and that Gordon Jewelry pay her $50,000 in punitive damages, less the $2,223.16 which Stanton admitted owing on her account with the Carlsbad store. Gordon Jewelry appeals.

{7} We affirm that part of the judgment ordering Gordon Jewelry to return the jewelry to Stanton and ordering Stanton to pay $2,223.16 to Gordon Jewelry. We reverse the award of $50,000 punitive damages to Stanton.

{8} Our review on appeal is limited to the record before us. **Federal Nat'l Mortgage Ass'n v. Rose Realty, Inc.,** 79 N.M. 281, 282, 422 P.2d 593, 594 (1968). The record before us does not support an award of punitive damages to Stanton. A trial court may not grant relief that is not supported in the record. **Id.** The award of punitive damages by the trial court was in error.

{9} We take notice that Stanton's attorney appears to have acted inappropriately in signing an amended complaint seeking $10,000,000 in punitive damages. When seeking an award of punitive damages, the following elements should properly be considered: (1) the character of the defendant's act; (2) the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause; and (3) the wealth of the defendant. **See Restatement (Second) of Torts** § 908(2) (1977). **See also Faubion v. Tucker,** 58 N.M. 303, 307-08, 270 P.2d 713, 716 (1954); **Robison v. Campbell,** 101 N.M. 393, 396, 683 P.2d 510, 513 (Ct. App.) **cert. denied,** 101 N.M. 362, 683 P.2d 44 (1984); **Sweitzer v. Sanchez,** 80 N.M. 408, 412, 456 P.2d 882, 886 (Ct. App. 1969). We see no rational relationship between the alleged acts of Gordon Jewelry and the amount of $10,000,000 sought in punitive damages.

{10} We also take notice that Gordon Jewelry's attorney appears to have acted inappropriately in pursuing a counterclaim against Stanton. The trial court found that in making the counterclaim:

> [Gordon Jewelry] acted in bad faith in asserting a debt of $5,050.00 based upon records which they knew to be unreliable under these circumstances. Their concession that the amount asserted to be owed by the plaintiff was in fact $2,223.00 came only after a protracted dispute and a full trial on the merits. [sic]

{11} Pleadings signed by both attorneys thus appear to violate SCRA 1986, 1-011, which requires in part that:

> The signature of an attorney on any pleading * * * constitutes a certificate by him that he has read the pleading * * *; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

{12} We refer this matter to the Disciplinary Board of the State Bar for appropriate administrative proceedings whereby both attorneys will be given an opportunity to justify their conduct and explain why they should not be sanctioned.

{13} IT IS SO ORDERED.

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-010

Filing Date: March 9, 1989

Docket No. 17,265

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

TERRY D. CLARK,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF QUAY COUNTY,
STANLEY F. FROST, District Judge.

Motion for Rehearing Denied May 15, 1989

Rothstein, Bennett, Daly, Donatelli & Hughes,
Mark H. Donatelli,
Martha A. Daly,
Santa Fe, New Mexico,

David I. Bruck,
John H. Blume,
Columbia, South Carolina,

for Appellant.

Hal Stratton, Attorney General,
William McEuen, Assistant, Attorney General,
Santa Fe, New Mexico,

for Appellee.

OPINION

SCARBOROUGH, Justice.

{1} Terry D. Clark (Clark) pled guilty to the kidnapping and murder in the first degree of Dena Lynn Gore. He was sentenced to death for the murder and twenty-six years imprisonment for the kidnapping. This appeal follows. We affirm Clark's convictions and the imposition of the death penalty.

{2} We discuss: (1) denial of Clark's motion to withdraw his guilty plea; (2) the trial court's decision to delay imposing the noncapital portion of Clark's sentence until after the jury deliberations in the capital sentencing proceeding; (3) cross-examination and jury arguments of the State concerning the possible length of a life sentence; (4) testimony of the victim's mother and the State's jury arguments said to have violated the principles of **Booth v. Maryland,** 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987); (5) testimony concerning the costs of incarceration; (6) comment on Clark's failure to testify; (7) the validity of the statutory aggravating circumstance of "murder of a witness to a crime," and the admission into evidence of Clark's prior criminal record; (8) television coverage of Clark's allocution to the jury; (9) claims of reversible error due to the jury instructions; (10) review of the death sentence pursuant to NMSA 1978, Section 31-20A-4(C) (Orig. Pamp. & Cum. Supp. 1988); (11) the proportionality guidelines of **State v. Garcia,** 99 N.M. 771, 664 P.2d 969, **cert. denied,** 462 U.S. 1112, 103 S. Ct. 2464, 77 L. Ed. 2d 1341 (1983); and (12) Clark's claim of cumulative error.

FACTS

{3} Terry Clark had previously been convicted of the kidnapping and criminal sexual penetration of a six-year-old girl for which he received a sentence of twenty-four years imprisonment. Pending appeal of that conviction, he was released on bond and was living at his brother's ranch in Chavez County, New Mexico. On July 17, 1986, about 6:00 p.m. in the afternoon, he forcibly abducted nine-year-old Dena Lynn Gore from near

her home in Artesia, New Mexico. He drove her to his brother's ranch where he raped her, shot her three times in the head, and then buried her nude body in a shallow grave.

{4} An extensive investigation and search for the victim followed her disappearance. Various suspicious circumstances caused Clark's older brother, Steve, together with a ranch hand, to search for the girl's body on the ranch on July 22, 1986. After locating the grave they notified the authorities who then recovered the body and arrested Clark.

{5} While Clark's case was pending Governor Toney Anaya, on November 26, 1986, announced his decision to commute the death sentences of the five men then on death row. The Governor advised Clark's defense team that he would also commute Clark's death sentence if one were to be imposed prior to the expiration of his term of office on December 31, 1986. On December 4, 1986 Clark entered a plea of guilty to all charges. The trial judge denied Clark's request to hold a sentencing proceeding in December of 1986, and the New Mexico Supreme Court later declined to order the trial court to do so. On February 16, 1987, the trial court denied Clark's motion to withdraw the guilty plea. On May 7, 1987, a jury in Quay County sentenced Clark to death for the murder of Dena Lynn Gore.

I. Withdrawal of Clark's Guilty Plea.

{6} Clark complains that the trial judge erred in refusing to allow him to withdraw his guilty plea. Clark does not contest that the court's acceptance of the plea satisfied the requirements of Rule 5-303(E) & (F) which govern the taking of guilty pleas.[1] Rather, he claims that the trial judge should have permitted him to withdraw the plea in the interest of justice and fair play, and because granting the motion would not have prejudiced the prosecution. Clark argues that the actions taken by the Governor were inherently coercive and rendered his guilty plea suspect. We disagree, and hold that the trial judge did not abuse his discretion by denying the motion to withdraw the plea.

{7} In November 1986, Clark learned from his defense counsel that Governor Anaya intended to commute the sentence of all persons currently on death row to a sentence of life imprisonment. Defense counsel advised Clark that if he were sentenced to death before the expiration of Anaya's term of office the Governor would commute his sentence also. On December 4, 1986, Clark entered a motion to change his plea to one of guilty to all charges. Prior to accepting the new plea, the trial judge advised Clark that not only was it impossible for the court to conduct sentencing proceedings before January 1, 1987, but also that the court had no intention of attempting to do so. Clark chose to enter the new plea in any case and acknowledged to the court that, in part, his decision was based upon the possibility of having a sentence of death commuted by Governor Anaya. Clark also stated to the court that he had decided to plead guilty about three weeks prior to learning of the Governor's possible intervention. He stated that he did not believe any consideration of a possible commutation had been involved in his decision at that time. Clark stated that he understood

[1] SCRA 1986, 5-303(E) & (F) require the trial judge to determine that the entry of a plea of guilty is intelligently and voluntarily given. The Rule in pertinent part provides:

E. **Advice to defendant.** The court shall not accept a plea of guilty * * * without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge to which the plea is offered;

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible for the offense to which the plea is offered;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and

(4) that if he pleads guilty * * * there will not be a further trial of any kind, so that by pleading guilty * * * he waives the right to a trial.

F. **Ensuring that the plea is voluntary.** The court shall not accept a plea of guilty * * * without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or promises apart from a plea agreement. The court shall also inquire of the defendant, defense counsel and the attorney for the government as to whether the defendant's willingness to plead guilty * * * results from prior discussions between the attorney for the government and the defendant or his attorney.

the rights he was giving up by pleading guilty and that he knew he would be unable to withdraw the plea if a death sentence were to be imposed. He then admitted to the court that he had committed the crimes with which he had been charged and proceeded to describe the factual details of those crimes. The trial judge accepted the guilty plea after concluding that it was knowingly and voluntarily entered.

{8} On December 10, 1986, this Court denied Clark's motion for an extraordinary writ ordering the trial court to conduct the sentencing proceeding in December of 1986. On February 16, 1987, Clark moved to withdraw his plea and the motion was denied.

{9} Clark must show that the trial judge abused his discretion by refusing to allow him to withdraw his guilty plea prior to sentencing. **State v. Brown,** 33 N.M. 98, 263 P. 502 (1927); **State v. Kincheloe,** 87 N.M. 34, 528 P.2d 893 (Ct. App. 1974). In **Brown,** this Court concluded that the defendant was entitled to withdraw his plea where he acted promptly to withdraw a guilty plea induced by threats, entered without the benefit of counsel, and where he asserted his innocence and stated a defense. 33 N.M. at 101, 263 P. at 504. In **Kincheloe,** the court found denial of a motion to withdraw a guilty plea to constitute manifest error when the undisputed facts showed that the plea could not have been knowingly and voluntarily made. 87 N.M. at 36, 528 P.2d at 895. Consideration of factors such as these, taken together, must guide the exercise of a trial court's discretion. Federal courts consider similar factors when deciding a presentence motion to withdraw a guilty plea. **E.g., United States v. Carr,** 740 F.2d 339, 343 (5th Cir.), **cert. denied,** 471 U.S. 1004, 105 S. Ct. 1865, 85 L. Ed. 2d 159 (1985); **United States v. Spencer,** 836 F.2d 236 (6th Cir. 1987).[2] While possible prejudice to the prosecution is also a factor to be considered, absence of prejudice to the prosecution, by itself, is insufficient to mandate permission for presentence withdrawal of a plea of guilty. **See Carr** at 345; **United States v. Saft,** 558 F.2d 1073, 1083 (2d Cir. 1977), **cited with approval in** Fed.R. Crim.P. 32(d) advisory committee note; **see also American Bar Association Standards for Criminal Justice** § 14-2.1 commentary at 52-53 (2nd ed. 1980). Thus, the defendant has the initial burden to establish sufficient grounds for permitting the plea to be withdrawn, and he does not meet that burden solely by showing an absence of prejudice to the prosecution.

{10} With these considerations in mind, we must conclude that Clark failed to establish any valid reason why the trial court should have granted his motion. He admits compliance with the relevant procedural requirements to ensure that the plea was knowing and voluntary, and does not now claim the original plea was otherwise. He did not assert his innocence when he first sought to withdraw the plea, nor does he now on appeal. At the time he entered the plea, Clark had the close assistance of a team of four defense attorneys. Finally, Clark waited two and one-half months before seeking a withdrawal. Under these circumstances there was no abuse of discretion in denying the motion to withdraw the plea.

{11} Moreover, we disagree with the suggestion that his plea was any less knowing and voluntary because of the representations of the Governor. Clark persisted with his request to enter the plea with the full knowledge of the court's intention not to hold a sentencing hearing before the end of 1986 and the expiration of the Governor's term of office. Also, at the time Clark entered the guilty plea he informed the court, and did not later recant, that he had decided to plead guilty prior to the time he became aware of a possible commutation. Thus, the possible intervention of the Governor was only one factor in his decision to enter the plea. While the Governor's actions no doubt influenced Clark's decision to plead guilty, we cannot say the Governor's actions improperly compelled that decision. More to the point, we agree with the court in **United**

[2] **See also** SCRA 1986, 5-304 committee commentary, citing the recommendations of **The American Bar Association Standards Relating to Pleas of Guilty** Section 2.1 (approved draft 1968). The recommendation concerning a motion for withdrawal of a guilty plea prior to sentencing mirrors the federal rule. **See** Fed.R. Crim.P. 32(d).

States v. Carr which stated that the purpose for allowing a defendant to withdraw a guilty plea is "not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice." 740 F.2d at 345.

II. Delay in Imposing the Noncapital Portion of Clark's Sentence.

{12} The eighth amendment requires that the discretion afforded a capital jury "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." **Gregg v. Georgia,** 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976). Clark argues that the jury's understanding of the sentencing alternatives available to them was affected by two related arbitrary factors, either of which requires reversal: (1) delay in imposing Clark's sentence on the noncapital charge of kidnapping; (2) cross-examination and argument concerning the possible length of Clark's incarceration if sentenced to life imprisonment. We discuss these issues separately.

{13} Prior to the commencement of the sentencing proceeding. Clark moved the district court to impose his sentence on the kidnapping charge before jury deliberations on the death sentence for capital murder. Clark faced the basic eighteen-year sentence for kidnapping in addition to a possible life sentence for murder as an alternative to the death penalty.[3] NMSA 1978, § 31-18-15(A)(1) (Repl. Pamp. 1987). Also, after hearing evidence of mitigating or aggravating circumstances, the court could decide to increase or decrease the basic eighteen-year sentence by as much as one-third, NMSA 1978, Section 31-18-15.1 (Repl. Pamp. 1987), and then decide whether the sentence was to be served concurrently or consecutively with the twenty-four year sentence imposed for Clark's previous conviction. NMSA 1978, § 31-18-21 (Repl. Pamp. 1987). Additionally, the basic sentence was subject to a one-year enhancement for the use of a firearm, and a one-year enhancement under the habitual offender statute. NMSA 1978, § 31-18-16(A) (Repl. Pamp. 1987); NMSA 1978, § 31-18-17(B) (Repl. Pamp. 1987). Clark argued in his motion that the court's failure to first impose sentence on the noncapital charge would unnecessarily enlarge the range of sentences available, and would confuse the jury about the effect of its verdict. The trial judge denied the motion stating that it would be inappropriate to sentence Clark on the kidnapping charge prior to the jury's decision regarding the sentence for capital murder. Instead, counsel was allowed to inform the jury what options were open to the court under the Criminal Sentencing Act.[4]

{14} Clark now argues that no jury could be expected to give serious consideration to sentencing Clark to life imprisonment unless it was confident that such a sentence would protect society by isolating Clark in prison for most or all of his life. In his opening statement, defense counsel had conceded to the jury that Clark should not again be released into society.

{15} We agree with Clark that if the jury had decided not to impose the death penalty, the terms of Clark's sentence on the kidnapping

[3] Under the Criminal Sentencing Act as amended in 1979, conviction of a capital felony calls for either a sentence of death or life imprisonment. NMSA 1978, § 31-18-14 (Repl. Pamp. 1987); NMSA 1978, § 31-20A-1 (Repl. Pamp. 1987). Under the Probation and Parole Act as amended in February of 1980, an inmate who is sentenced to life imprisonment for the commission of a capital felony becomes eligible for a parole hearing after he has served thirty years of his sentence. NMSA 1978, § 31-21-10(A) (Repl. Pamp. 1987).

[4] The jury was provided with the following instruction at the request of defense counsel:

Without requiring testimony or other evidence, the court has taken notice that:

1. Under the prior conviction defendant was sentenced to the custody of the Corrections Department to be imprisoned for a term of eighteen (18) years under count I followed by two years parole, and nine (9) years under count II, three years to be suspended, followed by two years of parole.

2. Under the prior conviction defendant is to serve each count consecutive to one another.

3. Under the present conviction for murder, defendant shall be sentenced to death or life imprisonment.

4. Under the present conviction for kidnapping, the basic sentence established by law equals eighteen (18) years imprisonment.

charge would significantly affect the timing of his eligibility for release on parole. When the trial judge later sentenced Clark on the kidnapping charge he imposed the maximum allowable term, to be served consecutive to his other convictions. The question is whether the court was required to impose the noncapital sentence in advance in order that the jury might take that information into account in deciding whether or not to impose the death sentence. Clark argues that he had a constitutional right under **Skipper v. South Carolina,** 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986), and **Lockett v. Ohio,** 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), to have the jury informed of his kidnapping sentence, in order to firmly fix the time when he might become eligible for parole, before the jury retired to consider the penalty for murder.

{16} There is no dispute that the eighth amendment requires that the sentencing jury must be allowed to consider any aspect of the defendant's character and record and any of the circumstances of the offense proffered in mitigation. **Eddings v. Oklahoma,** 455 U.S. 104, 110, 102 S. Ct. 869, 874, 71 L. Ed. 2d 1 (1982); **Lockett,** 438 U.S. at 604, 98 S. Ct. at 2964 (Burger, C.J., plurality opinion). In **Eddings,** the judge refused to consider the defendant's youth, history of a violent family background, and severe emotional disturbance. 455 U.S. at 115, 102 S. Ct. at 877. The jury in **Lockett** was barred from considering evidence of the defendant's youth, lack of specific intent to cause death, and relatively minor role in the crime. 438 U.S. at 597, 98 S. Ct. at 2961. The evidence in both **Eddings** and **Lockett** was mitigating because it tended to diminish the defendant's responsibility for the crime. In **Skipper,** the jury was barred from considering testimony regarding the defendant's good behavior during the seven months he spent in jail awaiting trial. 476 U.S. at 4, 106 S. Ct. at 1671. The Court stated that evidence concerning a defendant's past conduct was indicative of probable future behavior and, therefore, was relevant to the question of his "future dangerousness." **See id.** at 5, 106 S. Ct. at 1671. Clark argues that a far more important determinant of whether a capital defendant poses a risk of future violence than his pretrial good conduct in jail is the question of his eligibility for parole. Thus, Clark claims, under the rationale of **Skipper,** his possible ineligibility for parole, for virtually the remainder of his life, is a mitigating circumstance which cannot be constitutionally withheld from the jury.

{17} We do not agree that the potential period of confinement of a capital defendant sentenced to life imprisonment is a mitigating circumstance under the eighth amendment jurisprudence of the United States Supreme Court. That Court has repeatedly defined relevant mitigating circumstances as facts about the defendant's character or background or the circumstances of the particular offense that may call for a penalty less than death. **See Skipper,** 476 U.S. at 4, 106 S. Ct. at 1671; **Eddings,** 455 U.S. at 110, 112, 102 S. Ct. at 874, 875; **Lockett,** 438 U.S. at 605, 98 S. Ct. at 2965; **California v. Brown,** 479 U.S. 538, 541, 107 S. Ct. 837, 839, 93 L. Ed. 2d 934 (1987). In **Skipper,** the evidence that "the defendant would not pose a danger if spared" was evidence regarding his **character.** It is the defendant's own conduct and background that is the source of mitigating evidence regarding his potential for future dangerous behavior that the jury must be allowed to consider. The sentencing prerogatives of the trial judge, or the possible length of a life sentence, simply have no relevance under eighth amendment standards as they have developed so far.

{18} Moreover, it can not be guaranteed that the jury would respond in a positive fashion to the information which Clark sought to put before them. Instead, information of this sort may have an impermissible prejudicial effect, especially where the evidence is evenly balanced. In Clark's case, after the jury returned a verdict of death, the trial judge imposed the maximum enhanced sentence of twenty-six years on the kidnapping charge, and then ordered that the sentence be served consecutive to Clark's other convictions. This was the most severe sentencing option open to the court. It is almost universally accepted that a trial judge should not express or otherwise indicate to the jury an opinion on whether a defendant is guilty of criminal charges.

See American Bar Association Standards for Criminal Justice § 15-3.8 commentary at 113-14 (2nd ed. 1980). Similarly, any action taken by a trial judge during a capital sentencing proceeding which might be interpreted to reflect on the defendant's culpability for his capital crime must also be avoided. Here, the court was under a duty to base its noncapital sentencing decision on the same evidence in mitigation and aggravation as was presented to the capital jury. **See** NMSA 31-18-15.1(A) (Repl. Pamp. 1987). The court's decision could not be viewed in isolation from the one faced by the jury on the appropriate penalty for the capital crime of murder. If the judge had made his sentencing decision prior to the capital jury deliberations, his decision may well have had an impermissible effect on the jury. For these reasons, we conclude that the trial judge did not abuse his discretion in refusing to impose the noncapital sentence until after the capital jury deliberations.

III. Statements Concerning the Possible Length of a Life Sentence.

{19} Clark asserts that while the judge's withholding of the noncapital sentence was in and of itself sufficiently prejudicial to require reversal, the prejudice was greatly exacerbated by the prosecutor's unfair cross-examination and closing argument to the jury concerning the possible length of a life sentence.

{20} As discussed, much of Clark's defense was intended to assure the jury that if Clark were sentenced to life imprisonment he would pose no further threat to society. Defense counsel embarked on the task of advising the jury of the approximate period of confinement Clark faced, and at what time he might become eligible for parole. Defense counsel first sought to have Clark sentenced on the kidnapping charge before the jury retired, a request appropriately denied. At the sentencing proceeding, Clark introduced into evidence a chart showing the effect of various sentencing alternatives open to the court, and the effect of possible meritorious deductions, or "good-time" awards, by the Corrections Department.[5] The chart showed that if Clark received a life sentence, and also maximum leniency from the court on the kidnapping charge, Clark would not be considered for parole until he had served at least thirty years in prison and reached the age of sixty-one. This conclusion was based upon the premise that good-time awards by the Corrections Department were inapplicable towards a life sentence.

{21} The defense called the records administrator of the Corrections Department, Ms. Cathy Catanach, to testify as an expert on sentencing and to explain the chart to the jury. On direct examination, however, she stated that there was a difference of opinion between the Corrections Department and the State Attorney General on whether good-time credits could be awarded against a life sentence. She stated that the department was keeping good-time records on prisoners serving a life sentence and that Clark could be paroled at the age of forty-six if he received such awards.

{22} On cross-examination the expert affirmed her view that the Corrections Department was not bound by the Attorney General's opinion. She stated that the department currently was treating life sentences as eligible for meritorious deductions against the thirty-year minimum. On further cross-examination, the expert assented to other factors which the prosecutor suggested might affect Clark's possible release date, such as: the commutation authority of the governor; possible legislative amendments; future judicial decisions; and policy changes of the Corrections Department. The witness concluded that, given the variables, she did not feel comfortable predicting the term any inmate would serve.

{23} The question of when Clark might become eligible for parole again became an issue in the closing arguments of both defense counsel and the prosecutor. Defense counsel argued

[5] Under the present conviction for kidnapping, if the court finds that mitigating or aggravating circumstances exist, it has the authority to increase or decrease the basic sentence up to one-third.

that if Clark received "every break in the world" he would not be eligible for parole until he was sixty-one. In his rebuttal argument the prosecutor made the following statement:

> [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.

{24} Defense counsel failed to make any objection to this closing argument, or to the earlier cross-examination of the defense expert. In view of the fact that in a number of instances what is now asserted to be reversible error passed without objection during the sentencing proceedings, a general discussion of our scope of review in this case is warranted.

{25} Generally, failure to make a timely objection to allegedly improper testimony or argument bars review of the issue on appeal. **State v. Tafoya,** 94 N.M. 762, 764, 617 P.2d 151, 153 (1980); **State v. Ruffino,** 94 N.M. 500, 502, 612 P.2d 1311, 1313 (1980); **State v. Casteneda,** 97 N.M. 670, 678, 642 P.2d 1129, 1137 (Ct. App. 1982). Claims of error involving fundamental rights should be brought to the attention of the trial court in order that the trial judge may, if possible, correct the alleged violation before the jury retires. Absent a timely objection which invokes a ruling of the trial court, the fundamental rights of a party are subject to waiver. **State v. Escamilla,** 107 N.M. 510, 760 P.2d 1276 (1988). Review of the issue in an appellate court is then discretionary. SCRA 1986, 12-216(B). An exception to the general rule barring review of questions not properly preserved below, however, applies in cases which involve fundamental error. **State v. Compton,** 104 N.M. 683, 687, 726 P.2d 837, 841, **cert. denied,** 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986); **State v. Ramirez,** 98 N.M. 268, 269, 648 P.2d 307, 308 (1982). Fundamental error cannot be waived. **Escamilla,** 107 N.M. at 515, 760 P.2d at 1281.

{26} While we adhere to the principle that a capital sentencing determination requires a "greater degree of scrutiny" than the imposition of all other penalties, **Compton,** 104 N.M. at 688, 726 P.2d at 842, the accused is not thereby excused from raising questions of alleged error during the sentencing proceeding itself. **See, e.g., State v. Cheadle,** 101 N.M. 282, 287, 681 P.2d 708, 713 (1983), **cert. denied,** 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984) (noting that even in death penalty cases objections to jury instructions cannot be raised for the first time on appeal). The trial judge, who has observed the entire proceedings, is in the best position to make the factual determination of whether the violation has occurred and evaluate the extent of any possible prejudice. **State v. Gonzales,** 105 N.M. 238, 243, 731 P.2d 381, 386 (Ct. App. 1986), **cert. quashed,** 105 N.M. 211, 730 P.2d 1193 (1987). At that point the error may be susceptible to correction, or if not, a new trial may be ordered without further waste of judicial resources. To the greatest extent possible, all issues which bear upon the validity of the sentencing determination should be fully aired in the trial court. The relaxation of the timely objection rule in capital cases may encourage the defense to gamble on the verdict with the intent of raising the claim of error on appeal if the gamble does not pay off. To the extent alleged violations rise to the level of fundamental error, the question will be reviewed on appeal and, if fundamental error exists, a new trial will be ordered. Otherwise, a claim of error must first be addressed in the trial court to preserve the issue for appeal.

{27} Returning to the question of the propriety of the extensive testimony and argument during the sentencing proceedings concerning Clark's possible release, we recognize that a majority of state courts have held it improper for the jury to consider or be informed of the possibility of

commutation, pardon, or parole. **See Murray v. State,** 359 So.2d 1178 (Ala. Crim. App. 1978); **People v. Morse,** 60 Cal.2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964); **People v. Walker,** 91 Ill.2d 502, 64 Ill. Dec. 531, 440 N.E.2d 83 (1982); **State v. Lindsey,** 404 So.2d 466 (La. 1981), **cert. denied,** 464 U.S. 908, 104 S. Ct. 261, 78 L. Ed. 2d 246 (1983); **Poole v. State,** 295 Md. 167, 453 A.2d 1218 (1983); **State v. Atkinson,** 253 S.C. 531, 172 S.E.2d 111 (1970), **vacated on other grounds,** 408 U.S. 936, 92 S. Ct. 2859, 33 L. Ed. 2d 752 (1972). **Contra State v. Jackson,** 100 Ariz. 91, 412 P.2d 36, **cert. denied,** 385 U.S. 877, 87 S. Ct. 156, 17 L. Ed. 2d 104 (1966). These decisions, and we would agree, generally view such considerations to be inconsistent with the jury's proper decision-making role, or the relevant sentencing considerations as fixed by statute. **E.g., People v. Brisbon,** 106 Ill.2d 342, 88 Ill. Dec. 87, 478 N.E.2d 402, **cert. denied,** 474 U.S. 908, 106 S. Ct. 276, 88 L. Ed. 2d 241 (1985) (holding that parole eligibility is immaterial to either the aggravating or mitigating issues of a capital sentencing proceeding). We recognize, however, that the eighth amendment does not prohibit providing the jury with accurate information concerning postsentencing procedures. **See California v. Ramos,** 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983).

{28} In this case, any error in the prosecutor's cross-examination and argument was waived by Clark's failure to object and inform the trial court why the questioning and argument were improper. Review of the issue is limited to whether the prosecutor's actions constitute fundamental error. The doctrine of fundamental error is to be applied only under exceptional circumstances and solely to prevent a miscarriage of justice. **State v. Tipton,** 73 N.M. 24, 385 P.2d 355 (1963); **see also State v. Rodriguez,** 81 N.M. 503, 469 P.2d 148 (1970); **State v. Padilla,** 104 N.M. 446, 451, 722 P.2d 697, 702 (Ct. App.), **cert. denied,** 104 N.M. 378, 721 P.2d 1309 (1986).

{29} We hold the doctrine has no application to the circumstances of this case where the question of Clark's possible release and the term of a life sentence was introduced and argued by the defense as part of its case-in-chief. It was error to place the issue of Clark's eligibility for parole and the parole laws before the jury. The consideration is immaterial to the aggravating and mitigating issues of our capital sentencing proceedings. However, the defense introduced the issue of parole eligibility as a central part of its defense, and without objection allowed extensive cross-examination and later argument on the question. Once the issue was introduced it was not surprising that the prosecutor, in rebuttal, sought to point out all of the factors which bear upon the possibility of release after conviction of a life sentence. Cross-examination is permitted on the subject matter of direct examination, SCRA 1986, 11-611, and, as a general proposition, a prosecutor is entitled to respond to defense counsel's argument. **State v. Muise,** 103 N.M. 382, 392, 707 P.2d 1192, 1202 (Ct. App.), **cert. denied,** 103 N.M. 287, 705 P.2d 1138 (1985).

{30} The fundamental error rule guards against the corruption of justice. **State v. Rogers,** 80 N.M. 230, 453 P.2d 593 (Ct. App. 1969). The doctrine has no application in cases where the defendant by his own actions created the error, where to invoke the doctrine would contravene that which the doctrine seeks to protect, namely, the orderly and equitable administration of justice. **See Padilla,** 104 N.M. at 449-51, 722 P.2d at 700-02.

IV. Testimony of the Victim's Mother and the State's Argument to the Jury.

{31} Clark claims that the jury was permitted to receive and consider evidence and argument wholly unrelated to his blameworthiness, and this factor created an impermissible risk that the capital sentencing decision would be made in an arbitrary manner as proscribed by **Booth v. Maryland,** 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987). First, Clark argues that the examination of the victim's mother deliberately introduced the anguish of the victim's mother. Second, Clark argues that the prosecutor in his closing argument invited the

jury to impose the death sentence based upon the relative worth of the lives of the victim and the defendant.

{32} We accept the proposition advanced by Clark that his death sentence must be reviewed in light of **Booth** although that case was decided six weeks after Clark's sentencing. **See Yates v. Aiken,** 484 U.S. 211, 108 S. Ct. 534, 98 L. Ed. 2d 546 (1988); **Griffith v. Kentucky,** 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). In **Booth,** the Supreme Court rejected the contention that the emotional distress of the victim's family or the victim's personal characteristics (including his perceived social worth) are proper sentencing considerations in a capital case. 107 S. Ct. at 2535. The **Booth** Court reversed the imposition of a death penalty where a detailed five-page victim impact statement had been introduced by the State. In doing so the Court observed, however, that "[s]imilar types of information may well be admissible because they relate directly to the circumstances of the crime." **Id.** at 2535 n.10.

{33} In this case, during direct examination of the victim's mother by the prosecutor, Mr. Plath, the following exchange took place:

> MR. PLATH: About how long did you spend driving around looking for her, if you can give us an idea?
>
> MRS. GORE: I don't know how long I spent. I know that I would continue coming back to the house after a few minutes to see if she had checked in yet.
>
> * * * * * *
>
> Q: Now did you ever see your daughter again?
>
> A: No.
>
> Q: During the next few days, were you aware of any efforts to locate your daughter by the community or by agencies of the community?
>
> A: Yes. The police department was looking for her. They had called the FBI and there were several assistants looking for Dena.
>
> Q: Did you yourself participate in that?
>
> A: Not until Sunday.
>
> Q: Were there any sort of notices sent out, or pictures?
>
> A: Yes. I made flyers. I had flyers made up at City Hall out of a picture I had of Dena of her school pictures.
>
> Q: Were they circulated in Artesia?
>
> A: Yes. And they were also circulated in Carlsbad and Roswell and anywhere else we could send them.

{34} Clark asserts that the victim's mother gave the above testimony in a quavering voice filled with emotion and grief. He argues that there was no conceivable reason for introducing this testimony other than to accomplish what **Booth** forbids. We disagree. Ms. Gore's testimony was brief. The recordings of the proceedings show that her testimony was not overly emotional. She described where she lived, who her children were, when she returned home from work, and similar background information. She described her daughter leaving for a nearby store on her brother's bicycle and not returning. She described her daughter's clothing and her subsequent search for the missing girl. She then described reporting the matter to the police, and identified a picture she gave the police.

{35} Ms. Gore's testimony was admissible under NMSA 1978, Section 31-20A-1(C) for two reasons. First, the testimony was relevant to show the aggravated circumstance of kidnapping. Despite Clark's plea of guilty, the State was still required to prove beyond a reasonable doubt that the murder was committed during the course of a kidnapping, and the State was not required to present its case in the abstract. Second,

the testimony was directly related to the circumstances of the crime itself. While Clark had entered a guilty plea to all charges and he was willing to stipulate to the facts surrounding the girl's disappearance, guilty pleas and stipulated facts are no substitute for the evidence of a crime to be considered by a jury. We will not read **Booth** so as to exclude all testimony concerning a capital crime from anyone who was close enough to the victim to be emotionally affected.

{36} Lastly, we note that Ms. Gore's testimony actually contained none of the elements proscribed in **Booth:** descriptions of the character and reputation of the victim; descriptions of the emotional impact of the crime upon the victim's family; and opinions of the victim's family characterizing the crime or the defendant.

{37} Clark also argues that the prosecutor's closing argument constitutes a separate violation of the standards set forth in **Booth.** The prosecutor made the following rebuttal argument in his closing statement to the jury:

> This case is not just about Terry Clark. And at this point I totally reject the efforts of counsel and Mr. Clark to tear that girl from this room. Dena Lynn Gore. Dena Lynn Gore. DENA LYNN GORE, NINE YEARS OLD.
>
> * * * * * *
>
> You know every time twelve citizens sit on a criminal case a very important thing happens. I'm not talking about citizens' duty. I'm talking about values. What we as a people in a community stand for. What we in particular situations state are our values. What are our priorities. And every verdict that has [been] returned in every criminal case is unmistakably a question of values, a statement of values, because it holds like a banner out to the community what our values are.
>
> No, you cannot say in dollars and cents how much a life is worth. That cannot be done. I wouldn't ask you to put a dollar value on Dena Gore's life, but if Dena Gore's life, what is it worth? [sic] So much has become devalued. Our money is not worth what it used to be. Grades in school are inflated. It's a symptom of our modern life, and the devaluation creeps into our morality. If a victim, if an innocent victim's life, if a nine-year-old child, innocent victim's life, is not even worth the life of that man, what does it say about us? What does it say about us? How profane, having viewed the circumstances under which this child's life was taken to then make a gift of thirty or forty or fifty years to Mr. Clark. [Defense counsel's] logic is, well, you can't give it to Dena Gore, so you might as well give it to Terry Clark. Is that what we want to state as our values? What's her life worth? Isn't it, isn't it at least worth his life in the scales of justice? Isn't it worth that much to us? Isn't her innocence, her defenselessness, aren't those things worth at least the life of the cunning and cruel and guilty? Let's not devalue her life.

The United States Supreme Court in **Booth** recognized that the perceived social worth of a murder victim is not a proper sentencing consideration. **Id.** at 2534 n. 8. Clark contends that the prosecutor's closing argument is an explicit appeal to the jury to weigh the relative worth of the murderer, Terry Clark, and his victim, Dena Lynn Gore. The State answers that the prosecutor's argument equates the value of their lives in making an argument for retribution, that the taking of the life of Dena Lynn Gore justifies the taking of Terry Clark's life.

{38} We agree with the State that the prosecutor's argument to the jury was not an explicit invitation to weigh or compare the relative merits of the lives of Clark and his victim. The rebuttal argument equated the value of their lives in asking for retribution. Retribution is an accepted basis for imposing the death penalty and a permissible subject for prosecutorial argument. **Gregg v. Georgia,** 428 U.S. 153, 183, 96 S. Ct. 2909,

2930, 49 L. Ed. 2d 859 (1976) (Stewart, Powell and Stevens, JJ., plurality opinion). We note that the prosecutor did not offer the personal characteristics of Dena Lynn Gore as justification for executing Clark. The only characteristics which were mentioned, her defenselessness and innocence, were generic to children, as opposed to those personal to the victim. Choice of this class of victim, a nine-year-old girl, is a circumstance of the crime which **Booth** does not purport to bar. **See Booth,** 107 S. Ct. at 2534 n. 7 (decision of murderer to attack a vulnerable victim is a factor which reflects on culpability since that circumstance is under his control).

{39} Moreover, the prosecutor's rebuttal argument concerning the worth and value of the victim's life was in direct response to closing arguments of the defense. Defense counsel advised the sentencing jury that in making their decision they were being asked to "weigh the value of a life," and that no one had said that Clark's life was not "worth saving." Defense counsel stated that Dena Lynn Gore's life was gone, and there was nothing the jury could do to bring it back, but the jury now held Terry Clark's life in their hands. The prosecutor in arguing for retribution was allowed to respond to the arguments of the defense. The defense argument, we believe, tended to downplay the value of a life which was irretrievably lost. The comments of the prosecutor in rebuttal were not improper under these circumstances.

V. Testimony on the Cost of Incarceration.

{40} Clark argues that the prosecutor introduced an arbitrary and prejudicial factor into the determination of his sentence by eliciting testimony concerning the cost of incarceration. The subject arose when the prosecutor cross-examined Ms. Catanach from the Corrections Department. The prosecutor asked Ms. Catanach the average cost to house a prison inmate and was told that the cost was about fifty dollars per capita per day. Defense counsel made no objection. Later the defense pursued the issue by questioning a different witness, the Rev. Stewart, on the subject of the value of human life and the ethics of taking the costs of incarceration into account in making a capital sentencing decision.

{41} It is well settled that the cost of incarceration is not a legitimate capital sentencing consideration. **Tucker v. Kemp,** 762 F.2d 1480, 1486 (11th Cir. 1985) (en banc), **sentence vacated,** 474 U.S. 1001, 106 S. Ct. 517, 88 L. Ed. 2d 452 (remanded for reconsideration in light of **Caldwell v. Mississippi,** 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)), **judgment reinstated,** 802 F.2d 1293 (1986), **cert. denied,** 480 U.S. 911, 107 S. Ct. 1359, 94 L. Ed. 2d 529 (1987); **Brooks v. Kemp,** 762 F.2d 1383, 1412 (11th Cir. 1985), **sentence vacated,** 478 U.S. 1016, 106 S. Ct. 3325, 92 L. Ed. 2d 732 (1986) (remanded for reconsideration in light of **Rose v. Clark,** 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)), **judgment reinstated,** 809 F.2d 700, **cert. denied,** 478 U.S. 1022, 106 S. Ct. 3337, 92 L. Ed. 2d 742 (1987); **Collier v. State,** 101 Nev. 473, 705 P.2d 1126 (1985). The State admits that the content of the inquiry cannot be defended but argues that failure to object waived this issue, and that the isolated incident was not fundamental error which warrants reversal. We agree.

{42} The doctrine of fundamental error should be applied sparingly, to prevent a miscarriage of justice, and not to excuse the failure to make proper objections in the court below. **State v. Aull,** 78 N.M. 607, 435 P.2d 437 (1967), **cert. denied,** 391 U.S. 927, 88 S. Ct. 1829, 20 L. Ed. 2d 668 (1968). With regard to a criminal conviction, the doctrine is resorted to only if the defendant's innocence appears indisputable or if the question of his guilt is so doubtful that it would shock the conscience to permit the conviction to stand. **State v. Manlove,** 79 N.M. 189, 441 P.2d 229 (Ct. App.), **cert. denied,** 79 N.M. 159, 441 P.2d 57 (1968). Where a defendant appeals the imposition of the death penalty, the doctrine should be applied only where error in the sentencing proceedings sufficiently undermines confidence in the capital jury's decision. The question on review is whether there is a

reasonable probability that any error changed the outcome of the sentencing hearing. **Cf. Tucker v. Kemp,** 802 F.2d 1293 (11th Cir. 1986) (using "prejudice prong" of **Strickland v. Washington,** 466 U.S. 668, 693-94, 104 S. Ct. 2052, 2067-68, 80 L. Ed. 2d 674 (1984), as the standard to determine if sentencing proceeding was fundamentally unfair).

{43} The court in **Brooks** noted the undeniable impropriety of arguing that the execution of the defendant would save taxpayer's money. The court stated that the potential prejudice was somewhat minimized by the brevity of the comment and the tentativeness of the prosecutor in asserting it. **Brooks,** 762 F.2d at 1415. The **Tucker** court regarded similar remarks by a prosecutor clearly unprofessional and improper. However, both courts concluded that it was not likely that the brief remarks had great adverse impact and concluded that, given the circumstances, there was no reasonable probability that the improper arguments changed the outcome of the jury deliberation. **See Tucker,** 762 F.2d at 1488; **Brooks,** 762 F.2d at 1415.

{44} The facts of this case are similar to those in **Brooks** and **Tucker** in that the prosecutor elicited only brief testimony concerning the cost of incarceration. Also the prosecutor did not return to the subject in later argument. We believe that the reaction of defense counsel is also significant. His failure to protest what he now contends is serious and highly prejudicial error suggests that the potential for serious prejudice was not apparent to one present during the proceedings. Instead, the defense treated the matter as one for argument, as evinced by the later examination of the Rev. Stewart.

{45} We conclude that, because of the brevity of the testimony and the lack of further comments on the subject by the prosecutor, there is no reasonable probability that the testimony changed the outcome or significantly affected the jury's exercise of discretion in making the sentencing determination. The very brief testimony elicited by the prosecutor was not sufficiently prejudicial to be considered fundamental error.

VI. Comment on the Defendant's Failure to Testify.

{46} Next, Clark asserts that the prosecutor improperly commented to the jury about his failure to testify and that this too represents fundamental error. The State answers that none of the statements constituted error, or fundamental error, and that Clark's failure to object has waived the issue on appeal. The State contends that all of the statements to which Clark objects were references to his lack of candor with medical personnel testifying as defense experts. The State argues that Clark's failure to explain certain details of his crime to those experts undermined their opinions. Thus, the prosecutor's comments, understood in the context of an attack on the expert testimony, were permissible.

{47} One of the medical experts, Dr. Golding, testified that Clark suffered from post-traumatic stress syndrome. The expert, in part, based his opinion on Clark's description of his experiences while serving in the military. Dr. Golding expressed confidence in Clark's honesty with him. On cross-examination Dr. Golding conceded that omissions on Clark's part might be significant. The prosecutor asked Dr. Golding if he had discussed with Clark the bindings which were found on the victim's legs. He had not. During closing argument the prosecutor attacked the opinions of Dr. Golding including his assertion that certain omissions or misrepresentations by Clark were not clinically significant:

> If he's telling the honest truth to Dr. Golding or anybody else, he's going to tell the whole truth. How can a person stand up there and say it's not important to know the whole truth. It's ludicrous. And when you care, when you put your stamp of approval, Dr. Golding, on Terry Clark, that he's telling the whole truth, he's forthright, and he's open, and I believe him. And he leaves out critical details of a crime. Whether they were clinically significant or not, they were left out, Terry Clark didn't say them. He didn't say how else he used Dena Gore, he didn't say, for instance, anything about

> what those bindings on her limbs were about. In fact, he never has. He has never told anybody about that. Lies, lies, lies. All the way through.

The second set of comments to which Clark objects came considerably later in the prosecutor's argument to the jury. The prosecutor had finished addressing the evidence of mitigating circumstances which the defense had presented during its case-in-chief. He then described the events of July 17th, that is, the evidence of the crime itself, which he advised the jury to consider in making their sentencing decision. After describing Clark's preliminary activities in Artesia, he continued with the following statement:

> He follows Dena Gore, snatches her up at the Allsup store and takes her out to Squaw Canyon Road where, at some point during this horror, he binds one of her hands. We don't see rope on the other. He ties one of those hands. They're not together ladies and gentlemen. They're not wrapped as you would to restrain a person to keep that person from getting away. We don't know exactly how the other hand was confined. He binds her legs separately. He wraps a cord around the left and the right ankle, separately ties them off. Well, that's not the way, of course, we tie people up if we want to keep them from running away, that's a little bit like putting a person in handcuffs and the handcuffs aren't connected. What good does that do? So there's a more insidious purpose here. But we don't know what that is because Terry Clark has never told us what he, why he did that. But what we do know is that Terry Clark abducted this child, and presumably raped her. And we don't know whether he raped her vaginally and anally, or only anally. We don't know anything else about that frenzied attack on this child. What we do know is that there is something very important to Mr. Clark about this kind of bondage that we don't know. He won't tell us. So she is, she is raped. And then she is executed.

The defense made no objection to any of these arguments.

{48} Comment by the prosecutor upon a defendant's failure to testify violates the privilege against self-incrimination guaranteed by the Fifth and Fourteenth Amendments. **Griffin v. California,** 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). **Griffin** forbids either direct or indirect improper comments by the prosecution. **E.g., State v. Schrock,** 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986); **People v. Jackson,** 28 Cal.3d 264, 304, 618 P.2d 149, 169 Cal. Rptr. 603, 623 (1980), **cert. denied,** 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981). The protection of the Fifth Amendment privilege is fully applicable to the sentencing phase of a capital murder trial. **Estelle v. Smith,** 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

{49} The standard generally used for evaluating allegedly improper prosecutorial comments is whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. **Hearn v. Mintzes,** 708 F.2d 1072, 1076 (6th Cir. 1983); **United States v. White,** 444 F.2d 1274, 1278 (5th Cir.), **cert. denied,** 404 U.S. 949, 92 S. Ct. 300, 30 L. Ed. 2d 266 (1971); **Knowles v. United States,** 224 F.2d 168, 170 (10th Cir. 1955); **McCracken v. State,** 431 P.2d 513, 517 (Alaska 1967); **State v. Lincoln,** 3 Haw. App. 107, 125, 643 P.2d 807, 819 (1982); **State v. Hunter,** 29 Wash. App. 218, 220, 627 P.2d 1339, 1342 (1981). We adopt that test today.[6]

{50} Since the defense failed to object to these closing arguments, the right to raise the issue on appeal is waived. **See** SCRA 1986, 12-216(A). Review is limited to the question of whether any violation rises to the level of fundamental error. **See State v. Chavez,** 100 N.M. 730, 734, 676 P.2d 257, 261 (Ct. App.), **cert. denied,** 100 N.M.

[6] If the court finds that the defendant has a prior conviction, it must increase his basic sentence by one year; if the court finds that a firearm was used in the present conviction, it must increase the basic sentence by an additional one year.

689, 675 P.2d 421 (1984). If the violation constitutes fundamental error, failure to seek a ruling of the trial court does not bar review and requires reversal on appeal. **See State v. Ramirez,** 98 N.M. 268, 648 P.2d 307 (1982).

{51} We agree that the first set of comments by the prosecutor did not compromise Clark's right to remain silent. There is nothing in the record that suggests the prosecutor manifestly intended these arguments as a comment on Clark's failure to testify. To decide if the jury would naturally and necessarily assume the statements to be such a comment, the statement must be viewed within its precise context and not in isolation. **See United States v. Robinson,** 651 F.2d 1188, 1197 (6th Cir.), **cert. denied,** 454 U.S. 875, 102 S. Ct. 351, 70 L. Ed. 2d 183 (1981); **Hunter,** 29 Wash. App. at 220, 627 P.2d at 1342. We believe that the jury would have taken these remarks within the context they were made, that is, a permissible attack on the credibility of the defense expert, Dr. Golding.

{52} We view the second set of comments differently. We disagree with the State's argument that the jury would also understand these comments to be within the context of Clark's failure to explain the matter to his psychologist. The context in which the second statement was made had nothing to do with the testimony of expert witnesses. Rather, the prosecutor was summarizing the facts of the crime, so far as they were known to him, and commenting on the defendant's failure to fill in the gaps. A violation of the **Griffin** rule is evident in the repeated focus upon Clark's failure to "tell us," that is, those persons in the courtroom, certain details of the crime. The possible prejudice to Clark stems from the inference that Clark's use of the bindings was especially sinister since he chose not to disclose their purpose. The argument proceeded without objection. Where the defendant fails to object and chooses instead to await the verdict, his silence is waiver of the improper comments by the prosecutor. **See State v. Gruender,** 83 N.M. 327, 329, 491 P.2d 1082, 1084 (Ct. App.), **cert. denied,** 83 N.M. 324, 491 P.2d 1079 (1971). This rule is followed in numerous states where violations of the **Griffin** rule are involved. **See, e.g., People v. Murtishaw,** 29 Cal.3d 733, 756, 631 P.2d 446, 459, 175 Cal. Rptr. 738, 751, **cert. denied,** 455 U.S. 922, 102 S. Ct. 1280, 71 L. Ed. 2d 464 (1981); **Clark v. State,** 363 So.2d 331, 333 (Fla. 1978); **People v. Davis,** 125 Ill. App. 3d 568, 569, 80 Ill. Dec. 879, 880, 466 N.E.2d 331, 332 (1984); **Commonwealth v. Brown,** 392 Mass. 632, 640, 467 N.E.2d 188, 195 (1984); **Martin v. State,** 674 P.2d 37, 41 (Okla. Crim. App. 1983), **cert. denied,** 465 U.S. 1081, 104 S. Ct. 1448, 79 L. Ed. 2d 767 (1984); **State v. Neal,** 73 Or. App. 816, 817, 699 P.2d 1171, 1172, **review denied,** 299 Or. 663, 704 P.2d 514 (1985).

{53} After reviewing the violation for possible fundamental error, we conclude that there is no reasonable probability that the error was a significant factor in the jury's deliberations in relation to the rest of the evidence before them. The aggravating factors of the crime known to the jury concerning the kidnapping, rape and murder of the victim were overwhelming. The prejudicial effect of any inference the jury might have drawn from the prosecutor's improper remarks, in relation to the strength of the rest of the evidence, was by comparison minor. For these reasons, we do not believe that the outcome of the jury deliberation was affected by the error. Because the violation does not rise to the level of fundamental error, we will not reverse the verdict.

VII. Aggravating Circumstances.

{54} Clark attacks NMSA 1978, Section 31-20A-5(G) as applied to his case. Under New Mexico's capital sentencing procedures, a jury must unanimously find beyond a reasonable doubt and specify at least one of the aggravating circumstances enumerated in Section 31-20A-5. NMSA 1978, § 31-20A-3 (Repl. Pamp. 1987). Here, the jury made the unanimous findings that the murder of Dena Lynn Gore was committed during the commission of a kidnapping, Section 31-20A-5(B), and was the murder of a witness to a crime for the purpose of preventing report of that crime, Section 31-20A-5(G). Clark claims that the "murder of a witness" aggravating

circumstance is overbroad if it is construed to include cases where murder follows another crime against the same victim. **See Zant v. Stephens,** 462 U.S. 862, 877, 103 S. Ct. 2733, 2742, 77 L. Ed. 2d 235 (1983) ("an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder"); **Godfrey v. Georgia,** 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

{55} When a jury considers the aggravating circumstance of "murder of a witness" during capital sentencing, it is evaluating the motive or reason why the victim was murdered. When the motive for the murder was to avoid detection and arrest, the class of murders is adequately narrowed for eighth amendment purposes. **See Harich v. Wainwright,** 813 F.2d 1082, 1103 (11th Cir.), **reh'g granted,** 828 F.2d 1497 (1987), **opinion on reh'g,** 844 F.2d 1464 (1988) (sentence affirmed). **Gray v. Lucas,** 677 F.2d 1086, 1110 (5th Cir. 1982), **cert. denied,** 461 U.S. 910, 103 S. Ct. 1886, 76 L. Ed. 2d 815 (1983). This remains true with the murder of a victim of an underlying felony if the motive for the killing is to avoid arrest and prosecution for the earlier felony. **See Harich,** 813 F.2d at 1104. The correct application of Section 31-20A-5(G) similarly narrows the class of murders eligible for the death penalty. Under that section, the motive for the killing must be to prevent reporting of a crime, testimony in a criminal proceeding, or retaliation for the victim's previous testimony. **See** NMSA 1978, § 31-20A-5(G). Consideration of this factor as an aggravating circumstance furthers the state's interest in preventing victims from being killed by felons attempting to avoid arrest and prosecution. This factor reasonably justifies imposition of a more severe sentence.

{56} The remaining question is whether Section 31-20A-5(G) was properly applied in this case. The jury was instructed that it must find beyond a reasonable doubt that the victim was a witness to a crime and that she was murdered to prevent her from reporting that crime. Ample evidence supports the jury's finding that the aggravated circumstance existed. Witnesses testified to Clark's admission that he kidnapped Dena Lynn Gore, took her to his brother's ranch and raped her. They testified that Clark had told them that he became "frantic," took a gun and shot her to death. He is said to have stated that he believed he could not let her go "because that would be the end for him." His tape recorded guilty plea was played for the jury.

{57} Also, evidence of Clark's prior conviction for kidnapping and criminal sexual penetration was admitted for the limited purpose of showing his motive in committing the killing. His earlier conviction was largely a result of information given to the police by the six-year old victim after Clark had released her. **See State v. Clark,** 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986). Since his decision to kill Dena Lynn Gore rather than release her was likely influenced by his earlier experience, the evidence was highly relevant to show his motive for the killing. For that reason, his criminal record was properly admitted, accompanied by a limiting instruction, in order to establish the purpose for the killing. In a capital sentencing proceeding the jury may consider all evidence admitted at the guilt-innocence phase of a trial, which may include evidence of other crimes when offered as proof of motive, as well as additional evidence which is relevant to particular aggravating circumstances. NMSA 1978, § 31-20A-1(C) (Repl. Pamp. 1987).

{58} Clark further argues that the State has been able to "double count" aggravating circumstances since "every case involving murder in the commission mission of kidnapping * * * will also necessarily involve the 'murder of a witness.'" The two aggravating factors, however, are not subsumed one within the other. Many killings of kidnap victims, but by no means all, may be motivated by the desire to escape criminal prosecution. The requirement that the State prove beyond a reasonable doubt that the motive for the killing was the elimination of a potential witness sufficiently distinguishes a killing of this type from other killings committed during the commission of a kidnapping. Furthermore, killing during the commission of a kidnapping and

killing motivated by a desire to avoid prosecution for the kidnapping, or other crimes, can coexist as aggravating circumstances if both are proved beyond a reasonable doubt. **See Harich v. Wainwright,** 813 F.2d 1082 (11th Cir.), **reh'g granted,** 828 F.2d 1497 (1987), **opinion on reh'g,** 844 F.2d 1464 (1988) (sentence affirmed); **Adams v. Wainwright,** 764 F.2d 1356 (11th Cir. 1985), **cert. denied,** 474 U.S. 1073, 106 S. Ct. 834, 88 L. Ed. 2d 805 (1986); **Gray v. Lucas,** 677 F.2d 1086 (5th Cir. 1982), **cert. denied,** 461 U.S. 910, 103 S. Ct. 1886, 76 L. Ed. 2d 815 (1983).

VIII. Media Coverage of Clark's Allocution to the Jury.

{59} Clark argues that the trial court erred by allowing television coverage of his allocution. We disagree. Clark abandoned his conditional pretrial request to bar television coverage and, in any case, Clark never made a showing that the relief was necessary.

{60} Supreme Court Rule 23-107 authorizes television coverage of criminal proceedings in accordance with specified guidelines providing safeguards to ensure that media coverage shall not interfere with the defendant's due process right to a fair trial. **See** SCRA 1986, 23-107. The rule grants the district judge plenary discretion to limit camera coverage for good cause. SCRA 1986, 23-107(A)(2). If the defendant objects to media coverage he must make a prima facie showing that he will be prejudiced by the media coverage. **See** SCRA 1986, 23-107(G)(2); **State v. Hovey,** 106 N.M. 300, 302, 742 P.2d 512, 514 (1987). A general assertion that the coverage will make the defendant nervous, unsupported by affidavits which address the discretionary standard articulated in **State ex rel. New Mexico Press Association v. Kaufman,** 98 N.M. 261, 648 P.2d 300 (1982), is not sufficient. **See Hovey**, 106 N.M. at 303, 742 P.2d at 515.

{61} In this case Clark's pretrial motion to bar television coverage of the **entire** sentencing proceeding was denied. Subsequently, Clark requested that **if** the court were to grant a motion filed by the State to limit media coverage of certain juvenile witnesses, then the court should also allow Clark to testify without the distraction of television cameras. The motion was not ruled upon as the issue became moot when the State chose not to call the proposed juvenile witnesses. Clark did not pursue the issue, and he later failed to mention any potential problem with media coverage in his motion to allocute. Thus, the claim was abandoned and not preserved for appeal. SCRA 1986, 12-216(A). Moreover, Clark made no showing in his conditional request, by affidavit or otherwise, that good cause existed to bar media coverage of his allocution. He is overruled on this point of error.

IX. Jury Instructions.

1. Nonstatutory Mitigating Circumstances.

{62} Clark argues that the refusal to submit to the jury his tendered instruction concerning specific nonstatutory mitigating circumstances was error.[7] In capital cases the defendant is entitled to have the sentencing jury consider any relevant mitigating evidence. **Hitchock v. Dugger,** 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987); **see also Lockett v. Ohio,** 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1977). In this case the jury was instructed pursuant to SCRA 1986, 14-7029 that it must consider "all mitigating circumstances," and that a "mitigating circumstance is any conduct, circumstance or thing which would lead you to decide not to impose the death penalty." The instruction listed the statutory mitigating circumstances for which there was evidence, then instructed the jury that it must consider "anything else which would lead you to believe that the death penalty should not be imposed." Finally, the jury was told to consider the "character, emotional history and family history of the defendant which are mitigating."

[7] The court may order that defendant serve the prior and present convictions either consecutive or concurrent to the remainder of the term.

{63} Evidence concerning nonstatutory mitigating factors was presented to the jury and was extensively argued by defense counsel. We are not persuaded that these instructions did not afford Clark a full opportunity to have his sentencing jury consider and give effect to any mitigating impulse which the nonstatutory factors might have suggested. **Cf. Hitchock v. Dugger,** 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987) (judge's instruction to jury had the effect of precluding consideration of nonstatutory mitigating circumstances); **Skipper v. South Carolina,** 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986) (evidence of defendant's conduct while incarcerated wholly excluded from jury's consideration); **Franklin v. Lynaugh,** 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) (refusal to submit proffered instruction to jury did not prevent full consideration of mitigating evidence presented by defense). We do not agree that the instruction encouraged the jury to discount nonstatutory factors, thereby increasing the likelihood that aggravating factors would outweigh mitigating factors, as Clark suggests.

{64} This Court previously rejected a similar challenge to the current jury instruction's predecessor, Uniform Jury Instruction, Criminal 39.30. **Compton,** 104 N.M. 683, 695, 726 P.2d 837, 849 (no error in refusing proffered instruction where jury was instructed to consider any circumstances deemed mitigating), **cert. denied,** 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986). We adhere to the view that a specific written list of nonstatutory mitigating circumstances is not required where the instruction given indicates that the list of enumerated mitigating factors is not exclusive. **Cf. People v. Free,** 94 Ill.2d 378, 69 Ill. Dec. 1, 447 N.E.2d 218, **cert. denied,** 464 U.S. 865, 104 S. Ct. 200, 78 L. Ed. 2d 175 (1983); **Bowers v. State,** 306 Md. 120, 507 A.2d 1072, **cert. denied,** 479 U.S. 890, 107 S. Ct. 292, 93 L. Ed. 2d 265 (1986); **State v. Linder,** 276 S.C. 304, 278 S.E.2d 335 (1981). Likewise, we conclude that the New Mexico legislature did not intend such a requirement when it drafted the Capital Felony Sentencing Act. **See** NMSA 1976, 31-20A-6 (Orig. Pamp. & Cum. Supp. 1988).

2. Legal Standards.

{65} The capital jury was given Uniform Jury Instructions 14-7028 and 14-7030.[8] Clark points

[8] The court has no authority to suspend or defer any sentence to be imposed in this case.

You may, but are not required to, accept this as a fact.

5 Under the Corrections Act, Section 33-2-34, any inmate confined in the penitentiary may be awarded a meritorious deduction of thirty days per month for his good conduct and the performance of industrial labor. NMSA 1978, § 33-2-34 (Repl. Pamp. 1987 & Supp. 1988). Neither that statutory provision, nor our previous court decisions, address the question of whether these credits may reduce the period of thirty years an inmate sentenced to life imprisonment must serve before he becomes eligible for a parole hearing pursuant to the Probation and Parole Act. **See** NMSA 1978, § 31-21-10(A) (Repl. Pamp. 1987) (as amended February, 1980). That question is not before us today.

6 The United States Supreme Court has declined to hold that improper comments in violation of the Griffin Rule are always harmful or require automatic reversal. **Chapman v. California,** 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); **see also Satterwhite v. Texas,** 486 U.S. 249, 108 S. Ct. 1792, 1798, 100 L. Ed. 2d 284 (1988). However, where the error is exposed, the prosecution has the burden to prove beyond a reasonable doubt that the constitutional error did not contribute to the verdict and was, therefore, harmless. **See Chapman,** 386 U.S. at 24, 87 S. Ct. at 828; **see also State v. Frank,** 92 N.M. 456, 589 P.2d 1047 (1979); **State v. Lopez**, 105 N.M. 538, 734 P.2d 778 (Ct. App. 1986), **cert. quashed,** 105 N.M. 521, 738 P.2d 761 (1987); **State v. Martin,** 84 N.M. 27, 498 P.2d 1370 (Ct. App. 1972); **State v. Jones,** 80 N.M. 753, 461 P.2d 235 (Ct. App. 1969).

7 The nonstatutory mitigating circumstances included in the refused instruction were: the defendant was commended during service and was honorably discharged from the armed forces; the defendant suffered from post-traumatic stress disorder; and, the defendant poses no significant threat to others while confined.

The statutory mitigating circumstances included in the instruction which was given were: the defendant did not have any significant history of prior criminal activity; the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; the defendant was under the influence of mental or emotional disturbance; cooperation by the defendant with authorities; the defendant is likely to be rehabilitated. See NMSA 1978, Section 31-20A-6 for mitigating circumstances listed by statute.

8 Uniform Jury Instruction 14-7028 states:

You must first consider whether one or more of the aggravating circumstances charged was present in this case. You must decide separately as to each of the aggravating circumstances.

In order for you to find an aggravating circumstance, you must agree unanimously. You cannot consider the penalty to be imposed until you have found that one or more of the

out that while these instructions require the jury to unanimously find a statutory aggravating circumstance exists beyond a reasonable doubt before a death sentence can be imposed, the jury is not provided with a legal standard for weighing the aggravating circumstances against the mitigating circumstances. Clark argues that this renders his sentence unreliable under eighth amendment standards.

{66} Specific legal standards for balancing aggravating circumstances against mitigating circumstances in a capital sentencing proceeding are not constitutionally required. **Zant v. Stephens,** 462 U.S. 862, 876 n.13, 103 S. Ct. 2733, 2742 n. 13, 77 L. Ed. 2d 235 (1983); **State v. Cheadle,** 101 N.M. 282, 287, 681 P.2d 708, 713 (1983), **cert. denied,** 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984); **see also Franklin,** 108 S. Ct. at 2320 (holding that no specific method is required by the Constitution for balancing mitigating and aggravating factors).

{67} The instructions which were used indicate that in weighing the mitigating and aggravating circumstances the jury must find that the aggravating circumstances outweigh the mitigating circumstances before the penalty of death can be imposed. However, the jury is instructed that even if aggravating circumstances outweigh mitigating circumstances the jury is free to not impose the penalty of death. The jury is directed to consider both the defendant and the crime. We have recognized that a subjective standard must be used for this review. **State v. Garcia,** 99 N.M. 771, 779, 664 P.2d 969, 977, **cert. denied,** 462 U.S. 1112, 103 S. Ct. 2464, 77 L. Ed. 2d 1341 (1983); **see also Zant,** 462 U.S. at 902, 103 S. Ct. at 2756 (Rehnquist, J., concurring in judgment) ("sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does"); **Ford v. Strickland,** 696 F.2d 804, 818 (11th Cir.), **cert. denied,** 464 U.S. 865, 104 S. Ct. 201, 78 L. Ed. 2d 176 (1983) ("While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard the relative **weight** is not") (citations omitted). These instructions adequately focused the jury's attention on the particularized nature of the crime and the unique characteristics of the individual defendant, as required by the Constitution.

{68} Clark similarly argues that a capital jury should be required to find beyond a reasonable

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specified aggravating circumstances has been proved beyond a reasonable doubt.

A special form has been prepared for you for each of the aggravating circumstances charged. In this case, as to each of the aggravating circumstances, there are three possible verdicts:

(1) finding beyond a reasonable doubt that the aggravating circumstance exists;

(2) finding that the aggravating circumstance does not exist; or

(3) being unable to reach an agreement.

You must complete the form for each aggravating circumstance.

If you unanimously find the state had proved beyond a reasonable doubt that one or more of the aggravating circumstances was present, you shall complete the form for each aggravating circumstance you find, indicating your finding, and have the foreman sign this part.

If you are unable to agree unanimously as to any aggravating circumstance or if you unanimously find that any aggravating circumstance was not present, you shall complete the form for that aggravating circumstance, indicating your finding, and shall have the foreman sign this part. You will then consider the penalty to be imposed.

If you find that the state has not proven that one or more of the aggravating circumstances was present you shall complete the form for each aggravating circumstance. You shall indicate whether:

(1) you are unable to agree unanimously that the aggravating circumstance was present; or

(2) you unanimously find that the aggravating circumstance was not present. The foreman shall sign this part of each finding form. You will then return to the courtroom.

SCRA 1986, 14-7028.

Uniform Jury Instruction 14-7030 was submitted to the jury in the following form:

If you find any aggravating circumstance(s) that were charged you must weigh those aggravating circumstance(s) against any mitigating circumstances you have found in this case. After weighing the aggravating circumstance(s) and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, you shall determine whether the defendant should be sentenced to death or life imprisonment. The aggravating circumstance(s) must outweigh the mitigating circumstances before the death penalty can be imposed.

However, even if the aggravating circumstance(s) outweigh the mitigating circumstance(s), you may still set the penalty at life imprisonment.

SCRA 1986, 14-7030.

doubt that the penalty of death is the appropriate punishment. We have previously rejected this argument. **State v. Finnell,** 101 N.M. 732, 736, 688 P.2d 769, 773, **cert. denied,** 469 U.S. 918, 105 S. Ct. 297, 83 L. Ed. 2d 232 (1984).

3. Consideration of Factors other than the Statutory Aggravating Circumstances as a Basis for Imposing the Sentence of Death.

{69} The trial judge refused Clark's requested instruction to the effect that the jury was not allowed to take into account anything other than the two charged statutory aggravating circumstances as a basis for deciding to impose the death penalty. Clark argues that the refusal to give this instruction created an impermissible risk that the jury considered aspects of Clark's background, the offense under consideration, and his prior conviction for criminal sexual penetration as aggravating circumstances. The requested instruction was properly refused.

{70} When a jury makes its threshold decision as to the existence of an aggravating circumstance, it is explicitly restricted to the statutory aggravated circumstances "charged." SCRA 1986, 14-7028. Then, if the jury finds any "charged" aggravating circumstances, the jury must weigh **those** aggravating circumstances against any mitigating circumstances present. Those aggravating circumstances must outweigh the mitigating circumstances before the death sentence can be imposed. SCRA 1986, 14-7030. There is no indication that the jury is to consider facts and circumstances other than the statutory aggravating circumstances in this weighing process. **See State v. Guzman,** 100 N.M. 756, 760, 676 P.2d 1321, 1325, **cert. denied,** 467 U.S. 1256, 104 S. Ct. 3548, 82 L. Ed. 2d 851 (1984); **see also** NMSA 1978, § 31-20A-5 (limiting the aggravating circumstances to be considered by the jury pursuant to Section 31-20A-2 to the listed statutory aggravating circumstances). This procedure channels the sentencing decision of the jury and avoids the exercise of unbridled discretion in determining whether the death penalty should be imposed.

{71} The jury is also instructed to consider "both the defendant himself and the crime" in making its final determination of whether to impose the death penalty. SCRA 1986, 14-7030. This consideration is properly before a capital jury. **See Zant,** 462 U.S. at 878-79, 103 S. Ct. at 2743-44. Once the jury has determined that a statutory aggravating circumstance exists, and that the statutory aggravating circumstance(s) outweigh mitigating factors, the jury is free to consider all relevant aspects of the defendant's character, as well as the crime itself, in making its final decision of whether or not to impose the penalty of death. For these reasons the refusal of Clark's tendered instruction was not error.

4. Unanimity Instruction.

{72} The jury was instructed by the court that any finding they reached regarding the appropriate sentence to be imposed must be unanimous. The jury was provided with forms which allowed them to unanimously sentence Clark to either life imprisonment or death. The verdict form did not contain a place to sign if the jury was divided concerning the penalty to be imposed.[9] Clark argues that the court's instruction was in conflict with NMSA 1978, Section 31-20A-3. That statute directs the court to sentence the defendant to life imprisonment, "[w]here a sentence of death is not unanimously specified, or the jury does not make the required finding, or the jury is unable to reach a unanimous verdict." **Id.** Thus, Clark argues, the statute indicates that a split decision is a verdict, and therefore the unanimity instruction given by the court contravened the statute and constitutes reversible error. This contention is without merit. The statutory injunction is directed to the trial court, not the sentencing jury. **Cf. Brogie v. State,** 695 P.2d 538, 547 (Okla. Crim. App. 1985). Section 31-20A-3 does not require that the jury return a specific verdict if unanimity is absent.

[9] Clark's proposed verdict form, which was refused by the trial judge, contained a place for the foreman to sign in the event the jury was divided.

{73} Clark also claims that the unanimity instruction was impermissibly coercive because that charge, together with Uniform Jury Instruction 14-7043, imposed upon a divided jury the duty to consult. We reject this argument also. We have previously decided that instructions such as these cannot be construed to improperly encourage individual jurors to abandon a decision to impose a life sentence in favor of a sentence of death for the sole purpose of simply maintaining unanimity. **Compton,** 104 N.M. at 694, 726 P.2d at 848.

5. Role of Mitigating Circumstances - "Mills Error".

{74} Clark also argues that the instructions violated the principles of the recent United States Supreme Court case of **Mills v. Maryland,** 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). In **Mills,** the Court held that remand for resentencing was required where there was a substantial probability that the jurors thought they were precluded from considering any mitigating evidence unless they unanimously agreed on the existence of a particular such circumstance. 108 S. Ct. at 1870. As we have recognized, it is well established that the sentencing jury must be allowed to consider all relevant mitigating evidence. The Supreme Court in **Mills** has now decided that where there is a probability that one juror could block such consideration, and effectively require the sentencing jury to impose the death penalty, the judgment must be vacated. **Id.; see also North Carolina v. Lloyd,** 321 N.C. 301, 364 S.E.2d 316 (requiring jurors to reach unanimous decision regarding the presence of mitigating circumstances), **vacated and remanded in light of Mills v. Maryland,** . . . U.S. . . . 109 S. Ct. 38, 102 L. Ed. 2d 18 (1988).

{75} We note that the capital sentencing procedures used in Maryland differ markedly from those used in New Mexico. In New Mexico, no vote is taken concerning the existence of any mitigating circumstance; no findings in this regard are made; and all mitigating evidence must be considered by the jury. The verdict form employed in Maryland at the time **Mills** was decided required the sentencing jury to make specific findings that particular mitigating circumstances either existed or did not exist, and that this fact had been proved by a preponderance of the evidence. Thus, the probability existed that once a jury found the presence of an aggravating circumstance, unless the jurors were to all agree on the existence of a particular mitigating circumstance, they might never engage in the weighing process or deliberate the appropriateness of the death penalty. **Mills,** 108 S. Ct. at 1868. Instead, they might impose the death sentence automatically even though individual jurors might believe that certain mitigating factors existed which should be taken into consideration. We do not believe a similar danger exists with the instructions used in this case.

{76} At Clark's trial, the jury was instructed that they must unanimously find beyond a reasonable doubt that the aggravating circumstances existed. Similarly, the jury was instructed that any finding they reached regarding the appropriate sentence to be imposed (life imprisonment or death) must be unanimous. The jury was provided with forms for these findings. No other formal findings were requested of the jury. The jury was instructed pursuant to SCRA 1986, 14-7029 that "[i]f you find an aggravating circumstance, you must consider all mitigating circumstances. A mitigating circumstance is any conduct, circumstance or thing which would lead you to decide not to impose the death penalty."

{77} The jury was also instructed pursuant to SCRA 1976, 14-7030 that "[i]f you find any aggravating circumstance(s) that were charged you must weigh those aggravating circumstance(s) against any mitigating circumstances you have found in this case." Clark argues that this instruction, SCRA 1976, 14-7030, suggests to the jury that they must unanimously agree as to existence of a mitigating circumstance since it directs the jury to balance aggravating circumstances against the mitigating circumstances they have **found.** We do not agree. As stated in **Mills,** "the question is whether petitioner's interpretation of the sentencing process is one a reasonable jury

could have drawn from the instructions given by the trial judge and from the verdict form employed." **Id.** 108 S. Ct. at 1866. For a jury to reach the interpretation which Clark urges, the jury would have to ignore the previous instruction, SCRA 1986, 14-7029, that, should they decide an aggravating circumstance exists, they **must** then consider **all** mitigating circumstances.

{78} The first instruction submitted to the jury was to "consider these instructions as a whole" and "not pick out one instruction or parts of an instruction or instructions and disregard others." SCRA 1986, 14-6001. There is a presumption that jurors will adhere to their instructions. **State v. Chase,** 100 N.M. 714, 676 P.2d 241 (1984). We conclude that no reasonable jury would have understood these instructions to preclude individual jurors from considering any mitigating evidence they believed was present unless the entire jury were to unanimously agree on the existence of a particular such circumstance.

X. Supreme Court Review Under Section 31-20A-4(C).

{79} Under the Capital Felony Sentencing Act, Section 31-20A-4(C), we are to review a sentence of death and find that sentence invalid if: (1) the evidence does not support the finding of a statutory aggravating circumstance; (2) the evidence supports a finding that the mitigating circumstances outweigh the aggravating circumstances; (3) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; or (4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. NMSA 1978, § 31-20A-4(C) (Orig. Pamp. & Cum. Supp. 1988).

{80} Clark does not argue that insufficient evidence supports the finding of the first aggravated circumstance, murder during the commission of a kidnapping. His guilty plea supports such a finding. While Clark disputes the validity of the second aggravating circumstance, murder of a witness for the purpose of preventing report of a crime, for the reasons stated in Section VII we reject that argument and find ample evidence exists to support such a finding.

{81} Clark makes no attempt to discuss the evidence in mitigation and argue that a sentence of life imprisonment should have been imposed. At trial, the major mitigating evidence presented to the jury consisted of psychological evidence which purported to demonstrate that his criminal behavior was the result of a traumatic incident which occurred during the rescue of Vietnamese boat people during his service with the Navy. Two psychologists proposed that this traumatic experience, followed by his involvement with Filipino child prostitutes, came to the surface following a blow on the head five years later, and triggered the attack on his first victim and later the attack on Dena Lynn Gore. On rebuttal, the State presented a former shipmate of Clark who testified that he recalled no incidents of combat, helicopter assaults on pirate ships, or wounded boat people as described by Clark to his psychologists. Other mitigating evidence which Clark presented consisted of his voluntary guilty plea; his honorable service record in the Navy; and his good conduct while incarcerated in prison awaiting trial.

{82} The evidence of Clark's prospects for rehabilitation was inconclusive. A defense expert who testified that he had a good success rate treating sex offenders also stated that his program did not include those who killed during the commission of the sexual offense. Another expert testified that a rapist-murderer was the most difficult sex offender to treat.

{83} A review of the evidence of mitigating circumstances supports the jury's determination in this case. **See Guzman,** 100 N.M. 756, 761, 676 P.2d 1321, 1326, **cert. denied,** 467 U.S. 1256, 104 S. Ct. 3548, 82 L. Ed. 2d 851 (1984). The evidence does not support a finding that mitigating circumstances outweigh the aggravating circumstances of Clark's crimes.

{84} Regarding the third statutory inquiry mandated by Section 31-20A-4(C), Clark submits

that his sentence was imposed under the influence of all of the arbitrary factors which he has raised thus far. For the reasons discussed in detail in previous sections of this opinion, we reject that argument.

{85} Lastly, this Court under Section 31-20A-4(C) must review the sentence in order to determine if it is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." We established our guidelines for this review in **State v. Garcia,** 99 N.M. 771, 780, 664 P.2d 969, 978, **cert. denied,** 462 U.S. 1112, 103 S. Ct. 2464, 77 L. Ed. 2d 1341 (1983). In reviewing a sentence under these guidelines we will compare other New Mexico cases in which a capital defendant has been convicted of capital murder under the same aggravating circumstances, and then received **either** the sentence of death or life imprisonment. **Id.** We will, however, review this issue only when raised. **Id.** Since Clark does not refer this Court to similar New Mexico cases for comparison, we will not undertake such a review at this time.

{86} Rather than refer this Court to similar cases for a proportionality review, Clark argues that the **Garcia** guidelines are unduly restrictive. He argues that the guidelines should be broadened by this Court to include comparison with cases in which the death penalty could have been sought but was not, as well as cases in which the death penalty was sought but which ended either in a plea of guilty to a noncapital offense or with the jury's failure to find the existence of the alleged statutory aggravating circumstance. We agree with the State that Clark does not present this Court with a question to review. He does not allege, or make any showing, that his sentence would be disproportionate if compared to this pool of cases. This court does not give advisory opinions. **See State v. Hines,** 78 N.M. 471, 474, 432 P.2d 827, 830 (1967).

{87} We reject Clark's argument that he was unable to gain access to this pool of cases. As we noted in **Garcia,** 99 N.M. at 780, 726 P.2d at 978, it is the duty of the defendant's attorney to supply the Court with information of similar cases. The information is a matter of public record. **Id.; see** NMSA 1978, §§ 14-3-1 to -25 (Repl. Pamp. 1988).

XI. Cumulative Error.

{88} Clark argues that the cumulative impact of the errors which occurred at the sentencing proceeding requires reversal. We have addressed his claims and decided either that no errors were committed or that certain errors which were waived did not individually amount to fundamental error. We are not persuaded that there is a reasonable probability that the cumulative prejudicial effect of those errors, testimony on the cost of incarceration and comment on Clark's failure to testify, changed the outcome of the sentencing hearing. The doctrine of fundamental error has no application where the record does not reveal the type of cumulative error that would change the result. **State v. Hamilton,** 89 N.M. 746, 751, 557 P.2d 1095, 1100 (1976).

CONCLUSION

{89} Twenty-three issues were initially raised in Clark's docketing statement. The issues not addressed here were not briefed and are, therefore, abandoned. **State v. Foye,** 100 N.M. 385, 671 P.2d 46 (Ct. App. 1983).

{90} For the foregoing reasons, we determine that the convictions of Terry Clark and the sentence of death imposed upon him for the murder of Dena Lynn Gore should be affirmed.

{91} IT IS SO ORDERED.

WE CONCUR:

HARRY E. STOWERS, JR.,
Justice

JOSEPH F. BACA,
Justice

DAN SOSA, JR.,
Chief Justice, specially concurs

RICHARD E. RANSOM,
Justice, dissents

SPECIAL CONCURRENCE

SOSA, Chief Justice, specially concurring.

{92} I concur in the majority opinion insofar as it affirms Clark's conviction for kidnapping and first-degree murder. I dissent, however, from that portion of the opinion which affirms the jury's imposition of the death penalty. In my estimation, the trial court erred in not sentencing Clark on the kidnapping charge and in not informing the jury, prior to its deliberations on the death penalty, as to the sentence which Clark would have received on the kidnapping charge. I disagree with the majority's conclusion that, "The sentencing prerogatives of the trial judge, or the possible length of a life sentence, simply have no relevance under Eighth Amendment standards as they have developed so far."

{93} As I read the Supreme Court's decision in **Lockett v. Ohio,** 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), the length of time a convicted capital felon would serve in prison for another crime for which he has been convicted should, at the request of the defendant, be considered by the jury as a mitigating factor when the jury deliberates on the death penalty. The Court wrote:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer * * * not be precluded from considering **as a mitigating factor** any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis of a sentence less than death.

Id., at 604, 98 S. Ct. at 2964 (emphasis in original).

{94} The fact that Clark already had been convicted of a kidnapping is unquestionably a part of his "record." The fact that his conviction for kidnapping is not a salutary part of his record, in the same sense that facts concerning his character or good conduct might be, is irrelevant. It seems to me that the Court in **Lockett v. Ohio** was concerned both about the nature of the information proffered to the jury in mitigation as well as about the motivation behind the defendant's proffering the information—namely, to persuade the jury to impose a sentence less than death. In my opinion, Clark's attempt to proffer his sentence on the kidnapping conviction was part of his record and was intended to persuade the jury to return a sentence other than death. Therefore, under **Lockett,** the trial court should have imposed that sentence prior to the jury's deliberation on the death penalty; and the jury then should have been instructed on the sentence.

{95} The Supreme Court has held that consideration by a jury of a convicted capital felon's future dangerousness and the relationship of that dangerousness to the length of time he must serve in prison before he can be paroled is a proper subject for the jury's deliberation when it sits to decide whether the defendant should receive the death penalty. **California v. Ramos,** 463 U.S. 992, 103 S. Ct. 3446, 77 L. Ed. 2d 1171 (1983); **Jurek v. Texas,** 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976). Here Clark wanted the jury to know that he faced a lengthy prison term for kidnapping. If the trial court would have imposed the basic eighteen-year sentence for kidnapping, it could have increased that sentence by one-third, for a sum of twenty-four years. In addition, the trial court could have enhanced that sentence by another two years, for a sum of twenty-six years. If the court then ordered that sentence to be served consecutively with Clark's previous twenty-four year sentence on the earlier conviction, and if these sentences were made known to the jury, the jury then would have known, before it began its deliberations on the death penalty, that Clark already had been sentenced to fifty years in prison. Such information clearly would have been a mitigating factor, under **Lockett,** that may have changed the outcome of the jury's decision on the death penalty.

{96} In addition, I would make it mandatory in a situation such as this one, where a convicted

capital felon asks that the jury be informed as to the length of time to which he has been sentenced on another crime, for the trial court to instruct the jury on the provisions of NMSA 1978, Section 31-21-10 (Supp. 1988), to the effect that, "An inmate of an institution who was sentenced to life imprisonment as the result of the commission of a capital felony becomes eligible for a parole hearing after he has served thirty years of his sentence." NMSA 1978, § 31-21-10(A). I am aware that NMSA 1978, Section 33-2-34 (Repl. Pamp. 1987), provides for certain "meritorious deductions" to be subtracted from a convicted felon's time served, but I read that statute as not affecting the more narrowly drafted provisions of Section 31-21-10, so that a capital felon who is sentenced to life imprisonment may not be eligible for parole before he has served thirty years.

{97} This information too should have been presented to the jury deliberating over Clark's sentence. Had the jury known both of Clark's possible fifty-year sentence for previous convictions, and of the mandatory thirty-year imprisonment under a life sentence, they then would have known that Clark faced the possibility of eighty years in prison, or a true life term. Then the jury would have been faced with an actual alternative between imposition of the death penalty and imposition of a life sentence. As it happened, however, especially after the bewildering testimony presented at trial, and after the prosecutor's closing argument to the effect that Clark would certainly be released from prison, the jury's choice was not one of life vs. death, but of death vs. releasing a dangerous felon in perhaps a short period of time after he had entered the penitentiary. It was constitutionally impermissible to present this latter choice to the jury.

{98} I agree with the Court's reasoning in **California v. Ramos:** "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." 463 US. at 1004, 103 S. Ct. at 3455. Here the jury did not have all relevant information before it, and because the trial court did not give it this information on Clark's request, the court committed fundamental error. "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty." **McCleskey v. Kemp,** 481 U.S. 279, 306,107 S. Ct. 1756, 1774, 95 L. Ed. 2d 262 (1987). "[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination," **Caldwell v. Mississippi,** 472 U.S. 320, 329, 105 S. Ct. 2633, 2639, 86 L. Ed. 2d 231 (1985) (quoting **California v. Ramos,** 463 U.S. 992, 998-999, 103 S. Ct. 3446, 3451-52, 77 L. Ed. 2d 1171 (1983)). In the present case I find the majority's scrutiny of the jury's sentencing determination to be constitutionally inadequate. I would reverse the death sentence and remand this case to the trial court for a new sentencing hearing to be conducted in a manner that is not inconsistent with the above.

DISSENT IN PART

RANSOM, Justice (dissenting in part).

{99} I respectfully dissent; I would remand for a new sentencing proceeding in which the jury would decide whether to impose the death sentence or life imprisonment.

{100} The death sentencing proceeding in the trial court and the majority opinion of this Court conspire to defeat the legislative mandate that the jury determine **whether the defendant should be sentenced to death or life imprisonment.** NMSA 1978, §§ 31-20A-1(B), 31-20A-2(B) (Repl. Pamp. 1987). The legislature has clearly provided that an inmate sentenced to "life imprisonment" is ineligible for a parole hearing before he has served thirty years of his sentence. NMSA 1978, § 31-21-10(A) (Supp. 1988). For imposition of death, the jury must weigh the evidence presented as to the circumstances of the crime and as to any aggravating or mitigating circumstances, Sections 31-20A-1(C) and 31-20A-2(B), and choose between either (a) death or (b) life imprisonment without possibility of parole for a definite thirty-year period to begin no sooner than a time made certain under

the sentencing authority of the trial court. In reviewing the jury's choice, this Court must adhere to the legislative mandate that the death penalty not be imposed if the sentence is found to have been influenced by any arbitrary factor, i.e., caprice or speculation. § 31-20A-4.

{101} Special scrutiny. I accept without reservation the legislature's constitutional authority under **Gregg v. Georgia,** 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), to craft death penalty statutes consistent with the eighth amendment's prohibition against cruel and unusual punishment. This Court has held our legislature's capital sentencing statutes to be constitutional. **State v. Garcia,** 99 N.M. 771, 664 P.2d 969, **cert. denied,** 462 U.S. 1112, 103 S. Ct. 2464, 77 L. Ed. 2d 1341 (1983). However, in order to assure reliability in any decision that subjects an individual to the ultimate and irrevocable sanction, death penalty determinations require special scrutiny of fundamental error claims. **State v. Compton,** 104 N.M. 683, 726 P.2d 837, **cert. denied,** 479 U.S. 890, 107 S. Ct. 291, 93 L. Ed. 2d 265 (1986). "'[T]he qualitative difference of the death penalty requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" **Id.** at 688, 726 P.2d at 842 (quoting **Caldwell v. Mississippi,** 472 U.S. 320, 329, 105 S. Ct. 2633, 2639, 86 L. Ed. 2d 231 (1985), quoting **California v. Ramos,** 463 U.S. 992, 998-99, 103 S. Ct. 3446, 3451-52, 77 L. Ed. 2d 1171 (1983)); **see, e.g., Lockett v. Ohio,** 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); **Woodson v. North Carolina,** 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976); **Gregg v. Georgia,** 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976). Moreover, death penalty determinations impose requirements of special scrutiny of eighth amendment claims, perhaps chief among which is the right of the defendant to proffer any factors that may mitigate against death. **See Ramos,** 463 U.S. at 1000-1001, 103 S. Ct. at 3452-53; **Lockett,** 438 U.S. at 604, 98 S. Ct. at 2964; **Woodson,** 438 U.S. at 304, 96 S. Ct at 2991.

{102} Fundamental error. A substantial portion of Clark's death penalty hearing was devoted to evidence and arguments on the possibility of commutation or pardon, parole, the costs of incarceration, and legislative or judicial actions that could impact the sentence of life imprisonment. The majority opinion concedes this was inconsistent with the decision-making role that the legislature set out for the jury. It is clear to me that the jury had to be in complete and utter confusion over the choice they were to make, and I believe this constituted a miscarriage of justice in the sentencing proceeding. Any miscarriage of justice is fundamental error. As we recently reiterated in **State v. Escamilla,** 107 N.M. 510, 515, 760 P.2d 1276, 1281 (1988), while fundamental rights may be waived, fundamental error cannot be waived and such error requires a new trial.

{103} To preclude application of the doctrine of fundamental error, the majority opinion relies on **State v. Cheadle,** 101 N.M. 282, 287, 681 P.2d 708, 713 (1983), **cert. denied,** 466 U.S. 945, 104 S. Ct. 1930, 80 L. Ed. 2d 475 (1984), which held fundamental error did not apply when the defendant failed to object to proposed jury instructions in a death penalty sentencing. The majority opinion concludes that Clark cannot now complain because, by asking a witness about the minimum term of incarceration he might serve, Clark opened the door to the prosecutor's admittedly improper remarks. While I agree that the error alleged in **Cheadle** did not result in a miscarriage of justice, the majority's reliance on that case begs the question. If fundamental error occurred, by definition it was not waived. The same can be said of **State v. Padilla,** 104 N.M. 446, 451, 722 P.2d 697, 702 (Ct. App.), **cert. denied,** 104 N.M. 378, 721 P.2d 1309 (1986) (when defendant requested an instruction on manslaughter, there was no fundamental error, and he would not be heard to complain that the evidence did not warrant such an instruction). Furthermore, I concur in the **Padilla** dissent of Judge Minzner.

> The majority appears to equate fundamental error with a denial of due process rights, which requires state action and which includes rights that can be waived. While I believe that the concept of due process will often be implicated when the doctrine of

> fundamental error must be applied, I understand fundamental error as a broader doctrine, which enables an appellate court to correct manifest injustice even in cases where the claim of error does not lie within an existing rule.
>
> * * * * * *
>
> The majority in effect holds that defendant waived his right to object to lack of substantial evidence by offering the instruction on voluntary manslaughter, and because he waived that right, no fundamental error occurred. I would analyze the issues differently; first, we must determine whether fundamental error is involved and then, if not, we may determine whether the relevant right was waived. We ought not limit our discretion to correct fundamental error in an appropriate case.

Id. at 452, 722 P.2d at 703.

{104} I don't believe the question of eligibility for parole from a life sentence raised a factual issue that was subject to proof by means of expert testimony. What constitutes a life sentence is a question of law, and the answer to that question is that the sentence is for life, with the possibility of parole after thirty years. § 31-21-10(A). In a death penalty proceeding, presentation to the jury of incompetent testimony and speculative arguments on matters of statutory interpretation was fundamental error. This Court should so hold.

{105} Moreover, the allegations of error here point to a systematic attempt by the prosecutor to convince the jury that the only meaningful sentence was the death sentence, by means of speculative testimony and arguments about possible legislative changes, federal intervention under the **Duran** consent decree, inquiry into the cost of incarceration, and the possibility of commutation. In closing, the prosecutor argued that a life sentence did not pose a question **whether** Clark would be released from prison, but **when** he would be released, that Clark's release was "inevitable," and that his release might occur within ten years.

{106} When a defendant's life hangs in the balance, prosecutorial overreaching should not be excused by defense counsel's failure to object. Although I do not believe testimony on the meaning of the sentencing statutes was appropriate, if it were to be acknowledged that the prosecutor was entitled to cross-examine the defense witness on matters reasonably raised on direct examination, **Jaramillo v. Fisher Controls Co.,** 102 N.M. 614, 698 P.2d 887 (Ct. App. 1985), in this case the prosecutor went well beyond the scope of direct examination into matters which were both highly speculative and highly prejudicial. **See State v. Martin,** 101 N.M. 595, 601, 686 P.2d 937, 943 (1984); **cf. Ex parte Rutledge,** 482 So.2d 1262 (Ala. 1984).

{107} It is therefore misleading and unfair to suggest that Clark "created" the error here. Such a statement suggests that under the guise of the "reply in kind" doctrine a prosecutor may violate the defendant's eighth amendment rights with impunity. Such a holding is incompatible with the doctrine of fundamental error and the need for meaningful appellate review of death sentence determinations. **See Eddings v. Oklahoma,** 455 U.S. 104, 118, 102 S. Ct. 869, 878, 71 L. Ed. 2d 1 (1982) (O'Connor, J., concurring) (as much as humanly possible, death sentence determinations must not be based on whim, passion, prejudice, or mistake).

{108} The mitigating factor of noncapital sentencing. Further, I believe the trial court was without discretion to deny the defendant's request to have the jury informed of his noncapital sentence prior to its deliberation on the capital sentencing. I am firmly convinced that under eighth amendment jurisprudence the defendant was entitled to have the jury apprised of this information. Under **Lockett,** a capital sentencing jury must be allowed to consider, as a mitigating factor, any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. 438 U.S. at 604, 98 S. Ct. at 2964.

{109} The majority opinion erroneously limits the scope of relevant mitigating evidence to the defendant's own conduct and background and concludes that "the sentencing prerogatives of the trial judge, or the possible length of a life sentence, simply have no relevance under eighth amendment standards as they have developed so far." 108 N.M. at 295, 772 P.2d at 329. However, in **Ramos** the Court reasoned that the possibility the defendant may be returned to society focuses the jury's attention on the defendant's probable "future dangerousness" and is therefore "'relevant information about the individual defendant whose fate it must determine.'" 463 U.S. at 1003, 103 S. Ct. at 3454 " (quoting **Jurek v. Texas,** 428 U.S. 262, 276, 96 S. Ct. 2950, 2958, 49 L. Ed. 2d 929 (1976)). Whereas the length of incarceration may be relevant to the aggravating circumstance of future dangerousness in one sense, it clearly may be relevant as mitigation from the defendant's perspective in another. **See Skipper v. South Carolina,** 476 U.S. 1, 5, 106 S. Ct. 1669, 1671, 90 L. Ed. 2d 1 (1986) (evidence that a defendant would not pose a danger if incarcerated rather than put to death must be considered potentially mitigating).

{110} Moreover, I find unpersuasive the argument that such sentencing information should be denied the jury because it may have an impermissible prejudicial effect. Admittedly, the jury could interpret the sentencing decision of the trial court as a reflection of the defendant's culpability. However, **Lockett** and its progeny require that the defendant be allowed to place before the jury any relevant mitigating circumstance. "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty." **McClesky v. Kemp,** 481 U.S. 279, . . . U.S. . . . , 107 S. Ct. 1756, 1774, 95 L. Ed. 2d 262 (1987).

{111} Therefore, if the defendant decides it is in his best interest to have the jury apprised of this information before it deliberates upon the capital sentencing, the trial court is without discretion to withhold it from the jury. It is certainly a matter the court would have in mind if sentencing without benefit of a jury. The jury likewise necessarily must know when the minimum thirty-year period of the life imprisonment is to begin. Here, the court had in mind that, before life imprisonment was to begin, this child rape-murder was serious enough to warrant the maximum sentences, i.e., twenty-four years to be served consecutively with the twenty-four year sentence previously imposed, plus one year each for use of a firearm and as an habitual offender, subject to meritorious deductions and parole.

{112} Assuming maximum good time for the noncapital offenses, a life sentence would have assured incarceration to age eighty-six. The prosecution could argue release as early as age forty-one only by asking the jury to **speculate** on what the noncapital sentence might be, and on what the executive, legislative or judicial officers or bureaucrats **might** do to change the current meaning of a life sentence. The jury was faced with false issues that were not intended by the legislature nor permitted by the requirements of the eighth amendment.

{113} Because length of incarceration is relevant, it is necessary to address whether gubernatorial postsentence remedies, such as commutations and pardons, or other sentence-reduction mechanisms, such as parole and meritorious deductions, are proper subjects for capital sentencing deliberations. I agree with the majority that the possibility of commutation or pardon of a sentence should not enter the sentencing calculus. Whereas **Ramos** held it is not a violation of eighth amendment rights to instruct the jury as to commutation authority relevant and material to the meaning of "life imprisonment without possibility of parole," this Court is not precluded from requiring a more strict standard of inadmissible speculation. Such speculation is inconsistent with the jury's proper decision-making role. These extraordinary postsentencing remedies are an exercise of executive discretion and injection of such considerations into the capital sentencing process would undermine the legislative intent that the jury make a reasoned choice between death and life imprisonment.

{114} As the majority opinion notes, a substantial number of other states have interpreted their statutes to prohibit jury consideration

of parole eligibility. Our statutory sentencing scheme, however, should lead us to a contrary view. The trial court should instruct the jury on the definition of life imprisonment, tracking the language of Section 31-21-10(A). When collateral noncapital sentences are also at issue, if the defendant chooses to have the jury informed of the sentences to be imposed for those collateral offenses, then the trial court also should instruct the jury on parole eligibility and the possibility of meritorious deductions for these other offenses.

{115} On remand, the jury should be specifically instructed that, for consideration of mitigating circumstances, unanimity on the existence of a mitigating circumstance is not required. **Mills v. Maryland,** 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). While **Mills** is distinguishable (Clark went to the jury without a verdict form requiring a specific finding on each mitigating circumstance, as in **Mills**), and reversal is not required on this point, it would be well for a clarifying instruction to be given.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-025

Filing Date: May 4, 1989

Docket No. 17,790

YATES EXPLORATION, INC., a New Mexico corporation, CIBOLA ENERGY CORPORATION, a New Mexico corporation, OTEC, a California corporation, LYNN LUCAS, THOMAS N. JONES, ROGER V. EATON, CHARLES M. SAGGIO, AMY N. SAGGIO, RAYMOND L. SURRETTE, AGNES A. SURRETTE, RAYMOND L. SURRETTE, JR., and MAY T. MISSEC, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

VALLEY IMPROVEMENT ASSOCIATION, INC., a New Mexico corporation, formerly known as HORIZON COMMUNITIES IMPROVEMENT ASSOCIATION OF NEW MEXICO, INC.,

Defendant,

VALLEY IMPROVEMENT ASSOCIATION, INC., a New Mexico corporation,

Third-Party-Plaintiff-Appellant,

v.

HORIZON CORPORATION,

Third-Party-Defendant-Appellee,

v.

WELDON BURRIS,

Third-Party Defendant.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY, WILLIAM W. DEATON, District Judge.

Lanphere, McBride & Gross,
Eric D. Lanphere,
Albuquerque, New Mexico,

Rodey, Dickason, Sloan, Akin & Robb,
William S. Dixon,
James O. Browning,
Charles K. Purcell,
Albuquerque, New Mexico,

for Appellant.

Modrall, Sperling, Roehl, Harris & Sisk,
Kevin T. Riedel,
J. Douglas Foster,
Albuquerque, New Mexico,

for Appellee Horizon.

OPINION

SCARBOROUGH, Justice.

{1} This suit involves a dispute between a group of persons owning certain subdivision lots, the civic association organized to represent them and the development corporation associated with the subdivisions. The lots were purchased in anticipation of rising residential and commercial development in an area which remains essentially unimproved and unoccupied. Defendant and third-party plaintiff, Valley Improvement Association, Inc. (VIA) appeals from the district court the dismissal of its third-party complaint against appellee Horizon Corporation (Horizon). We affirm.

{2} Factual Background. Plaintiffs in the underlying class action lawsuit are past and

present owners of lots in two subdivisions located in Valencia County, New Mexico. The lots were platted and promoted by Horizon, a land development corporation. VIA is the successor in interest to Horizon Communities Improvement Association (HCIA), a New Mexico nonprofit corporation formed in 1969, with Horizon's involvement, and intended to be a civic organization representing the lot owners. HCIA was charged with "promot[ing] the common good and social welfare" of the subdivision landowners. Until about 1983 one or more Horizon officers or representatives served as members of the HCIA/VIA board of directors.

{3} After the formation of HCIA, Horizon deeded all of the subdivision lots to HCIA who in turn deeded the properties back to Horizon subject to certain indentures. Then, between 1969 and 1981, Horizon sold thousands of individual lots subject to the indentures which empowered HCIA/VIA to assess and collect annual charges on each lot. The collected funds were to be used for the benefit of the subdivisions.

{4} Plaintiffs in the underlying suit allege that while funds in excess of $15,000,000 have been collected by HCIA/VIA, only negligible amounts have actually been used to benefit the properties. Apparently little or no utility services, buildings, or improved roads exist within the two subdivisions which remain undeveloped. The directors of HCIA/VIA are said to have used the funds unlawfully. The assessment methods themselves are said to be irrational and arbitrary. Enforcement action by HCIA/VIA is said to be selective.

{5} At the same time HCIA/VIA has filed foreclosure actions upon hundreds of landowners for nonpayment of the assessments. Also, a large number of the lots have been sold by the State of New Mexico for unpaid taxes. The plaintiffs claim there is little, if any, market for the resale of these lots due, in large part, to the continued existence of the indentures. The plaintiffs allege the directors of VIA have so manipulated the association meetings and elections that the voting power of the membership is illusory leaving the members with no effective way to eliminate or change the assessments other than legal action.

{6} In their complaint against VIA, the plaintiffs listed a number of potential remedies including: the dissolution of VIA; an accounting for all of the assessments VIA has received; the invalidation of the indentures; turning over the assessment funds to the plaintiffs, to a trustee, or to another nonprofit corporation formed under the direction of the court; the return of foreclosed upon properties to their former owners; and enjoining VIA from paying the attorney fees of its officers and directors in this or related suits.

{7} The plaintiffs did not join the original development corporation, Horizon, in this suit. In a separate action, the Federal Trade Commission (FTC) in May 1981, found that Horizon's representations to the public that its land was an excellent, financially risk-free, short-term investment were false, misleading and deceptive, and in violation of federal law. The FTC severely restricted further promotion and sales by Horizon and ordered that Horizon spend not less than $45,000,000 for improvements in the subdivisions within twenty years. In calling for the dissolution of VIA in the present suit, the plaintiffs restate the findings of the FTC, recall the central role of HCIA and the indentures in Horizon's sales program, and make the statement that Horizon's actions are attributable "by operation of law" to HCIA/VIA. Dissolution is also requested on the basis of VIA's failure of purpose, and due to changed circumstances.

{8} The district court denied VIA's motion to join Horizon as a necessary party to this action. Later VIA proceeded to name Horizon as a defendant in a third-party complaint seeking contribution, indemnity, and any other available form of relief from Horizon. The third-party complaint was dismissed on Horizon's motion.

{9} Impleader under SCRA 1986 1-014(A). The issue on appeal is whether VIA stated a third-party claim against Horizon under Rule 1-014(A) of the New Mexico Rules of Civil Procedure. Rule 1-014(A) permits a defendant

to implead a person "who is or may be liable to him for all or part of the plaintiff's claim against him." SCRA 1986, 1-014(A). To come within the scope of Rule 1-014(A), the third-party's potential liability must in some way be dependent upon the outcome of the main claim against the defendant. 6 C. Wright & A. Miller, **Federal Practice and Procedure** § 1446 (1971) (discussing Fed R. Civ.P. 14, the federal counterpart to SCRA 1986, 1-014); **United States v. Olavarrieta,** 812 F.2d 640 (11th Cir. 1987); **Southeast Mortgage Co. v. Mullins,** 514 F.2d 747 (5th Cir. 1975). Traditionally, derivative or secondary liability to the defendant, on the basis of indemnity, contribution, or some other theory, is considered to be essential. **Grain Dealers Mutual Insurance Co. v. Reed,** 105 N.M. 586, 734 P.2d 1269 (1987); **see also** 6 C. Wright A. Miller, **Federal Practice and Procedure** 1446 (1971). We have, however, relaxed the traditional rule in negligence suits in order to allow the continued impleader of concurrent tortfeasors whose liability for contribution was abolished with the adoption of comparative negligence. **Tipton v. Texaco, Inc.,** 103 N.M. 689, 712 P.2d 1351 (1985) (allocation of comparative negligence among concurrent tortfeasors assures the complete disposition of the underlying suit).

{10} Still, the requirement that the third-party's potential liability be dependent upon the outcome of the main claim remains the general rule and the central concept involved in third-party practice. The rule was not intended to be used to resolve every controversy between the defendant and a third-party which may have some relationship with the transaction at issue in the original complaint. **Grain Dealers,** 105 N.M. at 587, 734 P.2d at 1271; **see also First Nat'l Bank of Santa Fe v. Espinoza,** 95 N.M. 20, 618 P.2d 364 (1980) (dismissal proper where third-party complaint introduced only collateral issues not dependent upon resolution of issues in main claim). Nor does the rule create any new right of action. Impleader is only a procedural device. In the event that the plaintiff's suit is successful, the right to relief in favor of a third-party plaintiff must exist under principles of substantive law. 6 C. Wright & A. Miller, **Federal Practice and Procedure,** §§ 1442, 1446 (1971). But whether a third-party claim is predicated upon express or implied indemnity, contribution, breach of warranty, subrogation, negligence or some other theory is irrelevant. **Id.** at § 1446. However, if there is no right to relief under the substantive law, impleader is improper. **Id.; see also Valley Landscape Co. v. Rolland,** 218 Va. 257, 237 S.E.2d 120 (1977); **Brown v. Spokane County Fire Protection Dist. No. 1,** 21 Wash. App. 886, 586 P.2d 1207 (1978).

{11} Lack of a substantive basis for relief. The trial court dismissed the third-party complaint concluding that the plaintiffs "do not seek any relief against [VIA] for which a claim for contribution or indemnity exists." These two legal theories were the only ones argued to the trial court. We are not persuaded on appeal that VIA has shown that in the event the plaintiffs' suit is successful, VIA has a right to relief from Horizon.

{12} VIA argues that had the plaintiffs sued Horizon directly, they would have had little trouble in stating a claim, **see, e.g., Register v. Roberson Constr. Co.,** 106 N.M. 243, 741 P.2d 1364 (1987) (homeowner's suit for developer's failure to complete project as promised), and, at the same time, VIA has standing to assert such a claim on behalf of the association membership. **See, e.g, Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.,** 77 N.M. 730, 427 P.2d 249 (1967). However, neither of these factors establishes the secondary liability required under the rules of impleader. The third-party's potential liability to the plaintiff, or his potential liability to the defendant which is not dependent upon the resolution of the main claim, do not form the basis for impleader. **See Grain Dealers,** 105 N.M. at 587, 734 P.2d at 1270; **Espinosa,** 95 N.M. at 21, 618 P.2d at 365.

{13} Next, VIA characterizes the plaintiffs' complaint as largely a recitation of the plaintiffs' grievances against Horizon, and makes much of the charge in the plaintiffs' complaint that Horizon's misdeeds are attributable to HCIA/VIA

"by operation of law." VIA's argument on this point seems to be that since the plaintiffs seek to impute Horizon's supposed liability to VIA, VIA is entitled to implead Horizon, the actual wrongdoer, under principles of indemnification. **See Rio Grande Gas Co. v. Stahmann Farms Inc.,** 80 N.M. 432, 457 P.2d 364 (1969) ("A common example [of the right to indemnity] is a case where a blameless employer recovers from a negligent employee, after the employer has been held liable to the injured third person upon the theory of respondeat superior"). However, neither the plaintiffs nor VIA have ever articulated a legal theory by which VIA can be made liable for Horizon's misdeeds. Unsupported legal conclusions need not be accepted by this Court. **See C & H Constr. & Paving, Inc. v. Foundation Reserve Ins. Co.,** 85 N.M. 374, 512 P.2d 947 (1973); **McNutt v. New Mexico State Tribune Co.,** 88 N.M. 162, 538 P.2d 804 (Ct. App. 1975). Since there is no basis for claiming that the plaintiffs can impute liability to VIA, this argument in support of the third-party claim must fail.

{14} Finally, the relief the plaintiffs have requested is significant: the dissolution of VIA, the invalidation of the indentures, or the return of the assessment funds. VIA asserts that if it is enjoined from collecting the assessments, or ordered to turn them over to another person, Horizon should be required to compensate VIA with money damages. The substantive basis for this asserted right, however, has not been articulated by VIA. For instance, we have been cited to no authority to show that the termination of a nonprofit corporation for its failure of purpose, changed circumstances, or the role it may have independently played in the machinations of third persons who caused its incorporation, gives rise to a claim for relief against those third persons. Perhaps VIA may later establish the basis for such a claim. **Cf. Tate v. Frey,** 735 F.2d 986 (6th Cir. 1984) (Third-party action against state corrections officials proper in a civil rights suit against county officials by prison inmates seeking injunctive relief against overcrowding, where the responsibility under state law for the incarceration of felons rests with the state, and where without joinder of state officials complete relief would be impossible to grant). The dismissal of the third-party claim has no effect on VIA's right to bring such a suit. We conclude here simply that VIA, at this point, has not presented this Court with any legal theory which would form the basis of a right to relief under the substantive law. Impleader should be denied when the substantive basis for relief appears doubtful to the court, and where the presence of a third-party would complicate rather than simplify the determination of the case. **See** 6 C. Wright & A. Miller, **Federal Practice and Procedure** §§ 1443, 1446, 1451 (1971); 3 J. Moore, **Moore's Federal Practice** paras. 14.05, 14.10 (2d ed. 1988). The acknowledged impact on this suit of impleading Horizon would be to further complicate and confuse already protracted and complex multiparty litigation.

{15} We wish to emphasize that the justification offered for the relief which the plaintiffs have requested is based almost entirely on the active misconduct of HCIA/VIA and its board of directors. And neither VIA, nor the plaintiffs in their complaint, allege that Horizon actually **controlled** HCIA or VIA, that HCIA or VIA acted as Horizon's agent in these matters. It seems that whatever role HCIA/VIA may have played in Horizon's development scheme, it still played that role as an independent nonprofit corporation for which Horizon bore no responsibility. Even if the relationship between Horizon and HCIA/VIA can be said to be one of principal and agent (a matter we do not decide), an agent has no claim for indemnity where he is the party primarily at fault. **See Dessauer v. Memorial Gen. Hosp.,** 96 N.M. 92, 628 P.2d 337 (Ct. App. 1981); **see also,** 42 C.J.S. **Indemnity** § 20 (1944).

{16} Discretion to dismiss a third-party claim. VIA also asserts that since the third-party claim was filed within 10 days after VIA served its original answer, the trial court was without discretion to dismiss the claim. It is true that the filing of third-party complaint is a matter of right, not dependent upon the leave of court, if accomplished within the time specified in Rule 1-014. The provision was intended to encourage

the defendant to implead third parties as early as possible. However, any party may move to strike the third-party claim, SCRA 1986, 1-014, and whether or not to dismiss an otherwise proper third-party complaint timely filed continues to be a question addressed to the sound discretion of the trial court. **See** 6 C. Wright & A. Miller, **Federal Practice and Procedure,** § 1443 (discussing grounds for dismissal or severance of valid third-party claims); **see also Nikolous v. Superior Court,** 157 Ariz. 256, 756 P.2d 925 (1988). To refuse to dismiss a third-party complaint which did **not** meet the standards of Rule 1-014, however, would be an abuse of discretion, **Grain Dealers Mutual Ins. Co. v. Reed,** 105 N.M. 587, 734 P.2d 1269 (1987), as would be a dismissal based upon an erroneous view of the substantive law. **Southern Ry. v. Fox,** 339 F.2d 560 (1964); **see also City of Elkhart v. Middleton,** 265 Ind. 514, 356 N.E.2d 207 (1976) (preferring to call such a dismissal "clear error" outside the court's discretionary power).

{17} For the above reasons, we hold that the trial court did not abuse its discretion in dismissing the third-party complaint. The judgment of the trial court is affirmed.

{18} IT IS SO ORDERED.

WE CONCUR:

HARRY E. STOWERS, JR.,
Justice

JOSEPH F. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-038

Filing Date: June 22, 1989

Docket No. 18,007

MARY ANA RAMIREZ-EAMES,

Plaintiff-Counterdefendant-Appellee,

v.

WADE H. HOVER,

Defendant-Counterclaimant-Appellant.

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY,
PATRICIA M. SERNA, District Judge.**

Wade H. Hover,
Los Gatos, California,

Pro Se.

Winston Roberts-Hohl,
Santa Fe, New Mexico,

for Appellee.

OPINION

RANSOM, Justice.

{1} Wade H. Hover, an attorney and lessor of a Santa Fe apartment, appeals pro se from judgment by the district court on a claim brought by Mary Ana Ramirez-Eames to recover the security deposit she paid Hover under a lease agreement entered into on August 8, 1987. The lease was to run from October 1, 1987, to September 30, 1988. Ramirez-Eames agreed to pay $850 per month in rent plus an $800 security deposit. According to her complaint, Ramirez-Eames contacted Hover on August 30, 1987, to inform him that she no longer was willing to occupy the apartment under the terms of the lease and to seek return of her $800 security deposit. She did offer to pay the $531.41 leasing agent fee charged pursuant to their lease. Hover persuaded the tenant then occupying the premises to renew his lease for the period covered by the lease with Ramirez-Eames, at $725 per month rent. With Ramirez-Eames he took the position that, in addition to the leasing agent fee, she owed him the $125 per month difference between the rent she had contracted to pay and the rent he had agreed upon with the tenant in occupancy. Ramirez-Eames filed suit in magistrate court to recover her deposit and Hover counterclaimed for breach of contract. The case was transferred to district court.

{2} At trial, Ramirez-Eames argued her notice to Hover that she no longer intended to occupy the property constituted proper notice of rescission. Moreover, she contended, the fair market value of the apartment was $725 per month rent, not $850, and in equity she should not be forced to pay the difference. Ramirez-Eames concluded that she should have judgment for the difference between her security deposit and the leasing fee, or $268.59. Hover contended the parties had entered into a valid, binding contract and Ramirez-Eames had repudiated that contract in an anticipatory breach. He sought recovery of the $531.41 leasing fee, plus $1,500 for loss of the benefit of the bargain, minus an $800 credit for the security deposit paid by Ramirez-Eames, or $1,231.41.

{3} The court found Ramirez-Eames had "repudiated" a valid lease contract prior to its commencement date, and also prior to the commencement date Hover had rented the apartment for $725 per month. The court further found the fair market value of the subject rental to be $725 per month, not $850. Based on these findings, the court concluded that **in equity** Ramirez-Eames

should not be forced to pay $850 per month. Since the apartment in question was occupied at fair market value throughout the duration of the Ramirez-Eames lease, the court decided the only cost that should be borne by Ramirez-Eames was the leasing fee. The balance of the security deposit the court ordered returned to her.

{4} On appeal, Hover argues the court cannot find the parties entered into a valid contract, enforceable at law, find this contract was repudiated by Ramirez-Eames, and then proceed to apply principles of equity to relieve Ramirez-Eames of her responsibilities under the contract. It is axiomatic under the common law that courts will not undertake to rewrite the parties' agreement. **CC Housing Corp. v. Ryder Truck Rentals, Inc.,** 106 N.M. 577, 746 P.2d 1109 (1987). Absent unusual circumstances such as fraud or material misrepresentation, **see Ledbetter v. Webb,** 103 N.M. 597, 711 P.2d 874 (1985), duress, **see Pecos Const. Co. v. Mortgage Inv. Co. of El Paso,** 80 N.M. 680, 459 P.2d 842 (1969), or unconscionability, **see Huckins v. Ritter,** 99 N.M. 560, 661 P.2d 52 (1983), a valid contract will be enforced, notwithstanding allegations that one party has received the better part of the bargain.

{5} In her response to Hover's motion to reconsider the judgment, Ramirez-Eames referred the trial court to **Huckins,** arguing the lease under consideration here, like the lease in **Huckins,** was unconscionable. We disagree. In **Huckins,** pursuant to a contract to purchase real estate, the defendants had tendered $45,000 in down-payment. At the time they defaulted, they had only occupied the premises for eight months. This court refused to allow enforcement of the provision calling for forfeiture of the money paid on the contract upon default, because the amount of money paid bore no relationship to the value bestowed by the plaintiffs. Here, the difference between the contract price and what the court found to be the fair market value of the rental does not remotely approach the magnitude or proportion of the difference considered in **Huckins.** While this difference may indicate overreaching, it is not an unconscionable difference.

{6} However, in New Mexico, the common law in the area of rental agreements has been modified to some extent by the Uniform Owner-Resident Relations Act, NMSA 1978, Sections 47-8-1 to 47-8-51 (Repl. Pamp.1982). Section 47-8-4 provides that common law principles of law and equity supplement the provisions of the Act, except insofar as displaced by its other provisions. Section 47-8-12, entitled the "Inequitable agreement provision," states:

> A. If the court, as a matter of law, finds that any provision of a rental agreement was inequitable when made, the court may limit the application of such inequitable provisions to avoid an inequitable result.
>
> B. If inequitability is put into issue by a party to the rental agreement, the parties to the rental agreement shall be afforded a reasonable opportunity to present evidence as to the setting, purpose and effect of the rental agreement, or settlement, to aid the court in making a determination.

{7} A plain reading of this statute suggests it modifies the common law principles discussed above, by allowing the court to make a determination of the underlying fairness of the rental agreement when made and allowing selective enforcement of the contract to bring about an equitable result. We note that this section is in most respects modeled after a comparable section of the Uniform Residential Landlord and Tenant Act drafted and approved by the Conference of Commissioners on Uniform State Laws in 1972. **See** Survey of Developments, **The Uniform Owner-Resident Relations Act,** 6 N.M.L. Rev. 293, 300 (1976). However, in the comparable provision of the model act, the term "unconscionable" is used rather than "inequitable." **Id.; see** Uniform Residential Landlord and Tenant Act § 1.303 (1972).

{8} The unconscionability provision adopted by the Commissioners on Uniform State Laws, which the New Mexico legislature modified in adopting the inequity provision of our Uniform Owner-Resident Relations Act, is itself modeled

after Section 2-302 of the Uniform Commercial Code (NMSA 1978, Section 55-2-302). As in Section 2-302, the determination of unconscionability under the model act is described as a matter of law; accordingly, the court in **Osgood v. Medical, Inc.,** 415 N.W. 2d 896 (Minn. Ct. App. 1988), held this determination should be made de novo on review. We disagree. The history of the UCC's unconscionability provision demonstrates that the intent of this language simply was to reserve the question of unconscionability for the trial court rather than the jury. **See** D. Price, **The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact,** 54 Temp. L. Q. 743, 749-52 (1981).

{9} Because the decision of unconscionability depends ultimately on the facts of each case, we do not believe the drafters of the UCC intended, in labeling the question to be one of law, to compel a reviewing court to disregard a trial court's evaluation of the facts, if based on substantial evidence, and proceed to reweigh these facts on the basis of the appellate record. Similarly, we do not believe appellate courts should be de novo courts of equity in landlord-tenant disputes. We believe this principle was served in **A & M Produce Co. v. FMC Corp.,** 135 Cal. App. 3d 473, 186 Cal. Rptr. 114 (1982) (construing UCC Section 2-302), when the court wrote:

> The business conditions under which [a] contract was formed directly affect the parties' relative bargaining power, reasonable expectations, and the commercial reasonableness of risk allocation as provided in the written agreement. To the extent there are conflicts in the evidence or in the factual inferences which may be drawn therefrom, we must assume a set of facts consistent with the court's finding of unconscionability if such an assumption is supported by substantial evidence.

Id. at 490, 186 Cal. Rptr. at 123-24.

{10} Given that New Mexico has adopted a standard of inequity in place of a standard of unconscionability, we conclude the considerations to which we have alluded are even more compelling, since the determination of the equities in a given case historically has been left to the discretion of the trial court. **See Wolf and Klar Cos. v. Garner,** 101 N.M. 116, 679 P.2d 258 (1984). The trial court finds substantive unfairness through a process of evaluating whether the risks and benefits of the bargain have been allocated in an objectively unreasonable fashion.[1] This evaluation of reasonableness in the allocation is tied to procedural aspects of unconscionability (e.g., oppression or surprise); the greater the procedural deficits in the bargaining process, the less substantive unfairness will be tolerated. **See A & M Produce,** 135 Cal. App. 3d at 488, 186 Cal. Rptr. at 122. Such considerations are seldom the stuff of which purely legal issues are made.

{11} Here, evidence was presented that Ramirez-Eames had only one day in which to find an apartment and agreed to pay the $850 per month under these circumstances, that at the time she signed the agreement the apartment actually had been renting for $725 per month, that Ramirez-Eames timely notified Hover of her intent not to occupy the apartment, and that she volunteered to pay the leasing agent fee. While we do not wish to encourage interference with contractual relations, given the unique statutory language and factual predicates before it, we believe there was authority and substantial

[1] It is well established that "unconscionable" terms may include the price term, notwithstanding the UCC's general affirmation of the freedom of parties to agree to their own price term. **See, e.g., Zepp v. Mayor & Council of Athens,** 180 Ga. App. 72, 348 S.E.2d 673 (1986); **John Deere Leasing Co. v. Blubaugh,** 636 F. Supp. 1569, 1572 (D. Kan. 1986); **Lefkowitz v. ITM, Inc.,** 52 Misc. 2d 39, 275 N.Y.S.2d 303 (1966). **Compare, Patterson v. Walker-Thomas Furniture Co.,** 277 A.2d 111 (D.C. 1971) (allegation of excessive price, standing alone, insufficient to support defense of unconscionability), **with, American Home Improv. Inc. v. MacIver,** 105 N.H. 435, 201 A.2d 886 (1964) (discrepancy between sale price and value of goods or service supported claim of unconscionability). Similarly, although the New Mexico Uniform Owner-Resident Relations Act generally affirms the ability of the parties to reach their own agreement on rental price, we believe the equity provisions must be construed as a limitation on this ability.

evidence upon which the trial court could find the agreement to pay $850 per month was $125 (17 1/4%) over the market value, was inequitable, and should not be enforced.

{12} Based on the foregoing considerations, we affirm the decision of the trial court.

{13} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA,
Chief Justice,

JOSEPH F. BACA,
Justice.

TONY SCARBOROUGH,
Justice (Dissenting)

DISSENT

SCARBOROUGH, Justice, dissenting.

{14} I must dissent because I believe the majority opinion opens the way for judicial supervision of residential rents under a nebulous "inequity" standard concerned with the "underlying fairness" of rental agreements. If a court may limit a rental agreement under the facts of this case, where the sole evidence of "overreaching" is an unsubstantial deviation between the fair market value as found by the court, and the agreed upon amount of rent, then innumerable rental agreements are now fair game for litigation or renegotiation.

{15} The court below based its ruling on principles of equity without specifically identifying the principles involved. Certainly the facts of this case, as the majority acknowledge, do not warrant a finding of unconscionability as argued by Ramirez-Eames. To uphold the ruling the majority rely on a statute not argued by the parties to the trial court nor argued to this Court, and then interpret that statute to provide for a radically lower standard of substantive unfairness than the common law unconscionability standard of equity. The solution is inventive, but I cannot believe that this was the intent of the legislature when it adopted the Uniform Owner-Resident Relations Act even taking into consideration the use of the term "inequitable" rather than "unconscionable."

{16} The facts of this case raise no question of unconscionability. On that basis, without **sua sponte** raising the applicability of the Uniform Owner-Resident Relations Act, this Court should reverse the judgment of the district court. I dissent.

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,

v.

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

[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).

knew of Jessen's previous flying experience and knew of potential sources of information that might have allowed him to verify the number of 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, **Punitive Damages in Bad Faith Cases** § 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.

DAN SOSA, JR.,
Chief Justice

RUDY S. APODACA,
Justice, Court of Appeals.

SCARBOROUGH,
Justice (dissents).

DISSENT

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

[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).

1363 (Me. 1985); **Wangen v. Ford Motor Co.,** 97 Wis.2d 260, 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-044

Filing Date: June 27, 1989

Docket No. 18,128

SECURITY FEDERAL SAVINGS & LOAN, a Savings and Loan Association,

Plaintiff-Appellee,

v.

ROBERT and LINDA PRENDERGAST,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, GERARD W. THOMPSON, District Judge.

Turpen, Cannain & Merchant,
Lester C. Cannain,
Albuquerque, New Mexico,

for Appellants.

Alan R. Wilson,
Albuquerque, New Mexico

for Appellee.

OPINION

SCARBOROUGH, Justice.

{1} This suit arises out of the sale of secured collateral under Article 9 of the Uniform Commercial Code after default on a promissory note. Defendants-appellants, Robert and Linda Prendergast, claim the sale of the collateral was commercially unreasonable and appeal the granting of a deficiency judgment to plaintiff-appellee, Security Federal Savings & Loan (Security). We affirm.

{2} In 1983, the Prendergasts borrowed $8,150.63 from Security Federal Savings & Loan and signed a promissory note giving Security a security interest in, among other things, a "1976 Huntsman 23 foot mini-mobile home." About three years later, the Prendergasts defaulted on the note and voluntarily gave possession of the mobile home to Security. Security then notified the Prendergasts that it intended to dispose of the mobile home by private sale some time after April 13, 1987. For the purposes of arranging a sale, Security placed the vehicle on the premises of a dealer in used autos, Triangle Auto Sales, where Triangle's customers could view repossessed vehicles and make written offers to purchase them. Security did not advertise the vehicle for sale.

{3} On May 28, 1987, Security sold the 1976 Huntsman for $2,000, leaving a deficiency balance on the note of $4,286.02. The Prendergasts failed to pay any part of the deficiency and Security brought suit to collect it. At trial, the Prendergasts argued that Security had failed to comply with applicable provisions of the New Mexico Uniform Commercial Code concerning the disposal of repossessed collateral. The trial court found, however, that Security had given sufficient notice to the Prendergasts of the impending private sale and had sold the collateral in a commercially reasonable manner despite the lack of advertising. The district court awarded Security the amount of the deficiency, plus interest and reasonable attorney fees.

{4} The issue raised on appeal is whether the sale was commercially reasonable when the vehicle was never advertised for sale.

{5} Under the Uniform Commercial Code every aspect of the disposition of secured collateral must be commercially reasonable. NMSA

1978, § 55-9-504(3) (Repl. Pamp. 1987); **Clark Leasing Corp. v. White Sands Forest Prods., Inc.,** 87 N.M. 451, 535 P.2d 1077 (1975). Section 55-9-504 places upon the creditor the good faith duty to the debtor to use reasonable means to see that a reasonable price is received for the collateral. **Clark Leasing Corp.,** 87 N.M. at 454, 535 P.2d at 1080. The determination of commercial reasonableness will turn on the particular facts of each case, **Villella Enterprises, Inc. v. Young,** 108 N.M. 33, 35, 766 P.2d 293, 295 (1988), and where the evidence concerning commercial reasonableness is contradictory, the issue is a question of fact. **Clark Leasing Corp.,** 87 N.M. at 454, 535 P.2d at 1080; **Richardson Ford Sales, Inc. v. Johnson,** 100 N.M. 779, 786, 676 P.2d 1344, 1351 (Ct. App. 1984). The appellate issue is whether there is substantial evidence to support the finding.

{6} In this appeal, however, the Prendergasts do not posture their argument in terms of a lack of substantial evidence. Indeed, a transcript of the proceedings before the trial court and the trial exhibits have not been provided for our review.[1] We have no idea what evidence may have been presented to the trial court concerning the method and manner of the private sale in question, other than the fact that customers of a certain dealer in used automobiles were somehow able to view the repossessed vehicle and submit written offers. Only the official court record, which includes the trial court's findings of fact and conclusions of law, are before us. Accordingly, our review is more limited than normally would be the case, and we focus solely on whether the lack of advertising is determinative.

{7} Advertising, a form of notice to the public, may be an important factor in the commercial reasonableness of any sale. In the public sale of collateral to the highest bidder at a particular time and place, adequate notice to a relevant public is essential. **See Villella Enterprises,** 108 N.M. at 37, 766 P.2d at 297; **see also Foster v. Knutson,** 84 Wash.2d 538, 544, 527 P.2d 1108, 1114 (1974) (en banc) (setting standards for conducting a public sale). Advertising may even play an important role in certain private sales, **e.g., Piper Acceptance Corp. v. Yarbrough,** 702 F.2d 733 (8th Cir. 1983) (invitation for bids placed in a monthly trade publication); **Ford Motor Credit Co. v. Solway,** 825 F.2d 1213 (7th Cir. 1987) (advertisement of upcoming wholesale auction of automobile inventory sent to other dealers), although we see no reason why this should always be the case. **Cf., Trimble v. Sonitrol of Memphis, Inc.,** 723 S.W.2d 633 (Tenn. Ct. App. 1986) (reliance upon personal contacts within industry); **Hall v. Owen County State Bank,** 175 Ind. App. 150, 370 N.E.2d 918 (1977) (sale privately negotiated with used car and truck dealer); **Swanson v. May,** 40 Wash. App. 148, 697 P.2d 1013 (1985) (farm equipment marketed by locating it next to large "For Sale" sign bordering highway). **Accord Richardson Ford Sales,** 100 N.M. at 785-88, 676 P.2d at 1350-53. Rather than adequate notice to a relevant public of an impending public sale, notice calculated to achieve competitive bidding, the commercial reasonableness of private sales must rest upon other factors. We will make no attempt to list such factors here. When suing to collect a deficiency it is the creditor's burden to establish the basis for the commercial reasonableness of the private sale. **See Clark Leasing Corp.**, 87 N.M. at 454, 535 P.2d 1080 (burden of proof upon creditor in suit for deficiency judgment to show that sale was commercially reasonable in all aspects).

{8} The Commercial Code specifically recognizes that either public or private proceedings may be used to dispose of secured collateral so long as every aspect of the disposition is commercially reasonable. NMSA 1978, § 55-9-504(3). While leaving the terms "public" and "private" sales undefined, the Code provides

[1] The argument that a judgment is not supported by substantial evidence is waived unless a party's brief-in-chief includes a summary of the substance of the evidence bearing upon the proposition, together with citations to the record proper, transcript of proceedings or exhibits before the trial court. SCRA 1986, 12-213. It is the appellant's responsibility to provide a record sufficient for review. Where the record is incomplete we must infer the missing portions would support the trial court's ruling. **State v. Padilla,** 95 N.M. 86, 619 P.2d 190 (Ct. App. 1980).

several examples of commercially reasonable sales.[2]

> If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

NMSA 1978, § 55-9-507(2). The official comment to Section 55-9-507 also states that a sale of the collateral to or through a dealer, fairly conducted, is recognized as commercially reasonable under that section. NMSA 1978, § 55-9-507 official comment 2. As these examples suggest, the Code encourages sales of repossessed collateral through regular commercial channels as opposed to public auction which often times yields only disappointing results. A satisfactory sale through regular commercial channels can often times be privately negotiated without the need for advertising. As with public sales, the commercial reasonableness of a private sale will depend upon the particular facts of each case. However, notice to the public at large, through advertising or other means, is not an essential factor when a sale is privately negotiated. Contrary to what the Prendergasts might suggest, nothing in our recent decision, **Villella Enterprises,** is in conflict with what we say here. **See Villella Enterprises, Inc. v. Young,** 108 N.M. 33, 766 P.2d 293 (1988) (summary judgment in favor of creditor reversed where notice of public sale was published in a weekly legal periodical on just two occasions, only the creditor attended the sale and he purchased the collateral for a price well below an offer privately made).

[2] The methods set forth in Section 55-9-507(2) were not intended to be exclusive and other forms of either public or private sales may certainly be commercially reasonable. **See** NMSA 1978, § 55-9-507 official comment 2.

{9} The deficiency judgment for default on a promissory note is affirmed. Each party shall bear their own costs on appeal.

{10} IT IS SO ORDERED.

WE CONCUR:

RICHARD E. RANSOM,
Justice

JOSEPH F. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-045

Filing Date: June 27, 1989

Docket No. 18,298

THE INCORPORATED COUNTY OF LOS ALAMOS, NEW MEXICO,

Petitioner,

v.

DONALD R. JOHNSON,

Respondent.

ORIGINAL PROCEEDING ON CERTIORARI,
ART ENCINIAS, District Judge.

Motion for Rehearing Denied August 8, 1989

Bryon L. Treaster, Associate County Attorney,
Los Alamos, New Mexico,

for County of Los Alamos.

P. Reid Griffin, Jr.,
Los Alamos, New Mexico,

for Respondent.

OPINION

SCARBOROUGH, Justice.

{1} Sometime after midnight on July 18, 1986, a uniformed officer of the Los Alamos Police Department observed Johnson driving in an erratic manner. The police officer suspected Johnson was DWI and elected to make a traffic stop. The police officer turned on his emergency lights, and at first it appeared Johnson would pull over and stop at a point approximately one-half mile from the Los Alamos-Santa Fe County Line. Johnson, however, did not pull over but continued to drive for a distance of approximately one mile after the police officer turned on his emergency lights. Johnson finally pulled over and stopped at a point approximately one-half mile beyond the county line, in Santa Fe County. The police officer determined that Johnson was DWI and arrested him. Johnson consented to a blood alcohol test which revealed his blood contained a .10 percent alcohol by weight. Johnson was found guilty of DWI by the Los Alamos Municipal Court and appealed for de novo review by the district court.

{2} Johnson argued on appeal to the district court that the arresting officer had no authority to arrest him in Santa Fe County under NMSA 1978, Section 31-2-8 (Repl. Pamp. 1984) of the Fresh Pursuit Act. After a non jury trial, the district court upheld the verdict rendered by the municipal court. Johnson appealed to the court of appeals which reversed the district court. We reversed the court of appeals.

{3} The issue we are asked to address on certiorari is whether Section 31-2-8 of the Fresh Pursuit Act authorizes a municipal police officer to make an extraterritorial arrest for DWI. We find that it does.

{4} When interpreting a statute we seek to determine and give effect to the legislative intent. **Smith Mach. Corp. v. Hesston, Inc.**, 102 N.M. 245, 694 P.2d 501 (1985). The provisions of a statute must be read together with other statutes **in pari materia** to ascertain legislative intent. **Quintana v. New Mexico Dep't of Corrections**, 100 N.M. 224, 668 P.2d 1101 (1983), **rev'd on other grounds, Devine v. New Mexico Dep't of Corrections,** 866 F.2d 339 (10th Cir. 1989). We presume that the legislature is well informed as to existing statutory and common law and does not intend to enact a nullity, and we also presume

that the legislature intends to change existing law when it enacts a new statute. **State ex rel. Bird v. Apodaca**, 91 N.M. 279, 284, 573 P.2d 213, 218 (1977). When several statutes relate to the same subject matter, we will, if possible, construe them in such a fashion as to give effect to every provision of each. **First Nat'l Bank v. Southwest Yacht & Marine Supply Corp.**, 101 N.M. 431, 436, 684 P.2d 517, 522 (1984). While normally bound to follow legislative definitions, we are not so bound when a particular definition would result in an unreasonable classification. 1A, N. Singer, **Sutherland Statutory Construction**, § 20.08 (4th ed. 1985). In such a case, we look to the intent of the language employed by the legislature rather than to the precise definition of the words themselves. **State v. Nance**, 77 N.M. 39, 45-6, 419 P.2d 242, 248-49 (1966), **cert. denied**, 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967). Finally, we seek to adopt a construction which will not render an application of the statute absurd or unreasonable. **State v. Nance**, 77 N.M. at 46, 419 P.2d at 249.

{5} Johnson argues on appeal that municipal police officers are not empowered to make extraterritorial DWI arrests because a DWI arrest under a local DWI ordinance carries only "petty misdemeanor" penalties rather than "misdemeanor" penalties, as required by Section 31-2-8 of the Fresh Pursuit Act. At the time Johnson was arrested, the Municipal Code provided that municipalities could enforce local ordinances by imposing penalties comparable to "petty misdemeanor" penalties. NMSA 1978, § 3-17-1(C) (Repl. Pamp. 1985) (fines not exceeding $300 or imprisonment not exceeding ninety days or both); **see also** NMSA 1978, § 31-1-2(K) (Repl. Pamp.1984) of the Criminal Procedure Act ("misdemeanor" penalty is imprisonment in excess of six months but less than one year) and § 31-1-2(L) ("petty misdemeanor" penalty is imprisonment for six months or less). We do not adopt this constrictive reading of the Fresh Pursuit Act.

{6} Over a decade ago, this Court recognized the common law doctrine that allows police officers to pursue and arrest a suspected felon beyond the boundaries of their jurisdiction. **Benally v. Marcum**, 89 N.M. 463, 553 P.2d 1270 (1976). When the legislature passed Section 31-2-8 authorizing the fresh pursuit and extraterritorial arrests of misdemeanants, we assume they were aware of the existing common law regarding fresh pursuit of felons and of "petty misdemeanor" and "misdemeanor" definitions in the Criminal Procedure Act and the penalty provisions for DWI convictions in NMSA 1978, Section 66-8-102(D) and (E) (Supp. 1988) of the Motor Vehicle Code. We believe the legislature intended in Section 31-2-8 to expand the fresh pursuit and extraterritorial arrest powers of county sheriffs and municipal police officers and that this expansion power included the authority for fresh pursuit and extraterritorial arrest of DWI suspects.

{7} We recognize the public policy of removing DWI drivers from New Mexico roads in order to protect the public, and have previously termed the offense of DWI a "misdemeanor." **Boone v. State**, 105 N.M. 223, 731 P.2d 366 (1986); **State v. Manzanares**, 100 N.M. 621, 674 P.2d 511 (1983), **cert. denied**, 471 U.S. 1057, 105 S. Ct. 2123, 85 L. Ed. 2d 487. To adopt the reading of the Fresh Pursuit Act based upon an exercise in semantics as urged by Johnson would eviscerate the Act as it pertains to pursuit of DWI suspects. In addition to preventing fresh pursuit of DWI suspects by municipal police officers, Johnson's interpretation would also unacceptably restrict the pursuit of DWI suspects by county sheriffs. Section 66-8-102(D) authorizes a sentence of not more than ninety days for a first conviction for DWI, which would fall within the "petty misdemeanor" definition in the Criminal Procedure Act. Section 66-8-102(E) authorizes sentences for second or subsequent DWI convictions which would fall within the "misdemeanor" definition. A peace officer in fresh pursuit of a DWI suspect, however, would have no way of determining whether a first, second or subsequent DWI conviction could result.

{8} The Court of Appeals is reversed, and the judgment of the district court in the Johnson cause is reinstated.

{9} IT IS SO ORDERED.

WE CONCUR:

RICHARD E. RANSOM,
Justice

JOSEPH F. BACA,
Justice, files a specially concurring opinion in which RANSOM, Justice, joins.

DAN SOSA,
Chief Justice, dissents.

SPECIAL CONCURRENCE

BACA, Justice, (specially concurring).

{10} I concur in the majority result but would add to the reasoning found in the discussion of fresh pursuit.

{11} I first note that in **Benally v. Marcum**, 89 N.M. 463, 553 P.2d 1270 (1976), we recognized that the common law doctrine of fresh pursuit allowed police officers to pursue and arrest suspected felons beyond the territorial boundaries of their jurisdiction. 89 N.M. at 466, 553 P.2d at 1273. In response to this limited common law doctrine allowing police officers to only pursue felons and not misdemeanants, the legislature, in 1981, enacted an act relating to law enforcement, allowing fresh pursuit of a misdemeanant across intrastate jurisdictional lines. 1981 N.M. Laws, ch. 102, § 1 (codified at NMSA 1978, § 31-2-8 (Repl. Pamp.1984)). Section 31-2-8(A) and (B) provides in pertinent part:

> A. Any county sheriff or municipal police officer who leaves his jurisdictional boundary while in fresh pursuit of a misdemeanant whom he would otherwise have authority to arrest shall have the authority to arrest that misdemeanant anywhere within this state and return him to the jurisdiction in which the fresh pursuit began without further judicial process.
>
> B. For purposes of this section, "fresh pursuit of a misdemeanant" means the pursuit of a person who has committed a misdemeanor in the presence of the pursuing officer. Fresh pursuit shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

{12} In my view, the critical issue in this case is whether the generic term "misdemeanor" in Section 31-2-8(B) includes "petty misdemeanors," allowing police officers to make extraterritorial arrests for DWI, an offense carrying "petty misdemeanor" penalties. I believe it does. I note that the criminal law evolved over several centuries in England creating three classifications of crimes: treasons, felonies, and misdemeanors. **Hoffman v. People**, 72 Colo. 552, 555, 212 P. 848, 851 (1923); W. LaFave & A. Scott, Jr., **Criminal Law** § 6 (1972) (hereinafter LaFave). At common law, all offenses other than treasons or felonies, were misdemeanors. **State v. Kelly**, 218 Minn. 247, 257, 15 N.W.2d 554, 564 (1944); **State v. O'Shields**, 163 S.C. 408, 410, 161 S.E. 692, 694 (1931); I.C. Torcia, **Wharton's Criminal Law** § 20 (14th ed. 1978). Codification of the criminal law occurred in the United States to subdivide felonies and misdemeanors into classes for purposes of defining levels of punishment. **See State v. Pontier**, 95 Idaho 707, 715, 518 P.2d 969, 977 (1974); R. Perkins, **Criminal Law** § 1 (2d ed. 1969). In New Mexico felonies are subdivided into degrees. NMSA 1978, § 30-1-7 (Repl. Pamp.1984). A misdemeanor may be either a major crime or a petty offense/misdemeanor depending on the possible level of punishment. **See Fimara v. Garner**, 86 Conn. 434, 436, 85 A. 670, 672 (1913); LaFave at § 6. Generally, petty offenses/misdemeanors are **subgroups of misdemeanors**. **Fimara v. Garner**, 86 Conn. at 436, 85 A. at 672 (dividing misdemeanors into two **grades:** serious and petty misdemeanors). **See State v. Berg**, 237 Iowa 356, 357, 21 N.W.2d 777, 778 (1946); **Commonwealth v. Cano**, 389 Pa. 639, 645, 133 A.2d 800, 806, **cert. denied**, 355 U.S. 182, 78 S. Ct. 267, 2 L. Ed. 2d. 186 (1957). **See also** 18 U.S.C. § 1 (1982); LaFave at § 6.

{13} I believe the legislature was aware of the statutory criminal law trend to subdivide felonies and misdemeanors into distinct categories. I further believe that the legislature did not intend to

supplant this trend. Therefore, as it follows that the generic term "felony" is subdivided into degrees, it also would logically follow that the generic term "misdemeanor" in Section 31-2-8(B) includes "petty misdemeanors" as it historically always has. Thus, Section 31-2-8 of the Fresh Pursuit Act allows county sheriffs or municipal police officers to make an extraterritorial arrest for a DWI offense carrying "petty misdemeanor" penalties.

DISSENT

SOSA, Chief Justice (dissenting)

{14} I hereby adopt as my dissent the majority opinion of the court of appeals as appended herein in full.

APPENDIX

OPINION

ALARID, Judge.

Defendant appeals his conviction for driving while intoxicated (DWI), claiming the arresting Los Alamos police officer had no authority to stop and arrest defendant in Santa Fe County because: (1) DWI is not a "misdemeanor" under the Uniform Act on Fresh Pursuit (Act), NMSA 1978, Sections 31-2-1 to 31-2-7 (Repl. Pamp.1984), or NMSA 1978, Section 31-2-8 (Repl. Pamp.1984), and (2) pursuit into Santa Fe County was not justified as an emergency measure or as a citizen's arrest. We agree, and reverse and remand.

FACTS

A uniformed Los Alamos police officer, driving a marked patrol unit, observed defendant driving his vehicle within Los Alamos County. Following defendant for several miles, the officer observed defendant make an improper left turn, touch or straddle the white side line of the road, and touch or straddle the yellow center line of the highway. The officer then attempted to stop defendant's vehicle while still in Los Alamos County but did not effect the stop until defendant entered Santa Fe County.

After the stop, the officer asked defendant to submit to a field sobriety test, subsequently arresting defendant in Santa Fe County for DWI in Los Alamos County. Defendant also submitted to a breath-alcohol test which determined his blood contained .10 alcohol by weight.

In Los Alamos Municipal Court, pursuant to a Los Alamos municipal ordinance, defendant was convicted of DWI. On appeal, the district court concluded the arrest of defendant in Santa Fe County, by an officer acting for Los Alamos County, was proper pursuant to Section 31-2-8, and found defendant guilty of DWI.

DISCUSSION

1. THE MEANING OF "MISDEMEANOR" IN THE ACT.

Section 31-2-8 provides:

> A. Any county sheriff or municipal police officer who leaves his jurisdictional boundary while in fresh pursuit of a misdemeanant whom he would otherwise have authority to arrest shall have the authority to arrest that misdemeanant anywhere within this state and return him to the jurisdiction in which the fresh pursuit began without further judicial process.
>
> B. For purposes of this section, "fresh pursuit of a misdemeanant" means the pursuit of a person who has committed a **misdemeanor** in the presence of the pursuing officer. . . . [Emphasis added.]

NMSA 1987, Section 31-1-2 (Repl. Pamp.1984), provides:

> Unless a specific meaning is given, as used in the Criminal Procedure Act [31-1-1 to 31-3-9 NMSA 1978]:

. . . .

K. "misdemeanor" means any offense for which the authorized penalty upon conviction is imprisonment in excess of six months but less than one year: and

L. "petty misdemeanor" means any offense so designated by law or if upon conviction a sentence of imprisonment for six months or less is authorized.

The parties do not dispute that the crime of DWI is a petty misdemeanor under the definitions of Section 31-1-2. **See** NMSA 1978, § 66-8-7 (Repl. Pamp.1987) and § 66-8-102 (Supp.1988). Defendant argues that Section 31-2-8 authorizes a police officer to arrest outside his jurisdictional boundaries when a person has committed a misdemeanor, as defined pursuant to Section 31-1-2(K), in the presence of the officer and while the officer is in fresh pursuit of that person. Defendant concludes that the officer had no authority to arrest him pursuant to Section 31-2-8, since under the Act DWI is a petty misdemeanor rather than a misdemeanor.

Los Alamos County (county) contends that "fresh pursuit of a misdemeanant," as used in Section 31-2-8, refers to pursuit of persons committing both "petty misdemeanors" and "misdemeanors" as defined in Section 31-1-2. Arguing absurdity results if "misdemeanant" is interpreted in any other manner, the county notes that the pursuit across jurisdictional boundaries to enforce local ordinances prohibiting DWI would be unauthorized, and suspects would be immune from arrest by a pursuing local police officer once they crossed a county or city line.

While we recognize and appreciate the county's concerns, we are not inclined to ignore the clear language of Section 32-1-8. Legislative intent is to be determined primarily by the language of the statute, and words will be given their plain and ordinary meaning unless a different intent is clearly indicated. **State v. Pecroncelli**, 100 N.M. 678, 675 P.2d 127 (1984).

Section 31-2-8(B) specifically states the meaning of the phrase "fresh pursuit of a misdemeanant." Under subsection B, the legislature has limited fresh pursuit of misdemeanants to "pursuit of a person who has committed a misdemeanor in the presence of the pursing officer." The legislature made no reference to pursuit of a person committing a petty misdemeanor. Section 31-1-2 states that, unless a specific meaning is given, the definitions therein are applicable to the Act. No specific meaning of "misdemeanor" is given in Section 31-2-8: therefore, the definitions of Section 31-1-2 apply.

We commend to the legislature the question of whether the Act should be amended to include pursuit of DWI suspects in the future. In so doing, we note DWI has repeatedly been characterized by our courts as a "misdemeanor." **See Boone v. State**, 105 N.M. 223, 731 P.2d 366 (1986); **State v. Manzanares**, 100 N.M. 621, 674 P.2d 511 (1983), **cert. denied**, 471 U.S. 1057, 105 S. Ct. 2123, 85 L. Ed. 2d 487 **reh'g denied,** 472 U.S. 1013, 105 S. Ct. 2715, 86 L. Ed. 2d 729 (1985); **State v. Calanche**, 91 N.M. 390, 574 P.2d 1018 (Ct. App.1978). Moreover, Section 66-8-7 states that it is a "misdemeanor" for any person to violate any provisions of the Motor Vehicle Code, and DWI is an offense under the provisions of the Code. **See** § 66-8-102. However, for the purposes of Section 31-2-8, DWI is a petty misdemeanor, and the statute does not permit fresh pursuit except for a misdemeanor as defined by Section 31-1-2(K).

2. WHETHER PURSUIT WAS JUSTIFIED AS AN EMERGENCY MEASURE OR A CITIZEN'S ARREST.

The county offers authority from other jurisdictions recognizing the right of police, acting without statutory authority, to engage in fresh pursuit of DWI offenders. Citing **State v. McCarthy**, 123 N.J. Super. 513, 303 A.2d 626 (Law Div. 1973), the county suggests the officer's pursuit across the county line be justified as an emergency measure. We do not see the evidence before us as sufficient to justify the officer's

pursuit as an emergency measure. Prior to stopping defendant, the officer observed only minor traffic violations. There is no evidence indicating defendant's driving was so erratic as to lead the officer to believe defendant presented a threat or menace to the general public. **See id.**

Alternatively, the county urges we validate the officer's pursuit and subsequent stop of defendant as a citizen's arrest. **See State v. Sellers**, 350 N.W.2d 460 (Minn.Ct. App.1984). Historically, a citizen's power to arrest in New Mexico has extended only to felonies. **See State v. Sarraras**, 64 N.M. 300, 328 P.2d 74 (1958); **Territory v. McGinniss,** 10 N.M. 269, 61 P. 208 (1900), overruled on other grounds. State v, Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), **cert. denied**, 386 U.S. 976, 87 S. Ct. 1171, 18 L. Ed. 2d 136 (1967). More recently, this court has noted that at common law a citizen was privileged to arrest for a breach of the peace committed in his presence. **Downs v. Garay**, 106 N.M. 321, 742 P.2d 533 (Ct. App.1987). Our courts have also recognized DWI as an offense involving a breach of the peace in order to allow justices of the peace jurisdiction to hear such complaints. **State v. Rue**, 72 N.M. 212, 382 P.2d 697 (1963). We do not read the holdings in **Rue** and **Downs** as recognition of common law power in citizens of New Mexico to arrest for traffic offenses such as DWI, and we decline to do so here for two reasons.

First, specific to the facts of this case, the legislature has addressed the question of the authority of police officers acting out of their jurisdiction in the Act. We believe it is improper to circumvent the clear language of Section 31-2-8 by characterizing an officer's actions as a citizen's arrest in every instance of pursuit which goes beyond the authority conferred by the Act. To hold otherwise would render Section 31-2-8 useless. **See State ex rel. Bird v. Apodaca**. 91 N.M. 279, 573 P.2d 213 (1977).

Moreover, we will not employ common law citizen's arrest powers as a vehicle to broaden the authority of police officers acting beyond their jurisdiction, because we envision such a holding as potentially creating problems more numerous and onerous than those arising from the question we decide today. As the court stated in **Commonwealth v. Grise**, 398 Mass. 247, 496 N.E.2d 162 (1986), "[s]ince 'breach of the peace' may be construed by laymen as a somewhat elastic concept, empowering private persons to arrest for such misdemeanors might only encourage 'vigilantism and anarchistic actions'." **Id**. at 251, 496 N.E.2d 164-165. Facing a similar question in **Settle v. State**, 679 S.W.2d 310 (Mo.Ct. App.1984), **cert. denied**. 472 U.S. 1007, 105 S. Ct. 2701, 86 L. Ed. 2d 717 (1985), the Missouri court questioned the wisdom of authorizing stops and detention by private citizens for ordinance violations or traffic offenses, concluding such a grant of authority "would invite more breaches of the peace than the number hoped to be prevented." **Id**. at 318. We share the concerns expressed by the courts in **Grise** and **Settle** in declining to justify the Los Alamos officer's arrest of defendant as a citizen's arrest. We believe it most appropriate and prudent to leave to the legislature the question of whether the Act should be amended to include pursuit of suspected DWI offenders. **See Garrison v. Safeway Stores**, 102 N.M. 179, 692 P.2d 1328 (Ct. App.1984); **Varos v. Union Oil Co. of Cal**., 101 N.M. 713, 688 P.2d 31 (Ct. App.1984). We agree with the statement in **Grise.** 398 Mass. at 252, 496 N.E.2d at 165, that there is a

> strong public policy . . . against drunk driving, and [a] necessity for removing intoxicated motorists from the roads before they harm themselves or other persons. We also appreciate that these interests might best be served by allowing police officers to apprehend intoxicated motorists outside of the officers' territorial jurisdictions. However, we decline to reach this result through the circuitous route of empowering private persons to arrest for misdemeanors involving a breach of the peace. If the Legislature in its wisdom wishes to broaden the powers of police officers acting outside of their territorial jurisdictions, it may amend [the statute] to accomplish this purpose. [Citation omitted.]

CONCLUSION

Accordingly, the Los Alamos County police officer was without jurisdiction to arrest defendant for a petty misdemeanor in Santa Fe County. Since the evidence was obtained as a result of a violation of defendant's statutory rights, it should have been suppressed. **State v. Wilson**, 92 N.M. 54, 582 P.2d 826 (Ct. App.1978). We reverse and remand for a new trial with instructions that all evidence obtained as a result of the illegal stop and arrest be suppressed.

IT IS SO ORDERED.

WE CONCUR:

WILLIAM W. BIVINS,
Chief Justice

HARRIS L. HARTZ,
Justice, dissents.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-047

Filing Date: June 29, 1989

Docket No. 17,658

TUI WILSCHINSKY, IRENE ROKSTAD WILSCHINSKY, in their own behalf and as parents and next friends of Zoe Wilschinsky, Taflyn Wilschinsky, and Tara Rokstad,

Plaintiffs,

v.

HELEN MEDINA and MICHAEL STRAIGHT, M.D.,

Defendants.

CERTIFICATION FROM THE UNITED STATES DISTRICT COURT, JAMES A. PARKER, U.S. District Judge.

Stephen Durkovich,
Albuquerque, New Mexico,

for Plaintiffs.

Rodey, Dickason, Sloan, Akin & Robb, P.A.,
W. Mark Mowery,
Santa Fe, New Mexico,

for Defendant Medina.

Campbell & Black, P.A.,
John H. Bemis,
Bradford C. Berge,
Santa Fe, New Mexico,

for Defendant Straight.

Hatch, Beitler, Allen & Shepherd, P.A.,
Phyllis A. Dow, Albuquerque,
New Mexico

Amicus Curiae New Mexico Medical Society.

OPINION

BACA, Justice.

{1} This certification from the United States District Court raises a fundamental question whether a third party, who is injured by a person under the influence of medications administered to her as an outpatient in a doctor's office, can recover directly from the doctor when and if the doctor failed to follow proper medical procedures, and when and if it can be proven the third party suffered injuries which proximately resulted from that doctor's act of malpractice. The district court certified the following three questions to this court:

> 1. Does the legal duty of a physician practicing in New Mexico to use reasonable care in treating a patient extend only to the patient or also to others who may foreseeably be harmed by the physician's negligent treatment of the patient?
>
> 2. If the legal duty extends to others in addition to the patient, what is the nature and extent of the duty owed to the plaintiffs in this case?
>
> 3. If the legal duty extends to others in addition to the patient, does the New Mexico Medical Malpractice Act . . . [NMSA 1978, §§ 41-5-1 to 41-5-28 (Repl. Pamp. 1986)] apply to claims based on malpractice asserted by non-patients against a physician who is qualified under the provisions of the Medical Malpractice Act?

{2} The issues certified arose under the following circumstances. Plaintiffs Tui Wilschinsky and members of his family filed suit in the United States District Court against Helen Medina, alleging Medina was the driver of a car that struck and injured Wilschinsky in the presence of his family. Plaintiffs then filed an amended complaint seeking to join Dr. Michael Straight as an additional defendant, alleging Dr. Straight was negligent in administering to Medina two drugs that have known side effects causing drowsiness and impairment of judgment. Dr. Straight moved to dismiss.

{3} The facts, as developed by depositions of the parties, indicate on the morning of the accident Medina was suffering from a debilitating migraine headache. She had taken the drug Percodan at about 8:00 a.m. Dr. Straight had previously prescribed this drug for Medina's headache problems, which Dr. Straight had been treating since October 1983. On the morning of August 7, 1985, Medina went to Dr. Straight's office and complained the Percodan was not helping. Dr. Straight administered by injection a drug named Meperidine, which is composed of equal parts of Phenergan and Demerol. When Medina complained of nausea, Dr. Straight administered a second drug, either Vistaril or Tigan, to combat Medina's nausea. It is unclear exactly how long Medina remained in the office, and exactly how much time elapsed between the administration of these drugs and her accident. According to Dr. Straight, roughly seventy minutes may have passed between the first injection and Medina's accident. Again according to Dr. Straight, the drug Meperidine would have peaked in Medina's system between thirty and fifty minutes after the injection. Meperidine's effects may have been enhanced by both prior and subsequent drugs.

{4} The above facts taken together show that Dr. Straight administered drugs in his office to Medina, which drugs could cloud a person's judgment and physical abilities and create a risk to that person in driving a car; that Medina was involved in a serious car accident within a short time of receiving medication; and that Wilschinsky suffered injuries from that accident. Based on these facts, we granted certification because whether a doctor may owe a duty to a third person such as Wilschinsky involves an important interpretation of New Mexico law, and our answer to that question would materially advance the federal litigation by resolving whether Dr. Straight can be joined in the Wilschinskys' lawsuit.[1]

I

{5} Whether a practicing physician in New Mexico owes a duty to third persons who foreseeably may be harmed by the physician's negligence in treatment of his patient is an issue of first impression in this state. In addressing this question generally, we focus on the patient-care setting that gave rise to this certification. The recent growth in use of outpatient clinics, day surgery units, and extensive office procedures is a new development in health care, unforeseen at the time when most state legislatures adopted malpractice legislation. It is encouraged by insurance policies that offer only partial coverage for patients admitted into hospitals over night. As more extensive medical procedures are shifted to an outpatient setting, the risk of injuries to the general public from patients driving under the influence of drugs increases.

{6} The existence of duty is a question of law. **Schear v. Board of County Comm'rs,** 101 N.M. 671, 687 P.2d 728 (1984). In analyzing whether a duty exists we note the following language from Prosser:

> Changing social conditions lead constantly to the recognition of new duties. No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists.

[1] We note that while certification was granted in this case prior to this court's per curiam opinion in **Schlieter v. Carlos,** 108 N.M. 507, 775 P.2d 709 (1989), we could have granted certification in this case by applying the standards articulated in **Schlieter.**

W. Page Keeton, **Prosser & Keeton on the Law of Torts,** § 53, at 359 (5th ed. 1984) (footnote omitted).

{7} The finding of a duty involves the court in a careful balancing. We must "take into account the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant." **Kirk v. Michael Reese Hosp. & Medical Center,** 117 Ill.2d 507, 526, 111 Ill. Dec. 944, 953, 513 N.E.2d 387, 396 (1987). At the outset we note the salient alleged facts: testimony was offered to show the drugs administered included at least one narcotic; this narcotic's effect may have been enhanced by two additional drugs in Medina's blood stream; the effect of the narcotic would have peaked near the time of the accident; and the drugs have side effects that could impair a person's ability to make rational judgments and impair a person's ability to drive an automobile.

{8} Heretofore, courts have recognized two sources of duty for the medical profession to third parties: when a doctor exerts control over a patient, or when a doctor is aware of threats against specific, identifiable third parties. In the control cases, courts have relied upon Section 315 of the Restatement (Second) of Torts to find a special relationship between doctor and patient, which creates a special duty to control that patient's actions. Restatement (Second) of Torts § 315 (1965). This doctrine, holding institutions and doctors potentially liable for patients with known "dangerous propensities" has been recognized in New Mexico. **See Kelly v. Board of Trustees,** 87 N.M. 112, 529 P.2d 1233 (Ct. App.), **cert. denied,** 87 N.M. 111, 529 P.2d 1232 (1974); **see also Stake v. Woman's Div. of Christian Serv.,** 73 N.M. 303, 387 P.2d 871 (1963). We do not find the facts here to raise an issue of patient control. Liability under these facts must stem from the doctor's control over his offices and the administration of powerful drugs in those offices, not from a duty to control a patient with known dangerous propensities.

{9} A second, though not mutually exclusive, line of cases has followed from **Tarasoff v. Regents of University of California,** 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In **Tarasoff,** a psychiatrist, aware of specific threats to the life of an individual, abided by professional ethics in failing to disclose his patient's threats to authorities or to the person threatened. The court found the doctor breached a duty to warn when a specific, identifiable third party was known to the doctor. Again, this duty to warn specific, identifiable third parties is **not** an issue raised by the facts of this certification. The only issue raised by these facts is whether a doctor owes a duty to third parties from treatment of an outpatient when the doctor has given the patient an injection of drugs that could clearly impair the patient's ability to reason and to operate an automobile.

{10} Cases from other jurisdictions have addressed similar, though not precisely equivalent facts. In **Gooden v. Tips,** 651 S.W.2d 364 (Tex. Ct. App. 1983), the Texas Court of Appeals concluded that a doctor, who had prescribed quaaludes to a patient with a known propensity to abuse drugs, might be liable to a third party injured in an automobile accident. The **Gooden** court specifically found no duty "to **control** the actions of the patient," but only a duty to warn the patient. **Gooden,** 651 S.W.2d at 371. The **Gooden** court relied upon authority from several jurisdictions. **See Wharton Transp. Corp. v. Bridges,** 606 S.W.2d 521 (Tenn. 1980) (cause of action for indemnity by trucking company for doctor's negligent failure to perform an adequate physical upon company's driver); **Freese v. Lemmon,** 210 N.W.2d 576 (Iowa 1973) (cause of action by injured pedestrian against doctor for failing to diagnose patient's epileptic condition); **Kaiser v. Suburban Transp. Sys.,** 65 Wash. 2d 461, 398 P.2d 14 (1965) (cause of action for failing to warn patient of dangerous side effects of drug prescribed to bus driver).

{11} Both **Gooden** and **Kaiser** created third-party liability when a doctor apparently had negligently prescribed a potentially dangerous drug. The Illinois Supreme Court, however, recently declined to find third-party liability for the allegedly negligent prescription of drugs to a

psychiatric patient whose accident on the morning of his release injured a passenger. **Kirk,** 117 Ill. 2d at 53, 111 Ill. Dec. at 956, 513 N.E. 2d at 399. That case may be distinguishable from an evolving policy to create a duty in that the driver-patient had consumed an alcoholic beverage after his release and prior to the accident. In any case, we note the facts before us do **not** involve prescription and we specifically decline to address the issue of whether under any facts, negligently prescribing drugs could give rise to third-party liability. This case raises the third-party liability issue in the context of injections given in a doctor's office and we turn, therefore, to those few cases which have discussed injuries involving patients who have been treated or injected in the doctor's care.

{12} In **Joy v. Eastern Maine Medical Center,** 529 A.2d 1364 (Me. 1987), the Supreme Court of Maine allowed a third-party cause of action against a doctor whose treatment included fitting his patient with an eyepatch. The court wrote "when a doctor knows, or reasonably should know that his patient's ability to drive has been affected, he has a duty to the driving public." **Id.** at 1366. In **Welke v. Kuzilla,** 144 Mich. App. 245, 375 N.W.2d 403 (1985), the Michigan Court of Appeals found that an injection given on the evening prior to the accident created a cause of action in malpractice for the third-party victim. The facts in these two cases are markedly different from the present case.

{13} The facts of this certification present a stronger argument for finding a duty than any of the cases described above. Unlike **Joy**, facts here do not suggest that Medina should have known the extent of her risk in accepting medication. In **Joy**, the doctor argued the eyepatch created an obvious impairment for which no reasonable person required a warning. Here, one side effect of the drugs may have been impairment of the patient's ability to reason. In addition, it will require medical testimony to explain the probable diminishment of capacity when Demerol is administered, either by itself, or in combination with other drugs. Unlike **Welke,** facts here also suggest a stronger argument for proximate cause, as Dr. Straight injected Medina within seventy minutes of the accident. Finally, unlike the prescription cases, the administration of these drugs was within the doctor's presence, in the doctor's office under his direction and timing, making reasonable preventative measures of whatever type easier to implement, and, at the same time, creating a higher degree of patient reliance on the doctor's professional judgment.

{14} Having canvassed other jurisdictions, we return to the balance set forth from the **Kirk** opinion: the likelihood of injury, the reasonableness of the burden of guarding against it, and the consequences of burdening the defendant. The likelihood of a vehicular accident immediately following injection of a narcotic in combination with other drugs is high. When the narcotic is administered by a doctor in his office, the burden of guarding against that foreseeable danger is not unreasonable if the doctor is judged by standards of normal medical procedures, rather than subjected to after-the-fact speculative attack. Finally, if the scope of the doctor's duty is limited to the professional standards of acceptable medical practice, the additional burden on the doctor's treatment decisions is negligible.

{15} The dissent reaches a different conclusion concerning the burdens placed on doctors by this opinion. The dissent expresses concern about the burdens already placed on a doctor's practice by threat of litigation from patients. We are not, however, addressing the larger issues of malpractice in this opinion, and by recognizing a duty based on standards for malpractice we are attempting to balance fairness to the innocent injured person with fairness to the doctor's treatment decisions. The dissent also claims lawyers are not subject to liability to third parties and are treated differently. The comparison to lawyers is not apt. **Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.,** 106 N.M. 757, 750 P.2d 118 (1988), cited by the dissent, involved a litigant's attempt to sue his adversary's attorney for that attorney's alleged bad acts during a trial. This court specifically weighed the harm suffered by the litigant against the policy of holding lawyers to a single standard of behavior. Lawyers are

bound to zealously represent their clients, with ethical codes and rules to define the limits of that representation, and disciplinary proceedings to punish lawyers' excesses. To have held lawyers liable to the party opposing the lawyers' clients would have been to imply representation in direct conflict with the representation actually undertaken. The dissent's analogy to **Garcia** might have been apt for a situation more like **Tarasoff,** when the court imposed on psychiatrists a duty to warn third parties despite their professional code of client confidentiality. Here, however, we have defined the doctor's duty in terms of medical standards already in place. Finally, contrary to the dissent's characterization of **Garcia,** that opinion recognized third-party causes of action against lawyers when lawyers were engaged in will drafting and examination of titles. The case, therefore, cannot be cited for the overbroad interpretation that this court rejected all third-party causes of action against lawyers.

{16} The additional burden placed on doctors by this opinion is negligible because the duty we recognize is consistent with professional standards in the medical community and the liability falls under the rubric of the Medical Malpractice Act (see below). Applying the **Kirk** balance, therefore, we find Dr. Straight owed a duty to the driving public when he administered these drugs to Helen Medina under these particular circumstances.

II

{17} Having recognized a duty under these facts, we next address the scope of that duty. First, we re-emphasize the narrow factual scope of the duty recognized. The duty is not to the entire public for any injuries suffered for which an argument of causation can be made. The duty specifically extends to persons injured by patients driving automobiles from a doctor's office when the patient has just been injected with drugs known to affect judgment and driving ability. No other facts are before us, and this case may not be construed to create a general duty to the public.

{18} Second, we note factual issues that preclude our finding as a matter of law the duty would be adequately discharged by a warning. The parties contest whether Dr. Straight did warn his patient, but even if he did the adequacy of a warning is a fact issue when evidence suggests the drugs may have affected the patient's ability to comprehend the warning. It is claimed the physician should have explained that the patient would have to remain under observation until fit to drive, or that no injection would be given until transportation was available, or that other similar measures should have been taken to safeguard the patient. The timing and adequacy of any warnings, if given, are fact questions for the jury to decide in order to determine the proportionate fault, if any, of the physician.

{19} In determining what measures might have been taken, we find the standard for argument to the jury should be that which the medical community has determined. We cannot intrude on the medical profession's own careful balancing of treatment and risk. We endorse, therefore, those policies which already exist for the administration of powerful drugs in outpatient settings. Medical standards for the administration of drugs must define the duty owed by Dr. Straight, both as to his patient, and to the Wilschinskys. We do not live in a risk-free society, but rather a risk-allocative one. Where doctors are bound to administer to the sick and take an oath to that effect, they should not be asked to weigh notions of liability in their already complex universe of patient care. If, on the other hand, a doctor fails to meet the standards of his own community in caring for his patient, his liability is defined by the Medical Malpractice Act, with limits set regardless of the injuries suffered or the parties affected.

III

{20} The final question certified to this court is whether the Medical Malpractice Act applies to this action. No language in the Act specifically addresses the issue of third-party recovery for an act of malpractice. In reviewing the Act, we

construe all of its provisions together in order to determine the intent of the legislature on this issue. **Quintana v. New Mexico Dep't of Corrections,** 100 N.M. 224, 668 P.2d 1101 (1983), **rev'd on other grounds sub nom. Devine v. New Mexico Dep't of Corrections,** 866 F.2d 339 (10th Cir. 1989).

{21} The New Mexico Medical Malpractice Act was enacted by the legislature in order to meet an insurance crisis, to promote health care in New Mexico by providing a framework for tort liability with which the insurance industry could operate. **See** NMSA 1978, § 41-5-2 (Repl. Pamp. 1986); **see also Medical Malpractice Legislation in New Mexico,** 7 N.M.L. Rev. 5 (1976-77). Through several procedural measures and by establishing a limitation on full recovery for malpractice injury, the Act restricted and limited plaintiffs' rights under the common law. The established principle of strict statutory construction for acts passed in derogation of the common law would apply. 3 N. Singer, **Sutherland Statutory Construction,** § 61.01 (4th ed. 1985).

{22} While the legislature did not directly address potential recovery by third parties, one provision of the Act might be read to exclude third-party actions from the Act's ambit. Under paragraph C of the definitional section, 41-5-3, the legislature wrote: "'[M]alpractice claim' includes any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient[.]" Read to this point, the legislature's definition clearly extends the Act's coverage to acts of malpractice resulting in injury **to the patient.**

{23} After language explicating the range of allowable patient claims, the definition under Section 41-5-3(C) continues: "'[M]alpractice claim' does not include a cause of action arising out of the driving, flying or nonmedical acts involved in the operation, use or maintenance of a vehicular or aircraft ambulance[.]" By this language, the legislature created a specific exception or a negative definition for "malpractice claim."

{24} The facts of this certification arise from a health care provider's potentially negligent acts in the administration of medical treatment resulting in an injury to a third party. Thus, the activity at issue falls neither within the articulated ambit of the statutory definition, nor within the ambit of the exclusion. Under principles of narrow construction, generally we would find this cause of action is not covered by the definitional section and is therefore outside the Act. **See** 1A N. Singer, **Sutherland Statutory Construction,** § 20.08 (4th ed. 1985) (definitions of legislature binding on the courts).

{25} Here, however, we note several factors which should affect our analysis. First, the nonmedical nature of the articulated exclusion in paragraph C is at least some evidence the legislature foresaw and intended broad application of the concept of a "malpractice claim." Second, the specific cause of action recognized by this court did not exist in 1976. Therefore, the legislature did not intentionally fail to address this issue. Third, if we recognize a third-party cause of action for the Wilschinskys and it is not covered by the Act, a third party would be placed in a better position to achieve full recovery from an act of malpractice than would the patient malpracticed upon. Finally, the clear intent of the legislature, as articulated in Section 41-5-2, was to make malpractice insurance available to health care providers.

{26} While courts normally are bound to follow legislative definitions, they are not bound when a definition would result in an unreasonable classification. 1A, N. Singer, **Sutherland Statutory Construction** § 20.08 (4th ed. 1985). Here, an unreasonable classification would result, as only patients with direct injuries from acts of malpractice would be denied full recovery under the Act. The Supreme Court of Arkansas has stated that courts must follow statutory definitions "unless the definition is arbitrary, creates obvious incongruities in the statute, defeats a major purpose of the legislation or is so discordant to common usage as to generate confusion." **Bird v. Pan Western Corp.,** 261 Ark. 56, 60, 546 S.W.2d 417, 419 (1977). A major purpose of the Medical Malpractice Act was

to meet a perceived insurance crisis and to regulate the tort liability of medical professionals for acts of medical malpractice. When we find, as we do here, a clash between the intent of the legislature and its own definitional section, we seek to harmonize the two. **Town of Scituate v. O'Rourke,** 103 R.I. 499, 239 A.2d 176 (1968). We, therefore, read the language "which proximately results in injury to the patient" as not having been intended to restrict the definition of "malpractice claim" to only those instances resulting in injury to patients. Instead, based on the causes of actions that were known to the legislature at the time this act was adopted, we find this language to refer to the legal standards of proximate cause, requiring causes of action to survive that test. We find the legislature intended to cover all causes of action arising in New Mexico that are based on acts of malpractice.

{27} Other jurisdictions, faced with questions about the coverage of malpractice procedures to third-party actions have required those actions to proceed through malpractice. **See Faden v. Robbins,** 88 A.D.2d 631, 450 N.Y.S.2d 238 (1982) (chiropractor's third-party complaint against physicians for alleged malpractice on chiropractor's patient); **Gobble v. Baton Rouge Hosp.,** 415 So.2d 425 (La. Ct. App. 1982) (loss of consortium claim to proceed through malpractice where alleged malpractice caused death); **Davis v. Acton,** 373 So.2d 952 (Fla. Dist. Ct. App. 1979) (third-party complaint against consulting physician). While both New York and Florida have different statutory language than New Mexico, the Louisiana court interpreted language almost identical to that found in the New Mexico Medical Malpractice Act. **See** LA. Rev. Stat. Ann. §§ 40:1299.31-40:1299.48 (West 1977). The Louisiana court found language allowing claims to be brought by "a patient or his representative" did not restrict the class of persons who might bring an action. **Gobble,** 415 So.2d at 426. Even when the language reviewed by other courts has not been identical to that reviewed by this court, the thrust of those decisions has been similar. The Florida court wrote, "the gravamen of the third-party action is predicated upon the allegation of professional negligence by a practicing physician." **Davis,** 373 So.2d at 953. We find this underlying logic compelling. **See also Welke v. Ruzilla,** 144 Mich. App. 245, 375 N.W.2d 403 (1985); **Durflinger v. Artiles,** 234 Kan. 484, 673 P.2d 86 (1983).

SUMMARY

{28} We find, as a matter of law, a duty was owed to the public who might be injured by a patient's impaired ability to drive when a doctor administered powerful drugs in his office. The doctor had an obligation to follow acceptable medical procedures. The Wilschinskys' cause of action falls within the purpose of the New Mexico Medical Malpractice Act and should be pursued according to its guidelines.

IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

RICHARD E. RANSOM,
Justice, specially concurring

TONY SCARBOROUGH,
Justice, dissents

SPECIAL CONCURRENCE

RANSOM, Justice (Specially concurring).

{29} I specially concur to express chagrin that seeds of further interprofessional discord needlessly may be sown by certain language in the dissent. Justice Scarborough asserts that the majority opinion has extended the liability burden of physicians despite this Court's having rejected extension of the burden of lawyers to include liability to the courtroom adversary of an attorney's client. In point of fact, the opinion of this Court to which the dissent refers, **Garcia v. Rodey, Dickason, Sloan, Akin & Robb P.A.,** 106 N.M. 757, 750 P.2d 118 (1988), was decided on public policy considerations that support preservation

of a lawyer's special allegiance to a client in an **adversary** proceeding. As **Garcia** specifically observes, appropriate means do exist to redress a grievance concerning an attorney's alleged misconduct toward the adversary. "Within the action out of which a grievance arises, remedies are provided for the benefit and relief of parties wronged through reasonable reliance upon misrepresentations of an adversary's attorney." 106 N.M. at 763, 750 P.2d at 124.

{30} It is certainly no extension of the liability burden of physicians under tort law to say that a doctor has a duty to refrain from optional outpatient administration of mind altering medication that, under the circumstances, gives rise to an unreasonable risk of injury to others. Reasonableness turns on the foreseeability of injury and the options available to the doctor in treatment of the patient. The conduct of the physician is measured by what a reasonably well-qualified doctor may do under similar circumstances.

{31} With respect to the propriety of our accepting certification from the federal court, we have recently held by per curiam opinion that:

> The intent of the certification of facts and determinative answer requirements is that this Court avoid rendering advisory opinions. Relative to the first requirement, it is sufficient if the certification of facts and the record contain the necessary factual predicates to our resolution of the question certified, and it is clear that evidence admissible at trial may be resolved in a manner requiring application of the law in question.

Schlieter v. Carlos, 108 N.M. 507, 508, 775 P.2d 709, 710 (1989). Here, it is absolutely clear from the record that evidence admissible at trial will require a jury instruction in accordance with the law of this opinion, and that the jury's findings in accordance with that law will determine the proportionate liability, if any, of the defendant doctor. Our resolution of this legal issue will materially advance the ultimate termination of the litigation. **See id.**

DISSENT

SCARBOROUGH, Justice, dissenting.

{32} I respectfully dissent from the majority opinion. The majority expand the scope of a physician's duty to third parties and thus significantly enlarge a physician's potential liability. In assessing the consequences of their holding, the majority conclude that "the burden on the doctor's treatment decisions is negligible." In fact, one can readily assume just the opposite: the burdens already imposed on treatment decisions by physicians have driven many from the practice of medicine, and the majority opinion will further exacerbate the existing medical liability crisis. Along this same line of reasoning, the majority note that we live in a "risk-allocative" society. While this may be true, consideration of such issues is a task best left to the legislature rather than to the judiciary. There are no data before us from which this Court can appropriately determine "risk-allocative" issues.

{33} The majority assume that there are facts before us. This is not so. There has been no fact finding by the trial court. We do not know what the facts are or will be. The majority opinion, therefore, is little more than an advisory opinion decided in a factual vacuum in contravention of our longstanding rule that appellate decisions be fact specific.

{34} The majority's assumption that the "recent growth" of new and unforeseen practices by physicians somehow justifies the destruction of patient-client liability constraints finds no support in the facts before us, or in any facts of which we could properly take judicial notice. From time immemorial, patients have been treated in their homes or in the offices of physicians and clinics of physicians. There is no factual basis upon which this court can extend tort liability of physicians to include third parties.

{35} We have declined to burden attorneys with tort liability to third parties. **Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.,** 106 N.M. 757, 750 P.2d 118 (1988). This Court in **Garcia v. Rodey** was not prepared to extend the legal duty of an attorney to non-client thirty parties who may be injured by the services or advice of the attorney to this client. I am not prepared to extend the liability burden of physicians which the majority opinion would impose.

{36} While I agree with the majority that the limits imposed on a physician's liability are appropriately set by the Medical Malpractice Act, I believe this issue is not ripe for our resolution. The question of liability limits is not before us by certification, and the issue has not been addressed by the parties in any manner.

{37} My disagreement with the majority opinion notwithstanding, I further conclude that the instant case is not properly before us. Three legal questions were certified to this Court for our response, but the certification request entered by the U.S. District Court was not accompanied by a sufficient factual predicate in the form of findings or stipulated facts. And for this reason I would decline to accept certification.

{38} In New Mexico, the process of certification from federal courts is governed by SCRA 1986, 12-607, which implements NMSA 1978, Section 34-2-8 (Repl. Pamp. 1981). SCRA 12-607 requires a certification request to include "either a statement by the certifying court of the facts relevant to the question certified, showing the nature of the controversy in which the questions arose, or a stipulation of such facts by the parties, which has been approved by the certifying court." SCRA 12-607(C)(3). The certification request before us does not include a stipulation of the facts, nor does the certifying court provide sufficient nondisputed facts relevant to the questions of law certified to us. It is essential that the material facts have been either agreed upon or determined by the certifying court before we attempt to form an authoritative statement of New Mexico law on the issues. I strongly disfavor giving an advisory opinion unless it is fact intensive.

{39} I find considerable support for my conclusion. "Certification would be a pointless exercise unless the state court's answers are regarded as an authoritative and binding statement of state law." 17A C. Wright, A. Miller & E. Cooper, **Federal Practice and Procedure** § 4248 at 179 (2d ed 1988). Without sufficient, nondisputed facts we cannot authoritatively answer the questions of law before us. I would not go as far in this regard as the Supreme Court of Wyoming which has said it will not answer a certified question of state law "until there is nothing left for the [federal] court to do but apply our answer to the question and enter judgment consistent with the answer or answers." **In re Certified Question from the District Court,** 549 P.2d 1310, 1311 (Wyo. 1976). Instead, I would look to the Supreme Court of Maine, which was one of the first state courts to adopt certification procedures more than twenty-five years ago. In 1966, the Maine court held:

> If we are to participate and yet not render purely advisory opinions, we think it will be incumbent upon us to respond to questions only when it is apparent from the certification itself that all material facts have been either agreed upon or found by the court and that the case is in such posture in all respects that our decision as to the applicable Maine law will in truth and in fact be "determinative of the cause" as the statute conferring jurisdiction upon us requires.

In re Richards, 223 A.2d 827, 833 (Me. 1966). **See also** R. Field, V McKusick & L. Wroth, **Main Civil Practice** § 76B Commentary (1967 Supp.).

{40} The absence of sufficient nondisputed facts occurs most often in certifications from federal district courts. Certification requests from federal appellate courts will normally include findings of facts. The burden to provide sufficient nondisputed facts rests with the district courts:

> Due regard for the interests of the states in conserving their judicial resources requires

> that the district courts be careful in their use of certification procedures. **This is particularly true in cases in which the unclear legal issue is identified in advance of trial and there are factual disputes to be resolved.** (Emphasis added)

1A J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, **Moore's Federal Practice** § 0.203[5] Pt. 2 at 2162 (2d ed 1989). Whether a certification request provides sufficient nondisputed facts must of necessity be determined on a case-by-case basis. An example of an effective certification request from a district court to this Court can be seen in **Hamilton Test Systems, Inc. v. City of Albuquerque,** 103 N.M. 226, 704 P.2d 1102 (1985), which provided stipulated facts. This Court should not make common law in a vacuum. It is, therefore, imperative that we preserve the procedural parameters for certification we have set forth in SCRA 1986, 12-607.

{41} Absent a certification request providing sufficient, nondisputed facts, I do not believe we should contemplate rendering an opinion in the instant case. I dissent.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-048

Filing Date: June 29, 1989

Docket No. 17,817

J. L. MURDOCK,

Plaintiff-Appellant,

v.

PURE-LIVELY ENERGY 1981-A, LTD. a Texas Limited Partnership, LIVELY ENERGY AND DEVELOPMENT CORPORATION, BRUCE R. LIVELY, LINDA WHITTEN LIVELY, THOMAS E. TUCKER, LARRY D. JOHNSON and JOSEPH W. PETROV,

Defendants,

and

CONOCO, INC.,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY, ALVIN F. JONES, District Judge.

Padilla & Snyder,
Ernest L. Padilla,
Santa Fe, New Mexico,

for Appellant.

Atwood, Malone, Mann & Turner,
John S. Nelson,
Roswell, New Mexico,

for Appellee.

OPINION

SCARBOROUGH, Justice.

{1} Plaintiff-appellant, J.L. Murdock (Murdock), filed a lawsuit against defendant-appellee, Conoco, Inc., a Delaware corporation, Pure-Lively Energy 1981-A, Ltd., a Texas limited partnership, and Lively Energy and Development Corporation, a Texas corporation (Lively), and certain named individuals in the Chaves County District Court. In his complaint Murdock alleged he had not been timely paid royalty proceeds from five oil wells operated by Lively and Conoco. Among his claims for relief, Murdock sought interest on the suspended royalty proceeds. The District Court granted summary judgment against Murdock in favor of Conoco and granted summary judgment for Murdock against Lively. The individually named defendants were dismissed as defendants in the action. Murdock appeals the summary judgment entered in favor of Conoco. We affirm.

FACTS

{2} Conoco owned executive rights to the mineral estate of certain land in Chaves County pursuant to a mineral deed executed and recorded in 1930. Murdock had a perpetual one-eighth royalty interest in the minerals from the same land pursuant to a warranty deed executed and recorded in 1948. Conoco entered into an oil and gas production lease with Lively in 1981 pertaining to a portion of that same land whereby Conoco reserved to itself a one-eighth royalty interest in addition to the one-eighth interest owned by Murdock. Lively as operator drilled four wells (Lively wells) between 1981 and 1983 which have continuously produced oil in paying quantities.

{3} With regard to his one-eighth royalty interest, Murdock executed a division order in

favor of Lively pertaining to production from the Lively wells and to proceeds from the sale of such production. The Lively-Murdock division order was effective as of the date of first production runs from the Lively wells.

{4} Lively, as operator of the Lively wells and consistent with the Conoco-Lively lease and the Lively-Murdock division order, sold to Conoco the oil production from the Lively wells. The casinghead gas was sold to a third party who was not a party in the instant lawsuit. Lively executed two Conoco-Lively division orders in favor of Conoco to document the sales arrangement with Conoco. Pursuant to the Conoco-Lively division orders, Conoco was to pay all proceeds from the sale of oil production from the Lively wells to Lively, with the exception of Conoco's one-eighth royalty interest, which it retained. Lively in turn was to distribute the remaining proceeds to the other interest owners, including Murdock. Conoco never entered into any arrangement with Murdock whereby Conoco agreed to pay oil production proceeds from the Lively wells directly to Murdock.

{5} Before Lively paid royalty proceeds from the Lively wells to Murdock, adverse claims to Murdock's interest were made. Murdock filed a suit in May 1985 to quiet title to his royalty interest. On May 17, 1984, Lively notified Murdock that payment of his royalty proceeds would be suspended and the money deposited in an interest bearing account pending proof of clear title by Murdock. On August 19, 1985, Lively tendered a cashier's check in the amount of $281,549.88 to the First Interstate Bank of Roswell, New Mexico, to be held pending final judgment in Murdock's quiet title suit. In the lawsuit that we now review on appeal, Murdock sought interest from Lively on his royalty proceeds from the first day of production to August 19, 1985. The district court found Murdock was entitled to judgment as a matter of law against Lively and awarded Murdock $91,814.79.

{6} In addition to the four Lively wells, Conoco drilled and operated a well (Conoco well) on the unleased portion of the subject land. Conoco operated the well and purchased all of the oil produced by the well. The casinghead gas was sold to a third party who was not a party in the instant lawsuit. The Conoco well was drilled in 1983 and has continuously produced oil in paying quantities.

{7} Prior to drilling the Conoco well, Conoco notified Murdock that its attorneys refused to approve the title to his one-eighth perpetual royalty interest. Between February 1984 and May 1985, when Murdock filed his quiet title suit, Conoco corresponded with Murdock concerning adverse claims to Murdock's interest. Among other documents, Conoco's attorneys furnished to Murdock's attorneys the title abstracts Conoco's attorneys had examined. By letter dated July 25, 1984, Conoco advised Murdock that the title to his interest was still defective and notified him it was willing to deposit suspended royalty proceeds into the registry of the court. Neither Murdock nor his attorneys requested Conoco to release such proceeds to the court.

{8} In August 1985, Murdock sent to Conoco copies of various stipulations and a partial summary judgment order in the quiet title suit. Conoco's attorneys in a supplemental title opinion dated September 9, 1985, approved the release of one-half of the proceeds attributable to Murdock's interest. Conoco prepared a division order pertaining to the proceeds from the beginning of production and sent it to Murdock for execution. Murdock returned the executed division order to Conoco with an unauthorized change. This change consisted of marking out "without interest" from the paragraph of the division order authorizing Conoco to withhold payment of royalty proceeds without interest until any adverse claims to title were settled.

{9} By letter dated September 23, 1985, Murdock's attorneys sent to Conoco a copy of a summary judgment order in Murdock's favor in his quiet title suit. The defendants in Murdock's quiet title suit did not appeal the summary judgment; subsequently, Conoco's attorneys prepared another supplemental title opinion dated October 29, 1985, approving the release of all

proceeds attributable to Murdock's royalty interest. In December 1985, Conoco paid Murdock $14,739.82, the proceeds attributable to the first one-half on Murdock's interest released for payment by the supplemental title opinion of September 9, 1985. On December 6, 1985, Conoco sent Murdock an amended division order, the second of the Conoco-Murdock division orders. The amended division order covered Murdock's entire royalty interest that had been released for payment by Conoco's title attorneys in the October 29, 1985, supplemental title opinion. The amended division order restored the unauthorized deletion which Murdock made in the first Conoco-Murdock division order and provided that Conoco could withhold royalty payments without interest. Murdock executed the amended division order and returned it with no changes on January 31, 1986. In March 1986, Conoco paid Murdock $14,739.83, all the remaining proceeds attributable to his one-eighth royalty interest in the Conoco well. On July 14, 1986, Murdock filed the lawsuit which is before us on appeal, seeking, among other claims for relief, interest from Conoco on his suspended royalty proceeds from the Lively and Conoco wells.

ISSUES

{10} Summary judgment is proper if there is not genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SCRA 1986, 1-056(C); **Westgate Families v. County Clerk of Los Alamos**, 100 N.M. 146, 667 P.2d 453 (1983). The material facts in this case are not disputed. On appeal Murdock asks whether as a matter of law he was entitled to interest from Conoco on: (1) royalty proceeds held in suspense by Lively on the Lively wells, and (2) royalty proceeds held in suspense by Conoco on the Conoco well.

{11} In his complaint, Murdock's sole legal theory for recovery of interest from Conoco was NMSA 1978, Section 56-8-3(B) (Cum. Supp. 1985). Section 56-8-3(B) provides that the rate of interest, in the absence of a written contract fixing a different rate, shall be not more than fifteen percent "on money received to the use of another and retained without the owner's consent express or implied." On appeal Murdock continues an argument he made at the summary judgment hearing in district court for an "equitable application" of Section 56-8-3(B). We are not persuaded by Murdock's argument.

{12} Section 56-8-3(B) does not create a liability for interest if the retention of a payable obligation is proper. Both Conoco-Murdock division orders contained a clause permitting the withholding of royalty payments to Murdock without interest if there were a question about Murdock's title. When an express provision of a contract stipulates that a payable obligation is to bear no interest, there can be no implied contract to pay interest under Section 56-8-3. **City of Clovis v. Southwestern Pub. Serv. Co.**, 49 N.M. 270, 161 P.2d 878 (1945).

{13} Murdock argues on appeal that Conoco had a fiduciary duty to him similar to that owned by a trustee. We decline to impose such a standard of conduct on an executive right holder. Instead, we find that an executive right holder owes a duty of utmost good faith to a royalty holder. **See Manges v. Guerra**, 673 S.W.2d 180 (Tex. 1984). Sometimes called the "ordinary prudent landowner test," the standard for utmost good faith or utmost fair dealing requires more concern than ordinary good faith for the interests of royalty owners. Unlike a fiduciary obligation, however, the standard of utmost good faith does not require the holder of the executive right to subordinate his interest to those of the royalty owners. Smith, **Implications of a Fiduciary Standard of Conduct for the Holder of the Executive Right**, 64 Tex. L. Rev. 371, 372-3 (1985); **see also** Smith, **The Standard of Conduct Owed by Executive Right Holders and Operators to the Owners of Nonparticipating and Nonoperating Interests**, 32 Inst. on Oil & Gas L. & Tax'n 241-66 (1981).

{14} We further find that an "equitable application" of Section 56-8-3(B) as argued by Murdock cannot be sustained because of the unique

attributes of a division order. A division order is a specialized contract developed for the petroleum industry that provides authorization to a purchaser of oil and gas to pay proceeds from production to the owners of production. The function of a division order is to protect a purchaser as distributor of funds against potential liability for improper payment, which could include tort liability for conversion. **See** R. Hemingway, **The Law of Oil & Gas** § 7.5 (A) (2d ed. 1983). To avoid potential liability, a purchaser typically requires each person who is entitled to a royalty share in the production proceeds to execute a division order that declares the portion of production to which he is entitled. **Id.**; **see also** Holliman, **Division Orders—A Primer**, 34 Inst. on Oil & Gas. L. & Tax'n 313-30 (1983); W. Summers, 3A, **The Law of Oil & Gas** § 590, at 135-37 (1958).

Lively-Conoco Division Order

{15} Conoco utilized two different methods of purchasing production and paying proceeds from the Lively and Conoco wells. Under the first method Conoco disbursed production proceeds to Lively, the operator of the Lively wells, a practice that is common and widely accepted in the petroleum industry. **See** Holliman, **Division Orders—A Primer**, 34 Inst. on Oil & Gas. L. & Tax'n, at 349-50 (1983). Lively in turn disbursed the proceeds to the various royalty owners. Before disbursing proceeds Lively obtained division orders in its favor from each royalty owner, including Murdock. By the terms of the Lively-Murdock division order, Lively was Murdock's agent to sell Murdock's royalty production and to remit proceeds to Murdock. Lively also executed a Conoco-Lively division order in favor of Conoco in which Lively agreed to pay production proceeds from the Lively wells to the various royalty owners, including Murdock. In regard to the Lively wells, Conoco did not enter into a contractual relationship with Murdock. Conoco paid all proceeds from the Lively wells to Lively. Lively, not Conoco, suspended payment to Murdock because of questions about the title to Murdock's royalty interest. Therefore, Conoco is not responsible to pay interest on the suspended royalties.

Murdock-Conoco Division Order

{16} Under the second method for purchasing production, Conoco dealt directly with Murdock with respect to the Conoco well. Murdock had the burden to prove he had good title to his royalty interest. A seller of production is required to furnish a satisfactory title abstract or other evidence of title to a purchaser. **See** Bounds, **Division Orders**, 5 Inst. on Oil & Gas L. & Tax'n 91, 94 (1954). The purchaser's attorneys then review the title abstract or other evidence of title furnished by the seller. Failure by a seller to furnish evidence of title, or any dispute or questions concerning title to the land or to the oil produced therefrom, can authorize a purchaser under the terms of a division order to withhold proceeds of all oil received and run, typically without interest, until the dispute, defect, or question of title is corrected or removed. A clause is included in the typical division order that effectively frees a purchaser from any claim for interest from a seller on payments withheld until a satisfactory title determination is made. **See** H. Williams & C. Meyers, 4 **Oil and Gas Law** § 704.8 (1988). Both Conoco-Murdock division orders contained a clause which stated:

> If any claim is made which in your opinion adversely affects title to any interest credited hereunder, or such title is not satisfactory to you, the parties credited with such interest severally agree to furnish abstracts or other evidence of title acceptable to you. In the event of failure to furnish such evidence of title, you are authorized to withhold payments accruing to such interest, **without interest**, until the claim is settled. [Emphasis added.]

{17} The "without interest" clause in the Murdock-Conoco division orders contains standardized language typically included in division

orders.[1] In common law jurisdictions this clause in a division order coupled with failure by a seller to comply with its terms upon demand usually relieves the purchaser of any duty to pay interest on sums withheld by purchaser. **See** Holliman, **Division Orders—A Primer**, 34 Inst. on Oil & Gas L. & Tax'n, at 330 (1983); **but cf.** Louisiana Mineral Code, La. Rev. Stat. §§ 31:123 and 31:210-31:212 (West 1989) (when payment of production proceeds is delayed pending proof of clear title, interest must be paid on all monies held for more than thirty days).

{18} We conclude that under the terms of the division order Murdock signed and returned to Conoco on January 31, 1986, Conoco did not owe Murdock interest on proceeds withheld pending resolution of the title dispute. We note, however, that even if the division order had not specifically provided that Conoco did not owe interest, under the common law some courts hold interest would not be owed. The leading Texas opinion on this subject held:

> [T]he purchase price of royalty oil under the division order is not due and payable until the disputes as to ownership have been settled. . . . The purchase price of the oil . . . not being due and payable until the adverse claim was extinguished forces the conclusion that the [sellers] are not entitled to collect interest until the trial court's judgment was entered in this case which settled and extinguished the dispute as to the adverse claim. . . .

Gulf Pipe Line Co. v. Nearen, 135 Tex. 50, 56, 138 S.W.2d 1065, 1068 (Comm. of Appeals Tex. 1940) (adopted by the Texas Supreme Court).

{19} The New Mexico legislature has addressed the issue of oil proceeds payments, including interest on late payments, in the Oil and Gas Proceeds Payment Act. NMSA 1978, §§ 70-10-1 et seq. (Repl. Pamp. 1987). Enacted after the relevant events in the instant case, the Act shows the legislative intent to adopt the common law approach to division orders set forth in **Gulf Pipe Line Co. v. Nearen**. The Act provides in its "Application" section that the interest permitted on late payments of proceeds does not apply when the payor believes in good faith that there is lack of a good and marketable title held by payee.[2]

{20} The order of the district court giving summary judgment to Conoco is affirmed.

{21} IT IS SO ORDERED.

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

RICHARD E. RANSOM,
Justice

[1] A sample division order provided in H. Williams & C. Meyers, 7 **Oil & Gas Law** § 701.1 (1988) reads in pertinent part: "In the event of a failure so to furnish such evidence of title, or in the event of an adverse claim, question or dispute at any time concerning the title to such oil or any part thereof or to the land from which such oil is produced, you may hold the proceeds of all oil received and run, to the extent of the interest involved in such adverse claim, question or dispute, **without interest**. . . ." [Emphasis added.]

[2] NMSA 1978, Section 70-10-5 (Repl. Pamp. 1987) reads in part:

"The penalty provisions of the Oil and Gas Proceeds Payment Act [70-10-1 to 70-10-5 NMSA 1978] shall not apply in the following instances:

A. the payor fails to make such payment otherwise required hereunder in good faith reliance upon a title opinion by a licensed New Mexico attorney making objection to the lack of good and marketable title of record in the party claiming entitlement to payment and furnishes a copy thereof to such party for curative action required thereby;

B. the payor receives information which in its good faith judgment brings into question the entitlement of the person claiming the right to such payment to receive the same, or which has rendered unmarketable of record the title thereto, or which may expose payor to the risk of multiple liability, or liability to third parties if such payment is made. In such event the payor may suspend such payments otherwise required by the Oil and Gas Proceeds Payment Act or, at the request and expense of the party claiming entitlement or upon the payor's own initiative, may interplead such funds in the manner provided by law in order to resolve such claims and avoid liability under the Oil and Gas Proceeds Payment Act. . . ."

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-050

Filing Date: July 5, 1989

Docket No. 17,596

SEVERO A. CHAVEZ,

Plaintiff-Appellant,

v.

MANVILLE PRODUCTS CORPORATION and MANVILLE SALES CORPORATION,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY, JOSEPH E. CALDWELL, District Judge.

Motion for Rehearing Denied August 8, 1989

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OPINION

SCARBOROUGH, Justice.

{1} Plaintiff-appellant, Severo A. Chavez, brought suit against his former employer for breach of an express or implied employment contract and for retaliatory discharge. Defendants-appellees are the Manville Products Corporation and Manville Sales Corporation (collectively Manville). Chavez appeals the entry of summary judgment against him on claims sounding in contract, and the entry of a directed verdict against him on the claim of retaliatory discharge. We granted motions from the New Mexico Trial Lawyers Association and from the Association of Commerce and Industry of New Mexico to submit amicus briefs. We affirm the dismissal of the contract claims, but reverse the district court on the question of retaliatory discharge and remand for a new trial solely on that issue.

Factual Background

{2} Manville operates an open pit mine and processing mill for perlite ore at No Agua, New Mexico. Chavez began working at the Manville mine and mill in 1965 as an hourly laborer. By 1973 he had worked his way up to a position as lead mill operator and was a union shop steward. That year, Manville offered Chavez a non-union supervisory position in the production mill, which Chavez accepted. For the next twelve years he worked as a production supervisor.

{3} In the early part of 1985, Manville was engaged in a concerted lobbying effort in support

of federal legislation concerning asbestos liability and claims. In a corporate-wide campaign termed the "Call to Action" program, Manville sought to involve its employees in its lobbying efforts. Plant manager Loretta Turner acted as the local coordinator for the No Agua facility. Chavez had been asked to participate in the lobbying effort, but had declined to do so.

{4} On April 3, 1985, plant manager Turner received a request for assistance in influencing an upcoming vote in the United States Senate on proposed asbestos legislation. Turner sent a mailgram to United States Senator Pete V. Domenici stating that the undersigned employees of Manville, including Chavez, urged the Senator to support the legislation.

{5} Chavez had not given Manville permission to use his name. He testified before the district court that when he arrived at work on April 3, shortly before 4:00 p.m., he was asked to assist with the lobbying effort, and he again refused. His immediate supervisor, Jack Carraher, then informed Chavez that he would have to call Turner and tell her of the refusal.

{6} About a month later, Chavez received a letter from Senator Domenici thanking him for his recent mailgram in support of the legislation. Angry, he took the letter to work for an explanation, but states that his immediate supervisor only made light of the matter.

{7} Sometime in the following month Manville decided to terminate Chavez' employment. Turner obtained approval for the termination decision from her district manager and on June 10, 1985, she summoned Chavez to her office. She advised him that he was being laid off for a month. Thereafter, Chavez was told that his job had been eliminated. He was told that he had been selected for termination as only two production foremen were now required and he was the worst of the three employed. In its documentation of the separation, however, Manville listed Chavez as being ineligible for future employment with the corporation in any capacity.

Breach of Employment Contract

{8} Chavez' initial employment in 1965 as an hourly worker could be terminated by Manville at will. Later, the terms of his employment were changed when Manville entered into a union collective bargaining agreement covering hourly workers. In 1973, when Chavez contemplated accepting the supervisory position, he realized he would once again have an at-will status absent an agreement to the contrary. This was consistent with Manville's policy of avoiding the use of employment contracts with all salaried personnel. Chavez stated that when he was offered the supervisory position in 1973, he was reluctant to accept it and lose the security afforded by the recently negotiated collective bargaining agreement. He claims he was given an express assurance from the now-deceased former plant manager that if he didn't work out in the new role, he could return to his former hourly position without loss in seniority. Thus, Chavez claims that he had an oral employment contract which Manville breached in 1985 when it refused his request to return him to hourly work.

{9} In support of its motion for summary judgment, Manville submitted an employee agreement executed by Chavez and Manville in 1965 and an employee handbook for salaried employees issued in 1981, which was in effect when Chavez was fired. Manville argues that the provisions in these documents concerning Chavez' at-will status are unequivocal and should be enforced. Chavez answers that the 1965 agreement is irrelevant since it was modified by the collective bargaining agreement and argues that the unilateral publication of the employment manual cannot abrogate the earlier oral agreement between Manville and Chavez.

{10} The "Employment Agreement and Record of Changes," executed in 1965, provides that Chavez' employment was "terminable by either the company or the undersigned [Chavez] at any tame." The contract continues and addresses certain other conditions of employment, such as the company ownership of inventions and patents developed while employed at Manville and the

nondisclosure of company secrets. The contract then provides:

> It is further agreed that as a condition of said employment, no modification of any of the terms of this employment agreement shall be of any force or effect **unless such modification shall be in writing.**
>
> * * * * * *
>
> The undersigned hereby further agrees that in the event of the transfer of his employment from the company to any subsidiary, parent, or affiliated company thereof, his employment shall continue to be subject to each and all of the terms and conditions hereof, except as modified as herein provided.

(Emphasis added). The Employment Practices section in Manville's 1981 Employee Handbook for salaried personnel states that employment with Manville can be terminated at any time, and, without express authorization of the Board of Directors, employees do not have a contract of employment with the company, either written, verbal, or implied.

{11} New Mexico recognizes an exception to at-will employment when the words and conduct of the parties give rise to an implied employment contract. **Forrester v. Parker,** 93 N.M. 781, 606 P.2d 191 (1980) (implied contract based upon provisions of employee handbook); **Kestenbaum v. Pennzoil Co.,** 108 N.M. 20, 766 P.2d 280 (1988) (oral statements made by an employer may be sufficient to create an implied contract), **cert. denied,** . . . U.S. . . . 109 S. Ct. 3163, 104 L. Ed. 2d 1026 (1989). However, we are of the opinion that the alleged oral representations made to Chavez in 1973 cannot create enforceable contractual obligations in the face of the provision in the 1965 agreement that any modification of the employment agreement must be in writing. As a matter of law, this provision precluded Manville's oral assent to modification of its contractual relationship with Chavez. It also precludes the possibility that any reliance by Chavez on the alleged representations was reasonable.

{12} Numerous decisions in other jurisdictions recognize that an employer is free to enter into written contracts that explicitly provide the employer may terminate the employment contract at any time, with or without reason. **e.g., Pratt v. Brown Mach. Co.,** 855 F.2d 1225 (6th Cir. 1988); **Reid v. Sears, Roebuck & Co.,** 790 F.2d 453 (6th Cir. 1986); **Eliel v. Sears, Roebuck & Co.,** 150 Mich. App. 137, 387 N.W.2d 842 (1985). Similarly, this Court, in **Lukoski v. Sandia Indian Management Co.,** 106 N.M. 664, 748 P.2d 507 (1988), recognized that various means exist whereby employers may limit their employees' reasonable expectations concerning the employment relationship.

> We do not mean to imply that all personnel manuals will become part of employment contracts. Employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract and that their jobs are terminable at the will of the employer with or without reason. Such actions . . . instill no reasonable expectations of job security and do not give employees any reason to rely on representations in the manual.

Id. at 666-67, 748 P.2d at 509-10 (quoting **Leikvold v. Valley View Community Hosp.,** 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984) (en banc)).

{13} In the instant case, it is not the contractual provision concerning at-will employment alone that is significant; also significant is the condition in the 1965 contract that any modification of the employment agreement is to be in writing. This provision, like the at-will provision, is enforceable and clearly was intended to protect the employer from claims based upon oral representations made to employees concerning their employment status, such as were alleged in this case.

{14} Chavez asserts that the 1965 agreement is irrelevant since it was modified by the 1973 collective bargaining agreement. We agree that the union agreement changed Chavez' at-will status. After the adoption of the collective bargaining agreement, termination of hourly workers was controlled by employee seniority, with certain exceptions such as discharge for cause. However, we do not believe the agreement with the union was intended to replace entirely the earlier 1965 agreement. Nothing in the collective bargaining agreement states that it supersedes or revokes any prior contractual agreements that may have been in existence. We conclude that, unless modified, the provisions of the 1965 agreement continued in full effect, and the requirement that changes to Chavez' employment agreement be in writing remained in effect the entire time he worked for Manville. Because the union contract did not purport to cover non-union supervisory personnel, when Chavez accepted the salaried position in 1973 he once again was terminable at will absent a **written agreement** to the contrary. For that reason, summary judgment by the district court in favor of Manville on the contract claims was proper. Based upon our resolution of this question it is unnecessary to address the effect of the subsequent publication of the employee manual in 1981.

{15} We still must address, however, Chavez' argument that, even if the 1965 employee agreement precluded oral modification of the employment relationship, he is entitled to relief under principles of promissory estoppel. We disagree. Promissory estoppel requires the party invoking the doctrine to have acted reasonably in justifiable reliance on the promise that was made. **See Eavenson v. Lewis Means Inc.,** 105 N.M. 161, 730 P.2d 464 (1986). We hold as a matter of law that it was unreasonable for Chavez to change his position in reliance on oral representations contrary to an express term of an employment contract which provided that their agreement could only be modified in writing. Were we to reach a different conclusion, we believe in effect we would be rewriting the terms of the parties' contract, and this we decline to do.

Retaliatory Discharge

{16} In New Mexico, until 1983, the longstanding rule was that an employee who did not have a contract of employment for a definite term could be discharged at will, with or without cause. **E.g., Gonzales v. United Southwest Nat'l Bank of Santa Fe,** 93 N.M. 522, 602 P.2d 619 (1979); **Bottijliso v. Hutchison Fruit Co.,** 96 N.M. 789, 635 P.2d 992 (Ct. App.1981). In 1983, the court of appeals recognized for the first time in New Mexico a limited public policy exception to the terminable at-will rule. **See Vigil v. Arzola,** 102 N.M. 682, 686-90, 699 P.2d 613, 617-21 (1983), **rev'd on other grounds,** 101 N.M. 687, 687 P.2d 1038 (1984). This Court has adhered to the new rule, which allows a discharged at-will employee to recover in tort when his discharge contravenes a clear mandate of public policy. **See Sanchez v. The New Mexican,** 106 N.M. 76, 738 P.2d 1321 (1987); **Boudar v. E G & G Inc.,** 105 N.M. 151, 730 P.2d 454 (1986). As the **Vigil** court put it:

> For an employee to recover under this new cause of action, he must demonstrate that he was discharged because he performed an act that public policy has authorized or would encourage, or because he refused to do something required of him by his employer that public policy would condemn.

Vigil, 102 N.M. at 689, 699 P.2d at 620. The **Vigil** court required that the causal connection between the employee's actions and the retaliatory discharge be shown by clear and convincing evidence. **Id. Vigil** also limited the employee's recovery to actual pecuniary losses rather than the full measure of compensatory damages, including emotional distress or psychological harm. **Id.**

{17} When the instant case was tried to a jury, the judge considered a motion for a directed verdict by Manville at the close of Chavez' case-in-chief. The trial judge granted the motion and ruled that the evidence presented was insufficient to support a jury determination that the discharge was caused by Chavez' protest of

the unauthorized use of his name in Manville's lobbying efforts. The trial judge concluded that Chavez had failed to meet the clear and convincing standard articulated in **Vigil**.

{18} Chavez argues on appeal that he presented evidence at trial sufficient to require a jury determination on the factual issue of a causal connection between his actions and Manville's alleged retaliatory discharge.[1] We recently have reviewed the standards for granting a directed verdict in **Melnick v. State Farm Mut. Auto. Ins. Co.,** 106 N.M. 726, 749 P.2d 1105 (1988). While recognizing that the trial court must consider all the evidence, insofar as properly admitted evidence is uncontroverted, any conflicts or contradictions in the evidence must be resolved in favor of the party resisting the motion. **Id.** at 728-29, 749 P.2d at 1107-08 (reaffirming the standard announced in **Skyhook Corp. v. Jasper,** 90 N.M. 143, 146, 560 P.2d 934, 937 (1977), applicable to both trial and appellate courts). We stated that:

> The principal consideration, however, is recognition that interference with the jury function must be minimized so that erosion of a litigant's right to a trial by jury is not effected. To remove a case from the jury, it should be clear that the nonmoving party has presented no true issues of fact which that party has the right to have decided by his peers. If the evidence fails to present or support an issue essential to the legal sufficiency of a legally recognized and enforceable claim, the right to a jury trial disappears. The basis for a directed verdict, therefore, is the absence of an issue for the jury to resolve.

Melnick, 106 N.M. at 729, 749 P.2d at 1108 (citations omitted). These basic principles are not altered because the burden of proof required for recovery is proof by clear and convincing evidence. In **Melnick,** we noted that "'even though, to the presiding judge, the possibility of recovery by the plaintiff may appear remote . . . the party aggrieved may not [by manner of a directed verdict] be deprived of a jury determination'." **Id.** (quoting **Sanchez v. Gomez,** 57 N.M. 383, 392, 259 P.2d 346, 351 (1953)). Thus, when a plaintiff has introduced evidence that either directly or by permissible inference provides adequate support for all of the essential elements of his claim, **it is for the jury to weigh that evidence against contradictory evidence introduced by the defense and determine if the plaintiff has met the burden of proof required in the case.** The possibility of recovery may appear remote to the trial judge in the normal case involving a "preponderance of the evidence" standard. It may appear even more remote when proof is required by "clear and convincing evidence." However, if the plaintiff has introduced a minimum quantum of evidence from which the jury could reasonably find in his favor under the applicable standard of proof, then the plaintiff is entitled to a jury determination.

{19} When the standard is clear and convincing evidence, the question for the trial judge is whether there is sufficient evidence introduced from which a reasonable juror could reach an "abiding conviction" as to the truth of the plaintiff's claim. **See Duke City Lumber Co. v. Terrel,** 88 N.M. 299, 540 P.2d 229 (1975); **In re Foster,** 102 N.M. 707, 699 P.2d 638 (Ct. App.), **cert. denied,** 102 N.M. 734, 700 P.2d 197 (1985); **see also In re Fletcher,** 94 N.M. 572, 613 P.2d 714 (Ct. App.), **cert. denied,** 94 N.M. 674, 615 P.2d 991 (1980).

{20} In the instant case, we believe that the evidence presented by Chavez met this threshold standard and, therefore, entry of a directed verdict against him was error.[2] The evidence is

[1] Whether a clear public policy of this state was shown that may have been violated by Manville's termination action was decided affirmatively by the trial court. **Compare Novosel v. Nationwide Ins. Co.,** 721 F.2d 894, 898-900 (3rd Cir. 1983) (concluding that the protection of a private employee's freedom of political expression is a clearly mandated public policy under Pennsylvania law). This issue, however, was not raised on appeal.

[2] Amicus cites us to cases in other jurisdictions that utilize a shifting burden of production for testing evidence of causal connection between improper motive and adverse employment action. **Burrus v. United Tel. Co. of Kansas,** 683 F.2d 339 (10th Cir. 1982), **cert. denied,** 459 U.S. 1071, 103 S. Ct.

entirely circumstantial, but we have long recognized that clear and convincing evidence may be circumstantial in nature. **See Ledbetter v. Webb,** 103 N.M. 597, 711 P.2d 874 (1985); **Sauter v. St. Michael's College,** 70 N.M. 380, 374 P.2d 134 (1962). Also, it is not to be expected in cases of this type that a plaintiff would necessarily discover documentary or other direct evidence in support of his claim.

{21} When we consider as true the following evidence presented by Chavez: that on April 4, the day after his refusal to participate in Manville's lobbying effort, Loretta Turner, said to be informed of the refusal, placed an unwarranted critical memo in Chavez' file concerning his unsafe use of certain equipment; that on the same day his immediate supervisor advised him that he had better be careful because "Loretta is after you"; that when Chavez requested an explanation from his immediate supervisor for the unauthorized use of his name in the lobbying effort, Manville, shortly thereafter, made a decision to terminate him; that after being "laid off" for a month he was advised that his job had been eliminated; that after his termination the number of production crews remained unchanged at two, and Chavez' supervisory position was taken by another employee who had for over five years been assigned to other duties; that Manville made no efforts to place Chavez, an employee of 20 years, in any other position, despite a company policy to the contrary, and instead listed him as being ineligible for future employment with Manville in any capacity, it was well within the province of the fact finder to reach an abiding conviction that the discharge was in response to his noncooperation with Manville's legislative agenda.

{22} To be sure, Manville was prepared to marshall considerable evidence suggesting that the corporation had legitimate business reasons for discharging Chavez: evidence that Chavez was prepared to rebut as best he could. However, it was not for the trial court, nor is it for us, to decide whether Chavez' version of the facts is correct, or whether Manville's is correct, or even whether the two are incompatible. These are questions for the trier of fact who alone in this case can weigh credibility and resolve contradictory testimony.

{23} Chavez and Amicus Curiae also urge us to re-examine **Vigil** insofar as it requires clear and convincing evidence to prove retaliatory discharge, and insofar as it limits the recovery to pecuniary losses.[3] **See Vigil,** 102 N.M. at 689-90, 699 P.2d at 620-21. **Vigil** placed these limitations on the newly recognized tort "[b]ecause the claim in most instances will assert serious misconduct" and "in order to prevent any chilling effect on the employer's freedom in hiring." **Id.**

{24} We believe the **Vigil** court may have been unduly cautious in its initial recognition of this new cause of action. This tort remains the single exception to the at-will doctrine in New Mexico. It is a strict alternative to recovery under a theory of contract. **See Silva v. Albuquerque Assembly & Distrib. Freeport Warehouse Corp.,** 106 N.M. 19, 738 P.2d 513 (1987). We believe requiring the at-will employee to show the discharge contravened a clear mandate of public policy, such as the right to freedom of political

491, 74 L. Ed. 2d 633 (1982); **Hubbard v. United Press Int'l,** 330 N.W.2d 428 (Minn. 1983). First, the plaintiff must prove a prima facie case of causal connection; the connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action. **Burrus,** 683 F.2d at 343. Second, if a prima facie case is established, then the burden of production shifts to the defendant to articulate a legitimate reason for the adverse action. **Id.** Third, if evidence of a legitimate reason is produced, the plaintiff may still prevail if he demonstrates that the articulated reason was a mere pretext. **Id.**

We believe it is unnecessary to consider the shifting of burdens here. The directed verdict was granted at the close of Chavez' case-in-chief and, as discussed in the body of this opinion, it was improper because Chavez had introduced sufficient evidence to make a prima facie showing that his discharge was a result of an improper motive.

[3] The trial court in this case excluded all evidence of psychological distress not only because **Vigil** did not allow recovery for emotional harm, but also because the court found the evidence irrelevant to the issue of whether Chavez had failed to properly mitigate his pecuniary damages by failing to secure further employment. Chavez sought to introduce the evidence to explain his inability to fully mitigate his damages.

expression, sufficiently limits the exception to at-will employment recognized by **Vigil**.

{25} With reference to the standard of proof adopted in **Vigil**, the requirement of clear and convincing proof in civil cases is the exception rather than the rule, an exception whose application we have not been disposed to enlarge. **See, e.g., United Nuclear Corp. v. Allendale Mut. Ins. Co.,** 103 N.M. 480, 485, 709 P.2d 649, 654 (1985). The tort of retaliatory discharge can be characterized as an intentional tort. **Cagle v. Burns and Roe, Inc.,** 106 Wash.2d 911, 726 P.2d 434 (1986) (en banc); **Scott v. Otis Elevator Co.,** 524 So.2d 642 (Fla. 1988). Generally, an injured party may recover for intentional torts under a preponderance of evidence standard. **See, e.g. Trujillo v. Puro,** 101 N.M. 408, 683 P.2d 963 (Ct. App.), **cert. denied,** 101 N.M. 362, 683 P.2d 44 (1984) (intentional infliction of emotional distress); **Anderson v. Dairyland Ins. Co.,** 97 N.M. 155, 637 P.2d 837 (1981) (interference with contractual relations). **But see Snell v. Cornehl,** 81 N.M. 248, 466 P.2d 94 (1970) (fraud); **Duke City Lumber Co. v. Terrel,** 88 N.M. 299, 540 P.2d 229 (1975) (economic duress). We believe the standard of proof required in retaliatory discharge cases should be consistent with the majority of other intentional torts—proof by a preponderance of the evidence.

{26} Similarly, we see no reason to exclude the recovery of damages for emotional distress in an action for retaliatory discharge. In actions based upon breach of an express or implied employment contract, we have refused such recovery. **Silva,** 106 N.M. at 20, 738 P.2d at 514. A cause of action for retaliatory discharge is, however, based upon principles of tort. **Vigil,** 102 N.M. at 688, 699 P.2d at 619. We have consistently allowed recovery for emotional harm in intentional tort cases, **e.g., Apodaca v. Miller,** 79 N.M. 160, 441 P.2d 200 (1968); **Trujillo v. Puro,** 101 N.M. 408, 683 P.2d 963 (Ct. App.), **cert. denied,** 101 N.M. 362, 683 P.2d 44 (1984). Rather than create an exception, we believe that the injured employee is entitled to be compensated fully, that is, to be compensated for all injuries proximately caused by the wrongful act. We overrule **Vigil** to the extent it limits recovery and requires a clear and convincing burden of proof.

{27} Moreover, we believe the evidence of emotional harm was relevant and material to show that Chavez' inability to secure further employment was not an unreasonable failure to mitigate his pecuniary damages. **See Vigil**, 102 N.M. at 689, 699 P.2d at 620 (recognizing a duty to seek other employment); **see also Rutledge v. Johnson,** 81 N.M. 217, 465 P.2d 274 (1970) ("person injured by tort of another is not entitled to damages for harm he could have avoided by the use of due care after the commission of the tort").

Conclusion

{28} Because Chavez' written employment agreement in 1965 precluded oral modification of his contractual relationship with Manville, we affirm the granting of summary judgment against him on the contract claims. Because sufficient evidence was presented to the court to support Chavez' claim of retaliatory discharge, we reverse the entry of a directed verdict on that claim and remand the case to the district court for a new trial solely on the issue of retaliatory discharge. On remand, the standard of proof shall be by a preponderance of the evidence, and the measure of compensatory damages shall include emotional distress attributable to the discharge.

{29} IT IS SO ORDERED.

WE CONCUR:

RICHARD E. RANSOM,
Justice

RUDY S. APODACA,
Justice, Court of Appeals