# SUPREME COURT
# STATE OF NEW MEXICO
# COMMEMORATIVE
# APPELLATE OPINIONS

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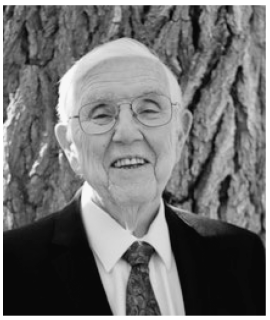
VOLUME 4

JUSTICE H. VERN PAYNE

1977–1983

## ABOUT THE AUTHOR



**Justice H. Vern Payne** was born on August 13, 1936, in Lordsburg, New Mexico. Justice Payne received his Bachelor's degree from Brigham Young University in 1961 and his law degree from the University of New Mexico in 1964. He was admitted to the New Mexico Bar in the same year.

Justice Payne was elected a judge at the Second Judicial District in Albuquerque, a position he served in from 1971 to 1976. He left that position when he was elected to the New Mexico Supreme Court, beginning his term on January 1, 1977. Justice Payne's father, U.S. District Court Judge H. Vearle Payne, administered his oath of office. Justice Payne was re-elected to the Supreme Court in 1980. In 1982, Justice Payne received a Master of Laws degree from the University of Virginia. On January 1, 1983, Justice Payne became Chief Justice and served in this position until December 31, 1983, when he retired. During his tenure on the court, Justice Payne held the Roberts seat.

After retiring from the Supreme Court, Justice Payne went into private practice and argued many cases in front of the New Mexico Court of Appeals and the New Mexico Supreme Court between 1984 and 1992. Representations and cases of note after his service on the Supreme Court include serving on the Las Conchas Fire trial team. Justice Payne has also represented the New Mexico Association of Counties on their Risk Management Committee. In addition, he has represented the State of New Mexico Risk Management Committee. Justice Payne has served as an advisor to New Mexico tribal courts, represented the Middle Rio Grande Conservancy District, and instructed judges with the National College of State Courts. Justice Payne's international work includes advising judicial systems in Argentina, Australia, and Venezuela. He also served as a consultant for USAID and the World Bank.

Justice Payne is currently Of Counsel at the firm Singleton Schreiber in municipal, county, and state matters in New Mexico. He is also in private practice with Payne & Jimenez, P.C., where he practices in the areas of real estate and estate planning.

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Justice H. Vern Payne

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-020**

**Filing Date: March 21, 1977**

**Docket No. 10,768**

**PATRICIA G. CHINO,**

**Plaintiff-Appellee,**

**v.**

**MARK R. CHINO,**

**Defendant-Appellant.**

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Kim J. Gottschalk
Alamogordo

for Defendant-Appellant.

Shipley, Durrett, Conway & Sandenaw
Wayne A. Jordan
Alamogordo

for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** The district court of Otero County granted an order for the removal of the appellant from a home owned by his mother, the appellee. Appellant contests the court's jurisdiction of his person and of the subject matter.

**{2}** The appellee, Patricia G. Chino, is an enrolled member of the Santa Clara Indian Pueblo but owns a home located within the Mescalero Apache Indian Reservation. The home had been acquired during her marriage to the appellant's father, a member of the Mescalero Apache Tribe. It was awarded to her in duplicate divorce proceedings in the Mescalero Apache Tribal Court and in the state district court in Otero County.

**{3}** The appellant, Mark Chino, is an enrolled member of the Mescalero Apache Tribe. After his parents' divorce he moved into his mother's vacant home against her wishes. His mother brought suit in the district court in Otero County for forcible entry and wrongful detainer of her home.

**{4}** The only issue with which we need concern ourselves on this appeal is whether state courts have jurisdiction over forcible entry and wrongful detainer actions involving fee patent lands lying within an Indian reservation.

**{5}** Both federal and state courts have wrestled with jurisdictional problems between states and Indian tribes. These efforts to bring order to conflicting philosophies are made more difficult by increased interaction between Indians and non-Indians and by changing Indian policies enacted by Congress. See Canby, Civil Jurisdiction and the Indian Reservation, 1973 Utah L. Rev. 206; Kane, Jurisdiction over Indians and Indian Reservations, 6 Ariz. L. Rev. 237 (1965).

**{6}** In 1832 Chief Justice Marshall first enunciated the principle that tribal jurisdiction was complete and that states were without jurisdiction unless some affirmative act of the federal government or the tribe operated to confer jurisdiction upon the state. **Worcester v. Georgia**, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832). Marshall's recognition of Indian tribal sovereignty was based upon the principle that tribal self-government is inherent. Using that criterion, the initial inquiry when questions of state authority over matters arising upon reservations were presented, was whether any affirmative act of the tribe or of the federal government allowed the state's intrusion into tribal affairs. The United States Supreme Court subsequently modified Justice Marshall's approach and allowed states to exercise their

authority in some cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. **United States v. Candelaria**, 271 U.S. 432, 46 S. Ct. 561, 70 L. Ed. 1023 (1925).

**{7}** In a civil suit against reservation Indians for goods sold them by a non-Indian operating a store on a reservation, the United States Supreme Court held that the state court lacked jurisdiction. **Williams v. Lee**, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). The court stated:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them (citations omitted).

This language has led to what has become known as the "infringement test." **State Securities, Inc. v. Anderson**, 84 N.M. 629, 506 P.2d 786 (1973), (dissenting opinion); Ransom and Gilstrap, Indians—Civil Jurisdiction in New Mexico—State, Federal and Tribal Courts, 1 N.M.L. Rev. 196 (1971). New Mexico has recognized and applied this test. **Sangre de Cristo Dev. Corp., Inc. v. City of Santa Fe**, 84 N.M. 343, 503 P.2d 323 (1972); **Montoya v. Bolack**, 70 N.M. 196, 372 P.2d 387 (1962).

**{8}** Shortly after **Williams v. Lee**, supra, the United States Supreme Court decided **Kake Village v. Egan**, 369 U.S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962), which involved an attempt by the State of Alaska to regulate the fishing practices of non-treaty, non-reservation Alaskan Indians. In allowing the state to exercise jurisdiction the Supreme Court had to deal with Section 4 of the Alaskan Statehood Act.[1] Under that Act, Alaska had disclaimed all right and title to, and the United States had retained absolute jurisdiction and control over any lands or other properties held by the Indians. A similar disclaimer can be found in Section 2 of the New Mexico Enabling Act.[2]

**{9}** Interpreting the disclaimer clause in **Kake Village,** supra, the United States Supreme Court came to the conclusion that absolute jurisdiction is not necessarily exclusive jurisdiction. This rationale was relied upon by this court in **State Securities, Inc. v. Anderson**, supra, to extend state jurisdiction, but recent decisions of the United States Supreme Court have narrowed its application. In **McClanahan v. Arizona State Tax Comm'n**, 411 U.S. 164, 176, 93 S. Ct. 1257, 1264, 36 L. Ed. 2d 129, 138 (1973), the court noted that the Indians in Kake Village were non-reservation Indians, and refused to extend the concept of concurrent federal and state jurisdiction to cases which arise in areas set aside by treaty for the exclusive use and control of Indians.

**{10}** More recent cases shift the focus of analysis to the relevant treaties and statutes governing the tribes, and whether or not they would pre-empt state jurisdiction. **Moe v. Confederated Salish and Kootenai Tribes**, 425 U.S. 1634, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976); **McClanahan v. Arizona State Tax Comm'n** supra; **Mescalero Apache Tribe v. Jones**, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). Although these cases concern the power of the state to tax Indians and Indian related activities, they indicate a reluctance to extend state jurisdiction.

**{11}** Applying the pre-emptive approach as used in **Moe, McClanahan** and **Mescalero**, supra, we must examine the treaties and statutes governing the Mescalero Indian tribe. The relevant treaty here is the Treaty of 1852 between the United States and the Apache Nation of Indians. 10 Stat. 979. Article I of that treaty states:

> Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws,

[1] Pub.L. No. 85-508 July 7, 1958, 72 Stat. 339, amended by Act of June 25, 1959, Pub.L. No. 86-70, § 2A, 73 Stat. 141.

[2] Repl. Vol. 1, 168, 170, N.M.S.A. 1953; 36 Stat. 557 Ch. 310.

> jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

In addition, the New Mexico Enabling Act, supra, disclaimed jurisdiction over the Indians. The State of New Mexico has declined to assume jurisdiction over the Indian reservations within the state by failing to take affirmative steps under Public Law 280,[3] enacted by Congress in 1953, or under more recent congressional acts.[4] Thus the treaties and statutes applicable in this case preclude the state from exercising jurisdiction over property lying within the reservation boundaries.

**{12}** In applying the "infringement test" the same conclusion is reached. In considering this test it is helpful to summarize certain criteria to determine whether or not the application of state law would infringe upon the self-government of the Indians. These are the following: (1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reservation, and (3) what is the nature of the interest to be protected.

**{13}** An action for forcible entry and unlawful detainer deals directly with the question of occupancy and ownership of land. When the land lies within a reservation, enforcement of the owner's rights to such property by the state court would infringe upon the governmental powers of the tribe, whether those owners are Indians or non-Indians. Civil jurisdiction of lands within the reservation remains with the tribe. **Kennerly v. District Court of Montana**, 400 U.S. 423, 91 S. Ct. 480, 27 L. Ed. 2d 507 (1971). The fact that the land upon which plaintiff's house was located is fee patent land, presumably granted under the Indian Allotment Act,[5] is immaterial. **Moe v. Confederated Salish and Kootenai Tribes**, supra; **Seymour v. Superintendent**, 368 U.S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962). Even though the Mescalero tribal law makes no provision for a wrongful entry and detainer action, the state may not assume jurisdiction without congressional or tribal authorization. Indian customs and traditions may dictate different approaches than that which the state may use. For a state to move into areas where Indian law and procedure have not achieved the degree of certainty of state law and procedure would deny Indians the opportunity of developing their own system.

**{14}** The decision of the trial court is reversed and the case is remanded with instructions to dismiss for lack of jurisdiction.

**{15} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**LAFEL E. OMAN,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

[3] 28 U.S.C. § 1360 (1970).
[4] 25 U.S.C. §§ 1321 and 1322 (1970).
[5] 25 U.S.C. §§ 331-34 (1970).

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-023**

**Filing Date: March 30, 1977**

**Docket Nos. 10,393, 11,004, 10,957, 10,966**

**STATE OF NEW MEXICO EX REL. PROPERTY APPRAISAL DEPARTMENT,**

**Plaintiff-Appellee,**

**v.**

**SIERRA LIFE INSURANCE COMPANY, PETER CHALAMIDAS AND ELIZABETH CHALAMIDAS, DEFENDANTS-APPELLANTS, AND WESTERN SKIES CORPORATION AND AMERICAN TITLE INSURANCE COMPANY,**

**Intervenors-Appellants.**

**Motion for Rehearing Denied April 15, 1977**

Standley, Quinn & Patterson
Fred M. Standley
Santa Fe

for Sierra Life.

Robert J. Maguire
Earl E. Hartley
Albuquerque

for Chalamidas.

Keleher & McLeod
John B. Tittmann
Charles A. Pharris
Albuquerque

for Intervenors.

Toney Anaya, Atty. Gen.
John C. Cook, Asst. Atty. Gen.
Property Tax Dept.
Santa Fe

for Plaintiff-Appellee.

Vance A. Mauney
Joe C. Diaz
Albuquerque

for County Assessor & Treasurer.

**OPINION**

**PAYNE, Justice.**

**{1}** This appeal involves the determination of the property tax liability of the appellants, Chalamidas and the Sierra Life Insurance Company, for the years 1971-1973.

**{2}** The property that is subject to taxation in this proceeding is a 17.684 acre tract of land known as the Western Skies property. In 1967, 5.56 acres of the property was erroneously assessed to a Mr. W. T. Kelly. Mr. Kelly never owned any interest in the property and informed both the County Treasurer and the County Assessor of the error. The Assessor corrected the error but the County Treasurer's office failed to correct its records and failed to show payment of the 1967 taxes. On August 16, 1971, the Treasurer executed and delivered to the State of New Mexico a tax deed for the erroneously assessed 5.56 acres. This error was compounded when the entire 17.684 acres of the Western Skies property appeared on the official 1971 tax roll of Bernalillo County as property of the State of New Mexico. On June 14th of the same year Sierra, the first of the appellants to own the property, sold it to Chalamidas.

**{3}** During 1972 and through June 16, 1973, the property continued to be carried on the official tax rolls as the property of the State of New Mexico. The property was not declared and no

taxes were assessed or paid. Early in 1973, a title search was conducted as part of a proposed sale of the property and the errors were discovered. These discrepancies were brought to the attention of the State Attorney General by the appellants, and on June 21, 1973, the State deeded the 5.56 acre tract to Chalamidas.

**{4}** The complaint in this action was filed on September 7, 1973, by the Property Appraisal Department which was represented by the Attorney General. It sought to collect any delinquent taxes and correct assessment errors pursuant to § 72-7-26[1] and § 72-7-27[2] N.M.S.A. 1953. A stipulated judgment was entered the same day ordering the appellants to pay delinquent taxes in the amount of $530.60. The judgment further decreed that the State of New Mexico had no interest in the subject property and that the ad valorem taxes on the property were current through June 21, 1973, except for the $530.60. There was no appeal from this judgment.

**{5}** Approximately fourteen months later the district court reopened the case on its own motion. The Property Appraisal Department (this time represented by a court-designated attorney and a deputy attorney general) was allowed to file a motion to vacate and set aside the judgment that had been previously entered. This motion was made under N.M.R. Civ.P. 60(b)(4) and (6),[3] asserting that the judgment was void and that justice required relief. The district court set the judgment aside on two grounds: (1) lack of indispensable parties (the County Assessor and the County Treasurer), and (2) lack of jurisdiction by the district court to cancel or forgive ad valorem taxes. On October 1, 1975 the court entered its order joining as parties plaintiff the Bernalillo County Assessor and the Bernalillo County Treasurer. Western Skies Corporation, which had purchased the property from Chalamidas in 1974, and the American Title Insurance Company, which had issued a title policy acting in reliance on the earlier judgment, were allowed to intervene. At the trial on the merits, Chalamidas and Sierra were found liable for payment of taxes in the amounts of $139,023.26 and $79,217.50 respectively. Appellants assert that the original decree entered on September 7, 1973, was valid and that the trial court erred in setting it aside.

**{6}** Under the statutes as they existed in 1973, the State Tax Commission (now known as the Property Appraisal Department) had authority to: (A) "* * * exercise general supervision over the administration of the assessment and tax laws of the state, over boards of equalization and all officers having power of levy and assessment, * * *." § 72-6-12(1), N.M.S.A. 1953[4], (B) "Advise and assist the attorney general and the district attorneys in the commencement and prosecution of actions and proceedings in respect to the assessment of property and the collection of taxes * * *.", § 72-6-12(3), N.M.S.A. 1953[5], (C) file a petition in the district court for the county in which erroneous assessments have been made, "* * * praying for a correction thereof * * *.", § 72-7-27, N.M.S.A. 1953, and (D) file petitions in district court seeking to void any double assessments or to make corrections where "* * * property has been erroneously described or assessed, * * *." § 72-7-28, N.M.S.A. 1953.[6]

**{7}** Nowhere do the statutes provide that the County Assessor or the County Treasurer must be made parties to effect the corrections of errors and assessments, or in assessing property that has been omitted from the tax rolls, or in collecting back taxes that might have accrued through errors or inadvertence in the assessment or taxing procedures. To the contrary, the State Tax Commission had full authority to take the necessary steps in representing the State of New Mexico as well as any county authorities that would be affected. The Assessor and the Treasurer were not, therefore, indispensable parties to the relief

[1] Ch. 154, § 1, [1957] N.M. Laws 240 (Repealed as of January 1, 1975).
[2] Ch. 6, § 2, [1929 (S. S.)] N.M. Laws 14 (Repealed as of January 1, 1975).
[3] § 21-1-1(60)(b)(4) and (6), N.M.S.A. 1953.
[4] Ch. 208, § 6, [1947] N.M. Laws 467 (Repealed as of January 1, 1975).
[5] Id.
[6] Ch. 125, § 2, [1935] N.M. Laws 307 (Repealed as of January 1, 1975).

sought in the original lawsuit brought by the Property Appraisal Department through the Attorney General of the State of New Mexico.

**{8}** The statutes of the State of New Mexico as they existed in 1973 gave the district court the power to: (A) "* * * order the correction of errors or inequalities in any assessment, or levy appearing upon any tax roll, * * *." § 72-7-26, N.M.S.A. 1953, (B) make orders canceling erroneous assessments and canceling any tax liens or tax sale certificates that may have been issued against property and "* * * authorize and empower the treasurer to reassess the property correctly * * *." § 72-7-28, N.M.S.A. 1953, and (C) "* * * order the state tax commission to reassess the property so erroneously assessed * * *." § 72-7-27, N.M.S.A. 1953.

**{9}** Taxes were not forgiven nor cancelled by the court in the original order entered in this matter. Because of the errors there had been no assessments made nor taxes charged to the property. The original decree of the district court was not to cancel or forgive taxes, but to correct assessment errors, order reassessment and to enforce the payment of delinquent taxes in the amount of $530.60.

**{10}** The evidentiary presentation at the rehearing, after the original order had been set aside, indicated that the subject property should have been assessed at a higher rate and should have been subject to a much higher ad valorem taxation than $530.60. In the original proceedings the Property Appraisal Department had been represented by the Attorney General, who entered into the negotiations with the property owners and Bernalillo County. The original judgment was stipulated and agreed to at that time. The Attorney General had the authority to compromise the claims and enter into the settlement in behalf of the Property Appraisal Department. Section 17-1-15, N.M.S.A. 1953, reads as follows:

> The attorney general * * * when any civil proceedings may be pending in * * * the district court, in which the state or any county may be a party, * * * shall have power to compromise or settle said suit or proceedings, or grant a release or enter satisfaction in whole or in part, of any claim or judgment in the name of the state or county, or dismiss the same, or take any other steps or proceedings therein which to him may appear proper and right; and all such civil suits and proceedings shall be entirely under the management and control of the said attorney general * * * and all compromises, releases and satisfactions heretofore made or entered into by said officers are hereby confirmed and ratified.

**{11}** This court has also held that when acting in accordance with his statutory responsibilities, the Attorney General's acts must be affirmed. **Lyle v. Luna**, 65 N.M. 429, 338 P.2d 1060 (1959), **State v. State Inv. Co., et al**., 30 N.M. 491, 239 P. 741 (1925). Absent a showing of fraud or misdealing, it is not for the courts to second-guess the Attorney General in the exercise of his authority in compromising this matter. **State v. State Inv. Co. et al**., supra. No fraud or misdealing was proved.

**{12}** The district court correctly held that a property owner has an affirmative duty to declare his property pursuant to § 72-2-1[7] and § 72-2-10.1[8], N.M.S.A., and that appellants had failed in that duty. The failure of the property owner to declare the property as required by statute, however, could have been raised by the Property Appraisal Department at the original proceeding. The Property Appraisal Department was a party and the named plaintiff in the original proceeding. Any omissions or failures of the Property Appraisal Department to assert claims in the original proceedings are not now grounds for setting aside the judgment. **Miller v. Miller**, 83 N.M. 230, 490 P.2d 672 (1971), **Ealy v. McGahen**, 37 N.M. 246, 21 P.2d 84 (1933).

[7] Ch. 107, § 2, [1933] N.M. Laws 205 (Repealed as of January 1, 1975).

[8] Ch. 328, § 1, [1959] N.M. Laws 1012 (Repealed as of January 1, 1975).

**{13}** After the original proceeding the appellees delayed in trying to remedy or rectify the inconsistencies they now claim in that proceeding. A delay in excess of sixteen months, from the time the original decree was entered until the motion to vacate was filed, is a delay beyond the time that is reasonable for setting aside the judgment in this case.

**{14}** We reverse the decision of the trial court and remand the case with instructions to reinstate the original judgment entered herein.

**{15}** **IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**RICHARD B. TRAUB,**
**District Judge, sitting by designation**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-024**

**Filing Date: March 31, 1977**

**Docket No. 11,215**

**THOMAS W. KRUPIAK AND MARIA ESTELLA KRUPIAK, HIS WIFE, INDIVIDUALLY, AND KRUPIAK CONSTRUCTION & DEVELOPMENT CO., INC.,**

**Petitioners,**

**v.**

**GEORGE A. PAYTON AND JOAN PAYTON, HIS WIFE, PERRY C. CHASE AND PATRICIA A. CHASE, HIS WIFE, DANIEL ARCHULETA AND MARTHA ARCHULETA, HIS WIFE, FRANK E. LARKINS, A SINGLE MAN, GERALD EMERSON AND REYNA EMERSON, HIS WIFE,**

**Respondents.**

Edward J. Apodaca
Albuquerque

for Petitioners.

Robert C. Resta
Rodey, Dickason, Sloan, Akin & Robb
John P. Salazar
Albuquerque

Amicus Curiae Albuquerque Home Builders Assn.

**OPINION**

**PAYNE, Justice.**

**{1}** In February 1972, the defendant Krupiak, a home builder, purchased certain lots fronting a paved access road and bordered on the back by an unpaved street. He was given a discount from the purchase price to offset any special assessments or other charges which "have been or may be levied against said lots." Homes were constructed on these lots which were sold to the plaintiffs through a real estate agency. These sales occurred in 1973. In 1975 the City of Albuquerque levied a special assessment against the lots for the purpose of improving and paving San Antonio Drive, the street which abutted the lots to the rear. The plaintiffs filed suit alleging that Krupiak, with the intent to deceive them, had violated a duty to disclose the possibility of the special assessment. The district court granted summary judgment in favor of Krupiak. That decision was reversed by the Court of Appeals. Certiorari was granted and we now uphold the decision of the district court.

**{2}** Even when given the strongest possible weight, the plaintiff's petition and affidavits do not show the existence of any genuine issue of fact. The most that can be supported by the record is that Krupiak knew of the "possibility" of an assessment at the time plaintiffs purchased their homes.

**{3}** The plaintiff's petition was sufficient to raise the issue of fraud. **Steadman v. Turner**, 84 N.M. 738, 507 P.2d 799 (Ct. App.1973). Actionable fraud is found if a party to a transaction knows of material facts, has a duty to disclose, and remains silent. A duty to disclose may arise if there is knowledge that the other party to a contemplated transaction is acting under a mistaken belief. A duty to disclose may also arise if one has superior knowledge that is not within the reach of the other party or could not have been discovered by the exercise of reasonable diligence. **Everett v. Gilliland**, 47 N.M. 269, 141 P.2d 326 (1943); **H.B. Cartwright v. U.S.B. & T. Co.,** 23 N.M. 82, 131, 167 P. 436, 453 (1917); W. Prosser, Law of Torts, § 106, at 695-696 (4th ed. 1971).

**{4}** There is no evidence that the defendant had any direct contact or acquaintance with any of

the plaintiffs prior to the lawsuit. There was no fiduciary or confidential relationship existing between the parties. There was no reliance upon any affirmative statements, words or acts by the defendant distracting the plaintiffs from making their own independent investigation as to the status of the property.

**{5}** The record does not reflect that the builder had superior knowledge of any possible future special assessment. He knew that there was an unpaved street to the rear of the lots, but the homeowners also knew the status of the unpaved street. The homeowners had visually inspected their lots and had or could have obtained all the knowledge that the builder had pertaining to a possible assessment. The builder had no duty to disclose his discount transaction nor to pass along the benefit of that transaction to plaintiffs when the discount was based upon the mere "possibility" of a special assessment. We hold that a builder cannot be held to a burden of disclosing unknown contingencies.

**{6}** The special assessments made by the city in this case were presumably based upon benefits which would accrue to the abutting property under §§ 14-32-1 and 14-32-4, N.M.S.A. 1953. These benefits had not accrued at the time the plaintiffs purchased their homes. If plaintiffs contend they are not benefited to the extent of any assessments made, their remedy would have been against the city. Section 14-32-6, N.M.S.A. 1953.

**{7}** The decision of the Court of Appeals is reversed and the matter is remanded for action consistent with this opinion.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**LAFEL E. OMAN,**
**Chief Justice**

**JOHN B. MCMANUS,**
**Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-026**

**Filing Date: April 6, 1977**

**Docket No. 11,090**

**MARGARET PLATT,**

**Plaintiff-Appellant,**

**v.**

**ANSELMO MARTINEZ,**

**Defendant-Appellee.**

**Motion for Rehearing Denied May 3, 1977**

Burton F. Broxterman
Albuquerque

for Plaintiff-Appellant.

N. Tito Quintana
Albuquerque

for Defendant-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This is a boundary dispute. Plaintiff, Margaret Platt, brought suit alleging that the defendant, Anselmo Martinez, had encroached upon her lands by building fences that incorporated portions of her property within his. Martinez counterclaimed asking that title to the disputed land be quieted in him on the alternative grounds of either adverse possession or acquiescence. The trial court found for Martinez. We reverse.

**{2}** In 1961 the plaintiff and her husband, since deceased, purchased a tract of land described as apportionate parts of a particular section. The defendant, Martinez, also held lands in the same section. His lands abut the Platt property and were described as apportionate parts of the same section. The legal descriptions of the two tracts of land contained in the respective deeds do not conflict and create no over-lap. Martinez had purchased his land in 1955 and had been familiar with it from his boyhood. In 1964 the defendant procured a survey in which the surveyor followed some stone markers and some old fence posts in setting the boundaries. These corresponded to Martinez' understanding of the boundary and to the location of old fences of which only vestiges remained. Based upon that survey, Martinez built a new fence, which incorporates a portion of the Platt property within his.

**{3}** The terrain where the fence was built, as viewed from the plaintiff's side, is brushy and somewhat uneven. If fact, the fence cannot be seen from plaintiff's side without a specific effort to do so and without "crawling through the brush." On the defendant's side there is a meadow and the new fence included all of the meadow within the defendant's property. The fence is easily seen from his side. After the fence line was erected, but before its discovery by plaintiff, she went onto the property at various times but made no specific effort to walk the boundaries or to explore her property. She was never aware that a fence had been built that encroached upon her land.

**{4}** The two theories upon which defendant claims title to the disputed land are adverse possession and acquiescence. The requirements of adverse possession are established in New Mexico by statute. Section 23-1-22, N.M.S.A. 1953 (Supp.1975). We do not have to consider the application of adverse possession in this case beyond stating that there was no evidence of the payment of taxes on the disputed tract by the defendant. This is a specific requirement of our statute and the lack of that evidence defeats defendant's claim for title whether or not any other elements of adverse possession are present.

Defendant paid taxes only on the property covered by his deed.

**{5}** The theory of acquiescence upon which Martinez also relies has been treated in numerous New Mexico cases. **Sachs v. Board of Trustees of the Town of Cebolleta Land Grant**, 89 N.M. 712, 557 P.2d 209 (1976); **McBride v. Allison**, 78 N.M. 84, 428 P.2d 623 (1967); **Thomas v. Pigman**, 77 N.M. 521, 424 P.2d 799 (1967); **Woodburn v. Grimes**, 58 N.M. 717, 275 P.2d 850 (1954); and **Retherford v. Daniell**, 88 N.M. 214, 539 P.2d 234 (Ct. App.1975). These cases have firmly recognized acquiescence as a principle for settling boundary disputes in New Mexico. As stated in the **Sachs** case:

> . . . It is well established in the law of this State and generally that if adjoining landowners occupy their respective tracts up to a clear and certain line (such as a fence), which they mutually recognize and accept as the dividing line between their properties for a long period of time, neither may thereafter claim that the boundary thus recognized is not the true boundary.

89 N.M. at 717, 557 P.2d at 214.

**{6}** There is no question in this case that the defendant occupied the land up to the fence line and that he recognized the fence line as the boundary. However, there are questions as to whether there was a mutuality of recognition of the fence line, and the degree of knowledge the plaintiff must have to support acquiescence. The trial court in its findings of fact stated:

> 12. Plaintiff knew, or should have known, of the fence line after she purchased the property in 1961 and also of the new fence constructed by the defendant in 1964.

It is undisputed that the fence was in existence for at least ten years. Nothing in the record, however, supports that portion of the finding that plaintiff "knew" of the fence line. The finding is incorrect to that extent. The issue to be determined is whether acquiescence can be found where a party does not know of the existence of the fence or the boundary but "should have known."

**{7}** In the **Sachs** decision this court referred to the "plain meaning of the words" in interpreting acquiescence, and stated that:

> . . . According to Webster's New International Dictionary of the English Language (2d ed. 1960), to "acquiesce" in something is to accept or comply tacitly or passively, without implying assent or agreement; "acquiescence" is distinguished from avowed consent on the one hand, and, on the other, from opposition or open discontent. . . .

89 N.M. at 719, 557 P.2d at 216.

This definition implies that a party must be aware of a condition to acquiesce in that condition. The **Sachs** case also quoted **Lane v. Walker,** 29 Utah 2d 119, 120, 505 P.2d 1199, 1200 (1973) as follows:

> Plaintiffs urge that there is no evidence to indulge a fiction that there was a fence mutually 'intended' to be a boundary. To this we say that the test to establish the boundary by 'acquiescence' necessarily need not be based on mutual 'intent.' 'Intent' is not synonymous with 'acquiescence' in these cases. 'Acquiescence' is more nearly synonymous with 'indolence,' or 'consent by silence,'—or a knowledge that a fence or other monuments appears to be a boundary,—but that no one did anything about it for 48 years. No one in this case did much except by invective, across the very fence that made irritants out of erstwhile neighbors, for 48 years,—until suddenly the appreciation of property values transmuted yesteryear's minimal values into objects d'art of inestimable value in the real estate market.

Again, even though the court specifically rejects the necessity of "mutual intent", it does require some knowledge as a base from which "consent

by silence" will spring. The knowledge required is not that of an ultimate mental conclusion, i.e. that a fence is or is not on the true property line, however, there must at least be a knowledge that the fence is in existence.

**{8}** Each case must be viewed upon its own facts. In this instance, even though the plaintiff had been on the property numerous times gathering wood, picnicking and enjoying the property, she was never aware of the existence of the fence. The particular terrain and the heavy brush involved obscured her view of the fenced boundary. There are many situations where a property owner could unknowingly be subject to the loss of lands by neighbors mistakenly relocating fences and thus expanding their holdings. This could occur because of absentee ownership, incapacity or even, as in this case, terrain which precludes reasonable ascertainment of fences and boundary lines. We cannot extend the doctrine of acquiescence to that extent in New Mexico.

**{9}** We therefore reverse and remand the cause to the district court for further proceedings necessary to conform to this decision.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-034**

**Filing Date: April 25, 1977**

**Docket No. 11,288**

**LEONARD OLGUIN,**

**Petitioner,**

**v.**

**STATE OF NEW MEXICO,**

**Respondent.**

Jan A. Hartke, Chief Public Defender
Reginald J. Storment, Appellate Defender
Santa Fe

for Petitioner.

Toney Anaya, Atty. Gen.
Santa Fe

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** The defendant Olguin was convicted of the crimes of battery and possession of a deadly weapon by a prisoner. Notice of appeal from the judgment was timely filed, but a docketing statement, which is required by N.M.R. Crim. App. 205(a)[1], was not timely filed. Defendant's appointed counsel was called several times by the clerk of the Court of Appeals in an attempt to correct the problem. These attempts resulted in statements by counsel that he was "incredibly busy" and would send a motion to extend the time for filing the docketing statement. This was never done. Counsel finally tendered a docketing statement on the day set for the hearing of an order to show cause why the appeal should not be dismissed pursuant to N.M.R. Crim. App. 404(a)[2]. The Court of Appeals heard the argument of counsel as to why he had not complied with the rules in behalf of his client. It concluded that no sanctions should be imposed upon the attorney, but refused to accept the docketing statement for late filing and dismissed the appeal pursuant to N.M.R. Crim. App. 102[3]. Certiorari was granted to review the dismissal.

**{2}** The defendant Olguin seeks relief by relying upon the New Mexico Constitution, art. VI, § 2. That section provides "that an aggrieved party shall have an absolute right to one appeal." This does not mean that a party can disregard time limits provided for in the rules of appellate procedure. The right of appeal is provided for in the Constitution while the means for exercising that right are properly controlled by rules of procedure. **State v. Garlick**, 80 N.M. 352, 456 P.2d 185 (1969). The defendant's constitutional right to appeal was not abridged by the dismissal for failure to follow procedural rules.

**{3}** There are adequate grounds to support defendant's petition for relief within the rules of procedure. Inherent within Rule 102 is the necessary latitude and flexibility to allow stern enforcement without depriving a party of his appeal. This rule provides as follows:

> For failure to comply with these rules or any order of court, the appellate court may, on motion or on its own initiative, take such action as it deems appropriate, including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of costs or, **in extreme cases**, dismissal or affirmance. (Emphasis added.)

[1] Section 41-23A-205(a), N.M.S.A. 1953 (Supp. 1975).

[2] Section 41-23A-404(a), N.M.S.A. 1953 (Supp.1975).

[3] Section 41-23A-102, N.M.S.A. 1953 (Supp. 1975).

New Mexico Criminal Appellate Rule 404(a), supra, provides as follows:

> When an appellant fails to comply with these rules, the appellate court shall notify the appellant that upon the expiration of ten [10] days from the date thereof the appeal will be dismissed unless prior to that date appellant shows cause why the appeal should not be dismissed.

Rules 102 and 404 are enforcement rules designed to give the courts sufficient power to insure that appellants comply with other procedural rules. Previous opinions of this court have recognized that appeals could be dismissed for failure to follow appellate procedures that are outlined. **Vigil v. State**, 89 N.M. 601, 555 P.2d 901 (1976); **State v. Garlick**, supra; **Jaritas Live Stock Co. v. Spriggs**, 42 N.M. 14, 74 P.2d 722 (1937).

**{4}** Procedural rules of courts must be carefully followed to provide for orderly disposition of cases. However, this court has consistently followed a policy of construing rules liberally, "to the end that causes on appeal may be determined on the merits where it can be done without impeding or confusing administration or perpetrating injustice." **Jaritas Live Stock Co. v. Spriggs**, supra at 16, 74 P.2d at 722.

**{5}** Rule 102 provides that only in extreme cases is the appeal to be dismissed. In **Vigil v. State**, supra, we declined to define the parameters of what constitutes an "extreme case." This must be determined on a case by case basis and no party or counsel can assume that procedural rules can be disregarded without the possibility that his case will be dismissed. The court should consider other sanctions against counsel or a party prior to applying the extreme sanction of dismissal.

**{6}** In the case at bar, the appellate court did consider sanctions against counsel but did not feel compelled to impose them. It is inconsistent to impose the most severe sanction of dismissal against the defendant while failing to impose any sanction against heedless counsel upon whom the defendant relied.

**{7}** We therefore reverse the dismissal of the appeal and remand the matter to the Court of Appeals with instructions to allow the filing of a docketing statement and to reinstate the matter for its determination upon the merits.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN B. McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-039**

**Filing Date: May 23, 1977**

**Docket No. 11,094**

**MIMBRES VALLEY IRRIGATION CO.,**

**Plaintiff-Appellee,**

**v.**

**TONY SALOPEK ET AL.,**

**Defendants-Appellees,**

**v.**

**DEPARTMENT OF AGRICULTURE FOREST SERVICE,**

**Defendant-Appellant,**

**STATE OF NEW MEXICO,**

**Plaintiff-in-Intervention-Appellee.**

Victor Ortega, U.S. Atty.
James B. Grant, Asst. U.S. Atty.
Albuquerque

Peter R. Steenland, Jr.
Land & Natural Resources Div., Dept. of Justice
Washington, D.C.

for Defendant-Appellant.

Toney Anaya, Atty. Gen.
Paul L. Bloom
Richard A. Simms, Asst. Attys. Gen.
Santa Fe

for State of New Mexico, Intervenor.

J. Wayne Woodbury
Ben Shantz
Silver City

for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** This suit was filed in 1966 as a private action to enjoin alleged illegal diversions of the Rio Mimbres which flows through the Gila National Forest in southwest New Mexico. In 1970 the State of New Mexico, on the relation of the State Engineer and pursuant to § 75-4-4, N.M.S.A. 1953 (Repl. Vol. 11, Pt. 2, 1968), filed a complaint-in-intervention seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. The complaint-in-intervention named as defendants all parties claiming any interest in and use of the waters of the Rio Mimbres. The State's motion to intervene was granted and the suit proceeded as a general statutory adjudication of all the water rights on the stream system.

**{2}** Among the named defendants in the complaint-in-intervention was the United States of America, joined pursuant to 43 U.S.C. § 666 (1970). The United States claimed reserved water rights for minimum instream flows and for recreational purposes within the Gila National Forest. The matter was referred by the trial court to a special master to determine the rights of the parties. The master entered findings of fact and conclusions of law which supported the United States' claim to 6.0 cubic feet per second of water in the Gila National Forest for minimum instream flows and recreational purposes. The State of New Mexico, pursuant to N.M.R. Civ.P. 53(e)(2)[1], objected to the master's report. The district court reversed, holding that the United States had not reserved water rights in the Gila National Forest for its claimed purposes. We affirm the decision of the district court.

**{3}** The "reservation" doctrine, as it applies to federal enclaves, was initially recognized in

[1] Section 21-1-1(53)(e)(2), N.M.S.A. 1953 (Repl. Vol. 4, 1970).

**Winters, v. United States**, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908). The issue decided therein was whether the United States, at the time of the creation of the Fort Belknap Indian Reservation in Montana, had impliedly reserved a water right for future use of the Indians upon those lands. The United States Supreme Court upheld the power of the federal government to reserve the waters and exempt them for appropriation under state laws.

**{4}** The exact meaning of the principle articulated in the **Winters** case has been subject to inconclusive debate through the years. It was further clarified, however, in **Arizona v. California**, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963), a case that also involved waters flowing through the Gila National Forest. The United States Supreme Court reaffirmed the viability of the **Winters** doctrine, and for the first time extended the reservation doctrine to other non-Indian federal enclaves. Although it refused to discuss the non-Indian related claims, the Court said:

> The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.
>
> 373 U.S. at 601, 83 S. Ct. at 1498.

More recently the Supreme Court has given additional guidance on the application of the principle of reserved water rights. In **Cappaert v. United States**, 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976), the Court stated:

> [W]hen the Federal Government reserves land, by implication it reserves the water rights sufficient to accomplish the purposes of the reservation.
>
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created . . . (Citations omitted.)
>
> 426 U.S. at 139, 96 S. Ct. at 2070.
>
> The implied-reservation-of-water doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. . . . (Citation omitted.)
>
> Id. at 141, 96 S. Ct. at 2071.

The **Cappaert** decision restricts the application of the reservation doctrine to the limited purposes for which the reservation was created.

**{5}** The final decree entered in **Arizona v. California**[2] concludes that the United States had reserved water rights in "quantities reasonably necessary to fulfill the purposes of the Gila National Forest." Applying the **Cappaert** Rule, we must now determine for what purpose the Gila National Forest was originally established and whether those purposes necessarily require an implied reservation of water.

**{6}** The Gila National Forest was established by separate presidential proclamations dated March 2, 1899, July 2, 1905, February 6, 1907, June 18, 1908 and May 9, 1910. In subsequent years portions of other national forests were transferred to the Gila National Forest so that it now comprises about 2,787,093 acres of land

[2] 376 U.S. 340, 350, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964). Decree carrying into effect the United States Supreme Court's prior opinion of June 3, 1963, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542.

in southwestern New Mexico. Approximately 92,622 acres of privately owned land is encompassed by the forest. The legislative act under which the establishment of national forests was authorized is the Creative Act of March 3, 1891. 16 U.S.C. § 471 (1970). It reads as follows:

> The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof.

The statute did not set forth the purposes for which the forests were withdrawn nor did it set up the means of administration of the forests. Further congressional action to remedy this situation resulted in the passage of the Organic Act of 1897. 16 U.S.C. § 475 (1970); see Bassman, "The 1897 Organic Act: A Historical Perspective," 7 Nat. Res. Law. 503 (1974). The pertinent provision of that Act reads as follows:

> § 475. **Purposes For Which National Forests May Be Established And Administered**.
>
> . . . No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Act limits the purposes for which national forests are authorized to: 1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.

**{7}** The United States asserts that additional recreational purposes were envisioned when the act was passed. It likewise argues that minimum instream flows are necessary for aesthetic, environmental, recreational and "fish" purposes. We do not disagree with the objective of preserving the aesthetic and environmentally pleasing qualities of the forests and we appreciate the availability of the forests for recreational purposes. We cannot agree, however, that these objectives come within the original intent of Congress when creating national forests. The United States would equate these other "uses" of the forest as part of the original "purposes" for which it was established, and argues that the "uses" and "purposes" of the forest are one and the same. Congress has provided that the Secretary of Agriculture is authorized "to regulate . . . occupancy and use and to preserve the forests thereon from destruction . . . 16 U.S.C. § 551 (1970). We are urged to recognize this section of the Code as support for the proposition that the words "occupancy and use" contemplate more than the limited purposes set out in the Organic Act. We cannot take such liberty with the expressions of Congress. There is little doubt that if secondary uses such as grazing, mining or recreation conflict with the primary purposes of assuring watershed protection or timber preservation, those secondary uses would not be permitted to continue. **United States v. Grimaud**, 220 U.S. 506, 31 S. Ct. 480, 55 L. Ed. 563 (1911); **Light v. United States**, 220 U.S. 523, 31 S. Ct. 485, 55 L. Ed. 570 (1911); **United States v. Hunt**, 19 F.2d 634 (N.D. Ariz.1927); **Honchok v. Hardin**, 326 F. Supp. 988 (D.Md.1971). The fact that Congress has opened the national forests for the many diversified uses which are now allowed does not expand the purposes for which they were originally created.

**{8}** If there remains any question concerning the applicability of the "reservation" doctrine for the uses now claimed by the United States, it is dispelled by the Multiple-Use Sustained-Yield Act of 1960. 16 U.S.C. § 528 (1970). This act includes the following proviso:

> It is the policy of the Congress that national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title.

The United States argues that this enactment by Congress clarifies and is further support for its position that these additional purposes have always been considered as integral parts of the whole purpose of the Creative and Organic Acts. A similar argument was made in **West Virginia Div. of Izaak Walton L. of Am., Inc. v. Butz**, 522 F.2d 945 (4th Cir. 1975), wherein the Court stated:

> In effect, appellants appear to argue that the Multiple-Use Act has by implication repealed the restrictive provisions of the Organic Act. In our opinion, however, this argument falls short of the mark on several grounds. First of all, it is at odds with the well established rule that repeal of a statute by implication is not favored and, as recently stated by the Court in **Morton v. Mancari**, 417 U.S. 535, 550, 94 S. Ct. 2474, 2482, 41 L. Ed. 2d 290 (1974):
>
> "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."

In addition to the foregoing principle, Section 1 of the Multiple-Use Act specifically recognizes the continued viability of the Organic Act in the following language:

> "The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C. § 475)."

Appellants' argument in this respect also elides the fact that in and out of Congress there has not been unanimous agreement with respect to the interpretation and application of the Multiple-Use Act. Over a decade after its passage controversy over its meaning and intent, as well as the management practices of the Forest Service, . . . has continued unabated.

. . . . .

> [F]rom our review of the material at hand we are satisfied that in enacting this legislation Congress did not intent [sic] to jettison or repeal the Organic Act of 1897. We are equally satisfied that this act did not constitute a ratification of the relatively new policy of the Forest Service . . .
>
> 522 F.2d at 953-54.

The Multiple-Use Sustained-Yield Act can just as easily be interpreted to exclude the additional purposes as part of the original intent of the Organic Act. The fact that Congress declared them to be "supplemental to" the purposes for which the national forests were established clearly indicates that Congress did not envision them as having been included in the original Act. The Multiple-Use Sustained-Yield Act of 1960 does not have a retroactive effect nor can it broaden the purposes for which the Gila National Forest was established under the Organic Act of 1897.

**{9}** We thus conclude that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flows were not contemplated.

**{10}** We are aware of the advancing environmental and aesthetic concerns related to the use of our natural resources. Had the congressional enactments and their interpretations by the Supreme Court given us leeway so as to interpret more broadly the intent of the Creative and Organic Acts we may have been persuaded to

decide differently. However, the intent of Congress is clear and we must follow it.

**{11}** An additional matter raised in this appeal is whether the water rights used by permittees of the United States Forest Service should be adjudicated to the permittee under the state law of prior appropriation or outright to the United States. The prior discussion in this opinion reveals that the United State does not have reserved water rights in the forests for these permitted uses. It necessarily follows that water rights must be perfected and held by the permittee in accordance with state law.

**{12}** We affirm the trial court.

**{13}** **IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-041**

**Filing Date: May 26, 1977**

**Docket No. 11,143**

**STATE OF NEW MEXICO EX REL. STATE HIGHWAY DEPARTMENT OF NEW MEXICO,**

**Petitioner-Appellee,**

**v.**

**DUDLEY C. SHAW ET AL., EXXON CORPORATION AND TEXACO, INC.,**

**Defendants-Appellants.**

**As Amended on Denial of Rehearing June 30, 1977**

Hinkle, Bondurant, Cox & Eaton
Harold Hensley, Jr.
Paul M. Bohannon
Roswell

for Exxon.

Rowley & Bowen
Stephen W. Bowen
John W. Anderson
Tucumcari

for Texaco.

Toney Anaya, Atty. Gen.
V. Henry Rothschild, III, Asst. Atty. Gen.
Santa Fe

for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** In 1962 it became a matter of general knowledge that a by-pass, which would be a part of Interstate Highway 40, would be built in the Tucumcari, New Mexico area. Based upon this information, Texaco and Exxon, in separate transactions, acquired "floating options" to purchase tracts of property in the vicinity of the highway. The floating options gave the defendants the right to select a specific location within a general tract of land at such time as the exact location of the highway and its right-of-way became fixed by the State Highway Department. By 1969 the Highway Department began to acquire the property that would be necessary to construct the by-pass. During the year 1972 and continuing through April 24, 1973, the defendants maintained continuous contact with the Highway Department so that they would know when to exercise their options. Throughout 1972 and 1973 there were numerous conversations between representatives of Texaco and Exxon and officials in both the Design and Right-of-way Divisions of the Highway Department. The defendants were told that there would be no further taking of land by the State. In December, 1972, Texaco applied for and was granted a driveway permit based upon the *{*486}* right-of-way maps as they then existed. On April 24, 1973, a representative of Exxon wrote the design engineer of the Highway Department desiring to know whether there would be any further taking by the State from the property Exxon wanted to purchase. The State replied by letter stating that it had acquired all the necessary property. As a result of the verbal assurances, the granting of the driveway permit, the letter and the right-of-way maps, defendants exercised their options in July of 1973 paying $85,000.00 each for their respective tracts of land. On May 6, 1974, the Highway Department issued a "final" right-of-way map which generally was in agreement with prior maps that had been used by the department. However, in July, 1974, the Highway Department amended its right-of-way map to show an additional thirteen-foot right-of-way taking from the front of the Exxon property. In December of 1974, another amendment was made taking a thirteen-foot right-of-way from the front of

Texaco's property. Finally in March, 1975, another taking appeared on the right-of-way map showing for the first time a fifty-foot by one hundred seventeen-foot (50′ × 117′) drainage easement that bisects the Exxon property.

**{2}** Condemnation proceedings were brought by the State against the defendants. Prior to trial, the parties stipulated that the district court would determine whether the evidence of value of the Texaco and Exxon tracts admissible at the trial should be the enhanced value due to the proximity of the freeway or the values of the land prior to enhancement. The trial court ruled that evidence of enhancement would not be admissible. We granted this interlocutory appeal and reverse the trial court.

**{3}** The general rule of whether enhancement may be considered as an element of value is explained in 4 J. Sackman, Nichols' Law of Eminent Domain § 12.3151, at 12-293 (rev. 3d ed. 1976):

> The general rule is that any enhancement in value which is brought about in anticipation and by reason of a proposed improvement is to be excluded in determining the market value of such land,
>
> . . .

In **United States v. Miller**, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336 (1943), the Supreme Court of the United States stated:

> If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement. 317 U.S. at 376-377, 63 S. Ct. at 281.

The Court then stated an exception which has become the controlling rule of law:

> The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating a probable increase in value due to the Government's activities. Id. at 377, 63 S. Ct. at 281.

This rule has been followed by federal and state courts. **United States v. 2,353.28 Acres of Land, etc., State of Fla**., 414 F.2d 965 (5th Cir. 1969); **United States v. 172.80 Acres of Land, etc.**, 350 F.2d 957 (3rd Cir. 1965); **Merced Irrigation District v. Woolstenhulme**, *{*487}* 4 Cal.3d 478, 93 Cal. Rptr. 833, 483 P.2d 1 (1971); **State, Department of Highways v. Colby**, 321 So.2d 878 (La. App. 1975).

**{4}** The trial court determined that the lands being condemned were within the scope of the highway project at the time the State was first committed to it. The record reflects that the Department's design maps differed from its right-of-way maps[1] as to what lands would ultimately

[1] A right-of-way map is prepared by the Right-of-Way Division and shows the property that will have to be acquired by the State in order to construct the highway. This map is

have to be acquired. The Department admitted to a mistake when it failed to transfer the extra right-of-way takings from its design specification plan to the right-of-way map. It is apparent from the record that the additional thirteen-foot takings that affect both Texaco and Exxon were contemplated in the original design specifications that were drawn up for the Department. The record also shows that the drainage easement that affected Exxon's property was on the 1970 construction plans. Texaco and Exxon take the position that since these additional takings were not added to the right-of-way maps until after the "final" map of May 6, 1974, they were not within the original scope of the highway project. We do not agree. The scope of a project is determined by a showing of what the State Highway Department intended. Although intent is subjective, the scope of a project as it related to the land necessary to complete the project can be determined by examining the objective acts of the department. The design and construction plans, although subject to possible diverse interpretation, are the primary tools in determining whether the land to be condemned was probably within the scope of the project involved. These plans support the finding of the trial court.

**{5}** The defendants further assert that the principle of equitable estoppel precludes the State from denying their recovery of the enhanced value of their land. The events upon which the defendants base this claim are not in dispute. Exxon and Texaco executed options to purchase their property in July of 1973. They did this after considerable effort to determine the extent of the State's taking. They received repeated assurances from the Highway Department upon which they relied. The additional takings of which defendants complain were subsequently announced in 1974 and 1975.

**{6}** In **State ex rel. State Highway Department v. Yurcic**, 85 N.M. 220, 511 P.2d 546 (1973), we discussed the application of the principle of estoppel as it would be applied against the State Highway Department. We said:

> "'The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.'" 85 N.M. at 223, 511 P.2d at 549.

**{7}** The trial court set forth three reasons for not applying the principle of estoppel: (1) there was no false representation or concealment on the part of the Highway Department, (2) the defendants should not have relied on the April 24, 1973, letter from Mr. Bob Humble; and (3) the defendants had reason to know and means of discovering the probable extent of the project.

**{8}** The first reason cannot be used to defeat the defendants' claim of estoppel. The trial court failed to apply that part of the Yurcic test which triggers an estoppel claim when the "conduct . . . is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert. . . ." It is clear that the Department is now adopting a position that is contrary to its representations to the defendants in 1973. Representations that are contrary to the essential facts to be relied upon, even though made innocently or by mistake, will support the application of the estoppel doctrine.

**{9}** It must be assumed that Mr. Bob Humble was authorized to speak for the State Department.

developed from the design specifications that are set forth on the maps provided by the Design Division of the Department.

The letter he sent was pursuant to an inquiry referred to him by the supervising engineer of the Design Division. The letter was sent out over the signature block of L.G. Boles, the State Highway Engineer. Mr. Humble was thus authorized to speak for the Design Division and the Highway Department must be held responsible for the representations he made.

**{10}** The trial court found that the defendants had "reasons to know and means of discovering the probable extent of the project." We have searched the record for evidence that might support this conclusion but have been unsuccessful. The testimony of all the witnesses, including the Highway Department personnel, was that no one knew the additional takings would be made until July, 1974, one year after defendants made their purchase. Although the design plans were available which showed that the additional property was probably within the scope of the project, these plans were never made available to the defendants.

**{11}** We find that the defendants claim of estoppel against the State should prevail. The defendants, in good faith, relied upon the Department's maps and verbal assurances and paid the consideration of $85,000 each for their property. The State now wishes to condemn the property at values far less than what the defendants paid, based on the argument that the defendants should have searched out and understood the design plans. It is estopped from doing so. The enhancement of value due to the construction of the highway project may be used as evidence by the defendants in determining damages for the property that the Department now wishes to acquire. The ruling of the trial court is reversed and the case is remanded to the district court for further proceedings.

**{12} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA,**
**Justice**

**FRED T. HENSLEY,**
**District Judge, sitting by designation**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-052**

**Filing Date: June 30, 1977**

**Docket No. 11,152**

**AMERICAN TANK AND STEEL CORPORATION AND EMPLOYERS NATIONAL INSURANCE COMPANY,**

**Petitioners,**

**v.**

**JOHNNIE LEE THOMPSON,**

**Respondent.**

Tansey, Rosebrough, Roberts & Gerding
Charles Tansey
Farmington

for Petitioners.

Hynes, Eastburn & Hale
Benjamin S. Eastburn
Farmington

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** In 1973, while engaged in the course of his employment Johnnie Lee Thompson, a code welder, sustained an accidental injury to his right thumb, right index finger and the webbing between the thumb and finger. In an action brought under the New Mexico Workmen's Compensation Act,[1] the trial court found that no other part of Thompson's body was physically impaired as a natural and direct result of the accident. It further found that Thompson is able to use some, but not all of the tools necessary to perform the usual tasks of a welder. The trial court specifically found as follows:

> 7. Because of his inability to use all of the necessary tools, the plaintiff is wholly unable to perform the usual tasks in the work he was performing at the time of his injury and for the same reason is wholly unable to perform the usual tasks in any work for which he is fitted by reason of age, education, training, general physical and mental capacity and previous work experience.

The trial court concluded that the plaintiff was entitled to total disability rather than the limited benefits under the scheduled injury section[2] of the Workmen's Compensation Act. The Court of Appeals affirmed the decision of the trial court.

**{2}** The question presented for review on certiorari is whether a workman is entitled to compensation benefits for total permanent disability where disability arose from injuries to a specific body member scheduled in § 59-10-18.4, **supra**, or whether the scheduled injury section is exclusive.

**{3}** The employer and the insurance carrier argue that the decisions rendered by the Court of Appeals in this case and in an earlier case, **Witcher v. Capitan Drilling Company,** 84 N.M. 369, 503 P.2d 652 (Ct. App.1972), cert. denied, 85 N.M. 380, 512 P.2d 953 (1973), are in conflict with prior decisions of this Court: See **Montoya v. Sanchez,** 79 N.M. 564, 446 P.2d 212 (1968); **Quintana v. Trotz Construction Company,** 79 N.M. 109, 440 P.2d 301 (1968); **Yanez v. Skousen Construction Company,** 78 N.M. 756, 438 P.2d 166 (1968); **Webb v. Hamilton,** 78 N.M. 647, 436 P.2d 507 (1968); **Baker v.**

[1] §§ 59-10-1 to 59-10-37, N.M.S.A. 1953 (2d Repl. Vol. 9, Pt. 1, 1974).

[2] § 59-10-18.4, N.M.S.A. 1953 (2d Repl. Vol. 9, Pt. 1, 1974).

**Shufflebarger & Associates, Inc.,** 78 N.M. 642, 436 P.2d 502 (1968); **Casados v. Montgomery Ward & Co.,** 78 N.M. 392, 432 P.2d 103 (1967); **Jensen v. United Perlite Corporation,** 76 N.M. 384, 415 P.2d 356 (1966); **Salome v. Eidal Manufacturing Company,** 75 N.M. 354, 404 P.2d 308 (1965); **Sisneros v. Breese Industries, Inc.,** 73 N.M. 101, 385 P.2d 960 (1963); **Boggs v. D & L Construction Company,** 71 N.M. 502, 379 P.2d 788 (1963). To the extent that they conflict with Witcher we specifically overrule the previous decisions of this court.

**{4}** This court first enunciated the exclusivity of the scheduled injury section in **Boggs v. D & L Construction Company, supra.** This position has not always received the total support of this court. See **Salome v. Eidal Manufacturing Company, supra,** (Moise, J., concurring opinion). The strict application of the scheduled injury section created inequities in the remedy provided to injured workmen who were totally disabled and unable to return to gainful employment because of injuries to a scheduled body member. An analysis of the cases arising after the **Boggs** decision demonstrates a tendency to relate scheduled injuries to other parts of the body or to psychological problems in an apparent effort to circumvent the **Boggs** holding and reach a just result. **Quintana v. Trotz Construction Company, supra; Yanez v. Skousen Construction Company, supra; Webb v. Hamilton, supra; Jensen v. United Perlite Corporation, supra; Salome v. Eidal Manufacturing Company, supra.** These cases frequently resulted in less than precise directives for lawyers and litigants. Such legal and judicial gyrations can be easily resolved by adherence to the legislative directives within the Act. **Security Insurance Co. of Hartford v. Chapman,** 88 N.M. 292, 540 P.2d 222 (1975); **Mascarenas v. Kennedy,** 74 N.M. 665, 397 P.2d 312 (1964); **Montell v. Orndorff,** 67 N.M. 156, 353 P.2d 680 (1960).

**{5}** The pertinent provision of the Workmen's Compensation Act defining total disability states:

> 59-10-12.18. Total Disability.—As used in the Workmen's Compensation Act [59-10-1 to 59-10-37], "total disability" means a condition whereby a workman, by reason of an injury arising out of, and in the course of, his employment, is wholly unable to perform the usual tasks in the work he was performing at the time of his injury, and is wholly unable to perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience.

The section of the Workmen's Compensation Act dealing with injuries to specific body members states:

> 59-10-18.4. Compensation Benefits—Injury to Specific Body Members.—A. For disability resulting from an accidental injury to specific body members including the loss or loss of use thereof, the workman shall receive the weekly maximum and minimum compensation for disability as provided in section 59-10-18.2 NMSA 1953, . . .
>
> . . . . .
>
> B. For a partial loss of use of one of the body members of physical functions listed in subsection A of this section, the workman shall receive compensation computed on the basis of the degree of such partial loss of use, payable for the number of weeks applicable to total loss or loss of use of that body member of physical function.

To allow the scheduled injuries section to be exclusive of the total disability section is to ignore both the plain meaning of § 59-10-12.18 **supra**, and the overall purpose of the Workmen's Compensation Act.

**{6}** A summary of the exclusivity of scheduled allowances is found in 2 Larson's Workmen's Compensation Law, § 58.20 at 10-212-214 (1976), where it states:

> Although it is difficult to speak in terms of a majority rule on this point, because of

> significant differences in statutory background, it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that the field is dominated by the view that schedule allowances should not be deemed exclusive, whether the issue is treatment of a smaller member as a percentage loss of a larger, or treatment of any scheduled loss as a partial or total disability of the body as a whole. (Footnotes omitted.)

**{7}** The facts in this case can equally justify an award of total and permanent disability under § 59-10-18.2 (2d Repl. Vol. 9, Pt. 1, 1974), or an award for a scheduled injury under § 59-10-18.4, **supra.** Under the latter, Thompson could receive no more than $65.00 per week for 125 weeks notwithstanding the fact that he is totally disabled within the terms of § 59-10-12.18, **supra.**[3] Under the former, he would be entitled to $65.00 per week for up to 500 weeks.

**{8}** If one suffers a scheduled injury which causes a physical impairment but does not create disability, § 59-10-18.4, **supra,** will apply. When the impairment amounts to a disability, §§ 59-10-18.2 and 59-10-18.3, **supra,** are properly invoked.

**{9}** The trial court in the present case found that the injury and physical impairment were limited to plaintiff's right hand. No other part of plaintiff's body was physically impaired. The trial court also found total disability as a result of the plaintiff's injuries and his subsequent inability to perform the only work for which he was qualified. The degree of disability is a question of fact to be determined by the fact finder. **Roybal v. County of Santa Fe,** 79 N.M. 99, 440 P.2d 291 (1968); **Adams v. Loffland Brothers Drilling Company,** 82 N.M. 72, 475 P.2d 466 (Ct. App.1970). We have reviewed the record and have concluded that there is substantial evidence to support the court's findings of fact and conclusions of law. **Gallegos v. Duke City Lumber Co., Inc.,** 87 N.M. 404, 534 P.2d 1116 (Ct. App.1975); **Maes v. John C. Cornell, Inc.,** 86 N.M. 393, 524 P.2d 1009 (Ct. App.1974).

**{10}** We therefore affirm both the trial court and the Court of Appeals and assess additional attorney's fees against American Tank and Steel Corporation and Employers National Insurance Company in the amount of $1,500.00.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**JOHN McMANUS,**
**Chief Justice, dissenting**

**WILLIAM FEDERICI,**
**Justice, not participating**

[3] Defendants argued at trial that plaintiff was only entitled to recover 45% partial permanent disability to the right hand for an amount of $29.25 per week for 125 weeks.

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-054**

**Filing Date: July 6, 1977**

**Docket No. 12,216**

**VANN TOOL COMPANY, A NEW MEXICO CORPORATION,**

**Plaintiff-Appellee,**

**v.**

**MICHAEL P. GRACE, II AND CORRINE GRACE, HIS WIFE,**

**Defendants-Appellants.**

Lamb, Metzgar, Franklin & Lines
Richard Mantlo
Albuquerque

for Defendants-Appellants.

Losee & Carson
Chad D. Dickerson
Artesia

for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Vann Tool Company brought suit upon a contract against the Graces, who are nonresidents of New Mexico. Service of process was obtained by posting the summons at an address in Phoenix, Arizona. The defendants failed to appear and default judgment was entered in favor of Vann Tool. Subsequently the defendants entered an appearance and moved to set aside the judgment. They asserted that they were not "personally" served as required by § 21-3-16, N.M.S.A. 1953 (Supp.1975), more commonly known as the "long-arm statute," and that the address where the summons was posted was not their usual place of abode. The court denied the defendants' motions.

**{2}** The initial question presented is whether or not substituted service of process under the long-arm statute is sufficient to give the court jurisdiction over the defendants. The proper method for obtaining jurisdiction in this instance was by complying with the provisions of § 21-3-16, supra. Subparagraph B of that statute reads:

> Service of process may be made upon any person subject to the jurisdiction of the courts of this state under this section by **personally serving the summons upon the defendant** outside this state and such service has the same force and effect as though service had been personally made within this state. (Emphasis added.)

**{3}** Defendants assert that the statute requires the summons to be placed "in hand" to be personally served. Plaintiffs argue that the use of the phrase "personally serving the summons" merely differentiates between service which would give **in personam** jurisdiction and constructive service which would give **in rem** jurisdiction.

**{4}** The New Mexico long-arm statute was patterned after a similar Illinois statute. Decisions of the Illinois courts in construing the statute are helpful in defining its scope. **Melfi v. Goodman,** 69 N.M. 488, 368 P.2d 582 (1962). Illinois has held that the long-arm statute reflects the legislative intention to exert jurisdiction over non-resident defendants to the limits permitted by the due process clause. **Ziegler v. Houghton-Mifflin Co.,** 80 Ill. App.2d 210, 224 N.E.2d 12 (1967); **Koplin v. Thomas, Haab & Botts,** 73 Ill. App.2d 242, 219 N.E.2d 646 (1966). Defendants make no argument that out-of-state substituted service by posting exceeds constitutional due process requirements.

**{5}** Although substituted service is not explicitly provided for in New Mexico's long-arm

statute, we are of the opinion that the legislature's purpose in adopting the statute was to permit service of process on out-of-state persons in the same manner as process may be served upon residents of the state. The procedure for service of process in New Mexico is outlined in N.M.R. Civ.P. 4 [§ 21-1-1(4), N.M.S.A. 1953]. The same procedure will be applied to actions which are brought under § 21-3-16, supra.

**{6}** The remaining issue is whether the substituted service by posting was left at "the usual place of abode" of the defendants. Service of process was shown by a return executed by a deputy sheriff of Maricopa County, Arizona. The return stated:

> [T]hat he served the within summons on the 10th day of June, 1976 * * * by posting a copy of said summons on front door of residence, at 1141 E. Bethany Home Road, Phoenix, Arizona * * *.

N.M.R. Civ.P. 4(e)(1), supra, allows substituted service by delivering a copy to a person of sufficient age residing at "the usual place of abode" of the defendant. If no such person be found willing to accept a copy, then service shall be made by posting on the defendant's premises.

**{7}** Defendants presented testimony that they had not lived at the address indicated in the return of service since December of 1975. Defendants did not disclaim ownership of the home nor did they deny that they were residents of Phoenix, Arizona. Their children had remained at the Phoenix address until about two (2) months prior to the date of service, but no member of the family lived there on June 10, 1976.

**{8}** Plaintiffs introduced documents showing that defendants had answered a suit filed against them wherein summons had been posted at the same address on May 6, 1976. A document was introduced showing that defendants answered another lawsuit on April 26, 1976, admitting that they were residents of Phoenix, Arizona. A third document showed that defendants admitted residence in Maricopa County, Arizona. These documents were the only evidence presented by the plaintiffs. The trial court found that:

> 1. Process was served upon the defendants, Michael P. Grace, II and Corrine Grace, his wife, on June 10, 1976, by posting copies of the Summons and Complaint herein on the front door of a residence at 1141 East Bethany Home Road, Phoenix, Arizona.
>
> 2. The residence set forth above was the usual place of abode of the defendants, Michael P. Grace, II and Corrine Grace, his wife, on June 10, 1976.

**{9}** There is no testimony or evidence that 1141 East Bethany Home Road was the usual place of abode of the defendants on June 10, 1976. Even if the defendants' evidence is completely discounted, nothing remains in the record to support the court's finding. Had the return of service indicated that the questioned address was defendants' "usual place of abode," the burden would have been upon defendants to persuade the court to the contrary. Under those circumstances the trial court could have disbelieved defendants' evidence and we would have been bound to sustain the finding. This was not the case.

**{10}** This court recently answered the question of what constitutes the usual place of abode in connection with service under § 21-1-1(4)(e)(1) in **Household Finance Corporation v. McDevitt,** 84 N.M. 465, 466, 505 P.2d 60, 61 (1973), by citing **Williamson v. Taylor,** 96 W.Va. 246, 122 S.E. 530 (1924):

> Under the statute 'the usual place of abode' means the customary place of abode at the very moment the writ is left posted; hence, where the writ is left posted at a former place of abode, but from which defendant had, in good faith, removed, and taken up his place of abode elsewhere, service so had is ineffective and invalid.

**{11}** Even when we view the evidence in the light most favorable to the plaintiff, the finding by the district court that the address where

posting was made was the usual place of abode of the defendants on June 10, 1976 is not supported by substantial evidence.

**{12}** We reverse the trial court and remand the case with instructions to set aside the judgment for lack of jurisdiction over the defendants.

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN B. MCMANUS,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-056**

**Filing Date: July 7, 1977**

**Docket No. 11,185**

**KENNETH ARNOLD,**

**Plaintiff-Appellee,**

**v.**

**FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY AND WAYNE LOVELADY'S FRONTIER FORD, INC.,**

**Defendants-Appellants.**

Rodey, Dickason, Sloan, Akin & Robb
Gene C. Walton
Albuquerque

for Ford Motor Co. and Ford Motor Credit Co.

Threet, Threet, Glass, King & Maxwell
J. Jerome Maxwell
Albuquerque

for Wayne Lovelady's Frontier Ford.

Kanter & Carmody
John Carmody, Jr.
Albuquerque

for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Kenneth Arnold brought suit against Wayne Lovelady's Frontier Ford, Ford Motor Company and Ford Motor Credit Company to recover damages for breach of warranty in the sale of a new 1972 Ford Ranger pickup. Ford Motor Credit Company counterclaimed for the balance due on the purchase price of the vehicle. The trial court denied the counterclaim of the credit company, awarded Arnold damages against defendants Ford Motor Company and Wayne Lovelady's Frontier Ford, and directed Arnold to deliver the vehicle to defendants upon satisfaction of the judgment.

**{2}** It was uncontested at trial that Frontier Ford and Ford Motor extended an express warranty to the plaintiff which warranted the pickup for a period of twelve months or 12,000 miles. The warranty provided that the "selling Dealer will repair or replace any part that is found to be defective in factory materials or workmanship." Arnold had the burden of proving four essential elements. Those elements were: (1) the existence of a defect in the operation of the vehicle, (2) that the defect resulted from factory material or workmanship, (3) that the plaintiff presented the vehicle to the automobile dealer with a request that the defect be repaired, and (4) that the dealer failed or refused to repair or replace the defective parts. **Hass v. Buick Motor Division of General Motors Corp.,** 20 Ill. App.2d 448, 156 N.E.2d 263 (1959); **Lilley v. Manning Motor Co.,** 262 N.C. 468, 137 S.E.2d 847 (1964).

**{3}** The dispute in this case centers around the requirement that the defect resulted from factory material or workmanship and the proof necessary to establish this element. The trial court failed to make a specific finding that there was a defect in factory material or workmanship, but did find as follows:

> 7. The vehicle . . . was defective in the following respects:
>
> (a) the engine would die when the gears were engaged and the driver attempted to cause the vehicle to begin moving.
>
> (b) the engine would die upon turning corners.

(c) the engine would die unexpectedly and on numerous occasions when being driven straight ahead at various speeds.

(d) the engine would overheat when the air conditioning was in use.

(e) the engine would exhaust black smoke.

The court concluded that there was a breach of the express warranty based upon that finding.

**{4}** Plaintiff did not offer the testimony of any expert witness that the defects in the car were a result of factory material or workmanship. There is substantial testimony, however, to support the fact that the defects in the vehicle existed from the time Arnold drove the vehicle from the lot after it had been newly purchased. We must give a liberal construction to the trial court's findings of fact in determining whether these findings would sustain a judgment. **Jones v. Friedman,** 57 N.M. 361, 258 P.2d 1131 (1953). The failure of the court to use the specific words that the defect resulted from factory materials or workmanship does not change the clear meaning of the court's findings of fact and conclusions of law.

**{5}** It is not clear what process the trial court used in determining damages. The parties are in agreement that the applicable measure of damages for breach of warranty in this case is outlined in § 50A-2-714(2), N.M.S.A. 1953 (Repl. Vol. 8, Pt. 1, 1962). That provision provides that damages for breach of warranty are to be measured by the difference between the value of the vehicle as accepted and the value of the vehicle as it was warranted. The proper measure of damages was not used and on remand § 50A-2-714(2), supra, should be applied.

**{6}** The third issue presented in this case is raised by the Ford Motor Credit Corporation with regards to its counterclaim which was denied by the trial court. The trial court concluded that defendant Ford Motor Credit Company took the assignment of Arnold's retail installment contract subject to the express warranties of defendants Ford Motor Company and Frontier Ford.

**{7}** The relationship between account debtors and assignees of contracts is governed by the terms of § 50A-9-318, N.M.S.A. 1953 (Repl. Vol. 8, Pt. 1, 1962). Under the terms of that section, the rights of the assignee, Ford Motor Credit Company, are subject to all the terms of the contract between Frontier Ford and Arnold. This includes any defenses arising therefrom. See also **Associates Loan Company v. Walker,** 76 N.M. 520, 416 P.2d 529 (1966). Pursuant to the terms of § 50A-9-206, N.M.S.A. 1953 (Supp. 1975), however, if Arnold had agreed not to assert any claims or defenses against the assignee, Ford Motor Credit Company would be entitled to fully recover on its counterclaim. The contract entered into between Arnold and Frontier Ford contains an agreement which requires the buyer to "settle directly with the original Seller all claims concerning the Property or its use or operation." The language of the contract does not restrict Arnold from asserting defenses against Ford Motor Credit Company. The defense of breach of warranty was available to Arnold. The extent and nature of Arnold's defense, however, needs further clarification.

**{8}** The trial court treated Arnold's breach of warranty defense as a complete bar to Ford Motor Credit Company's counterclaim. The defense of breach of warranty, however, can only be used by Arnold as a setoff against the amount owing under the installment contract. Arnold had not rejected or properly revoked acceptance of the vehicle under the Uniform Commercial Code. The guidelines for determining whether a buyer has accepted, rejected or revoked acceptance of any particular goods are found in §§ 50A-2-602, 50A-2-606, 50A-2-607 and 50A-2-608, N.M.S.A. 1953 (Repl. Vol. 8, Pt. 1, 1962). At the time of trial Arnold had driven the vehicle approximately 49,000 miles. He had not rejected or revoked acceptance of the vehicle. Since he had accepted the vehicle his only remedy was under § 50A-2-717, N.M.S.A. 1953 (Repl. Vol. 8, Pt. 1, 1962). This section allows the buyer to deduct the damages for breach of warranty from the portion of the purchase price still due under the contract. Arnold should therefore retain the vehicle and pay Ford Motor Credit Corporation any

balance owing on the contract after deducting his damages as measured by § 50A-2-714(2), supra. If Arnold's damages exceed the amount owing on the installment contract, judgment should be entered against the defendants for the additional amount.

**{9}** This case is remanded to the trial court for a proper determination of damages and for such other proceedings that are necessary to conform to this opinion.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**REUBEN E. NIEVES,**
**District Judge**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-059**

**Filing Date: July 8, 1977**

**Docket No. 11,239**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**LALO CASTRILLO,**

**Respondent.**

Toney Anaya, Atty. Gen.
Don Montoya, Asst. Atty. Gen.
Santa Fe

for Petitioner.

Pickard & Singleton
Lynn Pickard
Santa Fe

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** The defendant was tried to a jury on a charge of murder in the first degree. Lesser included offenses of second-degree murder and voluntary manslaughter were also submitted for the jury's consideration. At the conclusion of the trial and after deliberation by the jury, the foreman announced that the jurors were deadlocked and unable to reach a verdict. The defendant was tried a second time and found guilty of murder in the second degree. He appealed from that judgment and the Court of Appeals reversed the conviction, holding that the defendant had twice been put in jeopardy and should therefore be discharged. We granted certiorari not only to review that issue but because the Court of Appeals treated additional issues and gave an advisory opinion on matters that were outside the scope of appellate review.

**{2}** Prior to the second trial, defendant moved to dismiss the charges against him on the grounds of double jeopardy, claiming that the first jury had unanimously voted for acquittal on the charges of first and second-degree murder. An affidavit of the foreman of the jury was offered to support the defendant's contention. The trial court denied the motion, relying upon **Biebelle v. Norero,** 85 N.M. 182, 510 P.2d 506 (1973) and **State v. Brooks,** 59 N.M. 130, 279 P.2d 1048 (1955).

**{3}** Defendant argues that where a mistrial has been declared without a conviction or acquittal there is no verdict and that Rule 606(b)[1] of the Rules of Evidence allows the introduction of the affidavit as evidence. We do not agree.

**{4}** New Mexico has consistently held that it is improper to allow juror affidavits or other evidence tending to impeach, impugn or vitiate the jury's decisions. **Biebelle v. Norero,** supra. The affidavit of the foreman of the jury was properly disregarded by the trial court.

**{5}** In **State v. Brooks,** supra, the jury had deliberated on a murder charge for a period of time and concluded that it was unable to reach a verdict. The defendant then requested that the court poll the jurors as to conviction or acquittal on the included offenses of a murder charge. The trial court refused the request and on appeal this court held:

> While the parties to either criminal or civil cases have a right to poll the jury to ascertain whether the verdict rendered is the verdict of the individual juror, a request to

[1] Section 20-4-606(b), N.M.S.A. 1953 (Supp. 1975).

> have the jury polled before the verdict is rendered is premature and should be denied. (Citations omitted.) 59 N.M. at 133, 279 P.2d at 1050.

The holding in **Brooks** will no longer be applicable in New Mexico. Henceforth, when a jury announces its inability to reach a verdict in cases involving included offenses, the trial court will be required to submit verdict forms to the jury to determine if it has unanimously voted for acquittal on any of the included offenses. The jury may then be polled with regard to any verdict thus returned.

**{6}** Within the framework of the Uniform Criminal Jury Instructions a jury may reach one of three different results as to each included offense. It may unanimously find a defendant guilty of a greater offense, it may unanimously vote to acquit on the greater offense, or it may fail to reach agreement. If the vote is not unanimous or if the vote is unanimous for acquittal, it must then move to a consideration of the lesser offenses. N.M.U.J.I. Crim. 50.01 and 50.12 [2d Repl. Vol. 6, N.M.S.A. 1953 (Supp.1975), at 335, 338]. Either an acquittal or a conviction of a lesser included offense bars further prosecution for the greater offense. **State v. Tanton,** 88 N.M. 333, 540 P.2d 813 (1975); **State v. Goodson,** 54 N.M. 184, 217 P.2d 262 (1950); **State v. Medina,** 87 N.M. 394, 534 P.2d 486 (Ct. App.1975).

**{7}** If charges are presented to a jury as separate or alternative counts rather than included offenses, Rule 44(c) of the Rules of Criminal Procedure [§ 41-23-44(c), N.M.S.A. 1953 (Supp.1975)] allows retrial only for counts upon which the jury cannot agree. The rule states.

> If there are two [2] or more counts, the jury may at any time during its deliberations return a verdict or verdicts with respect to a count or counts upon which it has agreed. If the jury cannot agree with respect to all counts, the defendants may be tried again upon the counts on which the jury could not agree.

Retrial is thus precluded for counts upon which the jury reached unanimous agreement and returned a verdict. **Ex parte Williams,** 58 N.M. 37, 265 P.2d 359 (1954). The same result should also obtain if a jury has voted unanimously for acquittal on any of several included offenses. The procedure, however, must be different when charges are presented as lesser-included offenses rather than separate counts. A trial court should not accept an announcement as to the jury vote on any included offense until the jury has carried its deliberations as far as possible. Jeopardy should then attach to those offenses upon which the jury has unanimously agreed to acquit, even if it is unable to reach a final verdict as to any lesser included offenses.

**{8}** We are aware that our holding in this case is not only contrary to **State v. Brooks,** supra, but is also a departure from the approach taken in other jurisdictions. **Walters v. State,** 255 Ark. 904, 503 S.W.2d 895, cert. denied, 419 U.S. 833, 95 S. Ct. 59, 42 L. Ed. 2d 59 (1974); **People v. Griffin,** 66 Cal.2d 459, 58 Cal. Rptr. 107, 426 P.2d 507 (1967); **People v. Doolittle,** 23 Cal. App.3d 14, 99 Cal. Rptr. 810 (1972); **People v. Hall,** 25 Ill. App.3d 992, 324 N.E.2d 50 (1975); **State v. Hutter,** 145 Neb. 798, 18 N.W.2d 203 (1945). In **People v. Griffin,** supra, a recent case that is frequently relied upon, the Supreme Court of California said:

> We first consider defendant's contention that his third trial placed him twice in jeopardy of first degree murder * * * The jury at the second trial was discharged after failing to reach a unanimous verdict, and a mistrial was declared. * * * After the jury was discharged, the foreman disclosed in open court that the jurors had stood 10 for acquittal and 2 for guilty of second degree murder. * * * Defendant contends that this fact establishes an implied acquittal of first degree murder.
>
> This contention must be rejected . . . We may not infer from the foreman's statement that the jury had unanimously agreed to acquit of first degree murder. There is no

> reliable basis in fact for such an implication, for the jurors had not completed their deliberations and those voting for second degree murder may have been temporarily compromising in an effort to reach unanimity.

66 Cal.2d at 464, 58 Cal. Rptr. at 109-10, 426 P.2d at 509-10.

The California Court raised the question of when a jury vote can be considered final and opted to deny recognition to any jury action not returned in a final verdict. It recognized that as a practical matter juries may not follow an undeviating procedure of voting on included offenses starting with the greater and moving to the lesser. It did not want to preclude a jury from reconsidering a previous vote on any issue.

**{9}** We agree that the approach taken by a jury in reaching a decision should not be called into question. We agree with the policy that discourages, and in most instances prohibits, any inquiry or intrusion into the jury room. We do not feel, however, that allowing inquiry as to the jury vote on greater-included offenses would violate that policy.

**{10}** The reluctance of courts to allow consideration of a jury's determination on any included offenses until the jury has reached a final verdict on the total package of charges is based upon additional factors. One factor is the interest of the State in retrying a defendant on the total case rather than a limited portion. If prosecutors are unsuccessful in a first trial, they hope to use that experience as a dress rehearsal for a better presentation of evidence in the second trial. It could also be argued that fairness is a two-edged sword that requires an aborted trial to be retried from the first with neither side given an advantage. The doctrine of double jeopardy, however, recognizes that the State has the burden of proof, and once a defendant has been put in jeopardy the State cannot retry that issue.

**{11}** The historical development of the trial of homicide cases is another basis for the failure of some states to accept the approach we now adopt. Under the early common law there were no degrees of murder or manslaughter. In dividing these crimes into degrees, legislatures recognized that homicide could not be so easily categorized. Some are less aggravated and merit less punishment, while others must be treated more severely. In **State v. Hutter,** supra, the Nebraska Court, following the historical approach said:

> The unlawful killing constitutes the principal fact and the condition of the mind or attendant circumstances determine the degree or grade of the offense, and when the greater of the degrees has been committed, the lesser degrees have also been committed, they being necessarily involved as a constituent part of the higher crime. * * *
>
> * * * [W]hen the jury disagrees there is no verdict determining the primary element of the crime, whether or not there was an unlawful killing. Until there has been a final determination of the crime charged, there is no verdict which can be pleaded as a prior conviction or acquittal.
>
> 145 Neb. at 804-05, 18 N.W.2d at 208.

The fallacy of this logic if applied to New Mexico, is that even if the fact of homicide is conceded, the statutory scheme of homicide prohibits convictions on the greater offenses unless additional elements are also present. § 40A-2-1, N.M.S.A. 1953 (2d Repl. Vol. 6, 1972). A jury that has unanimously concluded that there is a failure of proof on any necessary element is bound to acquit.

**{12}** The theories behind the arguments that are contrary to our present approach have not remained inviolate. In order to protect the right to appeal, a defendant convicted of a lesser offense overturned on appeal may not be retried for any greater offense. A defendant would not always pursue valid grounds for appeal after conviction of a lesser charge if he knew he would face the possibility of a trial on greater charges after reversal. **Green v. United States,** 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957). We hold that the purpose and policies supporting the double jeopardy

restrictions are equally as valid. That rationale is ably set forth by the Court of Appeals in **State v. De Baca,** 88 N.M. 454, 541 P.2d 634, cert. denied, 89 N.M. 6, 546 P.2d 71 (1975).

**{13}** A mistrial not moved for or consented to by the defendant must be based upon a manifest necessity or jeopardy attaches preventing retrial. **Green v. United States**, supra. The power to declare a mistrial must be exercised with the greatest caution, under urgent circumstances, and for very plain and obvious reasons. **United States v. Perez,** 22 U.S. (9 Wheat.) 579, 6 L. Ed. 165 (1824). There is no plain and obvious reason to declare a mistrial as to any included offense upon which the jury has reached a unanimous agreement of acquittal.

**{14}** In the present case the declaration of the mistrial came after the following exchange between the trial court and the foreman of the jury:

> THE COURT: Mr. Fenner, you wish to speak to the Court?
>
> MR. FENNER: Yes, sir, your honor, we are deadlocked.
>
> THE COURT: All right, sir. You have been at your work just about eleven or twelve hours, since we have submitted the case to you, including the times you have had for meals. Do you think to this point, Mr. Fenner, there is no real purpose in continuing with deliberations in the case?
>
> MR. FENNER: Yes, sir. By polling the Jury in the Jury Room, they are of the opinion that there would be no—
>
> THE COURT: No chance?
>
> MR. FENNER: No chance, no change to be expected, no sir.
>
> THE COURT: All right, thank you. I suspect it is always a little disappointing to the Jury not to be able to resolve on the Jury in a case, after the time and efforts that you have invested in it. We, of course, like to have a verdict, if possible to do so. We don't undertake to resort to any sort of coercion amongst the Jury to bring that about. I am going to declare a mistrial in the case, and discharge the Jury. I would like to know, Mr. Fenner, questions which I don't ask except when I am breaking the Jury out, because before that time, I don't consider it any of my business. What is your numerical stand? What is your division?
>
> MR. FENNER: Nine to three.
>
> THE COURT: Nine to three. Are you at a level of acquittal on voting?
>
> MR. FENNER: Yes, sir, we have a level of acquittal.
>
> THE COURT: In other words, how do you stand, how many for acquittal, to your nine to three?
>
> MR. FENNER: Nine.
>
> THE COURT: Nine for acquittal and three for some degree of conviction?
>
> MR. FENNER: Yes, sir.

A manifest necessity for the declaration of a mistrial is shown since the jury could not agree to at least one of the included offenses within the murder charge. The record is silent upon which, if any, of the specific included offenses the jury had agreed and upon which the jury had reached an impasse. The record is clear, however, that the jury did not acquit the defendant on all offenses. The holding in **State v. Spillmon,** 89 N.M. 406, 553 P.2d 686 (1976), dictates a dismissal upon double jeopardy grounds as to such offenses on which the record is unclear. In that case, this court held:

> Since the record does not disclose a "manifest necessity" for the discharge of the jury and a final termination of the trial, we follow the suggestion of the United States Supreme Court in **Downum v. United States,** 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d

> 100 (1963), and resolve any doubt in favor of the liberty of the citizen. We hold that under the facts in this case jeopardy has attached and the defendants may not be tried again on the murder charge.
>
> 89 N.M. at 408, 553 P.2d at 688.

The principle set forth in **Spillmon,** supra, is applicable under the circumstances of this case since the record is not clear as to which of the included offenses the jury was considering at the time of its discharge. Without inquiry by the trial court into the jury's deliberations on the greater, included offenses, no necessity is manifest to declare a mistrial as to those offenses and thus jeopardy has attached. Jeopardy did not attach to the offense of voluntary manslaughter which was the least of the included offenses. Had the jury reached a unanimous decision on that offense it could not have been in the posture it announced to the court.

**{15}** The Court of Appeals erred in concluding that jeopardy had attached to all of the included offenses. Jeopardy had not attached to the charge of voluntary manslaughter. The conviction of the defendant of second-degree murder is reversed and the case is remanded for retrial on the charge of voluntary manslaughter.

**{16} IT IS SO ORDERED**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-069**

**Filing Date: August 25, 1977**

**Docket No. 11,151**

**JEWEL BIRTRONG,**

**Plaintiff-Appellant,**

**v.**

**CORONADO BUILDING CORPORATION, ALL SHAREHOLDERS AND OFFICERS OF SAID CORONADO BUILDING CORPORATION, TOGETHER WITH ALL UNKNOWN CLAIMANTS OF INTEREST IN AND TO THE PREMISES ADVERSE TO THE PLAINTIFF,**

**Defendants-Appellees.**

Sherman & Sherman
Paul F. Sherman
Lordsburg

for Appellant.

Martin, Martin & Lutz
Michael L. Winchester
Las Cruces

for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** In 1927 the appellee, Jewel Birtrong and her husband, Alec Lee Birtrong conveyed by warranty deed a tract of land in Hidalgo County to Coronado Building Corporation. The deed on its face provides that it was given for consideration and conveyed the property together with all " . . . the hereditaments and appurtenances . . . the reversion and reversions, remainder and remainders, . . . and all the stake, right, title, interests, claim and demand whatsoever,. . . ." The property was used by Coronado Post Number 85 of the American Legion until the early 1940's when the post was disbanded. After World War II, another American Legion Post occupied the premises for several years until it, too, was disbanded. Since that time the property has been used by different community groups for various activities.

**{2}** In 1973 Jewel Birtrong (her husband being deceased) filed a quiet title suit in district court alleging that she was entitled to the property on several theories. Her claim to the property is based on allegations of direct chain of title, reversion of title, and adverse possession.

**{3}** In response to her complaint, W. H. Adams, Jr., W. H. Walter, Jr., J. R. Walter, Charles Hoggett and Betty E. Edington entered the suit as defendants. They denied any title in Jewel Birtrong and asserted that they were heirs of the original founders of the Coronado Building Corporation, and as such claimed title to the property by inheritance. After preliminary discovery each of the parties moved for summary judgment. The trial court heard the matters and ruled in favor of the defendants. Jewel Birtrong appeals from that decision.

**{4}** Plaintiff tried to establish a direct chain of title by documents which include a disclaimer and a quitclaim deed executed by the American Legion. The record does not reveal that the American Legion was ever in the chain of title to the legal estate involved. A post of the American Legion did use the property for a period of time as a meeting place, as did numerous other community organizations. That alone does not establish that the American Legion had any interest in the real estate involved. Since a quitclaim deed conveys only such title, if any, as the grantor possessed, the deed to the plaintiff from

the American Legion is of no value whatsoever. **Metzger v. Ellis,** 65 N.M. 347, 337 P.2d 609 (1959).

**{5}** The plaintiff alleges that it was the intention of all the parties involved to convey the land from the Birtrongs to the Coronado Building Corporation upon the condition that it always be used as an American Legion Hall. The deed itself contains no such condition. The intention of the grantor must be derived from the language of the instrument of conveyance, and it will not be impeached except to correct or prevent injustice for such reasons as accident, mistake or fraud. **Garcia v. Garcia,** 86 N.M. 503, 525 P.2d 863 (1974); **Garry v. Atchison, Topeka & Santa Fe Railway Co.,** 71 N.M. 370, 378 P.2d 609 (1963); **Sharpe v. Smith,** 68 N.M. 253, 360 P.2d 917 (1961). Prior considerations, negotiations or stipulations are merged in the final and formal deed executed by the parties. Although the terms of the deed may vary from the prior negotiations, the deed alone must be looked to in determining the rights of the parties. **Chavez v. Gomez,** 77 N.M. 341, 423 P.2d 31 (1967); **Duvall v. Stone,** 54 N.M. 27, 213 P.2d 212 (1949); **Collier v. Sage,** 51 N.M. 147, 180 P.2d 242 (1947); **Fuqua v. Trego,** 47 N.M. 34, 133 P.2d 344 (1943); **Continental Life Ins. Co. v. Smith,** 41 N.M. 82, 64 P.2d 377 (1936).

**{6}** The plaintiff has failed to allege in her complaint, or submit evidence of, any accident or fraud in the drafting and signing of the deed. The issue of mistake however, is supported by her affidavit, that the parties relied on the man who prepared the deed (a notary public) and that he did not carry out the intentions of the parties. There is a factual issue raised by her affidavit sufficient to defeat summary judgment.

**{7}** Plaintiff also claims title by adverse possession. If any one of the elements necessary to constitute adverse possession is absent, then no title by adverse possession can be found. **Weldon v. Heron,** 78 N.M. 427, 432 P.2d 392 (1967); **Murray Hotel Co. v. Golding,** 54 N.M. 149, 216 P.2d 364 (1950); **Turner v. Sanchez,** 50 N.M. 15, 168 P.2d 96 (1946).

**{8}** As of November 25, 1927, the date of execution of the deed to Coronado Building Corporation, the plaintiff divested herself of any and all color of title that she might have had to the property in question. **Wilson v. Kavanaugh,** 55 N.M. 252, 230 P.2d 979 (1951). The lack of such color of title is fatally defective to an adverse possession claim. **Thomas v. Pigman,** 77 N.M. 521, 424 P.2d 799 (1967); **Wilson v. Kavanaugh, supra; Sandoval v. Perez,** 26 N.M. 280, 191 P. 467 (1920). Since the plaintiff's claim lacks one of the prerequisites, we need not review any other of plaintiff's claims to title by adverse possession. The burden of proving title by adverse possession is upon him who asserts it. **Ward v. Rodriquez,** 43 N.M. 191, 88 P.2d 277 (1939). That burden must be met by clear and convincing evidence. **Frietze v. Frietze,** 78 N.M. 676, 437 P.2d 137 (1968); **Marquez v. Padilla,** 7 N.M. 620, 426 P.2d 593 (1967). Such title cannot be established by inference or implication. **Frietze v. Frietze,** supra; **Merrifield v. Buckner,** 41 N.M. 442, 70 P.2d 896 (1937); **Montoya v. Catron,** 22 N.M. 570, 166 P. 909 (1917).

**{9}** The defendants entered their appearance in this case as successors in interest of the Coronado Building Corporation. We have no difficulty in recognizing title in the disputed piece of land in the Coronado Building Corporation, but we cannot agree that the alleged successors in interest have shown by their pleadings or their affidavits that they are entitled to judgment as a matter of law. The record shows only that they are some of the heirs of the founders of Coronado Building Corporation. Other known heirs were not joined. Probate proceedings of the original founders of the Coronado Building Corporation made no mention of the property in question. We need not elaborate upon the other gaps in the record as it pertains to defendants' claims.

**{10}** We reverse the trial court in granting summary judgment as to either party for the reasons set forth. The case is remanded for further proceedings in the district court as are consistent with this opinion.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-077**

**Filing Date: September 29, 1977**

**Docket No. 11,287**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**ALLEN JACKSON AUBREY,**

**Defendant-Appellant.**

Robert R. Rothstein
Santa Fe

for Defendant-Appellant.

Tony Anaya, Atty. Gen.
Donald D. Montoya, Asst. Atty. Gen.
Santa Fe

for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** The defendant was convicted of first-degree murder contrary to § 40A-2-1, N.M.S.A. 1953 (Repl.1972) and sentenced to life in prison.

**{2}** In the early morning hours of May 15, 1976, Edna Sharp was killed in her home in Artesia, New Mexico. The defendant was seen at the victim's home that morning, and witnesses provided testimony from which the jury could conclude that defendant beat the victim outside of her house, dragged her into the house, and then cut her throat.

**{3}** The State's medical examiner testified that there had been multiple blows to the chest of the victim which, in his opinion, were inflicted prior to her throat having been cut. The doctor further testified that death was caused by severance of the trachea and great vessels to the neck.

**{4}** On appeal defendant claims that there was insufficient evidence to show a deliberate intention to take the life of the victim, and therefore a first-degree murder instruction should not have been given. Whether the defendant had a deliberate intent to take the life of the victim is a question for the jury to resolve under proper instruction. **State v. Lucero,** 88 N.M. 441, 541 P.2d 430 (1975).

**{5}** The jury was instructed in accordance with N.M.U.J.I. Crim. 2.00 [2nd Repl. Vol. 6, N.M.S.A. 1953 (Supp. 1975) at 295], which states in part as follows:

> A deliberate intention refers to the state of mind of the defendant. **A deliberate intention may be inferred from all of the facts and circumstances of the killing**. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.

**{6}** The jury made the determination that the defendant's actions showed the requisite deliberate intent to take the life of the victim. This Court must review the evidence in the light most favorable to the jury's verdict, resolving all conflicts and indulging all permissible inferences in favor of the verdict. **State v. Hartley,** 90 N.M. 488, 565 P.2d 658 (1977); **State v. Lucero, supra**. The evidence supports the verdict.

**{7}** The defendant further claims that the trial court erred in failing to give the jury an instruction on voluntary manslaughter. Before error can be predicated upon a failure to give an instruction on a lesser-included offense, there must be some evidence tending to establish the lesser offense. **State v. Riggsbee,** 85 N.M. 668, 515 P.2d 964 (1973). An instruction on voluntary manslaughter requires evidence that the killing resulted from a sudden quarrel or in the heat of passion. **Smith v. State,** 89 N.M. 770, 558 P.2d 39 (1976). No evidence was adduced at trial that would warrant the giving of a voluntary manslaughter instruction.

**{8}** The decision of the trial court is affirmed.

**{9}** **IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-089**

**Filing Date: November 7, 1977**

**Docket No. 11,366**

**FIRST NATIONAL BANK OF RIO ARRIBA,**

**Plaintiff-Appellee,**

**v.**

**MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,**

**Defendant-Third-Party Plaintiff-Appellant,**

**v.**

**VERNON L. SILER,**

**Third-Party Defendant.**

Campbell, Bingaman & Black
Bruce D. Black
Santa Fe

for Defendant-Third-Party Plaintiff-Appellant.

Montgomery, Andrews & Hannahs
Thomas W. Olson
Santa Fe

for 1st Nat'l Bank of Rio Arriba.

Catron, Catron & Sawtell
William A. Sawtell
Santa Fe

for Siler.

**OPINION**

**PAYNE, Justice.**

**{1}** This is an appeal from a summary judgment granted in favor of the plaintiff, First National Bank of Rio Arriba County, against Mountain States Telephone and Telegraph Company (Mountain Bell).

**{2}** First National Bank sought to recover payment from Mountain Bell pursuant to an assignment given to the bank by Vernon Siler. Siler had previously contracted with Mountain Bell to do work on a project near Questa. In order to help finance the project, Siler obtained a loan from First National which was secured by an assignment of the proceeds that he was to receive from Mountain Bell upon completion of the work. The assignment was delivered by Siler to Anthony With, an employee of Mountain Bell, who accepted it. The bank made no demand upon Mountain Bell and when the first payment was due on the contract, Mountain Bell did not pay First National but instead paid Siler.

**{3}** The language contained in the assignment is as follows:

> I, Vernon Siler, to hereby sell, assign and transfer to the First National Bank of Rio Arriba, Espanola, New Mexico, without recourse my right, title and interest in the funds due me from Mountain States Telephone Company on Job No. N-3-0868 Taos North-Questa Exchange. Dated at Espanola, New Mexico this 12th day of April, 1974.

**{4}** The issues in this appeal are concerned with the meaning and application of § 50A-9-318(3), N.M.S.A. 1953 (Repl.1962) as it pertains to the form of an assignment, and timeliness of notice of the assignment. Section 50A-9-318(3) reads as follows:

> The account debtor is authorized to pay the assignor until the account debtor receives notification that the account has been assigned and that payment is to be

> made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

**{5}** To support the decision of the trial court in this case the account debtor, Mountain Bell, must have received notification (1) that the account had been assigned, and (2) that payment was to have been made to the bank.

**{6}** The assignment shows on its face that it was accepted on behalf of Mountain Bell by Anthony With, who not only signed the instrument, but also noted thereon; "This **assignment** applies to the contract portion of the above-mentioned project only."

**{7}** Mountain Bell argues that Siler, the assignor, misrepresented the nature of the "assignment" document as a verification of employment. However, the document was clear on its face as to its effect and because fraud was neither pleaded nor raised at the trial level, we cannot consider it on appeal. **Western Farm Bureau Mutual Ins. Co. v. Barela,** 79 N.M. 149, 441 P.2d 47 (1968).

**{8}** The assignment provision, § 50A-9-318(3), establishes no specific requirements as to the form of the notice of assignment. It provides only that "a notification which does not reasonably identify the rights assigned is ineffective." The "assignment" document in this case explicitly identified the rights assigned. If Mountain Bell was unclear as to the effect of the assignment, it could not safely proceed to make payment. As noted by the draftsmen in comment 5 to § 9-318, 4 R. Anderson, Uniform Commercial Code (2d ed. 1971):

> What is 'reasonable' is not left to the arbitrary decision of the account debtor; if there is doubt as to the adequacy either of a notification or of proof submitted after request, the account debtor may not be safe in disregarding it unless he has notified the assignee with commercial promptness as to the respects in which identification or proof is considered defective.

**{9}** This issue is raised as to the meaning to be given the requirement that the account debtor have notification that "payment is to be made to the assignee." The Code does not require any particular language to be used in directing payment to the assignee. One purpose for the provision requiring notice that "payment is to be made to the assignee" is to allow for commercial situations where accounts are used as collateral to secure a loan repayment. In such cases, the borrower often retains the right to collect the accounts, and the assignee's rights of collection ripen only upon default by the borrower. Such a transaction is referred to as an "indirect collection." 4 R. Anderson, Uniform Commercial Code, **supra,** comment 3 to § 9-318, and comment 1 to § 9-308. Subjected to such an assignment and indirect collection situation, the account debtor could not be expected to pay the assignee until he had been instructed to do so. This is also the situation to which the draftsmen of the Code were referring in the portion of comment 3 to § 9-318:

> So long as the assignee permits the assignor to collect accounts or leaves him in possession of chattel paper which does not indicate that payment is to be made at some place other than the assignor's place of business, **the account debtor may pay the assignor even though he may know of the assignment. In such a situation an assignee who wants to take over collections must notify the account debtor to make further payments to him.** (emphasis added).

**{10}** This case, however, does not concern an "indirect collection." Article 9 of the Uniform Commercial Code applies to sales of contract rights as well as assignments of security interests. Section 50A-9-102(1)(b), N.M.S.A. 1953 (Repl.1962). Mountain Bell could readily determine from the assignment form that First National had purchased Siler's **right, title** and

**interest** in the contract proceeds and was therefore entitled to payment. There was no reason for the bank to instruct Mountain Bell not to pay Siler because Siler retained no right to payment. The unconditional language of the assignment was notice that "payment (was) to be made to the assignee." Section 50A-9-318(3).

**{11}** Mountain Bell takes the position that it was not an account debtor at the time it received notice, as the contract had not been performed and nothing was owed to Siler. Thus it argues that notice of the assignment was untimely since Siler had nothing to assign. Section 50A-9-105(1)(a), N.M.S.A. 1953 (Repl.1962) defines an account debtor as follows:

> 'Account debtor' means the person who is obligated on an account, chattel paper, **contract right** or general intangible; (emphasis added).

**{12}** Siler had contracted to perform work for Mountain Bell prior to the date of the assignment and the date of acceptance of the assignment by Mountain Bell. At the time of the assignment there was a contract, and Siler had a right to payment upon performance of the contract work. The comment to § 9-106 [§ 50A-9-106, N.M.S.A. 1953 (Repl.1962)] is helpful on this point:

> 'Contract right' is a right to be earned by future performance under an existing contract: for example, rights to arise when deliveries are made under an installment contract or **as work is completed under a building contract**. Contract rights may be regarded as potential accounts; they become accounts as performance is made under the contract.
>
> It has been found advisable to distinguish rights earned from rights not yet earned for several reasons. The recognition of the 'contract right' as collateral in a security transaction makes clear that this Article rejects any lingering common law notion that only rights already earned can be assigned. Furthermore in the triangular arrangement following assignment, there is reason to allow the original parties—assignor and account debtor—more flexibility in modifying the underlying contract before performance than after performance (see Section 9-318). It will, however, be found that in most situations the same rules apply to both accounts and contract rights. (emphasis added).

4 R. Anderson, Uniform Commercial Code, **supra. See Also, Marine National Bank v. Airco, Inc.,** 389 F. Supp. 231 (W.D.Pa.1975). We hold that Mountain Bell was an account debtor.

**{13}** The decision of the trial court is affirmed.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-090**

**Filing Date: November 7, 1977**

**Docket No. 11,454**

**FRANCES E. VALLEJOS, GUARDIAN OF THE PERSON AND NEXT FRIEND OF MARK ANTHONY LUCERO, A MINOR,**

**Plaintiff-Appellant,**

**v.**

**COLONIAL LIFE & ACCIDENT INSURANCE COMPANY,**

**Defendant-Appellee.**

Charles A. Keeling, Jr.
Albuquerque

for Plaintiff-Appellant.

Modrall, Sperling, Roehl, Harris & Sisk
Alan Konrad
James A. Parker
Albuquerque

for Defendant-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This suit was brought in behalf of Mark Anthony Lucero, a minor, to recover insurance benefits in the amount of $20,000 plus interest for the accidental death of his father, Joe Lucero. The trial court denied the plaintiff's claim and entered judgment for the defendant based upon stipulated facts.

**{2}** The stipulated findings of fact are as follows:

1. The decedent Joe S. Lucero, intentionally and deliberately consumed heroin or morphine resulting in his death.

2. The resultant death was neither intentional nor deliberate by the insured and without the intent to commit suicide.

3. Such consumption of the heroin or morphine constituted the injury which resulted in the decedent's death.

4. The decedent's possession of the heroin or morphine was a felony in violation of N.M.S.A. Section 54-11-23(B)(5) (1975 Supp.).

5. The decedent was in such possession of the heroin or morphine at the time of the injury which resulted in his death.

**{3}** The issue before the Court is the interpretation and application to be given two clauses contained in the insurance contract. The first clause relates to accidental injury and is stated as follows:

> (T)he company * * * hereby insures the person named in the Schedule, hereinafter called the Insured . . . against loss resulting directly, independently and exclusively of all other causes from bodily injuries effected solely through external and accidental means during the term of this policy. . . .

**{4}** The trial court followed the case of **Landress v. Phoenix Ins. Co.,** 291 U.S. 491, 54 S. Ct. 461, 78 L. Ed. 934 (1934) and ruled that death caused by the intentional and deliberate consumption of narcotics could not be considered death by "accidental means" as set forth in the policy clause. Appellant argues that stipulated finding of fact No. 2 establishes that the death of Joe Lucero was not intentional or deliberate, and therefore was accidental.

**{5}** In the **Landress** case the Court distinguished between "accidental means" and "accidental results." The Court held that it is not enough that the death or injury be "accidental" as understood by the average man, or that the result of a person's actions be unforeseeable. It interpreted the term "accidental means" to apply to the external cause of the injury. If the external cause was voluntarily effected by the individual then the injury could not be considered to be the result of "accidental means." In summary, an accidental result was not necessarily caused by "accidental means."

**{6}** Justice Cardozo dissented and stated that the attempted distinction between accidental means and accidental results would only further confuse the law. Many states, including New Mexico, have since adopted Justice Cardozo's rationale. In **Scott v. New Empire Insurance Company**, 75 N.M. 81, 84, 400 P.2d 953, 955 (1965), it was stated that "[a]bsent any provision in the policy defining 'accidental means' as something different from that as understood by the general public, we follow the holding * * *, that words, phrases or terms will be given their ordinary meaning." We continue to follow the Cardozo approach. When a person dies from the injection or consumption of narcotics without the intention to injure himself or commit suicide, his death is to be considered an accident, or brought about by "accidental means." Insurance policies must more clearly define those injuries that are not intended to be covered.

**{7}** The second clause of the contract which is at issue is the "violation-of-law" clause which states that, "The insurance under the policy shall cover death or other loss caused or contributed to by.. injuries sustained while the Insured is committing an assault or felony."

**{8}** The statutes in New Mexico are clear in establishing that illegal **possession** of heroin or morphine is a felony under the provisions of the Controlled Substances Act. Section 54-11-23(B)(5), N.M.S.A. 1953 (Supp.1975). Plaintiff argues that the **use** of heroin, under the present statutory scheme, is not a felony and since the cause of Joe Lucero's death was the **use** of narcotics and not its **possession**, the violation-of-law clause would not preclude recovery. Thus, the issue before the Court is whether we will require a proximate cause relationship between the felony committed and the injury or death.

**{9}** This issue has been addressed by many courts with varying results. **See, Lamar Life Insurance Company v. Bounds**, 200 Miss. 314, 25 So.2d 707, 166 A.L.R. 1115 (1947), **Jordan v. Logia Suprema De La Alianza Hispano-Americana**, 23 Ariz. 584, 206 P. 162, 24 A.L.R. 974 (1923), and **Townsend v. Commercial Travelers' Mutual Accident Association of America**, 231 N.Y. 148, 131 N.E. 871, 17 A.L.R. 1001 (1922). A strict interpretation of the violation-of-law clause could lead to inequitable results in situations where there is not the slightest causal connection between the felony that is being committed and an injury. We decline to adopt such a position and hold that there must be a reasonable causal connection between the felony committed and the resultant injury.

**{10}** The findings of fact before us are limited. They established, however, that the decedent was a user of narcotics. They also established that he was illegally in possession of narcotics. We hold that the illegal possession of narcotics in this case was reasonably and causally connected to the death of the insured.

**{11}** Although the trial court erred in its interpretation of the "accidental injury" clause, its decision is sustained by a correct application of the violation-of-law clause. We therefore affirm the result reached by the trial court.

**{12} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-092**

**Filing Date: November 15, 1977**

**Docket No. 11,482**

**A.V. "GABBY" HAYES, JR. AND MILTON D. WEBB,**

**Petitioners,**

**v.**

**REX E. REEVES, PAUL C. DEAN, HOWARD A. FOSTER AND LAWRENCE A. DAILEY,**

**Respondents.**

Montgomery, Andrews & Hannahs
Fred C. Hannahs
Santa Fe

Robertson & Robertson
G. Gordon Robertson
Raton

for Petitioners.

Modrall, Sperling, Roehl, Harris & Sisk
Peter J. Adang
Albuquerque

for Respondents.

**OPINION**

**PAYNE, Justice.**

**{1}** The plaintiffs, partners in a ranching operation, brought a declaratory judgment action to determine whether the defendants were entitled to a real estate commission for the sale of a ranch. The defendants counterclaimed for the commission. At the close of plaintiffs' case, the district court dismissed the jury and directed a verdict in favor of the defendants in the sum of $70,500. The Court of Appeals, in three diverse but concurring opinions, reversed the decision of the district court and entered judgment for the plaintiffs. Defendants' petition for certiorari was denied and the mandate from the Court of Appeals was sent down.

**{2}** Defendants filed a motion for reconsideration of their petition for certiorari, which was treated as a motion for rehearing as provided for by Civil Appellate Rule 19 [§ 21-12-19, N.M.S.A. 1953 (Supp.1975)]. We determined that certiorari had been improvidently denied and recalled the Court of Appeals' mandate before it was filed in the district court.

**{3}** Plaintiffs argue that this Court lost jurisdiction at the time the mandate was sent down by the Court of Appeals. We do not accept this view. New Mexico formerly had an appellate rule allowing recall of a mandate. Supreme Court Rule 17(6) [§ 21-2-1(17)(6), N.M.S.A. 1953 (Repl.1970)]. Although this rule was not retained, the present rules provide for motions for rehearing if timely filed after a decision of this Court. A denial of a petition for certiorari is a decision within the meaning of the rule.

**{4}** Even if there was no rule covering the matter, this Court has the inherent power to recall a mandate where clear error appears and the interests of justice so demand. This power must be exercised sparingly. Whether occasioned by a motion for rehearing or initiated by the Court under its inherent power, rehearings will seldom be granted after a mandate has issued. In **Woodson v. Lee,** 74 N.M. 227, 392 P.2d 419 (1964) this Court addressed a similar problem and quoted from the annotation at 84 A.L.R. 579 (1933) that "to require courts to consider and reconsider cases at the will of litigants would deprive the courts of that stability which is necessary in the administration of justice." The Court also stated the following:

> Although no time within which a mandate may be recalled is prescribed by our rules, it would seem fairly certain that upon mandate having been issued by us and action having been taken thereon in the district court, jurisdiction of this court would be at an end.

74 N.M. at 230, 392 P.2d at 420.

**{5}** In the present case, no action had been taken on the mandate. The mandate had not been filed in the trial court prior to its recall. We hold that this Court retained jurisdiction to hear the defendants' motion for reconsideration.

**{6}** In April of 1973 the plaintiffs purchased the Corralitos Ranch, located in Dona Ana County. Defendant Webb, a real estate broker licensed in both Arizona and New Mexico, handled the purchase. Webb's New Mexico license was subsequently terminated, but he continued to be licensed in Arizona.

**{7}** In the fall of 1973 the cattle market declined abruptly, and plaintiffs decided to sell the ranch. Plaintiff Dean contacted the defendant Webb in Arizona to seek his help in finding a buyer for the property because Webb was familiar with the ranch and also because he had a reputation for being effective in large ranch sales.

**{8}** The price of the ranch was set at $1,100,000 "net" to the plaintiffs. Since Webb did not have a New Mexico real estate license he contacted the defendant Hayes, a New Mexico real estate broker. They agreed to co-broker the ranch property at $1,175,000 to allow for a six percent commission ($70,500) and any additional closing costs.

**{9}** On Sunday, March 3, 1974, Hayes showed the ranch to a John Donaldson of Tucson, Arizona. During the next 36 hours Donaldson vacillated back and forth on whether to buy the ranch, but early on the morning of March 5, 1974, he called Hayes and said he would go ahead with the purchase. Hayes consulted with Webb by telephone, and upon Webb's recommendation, required a $200,000 earnest money deposit. Defendants felt that a large deposit would prevent Donaldson from "backing out on the deal." Hayes prepared a binder agreement using a standard printed form which Hayes' attorney had earlier reviewed, revised and approved. The binder, in part, contained the following language: "Deed shall be made subject to the usual restrictions and reservations shown of record to John Donaldson. . . ."

**{10}** About noon on the same day, Donaldson, Hayes and Webb met at the airport in Phoenix, Arizona. Donaldson looked over the agreement, signed it and delivered a $200,000 cashier's check to be held by Webb until all four of the plaintiffs had signed the agreement. Shortly thereafter, plaintiff Dean flew into Phoenix to meet with defendants. Webb suggested that Dean have his attorney look over the binder agreement. Dean signed the agreement without the assistance of an attorney and eventually secured the signatures of the other plaintiffs.

**{11}** The closing was set for July 1, 1974, but during the months of April and May, Donaldson decided that he was not going to go through with the deal. His attorney began to review the purchase agreement and found that the provisions of the agreement did not contain explicit reservations for minerals and easements. Title abstracts showed many such reservations on the ranch. Donaldson's attorney then advised plaintiffs' attorney that Donaldson would not take the ranch because plaintiffs could not deliver the title required by the contract. He also demanded the return of Donaldson's $200,000 deposit. The plaintiffs' attorney demanded that Donaldson fulfill the agreement. The dispute was compromised by Donaldson surrendering his claim to a refund of the $200,000 in exchange for a release of any further obligations or liability under the purchase agreement.

**{12}** Plaintiffs did not pay any commission to either Mr. Hayes or Mr. Webb from the forfeited earnest money.

**{13}** Prior to any consideration of defendants' rights to a commission is the question of whether

the defendant Webb, who was not a licensed New Mexico real estate broker, can maintain an action for a commission in New Mexico. Plaintiffs argue that the New Mexico Real Estate Brokers and Salesman Act [§§ 67-24-19 to 67-24-35, N.M.S.A. 1953 (Repl.1975)] would prevent such an action. Section 67-24-19 provides as follows:

> It is unlawful for any person, business association or corporation to engage in the business, act in the capacity of, advertise or display in any manner, or otherwise assume to engage in the business of, or act as, a real estate broker or real estate salesman within this state without a license issued by the New Mexico real estate commission.

Section 67-24-33 further provides:

> No action for the collection of commission or compensation earned by any person as a real estate broker or salesman required to be licensed under the provisions of this act [67-24-19 to 67-24-35] shall be maintained in the courts of the state unless such person was a duly licensed broker or salesman at the time the alleged cause of action arose.

**{14}** Though Webb was not licensed in New Mexico he was licensed in Arizona. The record does not reflect that Webb conducted any negotiations in New Mexico in the capacity of a real estate broker or salesman. He was contacted by plaintiffs in Arizona. He did not show the ranch but only conferred with Hayes, the New Mexico broker, by telephone. Hayes contacted the prospective purchaser, showed the ranch and performed any acts regarding the sale that were performed within the State of New Mexico. The purchase agreement was signed in Arizona, the agreement was delivered in Arizona, the agreement was signed and accepted by plaintiff Dean in Arizona. Thus Webb did not engage in the business of a real estate broker or salesman within New Mexico as is prohibited by § 67-24-19. He was not required to be licensed in New Mexico to do what he did and therefore § 67-24-33 would not prevent him from bringing an action in New Mexico for the collection of a commission for services he performed in Arizona.

**{15}** Other sections of the Act give additional support to the right of brokers licensed in other states to associate with New Mexico brokers. Section 67-24-29. G provides in part:

> **[A] licensed broker may pay a commission to a licensed broker of another state**; Provided, further, that such nonresident broker does not conduct in this state any of the negotiations for which a fee, compensation or commission is paid **except in co-operation with a licensed broker of this state**. (emphasis added).

This section modifies §§ 67-24-19 and 67-24-33 to the extent that a nonresident broker may, in a limited situation, share in a commission. He may only do so, however, through cooperation with a New Mexico licensed broker. We hold that the Act does not deny the defendant Webb access to our courts. He is entitled to maintain his counterclaim in this action.

**{16}** The trial court rules as a matter of law that the defendants were not negligent in drafting the purchase contract. The Court of Appeals reversed the judgment of the trial court and as a matter of law found the defendants negligent. It is our opinion that both courts were in error by summarily disposing of the case without a factual determination on the conflicting evidence that was presented. Neither a trial court nor an appellate court had discretion in ruling upon a motion for a directed verdict. The evidence must be weighed in the light most favorable to the party resisting the motion, disregarding all conflicts in the evidence unfavorable to that party. **Archuleta v. Pina**, 86 N.M. 94, 519 P.2d 1175 (1974).

**{17}** In determining whether defendants are entitled to a commission and the amount of any commission, the cause of Donaldson's failure to perform the contract must be determined.

The record indicates that the failure to consummate the sale may have been due to Donaldson's health or may have been due to the deficiencies in the purchase agreement prepared by the brokers. If the brokers were negligent in performing duties they were obligated to perform and that negligence caused the transaction to fail, and if plaintiffs can show that they have been damaged beyond the extent that they have been enriched, then the defendants have no right to a commission. **Hammond & Taylor, Inc. v. Duffy Tingue Co**., 39 Del.Ch. 174, 161 A.2d 238 (1960); **See also Tackett v. Croonquist**, 244 Cal. App.2d 572, 53 Cal. Rptr. 388 (1966). If negligence or damages cannot be proven, or if failure to complete the transaction was based upon Donaldson's acts, then the rule set forth in **Stewart v. Brock**, 60 N.M. 216, 290 P.2d 682 (1955) would entitle the brokers to the same commission as if the sale had been consummated.

**{18}** We remand this case to the district court with instructions to retry the factual issues in conformance with this opinion.

**{19} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice, not participating**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-095**

**Filing Date: November 21, 1977**

**Docket No. 11,428**

**IN THE MATTER OF THE LAST WILL AND TESTAMENT OF THOMAS PADILLA, DECEASED; FRANK PADILLA AND BESSIE PADILLA HARMON,**

**Petitioners-Appellants,**

**v.**

**ROSE PADILLA,**

**Respondent-Appellee.**

Johnson, Paulantis & Lanphere
John M. Kirk, Jr.
Albuquerque

for Petitioners-Appellants.

Michael Fitzpatrick
Albuquerque

for Respondent-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This is an appeal from a probate proceeding wherein Frank Padilla and Bessie Padilla Harmon petitioned the court for a determination that they were pretermitted heirs of their father and were entitled to an intestate share of his estate. The district court denied the relief sought and the petitioners appeal. We affirm.

**{2}** Thomas O. Padilla, the testator, died on December 1, 1974. At the time of his death, he was survived by six children. By his first wife, Daphne, he had two children, the appellants. By his second wife, Josephine, he had four children. He had no children by his third wife, Rose, who is the appellee.

**{3}** The fourth clause of the will stated:

> **Fourth**: I declare that at the date of this Will, I am married to Rose Padilla; that I have four living children, all adults, from a previous marriage; that having, during my lifetime, more than adequately provided for these four children, I leave them nothing in this Will.

Nowhere else in the will did he make reference to his children or name the appellants.

**{4}** At a hearing wherein three of the testator's four children by Josephine challenged the validity of the will, testimony established that Thomas had intentionally omitted all of his children, including the appellants, from the will. This testimony was adopted by the trial court as a finding of fact. The appellants concede that the finding was supported by substantial evidence. The court concluded that the appellants were not entitled to share in the estate, and that the appellee, Rose, was the sole beneficiary of the estate.

**{5}** The parties agree that a child omitted from a parent's will through oversight or error, shares in the parent's estate by virtue of § 30-1-7, N.M.S.A. 1953[1], the "pretermitted heir" statute that was in force at the time of the testator's death. This case, however, raises the question of whether a child who was **intentionally** omitted from a will is a pretermitted heir where no indication of that intention is found within the four corners of the will but where all parties agree that the testator's intent was to exclude the children. The statute reads as follows:

> 30-1-7. **Children omitted from will—Receive intestate share**.—If any

[1] Section 30-1-7 has since been repealed by Ch. 257, § 9-101, 1975 N.M. Laws 1109, 1342.

> person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will, every such testator, so far as shall regard such child or children, or their descendants not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part.

This statute was copied from the statute in force in the State of Missouri in 1901. **In re Gossett's Estate,** 46 N.M. 344, 129 P.2d 56 (1942). **Smith v. Steen,** 20 N.M. 436, 150 P. 927 (1915).

**{6}** In **Smith v. Steen, supra,** this Court explained the purpose of the statute as follows:

> The courts, in construing this statute, have held that the object of the statute is to produce an intestacy only when the child or descendant is unknown or forgotten, and thus unintentionally omitted;. . . .

20 N.M. at 445, 150 P. at 929.

**{7}** The statute was adopted in response to the common law rule that an omission of a child from a will was presumed to be a deliberate omission. It was designed to change the common law rule and to provide that the omission of a child would be presumed to be unintentional. **In re McMillen,** 12 N.M. 31, 71 P. 1083 (1903).

**{8}** Appellants argue that § 30-1-7 does not address intentional omissions, and therefore any evidence relating to the intent of the testator is irrelevant. Under this interpretation the failure to name or provide for a child in a will would negate any intent to omit a child, even where all parties agree that the testator's intent was to omit the child.

**{9}** In **Thomas v. Black,** 113 Mo. 66, 20 S.W. 657 (1892) the Supreme Court of Missouri said:

> Where children are not named, the presumption is that they were unintentionally omitted; and while this presumption may be rebutted, when the tenor of the will, or any part of it, indicates that they were not forgotten, yet it cannot be made to appear by parol evidence, but it must appear on the face of the will, that the testator remembered them; and where they are neither expressly named, nor so alluded to as to show affirmatively that they were in the testator's mind, such presumption becomes conclusive. (citations omitted).

20 S.W. at 657.

**{10}** The Missouri Court held that the question of whether or not the child was intentionally omitted may only be answered with reference to the will itself, and not through recourse to extrinsic evidence. We also accept this proposition as a general rule. However, when the testator's intent is not contested and is established so clearly as to remove any doubt, we will recognize an exception.

**{11}** In this case the trial court found that the testator had considered the appellants, had not forgotten them and had intentionally omitted them from his will. This finding was not challenged and will be accepted by this Court as binding on the parties.

**{12}** It is therefore ordered that the decision of the trial court be affirmed.

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA,**
**JR., Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-102**

**Filing Date: December 12, 1977**

**Docket No. 11,376**

**CONSTRUCTION ENGINEERING AND MANUFACTURING CO., A NEW MEXICO CORPORATION,**

**Plaintiff-Appellant,**

**v.**

**DON ADAMS MINING CO., INC., A NEW MEXICO CORPORATION,**

**Defendant-Appellee.**

Matthews, Shannon & Hooker
Thomas F. Hooker, Jr.
Albuquerque

for Plaintiff-Appellant.

Terrance L. Dolan
Albuquerque

for Defendant-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This suit was brought by the plaintiff, Construction Engineering and Manufacturing Company (CEMCO), to recover judgment on a promissory note and foreclose a mortgage on real property securing the promissory note. Plaintiff's motion for summary judgment was granted by the district court. Subsequently the defendant, Don Adams Mining Company, Inc. (Adams), made a motion to redeem the property which was resisted by CEMCO. The court ordered CEMCO to reconvey the property to Adams and plaintiff appeals that decision.

**{2}** Adams signed a $10,000 promissory note and executed a real estate mortgage in favor of CEMCO. Adams failed to pay on the due date and CEMCO filed its complaint seeking judgment and foreclosure. Adams admitted that payment had not been made and CEMCO's motion for summary judgment was granted. Final judgment and decree of foreclosure were entered. At the foreclosure sale CEMCO was the only bidder and purchased the property for $500. This left a deficiency judgment in the amount of $10,782 including attorney's fees and costs. Adams then filed a motion to redeem the property pursuant to § 24-2-19, N.M.S.A. 1953 (Supp.1975) for the sum of $500 plus interest at the rate of 10% per annum for a period of one year. The court ordered the clerk of the district court to accept the amount tendered in redemption of the real property. Thereafter, CEMCO filed a response to Adams' motion regarding redemption arguing: (1) that Adams' redemption tender was insufficient because it failed to pay the unpaid balance of the deficiency and, alternatively, (2) that in the event the court allowed redemption, the mortgage lien of CEMCO should be restored allowing foreclosure of such lien and alias sale of the real estate to satisfy the deficiency judgment against Adams. The district court denied CEMCO's motion and ordered CEMCO to convey the redeemed property to Adams for the tendered amount. The deficiency judgment against Adams remains unsatisfied.

**{3}** Section 24-2-19 providing for the redemption of real property sold under judgment or decree of foreclosure states in pertinent part as follows:

> 24-2-19. **Redemption of real property sold under judgment or decree of foreclosure**.—After sale of any real estate pursuant to any such judgment or decree of any court, the real estate may be redeemed by the former defendant owner thereof, . . . by paying to the purchaser, . . . the amount paid, with interest from the date of purchase at the rate of ten per cent [10%] a year

> together with all taxes, interest and penalties thereon paid by the purchaser,. . . .

**{4}** The statute appears straightforward and allows redemption by paying only the amount of the purchase price at the foreclosure sale plus taxes, interest and penalties. Appellant argues to the contrary, stating that in addition to the price paid at the foreclosure sale, Adams must also pay the unpaid balance of the deficiency judgment. CEMCO cites **Springer Corporation v. Kirkeby-Natus**, 80 N.M. 206, 453 P.2d 376 (1969) as authority for its position. The holding in **Springer** does not apply to this case. In **Springer**, Kirkeby-Natus had foreclosed its first mortgage covering 403 acres of land securing an indebtedness of $521,488.11. It purchased the property at the foreclosure sale for $323,625 and obtained a deficiency judgment. The deficiency judgment was reduced to $13,041.07 because of payments subsequently made. Springer Corporation held a second mortgage on 94.96 acres of the same tract of land. The second mortgage secured an indebtedness of $77,800. Springer had been left out of the prior foreclosure proceedings and petitioned the court for relief. The trial court allowed Springer to redeem from Kirkeby-Natus by payment of the full amount that Kirkeby-Natus had paid for the entire 403 acres—$323,625 plus the $13,041.07 deficiency judgment. Springer argued for a right to redeem by paying a pro rata share of the price paid upon foreclosure. On appeal, this Court held that Springer could not redeem in part, but would have to purchase all of the land and pay the deficiency judgment. The Court did not treat the issue of whether the deficiency judgment also had to be paid before Springer could redeem.

**{5}** The states of Michigan[1] and California[2] have statutes similar to the New Mexico statute. Under circumstances similar to the case at bar those states have held that a party may redeem by paying the purchase price paid at the foreclosure sale plus taxes, interest and penalties. **In re Chaboya**, 9 F. Supp. 174 (N.D. Cal.1934); **City Bank of San Diego v. Ramage**, 266 Cal. App.2d 570, 72 Cal. Rptr. 273 (1968); **Haskins v. Certified Escrow and Mortgage Company**, 96 Cal. App.2d 688, 216 P.2d 90 (1950); **Duff v. Randall**, 116 Cal. 226, 48 P. 66 (1897); **Heimerdinger v. Heimerdinger**, 299 Mich. 149, 299 N.W. 844 (1941); **Hilliard v. Schram**, 285 Mich. 686, 281 N.W. 405 (1938).

**{6}** We are of the opinion that § 24-2-19 should be given its plain, literal meaning. Adams was only required to pay the $500 plus taxes, interest and penalties in order to redeem the property.

**{7}** The second issue raised by CEMCO is that the court erred in not granting its motion to restore the mortgage lien, foreclosing the lien and ordering an alias sale of the property.

**{8}** It is not necessary to reach the issue of whether the mortgage lien should be revived upon redemption by the mortgagor. **See generally** Annot., 128 A.L.R. 796 (1940). Our present statutory scheme provides CEMCO with a remedy. The deficiency judgment obtained by CEMCO at the foreclosure sale became a lien on the debtor's real estate upon compliance with § 21-9-6, N.M.S.A. 1953 (Supp.1975). Any real estate of the debtor within the state would be subject to this lien. Once the mortgagor redeems foreclosed property, it again becomes part of his real estate and thus subject to the judgment lien and foreclosure. A foreclosure suit would then be the proper remedy to effect payment of the amount of the deficiency. § 24-1-22, N.M.S.A. 1953.

**{9}** The trial court is affirmed.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

[1] Mich. Comp. Laws § 600.3240 (1970) and prior laws.
[2] Cal. Civ. Proc. Code § 702 (West Supp. 1977) and prior laws.

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-103**

**Filing Date: December 14, 1977**

**Docket Nos. 11,518, 11,519, 11,631, 11,679, 11,683**

**THOMAS G. KEIDERLING, FRANCIS GRIEGO, MERCED ANZURES, ROGER RAMIREZ, WILLIE D. SMITH,**

**Petitioners,**

**v.**

**HON. MAURICE SANCHEZ AND HON. JOSEPH F. BACA,**

**Respondents.**

Jan A. Hartke, Chief Public Defender
Janice Hensolt-Ellis
Mark Shapiro
Samuel A. Francis
Jon T. Kwako
Raymond Hamilton
Alice G. Hector
Joseph N. Riggs, III
J. Brent Ricks
Albuquerque

for Petitioners.

Toney Anaya, Atty. Gen.
Don Montoya, Asst. Atty. Gen.
Santa Fe

for Respondents.

**OPINION**

**PAYNE, Justice.**

**{1}** In this proceeding the petitioner, Thomas Keiderling, seeks a writ of prohibition directed to the Honorable Maurice Sanchez, District Judge of the Second Judicial District, for failure to honor an attempted disqualification. Since the original writ was filed, additional cases have been filed based on similar factual and legal grounds. These petitions have been consolidated into this cause and the decision herein is dispositive of those cases.

**{2}** The respondent challenges § 21-5-8, N.M.S.A. 1953 (Inter. Supp.1976-77) [Chap. 228 § 1, 1977 N.M. Laws 8751], which authorized the disqualification, as an unconstitutional enactment of special legislation in violation of Article IV, § 24 of the New Mexico Constitution.

**{3}** Section 21-5-8 provides for the disqualification of judges by affidavit if a party questions the impartiality of the judge. Originally the disqualification section allowed only one disqualification to every party involved in a lawsuit. § 21-5-8, N.M.S.A. 1953 (Repl.1970) [Chap. 165, § 2, 1965 N.M. Laws 426]. Section 21-5-8 as now amended reads in pertinent part as follows:

> A. Whenever a party to an action or proceeding, civil or criminal, including proceedings for indirect criminal contempt arising out of oral or written publications, except actions or proceedings for constructive and other indirect contempt or direct contempt shall make and file an affidavit that the judge before whom the action or proceeding is to be tried and heard, whether he be the resident judge or a judge designated by the resident judge, except by consent of the parties or their counsel, cannot, according to the belief of the party making the affidavit, preside over the action or proceeding with impartiality, that judge shall proceed no further. Another judge shall be designated for the trial of the cause,. . . .
>
> B. A party to an action filed in the second judicial district [sic] may disqualify three

judges pursuant to the provisions of Subsection A of this section.

**{4}** The difference between § 21-5-8 as it now exists and the prior law is that parties in the Second Judicial District are now entitled to three disqualifications by affidavit, while parties in the other districts of the state are allowed only one.

**{5}** Article IV, § 24 of the New Mexico Constitution provides that the Legislature shall not pass special laws when a general law can be made applicable. A special law is generally defined as legislation written in terms which makes it applicable only to named individuals or determinative situations. In contrast a law is considered **general** in nature if the subject of the statute may apply to, and affect the people of, every political subdivision of the state. 2 C. Sands, **Statutes and Statutory Construction,** §§ 40.01, 40.02 (4th ed. 1973); **See also State v. A., T. & S.F. Ry. Co.,** 20 N.M. 562, 151 P. 305 (1915).

**{6}** The evil inherent in **special** legislation is the granting to any person or class of persons, the privileges or immunities which do not belong to all persons on the same terms.

**{7}** This Court has on previous occasions addressed itself to the subject of whether various legislative acts could be classified as special or general laws. **See Board of Trustees of Town of Las Vegas v. Montano,** 82 N.M. 340, 481 P.2d 702 (1971); **City of Raton v. Sproule,** 78 N.M. 138, 429 P.2d 336 (1967); **Albuquerque Met. Arroyo Flood Con. A. v. Swinburne,** 74 N.M. 487, 394 P.2d 998 (1964); **Airco Supply Company v. Albuquerque National Bank,** 68 N.M. 195, 360 P.2d 386 (1961); **State v. A., T. & S.F. Ry. Co., supra**.

**{8}** The most-followed authority throughout the years in determining whether an act of the Legislature is a special or general law has been **State v. A., T. & S.F. Ry. Co., supra**. In that case this Court considered the validity of an Act providing for a one mill tax levy for feeding prisoners in first class counties. The counties of Bernalillo and San Miguel were the only counties subject to the tax by having been declared first class counties. No provisions were made in and San Miguel were the only counties subject the Act for other counties to attain the same status, nor were there any provisions to relieve the first class counties of their responsibility should there be future changes in their condition. Considering these facts, the Court noted:

> It is equally plain that the classification of the counties by the act of 1897 made no provision whereby other counties might enter into the privileges of any class, or be relieved from the responsibilities thereof, by reason of changing conditions *{*200}* developing in the future. In other words, there was no basis for the classification, such as the assessed valuation of the counties, which was adopted as the basis of all subsequent classification statutes. We have in the act of 1897 a legislative declaration that certain counties, therein named, shall be "counties of the first class" until such time as the Legislature shall elect to make other and different classification of the counties. Should a shifting population, or numerous other conditions, make the classification either unfair or burdensome, there could be no relief until the Legislature revoked the law and made different provisions.

20 N.M. at 566, 151 P. at 306. The Court reviewed many prior cases and concluded that each case must be viewed in its own light.

**{9}** The principles of law set forth in **State v. A., T. & S.F. Ry. Co., supra,** have consistently been approved and followed by this Court in subsequent cases. **Crosthwait v. White,** 55 N.M. 71, 226 P.2d 477 (1951); **Hutcheson v. Atherton,** 44 N.M. 144, 99 P.2d 462 (1940).

**{10}** Petitioner argues that a law is not necessarily "special" in the constitutional sense unless the classification is unreasonable or there is no rational basis for it. **Airco Supply Company v. Albuquerque National Bank, supra**.

**{11}** Petitioner argues that from the enactment of § 21-5-8 it is clear that the Legislature deemed

it necessary to expand the right to disqualify judges. Were this the intent of the Legislature, it appears that there could be a rational basis for the law. Petitioner, however, fails to recognize the second part of the test that "the statute [must be] general to the class that it embraces, operating uniformly on all members of that class." **Airco Supply Company v. Albuquerque National Bank, supra,** 68 N.M. at 206, 360 P.2d at 393.

**{12}** In this instance the members of the class are parties involved in legal proceedings in the district courts of this state. The ultimate effect of § 21-5-8 is that members of the class who appear before the District Court in the Second Judicial District have the right to disqualify three judges while the members of the class outside of the Second Judicial District are only allowed one disqualification. The legislation before us falls squarely within the prohibition set forth in **State v. A., T. & S.F. Ry. Co., supra**. By the terms of the statute the judicial districts have been unreasonably classified. Different rights accrue to citizens of the state depending upon where cases are filed without regard to changing conditions that might develop in the future.

**{13}** Petitioner has not shown that a **general** law could not have been enacted giving all parties the same status as the litigants residing in the Second Judicial District. We, therefore, hold that § 21-5-8 B is an unconstitutional **special** law in violation of Article IV, § 24 of the New Mexico Constitution. Petitioner's application for a writ of prohibition must be denied. This holding relates only to Part B of § 21-5-8. The force and effect of the remaining provisions of the section are severable and not affected. **Bradbury & Stamm Const. Co. v. Bureau of Revenue,** 70 N.M. 226, 372 P.2d 808 (1962).

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1977-NMSC-108**

**Filing Date: December 21, 1977**

**Docket No. 11,405**

**MGIC MORTGAGE CORPORATION,**

**Plaintiff-Appellee,**

**v.**

**ALBERT GRAY BOWEN ET AL., DEFENDANTS-APPELLEES, ACRA, INCORPORATED,**

**Defendant-Appellant.**

Louis J. Vener
Albuquerque

for Defendant-Appellant.

Victor R. Ortega, U.S. Atty.
Albuquerque

Timothy B. McBride
M. Carr Ferguson
Gilbert E. Andrews
Grant W. Wiprud
Karl Schmeidler, Asst. U.S. Attys. Gen.
Tax Division, Dept. of Justice
Washington, D.C.

for Plaintiff-Appellee.

## OPINION

**PAYNE, Justice.**

**{1}** This is an action to determine the rights to a surplus resulting from a mortgage foreclosure sale. The foreclosure was initiated by MGIC Mortgage against real property initially owned by the Bowens. The Bowens subsequently sold the property to the Lovatos by a real estate contract subject to the MGIC mortgage. After the payment of MGIC's claim, a surplus of $2,863.40 was deposited in the registry of the District Court of Bernalillo County. ACRA, Inc., a judgment lien creditor of the Bowens, and the United States of America, a federal tax lien claimant of the Lovatos, each applied for distribution of the surplus. The district court rendered judgment for the United States and ACRA, Inc. appeals. We affirm.

**{2}** On July 27, 1973, the defendants Bowen bought the subject property and financed it by signing a promissory note and executing a first mortgage to Hinton Mortgage and Investment Company. The mortgage was subsequently assigned to MGIC. On June 10, 1974, the Bowens sold the property to Raymond and Gloria Lovato by executing a standard real estate contract. The contract provided that the Lovatos were to assume and make the payments under the prior not and mortgage. The contract also require a 30-day notice be given before the Lovatos' interest could be forfeited for failure to make payments.

**{3}** On January 2, 1974, ACRA, Inc. became a judgment lien creditor of the Bowens and filed its lien against the property. On June 18, 1975, the United States filed a tax lien against the same property based on tax assessments against the Lovatos. Meanwhile, the Lovatos had failed to make the payments under the real estate contract and this foreclosure proceeding was initiated. Bowens failed to send Lovatos a notice of forfeiture during the time that the contract was in default. Judgment foreclosing the mortgage was entered October 18, 1976, after the filing of both liens.

**{4}** The issue before us is whether the Lovatos retained a property right under the real estate contract, separate from the Bowens, that could be attached by the United States.

**{5}** Initially it should be stated that during the life of the real estate contract any risk of loss or

enhancement in value accrues to the purchaser. **Mesich v. Board of County Comm'rs of McKinley Co.,** 46 N.M. 412, 129 P.2d 974 (1942).

**{6}** This Court has recognized that the equitable interest of a vendee is subject to a lien. **Mutual Building & Loan Ass'n of Las Cruces v. Collins,** 85 N.M. 706, 516 P.2d 677 (1973). This Court has also held that the interest of a lien creditor of a vendee does not survive a forfeiture of the vendee's interest upon his default. **Petrakis v. Krasnow,** 54 N.M. 39, 213 P.2d 220 (1949). The case of **Bishop v. Beecher,** 67 N.M. 339, 355 P.2d 277 (1960) supports the proposition that once the equitable interest of a vendee is lost through forfeiture, he has no equity of redemption. **Bishop** and **Petrakis,** however, are distinguishable from the case at bar in that in those cases the vendee had received notice of forfeiture by the vendor.

**{7}** Tax liens attach to the interest of the vendee in a conditional sales contract. **Greenup v. United States,** 239 F. Supp. 330 (D. Mont.1965). They are co-extensive with the taxpayer's interest in the property. **Karno-Smith Co. v. Maloney,** 112 F.2d 690 (3rd Cir. 1940); **United States v. Western Union Telegraph Co.,** 50 F.2d 102 (2nd Cir. 1931); **Spade v. Salvatorian Fathers,** 78 N.J. Super. 554, 189 A.2d 738 (1963). However, a tax lien cannot endure after the expiration of the interest of the party against whom the lien was filed. **Greenup v. United States, supra**. If the interest of Lovatos, the vendees, terminated through forfeiture or otherwise, the tax lien attached to that interest must have also terminated.

**{8}** Appellants argue that Lovatos' interest terminated when they were served in the mortgage foreclosure proceeding, and that an additional 30-day notice under the terms of the contract would have been a useless act. The United States argues that even though the Lovatos were in default, they had not received the 30-day notice required by the contract in order to forfeit their interest. This Court has held that if the vendor fails to give notice of his intent to forfeit the contract, it remains in effect. **Nelms v. Miller,** 56 N.M. 132, 241 P.2d 333 (1952).

**{9}** Although the Lovatos were in default, since their interest had not been forfeited by receiving notice, they still had an equitable interest that could have been redeemed prior to the foreclosure sale. The United States' tax lien attached to the equitable interest of the Lovatos which was still in existence at the time the mortgage was foreclosed. It is therefore entitled to the surplus proceeds resulting from the sale.

**{10}** The decision of the trial court is affirmed.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**C. FINCHER NEAL,**
**District Judge**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-001**

**Filing Date: January 3, 1978**

**Docket No. 11,415**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**HENRY FRANK OZAREK, FATHER AND NEXT OF KIN OF MARK OZAREK, DECEASED,**

**Defendant-Appellant.**

David A. Lane
Silver City

for Defendant-Appellant.

Toney Anaya, Atty. Gen.
Sammy J. Quintana, Asst. Atty. Gen.
Santa Fe

for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Mark Ozarek, the appellant, agreed to repair Barney Sawyer's vehicle. Ozarek was unable to complete the repairs within the promised time and lent his personal car, a 1974 Chevrolet Malibu, to Sawyer. While driving the 1974 Chevrolet, Sawyer was arrested for possession of a controlled substance. The State filed a petition seeking forfeiture of the vehicle pursuant to §§ 54-11-33 and 54-11-34, N.M.S.A. 1953 (Supp.1975). Ozarek appeals from a judgment forfeiting the car. We reverse.

**{2}** The question on appeal is whether the appellant met his burden of establishing that the offense committed was without his knowledge or consent. If so, did the State rebut the appellant's showing.

**{3}** Section 54-11-33 provides that vehicles used, or intended for use, to transport controlled substances are subject to forfeiture. Subsection G of that section however provides:

> (2) no conveyance is subject to forfeiture under this section by reason of any act or omission **established by the owner** to have been committed or omitted without his knowledge or consent; (emphasis added).

**{4}** Forfeitures are not favored at law and statutes are to be construed strictly against forfeiture. **State v. Sunset Ditch Co**., 48 N.M. 17, 145 P.2d 219 (1944). The forfeiture provisions of the Controlled Substances Act are penal in nature. **Matter of One Cessna Aircraft, etc**., 90 N.M. 40, 559 P.2d 417 (1977). "[A] forfeiture proceeding is quasi-criminal in character. Its object, like a criminal proceeding, is to penalize for the commission of an offense against law." **Plymouth Sedan v. Pennsylvania**, 380 U.S. 693, 700, 85 S. Ct. 1246, 1250, 14 L. Ed. 2d 170 (1965).

**{5}** We hold that the burden imposed on the owner is the burden of going forward and not the burden of persuasion. The appellant met this burden by testifying at the hearing that he neither consented to nor had any knowledge that his automobile would be used to transport controlled substances. Appellant's testimony is similar to the affidavit the owner submitted in the case of **Garner v. State**, 121 Ga. App. 747, 175 S.E.2d 133 (1970). In that case, the owner's son was operating the car. The court ruled that the affidavit established a prima facie case that the owner had no knowledge that his automobile was used to transport narcotics and that the owner was entitled to a summary judgment. In the case of **State v. One (1) Certain 1969 Ford Van**, 191 N.W.2d 662 (1971), the Iowa Supreme Court held that a

bare denial of knowledge by the owner's agent was sufficient to rebut the presumption that the owner of a vehicle had knowledge and consented to the use of the vehicle for the unlawful purpose. **See also 1957 Chevrolet v. Division of Narcotic Control**, 27 Ill.2d 429, 189 N.E.2d 347 (1963); **In re One 1965 Ford Mustang**, 105 Ariz. 293, 463 P.2d 827 (1970).

**{6}** The owner need only assert that the vehicle was used without his knowledge and consent to shift the burden to the State. Ozarek met this burden. But we find no testimony in the record that would establish that Ozarek had any knowledge that Sawyer intended to use his car to transport controlled substances.

**{7}** We therefore reverse the decision of the trial court and remand the case with an instruction for the trial court to enter judgment in favor of Ozarek.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-019**

**Filing Date: March 15, 1978**

**Docket No. 11,637**

**EMMETT KEPLER,**

**Plaintiff-Appellant,**

**v.**

**MARIA COVARRUBIA AND TOM LYANNIS,**

**Defendants-Appellees.**

Anthony F. Avallone
Las Cruces

for Plaintiff-Appellant.

Larry R. Hill
Las Cruces

for Defendants-Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** Action was brought under the Uniform Owner-Resident Relations Act, §§ 70-7-1 et seq., N.M.S.A. 1953 (Supp.1975). The land owner sought a recovery of unpaid rent and the resident sought damages and abatement of her rent. The trial court denied recovery to the owner but granted both damages and abatement of rent to the resident. We reverse only on the issue of the abatement of rent.

**{2}** The owner first raises the issue of whether § 70-7-27 B, N.M.S.A. 1953 (Supp.1975) is unconstitutionally vague because it uses the term "damages" without defining the limit or extent to which damages may be granted. Section 70-7-27 B states:

> Except as provided in the Uniform Owner-Resident Relations Act, the resident may recover damages and obtain injunctive relief for any material noncompliance by the owner with the rental agreement or section 20 of the Uniform Owner-Resident Relations Act [70-7-20]. If the noncompliance is willful, the resident may recover reasonable attorney's fees. If the owner's noncompliance is caused by conditions or circumstances beyond his control, the resident may not recover consequential damages, but retains remedies provided in section 31 of the Uniform Owner-Resident Relations Act [70-7-31].

**{3}** The statute defines what damages may be recovered by distinguishing between the willful acts of the property owner as opposed to conditions or circumstances beyond his control. The entire section must be considered in determining whether there is any unconstitutional vagueness. **State v. Ferris**, 80 N.M. 663, 665, 459 P.2d 462, 464 (Ct. App.1969); **State v. Minns**, 80 N.M. 269, 454 P.2d 355 (Ct. App.1969), **cert. denied**, 80 N.M. 234, 453 P.2d 597 (1969). We hold that the statute is sufficiently clear to meet the constitutional tests imposed.

**{4}** The owner next claims that the resident is not entitled to abatement of rent because she failed to give written notice of any breach. Section 70-7-29, N.M.S.A. 1953 (Supp.1975) provides that before a resident is entitled to abatement of rent he must give the owner written notice specifying the owner's breach. In the present case the court found that the owner had actual notice of the deficiencies claimed. There is, however, no evidence of any written notice. The resident, Ms. Covarrubia, did not appear the testify at the hearing and the only testimony in the record is that the land owner did not receive written notice. The owner properly requested a

finding of fact that the resident did not serve any written notice in compliance with § 70-7-29 allowing abatement of rent. The trial court erred in failing to give this requested finding of fact.

**{5}** In reading the Uniform Owner-Resident Relations Act in its entirety, we find that § 70-7-13 A, N.M.S.A. 1953 (Supp.1975) deals with general notice and states that "[a] person has notice of a fact if: (1) he has actual knowledge of it; (2) he has received a notice or notification of it; or (3) from all facts and circumstances known to him at the time in question he has reason to know that it exists." This section controls any notice requirement under the Act except for the written notice specifically required by § 70-7-29. That section provides:

> A. Upon the failure of the owner to perform his obligations as required by section 20 of the Uniform Owner-Resident Relations Act [70-7-20], the resident may give written notice to the owner specifying the breach and may:
>
> * * * * * *
>
> (2) be entitled to reasonable abatement of the rent.
>
> * * * * * *
>
> C. The rights under this section **do not arise until the resident has given written notice to the owner** . . . (emphasis added).

**{6}** The statute requires written notice for an abatement of rent. Written notice having been absent in this case, we reverse the trial court. The case is remanded with instructions that the judgment be revised accordingly.

**{7} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-021**

**Filing Date: March 21, 1978**

**Docket No. 11,691**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellant,**

**v.**

**EDWARD VINCENT NICOLINI,**

**Defendant-Appellee.**

Toney Anaya, Atty. Gen.
Dennis P. Murphy, Asst. Atty. Gen.
Santa Fe

Ira Robinson, Dist. Atty.
David C. Hughes, Jr., Asst. Dist. Atty.
Albuquerque

for Plaintiff-Appellant.

John Bigelow, Chief Public Defender
Santa Fe

William D. Teel, Asst. Public Defender
Albuquerque

Reginald J. Storment, Appellate Defender
Santa Fe

for Defendant-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Defendant was arrested pursuant to the Uniform Criminal Extradition Act[1] on a warrant issued from the State of Arizona. After a hearing, the trial court granted a writ of habeas corpus to the defendant thereby discharging him. The State appeals. We reverse.

**{2}** On July 15, 1976, in a hearing before the District Court of Bernalillo County, the defendant was sentenced pursuant to a separate charge arising in New Mexico. At the sentencing, mention was made that charges were pending against defendant in Arizona, whereupon the district court purported to release the defendant on his recognizance from the Arizona charges and allowed the State of Arizona thirty days to perfect extradition. There were no indicia of jurisdiction in the New Mexico courts at that time. The record reflects only the statements of the assistant district attorney indicating the possibility of an Arizona warrant for his arrest.

**{3}** One year later, Arizona applied for extradition pursuant to the Uniform Criminal Extradition Act. Defendant claimed that because Arizona failed to perfect extradition within thirty days of July 15, 1976, principles of fundamental fairness demanded that Arizona be precluded from extraditing him.

**{4}** The trial court had no jurisdiction over the defendant pertaining to any Arizona matter in 1976. Under the Uniform Criminal Extradition Act, the district court does not obtain jurisdiction over the person until after an arrest has been made. § 41-19-10, N.M.S.A. 1953 (Repl.1972). In the present case there was never an arrest. Any acts of the trial court were beyond its authority and did not preclude the subsequent statutory proceedings of which defendant complains. Defendant was not incarcerated nor held pursuant to any of the acts of the district court nor did he suffer any other prejudice by virtue of the ultra vires act of the district court. It is true that for more than one year he had the specter of criminal charges over his head, however this was created by the charges in Arizona and not by virtue of any act of the trial court in New

[1] §§ 41-19-1 et seq., N.M.S.A. 1953 (Repl.1972 and Supp.1975).

Mexico. Upon appeal the defendant abandoned claims of res judicata and double jeopardy and relied solely upon the fundamental unfairness of the proceeding. We can find no unfairness. The defendant did not suffer any damage, harm, inconvenience or prejudice from the extra-jurisdictional actions of the trial court in 1976. We therefore reverse the trial court and order that the habeas corpus be dissolved in order that statutory proceedings for extradition may be pursued.

**{5} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-022**

**Filing Date: March 21, 1978**

**Docket No. 11,635**

**IN RE INVESTIGATION NO. 2 OF THE GOVERNOR'S ORGANIZED CRIME PREVENTION COMMISSION. STATE EX REL. THE GOVERNOR'S ORGANIZED CRIME PREVENTION COMMISSION,**

**Petitioner-Appellee,**

**v.**

**CARLOS JARAMILLO AND JOHNNY VIGIL,**

**Respondents-Appellants.**

Marchiondo & Berry
William C. Marchiondo
Albuquerque

for Vigil.

David L. Norvell
Albuquerque

for Jaramillo.

Toney Anaya, Atty. Gen.
Dennis M. Murphy, Asst. Atty. Gen.
Santa Fe

Harris L. Hartz, Sp. Asst. Atty. Gen.
Albuquerque

for Petitioner-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This case involves the validity of a subpoena duces tecum issued pursuant to the Organized Crime Act, as amended, §§ 39-1-1 et seq., N.M.S.A. 1953 (Supp. 1975 & Inter. Supp. 1976-77). The Governor's Organized Crime Prevention Commission, in an investigation to determine whether the liquor industry in New Mexico has been infiltrated by organized crime, subpoenaed records of a Santa Fe bank covering loans and bank accounts belonging to the State Liquor Director Carlos Jaramillo. Jaramillo moved to quash the subpoena, stating that the Act was unconstitutional. The trial judge denied the motion and Jaramillo appealed.

**{2}** Jaramillo challenges the constitutionality of the Act under three theories:

> (1) Does the United States Constitution require a showing of probable cause before records of a business can be subpoenaed?

**{3}** It is Jaramillo's claim that the fourth and fourteenth amendments of the United States Constitution require a showing of probable cause before records of a business can be subpoenaed. We disagree. The Commission is an investigatory rather than an accusatory body and therefore its subpoenas are administrative subpoenas. **Dixon v. Pennsylvania Crime Commission,** 347 F. Supp. 138 (M.D.Pa.1972); **Illinois Crime Investigating Com'n v. Buccieri,** 36 Ill.2d 556, 224 N.E.2d 236 (1967). Administrative subpoenas, including subpoenas duces tecum, are not subject to the search and seizure provisions of the fourth amendment. **United States v. Morton Salt Co.,** 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950); **Oklahoma Press Pub. Co. v. Walling,** 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614 (1946); 1 K. Davis, **Administrative Law Treatise,** § 3.05 (1958). The fourth amendment, however, requires that a subpoena be sufficiently limited in scope and relevant in purpose. **See v. City of Seattle,** 387 U.S. 541, 544, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967).

**{4}** The United States Supreme Court has set three requirements an agency must meet in issuing subpoenas: (a) the inquiry must be within the authority of the agency; (b) the demand must not be too indefinite; and (c) the information must be reasonably relevant to the purpose of the investigation. **Morton, supra,** 338 U.S. at 652, 70 S. Ct. 357. If a subpoena does not meet the three requirements then it is violative of the fourth amendment.

**{5}** Under the Act the Legislature provided that the Commission must petition the district court to obtain a subpoena. The district court must determine whether the investigation is within the power of the Commission, whether the subpoena is definite enough and whether the material sought is reasonably relevant. What is reasonably relevant depends on the nature and purpose of the investigation and relevancy cannot be determined in the absence of a stated purpose. Once the purpose is ascertained it must be shown that the material sought has a logical relation to the purpose of the investigation. **Oklahoma Press, supra,** 327 U.S. at 209, 66 S. Ct. 494; **See also** Davis, **supra,** § 3.06. If the Commission is able to make such a showing the subpoena will issue.

**{6}** After a subpoena is issued the individual or institution upon whom it is served has an opportunity to challenge it. The subpoenas issued under the Act ask only for voluntary compliance. Under § 39-9-4 D, N.M.S.A. 1953 (Inter. Supp. 1976-77) of the Act the Commission is authorized to go to any district court to seek enforcement of the subpoena. The Legislature must have contemplated that the subpoenaed person would be allowed to show at that hearing why the subpoena should not be enforced.

**{7}** We need not reach the question of whether the subpoena in the present case was proper. The trial court held that Jaramillo could not intervene to challenge the sufficiency of the petition upon which the subpoena was issued. Jaramillo did not appeal that ruling.

(2) Is the Act unconstitutionally vague and indefinite?

**{8}** Appellant claims that the Act is unconstitutionally vague and indefinite. We hold the Act is not the type of statute that is amenable to a claim of vagueness. In **State v. Najera,** 89 N.M. 522, at 522, 554 P.2d 983, at 983 (Ct. App.1976) the Court of Appeals stated:

> The vagueness doctrine is based on notice and applies when a potential actor is exposed to criminal sanctions without a fair warning as to the nature of the proscribed activity. (citations omitted).

No one can be found guilty of violating the Act. The Act is not a penal act. The only sanction that can come from the Act is a contempt citation for failure to abide by a court order. The Act therefore is not unconstitutionally vague or indefinite.

(3) Does the title of the Act violate art. IV, § 16 of the New Mexico Constitution?

**{9}** The New Mexico Constitution provides that, "The subject of every bill shall be clearly expressed in its title." Appellant claims that because the 1977 amendment to the Act for the first time authorizes the Commission to investigate racketeering, the title of the amendment should have contained the word "racketeering." We disagree. In the case of **State v. Humble Oil & Refining Co.,** 55 N.M. 395, 420, 234 P.2d 339, 356 (1951), this Court stated:

> It seems to us that the construction of the section of the constitution in question which most truly follows its spirit without being so narrowly technical on the one side so as to substitute the letter for the spirit, or so foolishly liberal on the other as to render the constitutional provision nugatory, is that when it appears from the title of the act that certain specific provisions of another act are to be amended, the body of the amending act may contain only matter which is reasonably germane to the subject matter of the sections which are stated by the title to be the subject of amendment * * *.

We hold that racketeering is reasonably germane to the subject matter of organized crime and

therefore the word "racketeering" does not need to appear in the title to Ch. 215, 1977 N.M. Laws 712, which amended the Act.

**{10}** We affirm the decision of the trial court.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**WILLIMA FEDERICI,**
**Justice**

**JOHN McMANUS,**
**Chief Justice, specially concurring and dissenting**

**DISSENT**

**McMANUS, Chief Justice, specially concurring and dissenting.**

**{12}** The trial court granted appellant's petition to intervene and object to the issuance of the subpoenas for the limited purpose of challenging the constitutionality of the Act which created the Organized Crime Prevention Commission. The majority opinion correctly holds that the Act does not violate the fourth and fourteenth amendments of the United States Constitution, nor is the Act unconstitutionally vague, nor is title of the Act defective. I concur in the opinion to that extent. However, I feel that there are certain constitutional questions which this Court should properly consider.

**{13}** The New Mexico Constitution Art. II, § 18 provides "No person shall be deprived of life, liberty or property without due process of law * * *" Art. II, § 10 guarantees that "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, * * *" It is not clear from the record before us if the appellant properly raised the constitutionality of the Act under our constitution before the trial court. The trial court in its decision concluded that the Act did not violate the due process clause of the New Mexico Constitution. The majority opinion does not reach this question because it was not raised or briefed by appellant.

**{14}** I recognize that this Court does not decide abstract constitutional questions, **State v. Hines,** 78 N.M. 471, 432 P.2d 827 (1967), nor do we reach constitutional issues when a case may be disposed of on other grounds, **Ratliff v. Wingfield,** 55 N.M. 494, 236 P.2d 725 (1951). We do, however, reserve the power to decide questions not preserved for review when those issues concern the general public interest or fundamental rights of a party. N.M.R. Civ. App. 11 [21-12-11, N.M.S.A. 1953 (Supp.1975)]. That due process of law is a fundamental right cannot be questioned. This Court has on rare occasions granted a party standing to raise certain constitutional issues, e.g., **State ex rel. Sego v. Kirkpatrick,** 86 N.M. 359, 524 P.2d 975 (1974), or decided constitutional questions in its discretion, e.g., **State v. Campbell,** 75 N.M. 86, 92, 400 P.2d 956, 960 (1965). Since this issue was decided by the trial court, I feel that this Court should consider the question of whether the New Mexico Constitution requires a showing of probable cause before records of a business may be subpoenaed.

**{15}** The majority opinion is correct in the legal interpretation of the federal due process standards as applied to administrative subpoenas. The United States Supreme Court has granted broad subpoena powers to administrative agencies to investigate private individuals and their papers, but this state need not adopt that federal standard. In **State of New Mexico ex rel. Serna v. Hodges,** 89 N.M. 351, 356, 552 P.2d 787, 792 (1976) we stated:

> [We are] the ultimate arbiters of the law of New Mexico. We are not bound to give the same meaning to the New Mexico

> Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, "unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter." **People v. Brisendine,** 13 Cal.3d 528, 548 119 Cal. Rptr. 315, 328, 531 P.2d 1099, 1112 (1975).

**{16}** The Legislature passed this Act in the exercise of its authority, but the Legislature's power is limited, as is the Judiciary's, by our constitution and that constitution is the yardstick by which we must measure legislative acts. **State v. Mechem,** 63 N.M. 250, 316 P.2d 1069 (1957). The guarantees of due process and freedom from unreasonable searches may not be abridged by either the legislative, executive, or judicial branch of government.

**{17}** The Act gives the Commission power to subpoena records in its investigations. Although administrative subpoenas are not equivalent to the search and seizure provisions associated with a warrant, a subpoena in aid of an investigation is clearly a search of a citizen's papers and effects. This type of a subpoena which calls for the production of private records functions in the same manner as a warrant insofar as it violates one's constitutional right to be secure in their papers and effects. Therefore, it appears that a minimum of due process is required, i.e., a showing of probable cause **to investigate.** In this instance, I would adopt a different approach from the federal due process standard and grant the citizens of this state greater protection "in their *{*520}* persons, papers, homes and effects" by requiring the Commission to prove to a judicial officer that it has probable cause to call for the collection and release of such documents. I recognize that this would place an additional burden on the Commission in fulfilling its duties, but I feel the constitution mandates this result.

**{18}** Notwithstanding the above issues, there still remains a question as to the relevancy and specificity of the documents requested by the Commission. This issue was not resolved by the trial court because the scope of appellant's intervention was limited to challenging the constitutionality of the Act. This decision was proper based upon N.M. Rules Civ. Pro. Rule 24(b) [§ 21-1-1(24)(b), N.M.S.A. 1953 (Repl.1970)]. The propriety of the subpoena remains as a major issue to be resolved in a subsequent proceeding if challenged by the Bank. The majority opinion requires the Commission to meet three requirements in supporting the validity of its subpoena; (1) the inquiry must be within the authority of the agency, (2) the request must be specific, and (3) the information must be relevant. Although I would require the subpoena to meet a probable cause standard, it remains to be seen if the subpoena can meet even the lesser requirements outlined by the majority.

**{19}** For the reasons stated above, I concur in the majority opinion on the issues decided therein, but I dissent in the ultimate result which would require a standard of less than probable cause to enforce a subpoena issued by the Organized Crime Prevention Commission.

**JOHN McMANUS,**
**Chief Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-023**

**Filing Date: March 23, 1978**

**Docket No. 11,369**

**ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY AND TUCSON GAS & ELECTRIC COMPANY,**

**Plaintiffs-Appellants,**

**v.**

**FRED O'CHESKY, COMMISSIONER OF REVENUE, BUREAU OF REVENUE AND STATE OF NEW MEXICO,**

**Defendants-Appellees.**

Montgomery, Andrews & Hannahs
Frank Andrews, III
Santa Fe

Rodey, Dickason, Sloan, Akin & Robb
William C. Schaab
Albuquerque

White, Koch, Kelly & McCarthy
Benjamin Phillips
Santa Fe

Bigbee, Stephenson, Carpenter & Crout
Richard N. Carpenter
Santa Fe

Snell & Wilmer
Mark Wilmer
Daniel J. McAuliffe
Phoenix, Ariz.

for Appellants.

Toney Anaya, Atty. Gen.
Jan Unna
Daniel H. Friedman, Special Asst. Attys. Gen.
Bureau of Revenue
Santa Fe

for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** Appellants, five major public utility companies who generate electricity in New Mexico, sought a judgment declaring the provisions of the Electrical Energy Tax Act, Ch. 263, 1975 N.M. Laws 1371[1] to be unconstitutional and void. The district court denied their motion for summary judgment and granted summary judgment on a cross-motion filed by the appellee, Commissioner of the Bureau of Revenue. We sustain the trial court.

**{2}** There was testimony that power plants owned and operated by the utility companies within the State of New Mexico cause an estimated $12,000,000 of environmental damage each year. There was evidence that the socio-economic problems caused by the plants may cost as much as $27,000,000 to remedy. Further testimony indicated that if the utilities were to generate the same amount of electricity at their plants outside of New Mexico it could cost them an additional $124,000,000 annually. New Mexico enacted the Electrical Energy Tax to deal with these conditions. The Act imposes a tax upon the "privilege of generating electricity in this state for the purpose of sale." The provisions of the Act pertinent to this suit are §§ 3[2] and 9[3]. Section 3 provides as follows:

[1] The Act amended §§ 45-4-28 and 72-13-24, N.M.S.A. 1953 and added §§ 72-34-1 through 72-34-6 and 72-16A-16.1.
[2] Section 72-34-3, N.M.S.A. 1953 (Supp.1975).
[3] Section 72-16A-16.1, N.M.S.A. 1953 (Supp.1975).

> A. For the privilege of generating electricity in this state for the purpose of sale, whether the sale takes place in this state or outside this state, there is imposed on any person generating electricity a temporary tax, applicable until July 1, 1984, of four-tenths of one mill ($.0004) on each net kilowatt hour of electricity generated in New Mexico.

Section 9 provides:

> A. If on electricity generated outside this state and consumed in this state, an electrical energy tax or similar tax on such generation has been levied by another state or political subdivisions thereof, the amount of such tax paid may be credited against the gross receipts tax due this state.
>
> B. On electricity generated inside this state and consumed in this state which was subject to the electrical energy tax, **the amount of such tax paid may be credited against the gross receipts tax due this state.** (Emphasis added.)

**{3}** Section 3 imposes a 2% tax[4] on all electricity generated in the state. Section 9 provides a tax credit against the 4% gross receipts tax imposed on all retail sales in the state. The ultimate effect is that in-state sales are, as in the past, subject to a total tax burden of 4% while out-of-state sales are subjected to a 2% tax burden which they previously did not have.

**{4}** During the pendency of this litigation, the United States Congress enacted the Tax Reform Act of 1976. Section 2121(a) of that Act, 15 U.S.C. § 391 (1976), provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity **which discriminates** against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory **if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.** (Emphasis added.)

**{5}** The appellants argue that New Mexico's Electrical Energy Tax is prohibited by § 2121(a) of the federal act because it discriminates against out-of-state producers. If so, it must give way to the federal act because of the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2.

**{6}** The operative test of a discriminatory tax under § 2121(a) is:

> [I]f it results, either directly or indirectly, in a **greater tax burden** on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce. (Emphasis added.)

**{7}** The utilities contend that the credit provisions of the Electrical Energy Act result in a "greater tax burden" on electricity destined for use out-of-state than on electricity used in-state. They misread the section's language. The word "greater" means "larger", not "additional." As used, greater is a word of comparison.

**{8}** The Electrical Energy Tax does not "directly" place a greater tax burden on electricity destined for out-of-state transmission. All utilities pay the same generating tax at the same rate. Ch. 263, § 3, 1975 N.M. Laws 1371.

**{9}** To determine whether the Electrical Energy Tax "indirectly" results in a greater burden on electricity destined for out-of-state use as compared to electricity used within the state, the **entire tax structure** of a state as applied to the **particular commodity** which is taxed must be examined. **See Halliburton Oil Well**

[4] For the sake of clarity in this opinion we will refer to the tax as 2% although it varies slightly and is usually less.

**Cementing Co. v. Reily,** 373 U.S. 64, 83 S. Ct. 1201, 10 L. Ed. 2d 202 (1963); **Gregg Dyeing Co. v. Query,** 286 U.S. 472, 52 S. Ct. 631, 76 L. Ed. 1232 (1932).

**{10}** The test of discrimination is not whether a tax imposes an **additional** burden on out-of-state electricity compared to the situation prior to passage of the tax. The test is whether the generation tax on electricity destined for out-of-state use is larger than the total tax on each unit of electricity subsequently consumed in New Mexico. The gross receipts tax, although reduced by the amount of generation tax, continues to impose a burden on in-state sales of electricity from which out-of-state sales of electricity are exempted. Thus, while the out-of-state electricity must bear an **additional** tax that it was not previously required to bear, payment of this tax does not result in a "greater tax burden" on that electricity.

**{11}** New Mexico chose to decrease the rate of its sales tax for electricity by allowing the generation tax to be credited against its sales tax. This approach is not condemned by § 2121(a). A state has the power to shift the burden of its tax as it feels best as long as it does so in a nondiscriminatory manner. **See Public Utility Dist. No. 2 of Grant County v. State,** 82 Wash.2d 232, 510 P.2d 206 (1973), **appeal dismissed for want of a substantial federal question,** 414 U.S. 1106, 94 S. Ct. 833, 38 L. Ed. 2d 734 (1974).

**{12}** Appellants further claim that the Electrical Energy Tax violates the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3. They claim that the energy tax places an undue burden on interstate commerce. Interstate commerce and its instrumentalities are not immune from state taxation. Interstate commerce must pay its own way. **Western Live Stock v. Bureau,** *{*489}* 303 U.S. 250, 254, 58 S. Ct. 546, 82 L. Ed. 823 (1938).

**{13}** The test in determining whether the Electrical Energy Tax places an undue burden on interstate commerce, is whether the Act, in its practical application, discriminates against interstate commerce. **Best & Co. v. Maxwell,** 311 U.S. 454, 455, 456, 61 S. Ct. 334, 85 L. Ed. 275 (1940). The courts in passing on this question have employed two tests:

> (1) Whether the tax places an extra burden on interstate commerce not borne by intrastate commerce, or erects barriers, placing out-of-state businesses at a disadvantage when competing locally; **the discrimination test.** (2) Whether the interstate commerce involved is subject to the risk of repeated exactions of the same nature from other states; **the multiple burden test.**

**Public Utility, supra,** 510 P.2d at 209.

**{14}** Appellants argue that the energy tax is contrary to both the discrimination test and the multiple burden test.

(1) **Discrimination Test**

**{15}** Appellants contend that while the energy tax on its face may not violate the Commerce Clause, the operation of the credit provisions contained in § 9 of the Act work to discriminate against the out-of-state producer. We do not agree with this analysis.

**{16}** The appellants have failed to show that the energy tax as applied places out-of-state producers at a disadvantage when competing against local producers. The out-of-state producers who retail electricity inside the state get the same tax credit as the in-state producers. If electricity consumed in New Mexico is subject to an electrical energy tax imposed by another state it can also take advantage of the credit provisions of § 9. Further, the electricity that is retailed outside the state is not in competition with the electricity consumed within the state. Without competition there can be no discrimination. **Public Utility, supra.**

**{17}** In the present case the Legislature has determined that instead of a strict 4% gross receipts tax on the retail sale of electricity they would impose a 2% tax on the generation and a 2% tax on the retail sale. In this instance we find no discrimination.

All producers of electricity are subject to the energy tax. All producers who retail their electricity in New Mexico can take advantage of the credits provided in § 9. The energy tax does not place the out-of-state producer at a disadvantage when competing against the in-state producer.

(2) **Multiple Burden Test**

**{18}** Appellants also argue that the energy tax is discriminatory because its sole and exclusive economic impact is upon an interstate transaction—the transmission of electricity for consumption in other states. They cite as authority, **Mich.-Wis. Pipe Line Co. v. Calvert,** 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583 (1954). In that case the United States Supreme Court invalidated a Texas tax on the occupation of "gathering gas," measured by the volume of gas "taken," because the incidence of the tax had been delayed beyond the step where production had ceased and transmission in interstate commerce had begun. The Court held that the incidence of the tax was "on the exit of gas from the State," and found that the gathering of the gas into transmission lines was an integral part of interstate commerce. **Id.** at 167, 74 S. Ct. 396. Had Texas been allowed to impose such a tax, the door would have been opened for other states on the line to tax the volume of gas in the pipeline as it crossed their boundaries. The net effect would have been "to resurrect the customs barriers which the Commerce Clause was designed to eliminate." **Id.** at 170, 74 S. Ct. at 403.

**{19}** Appellants contend that the Electrical Energy Tax Act carries the vice condemned in **Michigan-Wisconsin** further, stating that it is only interstate transmission and consumption of electricity that incurs any monetary liability by reason of the energy tax. We cannot agree with their analysis.

**{20}** There is a distinct difference between the generation of electricity and the transmission of electricity as it relates to interstate commerce. The United States Supreme Court has held that:

> [T]he process of generation is as essentially local as though electrical energy were a physical thing; and to that situation we must apply, as controlling, the general rule that commerce does not begin until manufacture is finished, and hence the commerce clause of the Constitution does not prevent the state from exercising exclusive control over the manufacture.

**Utah Power & L. Co. v. Pfost,** 286 U.S. 165, 181, 52 S. Ct. 548, 552, 76 L. Ed. 1038 (1932).

**{21}** The energy tax is a tax on the generation of electricity and electricity can only be generated once. Since the electricity is generated in the State of New Mexico, only New Mexico can impose a tax on the generation. Only if the tax were imposed upon some later, nonlocal process would the **Michigan-Wisconsin** case be applicable.

**{22}** For the reasons stated, we affirm the trial court and hold the Electrical Energy Tax to be constitutional and valid.

**{23} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-025**

**Filing Date: March 30, 1978**

**Docket No. 11,580**

**K. L. HOUSE CONSTRUCTION CO., INC., A NEW MEXICO CORPORATION, AND WESTERN CASUALTY AND SURETY COMPANY, A FOREIGN CORPORATION AUTHORIZED TO DO BUSINESS IN NEW MEXICO,**

**Plaintiffs-Appellants,**

**v.**

**THE CITY OF ALBUQUERQUE, NEW MEXICO, A MUNICIPAL CORPORATION,**

**Defendant-Appellee.**

Hannett, Hannett, Cornish & Barnhart
Charles E. Barnhart
Scott Oliver
Albuquerque

for Plaintiffs-Appellants.

Sutin, Thayer & Browne
Irwin S. Moise
Raymond Schowers
Albuquerque

for Defendant-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Appellants sought a declaratory judgment, requesting the district court to construe certain contracts and declare that appellants had fulfilled their obligations under the contracts. Upon the application of appellee, The City of Albuquerque, the district court stayed the proceedings and ordered arbitration. The arbitrators granted the City an award of $125,000. The district court confirmed the award and denied the appellants' motion to vacate, modify or correct the award. This appeal seeks a review of the district court order allowing arbitration and the subsequent order confirming the arbitration award.

**{2}** In April, 1973, the City engaged K. L. House Construction Co. to perform certain additions and other work on a manufacturing plant which the City leases to industrial users. A part of this contract involved a roofing job which House subcontracted to Jack Pope, Inc. Under the contract a "forty year roof" was to be applied. The contract provided that House would give the City a one year warranty on all its work, and further provided that the roofer, Pope, would give a two year warranty running directly to the City. Appellant, Western Casualty & Surety Company, wrote performance bonds to the City in behalf of House. The work was completed and the job was accepted by the City on November 3, 1973.

**{3}** The trial court entered a finding, supported by substantial evidence, that within the one year warranty period the City gave notice to House that there were some problems with the roof. Within its two year warranty period Pope made certain repairs on the roof. After the expiration of both warranty periods the City sought to have the entire roof replaced, asserting that the roofing job failed to meet the requirements of the contract. The appellants, House, Pope and Western, sought a declaratory judgment from the district court that the acceptance of the job by the City and the expiration of the warranty periods satisfied all the terms of the contract with regards to the roof. The City sought to have this issue determined under the arbitration clause in the contract which provided as follows:

> 7.10 ARBITRATION
>
> 7.10.1 All claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

**{4}** Appellants claim that arbitration is inappropriate because the dispute did not arise out of the contract but is a dispute which arose after the contract had been completed. The appellants argue that the matter should therefore be determined by a trial in district court. We cannot agree with this position.

**{5}** In addition to the provisions of the arbitration clause in the contract entered into between the parties, the Uniform Arbitration Act adopted by New Mexico provides in § 22-3-9, N.M.S.A. 1953 (Supp.1975) as follows:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

**{6}** The agreement between the parties provided that "[a]ll claims, disputes and other matters in question arising out of, or relating to, this Contract or the breach thereof, . . . shall be decided by arbitration." We hold that any disputes pertaining to the performance of the contract, even if they arise after the warranty has expired, are disputes which arise out of the contract and are therefore subject to arbitration.

**{7}** We adopt the reasoning of the New York Court of Appeals which said:

> [T]he announced policy of this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties. . . . To this end the Legislature has assigned the courts a minimal role in supervising arbitration practice and procedures.
>
> Generally it is for the courts to make the initial determination as to whether the dispute is arbitrable, that is "whether the parties have agreed to arbitrate the particular dispute" . . .
>
> [T]ypically the parties adopt a "broad" arbitration clause agreeing generally to submit to arbitration all disputes arising out of the contract, or any dispute relating to the meaning and interpretation of the underlying agreement. Then the scope of the arbitration clause and the scope of the underlying agreement are identical, and disputes over interpretation run the hazard of being refined into questions of arbitrability. . . .
>
> The way out of this apparent dilemma of course is to recognize that although the courts and the arbitrators in these cases cover the same field, they perform very different functions. Basically the courts perform the initial screening process designed to determine in general terms whether the parties have agreed that the subject matter under dispute should be submitted to arbitration. Once it appears that there is, or is not a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract, the court's inquiry is ended.

**Nationwide Gen. Ins. Co. v. Investors Ins. Co. of Am.,** 37 N.Y.2d 91, 95, 96, 371 N.Y.S.2d 463, 466, 332 N.E.2d 333, 335 (1975).

**{8}** In the present case the subject matter of the dispute has a reasonable relationship to the subject matter of the contract. It would be inconsistent to hold that the parties intended to arbitrate only disputes which were discovered during the period of construction or any short warranty period following thereafter. When a broad and general arbitration clause is used, as in this case, the court should be very reluctant to interpose itself between the parties and the arbitration upon which they have agreed. When the parties agree to arbitrate any potential claims or disputes arising out of their relationships by contract or otherwise, the arbitration agreement will be given broad interpretation unless the parties themselves limit arbitration to specific areas or matters. Barring such limiting language, the courts only decide the threshold question of whether there is an agreement to arbitrate. If so, the court should order arbitration. If not, arbitration should be refused. We therefore affirm the decision of the district court in submitting the matter to arbitration.

**{9}** The appellants also claim that the arbitration award should have been vacated. The New Mexico Arbitration Act sets forth the grounds for vacating an award. § 22-3-20, N.M.S.A. 1953 (Supp.1975). Appellants contend that there was evident partiality and misconduct by the arbitrators prejudicing their rights.

**{10}** The claim of misconduct by the arbitrators asserted by appellants is based upon two evidentiary matters. An opening statement by counsel for the City was presented to the arbitrators in a written form. It included documents with a synopsis of what the City's position would be as to each document and a summary of what other witnesses would prove. Appellants argue that this deprived them of the opportunity to effectively cross-examine on those matters before they were reviewed by the arbitrators. Conversely, a written article tendered by appellants to the arbitrators was refused as being hearsay.

**{11}** Misconduct of an arbitrator was discussed in **Lee v. Providence Washington Ins. Co.,** 82 Mont. 264, 274, 266 P. 640, 643 (1928), wherein the court stated:

> The word "misconduct," as employed in the first statement of the rule, is comprehensive enough to include "misfeasance" and "malfeasance." As variously defined, misfeasance is the improper doing of an act which a person might lawfully do; malfeasance is the doing of an act which a person ought not to do at all. . . . Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner. Malfeasance is the unjust performance of some act which the party had no right, or which he had contracted not, to do. . . . Misfeasance is the wrongful or injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner, while malfeasance is doing an act which is positively unlawful or wrongful. (Citations omitted.)

**{12}** The evidentiary rulings by the arbitrators did not constitute misconduct within the meaning of the statute. The only record before us indicates that the evidence either included in the opening statement or excluded in the written article was cumulative and testified to by other witnesses. Appellants were not injured by either act.

**{13}** We affirm the trial court.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-033**

**Filing Date: May 3, 1978**

**Docket No. 11,704**

**FRED W. POORBAUGH,**

**Petitioner-Appellant,**

**v.**

**NEW MEXICO REAL ESTATE COMMISSION,**

**Respondent-Appellee.**

**Motion for Rehearing Denied May 15, 1978**

Sutin, Thayer & Browne
Ronald J. Segel
Albuquerque

for Petitioner-Appellant.

Toney Anaya, Atty. Gen.
Nicholas R. Gentry, Asst. Atty. Gen.
Santa Fe

for Respondent-Appellee.

## OPINION

**PAYNE, Justice.**

**{1}** The New Mexico Real Estate Commission issued an order revoking Fred Poorbaugh's real estate license. The Commission found that Poorbaugh, while acting as a broker, made material misrepresentations to people with whom he dealt in buying and selling a piece of real estate. Poorbaugh sought review of the Commission's order in the district court. The district court upheld the Commission's decision. Poorbaugh appealed. We affirm in part and reverse in part.

**{2}** Poorbaugh claims that the court erred in two areas. First, he asserts that the Commission did not have jurisdiction over the transactions in question and therefore could not revoke his license. We do not agree.

**{3}** Section 67-24-20, N.M.S.A. 1953 (Repl.1974) of the Real Estate Brokers and Salesmen Act provides in pertinent part:

> A real estate broker within the meaning of this act [67-24-19 to 67-24-35] is any person . . . who for a salary, fee, commission or valuable consideration lists, sells or offers for sale, buys or offers to buy, or negotiates the purchase or sale or exchange of real estate . . . or **advertises or holds himself out as being engaged in the business of buying, selling, exchanging . . . any real estate** . . . as a whole or partial vocation.
>
> . . . . .
>
> The provisions of this act shall not apply to any person . . . who as owner or lessor shall perform any of the aforesaid [acts]. . . . (Emphasis added.)

Poorbaugh argues that since he bought and sold the land for himself he was not acting as a "broker." Conversely, the Commission claims that because he represented to the buyer and seller that he was a broker, he was in fact a "broker" within the meaning of § 67-24-20 and therefore it had jurisdiction to revoke his license.

**{4}** In interpreting § 67-24-20, we must read the statute as a whole, with each part construed in connection with all other parts. **Trujillo v. Romero,** 82 N.M. 301, 481 P.2d 89 (1971). Section 67-24-20 provides that a person who advertises or holds himself out as being engaged in the business of buying and selling real estate is a broker. The Commission found that Poorbaugh advertised that he was acting as a broker.

It further found that while acting as a broker, Poorbaugh misrepresented his intentions and engaged in conduct that demonstrated bad faith and impropriety.

**{5}** Section 67-24-29, N.M.S.A. 1953 (Repl.1974) provides that the Commission can revoke a broker's license if, while engaged in any activity as a broker, he is guilty of any of the acts enumerated in the section. We hold that under the New Mexico statute if Poorbaugh represented to either the buyer or seller that he was acting as a broker, the Commission has jurisdiction. Whether Poorbaugh made such a representation is a factual determination to be made by the trier of fact. A licensed broker has the burden of showing that there is no possibility of misunderstanding or confusion as to his status when he purports to act for himself.

**{6}** Poorbaugh also claims that the court erred in failing to give him a hearing **de novo.** The trial court ruled that the scope of review should be governed by the Uniform Licensing Act, § 67-26-20, N.M.S.A. 1953 (Repl.1974). We reverse on this issue.

**{7}** In determining whether Poorbaugh is entitled to the hearing **de novo** in the district court, we must determine whether § 67-26-20 or § 67-24-30, N.M.S.A. 1953 (Repl.1974) applies. Section 67-26-20 provides that the judge shall receive "no evidence not offered at the hearing." On the other hand, § 67-24-30 provides that a broker may appeal the decision of the Commission to a district court and the hearing in the district court "shall be tried **de novo."**

**{8}** We hold that § 67-24-30 is controlling. The Uniform Licensing Act, of which § 67-26-20 is a part, was adopted in 1957. It purports to govern reviews of many boards and commissions including the Real Estate Commission. The Real Estate Brokers and Salesmen Act, of which § 67-24-30 is a part, was adopted in 1959 and is specifically limited to governing the New Mexico Real Estate Commission. In the case of **State ex rel. Bird v. Apodaca,** 91 N.M. 279, 573 P.2d 213 (1977) we held that where statutes are in conflict with one another other and one cannot be applied without doing violence to another, the specific provision should govern over the general. In **Bird** the Court also said, "when the Legislature enacts a new statute we presume that it intended to change the law as it previously existed." **Id.** at 284, 573 P.2d at 218. In passing the Real Estate Brokers and Salesmen Act the Legislature knew of the provisions of the Uniform Licensing Act. If the Legislature had intended appeals to the district court to be governed by the provisions of the Uniform Licensing Act it could have stated such or it could have said nothing. Instead it adopted § 67-24-30 which sets forth a different method for appeal.

**{9}** The Commission argues that because the 1971 Legislature amended the Uniform Licensing Act by changing the New Mexico Real Estate Board to the New Mexico Real Estate Commission, the Legislature intended that the Uniform Licensing Act should control. We cannot agree. The Commission still follows the hearing procedures set forth in the Uniform Licensing Act. The only portion of that Act that is not applicable is § 67-26-20, dealing with appeals to the district court. The Legislature enacted § 67-24-30 to outline the procedure for reviewing the Commission's ruling.

**{10}** This case must be remanded to the district court for a hearing **de novo** not inconsistent with this opinion.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-043**

**Filing Date: May 26, 1978**

**Docket No. 11,523**

**STELLA M. GARMOND AND BEVERLY FLORES, INDIVIDUALLY AND AS MEMBERS OF A CLASS OF OWNERS OF LOTS IN THE SAN MIGUEL ACRES SUBDIVISION,**

**Plaintiffs-Appellees,**

**v.**

**EDWARD E. KINNEY AND KINNEY BRICK COMPANY, INC.,**

**Defendants-Appellants.**

Miller & Melton
Steve H. Mazer
Albuquerque

for Defendants-Appellants.

Toulouse, Krehbiel & DeLayo
Narciso Garcia, Jr.
Albuquerque

for Plaintiffs-Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** Plaintiffs Stella Garmond and Beverly Flores brought suit individually and as owners of lots in San Miguel Estates seeking a prescriptive easement over land belonging to the defendant, Kinney Brick Company. The land involved is located in the Manzano Mountains. The trial court granted the easement to the plaintiffs and Kinney appeals. We reverse.

**{2}** In order for the court to grant an easement in favor of the plaintiffs, the plaintiffs must show by clear and convincing evidence that they used the roadway in question openly, uninterruptedly, peaceably, notoriously, adversely and under a claim of right for a period of ten years and that they did so with the knowledge of the owner. **Vigil v. Baltzley**, 79 N.M. 659, 448 P.2d 171 (1968); **Sanchez v. Dale Bellamah Homes of New Mexico, Inc**., 76 N.M. 526, 417 P.2d 25 (1966); **Hester v. Sawyers**, 41 N.M. 497, 71 P.2d 646 (1937). Kinney claims that the plaintiffs' use was permissive and thus not adverse to its interest in the land.

**{3}** "A prescriptive right cannot grow out of a strictly permissive use, no matter how long the use." **Id**. at 504, 71 P.2d at 651. Several uncontroverted facts lead to the conclusion that plaintiffs used the road with the permission of Kinney.

**{4}** First, in 1953 Alice Ingram Smith, the plaintiffs' predecessor, obtained from the forest service a Special Use Permit allowing her to improve and use the roadway. A condition to the issuance of the permit was that Mrs. Smith obtain permission from the Kinney Brick Company to cross its land. There is uncontroverted evidence that Mrs. Smith received permission from Kinney. Tom Kinney testified:

> A. Yes. Early in the '50's Mr. Cole, who had been surveying the clay pit property and with whom I had a great deal of contact . . . came to me and asked for permission to put a road from the then subdivision that didn't have a name at that time to the west of us, along . . . a closer route to Highway 10 because the only way to get in and out of the Acres Subdivision that he was platting was the circuitous route up the valley or down the valley north that joined eventually Highway 14 or Highway 10 at the time and he was looking for a shorter route.

Q. Did he tell you who he was representing?
A. No, sir.
Q. Just the owners of the subdivision?
A. Right, he said they were relatives of his.
. . . . .
(My father) told me to tell Mr. Cole to go ahead . . . and also to inform Mr. Cole to inform his people that this was only on a temporary basis because sometime maybe we would need that ground and on that basis to go ahead.
Q. Did you, in fact, tell Mr. Cole this?
A. Yes, that's the only reason he went ahead and did it.

**{5}** Mr. Cole is the son-in-law of Mrs. Smith and he received permission to use the roadway on her behalf. When Mrs. Smith received permission to use the roadway, Kinney knew that she was going to subdivide the land. Kinney's permission went directly to the unknown lot owners.

**{6}** A second indication that the use of the roadway was permissive was a letter addressed to Mrs. Smith, dated July 23, 1959 and introduced as defendants' Exhibit 6. The letter, written by Kinney's attorney, reaffirmed that Mrs. Smith's use of the roadway was permissive. It was stipulated that in 1959 Mrs. Smith lived at the address indicated in the letter and that the letter was mailed. A properly addressed letter that is mailed is presumed to be received. **Adams v. Tatsch**, 68 N.M. 446, 362 P.2d 984 (1961); **Associated Petroleum Transport v. Shepard**, 53 N.M. 52, 201 P.2d 772 (1949). There was no competent evidence introduced to rebut this presumption.

**{7}** Finally, the trial court found that the roadway had been used by the Campfire Girls and by the general public as well as by the plaintiffs. Based upon this finding, the trial court concluded that the plaintiffs had established a prescriptive easement. We cannot agree. A finding that the general public used the roadway is inconsistent with the conclusion that plaintiffs established a prescriptive easement. **Martinez v. Mundy**, 61 N.M. 87, 295 P.2d 209 (1956). In the **Martinez** case this Court held that an easement by prescription could not be acquired by usage "common with and similar to that of the general public." **Id**. at 95, 295 P.2d at 214. The court's finding does not support the conclusion that plaintiffs established an easement. To the contrary, use by the general public under under the facts of this case negates such a conclusion.

**{8}** We hold that based on the evidence in the record, the plaintiffs failed to show that they used the roadway adverse to Kinney's interest. We reverse the decision of the trial court.

**{9} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-047**

**Filing Date: June 8, 1978**

**Docket No. 11,684**

**VALERIA C. BARELA,**

**Petitioner-Appellant,**

**v.**

**ERNESTO ORLANDO BARELA,**

**Respondent-Appellee.**

James R. Beam
Albuquerque,

for Petitioner-Appellant.

Richard J. Grodner
Albuquerque

for Respondent-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This is an appeal by Valeria Barela from a decree terminating Ernesto Barela's support obligation for their children. The original divorce decree provided that Ernesto Barela was to make monthly support payments for the two minor children and have reasonable visitation rights. Subsequent to the divorce, the mother petitioned the district court for help in collecting past due support payments. On the second occasion the mother also sought an order greatly limiting the father's visitation rights. The trial court, after hearing testimony from the parties and the two minor children, granted judgment for the arrearages but relieved the father of paying future child support. We affirm the decision of the trial court.

**{2}** The mother claims that the trial court erred in three respects. First, she claims that the court's order denied her due process. She argues that because the father never petitioned the court to terminate the support payments, the court should not have addressed that issue. Secondly, she argues that the judge erred as a matter of law in terminating the support requirement. Thirdly, she claims the court erred in failing to adopt a statement of evidence and proceedings.

**{3}** The case of **Corliss v. Corliss**, 89 N.M. 235, 549 P.2d 1070 (1976), is applicable in determining whether the court denied Valeria Barela due process in terminating future child support. In **Corliss** the father brought a change of custody action against his former wife. The wife counterclaimed seeking alimony and child support arrearages. The judge ordered a change of custody for one of the children and reduced the amount of child support and alimony. The wife appealed claiming that the court erred in reducing child support payments and alimony without being petitioned to do so. The wife argued that because the father's pleadings did not ask for a reduction in alimony and support obligation the court denied her due process by ordering the reduction. This Court reversed the trial court on the alimony reduction but affirmed on the reduction of child support. The Court stated:

> Notice and a fair hearing must be afforded both parties to meet the requirements of due process. . . . Moreover, a court cannot modify a judgment when neither party has sought such relief and the issue has not been implicitly or explicitly consented to by the parties. . . . The Husband did not seek a modification of alimony, and neither party consented to a modification. Thus, the trial court improperly modified future alimony and is reversed.
>
> The modification of child support, however, is a different question. The Husband sought a change of custody which implicitly

> would involve the consideration of future child support if a change of custody were made. **Although it would have been better practice to plead for modification of child support when seeking a change of custody, we nevertheless hold that failure to do so did not preclude consideration of the issue since the questions of change of custody and child support are so inextricably related**. The trial court is affirmed on this issue. (Emphasis added.)

**Id.** at 238-39, 549 P.2d at 1073-74.

**{4}** In **Corliss** we said that changes in custody and child support are so inextricably related that a consideration of one may open the door to a hearing on the other. In this case the mother raised the issue of child support and visitation rights. She was present during the hearing, was represented by counsel, presented testimony and could have cross-examined all the witnesses.

**{5}** The district court has jurisdiction to modify and change existing orders regarding visitation rights and support obligations. **Quintana v. Quintana**, 45 N.M. 429, 115 P.2d 1011 (1941); § 22-7-6 C, N.M.S.A. 1953 (Supp.1975). Whether to modify an award of support payments is in the discretion of the trial judge. § 22-7-6 C. Where the issues of child support and visitation rights are raised, the court is not precluded from or limited in fully adjudicating those rights.

**{6}** The mother argues that the case of **Fullen v. Fullen**, 21 N.M. 212, 153 P. 294 (1915), prevents the court from withholding support payments to enforce visitation rights. That case is not applicable here. In **Fullen** the mother removed the children from the state and refused to allow them to visit their father. The court found that the mother was unable to support the children without the help of the father and refused to modify the support obligation. **Fullen** holds that support obligations are for the benefit of the children and the court should not punish the children for the wrongdoing of the mother. We reaffirm the holding of the **Fullen** case. Support obligations are for the benefit of the children and if the custodial parent does not have the financial ability to support the children, the support obligation should not be reduced. But this is not the situation in the present case. In this case the court found, and the mother does not challenge the finding, that she is financially able to take care of the children. It is only after making this finding that the court could properly consider reducing the support obligation.

**{7}** Parents have equal responsibility to support their children. **Petition of Quintana**, 83 N.M. 772, 497 P.2d 1404 (1972). New Mexico recognizes that if a parent does not support his child when legally required to do so, his rights to associate with the child can be terminated by the court. Where a custodial parent is financially able to support the children and the children refuse to visit their other parent due to the emotional influence of the custodial parent, the court in its discretion has the power to terminate future support obligations of the non-custodial parent. **Spingola v. Spingola**, 91 N.M. 737, 580 P.2d 958 (1978); **Snellings v. Snellings**, 272 Ala. 254, 130 So.2d 363 (1961); **Spurrell v. Spurrell,** 205 Cal. App.2d 786, 23 Cal. Rptr. 414 (1962); **Gannon v. Gannon**, 258 Minn. 57, 102 N.W.2d 677 (1960). In the present case, the court found that the mother was financially able to support the children. It also found that the children refused to visit their father and that their refusal was due to the emotional, mental and physical influence of the mother. If circumstances change, the mother may petition the district court and the court may again modify its order.

**{8}** As a final argument, Valeria Barela claims the court erred in failing to adopt a statement of evidence and proceedings as dictated by Rule 7(c) of the New Mexico Rules of Appellate Procedure for Civil Cases. N.M.R. Civ. App. 7(c) [§ 21-12-7(c), N.M.S.A. 1953 (Supp.1975)]. Even if the court committed error by not adopting a statement, the error is harmless. It was her responsibility to perfect the record on appeal and since she chose not to challenge the findings of fact we are bound by those findings. **Westland Development Co. v. Saavedra**, 80 N.M. 615, 459 P.2d 141 (1969).

**{9}** We affirm.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-048**

**Filing Date: June 9, 1978**

**Docket No. 11,823**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**LAWRENCE MENDOZA,**

**Respondent.**

Toney Anaya, Atty. Gen.
Sammy J. Quintana, Asst. Atty. Gen.
Santa Fe

for Petitioner.

Charles R. Finley
Albuquerque

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** Mendoza pleaded guilty to larceny and was sentenced to serve one to five years in the penitentiary. The sentence was suspended and he was placed on probation for two years. Later, the State sought a revocation of his probation and a hearing was held. The sentencing court found that Mendoza violated probation by carrying a concealed weapon and revoked probation. Mendoza denied that he was the Lawrence Leroy Mendoza convicted in another case of carrying a concealed weapon. He appealed the revocation of his probation to the Court of Appeals which reversed. The Court of Appeals held that Mendoza was entitled to a jury trial on the issue of whether he was the person convicted of carrying a concealed weapon. We granted certiorari and reverse.

**{2}** The Court of Appeals relied in part on the case of **Ex Parte Lucero**, 23 N.M. 433, 168 P. 713 (1917). The **Lucero** case holds that a defendant is entitled to a jury trial in a revocation proceeding if he pleads "want of identity of himself and the person originally sentenced." **Id.** at 439, 168 P. at 715. In its opinion in the present case, the Court of Appeals cited **State v. Wolfer**, 53 Minn. 135, 54 N.W. 1065 (1893), in explaining the rationale behind the **Lucero** case:

> "According to the course of common-law practice, the only issue that must be tried by a jury is whether the prisoner is the same person who was convicted. The reason for this is that otherwise a person might be remanded to suffer punishment who has never been tried by a jury." There is no problem in this case as to whether the defendant in the probation revocation proceeding was the person originally sentenced.

**State v. Mendoza**, 17 N.M.St.B. Bull. 2343, 2344 (1978).

**{3}** The Court of Appeals then followed two decisions from this Court, **State v. Peoples**, 69 N.M. 106, 364 P.2d 359 (1961) and **Blea v. Cox**, 75 N.M. 265, 403 P.2d 701 (1965). These cases expanded **Lucero** by granting a probationer the right to a jury trial if he claimed he was not the person who committed the act relied upon for revocation. We reverse **Peoples** and **Blea** on this issue.

**{4}** In the present case, Mendoza was entitled to a jury trial on the original larceny charge. He chose not to exercise that right when he entered his guilty plea. It was within the discretion of the trial court to place him on probation. The trial court revoked probation when, after a hearing, it

was satisfied that Mendoza violated the terms of probation.

**{5}** Mendoza's right to a jury trial for any new offense charged is not affected. The holding in this case does not affect the other rights of a probationer in a revocation hearing. A probationer has a right to a hearing on whether he has violated the conditions of his probation. **Blea, supra; Peoples, supra; State v. Brusenhan**, 78 N.M. 764, 438 P.2d 174 (Ct. App.1968). Probation is not a right but a privilege. A revocation hearing is not a criminal proceeding and the same procedural safeguards that attach to a criminal proceeding do not always apply to revocation hearings. **Brusenhan, supra**. A probationer is "a person convicted of an offense, and the suspension of his sentence remains within the control of the court." **Burns v. United States**, 287 U.S. 216, 222, 53 S. Ct. 154, 156, 77 L. Ed. 266 (1932).

**{6}** In **Brusenhan** the Court adopted the following language from **Sparks v. State**, 77 Ga. App. 22, 47 S.E.2d 678 (1948), in setting the proper standard in a revocation hearing:

> "In a hearing of this character a violation of the conditions of probation must be established with such reasonable certainty as to satisfy the conscience of the court of the truth of the violation. It does not have to be established beyond a reasonable doubt. * * *"

**Brusenhan**, 78 N.M. at 766, 438 P.2d at 176.

**{7}** There was substantial evidence to support the trial court's decision that Mendoza violated the terms of his probation. The Court of Appeals is reversed and the decision of the trial court is affirmed.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**DAN SOSA, JR.,**
**Justice, dissenting**

**DISSENT**

**SOSA, Justice, dissenting.**

**{9}** I cannot agree with the majority opinion. I would not reverse **State v. Peoples**, 69 N.M. 106, 364 P.2d 359 (1961) nor **Blea v. Cox**, 75 N.M. 265, 403 P.2d 701 (1965) since I believe those cases reflect good law. The right involved is a substantial right and should not lightly be set aside for either administrative convenience or judicial economy. Therefore, I respectfully dissent.

**DAN SOSA, JR.,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-055**

**Filing Date: July 14, 1978**

**Docket No. 11,855**

**LUCIA VALDEZ, PERSONAL REPRESENTATIVE OF VICTOR CHAVEZ, DECEASED, RICHARD D. LANCE, SR., PERSONAL REPRESENTATIVE OF GLADYS M. LANCE, DECEASED, ISABELA BARELA, PERSONAL REPRESENTATIVE OF JIMMY BARELA, DECEASED, AND THEODORE EUGENE HALL,**

**Petitioners,**

**v.**

**IRBY B. BALLENGER,**

**Respondent.**

Benito Sanchez
Sutin, Thayer & Browne
Jonathan B. Sutin
Joseph P. Paone
Albuquerque

for Petitioners.

Modrall, Sperling, Roehl, Harris & Sisk
James A. Parker
Rodey, Dickason, Sloan, Akin & Robb
Robert G. McCorkle
Albuquerque

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** This opinion involves the question of proper venue and jurisdiction of two causes of action arising out of a two-car collision in Bernalillo County. Irby Ballenger, the driver and sole occupant of one car, filed suit on May 24, 1977, in Bernalillo County against Theodore Hall, the driver of the other car, and the unnamed personal representative of Victor Chavez, the owner and a passenger in the car driven by Hall. Jimmy Barela and Gladys Lance were also passengers in the car driven by Hall. On June 10, Lucia Valdez was named personal representative of the Chavez estate and filed suit in Torrance County against Ballenger. Hall and the personal representatives of Lance and Barela joined in the Torrance action against Ballenger. Ballenger subsequently amended his complaint in Bernalillo County substituting Valdez as the representative of the Chavez estate. On August 1, the judge in Torrance County orally enjoined Ballenger from proceeding in Bernalillo County and on August 24, the Bernalillo County judge enjoined Hall and Valdez from proceeding in Torrance County. Both parties appealed to the Court of Appeals which ordered the trial court in Torrance County to abate the action and rescind its injunction. Hall, Valdez, Lance and Barela sought a writ of certiorari which we granted. We agree with the result reached by the Court of Appeals.

**{2}** Ballenger argues that the case of **State v. Larrazolo,** 70 N.M. 475, 375 P.2d 118 (1962), is applicable and that Hall and Valdez should be forced to file their claim as a counterclaim in the Bernalillo action. **Larrazolo** holds that:

> Generally, a second suit based on the same cause of action as a suit already on file will be abated where the first suit is entered in a court of competent jurisdiction in the same state between the same parties and involving the same subject matter or cause of action, if the rights of the parties can be adjudged in the first action.

**Id.** at 482, 375 P.2d at 123.

**{3}** Hall was named in the suit filed on May 24, thus under **Larrazolo** he must proceed in Bernalillo County. Ballenger argues that under Rule 15(c) of the New Mexico Rules of Civil Procedure, § 21-1-1(15)(c), N.M.S.A. 1953 (Repl.1970), the July 10 amendment substituting Valdez for John Doe as representative of the Chavez estate relates back to May 24 and therefore Valdez should be forced to abate her action in Torrance County. Rule 15(c) provides that an amendment will relate back to the date of the original complaint if the claim or defense stated in the amended pleading arose out of the same conduct, transaction or occurrence set forth in the original complaint and (1) the party to be brought in by amendment has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) he knew or should have known that but for a mistake concerning the identity of the proper party, the action would have been brought against him. The following cases have held that substitution of a John Doe relates back to the original complaint: **Varlack v. SWC Caribbean, Inc.,** 550 F.2d 171 (3rd Cir. 1977); **Craig v. United States,** 413 F.2d 854 (9th Cir. 1969), **cert. denied,** 396 U.S. 987, 90 S. Ct. 483, 24 L. Ed. 2d 451 (1969); **Stephens v. Balkamp, Inc.,** 70 F.R.D. 49 (E.D. Tenn.1975); **Heatherton v. Playboy, Inc.,** 60 F.R.D. 372 (C.D. Cal.1973). In the present case Hall and Valdez are represented by the same law firm. Further, at the time the suit was filed, Hall's attorney advised Ballenger that his law firm was representing the Chavez estate. Valdez received notice of the suit and she knew that she would have been served had she been named representative of the Chavez estate. Therefore, the July 6, 1977, amendment relates back to May 24 and Valdez must abate her action in Torrance County. Rule 13(a) of the New Mexico Rules of Civil Procedure, § 21-1-1(13)(a), N.M.S.A. 1953 (Repl.1970), provides that if Mrs. Valdez wants to assert a claim against Ballenger she must do so as a compulsory counterclaim in the Bernalillo action.

**{4}** The remaining question is whether Lance and Barela can proceed in Torrance County absent Valdez. The Court of Appeals did not directly address this issue. Since Lance and Barela are not parties in the Bernalillo County action the court in Bernalillo County did not have jurisdiction over them and therefore their action in Torrance County should not be abated under the rationale of the **Larrazolo** case. The court in Torrance County has jurisdiction to hear Lance and Barela's claim. But venue is improper and therefore, since Ballenger properly raised the issue of improper venue, the Torrance County action should be dismissed. Valdez, as Chavez' personal representative, is the only party who could bring suit in Torrance County. Lance and Barela both resided in Bernalillo County and their estates are being probated in Bernalillo County. Had Valdez properly filed her suit in Torrance County, Lance and Barela could join pursuant to § 21-5-1, N.M.S.A. 1953 (Repl.1970). Lance and Barela argue that because venue was proper in Torrance County when the action was commenced, even if Valdez is forced to abandon her suit in Torrance County, they should be allowed to continue their suit. They rely on **Hughes v. Joe G. Maloof and Company,** 84 N.M. 516, 505 P.2d 859 (Ct. App.1973). In the **Hughes** case the Court of Appeals held that § 21-5-1 requires only that venue be proper when the action is commenced. But in the instant case because the amendment substituting Valdez for John Doe as representative of the Chavez estate related back to the original filing of the complaint in Bernalillo County, venue in the Torrance County action was improper **ab initio.** Since venue was not proper when the action was commenced Lance and Barela will not be allowed to maintain the action in Torrance County.

**{5}** We remand this case to the district court with instructions to dismiss the Torrance County case without prejudice to the rights of the parties to join the Bernalillo County action.

**{6} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-060**

**Filing Date: July 26, 1978**

**Docket No. 11,942**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**ROGER LOPEZ,**

**Respondent.**

**Motion for Rehearing Denied June 1, 1978;**
**Writ of Certiorari Denied July 11, 1978**

Toney Anaya, Atty. Gen.
Sammy J. Quintana, Asst. Atty. Gen.
Santa Fe

for Petitioner.

Joan Friedland
Santa Fe

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** Defendant was convicted of burglary. He appealed the conviction, claiming the trial court erred in failing to submit to the jury the issue of whether he was competent to stand trial. The Court of Appeals reversed the decision and the State petitioned for writ of certiorari. We reverse the Court of Appeals and affirm the decision of the trial court.

**{2}** Prior to trial, the defendant raised the issue of his competency to stand trial. A psychiatric examination was ordered by the court. The psychiatrist stated that in his expert opinion defendant was competent to stand trial. Four days before trial defendant moved for an additional psychiatric examination. He alleged that recent behavior changes raised new questions of competency. The court denied defendant's motion. On the day of trial defendant offered two witnesses who would testify as to the need for a further examination to determine defendant's competency. After hearing one of the witnesses, the trial judge reversed his earlier ruling and authorized the additional examination. The new examination was conducted by a different psychiatrist who testified that defendant was competent even though one of the tests administered showed a borderline result. The court then found defendant competent to stand trial and refused to submit the issue of competency to the jury. The jury found defendant guilty of the offense.

**{3}** The Court of Appeals correctly stated that the trial judge's ruling was subject to review for abuse of discretion. **State v. Noble,** 90 N.M. 360, 563 P.2d 1153 (1977). We hold that the trial court did not abuse its discretion.

**{4}** The question of incompetency to stand trial is often compared with the defense of insanity. **State v. Santillanes,** 91 N.M. 721, 580 P.2d 489 (Ct. App.1978). In many respects they are similar. But they are different in one critical area. To rebut the presumption of sanity a defendant must only introduce some competent evidence to support the allegation of insanity. **State v. Hartley,** 90 N.M. 488, 565 P.2d 658 (1977); **State v. Roy,** 40 N.M. 397, 60 P.2d 646 (1936). The burden then shifts to the State to prove beyond a reasonable doubt that defendant was sane at the time the act was committed.

**{5}** On the other hand, if the defendant claims incompetency to stand trial he must show by a preponderance of the evidence that he is not competent. **State v. Armstrong,** 82 N.M. 358, 482 P.2d 61 (1971); **State v. Ortega,** 77 N.M.

7, 419 P.2d 219 (1966). In this case it was the opinion of both psychiatrists that the defendant was competent to stand trial. The second psychiatrist admitted that defendant was in the borderline group, but still maintained that defendant was competent. Defendant also presented lay testimony that he was not capable of aiding his counsel.

**{6}** In reviewing the present case the appellate court should only examine the evidence to determine whether the trial court abused its discretion. The reviewing court cannot substitute its judgment for that of the trial court. **Edington v. Alba,** 74 N.M. 263, 392 P.2d 675 (1964); **Rogers v. Lyle Adjustment Company,** 70 N.M. 209, 372 P.2d 797 (1962).

**{7}** Viewing the evidence in the light most favorable to the trial court's decision we hold it did not abuse its discretion by finding that there was no reasonable doubt that defendant failed to meet his burden.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-061**

**Filing Date: July 26, 1978**

**Docket No. 11,904**

**EDGAR W. MILLICAN,**

**Petitioner,**

**v.**

**STATE OF NEW MEXICO,**

**Respondent.**

Whitney Johnson
Santa Fe

for Petitioner.

Toney Anaya, Atty. Gen.
Lawrence A. Gamble, Asst. Atty. Gen.
Santa Fe

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** Defendant was convicted by a jury of intentionally obtaining a controlled substance by forgery in that he used a forged prescription purportedly signed by a Dr. Sims. He claims that the trial court erred in admitting a tape recording of a stipulation made by defense counsel at the preliminary hearing. Defendant appealed to the Court of Appeals which affirmed the trial court. He then petitioned for a writ of certiorari, we granted certiorari and reverse the decision and remand the case for a new trial.

**{2}** At the preliminary hearing, in Lovington, the State subpoenaed Dr. Sims, but due to an emergency in Eunice the doctor was unable to attend. The prosecutor and defense counsel agreed to recess the hearing and go to Eunice to take Dr. Sims' deposition. The deposition was recorded on a tape recorder but the tape recorder malfunctioned and the recording was inaudible. The parties, not wishing to further delay the hearing, entered into a stipulation summarizing Dr. Sims' testimony at the deposition. Defendant was bound over for trial. At the trial the State once again subpoenaed Dr. Sims but was again unable to secure his attendance because he had moved from the state. The State offered into evidence the tape recording of the stipulation from the preliminary hearing. Defendant objected on the grounds that it denied him the right to confront and cross-examine Dr. Sims. The court ruled that since Dr. Sims was unavailable to testify, the recording of the stipulation would be received into evidence. On review the Court of Appeals upheld the conviction and held that the stipulation would have been admissible even if the doctor had been available. We do not agree.

**{3}** It is important to understand the purpose and the extent of the stipulation. Defense counsel did not stipulate to the truthfulness of Dr. Sims' deposition testimony, he merely acknowledged what Dr. Sims testified at the deposition.

**{4}** If Dr. Sims had testified at the preliminary hearing and had been unavailable for the trial, the transcript of his testimony would have been admissible. N.M.R. Evid. 804(b)(1) [§ 20-4-804(b)(1), N.M.S.A. 1953 (Supp.1975)].

**{5}** If the stipulation had been that Dr. Sims did not sign the prescription, then defendant would have been bound by the stipulation. **See State v. Plant**, 86 N.M. 2, 518 P.2d 961 (Ct. App.1973); Annot., 100 A.L.R. 775 (1936). If defendant had stipulated to the truthfulness of the doctor's statements the trial judge could have instructed the jury on the point and no further evidence would have been necessary. Such is not the case. All defendant stipulated was that Dr. Sims said

he did not sign the prescription and rarely prescribed the drug in question. The stipulation had no other effect.

**{6}** The accused's right to confront the witnesses against him is basic to both the United States and the New Mexico Constitutions. U.S. Const. Amend. VI; N.M. Const. art. II, § 14. The purpose of the guarantee is explained in **State v. James**, 76 N.M. 376, 380, 415 P.2d 350, 352 (1966):

> The purposes of confrontation are to secure to the accused the right of cross-examination; the right of the accused, the court and the jury to observe the deportment and conduct of the witness while testifying; and the moral effect produced upon the witness by requiring him to testify at the trial.

**{7}** Under the facts presented in this case we hold that defendant was deprived of his constitutional right to confront Dr. Sims. We therefore reverse the case and remand it for a new trial.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**MACK EASLEY,**
**Justice, not participating**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-062**

**Filing Date: July 26, 1978**

**Docket No. 11,511**

**NEW MEXICO BANK AND TRUST COMPANY,**

**Plaintiff-Appellant,**

**v.**

**LUCAS BROTHERS, A PARTNERSHIP COMPOSED OF RAYMOND A. LUCAS AND JOHNNY T. LUCAS, RAYMOND A. LUCAS, JOHNNY T. LUCAS AND LOUISE V. LUCAS, HUSBAND AND WIFE, LIBERTY NATIONAL BANK AND NATHAN G. HOWRY,**

**Defendants-Appellees.**

**Motion for Rehearing Denied August 8, 1978**

Heidel, Samberson, Gallini & Williams
Jerry L. Williams
Lovington

for Plaintiff-Appellant.

Sanders, Templeman & Crutchfield
C. Barry Crutchfield
Lovington

for Defendants-Appellees.

**OPINION**

**PAYNE, Justice.**

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

**{2}** A chronology of the loans is helpful in understanding the issues:

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

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

> [t]he payment of all loans, advances, indebtedness or liabilities, whether now existing or which hereafter come into existence, whether matured or unmatured, whether direct or indirect, absolute or contingent, primary or secondary, including any extensions and renewals thereof, and however acquired by mortgagee, due the mortgagee from the mortgagor.

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

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

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

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

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

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

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

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

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

**{9}** The importance of allowing open-ended lending made possible by the "dragnet clause" is well recognized. **First Nat. Bank of Guntersville v. Bain,** 237 Ala. 580, 188 So. 64 (1939); **Smith Eng. & Const. Co. v. United States Fid. & Guar. Co.,** 199 So.2d 302 (Fla. Dist.Ct. App.1967); **Estes v. Republic National Bank of Dallas**, 462 S.W.2d 273 (Tex.1970). However, in lending money secured by property, recording statutes provide for notice to other potential

lenders and indicate the upper limits of that financing. § 71-2-1, N.M.S.A. 1953 (Repl.1961). Because potential lenders rely upon the recorded mortgages to determine whether to make other loans there must be certainty as to the extent to which a mortgage encumbers property. It would defeat the purpose of recording to allow "dragnet clauses" to extend to the bounds argued by appellants.

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

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

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

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-071**

**Filing Date: September 6, 1978**

**Docket No. 11,743**

**TERESA M. STRINGER AND MANUEL GARCIA, GUARDIAN AD LITEM FOR REBECCA RACHEL STRINGER,**

**Plaintiffs-Appellants,**

**v.**

**STEPHEN P. DUDOICH,**

**Defendant-Appellee.**

Wycliffe V. Butler
Albuquerque

for Plaintiffs-Appellants.

Alarid & Riley
Michael Alarid, Jr.
James E. Riley, Jr.
Albuquerque

for Defendant-Appellee.

**OPINION**

**PAYNE, Justice.**

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

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

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

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

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

**{5}** At early common law an illegitimate child was considered **nullius filius**—the son of no one—of no mother and no father. He was not entitled to support from anyone. In New Mexico, however, both legitimate and illegitimate children are entitled to support from their mothers and fathers. **Petition of Quintana**, 83 N.M. 772, 497 P.2d 1404 (1972); **State ex rel. Terry v. Terry**, 80 N.M. 185, 453 P.2d 206 (1969); **Wilson**

**v. Wilson**, 45 N.M. 224, 114 P.2d 737 (1941); § 40A-6-2, N.M.S.A. 1953 (Supp.1975); § 22-4-1, N.M.S.A. 1953 (Supp.1975). Section 22-4-1 provides:

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

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

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

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

**{6}** The question remaining is whether the two-year statute of limitations imposed by § 22-4-24 bars a child from bringing an action beyond his second birthday. We hold that it does not.

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

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

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

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

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

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

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-083**

**Filing Date: November 8, 1978**

**Docket No. 11,838**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**SIMON MARTINEZ,**

**Defendant-Appellant.**

**Motion for Rehearing Denied December 1, 1978**

Theodore E. Lauer
Santa Fe

for Defendant-Appellant.

Toney Anaya, Atty. Gen.
Michael E. Sanchez, Asst. Atty. Gen.
Santa Fe

for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Defendant Simon Martinez was convicted of criminal sexual penetration in the second-degree and of a separate charge of armed robbery. He was sentenced to a term of ten to fifty years for each offense. The court ordered that the terms be served consecutively. Thereafter, habitual offender charges were filed against him based on these two convictions and three previous convictions. Defendant was tried and convicted on the habitual offender charges and was resentenced to two consecutive life sentences pursuant to § 40A-29-5 C, N.M.S.A. 1953 (Repl.1972) (repealed by Laws 1977, ch. 216, § 17, effective July 1, 1979).

**{2}** Defendant raises three issues on appeal from his conviction of and sentencing on the habitual offender charges: (1) Whether the trial court erred in refusing to submit to the jury the issue of the alleged invalidity of two of defendant's prior convictions; (2) whether consecutive life sentences may be imposed under § 40A-29-5 C; and (3) whether defendant was properly credited with time he served on the original vacated sentences. We affirm the trial court on the first two issues, but remand the case for the purpose of crediting defendant for time he served prior to his conviction in the habitual offender proceedings.

I. **Validity of Prior Convictions**

**{3}** At his trial on the habitual offender charges, defendant attempted to introduce evidence to show that his guilty pleas to burglary charges in 1964 and 1969 were entered as a result of coercion by law enforcement officers, and were therefore involuntary. The proffered evidence consisted of the testimony of the attorney who represented defendant on the two burglary charges and the defendant's own testimony. The trial court heard the testimony, ruled that the validity of the prior convictions was a question of law which was not to be submitted to the jury, and held that the challenged convictions were valid.

**{4}** Section 40A-29-7, N.M.S.A. 1953 (Repl. 1972) (repealed by Laws 1977, ch. 216, § 17, effective July 1, 1979) provides for trial by jury in habitual proceedings. That section requires the jury to decide two issues: (1) Whether the defendant in an habitual proceeding is "the same person mentioned in the several records as set forth in the information"; and (2) whether the defendant has been convicted of the previous crimes as charged.

**{5}** Defendant contends that because the jury must decide whether defendant was previously

convicted of the crimes set forth in the habitual offender information, it must also determine whether those prior convictions were legally valid. We do not agree.

**{6}** The constitutional validity of the prior convictions upon which the habitual offender charges are brought is subject to attack in an habitual offender proceeding. **State v. Dalrymple,** 75 N.M. 514, 407 P.2d 356 (1965); **State v. Dawson,** 91 N.M. 70, 570 P.2d 608 (Ct. App.1977). However, we cannot subscribe to the view that all issues of validity are to be decided by the jury in such a proceeding. This is particularly the case where the attack on the prior convictions goes to the validity of defendant's guilty pleas. The Court of Appeals stated in **State v. Gallegos,** 91 N.M. 107, 111, 570 P.2d 938, 942 (Ct. App.1977):

> It is the trial court that determines whether a guilty plea is voluntary. Rule of Crim. Proc. 21(f). It is the trial court that determines whether a plea of guilty may be withdrawn. **State v. Kincheloe,** 87 N.M. 34, 528 P.2d 893 (Ct. App.1974). Similarly, the trial court should determine whether a guilty plea is invalid.

**{7}** Defendant contends that this problem is analogous to the manner in which allegations that a confession was involuntary are decided. In such a case the trial judge makes a preliminary determination of the issue, and if he concludes that it was voluntarily given, the defendant may have the issue submitted to the jury for a final determination. **Jackson v. Denno,** 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); **State v. Burk,** 82 N.M. 466, 483 P.2d 940 (Ct. App.1971), **cert. denied,** 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971); N.M.U.J.I. Crim. 40.40 [Vol. 6, N.M.S.A. 1953 (Supp. 1975), at 324]; N.M.R. Evid. 104(c) [§ 20-4-104(c), N.M.S.A. 1953 (Supp.1975)]. Defendant argues that the voluntariness of a guilty plea to an offense which is relied upon to support an habitual offender charge should be decided in the same manner.

**{8}** There are two significant differences between proceedings to determine voluntariness of confessions and voluntariness of pleas. The first difference lies in the manner in which guilty pleas are entered. Unlike confessions, guilty pleas are made before an impartial magistrate in a judicial forum with a verbatim record. Such pleas may not be accepted by the court unless a defendant is informed of the nature of the charges against him, the penalties that may be imposed, his right to plead not guilty and the fact that he relinquishes his right to trial by jury by so pleading. N.M.R. Crim.P. 21(e) [§ 41-23-21(e), N.M.S.A. 1953 (Supp. 1975)]. Furthermore, the court must determine from the defendant himself whether the plea is voluntary, and whether it is the result of force, threats, or promises. N.M.R. Crim.P. 21(f) [§ 41-23-21(f), N.M.S.A. 1953 (Supp.1975)]. Any failure to comply would be grounds for appeal. No such safeguards are present at the time extrajudicial confessions are made.

**{9}** The second major difference lies in the nature of the proceedings in which the issue arises. The determination of the admissibility of confessions is made in a judicial proceeding to determine the defendant's guilt or innocence of the charges to which the alleged confession relates. Matters other than the confession may also be presented to the jury in determining guilt or innocence and may affect the determination. In an habitual offender proceeding, the function of the jury is set forth in § 40A-29-7. Here defendant seeks to retry in an habitual offender proceeding the question of voluntariness of guilty pleas he made a decade ago. Although the validity of the prior convictions upon which the habitual offender charge is based is subject to attack in such a proceeding, the purpose of § 40A-29-7 was not to provide a defendant with a trial by jury on previous convictions where the defendant waived such a trial in the original criminal proceedings.

**{10}** The trial court did not err in refusing to submit the question of the voluntariness of defendant's guilty pleas to the jury.

## II. **Imposition of Consecutive Life Sentences**

**{11}** Defendant contends that the imposition of consecutive life sentences following his

conviction in the habitual offender proceedings in the habitual offender proceedings was error in light of § 42-1-59, N.M.S.A. 1953 (Repl.1972).

**{12}** Section 42-1-59 provides:

> Whenever any convict shall have been committed under several convictions with separate sentences, they shall be construed as one continuous sentence for the full length of all the sentences combined.

**{13}** Where a person received eight consecutive sentences each for a term of not less than one nor more than five years, it has been held that the sentence must be considered one continuous sentence of not less than eight nor more than forty years. **Deats v. State**, 84 N.M. 405, 503 P.2d 1183 (Ct. App.1972).

**{14}** Defendant argues that since multiple sentences can never exceed a single life, § 42-1-59 cannot affect his sentences, and consecutive life sentences are therefore meaningless. He contends that his parole eligibility will accrue in ten years under § 41-17-24(D)(4), N.M.S.A. 1953 (Inter. Supp.1976-77).

**{15}** Consecutive life sentences have meaning as they relate to the time that must be served before becoming eligible for parole under § 41-17-24(D)(4). We do not construe the statutory scheme of sentencing adopted by the Legislature to mandate eligibility for parole on consecutive life sentences at the same time as if a defendant had committed a single such crime. In the absence of more specific statutory language evidencing a contrary legislative intent, we hold that consecutive life sentences may be imposed.

III. **Deduction for Time Served**

**{16}** Defendant contends that the trial court failed to properly credit him under § 40A-29-7 for the time he served on the original vacated sentences upon which the habitual charges were based.

**{17}** The original sentences commenced as of the date of sentencing, February 2, 1977. On January 20, 1978 these sentences were vacated and the life sentences were imposed. The commitment to the State Penitentiary expressly provided that the life sentences were to begin as of that date. Therefore, it appears from the record that defendant did not receive the credit to which he was entitled under § 40A-29-7 for time served between February 2, 1977 and January 20, 1978.

**{18}** Under § 40A-29-25, N.M.S.A. 1953 (Repl.1972) defendant was also entitled to credit on his sentences for any period he spent in confinement on these charges prior to imposition of the original sentences on February 2, 1977. It would appear that such credit was not given, although the record is not clear as to what time was actually served.

**{19}** The State contends that if it is not clear whether defendant received proper credit, this issue should be raised in a post-conviction proceeding under N.M.R. Crim.P. 57 [§ 41-23-57, N.M.S.A. 1953 (Supp.1975)]. However, since proper credit may be given on remand of this case to the trial court, there is no reason why defendant should be forced to re-litigate the matter in a new forum at a later date. **But see State v. DeSantos**, 91 N.M. 428, 575 P.2d 612 (Ct. App.1978).

**{20}** The convictions of the habitual offender charges and the imposition of consecutive life sentences are affirmed. The case is remanded to the trial court for the purpose of crediting defendant for the time he has served as required by §§ 40A-29-7 and 40A-29-25.

**{21} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-087**

**Filing Date: November 17, 1978**

**Docket No. 11,958**

**W. D. BAKER AND LOIS M. BARNES,**

**Plaintiffs-Appellees,**

**v.**

**MARGUERITE BENEDICT, JASPER O. BLISS AND BERTHA BLISS, HIS WIFE, RAYMOND KELLY, LEWIS KELLY, A/K/A LOUIS KELLY, WILLIE KELLY, JR., A/K/A WILLIE KELLY, A/K/A WILLIE KELLEY, WILLIE KELLY, SR., PAT E. KELLY, THE FOLLOWING NAMED DEFENDANTS BY NAME IF LIVING, IF DECEASED, THEIR UNKNOWN HEIRS, CANDIDA K. ANAYA, ET AL.,**

**Defendants-Appellants.**

**Motion for Rehearing Denied December 13, 1978**

J. Wayne Woodbury
Silver City

for Defendants-Appellants.

John W. Reynolds
Silver City

for Plaintiffs-Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** Baker and Barnes brought suit to quiet title to twenty-two acres of land in Catron County against appellants Lewis Kelly, Willie Kelly, Jr., and Willie Kelly, Sr. The trial court found for Baker and Barnes. Appellants allege that the trial court erred in quieting title in Baker and Barnes for three reasons: (1) Baker and Barnes or their predecessors in interest failed to take possession of the property at anytime; (2) Baker and Barnes delayed in bringing this action; and (3) the 1952 judgment quieting title to this property in Baker and Barnes' predecessor in interest was invalid. We affirm.

**{2}** Most of the facts in this case are undisputed. Pat E. Kelly, predecessor in interest to Baker and Barnes, obtained various quitclaim deeds and disclaimers to the property from appellants and other heirs of Patricia Kelly and Felicita F. Kelly. In 1952 Pat E. Kelly brought a quiet title action with respect to this property. Title was quieted in him on November 12, 1952. At no time was Pat E. Kelly in possession of the property.

**{3}** Appellants Willie Kelly, Jr., Willie Kelly, Sr. and Lewis Kelly have been in actual physical possession of this property for a continuous period of at least forty-six years, including the entire period since entry of the 1952 judgment. During that time they have made approximately $35,000 in improvements. Appellants concede that since entry of the 1952 judgment they have never had color of title to or paid taxes on the property. Baker and Barnes and their predecessors in interest have paid the taxes on this property since 1952, although they have not been in actual physical possession of the property.

**{4}** The first issue raised by appellants is whether a plaintiff in a quiet title action may prevail notwithstanding the fact that he has never been in actual physical possession of the subject property. Appellants contend that the plaintiff in a quiet title action must not only hold the property under color of title and pay property taxes, but must also be in actual possession of the property for a period of at least ten years prior to the institution of the action.

**{5}** Section 22-14-1, N.M.S.A. 1953 specifically provides that an action to quiet title may be brought by one "whether in or out of possession." **See Caranta v. Pioneer Home Improvements, Inc.,** 81 N.M. 393, 396, 467 P.2d 719, 722 (1970). Appellants contend, however, that §§ 23-1-21 and 23-1-22, N.M.S.A. 1953 (Supp.1975) require a different result.

**{6}** Section 23-1-21 provides:

> In all cases where any person . . . shall have had possession for ten [10] years of any lands, . . . holding or claiming the same by virtue of a deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted shall have been set up or made to the said lands, . . . within the aforesaid time of ten [10] years, then and in that case, the person . . . so holding possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands, . . . in preference to all, and against all, and all manner of person or persons whatsoever; and any person . . . who shall neglect or who have neglected for the said term of ten [10] years, to avail themselves of the benefit of any title, . . . within this state, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in possession, shall be forever barred, and the person or persons . . . so holding or keeping possession as aforesaid for the term of ten [10] years, shall have a good and indefeasible title in fee simple to such lands. . . .

**{7}** Section 23-1-22 provides:

> In all cases where any person . . . shall have had adverse possession continuously and in good faith under color of title for ten [10] years of any lands . . . and no claim by suit in law or equity effectually prosecuted shall have been set up or made to the said lands, . . . within the aforesaid time of ten [10] years, then and in that case, the person . . . so holding adverse possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in some writing purporting to give color of title to such adverse occupant, in preference to all, . . . and any person or persons, . . . who shall neglect or who have neglected for the said term of ten [10] years, to avail themselves of the benefit of any title, legal or equitable, which he . . . may have to any lands . . . within this state, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in adverse possession, shall be forever barred, and the person . . . so holding or keeping possession as aforesaid for the term of ten [10] years shall have a good and indefeasible title in fee simple to such lands. . . . "Adverse possession" is defined to be an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another; . . . and Provided further in no case must "adverse possession" be considered established within the meaning of the law, unless the party claiming adverse possession, his predecessors or grantors, have for the period mentioned in this section continuously paid all the taxes . . . which during that period have been assessed against the property.

**{8}** Appellants' reliance on these two sections is misplaced. Section 23-1-22 provides for acquiring title by adverse possession and specifically requires that the party relying on adverse possession have color of title to and have paid taxes on the property for the statutory period. Appellants have done neither. While this section purports to bar the claims of those who for ten years have taken no action to avail themselves of the benefit of their title, it does so only as against those who are in adverse possession. Therefore, § 23-1-22 does not support appellants' position.

**{9}** Section 23-1-21 is no more helpful to appellants. This section is similar to § 23-1-22,

except that it applies to land grants and does not require that the party relying on it have paid taxes on the property for the statutory period of ten years. Both §§ 23-1-21 and 23-1-22 require that the party in possession have color of title, and both sections bar the claims of others only if the party in possession meets the criteria of the statutes. Since appellants have no color of title, §§ 23-1-21 and 23-1-22 do not require Baker and Barnes to be in physical possession of the property in order to prevail in a quiet title action.

**{10}** Appellants properly contend that a plaintiff in a quiet title action must recover on the strength of his own title and cannot rely on any weaknesses in a defendant's title. **Jackson v. Hartley**, 90 N.M. 428, 564 P.2d 992 (1977). This principle does not dictate a different result in the present case. Baker and Barnes established their claim to title to the property by deed and by payment of taxes thereon. It then became incumbent upon appellants to show a weakness in the title of Baker and Barnes to prevent title from being quieted in them. They sought to do this by attempting to prove superior title in themselves under §§ 23-1-21 and 23-1-22. Their reliance was misplaced. Baker and Barnes prevailed in the trial court on the strength of their title, and not on the basis of any weakness in appellants' claim of title.

**{11}** Appellants' second contention is that the trial court erred in finding that their claim, rather than that of Baker and Barnes, is barred by the doctrine of laches. The elements that must be proved to establish laches are: (1) Conduct on the part of the defendant, giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant or the suit is not held to be barred. **Cave v. Cave,** 81 N.M. 797, 474 P.2d 480 (1970).

**{12}** Appellants point out that Baker and Barnes and their predecessors in interest had an immediate right to possession of the property upon entry of the quiet title decree in 1952, but they took no legal action until bringing this suit in 1973. During the twenty-one year interval Baker and Barnes knew that appellants were in possession of the property and had made improvements on it. Appellants contend that they were unaware that any action would be taken by Baker and Barnes to recover possession.

**{13}** The trial court found that appellants have had personal knowledge since the 1952 quiet title decree that they were divested of their right, title and interest in the property by virtue of quitclaim deeds, disclaimers and the 1952 final decree, but they took no action for twenty-six years. There is substantial evidence to support this finding. There is also evidence that one of the predecessors in interest of Baker and Barnes informed appellants that he claimed title to the property and threatened to evict them. Therefore, the third element of laches is missing.

**{14}** In **Thomas v. Pigman**, 77 N.M. 521, 424 P.2d 799 (1967), this Court held that the doctrine of laches would not bar plaintiffs' action to quiet title to certain property which was within a fence line erected by defendants' predecessor in interest fifty years earlier, despite the fact that plaintiffs had taken no action to correct the boundary line. The Court recognized that lapse of time alone does not necessarily constitute an unreasonable delay; it must appear that the delay worked to the injury of another. The Court noted that where there was a well-known boundary, the location of which was not in dispute, defendants were not injured by plaintiffs' delay in asserting their rights.

**{15}** Likewise, in this case we cannot say that appellants were injured by the delay of Baker and Barnes in bringing this action when they knew that they had been divested of title, had notice that others claimed title to the property, and had never paid taxes on the property. Although appellants did make improvements on the property, they did so at a time when they were fully aware of the risk

involved. There is substantial evidence to support the trial court's refusal to find that the claim of Baker and Barnes was barred by laches.

**{16}** The third contention of appellants is that the trial court erred in holding that appellants failed to prove that the 1952 decree was invalid because it was based on fraud.

**{17}** Appellants testified that the quitclaim deeds to Pat E. Kelly, upon which the 1952 decree was based, were forgeries. Baker and Barnes offered the testimony of three notary publics, who notarized the deeds, that they never had notarized any document unless they saw the person sign it in their presence. As appellants concede, the evidence is conflicting. The testimony of the notary publics was clearly sufficient to support the trial court's finding. This Court will not disturb such findings, weigh the evidence, resolve conflicts or pass on the credibility of witnesses where the evidence substantially supports the findings made by the trial court. **First National Bank of Santa Fe v. Wood**, 86 N.M. 165, 521 P.2d 127 (1974); **Cooper v. Burrows**, 83 N.M. 555, 494 P.2d 968 (1972).

**{18}** The judgment of the trial court is affirmed.

**{19} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-090**

**Filing Date: November 28, 1978**

**Docket No. 12,139**

**MARY HERNDON,**

**Petitioner,**

**v.**

**ALBUQUERQUE PUBLIC SCHOOLS AND COMMERCIAL STANDARD INSURANCE COMPANY,**

**Respondents.**

Thomas E. Jones
Albuquerque

for Petitioner.

Vance A. Mauney
Albuquerque

for Respondents.

**OPINION**

**PAYNE, Justice.**

**{1}** Petitioner Mary Herndon seeks certiorari for the purpose of reviewing the decision of the Court of Appeals denying her request for attorney's fees incurred during the appeal of this case.

**{2}** The trial court awarded petitioner $37,500 on her workman's compensation claim and $3,800 in attorney's fees. This award was appealed by her employer, Albuquerque Public Schools. Albuquerque Public Schools filed a brief of some thirty-three pages raising three major points for reversal. Petitioner, through her attorney, responded with an answer brief of thirty-eight pages responding to the points raised by Albuquerque Public Schools and raising two additional points. The Court of Appeals affirmed the trial court on the issues raised by appellant and accepted the arguments of petitioner regarding the proper date of total disability of the petitioner. On appeal the award was increased from $37,500 to approximately $54,000. However, the Court of Appeals allowed no additional attorney's fees. We reverse and hold that the Court of Appeals abused its discretion in failing to award additional attorney's fees.

**{3}** We recently held that the award of attorney's fees in a workmen's compensation case is discretionary with the court. **Genuine Parts Co. v. Garcia**, 92 N.M. 57, 582 P.2d 1270 (1978); **Ortega v. New Mexico State Highway Department,** 77 N.M. 185, 420 P.2d 771 (1966).

**{4}** The Workmen's Compensation Law is very specific as to attorney's fees and restricts an attorney to those fees which are permitted by the court. § 59-10-23, N.M.S.A. 1953 (Repl.1974). If attorneys are denied fees for work prosecuted on behalf of an injured workman, there would be a chilling effect upon the ability of an injured party to obtain adequate representation. Through their insurance companies, employers regularly obtain exceptional and well-qualified counsel to defend them in such cases. It is imperative that courts foster and protect the ability of an injured workman to obtain counsel of his choice. We must avoid a policy or a practice which would discourage representation or the taking of appeals where counsel feels that an injured workman has been aggrieved at the trial court level. We must also preserve the right of an injured workman to have representation where the employer has appealed.

**{5}** The Court of Appeals is therefore reversed as to the refusal to award additional attorney's fees. Counsel for the petitioner is granted additional fees of $2,500 for the appeal to the Court of Appeals, and an award of an additional $500 for prosecuting the petition for writ of certiorari.

**{6} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-094**

**Filing Date: December 11, 1978**

**Docket No. 12,030**

**ERNEST W. HAHN, INC. AND DALE BELLAMAH LAND CO., INC.,**

**Petitioners,**

**v.**

**COUNTY ASSESSOR FOR BERNALILLO COUNTY, NEW MEXICO,**

**Respondent.**

Johnson & Lanphere
J. Victor Pongetti
Albuquerque

for Petitioners.

Hunter L. Geer
Albuquerque

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** This matter involves the constitutionality of property taxes imposed on properties located in Bernalillo County belonging to Ernest W. Hahn, Inc. and Dale Bellamah Land Company, Inc. Taxpayers protested Notices of Valuation received from the Bernalillo County Assessor. They challenged the valuations placed on their properties and claimed that the assessor's revaluation of their properties was unconstitutional. The Bernalillo County Valuation Protests Board denied the protests, holding that the revaluation was part of "an unscheduled continuous reappraisal program" designed to keep values current. The Court of Appeals affirmed this finding, but remanded the case in order to permit taxpayers to present their constitutional claims to the Protests Board. **Matter of Protest of Miller**, 88 N.M. 492, 542 P.2d 1182 (Ct. App.1975), **cert. denied**, 89 N.M. 5, 546 P.2d 70 (1975). On remand the Protests Board again upheld the assessor's actions and the Court of Appeals affirmed. We granted certiorari to consider the constitutionality of the assessor's actions under Article VIII, Section 1 and Article II, Section 18 of the New Mexico Constitution. We reverse.

**{2}** The assessor contends that this appeal is barred by the doctrine of res judicata in that the earlier decision of the Court of Appeals in **Miller** constituted a final decision on the merits. We hold to the contrary.

**{3}** In **Miller** the court decided that the assessor's actions did not violate §§ 72-2-21.1 to 72-2-21.14, N.M.S.A. 1953 (Supp.1973) (repealed by Laws 1968, ch. 61, § 7, Laws 1970, ch. 31, § 22, Laws 1973, ch. 274, § 23, and Laws 1974, ch. 92, § 34). The constitutionality of the assessor's reappraisal of taxpayers' properties was not decided in **Miller**. To the contrary, the Court of Appeals remanded the case to the Protests Board to consider the constitutional challenge. Therefore, the doctrine of res judicata does not bar this appeal.

**{4}** On remand to the Protests Board, the issue was submitted on stipulated facts. In 1965 and 1966 all of the land in Bernalillo County was appraised pursuant to an overall program called the Jacobs Reappraisal. In October 1974 the assessor commenced a new program designed to reappraise all the land in Bernalillo County over several succeeding years. Between 1966 and October 1974, however, there was no scheduled, systematic reappraisal program applicable to all properties in Bernalillo County, nor was there an overall reappraisal program designed to cover all property having a similar zoning classification.

The assessor did engage in "an unscheduled continuous reappraisal program" during those years.

**{5}** Only eight to ten percent of the land within Bernalillo County was reappraised during the eight-year period of the "unscheduled" program. In 1969 the assessor reassigned a new market value to one percent of the total property in Bernalillo County. In 1970 the value of taxpayers' properties was raised approximately one hundred percent while only three percent of the total property in the county was reappraised. In 1971 and 1972 the assessor assigned a new value to one percent of the lands in the county and again taxpayers' lands were subjected to reappraisal. Taxpayers protested all three of the new value assignments and in each instance the Property Appraisal Department in Santa Fe lowered it to the average market value. Then, in 1973 the assessor raised the value of these properties for purposes of the 1974 tax year approximately one hundred and eighty percent above their 1966 assessed value while reappraising another two percent of the lands in the county. Taxpayers maintain that the 1973 revaluation for purposes of 1974 taxes was contrary to Article VIII, Section 1 and Article II, Section 18 of the New Mexico Constitution.

**{6}** Article VIII, Section 1 provides:

> Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class.

**{7}** Article II, Section 18 provides:

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person by denied equal protection of the laws.

**{8}** Violations of constitutional uniform taxation requirements frequently result in violations of equal protection clauses. **Larson v. State**, 166 Mont. 449, 534 P.2d 854 (1975). A taxpayer must not be subjected to discrimination in the imposition of a property tax burden which results from systematic, arbitrary, or intentional revaluation of some property at a figure greatly in excess of the undervaluation of other like properties. **Sioux City Bridge Co. v. Dakota County**, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923); **McCluskey v. Sparks**, 80 Ariz. 15, 291 P.2d 791 (1955); **Hamm v. State**, 255 Minn. 64, 95 N.E.2d 649 (1959).

**{9}** The evidence consists of stipulated facts and documents; therefore, this Court is in as good a position to review the facts as the Protests Board and the Court of Appeals and is not bound by their findings. **House of Carpets, Inc. v. Mortgage Investment Co**., 85 N.M. 560, 514 P.2d 611 (1973). Property values in Bernalillo County greatly increased from 1966 to 1974. Any reappraisal would therefore lead to an increase in property taxes. Taxpayers' properties were reappraised every year from 1970 through 1973 while over ninety percent of the land in Bernalillo County had not been subjected to even a single reappraisal. Although taxpayers' property taxes have more than tripled, the large majority of property taxes in Bernalillo County have remained unchanged during this period.

**{10}** In **Skinner v. New Mexico State Tax Commission**, 66 N.M. 221, 223, 345 P.2d 750, 752 (1959), this Court held that a "well-defined and established scheme of discrimination" in the method used for reappraising land within a county would violate Article VIII, Section 1 and entitle the taxpayer to relief. We also held that there was no requirement under Article VIII, Section 1 for reappraisals of all comparable properties within a county to be completed within a single year. Temporary inequalities which result from the practicalities of carrying out a county-wide systematic and definite property appraisal program are inevitable and constitutional. This rule is universally accepted. **Hamilton v. Adkins**, 250 Ala. 557, 35 So.2d 183 (1948), **cert. denied**, 335 U.S. 861, 69 S. Ct. 133, 93 L. Ed. 407 (1948); **Maricopa County v. North Central Dev. Co**., 115 Ariz. 540, 566 P.2d 688 (Ct. App.1977); **Rogan v. County Commissioners of Calvert County**, 194 Md. 299, 71 A.2d 47 (Ct. App.1950); **Larson, supra**. However,

singling out one or a few taxpayers for reappraisals for several years in succession while virtually all other owners of comparable properties do not undergo a single reappraisal in the same period is an inequality that is neither temporary nor constitutional. **Maricopa County, supra; Penn Phillips Lands, Inc. v. State Tax Commission**, 247 Or. 380, 430 P.2d 349 (1967).

**{11}** We conclude that in the present case the reappraisal was done in a systematically discriminatory manner. First, taxpayers were singled out for selective enforcement of tax laws that apply equally to all similarly situated taxpayers. In the event the assessor was choosing properties for revaluation on a random basis, the statistical odds against taxpayers' properties being picked for revaluation in each of four consecutive years would be no more than one chance in sixteen million.

**{12}** Second, it is uncontested that the 1970-1973 reappraisals of taxpayers' properties were not conducted as part of a definite and logical plan for the revaluation of all properties within Bernalillo County to be executed in a reasonably limited time. To the contrary, had the reappraisals continued at the 1969-1973 completion rate, it might well have taken from fifty to one hundred years to complete the reappraisal of all property within the county. We agree with the Arizona Supreme Court in **Sparks v. McCluskey**, 84 Ariz. 283, 327 P.2d 295, 297 (1958), wherein the court stated:

> The evidence does not indicate how many years might elapse before the program would be complete and equalization effected. We cannot subscribe to the proposition that grossly inequal values by the use of a specific method of assessment may be placed on a small portion of a class of property and remain subject to the disproportionately excessive value for an indefinite number of years in the future until the taxing officials can get around to using the same method upon the other like properties.

**{13}** The assessor contends that he was under a statutory duty to annually maintain values of property at full actual value. §§ 72-2-1 through 72-2-3, N.M.S.A. 1953 (repealed by Laws 1970, ch. 31, § 22 and Laws 1974, ch. 92, § 34). He argues that pursuant to that duty he was engaging in "an unscheduled, continuous reappraisal program" which violated neither the statutes pursuant to which it was conducted nor Article VIII, Section 1 and Article II, Section 18.

**{14}** We need not determine whether the assessor had such a duty under the statutes or whether these reappraisals were conducted as part of such a program. Whatever the assessor's duty may have been under the applicable statutes, he had a **constitutional** duty "to take the necessary action to require, so far as possible, equality and uniformity on a continuing basis." **State ex rel. Castillo Corp. v. New Mexico St. T. Com'n**, *{*613}* 79 N.M. 357, 362, 443 P.2d 850, 855 (1968). The uniformity clause of the New Mexico Constitution requires uniformity of property taxation within a county as well as statewide uniformity of assessments.

**{15}** Uniformity and equality do not mean mathematical exactitude. As this Court said in **Castillo**, "[i]t is, of course, too much to expect that there will be absolute uniformity at any time (appraisals involve the human equation and therefore are simply not 100% accurate)." **Id**. at 362, 443 P.2d at 855. In order to support a claim under the uniformity clause of the New Mexico Constitution, the taxpayer must show that the inequality is substantial and amounts to an intentional violation of "the essential principle of practical uniformity." **Sioux City Bridge Co**., 260 U.S. at 447, 43 S. Ct. at 192. Mere errors of judgment in estimating market value of property will not be sufficient to show unconstitutional discrimination. But good faith alone will not justify an assessment which is discriminatory in fact. **Sparks v. McCluskey, supra; Maricopa County, supra; Hamm, supra**.

**{16}** A uniform method of taxation requires that each reappraisal be part of a systematic and definite plan which provides that all similar properties be valued in a like manner. We do not prohibit the use of cyclical plans of reappraisal of lands within a county. Such plans need not

necessarily be completed within a single year. Where a cyclical program of revaluation is undertaken, however, it must be completed within a reasonably limited time. More than fifty years is not a reasonable time.

**{17}** The constitutional defect in this case is the absence of any systematic and definite plan for the reappraisal of all lands in Bernalillo County. "Without such a plan, there is no assurance of uniformity of appraisal method or of sequential selection of property for reappraisal." **Larson**, 534 P.2d at 857. In determining whether a property revaluation plan constitutes intentional and arbitrary discrimination in violation of the uniformity and equal protection clauses, all relevant circumstances should be taken into consideration. Such factors should include, but not be limited to, the resources realistically available to the assessing authority, the time limitations involved in the plan, the availability of other alternatives, and the amount of temporary inequalities in valuations which result from the cyclical implementation of the plan. **Hillock v. Bade**, 22 Ariz. App. 46, 523 P.2d 97 (1974), **aff'd**, 111 Ariz. 585, 535 P.2d 1302 (1975).

**{18}** Lack of adequate resources with which to undertake and complete a cyclical reappraisal within a reasonable time cannot be relied upon as an excuse where the assessor has a mandatory duty to achieve equal and uniform property taxation. As this Court said in **Castillo, supra**:

> If there is a mandatory duty, delay in exercising it is just as much to be condemned as is the refusal to do the duty. We do not believe that our constitution or the statutes authorize the taxing authorities to procrastinate in making a required decision.

79 N.M. at 362, 443 P.2d at 855.

**{19}** The sole question remaining is the remedy available to taxpayers to redress this constitutional wrong for the 1974 tax year. In **Skinner, supra**, this Court said:

> [A] taxpayer who is not assessed more than the law provides has no cause for complaint in the courts **in the absence of some well-defined and established scheme of discrimination or some fraudulent action** (citations omitted). The taxpayer's remedy is to have the assessing authority raise the value on the property claimed to be, valued too low to a level with his own. (Citations omitted and emphasis added.)

66 N.M. at 223-24, 345 P.2d at 752. The assessor argues that taxpayers must therefore seek an upward revision of the taxes of other members of their class. We have indicated in **Skinner**, however, that this remedy does not apply where there has been a violation of taxpayers' constitutional right to equal and uniform taxation.

**{20}** In **Hillsborough v. Cromwell**, 326 U.S. 620, 623, 66 S. Ct. 445, 448, 90 L. Ed. 358 (1946) the United States Supreme Court stated:

> The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. He may not complain if equality is achieved by increasing the same taxes of other members of the class to the level of his own. The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class. (Citations omitted.)

**{21}** Forcing taxpayers to carry the burden of joining all other taxpayers to bring about an upward revaluation of their properties would be contrary to the holding in **Hillsborough**. Although **Hillsborough** was decided on the basis of the equal protection clause of the Federal Constitution, we are persuaded that the equal protection and uniform taxation clauses of our own Constitution require the same approach. Taxpayers are entitled to a reduction in their assessment for the

1974 tax year to a level which will achieve the practical uniformity required by Article VIII, Section 1 and Article II, Section 18 of the New Mexico Constitution.

**{22}** We cannot tell from the existing record whether practical uniformity would be achieved by assessing taxpayers' properties based on the 1966 assessment level. Approximately ninety percent of the properties in Bernalillo County were assessed for purposes of 1974 taxes on the basis of the 1966 reappraisals, but that approach would not necessarily achieve practical uniformity. For example, if the value of taxpayers' properties rose three hundred percent between 1966 and 1974 while the average comparable property rose one hundred percent, that fact would dictate a higher assessment on taxpayers' properties.

**{23}** We subscribe to the view set forth in **Bemis Bros. v. Claremont**, 98 N.H. 446, 102 A.2d 512, 516 (1954). The court stated: "The relief to which it [plaintiff] is entitled is to have its property appraised for taxation at the same ratio to its true value as the assessed value of all other taxable estate bears to its true value." **See also Southern Pacific Company v. Cochise County**, 92 Ariz. 395, 377 P.2d 770 (1963). On the record before us we cannot say what level of assessment is consistent with this ratio. It was stipulated that the market value assigned by the assessor on residences constructed during or prior to 1966 and which were sold during 1972, 1973 and 1974 amounts to approximately fifty to sixty percent of the actual sales prices at which the homes were sold. This is some evidence of the proper ratio, but there is no evidence of the ratio between assessed value and actual market value of other comparable (commercial) properties in 1974. Therefore, the case must be remanded to the Valuation Protests Board to determine the proper ratio to achieve practical uniformity.

**{24}** The decision of the Court of Appeals is reversed and the cause remanded to the Valuation Protests Board with directions to reassess taxpayers' properties in accordance with the standards set forth in this opinion.

**{25} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-095**

**Filing Date: December 11, 1978**

**Docket No. 12,114**

**DALE BELLAMAH LAND CO., INC., A NEW MEXICO CORPORATION, ET AL.,**

**Petitioners,**

**v.**

**COUNTY OF BERNALILLO ET AL.,**

**Respondents.**

Johnson & Lanphere
Floyd Wilson
Albuquerque

for Petitioners.

Joe C. Diaz
Vance Mauney
Albuquerque

for Respondents.

**OPINION**

**PAYNE, Justice.**

**{1}** This matter is before this Court on a writ of certiorari challenging the constitutionality of property taxes imposed for the 1975 and 1976 tax years on property located in Bernalillo County which belonged to petitioners, Dale Bellamah Land Co., Inc. until February 6, 1975 and to Adcor Realty after that date. Taxpayers brought suit for refund of the taxes pursuant to § 72-31-39, N.M.S.A. 1953 (Supp.1975). The trial court upheld the constitutional challenge to the taxes and found that taxpayers' property had an actual market value of one dollar per square foot as of both January 1, 1975 and January 1, 1976. The Court of Appeals reversed both of these findings and upheld the two dollar per square foot valuation assigned to the property by the assessor. We reverse.

**{2}** Originally taxpayers requested a refund of taxes only for the 1975 tax year. The trial court subsequently permitted taxpayers to file a supplemental complaint for refund of taxes for the 1976 tax year.

**{3}** Under § 72-31-40(A)(1), N.M.S.A. 1953 (Supp.1975), a claim for refund must be filed no later than December 15 of the year in which the first installment of the challenged tax is due. The first installment of 1976 taxes was due November 1, 1976. The supplemental complaint was not filed until January 27, 1977. Taxpayers failed to file a timely claim under § 72-31-40(A)(1) for refund of taxes paid for the 1976 tax year. **See Dale Bellamah Land Co., Inc. v. County of Bernalillo**, 92 N.M. 368, 588 P.2d 1043 (Ct. App.1978), **cert. denied** (1978). Therefore, the present decision applies only to taxes paid for the 1975 tax year.

**{4}** In **Ernest W. Hahn, Inc. v. County Assessor for Bernalillo County**, 92 N.M. 609, 592 P.2d 965 (1978), filed simultaneously with this opinion, we decided identical constitutional claims with respect to the taxation of this same property for the 1974 tax year. In that case we held that the 1974 assessment violated Article, II, Section 18 and Article VIII, Section 1 of the New Mexico Constitution. The 1975 assessment was not based on any new reappraisal, but was a result of an automatic carry-over of the 1974 assessment. Because the 1975 assessment was based on the constitutionally invalid 1974 reappraisal, it too cannot withstand the constitutional challenge.

**{5}** In **Hahn** we held that **temporary** inequalities which result from the practicalities of carrying out a county-wide systematic and definite

property appraisal program are inevitable and constitutional. Although a county-wide reappraisal plan was instituted in October 1974, the assessment of taxpayers' property for the 1975 tax year was not based on that plan, nor was the inequality in taxation for that year merely a temporary inequality resulting from the institution of that plan. To the contrary, the 1975 inequality in taxation was an automatic perpetuation of a long-standing practice of singling out taxpayers for discriminatory treatment. Such a practice is unconstitutional.

**{6}** The Court of Appeals' decision is reversed and the cause remanded to the trial court with directions to reassess taxpayers' property in a manner consistent with this opinion and the decision of the **Hahn** case. The trial court may wish to delay a decision in this case until the assessor and the Bernalillo County Valuation Protests Board have taken action as mandated in the **Hahn** decision.

**{7} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1978-NMSC-098**

**Filing Date: December 21, 1978**

**Docket No. 11,861**

**JOSEPH E. BROSSEAU, JR.,**

**Plaintiff-Appellee,**

**v.**

**NEW MEXICO STATE HIGHWAY DEPARTMENT,**

**Defendant-Appellant,**

**ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,**

**Defendant-Appellee.**

Toney Anaya, Atty. Gen.
V. Henry Rothschild, Deputy Chief Counsel
State Highway Dept.
Santa Fe

for Appellant.

Kegel & McCulloch
W. R. Kegel
Santa Fe

for Appellee Brosseau.

Johnson & Lanphere
Bryan G. Johnson
Albuquerque

for Appellee Atchison, Topeka and Santa Fe Railway.

**OPINION**

**PAYNE, Justice.**

**{1}** Plaintiff-appellee Brosseau brought this quiet title action to extinguish title to certain property against both the New Mexico State Highway Department and the Atchison, Topeka and Santa Fe Railway Company. The Department filed a motion to dismiss the case on the ground that quiet title actions against the State are barred by the doctrine of sovereign immunity. From denial of that motion by the trial court, the Department brought this interlocutory appeal. By order we affirmed the trial court's decision. However, we granted the State's motion for a rehearing to more fully address the question presented on appeal.

**{2}** The land which is the subject of this suit had allegedly been used by the Railway for railroad purposes until February 1974. The railway line was rerouted over land conveyed to the Railway by the Highway Department. This land had been condemned by the Department from Brosseau. In return for this conveyance, the Railway allegedly attempted to convey the abandoned property to the Department by quitclaim deed. Brosseau contends that under the federal statute by virtue of which the Railway acquired the right to use this land, the land reverted to him upon abandonment by the Railway. He further contends that by its attempt to secure a conveyance of the allegedly abandoned property from the Railway, the Department claims an interest adverse to him which operates as a cloud on his title.

**{3}** The Department contends that §§ 22-14-12 through 22-14-17, N.M.S.A. 1953 establish a statutory scheme by which the State can be made a party to a quiet title action. The Department argues that this statutory scheme has the effect of establishing statutory sovereign immunity with respect to quiet title actions which fall outside the scope of § 22-14-12.

**{4}** Section 22-14-12 provides:

> Upon the conditions herein prescribed for the protection of the state of New

> Mexico, the consent of the state is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of competent jurisdiction of the state to quiet title to or for the foreclosure of a mortgage or other lien upon real estate or personal property, for the purpose of securing an adjudication touching any mortgage or other lien the state may have or claim on the premises or personal property involved.

**{5}** The Department contends that because Brosseau's suit does not fall within the language of § 22-14-12, it is barred by the doctrine of sovereign immunity. We do not agree.

**{6}** Section 22-14-12 was enacted before this Court's decision in **Hicks v. State,** 88 N.M. 588, 544 P.2d 1153 (1975) in which the doctrine of sovereign immunity was abolished in tort actions against the State. At the time this section was enacted and at the time it was later interpreted to bar quiet title actions against the State which did not fall within its scope, the judicially-created doctrine of sovereign immunity was intact. **Nevares v. State Armory Board,** 81 N.M. 268, 466 P.2d 114 (1969); **Maes v. Old Lincoln County Memorial Commission,** 64 N.M. 475, 330 P.2d 556 (1958). The purpose of § 22-14-12 was to create an exception to that doctrine, rather than to statutorily adopt it.

**{7}** In **Hicks** this Court rejected the argument that another statutory scheme, §§ 64-25-8 and 64-25-9, N.M.S.A. 1953 (Repl.1972) (repealed by Laws 1975, ch. 334, § 18), amounted to a legislative enactment of sovereign immunity. We said:

> [T]hese statutory schemes were in harmony with the common law doctrine of sovereign immunity, but had the effect of lessening, to a certain extent, the oftentimes harsh results of that doctrine. They definitely did not, as argued by defendants, create statutory sovereign immunity.

**Id.** at 589, 544 P.2d at 1154.

**{8}** We also said:

> The doctrine of sovereign immunity has always been a judicial creation without statutory codification and, therefore, can also be put to rest by the judiciary. (Citations omitted.) [A]nd all other cases holding that the legislature and not the judiciary is the proper forum to decide the fate of sovereign immunity are expressly overruled.

**Id.** at 589-90, 544 P.2d at 1154-55.

**{9}** We hold that § 22-14-12 did not statutorily create sovereign immunity in quiet title actions against the State.

**{10}** The Department points out that the decision in **Hicks** was limited to sovereign immunity as it applied to tort actions against the State and argues that its rationale should not be extended to quiet title actions. Although **Hicks** did apply only to tort actions, its essential premise was that the doctrine of sovereign immunity was an out-moded, archaic doctrine. We said: "There are presently in New Mexico no conditions or circumstances which could rationally support the doctrine of sovereign immunity." **Id.** at 590, 544 P.2d at 1155.

**{11}** We can find no reason why the decision in **Hicks** should not be extended to quiet title actions. A suit to quiet title does not involve a claim for damages. **Chavez v. Gomez,** 77 N.M. 341, 423 P.2d 31 (1967). It does not ask the judiciary to compel the legislative or executive branches to do anything. The plaintiff in such an action does not seek a dollar judgment. He seeks only that it be decided that he, rather than the State, is the owner of some specific property. This issue must be decided at some point if the Department persists in its claim to the land. This land and other similar lands may be idled by the cloud which the State's claimed interest places on title to the property. It is in the public interest that such clouds be removed in order that land be put to its full potential use. **O'Neill v. State Highway Department,** 50 N.J. 307, 235 A.2d 1 (1967).

**{12}** A further justification for our decision is the fact that Brosseau and others in his position

may have no adequate substitute to obtain an adjudication of their property rights as against the claimed interest of the State. An inverse condemnation action under § 22-9-22, N.M.S.A. 1953 (Supp. 1975) would not lie if this property was not acquired for a public use. The doctrine of sovereign immunity may not be interposed to bar quiet title actions if its effect is to deny one a remedy for the taking of his property without compensation.

**{13}** The Department asserts that if the **Hicks** decision is applied to quiet title actions against the State, the prospectivity rule established in that decision should be followed as well.

**{14}** In **Hicks** this Court held that its ruling abrogating the doctrine of sovereign immunity in tort actions would be applied only to torts which occurred on or after July 1, 1976. The Department contends that if this rule is applied, this suit would be barred because the quitclaim deed which purportedly conveyed this property to the Department was executed before July 1, 1976.

**{15}** We decline to apply the prospectivity rule. This rule was adopted in **Hicks** because of the unique circumstances posed by subjecting the State to tort liability without providing the State with an opportunity to secure liability insurance coverage and to promptly investigate tort claims made against it. No such considerations are present here.

**{16}** The decision of the trial court denying the Department's motion to dismiss the case is affirmed and the case is remanded to the trial court for further proceedings.

**{17} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Chief Justice**

**DAN SOSA, JR.,**
**Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-007**

**Filing Date: January 23, 1979**

**Docket No. 12,066**

**OCCIDENTAL LIFE OF CALIFORNIA,**

**Plaintiff-Appellee,**

**v.**

**STATE OF NEW MEXICO,**

**Defendant-Appellant.**

Toney Anaya, Atty. Gen.
Andrea R. Buzzard, Asst. Atty. Gen.
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for Defendant-Appellant.

Rodey, Dickason, Sloan, Akin & Robb
Rex D. Throckmorton
Jonathan W. Hewes
Albuquerque

for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Occidental Life of California brought suit against the State of New Mexico to recover an overpayment of premium taxes. The taxes were paid on premiums received on an insurance policy issued by Occidental to an Albuquerque-based retail clerk's union for the purpose of furnishing insurance benefits to members of the union in El Paso, Texas. The trial court held that Occidental was entitled to a full refund of the overpayment. The State appealed. We reverse.

**{2}** The overpayment of taxes arose as a result of an error by an employee of Occidental. Occidental's usual business practice was to assign a code to an insurance policy which identified the state where the greater number of the insured persons resided. All premiums received under the policy were identified by this code and attributed for tax purposes to the state represented by that code. An Occidental employee assigned a New Mexico code number to the policy, although virtually all the insured parties lived in Texas. As a result of this error, all premium taxes on the policy from 1967 through 1973 were erroneously paid to New Mexico instead of Texas.

**{3}** The trial court held that since the erroneous coding of the policy was an innocent mistake of which Occidental had no knowledge or notice until 1974, it was entitled to a full refund.

**{4}** It is well established that in the absence of a statute permitting a recovery, taxes paid voluntarily and without compulsion cannot be recovered. **Jaynes v. Heron**, 46 N.M. 431, 130 P.2d 29 (1942); **Johnson v. Greiner**, 44 N.M. 230, 101 P.2d 183 (1940). Occidental does not dispute that this is an accurate statement of the law, nor is it disputed that at the time these taxes were paid there was no statute which permitted a refund.

**{5}** Occidental's argument is based on the theory that taxes paid pursuant to an innocent mistake of fact are not paid voluntarily. It contends that the cases of **Rabbit Ear Cattle Company v. Frieze**, 80 N.M. 203, 453 P.2d 373 (1969) and **Elgin v. Gross-Kelly Co**., 20 N.M. 450, 150 P. 922 (1915) establish the rule that payments made as a result of a mistake of fact are regarded as involuntary and are recoverable. Neither of these cases, however, involve the payment of taxes; both are consistent with the rule of **Jaynes, supra**, and **Johnson, supra**, that the recovery of taxes is governed by statute in the absence of duress.

**{6}** The trial court found that Occidental did not pay these taxes under duress. Occidental does not challenge that finding on appeal. Had

the taxes been paid under duress they would have been recoverable, even in the absence of a statute permitting their recovery. **Jaynes, supra**. The mere fact that Occidental placed the wrong code on the policy in 1966, and perpetuated the error until 1974, does not render the payment of taxes pursuant to this error "involuntary." The payment of taxes may be voluntary, and hence unrecoverable, even though it is made as a result of a mistake on the part of the taxpayer. **City of Phoenix v. Phoenix Newspapers, Inc**., 100 Ariz. 189, 412 P.2d 693 (1966); **Sierra Investment Corporation v. County of Sacramento**, 252 Cal. App.2d 339, 60 Cal. Rptr. 519 (1967); **E. A. Stephens & Co. v. Board of Equalization**, 104 Colo. 556, 92 P.2d 732 (1939); **Scoa Industries, Inc. v. Howlett**, 33 Ill. App.3d 90, 337 N.E.2d 305 (1975); **Bateson v. City of Detroit**, 143 Mich. 582, 106 N.W. 1104 (1906). This is especially the case where, as here, it is within the ability of the taxpayer to ascertain the actual facts.

**{7}** Occidental contends that the passage of § 59-3-7 B, N.M.S.A. 1978 (formerly § 58-3-7 B, N.M.S.A. 1953 (Inter. Supp.1976-77)) is an expression of a legislative intent that taxes paid by mistake should be recoverable. If this Court were to judicially adopt the proposition advocated by Occidental, the statute permitting recovery would be rendered meaningless. The effect of such a holding would be to permit a recovery of taxes erroneously paid notwithstanding the absence of a statute permitting recovery. We believe that whether a recovery should be allowed is properly a question for the Legislature. The Legislature did not give § 59-3-7 B retroactive effect.

**{8}** We hold that the district court erred in permitting the recovery of the premium taxes Occidental erroneously paid. In light of this conclusion, it is unnecessary to consider the other issues raised by the State.

**{9}** The judgment of the district court is reversed and the cause remanded with instructions to enter judgment in favor of the State.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**JOHN McMANUS,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-011**

**Filing Date: January 25, 1979**

**Docket No. 11,799**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**ELOY JERRY ORONA,**

**Defendant-Appellant.**

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for Defendant-Appellant.

Toney Anaya, Atty. Gen.
Charlotte Hetherington Roosen, Asst. Atty. Gen.
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Ira Robinson, Dist. Atty.
Chester A. Bowerman, Asst. Dist. Atty.
Albuquerque

for Plaintiff-Appellee.

## OPINION

**PAYNE, Justice.**

**{1}** Defendant was convicted of the first-degree felony of criminal sexual penetration of a person under thirteen years of age and of criminal sexual penetration in the third-degree. Defendant appeals both convictions alleging that various errors committed during the course of the proceedings deprived him of his right to a fair trial.

**{2}** We address three of these contentions: (1) The trial court's order prohibiting defense counsel from interviewing the State's main witnesses; (2) the prosecutor's leading questions to the complaining witness; and (3) the trial judge's communications with the jury outside the presence of defendant and his counsel.

I.

**{3}** Defendant contends that the trial court committed reversible error in ordering defense counsel not to interview the complaining witness and her older sister. The sisters were the State's main witnesses. Defendant argues that this order prevented investigation and preparation of a defense, and denied him his right to effective assistance of counsel.

**{4}** Prior to trial, the State filed a motion to revoke defendant's bond on the ground that defendant had been contacting the older sister. Evidence was presented that defendant attempted to persuade the older sister not to testify against him. The trial judge denied the motion to revoke bond and ordered that neither defendant, nor his attorneys, could contact either sister. The court also denied a defense request to depose the sisters. The court did allow copies of the witnesses' grand jury testimony to be made available to defense counsel in order to assist defendant in the preparation of his case.

**{5}** N.M.R. Crim.P. 27(b), N.M.S.A. 1978 provides that a defendant is entitled to a list of the names and addresses of all witnesses which the district attorney intends to call at trial and any statements made by these witnesses. The State contends that having provided defense counsel with this information, along with the sisters' grand jury testimony and the deposition of the complaining witness, defendant was entitled to nothing more. The State contends that the trial court did not err in ordering defense counsel not to contact either sister. We do not accept this argument.

**{6}** In **Gregory v. United States,** 125 U.S. App.D.C. 140, 369 F.2d 185 (1966) the

prosecutor instructed the government's witnesses not to discuss the case with defense counsel outside of his presence. In construing a federal statute which required the submission of a list of the names and addresses of the government's prospective witnesses, the court stated that the purpose of such discovery was to assist defense counsel in the preparation of a defense by providing the opportunity to interview the government's witnesses. The court stated:

> Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them. Here the defendant was denied that opportunity which . . . elemental fairness and due process required that he have. . . .
>
> . . . [T]here seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to. In fact, Canon 39 of the Canons of Professional Ethics makes explicit the propriety of such conduct: "A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party." Canon 10 of the Code of Trial Conduct of the American College of Trial Lawyers is an almost verbatim provision.

**Id**. 125 U.S. App.D.C. at 143, 369 F.2d 188 at 188. **See also United States v. Vole**, 435 F.2d 774 (7th Cir. 1970).

**{7}** The State contends that **Gregory** is inapposite authority because in this case the judge on his own ordered defense counsel to refrain from contacting the sisters, whereas in **Gregory** the prosecutor prevented interviews of government witnesses. We see no basis for such a distinction. Regardless of who prevents the interviews, the effect may be to deprive defendant of his right to prepare a defense.

**{8}** The State argues that defendant has failed to show that he was prejudiced by this particular order. No more prejudice need be shown than that the trial court's order may have made a potential avenue of defense unavailable to the defendant. As the court said in **Gregory**:

> It is not suggested here that there was any direct suppression of evidence. But there was unquestionably a suppression of the means by which the defense could obtain evidence. The defense could not know what the eye witnesses to the events in suit were to testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview.

125 U.S. App.D.C. at 144. 369 F.2d at 189.

**{9}** Furthermore, the United States Supreme Court has pointed out:

> [It is not] realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate. (Footnote omitted.)

**Dennis v. United States**, 384 U.S. 855, 874-75, 86 S. Ct. 1840, 1851, 16 L. Ed. 2d 973 (1966).

**{10}** We do not hold that the defendant has an absolute and unlimited right of access to the State's prospective witnesses. This is not a case in which there are compelling justifications for totally limiting defendant's access to the witnesses against him. Although there may have been good reason to limit access by the defendant himself, there does not appear to have been any justification for the court's absolute prohibition against any contact by defense counsel. Although defendant had been in contact with one of the sisters, we cannot impute his motives, whatever they may have been, to his attorneys. Furthermore, as the court stated in **Gregory**:

> Tampering with witnesses and subornation of perjury are real dangers. . . . But there are ways to avert this danger without denying defense counsel access to eye witnesses to the events in suit. . . . Defense counsel are officers of the court. And defense counsel are not exempted from prosecution under the statutes denouncing the crimes of obstruction of justice and subornation of perjury.

125 U.S. App.D.C. at 143, 369 F.2d at 188.

**{11}** The State contends that defendant's conduct in contacting the older sister amounted to a waiver of any right he had to further contact with either girl. Although in some cases such conduct might conceivably rise to the level of a waiver, defendant's conduct in this case, which the trial court did not consider sufficient to justify a revocation of bond, did not constitute a waiver of his right to prepare a defense.

**{12}** We are aware of the sensitive nature of this case, and of the problems that might arise in light of the ages of the witnesses, their past relationship to defendant, and the nature of the alleged crimes. None of these facts, however, justify an outright prohibition against all contact with the witnesses. The trial court could fashion some means to ensure that the witnesses will be protected from intimidation without unduly impairing defendant's right to prepare a defense. However, in the absence of some demonstrable good cause, a trial court may not impose an absolute restriction on defense counsel's access to the State's prospective witnesses.

II.

**{13}** The second issue we address on this appeal is defendant's contention that he was deprived of a fair trial by the use of leading questions put to the young complaining witness by the prosecuting attorney. The particular testimony which defendant contends deprived him of a fair trial concerns the offense of criminal sexual penetration in the first-degree allegedly committed in June 1977.

**{14}** The complaining witness testified that she and her sister went to defendant's house. Her sister then left, taking defendant's car to visit a friend. When asked to describe what happened thereafter, the witness said:

> Well, I was just listening to the radio or something. Listening to the radio I think, and I [pause] don't think, excuse me, [pause] I'm not sure he tried anything and then I told him to leave me alone.

**{15}** After a pause, the prosecutor asked a leading question to which defense counsel objected. The court sustained defense counsel's objection to that question and instructed the State not to lead the witness on the crucial elements of the offense.

**{16}** At this point the prosecutor asked the witness if she remembered giving a written statement to the police. The witness answered affirmatively. Defendant objected to the use of the statement and the prosecutor responded that the witness had already said she did not recall exactly what had occurred. The court then asked the witness if it would help her to read the statement, to which she answered "yes." The witness was then allowed to read the statement. Without the prosecutor inquiring if her memory had been refreshed, the following exchange took place:

> Prosecutor: Now, did you say in your statement to the police as follows: "I was wearing a dress. . . ."
>
> Defense Counsel: I'll object to this Your Honor. It's improper, highly improper. The witness is in person, she can testify. You've permitted her to refresh her recollection.
>
> Judge: Yes, I'll sustain that. I'll ask you to just ask those questions and if she still needs additional refreshing on her recollection then you can use the statement then.

**{17}** Ignoring the judge's ruling, the prosecutor then asked:

> Did you tell the police on July 6 that on one occasion you saw Jerry Orona alone when you were wearing a dress?

**{18}** Defense counsel again objected on the same grounds and the judge again sustained the objection. After asking if her statement to the police was true, the prosecutor went right back to the leading questions which the court had twice prohibited. The only evidence which would support criminal sexual penetration in the first-degree was then elicited by the following exchange:

> Prosecutor: On this occasion were you wearing a dress and did he lift up your dress and start pulling down your panties?
>
> Witness: Yes.
>
> Prosecutor: Did he start kissing your vagina and stick his tongue inside your vagina?
>
> Defense Counsel: Objection Your Honor. The district attorney is now testifying. This is. . . . This is shocking. The witness has a right to relate what occurred. She is now being spoon-fed the story.

**{19}** At this point the trial court permitted the witness to be led, citing N.M.R. Evid. 611(c), N.M.S.A. 1978. The direct examination continued with the prosecutor graphically describing sexual acts of defendant by way of leading questions, to each of which the witness gave a simple answer of "yes."

**{20}** Rule 611(c) provides in part:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony.

**{21}** Developing testimony by the use of leading questions must be distinguished from substituting the words of the prosecutor for the testimony of the witness. Here, the trial court, in permitting every word describing the alleged offense to come from the prosecuting attorney rather than from the witness, abused its discretion in such a manner as to violate principles of fundamental fairness.

**{22}** The State argues that the complaining witness could not recall the events in June and the trial court permitted her memory to be refreshed by use of the police statement consistent with N.M.R. Evid. 612, N.M.S.A. 1978. The trial court was correct in permitting the witness to refresh her recollection, but Rule 612 does not permit the use of leading questions as was done in this case.

**{23}** There are several requirements that must be met before a writing can be used to refresh recollection. The witness' memory on the subject must be exhausted. **State v. Bazan,** 90 N.M. 209, 561 P.2d 482 (Ct. App.1977), **cert. denied**, 90 N.M. 254, 561 P.2d 1347 (1977); 3 Weinstein's Evidence, P[61201] (1978). The time, place, and person to whom the statement was given must be established. **Goings v. United States**, 377 F.2d 753 (8th Cir. 1967). If the witness acknowledges the statement, the court may allow the witness to use it to refresh his recollection. "It then becomes proper to have the witness, if it is a fact, to say that his memory is refreshed and, independent of the exhibit, testify what **his present recollection is**. [Citation omitted.]" **Id**. at 760-61.

**{24}** In this case the threshold requirement of exhausted memory was met. The witness' first description of what occurred in June was uncertain and hesitant. The trial court properly determined that she needed to read the statement. However, after reading the statement, the witness was never asked if her memory was thereby refreshed. Rather, the prosecutor began leading the witness as to the contents of the statement as follows:

> Now, did you say in your statement to the police as follows: "I was wearing a dress. . . ."

**{25}** When an objection to this question was sustained, the prosecutor ignored the court's

ruling and went right on with additional leading questions. The witness was never given an opportunity to testify independently of the statement.

**{26}** As the court said in **Goings, supra** Refreshing a witness's recollection by memorandum or prior testimony is perfectly proper trial procedure and control of the same lies largely in the trial court's discretion. However, if a party can offer a previously given statement to substitute for a witness' testimony under the guise of "refreshing recollection," the whole adversary system of trial must be revised. **The evil cf this practice hardly merits discussion. The evil is no less when an attorney can read the statement in the presence of the jury and thereby substitute his spoken word for the written document**. (Citation and footnote omitted.)

**Id**. at 759-60.

**{27}** The fact that the witness adopted her prior statement by her simple affirmative answers to the prosecutor's leading questions did not cure the error.

> It [the prior statement] is still a hearsay statement suggested to the witness rather than his own statement given under oath in court. The procedure utilized cannot be sanctioned to fill in memory gaps of any witness who is called to testify. (Citation omitted.)

**Id**. at 761-62.

**{28}** Leading questions are often permissible when a witness is immature, timid or frightened. 3 Weinstein's Evidence, para. [61105] (1978). Although the age of a witness might justify the use of leading questions under some circumstances, the youth and inexperience of such a witness might also create a much greater danger from the use of suggestive questions than might otherwise be the case.

**{29}** In this case the witness, without the use of leading questions, described another incident with defendant which occurred in January 1977. Although her answer to the first question about the events in June was hesitant and equivocal, she was never given an opportunity to testify independently after reviewing her statement. The purpose of permitting her to refresh her recollection by the use of that statement was to assure that the witness testify in her own words. **Goings, supra** at 762. Since she was never given that opportunity, we cannot say that she was too timid, frightened or immature to testify on her own.

**{30}** We hold that there was an abuse of discretion by the trial court in allowing the prosecutor to lead the witness as to each critical element of the offense.

III.

**{31}** Defendant's third contention is that the trial judge committed reversible error when he answered two notes from the jury outside the presence of defense counsel and without informing counsel of the receipt of the notes, their contents, or the nature of his answers to those notes.

**{32}** The first note asked how the case got before the grand jury. The judge's answer was:

> All criminal cases start with a grand jury proceeding or a criminal information filed by the District Attorney.
>
> This is simply the way charges are brought against defendants. The triggering mechanism to bring the matter to the attention of the District Attorney can come from any source—and that is immaterial.
>
> It really does not matter how a case gets started—the important thing is that you, the jury, hear and decide the entire case on your own.

**{33}** The second note simply said: "Four not guilty, eight—guilty—both counts." The court's answer was:

> Your verdict must be unanimous. You have not been deliberating all that long, and I

request that you continue to see if you can arrive at a unanimous verdict.

**{34}** After the notes were answered, the court informed counsel of their existence. After the verdict was returned, defense counsel moved for a mistrial because of the court's answers to the notes. The motion was denied.

**{35}** Defendant contends that the trial court's communications with the jury outside the presence of defendant and his counsel and without informing them of the communications violated defendant's right to be present at all stages of the proceedings and his right to assistance of counsel. Although we are not certain whether the court's answers to the notes affected the jury's verdict, we agree that they violated proper trial procedure.

**{36}** The law in New Mexico is well settled that it is improper for the trial court to have any communication with the jury concerning the subject matter of the court proceedings, except in open court and in the presence of the accused and his counsel. **State v. Beal**, 48 N.M. 84, 146 P.2d 175 (1944); **State v. Brugger**, 84 N.M. 135, 500 P.2d 420 (Ct. App.1972). When such communication takes place, a presumption of prejudice arises which the State has the burden to overcome. **State v. Brugger, supra**. The State made no attempt whatsoever to overcome this presumption. Having failed to rebut the presumption, we must hold that the judge's communications with the jury were prejudicial and entitled defendant to a new trial.

**{37}** Defendant raises other issues which he argues would require reversal of his convictions. We are not persuaded by defendant's contentions as to those matters.

**{38}** The convictions are reversed and the cause is remanded to the district court for a new trial.

**{39} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**JOHN McMANUS,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-012**

**Filing Date: January 31, 1979**

**Docket No. 12,021**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**ROBERT FRANK,**

**Defendant-Appellant.**

Hynes, Eastburn & Hale
Thomas J. Hynes
Farmington

for Defendant-Appellant.

Toney Anaya, Atty. Gen.
Sammy J. Quintana, Asst. Atty. Gen.
Santa Fe

for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Defendant appeals his convictions on separate charges of first-degree murder and aggravated burglary. He was charged with having killed Tina Marie Alexander while committing an aggravated burglary in Farmington, New Mexico.

**{2}** Prior to trial, defendant moved for a change of venue alleging that adverse pretrial publicity prevented him from receiving a fair trial. The motion was denied by the trial court. At trial defendant asked to voir dire each prospective juror individually and out of the presence of other prospective jurors concerning certain newspaper articles about the crime. Defendant also requested that he be allowed to show the articles to the jurors and to question them as to their knowledge of the matters contained in the articles. These requests were denied. Six of the jurors selected to sit on the case admitted that they had read the articles, but indicated that they would not be adversely affected and could render a fair verdict. The trial court refused to disqualify these jurors for cause.

**{3}** During closing argument the prosecutor referred to the failure of defendant's wife to testify. Defendant moved for a mistrial, but the trial court denied the motion. We reverse the trial court on the denial of the motion for mistrial and affirm as to the other issues raised.

I.

**{4}** Under his first point, defendant raises three contentions with respect to two newspaper articles concerning the alleged crime. First, he contends that because of the publicity given to this crime, as evidenced by the articles, it was impossible for him to receive a fair trial in San Juan County. Therefore, he argues that the trial court abused its discretion in denying his motion for a change of venue.

**{5}** There is no record before us of the hearing on the motion for change of venue. Requested findings of fact were not submitted by defendant and none were entered by the trial court. Under these circumstances we have nothing to review and the decision of the trial court denying the motion must be upheld. **State v. Fernandez**, 56 N.M. 689, 248 P.2d 679 (1952).

**{6}** Defendant next contends that the trial court abused its discretion by restricting defense counsel in his voir dire examination of the prospective jurors. Defendant argues that the ABA Standards for Criminal Justice Relating to Fair Trial and Free Press are valid considerations in

ensuring that defendants are given a fair trial. He argues that the trial court should have followed those standards and granted individual voir dire of prospective jurors.

**{7}** There are times when individual voir dire of prospective jurors is not only helpful, but also essential in providing a fair trial. However, some of the questions defense counsel sought to ask the prospective jurors would have been prejudicial, regardless of whether they had been asked before the entire panel or only before a single juror.

**{8}** The determination of whether to allow individual voir dire lies within the discretion of the trial court. N.M.R. Crim.P. 39(a), N.M.S.A. 1978; **United States v. Crow Dog**, 532 F.2d 1182 (8th Cir. 1976), **cert. denied**, 430 U.S. 929, 97 S. Ct. 1547, 51 L. Ed. 2d 772 (1977); **Hackney v. State**, 233 Ga. 416, 211 S.E.2d 714 (1975); **Ferguson v. Commonwealth**, 512 S.W.2d 501 (Ky.1974). We hold that the trial court did not abuse its discretion in refusing to permit the questioning requested by defendant. We see no need to adopt the ABA Standards as rules of law, although we recognize they may be useful guidelines which a trial court may consider in exercising its discretion.

**{9}** Defendant's third contention is that the trial court abused its discretion by refusing to excuse for cause all those prospective jurors who said they had read newspaper articles concerning the crime. We do not agree. The record does not show that any of the jurors had specific recollection of the details of the articles. The jurors all indicated that they had no opinion as to the guilt or innocence of defendant as a result of the articles. They all indicated they could fairly judge the case.

II.

**{10}** Defendant contends that the trial court erred in denying his motion for directed verdict on both the aggravated burglary and the felony-murder charges. He argues that there was insufficient evidence to go to the jury on either charge because the State failed to prove two elements of the burglary charge: (1) An unauthorized entry by defendant into the house; and (2) defendant's intent to commit a felony therein. Defendant also argues that the trial court erred in giving an aggravated burglary instruction because there was insufficient evidence to go to the jury on this charge. We do not agree. There is sufficient testimony in the record to support submission of these issues to the jury.

**{11}** Intent is subjective and is almost always inferred from other facts in the case. It is rarely established by direct evidence. N.M.U.J.I. Crim. 1.50, N.M.S.A. 1978; **State v. Mata**, 86 N.M. 548, 525 P.2d 908 (Ct. App.1974), **cert. denied**, 86 N.M. 528, 525 P.2d 888 (1974); **State v. Ortega**, 79 N.M. 707, 448 P.2d 813 (Ct. App.1968). The evidence showed that defendant went to the home where the victim was killed only after he called to make sure someone was there. He and another individual went to the house armed with firearms. He had the other armed person cover the back of the house while he entered through the front door. There was evidence that defendant hit the screen door with his fist to obtain entry. Defendant testified that he opened the front door himself. There was no evidence that defendant received anyone's permission to enter the house. To the contrary, several witnesses testified that they had not given defendant such permission. This evidence was sufficient to submit the burglary charge to the jury.

III.

**{12}** Defendant contends that the trial court erred in failing to grant his motion for a mistrial following the prosecutor's comments during his rebuttal argument. The prosecutor made the following statement:

> I'm going to close with one last statement. Now we haven't mentioned this very much during the trial, but remember the wife of the defendant was in that living room when that shot was fired. She saw everything the defendant did. Now you notice she is not here to testify.

Defendant objected to this statement and moved for a mistrial. The motion was denied. The court properly instructed the jury to disregard the wife's failure to testify and explained the husband-wife privilege.

**{13}** At this point the prosecuting attorney concluded his rebuttal argument with the following words:

> But let's just back up to Penny Frank who was in that living room, who saw what happened, who saw her husband, who saw Tina, who saw what took place. Remember when they ran out of the car, when they ran out of the house, they went back to the car, they got in. And what did Penny Frank say? Roy Nickerson told us what she said. She said, "Bob, you didn't have to shoot that girl." I think that tells us what happened inside that house, and based on that we would ask you to return the verdict of guilty of aggravated burglary and also of first-degree felony murder.

**{14}** N.M.R. Evid. 505(b)(1), N.M.S.A. 1978 provides:

> An accused spouse in a criminal proceeding has a privilege to prevent the other spouse from testifying against the accused.

**{15}** N.M.R. Evid. 513(a), N.M.S.A. 1978 provides:

> The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.

**{16}** The privilege of an accused to prevent his spouse from testifying is subject to certain exceptions; however, none of these exceptions are applicable in this case. N.M.R. Evid. 505(d), N.M.S.A. 1978.

**{17}** The State contends that the privilege was not exercised, and, therefore, that the prosecutor's comments were not improper. As to whether the privilege was exercised, we agree with the decision of the New Jersey Supreme Court in **State v. Lowery**, 49 N.J. 476, 231 A.2d 361 (1967). In that case the court stated:

> We do not regard it as necessary for a husband or wife to go upon the stand and there affirmatively "exercise" the privilege not to testify. The decision of a husband in a case like the present one not to call his wife as a witness is a sufficient "exercise" of the privilege to justify invocation of the statutory protection. (Citation omitted.)

**Id**. at 366.

**{18}** We hold that the husband-wife privilege applied. The prosecutor's comments on the failure of the wife to testify were improper. **State v. Warren**, 212 N.W.2d 509 (Iowa 1973); **State v. Brown**, 14 Utah 2d 324, 383 P.2d 930 (1963); **State v. Torres**, 16 Wash. App. 254, 554 P.2d 1069 (1976).

**{19}** The remaining issue is whether the improper argument of counsel requires reversal of these convictions, or whether the trial court's instruction to the jury to disregard counsel's statement was sufficient to cure the error.

**{20}** If there is a reasonable possibility that the inappropriate remarks of the prosecutor caused the jury to consider the failure of the wife to testify as evidence against defendant, or caused it to reach a verdict that it otherwise might not have reached, then such arguments are grounds for reversal.

**{21}** This case turned not upon whether defendant was at the home of the decedent, but on the manner and purpose of his entry. The State argued that the entry was a burglary, bringing the killing within the felony-murder statute. § 30-2-1A(3), N.M.S.A. 1978 (formerly § 40A-2-1A(3), N.M.S.A. 1953 (Repl.1972)). Defendant took the stand and explained those acts in such a way that, had the jury believed him, there would not have been a conviction on either charge. Defendant's wife was the only other person present to see

defendant's means of entry and to see whether defendant's acts within the house were felonious. Defendant's father-in-law testified that defendant's wife said to defendant immediately after the killing, "Bob, you didn't have to shoot her."

**{22}** Whatever the prosecutor intended to accomplish by his comments is not controlling. Even if spoken with the purest of motives, the prosecutor's reference to the wife's failure to testify could have been interpreted by the jury to imply that she would have testified adversely to her husband.

**{23}** After the trial court sustained an objection to the comment on the wife's failure to testify, the prosecutor went on to refer to the statement made by her to her father which indicated that the wife knew what had occurred. The prosecutor's reference to her absence at trial, backed by a reminder of her statement to her father, strongly suggested to the jury that the wife was not called because her testimony would damage defendant.

**{24}** We adhere to the reasoning of the court in **Johnson v. The State**, 63 Miss. 313 (1885), wherein the court stated:

> If the failure of the husband to call his wife as a witness in his behalf is to be construed as testimony, or as a circumstance against him, his privilege and option in the matter would be annulled, and he would be compelled, in all cases, to introduce her, or run the hazard of being convicted on a constrained, implied confession or admission, or to make explanations for not introducing her which might involve the sacred privacy of domestic life.

**Id**. at 317.

**{25}** We do not accept the State's argument that the court's admonition to the jury to disregard his comments removed any prejudice to defendant, unless it clearly appears from the record that his remarks could not have influenced the verdict. The record supports the opposite conclusion.

**{26}** The following language from the case of **Miller v. Territory of Oklahoma**, 149 F. 330 (8th Cir. 1906), which this Court cited with approval in **State v. Rowell**, 77 N.M. 124, 128, 419 P.2d 966, 970 (1966), is appropriate here:

> The zeal . . . of some prosecuting attorneys, tempts them to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty. . . . When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. . . . [T]he presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty.

149 F. at 339.

**{27}** We hold that the comments of the prosecutor on the failure of defendant's wife to testify were prejudicial to defendant. Defendant's motion for a mistrial should have been granted. The cause is remanded to the district court with directions that the conviction be set aside and that the defendant be given a new trial.

**{28} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**JOHN McMANUS,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-033**

**Filing Date: April 30, 1979**

**Docket No. 12,235**

**DAVID E. JONES,**

**Plaintiff-Appellee,**

**v.**

**NEW MEXICO STATE HIGHWAY DEPARTMENT, NEW MEXICO STATE HIGHWAY COMMISSION, JULIAN GARCIA, KENNETH L. TOWLE, ALBERT N. SANCHEZ, ROBERT C. MARTIN AND JAMES W. CHANEY,**

**Defendants-Appellants.**

Jeff Bingaman, Atty. Gen.
V. Henry Rothschild, Deputy Chief Counsel,
Asst. Atty. Gen.
Santa Fe

for Defendants-Appellants.

Michael L. Gregory
Las Vegas

for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** David E. Jones brought a breach of contract action against the New Mexico State Highway Department and State Highway Commissioners. The complaint was filed in the District Court in San Miguel County. The State moved for dismissal asserting improper venue and insufficient service of process. The District Court in San Miguel County transferred the cause to the District Court in Santa Fe County. The State appealed.

**{2}** The controlling issue in this case is whether an action against a state officer may be brought in a district court other than the District Court in Santa Fe County, in the absence of a waiver of venue by the state officer.

**{3}** Section 38-3-1(G), N.M.S.A. 1978 states that "suits against any state officers as such shall be brought in the court of the county wherein their offices are located, at the capitol [capital] and not elsewhere."

**{4}** The State Highway Commissioners are state officers within the meaning of this statute. **See State ex rel. Bureau of Revenue v. MacPherson,** 79 N.M. 272, 442 P.2d 584 (1968); **Tudesque v. New Mexico State Board of Barber Exam,** 65 N.M. 42, 331 P.2d 1104 (1958). The State Highway Commission's office is located at the state capital in Santa Fe. § 67-3-9, N.M.S.A. 1978. The Legislature, in enacting this statute, intended that actions against state officers be brought only in Santa Fe County. **State v. Quesenberry,** 74 N.M. 30, 390 P.2d 273 (1964).

**{5}** We have held that this venue statute is not to be equated with jurisdiction. **Kalosha v. Novick,** 84 N.M. 502, 505 P.2d 845 (1973). Although in **Kalosha** we held that proper venue may be waived, there is no evidence in this case that the State waived venue. To the contrary, the State moved for dismissal of the action alleging improper venue.

**{6}** Absent a statute giving it such authority, a trial court has no power to change the venue of a misfiled lawsuit. 1 **Moore's Federal Practice** para. 0.146[2], at 1660 (2d ed. 1978). Venue was improper in this case, and the District Court in San Miguel County could not properly issue an order for a change of venue.

**{7}** We need not discuss the issue of service of process raised by the State.

**{8}** The trial court is reversed. The matter is remanded with instructions to dismiss the action in the District Court in San Miguel County.

**{9}** **IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-042**

**Filing Date: May 17, 1979**

**Docket No. 11,969**

**PUBLIC SERVICE COMPANY OF NEW MEXICO,**

**Petitioner-Appellant and Cross-Appellee,**

**v.**

**NEW MEXICO PUBLIC SERVICE COMMISSION,**

**Respondent-Appellee and Cross-Appellant,**

**CITY OF SANTA FE,**

**Intervenor.**

Keleher & McLeod
Richard B. Cole
Albuquerque

for Petitioner-Appellant.

Jeff Bingaman, Atty. Gen.
David S. Cohen
Patrick T. Ortiz, Asst. Attys. Gen.
Santa Fe

for Public Service Commission.

Frank R. Coppler
Santa Fe

for Intervenor.

Jeff Bingaman, Atty. Gen.
Paul L. Biderman
Steven Asher, Asst. Attys. Gen.
Santa Fe

for Amicus Curiae.

**OPINION**

**PAYNE, Justice.**

**{1}** Public Service Company of New Mexico (PNM) brought this action in district court to review a decision of the New Mexico Public Service Commission with respect to PNM's request for rate increases for water service to the City of Santa Fe. The district court reversed the decision and remanded the case to the Commission. Both parties appeal.

**{2}** When the Commission first considered the proposed rates, it held lengthy hearings and found that a fair rate of return on equity for PNM's Santa Fe water operations was 4 percent. PNM's proposed rates, based on a 14 percent rate of return, were disapproved as unjust and unreasonable. On appeal to the district court, the Commission's order granting a 4 percent return was found to be unsupported by substantial evidence. The district court annulled and vacated the Commission's decision and ordered the case remanded to the Commission with permission to take new evidence on the issue of a fair rate of return. The Commission appeals the district court's finding that a 4 percent rate of return was not supported by substantial evidence and PNM appeals the court's decision to the extent that it permits the Commission to consider additional evidence on remand.

**{3}** We first determine the issue raised by the Commission of whether the district court erred in its finding that a 4 percent rate of return was not supported by substantial evidence.

**{4}** The district court stated in its findings:

> Further examination of this record discloses no arithmetic formula or other basis, be it algebraic or expressed in hypothetical theory that would allow the commission based on this record to arrive at a figure of four percent (4%) as a fair and valid return . . .

> . . . I cannot find a clear and adequate basis in the record for the rate arrived at by the commission. . . . I simply cannot find relevant testimony which would enable anyone seriously studying the matter to pin point how the figure of four percent (4%) was arrived at.

**{5}** Judicial review of a Commission's decision is limited to a determination of whether the Commission acted fraudulently, arbitrarily, or capriciously, and whether the Commission's decision is supported by substantial evidence. **Llano, Inc. v. Southern Union Gas Company,** 75 N.M. 7, 399 P.2d 646 (1964). The district court may not substitute its judgment for that of the Commission. **Maestas v. New Mexico Public Service Commission,** 85 N.M. 571, 514 P.2d 847 (1973). Although every inference is to be drawn in support of the Commission's decision, a reviewing court may not uphold a Commission's decision which is not supported by substantial evidence. **See Rinker v. State Corporation Commission,** 84 N.M. 626, 506 P.2d 783 (1973).

**{6}** The Commission points to several factors which it contends constitute substantial evidence to support a 4 percent rate of return. One is the relative risks of Santa Fe water operations compared to PNM's electrical operations. Another is PNM's general financial health, including the market value of PNM's stock, recent stock dividends, and PNM's credit rating and capital attractiveness. These factors are properly considered in a rate hearing. However, these factors alone do not indicate why 4 percent, as opposed to 6, 8, or 12 percent, is a fair and reasonable rate of return. General statements are no substitute for specific factual evidence. The Commission does not point to any such evidence to justify a 4 percent rate.

**{7}** The expert witnesses for both the Commission and for PNM testified that a rate of return between 13 percent and 14.8 percent was justified. The Commission contends that it was entitled to ignore the expert testimony presented to it, and to set a rate inconsistent with that testimony. Assuming **arguendo,** that this is a correct statement of law (**see Hardin v. State Tax Commission**, 78 N.M. 477, 432 P.2d 833 (1967)), it does not justify the setting of rates, inconsistent with the expert testimony, which are not otherwise supported by substantial evidence. The district court did not err in rejecting the 4 percent rate of return and annulling the Commission's decision.

**{8}** We next consider whether the district court erred in remanding the case to the Commission with permission to take additional testimony.

**{9}** The court stated:

> I do not deem it necessary that additional evidence be taken, though the commission in its wisdom if it so desires may do so.

**{10}** The district court reviewed the Commission's decision pursuant to § 62-11-5, N.M.S.A. 1978, which reads in part:

> The trial before the district court shall be before the court without a jury and the court shall have no power to modify said action or order appealed from, but shall either affirm or annul and vacate the same. The court shall vacate and annul the order complained of, if it is made to appear to the satisfaction of the court that the order is unreasonable or unlawful.

**{11}** PNM contends that because § 62-11-5 does not specifically provide for a remand of a rate case to the Commission for the taking of new evidence, the remand of this case was improper. PNM argues that the substantial evidence in the existing record requires the Commission on remand to adopt a rate of return on equity of between 13 and 14.8 percent.

**{12}** The district court correctly rejected this argument, stating:

> I do not deem it the court's function here to usurp the powers of the commission to the extent of stating a percentage or a range of percentages within which an appropriate rate must fall. I merely state that such

> figure when established must be consistent with the evidence adduced before the commission.

**{13}** Section 62-11-5 does not authorize the district court to modify an order of the Commission. If the approach advocated by PNM were adopted, it would place the district court in the position of weighing the evidence and substituting its judgment for the judgment of the Commission. The district court properly restricted its review to the question of whether the Commission's order was supported by substantial evidence. Having found that it was not, the court remanded the case for the entry of a new order based on substantial evidence.

**{14}** PNM contends that in establishing a new rate of return the Commission is limited by the decisions of this Court from considering evidence outside of the existing record. PNM relies on **State v. Carmody,** 53 N.M. 367, 208 P.2d 1073 (1949) in which a writ of prohibition was issued against a trial judge to prevent him from remanding a pending cause to the State Corporation Commission for the taking of additional evidence. This Court said:

> [N]ot a single case has been found in which the cause was remanded to an administrative board or authority for further proceedings as, for instance, taking of additional testimony, that lacks the sanction of statutory or constitutional authorization for the remand.
>
> [The] trial judge could not properly remand the cause to the Corporation Commission for the taking of additional evidence. He could only determine the questioned order to be reasonable or unreasonable, lawful or unlawful, on the record made before the Commission and approve, or disapprove, the same accordingly.

**Id.** at 376-77, 208 P.2d at 1079.

**{15}** The Commission seeks to distinguish **Carmody** and other cases relied on by PNM on the basis that they involve remands following **interlocutory** orders of the reviewing courts. It cites the following language from **Carmody**

> The kind of remand we are here talking about is one for the taking of additional testimony preliminary to deciding reasonableness or lawfulness of the order under review, as enjoined by the statute. Of course, when the reviewing court has decided this basic question, if judgment vacating the questioned order be entered, then with or without any formal order of remand, the cause will stand remanded to the administrative board for the conduct of such further proceedings as lie within its statutory powers. (Citations omitted.)

**Id.** at 377, 208 P.2d at 1079.

**{16}** Even if we were to assume that the Court in **Carmody** intended such a distinction, we can discern no rational basis for distinguishing interlocutory from final orders for purposes of determining the issue in this case. The Commission, amicus curiae, and the intervenor do not cite any basis for this distinction. However, the decision we reach in this case is not inconsistent with the above quoted language in **Carmody**.

**{17}** In **Carmody** this Court said that after entry of a final order a cause will always stand remanded to the administrative agency for such further proceedings as lie within its statutory powers. This proposition is not more than a statement of an obvious rule of law. "An agency is always free to conduct such further proceedings as lie within its statutory powers. . . ." 2 Vom Baur, **Federal Administrative Law,** § 790, at 755 (1942). The agency has an affirmative duty to exercise its statutory powers. The question is what further proceedings lie within the Commission's statutory powers after its decision in a rate case has been annulled and vacated.

**{18}** Under the Public Utilities Act the Commission has continuing jurisdiction to set just and reasonable utility rates. Section 62-10-1, N.M.S.A. 1978 provides in part:

> [T]he commission, whenever it deems that the public interest or the interest of consumers and investors so requires, may proceed, to hold such hearing as it may deem necessary or appropriate.

**{19}** It is the Commission's position that it had the authority under § 62-10-1 to consider additional evidence regardless of whether the district court's remand order so provided. The Commission argues that it had an affirmative duty to utilize the most recent available economic data in determining just and reasonable utility rates. **See Mountain States Tel. v. New Mexico State Corp.,** 90 N.M. 325, 563 P.2d 588 (1977). The Commission contends that because approximately 13 months elapsed between the date of the Commission rate hearing and the entry of the district court's order of remand, it had an obligation, rather than merely a right, to consider new evidence on remand. The Commission also contends that there is no applicable statutory time limitation within which the new testimony must be heard and a new decision rendered, but that it is only limited by the general requirement that it act diligently and in good faith to dispose of the matter.

**{20}** PNM argues that if the Commission is permitted to take new testimony on remand, the regulatory scheme established by the Public Utilities Act will be violated and the rate relief to which PNM is undisputedly entitled will be indefinitely delayed. Such a procedure could become confiscatory by depriving a utility of a fair return on its investment. PNM contends that § 62-8-7, N.M.S.A. 1978 places a ten-month limit within which a final decision on rate increases must be made.

**{21}** Section 62-8-7 sets forth the statutory procedure for rate changes. Under that section a utility files a proposed rate increase with the Commission, giving the Commission 30 days' notice thereof before the proposed rates can go into effect. Within that thirty-day period the Commission may suspend the operation of the proposed rates for up to 9 months pending a hearing. The Commission may also suspend imposition of the proposed rates for an additional three-month period. However, during the extended period the utility may put the proposed rates into effect by filing its undertaking secured by a bond for the purpose of refunding any amounts that may later be determined to be excessive.

**{22}** We hold that § 62-8-7 does not make it mandatory for the Commission to act within any specific time; it merely provides that if the Commission fails to act within the nine-month suspension period, the utility may put the proposed rates into effect. **See Mountain States Tel., supra.**

**{23}** The Commission contends, however, that once it has determined that the requested rates are unjust and unreasonable, even if its decision is annulled on review, the time limitations contained in § 62-8-7 are no longer applicable. We do not agree.

**{24}** Once the Commission's order is annulled and vacated, a rate case is in the same posture it was in before the original decision was rendered. The Commission may hold additional hearings and take additional testimony just as if the vacated order had never been entered; however, because the proposed rates may be put into effect after expiration of the initial nine-month period, the Commission will have every reason to act expeditiously to enter new findings based on substantial evidence.

**{25}** The decision of the trial court is affirmed and the case is remanded to the Commission with directions to conduct such further proceedings as are consistent with the views expressed herein.

**{26} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**JOHN McMANUS,**
**Senior Justice, dissenting**

**WILLIAM FEDERICI,**
**Justice, not participating**

**DISSENT**

**McMANUS, Senior Justice, respectfully dissenting.**

**{27}** I respectfully dissent only from the portion of the majority opinion whereby the case is remanded to the Commission with directions to conduct further proceedings.

**{28}** I feel that § 62-11-5, N.M.S.A. 1978 only gives the Supreme Court, as well as the district court, authority to affirm or annul and vacate the action of the Commission. There is no provision in the statute which allows a remand for the taking of new evidence.

**JOHN McMANUS,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-044**

**Filing Date: May 21, 1979**

**Docket No. 12,329**

**SISTERS OF CHARITY OF CINCINNATI, OHIO, A CORPORATION,**

**Petitioner,**

**v.**

**COUNTY OF BERNALILLO, STATE OF NEW MEXICO, RESPONDENT, AND PROPERTY TAX DEPARTMENT OF THE STATE OF NEW MEXICO,**

**Respondent.**

Johnson & Lanphere
John M. Kirk
Albuquerque

for Petitioner.

Hunter L. Geer
Albuquerque

for County of Bernalillo.

Jeff Bingaman, Atty. Gen.
John C. Cook, Asst. Atty. Gen.
Santa Fe

for Respondent Property Tax Dept.

**OPINION**

**PAYNE, Justice.**

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

**{2}** Petitioner is a religious order which owns and operates schools and hospitals around the country. St. Joseph Hospital, Inc. is a New Mexico non-profit corporation and a wholly owned subsidiary of petitioner. St. Joseph operates a hospital in Albuquerque.

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

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

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

**{6}** The Court of Appeals reversed on two grounds. First, it held that petitioner, as a lessor, is not entitled to a charitable deduction for leased property, even if the lessee uses the property for charitable purposes. Second, the Court

of Appeals held that a charity is not entitled to a partial tax exemption for that portion of its property which is used exclusively for charitable purposes.

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

I.

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

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

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

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

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

**{12}** It is also important for the law to retain sufficient flexibility to adjust to changing circumstances. We must inquire as to the purposes served by the present rule and whether those purposes are served by application of the rule in situations such as that presented in this case. "It is a cardinal rule of construction that statutes are to be construed so that they carry out the intent of the legislature." **Hartford Hosp. v. City and Town of Hartford,** 160 Conn. 370, 279 A.2d 561, 563 (1971). This Court has held that Article VIII, Section 3 of the New Mexico Constitution is to be subject to "reasonable construction * * * to the end that the probable intent of the provision is effectuated and the public interests to be subserved thereby are furthered. (Citations omitted.)" **Benevolent & P. Ord. of Elks v. New Mexico Prop. A.D.,** 83 N.M. 445, 447, 493 P.2d 411, 413 (1972).

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

**{14}** "Foremost among the reasons why exemption from taxation is denied to property leased out by an otherwise tax exempt body is that the property is put to a profit-making or revenue-producing use. . . . (Footnote omitted.)"

Annot., 54 A.L.R.3d 402, § 11 at 471 (1974). "Normally, also, the property under lease serves the profit-making purposes of some private [non-exempt] person or organization." **Id.** at 422.

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

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

II.

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

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

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

**{19}** The majority of jurisdictions in the United States have adopted the principle that where one portion of a piece of property is used for an exempt purpose and another portion for a non-exempt purpose, only the value of the non-exempt portion is subject to taxation. **See** Annot., 159 A.L.R. 685 (1945); 71 Am. Jur.2d **State and Local Taxation** § 371 (1973), and cases cited therein. This rule has been applied to hospitals which rent a portion of their premises to rent-paying medical tenants. **Milton Hospital & Conv. Home v. Board of Assessor,** 360 Mass. 63, 271 N.E.2d 745 (1971); **Genesee Hospital v. Wagner,** 47 A.D.2d 37, 364 N.Y.S.2d 934 (1975), **aff'd,** 39 N.Y.2d 863, 386 N.Y.S.2d 216, 352 N.E.2d 133 (1976).

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

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

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

**{23}** Therefore, we hold that where one substantial part of a building that is owned by a

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

III.

**Was the claim for refund of 1974 taxes timely filed**?

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

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

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

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

**{28}** Under the statutory scheme applicable to the 1974 tax assessment, one-half of the tax assessment became delinquent in December of the tax year, and the other half became delinquent on May 1 of the following year. § 72-7-3, N.M.S.A. 1953 (Repl.1961) (repealed by N.M. Laws 1973, ch. 258, 156 and N.M. Laws 1974, ch. 92, § 34). Petitioner's payment of 1974 taxes in November 1975 was not timely. Recovery of those taxes was therefore barred by § 72-5-4.

IV.

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

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

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

**{31}** This issue is controlled by our decision in **Dale Bellamah Land Co. v. Bernalillo County,** 92 N.M. 615, 592 P.2d 971 (1978). In that case

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

we held that a claim for 1976 taxes, asserted in a supplemental complaint in an action for a refund of 1975 taxes, was not timely where the supplemental complaint was filed six weeks after the deadline under § 7-38-40(A)(1) for claiming a refund of 1976 taxes.

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

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

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

**{35} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**JOHN McMANUS,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-047**

**Filing Date: June 6, 1979**

**Docket No. 12,166**

**JOSIE R. ABERNATHY,**

**Plaintiff-Appellee,**

**v.**

**EMPLOYMENT SECURITY COMMISSION OF NEW MEXICO,**

**Defendant-Appellant.**

Jeff Bingaman, Atty. Gen.
C. Reischman
Santa Fe

for Defendant-Appellant.

Ralph D. Wanek
Las Cruces

for Plaintiff-Appellee.

Clifford Martin Rees
Santa Fe

for Amicus Curiae.

**OPINION**

**PAYNE, Justice.**

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

**{2}** The Commission argues that Abernathy's last employer is an indispensable party under the terms of § 51-1-8(K), N.M.S.A. 1978. It relies on that portion of the statute which states:

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

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

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

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

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

> The district court shall try and determine such cause upon the evidence legally introduced at the hearing before said employment security commission [employment services division] presented by the parties to said court.

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

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

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

> The trial court shall adopt as its own such of the Commission's findings of fact as it determines to be supported by substantial evidence and shall make such conclusions of law and decision as lawfully follow therefrom.

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

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

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

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

**{13}** The district court is therefore affirmed.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**JOHN McMANUS,**
**Senior Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-056**

**Filing Date: July 26, 1979**

**Docket No. 11,418**

**ORTEGA, SNEAD, DIXON & HANNA, A PARTNERSHIP,**

**Plaintiff-Appellee,**

**v.**

**JOSEPH A. GENNITTI, PECOS LAND AND CATTLE CORPORATION, ORCHID ISLAND HOTELS, INC. AND JOSEPHINE GENNITTI, DEFENDANTS-APPELLEES, LOUIS MENEGHIN AND JEANETTE MENEGHIN, HIS WIFE, CROSS-DEFENDANTS-APPELLEES, BILL FROST AND LETA M. OMTA, PERSONAL REPRESENTATIVE FOR JOHN W. OMTA, DECEASED,**

**Defendants-Appellants.**

**APPEAL FROM THE DISTRICT COURT OF GUADALUPE COUNTY, JOE ANGEL, District Judge.**

Solomon, Roth & Van Amberg
Charles Solomon
Santa Fe, New Mexico

for Appellants.

Matias Zamora
Santa Fe, New Mexico

Michael Bustamante
Albuquerque, New Mexico

Richard F. Rowley II,
Clovis, New Mexico

for Appellees.

**OPINION**

**PAYNE, Justice.**

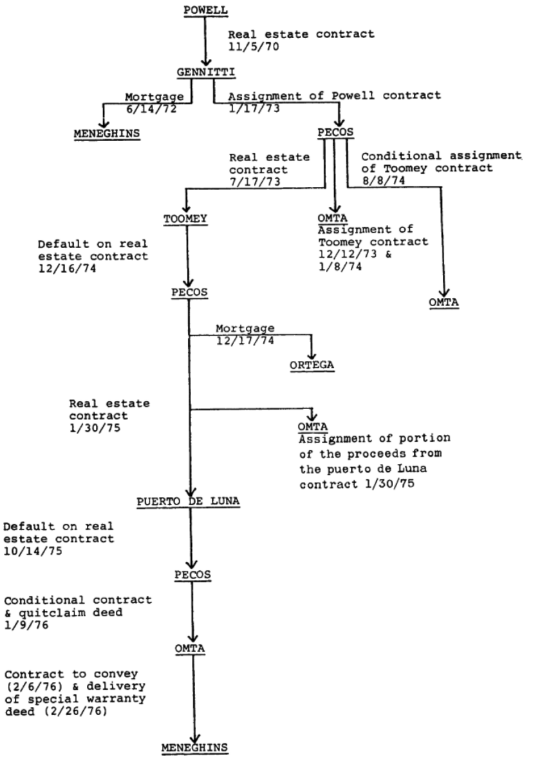
**{1}** On May 15, 1979 an opinion in the above case was handed down by this Court. A motion for rehearing was filed by the personal representative of one of the defendants, John W. Omta, deceased. The motion for rehearing was granted in order to reconsider our original opinion. Several factual inaccuracies in the first opinion were brought to light on rehearing. Although we are satisfied that these matters do not change the soundness of the result we originally reached, we are hereby withdrawing the opinion of May 15, 1979 in order to correct the inaccuracies.

**{2}** Plaintiff, Ortega, Snead, Dixon & Hanna, a partnership engaged in the practice of law, brought suit in Guadalupe County seeking judgment on an open account and foreclosure of a mortgage. A default judgment was entered against four of the eight named defendants, Joseph and Josephine Gennitti, Pecos Land and Cattle Corporation, and Orchid Island Hotels, Inc. No appeal was taken from this default judgment. The remaining four defendants, Louis and Jeanette Meneghin, and Bill Frost And John Omta, respectively, sought by counterclaim and cross-claim to quiet title to the subject property. The trial court dismissed the claim of Frost and Omta, and quieted title in the Meneghins subject to the mortgage lien in favor of Ortega. Omta appeals.[1]

**{3}** The transactions which gave rise to this litigation are complicated and confusing. A diagram depicting the chain of title is set out below in order to facilitate an understanding of the nature of the dispute.

[1] Subsequent to the filing of this lawsuit, but prior to trial, Frost quitclaimed whatever interest he had in the property to Omta. Subsequent to the filing of this appeal, but prior to oral argument, Omta died, and his personal representative was substituted for him as a party to the appeal. However, for the sake of simplicity, this opinion will refer simply to Omta, although the transactions were undertaken by both Frost and Omta and Omta's personal representative is actually the appellant.

**CHAIN OF TITLE DIAGRAM**




**{4}** The first conveyance relevant to the issues in this case of the property which is the subject of this suit occurred in 1970 when Earl Powell, Inc. transferred the land to the Gennittis by a real estate contract (the Powell contract). The contract called for annual payments over a ten-year period. In June 1972 the Gennittis mortgaged the property to the Meneghins, and in January 1973 the Gennittis transferred their interest under the Powell contract to Pecos Land and Cattle Corporation.

**{5}** In July 1973 Pecos executed a real estate contract by which the land was transferred to Robert J. Toomey (the Toomey contract). Toomey agreed to assume the payments to be made under the Powell contract, and, in addition, agreed to pay $503,000 in six consecutive annual installments of $50,000 each for the first five years, with the remainder to be paid in he sixth year. Toomey also agreed to pay the sum of $75,000 within sixty days of the date of the closing of the transaction.

**{6}** On December 12, 1973 Pecos, as purchaser, entered into an agreement with Omta, as seller, for the purchase of all of the stock of Omta in a Hawaiian corporation, Orchid Island Hotels, Inc. (the Hotel contract). The Hotel contract called for a cash down payment in the amount of $603,000. In satisfaction of the down payment on the Hotel contract, Pecos assigned to Omta its right to the $75,000 then due Pecos under the Toomey contract. In addition, Pecos delivered a ninety-day promissory note for $25,000, and agreed to pay $503,000 on January 2, 1974.

**{7}** By a letter agreement dated December 12, 1973, Pecos and Omta agreed that the $503,000 payment due on January 2, 1974 could be satisfied by Pecos' assignment to Omta of its interest in the Toomey contract. An assignment of Pecos' interest in the Toomey contract was executed by Pecos in favor of Omta on January 8, 1974.

**{8}** On August 8, 1974 Pecos and Omta executed a promissory note and collateral agreement for the sum of $503,000 secured by an agreement which was labeled "conditional assignment." This "conditional assignment" contained the following paragraph:

> This conditional assignment supersedes any previous agreement between the parties regarding the said agreement attached as Exhibit "2" to the December 12, 1973 Purchase Agreement between the parties.

Exhibit 2 to the December 12, 1973 Purchase Agreement was the Pecos-Toomey contract of July 1973.

**{9}** A separately numbered paragraph in the "conditional assignment" provided that the assignment would become effective upon the election of the assignees (Omta and Frost) to take Pecos' rights under the Toomey contract, and written notice of the election to Pecos. Omta did not give such notice until approximately six months after Toomey defaulted on his contract. In the meantime, upon Toomey's default in October 1974, the property was reconveyed from Toomey to Pecos. In December 1974 Pecos

executed and delivered a mortgage note in favor of the Ortega law firm.

**{10}** On January 30, 1975 Pecos sold the property to the Puerto de Luna limited partnership. On that same date Omta and Pecos agreed on an assignment of a portion of the proceeds of that contract from Pecos to Omta, and conditionally agreed to an assignment of the remainder of the proceeds. A full assignment of this contract was never executed. Puerto de Luna defaulted, and the property was reconveyed to Pecos in October 1975.

**{11}** On January 9, 1976 Pecos and Omta agreed that Pecos would convey the property to Omta in return for $15,000 and Omta's promise to take the property subject to the Ortega mortgage of December 1974. Omta expressly agreed to make the payments on the Powell contract, one of which had been due on January 6, 1976. Omta did not make the Powell payment. The trial court found that by this breach of the agreement, Omta lost all his interest in the property.

**{12}** In order to preserve their interest in the land, Pecos and the Meneghins entered into an agreement on February 6, 1976 under which the Meneghins agreed to make the Powell payments, and Pecos agreed to convey the property to the Meneghins, which it did in late February 1976 by a special warranty deed.

**{13}** Omta argues several issues on appeal. We address the following questions: (1) Whether the trial court had jurisdiction in a mortgage foreclosure action over a counterclaim and cross-claim to quiet title; (2) whether the Ortega law firm and the Meneghins had standing to seek cancellation of the January 9, 1976 quitclaim deed from Pecos to Omta; (3) whether the Meneghins or Omta had superior title to the property; and (4) whether Omta and Frost acted as partners.

I.

**{14}** Notwithstanding the fact that he requested the same relief, Omta contends that the trial court did not have jurisdiction to entertain the Meneghins' counterclaim and cross-claim to quiet title. He cites **Clark. v. Primus,** 62 N.M. 259, 308 P.2d 584 (1957) and **Jackson v. Hartley**, 90 N.M. 428, 564 P.2d 992 (1977) for the proposition that counterclaims may not be asserted in actions to quiet title. Omta argues that counterclaims and cross-claims to quiet title cannot be asserted in other statutory actions, such as in an action to foreclose a mortgage.

**{15}** In **Clark** the plaintiff sued to quiet title to certain property. The trial court dismissed the defendant's counterclaims which sought an accounting for the rents and profits received from the premises. This Court held that the counterclaims were properly dismissed because "counterclaims are not within the purview of the quiet title statute, § 22-14-1, N.M.S.A. 1953 Compilation [§ 42-6-1, N.M.S.A. 1978]. (Citations omitted.)" 62 N.M. at 263, 308 P.2d at 586.

**{16}** The **Clark** decision was followed in **Jackson**. In **Jackson** this Court held that a counterclaim for ejectment could not be asserted in a suit to quiet title.

**{17}** Neither **Clark** nor **Jackson** referred to this Court's decision in **Martinez v. Mundy**, 61 N.M. 87, 295 P.2d 209 (1956), in which a counterclaim to quiet title was permitted to be asserted in an ejectment action. In **Martinez** this Court stated:

> The plaintiff had the right to bring this suit in ejectment and to request a prayer for relief and the defendant had the right to come in with the counterclaim for remedy in the nature of a suit to quiet title. This is in accordance with the familiar rule that when a court of chancery obtains jurisdiction of a cause, it will retain it to administer full relief. (Citation omitted.)

61 N.M. at 96, 295 P.2d at 215. **Martinez** was followed in **Bailey v. Barranca**, 83 N.M. 90, 488 P.2d 725 (1971).

**{18}** The law in New Mexico is obviously confusing in light of these four decisions by this Court. These cases indicate that a counterclaim

to quiet title can be raised in an ejectment action (**Martinez**), but a counterclaim for ejectment cannot be raised in a quiet title action (**Jackson**). As one commentator stated:

> [W]hether or not two actions, one of which involves a suit to quiet title, can be determined in a single proceeding in New Mexico may depend upon the wholly coincidental factor of which party first commences litigation. (Footnote omitted.)

J. Walden, "The 'New Rules' in New Mexico," 25 F.R.D. 107, 121 (1960). Such a distinction is untenable.

**{19}** Nowhere in **Clark** or the cases following it was any justification set forth for the principle announced therein. **Jackson, supra**; **Lanehart v. Rabb**, 63 N.M. 359, 320 P.2d 374 (1957). In addition, in the **Clark** line of cases, this Court never attempted to reconcile its holdings with the New Mexico Rules of Civil Procedure.

**{20}** The applicable rule in this regard is N.M.R. Civ.P. 1, N.M.S.A. 1978:

> These rules govern the procedure in the district courts of New Mexico in all suits of a civil nature whether cognizable as cases at law or in equity, except in special statutory and summary proceedings **where existing rules are inconsistent herewith**." (Emphasis added.)

**{21}** Clark and its progeny ignore the critical inquiry under N.M.R. Civ.P. 1: Whether the statutory rules for proceedings to quiet title are inconsistent with the applicable rules with respect to the assertion of counterclaims and cross-claims in civil actions, N.M.R. Civ.P. 13, N.M.S.A. 1978. As Professor Walden stated: "A careful reading of the quieting title statute * * * reveals nothing specifically nor inherently at variance with the unrestrictive counterclaim provisions of Rule 13." 25 F.R.D. at 120 (footnotes omitted). To the contrary, the language of § 42-6-1, N.M.S.A. 1978 is consistent with the application of Rule 13 in this case. That statute provides that a claim to quiet title may be brought by a mortgage holder in an action to foreclose a mortgage. The statute contemplates the trial of both a foreclosure action and a quiet title claim in a single proceeding. It would be logically inconsistent to hold that it is permissible to try both claims in one proceeding if both are asserted by the plaintiff, but it is not permissible to join them in one case if one is asserted by the plaintiff and the other arises in a defendant's counterclaim or cross-claim. **See** Walden, note 53, 25 F.R.D. at 121-22.

**{22}** This incongruous holding would also be contrary to the purpose of Rule 13. In **Scott v. United States**, 354 F.2d 292, 173 Ct. Cl. 650 (1965), the court said with respect to identical portions of Rule 13 of the Federal Rules of Civil Procedure:

> The overriding emphasis is on consolidation and the expeditious resolution (where that is fair) of all the claims between the parties in one proceeding. * * * The controlling philosophy is that, so far as fairness and convenience permit, the various parties should be allowed and encouraged to resolve all their pending disputes within the bounds of the one litigation. (Footnote omitted.)

**Id**. at 300.

**{23}** The Meneghins' counterclaim and cross-claim clearly could have been raised under Rule 13. Rule 13(a) provides that a party **must** state as a counterclaim all claims arising out of the same transaction or occurrence giving rise to his opponent's claim. Rule 13(b) provides that a party **may** state as a counterclaim **any** other claim against an opposing party. Regardless of whether the Meneghins' counterclaim against Ortega is considered to arise from the same transaction or occurrence as the Ortega mortgage foreclosure action, there can be no doubt that the counterclaim could have been raised under Rule 13.

**{24}** The cross-claim against Omta was also proper under Rule 13. Rule 13(g) provides that a cross-claim may state:

> any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or **relating to any property that is the subject matter of the original action**. (Emphasis added.)

The Meneghins' cross-claim clearly related to the property which was the subject of the foreclosure action.

**{25}** It should be noted that N.M.R. Civ.P. 20(b) and 42, N.M.S.A. 1978 provide adequate safeguards to protect against any inconvenience or undue complication which might arise from joinder of claims under Rule 13. In light of these provisions, no purpose is served by continued adherence to the **Clark** rule. **See** Walden, 25 F.R.D. at 120.

**{26}** We expressly overrule the principle established in **Clark** and the cases which have relied on it. We hold that in determining whether a counterclaim or cross-claim may be brought in a quiet title action, or whether a counterclaim or cross-claim to quiet title may be brought in any other action, the proper analysis is that provided in Rules 1, 13, 20(b) and 42. Applying those rules to the facts of this case, it is evident that the trial court did not err in hearing the Meneghins' counterclaim and cross-claim in the mortgage foreclosure action.

II.

**{27}** Omta contends that neither Ortega nor the Menghins had standing to seek cancellation of the January 9, 1976 quitclaim deed from Pecos to Omta. Omta makes several arguments to support this contention: (1) Cancellation of a deed cannot be sought in a suit to foreclose a mortgage; (2) neither Ortega nor the Meneghins were parties to the agreement pursuant to which the quitclaim deed was conveyed, and only a party is entitled to seek its cancellation; and (3) neither Ortega nor the Menghins had a claim to the property superior to that of Omta's.

**{28}** We need not address the first issue. Under Point I we held that a counterclaim to quiet title can be pled in an action to foreclose a mortgage. It is well settled that a deed may be cancelled in an action to quiet title to the property which the deed embraces. 12 C.J.S. **Cancellation of Instruments,** § 16 (1938). Pecos' January 9 quitclaim deed to Omta clearly placed a cloud on the Meneghins' asserted title.

**{29}** Omta's contention that only a party to a transaction may seek its cancellation is also without merit. Although the Meneghins were not parties to the January 9, 1976 contract and deed between Omta and Pecos, their purported title was derived from Pecos. "[A] conveyance of property carries with it the incidental right of the grantee to maintain a suit in equity to set aside the voidable title of the third person. (Citations omitted.)" **Regnier v. Lay**, 21 Ill. 2d 177, 171 N.E.2d 629, 630 (1961). **See also Lockhart v. Garner**, 156 Tex. 580, 298 S.W.2d 108 (1957).

**{30}** Omta's third argument is that the Meneghins are strangers to the title of this property, and as such have no standing to challenge the quitclaim deed to Omta. This contention requires an examination of the respective claims to title of Omta and the Meneghins.

III.

**{31}** The trial court found that Omta had lost all his interest in the property. The court found that the Meneghins had title to the property by virtue of the February 1976 special warranty deed from Pecos, but that the Meneghins' interest was subject to the December 1974 mortgage to the Ortega law firm and to the 1970 Powell real estate contract. Omta challenges these findings. He contends that he has title to the property free from the claims of both the Ortega law firm and the Meneghins.

**{32}** Omta first contends that he had superior title to the property as a result of the January 8, 1974 assignment by Pecos of the Toomey contract. He argues that he and Frost never directly reassigned their interest under this agreement to Pecos. This claim is without merit.

**{33}** The August 8, 1974 agreement was labeled "conditional assignment." Paragraph 2 of that agreement expressly revoked "any previous agreement" between the parties with respect of the Toomey contract. This language included the January 8, 1974 assignment of the Toomey contract. Furthermore, the assignment provided that any rights Omta had to the Toomey contract were conditional upon written notice to Pecos of an election. Omta never gave timely notice. Therefore, as of December 1974 Omta had no interest in the property by virtue of either the January 1974 assignment or the August 1974 conditional assignment.

**{34}** Omta next contends that the Pecos-Puerto de Luna contract of January 30, 1975 constituted a re-institution of the Toomey contract. Omta relies on two facts to support this contention: (1) Toomey was a general partner in the Puerto de Luna limited partnership; and (2) the Puerto de Luna contract incorporated by reference most of the terms of the Toomey contract.

**{35}** Even if we assume that these two facts indicated that there was a re-institution of the Toomey contract, Omta's actions indicated that his understanding was precisely the opposite. On the same day that the Puerto de Luna real estate contract was executed, Omta and Pecos signed a letter agreement whereby Pecos assigned its right to $50,000 of the proceeds under the Puerto de Luna contract to Omta and Omta agreed to an assignment of the remainder of the proceeds if Ortega and the Meneghins released their claims against the property. If the Puerto de Luna contract had merely re-instituted the Toomey contract, this new assignment would have been unnecessary. By agreeing to an assignment of a portion of the proceeds and conditionally agreeing to an assignment of the remainder, Omta recognized the existence of a new agreement. Therefore, the trial court did not err in refusing to find that there had been a re-institution of the Toomey contract.

**{36}** In October 1975 Puerto de Luna defaulted on the contract, and the property was once again reconveyed to Pecos. Thus, at the end of 1975, Omta no longer had any interest in the property.

**{37}** Omta's final claim of title is the January 9, 1976 contract and quitclaim deed from Pecos. The trial court found that Omta's agreement on that date to make the delinquent payment on the Powell contract was a "material and substantial condition subsequent." Further, the trial court held that by his refusal and failure to make the payment on the Powell contract, Omta lost all his interest in the property. These findings are supported by the evidence.

**{38}** Omta argues that the June 1972 mortgage on the property to the Meneghins and the December 1974 mortgage in favor of Ortega are invalid. This claim is also without merit. First, the Meneghins' claim rests not upon the 1972 mortgage, but upon the February 1976 special warranty deed from Pecos. Second, in the contract of January 9, 1976, Omta recognized the existence of the Ortega mortgage, and expressly agreed to take the property **subject to** this mortgage. Having done this, he will not now be heard to say that the mortgage was invalid.

**{39}** In summary, the evidence supports the trial court's finding that Omta had lost all his interest in the property. He lost his original assignment of January 8, 1974 by executing the conditional assignment of August 8, 1974. He lost his interest in the conditional assignment by his failure to fulfill the condition. Finally, he lost the interest he acquired by the quitclaim deed when he failed to fulfill the condition required by his January 9, 1976 agreement which Pecos of making payments under the Powell contract. The trial court did not err in quieting title in the Meneghins.

IV.

**{40}** Omta also contends that the trial court erred in finding that he and Frost acted as partners with respect to the property transactions at issue in this case. There is no merit to this contention.

**{41}** First, Omta makes no argument that this finding is in any way relevant to any other issue on appeal, or that a contrary finding would in any way affect the outcome of this case.

**{42}** Second, assuming that the partnership issue is material, it need only be noted that the pre-trial order listed the existence of a partnership between Frost and Omta as the sole uncontroverted fact in this case. Although Omta's counsel objected to other portions of the pre-trial order, he made no reference to this item. The principle is well established that a pre-trial order, made and entered without objection, and to which no motion to modify has been made, "controls the subsequent course of the action." N.M.R. Civ.P. 16, N.M.S.A. 1978. **See also Transwestern Pipe Line Company v. Yandell**, 69 N.M. 448, 367 P.2d 938 (1961); **Johnson v. Citizens Casualty Company of New York**, 63 N.M. 460, 321 P.2d 640 (1958).

**{43}** Omta argues that although the pre-trial order provided that Omta and Frost were partners, the evidence at trial showed that they were not. Because the question of a partnership was not an issue at trial, the evidence Omta presented on the question was immaterial.

**{44}** In light of the disposition we make of the foregoing issues, it is not necessary to consider the other issues raised by Omta.

**{45}** There being no error in the findings of fact and conclusions of law of the trial court, its judgment is hereby affirmed.

**{46} IT IS SO ORDERED.**

**H. VERN PAYNE**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**MACK EASLEY,**
**Justice, not participating**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-057**

**Filing Date: July 26, 1979**

**Docket No. 12,005**

**LOCAL 2238, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,**

**Petitioner-Appellee,**

**v.**

**NEW MEXICO STATE HIGHWAY DEPARTMENT, ET AL.,**

**Respondents-Appellants;**

**NEW MEXICO STATE HIGHWAY DEPARTMENT, ET AL.,**

**Petitioners-Appellants,**

**v.**

**LOCAL 2238, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,**

**Respondent-Appellee.**

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

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**OPINION**

**PAYNE, Justice.**

**{1}** Local 2238, of the American Federation of State, County and Municipal Employees, brought a mandamus action in district court against the State Highway Department, the State Department of Finance & Administration, and the Governor to compel compliance with an arbitration decision awarding increased per diem payments to union members. The trial court held that the arbitration award was binding and awarded the union $343,174.60 in damages. The Highway Department appeals.

**{2}** The arbitrator held that the Highway Department was obligated under its collective bargaining agreement with the union to pay a "special living allowance" to any union employee who regularly reports to a work site away from the district or general office of the Department and outside of the municipal limits of the employee's place of residence. The Highway Department contends that this decision is unenforceable because it violates § 10-8-4B, N.M.S.A. 1978 of the New Mexico Per Diem and Mileage Act, which provides:

> Every salaried public officer or employee who is traveling within the state but away from his home and away from his designated post of duty on official business shall receive not to exceed twenty-four dollars ($24.00) a day for each day spent in the discharge of his official duties.

The arbitrator rejected the Highway Department's contention that the contractual provision violates § 10-8-4B.

**{3}** To clearly understand the arbitrator's decision it is necessary to review the history which led up to the collective bargaining agreement.

**{4}** Since 1960 the Highway Department has paid per diem or a special living allowance to

certain of their employees who were called to work away from their regular place of employment. In 1965 the Highway Department began to pay five dollars per day to construction crew employees whose work site was more than thirty-five miles from their district office. In 1970 a new policy was issued by the Highway Department whereby a special living allowance in the amount of seven dollars per day was paid to certain employees whose work was confined to specific areas more than thirty-five miles away from their "home base" and where the work continued for a considerable period of time. This policy also required that the employee remain overnight.

**{5}** The first contract between the Highway Department and the union was executed in 1973. It provided that "to be eligible for per diem, an employee must be thirty-five (35) miles away from his duty station, and the nature of his assignment normally require him to remain overnight." Since 1973 the Highway Department's application of this provision has ignored the requirement that an employee remain away from his duty station overnight in order to qualify for the allowance. The Highway Department has never made an effort to determine whether or not employees physically remained overnight. If the work site was more than thirty-five miles from the general or district office, an employee was eligible for and received the payment.

**{6}** The negotiations, which led to the contract that is now in dispute, were conducted in 1975. In these negotiations the Highway Department proposed to divide the expense reimbursement policy into two categories, "per diem" and "special living allowance." Special crews who were regularly away from the district or general office and at one location for several consecutive days would receive the special living allowance. Employees of the general or district office who were away from such office only on sporadic intervals and not in one particular location for any lengthy period would receive per diem. This distinction was eventually adopted by the parties in their bargaining agreement.

**{7}** From the beginning of the negotiations the union insisted that the thirty-five mile radius be deleted as a condition for receiving the special living allowance. The Highway Department consistently sought to maintain that requirement.

**{8}** The union took the position that it was willing to have the affected employees report to their district office or home base for each day of work to be transported to the job site by the Highway Department. The Highway Department rejected this proposal.

**{9}** During the last day of negotiations the thirty-five mile radius requirement was deleted from the special living allowance provision of the bargaining agreement, but it was retained in the per diem provision. The bargaining agreement was signed by the parties and was subsequently approved by the State Personnel Board and the Office of the Attorney General. The special living allowance provision was approved by the Department of Finance & Administration.

**{10}** In light of the bargaining history and the fact that a thirty-five mile condition was retained in only the per diem clause, we agree with the arbitrator and the district court that it was clear that the parties intended that the thirty-five mile condition would not apply to the special living allowance provision. It should be borne in mind that the thirty-five mile restriction and the overnight requirement are two separate and distinct issues. The thirty-five mile restriction was not imposed by statute nor has it been shown to be a rule or regulation. Consequently, the Highway Department, once it agreed to drop the restriction during negotiations, cannot now be allowed to enforce it.

**{11}** The special living allowance provision, as finally adopted, provides in part:

> Members of the bargaining unit . . . shall be placed on a special living allowance rate of $1.60 per hour while traveling away from their duty station. . . . This special living allowance shall be paid for a maximum of eight (8) hours per day.

**{12}** We do not agree with the Highway Department's contention that payment of this

allowance violates § 10-8-4B of the Per Diem and Mileage Act.

**{13}** The New Mexico Per Diem and Mileage Act does not on its face prohibit partial per diem payments. It does not specify how far a person must travel to be "away from his home and away from his designated post of duty." Nor does it specify what is meant by the use of the phrase "for each day spent in the discharge of his official duties."

**{14}** The director of the Department of Finance & Administration testified that he was charged with the responsibility of implementing the provisions of the Per Diem and Mileage Act or of designating the heads of the various departments to do so in his stead. He testified that it had been the policy of the Department of Finance & Administration in applying the Act to other agencies to break a day into one-quarter segments for the purpose of reimbursement for mileage and per diem. He also stated that he had allowed the Highway Department to act as its own fiscal agent in the payment of partial per diem payments under the Act.

**{15}** The Highway Department agreed in the collective bargaining agreement to make partial per diem payments in the form of the special living allowance. Although the amount of these allowance payments exceeded the normal amount of payments allowed by the Department of Finance & Administration for other agencies, they did not exceed the maximum twenty-four dollars per day limit imposed by the Act. There is nothing in the Act which is in conflict with the interpretation given to it by either the director of the Department of Finance & Administration or the Highway Department. Therefore, we cannot say that the special living allowance provision agreed upon by the parties is violative of § 10-8-4B.

**{16}** We affirm the decisions of the arbitrator and the district court upholding these partial payments.

**{17} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-069**

**Filing Date: September 6, 1979**

**Docket No. 12,386**

**IN THE MATTER OF THE ESTATE OF LOIS FAYE SEYMOUR, DECEASED: DALE ALLEN SEYMOUR, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR AND PERSONAL REPRESENTATIVE, VICKI MCCLINTIC AND ANDREW J. GONZALES,**

**Petitioners,**

**v.**

**JAY LYNN DAVIS, AKA JAY DAVIS,**

**Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

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**OPINION**

**PAYNE, Justice.**

**{1}** This dispute arose over the admissibility to probate of Lois Faye Seymour's will. The district court admitted the will to probate over the objections of her son, Jay Lynn Davis, and held that Davis should be disinherited for contesting it. On appeal, the Court of Appeals reversed the district court. We granted certiorari and now reverse in part and affirm in part the decision of the Court of Appeals.

**{2}** The decedent executed the will at issue in October 1971 while she was married to Dale R. Seymour. Excepting a few specific bequests, the will provided that her estate was to go to her husband, unless he predeceased her, died simultaneously with her, or died within sixty days following her death. In any of those events an alternate disposition provided that Davis, her son, would receive $10,000 plus certain mortgage notes. The alternate disposition also provided that the residue of her estate would go to her stepson, Dale Allen Seymour, an appellee.

**{3}** After execution of the will, the decedent divorced Dale R. Seymour in September 1975. Lois Faye Seymour died in March 1977. The decedent's former husband makes no claim and asserts no rights under the will. The district court admitted the will to probate over Davis' objections and entered an additional finding that Davis was disinherited under a provision in the will which stated:

> I expressly provide that if either JAY LYNN DAVIS or DALE ALLEN SEYMOUR shall contest the terms and provisions of this Will, making claim that he is entitled to a greater share of my estate than is provided herein, or contesting in any way the terms and provisions hereof, then I direct that said son shall be disinherited.

**{4}** Davis argues on appeal that his mother's will was revoked on the date of divorce by operation of § 30-1-7.1, N.M.S.A. 1953 (Supp. 1975) enacted in 1967. He argues that the statute

which was in effect on the date of divorce did not prescribe an alternative disposition of the estate following revocation of the primary dispositive provisions.

**{5}** Section 30-1-7.1 of the old law provides as follows:

> B. If after making a will the testator becomes divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked.
>
> C. Except for the circumstances described in subsections A and B of this section and the provisions of 29-1-16 and 30-1-7 New Mexico Statutes Annotated, 1953 Compilation, no written will nor any part thereof can be revoked by any change in the circumstances or condition of the testator.

**{6}** Davis therefore argues that the alternative distribution of the estate cannot be given effect, and thus that the alternative distribution of the estate should be distributed under the New Mexico intestacy laws. Davis asserts that the district court order was contrary to the decedent's intention. Davis further asserts that he did not intend to contest his mother's will as such, but only to have a court construe the meaning and effect of the will.

**{7}** The appellees argue that the decedent's will was not revoked at the instant of her divorce since wills are "ambulatory" until the instant of death. They argue that the Legislature's enactment of the Probate Code, specifically § 45-2-508, N.M.S.A. 1978, prior to decedent's death governs the effect of the divorce.

**{8}** Section 45-2-508 provides:

> A. If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power or appointment on the former spouse, and any nomination of the former spouse as personal representative, trustee, conservator or guardian, unless the will expressly provides otherwise.
>
> B. Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent.
>
> . . . . .
>
> E. No change of circumstances other than as described in this section revokes a will.

**{9}** The pertinent distinction between the application of the two sections is that under the prior law the provisions relating to the divorced spouse are revoked, while under the present law the divorced spouse is considered to have predeceased the testator.

**{10}** The Court of Appeals held that revocation of the will by divorce takes effect as of the date of divorce and that under § 30-1-7.1(B) of the former law that the decedent's will did not make an effective disposition of her estate. The court further held that there was no practical reason to admit the will to probate and that the "no contest" provision would therefore not be effective to disinherit Davis.

**{11}** The issues presented are matters of first impression in New Mexico. We will first deal with the matter of whether the old law or the new Probate Code governs the disposition of the decedent's will. We will then deal with the effect of the no-contest provision in the will. While the position taken by the Court of Appeals on the first issue is not without precedent in other states, we feel that the better view and the weight of authority are to the contrary.

**{12}** Thirty-five states have adopted legislation which revokes wills or will provisions in favor

of divorced spouses. In only a few states have courts considered whether new statutes should apply to divorces obtained before the effective dates of the statutes. In the present case, however, we need look only to the legislative intent in the enactment of the Probate Code in New Mexico.

**{13}** The Probate Code states that "the affairs of decedents dying on or after the effective date of the Probate Code" will be controlled by the provisions of the Code; the effective date of the Probate Code was July 1, 1976, prior to decedent's death in March 1977. N.M. Laws 1975, ch. 257, § 10-101(A). Therefore, the affairs of Lois Faye Seymour's estate are governed by the new Code. We hold that the terminology used by the Legislature encompasses wills of decedents, even though executed prior to the effective date of the Code.

**{14}** The enabling act distinguishes the term "affairs of decedents" for persons "dying on or after the effective date", N.M. Laws 1975, ch. 257, § 10-101(B), from other matters governed by the Probate Code, such as missing persons, minors and incapacitated persons. In these areas, the Probate Code is effective only where such matters were "commenced on or after the effective date." N.M. Laws 1975, ch. 257, § 10-101(B). Thus it is clear that the Legislature recognized the distinction between the effective date of the Code as it applied to different circumstances governed by the Act. The Probate Code provided for a time lag prior to its effective date. This provided time for adjustments by parties who felt their wills would need to be changed. The Code's planning period provision would not have been necessary if the Legislature had intended the Code to apply only to wills executed after its effective date.

**{15}** Under the new Code, a testator's will can be revoked in three cases. These are divorce (§ 45-2-508), an omitted spouse (§ 45-2-301, N.M.S.A. 1978), and a pretermitted child (§ 45-2-302, N.M.S.A. 1978). In each of these provisions, something in addition to the cited event is required to revoke the will. Additionally, § 45-2-104, N.M.S.A. 1978 imposes a condition of survival on intestate takers. All these provisions point to the testator's death as being the moment of revocatory effect intended by the Legislature. Historically, the statutory scheme for revocations by operation of law allowed a less than total revocation of a will. **See** § 30-1-7.1, N.M.S.A. 1953. This scheme also required that affected parties survive the testator in order to trigger revocatory effect.

**{16}** Our holding, that § 45-2-508 controls the effect of divorce on the construction of the unrevoked portions of the will, is supported by modern case authority and the Uniform Probate Code § 2-508, after which our Legislature modeled New Mexico's new Probate Code. The majority of recent cases follow the dictates of the Uniform Probate Code, holding that divorce is equivalent to death. **Calloway v. Estate of Gasser**, 558 S.W.2d 571 (Tex. Civ. App. 1977).

**{17}** Two additional factors compel the admission of the Seymour will to probate. First, as previously stated, decedent's will is governed by the new Probate Code because she died after July 1, 1976. To determine whether any of the provisions of decedent's will can dispose of her property, the court must first determine the will's validity and whether it was the last one she executed. Even if decedent's will had no dispositive provisions, its admission to probate is nevertheless necessary because of the revocatory clause contained in it. **See Matter of Estate of Gardner**, 561 P.2d 1079 (Utah 1977). Second, the decedent appointed a series of successor personal representatives, none of whose service was conditioned on her husband's predeceasing her. The fact that a personal representative for decedent Seymour remains to be designated is another reason for allowing the will to go to probate. § 45-3-203(A)(1), N.M.S.A. 1978; **Matter of Estate of Gardner, supra**.

**{18}** Finally, we address the validity of decedent's no-contest provision and whether appellee Davis is disinherited by its operation. On this issue, we agree with the Court of Appeals and overrule the trial court.

**{19}** We hold that no-contest provisions are valid and enforceable in New Mexico, but they are not effective to disinherit a beneficiary who has contested a will in good faith and with probable cause to believe that the will was invalid. **See Hartz' Estate v. Cade**, 247 Minn. 362, 77 N.W.2d 169 (1956). No-contest provisions are valuable will devices. They serve to protect estates from costly and time-consuming litigation and they tend to minimize family bickering over the competence and capacity of testators, and the various amounts bequeathed. However, the function of the court is to effect the testator's intent to the greatest extent possible within the bounds of the law. To strictly construe no-contest provisions in the face of obvious indications of unresolved legal questions, such as were present in this case, could result in complete destruction of a testator's intent. Accordingly, where the circumstances upon which a will is based have changed substantially between the time of its execution and the time of its probate, courts should not discourage contests. The circumstances relative to the Seymour will were sufficiently changed to justify appellee Davis in seeking a judicial determination construing its meaning and effect. We hold that Davis is entitled to share in the estate of his mother under her will.

**{20}** Whenever a beneficiary contests a will in the face of a no-contest provision, he does so at the peril of his bequest. But, when he does so in good faith and for probable cause, his bequest should not be jeopardized by the contest. The court should infer the existence or absence of good faith and probable cause from the totality of the circumstances. **See** 80 Am. Jur.2d **Wills** § 1575 (1975); Annot., 125 A.L.R. 1135 (1940); 5 Bowe—Parker, **Page on Wills** § 44.29 (rev. 1962); Leavitt, **Scope and Effectiveness of No-Contest Clauses in Last Wills and Testaments**, 15 Hastings L.J. 45, 67, n. 87 (1963); Note, 23 U. Pitt. L. Rev. 767 (1962); Notes, 43 Marq. L. Rev. 528 (1960).

**{21}** The case is remanded to the district court for such further action as is necessary to conform to this opinion.

**{22} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-070**

**Filing Date: September 10, 1979**

**Docket No. 12,184**

**ABO PETROLEUM CORPORATION, ET AL.,**

**Plaintiffs-Appellees,**

**v.**

**JAMES W. AMSTUTZ, ET AL.,**

**Defendants-Appellants.**

**APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY, D. D. ARCHER, District Judge.**

Motion for Rehearing Denied September 25, 1979

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## OPINION

**PAYNE, Justice.**

**{1}** This action was brought in the District Court of Eddy County by Abo Petroleum and others against the children of Beulah Turknett Jones and Ruby Turknett Jones to quiet title to certain property in Eddy County. Both sides moved for summary judgment. The district court granted Abo's motion, denied the children's motion, and entered a partial final judgment in favor of Abo. The children appealed, and we reverse the district court.

**{2}** James and Amanda Turknett, the parents of Beulah and Ruby, owned in fee simple the disputed property in this case. In February 1908, by separate instruments entitled "conditional deeds," the parents conveyed life estates in two separate parcels, one each to Beulah and Ruby. Each deed provided that the property would remain the daughter's

> during her natural life, . . . and at her death to revert, vest in, and become the property absolute of her heir or heirs, meaning her children if she have any at her death, but if she die without an heir or heirs, then and in that event this said property and real estate shall vest in and become the property of the estate of . . . [her], to be distributed as provided by law at the time of her death. . . .

**{3}** At the time of the delivery of the deed, neither daughter was married, nor were any children born to either daughter for several years thereafter.

**{4}** In 1911, the parents gave another deed to Beulah, which covered the same land conveyed in 1908. This deed purported to convey "absolute title to the grantee. . . ." In 1916, the parents executed yet another deed to Beulah, granting a portion of the property included in her two previous deeds. A second deed was also executed to Ruby, which provided that it was a "correction deed" for the 1908 deed.

**{5}** After all the deeds from the parents had been executed, Beulah had three children and Ruby had four children. These children are the appellants herein.

**{6}** Subsequent to the execution of these deeds, Beulah and Ruby attempted to convey fee simple interests in the property to the predecessors of Abo. The children of Beulah and Ruby contend that the 1908 deeds gave their parents life estates in the property, and that Beulah and Ruby could only have conveyed life estates to the predecessors in interest of Abo. Abo argues that the 1911 and 1916 deeds vested Beulah and Ruby with fee simple title, and that such title was conveyed to Abo's predecessors in interest, thereby giving Abo fee simple title to the property.

**{7}** We begin our inquiry by examining the nature of the estates James and Amanda Turknett conveyed in the 1908 deeds.

**{8}** First, the deeds gave each of the daughters property "during her natural life." As Abo apparently concedes, these words conveyed only a life estate.

**{9}** Second, each deed provided that upon the daughter's death, the property would pass to her "heir or heirs," which was specifically defined as "her children if she have any at her death." Because it was impossible at the time of the original conveyance to determine whether the daughters would have children, or whether any of their children would survive them, the deeds created contingent remainders in the daughters' children, which could not vest until the death of the daughter holding the life estate. C. Moynihan, **Introduction to the Law of Real Property** 123 (1962).

**{10}** Third, each deed provided that if the contingent remainder failed, the property would become part of the daughter's estate, and pass "as provided by law at the time of her death." The effect of this language would be to pass the property to the heirs of the daughter upon the failure of the first contingent remainder. Because one's heirs are not ascertainable until death, (C. Moynihan, **supra** at 127), the grant over to the daughter's estate created a second, or alternative, contingent remainder.

**{11}** The only issues that remain are whether the parents retained any interest, whether by their subsequent deeds to their daughters they conveyed any interest that remained, and whether those conveyances destroyed the contingent remainders in the children.

**{12}** The grantor-parents divested themselves of the life estate and contingent remainder interests in the property upon delivery of the first deed. Because both remainders are contingent, however, the parents retained a reversionary interest in the property. C. Moynihan, **supra** at 124, n. 1.

**{13}** Abo's position is that by the subsequent conveyances to the daughters, the parents' reversionary interest merged with the daughters' life estates, thus destroying the contingent remainders in the daughters' children and giving the daughters fee simple title to the property. This contention presents a question which this Court has not previously addressed—whether the doctrine of the destructibility of contingent remainders is applicable in New Mexico.

**{14}** This doctrine, which originated in England in the Sixteenth Century, was based upon the feudal concept that seisin of land could never be in abeyance. From that principle, the rule developed that if the prior estate terminated before the occurrence of the contingency, the contingent remainder was destroyed for lack of a supporting freehold estate. The one instance in which this could happen occurred when the supporting life estate merged with the reversionary interest.

**{15}** Although New Mexico has adopted the common law of England by statute, § 38-1-3, N.M.S.A. 1978, it has been repeatedly held that "if the common law is not 'applicable to our condition and circumstances' it is not to be given effect." **Flores v. Flores**, 84 N.M. 601, 603, 506 P.2d 345, 347 (Ct. App. 1973), **cert. denied**, 84 N.M. 592, 506 P.2d 336 (1973). **See also Hicks v. State**, 88 N.M. 588, 544 P.2d 1153 (1975). In **Hicks** this Court held that sovereign immunity—another doctrine of the common law—could be "put to rest by the judiciary" once it had reached a point of obsolescence. **Id.** at 590, 544 P.2d at 1155.

**{16}** The doctrine of destructibility of contingent remainders has been almost universally

regarded to be obsolete by legislatures, courts and legal writers. **See, e.g., Whitten v. Whitten**, 203 Okla. 196, 219 P.2d 228 (1950); 1 L. Simes and A. Smith, **Law of Future Interests** § 209 (2d ed. 1956). It has been renounced by virtually all jurisdictions in the United States, either by statute or judicial decision, and was abandoned in the country of its origin over a century ago. Section 240 of the **Restatement of Property** (1936) takes the position that the doctrine is based in history, not reason. Comment (d) to § 240 states that "complexity, confusion, unpredictability and frustration of manifested intent" are the demonstrated consequences of adherence to the doctrine of destructibility. Furthermore, because operation of the doctrine can be avoided by the use of a trust to support the contingent remainder, the doctrine places a premium on the drafting skills of the lawyer. 49 Mich. L. Rev. 762, 764 (1951).

**{17}** The only tenable argument in support of the doctrine is that it promotes the alienability of land. It does so, however, only arbitrarily, and oftentimes by defeating the intent of the grantor. Land often carries burdens with it, but courts do not arbitrarily cut off those burdens merely in order to make land more alienable.

**{18}** Because the doctrine of destructibility of contingent remainders is but a relic of the feudal past, which has no justification or support in modern society, we decline to apply it in New Mexico. As Justice Holmes put it:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, **The Path of the Law**, 10 Harv. L. Rev. 457 at 469 (1897).

**{19}** We hold that the conveyances of the property to the daughters did not destroy the contingent remainders in the daughters' children. The daughters acquired no more interest in the property by virtue of the later deeds than they had been granted in the original deeds. Any conveyance by them could transfer only the interest they had originally acquired, even if it purported to convey a fee simple. **Cook v. Daniels**, 306 S.W.2d 573 (Mo. 1957).

**{20}** The summary judgment and partial final judgment entered in favor of Abo are reversed, and the cause is remanded for further proceedings consistent with this opinion.

**{21} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-086**

**Filing Date: November 13, 1979**

**Docket No. 12,064**

**JOSE GONZALES,**

**Plaintiff-Appellant and Cross-Appellee,**

**v.**

**UNITED SOUTHWEST NATIONAL BANK OF SANTA FE, NEW MEXICO, A NATIONAL BANKING CORPORATION,**

**Defendant-Appellee and Cross-Appellant.**

**Appeal from the District Court of Santa Fe County, James W. Musgrove, District Judge.**

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Attorney for Appellee and Cross-Appellant.

## OPINION

**PAYNE, Justice.**

**{1}** Gonzales applied to the District Court in Santa Fe County for an order compelling United Southwest Bank of Santa Fe to arbitrate a controversy arising from the Bank's firing of petitioner. The firing was allegedly done without cause and in violation of a previously executed employment contract. From a judgment in favor of the Bank, Gonzales appeals.

**{2}** Gonzales claimed that the contract was still in effect at the time of his discharge and that arbitration of employment matters was required by the contract as a condition precedent to any action by the Bank affecting his employment. The Bank countered that the employment contract had expired prior to the discharge, relieving it of its duty under the agreement to arbitrate.

**{3}** The trial court ruled that the issue of whether the contract was in effect at the time of the termination was a matter for the court, and not the arbitrator, to decide. The court found that the contract had expired after three years, that there was no evidence that it had been renewed or extended in writing, as required by the Statute of Frauds, and that, having expired by its terms, it could not be revived and extended by parol agreement. We affirm the district court decision on each point.

**{4}** There are three issues for resolution in this case. First, was it the province of the court or of the arbitrator to determine the existence and duration of a contract requiring the parties to arbitrate? Second, did this employment contract provide Gonzales with lifetime or permanent employment so long as he conducted bank business competently? Finally, if the employment agreement was not a contract for life, but for a three-year term, was it renewed for an additional three years by virtue of the conduct of the parties?

**{5}** The trial court properly took jurisdiction to determine whether a contract existed between the parties which required arbitration. When a petition is filed to compel arbitration pursuant to a contract's arbitration clause and the responding party denies the existence or validity of the contract, the court must determine whether the contract is still in force to compel the requested arbitration. Until this threshold issue is resolved, an arbitrator has nothing to arbitrate.

**{6}** The pertinent provisions of the Uniform Arbitration Act, §§ 44-7-1 and 44-7-2(A), N.M.S.A. 1978, state respectively:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. * * *
>
> On application of a party showing an agreement described in Section 1 [44-7-1 NMSA 1978] and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

**{7}** These sections make it clear that the threshold issue of whether there was an existing agreement requiring arbitration is a matter for the court, not the arbitrator. In this regard the court must rule upon the existence or validity of an alleged contract.

**{8}** Petitioner suggests that our opinion in **K. L. House Const. Co. v. City of Albuquerque,** 91 N.M. 492, 576 P.2d 752 (1978) interprets the statute in a manner extending arbitration beyond the contract period. We agree that in some instances that may be so but the terms of a contract providing for arbitration cannot be ignored. At some point the parties' obligation to arbitrate will end. In **House,** even though the contract had been completed, we held that the parties were still bound by its broad arbitration clause because the dispute related back to the performance rendered during the contractual period. We concluded "that any disputes pertaining to the performance of the contract, even if they arise after the warranty has expired, are disputes which arise out of the contract and are therefore subject to" the arbitration agreement in existence at the time of performance. 91 N.M. at 493, 576 P.2d at 753.

**{9}** We do not view this dispute to have arisen "out of the contract." The dispute between Gonzales and the Bank arose well after the time that their original written employment contract had expired.

**{10}** Gonzales claimed that the original written employment agreement provided for lifetime or permanent employment if he competently conducted bank business. He argued that he could only be discharged for good cause. Therefore, he asserts, the original written employment agreement would still control the relationship of the parties.

**{11}** In **Garza v. United Child Care, Inc.,** 88 N.M. 30, 31, 536 P.2d 1086, 1087 (Ct. App. 1975), the Court of Appeals set forth the meaning of "permanent employee" as follows:

> The rule is uniform that a contract for permanent employment, not supported by any consideration other than performance of duties and payment of wages, is a contract for an indefinite period. It is terminable at the will of either party. A discharge without cause does not constitute a breach of such contract justifying recovery of damages. (Citations omitted.)
>
> Where a contract for permanent employment provides additional consideration, the employee can recover damages for his discharge when made without just cause. (Citations omitted.)
>
> In the instant case, there is no evidence that any consideration, other than employment and payment of wages, was given by defendant to plaintiffs.

**{12}** In the case at bar, the contract providing for lifetime employment is not supported by any consideration, other than performances of duties and payment of wages. It is therefore a contract for an indefinite period, terminable at the will of either party. **Garza, supra**. The agreement in dispute uses the word "permanent" to describe petitioner's employment. We hold that its usage in this

context means steady employment, as opposed to temporary or part-time employment. The contract also contained a clause providing for its renewal, thus refuting any suggestion that the contract was for life. A lifetime contract need not be renewed.

**{13}** Gonzales argues in the alternative that if his contract was not for life, upon the expiration of the first three-year term, an additional three-year term automatically became effective. He further asserts that if the Statute of Frauds is applicable, the Bank should be estopped from asserting it. We find no facts to substantiate the claim of estoppel.

**{14}** The argument assumes the existence of a provision for automatic renewal. Nowhere in the contract is there such a provision. The contract does contain an "option for renewal" clause, which by its very term implies that the parties must affirmatively exercise the option. It follows that if the option relates to a matter falling within the Statute of Frauds, it must be exercised in writing. Where a written contract is for a period of more than one year, a renewal contract for a like period is not enforceable without a writing. **See** 2 A. Corbin, **Contracts** § 504 (1950). The contract at issue called for a three-year period of performance, bringing it within the purview of the Statute of Frauds. **Westerman v. City of Carlsbad,** 55 N.M. 550, 237 P.2d 356 (1951). An expired contract within the statute cannot be revived and extended by parol agreement, **Adams v. Thompson,** 87 N.M. 113, 529 P.2d 1234 (Ct. App. 1974), **cert. denied,** 87 N.M. 111, 529 P.2d 1232 (1974), nor can a contract in writing be modified or varied by a subsequent oral agreement, **Gee v. Nieberg,** 501 S.W.2d 542 (Mo. App. 1973). Accordingly, we hold that part or continued performance by the parties in this case did not take the contract out of the application of the Statute of Frauds.

**{15}** The decision of the trial court is affirmed.

**{16} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-093**

**Filing Date: November 27, 1979**

**Docket No. 12,434**

**ROBERT DALE MORRISON,**

**Plaintiff-Appellee,**

**v.**

**RUDI WYRSCH,**

**Defendant-Appellant.**

**Appeal from the District Court of Santa Fe County, Felter, Judge.**

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Robert Dale Morrison
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Attorney for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Defendant Wyrsch appeals from an order of the district court which struck all of his pleadings and granted summary judgment to plaintiff Morrison. We are called upon to decide the propriety and timelines of Wyrsch's pleadings and to review the summary judgment granted in this instance. We must determine whether Wyrsch's counterclaim, jury demand and response to request for admissions complied with the New Mexico Rules of Civil Procedure.

**{2}** The pertinent facts in this case are set forth in the order of their occurrence. Wyrsch answered Morrison's complaint with a denial. Morrison served a request for admissions upon Wyrsch. Wyrsch filed what he called an amended answer which contained the same denial with the addition of a counterclaim and a jury demand. Wyrsch filed his answers to the request for admissions but failed to verify his response as required by N.M.R. Civ. P. 36(a), N.M.S.A. 1978.

**{3}** Morrison moved to strike Wyrsch's amended answer and the district court granted the motion. Wyrsch moved the court to reconsider and was granted 15 days in which to file "proper pleadings." The court did not specify what it meant by "proper pleadings." Wyrsch thereupon filed an amended answer identical to that previously filed with a similar counterclaim, a jury demand and a verified response to the request for admissions. Morrison moved again to strike these pleadings and also moved for summary judgment. The court granted both of Morrison's motions.

**A. The Counterclaim**

**{4}** In his amended answer, Wyrsch attempted to add a compulsory counterclaim—one which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . ." N.M.R. Civ. P. 13(a), N.M.S.A. 1978. Rules 7(a) and 13(a) of N.M.R. Civ. P., N.M.S.A. 1978, provide that a counterclaim is to be part of the answer, and Rule 13(f) provides that if omitted, it may be added only when leave to amend has been granted by the court.

**{5}** Wyrsch disputes whether Rule 13(f) alone governs amendments for the addition of counterclaims or whether N.M.R. Civ. P. 15(a), N.M.S.A. 1978, is also applicable. He had relied upon Rule 15(a) in his first attempt to amend.

**{6}** Rule 15(a) states that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . ." But Rule 13(f) provides that "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment." We hold that Rule 13(f) alone governs the addition of counterclaims by amendment.

**{7}** Of the federal courts which have dealt with this same question under the federal rules, most agree with our conclusion that Rule 13(f) governs counterclaim amendments exclusively. **See Stoner v. Terranella,** 372 F.2d 89 (6th Cir. 1967); **Goldlawr, Incorporated v. Schubert,** 268 F. Supp. 965 (E.D. Pa. 1967). **But see A. J. Industries, Inc. v. United States Dist. Ct., C.D. of Cal.,** 503 F.2d 384 (9th Cir. 1974).

**{8}** Under Rule 13(f) and pursuant to this holding, a counterclaiming party must demonstrate as a condition precedent for leave to amend that "oversight, inadvertence or excusable neglect" caused the counterclaim to be left out of the original pleading, or that "justice requires" its addition. This may be accomplished by motion to the court and, if necessary, the court should conduct a hearing on the matter.

**{9}** The record shows that after his first unsuccessful attempt, Wyrsch did obtain leave of court to add the counterclaim by the second amendment and that he responded within the time allowed. Although the record does not disclose on what basis leave was granted, we may assume that it was granted for a reason set forth in Rule 13(f). It is not necessary, as Morrison argued, that Wyrsch also plead his "oversight, inadvertence or excusable neglect" in his amended pleading once the court has allowed the addition.

**{10}** Wyrsch's first attempt to amend is not an issue. That amendment was properly stricken for failing to obtain consent of the court. However, the trial court erred in striking the second amended answer and in rendering summary judgment without considering the stricken pleading.

### B. The Jury Demand

**{11}** The record indicates that Wyrsch did not make a jury demand within ten days after his answer to Morrison's complaint as required by N.M.R. Civ. P. 38(a), N.M.S.A. 1978. Failure to demand a trial by jury in a timely manner will result in the waiver of a jury trial. Rule 38(d). Once waived, the right is not automatically revived by the filing of an amended pleading except as to new issues raised. **Griego v. Roybal,** 79 N.M. 273, 442 P.2d 585 (1968); **Davis v. Severson,** 71 N.M. 480, 379 P.2d 774 (1963).

**{12}** Wyrsch has therefore waived his right to a jury trial on the issues raised in the complaint. As to any new issues raised by Wyrsch's counterclaim, he is entitled to a jury trial, for he had filed a jury demand within 10 days of filing his amended answer.

### C. Response to Request for Admissions

**{13}** Wyrsch failed to comply with Rule 36(a), in that his response to the request for admissions was not sworn to by him but only signed by his attorney. The rule provides:

> [e]ach of the matters of which an admission is requested shall be deemed admitted unless, with in a period designated in the request, not less than ten days after service thereof or within such longer or shorter time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters, or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper with a notice of hearing the objections at the earliest practicable time.

Morrison contends that each admission he requested was properly admitted because Wyrsch failed to comply with the requirements of Rule

36(a). We have previously held that an unexcused failure to file a timely, sworn response is the equivalent of filing no response and that all matters requested are thereby deemed admitted. **Robinson v. Navajo Freight Lines, Inc.,** 70 N.M. 215, 372 P.2d 801 (1962).

**{14}** Although Wyrsch attempted to correct his default by filing a sworn statement, it was not filed within the time limits of the rule. He urges his own contrition and requests leniency so that he can have his day in court and receive a judgment on the merits and not one based upon a pleading technicality.

**{15}** We hold that the district courts have discretion in this area. Although the rule does not provide for the particular situation presented by this case, we reaffirm the principle that the purpose of pleading is to facilitate proper decisions on the merits. **Hambaugh v. Peoples,** 75 N.M. 144, 401 P.2d 777 (1965). All pleadings should be construed so as to do substantial justice, N.M.R. Civ. P. 8(f), N.M.S.A. 1978.

**{16}** There is no record on appeal indicating that the district court considered whether Wyrsch's failure to verify his response was excusable. If the court properly considered this matter and then deemed as admitted all the matters requested by Morrison, there is "no genuine issue as to any material fact" and Morrison is "entitled to a judgment as a matter of law." N.M.R. Civ. P. 56(c), N.M.S.A. 1978. As the record before us is silent on this issue, we must remand for further proceedings consistent with this opinion.

**{17} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-096**

**Filing Date: November 30, 1979**

**Docket No. 12,430**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**BOBBY JAMES,**

**Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

Motion for Rehearing Denied December 10, 1979

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For Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** Defendant was charged in district court with homicide any vehicle. He moved to dismiss the charge, contending that prior proceedings in the municipal court on lesser included defenses barred a subsequent prosecution for the greater offense. The district court denied the motion, and defendant brought an interlocutory appeal to the Court of Appeals. The Court of Appeals held that jeopardy had attached at the municipal court level. It reversed the district court and held that the charges against defendant should be dismissed. We granted a writ of certiorari and now affirm the district court and hold that jeopardy had not attached.

**{2}** This case presents two issues for resolution:

> (1) Does defendant's attendance at the Alcohol Related Offenses (ARO) school support a finding of a DWI conviction and cause jeopardy to attach?
>
> (2) Is there a jurisdictional exception to the lesser included offense rule which is applicable in this instance?

**{3}** A vehicle driven by defendant was involved in a head-on collision which resulted in the death of the other driver. Defendant was cited for driving while under the influence of intoxicating liquor (DWI), reckless driving, and failure to illuminate headlamps, all three offenses being violations of the Gallup City ordinances. The City instituted proceedings against defendant for these offenses. The State independently filed a criminal complaint against defendant in the Magistrate Court of McKinley County alleging homicide by vehicle on the grounds that defendant had driven his vehicle in an unlawful and reckless manner, and had done so while under the influence of alcohol in violation of Section 66-8-101, N.M.S.A. 1978.

**{4}** Five days after the filing of the criminal complaint, defendant was found guilty of reckless driving and driving without headlamps in municipal court. The circumstances surrounding the disposition and effect of the DWI charge against defendant have been the subject of some confusion.

**{5}** The Court of Appeals held that defendant had pled guilty to the DWI charge and that the

district court must necessarily have accepted the plea. This, the Court of Appeals reasoned, must have been the case or the court would not have utilized the ARO school provision permitting the removal of a DWI conviction from the record of defendant upon the successful completion of the course.

**{6}** The record, however, shows that defendant pled "not guilty" to all charges in municipal court, and that the DWI charge was dismissed following defendant's voluntary attendance at the ARO school. The record does not show a plea of guilty or a trial to determine guilt or innocence on the DWI charge. This circumstance does not rise to the level of a conviction for purposes of double jeopardy, and defendant has not been so prejudiced by these proceedings that jeopardy can be said to have attached. **State v. Rhodes,** 76 N.M. 177, 413 P.2d 214 (1966).

**{7}** Jeopardy is said to attach at that point when a jury is impaneled, **State v. Rhodes, supra; State v. Sedillo,** 88 N.M. 240, 539 P.2d 630 (Ct. App. 1975), or, in a non-jury situation, when the State presents at least some evidence, **State v. Ferris,** 80 N.M. 663, 459 P.2d 462 (Ct. App. 1969). The record does not indicate that proceedings concerning the DWI charge reached this point. A conviction cannot be assumed by virtue of defendant's voluntary attendance at the ARO school.

**{8}** We hold that jeopardy did not attach by virtue of the DWI charge so as to preclude the State from prosecuting the felony charge. To hold otherwise would pave the way for defendants to evade vehicular homicide prosecutions simply by volunteering for ARO school, or paying a nominal fine for a lesser charge in municipal court and claiming double jeopardy at trial on the greater offenses.

**{9}** We also reassert the jurisdictional exception to using a lesser included offense as a bar to prosecution of the greater offense. This exception was set forth in **State v. Goodson,** 54 N.M. 184, 186, 217 P.2d 262, 263 (1950), where the Court quoted the following language from 1 F. Warton, **Criminal Law** § 394 (12th ed.):

> And a conviction of a lesser offense bars a subsequent prosecution for a greater offense, in all those cases where the lesser offense is included in the greater offense, and vice versa. But a former trial and acquittal or conviction will not be a bar to a subsequent prosecution, unless the defendant could have been convicted on the same evidence in the former trial, of the offense charged in the subsequent trial. An acquittal or conviction for a minor offense included in a greater will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense.

**{10}** This exception was recognized in the specially concurring opinion of Justice Sosa in **State v. Tanton,** 88 N.M. 333, 337, 540 P.2d 813, 817 (1975):

> I would hold that conviction bars prosecution of a greater offense, subject to one exception: If the court does not have jurisdiction to try the crime, double jeopardy cannot attach. Double jeopardy requires that a court have sufficient jurisdiction to try the charge.

**{11}** This exception does not conflict with the United States Supreme Court decision in **Waller v. Florida,** 397 U.S. 387, 90 S. Ct. 1184, 25 L. Ed. 2d 435 (1970). The **Waller** decision stands for the proposition that two courts within a state—district and municipal—cannot each try a person for the same crime. However, the Supreme Court recognized the possible existence of exceptions to this rule. **Id.** at 395, n. 6, 90 S. Ct. 1184. In **Ashe v. Swenson,** 397 U.S. 436, 453, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), Mr. Justice Brennan specified and elaborated upon several of these exceptions in his concurring opinion. He stated: "Another exception would be necessary if no single court had jurisdiction of all the alleged crimes." **Id.** at 453, n. 7, 90 S. Ct. at 1199, n. 7.

**{12}** It is clear that the municipal court in this case was acting pursuant to its authority to punish defendant for his traffic infractions, but it is

equally clear that it had no authority to prosecute for vehicular homicide. Consequently, under the jurisdictional exception the State's felony prosecution against defendant may proceed. The cause is remanded to the district court for further proceedings consistent with this opinion.

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-097**

**Filing Date: December 4, 1979**

**Docket No. 12,094**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**JOHN DAVID DORSEY,**

**Defendant-Appellant.**

**APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, JAMES W. MUSGROVE, District Judge.**

Reginald J. Storment
Santa Fe, New Mexico

Thomas J. Hynes
Randall Roberts
Farmington, New Mexico

for Appellant.

Toney Anaya, Attorney General
Ralph W. Muxlow, II,
Assistant Attorney General
Santa Fe, New Mexico

for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Defendant was convicted of first-degree murder. He appeals, alleging two grounds for reversal: (1) the trial court failed to direct a verdict of not-guilty by reason of insanity, and (2) the trial court failed to direct a verdict of not-guilty because there was insufficient evidence of a deliberate intention to kill. Each allegation turns on whether there was sufficient evidence to go to the jury. We affirm the trial court.

**{2}** Defendant and a passenger were driving on a highway in San Juan County. They had consumed a few beers and had smoked some marijuana. The defendant began driving at a very high rate of speed in order to catch some companions in another car. When the passenger asked defendant to slow down, defendant hit him with a beer bottle and tried to push him out of the moving vehicle. The passenger turned off the ignition to stop the car. When the car came to a stop, defendant jumped out, ran across the highway median, and flagged down a truck driven by Billy Craven. Craven did not know defendant, but gave him a ride. After several miles, defendant seized a large knife in the cab of the truck and began plunging it into Craven. The truck careened off the highway onto the shoulder. Craven staggered from the truck with defendant in pursuit. Defendant chased Craven some 100 yards or more, knocked him down in the middle of the highway, straddled him, and again stabbed him repeatedly. Several passersby subdued defendant, but not before Craven had been mortally wounded.

**{3}** At trial, defendant pled not-guilty by reason of insanity. To rebut the evidentiary presumption of sanity, defendant presented the expert testimony of two psychologists and one psychiatrist. Each stated that defendant suffered from latent schizophrenia, a long-standing disease of the mind, which prevented defendant from knowing the nature of his deadly act, or from forming the requisite deliberate intent to kill.

**{4}** The State did not present any psychiatrists or psychologists to counter defendant's expert witnesses. The State did present lay witnesses who observed defendant at the time of the offense. They testified that the defendant acted coolly and deliberately before and during the

commission of the homicide. Two medical witnesses for the State testified that if defendant was insane, the insanity resulted from a functional and not a structural abnormality.

**{5}** Defendant argues that because there was no expert psychiatric or psychological evidence as to defendant's sanity at the time of the crime, the trial court erred in refusing to direct a verdict of not-guilty by reason of insanity. We disagree.

**{6}** The trial court found the evidence sufficient to justify submitting the issue of insanity to the jury. The court instructed the jury on the effect which mental disease has upon a defendant's ability to form a "deliberate intention to kill." Crim. 2.00, N.M.S.A. 1978 (Supp. 1978). The jury found defendant guilty of first-degree murder.

**{7}** In New Mexico, the standards governing the defense of insanity are well established. This Court said in **State v. White,** 58 N.M. 324, 330, 270 P.2d 727, 731 (1954), that in order for a jury to find an accused blameworthy for this acts, it must be satisfied that:

> the accused, as a result of disease of the mind . . . (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it.

**{8}** State v. White, supra, attempts to draw a clear dichotomy between those defendants who are sane and those who are insane. Requiring such an all or nothing decision often makes it difficult to apply sophisticated psychiatric evaluations and theories to legal formulations.

**{9}** The conflict between legal and psychiatric principles is made more understandable when the premises and purposes of each is realized. The purpose of psychiatry is to diagnose and cure mental illnesses, but not to assess blame for acts resulting from those illnesses. The law seeks to find facts and assess accountability. One author has stated the problem thusly:

> Psychiatry evaluates individual behavior with the aid of standards of the most general and flexible nature such that each individual may receive special consideration for his unique characteristics. (Footnote omitted.) The inherent vagueness and lack of predictability in such a method of evaluation is foreign to the necessity, in making legal judgments about individual behavior, that a standard of evaluation be uncomplicated and uniform.

Comment, **A Punishment Rationale for Diminished Capacity,** 18 U.C.L.A. L. Rev. 561, 571 (1971). Although it may be difficult to apply, we do not hold that psychiatric testimony may not be used in determining accountability. Conversely, we cannot accept the premise that it outweighs all other evidence that bears upon a person's sanity.

**{10}** We express no opinion as to the relative weight to be accorded to lay or expert testimony. This is a matter for the jury to decide.

> The doctrine of criminal responsibility is such that there can be no doubt "of the complicated nature of the decision to be made—intertwining moral, legal, and medical judgments," (Citations omitted.) [J]ury decisions have been accorded unusual deference even when they have found responsibility in the face of a powerful record, with medical evidence uncontradicted, pointing toward exculpation. (Footnote omitted.) The "moral" elements of the decision are . . . defined . . . by the totality of underlying conceptions of ethics and justice shared by the community, as expressed by its jury surrogate.

**United States v. Brawner,** 153 U.S. App.D.C. 1, 14, 471 F.2d 969, 982 (D.C. Cir. 1972).

**{11}** Defendant contends that because he was insane according to the unanimous opinion of the psychiatrist and psychologists, this established his insanity as a matter of law and the jury

should never have been allowed to consider this as a factual issue. The trial court held that the evidence was sufficiently conflicting to go to the jury. Only in those instances where the trial court has clearly abused its discretion will this Court reverse it. **State v. Moore,** 42 N.M. 135, 76 P.2d 19 (1938).

**{12}** Our opinion should not be construed to say that insanity as a matter of law cannot exist. The evidence in this case, however, was not uncontroverted. An eyewitness testified that defendant was acting coolly and deliberately at the time he was stabbing Craven, as though he were "skinning a deer." The physician who conducted the autopsy testified that the "overkill" type of wounding to the victim was consistent with that done by one who is sane. The arresting deputy sheriff testified that defendant was calm and lucid on the way to and at the station house. A military witness testified that, upon defendant's induction into the army reserve, he had no past history of mental illness. An osteopathic physician who examined defendant within hours after the incident testified that defendant acted calmly and coherently. The testimony of these and other witnesses justified the trial judge in allowing the sanity issue to go to the finder of fact.

**{13}** This Court stated in **State v. Moore, supra** "[w]e cannot supplant the conclusions of experts, though unanimous, which unanimity is rare, for the conclusion of the jury's verdict. The jury can reject all the testimony, and we must respect their action unless clearly erroneous." 42 N.M. at 160, 76 P.2d at 34.

**{14}** Defendant asserts that the jury, because of the bizarre and heinous circumstances of this killing, could not and did not reasonably and dispassionately consider the evidence presented. To accept this argument would be to repudiate a fundamental principle of American criminal justice—that twelve ordinary citizens can determine such issues reasonably and dispassionately. Nothing has been submitted suggesting impropriety in jury selection or conduct.

**{15}** Defendant's second argument for reversal is that he did not have a "deliberate intention" to kill Billy Craven. Defendant again relies upon the testimony of experts to support his defense that he had not formed the requisite deliberate intention or mens rea for first-degree murder. When the trial judge determined that the question of defendant's sanity was a jury issue, a critical part of the jury's determination became whether defendant had formed the deliberate intent to kill. The trial court, therefore, cannot be said to have erred, as defendant contends, in refusing to direct a verdict to the effect that defendant could not have formed a deliberate intention to kill Billy Craven.

**{16}** The jury was properly instructed as to the definition of "deliberate intention." Crim. 2.00. This instruction states:

> A deliberate intention may be inferred from all of the facts and circumstances of the killing. The word deliberate means arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intention to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.

**{17}** The jury was also instructed as to the elements of first-degree murder and charged that the defendant could not be convicted of first-degree murder unless he was found to have formed a deliberate intention to take the life of another.

**{18}** The jury found that defendant had killed Billy Craven with deliberate intent. We cannot say that sufficient facts were not in existence from which a jury could reasonably infer that defendant had formed such an intent.

**{19}** The matter is affirmed.

**{20}** **IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1979-NMSC-101**

**Filing Date: December 21, 1979**

**Docket No. 12,444**

**TONY S. PARKER,**

**Plaintiff-Appellant,**

**v.**

**BOARD OF COUNTY COMMISSIONERS OF DONA ANA COUNTY,**

**Defendant-Appellee.**

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

Anthony F. Avallone
Las Cruces, New Mexico

for Appellant.

Joseph M. Holmes, Assistant District Attorney
Las Cruces, New Mexico

for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Appellant filed an action for declaratory judgment in the district court challenging the constitutionality of portions of the Dona Ana County Subdivision Regulations. The trial court granted summary judgment. We affirm.

**{2}** Appellant subdivided land into a Type 3 classification under Section 47-6-2(M), N.M.S.A. 1978 (Cum. Supp. 1979), and Section II-49 of the county subdivision regulations. To receive county approval and to meet with county road requirements, appellant filed a disclosure statement and agreed to surface subdivision roads with six inches of base course and two inches of asphalt within a year.

**{3}** The county suspended plat approval in October 1977 because appellant failed to meet his deadline for surfacing all roads. Thereafter, the county accepted an $18,000 indemnification bond to extend for twelve months the time within which to install "two inches of hot mix asphalt." Appellant again failed to make the improvements. He now states he would suffer irreparable damage if the guarantee of performance were enforced.

**{4}** The issue before us is whether the New Mexico Subdivision Act (the Act), Sections 47-5-9, 47-6-1 to 47-6-28, N.M.S.A. 1978, authorized the county to enact Section XX of its regulations. That regulation provides:

> Upon approving a subdivision plat, the Commission expressly reserves jurisdiction to subsequently determine whether plat approval should be suspended or revoked because:
>
> 1. Any material misstatement or error of fact in the disclosure statement or any information upon which the Commission relied; or
>
> 2. A subsequent failure to comply with a material provision of the disclosure statement or a subsequent failure to comply with County Regulations. (Emphasis added.)

To resolve this issue we must address several points; namely, the purpose and requirements of the Act, and the requirements of due process.

**{5}** With the enactment of the New Mexico Subdivision Act, the board of county commissioners

was given "the power to adopt, promulgate and enforce subdivision regulations. . . ." **El Dorado at Santa Fe, Inc. v. Board of Cty. Com'rs,** 89 N.M. 313, 320, 551 P.2d 1360, 1367 (1976).

**{6}** Section 47-6-9(A), N.M.S.A. 1978, of the Act provides in part:

> A. The board of county commissioners of each county shall regulate subdivisions within the county's boundaries. In regulating subdivisions, the board of county commissioners of each county shall adopt regulations setting forth the county's requirements for:
>
> . . . . .
>
> (5) sufficient and adequate roads;
>
> . . . . .
>
> (10) any other matter relating to subdivisions which the board of county commissioners feels is necessary to ensure that development is well planned, giving consideration to population density in the area.

**{7}** The concept of "well planned" development through subdivision regulations protects purchasers from unscrupulous or nonperforming developers. Even after the approval of a subdivision, Section 47-6-25 clearly allows a county to revoke or suspend that approval for failure of the developer to comply with a schedule of compliance:

> The board of county commissioners may suspend or revoke approval of a plat as to the unsold or unleased portions of a subdivider's plat if the subdivider does not meet the schedule of compliance approved by the board.

**{8}** Sections 47-6-11 and 47-6-17 of the Act set forth specific methods for submission of information on Types 1, 2, and 4 subdivisions, requiring a disclosure statement for them. The Act does not specifically set forth a method for the smaller Type 3 subdivision, but Section 47-6-12(B) does provide the following:

> Any subdivider submitting a plat of a type-three or a type-four subdivision shall submit **sufficient information** to permit the board of county commissioners to determine whether or not the subdivision conforms to the New Mexico Subdivision Act and the county's subdivision regulations. (Emphasis added.)

**{9}** Appellant asserts that the county may not impose requirements for approval of a Type 3 subdivision beyond those of the statute. We do not agree.

**{10}** The Act delegates authority to counties to adopt regulations for Type 3 subdivisions. Standards need not be specific; broad general standards are permissible "'so long as they are capable of a reasonable application and are sufficient to limit and define the Board's discretionary powers.'" **City of Santa Fe v. Gamble-Skogmo, Inc.,** 73 N.M. 410, 417, 389 P.2d 13, 18 (1964). **See also Ayres v. City Council of City of Los Angeles,** 34 Cal. 2d 31, 207 P.2d 1 (1949); **Clark v. Town Council of Town of West Hartford,** 145 Conn. 476, 144 A.2d 327 (1958); **Vogel v. Board of County Com'rs of Gallatin Co.,** 157 Mont. 70, 483 P.2d 270 (1971); **Frank Ansuini, Inc. v. City of Cranston,** 107 R.I. 63, 264 A.2d 910 (1970). Because the Section 47-6-12(B) requirement of submission of "sufficient information" is general, the county is left to determine what quantum of information amounts to "sufficient information" and to specify the form for acquiring it.

**{11}** The county regulations set forth requirements for developers who apply for approval of Types 3 and 5 subdivisions. One provision requires information on the surfacing of roads through the filing of a disclosure statement. Appellant complied with this requirement. The county could not consistently require a disclosure statement for approval and then not insure compliance therewith. Section XX is a reasonable exercise of the delegated power. It prevents

subdividers, subsequent to plat approval, from circumventing the Act and the county regulations adopted to supplement the Act.

**{12}** Appellant challenges Section XX of the county regulations as a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, because he was allegedly deprived of land without just compensation. He seeks support for his position from the case of **El Dorado at Santa Fe, Inc., supra,** wherein this Court held:

> Upon compliance with the statutory prerequisites to subdivision and sale by a subdivider, followed by a determination of the board of county commissioners that such compliance had in fact occurred, rights vest in the subdivider which cannot thereafter be withheld, extinguished or modified except upon due process of law.

89 N.M. at 319, 551 P.2d at 1366. The **El Dorado** holding is not applicable to the present case. We cannot equate the approved subdivision plat in this case with vested property rights, as the approval was conditioned upon performance by the subdivider. Suspension or revocation of plat approval remain realities for the developer until he complies with the reasonable conditions imposed by the county within its authority. The appellant failed to accomplish the condition she agreed to accomplish and which were required by the county as a prerequisite to plat approval.

**{13}** We affirm the trial court.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-005**

**Filing Date: January 17, 1980, As Amended March 6, 1980**

**Docket No. 12,147**

**HOBBS GAS COMPANY,**

**Plaintiff-Appellee and Cross-Appellant,**

**v.**

**NEW MEXICO PUBLIC SERVICE COMMISSION,**

**Defendant-Appellant and Cross-Appellee,**

**REV. F. W. WELLS AND JEFF BINGAMAN, ATTORNEY GENERAL,**

**Intervenors-Appellants and Cross-Appellees.**

**APPEAL FROM THE DISTRICT COURT OF LEA COUNTY,**
**Garnett R. Burks, Jr., District Judge.**

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Leonard A. Helman
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**OPINION**

**PAYNE, Justice.**

**{1}** Hobbs Gas Company (Hobbs) filed with the New Mexico Public Service Commission (Commission) Advice Notice Nos. 18 and 19 and Tariff Sheets by which it requested the Commission to approve a rate increase. After hearings, the Commission issued its final order denying any rate increase. Hobbs appealed to the district court which held that the Commission's order was arbitrary, capricious, unreasonable, unlawful and not supported by substantial evidence. The district court declared the order invalid and remanded the cause. The Commission now appeals from this order.

**{2}** The district court made the following findings of fact upon which it based its decision:

> 6. The finding in Finding of Fact No. 13 of the Commission's Order that the common equity portion of Petitioner's capital structure as of December 31, 1976 was $896,479 is arbitrary, capricious, unreasonable, unlawful and is not supported by substantial evidence in the record in

that Respondent acted unreasonably in deducting the Company's acquisition adjustment ($505,583) from the Company's equity capital at the end of the test year ($1,402,062).

7. The finding in Finding of Fact No. 13 of the Commission's Order that "previous Commissions have not addressed themselves squarely to the contested issue of whether the acquisition and adjustment should be included within the equity portion of the Company's capital structure" is not supported by the record of Case No. 1359 where it is shown that in Case No. 1046 Respondent specifically rejected this concept; such prior action by Respondent invoking the principles of res judicata and equitable estoppel as to this issue.

8. The finding in Finding of Fact No. 13 of the Commission's Order that "sound regulatory principle requires that it (acquisition adjustment) be deducted from both rate base and the Company's equity capital" is arbitrary, capricious, unreasonable, unlawful, is not supported by substantial evidence in the record and is in direct conflict with Respondent's previous decisions.

9. The deduction of acquisition adjustment from the common equity of Petitioner is arbitrary, capricious, unreasonable, unlawful and is not supported by substantial evidence in the record.

10. Respondent arbitrarily, capriciously and unreasonably prevented Petitioner's expert witness from testifying as a rebuttal witness at the hearing held January 3, 1978, thereby depriving Petitioner of its right to present all relevant and material evidence to Respondent on the issues in the case and such refusal was therefore unlawful and the tendered testimony of such witness should be considered a proper part of the case record.

11. The Commission should acknowledge the full amount of the Company's book equity capital and allow a just and reasonable return thereon.

12. The Order of the Respondent dated February 27, 1978 should be annulled and vacated and this case should be remanded to the Respondent for the sole purpose of determining the revenues sufficient to achieve the purposes set forth in the New Mexico Public Utility Act (§ 68-3-1B NMSA) acknowledging the full amount of the Company's book equity capital and allowing a just and reasonable return thereon.

**{3}** Three issues are raised on appeal: (1) did the trial court err in vacating and annulling the order of the Commission, which directed that Hobbs' acquisition adjustment should not be included within its capital structure for the purpose of rate base and revenue requirements, (2) did the trial court err in applying the doctrines of res judicata and equitable estoppel to the proceedings, and (3) did the trial court err in not allowing Hobbs the right to present a rebuttal witness on the issue of acquisition adjustment. We agree with the district court and affirm.

**{4}** A general preliminary statement of legislative policy and public utility regulatory principles may be helpful in understanding the issues presented in this case. The Legislature delegated to the Public Service Commission the power and authority to regulate utilities. § 62-6-4, N.M.S.A. 1978. The Public Utility Act, which establishes both the Commission and all the apparatus for regulating utilities, provides in Section 62-3-1, N.M.S.A. 1978:

B. It is the declared policy of the state that the public interest, the interest of consumers and interest of investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates, and to the end that capital and investment may be encouraged and attracted so as to provide for the construction . . . of proper plants and

> facilities for the rendition of service to the general public and to industry.

The law also charges the Commission with the responsibility of insuring that every rate made or received by a public utility shall be just and reasonable. § 62-8-1, N.M.S.A. 1978. Whether or not a rate is just and reasonable is to be determined from the facts in each case based upon statutory guidelines. § 62-8-1; § 62-8-7, N.M.S.A. 1978. The Commission is vested with considerable discretion in determining whether a rate to be received and charged is just and reasonable. **State v. Mountain States Tel. & Tel. Co**., 54 N.M. 315, 224 P.2d 155 (1950); **Cities Service Gas Co. v. Federal Power Com'n**, 155 F.2d 694 (10th Cir. 1946), **cert. denied**, 329 U.S. 773 (1946).

**{5}** The traditional elements of the rate-making process and the establishment of the total revenue requirement are (1) determination of the costs of the operation, (2) determination of the rate base which is the value of the property minus accrued depreciation, and (3) determination of the rate of return. C. Phillips, **The Economics of Regulation** 178 (1972). This rate-making process involves decisions as to whether certain utility investments or expenditures should be included or excluded under the above elements.

**{6}** The rate base of a utility is the measure of the current value of property or investments owned by the utility in rendering service to the public. Several factors are considered in determining whether a particular piece of property should or should not be included in the rate base. Once a determination is made to include the utility plant in the rate base, then the value of the plant must be ascertained in order to compute the revenue requirements. In New Mexico, the Legislature provided the manner and elements of value under Section 62-6-14, N.M.S.A. 1978, which reads in pertinent part:

> When in the exercise of its powers and jurisdiction, it shall be necessary for the commission to consider or ascertain the valuation of the properties or business of a public utility, **it shall**, in arriving at such valuation, **give due consideration** to the history and development of the property and business of the particular public utility, **to the original cost thereof and to the cost of reproduction as a going concern and to other elements of value recognized by the laws of the land for rate-making purposes**. (Emphasis added.)

Reconstruction cost, replacement cost, original cost, capital cost, fair value and prudent investment have been and are factors utilized by regulatory commissions and courts in determining plant valuation. **State Corporation Com'n v. Mountain States Tel. & Tel. Co**., 58 N.M. 260, 270 P.2d 685 (1954). Neither New Mexico case law nor the Public Utility Act imposes any one particular method of valuation upon the Commission in ascertaining the rate base of a utility. **Mountain States Tel. v. New Mexico State Corp**., 90 N.M. 325, 563 P.2d 588 (1977). Nor does the spirit of the statute tie the Commission down to the consideration of a single factor in establishing rates. **See Southern Union Gas Co. v. New Mexico Pub. Serv. Com'n**, 84 N.M. 330, 503 P.2d 310 (1972).

**{7}** In **Mountain States Tel. v. New Mexico States Corp., supra** at 338, 563 P.2d at 601, this Court reaffirmed this interpretation:

> The Commission was not bound to the use of any single formula or combination of formulae in determining rates. The rate-making function involves the making of pragmatic adjustments. It is the result reached, not the method employed, which is controlling. (Citations omitted.)

**{8}** In reviewing the present case, the record discloses that the gas utility company was purchased by its current owners from the University of Virginia for approximately 2.7 million dollars. In a previous hearing before the Commission, Cause No. 1046, the record shows that the original cost less depreciation for the plant in service at the time of the purchase was 1.9 million dollars, with an acquisition adjustment of

$522,976. The Commission carried these figures forward from that hearing to the present hearing and denied most of the acquisition adjustment as a revenue requirement for Hobbs. Of particular importance in the present case is plant acquisition adjustment. This is an accounting principle peculiar to regulated industries. It means, in ordinary terms, the amount paid for a plant in excess of original cost less accrued depreciation.

**{9}** The accounting procedures governing gas utilities are contained in the National Association of Regulatory Commission's Uniform System of Accounts, which system has been adopted by the Commission. The uniform system of accounts provides specific accounts for the recording of plant acquisition adjustment on the utility's balance sheet. If the plant acquisition adjustment is included as a legitimate plant cost, it becomes a part of the rate base upon which a rate of return is to be computed. Inclusion of the plant acquisition adjustment increases the utility's revenue requirement which is borne by the rate payer in the form of increased utility rates. If the plant acquisition adjustment is excluded from the rate base, the cost of the adjustment is not borne by the rate payer.

**{10}** There is no dispute as to the percentage of return that would be fair for a small utility the size of Hobbs. Hobbs asked for a 15 percent return on its actual equity and the Commission found that "a 15% return on common equity is just and reasonable and should allow the Company to obtain long-term financing."

**{11}** In deducting $505,583 of the acquisition adjustment from Hobbs' actual equity capital invested in its properties, which is admitted to be $1,402,062 as of the end of the test year, the Commission has reduced Hobbs' equity capital by 36 percent. Most of this capital was invested as a condition precedent to obtaining rate relief from the Commission in Hobbs' last rate case before the Commission. This deduction, combined with other deductions, resulted in a return on actual equity capital of only 7.5 percent rather than the 15 percent which the Commission admits to be a "just and reasonable" return on equity. There is no evidence which supports a determination by the Commission that a 7.5 percent return on equity is a "just and reasonable" return on Hobbs' fair value rate base. Too low a return does not permit adequate "interest coverage" which is essential to allow a utility to attract capital.

**{12}** The Commission suggests that the plant acquisition adjustment should be excluded under the policy that there have been historical abuses associated with the sale and purchase of utility plants, and that under some types of transfers and manipulations, sales prices have been "beefed up." The Commission recognizes, however, that not all acquisition adjustments can be attributed to the above practices. The Commission further contends that a utility seeking inclusion of the adjustment must prove that the purchase was an arm's length transaction and resulted in some benefit to the rate payer. These contentions are not applicable in the present case for several reasons: (1) the denial of the acquisition adjustment has been applied almost exclusively in "original cost" jurisdictions, and (2) the record is very clear in this case that the purchase was indeed an arm's length transaction and did inure to the benefit of rate payers since the purchase price was a million dollars less than the appraised value. It further appears from the record that other utilities had been interested in purchasing the same property at the same time thus providing a source of true market value at the time of the purchase.

**{13}** The action taken by the Commission in this case in deducting approximately $505,583 as plant acquisition adjustment from Hobbs' actual equity capital is unprecedented and contrary to previous policy of the Commission and previous orders of the Commission. The Commission's staff witness concedes that this is a recommended change in **policy** but the record does not reflect substantial evidence to sustain the Commission's refusal to include the above amount as a plant acquisition adjustment.

**{14}** New Mexico is not an "original cost" jurisdiction. It is a "fair value" jurisdiction. A. Priest, PRINCIPLES OF PUBLIC UTILITY REGULATION 162 (1969); § 62-6-14. To

bolster its decision to deduct the plant acquisition adjustment from equity capital, the Commission would have this Court transform New Mexico from a fair value jurisdiction into an original cost jurisdiction. This is contrary to the plain language of Section 62-6-14. **See also State Corporation Com'n v. Mountain States Tel. Co**., **supra**; **Southern Union Gas Co. v. New Mexico Pub. Serv. Com'n**, **supra**. We do not interpret the above cases as repudiating the fair value concept. On the contrary, they reaffirm what is clearly stated by the Legislature in the Public Utility Act.

**{15}** In prior hearings before the Public Service Commission relating to the purchase of the utility plant, acquisition adjustment was never considered a factor in determining a fair value rate base, the amortization of the acquisition adjustment was not included as an operating revenue deduction in determining net operating revenue for rate-making purposes, and Hobbs never attempted to include the acquisition adjustment in the original cost component of its fair value rate base and to recover its amortization as a revenue deduction. If Hobbs had attempted this latter action, then acquisition adjustment would be a proper issue in the case. In the present case, the purchase price paid in 1972 was the fair value of the property at the time of sale. The value that existed at that time, and represented by the purchase price, continues to be reflected as part of the new component reproduction cost of Hobbs' fair value rate base. Therefore, acquisition adjustment is not a true issue.

**{16}** The application by the trial court of the principles of res judicata and equitable estoppel in reviewing the Public Service Commission determination was not error in this case. This holding does not restrict the ability of the Commission to adapt to changes in circumstances in the rate-making determination from one year to the next. In so holding we do not overrule or modify **Southern Union Gas Co. v. New Mexico Pub. Serv. Com'n, supra.** Conversely, we do not take the position that the Commission may not be bound by prior decisions as they affect a particular factual situation. In the present case, the trial court found that the specific issue of acquisition adjustment had been dealt with by the Commission in a previous proceeding in a manner inconsistent with its theory in this case. Under the facts in this case that inconsistency was not allowed by the district court. We affirm the trial court on this issue.

**{17}** Hobbs properly requested the Commission to hear an expert witness on rebuttal. Expert rebuttal witnesses are proper and necessary in complicated and technical hearings for adjustment of rates of public utilities for the purpose of explaining testimony of expert witnesses supplied by the Commission. The mere fact that the Commission was in a rush to end the hearings and enter its order was not sufficient grounds for refusal to hear the rebuttal witness.

**{18}** The judgment and order of the trial court is affirmed

**{19} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-018**

**Filing Date: February 25, 1980**

**Docket No. 12,389**

**CARMEN PEDRAZZA, MOTHER AND NEXT FRIEND OF SUSANNA PEDRAZZA, LOURDES PEDRAZZA, SALVADOR PEDRAZZA, MARIA PEDRAZZA, MARIA DEL CARMEN PEDRAZZA AND MARGARITA PEDRAZZA, CHILDREN OF SALVADOR F. ONTIVEROS, DECEASED,**

**Plaintiff-Appellant,**

**v.**

**SID FLEMING CONTRACTOR, INC. AND FIREMAN'S FUND INSURANCE COMPANIES,**

**Defendants-Appellees.**

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

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Attorney for Appellant.

J. R. Crouch
Las Cruces, New Mexico

Attorney for Appellees.

Modrall, Sperling, Roehl, Harris & Sisk
James A. Parker
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Amicus Curiae.

Sheehan & Sheehan
William H. Carpenter
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Amicus Curiae.

## OPINION

**PAYNE, Justice.**

**{1}** Salvador Ontiveros was killed in an accident while employed by Sid Fleming Contractor, Inc. The natural mother of the decedent's children, Carmen Pedrazza, filed a complaint for benefits under the New Mexico Workmen's Compensation Act on behalf of decedent's children.

**{2}** The plaintiff children have at all times been residents of the Republic of Mexico. Defendant moved for dismissal based upon the pleadings, claiming that plaintiffs are precluded from recovery by Section 52-1-52, N.M.S.A. 1978. The court granted the motion and dismissed the complaint with prejudice. We affirm the trial court.

**{3}** Plaintiff's challenge the constitutionality of that portion of Section 52-1-52 which states:

> [N]o claim or judgment for compensation, under this act (citation omitted), shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman.
>
> Specifically they allege that this section violates the "due process" and "equal protection" clauses of the New Mexico and United States Constitutions.

**{4}** It is important to note the exclusive nature and operation of workmen's compensation. If an employer and employee are covered by the Act, all their rights and remedies are defined

exclusively by the Act. § 52-1-9, N.M.S.A. 1978. As between the employer and the employee, all other common law and statutory actions are barred by the Act. This bar also applies to the employee's dependents to the extent that they are covered by the Act.

**I.**

**{5}** In considering the due process and equal protection principles in this case, the federal and state clauses are treated alike.

**{6}** Plaintiffs argue that Section 52-1-52 deprives them of due process of law. A state violates the due process clause when it interferes with a fundamental right or a vested property interest. **United States v. State of Texas**, 252 F. Supp. 234 (1966), **aff'd**, 384 U.S. 155, 86 S. Ct. 1383, 16 L. Ed. 2d 434 (1966). No law has been cited, nor can we find any, stating that workmen's compensation is or ought to be ranked as a fundamental right within the framework of the Constitution.

**{7}** Next we consider whether a worker's right to compensation under the Act is a vested property interest. Plaintiffs liken workmen's compensation to insurance, the premiums being paid in labor, not dollars, and the benefits vesting upon payment, not death. Plaintiffs' comparison with insurance, however, clouds a proper understanding of the operation of workmen's compensation. While there are surface similarities between the two, there are also critical differences.

**{8}** The worker's and the dependent's right to compensation benefits arise and may be received only as specified by statute. New Mexico's Act provides that the right to enforce dependency death benefits attaches at that point when the worker dies, not at the inception of or during his work relationship. § 52-1-17, N.M.S.A. 1978; **Employers Mutual Liability Ins. Co. of Wis. v. Jarde**, 73 N.M. 371, 388 P.2d 382 (1963). **See also Gambalan v. Kekeha Sugar Co., Ltd.,** 39 Hawaii 258 (1952). The worker's dependents have only an inchoate right to benefits prior to the worker's death, and after his death their right vests as property, if at all, according to the terms of the Act. **Todeva v. Oliver Iron Mining Co**., 232 Minn. 422, 45 N.W.2d 782 (1951).

**{9}** It is apparent that the New Mexico Legislature, through the terms of Section 52-1-52, intended that a property right in workmen's compensation claims never vest in non-resident, alien dependents. This Court will not invade the province of the Legislature and say that the plaintiffs have a due process property right which the Legislature has not seen fit to confer, unless the Legislature's denial is unconstitutional on equal protection grounds.

**{10}** Federal courts have stated the due process problem confronting us thusly:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

**Board of Regents v. Roth**, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972).

> For plaintiffs to acquire the right contended for, so that it is a protected "property" interest under the Fourteenth Amendment, it must appear that the state intended to confer that right. Once conferred its deprivation requires compliance with procedural due process.

**Child v. Beame**, 412 F. Supp. 593, 605 (D.C. N.Y. 1976).

**{11}** The Legislature conferred no due process property right upon the plaintiffs which the district court could have violated by dismissing plaintiffs' suit.

**II.**

**{12}** Plaintiffs' second constitutional argument is that Section 52-1-52 is void on equal protection grounds. They assert that the Act discriminates on the basis of alienage with no rational

relation to a legitimate state interest. Plaintiffs maintain that New Mexico has created a suspect classification and urge us to apply strict scrutiny in our equal protection analysis. The plaintiffs' non-resident alien status, however, prevents us from being able to apply an equal protection test.

**{13}** Plaintiffs are beyond the reach of the equal protection clause. The equal protection clause extends "to any person within [the state's] jurisdiction." As residents of the Republic of Mexico, plaintiffs cannot satisfy this qualification. The United States Supreme Court has counseled against exporting constitutional guarantees, saying:

> [I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of **Yick Wo v. Hopkins** [118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, **to all persons within the territorial jurisdiction**, without regard to any differences of race, of color, or of nationality. . . ."

**Johnson v. Eisentrager**, 339 U.S. 763, 771, 70 S. Ct. 936, 940, 94 L. Ed. 1255 (1950).

**{14}** The purpose of the equal protection clause is to protect persons and groups within United States jurisdiction from being singled out and subjected to hostile legislation. **Pembina Consolidated Silver Min. & Milling Co. v. Pennsylvania**, 125 U.S. 181, 8 S. Ct. 737, 31 L. Ed. 650 (1888). Clearly, the plaintiffs are being subjected to hostile legislation, but as non-resident aliens they are beyond the protective reach of the equal protection clause and outside of our ability to help their cause on constitutional grounds.

**{15}** Had the workmen's compensation law provided that the rights of the worker and the rights of his dependents are the same, plaintiffs could have claimed a denial of equal protection through their deceased father, a resident worker. The rights and remedies of the worker, however, are separate and distinct from those of his dependents. A dependent's claim is not derivative of the worker, but is given him by statute independent of the worker. **See generally** A. Larson, **The Law of Workmen's Compensation**, § 64.10 (1978). The status of the dependent, and his relationship to the Act, determines whether he recovers. **Bjolstad v. Pacific Coast S.S. Co**., 244 F. 634 (N.D. Cal. 1917); **Frasca v. City Coal Co**., 97 Conn. 212, 116 A. 189 (1922); **See Erba v. Erba Bros. Inc**., 77 R.I. 75, 73 A.2d 697 (1950). Plaintiffs' non-resident alien status prevents them from recovering death benefits under the New Mexico Act.

**{16}** This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from one another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

**{17}** We affirm.

**{18} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**DAN SOSA, JR.,**
**Chief Justice, not participating**

**WILLIAM R. FEDERICI,**
**Justice, dissenting**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-027**

**Filing Date: March 6, 1980**

**Docket No. 12,592**

**MAX SCHUERMANN,**

**Petitioner-Appellee,**

**v.**

**ALETTA M. SCHUERMANN,**

**Respondent-Appellant.**

**APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, REUBEN E. NIEVES, District Judge.**

Harold H Parker
Albuquerque, New Mexico

Attorney for Appellant.

Rowley, Hammond, Rowley & Tatum
David F. Richards
Clovis, New Mexico

Attorney for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This appeal involves a dispute over the custody of minor children by their divorced parents. Max Schuermann, the appellee, moved the district court to change the original divorce decree to give him custody of the couple's two boys. He alleged changed circumstances. Aletta Schuermann, the appellant, responded that circumstances had not changed sufficiently, and asked for an increase in child support and for attorney's fees. After a full hearing on the motion, the father was awarded custody and the mother was denied attorney's fees. The mother appeals. We affirm the custody award to the father, but reverse the denial of attorney's fees.

**{2}** The issue before us is whether change of circumstances had occurred and by what standard that change ought to be measured.

**{3}** The mother contends that modification of custody cannot be made unless the morality, character or integrity of the custodial parent becomes such that the child is no longer receiving proper care. The father counters that modification of custody only need be supported by a finding that the change is in the best interests of the child.

**{4}** This Court has repeatedly stated that the controlling inquiry of the trial court in settling any custody dispute is the best interests of the child. **Matter of Briggs**, 91 N.M. 84, 570 P.2d 915 (1977); **Boone v. Boone**, 90 N.M. 466, 565 P.2d 337 (1977); **Terry v. Terry**, 82 N.M. 113, 476 P.2d 772 (1970). We reaffirm the best interests test. We also reaffirm the rule that:

> In a proceeding to modify a provision for the custody of minor children, the burden is on the moving party to satisfy the court that circumstances have so changed as to justify the modification. Every presumption is in favor of the reasonableness of the original decree. (Citation omitted.)

**Merrill v. Merrill**, 82 N.M. 458, 459, 483 P.2d 932, 933 (1971). **See also Kerley v. Kerley**, 69 N.M. 291, 366 P.2d 141 (1961).

> Litigants and trial courts, however, seem to encounter difficulty in reconciling that test with the following principles also enunciated by this Court:
>
> [T]he trial record must indicate that the morality, character or integrity of the

custodial parent is such that the children are not receiving proper care.

**Matter of Briggs**, **supra**, at 86, 570 P.2d at 917. **See also Boone v. Boone**, **supra**.

**{5}** Courts frequently see cases where a change in the circumstances of the non-custodial parent could provide better for a child's best interests than can the circumstances of the custodial parent. The custodial parent often will argue that his or her morality, character or integrity has not changed. It is argued that before the "best interests of the child" test can be employed, the court must first find that the morality, character or integrity of the custodial parent has changed since the original award of custody. We reject that argument and, to the extent that prior opinions of this Court are in conflict with this holding, we overrule them. To rely upon any test which causes parents contesting custody to promulgate the negative qualities of each other can only bruise and further disrupt a young child's family relations.

**{6}** In any proceeding involving custody, the courts' primary concern and consideration must be for the child's best interests. In determining which parent will provide best for those interests, courts should consider all relevant factors including, but not limited to:

(1) the wishes of the child's parent or parents as to his custody;
(2) the wishes of the child as to his custodian;
(3) the interaction and interrelationship of the child with his parents, his siblings and any other person who may significantly affect the child's best interest;
(4) the child's adjustment to his home, school and community; and
(5) the **mental** and physical health of all individuals involved. (Emphasis added.)

§ 40-4-9A, N.M.S.A. 1978.

**{7}** In proceedings for modification of custody, courts also should consider any negative impact of children caused by a custody change. Frequent changes of schools and home locations, differences in family structures and in parental personalities are difficult for children to adapt to even under the best of circumstances. Modifications in custody should not be granted too quickly. Once custody has been awarded to a parent, this Court has held that the best interests of the child ordinarily will not be served unless a substantial change has occurred in the circumstances of the custodial home or in the capacity of the custodial parent. Where, however, the home environment or the morality, character or integrity of the custodial parent prevents the child from receiving proper care or from enjoying stable family relationships, a change in custody is justified.

**{8}** The "morality, character or integrity" standard should still be used to determine the capacity of the custodial parent, and it should function to determine the child's best interests. The "best interests" test is broad and vests the trial judge with considerable discretion. The exercise of discretion by the trial judge, however, must be consistent with the evidence.

**{9}** We hold that the district court acted properly in modifying custody in this case. The record indicates a sufficient change in the circumstances and capacity of the mother that an award of custody to the father is in the best interests of the Schuermann children.

**{10}** We further hold that the father must bear a portion of the costs incurred by the mother in defending this action. The economic circumstances of the parties and the amount of travel in this suit imposed a particularly heavy financial burden on the mother. The appellee is ordered to pay $1,500 towards the appellant's attorney's fees and court costs.

**{11}** It is important for trial judges to be liberal in awarding attorney's fees in custody cases where the economic disparity between the parties and the costs involved in pursuing the action are so great that participation becomes economically oppressive to one party. To do otherwise would have a chilling effect upon the less affluent parent's ability to present his or her case and

upon the trial judge's ability to determine which parent can provide best for a child's welfare.

**{12}** The trial court is affirmed as to the custody of the minor children and reversed as to the awarding of attorney's fees and court costs to the appellant.

**{13}** This matter is remanded with instructions to take such further action necessary, consistent with the holdings of this opinion.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-028**

**Filing Date: March 6, 1980**

**Docket No. 12,420**

**MR. AND MRS. STANLEY D. SPRAY, ET AL.,**

**Plaintiffs-Appellees,**

**v.**

**CITY OF ALBUQUERQUE, NEW MEXICO, A MUNICIPAL CORPORATION,**

**Defendant-Appellant.**

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, GENE E. FRANCHINI, District Judge.**

Motion for Rehearing Denied April 8, 1980

Susan Green
Albuquerque, New Mexico

Attorney for Appellant.

Rodey, Dickason, Sloan, Akin & Robb
Catherine T. Goldberg
Albuquerque, New Mexico

Attorney for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** Appellee Stanley D. Spray, as the representative of a homeowner's group, sought an injunction to prevent the City of Albuquerque from constructing a five foot fence around the Arroyo del Oso Golf Course and to enforce a contract entered into by the parties which provided for lower fencing specifications. The District Court of Bernalillo County granted the injunction. The City appeals and raises three arguments as grounds for reversal. We affirm the district court.

**{2}** The appellee homeowners all own houses which border the Arroyo del Oso Golf Course, situated and designed to enjoy an unobstructed view of the golf course and the distant mountains. Since 1975, the homeowners have resisted the construction of any unsightly or view-obstructing fence around the golf course.

**{3}** In June of 1975, the City, without notice to the homeowners, began enclosing the golf course with a seven foot chain link fence topped with barbed wire. When numbers of homeowners protested, the City stopped construction and removed those portions of the fence already installed. Heated and protracted negotiations between the affected homeowners and the City ensued. Eventually, Mr. Spray met with Robert L. Burgan, head of the City's Parks and Recreation Department, and reached agreement on a plan acceptable to all parties. The Burgan Plan, as it was called, specified a fence height of three to four feet.

**{4}** When a new city administration came into office, it began installing five foot fence posts without notifying affected homeowners. The mayor's chief administrative officer stopped construction after numerous homeowners protested and negotiations resumed again. The homeowners informed the administrator that they would sue the City for its breach of the Burgan Plan agreement if the rekindled fencing controversy were not resolved to their satisfaction. Negotiations ended in an agreement to implement the Burgan Plan with slight modifications; the revision became known as the Jaramillo agreement.

**{5}** Later, without notice to affected homeowners and pursuant to the mayor's directive, the City again began installing a five foot fence. The instant litigation ensued. A temporary restraining

order and, later, a preliminary injunction, stopped construction of the fence. After a trial on the merits, the City was ordered to comply with the Jaramillo agreement. The court found, **inter alia,** that:

> 16. After the homeowners agreed to the specifications offered by the City, they believed they had a binding commitment from the City and that the fencing controversy had finally been resolved. In reliance upon their agreement with the City, Plaintiff homeowners forbore bringing a suit. At the time of the Plaintiff homeowners' negotiations with Mr. Jaramillo, the homeowners in good faith held a reasonable belief that they had a valid claim against the City for breaching its preexisting agreement, made through the person of Mr. Frank Kleinhenz, to adhere to the Burgan Plan.

**I.**

**{6}** The City first challenges the adequacy of the consideration supporting the alleged contract. The City does not contest whether the homeowners ever had a legal right upon which they could sue. It argues that in order for the homeowners' forbearance to constitute adequate consideration, a promise to forbear from suing must have been made by one party and accepted by the other. The City relies on **Gonzales v. Gauna**, 28 N.M. 55, 206 P. 511 (1922), for the proposition that unilateral forbearance from suit, in itself, is insufficient consideration to support a contract. The City maintains that forbearance was never bargained for consideration in the negotiations between the parties. There is substantial evidence in the record, however, to suggest otherwise.

**{7}** The record speaks of homeowners willing to exhaust all their remedies to protect the beauty of their properties and of a city government anxious to avoid litigation. While some contradictory evidence may be present, we will not reverse the district court if substantial evidence exists to support its decision. **Hamilton v. Doty**, 71 N.M. 422, 379 P.2d 69 (1962). There is evidence in the record which is adequate to support the district court's conclusion that the homeowners' forbearance was sufficient consideration to create a binding contract with the City.

**{8}** The City contends that the record does not reflect that the parties ever discussed the possibility of legal proceedings, much less that they reached agreement. Even if this were true, the circumstances of this case would have justified the district court in treating the homeowners' forbearance as consideration in any event. In New Mexico, forbearance may be consideration for a contract where either an express agreement to forbear exists or where the circumstances otherwise suggest that a contract ought to be enforced by implying such an agreement. **Gonzales v. Gauna, supra**.

**II.**

**{9}** The City next argues that it never had any intention of entering into a contract with the homeowners and that its decision to erect a five foot fence around the golf course was an administrative decision, reviewable only for arbitrariness or abuse of discretion. The short answer to this contention is that the City did enter into a contract which was supported by consideration, regardless of what its subjective intentions may have been. Once the contract was entered into, the City's administrative discretion was replaced by a legal commitment.

**{10}** The City urges, however, that such a contract is void as against public policy. The City looks to that body of law which limits a municipality's contractual ability because the possibility exists that it may bargain away the sovereign powers delegated to it by the state. **Lamar Bath House Co. v. City of Hot Springs**, 229 Ark. 214, 315 S.W.2d 884 (1958), **appeal dismissed**, 359 U.S. 534, 79 S. Ct. 1137, 3 L. Ed. 2d 1028 (1959).

**{11}** There is a distinction, however, "between contracts which merely involve the propriety or business functions of the municipality and those which attempt to curtail or prohibit its legislative

or administrative authority. The former [are] valid, the latter are uniformly invalid." **Wills v. City of Los Angeles,** 209 Cal. 448, 451-52, 287 P. 962, 964 (1930). According to this distinction, the question before us is whether maintenance of a municipal park or golf course is a proprietary or governmental function. New Mexico law clearly designates maintenance of a municipal park as a proprietary function. **State v. City of Albuquerque**, 67 N.M. 383, 355 P.2d 925 (1960); **Murphy v. City of Carlsbad**, 66 N.M. 376, 348 P.2d 492 (1960). Thus the City's contract with the homeowners regarding the maintenance of the golf course does not violate public policy, as the City's sovereign powers are not impaired. Additionally, there is no reason to suspect corruption or improper influence for private gain. The agreement does not call for the exercise of personal influence for the enactment of favorable legislation nor is a personal benefit conferred upon any official as a reward for his action. We find no reason to invalidate the contract based upon this argument.

**III.**

**{12}** The City raised its final argument for the first time when it brought this action before the Supreme Court for oral argument. The City was given additional time to brief its claim that Section 37-1-23, N.M.S.A. 1978, cloaked it with the defense of governmental immunity and that this defense was jurisdictional in nature so that it could be raised at any point during the proceedings.

**{13}** Section 37-1-23 states:

> A. Governmental entities are granted immunity from actions based on contract, except actions based on a valid written contract.
>
> B. Every claim permitted by this section shall be forever barred unless brought within two years from the time of accrual. (Emphasis added.)

We hold that the issue of governmental immunity is jurisdictional in nature and that it may be raised at any time during the proceedings. **See State ex rel. Evans v. Field**, 27 N.M. 384, 201 P. 1059 (1921). But we also hold that Section 37-1-23 cannot be made applicable to cities because Section 37-1-24, N.M.S.A. 1978, specifically applies to cities and these sections contain conflicting and irreconcilable provisions.

**{14}** Section 37-124 provides in pertinent part:

> No suit, action or proceeding at law or equity, for the recovery of judgment upon, or the enforcement or collection of any sum of money claimed due from any city, town or village in this state . . . **arising out of or founded upon any ordinance**, **trust relation or contract written or unwritten**, or any appropriation of or conversion of any real or personal property, shall be commenced except within **three years** next after the date of the act of omission or commission giving rise to the cause of action, suit or proceeding. . . . (Emphasis added.)

**{15}** It is apparent that the two statutes are inconsistent concerning the binding effect that written or unwritten contracts will have upon a city and inconsistent as to the length of the statute of limitations to be applied.

**{16}** When such a conflict exists between "statutes relating to the same subject," we will interpret them, if possible, so that "all of the acts will be operative." **Runyan v. Jaramillo**, 90 N.M. 629, 631, 567 P.2d 478, 480 (1977). In this instance, however, we must conclude that the Legislature never intended these statutes to relate to the same subject. Its designation of "government entities" in Section 37-1-23 cannot include cities and remain consistent with the terms of Section 37-1-24. Section 37-1-24 specifically applies to cities, towns, and villages and implicit within its terms is the allowance that New Mexico cities may be sued on written and unwritten contracts, subject to a three year statute of limitations. Section 37-1-23, therefore, does not protect the City with the governmental immunity it seeks.

**{17}** For the reasons stated, we affirm the district court.

**{18} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-031**

**Filing Date: March 12, 1980**

**Docket No. 12,628**

**CLYDE BERLIER AND EARL BERLIER,**

**Plaintiffs-Appellees,**

**v.**

**WAYNE N. GEORGE,**

**Defendant-Appellant.**

**APPEAL FROM THE DISTRICT COURT OF MORA COUNTY, JOE ANGEL, District Judge.**

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Attorney for Appellant.

Robert S. Skinner
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Attorney for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** The appellees, Clyde Berlier and Earl Berlier, entered into a real estate contract on November 5, 1976, with the appellant, Wayne George. The Berliers agreed to buy and Mr. George agreed to sell a 9,000 acre ranch for a price of $445,000, payable in installments. A house located on the ranch was included in the transaction and the sales contract directed the seller to insure the house against fire for one year; thereafter, the buyers were required to insure the house. The insurance provision of the contract stated:

> 5. For the balance of 1976 and the year of 1977, Seller agrees to keep the upon said real estate insured against the hazards covered by fire and extended insurance coverage in an insurance company in the sum of $10,000.00, and the barn in the sum of $5,000.00 for the benefit of Traveler's Insurance Company. In the event of a loss for the balance of the year 1976 and 1977, said monies shall be paid to Traveler's Insurance Company and shall be credited against any balance remaining to Seller from Buyers. For the year 1978 and each successive year thereafter, Buyers shall maintain at their expense insurance on the home in the amount of $10,000.00 and on the barn in the amount of $5,000.00. In the event of a loss, said monies shall be paid to Traveler's Insurance Company and Buyers shall receive credit for said monies paid against any balance remaining to Seller from Buyers.

**{2}** Mr. George, however, insured the house with a $30,000 fire insurance policy which extended coverage beyond his 1976–77 period of obligation. The Berliers had paid the premiums for $10,000, the portion of the coverage required in the purchase agreement, and Mr. George had paid the additional premium to keep the coverage at $30,000. The policy also contained a provision that would pay up to one half of the face amount for loss to the contents of the house.

**{3}** The house was destroyed by fire in April 1978 while the $30,000 policy was still in effect. Mr. George had left some personal property in the house after its sale and recovered for the loss of those items. The recovery by Mr. George on the contents is not an issue in this case.

**{4}** Both parties agree that $10,000 of the insurance proceeds should be paid to the insurer,

Traveler's Insurance Company, which held the first mortgage on the house, and that this amount should be credited against the Berliers' purchase price obligation. The parties' dispute concerns who ought to receive the additional $20,000 in insurance proceeds. When Mr. George refused to credit these proceeds towards the contract price, the Berliers sued Mr. George to compel that credit.

**{5}** The trial court found in favor of the Berliers and Mr. George appeals. We affirm the trial court.

**{6}** Mr. George disputes the trial court's findings and also argues that since he paid the policy premiums for the additional coverage he should receive the excess proceeds. The Berliers respond that, as bearers of the risk of loss during the contractual period, they are entitled to credit any and all insurance proceeds for the loss of the house against their purchase obligation.

**{7}** These arguments raise an issue of first impression in New Mexico. Should the party who contracts for the policy or the party who bears the risk of loss be the beneficiary of insurance proceeds? We adhere to the majority position as stated in 46 C.J.S. **Insurance** § 1145 (1946):

> As between a vendor and purchaser it has been held that whichever must bear the loss resulting from the injury to the property sold, (citations omitted), is entitled to the proceeds of fire insurance thereon. Hence, if the loss falls on the purchaser, he is entitled to the benefit of the insurance proceeds, and to receive it on payment of the full purchase price; and, if the vendor collects it he holds it, as trustee, for the benefit of the purchaser, subject, however, to any claims he may possess for unpaid purchase money or insurance premiums. (Footnotes omitted.)

**{8}** We hold that the party who bears the risk of loss is entitled to any and all insurance proceeds, less an offset for the amount required to reimburse the payor of the premiums, regardless of who contracts for the coverage. **See generally Alabama Farm Bureau Mutual Insur. Service v. Nixon**, 268 Ala. 271, 105 So. 2d 643 (1958); **Gilles v. Sprout**, 293 Minn. 53, 196 N.W.2d 612 (1972). The trial court correctly credited the additional insurance proceeds to the Berliers.

**{9}** Finally, regarding Mr. George's dispute with the trial court's findings of fact, we note that considerable conflict exists between the testimony given by Mr. George and by the Berliers concerning what was said about insurance during their contract negotiations. We will not disturb a finding of fact which is based upon substantial evidence. The trial court is entrusted with the responsibility of weighing testimony, crediting witnesses and, from that, arriving at the truth. Nothing has been presented to suggest that the trial court abused or erred in its fact-finding function.

**{10}** We affirm.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-033**

**Filing Date: March 17, 1980**

**Docket No. 12,759**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**MICHAEL RHEA,**

**Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

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Michael E. Sanchez, Assistant Attorney General
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Attorneys for Petitioner.

Martha Daly, Appellate Defender
Michael Dickman, Assistant Appellate Defender
Santa Fe, New Mexico

Attorney for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** Defendant, Michael Rhea, was convicted in the district court of escape from jail, robbery, and battery upon a peace officer. The Court of Appeals summarily reversed the defendant's conviction of battery upon a peace officer, finding that it was improper to prosecute the defendant under Section 30-22-24, N.M.S.A. 1978 (Battery upon a peace officer), when Section 30-22-17, N.M.S.A. 1978 (Assault by a prisoner), was specifically applicable to the facts of this case. The majority also stated that any argument holding a jailer to be "a peace officer is totally without merit." We reverse the Court of Appeals.

**{2}** In reaching its conclusion that the section dealing with assault by a prisoner was more specifically suited to the facts of this case than the section dealing with battery upon a peace officer, the Court of Appeals erroneously engaged in factual determinations while having before it only the limited rendition of the facts found in the docketing statement. Although a complete record may fail to support the trial court's verdict and support the decisions of the Court of Appeals that the facts of the case would more nearly fit a different statute, it was premature to summarily reverse the trial court using only the docketing statement as the basis for reversal.

**{3}** We also reach a different conclusion upon the interpretation of the statutes. Section 30-22-24(A) defines battery upon a peace officer as:

> the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent or angry manner.

Section 30-22-17 defines assault by a prisoner as intentionally:

> "A. **placing an officer** or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein, **in apprehension of an immediate battery likely to cause death or great bodily harm**;
>
> B. **causing or attempting to cause great bodily harm to an officer** or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein; or

> C. **confining or restraining an officer** or employee of any penal institution, reformatory, jail or prison farm or ranch, or a visitor therein, with intent to use such person as a hostage. (Emphasis added.)

**{4}** The Court of Appeals looked to **State v. Riley**, 82 N.M. 235, 478 P.2d 563 (Ct. App. 1970), which held that where general and specific statutes condemn the same crime, and where each requires the same proofs, it is error to prosecute under the general statute. While this is a correct statement of law, it is not applicable to this case. Although it is possible for the same set of facts to fall within the ambit of both statutes, they do not deal with the same crime, but deal with two different crimes. The Court of Appeals conclusion that the State had prosecuted the defendant under the wrong statute is founded upon the conclusion that a jailer is not a peace officer. Section 30-1-12(C), N.M.S.A. 1978, designates a peace officer as:

> any public official or **public officer vested by law with a duty to maintain public order** or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes * * *. (Emphasis added.)

**{5}** We hold that the Legislature did not exclude jailers from its definition of peace officers. A jailer is an officer in the public domain, charged with the duty to maintain public order. Other jurisdictions have also held jailers to be peace officers. **See Schalk v. Department of Admin., Pub. Emp. Retire. Sys**., 42 Cal. App. 3d 624, 117 Cal. Rptr. 92 (1974); **Kimball v. County of Santa Clara**, 24 Cal. App. 3d 780, 101 Cal. Rptr. 353 (1972); **State v. Grant**, 102 N.J. Super, 164, 245 A.2d 528 (1968).

**{6}** We reverse and remand this matter to the Court of Appeals with instructions to determine if further proceedings and review are necessary.

**{7} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-042**

**Filing Date: March 31, 1980**

**Docket No. 12,588**

**ROSE ANN THOMAS,**

**Plaintiff-Appellee,**

**v.**

**JOHNNY L. REID AND JACKIE L. REID, HIS WIFE,**

**Defendants-Appellants.**

**APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY, HARVEY W. FORT, District Judge.**

McCormick & Forbes
Don G. McCormick
Jay W. Forbes
Carlsbad, New Mexico

Attorneys for Appellants.

Paine, Blenden & Diamond
Dick A. Blenden
Carlsbad, New Mexico

Attorney for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Rose Ann Thomas sought a declaratory judgment naming her as beneficial owner of one half of the minerals under an eighty acre tract of land held by her brother Johnny Reid and his wife. The court concluded that Johnny and his wife held the land is trust for his sister Rose Ann and named her owner of one half of the minerals. The court ordered an accounting for past profits. Johnny appeals, claiming there is no substantial evidence to establish the creation of a trust. We agree with Johnny and reverse the trial court.

**{2}** Johnny's and Rose Ann's father lived on and farmed eighty acres of land near Loving, New Mexico. Prior to his death the father deeded half of the farm to his wife Bernice and the other half to Johnny and his wife. Bernice eventually deeded her half over to Johnny who continued to farm the entire eighty acres. Rose Ann received, in joint tenancy with her mother, title to a house in Loving and was named joint tenant with her mother on a savings account. Three years after the father's death, a lease was executed for the extraction of oil and gas beneath the farm property, and in 1978 a gas well "came in." Thereafter Rose Ann asserted an interest in the property and instituted this action.

**{3}** There is no contention that a written express trust ever existed. Rose Ann alleges, however, that when her father signed deeds to the farm, he created an oral express trust which required her brother to hold half the property for her benefit. She bases her claim on her understanding that: the father intended to treat his children equally; he hesitated to leave a portion of the farm to Rose Ann because he mistrusted her husband; he discussed with an attorney the possibility of deeding the property to his wife for her life with the remainder in equal shares to the children, although he never pursued that option; and, Johnny told Rose Ann she would get something from the gas well if anything came of it.

**{4}** We have repeatedly stated that on appeal, presumptions are in favor of sustaining the verdict of the trial courts. **Durrett v. Petritsis**, 82 N.M. 1, 474 P.2d 487 (1970). But no evidence was presented to show that the father ever expressed an intention that Johnny should hold half the property in trust for Rose Ann. No direct evidence supports the court's conclusion that an express oral trust was created by her father. The

evidence here is certainly not "strong, cogent, and convincing." **Portales Nat. Bank v. Beeman**, 52 N.M. 243, 196 P.2d 876 (1948). Findings of fact will ordinarily not be disturbed on appeal, but they must be supported by substantial evidence. **Boone v. Boone,** 90 N.M. 466, 565 P.2d 337 (1977). Because the court's finding of an express oral trust is not supported by substantial evidence it must be overturned.

**{5}** There was testimony that the father intended to treat his children equally. This testimony may have persuaded the court that had the father known of the valuable oil and gas deposits he would have divided them equally between son and daughter. However, no evidence exists suggesting that he knew of the gas deposits. It is speculative to suggest he intended to divide something of which he had no knowledge. Findings of a trial court may not rest on speculation or conjecture. **Otto v. Otto**, 80 N.M. 331, 455 P.2d 642 (1969).

**{6}** We likewise find no substantial evidence in the record supporting the establishment of a resulting trust.

> A resulting trust arises when the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is inferred from the terms of the disposition or from accompanying facts and circumstances that the beneficial interest is not to go, or be enjoyed, with the legal title. (Citations omitted.)

**McCord v. Ashbaugh**, 67 N.M. 61, 65, 352 P.2d 641, 644 (1960). Once again, no evidence shows that the father intended that Rose Ann share in the beneficial interest of the property. The evidence does suggest that the father treated his children equally in that Rose Ann received, as a joint tenant with her mother, title to the house in Loving and cash savings which approximately equaled the value of the farm at the time of the father's death. The evidence does not indicate that the father intended for Rose Ann to share equally in the farm also.

**{7}** A constructive trust would be inappropriate as well. In order for a constructive trust to be imposed, fraud or overreaching must be shown, and the evidence does not suggest that Johnny engaged in such conduct. **Boardman v. Kendrick**, 59 N.M. 167, 280 P.2d 1053 (1955). It would create havoc in the law for this Court to allow the redistribution of assets conveyed by a parent to his children without stronger evidence that the parent desired perpetual equality between his children. Obviously the father attempted to divide his property as best he could with his understanding of the circumstances as they existed at the time. He could have pursued many other options but he did not. We cannot by legal fiat vest the father with a vision of the future made available to the present court by virtue of hindsight.

**{8}** The record fails to show any substantial evidence to support the court's finding of an oral trust, or to allow the establishment of either a resulting or a constructive trust. The judgment of the trial court is therefore reversed.

**{9} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-043**

**Filing Date: April 9, 1980**

**Docket No. 12,800**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**LOWADA HALL MANN,**

**Respondent.**

**ORIGINAL PROCEEDING OF CERTIORARI.**

Jeff Bingaman, Attorney General
Michael E. Sanchez, Assistant Attorney General
Santa Fe, New Mexico

Attorneys for Petitioner.

Martha A. Daly, Appellate Defender
Michael Dickman, Assistant Appellate Defender
Santa Fe, New Mexico

Attorneys for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** On October 17, 1978, defendant Lowada Hall Mann was arrested by the Albuquerque City Police and charged with possession of amphetamines with intent to distribute, and conspiracy to possess amphetamines with intent to distribute. Defendant was arraigned on the above charges before the Magistrate Court of Bernalillo County on October 18, 1978. No preliminary hearing was held. The case remained pending in the magistrate court until April 30, 1979, when the magistrate judge dismissed the State's case with prejudice, pursuant to N.M. Magis.R. Crim. P. 17(b), N.M.S.A. 1978, for failure to prosecute within six months.

**{2}** After the magistrate court's dismissal with prejudice, the Bernalillo County grand jury returned a criminal indictment charging defendant with possession with intent to distribute a controlled substance, namely methamphetamine, and with conspiracy to possess with intent to distribute methamphetamine. Defendant objected to the indictment and her arraignment was delayed in order for the district court to hear a defense motion which argued that these charges had previously and properly been dismissed with prejudice by the magistrate. Relying upon Rule 17(b), the district court agreed with the defendant and dismissed the indictment with prejudice. The Court of Appeals affirmed. We reverse, acknowledging the misleading and confusing situation created by the adoption of Rule 17(b) by the Supreme Court.

**{3}** The issue we address in this case is whether Rule 17(b) empowers magistrate courts to dismiss with prejudice felony charges over which they have no trial jurisdiction.

**{4}** We reaffirm the decisions rendered by the Court of Appeals and this Court in **State v. Peavler**, 87 N.M. 443, 535 P.2d 650 (Ct. App. 1975), **rev'd on other grounds**, 88 N.M. 125, 537 P.2d 1387 (1975), which held that the rules governing criminal actions in magistrate courts cannot be used to dispose of cases over which the magistrate is without trial jurisdiction. In **Peavler**, since the magistrate had no jurisdiction to try the felony charges before him, he lacked the power to acquit and his dismissal of the complaint was not an acquittal. The State was not barred from seeking a grand jury indictment and from proceeding in the district court. Although Rule 17(b) was not enacted at the time the **Peavler** case arose, the reasoning of both the Court of Appeals and this Court in **Peavler** remains valid.

**{5}** The Legislature established the bounds of magistrate court jurisdiction in Section 35-3-4, N.M.S.A. 1978, saying:

> A. **Magistrates have jurisdiction in all cases of misdemeanors**. Magistrates also have jurisdiction in any other criminal action where jurisdiction is specifically granted by law, and they may hold preliminary examinations in any criminal action where authorized by law.
>
> B. In any criminal action in the magistrate court which is beyond the jurisdiction of the magistrate court, the magistrate may commit to jail, discharge or recognize the defendant to appear before the district court as provided by law. Whenever the defendant is bound over to the district court, the magistrate shall forthwith deliver to the clerk of the district court a transcript of all proceedings in the magistrate court in the action. (Emphasis added.)

**{6}** It was not the intention of this Court to promulgate a rule which conflicts with Section 35-3-4 by extending the dispositive powers of magistrates to cover felony charges. In drafting the Rules of Criminal Procedure for the Magistrate Courts, we stated that the rules "shall not be construed to extend or limit the jurisdiction of any court, or to abridge, enlarge or modify the substantive rights of any litigant." N.M. Magis.R. Crim. P. 1(b), N.M.S.A. 1978. In keeping with this policy, a distinction has been made in the way the magistrate is to handle felony and non-felony charges. **See** Magistrate Court Rules 7(a), 10, 14(b), 14(c), 15, 16, 18 and 21. Unfortunately, the same distinction was not made in Rule 17(b).

**{7}** Rule 17(b) states:

> **Any criminal charge** which is pending for six months from the date of the complaint without disposition by the magistrate court shall be dismissed with prejudice unless, after a hearing, the magistrate finds that the defendant was responsible for the failure of the court to complete the disposition of the proceeding. If a complaint is dismissed pursuant to this paragraph, a criminal charge for the same offense shall not thereafter be filed in any court. (Emphasis added.)

**{8}** The words "[a]ny criminal charge" should be taken to mean any criminal charge within the magistrate court's jurisdiction. Felony charges may only be dismissed with prejudice by the district court for failure to abide by the rules and by the applicable statutes of limitation of that court.

**{9}** The dismissal is reversed and this case is remanded to the district court for further proceedings consistent with this opinion.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**EDWIN FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-044**

**Filing Date: April 10, 1980**

**Docket No. 12,548**

**RUDY S. YBARRA AND CARMEN N. YBARRA,**

**Plaintiffs-Appellees,**

**v.**

**MODERN TRAILER SALES, INC.,**

**Defendant-Appellant.**

**APPEAL FROM THE DISTRICT COURT OF HARDING COUNTY, STANLEY F. FROST, District Judge.**

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Attorneys for Appellant.

Eugene E. Brockman
Tucumcari, New Mexico

Attorney for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** Plaintiffs, Rudy and Carmen Ybarra, brought this suit seeking to revoke their acceptance of a contract for the sale of a mobile home. The district court, sitting as the trier of fact, found that the plaintiffs revoked the contract under the terms of Section 55-2-608, N.M.S.A. 1978. Defendant, Modern Trailer Sales, appeals. We affirm.

**{2}** The issue on appeal is whether plaintiffs met the conditions for revocation of acceptance of the mobile home contract as required by Section 55-2-608.

**{3}** On March 11, 1974, defendant delivered to the plaintiffs a new double-wide mobile home which is the subject of this dispute. A few days after delivery, portions of the floor began to rise and bubble, creating an unsightly and troublesome situation for the plaintiffs. The trial court found that the defects in the floor existed when the mobile home was delivered, but that they were not observable upon delivery. The court also found that such defects are not acceptable in the mobile home industry.

**{4}** Plaintiffs complained about the floor as soon as its defects were discovered and they continued to request that the defendant remedy the situation. The defendant responded on at least three occasions by sending repairmen to cure the defective floor, but each time they were unsuccessful. The plaintiffs continued to rely upon defendant's assurances that it was willing and able to repair the floor.

**{5}** Defendant alleges that after its last unsuccessful attempt to repair the floor, on September 4, 1975, it received no further complaints from the plaintiffs regarding the unacceptability of the defects until this suit was filed on March 10, 1978. This, defendant contends, prevented it from curing the defects during this period. Plaintiffs deny defendant's allegation saying that they continued to telephone and visit the defendant's place of business to demand repair. The district court found for the plaintiffs on this issue. We find substantial evidence in the record to support all of the district court's findings of fact.

**{6}** Defendant complains that plaintiffs failed to satisfy the revocation requirements of Section 55-2-608 in that revocation of acceptance was not made within a "reasonable time" and notice of revocation was not given until the filing of

this suit. Given the facts of this case, we disagree with defendant's argument.

**{7}** Section 55-2-608 states:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity **substantially impairs its value** to him if he has accepted it:
>
> (a) on the **reasonable assumption** that its nonconformity **would be cured** and it has **not been seasonably cured;** or
>
> (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur **within a reasonable time** after the buyer discovers or should have discovered the ground for it and **before any substantial change** in condition of the goods which is not caused by their own defects. It is **not effective until the buyer notifies the seller of it.**
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them. (Emphasis added.)

**{8}** Nearly four years passed from the time the parties executed this contract to the time the plaintiffs instituted this action. The statute creates a "reasonable time" standard and requires the trial court to make a factual determination. We cannot say that four years is unreasonable as a matter of law. The reasonableness of the time at which revocation is communicated is dependent upon the facts of each case. Four years, in this case, is not unreasonable.

**{9}** The statute requires the buyer to give the seller notice before a revocation can be effective. Official Comment 5 to Section 55-2-608 states that "[t]he content of the notice under Subsection (2) is to be determined . . . by considerations of good faith, prevention of surprise, and reasonable adjustment." Defendant argues that if the seller's first notice of revocation comes with the process server, then the notice requirement is not satisfied. **See Kohlenberger, Inc. v. Tyson's Foods, Inc.,** 256 Ark. 584, 510 S.W.2d 555 (1974); **Lynx, Incorporated v. Ordnance Products, Inc.,** 273 Md. 1, 327 A.2d 502 (1974). This will be true in most instances, but it is not true here. In this instance service of process was preceded by a continuing series of complaints and negotiations regarding the unacceptability of the defective mobile home and by repeated failures on the part of the seller to cure the defects. The process server bore only the formal tidings of revocation. **See DeCoria v. Red's Trailer Mart, Inc.,** 5 Wash. App. 892, 491 P.2d 241 (1971). This constitutes sufficient notice of revocation "even though the formal rejection comes a considerable time after the sale." White & Summers, **Uniform Commercial Code** § 8-3, pp. 262–63 (1972). **See Irrigation Motor And Pump Co. v. Belcher,** 29 Colo. App. 343, 483 P.2d 980 (1971).

**{10}** Defendant argues that plaintiffs slept on their rights and that laches operates to deny them the remedy of revocation. According to the record, however, the converse can also be argued. Plaintiffs patiently endured the defects to provide defendant ample time to cure them, and plaintiffs continued to protest the unacceptability of the defects to preserve their remedies. This is the factual conclusion reached by the district court which we will not overturn.

**{11}** Defendant's argument suggests that the buyer must use some magic words of revocation in order to give the seller effective notice. In all probability the ordinary buyer never learns that he even has a remedy of revocation until he goes to his lawyer in desperation. Strict adherence to the use of some specific words of revocation is not required of buyers in the plaintiffs' position. Buyers, however, must give sufficient indication of revocation that there can be no surprise on the part of the seller. We can find no basis for a claim of surprise in the record.

**{12}** The defendant also argues that the defects complained of by the plaintiffs are not substantial. The trial court held to the contrary and we agree. Measured against any objective test, raised or bubbled portions of a floor would be unacceptable to the reasonable buyer as an unsightly, inconvenient and possibly hazardous circumstance.

**{13}** For the reasons stated, we affirm the district court.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-045**

**Filing Date: April 10, 1980**

**Docket No. 12,577**

**ALEX MONTOYA,**

**Petitioner-Appellant,**

**v.**

**THE HON. JAMES M. O'TOOLE, MAGISTRATE JUDGE OF THE BERNALILLO DISTRICT, DIVISION II,**

**Respondent-Appellee.**

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, WILLIAM R. RIORDAN, District Judge.**

Motion for Rehearing Denied May 15, 1980

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Jose L. Martinez
Albuquerque, New Mexico

Attorneys for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Alex Montoya was charged in magistrate court with a violation of the Controlled Substances Act for possession of a controlled substance, diazepam, commonly known as Valium.

**{2}** Montoya filed a motion to dismiss, alleging an unlawful delegation of power under the New Mexico Constitution and a violation of the notice requirement under the due process clause of the United States Constitution. The motion was denied. Montoya then filed a petition for writ of prohibition. The court again found against Montoya who now asks this Court to reverse the district court and to enter a permanent writ of prohibition against the magistrate judge. We affirm.

**{3}** This appeal raises two issues: (1) whether there has been an unconstitutional delegation of power to the Board of Pharmacy by the Legislature; and (2) whether the procedure followed in classifying drugs by the Board violates the due process notice requirements of the New Mexico and United States Constitutions.

**{4}** Montoya argues that to allow the Board of Pharmacy to schedule drugs, resulting in the attachment of differing criminal penalties for the possession of scheduled drugs, is an unconstitutional delegation of authority under the New Mexico Constitution, Article III, § 1.[1] We disagree. The Legislature may lawfully delegate authority to an administrative agency when that authority is restricted by specific legislative standards. **See City of Albuquerque v. Jones,** 87 N.M. 486, 535 P.2d 1337 (1975); **City of Santa Fe v. Gamble-Skogmo, Inc.,** 73 N.M. 410, 389 P.2d 13 (1964); **Arnold v. Board of Barber Examiners,** 45 N.M. 57, 109 P.2d 779 (1941). This Court said in a case involving a delegation of authority under New Mexico's Bond Act that:

[1] 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. N.M. Const. Art. III, § 1.

> The legislature has declared the policy and established primary standards to which the agencies must conform. The Authority and other state agencies are delegated only that power necessary to the accomplishment of the purposes of the statute. Beyond that, it does not delegate legislative power or confer executive or judicial authority. The legislature has not delegated its authority to make a law but has delegated power to determine facts upon which the law makes its own action depend. (Emphasis added.)

**State v. New Mexico State Authority,** 76 N.M. 1, 13, 411 P.2d 984, 993 (1966).

**{5}** Section 30-31-3, N.M.S.A. 1978, does not violate the delegation strictures of the New Mexico Constitution. The Legislature has established strict guidelines for the Board of Pharmacy to follow in determining a substance's potential for abuse. The standards for the scheduling of dangerous drugs are clear and the duties of the Board are definite. The statute requires that the board **shall** consider the following:

(1) the actual or relative abuse of the substance;

(2) the scientific evidence of the pharmacological effect of the substance, if known;

(3) the state of current scientific knowledge regarding the substance;

(4) the history and current pattern of abuse;

(5) the scope, duration and significance of abuse;

(6) the risk to the public health;

(7) the potential of the substance to produce psychic or physiological dependence liability; and

(8) whether the substance is an immediate precursor of a substance already controlled under the Controlled Substances Act. (Emphasis added.)

**{6}** After evaluating a substance under this provision, the Board of Pharmacy must then determine if it falls within the mandatory provisions of Section 30-31-5, N.M.S.A. 1978, which states in part:

> A. The board **shall** place a substance in Schedule I if it finds that the substance:
>
> (1) has a high potential for abuse; and
>
> (2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.
>
> B. The board **shall** place a substance in Schedule II if it finds that:
>
> (1) the substance has a high potential for abuse;
>
> (2) the substance has a currently accepted medical use in treatment in the United States or currently accepted medical use with severe restrictions; and
>
> (3) the abuse of the substance may lead to severe psychic or physical dependence.
>
> C. The board **shall** place a substance in Schedule III if it finds that:
>
> (1) the substance has a potential for abuse less than the substances listed in Schedules I and II;
>
> (2) the substance has a currently accepted medical use in treatment in the United States; and
>
> (3) abuse of the substance may lead to moderate or low physical dependence or high psychological dependence.
>
> D. The board **shall** place a substance in Schedule IV if it finds that:

(1) the substance has a low potential for abuse relative to the substances in Schedule III;

(2) the substance has a currently accepted medical use in treatment in the United States; and

(3) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substance in Schedule III.

E. The board **shall** place a substance in Schedule V if it finds that:

(1) the substance has a currently accepted medical use in treatment in the United States; and

(2) abuse of the substance may lead to limited physical dependence or psychological dependence relative to the substances in Schedule IV. (Emphasis added.)

**{7}** This legislative scheme for designating and scheduling potentially abused drugs allows the Board of Pharmacy only minimal discretion in its fact-finding function and no discretion in enacting substantive law. The Board's expertise in this field is crucial and its vigilance in dealing with new and dangerous drugs is necessary. It would place an enormous burden upon the Legislature, in time and expense, if it were required to consider each of the thousands of new substances that are marketed each year by pharmaceutical firms. In the final analysis the Legislature would still have to rely on outside expertise to evaluate each substance. Here the Legislature established strict statutory standards and directed the Board to apply them in categorizing substances.

**{8}** The Supreme Court of Tennessee, in a case similar to this one, viewed the administrative and legislative tensions raised by such a circumstance in this way:

At the outset, it should be noted that the area of drug control is one in which some form of delegation by the legislature of discretionary authority to an agency is peculiarly necessary. To be effective, a drug control program must be reviewed continuously, and adjusted when necessary, in the light both of new drugs coming on to the market, and of new knowledge concerning old drugs. The legislature, by its nature, has neither the facilities nor the expertise to assume this task. Furthermore, because the legislature is not in continuous session, it cannot give the drug control program constant attention, the lack of which could result in a dangerous drug being widely disseminated throughout the state before effective controls were instituted. (Citations omitted.)

**State v. Edwards,** 572 S.W.2d 917, 919 (Tenn. 1978).

**{9}** This Court has applied a restrictive approach to the delegation doctrine in some cases. **Stat v. Heffernan,** 41 N.M. 219, 67 P.2d 240 (1936); **State v. Roy,** 40 N.M. 397, 60 P.2d 646 (1936). In this case, however, we hold that the Legislature has not abrogated its responsibilities, but has defined and confined the role of the Board of Pharmacy to that of a fact-finder.

**{10}** Montoya also argues that prosecuting him under this complaint violates the fair notice requirements of the state and federal due process clauses. He complains that there is no notice provision to alert a person that a drug has been added by the Pharmacy Board and contends that this voids the statute. He relies upon the language of the United States Supreme Court in **Lanzetta v. New Jersey,** 306 U.S. 451, 453, 59 S. Ct. 618, 619, 83 L. Ed. 888 (1939), for the position that the terms of a penal statute creating a new offense should not forbid or require "the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ."

**{11}** We hold that the notice procedure of the Pharmacy Board does not violate due process. Although drugs, when scheduled, are not added

to those initially listed and published under the Controlled Substances Act, a reasonable person reading Sections 30-31-3 and 30-31-5 would see that he also needs to read the regulations of the Pharmacy Board to obtain a complete list of scheduled drugs. The Act provides an additional safeguard by requiring notice and a public hearing before the adoption of a regulation, followed by a thirty-day time period before the regulation becomes effective. § 61-1-29, N.M.S.A. 1978. This satisfies the due process notice requirements of the state and federal constitutions.

**{12}** We affirm.

**{13}** **IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-054**

**Filing Date: May 5, 1980**

**Docket No. 12,565**

**JIMMIE G. TRUJILLO,**

**Petitioner-Appellant,**

**v.**

**EMPLOYMENT SECURITY COMMISSION OF NEW MEXICO, AND ALBUQUERQUE-BERNALILLO COUNTY ECONOMIC OPPORTUNITY BOARD,**

**Respondents-Appellees.**

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, PHILLIP D. BAIAMONTE, District Judge.**

Freedman, Boyd & Daniels
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for Petitioner-Appellant.

Rodey, Dickason, Sloan, Akin & Robb
John P. Salazar
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for Albuquerque-Bernalillo County E O B.

R. Baumgartner
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for Employment Sec. Commission.

**OPINION**

**PAYNE, Justice.**

**{1}** Appellant, Jimmie Trujillo, was fired on April 29, 1977, from his job with the Albuquerque-Bernalillo County Economic Opportunity Board. He applied for and was granted unemployment compensation benefits by the Employment Security Commission (E.S.C.), but the E.S.C. Appeals Tribunal reversed the award and demanded the return of amounts already paid to Trujillo. Trujillo sought review in the district court, and the court affirmed the E.S.C.'s final decision, whereupon Trujillo appealed to this Court. We reverse.

**{2}** Trujillo's employer leveled six charges of employment misconduct against him, any one of which, if substantiated, would have justified his dismissal without unemployment benefits. The only charge which the Appeals Tribunal found meritorious was that Trujillo conspired to align members of an advisory council against his superior, Eric Berg. The only evidence offered in support of that charge was the testimony given by Berg himself. He testified that three members of the council had told him on several occasions prior to official council meetings that Trujillo had told them that Berg was taking actions which violated federal program regulations. As a consequence, Berg testified, council members consistently questioned his decisions and forced him to prove the correctness of his actions.

**{3}** Trujillo correctly contends that Berg's testimony was based upon hearsay. That testimony, moreover, was controverted by Trujillo. The Appeals Tribunal could not have verified the accuracy of Berg's testimony nor ascertained the impressions of council members as they were never called upon to testify.

**{4}** This appeal raises one issue: whether the E.S.C.'s decision—that Trujillo was guilty of employment misconduct sufficient to deny him unemployment benefits—is supported by substantial evidence. Related to the resolution of this issue is whether the "legal residuum rule" is applicable to this administrative decision.

**{5}** "The residuum rule requires a reviewing court to set aside an administrative finding unless the finding is supported by evidence which would be admissible in a jury trial." 2 Davis, **Administrative Law Treatise** § 14.10, pp. 291–92 (1958). The rule was first enunciated in **Carroll v. Knickerbocker Ice Co.,** 218 N.Y. 435, 113 N.E. 507 (1916). That court set aside the compensation award of an administrative agency because the crucial finding there was based entirely upon the hearsay testimony of witnesses who said that the decedent had told them what caused his injury. The court concluded that "still in the end, there must be a residuum of legal evidence to support the claim before an award can be made." 113 N.E. at 509.

**{6}** Since the **Carroll** case, courts have qualified their adherence to the rule. **Altschuller v. Bressler,** 289 N.Y. 463, 46 N.E.2d 886 (1943). Commentators have criticized it. 2 Davis, **supra,** §§ 14.09–14.10 (1958). Professor Davis states that:

> Rejection of the residuum rule does not mean that an agency is compelled to rely upon incompetent evidence; it means only that the agency and the reviewing court are free to rely upon the evidence if in the circumstances they believe that the evidence should be relied upon. Rejection of the residuum rule does not mean that a reviewing court must refuse to set aside a finding based upon incompetent evidence; it means only that the court may set aside the finding or refuse to do so as it sees fit, in accordance with its own determination of the question whether the evidence supporting the finding should be deemed reliable and substantial in the circumstances.

**Id.** § 14.10, at p. 293.

**{7}** This is the proper position regarding evidence in most administrative adjudications. In many circumstances hearsay is reliable and probative, and at times it may be the only evidence available. Nevertheless, we believe that the residuum rule should be retained in those administrative proceedings where a substantial right, such as one's ability to earn a livelihood, is at stake. In those instances, "any action depriving him of that [right or ability] must be based upon such substantial evidence as would support a verdict in a court of law." **Young v. Board of Pharmacy,** 81 N.M. 5, 9, 462 P.2d 139, 142 (1969).

**{8}** We interpret Section 51-1-3, N.M.S.A. 1978, to establish unemployment compensation as a substantial right as a matter of public policy. The benefits in this case may not be denied on the basis of controverted hearsay alone. Controverted hearsay under these facts does not qualify as substantial evidence.

**{9}** For this reason, we reverse.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-056**

**Filing Date: May 5, 1980**

**Docket No. 12,732**

**JOHN A. MITCHELL AND SHARON O. MITCHELL, HIS WIFE,**

**Plaintiffs-Appellants,**

**v.**

**ALBERT H. HEDDEN AND MADELON HEDDEN, HIS WIFE, AND THE CITY OF SANTA FE, PLANNING DEPARTMENT,**

**Defendants-Appellees.**

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, EDWIN L. FELTER, District Judge.**

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Santa Fe, New Mexico

Frank R. Coppler
Santa Fe, New Mexico

Attorneys for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** The Mitchells filed a petition challenging the legality of the City of Santa Fe's approval of a proposed subdivision adjacent to their property. The subdivision was originally approved by the City Engineer and City Planner in a summary proceeding. The Mitchells alleged that the City's summary proceeding for creating subdivisions was never properly adopted. The City filed a motion for summary judgment which the trial court granted. Plaintiffs appeal and we reverse.

**{2}** On March 30, 1966, the Planning Commission of the City of Santa Fe recommended the disputed summary subdivision procedure to the City Council. The Mitchells contend that the City Council minutes do not show that the City Council, at any time, "approved by resolution" the recommended subdivision procedure. The Council minutes produced by the City as evidence of the adoption of the subdivision procedure shows a discussion of the procedure, but the minutes are unclear as to whether it was adopted. There is not a formal document in the record purporting to be a resolution adopting the summary procedure. The minutes referred to a public hearing that was to be held on some of the issues discussed at the meeting. This raises a question of fact as to whether the procedure was "established" within the meaning of the applicable state statutes at the same meeting on March 30th.

**{3}** The proceeding for summarily approving subdivisions was created pursuant to Section 3-20-8(B), N.M.S.A. 1978, which provides in part:

> B. In lieu of the requirements of Section 30-2-7 NMSA 1978, the following procedure may be followed:
>
> (1) **the planning authority shall establish a summary procedure** for approving:
>
> (a) subdivisions of not more than two parcels of land;
>
> (b) resubdivisions, where the combination or recombination of portions of previously platted lots does not increase the total number of lots; or

> (c) subdivisions of two or more parcels of land in areas zoned for industrial use. . . . (Emphasis added.)

**{4}** A question that must be resolved under the facts in this case is whether the "planning authority" referred to in the statute is the City Council or the City Planning Commission.

**{5}** The City Council adopted ordinance § 31-1 limiting the authority of its planning commission as follows:

> [all] rules, procedures, standards and other regulations, including any amendments thereto as may be adopted by the planning commission, shall not become effective and shall not be enforced until and unless the same may be approved by resolution of the city council.

**{6}** Even if the summary procedure recommended to the City was not adopted by a formal ordinance, this would not prevent the Council from establishing such a means. The Planning Commission is not empowered to unilaterally establish the summary procedure unless "the same [is] approved by resolution of the city council."

**{7}** We hold that the planning authority in this case is the City Council. The Planning Commission is a creature of the City Council and has no authority independent of the City Council. Ultimate planning decisions within the City rest with the City Council. § 3-19-1, N.M.S.A. 1978.

**{8}** Giving appellants the benefit of all reasonable inferences, we find that an issue of fact exists as to whether the City Council ever "established" the subdivision procedure, either formally or by implication. When there is a genuine issue as to any material fact, summary judgment is improper. **See Akre v. Washburn,** 92 N.M. 487, 590 P.2d 635 (1979), and cases cited therein.

**{9}** A finding that the City Council adopted a "resolution" approving the Planning Commission recommendations would be dispositive. Short of this, the trial court must find that the City Council "established" the procedure by some other means if the subdivision is to be valid.

**{10}** The cause is remanded for further action consistent with this decision.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-065**

**Filing Date: May 29, 1980**

**Docket No. 12,655**

**WILFRED GALLEGOS AND MARIE LORRAINE GALLEGOS,**

**Plaintiffs-Appellants,**

**v.**

**C. H. QUINLAN, DORA S. QUINLAN AND QUINLAN RANCHES, INC., A COLORADO CORPORATION,**

**Defendants-Appellees.**

**Appeal from the District Court of Taos County, Wright, District Judge.**

Weisfeld & Wallner
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Taos, New Mexico

Attorney for Appellants.

Brandenburg & Johnson
Clifford J. Johnson
Taos, New Mexico

Attorney for Appellees.

## OPINION

**PAYNE, Justice.**

**{1}** Plaintiffs Gallegos brought suit to be declared the fee simple owners of property that they alleged defendant Quinlan had fraudulently obtained by tax deed from the State of New Mexico. Quinlan received his tax deed in 1959. He filed a quiet title suit in which a decree was entered in his favor in 1961. The Gallegos' acquired their claim of title eighteen years later, in 1977 and 1978, through deeds received from the heirs of Elmer Davis and John Pearson. The United States Government had given Davis and Pearson the first patents on the land. The Gallegos' asked that the quiet title decree in favor of Quinlan be set aside and moved for summary judgment. Quinlan counterclaimed and also asked for summary judgment. The trial court granted summary judgment in favor of Quinlan. We affirm.

**{2}** On appeal, the Gallegos' contend that summary judgment was improper because of a genuine issue of fact that existed concerning whether the original tax deeds, upon which Quinlan based his quiet title suit, were obtained by fraud.

**{3}** The original patentees never recorded the property and never had the property assessed for taxes. Quinlan, whose property abutted and partially surrounded the property in question, began a search prior to 1955 to determine the ownership in the hope that he could purchase the property. He could find no evidence of who owned the property in any of the county records, but learned the names of the original patentees from the United States Government. He made at least some attempt to locate them. In 1955, Quinlan went to the Taos County Assessor's Office to have the property entered for assessment of unpaid taxes in order to precipitate an eventual tax sale. Quinlan maintains that he presented the true owners' names for assessment, but the tax schedules listed him as the owner of the property. Quinlan paid no taxes on the property after it was assessed in his name, and in March 1959 the land was deeded to the state for unpaid taxes. In December 1959 Quinlan purchased the property from the state by paying back taxes and penalties. The deed which Quinlan received from the state erroneously listed him as the original owner. The sale of the property by the state was made during a period when, by statutory limitation, only the previous owner was entitled to obtain the land by repurchase. §§ 72-18-31 and 32,

N.M.S.A. 1953 (current version at §§ 7-27-6 and 7, N.M.S.A. 1978).

**{4}** Quinlan's suit to quiet title on the property was based upon the tax deed. Quinlan and his successor, a closely held corporation, have exercised ownership of the land since that time.

**{5}** The Gallegos' allege that the defendant misrepresented himself as the original owner to obtain the repurchase preference provided to previous owners in the sale of land for unpaid taxes. They claim that if such actions constitute fraud, the quiet title suit must be set aside. Quinlan alleges that there was insufficient evidence of fraud to overcome the motion for summary judgment and argues that, by virtue of the intervening eighteen years, the statute of limitations for contesting tax deeds has long since run.

**{6}** We do not reach, nor rule upon, the arguments of either party. A tax deed obtained by fraud may be attacked without regard to the statute of limitations. Fraud vitiates the conveyance when the fraud is shown by clear and convincing evidence. **See Trujillo v. Dimas,** 61 N.M. 235, 297 P.2d 1060 (1956). However, the Gallegos' have no standing to assert a claim in this case.

**{7}** The method by which the state obtained title to the land is not an issue. Under Section 72-8-15, N.M.S.A. 1953 (repealed by N.M. Laws 1974, ch. 92, § 34), the county, immediately upon the expiration date of the redemption period, executes tax deeds to the state for all unredeemed property that is sold to the state. The fact that the property was assessed in the wrong owner's name did not make the deed issued by the county to the state defective. The applicable statute in effect at that time, Section 72-8-14, N.M.S.A. 1953 (repealed by N.M. Laws 1974, ch. 92, § 34), states: "No sale of any real property, land or lot, or parts thereof, or any property for delinquent taxes shall be considered invalid on account of its having been charged on the tax rolls in any other name than that of its record owner. . . ." The state obtained a good title to the land and the original patentees lost it. The Gallegos' predecessors had neither assessed the land nor paid taxes thereon. They cannot attack the state's title. Therefore, any title or interest that the Gallegos' and their predecessors in interest held was lost and they have no standing to assert a claim in this case.

**{8}** This action brought by the Gallegos' is similar, in relevant part, to a quiet title action, wherein a party may prevail only on the strengths of their own title and not through the weakness of their adversary's title. **Baker v. Benedict,** 92 N.M. 283, 587 P.2d 433 (1978); **Jackson v. Hartley,** 90 N.M. 428, 564 P.2d 992 (1977); **Lerma v. Romero,** 87 N.M. 3, 528 P.2d 647 (1974); **Heron v. Conder,** 77 N.M. 462, 423 P.2d 985 (1967). In the instant case, the Gallegos' have no title or interest in the property. Thus, they can raise no claim against the title of Quinlan. Summary judgment against the Gallegos' was proper for the reasons stated. We do not reach the merits of Quinlan's title.

**{9}** We affirm.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-068**

**Filing Date: June 18, 1980**

**Docket No. 12,322**

**HOUSTON LUMBER COMPANY,**

**Plaintiff-Appellee,**

**v.**

**JIMMY RICHARD SKAGGS, ET AL.,**

**Defendants-Appellants.**

**Appeal from the District Court of Curry County, Nieves, District Judge.**

Sommer, Lawler, Scheuer & Simons
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Ted L. Hartley
Lyle Walker
Fred Tharp, Jr.
Richard M. Snell
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Attorneys for Appellants.

No Appearance for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** On June 30, 1977, appellant Sandia Savings loaned Jimmy Richard Skaggs $37,000 for the construction of a home on Skaggs' property. Sandia Savings secured the loan by taking a construction loan mortgage on the property. Skaggs hired Jim Burnett, a contractor, to build the house, which he did with the aid of subcontractors and materialmen, including Houston Lumber Company.

**{2}** On November 28, 1977, Sandia Savings simultaneously released the construction loan mortgage and filed a permanent loan mortgage. Houston Lumber and others had not been paid for all the labor and materials they had put into the project and instituted an action to foreclose their mechanic's and materialmen's liens. The trial court found that the advances made by Sandia Savings to Skaggs for payment of construction costs were not used for that purpose. The court further found that Sandia Savings never made any attempt to determine how the advances were being spent or whether construction debts were being paid. The trial court found:

> At the time of the final disbursement of the construction loan, and at the time of the recording of the permanent loan, the defendant Sandia knew, or in the exercise of ordinary and reasonable care should have known, that none of the proceeds of the construction loan had been used for the purposes for which it was intended, and that each of the lien claimants was unpaid and had the right to perfect each separate inchoate lien against the property.

**{3}** The court concluded that when Sandia Savings released the construction loan mortgage it ceased to be a recorded mortgage at that point and Sandia Savings lost its priority. The court also concluded that Sandia Savings was negligent in disbursing the construction funds and thereby had damaged the lien claimants.

**{4}** We reverse the trial court and hold that Sandia Savings' senior priority status was not lost to junior lienholders by virtue of its release of the interim construction loan mortgage and simultaneous taking of a permanent mortgage. We adhere to the rule followed in other jurisdictions that the

> cancellation of a mortgage on the record is not conclusive as to its discharge, or as to the payment of the indebtedness secured thereby. And **where the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien** unless the circumstances of the transaction indicate this to have been his intention, or such intention upon his part is shown by extrinsic evidence. (Emphasis added & citation omitted.)

**Hadley v. Schow,** 146 Neb. 163, 18 N.W.2d 923, 926 (1945), quoting from 33 A.L.R. 149 (1924). **See also Guleserian v. Fields,** 351 Mass. 238, 218 N.W.2d 397 (1966); **Larson Cement Stone Co. v. Redlim Realty Company,** 179 Neb. 134, 137 N.W.2d 241 (1965); **Kellogg Bros. Lumber v. Mularkey,** 214 Wis. 537, 252 N.W. 596 (1934).

**{5}** The question is whether there is sufficient evidence to support the trial court's finding that "equities" exist in favor of Houston Lumber, and if they are sufficient to justify subordinating Sandia Savings' priority to Houston Lumber's junior claims.

**{6}** The trial court made the following finding concerning "paramount equities":

> The filing of the permanent loan mortgage released the construction loan mortgage. As to the priority of the various encumbrances, the equities in the present case are in favor of the lien claimants, who should be granted lien priorities superior to the permanent loan held by the defendant Sandia.

**{7}** We hold that this finding was not sufficiently supported by the evidence.

**{8}** The record indicates that the Sandia Savings mortgage attached prior to any work being done on the property. Houston Lumber had worked with the contractor prior to the Skaggs project and readily advanced him credit without a credit check. Additional credit was extended even though the contractor did not pay any of his monthly bills. Houston Lumber did not know that the construction loan had been released and replaced by a permanent financing arrangement. The majority of the work had been completed prior to the change of financing. There is no showing that Houston Lumber detrimentally relied on the release in any way. Therefore, we fail to see how the paramount equities favor Houston Lumber.

**{9}** The issue of "paramount equities" was discussed in **Kellogg Bros. Lumber v. Mularkey, supra.** There the facts were essentially similar to those involved here, in that an existing mortgage was released and simultaneously renewed. The mechanic's and materialmen's liens had attached prior to the release and renewal of the first mortgagee. The lienholder argued that the paramount equities existed in its favor because the mortgagee was negligent in failing to discover the existence of its mechanic's and materialmen's liens. The court rejected that argument and held that a negligent mortgagee would only be denied relief as against persons who had acquired superior equities by making advances subsequent to and in reliance upon the satisfaction of the original mortgage. The court failed to see how the equities favored the lienholder inasmuch as it had not detrimentally relied upon the release of the mortgage nor would it be placed in any worse position if the priority of the released mortgage attached to the renewal mortgage. We agree with this reasoning.

**{10}** The trial court found that Sandia Savings was negligent in its management of the loan—apparently for lending money to Skaggs who in turn contracted with Burnett, a builder heading for bankruptcy. Even if Sandia Savings were negligent, this does not impose upon it any greater duty to ascertain Burnett's solvency and reliability than rests with Houston Lumber. Nor does it relieve Houston Lumber of any responsibility for its own credit practices. Houston Lumber may have been in a better position to have anticipated problems with the contractor as it had personal dealings with him.

**{11}** Under these facts, it cannot be concluded that paramount equities favor Houston Lumber.

**{12}** For these reasons, we reverse.

**{13}** **IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-072**

**Filing Date: June 24, 1980**

**Docket No. 12,782**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**ANDREW ANGELO RUFFINO,**

**Defendant-Appellant.**

**Appeal from the District Court of Bernalillo County, Stowers, District Judge.**

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Santa Fe, New Mexico

Attorneys for Appellee.

## OPINION

**PAYNE, Justice.**

**{1}** Defendant Andrew Ruffino was convicted for the first-degree murder of Don Johnson. He appeals claiming two errors. During the trial the court denied Ruffino's motion to suppress evidence taken in the search of his car. Ruffino also claimed prejudice because of statements made by the assistant district attorney during closing argument. We affirm.

**{2}** On February 26, 1979, Officer Quintana of the Albuquerque Police Department was called to assist in the impoundment of a motor vehicle belonging to Ruffino, after Ruffino had been arrested on a minor charge. Pursuant to police regulations, Officer Quintana began to inventory the contents of the car prior to its being towed. He first inventoried the interior of the car and then using the keys, obtained by another officer from Ruffino, opened and inventoried items in the trunk. The items in the trunk included grocery bags, clothing, a radio, repair items and a twelve-gauge shotgun with shells. The inventory completed, Officer Quintana returned all items to the trunk and locked the car. The car was then towed to a wrecking yard and secured. Later Officer Quintana returned with a search warrant and seized the shotgun and shells. Prior to the inventory search of the car, Officer Quintana had no knowledge or reason to suspect that Ruffino had been involved in any killing or that the search would produce items that would so implicate him.

**I.**

**{3}** The inventory search[1] of Ruffino's car was done without a warrant. Warrantless searches are permissible under the Fourth Amendment, as applied to the states by the Fourteenth Amendment, if they fall within one of the exceptions to the warrant requirements. Three of the exceptions, plain view, probable cause plus exigent circumstances, and search incident to a lawful arrest, were set forth in **State v. Gorsuch**, 87 N.M. 135, 529 P.2d 1256 (Ct. App. 1974). We also recognize at least three others, consent (**State v. Bidegain**, 88 N.M. 384, 540 P.2d 864 (Ct. App.

[1] Although some courts have held that a mere inventory search of a vehicle is not a search under the Fourth Amendment, **Haerr v. United States**, 240 F.2d 533 (5th Cir. 1957); **see State v. All**, 17 N.C. App. 284, 193 S.E.2d 770, 772 (1973), **cert. denied,** 414 U.S. 866, 94 S. Ct. 51, 38 L. Ed. 2d 85 (1973), the rule adopted by this Court is that it is a search under the Fourth Amendment but that it falls within an exception to the warrant requirement.

1975)), hot pursuit (**State v. Moore**, 92 N.M. 663, 593 P.2d 760 (Ct. App. 1979), **rev'd on other grounds**, 88 N.M. 466, 541 P.2d 971 (1979)), and inventory searches (**State v. Vigil**, 86 N.M. 388, 524 P.2d 1004 (Ct. App. 1974), **cert. denied**, 86 N.M. 372, 524 P.2d 988 (1974), **cert. denied**, 420 U.S. 955, 95 S. Ct. 1339, 43 L. Ed. 2d 432 (1975)).

**{4}** The overwhelming majority of state and federal courts have concluded that inventory searches are constitutionally permissible. See, **South Dakota v. Opperman**, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976), for a comprehensive listing of state and federal cases. Because of the inherent mobility of vehicles, inventory searches of cars have been upheld, where similar searches of houses, or other fixed locations have not. **See Opperman, supra; Cardwell v. Lewis**, 417 U.S. 583, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974); **Cady v. Dombrowski**, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). There is a reduced expectation of privacy in cars, **see Opperman, supra**, and police officers have "extensive, and often noncriminal contact with automobiles [which] will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband." (Citation omitted.) **Dombrowski** at 442, 93 S. Ct. at 2528. This contact reduces the expectation of privacy in automobiles. **Opperman** at 368, 96 S. Ct. at 3096.

**{5}** We accept the following requirements for an inventory search: (1) The vehicle to be inventoried must be in police control and custody. **Dombrowski, supra; State v. Vigil, supra**. Custody of the vehicle must be based on some legal ground and there must be some nexus between the arrest and the reason for the impounding. **Preston v. United States**, 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964);[2] **United States v. Lawson,** 487 F.2d 468 (8th Cir. 1973). (2) The inventory must be made pursuant to established police regulations. **See Opperman, supra; Dombrowski, supra**. Although **Lawson, supra**, held that the existence of police regulations should have no bearing in determining the reasonableness of the search, such regulations serve to control and proscribe the limits of such searches. (3) Searches must be reasonable. U.S. Const. Amend. IV; **Opperman, supra; Cooper v. California**, 386 U.S. 58, 86 S. Ct. 1348, 16 L. Ed. 2d 357 (1967). Generally courts have upheld inventory searches as reasonable if they are made to further one of two purposes, either the protection of the owner's property (**United States v. Mitchell**, 458 F.2d 960 (9th Cir. 1972)), or to protect police from false claims or potential danger (**Cooper, supra; United States v. Kelehar**, 470 F.2d 176 (5th Cir. 1972)). If during an inventory search evidence of a crime is discovered, a search warrant should normally be obtained prior to seizing the evidence. **See Dombrowski, supra**.

**{6}** We hold that the initial search was valid and also hold that the entry into the trunk was equally valid. **Dombrowski, supra; United States v. Edwards**, 577 F.2d 883 (5th Cir. 1978), **cert. denied**, 439 U.S. 968, 99 S. Ct. 458, 58 L. Ed. 2d 427 (1978); **State v. Vigil, supra=. But see Larson, supra. Vigil** held that items need not be in plain sight to be subject to an inventory search. To forbid entry into trunks as part of an inventory search would frustrate the very purpose of the inventory, since the trunk is a likely place for valuables to be stored.

**II.**

**{7}** The second issue to be decided by this Court is whether certain statements made by the prosecutor during closing argument so prejudiced the jury as to require a new trial. We feel they did not.

**{8}** Although several allegedly improper statements are complained of, only one was objected to at trial. This Court has consistently held that unless a timely objection is made to an allegedly improper comment it will not be reviewed. **See State v. Seaton**, 86 N.M. 498, 525 P.2d 858 (1974); **State v. Riggsbee**, 85 N.M. 668, 515 P.2d 964 (1973); **State v. Victorian**, 84 N.M. 491, 505 P.2d 436 (1973). Only one statement by the prosecutor is reviewable as having been objected to.

[2] That case has been severely limited in its holding by **Dombrowski, supra**.

It is argued that this statement by the prosecutor[3] involved three errors: (1) He referred to the defendant's failure to testify, (2) he referred to his failure to present witnesses, and (3) he indicated a personal belief that the defendant was guilty.

**{9}** Generally, reference by the prosecutor to the defendant's silence will be reversible error. As stated in **State v. Lara**, 88 N.M. 233, 236, 539 P.2d 623, 626 (Ct. App. 1975), following the precedent established in **United States v. Hale**, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975), "we will no longer weigh the prejudicial impact of improper questions concerning defendant's silence. If defendant's silence lacks significant probative value, any reference to defendant's silence has an intolerable prejudicial impact requiring reversal." While we recognize and accept the foregoing principle, we also recognize that the defense cannot with impunity refer to their own lack of testimony. The defendant here concedes in his reply brief that the reference by the prosecutor to the defendant's failure to testify was invited by his own closing argument. That the prosecutor can refer to the defendant's failure to testify if the door is opened by the defense, is well supported by case law. **See State v. Gutierrez**, 78 N.M. 529, 433 P.2d 508 (Ct. App. 1967); **State v. Peris**, 76 N.M. 291, 414 P.2d 512 (1966).

**{10}** The only remaining question is whether the reference to the defendant's failure to call witnesses or the indication of the prosecutor's personal belief of the defendant's guilt, have the cumulative effect of prejudicing the jury. We hold that it did not.

**{11}** While the reference to personal belief in closing argument is of questionable ethical propriety, it is not always reversible error. See **State v. Seaton, supra; State v. Polsky**, 82 N.M. 393, 482 P.2d 257 (Ct. App. 1971), **cert. denied**, 82 N.M. 377, 482 P.2d 241 (1971). However, given the proper factual setting, it may be. **See State v. Leyba**, 89 N.M. 28, 546 P.2d 876 (Ct. App. 1976), **cert. denied**, 89 N.M. 206, 549 P.2d 284 (1976).

**{12}** The reference to the defendant's failure to call a witness was not so extreme, in this case, as to constitute reversible error. The prosecutor, as well as the defense, has reasonable latitude in closing arguments, **State v. Riggsbee, supra; State v. Pace**, 80 N.M. 364, 456 P.2d 197 (1969), and the trial court has wide discretion in dealing with and controlling closing argument. **State v. Pace, supra**. Here the statements, neither individually nor cumulatively, reached the level of prejudicial error, especially in view of the fact that defense counsel opened the area for discussion and the trial court gave adequate warnings and instructions. **See 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).

**{13}** We affirm.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

[3] "Mr. Taylor [defense counsel] then tells you that Angelo Ruffino stands here telling you that he didn't do the crime—he didn't commit the crime. First of all, he's not standing and second of all, he hasn't told you anything. Now let me tell you something: Mr. Taylor tells you that his client didn't testify in this case because there wasn't anything he could have told you. How about Rosie? Back, uh, when he was arrested, the person he was with—where's Rosie? She's not here. She didn't testify. He didn't testify because he's guilty, that's why. And not because he didn't have any evidence.

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-073**

**Filing Date: June 26, 1980**

**Docket No. 13,025**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**LEE AUTRY MOORE,**

**Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

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Attorneys for Petitioner.

Michael Dickman
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Attorney for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** The defendant, Lee Autry Moore, was convicted of aggravated burglary, two counts of criminal sexual penetration in the second degree, larceny of less than one hundred dollars and false imprisonment. The Court of Appeals reversed on the basis of possible prejudice from the admission into evidence of improper testimony. We reverse only as to the disposition of the case and sustain the conviction of the trial court.

**{2}** The following questions are raised on certiorari: (1) is the testimony of a rape victim concerning her mental state following the rape admissible, and (2) was the admission of that testimony prejudicial or harmless error.

**{3}** We will not disturb the Court of Appeals' decision that the victim's testimony, as to the effects of the rape on her, was improperly admitted by the trial court. The defendant's objection was properly based on N.M.R. Evid. 403, N.M.S.A. 1978, and should have been sustained. There was little, if any, probative value to the challenged evidence and it might have had possible prejudicial effect. **See State v. Hogervorst**, 90 N.M. 580, 566 P.2d 828 (Ct. App. 1977), **cert. denied**, 90 N.M. 636, 567 P.2d 485 (1977). However, we hold that under the facts of this case the improper admission of that testimony was harmless error.

**{4}** For an error by the trial court to be considered as harmless, there must be: (1) substantial evidence to support the conviction without reference to the improperly admitted evidence, (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear so miniscule that it could not have contributed to the conviction, and (3) no substantial conflicting evidence to discredit the State's testimony. **State v. Day**, 91 N.M. 570, 577 P.2d 878 (Ct. App. 1978), **cert. denied**, 91 N.M. 491, 576 P.2d 297 (1978); **State v. Self**, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975).

**{5}** It is difficult to conceive of a more thorough, complete, and convincing array of testimony than was presented in this case. Here, the victim was confronted, bound, gagged and sexually abused by a man she identified as the defendant. She was in close physical contact with this man for over one hour in her well-lit home. In connection with her previous bank employment she had received special training in suspect remembrance and identification. She immediately gave the police an "extremely accurate description of the defendant, including the defendant's approximate age, hair, hair length, race, body shape, and the clothes he was wearing." This

description was so detailed that it included the location of a birthmark on the defendant's chest and the color of the defendant's undershorts. Armed with this description the police were able to identify and arrest the defendant later the same day.

**{6}** The victim positively identified the defendant as the man who raped her at a police show-up outside her home on the day of the alleged rape, even though she felt the police would try and trick her. She subsequently repeated this positive identification of the defendant two other times. Several parts of the victim's testimony were corroborated by the testimony of the responding and arresting police officers. To further corroborate her testimony, a calculator stolen from the victim's home was found on the defendant when he was arrested.

**{7}** The foregoing evidence is sufficient to support the verdict without reference to the improperly admitted testimony. No substantial conflicting evidence was presented. The record demonstrates an overwhelming volume of permissible incriminating evidence in comparison with the small amount of impermissible and potentially prejudicial evidence. The victim was on the witness stand for approximately three hours testifying and being cross-examined in great detail to the events leading up to the rape, the rape itself and its aftermath. The improperly admitted evidence consisted of testimony which lasted less than two minutes. We recognize that a trial can be prejudiced by testimony lasting but a fraction of a second, but here that was not the case. The disparity in time only demonstrates the overwhelming volume of the permissible testimony. The permissible evidence was so strong that it is inconceivable that the small amount of impermissible testimony would have affected the jury's verdict.

**{8}** As stated by Judge Hernandez in his dissenting opinion in the Court of Appeals, quoting from **Lutwak v. United States**, 344 U.S. 604, 619, 73 S. Ct. 481, 490, 97 L. Ed. 593 (1953), "[a] defendant is entitled to a fair trial but not a perfect one." Here the defendant did receive a fair trial. The evidence against him was convincing and overwhelming.

**{9}** We reverse.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**DAN SOSA, JR.,**
**Chief Justice, dissenting**

**DISSENT**

**SOSA, Chief Justice, dissenting.**

**{11}** I respectfully dissent.

**{12}** The evidence which was admitted at trial, over objection, concerned the effects the rape has had on the victim's life. It was clearly not probative of the guilt or innocence of the defendant. Defendant's objection was based on N.M.R. Evid. 403, N.M.S.A. 1978:

> Although relevant, evidence may be excluded if its probative value of is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

The prejudice inherent in the evidence substantially outweighed any probative value, and the evidence should not have been admitted.

**{13}** Though evidence of guilt was great in this case, I believe that prosecutors should nonetheless conform to legal standards in obtaining

convictions. There is no need, especially in a case with overwhelming evidence of guilt, to resort to tactics which unfairly prejudice a jury. Convictions should not be obtained at any cost, but should be obtained in accordance with the rules of evidence.

**{14}** I would give the defendant a new trial, excluding irrelevant and prejudicial evidence.

**DAN SOSA, JR.,**
**Chief Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-086**

**Filing Date: August 11, 1980**

**Docket No. 12,833**

**SHED INDUSTRIES, INC.,**

**Plaintiff-Appellant,**

**v.**

**DAVID KING, ET AL.,**

**Defendants-Appellees,**

**v.**

**THE BANES COMPANY,**

**Plaintiff-in-Intervention-Appellee.**

**Appeal from the District Court of Santa Fe County, Lorenzo F. Garcia, District Judge.**

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**OPINION**

**PAYNE, Justice.**

**{1}** The State of New Mexico, through its Department of Finance & Administration, let to bid a one year price agreement for the purchase of portable metal classroom buildings. Shed Industries submitted a base bid of $1,440,000.00 and the Banes Company submitted a bid of $1,474,820.00. The contract was to be awarded to the bidder with the lowest bid price. The bid instructions indicated that the base bid price was to be based on items A through D of the bid request. Due to an error in its bid preparation, Shed placed the costs for loading and unloading the buildings that should have been in items A through D into another section of its bid under item I. When the bids were opened and inspected the error was discovered by the state and the amount of the error was added to Shed's bid, raising its bid to $1,487,760.00. This caused Banes to be the low bidder and to receive the award. Shed brought suit in the lower court, contending that its bid was both low and responsible. Banes sought for and received permission to intervene. After a trial without a jury, the lower court entered judgment for the State and dismissed Shed's complaint. We affirm.

**{2}** Two major issues are raised on appeal: (1) has Shed waived its right to have this Court review the lower court's finding of fact, and (2) was Shed the low and responsible bidder.

**I.**

**{3}** Shed challenges only the trial court's finding of fact no. 24. It is clearly established by case law that "findings that are not challenged are binding upon this Court on appeal." **Winrock Enter. v. House of Fabrics of N.M.,** 91 N.M. 661, 663, 579 P.2d 787, 789 (1978); **State Ex Rel. N.M. Water Qual. C.C. v. City of Hobbs**, 86 N.M. 444, 525 P.2d 371 (1974). Therefore, all facts in findings one through 23 are considered admitted and are binding on this Court. There are unchallenged

facts contained in findings one through 23 that are inconsistent with Shed's claim that it is the low and responsible bidder. There is also evidence in the record to show that Shed may have waived its right to challenge finding no. 24 because of its failure to file requested findings of fact and conclusions of law or to timely object to those of the court. **See Wagner Land and Investment Co. v. Halderman**, 83 N.M. 628, 495 P.2d 1075 (1972). Even if all the correct procedural steps had been followed by Shed, there is substantial evidence to support the trial court's finding that Shed was neither the low nor responsible bidder.

**II.**

**{4}** The contract is regulated by the Public Purchases Act, Sections 13-1-1 to 13-1-27, N.M.S.A. 1978 (1979 Cum. Supp.). The Act states as a bid requirement "the central purchasing office shall purchase all materials and services by issuing purchase orders based on the lowest responsible bid. . . ." § 13-1-11(A). Responsible bid is defined as "a written offer to furnish materials or services in conformity with standards, specifications, delivery terms and conditions and other requirements established by the user or central purchasing office." § 13-1-2(H). The Shed bid did not conform with the "standards, specifications . . . and conditions" of the request for bids in two regards. Shed failed to include costs for loading and unloading the portable buildings in its base bid price. Shed also filed to use state minimum wage standards in figuring its bid as called for in the bid request.

**{5}** Shed argues that the misplaced building loading charges should not affect the responsibleness of its bid. It claims that it would be "obligated to perform the contract including loading charges for the base price of $1,440,000.00." It also asserts that the "erroneous addition of loading charges to item I by Shed in preparing its bid would not affect its base price nor give [it] any competitive advantage over the other bidders." We disagree.

**{6}** The trial court found, and Shed concedes, that the loading costs should have been included in the bid price. The failure to include them in items A through D, on which the bid price was based, was not in conformity with the bid specifications. Had Shed been awarded the contract, it is not unreasonable to assume that the state would either have had to pay the loading charges of bring suit to force Shed to perform at the bid price. Either option would have resulted in raising the cost of the contract and defeating the goal of the Public Purchases Act to award the contract to the lowest responsible bidder. To allow bidders to hide costs in bids that are not reflected in their bid price would result in manipulations by bidders seeking to controvert the protections of the Public Purchases Act.

**{7}** When the state defendants discovered the erroneously misplaced loading charges they sought to bring Shed's bid into conformity with the specifications of the bid request by adding the costs to Shed's bid price. This made the Shed bid, at least in regards to this irregularity, responsible; but it also raised Shed's bid price above that of Banes. If the loading costs were left where Shed erroneously placed them, then the bid was not responsible.

**{8}** In failing to incorporate the state's public works minimum wage rates in its bid, Shed's bid again was not responsible. The trial court found the bid instructions required a successful bidder to adhere to Albuquerque's public works minimum wage rates, and that Shed did not incorporate them in its bid. There is substantial evidence to support these findings. The trial court was correct in its conclusion that Shed was neither the low nor the responsible bidder.

**{9}** All other issues are moot.

**{10}** We affirm.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**JAMES L. BROWN,**
**District Judge**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-088**

**Filing Date: August 12, 1980**

**Docket No. 12,910**

**AALCO MANUFACTURING COMPANY, A FOREIGN CORPORATION,**

**Petitioner,**

**v.**

**CITY OF ESPANOLA, A MUNICIPAL CORPORATION,**

**Respondent.**

**Original Proceeding on Certiorari.**

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**OPINION**

**PAYNE, Justice.**

**{1}** Peggy Sue Sanchez and her mother sued the City of Espanola, Aalco Manufacturing Company and Tiano's Sporting Goods Store for damages arising from an accident in which a volleyball net standard fell and severely injured Peggy Sue's foot. The standard was manufactured by Aalco. Tiano's purchased the standard in the course of its business and sold it to the City of Espanola which used it in a city supervised recreation facility. A jury found the City liable for the injury under a negligence theory and found Tiano's and Aalco liable under strict products liability. Judgment was entered finding the three defendants jointly and severally liable.

**{2}** The defendants cross-claimed against each other and the court assessed one half of the judgment against the City. The other half was assessed jointly against Tiano's and Aalco, with Aalco being ordered to indemnify Tiano's for its portion of the assessment.

**{3}** The trial court's fifty-fifty split was based on its finding that the injury was proximately caused, both by the City's negligent use of the apparatus and by Aalco's defective manufacture of it. The court concluded that Aalco and the City were both active tortfeasors and should be considered as joint tortfeasors under the Uniform Contribution Among Tortfeasors Act (Uniform Act), Sections 41-3-1 through 41-3-8, N.M.S.A. 1978, whereas Tiano's is not a joint tortfeasor under the Act because its liability is purely technical, founded not on negligence but derived solely from strict liability. Hence, the court assessed one half of the judgment against Aalco and Tiano's as a single entity and the other half against the City.

**{4}** The City appealed the apportionment of the judgment, claiming it should pay only one third of the damages since there were three tortfeasors. The Court of Appeals agreed with the City and reapportioned the damages, requiring Aalco to pay two thirds and the City one third. Aalco's indemnification of Tiano's was not appealed. The Court of Appeals concluded that a defendant found liable under strict products liability is a joint tortfeasor under the Uniform Act and his liability is not merely technical but is founded on his failure to sell safe products to the public.

**{5}** The confusion in apportionment is generated by the fact that the doctrine of strict

liability and the Uniform Act are directed at different goals. The Uniform Act requires tortfeasors who share in causing an injury to share equally in paying for that injury. Its goal is equity among tortfeasors. The purpose behind strict products liability, on the other hand, is to allow an injured consumer to recover against a seller or manufacturer without the requirement of proving ordinary negligence. Its goal is to protect the injured consumer. As adopted by New Mexico in **Stang v. Hertz Corporation,** 83 N.M. 730, 497 P.2d 732 (1972), the Restatement (Second) of Torts § 402A (1965) accomplishes that goal by imputing fault for an injury caused by a product to the seller of that product, regardless of the presence or absence of negligence on his part. This is because "[i] n some cases the retailer may be the only member of that enterprise reasonably available to the injured plaintiff." **Vandermark v. Ford Motor Company,** 61 Cal.2d 256, 37 Cal. Rptr. 896, 391 P.2d 168, 171 (1964).

**{6}** We held in **Stang, supra,** that the doctrine of strict liability in tort was evolved to place liability on the manufacturer of the defective product as the party primarily responsible for the injury. This liability has been extended to the wholesalers and retailers of the defective product.[1] As stated in **Vandermark, supra:**

> Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.

37 Cal. Rptr. at 900, 391 P.2d at 172.

[1] Some courts have held contra. The Mississippi Supreme Court in **Sam Shainberg Company of Jackson v. Barlow,** 258 So.2d 242 (Miss. 1972), held, on facts essentially similar to those in the instant case, that the doctrine of strict liability in tort, § 402A of the Restatement of Torts Second, did not apply to non-negligent retailers. **See also R. Clinton Const. Co. v. Bryant & Reaves, Inc.,** 442 F. Supp. 838 (N.D. Miss. 1977).

**{7}** The extension of strict liability to non-negligent retailers provides two pockets from which the injured consumer can obtain relief, one being the usually local and more accessible retailer. The retailer may look to the manufacturer for indemnification for any loss he may suffer. This puts the risk of the manufacturer's insolvency on the retailer, but it is a risk that he is better able to foresee and protect against than the consumer.

**{8}** Imputing liability to brand the non-negligent retailer a joint tortfeasor under the Uniform Act may create an unjust result. The non-negligent retailer is bootstrapped from being only an insurer of the manufacturer's liability to the plaintiff into carrying a portion of the burden of unrelated torts.

**{9}** The doctrine of contribution is deeply rooted in the principles of equity, fair play and justice. **See e.g., Panichella v. Pennsylvania Railroad Company,** 167 F. Supp. 345 (W.D. Pa. 1958); **Stark v. Posh Construction Company,** 192 Pa. Super. 409, 162 A.2d 9 (1960); **Fisher v. Diehl,** 156 Pa. Super. 476, 40 A.2d 912 (1945). The Uniform Act must be interpreted in light of these principles. It is not equitable to require Aalco to pay two thirds of the judgment. As stated in **Larsen v. Minneapolis Gas Company,** 282 Minn. 135, 163 N.W.2d 755, 764 (1968):

> It does not appear equitable to require one defendant to pay two-thirds of the verdict where the jury has determined that there were two distinct negligent acts which combined to cause the accident and that the defendant's liability is based on its responsibility for only one of those acts.

In the instant case there are two active torts involved: first, that of Aalco in the manufacture of the defective product, and second, the negligence of the City. Tiano's liability arose without having committed an active tort.

**{10}** Had there been only the strict liability action, Aalco, as the party at the head of the distribution chain, would have had to bear the entire

financial burden of the judgment. This is equitable because, while the retailer may be strictly liable to the consumer, the ultimate economic loss should be shifted to the manufacturer whose "active" conduct caused the injury, barring independent conduct on the part of the retailer. **See Farr v. Armstrong Rubber Company,** 288 Minn. 83, 179 N.W.2d 64 (1970); **Kerr v. Corning Glass Works,** 284 Minn. 115, 169 N.W.2d 587 (1969); **see also** Jensvold, **A Modern Approach to Loss Allocation Among Tortfeasors in Product Liability Cases,** 58 Minn. L. Rev. 723 (1974). The presence of another tort and its tortfeasor does not change Aalco's and Tiano's liability. Aalco remains ultimately responsible economically for the strict liability tort. The City is ultimately liable for its negligence. Two different torts, and two active tortfeasors, supports a fifty-fifty split of the judgment.

**{11}** The Court of Appeals, by assessing one third of the damages against Tiano's and then requiring Aalco to indemnify, has effectively imputed a portion of the fault of the City to Tiano's and thence to Aalco, a result not intended in either § 402A or the Uniform Act. This application of the law would frustrate the intent of the Uniform Act since the more links in the chain of supply, the greater the disparity in payment between the active tortfeasors at either end of that chain. Under this theory, if there had been eight middlemen between the City and Aalco, Aalco would pay ninety percent and the City ten percent.

**{12}** We recognize that the passive-active distinction utilized by the trial court to apportion damages may also lead to inequities if the passive tortfeasor is not entitled to indemnification. For example, if Tiano's had not been indemnified by Aalco for whatever reason, the apportionment then would have been City fifty percent, Aalco twenty-five percent, and Tiano's twenty-five percent, not a uniform contribution as required by the Act.

**{13}** But, as stated in **Larsen, supra,** "[i]t does not seem reasonable that the [manufacturer] should ultimately be required to pay more of the verdict because the law has decreed that another must answer for his torts when he cannot." 163 N.W.2d at 765.

**{14}** For the reasons stated, we reverse the Court of Appeals and reinstate the district court judgment.

**{15} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**EDWIN L. FELTER,**
**Justice, not participating**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-094**

**Filing Date: August 29, 1980**

**Docket Nos. 11,988, 12,052**

**UNITED NUCLEAR CORPORATION,**

**Plaintiff-Appellee,**

**v.**

**GENERAL ATOMIC COMPANY,**

**Defendant-Appellant,**

**and**

**INDIANA & MICHIGAN ELECTRIC CO.,**

**Defendant-Appellee,**

**and**

**UNITED NUCLEAR CORPORATION,**

**Plaintiff-Appellee,**

**v.**

**GENERAL ATOMIC COMPANY,**

**Defendant-Appellant,**

**and**

**INDIANA & MICHIGAN ELECTRIC COMPANY,**

**Defendant-Appellee.**
**(Part 1 of 2)**

**Appeal from the District Court of Santa Fe County, Edwin L. Felter, District Judge.**

Motion for Rehearing Denied October 23, 1980

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**OPINION**

**PAYNE, Justice.**

**{1}** This is an appeal from a default judgment entered against General Atomic Company (GAC) in Santa Fe District Court for its alleged

willful and bad faith failure to comply with the court's discovery orders.[1]

**{2}** This case is by far the single largest litigation in the history of New Mexico, both in terms of the dollar value of the judgment, which approaches one billion dollars, and the sheer volume of the record, which contains more than 28,000 pages in the record proper, 13,000 pages of transcripts, thousands of documents, and over 100 depositions containing approximately 16,000 pages of testimony and 2,700 exhibits. The facts are largely disputed and are extremely complex. Although we begin with a general factual background and summary of the proceedings below, additional factual details are contained in the separate discussions of the issues raised on appeal.

**{3}** This action was instituted by United Nuclear Corporation (United) against GAC, a partnership made up of Gulf Oil Corporation (Gulf) and Scallop Nuclear Corporation (Scallop).[2] Scallop is a wholly-owned subsidiary of Dutch-Shell Oil Company. As amended, United's complaint sought a declaratory judgment that two contracts under which United was to supply approximately twenty-seven million pounds of uranium to GAC were void and unenforceable. The complaint alleged that GAC and Gulf committed fraud and economic coercion, breached their fiduciary duties to United, and violated the New Mexico Antitrust Act. United also contended that its performance under the contracts had been rendered commercially impracticable. GAC counterclaimed for actual and punitive damages for United's alleged violations of the New Mexico Antitrust Act, and for specific performance of the two contracts, or alternatively, for damages of almost eight hundred million dollars.

**{4}** GAC impleaded Indiana and Michigan Electric Company (I&M), a public utility company which provides electrical service to customers in the states of Indiana and Michigan. GAC contended that if United's obligations to supply uranium to GAC were excused, GAC's obligations to supply uranium to I&M from the supplies United was to deliver should also be excused.[3] I&M counterclaimed against GAC for specific performance and for other relief.

**{5}** The trial of this case began on October 31, 1977. It was terminated on March 2, 1978, when the trial judge entered a sanctions order and default judgment against GAC. The court found that GAC had exercised "the utmost bad faith in all stages of the discovery process." The court

[1] This case has been the subject of a number of previous decisions of this Court: **United Nuclear Corp. v. General Atomic Co.,** 93 N.M. 105, 597 P.2d 290 (1979) (upholding trial court's refusal to stay its proceedings pending arbitration), **cert. denied,** 444 U.S. 911, 100 S. Ct. 222, 62 L. Ed. 2d 145 (1979); **United Nuclear Corp. v. General Atomic Co.,** 91 N.M. 41, 570 P.2d 305 (1977) (upholding personal jurisdiction of trial courts) **rev'd General Atomic Co. v. Felter**, 90 N.M. 120, 560 P.2d 541 (1977) (upholding injunction prohibiting the parties from instituting related actions in other courts), **rev'd, General Atomic Co. v. Felter**, 434 U.S. 12, 98 S. Ct. 76, 54 L. Ed. 2d 199 (1977); and **United Nuclear Corp. v. General Atomic Co.,** 90 N.M. 97, 560 P.2d 161 (1976) (upholding personal jurisdiction of trial court over GAC). In addition, this Court refused to consider the issue of the disqualification of United's counsel as either an appeal from a final judgment or as a petition for an extraordinary writ (No. 11,469, June 29, 1977, and No. 11,484, July 1, 1977, respectively).

In addition to the two decisions mentioned above which were taken to the United States Supreme Court, that Court has had this case before it on at least three other occasions. On May 30, 1978, the Supreme Court held that the trial court could not enjoin GAC from proceeding with its right to arbitration against United. **General Atomic Co. v. Felter**, 436 U.S. 493, 98 S. Ct. 1939, 56 L. Ed. 2d 480 (1978). GAC applied for a stay of all proceedings in the trial court on the basis that the threat of sanctions under Rule 37 violated the act of state doctrine. This application was denied. **General Atomic Co. v. Felter**, 435 U.S. 920, 98 S. Ct. 1481, 55 L. Ed. 2d 514 (1978). After sanctions were imposed, GAC sought immediate review by the Supreme Court of the sanctions order and default judgment. This petition was also denied. **General Atomic Co. v. Felter**, 436 U.S. 904, 98 S. Ct. 2233, 56 L. Ed. 2d 402 (1978).

[2] This action was originally filed on August 8, 1975 in Santa Fe District Court. Both GAC and its constituent partners, Gulf and Scallop, were named as defendants in that case. The case was removed to federal district court by Gulf. On December 31, 1975, United voluntarily dismissed the case in federal court, and refiled it on the same day in Santa Fe State District Court, naming only the partnership as a defendant. It is this later case that is the subject of this appeal.

[3] Detroit Edison Company, another electric utility company, was also impleaded by GAC, but was dismissed as a party in March 1978 after it reached a settlement with GAC.

entered forty-eight recitals relating to GAC's discovery failures, twelve findings of fact as sanctions pursuant to N.M.R. Civ. P. 37(b)(2)(i), N.M.S.A. 1978, and a default judgment under N.M.R. Civ. P. 37(b)(2)(iii), N.M.S.A. 1978.[4] The judgment invalidated United's uranium supply contracts with GAC, declared that United had no other obligations to deliver uranium to GAC, and struck GAC's defenses, counterclaims and cross-claims.

**{6}** A hearing on damages followed, after which the court entered a final judgment, amended final judgment, and second amended final judgment. In addition to invalidating the United-GAC contracts, the court awarded damages to United of $8,264,723 (reduced by an offset for prepayments that had been made) and to I&M of $15,950,752. The court also granted specific performance of I&M's contract for the supply of five million pounds of uranium from GAC.

**{7}** GAC appeals from the default judgment, arguing ten main grounds for reversal. We have consolidated these points in this opinion into the following five sections: (1) The propriety of the court's discovery orders; (2) GAC's noncompliance with those orders and the propriety of the sanctions entered for noncompliance; (3) the court's failure to disqualify United's counsel; (4) the trial judge's refusal to disqualify himself; and (5) the propriety of the remedies.

**{8}** Before turning to the examination of the issues on appeal, we think it appropriate to comment on the conduct of all parties in these appellate proceedings. We have been faced with the difficult task of wading through an avalanche of motions and papers, much of which has done little to add to our understanding of this case or to expedite the ultimate resolution of it. Perhaps because of the longevity of this litigation, the acrimony which marked the proceedings in the trial court, or the monetary value of the judgment at stake, the over six hundred pages of appellate briefs filed, as well as the arguments of the attorneys in the hearings in this Court, have been filled with unnecessary "invectives, maledictions, and denunciations which we ignore." **State of Ohio v. Arthur Andersen & Co.,** 570 F.2d 1370, 1372 (10th Cir. 1978), **cert. denied**, 439 U.S. 833, 99 S. Ct. 114, 58 L. Ed. 2d 129 (1978).

**{9}** After having received the permission of this Court to file briefs which exceed by several times the length generally permitted by the Rules of Appellate Procedure, N.M.R. Civ. P. App. 9(k)(4), N.M.S.A. 1978, GAC and United resorted to the practice of adding additional argumentative material in a device called an appendix, without requesting or receiving permission from this Court. N.M.R. Civ. App. 9(b) and (k)(4). In addition to argument, the parties inserted other material from outside the record in these appendices, including a newspaper article and correspondence, contrary to the rules, N.M.R. Civ. App. 9(b), and to prior decisions of the Court. **General Services Corp. v. Board of Com'rs**, 75 N.M. 550, 552, 408 P.2d 51, 53 (1965); **Porter v. Robert Porter & Sons, Inc.,** 68 N.M. 97, 101, 359 P.2d 134, 137 (1961). These we have also ignored.

**{10}** Although the briefs of all three parties are articulate forensic efforts, each, in one form or another, has failed to fully comply with the rules of this Court. Neither the significance of the issues involved nor the magnitude of the dollars at stake excuses noncompliance with those rules. We take this opportunity to serve warning on the bar that this Court fully expects compliance with its rules of procedure in general and its specific orders in particular, and will not hesitate to impose the sanctions provided for in N.M.R. Civ. App. 31, N.M.S.A. 1978, in order to secure adherence to the rules and to our orders.

## I. FACTUAL BACKGROUND

**{11}** To understand the issues in this appeal we must begin with a more detailed factual summary than is usual. Many entities have interacted to create the conditions from which this case arose.

[4] In 1979, most of the specific New Mexico Rules of Civil Procedure with which we are concerned were amended (e.g., Rules 26, 33, 34, 37). Because this case was decided in the court below prior to the adoption of these amendments, all citations in this opinion are to the former rules.

## A. THE GULF URANIUM ORGANIZATION

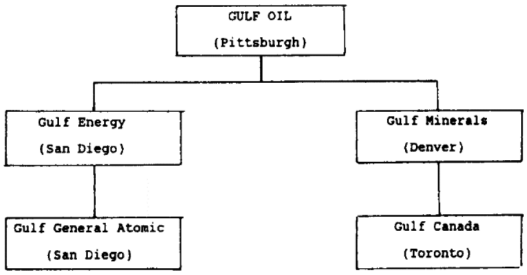
**{12}** The principal contract at issue here was entered into by Gulf and United. GAC's predecessor was at one time a wholly-owned subsidiary of Gulf. Most of United's allegations against GAC involve alleged wrongdoing by Gulf. Therefore, an understanding of the issues on appeal must begin with a background of Gulf's activities in the uranium market.

**{13}** In 1967, Gulf entered the uranium business by purchasing a subsidiary of General Dynamics known as General Atomic. General Atomic, which was a manufacturer of nuclear reactors, was renamed Gulf General Atomic and was operated as a subsidiary of Gulf located in San Diego, California.

**{14}** In 1970, Gulf formed a new division, called Gulf Energy and Environmental Systems (Gulf Energy). Gulf General Atomic became a part of Gulf Energy. Gulf Energy was the Gulf entity involved in the marketing of uranium and the manufacture of nuclear reactors. Gulf was the only manufacturer in the United States of high temperature gas cooled reactors.

**{15}** Beginning in 1967, Gulf undertook the exploration and development of uranium ore bearing properties. A Gulf division located in Denver, Gulf Minerals Resources Company (Gulf Minerals), was charged with this, the production end, of Gulf's uranium business. One of Gulf's first substantial uranium discoveries was made in 1967 in the Rabbit Lake area of Canada. Another wholly-owned Gulf subsidiary, Gulf Minerals Canada Limited (Gulf Canada), was responsible for the development of the Rabbit Lake uranium project. Gulf Minerals had administrative responsibility in the Gulf organization for Gulf Canada's operations.

**{16}** The following chart outlines the organization, as of 1971, of those aspects of Gulf's uranium business operations which are essential to an understanding of this case.




**{17}** In addition to its Canadian uranium reserves, Gulf, through Gulf Minerals, began to acquire substantial uranium reserves in the United States. By 1971, it had acquired the Mt. Taylor reserves in New Mexico, which contain the largest body of uranium ore in the United States. Through Gulf Energy, Gulf also began to purchase substantial quantities of uranium on the open market from other uranium producers. Two of such purchase agreements, those Gulf and GAC entered into with United, are the principal subjects of this litigation.

## B. THE CONTRACTUAL RELATIONSHIPS OF THE PARTIES

**{18}** United is a major New Mexico uranium producer. Much of the uranium it produces is used in the nuclear reactors of public utilities. In the 1960's, United entered into the fuel fabrication market. Fuel fabrication is the process by which enriched uranium is manufactured into fuel clusters to power nuclear reactors.

**{19}** In 1966, United entered into a contract to sell nuclear fuel to Commonwealth Edison, a commercial utility. It later contracted to sell fuel to I&M, and signed letters of intent to deliver fuel to Detroit Edison, Duke Power, Yankee Atomic and Consolidated Edison, all of which are also commercial utility companies. United also signed a letter of intent with Commonwealth Edison to supply it with additional fuel.[5]

[5] One issue in this case is whether United's so-called letters of intent with the utilities were actually non-binding letters of intent, or rather, binding contracts. We will refer to them here as letters of intent, and discuss the legal nature of them in Section II B, **infra**, of this opinion. However, collectively, the

**{20}** By 1970, United's commercial nuclear fuels business required more capital than United had or could obtain on its own. In that year, United entered into negotiations with Gulf, through Gulf Energy, to form a joint commercial light water reactor fuel fabrication business. For its part, Gulf was interested in such a business as an outlet for its uranium supply and as an opportunity to enter the fuel market for such reactors, which might provide a hedge for its high temperature reactor business.

**{21}** The negotiations between Gulf and United culminated in July 1971, with the formation of a jointly owned corporation called Gulf United Nuclear Fuels Corporation (Gulf-United). The purpose of Gulf-United was to manufacture and sell nuclear fuel for commercial power reactors. United contributed its expertise in the business and some of its facilities and employees. Gulf was to contribute capital. United assigned its rights under the utility contracts to Gulf-United, thereby obligating the new corporation to supply the utilities with uranium. United in turn agreed to supply the new corporation with the uranium needed to fulfill the utility contracts. This latter agreement will be referred to as the 1971 Supply Agreement. Gulf was to supply Gulf-United with one-half of the uranium required for each existing order and letter of intent, but, upon the advice of United's counsel, this obligation was made an option. Gulf owned fifty-seven percent of the capital stock of Gulf-United, and United owned the remainder.

**{22}** From 1971 to 1973, Gulf-United was jointly operated by Gulf and United. During this period Gulf-United formalized two of the letters of intent. For reasons that are disputed, Gulf-United's business did not prosper. In the summer of 1973, United agreed to sell its interest in Gulf-United to Gulf (the Buyout Agreement). United and Gulf then entered into a new contract, the 1973 Supply Agreement. Pursuant to this contract, which cancelled and rescinded the 1971 Supply Agreement, United agreed to sell Gulf-United the uranium needed to supply the utilities. Gulf-United continued to be obligated to supply the utilities with uranium. Thus, the 1973 Supply Agreement basically replaced the 1971 Agreement, with an upward adjustment in the price.

**{23}** In November 1973, Gulf-United was merged into Gulf. Gulf then entered into a partnership with Scallop. That partnership, known as General Atomic Company (GAC), is the defendant here. Gulf transferred Gulf Energy, including Gulf General Atomic to the new partnership. In the spring of 1974, Gulf transferred the Gulf-United business operation, including the utility contracts and the 1973 Supply Agreement, to GAC. GAC thus became obligated to perform the utility contracts and acquired the right to receive uranium from United. In essence, GAC simply took over the operations of Gulf Energy and Gulf-United.

**{24}** Later in 1974, the new partnership, GAC, entered into another contract with United, the 1974 Supply Agreement, whereby United became obligated to supply GAC with an additional three million pounds of uranium.

**{25}** United contends that Gulf entered into the formation of Gulf-United and the 1971 Supply Agreement as part of an attempt to monopolize the uranium market, and with the specific intent of eliminating United as a competitor in the fuel fabrication and uranium mining industries. United contends that Gulf fraudulently promised to supply Gulf-United with capital and one-half of the uranium needed for the utility contracts. United alleges that as part of this monopolistic scheme, Gulf refused to honor its obligations, refused to permit Gulf-United to buy uranium on the open market, and forced United to supply all of the uranium necessary to meet Gulf-United's needs. United argues that by deliberately mismanaging Gulf-United and withholding capital and uranium, Gulf successfully forced United to sell its interest in Gulf-United to Gulf at terms Gulf dictated and to execute the 1973 Supply Agreement. United also alleges that Gulf, acting through GAC, planned and attempted to negotiate out of its obligations to the utilities, and to then

formal contracts and the letters of intent will be referred to as the utility contracts.

resell the uranium which United was obligated to supply at prices that Gulf had fixed. Knowing that United was in desperate financial straits, Gulf and GAC are alleged to have sought to secure a security interest on United's Churchrock, New Mexico mine—the largest underground uranium mine in the United States—and the right to control production from that mine. GAC allegedly refused to give United any price relief. This impasse led to the filing of this case.

**{26}** All of the foregoing alleged actions are asserted to have been part of a larger conspiracy to control uranium reserves in the United States. United contends that Gulf sought to accomplish this feat by tying up vast quantities of uranium through the contracts it entered into between 1972 and 1974 with other American uranium producers, in addition to the 1973 and 1974 Supply Agreements with United, and by acquiring, and then delaying the production of, uranium from Gulf's enormous Mt. Taylor reserves.

## C. THE INTERNATIONAL URANIUM CARTEL

**{27}** Several months after this case was filed, United raised a new allegation—that Gulf's and GAC's monopolistic efforts were part of a worldwide conspiracy of certain international uranium producers to fix the prices, allocate the markets, and control the production of uranium. United's efforts to secure discovery of records relating to this international uranium cartel became the major focus of this litigation, and GAC's failure to supply cartel-related information was the principal basis for the sanctions order and default judgment entered by the trial court.

**{28}** The precise facts regarding the development and operation of the cartel are not completely clear, largely because full cartel-related discovery was not made in this case. However, several matters are well established.

**{29}** First, as GAC concedes, there was a uranium cartel made up of various international uranium producers, which operated from at least 1972 to 1975. Foreign governments, including those of Canada, South Africa, France and Australia, played some role in the formation and operation of the cartel. The nature of the roles played by those governments, particularly by the Canadian Government, is a disputed question in this case, the resolution of which is critical to the disposition of one of the major issues raised by GAC on appeal. We will examine this question is Section II C, **infra**, of this opinion.

**{30}** Second, it is established that Gulf, acting through Gulf Canada, was a member of the cartel no later than June 1972. It is also clear that the top executives of Gulf Energy, the immediate predecessor of GAC, were aware of the cartel and received information concerning its activities. At least two high-level officials of Gulf Energy attended one or more cartel meetings. All of these executives later became key personnel of GAC.

**{31}** Third, the basic purposes of the cartel are unquestionably clear. GAC's counsel stated to the trial court:

> The purpose of [the cartel] was to set terms and conditions of sale. It was to set floor prices. And it was to set quotas and divide up who could produce how much. They were going to restrict supply. **It was in its intention a cartel in every sense of the word**. (Emphasis added.)

**{32}** One of the Gulf attorneys who had advised Gulf that it was legal for it to join the cartel later told a Congressional subcommittee impaneled to investigate cartel activities: "There, of course, was never any doubt about what the 'cartel' intended to accomplish. It was to completely frustrate free competition." **International Uranium Cartel: Hearings Before the Subcomm. on Oversight and Investigation of the House Comm. on Interstate and Foreign Commerce**, 95th Cong., 1st Sess., Serial No. 95-95, p. 89 (1977) [hereinafter cited as **Hearings on International Uranium Cartel**].

**{33}** Fourth, between 1972, when the cartel apparently began, and 1975, when this suit was

filed, the price of uranium in the United States increased from approximately $6.00 per pound to approximately $40.00 per pound.

**{34}** Beyond these four established facts—the existence of the cartel, Gulf's active participation therein, the cartel's anticompetitive purposes, and the dramatic increase in uranium prices during the cartel's existence—there is little about the cartel that is not disputed by the parties. One of the principal disputes is whether the cartel has any relevance to the contracts at issue in this litigation, which will be discussed in Section II B, **infra**, of this opinion.

## D. HISTORY OF THE PROCEEDINGS IN THE TRIAL COURT

**{35}** In Section III A, **infra**, of this opinion we will discuss in detail the chronology of the proceedings in the court below in the context of analyzing GAC's efforts to comply with the court's discovery orders. At this point, however, it is necessary to provide a brief outline of those proceedings in order to facilitate an understanding of the overall posture of the case and the various issues on appeal.

**{36}** On December 31, 1975, United filed this action in Santa Fe District Court. On the same day, United served lengthy interrogatories on GAC. This set of interrogatories will be referred to as the First Set of Interrogatories. The interrogatories called for detailed information concerning the uranium and fuel fabrication businesses of Gulf, Scallop and GAC. Many of the interrogatories specifically asked for information from "the partnership and the partners." Neither the complaint nor the interrogatories specifically mentioned the international uranium cartel.

**{37}** On April 5, 1976, GAC filed the first of two sets of answers to the First Set of Interrogatories. The answers provided no information on the cartel and virtually no information on the separate uranium business activities of Gulf and Scallop. The trial court eventually found these answers to have been "wholly inadequate and evasive."

**{38}** During the summer of 1976, extensive discovery efforts were conducted by United. GAC produced its business records, but it did not produce documents which were in the separate possession of Gulf or Scallop. On September 23, 1976, the Canadian Government promulgated the Canadian Uranium Information Security Regulations, which prohibited the release of cartel information from Canada.[6] One week later, United pointed out for the first time that GAC had failed to produce documents from Gulf and Scallop. GAC then contended that it was not obligated to produce records which were in the separate possession of the partners. **See** Section II A, **infra**. The trial court rejected this argument on November 30, 1976. The court held that both the partnership and the partners were subject to its discovery orders, and it warned that sanctions would be imposed if either the partnership or the partners failed to comply with those orders.

**{39}** United then moved to compel production of partner documents and supplemental answers to the First Set of Interrogatories. GAC continued to assert that partner documents were not discoverable, and the court again rejected this argument at three different hearings in January 1977. It ordered GAC to provide supplemental answers and to produce partner documents by April 15, 1977.

**{40}** In February 1977, United moved to compel production of cartel-related documents Gulf had produced in other litigation. GAC resisted production of these documents, once again rearguing the question of partner discovery. GAC also suggested for the first time that United's counsel, who had represented Gulf until November 1976 on its operations at Mt. Taylor, might have to be disqualified in this case. **See** Section IV, **infra**. On March 1, 1977, for the first time GAC specifically asserted the Uranium Information Security Regulations were a bar to discovery of cartel information. At a hearing on March 7, the court reiterated its previous rulings that Gulf

[6] Can. Stat. O. & R. 76-644 (1976). The Regulations were promulgated pursuant to the Canadian Atomic Energy Control Act, 1970, Can. Rev. Stat. c. A-19. Pertinent portions of the original Regulations are set forth in n. 41, **infra**.

was subject to its discovery orders, granted United's motion to produce the cartel records, and again warned that sanctions, including a default judgment, would be imposed if good faith discovery efforts were not made. GAC then formally moved to disqualify United's counsel. The court denied this motion. In March 1977, I&M, which had been joined as a party in January 1977, filed claims against GAC, specifically asserting Gulf's cartel activities as a basis for the relief it sought. GAC's supplemental answers were filed on April 15. They made no mention of the cartel.

**{41}** In August 1977, United filed its Second Set of Interrogatories. This set was specifically addressed to the activities of the cartel. GAC filed objections to these interrogatories. The objections made no mention of the Uranium Information Security Regulations or any other Canadian secrecy laws. The court overruled most of the objections. GAC then filed answers to these interrogatories, which included the assertion that Canadian laws barred production of cartel documents.

**{42}** United moved to compel further answers to the interrogatories and the production of cartel documents, and to have sanctions imposed. The trial court granted the request for further answers. The court found that GAC had not acted in good faith regarding the production of cartel documents up to that time. It ordered GAC to produce cartel records to the extent lawful, and to the extent that it was unlawful, to seek a waiver of Canadian nondisclosure laws. The court again warned that sanctions would be imposed if its order was not complied with.

**{43}** GAC unsuccessfully sought permission from the Canadian Government to produce cartel documents located in Canada. GAC then submitted its second set of answers which did not identify any cartel documents located in Canada or contain information from such documents.

**{44}** Five days after the trial began, United again moved to compel the production of cartel documents and for sanctions for GAC's alleged discovery failures. At a hearing on November 8, 1977, the trial judge accused GAC of "stonewalling" information. The following day, GAC moved to disqualify the judge. The motion was denied. **See** Section V, **infra**. The trial court, after a hearing, found that GAC had deliberately housed cartel documents in Canada in an attempt "to court legal impediments" to their production. It also found that GAC had violated its prior order to identify cartel documents, and it again ordered such identification.

**{45}** In December 1977, United and I&M filed objections to GAC's second set of answers to the Second Set of Interrogatories and moved to compel further answers. The trial court granted this request. On February 1, 1978, GAC filed its third set of answers. Thereafter, United filed its fourth motion for a default judgment, in which I&M joined. The trial court granted the motion, and entered the sanctions order and default judgment which is the subject of this appeal. The trial court found all issues of liability against GAC and in favor of I&M and United. The Court found that GAC had acted in bad faith throughout the discovery process, and had "willfully, intentionally and in bad faith covered up" "highly relevant" information concerning the cartel and Gulf's role therein. The court said that GAC's answers to the First Set of Interrogatories were "wholly inadequate and evasive," and that its series of answers to the Second Set of Interrogatories amounted to a willful, intentional, deliberate and bad faith failure and refusal to answer. **See** Section III, **infra**.

**{46}** A lengthy trial on the question of damages was conducted following entry of the sanctions order and default judgment. **See** Section VI, **infra**. On May 16, 1977, the court entered a final judgment against GAC.

## II. PROPRIETY OF DISCOVERY ORDERS

**{47}** The first area we examine is whether the trial court's discovery orders, which the court found GAC had willfully failed to comply with,

were within the court's authority to enter. If, as GAC contends, the court's orders were invalid from the outset, then GAC could not have been sanctioned for its failure to comply with them.[7]

**{48}** The orders involve the production of documents or the furnishing of information regarding the international uranium cartel. GAC contends that they were invalid for four reasons: (1) information and documents in the possession of the partners cannot be the subject of discovery orders in a case in which only the partnership, and not the individual partners, is a party; (2) the cartel documents and information are not relevant to any issue in this case; (3) adjudication of any issues regarding the cartel, and therefore discovery orders directed at cartel-related information and documents, are barred by the act of state doctrine and the exclusive federal power over the conduct of foreign relations; and (4) the New Mexico Antitrust Act cannot be applied to the 1973 and 1974 uranium supply agreements, and therefore, the court was without jurisdiction to enter discovery orders based on appellees' allegations of violations of that Act. Each of these contentions will be separately discussed in the sections that follow.

## A. DISCOVERY OF PARTNER DOCUMENTS

**{49}** GAC contends that a partner, who is not itself a party in a case brought against the partnership, may not be ordered to answer interrogatories under N.M.R. Civ. P. 33, N.M.S.A. 1978, or to produce documents under N.M.R. Civ. P. 34, N.M.S.A. 1978.

**{50}** This issue arose when United served its First Set of Interrogatories on GAC. The interrogatories clearly called for information from "the partnership or partners." **See** Section III A, **infra,** and n. 80, **infra.** None of these interrogatories was objected to within the time provided by Rule 33.[8] GAC provided only limited information from the partners in its original answers to those interrogatories. During several months of document production that followed the filing of those answers, it did not produce any records from the partners' files. In September 1976, United brought GAC's failure to provide information from the partners to the attention of the trial court. In November 1976, the court ruled that the right to discovery extends to "a party partnership and the individual partners comprising the partnership, and the agents, servants, employees, directors and officers of a party or partner," and the court warned that sanctions would be imposed "for the failure of the defendant partnership **or either partner thereof** to comply with specific orders of the Court directing discovery." (Emphasis added.)

**{51}** The court reiterated this ruling on at least five separate occasions in early 1977. It held that the partners "have the same obligation in relationship to discovery as the partnership," because "[t]he partnership is not an entity in and of the cognizable law." The court stated: "GAC has no substantive separate existence in law. It is not a separate legal entity." GAC then argued that even if the court could order production of partnership-related documents in the possession of the partners, it could not require the partners to produce "non-partnership documents." The court rejected this contention on at least two

[7] "If sanctions are imposed under Rule 37(b), . . . on appeal from the order imposing sanctions the appellate court will consider the propriety of the prior order for discovery." C. Wright and A. Miller, **Federal Practice and Procedure: Civil** § 2289, at 791 (1970) (footnote omitted). **See also Familias Unidas v. Briscoe**, 544 F.2d 182, 191 (5th Cir. 1976); **Gordon v. Federal Deposit Insurance Corporation**, 138 U.S. App. D.C. 308, 427 F.2d 578, 581 (D.C. Cir. 1970); **Hanley v. James McHugh Construction Company**, 419 F.2d 955, 957 (7th Cir. 1969).

[8] As we discuss in Section III, **infra,** the failure to raise a timely objection to an interrogatory operates as a waiver of any objection a party might have. However, we address GAC's objection to the production of partner documents notwithstanding its failure to raise a timely objection both because the trial court did not rely on the principle of waiver and because it is a question that has apparently never before been specifically decided by any court in the United States. Our decision to decide the question on its merits in no way detracts from the significance to the issues discussed in Section III, **infra,** of GAC's failure to comply with the express provisions of Rule 33.

occasions.[9] Finally, in early March 1977, GAC began to produce documents which were in the possession of the partners. A year later the default judgment was entered because GAC failed to produce all of Gulf's cartel records.

**{52}** GAC's argument is based on the principle that discovery under Rules 33 and 34 is limited to parties to the case. GAC argues that a partnership is a separate legal entity, and as such, only it, the named defendant in this suit, rather than the non-party constituent partners, is subject to discovery under Rules 33 and 34.

**{53}** We find it unnecessary to consider the extent to which a partnership is a separate legal entity as a matter of substantive partnership law, because we conclude that under Rules 33 and 34 the trial court properly ordered GAC to produce partner documents and furnish information from the partners.

**{54}** In construing Rules 33 and 34, we must begin with the notion that discovery is designed to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." **United States v. Procter & Gamble,** 356 U.S. 677, 682, 78 S. Ct. 983, 986-87, 2 L. Ed. 2d 1077 (1958) (citation omitted). In light of that policy, Rules 33 and 34 must be liberally construed in order to insure that a litigant's right to discovery is "broad and flexible." **Davis v. Westland Development Company,** 81 N.M. 296, 299-300, 466 P.2d 862, 865-66 (1970). **See also Goldman v. Checker Taxi Company,** 325 F.2d 853, 855 (7th Cir. 1963); **In Re Folding Carton Antitrust Litigation,** 76 F.R.D. 420, 423 (N.D. Ill. 1977); **Hart v. Wolff,** 489 P.2d 114, 117 (Alaska 1971).

**{55}** Rule 33 provides that interrogatories may be served only on a party, but it states that the interrogatories must be answered by the party served, or " **if the party served is . . . a partnership,** . . . by any officer **or agent,** who shall furnish such information as is **available to the party.**" (Emphasis added.) In an earlier opinion concerning this litigation, we noted that Gulf is a general agent of the GAC partnership. We stated: "The agency of a partner is the hallmark of that particular form of business or professional association." **United Nuclear Corp. v. General Atomic Co., supra,** 90 N.M. at 100, 560 P.2d at 164. **See** § 54-1-9A, N.M.S.A. 1978. If, under Rule 33, Gulf is obliged, as an agent of GAC, to furnish answers to interrogatories directed at the partnership, it would be incongruous to hold that information in the possession of Gulf is not "available" to GAC for the purpose of giving complete and accurate answers to those interrogatories. Indeed, the rule that "all information available to the interrogated party must be supplied . . . includes information possessed by, or within the knowledge of, . . . agents or representatives of the party." **Wycoff v. Nichols,** 32 F.R.D. 370, 372 (W.D. Mo. 1963) (citations omitted).

**{56}** Although Rule 34 requires production of documents in the "possession, custody or control" of a party, and, unlike Rule 33, it does not specifically refer to the discovery obligations of the agents of a partnership, the principle is well-established that Rules 33 and 34 are "equally inclusive in their scope." **Wilson v. Volkswagen of America, Inc.,** 561 F.2d 494, 513 (4th Cir. 1977), **cert. denied,** 434 U.S. 1020, 98 S. Ct. 744, 54 L. Ed. 2d 768 (1978). **See also Davis v. Westland Development Company, supra,** 81 N.M. at 299, 466 P.2d at 865.[10]

[9] The distinction between partnership and non-partnership documents confuses the relevancy of the information under Rule 26(b) with its availability under Rules 33 and 34. It is one thing to say that non-partnership-related documents are not relevant, but quite another to say that they are incapable of being obtained. The trial court repeatedly made this crucial distinction. If the partnership business was conducted as part of a coordinated Gulf effort to monopolize the uranium market, as United contends it was, then various Gulf documents pertaining to production and marketing of uranium might be relevant, even though they did not directly pertain to what was ostensibly the partnership business. To permit the parties to determine what is related to the partnership business is to allow that party to make its own unilateral determination of the scope of discovery, which, of course, it may not do. **See United States v. Board of Trade of the City of Chicago, Inc.,** 18 F.R. Serv. 2d 318, 319 (N.D. Ill. 1973).

[10] For cases construing the term "control" to be synonymous with the term "available," **see Sol S. Turnoff Drug Dist. v.**

**{57}** GAC concedes that the two rules should be similarly construed, but it argues that the focus should be on the concept of "control" under Rule 34, rather than on the phrase "available" in Rule 33. However, the proper focus is not so much on one phrase or on the other, as it is on the purposes underlying each limitation on the scope of discovery under those rules. In each instance, the purposes are relatively apparent and very pragmatic. Each phrase embodies only two limitations. First, a party obviously cannot be required to produce materials which he is incapable of procuring. Second, in general a party should not be required to obtain, collect or turn over materials which the opposing party is equally capable of obtaining on its own. **Konczakowski v. Paramount Pictures,** 20 F.R.D. 588, 593 (S.D.N.Y. 1957); **Cinema Amusements v. Loew's, Inc.,** 7 F.R.D. 318, 321 (D. Del. 1947).

**{58}** It is undisputed that neither United nor I&M was capable of procuring on its own the information and documents sought from the partners. Thus, the critical inquiry concerns only the first of the above mentioned principles—whether the party from whom the materials are sought has the practical ability to obtain those materials. Because the inquiry is a pragmatic one, the phrases "available" and "possession, custody or control" should not be subjected to formalistic strictures which ignore the policy of liberal discovery and the practical realities of the particular situation at issue. **See Hart v. Wolff, supra,** 489 P.2d at 117. Thus, it is immaterial under Rules 33 and 34 that the party subject to the discovery orders does not own the documents, [11] or that it did not prepare or direct the production of the documents,[12] or that it does not have actual physical possession of them.[13] It is also clear that the mere fact that the documents are in the possession of an individual or entity which is different or separate from that of the named party is not determinative of the question of availability or control.[14]

**{59}** In light of the fact that partner documents were ultimately produced in this case, there can be little doubt that, as a practical matter, those documents were "available" to GAC.[15] Therefore, they were subject to discovery orders entered under Rules 33 and 34.

**{60}** Our holding in this regard is not only supported by the language and underlying purposes of Rules 33 and 34, but also, it is mandated by two practical considerations. The first concerns the nature of a partnership; the second involves

**N.V. Nederlandsche C.V.C. Ind.,** 55 F.R.D. 347, 349 (E.D. Pa. 1972); **Erone Corporation v. Skouras Theatres Corporation,** 22 F.R.D. 494, 498 (S.D.N.Y. 1958).

[11] **See Ghandi v. Police Department of the City of Detroit,** 23 F.R. Serv. 2d 35 (E.D. Mich. 1977); **United States v. National Broadcasting Company, Inc.,** 65 F.R.D. 415, 419-20 (C.D. Cal. 1974), **appeal dismissed,** 421 U.S. 940, 95 S. Ct. 1668, 44 L. Ed. 2d 97 (1975); **Advance Labor Serv., Inc. v. Hartford Accident & Ind. Co.,** 60 F.R.D. 632, 633-34 (N.D. Ill. 1973).

[12] **See Herbst v. Able,** 63 F.R.D. 135, 138 (S.D.N.Y. 1972).

[13] **See e.g., In Re Folding Carton Antitrust Litigation, supra,** 76 F.R.D. at 423; **Buckley v. Vidal,** 50 F.R.D. 271, 274 (S.D.N.Y. 1970); **Smith v. Maryland Casualty Company,** 42 F.R.D. 587, 589 (E.D. La. 1967); **Schwartz v. Travelers Insurance Company,** 17 F.R.D. 330 (S.D.N.Y. 1954); **Tollefsen v. Phillips,** 16 F.R.D. 348 (D. Mass. 1954); **Reeves v. Pennsylvania R. Co.,** 80 F. Supp. 107, 108-09 (D. Del. 1948); **Williams v. Consolidated Investors, Inc.,** 205 Kan. 728, 472 P.2d 248, 252 (1970).

[14] **See e.g., Pennwalt Corp. v. Plough, Inc.,** 85 F.R.D. 257, 263 (D. Del. 1979); **Advance Labor Serv., Inc. v. Hartford Accident & Ind. Co., supra,** 60 F.R.D. at 633-34; **Sol S. Turnoff Drug Dist. v. N.V. Nederlandsche C.V.C. Ind., supra,** 55 F.R.D. at 349; **Erone Corporation v. Skouras Theatres Corporation, supra,** 22 F.R.D. at 498 (S.D.N.Y. 1958).

[15] Indeed, in its Reply Brief in this appeal, GAC conceded that Gulf's records were "available" to it. GAC stated:

> **GAC did not contend in the trial court that it would be unable to persuade Gulf to produce its domestic records** if they came within a judicial order to produce. Obviously, Gulf had—and continues to have—a very significant interest in this litigation. As one of GAC's constituent partners, it stands to gain or lose immediately from any decision.
>
> * * * * * *
>
> . . . **GAC did not represent to the trial court that Gulf would refuse to produce its documents if an order directing it to do so were entered.** (Emphasis added.)

However, GAC **had** stated to the trial court that it had "no obligation **or ability** to furnish . . . documents from Gulf Oil Corporation or Scallop Nuclear, Inc." (Emphasis added.)

the business relationships of the entities involved in this case.

**{61}** A partnership is composed of and can only act through its constituent partners. As the trial judge pointed out in this case, if the discovery obligations of a partnership do not extend to the individual partners, then the partners could avoid all meaningful discovery by the simple expedient of maintaining the information and documents related to the partnership business in the separately located files of the partners, rather than in the partnership offices. **Cf.** C. Wright & A. Miller, **Federal Practice and Procedure: Civil** § 2208, at 616 (1970) ("[A] party cannot immunize a document from inspection by turning it over to a nonparty so long as it remains in the party's control." (Footnote omitted.))

**{62}** The second practical consideration which compels the conclusion that documents in the separate possession of the partners should be subject to production concerns the nature of Gulf uranium activities and the history of the General Atomic business operation as they relate to the issues raised in this case.

**{63}** Although GAC is a partnership rather than a subsidiary of Gulf, it simply took over the business of Gulf Energy including that of Gulf General Atomic. Gulf Energy was planned to be and was operated by Gulf as one part of a coordinated, comprehensive uranium business. Thus, through Gulf Minerals, Gulf Canada and Gulf Energy, Gulf was involved in the production of uranium, the purchase and sale of uranium supplies, the fabrication of uranium fuel and the manufacture of nuclear reactors. Prior to the creation of GAC, these various Gulf divisions or subsidiaries were clearly not operationally divorced from one another.[16]

**{64}** The transformation of Gulf Energy from a Gulf division to a partnership with Scallop changed the form of the business organization, but not the nature of the business it conducted. There was a substantial continuity of identity in the top levels of management.[17] GAC succeeded to the business records of Gulf General Atomic, Gulf Energy and Gulf-United. The evidence

[16] The record is replete with evidence of the interconnection of the various aspects of Gulf's uranium business. In addition to other examples discussed elsewhere in this opinion with respect to other issues raised on appeal, are the following examples, which should suffice to illustrate the point made here: When the cartel was formed, Gulf Canada informed Gulf's executives in Pittsburgh and Gulf Energy officials in San Diego. Over the next six months, officials from Gulf Oil in Pittsburgh (O'Hara, Jackson, Ramsey), Gulf Minerals in Denver (Zagnoli, Allen) and Gulf Energy in San Diego (Hunter, Hoffman) were sent to Canada, Europe and Africa for cartel meetings. Gregg of Gulf Energy was transferred to Gulf Canada, but remained in contact with officials of Gulf Energy (Hunter, Fowler) for at least several months. Officials in Gulf Oil, Gulf Minerals and Gulf Energy participated in the decision to transfer Gregg. In March 1972, Hoffman of Gulf Energy briefed the Gulf Minerals board on Gulf Energy's marketing activities. In August 1972, Hunter briefed Gulf Oil executives in New York City. Rolander of Gulf General Atomic, Gulf Energy, and later GAC, also sat on the boards of Gulf Canada and Gulf Minerals and was chairman of the board of Gulf-United. Gulf Minerals had administrative responsibility for Gulf Canada, and Gulf Minerals' uranium marketing function was handled by Gulf General Atomic. Gulf Energy's larger supply contracts were approved by Gulf's Pittsburgh executives. Gulf Energy and Gulf Minerals worked together on plans for the development of Gulf's Mt. Taylor uranium reserves. In March 1973, Hunter stated that Gulf Energy would "work with GMCL [Gulf Canada] . . . to block" a Westinghouse effort to secure uranium from Australia.

[17] The president of Gulf Energy, Mr. Rolander, became the president of GAC pursuant to the terms of the partnership agreement. Mr. Gallaway, the executive vice-president of Gulf Energy, Mr. Johnston, Gulf General Atomic's vice-president for marketing, and Mr. Dieter, Gulf Energy's chief legal adviser, all continued to perform the same duties for GAC. Mr. Hunter, who had attended the cartel's May 1972 meeting in Johannesburg as an executive of Gulf Energy, worked in a similar capacity for GAC, as did Mr. Fowler. As executives of GAC, Gallaway and Dieter remained on the payroll of Gulf, not GAC.

Most of these individuals played some role in the formation and operation of Gulf-United and in the acquisition of uranium by Gulf Energy and GAC. (Rolander, Gallaway and Hunter negotiated the formation of Gulf-United and the execution of the 1971 Supply Agreement with United. All three were members of the Gulf-United board.) All of these individuals at one time or another were either involved in or aware of Gulf's participation in the cartel.

Four months after the formation of GAC, Rolander rejoined the Gulf organization in Pittsburgh, where he remained until after this case was filed. Mr. Gregg, the Gulf Energy employee who was transferred to Gulf Canada in Toronto and became a member of the cartel operating committee, returned to the United States in 1974 to work for GAC, where he remained until the month this case was filed.

does not indicate that when GAC took over Gulf Energy—operating an identical business, in identical offices, with the same records, and with largely the same personnel in essentially unchanged reporting relationships—it suddenly became totally divorced from the uranium activities of the partners comprising it.[18] The flow of information and the transfer of key personnel from one entity to another; the past history of close coordination of activities between GAC's predecessor and other Gulf companies; and the continuity of business purpose—all substantially refute any such implication. We fail to see how what was apparently interrelated for purposes of corporate profit became totally separate and distinct when it became the subject of discovery in litigation.

**{65}** Other decisions involving discovery from distinct, though related, corporations in cases in which only one corporation is named as a party, support our conclusion that the coordinated nature of the business enterprises of separate entities may justify the imposition of discovery obligations on those entities which are not parties to the action.

**{66}** In **Societe Internationale, Etc. v. McGranery,** 111 F. Supp. 435 (D.D.C. 1953), **modified on other grounds sub nom., Societe Internationale, Etc. v. Brownell,** 96 U.S. App. D.C. 232, 225 F.2d 532 (D.C. Cir. 1955), **rev'd on other grounds sub nom., Societe Internationale v. Rogers,** 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958), the court ordered production of documents in the possession of a corporation, which, although related to the corporate-plaintiff, was not itself a party. The court said:

> Certain it is that the court can pierce the corporate veil to determine the true character of the interests making up its composition. Subtle relationships are necessarily to be contemplated. Through the interlocked web of corporate organization, management and finance there runs the thread of a fundamental identity of individuals in the pattern of control.

111 F. Supp. at 441-42 (citations omitted). **See also In Re Uranium Antitrust Litigation,** 480 F. Supp. 1138, 1153 (N.D. Ill. 1979) ("The formalities separating the two corporations cannot be used as a screen to disguise the coordinated nature of their uranium enterprise").

**{67}** These two decisions are consistent with our own in recognizing not only the practical managerial connections between the various entities, but also, the identity of financial interest in the outcome of the litigation. As GAC pointed out on this appeal, Gulf has "a very significant interest in this litigation," and "stands to gain or lose immediately from any decision." It should not be very startling then that we demand as the price of possible legal victory full participation in the disclosure of relevant information by those who stand to profit from the ultimate outcome. Therefore, we hold that the trial court properly concluded that documents and information in the separate possession of the partners were subject to production in a suit in which only the partnership was named as a party.[19]

[18] One of the more extreme examples of the extent to which GAC has sought to differentiate into distinct compartments the interrelated activities of the various aspects of Gulf's uranium activities is the following: When Hunter and Hoffman flew from Gulf Energy's San Diego headquarters to the cartel meeting in Johannesburg in May 1972, they went, according to GAC, as representatives of Gulf Canada in Canada, and not Gulf Energy, despite the fact that immediately prior to and after their week-long trip they were top officials with Gulf Energy, and despite the fact that they apparently continued to receive cartel information in their San Diego offices for several more months in order to coordinate Gulf's foreign and domestic uranium marketing efforts. The absurdity of GAC's position is highlighted by Hoffman's deposition in the **Westinghouse** litigation, where he testified that we went to Johannesburg "as an advisor to—I don't recall the name of the Canadian company. What was it? GMCL? Was that their initials?"

[19] The fact that Gulf and Scallop were named as parties in the original suit, which United voluntarily dismissed after its removal to federal court (**see** n. 2, **supra**), is completely immaterial to the question of the proper scope of Rules 33 and 34. The scope of discovery under those rules does not expand or contract depending on whether or not the individual partners once were or now could be named as parties.

## B. RELEVANCY OF THE INTERNATIONAL URANIUM CARTEL

**{68}** The trial court found that information concerning the international uranium cartel was "highly relevant" to United's antitrust, fraud, and breach of fiduciary duty allegations against GAC. GAC contests this finding, asserting that the cartel, which became the principal focus of discovery, is completely unrelated to the injury allegedly suffered by United. Therefore, GAC urges that its failure to produce documents and other information regarding the cartel could not be the basis for sanctions under N.M.R. Civ. P. 37(b)(2), N.M.S.A. 1978. **See Roberson v. Christoferson,** 65 F.R.D. 615, 620 (D.N.D. 1975); Annot., 6 A.L.R.3d 713, § 6 (1966). We analyze this question in light of the scope of discovery as defined by N.M.R. Civ.P. 26(b), N.M.S.A. 1978, the nature of United's and I&M's allegations against GAC, and the light shed on those allegations by the presently available cartel evidence.

### 1. The Legal Standard of Relevancy

**{69}** Rule 26(b) states, in pertinent part, that a deponent

> may be examined regarding any matter, not privileged, **which is relevant to the subject matter involved in the pending action,** whether it relates to the claim or defense of the examining party or to the claim or defense of any other party. . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears **reasonably calculated to lead to the discovery of admissible evidence.** (Emphasis added.)[20]

**{70}** This language is subject to a broad interpretation. **Fort v. Neal,** 79 N.M. 479, 481, 444 P.2d 990, 992 (1968). "Objections based on alleged irrelevancy must, therefore, be viewed in light of the broad and liberal discovery principle consciously built into" the rules of civil procedure. **Independent Productions Corp. v. Loew's, Incorporated,** 22 F.R.D. 266, 271 (S.D.N.Y. 1958). "The boundaries defining information relevant to the subject matter involved in an action are necessarily vague, making it practically impossible to formulate a general rule by which they can be drawn." **La Chemise Lacoste v. Alligator Company, Inc.,** 60 F.R.D. 164, 170 (D. Del. 1973).[21] Because courts "are not shackled with strict interpretations of relevancy," **Cox v. E.I. Du Pont de Nemours and Company,** 38 F.R.D. 396, 398 (D.S.C. 1965), discovery is permitted as to matters that "are or may become relevant"[22] or "might conceivably have a bearing" on the subject matter of the action,[23] or where there is "any possibility" or "some possibility" that the matters inquired into will contain relevant information.[24] Conversely, courts have said that discovery will be permitted unless the matters inquired into can have "no possible bearing upon,"[25] or are "clearly irrelevant" to the subject matter of the

[20] Although Rule 26(b) refers only to depositions, the scope of discovery permitted under Rules 33 (interrogatories) and 34 (production of documents) is defined in terms of the relevancy standard established in Rule 26(b). **See Davis v. Westland Development Company, supra,** 81 N.M. at 299-300, 466 P.2d at 865-66.

[21] **See also Mallinckrodt Chemical Works v. Goldman, Sachs & Co.,** 58 F.R.D. 348, 353 (S.D.N.Y. 1973); C. Wright & A. Miller, **Federal Practice and Procedure: Civil** § 2008, 45 (1970); J. Moore, **Federal Practice,** para. 26.56[1], at 26-131 (2d ed. 1979).

[22] **Payer Hewitt & Company v. Bellanca Corporation,** 26 F.R.D. 219, 221 (D. Del. 1960).

[23] **Triangle Mfg. Co. v. Paramount Bag Mfg. Co.,** 35 F.R.D. 540, 542 (E.D. N.Y. 1964); **Bloomer v. Sirian Lamp Co.,** 4 F.R.D. 167, 169 (D. Del. 1944).

[24] **In Re Wheat Farmers Antitrust Class Action,** 440 F. Supp. 1022, 1025 (D.D.C. 1977); **In Re Folding Carton Antitrust Litigation, supra,** 76 F.R.D. at 431 (N.D. Ill. 1977); **Detweiler Bros., Inc. v. John Graham & Co.,** 412 F. Supp. 416, 422 (E.D. Wash. 1976); **Nichols v. Philadelphia Tribune Company,** 22 F.R.D. 89, 90 (E.D.Pa. 1958); C. Wright, **Law of Federal Courts** § 81, at 403, n. 47 (3d ed. 1976).

[25] **E.I. Du Pont de Nemours v. Deering Milliken Res.,** 72 F.R.D. 440, 443 (D. Del. 1976); **Marshall v. Electric Hose and Rubber Company,** 68 F.R.D. 287, 295 (D. Del. 1975); **La Chemise Lacoste v. Alligator Company, Inc., supra,** 60 F.R.D. at 171; **Dart Industries, Inc. v. Liquid Nitrogen Proc. Corp. of Cal.,** 50 F.R.D. 286, 292 (D. Del. 1970).

action.[26] Not only is the term "relevant" subject to a broad interpretation as it is generally used in the discovery context, but also, it is given a particularly liberal interpretation for purposes of discovery in antitrust cases.[27]

## 2. Summary of Evidence on the Gulf Uranium Business and the Cartel

**{71}** The allegations of appellees give great weight to the claim that the cartel is relevant to the subject matter of this litigation. As amended, United's complaint named a number of distinct legal bases for the relief it sought—the invalidation of the 1973 and 1974 Supply Agreements. The complaint alleged that (1) in violation of their fiduciary duties, Gulf and GAC withheld material facts which, if disclosed, would have had a bearing on United's decision to enter into Gulf-United and the 1971, 1973 and 1974 Supply Agreements; (2) the 1971, 1973 and 1974 Agreements were illegal and void because they had been procured through Gulf's and GAC's fraud; (3) Gulf mismanaged Gulf-United, refused to provide Gulf-United with uranium and capital, and economically coerced United into a position where it had no viable alternative to accepting Gulf's requirement of the 1973 Supply Agreement; (4) Gulf tried to eliminate United as a competitor in the nuclear fuels industry and to restrict its ability to compete in the uranium business; (5) the sudden increase in the cost of producing uranium, unforeseen to all but GAC and Gulf, rendered United's performance under the 1973 and 1974 Agreements commercially impracticable; and (6) the 1971, 1973 and 1974 Supply Agreements were void because they were in violation of New Mexico's antitrust laws prohibiting price-fixing attempts and conspiracies to monopolize, and actual monopolization of trade and commerce.

**{72}** I&M's counterclaim specifically alleged that by their participation in the cartel, GAC and Gulf had violated the New Mexico Antitrust Act, thereby injuring I&M. I&M also defended against GAC's claim that performance of its obligation to supply I&M with uranium had been rendered commercially impracticable by contending that the cartel was responsible for increases in the price of uranium, and therefore, such price increases were not unforeseen by GAC and Gulf.

**{73}** The evidence which has been produced in this case demonstrates that information on the cartel could be crucial to the proper resolution of this litigation. The following review of some of that evidence should not be considered to reflect a view as to the merits of appellees' substantive claims, but rather, as support for their contention that the cartel is relevant to those claims.

**{74}** In 1967, Gulf entered the uranium market by purchasing the General Atomic business. Over the next five years, Gulf purchased and began to develop various uranium ore bearing properties in the United States and Canada, including the large Mt. Taylor reserves in New Mexico. Thus, by the early 1970s Gulf was in a position to be a leading producer of uranium, nuclear fuel fabricator, and manufacturer of nuclear reactors. **See** Section I A, **supra.** It was therefore directly in competition with United.

**{75}** However, in 1971 Gulf and United formed the jointly owned company, Gulf-United, to fabricate fuel for commercial nuclear reactors, and executed the 1971 Supply Agreement. Independently of Gulf-United, Gulf also began to purchase large quantities of uranium from other American producers.

**{76}** Contemporaneously with these activities, Gulf began to participate in early meetings of the

[26] **Bailey v. Meister Brau, Inc.,** 55 F.R.D. 211, 214 (N.D. Ill. 1972); **Independent Productions Corp. v. Loew's, Incorporated, supra,** 22 F.R.D. at 271; **Steamship Co. of 1949 v. China Union Lines, Hong Kong,** 123 F. Supp. 802, 805 (S.D.N.Y. 1954); **Bloomer v. Sirian Lamp Co., supra,** 4 F.R.D. at 169.

[27] **Cf. United States v. International Business Machines, Corp.,** 66 F.R.D. 186, 189 (S.D.N.Y. 1974) ("discovery in antitrust litigation is most broadly permitted"). **See also Bass v. Gulf Oil Corporation,** 304 F. Supp. 1041, 1046-47 (S.D. Miss. 1969); **Alexander's Department Stores, Inc. v. E.J. Korvette, Inc.,** 198 F. Supp. 28, 29 (S.D.N.Y. 1961); **Leonia Amusement Corporation v. Loew's, Incorporated,** 16 F.R.D. 583, 584 (S.D.N.Y. 1954).

cartel. Top officials of Gulf Energy (Rolander, Gallaway, Gregg, Hunter and Hoffman) were informed of the cartel's creation and Gulf's participation. Hunter, Gallaway and Rolander were the Gulf officials who negotiated the formation of Gulf-United and the execution of the 1971 Supply Agreement with United. All of these individuals later held key positions in GAC. **See** Section II A, **supra,** especially n. 16 and 17, **supra.** All but Gregg served on the Gulf-United board.

**{77}** One document reflects that Hoffman, along with Zagnoli of Gulf Minerals in Denver, was participating in cartel discussions in Canada as early as February 1972. The same month Hunter informed Hoffman that Gulf Energy would "proceed to tie up" an additional ten million pounds of uranium. Within weeks, Gulf Energy signed agreements with two American producers to purchase in excess of that amount of uranium. In March, according to Hunter's account, Hoffman informed the board of directors of Gulf Minerals: "We've taken low cost supplies now on market. . . . We've cleaned out cheap material available now." Another document dated in the spring of 1972, which reviewed Gulf-United's financial condition, stated that Gulf's objective was to "minimize UNC's [United's] book income."

**{78}** Throughout the spring of 1972, various Gulf officials from the United States attended meetings of the cartel. In late May, Hoffman and Hunter from Gulf Energy, Allen from Gulf Minerals, and Ediger from Gulf Canada, flew to Johannesburg, South Africa for a meeting of the cartel. The available cartel evidence shows that in Johannesburg, the cartelists adopted a set of rules to govern their organization. The rules allocated markets among the participating nations, set minimum prices for uranium, and established a rigged bidding system with a lead bidder and a runner-up bidder. Under a heading labeled "Attitude Towards Competitors," the Rules stated:

> It was agreed that if a supplier not associated with the organization should quote under the minimum price, the leader will not match that quotation and the [cartel's] Operating Committee will review the situation and decide on a course of action as soon as possible.

**{79}** The Rules also provided that all quotations to fuel fabricators and nuclear reactor manufacturers "should be made on the basis of the minimum prices."

**{80}** Although the Johannesburg Rules provided for the exclusion of the United States domestic uranium market, one week after the Johannesburg meeting, Hunter, in referring to "the agreements which we have reached in the last couple of days with respect to action which we will be taking," told Hoffman that Gulf's "overall strategy must reflect the interrelationship existing between foreign and domestic markets." He went on to say that "foreign and domestic marketing activities are inseparable and indeed should be treated integrally if we are to optimize the company position." In the following paragraph, Hunter stated: "Based on input provided by Gulf Minerals, we conclude that corporation profit is greater if New Mexican production begins in 1978 rather than 1976." Hunter then noted that "[i]n order for us to realistically appraise our U308 competitive position as well as to effectively sell foreign uranium, it is necessary for us to sell uranium directly to the U.S. utilities."

**{81}** The minutes of a September 5, 1972 cartel meeting indicate that the cartel was considering the prospect of taking anticompetitive actions against the foreign uranium operations of American corporations. The minutes reported:

> There followed a general discussion of the impact of Westinghouse bidding in Europe. . . . Some members thought that Westinghouse should be approached directly, whereas other views were that it would be a dangerous move. **The consensus finally reached was that if the club was to survive as a viable entity, it would be necessary to delineate where the competition was and the nature of its strength, as a prelude to eliminating it once and for all.** (Emphasis added.)

**{82}** In September 1972, a Gulf attorney observed that "it is improbable that either the cartel structure or operation will remain static," and warned that "the instinctive reaction of the cartel's Operating Committee will likely be to exert pressure to suppress the new competition one way or another." He said:

> It could well be that the governments involved would tacitly approve (or effectively direct) predatory actions by the cartel producer members **to suppress outside competition from any source**. . . . (Emphasis added.)

**{83}** In March 1973, Hunter, of Gulf Energy, reported that Westinghouse was trying to buy uranium to cover its "substantial foreign shortage." Hunter stated that if successful, the purchase "would provide Westinghouse with a potential source for U.S. reactor sales." He said that Gulf Energy would "work with GMCL [Gulf Canada] to try to put pressure on the Australians to block the proposed arrangement."[28]

**{84}** Gregg, the Gulf Energy employee who became Gulf's representative on the cartel's Operating Committee, testified in a deposition taken in the **Westinghouse** uranium litigation that

**{85}** Westinghouse was not necessarily singled out for discussion each and every time. There were others who were discussed from time to time, also; GE [General Electric], KWU in Germany, ASEA in Sweden; other reactor manufacturers, Exxon as a fuel fabricator, **Gulf-United as a fuel fabricator,** so perhaps Westinghouse was discussed more than any of the others. (Emphasis added.)[29]

**{86}** Beginning in early 1973, United and Gulf entered into negotiations concerning the disposition of Gulf-United. On January 23, 1973, Mr. Henry, the executive vice-president of Gulf Oil in Pittsburgh, informed the president of United:

> It is our intention that any sale of the shares of Gulf [in Gulf-United], of course, will be done entirely in good faith, on a fair basis, and free of any secret or undisclosed arrangements.

**{87}** GAC alleges that United had independent knowledge of the cartel, but it does not contend that in the negotiations that followed, Gulf informed United of its role in the cartel.

**{88}** In June 1973, Gulf executed the 1973 Supply Agreement with United; and in September it bought United's interest in Gulf-United. In November 1973, the GAC partnership was formed, and along with the operations of Gulf Energy, the Gulf-United business was transferred to GAC.

**{89}** Within nine months of the execution of the 1973 Supply Agreement and the buyout of United's interest in Gulf-United, Gulf also purchased several million pounds of uranium from two other American producers. During the same period, it signed definitive contracts with two utilities to formalize the letters of intent United

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[28] Both Westinghouse and General Electric were major manufacturers in the United States of nuclear reactors; as such they were competitors of Gulf Energy.

[29] In his deposition in this case, Gregg first testified that United and Gulf-United were never discussed at any cartel meetings. He later qualified that answer by stating that he could not recall those companies being discussed at meetings at which he was present. When specifically questioned regarding the foregoing passage from his **Westinghouse** deposition, Gregg conceded that he had made the statement, but he said he could not recall "who or who was not discussed other than Westinghouse." He stated that Gulf-United and General Electric were "representative of who might have been discussed"; but he could not remember whether or not Gulf-United was ever discussed.

Hunter testified in his deposition in this case that Gulf-United was discussed by Gulf officials at the cartel meeting he attended in Johannesburg in 1972. He stated:

> I raised the point that from my standpoint and understanding in what we were trying to do in the uranium supply, the [cartel's] middleman restriction would affect our ability to buy uranium to serve Gulf-United and HTGR [high temperature gas cooled reactors].

He went on to say that by virtue of the cartel's rules, Gulf-United "would have to pay the same higher price that . . . Westinghouse would have to pay." But he said that this matter "wasn't of concern" to the other Gulf participants.

had previously signed and assigned to Gulf-United.

**{90}** By March 1974, Mr. Fowler, a GAC employee reported:

> What appears to be happening is that the international producers are in effect setting the world price via
>
> a) establishing a "floor" that is higher than the U.S. offers to buy.
>
> b) the U.S. producers refuse to sell at any price that doesn't give them a substantial margin above the "floor" being quoted by the non-U.S. producers.
>
> c) Thus, in essence, the international producers can stop any transactions by constantly nudging the floor upward.

**{91}** In the interim, the U.S. buyer becomes increasingly frustrated, offers a higher price in order to get some response and the cycle starts over again.

**{92}** It seems likely that at some point, the mechanism will break down and if it does, there will again be price competition. However, it doesn't appear likely the break will come in the immediate future.

**{93}** Three months later, GAC signed the 1974 Supply Agreement, committing United to supply an additional three million pounds of uranium.

**{94}** We accept none of the available cartel evidence as conclusive. However, where business records such as these are produced from the files of GAC and Gulf, and where it is undisputed that a uranium cartel existed and that Gulf was a member of it, we are satisfied that cartel information is relevant to the subject matter of this litigation in general, and to the specific allegations of the parties. We look with a jaundiced eye upon any claim of irrelevancy made in the background of (1) the common identity of the individuals who negotiated the contracts at issue here and the information of Gulf-United; who participated in meetings of the cartel on behalf of Gulf or were privy to cartel information; and who later formed the top level of management of GAC; (2) the temporal proximity of cartel activities to the purchase by Gulf and GAC of substantial quantities of uranium from several major American producers—including the 1971, 1973 and 1974 Supply Agreements with United; to the formation, the buyout and the dissolution of Gulf-United; and to the creation of GAC; and (3) references to "cleaning out" and "tying up" "cheap material"; to objectives of "minimizing UNC's [United's] book income"; to the "inseparability of domestic and foreign uranium marketing"; to Gulf's need to sell uranium "directly to the U.S. utilities"; to working with Gulf Canada to "block" a Westinghouse uranium purchase; to the likely need to suppress new competition "one way or another"; and most striking of all, to "the consensus," reached by the cartel in the context of discussing an American corporation, "to delineate where the competition was and the nature of its strength as a prelude to eliminating it once and for all." These things are not the stuff of which antitrust irrelevancy is made.

**{95}** Finally, we cannot accept GAC's argument that the cartel is irrelevant to the commercial impracticability issues in this case.[30] We

[30] GAC asserts that United's commercial impracticability claim is a "patent make-weight" because United's forty page trial brief on the subject contained only six sentences concerning the cartel. Relevancy for purposes of discovery is not measured by such a sentence-to-page ratio. As to I&M's defense to GAC's claim of commercial impracticability, GAC's counsel told the trial court at a hearing on August 26, 1977:

> We can understand the people like Indiana-Michigan or Detroit-Edison feeling some sort of misery caused by the present prices of uranium, and we suspect that they will be completely unable to establish anything to do with the cartel leading to the existence of the price levels. . . .

Obviously, the cartel is not made irrelevant to I&M's claims simply because GAC's counsel "suspects" that those claims would ultimately not be proved. Cf. **American Mfrs. M.I. Co. v. American Broadcasting - Para. Th.**, 388 F.2d 272, 279, n. 9 (2nd Cir. 1967) ("'[T]hat it might be surmised that the adverse party is unlikely to prevail at the trial is not sufficient to authorize summary judgment against him'") (citation omitted).

cannot say that such evidence has no possible bearing on United's claim that the cartel itself was responsible for the enormous price increases in uranium that took place contemporaneously with the operation of the cartel. If the cartel is relevant to that claim, it is no less relevant to I&M's defense that GAC is in no position to claim commercial impracticability because, along with Gulf and the other cartelists, it was responsible for, and thus foresaw, those price increases.

### 3. GAC's Arguments as to the Cartel's Irrelevance

**{96}** GAC argues that the cartel was irrelevant because United "has been unable to adduce any evidence whatsoever that the 1973 and 1974 contracts were in any way connected with the activities of the cartel." Obviously this proposition is untenable. United sought cartel evidence in order to establish that the 1973 and 1974 Supply Agreements were connected to cartel activities in one manner or another. It makes no sense whatsoever to say that the cartel is not relevant, and therefore cartel information will not be produced, because the plaintiff who seeks such discovery has failed to produce, from what has been withheld from it, evidence to conclusively establish its case. As the court said in **Beler v. Savarona Ship Corporation**, 26 F. Supp. 599 (E.D.N.Y. 1939):

> The requirement of materiality does not . . . compel the person seeking discovery definitely to prove materiality before being entitled to a discovery. Such an interpretation of the rule would place upon it a narrow construction which would severely limit the bounds of the discovery procedure. It might compel a party to know what was in the documents before he had seen them. One of the basic purposes of the new rules is to enable a full disclosure of the facts so that justice might not move blindly.

**See also Radio Corporation of America v. Rauland Corporation**, 18 F.R.D. 440, 444-45 (N.D. Ill. 1955).

**{97}** GAC further argues that the cartel cannot conceivably be relevant because by May 1971, United had "locked up" the uranium covered by the 1973 Supply Agreement through supply contracts it had directly entered into with the utilities; and second, that the cartel came into existence in 1972. Because United allegedly had committed the uranium previous to the formation of the cartel, GAC concludes that cartel activities could not possibly have been the cause of any competitive injury United might have suffered.

**{98}** There are a number of reasons why this argument must be rejected. In the first place, there is a dispute in this case over the question of whether the uranium covered by the 1973 Supply Agreement was in fact "locked up" prior to the formation of the cartel, or even prior to the execution of the 1971 Supply Agreement. Over one-half of the uranium at issue here involves the utility agreements with Detroit Edison and Duke Power. Originally, this uranium was covered by letters of intent United signed with the utilities in 1969 and 1970, respectively. United's contention that these were merely non-binding agreements finds some support in the record.[31] But even if

[31] The Detroit Edison letter of intent, which is dated September 25, 1969, reads in part:

> Please be advised that The Detroit Edison Company has determined and **intends to enter into a contract** with the United Nuclear Corporation for the nuclear materials, fabrication, and services therein defined.
>
> United Nuclear Corporation and Detroit Edison **will proceed reasonably toward the negotiation, drafting, and execution of a formal written contract** which will reflect the pertinent rights and obligations of each party **as generally set forth** in the referenced documents **and as discussed and to be discussed** during the various meetings of representatives of our two companies. **It is also subject to the receipt of all necessary approvals of regulatory authorities**. (Emphasis added.)

Formal definitive contracts were signed on the basis of this letter of intent and a letter of intent of December 30, 1970 with Duke Power, on March 19, 1973 by Gulf-United, and on November 7, 1973 by Gulf, respectively. United signed two additional letters of intent with Yankee Atomic and Consolidated Edison. The latter two letters were also assigned to Gulf-United in 1971, but formal contracts were never signed,

we were to assume that they were binding contracts at the time of the formation of Gulf-United in 1971, and that the cartel was not formed prior to 1972, it would not necessarily follow that cartel evidence has no bearing on the issues in this case.

**{99}** United contends that Gulf did not disclose a slippage in the construction of a Commonwealth Edison reactor which allegedly would have waived Gulf-United's obligation to supply the utility with fuel, and that Gulf signed a secret "side-letter" with Duke waiving conditions which also allegedly would have denied Duke uranium. These actions were allegedly taken in order that GAC could resell the uranium covered by the 1971 and 1973 Supply Agreements at higher prices. Other allegations which would have a bearing on the case, even if the uranium had all been previously committed by United, are that Gulf wrongfully refused to supply Gulf-United with the uranium needed to fulfill the requirements of the utility contracts, wrongfully blocked Gulf-United's efforts to purchase uranium on the open market, and wrongfully interfered with United's efforts to independently negotiate directly with the utilities for price relief and other conditions of sale. Cartel information is relevant to United's claim that Gulf tied up the cheap material on the market, thus denying United alternative sources of uranium to fulfill its commitments to Gulf-United and driving up uranium prices. United argues that the price increases encouraged new exploration and mining which increased the competition for limited mining supplies and labor, and in turn caused United to incur far greater uranium production costs than it otherwise would have.

**{100}** We also consider it material to GAC's relevancy argument that Gulf apparently considered it necessary "to sell uranium directly to the U.S. utilities" in order to maintain its competitive position; and that GAC now contends that although it is not obligated to supply uranium to I&M or the other utilities,[32] United nonetheless remains obligated to supply GAC with at least a substantial portion of the uranium covered by the 1973 Supply Agreement.

**{101}** Finally, even were GAC's position sound as to United's allegations of fraud, breach of fiduciary duty, economic coercion and antitrust violations concerning the 1973 Supply Agreement, it would have no bearing on United's allegations concerning the 1974 Supply Agreement, or on United's and I&M's claims based on commercial impracticability. As to the former, GAC contends that it involved a blind transaction, and since it therefore did not know the seller, neither GAC nor Gulf could have entered into that agreement with illicit intentions towards United. However, that fact does not alone dispose of United's claims, for even such a blind agreement could conceivably have been a part of a scheme to achieve monopoly control over United States uranium reserves. As to the commercial impracticability questions, we have previously noted that even GAC does not advance a persuasive argument of irrelevancy. **See** n. 30, **supra**.

**{102}** GAC vehemently contests the merits of each of the foregoing allegations, contending that all are unsubstantiated.[33] But in the discovery context, it is not the function of the trial court or of this Court to try every issue prior to

and the uranium covered by these letters is not included in the 1973 Supply Agreement.

[32] Notes of a GAC-Gulf litigation strategy meeting held on January 13, 1976 in San Diego, which were inadvertently produced to United in this case, reflect a GAC "plan to welch on **all** utility contracts." (Emphasis in original.)

[33] GAC's arguments are contained in a forty-six page appendix entitled "Review of Historical Facts." This appendix was filed along with GAC's reply brief. It apparently was not included in that brief because GAC had already met the 150 page limit on that brief this Court had specifically set at GAC's request. We note that GAC did not seek leave of the Court to exceed that page limitation in order to include these additional arguments in its reply brief, nor did it seek or receive permission from the Court to file such an argument in an appendix, rather than in a brief. "[W]e disapprove of and will in the future disregard attempts by counsel to supplement their briefs in a manner not authorized by the rules." **Lance v. New Mexico Military Institute**, 70 N.M. 158, 164, 371 P.2d 995, 999 (1962).

the full disclosure of all relevant information.[34] Nor is it

> the function of . . . counsel to rule with finality on the relevancy or irrelevancy of documents in their exclusive possession and thereby to deprive both Court and opposing counsel of an opportunity to evaluate their contentions.

**Radio Corporation of America v. Rauland Corporation, supra**, 18 F.R.D. at 444. The rules call for something quite different:

> Unless it is palpable that the evidence sought can have no possible bearing upon the issues, the spirit of the new rules calls for every relevant fact, however, remote, to be brought out for the inspection not only of the opposing party but for the benefit of the court which in due course can eliminate those facts which are not to be considered in determining the ultimate issues.

**Hercules Powder Co. v. Rohm & Haas Co**., 3 F.R.D. 302, 304 (D. Del. 1943). **See also La Chemise Lacoste v. Alligator Company, Inc**., **supra**, 60 F.R.D. at 171.

**{103}** At the present stage of the litigation, we are unable to say that information concerning an international uranium cartel, which had as its avowed purpose the fixing of prices for and the allocation of markets in uranium, and which counted a constituent partner of GAC as one of its members, palpably can have no possible bearing upon the subject matter of this action. Therefore, cartel information satisfies the test of relevancy for purposes of discovery under Rule 26(b).

[34] "Ordinarily, in ruling on a discovery motion, the Court will not determine whether a claim in the complaint, if proved, would have a bearing on the ultimate outcome of the action, it being sufficient that the matter to be explored is relevant to the issues made by the pleading." **Apel v. Murphy**, 70 F.R.D. 651, 654 (D.R.I. 1976) (citation omitted). **See also Humphreys Exterminating Company, Inc. v. Poulter**, 62 F.R.D. 392, 393 (D.Md. 1974); **V.D. Anderson Co. v. Helena Cotton Oil Co**., 117 F. Supp. 932, 945, n. 9 (E.D. Ark. 1953).

## C. ACT OF STATE DOCTRINE AND EXCLUSIVE FEDERAL POWER OVER FOREIGN RELATIONS

**{104}** GAC's second basis for challenging the validity of the trial court's discovery orders involves two distinct legal principles—the act of state doctrine and the exclusive power of the federal government over the conduct of foreign relations. Although distinct, each principle is alleged to be applicable to this case because of two actions of the Canadian Government—first, the role that Government played in the foreign uranium cartel; and second, the Canadian Uranium Information Security Regulations. GAC contends that both principles, as applied to these actions of Canada, precluded the trial court from considering any claims concerning the cartel or Gulf's role therein and, therefore, from entering discovery orders directed at cartel documents or information. The applicability of each of these principles will be separately examined.

### 1. The Canadian Government's Role in the cartel a. The Act of State Doctrine

**{105}** The classic definition of the act of state doctrine is found in **Underhill v. Hernandez**, 168 U.S. 250, 252, 18 S. Ct. 83, 84, 42 L. Ed. 456 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

**{106}** The act of state doctrine, which has "'constitutional' underpinnings," reflects "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." **Banco Nacional de Cuba v. Sabbatino,** 376 U.S. 398, 423, 427-28, 84 S. Ct. 923, 940, 11 L. Ed. 2d 804 (1964). The doctrine "derives from the judiciary's concern for its possible interference with

the conduct of foreign affairs by the political branches of the government." **Timberlane Lbr. Co. v. Bank of America, N.T. & S.A.,** 549 F.2d 597, 605 (9th Cir. 1976). The doctrine is a matter of federal law which is binding on state courts. **Banco Nacional de Cuba v. Sabbatino, supra**, 376 U.S. at 427, 84 S. Ct. at 939; **Republic of Iraq v. First National City Bank,** 353 F.2d 47, 50-51 (2nd Cir. 1965), **cert. denied**, 382 U.S. 1027, 86 S. Ct. 648, 15 L. Ed. 2d 540 (1966).

**{107}** GAC contends that the act of state doctrine is applicable because the Canadian Government participated in the cartel and effectively compelled Gulf, through its Canadian subsidiary, Gulf Canada, to join the cartel, transforming the cartel itself and all actions Gulf or Gulf Canada may have taken pursuant to it into the acts of a foreign state.[35] GAC asserts that judicial inquiry into the cartel and Gulf's role therein is precluded by the act of state doctrine because such an inquiry would necessarily place in question the legitimacy of the Canadian Government's actions.

**{108}** The Canadian Government has repeatedly stated that it "initiated" the discussions which led to the formation of the cartel, and that it thereafter "participated" in that organization. It has also stated that it "approved" of the participation of Canadian uranium producers in the cartel and that Gulf participated at the Government's "specific written request."[36]

**{109}** We accept these representations of the Canadian Government. However, the initiation of the cartel and the participation therein by that Government are not sufficient alone to transform the cartel-related activities of a wholly-owned subsidiary of a corporation based in the United States into the sovereign acts of a foreign nation, and thus to immunize those activities from challenge in American courts.

**{110}** It is well-settled that the mere fact that a foreign government approved, authorized, tolerated, encouraged, aided, or participated in the anti-competitive actions of a private individual or corporation does not necessarily provide an act of state defense. **See Cantor v. Detroit Edison Co**., 428 U.S. 579, 592-93, 96 S. Ct. 3110, 3118, 49 L. Ed. 2d 1141 (1976);[37] **Continental Co. v. Union Carbide,** 370 U.S. 690, 706-07, 82 S. Ct. 1404, 1414, 8 L. Ed. 2d 777 (1962); **U.S. v. Sisal Sales Corp**., 274 U.S. 268, 276, 47 S. Ct. 592, 593, 71 L. Ed 1042 (1927); **Mannington Mills, Inc. v. Congoleum Corp**., 595 F.2d 1287, 1293 (3rd Cir. 1979); **Timberlane Lbr. Co. v. Bank of America N.T. & S.A., supra,** 549 F.2d at 606; **Linseman v. World Hockey Ass'n, supra**, 439 F. Supp. at 1324; **United States v. The Watchmakers of Switzerland Information Center, Inc**., 1963 Trade Case. para. 70,600 (S.D.N.Y. 1963), **order modified**, 1965 Trade Cas. para. 70,352 (S.D.N.Y. 1965); Annot., 40 A.L.R. Fed. 343, 379-80, § 15 (1978); Baker, **Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's,** 11 Cornell Int'l L.J. 165, 177-78 (1978). In the recent case of **Industrial Inv. Development v. Mitsui & Co., Ltd**., 594 F.2d 48 (5th Cir. 1979), **cert. denied,** 445 U.S. 963, 100 S. Ct. 1078, 63 L. Ed. 2d 318 (1980), the court said that "the instigation of foreign governmental involvement does not mechanically protect conduct otherwise illegal in this country from scrutiny by the American courts." **Id**. at 52.

[35] In the findings it entered as sanctions against GAC for GAC's failure to comply with its discovery orders, the trial court found that the cartel was made up of uranium producers. Although the court did not mention government participation in the cartel, it did find that the Canadian Government had "encouraged," but neither "required," "mandated," nor "compelled" Gulf or Gulf Canada to participate in the cartel.

[36] According to that Government, the cartel was created in order to protect the uranium mining industries of the participating nations from the adverse consequences of an embargo the United States Government had established in 1964 on the importation of foreign uranium into this country. **See** Act of August 26, 1964, P.L. 88-489, 78 Stat. 602.

[37] Although this case dealt with the doctrine as it applies to an act of one of the states of the United States, the Court's ruling in **Cantor** applies to acts of foreign governments as well. **See Hunt v. Mobil Oil Corp**., 550 F.2d 68, 80 (2nd Cir. 1977) (Van Graafeiland, J., dissenting), **cert. denied**, 434 U.S. 984, 98 S. Ct. 608, 54 L. Ed. 2d 477 (1977); **Linseman v. World Hockey Ass'n**, 439 F. Supp. 1315, 1324 (D. Conn.1977).

**{111}** It is not sufficient merely to say the Government of Canada played a role in the cartel. The critical inquiry is into the nature of the role played by the foreign government, for "the very assertion of an act of state defense requires the court to examine into the nature of the conduct complained of and its relationship to the foreign sovereign." **Hunt v. Mobil Oil Corp., supra**, 550 F.2d at 79 (citations omitted) (Van Graafeiland, J., dissenting). Unless a court can examine this initial issue—"whether the acts complained of are in reality the acts of the defendants or the acts of a foreign government"[38]—it cannot determine whether the act of state doctrine applies, for that doctrine requires the act in question to be "the public act of those with authority to exercise sovereign powers." **Alfred Dunhill of London, Inc. v. Cuba**, 425 U.S. 682, 694, 96 S. Ct. 1854, 1861, 48 L. Ed. 2d 301 (1976).

**{112}** In each of the act of state decisions cited above, there appeared to be little doubt as to the nature of the role played by the foreign government. However, in this case, the absence of cartel discovery has made it impossible for our courts to determine the preliminary question—whether the **challenged** acts involve **any** action by the Government of Canada. There are two aspects to this dilemma.

**{113}** First, neither the official statements of the Canadian Government nor the available cartel evidence fully describes the acts of the cartel or the situs of those acts. More specifically, without the cartel records, it is impossible to determine precisely what cartel-inspired actions Gulf Canada, Gulf or GAC may have taken, at whom such actions may have been directed, or where they occurred.

**{114}** Second, the absence of cartel information has made it impossible to fully delineate the precise role played by the Government of Canada in the cartel; and more importantly, what specific actions, if any, Gulf was "compelled" by that Government to perform, or where those activities took place.

**{115}** Without this vital information we cannot determine if the act of state doctrine is applicable, as the following hypotheticals demonstrate. First, if we assume that the cartel, as the Canadian Government has described it, was not intended to, and did not have an adverse impact on, the domestic market of the United States, then cartel activities might well be beyond the scope of American antitrust laws,[39] and shielded by the act of state doctrine.

**{116}** However, we could also assume—because the absence of cartel records makes it impossible to negate the possibility—that Gulf, with the knowledge of such anticompetitive, non-United States activities and of the potential business opportunities such activities presented, went beyond the scope of the cartel as the Canadian Government defined it, and took predatory actions in the United States designed to eliminate competitors and to monopolize uranium reserves.[40] If this were the case, GAC and

[38] W. Fugate, **Foreign Commerce and the Antitrust Laws** 49-50 (1958). **See also** Fugate, **Antitrust Jurisdiction and Foreign Sovereignty,** 49 Va. L. Rev. 925, 932 (1963):

> The real question is **whose** acts are the subject of inquiry. If the acts are those of the foreign government within its own jurisdiction, then the antitrust exception applies. The situation is the same if the foreign government through its laws, regulations, or orders, **requires** private parties to perform the anticompetitive acts. If, on the other hand, the acts complained of are in reality those of private parties who seek to hide behind the cloak of foreign law, the courts will attach antitrust liability.

[39] "Sherman Act jurisdiction now depends upon a showing of anticompetitive effects within the United States." **Industrial Inv. Development v. Mitsui & Company, Ltd., supra**, 594 F.2d at 52 (citations omitted). **See also** K. Brewster, Jr., **Antitrust and American Business Abroad** 65-75 (1958); W. Fugate, **supra** at 29-34.

[40] GAC itself made this very distinction to the court below. In its opening statement at the trial, GAC's counsel stated:

> [T]he 1973 and 1974 supply agreements were not the part, product, or in any way connected with an agreement of the cartel.
>
> Now, it may be that Gulf was motivated to go into the agreements because of the cartel, or its knowledge of the cartel. There may be a lot of things. And all of those "maybes" may come out at trial. (Emphasis added.)

Gulf would not be shielded by the act of state doctrine, since the Canadian Government would have played no role in the **specific** anticompetitive conduct challenged in our courts. **See Continental Co. v. Union Carbide, supra,** 370 U.S. at 706-07, 82 S. Ct. at 144; W. Fugate, **supra**, at 148.

**{117}** The Canadian Government has repeatedly stated that the United States was excluded from the cartel's operations. However, Prime Minister Trudeau stated in October 1977 that although the exclusion of the domestic markets of the United States and Canada was his government's policy, he did not rule out the possibility that some producers may have gone beyond that policy. He stated: "We have no knowledge what some companies may have done under the pretext or cover of government policy." **Official Report of House of Commons Debates**, Vol. 121, No. 6, p. 224, 3rd Sess., 30th Parliament (Oct. 25, 1977).

**{118}** Without the withheld cartel documents it is impossible to determine whether the limited territorial scope of that policy was adhered to by the cartel or by Gulf. Although the Canadian Government has said that the cartel did not include the United States market, the broad proscriptions of the Canadian Uranium Information Security Regulations are not similarly limited. The language of those Regulations is broad enough to encompass **any** documents or information concerning the uranium activities of an American corporation in the United States.[41] Thus, the breadth of the regulations effectively precludes our courts from determining whether GAC or Gulf took predatory actions against their competitors in the United States, either as part of the cartel conspiracy or completely independently of it.

**{119}** It is clear that the Canadian Government does not wish to permit the courts of this country to inquire into whether Gulf exceeded the original scope of the cartel. However, whether Gulf adhered to the limited territorial scope of the cartel as Canada defined it is an inquiry that the act of state doctrine cannot preclude an American court from making. It is for the courts of this country, and not for the government of a foreign state, to determine whether **our** nationals took actions in **our** nation in violation of **our** laws.[42] The existence of cartel evidence indicating that the cartel might have exceeded its original non-United States scope makes it imperative that our courts be free to conduct such an inquiry in this case.[43]

**{120}** GAC argues on appeal that United has "failed to show that the cartel either sought to or

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[41] The Regulations read in pertinent part:

> No person who has in his possession or under his control any note, document or other written or printed material in any way related to conversations, discussions or meetings that took place between January 1, 1972 and December 31, 1975 involving that person or any other person or any government, crown corporation, agency or other organization in respect of the production, import, export, transportation, refining, possession, ownership, use or sale of uranium or its derivatives or compounds shall (a) release any such note, document or material, or disclose or communicate the contents thereof to any person, government, crown corporation, agency or other organization unless (i) he is required to do so by or under a law of Canada, or (ii) he does so with the consent of the Minister of Energy, Mines and Resources; or (b) fail to guard against or take reasonable care to prevent the unauthorized release of any such note, document or material or the disclosure or communication of the contents thereof.

The Regulations were amended in October 1977, but the amendments are not pertinent to the issues in this case.

[42] On appeal, GAC has contended that a court cannot, without violating the act of state doctrine, "inquire into what was the real scope of the Canadian policy," nor "judge what was the entire contour of the Canadian policy and was anything done outside the contours of that policy."

That that proposition is untenable should be evident. **See** Baker, **supra**, 11 Cornell Int'l L.J. at 177, n. 67. If GAC's position was adopted, then an act of state or sovereign compulsion defense could be irrefutably established by the mere assertion of it by the party seeking its protection.

[43] The chairman of the Congressional subcommittee which investigated cartel activities concluded that there could not be "any serious doubt . . . that cartel activities did in fact affect domestic American commerce." **Hearings on International Uranium Cartel, supra**, Vol. 1, Serial No. 95-39, p. 247. **See also** the evidence reviewed in Section II B, **supra**, and **Duquesne Light Co., et al. v. Westinghouse Electric Corporation**, (No. G.D. 75-23978) (Pa. Ct. of Comm. Pleas, March 30, 1977) (approving settlement).

did harm United"; has "failed to show that the cartel even considered uranium producers"; and has not cited "any competent evidence that the cartel engaged in any predatory activity against anyone." These assertions are entirely beside the point. It is inconsistent for a party to fail to produce records and to then contend that the opposing party has failed to point to any records to support its allegations. We will not accept the proposition that the broad and vague outlines of a foreign government's activities automatically activate a doctrine which provides a total eclipse of the judicial search for the truth.

**{121}** The absence of cartel records makes the second aspect of Canada's alleged involvement in the cartel—its compulsion of Gulf Canada—equally unavailing to GAC under rubric of the act of state doctrine.

**{122}** In **Interamerican Refining Corp. v. Texaco Maracaibo, Inc**., 307 F. Supp. 1291, 1297-98 (D. Del. 1970), the court held that where an American corporation is compelled by a foreign government to commit anti-competitive practices, such compulsion constitutes a complete defense to an antitrust action based on those practices. **See also United States v. The Watchmakers of Switzerland Information Center, Inc., supra**; K. Brewster, **supra**, at 92-94; W. Fugate, **supra**, at 148-49; Annot., 12 A.L.R. Fed. 329, 340-43, § 4 (1972); Annot., 40 A.L.R. Fed. 343, 377-79, § 14 (1978). However, "[o]ne asserting the [sovereign compulsion] defense must establish that the foreign decree was basic and fundamental to the alleged antitrust behavior and more than merely peripheral to the overall illegal course of conduct." **Mannington Mills, Inc. v. Congoleum Corp**., **supra**, 595 F.2d at 1293.

**{123}** The reason why the sovereign compulsion defense cannot be invoked here is because the absence of cartel records makes it impossible to determine precisely what acts, if any, were compelled, and where those acts were performed.[44]

**{124}** The available cartel evidence bearing on the question of government compulsion is ambiguous and conflicting. The Canadian Government has stated that the participation of all Canadian uranium producers in the cartel was "a matter of Canadian Government policy," which was "implemented through the [Canadian] Atomic Energy Control Act and Regulations." The Government also stated it had "secured compliance with the terms of the [cartel] arrangement." However, Prime Minister Pierre Trudeau stated in response to a question in the Canadian Parliament that the contention "about the government forcing companies into [the cartel] . . . is obviously a spurious argument." He said that "the government had a policy which authorized" the cartel and that the Government had "requested" Canadian uranium producers to act within that policy. **Official Report of House of Commons Debates**, Vol. 121, No. 6, p. 224, 3rd Sess., 30th Parliament (Oct. 25, 1977).

**{125}** The cartel records that have been produced do not substantially clarify this issue. Initially, Gulf described its attendance at early cartel meetings as a response to "a very strong invitation" from the Government to participate in the cartel; Gulf Canada had been "forcefully invited" to attend. From the outset, however, Gulf apparently conditioned its participation upon a determination that it would not result in violations of the United States antitrust laws.

**{126}** In April 1972, an associate general counsel for Gulf wrote to Gulf's general counsel in Pittsburgh concerning "an agreement" in the making "among producers of uranium." He stated that the producers would present their agreement to the Canadian Cabinet "for approval," and that the Cabinet would thereafter

[44] In his opinion in **In Re Uranium Antitrust Litigation, supra**, 480 F. Supp. at 1154, Judge Marshall indicated that cartel records could have a vital bearing on the defendants' defenses of sovereign compulsion. Thus, he indicated that merely by raising the sovereign compulsion defense, a defendant could not preclude a court from seeking documents located in a foreign country which might be relevant to the merits of that defense. **Compare** GAC's position at n. 42, **supra**.

direct the producers to participate in the agreement.[45] He concluded that a decision by Gulf to participate in the cartel was necessary before the cartel's Paris meeting on April 20-21, because "there is no point in our attending the meeting unless we have decided to go along."

**{127}** Gulf apparently decided "to go along." Roger Allen, an attorney for Gulf Minerals in Denver, attended the cartel's Paris meeting, along with Gulf Minerals' president, S.A. Zagnoli. However, Gulf was nevertheless still concerned about its possible liability under United States antitrust laws. Allen told the other cartel members that "Gulf management was unwilling to take such a risk and, consequently, any participation by Gulf in the arrangement was conditioned upon receiving an expression from the U.S. Department of Justice satisfactory to Gulf."

**{128}** The following month, Gulf indicated that although it remained concerned about United States antitrust laws, it otherwise agreed "in principle with the desirability of establishing a marketing arrangement." By June 1972, Allen was reporting that Gulf had decided that it "should not even file a White Paper with the Department of Justice. Gulf Minerals **had agreed to take a business risk**. . . ." (Emphasis added.)

**{129}** Although by early June 1972, Gulf had established "compulsion" as the "fountainhead" of its antitrust defense, in July 1972, Gulf officials were nevertheless describing "the nature of the Canadian Government activity in fostering the Organization" as "still a bit fuzzy." As late as September 1972, a Gulf attorney stated that Gulf's antitrust problem was aggravated by the "ambiguous role played by the cartel governments." The following month, the same attorney referred to the "interchanging and ambiguous capacities in which the Canadian Government had acted." Thus, six months after the government "compulsion" allegedly occurred, Gulf officials were still having difficulty delineating the role played by the Government.

**{130}** The evidence suggests that Gulf officials took steps designed to bolster the sovereign compulsion defense by encouraging Canada to take a more explicit and less flexible position. As early as May 1972, Mr. Ediger, Gulf Canada's president, advised Mr. Hoffman, a member of the Gulf-United board of directors and a vice-president of Gulf Energy, the predecessor of GAC, that Gulf intended

> to suggest amendments [to the proposed producers' agreement] which will emphasize the fact that our participation is a result of direction from the Canadian government. Therefore, we will likely suggest [adding language] to indicate that Gulf and UCL [Uranez Canada Limited, a German corporation] are complying at the request of the Canadian government. . . .

**{131}** In September 1972, a Gulf attorney complimented Mr. Ediger for telling the other cartel members that "it was very important for continuity to reside in the [Canadian] Department of E.M.& R. [Energy, Mines, and Resources]." The attorney went on to say:

> Whatever the occasion for expression of this position, Gulf representatives should

[45] On August 17, 1972, the Canadian Minister of Energy, Mines and Resources wrote to the President of the Canadian Atomic Energy Control Board, informing him that the Canadian Government had approved a regulation governing the export of uranium from Canada "[i]n order to enforce compliance with the terms of the marketing arrangements." The letter began by stating that "[o]n June 29, 1972, [the Canadian] Cabinet approved the terms of a uranium export marketing arrangement [the cartel] **proposed by producers** in Canada and several other countries." (Emphasis added.) One writer suggested that "this document reveals an approval by government of a privately proposed arrangement, which was in turn implemented by government orders." **Baker, supra**, 11 Cornell Int'l L.J. at 183, n. 94. **Compare** W. Fugate, **supra**, at 148 ("[I]f private parties . . . influence foreign government legislation as part of a conspiracy to restrain United States foreign trade, the foreign government sanction of some of their activities will not justify their conspiracy" (Footnotes omitted)) **with Cal. Retail Liquor Dealers Ass'n v. Midcal Alum**., 445 U.S. 97, 104-108, 100 S. Ct. 937, 943-44, 63 L. Ed. 2d 233 (1980) ("The State simply authorizes price-setting and enforces the prices established by private parties. . . . The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.")

> take advantage of the occasion **and recognize it as the party line**. The more intricately involved the Canadian Government and any of its agencies or Departments becomes and remains in this uranium matter, the better the degree of protection for Gulf. (Emphasis added.)

**{132}** One reasonable inference that can be drawn from this evidence is that Gulf wanted to be compelled by the Government of Canada; it is not particularly consistent with the notion that Gulf reacted, "in innocence and good faith, to governmental threats and pressures." Graziano, **Foreign Governmental Compulsion as a Defense in United States Antitrust Law,** 7 Va. J. Int'l L. 100, 117 (1967). The evidence does not establish to our satisfaction that Gulf—acting without the intent to restrain competition—innocently responded to foreign governmental pressure. Rather, it would appear that Gulf simply decided "to take a business risk," and thereafter did all it could to minimize that risk by establishing "the effective Canadian Government direction" that it join the cartel as "the fountainhead" of its antitrust defense.

**{133}** Even if we were to assume, however, that Gulf had been effectively compelled to join and participate in the cartel operations, such compulsion might not provide an all-encompassing defense in this case, for the critical questions upon which application of the act of state doctrine turns would remain unresolved—what **specific** acts were compelled and where did they take place.[46]

**{134}** United has alleged that GAC and Gulf sought to eliminate it as a competitor in the United States and to monopolize American uranium reserves. It further contends that the 1973 and 1974 Supply Agreements were part of that anticompetitive effort. Even if such actions were "compelled" by a foreign government the act of state doctrine would provide no protection to Gulf or GAC. By definition, the act of state doctrine applies only to the acts of a foreign state "done within its own territory." **Underhill v. Hernandez, supra**, 168 U.S. at 252, 18 S. Ct. at 84. **See also Republic of Iraq v. First National City Bank, supra,** 353 F.2d at 51. "The doctrine cannot be used to excuse the commission of illegal acts within the territorial boundaries of the United States." **Linseman v. World Hockey Ass'n, supra**, 439 F. Supp. at 1324 (citations omitted). Although the "compulsion" may have occurred in Canada, it is the acts that are compelled, rather than the compulsion itself, that are at issue in the present litigation. The act of state doctrine must apply to those acts, if it is to apply at all.

**{135}** We cannot agree with the proposition that if a foreign state compels an American corporation to take actions in the United States which are intended to and do have severe adverse consequences to free and fair trade in the United States, the American corporation is thereby immunized from the full force of the laws of its own sovereign.[47] To hold otherwise would render asunder the "cornerstones of this nation's economic policies"—the antitrust laws. **United States v. First National City Bank**, 396 F.2d 897, 903 (2nd Cir. 1968).

**{136}** Our conclusion that the act of state doctrine is inapplicable is supported by the position taken towards the cartel by those branches of the federal government that are responsible for the formulation and execution of foreign policy.

**{137}** The Proposition that the act of state doctrine should not be applied where the

[46] "Today it is clear that a businessman may do no more than what is required by foreign legislative mandate if he is to claim antitrust immunity." 7 Va. J. Int'l L. at 133. **See also** W. Fugate, **supra**, at 148.

[47] For authorities supporting the position that the sovereign compulsion defense should be limited to activities conducted solely within the foreign sovereign's territory, **see** Fugate, 49 Va. L. Rev. at 934; Note, **Development of the Defense of Sovereign Compulsion,** 69 Mich. L. Rev. 888, 901-02 (1971); 7 Va. J. Int'l L. at 140-42; **United States Department of Justice Antitrust Guide for International Operations**, T. Reg. Rep. (CCH) No. 266, Part II (Feb. 1, 1977).

executive or legislative branches of the federal government have indicated that the act of a foreign state is not entitled to recognition under that doctrine was first set forth in **Bernstein v. N.V. Nederlandsche-Amerikaansche, Etc**., 210 F.2d 375, 376 (2d Cir. 1954). **See generally** Annot., 12 A.L.R. Fed. 707, § 2 [b] (1972). The Bernstein exception to the act of state doctrine was subsequently adopted by three members of the United States Supreme Court in **First Nat. City Bk. v. Banco Nacional de Cuba,** 406 U.S. 759, 767-70, 92 S. Ct. 1808, 1813, 32 L. Ed. 2d 466 (1972). Although the Bernstein exception has never gained the support of a majority of the Supreme Court,[48] neither in **First Nat. City Bk.** nor in any other case has the Court held that the position taken by the executive and legislative branches regarding the subject matter of the particular litigation in which the doctrine is sought to be invoked is irrelevant. The fact that those branches of the federal government which are responsible for the formulation and execution of foreign policy do not consider a certain subject to involve act of state implications is relevant to, but not dispositive of, the question of the applicability of that doctrine.

**{138}** Both the executive and legislative branches have taken actions with respect to the uranium cartel which are clearly inconsistent with the notion that judicial examination of Gulf's participation in the cartel is precluded by the act of state doctrine.

**{139}** The United States Government declined to state that this litigation involves "a breach of friendly relations" between the United States and Canada. In a letter transmitting communications from the Canadian Government to the trial court, the State Department stated that it was taking "no position with regard to any of the issues raised" by those letters, and that transmittal of the letters "should not be understood as having implications with respect to the foreign affairs of the United States."[49]

[48] Six members of the Supreme Court in **First Nat. City Bk.** rejected the notion that the position of the executive branch is dispositive of the question of the applicability of the act of state doctrine in a particular case.

[49] GAC has brought to our attention two letters written by the Justice Department to the Seventh Circuit Court of Appeals and to Judge Marshall in the **Westinghouse** uranium litigation now pending before those courts. **See In Re Uranium Antitrust Litigation,** 617 F.2d 1248 (7th Cir. 1980) and D.C., 480 F. Supp. 1138, **supra.** On March 18, 1980, the Justice Department sent the Seventh Circuit a letter from the State Department which referred to criticism of foreign governments in a recent decision of that court (**see** 617 F.2d at 1256). The State Department said that this criticism had "caused serious embarrassment to the United States in its relations with some of our closest allies." It stated that "the foreign governments concerned have substantial interest not only in [the **Westinghouse**] litigation, but also in certain broader issues which it raises." It said that although "the United States Government does not share some of the views presented by the foreign governments," it recognized "the genuineness of their concerns," and believed that their views should be considered by the courts because they "may assist the judiciary . . . in making the necessary accommodations between the laws and policies of various sovereign nations."

In May of this year, Associate Attorney General John Shennefield asked Judge Marshall to give "appropriate deference and weight" to the views and representations of the foreign governments. He stated that because the **Westinghouse** case "implicates foreign policy concerns of both the United States and foreign governments," "it would be inappropriate, **in the absence of bad faith,** to inflict punishment against a defendant . . . for inability to comply with the discovery order of the court because of a contrary foreign criminal law." (Emphasis added.) He urged the court to consider "the consequences of the absence of complete discovery" by reference to the factors identified in **Societe Internationale v. Rogers,** 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958).

Unlike the Seventh Circuit's recent decision, nothing either this Court or the trial court below has said in this case was critical of the Government of Canada. In May of this year, the Government of Canada sought leave of this Court to file an amicus curiae brief in this appeal. The motion was filed over two years after entry of the sanctions order and default judgment, and one year after the case had been argued to this Court. No reason was given for the delay in filing the motion, and accordingly, it was denied. In any case, the views of the Canadian Government were presented to the trial court, and are part of the record on appeal. We have fully considered them in reaching our decision. Like the State Department, however, we do not share some of the Canadian Government's views, though we have given full credence to their representations. The State Department's statement that the views of the foreign governments involved "may assist the judiciary . . . in making the necessary accommodations between the laws and policies of the various sovereign nations," is inconsistent with the notion that judicial examination of the matters at issue is precluded by the act of state doctrine. It is worth noting that neither the State nor the Justice Department has communicated similar concerns either to the court below or to this Court over the course of this litigation. Finally, the

**{140}** More significantly, the federal government has affirmatively sought to apply the laws of this country to Gulf's cartel activities. A Congressional subcommittee held hearings on the cartel. **See Hearings on International Uranium Cartel, supra.** A federal grand jury was impaneled to investigate the cartel. **In Re Grand Jury Investigation of Uranium Industry,** Misc. 78-0173, F.S. 78-0166 (D.D.C. 1978). In May 1978 the Justice Department filed a criminal information against Gulf, charging it with violations of the Sherman Antitrust Act, to which Gulf pled **nolo contendere. United States v. Gulf Oil Corp.,** Cr. No. 78-123 (W.D. Pa. 1978).[50]

**{141}** The actions taken by both the legislative and executive branches regarding the cartel, and the detailed position the Justice Department has adopted in the general area of the extraterritorial application of United States antitrust laws (**see** n. 50, **supra**), are persuasive evidence that the branches of the federal government having responsibility for the conduct of foreign affairs do not consider the cartel activities of a major United States corporation to be immune from examination by the courts of this country.

**{142}** These actions are more than a simple statement that the United States Government does not consider the act of state doctrine to be applicable to specific litigation involving private parties. The Government's position is also not merely an isolated instance involving a single corporation and a specific cartel. **See** n. 50, **supra.** Therefore, there is little danger that judicial deference to the executive branch's position will make the judiciary "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others." **First Nat. City Bk. v. Banco Nacional de Cuba, supra,** 406 U.S. at 773, 92 S. Ct. at 1816 (footnote omitted) (Douglas, J., concurring).

**{143}** The fact that these actions involved the public enforcement of the antitrust laws, rather than a civil antitrust action by a private litigant, is immaterial. Recognition of such a distinction would further no national interest. As one commentator noted:

> It would seem that where the branches responsible for formulation of foreign policy have subordinated the sensitivity of foreign governments to having their acts of a particular sort explored in American courts that, at least after a successful prosecution of the American concern, the act of state doctrine should not stand in the way of the injured competitor's antitrust claim. In such a case, the act of state doctrine would thwart antitrust enforcement policies without furthering any separation of powers (judicial non-interference with foreign policy) values. . . . [T]he decision to review a foreign sovereign's act has already been contemplated by the statute and . . . already occurred in a prosecution.

Note, **"Sherman Act Jurisdiction and the Acts of Foreign Sovereigns**," 77 Colum.L. Rev. 1247, 1261 (1977) (footnote omitted).

**{144}** The antitrust laws of this State and nation contemplate both public and private actions against those who may have violated them.[51]

default judgment imposed in this case was based on findings that GAC acted in bad faith. Those findings are supported by the record; and they are consistent with the requirements of **Societe Internationale** (**see** Section III A, **infra**), and the concerns the Justice Department expressed in its most recent letter concerning the **Westinghouse** litigation.

[50] The Antitrust Division of the Justice Department has an established policy regarding the application of American antitrust laws to the international activities of American corporations which is consistent with the actions taken by the Division regarding this cartel and with the discovery orders entered in this case. In the **Antitrust Guide for International Operations,** (**see** n. 47, **supra**), the Justice Department discusses its position concerning the application of the act of state doctrine to two hypothetical situations (cases "K" and "L") that have a direct bearing on the allegations against GAC and Gulf in this case.

[51] **United States v. Borden Co.,** 347 U.S. 514, 518, 74 S. Ct. 703, 706, L. Ed. 903 (1954); **Battle v. Liberty National Life Insurance Company,** 493 F.2d 39, 52 (5th Cir. 1974), **cert. denied,** 419 U.S. 1110, 95 S. Ct. 784, 42 L. Ed. 2d 807 (1975); **In Re Uranium Antitrust Litigation, supra,** 480 F. Supp at 1154.

They do not envision, nor should they be applied in such a way as to bring about, the anomalous situation in which the public interest is vindicated by the imposition of a fine of several thousand dollars, but in which the private interest is frustrated by enforcement of a multi-million dollar judgment against what may have been a harmed competitor. To permit such a situation to exist could further the very anticompetitive and monopolistic goals which the multi-national corporation is alleged to have sought to achieve and which the antitrust laws were designed to prevent.[52]

### b. Exclusive Federal Power Over Foreign Affairs

**{145}** GAC claims that even if the act of state doctrine does not bar an American court from examining Gulf's cartel-related actions, the principle of exclusive federal power over the conduct of foreign relations nevertheless precludes an American **state** court from conducting such an examination.[53]

**{146}** GAC relies on **Zschernig v. Miller,** 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968), in which the United States Supreme Court struck down an Oregon intestacy statute as it had been applied by the Oregon Supreme Court. 243 Or. 567, 412 P.2d 781 (1966). The Oregon statute required that in order to take property belonging to an Oregon resident by succession or testamentary disposition a non-resident alien had to prove that (1) American residents had a reciprocal right to inherit in the alien's country; and (2) the non-resident alien would be able to receive "the benefit, use or control" of the proceeds of the Oregon estate "without confiscation" by his government.

**{147}** In **Zschernig,** the Court held that, as applied, the statute constituted an impermissible intrusion by the state into foreign affairs, an area which the Court said was entrusted by the United States Constitution solely to the President and Congress. The Court said that the statute required local probate courts to launch "minute inquiries" into the nature of foreign governments, the quality of rights which those governments accorded to both American citizens and their own citizens, the credibility of the representations of officials of foreign governments, and the actual administration of foreign legal systems. **Zschernig,** 389 U.S. at 433-35, 88 S. Ct. at 666-667.

**{148}** GAC contends that the **Zschernig** decision precludes state courts from exercising jurisdiction over issues relating to the foreign cartel because of the Canadian Government's relationship to the cartel. GAC argues that because the trial court was without jurisdiction to consider the cartel-related issues, it could not enter discovery orders directing the production of cartel documents.

**{149}** The **Zschernig** decision, which has not been applied by the United States Supreme Court outside of the limited context of the alien inheritance statutes at issue in that case, has nothing to do with this case. Unlike the statute at issue in **Zschernig,** the causes of action involved in this case are universally accepted by American jurisdictions—fraud, breach of fiduciary duty, commercial impracticability, economic coercion and antitrust. The effective enforcement of the antitrust laws is essential to the maintenance of free and fair business competition.[54] Unlike the

Sections 57-1-1 and 57-1-2, N.M.S.A. 1978, make certain anti-competitive trade practices a crime in New Mexico. Section 57-1-3, N.M.S.A. 1978, provides a private party with a cause of action for damages it suffers by reason of the same practices.

[52] "Private litigation under the antitrust laws plays an important role in the enforcement of antitrust violations. It supplements public enforcement, 'increases the likelihood that a violator will be found out, greatly enlarges his penalties, and thereby helps discourage illegal conduct.'" Wechsler, **New Mexico Restraint of Trade Statutes—A Legislative Proposal,** 9 N.M.L. Rev. 1, 20 (1979) (footnote omitted).

[53] Although similar to the act of state doctrine, this second principle is distinct in that the former looks to the power of American courts in general, whereas the latter is concerned with the power of an American **state** court. The act of state doctrine rests on the principle of separation of powers between branches of the federal government; the principle of exclusive federal power over the conduct of foreign relations is based on the concept of federalism.

[54] "Antitrust laws in general, and the Sherman Act in partic-

alien inheritance statutes in **Zschernig,**[55] the causes of action in this case do not involve questionable attempts by states to directly affect the rights of citizens in foreign nations, nor are they related to the foreign policy attitudes of this or any other state court.

**{150}** In this litigation the courts of this State have not undertaken the type of analysis that **Zschernig** prohibits. No pejorative criticism has been directed at Canada or any other foreign government. No minute inquiry has been made into the actual administration of foreign law by a foreign government, or into the rights that such a government affords to its own citizens. The veracity of the representations of its diplomats has not been questioned. This case involves nothing more than an inquiry into what an **American** corporation has done **in America,** a situation which finds no appropriate analogy in **Zschernig** or its exceedingly limited progeny.

**{151}** The states of this country have little interest in how a foreign government treats its own citizens, but they have every conceivable interest in anticompetitive conduct by American corporations occurring within their own borders. Likewise, foreign governments have a legitimate interest in the rights they choose to afford their own citizens; but they have no legitimate interest in whether a state court in this country will lend its judicial processes to the enforcement of contracts entered into in the United States by corporations based in this country for the supply of a resource to be mined and milled in the United States. Our courts have done no more than seek to enforce state laws which are consistent with federal laws, and with actions of the United States Congress[56] and the United States Justice Department concerning Gulf's cartel activities. We therefore hold that neither **Zschernig** nor the act of state doctrine precludes the courts of New Mexico from litigating the cartel-related issues present in this case, or from seeking the production of documents which will facilitate the resolution of such litigation.

### 2. Canada's Uranium Information Security Regulations

**{152}** GAC also contends that the trial court's discovery orders commanded conduct in violation of the Canadian Uranium Information Security Regulations, and were therefore prohibited by the act of state doctrine and the **Zschernig** decision.

#### a. Act of State Doctrine

**{153}** Clearly, the Uranium Information Security Regulations were an act of state. They were promulgated by the Canadian Government pursuant to the Canadian Atomic Energy Control Act. They have been upheld by Canadian courts. The Regulations have been considered by both the Canadian executive and judicial branches to be in the public interest of Canada. However,

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ular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." **United States v. Topco Associates,** 405 U.S. 596, 610, 92 S. Ct. 1126, 1135, 31 L. Ed. 2d 515 (1972).

"So crucial are antitrust laws to the economy of the state that the New Mexico Constitution [Art. IV, § 38] mandates the enactment of laws 'to prevent trusts, monopolies and combinations in restraint of trade.'" Wechsler, 9 N.M. L. Rev. at 22.

[55] These statutes had largely been applied to Communist countries. In the years following their passage, the statutes were subject to widespread criticism by legal scholars for being unsound legislation which had been both ineffective and prejudicially applied. **See e.g.** the authorities cited in 32 Alb.L. Rev. 646, 649, n. 15 (1968). In applying these statutes, state courts had on occasion criticized foreign governments in strong and intemperate language. **See** examples cited in **Zschernig, supra** at 437-39, n. 8, 88 S. Ct. at 669 n. 8 and in 82 Harv.L. Rev. at 239, n. 8. Commentators were virtually unanimous in condemning these statutes and in applauding the **Zschernig** decision. One said: "[C]learly the state has no interest in inquiries of the sort which [ **Zschernig**] condemned." 82 Harv.L. Rev. at 245. **See also** 32 Alb.L. Rev. at 653-54.

[56] It is worth noting that the Congressional subcommittee investigating the cartel held several of its hearings in unprecedented joint sessions with a committee of the New York State Assembly in order to assist that state's independent investigation of the cartel. **Hearings on International Uranium Cartel, supra,** Vol. I, Serial Nos. 95-39, p. 130 and No. 95-95, p. 1.

it does not follow that because the Regulations were an act of state, the discovery orders were precluded by the act of state doctrine.

**{154}** The trial court never ordered GAC, Gulf, or Gulf Canada to violate the Regulations, and never questioned the validity of those Regulations. In October 1977, the court ordered GAC to produce all non-privileged cartel records, **"[i]nsofar as it is lawful so to do."** (Emphasis added.) The court went on to say that "to the extent that it might be a violation of Canadian law to produce . . . [cartel] documents housed in Canada," GAC had an obligation to "make an immediate diligent and good faith effort to obtain a **lawful** waiver of or dispensation from such Canadian prohibitions and to the extent thereafter **lawful** at the earliest possible date, actually produce for inspection and copying of such documents." (Emphasis added.) In subsequent orders the trial court expressly refused to order identification or production of cartel documents in violation of Canadian law. Instead, it relied on Rule 37 sanctions to redress the dilemma resulting from the absence of the documents or the identification thereof.[57]

**{155}** Further, the act of state doctrine is inapplicable insofar as the Regulations are concerned under the decision of the United States Supreme Court in **Societe Internationale v. Rogers,** 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958). In that case the plaintiff, a Swiss holding company, had assets seized by the Alien Property Custodian during the Second World War pursuant to the Trading With The Enemy Act. After the War, the plaintiff filed suit against the Attorney General of the United States seeking to recover the property on the ground that it had not been an enemy within the meaning of the Act. The Government sought production of records which were in the possession of a Swiss banking company controlled by the plaintiff, which it claimed were relevant to the issue of the plaintiff's alleged "enemy taint." The plaintiff failed to produce the documents because Swiss law prohibited production of the records. The district court dismissed the plaintiff's complaint, **Societe Internationale, Etc. v. McGranery,** 111 F. Supp. 435 (D.D.C. 1953). The Court of Appeals affirmed. **Societe Internationale v. Brownell,** 95 U.S. App.D.C. 232, 225 F.2d 532 (D.C. Cir. 1955). The Supreme Court unanimously reversed the two lower courts.

**{156}** Two aspects of the Supreme Court's decision are pertinent to this case—first, the propriety of a court's order to produce records located in a foreign country whose laws prohibit disclosure of the records; and second, the appropriateness of the sanctions imposed for a party's failure to comply with such an order where the failure is due to the proscriptions of foreign law. In this section of the opinion, we are concerned only with the first question; the latter aspect is considered in Section III A, **infra.**

**{157}** In **Societe Internationale,** the Court stated:

> Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant **only** to the path which the District Court might follow in dealing with petitioner's failure to comply.

357 U.S. at 208, 78 S. Ct. at 1094 (emphasis added). This passage implies that foreign nondisclosure laws are not relevant to the propriety of production orders. Rather, it states that the reason for nonproduction is relevant **only** to the question of appropriate sanctions for noncompliance

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[57] In ordering production of Gulf's Canadian cartel documents in the Westinghouse litigation, Judge Marshall rejected the very same act of state argument GAC advances here. He stated:

> Plaintiffs have not challenged the validity of any of the foreign nondisclosure laws which are relied on by defendants. The issue is not whether those laws are valid, but rather, conceding their validity, whether they excuse defendants from complying with a production order.

**In Re Uranium Antitrust Litigation, supra,** 480 F. Supp. at 1149.

with the order. This distinction is significant. **In Re Westinghouse Elec. Corp. Uranium, Etc.,** 563 F.2d 992, 997, 999 (10th Cir. 1977); **Arthur Andersen & Co. v. Finesilver,** 546 F.2d 338, 341 (10th Cir. 1976), **cert. denied,** 429 U.S. 1096, 97 S. Ct. 1113, 51 L. Ed. 2d 543 (1977); **In Re Uranium Antitrust Litigation, supra,** 480 F. Supp. at 1144-48; Wright, "Discovery," 35 F.R.D. 39, 81 (1963); Note, **Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-production,** 14 Va.J. Int.L. 747, 753 (1974).

**{158}** In **Societe Internationale** the Court did not refer to the act of state doctrine or to principles of international comity. The reason for that lack of reference to these principles is simple. Neither in **Societe** nor in this case did the trial court order a litigant to violate the nondisclosure laws of the foreign sovereign. Neither court criticized the foreign sovereign or its laws, or engaged in an examination of such laws or the motivations which gave rise to them. Both courts sought only to maintain the integrity of the judicial process and the efficacy of the laws upon which the cause of action in each case was based. In both cases, those laws reflected very significant policies of this country.[58]

### b. Exclusive Federal Power over Foreign Relations

**{159}** The principles set forth in **Zschernig v. Miller, supra,** are inapplicable to the Uranium Information Security Regulations for largely the same reasons that the act of state doctrine does not apply. The discovery orders in this case which sought cartel document production involved none of the problems the Supreme Court was confronted with in **Zschernig. See e.g.,** n. 55, **supra,** and accompanying text.

## D. APPLICABILITY OF NEW MEXICO ANTITRUST ACT

**{160}** The last issue we consider concerning the propriety of the trial court's discovery orders involves the applicability of the New Mexico Antitrust Act, Sections 57-1-1 to 57-1-3, N.M.S.A. 1978.[59] Although GAC filed a counterclaim alleging that United had violated the New Mexico Antitrust Act, it now contends that that Act may not be applied to the specific commerce at issue in this case (the 1973 and 1974 Supply Agreements and the I&M contract) and to the activities of the international uranium cartel. GAC argues that if the Act does not apply, discovery orders pertaining to allegations of violations of the Act could not be entered, and therefore, sanctions

[58] In his recent decision ordering Gulf and other parties in the **Westinghouse** litigation to produce cartel records located in Canada and elsewhere, United States District Judge Marshall stated that "the policies supporting an inquiry into corporate activities and structure are at least as weighty, and probably stronger, with the antitrust statutes here than they were with the Trading with the Enemy Act in **Societe Internationale.**" **In Re Uranium Antitrust Litigation, supra,** 480 F. Supp. at 1154 (citation omitted).

In a decision rendered on March 18 of this year, the Supreme Court of Canada denied an application of Gulf Oil for letters rogatory to secure cartel documents located in Canada. **Gulf Oil Corp. v. Gulf Canada Ltd.** (Slip Op. March 18, 1980). Gulf sought the letters in order to comply with discovery orders entered by Judge Marshall in the **Westinghouse** litigation. **See In Re Uranium Antitrust Litigation, supra,** 480 F. Supp. 1138. The Canadian high court stated that the Canadian Government's "resistance to disclosure was not so much a matter of the maintenance of secrecy as it was of an assertion of Canadian sovereignty to resist the extra-territorial application of United States anti-trust laws." The court stated that it failed to see how such a policy "can be ignored in the interests of comity towards a foreign court, as if the policy was essentially a reflection of private considerations without any public, governmental interest." But it stated: "It may be that different considerations will operate where a Canadian court is concerned with Canadian litigation arising out of issues turning on Canadian law."

The antitrust issues in this litigation reflect more than "private considerations without any public, governmental interest." **See** n. 54, **supra.** We cannot subscribe to the idea that the fundamental public policy which the antitrust laws embody must be ignored in the interests of comity towards the policy of a foreign state, particularly where the highest court of that state intimates that it would not necessarily be bound by the same policy of its own government in litigation "turning on Canadian law."

[59] In 1979, the New Mexico Legislature substantially revised the Antitrust Act. **See** N.M. Laws 1979, ch. 374, §§ 1-18 (codified as Sections 57-1-1 to 57-1-15, N.M.S.A. 1978 (Supp. 1979)). In this case, we are concerned with the prior act, Sections 57-1-1 to 57-1-3, N.M.S.A. 1978.

could not be imposed for a failure to comply with such orders.[60]

### 1. The Commerce Clause

**{161}** GAC's first contention is that the Commerce Clause of the United States Constitution[61] bars the application of state antitrust laws to activities which occur exclusively or overwhelmingly in interstate and foreign commerce. GAC argues that the supply and utility contracts in this case have no immediate relationship to the State of New Mexico, and therefore, that they involve only interstate commerce. Further, GAC argues that the cartel's operations were concerned solely with foreign commerce.

**{162}** It is well-settled that the federal power to regulate commerce is not exclusive, and that states have the inherent police power to regulate commerce within their borders, even though such activities may include or affect interstate and foreign commerce. **Merrill Lynch, Pierce, Fenner & Smith v. Ware,** 414 U.S. 117, 140, 94 S. Ct. 383, 396, 38 L. Ed. 2d 348 (1973); **Cities Service Co. v. Peerless Co.,** 340 U.S. 179, 186, 71 S. Ct. 215, 219, 95 L. Ed. 190 (1950); **Southern Pacific Co. v. Arizona,** 325 U.S. 761, 766-67, 65 S. Ct. 1515, 1518-19, 89 L. Ed. 1915 (1945); **K.S.B. Tech. Sales v. North Jersey, Etc.,** 75 N.J. 272, 381 A.2d 774, 784 (1977). Specifically, a state may exercise its power by removing restraints on the trade and commerce of that state even though interstate commerce may thereby be affected. **Giboney v. Empire Storage Co.,** 336 U.S. 490, 495, 69 S. Ct. 684, 687, 93 L. Ed. 834 (1949); **Watson v. Buck,** 313 U.S. 387, 403-04, 61 S. Ct. 962, 967, 85 L. Ed. 1416 (1941); J. Flynn, Federalism and State Antitrust Regulation 63 (1964).

**{163}** The following standards for the states' power to regulate commerce were established in **Pike v. Bruce Church, Inc.,** 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174 (1970):

> Where the [state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

**See also Philadelphia v. New Jersey,** 437 U.S. 617, 624, 98 S. Ct. 2531, 2536, 57 L. Ed. 2d 475 (1978).

**{164}** Thus, the first inquiry is whether the state regulation effectuates "a legitimate local public interest." There are two aspects to this requirement. First, the type of regulation—here antitrust—must be one within the state's inherent police powers. Second, the specific activity to which the state regulation is applied in a particular case must involve a matter of local concern which is "local in character and effect." **Southern Pacific Co. v. Arizona, supra,** 325 U.S. at 767, 65 S. Ct. at 1519.

**{165}** It has consistently been held that the type of regulation at issue here—the prevention of anti-competitive, monopolistic and predatory trade practices—is a legitimate exercise of the state's inherent police powers. **See United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. at 124-27, 597 P.2d at 309-12 (1979);

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[60] GAC's argument as to the inapplicability of the New Mexico Antitrust Act relates only to the antitrust issues in this case. However, as we have already held, the information and documents sought were also relevant to United's claims of fraud, breach of fiduciary duty, economic coercion and commercial impracticability. The judgment for I&M was based on commercial impracticability under Section 55-2-615, N.M.S.A. 1978. GAC makes no claim that trial of these issues was precluded by the Commerce Clause or the Sherman Antitrust Act.

[61] U.S. Const., Art. I, § 8, cl. 3 provides:

> "The Congress shall have power . . . to regulate Commerce with the foreign Nations, and among the several States, and with the Indian Tribes. . . ."

**Giboney v. Empire Storage Co., supra; German Alliance Ins. Co. v. Hale,** 219 U.S. 307, 316-17, 31 S. Ct. 246, 55 L. Ed. 229 (1911); J. Flynn, **supra,** at 76-77.

**{166}** GAC's principal argument is that the second element of "a legitimate local public interest" is not present in this case because the specific contracts at issue and the uranium cartel are not "local in character and effect." GAC relies on four points to support its position. First, the cartel had "no immediate relationship" to New Mexico and never conducted meetings in this state. GAC contends that cartel operations were "plainly in foreign commerce outside the United States." Second, none of the entities involved in this case are incorporated in New Mexico. Third, the 1973 Supply Agreement was not executed in and does not require the performance of any act in New Mexico. Fourth, the uranium market is national in scope.

**{167}** We are not persuaded that the matters at issue in this case occurred exclusively in interstate and foreign commerce and had no significant local aspects. It has been recognized that state antitrust laws may reach up to include the regulation of interstate commerce. **See R.E. Spriggs Co. v. Adolph Coors Company,** 37 Cal. App.3d 653, 112 Cal. Rptr. 585, 589; J. Flynn, **supra,** at 71, and cases cited therein at n. 251; Wechsler, **supra,** 9 N.M.L. Rev. at 3. As the Massachusetts Supreme Judicial Court stated:

> If State laws have no force as soon as interstate commerce begins to be effected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare. (Citation omitted.)

**Commonwealth v. McHugh,** 326 Mass. 249, 93 N.E.2d 751, 762 (1950) (citation omitted).[62]

**{168}** We cannot agree that the outer limit of the exercise of that power—activity of a wholly interstate nature—has been exceeded in this case. The contracts at issue may be regarded as having no immediate relationship to New Mexico only by relying upon the formalities - the domicile of the parties to the contracts, the place of performance, and the place the contracts were entered into—and ignoring the practical realities.

**{169}** United alleges that the 1973 and 1974 Supply Agreements were part of a conspiracy to monopolize uranium reserves in the United States and to eliminate it as a competitor in the uranium market. As of 1975, over one-half of the uranium reserves of the United States were located in New Mexico. In all but one year from 1966 to 1976, in excess of forty percent of the annual production of uranium in the United States came from New Mexico mines. As of 1976, over fifty percent of the uranium mining work force in this country and nearly forty percent of the uranium milling work force were located in New Mexico. Nearly half of the capacity of American uranium production mills is in this State. Gulf's New Mexico Mt. Taylor uranium reserves constitute the largest uranium ore body in the United States. United's mine at Churchrock, New Mexico, which GAC is alleged to have attempted to gain control of as part of the monopolistic conspiracy, is the largest underground uranium mine in the United States. Therefore, it would be

[62] GAC relies on the case of **Kosuga v. Kelly,** 257 F.2d 48 (7th Cir. 1958), **aff'd on other grounds,** 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959), in which the court held that the Illinois Antitrust Act did not apply to a contract for the sale of onions in interstate commerce. That decision indicated that the scope of the Illinois Act extended solely to intrastate commerce. **See Henry G. Meigs, Inc. v. Empire Petroleum Company,** 273 F.2d 424, 430 (7th Cir. 1960); **R.E. Spriggs Co. v. Adolph Coors Co., supra,** 112 Cal. Rptr. at 591. To the extent that **Kosuga** held state antitrust laws to be generally inapplicable to transactions involving interstate commerce, we decline to follow it. The language in **Kosuga** which supports such a holding has been criticized for its lack of authority and reasoning. **See R.E. Spriggs Co. v. Adolph Coors Co., supra,** 112 Cal. Rptr. at 591; J. Flynn, **supra** at 74-75; Pollack, **Federal Preemption and State Antitrust Enforcement,** 43 Chi. Bar Record 145 (1961). **Kosuga** relied on a reference to **Corpus Juris Secundum,** but the cases cited by **C.J.S.** do not stand for the proposition stated in the text. Two years after **Kosuga,** the Seventh Circuit applied a Wisconsin antitrust law to a transaction involving interstate commerce. **Henry G. Meigs, Inc. v. Empire Petroleum Company, supra.**

impossible to monopolize the American uranium market without having an immediate relationship to, and a substantial effect on, the trade and commerce of this State.

**{170}** Although the contracts at issue do not formally require any activity to take place here, almost all of United's uranium production is from New Mexico mines. New Mexico is also the site of its only uranium mill, which is the place of delivery under the terms of the 1974 Supply Agreement. In its brief on appeal, GAC conceded that New Mexico is "the state in which [United's] operation is located." The uranium sales efforts of GAC and its predecessors were based on Gulf production in New Mexico, foreign uranium imports, and purchases on the open market. Those purchases also included substantial amounts of New Mexico uranium. **See** Section II B, **supra.**

**{171}** It is simply not the case that this litigation involves exclusively interstate commerce and that this State has no interest in its adjudication. **United Nuclear Corp. v. General Atomic Co., supra,** 90 N.M. at 101-02, 560 P.2d at 165-66. Therefore, we hold that the State of New Mexico has "a legitimate local public interest" in the application of its antitrust laws to this case.

**{172}** The remaining inquiries are whether the state law as applied here (1) "regulates evenhandedly" and (2) has only "incidental" effects on interstate commerce. There is clearly nothing in the New Mexico Antitrust Act or in its application to this case which entails any discrimination against interstate goods or which favors local commerce over the commerce of sister states. **Compare Exxon Corp. v. Governor of Maryland,** 437 U.S. 117, 125-26, 98 S. Ct. 2207, 2213-14, 57 L. Ed. 2d 91 (1978) with **Dean Milk Co. v. Madison,** 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951). GAC makes no contention to the contrary.[63] Further, GAC has made no showing whatsoever that the application of state antitrust laws to this case will have **any** adverse effects on "the free flow of commerce across state lines." **Southern Pacific Co. v. Arizona, supra,** 325 U.S. at 770, 65 S. Ct. at 1521. The very purpose of these laws is to remove privately created restraints on free trade.

> Consequently, it would be difficult to prove that a policy which removes privately instituted interferences, delays, interruptions, and inconveniences with interstate commerce, is itself a delay, interference, interruption, and inconvenience to interstate commerce when enforced at the local level by the states.

J. Flynn, **supra,** at 84.

**{173}** GAC nevertheless contends that because the uranium market is "national in scope," and because uranium is "vital to the military posture of the United States" and to federal energy policy, "legal and policy questions involving uranium in the uranium industry must be addressed uniformly by the federal government." GAC argues that application of state antitrust laws to such matters "is too fraught with a potential for inconsistent results, lack of uniformity, and consequent burdens upon interstate commerce."

**{174}** GAC places principal reliance on **Flood v. Kuhn,** 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972), **aff'g,** 443 F.2d 264 (2d Cir. 1971), **aff'g,** 316 F. Supp. 271 (S.D.N.Y. 1970), in which the Supreme Court upheld lower court rulings that the reserve clause in professional baseball contracts was not subject to challenge under state antitrust laws. Previous decisions of

[63] GAC does suggest New Mexico will be benefited by invalidation of the contracts because United will be permitted to sell the uranium at higher prices, thus increasing local tax revenues and forcing out-of-state consumers to pay higher utility rates. However, any such consequences are entirely indirect results of the application of laws which, on their face, have no discriminatory aspects. GAC, of course, seeks to avoid its obligations to I&M, which, if successful, would have precisely the same effect on I&M's customers. Furthermore, if United were to sell any of this uranium for use inside New Mexico, New Mexico consumers would pay the same higher price. It is also interesting to note that GAC's argument that higher uranium prices will result in higher tax revenues in this State is based on GAC's recognition that the uranium would have been supplied from New Mexico sources.

the Supreme Court had held that professional baseball was not subject to federal antitrust laws. **Toolson v. New York Yankees,** 346 U.S. 356, 74 S. Ct. 78, 98 L. Ed. 64 (1953); **Federal Club v. National League,** 259 U.S. 200, 42 S. Ct. 465, 66 L. Ed 898 (1922). In **Flood** the lower courts had held that "the nationwide character of organized baseball combined with the necessary interdependence of the teams requires that there be uniformity in any regulation of baseball and its reserve system." 316 F. Supp. at 279-80. **See** 443 F.2d at 267-68.

**{175}** In affirming the lower courts' decisions, the Supreme Court did not adopt any broad or rigid limitations on the applicability of state antitrust laws to transactions involving interstate commerce. The Court upheld those holdings "[a]s applied to organized baseball, and in the light of this Court's observations and holdings in **Federal Baseball,** [and] in **Toolson**. . . ." 407 U.S. at 284, 92 S. Ct. at 2113.

**{176}** We believe that **Flood** is readily distinguishable from this case. First, the time honored, though unusual, exemption from federal antitrust laws which professional baseball enjoys would be meaningless if state antitrust laws were not also inapplicable. Thus, in **Flood** there was a clear conflict between federal and state antitrust enforcement policies.

**{177}** Second, professional baseball is significantly different from the uranium market. Baseball involves "[a] complex web of franchises, farm teams and recruiters. . . ." 443 F.2d at 267. Baseball clubs are organized into leagues and

> are dependent on the league playing schedule. . . . Therefore, it is the league structure at which any state antitrust regulation must be aimed. . . . [E]ach league extends over many states, and . . . , if state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard.

**Id.** at 267-68.

**{178}** No single state has a particularly significant interest in the operation of nationwide professional sports. However, this State has a very substantial relationship to uranium production, and therefore, a significant interest in preventing anti-competitive practices in the uranium industry. Moreover, in energy-related matters, unlike professional baseball, there is uniformity of treatment of anti-competitive practices under both federal and state law. Challenging such activities is federal policy. Challenging the uranium cartel and Gulf's role therein was the federal practice.[64]

**{179}** The fact that the uranium market is nationwide in scope does not require a different result. In **Flood,** state antitrust regulations would have directly affected the entire "complex web" of professional baseball, and would have been aimed at league structure. In this case, the state law has been applied solely to private contracts for the sale of specific goods. In **Flood** the reserve clause being challenged was a recognized practice in the sport. Here, the alleged conspiracy was a secret attempt to dominate an industry, a practice condemned by the Congress, the Justice Department, and the courts. If the fact that the commerce at issue involved a national market were enough to render state law invalid, the states' power to regulate anti-competitive practices would be effectively destroyed.

**{180}** In **Exxon Corp. v. Governor of Maryland, supra,** the United States Supreme Court rejected a similar argument advanced by Gulf and other oil companies regarding the national scope of the petroleum industry and a state statute that regulated aspects of that industry in Maryland. The Court said:

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[64] **See** n. 50, **supra,** and accompanying text. In addition to the hearings held on the anti-competitive practices of the cartel (**see Hearings on International Uranium Cartel, supra**), in 1975 another subcommittee of the U.S. House of Representatives held extensive hearings on competition in the energy industry. **Energy Industry Investigation: Hearings Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary,** 94th Cong., 1st Sess., Serial No. 48-49, Parts 1-2 (1975). (Gulf submitted a report on its uranium business as part of those hearings. The report did not, however, reveal Gulf's role in the uranium cartel.)

> [W]e cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas. Appellants point out that . . . the cumulative effect of this sort of legislation may have serious implications for their national marketing operations. While this concern is a significant one, we do not find that the Commerce Clause, by its own force, pre-empts the field of retail gas marketing. . . . [T]his Court has only rarely held that the Commerce Clause itself pre-empts an entire field from state regulation, and then only when a lack of national uniformity would impede the flow of interstate goods. . . . In the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.

437 U.S. at 128-29, 98 S. Ct. at 2215. (citations and footnote omitted).

**{181}** No showing has been made that application of New Mexico law entails "a specific discrimination against, or burdening of, interstate commerce." No embargo has been placed on interstate shipments of uranium. **Compare Penna. v. West Virginia,** 262 U.S. 553, 43 S. Ct. 658, 67 L. Ed. 1117 (1923) **and West v. Kansas Natural Gas. Co.,** 221 U.S. 229, 31 S. Ct. 564, 55 L. Ed. 716 (1911). Unlike other situations in which state regulations have been invalidated under the Commerce Clause,[65] there is little likelihood that in the area of state antitrust laws an excessive cost of compliance will be imposed by piecemeal state regulation. The cost of compliance is nothing more than refraining from the kind of anti-competitive, predatory trade practices which federal law and the laws of virtually all states condemn. The pervasiveness of antitrust regulation in the economy demonstrates a uniformity between state and federal laws which was not present in **Exxon Corp. v. Governor of Maryland, supra**. Therefore, the New Mexico Antitrust Act was applied consistently with the Commerce Clause of the federal constitution.

### 2. Preemption by Sherman Antitrust Act

**{182}** GAC's second claim is that the New Mexico Antitrust Act is preempted by the Sherman Antitrust Act in the context of this case.

**{183}** Congress has the unquestioned power to pre-empt state regulations in the field of interstate and foreign commerce.[66] Preemption may be ascertained from the express language of the federal statute,[67] by reference to the statute's legislative history,[68] or from a clear inconsistency, repugnancy, or serious danger of conflict between the state and federal regulations.[69] However, none of these sources evidence a Congressional intent to preempt state antitrust laws in the circumstances present in this case.

**{184}** We begin with the well-established principle that "in a field which the States have traditionally occupied," "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. (Citations omitted.)" **Rice v. Santa Fe Elevator Corp.,** 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947).

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[65] **See e.g., Bibb v. Navajo Freight Lines,** 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959) (state law required change of mudguards on interstate carriers at state line); **Southern Pacific Co. v. Arizona, supra,** (state law required change in length of trains at state line).

[66] **De Canas v. Bica,** 424 U.S. 351, 357, 96 S. Ct. 933, 937, 47 L. Ed. 2d 43 (1976); **Southern Pacific Co. v. Arizona, supra,** 325 U.S. at 769, 65 S. Ct. at 1520.

[67] **Florida Avocado Growers v. Paul,** 373 U.S. 132, 146-47, 83 S. Ct. 1210, 1219, 10 L. Ed. 2d 248 (1963); **Campbell v. Hussey,** 368 U.S. 297, 300-01, 82 S. Ct. 327, 328-29, 7 L. Ed. 2d 299 (1961); J. Flynn, **supra,** at 119.

[68] **De Canas v. Bica, supra,** 424 U.S. at 358, 96 S. Ct. at 937; **City of Burbank v. Lockheed Air Terminal,** 411 U.S. 624, 634-37, 93 S. Ct. 1854, 1860-1861, 36 L. Ed. 2d 547 (1973); J. Flynn, **supra,** at 125.

[69] **Florida Avocado Growers v. Paul, supra,** 373 U.S. at 146, 83 S. Ct. at 1219; **Pennsylvania v. Nelson,** 350 U.S. 497, 505, 76 S. Ct. 477, 481, 100 L. Ed. 640 (1956).

**See also Florida Avocado Growers v. Paul, supra,** 373 U.S. at 146, 83 S. Ct. 1219.

**{185}** Nothing in the language of the Sherman Act expresses any intent to preempt state antitrust laws, many of which were enacted prior to the Sherman Act. **See United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. at 125, 597 P.2d at 310; J. Flynn, **supra** at 90-91. The legislative history of the Sherman Act indicates that, rather than intending to supersede state antitrust laws, Congress was seeking to supplement the enforcement of those laws. **See** remarks of Senator Sherman quoted in **United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. at 125, 597 P.2d at 310. **See also** H.R. Rep. No. 1707, 51st Cong., 1st Sess. 1 (1890). This legislative history has been interpreted as evidence of a lack of an intent to preempt state antitrust laws. **United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. at 125, 597 P.2d at 310; **R. E. Spriggs Co. v. Adolph Coors Co., supra,** 112 Cal. Rptr. at 589.

**{186}** Preemption may also be inferred where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to regulate,[70] or where the state act touches a field in which the federal interest is so dominate that state regulation might interfere with the federal purposes,[71] or where there is a "direct and positive" conflict or repugnancy between the state and federal laws.[72]

**{187}** GAC points to no "direct and positive" conflict between state and federal antitrust laws in general, or as the state law has been applied in this case. However, it suggests that if state antitrust laws are applied to interstate commerce of the nature involved in this case, "intolerable burdens" would be imposed on that commerce because of "differing limitations upon competition in each jurisdiction where goods might be produced, transported or sold."

**{188}** In **Exxon v. Governor of Maryland, supra,** the Supreme Court rejected a similar argument, stating that the existence of such potential conflicts is "'entirely too speculative' . . . to warrant preemption." 437 U.S. at 131, 98 S. Ct. at 2216. The Court went on to say that it is not only "generally reluctant to infer pre-emption," but also, that it would be "particularly inappropriate to do so" where "the basic purposes" of the state and federal statutes are similar. **Id.** at 132, 98 S. Ct. at 2217.

**{189}** The basic purposes of the state and federal antitrust laws in question here are not merely similar; they are identical—"to establish a 'public policy of first magnitude;' that is, promoting the national interest in a competitive economy." **United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. at 125, 597 P.2d at 310 (citation omitted). **See also** J. Flynn, **supra,** at 138. The state act in question uses substantially the same language as the Sherman Act. J. Flynn, **supra,** at 138. The state act has been applied consistently with federal actions regarding the cartel and Gulf's role therein. **see** n. 50, **supra,** and accompanying text. There is thus no "clash of competing fundamental policies." **United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. at 125, 597 P.2d at 310.

**{190}** GAC suggests that even in the absence of "direct and positive" conflicts between state and federal antitrust laws, the dominate federal interest in foreign commerce precludes application of state antitrust laws to cartel activities. However, we are not interested in this case in regulating foreign commerce; we are concerned with practices that allegedly were aimed at restraining trade in this State. Without full cartel disclosure, we cannot determine to what commerce the cartel's activities extended. We will not cast aside laws designed to protect the trade

[70] **See e.g., Ray v. Atlantic Richfield Co.,** 435 U.S. 151, 157, 98 S. Ct. 988, 994, 55 L. Ed. 2d 179 (1978); **City of Burbank v. Lockheed Air Terminal, supra,** 411 U.S. at 633, 93 S. Ct. at 1859; **Rice v. Santa Fe Elevator Corp., supra,** 331 U.S. at 230, 67 S. Ct. at 1152; Note, **The Commerce Clause and State Antitrust Regulation,** 61 Colum.L. Rev. 1469, 1477-78 (1961).

[71] **Id.**

[72] **Kelly v. Washington,** 302 U.S. 1, 10-11, 58 S. Ct. 87, 92, 82 L. Ed. 3 (1937). **See also R. E. Spriggs Co. v. Adolph Coors Company, supra,** 112 Cal. Rptr. at 593.

of this State without the necessary factual predicate upon which to base a finding that they have been preempted by federal law, particularly where the bad faith conduct of the party charged with violations of those laws has been found to be largely responsible for the missing factual material. **See** Section III, **infra**.

**{191}** GAC also argues that the dominate federal interest in energy matters warrants a finding that state antitrust laws are preempted insofar as they may be applied to anti-competitive practices in the field of energy. However, the concept of preemption based on federal dominance of a subject matter rests on the likelihood that state regulations in the area will interfere with the federal purposes. **See City of Burbank v. Lockheed Air Terminal, supra; Head v. New Mexico Board,** 374 U.S. 424, 429-30, 83 S. Ct. 1759, 1762-63, 10 L. Ed. 2d 983 (1963). The promotion of anti-competitive trade practices in uranium marketing is not part of any federal energy program. **See** n. 50, **supra,** and accompanying text, and n. 64, **supra**. Thus, the prevention of such practices by the states poses no significant possibility of conflict with federal policy.

**{192}** Therefore, we find no basis upon which to hold that the New Mexico antitrust laws, as applied to the contracts for the sale of uranium at issue in this case, have been preempted by the federal antitrust laws.

### 3. Scope of the New Mexico Antitrust Act

**{193}** GAC's third argument as to the inapplicability of the New Mexico Antitrust Act is that the Act only applies to contracts which are illegal on their face. GAC contends that ordinary purchase and sale contracts—such as the Supply Agreements at issue here—which are fair and enforceable on their face, are valid even if they are related in some peripheral way to an antitrust violation.

**{194}** GAC relies on **State v. Electric City Supply Company,** 74 N.M. 295, 393 P.2d 325 (1964) and **Kelly v. Kosuga,** 358 U.S. 516, 79 S. Ct. 429, 3 L. Ed. 2d 475 (1959). We find both cases distinguishable from this case. First, unlike the Sherman Antitrust Act at issue in **Kelly v. Kosuga,** the New Mexico Act **does** contain an explicit provision voiding contracts which have as their object or operate to restrict or monopolize any part of the trade or commerce of New Mexico. Section 57-1-3, N.M.S.A. 1978 (current version at § 57-1-3, N.M.S.A. 1978 (1979 Supp.)) states:

> All contracts and agreements in violation of the foregoing two sections [57-1-1-, 57-1-2 NMSA 1978] shall be void, and the person or persons, corporation or corporations, association or associations who shall violate the provisions of either of said sections shall be civilly liable to the party injured for any and all damage occasioned by such violation, and any purchaser of any commodity from any individual, corporation or association transacting business in violation of such section shall not be liable for the payment for such commodity.

By recognizing the defense of contract illegality in this case, we are, rather than creating a new remedy, merely giving effect to the express provisions of the antitrust laws of this State.[73]

**{195}** Second, in both **Kelly v. Kosuga** and **Electric City Supply Company,** the contracts sued upon had been fully performed, and the courts refused to permit one party to avoid its obligation to pay for the goods it received.[74] Thus, in those cases the courts furthered the general

[73] Because the New Mexico Antitrust Act "does not provide for treble damages as available to federal litigants, the ability to have a contract declared void is the most effective tool provided by New Mexico law." Weschler, 9 N.M.L. Rev. at 9 n. 70.

[74] In **Electric City Supply Company,** the contract sued upon was not even alleged to have violated the antitrust laws. There, a contractor sold equipment to a municipality which he had purchased from a materialman. After the contractor was paid by the city, he sought to avoid his obligation to pay the materialman on the ground that his contract **with the municipality** violated state and federal antitrust laws. The materialman was not a party to that contract. Thus, since the contractor had been fully paid by the city, this Court refused to permit him to avoid his obligation to pay the materialman.

policy, as Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it." **Continental Wall Paper Co. v. Lewis Voight & Sons Co.,** 212 U.S. 227, 271, 29 S. Ct. 280, 296, 53 L. Ed. 486 (1909) (dissenting). **See Kelly v. Kosuga,** 358 U.S. at 520-21, 79 S. Ct. at 431-32. This policy controlled the **Kelly** case. **See Viacom Intern. Inc. v. Tandeum Productions, Inc.,** 526 F.2d 593, 599 (2d Cir. 1975); Comment, **The Defense of Antitrust Illegality in Contract Actions,** 27 U. Chi.L. Rev. 758, 769 (1960).

**{196}** No such policy is involved here, for United is not seeking to avoid its obligation to deliver the uranium and yet at the same time recover the contract price for it. In the case of executory contracts, such as those at issue here, the policy of avoiding the unjust enrichment which would result from recognition of an antitrust defense simply is not relevant. **See** 27 U. Chi.L. Rev. at 769-71; Lockhart, **Violation of the Antitrust Laws as a Defense in Civil Actions,** 31 Minn.L. Rev. 507, 573 (1947). **Compare Atlantic Richfield Co. v. Malco Petroleum, Inc.,** 471 F.2d 1258, 1260-61 (6th Cir.) **with Associated Press v. Taft-Ingalls Corporation,** 340 F.2d 753, 769 (6th Cir.) **cert. denied,** 382 U.S. 820, 86 S. Ct. 47, 15 L. Ed. 2d 66 (1965).

**{197}** Third, the Supply Agreements at issue here are alleged to be one of the means by which GAC and Gulf sought to monopolize the uranium market of the United States. If proven, United's allegations would establish that the Supply Agreements, rather than being collateral to or independent of the alleged monopolistic conspiracy, were essential parts of a general plan or scheme which the law condemns. **Compare Connolly v. Union Sewer Pipe Co.,** 184 U.S. 540, 546-49, 22 S. Ct. 431, 434-35, 46 L. Ed. 679 (1902) **with Continental Wall Paper Co. v. Louis Voight & Sons Co., supra,** 212 U.S. at 258-62, 29 S. Ct. at 290-292. Under such circumstances, the refusal to recognize an antitrust defense would place the court in the position of "enforcing the precise conduct made unlawful by the [antitrust laws]." **Kelly v. Kosuga,** 358 U.S. at 520, 79 S. Ct. at 432. It would be contrary to the public policy of this State to enforce a sale which was in execution or aid of an illegal price-fixing, anti-competitive, monopolistic conspiracy where recovery would aid the alleged law violator to accomplish the very purpose of his illegal agreement.

**{198}** Finally, we do not read the words in **Electric City Supply Company** that the contract sued on must "itself [be] tainted with illegality" to mean that the contract must overtly call for some illegal act on its face before the antitrust laws can provide a defense. To the extent that that decision can be so construed, it is inconsistent with the language of Section 57-1-3. **See generally Bruce's Juices v. Amer. Can. Co.,** 330 U.S. 743, 763-64, 67 S. Ct. 1015, 1024-25, 91 L. Ed. 1219 (1947) (Murphy, J., dissenting); 31 Minn.L. Rev. at 547, n.211.[75]

**{199}** Based on the foregoing reasons, we find that the contracts at issue and United's antitrust allegations are within the scope of the New Mexico Antitrust Act.

## III. GAC'S NONCOMPLIANCE WITH DISCOVERY ORDERS AND THE DISCOVERY SANCTIONS IMPOSED FOR NONCOMPLIANCE

**{200}** In this section of the opinion we examine GAC's conduct in the discovery process, and analyze both the discovery sanctions and the means by which they were imposed. In light of the complex and lengthy proceedings which led to that judgment, an extensive and detailed examination of the questions presented is imperative. They will be analyzed in the following order:

[75] A similar argument was rejected in the unreported decision of **General Atomic Company v. Exxon Nuclear Company, Inc.,** (No. 78-223E) (S.D. Cal., Sept. 6, 1978). Like United here, Exxon sought to have its obligation to supply uranium to GAC declared invalid. The court held that a contract need not call for some overtly illegal act on its face before performance of it is enjoined. The court concluded that it would be enough if it was proved that GAC's contract with Exxon "would have the effect of securing to GAC monopoly control of the relevant uranium market."

1. Whether GAC was guilty of a willful failure to comply with the rules of discovery and the discovery orders of the court.
2. Whether findings of willful noncompliance could be made without a hearing.
3. Whether the sanctions entered for such noncompliance were appropriate.

**{201}** The trial court's sanctions order and default judgment of March 2, 1978 was entered under Rule 37(b)(2)(iii), which provides that if a party or an officer or managing agent of a party refuses to obey an order issued under Rule 37(a) to answer interrogatories, or an order made under Rule 34 to produce documents,

> the court may make such orders in regard to the refusal as are just, and among others the following:
>
> . . . . ..
>
> (iii) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, **or rendering a judgment by default against the disobedient party[.]** (Emphasis added.)

**{202}** The case law in New Mexico is not clear as to whether Rule 37(b)(2) is applicable only to a willful or bad faith refusal to obey orders entered under Rules 37(a) and 34. **Compare Rio Grande Gas Company v. Gilbert,** 83 N.M. 274, 276-78, 491 P.2d 162, 164-66 (1971) **with Pizza Hut of Santa Fe, Inc. v. Branch,** 89 N.M. 325, 326-27, 552 P.2d 227, 228-29 (Ct. App.1976). We agree with the approach of the United States Supreme Court in **Societe Internationale v. Rogers, supra**, 357 U.S. at 208-12, 78 S. Ct. at 1094-96, where, in construing identical language in Rule 37 of the Federal Rules of Civil Procedure, the Court stated:

> For purposes of subdivision (b)(2) of Rule 37, we think that a party "refuses to obey" simply by failing to comply with an order. So construed the Rule allows a court all the flexibility it might need in framing an order appropriate to a particular situation. Whatever its reasons, petitioner did not comply with the production order. Such reasons, and the willfulness or good faith of petitioner, can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.

**Id.** at 208, 78 S. Ct. at 1094. Thus, Rule 37(b)(2) applies to **any** failure to comply with discovery orders of the type specified therein. However, the sanctions provided by Rule 37(b)(2)(iii), entailing the denial of an opportunity for a hearing on the merits, may only be imposed when the failure to comply is due to the willfulness, bad faith or fault of the disobedient party. **See Societe Internationale v. Rogers, supra,** 357 U.S. at 212, 78 S. Ct. at 1096.[76]

**{203}** We have previously adopted the following test of willfulness:

> [A] willful violation of a provision of a statute or regulation is any conscious or intentional failure to comply therewith, as distinguished from accidental or involuntary non-compliance, and . . . no wrongful intent need be shown to make such a failure willful. (Citations omitted.)

**Rio Grande Gas Company v. Gilbert, supra** 83 N.M. at 278, 491 P.2d at 166, quoting from **Brookdale Mill v. Rowley,** 218 F.2d 728, 729 (6th Cir. 1954).

[76] Because both **Rio Grande Gas Company v. Gilbert, supra,** and **Pizza Hut of Santa Fe, Inc. v. Branch, supra,** involved such sanctions, the requirement of a willful refusal they applied is consistent with the approach we take here. **Kalosha v. Novick,** 77 N.M. 627, 426 P.2d 598 (1967), is also consistent with the distinction we make based on **Societe Internationale v. Rogers, supra,** because **Kalosha** involved Rule 37(d), which, unlike Rule 37(b)(2), expressly requires a showing of willfulness.

**{204}** The trial court in this case made the requisite finding that GAC's discovery failures were willful. It was based on forty-eight recitals, in which the court described GAC's discovery failures in detail. The court concluded:

> [T]he defendant, General Atomic Company, has followed a conscious, willful and deliberate policy throughout this litigation, which continues to the present time, in cynical disregard and disdain of the Rules of Procedure relating to discovery and this Court's discovery Orders, of concealing rather than in good faith revealing the true facts concerning the international uranium cartel in which Gulf Oil Corporation was involved and which through its subsidiaries, officers, agents and affiliates, including defendant, GAC, participated . . . ; the aforesaid policy of defendant, GAC, of hiding that information from the Court and opposing counsel, and in consequence thereof, the exercise of the utmost bad faith in all stages of the discovery process up to the present time, leads the Court to the inescapable conclusion that at this late date, the Court's discovery Orders will not be complied with by the defendant, GAC, and that this Court is powerless to secure unto all parties to this case either due process of law or a fair trial based upon equality and parity of right and duty unless sanctions under Rule 37 are imposed by the Court at this time.

**{205}** The scope of review on appeal from such a judgment is

> "to consider the full record" as well as the reasons assigned by the Trial Court for its judgment, and to reverse the judgment below, if after such review, the appellate court "'has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'"

**Wilson v. Volkswagen of America, Inc., supra,** 561 F.2d at 506 (footnote omitted), quoting from **Finley v. Parvin/Dohrmann Company, Inc.,** 520 F.2d 386, 390 (2d Cir. 1975). **See also Anderson v. Air West, Inc.,** 542 F.2d 522, 524 (9th Cir. 1976). Where the judgment involves the sanctions provided by Rule 37(b)(2)(iii),

> an appellate court's review should be particularly scrupulous lest the district court too lightly resort to this extreme sanction, amounting to judgment against the defendant without an opportunity to be heard on the merits.

**Emerick v. Fenick Industries, Inc.,** 539 F.2d 1379, 1381 (5th Cir. 1976). In making this determination, we must consider the entire record,[77] and "the totality of circumstances surrounding the failure to make discovery."[78]

**{206}** Before turning to that task, we consider GAC's argument that the judgment is defective because the trial court adopted almost verbatim the proposed recitals submitted by United. The practice of verbatim adoption of proposed findings is not desirable, but it may be acceptable in some instances. **See United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. at 122, 597 P.2d at 307. Such findings "are not to be rejected out-of-hand." **United States v. El Paso Gas Co.,** 376 U.S. 651, 656, 84 S. Ct. 1044, 1047, 12 L. Ed. 2d 12 (1964).

> The ultimate test as to the adequacy of findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and whether they are supported by the evidence.

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[77] **See In Re Liquid Carbonic Truck Drivers Chemical, Etc.,** 580 F.2d 819, 823 (5th Cir. 1978), **cert. denied sub nom. Strain v. Turner,** 441 U.S. 945, 99 S. Ct. 2165, 60 L. Ed. 2d 1047 (1979); **Affanato v. Merrill Bros.,** 547 F.2d 138, 140 (1st Cir. 1977).

[78] **Trans World Airlines, Inc. v. Hughes,** 449 F.2d 51, 57 (2d Cir. 1971), **rev'd on other grounds,** 409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973).

**Schilling v. Schwitzer-Cummins Co.,** 79 U.S. App.D.C. 20, 142 F.2d 82, 84 (D.C. Cir. 1944) (footnotes omitted). **See also United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. at 122, 597 P.2d at 307.

**{207}** The verbatim adoption of proposed findings requires the appellate court to "view the challenged findings and the record as a whole with a more critical eye to insure that the trial court has adequately performed its judicial function." **Ramey Const. Co., Inc. v. Apache Tribe, Etc.,** 616 F.2d 464, 467 (10th Cir. 1980) (citations omitted). **See also In Re Las Colinas, Inc.,** 426 F.2d 1005, 1010 (1st Cir. 1970). This we have done.

**{208}** GAC did not challenge thirteen of the forty-five recitals of United which the trial court adopted. At least seven others are narrative descriptions of the proceedings which, although challenged by GAC, are uncontradicted by any evidence. Many of the recitals merely described actions the trial court had previously taken or statements it had made in open court; several reiterated rulings the court had made over the course of the preceding two years of proceedings. All of the matters recited were within the personal knowledge of the trial court, and most concerned matters that had been argued before the court in previous hearings. In light of these factors and our conclusion that the findings of bad faith are amply supported by the record, it was not reversible error to adopt the proposed findings of United. **United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. at 122, 597 P.2d at 307.

## A. GAC WILLFULLY FAILED TO COMPLY WITH THE COURT'S DISCOVERY ORDERS AND THE RULES OF DISCOVERY

**{209}** As found by the trial court, GAC's bad faith in discovery consisted of four categories of misconduct: (1) Its responses to the First Set of Interrogatories; (2) its responses to the Second Set of Interrogatories; (3) its failure to produce Canadian cartel documents; and (4) its conduct regarding the production of the so-called "Grand Jury Documents" and "Snyder Documents." The first area will be examined in the following section. The remaining three areas, which cover events that transpired in the final year of the proceedings in the trial court, will be examined together in a second section.

### 1. The First Set of Interrogatories

#### a. The Trial Court's Recitals on the First Set of Interrogatories

**{210}** The following is a summary of the contested recitals of the trial court regarding GAC's responses to the First Set of Interrogatories:

> 1. The definition section and certain questions of those interrogatories (including questions 30-34 and 69) specifically requested information from the constituent partners of GAC. Neither the definitions nor the questions were objected to within the time provided by Rule 33.
>
> 2. Gulf was obligated by the terms of the parties' agreement of March 12, 1976 to produce its relevant business records.
>
> 3. Cartel documents were subject to production under the First Set of Interrogatories and the March 12 agreement.
>
> 4. No law of Canada prohibited the production of cartel documents as of March 1976.
>
> 5. GAC's first answers to the interrogatories were "wholly inadequate and evasive," in part, because of the failure to include information on the cartel.
>
> 6. GAC agreed in its answer to interrogatory number 69 to produce the business records of Gulf and Scallop.

7. From March 12, 1976, GAC neither identified nor produced cartel documents or information in the possession of Gulf despite its agreement to do so and the court's order of April 30, 1976 that it comply with that agreement.

8. From December 31, 1975 through September 23, 1976—the date of the promulgation of the Canadian Uranium Information Security Regulations—GAC informed neither United nor the trial court about the existence of the cartel, Gulf's participation therein, or about Gulf cartel documents in Canada.

9. A good faith, non-evasive answer to the First Set of Interrogatories would have, in whole or in part, eliminated the necessity for the Second Set of Interrogatories.

10. Cartel documents and records were clearly within the ambit and requirement of a good faith compliance with United's initial discovery demands, and subsequent demands made prior to September 23, 1976.

11. GAC was in default and violation of its obligation to produce cartel documents prior to September 23, 1976.

**{211}** Before analyzing these recitals, we detail the history of the portion of the proceedings they cover.

### b. The Proceedings Through April 1977

**{212}** On December 31, 1975, United filed its complaint in Santa Fe District Court. On the same day it received leave of the court pursuant to Rule 33 to serve interrogatories on GAC. This, the First Set of Interrogatories, was virtually identical to a set served in September 1975 in the previous action.[79] Certain portions of these interrogatories, which later became a key issue in the case, are set forth below.[80] Although the interrogatories did not specifically refer to the

[79] See n. 2, **supra**. Answers to the interrogatories never became due in the earlier action, and none were ever filed.

[80] The interrogatories contain the following definitions:

> B. "Gulf" means Gulf Oil Corporation **and person(s),** as hereafter defined.
>
> . . . . .
>
> D. "General Atomic" means General Atomic Company, a partnership, **its general partners Gulf and Scallop,** and all person(s) as hereafter defined.
>
> . . . . .
>
> F. "Person(s)" means all entities, including, without limiting the generality of the foregoing, all individuals, any and **all business entities, associations, partnerships, limited partnerships, joint ventures or corporations which are owned or controlled by or which are under common control of any corporation** and any person acting on behalf of any of the entities described in this definition. (Emphasis added.)

The interrogatories which are of particular importance to the issues on this appeal are the following:

> 30. Identify all properties owned or **controlled by the partnership or the partners** directly or indirectly for the exploration, development or mining of uranium bearing ore.
>
> 31. Identify all licenses, permits, leases and agreements and all past and pending, contemplated negotiations **of the partnership or the partners** directly or indirectly pertaining to the exploration, development, mining and milling of uranium bearing ores.
>
> 32. Identify all agreements and all past, pending or contemplated negotiations **of the partnership or the partners** directly or indirectly pertaining to the processing of uranium bearing ores into U3O8 the conversion thereof into UF6 or any other form and the marketing and sale of all such uranium bearing products.
>
> 33. Identify all agreements and all past, pending and contemplated negotiations **of the partnership or the partners** directly or indirectly pertaining to the acquisition of uranium in any form.
>
> 34. Identify all studies, evaluations, projections and other data pertaining to uranium ore reserves, the mining and milling thereof, the further processing and conversion of uranium and the marketing and sale of all such uranium products.
>
> . . . . .

cartel, the definitions and interrogatories were extremely broad. The definitions defined GAC as including "a partnership [and] its general partners." In addition to Interrogatories 30 through 34, numerous other interrogatories called for information from the "partnership and the partners."

**{213}** Although GAC's counsel stated in October 1976, that the interrogatories were "in the broadest form that I have ever seen in my years of practice; although GAC was to concede almost two years later that "interrogatories 32, 33 and 34 relate to every conceivable relationship of uranium to the partnership or the partners"; and although GAC now objects on appeal to these interrogatories as being "literally limitless" in scope—GAC did not timely object to their vagueness, to their breadth, or to the fact that they called for information from the partners.

**{214}** Three days after the time for filing objections had passed, Gulf and GAC held a litigation strategy meeting in San Diego. Notes of that meeting, which were inadvertently produced to United in this case, reflect a discussion on the topic of "how to reduce discovery by Bigbee [United's counsel]."[81]

**{215}** On the day before answers to the interrogatories were due under Rule 33, GAC sought and received an extension until February 23, 1976, to answer or otherwise plead to the complaint and to answer the interrogatories. The court also extended the time for filing objections to the interrogatories, even though it had already expired.

**{216}** On February 23, GAC moved to dismiss the case for lack of personal jurisdiction. It also moved for a protective order under Rules 33 and 30(b) to stay its obligation to answer the interrogatories until the motion to dismiss was disposed of.[82] United refused to consent to the protective order, and GAC did not secure an order based on its motion. The time for filing answers or objections to the interrogatories again passed. On March 10, 1976, United filed its first application for a default judgment under Rule 37(d), alleging that GAC had "wilfully failed to answer interrogatories."

**{217}** GAC now seeks to excuse its failure to comply with the February 23 deadline on two bases: First, it had filed the motion for a protective order on that date; and second, on March 4, 1976, United's counsel agreed that answers would not have to be filed while motions were pending.[83]

**{218}** Motions for protective orders under Rule 30(b) "do not have the effect of automatically accomplishing what is sought therein." **Wieneke v. Chalmers,** 73 N.M. 8, 14, 385 P.2d 65, 69 (1963). GAC's position was aptly described in **Pioche Mines Consolidated, Inc. v. Dolman,** 333 F.2d 257, 269 (9th Cir. 1964), **cert. denied,** 380 U.S. 956, 85 S. Ct. 1081, 13 L. Ed. 2d 972 (1965):

> Counsel's view seems to be that a party need not appear if a motion under Rule 30(b), F.R. Civ.P. is on file, even though it has not been acted upon. Any such rule would be an intolerable clog upon the discovery process. Rule 30(b) places the burden on the proposed deponent to get an order, not just to make a motion. And if there is not time to have his motion heard, the least that he can be expected to do is to get an order postponing the time of the deposition until his motion can be heard. . . . But

69. Specify a date and place where counsel for Plaintiff may examine and reproduce the relevant business records **of the partnership or the partners** and each of them and those records of GUNFC [Gulf-United] **in the custody of the partnership or the partners**. (Emphasis added.)

[81] The notes also reflect that the idea of filing a motion to disqualify United's counsel was discussed and rejected. However, the motion was filed fourteen months later. **See** Section IV, **infra,** especially n. 152, **infra**. **See also** n. 32, **supra**.

[82] Rule 30(b) provides for protective orders from the taking of depositions. Rule 33 provides that the provisions of Rule 30(b) apply to interrogatories as well.

[83] GAC originally contended that on February 13, 1976, United had agreed that answers to the interrogatories did not have to be filed on February 23. At a hearing on October 1, 1976, GAC conceded that although a proposal to that effect was discussed, no such agreement was ever reached.

> unless he has obtained a court order that postpones or dispenses with his duty to appear, that duty remains. Otherwise, . . . a proposed deponent, by merely filing motions under Rule 30(b), could evade giving his deposition indefinitely. Under the Rules, it is for the court, not the deponent or his counsel, to relieve him of the duty to appear.

**See also Twardzik v. Sepauley**, 286 F. Supp. 346, 350 (E.D.Pa. 1968) ("we criticize the filing of a motion for a protective order on the very day on which the depositions were scheduled"); **Jefferson v. Greater Anchorage Area Borough**, 451 P.2d 730, 734 (Alaska 1969).

**{219}** The alleged agreement between counsel of March 4, 1976, is largely irrelevant since GAC was not defaulted on the basis of this original failure to answer. In any event, any agreement reached on that date to relieve GAC of its obligation to answer the interrogatories does not alter the fact that ten days **earlier** GAC had failed to meet a deadline set by the court.

**{220}** United's first motion for a default judgment was not acted upon by the court because the parties signed a written agreement on March 12, 1976, whereby United agreed to withdraw its motion for a default judgment. GAC in turn agreed to "answer in good faith" the interrogatories. Counsel for Gulf also signed the agreement, consenting to an extension of time within which United could answer or otherwise plead to a federal declaratory judgment action Gulf had filed against it the previous month.[84] The agreement provided that documents called for by the interrogatories would be produced at GAC's San Diego headquarters instead of being supplied with the answers, but it made no mention of the fact that the interrogatories specifically requested information from the partners. The agreement specified that if claims of privilege were to be made as to any documents, the grounds for such privilege would be "set forth in the answers to Interrogatories." One section of the agreement stated that certain documents could be only generally identified. It gave as an example "two boxes of correspondence relating to miscellaneous Gulf activities." On the basis of this language, the trial court ultimately found that Gulf had expressly agreed to produce its relevant documents.

**{221}** On April 5, 1976, GAC filed its first set of answers to the First Set of Interrogatories. The trial court ultimately found these answers to be "wholly inadequate and evasive," because, for the most part, information concerning the uranium business activities of the individual partners was not provided, and no mention of the cartel was made. The answers did not, as specified in the March 12 agreement of the parties, set forth the grounds for any claims of privilege as to unproduced documents. The answers also did not contain objections to any of the interrogatories or definitions.[85]

**{222}** Despite its agreement to answer the interrogatories in good faith and its promise to produce documents in June, GAC filed a motion an April 16, 1976 to stay all proceedings, including discovery, pending the outcome on appeal of GAC's challenge to the court's jurisdiction. The trial court granted GAC's motion as to any new discovery by either party. However, the court held that since GAC had agreed to answer United's interrogatories and to produce documents responsive to the interrogatories, it was bound by that agreement. United warned that it would

[84] On January 19, 1976, GAC filed an interpleader action against United, and on the following day, Gulf filed the declaratory judgment action. Both actions were dismissed for lack of subject matter jurisdiction, and appeals were taken from the dismissals. Dismissal of the first action was affirmed. **General Atomic Co. v. Duke Power Co**., 553 F.2d 53 (10th Cir. 1977). The appeal in the second case was abandoned. **Gulf Oil Corp. v. United Nuclear Corp**., Civ. No. 76-032-B (D.N.M. 1976). In neither case did GAC or Gulf seek arbitration or the disqualification of United's counsel. **See** n. 152, **infra**.

[85] Indeed, GAC answered Interrogatory 69, which asked for a date and place where United could examine "the relevant business records of the partnership **or the partners and each of them** and those records of GUNFC [Gulf-United] in the custody of the partnership **or the partners**" (emphasis added), as follows:

> **Answer No. 69**. June 20, 1976, General Atomic Company, San Diego, California.

file a motion for sanctions "if we do not get the documents and if . . . there has been a failure to make the discovery agreed to."

**{223}** As scheduled, document discovery began at San Diego. It continued through the first week of August. It resumed in mid-September and finally ended in mid-October. During this period of discovery, several million pages of documents were made available to United, who copied almost two hundred thousand pages. GAC argues that the number of documents it produced during that summer refutes any notion that it was acting in bad faith, but neither cartel documents nor any other documents which were then in the custody of the individual partners were produced. The quantity of material produced does not relieve a party of the obligation to produce what is requested.

**{224}** In August 1976, United filed its second application for a default judgment, alleging that GAC had failed to comply with the March 12 agreement, had filed answers to the interrogatories which were "so evasive and unresponsive . . . as to constitute a failure to answer," and had failed to properly make claims of privilege as contemplated by the agreement. However, neither this application nor the briefs in support of it mentioned GAC's failure to produce documents in the custody of the partners, or specifically, the failure to produce cartel records.

**{225}** A hearing on the application for a default judgment was set for October 1, 1976. One week before the hearing, the Canadian Government promulgated the Uranium Information Security Regulations. The Regulations generally prohibit the release of information contained in documents located in Canada concerning discussions taking place between January 1, 1972 and December 31, 1975 relating to various aspects of the uranium business. **See** n. 41, **supra**. The Regulations were adopted for the express purpose of preventing the production of cartel-related information in American courts.[86]

**{226}** Two days before the October 1 hearing, in a memorandum filed in support of its second application for a default judgment, for the first time, United specifically pointed out that GAC had failed to produce documents in the possession or custody of the individual partners, Gulf and Scallop, as required by the First Set of Interrogatories.

**{227}** On October 26, 1976, GAC for the first time informed the court that it did not consider itself obligated to supply documents "held individually" by the partners. GAC also argued:

> Whether or not the answers to the interrogatories are true or false involves the ultimate issues of fact in this case. . . . The correctness of defendant's answers to interrogatories is not within the scope of the issues to be determined at this hearing. . . .
>
> . . . . .
>
> . . . [Th]e issue in question . . . is whether or not defendant wilfully failed to answer the interrogatories. The issue is not whether defendant's answers are factually correct.

This is not a correct statement of the law.[87]

**{228}** On November 30, 1976, the trial court denied United's second application for a default

[86] There is no evidence that Gulf or GAC played any role in securing the adoption of the Regulations. To the contrary, the Canadian Government has stated: "These Regulations were not procured by members of the uranium industry. . . ." However, that Government has said that the Regulations were promulgated "when it became clear that documents located in Canada bearing on the [cartel] might be removed to the United States in response to proceedings there." The Canadian Government's immediate concern was apparently several cases involving Westinghouse. **See** n. 88, **infra**.

[87] **Cf**. **Evanson v. Union Oil Co. of California**, 85 F.R.D. 274, 277 (D. Minn.1979) ("Giving a false answer [to an interrogatory] is itself sufficient evidence of bad faith"); **Hunter v. International Systems & Controls Corp**., 56 F.R.D. 617, 631 (W.D.Mo.1972) ("Parties like witnesses are required to state the truth, the whole truth and nothing but the truth in answering written interrogatories"); **Buehler v. Whalen**, 70 Ill.2d 51, 374 N.E.2d 460, 467 (1977) ("[W]e cannot condemn too severely the conduct of the [defendant]. . . . It gave false answers to interrogatories under oath"). **See also Life Music, Inc. v. Broadcast Music, Inc**., 41 F.R.D. 16, 24 (S.D. N.Y. 1966).

judgment. But the court stated that the denial was without prejudice to the plaintiff's right to apply to the court to compel "full, detailed and complete discovery responses," or "for appropriate sanctions for the failure of the defendant partnership **or either partner thereof** to comply with specific orders of the Court directing discovery." (Emphasis added.) The court held that the right to discovery "exists against . . . a party partnership **and the individual partners comprising the partnership**, and the agents, servants, employees, directors and officers of a party **or partner**." (Emphasis added.)

**{229}** United then moved to compel further answers to the First Set of Interrogatories and for the production of documents from GAC and the individual partners. GAC responded by contending that it had "no obligation or ability" to furnish documents in the possession of the partners, a point decided against GAC in the November 30 order. GAC's statement that it had "no ability" to produce partner documents was false, since less than four months later it began to produce those records.

**{230}** In early January 1977, the court set a deadline of July 1, 1977 for the completion of all discovery, to which GAC made no objection. The court granted United's motion for supplemental answers to its First Set of Interrogatories and for the production of partner documents. It set a deadline of April 15, 1977 for the filing of the answers, stating that it expected "a good faith answer . . . , a complete answer, a non-evasive answer."

**{231}** GAC informed the court that none of Gulf's or Scallop's documents had been reviewed, although the court had held on two previous occasions that the partners were subject to discovery. The court reaffirmed that ruling at two other hearings in January 1977.

**{232}** GAC then informed the court that

> there are some problems that Gulf has in getting materials from Canada because there are some regulations and statutes that forbid transportation to the United States. There are a lot of problems that would be involved in some of the Gulf documents. . . .

The court ordered GAC to make "specific objections." However, GAC did not at that time inform the court of the Uranium Information Security Regulations promulgated almost four months earlier.

**{233}** At another hearing in January, GAC argued that even if the court could order production of "partnership related" documents in the possession of the partners, it could not require the partners to produce "non-partnership" documents. The trial court rejected this distinction. Although GAC's counsel told the judge, "I understand your position," GAC raised the very same objection one month later.

**{234}** In February 1977, United moved to compel the production of documents Gulf had produced in cartel-related litigation in Pennsylvania (the Duquesne documents),[88] and to the federal grand jury in Washington, D.C. (the Grand Jury documents), which was then investigating Gulf's participation in the cartel. In response, GAC reargued the issue of the production of "non-partnership documents," and for the first time suggested that the production of such materials would require the disqualification of United's counsel. Again GAC alluded to "a serious legal problem with respect to the partnership's ability to produce foreign documents," but it did not elaborate on this point. A week later, GAC finally raised the Uranium Information Security Regulations and the Ontario Business Records Protection Act as a bar to the production of Gulf Canada's records. However, it said nothing about

[88] **Duquesne Light Co., et al. v. Westinghouse Electric Corporation**, (No. G.D. 75-23978) (Pa.Ct. Comm. Pleas 1975). This was one of several cases brought by utility companies against Westinghouse for the delivery of uranium. Westinghouse defended by alleging that its obligations had been rendered commercially impracticable, in part because of the actions of the cartel. **See also In Re Westinghouse Electric Corporation Uranium Contracts Litigation** (M.D.L.235) (E.D.Va.).

the fact that those records included information on the cartel.

**{235}** United's motions to compel the production of the Grand Jury and **Duquesne** documents were heard on March 7, 1977. Again GAC reargued the question of the production of the partners' "non-partnership documents." It informed the court that it was producing the first of Gulf's records that very day, despite at least four prior orders of the court that the partners were subject to discovery, and despite an earlier court order that production of the partners' documents begin on January 24, 1977 and proceed "diligently and . . . continuously" thereafter.

**{236}** At the end of the March 7 hearing, the court granted United's motions for the production of the **Duquesne** and Grand Jury cartel documents, stating that they were "already covered" by its previous orders. The court again held that any specific documents subject to "good faith" claims of relevancy or privilege had to be made in accordance with its prior orders. Again the court insisted that "there be full and honest, good faith discovery available to all parties." And he warned:

> If that is not done, I assume that some party is going to file a motion for a default judgment, and . . . if I become convinced that there has been any, any invasion of good faith discovery, I would certainly look long and hard at a Motion for Default Judgment. . . .

Eleven days later, GAC finally moved to disqualify United's counsel. **See** Section IV, **infra**.

**{237}** On April 15, 1977, GAC filed approximately five thousand pages of supplemental answers to the First Set of Interrogatories. However, not a single word was said of the cartel or Gulf's role in it, nor was there any claim that cartel documents were privileged, irrelevant, or protected from disclosure by Canadian law. GAC did file objections to I&M's request for the production of depositions of Gulf cartel participants which had been taken in the **Duquesne** litigation, and any exhibits attached thereto. GAC stated that production of this material, which was located in the United States, "would be violative of Canadian law," despite the fact that six weeks earlier it had informed the trial court that Canadian nondisclosure laws did not apply to documents in the United States. Twelve days later, GAC withdrew these objections.

**{238}** It is in the context of the foregoing chronology of events that we examine the recitals of the trial court concerning GAC's answers to United's First Set of Interrogatories.

### c. Analysis of the Recitals on the First Set of Interrogatories

**{239}** We hold that each of the recitals of the trial court is supported by the record.

**{240}** The fact that the interrogatories called for information from the constituent partners of GAC is apparent from the plain meaning of the words in which they were written. **See** n. 80, **supra**. GAC did not object to this language, either within the time provided by Rule 33 (January 10, 1976), or within the extension of time granted by the trial court for the filing of objections (February 23, 1976).

**{241}** The law is well established that the failure to timely file objections to interrogatories operates as a waiver of any objections the party might have.[89] This rule is generally applicable "[r]egardless of how outrageous or how embarrassing the questions may be."[90] When a party

[89] **Monogram Models, Inc. v. Industro Motive Corporation,** 492 F.2d 1281, 1287 (6th Cir. 1974); **Perry v. Golub,** 74 F.R.D. 360, 363 (N.D. Ala. 1976); **United States v. 58.16 Acres of Land, Etc., Clinton Cty., Ill**., 66 F.R.D. 570, 572 (E.D. Ill.1975); **Harlem River Con. C., Inc. v. Associated G. of Harlem, Inc**., 64 F.R.D. 459, 465 (S.D.N.Y. 1974); **Zatko v. Rogers Manufacturing Company**, 37 F.R.D. 29, 33 (N.D. Ohio 1964); **Bohlin v. Brass Rail**, 20 F.R.D. 224, 225 (S.D.N.Y. 1957).

[90] **Davis v. Romney**, 53 F.R.D. 247, 248 (E.D.Pa. 1971). **Cf. Bollard v. Volkswagen of America, Inc**., 56 F.R.D. 569, 579 (W.D.Mo.1971) (the "contention of the vagueness of the interrogatories is not credible . . . when defendant . . . did not

fails to file timely objections, the only defense that it has remaining to it is that it gave a sufficient answer to the interrogatories.[91]

**{242}** GAC's first answers to the interrogatories almost totally failed to include information concerning the uranium activities of the partners despite the wording of the interrogatories. **See** n. 80, **supra**. Under the rules, if the interrogatories do not assign a particular meaning to the phrases they contain, the answering party is obligated to answer the interrogatories in "the ordinary, everyday usage and meaning" of the language in which the questions are asked. **Roesberg v. Johns-Manville Corp**., 85 F.R.D. 292, 298 (E.D.Pa.1980). These interrogatories did not assign a particular meaning to questions calling for information from the partners which would support the limited construction GAC gave to them. Therefore, the trial court was correct in finding those answers to be "wholly inadequate and evasive."

**{243}** GAC's explanation for this failure is without merit. It contends that because the partners were dropped as parties when the case was refiled on December 31, 1975 (**see** n. 2, **supra**), discovery could only be had from the partnership itself. However, GAC could have attempted to work out the matter with opposing counsel, or failing that, presented its objection to the trial court; it did neither. GAC simply made its own unilateral legal determination of the propriety of the questions asked. It later informed the court that it had "construed the interrogatories to be consistent with the information to which plaintiff was entitled under the rules," which it defined to be only those documents which were in the custody or control of GAC. This practice is universally condemned. **Cf**. **United States v. Board of Trade of the City of Chicago, Inc**., **supra**, 18 F.R. Serv.2d at 319 ("The proposition that an adverse litigant may not unilaterally determine the scope of discovery needs no citation"); **Fond Du Lac Plaza, Inc. v. Reid**, 47 F.R.D. 221, 222 (E.D. Wis. 1969) ("It is inappropriate for the party to determine on his own that the subject matter of the inquiry is 'premature'; thus, it was the plaintiff's responsibility in this case to answer the interrogatories or to seek relief from the court"). **See also Cohn v. Dart Industries, Inc. v. Kavanagh**, 21 F.R. Serv. 2d 792, 794 (D. Mass. 1976). **Armour & Co. v. Enenco, Inc**., 17 F.R. Serv. 2d 514, 517-18 (W.D. Tenn. 1973); **Cardox Corporation v. Olin Mathieson Chemical Corp**., 23 F.R.D. 27, 31 (S.D. Ill. 1958); C. Wright & A. Miller, **Federal Practice and Procedure**, § 2173 at 544 (1970).

**{244}** GAC's unilateral construction of its discovery obligations constituted bad faith. In **Hunter v. International Systems & Controls Corp**., **supra**, 56 F.R.D. at 622, the court said:

> The refusal to give the information on the ground that the defendant unilaterally and without seeking a ruling of the Court concluded [that the information sought was objectionable] constituted a wilful obstruction of discovery when defendant was possessed of the information (as it now admits). . . . [D]efendant could have objected and sought clarification of its obligation to answer but did not.

The court went on to say, in language applicable to this case:

> [I]t is found that this misconstruction and failure to make discovery was a callous disregard of discovery obligations, and a designing, self-serving unilateral construction of interrogatories 30 and 31. The wording of the interrogatories and answers themselves would not lead to any other reasonable conclusion.

**Id**. at 625 (footnote omitted). The court concluded:

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file any timely objection to the interrogatories on this ground and sought no pretrial conference to submit its contentions") **and Cephas v. Busch**, 47 F.R.D. 371, 372-73 (E.D.Pa.1969) (answers compelled "notwithstanding that much of the information sought is totally irrelevant . . . and notwithstanding that the interrogatories . . . are harassing and vexatious," and "patently objectionable").

[91] **National Transformer Corporation v. France Mfg. Co**., 9 F.R.D. 606, 607 (N.D. Ohio 1949).

> [I]t is a dangerous practice which incurs the risk of possible sanctions for a party to limit an interrogatory addressed to it to only a portion of the information which it explicitly requests.

**Id**. at 631.

**{245}** The designing, self-serving nature of GAC's construction of the First Set of Interrogatories is particularly apparent in light of the conflicting representations that GAC later made to the trial court. It represented to the court in December 1976 that it had "no ability" to produce information in the separate possession of its constituent partners; a host of GAC attorneys filed affidavits with the court on March 13, 1978, stating their understanding to be that only information and documents in GAC's possession were subject to production; and GAC argued to this Court that the court below committed error in ordering the production of documents in the possession of the partners. **See** Section II A, **supra**. However, John Ross, the GAC attorney in charge of supervising and coordinating GAC's efforts to provide discovery in response to United's First Set of Interrogatories, stated in an affidavit filed with the court in February 1978:

> Based on the [March 12] discovery agreement, my interpretation of UNC [United] interrogatory number 69 and the history of the case . . . I understood GAC's obligation regarding the production of documents to include . . . [a]ll relevant business records of GUNF [Gulf United], **whether in the custody of GAC, Gulf or Scallop**. . . . (Emphasis added.)

He went on to say that

> [n]o documents in the custody of either Gulf or Scallop were included . . . inasmuch as GAC had concluded that there were no relevant business records of GUNFC [Gulf-United] in the custody of Gulf or Scallop which were not duplicated in the records possessed by GAC.

That determination could not have been made without having examined the records in the custody of the partners.[92]

**{246}** Indeed, some information concerning partner operations was contained in GAC's first answers to the interrogatories. For the point made here, it is immaterial that this information concerned only matters relating to the business of Gulf-United or GAC, as GAC has defined that relationship. The fact is that **some** information from the partners was produced, contrary to GAC's disavowal of the availability of such information; to the arguments we rejected in Section II A, **supra**, of this opinion; to the March 1978 representations of its attorneys; and to the October 1976 expression of its understanding of the extent of its obligations. GAC's eventual production of thousands of partner documents demonstrates that such materials were available from the outset.[93] This conduct—which includes contradictory representations and actions and complete reversals of position—is compelling evidence of bad faith and merits the strongest condemnation. **See Diapulse Corporation of America v. Curtis Publishing Co**., 374 F.2d 442, 446 (2d Cir. 1967); **State of Ohio v. Crofters, Inc**., 75 F.R.D. 12, 24 (D. Colo. 1977), **aff'd sub nom**., **State of Ohio v. Arthur Andersen & Co.,** 570 F.2d 1370 (10th Cir. 1978), **cert. denied,** 439 U.S. 833, 99 S. Ct. 114,

[92] In **In Re Folding Carton Antitrust Litigation**, **supra**, 76 F.R.D. at 423-24, the defendant corporation objected to the definition of an interrogatory served on it to the extent that it required the production of documents in the custody of its parent corporation. An affidavit was later filed by an officer of the defendant subsidiary, in which he swore that he had searched the files of the parent company to determine the existence of any documents called for by the plaintiffs' discovery requests. He also stated that only certain documents in the parent's files were within the ambit of that request. Based on these statements, the court refused to entertain the defendant's objection that it had no "control" over the parent's records. The situation is almost identical here, except that GAC, unlike the defendant in that case, did not present its objection to the court in a timely fashion.

[93] **Cf. Bollard v. Volkswagen of America, Inc., supra,** 56 F.R.D. at 575 (defendant's "later unilateral . . . supplying of partial answers constituted an admission that the original disavowals and claims of unavailability of knowledge were false answers made with knowledge of their falsity." (Citation omitted.)).

58 L. Ed. 2d 129 (1978); **Armour & Co. v. Enenco, Inc., supra,** 17 F.R. Serv. 2d at 518-19; **Furrenes v. Ford Motor Co.,** 79 Wis. 2d 260, 255 N.W.2d 511, 516 (1977).

**{247}** GAC argues that it should not be penalized for its unilateral construction of the interrogatories because United did not complain about GAC's failure to provide information from the partners until September 1976. A similar argument was rejected in **Fond Du Lac Plaza, Inc. v. Reid**, **supra**, 47 F.R.D. at 222, where the court said:

> [C]ounsel sought to shift the burden to the defendants and require the latter to apply to the court. This is not the format contemplated by the . . . Rules of Civil Procedure. (Citation omitted.)

It was GAC's duty to object to the interrogatories, not United's to object to GAC's failures.

**{248}** Although some of GAC's answers revealed its interpretation of the requirements of the interrogatories,[94] others contained information from Gulf, and some stated that documents responsive to the questions would be provided later. GAC's answer to Interrogatory 69 is illustrative in that it failed to disclose the limited scope GAC gave to the questions. **See** n. 85, **supra**. The record is uncontradicted that United never represented to either GAC or the court that it did not desire information and documents from the partners. It will not be faulted for its patience in waiting for GAC to fully comply with its requests.[95]

**{249}** The court's recital that Gulf was obligated by the terms of the parties' March 12 agreement to produce its relevant business records is also fully supported. The Ross affidavit makes this point clear, regardless of how one construes the reference in that agreement to "correspondence relating to miscellaneous Gulf activities." Although Ross limited it to the "relevant business records of GUNF [Gulf-United]," the language of the interrogatories and the allegations of the complaint are clearly inconsistent with that limited construction.[96]

**{250}** The trial court's finding that cartel documents were within the scope of the First Set of Interrogatories is also supported by the record. Interrogatory 32 called for the identification of "all agreements and all past, pending or contemplated negotiations of the partnership or the partners directly or indirectly pertaining to . . . the marketing and sale of all . . . uranium bearing products." A cartel consists of a combination of producers of a product who agree to control the production, sale and price of the product, and to obtain a monopoly in any particular industry or commodity. **Black's Law Dictionary** 270 (4th rev. ed 1968). The uranium cartel consisted of agreements among producers, including Gulf Canada, to set floor prices for and quotas on the marketing of uranium.[97] **See** n. 102, **infra**. The definitions in the interrogatories clearly encompassed Gulf Canada, for GAC was defined to include Gulf, and Gulf was defined as including "all business entities, associations, partnerships, limited partnerships, joint ventures or corporations" under its control, a category into which its wholly-owned Canadian subsidiary clearly fell.

**{251}** GAC offers five excuses for its failure to provide cartel information and documents in

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[94] For example, in answer to Interrogatory 30, which called for the identification of the uranium ore bearing properties of "the partnership or the partners," GAC stated: "Neither of the partners owns or controls any such property for or on behalf of the partnership." United's counsel, of course, knew that Gulf owned massive uranium reserves at Mt. Taylor. **See** Section IV, **infra**.

[95] In certain circumstances, a failure to object to insufficient interrogatory answers can constitute a waiver of any right to further answers or sanctions. In **Butler v. Pettigrew**, 409 F.2d 1205, 1207 (7th Cir. 1969), the court found such a waiver where the party complaining of insufficient answers failed to seek sanctions until after a trial on the merits and the entry of a judgment thereon. Such extreme circumstances are not present here.

[96] GAC's counsel stated to the court in March 1977 that in United's complaint "Gulf is the main focal point of the action." **See also** n. 153, **infra**. It could hardly have come as a surprise to GAC then that United sought information from Gulf.

[97] In its briefs on appeal, GAC describes the cartel as a marketing agreement, precisely the language used in Interrogatory 32.

response to the First Set of Interrogatories: (1) The interrogatories were initially understood to be directed only at GAC; (2) the language of the interrogatories and United's complaint did not either explicitly or implicitly refer to the cartel; (3) the cartel was not raised as an issue until March 1977, and then, only as a legal issue; (4) United knew of the cartel before the complaint was filed; and (5) United's inaction and representations manifested its view that the cartel was not covered by the First Set of Interrogatories.

**{252}** We have previously rejected the first assertion, but whatever its merit might be as to GAC's original answers, it was no excuse whatsoever for GAC's failure to include information on the cartel in its supplemental answers, after the court had ordered GAC on at least six occasions to provide information from Gulf in those answers.[98]

**{253}** The second of the excuses—the failure of the complaint or interrogatories to explicitly or implicitly mention the cartel is immaterial. United's right to information did not turn upon its discovery of a magic formula. The scope of the definitions and questions in the First Set of Interrogatories clearly included the cartel. It was GAC's duty to fully answer the questions according to their terms. Its strained interpretation of the interrogatories to exclude the cartel amounts to "an attempt at gamesmanship, contrary to the principle that the purpose of our rules of discovery is to minimize concealment and surprise in litigation." **Hilmer v. Hezel**, 492 S.W.2d 395, 396 (Mo. Ct. App. 1973) (citation omitted). There was no reason for GAC's belief that the cartel was not covered by the interrogatories except its desire to so believe. However, its "ostrichlike attitude of self-delusion" cannot be accepted as establishing a good faith belief on its part. **Mitchell v. Hausman**, 261 F.2d 778, 780 (5th Cir. 1958). Although "a misunderstanding or misapprehension does not import willfulness," **Kalosha v. Novick**, **supra**, 77 N.M. at 631, 426 P.2d at 601, "'[g]ood faith' . . . does not include ignoring the obvious." **Wirtz v. Lone Star Steel Company**, 405 F.2d 668, 670 (5th Cir. 1968). It should have come as no surprise to GAC that as part of its antitrust case, United would desire information on an organization whose purpose was, as a Gulf attorney described it, "to completely frustrate free competition," and in which the very officials of Gulf and GAC with whom United had dealt were involved.[99] GAC's understanding that the cartel was not within the scope of the First Set of Interrogatories could be characterized as follows: "If he did not know, it was because he did not look, or looking, did not see, or want to see what was so plainly there." **Mitchell v. Raines**, 238 F.2d 186, 188 (5th Cir. 1956).

**{254}** Even if this excuse had merit as to the first set of answers, it is no justification for the supplemental answers, for by April 1977, GAC was clearly on notice that the interrogatories encompassed the cartel.

**{255}** In January 1977, when the court ordered GAC to include information on the partners' uranium activities in its supplemental answers, GAC asked if that ruling would require it to include in its answer to Interrogatory 30, information on "any properties [the partners] might hold in [their] individual capacity, anywhere in the world?" The court answered that such information "may be relevant to the issues in this case. If you make a claim that they are not relevant, the Court will pass upon it." The court proceeded to say that "the same ruling applies to" Interrogatories 31 through 34.

**{256}** GAC then raised the issue of the Canadian regulations which were promulgated for the express purpose of preventing the disclosure of

[98] GAC points out that although the court had ordered it to produce Gulf information and documents, it had not ordered it to produce cartel documents. What "cartel documents" are in the context of this case, if they are not Gulf documents, has never been apparent to this Court. In any case, in March 1977, the court did order GAC to produce the Grand Jury and Duquesne documents, which, as GAC was later to concede, "all had to do with the cartel."

[99] The executive vice-president of GAC, Gallaway, whose involvement in cartel discussions was discussed in Sections II A and B, **supra**, of this opinion, verified GAC's first answers to the First Set of Interrogatories, which failed to mention the cartel.

information on the cartel, thereby manifesting its understanding that such information was called for.

**{257}** GAC argues that at the hearing on March 7, United disclaimed any interest in cartel discovery. The portion of the transcript it cites does not support this claim. United merely pointed out that it sought the Duquesne and Grand Jury documents "to get Gulf off the dime," and that Canadian law did not shield those records because they were in the United States. GAC conceded the latter point, although it raised the same objection five weeks later.

**{258}** Nothing United's counsel stated at that or any other hearing could be construed as disclaiming an interest in cartel discovery—either from sources in the United States or elsewhere. In fact, at the hearing on March 7, United's counsel stated that the Grand Jury and Duquesne cartel documents "are clearly within the scope of interrogatories." He then referred specifically to Interrogatories 30, 32 and 33. Thus, GAC had been told that information on the cartel was expected in its supplemental answers. It is immaterial that United did not refer to the cartel by name. As GAC later told the trial court: "[T]his whole cartel thing . . . was what the whole grand jury thing was about and the whole Duquesne thing, that was what it was all about. It all had to do with the cartel."[100]

**{259}** At another hearing on March 25, 1977, United's counsel alleged that both Allen and Hoffman were "active participants in the international uranium cartel." GAC's counsel objected on the grounds of relevancy, stating: "I can get up and deny that there is any truth to this."[101] United's counsel then made it abundantly clear that United sought cartel information. He said:

> My only point is this. **I would like for the Court to be alerted to that kind of material, when it reviews the documents**. This kind of anti-trust activity is illegal; it is a crime under the laws of the United States and under the laws of the State of New Mexico. And no privilege attaches to that. (Emphasis added.)

Counsel for GAC responded to what he called the "the continual reference to the so-called international uranium cartel," by stating that it was "very difficult to appreciate any possible relevancy of that cartel, if it did in fact exist."[102]

**{260}** At the end of this hearing, the court again called for GAC to submit by the April 15 deadline all documents it claimed were privileged or irrelevant. Three weeks later, GAC submitted the supplemental answers which were silent on the cartel.[103]

**{261}** GAC's third excuse—that the cartel was not raised as an issue until March 1977—is also without merit. In October 1976, United

[100] The fact that the Duquesne and Grand Jury documents were produced is no excuse for the total failure to mention the cartel in those answers. In January 1977, the court had held that "in addition to providing the documentation, you will have to answer the interrogatories. . . . [United is] entitled to their answers to interrogatories in addition to the right to inspect and copy documents, so that you will pin yourself down and bind yourself by your answers; instead of merely furnishing the document to them." That information on Gulf's participation in the cartel's marketing agreements could have been provided, apart from information in the cartel documents in Canada, is evidenced by the fact that GAC later filed three sets of answers to United's Second Set of Interrogatories on the cartel, and by the presence in the United States of several GAC and Gulf employees who were intimately familiar with the cartel.

[101] Seven months later, GAC's counsel informed the trial court: "Mr. Rolander, Mr. Gallaway, Mr. Allen, Mr. Hoffman, Mr. Zagnoli, all of them knew about the cartel." In fact, records GAC produced show that Allen and Hoffman were among Gulf's representatives at the Johannesburg meeting of the cartel in May and June 1972.

[102] On October 24, 1977, GAC's counsel stated: "Let's go to the cartel. It's undisputed. . . . It was in its intention a cartel in every sense of the word."

[103] By the end of March, United had submitted two proposed pretrial orders which listed GAC's and Gulf's participation in the cartel as a contested issue of law, and a proposed amendment to its complaint which charged that Gulf and GAC were members of a cartel which violated the New Mexico Antitrust Act, and that the 1973 Supply Agreement was obtained in furtherance of the cartel's activities.

I&M filed a counterclaim on March 7 containing allegations concerning the cartel. GAC's reply, filed on March 28, denied these allegations, thus placing the cartel squarely at issue.

had referred to GAC's and Gulf's efforts to inject themselves into the cartel as an example of how they had violated the antitrust laws of New Mexico.[104] In its January 1977 answers to GAC's interrogatories, United had alleged that Gulf ruined the Gulf-United business by "collaborating" with the cartel to control uranium prices. More importantly, it is beside the point when the cartel was raised as an issue. It was GAC's obligation to provide discovery, or to seek guidance from the court as to the scope of its obligation. Any other rule would require the party seeking discovery to know what was in the opposing party's documents before he saw them. Finally, the concession that the cartel was an issue in March highlights the inadequacy of the supplemental answers GAC filed in April.[105]

**{262}** The fourth excuse is also irrelevant. Although some United officials testified at the trial that they were aware that a group of foreign uranium producers, including Gulf Canada, was discussing uranium marketing, there was no evidence adduced that United knew of the extent of Gulf's involvement, of the participation in the cartel of members of the Gulf-United board, or of cartel discussions involving Gulf competitors in the United States. GAC's argument also ignores the fact that the evidence shows that the cartel took "deliberate and elaborate steps to cloak its activities." **In Re Uranium Antitrust Litigation**, **supra**, 480 F. Supp. at 1155. In any event, United did seek information on the cartel by virtue of its request for Gulf records in general, and for the Grand Jury and Duquesne cartel documents in particular.

**{263}** GAC's final excuse for its failure to include information on the cartel in either set of its answers to the First Set of Interrogatories is that United had demonstrated by its inaction and representations that it did not consider the cartel to be covered by the First Set of Interrogatories. There is clearly nothing in the record to support this argument up to the time GAC served its first answers in April 1976. As we have seen, the record establishes that prior to the filing of the supplemental answers, United had made it abundantly clear that it sought information on the cartel, and had specifically informed GAC that cartel documents were within the scope of Interrogatories 30, 32 and 33.

**{264}** Although United did not object to the failure of the supplemental answers to include information on the cartel until late 1977, this delay does not reflect a lack of desire for cartel information, nor does it constitute a waiver of any claim that GAC's supplemental answers were inadequate. **See** n. 95, **supra**. In **Hunter v. International Systems & Controls Corp., supra**, 56 F.R.D. at 623, the court said:

> [I]t is irrelevant to the question of whether there was a failure to make discovery to consider whether the moving party was later willing to settle for other materials than were originally requested. The purpose of Rule 37, **supra**, is to secure compliance with discovery rules and orders. (Citations omitted.)

**{265}** Similarly, it is immaterial to the question of the good faith of GAC's supplemental answers that United was later willing to settle for **other means**—the Second Set of Interrogatories—of securing information on the cartel. As United's counsel stated in August 1977: "[T]he necessity for these late interrogatories [the Second Set] was brought about by the difficulty of obtaining information from Gulf."

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[104] The document United referred to in support of this allegation was introduced into evidence at a hearing on November 1, 1976, over GAC's objection that the exhibit "has nothing to do with GAC, and has nothing to do with the issues in this case." However, the exhibit contained two documents, both of which were written by and addressed to officials at Gulf Energy (Hunter, Rolander, Gregg and Hoffman), all of whom later occupied key positions in GAC. **See** Section II A, **supra**, especially n. 16-17, **supra**. The documents referred to early cartel meetings in Canada. GAC unsuccessfully sought a protective order in order to keep these records sealed from the public.

[105] This concession also contradicts the representation GAC later made to the trial court. In an affidavit filed in March 1978 in support of its motion for reconsideration of the default judgment, a GAC attorney stated that he "did not consider or recognize" that the cartel was an issue in this case until August 1977. However, it was this very same attorney who objected on March 25, 1977 to what he called "the continual reference to the so-called international uranium cartel."

**{266}** The trial court's finding that no law of Canada prohibited the production of cartel documents as of March 1976, is also essentially correct. GAC did contend both to the trial court[106] and to this Court that "GMCL [Gulf Canada] was barred at all relevant times by the Ontario Business Records Protection Act [1947, Ont. Rev. Stat. c. 54 (1970)] from producing [cartel] documents." However, at the oral argument of this appeal, GAC abandoned this position. GAC's counsel stated:

> [T]here were no legal impediments until then [September 1976]. There was . . . the Ontario Business Records Act in effect at the time period we are talking about. **But the Ontario Business Records Act is no impediment to discovery**. It prevented documents from being taken out of Canada. But those documents could be inspected in Canada by appellees or by anybody else. They could be used for depositions of GMCL [Gulf Canada] personnel in Canada, notes could be taken on them and notes could be brought back here. (Emphasis added.)

**{267}** GAC never made the foregoing explanation of the Ontario Act to the trial court,[107] contrary to the well-established rule that "[o]bjections to interrogatories must be specific and be supported by a detailed explanation as to why interrogatories or a class of interrogatories is objectionable."[108] The "bald assertion that production of the requested information would violate a privilege [provided by law] is not enough."[109] The party resisting discovery has the burden "to clarify and explain its objections and to provide support therefor."[110] "General objections without specific support may result in waiver of the objections."[111] These principles are equally applicable to objections based on foreign nondisclosure laws.[112] Instead of explaining the operation of the Ontario Act to the trial court as it did to this Court, GAC simply insisted that the Act was a complete bar to all discovery of cartel records. "[S]uch complete reversal of position . . . show[s] 'callous disregard of responsibilities' owed" by GAC and its counsel to the court and to the adversary parties. **Furrenes v. Ford Motor Co., supra**, 255 N.W.2d at 516. **See also State of Ohio v. Crofters, Inc., supra**, 75 F.R.D. at 19-20.

**{268}** Had GAC been more assiduous in its responsibility in discovery prior to September 23, 1976, Canadian cartel discovery could have been made without any serious foreign law entanglements. **Accord State of Ohio v. Crofters, Inc., supra**, 75 F.R.D. at 23. By failing to provide cartel information prior to the passage of the Canadian Uranium Information Security Regulations, and then relying on these Regulations as an excuse for nonproduction, GAC is "in the position of having slain [its] parents and then pleading for mercy on the ground that [it] is an orphan." **Life Music, Inc. v. Broadcast Music, Inc., supra**, 41 F.R.D. at 26. **Accord Shepard v. General Motors Corporation**, 42 F.R.D. 425, 427 (D.N.H. 1967).

**{269}** Finally, the court's finding that from December 31, 1975 to the date of the promulgation of the Uranium Information Security Regulations, GAC did not inform either United or the trial court about the existence of the cartel, Gulf's participation therein, or about Gulf cartel documents located in Canada, is fully supported by the record. There is not a scintilla of evidence

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[106] GAC first raised the Ontario Business Records Protection Act as a bar to discovery on March 1, 1977. It again relied on it in October 1977, and thereafter.

[107] Other courts have held the Ontario Business Records Protection Act to be inapplicable in similar situations. **See In Re Uranium Antitrust Litigation**, **supra**, 480 F. Supp. at 1143; **American Industrial Contr., Inc. v. Johns-Manville Corp**., 326 F. Supp. 879, 880 (W.D. Pa. 1971).

[108] **United States v. 58.16 Acres of Land, Etc., Clinton Cty. Ill**., **supra**, 66 F.R.D. at 572 (citations omitted). **See also In Re Folding Carton Antitrust Litigation**, 83 F.R.D. 260, 264 (N.D. Ill. 1979).

[109] **Miller v. Doctor's General Hospital**, 79 F.R.D. 136, 139 (W.D. Okla. 1977).

[110] **Roesburg v. Johns-Manville Corp., supra**, 85 F.R.D. at 297 (citations omitted).

[111] **Id**. (Citation omitted).

[112] **See State of Ohio v. Arthur Andersen & Co., supra**, 570 F.2d at 1374; Note, **Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation**, 88 Yale L.J. 612, 624 (1979).

to contradict it. As late as March 25, 1977, GAC was objecting to references to the cartel, "if it did in fact exist," and denying United's allegation that Allen and Hoffman were participants in the cartel.

**2. The Second Set of Interrogatories**

**a. The Court's Recitals on the Second Set of Interrogatories and the Identification and Production of Canadian Cartel Documents**

**{270}** The following summarizes the pertinent recitals of the trial court in the sanctions order and default judgment concerning GAC's discovery failures subsequent to the filing of the Second Set of Interrogatories on August 16, 1977:

> 1. GAC's first answers to the Second Set of Interrogatories consisted in large measure of a "do-it-yourself" kit, merely directing United to deposition pages. These answers were defective, incomplete, inadequate and unacceptable. The answers failed to identify cartel documents as called for by the interrogatories.
>
> 2. GAC's second answers to these interrogatories excluded all information contained in Gulf documents in Canada and did not identify the documents as GAC had been ordered to do on October 11, 1977. These answers did not comply with the court's order to make complete, good faith, non-evasive answers.
>
> 3. GAC's third answers to these interrogatories were unresponsive and evasive to the questions asked and were mere legal argument in many instances. The answers also failed to make a commitment to a set of facts, posture or position on the subject matter of the interrogatories. Instead, GAC simply stated that various cartel documents "purport to" reflect certain events. GAC steadfastly refused to admit that such events took place or to state true facts concerning the cartel.
>
> 4. GAC's three sets of answers to the Second Set of Interrogatories showed disdain for the court's orders, and coupled with what had gone before, constituted obstruction of justice and demonstrated a wilful, deliberate and flagrant scheme of delay, resistance, obfuscation and evasion. GAC has willfully, intentionally, deliberately and in bad faith, failed and refused to answer the Second Set of Interrogatories.
>
> 5. GAC did not make a good faith and diligent effort to secure the release of documents in Canada or the information contained in them. GAC's efforts to obtain a waiver of Canadian nonproduction laws demonstrated an intent to conceal evidence on the cartel, rather than a good faith effort to produce such information.
>
> 6. Gulf followed a conscious and deliberate policy of housing cartel documents in Canada, rather than in the United States. This action amounted to deliberately courting legal impediments to the production of the records.
>
> 7. GAC's failure to provide documents from the files of Gulf Canada was not based on inability to comply with production requests, but rather, on a bad faith refusal to produce.
>
> 8. GAC deliberately and improperly failed to inform the court and opposing parties in a timely manner of the actions of U.S. District Judge Snyder on August 10, 1977 deprivileging and making public documents turned over to him by Gulf in another case. GAC never accurately disclosed the existence of all of the documents turned over to Judge Snyder. These documents were called for by the First Set of Interrogatories, but the existence of most of them was not disclosed until over a

year after those interrogatories were filed. The existence of some Snyder documents was not disclosed until after Judge Snyder deprivileged them. Some of these documents were first identified and produced only after United brought the matter to the attention of the trial court. The failure to reveal the existence of and to identify all Snyder documents in a timely fashion was a deliberate attempt to further conceal those documents and avoid producing relevant information.

9. GAC in bad faith failed to reveal the existence of documents it produced to a federal grand jury in January 1978, to the trial court or to the opposing parties until after United had learned of their existence from a third party and made a demand upon GAC.

### b. The Proceedings from April 1977 to March 1978

**{271}** Four days after filing its massive supplemental answers to the First Set of Interrogatories, GAC moved to extend the discovery period to March 1, 1978, and to delay the trial until April 1978. At the hearing on this motion, GAC asked that the trial setting be further postponed until October 1978. The trial court rejected this delay, but it extended the discovery period from July 1, 1977 to September 1, 1977, and set the trial date for October 31, 1977.

**{272}** Discovery continued throughout the spring and summer of 1977, during which time the parties produced and reviewed thousands of pages of documents. During this period, GAC alone deposed almost one hundred persons.

**{273}** Beginning in late May, the Congressional subcommittee began to hold hearings on the cartel. **See Hearings on International Uranium Cartel**, **supra**. Various Gulf officials were prominent witnesses. New cartel records were released and much information was developed on Gulf's role in the cartel.

**{274}** On August 16, 1977, one day after the last of these Congressional hearings, United served its Second Set of Interrogatories. These interrogatories inquired in great detail into the cartel and Gulf's role therein. United also filed motions for the production of cartel documents.

**{275}** One week later, GAC filed objections to the Second Set of Interrogatories and the motions to produce. With the exception of a single specific document United had requested, the objections made no reference to any Canadian nondisclosure laws. GAC's objections were based on the grounds that the interrogatories were untimely, "unduly lengthy, burdensome, oppressive and harassing," and inquired into irrelevant matters.

**{276}** At the hearing on these objections, United contended that the necessity for the Second Set of Interrogatories "was brought about by the difficulty of obtaining information from Gulf." GAC responded that most of the information covered by the interrogatories had already been provided, particularly with the production of the Grand Jury and Duquesne documents. GAC's counsel specifically objected to the notion that "this whole cartel thing is something new" in this case.[113]

**{277}** The trial court overruled GAC's objections, but it granted an extension until September 20, 1977—only one day short of the date GAC had requested—to file answers to the interrogatories. The court also gave GAC until September 5, 1977, to file additional, "specific" objections to the interrogatories. The court asked if GAC had any objection to attaching responsive documents to its answers to the extent it was required to answer the interrogatories. GAC stated that it had no such objections. It made no mention of Canadian nondisclosure laws.

[113] Six months later, GAC took the position that the cartel was first raised as an issue when the Second Set of Interrogatories was filed in August. It has abandoned this position on appeal, as it must. **See** n. 103 and 105, **supra**, and accompanying text.

**{278}** In its specific objections to the interrogatories, GAC again did not mention the foreign nondisclosure laws. At the hearing on these objections, GAC promised to include in its answers information from the senior management of Gulf Canada. The court modified certain interrogatories, but it otherwise overruled GAC's objections. It stated that in identifying documents, a summary of the contents need not be provided if the documents were produced.

**{279}** The day before the answers were due, GAC filed a motion for an extension until September 26, 1977, to answer the interrogatories. The court granted the extension, but it warned that sanctions would be imposed if the interrogatories were not answered. GAC represented that ninety to ninety-five percent of the information called for by the interrogatories had already been provided to United. Once again, GAC failed to raise the question of Canadian nondisclosure laws.

**{280}** On September 26, GAC filed its first set of answers to the Second Set of Interrogatories. Although narrative answers were made to most questions, virtually all the answers contained the statement that responsive information was contained in depositions and documents previously produced. GAC cited extensive lists of references to specific depositions and exhibits. GAC finally raised the issue of Canadian law, stating that information contained in the documents of Gulf Canada as well as the documents themselves would not be provided because of the proscriptions of unspecified Canadian statutes and regulations.

**{281}** United moved to compel further answers to the Second Set of Interrogatories on the grounds that the answers of September 26 were inadequate, that only a few documents were produced, and that no documents were identified in the answers. United also sought the production of cartel documents, and requested that sanctions be imposed. In an accompanying brief, United alleged that Gulf had "deliberately placed documents in Canada so as to make them more difficult for U.S. courts to subpoena." I&M joined in this motion. In response, GAC relied for the first time since March 1977 on the Ontario Business Records Protection Act and the Uranium Information Security Regulations as excuses for the nonproduction of cartel documents located in Canada.

**{282}** At the hearing on the motion, GAC's counsel assured the court that "[e]very document that is available in the United States that are responsive to these interrogatories have been produced." However, some documents were not produced until February 1978. Again, GAC stated that Canadian laws barred the disclosure of documents in Canada. United again responded by contending that Gulf had deliberately housed documents in Canada in order to avoid their disclosure in courts in this country. The court took the motions under advisement, again warning that it expected "full, complete, good faith discovery."

**{283}** On October 11, 1977, the court granted the motion for further answers to the interrogatories, finding that most of the first answers were "defective, incomplete, inadequate and unacceptable." The court held that GAC was obligated to make "a firm commitment to a set of facts, posture or position on the subject matter of the interrogatory" in its answers, and that the references in the answers to depositions and other documents were inadequate. The court ordered that new answers be filed by October 20, 1977.

**{284}** The court also found that GAC had failed to provide the identification of documents called for by the interrogatories, and it ordered compliance with this request. The court found that GAC had not "in good faith, without evasion or reservation" produced all cartel documents in the United States, and ordered that this be done. The court also found that GAC had not made a good faith effort to produce cartel documents in Canada. The court stated that GAC was obligated to make "an immediate diligent and good faith effort to obtain a lawful waiver of or dispensation from" Canadian nondisclosure laws in order to lawfully produce those records. The court said that GAC had not shown that identification of the

documents was violative of Canadian law, and it ordered GAC to "separately, clearly and definitively" identify all documents called for by the interrogatories. Again, the court warned that further failures to abide by its orders to make good faith discovery would subject the offending party to sanctions.

**{285}** On October 13, GAC wrote to the Canadian Minister of Energy, Mines and Resources, requesting a waiver of the Uranium Information Security Regulations in order to produce the records and permission to identify the documents **with** a summary of their contents. The Canadian Minister refused to grant a waiver, and stated that identification of the documents "in the manner described in [GAC's] letter" would violate the Regulations. On October 21, 1977, GAC filed the Canadian Minister's reply to its request for a waiver, along with its second set of answers to the interrogatories.

**{286}** On November 4, 1977, four days after the trial began, United again moved to compel GAC to identify and produce all cartel documents and to identify those documents in Canada without a summary of contents. United argued that GAC's second answers were inadequate for failure to identify documents located in Canada, and it charged that Gulf had deliberately courted legal impediments to production of the cartel records by housing them in Canada. It requested that the court find all facts provable by those documents against GAC as a sanction under Rule 37(b)(2)(i).

**{287}** On November 8, 1977, GAC wrote a second letter to the Canadian Minister requesting permission to identify the Canadian cartel documents without a summary of their contents. The Minister informed GAC that as a result of a decision of the Supreme Court of Ontario on November 9, 1977, he was unable to consider its request.

**{288}** After hearings on United's motion of November 4, the court found that GAC had failed to produce the documents in part because of "its own early and deliberate policy of housing such documents in Canada." The court held that its order of October 11 had not required identification of the documents with a summary of their contents. It indicated that GAC's request of October 13 to the Canadian Minister to so identify them was an attempt to avoid that order. Again the court ordered GAC to "clearly and definitively" identify all documents in Canada, and it stated that facts provable from documents housed in Canada would be found against GAC.

**{289}** In December, I&M moved to compel further answers to United's Second Set of Interrogatories. United joined in this motion. On December 27, 1977, the court granted the motion for further answers, and stated that GAC had still failed to show to its satisfaction that the simple identification of cartel documents would violate Canadian law. However, the court held that sanctions would have to be imposed under Rule 37 for failure to comply with its order of November 18, even if such identification was prohibited. The court found that GAC's second set of answers had not complied with its previous orders to give "complete, good faith and non-evasive answers" to the Second Set of Interrogatories. The court set January 13, 1978, as the deadline for the filing of new answers, and again threatened to impose sanctions for further discovery failures.

**{290}** After receiving two more extensions of time, GAC filed its third set of answers to the Second Set of Interrogatories on February 1, 1978. Nine days later, United again moved for a default judgment based on all of GAC's previous discovery failures. United asserted that GAC's third set of answers to its Second Set of Interrogatories were "deficient and defective in almost every respect," and that GAC had willfully refused to answer the interrogatories in good faith. United also alleged that GAC had willfully and deliberately withheld certain documents which it had submitted to the federal grand jury in Washington, D.C. I & M joined in this motion.

**{291}** GAC then moved for an evidentiary hearing on the allegations that it had acted in bad faith. The motion was accompanied by various affidavits, including several from Gulf and GAC

officials on the question of the housing of cartel documents in Canada. The parties filed briefs and proposed findings of fact on the motions for sanctions. On March 2, 1978, the trial court entered its sanctions order and default judgment, in which it found all issues of liability against GAC and in favor of United and I&M.

**{292}** GAC filed a motion, accompanied by additional affidavits, for reconsideration of the sanctions order and default judgment. This motion was denied.

### c. Analysis of the Recitals on the Second Set of Interrogatories and the Identification and Production of Canadian Cartel Documents

**{293}** We will examine these findings in the following order: (1) The adequacy of the three sets of answers to the Second Set of Interrogatories; (2) the failure to identify or produce cartel records located in Canada, including the findings that GAC had failed to make good faith efforts to obtain a waiver of the Canadian nondisclosure laws and that it had deliberately courted legal impediments to the production of those records by housing them in Canada; and (3) the production of the Snyder and Grand Jury documents.

#### (1) GAC'S Answers to the Second Set of Interrogatories

**{294}** Before examining the propriety of the trial court's recitals concerning the inadequacy of GAC's three sets of answers to United's Second Set of Interrogatories, it is necessary to consider GAC's contention that the trial court erred in overruling its objections to those interrogatories.

**{295}** GAC originally objected on the grounds that the interrogatories were "unduly lengthy, burdensome, oppressive and harassing." It also contended that they were untimely because they were served only fifteen days before the date set for the end of all discovery. GAC later contended that the interrogatories were duplicative of the First Set of Interrogatories, and that although prior court orders had required the parties to produce their documents, there was "a clear distinction" between requiring the partners to produce documents and to answer interrogatories.[114]

**{296}** We hold that the trial court did not abuse its discretion in overruling these objections. The interrogatories were filed within the period set for discovery. As United argued, "the necessity for these late interrogatories was brought about by the difficulty of obtaining information from Gulf." Had GAC properly answered the First Set of Interrogatories, and had it been more diligent in producing documents from the partners, the need for these late interrogatories would have been obviated in whole or in part.[115]

**{297}** The objection that the interrogatories were harassing is without merit for the same reason. As was stated in **SCM Societa Commerciale S.P.A. v. Ind. & Com'l Res.,** 72 F.R.D. 110, 114 (N.D. Tex. 1976):

> [T]he short answer to Defendant's contention is that much of the Plaintiff's so-called harassment has become necessary because of the Defendant's failure to comply with this Court's orders.

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[114] GAC also objected on the grounds that the interrogatories inquired into irrelevant matters. This contention is addressed in Section II B, **supra**, of this opinion.

[115] For the same reason, it was not error for the trial court to refuse to grant GAC's motion for a continuance of the trial setting or to require additional discovery from GAC during the course of the trial. In **Wieneke v. Chalmers**, **supra**, 73 N.M. at 12, 385 P.2d at 68, this Court held that it was within the sound discretion of the trial court to permit additional discovery during the course of a trial, particularly where the need for it results from previous failures to make discovery. In refusing to grant a continuance in this case, the trial court noted that the remaining discovery "in good faith should have been taken care of earlier." In these circumstances, "[t]o grant another continuance would in effect be a sanction against the Court." **G-K Prop. v. Redevelop. Agcy. of City of San Jose**, 409 F. Supp. 955, 959 (N.D. Cal. 1976), **aff'd**, 577 F.2d 645 (9th Cir. 1978).

**{298}** GAC's third objection—that the interrogatories duplicated the First Set of Interrogatories—is also without merit. "A claim of duplication is insufficient, unless all documentary material from which the interrogatory answers may be conveniently obtained has been previously provided." **In Re Folding Carton Antitrust Litigation**, **supra**, 83 F.R.D. at 264-65 (citation omitted). Even GAC has never contended that all documentary evidence on the cartel has been produced.

**{299}** GAC's objection that the prior orders of the court did not require the partners to provide answers to interrogatories was a spurious argument. Not only had the court so held,[116] but also, its holding was legally correct. **See** Section II A, **supra**.

**{300}** We turn now to the question of whether the trial court's recitals on the inadequacy of GAC's answers to the interrogatories were correct. In making this determination, we are guided by the principle that "[u]ltimately, the question of what constitutes satisfactory responses to interrogatories rests within the sound discretion of the Court." **Martin v. Easton Publishing Co.,** 85 F.R.D. 312, 316 (E.D. Pa. 1980).

**{301}** The first answers consisted in large measure of references to documents and to depositions, many of which had been taken in other litigation. After hearing argument and reviewing the answers and referenced documents and depositions, the trial court concluded that these answers were inadequate and unacceptable, in part because most of the information contained in the references was subject to wide differences of opinion and interpretation and was "vague, indefinite, uncertain, incomplete, elusive and nonresponsive." In the sanctions order and default judgment, the court stated that these answers had constituted "a do-it-yourself" kit. **See Life Music, Inc. v. Broadcast Music, Inc., supra**, 41, F.R.D. at 25.

**{302}** Although GAC referred to specific pages in the referenced documents and depositions in its answers, rather than committing the universally condemned practice of referring to a mass of undifferentiated material,[117] our review of the record satisfies us that the court did not abuse its discretion in finding these answers to be unacceptable.

**{303}** First, much of the material GAC referred to was "elusive and non-responsive."[118] A party cannot answer an interrogatory simply by reference to another equally unresponsive answer. **Martin v. Easton Publishing Co., supra**, 85 F.R.D. at 315.

**{304}** Second, the purpose of interrogatories is to narrow and clarify the basic issues between the parties and to permit the ascertainment of the facts relative to those issues. **Smith v. Danvir Corporation**, 55 Del. 418, 188 A.2d 118, 120 (1963). As one court stated:

> Incorporation by reference of portions of a deposition of a witness, much of it discursive, . . . is not a responsive answer. The fact that a witness testified on a particular subject does not necessarily mean that a party who is required to answer interrogatories adopts the substance of the testimony to support his claim or contention.

[116] At a hearing on January 11, 1977, the court stated: "[W]henever an interrogatory is propounded to General Atomic, it is propounded to GAC's constituent partners also. That is my ruling. The interrogatories . . . [are] obligatory upon the constituent partners." On January 21, the court entered an order to this effect.

[117] **Martin v. Easton Publishing Co., supra**, 85 F.R.D. at 315; **Flour Mills of America, Inc. v. Pace**, 75 F.R.D. 676, 682 (E.D. Okla. 1977); **Kozlowski v. Sears, Roebuck & Co.,** 73 F.R.D. 73, 76-77 (D. Mass. 1976); **Harlem River Con. C., Inc. v. Associated G. of Harlem, Inc., supra**, 64 F.R.D. at 462; **Budget Rent-A-Car of Missouri, Inc. v. Hertz Corporation**, 55 F.R.D. 354, 357 (W.D. Mo. 1972); **Life Music, Inc. v. Broadcast Music, Inc., supra**, 41 F.R.D. at 25; **Smith v. Danvir Corporation**, 55 Del. 418, 188 A.2d 118, 120-21 (1963).

[118] For example, one such reference was to thirty-two pages of the deposition of Zagnoli, the head of Gulf Minerals, which had been taken in the **Westinghouse** litigation. In twenty-two of those pages, Zagnoli answered questions with the phrases "I do not recall" twenty-one times and "I don't know" twelve times. When Zagnoli was asked if "I don't recall" meant the same thing as "I don't know," he responded: "I don't know that."

**J.J. Delaney Carpet Co. v. Forrest Mills, Inc.,** 34 F.R.D. 152, 153 (S.D. N.Y. 1963). **See also Martin v. Easton Publishing Co., supra**, 85 F.R.D. at 315. Such answers make it impossible to satisfy the purposes of interrogatories because a party's admissions under oath cannot be obtained. **Life Music, Inc. v. Broadcast Music, Inc., supra**, 41 F.R.D. at 26.

**{305}** This problem was clearly apparent in this case. When United sought to admit into evidence at trial the portions of the documents referred to in GAC's interrogatory answers, GAC objected on the grounds that the references "contain opinions, conclusions, . . . legal contemplation speculations," and hearsay. GAC's counsel informed the court that it made the references "without knowing whether or not they were the best evidence or whether they were reliable or trustworthy." GAC's first answers cannot be read as stating that GAC and Gulf did not have or could not obtain information necessary to give narrative answers to the interrogatories. If, as GAC later represented, neither it nor Gulf could furnish the information, it should have so stated at the very outset. **See In Re Master Key**, 53 F.R.D. 87, 90 (D. Conn. 1971).

**{306}** Even more significant than the inadequacy of the references contained in the answers, however, was GAC's failure to identify or include information from cartel documents located in Canada. GAC's failure to promptly bring the problem of Canadian nondisclosure laws to the attention of the trial court is inexplicable. GAC failed to mention the problems posed by those laws in either set of its objections to the interrogatories. Instead, GAC promised the trial court in August that it would attach responsive documents to its answers, but it did not qualify that promise with any territorial limitations as to their location, even though neither the interrogatories themselves nor the court's order to answer them restricted the scope of inquiry to materials in the United States. At the hearing on GAC's "specific" objections, GAC promised to answer the interrogatories "on the basis of the knowledge, the present knowledge of the senior management of the corporation, **including the senior management of Gulf Minerals Canada** and Gulf Minerals Resources," (emphasis added), but it did not represent that it could only answer on the basis of the knowledge of officials of Gulf Canada who were located in the United States. When GAC received another time extension on the day the answers were due, it again failed to disclose the foreign law obstacles. Only when it filed its answers did GAC finally raise unspecified foreign laws as a bar to the production of information on the cartel.

**{307}** This failure to promptly raise the foreign law problem was contrary to settled principles of law governing discovery. As we previously noted, objections to interrogatories must be raised within the time provided by Rule 33 or within any extension of time granted by the trial court. The provisions of that rule "should be strictly adhered to." **Lackey v. Mesa Petroleum Co.,** 90 N.M. 65, 67, 559 P.2d 1192, 1194 (Ct. App. 1976). As the court stated in **Philpot v. Philco-Ford Corporation**, 63 F.R.D. 672, 674 (E.D. Pa. 1974): "A full and precise understanding of the . . . Rules of Civil Procedure will surely escape even the most erudite attorney if he chooses not to read them." (Footnote omitted.) In general, the filing of an answer to an interrogatory is deemed a waiver of the right to object. **Kozlowski v. Sears, Roebuck & Co.,** 71 F.R.D. 594, 597 (D. Mass. 1976); **Harlem River Con. C., Inc. v. Associated G. of Harlem, Inc., supra**, 64 F.R.D. at 465; **Skelton & Co. v. Goldsmith**, 49 F.R.D. 128, 130, n. 1 (S.D. N.Y. 1969); **Riley v. United Air Lines, Inc.,** 32 F.R.D. 230, 234 (S.D. N.Y. 1962).

**{308}** The failure to immediately raise this problem, particularly when considered in light of the trial, set to begin in only four weeks, was itself evidence of a lack of good faith. In **Shepard v. General Motors Corporation**, **supra**, 42 F.R.D. 425, the defendant failed to answer interrogatories, and later informed the court that it could not answer because key employees had either died or retired. The court imposed sanctions, stating:

> The defendant had the opportunity [at two previous hearings] in conjunction with

> previous motions concerning this set of interrogatories, to inform both the Court and counsel for the plaintiffs that Gandelot was no longer in the employ of General Motors. . . . [N]o explanation was given for the defendant's failure to raise this matter sooner and, therefore, the Court cannot now accept such an untimely objection. Defendant's conduct amounts to a deception of this Court and said conduct has materially hampered plaintiffs' counsel in the preparation of these cases.

**Id**. at 427. **Cf**. **United States v. 3963 Bottles, More or Less, Etc.,** 265 F.2d 332, 337 (7th Cir.), **cert. denied**, 360 U.S. 931, 79 S. Ct. 1448, 3 L. Ed. 2d 1544 (1959) ("[T]hough first representing to the court that it had such information available and implicitly offering it in support of this motion, when it was later served with interrogatories seeking details of such 'extensive research and consultation,' claimant asserted its claimed privilege"); **Perry v. Golub**, **supra**, 74 F.R.D. at 368 ("The fact that the defendants advanced these requested conditions long after the expiration of the period for the filing of objections and **after they had represented to the Court at the hearing that the documents would be produced** is further evidence of the defendants' intransigent conduct in responding to discovery and in complying with the Court's Order") (citation omitted and emphasis added).

**{309}** GAC had full knowledge at the time the Second Set of Interrogatories was filed that Canadian laws posed a problem for the production of cartel information, for it had informed the court six months earlier that it was prepared to present those proscriptions to the court. However, it was apparently unprepared or unwilling in September to do what it had promised in March; it clearly was not unable to do this in a prompt manner.[119]

[119] GAC's mention in March of the proscriptions of those laws is no excuse for its failure to raise the point in August and September. As far as the trial court knew, the laws might have been repealed, or a waiver of them secured. In any case, in March GAC had not specified those proscriptions with the particularity the law requires.

**{310}** Third, even if the reference in the answers to unspecified foreign laws could be considered to have been timely, it was not sufficient. The simple assertion that production would violate the laws of Canada did not comport with established principles governing the filing of objections. **See** n.n. 108-112, **supra**, and accompanying text.

**{311}** Finally, GAC was under a duty to make every effort to obtain the requested information and, if, after adequate effort, it was unsuccessful, its answers should have recited in detail the attempts which it made to acquire the information. **Jackson v. Kroblin Refrigerated Xpress, Inc.,** 49 F.R.D. 134, 137 (N.D.W. Va. 1970). **See also Budget Rent-A-Car of Missouri, Inc. v. Hertz Corporation**, **supra**, 55 F.R.D. at 357; **Breeland v. Bethlehem Steel Company,** 179 F. Supp. 464, 467 (S.D. N.Y. 1959); 4A J. Moore, **Federal Practice** § 33.26, at 33-140 (2d rev. ed. 1980). Until ordered by the court to seek a waiver of Canadian law, GAC did nothing at all, with full knowledge that, at that time, the Uranium Information Security Regulations contained a provision permitting a Canadian Government Minister to consent to the disclosure of cartel information. None of the foregoing failures bespeak of GAC's good faith response to its discovery obligations under the rules or the orders of the court.

**{312}** As the trial court found, GAC's second set of answers failed to comply with the court's order to identify cartel documents in Canada and failed to contain information from those documents. However, it was not until the filing of these answers that GAC first informed the trial court that, contrary to its earlier representation, it would not provide information from persons in Canada because of Canadian law.

**{313}** The trial court found that GAC's third set of answers were inadequate because they did not contain "a commitment to a set of facts, posture or position," but merely stated that various cartel documents "purport to" reflect certain events. Based on our review of those answers and the following factors we discuss, we are unable to say that the court abused its discretion in making this finding.

**{314}** GAC contends that it could not have been faulted for merely stating that certain documents "purport to" reflect certain events, because no personnel employed by GAC or Gulf at the time the answers were prepared were able to verify the contents of those documents. GAC points out that a response to an interrogatory indicating that a party does not know the answer is sufficient if that, in fact, is the case, (**see Harlem River Con. C., Inc. v. Associated G. of Harlem, Inc., supra**, 64 F.R.D. at 463; **Roberson v. Great American Insurance Companies of N.Y.,** 48 F.R.D. 404, 411 (N.D. Ga. 1969); 4A J. Moore, **Federal Practice** § 33.26, at 33-140 (2d rev. ed. 1980)), and that where the information is obtained from third persons, the party is not required to admit its accuracy. **Riley v. United Air Lines, Inc., supra**, 32 F.R.D. at 233; 4A J. Moore, **Federal Practice** § 33.26, at 33-145 (2d rev. ed. 1980).

**{315}** Although these are correct statements of basic principles, they do not aid GAC. The time for stating the limited extent of its knowledge and the absence of personnel to make responsive answers had long since passed. If GAC and Gulf were not able to vouch for the contents of their own business records, GAC should have promptly so informed the trial court.[120] Instead, when it promised to attach responsive documents to its answers and to answer "on the basis of the knowledge . . . of the senior management" of Gulf and its subsidiaries, GAC made no representation that the senior management was without sufficient knowledge to answer, or that it could not vouch for the authenticity of the "responsive" documents. In its first answers, GAC represented that various documents and depositions contained answers to United's questions, but it did not represent that it could not vouch for the reliability of the information contained in the references it gave. It was only after United attempted to admit these references at trial that GAC informed the court that it did not know "whether they were reliable or trustworthy."

**{316}** Even if GAC and Gulf no longer employed personnel who could commit GAC to a posture, position or set of facts concerning the cartel, this inability merely highlighted the significance of the cartel documents located in Canada, and demonstrated the insolubility of the dilemma created by GAC's earlier discovery failures.

**{317}** In any event, answers to interrogatories were an inadequate substitute for full production of records on the cartel. Without those documents, appellees were in no position to challenge the veracity, responsiveness, or completeness of those answers. As one commentator has stated: "The heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case." Note, **Discovery of Documents Located Abroad and U.S. Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Nonproduction** 14 Va. J. Int'l L. 747 (1974). As Judge Marshall concluded in the **Westinghouse** case, when he ordered production of Gulf's Canadian cartel documents:

> That is especially true when plaintiffs allege an antitrust conspiracy which has taken deliberate and elaborate steps to cloak its activities. "If true, the nature of the activities must be ferreted out of dark and obscure corners." The documents at issue here are crucial to plaintiffs' proof. (Citation omitted.)

**In Re Uranium Antitrust Litigation**, **supra**, 480 F. Supp. at 1155.

### (2) Production and Identification of Canadian Cartel Documents

**{318}** GAC contends that because Canadian law forbids production of cartel documents in the custody of Gulf Canada in Canada, its failure to produce them in this litigation was based

[120] GAC did inform the trial court on September 9, 1977, that some employees who were active in the cartel no longer were employed by GAC or Gulf. But it did not represent that it would be unable to furnish responsive answers because of their absence, either at that time or in its original answers of September 26, 1977.

on an inability to comply, and that such an inability could not be the basis for a default judgment.

**{319}** The first part of this argument is undoubtedly correct—the Uranium Information Security Regulations prohibit the production of the documents or the release of their contents. Those Regulations, and the act under which they were promulgated, contain criminal sanctions for their violation. It is now clear that there is no possibility of a relaxation of those proscriptions. **See** n. 125, **infra**.

**{320}** The question of the power of a court to impose the severe sanctions provided by Rule 37(b)(2)(iii) for a party's failure to produce documents located in a foreign country where the laws of that country forbid their disclosure was addressed in **Societe Internationale v. Rogers, supra,** 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255. The facts of that case were set forth in Section II C(2)(a), **supra**, of this opinion, where we discussed the aspect of **Societe** which addressed the propriety of an order to produce documents whose disclosure is prohibited by foreign law. The second aspect of **Societe** is the propriety of sanctions imposed for a party's failure to comply with such an order. In this section we are concerned with the latter issue.

**{321}** In **Societe**, the Court held that where a plaintiff had in good faith made diligent efforts to secure the documents that could not be released without violating a foreign nondisclosure law, dismissal of the action was an inappropriate sanction under Rule 37. The Court stated that fear of criminal prosecution resulting from production of the documents "constitutes a weighty excuse for nonproduction." 357 U.S. at 211, 78 S. Ct. at 1095. However, the Court did not hold that foreign nondisclosure laws completely preclude the imposition of sanctions. Rather, the Court said that the reasons for noncompliance and the willfulness or good faith of the party "can hardly affect the fact of noncompliance and are relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply." **Id**. at 208, 78 S. Ct. at 1094. The Court stated that in the absence of complete disclosure, the district court possessed "wide discretion to proceed in whatever manner it deems most effective." **Id**. at 213, 78 S. Ct. at 1096. It indicated that the court could draw inferences of fact unfavorable to the plaintiff as to particular events related to the nonproduced documents.

**{322}** GAC contends that under **Societe** the default judgment was an improper sanction for its inability to produce the Canadian cartel records. We disagree. The touchstone of **Societe** is that such a sanction is not permissible where the failure to comply with the court's production order was "due to inability, and not to willfulness, bad faith, or any fault of" the noncomplying party. **Id.** at 212, 78 S. Ct. at 1096. In **Societe,** the Court found that the plaintiff had made "extensive efforts at compliance," and that its failure to produce "was due to inability fostered neither by its own conduct nor by circumstances within its control." **Id**. at 211, 78 S. Ct. at 1095.

**{323}** In this case, the trial court found that GAC's failure to produce the documents in Canada was not based on inability; rather, it was due to its own bad faith conduct. The recitals of bad faith upon which that conclusion was based are supported by the record. As the trial court found, GAC's misconduct in discovery involved more than merely the failure to produce documents located in Canada. The record here is hardly similar to the one that was before the Court in **Societe**.[121]

[121] For similar reasons, GAC's reliance on **In Re Westinghouse Elec. Corp. Uranium, Etc., supra,** 563 F.2d 992, is misplaced. There the court reversed a contempt citation against Rio Algom for its failure to comply with subpoenas, where compliance would have violated the same Canadian regulations at issue here. However, the Court of Appeals found that Rio Algom had acted in good faith; had made a diligent effort to produce records which were not subject to the Canadian regulations; and had made an adequate effort to secure a waiver of the regulations from Canadian authorities. In this case, the trial court made findings to the contrary, which, with the exceptions noted herein, we have found to be supported by the record. We also take note of the following factors in the Tenth Circuit's opinion which find no parallel here—(1) the discovery at issue was "in a sense cumulative" (563 F.2d at 999); (2) the case did not involve the enforcement of antitrust laws (**id.**); and (3) Rio Algom was not a

**{324}** There are two additional aspects of GAC's failure to produce the documents in Canada which the Court in **Societe** suggested were material to the propriety of the imposition of a Rule 37(b)(2)(iii) sanction. The first concerns GAC's efforts to secure a waiver of the Canadian law; the second involves how the documents came to be located in the foreign nation. The trial court made findings on both issues in this case, which will be separately considered here.

**{325}** In **Societe**, the Court pointed out that the plaintiff, a Swiss company, was "in a most advantageous position to plead with its own sovereign for relaxation" of the Swiss nondisclosure laws, in order to achieve at least a significant measure of compliance with the court's production order. **Id**. at 205, 78 S. Ct. at 1092. It suggested that a party is required to make all maximum efforts to secure the release of the documents. In this case, the trial court found that GAC had not made a good faith effort to secure a waiver of or dispensation from the proscriptions of Canadian law.

**{326}** On October 11, 1977, the court had ordered GAC to secure a waiver of the Canadian nondisclosure laws in order to produce the documents. It also ordered GAC to "separately, clearly and definitively" identify the documents.

**{327}** On October 13, 1977, GAC consulted Canadian counsel on the appropriate way to secure a waiver. It was informed that only the Canadian Minister of Energy, Mines and Resources could grant a waiver. On the same date, GAC wrote to the Minister requesting permission to produce the cartel documents in Canada and to identify the documents **with** a summary of their contents. On October 19, 1977, the Canadian Minister rejected GAC's request of October 13 for a waiver of the Regulations, and he refused to give permission to identify the documents "in the manner" GAC had described. United then moved on November 4 for sanctions for GAC's failure to produce the documents and to compel identification of the documents **without** a summary of contents. Four days later, GAC sent a second letter to the Minister, requesting permission to so identify the documents.

**{328}** On the following day, the Supreme Court of Ontario handed down a decision upholding the validity of the Uranium Information Security Regulations. **Joe Clark v. Attorney General of Canada**, 17 Ont. 2d 593 (1977). However, the court struck down the portion of the Regulations which permitted the Minister to consent to the release of the documents. Accordingly, on December 6, the Minister informed GAC that in light of the court's decision, he was "not able to consider your request." GAC subsequently refused to produce or to in any way identify any of the cartel documents located in Canada.

**{329}** On December 27, the trial court stated that it was not satisfied that simple identification of the documents was prohibited by Canadian law. GAC did not present further evidence on the issue.[122]

**{330}** The trial court found that GAC's efforts to secure a waiver were not only insufficient, but also, were deliberate attempts to avoid producing or identifying the documents. First, the court

party in the litigation, had not sought affirmative relief from the court, and therefore, was not in a position to profit from its failure to comply with the production orders. **Compare Societe**, 357 U.S. at 212, 78 S. Ct. at 1095. **See also** n. 125, **infra**.

[122] On February 22, 1978, GAC suggested that the court and counsel for appellees meet with Canadian officials. Both the court and counsel refused. On the day after the default judgment was entered, GAC met with officials of the Government in Canada. GAC gave the court a report of that meeting, which stated that officials of the Canadian Department of Energy, Mines and Resources had informed GAC's representatives that there was no possibility that release of the cartel documents would be permitted by the Canadian Government, and that, in the opinion of the officials, simple identification of the documents without a summary of their contents was also prohibited by Canadian law. One official stated that no Canadian court had decided the latter issue, although it was the Government's intention that such identification be prohibited. However, in a Diplomatic Note sent to the United States on March 15, 1977, the Canadian Government stated that "[t]he interpretation of the Regulations, including a determination of their scope, is a matter for Canadian courts." Prior to entry of the default judgment on March 2, no Canadian court had addressed the question of the propriety of a simple identification of the documents, nor had GAC made any attempt to have a Canadian court decide the question.

found that it was improper for GAC to request permission to identify the documents **with** a summary of contents, as it did in its original letter of October 13, because the court's order of October 11 did not call for such identification. Second, the court found that GAC's second letter of November 8 requesting permission to identify the documents **without** a summary of contents was written to the Minister with the knowledge that he did not have authority to interpret the Uranium Information Security Regulations. Third, the court construed the Regulations to permit simple identification of the documents. Fourth, the court found that GAC had failed to comply with the court's order to so identify the documents. Fifth, the court found that GAC's only effort, until late February 1978 (**see** n. 122, **supra**), to secure a waiver of the Regulations in order to produce the documents was to write the original letter of October 13. The court stated that writing "a simple letter" to an official who has been declared by the Canadian courts to have no power to interpret the Regulations did not constitute a good faith effort to secure the release of the documents. The court suggested that GAC, Gulf and Gulf Canada should have entered into negotiations with the Canadian Government to secure the documents.

**{331}** We do not completely agree with these findings. First, GAC's original request to identify the documents with a summary of contents was not unreasonable, although the court's order of October 11 did not call for identification in that manner. United's Second Set of Interrogatories defined the term "identify" to include a summary of the contents of the documents. At a hearing on September 9, the court stated that if the documents were produced, GAC did not need to summarize their contents. The Canadian cartel documents were not produced; therefore, it was understandable that GAC asked for permission to identify them in the manner described in the interrogatories themselves.[123]

[123] However, as we have previously noted, as of the hearing on September 9, GAC had still not informed the court that it would not be able to produce all documents responsive to the Second Set of Interrogatories.

**{332}** Second, GAC could not have written its second letter to the Canadian Minister with the knowledge that he had no power to either consent to a waiver of the Regulations or to construe them, because it was not until the day after that letter was sent that a Canadian court struck down the provision giving the Canadian Minister the authority to grant a waiver.

**{333}** Third, although we do not necessarily disagree with the court's interpretation that the Regulations permit simple identification of the cartel records, such identification is not an adequate substitute for production of the documents themselves. We cannot perceive how identification which does not draw upon the contents of the documents could have significantly assisted either the court or appellees.

**{334}** Fourth, GAC concededly did not comply with the court's orders of November 18 and December 27 to make a simple identification of the documents. Although GAC might have taken further steps to ascertain the legality of making such an identification, in light of the time constraints imposed on it and the limited utility of such identification, we cannot agree that its failure to take such steps either constituted bad faith or prejudiced the rights of appellees.

**{335}** The court's final recital on the issue of efforts to secure a waiver is, however, essentially correct. GAC did not make any effort to secure the actual production of the documents other than its letter of October 13 to the Canadian Minister. Although it was extreme to say that GAC's failure to make additional efforts demonstrated an "intent to conceal" evidence concerning the cartel, GAC's efforts were nevertheless inadequate in at least three respects.

**{336}** First, GAC was under a duty to make every effort to obtain the requested information, **Jackson v. Kroblin Refrigerated Xpress**, **Inc., supra,** 49 F.R.D. at 137, which included making all efforts to secure a relaxation of the foreign nondisclosure laws to the maximum of its ability. **Societe Internationale v. Rogers**, **supra,** 357 U.S. at 205, 78 S. Ct. at 1092. This obligation

arose no later than when the court ordered GAC to answer the Second Set of Interrogatories and to produce cartel documents; it did not originate with the court's order of October 11. It is undisputed that prior to October 13, GAC had made no efforts whatsoever to secure the release of the documents located in Canada. **Compare State of Ohio v. Crofters, Inc., supra**, 75 F.R.D. at 21.

**{337}** Second, GAC's letter of October 13 to the Canadian Minister did not constitute an effort to the maximum of its ability. GAC's letter was similar to a letter Rio Algom had written to the same Minister on June 23, 1977, requesting permission to comply with the subpoenas for cartel records issued in the **Westinghouse** case. Rio Algom's request had been denied by the Minister on July 19, 1977. GAC was aware of Rio Algom's letter and of the results it achieved. In writing this Minister, GAC chose an avenue which it knew would be to no avail.[124]

**{338}** Finally, even if the letter of October 13 was a good place to start, as GAC had been advised by Canadian counsel, it was not the proper place to stop. Even if, as is now apparent, the Canadian Government's position on the subject is completely inflexible, GAC's lack of effort after October to secure the document does not comport with the command that a party make "every effort," or efforts to the maximum of its ability, to secure the information it has been ordered to produce. Taken alone, GAC's inaction is not every significant because it has subsequently become clear that further actions would not have been more successful.[125] However, the court could properly consider this conduct as part of the totality of circumstances surrounding GAC's approach to its discovery obligations.

**{339}** The final aspect of **Societe** which is relevant to the propriety of the default sanction imposed on GAC for its failure to produce cartel documents concerns the trial court's finding that Gulf had followed a conscious and deliberate policy of housing the cartel documents in Canada, rather than in the United States; and that this action amounted to deliberately courting legal impediments to the production of the records. GAC contends that the recital is improper not only because it did not pursue such a policy, but also, because it was denied a hearing on the allegations that it did.

**{340}** In **Societe**, the Supreme Court stated that if a party, who failed to comply with a court order to produce documents whose production was proscribed by foreign law, had attempted to take advantage of that foreign secrecy law, and thus, had "deliberately courted legal impediments to production of the . . . records," this fact would have "a vital bearing on justification for dismissal of the action" under Rule 37(b). 357 U.S. at 208-09, 78 S. Ct. at 1094.

**{341}** United first raised this issue on September 30, 1977 in support of its motion for sanctions and for supplemental answers to its Second Set of Interrogatories. United asked that inferences of fact be drawn against GAC because of the policy of keeping documents in Canada. GAC did not respond to these charges, nor did it offer evidence to refute them. The trial court did not make any findings regarding the housing allegation in its order of October 11.

**{342}** After GAC informed the court that the Canadian Minister had refused to waive the proscriptions of the Uranium Information Security Regulations, United moved on November 4, 1977, for sanctions for GAC's failure to produce Canadian cartel documents. In a supporting

[124] GAC contends that this letter was sufficient because the Tenth Circuit had held on October 11 that Rio Algom's letter was an adequate attempt to secure a waiver. **In Re Westinghouse Elec. Corp. Uranium, Etc., supra,** 563 F.2d at 999-1000. However, when Rio Algom wrote on June 23 it did not know what GAC was aware of on October 13—that the Minister would not consent to the release of the documents.

[125] In addition to the Canadian Minister's refusals to grant waivers to Rio Algom and GAC, Canadian courts have refused to enforce letters rogatory to secure the cartel records. **See In the Matter of the Evidence Act**, R.S.O. 1970, c. 151 (**and In Re Westinghouse Electric Corporation Uranium Contracts Litigation**), 16 Ont. 2d 273 (1977); **Joe Clark v. Attorney General of Canada**, 17 Ont. 2d 593 (1977); **Gulf Oil Corp. v. Gulf Canada Ltd.** (Sup. Ct. of Canada, slip op. March 18, 1980). **See also In Re Uranium Antitrust Litigation**, **supra,** 480 F. Supp. at 1155.

memorandum of the same date, United again raised the housing allegation.

**{343}** The trial court set November 14 as the date for a hearing on United's motion. The court suggested that an evidentiary hearing might be required. GAC stated that with the exception of one witness, it was prepared to present its side on affidavits alone. United stated that it would rely "on affidavits and deposition references." The court ordered the parties to submit their affidavits by November 11. Neither United nor GAC filed affidavits on that date concerning the housing question.

**{344}** At the hearing on November 14, a GAC attorney testified on various GAC discovery efforts. However, GAC again did not present any evidence on the housing question.

**{345}** At the continuation of the hearing on November 16, United's counsel sought to admit into evidence in connection with its motion for sanctions references from Gregg's deposition in the **Westinghouse** litigation. United had quoted these references in the hearing on October 7 and in the memorandum in support of its November 4 motion. GAC objected, claiming surprise because United had not submitted affidavits on the housing issue by the November 11 deadline. The court indicated that it agreed with GAC, but when United's counsel pointed out that the references were quoted in its memorandum, GAC's counsel withdrew the objection and stipulated to the admission of the four references from the Gregg deposition "for purposes of this motion."

**{346}** On November 18, the court found that GAC's previous failures to produce cartel records were due in part to "its own early and deliberate policy of housing such documents in Canada." In December 1977, GAC moved to vacate the order of November 18. However, it presented no evidence to refute the finding that it had stored cartel documents in Canada. This motion was denied.

**{347}** Not until three days after United's final motion for sanctions was filed in February 1978, did GAC offer evidence on the question of whether either it or Gulf had pursued a policy of housing cartel documents in Canada. GAC asked for another evidentiary hearing on that question. The court denied this request.

**{348}** GAC now contends that its constitutional right to due process was denied by the failure to conduct a hearing on the housing issue. We disagree.

**{349}** GAC had adequate notice that United was relying on the housing allegation in support of its November 4 motion for sanctions. Not only did United's supporting memorandum expressly make this allegation, with specific references to Gregg's deposition, but also, on November 7 the court had listed the subject of "the effort to get away with the Canadian law" as a subject for consideration at the hearing on November 14. In a brief filed with the court on November 14, GAC recognized that "[m]ost of [United's] argument in its memorandum brief in support of its Motion" for sanctions was based on the housing allegation. GAC said that that matter had been settled by the court's order of October 11, which was untrue since the order did not even mention that issue. GAC said that it would "therefore not respond to those arguments," except to note that **it**, unlike Gulf Canada, had no documents in Canada. Thus, GAC had ample notice that United was relying on the housing allegation; it simply did not respond.

**{350}** The record establishes that GAC's counsel not only stipulated to the admission of Gregg's testimony, but failed to take advantage of several opportunities to present evidence to contradict it.[126] Under such circumstances, GAC was not deprived of an evidentiary hearing on the

[126] When the court agreed to consider Gregg's testimony "for purposes of this motion," it invited GAC to submit a brief on the subject. GAC did not. On the day following the hearing, GAC wrote to the court, stating its understanding that the November hearing was limited to the question of whether it had complied with the court's order of October 11 to secure a waiver. However, it enclosed materials which it said bore on United's other contentions, but none of the submissions were related to the housing issue.

housing allegation. As the court said in **Satterfield v. Edenton-Chowan Bd. of Ed**., 530 F.2d 567, 572 (4th Cir. 1975): "[w]hen this opportunity [to be heard] is granted a complainant, who chooses not to exercise it, that complainant cannot later plead a denial of procedural due process." (Footnote omitted.) **See also Birdwell v. Hazelwood School District**, 491 F.2d 490, 495 (8th Cir. 1974).

**{351}** We turn now to an examination of the evidence in the record on the housing issue, and the applicable principles of law in this regard. In the deposition references whose admission was stipulated to by GAC at the November hearing, Gregg testified that he and Ediger, the head of Gulf Canada, "had an understanding" that "anything that I sent to the United States would be with his approval, and I did not send anything of this type down there." He also stated that there was an understanding that "we should minimize, to the greatest extent possible, sending any of this type of material down." Gregg testified that the subject of "concealing" information on cartel activities had been discussed at "great length" in a meeting at which "a large number of lawyers [were] present," and that it was agreed "not to send anymore across the border than absolutely necessary." This testimony, which is consistent with other evidence in the record,[127] constitutes substantial evidence to support the trial court's finding that Gulf followed a policy of housing cartel documents in Canada.

**{352}** GAC contends that although cartel documents were kept in Canada, this policy did not amount to the prohibited conduct of "courting legal impediments" to the production of the records. It argues that GAC did not keep such documents in Canada. It also contends that these records were Gulf Canada's, and that it was a normal business practice for Gulf Canada to keep those records at its headquarters in Canada. GAC maintains that the records were kept in Canada before the promulgation of the Uranium Information Security Regulations, and thus, neither it nor Gulf could have been courting legal impediments prior to the enactment of such impediments. It further contends that the documents were kept in Canada long before any foreseeable litigation arose, and thus, Gulf had not been taking unusual actions motivated by a desire to frustrate such litigation. Finally, GAC contends that the presence of many cartel records in this country refutes the notion that Gulf followed an illicit policy of housing them in Canada.

**{353}** The evidence we have reviewed demonstrates that Gulf's policy of keeping cartel records in Canada was motivated in large part by an unusual concern for secrecy, and thus, was not just a normal business practice. Although Gulf Canada's headquarters are in Canada, many officials of Gulf from the United States participated in meetings of the cartel (e.g., Hunter, Hoffman, Allen, Zagnoli). At the important Johannesburg cartel meeting in May and June 1972, three of Gulf's four representatives were from the United States.

**{354}** Although the Uranium Information Security Regulations were not in effect during the period the cartel was apparently in existence, the Ontario Business Records Protection Act was in effect. Although that Act is not a significant impediment to discovery, it was relied on by GAC in the court below as a total bar to the discovery of cartel records. If documents were housed in Canada with the expectation that the Ontario Act would be applicable, it is largely immaterial that the expectation was later realized in the form of a different secrecy law. When a party places documents outside this country with the expectation that production of those documents will be frustrated in litigation here, the strong policy in favor

[127] In his deposition in this case, Gregg testified that Allen of Gulf Minerals sent cartel materials to Canada from Denver because "he thought it was material that was best kept in Canada or better kept in Canada." In testimony before the Congressional subcommittee, Gregg was asked if there was any reason other than "the need for secrecy" that those materials were "better kept" in Canada. He replied: "None that I can think of." **Hearings on International Uranium Cartel**, **supra**, Serial No. 95-39, p. 271. Hunter was asked in his deposition in this case if one of the reasons Gregg was transferred to Canada was "the concern about the antitrust laws of the United States." He replied: "Concern about all the documentation that would flow out of any implementation of the Johannesburg agreement and the desirability of having that out - non-U.S., in the Canadian subsidiary."

of broad discovery dictates that that party bear the consequences of the dilemma created by the realization of its expectations.

**{355}** It is not required that the actual litigation in which the documents are ordered produced must be either pending or contemplated at the time the housing policy is initiated and followed. In **Societe,** the Court suggested that an attempt to take advantage of foreign secrecy laws **before** the United States entered World War II would have "a vital bearing" on litigation which commenced many years later under the Trading with the Enemy Act. The evidence demonstrates that Gulf was very concerned about possible liability under American antitrust laws resulting from its participation in the cartel. **See** n. 127, **supra,** and Section II C(1), **supra.**

**{356}** We hold that GAC was not deprived of its right to notice of, and a hearing on, the housing allegations against it and Gulf. We also hold that there is substantial evidence to support the court's finding that Gulf followed a deliberate policy of storing cartel documents in Canada, and that this policy amounted to courting legal impediments to their production. Under **Societe,** these findings alone may be the basis for the imposition of such a discovery sanction as a default judgment.

### (3) The Snyder and Grand Jury Documents

**{357}** The last two recitals of bad faith we examine concern documents which, for the most part, GAC did not produce until after the commencement of the trial. These documents consisted of two categories—the so-called Snyder and Grand Jury documents.

**{358}** The term Snyder documents refers to a group of documents Gulf produced in another case involving the cartel. In that case, Westinghouse subpoenaed certain documents concerning the cartel from Gulf. Gulf claimed that the documents were subject to the attorney-client privilege. In mid-August 1977, United States District Judge Daniel J. Snyder, Jr. held that many of the documents were not privileged, and ordered that they be turned over to Westinghouse. However, Judge Snyder maintained a confidentiality order prohibiting their disclosure to outsiders. **In Re Westinghouse Elec. Corp., Etc.,** 76 F.R.D. 47 (W.D. Pa. 1977).

**{359}** The trial court in this case found that (1) GAC wrongfully failed to inform it and the opposing parties of Judge Snyder's rulings of August 1977; (2) GAC never accurately disclosed to the court or to United the existence of all the Snyder documents; (3) these documents were called for by the First Set of Interrogatories, but the existence of most of them was not disclosed in this case until over a year after the interrogatories were filed; (4) the existence of some of the documents was not disclosed until after Judge Snyder held them to be public and not subject to claims of privilege; and (5) some of the documents were not identified or produced until after United brought the matter to the attention of the trial court in October 1977. The trial court concluded that GAC's failure to reveal the existence of, and to identify, the Snyder documents in a timely manner was a deliberate attempt to conceal relevant evidence.

**{360}** As we have previously discussed, documents such as these were called for by the First Set of Interrogatories. Further, on January 11, 1977, the court had specifically ordered the production of such documents, and had set a deadline of April 15, 1977, for complete production or the submission of those documents as to which GAC was claiming a privilege to the court for an **in camera** review.

**{361}** By April 1977, GAC had produced only a few of the Snyder documents. It had claimed a privilege on many others, but had not submitted any of the documents for an **in camera** review by the April 15 deadline. It was not until late August 1977, that GAC listed twelve of the documents on a privilege list. GAC did not submit the documents as to which its claim of privilege had been challenged for an **in camera** review until September 16, 1977—five months

after the deadline for their submission, over two weeks after the deadline for the completion of all discovery, and six weeks before the scheduled commencement of the trial.

**{362}** On October 5, 1977, the court upheld GAC's claim of privilege in many of the instances in which it had been challenged. The remaining documents were turned over a week later. On October 7, 1977, United raised the question of the Snyder documents, stating that it had received only a few, despite Judge Snyder's rulings in August that many of the documents were not privileged. On October 11, the court held that documents de-privileged by another court were not subject to a claim of privilege in this case. On October 20, GAC produced the documents Judge Snyder had held were non-privileged, including documents which the court in this case had held to be privileged. On October 28, Judge Snyder ordered Gulf to produce the remaining documents he had not previously ruled on. On November 7—eight days after the trial commenced—GAC produced all of the remaining Snyder documents.

**{363}** We cannot agree in all respects with the court's recital on the production of the Snyder documents. The court was incorrect in ruling that Judge Snyder had made the documents public; although produced to Westinghouse, the documents were still subject to a confidentiality order. The court also erred in faulting GAC for its failure to bring Judge Snyder's August order to its attention, since the court had stated prior to October 11 that it would not be bound by other judges' rulings on claims of privilege. Despite these errors, however, the court's conclusion that GAC did not fulfill its obligation to make full and complete discovery of the Snyder documents in a timely fashion is not manifestly erroneous.

**{364}** GAC did not identify all of the documents in a timely manner. It did not submit the documents as to which it claimed a privilege for an **in camera** review until long after the date set for their submission. By failing to submit them until after the completion of the period set for discovery, appellees were effectively precluded from using the documents during depositions of key individuals taken during the summer of 1977. GAC's excuse for these delays is that discovery was an on going process which took a great deal of time. However, the court had made it clear throughout 1977 that adherence to the deadlines it set was a matter of considerable importance. After GAC failed to produce Gulf's records in response to United's original discovery requests, the court had ordered production of them to commence on January 24 and to continue diligently thereafter. Instead of producing the documents, GAC continued to reargue the production of partner records, despite several previous rulings on that subject. It waited until March 1977 to begin production of Gulf's records. The consequences which flowed from GAC's inability to comply with the court's orders in a timely fashion were self-inflicted wounds.

**{365}** The second group of documents consisted of records Gulf produced to the federal grand jury. The trial court found that GAC had in bad faith failed to reveal the existence of these documents to the court or the other parties until after United learned of their existence from a third party and had made a demand on GAC for them. The facts concerning these documents are largely uncontested; the only issue is the correctness of the trial court's conclusion that GAC had acted in bad faith with respect to their production.

**{366}** When these documents were produced to the grand jury in January 1978, copies were apparently sent to GAC's counsel in Santa Fe, but they were not turned over to the court or the opposing parties. United filed a demand for them on February 15, 1978, after learning of their existence from Westinghouse.

**{367}** GAC contends that it did not act in bad faith because it was still reviewing the documents at the time United filed its demand, and that it turned them over before completing its review. It contends that in view of the constraints involved in reviewing the documents while the trial was continuing, it acted as expeditiously as possible.

**{368}** The trial court's finding on this subject was not erroneous. On October 7, 1977, GAC's counsel represented to the trial court that "every document that is available in the United States that are responsive to [the Second Set of Interrogatories] has been produced." That representation could not be made in good faith at a time when a file search was continuing. **Compare Armour & Co. v. Enenco, Inc**., **supra**, 17 F.R. Serv. 2d at 515, 519. When the documents were sent to Santa Fe, GAC could have informed the trial court and opposing counsel that it was reviewing additional material; however, it did not. These documents were called for by United's first discovery requests. Their production had specifically been ordered as early as January 1977, over a year before they were eventually produced. "Such a dilatory response . . . hardly bespeaks of the good faith compliance which [defendant] repeatedly asserts." **State of Ohio v. Crofters, Inc**., **supra**, 75 F.R.D. at 19. **See also Perry v. Golub, supra**, 74 F.R.D. at 365; **Von Brimer v. Whirlpool Corporation**, 362 F. Supp. 1182, 1186 (N.D. Cal. 1973), **aff'd**, 536 F.2d 838 (9th Cir. 1976); **Armour & Co. v. Enenco, Inc**., **supra**, 17 F.R. Serv. 2d at 515-16. Under these circumstances, it was reasonable for the trial court to conclude that GAC's actions as to the production of these documents were improper. **See generally Link v. Wabash Railroad Co**., 370 U.S. 626, 634-35 n. 11, 82 S. Ct. 1386, 1391 n.11, 8 L. Ed. 2d 734 (1962).

**{369}** If GAC's conduct with regard to the production of the Snyder and Grand Jury documents were the only matters at issue, we might take a different view. But they are just two instances to be considered in the pattern of intransigence which characterized GAC's actions during discovery. **DiGregorio v. First Rediscount Corporation**, 506 F.2d 781, 787 (3rd Cir. 1974). **See also Link v. Wabash Railroad Co**., **supra**, 370 U.S. at 634, 82 S. Ct. at 1390; **Diapulse Corporation of America v. Curtis Publishing Co**., **supra**, 374 F.2d at 446; **Riverside Memorial, Etc. v. Sonnenblick-Goldman**, 80 F.R.D. 433, 436 (E.D. Pa. 1978), **aff'd mem**., **Riverside Memorial Mausoleum, Inc. v. Umet Trust**, 605 F.2d 1196 (3rd Cir. 1979), **cert. denied**, 444 U.S. 1075, 100 S. Ct. 1022, 62 L. Ed. 2d 757 (1980). In light of the full record, the trial court did not err in reaching the conclusions it did regarding the production of these two categories of documents.[128]

**{370}** With the few exceptions we have noted, the recitals of the trial court on GAC's bad faith conduct during discovery are supported. Considering the full record, we do not have the "'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors'" that is required to reverse the judgment. **Wilson v. Volkswagen of America, Inc**., **supra**, 561 F.2d at 506. Although we do not agree with a few of the recitals, the conclusion that the trial court reached—that GAC acted in bad faith and that this misconduct precluded a full and fair trial of the issues in the case—was not manifestly erroneous; indeed, it is compelled by an exhaustive review of the record.

## B. REQUIREMENTS OF NOTICE AND HEARING ON DISCOVERY FAILURES

**{371}** GAC argues that the trial court's findings that it had acted in bad faith during discovery, and the sanction of a default judgment which followed from those findings, could not have been entered without prior, specific notice of, and an evidentiary hearing on, the allegations against it. GAC contends that the trial court's refusal to conduct such a hearing, at which the parties would have had an opportunity to present live testimony and cross-examine witnesses, amounted to a denial of due process under Article II, § 18 of the New Mexico Constitution and

[128] I&M asserts that GAC and Gulf produced various cartel documents in other litigation subsequent to the entry of the sanctions order and default judgment in this case which it had not produced here, including certain documents from Canada, which it had determined were not covered by the Uranium Information Security Regulations, and various cartel documents from Gulf files in the United States, Japan and Switzerland. Because these matters are not of record in this case, we have not considered them.

the Fourteenth Amendment of the United States Constitution.

**{372}** In Section III A, **supra,** we discussed the adequacy of the notice and hearing afforded on the question of whether GAC and Gulf had followed a policy of housing cartel documents in Canada. In this section, we discuss the notice and hearing issues as they relate to all the other recitals on GAC's discovery failures.

**{373}** GAC requested an evidentiary hearing on February 13, 1978, in response to United's motion for a default judgment. In the sanctions order and default judgment, the court stated that the factual basis for imposing sanctions for GAC's bad faith "manifestly appear[s] from the face of the record . . . , without any need or requirement for an evidentiary hearing." GAC renewed its request for an evidentiary hearing in connection with its March 13 motion for reconsideration of the sanctions order and default judgment. This motion was denied. Both of GAC's requests for an evidentiary hearing were accompanied by numerous affidavits from its attorneys and officers attesting to the good faith of their approach to discovery.

**{374}** GAC was on notice long before the sanctions order and default judgment was entered that its conduct in discovery was at issue, that the court considered many of its actions improper and unresponsive, and that the court would consider the imposition of sanctions under Rule 37, including a default judgment, for further discovery failures. **See generally Riverside Memorial, Etc. v. Sonnenblick-Goldman, supra,** 80 F.R.D. at 436; **G-K Prop. v. Redevelop. Agcy. of City of San Jose, supra,** 409 F. Supp. at 959-60; **In Re Professional Hockey Antitrust Litigation,** 63 F.R.D. 641, 656 (E.D. Pa. 1974), **rev'd,** 531 F.2d 1188 (3rd Cir. 1976), **rev'd, National Hockey League v. Met. Hockey Club,** 427 U.S. 639 (1976). At least five times before it entered the default judgment, the trial court had warned that appropriate sanctions would be imposed for the failure of GAC or either partner thereof to comply with its discovery orders. In March 1977, it warned that it would "look long and hard" at a motion for a default judgment if there was a failure to make good faith discovery. Prior to March 1978, the trial court had found GAC's conduct in discovery deficient on at least four occasions. Under these circumstances, GAC will not now be heard to say that it did not foresee the consequences of its discovery failures. **Compare Link v. Wabash Railroad Co., supra,** 370 U.S. at 636, 82 S. Ct. at 1391, **with Asociacion de Empleados, Etc. v. Rodriguez Morales,** 538 F.2d 915, 917 (1st Cir. 1976).

**{375}** The other aspect of GAC's attack upon the procedures by which the judgment was entered—the lack of an evidentiary hearing—is also without merit. There is no requirement under Rule 37(b) that an evidentiary hearing be held before sanctions are imposed. **See Norman v. Young,** 422 F.2d 470, 474 (10th Cir. 1970). Under our rules, a court may decide motions on the basis of affidavits, oral testimony or depositions. N.M.R. Civ. P. 43(e), N.M.S.A. 1978 (current version at N.M.R. Civ. P. 43(c), N.M.S.A. 1978 (Repl. Pamp. 1980)). Evidentiary hearings in cases involving the imposition of discovery sanctions have been required under some, but not all circumstances. **Compare Flaks v. Koegel,** 504 F.2d 702, 712 (2d Cir. 1974) **and McFarland v. Gregory,** 425 F.2d 443, 450 (2d Cir. 1970) **with Margoles v. Johns,** 587 F.2d 885, 888-89 (7th Cir. 1978) **and Norman v. Young, supra**.

**{376}** In a previous opinion in this case, we considered the question of the circumstances under which a trial court is required to hold an evidentiary hearing. In **United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. at 123-24, 597 P.2d at 308-09, we rejected GAC's argument that the trial court erred in failing to hold an evidentiary hearing on GAC's motion to stay the proceedings pending arbitration. We noted that the critical question is "what type of hearing is 'appropriate to the nature of the case.'" **Id.** at 123, 597 P.2d at 308 (citation omitted). The following general principles, set forth in our earlier decision, are equally applicable here:

> The requirements of due process are not technical, and no particular form of

> procedure is necessary for protecting substantial rights. The circumstances of the case dictate the requirements. The integrity of the fact-finding process and the basic fairness of the decision are the principal considerations. **Id.** (citations omitted).

**{377}** GAC's failures to make good faith discovery are "mirrored in the record." **In Re Liquid Carbonic Truck Drivers Chemical, Etc., supra,** 580 F.2d at 822; **DiGregorio v. First Rediscount Corporation, supra,** 506 F.2d at 788; **Norman v. Young, supra,** 422 F.2d at 474. The initial, self-serving misconstruction of the scope of the First Set of Interrogatories, the unjustified failure to include cartel information in the supplemental answers to those interrogatories, the contradictory representations GAC made to the trial court at various stages of the proceedings, the series of inadequate answers to the Second Set of Interrogatories, and the unfulfilled commitments to produce cartel documents, are all apparent from the face of the record. No amount of oral testimony could alter those aspects of the history of this litigation.

**{378}** Further, the affidavits GAC filed on February 13 and March 13, 1978, in connection with its request for an evidentiary hearing did not demonstrate any need for such a hearing. Rather, portions of those affidavits are themselves evidence of the lack of good faith on GAC's part. For example, the Ross affidavit of February 13, which stated that GAC understood its obligation under the First Set of Interrogatories to include the furnishing of at least some records in the custody of the partners, contradicted the March 13 affidavits of five GAC attorneys stating that they understood that only documents in the possession of GAC were required. One of the March 13 affidavits contained the assertion that United's allegation that documents in Gulf's possession were required was "patently false," which was rather startling in light of the Ross affidavit and the fact that **some** information from Gulf was provided in GAC's original answers to the First Set of Interrogatories. The trial court afforded these contradictory sets of affidavits the weight to which they were entitled.

**{379}** Even if GAC's representations of February and March 1978 concerning its understanding of the scope of its obligations had been consistent, they would not have established that it had acted in good faith nor would they have demonstrated the presence of factual issues to be resolved at an evidentiary hearing. The undisputed fact is that without objecting to the interrogatories, without disclosing its understanding of its obligations to opposing counsel, and without seeking guidance from the court, GAC made a unilateral, self-serving construction of the scope of the interrogatories. "The wording of the interrogatories and answers themselves would not lead to any other reasonable conclusion." **Hunter v. International Systems & Controls Corp., supra,** 56 F.R.D. at 625 (footnote omitted). It is no defense to say that GAC simply made an innocent mistake of law in determining that information and documents in the possession of the partners were not subject to discovery under Rules 33 and 34. **Compare Unger v. Los Angeles Transit Lines,** 180 Cal. App. 2d 174, 4 Cal. Rptr. 370, 378 (Ct. App. 1960). As we have previously noted, the rules call for such a question to be presented in advance to the court for its determination.

**{380}** The affidavits GAC submitted concerning its failure to provide information on the cartel in its supplemental answers to the First Set of Interrogatories similarly failed to present any factual issue as to the good faith of this failure. In one affidavit, a GAC attorney stated that he did not consider the cartel to be an issue when the supplemental answers were filed in April 1977, and only appreciated that it had become "a significant issue" when United filed its Second Set of Interrogatories on August 16, 1977. However, on March 25, 1977, almost three weeks before the supplemental answers were filed, this same attorney had objected in the presence of the trial court to United's "continual reference to the so-called international uranium cartel." In a second affidavit the GAC attorney who prepared the supplemental answers to questions 30-34 of the First Set of Interrogatories stated that no information on the cartel was provided in those answers because the cartel was not mentioned in

United's complaint or in the interrogatories, and therefore, had not yet been raised as an issue. We have previously reviewed the evidence which contradicts these assertions or demonstrates the unreasonableness of them.

**{381}** Finally, these affidavits did not create an issue as to the trial court's finding that GAC had, in bad faith, concealed the existence of the cartel and Gulf's participation in it. It was permissible for the trial court to conclude that GAC's excuses for not producing cartel information early in the litigation were inadequate. And it could reasonably be inferred from GAC's conduct in various aspects of the proceedings throughout the course of this litigation, as well as from the nature of the cartel evidence that was eventually made available, that GAC had deliberately concealed cartel information. **Compare Link v. Wabash Railroad Co., supra,** 370 U.S. at 633, 82 S. Ct. at 1390.

**{382}** Even if GAC's failure to provide information on the cartel in response to the First Set of Interrogatories was not the product of a calculating, illicit attempt to conceal damaging information, the record compels the conclusion that, at best, it could be characterized as "gross disregard for the requirements of the discovery process." **Armour & Co. v. Enenco, Inc., supra,** 17 F.R. Serv. 2d at 519. However, whether GAC's original failures to make cartel discovery were the result of a willful, intentional and bad faith attempt to conceal evidence, as the trial court found, or were due to a gross indifference to its discovery obligations, is immaterial. The willfulness required to sustain the severe sanctions of Rule 37(b) (2)(iii) may be predicated upon either type of behavior. **See Rio Grande Gas Company v. Gilbert, supra,** 83 N.M. at 278, 491 P.2d at 166; **Cine Forty-Second St. Theatre v. Allied Artists,** 602 F.2d 1062, 1066-68 (2d Cir. 1979); **Kozlowski v. Sears, Roebuck & Co., supra,** 73 F.R.D. at 77; **Armour & Co. v. Enenco, Inc., supra**. The two types of misconduct differ only in degree as to culpability, and they differ not at all in terms of the adverse effects that GAC's discovery failures have had on the due process rights of appellees and the integrity of the truth-seeking function of the trial court.

**{383}** In conclusion, we note that the matters set forth in the recitals of bad faith were within the knowledge of the trial court. The parties had full opportunity to brief the facts and law regarding GAC's failures to make discovery, its lack of good faith, and the sanctions to be applied; they filed extensive briefs with the court prior to entry of the sanctions order and default judgment. Each side filed proposed findings, and GAC submitted numerous affidavits. "The briefs and affidavits fully recounted the circumstances surrounding the noncompliance with the court's order[s]." **Margoles v. Johns, supra,** 587 F.2d at 889. Therefore, the trial court did not err in failing to hold additional evidentiary hearings on GAC's conduct in discovery.

## C. THE BREADTH OF THE SANCTIONS FOR NON-COMPLIANCE

**{384}** GAC contends that even if sanctions should have been entered under Rule 37 for its discovery failures, a default judgment on all issues was unconstitutionally overbroad. GAC makes two points in this regard. First, GAC contends that the trial court could have imposed lesser sanctions to resolve the problem of the nonproduction of cartel documents. Second, GAC argues that its discovery failures, particularly those relating to the cartel, did not relate to all dispositive issues, and that a default judgment depriving it of a trial on the merits on other issues amounted to "mere punishment." We are not persuaded by either argument.

**{385}** It is well-settled that the choice of sanctions under Rule 37 lies within the sound discretion of the trial court.[129] Only an abuse of that

[129] **Rio Grande Gas Company v. Gilbert, supra,** 83 N.M. at 278, 491 P.2d at 166; **Pizza Hut of Santa Fe, Inc. v. Branch, supra,** 89 N.M. at 328, 552 P.2d at 230; **Gallegos v. Franklin,** 89 N.M. 118, 122, 547 P.2d 1160, 1164 (Ct. App. 1976), **cert. denied,** 89 N.M. 206, 549 P.2d 284 (1976); **National Hockey League v. Met. Hockey Club,** 427 U.S. 639, 642, 96 S. Ct. 2778, 2780, 49 L. Ed. 2d 747 (1976); **DiGre-**

discretion will warrant reversal.[130] Although the severest of the sanctions should be imposed only in extreme circumstances,[131] "in this day of burgeoning, costly and protracted litigation courts should not shrink from imposing harsh sanctions where, as in this case, they are clearly warranted."[132] As one court stated:

> [W]hen a defendant demonstrates flagrant bad faith and callous disregard of its responsibilities, the district court's choice of the extreme sanction is not an abuse of discretion. It is not our responsibility as a reviewing court to say whether we would have chosen a more moderate sanction.

**Emerick v. Fenick Industries, Inc., supra,** 539 F.2d at 1381.

**{386}** The trial court's conclusion that GAC acted in flagrant bad faith and callous disregard of its responsibilities is supported by the record. In light of the principle that the choice of sanctions "must be weighed in light of the full record in the case,"[133] the trial court did not abuse its discretion in imposing the stringent sanction of a default judgment.[134]

**{387}** First, we are unpersuaded by GAC's argument that the trial court should have attempted to resolve the problem of Canadian cartel documents by employing lesser sanctions. Although the severest of sanctions should be imposed only "when the court in its discretion determines that none of the 'lesser sanctions available to it,' would truly be appropriate," the court need not exhaust the lesser sanctions. **Asociacion de Empleados, Etc. v. Rodriguez Morales, supra,** 538 F.2d at 917 (construing Fed. R. Civ. P. 41(b)) citation and footnote omitted). **See also Anderson v. Air West, Inc., supra,** 542 F.2d at 525 (construing Fed. R. Civ. P. 41(b)). GAC's argument rests on a premise we reject—that the discovery dilemma was not due in large measure to GAC's misconduct. But equally important, the lesser sanctions which GAC suggests could have been imposed were not commensurate with the nature of its misconduct, and were totally incapable of remedying the dilemma created by that misconduct.

**{388}** GAC suggests three alternative means the court could have utilized—(1) an order to produce the Canadian cartel documents pursuant to an order of civil contempt carrying the sanction of a daily fine for disobedience; (2) an attempt to secure the documents by letters rogatory executed in Canada; or (3) the entry of preclusive findings under Rule 37(b)(2)(i) which were closely tailored to facts that could reasonably have been proven by the missing Canadian documents.

**{389}** The trial court did not err in failing to employ any of these alternatives. Even GAC does not contend that a contempt citation would have secured the production of cartel documents located in Canada.[135] Further, such an order would have entailed a command to violate the nondisclosure laws of a foreign state, something the trial court repeatedly, expressly, and properly refused to do. The second alternative, letters rogatory, was equally unavailing, as GAC itself recognized,[136] and as subsequent events have

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**gorio v. First Rediscount Corporation, supra,** 506 F.2d at 788.

[130] **General Dynamics Corp. v. Selb Manufacturing Co.,** 481 F.2d 1204, 1211 (8th Cir. 1973), **cert. denied,** 414 U.S. 1162, 94 S. Ct. 926, 39 L. Ed. 2d 116 (1974).

[131] **Emerick v. Fenick Industries, Inc., supra,** 539 F.2d at 1381; **Asociacion de Empleados, Etc. v. Rodriguez Morales, supra,** 538 F.2d at 917 (construing Fed. R. Civ. P. 41(b)).

[132] **Cine Forty-Second St. Theatre v. Allied Artists, supra,** 602 F.2d at 1068.

[133] **Cine Forty-Second St. Theatre v. Allied Artists, supra,** 602 F.2d at 1068.

[134] **See Emerick v. Fenick Industries, Inc., supra,** 539 F.2d at 1381.

[135] Other courts have also found a contempt citation or fine to be an inappropriate or inadequate sanction for failure to make discovery. **See G-K Prop. v. Redevelop. Agcy. of City of San Jose, supra,** 409 F. Supp. at 959; **Perry v. Golub, supra,** 74 F.R.D. at 366; **Buehler v. Whalen, supra,** 374 N.E.2d at 467.

[136] On October 7, 1977, GAC's counsel informed the trial court:

> I don't find it all surprising that neither [United] nor [I&M] have tried to go this same course and seek out letters rogatory because it would be my conclusion

proven. **See** n. 125, **supra**. The third alternative, closely tailored cartel findings, was met in this case. Without fully setting forth those findings here, it is enough to say that we are satisfied those findings were as closely tailored to the withheld information as was possible under the circumstances. After fully considering the entire record, "we are unable on review to hold that the trial court could have fashioned an equally effective but less drastic remedy." **Diaz v. Southern Drilling Corp.,** 427 F.2d 1118, 1127 (5th Cir.), **cert. denied,** 400 U.S. 878, 91 S. Ct. 118, 27 L. Ed. 2d 115 (1970).

**{390}** The second aspect of GAC's argument that the sanction of a default judgment was inappropriate is based on the principle that the least restrictive alternative sufficient to protect the opposing party must be imposed. GAC contends that the default related only to the Canadian cartel documents, and that such information could not have been dispositive of every issue in the case. Therefore, it argues that an across-the-board default judgment amounted to "mere punishment," in contravention of settled principles of constitutional law. **Compare Hammond Packing Co. v. Arkansas,** 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530 (1909) **with Hovey v. Elliott,** 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897). This argument is also without merit.

**{391}** When a party takes a cavalier approach to its discovery obligations, as GAC did in this case, the entry of a default judgment is an appropriate sanction. Upon the default, the allegations of the complaint are taken as true. **Gallegos v. Franklin, supra,** 89 N.M. at 123, 547 P.2d at 1165.

**{392}** A position similar to GAC's was rejected in **Trans World Airlines, Inc. v. Hughes, supra**. There the court said that the non-defaulting party "had no obligation to introduce any evidence whatever in support of the allegations of its complaint." The defaulting party, the court said, cannot escape liability for its bad faith approach to discovery by relying on evidence "which only **tends** to contradict the allegations of the complaint." The defaulting party must show that the evidence it relies upon "could not conceivably have been refuted and disproved . . . had there been a trial." 449 F.2d at 63. The court concluded:

> It would usher in a new era in the dynamics of litigation if a party could suffer a default judgment to be entered against it and then go about its business as if the judgment did not exist and as though, despite the opportunities to comply with the court's orders and to defend on the merits which had been ignored, the slate was wiped clean and a new day had dawned. To state the proposition is to expose the folly of it.

**Id.** at 63-64.

**{393}** GAC was not defaulted merely because of the prejudice caused to the opposing parties by its failure to produce Canadian cartel records. The default judgment was entered as a result of a course of misconduct in discovery which began at the very outset of the case and ended only with the entry of that judgment. Although it is settled that discovery sanctions cannot be entered as "mere punishment," all such sanctions involve an element of punishment. **Norman v. Young, supra,** 422 F.2d at 474. As the court stated in **Buehler v. Whalen, supra,** 374 N.E.2d at 467:

> Our discovery procedures are meaningless unless a violation entails a penalty proportionate to the gravity of the violation. Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances.

It is "[o]nly where the sanction invoked is more stern than reasonably necessary" that a denial of due process results. **DiGregorio v. First Rediscount Corporation, supra,** 506 F.2d at 789. In

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that they would get exactly the same answers from the Canada Courts that Westinghouse did . . . Westinghouse tried it and Westinghouse lost and I don't think the courts of Canada will change their mind.

light of the nature of GAC's misconduct, the element of punishment involved here does not rise to the prohibited level of reprisal. **Id. See also Norman v. Young, supra,** 422 F.2d at 474.

**{394}** A party cannot approach its obligation to make good faith discovery however it chooses as to certain matters, and at the same time expect to have the case proceed in a normal fashion as to other issues. **See Haney v. Woodward & Lothrop, Inc.,** 330 F.2d 940, 945 (4th Cir. 1964). At stake is not only the appellees' right to a fair trial on the merits, but also, the integrity of the orders of the court. As the court in **Perry v. Golub, supra,** 74 F.R.D. at 365, stated:

> [T]he refusal of a party . . . to comply with an Order of the Court cuts substantially deeper than the question of prejudice to litigants and their attorneys. A basic tenet of our government of law is that a party is required to obey a Court order.

**{395}** In imposing stringent sanctions to preserve this basic principle, "courts are free to consider the general deterrent effect their orders may have on the instant case **and on other litigation,** provided that the party on whom they are imposed is, in some sense, at fault." **Cine Forty-Second St. Theatre v. Allied Artists, supra,** 602 F.2d at 1066 (emphasis added and citations omitted). As the United States Supreme Court stated in **National Hockey League v. Met. Hockey Club, supra,** 427 U.S. at 643, 96 S. Ct. at 2781:

> [T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

**See also Emerick v. Fenick Industries, Inc., supra,** 539 F.2d at 1381; **Perry v. Golub, supra,** 74 F.R.D. at 366-67.

**{396}** We are fully aware of the severity of the sanctions imposed by the judgment we affirm. Our affirmance of that judgment should not be construed as a retreat from the principle that such discovery sanctions are to be imposed only in extreme cases and only upon a clear showing of willfulness or bad faith. That principle is well-established in this jurisdiction; it is universally recognized in American jurisprudence; and it is fundamental to the constitutional right of due process. The length of this opinion and the months of study and consideration given to it are testimony to the trepidation with which we have approached the judgment in question.[137] In this extraordinary case, our review has been anything but cursory.

**{397}** Although the sanctions of Rule 37(b)(2)(iii) are to the applied only in aggravated circumstances, they must nevertheless be available to a court in order to achieve compliance with its orders and to insure that a determination of a case on the merits is made only after a full, good faith disclosure of all relevant facts. We are not only concerned with the constitutional right of the defaulted party to an opportunity to be heard on the merits, but also, with the equally fundamental constitutional right of the party who seeks discovery to a hearing which is meaningful. When a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants. **See In Re Liquid Carbonic Truck Drivers Chemical, Etc., supra,** 580 F.2d at 823; **Norman v. Young, supra,** 422 F.2d at 474.

**{398}** We are also mindful of the magnitude of the relief afforded in this case. It is unprecedented in New Mexico. We cannot consider such a matter lightly.[138] While we must guard against

[137] "Because dismissal is the most severe sanction available to a district court under rule 37, we are ever reluctant to affirm its invocation." **DiGregorio v. First Rediscount Corporation, supra,** 506 F.2d at 788.

[138] **Cf. Trans World Airlines, Inc. v. Hughes, supra,** 449 F.2d at 63 ("[I]t would appear that were less at stake in this litigation, the propriety of the default judgment would

the possibility that such an enormous judgment is improperly imposed by an impatient court, we must also recognize that with stakes so high, there is a concomitant possibility that parties will make less than full, good faith disclosure. Undue leniency would encourage recalcitrance by litigants with something to hide.[139]

**{399}** The rules of discovery are as equally applicable to cases involving large sums as they are to small; and the obligation to comply with those rules in good faith and to obey the orders of the court is no less incumbent on the largest company than it is on the poorest citizen. Any contrary rule, or any special considerations in a billion dollar case, would be inimical to the most fundamental postulate of our legal system—that before the law, all stand equal.

## IV. DISQUALIFICATION OF UNITED'S COUNSEL

**{400}** GAC contends that the trial court erred in denying its motion to disqualify United's counsel, the law firm of Bigbee, Stephenson, Carpenter & Crout, now known as Bigbee, Stephenson, Carpenter, Crout & Olmsted (hereinafter referred to as the Bigbee firm), and that all orders entered by the court subsequent to the filing of its disqualification motion—including the sanctions order and default judgment—are therefore invalid and must be reversed.

**{401}** This issue first arose on February 23, 1977—almost fourteen months after the filing of the complaint in this case—when GAC suggested that the Bigbee firm would have to be disqualified if Gulf documents regarding its "separate non-partnership uranium activities in New Mexico" had to be produced. On March 21, 1977—two weeks after the court ordered such production for at least the second time—at the direction of Gulf, GAC filed a motion to disqualify the Bigbee firm. The issue was submitted to the trial court on affidavits and depositions.[140] The court denied the motion without making specific findings. The trial court refused to certify the issue for an interlocutory appeal. GAC thereafter sought unsuccessfully to have the denial of its motion of disqualification reviewed by this Court, either as an appeal from a final judgment under the collateral order doctrine of **Cohen v. Beneficial Loan Corp.,** 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), (No. 11469, June 29, 1977), or as a petition for an extraordinary writ (No. 11484, July 1, 1977.) GAC renewed the motion in November 1977, which the court again denied.

**{402}** In 1961, the Bigbee firm began to represent United in connection with its uranium activities in New Mexico. It has continuously represented United since that time. In 1971, Gulf hired the Bigbee firm to represent it on legal matters relating to Gulf's uranium operations in New Mexico, particularly the large reserves at Mt. Taylor it was then in the process of acquiring. The Bigbee firm had continued to represent Gulf until November 1976, ten months after the complaint in this case was filed. The principal services performed by the Bigbee firm for Gulf during this period were perfecting and protecting Gulf's title to mining rights—including maintenance of possessory rights, application for mineral patents, defense of mining claims, and representation in quiet title suits—and representing

not have deserved the full discussion we have afforded it.")

[139] **Cf. Trans World Airlines, Inc. v. Hughes,** 332 F.2d 602, 615 (2d Cir. 1964), **cert. denied,** 380 U.S. 248, 85 S. Ct. 934, 13 L. Ed. 2d 817 (1965) (misconduct in discovery "is particularly intolerable in a large and complex litigation such as this one"); **Philadelphia Hous. A. v. American Radiator & S. San. Corp.,** 50 F.R.D. 13, 19 (E.D. Pa. 1970), **aff'd sub nom, Mangano v. American Radiator & Standard San. Corp.,** 438 F.2d 1187 (3d Cir. 1971) (severe discovery sanctions are "particularly appropriate in complex antitrust litigation like that now before the Court where efficient and effective discovery procedures are essential to orderly adjudication"). **See also Harlem River Con. C. Inc. v. Associated G. of Harlem, Inc., supra,** 64 F.R.D. at 465.

[140] At a hearing in May 1977, GAC informed the court that there was no need for an evidentiary hearing because "there is no genuine issue [as] to any material fact." On appeal, GAC has reversed itself, and argues that there are disputed facts as to some issues, and that an evidentiary hearing was required. In light of its representation to the trial court, and the approach we take to this issue, it is unnecessary for us to decide this question.

Gulf before the New Mexico State Legislature on a variety of issues.

**{403}** GAC contends that because Gulf's uranium production activities in New Mexico became an issue in this case, there is a substantial relationship between the Bigbee firm's past representation of Gulf and its present representation of United in this case, and a concomitant danger that confidential information given to the Bigbee firm in its prior representation might be used against Gulf's interests in the present action. United argues that there was no substantial relationship between the firm's representation of Gulf and United; that Gulf consented to any conflicting representation; and that by their delay in raising the disqualification issue, Gulf and GAC were estopped from asserting it.

**{404}** We believe that the substantial relationship test is the proper standard by which motions to disqualify counsel are to be judged under Canon 4 of the Code of Professional Responsibility, which provides that a lawyer must preserve the confidences and secrets of a client. Simply stated, the substantial relationship standard requires disqualification "where an attorney represents a party in a matter in which the adverse party is that attorney's former client . . . [and] the subject matter of the two representations are 'substantially related.'" **Westinghouse Elec. Corp. v. Gulf Oil Corp.,** 588 F.2d 221, 223 (7th Cir. 1978), **rev'g Westinghouse Elec. Corp. v. Rio Algom, Ltd.,** 448 F. Supp. 1284, 1310-12 (N.D. Ill. 1978). In the **Westinghouse** decision, the Seventh Circuit Court of Appeals found that the substantial relationship test had been satisfied, and reversed the district court's denial of Gulf's motion to disqualify the Bigbee firm from representing United in the **Westinghouse** uranium litigation. We think that the approach taken by the Seventh Circuit was the proper one. Because the facts and law are fully set forth in its decision, we will not further elaborate on the substantial relationship question.

**{405}** The substantial relationship standard does not, however, entirely dispose of the question of the propriety of the Bigbee firm's professional conduct in this affair. From the filing of the predecessor to this case on August 8, 1975, to the present time, United has alleged that GAC and Gulf have committed various tortious acts in New Mexico and have violated the New Mexico Antitrust Act. United, represented at all times by the Bigbee firm, has repeatedly asserted that by its action in acquiring, and allegedly delaying production from, its Mt. Taylor reserves, Gulf has committed antitrust violations. For the Bigbee firm to be making these accusations on behalf of United, at the same time that it was continuing to represent Gulf with respect to these very reserves, raises a second ethical question of serious dimensions. The propriety of an attorney making such allegations against a **current,** rather than a former, client

> must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.
>
> * * * * * *

Under the Code, the lawyer who would sue his own client, asserting in justification the lack of "substantial relationship" between the litigation and the work he has undertaken to perform for that client, is leaning on a slender reed indeed.[141]

**Cinema 5, Ltd. v. Cinerama, Inc.,** 528 F.2d 1384, 1386 (2d Cir. 1976). **See** Canon 5-105 of the Code of Professional Responsibility;[142] **State**

[141] Although the Bigbee firm had ended its representation of Gulf by the time the motion to disqualify was filed, we think that this principle is nonetheless applicable here, where the contemporaneous representation of United and Gulf continued for ten months after the filing of this lawsuit.

[142] Canon 5-105 reads in pertinent part:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under Rule 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under Rule 5-105(C).

**v. Aguilar,** 87 N.M. 503, 504, 536 P.2d 263, 264 (Ct. App. 1975); **Fund of Funds, Ltd. v. Arthur Andersen & Co.,** 567 F.2d 225, 232-35 (2d Cir. 1977).

**{406}** United argues that "the Bigbee firm's conduct in this litigation was in accord with both the letter and spirit of the highest ethical standards of the bar." We do not agree. However, "a violation of professional ethics does not . . . automatically result in disqualification of counsel."[143] "[E]thical problems cannot be resolved in a vacuum."[144] In disqualification cases, judges cannot "exclude from their minds realities of which fair decision would call for judicial notice."[145] Because a disqualification motion is of an equitable nature,[146] it is appropriate to consider the prior conduct and statements of the movant and its attorneys on the question of the movant's good faith and credibility in connection with the motion to disqualify.[147]

**{407}** A motion to disqualify opposing counsel should be filed at the onset of the litigation,[148] or "with promptness and reasonable diligence once the facts" upon which the motion is based have become known.[149] A failure to act promptly may warrant denial of the motion.[150]

**{408}** GAC's delay in raising the disqualification issue—considered in the context of United's allegations against it and GAC's conduct throughout the proceedings in the trial court—casts serious doubt on the good faith with which the motion was made. GAC's motion to disqualify the Bigbee firm was filed after twenty months of litigation with United. During this period very extensive pretrial proceedings were conducted in the trial court, and GAC had sought appellate review of several of its decisions both in this Court and the United States Supreme Court. **E. g., General Atomic Co. v. Felter, supra,** 90 N.M. 120, 560 P.2d 541, **rev'd**, **General Atomic Co. v. Felter**, **supra**, 434 U.S. 12, 98 S. Ct. 76, 54 L. Ed. 2d 199, and **United Nuclear Corp. v. General Atomic Co**., **supra**, 90 N.M. 97, 560 P.2d 161. At no time during any of these proceedings was the disqualification issue raised.

**{409}** GAC finally moved to disqualify the Bigbee firm only after two actions it had filed against United in federal court had been dismissed (**see** n. 84, **supra**); after the trial court in this case had found GAC's answers to the First Set of Interrogatories to be deficient; after United had twice moved for a default judgment for GAC's discovery failures; after the trial court had twice warned that sanctions would be imposed for further failures; after the court had held on at least five separate occasions in as many months that the partners were subject to discovery; after this Court had upheld the trial court's personal jurisdiction over GAC; and after United had raised Gulf's participation in the international uranium cartel as an issue. In this context, GAC's disqualification motion would seem to have been

(C) In the situations covered by Rule 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

[143] **W.T. Grant Co. v. Haines,** 531 F.2d 671, 677 (2d Cir. 1976) (citation omitted).

[144] **Emle Industries, Inc. v. Patentex, Inc.,** 478 F.2d 562, 565 (2d Cir. 1973). **See also Silver Chrysler Plymouth, Inc. v. Chrysler Mot. Corp.,** 518 F.2d 751, 753 (2d Cir. 1975).

[145] **Silver Chrysler, supra,** 518 F.2d at 753. **See also City of Cleveland v. Cleveland Elec. Illuminating,** 440 F. Supp. 193, 197 (N.D. Ohio 1976), **aff'd,** 573 F.2d 1310 (6th Cir. 1977).

[146] **Milone v. English,** 113 U.S. App. D.C. 207, 306 F.2d 814, 818 (D.C. Cir. 1962); **Marco v. Dulles,** 169 F. Supp. 622, 632 (S.D.N.Y. 1959), **appeal dismissed,** 268 F.2d 192 (2d Cir. 1959).

[147] **Fleischer v. A.A.P., Inc.,** 163 F. Supp. 548, 559 (S.D.N.Y. 1958), **appeal dismissed sub nom., Fleischer v. Phillips,** 264 F.2d 515 (2d Cir.), **cert. denied,** 359 U.S. 1002, 79 S. Ct. 1139, 3 L. Ed. 2d 1030 (1959). **See also Marco v. Dulles, supra,** 169 F. Supp. at 632.

[148] **International Brotherhood of Teamsters, Etc. v. Hoffa,** 242 F. Supp. 246, 257 (D.D.C. 1965).

[149] **Milone v. English, supra,** 306 F.2d at 818. **See also Marco v. Dulles, supra,** 169 F. Supp. at 632.

[150] **Redd v. Shell Oil Company,** 518 F.2d 311, 315 (10th Cir. 1975); **Milone v. English, supra,** 306 F.2d at 818; **City of Cleveland v. Cleveland Elec. Illuminating, supra,** 440 F. Supp. at 203-05; **Marco v. Dulles, supra,** 169 F. Supp. at 632. **But see Emle Industries, Inc. v. Patentex, Inc., supra,** 478 F.2d at 574; **W.E. Bassett Company v. H.C. Cook Company,** 201 F. Supp. 821, 825 (D. Conn. 1961), **aff'd per curiam,** 302 F.2d 268 (2d Cir. 1962).

motivated more by "a desire to fragmentize the [opposition] than by any sensitivity to the ethical considerations involved." **Aetna Cas. & Sur. Co. v. United States**, 570 F.2d 1197, 1201 n. 7 (4th Cir.), **cert. denied**, 439 U.S. 821, 99 S. Ct. 87, 58 L. Ed. 2d 113 (1978).[151] The delay in raising the issue could hardly be ascribed to a lack of understanding. GAC and its constituent partners have been represented in this case by large and experienced law firms from throughout the country.[152]

**{410}** GAC seeks to excuse its delay in raising the disqualification issue by asserting that the legal basis for the Bigbee firm's conflict did not become clear until the court had held that Gulf and Scallop were subject to its discovery orders. Under the terms of United's original discovery requests of December 1975, to which GAC made no objection, the partners were required to provide discovery. Contrary to GAC's representation, it was not in January 1977, but in November 1976, when the court first held that the partners were subject to its discovery orders. GAC waited almost four months after the November order before moving to disqualify the Bigbee firm.

**{411}** GAC further seeks to excuse its delay by asserting that Gulf's Mt. Taylor uranium operations did not become an issue until early 1977. This excuse is also without merit. The complaint in this case alleged that GAC and Gulf had violated the antitrust laws of New Mexico by restricting trade in, and attempting to monopolize, the uranium market.[153] In light of the fact that the Mt. Taylor reserves are the most significant of Gulf's proven domestic uranium reserves and are the largest single body of uranium ore in the United States, it is clear that these reserves were pertinent to these antitrust allegations.[154]

**{412}** In pleadings filed over one year before the motion to disqualify the Bigbee firm was filed, United charged that Gulf's "huge uranium reserves . . . in New Mexico . . . are part and parcel of the antitrust violations with which General Atomic is charged." United's counsel also alleged that GAC was "trying with this partner Gulf to monopolize uranium in New Mexico." He said: "That is what this suit is all about." United's reply to GAC's counterclaim, filed in June 1976, directly tied its antitrust allegations to Gulf's Mt. Taylor reserves.

**{413}** In the **Westinghouse** litigation there was no evidence that Gulf belatedly raised the issue of the disqualification of the Bigbee firm. Furthermore, in that case there was a continuing possibility of the misuse of confidential information

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[151] Numerous other courts have recognized that motions to disqualify opposing counsel "have become common tools of the litigation process," **International Electronics Corp. v. Flanzer**, 527 F.2d 1288, 1289 (2d Cir. 1975), which are often used "for purely strategic purposes." **Woods v. Covington Cty. Bank**, 537 F.2d 804, 813 (5th Cir. 1976) (footnote omitted). **See also Allegaert v. Perot**, 565 F.2d 246, 251 (2d Cir. 1977); **Redd v. Shell Oil Company**, **supra**, 518 F.2d at 315; **Pennwalt Corp. v. Plough, Inc**., 85 F.R.D. 264, 274 (D. Del. 1980). Comment, **The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts,** 45 U. Chi. L. Rev. 450 (1978).

[152] That GAC's and Gulf's inaction was not the result of any innocent misunderstanding is evidenced by the notes of the litigation strategy meeting held shortly after this case was filed. Those notes, to which we have previously referred (**see** n. 32 and 81, **supra**), reflect that GAC and Gulf attorneys rejected a move to disqualify the Bigbee firm. Those notes, taken by an associate general counsel of Gulf, contain these remarks: "Move to disqualify Bigbee from UNC [United]? . . . **Don't** if case gets before Judge Bratton." (Emphasis in original.) Within a week of this meeting, GAC and Gulf filed a declaratory judgment and an interpleader action against United in federal court. **See** n. 84, **supra**. Both cases were assigned to Judge Bratton. In neither case was a disqualification motion filed. Judge Bratton dismissed both actions.

[153] In March 1977, GAC's counsel made it clear that GAC recognized that Gulf's activities were at issue. Referring not to anything that had transpired in early 1977, but to "[t]he fact that the first 53 paragraphs [of the complaint] relate to Gulf's misconduct," he told the trial court that "Gulf is the main focal point of the action." He went on to say:

> [N]early all of the misconduct alleged in the complaint was alleged misconduct on the part of Gulf before GAC was even formed. It is not a question of Gulf doing things on behalf of the partnership. What they are being charged primarily with are things that happened before the partnership was even in existence.

[154] It is hard to believe that GAC did not recognize that the Mt. Taylor reserves were an issue in this case until late February 1977 when this Court had done so in October 1976. **United Nuclear Corp. v. General Atomic Co**., **supra**, 90 N.M. at 101, 560 P.2d at 165.

against Gulf by the Bigbee firm.[155] In the present case there is no such prospect. GAC nevertheless contends that the judgment entered against it for **its** discovery failures must be reversed—including all discovery orders entered after the disqualification motion was filed—"in order to uphold standards of ethics" for the bar. To accept GAC's position would permit a party to virtually ignore its obligation to follow the rules of discovery and the specific orders of the court, and then entirely escape liability for such misconduct by belatedly asserting a motion to disqualify opposing counsel. In such circumstances, we decline to reverse a judgment that is not tainted by the Bigbee firm's conflict ad is otherwise supported by the record. **See W.T. Grant Co. v. Haines, supra**, 531 F.2d at 677.

## V. DISQUALIFICATION OF THE TRIAL JUDGE

**{414}** GAC also contends that the sanctions order and default judgment must be reversed because the trial judge refused to disqualify himself. This contention is without merit. GAC has failed to demonstrate either a personal bias or prejudice on the part of Judge Felter toward any party or a reasonable basis for questioning his impartiality.

**{415}** Two weeks after the complaint in this case was filed, GAC moved under Section 38-3-9, N.M.S.A. 1978, to disqualify Judge Campos, who was originally assigned to hear it. Judge Felter was then assigned to the case. Almost two years later, on November 9, 1977, GAC moved for the first time to disqualify Judge Felter, alleging that by language he used in two discovery orders entered in October 1977, and in in-court remarks he made on November 8, 1977, the judge had demonstrated "a bias, prejudice and 'interest'" against it. The motion was denied on the same day. GAC on two occasions renewed this motion, which the judge again denied. The motions were filed pursuant to Article VI, § 18 of the New Mexico Constitution, Canon 3(C)(1) of the New Mexico Code of Judicial Conduct, and the due process clauses of the United States and New Mexico Constitutions, U.S. Const., Amend. XIV, § 1 and N.M. Const., Art. II, § 18.[156]

**{416}** GAC's charge of bias and prejudice is based on the following allegations:

(1) The "vituperative tone" of several of the judge's orders and statements, especially in the sanctions order and default

[155] In **Westinghouse**, the Court of Appeals held that there had been no legally effective consent by Gulf to the Bigbee firm's representation of United in that litigation because "a client's consent will not justify the use of confidential information against the client." 588 F.2d at 228.

[156] Section 38-3-9, N.M.S.A. 1978, provides that a judge may be disqualified by a party who files an affidavit alleging a "belief" that the judge cannot preside impartially. Under this section a judge is automatically disqualified upon the filing of such an affidavit. **Norton v. Reese**, 76 N.M. 602, 604, 417 P.2d 205, 207 (1966); **Rivera v. Hutchings**, 59 N.M. 337, 341, 284 P.2d 222, 225 (1955). Thus, mere suspicion of bias or prejudice is a sufficient basis for the exercise of the statutory right of disqualification. **State v. Scarborough**, 75 N.M. 702, 713, 410 P.2d 732, 740 (1966) (Noble and Compton, JJ., dissenting). However, only one judge may be disqualified under that section, **Gray v. Sanchez**, 86 N.M. 146, 148, 520 P.2d 1091, 1093 (1974); **Beall v. Reidy**, 80 N.M. 444, 447, 457 P.2d 376, 379 (1969), and a party must file the disqualification affidavit within the statutory time limitations set forth in Section 38-3-10, N.M.S.A. 1978, which are strictly construed. **Gerety v. Demers**, 92 N.M. 396, 401, 589 P.2d 180, 185 (1978).

Because Judge Campos had already been disqualified and because the motion to disqualify Judge Felter was not filed within the time limitations of Section 38-3-10, GAC had no **statutory** right to disqualify Judge Felter. However, the right of disqualification provided by Section 38-3-9 is not the exclusive method of disqualification. **See State v. Scarborough**, **supra**, 75 N.M. at 709, 410 P.2d at 736-37. **But see Doe v. State**, 91 N.M. 51, 52, 570 P.2d 589, 590 (1977). The guarantee of a fair and impartial tribunal, embodied in Article VI, § 18 and Canon 3(C)(1), and assured by the concept of due process, cannot be rendered meaningless by the limitations found in Sections 38-3-9 and 38-3-10. However, though mere suspicion is a sufficient basis for disqualification under Section 38-3-9, the other methods require more, as we explain in this section of the opinion. Although not strictly limited by the time limitations of Section 38-3-10, a disqualification motion based on one of the non-statutory grounds must nevertheless be filed within a reasonable time after the party becomes aware of the grounds for it. **Cf**. **In Re International Business Machines Corp**., 618 F.2d 923, 932 (2d Cir. 1980) (construing similar federal provisions). Because we find there was no basis to disqualify Judge Felter, we do not consider the question of the timeliness of GAC's motion.

judgment, manifested a personal hostility towards GAC.

(2) The judge's actions during the trial were one-sided in favor of United, as evidenced by his interruption and termination of GAC's cross-examination of United's witnesses, his curtailment of GAC's right to impeach those witnesses, and his questioning of witnesses.

(3) Various orders and rulings on questions of evidence, procedure and discovery were favorable to United, prejudicial to GAC, and explainable only as expressions of hostility to GAC.

(4) In his conduct of pretrial discovery and in his entry of sanctions, the judge acted with unreasonable haste and without exercising independent judgment, thereby prejudicing GAC and favoring United.

**{417}** In this section of the opinion we are not concerned with whether the various rulings GAC complains of were legally correct, but rather, with whether those rulings are sufficient to establish that Judge Felter had a personal bias and prejudice against GAC.

**{418}** Article VI, § 18 of the New Mexico Constitution provides: "No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause . . . in which he has an interest." In **State v. Scarborough**, **supra**, 75 N.M. at 705, 410 P.2d at 734, we said that an "interest" necessary to disqualify a judge under this constitutional provision may be an actual bias or prejudice. However, we agree with the construction given to the term "bias or prejudice" by the United States Supreme Court in **United States v. Grinnell Corp**., 384 U.S. 563, 583, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966), where, in construing a federal judicial disqualification statute, 28 U.S.C. § 144, the Court held:

> The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (Citation omitted.)

**See also In Re International Business Machines Corp.,** 618 F.2d 923, 927-28 (2d Cir. 1980); **United States v. Haldeman,** 181 U.S. App. D.C. 254, 559 F.2d 31, 132 (D.C. Cir. 1976), **cert. denied,** 431 U.S. 933, 97 S. Ct. 2641, 53 L.E.2d 250 (1977); **United States v. Conforte,** 457 F. Supp. 641, 657 (D. Nev. 1978); **Lazofsky v. Sommerset Bus Co., Inc.,** 389 F. Supp. 1041, 1043 (E.D. N.Y. 1975). Stated another way, the bias must be personal, and not judicial. **In Re International Business Machines Corp**., **supra**, 618 F.2d at 929.

**{419}** GAC's original motion to disqualify Judge Felter was filed one day after he had accused GAC of "cover-ups" and "stonewalling information" in connection with an effort by Gulf to quash a subpoena issued for S. A. Zagnoli, the executive vice-president of Gulf Minerals in Denver.[157]

[157] GAC had listed Zagnoli, who had represented Gulf at several cartel-related meetings, as a possible GAC witness at trial. United sought to have him appeal to identify documents produced from Gulf files by GAC. The court granted the motion to quash, but stated:

> I will not completely buy this nonparty corporate stonewall proposition. The separate corporate identities and the rules relating to partnerships and so forth are not calculated to foment and bring about cover-ups and stonewalling information, and I am not going to permit them to be used that way.
>
> . . . . .
>
> . . . [I]t seems to me that General Atomic easily could have voluntarily brought about the appearance of Mr. Zagnoli here without any harm to themselves. . . . But instead, it seems they desire to hide behind procedural and other rules in order to play a game of hide-and-go-seek with this Court, and I am getting sick of it. . . .
>
> I don't think that you are acting in good faith at all in this regard. I think you are trying to suppress information that could be brought to light and aid this Court. . . .

**{420}** Although these remarks were the immediate precipitating event for the disqualification effort and the principal example of the judge's alleged bias and prejudice up to that time, GAC also cited the court's discovery order of October 11, 1977, wherein the court found that GAC had not answered United's Second Set of Interrogatories in good faith, and an order of the court on October 27, 1977, denying GAC's motion for a continuance of the trial setting, wherein the court stated that adequate time had been given for trial preparation "by the exercise of reasonable diligence and good faith."

**{421}** GAC has yet to show any extrajudicial conduct or incident which demonstrates any bias or prejudice on the part of Judge Felter.[158] Because GAC can establish no extrajudicial source for Judge Felter's alleged bias, it is forced to rely exclusively on his in-court comments and rulings. But as we have said, these afford no basis for disqualification.[159] The reasons for the extrajudicial source rule were recently set forth by the Second Circuit Court of Appeals in **In Re International Business Machines Corp**., **supra**, which involved a similar factual situation.

**{422}** In the first place,

> [a] trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest.

618 F.2d at 929.

**{423}** Second, a judge is not merely "a passive observer." **Id**. at 930.

> He must . . . shrewdly observe the stratagems of the opposing lawyers, perceive their efforts to sway him by appeals to his predilections. He must cannily penetrate through the surface of their remarks to their real purposes and motives. He has an official obligation to become prejudiced in that sense. Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.

**Id**., quoting from **In Re J.P. Linahan**, 138 F.2d 650, 654 (2d Cir. 1943) (footnotes omitted).

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[158] GAC does suggest that certain newspaper articles which discussed the favorable impact on the State of a judgment for United "could have had a serious prejudicial effect on the court," and amounted to "public pressure exerted through partisan appeals in the media." This is the very type of "indirect, remote, speculative, theoretical or possible interest" which we have previously said is not sufficient to warrant disqualification under Article VI, § 18. **State v. Scarborough**, **supra**, 75 N.M. at 705, 410 P.2d at 734. The articles were clearly not "partisan appeals." GAC has not shown that Judge Felter ever read those articles. Furthermore, many of the rulings that GAC relies on to support its claim of bias were made before the articles were published. It is difficult to believe that two innocuous newspaper articles had within two weeks of their publication transformed a judge, who GAC had said in May 1977 "has certainly furnished us complete due process all along," into what it now describes as a "patently hostile" jurist, harboring "personal grudges" and incapable of "calm impartial consideration."

[159] We do not mean to suggest that a judge's in-court conduct can never be relevant to show a **personal** bias or prejudice against a party which has an extrajudicial source. **See In Re International Business Machines Corp**., **supra**, 618 F.2d at 928 n. 6. The critical distinction between an impermissible personal, extrajudicial bias, and in-court opinions was explained in **United States v. Conforte**, **supra**, 457 F. Supp. at 658 n. 12:

> The purpose of the extrajudicial source requirement concerns the origin of the judge's bias rather than the place of its expression. Certainly, judicial rulings or comments on the evidence made during the course of a proceeding do not fall within the rule. However, if a judge's statements or conduct during a trial refer to or reflect bias or prejudice which arose outside of his judicial duties, then the extrajudicial source rule is satisfied and recusal may be required.

The practical meaning of this distinction is perhaps best exemplified by comparing the statements and rulings which allegedly showed Judge Felter's bias with the in-court statements of the trial judge who was disqualified in **United States v. Hatahley**, 257 F.2d 920, 925-26 (10th Cir.), **cert**. **denied**, 358 U.S. 899, 79 S. Ct. 222, 3 L. Ed. 2d 148 (1958).

**{424}** Criticism by the court of a party or its counsel is inevitable if the court's discovery orders are to be enforced in the face of a party's intransigence. Indeed, the ultimate discovery sanctions imposed here require a finding of bad faith or willfulness. **See** Section III, **supra**. Since the principal evidence of the judge's alleged bias is the language he used to describe what he found to be GAC's bad faith in discovery, it would seem that if GAC's argument were accepted, only a biased judge could ever make the requisite finding of bad faith necessary to support the sanctions authorized by Rule 37(b)(2)(iii).[160] If this were true, such sanctions could never be imposed.[161]

**{425}** Rulings adverse to a party do not necessarily evince a personal bias or prejudice on the part of the judge against it, even if the rulings are later found to have been legally incorrect. In **International Business Machines**, IBM contended, as GAC does here, that various erroneous rulings of the trial judge demonstrated that he was personally biased or prejudiced against it. The Second Circuit rejected this notion, stating that it

> would necessarily require this court to examine each and every ruling to determine whether it was, initially, legally valid. If we determine that some adverse rulings were correctly made, obviously they could not be tainted by bias. Even if they were deemed to be incorrect, it of course does not follow that they were motivated by personal bias. We would next have to ask whether the error could be attributed to the judge's misunderstanding of the facts or the law. The exercise would require this court to become intimately familiar with a 90,000 page trial transcript and to examine thousands of underlying documents and exhibits.

**Id**. at 930. The court concluded that it would be meaningless for it to determine the propriety of each contested ruling because it would be impossible to "divine its motivation." **Id**. at 933. In such circumstances, "the attribution of extrajudicial bias would require extrasensory perception." **Id**. at 934.

**{426}** Another reason for the rule that judicial disqualification may not be based on in-court rulings is that "such rulings are reviewable otherwise." **Ex Parte Am. Steel Barrel Co**., 230 U.S. 35, 44, 33 S. Ct. 1007, 1010, 57 L. Ed. 1379 (1913). **See In Re International Business Machines Corp**., **supra**, 618 F.2d at 929. This is particularly true here, where the propriety of the court's discovery orders and sanctions—which were the principal bases for the motions to disqualify Judge Felter—have been subject to full appellate review in this Court. **See** Sections II and III, **supra**.

**{427}** GAC's contention that, independently of Article VI, § 18 of the New Mexico Constitution, Judge Felter's disqualification was required by Canon 3(C)(1) of the New Mexico Code of Judicial Conduct is also without merit. That Canon provides: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . ." This provision sets up an objective standard geared to the appearance of justice, and thus expands the instances in

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[160] GAC also argues that the fact that the recitals containing this language were adopted almost verbatim from the proposed findings of United demonstrates the judge's bias against it and in favor of United. Although, as we have noted, this practice is not to be commended, it does not necessarily demonstrate that the judge acted in such a judicially irresponsible way as to require his disqualification. **See Ramey Const. Co**., **Inc. v. Apache Tribe, Etc**., **supra**, 616 F.2d at 468-69.

[161] Not only is Judge Felter's description of GAC's conduct supported by the record, but also, it was similar to language other courts have used to describe bad faith discovery efforts. **See e.g**., **Fox v. Studebaker-Worthington, Inc**., 516 F.2d 989, 991 (8th Cir. 1975) ("shocking abuse," "flagrant violations of the rules of discovery"); **Conrad Music v. Modern Distributors, Inc**., 433 F. Supp. 269, 270 (C.D. Cal. 1977) ("utter disdain," "gross indifference," "deliberate callousness"); **Technograph Printed Cir. v. Packard Bell Electronics Corp**., 290 F. Supp. 308, 320 (C.D. Cal. 1968) ("willful, intentional, and conscious flouting and disobedience," "callous, cynical disdain"); **Life Music, Inc. v. Broadcast Music, Inc**., **supra**, 41 F.R.D. at 28 (S.D.N.Y. 1966) ("deliberate flouting of this court's order," "willful, intentional, and in bad faith," "contumacious conduct calculated and designed to frustrate the order of this court," "reprehensible and irresponsible in the extreme").

which a judge should disqualify himself beyond those set out in Article VI, § 18. However, we adopt the construction given to an identical provision in 28 U.S.C. § 455(a) (1976), to the effect that there must be "a reasonable factual basis for doubting the judge's impartiality." Report of the Judiciary Committee of the United States House of Representatives (1974 U.S. Code Cong. & Ad. News 6351, 6355).

> [I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a **reasonable** basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

S. Rep. No. 93-419, 93d Cong., 1st Sess. 5 (1973); H. Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974).[162]

**{428}** For the very same reasons that courts have refused to permit a judge's in-court rulings to form the basis for his disqualification for actual bias or prejudice, Canon 3(C)(1) and identical language in its federal counterpart have been repeatedly construed to require extrajudicial bias. **In Re International Business Machines Corp**., **supra**, 618 F.2d at 929; **United States v. Haldeman**, **supra**, 559 F.2d at 132-33 n. 297.[163] In **Lazofsky v. Sommerset Bus Co., Inc**., **supra**, 389 F. Supp. at 1044, the court said:

> If the words "impartiality might reasonably be questioned" and "avoid impropriety and the appearance of impropriety" were to be interpreted to encompass judicial rulings in the course of a trial or other proceeding, . . . then there would be almost no limit to disqualification motions and the way would be opened to a return to "judge shopping", a practice which has been for the most part universally condemned. Certainly every ruling on an arguable point during a proceeding may give "the appearance of" partiality, in the broadest sense of those terms, to one party or the other.

Therefore, we conclude that GAC's disqualification argument under Canon 3(C)(1) is deficient for the same reasons it is under Article VI, § 18 of the New Mexico Constitution.[164]

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[162] It is important to note that GAC moved to disqualify Judge Felter only after he had warned time and time again that he would impose sanctions for failure by either party to comply with the court's discovery orders; after he found in October 1977 that GAC had not previously acted in good faith in discovery; and after United had filed its fourth motion for sanctions. This is not the first case in which a party faced with the imposition of sanctions for its discovery failures has sought to question the judge's integrity and impartiality. **State of Ohio v. Arthur Andersen & Co**., **supra**, 570 F.2d at 1372; **Henry v. Sneiders**, 490 F.2d 315, 317-18 (9th Cir. 1974), **cert**, **denied**, 419 U.S. 832, 95 S. Ct. 55, 42 L. Ed. 2d 57 (1974); **Pioche Mines Consolidated, Inc. v. Dolman**, **supra**, 333 F.2d at 259.

[163] Canon 3(C)(1)(a) states that one instance in which a judge's impartiality "might reasonably be questioned" is where "he has a **personal** bias or prejudice concerning a party." (Emphasis added.) Because subsection (a) is not the only such instance, disqualification under Canon 3(C)(1) could also be required where the judge did not in fact have such a personal bias, but where there was nonetheless "a reasonable factual basis" for believing that he did. However, for the reasons stated in the text, even in that instance the extrajudicial source requirement must be satisfied.

[164] Our determination that Judge Felter's disqualification was not mandated by Article VI, § 18 of the New Mexico Constitution or Canon 3(C)(1) of the Code of Judicial Conduct disposes of GAC's claim that its due process right to a fair trial was violated by Judge Felter's alleged bias against it. Clearly, the right to "[a] fair trial in a fair tribunal is a basic requirement of due process." **In Re Murchison**, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). **See also Beall v. Reidy**, **supra**, 80 N.M. at 446, 457 P.2d at 378. Although we cannot say that a judge's disqualification may never be required by the due process clauses of the United States and New Mexico Constitutions even though it is not also mandated by Article VI, § 18 of the State Constitution or Canon 3(C)(1), it is difficult to conceive of circumstances in which a claim sufficient under the later two standards would not also satisfy the due process test. **See In Re International Busi-**

**{429}** Because GAC failed to meet its burden of establishing that Judge Felter had a personal or extrajudicial bias or prejudice against it, the judge properly refused to disqualify himself. **See Gerety v. Demers**, **supra**, 92 N.M. at 400, 589 P.2d at 184; **In Re International Business Machines Corp**., **supra**, 618 F.2d at 934.

## VI. APPROPRIATENESS OF THE REMEDIES GRANTED APPELLEES

**{430}** In this final section of the opinion we examine GAC's contentions concerning the propriety of the remedies awarded United and I&M by the trial court.

**{431}** After entry of the sanctions order and default judgment, the court conducted a trial on damages.[165] The court invalidated the 1973 and 1974 Supply Agreements, and held that United had no obligation to supply any uranium to GAC or its predecessors. The court also found that GAC was obligated to indemnify United for any liabilities connected to United's failure to deliver uranium covered by the 1973 Agreement or any of the utility contracts. The court awarded I&M $15,950,752 in damages, and decreed specific performance of GAC's obligation to supply uranium to I&M. GAC contends that these remedies were improper.

**{432}** GAC argues that the invalidation of a contract which displaced a prior, valid contract reinstates the prior contract. GAC also argues that rescission of a contract requires restoration of the status quo ante. **Prudential Insurance Company of America v. Anaya**, 78 N.M. 101, 106, 428 P.2d 640, 645 (1967). Because the 1973 Supply Agreement replaced the 1971 Agreement and continued United's obligation to supply uranium to Gulf-United, GAC contends that if the 1973 Agreement was correctly invalidated, the 1971 Agreement remains in force. Therefore, it concludes that the trial court erred in holding that United had no further obligations to supply uranium to GAC. Alternatively, GAC argues that if the 1971 Agreement is also invalidated, United remains obligated to supply uranium to the utilities by virtue of the utility contracts it entered into prior to the execution of the 1971 Agreement.

**{433}** The principles GAC relies on do not apply here. Entry of the default had the effect of establishing as true the allegations of the complaint (**Gallegos v. Franklin**, **supra**, 89 N.M. at 123, 547 P.2d at 1165)—namely that the 1973 Supply Agreement was unenforceable due to antitrust violations, fraud, breach of fiduciary duty, economic coercion and commercial impracticability. Among the averments established by the default was that the purpose or effect of the 1973 Agreement was to restrain trade in and further the monopolization of the uranium market in New Mexico. Acceptance of GAC's contract revival argument would merely substitute one invalid contract with another which would have the same illegal effect. **See Evans v. Ideal Brick and Brikcrete Mfg. Co**., 287 P.2d 454, 456 (Okla. 1955). The default also established as true the allegation that United's performance of the 1973 Agreement was commercially impracticable. If performance of the 1973 Agreement is commercially impracticable, performance of the 1971 Agreement at the lower prices contained therein would be even more so.

**{434}** Second, GAC contends that there was no basis for the trial court to hold that GAC was obligated to indemnify United. We disagree. In this instance, the issue of indemnification was a question of liability and not of damages. United pled facts entitling it to indemnification. The default established the truth of those averments. **Gallegos v. Franklin**, **supra**.

**{435}** Finally, GAC contends that the remedies awarded to I&M were improper because I&M was not entitled to specific performance of its contract, and because the trial court improperly

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**ness Machines Corp**., **supra**, 618 F.2d at 932 n. 11; **United States v. Haldeman**, **supra**, 559 F.2d at 130 n. 276; **United States v. Conforte**, **supra**, 457 F. Supp. at 659 n. 13.

[165] Upon the default, GAC is deemed to have admitted the allegations of the complaint, but the prevailing parties must prove the damages to which they are entitled. **Gallegos v. Franklin**, **supra**, 89 N.M. at 123, 547 P.2d at 1165.

refused to hear evidence on limitation of liability and equitable adjustment clauses in the I&M contract.

**{436}** GAC argues that specific performance was not a proper remedy because fabricated nuclear fuel is not a unique good. Section 55-2-716, N.M.S.A. 1978, provides that specific performance may be decreed "where the goods are unique or in other proper circumstances." Official Comment 1 to Section 55-2-716 states that the intent of this provision is to liberalize the availability of this remedy. Comment 2 makes it clear that the uniqueness of the goods is not "the sole basis of the remedy." A decree of specific performance is proper where the remedy at law, in this case damages, is inadequate. To be adequate, the remedy at law "'must be as certain, prompt, complete, and efficient to attain the ends of justice as a decree of specific performance.'" **Laclede Gas Company v. Amoco Oil Company**, 522 F.2d 33, 40 (8th Cir. 1975), quoting from **National Marking Mach. Co. v. Triumph Mfg. Co**., 13 F.2d 6, 9 (8th Cir. 1926).

**{437}** In this case, there is substantial evidence to support the conclusion that damages are an inadequate remedy. The evidence shows that no seller was willing to make a long-term contract with I&M on any basis other than the market price at the time of delivery. Because fixed price contracts for future delivery were unavailable, there was no way to predict the price I&M might have to pay. Thus, specific performance was a proper remedy, even though the goods involved are not "unique" in the traditional sense of that term. Other courts have decreed specific performance in similar circumstances. **Laclede Gas Company v. Amoco Oil Company**, **supra**, 522 F.2d at 40 (supply contract for propane); **Eastern Air Lines, Inc. v. Gulf Oil Corp**., 415 F. Supp. 429, 442-43 (S.D. Fla. 1975) (supply contract for aviation fuel).

**{438}** The issues concerning the limitation of liability and equitable adjustment clauses are more troubling. The I&M contract contains a clause which limits the seller's liability. Another clause provides for certain adjustments in price for increased costs incurred by the seller as a result of delays caused by the purchaser. The trial court held that by reason of the default, GAC was precluded from offering evidence on either issue. We disagree.

**{439}** The limitation of liability clause is directly related to the question of damages. A hearing on its applicability was not precluded by the act of default. **See Kohlenberger, Inc. v. Tyson's Foods, Inc**., 256 Ark. 584, 510 S.W.2d 555, 565 (1974). We need not consider I&M's various arguments as to the inapplicability of this clause. The time and place for resolving those issues is at a damages hearing in the trial court.

**{440}** We also hold that the trial court erred in refusing to hear evidence on the question of the applicability of the equitable adjustment clause of the I&M contract. I&M argues that the default established that "the largest component of GAC's claimed increase in cost" was caused by the activities of the cartel, and that GAC therefore had no equitable claim to compel I&M to bear the consequences of GAC's misdeeds. Although the default established that uranium price increases were due to cartel activities, which is a finding we do not disturb, GAC was nevertheless entitled to show that other costs, such as those for separative work, were due to I&M's delays in constructing one of its nuclear reactors, and that it was therefore entitled to price increases under the equitable adjustment clause of the I&M contract.

**{441}** The trial court did not make specific findings setting forth any factual or legal basis for precluding evidence with respect to these contractual clauses. A search of the record shows a dearth of argument, briefing, or other means by which we can pin point the reasons for that decision. On the record before us, we cannot determine whether these clauses are applicable, or whether, if applied, they would reduce the amount of damages which were awarded. That award will not be disturbed unless on remand the trial court finds that the limitation of liability or equitable adjustment clauses are applicable and would change the result. We are satisfied that the

trial court adequately considered the other damage questions GAC raises on appeal. However, the case is remanded to the trial court for the limited purpose of a hearing on the applicability of the limitation of liability and equitable adjustment clauses of the I&M contract.

## VII. CONCLUSION

**{442}** Our exhaustive examination of the record in this extraordinary case convinces us that the trial court properly found that GAC had acted in bad faith throughout the discovery process and that the court did not, in the face of such misconduct, abuse its discretion in entering the sanction of a default judgment.

**{443}** In discovery, as well as in other aspects of this litigation, GAC's efforts have been marked by an extraordinary lack of diligence that cannot be characterized as accidental, unintentional, or involuntary. In addition to the discovery failures we have extensively outlined, GAC unjustifiably delayed asserting its rights to arbitration, **United Nuclear Corp. v. General Atomic Co., supra,** 93 N.M. 105, 597 P.2d 290, and to the disqualification of United's counsel. The following language of the court in **Pioche Mines Consolidated, Inc. v. Dolman, supra,** 333 F.2d at 260, aptly characterizes the situation here:

> Throughout, appellants' position has been that the litigation is totally without merit. One cannot help wondering why, if this is so, appellants did not promptly answer, press for an early trial, and get a judgment to that effect.

The trial court's conclusion that GAC pursued a persistent policy of delay and resistance is supported by the record; indeed, that conclusion is inescapable.

**{444}** Therefore, the sanctions order and default judgment is affirmed. The amended final judgment is also affirmed, except to the extent that evidence as to the limitation of liability and equitable adjustment clauses of the I&M contract was excluded. The cause is remanded for the purpose of holding a new hearing on those limited issues.

**{445} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-098**

**Filing Date: September 15, 1980**

**Docket No. 12,835**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**RICHARD VALDEZ,**

**Defendant-Appellant.**

**Appeal from the District Court of Bernalillo County, Gerald R. Cole, District Judge.**

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**OPINION**

**PAYNE, Justice.**

**{1}** Richard Valdez was convicted of armed robbery. He appeals claiming that testimony by his former attorney was improperly excluded by the trial court. He further argues that a new trial should be granted because of the discovery of new evidence bearing on his case. We affirm.

**{2}** While the defendant was in jail awaiting trial, he was approached by Garcia, a fellow inmate, who allegedly confessed to the robbery for which the defendant was charged. The defendant contacted his attorney, Alice Hector, the district public defender. At defendant's suggestion she met with Garcia. Garcia was also a client of the public defender's office although he had only dealt with an attorney other than Hector. The other attorney was present at the meeting and warned Garcia that Hector was not his attorney and any statement Garcia made would be used at the defendant's trial and could be detrimental to his own interests. Garcia repeated his confession to Hector and indicated his willingness to testify on defendant's behalf.

**{3}** At trial the defendant called Garcia as a witness, but Garcia had changed his mind about testifying and exercised his Fifth Amendment right refusing to testify. Hector, who was no longer representing the defendant, was called to testify concerning Garcia's confession to her. An objection was made to this testimony by Garcia's attorney on the grounds of the attorney-client privilege. The objection was sustained by the court and the testimony refused. The defendant took the witness stand and testified in his own behalf, but made no reference to Garcia or his alleged confession. The State presented testimony from four eyewitnesses, three of whom were positive the defendant was the man who committed the robbery, and the fourth was almost positive. During the investigation of the robbery these same eyewitnesses viewed a photographic array at the police department containing the picture of Garcia, but not one of the eyewitnesses selected his picture as one who had been involved in the robbery.

**{4}** Before reaching the issue of whether Garcia's confession to Hector was protected by the attorney-client privilege, we must first determine if Hector can be considered Garcia's "attorney." We hold that she was.

**{5}** Ms. Hector was the district public defender. She and her staff were required by statute to

defend all indigent persons who were charged with a crime for which there is possible imprisonment. § 31-15-10B, N.M.S.A. 1978. Richard Garcia was such a person. Although Ms. Hector was not directly involved in the representation of Garcia, her staff was, and all information obtained by them must be imputed to her. **See Allen v. District Court In and For Tenth Jud. Dist**., 184 Colo. 202, 519 P.2d 351 (1974). Communications made to her by Garcia that meet the requirements of the attorney-client privilege are protected.

**{6}** Rule 503(b) of the New Mexico Rules of Evidence sets forth the basic rule of the attorney-client privilege. To be privileged a communication must be:

> confidential * * * [and] made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or * * * (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or * * * (5) between lawyers representing the client.

**{7}** Having determined that the attorney-client relationship existed between Ms. Hector and Garcia, we further hold that there was sufficient evidence to support the trial court's determination that the communication was made to facilitate legal services to Garcia. The remaining question is whether the communication was confidential.

**{8}** A communication is defined by Rule 503 as being confidential if it is "not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." The idea of confidentiality as a requirement for the application of the privilege was explored and explained in Annot., 9 A.L.R.3d 1420, 1422 (1966). The annotation states:

> In order that the rule as to privileged communications between attorney and client shall apply, it is necessary that the communication by the client to the attorney be confidential, and be intended as confidential. The communication must be made in confidence for the purposes of the relation of attorney and client. **If it appears from the nature of the transaction or communication that confidence was not contemplated and the communication was not regarded as confidential, then testimony of the attorney or client may be compelled.** (Emphasis added and citation omitted.)

**{9}** The defendant points to the confession Garcia purportedly made to him, prior to the meeting with Hector, and the presence of the other attorney in the meeting as possible factors that removed the confidential nature of the communication. We disagree. Clearly the presence of another attorney will not destroy the confidential nature of the communication. This is especially true when both attorneys, as in this case, are considered to be representing Garcia. The privilege would apply to both attorneys and would extend to any conversation between them. **See In re Felton,** 60 Idaho 540, 94 P.2d 166 (1939).

**{10}** The communication to the defendant, however, was not protected by the attorney-client privilege. It was not made to an attorney or for the purpose of obtaining legal services. When the defendant took the stand he could have testified to all that Garcia told him, including the alleged confession. He chose not to do so. Even though a third party knows of certain facts and can testify concerning them, and even if they are public knowledge, it does not release the attorney to testify to those same facts if received in confidence. **See Emile Industries, Inc. v. Patentex, Inc.,** 478 F.2d 562 (2nd Cir. 1973). To hold otherwise would destroy the whole purpose of the attorney-client privilege, which is to facilitate full and free disclosure to one's counsel in order to insure adequate advice and proper defense.

**{11}** The defendant also contends that Garcia did not intend the communications to be confidential and so the privilege should not apply. The testimony concerning Garcia's intentions at the

time of the confession is conflicting. However, Garcia invoked the Fifth Amendment at trial. That is sufficient evidence to support the trial judge's determination that Garcia intended the conversation to be confidential. While the defendant was free to testify concerning the alleged confession, Hector was not, and the objection was proper.

**{12}** The defendant's second claim, that a new trial is warranted because of newly discovered evidence, must also be denied. All of the evidence which defendant could present at a new trial was available at the first trial. Even if the defendant's claim that Garcia is now prepared to testify is true, he could add nothing to what defendant could have testified to in his original trial. It is not new evidence.

**{13}** We affirm.

**{14}** **IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-103**

**Filing Date: September 29, 1980**

**Docket No. 12,972**

**LISA HARPER,**

**Appellant,**

**v.**

**NEW MEXICO DEPARTMENT OF HUMAN SERVICES, INCOME SUPPORT DIVISION,**

**Appellee.**

**Certification from the Court of Appeals.**

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**OPINION**

**PAYNE, Justice.**

**{1}** This case was certified from the Court of Appeals because of a conflict in the precedents in that court. The appellant, Mrs. Harper, made application for aid to families with dependent children (AFDC) with the New Mexico Department of Human Services on behalf of her children by a previous marriage. Her application was denied by the Department because of the community income earned by her present husband, the non-adoptive stepfather of the children for whom AFDC is sought. We reverse.

**{2}** Living in the home are four children of Mrs. Harper's previous marriage (the applicants for AFDC) and two children of the current marriage. Mr. Harper's present community income is $23,243 a year; Mrs. Harper has no separate income. The Department's regulations require including one-half of the community property income in the determination of qualification for AFDC benefits if the stepfather is residing in the home. This regulation is based on a conclusive presumption that one-half of the community income is available for the children's support.

**{3}** To the extent that the Department's regulations create a conclusive presumption that the non-adoptive stepfather's income is available to the children, we hold them to be invalid.

**{4}** Three case have recently dealt with the issue of the Department's community property AFDC regulations. Two of the cases, **Barela v. N.M. Dept. of Human Ser., Etc.,** 94 N.M. 288, 609 P.2d 1244 (Ct. App. 1979), **cert. denied,** 94 N.M. 629, 614 P.2d 546 (1979), and **Duran v. New Mexico Department of Human Services**, No. 4350 (Ct. App., March 4, 1979), **cert**. **granted**, No. 13,005 (April 11, 1980), were decided by the Court of Appeals with inconsistent conclusions, and are the reason for the certification. The third case, **Nolan v. C. de Baca**, 603 F.2d 810 (10th Cir. 1979), **cert**. **denied**, . . . U.S. . . . , 100 S. Ct. 2927, 65 L. Ed. 2d— (May 1980), arose in the federal district court.

**{5}** In **Nolan**, the wife had three children of a previous marriage who were receiving AFDC benefits. The Department, applying the community property law regulation also under attack in this case, drastically reduced their benefits. The stepfather had not adopted the children and claimed he did not voluntarily support them. The

United States District Court granted summary judgment to the plaintiffs. The United States Court of Appeals affirmed, holding AFDC regulations were within the federal province and the HEW regulations controlled over state regulations. The United States Supreme Court denied certiorari.

**{6}** Barela is factually similar to **Nolan**. A stepchild was denied AFDC benefits because of the community income earned by his nonadoptive stepfather. The Court of Appeals, following **Nolan,** held that the state regulations conflicted with the federal regulations. This holding was based on the absence of proof of actual contributions by the stepfather to the children's support, as required by the federal regulations. The opinion went on to state: "Community property law cannot be used to subvert federal regulations." **Barela**, 609 P.2d at 1247.

**{7}** Duran overruled **Barela**, stating that both **Nolan** and **Barela** had misinterpreted New Mexico community property law. It held that, since the state regulations correctly applied community property law principles and that the child could bring suit against its mother to enforce support from her share of the community income, the state regulations were valid.

**{8}** We recognize the careful and correct analysis of New Mexico community property law made by Judge Hendley in **Duran v. Department of Human Services**, No. 4350 (Ct. Appeals, March 4, 1980). His conclusions accurately state the present state of New Mexico law. New Mexico has a long standing and constitutionally mandated commitment to the community property concept, that a spouse has a present and vested property interest in one-half of the community income, and that this income can be used to meet that spouse's obligations. The application of these principles to the facts presented in the **Duran** case was both logical and reasonable. However, because of the conclusive presumption employed by the Department's regulations, which conflicts with controlling federal regulations that have preempted this area, community property principles cannot be applied.

**{9}** The controlling federal regulation is, HEW's regulation, 45 C.F.R., § 233.90(a) (1978):

> [T]he determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, . . . will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent, who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. . . . In establishing financial eligibility and the amount of the assistance payment, only such net income as is **actually available** for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of **proof of actual contributions**. (Emphasis added.)

**{10}** It is evident by the language of the regulation and its interpretation in both **Nolan** and **Barela**, that it was intended to preempt state law and control the determination of AFDC benefits. Under the supremacy clause of the United States Constitution, if federal regulations have preempted an area and there are conflicting state regulations, the federal regulations prevail. **See Hisquierdo v. Hisquierdo**, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979); **Townsend v. Swank**, 404 U.S. 282, 92 S. Ct. 502, 30 L. Ed. 2d 448 (1971); **King v. Smith**, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). The state regulation as contained in the New Mexico Department of Human Services' manual, § 221.832 is in conflict with the federal regulation. The federal regulation, 45 C.F.R. § 233.90(a), requires a showing that the income is **actually available** to the children and if the "parent" is not legally obligated to support the children there must be "proof of actual contributions." In New Mexico, a non-adoptive stepfather has no legal obligation

to support his non-adopted stepchildren, **Barela**, **supra**, though the mother does have a legal obligation to support her children. The state's regulations conclusively presume that the community income earned by the non-adoptive stepfather is available to the children, without a showing of actual contributions. There is a clear conflict between the state and federal regulations. The facts of the instant case do not require us to pass on whether a rebuttable presumption would be consistent with the federal regulations, and therefore we will not decide that question.

**{11}** While we are constrained to overrule, we reaffirm New Mexico's commitment to the community property principles enunciated by Judge Hendley. The spouse does have a present vested right to one-half of the community property. The mother has a legal obligation to support her children. Her interest in the community property should be used for this purpose. In absence of the controlling federal regulations we would follow Judge Hendley's lead and uphold the state regulations.

**{12}** We reverse.

**{13}** **IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-109**

**Filing Date: October 22, 1980**

**Docket No. 12,749**

**IN THE MATTER OF THE GUARDIANSHIPS OF VICTORIA S. HOOKER AND TRINIDAD C. HOOKER, MINORS. RAYMAN LEWIS HOOKER,**

**Plaintiff-Appellee,**

**v.**

**JUAN R. LUCERO, GUARDIAN OF VICTORIA S. HOOKER AND TRINIDAD C. HOOKER, MINORS,**

**Defendant-Appellant.**

**Appeal from the District Court of Bernalillo County, John E. Brown, District Judge.**

Coors, Singer & Stratton
Robert N. Singer
Albuquerque, New Mexico

Attorney for Appellant.

No Appearance for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** The district court held the appellant, Juan R. Lucero, in contempt for failing to comply with its order transferring temporary custody of two minor children. The appellant, the children's maternal uncle, was made the guardian of the children by the New Mexico court upon the death of their mother. He lived in Georgia and removed the children to that state. The father, who was divorced from the mother, consented to the guardianship with the condition that he be granted reasonable visitation rights. The father, after making two trips to Georgia to see his children, alleged that he was denied adequate visitation and petitioned the court for relief. The court ordered the appellant to show cause why he had not granted visitation. This order was personally served on appellant, but he failed to appear and was found in contempt of court. The court assessed a thirty-day jail term and ordered the appellant to pay the father's travel and legal expenses in the amount of $701.00. The court later vacated the jail term, but affirmed the legal and travel expenses and added an additional $500.00 for subsequent legal expenses incurred by the father. The court also placed temporary custody of the children in the father. We affirm in part and reverse in part.

**{2}** Three issues are raised by this appeal: (1) did the guardian fail to grant reasonable visitation; (2) can this failure be punished by the court's contempt powers, and (3) was there proper jurisdiction in the district court to grant temporary custody.

**I.**

**{3}** There is sufficient evidence to support the trial court's finding that the appellant failed to grant reasonable visitation as called for by the guardianship decree. This failure is demonstrated by his actions during the father's first visit with the children in Georgia. The appellant engaged in a heated argument with the father and refused to allow the father to enter his home or to be alone with the children. He also refused several requests by the father and the father's attorney to make arrangements for the children to spend part of the summer vacation with the father. In addition, prior to the father's second trip to Georgia the appellant had moved to Texas without informing the father. Although some conflicting evidence was presented, it is the well-established rule of this Court that it will

not reverse a district court finding supported by substantial evidence, notwithstanding evidence to the contrary. **Fox v. Doak**, 78 N.M. 743, 438 P.2d 153 (1968).

## II.

**{4}** Contempt powers of a court should be used sparingly. **Corliss v. Corliss**, 89 N.M. 235, 549 P.2d 1070 (1976). However, the trial court properly exercised its contempt powers here after an unsuccessful attempt to compel the presence of the appellant at the hearing to show cause. The elements necessary for a finding of civil contempt are: (1) knowledge of the court's order, and (2) an ability to comply. **Danielson v. United Seafood Wkrs. Smoked F. & C.U.,** 405 F. Supp. 396 (S.D.N.Y. 1975); **Nelson v. Nelson**, 82 N.M. 324, 481 P.2d 403 (1971); **State v. Casarez**, 52 N.M. 406, 200 P.2d 369 (1948). Here the court's order that the appellant should appear on July 20 and show cause why he should not be held in contempt was personally served upon him. Thus he had knowledge of the court's order. The appellant had opportunity to comply with the order or notify the court. While the appellant's military service made it difficult to appear at the hearing, he could have and should have notified the court of this impediment. There is sufficient evidence to support the conclusion that the appellant did not do everything he could have to appear or give notice of his inability to do so. Finally, after being found in contempt the appellant could have purged himself of the contempt by simply transferring custody of the children. He need not have come to New Mexico to accomplish this. The father went to Texas prior to any Texas hearing and the guardian could have transferred custody then; he chose not to do so. The ability to comply with the order to show cause and the ability to purge the contempt was present.

**{5}** The general rule is that a court has power to award damages and attorney's fees to a party aggrieved by a contempt. The recovery is limited, however, to the actual loss plus the costs and expenses, including counsel fees, incurred in investigating and prosecuting the contempt. **Backo v. Local 281, United Bro. of Carpenters & Joiners**, 308 F. Supp. 172 (N.D.N.Y. 1969), **aff'd**, 438 F.2d 176 (2nd Cir. 1970), **cert**. **denied**, 404 U.S. 858, 92 S. Ct. 110, 30 L. Ed. 2d 99 (1971). This general rule is in accord with our rule as stated in **Royal Intern. Optical v. Texas State Optical**, 92 N.M. 237, 586 P.2d 318 (Ct. App.1978), **cert**. **denied**, 92 N.M. 260, 586 P.2d 1089 (1978), **cert**. **denied**, 442 U.S. 930, 99 S. Ct. 2860, 61 L. Ed. 2d 297 (1979). We hold that the punishment for civil contempt in this case should be remedial and designed to reimburse the father for the wrong done as a result of appellant's noncompliance with the court order. We affirm the trial court's award of $875.00 to the father as reimbursement for legal fees. We reverse as to $326.00 awarded to the father as reimbursement for travel expenses incurred on his June trip to Georgia. The evidence did not sufficiently demonstrate that the appellant had any notice or knowledge of the father's second trip prior to the appellant's move to Texas. It is inequitable to hold the appellant liable for these costs when he could have done nothing to prevent them.

## III.

**{6}** The final issue is whether the trial court had jurisdiction to grant temporary custody to the father. The three bases for jurisdiction in a custody suit are: (1) the child must be domiciled in the state; (2) the child must be physically present in the state, or (3) the parties disputing custody must all be personally subject to the jurisdiction of the court. **See Worland v. Worland**, 89 N.M. 291, 551 P.2d 981 (1976). However, the case before us is not an ordinary custody proceeding, but a guardianship proceeding. Section 45-5-211, N.M.S.A. 1978, provides that the court which appoints the guardian has concurrent jurisdiction with the court wherein the ward resides. Therefore, the New Mexico court which appointed the guardian has concurrent jurisdiction with the Texas court, where the child resides. New Mexico's jurisdiction is further supported by Section 45-5-305, N.M.S.A. 1978, which states: "By accepting a testamentary or court appointment as

guardian, a guardian submits personally to the jurisdiction of the court at any proceeding relating to the guardianship that may be instituted by any interested person." While this section deals specifically with guardians of incapacitated persons it applies equally to guardians of wards who are legally incapacitated by their minority. The New Mexico order granting temporary custody to the father was issued prior to the Texas hearing. The temporary custody granted by the court was a valid order and should have been recognized by the Texas court under the full faith and credit clause of the United States Constitution.

**{7}** The trial record does not present sufficient facts from which a determination of whether a substantial change in circumstances has occurred so as to warrant a permanent change of custody. **See In Re Guardianship of Howard**, 66 N.M. 445, 349 P.2d 547 (1960). Therefore, we leave the issue of permanent custody to the trial court. Until such determination is made the trial court's order placing temporary custody in the father shall remain in force.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM FEDERICI,**
**Justice**

**LORENZO F. GARCIA,**
**District Judge**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-115**

**Filing Date: November 12, 1980**

**Docket No. 13,039**

**TOLTEC INTERNATIONAL, INC.,**

**Plaintiff-Appellee,**

**v.**

**VILLAGE OF RUIDOSO,**

**Defendant-Appellant.**

**Appeal from the District Court of Lincoln County,**
**Robert M. Doughty, II, District Judge.**

Ronald G. Harris
Ruidoso, New Mexico

Attorney for Appellant.

Neal & Neal
William G. W. Shoobridge
Hobbs, New Mexico

Attorney for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This appeal arises from a suit instituted by the plaintiff to recover $7,400 alleged due it from the defendant, the Village of Ruidoso (village), for the construction and delivery of a portable metal tower. The construction of the tower had been ordered by the finance director of the village, but without the authorization of the mayor, the board of trustees of the village or the village purchasing agent. A set of drawings and specifications for the tower, which had been prepared by an architect retained by the village, were delivered to the plaintiff as well as a signed purchase order. The tower was constructed according to the specifications and delivered, as ordered by the finance director, to the race track at Ruidoso Downs. Ruidoso Downs is a completely separate municipality from the Village of Ruidoso. The tower was used by the Lincoln County Mule-O-Rama for mule racing events. It was also designed to be used as a tower at the village's airport and meets the FAA requirements for airport towers. It has never been so used.

**{2}** The trial court made undisputed findings of fact and conclusions of law that the contract between the plaintiff and the village was illegal and therefore void. These undisputed findings and conclusions are binding upon us on appeal. **Shed Industries, Inc. v. King**, 19 N.M. St. B. Bull 806, 95 N.M. 62, 618 P.2d 1226 (1980); **Winrock Enter. v. House of Fabrics of N.M.,** 91 N.M. 661, 579 P.2d 787 (1978). The theories upon which the court found for the plaintiff were unjust enrichment, quantum valebant and quasi-contract. The village appealed. We reverse.

**{3}** For the plaintiff to recover under any of the three theories listed above, or under the theory of contract by estoppel, which was not properly pled to the court and therefore not considered on appeal, there must be a finding that the village received some benefit from the contract and construction of the tower. **See Danley v. City of Alamogordo**, 91 N.M. 520, 577 P.2d 418 (1968). Therefore, the key question in this appeal is whether there was substantial evidence to support the trial court's finding of benefit to the village. The basic rules this Court utilizes in determining if there is substantial evidence to support a finding of fact are as follows: (1) that substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) that on appeal all disputed facts are resolved in favor of the successful party, with all reasonable inferences indulged in support of a verdict, and all evidence and inferences

to the contrary disregarded, and (3) that although contrary evidence is presented which may have supported a different verdict, the appellate court will not weigh the evidence or foreclose a finding of substantial evidence. **McCauley v. Ray**, 80 N.M. 171, 453 P.2d 192 (1968); **Tapia v. Panhandle Steel Erectors Company**, 78 N.M. 86, 428 P.2d 625 (1967).

**{4}** After reviewing the evidence in light of these rules, we feel that there was not substantial evidence to support the finding of benefit to the village. The plaintiff raised two possible benefits conferred upon the village. These are: (1) increased tourism from the use of the tower at the mule races, and (2) the adaptability of the tower for use at the airport. It is undisputed that the Village of Ruidoso is dependent to a large extent on tourism and the revenue derived from it due to increased tax receipts. It is equally undisputed that the Mule-O-Rama draws tourists to the village. But, there was no showing in the evidence that the tower, itself, was responsible for inducing tourists to the Mule-O-Rama who would have not otherwise attended. There is also no evidence that the tower, while admittedly designed for and capable to be used as an airport tower, has ever been or will ever be used as such.

**{5}** Since there was no evidence of benefit to the village, we must reverse and remand to the district court for entry of an order dismissing the complaint.

**{6} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-120**

**Filing Date: November 18, 1980**

**Docket No. 12,789**

**DERK A. JONES,**

**Petitioner-Appellant,**

**v.**

**EMPLOYMENT SERVICES DIVISION OF THE HUMAN SERVICES DEPARTMENT,**

**Respondent-Appellee.**

**Appeal from the District Court of Bernalillo County, Gerald R. Cole, District Judge.**

Menig, Sager, Curran & Sturges
Bradley D. Tepper
Albuquerque, New Mexico

Attorney for Appellant.
C. Reischman
Human Services Department
Albuquerque, New Mexico

Attorney for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Derk Jones was terminated from his job as a truck driver for alleged misconduct related to his work. He applied for unemployment compensation benefits. The Employment Services Division (ESD) denied Mr. Jones benefits based on a finding that he was discharged "for being absent from work and failing to properly notify" his employer. The appeal tribunal of ESD reversed the determination and granted benefits to Mr. Jones, finding the reasons for discharge did not constitute misconduct related to employment. Mr. Jones' employer, Big Three Industries, appealed to the Secretary of the Department of Human Services who remanded the case to the appeal tribunal to consider the question of whether the employer had standing to appeal inasmuch as it had failed to return form ES-442 as required by the ESD.[1] On remand, the appeal tribunal found that the failure to return the form ES-442 was for good cause and did not affect the standing of the employer. The issue of whether Mr. Jones was guilty of misconduct was left to be decided by a new Secretary of the Human Services Department who reversed the appeal tribunal and denied benefits to Jones. Jones petitioned the district court for certiorari which affirmed the disqualification of Jones from unemployment benefits. Mr. Jones again appeals. We also affirm.

**{2}** This matter raises three issues. Did the employer, Big Three Industries, have standing to appeal the appeal tribunal decision? Is there substantial evidence to support the commission's findings? Did petitioner's actions constitute misconduct so as to disqualify him from unemployment compensation benefits?

**I.**

**{3}** We first determine whether the employer had standing to appeal the decision of the ESD appeal tribunal. Jones argues that the failure of the employer to file the ES-442 within five days bars it from appealing an administrative decision dealing with this case. An examination of

[1] D. FAILURE TO REPLY.—Failure on the part of the employer to notify the Commission within five working days in at least one of the three methods provided in Subsections A, B or C of this Regulation shall, at the expiration of the period set for response, be deemed an irrevocable waiver of his rights to be heard before a determination is made, and benefits charged to his account as a result of the determination shall remain so charged. Regulation 308 (D) of the ESD Regulations.

the controlling statute, Section 51-1-8, N.M.S.A. 1978 (Repl. Pamp. 1979), shows this belief of petitioner to be in error. If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail. An agency by regulation cannot overrule a specific statute. The statute, Section 51-1-8 (B through G), grants all interested parties, including the employer, the right to appeal a decision of the Department if they file within fifteen days of the date of that decision. Big Three Industries filed its notice of appeal within the fifteen days mandated by the statute. Section 51-1-8(G) allows a department to determine the manner and mode of such appeals by its regulations, but it does not permit the regulations to foreclose a right of an interested party to appeal a decision of the ESD.

**II.**

**{4}** Second, we must determine whether the findings made by the appeal tribunal are supported by substantial evidence and therefore binding on the district court. **Wilson v. Employment Security Commission**, 74 N.M. 3, 389 P.2d 855 (1963). The appeal tribunal found that the petitioner failed, as required by company policy, to give notice every twenty-four hours of his intended absence and failed to notify the employer four hours in advance of his assigned shift. The findings of the tribunal are not unsubstantiated simply because the evidence may be conflicting. **Wickersham v. New Mexico State Board of Education,** 81 N.M. 188, 464 P.2d 918 (Ct. App. 1970); **Fox v. Doak**, 78 N.M. 743, 438 P.2d 153 (1968). Although the evidence is conflicting, we find substantial evidence which supports the findings of the appeal tribunal. As stated in **Wilson v. Employment Security Commission**, **supra**, those findings were binding on the district court. The tribunal found that after arriving at the plant at or about 7:00 p.m. on May 15, the petitioner clocked out at approximately 11:00 p.m., putting himself voluntarily in violation of ICC regulations. He told his supervisor that he was ill but agreed to take the 8:00 a.m. run on May 16. Petitioner admittedly made no contact with the plant prior to a phone call he testified he made at 6:00 or 7:00 p.m. on May 16, almost twelve hours after his assigned shift began. No record was made of this May 16 call, although as Jones admits, the policy of the company was to log all incoming calls. Even if this call was made, it was not sufficient to qualify as notice to the employer as required by company policy. The notice must be given to supervisory personnel, who are available twenty-four hours. The phone call was to a friend at the plant and not to supervisory personnel.

**III.**

**{5}** The last issue to be decided is whether the findings of the district court are sufficient to support its conclusion that the termination resulted from "misconduct connected with work" under the provisions of Section 51-1-7(B), N.M.S.A. 1978 (Repl. Pamp. 1979). No definition of misconduct is found in the unemployment compensation statute, Sections 51-1-1 to 51-1-54, N.M.S.A. 1978. Because of this lack of definition, this Court in **Mitchell v. Lovington Good Samaritan Center, Inc**., 89 N.M. 575, 555 P.2d 696 (1976), adopted a definition of misconduct as set forth in **Boynton Cab Co. v. Neubeck**, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941), quoted below.

> [M]isconduct . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of his employee, or carelessness or negligence of such degree or reoccurrence as to manifest equal culpability, wrongful intent or evil design or to show unintentional and substantial disregard of the employer's interest of the employee's duties and obligations to his employer.

**{6}** While this Court has reservations concerning whether mere absence or tardiness alone, without unheeded warnings or past history of absence, constitutes misconduct as defined above, **see White v. Industrial Commission**, 518 P.2d 292

(Colo. App. 1973); **Januzik v. Dept. of Employment Sec., Etc.,** 569 P.2d 1112 (Utah 1977), there is sufficient evidence to support the lower court's finding of misconduct. We approved using the totality of the circumstances in determining if there is misconduct under our unemployment statutes. **Mitchell v. Lovington Good Samaritan Center, Inc., supra**. The evidence here established three separate incidents: (1) that Mr. Jones failed to give notice every twenty-four hours of his intended absence as required by company regulations; (2) that Mr. Jones failed to give notice four hours prior to his assigned shift, and (3) that Mr. Jones intentionally put himself in violation of ICC regulations which forced his employer to find a replacement for his 1:30 a.m. run. Individually these incidents may not have been enough to constitute misconduct, but taken together they do.

**{7}** We therefore affirm the district court.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**EDWIN L. FELTER,**
**Justice, dissenting**

**DISSENT**

**FELTER, Justice, dissenting.**

**{9}** I dissent.

**{10}** I have difficulty with two aspects of the majority opinion. First, I am troubled by the finding that there was substantial evidence to support the Department's decision. It does not appear to me that this Court in reviewing the decision below has availed itself of the more enlightened version of the substantial evidence test. It would seem that this Court has only looked to see if there is any evidence, more than a scintilla, to support the Department's findings. This Court has said in effect that its job is done when it finds there is more than a scintilla of evidence to support the administrative decision and that it need look no further once that point is reached. New Mexico courts have not addressed the "new" substantial evidence test, which was promulgated by the Congress of the United States when the Administrative Procedure Act was passed. "Administrative Procedure Act", Pub. L. No. 79-404, 60 Stat. 237 (current version at 5 U.S.C. Sections 551 et seq. (1976)). New Mexico has adopted an administrative procedure act, Sections 12-8-1 to 12-8-25, N.M.S.A. 1978 which was modeled after the federal act (5 U.S.C. Sections 551, et seq. 1976)). I am well aware that whether or not New Mexico follows the federal act does not govern our standard of review but I am convinced that the act carries with it a more providential approach to judicial review of administrative action which should be adopted by this Court.

**{11}** In the leading case of **Universal Camera Corp. v. Labor Bd.,** 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951), the United States Supreme Court was asked to decide if the "substantial evidence test" was the same under both the Taft-Hartley Act, 29 U.S.C. Section 141 et seq. (1976), and the Administrative Procedure Act, **supra**. In so deciding, Justice Frankfurter, writing for the majority discussed the changes intended by the Administrative Procedure Act. In the report of the Attorney General's Committee on the Walter-Logan Bill, S. 915, H.R. 6324 76th Cong., 1st Sess. (1939), which bill aimed to tighten control over administrative determinations of fact, the majority of the Committee concluded that:

> "[d]issatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with

> the fact-finding procedures now employed by the administrative bodies." Departure from the "substantial evidence" test, it was thought, would either create unnecessary uncertainty or transfer to courts the responsibility for ascertaining and assaying matters the significance of which lies outside judicial competence. Accordingly, it recommended against legislation embodying a general scheme of judicial review. (Footnotes omitted.)

**Universal Camera, supra**, at 480, 71 S. Ct., at 460.

**{12}** Three members of the Committee dissented stating that the:

> "present system or lack of system of judicial review" led to inconsistency and uncertainty. They reported that under a "prevalent" interpretation of the "substantial evidence" rule "if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored." Their view led them to recommend that Congress enact principles of review applicable to all agencies not excepted by these unique characteristics. One of these principles was expressed by the formula that judicial review could extend to "findings, inferences, or conclusions of fact unsupported, upon the **whole record**, by substantial evidence." (Footnotes omitted.) (Emphasis added.)

**Id.** at 481, 71 S. Ct. at 460

> On the one hand, the sponsors of the legislation indicated that they were reaffirming the prevailing "substantial evidence" test. But with equal clarity they expressed disapproval of the manner in which the courts were applying their own standard. The committee reports of both houses refer to the practice of agencies to rely upon "suspicion, surmise, implications, or plainly incredible evidence," and indicate that courts are to exact higher standards "in the exercise of their independent judgment", and on consideration of "the whole record." (Footnotes omitted.)

**Id**. at 483-84, S. Ct. at 462.

**{13}** It is my belief that this Court must hold itself to the "higher standards" and consider the entire record in making its determination to uphold or reverse the decision of the administrative agency.

**{14}** Justice Frankfurter continued:

> The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes [Taft-Hartley Act and Administrative Procedure Act, **supra**] that courts consider the whole record.
>
> To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it **de novo**. Congress has merely made it clear

> that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

**Id.** at 488, 71 S. Ct. at 464.

**{15}** There is a great body of evidence opposed to the decision below. Let us consider the testimony that was presented to the Appeal Tribunal.

**{16}** Petitioner was a truck driver who was employed by Big Three Industries, Inc., from September 1976 until May 1978, as a transport driver. On May 15, 1978, petitioner began working at 1:30 a.m. Accepting the testimony of Mr. Miller, the Albuquerque plant branch manager of Big Three Industries, Inc., petitioner arrived back in Albuquerque between 6:30 and 7:30 a.m. on May 15, 1978, after a trip to and from Farmington, New Mexico. Petitioner claims he did not clock out until 11:00 p.m., May 15, 1978. Also, according to Mr. Miller's testimony (based upon what was told to him by the dispatcher, Mike Chandler, who was not present for cross-examination), petitioner allegedly told Chandler he would make a 1:30 a.m. run on May 16, 1978, but called back two or three hours later and told Chandler he was sick. However, again according to Mr. Miller's testimony of his conversation with Mr. Chandler, petitioner allegedly agreed to come in at 8:00 a.m. on May 16, 1978. Mr. Miller said that they did not hear from petitioner until a couple of days later, which prompted Big Three to fire him. Mr. Miller testified company rules require drivers who are ill to contact the company every 24 hours to advise the company. Policy requires four hour notice if an employee is not going to be able to make a run. Plant operators are on duty 24 hours a day.

**{17}** Mr. Miller stated on page 20 of the transcript the reasons for which petitioner was fired:

> Mr. Chandler told me that Derk Jones had agreed to come out a certain time in the morning to go to work the next morning and yet we had not heard from him in two days, so we went to Mr. Crawford and told him what was happening. We were in a situation where we needed the truck drivers and this and that. So he said, 'It looks like it's job abandonment to me, and he's just not going to show up. So the next time you see him, just give him his papers.'

**{18}** The following recitation of facts, paraphrased from petitioner's brief before the district court summarizes petitioner's version of the events. Much of his testimony is undisputed. During petitioner's long working day on May 15, 1978, he felt ill and nauseated having had diarrhea all day at the job site. He was physically and emotionally exhausted and told the Big Three dispatcher he was sick and wanted to be taken off the dispatching board. According to petitioner, Mike Chandler never told him he was to make an 8:00 a.m. run on May 16, although Mr. Chandler was irritated that petitioner was not going to make a run at 1:30 a.m., just two hours after petitioner clocked in after a 21 hour day. Instead, petitioner, in accordance with Federal Motor Carrier Safety Regulations promulgated by the Department of Transportation, 49 C.F.R. § 395.3 (1979), deemed himself too ill and fatigued to drive and asked to be taken off the board.

**{19}** Petitioner's conduct after notifying Big Three of his illness verified his debilitated condition. Because petitioner had been unable to hold anything down during the day and night of the 15th, he went to a restaurant to get something to eat (cottage cheese and milk), attempting to recoup some of his strength. After eating, he still felt sick. Since he lived by himself and thought he might be seriously ill, he went to the house of some friends, waking them up during the early hours of May 16. He went to bed at their house, but was unable to fall asleep until 4:00 a.m. During the afternoon of May 16, 1978, petitioner awoke and went to see his physician, Dr. Don Hedges, who diagnosed his condition as physical and mental fatigue. Dr. Hedges' report verifying his diagnosis is in the record.

**{20}** After coming back from the doctor's office, at approximately 6:30 p.m. on May 16, 1978, petitioner called the Big Three plant and talked to two employees of Big Three, including Mr. Gene Buck, an operator at the plant, the person Mr. Miller testified he was supposed to call, and told him that he was "still off" although he was feeling better. Petitioner understood that if he was ill for a 24-hour period, company rules required him to call a plant operator, such as Gene Buck, and inform him he was still sick. He did not think his continued illness required calling a plant supervisor at home. Big Three knew petitioner had talked to employees at the plant prior to May 17, 1978.

**{21}** After speaking with Gene Buck and his friend, Don Moore, petitioner went back to bed and did not get up for more than twenty hours. When he awoke he felt able to go back to work so he called the plant and asked the dispatcher, Mike Chandler, to put him back on the board. Mr. Chandler then informed petitioner that he had been fired.

**{22}** Petitioner clocked out at 11:00 p.m. on May 15, 1978. He called back several hours later and told Chandler he was sick. He talked to Gene Buck at approximately 6:30 p.m. on May 16 and told Gene Buck, the operator on duty, that he was still sick. He reported for work at 3:30 p.m. on May 17, 1978. Petitioner never was out of contact with Big Three for a 24-hour period.

**{23}** Petitioner did not give notice four hours in advance of 8:00 a.m. on May 16, 1978, that he would not be able to make a run. However, substantial evidence is not in the record establishing that petitioner was, in fact, assigned to come in at 8:00 a.m. The only testimony in the record that supports this finding is on page 21 of the transcript in which Mr. Miller relates what was told to him by Mike Chandler about a conversation Mr. Chandler had with petitioner in which petitioner purportedly agreed to come in at 8:00 a.m. Although hearsay is admissible in the administrative proceedings below, this testimony deeming the petitioner was entitled to little if any weight and does not constitute substantial evidence. Petitioner claimed he never agreed to come in at 8:00 a.m. He was too sick. Petitioner was never given an opportunity to cross-examine his accuser, the important protection which the hearsay rule affords. Dispensing with the hearsay rule during administrative proceedings is to expedite the determination of claims, not to deny the claimant a fair hearing. It is significant that the Appeal Tribunal, which initially considered the hearsay accusations of Mr. Miller, related in person, gave them the weight they deserved and held in petitioner's favor.

**{24}** When I consider the record as a whole in the instant case, I cannot conscientiously find that the evidence supporting the decision of the trial court is substantial.

**{25}** To quote Justice Frankfurter:

> A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.
>
> * * * There are no talismanic words that can avoid the process of judgment.
>
> * * * * * *
>
> * * * But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in. The legislative history of these acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized.

**Id**. at 488-489, 71 S. Ct. at 465.

**{26}** This Court should recognize that we can no longer merely find in the record evidence which supports an agency's decision so long as that evidence is more than a scintilla. It is clear from the pronouncement of Justice Frankfurter in the **Universal Camera** case, **supra**, that a change was intended because of growing dissatisfaction with the exercise of review on the part of reviewing courts. Applying this standard, I cannot join the majority in finding substantial evidence to support the decision below.

**{27}** Second, I agree with the majority that the definition of misconduct is the one adopted by this Court in **Mitchell v. Lovington Good Samaritan Center,** 89 N.M. 575, 555 P.2d 696 (1976), and cited in the majority opinion. However, the acts of Mr. Jones do not rise to the level of misconduct contemplated by the statute necessary to deprive him of unemployment compensation benefits.

**{28}** I have found no case that has denied a person unemployment compensation benefits because of one absence without at least a prior warning. Cases which have denied such benefits usually evidence chronic absenteeism or a history of unheeded warnings as the majority recognizes. Such histories are useful to us to determine if an employee's conduct rose to the level of misconduct contemplated by our statute. Sections 51-1-1 et seq., N.M.S.A. 1978 (1979 Repl. Pamp.).

**{29}** In **Thompson v. Hygrade Food Products Corp**., 137 Ind. App. 591, 210 N.E. 2d 388 (1965), the question was whether appellant was discharged for misconduct in connection with his work. Appellant claimed he was discharged when he called his employer to tell her that he was ill and there was also evidence that no such call was made. It was also found that appellant had been in 1963, tardy eight times, absent seven days without report, absent nine days for personal business and had 121 days of excused compensated illness and three weeks vacation.

**{30}** The court said "It has been held that **chronic** absence without notice and without permission amounts to misconduct. . . ." (Emphasis added.) **Id**. 310 N.E.2d at 390.

**{31}** Where failure to notify the employer of an intended absence was a breach of company rules, a claimant discharged for taking a day off without notice in order to seek other employment was held guilty of misconduct. In **Ware v. Brown**, 147 So. 2d 455, (La. Ct. of App. 1962), the court concluded that the employee had made no reasonable effort to notify his employer of his intended absence, a deliberate violation of the company's rules, as well as a disregard of the employer's interest, since the company had no way of knowing of the claimant's whereabouts or how he could be reached. This, the court declared, constituted misconduct under the pertinent portions of the unemployment compensation law. In **Ware**, the employee testified that he attempted to call the office at a time when he knew that the office was not open. This evidence was not refuted. Mr. Jones' actions did not reach this extreme. He made efforts to contact the employer and except for the first evening could have been contacted.

**{32}** In **Curran v. Unemployment Compensation Board of Review**, 181 Pa. Super. 578, 124 A.2d 404 (1956), the record disclosed that claimant was absent from work without notice twice in one month and five times the next, after which he received a written notice warning that future absence without notice would result in dismissal. After another absence without notice he was discharged. The court found that the claimant had no regard for the standards of behavior expected of him and found him guilty of willful misconduct disqualifying him from receiving unemployment compensation benefits. In this case, the employee had not only a history of absenteeism but had been warned as well. No such chronic absenteeism or history of warnings exist in the instant case and as such Jones showed no disregard for the standards expected of him.

**{33}** The cases in accord with the requirement of a prior history of absenteeism or unheeded warnings are too numerous to cite but may be found in an excellent annotation at 58 A.L.R.3d 674 (1974). It is clear that this court should not deny benefits to someone who has no record of absenteeism or of disregarding warnings. As we said in

**Employment Sec. Com'n v. C.R. Davis Contracting Co**., 81 N.M. 23, 462 P.2d 608 (1969), the unemployment compensation act "is remedial legislation that calls for a liberal construction to the end that humanitarian purposes may be given effect." (Citation omitted.) **Id**. at 25, 462 P.2d at 610.

**{34}** It is clear from the cases cited above that some history of absenteeism or prior alleged misconduct is required to disqualify one from unemployment compensation benefits. A single absence may suffice to deny benefits, provided that there has been a prior incident such as one which resulted in a warning relating to an instance of misconduct. **Broadway & Fourth Avenue Realty Co. v. Crabtree**, 365 S.W. 2d 313 (Ky. 1963). What happened to Mr. Jones at the very most could only be considered one incident of alleged misconduct. Without even a prior warning he should not be denied benefit on the grounds of misconduct connected with work. There has been no evidence to support a charge that his conduct was in willful or wanton disregard of his employment.

**{35}** At most his actions could be characterized as inept or:

> mere inefficiency, unsatisfactory conduct, failure in good performance at the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion [which] are not to be deemed "misconduct" within the meaning of the statute.
>
> Similar conclusions were reached in decisions by the British Umpire, established by Parliament for the ultimate review of decisions by the Court of Referees in matters relating to unemployment compensation. **Boynton Cab Co. v. Neubeck**, 237 Wis. 249, 296 N.W. 636, 640 (1941).

**{36}** To deny employment compensation for this single incident of alleged misconduct would be to do violence to the remedial nature of the statute.

> If mere mistakes, errors in judgment or in the exercise of discretion, minor and but casual or unintentional carelessness or negligence, and similar minor peccadilloes must be considered to be within the term "misconduct", and no such element as wantonness, culpability or willfulness with wrongful intent or evil design is to be included as an essential element in order to constitute misconduct within the intended meaning of the term as used in the statute, then there will be defeated, as to many of the great mass of less capable industrial workers, who are in the lower income brackets and for whose benefit the act was largely designed, the principal purpose and object under the act of alleviating the evils of unemployment by cushioning the shock of a layoff, which is apt to be most serious to such workers. In view of these consequences which would thus result if the provision as to misconduct, under which an employee may become subjected to the forfeiture, must be deemed applicable to all types of "misconduct" that can be considered to be within the broad scope of that term (as defined in the above quotation from 40 C.J. p. 1220), and in view of the ambiguous or doubtful import in its meaning as used in the statute, it is necessary and proper to resort to the rule that statutes providing for forfeitures are to be strictly construed and terms and provisions therein, which are ambiguous or of doubtful meaning, will be given the construction which is least favorable to working a forfeiture, so as to minimize the penal character of the provision by excluding rather than including conduct or cases not clearly intended to be within the provision. "Where the purpose is uncertain, the language should be read strictly to soften its severity; where otherwise, it would express a meaning which would be unreasonably harsh."

**Id**.

**{37}** In view of Mr. Jones' past history, that he had never previously been absent without notice, nor warned about such conduct, it would be a manifest injustice to deny him the benefits provided by our unemployment compensation law.

**{38}** It might also be noted that this Court recently reiterated the "residuum rule" in the case of **Trujillo v. Employment Security Commission**, 19 N.M. St. B. Bull. 453 (1980). The Court held that a reviewing court is required by the rule to set aside an administrative finding unless supported by evidence which would be admissible in a jury trial. The only testimony in the record as to whether Jones agreed to report at 8:00 a.m. on May 16, 1978 is the hearsay testimony of Mr. Miller. Such evidence would not be admissible in a jury trial. Nor would such controverted hearsay qualify as substantial evidence.

**{39}** The majority also finds that Jones intentionally placed himself in violation of I.C.C. regulations, 49 C.F.R. § 395.3(a) (1979), forcing his employer to find replacement for him. This finding is supported only by hearsay testimony of Mr. Miller as to what Mr. Chandler told him. This evidence is controverted by Mr. Jones. Under **Trujillo**, **supra**, this controverted hearsay cannot be considered substantial evidence nor can the decision rest on evidence that would not be admissible at a jury trial.

**{40}** I would therefore reverse the trial court and allow Mr. Jones to receive unemployment compensation benefits. The majority feeling otherwise, I respectfully dissent.

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-121**

**Filing Date: November 18, 1980**

**Docket No. 13,098**

**EXECU-SYSTEMS, INC., REALTORS,**

**Plaintiff-Appellee,**

**v.**

**BRAD CORLIS,**

**Defendant-Appellant.**

**Appeal from the District Court of Bernalillo County, Patricia A. Madrid, District Judge.**

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Attorney for Appellee.

## OPINION

**PAYNE, Justice.**

**{1}** The defendant Brad Corlis signed a real estate listing agreement with the plaintiff, the listing agent, for the sale of a house jointly owned with his wife. The agreement provided for payment of a commission if the house was sold within the listing period, regardless of who obtained the purchaser. The wife did not join in signing the listing agreement. The plaintiff knew that the wife was a joint owner and had not signed the listing agreement.

**{2}** Within the listing period the defendant found a buyer and sold the house without going through the listing agent. The plaintiff filed suit to recover a commission. Both parties filed motions for summary judgment. The trial court granted the listing agent's motion and denied the defendant's. From this judgment the defendant appeals. We affirm.

**{3}** The defendant argues that his motion for summary judgment should have been granted because the agreement on which the plaintiff seeks to recover is void. He argues that a real estate listing agreement is a contract for the sale of community property, and under Section 40-3-13, N.M.S.A. 1978, such a contract must be signed by both the husband and the wife to be valid. We disagree.[1] We hold that a real estate listing agreement is not a transfer, conveyance, mortgage or contract to transfer, convey or mortgage community property within the meaning of Section 40-3-13.

**{4}** Section 40-3-13 reads as follows:

> A. Except for purchase-money mortgages and except as otherwise provided in this subsection, the spouses must join in all transfers, conveyances or mortgages or contracts to transfer, convey or mortgage any interest in community real property. . . .
>
> Any transfer, conveyance, mortgage or lease or contract to transfer, convey, mortgage or lease any interest in the community real property or in separate real property owned by the spouses as cotenants in joint tenancy or tenancy in common, attempted to be made by either spouse alone

[1] Several other community property states have similarly held that a real estate listing agreement need not be signed by both spouses to be enforceable against the one signing. **See C. Forsman Real Estate Company v. Hatch**, 97 Idaho 511, 547 P.2d 1116 (1976); **Tamimi v. Bettencourt**, 243 Cal. App. 2d 377, 52 Cal. Rptr. 273 (1966).

> in violation of the provisions of this section shall be void and of no effect, except that either spouse may transfer, convey, mortgage or lease directly to the other without the other joining therein. . . .

**{5}** The defendant argues that the purpose of the 1973 amendment was to expand the 1953 statute, which required joint signatures only on deeds and mortgages, to also require joint signatures on real estate listing agreements. We disagree. The statute was amended to include real estate contracts, not to include contracts for services, such as listing agreements.

**{6}** There are several differences between a real estate contract and a real estate listing agreement. The listing agreement does not affect the title to real estate but only the right to a commission upon its sale. A listing agreement deals with services to be rendered to those giving the listing and a breach does not automatically result in any cloud on the title to real estate. No lien attaches to the real estate as a result of a listing. **See First Nat. Bk., Tucumcari v. Berger Briggs R.E. & I., Inc.,** 89 N.M. 185, 548 P.2d 863 (1976). Default of a listing agreement must be reduced to judgment before it can impact upon the title to the property. To accept defendant's argument would adversely affect titles to any real estate subject to a listing agreement.

**{7}** The defendant's final argument, that it would frustrate the purposes of the statute to allow the plaintiff to enforce the contract, is equally unavailing. The fact that upon breach by the defendant the plaintiff can bring suit, obtain a judgment and levy on the property without the wife's signature is not violative of New Mexico community property laws. A husband can subject the community to certain debts without the concurrence of his wife. **See** § 40-3-9, N.M.S.A. 1978; **Eaves v. United States**, 433 F.2d 1296 (10th Cir. 1970); **Cabot v. First National Bank of Santa Fe,** 81 N.M. 793, 474 P.2d 476 (1970). Simply because this debt, after judgment, may be satisfied by levying on community real property is not a basis for unnecessarily expanding the meaning of Section 40-3-13.

**{8}** Since the listing agreement is a contract for services and not a contract for the sale of community property, Section 40-3-13 is not applicable. Under ordinary contract law the defendant is liable for the contract, even though at the time of contracting the defendant could not have performed his part of the agreement to convey the property without his wife's signature.

**{9}** For these reasons we affirm.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-127**

**Filing Date: December 1, 1980**

**Docket No. 13,040**

**DAN L. BUTCHER, ET AL.,**

**Petitioners-Appellants,**

**v.**

**CITY OF ALBUQUERQUE AND MENAUL SCHOOL, A NONPROFIT CORPORATION,**

**Respondents-Appellees.**

**Appeal from the District Court of Bernalillo County, James A. Maloney, District Judge.**

Motion for Rehearing denied January 2, 1981

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Attorneys for Appellee City of Albuquerque.

Roy F. Miller, Jr.
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Attorney for Appellee Menaul School.

**OPINION**

**PAYNE, Justice.**

**{1}** The petitioners sought review of a zoning action by the Environmental Planning Commission and the City Council of Albuquerque approving a site development plan. The plan was approved April 30, 1979. They filed a petition for certiorari with the district court on May 11, 1979. This petition, which alleged illegality and arbitrary and capricious conduct in the zoning action, was originally granted by the district court and then quashed. This appeal is brought to review the district court's actions in quashing the writ of certiorari.

**{2}** The petitioners raise three errors of the trial court in this appeal. They are: (1) that the district court erred in ruling that the petitioners failed to present the petition for writ of certiorari within the required thirty days; (2) that the court erred in finding that the petitioners are barred by reason of the doctrine of laches, and (3) the petitioners claim that they were denied due process by the district court in the proceedings below.

**I.**

**{3}** The primary issue is whether the petitioners properly presented their petition for certiorari to the district court within the time limits established by the applicable statute, Section 3-21-9, N.M.S.A. 1978. The key question is what definition will be given to the statute's phrase, "may present . . . a petition." The applicable portion of the statute reads as follows:

> A. Any person aggrieved by a decision of the zoning authority, or any officer, department, board or bureau of the zoning authority may present to the district court a petition, duly verified, setting forth that the decision is illegal, in whole or in part, and specifying the grounds of the illegality. The petition shall be presented to the court within thirty days after the decision is entered in the records of the clerk of the zoning authority.

**{4}** The petition was filed in the district court within thirty days. The respondents, however,

contend that more than filing with the clerk of the court is required. They urge us to read into the term "present" not only a filing requirement, but also a requirement that the petition must be personally presented to a district judge within the thirty day period.

**{5}** We have repeatedly held that the petition must be filed with the clerk of the court within the thirty day period. **See Bolin v. City of Portales**, 89 N.M. 192, 548 P.2d 1210 (1976); **Serna v. Board of Cty. Com'rs of Bernalillo County**, 88 N.M. 282, 540 P.2d 212 (1975); **Cf. Gulf Oil Corporation v. Rota-Cone Field Operating Company**, 85 N.M. 636, 515 P.2d 640 (1973). We have never indicated that any additional requirement would be necessary to comply with the presentment requirement in the statute. **But see Ballman v. Duffecy**, 230 Ind. 220, 102 N.E.2d 646 (1952), which held to the contrary.

**{6}** To hold, as did **Ballman**, that personal presentment is required in addition to filing would run counter to our rules of statutory construction, as announced in **Burroughs v. Board of Cty. Com'rs, Cty. of Bernalillo**, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975). These rules are:

> [T]o interpret the statute or ordinance to mean what the legislature intended it to mean, and to accomplish the ends sought to be accomplished by it.
>
> Another rule of construction is that the entire act or ordinance is to be read as a whole and each part construed in connection with every other part so as to produce a harmonious whole. Still another [rule] is that the court will not read into a statute or ordinance language which is not there, particularly if it makes sense as written. (Citations omitted.)

The statute clearly intends to give the petitioner thirty days to "present" his petition to the court. To define the phrase in question, as suggested by the respondents, would be inconsistent with the legislative grant of thirty days in which to file the petition. For example, if the petitioners took twenty-nine or thirty days to decide whether to file the petition, as the statute allows, their ability to obtain jurisdiction for their petition would be subject to the uncertain availability of a trial judge. If on the twenty-ninth or thirtieth day a judge was unavailable due to court commitments in another county, illness, vacation, or any other reason, the petition would have to be dismissed for failure to have been presented to the judge within thirty days. It is inconsistent with legislative intent or good reason to make a party's right to petition a court dependent upon the availability of a judge on the final day of the statutory period.

**{7}** To decide that the phrase requires personal presentment to the judge is also contrary to our rules of construction since to so hold we would have to read nonexistent language into a statute that makes sense as written. **Burroughs, supra**. For example, if we were to expand the meaning as argued by respondents, we would then need to decide whether presentment to the judge can be oral or written, formal or informal, to only the assigned judge hearing the matter or to any district judge. By holding that the term requires only filing with the court we do not expand the meaning or intent of the statute and raise such issues.

**{8}** For the foregoing reasons we hold that the term "present" as used in Section 3-21-9 requires only filing with the clerk of the court. In the normal case personal presentment to the trial judge should follow soon after the filing with the clerk. We feel that personal presentment to the trial judge should be within a reasonable time, but cannot read such requirement into the statute. Such an additional requirement would again be contrary to our rules of construction as announced in **Burroughs**. Any unreasonable delay in personal presentment to the judge, while not actionable under Section 3-21-9, can be dealt with adequately under the existing rules of civil procedure and the equitable doctrine of laches.

## II.

**{9}** The second allegation of error raised by the petitioners on appeal is that the trial court erred

in finding their petition barred by the doctrine of laches. The court based its finding on the fact that nine months had elapsed from the time of filing to the time of personal presentment to the trial judge. The petitioners contend that all the necessary elements of the doctrine of laches were not present. We also agree with this analysis.

**{10}** The doctrine of laches is not favored in this State and is applied only in cases where the party is guilty of inexcusable neglect in enforcing its rights. **See Cain v. Cain**, 91 N.M. 423, 575 P.2d 607 (1978); **Cave v. Cave**, 81 N.M. 797, 474 P.2d 480 (1970). The necessary elements of laches are: (1) the defendant's invasion of plaintiff's rights; (2) a delay in asserting plaintiff's rights, after having had notice and an opportunity to institute a suit; (3) lack of knowledge in the defendant that the plaintiff would assert his rights, and (4) injury or prejudice to the defendant in event relief is accorded to the plaintiff or suit is not held to be barred. **Baker v. Benedict**, 92 N.M. 283, 587 P.2d 430 (1978); **Cave v. Cave, supra**.

**{11}** Generally the defense of laches is used when there has been a delay in filing a suit. **See e.g., Apodaca v. Tome Land & Imp. Co. (NSL),** 91 N.M. 591, 577 P.2d 1237 (1978). However, where the delay is in the prosecution and not the filing of the suit, the application of the doctrine of laches is not foreclosed. **Johnston v. Standard Mining Co**., 148 U.S. 360, 13 S. Ct. 585, 37 L. Ed. 480 (1893). The application of the doctrine is proper in this case if all the elements are met. The first element, as enumerated above, is satisfactorily met. The second element, that of delay in the assertion of the plaintiff's rights, is also met. There is sufficient evidence to support the trial court's finding that the nine month delay between the filing of the petition and the issuance of the writ was unreasonable. But as stated in **Patterson v. Hewitt**, 11 N.M. 1, 66 P. 552 (1901), quoted with approval in **Roberson v. Board of Education of City of Santa Fe**, 78 N.M. 297, 302, 430 P.2d 868, 873 (1967):

> The reported cases show that, while the lapse of time is one of the elements to be considered in applying laches to stale claims, it is only one, and that it is not ordinarily the controlling or most important one to be considered by the court in applying laches as a defense in equity.

**{12}** The third and fourth elements of the defense of laches were not met. The respondents knew that the petitioners had filed a petition for certiorari. They had no reason to believe or suspect that the petitioners had or intended to abandon their rights. Finally, there is not sufficient evidence in the record to show that the respondents were in any way prejudiced by the delay. It is not enough to show merely an unreasonable delay "to establish the defense [of laches], the evidence must show both that the delay was unreasonable and that it prejudiced the defendant." (Citations omitted.) **C & H Const. & Paving Co. v. Citizens Bank**, 93 N.M. 150, 163, 597 P.2d 1190, 1203 (Ct. App. 1979). The respondents suggest that they are prejudiced because they cannot use their land in accordance with the decision of the city council and zoning commission. But this claim is unsubstantiated by any reference to the record. Also, the development of the respondents' land has been enjoined in a separate action. Therefore, we do not feel that respondents have been sufficiently prejudiced to make applicable the doctrine of laches.

**{13}** We reverse the decision of the district court and reinstate the petitioners' petition. Other issues raised are moot.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Justice**

**WILLIAM FEDERICI,**
**Justice**

**EDWIN FELTER,**
**Justice**

**DAN SOSA, JR.,**
**Chief Justice, dissents**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-134**

**Filing Date: December 9, 1980**

**Docket No. 12,970**

**PHYLLIS T. MASK, INDIVIDUALLY AND PHYLLIS T. MASK, AS NEXT FRIEND OF AMY MARIE MICHELLE MASK,**

**Plaintiff-Appellant,**

**v.**

**JAMES LELAND MASK,**

**Defendant-Appellee.**

**Appeal from the District Court of Curry County, Fred T. Hensley, District Judge.**

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Attorney for Appellant.

Dan B. Buzzard
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Attorney for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Plaintiff petitioned to recover arrearages in child support payments. The trial court awarded judgment to plaintiff but allowed offsets to defendant for social security benefits the child received. Plaintiff appealed. We affirm in part and reverse in part.

**{2}** The plaintiff and defendant were divorced in 1965. There was one child born of the marriage. Plaintiff alleged and the court found that defendant was in default in his support payments for the period January 1, 1966 to September 1976. This finding of the court that the defendant had failed to make child support payments was not appealed and has become final. The defendant claimed as an offset the amount of the monthly checks ($228.30) the child received from the Social Security Administration beginning in October of 1978. These checks resulted from the defendant's contributions to the social security fund and his retirement.

**{3}** The court allowed the offset against the total arrearages in an amount equal to the excess of the monthly social security payment over the monthly child support obligation. The court further allowed an offset for the entire amount of the social security payment received by the child after her eighteenth birthday.

**{4}** Three issues are raised on appeal. They are: (1) whether the fact that a child receives income from a collateral source excuses a parent from compliance with the support provisions of the divorce decree; (2) whether the excess of the social security payments over the monthly support obligations can be used as an offset against the arrearages that accrued prior to the commencement of the social security benefits; and (3) whether the court erred in allowing the defendant to purge the contempt by simply paying the attorney's fees assessed against him and not the child support arrearages.

**I.**

**{5}** Plaintiff argues that allowing the defendant credit toward his support obligation for the social security payments is a modification of a vested and accrued obligation. Generally a court cannot retroactively modify a support order that has accrued and become vested. **Gomez v. Gomez,** 92 N.M. 310, 587 P.2d 963 (1978). However, here the case arises in the context of a contempt proceeding and

so equitable principles are applicable. **Corliss v. Corliss,** 89 N.M. 235, 549 P.2d 1070 (1976). Also, in a proceeding for the enforcement of a support order, any valid defense against payment may be raised, **Headley v. Headley,** 277 Ala. 464, 172 So.2d 29 (1964), including the defense of payment from some other source, **Binns v. Maddox,** 57 Ala. App. 230, 327 So.2d 726 (1976).

**{6}** We affirm the trial court in holding that the defendant may receive a credit against his support obligation, but only up to the amount of that obligation ($50.00), for each month after the child began receiving the benefits. It would be inequitable to rule otherwise, as stated in **Andler v. Andler,** 217 Kan. 539, 538 P.2d 649, 654 (1975):

> [W]here a father who has been ordered to make child support payments becomes totally and permanently disabled, and unconditional Social Security payments for the benefit of the minor children are paid to the divorced mother, the father is entitled to credit for such payments by the government against his liability for child support under the divorce decree. The father is entitled to credit, however, only up to the extent of his obligation for monthly payments of child support, but not exceeding it.

The Missouri Court of Appeals has held similarly in **McClaskey v. McClaskey,** 543 S.W.2d 832 (Mo. App. 1976), and allowed credit against support payments falling due after the social security payments had begun, even though the general rule in Missouri is that a father cannot have credits against child support judgments except by his direct payment to the wife. The Missouri court recognized exceptions under appropriate circumstances and held that credit could be given to the husband when dictated by equitable considerations. Here we find such equitable considerations and allow the credit to be given.

**II.**

**{7}** While affirming the trial court's allowance of credits while the social security payments were received, we reverse as to the allowance of credit for months prior to the receipt of the social security benefits. As stated in **McClaskey, supra:**

> We hold the father is entitled to credit against support payments falling due after social security payments have begun, but is not necessarily entitled to a carry-back credit against support payments that were delinquent when the social security payments began.
>
> . . . .
>
> [T]he amount by which the monthly social security benefits exceed the amount required under the support decree are considered gratuitous. (Citation omitted.)

543 S.W.2d at 833-34. To grant such a "carry-back" credit would be violative of both federal law and the principles of equity.

**{8}** Federal regulations prohibit the custodial parent from recovering support arrearages out of social security payments. This should apply equally to the noncustodial parent who seeks to satisfy his support obligation by way of social security payments made directly from the social security administration to the child. These funds are the child's and not the noncustodial parent's, and cannot be used to meet his obligations, as stated in **Fuller v. Fuller,** 49 Ohio App.2d 223, 360 N.E.2d 357, 358 (1976):

> The Social Security Act, Title 42, U.S. Code, Section 401 et seq., provides that every dependent child of an individual who is entitled to Social Security benefits shall be entitled to a child's insurance benefit. . . . We determine from this that the benefit inures directly to the child, notwithstanding the prerequisite status of the parent. No indices of the father's ownership ever attached to these funds. Thus, the court is, in effect, ordering the children to pay the accrued arrearages for their own support.

**{9}** To grant such "carry-back" credits violates the principles of equity. If we were to allow such credits, the defendant would receive a windfall, since the delinquent support payments would be made with the funds of the social security administration and not with his own. If we disallow the credits, the daughter will receive the benefit of the extra payments since she will receive not only the support arrearages but also the monthly social security checks. As between the two parties, we feel, as did the Missouri court in **McClaskey, supra,** 543 S.W.2d at 835, that "[w]hen the windfall comes, equitably it should inure not to the defaulting husband's benefit, but to his bereft children."

**{10}** The second reason equity requires that the credits not be allowed is that the child's need is current, and must be met monthly, not sometime in the future. Again, as stated in **McClaskey,** "a child's needs for food, clothing, lodging and other necessary expenses is current—today, this week, this month—and the expectation of a future payment does not meet these needs." **Id.** at 835. To allow such credits would be to encourage fathers to put off making their support payments in the hope that some future collateral source would satisfy their arrearages.

**III.**

**{11}** The trial court did not err in allowing the defendant to purge the contempt by paying only the attorney's fees and not satisfying the arrearages. The contempt power should be used sparingly and the trial court has broad discretion in its imposition. **See Corliss v. Corliss, supra**. Here the court did not abuse its discretion. Should the defendant fail to pay the arrearages, after purging the contempt, he would still be subject to the other judgment enforcement devices available to the plaintiff. This is sufficient to insure the defendant's good faith compliance with the orders of the court.

**{12}** For the foregoing reasons, we affirm in part and reverse in part the decision of the trial court.

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1980-NMSC-136**

**Filing Date: December 12, 1980**

**Docket No. 13,216**

**DONALD R. OSCHWALD,**

**Petitioner,**

**v.**

**CLARA CHRISTIE, RAY STEWART AND RALPH DENNIS, D/B/A UNIQUE BUILDERS CONST. CO., A NEW MEXICO PARTNERSHIP, AND HAROLD ROGERS AND MARGARET ANNE ROGERS, HIS WIFE,**

**Respondents.**

**Original Proceeding on Certiorari.**

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**OPINION**

**PAYNE Justice.**

**{1}** An action was filed for injury to Clara Christie due to the alleged negligent and improper construction of a residence. The trial court granted summary judgment in favor of Oschwald. The judgment was overturned by the Court of Appeals and Oschwald petitioned to this Court for a writ of certiorari. We reverse and reinstate the trial court's ruling granting summary judgment.

**{2}** Because of problems in a newly constructed home Christie's daughter and son-in-law hired Oschwald, an architect, to inspect the home and indicate areas not in compliance with the contract's specifications. Oschwald was not employed until after the construction of the home was essentially completed. He was not the project architect and therefore had not designed or supervised the construction of the home.

**{3}** Some time after Oschwald had completed his inspection of the home and made his recommendations, Christie was injured when she fell while descending stairs in the home. She filed suit against Oschwald claiming he had been negligent in the performance of his duties as an architect. She also included as defendants the builders of the home. Oschwald filed a motion for summary judgment and a third party complaint against the homeowners. The trial court granted the summary judgment and dismissed the third party complaint.

**{4}** In **Goodman v. Brock,** 83 N.M. 789, 792-93, 498 P.2d 676, 679-80 (1972), we set forth the respective burdens on the various parties in a summary judgment hearing as follows:

> Unquestionably the burden was on defendants to show an absence of a genuine issue of fact, or that they were entitled as a matter of law for some other reason to a summary judgment in their favor. (Citations omitted.) However, once defendants had made a prima facie showing that they were entitled to summary judgment, the

> burden was on plaintiff to show that there was a genuine factual issue and that defendants were not entitled as a matter of law to summary judgment. . . . (Citations omitted.)
>
> . . . .
>
> The burden was on the plaintiff, as the party resisting the motion for summary judgment, to come forward and demonstrate that a genuine issue of fact requiring a trial did exist. This burden is contemplated and required by Rule 56(e). . . .

**See also Smith Const. Co. v. Knights of Columbus, Coun.,** 86 N.M. 50, 519 P.2d 286 (1974). If Oschwald met his burden of establishing a prima facie case in favor of summary judgment, the burden then fell upon Christie to come forward and show that a genuine issue of material fact existed.

**{5}** Oschwald made a prima facie showing that he was entitled to summary judgment and thereby satisfactorily met his burden. Oschwald, by deposition and affidavit, showed that he had agreed to "inspect the . . . residence and make a list of those items which, in my professional opinion are deficient. I will also make reasonable recommendations for correction as to the cited deficiencies. . . ." He submitted a nine-page report to the homeowners, which pointed out, among other things, that the stairs did not conform to the contract plans. In addition, he measured the rise and run of each stair and called the Construction Industries Commission to make sure the stairs conformed to the Uniform Building Code. An inspector for General Construction also inspected the residence and measured the stairs and found each to be within the tolerance levels of the Uniform Building Code. It was also noted that the homeowners had added a thick carpeting and pad to the stairs which was not in the contract plans. The owners were told that it created a dangerous condition and its removal was suggested. Oschwald concluded that nothing in the construction of the stairs operated to create a dangerous condition in the residence. These facts were sufficient to shift the burden to Christie in opposing summary judgment and require her to show that a material issue of genuine fact did exist.

**{6}** The party opposing summary judgment is favored procedurally. **See Fischer v. Mascarenas,** 93 N.M. 199, 598 P.2d 1159 (1979); **Shumate v. Hillis,** 80 N.M. 308, 454 P.2d 965 (1969). Although favored procedurally, that party cannot stand idly by and rely solely on the allegations contained in its complaint or upon mere argument or contention to defeat the motion if a prima facie showing has been made. **See Rekart v. Safeway Stores, Inc.,** 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970). Summary judgment may be proper even though some disputed issues remain, if there are sufficient undisputed facts to support a judgment and the disputed facts relate to immaterial issues. **Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co.,** 77 N.M. 730, 427 P.2d 249 (1967). Finally, while summary judgment is not properly granted if there is an "issue of material fact", it will not be reversed on the basis of slight issues of fact. **Goodman v. Brock, supra; Galvan v. City of Albuquerque,** 85 N.M. 42, 508 P.2d 1339 (Ct. App. 1973).

**{7}** In this case Christie did not meet her burden of showing that a genuine issue of material fact did exist. She presented no affidavits or depositions in support of her position. To show negligence on the part of Oschwald she relied solely on the allegations of her complaint. While some inconsistencies appeared in the affidavits and depositions presented by Oschwald, they are not sufficient to defeat Oschwald's motion, even when viewed in the light most favorable to Christie.

**{8}** We also hold that there was no abuse of discretion by the trial court in denying Christie's motion for a continuance so that she might take depositions.

**{9}** For these reasons we reverse the Court of Appeals and direct that the summary judgment be reinstated.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Chief Justice**

**MACK EASLEY,**
**Justice**

**WILLIAM R. FEDERICI,**
**Justice,**

**EDWIN L. FELTER,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-015**

**Filing Date: January 30, 1981**

**Docket No. 13,103**

**LEE CLICK, D/B/A BEST PRINTING COMPANY,**

**Plaintiff-Appellee,**

**v.**

**LITHO SUPPLY COMPANY, A NEW MEXICO CORPORATION,**

**Defendant-Appellant.**

**Appeal from the District Court of Lea County, C. Fincher Neal, District Judge.**

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Attorney for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** The plaintiff, Click, sought to recover damages for breach of contract and for money due in the amount of $5,818.69. The defendant, Litho Supply Company, answered denying that the contract had been breached or that any money was due the plaintiff.

**{2}** Trial was set for 9:00 a.m. on January 31, 1980, in Lovington, New Mexico. Because of a conflicting out-of-state business commitment, Litho's president, who resided in Albuquerque, sought a continuance. He did not seek the continuance until the day prior to trial. When counsel was unable to reach the judge to obtain the continuance, Litho's president obtained confirmed reservations on a commercial flight to Hobbs for the same evening and planned to travel by car from Hobbs to Lovington. On arrival at the airport in Albuquerque, he was informed that the flight had been cancelled due to inclement weather. He then made plans to drive through the night to Lovington, but upon inquiry was discouraged by the State Police from making the trip as the roads were dangerous due to ice and snow. The next morning, when trial was scheduled, another attempt was made to contact the judge, but he had already left for Lovington from Hobbs. Local counsel appeared for Litho and requested a continuance until the president could arrive. This motion was denied.

**{3}** Trial was held with counsel for Litho participating, however Litho had no witnesses present and could not establish a defense. At trial, the court approved the plaintiff's motion to amend the prayer for damages in its complaint by almost $4,000 and granted judgment to plaintiff. After the trial, Litho filed a motion under N.M.R. Civ. P. 60(b), N.M.S.A. 1978 (Repl. Pamp. 1980) to set aside the judgment. A hearing was held with an opportunity for Litho's witness to be present and the motion was denied. Litho appeals that denial. We reverse.

**{4}** We hold that the motion to set aside the judgment should have been granted. Relief under Rule 60 is discretionary with the trial judge and will be reviewed only for an abuse of that discretion. **Home Savings & Loan Ass'n v. Esquire Homes, Inc**., 87 N.M. 1, 528 P.2d 645 (1974); **Guthrie v. U.S. Lime and Mining Corporation**, 82 N.M. 183, 477 P.2d 817 (1970). The trial court had before it at the motion hearing affidavits of Litho's president and of a second witness supporting the inability to make the flight

connections and the hazardous driving conditions. The court also had before it a letter from the airline's agent confirming the cancellation of the flight and indicating that the witnesses had tickets and were at the airport in time to catch the plane. Litho's president also testified at the hearing and explained the circumstances surrounding his failure to appear.

**{5}** In denying the motion the court emphasized that: (1) Litho's president had sought an earlier continuance for business reasons on the day before trial; (2) Litho's president had delayed until that same day to obtain transportation to the trial, and (3) Litho had little contact with its attorney prior to trial. While these factors suggest that Litho was remiss in its planning and preparation for trial, they are not sufficient by themselves to support the refusal to set aside the judgment. The request for the first continuance should have no bearing on the disposition of the motion, especially in view of the good faith effort by Litho's president to attend trial after the denial. The fact that the president did not make reservations until the day prior to trial may show a casual attitude towards the trial but is not relevant to the issue at hand. Even if the same arrangements had been made a month prior to trial, the unexpected cancellation of the flight would have had no different effect than when the arrangements were made earlier on the same day. Finally, the failure of Litho to prepare for trial through consultation with its attorney, though not good practice, does not support the trial court's denial of the motion.

**{6}** For these reasons, the trial court's judgment is reversed. The case is remanded for a new trial on the merits.

**{7} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-020**

**Filing Date: February 12, 1981**

**Docket No. 13,333**

**JIMMIE CHARLES PAQUIN,**

**Petitioner,**

**v.**

**ROBERT S. ECHEVERRIA,**

**Respondent.**

**Original Proceeding on Certiorari.**

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Attorney for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** While driving on an interstate highway, Jimmie Paquin was struck from behind by Robert Echeverria. Paquin filed suit to recover damages for injuries allegedly received in the accident. At the conclusion of the trial, at which the defendant presented no evidence other than his testimony as a hostile witness, the court gave, over Paquin's objection, an instruction on contributory negligence. The jury found Paquin was contributorily negligent and was barred from recovery. Paquin appealed and the Court of Appeals affirmed. He then sought review by this Court by way of certiorari. We granted certiorari and now reverse.

**{2}** The sole question on certiorari is whether there was sufficient evidence to support the giving of the contributory negligence instruction. We hold that there was not.

**{3}** The Court of Appeals, relying on **Archibeque v. Homrich**, 88 N.M. 527, 543 P.2d 820 (1975), correctly stated the test to be:

> If there is no evidence to justify submission of an issue to the jury, no instruction may be given; and no instruction may be given when it is based on speculation or conjecture.

We disagree, however, with their application of this rule.

**{4}** The fact that there was an accident, injuries or damage, is not sufficient by itself to prove someone was negligent. **Waterman v. Ciesielski**, 87 N.M. 25, 528 P.2d 884 (1974). In the instant case the defendant could point to no act of negligence by Paquin. The possibility that Paquin was driving too slow was only suggested by testimony that Paquin was not going faster than 50 miles per hour. If Paquin was driving so slow that his speed created a hazard, the jury could have found him to be in violation of Section 64-18-4A, N.M.S.A. 1953 (Supp. 1975) [Repealed N.M. Laws 1978, ch. 35, § 554], in which case he would have been negligent per se. **McKeough v. Ryan**, 79 N.M. 520, 445 P.2d 585 (1968). But there was no evidence, even when viewed in the light most favorable to the defense verdict, that Paquin was in violation of the statute or otherwise negligent. **See Martinez v. Schmick**, 90 N.M. 529, 565 P.2d 1046 (Ct. App. 1977), **cert. denied**, 90 N.M. 637, 567 P.2d 486 (1977). The only evidence in the record relating to the speed of the two vehicles comes from the testimony of the parties as part of Paquin's case. The defendant testified:

Q About what speed did you travel on that trip?
A 55.
* * * *
Q Tell us what happened.
A I was driving along the Interstate, and I looked in my rearview mirror outside of the door, and I looked back, and I saw these lights.
Q You saw the taillights of a vehicle in front of you?
A Uh-huh.
Q Were they burning normally?
A I could see them from where I was at, you know.
* * * *
Q Did you apply your brakes?
A Yes, sir.
Q How much time did you have to apply your brakes?
A Not very much.
* * * *
Q Did you lay down any skid marks?
A Yes, there was.
Q About how long were the skid marks?
A Seven, eight feet long.
* * * *
Q Did you tell them that it was your fault that the accident occurred?
A I don't know whether I told them that or not. I don't remember saying that. I might have, but I knew that I had hit somebody in the back, and it is usually the fault of the person who strikes somebody in the rear.
Q Could you tell how fast they were going?
A I don't believe they were going over 50 miles an hour.
Q But you couldn't tell?
A I couldn't tell.
Q You don't think they were going over 50.
A No.
Q You actually just ran upon them before you realized what happened; is that right?
A Yes, sir.

**{5}** Paquin testified as follows concerning the speed of the two vehicles:

Q Tell us what you were doing prior to the accident. What you remember. What happened.
A We were just coming down the road. It was quite dark that night, and as I said, I didn't see any much traffic after dark anyway, and all of a sudden there was a loud collision with my pickup. It knocked us several hundred feet, and it just happened so suddenly that I didn't really know what had happened when I was awakened by my brother, who brought me to.
* * * *
Q You were traveling along at 55 miles an hour approximately in a heavy-duty truck.
A Yes, sir.
* * * *
Q You will have to tell me, Mr. Paquin, what happened that night. Did you see any lights or anything prior to the accident?
A What happened was we were traveling between 50 and 55 miles an hour. I thought I might have seen a flash of light in the side mirrors. I didn't have a rearview mirror in the truck. An instant later there was a loud collision and a jolt of the truck * * *
* * * *
Q Let's go back now, if you would with me, Mr. Paquin, to January 18th, the night this accident occurred in 1975. I want to discuss that with you just a little. What was the speed of the vehicle that you were driving immediately before impact?
A I know I was driving 50 to 55 miles an hour.

**{6}** No inference can be drawn from the foregoing that Paquin was in violation of a statute or was negligent. Nothing was introduced to show negligence by Paquin or that he was driving at less than 50 miles per hour.

**{7}** The Court of Appeals relied in part on the physical damage to the vehicles in upholding the

trial court's verdict. The physical damage demonstrates no negligence on the part of Paquin. All the damage shows is that the trail car was going faster than the lead car. No expert or other testimony was introduced as to the relative speeds of the vehicles or the significance of the vehicle damage. Any inference drawn from the damage done to the vehicle in this case would be mere speculation or conjecture and cannot support giving a contributory negligence instruction. **See Archibeque**, **supra**.

**{8}** For these reasons it was error to give a contributory negligence instruction. We reverse and remand for a new trial consistent with this opinion.

**{9} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**MACK EASLEY,**
**Chief Justice, not participating**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-036**

**Filing Date: March 27, 1981**

**Docket No. 13,410**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**DONALD RICKERSON,**

**Respondent.**

**Original Proceeding on Certiorari.**

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**OPINION**

**PAYNE, Justice.**

**{1}** Rickerson was charged with criminal sexual penetration of a minor. At trial the jury was instructed on both the crimes of criminal sexual penetration of a minor and a lesser included offense of criminal sexual contact of a minor. After several hours of deliberation and four or five votes the jury informed the court that they could not agree on a verdict. The judge reassembled the jurors in the courtroom and asked the foreman to tell him, without divulging whether the vote was for or against conviction, what the numerical results of the voting had been. He was informed that the first vote on the greater charge of criminal sexual penetration had been three to nine and that it had changed only one vote over the course of the deliberations. The judge was also informed that the jury did not feel they could reach a unanimous verdict on the lesser included offense of criminal sexual contact. The judge, speaking to the jury, said "the court is going to let you retire to the jury room again; and that's about all I want to say at this time. The jury will retire." Rickerson moved for a mistrial based on the court's inquiry into the numerical split of the jury and its statement to the jury, arguing that it was in effect a modified shotgun instruction. The motion was denied. The jury returned after two hours of additional deliberation with a guilty verdict on the lesser included charge of criminal sexual contact of a minor.

**{2}** The defendant appealed his conviction to the Court of Appeals, alleging three errors by the trial court. The Court of Appeals reversed. We granted certiorari. The question on certiorari is whether an inquiry by the trial court limited to the numerical division of the jury violates due process. Under the facts of this case we hold that it does not.

**{3}** This question has been addressed by this Court and the Court of Appeals in several opinions. **See State v. McCarter**, 93 N.M. 708, 604 P.2d 1242 (1980); **State v. Nelson**, 63 N.M. 428, 321 P.2d 202 (1958); **State v. Turner**, 90 N.M. 79, 559 P.2d 1206 (Ct. App. 1976), **cert. denied,** 90 N.M. 9, 558 P.2d 621 (1977); **State v. Aragon,** 89 N.M. 91, 547 P.2d 574 (Ct. App. 1976), **cert. denied**, 89 N.M. 206, 549 P.2d 284 (1976), and **Pirch v. Firestone Tire & Rubber Co.,** 80 N.M. 323, 455 P.2d 189 (Ct. App. 1969), **cert. denied**, 80 N.M. 316, 454 P.2d 973 (1969). Prior to **Aragon**, inquiries into the numerical division of juries were dealt with under the rule established in the cases of **Nelson** and **Pirch**. The rule was that convictions would be reversed if the cumulative effect

of the trial court's actions had a coercive effect on the jury.

**{4}** The factors considered in determining if a court's inquiry was coercive under the **Nelson-Pirch** rule were: (a) whether any additional instruction or instructions, especially a shotgun instruction, were given; (b) whether the court failed to caution a jury not to surrender honest convictions, thus pressuring holdout jurors to conform, and (c) whether the court established time limits on further deliberations with the threat of a mistrial. This test was changed by the Court of Appeals in the **Aragon** case. Although the court in **Aragon** announced a new test to be used in future cases dealing with inquiry into the numerical division of the jurors, the **Aragon** case itself was decided based on the **Nelson-Pirch** test. The rule announced in **Aragon** was that any inquiry into the numerical division of the jurors is reversible error. There is no need under the **Aragon** rule to establish whether the inquiry into the numerical division had a coercive effect on the jury. The Court of Appeals based this test on the United States Supreme Court case of **Brasfield v. United States**, 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926). The court in **Aragon** stated: "Because the error [inquiry into the numerical split of the jury] goes to a 'fair and impartial' trial, the error violates due process. Accordingly, **Brasfield v. United States**, supra, applies to New Mexico courts." 89 N.M. at 97, 547 P.2d at 580.

**{5}** Only the State of Michigan in addition to New Mexico has held that **Brasfield** involved constitutional principles and was thus applicable to the states. **See People v. Wilson**, 390 Mich. 689, 213 N.W.2d 193 (1973). The remainder of the states and federal courts that have considered the issue have held that **Brasfield** was an exercise of the Supreme Court's supervisory powers over the federal courts and not an announcement of a principle of constitutional law, or they have held that inquiry into the numerical division of a jury is not error per se without discussing **Brasfield**. As stated by the Eighth Circuit in **Cornell v. State of Iowa**, 628 F.2d 1044, 1047 (8th Cir. 1980):

> When read in the light of the rationale suggested in **Burton**, we think the rule in **Brasfield** is more easily understood, not as an announcement of a mandatory principle of substantive constitutional doctrine, but as an administrative admonition to the lower federal courts based upon carefully considered notions of sound judicial practice.

**See also Ellis v. Reed**, 596 F.2d 1195 (4th Cir. 1979), **cert. denied**, 444 U.S. 973, 100 S. Ct. 468, 62 L. Ed. 2d 388 (1979); **People v. Carter**, 68 Cal. 2d 810, 69 Cal. Rptr. 297, 442 P.2d 353 (1968); **Lowe v. People**, 175 Colo. 491, 488 P.2d 559 (1971); **Muhammad v. State**, 243 Ga. 404, 254 S.E.2d 356 (1979); **People v. Kirk**, 76 Ill. App.3d 459, 31 Ill. Dec. 835, 394 N.E.2d 1212 (1979), **cert. denied**, 447 U.S. 925, 100 S. Ct. 3019, 65 L. Ed. 2d 1118 (1980); **State v. Cornell**, 266 N.W.2d 15 (Iowa 1978), **cert. denied**, 439 U.S. 947, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978); **State v. Smith**, 431 S.W.2d 74 (Mo. 1968); **see e.g. Gov't of Virgin Islands v. Romain**, 600 F.2d 435 (3rd Cir. 1979). We have reviewed the **Brasfield** case and hold that it was an exercise of the Supreme Court's supervisory powers and did not involve substantive constitutional principles. It is, therefore, not binding on the states. **See Crist v. Bretz**, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978); **People v. Kirk**, **supra**. Therefore, we reverse that portion of the **Aragon** case which held to the contrary.

**{6}** While inquiry into the numerical division of the jury is not to be encouraged, **see Cornell v. State of Iowa, supra** and **Lowe v. People**, **supra**, it is not error per se. We reaffirm the **Nelson-Pirch** rule that such inquiries are reversible error only when shown to have a coercive effect on the jury. The inquiry itself is not coercive since the jury is already well aware of its numerical split. **Ellis v. Reed**, **supra**.

**{7}** There is some justification for inquiries as to probability of agreement among the jury when done pursuant to the court's duty to assure that a verdict is reached, **People v. Carter, supra,**

and in determining whether further deliberations are needed or if the jury should be discharged, **People v. Hall**, 25 Cal. App. 2d 336, 77 P.2d 244 (1938); **Linscomb v. State**, 545 P.2d 1272 (Okla. Crim. App.1976). Such an inquiry may also be necessary to protect the defendant from double jeopardy consequences when more than one count is presented to the jury. **See** N.M.R. Crim.P. 44(d), N.M.S.A. 1978 (Repl. Pamp. 1980); **O'Kelly v. State**, 94 N.M. 74, 607 P.2d 612 (1980).

**{8}** We remand this case to the Court of Appeals for its consideration of other issues raised on the appeal not dealt with in its memorandum opinion.

**{9} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-038**

**Filing Date: April 21, 1981**

**Docket No. 13,226**

**GENERAL MOTORS ACCEPTANCE CORPORATION, A DELAWARE CORPORATION,**

**Petitioner,**

**v.**

**PATRICK CHISCHILLY,**

**Respondent.**

**Original Proceeding on Certiorari.**

Motion for Rehearing Denied May 26, 1981

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**OPINION**

**PAYNE, Justice.**

**{1}** The plaintiff, Patrick Chischilly, entered into a retail installment contract with a New Mexico corporation bank in Albuquerque for the purchase of a pickup truck. The sale was financed by the General Motors Acceptance Corporation (GMAC) which took a security interest in the truck. The plaintiff is a member of the Navajo Tribe, but resides off the reservation on lands owned by the United States and held in trust for the Navajo Nation. On two occasions the truck was repossessed by employees of GMAC from the plaintiff's residence. The plaintiff brought an action against GMAC for violating Navajo tribal law in the repossession. The issue raised in the trial court was which law, New Mexico civil or Navajo tribal, should apply. The trial court held that New Mexico had the most significant contacts with the case and so its law should be applied. Applying New Mexico law, the court dismissed the case for failure to state a cause of action. Following the dismissal the plaintiff appealed to the Court of Appeals which reversed, Chief Judge Wood dissenting. The majority held that Navajo law should have been applied, and that if applied, the plaintiff had a cause of action. We granted certiorari and now reverse the Court of Appeals.

**{2}** Before Navajo tribal law can be applied to the instant case, there must be a showing that the tribe had jurisdiction. Both the trial court and the Court of Appeals, in order to reach their respective decisions, necessarily assumed, without discussion, that the tribe had the requisite jurisdiction.

**{3}** In **Begay v. First National Bank of Farmington**, 84 N.M. 83, 499 P.2d 1005 (Ct. App. 1972), **cert**. **denied**, 84 N.M. 77, 499 P.2d 999 (1972), the Court of Appeals held in a case very similar to the instant case that to recover for the unlawful repossession of a pickup truck in violation of the Navajo Tribal Code, the plaintiff had the burden of proving that the repossession occurred on the Navajo Reservation. In the instant case the parties have agreed by way of stipulation that the repossession did not occur within the boundaries of the Navajo Reservation. The

plaintiff argues instead that the tribe's civil jurisdiction extends beyond the reservation boundaries to include all lands that are in "Indian country." We hold that this extension of the tribe's civil jurisdiction beyond the reservation boundaries as against a non-Indian defendant is unjustified.

**{4}** In 1832 the concept of tribal sovereignty and self-government was first recognized by the United States Supreme Court in **Worcester v. Georgia**, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832). There Justice Marshall stated that the Indian nations were

> distinct, independent, political communities, retaining their original natural rights. . . .
>
> . . . .
>
> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.

**Id**. at 559-60. Although this absolute view of Indian sovereignty has been modified somewhat by subsequent cases, the principle that Indian jurisdiction is territorial in nature remains the touchstone of Indian jurisprudence. The idea that the territorial boundaries of the tribe's civil jurisdiction are co-existent with the boundaries of the reservation was discussed in the case of **Williams v. Lee**, 358 U.S. 217, 223, 79 S. Ct. 269, 272, 3 L. Ed. 2d 251 (1959) as:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves. It is immaterial that the respondent is not an Indian. He was **on the Reservation** and the transaction with an Indian **took place there**. Cf. **Donnelly v. United States**, **supra**. [228 U.S. 243; 269-272, 33 S. Ct. 449, 458-459, 57 L. Ed. 820]; **Williams v. United States**, **supra**. [327 U.S. 711, 66 S. Ct. 778, 90 L. Ed. 962]. The cases in this Court have consistently guarded the authority of Indian governments **over their reservations**. (Emphasis added.)

And also in **Mescalero Apache Tribe v. Jones**, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 1270-71, 36 L. Ed. 2d 114 (1973) as:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state. (Citations omitted.)

**{5}** The extension of tribal jurisdiction beyond the exterior boundaries of the reservation must be done only for overriding policy considerations or to avoid hampering the Indians' right of self-government as it carries with it the problem of "checkerboard" jurisdiction. This "checkerboard" pattern of jurisdiction would require lawyers and judges to consult tract books to determine whether to apply New Mexico or tribal law. **See** Justice Marshall's dissent in **Rosebud Sioux Tribe v. Kneip**, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977). This type of confusing "checkerboard" jurisdiction currently exists in the field of criminal law because of the way 18 U.S.C. § 1151 (1977) defines Indian country. 18 U.S.C. § 1151 is a federal regulation which expands the tribe's jurisdiction over minor crimes involving members of the tribe taking place on land defined as Indian country. This section defines Indian country as:

> [T]he term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the boarders (sic) of the United States whether within the original or subsequently acquired

> territory thereof, and whether within or without the limits of a State, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

We feel that there is no compelling reason, in absence of federal law, to extend the same confusing pattern of jurisdiction into the civil area.

**{6}** The plaintiff would have us close our eyes to the problems inherent in expanding the tribe's civil jurisdiction and rule that the tribal court has jurisdiction where an Indian brings suit against a non-Indian over civil matters arising on trust lands lying outside the reservation. As support for this proposition the plaintiff relies on: (1) a Navajo tribal ordinance; (2) a federal statute, 18 U.S.C. § 1151, dealing with federal criminal jurisdiction, and (3) dictum in the case of **DeCoteau v. District County Court**, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975).

**{7}** The tribe has enacted Navajo Tribal Resolution CMY-28-70, compiled as 7 N.T.C. 134 (1969 Ed.) and subsequently recompiled as 7 N.T.C. 254 (1977 Ed.). This ordinance grants the tribal courts civil and criminal jurisdiction over the reservation, and also over trust lands, allotments, dependent Indian communities, etc. This ordinance follows the definition of Indian country as found in 18 U.S.C. § 1151. This ordinance is helpful to the plaintiff only if the tribe has the power of authority to enact such a statute with respect to a non-Indian defendant. We hold that a tribe cannot sua sponte enlarge the jurisdiction of its tribal courts over non-Indians without express federal delegation. We find no federal delegation in this case.

**{8}** The plaintiff argues that 18 U.S.C. § 1151 is authority for the tribe's ordinance and for the extension of tribal civil jurisdiction to lands outside of the reservation. However, Title 18 U.S.C. § 1151 merely defines the geographic area over which the federal government, and to a lesser extent the tribal government, may exercise criminal jurisdiction, and must be read in conjunction with the other sections defining criminal jurisdiction. Section 1152 allows the tribe to exercise criminal jurisdiction only over minor crimes involving Indians. The tribe has no jurisdiction when a non-Indian is involved. Section 1151 cannot be read to grant the tribe authority to enact ordinances like 7 N.T.C. 254 which would extend their civil jurisdiction over non-Indians.

**{9}** Finally the plaintiff refers to the footnote in **DeCoteau v. District County Court**, **supra**, n. 2, as authority for the extension of 18 U.S.C. § 1151 to civil as well as criminal matters. While this footnote may be read to support this theory, it is ambiguous and the cases cited in support of the statements in the footnote do not refer to any civil application of 18 U.S.C. § 1151. We feel that the plaintiff's reading of the footnote would be a departure from the direction of **Mescalero Apache Tribe v. Jones**, **supra**, and **Williams v. Lee**, **supra**, and other cases indicating that the tribe's civil jurisdiction ends at the reservation line, and beyond it Indians, even in trust lands, are subject to the same nondiscriminatory laws as are all citizens of the state.

**{10}** For the foregoing reasons we hold that the tribal court did not have jurisdiction over the instant case and the district court was correct in applying New Mexico law and dismissing the case. This case is remanded to the district court for entry of judgment consistent with the foregoing opinion.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-039**

**Filing Date: April 21, 1981**

**Docket No. 13,167**

**EL PASO ELECTRIC COMPANY, ET AL.,**

**Plaintiff-Appellants,**

**v.**

**STEWART M. PINKERTON, JR., ET AL.,**

**Defendants-Appellees.**

**Appeal from the District Court of Dona Ana County, Joe H. Galvan, District Judge.**

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## OPINION

**PAYNE, Justice.**

**{1}** Three public utilities sought to condemn certain lands of seven defendants for the purpose of constructing transmission lines. The jury returned a consolidated condemnation award for the defendants in the amount of $203,000.00. El Paso Electric appealed. It raises four points on appeal: (1) that the court erred in giving a jury instruction which allowed the jury to consider loss of crops as an element of special damages; (2) that the court erred in refusing to permit El Paso Electric's witness to give rebuttal testimony as to the value of the land after the construction of the transmission lines; (3) that the court erred in giving a non-uniform instruction, and (4) that the court abused its discretion by allowing the defendants to recover separate costs for the use of the same expert witness. We affirm the trial court on all points.

**{2}** We hold that the trial court did not commit error in giving an instruction that allowed the jury to consider loss of crops as an element of special damages. The challenged instruction, adapted from N.M.U.J.I. Civ. 7.10, N.M.S.A. 1978 (Repl. Pamp. 1980), stated:

> In addition to determining the value of the land taken, you may consider the following items of special damages claimed by the landowner:
>
> (a) Loss of damage to or decrease in yield of crops of Defendants Gray, Hernandez, Brooks and Perea.

Where there is only a partial taking of land in an eminent domain action the measure of damages is the difference in the value of the property immediately before and the value immediately after the taking. **Board of Trustees v. B.J. Service, Inc**., 75 N.M. 459, 406 P.2d 171 (1965); **Board of County Com'rs v. Slaughter**, 49 N.M. 141, 158 P.2d 859 (1945). This "before and after" rule is designed to compensate the landowner for the diminution in the fair market value of the land caused by the taking. The value of the land is determined by examining what an unobligated, willing purchaser would pay. **Board of Trustees v. B.J. Service, Inc**., **supra**. The challenged instruction allowing the jury to consider crop damage as an element of special damages is not inconsistent with this "before and after" rule.

**{3}** In this case certain of the defendants claimed damage in addition to the mere taking of land. These additional damages resulted from the loss of several cuttings of their alfalfa crop caused by the construction of the transmission lines. This loss was properly considered special or consequential damages. An existing crop is a condition which a willing, unobligated buyer would consider in arriving at a price for the property. Therefore, crop damages of this type may be included in a condemnation award. The court did not err in giving the requested instruction and allowing the jury to consider crop damage.

**{4}** The trial court did not commit error or abuse its discretion in refusing to allow Ronald Crouse to testify. Mr. Crouse's testimony was excluded for two reasons. The trial court has broad discretion in the exclusion or admission of testimony concerning purchases of property made subsequent to a condemnation proceeding. **See State ex rel. State Highway Commission v. Bassett**, 81 N.M. 345, 467 P.2d 11 (1970). Mr. Crouse had previously been a defendant in this condemnation suit but had settled prior to trial. He purchased a number of tracts of land involved in the condemnation proceeding from other landowners who had also settled with El Paso Electric. He could have testified only as to purchases of property made after the condemnation action. Mr. Crouse was not listed in the pre-trial order as a prospective witness. We have held that it was an abuse of discretion for the trial court to allow a witness to testify in a condemnation proceeding who had not been listed in the pre-trial order. **State ex rel. S. Hwy. Dept. v. Branchau**, 90 N.M. 496, 565 P.2d 1013 (1977). El Paso Electric argues that Mr. Crouse should have been allowed to testify even though he had not been listed in the pre-trial order because his testimony was "rebuttal" testimony and not part of its case-in-chief. El Paso Electric cannot escape a requirement imposed by the pre-trial order by simply labeling Mr. Crouse's testimony as "rebuttal." It knew that the defendants would offer evidence relating to the fair market value of their property after the taking. There was a sufficient basis for the trial court to exercise its discretion in holding Crouse's testimony inadmissible.

**{5}** The defendants' third point of error is that the trial court abused its discretion by using a non-uniform jury instruction. This challenged instruction reads:

> In determining the fair market value of the property after the taking, you should consider the value of the land actually taken and the damage, if any, to the remaining land not taken but injuriously affected.

While this particular instruction is ambiguous and obscures the "before and after" formula for measuring damages, we do not feel it was prejudicial to the plaintiffs. The challenged instruction was given as an aid in the determination of the fair market value of the land. Other instructions properly defined the "before and after" measure of damages. An unnecessary and non-prejudicial instruction is not grounds for reversal if it does not mislead the jury. **See generally Mining Co. v. Hendry**, 9 N.M. 149, 50 P. 330 (1897). Here we do not find that the jury was misled.

**{6}** We also affirm, without discussion, the trial court's award for expert witness fees. Section 38-6-4(B), N.M.S.A. 1978 allows district judges to award additional compensation for expert witnesses' investigation and preparation prior to testifying. The fee for these services "may be allowed by the court to the prevailing party [but] shall not exceed seven hundred fifty dollars ($750)."

**{7}** For the foregoing reasons we affirm the trial court on all points and remand for entry of judgment consistent with this opinion.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-049**

**Filing Date: May 7, 1981**

**Docket Nos. 12,741, 12,761**

**FIRST NATIONAL BANK OF LEA COUNTY, A NATIONAL BANKING CORPORATION,**

**Plaintiff-Appellee,**

**v.**

**(TROY JULIAN, ET AL.) JOHN PIKE, D/B/A PIKE'S PLUMBING AND HEATING,**

**Defendant-Appellant,**

**FIRST NATIONAL BANK OF LEA COUNTY, A NATIONAL BANKING CORPORATION,**

**Plaintiff-Appellee,**

**v.**

**GARRETT BUILDING CENTERS, INC.,**

**Defendant-Appellant,**

**TROY JULIAN, ET AL.,**

**Defendants.**

**Appeal from the District Court of Lea County, C. Fincher Neal, District Judge.**

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**OPINION**

**PAYNE, Justice.**

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

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

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

**I.**

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

**II.**

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

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

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

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

> Plaintiff is informed and believes GARRETT BUILDING CENTERS, INC.; JOHN PIKE, d/b/a PIKE'S PLUMBING AND HEATING . . . may claim an interest

> in the property which is the subject of this suit, but these claims are inferior to plaintiff's mortgage lien and should be declared inferior by the Court.

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

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

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

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

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**JAMES MICHAEL FRANCKE,**
**District Judge, dissent**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-050**

**Filing Date: May 11, 1981**

**Docket No. 12,840**

**JOHN A. SHINDLEDECKER,**

**Plaintiff-Appellant,**

**v.**

**BOB SAVAGE, A/K/A BOBBIE O. SAVAGE, AND BARBARA SAVAGE, HUSBAND AND WIFE, DONALD E. JACQUEZ AND VERITA L. JACQUEZ, HUSBAND AND WIFE, AND FEDERAL NATIONAL MORTGAGE ASSOCIATION,**

**Defendants-Appellees.**

**Appeal from the District Court of San Juan County, James L. Brown, District Judge.**

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**OPINION**

**PAYNE, Justice.**

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

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

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

**{4}** The two issues raised on appeal are: (1) whether Shindledecker had an interest in the subject real estate which was enforceable against

the Savages' equitable interest in the real estate, and (2) whether the Savages terminated or relinquished any interest they may have had in the real estate thus extinguishing any claim Shindledecker would have as against subsequent purchasers of the property.

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

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

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

425 P.2d at 894.

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

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

> The mortgage by a purchaser of his interest in a contract for the sale of real property merely gives the mortgagee the right to complete the purchase if the mortgagor refuses to do so, and the mortgagee takes no greater rights than the purchaser had. In other words, the mortgagee acquires a right to purchase the property for

> the consideration stipulated in the contract of purchase, and the enforceability of the mortgage depends upon the condition that the contract be kept in force by the subsequent performance of its terms. **Young v. Clay** [139 Or. 427, 10 P.2d 602 (1932)]; **Sheehan v. McKinstry,** [105 Or. 473, 210 P. 167 (1922)]; **Nelson v. Bailey,** 1959, 54 Wash.2d 161, 338 P.2d 757, 73 A.L.R.2d 1400; 59 C.J.S. Mortgages § 184.

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

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

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

**{12}** For the foregoing reasons the trial court's judgment is affirmed.

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-051**

**Filing Date: May 13, 1981**

**Docket No. 13,446**

**EARL LEWIS and LEANN LEWIS,**

**Petitioners,**

**v.**

**LINDA BLOOM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUISE DILS, DECEASED, AND WALTER DILS AND BARBARA DILS,**

**Respondents.**

**Original proceeding on Certiorari.**

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Attorney for Respondents.

**OPINION**

**PAYNE, Justice.**

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

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

**{3}** The questioned instruction states:

> Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one (1) line of traffic in each direction each driver shall give to the other at least one-half of the main-traveled portion of the roadway as nearly as possible.
>
> If you find from the evidence that LeANN LEWIS conducted herself in violation of this statute, you are instructed that such conduct constituted negligence as a matter of law, unless you further find that such violation was excusable or justifiable.
>
> To legally justify or excuse a violation, the violator must sustain the burden of showing that she did that which might reasonably be expected of a person of ordinary prudence acting under similar circumstances who desired to comply with the law.

**{4}** Under this instruction the jury was required to find Lewis guilty of negligence as a matter of law **unless** she sustained the burden of explaining why she was on the wrong side of the road and that she did "that which might reasonably be expected of a person of ordinary prudence acting under similar circumstances who desired to comply with the law." The burden imposed by the instruction did not require her to disprove the facts which, if not excused, would establish negligence as a matter of law. Once the facts were established

which gave rise to negligence as a matter of law, she had the burden of showing excuse or justification by showing that she acted as an ordinary prudent person desiring to comply with the law. The jury believed that Lewis sustained her burden and accordingly found in her favor. We cannot substitute our judgment of the facts for that of the trial court since only the trier of facts may weigh the evidence, determine the credibility of witnesses, reconcile inconsistent or contradictory statements of witnesses, and decide where the truth lies. **Worthey v. Sedillo Title Guaranty, Inc**., 85 N.M. 339, 512 P.2d 667 (1973); **Durrett v. Petritsis**, 82 N.M. 1, 474 P.2d 487 (1970).

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

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

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

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLILAM RIORDAN,**
**Justice, not participating**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-083**

**Filing Date: August 20, 1981**

**Docket No. 13,469**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**RUPERTO SANDOVAL,**

**Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

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Martha A. Daly, Appellate Defender
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**OPINION**

**PAYNE, Justice.**

**{1}** The defendant, Ruperto Sandoval, was convicted of trafficking in heroin contrary to Section 30-31-20(A)(2), N.M.S.A. 1978 (Repl. Pamp. 1980). The defendant sought review by the Court of Appeals which reversed and remanded to the trial court. The State petitioned this Court for certiorari to review the Court of Appeals' application of Rule 510 of the New Mexico Rules of Evidence, N.M.S.A. 1978. We granted certiorari.

**{2}** The defendant's conviction stemmed from a transaction where he allegedly sold quantities of heroin to an undercover agent. Present during this transaction was a confidential informant who assisted the agent in setting up the purchase. During the course of the trial, the defendant sought a court order requiring the State to identify and produce the confidential informant. The trial court determined that the informant was a material witness and, pursuant to Rule 510, ordered the State to produce him for an **in camera** hearing to determine whether his identity should remain confidential. A continuance was allowed so that the **in camera** hearing could be held.

**{3}** The State was unable to locate the informant and indicated it did not believe it could locate and produce him for the **in camera** hearing. The court then entered an order that the State would have to either disclose the identity and last known address of their informant or suffer dismissal of its case. The State then disclosed the name and last known address of its informant, whereupon the defendant moved for dismissal, alleging a failure by the State to use due diligence in locating the informant. The trial court denied this motion, holding that due diligence is only necessary when there is no disclosure of the informant's identity.

**{4}** The issue on certiorari is whether the remand by the Court of Appeals to determine whether the State exercised due diligence was beyond the scope of Rule 510. Although we agree that the case must be remanded, we feel it necessary to modify the standards set forth by the Court of Appeals.

**{5}** The function and purpose of Rule 510 was stated by this Court in **State v. Robinson**, 89 N.M. 199, 201-202, 549 P.2d 277, 279-80 (1976), as:

> Our evidentiary Rule 510 provides a systematic method for balancing the state's interest in protecting the flow of

> information against the individual's right to prepare his defense. It gives the trial court the opportunity to determine through an **in camera** hearing whether the identity of the informer must be disclosed or not. Where it appears that the informer's testimony will be relevant and helpful to the defense of an accused, or necessary to a fair determination of the issue of guilt or innocence, then **the trial judge can order the state to either reveal the identity of the informer or suffer a dismissal of the charges to which the testimony would relate**. On the other hand, where it appears to the trial judge from the evidence that the informer's testimony will not be relevant and helpful to an accused's defense, or necessary to a fair determination of the issue of guilt or innocence, then the identity of the informer can remain undisclosed, and that person is not exposed unnecessarily to the highly dangerous position of being a known informant. (Emphasis added.)

**{6}** Rule 510 creates a privilege in this state or any of its subdivisions to refuse to reveal the identity of a person who has furnished information or assisted in the investigation of a possible criminal violation. This privilege is subject to exceptions as set forth in Subsection (C)(1)(2) and (3). The rule extends only to a determination of when an informer's identity will be required by the court to be disclosed. Here, the identity of the informer and his last known address were disclosed to the defendant pursuant to the court's order. The United States Supreme Court has held that this type of order is a proper limitation on the informer's privilege. **Roviaro v. United States**, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).

**{7}** In the present case, Rule 510 no longer has any applicability because full disclosure, as required by **Roviaro**, **supra**, has been made. However, the fundamental requirements of fairness include a duty on the part of the prosecution and the police to "give reasonable assistance to defendants and their counsel in making it possible for them to procure the informer as their witness." (citation omitted.) **United States v. Fancutt**, 491 F.2d 312, 314 (10th Cir. 1974).

**{8}** Roviaro did not foreclose the possibility of a higher duty to assist the defense where disclosure of the informer's identity is not useful. In **United States v. Williams**, 496 F.2d 378, 382 (1st Cir. 1974) the court stated that "the government's duty under **Roviaro** to produce names and addresses requires it to produce correct information or at least to have exercised diligence reasonable under the circumstances to locate the informer. . . . How far it must go to keep track of, or search for, an informer is less easily stated; that depends on many factors including the extent of the government's control over the witness, the importance of the witness' testimony, the difficulty of finding him, and similar matters.

**{9}** The California Supreme Court has "recognized the futility of a rule requiring disclosure of the information which the police know about a material witness informer without a further requirement that the police make efforts to obtain information useful in locating the informer as well." **People v. Goliday**, 8 Cal.3d 771, 778, 106 Cal. Rptr. 113, 118, 505 P.2d 537, 542 (1973). There, the police agent learned only the first names of two witness-informants, purposely avoiding any further information to assure that the informants could not be called as witnesses.

**{10}** The Court of Appeals properly recognized that the government has a duty to act with due diligence in locating the informant where it refuses to disclose the informant's identity. **State v. Ramirez**, 95 N.M. 202, 619 P.2d 1246 (Ct. App. 1980); **State v. Alvarez**, 93 N.M. 761, 605 P.2d 1160 (Ct. App. 1978); **State v. Carrillo**, 88 N.M. 236, 539 P.2d 626 (Ct. App. 1975). However, once the government has disclosed the informant's identity and last known address, the threshold for finding due diligence is lowered. After disclosure, the government must show only that it made reasonable attempts to acquire the information needed to locate the informer and that it disclosed all the information it possesses which is useful in locating the informer.

Failure to make such a showing where the court has determined that disclosure of the informer's identity is necessary under Rule 510 would justify dismissal of the charges.

**{11}** The case is remanded for further proceedings consistent with this opinion.

**{12} IT IS SO ORDERED.**

**H. VERN PAYNE, Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Not Participating**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-084**

**Filing Date: August 20, 1981**

**Docket No. 13,301**

**CELEBRITY, INC.,**

**Plaintiff-Appellant,**

**v.**

**DALE KEMPER, D/B/A K-DRUGS,**

**Defendant-Appellee.**

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, PATRICIA MADRID, District Judge.**

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## OPINION

**PAYNE, Justice.**

**{1}** Appellant Celebrity sold goods on open account to appellee Kemper, a retailer, with whom it had been doing business over a period of four or five years. Immediately after delivery, Kemper noticed some defective items in the shipment. These were set aside. In past dealings when shipments had contained defective goods, Kemper would set aside the defective items and Celebrity's salesman would check the items and make an adjustment to the account. In this instance, Celebrity's salesman refused to make an adjustment when notified of the defective goods. The invoice for the goods specified that all returns were to be made within five days after receipt and would be accepted only with prior written authorization. Kemper took no further action until he received a demand for payment and threat of lawsuit from Celebrity (approximately three months after the meeting with the salesman). At this time Kemper reboxed all of the unsold and returned goods, whether defective or not, and returned them to Celebrity. Celebrity sent them back, but Kemper refused to accept them. Celebrity sued for the purchase price and judgment was entered for Kemper. We reverse.

**{2}** This case raises the question of whether there was an adequate rejection of goods under Section 55-2-602, N.M.S.A. 1978. The trial court found a course of dealing between the parties whereby damaged or defective goods were rejected if Kemper brought the damaged or defective goods to the attention of Celebrity's salesman on his next visit to Kemper's place of business following receipt of the merchandise. However, where the express terms of a contract cannot be reconciled with an established course of dealing, the express terms control. § 55-1-205(4), N.M.S.A. 1978. Kemper was justified in acting pursuant to the established course of dealing until notified that the express terms of the contract were to be invoked by Celebrity. The salesman's refusal to make the requested adjustments constituted such notice to Kemper. Under the Uniform Commercial Code, all parties in commercial dealings have obligations of good faith, diligence, reasonableness and care which must be met. § 55-1-102, N.M.S.A. 1978. Kemper's failure to respond to the salesman's notification until threatened with suit does not accord with these obligations. Kemper failed, as a matter of law, to give Celebrity seasonable and particular notice of rejection as to the entire shipment. § 55-2-602(1) and § 55-2-605, N.M.S.A. 1978.

**{3}** Recognizing that Kemper was justified in acting according to the established course of dealing until notified of a change, we find that only those items set aside and presented to the salesman were properly rejected. We remand for a determination of what items were rejected in this manner.

**{4}** On appeal, Kemper relied upon Section 55-2-601, N.M.S.A. 1978, as justification for his eventual rejection of all of plaintiff's goods. The statute provides that where the seller's tender fails in any respect, the buyer has three alternatives: reject the whole, accept the whole, or accept any commercial unit or units and reject the rest. Since defendant failed to properly reject all but certain specific items, those items not rejected were accepted. § 55-2-606(1)(b), N.M.S.A. 1978. He thus chose the third alternative under Section 55-2-601 and was unjustified in returning the whole.

**{5}** Kemper also claims he had insufficient opportunity to inspect the goods because they were packaged for sale, but the law does not permit an indefinite period for inspection where inspection may be difficult. The law provides the buyer a reasonable opportunity to inspect. § 55-2-606(1)(b), N.M.S.A. 1978. We do not decide whether the five-day contractual period is reasonable, but Kemper's delay after Celebrity's invocation of the contract provision was unreasonable. In addition, under Section 55-2-601, Kemper had the opportunity to reject the entire shipment when he learned upon receipt that some of the items were defective. He failed to do so; instead, he accepted most of the shipment and rejected the rest.

**{6}** Celebrity sought the full contract price. We leave to the trial court the determination of whether any attempt was made by Celebrity to sell the goods in its possession and the applicability of §§ 55-2-703, 55-2-706, 55-2-709, N.M.S.A. 1978.

**{7}** The case is remanded for further action consistent with this opinion.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-086**

**Filing Date: August 24, 1981**

**Docket No. 13,165**

**WENDELL WOOD,**

**Plaintiff-Appellee,**

**v.**

**MILLERS NATIONAL INSURANCE COMPANY, A CORPORATION,**

**Defendant-Appellant.**

**APPEAL FROM THE DISTRICT COURT OF DONA ANA COUNTY,
GARNETT R. BURKS, JR., District Judge.**

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**OPINION**

**PAYNE, Justice.**

**{1}** The defendant, Millers National Insurance Company, has appealed an order denying its motion to compel arbitration, or in the alternative, to stay proceedings of the district court. The suit arose from a collision between the plaintiff Wood and an uninsured motorist, Gonzales. Both Wood and Gonzales were injured. Wood was operating a vehicle insured by Millers. Millers undertook Wood's defense in a suit initiated by Gonzales, and suggested that Wood counterclaim. Wood's personal attorney demanded that in additional to providing a defense, Millers cover Wood's own injuries under the uninsured motorist provisions of the policy. He also demanded arbitration if Millers refused to pay. Millers denied coverage for Wood's injuries and expressed a willingness to arbitrate, but suggested avoiding arbitration costs through agreement that the determination of liability between Wood and Gonzales in the pending litigation would determine Wood's claim for uninsured motorist coverage. Wood made a further demand for coverage, without response from Millers. Wood then filed suit, alleging that Millers' denial of coverage was not in good faith. Millers filed a motion to dismiss which was denied. Millers then filed its motion to compel arbitration. The latter motion is the subject of this appeal.

**A.**

**{2}** The trial court concluded as a matter of law that there was no valid agreement of arbitration between Wood and Millers. However, the policy under which Wood makes his claim specifies that matters upon which Millers **and any person making a claim under the policy** disagree shall be settled by arbitration. Wood argues that since he did not sign the policy, he should not be bound by its terms. We fail to see how this argument has any validity in the circumstances of this case. **See Jeanes v. Arrow Insurance Company**, 16 Ariz. App. 589, 494 P.2d 1334 (1972).

**B.**

**{3}** The trial court also found that Millers waived its right to compel arbitration. We affirm the trial court on this issue.

**{4}** This Court discussed the question of waiver in **United Nuclear Corp. v. General Atomic Co**.,

93 N.M. 105, 597 P.2d 290 (1979). As indicated in **United Nuclear**, this Court has encouraged arbitration and "all doubts as to whether there is a waiver must be resolved in favor of arbitration." **Id**. at 114, 597 P.2d at 299 [citations omitted]. **See also Dairyland Ins. Co. v. Rose**, 92 N.M. 527, 591 P.2d 281 (1979); **Bernalillo Cty. Med. Center Emp. v. Cancelosi**, 92 N.M. 307, 587 P.2d 960 (1978). Also, "dilatory conduct by the party seeking arbitration, unaccompanied by prejudice to the opposing party, does not constitute waiver." **United Nuclear**, **supra**, 93 N.M. at 115, 597 P.2d at 300 (citation omitted). The type of prejudice usually invoking a waiver involves trial preparation based on the belief that the other party does not desire or intend to make a demand for arbitration. **Id**. at 117, 597 P.2d at 302. Thus, the extent of court action taken is an important inquiry. In **Cancelosi**, **supra**, this Court found no waiver of arbitration where "[t]he case was not at issue and since no hearings had been held, the judicial waters had not been tested prior to the time the motion for arbitration had been filed." **Id**. 92 N.M. at 310, 587 P.2d at 963.

**{5}** With reference to waiver of arbitration, the pertinent dates and proceedings consisted of the following:

October 15, 1979: Complaint filed by Wood
November 20, 1979: Entry of Appearance by Millers
December 3, 1979: Order for Enlargement of Time
December 14, 1979: Motion to Dismiss by Millers
January 21, 1980: Order to Deny Motion to Dismiss
January 29, 1980: Motion to Compel Arbitration or Stay
Proceedings filed by Millers
March 6, 1980: Motion for Default Judgment or for a Partial
Summary Judgment filed by Woods
April 30, 1980: Order Denying Motion for Default Judgment
May 9, 1980: Order Denying Motion to Compel Arbitration

**{6}** Between October 15, 1979 (the date the complaint was filed), and January 21, 1980 (the date the motion to compel arbitration was filed), the trial court held a hearing on Millers' motion to dismiss. After the court denied Millers' motion, Millers moved to compel arbitration. The question then is whether, having invoked the court's discretionary power, Millers may thereafter seek to compel arbitration. We hold that it cannot.

**{7}** The mere instigation of legal action is not determinative for purposes of deciding whether a party has waived arbitration. The point of no return is reached when the party seeking to compel arbitration invokes the court's discretionary power, prior to demanding arbitration, on a question other than its demand for arbitration. Millers passed this point, and thereby waived arbitration. To hold otherwise would permit a party to resort to court action until an unfavorable result is reached and then switch to arbitration. We cannot sanction such a procedure.

**C.**

**{8}** Millers also appeals the denial of its motion to stay proceedings. The power to stay proceedings pending the outcome of other litigation is within the discretion of the court, and we will only find error when the lower court has abused its discretion. **See Flinchum Const. Co. v. Central Glass & Mirror**, 94 N.M. 398, 611 P.2d 221 (1980). Millers claims that Wood's action should be stayed because the suit between Gonzales and Wood will settle the dispute between Millers and Wood. In essence, Millers is challenging Wood's right to bring a direct action against Millers for uninsured motorist benefits.

**{9}** Different jurisdictions have focused on various factors in determining whether an insured has a right to bring a direct action against the insurer for uninsured motorist benefits. Among these factors are: 1) legislative intent in enacting the statute requiring uninsured motorist coverage; 2) the insurer's intent in drafting the provision; 3) judicial economy; 4) the meaning

of the phrase "legally entitled to recover"; and 5) the effect of an arbitration provision. **See generally** Annot., 73 A.L.R.3d 632 (1976). Review of the cases indicates that there is no single prevailing view. We have considered the various factors as they relate to New Mexico law and conclude that a direct action against an insurer for uninsured motorist benefits is permissible.

**1.**

**{10}** In **Chavez v. State Farm Mutual Automobile Ins. Co**., 87 N.M. 327, 329, 533 P.2d 100, 102 (1975), we stated that "'the legislative purpose in creating compulsory uninsured motorist coverage was to place the injured policyholder in the same position, with regard to the recovery of damages, that he would have been in if the tortfeasor had possessed liability insurance.' **Bartlett v. Nationwide Mutual Ins. Co**., 33 Ohio St.2d 50, 52, 294 N.E.2d 665, 666 (1973)." In **Sandoval v. Valdez**, 91 N.M. 705, 580 P.2d 131 (Ct. App. 1978), **cert. quashed**, April 13, 1978, the Court of Appeals noted that the statute does not mention any limitations on actions except that the insured must be legally entitled to recover damages and the negligent driver must be uninsured. Accordingly, we cannot find any legislative intent that an insured must obtain a judgment against the uninsured motorist before bringing an action for uninsured motorist coverage.

**{11}** The intent of the insurer in this case is clear from the wording of its policy and from the actions of its counsel. The relevant portion of the contract states:

> [D]etermination as to whether the insured . . . is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured . . . and the company or, if they fail to agree, by arbitration.
>
> No judgment against any person or organization alleged to be legally responsible for the bodily injury . . . shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.

Millers intended that claims under the uninsured motorist provisions should be settled between it and the insured, with the possibility that a suit between the insured and the uninsured motorist could be conclusive if prosecuted by the insured with the company's written consent. No provision is made for the situation where arbitration fails, as it did here, nor is there indication that a judgment against an uninsured motorist is a prerequisite for recovery.

**{12}** Wood never agreed to Millers' proposed arrangement whereby the results of the litigation between Gonzales and Wood would be determinative of Wood's claim for uninsured coverage. The fact that Millers deemed it necessary to seek such an arrangement indicates that the parties did not intend under the contract that the separate suit would be inclusive.

**3.**

**{13}** Judicial economy might favor a stay of these proceedings, but the notion should not be invoked where it substantially impairs a party's rights. **See** 1 Am. Jur.2d **Actions** § 97 (1962). The trial judge is in the best position to make the relevant determinations. We cannot hold as a matter of law that judicial economy is the overriding consideration or that the lower court's balancing of economy against harm to the plaintiff was erroneous.

**4.**

**{14}** The phrase "legally entitled to recover" has been interpreted both as permitting direct action and as not permitting direct action. **See**

Annot., 73 A.L.R.3d 632, §§ 8 and 9 (1976). We hold that the phrase merely requires that the determination of liability be made by legal means. Millers recognizes that agreement by the parties directly or through arbitration may result in a determination of what the insured is legally entitled to recover. No judgment against the uninsured motorist is necessary under this procedure. We hold that the same phrase does not constitute a barrier to court action where agreement and arbitration have failed.

**5.**

**{15}** The contract provision requiring arbitration in the present case specifies that the parties shall submit to arbitration "upon written demand of either." Millers waived its right to make such a demand, as discussed **supra**. Under the circumstances of this case, Wood was not required to further pursue the arbitration procedure where Millers made no attempt to negotiate Wood's claim and failed to timely pursue arbitration on its own.

**D.**

**{16}** We conclude that the trial court did not abuse its discretion by its denial of Millers' motion to stay proceedings. We recognize the difficult position Millers faces in defending two separate lawsuits which might subject Millers to a different liability than it would face if the present case were stayed. However, we cannot deny Wood his day in court because Millers failed to properly demand arbitration. Wood has made allegations of bad faith against Millers which are separate from the issue involved in the Gonzales litigation. Thus we cannot say as a matter of law that the motion to stay should have been granted.

**E.**

**{17}** The judgment is reversed in part and affirmed in part, and the cause remanded for further proceedings consistent with this opinion.

**{18} BE IT SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-088**

**Filing Date: August 24, 1981**

**Docket No. 13,316**

**IN RE PETITION OF LOWER VALLEY WATER AND SANITATION DISTRICT: LOWER VALLEY WATER AND SANITATION DISTRICT,**

**Petitioner-Appellant, and Cross-Appellee,**

**v.**

**PUBLIC SERVICE COMPANY OF NEW MEXICO, WESTERN COAL COMPANY, UTAH INTERNATIONAL AND TUCSON ELECTRIC POWER COMPANY,**

**Respondents-Appellees and Cross-Appellants,**

**and**

**PARAGON RESOURCES, INC., VALENCIA ENERGY COMPANY AND SAN JUAN COAL COMPANY,**

**Intervenors.**

**APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, JAMES L. BROWN, District Judge.**

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**OPINION**

**PAYNE, Justice.**

**{1}** This appeal presents important questions regarding the statutory scheme for creation of water and sanitation districts.

**{2}** Citizens in the Lower Valley of the San Juan River in San Juan County petitioned the district court for the creation of the Lower Valley Water and Sanitation District (Lower Valley) pursuant to the Water and Sanitation District Act, Sections 73-21-1 through 73-21-54, N.M.S.A. 1978 (Orig. Pamp. and Cum. Supp. 1980). The water and sewage situation there has deteriorated with the rapid population increase caused by development related to the energy industry. The situation is dangerous and unhealthy; in some areas, effluent material from septic tanks is surfacing.

**{3}** As described in the petition, the proposed district would include a substantial area owned by the protestors, Public Service Company of New Mexico, Western Coal Company, Utah International and Tucson Electric Power Company. The trial court found that the protestors had no "actual and impending" need for the proposed sewer improvements. It modified the petition to exclude their land for purposes of the sewer improvements. This land was retained for water district purposes, however. Under the petition as filed, the protestors would bear 98% of the construction and purchasing costs associated with

the formation of the district. The estimated costs total $7.4 million, with $6.4 million for sewage facilities and $1.0 million for water. Under the petition as modified, the protestors would bear a similar percentage of only the $1.0 million for water improvements.

**{4}** Lower Valley appeals the modification order excluding the protestors' land from the sewage district, asserting that it was based on improper criteria. The protestors cross-appeal on grounds that the trial court erred in not granting their motion to dismiss. This motion was based on allegations that the original petition did not meet the statutory requirements. The protestors also appeal the modification order on grounds that the protestors' land should not be included in the water district. There are five basic issues presented: 1) whether the order appealed from is a final order; 2) whether the trial court applied the proper criteria for determining the boundaries of the sewage district; 3) whether the statutory requirements for a valid petition are constitutional; 4) the extent of the trial court's statutory duty to consult with related state agencies; and 5) whether the trial court abused its discretion by including the protestors' lands within the water district.

**I.**

**{5}** The protestors argue that the order appealed from is not a final judgment and is not therefore appealable. There is no statutory language determinative of this question. The protestors base their view on the fact that the court must enter additional orders before the district is actually created.

**{6}** The procedure for creating water and sanitation districts includes three distinct steps requiring action by the district court. First, the court conducts a hearing to determine the validity and merits of the petition to establish the district. §§ 73-21-8 and 73-21-9, N.M.S.A. 1978. At the conclusion of the hearing, the court may grant, modify, or deny the petition. Second, if the court grants or modifies the petition, it must submit the question of organization of the district to the voters. § 73-21-9(F). Third, if approved by the electors, the court must declare the district organized, give it a corporate name, and designate the first board of directors. § 73-21-9(I). The statute specifies that no appeal shall lie from the entry of an order establishing the district, Section 73-21-9(J), N.M.S.A. 1978, but is silent as to the appealability of prior court actions in this process.

**{7}** The only step in the process which requires full exercise of the court's discretion is the first one. After the court's disposition of the petition, all its subsequent actions are ministerial.

**{8}** The Court of Appeals considered the factors relevant to a determination of finality in **Johnson v. C & H Construction Company**, 78 N.M. 423, 432 P.2d 267 (Ct. App. 1967).

**{9}** A judgment or order is not final unless all the issues of law and of fact necessary to be determined, were determined, and the case completely disposed of so far as the court has power to dispose of it. In determining whether there is a final judgment or order, we look to the substance and not the form of the judgment or order.

> . . . The current proceeding must have been completely disposed of so far as the court has power to dispose of it. (Citations omitted.)

**Id**. at 425, 432 P.2d at 269.

**{10}** Applying these factors to the instant case, we hold that the modification order was final and therefore appealable. The court had determined all issues of law and fact regarding the petition and had completely disposed of the matter. The remaining steps would constitute further action on the proposed district, but could in no way alter the court's modification order. There was no further action contemplated with respect to determining the boundaries of the district.

**II.**

**{11}** Lower Valley claims that since the statute is intended to promote the health, safety, prosperity,

security and general welfare of the inhabitants of the districts, Section 73-21-1, N.M.S.A. 1978, it differs from those statutes which assess taxes for a specific purpose based on an assessment of the "benefit" to the land in question. Instead, the statute provides for ad valorem taxes against all the taxable property within the district. § 73-21-17, N.M.S.A. 1978. Therefore, Lower Valley contends that the proper criteria for determination of water and sewage districts is the area which must be included to assure community health had welfare and not whether each specific area will receive a special benefit. We recognize that the districts formed under the Act are intended to promote the general health and welfare of the inhabitants of the districts. However, we cannot ignore the statutory procedure for creation of the district. Section 73-21-9(E) specifies conditions which, if existent, permit the district court to deny or modify the petition. Adoption of Lower Valley's proposition would render this section of the statute ineffective. Broad considerations of community health and welfare cannot be invoked to override the specific considerations set out by the Legislature. In the present case, the court found that the protestors' lands had no need for the proposed sewage improvements and accordingly modified the petition to exclude these lands. We find substantial evidence to support this determination and hold that the court followed the statutory procedure.

**{12}** Lower Valley argues that the same considerations applicable to exclusion of land from an organized district should apply to exclusion of land from a proposed district. In order to exclude land from an organized district, the owner must persuade the board of directors that it is in the best interests of the district to have the land excluded. § 73-21-24, N.M.S.A. 1978. This statutory scheme sets forth different considerations from those specified for creation of a district. We cannot say that the Legislature acted improperly by specifying that the court should have relatively free discretion to consider all relevant factors when considering a proposed district, but that in changing a district once it has been voted on and organized, the best interests of the district should be paramount.

**{13}** Accordingly, we affirm the trial court on this issue.

**III.**

**{14}** The protestors asserted by way of a motion to dismiss that there was no showing that the signers of the petition were taxpaying electors of the area included in the proposed district and that therefore the required twenty-five percent of such persons' signatures were not accumulated. § 73-21-6(A), N.M.S.A. 1978. The court took this motion under advisement and requested that the matter be briefed. This motion was never formally ruled on or addressed in the court's Findings and Conclusions, and was therefore denied by implication. We are unable to conclude on this record whether the trial court denied the motion because he considered the requirements unconstitutional, or for some other reason. We will discuss this issue and remand for appropriate proceedings so that the district court may consider evidence and make the appropriate finding or dismiss the petition.

**{15}** Lower Valley cites numerous cases for the proposition that the procedure and requirements for obtaining signatures on the petition are unconstitutional. **Hill v. Stone**, 421 U.S. 289, 95 S. Ct. 1637, 44 L. Ed. 2d 172 (1975); **Phoenix v. Kolodziejski**, 399 U.S. 204, 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970); **Kramer v. Union School District**, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969); **Prince v. Board of Ed. of Cent. Con. Ind. Sch. D. No. 22**, 88 N.M. 548, 543 P.2d 1176 (1975); **Board of Education of Vil. of Cimarron v. Maloney**, 82 N.M. 167, 477 P.2d 605 (1970). These cases hold that direct restrictions on the right to vote, such as limiting of the franchise to property owners, are unconstitutional even where the election relates to specialized governmental entities such as school boards. Since numerous New Mexico statutes, **(e.g**., § 73-1-3 (artesian conservancy districts), § 73-6-1 (drainage districts), and § 73-9-3 (irrigation districts)), in addition to Section 73-21-6(A), limit the category of persons who may sign petitions for the creation of special districts, we find it necessary to address the issue.

**{16}** In **Reynolds v. Sims**, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), the United States Supreme Court held that the equal protection clause requires adherence to the principle of one-person-one-vote in elections of state legislators. The **Reynolds** rule was later extended to the election of county government officials in **Avery v. Midland County**, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968). In **Hadley v. Junior College District**, 397 U.S. 50, 90 S. Ct. 791, 25 L. Ed. 2d 45 (1970), the Court applied **Reynolds** to the election of trustees of a community college district because those trustees "exercised general governmental powers" and "performed important governmental functions" that had significant effect on all citizens residing within the district. **Id**. at 53-54, 90 S. Ct. at 793-94. However, the Court has found that certain types of entities are so specialized and so disproportionately affect certain portions of the public that the franchise may be limited to those members of the public peculiarly affected. **Ball v. James**, . . . U.S. . . . , 101 S. Ct. 1811, 68 L. Ed. 2d 150 (1981). **Salyer Land Co. v. Tulare Water District**, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973).

**{17}** The United States Supreme Court has held state laws tying voting eligibility to property ownership for certain types of elections to be invalid. **Hill v. Stone**, **supra**, (election to approve issuance of bonds to finance a city library); **Phoenix v. Kolodziejski**, **supra**, (issuance of general obligation bonds secured by a lien on real property); **Cipriano v. City of Houma**, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969) (bonds to finance a municipal utility). Those cases, however, involved elections relating to the operations of traditional municipalities exercising the full range of normal governmental powers. They are controlling only where it is first determined that the governmental entity is not a special-purpose entity under **Salyer** and **Ball**. In **Kramer v. Union School District**, **supra**, the Court held unconstitutional a scheme limiting the right to vote in school district elections to owners or lessees of real property and parents of enrolled children. The limitation denied equal protection because it did "not meet the exacting standard of precision" since it was both under- and over-inclusive. **Id**. 395 U.S. at 632, 89 S. Ct. 1892.

**{18}** In **Maloney**, **supra**, this Court held that a state constitutional clause restricting to land owners the right to vote on creation of school district debt violated the equal protection clause of the United States Constitution. Later, in **Prince v. Board of Ed. of Cent. Cont. Ind. Sch. D. No. 22**, **supra**, this Court adopted a rule from **Hill v. Stone**, **supra**, that "as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest." **Id**. 88 N.M. at 552, 543 P.2d 1176. The Court concluded that the election in **Prince**, a school board election and bond issue, was one of general rather than special interest. Accordingly, the Court considered whether the State's interest in excluding non-taxpaying Indian reservation residents was sufficient under this test. It held that there was no compelling state interest, and upheld the election in which reservation residents participated.

**{19}** Pursuant to the principles outlined above, we must first determine whether the proposed district is of general or special interest. If it is of general interest, we must decide whether the **Reynolds** rule extends beyond actual voting to the preliminary step of petition qualification.

**{20}** A governmental entity may be considered of general interest where it performs functions traditionally at the core of government service or where it performs a variety of functions normally performed by the government. For example, "the provision of electricity is not a traditional element of governmental sovereignty, **Jackson v. Metropolitan Edison Co**., 419 U.S. 345, 353, 95 S. Ct. 449, 455, 42 L. Ed. 2d 477 (1974), . . . and so is not in itself the sort of general or important governmental function that would make the government provider subject to the doctrine of the **Reynolds** case." (Footnote omitted.) **Ball v. James**, **supra** 101 S. Ct. at 1819. Other types of powers and services, however, do invoke the strict

demands of **Reynolds**. For example, authority to impose ad valorem property taxes or sales taxes, or to enact laws governing the conduct of citizens, are at the core of governmental sovereignty. Administration of normal governmental functions such as operation of schools, street maintenance, or sanitation, health, or welfare services may bring an entity within the **Reynolds** requirements. On the other hand, storage and delivery of water, without a concurrent power to control the use of such water, is not such a central governmental function, even where the entity possesses a nominal public character. **Ball**, **supra**, and **Sayler**, **supra**.

**{21}** Applying these considerations of Lower Valley, we note that Section 73-21-17 gives the district authority to impose ad valorem taxes. The proposed district is essentially an expansion of a private water users cooperative association organized in 1966. This expansion is considered essential primarily because of significant health risks present in the area. Thus it involves administration of sanitation and health services. Accordingly, we hold that the district is of general, not special, interest.

**{22}** Having determined that the **Reynolds** rule must apply to the creation of a water and sanitation district, we now must decide whether **Reynolds** attaches at the petition stage. A district cannot be formed until a petition which conforms to statutory requirements is filed in a district court. The question we address is whether the statutory requirement that twenty-five percent of the taxpaying electors of the district sign the petition denies equal protection. We conclude it does not.

**{23}** We note that this precise question has not been addressed by the United States Supreme Court. The cases discussed **supra** deal with direct limitations on the right to vote, whereas the restriction here involves not the right to vote but rather the right, created by the Legislature, to propose a district to the voters. Being a step removed from the actual voting process, we conclude that the State need not show a compelling interest but that a rational basis justification will suffice.

**{24}** While the public generally will benefit upon creation of a water and sewage district, it is the taxpayers who bear the substantial financial burden. The Legislature may properly determine that in order to protect these taxpayers, any petition for the creation of a district must be approved by at least twenty-five percent of this class. The United States Supreme Court noted that "most States find it possible to protect property owners from excessive property tax burdens by means other than restricting the franchise to property owners." **Phoenix**, **supra** 399 U.S. at 213, 90 S. Ct. at 1996. The petitioning procedure adopted by the Legislature exemplifies this notion of protecting property owners.

**{25}** We do not decide whether the voting procedure set out in Section 73-21-9(C) is constitutional since it is not at issue here.

**{26}** We remand on this issue for further consideration consistent with this opinion.

**IV.**

**{27}** Section 73-21-9(D) specifies that in addition to the findings relating to petition validation, Section 73-21-9(A), the trial court must consult and request an opinion from:

> (1) the state engineer, to determine whether the proposed district has adequate water rights . . . ; and
>
> (2) the environmental improvement agency as to the technological feasibility of the proposed improvements. . . .

**{28}** The protestors contend that there was not sufficient evidence presented to the trial court to enable it to fulfill these statutory requirements. We also remand on this point for further consideration consistent with the following guidelines. The statute requires that the district court "consult and request an opinion from" the state agencies indicated. The Legislature intended that these specific agencies have an opportunity to present their views to the district court. Failure to afford this opportunity is reversible error. We cannot determine on this record whether an opportunity

was adequately provided to the State Engineer and the Environmental Improvement Agency for presentation of their views in this case. We remand to the trial court for a determination as to whether these requirements were met.

**V.**

**{29}** The protestors seek reversal of that portion of the modification order which retains their land within the water district. However, the district court's decision is supported by substantial evidence and we affirm.

**{30}** Affirmed in part and remanded for the limited purposes specified.

**{31} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-094**

**Filing Date: September 15, 1981**

**Docket No. 13,524**

**STATE OF NEW MEXICO,**

**Plaintiff-Petitioner,**

**v.**

**WILLIE JAMES STEVENS,**

**Defendant-Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

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**OPINION**

**PAYNE, Justice.**

**{1}** The defendant, Willie James Stevens, was convicted of second-degree murder under the third of a series of successively more serious indictments. On appeal he alleged, among other things, that the enhanced successive reindictments which resulted in his conviction violated his right to due process. The Court of Appeals overturned the conviction, holding that the reindictments created a presumption of vindictiveness on the part of the prosecutor. We granted certiorari and reverse the Court of Appeals on that issue.

**{2}** The defendant was originally indicted for aggravated assault with a firearm enhancement and voluntary manslaughter or, in the alternative, involuntary manslaughter with firearm enhancement. He moved to suppress certain evidence upon which this indictment was based. While the first indictment was pending and before a ruling on the motion to suppress, a second indictment was filed which charged the defendant with second-degree murder with firearm enhancement. Four days after the second indictment was filed, the district attorney filed a **nolle prosequi** in the first cause. Notwithstanding the **nolle prosequi**, the trial court acted on the motion to suppress and ruled in the defendant's favor. The defendant's subsequent motion to quash the second indictment was granted because that indictment was filed while the first was still pending. Later, the prosecutor procured a third indictment containing an open charge of murder. The court granted the defendant's motion to quash the third indictment on the grounds that it was based on evidence suppressed as to the first indictment. On appeal, the Court of Appeals reinstated the third indictment. **State v. Stevens**, 93 N.M. 434, 601 P.2d 67 (Ct. App. 1979). A second motion to quash the third indictment was denied.

**{3}** Prior to trial on the third indictment the defendant moved again for dismissal upon a new ground contending that the successive reindictments on more serious charges denied him due process. The trial court denied the motion because it found no vindictiveness on the State's part in increasing the charges in the successive indictments.

**{4}** On appeal his conviction was reversed by the Court of Appeals which held that a presumption of vindictiveness arose when the prosecutor sought an enhanced indictment after the defendant exercised a procedural right which resulted

in a need for reindictment. We disagree with the Court of Appeals that a presumption of vindictiveness arose in this case and affirm the trial court.

**{5}** The United States Supreme Court recognized a presumption of vindictiveness in **North Carolina v. Pearce**, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). There the Court held that the record must reflect the reasons for a heavier sentence imposed by the same judge after a second conviction resulting from a successful appeal of the original conviction. The holding was based on two concurrent due process considerations. First, "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Second, "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge" which could deter exercise of procedural rights. **Pearce**, **supra**, 395 U.S. at 725, 89 S. Ct. at 2080. The requirement of objective, on-the-record facts justifying the stiffer sentence is a "prophylactic rule" intended to police vindictive judicial behavior. However, this rule does not apply where a stiffer sentence is imposed pursuant to a trial de novo before a different judge, **Colten v. Kentucky**, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972), or where the resentencing is performed by a different jury following a second conviction after a successful appeal, **Chaffin v. Stynchcombe**, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973). In the latter cases, the Court explained that a different judge or a different jury will have "no personal stake in the prior conviction and no motivation to engage in self-vindication." **Stynchcombe**, **supra**, 412 U.S. at 27, 93 S. Ct. at 1983.

**{6}** In **Blackledge v. Perry**, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), the concern about vindictiveness was extended to prosecutorial action. In that case, the defendant, originally indicted on a misdemeanor charge, was reindicted on a more serious felony charge after he had exercised a statutory right to a de novo trial. On these facts, the Court concluded that the prosecutor had a "considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo," since "such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free." **Id**., at 27, 94 S. Ct. at 2102. Applying the rationale of **Pearce**, the Court held that the prosecutor's conduct violated due process, not because there was evidence of bad faith or because "actual retaliatory motivation must inevitably exist" in this circumstance, but because of the improper deterrent effect of a defendant's apprehension of retaliation. "A person convicted of an offense is entitled to pursue his statutory right of a trial de novo without apprehension that the state will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." **Blackledge**, **supra**, 417 U.S. at 28, 94 S. Ct. at 2102-2103.

**{7}** Most recently, in **Brodenkircher v. Hayes**, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978), the Court refined its approach. The prosecutor, openly admitting that he acted vindictively, obtained a second indictment adding a more serious charge after the defendant refused to plead guilty to the original indictment. The Court ruled that the defendant's due process rights were not impaired. Since an increase in charges as a part of the "give-and-take" of plea bargaining contained "no element of punishment or retaliation as long as the accused is free to accept or reject the prosecution's offer." **Id**. at 363, 98 S. Ct. at 668.

**{8}** A review of the approaches used in the federal courts demonstrates that reconciliation of these three cases has not been easy. A good example of this difficulty is **United States v. Andrews**, 633 F.2d 449 (6th Cir. 1980), in which four judges dissented separately from the **en banc** decision.

**{9}** Andrews involved a superseding indictment charging conspiracy which the prosecutor obtained within two days after the defendants successfully appealed a denial of bail. The court framed the question as a reconciliation of "two

conflicting rules of law: 1) prosecutors have and need broad discretion to file charges where there is probable cause that someone has broken the law; 2) vindictive conduct by persons with the awesome power of prosecutors (and judges) is unacceptable and requires control." **Id**. at 453. The majority adopted a standard that if "there existed a realistic likelihood of vindictiveness for the prosecutor's augmentation of the charges," the burden of disproving it is on the government. To avoid the difficulty and unpleasantness of having judges pass on subjective good faith assertions by prosecutors, "only objective, on-the-record explanations can suffice to rebut a finding of realistic likelihood of vindictiveness." **Id**. at 456. (footnote omitted). The court reached this result, applying it to pretrial prosecutorial discretion, by limiting **Bordenkircher** to the specific context of plea bargaining.

**{10}** Other circuits have applied different analyses. For example, in the Fifth Circuit, if a prosecutor adds charges related to separate criminal acts, he may overcome a presumption of vindictiveness merely by presenting non-vindictive reasons for his action. **Harkwick v. Doolittle**, 558 F.2d 292 (5th Cir. 1977), **cert**. **denied**, 434 U.S. 1049, 98 S. Ct. 897, 54 L. Ed. 2d 801 (1978). However, if the added charges arise out of the activity involved in the original indictment, a balancing test is applied which may result in barring the added charge. **Jackson v. Walker**, 585 F.2d 139 (5th Cir 1978); **Miracle v. Estelle**, 592 F.2d 1269 (5th Cir. 1979). That same circuit has recently ruled that there is no violation of due process where a defendant receives a greater sentence for choosing a trial over making a plea bargain. There, the sentencing judge indicated in pretrial plea bargaining sessions that he would sentence the defendant to twenty years confinement if he accepted a plea bargain. After trial, the same judge sentenced the defendant to thirty-three years in prison. **Frank v. Blackburn**, 646 F.2d 873 (5th Cir. 1980).

**{11}** In the Ninth Circuit, the prosecutor bears a heavy burden to overcome the presumption of vindictiveness whenever charges are added after the defendant exercises a procedural right. **United States v. Groves**, 571 F.2d 450 (9th Cir. 1978); **United States v. Griffin**, 617 F.2d 1342 (9th Cir. 1980).

**{12}** The Fourth Circuit recently held that, even though the prosecutor did not act with actual vindictiveness in seeking a felony indictment, a felony conviction must be set aside where the indictment could have been brought before the defendant elected a jury trial on a misdemeanor charge, but was not actually brought until after. The court feared that permitting the felony prosecution might chill the exercise of the right to a jury trial. **United States v. Goodwin**, 637 F.2d 250 (4th Cir. 1981).

**{13}** The Tenth Circuit has held that application of the New Mexico Habitual Offender Act to a defendant who had successfully appealed his original conviction but who had been reconvicted was improper since the prosecutor had not applied the Act after the original conviction. **James v. Rodriguez**, 553 F.2d 59 (10th Cir. 1977), **cert**. **denied**, 434 U.S. 889, 98 S. Ct. 262, 54 L. Ed. 2d 174 (1977). Several other variations of the vindictiveness notion have been applied. In the absence of further guidance by the United States Supreme Court, we deem it necessary to make an independent analysis of the question.

**{14}** In reconciling the conflicting rules of law outlined by the **Andrews** court, we note that the U.S. Supreme Court has never applied the vindictiveness notion to a prosecutor's actions in the pretrial and trial stages of a criminal case. **Bordenkircher** was the only case presenting pretrial activity, and there, despite clearly vindictive conduct, the Court declined to apply the doctrine. As Justice Blackmun stated in dissent, the Court appeared to be "departing from, or at least restricting" the **Pearce** and **Perry** doctrines. **Bordenkircher**, **supra**, 434 U.S. at 365, 98 S. Ct. at 669.

**{15}** The prosecution in the present case urges a distinction based on a double-jeopardy notion; i.e., it claims that the presumption of vindictiveness was intended only to protect double jeopardy values involving post-conviction vindictiveness. As a result, the doctrine would not

apply to pretrial proceedings. Adoption of this analysis would limit **Pearce** and **Perry** to the double jeopardy context. While this approach has the obvious advantage of relative simplicity and ease of application, we cannot foreclose the possibility that a prosecutor's pretrial retaliatory conduct might violate due process.

**{16}** At the same time, we see serious problems in applying a **Pearce/Perry** presumption of vindictiveness at the pretrial stage. As Judge Merritt stated in dissent in the **Andrews** case:

> During the pretrial and trial process, the prosecutor must decide what position to take on an endless variety of procedural, evidentiary, substantive and tactical questions. He may oppose motions to suppress evidence or for the appointment of counsel or refuse to agree to discovery, severance, bail, or plea bargaining; he may try to get into evidence prior criminal conduct or various co-conspirator and other kinds of hearsay; he may be harsh in his characterization of the defendant's conduct to the jury; he may recommend probation or refuse to prosecute altogether; or he may make a deal with a co-defendant in exchange for incriminating testimony and on and on.
>
> Once a defendant has successfully asserted a particular legal right in the course of the criminal process over the prosecutor's objection, is the prosecutor arguable guilty of unconstitutional vindictive conduct, which "chills" the exercise of the legal right asserted, each time the prosecutor thereafter takes a position contrary to the interests of the defendant? If not, why not, and what is the standard of measurement? What difference does it make that the prosecutor's conduct took place **after** rather than **before** the defendant asserted the right? The "exercise" of a legal right can be more effectively "chilled" before it is asserted than after. What difference should it make that the defendant was unsuccessful rather than successful in asserting the legal right?" On the facts of this case, would it make any difference that the defendant lost his motion for bail rather than won it? If we are talking about the "exercise" of a legal right, should it make a difference that its exercise happened to be unsuccessful in the particular case?

633 F.2d at 459.

**{17}** We are sensitive both to a defendant's due process rights and to the need for full prosecutorial discretion in seeking indictments. We would not hesitate to impose a presumption of vindictiveness if we felt that such a presumption were necessary to protect defendants, in a pretrial setting, from deprivations of due process. We do not feel that such a presumption is necessary, however.

**{18}** At the pretrial stage the prosecutor has not gone through the effort of a trial and therefore has less at stake and less motive to act vindictively. As pointed out by Judge Merritt, many actions taken by a prosecutor prior to conviction might appear vindictive yet are required by our system of criminal justice. We do not find at the pretrial stage the type of motivation sufficient to presume vindictiveness. Imposition of a pretrial presumption of vindictiveness would interfere with proper prosecutorial discretion. Prosecutors would be required to justify actions properly taken as adversaries but which may appear vindictive, adding additional burdens to the criminal justice system. Prosecutors might feel compelled to press the severest charges possible at the outset, to the detriment of defendants.

**{19}** If a prosecutor acts vindictively before trial, the defendant still retains the protection of a jury trial. Situations may arise where egregious conduct on the part of a prosecutor could extinguish the protections afforded by a jury trial. Even though a defendant does not have the benefit of a presumption at the pretrial stage, he may present evidence of vindictiveness and request relief from the Court. However, such conduct is not present in this case.

**{20}** We note that the indictments in the present case were obtained through a Grand Jury, which

traditionally has afforded some protection against improper prosecutorial activity. The present case presents no indication that the Grand Jury procedure inadequately protected the defendant. The trial court considered the question of vindictiveness and determined that there was no improper conduct. We do not deem it necessary to impose a pretrial presumption of vindictiveness. Therefore, we reverse the Court of Appeals and remand to them for consideration of the other points raised on appeal.

**{21}** We express no opinion on the evidentiary issues raised.

**{22}** Reversed.

**{23}** **BE IT SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, dissenting**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-095**

**Filing Date: September 22, 1981**

**Docket No. 13,581**

**IN THE MATTER OF THE APPLICATION OF ANGEL FIRE CORPORATION FOR A SUPPLEMENTAL WELL: ANGEL FIRE CORPORATION,**

**Applicant-Appellant,**

**v.**

**C. S. CATTLE COMPANY, SPRINGER DITCH COMPANY AND THE CITY OF SPRINGER,**

**Protestants-Appellees,**

**v.**

**S. E. REYNOLDS, State Engineer,**

**Party in Interest-Appellant.**

**INTERLOCUTORY APPEAL FROM COLFAX COUNTY DISTRICT COURT, Joseph E. Caldwell, District Judge.**

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Paul A. Kastler
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for Protestants-Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** This appeal requires a determination of the proper procedure for appeal to the district courts from actions taken by the State Engineer. § 72-7-1, N.M.S.A. 1978.

**{2}** The relevant events transpired as follows:

September 8, 1978 - Appellant Angel Fire applied for a supplemental water well.

September 22, 1980 - The State Engineer issued findings and an order favorable to Angel Fire.

October 1, 1980 - Angel Fire petitioned to modify the order.

October 6, 1980 - C.S. Cattle Co. (C.S.) filed a Notice of Appeal in district court and mailed copies to Angel Fire's counsel.

October 28, 1980 - The State Engineer issued a second order in the case, denying all significant modifications requested by Angel Fire but correcting an inconsequential error found in the September 22 order.

October 30, 1980 - C.S. received a copy of the State Engineer's modification order of October 28, 1980.

October 30, 1980 - Angel Fire was personally served with notice of C.S.'s appeal from the September 22 order.

December 31, 1980 - Angel Fire moved to dismiss C.S.'s appeal on grounds that the court lacked jurisdiction because Angel Fire had not been personally served within thirty days after the September 22 decision.

March 10, 1981 The district court denied Angel Fire's motion to dismiss and authorized an interlocutory appeal.

**{3}** Angel Fire appeals the district court's denial of its motion to dismiss.

**{4}** Section 72-12-10, N.M.S.A. 1978, states that "[t]he decision of the state engineer shall be final in all cases unless appeal be taken to the district court within thirty days after his decision as provided by § 72-7-1 N.M.S.A. 1978." Section 72-7-1, N.M.S.A. 1978, states:

> A. Any applicant or other party dissatisfied with any decision, act or refusal to act of the state engineer may appeal to the district court. . . .
>
> B. Appeals to the district court shall be taken by serving a notice of appeal upon the state engineer and all parties interested within thirty days after receipt by certified mail of notice of the decision, act or refusal to act. If an appeal is not timely taken, the action of the state engineer is conclusive.
>
> C. The notice of appeal may be served in the same manner as a summons in civil actions brought before the district court or by publication is [in] some newspaper . . . once a week for four consecutive weeks. The last publication shall be at least twenty days prior to the date the appeal may be heard. Proof of service of the notice of appeal shall be made in the same manner as in actions brought in the district court and shall be filed in the district court within thirty days after service is complete.

**{5}** The judiciary determines rules of procedure for cases within the judicial system, **Ammerman v. Hubbard Broadcasting, Inc**., 89 N.M. 307, 551 P.2d 1354 (1976) **cert**. **denied**, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978); **State v. Roy**, 40 N.M. 397, 60 P.2d 646 (1936), pursuant to its authority under the separation of powers doctrine, N.M. Const., Art. III, § 1. However, the statute here establishes an administrative procedure for taking a case or controversy out of the administrative framework into the judicial system for review. Jurisdiction of the matters in dispute does not lie in the courts until the statutorily required administrative procedures are fully complied with. The courts have no authority to alter the statutory scheme, cumbersome as it may be. Accordingly, we reverse.

**{6}** The statutory requirements are clear. "[A] ny decision, act or refusal to act of the state engineer" may be appealed. § 72-7-1. Thus, there is no requirement of finality. In the posture of the present case, C.S. is therefore required to appeal separately from the September 22 order and the October 28 modification order if it contests each.

**{7}** The statute requires service on all interested parties within thirty days. Thus, service on counsel will not suffice if service is not also made on the actual parties to the litigation. C.S.'s attempted appeal fails since no service was made upon Angel Fire until after the thirty-day period expired.

**{8}** The remaining provisions are not before this Court.

**{9}** The decision of the district court is reversed. The cause is remanded with directions to dismiss the appeal.

**{10} BE IT SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-096**

**Filing Date: September 23, 1981**

**Docket No. 13,423**

**STATE OF NEW MEXICO,**

**Plaintiff-Petitioner,**

**v.**

**MARK ALLEN CHOUINARD,**

**Defendant-Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

Motion for Rehearing Denied
October 23, 1981

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**OPINION**

**PAYNE, Justice.**

**{1}** This petition for certiorari arose from the reversal of two separate convictions of the defendant, Mark Chouinard. The Court of Appeals also ordered the defendant discharged. 96 N.M. . . . , 635 P.2d 986. We reverse.

**{2}** The defendant was indicted on September 21, 1977, on nine counts of trafficking in cocaine. He failed to appear for arraignment and was not apprehended and arrested on the indictment until May 15, 1979. In the interval, on May 16, 1978, the district attorney mistakenly authorized a court order for destruction of the substance alleged to be cocaine, which was the physical evidence in the case against the defendant for all but Count VII. The defendant moved for dismissal on grounds of destruction of the evidence. The trial court denied the motion but tried Count VII separately from the remaining counts. The defendant was found guilty in both trials, and appealed. We granted certiorari to consider the Court of Appeals' reversal of both convictions.

**I.**

**{3}** In his appeal from his conviction in the first trial (Count VII), the defendant alleged five points of error, three of which were considered by the Court of Appeals:

> I. The classification of l-cocaine (cocaine derived from the coca leaf) as a narcotic is irrational.
>
> II. The trial court erred when it refused to strike the testimony of the State's chemist when the defendant objected that the chemist's testimony was not competent.
>
> III. The prosecution failed to prove beyond a reasonable doubt that the substance was l-cocaine and not some other substance.

**A.**

**{4}** The constitutional challenge to classification of cocaine as a narcotic was considered by

the Court of Appeals and we adopt their discussion. We hold that the State Legislature can, like Congress, rationally classify cocaine, a non-narcotic central nervous system stimulant, as a narcotic for penalty and regulatory purposes.

**B.**

**{5}** The Court of Appeals also held that the State's failure to strike the incorrect testimony of the State's chemist was reversible error. We disagree. The relevant portion of the Controlled Substances Act, § 54-11-2(P), N.M.S.A. 1953 (Supp. 1975), states:

> "narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> * * * * * *
>
> (4) coca leaves and any salt, compound, derivative or preparation of coca leaves, any salt, compound, isomer, derivative or preparation which is a chemical equivalent of any of these substances except decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine; * * * *

**See also** § 54-11-7(A)(4), N.M.S.A. 1953 (Supp. 1975).

**{6}** The defense in this action was that the substance transferred was not coca leaf cocaine, but a manufactured substance which was not the chemical equivalent of coca leaf cocaine. The State's analysis of the substance showed that it was a form of cocaine, but was not conclusive as to whether it was l-cocaine, a derivative of the coca leaf which is an anesthetic and a stimulant, or d-cocaine, which is man-made and may have little or no effect as either a stimulant or anesthetic.

**{7}** The State's first expert chemist incorrectly testified that both d-cocaine and l-cocaine were derived from the coca leaf. However, the State's other expert witness and the defense's expert witness contradicted this testimony. The defense pointed out the erroneous testimony during examination of witnesses and in its closing argument. While the State did not affirmatively impeach its own witness, the error was discovered and contradicted during the trial. This case is therefore distinguishable from those cited by the defense in which the error was not discovered until after the case had been submitted to the jury, **see Giglio v. United States**, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); **Napue v. Illinois**, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), or in which the State failed to correct, before the case went to the jury evidence already known to be false, **see State v. Hogervorst**, 87 N.M. 458, 535 P.2d 1084 (Ct. App.), **cert**. **quashed**, 87 N.M. 457, 535 P.2d 1083 (1975). The defense asks us to extend these cases to find reversible error in the prosecutor's failure to affirmatively rebut the incorrect testimony of one of its witnesses even though another prosecution witness corrected the erroneous testimony and the defense extensively pointed out the error. We decline to go so far. Broad discretion in the admission or exclusion of expert evidence will be sustained unless manifestly erroneous. **Sanchez v. Safeway Stores, Inc**., 451 F.2d 998 (10th Cir. 1971). The trial court was faced with conflicting expert testimony. We cannot require a trial court to take judicial notice of whatever facts are necessary to prove the validity of one expert's testimony in order to strike the other expert's erroneous testimony. Accordingly, we hold that the trial court's refusal to strike this testimony was not manifestly erroneous.

**C.**

**{8}** The Court of Appeals held that consideration of the incorrect testimony resulted in a failure of proof on some of the elements of the crime charged. In a criminal prosecution the State has the burden of proving each element of the offense charged beyond a reasonable doubt.

**See Jackson v. Virginia**, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); **State v. Carter**, 93 N.M. 500, 601 P.2d 733 (Ct. App.), **cert. denied**, 93 N.M. 683, 604 P.2d 821 (1979). In deciding if the State has met its burden we view the evidence in the light most favorable to the jury's verdict and resolve all conflicts and indulge all permissible inferences in favor of this verdict. **State v. Aubrey**, 91 N.M. 1, 569 P.2d 411 (1977); **State v. Carter**, **supra**.

**{9}** A conviction for trafficking in a controlled substance can be sustained by circumstantial evidence. **See State v. Burrell**, 89 N.M. 64, 547 P.2d 69 (Ct. App. 1976). From the evidence presented at trial regarding the circumstances in which the transaction occurred the jury could properly draw the inference that cocaine was involved, even without the incorrect testimony.

**{10}** We reverse the Court of Appeals as to the first trial and remand the case to them for consideration of the remaining issues raised in the defendant's appeal.

**II.**

**{11}** The basis for reversal in the second trial (on all the remaining counts) was the destruction of the evidence. The evidence was destroyed when the Bernalillo County District Attorney's office erroneously included it in a list of evidence no longer necessary for preservation. Neither the defendant's failure to appear nor the subsequent disappearance directly caused the destruction of the evidence. The question presented therefore is what sanctions will be applied against the State for its failure to preserve evidence.

**{12}** In **United States v. Miranda**, 526 F.2d 1319 (2d Cir. 1975), **cert**. **denied**, 429 U.S. 821, 97 S. Ct. 69, 50 L. Ed. 2d 82 (1976), the Second Circuit undertook careful review of federal cases in which the question of applying sanctions for loss of evidence arose. The defendant in that case sought to suppress testimony as to a certain conversation, a tape recording of which had been lost by the prosecution. The court held that the loss was merely inadvertent or negligent, and that the defense was not so greatly prejudiced by the unavailability of the recording at trial as to require the imposition of sanctions against the Government.

> In a criminal case, the Government plainly has the obligation to make available to the defense evidentiary material in its possession which is disclosable under the due process safeguards of **Brady v. Maryland**, 373 U.S. 83, [83 S. Ct. 1194, 10 L. Ed. 2d 215] (1963).* * * *
>
> If the Government fails to carry out that obligation, a serious question arises as to whether such failure calls for the imposition of sanctions against the Government. Whether or not sanctions for nondisclosure should be imposed depends in large measure upon the extent of the Government's culpability for failure to make disclosable material available to the defense, on the one hand, weighed against the amount of prejudice to the defense which resulted, on the other.

**Id**. at 1324 (citations and footnote omitted).

**{13}** The court mentioned its earlier decision in **United States v. Augello**, 451 F.2d 1167 (2d Cir. 1971), **cert. denied**, 405 U.S. 1070, 92 S. Ct. 1518, 31 L. Ed. 2d 802 (1972), where it refused to order suppression of testimony concerning a conversation a tape of which had been destroyed. The court had relied on the first of the **Bryant** cases, **United States v. Bryant**, 439 F.2d 642 (D.C. Cir. 1971)(Bryant I); **United States v. Bryant**, 448 F.2d 1182 (D.C. Cir. 1971) (Bryant II). Those cases applied a pragmatic balancing approach, requiring the district court to

> Weigh the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at the trial in order to come to a determination that will serve the ends of justice.

439 F.2d at 653. The convictions in those cases were affirmed, after applying this balancing test, although the negligence of the agent was "regrettably great." However, the **Bryant** court specified that in future cases it would require rigorous and systematic rules for evidence preservation, and would examine the Government's observance of these rules.

**{14}** The **Miranda** court summarized its review of cases from other circuits as follows:

> Other circuits have dealt with the loss of disclosable evidence by the Government on a case-by-case basis, and have refused to impose sanctions where the loss was inadvertent and not deliberate or in bad faith, and there was not such prejudice to the defendant as to deny him a fair trial. **See United States v. Love**, 482 F.2d 213 (5th Cir. 1973); **United States v. Sewar**, 468 F.2d 236 (9th Cir. 1972), **cert. denied**, 410 U.S. 916, 93 S. Ct. 972, 35 L. Ed. 2d 278 (1973); **United States v. Shafer**, 445 F.2d 579, 581-82 (7th Cir.), **cert. denied**, 404 U.S. 986, 92 S. Ct. 448, 30 L. Ed. 2d 370 (1971); **United States v. Rojas**, 502 F.2d 1042, 1044-45 (5th Cir. 1974). **See also United States v. Augenblick**, 393 U.S. 348, 89 S. Ct. 528, 21 L. Ed. 2d 537 (1969), cited in **United States v. Augello**, **supra**, where the Supreme Court indicated that while sanctions should be imposed on the Government for bad faith suppression of evidence, they are not appropriate where the loss was in good faith and earnest efforts had been made to find the evidence, once its loss was discovered.

526 F.2d at 1327.

**{15}** These cases are are well reasoned and persuasive.

**{16}** New Mexico has adopted a three-part test to determine whether deprivation of evidence is reversible error. It was first stated in **State v. Lovato**, 94 N.M. 780, 617 P.2d 169 (Ct. App. 1980), as follows:

1) The State either breached some duty or intentionally deprived the defendant of evidence;

2) The improperly "suppressed" evidence must have been material; and

3) The suppression of this evidence prejudiced the defendant.

**Id**. at 782, 617 P.2d at 171. **See also State v. Duran**, 96 N.M. 364, 630 P.2d 763 (1981); **Trimble v. State**, 75 N.M. 183, 402 P.2d 162 (1965); **Chacon v. State**, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975). The purpose of the three-part test is to assure that the trial court will come to a determination that will serve the ends of justice. We consider the three-part test appropriate to a proper resolution of the question presented here. We do not construe the test to exclude the results of every test based on evidence which is no longer available. For example, where the evidence is used up during testing, a defendant is only able to cross-examine the State's witnesses. **Jamison v. State Racing Commission**, 84 N.M. 679, 507 P.2d 426 (1973). Thus if the substance in the present case had been used up during testing, the State would not have breached any duty, and there would have been no due process violation. Also, where material is destroyed before its significance as evidence is realized, the defendant's inability to inspect or test does not deny him due process. **See State v. Stephens**, 93 N.M. 368, 600 P.2d 820 (1979).

**{17}** Lovato, **Trimble**, and **Chacon** are each distinguishable from the present case. Chouinard essentially based his defense on the State's inability to prove that the substance he sold was l-cocaine. He did not contradict the State's presentation of the circumstances of the various transactions, nor did he attempt to explain the source of the substance or present any other evidence to show it was d-cocaine. During the trial, defense counsel carefully and thoroughly pointed out inconsistencies and apparent incompetence on the part of the State's expert witnesses. The jury was fully aware of the destruction of the evidence and of the possibility that further tests

would have revealed that the substance was d-cocaine. However, considering all the evidence before it, and not just the test results, the jury found Chouinard guilty.

**{18}** Lovato, **supra**, dealt with the invocation of a statutory presumption of guilt based on a blood alcohol test. Retesting could have made invocation of the presumption improper. This is significant because it appears that no other evidence was presented on the question of the defendant's intoxication. In the present case, the test results were not so determinative of guilt. **Lovato** also presented the court with an impermissible procedure for evidence preservation. In that case, there were no systematic rules to reasonably assure preservation of evidence. A court can hardly uphold such manifest indifference to proper law enforcement. The present case does not present such a situation since acceptable preservation procedures existed.

**{19}** Lovato cited **Chacon** and **Trimble**, **supra**, for the proposition that "[n]o different standard applies because the nondisclosure is negligent rather than deliberate." **Chacon**, **supra**, at 199, 539 P.2d at 219.

**{20}** Chacon, **supra**, presented a situation where the jury, and the defendant, were unaware during the trial of the prosecution's failure to disclose relevant evidence. This presented a question significantly different from the case at hand, where the destruction of evidence was fully presented to the jury for their consideration.

**{21}** Trimble, **supra**, was a response to wholly inappropriate police conduct. There, evidence not necessary to the prosecution was taken, damaged and lost. The prosecutor apparently contradicted himself at trial as to the very existence of the lost items. The defendant specifically identified the contents of the lost evidence. Here, however, Chouinard did not say what the substance was, only that it might have been something other than illegal cocaine. There is no indication of prosecutorial misconduct at trial. The evidence preservation procedures followed by the district attorney were systematic and reasonably assure preservation of evidence.

**{22}** This case thus presents a significant question of first impression. Even with the best of procedures, evidence may sometimes be lost as it was here. In such instances, what should be done?

**{23}** Where the loss of evidence is not known during the trial, as in **Chacon**, **supra**, and the evidence is material and its absence prejudicial to the defendant, the only remedy is a new trial incorporating the lost evidence once it is found. Where the loss is known prior to trial, there are two alternatives: Exclusion of all evidence which the lost evidence might have impeached, or admission with full disclosure of the loss and its relevance and import. The choice between these alternatives must be made by the trial court, depending on its assessment of materiality and prejudice. The fundamental interest at stake is assurance that justice is done, both to the defendant and to the public.

**{24}** We have cited **Chacon**, **supra**, as saying that no different standard applies because the nondisclosure is negligent rather than deliberate. The good faith of the state is irrelevant when the evidence lost is material and prejudicial to the accused. But, where the State shows it did not act in bad faith, the defendant must show materiality and prejudice.

**{25}** Determination of materiality and prejudice must be made on a case-by-case basis. The importance of the lost evidence may be affected by the weight of other evidence presented, by the opportunity to cross-examine, by the defendant's use of the loss in presenting the defense, and other considerations. The trial court is in the best position to evaluate these factors.

**{26}** Applying this analysis here, we conclude that the trial judge did not abuse his discretion as a matter of law. In the posture of this case, we cannot say that there is a realistic basis, beyond extrapolated speculation, for supposing that availability of the lost evidence would have undercut the prosecution's case. Chouinard made no assertion and introduced no evidence that the substance was other than what the State said it was. His only defense was that the State's tests

were insufficiently conclusive. In light of all the circumstances, the jury found otherwise.

**{27}** Accordingly, we reverse the Court of Appeals as to the second trial and reinstate the judgment of the district court.

**{28} BE IT SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, Dissenting**

**WILLIAM RIORDAN,**
**Justice, Not participating**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-100**

**Filing Date: September 30, 1981**

**Docket No. 13,386**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**EUGENE NELSON,**

**Defendant-Appellant.**

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY,**
**Gerald D. Fowlie, District Judge.**

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Jeff Bingaman, Attorney General
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for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Nelson appeals from an habitual offender proceeding which identified him as having prior felony convictions and which imposed two concurrent life sentences upon his underlying two-count felony conviction. On the first day of the proceeding, a hearing was held on Nelson's competency. Written and oral expert opinions were presented. The evidence conflicted as to his competency, but the most recent evidence, presented orally, characterized Nelson as incompetent. The court determined that Nelson was competent for purposes of the proceeding. Nelson unsuccessfully sought a jury determination of the issue under Rule 35(b) New Mexico Rules of Criminal Procedure, N.M.S.A. 1978 (Repl. Pamp. 1980), claiming that a reasonable doubt had been raised. He also objected to the introduction of certain evidence. These alleged errors are the basis for this appeal.

**I.**

**{2}** This case requires us to carefully examine certain aspects of the habitual offender proceeding, Sections 31-18-17 through 31-18-20, N.M.S.A. 1978 (Repl. Pamp. 1981). Specifically, we must examine the applicability to such proceedings of Rule 35(b), which sets forth the procedure for raising and determining competency, and related case law.

**{3}** The habitual offender procedure was established as a means of determining whether a person convicted of a noncapital felony has incurred one or more prior felony convictions arising out of a separate transaction or occurrence. If found guilty, the sentence imposed for the immediate conviction is increased by a specified term, depending upon the number of prior convictions. § 31-18-17, N.M.S.A. 1978 (Repl. Pamp. 1981). Once charged as an habitual offender, the defendant must respond by stating whether he is the same person as charged in the information. If he denies the charge or refuses to answer, a jury is empaneled to inquire whether the offender is the same person. If the jury so finds, the increased sentence is mandatory. § 31-18-20.

**{4}** The habitual offender statute has been held to be constitutional. **State v. James**, 85 N.M. 230, 511 P.2d 556 (Ct. App.), **cert**. **denied**, 85 N.M. 228, 511 P.2d 554 (1973). The statute does not create a new offense but merely provides a proceeding for enhancing sentences. However, the

charge is serious and the potential for prejudice against unrepresented defendants is so great that a right to counsel has been recognized. **Johnson v. Cox**, 72 N.M. 55, 380 P.2d 199, **cert**. **denied**, 375 U.S. 855, 84 S. Ct. 117, 11 L. Ed. 2d 82 (1963). We have held that the habitual offender proceeding is a sentencing procedure and not a trial of an offense. **State v. James**, 94 N.M. 604, 614 P.2d 16 (1980). Yet the proceeding possesses several characteristics of a trial (right to counsel, right to a jury, rules of evidence, etc.). The statute itself refers to the defendant's "right to be **tried** as to the truth" of the allegations of the information. § 31-18-20(A)(2) (emphasis added).

**{5}** A defendant's right to have his competency determined by a jury rather than by the court depends on the nature of the proceeding. Before making a final determination as to the nature of the habitual offender proceeding, however, it is necessary to examine and perhaps clarify the law as to the determination of competency.

**{6}** We begin by quoting Rule 35(b)(2), which applies only to competency to stand trial.

> (2) **Determination**. The issue of the defendant's competency to stand trial shall be determined by the judge, unless the judge finds there is evidence which raises a reasonable doubt as the [to] the defendant's competency to stand trial.
>
> (i) If a reasonable doubt as to the defendant's competency to stand trial [sic] is raised prior to trial, the court, without a jury, may determine the issue of competency to stand trial; or, in its discretion, may submit the issue of competency to stand trial to a jury, other than the trial jury.
>
> (ii) If the issue of the defendant's competency to stand trial is raised during trial, the trial jury shall be instructed on the issue. If, however, the defendant has been previously found by a jury to be competent to stand trial, the issue of the defendant's competency to stand trial shall be submitted to the trial jury only if the court finds that there is evidence which was not previously submitted to a jury which raises a reasonable doubt as to the defendant's competency to stand trial.

**{7}** It is clear that any right to a jury determination arises only upon establishment of a reasonable doubt as to the defendant's competency to stand trial. If the doubt is raised before trial, there is no right to a jury determination, although the judge may, in his discretion, permit a jury other than the trial jury to determine competency. If the issue is raised during the trial, the defendant has the right to have the trial jury determine the issue (unless a previous jury found him competent). When the issue is raised after the trial, there is no right to a jury determination. **State v. Sena**, 92 N.M. 676, 594 P.2d 336 (Ct. App. 1979).

**{8}** The defendant here asserts that this scheme is irreconcilable with case law, specifically with **State v. Noble**, 90 N.M. 360, 563 P.2d 1153 (1977). Judge Wood discussed this problem in **Sena**, **supra**, at 679-680, 594 P.2d 336:

> **Territory v. Kennedy** [15 N.M. 556, 110 P. 854 (1910)], and **State v. Folk**, [56 N.M. 583, 247 P.2d 165 (1952)], point out that the right to a jury trial on the question of competency to stand trial depended on the 1855-56 statute [Laws 1855-56, page 106; codified at § 41-13-3, N.M.S.A. 1953 (Repl. Vol. 1964), repealed by 1967 N.M. Laws, ch. 231, § 1], which is quoted in **State v. Folk**, [ **supra**]. The statute is not a model of clarity. **State v. Noble** [ **supra**] and **State v. Chavez** [88 N.M. 451, 541 P.2d 631 (Ct. App. 1975)], were of the view that a right to a jury trial existed on the issue of competency to stand trial, if by pretrial motion, there was reasonable doubt as to the defendant's competency to stand trial. Rule of Crim. Proc. 35(b)(2)(i), as amended in 1978, takes a more restricted view. That rule permits the competency to stand trial issue, when presented by pretrial motion, to be decided by the trial court or, in the trial court's

> discretion, by a jury. We cannot reconcile the amended rule with **State v. Noble**, [ **supra**], and **State v. Chavez**, [ **supra**]. We recognize, however, that the 1855-56 statute is ambiguous, requiring interpretation, and that language in **Territory v. Kennedy**, [ **supra**], supports the approach taken in the amended rule. [ **See** 15 N.M. at 559, 110 P. at 855.] See also language in connection with the motion for rehearing in **State v. Upton** [60 N.M. 205, 290 P.2d 440 (1955)].
>
> Although amended Rule of Crim. Proc. 35(b)(2)(i) is not applicable in this case, the approach taken by the rule indicates a restrictive approach to the right to a jury trial on the issue of competency to stand trial when the issue is presented for decision prior to trial. Such an approach is consistent with **In re Smith**, [25 N.M. 48, 176 P. 819, (1918)], which indicated there was no right to a jury trial on the issue of competency to be sentenced. Consistent with these views, we hold there is no right to a jury trial on the issue of competency to stand trial when the issue is first raised, as in this case, at the sentencing hearing.

**{9}** The common law rule has been stated as follows:

> If the court, at any of these stages, has a reasonable doubt whether the defendant is so mentally disordered, it should suspend the criminal proceedings and hold an inquiry on the matter, with or without a jury. * * *

H. Weihofen, Insanity As a Defense In Criminal Law 333 (1933), quoted in **State v. Folk**, **supra**, 56 N.M. at 591, 247 P.2d at 170.

**{10}** This common law rule applies in New Mexico, subject to the modification required by the 1855-56 statute which was in effect at the time our Constitution was adopted. After carefully reviewing the cases, and in light of Rule 35(b), we hold that a restrictive approach is appropriate. Accordingly, the right to have a jury determination of competency attaches only where competency to stand trial is at issue and when a reasonable doubt is raised after the trial has begun but before it has ended. In all other instances, the judge has discretion to make the determination himself or to submit the issue to a non-trial jury.

**{11}** In the present case, the competency hearing was initiated on the first day of the habitual offender proceeding. The State correctly points out that Rule 35(b) refers only to competency to be tried. Questions as to sentencing competency are always decided by a court alone regardless of when the question is raised. **In re Smith**, **supra**; **State v. Sena**, **supra**. We must therefore determine whether this proceeding is a "trial" in the constitutional sense.

**{12}** We begin by noting that the habitual offender proceeding did not exist at the time of the adoption of our Constitution. It is purely a statutory proceeding. Since the legislature did not specify the manner in which competency should be determined in this proceeding, we are reluctant to enlarge the reach of the proceeding by requiring a jury determination unless the Constitution compels such a result. We have indicated that the constitutional right to a jury determination of trial competency should be limited to the specific right recognized in Rule 35. We recognize that the habitual offender proceeding has many of the characteristics of a "trial." However, its purpose is limited to very narrow issues. It does not involve a determination of guilt of any offense, but only the limited questions posed in the statute.

**{13}** Considering all of these characteristics, we conclude that the habitual offender proceeding is not a trial in the constitutional sense for purposes of making a determination as to competency. Rule 35(b) does not apply to such proceedings.

**{14}** The defendant was not entitled to have the question of competency determined by a jury.

**{15}** Much of the defendant's brief discusses the evidence presented to the court below as

to the defendant's competency. The defendant cites **State v. Lopez**, 91 N.M. 779, 581 P.2d 872 (1978), for the proposition that a defendant need only show incompetency by a preponderance of the evidence. **Lopez**, however, does not apply here. Under **Lopez**, if at trial the defendant shows incompetency by a preponderance of the evidence, its effect is merely to require that the question of competency be submitted to the jury. Where there is no right of jury determination of competency, as here, the proper standard of review of the judge's determination is whether it is supported by substantial evidence. **Id**. The evidence presented to the court was conflicting, and we cannot hold as a matter of law that the trial judge abused his discretion in finding that the defendant was competent. Accordingly, we affirm.

**II.**

**{16}** The defendant argues that it was prejudicial for the court to admit in evidence documents relating to five informations, related to one prior conviction, but which had been nolle prosequied. He asserts that this evidence was irrelevant and could have confused and prejudiced the jury. The State responds that these five charges were an integral part of the resulting conviction because they showed why the defendant pleaded guilty to a lesser included charge. In addition, other evidence referring to these charges was not challenged by the defendant.

**{17}** We are not persuaded that the State needed to introduce this evidence to prove identity and fact of prior conviction. At the same time, we do not see any possible harm to the defendant. The jury's participation in these proceedings is quite narrow and introduction of these charges could not have biased the jury's limited fact-finding duty.

**{18}** Judgment is affirmed.

**{19} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-119**

**Filing Date: November 19, 1981**

**Docket No. 13,145**

**MANUEL PORTILLO,**

**Petitioner,**

**v.**

**IDA SHAPPIE AND RENE SHAPPIE,**

**Respondent.**

**Original proceeding on Certiorari.**

White, Koch, Kelly & McCarthy
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Santa Fe, New Mexico

for Petitioner.

Solomon, Roth & VanAmberg
Ronald J. VanAmberg
Santa Fe, New Mexico

for Respondent.

## OPINION

**PAYNE, Justice.**

**{1}** The plaintiff-appellant, Manuel Portillo, brought suit in district court to have an equitable lien imposed against real estate whose current titleholders are the defendants-appellees, Ida and Rene Shappie. The plaintiff based his claim on his community property interest in the realty which had previously been the separate property of his deceased wife, Frances Montano. The trial court entered judgment for plaintiff, imposing an equitable lien in the amount of $2,800. The plaintiff appealed to the Court of Appeals. Two judges agreed on the measure of recovery but disagreed on the actual amount proved at trial. We granted certiorari to determine the proper measure of recovery.

**{2}** When the plaintiff married Frances Montano in 1950, Montano owned the realty in question as her separate property. The only improvement on the property at that time was a 400-square-foot, two-room adobe structure. During their 26 years of marriage, the couple resided continuously on the property. The plaintiff invested community funds and his own labor to add substantial improvements to the property, doubling the size of the original structure and building a detached apartment. A year before her death, Montano executed a warranty deed granting the property to her daughter, Ida Shappie. Ida and her daughter, Rene Shappie, now hold the property as cotenants.

**{3}** The trial court found, based on uncontradicted testimony of a professional real estate appraiser, that on the date of Montano's death in 1976 the value of the real property, unimproved by community funds and labor, was $8,500, and that on the same date the value of the property as improved by community funds and labor was $33,400. The court also found that, although plaintiff kept no records of expenses or hours of labor invested in making the improvements, their reasonable value was $2,800. The court awarded plaintiff a lien limited to that amount.

**{4}** We decide what is the proper measure of the community's recovery when the community has invested its labor and funds in improving the separate realty of one of the spouses. Defendants argue that the district court's award was the proper measure, while plaintiff argues that the community is entitled to the enhanced property value directly attributable to the community investment. We hold that the community is not limited to a lien in the amount of its funds and labor expended in making the improvements.

**I.**

**{5}** Defendants rely on several New Mexico cases in arguing that the plaintiff's lien is limited to the amount of funds and labor the community expended in making the improvements to the property. However, none of these cases decided the precise issue presented here.

**{6}** In **Laughlin v. Laughlin**, 49 N.M. 20, 155 P.2d 1010 (1944), this Court considered the status of the proceeds of farming operations conducted by the husband on land that was the wife's separate property. We held that the rule of apportionment, "that accumulations resulting from a combination of the use of separate property of a spouse with the labor, skill and industry of one or both of the members of the community should be equitably divided between the two," **id**. at 27, 155 P.2d at 1014, as established by the Court in **Katson v. Katson**, 43 N.M. 214, 89 P.2d 524 (1939), applies to rents, issues and profits derived from the operation and management of realty as well as of personalty. The **Laughlin** court did state that "[t]he burden was upon appellant to establish the amount of community funds that were used in paying the mortgage debts and in making improvements on the appellee's farm before a lien (if he is entitled to a lien to secure his reimbursement) could be impressed." **Laughlin**, **supra**, at 36, 155 P.2d at 1020. However, the Court noted that the amount of community interest in the proceeds of the sale of the crops was not presented for review. Therefore, any language regarding the amount of a community lien based on improvements to realty was unnecessary to the decision.

**{7}** The Court's treatment of the value of the community lien in **McElyea v. McElyea**, 49 N.M. 322, 163 P.2d 635 (1945) was likewise unnecessary. There, the issue before the Court was the status of the title to separate realty on which the community had made improvements and mortgage payments. The Court held that the property remained separate, stating:

> It is not claimed that the community is entitled to a lien for funds advanced in payment of these mortgage debts, but it is asserted that appellant is **an owner of an interest in the land** * * *. If any part [of the mortgage debt] was subsequently paid by the community, or if the land was subsequently improved with community funds, then appellee became indebted to the community in the amount so expended. But the community did not by reason thereof, become part owner of the property. It belonged to appellee from the time it was purchased. **Laughlin v. Laughlin,** supra.

**Id**. at 325-26, 163 P.2d at 637. The statement regarding the amount of the debt to the community is dictum, as that question was not presented.

**{8}** The only question in **Campbell v. Campbell**, 62 N.M. 330, 310 P.2d 266 (1957), was whether substantial evidence supported the trial court's finding that the family residence was community rather than separate property. In holding that the residence was not community property, the Court gratuitously cited to the dictum from **Laughlin, supra**, stating that "[w]hile the community would have a right to be reimbursed for community funds expended in improving the separate property, the proof on the point is not sufficient to establish any liability." **Campbell, supra**, at 362, 310 P.2d at 287.

**{9}** The amount of the community lien against a spouse's separate property was at issue for the first time in **Galloway v. White**, 64 N.M. 470, 330 P.2d 553 (1958). However, the question was not whether the community claim was limited to the amount of funds and labor expended, but merely whether there was substantial evidence to support the trial court's finding that the community was entitled to a lien based on a $7,170 expenditure for improvements to the separate realty. The Court cited the **Laughlin** dictum that "[i]t is incumbent on the spouse claiming a lien on the other's separate property for improvements placed thereon by community funds to establish the amount of such funds." **Id**. at 472, 330 P.2d at 554. The Court noted that the claimant had introduced evidence on both the cost of the improvements and the increased value of the

realty resulting from those improvements, but did not deal with the trial court's handling of the evidence on increased value. The Court merely held that the trial court's finding was based on substantial evidence.

**{10}** The Supreme Court also considered whether substantial evidence supported the trial court's finding of a community lien against a spouse's separate property in **Michelson v. Michelson**, 89 N.M. 282, 551 P.2d 638 (1976). The trial court had awarded the wife a lien against the family residence, which was the husband's separate property, in the amount of $8,110, based on its findings that

> [t]he only separate funds of defendant [husband] used in the home was [**sic**] the $14,000 paid for the lot upon which the home is constructed. The value of the home exceeds the original land price and the mortgage balance by $32,440.00. Fifty (50%) percent of this value is attributable to the community expenditures of time, effort and money and the other fifty (50%) percent is attributable to the normal appreciation of property. The community has a lien against the home in the amount of $16,220.00.

**Id**. at 288, 551 P.2d at 644. The Supreme Court upheld the trial court's finding as to the wife's lien, noting that the source of the $35,500 spent on improvements was not proved to be either community or separate funds, that the community had made several mortgage payments and pledged its credit to refinance the mortgage, and that "[t]he parties expended considerable time and effort in making improvements." The Court, however, made no ruling on the propriety of the amount of the lien because "[t]he parties agreed that if a community lien was found to exist against the home, the wife's interest would be $8,110." **Id**. Although the Supreme Court cited **Laughlin, supra**, and **McElyea, supra**, it did so only to support its finding of substantial evidence of community expenditure allowing the imposition of a lien.

**{11}** Our examination of the relevant New Mexico cases indicates that the issue of the measure of a community lien under the circumstances presented in the instant case has never been decided. References to the amount of such a lien have been dicta. Accordingly, we must look to general principles of community property law for guidance.

**II.**

**{12}** Separate property consists of all property brought to the marriage by either spouse or acquired during marriage by gift, bequest, devise or descent, together with its rents, issues and profits. Community property consists of all property "acquired by either or both spouses during marriage, which is not separate property," and its rents, issues and profits. § 40-3-8, N.M.S.A. 1978. Those definitions have been in effect since 1907. **See** R. CLARK, COMMUNITY OF PROPERTY AND THE FAMILY IN NEW MEXICO 13-14 (1956) [hereinafter cited as R. CLARK, COMMUNITY OF PROPERTY]; Bingaman, **The Community Property Act of 1973: A Commentary and Quasi-Legislative History**, 5 N.M.L. Rev. 1, 3-9 (1974).

**{13}** The courts of New Mexico have long struggled with the meaning of "rents, issues and profits" of property in the context of community investments of funds and labor in the separate income-producing property of one of the spouses. The Supreme Court first established the rule of apportionment of income or increase in value in **Katson v. Katson**, **supra**, when it recognized that the community owns the earning power of each of the spouses, and that when that earning power is used for the benefit of one's separate property "the portion of the earnings attributable to his personal activities and talent is community property." **Id**. at 217, 89 P.2d at 526 (citation omitted). We have dealt with apportionment of income in a variety of situations, some of which involved difficult fact patterns. **See Corley v. Corley**, 92 N.M. 716, 594 P.2d 1172 (1979); **Hayner v. Hayner**, 91 N.M. 140, 571 P.2d 407 (1977); **Michelson v. Michelson**, **supra**; **Gillespie v. Gillespie**, 84 N.M. 618, 506 P.2d 775 (1973); **Moore v. Moore**, 71 N.M. 495, 379 P.2d

784 (1963); **Conley v. Quinn**, 66 N.M. 242, 346 P.2d 1030 (1959); **Galloway v. White, supra; Campbell, supra; McElyea, supra; Laughlin supra**. We have never adopted one single method of apportionment of income, although many are possible. **See** King, **The Challenge of Apportionment**, 37 Wash. L. Rev. 483 (1962). Instead we have used a "substantial justice" standard. In **Laughlin, supra**, we stated that "[e]ach case will depend upon its own facts * * *. Mathematical exactness is not expected or required, but substantial justice can be accomplished by the exercise of reason and judgment in all such cases." **Id**. at 35, 155 P.2d at 1019. The basic rule we have applied, and will continue to apply, is that "[t]he increase in value of separate property produced by natural causes or essentially as a characteristic of the capital investment is separate property." **Campbell v. Campbell, supra**, at 357, 310 P.2d at 284 (citation omitted). Beyond that, we have looked at many other factors, including community payment of mortgages, net profits, reinvestment in improvements, amount of income withdrawn by parties for personal use, and rates of interest on capital investment. **See Hayner v. Hayner, supra**.

**{14}** We have repeatedly stated, however, that the proper apportionment in any one case depends on the facts presented to the trial court. With this in mind, we return to the issue of apportionment, if any, of appreciation of separate property resulting from investment of community funds and labor.

## III.

**{15}** Although our community property scheme is statutory, it "was modeled after the civil law of Spain and Mexico and those laws will be looked to for definitions and interpretations." **McDonald v. Senn**, 53 N.M. 198, 201, 204 P.2d 990, 991 (1949) (citations omitted). Under the civil law, any intrinsic increase in value of the separate property of a spouse during marriage was separate. But any improvement to or appreciation of that property which resulted from use of community labor or funds went to the community, as did all the fruits and income of the separate property accruing during the marriage. The separate property owner retained ownership of any improvements, but

> the value of the improvements were shared, in the sense that the other spouse owned a half interest in the value of such improvements, or was entitled to reimbursement to the extent thereof. The valuation of the expenses or improvements, it has been said, was to be made on the basis of the time at which the expense was incurred or the improvement made, and not on the greater value of the property resulting from the expenditure or improvement. [Footnotes omitted.]

1 W. De Funiak, Principles of Community Property § 73, at 188 (1943). Apparently, there was a distinction made in valuation of the community's interest between "improvements that related to sowing or planting on separate land of a spouse and improvements that related to the erection of buildings on the land," **id**., since

> "the improvements made of plantation, building, etc., are divided, with the difference that if the planting should be done in the particular land of either of the spouses, it shall be divided, deducting first the value of the land before it was planted, and giving or allowing that to the owner; but if a house has been built, or an oven or a mill has been erected on the land of one of them, the person on whose land the building or erection is made, shall have the benefit of it, and shall pay to the other the moiety [half] of what the building cost." Asso and Manuel, Institutes of the Civil Law of Spain, Book I, Title VII, Cap. 5, § 2.

**Id**. at 188-89 n. 66.

**{16}** While the community property law of New Mexico conforms for the most part with that of Spain and Mexico, it differs in one major respect: The rents, issues and profits of separate property belong to the separate property owner

and not, as was true under the civil law, to the community. This classification of such rents, issues and profits as separate property, termed by some as the "American rule," W. Reppy & W. De Funiak, Community Property in the United States 248 (1975), derived from the influx into the Southwest of lawyers trained in the common law. **See** Bartke, **Yours, Mine and Ours—Separate Title and Community Funds**, 21 Baylor L. Rev. 137, 139-41 (1969). The American rule was the progeny of the Married Women's Property Acts, which derived from "the commendable desire to allow married women in the common law states to own and control their own property. . . . However, under the community property system a married woman always owned her separate property." Clark, **New Mexico Community Property Law: The Senate Interim Committee Report**, in Comparative Studies in Community Property Law 81, 96 (J. Charmatz & H. Daggett eds. 1955) [hereinafter cited as Clark, **Senate Committee Report**]. Thus, the American rule corrected no injustices in the community property system, and instead "probably engendered the greatest confusion and inequities to be found in the system." **Id**. at 97. **See Laughlin v. Laughlin, supra**, at 26-27, 155 P.2d at 1014; **see also** R. Clark, Community of Property, **supra**, at 13 n. 50. The decisions of the New Mexico Supreme Court regarding apportionment of income and profits from separate property have done much to correct these inequities and return us to the Spanish emphasis on community of property and of use rather than ownership of separate property. **See** Clark, **Senate Committee Report, supra**, at 96-97.

**{17}** As noted previously, the Spanish rule apparently was that when community funds and labor produced structural improvements to separate realty that increased the value of that realty, the community was entitled to be paid what the building cost rather than the increased value resulting from the improvements. The basic philosophy behind Spanish community property law, however, was the view of the family as an economic partnership. **See generally** L. Robbins, Community Property Laws With Translations of the Commentaries thereon of Matienzo, Azevedo & Gutierrez (1940). Another goal of the Spanish law was protection of the family property, and "[t]he Spanish law's recognition of separate property seems to have been mainly for the purpose of returning such property to the family line of the particular spouse. . . . There were express limitations on the testamentary right of a spouse to dispose of separate property beyond the spouse's immediate family." Clark, **Senate Committee Report, supra**, at 97 (quoting Clark, **Matrimonial Law in New Mexico and the Western United States**, in 2 Matrimonial Property 89 (1955)). Although New Mexico law still furthers the concept of the family as an economic partnership, we do not so vigorously protect the property of the family and restrict testamentary power. **See** § 45-3-101, N.M.S.A. 1978. Thus, since our emphasis is different from that of Spanish law, we do not feel bound to adhere to the Spanish rule on improvements to realty, which furthered the limitation on succession. Instead, we will adhere to our long-standing rule of doing substantial justice, based on the facts of each case.

**IV.**

**{18}** In the case at bar, uncontroverted evidence established that plaintiff Portillo, using community funds and his own labor, which was community property, **Katson v. Katson, supra**, added substantial improvements to the realty which was the separate property of his wife. Testimony of the real estate appraiser established that the value of the realty, unimproved by community funds and labor, was $8,500 on the date of Montano's death. That testimony also established that the value of the property as improved by the community funds and labor was $33,400 on the date of her death. It is clear from this evidence that the difference in the two figures, $24,900, represents increase in value of the realty directly attributable to community funds and labor. It represents the rents, issues and profits of community property, and to deny the community the right to a lien for that amount would do substantial injustice under the facts of this case. Awarding plaintiff a mere $2,800, rather than his share of the full community interest of $24,900, would not reflect the real value of the community investment, and would

give the separate property owners far more than the value of their naturally increased property ($8,500). As one commentator has noted,

> tying the recovery in every case to the amount of money spent may produce results which, depending on extraneous circumstances, would be unfair either to the separate estate, or to the community, depending on whether the property increased or decreased in value. If the court would treat such expenditures as an equity investment of community funds, rather than a loan, the community would share in the fluctuations of the market, taking both the gains and the losses. In view of the inflationary forces at work in the economy at present, tying the recovery to the amount of expenditure in each case seems grossly unfair to the community.

Bartke, 21 Baylor L. Rev. at 161. This recovery is also logical and consistent with our rule of apportioning income from separate property.

**{19}** We therefore reverse the Court of Appeals and the district court decisions awarding plaintiff a lien in the amount of $2,800, and remand with the instruction to enter a decree awarding him a lien in the amount of his share of the community interest of $24,900.

**{20} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-128**

**Filing Date: December 2, 1981**

**Docket No. 13,624**

**FLORENCE OHL,**

**Petitioner-Appellant,**

**v.**

**THOMAS HENRY OHL,**

**Respondent-Appellee.**

**Appeal from the District Court of Bernalillo County, Rozier E. Sanchez, District Judge.**

Order Amending Opinion December 16, 1982

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for Petitioner-Appellant.

William N. Henderson
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for Respondent-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Petitioner-appellant, Florence Ohl (Wife), petitioned for dissolution of her marriage to respondent-appellee, Thomas H. Ohl (Husband), and requested a property division. After trial, the district court granted the divorce and awarded the parties' residence to Husband as his separate property. Wife appeals, claiming that the court erred in its disposition of the residence.

**{2}** Shortly after the parties were married, Husband executed and delivered to Wife a deed conveying to himself and Wife as joint tenants certain real estate which was his separate property. The court found, based on testimony adduced at trial, that the deed "was a conditional transfer and upon divorce, the only community interest to be divided is a lien for mortgage payments made during marriage," and concluded that the real estate was Husband's separate property. The only issue on appeal is whether the trial court's finding was erroneous.

**{3}** Wife argues that the trial court erroneously based its decision on parol evidence of Husband's intent, in contravention of the long-established rule that "[t]he intention of the grantor must be derived from the language of the instrument of conveyance, and it will not be impeached except to correct or prevent injustice for such reasons as accident, mistake or fraud." **Birtrong v. Coronado Bldg. Corp**., 90 N.M. 670, 672, 568 P.2d 196, 198 (1977) (citations omitted). As the deed in issue was never entered into evidence at trial, and the only evidence regarding the deed was both parties' testimony that it was a quit claim deed granting the realty in joint tenancy, the trial court could hardly have looked solely to the language of the deed. Even if the deed were before the court, the plain meaning of Section 47-1-16, N.M.S.A. 1978, requires us to conclude that the Legislature intended that the court consider parol evidence. The statute provides that a deed conveying property in joint tenancy be conclusive only as against purchasers and encumbrancers for value. Obviously, as to anyone else, other evidence may be relied on to rebut or buttress the prima facie case of joint tenancy. Our practice has long been to look to parol evidence of the grantor's intent and the parties' understanding in determining whether a joint tenancy was created. **See Corley v. Corley**, 92 N.M. 716, 594 P.2d 1172 (1979); **Wiggins v. Rush**, 83 N.M. 133, 489 P.2d 641 (1971); **In re Trimble's Estate**, 57 N.M. 51, 253 P.2d 805 (1953); **Menger v. Otero County State Bank**, 44 N.M. 82, 98

P.2d 834 (1940); **Estate of Fletcher v. Jackson**, 94 N.M. 572, 613 P.2d 714 (Ct. App.), **cert. denied**, 94 N.M. 674, 615 P.2d 991 (1980). Therefore, the trial court did not commit error in basing its decision on parol evidence of Husband's intent.

**{4}** Wife also argues that the deed alone was sufficient to establish the joint tenancy by a preponderance of the evidence. However, we have previously held in reviewing a trial court finding of joint tenancy that a joint tenancy deed alone is insufficient to constitute substantial evidence to uphold the finding in the face of contrary evidence. **See Corley v. Corley**, **supra**. We will not now hold as a matter of law that, in cases involving persons other than those specified in Section 47-1-16, a joint tenancy deed is sufficient to prevail over other evidence of the grantor's intent or the parties' understanding. It is for the trial court and not the reviewing court, to determine whether a proof requirement, or burden of persuasion, has been met. **See Estate of Fletcher v. Jackson**, **supra**. The reviewing court may not pass upon the weight of the evidence. **Pentecost v. Hudson**, 57 N.M. 7, 252 P.2d 511 (1953).

**{5}** With this in mind, we must decide whether the trial court's finding, that the deed conveying a joint tenancy interest in the property was a conditional gift, is supported by substantial evidence. The record contains uncontradicted evidence of the delivery and acceptance of a present gift fully executed. The question, therefore, is one of Husband's donative intent: Was there sufficient evidence to support a finding that Husband intended to give to Wife a joint tenancy conditioned on their continuing to cohabit? Husband testified that he was concerned that Wife have a place to live should he die and that he had told Wife and his lawyer that she would have the joint tenancy as long as they lived together. Although some of his testimony was hearsay, which cannot be conclusive proof on the issue, it still has probative value. **See H.T. Coker Const. Co. v. Whitfield Transp., Inc**., 85 N.M. 802, 518 P.2d 782 (Ct. App. 1974). Since Wife did not object to its admission, the trial court was entitled to consider such testimony. **Id**.; **See Citty v. Citty**, 86 N.M. 345, 524 P.2d 517 (1974). In reaching its decision, the trial court also relied upon circumstantial evidence tending to substantiate Husband's contention that his gift was conditional. We hold that there is substantial evidence in the record to support the trial court's finding. The judgment of the trial court is affirmed.

**{6}** We award appellee costs of this appeal. We also assess an additional $200.00 in attorneys' fees against appellant's counsel for failure to timely notify his opposing attorney that he would not argue the matter at oral argument.

**{7} IT IS SO ORDERED.**

**H. VERN PAYNE, Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**ORDER AMENDING OPINION**

**{8}** This matter coming on for consideration by the Court upon Motion of Appellant for Rehearing, and the Court having considered said motion and being sufficiently advised;

**{9}** NOW, THEREFORE, IT IS ORDERED that the portion of the Opinion of the Court awarding $200.00 as attorney fees be and the same is hereby vacated.

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-130**

**Filing Date: December 10, 1981**

**Docket No. 13,501**

**RON ANDERSON,**

**Plaintiff-Appellee,**

**v.**

**DAIRYLAND INSURANCE COMPANY,**

**Defendant-Appellant.**

**Appeal from the District Court of Bernalillo County, Rozier E. Sanchez, District Judge.**

Farlow, Simone & Roberts
LeRoi Farlow
Albuquerque, New Mexico

for Defendant-Appellant.

Sara J. Powell
Shannon Robinson
Ernesto J. Romero
Albuquerque, New Mexico

for Plaintiff-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Anderson purchased an automobile insurance policy from Dairyland Insurance Company (Dairyland) on July 15, 1977 through an independent agent. Anderson requested three months' coverage. The agent erroneously calculated the premium which was sent with the application to Dairyland. Dairyland recomputed the premium, discovered the error, and issued a policy with a shortened coverage period to comply with the premium paid. The new period extended from July 15 to Sept. 24, 1977. It is uncertain whether Anderson received a copy of the policy with the new period specified, whether he received an expiration notice in September, and whether he received a lapse notice intended for the mortgagee of the vehicle. This lapse notice, allegedly sent on October 12, gives the mortgagee ten days' notice of expiration of coverage. On October 7, 1977, Anderson was injured in a one-vehicle accident. Dairyland paid the mortgagee the value of the truck less a $250 deductible. Dairyland then demanded that Anderson reimburse the company for this payment. Thereafter, Anderson filed suit against Dairyland for payment of his medical expenses and property damage arising from the accident, as well as punitive damages and attorney's fees. Anderson also alleged that after the collision his credit rating was adversely affected by several outstanding medical bills for injuries suffered in the collision. He was required to obtain co-signers on certain loans and was denied credit outright in March 1980. This credit impairment is the basis for a claim of tortious interference with contractual relations.

**{2}** Dairyland denied liability under the policy on grounds that the term had expired. Dairyland further claimed that the medical bills exceeded its alleged liability in any case, and that the credit impairment was due to Anderson's refusal to pay the bills when he was fully capable of doing so. At trial before a jury, the court directed a verdict for Anderson on the insurance contract, finding that Dairyland was estopped from asserting those portions of its defense which arose from the agent's error. The jury awarded Anderson $1,200 for collision, $1,000 for medical coverage, $1,000 for interference with prospective contractual relations, and $10,000 punitive damages. The court also awarded $2,500 attorneys fees.

**{3}** Dairyland appeals the entire judgment. Anderson appeals the award of attorneys fees as inadequate.

**I.**

**{4}** We have previously held that the doctrine of estoppel may apply in situations where an insured relies on the representations of the insurer's agent. **Pribble v. Aetna Life Insurance Company**, 84 N.M. 211, 501 P.2d 255 (1972); **see also King v. Travelers Insurance Company**, 84 N.M. 550, 505 P.2d 1226 (1973). Those cases involved a different type of fact situation but set forth the basis for the rule of law we apply here. Insurance policies are notoriously complex. Contracts for insurance are often entered into based upon an agent's representations and without having a policy to examine until later. Estoppel is a proper theory for preventing abuses arising from misrepresentations and mistakes but it should not be applied to prevent an insurer, having discovered an error, from correcting the error where the insured is adequately and fairly notified of the change.

**{5}** The facts in the present case raise questions as to whether Anderson ever received a copy of the policy or other documents, and whether reasonable examination of such would have alerted him to the reduced period. Facts were asserted in this case from which a jury could find that Anderson did receive such documents and that reasonable examination of them would have alerted him to the reduced period. Of course, the reasonable reliance on the agent's representations is a factor in determining the extent of Anderson's duty to examine. **See Pribble**, **supra**. If a jury finds that Anderson could reasonably have relied on the agent's representations and therefore not read documents received from Dairyland, then it is irrelevant whether Anderson received any documents. This is a factual determination, however. We cannot uphold a directed verdict based on estoppel unless the evidence could only show that plaintiff himself has met his duty to reasonably inspect documents received from the insurer which might have alerted him to the new terms. The case is remanded for jury consideration of this issue.

**{6}** Plaintiff's Requested Instruction No. 7, which was not given because of the directed verdict, fairly represents our view of the law. It states:

The responsibility for a mistake in the compilation of an insurance premium, not due to a misrepresentation of an insured, is upon the insuror, when the insured is not made aware of the mistake until a claim on the insurance policy is made.

**II.**

**{7}** Dairyland objects to the submission of the issue of punitive damages to the jury. We agree that here, where the verdict as to liability for compensatory damages was improperly directed, giving an instruction on punitive damages was inappropriate. The Court of Appeals discussed the application of punitive damages to actions against insurers in **Crawford v. American Employers' Insurance Co**., 86 N.M. 612, 526 P.2d 206 (Ct. App. 1974), **rev'd on other grounds**, 87 N.M. 375, 533 P.2d 1203 (1975). There, the insurer knew, two and one-half years before trial, that a serious question of coverage existed, but failed to so inform the insured. "Although the actions of the Insurer could be characterized as entirely self-interested they do not rise to the level of being 'maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton disregard of the Plaintiff's rights.'" **Id**., 86 N.M. at 621, 526 P.2d at 215. Not all actions taken by an insurer to the detriment of its insured justify punitive damages. The only case cited by Anderson which allowed punitive damages in a situation at all similar to the instant case is **Curtiss v. Aetna Life Ins. Co**., 90 N.M. 105, 560 P.2d 169 (Ct. App.) **cert**. **denied**, 90 N.M. 7, 588 P.2d 619 (1976). There, the insurer refused to pay under a valid oral contract of insurance because the plaintiff was unable to take a physical examination, due to his being in the hospital recovering from a heart attack suffered after the contract became effective.

> This evidence falls within the meaning of the words "willful", "wanton" or "malicious" conduct. Defendant intentionally

> refused to pay **without just cause or excuse** because it declined plaintiff's application after plaintiff suffered a heart attack, knowing that plaintiff could not take a physical examination. [Emphasis added.]

**Id**. at 109, 560 P.2d at 173

**{8}** We decline to hold as a matter of law that Dairyland's actions in this case would not support an instruction on punitive damages. However, the trial judge, in determining whether to submit the issue to the jury, should consider whether the insurer had a reasonable basis for its failure to pay the claims.

**{9}** Since we have concluded that the instruction given on punitive damages was inappropriate, we reverse and remand for further proceedings in light of our disposition of the first issue presented.

**III.**

**{10}** Dairyland asserts that the trial court should have dismissed Anderson's claim for interference with contractual relations. We agree.

> American courts are not as willing to protect interests in prospective contractual relations as they are to protect interests in existing contracts. Where the defendant is accused of interfering with the plaintiff's opportunity to enter into contracts with third persons, a strong showing must be made that the defendant acted not from a profit motive but from some other motive, such as personal vengeance or spite.

J. HENDERSON & R. PEARSON, THE TORTS PROCESS 1166 (2d ed. 1981). This statement fairly represents our views on the question.

**{11}** The first and only New Mexico case dealing with interference with prospective contractual relations was **M & M Rental Tools, Inc. v. Milchem, Inc**., 94 N.M. 449, 612 P.2d 241 (Ct. App. 1980). In that case, the Court of Appeals adopted the approach taken by the RESTATEMENT (SECOND) OF TORTS § 766B (1979). This approach, with which we agree, requires intentional and improper interference. In other words, "either an improper motive (solely to harm plaintiff), or an improper means is required for liability." **Milchem**, **supra**, at 454, 612 P.2d at 246. The plaintiff has the burden of proving the interference was improper **Id**. at 455, 612 P.2d at 247. Anderson did not meet his burden in this case.

**{12}** Referring to the comments under Section 766B of the RESTATEMENT, **supra**, Anderson correctly points out that whether a defendant has the necessary intent and purpose to create an actionable interference with a prospective contractual relation is a question of fact. However, in any case where a plaintiff has proved interference with prospective contractual relations, the factors set out in RESTATEMENT (SECOND) OF TORTS § 767 (1979) which relate to determining whether an interference is "improper" should be considered to the extent they apply. Indulging every inference in Anderson's favor, we cannot find any indication that Dairyland acted out of improper motive or out of "personal vengeance or spite." **HENDERSON**, **supra**.

**{13}** Even assuming that Dairyland's refusal to pay was a proximate and foreseeable cause of Anderson's unfavorable credit rating, and that Dairyland acted in bad faith, there is no proof that the impairment of credit did not result from Anderson's own refusal to pay the medical bills. Anderson's complaint alleges medical expenses of $7,000, yet the only unpaid bills which were proved to have appeared in Anderson's credit file totaled $458.17. There is no proof that any insurance benefits received would have been applied toward those bills which turned up in the credit file rather than toward the other, larger outstanding bills. Furthermore, there is no indication that Anderson could not have paid off the bills pending resolution of the case. To the contrary, uncontroverted evidence indicates that he was capable of paying the bills but refused to do so. It is a basic rule that the defendant must be shown to have caused the interference. W. PROSSER, THE LAW OF TORTS 934 (4th Ed. 1971). We cannot uphold

a claim for interference with prospective contractual relations where it is not clear that the plaintiff himself has not caused the interference. Where the claim is based on an indirect interference such as that alleged here, the plaintiff must clearly show that his own action or inaction did not constitute interference. In other words, Anderson must prove that there was an actual prospective contractual relation which, but for the insurer's interference, would have been consummated. This Anderson has failed to show.

**{14}** Since this claim should have been dismissed because Anderson did not meet his burden of proof, it is unnecessary for us to discuss the admissibility of expert testimony on the question of damages caused by the impaired credit rating. Nor need we discuss the other evidentiary matters raised.

**IV.**

**{15}** Since an award of attorneys fees under Section 39-2-1, N.M.S.A. 1978, requires a finding that the insurer acted unreasonably in failing to pay the claim, we vacate the award and remand pending the result of the new trial.

**{16} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-132**

**Filing Date: December 11, 1981**

**Docket No. 13,052**

**HOWARD S. ELLSWORTH,**

**Petitioner-Appellee,**

**v.**

**BETTY O. ELLSWORTH,**

**Respondent-Appellant.**

**Appeal from the District Court of Bernalillo County, William Riordan, District Judge.**

Betty Read
Albuquerque

Attorney for Petitioner-Appellee.

LeRoi Farlow
Albuquerque

Attorney for Respondent-Appellant.

**OPINION**

**PAYNE, Justice.**

**{1}** This appeal requires us to reevaluate certain principles of law governing divorce decrees. The husband filed for divorce and the wife counterclaimed. The parties had been married thirty years and all their children were over 18 years at the time of the divorce. The appellant contends that the trial court committed error in: (1) failing to award her alimony; (2) failing to grant her attorney's fees; (3) reducing the value of the Keogh retirement plan; and (4) requiring her to pay half of her husband's 1979 income tax. We hold that the court did not abuse its discretion as to the last three items. Accordingly, we affirm as to those issues and discuss only the issue of alimony.

**{2}** The decision to grant or deny alimony is within the sound discretion of the trial court, and its decision will be altered only upon a showing of an abuse of that discretion. **Seymour v. Seymour**, 89 N.M. 752, 557 P.2d 1101 (1976); **Mindlin v. Mindlin**, 41 N.M. 155, 66 P.2d 260 (1937). Section 40-4-7B(1), N.M.S.A. 1978, the statutory basis for granting alimony, states:

> **B.** On final hearing, the court:
>
> (1) may allow either party such a reasonable portion of the spouse's separate property, or such a reasonable sum of money to be paid by either spouse, either in a single sum, or in installments, as alimony, as under the circumstances of the case may seem just and proper * * *.

Some of the factors to be considered in determining when it is "just and proper" to award alimony are "The needs of the wife, her age, health and the means to support herself, the earning capacity and the future earnings of the husband, the duration of the marriage, and the amount of property owned by the parties." **Michelson v. Michelson**, 86 N.M. 107, 110, 520 P.2d 263, 266 (1974).

**{3}** The trial court's refusal to award alimony was due to a determination that the wife's needs were adequately met by payments received from real estate sales contracts she received as a substantial portion of her share of the property settlement. The wife argues that this treatment is contrary to certain language found in **Hurley v. Hurley**, 94 N.M. 641, 615 P.2d 256 (1980).

**{4}** Property settlements recognize the effort expended by both husband and wife in creating an estate. **See Hughes v. Hughes**, 91 N.M. 339, 573 P.2d 1194 (1978). Community property is to be divided equally. **Michelson v. Michelson**, **supra**. Alimony represents an entirely

different consideration. It is a continuation of the dependent spouse's right to support. **Burnside v. Burnside**, 85 N.M. 517, 514 P.2d 36 (1973); **Chavez v. Chavez**, 82 N.M. 624, 485 P.2d 735 (1971), based on need, ability to self-support, and the equities of the particular situation, **Michelson v. Michelson**, **supra**. Problems have arisen where the concepts of alimony and property division are mixed.

**{5}** In **Michelson**, **supra** 86 N.M. at 111, 520 P.2d at 267, the Court in dictum stated that "an important factor in determining an award of alimony is the amount of property distributed to the wife as her share of the community interest." The Court also discussed the relationship between property settlements and alimony in subsequent cases. **See Brister v. Brister**, 92 N.M. 711, 594 P.2d 1167 (1979) (the alimony provisions are entirely severable from property settlement provisions); **Hughes v. Hughes**, **supra** (award of alimony not in order until the extent of property awarded to each party is determined); **Seymour v. Seymour**, 89 N.M. 752, 557 P.2d 1101 (1976) (applying **Michelson** factors); **Hazelwood v. Hazelwood**, 89 N.M. 659, 556 P.2d 345 (1976) (the right of alimony is a continuation of the right to support). **See also Harper v. Harper**, 54 N.M. 194, 217 P.2d 857 (1950) (the court may award and set over to the wife a lump sum in lieu of alimony out of the husband's interest in the community).

**{6}** In the **Hurley** case the Court stated that a wife "should not be required to sell her share of the community property in order to supplement the amount allowed her by way of alimony to meet the daily living expenses of herself and her children." **Hurley**, **supra** 94 N.M. at 646, 615 P.2d at 261. The language in **Hurley** must be read in the context of the particular facts in that case and should not be read as an absolute prohibition on use of community property sales proceeds for support, since some situations may arise when fairness requires such use. To the extent that the **Hurley** case would preclude any consideration of the community property awarded to a spouse in reaching an equitable award of alimony, it is specifically overruled. While income (rental, interest, lease, etc.) produced by property may normally be considered in setting alimony, proceeds from selling the property itself should not be except in such rare cases where fairness requires.

**{7}** The trial court must look to the nature of the community assets given to each of the parties upon division in determining alimony. Although the portions of the community may be equal in value at the time of division, one asset may require the continued labors of a party to maintain its value while another asset may retain value independent of the efforts of its owner. One may be an appreciating asset and produce income without depleting the equity, while another asset may be depreciating in value or be able to produce income only by self-liquidation.

**{8}** Here, the wife was awarded certain real estate sales contracts whose values as assets diminish as they are paid off. The husband was awarded business property which may increase in its income-producing capability while also appreciating in value. The record does not reflect that the trial court considered the contrasting nature of the assets in evaluating the relative needs of the parties and reaching the amount of alimony to be awarded.

**{9}** We therefore reverse on the issue and remand to the trial court for further proceedings to reconsider the award of alimony.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice, not participating**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-133**

**Filing Date: December 11, 1981**

**Docket No. 13,689**

**WAYNE CONWELL, J. J. O'CONNELL, THOMAS SHOATS AND PAUL FROSTENSON,**

**Plaintiffs-Appellees,**

**v.**

**CITY OF ALBUQUERQUE, MAYOR DAVID RUSK, ALBUQUERQUE POLICE DEPARTMENT, CHIEF E. L. HANSEN, LABOR MANAGEMENT RELATIONS BOARD, DUANE GILKEY, HAROLD BREEN, GEORGE CHERPELIS, MEMBERS,**

**Defendants-Appellants.**

**Appeal from the District Court of Bernalillo County, Gerald D. Fowlie, District Judge.**

George R. "Pat" Bryan, III**,** City Attorney
Albert N. Thiel, Jr., Assistant City Attorney
Albuquerque, New Mexico

for Defendants-Appellants.

William J. Tryon
Albuquerque, New Mexico

for Plaintiff-Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** The appellees, four Albuquerque Police Department officers, were discharged following an investigation of their use of citizen band radios while on duty. They filed charges with the City of Albuquerque's Labor-Management Relations Board (LMRB) alleging violation of the collective bargaining agreement between the City and the Albuquerque Police Officers Association. After conducting a hearing, the LMRB found no violation of the contract. The district court issued a decision by writ of certiorari pursuant to Article VI, Section 13 of the New Mexico Constitution and reversed the LMRB decision, ordering "full back pay, seniority, and benefits from the date of the unlawful terminations." The City appeals from the reversal and the remedy granted.

**{2}** The investigation of the officers' conduct began with a week-long radio surveillance conducted by Lt. Sandlin. Lt. Sandlin was the immediate supervisor of appellee Conwell; Conwell was the immediate supervisor of the other three appellees. Lt. Sandlin, with the concurrence of his supervisor, instructed the Department's Internal Affairs Unit (IAU) to further investigate. As part of the IAU investigation, the appellees were individually questioned by IAU officers. Each appellee was told prior to the recorded interrogation that the investigation was being conducted at the request of "his supervisors." Appellee Conwell was told after recording began that the questioning was "in reference to some allegations about the misuse of CB radios by yourself and your subordinates." The other appellees were likewise told that the interrogation involved allegations of "your misuse," "you[r] and some fellow officers[‘] * * * misuse," or "misuse * * * which you may have been involved in."

**{3}** Section 22 of the collective bargaining agreement governs IAU investigations. Section 22D provides:

> The officer shall be informed of the nature, if known, of the investigation before any interrogation commences. Names of complainants shall be disclosed, together

> with sufficient information to reasonably apprise the officer of the allegations. If it is known that the member being interrogated is a witness only, he shall be so informed. When the officer is being interrogated as a principal, he shall be entitled to the presence of an attorney and/or one officer of his choice from the Albuquerque Police Department[,] excluding any officer under investigation for [the] same incident * * *.

Section 22G of the contract states that "[t]he complete interrogation of the member shall be recorded * * *. There will be no 'off-the-record' conversations except by mutual agreement."

**{4}** The LMRB found that the investigating officers of the IAU substantially complied with Section 22 of the contract since "each of the charging parties was fully apprised of the allegations * * * and was made aware that he was a principal in the investigation prior to the commencement of the questioning." The City argues that there is substantial evidence in the record of the LMRB hearing to support the finding of no contract violation. The City also argues that, even if the district court properly overturned the LMRB decision, the court improperly awarded back pay to the appellees. The appellees argue that in overturning the LMRB decision the court corrected a misapplication of the governing law (the collective bargaining agreement) and the application by the LMRB of an incorrect "substantial compliance" standard. The appellees also argue that although there is no right to back pay under the ordinance governing the LMRB, the district court properly granted a traditional remedy for violation of employees' rights.

## I.

**{5}** Judicial review of an administrative decision is limited to determination of "whether the administrative body acted fraudulently, arbitrarily or capriciously, whether the order was supported by substantial evidence and, generally, whether the action of the administrative body was within the scope of its authority." **Llano, Inc. v. Southern Union Gas Company**, 75 N.M. 7, 11-12, 399 P.2d 646, 649 (1964). Although the reviewing court generally may not substitute its judgment for that of the administrative decision maker, **id**., it may correct the decision maker's misapplication of the law. **See Chemical Workers v. Pittsburgh Glass**, 404 U.S. 157, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971); **Alto Village Services Corp. v. New Mexico, Etc**., 92 N.M. 323, 587 P.2d 1334 (1978). In reviewing the district court's action we must make the same review of the LMRB decision on the record as did the district court, applying the same legal standards. **Lloyd McKee Motors v. New Mex. St. Corp**., 93 N.M. 539, 602 P.2d 1026 (1979); **Grace v. Oil Conservation Commission of New Mexico**, 87 N.M. 205, 531 P.2d 939 (1975); **El Paso Natural Gas Co. v. Oil Conservation Com'n**, 76 N.M. 268, 414 P.2d 496 (1966); **Reynolds v. Wiggins**, 74 N.M. 670, 397 P.2d 469 (1964).

**{6}** The law governing the conduct of the interrogation is that stated in Section 22 of the collective bargaining agreement. The preamble to Section 22 states that the purposes of the procedures therein established are "[t]o insure that investigations by the Internal Affairs Unit are conducted in a manner conducive to public confidence, good order, discipline, and good management practices and recognizing the individual rights of each member of the force * * *." We hold that only specific and careful compliance with the terms of Section 22 furthers those purposes. Permitting mere substantial compliance with Section 22 allows ambivalence and uncertainty and could defeat the purposes and undermine the agreement as negotiated by both parties. We therefore hold that the LMRB applied an incorrect standard when finding no contract violation because the IAU substantially rather than strictly complied with the terms of Section 22.

**{7}** Section 22 plainly requires that the officer being investigated be informed, on the record, of everything prescribed by Section 22D. Section 22D specifies that he be told the names of the complainants, whether they be fellow officers or

civilians. That section necessarily requires that the officer be told that he is being interrogated as a principal. If he is to be "entitled to the presence of an attorney and/or one officer" during the interrogation, he must be informed of his status as a principal. Failure to so inform him is a deprivation of an important bargained-for right.

**{8}** After reviewing the record of the LMRB hearing under the standards here announced, we conclude that the investigation was conducted in violation of the collective bargaining agreement. Although most of each of the interrogations was recorded, before the recording began each appellee was merely told that he was being investigated at the request of his supervisors. Not only did that not comply with Section 22D, but it was also misleading, since appellee Conwell was the supervisor of the other three appellees and they might well have thought that he was a complainant. The appellees were not specifically informed that they were being investigated as principals, which may have caused them to forego requesting that someone else be present, as permitted by the contract. We therefore affirm the district court holding that the investigative procedure violated the collective bargaining agreement, and that the LMRB decision was erroneous.

**II.**

**{9}** The City of Albuquerque has developed a comprehensive scheme governing relations with its employees. The Merit System Ordinance, comprising Article IX of the City's Revised Ordinances, governs the hiring, promotion and discharge of employees. The Labor-Management Relations Ordinance, comprising Article II of the Revised Ordinances, modifies the Merit System Ordinance with regard to those whose conditions of employment are governed by a collective bargaining agreement. We must examine both ordinances in order to decide whether the district court properly awarded back pay, seniority and benefits to the appellees.

**{10}** Under the Merit System Ordinance, the City's Personnel Board is empowered to decide on appeal the merits of any disciplinary action taken by a department head. ALBUQUERQUE, N.M., REV. ORDINANCES art. IX, §§ 2-9-24, -25(B)-(D) (1978). The Board may accept, reverse, or modify that action, **see id**. § 2-9-25(D)(4); methods of modifying that action include ordinary reinstatement with back pay and reducing dismissal to suspension without pay, **see id**. § 2-9-24(A). The appellees availed themselves of this appellate procedure, and prevailed before the Personnel Board on the merits of their dismissals. The Board's decision to reduce their terminations to ninety-day suspensions has not been appealed.

**{11}** The Merit System Ordinance provides that employees with complaints regarding "the interpretation or application of a collective bargaining agreement may not utilize the grievance resolution procedures of this Ordinance. All such claims shall be properly referred to the Labor-Management Relations Board." **Id**. § 2-9-25(B). The LMRB, established pursuant to the Labor-Management Relations Ordinance, is empowered to, **inter alia**, determine whether the City or any employee collective bargaining organization has violated the provisions of any written agreement in force. If it determines that either has committed such a prohibited act the LMRB is required to state its findings of fact and its conclusion in the form of an order. ALBUQUERQUE, N.M., REV. ORDINANCES art. II, §§ 2-2-9 to -10 (1977). Here the LMRB issued such an order.

**{12}** The district court on review was limited to considering the propriety of the LMRB decision under the standards outlined in **Llano, Inc. v. Southern Union Gas Company**, **supra**. The court's options were to uphold the decision, reverse it, or vacate it and remand the case for further consideration; it could grant no further remedy. **See Tafoya v. New Mexico State Police Board**, 81 N.M. 710, 472 P.2d 973 (1970). We reverse the district court's award of back pay, seniority and benefits to the appellees as exceeding the scope of its review.

**{13}** We therefore remand the case to the district court, with directions to amend its order in conformance with this opinion and further

remand the case to the LMRB for such further proceedings as are consistent with this opinion.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1981-NMSC-137**

**Filing Date: December 21, 1981**

**Docket No. 13,298**

**J. WILLIAM CORR,**

**Plaintiff-Appellee, and Cross-Appellant,**

**v.**

**RICHARD H. BRAASCH AND BONITA BRAASCH,**

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

**v.**

**NORMAN R. PALMER,**

**Third-Party Defendant-Appellee and Cross-Appellee.**

**Appeal from the District Court of Bernalillo County, Gerald D. Fowlie, District Judge.**

Motion for Rehearing Denied January 13, 1982

Lamb, Metzgar & Lines
Bernard P. Metzgar
Albuquerque, New Mexico

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

Ruud & Wells
John M. Wells
Albuquerque, New Mexico

Plaintiff-Appellee, and Cross-Appellant.

Poole, Tinnin & Martin
Harris L. Hartz
Albuquerque, New Mexico

Third-Party Defendant-Appellee and Cross-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** J. William Corr (Corr), who is a California attorney, filed suit against Richard and Bonita Braasch (Braasches) for damages and specific performance arising out of a real estate purchase agreement. Braasches denied that a contract existed and alleged that if a contract did exist they were entitled to damages from third-party defendant Norman Palmer (Palmer), a licensed real estate broker. Palmer in turn filed a counterclaim against Braasches alleging that he was entitled to a commission on the agreement for sale of property from Braasches to Corr. The court granted judgment of $13,500 to Corr and ordered specific performance. Palmer was awarded damages of $5,000 against Braasches. Braasches appeal and Corr cross-appeals, alleging inadequate damages. We reverse.

**{2}** Most of the facts in this case are not in dispute. The dispositive issue in this appeal is whether a contract to sell the property had been entered into. We hold that it had not.

**{3}** Palmer was told by a friend that Corr wanted to invest in property in the Albuquerque area. In May or June of 1977, Palmer contacted Corr and Corr advised Palmer that he was looking for an apartment building, and that he wanted to purchase property with a down payment of 20% or $75,000 maximum. Palmer ran an advertisement in the Albuquerque newspaper from July 3-9 stating that he had a "client" that wanted to invest and had $75,000 available for a down payment. Richard Braasch saw the ad, called Palmer, and the next day showed Palmer the apartment building that he and his wife owned to see if Palmer's client would be interested. Palmer then told Braasches that he

would have to have a listing agreement to protect his commission before he would try to sell the building. Palmer negotiated an open listing agreement between himself and the Braasches. The terms under which the property was listed were $230,000 total purchase price with $75,000 down. Although Palmer wanted a longer period, Braasches agreed only to a thirty-day listing. The agreement provided for a 6% commission if sold on terms acceptable to Braasches. During the thirty-day period, one offer was presented through Palmer to Braasches which was rejected.

**{4}** On August 10, Palmer requested an extension of the listing agreement which Braasches refused to execute and the agreement expired. Braasches received and rejected two offers subsequent to the expiration of the listing, neither through Palmer. On August 15, 1977, Palmer wrote a letter to Corr suggesting that an offer be made. After the listing expired, Corr typed out a purchase agreement and sent it to Palmer to present to Braasches. Corr offered $230,000 with $46,000 down. Palmer, without the knowledge of Corr, added the following clause: "Sellers accept the offer contained in this Purchase agreement and agree to pay Norman R. Palmer, the Broker, a sales commission of six percent of the selling price." Palmer presented the agreement to Braasches without telling them that he had added the commission agreement. Braasches changed some of the terms of the offer and in particular changed the commission from 6% to $5,000, a reduction of $6,500. Braasches stated to Palmer that under the terms offered they would not sell the property with a 6% commission. Corr later initialed the other modifications, but neither Corr nor Palmer ever initialed the reduction in the commission. Subsequently, Braasches had their attorney draft an exchange agreement, based on the purchase agreement, which was never fully executed. Final closing of the sale was delayed, and Braasches eventually refused to pursue the sale further.

**{5}** For there to be a contract, the offer must be accepted unconditionally and unqualifiedly by the offeree. **Picket v. Miller**, 76 N.M. 105, 412 P.2d 400 (1966). The acceptance must be to all terms. **Silva v. Noble**, 85 N.M. 677, 515 P.2d 1281 (1973); **Tatsch v. Hamilton-Erickson Manufacturing Co**., 76 N.M. 729, 418 P.2d 187 (1966). With certain exceptions not relevant here, the offeror must be notified of the acceptance. **See Restatement (Second) of Contracts** § 56 (1981). The testimony is uncontradicted that Braasches never accepted the offer from Corr containing the 6% commission agreement. The trial court concluded as a matter of law, however, that the purchase agreement was two separate contracts—the first between Corr and the defendants Braasch for the sale of the property and the second between Braasches and Palmer for a $5,000 commission. The court found that the Braasches agreed to sell the property for a total amount of $230,000. The court also found that Braasches agreed separately to the payment of a $5,000 sales commission.

**{6}** The trial court erred in both respects. It is apparent by looking at the purchase agreement that neither Palmer nor Corr accepted the reduced commission by initialing the change. The only evidence cited on appeal to support the finding that Palmer accepted a $5,000 commission was Mrs. Braasches statement that she "felt he accepted the commission," although she was unaware of any statement that Palmer made to that effect.

**{7}** There was also testimony by the closing officer that Palmer had indicated he would accept $5,000 in order to assure that the deal would close. The officer also testified that Palmer said he would work out the remainder of the commission with Braasches. None of these pieces of evidence supports the court's finding that Palmer accepted the offer of a $5,000 commission. Notwithstanding this evidence, Palmer maintained prior to and throughout the trial that he was entitled to a 6% commission. The trial court's finding that Palmer accepted Braasches' offer is not supported by substantial evidence.

**{8}** The evidence is uncontradicted that Braasches would sell the property for $230,000 with $46,000 down only **if** Palmer reduced the commission. When asked why he modified the

commission, Mr. Braasch testified that he did so "because of inadequate down payment offered." To hold that Braasches are bound by the sales portion of the agreement yet are not bound by the commission provision would be to selectively enforce the terms of the clause inserted by Palmer, and would introduce precedent for subdividing any contract with multiple terms despite the written manifestation of the parties.

**{9}** We hold that by making their acceptance conditioned on Palmer's assent to the different term, Braasches made a counter-offer to Corr. In other words, Braasches would sell the property on terms offered by Corr **only** if Palmer agreed to the reduction in the commission. Palmer did not agree to these terms. Corr allowed Palmer to transmit the offer on his behalf to Braasches. The offer was modified by the addition of the commission agreement. The reduction in the commission was never accepted by Palmer nor Corr. A reply to an offer which adds qualifications or requires performance of conditions is not an "acceptance," but rather a counter-offer. **Polhamus v. Roberts**, 50 N.M. 236, 175 P.2d 196 (1946); see Restatement (Second) of Contracts § 59 (1981).

**{10}** Having concluded that there was no contract between the parties, we need not discuss the other questions presented with regard to the alleged contract.

**{11}** Braasches sought to recover damages from Palmer on a theory of tortious interference with contractual relations. However, the trial court did not err in refusing Braasches' requested findings on this issue, and we accordingly uphold its refusal of those requested findings.

**{12}** The cause is reversed and remanded with instructions to set aside the judgment and enter judgment in favor of Braasches consistent with this opinion.

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, respectfully dissents**

## DISSENT

**DAN SOSA, Senior Justice, Respectfully Dissenting.**

**{14}** The majority are applying the wrong test to our review.

**{15}** I find that the findings of the trial court are supported by substantial evidence, and I would not disturb this evidence. In reviewing the case for substantial evidence, the evidence must be considered in the light most favorable to Corr and in support of the findings. The appeals court cannot reverse unless convinced that there is neither evidence nor an inference therefrom which will support the findings of the court. The weight of the evidence must not be considered. All disputed facts are resolved in favor of the successful party and all reasonable inferences indulged in support of the findings. **Williams v. Vandenhoven**, 82 N.M. 352, 482 P.2d 55 (1971); **Gould v. Brown Construction Company**, 75 N.M. 113, 401 P.2d 100 (1965); **Lewis v. Barber's Super Markets, Inc**., 72 N.M. 402, 384 P.2d 470 (1963); **Jensen v. Allen**, 63 N.M. 407, 320 P.2d 1016 (1958); **Griego v. Wilson**, 91 N.M. 74, 570 P.2d 612 (Ct. App. 1977); **Romero v. Melbourne**, 90 N.M. 169, 561 P.2d 31 (Ct. App.), **cert**. **denied**, 90 N.M. 254, 561 P.2d 1347 (1977).

**{16}** The trial court concluded that:

> The purchase agreement is two separate contracts, one between Plaintiff Corr and

Defendants Braasch for the sale of the property, and one between Defendants Braasch and Counter-Defendant Palmer for the payment of a $5,000.00 sales commission.

All of the findings being sustained by substantial evidence, the aforegoing conclusion flows therefrom, and I would affirm the trial court. I feel that there is much more merit to the Plaintiff-Appellee and Cross-Appellant's contention that he was damaged more than the $13,500.00 found by the court when he was led to believe that he was to assume a contract at 9 1/4% and later found that the percentage of the assumption on the contract had been changed to 17%.

**{17}** Not agreeing with the majority, I respectfully dissent for the aforementioned reasons.

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-010**

**Filing Date: January 27, 1982**

**Docket No. 13,465**

**IN THE MATTER OF THE ESTATE OF STEPHEN D. SCHLEIS, DECEASED, KATHLEEN HALEY,**

**Claimant-Appellant,**

**v.**

**DANIEL SCHLEIS, PERSONAL REPRESENTATIVE AND THE ESTATE OF STEPHEN D. SCHLEIS, DECEASED,**

**Appellee.**

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, GERALD R. FOWLIE, District Judge.**

Paul R. Smith
Albuquerque, New Mexico

Attorney for Appellant.

Charles N. Glass
Glass & Fitzpatrick
Albuquerque, New Mexico

Attorneys for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This appeal requires us to determine whether a divorce decree automatically severs an ex-spouse's beneficiary interest in an insurance policy. We hold that it does not.

**{2}** Kathleen Haley and Stephen Schleis were married in 1975. During the marriage Stephen took out two insurance policies through his employer, naming Kathleen as beneficiary. On November 6, 1979, Stephen and Kathleen were divorced. The policies involved were term insurance and the period of coverage purchased with premium payments from the community funds had ended shortly after the divorce. Kathleen therefore retains no interest separate from her status as beneficiary. **Phillips v. Wellborn,** 89 N.M. 340, 552 P.2d 471 (1976).

**{3}** In July, 1980, Stephen's personal representative moved for summary judgment on the proper distribution of the death benefits. The asserted grounds for the motion were first, that Stephen had designated a beneficiary for only one of the policies and second, that since the divorce decree gave Stephen all personal property in his possession, Kathleen was divested of her interest in the policies. Kathleen also moved for summary judgment in her favor. The district court granted summary judgment in favor of Stephen's estate, finding there were no issues of material fact. Kathleen appeals. We reverse.

**{4}** Neither of the grounds asserted by Stephen's estate could support its motion for summary judgment in this case. His employer's practice was to require only one beneficiary designation no matter how many group policies were involved, unless separate beneficiaries were specifically desired. Under this procedure, Stephen's failure to make two beneficiary designations could not mean, as a matter of law, that he intended that proceeds of the second policy should go to his estate.

**{5}** The estate's assertion that Kathleen was divested of her beneficiary interest in the policy because the divorce decree granted ownership of the policy to Stephen cannot be sustained. The estate relies on **Romero v. Melendez,** 83 N.M. 776, 498 P.2d 305 (1972). In **Romero,** we held that a wife's interest as beneficiary under a life

insurance policy can be defeated by disposition of the policies in a divorce decree even though no change in beneficiary is made. We distinguished **Harris v. Harris,** 83 N.M. 441, 493 P.2d 407 (1972), which permitted a divorced wife to receive proceeds from a life insurance policy owned by her former husband, on grounds that the policy had not been disposed of in the decree. We reaffirm that the decree is dispositive, but feel it necessary to clarify what was meant in **Romero** and **Harris.**

**{6}** The cases cited as authority for the **Romero** rule, **Brewer v. Brewer,** 239 Ark. 614, 390 S.W.2d 630 (1965); **Dudley v. Franklin Life Insurance Company,** 250 Or. 51, 440 P.2d 363 (1968), involved instances where the former wife specifically transferred and released any and all interest in the husband's policies and released him from any and all obligations which may have existed for any reason whatsoever. They were not cases in which the husband was merely given ownership of the policies. In **Romero** itself the decree "gave the decedent the policies as his sole and separate property and divested the appellant of any and all interest, including the expectancy as a beneficiary." **Id.** at 780, 498 P.2d 309. Thus, the **Romero** rule, which applies when policies are disposed of by a divorce decree, is limited to situations where the interest of the beneficiary spouse is specifically divested. Where the decree merely grants ownership of the policy to one spouse, without divesting the former spouse of the beneficiary interest, **Romero** does not govern.

**{7}** Harris v. Harris, supra, sets forth the proper rule for situations where the insured spouse owns the policies, but where the beneficiary spouse is not specifically divested of any and all interest in the policies. Such ownership may be as a tenant in common when the decree does not grant ownership or as sole owner. In such situations, as **Harris** points out, the owner would have certain rights under the policy, including the right to change the beneficiary. Whoever is the named beneficiary owns the proceeds upon the happening of the contingency. The mere fact of a divorce has no effect upon the beneficiary's interest. 5 R. Anderson, Couch on Insurance 2d § 29:4 (1960).

**{8}** Accordingly, we hold that a divorce decree granting the insured spouse ownership of the policies does not, by itself, sever the beneficiary interest of a former spouse.

**{9}** Such a beneficiary interest could be relinquished by clear and specific language releasing that interest in the insured spouse's policies. **Redd v. Brooke,** 604 P.2d 360 (Nev. 1980). However, if Kathleen never made such a release, her beneficiary interest could have been divested by Stephen's changing the beneficiary.

**{10}** There is no evidence that Stephen complied with the policy's stated procedures for changing the beneficiary. The policy provided that a "change of beneficiary must be in writing[,] signed by the employee[,] and must be filed with the Company at its Head Office." Although the parties stipulated to the introduction of the policy as a part of the record on appeal, it appears that the trial court did not have the benefit of this policy provision in reaching its decision. We therefore do not base our decision on whether Stephen adhered to the policy provisions.

**{11}** In order to change the beneficiaries, the insured generally must comply with procedures adopted by the insurer or imposed by statute. If no such procedures exist the courts may recognize a change desired by the insured if the intent is declared in an appropriate manner. **See** R. Anderson, **supra,** §§ 28:51-52.

**{12}** Since no evidence of the policy requirements was introduced at trial, evidence of the insured's clear expression of intent combined with evidence of his reasonable efforts to change the beneficiary are necessary for the court to find a change of beneficiary. There is no such evidence in this record. Even if there were evidence that Stephen at some time expressed an intent to change the beneficiary, there is also evidence indicating expression of a contrary intent. Because we adopt the two-pronged test requiring a clear expression of intent coupled with reasonable efforts to effect the change of beneficiary, we conclude that Stephen never effectively changed the beneficiary.

**{13}** On appeal, the parties have extensively addressed the issue of ownership, since the estate's claim that Stephen owned the policies was based in "catch-all" language in the divorce decree awarding him "the other personal property which is in his possession." This failure to specifically designate Stephen as owner of the life insurance policies is claimed to give Kathleen a continuing interest. While this argument may have been relevant through the term of coverage paid for by the community, there can be little question that once Stephen began paying for the insurance out of his separate funds and not under any obligation under the decree or other agreement, the policy belonged to Stephen. However, as we have shown, ownership is not the deciding factor.

**{14}** Accordingly we reverse with instructions to enter judgment for the appellant.

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-015**

**Filing Date: February 9, 1982**

**Docket No. 13,522**

**ROY M. GILMAN AND ETHEL F. GILMAN, HUSBAND AND WIFE,**

**Plaintiffs-Appellants,**

**v.**

**H. J. McCRARY AND RUTH McCRARY, HUSBAND AND WIFE,**

**Defendants-Appellees.**

**APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY,**
**Rueben E. Nieves, District Judge.**

Robert Brack
Clovis, New Mexico

for Appellants.

Rowley, Hammond & Richards
Richard F. Rowley, II
Clovis, New Mexico

for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** The plaintiff, Gilman, and the defendant, McCrary, neighboring landowners, have had an ongoing boundary dispute. Gilman brought suit seeking a declaratory judgment that the north-south boundary between the properties should be located at a point west of an existing road. McCrary contends that the boundary is east of the road. Alternatively, Gilman sought a declaration of a prescriptive easement in the road which he had used for twenty-five years. The district court granted summary judgment for McCrary on all counts, and Gilman appeals.

**{2}** We held in an earlier case, **Gilman v. Powers,** 83 N.M. 80, 488 P.2d 337 (1971), that the boundary between these parcels was the existing fence or vestiges thereof.[1] A subsequent suit over the northern east-west boundary culminated in 1976 with a court-ordered survey. The trial court in the present case found that the 1976 survey established the boundary, pursuant to our direction in **Gilman v. Powers,** to be the eastern point as contended by McCrary. The court also found that this boundary was substantiated by its own court-ordered survey done in 1981.

**{3}** Nonetheless, Gilman argues that a genuine issue of material fact remains because of an alleged oral agreement between he and McCrary that a fence wholly located on Gilman's northern property was to be extended southward to form the boundary between the parties' land to the south. Gilman also alleges that McCrary had previously acknowledged the boundary determined by the court in **Gilman v. Powers,** as being within Gilman's property, and that this precludes the boundary determination made by the court in the present case. These allegations, Gilman claims, create a factual issue which only a trier of fact could resolve, and therefore summary judgment was inappropriate.

**{4}** We do not agree. The trial judge has considered the evidence, including the surveys, and has concluded that no factual issue exists as to the determination of the boundary under **Gilman v. Powers, supra.** Nothing in that case

[1] Gilman and McCrary were plaintiffs in this case and sought to establish the same boundary line in dispute here. We held that the evidence supported the trial court's decision that the boundary lines had been resolved by the acquiescence of the parties in existing fence lines or vestiges of fence lines.

intimates that the parties could agree separately to the boundary. The boundary was to be determined by existing fences or vestiges thereof; the court below made its determination pursuant to that standard, and we will not disturb that ruling.

**{5}** On Gilman's claim for a prescriptive easement, however, we reverse and remand for further consideration by the trial court.

**{6}** The district court apparently concluded that Gilman's claim of a prescriptive easement was barred by res judicata. However, there is no evidence in the record to support this conclusion. McCrary instead asks us to conclude that the court's conclusion was correct on other grounds, namely, that Gilman's evidence is insufficient to support a finding of a prescriptive easement and therefore summary judgment was proper. We have previously set forth the elements which must be satisfied to support a claim for a prescriptive easement.

> In order for the court to grant an easement in favor of the plaintiffs, the plaintiffs must show by clear and convincing evidence that they used the roadway in question openly, uninterruptedly, peaceably, notoriously, adversely and under a claim of right for a period of ten years and that they did so with the knowledge of the owner. [Citation omitted.]

**Garmond v. Kinney,** 91 N.M. 646, 579 P.2d 178 (1978).

**{7}** Applying this test to the facts presented shows that the only element which the judge could have concluded was not met as a matter of law was the last one. This requires us to decide whether a prescriptive easement may be obtained when the true owner does not know for sure whether he owns the servient land.

**{8}** McCrary cites **Heaton v. Miller,** 74 N.M. 148, 391 P.2d 653 (1964) for the proposition that ownership and prescriptive easement cannot be alternatively plead. We think **Heaton** is inappropriate, because it involved an improper attempt to acquire a corporal hereditament by prescriptive easement. No other cases on point are cited and our own research has revealed none.

**{9}** McCrary used the **Heaton** case as authority for his argument that he could not have acquiesced to Gilman's use of the road until after 1971 when **Gilman v. Powers, supra,** established the boundary line between the parties. Since the boundary line was in dispute, McCrary argues that there could be no acquiescence until the dispute was settled. Since the dispute was not settled until 1971, Gilman could not have used the road for the requisite ten-year period to establish a prescriptive easement. This argument is without merit since McCrary claimed ownership of the land prior to the **Gilman v. Powers** suit. He cannot claim to be the rightful owner of a parcel of land and obtain a judgment vindicating that claim, then later assert that he was not the owner of that same parcel for all the years that Gilman used the road.

**{10}** Finally, we note that McCrary claims his use of the road for forty years precludes Gilman's claim of prescription, since the use by the claimant must be exclusive. The rationale for the exclusive user rule is that "[i]f the claimant is only one of two, or several, or many, who make the user in question, it is perhaps inferable that all of these uses are permissive." 3 R. Powell, The Law of Real Property § 413 at 34-118 (1981) (footnote omitted). There is a split of authority as to whether a use made by the claimant and by the landowner in common is presumptively permissive. **Id.** at n. 24.

**{11}** The following statement by the Supreme Court of Wyoming fairly represents our view.

> Although several of the cases continue to mention exclusive use as an essential element to the acquisition of an easement by prescription, most agree that the term is not to be given the meaning which is given to it in the acquisition of title by adverse

> possession. It simply means that exercise of the right shall not be dependent upon a similar right in others. The use may be shared with the owner of the servient state. . . . [Citations omitted.]

**White v. Wheatland Irrigation District,** 413 P.2d 252, 260 (Wyo. 1966). **Accord, Shuggars v. Brake,** 248 Md. 38, 234 A.2d 752 (1967); **Cope v. Cope,** 158 Mont. 388, 493 P.2d 336 (1971).

**{12}** We remand for further proceedings to permit a factual determination as to whether Gilman has satisfied the requirements for a prescriptive easement.

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-022**

**Filing Date: February 22, 1982**

**Docket No. 13,908**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**JAMES L. JACKSON,**

**Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

Jeff Bingaman, Attorney General
Marcia E. White, Assistant Attorney General
Santa Fe, New Mexico

for Petitioner.

Ronald E. Koch
Albuquerque, New Mexico

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** We granted certiorari to determine whether, after the defense has voluntarily revealed to the prosecution the results of a psychiatric examination of a victim, ordered at the request of the defendant, the prosecution may then use those results at trial. We hold that it can, and reverse the lower courts.

**{2}** The defendant was indicted on a charge of second degree criminal sexual penetration as defined by Section 30-9-11(B), N.M.S.A. 1978. The State alleged mental anguish as the personal injury necessary to charge a second degree offense. The State introduced the testimony of its expert witness, a medical doctor, which established that the victim had suffered the necessary anguish. The defendant was convicted but a mistrial was declared for reasons not relevant here.

**{3}** Prior to retrial, the defendant filed a motion requesting a psychiatric examination of the victim. The court ordered the exam at the expense of the public defender, pursuant to **State v. Garcia,** 94 N.M. 583, 613 P.2d 725 (Ct. App.), **cert. denied,** 94 N.M. 675, 615 P.2d 992 (1980). After making the examination, the psychologist, Dr. Foote, at the defendant's request contacted the prosecution and reported that this was one of the worst cases of rape trauma syndrome he had ever seen. This was followed by a suggestion of a plea bargain to a third degree offense, to save the victim from having to testify. No plea agreement was reached.

**{4}** Subsequently, the State filed a notice of its intent to call Dr. Foote as a witness. The defendant moved to exclude Dr. Foote's testimony on grounds that he was retained by the defendant and would not be called as a defense witness. In its arguments at the hearing on the motion, the defendant claimed attorney-client privilege, work-product privilege, Rule 28 of the New Mexico Rules of Criminal Procedure relating to discovery, cumulative evidence, and prejudice.

**{5}** Stating that the law was unclear with respect to this particular question, the trial court granted the defendant's motion. In its order, the court found that the State could not call Dr. Foote as a witness because he was retained by the defendant and was not going to be called by the defense. The court also found that the "information, test results, documents, reports and testimony is not discoverable by the State of New Mexico pursuant to Rule 28 N.M.R.C.P. [N.M. R. Crim. P. 28, N.M.S.A. 1978 (Repl. Pamp. 1980]."

**{6}** The State appealed to the Court of Appeals, which affirmed, reasoning that since the State appealed pursuant to Section 39-3-3(B)(2), N.M.S.A. 1978, the evidence excluded must be "substantial proof of a fact material in the proceeding." The Court of Appeals held that Dr. Foote's testimony was cumulative, and therefore could not have satisfied the statutory requirement; thus there was no appealable order.

**{7}** We find no basis for the conclusion that Dr. Foote's testimony was cumulative. Such a determination should be made at trial based on the testimony presented, not based on speculation at the appellate level. **See State v. Rhea,** 94 N.M. 168, 608 P.2d 144 (1980). The State contends that the two experts, are specialists in different fields and examined the victim at different times. It acknowledges that the testimony may be harmonious, but asserts that it will not necessarily be cumulative. Without knowing the precise testimony to be offered, we cannot say it will be cumulative. We reverse the Court of Appeals on this issue.

**{8}** The trial court excluded Dr. Foote's testimony on grounds that it was not discoverable under Rule 28, which provides:

> (a) **Information subject to disclosure.** [T]he defendant shall disclose or make available to the state: * * * *
>
> (2) any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at trial if the results or reports relate to his testimony * * * *
>
> * * * * * *
>
> (c) **Information not subject to disclosure.** Except as to scientific or medical reports, this rule does not authorize the discovery or inspection: (1) of reports, memoranda, or other internal defense documents made by the defendant, his attorneys or agents, in connection with the investigation or defense of the case * * * *

**{9}** In the circumstances of this case, there was no need for the State to discover Dr. Foote's testimony; it had already been given to the State. The voluntary disclosure of the results of the examination constitutes a waiver of the defendant's right against forced disclosure. The disclosure also destroys any privileges claimed by the defense. N.M.R. Evid. 511, N.M.S.A. 1978.[1] The issue is whether Dr. Foote's testimony may be used by the State at trial, not whether the testimony is discoverable. This question of admissibility cannot be resolved without considering, in the proper context, the particular evidence offered in light of assertions that it is cumulative, prejudicial, and so on.[2] Accordingly, we reverse and remand for further proceedings consistent with this opinion.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice, Not Participating**

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[1] Defense counsel argues that there was no voluntary disclosure because he personally was not the defendant's attorney at the time the disclosure was made, or alternatively because Dr. Foote was not a party. Neither of these arguments are persuasive in light of the disclosure made to the State by Dr. Foote at the request of the defendant's former counsel. Rule 511 applies to the predecessor of the party asserting the claim, and covers both consent to disclosure of "any significant part of the matter or communication" as well as outright disclosure.

[2] Possible issues arising under N.M.R. Evid. 410, N.M.S.A. 1978, were not properly raised; therefore, we do not reach them.

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-026**

**Filing Date: February 23, 1982**

**Docket No. 13,831**

**DONALD KINNEY,**

**Petitioner,**

**v.**

**IRENE LUTHER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM LUTHER, DECEASED,**

**Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI**

Willard F. Kitts
Albuquerque, New Mexico

Miller, Stratvert, Torgerson & Brandt
Alan Konrad
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for Petitioner.

Pedro Rael
Peter Gallagher
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for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** We granted certiorari to determine whether the trial court committed reversible error in refusing a particular non-Uniform Jury Instruction (U.J.I.). We hold that the refusal was not reversible error. We therefore reverse the Court of Appeals and reinstate the judgment entered by the trial court.

**{2}** The vehicle in which plaintiff and her husband were riding was struck by a vehicle driven by Dr. Dan Cameron. Plaintiff was injured and her husband was killed. Cameron had been driving at an excessive speed and struck plaintiff's vehicle when it pulled out to cross the street on which Cameron was traveling. Cameron settled out-of-court with plaintiff.

**{3}** Plaintiff brought suit against defendant Kinney, alleging that Kinney was racing with Cameron at the time of the collision and that this was a direct and proximate contributing cause to the collision. Kinney denied these allegations and asserted as an affirmative defense that plaintiff's decedent was contributorily negligent for pulling out onto the road without adequately stopping at the stop sign and assessing the situation.

**{4}** The evidence was conflicting and went to the jury, who found that Kinney was not liable to plaintiff. Plaintiff appealed on grounds that one U.J.I. instruction which was given should not have been, and that two non-U.J.I. instructions which were not given should have been. The Court of Appeals found no reversible error in two of the trial court's rulings, and we concur in this conclusion. However, the Court of Appeals held that it was reversible error not to give the following instruction:

> You are instructed that travelers using the public highways and streets have the right to assume that other travelers will exercise reasonable care and caution to avoid placing the lives or safety of others in peril and will obey applicable traffic regulations and rules of the road. A motorist is not bound to anticipate negligence or gross negligence on the part of another motorist, in the absence of anything to indicate otherwise, and the care and diligence of a motorist is to be measured in view of the

> assumption that other motorists will not drive in a negligent or grossly negligent manner. But this assumption does not apply where a motorist sees, or in the exercise of ordinary care and prudence should see, that another motorist will not obey the traffic rules or regulations.

We cannot agree that failure to give this instruction was reversible error.

**{5}** We note that since this suit was filed, a new U.J.I. covering this issue has been adopted. N.M. U.J.I. Civ. 12.6, N.M.S.A. 1978 (Repl. Pamp. 1980), reads simply:

> A driver has the right to assume that other drivers will obey the law unless the driver sees, or by the exercise of ordinary care should have seen, that the driver of the other vehicle will not obey the law or is unable to avoid a collision.

We do not discuss plaintiff's offered instruction to evaluate its potential for future cases, since U.J.I 12.6 is now applicable. Nevertheless, we discuss the offered instruction to provide guidance in future cases where non-U.J.I. instructions are offered in the absence of an applicable U.J.I.

**{6}** Rule 51 of the Rules of Civil Procedure, N.M.S.A. 1978 (Supp. 1981), discusses the use of jury instructions. Subpart (F) states:

> **Instruction when no applicable UJI Civil.** Whenever the court determines that the jury should be instructed on a subject and no applicable instruction on the subject is found in UJI Civil the instruction given on that subject shall be brief, impartial and free from hypothesized facts.

Our courts have held that trial courts need not give erroneous instructions. **Goodman v. Venable,** 82 N.M. 450, 483 P.2d 505 (Ct. App. 1971); **Lopez v. Maes,** 81 N.M. 693, 472 P.2d 658 (Ct. App.), **cert. denied,** 81 N.M. 721, 472 P.2d 984 (1970). Instructions should be as plain, simple and clear as possible. **Haynes v. Hockenhull,** 74 N.M. 329, 393 P.2d 444 (1964).

**{7}** The offered instruction fails to meet these standards. It was taken from 7A Am. Jur.2d, **Automobiles and Highway Traffic** § 417 (1980). While it may be an appropriate summary of the law based on cases from several states, it is not an appropriate jury instruction. It certainly is not brief. Neither is it plain and simple, and we doubt it would be clear to a jury. A comparison with U.J.I. 12.6 illustrates these defects in plaintiff's instruction.

**{8}** However, the instruction suffers a more serious defect in that it does not fairly represent the law in New Mexico. Plaintiff relies on **Williams v. Cobb,** 90 N.M. 638, 567 P.2d 487 (Ct. App. 1977), to support its instruction. **Williams** involved a collision at an intersection in which a stop sign had been turned sideways. The plaintiff had both the general right-of-way, entering the intersection at the defendant's right, and the preferential right-of-way, given by the stop sign. Among other things, the plaintiff assigned error to the trial court's refusal to give two instructions on the assumption permitted to a motorist on a through street. The opinion of the Court of Appeals stated that it was reversible error to refuse these instructions. However, each of two concurring opinions disagreed with this conclusion; therefore, a majority of the panel thought that it was not reversible error to refuse these instructions. Judge Hernandez in his special concurrence, stated that:

> [N]either of the tendered instructions gives an adequate indication that plaintiff was still subject to the duty of ordinary care despite her right to rely on having the right-of-way, so that if she saw or **should have seen** defendant's car approaching, she had a duty to try to avoid the collision.

**Id.** at 646, 567 P.2d at 495. This is also true here, especially since Luther did not have the right-of-way. We also note that the actual instructions proposed in **Williams** would have hurt Luther's case here, since Cameron had the right-of-way.

**{9}** "In motor vehicle accident cases the instructions should define the relative degrees of care and caution properly exercisable by, and the corresponding duties under the surrounding facts and circumstances of, those involved in the accident." 8 Am. Jur.2d **Automobiles and Highway Traffic** § 1111 at 295 (1980). The essential defect in the proposed instruction is that it does not express a driver's duty to see that the other driver is unable to avoid a collision. Under the instruction Luther's only duty was to see that Cameron was speeding. However, even if Luther could not have seen that Cameron was speeding, Luther had a duty to see that Cameron could not avoid a collision. U.J.I. Civil 12.6, **supra.** This aspect of the rule that a driver has a right to assume that other drivers will obey the law is expressed in the omitted portion of the Am. Jur. language from which the instruction was taken:

> Where a motorist has had time to realize, or by the exercise of proper care and watchfulness should realize, that a traveler whom he meets is in a somewhat helpless condition or **apparently unable to avoid the approaching vehicle,** he must exert himself to avoid a collision. [Emphasis added and footnote omitted.]

7A Am. Jur.2d, **supra,** § 417.

**{10}** Furthermore, it is not certain that the evidence supports giving this instruction. There is uncontradicted evidence that Cameron was speeding, and that Luther's view was not obstructed. There is no evidence that Luther could not have, by the use of ordinary care, detected the danger presented by Cameron. There was evidence that had Luther made a full stop he would have been better able to see that Cameron would not obey the law or would be unable to avoid a collision. Although there is evidence that if Cameron had not been speeding Luther could have crossed the intersection, this fact is unrelated to whether Luther had a right under the circumstances to assume Cameron was not speeding.

**{11}** Given the defects in the instruction, and the weak factual basis upon which it was proposed, we hold that it was not error for the trial court to refuse this instruction.

**{12}** Accordingly, the Court of Appeals is reversed and the judgment of the trial court is reinstated.

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, respectfully dissenting**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-029**

**Filing Date: March 2, 1982**

**Docket No. 13,528**

**OMNI AVIATION MANAGERS, INC.,**

**Plaintiff-Appellee,**

**v.**

**WILLIAM P. BUCKLEY AND DORIS C. BUCKLEY,**

**Defendants and Third Party Plaintiffs-Appellants.**

**APPEAL FROM DISTRICT COURT BERNALILLO COUNTY,**
**James A. Maloney, District Judge.**

Wycliffe V. Butler
Albuquerque, New Mexico

for Appellants.

Sheehan & Sheehan
Mary Vermillion
Albuquerque, New Mexico

for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Plaintiff-appellee Omni Aviation Managers, Inc. (Omni), as subrogee of the claim of the insured, Avcor Enterprises, Inc. (Avcor), sued defendants-appellants Mr. and Mrs. Buckley for damages to Avcor's airplane due to the defendants' alleged negligence. The district court found that the defendants were negligent and that their rental contract with Avcor did not limit their liability for damage to the airplane. The defendants appeal, claiming three errors: 1) that the rental contract limited the lessee's liability for damage to the airplane; 2) that the plaintiff failed to join all indispensable parties, so that the trial court lacked jurisdiction to hear the case; and 3) that the trial court improperly applied the negligence law of New Mexico in deciding the case. We reverse on the first issue.

**{2}** On September 2, 1976, defendant William Buckley signed a standard form rental agreement provided by Avcor which authorized him to rent airplanes from Avcor on a continuing basis. The contract contained the following provisions:

> 17. I agree to pay for any loss or damage to the aircraft or to other persons or property caused in whole or in part by my failure to comply with the above, or by my negligence or pilot error, **not covered by insurance.** [Emphasis added.]
>
> 18. I expressly agree to and hereby indemnify and hold lessor harmless of, from and against any and all loss, costs, damages, attorney's fees and/or liability in connection with the foregoing contract.

**{3}** The contract also provided two statements: "I agree to pay $1.00 per flight hour in lieu of the deductible physical damage liability [,] . . . Date . . . [;] I do not wish to pay the $1.00 per flight hour and agree to remain liable for the specified physical damage deductible liability [,] . . . Date. . . ."[1] Neither of the statements was completed. Buckley rented an airplane from

[1] Whether the first option was still available at the time Buckley signed the contract was disputed at trial. Buckley testified that it was not pencilled out at the time he signed the agreement. Gelder, the president of Avcor, testified that, although he was not present when Buckley signed the contract, it was Avcor's policy for their representative to cross out the first option at the time of signing. However, at oral argument, Omni's counsel conceded that both options must be considered as part of the whole contract in order to determine the parties' intent.

Avcor and piloted it from Albuquerque to Puerto Vallarta, Mexico. While attempting to land in Puerto Vallarta, the Buckleys negligently caused $10,371 in damage to the plane.

**{4}** The Buckleys paid Avcor $2,913.72, which represented in part the costs of returning the damaged plane to Albuquerque and the deductible amount of $500 specified in Avcor's insurance contract with Omni. Subsequently Omni paid Avcor $9,871.75 in damages pursuant to the insurance contract and brought suit against the Buckleys as subrogee of Avcor's claim.

**{5}** The trial court found that "the terms of the rental agreement . . . did not limit the defendants' liability for damage to the aircraft" and that the payment the Buckleys made to Avcor did not constitute a complete settlement and release relieving them from further liability. Therefore, the court concluded, Omni was entitled to judgment against the Buckleys.

**{6}** The lease of personality, such as an automobile or an airplane, is a bailment, and the lease agreement is governed by the law of contracts as well as the law of bailments. 8 Am. Jur.2d **Bailments** § 4 (1980); Annot., 43 A.L.R.3d 1283 (1972); Annot., 44 A.L.R.3d 862 (1972).

**{7}** Although an ordinary bailee[2] is normally held liable for his negligence toward a bailed item, he may limit or disclaim his liability for his own negligence by so providing in the contract of bailment. **Langford v. Nevin,** 117 Tex. 130, 298 S.W. 536 (1927); 8 Am. Jur.2d **Bailments** §§ 154-55 (1980). We have examined exculpatory clauses in contracts in the context of leases of real property, **see Acquisto v. Joe R. Hahn Enterprises, Inc.,** 95 N.M. 193, 619 P.2d 1237 (1980), but not in the context of bailment contracts. In **Acquisto,** we held that the parties to a lease of real property may vary the rule that each bears the risk of loss caused by his own negligence, but to do so they must either agree to a specific allocation of the risk or must expressly provide in the lease that one party is relieved from liability for his negligence. We noted that one method by which the parties to the lease may agree to allocate the risk is by specifying which of them will carry fire insurance for the benefit of both. We also held that in determining whether the parties intended to vary the ordinary rules of liability, a court must construe the lease as a whole.

**{8}** Those courts of other jurisdictions which have dealt with contract clauses disclaiming or limiting a bailee's liability for his negligence have generally held that the exculpatory clause must be expressed in clear and unambiguous language. **See, e.g., Hill v. Carolina Freight Carriers Corp.,** 235 N.C. 705, 71 S.E.2d 133 (1952). Most of them have also held that the clause will be strictly construed and "will not be interpreted as effecting the exemption if any other meaning may reasonably be ascribed to the language employed." **Langford v. Nevin, supra,** 298 S.W. at 537. The result of the application of this strict construction rule has often been that a contract provision that would seem to relieve the bailee of liability for his negligence is ruled not to do so because the parties failed to use the word negligence in the provision. **See, e.g., Hill v. Carolina Freight Carriers Corp., supra** (provision that plaintiff "will bear . . . all losses thru [**sic**] . . . collision to said motor vehicle" held not to relieve defendant of liability for employee's negligence). Thus, the parties' ostensible freedom of contract has been circumvented through strict construction by the courts. Annot., 175 A.L.R. 8, 19 (1948). However, examination of those cases employing the strict construction rule reveals that in most of them the bailee either prepared the bailment contract, **see, e.g., Minnesota Butter & Cheese Co. v. St. Paul Cold-Storage Warehouse Co.,** 75 Minn. 445, 77 N.W. 977 (1899); **Hill v. Carolina Freight Carriers Corp., supra;**

[2] We use the term "ordinary bailee" here to refer to a bailee in an arrangement that is "essentially private in nature, so that no other than the bailor and bailee are directly and materially affected" by the limitation of liability. Brodkey, **Contractual Limitation of Bailee's Liability in Illinois,** 8 DePaul L. Rev. 25, 33 (1958). We do so because those bailees involved in arrangements which directly affect third parties, such as common carriers, are not permitted, absent special legislation, to limit their liability for their own negligence as a matter of public policy. **Id.**

**McAshan v. Cavitt,** 149 Tex. 147, 229 S.W.2d 1016 (1950); **Langford v. Nevin, supra,** or entered into a series of negotiations over the contract with the bailor, **see, e.g., Anchor Casualty Co. v. Robertson Transport Co.,** 389 S.W.2d 135 (Tex. Civ. App. 1965). Other courts have relaxed the strict construction rule, even when the bailee prepared the contract. **See, e.g., Blinder v. United States Fire Ins. Co. of New York,** 103 F. Supp. 902 (N.D. Ill. 1952) (phrase "any loss of or damage to said article" held to refer to losses due to bailee's own negligence); **Klann v. Hess Cartage Company,** 50 Mich. App. 703, 214 N.W.2d 63 (1973) (provision that bailee "shall not be liable for the loss of, or damage to, the aforesaid equipment, however caused" held to unequivocally absolve bailee of liability for own negligence). **See also Buckey v. Indianhead Truck Line,** 234 Minn. 379, 48 N.W.2d 534 (1951).

**{9}** The application of the strict construction rule has tended to weaken contract provisions that disclaim or limit the bailee's liability for his own negligence, and thus perpetuate the former rule that the bailee cannot exculpate himself from such liability. The two major purposes behind that rule have been "(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have the power to drive hard bargains." **Bisso v. Inland Waterways Corp.,** 349 U.S. 85, 91, 75 S. Ct. 629, 632, 99 L. Ed. 911 (1955) (footnote omitted).

**{10}** The application of the rule of strict construction in the case at bar would do little to achieve those purposes. Avcor, the bailor, provided the contract without any participation from Buckley, the bailee, who obviously did not have the power to drive a hard bargain. If anything, it was Buckley and not Avcor who needed protection here. Also, to suggest that failure to apply the strict construction rule here "would, without more, tend to encourage bailees to be careless is unrealistic and . . . highly conjectural and remote." Brodkey, **Contractual Limitation of Bailee's Liability in Illinois,** 8 DePaul L. Rev. 25, 27 (1958). Instead, a relaxation of the strict construction rule here would advance the goals of freedom of contract and security of transactions. We therefore hold that when the bailor prepares the contract of bailment without the participation of the bailee the rule that exculpatory clauses are to be strictly construed against exonerating the bailee from liability for his own negligence will not be rigorously applied. The parties to a bailment contract need not use any particular magic words to disclaim or limit the bailee's liability; their intent, clearly expressed or necessarily implied from the contract as a whole, will determine whether the bailee is liable. Thus, we adopt the rule of **Acquisto v. Joe R. Hahn Enterprises, Inc., supra,** as applicable to the case at bar.[3]

**{11}** In determining the intent of Avcor and Buckley regarding the limits of Buckley's liability, we must examine paragraphs 17 and 18 and the insurance options quoted above. Meaning and significance must be given to each provision in its proper context with all other parts of the agreement. **Schultz & Lindsay Construction Co. v. State,** 83 N.M. 534, 494 P.2d 612 (1972). Paragraphs 1 through 16 establish the standard of care Buckley had to exercise toward the airplane. Omni argues that paragraph 18 is an unlimited assumption of all liability by Buckley, and that paragraph 17 merely sets out his liability for damages not covered by insurance. Such a reading of the two paragraphs, however, makes paragraph 17 superfluous since it would merely be restating a part of what Buckley agreed to assume under paragraph 18. We reject this interpretation, since "[t]he court will if possible give effect to all parts of the instrument and an interpretation which gives a reasonable meaning to all its provisions will be preferred to one which

[3] The application of the rules governing leases of realty to cases involving bailment contracts, and vice versa, is not unheard of. See, for example, **Bleakley v. Fixture Exchange Corporation,** 470 S.W.2d 296 (Tex. Civ. App. 1971), and **Wichita City Lines v. Puckett,** 156 Tex. 456, 295 S.W.2d 894 (1956), applying **Langford v. Nevin, supra,** to leases of realty, and **Anchor Casualty Co. v. Robertson Transport Co., supra,** applying **Puckett** to bailment contracts. **See also Gulf Compress Co. v. Harrington,** 90 Ark. 256, 119 S.W. 249 (1909).

leaves a portion of the writing useless or inexplicable." 4 Williston on Contracts § 619, at 731 (3d ed. 1961) (footnote omitted). Instead, we read paragraph 17 as allocating the risk of personal injury or property damage caused by Buckley's departure from the standard of care established by paragraphs 1 through 16, or his negligence or pilot error. Paragraph 18 allocates all other risk under the contract.

**{12}** The rental contract, however, is ambiguous. Paragraph 17 implies that the pilot's negligence is covered by insurance. The insurance options refer to "deductible physical damage liability" and "specified physical damage deductible liability." A pilot could read the options as providing insurance to cover the deductible amount of the insurance already compensating for the damages dealt with by paragraph 17. From this he could reasonably conclude that he is liable under paragraph 17 for only the amount Avcor would itself be liable for under its insurance policy. This interpretation differs from Omni's interpretation, that paragraph 17 merely implicitly reserves a claim against the pilot for the specified damages, whether or not they are covered by insurance.

**{13}** Because the contract is reasonably and fairly susceptible of different constructions, it is ambiguous. **Vickers v. North Am. Land Developments,** 94 N.M. 65, 607 P.2d 603 (1980). Although "[t]he mere fact that the parties are in disagreement on the construction to be given does not necessarily establish ambiguity," **id.** at 68, 607 P.2d at 606 (citation omitted), we are unable to determine the parties' intent from the contract as a whole. "The mere fact that we have to speculate demonstrates the ambiguity of the agreement." **Young v. Thomas,** 93 N.M. 677, 679, 604 P.2d 370, 372 (1979).

**{14}** There is no substantial extrinsic evidence in the record to support Omni's interpretation. Instead, there is evidence to support Buckley's interpretation. The construction of a contract adopted by the parties, as evidenced by their conduct, is entitled to some weight in ascertaining their intention and understanding of the contract. "This is particularly true as to the resolution of ambiguities and uncertainties of meaning in the contract [citations omitted], and especially so if the conduct of the parties manifesting their construction of the contract occurred prior to the development of a controversy between them." **Schultz & Lindsay Construction Co. v. State, supra,** 83 N.M. at 536, 494 P.2d at 614. After the accident but almost a year before this suit was filed, Avcor, at Omni's instruction, deleted paragraph 17 from all its contracts so that they would not contradict Avcor's insurance policy with Omni. This constitutes some evidence that Avcor and Omni realized that paragraph 17 was at least ambiguous.

**{15}** We must construe the ambiguities in the contract most strongly against the party who drafted it. **Id.** Although Avcor did not draft the contract, it adopted it, so the contract will be construed against Omni, Avcor's subrogee. Since there is no substantial extrinsic evidence to support Omni's interpretation, we hold that the terms of the contract limit Buckley's liability to the amount of damages not covered by Avcor's insurance. Under these circumstances, this reasonable interpretation of the contract satisfies the rule of **Acquisto v. Joe R. Hahn Enterprises, Inc., supra.**

**{16}** Omni is also bound by the limitation of liability and cannot sue Buckley for reimbursement of its payments to Avcor under the insurance contract. **See** 16 Couch on Insurance 2d §§ 61:111,:113 (1966). We therefore reverse the judgment of the trial court and remand the case with directions to dismiss Omni's claim against the Buckleys.

**{17} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, Respectfully Dissenting**

**DISSENT**

**SOSA, Senior Justice, dissenting.**

**{18}** I respectfully dissent. The majority opinion incorrectly expands the holding of **Acquisto v. Joe R. Hahn Enterprises, Inc.,** 95 N.M. 193, 619 P.2d 1237 (1980), to allow courts to construe lease agreements to find an **implied** agreement as to which party will bear the risk of loss due to negligence. This is clearly contrary to the ruling in **Acquisto** which requires an **express** exculpatory provision before a negligent party will be allowed to escape liability.

**{19}** As in **Acquisto,** the parties in the case at bar failed to expressly agree that the pilot would purchase flight insurance; therefore, the pilot must bear the loss for his own negligent conduct. This result falls squarely within paragraph 17 of the lease agreement which states that the pilot agrees to pay for any damage "not covered by insurance," and with paragraph 18 in which the pilot agrees to indemnify the lessor against "any and all loss . . . and/or liability." Under the majority's ruling, the negligent lessee is allowed to escape liability for his negligence.

**{20}** For the foregoing reason, I respectfully dissent.

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-033**

**Filing Date: March 12, 1982**

**Docket No. 13,815**

**NEW MEXICO DEPARTMENT OF HUMAN SERVICES, INCOME SUPPORT DIVISION,**

**Petitioner,**

**v.**

**AURORA TAPIA,**

**Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

Motion for Rehearing denied March 25, 1982

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Manuel J. Lopez
Las Cruces, New Mexico

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** We granted certiorari to determine whether the Court of Appeals applied the proper scope of review in reversing the decision of the New Mexico Department of Human Services (DHS). We hold it did not and therefore reverse. We also considered whether the Court of Appeals improperly decided questions which were neither raised at the hearing nor argued on appeal. We conclude that these questions were improperly decided.

**I.**

**{2}** Aurora Tapia filed a request for a "fair hearing" under Section 27-3-3, N.M.S.A. 1978, following receipt of an advance notice of termination of financial and medical assistance. A hearing was held before a fair hearing officer of DHS who recommended to the division director that Dona Ana County be found to have acted correctly in terminating benefits. Two members of a Fair Hearing Review Committee concurred in the hearing officer's recommendation. The division director, through a subordinate, decided in favor of DHS. Tapia appealed to the Court of Appeals, which reversed, holding that DHS had not met its burden of proving Tapia's capacity to fulfill her normal function of parental support as a homemaker.

**{3}** The question presented is the proper scope of review applicable to appeals from decisions of the director of the income support division or the social services division of DHS. Section 27-3-4(F), N.M.S.A. 1978, states that:

> The court shall set aside a decision and order of the director only if found to be:
>
> (1) arbitrary, capricious or an abuse of discretion;
>
> (2) not supported by substantial evidence in the record as a whole; or
>
> (3) otherwise not in accordance with law.

**{4}** In reviewing an administrative decision, the courts must view the evidence in the light most favorable to the decision. **New Mexico Human Services Depart. v. Garcia,** 94 N.M. 175, 608 P.2d 151 (1980); **United Veterans**

**Organizations v. New Mexico Property Appraisal Department,** 84 N.M. 114, 500 P.2d 199 (Ct. App. 1972). The record as a whole contains substantial evidence supporting the administrative decision in the Tapia case.

**{5}** In holding that Tapia had been denied a fair hearing, the Court of Appeals relied on certain medical reports included in the record which indicated that Tapia suffered from hypertension, diabetes, and other medical problems. One medical report indicated that her activities must be limited to light physical exertion and that regular employment is not possible. However, prior to the hearing, the Incapacity Review Unit (IRU) of DHS reported that despite Tapia's health problems, she was capable of functioning in her usual role as homemaker. This report constitutes substantial evidence sufficient to support the final decision.

**{6}** The Court of Appeals erroneously ignored the IRU report. Although Tapia originally questioned whether DHS had performed the necessary fieldwork to support its conclusions, she withdrew the issue by stipulation.

**{7}** Accordingly, the decision of the Court of Appeals is reversed and the decision of DHS is reinstated.

**II.**

**{8}** The Court of Appeals discussed at length the validity of the procedures followed by DHS in reaching its decision and concluded that they were "not in accordance with law." This conclusion was reached without the benefit of briefs or arguments on appeal. Neither were the procedures challenged at trial.

**{9}** In **Sais v. City Elect. Co.,** 26 N.M. 66, 188 P. 1110 (1920), we decided a case on propositions of law which "were not only not assigned and argued in this court, but were not even raised in the trial court." **Id.** at 68, 188 P. at 1111. We then explained the justification for so doing.

> A general rule has been announced by this court to the effect that propositions of law not raised in the trial court cannot be considered here, and the reasons underlying such rule were fully discussed in the case of **Fullen v. Fullen,** 21 N.M. 212, 153 P. 294. [1915]. Three specific exceptions to that rule have also been announced in this court, viz: (1) That jurisdictional questions may be raised for the first time here. [Citations omitted.] (2) That questions of a general public nature affecting the interest of the state at large may be determined by the court without having been raised in the trial court. [Citation omitted.] And (3) that the court will determine propositions not raised in the trial court where it is necessary to do so in order to protect the fundamental rights of the party. [Citation omitted.]

**Id.** at 68-69, 188 P. at 1111.

**{10}** It should be obvious that the three exceptions could swallow the rule unless they are applied with caution and restraint. The rationale for the general rule as given in **Fullen, supra,** deserves repetition.

> The services of trained and skilled lawyers, thoroughly conversant with the facts and the law of the case, and thoroughly alive to the interests of their respective clients, are required to assist the court in arriving at the correct conclusions. The nature of the subject is such that the court, although always endeavoring to do full justice, is unable, alone, always to see fully and clearly all of the avenues leading to the truth, either of law or fact.

**Id.** at 225, 153 P. at 298.

**{11}** Courts risk overlooking important facts or legal considerations when they take it upon themselves to raise, argue, and decide legal questions overlooked by the lawyers who tailored the case to fit within their legal theories. Examination of those cases in which the **Sais** exceptions

were applied will prove that, generally, the courts will apply those exceptions sparingly and only where there could be no valid reason for the lower court's action. **See, e.g., Thwaits v. Kennecott Copper Corporation, Chino Mines Division,** 52 N.M. 107, 192 P.2d 553 (1948); **Sais, supra; Baca v. Perea,** 25 N.M. 442, 184 P. 482 (1919). These exceptions should not be used to decide new or difficult questions, especially when the factual basis is murky or incomplete.

**{12}** Accordingly, the judgment of the Court of Appeals is reversed and the decision originally appealed from is affirmed.

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**DAN SOSA JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-034**

**Filing Date: March 12, 1982**

**Docket No. 13,664**

**GERALDINE LOPEZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RUDOLPH A. LOPEZ, AND DELFINIA TORRES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS JAMES TORRES,**

**Plaintiffs-Appellants,**

**v.**

**FOUNDATION RESERVE INSURANCE COMPANY, INC., A NEW MEXICO CORPORATION,**

**Defendant-Appellee.**

**APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY,
EDMUND J. KASE, III, District Judge.**

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for Appellant Lopez.

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for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** The parties stipulated to the following facts. Rudolph Lopez and Foundation Reserve Insurance Company, Inc. (Foundation) entered into an insurance contract which covered two automobiles and included separate uninsured motorist coverage for each vehicle in the amount of $15,000 per person or $30,000 per accident. While driving one of the covered vehicles, Lopez and a passenger, Louis James Torres, were killed in a collision with an uninsured motorist. Plaintiffs, personal representatives of the estates of the decedents, demanded that Foundation pay $60,000 on grounds that the $30,000 per accident coverage on each vehicle should be "stacked" as if there were two separate policies. Foundation declined payment. Plaintiffs brought suit for declaratory judgment, and both parties moved for summary judgment. The court granted Foundation's motion and denied plaintiffs'. Plaintiffs appealed.

**{2}** We consider for the first time whether an insured may aggregate or "stack" uninsured motorist coverage when more than one automobile is covered under a single policy. The issue has received considerable scrutiny in our sister states, but no consensus as to the proper result has emerged.

**{3}** All motor vehicle insurers in New Mexico are required to provide uninsured motorist coverage under Section 66-5-301, N.M.S.A. 1978 (Cum. Supp. 1981). In compliance with this statutory requirement, Foundation included the following coverage:

COVERAGE J - UNINSURED MOTORISTS

> I. To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of:

> (a) bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury", sustained by the insured; * * * caused by accident and arising out of the ownership, maintenance or use of such uninsured motor vehicle * * *.

Foundation also included the following provision in order to limit its liability under Coverage J:

> 6. Limits of Liability.
>
> (a.) The company's limit of bodily injury liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person in any one accident shall not exceed the amount specified by the financial responsibility law [of New Mexico] for bodily injury to one person in any one accident * * *. [T]he company's limit of liability for all such damages arising out of bodily injury sustained by two or more persons in any one accident shall not exceed the amount specified by such financial responsibility law for bodily injury to two or more persons in any one accident.

Section 66-5-222, N.M.S.A. 1978, provides for limitations on the amounts recoverable:

> **Payments sufficient to satisfy requirements.**
>
> A. Judgments herein referred to shall, for the purpose of the Financial Responsibility Act [66-5-201 to 66-5-248 N.M.S.A. 1978] only, be deemed satisfied:
>
> (1) when fifteen thousand dollars ($15,000) has been credited upon any judgment or judgments rendered in excess of that amount because of bodily injury to, or death of one person as the result of any one accident; * * *
>
> * * * * * *
>
> B. However, payments made in settlements of any claims because of bodily injury, death or property damage arising from such accident shall be credited in reduction of the amounts provided for in this section.

**I.**

**{4}** Foundation asserts that the policy is unambiguous and should therefore be enforced to limit plaintiffs' recovery to $30,000. We cannot agree that the policy is unambiguous. On its face, the limitation clause in this case appears to limit Foundation's liability for bodily injury to the statutory minimum of $15,000 per person or $30,000 per occurrence. However, nowhere in the contract is there any mention of the effect of multiple premiums paid under one policy insuring more than one vehicle.

**{5}** Other states interpreting language similar to that in Foundation's limitation of liability clause have found it ambiguous. Once the ambiguity is found, the contract is construed against the insurance company which drafted the clause. **E. g., Goodman v. Continental Casualty Company,** 347 A.2d 662 (Del. Super. 1975); **Hartford Acc. & Indem. Co. v. Bridges,** 350 So.2d 1379 (Miss. 1977); **Mountain West Farm Bureau v. Neal,** 169 Mont. 317, 547 P.2d 79 (1976). One court reached the same result even where the limitation was preceded by the phrase "Regardless of the number of insureds * * *." **O'Hanlon v. Hartford Acc. & Indem. Co.,** 439 F. Supp. 377, 385 (D. Del. 1977). We follow this approach and hold that the policy is ambiguous. Therefore, the trial court erred in granting Foundation's motion for summary judgment.

**{6}** Because the policy is ambiguous, judicial construction of its terms is required to give it effect. Since construction of an ambiguous contract depends on extrinsic facts and circumstances, the terms of the agreement become questions of fact. **Young v. Thomas,** 93 N.M. 677, 604 P.2d 370 (1979). In normal situations, we would remand to the trial court for the findings necessary for a proper interpretation of the contract. **Id.** Here, however, the parties have stipulated to the essential facts. In addition, this case presents a question

of first impression in New Mexico. Other cases are pending in both the state and federal courts which require resolution of this question. Therefore we proceed to construe the policy.

**II.**

**{7}** The term "stacking" refers to an insured's attempted recovery of damages under more than one policy, endorsement or coverage "by placing one policy, endorsement, or coverage, etc. upon another and recovering from each in succession until either all of his damages are satisfied or until the total limits of all policies, endorsements, coverages, etc. are exhausted, even though the insured has not been fully indemnified. Davis **Stacking of Uninsured Motorist Insurance,** in N.H. Bar Ass'n C.L.E. Handbook 33, 36-37 (1980). We upheld interpolicy stacking in **Sloan v. Dairyland Insurance Company,** 86 N.M. 65, 519 P.2d 301 (1974), but had not been presented with the problem of intra-policy stacking until now.

**{8}** When someone purchases general uninsured motorist coverage he is insured against bodily injury in at least five situations:

1) as a pedestrian;
2) as a passenger in someone else's insured car;
3) as a passenger in an uninsured car;
4) while in his own insured car; and
5) for injuries suffered by passengers riding in his own insured car.

**See Chavez v. State Farm Mutual Automobile Ins. Co.,** 87 N.M. 327, 533 P.2d 100 (1975). He also obtains a minimum amount of insurance against property damage to the insured vehicle. The problem of intra-policy stacking arises when two or more vehicles are insured under one policy, with separate premiums paid for each. The insured may argue that he has paid more than once for each of the types of bodily injury coverage since the coverage is not related to a specific insured vehicle, and should therefore receive multiple coverage. For example, if the insured, while walking down the street, is struck by an uninsured motorist and suffers injury in excess of the minimum coverage provided by one payment of uninsured motorist premium, should he not get the benefit of the multiple premiums he paid? The same argument applies in the case at bar, where the decedents were occupying one of two insured vehicles.

**{9}** In deciding this issue, we feel it is useful to review and analyze **Sloan, supra,** which also involved uninsured motorist coverage. The suit was brought under an insurance policy owned by the deceased herself. She was killed while a passenger in another's vehicle as the result of a collision caused by an uninsured motorist. The executor of her estate collected the statutory minimum benefit under the policy covering the vehicle in which she was riding. Her own insurance company denied payment, claiming as a defense a standard "other insurance" limitation clause. We held that recovery under the deceased's policy could be "stacked" upon the benefits paid under the vehicle-owner's policy.

> Appellant urges that our legislature's true intention was to provide for $10,000 of minimum protection for those injured by uninsured motorists, and no more. It says that otherwise the estate here would receive a "windfall" not contemplated by the legislature, and that the estate would receive more than would have been the case had Mr. Vallejos [the uninsured motorist] had the minimum liability coverage * * *.
>
> We do not agree with the reasoning of appellant * * *. We find in our statutory scheme a minimum uninsured motorist coverage without difficulty, but are unable to perceive a maximum. Had the legislature intended the $10,000 to be both a minimum and a maximum it could easily have said so, but it did not. Nor do we view the recovery allowed by the court below as being a "windfall". The total damages suffered by the estate exceed the total recovery. On the other hand appellant is seeking

to avoid coverage for which it contracted and received a premium.

**Sloan, supra,** 86 N.M. at 68, 519 P.2d at 304.

**{10}** The reasoning adopted in the **Sloan** case is applicable to the issue in the present case.

**A.**

**{11}** "[T]he clear trend of late has been in favor of stacking." **Taft v. Cerwonka,** R.I., 433 A.2d 215, 218 (1981) (citations omitted). The courts of other jurisdictions have advanced several rationales in support of intra-policy stacking of uninsured motorist benefits. In **Sellers v. United States Fidelity & Guaranty Co.,** 185 So.2d 689 (Fla. 1966), cited with approval in **Sloan, supra,** the Florida court held that the "other insurance" limitation clause violated the Florida uninsured motorist statute. The **Sellers** rationale was extended to intra-policy stacking in **Tucker v. Government Employees Insurance Co.,** 288 So.2d 238 (Fla. 1973).[1] Other states have also permitted intra-policy stacking on grounds that the attempted limitation was void as against the policy of the relevant statute. **See General Mutual Insurance Company v. Gilmore,** 294 Ala. 546, 319 So.2d 675 (Ala. 1975); **Great Central Insurance Company v. Edge,** 292 Ala. 613, 298 So.2d 607 (1974); **Barbin v. United States Fidelity And Guaranty Co.,** 315 So.2d 754 (La. 1975); **Wilkinson v. Fireman's Fund Insurance Co.,** 298 So.2d 915 (Ct. App.), **appeal dismissed,** 309 So.2d 657 (La. 1974); **Ohio Cas. Ins. Co. v. Stanfield,** 581 S.W.2d 555 (Ky. 1979); **Chaffee v. U.S. Fid. & Guar. Co.,** 591 P.2d 1102 (Mont. 1979); **Cameron Mut. Ins. Co. v. Madden,** 533 S.W.2d 538 (Mo. 1976); **State Farm Mut. Auto Ins. Co. v. Williams,** 481 Pa. 130, 392 A.2d 281 (1978); **American States Ins. Co. v. Milton,** 89 Wash. 2d 501, 573 P.2d 367 (1978); **Federated American Ins. Co. v. Raynes,** 88 Wash. 2d 439, 563 P.2d 815 (1978).

**{12}** Our own statute, Section 66-5-301, is virtually identical to those of thirty-three other states, including all of those jurisdictions just cited, whose courts have held the limitations on stacking to be against statutory policy. Davis, **supra,** at 131 n.11. A decisive consideration of those cases was that the uninsured motorist coverage protects against bodily injury and does not relate to coverage of a particular vehicle.

**{13}** Foundation's position in this case is based on an interpretation of Section 66-5-301 which requires that separate full uninsured motorist coverage be provided for each vehicle. However, we adopt the better reasoned interpretation that the statute requires only that each of several vehicles insured under a single policy be covered by one minimum coverage with no need for separate full coverage for each.

**{14}** Other states have construed their statutes as requiring only minimum coverage for each policy. "The requirement of the statute is that every automobile liability insurance **policy** include uninsured motorists coverage." **Pettid v. Edwards,** 195 Neb. 713, 240 N.W.2d 344, 347 (1976). Accordingly, each of several vehicles insured under a single policy need not have separate coverage as long as one minimum coverage applies to each. **Holland v. Hawkeye Security Insurance Company,** 230 N.W.2d 517 (Iowa 1975); **Pettid v. Edwards, supra; Weemhoff v. Cincinnati Insurance Co.,** 41 Ohio St.2d 231, 325 N.E.2d 239 (1975).

**{15}** The intent of the legislation is to assure that no insured motorist will remain uncompensated for injuries caused by an uninsured motorist. **Chavez v. State Farm Mutual Automobile Ins. Co., supra.** The Legislature has established a minimum amount of liability coverage, and has required that all policies provide uninsured motorist coverage of this minimum amount. The desired result is that an injured insured receive the same compensation when injured by an uninsured motorist as he would receive if the other

[1] In 1977 Florida's legislature specifically prohibited intra-policy stacking. FLA. STAT. § 627.4132 (1977). This provision was later amended so as to not apply to uninsured motorist coverage. FLA. STAT. § 627.4132 (1981), and is entirely repealed effective October 1, 1982.

motorist had carried the minimum amount of liability insurance provided by statute. We do not find any legislative intent to relate the required amount of coverage to the number of vehicles owned and insured under one policy. We therefore hold that the statute does not require separate full uninsured motorist coverage for each vehicle insured under a single policy. However, this does not preclude purchase of additional coverage beyond the statutory minimum.

**B.**

**{16}** Another reason for intra-policy stacking is that it fulfills the reasonable expectations of the insured. **See Allstate Ins. Co. v. Maglish,** 94 Nev. 699, 586 P.2d 313 (1978). Numerous courts have also permitted stacking on the ground that payment of two premiums entitles the insured to two recoveries. **See, e.g., Curran v. Fireman's Fund Insurance Company,** 393 F. Supp. 712 (D. Alaska 1975); **Lambert v. Liberty Mutual Insurance Company,** 331 So.2d 260 (Ala. 1976); **Squire v. Economy Fire & Cas. Co.,** 69 Ill. 2d 167, 13 Ill. Dec.17, 370 N.E.2d 1044 (1977); **United Sec. Ins. Co. v. Mason,** 59 Ill. App. 3d 982, 17 Ill. Dec.507, 376 N.E.2d 653 (1978); **Sturdy v. Allied Mutual Insurance Company,** 203 Kan. 783, 457 P.2d 34 (1969). These two rationales are closely related and we find them persuasive.

**{17}** Sloan, supra, would permit stacking where several automobiles, owned by one individual, are insured under separate policies. It would be inconsistent to permit stacking in **Sloan** cases and deny stacking in cases where all the vehicles are insured under one policy but the same additional premiums are charged as would be charged if the coverage were provided by multiple policies. In **Sloan,** we stated that we cannot condone an insurance company's "seeking to avoid coverage for which it contracted and received a premium." **Sloan, supra,** 86 N.M. at 68, 519 P.2d at 304. The crucial question, therefore, is not whether multiple vehicles are insured under one policy or several, but whether the insured has paid one premium or several for the particular uninsured motorist coverage sought to be stacked.

**{18}** Where an insurance company charges a separate full uninsured motorist premium for each vehicle under a single or several policies, it is only fair that the insured be permitted to stack the coverages for which he has paid. Even where the second premium is reduced, fairness may require stacking. For example, in **Federated American Ins. Co. v. Raynes, supra,** the premium was reduced by $5.00 for the second and third vehicles. Yet the court stated:

> In this present case, respondent is entitled to recover under his policy with FAI because uninsured motorist coverage protects an insured, even though he was not occupying a vehicle named in the policy. If we limit respondent's uninsured motorist coverage to $15,000.00, he will not have gained anything by paying the second premium, because the uninsured motorist premium which he paid for his car would cover the $15,000.00. In effect, FAI will have gained a windfall by collecting the second premium.
>
> We hold that the number of uninsured motorist coverages on which an insured is entitled to rely is determined by the number of premiums paid and not by the number of policies under which the cars are insured.

563 P.2d at 820.

**C.**

**{19}** Courts in other jurisdictions have peremptorily held, without evidence, both that there is and that there is not additional risk incurred in insuring additional vehicles. **Compare, e.g., Allstate Company v. McHugh,** 124 N.J. Super. 105, 304 A.2d 777 (1973), **affirmed,** 126 N.J. Super. 458, 315 So.2d 423 (1974), **with, e.g., Chaffee v. U.S. Fid. & Guar. Co., supra.** We decline to make such a determination as a matter of law.

**{20}** There may be circumstances in which insurance companies may cover multiple vehicles in one policy and charge multiple premiums yet not make multiple payments for a claim related to one vehicle. Unlike most states with comparable statutes, New Mexico requires minimum property damage coverage under its financial responsibility law. This requirement may justify some additional premium charge for each additional vehicle, depending on the added risk incurred. Also, the additional risk accruing by covering passengers in additional insured vehicles may justify another premium for each additional vehicle.

**{21}** Whether stacking is to be permitted depends on the evidence presented in each case. The insured has the initial burden of proving that he paid multiple premiums for uninsured motorist coverage. Once he makes that showing, the burden shifts to the insurance company to prove that it did not charge multiple premiums for the same coverage.

**III.**

**{22}** On remand, the district court must apply the principles outlined above to two specific individuals—Lopez, as the named insured, and Torres, as a passenger in an insured vehicle.

**{23}** The uninsured motorist premium charged for the second car was one dollar less than that charged for the first car. In its motion for summary judgment, Foundation stated that:

> [T]his lesser charge recognized the lesser likelihood of both vehicles being operated at the same time and therefore being "at risk" at the same time. The fact that a premium was charged recognized that there might be times when both vehicles were being operated and were therefore "at risk."

This language does not indicate that a lesser premium was charged because the only additional coverage it purchased was for passengers in the car and for property damages. Had that been the case, there could be no stacking because there would be no double payment for a single coverage. Instead, it appears that the premium was reduced because of the decreased likelihood that a covered injury would occur through use of the **second** car. Upon payment of the second premium, Lopez paid a second time for coverage of personal injuries suffered as a pedestrian or as an occupant in any vehicle. Coverage of Lopez' personal injuries should therefore be stacked.

**{24}** However, uninsured motorist coverage of passengers who are not named insureds applies only to passengers injured while occupying an insured vehicle. If Lopez had insured only one vehicle, and he and Torres were occupying an uninsured vehicle when injured, Lopez would be covered under the policy on the first car but no coverage would extend to Torres. Accordingly, Torres' coverage is limited to the coverage purchased on the vehicle in which he was riding. **See Holloway v. Nationwide Mut. Ins. Co.,** 376 So.2d 690 (Ala. 1979).

**{25}** Each separate premium payment entitled Lopez and other named insureds to a maximum recovery of $15,000 per person or $30,000 per occurrence. Torres, whose coverage is limited to that purchased with the premium on the actual vehicle he was occupying, may recover only up to the $15,000 per person paid for by that premium.

**{26}** Therefore, the judgment is reversed and the cause is remanded to the district court for such further action as is consistent with this opinion.

**{27} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-041**

**Filing Date: March 24, 1982**

**Docket No. 13,574**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**RICHARD EDWARD WILLIAMS,**

**Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

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Martha A. Daly, Appellate Defender
Santa Fe, New Mexico

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** The defendant was convicted of armed robbery with firearm enhancement, contrary to Sections 30-16-2 and 31-18-4, N.M.S.A. 1978. The Court of Appeals reversed on grounds that evidence obtained pursuant to an improper search of the defendant's car directly undermined the defendant's claim of insanity and should have been suppressed. The search was made without a warrant and the court concluded that it neither was made under exigent circumstances nor satisfied the requirements of an inventory search. We disagree with the latter conclusion and affirm the conviction.

**{2}** On May 6, 1979, the defendant displayed a gun and forced a cashier to empty three separate cash registers at a grocery store. The cashier placed the money in a grocery bag which he carried from register to register. While the cashier was emptying a fourth register, a customer, wielding a gun, directed the defendant to set his weapon down on the counter. Shortly thereafter, the defendant was arrested and taken to the police station for booking. During booking, an officer found a set of keys in the defendant's pocket and, without obtaining a warrant, returned to the store to locate the defendant's car. The officer found the car locked and legally parked behind the grocery store. He then conducted an inventory search of its contents. Among the items inventoried were a map marked with an "escape route" and a checkbook showing a negative balance. These were seized by the officer.

**{3}** The trial court denied a motion to suppress the seized evidence with the following statement:

> The City or the police department have an obligation to protect the vehicle, to protect the inventory, and to hold them responsible in excess of the normal responsibility would be unfair to them. They have to inventory, and if they don't inventory they could be liable for the loss, and they must remove the vehicle from its location because of the possibility of danger. It was taken in accordance with the regulations. Unless there is something that is given to the Court that the Court would have notice that there was a violation of the procedures or something else was done that is not in accordance with their inventory procedure, then the Court is going to deny the motion.

**{4}** We limit our discussion of the search to a determination of whether it was a proper inventory search. An inventory search of an automobile

is constitutional if three requirements are met: 1) the vehicle to be inventoried is in police control or custody; 2) the inventory is made pursuant to established police regulations; and 3) the search is reasonable. **State v. Ruffino,** 94 N.M. 500, 612 P.2d 1311 (1980).

**{5}** The defendant does not assert that his vehicle was not in police control and custody. Other courts have held in similar situations that such custody of person property is proper. **United States v. Staller,** 616 F.2d 1284 (5th Cir.), **cert. denied,** 449 U.S. 869, 101 S. Ct. 207, 66 L. Ed. 2d 89 (1980); **United States v. Gravitt,** 484 F.2d 375 (5th Cir. 1973), **cert. denied,** 414 U.S. 1135, 94 S. Ct. 879, 38 L. Ed. 2d 761 (1974); **United States v. Rosenberg,** 458 F.2d 1183 (5th Cir.), **cert. denied,** 409 U.S. 868, 93 S. Ct. 166, 34 L. Ed. 2d 117 (1972). Rather, his challenge goes to the further requirement that custody "must be based on some legal ground and there must be some nexus between the arrest and the reason for the impounding. **Preston v. United States,** 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964); **United States v. Lawson,** 487 F.2d 468 (8th Cir. 1973)." **Id.** at 502, 612 P.2d at 1313 (footnote omitted). The **Preston** case was decided on the basis that the search "was too remote in time or place to have been made as incidental to the arrest." **Preston, supra** at 368, 84 S. Ct. at 883. That search was never characterized as an "inventory search;" indeed, the manner of search—entering the trunk through the back seat of the car—distinguishes it from the type of search involved in the instant case. The only relevance of **Preston** to inventory search cases is in its example of a nexus between the arrest and the impoundment. In **Preston,** the defendants were arrested for vagrancy while sitting in their parked car. Upon this arrest, the police properly took custody of the vehicle, even though they presumedly could have locked it and left it parked where it was. **United States v. Lawson, supra,** also cited in **Ruffino,** involved an arrest for passing insufficient funds checks. The defendants' vehicle was locked and parked in a motel parking lot. It was impounded and taken to the police station on the day of the arrest. The next day an inventory search was performed. There was no suggestion that the impoundment was improper.

**{6}** Preston and **Lawson,** as examples of impoundments incident to the respective arrests, indicate that while there must be **some** nexus between the arrest and the reason for the impounding, that nexus need only be reasonable. In neither of those cases could the impoundment be characterized as necessary because the car was a traffic hazard, **Cady v. Dombrowski,** 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973), or because it was violating a parking ordinance, **South Dakota v. Opperman,** 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). Therefore, **Preston** and **Lawson** were cited in **Ruffino** as illustrations that no compelling need must be present to justify impoundment of a vehicle incident to an arrest.

**{7}** Accordingly, we hold that the first **Ruffino** requirement was satisfied in this case. When the officer returned to locate the defendant's car, as directed by his supervisors, he was authorized to take custody for the purpose of having it towed. Thus, the vehicle was in police control and custody. The possible use of the vehicle as evidence of the crime, discussed more fully **infra,** supplies the necessary nexus between the arrest and the reason for impounding. The fact that the vehicle was legally parked and **could** have been left there does not make the impoundment improper.

**{8}** The second **Ruffino** requirement, that the inventory must be made pursuant to established police regulations, was considered by the trial court. The defendant claimed that the officer did not follow the following police department standard operating procedure:

> 314.02 The owner/operator of a vehicle has the right to select a wrecker of his choice or to release his vehicle to a qualified driver present at the scene or to legally park the car unless:
>
> A. He is physically or mentally incapable of doing so.

> B. The vehicle is needed as evidence of a crime.

The defendant was afforded no such choice.

**{9}** The State argues that the vehicle was a means of escape, and therefore was needed as evidence of the crime. Until the officer actually located a car with license plates from the defendant's home state and which could be opened with the defendant's keys, the very existence of the car was uncertain. Once the car was found, its proximity to the scene of the crime and testimony related to the officer by local residents to the effect that the car had been there only a short while constituted sufficient basis for a conclusion that the vehicle was related to the crime. Hence, there was no need to give the defendant a choice as to disposition of the car.

**{10}** No other failure to comply with the police regulations was alleged by the defendant. On this evidence, the second **Ruffino** requirement was satisfied.

**{11}** The third requirement—that the search be reasonable—has been carefully examined in inventory search cases. **See, e.g., Opperman, supra; Dombrowski, supra; Lawson, supra.** It is unnecessary to restate the balancing approach to determining the reasonableness of inventory searches. The **Lawson** case upheld suppression of a gun found in a locked trunk because the only justification for the search of the automobile was its possession by police.

> While police custody may justify reasonable measures to protect . . . property within plain view in the automobile, such reasonable measures do not extend to breaking into a locked trunk.

**Id.** at 475. While we disagreed with this analysis in **Ruffino** and specifically permitted trunk searches as part of an inventory procedure, even under the **Lawson** approach the map and checkbook could have been removed as a protective measure.

**{12}** We hold that in light of **Ruffino,** the search made here was reasonable and permissible, and we uphold the trial court's denial of the defendant's suppression motion. Accordingly, the Court of Appeals is reversed.

**{13}** The defendant raised three additional issues before the Court of Appeals which that court did not reach. Since the remaining issues are easily disposed of, we consider them here.

**{14}** First, the defendant assigns error to the trial court's refusal to instruct the jury on the lesser-included offense of attempted armed robbery. This claim is based on the fact that the defendant never actually possessed the money nor left the store with it. The implication is that the defendant never "carried away" the money, which is an essential element of armed robbery. N.M.U.J.I. Crim. 16.11, N.M.S.A. 1978. N.M.U.J.I. Crim. 16.02 defines "carried away" as "moving the property from the place where it was kept or placed by the owner." The instant the cashier, under the defendant's coercion, removed the money from the first register, this element was satisfied. There is no evidence to justify a jury finding that this element was not met. There was no error in refusing the instruction.

**{15}** Second, the defendant assigns error to the trial court's refusal to instruct the jury on the definition of mental disease. Although the general insanity instruction, N.M.U.J.I. Crim. 41.00, N.M.S.A. 1978, was given, the defendant claims the instruction was incomplete here because, while the instruction mentions mental disease, it fails to define what a mental disease is. N.M.U.J.I. Crim. 41.00 adequately instructed the jury on insanity and the trial court did not err in refusing the defendant's tendered instruction. **See State v. Blakely,** 90 N.M. 744, 568 P.2d 270 (1977).

**{16}** Finally, the defendant would have us reverse because the trial court refused to instruct the jury as to the consequences of a verdict of not guilty by reason of insanity. This was a proper refusal. **State v. Luna,** 93 N.M. 773, 606 P.2d 183 (1980); **State v. Chambers,** 84 N.M. 309, 502 P.2d 999 (1972).

**{17} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, respectfully dissenting**

**DISSENT**

**SOSA, Senior Justice, dissenting. I respectfully dissent.**

**{18}** I cannot join in the majority opinion because the facts of this case do not amount to a constitutional inventory search and because of the unreasonable burden the majority places on our police officers.

**I.**

**{19}** I agree that the three requirements for a constitutional inventory search are: (1) the vehicle to be inventoried must be in police control or custody; custody must be based upon a legal ground and there must be a nexus between the arrest and the reason for impoundment; (2) the inventory must be made pursuant to established police regulations; and (3) the search must be reasonable. **State v. Ruffino,** 94 N.M. 500, 612 P.2d 1311 (1980). However, the above requirements were not met in this case.

**{20}** The majority opinion states that the defendant does not assert that his automobile was not in police control or custody. I disagree. At the trial level, the defendant alleged that the search and seizure of his automobile was "not valid as an inventory search because the automobile was lawfully parked and there was no necessity to remove it into police custody." In my judgment, this allegation is sufficient to assert that the automobile was not in police custody. Furthermore, the issue on writ of certiorari as presented by the state is "[w]hether the facts in this case meet the requirements for a valid inventory search as stated by this Court" in **Ruffino, supra.** The first requirement is that the police have control or custody of the defendant's automobile.

**{21}** The police did not have control or custody of the defendant's automobile. The defendant was arrested inside the grocery store he attempted to rob and later transported to the police station. At the station, the police inventoried certain items the defendant had in his possession and seized a set of keys he was carrying. Such an inventory is conducted as part of the booking process as a reasonable means of safeguarding the property of the accused while he is in jail, and so that no weapons or contraband would be introduced into the jail. **United States v. Tillery,** 332 F. Supp. 217 (E.D. Pa. 1971), **aff'd, United States v. Smith,** 468 F.2d 381 (3d Cir. 1972); **People v. Glaubman,** 175 Colo. 41, 485 P.2d 711 (1971).

**{22}** After seizing the keys, instead of safeguarding them from loss, the police decided to try their luck at locating the defendant's automobile. The reasons alleged by the officer for locating the vehicle were threefold: (1) to seize the automobile as a means of escape; (2) because he believed he would find additional evidence in the automobile, such as ammunition; and (3) because his supervisor, without reason, told him to locate the automobile. Thus, not even knowing whether the defendant was driving an automobile prior to the attempted robbery, the police proceeded to the store to look for an automobile which the keys would open. Although the defendant's automobile was legally parked on a street directly behind the store, the officers searched the interior and hatch of the automobile and

found a checkbook and a map with an alleged escape route.[1]

**{23}** The majority incorrectly disposes of the custody issue. The police did not even know of the existence of the automobile nor its location. How could the police then have control or custody of the automobile? What the majority now permits is for a police officer to make a valid arrest, obtain the keys of the accused and proceed to search a city for his automobile so that they can search it, and then justify it as an inventory search. This is a clear violation of the Fourth Amendment.

**{24}** Control and custody of keys is not sufficient to have control and custody of the items the keys will open. The logical extension of the majority's holding is that a police officer who legally obtains the keys of an accused may then proceed to open a locked suitcase, safety deposit box, and possibly a house. I cannot join the majority in encouraging such blatant constitutional violations.

**{25}** Also, in **Ruffino, supra,** we required that custody of a vehicle be based upon some nexus between an arrest and the reason for the impoundment. Here, there was no nexus. This involved a warrantless search of an automobile without justification under one of the few exceptions to the warrant requirement. Since the police did not even know whether a vehicle existed (as the majority acknowledges) or whether the vehicle could be evidence of a crime, there could be **no** nexus between the arrest and the impoundment. The State argues that the vehicle was evidence of a means of escape. The import of this contention is questionable, since "escape" is not an element of the crime for which the defendant is being accused. § 30-16-2, N.M.S.A. 1978. The police officers merely engaged in a "fishing expedition" clearly impermissible by our constitution. If the police believed that this automobile contained evidence of a crime, they should have specified in writing their probable cause and have sought a search warrant from a neutral and detached judge.

**{26}** The police department also failed to comply with their own procedures. Section 314.02, as fully set out by the majority, permits an owner of an automobile to legally park his car unless the owner is physically or mentally incapable of doing so, or the automobile is evidence of a crime. The latter exception is argued by the State. However, I fail to see how the automobile could be evidence of the robbery, since the defendant was caught while attempting to rob. Thus, since the car was already legally parked and the police did not even know of its location or existence, the police need not have searched for it nor inventoried it, once located. The police had all the evidence they needed to proceed to trial on the robbery charge. They did not need to extend themselves into impermissible grounds without a warrant.

**II.**

**{27}** Before the majority ruled in this case, an inventory search of an automobile was required for two principle reasons. One, to protect the automobile while in the custody of police, **Harris v. United States,** 390 U.S. 234, 88 S. Ct. 992, 19 L. Ed. 2d 1067 (1968); two, to protect police from false tort claims or potential danger. **See United States v. Lawson,** 487 F.2d 468 (8th Cir. 1973). Generally, the automobile was either evidence of a crime (**i.e.,** stolen), was required to be impounded by state law, **Cooper v. California,** 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967), was impounded because the accused was arrested while in or near the automobile, **Harris, supra,** or the automobile was illegally parked, **South Dakota v. Opperman,** 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976).

**{28}** The majority now creates another category for impoundment which, in my judgment, imposes an unacceptable burden on police officers. The majority requires that a police officer, who makes a valid arrest and finds automobile keys on the defendant during the booking process, take those keys and attempt to locate the defendant's

[1] State's Exhibit 4, the tow-in report which allegedly includes a list of the items inventoried in the automobile, does not list the map as having been inventoried.

automobile so that the automobile may be inventoried and then impounded. Under this new category, the police need not be certain of the existence or location of the automobile; the automobile need not be in police custody; the police need not be required to protect it; nor need they be subjected to false tort claims or be subject to any danger. If a police officer is uncertain of the existence of an automobile belonging to an accused, and the automobile is not evidence of a crime, no logical nor legal reason exists for making the officer search a city for the automobile to insure its security. However, the majority now imposes such a requirement, and, as such, the police will hereinafter be subject to liability if loss occurs to an accused and the police did not search for his automobile and have it impounded, although they had custody of his keys.

III.

**{29}** There is little doubt that this defendant is guilty of the crime for which he is being charged. This fact can be proven by the State without the use of the unlawfully-obtained evidence. However, in analyzing whether a particular defendant has had his constitutional rights violated, we are required to ignore his guilt or innocence. We must decide these constitutional questions on their merit alone. In my judgment, although this defendant is probably guilty, his Fourth Amendment rights were violated. Evidence obtained in violation of the Fourth Amendment is not admissible at trial. The trial court having improperly admitted this evidence, I would remand for a new trial.

**{30}** In view of my apparent disposition of this case, I need not address the remaining issues discussed by the majority.

**{31}** I respectfully dissent.

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-042**

**Filing Date: March 25, 1982**

**Docket No. 13,130**

**STATE OF NEW MEXICO, EX REL., DEPARTMENT OF HUMAN SERVICES,**

**Plaintiff-Appellee,**

**v.**

**ELIAS RAEL, AND ESMERALDA MARTINEZ,**

**Defendants-Appellants.**

**APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY, THOMAS A. DONNELLY, District Judge.**

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**OPINION**

**PAYNE, Justice.**

**{1}** This appeal presents a question of first impression in New Mexico: Is an indigent entitled to court-appointed counsel in a civil contempt proceeding brought to enforce an order of child support entered in a paternity suit? We do not consider whether an indigent is entitled to counsel in other stages of paternity and support actions or where the Department of Human Services is not acting as assignee of support rights of a welfare recipient.

**{2}** The Department of Human Services originally brought suit for a determination of paternity under Section 40-5-7, N.M.S.A. 1978, and for the support of a minor recipient of public assistance pursuant to Section 27-2-28, N.M.S.A. 1978. A default judgment was entered against appellant Rael. Over a year later Rael failed to appear at a show cause hearing to determine whether he was in contempt of court for his alleged failure to comply with the order for support. He was arrested pursuant to a resulting bench warrant, and he appeared at a hearing on the warrant and the contempt allegation. The court continued the hearing based on its own determination that Rael did not understand the nature of the hearing and required the services of an attorney. Rael, after failing in his attempt to obtain private counsel, moved on the basis of his indigency for appointment of counsel. The court denied his motion, and we granted an interlocutory appeal.

**{3}** Rael advances several constitutional grounds for reversal of the trial court's denial of his motion. He claims that he is entitled to appointed counsel pursuant to the sixth amendment to the United States Constitution and the due process and equal protection clauses of the fourteenth amendment to the United States Constitution and of Article II, section 18 of the New Mexico Constitution. The Department argues that there is no constitutional requirement of appointed counsel in civil contempt proceedings brought to enforce a child support order.

**I.**

**{4}** The sixth amendment right to counsel guarantee applies only to criminal prosecutions. **Argersinger v. Hamlin,** 407 U.S. 25, 92 S. Ct.

2006, 32 L. Ed. 2d (1972). Therefore, we must initially determine whether this contempt proceeding is civil or criminal.

**{5}** We note that the United States Supreme Court has rejected a rule basing the sixth amendment right to counsel solely on the label given to a proceeding. **See Middendorf v. Henry,** 425 U.S. 25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976); **Argersinger v. Hamlin, supra.** "[T]he fact that the outcome of a proceeding may result in loss of liberty does not by itself . . . mean that the Sixth Amendment's guarantee of counsel is applicable." **Middendorf v. Henry, supra,** at 35, 96 S. Ct. at 1287. Instead, the Supreme Court has looked to the nature of the proceeding, of the offense, and of the punishment to determine whether the proceeding is a "criminal prosecution" for the purposes of the sixth amendment. **Id.**

**{6}** Our courts have for years looked to a number of factors, none of which is conclusive, in order to determine whether a contempt proceeding is civil or criminal. The most important of these factors is the nature and purpose of the punishment. **State v. Greenwood,** 63 N.M. 156, 315 P.2d 223 (1957). We discussed this factor in **International Min. & C. Corp. v. Local 177, U.S. & A.P.W.,** 74 N.M. 195, 198, 392 P.2d 343, 345 (1964):

> Commitments and fines for criminal contempt are imposed for the purpose of vindicating the authority of the court and are punitive in nature and intended as a deterrent to offenses against the public. Punishment for civil contempt is remedial and for the benefit of the complainant; it is coercive rather than punitive and is made contingent upon the defendants' compliance with the order of the court. . . .

With civil contempt, remedial punishment for the benefit of the plaintiff is "measured in some degree by the pecuniary injury caused by the acts of disobedience." **Id.** The court may properly impose imprisonment in a civil contempt action to coerce the defendant into complying with the order of the court. **Jencks v. Goforth,** 57 N.M. 627, 261 P.2d 655 (1953). Other factors to which we have looked include whether the contempt proceeding is a separate and independent proceeding or a continuation of the original action, **New Jersey Zinc Co. v. Local 890 of International Union, etc.,** 57 N.M. 617, 261 P.2d 648 (1953); **Canavan v. Canavan,** 18 N.M. 640, 139 P. 154 (1914), whether the state or a private party is bringing the contempt action, **State v. Greenwood, supra,** whether the act with which the defendant is charged is also an indictable crime, **id.,** and whether the defendant's act was one of those acts "done in disrespect of the court, or which obstruct the due and proper administration of justice, or which tend to bring the court into disrepute in the form of public opinion." **State v. Magee Pub. Co. et al.,** 29 N.M. 455, 471, 224 P. 1028, 1029 (1924).

**{7}** Although Rael could have been criminally prosecuted for nonsupport pursuant to Sections 40-5-20 through 40-5-22, N.M.S.A. 1978, the present proceeding is civil in nature. It is an enforcement action based on the paternity and support suit, and is not a proceeding separate and independent from the original suit. Although the state is bringing the action, it is merely acting as assignee of the minor's mother's claim for nonsupport, **see** 42 U.S.C. § 602(a)(26)(A) (1976); 45 C.F.R. § 232.11(a) (1980); § 27-2-28, N.M.S.A. 1978, rather than exercising its police power, **see Brotzman v. Brotzman,** 91 Wis. 2d 335, 283 N.W.2d 600 (Ct. App. 1979) (Foley, J., dissenting), and is therefore acting as a private party. The act for which the defendant would be held in contempt is his failure to pay support in compliance with the court order, rather than an act done in disrespect of the court, or one which obstructs justice or tends to bring the court into disrepute. Finally, the nature and purpose of the punishment are clearly civil. The order to show cause why judgment for $5,387 should not be entered against Rael reveals the remedial nature of the punishment. The amount is equal to the amount of the original judgment plus unpaid support from the time of judgment and is payable to the Department rather than to the court. Rael

also holds the keys to his prison, since he can avoid the contempt by either complying with the order or showing his inability to comply due to no fault on his part. **See Wilson v. Wilson,** 45 N.M. 224, 114 P.2d 737 (1941). We therefore hold that this is a civil contempt proceeding and not a criminal prosecution implicating the right to counsel provisions of the sixth amendment.

**II.**

**{8}** Because Rael faces the threat of imprisonment, the due process clause of the fourteenth amendment is implicated. That provision embraces a requirement of fundamental fairness. Accordingly, we must decide whether Rael must be represented by court-appointed counsel in order to have a fundamentally fair contempt hearing.

**{9}** The United States Supreme Court recently stated in **Lassiter v. Department of Social Services,** 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), that an indigent's right to appointed counsel "has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation," **id.** at 25, 101 S. Ct. 2158, and that as his interest in personal liberty diminishes so does his right to appointed counsel, **id.** at 26, 101 S. Ct. at 2159. From this the Court derived an historical "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his personal liberty." **Id.** The Court then set forth the test to be applied to determine whether the due process clause of the fourteenth amendment entitles the indigent to assistance of appointed counsel: The private interests at stake, the risk that the procedures used will lead to erroneous decisions, and the government's interest must all be evaluated and their net weight balanced against that historical presumption. **Id.**

**{10}** Here, the defendant's interest in his personal liberty, though an extremely important one, is not as strong as it would be if he were being criminally prosecuted or charged with criminal contempt. He will lose his liberty only if it is proven that he has the ability to comply and fails to make arrangements to do so. **See generally McClelland & Eby, Child Support Enforcement: The New Mexico Experience,** 9 N.M.L. Rev. 25, 38-39 (1978-79). Although the defendant's property interest is at stake, that interest is also a limited one since it has already been adjudicated in the original paternity and support suit.

**{11}** Both the defendant and the Department have an interest in the accurate determination of whether he has complied with the support order. Generally the legal and factual issues in a contempt hearing are not complex. The only issues before the court are whether the court order exists and is currently effective, whether the defendant knew of the order but failed to comply, and whether he has the ability to comply. These issues are typically straightforward and easily resolved. The existence and effectiveness of the order can be determined by reference to court records. "The facts establishing the arrearage are bookkeeping matters and rarely are subject to substantial dispute." **Sword v. Sword,** 399 Mich. 367, 249 N.W.2d 88, 93 (1976). The Department is unlikely to call any expert witnesses or rely to any great extent on its superior fact-gathering abilities in a routine enforcement proceeding. The defendant is usually capable of marshalling the financial facts, assessing the accuracy of the monetary claim against him and making some sort of presentation to the court. "Inquiry concerning [the] defendant's ability to pay, reasons for the arrearage and mitigating circumstances normally are not complicated," **id.,** and so do not require the assistance of an attorney to clarify them for the court. The presence of a court-appointed attorney would do little to enhance the accuracy of the decision-making in most cases and instead might inject a heightened adversarial atmosphere into an otherwise informal proceeding.

**{12}** The government's interest in the proceeding is primarily a financial one. The Department must be able to enforce the support orders it obtains as economically as possible without

impinging on constitutional guarantees. The expense of appointed counsel and the possible additional costs in time and money resulting from lengthened proceedings work against this interest in economy and efficiency. Thus, as both litigant and provider of the forum, the state has a strong interest in informal procedures. The state also has a strong interest in having court orders obeyed by the people within its jurisdiction.

**{13}** When we balance all these factors against each other we conclude that due process does not require that appointed counsel be provided in every instance in which an indigent defendant faces civil contempt charges that might subject him to incarceration. As we have explained, the defendant's liberty and property interests are not as vulnerable in the context of the civil contempt hearing as in the criminal setting. The provision of court-appointed counsel would do little to reduce erroneous decisions here, where the legal and factual issues are not complex. These factors, when added to the state's interests, militate against a rule requiring appointment of counsel in all cases such as this one.

**{14}** The historical presumption in favor of the appointment of counsel is weakened here. Because he "has the keys to his own prison," the defendant's liberty interest is not the full-blown liberty interest found in cases such as criminal cases or **In re Gault,** 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), and **Vitek v. Jones,** 445 U.S. 480 (1980), where the defendant has no control over whether or not he remains incarcerated or committed to an institution. As the **Lassiter** Court stated, "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel." **Lassiter v. Department of Social Services, supra,** at 26, 101 S. Ct. at 2159. We find that this weakened presumption is outweighed by the conclusion that the other three factors, when balanced, do not require that counsel always be appointed where an indigent is charged with civil contempt for nonsupport.

**{15}** We therefore hold that the due process clause of the fourteenth amendment does not require the appointment of counsel in every case where an indigent faces the possibility of imprisonment if found to be in civil contempt for failure to comply with an order of support. However, we recognize that there may be cases in which the defendant would be deprived of a fundamentally fair contempt hearing if assistance of counsel were not provided. As the court in **Duval v. Duval,** 114 N.H. 422, 322 A.2d 1, 4 (1974), states,

> In some nonsupport contempt cases, which are not routine in nature, there may be issues of sufficient complexity so as to require the defendant to be assisted by counsel for a competent presentation of their merits. Questions such as whether the defendant had a reasonable opportunity to present his case in prior proceedings or whether he has available certain defenses such as res judicata or the statute of limitations could baffle and confuse persons who are inexperienced in the law, and it would be unfair to deny such persons the benefit of counsel if they were unable to retain a lawyer because of their financial condition. [Citations omitted.]

**{16}** The trial court is the proper evaluator of the need for counsel on a case-by-case basis, considering factors such as the indigent's ability to understand the proceeding, the complexity of the legal and factual issues, and the defenses that might be presented. We hold that the trial court must make a case-by-case determination, based on articulated reasons, whether fundamental fairness requires the appointment of counsel to assist an indigent defendant in a nonsupport civil contempt proceeding, and may, in the exercise of its sound discretion, appoint counsel in the proper case.

**III.**

**{17}** When we examine the record before us we do not find that the trial court considered those factors we outlined above in making its decision to deny Rael's motion for appointment of counsel. We therefore vacate the trial court's

denial of the motion and remand the case for further proceedings consistent with this opinion.

**{18}** Because we reverse and remand this case on the basis of the due process clause of the fourteenth amendment to the United States Constitution, we need not consider Rael's other claims.

**{19} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-047**

**Filing Date: April 12, 1982**

**Docket Nos. 13,886, 14,141**

**ANDREA K. TERRY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT LYNNE SCHLUETER, DECEASED, SANTIAGO G. CHAVEZ, SR., PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID CHAVEZ, DECEASED, AND RUBEN CHAVEZ,**

**Plaintiffs-Appellants,**

**v.**

**NEW MEXICO STATE HIGHWAY COMMISSION, ET AL.,**

**Defendants,**

**and**

**BROWN CONSTRUCTION COMPANY, A CORPORATION,**

**Defendant-Appellee,**

**ANDREA K. TERRY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT LYNNE SCHLUETER, DECEASED, SANTIAGO G. CHAVEZ, SR., PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID CHAVEZ, DECEASED, AND RUBEN CHAVEZ,**

**Plaintiffs-Appellants,**

**v.**

**NEW MEXICO STATE HIGHWAY COMMISSION, ET AL.,**

**Defendants,**

**and**

**BOVAY ENGINEERS, INC.,**

**Defendant-Appellee.**

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY,**
**Lorenzo F. Garcia, District Judge.**

Motion for Rehearing denied June 7, 1982

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**OPINION**

**PAYNE, Justice.**

**{1}** These cases, which have been certified to us from the Court of Appeals, require us to take a further look at established case law in two important areas involving contractors' liability: the ten-year limitation on actions against architects, engineers and contractors, § 37-1-27, N.M.S.A. 1978, and the limitations on a contractor's liability set forth in **Tipton v. Clower,** 67 N.M. 388, 356 P.2d 46 (1960). They also present a situation where a cause of action is barred by an

unreasonably short limitations period. We hold that an unreasonably short limitations period denies due process and therefore reverse the trial court's grant of summary judgment for Bovay Engineers, Inc. (Bovay). We reaffirm the principles previously set forth in **Tipton v. Clower, supra,** and therefore affirm trial court's grant of summary judgment for defendant-appellee Brown Construction Company (Brown).

**{2}** Bovay was the engineer and Brown was the contractor for a construction project on State Highway 124, at or near McCarty's Exit in Valencia County. The project was substantially completed on September 6, 1967, the date of final inspection by the State Highway Department. Brown performed no work on the project after that inspection. Nine years and nine months later, on June 11, 1977, two persons died and another suffered serious and permanent injury in a one-car accident which occurred on a curve which was built as a part of the project.

**{3}** Plaintiffs Terry and Chavez, personal representatives of the deceased, brought suit within two years of the accident, on June 8, 1979, against numerous parties, and added Bovay and Brown as defendants on June 6, 1980, in an amended complaint.

**{4}** Bovay and Brown moved separately for summary judgment, each claiming that the suit was barred by the provisions of Section 37-1-27, which reads:

> No action to recover damages for * * * bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration * * * shall be brought after ten years from the date of substantial completion of such improvement * * * *

Brown also claimed that it had completed its contract in accordance with the plans provided by the State. Brown argued that the curve as designed and built was not obviously dangerous to a reasonable man, and therefore it could not be held liable under the rule announced in **Tipton v. Clower, supra.** The trial court granted the motions of both defendants and plaintiffs appealed. The Court of Appeals certified the cases to this Court pursuant to Section 34-5-14(c), N.M.S.A. 1978, because they involve "a significant question of law under the Constitution of New Mexico." We consolidated these cases because they present identical issues.

**{5}** Brown contends that we need not reach the constitutional question because under **Tipton** it would not be liable even if the statutory limitation period were invalid. However, since Bovay's appeal has been consolidated with Brown's, we reach the constitutional issue.

**I.**

**{6}** Plaintiffs argue that Section 37-1-27 is unconstitutional on several grounds. They claim that it denies due process because it deprives the State of a potential right to indemnification from Bovay and Brown in case plaintiffs prevail against the State. Plaintiffs also claim that the statute denies equal protection of the law because it makes a distinction between contractors and owners which has no rational basis, and that it constitutes special legislation which is prohibited by the New Mexico Constitution, Article IV, Section 24.

**{7}** We need not discuss plaintiffs' argument that Section 37-1-27 deprives the State or any other landowner of a potential right to indemnification from Brown. Plaintiffs are without standing to assert such a claim. They have not shown how any of their own rights are affected by this effect of the statute. **State v. Hines,** 78 N.M. 471, 432 P.2d 827 (1967).

**{8}** As to their other arguments, plaintiffs recognize that the case of **Howell v. Burk,** 90 N.M. 688, 568 P.2d 214 (Ct. App.), **cert. denied,** 91 N.M. 3, 569 P.2d 413 (1977), upheld this statute against

a similar attack. However, numerous similar cases have been decided in other jurisdictions since **Howell** was written. **See generally** Annot., 93 A.L.R.3d 1242 (1979). Plaintiffs, and the Court of Appeals, urge us to examine these constitutional questions. We have done so and conclude that, subject to one important refinement, the **Howell** majority opinion represents the proper approach. **See Overland Const. Co., Inc. v. Sirmons,** 369 So.2d 572 (Fla. 1979) (Alderman, J., dissenting); **Burmaster v. Gravity Drainage Dist. No. 2,** 366 So. 2d 1381 (La. 1978); **O'Brien v. Hazelet & Erdal,** 410 Mich. 1, 299 N.W.2d 336 (1980); **Harmon v. Angus R. Jessup Associates, Inc.,** 619 S.W.2d 522 (Tenn. 1981).

**{9}** The only aspect of **Howell** which we need discuss is the problem raised but not answered in **O'Brien, supra.** The **O'Brien** court pointed out that "a plaintiff whose injury occurred and whose right of action thus vested shortly before expiration of the [statutory] period" might be denied due process because he would be denied a reasonable time within which to bring his suit. 299 N.W.2d at 341 n.18. The cause of action in the present case arose approximately three months before the expiration of the ten-year period, yet the action was commenced after the ten-year period expired. We are therefore squarely faced with the question raised in **O'Brien.**

**{10}** This type of statute has been aptly characterized as partly an abrogation of a cause of action and partly a statute of limitations. **Id.** 299 N.W.2d at 341 (citing **Oole v. Oosting,** 82 Mich. App. 291, 298-300, 266 N.W.2d 795, 799-800 (1978)). We emphasize that the abrogation effect of the statute on claims which accrue after the ten-year period does not violate the Constitution. **Howell, supra.** The question we face here deals with the limitations characteristic, since the cause of action did accrue within the ten-year period. Thus, we must decide whether a cause of action, once accrued, may be barred by a period so short that it in effect prevents an injured party from obtaining relief.

**{11}** We note at the outset that Section 37-1-27 does not specify whether the statute extends or limits other applicable limitations periods, as does at least one comparable statute. **See, e.g.,** Utah Code Ann. § 78-12-25.5(2) (1953) (stating that the statute shall not extend or limit other applicable periods of limitations). Nor does Section 37-1-27 contain a grace period extending the limitations period for actions brought late in the ten-year period, as do some similar statutes. **See, e.g.,** N.D. Cent. Code § 28-01-44(2) (1974). Therefore, the interplay between Section 37-1-27 and the otherwise applicable statutes of limitation is unclear. The question is whether actions which accrue near the end of the ten-year expiration date should be governed by the ten-year limit or by any other limitations period otherwise applicable.

**{12}** It has been argued that, where the ten-year period would expire before any otherwise applicable statute of limitations, the courts should enforce the ten-year period because that provision is special and limited in scope, and applicable special statutes prevail over general statutes. Vandall, **Architects' Liability in Georgia: A Special Statute of Limitations,** 14 Ga.St.B.J. 164, 165 (1978); Note, **Actions Arising Out of Improvements to Real Property: Special Statutes of Limitations,** 57 N.D.L. Rev. 44, 56 (1981). One court, recognizing that such a statute is "not at all a typical statute of limitations," characterized it as a "hybrid." **O'Connor v. Altus,** 67 N.J. 106, 117, 335 A.2d 545, 553 (1975). That court described the operation of the statute:

> On the one hand, it bars a right of action from coming into existence if the accident occurs subsequent to the ten-year period; but as to those events happening before the statutory period has run, the provision disallows, like any other statute of limitations, the institution of suit after the prescribed ten years has expired.
>
> As do many of its counterparts in other states, N.J.S.A. 2A:14-1.1 impliedly incorporates the tort limitation act generally applying to all personal injury actions. [Citation omitted.] Hence, this state's two-year

> statute of limitations, * * * does operate to restrict the period in which actions can be initiated for accidents occurring within ten years after construction; but it does not serve to extend beyond ten years from the date construction was completed the time within which suit may be filed.

**Id.** Other cases have held that the ordinary statute of limitations applies to actions brought within the statutory period, so that the special statutory period acts as an outside limit within which the customary statutes of limitation continue to operate. **A.J. Aberman, Inc. v. Funk Bldg. Corp.,** 278 Pa. Super. 385, 420 A.2d 594 1980) (see also cases cited **id.** 420 A.2d at 598).

**{13}** Recognizing the merit of these two related approaches, we nevertheless are persuaded that fundamental considerations of due process require that the ten-year limitation not be applied to actions accruing within but close to the end of the ten-year period.

**{14}** In **Davis v. Savage,** 50 N.M. 30, 168 P.2d 851 (1946), we adopted certain language from Wood on Limitations 75 (4th ed.): "A statute of limitations will bar any right, however high the source from which it may be deduced, **provided that a reasonable time is given to a party to enforce his right." Id.** at 42, 168 P.2d at 859 (emphasis added). The general rule is that statutes of limitation may be passed where formerly there were none, and existing limitation periods may be reduced while the time is still running, provided **that a reasonable time** is left for the institution of an action before it is time-barred. **Cutler v. U.S.,** 202 Ct. Cl. 221, **cert. denied,** 414 U.S. 1065, 94 S. Ct. 572, 38 L. Ed. 2d 470 (1973); **Walker v. City of Salinas,** 56 Cal. App. 3d 711, 128 Cal. Rptr. 832 (1976); **Stanley v. Denning,** 130 Ill. App. 2d 628, 264 N.E.2d 521 (1970). **See generally** 51 Am. Jur.2d **Limitation of Actions** §§ 27-35 (1970). The constitutionality of statutes of limitation has hinged on the reasonableness of the time provided to pursue a remedy. **Capitan Grande Band of Mis. Indians v. Helix Irr. Dist.,** 514 F.2d 465 (9th Cir.), **cert. denied,** 423 U.S. 874, 96 S. Ct. 143, 46 L. Ed. 2d 106 (1975); **Town of Brookline v. Carey,** 355 Mass. 424, 245 N.E.2d 446 (1969).

**{15}** Although this rule has been formulated in circumstances where a limitations statute, applied retroactively, operates to bar an existing remedy, we think it is an appropriate general restriction on the Legislature's right to statutorily limit actions.

**{16}** There is no New Mexico limitations period which would give an aggrieved party less than three months to pursue a claim for personal injury, as Section 37-1-27 would do under these facts. Indeed, that section could operate to give an injured party only one day to pursue a claim, if the cause of action accrued one day prior to the expiration of the ten-year period. We hold that such an abbreviated period is unreasonable.

**{17}** Although the courts may find a limitations period to be unreasonably short, it is not a judicial function to set appropriate limitations periods. We have upheld limitations periods as short as one year when justified by specific considerations. **See Espanola Housing Authority v. Atencio,** 90 N.M. 787, 568 P.2d 1233 (1977). However, as the Legislature has not specified a shorter reasonable period of limitations for actions such as the ones at bar, we feel compelled to apply the period provided by the applicable statute of limitations. The general period of limitation for personal injuries is three years. § 37-1-8, N.M.S.A. 1978. In an action for wrongful death, which accrues as of the date of death, the limitations period is also three years. § 41-2-2, N.M.S.A. 1978. Applying these limitations periods to the cases at bar, we hold that plaintiffs' actions against Bovay and Brown are not barred by Section 37-1-27, since they named these parties as defendants less than three years after the accident occurred.

**II.**

**{18}** Since the statute does not bar this action against Brown, we will discuss the application of **Tipton, supra.** The rule set forth in **Tipton**

provides that, generally, an independent contractor may be liable to third parties who may have been foreseeably endangered by the contractor's negligence, even after the owner has accepted the work. **Id.** 67 N.M. at 393-94, 356 P.2d 49. The general rule is subject to two limitations:

> 1) The independent contractor should not be liable if he merely carefully carried out the plans, specifications and directions given him, at least where the plans are not so obviously dangerous that no reasonable man would follow them, and
>
> 2) If the owner discovers the danger, or it is obvious to him, his responsibility may supersede that of the contractor.

**Id.; Baker v. Fryar,** 77 N.M. 257, 260, 421 P.2d 784, 786 (1966).

**{19}** Brown claims that it is exempt from liability under the first exception, since its uncontradicted affidavits establish that it satisfactorily completed the work in accordance with the terms and conditions of the construction contract, and that the plans and specifications provided by the State were standard for this type of project and contained no obviously dangerous elements. Brown neither designed nor engineered the plans and specifications for the project. These affidavits are sufficient to support Brown's motion for summary judgment.

**{20}** Plaintiffs have failed to produce any contrary evidence as to these material facts. Plaintiffs refer to a traffic engineering consultant's written report, which concludes that the curve is hazardous. It states: "Regardless of the reason for building the curve as it is, there is no question in my mind that in so building this curve, a hazard was created." The hazard results from a combination of factors, including inadequate pavement and poor signing as well as deceptive curvature and inconsistent banking. However, nothing in the report indicates that Brown did not carefully carry out the plans, specifications and directions given, or that these plans were "so obviously dangerous that no reasonable man would follow them." **Id.** These are the relevant fact determinations here. Plaintiffs' report does not reach these questions and does not contradict the affidavits put forth by Brown.

**{21}** Plaintiffs also cite **New Mexico Electric Service Co. v. Montanez,** 89 N.M. 278, 551 P.2d 634 (1976), for the proposition that the first exception noted above is no longer the rule in New Mexico. However, **Montanez** did not involve a contractor who used plans given to him, and the first exception was not even discussed in relation to the facts in **Montanez.** Therefore the **Tipton** rule and its exceptions remain the law in New Mexico.

**III.**

**{22}** We reverse the grant of summary judgment for Bovay and affirm the grant of summary judgment for Brown.

**{23} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice, Respectfully dissenting**

**DISSENT IN PART**

**RIORDAN, Justice, Concurring in part and dissenting in part.**

**{24}** I concur in affirming the trial court's granting summary judgment in favor of Brown

Construction Company. **Tipton v. Clower,** 67 N.M. 388, 356 P.2d 46 (1960).

**{25}** I disagree with the reversal of the summary judgment granted Bovay. I cannot agree that the statute is unconstitutional. The majority holds that since the injury in this case occurred only three months before the ten year limitation on bringing the action runs that the statute is unconstitutional to the extent that it operates to bar a valid claim without providing a reasonable time to the injured party to enforce his right. There is no evidence in the record to support the assumption by the majority that three months was not a reasonable time in this case to bring an action.

**{26}** I believe the statute is clear in its statement of the legislative purpose. Section 37-1-27, N.M.S.A. (1978) reads as follows:

> 37-1-27. Construction projects; limitation on actions for defective or unsafe conditions.
>
> No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, **shall be brought** after ten years from the date of substantial completion of such improvement; provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith. The date of substantial completion shall mean the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the purpose for which it was intended, or the date on which the owner does so occupy or use the improvement, or the date established by the contractor as the date of substantial completion, whichever date occurs last. [Emphasis added.]

**{27}** I believe that the legislature acted within their authority in enacting the statute and that it is constitutional. Indeed, the appellant did not even attack the statute on the grounds that the majority used to hold it unconstitutional in its application to certain cases. The constitutional issues raised by the appellant had already been answered adversely to her position in **Howell v. Burk,** 90 N.M. 688, 568 P.2d 214 (1977) and **Mora-San Miguel Electric Cooperative, Inc. v. Hicks & Ragland Consulting & Engineering Co.,** 93 N.M. 175, 598 P.2d 218 (1979).

**{28}** I would affirm the trial court's grant of summary judgment in favor of Bovay, and not hold the statute unconstitutional.

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-052**

**Filing Date: April 15, 1982**

**Docket No. 13,712**

**JANE F. LOVATO,**

**Petitioner-Appellee,**

**v.**

**BALTAZAR LOVATO,**

**Respondent-Appellant.**

**APPEAL FROM DISTRICT COURT OF TORRANCE COUNTY,**
**Paul Marshall, District Judge.**

Pickard & Singleton
Lynn Pickard
Santa Fe, New Mexico

for Appellant.

Koch & Jones
Ron Koch
Albuquerque, New Mexico

for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Baltazar Lovato appeals from a trial court decision refusing to grant him relief from the provisions of a child support and alimony award in his divorce from Jane Lovato. The Lovatos were divorced in 1977. Jane was awarded custody of their seven minor children and possession of the family home outside Moriarty. At the time of the divorce Baltazar took home $1,000 a month and had additional income of $2,000 a year. Jane had a tenth-grade education, had never held a job and had no vocational training. Jane had requested alimony because she intended to be a full-time homemaker and mother. The court ordered Baltazar to pay $75 per month per child in support and $75 per month in alimony. The court further ordered that the alimony payment increase by $75 as each child became emancipated, so that he would continue to pay $600 per month to Jane.

**{2}** In 1980, Baltazar moved for reduction and amendment of the alimony and child support provisions of the final decree of divorce. At that time only three children, aged 10, 13 and 14, remained at home. Jane received $600 a month, representing $225 in child support and $375 in alimony. Her monthly expenses amounted to $560 excluding clothing costs and her church tithe. Jane had sought no employment or job training since the divorce. Although Baltazar's income had increased by $200 per month, in 1980 he remarried and began supporting three more children. The trial court denied Baltazar's motion, except to order that the alimony be reduced to $500 per month at the time of the youngest child's emancipation.

**{3}** Baltazar argues that the trial judge abused his discretion in failing to modify the alimony award and asserts that the court misapplied the law in making its ruling. He asserts that in New Mexico both parents have an equal obligation to exhaust all reasonable resources to support their children. He argues that the national trend is to treat alimony as a method of rehabilitating the party disadvantaged by the marriage and divorce rather than as an incentive for the party's avoiding the self-support of which he or she is capable.

**{4}** Jane counters that the judge properly exercised his discretion in considering her status as homemaker and mother. She argues that Baltazar failed to show sufficient changed circumstances to warrant modification of the order and failed to show that she has become able to support herself. Jane acknowledges that both parents have equal responsibility for child support, but asserts

that public policy does not require a woman who has no job experience or job skills to leave her children and a village where employment opportunities are scarce in order to seek employment.

**{5}** Both the amount of alimony and the amount of child support awarded are discretionary with the trial court. **Hurley v. Hurley** 94 N.M. 641, 615 P.2d 256 (1980); **Spingola v. Spingola,** 91 N.M. 737, 580 P.2d 958 (1978). The decision of a trial court will be upheld unless there has been an abuse of discretion. **Spingola, supra.** We have previously held that in determining alimony the trial court may consider such factors as the needs of the wife, her age, her health and the means to support herself, the earning capacity and future earnings of the husband, the duration of the marriage and the amount of the property owned by the parties. **Michelson v. Michelson,** 86 N.M. 107, 520 P.2d 263 (1974). Alimony is not intended as a penalty against a husband but is a personal right intended for the purpose of one spouse's supporting another. **Brister v. Brister,** 92 N.M. 711, 594 P.2d 1167 (1979).

**{6}** Wide discretion has been given to the courts in determining alimony in order to avoid hardship on the part of one spouse and in order to insure that a spouse may have the support needed after losing the sustenance and support of coverture. **See Brister, supra.** However, a trial court must not allow a spouse to abdicate the responsibility for his or her own support and maintenance and place that upon the other. **See Doyle v. Doyle,** 5 Misc.2d 4, 158 N.Y.S.2d 909 (Sup. Ct. 1957). Several states have adopted policies which require a divorced spouse to seek employment if possible to avoid inflicting upon the former spouse a perpetual lien on future earnings. **See, e.g., Beard v. Beard,** 262 So. 2d 269 (Fla. Dist. Ct. App. 1972); **Saviers v. Saviers,** 92 Idaho 117, 438 P.2d 268 (1968); **Dakin v. Dakin,** 62 Wash. 2d 687, 384 P.2d 639 (1963). It is preferable to use alimony as a method of allowing a divorced spouse to gain personal independence by helping the person disadvantaged by the marriage and the divorce to extricate himself or herself from such a position. **See Bingert v. Bingert,** 247 N.W.2d 464 (N.D. 1976) (noting national trend). This must be done, however, consistent with the responsibilities of both divorced spouses for the support of minor children, **see Barela v. Barela,** 91 N.M. 686, 579 P.2d 1253 (1978); **Petition of Quintana,** 83 N.M. 772, 497 P.2d 1404 (1972), and with due consideration for other factors such as age, health, opportunities for employment, etc.

**{7}** In the present case the record reflects that only three of the seven children originally left in the custody of Jane are currently in her care. The ages of these children are such that Jane has at least some opportunity for self-support. Evidence introduced in this case shows that she has used the child support and alimony payments for uses other than basic support. There is evidence to indicate that Jane has made no attempt to alleviate this situation and will not be encouraged to help herself under the current level of spousal and child support payments.

**{8}** It is the duty of the trial court to make a decision based upon all the facts and upon all the considerations that will result in fairness to both parties involved in an alimony and support situation. After examining the record before us, we find that the trial court abused its discretion. Baltazar demonstrated a sufficient change in the circumstances of both parties to justify a modification of alimony. The trial court instead accepted without question Jane's desire to avoid even attempting to train for or find employment.

**{9}** We therefore reverse this case and remand it to the trial court with instructions to modify the alimony obligations to the extent necessary to encourage Jane to assume the responsibility for her own care and support.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-057**

**Filing Date: May 7, 1982**

**Docket No. 13,944**

**NORTHERN PUEBLOS ENTERPRISES,**

**Plaintiffs,**

**J. H. BURTTRAM,**

**Interested Party-Appellant,**

**v.**

**MARTIN L. MONTGOMERY,**

**Defendant,**

**NORTHERN PUEBLOS ENTERPRISES,**

**Plaintiff,**

**J. H. BURTTRAM,**

**Interested Party-Appellant,**

**v.**

**PUEBLO ELECTRIC & REFRIGERATION,**

**Defendant-Appellee.**

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, Thomas A. Donnelly, District Judge.**

Joseph A. Roberts
Santa Fe, New Mexico

for Appellant.

Herrera, Sena & Vigil
R. Steve Herrera
Santa Fe, New Mexico

for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This case requires us to decide whether a court may enforce a charging lien filed by an attorney for legal services rendered by awarding an amount smaller than that provided for by the contract with the client.

**{2}** Appellant Burttram represented Northern Pueblos Enterprises, Inc. (Northern Pueblos) in separate actions against Montgomery, a former employee of Northern Pueblos, and against Pueblo Electric and Refrigeration (Pueblo Electric). In the action against Montgomery, the parties entered into a stipulated judgment for $15,000. Burttram filed an attorney's lien for $19,856.87 for services performed.

**{3}** At the inception of the second action against Pueblo Electric, Burttram withdrew his representation of Northern Pueblos. Pueblo Electric filed a counterclaim against Northern Pueblos, on which it obtained a default judgment for $4,984.93 plus $1,000 attorney's fees ($5,984.93).

**{4}** Northern Pueblos is now insolvent and all of its assets are in the control of the Bureau of Indian Affairs.

**{5}** Montgomery deposited $16,427.01 ($15,000 plus interest) in the registry of the district court and his motion for satisfaction of judgment was granted. Burttram sought disbursement of these funds to satisfy his attorney's lien. Pueblo Electric moved to satisfy its judgment lien from these same funds. Burttram opposed

the motion on grounds that his charging lien had priority. Pueblo Electric then sought an evidentiary hearing on the reasonableness of the amount of the attorney's lien. The court considered documentary evidence, including an affidavit by the former general manager of Northern Pueblos to the effect that the amount of Burttram's fees was reasonable under the contract, and the briefs of counsel. Subsequently the court wrote a letter to the parties indicating that Pueblo Electric should be paid out of the funds deposited by Montgomery the $5,984.93 plus costs of $67.36. The court then stated:

> The balance of the funds . . . the Court concludes should be paid to J. H. Burttram . . . on his claim of attorneys fees and attorney's charging lien, and the Court further concludes that as [sic] said J. H. Burttram, is reasonably entitled to an attorney's fee in the sum of $10,000.00 for his attorney's services on behalf of [Northern Pueblos]. . . .

**{6}** Two days after this letter was written, the court issued an order granting Burttram's motion for enforcement of his lien and ordering the clerk to disburse $10,000 to Burttram simultaneously with the disbursement to Pueblo Electric. Burttram appeals, claiming the court had no authority to reduce the amount of his lien.

**{7}** Burttram's lien is an attorney's "charging lien," which is defined as an attorney's right

> to recover his fees and money expended on behalf of his client from a fund recovered by his efforts, and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his right to the same, and also to prevent or set aside assignments or settlements made in fraud of his right.

**Prichard v. Fulmer,** 22 N.M. 134, 140, 159 P. 39, 41 (1916). Such a lien is not created by statute but has its origin in the common law, and is governed by equitable principles. **Id.** at 139, 159 P. at 40.

**{8}** The resolution of the issue presented here becomes clear when the historical basis for the "charging lien" is considered.

> [T]he lien originated in the desire on the part of the courts to protect attorneys against dishonest clients, who, utilizing the services of the attorney to establish and enable them to enforce their claims against their debtors, sought to evade payment for the services which enabled them to recover their demand. The court, having control of its own process, would not permit the client to have the benefit thereof without paying the attorney, because in equity and good conscience he should compensate the attorney, as by his exertions and skill he had made it possible for the client to invoke the aid of the court and secure the process of such court to enforce his demand. The court, having control of its own process, saw to it that the client did not utilize it so as to defeat the attorney of his fee. Upon proper application by the attorney it would direct its officers to pay to the attorney the money to which he was entitled or would withhold its process until he was compensated. . . . Thus we see that the courts, by the control which they have over their own process, have ample power to protect the diligent attorney, and this they do, as stated, because the demands of equity and justice require it.

**Id.** at 145, 159 P. at 42-43.

**{9}** Because a court exercises its equitable powers in enforcing an attorney's charging lien, it may inquire into the reasonableness of the asserted fee for purposes of enforcing the lien. This result is not contrary to our case law.

**{10}** In Re Will of Carson, 87 N.M. 43, 529 P.2d 269 (1974), involved construction of a contingent fee contract. The Court held that since courts may not alter or amend a contract, the terms of the contract must be enforced. The holding in **Citizens Bank v. C & H Const., Etc.,** 93 N.M. 422, 600 P.2d 1212 (Ct. App.) **cert. denied sub nom. Davis v. Citizens Bank,** 93 N.M. 683, 604 P.2d 821

(1979), is to the same effect. In the present case, the court below did not alter Burttram's contract with Northern Pueblos. Northern Pueblos was not seeking to have the contract modified in this proceeding. The court simply gave Burttram equitable relief for a reasonable fee, leaving Burttram free to go against Northern Pueblos for the remaining fees due under the contract.

**{11}** As set forth above, the trial court concluded that for purposes of setting priorities of liens, Burttram was reasonably entitled to an attorney's fee of $10,000. This conclusion was made in the context of a proceeding to enforce a charging lien, and its applicability is limited to that context. It does not adjudicate the reasonableness of the fee as between Burttram and his client beyond the limits of the charging lien. We find no abuse in this exercise of its equitable powers.

**{12}** The assertion made that the attorney for Montgomery and Pueblo Electric had a conflict of interest which required dismissal of the latter's writ of garnishment is without merit.

**{13}** Accordingly, the judgment below is affirmed.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-071**

**Filing Date: June 24, 1982**

**Docket No. 13,641**

**ORETTA J. NICHOLS,**

**Petitioner-Appellant and Cross-Appellee,**

**v.**

**EDDIE E. NICHOLS,**

**Respondent-Appellee and Cross-Appellant.**

**APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY,**
**George L. Zimmerman, District Judge.**

Motion for Rehearing denied July 19, 1982

O'Reilly & Huckstep
Lee Huckstep
Ruidoso, New Mexico

for Appellant.

Charles E. Hawthorne
Ruidoso, New Mexico

for Appellee.

## OPINION

**PAYNE, Justice.**

**{1}** Petitioner Oretta Nichols (Wife) filed suit for dissolution of her marriage to Respondent Eddie Nichols (Husband). At the conclusion of a hearing conducted in November 1980, the district court orally granted the divorce and decided property, support and child custody issues. The court entered final judgment December 30, 1980. Seventy-one days later, on March 11, 1981, the district court entered a second final judgment. Wife appeals the entry of the second judgment; Husband cross-appeals the court's treatment (in both judgments) of some of his separate property.

**{2}** The following facts appear in the record. At the close of the November hearing, the court announced that the couple's residence was community property and that Wife "may live there and make the monthly payments if she wants to do so, and she will be credited with principal reduction upon sale." The court also awarded Wife $300 in attorney's fees and ordered that Husband pay child support:

> During the time he works for Dial Electric, he will pay $150 per month child support * * *. That will accrue from November 1, 1980, but the legal requirement will be $200 a month that accrues from that date, and that will be up to $200 when his employment changes, or he returns to work for Continental Telephone Company.

Both parties subsequently submitted proposed findings of fact and conclusions of law. Husband's addressed only the separate property status of the couple's residence. On December 30, 1980, the court entered its first final judgment, including the following provisions:

> 3. Respondent is hereby ordered to pay the sum of $200.00 per month as and for child support with said obligation incurring from November 1, 1980. Further, that during the pendency of the time that Respondent works for Dial Electric, he will pay the reduced sum of $150.00 per month, with the $200.00 per month obligation resuming when Respondent returns to work for Continental Telephone Company of the West. The difference between the $150.00 per month obligation and the $200.00 per month obligation shall be made current upon Respondent's return to work for Continental Telephone Company of the West.

* * * * * *

7. Respondent is hereby ordered to maintain the medical insurance programs upon the minor children of the parties until they attain the age of majority.

8. Respondent is hereby ordered to pay the sum of $750.00 as and for Petitioner's attorney fees to Petitioner * * *.

9. Respondent is hereby ordered to pay the sum of $161.12 per month as and for the house payment on the family home of the parties and will be credited with the principal reduction thereon upon the sale of the property.

**{3}** On January 21, 1981, Wife filed her "Proposed Supplemental Findings of Fact and Conclusions of Law," which repeated some of her earlier proposals. On February 2, Husband filed a second set of proposed findings and conclusions, adding to his first proposals some which addressed the issues of child support and attorney's fees. On March 11, the district court entered its second final judgment without stating that it had withdrawn its first judgment. The court largely repeated its previous orders, including the child support provision. However, the court omitted the order that Husband maintain medical insurance for the children, and substituted these provisions for the earlier ones:

7. Respondent is hereby ordered to pay the sum of $300.00 as and for Petitioner's attorney's fees * * *.

8. Petitioner shall make the monthly payments upon the family home and will be credited with the principal reduction thereon upon the sale of the property.

**I.**

**{4}** The first issue is whether the district court properly entered the second final judgment. Wife identifies three provisions under which the trial court might have had the authority to modify, reopen, or vacate the first judgment: Section 39-1-1, N.M.S.A. 1978; Rule 60(b), N.M.R. Civ.P., N.M.S.A. 1978; Section 40-4-7, N.M.S.A. 1978. She argues that the court's action was improper under any of the provisions.

**A.**

**{5}** Our determination of the propriety of the court's action depends on our examination of the record before us on appeal. This record is somewhat confusing and requires that we deal first with procedural issues before we can reach the substantive matters raised.

**{6}** The record on appeal sent up from the district court contains a transcript of the testimony at the November hearing, two sets of findings of fact and conclusions of law proposed by each party, and two final judgments with supporting findings and conclusions. It does not include a transcript of any other hearing, nor does it include any motion to reconsider or vacate the first judgment or an order to set aside that judgment.

**{7}** Wife contends that the record below is totally devoid of any motion, made by either Husband or the trial court, for relief from the judgment, or any action taken by the court within 30 days of the entry of the first judgment. Husband maintains that on January 19, 1981, the district court conducted a hearing on Husband's motion to review the judgment, and that counsel for both parties attended. He also asserts that although there was no formal written order setting aside the judgment and no record of the action, the court did set aside the first judgment at the January hearing and requested that the parties file new proposed findings, conclusions and judgment.

**{8}** Husband's assertions concerning the proceedings below are contained in his "Suggestion of Diminution of Record and Motion for Writ of Certiorari" filed in this Court the same day he filed his answer brief. Husband requested that we "issue a Writ of Certiorari ordering the trial court to file its certificate certifing [**sic**] [certifying]

that the December 30, 1980, judgment was set aside on January 19, 1981, at the hearing to review the judgment." We treated his motion as one to correct the record pursuant to Rule 8(f), N.M.R. Civ. App., N.M.S.A. 1978, and, after hearing arguments, denied it.

**{9}** Rules 7 and 8 of the Rules of Appellate Procedure for Civil Cases, N.M.S.A. 1978, govern the contents and the procedure for challenging or enlarging the record on appeal. Our rules place the primary burden of properly preparing the record on the appellant. **See also, e.g., Flower v. Willey,** 95 N.M. 476, 623 P.2d 990 (1981); **General Services Corp. v. Board of Com'rs,** 75 N.M. 550, 408 P.2d 51 (1965); **Berkstresser v. Voight,** 63 N.M. 470, 321 P.2d 1115 (1958). However, the appellee shares some of that burden. **See, e.g.,** N.M.R. Civ. App. 7(b), (e).

**{10}** Here, both Wife and Husband appealed from portions of the judgment and requested the entire record proper except for summonses and notices of depositions. Neither excluded any post-judgment motions or orders to vacate judgment in their requests.[1] Although neither party filed a written request that the reporter prepare any transcript of proceedings, the skeleton transcript **filed by Wife** and the record proper contain the reporter's certification "that Appellants have made satisfactory arrangements for the payment of the cost of the transcript of proceedings," and a transcript of the November hearing appears in the record on appeal. Because Wife did not file a description of the parts of the proceedings which she intended to include in the transcript, we can only conclude that she had ordered the entire transcript of proceedings. **See** N.M.R. Civ. App. 7(b).

**{11}** Husband did not file any objection to the transcript of proceedings in the district court, which would have permitted it to correct anything amiss, such as the lack of transcript of the alleged January hearing. **See id.** Nor did he avail himself of the provisions of Rule 7(c), which would permit him to prepare a statement of the unreported January proceeding and submit it, along with Wife's objections, to the district court for settlement, approval, and inclusion in the record on appeal. The fact that the transcript on appeal had already been filed in the Supreme Court would not have prevented him from preparing such a statement; this correction of the record was not the type requiring leave of the appellate court under Rule 60(a), N.M.R. Civ. P., N.M.S.A. 1978 (Repl. Pamp. 1980). **See, e.g., Beyer v. Montoya,** 75 N.M. 228, 402 P.2d 960 (1965); **Telephonic, Inc. v. Montgomery Plaza Company, Inc.,** 87 N.M. 407, 534 P.2d 1119 (Ct. App. 1975). Rule 8(f), N.M.R. Civ. App., provides that the record may be corrected by the district court "either before or after the transcript on appeal is transmitted to the appellate court."

**{12}** We denied Husband's motion to correct the record because we did not feel compelled to direct the district court to correct it when Husband failed to take advantage of these other methods. This is in line with "the familiar principle of appellate practice that relief which may be afforded by the district court must ordinarily be sought there before application therefor may be made" to the appellate court. 9 Moore's Federal Practice para. 210.08[2], at 10-58 (2d ed. 1982). We consider this appeal on the basis of the record as ti was originally transmitted to us.

**B.**

**{13}** Section 39-1-1, N.M.S.A. 1978, states that a final judgment of a district court

> shall remain under the control of such [court] for a period of thirty days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any motion which may have been filed within such period, directed against such judgment;

[1] Wife requested "[t]he complete record, excepting summonses, notices of depositions, notices of setting, entries of appearance, transcript of trial testimony, transcript of arguments to court subsequent to actual trial." Husband requested "the entire record in this case, including all pleadings and depositions, EXCEPT Summons and Notices to take depositions."

> provided, that if the court shall fail to rule upon such motion within thirty days after the filing thereof, such failure to rule shall be deemed a denial thereof * * *.

**{14}** Wife argues that the trial court had no jurisdiction under the statute to enter the second judgment 71 days after the entry of the first. Not only was the second judgment filed 41 days after the statutory period ended, but Husband did not file within the 30-day period a motion against the judgment, which would have given the court only an additional 30 days in which to rule on the motion. **See National American Life Insurance Co. v. Baxter,** 73 N.M. 94, 385 P.2d 956 (1963).

**{15}** The fact that the record does not reflect that Husband timely filed a motion against the first judgment is not fatal. The district court is authorized under Section 39-1-1 to change, modify, correct or vacate a judgment on its own motion. **Desjardin v. Albuquerque Nat. Bank,** 93 N.M. 89, 596 P.2d 858 (1979); **Arias v. Springer,** 42 N.M. 350, 78 P.2d 153 (1938).

**{16}** Did the trial court so move? The record is devoid of such a motion. However, in their supplemental briefs, **both** parties, while not agreeing on much else, do state that they both met with the trial judge on January 19, 1981, and that at the close of their meeting the judge requested that they submit new proposed findings of fact and conclusions of law. "[T]he express * * * admissions of the briefs may be recognized as properly filling a hiatus in the transcript." **Royko v. Griffith Company,** 147 Cal. App. 2d 770, 306 P.2d 36, 40 (1957). We therefore deem it established for the purposes of this appeal that there was a January hearing at which the trial court requested the parties to submit new findings and conclusions. **See Houghton v. City of Long Beach,** 164 Cal. App. 2d 298, 330 P.2d 918 (1958); **Pringle v. Hunsicker,** 154 Cal. App. 2d 789, 316 P.2d 742 (1957); **H. Moffat Co. v. Rosasco,** 119 Cal. App. 2d 432, 260 P.2d 126 (1953). **See also Territory v. County Commissioners,** 13 N.M. 89, 79 P. 709 (1905); **Cornell v. Albuquerque Chemical Co., Inc.,** 92 N.M. 121, 584 P.2d 168 (Ct. App. 1978); **Anderson v. Jenkins Construction Co.,** 83 N.M. 47, 487 P.2d 1352 (Ct. App. 1971).

**{17}** "We have a well established rule that upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the decision of the trial court. * * *" **Fisher v. Terrell,** 51 N.M. 427, 429, 187 P.2d 387, 388 (1947). Therefore, although there is no record of the trial court's moving to vacate the first judgment or so ordering, we infer from the hearing, the court's request for new proposed findings and conclusions, and the parties' compliance with the request that the trial court on January 19 did vacate the first judgment on its own motion. That action was timely under Section 39-1-1.

**{18}** Was the trial court's action proper? The district court's power under Section 39-1-1 is discretionary. We adopt the statements of the Court of Appeals that

> We are not inclined to hold * * * that this right of control [over judgments] is absolute and there are no restraints on its exercise. The action of a court must always be supported by a good reason. [Citation omitted.] However, the discretion vested in the trial courts in the exercise of control over their judgments under § 21-9-1 [now codified as § 39-1-1], supra, is extremely broad.

**Laffoon v. Galles Motor Company,** 80 N.M. 1, 3-4, 450 P.2d 439, 441-42 (Ct. App. 1969). An appellant bears a heavy burden to show on the record "a patent abuse or manifest error in the exercise of the discretion." **Hanberry v. Fitzgerald,** 72 N.M. 383, 387, 384 P.2d 256, 259 (1963) (citations omitted). **See also Battersby v. Bell Aircraft Corporation,** 65 N.M. 114, 332 P.2d 1028 (1958). In light of the deficiencies in the record in this case, we hold that the court's setting aside the first judgment was proper. **See Fisher v. Terrell, supra.**

**{19}** Once the district court vacated its first judgment, the status of the case was as though

the first judgment had not been entered. **Arias v. Springer, supra.** The court was then free to enter its second judgment. The fact that the court did not state in the second judgment that the first had been vacated or withdrawn is irrelevant, especially in light of the rule that when there are two conflicting judgments rendered by a court upon the same rights of the same parties that which is later in time prevails. **See Cummins v. Mullins,** 183 Ky. 666, 210 S.W. 170 (1919); **Mahan v. Kyle,** 211 S.W. 302 (Tex. Civ. App. 1919); **Cootey v. Remington,** 108 Vt. 441, 189 A. 151 (1937). We therefore hold that the district court did not commit error in entering the second final judgment.

**{20}** Because we uphold the court's action on the basis of Section 39-1-1, we need not consider its propriety under Rule 60(b) or Section 40-4-7.

**II.**

**{21}** The second issue is whether the trial court erred in concluding that the parties' Ruidoso residence was community property. The parties were first married in 1972; during marriage they resided in the Roswell house, which Husband had purchased in 1970. The decree granting their first divorce in May 1975 incorporated an agreement that the Roswell house remain Husband's separate property, subject to a community lien for the amount of community funds expended on it. The parties remarried in June 1975 and Husband subsequently sold the Roswell house and placed the proceeds in the parties' joint savings and joint checking accounts. The down payment for the Ruidoso house and all the payments on the real estate contract were made from the joint checking account. The real estate contract was in the name of both parties, as husband and wife. On the basis of this evidence the trial court found that Husband made a gift of his separate funds to the community, and concluded that the Ruidoso house was community property.

**{22}** Property acquired by either or both spouses during their marriage is presumptively community property. **See** § 40-3-8, N.M.S.A. 1978; **Estate of Fletcher v. Jackson,** 94 N.M. 572, 613 P.2d 714 (Ct. App.), **cert. denied,** 94 N.M. 674, 615 P.2d 991 (1980). A party asserting that such property is separate has the burden of presenting evidence that would rebut the presumption by a preponderance of the evidence. **Estate of Fletcher, supra; Campbell v. Campbell,** 62 N.M. 330, 310 P.2d 266 (1957). "Property acquired in community property states takes its status as community or separate property at the very time it is acquired, and is fixed by the manner of its acquisition." **Laughlin v. Laughlin,** 49 N.M. 20, 37, 155 P.2d 1010, 1020 (1944) (citations omitted). The determination of its legal status as separate or community property is merely the initial inquiry, however, because the spouses are permitted to change the property's status. **Estate of Fletcher, supra; In re Trimble's Estate,** 57 N.M. 51, 253 P.2d 805 (1953). Once the community property presumption is overcome by a preponderance of the evidence, a party must prove the transmutation of the separate property into community property by clear and convincing evidence. **See Corley v. Corley,** 92 N.M. 716, 594 P.2d 1172 (1979);[2] **In re Trimble's Estate, supra.** Here, Husband carried his burden of persuasion by proving by a preponderance of the evidence that the proceeds from the sale of the Roswell house were his separate property and were deposited in the parties' joint accounts. The real issue before us is whether transmutation of the separate funds into community property was proven by clear and convincing evidence. The court in **Estate of Fletcher, supra,** stated the rule governing that determination:

> It is for the fact finder, in this case the trial court, to determine whether the proof requirement has been met; the appellate court reviews the evidence in the light most favorable to the prevailing party and

[2] We note that **Corley** is the only New Mexico case we have found in which the clear and convincing proof standard was applied in deciding whether separate property was transmuted into community property. The rest of the cases in which that standard was applied have involved determinations of whether community property was transmuted into separate property.

> determines whether the fact finder could properly have determined whether the proof requirement had been met.

**Id.** at 575, 613 P.2d at 717.

**{23}** Husband argues that the trial court erred in finding that the execution of the real estate contract on the Ruidoso house in both parties' names constituted a gift of Husband's separate property to the community. He contends that in **Corley v. Corley, supra,** we held that a deed alone cannot be relied on as substantial evidence that a gift was intended. However, in **Corley** we were examining the issue of transmutation in the light of Section 47-1-16, N.M.S.A. 1978, **see** Shapiro, **Domestic Relations and Juvenile Law,** 11 N.M.L. Rev. 135, 141 n. 25 (1980-81), which is not applicable here because it deals with joint tenancy. Also, our holding in that case was that "in reviewing a trial court finding of joint tenancy * * * a joint tenancy deed alone is insufficient to constitute substantial evidence to uphold the finding in the face of contrary evidence." **Ohl v. Ohl,** 97 N.M. 175, 176, 637 P.2d 1230, 1231 (1981). Although the real estate contract is not conclusive and is not, by itself, substantial evidence on the issue of transmutation, it at least constitutes some evidence of intent to transmute. The form of the contract was not the only evidence on which the trial court based its finding of transmutation.

**{24}** Husband testified "that he did not intend to make a gift of his separate property to [Wife]," and asserts that "[t]he only evidence introduced at trial which would shed any light on the reason for taking the title to the Ruidoso house in both names was [Husband's] testimony that he intended to make a devise of the Ruidoso home to [Wife]." He maintains that because his reason for naming her in the contract was to avoid probate, the trial court should have held that the deed was revocable. However, the record does not reflect that Husband raised the issue of revocable deed below,[3] and he clearly did not request any finding of fact or conclusion of law on the issue. Therefore we will not consider it. **See DesGeorges v. Grainger,** 76 N.M. 52, 412 P.2d 6 (1966).

**{25}** Husband's second argument is that placing the separate funds into the joint accounts did not constitute a gift. He asserts that under **Menger v. Otero County State Bank,** 44 N.M. 82, 98 P.2d 834 (1940), proof of the act of opening a joint bank account is insufficient to establish a gift; proof of intent to make a gift, **LeClert v. LeClert,** 80 N.M. 235, 453 P.2d 755 (1969), and proof of delivery, **Burlingham v. Burlingham,** 72 N.M. 433, 384 P.2d 699 (1963), are also required. Here, the only evidence presented was that Husband's separate funds were placed into bank accounts in which Wife had unlimited rights of withdrawal. Wife admitted that they never discussed Husband's making a gift. Husband also asserts that the fact that Wife had unlimited rights to withdraw the funds has no legal significance unless the separate funds cannot be traced; here, the funds are easily traceable and Wife never showed that they were expended for anything except the purchase of the Ruidoso house.

**{26}** Husband's argument is specious. No doubt he bases his contention on those cases which hold that "when separate property has been so intermingled with community property that the separate property cannot be traced or identified, it falls under the presumption of community property," **Conley v. Quinn,** 66 N.M. 242, 252, 346 P.2d 1030, 1036 (1959) (citations omitted). **See, e.g., Burlingham v. Burlingham, supra.** Those cases, however, involved the transmutation of property by operation of law: "[t]he general presumption in favor of community property which is the distinguishing feature of the community property system requires that the confused mass or funds be treated as community property." Clark, **Transmutations in New Mexico Community Property Law,** 24 Rocky Mtn.L. Rev. 272, 282 (1952) (footnotes omitted). In other words, when the separate property cannot be traced, the evidence of the separate status is insufficient to overcome the presumption of community property and transmutation is

[3] The deed was never introduced into evidence. In fact, the record shows that the deed was never the subject of testimony at trial; the testimony only addressed the real estate contract.

deemed by operation of law to have been proven by clear and convincing evidence. **Cf. Newton v. Wilson,** 53 N.M. 480, 486-87, 211 P.2d 776, 779-80 (1949) (Sadler, J., dissenting) (noting that with such commingling transmutation is found "irrespective of intention on the part of the spouses"). The fact that separate property can be traced does not mean that the act of commingling is not a circumstance to which the court may look when determining the separate property owner's intent. Ability to trace the separate funds merely prevents the determination of transmutation by operation of law; it does not deprive a trial court of the ability to consider the commingling, along with other evidence, in deciding whether transmutation took place. The trial court properly considered the act of commingling along with the other evidence presented.

**{27}** Husband's next contention, that there was not sufficient evidence to support the finding of transmutation by gift, is based on two grounds: 1) there was no proof of intent to make a gift to the community; and 2) there was no proof of delivery because there was no evidence that Wife had control over the disbursement of the separate funds except to accomplish the purchase of the house. The trial court considered evidence concerning both the real estate contract and the joint bank accounts in finding that there was a gift; therefore, we will examine all that evidence.

**{28}** The only direct evidence of Husband's intent was his answer to the following question:

Q: * * * Did you ever intend to make a gift of your separate property interest in that house to her?
A: No.

However, he also testified as follows:

Q: And now, isn't it true that at the time you bought that property that you intended to buy it as husband and wife?
A: That's the way we bought it, but I intended for us to be husband and wife from here on out. I didn't figure she was going to run me off.
Q: But when you actually purchased it, you did purchase it with the intention in your mind of purchasing it together with Oretta as husband and wife, didn't you?
A: Yes, I did, so long as we were married. I figured we were going to be married for the rest of our life, too.
Q: Did you ever tell Oretta Nichols that her interest would cease to be in the event that you all divorced?
A: No, I didn't figure we were going to get a divorce.

* * * * * *

Q: * * * When you and your wife purchased this house in Ruidoso in 1975, did you and she have any discussions about you making a gift of your separate property into this house to her?
A: No.
Q: Did you have any discussions with her about taking the house in both of your names?
A: Yes, because if we didn't, if I was killed, it would go through some kind of court.
Q: So, you were trying to avoid probate; is that your testimony?
A: Yes.
Q: Is that the reason you put it in both your names?
A: If I was killed, and I wanted the house to go to her and the kids.

* * * * * *

Q: Mr. Nichols, could you explain to me why you had this discussion with Oretta Nichols when you bought the house, the subject matter of which was why you put her name on the contract?
A: Well, we had to have both our names on these. If just mine went on there, if I was killed, it would go to Probate Court, and besides, it was going to be our house.

* * * * * *

Q: It's correct that you wanted it to be yours and Oretta's; is that correct?
A: Yes.
Q: But you don't any longer want it to be yours and Oretta's, you want it to

be all yours; is that what you're telling us?

A: No, sir. That's not what I'm telling you. If she had stayed married to me, it would still be ours, but as long as she's going to kick me out and take everything, I'm not going to * * * [**sic**].

From this testimony, the trial court could properly infer that Husband intended Wife to have legal interest in the house. The execution of the contract in the names of "Eddie D. Nichols and Oretta J. Nichols, husband and wife" supports the inference, and confers the status of community property on their interests. **See** §§ 47-1-15, -36, N.M.S.A. 1978.

**{29}** The commingling of the separate funds with community funds also supports the trial court's inference that Husband made a gift to the community. Not all of the proceeds from the sale of the Roswell house ($4,634.61) were expended on the Ruidoso house; after making the downpayment, $1,500 of the proceeds was left in the joint savings account, $434.61 was left in the joint checking account, and $200 was taken in cash. Husband contends that Wife never showed that those proceeds were expended for anything other than the purchase of the house. However, Husband testified that they withdrew the funds from the savings account whenever they needed them, and that **some** of the withdrawn funds were used to pay the downpayment; he also testified that Wife, who was "about the only one" who wrote checks on the checking account and had the only checkbook, frequently drew checks on the account. Other evidence also supports the Wife's position. All the payments on the real estate contract were made from the joint checking account, undisputedly from community funds; the numbers of the checks for those payments are not consecutive, indicating that many other expenditures were made from the account. Husband never rebutted this testimony which clearly indicates that he intended the balance of the separate money to be treated as community property.

**{30}** The finding of transmutation by gift is supported by substantial evidence.

**{31}** We also hold this evidence to be such that "the mind of the factfinder could properly have reached an abiding conviction as to the truth of the fact or facts found." **Duke City Lumber Company, Inc. v. Terrel,** 88 N.M. 299, 301, 540 P.2d 229, 231 (1975) (citations omitted). Therefore it meets the test of being not only substantial evidence, but also clear and convincing. We therefore affirm the court's findings of transmutation and conclusion that the Ruidoso house was community property.

**{32}** The final judgment of March 11, 1981, is hereby affirmed.

**{33} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, Respectfully Dissenting**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-072**

**Filing Date: June 25, 1982**

**Docket No. 13,799**

**HAROLD C. DOTSON, JR.,**

**Plaintiff-Appellee,**

**v.**

**JAMES L. GRICE, GEORGE GABALDON AND LOLA GRICE,**

**Defendants-Appellants.**

**APPEAL FROM DISTRICT COURT**
**SOCORRO COUNTY,**
**Robert M. Doughty, II.**

Anthony J. Williams
Stephen K. Bowman
Belen, New Mexico

for Appellants.

John R. Gerbracht
Socorro, New Mexico

for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This case involves the specific performance of a contract to convey realty. The record title is in the names of three individuals, two holding it as community property with the third as their tenant in common. Only one of the individuals signed the contract. The trial court, applying the Uniform Partnership Act, §§ 54-1-1 through 54-1-43, N.M.S.A. 1978, held that all three were bound by the conveyance and granted specific performance. We affirm.

**{2}** In 1972, defendants-appellants James Grice and his wife, Lola, conveyed to defendant-appellant George Gabaldon an undivided one-half interest in certain real estate they owned as community property. Subsequently the land was subdivided for sale. In September 1979 James Grice and plaintiff Harold Dotson executed a purchase agreement covering two of the lots. Dotson made a downpayment of $5,000.00. Thereafter Gabaldon refused to approve the sale or execute the deeds and defendants refused to convey the property.

**{3}** Dotson brought suit for specific performance against the Grices and Gabaldon. Lola Grice in her answer admitted that the conveyance was executed and that she was always willing to convey. At trial, she did not raise as an issue the accuracy of her answer or defend against or object to Dotson's allegations regarding the partnership relationship. The trial court ordered specific performance after finding that all three defendants were associated in a partnership, that the actions of James Grice bound the partnership, and that equitable interest in the property had passed to Dotson.

**{4}** Defendants argue that the trial court improperly applied the Uniform Partnership Act because: 1) the court did not find the realty to be partnership property, and could not have properly made such a finding; 2) there was not substantial evidence to support a finding that Lola Grice was a partner; 3) James Grice could not by his signature alone contract to convey his and Lola Grice's community interest in the realty; and 4) even if the realty were partnership property and Lola Grice's signature not required, James Grice could not bind the partnership to the contract.

**{5}** We disagree with defendants' first argument, that the trial court should not have applied Section 54-1-10, N.M.S.A. 1978, which governs conveyances of partnership real property, because it failed to specifically find that the realty is partnership property. Where a proper

judgment of the trial court depends on the finding of a particular material fact, such a finding will be implied from the entry of judgment favorable to plaintiff. **See Boone v. Smith,** 79 N.M. 614, 447 P.2d 23 (1968). Here, the trial court's application of the Uniform Partnership Act is dependent upon a finding of partnership property. The trial court's finding that the record title to the realty in question is in Gabaldon as tenant in common with the Grices, whose interest is held as community property, does not prevent our inferring a finding of partnership property. Partners may treat realty as partnership property without changing the record title to that of the partnership. **See, e.g.,** § 54-1-10(D), (E). We therefore infer from the judgment of the trial court that the court found that the realty is partnership property.

**{6}** The trial court's finding that defendants were engaged, at the time of conveyance, in a partnership is supported by the record. In **Goodpasture Grain & Milling Co. v. Buck,** 77 N.M. 609, 426 P.2d 586 (1967), we affirmed the finding of the trial court that defendants were involved in a partnership business and thus were jointly and severally liable to the plaintiff. We held that a **pattern of conduct,** such as the sharing of profits and expenses of the business, filing of partnership tax forms, previous execution of contracts on behalf of the partnership, and control of a partnership bank account will suffice to show the creation of a partnership relationship even in the absence of a written agreement. Here, the lower court found a dividing of profits and losses, previous sales of subdivided lots by the defendants, filings of partnership tax forms, and references to each other as partners in their testimony.

**{7}** Defendants' argument that insufficient evidence exists for finding Lola Grice in association with the partnership is incorrect. The lower court found a partnership based on the conduct described above. Even though Lola Grice could not be described as an active participant in partnership affairs, the record shows that she had long acquiesced in the conduct of her husband and Gabaldon as her co-partners. She also admitted her willingness to convey this property at all times and never protested the conveyance at trial.

**{8}** The rule governing when individually held property becomes that of a partnership is found in **Adams v. Blumenshine,** 27 N.M. 643, 204 P. 66 (1922). Generally, the parties must agree to make the property a partnership asset. In **Adams,** we set forth some facts which would be persuasive in deciding this issue: the use of property for the partnership, the existence of a partnership bank account, deposits of proceeds from property into this partnership account, and the purchase of the property with partnership funds with the intent that it be used solely in the partnership business.

**{9}** The record below supports the conclusion that the property was contributed to the partnership. **See also Perelli-Minnetti v. Lanson,** 205 Cal. 642, 272 P. 573 (1928). There was a partnership bank account and deposits were made into and out of this account, to the benefit of defendants. Defendants filed partnership income tax returns for six years, listing the partnership activity as "Real Estate, Investments and Rentals." Defendants had made previous sales of the kind made to plaintiff and reported the income on partnership tax returns. Mr. Grice was an agent for the partnership in those transactions.

**{10}** Once community property is contributed to a partnership, its status is not transmuted from community to separate or partnership property, as defendants claim. Although the community no longer has a right to the specific piece of property, **see** § 54-1-25(B)(5), N.M.S.A. 1978, the community still has an interest. The community merely trades its interest in the specific asset for a community interest in the partnership. **See Kenworthy v. Hadden,** 86 Cal. App. 3d 696, 151 Cal. Rptr. 169 (1978); **Rosenthal v. Rosenthal,** 240 Cal. App. 2d 927, 50 Cal. Rptr. 385 (1966). This is not transmutation, requiring the transmuting spouse's intent and agreement to transmute. **See McCall v. McCall,** 2 Cal. App. 2d 92, 37 P.2d 496 (1934).

**{11}** Because the community loses its interest in the specific property contributed to the

partnership, Section 40-3-13, N.M.S.A. 1978, which requires the joinder of both spouses in any conveyance of or contract to convey community realty, does not apply. **See Attaway v. Stanolind Oil & Gas Company,** 232 F.2d 790 (10th Cir. 1956). Once the specific property becomes partnership property, its conveyance is instead governed by Section 54-1-10.

**{12}** Finally, defendants argue that James Grice acted without actual authority and therefore Gabaldon, as an undisclosed principal, is not bound by the purchase agreement. They note that in applying Section 54-1-10(D) the court relied on Section 54-1-9, which, they argue, "embrace[s] the agency doctrine of apparent authority." Defendants contend that the section is only applicable when the third party is relying on the apparent existence of a partnership and when the act of the partner is apparently for carrying on the business of the partnership in the usual way. That was not the case here, because the trial court found that Dotson "did not rely on the authority of James L. Grice to act on behalf of any partnership, [because he] was unaware of the existence of any partnership and was further unaware of any relationship whatsoever between James L. Grice and George Gabaldon or of any interest in the property in question being held by George Gabaldon."

**{13}** We do not agree with defendants' contentions. Section 54-1-10(D) states:

> Where the title to real property is in the name of one or more of all of the partners, * * * a conveyance executed by a partner * * * in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of [Section 54-1-9(A)].

Section 54-1-9(A) provides:

> Every partner is an agent of the partnership for the purpose of its business, and the act of every partner * * * for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

Section 54-1-4(C) also provides that "[t]he law of agency shall apply under this act." Merely because Section 54-1-9(A) "embrace[s] the agency doctrine of apparent authority," which we do not here concede or decide, does not prevent Grice's binding the partnership under some other theory of an agent's authority.

**{14}** It has long been the law that every partner is the agent of the partnership for the purpose of its business, and that concept has been incorporated into the Uniform Partnership Act. **See** § 54-1-9(A). Here, Grice was acting as general agent for an undisclosed principal, the partnership. He testified that he acted in this case in accordance with the partnership's usual practice, and that this was the first time that Gabaldon had not gone along with a deal he had made. Grice was authorized to conduct transactions in furtherance of the sale of the partnership's lots. The only limitation on Grice's authority was that Gabaldon had to consent to the sale price.

**{15}** "A general agent for an undisclosed principal authorized to conduct transactions subjects his principal to liability for acts done on his account, if usual or necessary in such transactions, although forbidden by the principal to do them." Restatement (Second) of Agency § 194 (1958). This rule is "applicable to cases in which the agent has neither authority or apparent authority and acts disobediently or ignorantly on account of the principal," and illustrates the agent's inherent power to act, which derives "wholly from his relation with the principal." **Id.** § 161 comment a, at 378, 379. Because a partner's status as agent for the partnership flows from his status as a partner, **see Meehan v. Valentine,** 145 U.S. 611, 623, 12 S. Ct. 972, 974, 36 L. Ed. 835 (1892), his authority is also an inherent authority. Grice's act here was done on the partnership's

account, in the usual way, even though it was done without Gabaldon's consent. Therefore it bound the partnership.

**{16}** We affirm the trial court's holding that a partnership did exist among the defendants and that James Grice acted as an agent for such partnership, effectively conveying the individual interests of co-defendants. The trial court properly applied Section 54-1-10(D). We therefore affirm the trial court's award of specific performance.

**{17} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-078**

**Filing Date: June 30, 1982**

**Docket No. 13,767**

**HARRIS BOOKS, INC.,
A NEW MEXICO CORPORATION,**

**Plaintiff-Appellant,**

**v.**

**CITY OF SANTA FE, ET AL.,**

**Defendants-Appellees,**

**v.**

**HARRIS BOOKS, INC., A FOREIGN CORPORATION,**

**Defendant-Appellant.**

**APPEAL FROM DISTRICT COURT
SANTA FE COUNTY,
Bruce E. Kaufman, District Judge.**

Michael E. Vigil
Albuquerque, New Mexico

Jeffrey M. Libit
Albuquerque, New Mexico

Arthur M. Schwartz
Denver, Colo.

for Appellant.

Frank Coppler
Richard C. Bossen
Santa Fe, New Mexico

for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** This case involves an attempt by the City of Santa Fe to regulate the location of adult bookstores. After careful consideration of the ordinance, we conclude that it is unconstitutionally vague and cannot be enforced.

**{2}** At the outset, we emphasize the limited scope of our holding. The City proceeded on the basis that the speech involved was protected. Thus we are not, from a legal standpoint, dealing with obscenity, which is not entitled to first amendment protection and may therefore be outlawed. **Paris Adult Theatre I. v. Slaton,** 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973). We consider the ordinance solely as a time, place and manner restriction on protected speech.

**{3}** This appeal is a consolidation of two separate actions brought by the parties in district court. The City adopted the ordinance involved as Chapter 37 of the Santa Fe Code, now codified as Santa Fe, N.M., CODE Ch. 3, art. I (1981). Thereafter, Harris Books, Inc., which operated an "Adult Bookstore" under the definition in the ordinance, filed a complaint seeking a declaratory judgment that the ordinance was unconstitutional. The City filed a separate suit for an injunction against the continued operation of the bookstore in violation of the ordinance. The actions were consolidated for trial and the district court found for the City, granting its requested relief and denying the relief sought by Books. Books has appealed.

**{4}** The primary contention of Books, and the only one we address here, is that the ordinance is unconstitutionally vague. The relevant section of the ordinance reads as follows:

> 3-1-4 LOCATION OF ADULT BOOKSTORES, MOVIE THEATERS AND NEWSRACKS.

> —No person, whether as a principal or agent, clerk or employee, either for himself or any other person, or as an officer of any corporation, or otherwise, shall place, maintain, own or operate any adult bookstore, adult movie theater or adult newsrack within one thousand feet of any parcel of real property on which is located any of the following facilities:
>
> A. a school primarily attended by minors;
>
> B. a church which conducts religious education classes for minors;
>
> C. a public park, or public recreation facility;
>
> D. a residential area; or
>
> E. a business frequented by minors.

**{5}** The district court found that "[t]he current location of Harris Books, Inc. on Cerrillos Road is within 1,000 feet of a nonconforming use residence." This finding was the basis for the court's determination that the bookstore's operation in the existing location violated the ordinance, justifying the injunction.

**{6}** Uncontested evidence at trial suggests that the bookstore was also located within 1,000 feet of a family restaurant. The City claims this constitutes an independent ground for the court's holding, while Books asserts that the phrase "a business frequented by minors" is unconstitutionally vague. Because the trial court did not make a finding on this question, we decline to assume it was an independent ground for the decision and accordingly do not decide whether this phrase is unconstitutionally vague.

**{7}** Books asserts that by referring simply to "a residential area" the ordinance leaves enforcement to the subjective discretion of the enforcement officer. Although deference is given to the interpretation of the ordinance by those charged with administration, **Texas Nat. Theatres v. City of Albuquerque,** 97 N.M. 282, 639 P.2d 569 (1982), the City's own witness, the zoning enforcement officer, could not give a uniform definition of the phrase. At one point the witness stated that two or more houses would be necessary to have a "residential area," while at other points he said that one resident would not receive less protection than several and that a multifamily apartment building would not constitute a "residential area." The term cannot refer to a residential zone since the "nonconforming use residence" which supported the trial court's conclusion was actually located in a commercial zone.

**{8}** The City claims that there is no need for further statutory definition of "residential area" because its plain meaning is an area of two or more residential structures.

**{9}** The meaning which is so plain to the City is not so obvious to us. Since we are dealing with speech entitled to protection by the first amendment, each term of the ordinance must be specific enough to afford notice to potential violators. **Cox v. Louisiana,** 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965); **See Coates v. City of Cincinnati,** 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971).

**{10}** The City has discussed at length its police power to regulate "adult" entertainment through zoning ordinances as recognized in **Young v. American Mini-Theaters,** 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976).

**{11}** The **Young** case involved an ordinance which provided that an adult theater may not be located within 1,000 feet of any two other "regulated uses" or within 500 feet of a residential area. The City claims that it fashioned its ordinance "with a close eye" on the **Young** decision and that the 1,000 foot provision in the City's ordinance "is virtually identical with the Detroit ordinance approved in [**Young**]." The City's eye failed to perceive footnote 2 in **Young:**

> The District Court held that the original form of the 500-foot restriction was invalid because it was measured from "any building containing a residential, dwelling or

rooming unit." The city did not appeal from that ruling, but adopted an amendment prohibiting the operation of an adult theater within 500 feet of any area zoned for residential use. The amended restriction is not directly challenged in this litigation.

**{12}** The federal district court which heard the **Young** case at the trial level considered the nature of the Detroit ordinances and noted that they "prohibit [the location of adult bookstores] within 500 feet of a residential dwelling or rooming unit." **Nortown Theatre Incorporated v. Gribbs,** 373 F. Supp. 363, 366 (E.D. Mich. 1974). Thus, not only did the term "residential area" used by the Supreme Court in **Young** have a meaning different from that which the City now claims is "clear" on the face of the ordinance, but the term was deleted in a subsequent amendment and was not actually considered in **Young.**

**{13}** The federal district court held that the original 500-foot restriction was invalid under the equal protection clause because it was not necessary to promote any expressed compelling state interest. This holding was not appealed. The City asserts that its restriction does promote a compelling interest. We need not address the claim because the ordinance fails for vagueness; however, we note that the concurring opinion in **Young** considered it essential that the governmental interest prompting the 1,000-foot zone between regulated uses was "wholly unrelated to any suppression of free expression." **Young, supra,** 427 U.S. at 81, 96 S. Ct. at 2457-58 (Powell, J., concurring). For example, the justification must be based on interests in health, safety, etc., not merely on a desire to ban protected speech.

**{14}** In short, we find little similarity in the purpose, wording, or effect between the City's ordinance and the ordinances considered in **Young.**

**{15}** Books also raised questions as to the method of measuring the distances and as to the amortization period provisions of the ordinance. In light of our disposition of the vagueness issue, we do not reach these issues.

**{16}** Accordingly, the judgment below is reversed.

**{17} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM RIORDAN,**
**Justice**

**JOE W. WOOD,**
**Judge**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-083**

**Filing Date: July 13, 1982**

**Docket No. 13,787**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**JOHN AMADOR AND COTTON BELT INSURANCE COMPANY,**

**Defendant-Appellants,**

**FINN LEE PATTON,**

**Defendant.**

**APPEAL FROM THE DISTRICT COURT OF LEA COUNTY,**
**C. Fincher Neal, District Judge.**

Hinkle, Cox, Eaton, Coffield & Hensley
Paul J. Kelly, Jr.
Richard E. Olson
Roswell, New Mexico

for Appellants.

Jeff Bingaman, Attorney General
Andrea B. McCarty, Assistant Attorney General
Santa Fe, New Mexico

for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** Finn Lee Patton (the defendant) was charged with assault with the intent to commit criminal sexual penetration in the second degree, pursuant to Section 30-3-3, N.M.S.A. 1978. The bondsman, John Amador, an agent of Cotton Belt Insurance Co., posted $10,000 bond to secure the defendant's release. When the defendant failed to appear for trial, the district court issued a bench warrant for his arrest, declared the bond to be forfeited, and issued an order to show cause why judgment should not be entered on the forfeiture. After conducting a hearing, the district court ordered the forfeiture of the entire amount of the bail bond. The bondsman appeals the judgment of forfeiture. We reverse.

**{2}** The defendant was notified of his trial date, but the bondsman was not. The defendant failed to appear because he was incarcerated in Texas on a separate charge five days before the date set for trial. The bondsman first learned of the defendant's failure to appear when he was served with the order to show cause. Subsequently the bondsman located the defendant in the Midland, Texas, county jail. At the hearing on the show cause order, he stated that a detainer had been filed with the proper Texas authorities. He also stated that he would tender to the court an amount necessary to reimburse the court for any extradition and transportation costs reasonably incurred in retrieving the defendant.

**{3}** The bondsman appeals the total forfeiture on two grounds. He argues that the forfeiture should have been set aside because he had a due process right to receive personal notice of the defendant's trial date. He also argues that because the defendant was incarcerated in another jurisdiction the district court abused its discretion in refusing to set aside the forfeiture.

**I.**

**{4}** The bondsman asserts that the entire forfeiture process deprived him of property without due process of law, contrary to the due process clauses of both the United States and New Mexico Constitutions. Because he did not receive

notice of the trial date, he was deprived of the opportunity to fulfill his obligations under the bond contract. He argues that the order to show cause and the resulting hearing did not provide him with an opportunity to be heard "at a meaningful time and in a meaningful manner," **Armstrong v. Manzo,** 380 U.S. 545, 552, 585 S. Ct. 1187, 1191, 14 L. Ed. 2d 62 (1965); by the time of the hearing, the critical factual issues had already been determined and the burden of proof had shifted to him to show cause why the bond should not be forfeited.

**{5}** When the bondsman posted bond for the defendant, he entered into a contract with the state under which he guaranteed that the defendant would appear before the court in accordance with any order or direction of the court. **See Commonwealth v. Stuyvesant Insurance Company,** 366 Mass. 611, 321 N.E.2d 811 (1975). The bondsman's obligation was not to produce the defendant at a time later to be set, "but was rather an obligation to answer, to the extent of the penalty, for the default of the [defendant] . . . in the event [he] did not appear on the date set for trial. When the [defendant] defaulted by [his] failure to appear, the liability of the [bondsman], as surety, became fixed." **Pride v. Anders,** 266 S.W. 338, 223 S.E.2d 184, 186 (1976). The only determination to be made by the court at the time of trial that is relevant to the bondsman's obligation is whether the defendant is present. There is obviously little risk of an erroneous determination in that situation. Even if the bondsman had received notice of the trial date so he could appear, his liability still would have attached when the defendant did not appear. The bondsman could not avoid liability by explaining where the defendant was or by attempting to obtain a continuance to allow him to try to find the defendant. Any such efforts by the bondsman could only mitigate his liability.

**{6}** Nor was the bondsman deprived of any substantial right at the time of trial. His money was not seized, "no source of revenue essential to [Cotton Belt's] corporate life was cut off," none of his privileges was suspended, and he was not subjected to any new obligation beyond that for which he had already contracted. **People v. Surety Ins. Co.,** 82 Cal. App. 3d 229, 147 Cal. Rptr. 65, 71 (1978). The bondsman was protected by the participation of a judicial officer in the determination and by the provision of a hearing before judgment was entered on the forfeiture. **See North Georgia Finishing, Inc. v. DiChem, Inc.,** 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975). The bondsman, as one in the business of posting bonds, was subjected to no more liability than that to which he knowingly contracted.

**{7}** The fact that the bondsman bore the burden of proof at the hearing on the forfeiture did not impair his rights. Even if he had appeared at the time set for trial, the burden of proof would have been his; once the defendant failed to appear, anything asserted by the bondsman in mitigation of his liability would have been his to prove because he, as custodian of the defendant, **see Commonwealth v. Stuyvesant Insurance Company, supra,** is deemed to have the peculiar knowledge of the whereabouts of the defendant, **see United States v. Marquez,** 564 F.2d 379 (10th Cir. 1977); McCORMICK ON EVIDENCE § 337, at 787 (2d ed. 1972).

**{8}** Because there is little risk of an erroneous determination of the defendant's failure to appear, and considering the nature of the obligation the bondsman knowingly entered into, the hearing he received was adequate to protect his rights. We hold that the forfeiture process was not unconstitutional. The bondsman did not have a right to receive personal notice of the defendant's trial date under the due process clauses of the United States and New Mexico Constitutions.

**II.**

**{9}** The bondsman asserts that because the defendant was incarcerated in another jurisdiction, the district court abused its discretion in refusing to set aside the forfeiture. Because he is willing to incur the expense of returning the defendant to New Mexico and because a detainer has been

lodged with the proper authorities, he claims that the State has not been harmed and that justice does not require forfeiture.

**{10}** The State argues for application of the majority rule that incarceration in another jurisdiction is not an excuse for the defendant's failure to appear so as to exonerate the bondsman. Because the purpose of the bail bond is to assure the defendant's appearance, and the bondsman assumed the risk of his failure to appear, it was not an abuse of discretion for the trial court to order forfeiture in furtherance of that purpose.

**{11}** The State also argues that in **State v. United Bonding Insurance Company,** 81 N.M. 154, 464 P.2d 884 (1970), we have already decided that incarceration in another jurisdiction is not an excuse for a defendant's failure to appear. There, following the affirmance of his conviction on appeal, the defendant failed to appear on the writ of commitment. We based our holding on the fact that "[d]uring a portion of the time when the writs were outstanding . . . [the defendant] was at large. He was then as subject to apprehension and surrender by [the bondsman] as he was to the federal authorities who found him in Arizona." **Id.** at 158, 464 P.2d at 888. We then cited several cases with "interesting parallels in their facts to this situation. In each no exoneration of bail was granted when the [defendant], though taken into custody in other jurisdictions, had escaped and was at large when the failure to respond occurred." **Id.** (citations omitted). The same day we decided **United Bonding,** we decided **State v. Hathaway,** 81 N.M. 159, 464 P.2d 889 (1970), in which we applied the **United Bonding** holding to a situation in which the defendant failed to appear at his arraignment and subsequently was incarcerated in Florida. There, too, the defendant was at large during a portion of the time when a court order to appear was outstanding. Here, however, the defendant was incarcerated in Texas at the time set for his trial, at the time of the forfeiture hearing, and at all times in between. Therefore **United Bonding** is not controlling.

**{12}** Section 31-3-2(B), N.M.S.A. 1978, states that "[t]he court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture." Section 31-3-2(D), N.M.S.A. 1978, provides that at the hearing on the order to show cause why judgment should not be entered on the forfeiture, "[i]f good cause is not shown the court may then enter judgment against the [bondsmen] . . . for such sum as it sees fit, not exceeding the penalty fixed by the bail bond or recognizance." Each of the provisions establishes a standard requiring the court to exercise its discretion in determining whether to order forfeiture of the entire amount of the bond. Therefore, we shall examine the purposes of the bail bond and the actions of the bondsman to determine whether the court abused its discretion.

**{13}** We have previously stated that the purpose of bail "is to secure the attendance of the defendant" at his trial. **State v. Cotton Belt Ins. Co.,** 97 N.M. 152, 155, 637 P.2d 834, 837 (1981). Bail is not a source of revenue for the state.

> The purpose of the bond or security is to secure a trial, its object being to combine the administration of justice with the convenience of a person accused, but not proved, to be guilty. If the accused does not appear the bail may be forfeited, not as a punishment to the surety or to enrich the Treasury of the State, but as an incentive to have the accused return or be returned to the jurisdiction of the court.

**Irwin v. State,** 17 Md. App. 518, 302 A.2d 688, 692 (1973). The release of a defendant on bail bond is an accommodation of competing interests; it gives

> not lip service, but full fealty to the basic principles of freedom, inherent in our system, that an accused is presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt, [and] it reconciles a sound administration of justice with the rights of the accused to be free from harassment and confinement, unhampered in the preparation of his defense and not subjected to punishment prior to conviction.

**Dudley v. United States,** 242 F.2d 656, 659 (5th Cir. 1957) (citation omitted). Bail furthers the sound administration of justice by placing the defendant "in the protective custody of a surety—a jailer of his own choosing—, to insure his presence for trial at the call of the court without in any way delaying, impairing, or unduly burdening the administration of justice or in any manner prejudicing the state in its prosecution." **Application of Shetsky,** 239 Minn. 463, 60 N.W.2d 40, 46 (1953) (footnote omitted). The state is relieved of the expense and burden of keeping the defendant pending his trial. **State v. Jakshitz,** 76 Wash. 253, 136 P. 132 (1913). The state is also aided in its efforts to recapture a fugitive defendant by the bondsman, "who, it is presumed, will be moved by an incentive to prevent judgment [on the forfeiture] or, if it has been entered, to absolve it and to mitigate its penalties." **Id.,** 136 P. at 133.

**{14}** In order to promote the purpose of bail, it is desirable that bondsmen be encouraged to enter into bail contracts. And, although the bondsman's obligation is to guarantee the defendant's presence rather than produce him at trial, **see Pride v. Anders, supra,** the bondsman nevertheless aids in the administration of justice when he acts to protect his financial interest by producing the defendant. Strict application of forfeiture statutes discourages bondsmen from giving bail or producing the defendant. **See** Note, **The Bail Bond Practice from the Perspective of Bondsmen,** 8 Creighton L. Rev. 865 (1975); Note, **Compelling Appearance in Court: Administration of Bail in Philadelphia,** 102 U.Pa.L. Rev. 1031, 1065-66 (1954). Considering the purpose of bail and the policy to encourage bondsmen to enter into bail contracts, it is unjust to enrich the state treasury when a bondsman has been diligent in his efforts to apprehend and bring back for trial a defendant but has been thwarted by the actions of another sovereign jurisdiction.

**{15}** Here the bondsman did not connive with the defendant to avoid justice. He located the defendant in the Texas jail promptly after he was served with the order to show cause. He assured that there was a detainer filed with the Texas authorities. He offered to pay all reasonable extradition and transportation costs incurred by the state. The bondsman did all he could to secure the defendant's presence and insure the state against its monetary loss. The State is not unduly prejudiced by the defendant's failure to appear because he can be returned to New Mexico for trial once he is released.

**{16}** For these reasons, justice does not require the forfeiture of the entire amount of the bond. Considering the facts of the case and the purpose of bail, it was an abuse of discretion for the trial court to order the total forfeiture of the bond.

**{17}** Accordingly, the judgment of the trial court is reversed and the case remanded for further proceedings consistent with this opinion.

**{18} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-084**

**Filing Date: July 13, 1982**

**Docket No. 13,748**

**LORENZO FRANCO AND MARIA FRANCO, HUSBAND AND WIFE,**

**Plaintiffs-Appellees,**

**v.**

**FEDERAL BUILDING SERVICE, INC., A NEW MEXICO CORPORATION,**

**Defendant-Appellant.**

**APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY,**
**Harvey M. Fort, District Judge.**

Mercer, Lock & Keating
Duane F. Keating
Albuquerque, New Mexico

for Appellant.

Martin & Meyer
Robert N. Meyer
Carlsbad, New Mexico

for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** This case involves a race to the courthouse in a contract dispute between residents of Eddy and Bernalillo Counties. One party reached the courthouse first but the others perfected service of process first. While motions were pending in the first suit filed, a default judgment was entered in the other suit. The defaulted party appeals.

**{2}** Lorenzo and Maria Franco entered into a home improvement contract with Federal Building Service (Federal). A dispute arose over the adequacy of Federal's performance. After several months of negotiations, Federal, on February 24, 1981, filed a complaint in Bernalillo County District Court seeking to recover from the Francos the balance of the contract price. On March 25, 1981, the Francos filed suit in Eddy County against Federal for recision and restitution. Federal was served with the Francos' complaint on April 2; the Francos were served with Federal's on April 6. In the Bernalillo County action, Federal moved on April 16 for a stay against the Eddy County proceedings, and a hearing on the motion was set for May 12. On May 5, the day following the deadline for filing Federal's answer to the Francos' complaint, the clerk of the Eddy County District Court entered a certificate of default against Federal. Federal responded to the default on May 8, requesting that the court not enter judgment on the default and attaching its proposed answer and counterclaim. On May 11, the Eddy County District Court conducted a hearing on the issue of whether to enter a default judgment and on the issue of the amount of damages. At the close of the hearing, the court entered judgment against Federal in the amount of $5,939.85.

**{3}** We treat Federal's action in Eddy County suit as a motion to set aside the default under Rule 55(c), N.M.R. Civ.P., N.M.S.A. 1978 (Repl. Pamp. 1980), because the trial court had not yet entered the judgment on the default. Thus, we decide whether the court properly exercised its discretion when it denied Federal's motion. We reverse.

**{4}** Although the granting of a default judgment lies within the sound discretion of the trial judge, **see Wooley v. Wicker,** 75 N.M. 241, 403 P.2d 685 (1965), we have repeatedly held that defaults are not favored and cases should be decided on their merits. **See, e.g., Marberry Sales, Inc. v. Falls,** 92 N.M. 578, 592 P.2d 178 (1979).

We note that we have never dealt with the precise issue before us here, and that we have previously examined the exercise of discretion in the context of motions to set aside default judgments under Rule 60(b), N.M.R. Civ. P., N.M.S.A. 1978 (Repl. Pamp. 1980).

**{5}** Rule 55(c), which provides that "[f]or good cause shown, the court may set aside an entry of default," is identical to the federal rule, and we look to federal case law for guidance. Generally, before the trial court will set aside an entry of default, the defendant must demonstrate both that he had good cause for failing to answer and that he had a meritorious defense. **See** 6 Moore's Federal Practice para. 55.10[1] (2d ed. 1982). This showing is a lesser one than that required under Rule 60(b). **See id.** para. 55.10[2]; 10 C. Wright & A. Miller, Federal Practice & Procedure § 2692 (1973).

**{6}** We have held that in deciding a case under Rule 60(b), a trial court should be liberal in determining what is a good excuse and what is a meritorious defense. **See Springer Corporation v. Herrera,** 85 N.M. 201, 510 P.2d 1072 (1973). There, the court must balance the policy in favor of trials on the merits with the conflicting policy in favor of the finality of judgments. **See id.** Here, however, the former policy clearly prevails because the motion to set aside the entry of default is made before there is a final judgment. Therefore, in determining whether the entry of a default should be set aside under Rule 55(c), a trial court should be more liberal and resolve all doubts in favor of the party declared to be in default.

**{7}** In its "Response to Notice of Default Judgment," Federal stated that its attorney "was absent from his office for the week immediately preceding the answer date on this matter and was in trial on two (2) consecutive days, the day of said answer date and the day following said answer date." Federal also stated that its attorney "did not intentionally fail to answer said claim but that the date on which that answer was due was not calendared by the Defendant's [Federal's] attorney and in the absence of said attorney and in the preparation of trial of other causes, said attorney did inadvertently miss said date." The court found that Federal had not shown good cause why the default should be set aside; the court failed to reach the issue of meritorious defense.

**{8}** The court was well aware of the parties' race to the courthouse and procedural maneuverings, and the posture of the two suits. The Francos stated that one of their reasons for quickly moving for a default judgment was to prevent Federal's obtaining the stay against the Eddy County proceedings. Focusing its inquiry on Federal's filing an action in Bernalillo County against Eddy County residents, the court dwelled on the propriety of the Bernalillo County suit and that court's actions. The court invited the Francos to move for a stay of the proceedings in Bernalillo County, stating "I'll be glad to sign one today and see what [the Bernalillo County judge] can do with that tomorrow."

**{9}** Although the court was best situated to judge the credibility of Federal's assertions, **see Wooley v. Wicker, supra,** we find that the trial court abused its discretion. In evaluating Federal's showing, the court failed to apply a liberal standard favoring a trial on the merits. Although we realize that races to the courthouse are all too frequent, a default judgment was not the proper remedy here. Nor is a default judgment a tool to be used in a dispute over forum non conveniens or the propriety of another court's actions. The trial court's concern with the Bernalillo County suit cannot be defended as a proper evaluation of the equities. The court's consideration of those proceedings did not constitute an examination of the effect on the Francos of setting aside the default, and therefore cannot be said to be a consideration of the intervening equities. **See Springer Corporation v. Hererra, supra; General Telephone Corp. v. General Telephone Ans. Serv.,** 277 F.2d 919 (5th Cir. 1960).

**{10}** Because the trial court failed to apply the appropriate standard in determining whether

Federal showed good cause and a meritorious defense, we reverse the entry of the default and the judgment based on it. The case is remanded with directions to vacate the default judgment and to proceed in a manner consistent with this opinion.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice,**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**DAN SOSA, JR.,**
**Justice, Respectfully dissenting**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-086**

**Filing Date: July 16, 1982**

**Docket No. 14,110**

**PETER NAUMBURG,**

**Plaintiff-Appellee,**

**v.**

**ERNEST CUMMINS AND BARBARA L. CUMMINS,**

**Defendants-Appellants,**

**and**

**BUENA VISTA ESTATES, INC.,**

**Defendant.**

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, A. Joseph Alarid, District Judge.**

James E. Womack
Albuquerque, New Mexico

for Appellants.

Simons, Cuddy & Friedman
Thomas A. Simons, IV
Santa Fe, New Mexico

for Appellees.

Modrall, Sperling, Roehl, Harris & Sisk
George T. Harris, Jr.
Albuquerque, New Mexico

for Defendant.

**OPINION**

**PAYNE, Justice.**

**{1}** Plaintiff Naumberg, a resident of Santa Fe, brought suit in the district court of Bernalillo County against Defendants Cummins, residents of Albuquerque, Bernalillo County, and a New Mexico corporation, Buena Vista Estates, Inc. (Buena Vista), a New Mexico corporation having its principal place of business at Albuquerque. The complaint was based on a real estate contract involving lands in Santa Fe County. Under the contract, the Cummins sold the property to Naumberg, allegedly with the promise that the Cummins would find a subsequent buyer for Naumberg. The Cummins have failed to do so, and Naumberg has ceased payment under the contract. The Cummins assigned their interest to Buena Vista. Naumberg sought relief by way of injunction, recision, declaratory judgment, reformation of the contract, and monetary damages.

**{2}** Asserting that venue was improper under Section 38-3-1, N.M.S.A. 1978 (Cum. Supp. 1981), because the suit involved land situated in Santa Fe County, the Cummins filed a motion to dismiss. The motion was denied by the trial court and the Cummins appeal. We reverse.

**{3}** Section 38-3-1 provides:

> All civil actions commenced in the district courts shall be brought and shall be commenced in counties as follows and not otherwise:
>
> * * * * * *
>
> D.(1) when lands or any interest in lands are the object of any suit in whole or in part, such suit shall be brought in the county where the land or any portion thereof is situate.
>
> * * * * * *

**{4}** In **Rito Cebolla Inv., Ltd. v. Golden West Land,** 94 N.M. 121, 607 P.2d 659 (Ct. App. 1980), the Court of Appeals held that venue was **not** in the county in which the real estate involved was located (Mora County) when the parties had their principal places of business in Bernalillo County. The sales contract was executed in Bernalillo County and the only relief requested was damages for misrepresentation. The action "did not affect the title to, or ownership of, the property" **Id.** at 123, 607 P.2d at 661.

**{5}** This case presents a similar fact pattern with the exception of the type of relief sought. Naumberg seeks an injunction against the defendants to prohibit them from obtaining the special warranty deed involved from the escrow agent. He also seeks recision of the real estate contract. Such relief, if afforded, could "affect the title to, or ownership of, the property," and therefore an interest in land is the object of the suit. One of Naumberg's own allegations states that if Buena Vista declares a default and demands delivery of the deed from the escrow agent, "Naumberg will be irreparably damaged in that he will lose all interest in the subject property together with the substantial payments already made to date."

**{6}** Naumberg notes that Buena Vista, to whom the Cummins assigned the contract, does not challenge venue. Naumburg therefore argues that the proper disposition would be to dismiss the Cummins, but not Buena Vista, as defendants. We disagree. The complaint was filed naming both the Cummins and Buena Vista as defendants. It is likely that both are necessary and indispensable parties. Although Buena Vista did not challenge venue, the Cummins did and one challenge is sufficient to require that the complaint be dismissed.

**{7} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**C. FINCHER NEAL,**
**Judge**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-096**

**Filing Date: September 2, 1982**

**Docket No. 14,068**

**FLORENCIO BACA, ET AL.,**

**Petitioners-Appellees,**

**v.**

**EMPLOYMENT SERVICES DIVISION OF THE HUMAN SERVICES DEPARTMENT OF NEW MEXICO, AND GAS COMPANY OF NEW MEXICO,**

**Respondents-Appellants.**

**Appeal from the District Court of Bernalillo County, Gerald D. Fowlie, District Judge.**

Motion for Rehearing Denied October 4, 1982

J. Richard Baumgartner
Jon Nivala
George Cherpelis
Albuquerque, New Mexico

for Respondents-Appellants.

Freedman, Boyd & Daniels
David A. Freedman
Albuquerque, New Mexico

for Petitioners-Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** The district court reversed the decision of the Employment Security Division (E.S.D.) to deny appellees' claims for unemployment benefits. E.S.D. and the Gas Company of New Mexico (Gas Co.), the employer, appeal. We reverse the judgment of the district court and reinstate the decision of E.S.D.

**{2}** On March 28, 1978, members of the International Association of Machinists, Local 183, struck the Albuquerque service center of Gas Co. and established a picket line. The claimants-appellees, Baca and other members of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 412, refused to cross the picket line although they were not involved in a labor dispute with Gas Co. Following an outbreak of violence, during which shots were fired toward the service center building in the early morning of May 1, Gas Co. obtained a temporary restraining order removing the picket line. The claimants reported to work during the period of time in which there was no picketing. On May 19, limited picketing resumed pursuant to a preliminary injunction prohibiting any violence or threats of violence in the vicinity of, or any damage to, the Gas Co. service center or the residences of Gas Co. employees. The claimants again refused to cross the picket line, and did not report to work until the strike was settled and the picket line permanently removed.

**{3}** The claimants applied to E.S.D. for unemployment benefits. After several hearings and reviews, E.S.D. denied them benefits pursuant to Section 59-9-4(A)(3), N.M.S.A. 1953 (Interim Supp. 1976-77), because they could have continued to work by crossing the picket line and therefore had not reported to available work. The claimants appealed to the district court, which found that they had a reasonable fear of violence if they crossed the picket line. The district court thus based its judgment on the standards set out in **Kennecott Copper Corp., Etc. v. Employment Sec. Com'n,** 81 N.M. 532, 469 P.2d 511 (1970).

**{4}** Under **Abernathy v. Employment Sec. Com'n,** 93 N.M. 71, 73, 596 P.2d 514, 516

(1979), we "must address two questions: (1) [w]hether the district court was correct in finding the Commission decision to be unsupported by substantial evidence; and (2) assuming the district court was correct, whether the district court's independent findings are supported by substantial evidence." In determining whether there is substantial evidence to support a finding, the reviewing court must apply these basic rules:

> (1) that substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) that on appeal all disputed facts are resolved in favor of the successful party, with all reasonable inferences indulged in support of a verdict, and all evidence and inferences to the contrary disregarded[;] and (3) that although contrary evidence is presented which may have supported a different verdict, the appellate court will not weigh the evidence or foreclose a finding of substantial evidence. (Citations omitted)

**Toltec Intern., Inc. v. Village of Ruidoso,** 95 N.M. 82, 84, 619 P.2d 186, 188 (1980). These rules are applicable to the review decisions of administrative tribunals. **United Veterans Org. v. New Mexico Prop. App. Dept.,** 84 N.M. 114, 500 P.2d 199 (1972).

**{5}** After examining the record before us and applying those rules, we find that there is substantial evidence to support the decision of E.S.D. E.S.D. could reasonably infer from the evidence that the claimants' real motivation for not crossing the picket line was union solidarity. Forty-one members of the striking union did not feel threatened by violence and crossed the picket line to work. The acts of violence perpetrated by a few of the picketers primarily occurred in the early morning hours, when only two dispatchers and two security guards were working. When limited picketing resumed on May 18, pursuant to the preliminary injunction, the claimants refused to cross the picket line. There had been no violence since the May 3rd issuance of the temporary restraining order. The injunction prohibited any further violence. Although there is much evidence tending to show that the claimants were reasonably afraid of violence, we cannot say that the E.S.D. decision was against the clear weight of the evidence. **See Rush v. Fletcher,** 11 N.M. 555, 70 P. 559 (1902). Therefore, the district court incorrectly found the decision to be unsupported by substantial evidence.

**{6}** Although E.S.D. and Gas Co. have not challenged the applicability of **Kennecott Copper, supra,** the claimants in essence assert that if the district court judgment is reversed, the E.S.D. decision should not be reinstated because it is incorrect under **Albuquerque - Phoenix Exp., Inc. v. Employment S.C.,** 88 N.M. 596, 544 P.2d 1161 (1975) (herein referred to as **Apex**). We agree with E.S.D. and Gas Co. that **Apex** is not applicable to this case. There, we based our holding in part on the consideration that we cannot allow "the commission to demand that . . . [the claimants] abandon their legal rights and economic interest in the labor dispute and return to their jobs with the employer with whom they were disputing on the premise that their dispute was without merit." **Id.** at 598, 544 P.2d at 1163. Clearly, the fact that the **Apex** claimants were involved in a dispute with their employer was dispositive. Here, however, the claimants were not involved in a labor dispute with Gas Co.; their contract with Gas Co. was still in effect and their union had not called a strike. Therefore **Apex** is not applicable here.

**{7}** The judgment of the district court is reversed and the decision of E.S.D. is reinstated.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-099**

**Filing Date: September 7, 1982**

**Docket No. 14,196**

**IN THE MATTER OF JOHN DOE, A CHILD, STATE OF NEW MEXICO, EX REL., HUMAN SERVICES DEPARTMENT,**

**Petitioner,**

**v.**

**JULIE STAPLES,**

**Respondent.**

**Original Proceeding on Certiorari.**

Jeff Bingaman, Attorney General
James W. Catron, Assistant Attorney General
Human Services Department
Santa Fe, New Mexico

for Petitioner.

Elaine Hebard
Alamogordo, New Mexico

Guardian ad Litem for John Doe.

Jefferson R. Rhodes
Alamogordo, New Mexico

Attorney for Appellees Scott.

Jack Whorton
Alamogordo, New Mexico

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** The State brought an action against Staples to terminate her parental rights with reference to her minor son, pursuant Section 40-7-4, N.M.S.A. 1978 (Cum. Supp. 1981). The trial court terminated Staples' rights, and she appealed. The basis for her appeal was that the statute upon which the State relies is unconstitutional.

**{2}** The Court of Appeals opinion ignores the arguments presented in the briefs. The court issued its opinion not on the constitutionality of the statute but on the supposed failure of the State to comply with the statute. The relevant statute, Section 40-7-4(B)(4), N.M.S.A. 1978, states:

> B. The court shall terminate parental rights with respect to a minor child when:
>
> * * * * * *
>
> (4) the child has been placed in foster care by a court order **or has been otherwise placed by parents or others into the physical custody of such family** and the following conditions exist:
>
> (a) the child has lived in the foster home for an extended period of time;
>
> (b) the parent/child relationship has disintegrated;
>
> (c) a psychological parent/child relationship has developed between the foster family and the child;
>
> (d) if the court deems the child of sufficient capacity to express a preference, the child prefers no longer to live with the natural parent; and
>
> (e) the foster family desires to adopt the child. [Emphasis added.]

The conditions required by the statute were all found to exist by the trial court. The Court of

Appeals held that the trial court's termination order was improper because the child was not placed in foster care by court order. This is a more restrictive holding than is provided by the statute. No explanation is given for failing to consider the deleted portion of the statute, which recognizes that placement may be made without a court order. We do not know whether the court merely overlooked the additional language of the statute and was thus led into error or whether the additional words were deleted in an effort to see a result in the case more acceptable to the reviewing court. Under either circumstance, the Court of Appeals erred in reversing on that ground.

**{3}** We recently declared that "[c]ourts risk overlooking important facts or legal considerations when they take it upon themselves to raise, argue, and decide legal questions overlooked by the lawyers who tailor the case to fit within their legal theories." **New Mexico Department of Human Services v. Tapia,** 97 N.M. 632, 642 P.2d 1091 (1982). The present case illustrates how far a court may deviate when it ignores the arguments presented and searches for an alternative ground for decision.

**{4}** We reverse the Court of Appeals.

**{5}** We have not been asked to consider the constitutional arguments raised by the appellants. Because affirmance of the trial court's decision at this stage would leave Staples' claims unheard, we remand the case to the Court of Appeals for consideration of the arguments raised by counsel for the parties. To avoid further unnecessary delay which could adversely affect the sensitive relationships involved here, the matter should be expedited.

**{6} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-101**

**Filing Date: September 7, 1982**

**Docket No. 14,349**

**GILBERTO ULIBARRI AND ISABELLE ULIBARRI, HIS WIFE,**

**Plaintiffs-Appellees,**

**v.**

**THOMAS HAGAN and LENORA HAGAN, HIS WIFE,**

**Defendants-Appellants.**

**Appeal from District Court Catron County, Paul Marshall, District Judge.**

Motion for Rehearing Denied October 4, 1982

Bruce C. Redd
Albuquerque, New Mexico

for Appellants.

Steven Hernandez
Las Cruce, New Mexico

for Appellees.

**OPINION**

**PAYNE, Justice.**

**{1}** The Ulibarris brought this suit seeking an adjudication of water rights in a certain spring and an ejectment of the Hagans from the land on which the spring was located. The Hagans counterclaimed asking for a determination that they owned both the land and the water rights in the spring. The jury found that the Hagans owned the land and judgment was entered accordingly. That portion of the judgment is not challenged. On the issue of water rights, the court determined that ownership was irrelevant because the predecessors of the parties had entered an agreement to share the water. The court imposed a trust on the water rights for the use of both parties. The Hagans appeal from the imposition of this trust.

**{2}** During the trial, the Ulibarris moved for dismissal of that portion of the suit which involved a determination of the water rights. In support of the motion, the Ulibarris referred to a prior suit, **State ex rel. Reynolds v. Acosta,** Grant County District Court No. 16,610 (September 3, 1968), in which water rights in the Reserve Area of the San Francisco River Stream System had been determined. The spring at issue in the present case was not included in the original judgment in the **Acosta** case, but was considered in a subsequent order nunc pro tunc which supplemented the original order and granted the water rights in the spring to the Hagans' predecessor. The Ulibarris claimed that although Gilbert Ulibarri was joined as a defendant in the original **Acosta** suit, his wife Isabelle was not, and that neither of the Ulibarris was given notice of the motion which resulted in the order nunc pro tunc. The Ulibarris' motion to dismiss in the present case asserted that the Grant County court retained exclusive jurisdiction of the adjudication of water rights in the basin involved, and that any adjudication of water rights in the case at bar would be of no force and effect. The Hagans also moved for dismissal. The trial court denied these motions because it considered ownership irrelevant in light of the above agreement.

**{3}** The fundamental question here is whether, once an adjudication of water rights by one district court has been made, a separate district court may subsequently impose a trust on the water rights granting rights not recognized by the original court. Our conclusion is that it cannot.

**{4}** Section 72-4-17, N.M.S.A. 1978, states in part:

> In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties. . . . The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved. . . .

**{5}** The broad language in this statute specifies that **all** questions necessary for the adjudication of **all** water rights must be heard and determined in the court in which the suit is brought. The **Acosta** case involved the stream system in which the spring apparently lies. Therefore, only the district court in Grant County may hear and determine any questions relating to water rights to this spring. Consideration of the prior agreement to share the water rights, which was the basis for the court's imposition of a trust, involved a question relating to water rights under Section 72-4-17. By hearing questions relating to the water rights in a stream system which had been adjudicated in the Grant County court, the court below deprived the Grant County court of its exclusive statutory jurisdiction.

**{6}** The record in this case does not conclusively demonstrate that the spring was part of the stream system. Because the district court ruled that the ownership of the water rights was irrelevant to this case, it did not admit evidence of that ownership. The Ulibarris' motion indicates that the spring was part of the San Francisco River Stream System. If the Grant County court determined that the spring was part of the stream system, then the Grant County court would retain jurisdiction over the spring. We have previously held that the procedure for adjudication of water rights is all-embracing, and that it includes all claimed rights of appropriators from artesian basins within a stream system. **State v. Sharp,** 66 N.M. 192, 344 P.2d 943 (1959). However, we have also held that waters from springs which sink in the soil rather than flow in a natural channel are not subject to appropriation. **Burgett v. Calentine,** 56 N.M. 194, 242 P.2d 276 (1951). Before the district court can dismiss on the basis that the Grant County court has exclusive jurisdiction, it must be satisfied that a prior order actually was entered declaring that the spring is part of the "stream system involved." Accordingly, we remand for a determination of this issue, with directions to grant the motions to dismiss if such an order was entered at some point in the **Acosta** case.

**{7}** The judgment is affirmed in part and stayed in part pending a determination by the district court of whether a prior order by the Grant County court declared the spring to be part of the stream system; if it did, the judgment is reversed with directions to dismiss that portion of the suit involving the determination of water rights.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-110**

**Filing Date: September 28, 1982**

**Docket No. 13,928**

**PAUL LIVINGSTON,**

**Plaintiff-Appellant,**

**v.**

**GEORGE EWING, NEW MEXICO STATE CULTURAL AFFAIRS OFFICER,**

**Defendant-Appellee.**

**APPEAL FROM THE DISTRICT COURT SANTA FE COUNTY,**
**Bruce E. Kaufman, District Judge.**

Paul Livingston
Albuquerque, New Mexico

Pro Se.

Jeff Bingaman, Attorney General
Jill Z. Cooper, Deputy Attorney General
Santa Fe, New Mexico

for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This case involves the promulgation of the Museum of New Mexico's resolution permitting only Indians to sell handicrafts under the portal of the Palace of the Governors in Santa Fe. Livingston challenges the promulgation of the resolution on statutory grounds. He also claims that the Museum resolution impermissibly relies for its effectuation on Section 30-20-13(C), N.M.S.A. 1978 (Cum. Supp. 1982), which is itself an invalid delegation of legislative power and impermissibly vague.

**{2}** The facts of this case have never been at issue. **See Livingston v. Ewing,** 601 F.2d 1110 (10th Cir.), **cert. denied,** 444 U.S. 870, 100 S. Ct. 147, 62 L. Ed. 2d 95 (1979).

> The New Mexico legislature established the Museum in 1909, and since then the Indians have been a part of the Museum's program. In the interest of stimulating the native crafts and encouraging the educational consequences, the Board of the Museum was carrying out an educational policy to develop and preserve the traditions of New Mexico. In 1935, the Museum began to limit the space inside the portal to the Indians for the sale of their arts and crafts. * * * Custom was changed to a more definite policy by the Regents in 1972.

**Id.** at 1112. The Board of Regents formalized that policy by resolution in February 1976.

**{3}** On June 24, 1980, the Court of Appeals held in **State v. Joyce,** 94 N.M. 618, 614 P.2d 30 (Ct. App. 1980), that the resolution is a rule within the meaning of the State Rules Act, §§ 14-4-1 through 14-4-9, N.M.S.A. 1978; the court also held that the resolution was invalid and unenforceable because it had never been filed in accordance with that Act. On June 27, 1980, the Museum, through the State Cultural Affairs Officer, Ewing, filed the resolution with the State Records Office. That same day Livingston filed a petition in district court seeking a judgment declaring the enforcement of the resolution to be invalid; he also sought an alternative writ of prohibition to prevent its enforcement. The district court issued the writ on July 1, but quashed it the next day. Subsequently, after hearing legal arguments, the court issued an order dismissing the petition.

**I.**

**{4}** Ewing asserts that this case is moot because of the 1982 adoption of an amended resolution following public notice and comment. However, the object of Livingston's suit is a determination of the validity and enforcement of the 1976 resolution from the time of its filing in June 1980. The subsequent adoption of the amended resolution has no effect on the validity of the previous resolution during this time period. **Cf. State v. Watts,** 34 N.M. 451, 283 P. 905 (1929) (subject matter of suit no longer available for court's disposition). Nor have the parties changed their status since the instigation of the suit. Finally, our determination of the issue will affect the outcome of another pending suit between the same parties. Therefore, we will proceed to a determination of the merits of the case.

**II.**

**{5}** Livingston first argues that the resolution is invalid and unenforceable "because it was never promulgated as a rule." He asserts that because the resolution has the force of law its promulgation must have been preceded by notice to the public and opportunity for comment. He bases his assertion on the New Mexico Administrative Procedures Act, §§ 12-8-1 through 12-8-25, N.M.S.A. 1978, and the State Rules Act, §§ 14-4-1 through 14-4-9, N.M.S.A. 1978.

**{6}** We first note that the New Mexico Administrative Procedures Act is not applicable to the actions of the Board of Regents of the Museum of New Mexico. That Act is applicable only to agencies "specifically placed by law under the Administrative Procedures Act." § 12-8-2(A), N.M.S.A. 1978. **See also** § 12-8-23, N.M.S.A. 1978; **Mayer v. Public Employees Retirement Board,** 81 N.M. 64, 463 P.2d 40 (Ct. App. 1970). Livingston has not pointed out, nor can we find, any provision subjecting the Board of Regents to the Act's provisions.

**{7}** Livingston asserts that because the Court of Appeals determines that the resolution is a rule within the meaning of the State Rules Act, **supra, State v. Joyce, supra,** it is a rule for all purposes. He cites Section 14-4-5 of the State Rules Act, which provides that "[n]o rule shall be valid or enforceable until it is * * * filed and shall only be valid and enforceable upon such filing and compliance with any other law." He then refers to Section 9-6-11(E), N.M.S.A. 1978, (Repl. Pamp. 1980). That statute requires that

> [n]o rule or regulation promulgated by the director of [the museum division of the Office of Cultural Affairs] in carrying out the functions and duties of the division shall be effective until approved by the state cultural affairs officer unless otherwise provided by statute. Unless otherwise provided by statute, no regulation affecting any person or agency outside the office shall be adopted, amended or repealed without a public hearing on the proposed action before the state cultural affairs officer or a hearing officer designated by him. . . . Notice of the subject matter of the regulation, the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed regulation, proposed amendment or repeal of an existing regulation may be obtained shall be published. . . . All rules and regulations shall be filed in accordance with the State Rules Act.

The statute became effective March 5, 1980. **See** 1980 N.M. Laws ch. 151, § 60. However, the previous version of the provision, differing only in referring to the Secretary of Educational Finance and Cultural Affairs instead of the State Cultural Affairs Officer, became effective March 31, 1978. **See** 1977 N.M. Laws ch. 246 § 71. Livingston asserts that because this statute was in effect at the time the resolution was filed its provisions govern the promulgation of the resolution.

**{8}** Ewing argues that merely because the resolution is a rule for the purposes of the State Rules Act, it does not mean that it is a rule for the purposes of its promulgation, which is not governed by the terms of that Act. Moreover, Ewing

argues, the statutes governing the Board of Regents do not require notice and hearing, and Section 9-6-11(E) is not applicable because it did not become effective until two years after the promulgation of the resolution.

**{9}** The resolution is a rule for the purposes of its promulgation. It is not merely an announcement to the public of past or present practice or understanding, or tentative intentions for the future. It is a statement asserting a standard of conduct which has the force of law; it affects the rights or obligations of those who fall within its ambit. **See** 2K. Davis, Administrative Law Treatise § 7:5 (2d ed. 1979 & Supp. 1982).

**{10}** Both Ewing and Livingston agree that the resolution was adopted in 1976. At that time, Section 4-12-35, N.M.S.A. 1953 (Repl. Vol. 2, Part 1, Supp. 1975), authorized the Board of Regents to adopt rules and regulations and set policy directives; however, the statute established no required procedures for the Board's exercise of its power. Therefore, we must determine whether the subsequent enactment of Section 9-6-11(E), **supra,** with its provisions governing the adoption of such rules, affects the validity of the rule.

**{11}** To apply Section 9-6-11(E) to the adoption of the Museum rule requires giving it retroactive effect. "The general rule is that statutes . . . are to be construed as prospective rather than retrospective unless there is a clear legislative intention to the contrary." **Wilson v. New Mexico Lumber & Timber Co.,** 42 N.M. 438, 440, 81 P.2d 61, 62 (1938). However, "statutes relating to * * * procedure generally apply to pending actions." **Id.** at 441, 81 P.2d at 63, quoting **Link v. Receivers of Seaboard Air Line Ry. Co.,** 73 F.2d 149, 151 (4th Cir. 1934). Those relating to substance operate only prospectively. **See Gray v. Armijo,** 70 N.M. 245, 372 P.2d 821 (1962). "[S]ubstantive law * * is that which creates duties, rights and obligations. * * *" **Id.** at 248, 372 P.2d at 823, quoting **Johnson v. Terry,** 48 N.M. 253, 258, 149 P.2d 795, 797 (1944).

**{12}** We do not find in Section 9-6-11(E) a clear legislative intention regarding the effect of the statute. "[I]n the absence of such apparent legislative intent, [we] strongly presume statutes are to operate prospectively only." **Gallegos v. Atchison, T. & S.F. Ry. Co.,** 28 N.M. 472, 478, 214 P. 579, 582 (1923). Although it prescribes procedures for adoption of rules, Section 9-6-11(E) imposes certain duties on the State Cultural Affairs Officer (formerly the Secretary of Educational Finance and Cultural Affairs). We are unwilling to label the provision as purely procedural or purely substantive in nature. Therefore, we will not single out Section 9-6-11(E) as applicable retroactively. **See Demarest v. Zoning Commission,** 134 Conn. 572, 59 A.2d 293 (1948); 73 C.J.S. **Public Administrative Bodies and Procedure** § 5 (1951).

**{13}** We note that "a statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to the enactment." **State v. Mears,** 79 N.M. 715-16, 449 P.2d 85-86 (Ct. App. 1968). However, the provisions of Section 9-6-11(E) on which Livingston primarily relies go to the adoption of rules, and both parties agree that the Museum's rule was adopted two years before the effective date of the first version of the statute. Merely because the Museum was ordered to file the rule in 1980 by the Court of Appeals in **State v. Joyce,** does not mean that Section 9-6-11(E) as it then existed operates to invalidate the prior adoption. Good sense and justice do not dictate that the Museum's Board of Regents re-adopt the resolution under the new procedures when it was not told that it must be filed until 1980, after litigating the issue. **Cf. Carvette v. Marion Power Shovel Company,** 157 Conn. 92, 249 A.2d 58, 60 (1968) ("Even if the statute is procedural, it will not be applied retroactively if considerations of good sense and justice dictate that it not be so applied. [Citations omitted.]") **See also** Browde, **Administrative Law,** 12 N.M.L. Rev. 1, 23 n.136 (1982).

**{14}** Livingston also cites **Morgan v. United States,** 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129 (1938), for the proposition that "failure to strictly comply with the notice and hearing requirements denies the due process rights of those entitled to

notice and hearing." However, as we have determined, there were no notice and hearing requirements with which the Board of Regents had to strictly comply, and **Morgan** dealt with quasi judicial, not legislative, functions of administrative agencies. There is no fundamental right to notice and hearing before the adoption of a rule; such a right is statutory only. **Bi-Metallic Co. v. Colorado,** 239 U.S. 441, 36 S. Ct. 141, 60 L. Ed. 372 (1915); **Willapoint Oysters v. Ewing,** 174 F.2d 676 (9th Cir.), **cert. denied,** 338 U.S. 860, 70 S. Ct. 101, 94 L. Ed. 527 (1949); **United States v. Bodine Produce Co.,** 206 F. Supp. 201 (D. Ariz. 1962); **Webb v. State University of New York,** 125 F. Supp. 910 (N.D. N.Y. 1954). Moreover, requiring the Board of Regents to re-adopt its resolution would defeat the goals of speed and efficiency basic to the administrative process. **See** 1 F. Cooper, State Administrative Law 140-42 (1965); 4 B. Mezines, J. Stein & J. Gruff, Administrative Law § 31.02, at 31-31 (rev. ed. 1982).

**{15}** We therefore hold that the resolution is not invalid and unenforceable because Section 9-6-11(E), is not retroactively applicable to its adoption.

**III.**

**{16}** Livingston next argues that the Museum resolution impermissibly relies on Section 30-20-13(C), N.M.S.A. 1978 (Cum. Supp. 1982), for its effectuation because "no legislative enactment permits or authorizes the Museum to enforce the Indians-only rule with the sanction of criminal arrest and imprisonment."

**{17}** We recognize the general rule that "[a] legislative body may delegate . . . the power to make rules promoting the legislative object at hand, a violation of which will be deemed a crime, but only where the Legislature expressly and definitely provides." **People v. Sullivan,** 244 App. Div. 469, 280 N.Y.S. 48, 52 (1935). Yet, in looking at the delegation of legislative authority to an administrative agency, we must apply the following standards:

> All statutes are presumed to be enacted by the legislature with full knowledge of all other statutes in **pari materia** and with reference thereto. [Citation omitted.] Furthermore, statutes which are in **pari materia** should, as far as reasonably possible, be construed together as though they constituted one law so as to give force and effect to each. [Citation omitted.] This rule applies even though the statutes being construed together were enacted at different times and the latter contains no reference to the former. [Citation omitted.]

**New Mexico Mun. L., Inc. v. New Mexico Envir. Imp. Bd.,** 88 N.M. 201, 206, 539 P.2d 221, 226 (Ct. App.), **cert. denied,** 88 N.M. 318, 540 P.2d 248 (1975).

**{18}** Section 30-20-13(C), originally enacted by 1975 N.M. Laws ch. 52, § 2(C), provides:

> No person shall willfully refuse or fail to leave the property of or any building or other facility owned, operated or controlled by the state or any of its political subdivisions when requested to do so by a lawful custodian of the building, facility or property if the person is committing, threatens to commit or incites others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the property, building or facility.

Section 4-12-35, N.M.S.A. 1953 (Repl. Vol. 2, Part 1, Supp. 1975), originally enacted as 1975 N.M. Laws ch. 264, § 4(D), empowers the Board of Regents to adopt rules and regulations and "set policy directives for the operation of the museum and museum properties." Both of the statutes deal with the operation of state properties, and therefore are in **pari materia** and must be construed together. This is particularly true here, since the two provisions were products of the same legislative session.

**{19}** It is clear from the language of Section 30-20-13(C) that the Legislature intended

that those who set the "lawful mission, processes, procedures or functions" of state property be able to avail themselves of the statute's provisions in furtherance of those policies and functions. Therefore, the Board of Regents may properly rely on the provisions of that section to effectuate the provisions of the resolution.

**{20}** Livingston argues that Section 30-20-13(C) "is an invalid delegation of legislative power to the executive and is impermissibly vague." That statute, however, does not delegate legislative authority; it does not provide that the state property's lawful custodian may establish "the lawful mission, processes, procedures or functions of the property." Instead, it by its terms delegates power to prevent the willful interference with policies and procedures already established. Thus, Section 30-20-13(C) delegates judicial power, and that is the gravamen of Livingston's assertion. The statute has already been upheld in the face of an attack on the issues of the delegation of judicial power and vagueness, **see State v. Silva,** 86 N.M. 543, 525 P.2d 903 (Ct. App.), **cert. denied,** 86 N.M. 528, 525 P.2d 888 (1974), and Livingston has failed to point to any persuasive arguments to strike down the statute.

**{21}** We therefore affirm the judgment of the district court.

**{22} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-117**

**Filing Date: September 30, 1982**

**Docket No. 14,134**

**MARY SERNA,**

**Petitioner-Appellant,**

**v.**

**CLARENCE ADOLPH SALAZAR,**

**Defendant-Appellee.**

**APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, GEORGE L. ZIMMERMAN, District Judge.**

Larry R. Hill
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for Appellant.

David I. Rupp
Alamogordo, New Mexico

for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This appeal follows a New Mexico trial court order which declined jurisdiction to modify visitation rights in a California divorce decree. We find that under the New Mexico Uniform Child Custody Jurisdiction Act, §§ 40-10-1 through 40-10-24, N.M.S.A. 1978 (Cum. Supp. 1982) (UCCJA), the New Mexico court had jurisdiction. We therefore reverse.

**{2}** The parties were divorced in California in 1977. The divorce decree awarded the custody of the two minor children to the mother and gave the father reasonable visitation rights. The mother and children moved to New Mexico in 1978, where, except for a visit to their father in California in the summer of 1980, they have since remained.

**{3}** In October 1980 the father filed for modification of the final decree in the California court and was granted one month's visitation rights. In May 1981 the mother brought an action in New Mexico to further modify the father's visitation rights. She claims he is a drug addict and an alcoholic. The father moved for the court to decline jurisdiction under Section 40-10-15. The trial court granted the motion and this appeal ensued.

**{4}** We held in **Olsen v. Olsen,** 98 N.M. 644, 651 P.2d 1288 (1982) (No. 13,927, Sept. 28, 1982) that the New Mexico UCCJA applies to pending cases even though those cases were filed before, but decided after, July 1, 1982, its effective date. Section 40-10-15 provides that a New Mexico court has jurisdiction to modify a child custody decree made by the court of another state only when: "(1) it appears that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with the [UCCJA] or has declined to assume jurisdiction to modify the decree; and (2) the district court of New Mexico has jurisdiction."

**{5}** The first inquiry must be whether the California court still has jurisdiction over this case. In making this determination we look to the California UCCJA, Cal. Civ. Code § 5152 (West 1982), as interpreted by its courts. The language of the California UCCJA is practically identical to New Mexico's UCCJA jurisdictional statute. **See** § 40-10-4.

**{6}** By definition, under Section 5151(2), a "custody determination" includes visitation proceedings. Paragraph (5) of the same section defines "home state" as "the state in which the

child, immediately preceding the time involved, lived with his parents, a parent or person acting as a parent for at least six consecutive months."

**{7}** Both New Mexico and California require compliance with only one of the four jurisdictional prerequisites. **See** § 40-10-4(A) and Cal. Civ. Code § 5152(1). None of the four prerequisites was present in California in 1981. California was not the home state; the children have lived in New Mexico since 1978. The children had no significant connection with California. The **only** connection was a visit to their father. Although the evidence pertaining to the petitioner's claim that the father is an alcoholic and drug addict is in California, the substantial evidence concerning the children's "present or future care, protection, training and personal relationships" is in New Mexico, not in California. The children were not physically present in California at the time the California matter was filed, nor was abandonment or emergency at issue. Finally, it appears that it would be in the best interest of the children for the New Mexico court to assume jurisdiction.

**{8}** The California interpretation of Section 5152 also leads us to conclude that California no longer has jurisdiction in the present case. **In Re Marriage of Steiner,** 89 Cal. App. 3d 363, 152 Cal. Rptr. 612 (1979), noted that "it is the best interest of the child that governs and not the interest or desires of the wrangling parents." 152 Cal. Rptr. at 617 (citations omitted). The court continued by stating that

> it is apparent that the child and either or both of the parents can move away from the court of the state issuing the initial custody decree, thus losing contact with the state where the initial decree was rendered or the child's contact with the state may otherwise become slight. In such a situation a California court which issued the initial decree, acting in conformity with the purposes of the Act, would not have modification jurisdiction under either subdivision (1)(a) or (1)(b) of section 5152. Accordingly, a state should not assume the authority to modify a custody decree solely upon the fact that it was the state that initially made the custody determination.

**Id.**

**{9}** In all relevant respects, the facts in **Steiner** were identical to those in the present case, except that in **Steiner** the petitioner was seeking to modify a Colorado custody modification decree which had modified the original California decree. By dismissing the petition, the court recognized that California no longer had jurisdiction. In the present case, where the respondent is challenging New Mexico jurisdiction to modify a California decree, it is obvious that California no longer has jurisdiction. Therefore, the first requirement of Section 40-10-15(A) is met.

**{10}** Having determined that California does not now have jurisdiction, we must decide whether New Mexico has jurisdiction. The trial court held that it did not have jurisdiction under Section 38-1-16, N.M.S.A. 1978. However, Section 40-10-4, being the more specific statute, governs this case. Under that statute, if any of four circumstances exist, and the requirements of Section 40-10-15 are met, the New Mexico court has jurisdiction to make a modification decree. We hold that the statutory requirements are satisfied because under Section 40-10-4(A)(1)(a), New Mexico was the home state of the child, as defined by Section 40-10-3(E), when the proceeding was commenced. Accordingly, the court below erred in declining jurisdiction and the judgment is reversed.

**{11}** We take judicial notice of the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (PKPA). The PKPA was intended, **inter alia,** to "discourage continuing interstate controversies over child custody * * * avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation * * * and deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards." 28 USCA § 1738A, **Congressional Findings and Declaration of Purposes,** Pub. L. 96-611 § 7(c)(4), (5), and (6) (West. Supp. 1982). Because the

PKPA has supremacy over state law, we must determine whether it applies to change the result reached under state law in the present case. **See Tufares v. Wright,** 98 N.M. 8, 644 P.2d 522 (1982); **Belosky v. Belosky,** 97 N.M. 365, 640 P.2d 471 (1982); **State ex rel. Valles v. Brown,** 97 N.M. 327, 639 P.2d 1181 (1982).

**{12}** Subparagraph (f) of the PKPA states:

> A court of a State may modify a determination of the custody of the same child made by a court of another State, if—
>
> (1) it has jurisdiction to make such a child custody determination; and
>
> (2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

**{13}** As discussed **supra,** New Mexico does have jurisdiction to modify. Satisfaction of subsection (2), however, requires closer analysis of the statute. Subparagraph (d) of the PKPA states:

> The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirements of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

**{14}** In this case, we must assume for lack of contrary indication that California made the original child custody determination consistently with the PKPA. Additionally, one contestant, the father, remains a resident of California. Therefore, if the requirement of subsection (c)(1) continues to be met, California retains jurisdiction.

**{15}** Subsection (c)(1) requires that "such court has jurisdiction under the law of such State." This requirement demands the identical analysis set forth **supra,** resulting in the conclusion that California does not have jurisdiction under its own law.

**{16}** This conclusion is supported by the opinion in **Kumar v. Santa Clara County Superior Court,** 124 Cal. 3d 1003, 177 Cal. Rptr. 763 (1981). In that case, the court considered the application of the PKPA as well as the UCCJA. The court recognized and rejected the interpretation under which "the state that originally made a child custody decree continues to have jurisdiction * * * so long as at least one of the parties still remains a resident of the state." 177 Cal. Rptr. at 769. The court further opined that "the guiding principle of the California, New York and federal law is that the best interests of the child are and should be paramount," and that neither "Congress [n]or the state Legislature intended to preclude local adjudication." **Id.**

**{17}** We note finally that although California did exercise jurisdiction by modifying the decree in October 1980, this fact has no relevance to the situation in May 1981.

**{18}** The trial court is reversed.

**{19} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice,**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-119**

**Filing Date: September 30, 1982**

**Docket No. 14,323**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**VICTOR TOVAR,**

**Respondent.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

Jeff Bingaman, Attorney General
William Lazar, Asst. Attorney General
Santa Fe, New Mexico

for Petitioner.

Michael Dickman, Appellate Defender
David Stafford, Asst. Appellate Defender
Santa Fe, New Mexico

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** The defendant, Victor Tovar, was prosecuted for an unlawful taking of a motor vehicle in violation of Section 66-3-504, N.M.S.A. 1978. When the State rested its case, the defendant moved for a directed verdict. The trial court denied the motion. The defendant did not present any evidence. The jury returned a guilty verdict and the defendant appealed, asserting that the evidence presented was insufficient to support a conviction. The Court of Appeals, with one dissent, agreed with the defendant and reversed the conviction. We hold that substantial evidence supports the conviction and therefore reverse the Court of Appeals and affirm the jury verdict.

**{2}** The evidence presented by the State's witnesses may be summarized as follows. Sometime after 11:00 p.m., a U-Haul truck was taken from the lot of the service station in Lordsburg, New Mexico, that operated the U-Haul franchise. The particular truck taken was used by the station owner as a "working warehouse," which means that it contained extra tires, wheels, towbars, hitches, etc. At about 5:45 a.m. on the same morning that the owner discovered the truck was missing, two Border Patrol agents investigated a U-Haul truck parked by a bridge along the highway between Lordsburg and Douglas, Arizona, just a few miles out of Douglas. The defendant was in the driver's seat. Another man was with him in the cab. The Border Patrol agents asked to inspect the contents of the truck, and as the defendant took them to the rear of the truck, a third man approached from under the bridge. Three additional men were found in the rear portion of the truck.

**{3}** The defendant told the Border Patrol agents that he was "coming from Lordsburg" and going to Douglas to a Chevron station run by a relative. Satisfied that all six men were U.S. citizens, the Border Patrol agents left, noting that the truck left the area proceeding towards Douglas.

**{4}** A short while later, a resident of Douglas observed the truck being parked on his street, which ended in a dead-end. The witness watched the truck being driven to the dead-end, turned around, and then parked. The defendant and two other men left the truck and walked away. This witness feared that the truck might have contained illegal aliens and he notified the police. The officer who arrived and inspected the truck found that the wiring in the cab was ripped out and had probably been hot-wired. The defendant and his two companions were taken into custody.

**{5}** The defendant told the investigating officer the following story. He and his companions had been hitchhiking from Lordsburg to Douglas to see the defendant's aunt. About 20 miles out of Lordsburg they were picked up by three men driving the U-Haul truck. Before arriving at Douglas, these three men got out of the truck and left it to the defendant and his companions, who proceeded to take the truck to Douglas. After hearing this story, the police released the men.

**{6}** In the meantime, the Border Patrol found three tires under the bridge where the truck had been parked earlier that morning. The investigating officer from Douglas was summoned. After noticing a Lordsburg address written on the tires, the officer called the Lordsburg sheriff, and thereby discovered that a U-Haul truck was missing. Footprints near the bridge matched those found around the truck abandoned by the defendant in Douglas. The defendant and his companions were again taken into custody and charges brought against the defendant.

**{7}** We have previously stated:

> In determining whether the evidence supports a criminal charge or an essential element thereof, the appeals court must view the evidence in a light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of a verdict of conviction. (Citations omitted.) The appellate court does not weigh the evidence and may not substitute its judgment for that of the jury. (Citations omitted.)

**State v. Lankford,** 92 N.M. 1, 2, 582 P.2d 378, 379 (1978).

**{8}** The test for sufficiency of the evidence in a criminal case has been articulated by the Court of Appeals. "[W]e must determine whether there is sufficient evidence to justify a rational trier of fact to find beyond a reasonable doubt with respect to every element essential to a conviction." **State v. Carter,** 93 N.M. 500, 503, 601 P.2d 733, 736 (Ct. App.), **cert. denied,** 93 N.M. 683, 604 P.2d 821 (1979). A conviction cannot stand if "the evidence must be buttressed by surmise and conjecture, rather than logical inference in order to support [the] conviction." **State v. Romero,** 67 N.M. 82, 84, 352 P.2d 781, 782 (1960).

**{9}** To prove that the defendant committed the crime charged, the State must prove that he took the vehicle without the owner's consent, in New Mexico, with the requisite criminal intent. § 66-3-504; N.M.U.J.I. Crim. 1.50 and 16.50, N.M.S.A. 1978 (Repl. Pamp. 1982).

**{10}** The defendant argues that there was no evidence that he took the truck. As the Court of Appeals stated in **State v. Rivera,** 85 N.M. 723, 725, 516 P.2d 694, 696 (1973):

> We are mindful that, "'The unexplained possession by one of goods belonging to another does not raise the presumption that a larceny has been committed, and that the possessor is a thief; additional evidence is necessary to establish the corpus delicti'." **State v. White,** 37 N.M. 121, 19 P.2d 192 (1933). The additional evidence in this case is considerable * *."

On the basis of the evidence presented, the jury could logically infer that the defendant did in fact take the truck, with the requisite criminal intent. The truck had been broken into and hot-wired. The defendant was identified as the driver when the Border Patrol agents investigated the parked truck on the highway. During direct examination of one of the agents, the following question was answered affirmatively: "And this person that told you he had been picked up as a hitchhiker, was he the same person who earlier had told you that he was bringing the U-Haul to his brother-in-law?" This question was not objected to by the defendant. The defendant gave conflicting explanations of his activity. These facts support an inference that the defendant took the truck from Lordsburg. **State v. Rivera, supra.**

**{11}** Other evidence also supports the jury's verdict. The defendant acted as spokesman for the men in the truck. The men who supposedly

picked up the hitchhiking defendant were riding in the back of the truck. Although the defendant said the men had stopped at the bridge to relieve themselves, three of the tires which had been stored in the truck were found to have been concealed under the bridge. The defendant abandoned the truck in a residential area in Douglas without attempting to return it to a U-Haul dealer.

**{12}** This evidence supports the logical inference that the defendant was the leader of the group, that he took the truck in order to go to Douglas and that his explanations to the contrary were untrue. There is no need for surmise and conjecture, because substantial evidence, even if circumstantial, supports the conviction. **State v. Lankford, supra.**

**{13}** The defendant also claims that the trial Court erred in failing to change attorneys shortly before trial of the habitual offender charge and in failing to continue the trial of that charge. We disagree. As the defendant himself recognizes, the trial court has discretion in ruling on such matters and we will not interfere except where there is an abuse of discretion. **State v. Orona,** 97 N.M. 232, 638 P.2d 1077 (1982); **State v. Bell,** 90 N.M. 134, 560 P.2d 925 (1977); **See State v. Manus,** 93 N.M. 95, 597 P.2d 280 (1979). There was no abuse here.

**{14}** Accordingly, the judgment and sentence entered in the district court is reinstated.

**{15} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM RIORDAN,**
**Justice.**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice, respectfully dissenting**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-121**

**Filing Date: September 30, 1982**

**Docket Nos. 14,012, 14,014**

**WILLIAM LIVINGSTON AND JANICE LIVINGSTON, D/B/A THE LIVINGSTON HOTEL,**

**Petitioners,**

**v.**

**DAVIS PETER BEGAY, NELLIE LIVINGSTON AND MONTGOMERY WARD & COMPANY, INC.,**

**Respondents,**

**MONTGOMERY WARD & COMPANY, INC.,**

**Petitioner,**

**v.**

**DAVIS PETER BEGAY, AND WILLIAM LIVINGSTON AND JANICE LIVINGSTON, D/B/A THE LIVINGSTON HOTEL,**

**Respondents.**

**ORIGINAL PROCEEDINGS ON CERTIORARI.**

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**OPINION**

**PAYNE, Justice.**

**{1}** This case presents various questions concerning the liability of a hotel operator for the death of a guest caused by allegedly defective fixtures in the hotel room.

**{2}** Peter Begay, plaintiff's decedent, was found dead in his hotel room the morning after he had checked in. The cause of death was asphyxiation by carbon monoxide gas which apparently escaped from a disconnected exhaust vent attached to a gas space heater located in the room. Plaintiff sued the Livingstons, owners and operators of the hotel at the time of death, the prior owner, Nellie Livingston (Nellie); Montgomery Ward and Company, Inc., the alleged supplier of the heater; and Gas Company of New Mexico, supplier of the gas. Plaintiff's complaint included allegations of negligence, **res ipsa loquitur,** and strict liability. The trial court granted summary judgments for the defendants on all counts of the complaint involved here.

**{3}** Plaintiff appealed to the Court of Appeals, which affirmed in part and reversed in part. The Livingstons and Ward petitioned separately for

writs of certiorari, both of which we granted. We consolidated the petitions for purposes of this opinion.

**I.**

**{4}** Plaintiff's second amended complaint consists of seven counts.

**{5}** Count I is directed against the Livingstons based upon broad grounds of negligence with reference to the heater, its appurtenances and its position in the room. Count I is not at issue in this appeal.

**{6}** Count II is directed against the Livingstons under the doctrine of **res ipsa loquitur.**

**{7}** Count III is directed against Nellie based upon general grounds of negligence.

**{8}** Count IV is directed against the Livingstons and Nellie under the doctrine of strict liability.

**{9}** Count V is directed against Montgomery Ward under the doctrine of strict liability.

**{10}** Count VI is directed against Montgomery Ward on the basis of negligence.

**{11}** Count VII is directed against the Gas Company for negligence. Count VII is not an issue in this appeal.

**{12}** The Livingstons filed a third-party complaint against Montgomery Ward for contribution and indemnification.

**{13}** Plaintiff appealed to the Court of Appeals from summary judgments granted defendants on all Counts at issue on this appeal. The Court of Appeals affirmed as to Counts II, III, and IV pertaining to Nellie and reversed as to the Livingstons on Counts IV, V, and VI, as well as to the Livingstons' third-party complaint.

**II.**

**{14}** The basis for the Court of Appeals' affirming the summary judgment as to Count II (asserting **res ipsa loquiter**) was that after the Livingstons rented room 7 to decedent, the Livingstons no longer retained exclusive control and management of the heater and exhaust venting. **See** N.M.U.J.I. Civ. 16.23, N.M.S.A. 1978 (Repl. Pamp. 1980). There was no evidence to justify an inference that the exhaust vent from the heater to the ceiling juncture was disconnected at the time decedent took control of the room. Since the evidence showed that the disconnection could have been caused by decedent after the Livingstons relinquished exclusive control, we affirm the Court of Appeals on this point.

**III.**

**{15}** The Court of Appeals upheld the grant of summary judgment for Nellie on Count III based on Restatement (Second) of Torts, Sections 352 and 353 (1964). Section 352, comment (a) states:

> The vendee is required to make his own inspection of the premises, and the vendor is not responsible to him for their defective condition, existing at the time of transfer. Still less is he liable to any third person who may come upon the land, even though such entry is in the right of the vendee.
>
> To this rule an exception has developed as to undisclosed dangerous conditions known to the vendor, as to which see § 353.

Section 353 Comment (c) states:

> It is not, however, necessary that the vendor have actual knowledge of the condition, or that he be in fact aware that it involves an unreasonable risk of physical harm to persons on the land. It is enough that he has reason to know that the condition exists and is dangerous, as "reason to know" is defined in § 12(1)—that is to say, that he has information from which a

> person of reasonable intelligence, or his own superior intelligence, would infer that the condition exists, or would govern his conduct on the assumption that it does exist, and would realize that its existence will involve an unreasonable risk of physical harm to persons on the land.

**{16}** Nellie introduced affidavits to the effect that while she owned the hotel, she annually had the hotel checked by the Gas Company and by a plumber, and that no incident or event occurred that would give her reason to know of the existence of any dangerous condition. Nor did she actually have such knowledge.

**{17}** Plaintiffs were unable to come forward with any evidence to create a genuine issue of material fact.

**{18}** Therefore, we affirm the Court of Appeals' disposition of this issue.

**IV.**

**{19}** The Court of Appeals affirmed the grant of summary judgment in favor of Nellie on Count IV because plaintiff did not pursue the claim. We uphold the Court of Appeals on this point.

**{20}** However, the Court of Appeals reversed the grant of summary judgment in favor of the Livingstons on Count IV, thereby applying the doctrine of strict liability to a hotel operator. We hold that this was error and reverse on this point.

**{21}** The general rule is that a hotel operator owes its guests a duty to use reasonable care in promoting their safety. Annot., 18 A.L.R.2d 973, 974 (1951). Although a hotel operator must use reasonable care, he is not an insurer of the safety of his guests. The rule has been that the duty of reasonable care applies to cases involving injuries to guests caused by defective furnishings or conditions in their rooms. **Id.** This rule has been followed in cases involving unsafe heating fixtures. **See** cases cited **id.** at § 7. This reasonable care standard of liability has been applied to motel owners in New Mexico. **Withrow v. Woozencraft,** 90 N.M. 48, 559 P.2d 425 (Ct. App. 1976), **cert. denied,** 90 N.M. 255, 561 P.2d 1348 (1977).

**{22}** Plaintiff cites no authority for holding a hotel operator strictly liable for injuries to a guest by inherent defects in fixtures or furnishings in a hotel room. Plaintiff proposed to the Court of Appeals that it hold the Livingstons strictly liable on the authority of two California cases, **Golden v. Conway,** 55 Cal. App.3d 948, 128 Cal. Rptr. 69 (1976), and **Fakhoury v. Magner,** 25 Cal. App.3d 58, 101 Cal. Rptr. 473 (1972). The Court of Appeals, with one dissent, obliged.

**{23}** Golden and **Fakhoury** held landlords strictly liable for injuries to tenants caused by inherent defects in fixtures and furnishings provided as part of the lease. Other courts have refused to apply strict liability to lessors of real estate. **Old Town Development Company v. Langford,** 349 N.E.2d 744 (Ind. App. 1976); **Dwyer v. Skyline Apartments, Inc.,** 123 N.J. Super. 48, 301 A.2d 463 (Ct. App.), **aff'd. mem.** 63 N.J. 577, 311 A.2d 1 (1973). The question is one of first impression in New Mexico. Therefore, a brief review of the law of strict liability in New Mexico is necessary.

**{24}** In **Stang v. Hertz Corporation,** 83 N.M. 730, 497 P.2d 732 (1972), we approved the rule of strict products liability expressed in Restatement (Second) of Torts § 402A (1964). There we applied strict liability to a lessor of an automobile, reasoning that there is no logical basis for differentiating between a seller of a defective automobile and a lessor of such an automobile. In a lengthy analysis of the development of strict liability, we noted that the theory was adopted "[b]ecause of the shortcomings of the early theories * * *." **Stang, supra** at 731, 497 P.2d at 733. These theories—negligence and breach of warranty—imposed limitations and difficulties particularly onerous to purchasers of products. The difficulty in proving that a manufacturer was negligent, the common lack of privity between manufacturer and the ultimate purchaser, as well as other contract and sales rules, required development of

strict liability as applied to manufacturers. Liability extends to retailers and distributors as well as manufacturers because each is an integral part of the marketing process, **Vandermark v. Ford Motor Company,** 61 Cal.2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964), and because the shortcomings of the earlier theories are equally applicable to such dealers. In **Rudisaile v. Hawk Aviation, Inc.,** 92 N.M. 575, 592 P.2d 175 (1979), we also noted that an important reason for imposing strict liability was to encourage manufacturers to take care in production activities and to provide adequate warning of dangers. In **Stang** we held that these same rationales apply to lessors of particular products. We reaffirmed this application **Rudisaile.** However, we decline to extend the § 402A definition of "seller" to persons in the class represented by the Livingstons.

**{25}** The lessors involved in **Stang** and **Rudisaille** were involved in leasing particular products. Leasing automobiles and airplanes is a common means of making these products available to consumers. Henszey, **Application of Strict Liability to the Leasing Industry,** 33 Bus. Law. 631 (1978). The relationship between such lessors and the manufacturers is substantially the same as that between retail dealers and manufacturers. Thus, it would be illogical to distinguish between such lessors and retailers or other retail dealers.

**{26}** The Court of Appeals apparently considered the Livingstons to be lessors of the hotel room, as well as lessors of the fixtures placed therein. Thus, as in **Golden** and **Fakhoury,** the Livingstons could be strictly liable for injuries caused by defects in the fixtures, much as the lessors in **Stang** and **Rudisaille** were held liable.

**{27}** Plaintiff argues that there were three defective products involved: the room itself as a whole, the gas heater, and the vent. Because each of these "products" has distinctive characteristics, we shall examine the application of strict liability principles to each "product" separately.

**{28}** Plaintiff asserts that Room 7 was a defective product because it had an inherently unsafe design. (The heater was placed near the sink where a guest would be likely to bump it.) Accordingly, plaintiff claims that by offering the room to prospective guests, the Livingstons placed a defective product on the market. We decline to accept this line of reasoning. Although other courts have held that a house is a product for purposes of holding a contractor liable to the initial and subsequent purchasers, we think such an application is neither required nor advisable in the circumstances of this case. The rationales behind application of strict liability do not apply when the injured party necessarily has a direct relationship with the defendant, when proof of negligence is not difficult, and when traditional remedies have proven adequate. The unsafe design of a hotel room is simply not the type of defect for which strict liability was fashioned as a remedy.

**{29}** Any inherent defect in the gas heater would, of course, create strict liability in the manufacturer and distributors, including the seller to Nellie Livingston. The question here is whether the Livingstons should be treated as part of the "chain of distribution," or, in other words, whether the Livingstons placed the heater in the "stream of commerce." A major consideration in holding lessors of commercial products strictly liable was that such lessors possessed expert knowledge of the characteristics of the equipment or machines they leased. **Booth Steamship Co. v. Meier & Oelhaf Co.,** 262 F.2d 310 (2d Cir. 1958). Another consideration is that such lessors, like retailers, deal continually with their suppliers, giving them an enduring relationship which permits them to seek contribution and indemnification. These considerations do not apply when a motel operator makes a one-time purchase of furnishings and fixtures about which he has no special expertise. Therefore, we hold that a motel operator is not strictly liable for defects in the fixtures and furnishings of the rooms he holds out to the public.

**{30}** Finally, plaintiff claims the exhaust vent was defective. It appears that this vent was fabricated by the installer. Therefore, there is no chain of distribution to pursue, and liability, if any, can fall only on the Livingstons. The

traditional duty imposed upon hotel operators as discussed **supra** is adequate to cover any claim by plaintiff, and strict liability will not be imposed as to this item.

**{31}** Accordingly, we hold that a hotel operator may not be held strictly liable for injuries suffered by hotel guests when the injuries are caused by defects inherent in the fixtures or furnishings of the hotel rooms. This holding in no way diminishes the hotel operator's liability under alternative theories. **See Wagner v. Coronet Hotel,** 10 Ariz. App. 296, 458 P.2d 390 (1969).

**{32}** We reverse the Court of Appeals as to this issue.

**V.**

**{33}** The Court of Appeals reversed the grant of summary judgment for Montgomery Ward in the action by plaintiff and in the third-party action by Livingston. In so doing, the Court of Appeals misapplied the relevant standard. Accordingly, we reverse and uphold the trial court's action.

**{34}** In support of its motion for summary judgment, Montgomery Ward presented testimony that the heater had been tested prior to sale and was approved as safe by the American Gas Association. During the fifteen years of continuous normal operation without a mishap the heater was inspected on numerous occasions and found to be operating safely. Montgomery Ward also presented testimony that there was no direct evidence of a design or manufacturing defect, but that there was evidence of egregious misuse of the gas heater.

**{35}** Neither plaintiff nor Livingston presented any evidence contrary to that presented by Montgomery Ward. N.M.R. Civ.P. 56(e), N.M.S.A. 1978 (Repl. Pamp. 1980), provides that a person opposing a motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but his response * * * must set forth specific facts showing that there is a genuine issue for trial." The clear language of this rule demonstrates that the trial court acted properly in granting Ward's motion for summary judgment.

**{36}** Rather than apply Rule 56, the Court of Appeals imposed its own standard upon Montgomery Ward.

**{37}** To make a prima facie case, Montgomery Ward must establish that the heater it sold to Nellie was not at the time of sale in a defective condition, unreasonably dangerous to decedent in Room 7 of the Livingston Hotel.

**{38}** This improper attempt to require Montgomery Ward to prove a negative is essentially the same requirement which we expressly disapproved in **Goodman v. Brock,** 83 N.M. 789, 498 P.2d 676 (1972), **rev'g** 83 N.M. 580, 494 P.2d 1397 (Ct. App. 1972). We need not repeat the logic and analysis in **Goodman.** We merely reaffirm the principles outlined therein, which seem clear enough to us.

**{39}** Since the testimony presented by Ward suffices to establish a prima facie showing that the heater was not defective when sold, and since the opposing parties have failed to present any contrary evidence sufficient to establish a genuine issue of fact for trial, the trial court correctly granted Ward's motion for summary judgment.

**VI.**

**{40}** Accordingly, the decision of the Court of Appeals is reversed and the judgment of the trial court is reinstated.

**{41} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice, specially concurs**

**DAN SOSA, JR.,**
**Senior Justice, respectfully dissents**

## SPECIAL CONCURRENCE

**RIORDAN, Justice, specially concurring.**

**{42}** I concur in the result reached by the majority.

**{43}** I do not join the majority because the opinion does not overrule the cases of **Rudisaile v. Hawk Aviation, Inc.,** 92 N.M. 575, 592 P.2d 175 (1979) and **Stang v. Hertz Corporation,** 83 N.M. 730, 497 P.2d 732 (1972). Both cases stand for the proposition that a lessor who leases chattels, can be held strictly liable in tort if the chattel is defective thereby causing injuries. In **Stang,** Justice McManus relied upon the Restatement (Second) of Torts § 402A (1965) in adding this concept to New Mexico's law. Section 402A speaks in terms of a "seller". It is reasonable to assume that both a "manufacturer" and a "retailer" fit into this category. However, a "lessor" should **not** be included in this category. As pointed out by then Chief Judge Wood of the New Mexico Court of Appeals in **Stang v. Hertz Corporation,** 83 N.M. 217, 490 P.2d 475 (Ct. App.), **rev'd on this issue,** 83 N.M. 730, 497 P.2d 732 (1972), the Restatement (Second) of Torts makes a distinction between a "seller" and a "leasor". Restatement (Second) of Torts §§ 407 and 408 (1965) provide the standard for liability against lessors in terms of negligence, not strict liability.

**{44}** In the present case, we are now faced with the logical extension of this erroneous line of cases. If such extension is allowed to continue, the present case would hold that a motel owner is liable as a "lessor" just as **Rudisaile** and **Stang** hold that a lessor is liable as a "seller". I commend the majority in bringing this to a halt before taking the next step. However, they do not go far enough. I would overrule both **Rudisaile** and **Stang** in their application of strict liability in tort as to a "lessor".

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-122**

**Filing Date: September 30, 1982**

**Docket No. 13,945**

**FRANK McKAY,**

**Petitioner-Appellee,**

**v.**

**HON. THOMAS E. DAVIS,
METROPOLITAN JUDGE,**

**Respondent-Appellant.**

**APPEAL FROM DISTRICT COURT
OF BERNALILLO COUNTY,
Richard B. Traub, District Judge.**

Motion for Rehearing denied November 2, 1982

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for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** Frank McKay was arrested for driving while under the influence of liquor (DWI). When the arresting officer requested that he submit to a breath-alcohol test, McKay refused. At the pretrial conference, he informed the appellant, Judge Thomas E. Davis of the Metropolitan Court, that he would move to exclude any references at trial to his refusal to take the test. The Judge then advised McKay that he would permit the introduction of and comment on such evidence. Thereafter, McKay obtained a writ from the District Court prohibiting the introduction of or comment on evidence of McKay's refusal to take the test.

**{2}** The question of whether evidence of a defendant's refusal to take a breath-alcohol test is admissible at trial is one of first impression in New Mexico. Davis argues that it is admissible under the Implied Consent Act, §§ 66-8-105 through 66-8-112, N.M.S.A. 1978 (Orig. Pamp. & Cum. Supp. 1982), under U.S. Const. Amend. V, and under N.M.R. Evid. 401, N.M.S.A. 1978. We agree and reverse the District court.

**I.**

**{3}** McKay argues that Section 66-8-111, N.M.S.A. 1978, and **State v. Wilson,** 92 N.M. 54, 582 P.2d 826 (Ct. App. 1978), plainly create a statutory right to refuse to take a breath test and therefore mandate the exclusion of evidence of refusal. We hold that the Implied Consent Act, including Section 66-8-111, does not support McKay's position. Numerous cases have held that there is no constitutional right to refuse to take tests that produce this type of evidence. **See Schmerber v. California,** 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); **People v. Thomas,** 46 N.Y.2d 100, 412 N.Y.S.2d 845, 385 N.E.2d 584 (1978); **See also State v. Richerson,** 87 N.M. 437, 535 P.2d 644 (Ct. App.), **cert. denied,** 87 N.M. 450, 535 P.2d 657 (1975). In fact, the New Mexico Legislature made the right to refuse such tests conditional when it provided that one's license could be revoked if the "right" were exercised. **See** §§ 66-8-107 and 108. Therefore, the right granted by the Legislature is merely the right not to be forcibly tested after manifesting refusal. The scope of this opinion will not, however, include a discussion of what may happen to a defendant upon his refusal

to take a chemical test. Such a discussion would be collateral to the specific issue raised in this appeal.

**{4}** The first step in analyzing the evidentiary use of the refusal to submit is to review the legislative purposes of the Implied Consent Act. The Implied Consent Act is intended to deter driving while intoxicated and to aid in discovering and removing the intoxicated driver from the highway. These purposes could be frustrated if evidence of refusal were held inadmissible in DWI cases. In short, a defendant would be rewarded for refusing to cooperate with the scheme established by the Legislature. Specifically, a guilty defendant who took a chemical test could face a more severe penalty (a jail term or fine or both) than would a guilty defendant who did not cooperate (license suspension or revocation). Moreover, if the test results are not introduced at the DWI trial and the court is not informed about the driver's refusal to submit, the suppression of this evidence could create the mistaken impression that no test was offered.

**{5}** The next step leading to a solution to the question raised in this appeal is to review the alleged "right to refuse" created by the New Mexico Implied Consent Act. The Implied Consent Act does not grant a statutory right to refuse this kind of test. In **State v. Wilson, supra,** the Court of Appeals reviewed the lower court's suppression of blood test results which were obtained despite defendant's refusal. The court stated: "The exclusion of the blood test was appropriate. The sample was taken in violation of a statutory right." **Id.** at 56, 582 P.2d at 828 (citation omitted). McKay interprets this language as referring to a statutory right to refuse. However, it is clear that the **Wilson** court was interpreting that portion of Section 64-22-2.11(A) N.M.S.A. 1953 (2d Repl. Vol. 9, pt. 2, 1972), identical to Section 66-8-111(A), providing that once a person refuses to take a chemical test, "none shall be administered." In **Wilson,** the test was administered in open violation of that statutory prohibition. This statutory right referred to by the court was the right not to be forcibly tested after manifesting refusal. **See also State v. Miller,** 257 S.C. 213, 185 S.E.2d 359 (1971). Merely because the Legislature opted against forcible testing, it does not logically follow that the Legislature intended to create a statutory right to refuse to take the test. What actually exists is the driver's statutory power to refuse to submit to the physical act of intrusion upon his body. To call such a power to refuse a "right" to refuse is a misnomer. This incorrect labeling clouds the issue of whether the fact of refusal can be used as evidence in a later criminal trial. By correctly labeling the statutory power to refuse as a power rather than a right, the admissibility of the refusal as evidence is rendered clearly proper.

**{6}** We therefore hold that evidence of a defendant's refusal to take a breath-alcohol test is admissible under the Implied Consent Act.

**II.**

**{7}** In **Schmerber, supra,** the United States Supreme Court held that withdrawal of blood from a defendant for chemical analysis did not constitute testimonial evidence. The Court stated that the fifth amendment privilege against self-incrimination was not violated by this procedure. Relying on **Schmerber, supra,** the State argues that McKay's refusal to take the test is neither compelled nor testimonial communication of the type protected by the fifth amendment. We agree.

**{8}** As previously discussed, there is no constitutional right to refuse to take a chemical test. **See Schmerber, supra; People v. Thomas, supra.** Therefore, admitting refusal evidence cannot penalize one for exercising a constitutional right. **Hill v. State,** 366 So. 2d 318 (Ala. 1979). The essence of this analysis is contingent on whether the refusal is found to fall within the ambit of fifth amendment protection. Traditional fifth amendment analysis involving this type of evidence has been one of distinguishing "communications" or "testimony" from "real or physical evidence." **See Schmerber, supra.** Although this distinction is often a "helpful framework for analysis * * *," there are "many cases in which such a distinction is not readily drawn." **Id.** 384

U.S. at 764, 86 S. Ct. at 1832. The case at bar is one such case.

**{9}** The inapplicability of general fifth amendment principles to the situation presented in this appeal was discussed in two federal court decisions which dealt specifically with the admissibility of refusal evidence. In **Newhouse v. Misterly,** 415 F.2d 514 (9th Cir. 1969), the Ninth Circuit was asked to decide whether the introduction of and comment on evidence of refusal to take a blood test violated the fifth amendment. The Ninth Circuit concluded that "* * * a refusal to take a blood test is not a testimonial 'statement' within the Fifth Amendment; rather, it is best described as conduct indicating a consciousness of guilt." 415 F.2d at 518 (citation omitted). Thus, the court concluded that no constitutional provision bars the use of refusal to submit as evidence.

**{10}** In **Welch v. District County Court of Vermont Unit, Etc.,** 594 F.2d 903 (2nd Cir. 1979), the court also concluded that no constitutional rights of the driver had been violated by using his refusal to submit to chemical testing as evidence. In reaching that conclusion, the court stated:

> [T]here is nothing unconstitutional in the manner in which Vermont has chosen to condition its statutory right to refuse. **The statute does not compel a driver refusing to take the test to surrender any constitutional right.** It is merely an explicit recognition of the practical existence of situations that might develop where a driver simply will not cooperate even though required to by state law, such as resort by the police to force in an effort to obtain the physical evidence to which they are entitled.

**Id.** at 905 (emphasis added).

**{11}** We reach the same conclusion announced in **Newhouse** and **Welch.** As both decisions point out, because there is no constitutional right to refuse, any testimony about the refusal to submit does not burden the fifth amendment. His act of refusal merely exposes him to the drawing of inferences, **see People v. Ellis,** 65 Cal.2d 529, 55 Cal. Rptr. 385, 421 P.2d 393, (1966), just as does any other act.

**{12}** Therefore, we hold that the introduction of and comment on McKay's refusal to take a test does not violate U.S. Const. Amend. V.

**III.**

**{13}** In the instant case, the district court held, as a matter of law, that evidence of a defendant's refusal to take a chemical test was irrelevant, based on **State v. Chavez,** 96 N.M. 313, 629 P.2d 1242 (Ct. App.), **cert. denied,** 96 N.M. 543, 632 P.2d 1181 (1981). We disagree.

**{14}** It is well established that evidence of one's consciousness of guilt is relevant and admissible. **See, e.g., State v. Trujillo,** 95 N.M. 535, 624 P.2d 44 (1981) (flight or aborted plan of flight); **State v. Nelson,** 65 N.M. 403, 338 P.2d 301, **cert. denied,** 361 U.S. 877, 80 S. Ct. 142, 4 L. Ed. 2d 115 (1959) (resisting or avoiding arrest); **State v. Gonzales,** 93 N.M. 445, 601 P.2d 78 (Ct. App. 1979) (armed robbery). By definition, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.M.R. Evid. 401, N.M.S.A. 1978.

**{15}** In **State v. Jackson,** Mont., 637 P.2d 1 (1981), Chief Justice Haswell, in his dissent, stated the following in his support of the relevancy of refusal evidence:

> [R]efusal to take a chemical test for intoxication may indicate the defendants' fear of the results of the test and his consciousness of guilt, and if the defendant has some other explanation for the refusal, such explanation can be considered by the jury in determining whether the refusal is to be construed as consciousness of guilt. It would appear to me that such evidence could support an inference of consciousness of guilt. * * *"

**Id.** at 6 (citations omitted).

**{16}** We agree with this statement and hold that a defendant's refusal to take a chemical test is relevant to show his consciousness of guilt and fear of the test results.

**{17}** McKay argues that because of the myriad reasons for which a defendant could refuse such a test, the evidence is **per se** irrelevant. However, we find the inferences of fear of the breath-alcohol test results and consciousness of guilt to be reasonable inferences and not irrelevant. This type of evidence is similar to and no less probative than evidence of flight or resisting arrest, which is admissible. **See State v. Esperti,** 220 So.2d 416 (Fla. Dist.Ct. App.1969). Of course, it is not inconceivable that some fact patterns might render evidence of refusal irrelevant. In such cases, the trial court could properly exclude the evidence. Nevertheless, we hold that this kind of fact pattern was not present in the instant case.

**IV.**

**{18}** We find nothing in the foregoing authority to indicate that the evidence of McKay's refusal to take a test is inadmissible as a matter of law on statutory, constitutional, or relevancy grounds.

**{19}** Accordingly, we reverse the district court's grant of the writ of prohibition and remand the case for further proceedings consistent with this opinion.

**{20} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**MACK EASLEY,**
**Chief Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-130**

**Filing Date: November 1, 1982**

**Docket No. 13,557**

**IN THE MATTER OF THE ESTATE OF DANA U. LAMB, DECEASED; MARIA FELLIN,**

**Petitioner-Appellee,**

**v.**

**ESTATE OF DANA U. LAMB, MARIA FELLIN, PERSONAL REPRESENTATIVE, RESPONDENT, CHARLES E. LAMB III, CHARLOTTE LAMB TRAUTMAN, HAZEL A. PIRONE, JUDITH F. JONES, AND GLORIA E. GIFFORD,**

**Appellants.**

**APPEAL FROM THE DISTRICT OF SIERRA COUNTY,**
**Paul "Pablo" Marshall, District Judge.**

Motion for Rehearing denied December 13, 1982

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**OPINION**

**PAYNE, Chief Justice.**

**{1}** This appeal is from a judgment entered by the district court in two consolidated actions. The informal probate of the estate of the decedent, Dana U. Lamb, was consolidated by the district court with a petition for payment of claim by Maria Fellin for what amounted to a substantial portion of Lamb's estate. Several individual appellants were allowed to intervene in the latter action. Fellin was awarded the entire estate of the deceased. We reverse.

**{2}** We discuss two issues:

1. Whether the trial court erred in finding that Lamb and Fellin had entered into a common law marriage, thus entitling Fellin to receive Lamb's estate as decedent's widow.

2. Whether the trial court erred in concluding that, alternatively, Fellin was entitled to Lamb's estate as a matter of equity.

**{3}** Maria Fellin and Dana Lamb met in New Mexico in April 1975. They quickly became close friends and after about three months, they recorded a conversation in which they dedicated their lives to one another.

**{4}** The central part of their conversation is set out below:

> DAN: So now, let's—tonight, let's make this final decision now. This is it. Do you promise to dedicate your life to me? All right then, I promise to dedicate my life to you. Now, that's a marriage ceremony.
>
> MARIE: Yeah, it is.
>
> DAN: In the eyes of God, we're married.

MARIE: Um-hm.

DAN: Because we've been looking for each other all these years. We've finally found each other and in the eyes of God, we're mates. We can have a formal marriage ceremony, we can take off as we are right now, we can do anything we want to do, whatever our conscience wills. We do whatever we think we should do. Because we're free now. Don't you dare think of going back to earning a salary. We don't need it. We have enough money. I'll show you my financial statement. I think, I don't know, with this inflation, whether we have enough to keep us going the rest of our lives but as a team, what I have is yours, you know? It makes no difference, I don't care. We're not thinking about that, we're thinking about the things we're going to accomplish. So that's final now. Do you agree? This is like taking a marriage vow.

MARIE: Yeah, it is, sort of, isn't it?

DAN: When you dedicate yourself to the other person in the marriage vows, it's the same thing, to love and cherish, in sickness and in health and all the things that confront a person in life and that calls for a complete dedication and that's the fault in our modern society today, there's—we don't have dedication. There's too much selfishness. There's too much independence. When you're dedicated, independence is there but in a different form because your independence is based on what we want to do, what the team wants to do.

**{5}** Later that year Lamb and Fellin traveled to Micronesia, where they resided for several months. They returned to New Mexico in 1976.

**{6}** At trial Fellin testified as follows: "On numerous occasions, we pledged to spend the rest of our lives together. We loved each other dearly and we were devoted to each other and loyal to each other and everything in that original cassette was absolutely the way we felt." Fellin testified that she and Lamb made and reaffirmed these vows in El Paso, Texas, en route to Micronesia, and again while in Micronesia. From 1975 until Lamb's death they held themselves out as husband and wife, often cohabitating. They were known as Mr. and Mrs. Lamb. On returning from Micronesia, they contacted a Catholic Priest and started proceedings for church annulment of a previous marriage of Lamb. Fellin testified that it was the wish and desire of both parties to marry, but that Lamb's religious convictions prohibited marriage until he obtained an annulment of his first marriage. She testified that Lamb had promised to marry her as soon as an annulment was granted, and that, "I believe that the tape indicated that there was a marriage ceremony that took place between the two of us and that we were to have a formal marriage before a priest." Lamb died in 1979, shortly before notice arrived announcing the annulment of his previous marriage. At the time of his death, Lamb was seventy-eight years old.

**{7}** The district court found that Fellin and Lamb had entered into a common law marriage as a result of their acts and intentions while they were present in Texas and Micronesia. As common law marriage is not authorized in New Mexico, no common law marriage was formed when Lamb and Fellin tape recorded the original "vows" in New Mexico in 1975. **In re Gabaldon's Estate,** 38 N.M. 392, 34 P.2d 672 (1934). However, New Mexico will recognize a common law marriage if valid in the jurisdiction where consummated. § 40-1-4, N.M.S.A. 1978; **Gallegos v. Wilkerson,** 79 N.M. 549, 445 P.2d 970 (1968). New Mexico applies the rule of comity, that the law of the place where the marriage is performed governs the validity of that marriage. **Ferret v. Ferret,** 55 N.M. 565, 578-79, 237 P.2d 594, 602 (1951). To determine whether a valid common law marriage was formed in a foreign jurisdiction, it is therefore necessary to look to the substantive law of that jurisdiction.

**{8}** Fellin and Lamb were not citizens of Micronesia. To determine whether they entered into a common law marriage in Micronesia, it is necessary to assess Micronesia's law. Because Micronesia is a United States Trust Territory, it is governed by the Code of the Trust Territory

of the Pacific Islands. The Code does not explicitly permit common law marriages, but it does state that common law is adopted "in the absence of written law" governing the territories. 1 TTC § 103 (1980). However, the Code specifically states that in order to make valid a marriage contract between two non-citizens of the Trust Territory, "it shall be necessary that . . . [a] marriage ceremony be performed by a duly authorized person as provided in this chapter." 39 TTC § 51 (1980). The Code then specifies who such a "duly authorized" person may be and sets out requirements for a license of marriage. 39 TTC §§ 53, 54 (1980). There is no allegation that Fellin and Lamb complied with these requirements. Because these requirements are "necessary," Fellin and Lamb could not have been married under the law applicable in Micronesia.

**{9}** Texas, where Fellin and Lamb also visited but never resided, does recognize common law marriage. **See** Tex. Fam. Code Ann. § 1.91 (Vernon 1975); **Humphreys v. Humphreys,** 364 S.W.2d 177 (Tex. 1963); 38 Tex. Jur.2d Marriage § 15 (1962 and Supp. 1981). However, Texas law holds that merely spending an occasional night in Texas when the parties are domiciled in a state that does not recognize common law marriage does not give rise to a common law marriage in Texas. **Kelly v. Consolidated Underwriters,** 300 S.W. 981 (Tex. Civ. App. 1927), **aff'd,** 15 S.W.2d 229 (Tex. Comm. App.1929). The threshold question is whether a couple established significant contacts with a jurisdiction recognizing common law marriage. **See In re Estate of Willard,** 93 N.M. 352, 600 P.2d 298 (Ct. App. 1979). There is no evidence in the record that Fellin and Lamb established significant contacts in Texas. **Cf. In re Estate of Willard, Id.** (finding couple had sufficient significant contacts with State of Texas to establish common law marriage in New Mexico). Moreover, there is no evidence that they ever intended to reside there. As a Texas court held in **Marek v. Flemming,** 192 F. Supp. 528 (S.D. Tex. 1961), a trip to Texas does not result in a valid common law marriage when the spouses have no intention of acquiring residence in Texas.

**{10}** Fellin testified that she and Lamb stayed for a day or two at the Hilton Hotel in El Paso, Texas, and that they repeated their vows to each other at that time. This alone is insufficient to establish significant contacts with the State of Texas for purposes of common law marriage. **See Cruickshank v. Cruickshank,** 193 Misc. 366, 82 N.Y.S.2d 522 (1948) (common law marriage not established in Texas by temporary visits or stopovers in that state); **see also Vaughn v. Hufnagel,** 473 S.W.2d 124 (Ky. Ct. App. 1971); **cert. denied,** 405 U.S. 1041, 92 S. Ct. 1313, 31 L. Ed. 2d 582 (1972) (visit to Ohio insufficient to establish a common law marriage); **Laikola v. Engineered Concrete,** 277 N.W.2d 653 (Minn. 1979) (court held that Minnesota residents may not enter into a valid common law marriage by temporarily visiting in a state that allows common law marriages). Other states have made similar rulings. **McGrath v. McGrath,** 387 S.W.2d 239 (Mo. Ct. App. 1965); **In re Binger's Estate,** 158 Neb. 444, 63 N.W.2d 784 (1954); **State ex rel. Smith v. Superior Court,** 23 Wash. 2d 357, 161 P.2d 188 (1945).

**{11}** Based on facts similar to those in this case, the New Mexico Court of Appeals, in **Bivians v. Denk,** commented as follows:

> Because of the mobility of modern society, the possibility of fraud arising from claims of common law marriage and the uncertainty which such claims of marriage inject into the affairs of individuals, it is not enough to establish a common law marriage that the parties have together made occasional visits to a jurisdiction that recognizes common law marriages. Nor does an occasional holding out of marriage or mere sexual relationship in a state authorizing common law marriages result in the formulation of a bona fide marriage. **Grant v. Superior Ct. in and for County of Pima,** 27 Ariz. App. 427, 555 P.2d 895 (1976); **Ex parte Threet,** 160 Tex. 482, 333 S.W.2d 361 (1960). If the original relationship of the parties in New Mexico is illicit and the couple continue to maintain legal residence in New Mexico, a common law marriage cannot be inferred absent proof of each

element necessary to establish a common law marriage and a showing of substantial contacts by the parties with the state where the alleged common law marriage occurred.

**Bivians v. Denk,** 98 N.M. 722, 652 P.2d 744 (Ct. App.1982), **cert. quashed**, 98 N.M. 762, 652 P.2d 1213 (1982).

**{12}** The facts of this case do not support a finding that Fellin and Lamb entered into a common law marriage in either Micronesia or Texas.

**{13}** The second issue before this Court is whether Fellin was entitled to Lamb's estate as a matter of equity. From the facts in the record, we find no merit to this argument. We are not persuaded that in this case, in the absence of an agreement between the parties, Fellin can expect payment for services rendered while living with Lamb. There is no evidence that Fellin expected to be paid for her services, nor did she prove the value of her services. She is therefore not entitled to Lamb's estate as a matter of equity.

**{14}** We reverse the trial court and remand for entry of a decision consistent with this opinion.

**{15} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-143**

**Filing Date: November 23, 1982**

**Docket No. 13,939**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**JOSE MOISES SANDOVAL,**

**Defendant-Appellant.**

**Appeal from the district Court of Santa Fe County, Tony Scarborough, District Judge.**

Motion for Rehearing denied December 21, 1982

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for Appellant.

Jeff Bingaman, Attorney General
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for Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** This appeal involves two alleged errors committed during Sandoval's penitentiary riot murder trial. The State's case was based primarily on testimony by David Fuentes, who saw Sandoval enter the victim's cell and later saw the victim lying in a pool of blood but did not see Sandoval hit the victim, and testimony by Tunnell, who did see Sandoval hit the victim and to whom Sandoval stated that he had killed the victim.

**{2}** The State disclosed statements of two witnesses **after** certifying compliance with N.M.R. Crim. P. 27, N.M.S.A. 1978 (Repl. Pamp. 1980). The State also disclosed two statements by Fuentes for the first time during the trial, after certifying full compliance with Rule 27. Rule 27(a)(6) provides:

> (a) **Information subject to disclosure.** [W]ithin ten days after arraignment * * * the state shall disclose or make available to the defendant:
>
> * * * * * *
>
> (6) **exculpatory evidence.** Any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States constitution.

These witnesses and the substance of their statements were:

1. James French—two statements that he saw the murder and that only blacks were involved (the defendant is not black).

2. Kari Oranen—statements dealing with the murder which were inculpatory but different from the versions of the State's witnesses.

3. David Fuentes—one early statement about the murder in general in which he did not mention Sandoval, and one statement that when the killing began Sandoval was in Tunnell's cell sexually abusing Tunnell. All the other statements had indicated that Sandoval sexually abused Tunnell before and after the murder.

**{3}** Sandoval moved for a mistrial or a continuance. He was granted a one week recess to allow him to further prepare in light of the newly ascertained witnesses and statements. He asserts reversible error only as to the failure to disclose Fuentes' statements.

**{4}** During the recess, the media extensively covered an attempted escape incident at the penitentiary and the trials of Sandoval and Jessie Trujillo. The trial judge admonished the jury not to read anything regarding Sandoval's case. No evidence was presented that any of the jurors violated this admonition, but Sandoval moved for a mistrial and for voir dire of the jury to determine whether any of them had read the material. These motions were denied, and Sandoval claims this was reversible error.

## 1. VIOLATION OF RULE 27.

**{5}** Sandoval argues that the State's failure to provide the statements of Fuentes constitutes reversible error because the statements were material to the defense and the delayed disclosure was prejudicial. Tunnell, the state's only eye-witness, was sexually abused on numerous occasions by Sandoval. The defense strategy was to exclude this fact because it could be prejudicial to Sandoval. The court agreed and excluded the evidence, leaving the defense to attack Tunnell's credibility by other means. On the other hand, the defense could have used the fact of abuse to impeach Tunnell by imputing a revenge motive. The latter approach may have been used if the State had disclosed Fuentes' statement because it provided a partial alibi for Sandoval, and places in doubt Tunnell's ability to observe the killing. The statement also conflicts with Tunnell's version of the events. Sandoval claims the one week recess was incapable of remedying the defect because the defense could not change their strategy in mid-trial without impairing their own credibility before the jury.

**{6}** Sandoval seeks application of the three-prong test announced in **State v. Lovato,** 94 N.M. 780, 617 P.2d 169 (Ct. App. 1980), pursuant to which he asserts that his conviction must be reversed.

**{7}** The three-part test includes three elements:

1. The State either breached some duty or intentionally deprived the defendant of evidence;

2. The improperly "suppressed" evidence was material; and

3. The suppression of this evidence prejudiced the defendant.

**Id.** at 782, 617 P.2d at 171.

**{8}** The **Lovato** case involved a situation where evidence had been destroyed. The three-part test there announced does not cover a situation where the State initially deprives the defendant of evidence but then later produces the evidence. Therefore, in cases when the evidence is introduced during the trial, a fourth consideration is necessary; namely, whether the failure to timely disclose the evidence was cured by the trial court.

**{9}** In the present case, there is no doubt that the State breached its duty in failing to timely disclose the statement.

**{10}** The materiality part of the test requires consideration of the proposition for which the evidence is offered and the issues in the case. E. Cleary, McCormick on Evidence § 185 at 434 (2d Ed. 1972). Here, the proposition for which Sandoval claims the evidence could have been offered was that he was sexually abusing Tunnell at the time of the murder and therefore was not guilty of the murder. Under this analysis, the evidence was material.

**{11}** The prejudice part of the test requires the court to assess whether the omitted evidence created a reasonable doubt which did not otherwise exist. The constitutional dimensions of this part of the test were addressed by the United States Supreme Court in **United States v. Agurs,** 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). There, the Court discussed the

problem of a prosecutor's failure to disclose evidence when the defense counsel has made no request for it or only a general request. The Court noted that a general request "really gives the prosecutor no better notice than if no request is made," and that any duty to respond to such a request "must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor." **Id.** at 106-107, 96 S. Ct. at 2398. The Court reiterated its rejection of the proposition that a prosecutor has a constitutional duty to routinely provide defense counsel access to his entire file. Then the Court stated the following standard:

> [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

**Id.** at 112-113, 96 S. Ct. at 2401.

**{12}** To apply this standard we must first determine the nature of the request made by defense counsel. Counsel relies on Rule 27 and does not refer to any more specific request. We hold that Rule 27 constitutes a general request under **Agurs.** Therefore the standard set forth above applies to this case.

**{13}** The following are the relevant portions of the statements involved for purposes of this appeal. Gallegos, an agent of the New Mexico State Police, was the interviewing officer.

> Fuentes: And, uh, Moses [Sandoval] was down there but he was in Cell 45 sexually abusing the kid [Tunnell] that was in there.
>
> * * * * * *
>
> Fuentes: And, they beat him [Teardrop, the victim] up in the cell with a cross and sticks and stuff.
>
> Gallegos: Who's they?
>
> Fuentes: It was, uh, okay, it was that, that big heavy set dude. And, then Moses came out, came out of here when they were beating this guy. Came out of here, whatever he was doing with Gerald Tunnell. I know he was sexually abusing him.
>
> Gallegos: Okay.
>
> Fuentes: And they went in there and they beat Teardrop.

**{14}** This testimony, in the context of the entire record, does not create a reasonable doubt that did not otherwise exist. The evidence is that Sandoval was with Tunnell in cell 45, that he left the cell, entered the victim's cell and brought the victim outside cell 45, had the victim moved, left cell 45, then returned to cell 45 with a bloody typewriter roller and told Tunnell he had killed the victim. The statements set out above do not provide an alibi as Sandoval suggests. They do indicate that Sandoval may not have taken part in all aspects of the murder, but they do not create any reasonable doubt about his involvement as described by the other witnesses. Therefore, under the **Agurs** test there was no prejudice to Sandoval requiring reversal.

**{15}** We hold that failure to timely disclose this particular evidence was not prejudicial and is not grounds for reversal. Our holding is supported by the fact that the prosecution did disclose the evidence during the trial, that the court granted a continuance to allow defense counsel an opportunity to evaluate the statements, and that defense counsel used the statements in their cross-examination. Although not necessary to our opinion, such factors are appropriately considered where they may serve to cure any prejudice which could result from untimely disclosure.

**{16}** We emphasize, however, that the prosecution's failure to comply fully with Rule 27 is a

serious matter. It would be inexcusable and unjustifiable for an innocent defendant to be tried and convicted because the prosecution failed to make the required disclosures. The standard we adopt today is adequate insurance against such an event, even though it does not require reversal for insignificant errors. The advice of the United States Supreme Court should be carefully considered by prosecutors in New Mexico:

> Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure.

**Agurs,** 427 U.S. at 108, 96 S. Ct. at 2399.

**2. REFUSAL TO VOIR DIRE JURY.**

**{17}** Sandoval argues that the failure of the trial court to voir dire the jury after the recess was reversible error because there was a substantial risk of prejudice from possible exposure to the publicity. The nature of the media coverage, Sandoval claims, was such that if any of the jurors saw it, prejudice to Sandoval could result. The State argues that where no allegation of violation of the judge's admonition is presented, the jury must be presumed to follow the admonition. Sandoval replies that the defense should not be required to continually observe the jurors during a continuance, and that the threat of prejudice should not depend on whether anyone actually saw a juror read the articles involved. He asserts that the proper means to protect against prejudice should be individual voir dire.

**{18}** There is no case law in New Mexico which requires an individual voir dire in the absence of any proof or even an allegation that a juror has read a media article which could be prejudicial. To require such a procedure, where the jurors had been strongly admonished about publicity, would do little more than increase the complexity and time already involved in criminal trials. If not even an assertion of exposure is required, the court would have to voir dire the jurors after each recess, thereby drawing attention to any publicity there may be.

**{19}** Rather than adopt Sandoval's proposal, we reaffirm the rule of **State v. Campos,** 61 N.M. 392, 301 P.2d 329 (1956), whereby we decline to assume that jurors will violate a court's admonition absent proof or allegation of a violation. Instead, we rely on the trial court's proper exercise of discretion in assuring the fairness of a trial. Conducting an individual voir dire in certain circumstances may be an appropriate use of discretion. **See State v. Perez,** 95 N.M. 262, 620 P.2d 1287 (1980). We encourage the trial courts to do so under circumstances such as these in this case. However, we hold that the trial judge in this case did not abuse his discretion by declining to conduct an individual voir dire here.

**{20}** The conviction is affirmed.

**{21} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**LEON KARELITZ,**
**Judge**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-145**

**Filing Date: November 30, 1982**

**Docket No. 13,888**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**JESSIE JOSEPH TRUJILLO,**

**Defendant-Appellant.**

**Appeal from the district Court of Santa Fe County, Edwin L. Felter, District Judge.**

Motion for Rehearing Denied January 21, 1983

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**OPINION**

**PAYNE, Chief Justice.**

**{1}** The defendant, Jessie Trujillo, was convicted on two counts of first degree murder in the deaths of prisoner Bobby "Barbershop" Garcia and prison guard Louis Jewett. He was also convicted of one count of assault by a prisoner committed on another prison guard. He was jointly indicted with Richard Reynaldo Garcia but was tried separately. Trujillo was convicted and although the State sought the death penalty, the jury could not unanimously agree to impose it. Instead, Trujillo was sentenced to two life terms and three years, to run consecutively. This is a direct appeal from those convictions.

**{2}** In a pretrial motion, the defense unsuccessfully sought to prevent death qualification of the jury. The court conducted voir dire on the death penalty question in panels of five prospective jurors. The procedure followed that approved in **Witherspoon v. Illinois,** 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), in that jurors were excused who responded that (1) they could not vote to impose the death penalty under any circumstances, or (2) they could not vote to convict a person of a crime for which the penalty of death might be imposed.

**{3}** In **Witherspoon,** the Supreme Court heard evidence from unpublished studies which indicated that juries excluding persons with scruples against the death penalty were more prone to convict. The Court said sufficient data were not available to deem it necessary to exclude such persons from the guilt-innocence phase of trial but implied it might decide differently in the face of adequate scientific evidence. Since then, numerous studies have been performed. **See Hovey v. Superior Court of Alameda Cty.,** 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). Results of those studies were examined by the trial court in this case in conjunction with Trujillo's pretrial motion to prevent death qualification. Trujillo now claims that the death qualification procedure violated his sixth and fourteenth amendment rights to a representative jury and to a fair and impartial jury.

**{4}** The rule in **Witherspoon** has been interpreted in subsequent cases, **see Adams v. Texas,** 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980), but has never been applied so as to invalidate a conviction like Trujillo's. **Witherspoon** expressly permits a State to exclude prospective

jurors whose views on capital punishment are such as to render them unable to obey their oaths and follow their instructions. **Adams, supra** 44, 100 S. Ct. at 2526. It is unnecessary to reconsider this doctrine so clearly expressed by the United States Supreme Court. The trial judge closely followed the guidelines set forth and we hold that death qualification, properly conducted, is not grounds for reversal.

**{5}** Trujillo also claims that the trial judge should have conducted that death qualification portion of voir dire individually. However, the district court has discretion in determining how voir dire should be conducted and reversal is available only where the discretion is abused. **State v. Frank,** 92 N.M. 456, 589 P.2d 1047 (1979). The trial court began by separating those panelists who were opposed to the death penalty and then, in groups of five, inquired whether such panelists could return a guilty verdict based on the evidence. The court then asked each panelist if he or she was irrevocably committed to vote against the death penalty regardless of the facts of the case. This procedure satisfies the demands of due process. **See Turner v. Com.,** 221 Va. 513, 273 S.E.2d 36 (1980).

**{6}** Trujillo argues that his proposed instruction, which would require the panelist to "consider" the death penalty, would qualify the panelist to sit under the **Witherspoon** rule. We disagree. The **Witherspoon** rule clearly disqualifies a panelist who cannot follow the law with respect to the death penalty. An instruction that he do so is insufficient to assure that he will.

**{7}** Trujillo asserts that the panel included an excessive proportion of persons related to law enforcement personnel. He requested a continuance in order to obtain evidence related to this assertion. The trial court refused to continue the trial or to quash the jury panel. Trujillo did not establish any violation of Section 38-5-16, N.M.S.A. 1978, which permits a challenge to the jury panel on the ground that its members were not selected in accordance with law. We are not inclined to open a new avenue for challenges where an adequate statutory remedy exists and was not used. Accordingly, we uphold the court's exercise of discretion in refusing to grant a continuance.

**{8}** The remaining points in the appeal have been considered by the Court but need not be discussed because they involved the trial court's exercise of discretion. We hold that there was no abuse of discretion requiring reversal.

**{9}** The judgment is affirmed.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-147**

**Filing Date: December 6, 1982**

**Docket No. 13,806**

**DEATON, INC.,**

**Plaintiff-Appellee,**

**v.**

**AEROGLIDE CORPORATION,**

**Defendant-Appellant.**

**Appeal from the district Court of Bernalillo County, Gerald D. Fowlie, District Judge.**

Motion for Rehearing Denied January 7, 1983

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for Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** This case presents several questions under the Uniform Commercial Code, Sections 55-1-101 to 55-9-507, N.M.S.A. 1978 (Cum. Supp. 1982), which have not been considered before in New Mexico. Because of the importance of the facts in this case, we set them forth in detail.

**{2}** The defendant, Aeroglide Corporation, manufactures a piece of industrial machinery called a Mini Dump, which is installed on the bed of a pickup truck so the truck can be used as a small dumptruck. Aeroglide solicited Deaton, Inc., as a New Mexico distributor for its Mini Dumps and Deaton agreed to become a distributor. In February 1978, Deaton ordered 24 Mini Dumps as required by the distributorship agreement. Deaton testified that when the units arrived, some appeared to be new and others appeared used. Several units also appeared damaged. Deaton complained to Aeroglide, and was informed that the units had been inspected before shipment and "they were in good shape." Aeroglide admitted that two of the units had been mounted for demonstration, but stated that they had not been used otherwise. Shortly thereafter, Aeroglide sent paint and replacement parts to repair the defective units.

**{3}** In May 1978, Deaton wrote to Aeroglide and stated that the Mini Dumps failed to operate properly. Deaton also stated that it was "no longer interested in selling Mini Dumps," and requested that Aeroglide pick them up and fully refund its cash outlay of $23,499.02, which included miscellaneous costs for storage and materials. By return letter, Aeroglide stated that "some problem developed in storage," and promised it would try to locate another distributor in the area. No distributor was ever found. In May 1978, Aeroglide sent a telegram cancelling the agreement.

**{4}** In July 1978, Deaton wrote to Aeroglide and demanded payment of $23,599.02, an additional $100 having been incurred for storage costs. Later, Deaton agreed to continue to store the units and told Aeroglide that the carried had admitted liability for damage to the Mini Dumps. Aeroglide then informed Deaton that the defective units could be easily repaired and accused Deaton of making no attempt to remedy the defects. Aeroglide then offered to pay Deaton $21,976.39 plus storage costs, provided that title would revert

to Aeroglide and Deaton would assist Aeroglide in the prosecution of its claim against the carrier. However, Aeroglide also indicated that it was "not willing to absorb" the shipping costs at that time, but that it would continue to look for a distributor in New Mexico. Deaton refused this offer. In August 1978, Deaton sued Aeroglide for breach of contract on the ground that the units were defective and unfit for their intended use.

**{5}** In September 1978, Aeroglide offered to "repurchase" the Mini Dumps for $21,976.39, and stated that Deaton's acceptance of this offer would "not affect any claim [it] assert[ed] except claim for refund of this amount." Rejecting this offer, Deaton stated that it would "not settle for anything less than the cost of the units, shipping, storage, and an amount of $10,000 for his inconvenience and trouble in pursing [sic] this action against Aeroglide." Two years later, on June 30, 1980, Deaton sold the units to a third party in a private sale for $9,200. No notice of this sale was given to Aeroglide.

**{6}** The trial court entered its judgment in June 1981. It found that the units were defective and nonconforming as delivered, and that the value to Deaton was substantially impaired. The court also found that Deaton had a right to reject the Mini Dumps and to revoke any acceptance it may have made. Deaton was awarded $30,352.76 as follows: unrecovered purchase price and shipping costs $15,047.22, lost profits of $8,837.78, and incidental damages of $7,467.76. Aeroglide appeals.

**Warranty.**

**{7}** The trial court found that the contract contained disclaimers of warranty which did not mention merchantability and fitness, were not conspicuous, and were ineffective disclaimers of express warranties. Aeroglide contends that this finding is erroneous and not supported by the evidence.

**{8}** The original sales contract that Deaton signed contained the statement at the top of the description section of the form which reads:

> SUBJECT TO ALL THE CONDITIONS PRINTED ON THE BACK OF THIS SHEET, AEROGLIDE CORPORATION SHALL SELL AND THE UNDERSIGNED SHALL BUY THE FOLLOWING:

The reverse side lists 10 paragraphs of conditions, all in the same type and size. The first paragraph states the "Seller guaranties all equipment it manufactures to be free from defective material or workmanship." The second paragraph states:

> There shall be no implied warranty of merchantability or of fitness for a particular purpose or use. No other warranties shall be recognized unless expressed in writing and signed by an officer of the seller.

Deaton claims that express warranties were created by Aeroglide's literature, the verbal representations of its agent, the demonstrator model, and by the contract itself.

**{9}** In our view, the contractual clause sufficiently disclaims any implied warranties. Section 55-2-316(2), N.M.S.A. 1978, permits exclusion of implied warranties of merchantability if the contractual language mentions merchantability and is conspicuous. Comment 4 to the section indicates that implied warranties of fitness for a particular purpose may be excluded by general language if the writing is conspicuous. The question of conspicuousness is a question of law for the court to decide, Section 55-1-201(10), N.M.S.A. 1978. Thus, we may examine the contract to see if the trial court's finding was correct.

**{10}** Initially, it is obvious that the trial court erred in finding that the disclaimer did not mention merchantability and fitness. The question remains, however, as to whether the disclaimer was conspicuous. Section 55-1-201(10) provides that a term is conspicuous if it is so written that a reasonable person ought to have noticed it, and if it has a printed heading in capitals. Here, the reference to the disclaimer was printed in capitals.

Language which refers the reader to conditions or provisions on the reverse side of the form suffices to make the language referred to conspicuous. **See Hunt v. Perkins Machinery Co.,** 352 Mass. 535, 226 N.E.2d 228 (1967). We hold that the disclaimer in this contract was conspicuous and should have been noticed by a reasonable buyer. Accordingly, all implied warranties were properly disclaimed by Aeroglide.

**{11}** The more difficult question is whether the express warranties were properly disclaimed by the clause. Section 55-2-313, N.M.S.A. 1978, provides that express warranties may be created by any affirmation of fact relating to the goods which is part of the basis of the bargain, and by any sample or model which is made part of the basis of the bargain. The seller need not use formal words to create an express warranty. Under Section 55-2-313, the representations made by Aeroglide's literature, the demonstrator model, and the contract itself amount to express warranties. Therefore, these words and conduct are relevant to the creation of an express warranty under Section 55-2-316, N.M.S.A. 1978, and must be construed in light of the disclaimer. Note 1 to section 55-2-316 states that the statute is intended "to protect a buyer from unexpected and unbargained language of disclaimer" by denying effect to disclaimers which are inconsistent with language of express warranty. Like the trial court, we hold that the disclaimer cannot be construed to be consistent with the express warranties created by Aeroglide's representations. We also hold that the disclaimers are inoperative to void those express warranties.

**Breach of Warranty.**

**{12}** The trial court found that the units were defective and nonconforming when delivered, and that their value to Deaton was thereby substantially impaired. Aeroglide contends that this finding is erroneous and not supported by the record. We cannot agree.

**{13}** In order to recover for breach of warranty, a buyer must prove four essential elements: (1) the existence of a defect; (2) that the defect was caused by the seller; (3) that the buyer notified the seller and sought repairs; and (4) that the seller failed or refused to repair or replace defective parts. **Arnold v. Ford Motor Co.,** 90 N.M. 549, 566 P.2d 98 (1977). Aeroglide's representations included a demonstrator which was clean and attractive. There was evidence that when the units arrived, they were rusted and bent, that switches and mounting brackets were missing, and that electric cables had been cut. In our view, this evidence supports a finding that the Mini Dumps were defective when delivered. Aeroglide notes that the carrier admitted liability for part of the damage and contends that Deaton did not prove it caused the defects. However, the evidence indicates that the paint and some of the welds on the Mini Dumps were defective. There is no evidence that these defects could have been caused by the carrier.

**{14}** The evidence shows that after Deaton notified Aeroglide of the defects, Aeroglide sent parts and supplies which it thought were necessary to repair the units. However, Aeroglide claims it was never notified that the attempted repairs failed, and that the tendered parts and supplies were insufficient; nor, Aeroglide claims, did Deaton request further cure of defects. Whether or not Deaton requested further cure, it is apparent that Aeroglide knew Deaton was unsatisfied. Aeroglide's telegram to Deaton in May 1978, indicated that the agreement was formally cancelled. Aeroglide cannot claim at this late stage that it did not have adequate notice of Deaton's dissatisfaction. Therefore, the trial court's finding that there was a breach of warranty was not erroneous.

**Rejection.**

**{15}** Section 55-2-601, N.M.S.A. 1978, allows a buyer to reject the entire tender of goods if the goods fail in any respect to conform to the contract. The trial court found, and we agree, that the goods did not conform to the contract. The trial court found that Deaton had a right to reject the Mini Dumps and revoke any acceptance it

may have made. Finally, the trial court found that Deaton's May 1978 telegram informed Aeroglide it was rejecting or revoking acceptance of the Mini Dumps. We hold that these findings are supported by substantial evidence.

**{16}** Aeroglide complains that Deaton did not introduce evidence that the value of the Mini Dumps to Deaton was substantially impaired. This is a relevant factor where the buyer claims revocation under Section 55-2-608, N.M.S.A. 1978. However, it is apparent from this complaint that Deaton was simply rejecting the goods. Nowhere does Aeroglide show that goods "fail in any respect" to conform to the contract. Deaton was not required to prove substantial impairment.

**Alleged Acceptance.**

**{17}** Aeroglide contends that after Deaton gave notice of the defects, Deaton's actions were tantamount to an acceptance under Section 55-2-606(1)(c), N.M.S.A. 1978. That section states:

> (1) Acceptance of goods occurs when the buyer:
>
> * * * *
>
> (c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

Aeroglide asserts that certain actions by Deaton constituted acts inconsistent with its ownership. Deaton rejected Aeroglide's offer to refund Deaton's cash outlay for the units because the shipping costs were not included in the refund. Furthermore, Deaton held the Mini Dumps for a period of two years after the rejection. During that time, Deaton asserted dominion over the goods, stored them in a place where they were exposed to the elements, failed or refused to turn them over to Aeroglide, and resold them to a third party in a private sale without notice to Aeroglide.

**{18}** Section 55-2-602(2), N.M.S.A. 1978, reads as follows:

> (a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and
>
> (b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under [Section 55-2-711, N.M.S.A. 1978], he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but
>
> (c) the buyer has no further obligations with regard to goods rightfully rejected.

Section 55-2-711(3), N.M.S.A. 1978, reads:

> (3) On rightful rejection . . . a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller.

Since Deaton rightfully rejected the Mini Dumps, it necessarily follows that it had a security interest in the units pursuant to Section 55-2-711(3). Deaton had a security interest in the entire amount spent for the units and should not be required to return them for an amount less than this entire amount. Consequently, subsection (b) of Section 55-2-602(2), N.M.S.A. 1978, cannot apply. Because the security interest entitles Deaton to hold the goods and resell them, such action cannot constitute a violation of subsection (a) of Section 55-2-602(2). The remaining provision of Section 55-2-602(2) simply provides that Deaton had no further obligation with regard to the Mini Dumps. Therefore, Aeroglide's argument that Deaton's actions constituted acceptance must fail.

**Damages.**

**{19}** Under Section 55-2-711, N.M.S.A. 1978, Deaton was entitled to recover the purchase price and damages for nondelivery as well as for expenses incurred in handling the goods in which it had a security interest under subsection (3). As indicated previously, the trial court awarded damages for lost profits, incidental damages, and the unrecovered purchase price and shipping costs.

**a. Lost Profits.**

**{20}** The trial court awarded lost profits based on the difference between the cost of the units to Deaton and Aerolgide's suggested retail price. There is no established rule in New Mexico as to whether lost profits may be recovered in situations such as this. **See generally** 3 A. Squillanet and J. Fonseca, Williston on Sales, § 25-12 (Cum. Supp., 4th Ed. 1982). The trend elsewhere is to allow lost profits even when the business is new if the loss can be proved with reasonable certainty. **Clark v. International Harvester Co.,** 99 Idaho 326, 581 P.2d 784 (1978). Lost profits need not be proved with mathematical certainty. **See Nosker v. Western Farm Bureau Mutual Insurance Co.,** 81 N.M. 300, 466 P.2d 866 (1970). However, the only basis for awarding lost profits in the instant case was the difference between the suggested retail price and the cost to Deaton. The business was entirely new. Deaton produced neither proof of potential buyers nor evidence of its cost of doing business. Therefore, we hold that the award of lost profits is too speculative to be upheld.

**b. Incidental Costs.**

**{21}** The trial court awarded incidental damages as follows:

| | |
|---|---|
| Unloading costs | 82.50 |
| Conoco Oil | 7.60 |
| Yellow Freight (parts shipment) | 24.35 |
| Sand for testing loads | 12.35 |
| Storage charges for 28 months | 2,800.00 |
| Employee's expenses (Garreffa) | 565.15 |
| Long Distance Calls | 20.81 |
| Occupational Tax Fee | 5.00 |
| Purchase of demonstrator truck | 3,950.00 |
| | $7,467.76 |

Except for the cost of the demonstrator truck, the award of these expenses under Section 55-2-711(3) is supported by the record. These expenses were reasonably incurred in the inspection, receipt, transportation, care and custody of the Mini Dumps. However, we hold that the trial court improperly awarded the cost of the demonstrator truck as an expense. Because Deaton introduced no evidence at trial as to the actual expense of using the truck in handling the Mini Dumps, no amount may be awarded. Therefore, we hold that the award of damages for incidental expenses must be reduced by $3,950.00.

**c. Unrecovered purchase price.**

**{22}** Because Deaton had a security interest under Section 55-2-711(3), he had a right to resell the goods as provided by Section 55-2-706, N.M.S.A. 1978. In order to recover the balance of the purchase price paid to Aeroglide, the resale must have been made in good faith and in a commercially reasonable manner. § 55-2-706(1). Where the resale is a private sale, Deaton must have given Aeroglide reasonable notification of its intention to resell. § 55-2-706(3).

**{23}** Although Deaton had the right to resell the property, and such a resale would not have constituted an acceptance, the only way Deaton could have recovered the difference between the resale price and the contract price was to have complied with Section 55-2-706. Deaton failed to do so. Not only did Deaton fail to give proper notice, **See Foster v. Colorado Radio Corp.,** 381 F.2d 222 (10th Cir. 1967); **Anheuser v. Oswald Refractories Co., Inc.,** 541 S.W.2d 706 (Mo. App. 1967) the sale was commercially unreasonable as well. Deaton waited nearly two years before reselling the units. During this time, the condition of the units further deteriorated. Excessive delay in such a resale is enough to make the sale commercially unreasonable. **McMillan v. Meuser**

**Material & Equipment Co, Inc.,** 260 Ark. 422, 541 S.W.2d 911 (1976). It rejected a refund offer of $21,976.39, then accepted an offer of $9,200. There is no indication that Deaton sought other buyers or made any attempt to sell the units until it received an offer from a buyer some two years after it took delivery. Under these circumstances, we cannot hold that Deaton complied with Section 55-2-706. Accordingly, this element of damages cannot stand.

**{24}** Under Section 55-2-711(1)(b), N.M.S.A. 1978, Deaton could have recovered the difference between the market price when he learned of the breach and the contract price. However, because Deaton did not introduce any evidence of the market price at trial, we cannot entertain this argument on appeal.

**Conclusion.**

**{25}** The judgment of the trial court is affirmed as modified, and the case is remanded with instructions to reduce the award to the amount of $3,517.76.

**{26} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**HARRY E. STOWERS,**
**JR, Justice**

**REUBEN E. NIEVES,**
**District Judge**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-148**

**Filing Date: December 6, 1982**

**Docket No. 14,372**

**IN THE MATTER OF THE ARBITRATION BETWEEN DANIELS INSURANCE AGENCY, INC. AND LARRY R. JORDAN, DANIELS INSURANCE AGENCY, INC.,**

**Appellant,**

**v.**

**LARRY R. JORDAN,**

**Appellee.**

**Appeal from the District Court of Lea County, C. Fincher Neal, District Judge.**

Gary Don Reagan
Hobbs, New Mexico

Sarah M. Singleton
Santa Fe, New Mexico

for Appellant.

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

for Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** Daniels Insurance Agency, Inc., appeals from a judgment dismissing the company's motion to vacate an arbitration award in favor of Daniels' former employee, Larry R. Jordan, and confirming the award of the arbitrator. The issues on appeal are whether the trial court erred in finding that the Uniform Arbitration Act, §§ 44-7-1 through 44-7-22, N.M.S.A. 1978, was not applicable to the proceeding and that the court had no jurisdiction over the subject matter of the action under the rules of the American Arbitration Association. We reverse.

**{2}** Daniels sought to restrain Jordan from engaging in the bonding business on grounds of a restrictive covenant in Jordan's employment contract with Daniels. The parties submitted the matter to arbitration pursuant to a broad clause in Jordan's employment contract:

> Any controversy or claim arising out of, or relating to this Agreement, or breach thereof, shall be settled by arbitration in the City of Hobbs, New Mexico, in accordance with the rules then obtaining of the American Arbitration Association; judgment upon the award rendered may be entered in any Court having jurisdiction thereof.

**{3}** Arbitration ensued under Commercial Arbitration Rules of the AAA. After a hearing, the AAA arbitrator entered an award for Jordan and denied all of Daniels' claims. Six weeks later, Daniels filed a motion in the District Court of Lea County to vacate or modify the award. Jordan filed an answer denying that Daniels had the right to appeal the award under the rules of the AAA and counterclaiming for confirmation of the award. The parties stipulated to the contents of the record of the arbitration proceedings, which included exhibits, briefs, a transcript of testimony taken by the arbitrator, and requested finding of fact and conclusions of law by both sides.

**{4}** The trial court judgment noted it had heard the arguments of counsel and had examined the record of the arbitration proceeding. The court found that the Uniform Arbitration Act was not

applicable to the proceeding; the rules of the AAA were applicable; under the rules of the AAA, the court had no jurisdiction over the subject matter of the action; the arbitration award should be confirmed in Jordan's favor pursuant to AAA rules; and no findings of fact or conclusions of law should be permitted to be filed by the parties in the court proceeding. Daniels appealed to this court.

**{5}** In New Mexico, arbitration proceedings and awards are governed both by common law and by the Uniform Arbitration Act, but provisions of the Act govern where the Act conflicts with the common law. **Chaco Energy Co. v. Thercol Energy Co.,** 97 N.M. 127, 637 P.2d 558 (1981); **Andrews v. Stearns-Roger, Inc.,** 93 N.M. 527, 602 P.2d 624 (1979). The New Mexico Legislature adopted the Act in 1971. The legislative intent in adopting it, and the policy of the courts in enforcing it, is to reduce the caseload of the courts. The Act requires that conflicts be resolved by arbitration when terms of the contract provide for it. **Dairyland Ins. Co. v. Rose,** 92 N.M. 527, 591 P.2d 281 (1979). A valid arbitration defense does not divest the court of jurisdiction and is not properly raised by a motion to dismiss for lack of subject matter jurisdiction. **Dean Witter Reynolds, Inc. v. Roven,** 94 N.M. 273, 609 P.2d 720 (1980). When parties have agreed to arbitrate, however, a court should order arbitration. **K.L. House Const. Co., v. City of Albuquerque,** 91 N.M. 492, 576 P.2d 752 (1978).

**{6}** The Uniform Arbitration Act specifies procedures for court-supervised arbitration proceedings, §§ 44-7-2 through 44-7-10, but also recognizes that parties may agree to a different procedure, § 44-7-1. The Commercial Arbitration Rules of the AAA provide for a non-court-supervised arbitration proceeding. Only Section 47 of the AAA rules addresses court action:

> (a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
>
> (b) The AAA is not a necessary party in judicial proceedings relating to the arbitration.
>
> (c) Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any Federal or State Court having jurisdiction thereof.

**{7}** Thus, the AAA rules contemplate the possibility of judicial proceedings but, appropriately, do not attempt to regulate those proceedings. Such regulation is determined as a matter of law by the federal government and the states. Parties may not contract to grant or divest a court of subject matter jurisdiction; such jurisdiction is established only by law.

**{8}** In New Mexico, the district courts have original jurisdiction over all cases other than those specifically excepted by the New Mexico Constitution and "such jurisdiction of special cases and proceedings as may be conferred by law. . . ." N.M. Const. art. VI, § 13. Once an arbitration award is granted, whether or not by a court-supervised process, the Uniform Arbitration Act provides a mechanism by which the courts may take jurisdiction to confirm the award, or in the alternative, to vacate, modify or correct the award, within narrow statutory limits. §§ 44-7-11 through 44-7-13. The Act permits "any court of competent jurisdiction of this state" to enforce an arbitration agreement under the Act and to enter judgment on an award. § 44-7-17. Appeals may be taken from various types of orders, including an order confirming or denying confirmation of an award, an order modifying or correcting an award, or an order vacating an award without directing a rehearing. § 44-7-19. Thus, once the arbitration award was granted and Daniels filed a motion to vacate, the District Court had jurisdiction of the subject matter of the award and the Uniform Arbitration Act applied to the court's review process.

**{9}** Daniels claimed that the court should vacate the award because the arbitrator allegedly evidenced partiality and exceeded his powers,

both of which are statutory grounds for vacating an award. § 44-7-12A(2)-(3). Although the trial court judge said he reviewed the record of the arbitration proceedings, his findings do not indicate whether the record contained substantial evidence supporting or negating Daniels' claims, nor was the record of the arbitration proceedings made a part of the record for this appeal. We therefore remand the case to the District Court to determine whether the arbitration record supports confirmation, or, in the alternative, vacation or modification of the award. We direct the District Court to enter a new judgment or to order a new arbitration hearing in accordance with its findings, consistent with the requirements of §§ 44-7-11 through 44-7-14.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA,**
**JR., Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

Justice H. Vern Payne

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-150**

**Filing Date: December 20, 1982**

**Docket No. 14,258**

**STATE OF NEW MEXICO, EX REL. W.M. CARROLL & CO., A NEW MEXICO CORPORATION,**

**Plaintiff-Appellee,**

**v.**

**K.L. HOUSE CONSTRUCTION CO., INC., AND WESTERN CASUALTY & SURETY COMPANY,**

**Defendant-Appellants.**

**APPEAL FROM DISTRICT COURT OF BERNALILLO COUNTY, W. John Brennan, District Judge.**

Barhnart & Associates
Charles Barnhart
Stephen D. Bass
Albuquerque, New Mexico

for Appellants.

Spann, Latimer & Hollowwa
E. Douglas Latimer
Kerwin Hollowwa
Albuquerque, New Mexico

for Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** This case requires us to decide whether a third tier supplier is entitled to protection under the New Mexico "Little Miller Act," Sections 13-4-18 to 13-4-20, N.M.S.A. 1978. The trial court held that such a supplier is covered. We affirm.

**{2}** K.L. House Construction Co., Inc., (House) was awarded the general contract on a state construction project. Heights Plumbing Co. (Heights) entered into a subcontract with House. Heights then engaged Carlton Sheet Metal Co. as a subcontractor, and Carlton purchased supplies from W.M. Carroll & Co. (Carroll). Carlton failed to pay for these supplies, and Carroll sued House and House's bonding company under the Little Miller Act. Although House claimed that Carroll had no standing to sue under the Act, the trial court granted summary judgment for Carroll.

**{3}** The Little Miller Act is modeled after the federal Miller Act, 40 U.S.C. §§ 270a through 270d (1976 and Supp. IV 1980). These statutes are intended to provide a remedy equivalent to that of a materialmen's lien, which ordinarily may not attach to government property. **J.W. Bateson Co. v. United States ex rel. Board of Trustees,** 434 U.S. 586, 98 S. Ct. 873, 55 L. Ed. 2d 50 (1978). Section 13-4-19, N.M.S.A. 1978, provides in part:

> A. Every person, firm or corporation who has furnished labor or material [for use in a state construction contract] and who has not been paid in full * * * shall have the right to sue on [the general contractor's] payment bond * * *;
>
> [p]rovided, however, that any person having direct contractual relationship with a subcontractor, but no contractual relationship, express or implied, with the contractor furnishing such payment bond shall have a right of action upon said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such

> claim is made, stating with substantial accuracy the amount claimed, and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.

These provisions have not been interpreted in New Mexico. However, the federal courts have interpreted the identical federal provisions as allowing suits only by a party having a direct contractual relationship with a subcontractor who in turn deals directly with the general contractor. **See United States ex rel. Bryant v. Lembke Construction Co.,** 370 F.2d 293 (10th Cir. 1966); **United States ex rel. Jonathan Handy v. Deschense Const. Co.,** 188 F. Supp. 270 (D. Mass. 1960); **Elmer v. United States Fidelity & Guaranty Co.,** 275 F.2d 89 (5th Cir. 1960); **United States ex rel. W.J. Halloran Steel Erection Co. v. Frederick Raff Co.,** 271 F.2d 415 (1st Cir. 1959); **United States ex rel. Whitmore Oxygen Co. v. Idaho Crane & Rigging Co.,** 193 F. Supp. 802 (E.D. Idaho 1961) Annot., 79 A.L.R.2d 855 (1961); 7 Am. Jur. Trials, **Miller Act Litigation** § 8 (1964 & Supp. 1982).

**{4}** This interpretation excludes third tier suppliers such as Carroll from the protection of the Act. As noted in the cases cited, this interpretation complies with the congressional intent expressed in the legislative history of the federal act. However, this interpretation of congressional intent has been criticized. **See J.W. Bateson Co. v. United States ex rel. Board of Trustees, supra** (Stevens, J., dissenting).

**{5}** There is no legislative history from which we may ascertain the intent of the New Mexico Legislature in enacting this Act. However, Section 13-4-18 states that the performance bond is intended to satisfy " **all** just claims for * * * materials and supplies furnished * * * whether * * * said materials and supplies be furnished, under the original contract or under **any** subcontract." (Emphasis added).

**{6}** We have previously stated that

> [t]he statute is remedial in nature and that its principal purpose is to protect the supplier of labor and materials, and that it should be liberally construed to effectuate the obvious legislative intent.

**State ex rel. Komac Paint & Wallpaper v. McBride,** 74 N.M. 233, 236, 392 P.2d 577, 579 (1964). We have also held that the obligations of sureties under the bonds are construed strictly in favor of the beneficiaries. **Employment Security Comm'n. v. C.R. Davis Contracting Co.,** 81 N.M. 23, 462 P.2d 608 (1969).

**{7}** Section 12-2-2(A), N.M.S.A. 1978, sets forth the following rule of construction relevant to this case:

> A. words and phrases shall be construed according to the context and the approved usage of the language, but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed according to such meaning * * *.

**{8}** In light of the statutory language set forth above, and in the absence of any indication of a contrary intent on the part of the state Legislature, we hold that the Little Miller Act shall apply to suppliers of materials under any subcontract involving a state construction project. We recognize that the federal cases are contrary, but those cases rely on legislative history which is inapplicable to the New Mexico statute.

**{9}** Our conclusion is supported by analogy to the provisions governing mechanic's and materialmen's liens. Under Section 48-2-2, N.M.S.A. 1978, a party in Carroll's position would have a lien on the building if the construction project were private. Because the project involved here is governmental, no lien can attach. Sections 13-4-18 and 13-4-19 were intended to provide a comparable remedy to materialmen who provide supplies for a state government construction project. Adoption of the federal rule here would defeat that clear legislative purpose.

**{10}** We recognize the concern for unknown contingent liabilities facing a general contractor

as a result of liberal interpretation of the statute, and the possible increased costs that would follow. However, we believe such concerns are unfounded. As we held in **State ex rel. Komac Paint & Wallpaper v. McBride, supra,** the requirement that the claimant give written notice within 90 days is a necessary prerequisite to recovery.

**{11}** This notice requirement acts as a protection against unlimited and unascertainable contingent liabilities. The Legislature has weighed the possibility of increased expense due to more extensive bonding procedures against the need to protect all those who have input into a government construction project, and has determined that the latter is the predominant consideration. We are not inclined to reweigh these factors.

**{12}** Accordingly, the judgment is affirmed.

**{13}** **IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**HARRY S. STOWERS,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-151**

**Filing Date: December 20, 1982**

**Docket No. 13,868**

**DONALD E. CLARK AND BETTY J. CLARK,**

**Plaintiffs-Appellees and Cross-Appellants,**

**v.**

**MARK K. SIDERIS, DIRECTOR, STATE PARK AND RECREATION DIVISION, NEW MEXICO NATURAL RESOURCES DEPARTMENT, WILLIAM S. HUEY, SECRETARY, NM NATURAL RESOURCES DEPARTMENT, STATE OF NEW MEXICO NATURAL RESOURCES DEPARTMENT AND THE STATE OF NEW MEXICO,**

**Defendants-Appellants and Cross-Appellees.**

**APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY,**
**Edwin L. Felter, District Judge.**

Motion for Rehearing denied January 7, 1983

Jeff Bingaman, Attorney General
R. Michael Barlow
Assistant Attorney General
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for Appellants.

Fred M. Standley
Robert Suzenski
Santa Fe, New Mexico

for Appellees.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** This appeal involves a dispute over rights and obligations under a concession agreement between the plaintiff (Clark) and the defendant (Sideris), the Director of the State Parks and Recreation Division. The concession agreement covered facilities, including cabins, a lodge, and a marina, at the Elephant Butte Lake and Caballo Lake State parks. The trial court found that the State breached the agreement and awarded damages to Clark. Sideris appeals. We affirm in part and reverse in part.

**{2}** Clark purchased concession rights and certain property from Johnston, the prior concessionaire, on October 20, 1976. Johnston had discussed the condition of the concession with a State official who told him that if an appropriation was obtained from the Legislature, the State would put in a new marina and rehabilitate the lodge. Johnston later testified that this discussion "wasn't a commitment. We just talked about what the State Park would do if they get the money." Johnston passed this information on to Clark, although his exact statements are unknown. Johnston's representation was one of the bases upon which Clark relied in entering the sales agreement.

**{3}** The sales agreement was subject to the State's approval of the transfer of the concession. Clark contacted the Park and Recreation Commission himself. At least one discussion occurred with the same official to whom Johnston had spoken. Clark testified that "[t]he conversation at that time concerned the needed and planned improvements at that concession, provided money was appropriated." Essentially, the same items were discussed at this time that were discussed with Johnston.

**{4}** Subsequently, Clark and the State entered a concession or license agreement, which

provided that Clark, as licensee, would maintain the premises. However, he was not to make any alterations, additions, or improvements without the State's permission, "excepting only ordinary maintenance, repairs, and painting." The State was also responsible for maintenance of specified items. Any obligation of the State requiring the expenditure of money was to be "subject to the availability of appropriation therefor."

**{5}** At the time Clark purchased Johnston's interest, the premises were in poor condition. Clark claims that the state employees represented that they would seek and obtain an appropriation of $300,000 to improve the facilities. The appropriation was obtained, but only $156,000 was used to improve Clark's facilities; the rest was used to improve other facilities at the state park.

**{6}** During renovation of certain cabins by the State, furnishings provided by Clark were damaged. Clark remodeled the lodge on his own initiative when a State employee indicated there were no funds to do the remodeling. Several cabins and the marina facility were unusable, and the State failed to provide timely repairs and replacement. Clark sought and recovered damages for the furnishings, the money spent on the lodge, the lost profits from not having cabins and a marina, and interest lost on money he invested in the facilities. Sideris appeals from this judgment. Clark cross-appeals, claiming that the trial court erred in not awarding Clark $144,000 to make up for the amount of the appropriation not spent on his concession.

**I.**

**{7}** The first point raised by Sideris is that the trial court erred in finding an implied warranty and covenant of fitness and suitability.

**{8}** The trial court made the following findings:

> 11. That the said concession agreement contained an express warranty and covenant on the part of the Defendants and the State to repair and maintain the real and personal property and improvements let and demised to the Plaintiffs for the specific purpose and use as set forth above and in said concession agreement.
>
> 12. That the said concession agreement was entered into by the parties for a public use and purpose.
>
> 13. That there existed an implied warranty and covenant on the part of the Defendants and the State that the personal property, real property and improvements let and demised to Plaintiffs under the concession agreement would be and remain fit and suitable for the particular and specific purpose and use intended and contemplated as set forth above and in the concession agreement, at the inception of and throughout the term of the concession agreement.
>
> 14. That there further existed a warranty and covenant of quiet enjoyment and beneficial use and a warranty and covenant of habitability on the part of the Defendants and the State to Plaintiffs and certain third parties.

**{9}** In **T.W.I.W., Inc. v. Rhudy,** 96 N.M. 354, 630 P.2d 753 (1981), this Court noted that there is no implied warranty of habitability in New Mexico, except as provided by statute. No such statute applies to this case. Also, the concession agreement contains an integration clause specifying that there are no warranties "not set forth or incorporated by reference in this document." Therefore, the trial court erred in finding an implied warranty and any liability on the part of the State for damages must be based only on the express warranty found by the court.

**II.**

**{10}** Sideris also asserts that the trial court's findings on the representation to Clark were based either on evidence under the parole evidence rule or on no evidence at all. The trial court made the following findings:

17. That the very inducement and basis for the signing of the concession agreement by the Plaintiffs were the representations, stipulations and promises by the Defendants and the State of an appropriation and expenditure of at least $300,000.00 to be made forthwith to the property let and demised to the Plaintiffs under the concession agreement for the purposes and uses thereby intended, provided that a legislative appropriation to make such expenditure possible became law.

18. That the concession agreement, itself, contains an apparent and patent ambiguity in its reference to legislative appropriations, requiring resort to parol, oral and extrinsic evidence to show the intent and agreement of the parties regarding legislative appropriations and expenditures to be made for the benefit of the Plaintiffs.

19. That without a binding commitment on the part of the Defendants and the State to expeditiously obtain an appropriation of at least $300,000.00 and to expend such monies without delay under the concession agreement, there would be no consideration for the concession agreement and no mutuality of obligation, and the concession agreement would otherwise be an illusory contract and unenforceable.

20. That the Defendants and the State sought and obtained an appropriation of $300,000.00 in order to meet their commitments to the Plaintiffs and their obligations under the concession agreement to the Plaintiffs, and thereby obtained such appropriation from the legislature for this specific purpose, and upon which request of the Defendants and the State the legislative appropriation was made in such amount for this specific object and purpose.

21. That on numerous occasions subsequent to the execution of the concession agreement, the Defendants and the State promised and obligated the State to obtain such an appropriation and to expend the monies thereby obtained under the concession agreement.

22. That the appropriation was obtained in the amount of $300,000.00 as aforesaid, but only the amount of $156,000.00 more or less, was expended under the aforesaid concession agreement.

**A.**

**{11}** The parol evidence rule is a source of considerable confusion. Legal scholars and judges alike continue to express differing views as to its application. **See, e.g., Doyle v. Northrop Corp.,** 455 F. Supp. 1318 (D.N.J. 1978) (discussion of conflicting views of Professors Williston and Corbin); **Traudt v. Nebraska Public Power Dist.,** 197 Neb. 765, 251 N.W.2d 148 (1977) (majority and dissenting opinions). Because, this case presents a difficult situation, we proceed to closely analyze the trial court's findings as set forth **supra** in light of the case law, then discuss the effect of the Restatement (Second) of Contracts.

**B.**

**{12}** Finding 18 relates to the use of parol evidence to resolve an ambiguity.

**{13}** We have previously stated that "[a] lease is subject to the basic rules of contract construction. It must be read as a whole to effectuate the intent of the parties. We will not look beyond the four corners of the document unless the lease is ambiguous." **Acquisto v. Joe R. Hahn Enterprises, Inc.,** 95 N.M. 193, 195, 619 P.2d 1237, 1239 (1980). In the **Acquisto** case, the Court held that since the lease was "complete, plain and unambiguous, parol evidence [could] not be introduced to vary the terms of the agreement." **Id.**

**{14}** The provision in the concession agreement which the trial court found ambiguous reads as follows:

> 25. **Availability of appropriations.** It is understood and agreed that any obligation of the Licensor and/or the State hereunder requiring or involving the expenditure of money, shall be subject to the availability of appropriation therefor.

**{15}** We do not agree that this provision is ambiguous on its face. It merely places a condition on the State's obligation to spend more money under the agreement. The provision is ambiguous only after considering the parol evidence; however, parol evidence may not be used for the purpose of rendering an otherwise clear contract provision ambiguous.

**C.**

**{16}** Finding 17 relates to an exception to the parol evidence rule where the oral promise was an inducement to enter a contract. The import of this finding is unclear. There is no indication that Clark is relying on a promissory estoppel theory. Instead, Clark refers to such cases as **Bell v. Lammon,** 51 N.M. 113, 179 P.2d 757 (1947), and **Alford v. Rowell,** 44 N.M. 392, 103 P.2d 118 (1940). These cases indicate that the reason for the exception is to allow a party to show fraud. In **Alford, supra** at 397, 103 P.2d at 122, the Court stated:

> If a parol contemporaneous agreement be the inducing cause of the written contract, or forms a part of the consideration therefor, and it appears the writing was executed on the faith of the parol agreement or representation, extrinsic evidence is admissible. In such cases, the real basis for its admission is to show fraud.

**{17}** Clark is not attempting to show fraud but rather breach of contract. Assuming, **arguendo,** that the oral promises could be introduced to show that Clark relied on them in entering the concession agreement, the purpose for such evidence would only be to show fraud by the State. Evidence introduced on a theory of inducement is not evidence of a contract, the **breach** of which entitles Clark to damages.

**{18}** There are other uncertainties related to the legal significance of this finding. The evidence indicates that the representations regarding appropriations and expenditures was first made to Johnston. There is no evidence that these representations were intended to influence Clark. There is no finding as to the reasonableness of Clark's reliance on these representations. The timing of any representations made to Clark by the State is unclear. Although the court found the representations to be the inducement of the signing of the concession agreement, it made no finding regarding Clark's separate, prior contract with Johnston to acquire the concession. The latter contract makes no reference to any promised State expenditures. However, Clark obligated himself to buy the concession. The court's finding disregards any inducement resulting from this separate contractual obligation. These uncertainties undermine the legal effect of the finding, which, at most, could support only a claim of fraud, not of breach of contract.

**D.**

**{19}** Finding 19 states that without a binding commitment on the State to spend $300,000 without delay, there would be no consideration for the concession agreement and no mutuality of obligation. On the contrary, the extensive terms of the concession agreement establish rights and obligations for both parties. This finding is not supported by substantial evidence.

**E.**

**{20}** Finding 21 relates to promises made by the State subsequent to the execution of the concession agreement. There is no finding of consideration for such promises so as to make them enforceable, and we fail to see the relevance of this finding.

**F.**

**{21}** Findings 20 and 22 refer to the facts that the State did obtain an appropriation of $300,000 and then spent only $156,000 under the concession

agreement. These findings, which are supported by substantial evidence, do no more than show that the State had available $300,000 to perform its obligations under the concession agreement. Paragraph 25 made the State's obligations under the concession agreement "subject to the availability of appropriation therefor." Nothing in the agreement requires the State to spend any particular amount of money. There is no exception to the parol evidence rule that would allow a contract which would contradict the concession agreement on this point. Therefore, we are left with the agreement and the fact that the State had available $300,000 with which to perform its duties under the agreement. As discussed **infra,** to any extent the State breached its duties while having funds available, the State is liable for damages. However, these findings do not permit an award of damages for the mere failure to spend.

**G.**

**{22}** We are prompted by counsels' briefs and the meandering language of the case law to discuss the application of the Restatement (Second) of Contracts to this case.

**{23}** Section 209 discusses integrated agreements and states that the court should determine at the outset whether there is an integrated agreement. Restatement (Second) of Contracts § 209 (1979). The concession agreement in this case is an example of an integrated agreement. On its face it "reasonably appears to be a complete agreement." It contained an integration clause which states:

> This License Agreement contains the entire understanding between the parties and there are no understandings, representations, or warranties not set forth or incorporated by reference in this document.

**See id.** § 209(3). The parties made minor changes in the language of one of the exhibits incorporated into the agreement. All these facts indicate that the agreement constituted a final expression of one or more terms of the agreement.

**{24}** Section 210 of the Restatement discusses the difference between completely and partially integrated agreements. The comment states in part that "wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties." Restatement (Second) of Contracts § 210, comment b (1979). Because Sideris claims the agreement was completely integrated and Clark claims it was only partially integrated, we must consider Clark's evidence.

**{25}** Clark's evidence is that the State promised to obtain an appropriation and to spend the money on his concession. There was no evidence of negotiation or agreement on this issue as described in the Restatement but only of a promise. **See** Restatement (Second) of Contracts § 214 (1979). However, nothing in the Restatement allows introduction of a prior oral **promise** when there is a written agreement. The language is couched in terms of "agreed term" and "agreements" or "negotiations." Clark's evidence lacks any indication of negotiation and agreement between himself and the State. Under the Restatement there is no provision for allowing evidence of a promised expenditure for the purpose of proving an additional obligation when the parties have entered an integrated agreement.

**III.**

**{26}** We turn now to the question of damages. The trial court made the following findings:

> 24. That as a direct and proximate result of the breaches by the Defendants and the State of their obligations, promises and commitments as aforesaid to the Plaintiffs, including the breach of the concession agreement and breach of the various warranties and covenants set forth above, and the material misrepresentations made by the Defendants and the State to the Plaintiffs, the Plaintiffs have suffered the following damages:
>
> A. $16,000.00 in damages to the cabins, contents of the cabins, furniture,

fixtures, equipment and miscellaneous personal property;

B. $19,000.00 for damages to the lodge and contents;

C. Lost income and profits in the amount of $90,000.00;

D. $34,000.00 in lost interest and general damages.

**{27}** As we have discussed, the State did give an express warranty to repair and maintain the property and improvements let to Clark. This warranty was subject to the availability of appropriations as well as to the discretion of the Commission. Any liability of the State to Clark must be based on this warranty.

**A.**

**{28}** The damage to Clark's personal property during the repair of the cabins is a proper item of damage. The State asserts that the valuation of the damage was excessive, yet it provides no specific valuation that is more accurate. We find substantial evidence in the record to support the award of $16,000 for this item of damages.

**B.**

**{29}** The trial court awarded Clark $19,000 for damages to the lodge. Apparently this amount represents the expense incurred by Clark in remodeling and repairing the lodge with the State's permission. There is no contract provision requiring the State to reimburse Clark for remodeling.

**{30}** When asked if he expected to be reimbursed for his expenses, Clark testified as follows:

> A. I did. I figured it was no reason why they wouldn't, since it was bringing it up to code and improving it. I was not promised it. I didn't say that, but I did expect.
>
> Q. No one promised that if you made repairs you would be reimbursed for them? Not repairs, the improvements.
>
> A. The remodeling, no, sir, but I was dealing with fair people in a fair way.
>
> * * * * * *
>
> Q. Do you know of any provision in that contract that requires the State to reimburse you for remodeling that you undertake on your own behalf?
>
> A. No.

**{31}** It is impossible to tell from the court's findings how much, if any, of the award was for the cost of repairs to make the lodge usable for the specific purpose warranted, how much was for the cost of remodeling, and how much was for complying with the cost of satisfying the building code after remodeling. We hold that Clark is entitled to recover the cost of repairs that the State had warranted it would make. However, he may not recover the costs of remodeling and the consequential costs of complying with the building code. The State never warranted that it would remodel the lodge, and Clark admitted the State was not obligated to reimburse him for doing so.

**{32}** Accordingly, we remand for further findings and conclusions as to this element of damages consistent with this opinion.

**C.**

**{33}** The trial court awarded Clark $90,000 for lost income and profits. Again, it is impossible to tell how this amount was derived and what it represents. It apparently represents income lost from having certain cabins unsuitable for rental and from the State's failure to supply a new marina facility. Clark admitted that the State was not obligated under the agreement to provide a new marina. Clark also admitted that the State had increased the capacity of the marina beyond what existed when the contract was entered.

**{34}** By the terms of the agreement, the Commission had authority to remove any or all of the cabins, or the entire boat dock. However, it did not remove any cabins or the marina. There is evidence that the facilities provided were not kept in a repaired condition. Clark was entitled under the express warranty to have facilities in good repair. Therefore, Clark may have suffered damages due to breach of the express warranty to repair the actual property. To the extent the State's failure to repair and maintain the cabins and the dock caused Clark to lose profits, he may recover. Of course, the State's duty was limited to expenditure of the available $300,000 appropriation. We remand for specific findings and conclusions on this point.

**{35}** The State asserts that the court erroneously awarded Clark gross profits instead of net profits. Because we are remanding for more specific findings, we need not decide that question at this time.

**D.**

**{36}** The court also awarded Clark $34,000 in lost interest and general damages. No evidence supports the award of general damages. The award of lost interest relates to the cost of the funds Clark invested in the concession, including money for buying food and supplies. Clark admitted that the agreement did not require the State to reimburse him for these expenses. Clark gives no rationale to justify this award, other than that the interest was actually foregone. We can conceive of no rationale. Therefore, we hold that the court erred in awarding this item of damages.

**IV.**

**{37}** Clark brought a cross-appeal seeking the difference between the $300,000 appropriated and the $156,000 spent on his concession. The assertion that the State should be liable for this amount is untenable. The appropriation was made for Elephant Butte Lake Park, 1977 N.M. Laws, ch. 91, § 1, subd. B (5)(k), not for Clark or his specific concession. All of the appropriated funds were spent at that park, as determined by the Commission.

**V.**

**{38}** Accordingly, the judgment is reversed in part and affirmed in part, and remanded for more specific fact findings based on the record and consistent with this opinion.

**{39} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM RIORDAN,**
**Justice**

**HARRY STOWERS,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, Respectfully Dissenting**

**DISSENT**

**SOSA, Senior Justice, Dissenting.**

**{40}** I hereby respectfully dissent from this opinion. I feel that we are substituting our judgment for that of the trier of fact.

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-153**

**Filing Date: December 28, 1982**

**Docket No. 14,541**

**STATE OF NEW MEXICO, EX REL. HUMAN SERVICES DEPARTMENT,**

**Petitioner,**

**v.**

**LIBORIO GOMEZ,**

**Respondent.**

Motion for Rehearing Denied January 21, 1983

Charles McCormack
Southern New Mexico Legal Services
Clovis

for Respondent.

Jeff Bingaman, Atty. Gen.
Richard Shapiro, Asst. Atty. Gen.
Santa Fe

for Petitioner.

**OPINION**

**UPON CERTIORARI**

**PAYNE, Chief Justice.**

**{1}** This Court granted certiorari in **State of New Mexico v. Gomez,** in which the Court of Appeals majority opinion ruled to continue welfare benefits that Gomez had been receiving under AFDC (Aid to Families with Dependent Children). Specifically, the court held that Gomez was deprived of due process because his AFDC termination hearing was conducted by telephone and not in the presence of a hearing officer who could observe his demeanor. Judge Wood dissented from the majority opinion holding that Gomez' benefits should be terminated and outlined the reasons. With the exception of minor procedural questions, this case primarily dealt with the issue of whether telephonic hearings in AFDC termination proceedings violate due process. We adopt the dissenting opinion authored by Judge Wood of the Court of Appeals, thereby upholding the constitutionality of the telephonic hearings.

**{2} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**HARRY STOWERS,**
**Justice**

**DAN SOSA,**
**Senior Justice, respectfully dissenting and concurring with the Court of Appeals' majority opinion**

**DISSENT**

**SUTIN, Judge.**

**{3}** Gomez appeals a Fair Hearing Decision of the Human Services Department. We reverse.

**{4}** Gomez' AFDC benefits were terminated as a result of a telephonic hearing conducted by the hearing officer and his report to HSD. Prior to the hearing, Gomez, by mail, stated:

> We again insist that the requested hearing must be held in person to satisfy due

> process requirements since the decision clearly depends on Mr. Gomez' credibility, which cannot be judged over the telephone * * *.

In response, the hearing officer stated:

> During the Pilot Project testing the use of telephone conferences in Fair Hearings, one of the requisites of the Pilot Model was that a client might refuse to consent to a telephone hearing. However, based on the results of the Project and limitations imposed by time and the budget, the Department has designated certain counties where Fair Hearing will be held only by telephone * * *.
>
> I have accordingly scheduled a hearing for your client for November 10, 1981 at 10:00 A.M. * * *.

**{5}** On the morning of the hearing, the hearing officer, by telephone, read both letters into the record. Gomez made it clear on the record that he was still in opposition to the telephone hearing. The hearing officer proceeded with the telephonic hearing.

**{6}** The hearing officer has the power of "examining witnesses." Section 27-3-3(C), N.M.S.A. 1978 (1982 Repl. Pamph.). The examination of a witness consists of the series of questions put to him by the hearing officer for the purpose of bringing before him the knowledge which the witness has of the fact and matters in dispute, or of probing and sifting his evidence previously given. See, Black's Law Dictionary (Rev. 4th Ed. 1968) p. 664. In a telephonic hearing, a hearing officer can examine witnesses but cannot observe them. A telephonic television hearing would afford a public officer the opportunity to observe the demeanor of a witness.

**{7}** Black's Law Dictionary (Rev. 4th Ed. 1968) p. 517 defines "Demeanor":

> As respects a witness or other person, relates to physical appearance. [Citation Omitted.] It embraces such facts as the tone of voice in which a witness' statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidences of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity. [Citation Omitted.]

**{8}** "'The tongue of the witness,' it has been said, 'is not the only organ for conveying testimony.'" Frank, Law and The Modern Mind, p. 109 (1936).

**{9}** "Demeanor evidence may be a great weight in determining who is telling the truth." State v. Engstrom, 226 Minn. 301, 32 N.W.2d 553, 559 (1948).

**{10}** The failure of a hearing officer or trial examiner to observe the demeanor of witnesses denies a party due process of law. S. Buchsbaum & Co. v. Federal Trade Commission, 153 F.2d 85 (7th Cir. 1946). supplemental opinion, 160 F.2d 121 (1947); U.S. v. Raddatz, 592 F.2d 976 (7th Cir. 1979); Smith v. Dental Products Co., 168 F.2d 516 (7th Cir. 1948); Shawley v. Industrial Commission, 16 Wis.2d 535, 114 N.W.2d 872 (1962); Trzebiatowski v. Jerome, 24 Ill.2d 24, 179 N.E.2d 622 (1962).

**{11}** Buchsbaum involved a hearing before the Federal Trade Commission based upon testimony obtained by one trial examiner who died. A second trial examiner completed the taking of the testimony, closed the case and made his report to the commission. The court said:

> Indeed, under those authorities the Commission should disregard the finding of the Examiner if he had not complied with the rule of confrontation, and that is the precise question which confronts us. Congress has authorized the appointment of Examiners in such cases and they are the eyes and ears of the Commission. There is no complaint

> as to this delegated power, but it certainly cannot be said that the appointment would free the Examiner from the duty of observing the demeanor of witnesses, for this would amount to a lack of due process to which petitioner is entitled.[Id. 87.]

**{12}** In Smith, the hearing officer was a master who died before making any finding or report. A transcript of the evidence was lodged with the district judge upon which a final judgment was entered. The court followed Buchsbaum. The Smith court said:

> The reason for the rule is applicable here; the deciding officer, whether administrative in character or judicial, has a real function to perform in due process. The defect is one going to the right of the parties to have a decision from the agency having jurisdiction upon the merits upon testimony submitted by witnesses whom the trial tribunal has seen and heard. [Id. 519.].

**{13}** As Raddatz said:

> Our reading of the record convinces us of the wisdom of the traditional practice. The record here does not reveal a pattern of facts that exposes the defendant's testimony as wholly incredible. Thus the truth cannot be derived from this written record without an intolerably high margin of error—a margin of error that time-honored tradition teaches can be substantially reduced by simply requiring the trier of fact to hear and observe the witnesses. [Id. 983-4.]

**{14}** Gomez was heard but not seen. He was denied due process of law.

**{15}** Judge Wood points out in his dissent that "demeanor" of a witness is not an aspect of the constitutional right of confrontation. We agree. The Confrontation Clause of the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." It primary object is to compel an adverse witness, not an accused, to stand face to face with the jury in order that they may look at him and judge by his demeanor whether he is worthy of belief. But this rule must occasionally give way to considerations of public policy and the necessities of the case. "The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused." Mattox v. United States, 156 U.S. 237, 243, 15 S. Ct. 337, 39 L. Ed. 409 (1895). A witness not present at trial should not allow an accused to go scott free when the witness' former testimony is available. The rights of the public demand it. Therefore, the demeanor of the witness is only an incidental benefit of the accused.

**{16}** The Confrontation Clause does not involve the demeanor of an accused who takes the witness stand. A jury would not be allowed to sit in a jury box outside the court room and listen by telephone to the accused's testimony. Under due process of law, the demeanor of an accused is an essential ingredient in the determination of his guilt or innocence.

**{17}** Judge Wood relies upon Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) and Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In each of these cases, no evidentiary hearing was held prior to termination of public assistance or disability benefit payments to a recipient. The recipient had not testified. The demeanor of the recipient was not an issue. The question for decision was whether the Due Process Clause of the Fifth Amendment required that the recipient be afforded an opportunity for an evidentiary hearing before the termination of social security public assistance or disability benefit payments. Goldberg states that the recipient may request a post-termination "fair hearing", that

> [t]his is a proceeding before an independent state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the "fair

> hearing" he is paid all funds erroneously withheld. [397 U.S. 259-260.]

**{18}** The instant case is involved with a post termination "fair hearing" procedure, not with whether a recipient should be afforded an evidentiary hearing **before** termination of benefits. Goldberg and Mathews have no bearing upon the due process issue in the case before us.

**{19}** Before the close of the case, Gomez requested that the record be kept open for 10 days to allow the submission of a doctor's report concerning the re-examination of Gomez before the hearings. The hearing officer granted the request. The hearing was adjourned. The report was filed on December 4, 1981, and made a part of the record as Exhibit F. Appearing in the record as Exhibit G, dated January 12, 1982, was a memorandum to the hearing officer, the subject of which was: "Review of Post-Hearing Medical Evidence." It recites that the Incapacity Review Unit made a careful review of existing medical reports, the new medical report submitted by Gomez and the fair hearing transcript. Each of the doctors' opinions were summarized and the memorandum concluded that:

> The IRU has determined that the client is able to work, that he is not disabled * * *.

**{20}** In the report of the hearing officer to HSD, it stated:

> 3. After the hearing I requested that the IRU review the transcript and the latest medical report submitted. . . . This was the third review by the IRU, of the client's case. Attached as Exhibit G are IRU's findings supporting their original decision of denial made in February 1981, and again in October 1981.

**{21}** In his findings of fact, the hearing officer stated:

> 6. The IRU has reviewed the client's medical reports and case record for a third time. * * * Medical Consultant to IRU, in each review found that the client is not disabled.

**{22}** The report of the hearing officer was the basis upon which the "Fair Hearing Decision" was made.

**{23}** The hearing officer did not submit the memorandum to Gomez nor reset the case for another hearing at which time Gomez could examine and question the validity of the memorandum or object to its admission in the record. HSD argues that Gomez, by offering Exhibit F after the hearing, waived any objection to Exhibit G and is estopped to deny the validity of acceptance into evidence of Exhibit G. We disagree. The hearing officer allowed Gomez to file Exhibit F. The hearing officer, one who sits as fair and impartial, who governs the proceedings initiated by the county, did not announce that Exhibit F would be reviewed by IRU, or that a memorandum would be prepared and admitted in evidence as Exhibit G. Neither did the county request it. Section 275.31 of the Income Support Div., Program Manual, Volume I states:

> The right to a hearing includes the right * * * to have a hearing which fully safeguards the client's opportunity to present his case * * *.

**{24}** Section 275.472 states:

> All information presented or used by the county office (or its witnesses, if any) during the course of the hearing must be heard by or, if written, must be available to the claimant or his representative for examination prior to the hearing as well as during the hearing itself. **No other information may be a part of the hearing record or used in making a decision on the case.** [Emphasis added.]

The county argues:

> Since * * * it was Gomez, through counsel, who requested that the record remain open, it is clear that Gomez manifested an actual intention to relinquish his rights under IDS Manual 275.472 * * *.

**{25}** This attempted escape hatch does not meet the challenge of 275.472 nor the rules of administrative procedure. Neither Gomez nor the county had access to the memorandum. There is no hearing when a party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute. All parties must be fully appraised of the evidence submitted or to be considered and must be given an opportunity to inspect documents and offer evidence in explanation or rebuttal. **Transcontinental Bus System v. State Corp. Commission**, 56 N.M. 158, 241 P.2d 829 (1952). Hearings before administrative bodies need not be conducted generally with the formality of court hearings or trials, but procedures before such bodies must be consistent with the essentials of a fair trial. **Ferguson-Steere Motor Co. v. State Corp. Com'n**, 63 N.M. 137, 314 P.2d 894 (1957). See, **First Nat. Bank v. Bernalillo Cty. Valuation**, 90 N.M. 110, 560 P.2d 174 (Ct. App. 1977), Hernandez, J., specially concurring.

**{26}** Hillman v. Health and Soc. Services Dept., 92 N.M. 480, 590 P.2d 179 (Ct. App. 1979) presented a similar problem under the same regulation. At the end of the fair hearing, the hearing officer decided to refer a medical statement admitted in evidence to IRU for a recommendation. IRU concluded that the statement was completely inadequate. It recommended a psycho-diagnostic and orthopedic examination and requested a social summary to accompany the medical reports. Hillman refused upon the belief that her continued eligibility would be made on evidence outside the fair hearing. Her benefits were terminated. In reversing the "Fair Hearing Decision" this Court said:

> The record * * * does not show that the hearing would be reopened in order to allow appellant to present her case in light of the resulting medical reports and accompanying social summary. In this situation, Section 275.31 demanded that appellee advise appellant of the availability of another hearing. Because appellee failed to inform appellant of this availability, appellant's refusal to consent to the requested examination was justified. Therefore, Section 241.72 cannot be used as a lawful basis for terminating appellant's benefits. [Id. 483.]

Hillman also stated:

> We have already indicated that Section 275.472 requires the availability of examination as a requisite for inclusion in the record. Therefore, the availability of examine reports made pursuant to Section 275.472 is implicitly required in this section's provision that they be "made part of the record." [Id. 482.]

**{27}** The difference between Hillman and the instant case is that the hearing officer in the instant case actually did that which was prohibited in Hillman. The memorandum was made a part of the record without examination by Gomez and the hearing officer failed to make another hearing available. The Department's decision was not rendered in accordance with law.

**{28}** The "Fair Hearing Decision" is reversed. Gomez is entitled to a hearing with the hearing officer present and presiding. AFDC and medicaid benefits of Gomez and his family shall be reinstated and paid in full from the date payments ceased and shall continue unless a fair hearing decision to the contrary is made.

**{29} IT IS SO ORDERED.**

**SUTIN,**
**Judge**

**WE CONCUR:**

**LOPEZ,**
**Judge,**

**WOOD,**
**Judge, dissents**

**DISSENT**

**WOOD,**
**Judge (dissenting).**

**{30}** I would affirm the decision of the Department to terminate benefits that Gomez had been receiving under the welfare category of AFDC (Aid for Dependent Children). These benefits had been provided on the basis that the children had been deprived of parental support because of the physical or mental incapacity of Gomez. 1 Dept. of Human Services, Income Support Division Program Manual, 221.71.

**{31}** The Program Manual, **supra,** 221.723, defines physical or mental incapacity to be

> physiological, mental or psychological impairment of the person that, when considered in connection with the pertinent socio-economic conditions, results in a substantial lack of or reduction in the ability of the person to fulfill his normal function of parental support * * *. Determination of the existence of incapacity requires proof of the impairment plus an evaluation of the effect of the impairment upon the person's ability to function.

Under § 221.723, for benefits to be paid on the basis of a parent's disability, there must first be an impairment on the part of the parent. Absent an impairment, there is no need to consider socio-economic conditions.

**{32}** Gomez, at one time, apparently was impaired; he has been receiving AFDC benefits for a number of years. This case involves the decision that Gomez is no longer disabled. The decision was based on medical reports from an orthopedic surgeon, an internist and a psychologist. Each of these persons had examined Gomez; each had concluded that Gomez was not disabled. Their reports are substantial evidence supporting the decision to terminate benefits. **Richardson v. Perales,** 402 U.S. 389, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971). The medical report submitted by Gomez does not substantially contradict the reports of the three specialists.

**{33}** Gomez' brief on appeal makes three arguments.

**{34}** One argument is that the hearing officer seemed to proceed on the assumption that Gomez' subjective complaints were insufficient to show that he was disabled. This is speculative. The hearing officer's findings were based on the medical and psychological evidence, but these findings do not show that the hearing officer considered subjective complaints to be legally insufficient for a determination of disability. Gomez' argument, in effect, is that his subjective complaints should have been believed, regardless of the opinions of the specialists who examined him. The decision was based on **all** of the evidence presented. Gomez' complaints were not to be considered in disregard of the views of the three specialists. **See** 27-3-3(C), N.M.S.A. 1978 (1982 Repl. Pamph.); Program Manual, **supra,** 275.472.

**{35}** A second argument is that the hearing officer considered evidence that was not available to Gomez. This argument is factually correct. After the hearing was concluded, the hearing officer received and considered a report of the "Incapacity Review Unit". This report reviewed the various medical evaluations that had been admitted as evidence. Such a report would have been proper evidence if the report had been available to Gomez before the hearing was concluded and had been admitted as evidence. **Richardson v. Perales, supra.** Because the report was not available to Gomez before the hearing concluded, and was not properly admitted into evidence, consideration of this report by the hearing officer violated Program Manual, **supra,** 275.472.

**{36}** The Department claims the hearing officer's consideration of the report of the "Incapacity Review Unit" was not legal error because Gomez either waived any such contention or is estopped to make this contention. These contentions are frivolous; there is no factual basis for either waiver or estoppel.

**{37}** The majority opinion holds that the hearing officer's consideration of the report of the Incapacity Review Unit was error. I agree. The majority opinion apparently considers this violation of the rules to be reversible error. I disagree. The report did not more than agree with the reports of

the three specialists, which were properly in evidence. The reports of the three specialists are substantial support for the decision. Consideration of the report of the Incapacity Review Unit, because of its contents, could not have prejudiced Gomez, and was harmless error.

**{38}** Gomez' third argument is that he was deprived of due process because the termination hearing was conducted by telephone. He does not claim a violation of the due process requisites for terminating welfare benefits stated in **Goldberg v. Kelly,** 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970). Those requisites are summarized in **Mathews v. Eldridge,** 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), Footnote 4:

> 4. In Goldberg the Court held that the pre-termination hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for a proposed termination"; (2) "an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired; (4) an "impartial" decision maker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on.

**Goldberg, supra,** states that these requirements are "procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved." **Goldberg,** supra, disclaims any intention to impose requirements other than those above quoted. The requirements appear to have been imposed in **Goldberg, supra,** because of the impact an improper eligibility determination would have on the welfare recipient: "termination of aid pending resolution of a controversy over eligibility may deprive an **eligible** recipient of the very means by which to live while he waits." (Emphasis in original.)

**{39}** Although the due process requirements stated in **Goldberg v. Kelly, supra,** were met, Gomez asserts that even though he presented argument and evidence orally, due process was violated because he was not **seen.** He points out that 27-3-3(C), **supra,** provides that the hearing is to be conducted so that his contentions are "fairly presented." He also points out that Program Manual, **supra,** 275.472, provides that he may present his case "in any way he desires". Neither the statute nor the rule confer authority upon the welfare recipient to dictate the format of the termination hearing; the recipient cannot require, for example, a videotaped hearing. Nor may be dictate the place of the hearing. Neither the statute nor the rule support his due process argument.

**{40}** Gomez' argument, essentially, is that due process is violated if the hearing officer does not observe his demeanor. Some cases hold that demeanor is an aspect of the constitutional right to confrontation in criminal cases and an aspect of due process in non-criminal cases. This view, however, is not supported by New Mexico case law or federal constitutional law.

**{41}** New Mexico holds that "demeanor" is not an aspect of the constitutional right of confrontation. **State v. Jackson,** 30 N.M. 309, 233 P. 49 (1924); Opinion of Hernandez, J. in **State v. Tijerina,** 84 N.M. 432, 504 P.2d 642 (Ct. App. 1972), **aff'd** 86 N.M. 31, 519 P.2d 127 (1973); **see State v. Lunn,** 82 N.M. 526, 484 P.2d 368 (Ct. App. 1971). The United States Supreme Court has never held that "demeanor" is an aspect of the constitutional right of confrontation. **Ohio v. Roberts,** 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980); **California v. Green,** 399 U.S. 149, 26 L. Ed. 2d 489, 90 S. Ct. 1930 (1970).

**{42}** Whether Gomez was deprived of due process because the hearing officer could not **see** Gomez in a telephonic hearing depends on whether the hearing was not conducted in a "meaningful manner". See **Goldberg v. Kelly, supra.** Gomez contends the telephonic hearing was not meaningful because his efforts to remain on welfare depend upon his credibility, and the hearing officer could not judge his

credibility without seeing him. This is incorrect.

**{43}** Gomez testified that he was unable to work. The psychologist pointed out that Gomez "feels" he is unable to work, but concluded there was no evidence that he was unable to work because of a psychiatric problem. The psychologist reported that he (the psychologist) found "evidence that he [Gomez] would be unable, as far as he [Gomez] is concerned, to perform any kind of physical labor or employment which would require effort on his part." The orthopedic surgeon reported that Gomez "has a large functional deficit which is not supported by physical examination * * *." The internist reported "from a medical standpoint, I cannot find any reason why he should not be able to work due to his back pain." Concerning Gomez' diabetes, the internist reported that the diabetes, in itself, would not be disabling if Gomez would take "some personal interest in the control," but that Gomez would not buy insulin needles, and was not taking his medication because he had not been supplied with free needles. The internist pointed out that Gomez was purchasing cigarettes and the needles could have been purchased with the money spent on cigarettes.

**{44}** The foregoing shows that he **eligibility** issue in this case is far different than in **Goldberg v. Kelly, supra.** In **Goldberg, supra,** one of the welfare recipients alleged that she was in danger of having AFDC benefits terminated "for failure to cooperate * * * in suing her estranged husband." Another welfare recipient alleged his "Home Relief" benefits "were terminated because he refused to accept counseling and rehabilitation for drug addiction." The factual questions of eligibility in **Goldberg, supra,** involved far more than the question of eligibility in this case; here, the question was whether Gomez was disabled from working and this was essentially a medical question. **Mathews v. Eldridge, supra,** points out that a medical assessment of a person's physical or mental condition "is a more sharply focused and easily documented decision than the typical determination of welfare entitlement." **Mathews v. Eldridge, supra,** is the applicable law, not **Goldberg v. Kelly, supra.**

**{45}** Mathews v. Eldridge, supra, points out that the decision to discontinue disability benefits depends, in most cases, on medical reports of physician specialists, that only in a few cases will credibility or veracity be a factor in the ultimate disability assessment. That credibility may be a minimal factor in disability determination is illustrated in this case; Gomez says he cannot work, the specialists agree that Gomez believes he cannot work. The hearing officer heard Gomez testifying that he could not work; a requirement that the hearing officer also see Gomez testify that he cannot work would impose the rigidities of judicial procedure on what is supposed to be an informal proceeding.

**{46}** Even **Goldberg, supra,** agreed "that the pre-termination hearing need not take the form of a judicial or quasi-judicial trial", and **Goldberg, supra,** stands alone in regard to pre-termination due process. **See Mathews v. Eldridge, supra.**

**{47}** Mathews, supra, points out that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decision-maker, is substantially less in this context [of a disability determination] than in Goldberg." Here, however, Gomez had an evidentiary hearing at which he made an oral presentation to the hearing officer; Gomez received more than **Mathews, supra,** requires. Gomez was not deprived of due process because the termination hearing was conducted by telephone. The majority reach a contrary result, relying on cases only marginally supportive. Most of the cases relied on by the majority: (a) were concerned with a change in the hearing office during the course of the hearing, and (b) consider demeanor as a part of the constitutional right to confrontation.

**{48}** Thus, I dissent.

**WOOD,**
**Judge**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1982-NMSC-154**

**Filing Date: December 28, 1982**

**Docket No. 14,333**

**H. PETER PSOMAS,**

**Petitioner-Appellant,**

**v.**

**BETTY L. PSOMAS,**

**Respondent-Appellee.**

**APPEAL FROM DISTRICT COURT OF BERNALILLO COUNTY.**

Motion for Rehearing denied February 4, 1983

Michael E. Vigil
Jack Smith
Albuquerque, New Mexico

for Appellant.

Anne Kass
Albuquerque, New Mexico

for Appellee.

## OPINION

**PAYNE, Chief Justice.**

**{1}** Peter Psomas, husband, appeals from an amended partial decree of support and judgment in a divorce proceeding against his wife, Betty. The District Court certified the decree to permit appeal of a nonfinal judgment. The issues on appeal are (1) whether the trial court erred by awarding post-majority child support; (2) whether the trial court erred by deferring a final decree dissolving the marriage; and (3) whether the trial court abused its discretion in the amount of alimony awarded. We reverse and remand as to issues (1) and (2) and affirm as to issue (3).

**{2}** Peter and Betty were married in 1952 and separated in 1974. Peter filed for divorce in August 1981. The couple has ten children, only one of whom was still a minor at the time of filing. (The child's eighteenth birthday was in March 1982.) Peter is a retired military officer and worked part time for an insurance company. By the time of the hearing on the merits, he had given up this job. Betty was unemployed. She had been injured in a fall at a gasoline station and was receiving regular treatment at Kirtland Air Force Base hospital for pain in her back and neck. She also suffered from degenerative arthritis of the thumbs and had undergone corrective surgery on one thumb. Future surgery was planned for the other thumb.

**{3}** The trial court granted interim support and ordered the husband to pay for repairs to the house, dental expenses for the wife, and monthly mortgage payments. A series of disputes ensued, several culminating in motions for contempt against the husband for failure to pay the support ordered by the court.

**{4}** At the hearing on the merits, the court determined that the couple was entitled to a divorce on grounds of incompatibility. The court deferred entry of the decree of dissolution, however, to permit expenses for the operation on Betty's other thumb to be covered by military insurance benefits. The court found that Betty was unable to work and was in need of alimony to pay her living expenses, and that Peter should pay Betty $600 per month in alimony, continue to pay the monthly mortgage payments, and pay a portion of the taxes and insurance. In addition, the court awarded Betty $300 per month in child support for the remaining four months her child attended high school. The court ordered the house sold and the net proceeds after sale to be

divided equally between husband and wife. Personal property and debts were also apportioned between the parties.

**I**

**{5}** The husband argues that the court erred in granting child support beyond the 18th birthday of their minor child. The court knew it was awarding post-majority support. We agree with the husband that the court had no jurisdiction to provide for children who have passed the age of majority. § 40-4-7 N.M.S.A. 1978; **Spingola v. Spingola,** 93 N.M. 598, 603 P.2d 708 (1979); **Phelps v. Phelps,** 85 N.M. 62, 509 P.2d 254 (1973); **In Re Coe's Estate,** 56 N.M. 578, 247 P.2d 162 (1952). New Mexico statutes provide that the "district court shall have exclusive jurisdiction of all matters pertaining to the guardianship, care, custody, maintenance and education of the children . . . so long as they . . . remain minors." § 40-4-7 1978.

**{6}** Betty Psomas argues that a strict construction of these statutes may result in an 18-year old leaving school to support himself thus compromising his education by spending hours working to support himself, rather than pursuing academic studies. She also contends that the legislature intended 18 to be the "age of majority" and to operate only as a presumption which could be overcome by particular facts that show how a given child might suffer undue hardship. She cites several cases that have authorized post-majority support for children who are unable to support themselves as a result of mental or physical infirmities. This Court, in a dictum, also recognized the exception for mental or physical infirmities in **Fitzgerald v. Valdez,** 77 N.M. 769, 427 P.2d 655 (1967). Here, however, there is no evidence of such an infirmity.

**{7}** The wife urges that a strict construction is not required if it would defeat legislative intent or render the statute's application absurd or unreasonable, **State v. Nance,** 77 N.M. 39, 419 P.2d 242 (1966), **cert. denied,** 386 U.S. 1039, 87 S. Ct. 1495, 18 L. Ed. 2d 605 (1967). She appeals to this court to authorize limited post-majority child support through high school graduation. In **Phelps, supra,** this court held that the trial court correctly determined it had no authority to enforce a judgment providing for child support payments for a child who was no longer a minor under New Mexico statutes. "[Emancipation] . . . occurs by operation of law. In the usual situation, the parental relationship is severed when the child reaches majority because the law fixes that as the point in time for parental rights and liabilities to cease. . . ." **Phelps,** 85 N.M. at 65, 509 P.2d at 257 (quoting **Fitzgerald,** 77 N.M. at 776, 427 P.2d at 659). The rights and liabilities fixed by the age of majority pervade the law; we feel the need for certainty and uniformity is too great to allow the type of exception requested here. We therefore hold the trial court erred in awarding post-majority child support.

**II.**

**{8}** In New Mexico, a court may not deny a divorce where a statutory ground is shown to exist. **See Buckner v. Buckner,** 95 N.M. 337, 622 P.2d 242 (1981); **Garner v. Garner,** 85 N.M. 324, 512 P.2d 84 (1973); **State ex rel. DuBois v. Ryan,** 85 N.M. 575, 514 P.2d 851 (1973). Although the court deferred the entry of a final decree instead of denying it, the result is the same so long as no reasonable period of time accompanies the deferral, particularly in light of the health problems claimed by Betty. Since she had already undergone an operation on one hand, the costs for an identical operation on the other hand could have been estimated within a reasonable time and provision made for those expenses in the final decree.

**{9}** This court faced a similar problem in **DuBois, supra.** The wife suffered from a rare malignancy that required expensive chemotherapy. The court held she was entitled to military medical benefits only as long as she remained married. The court granted the couple a divorce and ordered the husband to pay her future medical expenses. The court then vacated its order after the husband remarried. Thereafter, the husband and his new wife

brought a mandamus proceeding to reinstate the decree. This court issued the writ, and held that the lower court had no discretionary power to deny a divorce after expressly provided statutory grounds for divorce had been established.

**{10}** Here, as in **DuBois,** the court found statutory grounds existed for granting a divorce. It had no discretionary power to defer a final decree for an unspecified period of time and should have issued a decree within a reasonable time. If additional information was needed, the court should have required the parties to provide it within a specified time period so that it could be incorporated into the final decree.

**III.**

**{11}** In New Mexico, a court has discretion to allow either party alimony, § 40-4-7(B)(1) 1978. Its decision will be altered only upon a showing of abuse of that discretion. **Lovato v. Lovato,** 21 N.M.St.B. Bull. 644 (1982); **Chrane v. Chrane,** 21 N.M.St.B. Bull. 1082 (1982); **Ellsworth v. Ellsworth,** 97 N.M. 133, 637 P.2d 564 (1981). In considering the award of alimony, we examine the record only to determine if the trial court abused its discretion by fixing an amount that was contrary to all reason. **Chrane, supra; Gallemore v. Gallemore,** 78 N.M. 434, 432 P.2d 399 (1967).

**{12}** In several cases, we have cited factors that the court should consider in deciding whether and in what amount to award alimony. **Michelson v. Michelson,** 86 N.M. 107, 520 P.2d 263 (1974) (needs of the wife, her age, her health and the means to support herself, the earning capacity and future earnings of the husband, the duration of the marriage, and the amount of the property owned by the parties); **Ellsworth v. Ellsworth, supra,** (income-producing capacity of property owned by the parties and whether assets are depreciating or appreciating); **Lovato v. Lovato, supra,** (whether alimony is structured to encourage a former spouse to assume responsibility for his or her own care and support).

**{13}** In this case, the trial court determined that the wife was unable to work and in need of alimony for at least a year. The amount set by the court appears reasonable in view of Peter's military retirement pay. He was ordered to pay $600 per month in alimony, plus house expenses of $303 per month until sale, from take-home pay and mortgage allotment of approximately $1800 per month. Despite the husband's offer to give the wife his share in the residence in lieu of alimony, we believe the trial court's decision to award alimony and order the sale of the residence was proper. The wife demonstrated need for immediate, regular income for her necessities. Further, since the residence was the couple's only significant community asset, the husband should be allowed to share in its proceeds.

**IV.**

**{14}** After the original appeal, Betty filed a motion to reverse and remand based on Pub. L. No. 97-252 (Sept. 9, 1982), which allegedly overrules **McCarty v. McCarty,** 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). **McCarty** held that military retirement benefits were the sole and separate property of the military retiree. New Mexico followed that ruling in **Espinda v. Espinda,** 96 N.M. 712, 634 P.2d 1264 (1981). Because of **McCarty** and **Espinda,** Betty did not argue at trial or on appeal that military retirement benefits are community property. She argues that Pub. L. No. 97-252 should be applied retroactively, thus making military retirement benefits community property. We deny her motion for two reasons. First, well-settled New Mexico law presumes a statute to operate prospectively unless a clear intention on the part of the legislature exists to give the statute retroactive effect. **State v. Padilla,** 78 N.M. 702, 437 P.2d 163 (Ct. App. 1968). No such legislative intent is expressed in Pub. L. No. 97-252. Second, Betty never cross-appealed the question of whether military retirement benefits constitute community property. Thus, she failed to preserve the issue for appeal to this court.

**{15}** The trial court's order awarding alimony is affirmed. Its orders of child support and deferral of the divorce decree are vacated, and the

case is remanded for further proceedings consistent with this opinion.

**{16} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM RIORDAN,**
**Justice**

Justice H. Vern Payne

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-003**

**Filing Date: January 7, 1983**

**Docket No. 14,661**

**IN THE MATTER OF BENJAMIN K. HORTON, ATTORNEY AT LAW.**

## OPINION

ORDER OF DISBARMENT

**{1}** After the hearing, the Disciplinary Board of the Supreme Court (Board) submitted its Decision and Recommendations to this Court in which they recommended that Attorney Benjamin K. Horton (Horton) be disbarred on nine charges that they found to have been proved by clear and convincing evidence in violation of the Code of Professional Responsibility; Canons and Disciplinary Rules, Rules 1-101 through 9-102, N.M.S.A. 1978 (Repl. Pamp. 1982) (Code). The findings of the Board's committee are summarized as follows:

1. The Board found that Horton signed a settlement check and a release of liability without the consent of his clients, Lydia and Nick Arambula, and thereby engaged in conduct which involved dishonesty, fraud, deceit and misrepresentation directly affecting his clients and opposing counsel, which was prejudicial to the administration of justice, in violation of Rules 1-102(A)(4) and (5) of the Code.

2. The Board found that Horton loaned money to his client, Danny Rodriguez, on several occasions, for purposes other than those related to the litigation in which he was representing Danny Rodriguez in violation of Rule 5-103(B) and that Horton misrepresented to his client the amount of the settlement which would accrue to the client thereby engaging in conduct which involved dishonesty, fraud, deceit and misrepresentation and which was prejudicial to the administration of justice contrary to Rule 1-102(A)(4) and (5) and which prejudiced or damaged his client during the course of the professional relationship contrary to Rule 7-101(A)(3) of the Code.

3. The Board found that Horton charged his client, Dennis Schummer, an illegal fee in a workmen's compensation case contrary to Section 52-1-54(A), N.M.S.A. 1978, by basing his 10% attorney's fee on workmen's compensation benefits not attributable to Horton's benefits but rather, which were voluntarily paid to the client by the employer. This conduct prejudiced or damaged his client in violation of Rule 2-106(A) and (B), and damaged the professional *{*14}* relationship contrary to Rule 7-101(A)(3) of the Code.

4. and 5. The Board found that Horton made loans to his client, Horace Johns, in varying amounts for purposes unrelated to the advancement of Johns' litigation thereby violating Rule 5-103(B) of the Code.

6. The Board found that Horton made numerous loans to his client, James Wade, which were unrelated to the expenses of litigation of Wade's case thereby violating Rule 5-103(B) of the Code.

7. The Board found that Horton represented to his client, Mary Ann Key, that he would charge 10% of the settlement sum (the statutory limit under Section 52-1-54, N.M.S.A. 1978), if the workmen's compensation case involving the death of her husband was settled out of court and that he also represented to her that the fee would be "over and above" the amount of benefits to be received by the client. However, in settling the case, Horton accepted a fee in excess of the amount fixed by statute and which was deducted from the benefits received by the client.

Horton, therefore, charged a fee that was illegal, excessive and contrary to the agreements with his client in violation of Rules 2-106(A) and (B) of the Code. By misrepresenting the manner in

which he would be compensated, Horton perpetrated a fraud on his client in violation of Rule 1-102(A)(4) of the Code and thereby prejudiced the interests of his client in violation of Rule 7-101(A)(3) of the Code.

8. The Board found that Horton in representing his client, Elaine Edgington, fixed his attorney's fee on a settlement sum which included $3,061.00 in medical benefits that had not been recovered from the insuror and which his client was precluded from receiving because of the release signed by her. Horton later sought to recover $3,061.00 from the insurer in an action which was dismissed for failure to prosecute; however, Horton never informed his client that the suit had been dismissed. Despite demands for accounting and for reimbursement, Horton did not return that portion of the fee based on the unrecovered sums until a complaint alleging a violation of the Code had been filed. Horton's conduct in collecting fees on amounts that had not been actually recovered for the client violated Rule 2-106(A) and (B) of the Code in that he collected a clearly excessive fee; further, Horton's conduct prejudiced or damaged his client in violation of Rule 7-101(A)(3) of the Code.

9. The Board found that Horton made money advances and loans to his client, Buster Archie, for purposes unrelated to Archie's litigation thereby violating Rule 5-103(B) of the Code.

**{2}** Upon these findings, the Board recommended to this Court that Benjamin K. Horton be disbarred.

**{3}** In attacking the Board's recommendations, Horton cites **In Re Martin,** 67 N.M. 276, 281, 354 P.2d 995, 998 (1960), which held that:

> The law is well settled in this jurisdiction that the evidence to sustain a charge of unprofessional conduct against a member of the bar, where in his testimony under oath he has fully and completely denied the asserted wrongful act, must be clear and convincing and **that degree of evidence does not flow from the testimony of one witness unless such witness is corroborated to some extent, either by facts or circumstances.** (Citations omitted.) [Emphasis added.]

We do not read **Martin** to invest a lawyer with a presumption of credibility as against another person in a case in which their respective testimonies may conflict. Rather, **Martin** reflects the greater evidentiary demands associated with the "clear and convincing" standard of proof. Compare the similar rule in cases where perjury is alleged. **State v. Naranjo,** 94 N.M. 413, 611 P.2d 1107 (Ct. App. 1979), **aff'd in part and rev'd in part,** 94 N.M. 407, 611 P.2d 1101 (1980).

**{4}** In **Martin,** there was absolutely no corroboration of the testimony by the opposing witness which could be found; hence, the rule favored the sworn denial of the lawyer. In the present case, however, substantial corroborating evidence appears in the record to support the findings of the hearing committee of the Board that the charges were proven by clear and convincing evidence. Further, the Board specifically found that the testimony of Horton was not credible in many particulars.

**{5}** We are of the opinion that the findings of the hearing committee of the Board with respect to clients Johns, Wade and Archie do not singly or in combination, support the Board's recommendation that Benjamin K. Horton be disbarred.

**{6}** We are of the opinion, however, that the findings of the hearing committee of the Board with respect to clients Arambula, Rodriguez, Schummer, Key and Edgington, either singly or in combination, clearly support the Board's recommendation that Benjamin K. Horton be disbarred.

**{7}** IT IS THEREFORE ORDERED that Benjamin K. Horton be and hereby is disbarred and his license to practice law in New Mexico be and hereby is revoked upon filing of this order.

**{8}** IT IS FURTHER ORDERED that the Clerk of the Supreme Court forthwith strike the name of Benjamin K. Horton from the roll of those persons permitted to practice law in New Mexico and that the Clerk cause this Order of

Disbarment to be published and made known to the bench, bar and public.

**H. VERN PAYNE,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM F. RIORDAN,**
**Justice**

**HARRY E. STOWERS,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-005**

**Filing Date: January 17, 1983**

**Docket No. 13,992**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**RUDOLPH AUGUSTINE SENA,**

**Defendant-Appellant.**

**APPEAL FROM DISTRICT COURT**
**BERNALILLO COUNTY,**
**Patricia A. Madrid, District Judge.**

Mary Joe Snyder
Santa Fe, New Mexico

for Appellant.

Jeff Bingaman, Attorney General
William Lazar, Asst. Attorney General
Santa Fe, New Mexico

for Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** This appeal arises from the murder conviction of Rudolph Sena. The primary issue is the proper application of the "depraved mind" theory of first degree murder, Section 30-2-1, N.M.S.A. 1978 (Cum. Supp. 1982).

**{2}** In March 1980, Sena, a woman, and another man entered a bar through the front entrance. The woman was holding a drink and the doorman did not allow her to enter with the drink. A dispute arose and Sena hit the doorman. The doorman then sprayed Sena with mace, hit him with a flashlight, and threw him out of the door. Within a few seconds, Sena returned with a gun. Sena opened fire on the doorman, who immediately turned and ducked. Sena fired four or five times. The first shot hit the doorman in the face, but the other shots missed. One of these shots struck and killed Raul Rodriguez, an innocent bystander.

**{3}** 1. Use of Second Indictment. Sena was originally indicted for second degree murder. However, three months later the district attorney reviewed the case and thought the evidence support first degree murder. The district attorney sought and obtained a second indictment, this time for first degree murder. Sena asserts that under Section 31-6-11.1, N.M.S.A. 1978 (Cum. Supp. 1982), the second indictment should have been dismissed insofar as it covered first degree murder because it was based on the same evidence as the original indictment. Sena claims that by returning an indictment only for second degree murder, the original grand jury effectively returned a no bill as to first degree murder.

**{4}** We cannot accept Sena's interpretation of the statute. The policy reasons expressed in **State v. Stevens,** 96 N.M. 627, 633 P.2d 1225 (1981), allow us to carefully consider motions for dismissal based on this type of procedural objection to an indictment. Section 31-6-11.1 specifies that no matter may be presented to a grand jury a second time once a grand jury has returned a no bill. We take this statute as it reads. We decline to engraft it with a judicially implied no bill in cases such as the present one. Because the original grand jury did not return a no bill, the district attorney was not precluded from resubmitting the case at a later time.

**{5}** 2. Prejudicial Witness Statements. Sena claims that during the trial the prosecutor elicited comments from the arresting officer concerning Sena's refusal to give a statement after the arrest, although the trial court had repeatedly

warned the prosecutor about commenting on Sena's silence. The officer testified about Sena's attitude after the arrest and stated that Sena acted "like he knew his way around * * * being told his rights and he wasn't going to say anything." The defense initially moved for a mistrial but later withdrew the motion because Sena would be retired. Instead, the defense wanted the court or the prosecution to initiate the mistrial motion. Neither the court nor the prosecution complied with the defense suggestion. Instead, the court gave a curative instruction.

**{6}** If the comments made by the officer were prejudicial, which is not clear, any prejudice was cured by the curative instruction given by the court. Also, the nature of Sena's objection at trial does not support a reversal. Sena withdrew his motion for a mistrial and directed his objection more to the prosecution's refusal to move for a mistrial and at the trial court's refusal to declare a mistrial on its own motion. The defense stated as a reason for not moving for a mistrial that it thought it was in the best possible posture it could be in regarding the direction of the trial. Sena's method of dealing with the issue at trial was a strategy decision and we will not reverse the trial court on so tenuous a ground, especially when error, if any, was cured by the court.

**{7}** 3. Depraved Mind Theory. The theory presented to the jury was that of the "depraved mind" under Section 30-1-2. Sena argues that the evidence supported a verdict based on transferred intent, but not the depraved mind theory, because there was a clear intention to kill the doorman. Sena cites **State v. DeSantos,** 89 N.M. 458, 461, 553 P.2d 1265, 1268 (1976), in which we stated that the use of the depraved mind theory "has been limited to reckless acts in disregard of human life in general as opposed to the deliberate intention to kill one particular person." However, in that case there was no evidence that the defendant committed an act that was dangerous to more than one person. The committee commentary to N.M.U.J.I. Crim. 2.05, N.M.S.A. 1978, states in part that [i]t is generally believed that this murder occurs when the accused does an act which is dangerous to more than one person.

[An example] of conduct which [has] been held to come within the depraved mind murder category [is]: firing a bullet into a room occupied by several people * * *."

**{8}** Section 30-2-1(A)(4) reads in relevant part:

> A. Murder in the first degree consists of all murder perpetrated:
>
> * * * * * *
>
> (4) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life;
>
> * * * * * *

**{9}** Sena cites cases which interpret their own versions of the depraved mind theory so that the existence of an intent to kill any particular individual would remove the act from this class of murder. **See, e.g., Napier v. State,** 357 So.2d 1001 (Ala. Crim. App. 1977). Regardless of such interpretations, we think our statute is clear. A murder committed by an act which indicates a depraved mind is a first degree murder. It is not limited to a situation where the defendant only intends to kill one person. By firing at the doorman in a room containing other persons within the line of fire, Sena committed an act "greatly dangerous to the lives of others" which falls within the depraved mind theory. It is irrelevant whether he intended only to kill the doorman as this does not necessarily preclude the elements which would also support the depraved mind theory. The fact remains that Sena's act, regardless of his specific intent to kill the doorman, was greatly dangerous to the lives of others and indicated a depraved mind without regard for human life. The statutory elements having been proved to the jury's satisfaction, Sena was properly convicted.

**{10}** 4. Definition of Depraved Mind. Sena claims that the court erred in refusing his

proposed instruction which would have defined the term "depraved mind." However, the submitted instruction contained a particular limitation which does not accurately reflect state law. Therefore, the refusal was proper.

**{11}** The conviction is affirmed.

**{12} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-017**

**Filing Date: February 8, 1983**

**Docket No. 14,408**

**ROBERT H. GRADY AND PATSY D. GRADY,**

**Plaintiffs-Appellees,**

**and**

**NARCISO ABREAU, ET AL.,**

**Involuntary Plaintiffs-Appellees,**

**v.**

**E. H. MULLINS AND NADINE MULLINS,**

**Defendants-Appellants,**

**v.**

**ALPINE BEARD, ET AL.,**

**Involuntary Defendants-Appellees.**

**APPEAL FROM DISTRICT COURT CATRON COUNTY, Edmund H. Kase, III.**

Motion for Rehearing Denied March 23, 1983

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John W. Reynolds
Silver City

for Plaintiffs-Appellees.

Reserve Sportsmen Association, Pro Se.

Mr. & Mrs. Charlie McCarty, Pro Se.

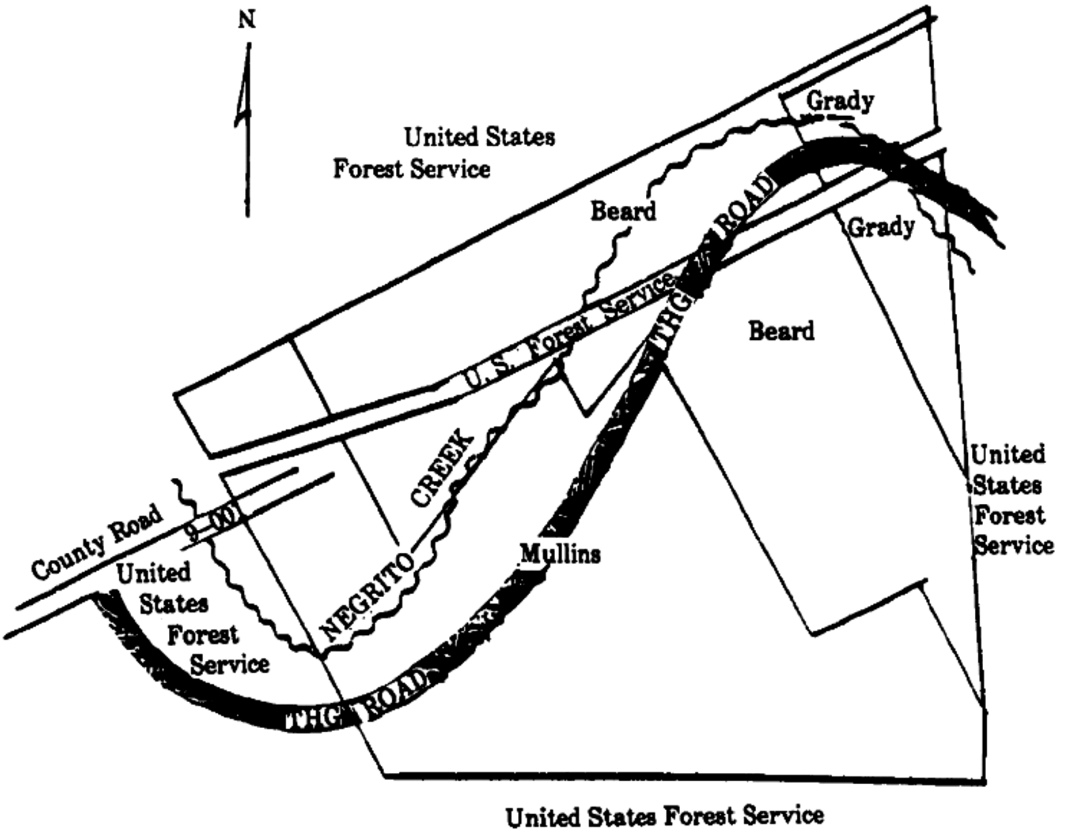
Mrs. Alpine Beard, Pro Se.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** This case involves Rule 19 of the New Mexico Rules of Civil Procedure, and the question of whether the United States is an indispensable party in a suit between parties disputing the closing of a roadway where it passes over private land. We affirm the district court's holding that the United States is not an indispensable party to the suit.

**{2}** A road, used continuously by the public for more than 25 years, runs from a county road and traverses intermittedly across federal and private land. The following sketch illustrates the situation:




In the Spring of 1981, defendants (Mullins) closed the road on their property, preventing plaintiffs (Gradys) from crossing. The portion of the road crossing the Forest Service's land is, and always has been, open to public use.

**{3}** Gradys asked the court to declare the existence of the road across Mullins' land as public by prescriptive use. Mullins thereafter joined numerous parties, including the United States. The district court, however, dismissed the United States for want of jurisdiction. Thereupon, Mullins moved to dismiss Gradys' suit for failure to join an indispensable party. This motion was denied.

**{4}** The district court ruled that the joinder of the United States was not necessary or proper because the determination of whether the roadway across Mullins' land is public by prescriptive use is a determination as to that part of the road only, and not the entire road. That ruling is not inconsistent with the intentions of Rule 19.

**{5}** In **Broussard v. Columbia Gulf Transmission Company,** 398 F.2d 885, 888 (5th Cir. 1968), it was noted that

> The new Rule 19 is designed to ameliorate the catechistic distinction between "necessary" and "indispensable" parties, which had sometimes subordinated logic and reality to historical encrustations. Under the present rule pragmaticals are to be the solvents of the joinder problems, replacing former rigid terminological descriptions of parties. * * * [T]he effect of the parties and on the litigation process is to be the fulcrum of decision.

Similarly, we stated in **Holguin v. Elephant Butte Irrigation Dist.,** 91 N.M. 398, 575 P.2d

88 (1977), that "[t]he obvious purpose behind [Rule 19] is to insure that courts reach decisions regarding indispensability only after a careful and thoughtful analysis as to whether it is feasible to proceed." **Id.** at 401, 575 P.2d at 91. **See also Advisory Committee's Notes to Amendments to Rules of Civil Procedure,** 39 F.R.D. 69, 88-94 (1966).

**{6}** Analysis under Rule 19 reaches four controlling conclusions in this case: (1) the interests of the United States are **separable** from those of the parties before the court; (2) a judgment rendered in the United States' absence will not be prejudicial to it or to those already parties; (3) a judgment rendered in the United States' absence will be adequate; and (4) Gradys will not have an adequate remedy if the suit is dismissed for nonjoinder. **See** N.M.R. Civ. P. 19(b), N.M.S.A. 1978 (Repl. Pamp. 1982).

**{7}** Where the interests of the United States are **separable** from those of the other parties, it is **not** an indispensable party. **Walton v. United States,** 415 F.2d 121 (10th Cir. 1969). Because there is no dispute as to that portion of the road crossing United States Forest Service land, the interests of the United States are separable from the parties before the court.

**{8}** We do not favor leaving any party without a remedy because of an "ideal desire to have all interested persons before the court." 3 J. Moore, **Moore's Federal Practice** § 19.07, at 2154-55 (2d ed. 1964). The fundamental issue here is the characterization of the road over Mullins' land. Assuming, **arguendo,** that the interests of the United States are not separate, failure to join them as a party may possibly lead to future litigation by the United States in seeking a declaration of the rest of the road in question. Nevertheless, as undesirable as it may be to have the possibility of another suit involving the same issue, it is less desirable to leave Gradys without any remedy at all. **See Bourdieu v. Pacific Oil Co.,** 299 U.S. 65, 57 S. Ct. 51, 81 L. Ed. 42 (1936). If we were to carry Mullins' argument to its logical extension, an effort to close an interstate highway would require that every state through which the highway traversed be joined as a party. This makes little sense.

**{9}** We therefore hold that the district court did not err in determining that the United States is not an indispensable party such as to require joinder under Rule 19. We further hold that the district court correctly exercised its discretion in refusing to dismiss Gradys' suit.

**{10}** Affirmed.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-018**

**Filing Date: February 10, 1983**

**Docket No. 14,475**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**ANGEL MARTINEZ,**

**Defendant-Appellant.**

**APPEAL FROM DISTRICT COURT**
**BERNALILLO COUNTY,**
**Harry E. Stowers, Jr., District Judge.**

Mary Lou Carson
Flagstaff, Arizona

Michael Dickman, Appellate Defender
Santa Fe, New Mexico

for Appellant.

Jeff Bingaman, Attorney General
Carol Vigil, Assistant Attorney General
Santa Fe, New Mexico

for Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** On July 16, 1982, the district court of Bernalillo County convicted Angel Martinez of felony murder, aggravated burglary, armed robbery and contributing to the delinquency of a minor. She appeals these convictions and raises six arguments in her defense.

**I.**

**{2}** Martinez argues that the trial court abused its discretion when it failed to control her emotional outbursts in front of the jury. After her first outburst, Martinez' attorney moved for a mistrial on the ground that her actions were so outrageous that she could not receive a fair trial. The trial court denied the motion and admonished the jury to totally disregard the outburst.

**{3}** Martinez' second outburst in front of the jury occurred after the prosecutor, in her closing statement, said "I give you the woman who's responsible for the death." The trial court admonished the jury to totally disregard the outburst. Shortly after the second outburst, and after the jury left the courtroom, Martinez threatened the prosecutor with physical harm. Essentially, Martinez claims she had a right to be removed from the courtroom at the time of her outburst. We note that a defendant has a right to be present at trial, but no right to be removed from the courtroom. **Illinois v. Allen,** 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). In **Allen,** the Supreme Court held that a defendant can lose his right to be present at trial if, following the judge's warning that he will be removed if his disruptive behavior continues, he nevertheless insists upon continuing his disruptive conduct. Generally, as soon as the defendant is willing to properly behave himself, he can reclaim his right to be present. After her first outburst, Martinez apologized to the court and calmed down. By the time the second outburst occurred, the trial had almost concluded and there was no need for her removal. We also note that although Martinez motioned for a mistrial, neither she nor her attorney ever asked to be removed from the courtroom. We have previously held that the decision to grant or deny a request for mistrial is left to the sound discretion of the trial court. **State v. Manus,** 93 N.M. 95, 597 P.2d 280 (1979). We find that the trial court's admonition after Martinez' first outburst was sufficient to purge the jury of any

possible prejudice. As for the second outburst, it occurred at the very conclusion of trial and was properly dealt with by the trial court when it instructed the jury. Thus, we find there was no error in the manner in which the trial court handled the situation.

**II.**

**{4}** Martinez also argues that there was prosecutorial misconduct when the prosecutor referred to her as a "chola punk" in closing arguments. We recognize that this type of remark is inappropriate and should not have been made. However, we do not believe this remark is sufficient to warrant a new trial. **See State v. Vigil,** 86 N.M. 388, 524 P.2d 1004 (Ct. App.), **cert. denied,** 86 N.M. 372, 524 P.2d 988 (1974). This is especially true in light of the fact that the trial court strongly reprimanded the prosecutor for the remark and it instructed the jury to disregard it. We conclude that any prejudice which occurred as a result of the comment was adequately cured by the trial court's admonition.

**III.**

**{5}** Martinez also contends that the result of the prosecutor standing in the line of vision between herself and a particular witness on the stand deprived the defense of its right to observe the demeanor of the witness, thus resulting in prosecutorial misconduct.

**{6}** The record indicates that Martinez' objection to the prosecutor's alleged activity was made outside the presence of the jury, and that even though Martinez' objection was overruled, the trial court instructed the prosecutor to stand behind the podium for the remainder of the examination. The record also indicates that the prosecutor fully complied with the trial court's admonition and stood behind the podium for the remainder of the examination. We find that the manner in which the trial court handled the prosecutor's alleged conduct eliminated any prejudice which might have occurred. We also recognize that there is a distinction between the demeanor observation of a witness from the right to confront the witness. In **State v. Lunn,** 82 N.M. 526, 484 P.2d 368 (Ct. App. 1971), the court states:

> that the observation of demeanor on the witness stand is a result of cross-examination but is not a part of the confrontation right. Where prior testimony has been properly admitted, the fact finder does not have the opportunity to observe the demeanor of that witness. Thus, it may be doubted that . . . demeanor is an aspect of the constitutional right of confrontation.

**Id.** at 528, 484 P.2d 368. Because Martinez conducted a thorough examination of the witness, we find none of her rights were violated. Thus, we find no error.

**IV.**

**{7}** Martinez' fourth argument is that fundamental error occurred when the trial court allowed witness Torrez to testify after his statement was read into the record because Martinez could not have cross-examined the statement when it was introduced.

**{8}** At trial, Torrez was called to the stand to testify concerning a statement give to police. However, when placed on the stand, he declined to testify and was cited for contempt. The statement he had given to police was then admitted and read to the jury. We hold that the statement is admissible. Pursuant to N.M.R. Evid., 804(a)(2), N.M.S.A. 1978, the declarant of this statement was unavailable in that he refused to testify concerning the subject matter of his statement, despite a court order to do so. Later in the trial, Torrez agreed to testify and did so without objection from Martinez. After Torrez' testimony, Martinez had the opportunity to fully cross-examine the witness concerning the statement. Thus, Martinez' claim that she could not cross-examine the statement's content must fail.

**V.**

**{9}** Next, Martinez contends that her confession to the District Attorney's office was not voluntary. On May 5, 1981, Martinez, against the advice of her attorney, called the District Attorney's office and offered to plead guilty to the murder on the condition that her sentencing be held immediately and that certain co-defendants be released. The District Attorney's office then informed Martinez that it would review the statement and decide what agreement to make with her. Martinez then confessed, however, her sentencing did not occur immediately. On May 7, her attorney filed an affidavit stating that he had not given permission for Martinez' confession to be taken. That same day, the court sealed her confession. She argues that her confession was involuntary because her unilateral requests were conditions precedent which never occurred. This argument is not supported by the record. The record indicates that the reason the prosecution did not sentence Martinez immediately after her confession was because Martinez' motion to suppress her confession slowed the handling of the case. Until this Court disposed of this motion and Martinez' interlocutory appeal, the proceedings in the district court were stayed. N.M.R. Crim. App. 203(d), N.M.S.A. 1978. We find it noteworthy that it was Martinez' affidavit, filed two days after the May 5 confession, which precluded the State from proceeding with the case and sentencing her immediately. Additionally, Martinez was repeatedly given her **Miranda** rights. She was also urged to talk to her attorney before she made the statement. However, Martinez repeatedly insisted on making the statement, contrary to the advice of her attorney. Thus, we find no evidence to support Martinez' claim that her statement was involuntary.

**VI.**

**{10}** Martinez' final assertion is that the trial court abused its discretion by refusing to sequester the jury during the second day of their deliberations after the media coverage of Martinez' threats to the prosecutor. After the jury retired for deliberations, Martinez threatened the prosecutor with physical harm. The media covered the incident that afternoon and the following morning in local newspapers and on television. Concerned about the possible influence the media coverage might have on the trial, Martinez motioned to sequester the jury. The court denied the motion, and the jury returned a verdict the following morning. As a reviewing court, we are bound by law which states that the extent of voir dire is left to the sound discretion of the trial court and limited only by the essential demands of fairness. **United States v. Crawford,** 444 F.2d 1404 (10th Cir. 1971), **cert. denied,** 404 U.S. 855, 92 S. Ct. 98, 30 L. Ed. 2d 95 (1971); **see also State v. Rodriquez,** 94 N.M. 801, 617 P.2d 1316 (1980). Therefore, we will not overturn the decision of the trial court absent a clear abuse of discretion. **Grammer v. Kohlhaas Tank & Equipment Co.,** 93 N.M. 685, 604 P.2d 823 (Ct. App. 1979). In the instant case, media was allowed into the courtroom and the trial court admonished the jury as to its responsibility. Nothing in the record indicates that any of the jurors knew of the threats. We find no evidence to suggest that the jury failed to perform its duty to give Martinez a fair and impartial trial. Thus, we hold that the trial court did not abuse its discretion in refusing to voir dire the jury on the second day of deliberation.

**VII.**

**{11}** Accordingly, we affirm Martinez' convictions for felony murder, armed robbery, aggravated burglary and contributing to the delinquency of a minor.

**{12} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-020**

**Filing Date: February 18, 1983**

**Docket No. 14,488**

**ARAGON & McCOY, A PARTNERSHIP, ET AL.,**

**Plaintiffs-Appellants,**

**v.**

**ALBUQUERQUE NATIONAL BANK, AS TRUSTEE FOR THE ESTATE OF ALVA J. COATS, ET AL.,**

**Defendants-Appellees.**

**APPEAL FROM DISTRICT COURT BERNALILLO COUNTY,**
**George H. Perez, District Judge.**

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Anita P. Miller, Assistant City Attorney
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for Defendant-Appellee City of Albuquerque.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** Appellant Aragon & McCoy (Aragon), a partnership, sued the City of Albuquerque to recover damages it incurred when the City failed to issue additional building permits beyond the initial permit for Phase I of its construction project. The complaint was filed on February 9, 1979, and in February 1982, the trial court entered summary judgment on behalf of the City on two grounds: 1) sovereign immunity and 2) the statute of limitations. Aragon now appeals. We affirm.

**{2}** Many of the relevant facts of this case are recited in **Nesbit v. City of Albuquerque,** 91 N.M. 455, 575 P.2d 1340 (1977), in which the City litigated similar issues that arose out of this same construction project. However, for purposes of clarity, we outline the factual history of this case in relevant detail.

**I.**

**{3}** In 1966, Byron Nesbit and Alva Coats applied for a zoning change allowing a broader range of uses regarding certain construction site property in Bernalillo County. The request was granted, and an initial development plan for 83 condominium units was approved. In 1972, Nesbit and Coats applied for a new site development plan which increased the density from 83 condominiums to 287 efficiencies and apartments. In 1973, the density was reduced from 287 to 274 units and the district court approved the new site development plan. In 1974, Aragon, now associated with Nesbit and Coats, spoke with a city official who allegedly informed it that the property was approved for 274 units. The project to build the units laid dormant for several years while financing was obtained. In September 1976, Aragon obtained a building permit for Phase I of the project. When construction began in November 1976, neighbors surrounding the construction site brought a motion to intervene and a motion to set aside the 1972 district court decision. Both motions were granted by the district court,

and in February 1977, the change in the 1972 site development plan was invalidated on the ground that proper notice of the re-zoning had not been given to the intervening neighbors. Thus, at this time, the only zoning in effect for the property was the 83 units approved in 1966. In November 1976, after construction began, Aragon was sued by the City. However, Aragon continued to expend substantial sums of money for its construction project and thereafter joined Nesbit and Coats to fight the City.

**{4}** In February 1977, the City sent Aragon a letter indicating that although Aragon could complete Phase I of the project, no future building permits would be issued because the matter was in litigation and the permit might be found invalid. Also, testimony was heard which indicated that when Aragon's architect for the project went to City Hall to "walk around his plans," he saw a notation on the site development plan that stated "[h]old all permits pending court action." In December 1977, this Court affirmed the February 1977 district court decision which invalidated the 1972 site development plan. **Nesbit v. City of Albuquerque, supra.** Between the time we affirmed this decision and the City denied Aragon a permit for Phase II, Aragon submitted a new site development plan proposing a density of 252 units. The City denied this plan. Alternatively, Aragon resubmitted a new plan which reduced the density to 200 units. The City Planning Commission denied the plan and said it would not approve a density of more than 16 units per acre for 141 units for the site. Finally, Aragon submitted a plan for 16 units acre. This plan was approved.

**II.**

**{5}** Aragon argues that the City is not immune from suit based on the theories of zoning estoppel and inverse condemnation.

**{6}** Aragon notes that the City issued building permits for Phase I of the project, then refused to issue building permits for additional phases, despite the fact that the City had approved Aragon's site development plan. Because a valid permit was issued for Phase I, and Aragon made substantial expenditures in reliance on the existing zoning of the property, Aragon argues that any subsequent change in zoning by the City amounts to zoning estoppel. In support of this argument, Aragon cites **Sautto v. Edenboro, Inc. Apartments,** 84 N.J. Super. 461, 202 A.2d 466 (1964), and **Tremarco Corp. v. Garzio,** 32 N.J. 448, 161 A.2d 241 (1960).

**{7}** In **Sautto,** the New Jersey Supreme Court stated that a previously issued permit is not per se protected from revocation or subsequent changes in zoning, and that reliance on the permit must be clearly established for an estoppel argument to succeed. In **Sautto,** a builder was issued a building permit, and the municipal building inspector assured him that changes in the zoning would not affect his property. Because the builder made financial commitments based on this representation, the City was held to be estopped from not issuing the building permit.

**{8}** Sautto is easily distinguished from the present case. Unlike the building inspector in **Sautto,** the city official with whom Aragon spoke made no assurances that Aragon could build the 274 units; he merely responded to a question which solicited his opinion as to how the existing property was zoned at the time. Admittedly, Aragon made financial commitments which were adversely affected by the rezoning. However, a substantial percentage of these commitments was made after Aragon was put on notice that its zoning was in question and could be found invalid. In the instant case, no representations or assurances were made by the city official from which Aragon could reasonably conclude that it had permission to build. Even if Aragon made its financial commitments based on a firm belief that it would win the pending lawsuit, such a belief is insufficient to support an estoppel argument. The record clearly indicates Aragon was on notice that it was proceeding at its peril if it continued to make these expenditures. Furthermore, even if Aragon had not received this notice, the record also reflects that the bulk of these expenses were made for Phase I rather than Phase II of

the project. Even the expenditures made to pave roads and drain arroyos on the property, allegedly made for Phase II, had to be made anyway in order to complete Phase I. For example, whether 83 or 283 units were planned, arroyos had to be drained and roads had to be built in and around the project.

**{9}** The **Tremarco** case is equally distinguishable. **Tremarco** also involved the issuance of a building permit later invalidated by a change in the zoning of the property. However, like **Sautto,** the builders' reliance in **Tremarco** occurred after specific assurance in writing had been received from a city official that the building permit would be valid in the face of subsequent zoning changes. In the instant case, a lawsuit was pending which could have invalidated the zoning for the entire building project. There is no evidence that the city official gave written or verbal assurances that the project was legal or approved. Rather, he merely stated that the property was currently approved for 274 units. Thus, both **Tremarco** and **Sautto** are factually distinguishable from the instant case and have no application.

**{10}** There is authority which we consider more analogous to the instant case. In **Colonial Inv. Co., Inc. v. City of Leawood,** 7 Kan. App.2d 660, 646 P.2d 1149 (Kan. App. 1982), the plaintiff raised a zoning estoppel argument based on the fact that city officials had made representations to Colonial about the zoning classification before it purchased the property. The court found that the actions and statements made by these officials were made with the specific purpose of inducing Colonial to buy or build on the property. The court found that these statements could not reasonably be construed to be an intent on the part of the officials to induce Colonial to buy the subject property. In the instant case, as in **Colonial,** matter of fact statements about the nature of the zoning were made in response to requests for information. In the instant case, the city official merely responded to Aragon's question regarding the zoning of the property by stating that he believed the property was approved for 274 units. His response was not an inducement. Nor did he make promises, assurances or representations that the City would continue this zoning. Thus, the statements made by the city official in the instant case were not inducements upon which Aragon could have reasonably relied. Accordingly, Aragon's estoppel argument must fail.

**{11}** In conjunction with the equitable argument of estoppel, Aragon raises the constitutional issue of vested rights. Specifically, Aragon argues that the denial of additional permits violated a vested property right it acquired when it's development plan was approved and it was issued a permit for Phase I. This argument is without merit. We have previously held that property owners have no vested rights in a particular zoning classification. **See Miller v. City of Albuquerque,** 89 N.M. 503, 554 P.2d 665 (1976). Furthermore, no particular significance should be attributed to the fact that the City approved Aragon's site development plan, and then later rezoned the property. A site development plan is no more than a particular zoning designation for a piece of property which is just as vulnerable to rezoning, especially when that rezoning is based on the City's valid exercise of its police power and its concern for the health, safety, and welfare of its citizens. Merely because a permit was issued for one part of the construction project does not guarantee vested rights in the remainder of the project. **Rogin v. Bensalem Tp.,** 616 F.2d 680 (3d Cir. 1980). Although zoning laws which reduce the density of dwelling units must be justified by some aspect of the City's police power, we hold that such measures are constitutional if they bear a substantial relation to the public health, safety, morals, or general welfare of its citizens. We find the City's decision to reduce the density of Aragon's proposed dwelling units to be based on these constitutional concerns.

**{12}** Aragon also contends that the City is not immune from suit by virtue of New Mexico's inverse condemnation statute, Section 42A-1-29, N.M.S.A. 1978, which removes the City from sovereign immunity when it "takes or damages" property rights of its citizens without compensation.

Aragon argues that it acquired a constitutionally protected property right when it obtained the initial building permit and that because the City neglected to issue additional permits, its property right in the entire project was taken or damaged without compensation. We disagree.

**{13}** Because Aragon did not raise the issue of inverse condemnation at trial, we hold that it cannot raise this theory for the first time on appeal. **Schreiber v. Armstrong,** 70 N.M 419, 374 P.2d 297 (1962). Even if we were to assume that Aragon had properly raised an inverse condemnation argument at trial, the argument would still fail. The change in the zoning of Aragon's property was based on the concern that any more than 141 units would be too dense a concentration of dwelling units. Such grounds for zoning changes have always been within the valid police power of a municipality on the ground that they further legitimate governmental interests. **City of Santa Fe v. Gamble-Skogmo, Inc.,** 73 N.M. 410, 389 P.2d 13 (1964). This Court has clearly indicated that "only if the governmental regulation deprives the owner of **all beneficial use** of his property will the action be unconstitutional." **Euclid** at 505. (Emphasis added). Aragon obtained a permit and financing for Phase I only. Aragon's beneficial use of and interest in Phase I was not disturbed by the City. In fact, Aragon admits it is certain to make a profit on Phase I of the project. Although Aragon may not reap the profit it could have made had the entire project been developed, it certainly did not lose all beneficial use of the property. Thus, we hold that no taking or inverse condemnation occurred.

**III.**

**{14}** The City, in its motion to dismiss, argued that this suit is barred by applicable statutes of limitations. The trial court agreed with this argument and treated the motion as a summary judgment. Aragon argues that if this is a condemnation case, the complaint filed on February 9, 1979, was within the three-year statute of limitations pursuant to section 42A-1-31, N.M.S.A. 1978 (1981 Repl. Pamp.). Alternatively, Aragon argues that if this is an action arising in tort, the filing of its complaint was within the two-year statute of limitations required by the Tort Claims Act.

**{15}** Because Aragon's initial complaint alleges that the zoning change arose from the negligent acts of the City in failing to issue additional permits, and because Aragon failed to argue inverse condemnation in the court below, we determine that the case sounds in tort and should therefore be governed by the two-year statute of limitations required by the Tort Claims Act. The date on which Aragon filed its complaint (February 9, 1979) is undisputed, however, the time the two-year statute of limitations began to run is argued by the parties.

**{16}** We hold that Section 41-4-15A, N.M.S.A. 1978, of the Tort Claims Act is dispositive:

> A. Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of **occurrence resulting in loss, injury** or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability. (Emphasis added).

**{17}** The plain language of the statute indicates that the period of limitations began to run when an "occurrence resulting in loss" took place. Until such a loss took place, the statute of limitations could not begin to run.

**{18}** Like the trial court, we agree that the date of accrual could have begun on several dates when Aragon suffered loss or injury. In October 1976, the neighbors filed suit which eventually resulted in the invalidation of Aragon's site development plan. On February 3, 1977, Aragon's application for a Phase II building permit was denied. Aragon submits that injury or loss occurred when the Supreme Court ruled on March 31, 1978. In our opinion, the very last

event which might be characterized as a loss or injury was the district court's February 8, 1977 order which vacated the 1972 decision approving the construction of 287 dwelling units. As a result of this order, Aragon's approval to build dwelling units was reduced in number from 287 to 83 units. In our view, this is a clear "occurrence resulting in loss" and thus marks the last date on which the statute could have begun to accrue. Because Aragon filed this action on February 9, 1979, over two years from the date of this order, we conclude that it is barred by the Tort Claims Act.

**IV.**

**{19}** Accordingly, we affirm the trial court's summary judgment dismissing all claims against the City.

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-026**

**Filing Date: March 16, 1983**

**Docket No. 14,114**

**COMMUNITY PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, NEW MEXICO ELECTRIC SERVICE COMPANY, PUBLIC SERVICE COMPANY OF NEW MEXICO AND SOUTHWESTERN PUBLIC SERVICE COMPANY,**

**Petitioners-Appellants,**

**v.**

**NEW MEXICO PUBLIC SERVICE COMMISSION,**

**Respondent-Appellee,**

**and**

**NEW MEXICO ATTORNEY GENERAL, ET AL.,**

**Intervenors-Appellees.**

**APPEAL FROM DISTRICT COURT OF SANTA FE COUNTY, Edwin L. Felter, District Judge.**

Hinkle, Cox, Eaton, Coffield & Hensley
Paul J. Kelly, Jr.
Roswell, New Mexico

for Southwestern Public Service Co. and Community Public Service Co. and N.M. Electric Service Co.

Keleher & McLeod
Richard B. Cole
Robert H. Clark
Albuquerque, New Mexico

for Public Service Co. and Community Public Service Co. & N.M. Electric Serv. Co.

William Royer
El Paso, Texas

for El Paso Electric.

Jeff Bingaman, Attorney General
Jeffrey Fornaciari
Paul L. Biderman, Assistant Attorneys General
Santa Fe, New Mexico

for Intervenors.

Patrick T. Ortiz, Commission Counsel
Geoffrey Sloan
Charles F. Noble
Staff Attorneys
Santa Fe, New Mexico

for N.M. Public Service Comm.

Suedeen G. Kelly
Melvin M. Eisenstadt
Albuquerque, New Mexico

for Energy Consumers of N.M., et al.

## OPINION

**PAYNE, Chief Justice.**

**{1}** This case presents several questions of first impression in New Mexico relating to the Public Service Commission's (PSC) regulation of public utilities.

**{2}** In January 1978, the PSC issued a notice of rulemaking regarding its intention to adopt a General Order. This was done pursuant to 16 U.S.C. Section 2601 (1978) requiring state regulatory authorities to hold hearings and adopt standards relating to various aspects of utility businesses. The proposed General Order set forth the

PSC policy with respect to, **inter alia,** rate-setting treatment of public utility expenditures for advertising. The PSC also directed all gas and electric utilities within its jurisdiction to submit a list of these expenditures for the 1977 calendar year. The utilities submitted the requested information, and in May 1978, the PSC held a non-adversary, public hearing regarding the General Order.

**{3}** In August 1979, the PSC approved and issued its order, entitled General Order No. 31 (G.O.31). The PSC denied applications for rehearing filed by several utilities. In November 1979, Community Public Service Company, et al. (Appellants), petitioned for review in district court pursuant to Section 62-11-1, N.M.S.A. 1978 (Cum. Supp. 1982). The district court dismissed the petition and found that it was without jurisdiction because none of the Appellants were "parties" to the proceeding according to Section 62-11-1, and therefore lacked standing. The court also found that "even if there were such standing, [Appellants'] petition for review is barred by the limitation of time specified in Section 62-11-1."

**I.**

**{4}** The term "party," as used in Section 62-11-1, is not statutorily defined. The PSC notes that the meaning of the term has jurisdictional impact because any party to a proceeding before the PSC may petition for review. The PSC argues that Appellants were not parties because the proceeding involved was one of rulemaking for prospective application of standards which, because no one's rights were foreclosed by the outcome, did not raise an immediate, adversarial controversy.

**{5}** We cannot adopt the PSC's argument for two reasons. First, the statutory language of Section 62-11-1 is too broad to support PSC's contention. The statute states in pertinent part: **"Any** party to **any** proceeding before the commission may file a petition. . . ." (Emphasis added.) In our view, this language is broad and requires liberal application which clearly encompasses Appellants. Therefore, we hold that Appellants were parties to the proceeding. Second, our interpretation of "party" fulfills the clear purposes of G.O.31. In the opinion attached to G.O.31, the PSC listed two main purposes to be accomplished by G.O.31:

> (1) to reduce the length and expense of rate cases by instituting a general policy regarding expense items which often have minor dollar impact upon the rates ultimately charged ratepayers,
>
> * * * * * *
>
> (3) to foster the establishment of just and reasonable rates to consumers.

**{6}** If review of a General Order originating from a rulemaking proceeding were unavailable, as would be the case if there were no parties to the proceeding, objections to the policy expressed in the order could be raised only in individual cases. This time-consuming process would defeat the public policy of reducing the length and expense of rate cases. On the other hand, complete non-review of these cases would be equally undesirable. In our view, judicial review is the means specified by the Legislature to assure that rates are just and reasonable. It is clear that unnecessary postponement of this review cannot advance the legislative scheme to reduce the length and expense of rate cases. These considerations are especially compelling where, as here, the General Order governs items worth relatively minor sums of money. Even if the General Order were improper or unreasonable, its impact would be so minor that the utilities would probably not suspend rates in order to to appeal issues involving such minor expenses.

**STATUTORY LIMITATION PERIOD**

**{7}** Section 62-11-1 requires that in order to be heard "a petition for review must be filed within thirty days after the entry of the commission's order." We note that the district court does not state how Section 62-11-1 would bar Appellants' claims if they had standing. The PSC offers two plausible bases for the trial court's ruling that Appellants

lacked standing. The PSC states that all of Appellants' challenges to G.O.31 are either alleged due process violations arising under G.O.29's rulemaking procedures, or are alleged problems with the standards themselves which were applied to Appellants before the official adoption of G.O.31. Because these problems and violations were never challenged, we choose to address them now.

**1. The challenge of G.O.31 is actually a challenge of G.O.29.**

**{8}** G.O.29 became effective in June 1977. It establishes a rulemaking procedure which enables the PSC "to secure the views and statements of all interested persons concerning rules and regulations adopted pursuant to the Public Utility Act, § 68-5-1, N.M.S.A. 1953." PREAMBLE, G.O.29. G.O.29 states in pertinent part:

> 4. **RULEMAKING PREREQUISITES:** Prior to the adoption, amendment or repeal of any rule, the Commission shall, at least 45 days prior to its proposed action:
>
> a. publish notice of its proposed action in newspapers of general circulation in the State of New Mexico * * *.
>
> b. notify the utilities under its jurisdiction by mail * * *.
>
> c. (1) give the date, time and place of any public hearing and state the manner in which comments may be submitted to the Commission by interested persons * * *.
>
> d. [a]fford all interested persons reasonable opportunity to submit written data, views or arguments, in support of or opposition to, a proposed rule * * *.
>
> * * * * * *

Essentially, G.O.29 requires the PSC to give advance notice of proposed action in order to afford all interested persons reasonable opportunity to submit data and arguments relating to a proposed rule, and to adopt any rule or regulation by issuing a General Order. It also permits the PSC to appoint a hearing officer and to hold hearings at which the rules of civil procedure and evidence are not enforced.

**{9}** The PSC argues that it followed G.O.29 when it adopted G.O.31, and that Appellants' attack is actually a collateral attack on G.O.29. We hold that any attack on G.O.31 is time-barred because no challenge to G.O.29 was brought within the 30-day period set out in Section 62-11-1. Appellants argue that G.O.31 is not a "rule or regulation" and thus its adoption was not governed by G.O.29. Further, they argue that under Section 62-10-1, N.M.S.A. 1978, the PSC must hold a hearing before adopting any order "affecting" rates. Section 62-10-1 states in relevant part:

> Upon a complaint made and filed by any municipality, or by any person or party affected, that any rate, service regulation, classification, practice or service in effect or proposed to be made effective is in any respect unfair, unreasonable, unjust or inadequate, the commission may proceed, * * * to hold such hearing as it may deem necessary or appropriate; but no such hearing shall be had without notice, and no order affecting such rates, service regulations, classifications, practice or service complained of shall be entered by the commission without a hearing and notice thereof * * *.

G.O.31 clearly affects rates, and therefore could not be adopted without a prior hearing. Even if G.O.29 was followed when G.O.31 was adopted, G.O.29 merely allows for a hearing which the PSC declined to hold. Thus, we find that the challenge is directed to the PSC's failure to hold a hearing and not to G.O.29. Because G.O.29 fulfills the statutory requirement of Section 62-10-1 that a hearing be held, we need not reach the question whether G.O.29 applies to the adoption of orders like G.O.31. Appellants appear to be challenging the failure of the PSC to comply with Section 62-10-1, within the framework of G.O.29. Thus, we find no collateral attack on

G.O.29, and that the petition was not time-barred on this ground.

**2. Appellants' failure to appeal individual rate case determinations constituted waiver of their challenge against G.O.31.**

**{10}** All but one of Appellants has individually accepted treatment under the policies expressed in G.O.31. This treatment occurred in rate cases while G.O.31 was pending. In none of those cases did Appellants pursue an appeal on the basis of the application of G.O.31 policy. Based on these facts, the PSC argues that Appellants waived their challenge to G.O.31.

**{11}** This argument is entirely without merit. First, it reaffirms what we stated previously, namely, that utilities would not suspend and challenge rates in order to appeal issues involving minor sums of money. Second, there is no basis for concluding that acceptance of a particular treatment in one case constitutes a waiver of objection to similar treatment in future cases. Even if the PSC's argument had merit, we hold that it would not justify dismissal of utilities to which the policy was not applied.

**SCOPE OF HEARING**

**{12}** Section 62-10-1 does not specify the minimum requirements of a "hearing." Under G.O.29, the PSC provided for the appointment of hearing officers and for a record of the hearing. Although the rules of civil procedure and evidence are not enforced at such hearings, comments by all interested persons may be heard. No authority has been cited which would require more extensive procedural requirements than those outlined in G.O.29. Thus, we hold that G.O.29 hearings will satisfy the requirements of Section 62-10-1.

**{13}** Appellants also discuss PSC's hearing procedures set forth in its Second Revised General Order No. 1. We note, however, that this order was not in effect at the time G.O.31 was being considered and therefore has no bearing on the present case.

**CONSIDERATION OF THE MERITS**

**{14}** Under Section 62-11-1, the statute in effect at the time the events in this case were occurring, petitions for review were directed to the district court. This statute has now been amended to direct such petitions to this Court. Appellants urge this Court to decide the instant case on the merits because of the time delay which has already occurred. We decline to do so for two reasons. First, we must apply the statute in effect at the time the events occurred in this case. This requires the district court, rather than this Court, to hear the merits. Second, in order to rule on the merits, we would have to permit the same full argument and presentation of evidence introduced at the hearing. For this Court to do so, in lieu of the district court, review on the merits would be clearly improper. § 62-11-1.

**{15}** Accordingly, the judgment is reversed and remanded with directions to consider the merits.

**{16} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**HARRY STOWERS,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-034**

**Filing Date: March 30, 1983**

**Docket No. 14,554**

**JACK CRUMPTON AND HIS WIFE, WANDA CRUMPTON,**

**Plaintiffs-Appellants,**

**v.**

**HUMANA, INC., A CORPORATION, AND MARY HARPER, R.N.,**

**Defendant-Appellees.**

**APPEAL FROM DISTRICT COURT LEA COUNTY,**
**N. Randolph Reese, District Judge.**

Harvey C. Markley
Lovington, New Mexico

for Appellants.

Atwood, Malone, Mann & Cooter
Bob F. Turner
Roswell, New Mexico

for Appellees.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** This is a frivolous appeal. We also note that there is a strong indication in the record that counsel for the appellant ineptly and perhaps negligently handled his client's case. Counsel for the appellant failed to file suit before the applicable statute of limitations had run. We are disappointed when members of our State Bar betray the trust and confidence of their clients by engaging in careless and unprofessional practice.

**{2}** On February 8, 1979, Wanda Crumpton underwent surgery at Llano Estacado Medical Center in Hobbs. She alleged that she sustained injuries to her neck and legs when an attending nurse attempted to lower her hospital bed on February 11, 1979. Her suit was filed more than three years later on February 15, 1982. The trial court granted a motion for summary judgment on the ground that the suit was barred by the three-year statute of limitations. § 41-5-13, N.M.S.A. 1978 (Repl. Pamp. 1982); § 37-1-8, N.M.S.A. 1978. Crumpton now appeals and argues that the exact date of her injury may not be ascertainable.

**I.**

**{3}** Crumpton argues that her injury was not ascertainable until some time after the accident occurred. Further, she contends that the statute of limitations should have been tolled during the time the parties were negotiating.

**{4}** These arguments are entirely without merit. In her deposition, Crumpton plainly testified that her injuries occurred on February 11, 1979. She also testified that she is still having problems in her shoulders, legs and sides which she attributed to the February 11, 1979 incident. Crumpton offers no evidence to contradict the fact that the alleged negligent act and injury occurred simultaneously on February 11, 1979. In our view, the fact that she had continuing treatments and hospitalizations after the injury does not necessarily make the date of the injury unascertainable.

**{5}** Under both the Medical Malpractice Act, Section 41-5-13, and the general three-year statute of limitations, Section 37-1-8, Crumpton's suit is barred. These statutes clearly indicate that the statute of limitations commences running from the **date of injury** or **the date of the alleged malpractice.** In **Peralta v. Martinez,** 90 N.M. 391, 564 P.2d 194 (Ct. App. 1977), **cert. denied,** 90 N.M. 636, 567 P.2d 485 (1977), the Court of Appeals stated at page 394:

> 'The injury is done when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable'. . . . We hold the limitation period begins to run from the time the injury manifests itself in a physically objective manner **and** is ascertainable.

**{6}** Crumpton cites no authority for her argument that the statute of limitations should be tolled during the time when the parties were negotiating a settlement. The record indicates that defendants did not fraudulently lead Crumpton to believe that the case would be settled at some future date. In fact, the record indicates that in May 1981, defendants sent Crumpton a letter wherein defendants made a final offer for a compromise settlement of the case.

**{7}** Accordingly, we affirm the trial court's grant of summary judgment against Crumpton. Because we determine this appeal to be frivolous and entirely without merit, costs and attorneys fees are to be born by appellants.

**{8} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM RIORDAN,**
**Justice**

**HARRY E. STOWERS,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-035**

**Filing Date: March 30, 1983**

**Docket No. 14,492**

**SECURITY MUTUAL CASUALTY COMPANY,**

**Plaintiff-Appellant,**

**v.**

**JAMES F. O'BRIEN AND O'BRIEN ENTERPRISES, INC., PEGASUS AERIAL SPORTS, INC.; JUDITH A. McKINNEY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN L. McKINNEY, DECEASED; JACK E. JOHNSON, HOWARD H. IRBY AND JOHN L. McKINNEY, DECEASED, D/B/A AERO ENTERPRISES; RODNEY JONES; SKY SCENE, INC., AND ROBERT ELLSWORTH,**

**Defendants-Appellees.**

**ORIGINAL PROCEEDING ON CERTIORARI.**

Motion for Rehearing Denied May 6, 1983

Civerolo, Hansen & Wolf, P.A.
Carl J. Butkus
Albuquerque, New Mexico

Hugh C. Griffin
Lord, Bissell & Brook
Chicago, Illinois

for Plaintiff-Appellant.

Robinson, Stevens & Wainwright
Paul S. Wainwright
Albuquerque, New Mexico

for Defendant-Appellee.

Rodey, Dickason, Sloan, Akin & Robb, P.A.
Albuquerque, New Mexico

for Plaintiff-in-Intervention-Appellee, Proprietors Ins. Co.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** James F. O'Brien, owner of a private aircraft, obtained a declaratory judgment against Security Mutual Casualty Company, the insurer of his aircraft. The trial court held that the aviation insurance policies Security had issued O'Brien afforded coverage. Security appealed to the Court of Appeals, which affirmed the decision of the trial court. We granted certiorari and reverse the decisions of both courts below. Security raises several issues on appeal. However, we will limit our opinion to the dispositive issue of whether a causal connection between the exclusion and the accident is essential to a denial of coverage.

**{2}** The facts of this case are not in dispute. In 1975, Security issued O'Brien two insurance policies which insured his aircraft. One policy provided coverage for the hull of the aircraft, the other provided liability coverage. The exclusion at issue in the hull policy specifically stated:

> THIS POLICY DOES NOT APPLY:—* * *
> (d) while the aircraft is in flight, unless its Airworthiness Certificate is in full force and effect.

The exclusion at issue in the liability policy stated:

> THIS POLICY DOES NOT APPLY:—* * *
> (2) While the Aircraft is in flight, unless its

> Airworthiness Certification is in full force and effect.

**{3}** O'Brien leased the aircraft to Pegasus Aerial Sports. Thereafter, Pegasus rented the aircraft to Ellsworth. On July 14, 1979, while piloting the aircraft in Albuquerque, Ellsworth collided with another plane. Security denied coverage based on the two exclusions set out above. Specifically, it claimed that the failure to perform a timely 1979 annual inspection on the aircraft terminated both the Airworthiness Certificate and Certification, and caused the insurance coverage to automatically lapse. Before trial, Security stipulated that there was no pre-crash malfunction of the aircraft. The courts below held that because there was no causal connection between the exclusion and the accident, Security could not deny coverage. We disagree and reverse the Court of Appeals holding that proof of a causal connection between the accident and the policy exclusion is required before coverage can be denied.

**{4}** There appears to be a split of authority in jurisdictions which have passed on this question. Each of the parties on appeal has cited a number of cases from other jurisdictions that tend to support their respective positions. However, the significance of these cases is questionable because the issue before this Court is most appropriately resolved by resort to New Mexico law.

**{5}** In **Peterson v. Romero,** 88 N.M. 483, 542 P.2d 434 (Ct. App. 1975), the Court of Appeals held that a causal connection between a policy exclusion and an automobile accident did not have no be shown to deny coverage. In **Peterson,** an 18-year old boy was killed while driving a car rented to his father. The insurance provisions of the rental contract excluded coverage if the driver was not 21 years of age. The trial court held that because the decedent was under 21 years of age, no triable issue of material fact existed and summary judgment should be granted. In **Peterson,** the fact that decedent was 18 instead of 21 bore no causal relationship to the automobile accident. The appellate court specifically held that insurance coverage under the rental contract was properly denied because the "[c]ausal connection between decedent's age and the accident did not have to be shown." **Id.** at 486, 542 P.2d 434. (Citations omitted.) Similarly, in the instant case, there is no causal connection between the lack of an effective Airworthiness Certificate or Certification and the cause of the airplane crash.

**{6}** O'Brien attempts to refute **Peterson** by arguing the holding of **Foundation Reserve Ins. Co. v. Esquibel,** 94 N.M. 132, 607 P.2d 1150 (1980), which held that an insurer must show "substantial prejudice" before it can be relieved of its obligations under an insurance policy. **Esquibel** is easily distinguished from the instant case because it involved a "condition subsequent" rather than specific policy exclusions. The distinction between a "condition subsequent" and an exclusion is stated at 7 **Couch on Insurance** 2d (1961), Sec. 36.48:

> A condition subsequent is to be distinguished from an exclusion from the coverage: the breach of the former is to terminate or suspend the insurance, while the effect of the latter is to declare that there never was insurance with respect to the excluded risk * * *.

We find this distinction to be determinative. Although "substantial prejudice" is relevant to condition subsequent clauses, it cannot be applied to specific policy exclusions. **Sanchez v. Kemper Ins. Companies,** 96 N.M. 466, 632 P.2d 343 (1981). Because the instant case involves policy exclusions, the issue of substantial prejudice is irrelevant, and **Esquibel** cannot apply. Thus, we hold that the Court of Appeals erred in applying **Esquibel** to the instant case.

**{7}** Even if **Peterson** were not dispositive on the issue of causal connection in New Mexico, we would be persuaded by decisions from jurisdictions which have also permitted an insurer to deny coverage in aviation insurance policies even though the exclusion clause had no causal relationship with the accident. **Hollywood Flying Service v. Compass Ins. Co.,** 597 F.2d 507 (5th Cir. 1979); **Bruce v. Lumberman's Mutual**

**Casualty Company,** 222 F.2d 642 (4th Cir. 1955); **Ochs v. Avemco Ins. Co.,** 54 Or. App. 768, 636 P.2d 421 (1981); **Macalco, Inc. v. Gulf Ins. Co.,** 550 S.W.2d 883 (Mo. App. 1977). We hold that a causal connection between an exclusion clause and an accident is not necessarily essential before coverage can be denied. In **Glades Flying Club v. Americas Aviation & M. Ins. Co.,** 235 So.2d 18 (Fla. App. 1970), a Florida court, faced with a similar set of facts and an identical policy exclusion, held that no causal connection was needed. The court stated:

> An aircraft insurance policy may validly condition liability coverage on compliance with a governmental regulation and, while non-compliance with such a regulation continues, the insurance is suspended as if it had never been in force. There need be no causal connection between the non-compliance and the loss or injury. (Citations omitted.)

**Id.** at 20. To hold otherwise would allow courts to ignore the plain language of insurance policy exclusions whenever they feel an insurer should not be allowed to avoid liability for an accident unrelated to a policy exclusion. This rationale is contrary to substantial legal precedent as well as long-standing public policy. Insurance coverage must not be afforded aircraft owners who ignore or refuse to comply with established certification requirements commonly part of policy exclusions.

**{8}** The policy behind such exclusions is clear and unambiguous. The exclusions encourage aircraft owners to obtain annual inspections of their aircraft in order to be certified by the F.A.A. under current applicable Federal Aviation Regulations. These regulations prohibit an aircraft owner from flying his aircraft unless an annual safety inspection is performed. 14 C.F.R. § 91.169 (1982); **see also** 14 C.F.R. §§ 21.181, 91.165 (1982). The subject insurance policies clearly deny coverage when an aircraft is not validly and currently certificated. The record indicates that O'Brien was familiar with the policy and the Federal Aviation Regulations which require the annual inspection. O'Brien also knew that the regulations forbade the operation of his airplane if it had not received an annual inspection within the preceding 12 months. Because no annual inspection was performed on O'Brien's aircraft, the certificate lapsed and the policy exclusion was properly invoked. To hold otherwise, we would have to rewrite the regulations or the insurance policy. This we will not do. In **Electron Machine Corp. v. American Mercury Insurance Co.,** 297 F.2d 212 (5th Cir. 1961), the court stated:

> 'We start with the proposition that our function is not to write insurance contracts. We are not underwriters. We must apply them as written by the parties, (citations omitted), even though the result compelled by the plain words used may appear or be thought to appear to be unreasonable, unduly harsh, or stringent. We cannot ignore them. We cannot substitute others for them.'

**Id.** at 214. Although insurance policies are generally construed in favor of the insured, **Visco Flying Company v. Hansen & Rowland, Inc.,** 184 Cal. App. 2d 829, 7 Cal. Rptr. 853 (1960), policies like the one in the instant case, which do not contravene public policy and are not ambiguous, must be enforced as written. Likewise, we conclude that O'Brien's aviation policy must be enforced as written.

**{9}** Next, we consider the issue of the ambiguity of the exclusion clauses. The Court of Appeals, affirming the trial court, found the exclusion clauses to be inherently ambiguous. Specifically, the court held that the insurance policies were ambiguous because they failed to define the terms "airworthiness certificate," "airworthiness certification" and "full force and effect." In our view, these terms are unambiguous. A copy of the "airworthiness certificate" itself was introduced into evidence at trial and is in the record on appeal. We also find no inherent ambiguity in the term "full force and effect." Because no timely annual inspection was performed, the airworthiness certificate lapsed

and was no longer in "full force and effect." Although O'Brien asserts that these terms are ambiguous, he has not presented evidence to show how they are ambiguous. Additionally, we hold that the fact the exclusions do not specifically refer to the Federal Aviation Regulations, which define these terms, is not fatal. New Mexico has declared these pertinent regulations to be part of the law of this state. **See** § 64-1-2, N.M.S.A. 1978. We have held that when construing insurance policy language, the language "must be construed in the light of the context in which it is used." **Mountain St. M. C. Co. v. Northeastern N.M. Fair Ass'n.,** 84 N.M. 779 at 782, 508 P.2d 588 at 591 (1973). Because this case and the policy exclusions are clearly within the context of aviation, we hold that the pertinent aviation regulations apply. We have previously refused to label policies ambiguous merely because certain "words and terms are not fully defined in the contract." **Cain v. National Old Line Insurance Company,** 85 N.M. 697 at 698, 516 P.2d 668 at 669 (1973).

**{10}** Accordingly, we reverse the decisions of the trial court and Court of Appeals on these issues and remand this case to the trial court for further proceedings consistent with this opinion.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Justice**

**HARRY E. STOWERS,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, respectfully dissenting**
**and adopting the Court of Appeals' opinion**
**as his dissent**

**WILLIAM RIORDAN,**
**Justice, respectfully dissenting**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-048**

**Filing Date: June 2, 1983**

**Docket No. 14,879**

**IN THE MATTER OF HOWARD L. EVERIDGE ATTORNEY AT LAW.**

Barry M. Viuker, Chief Disciplinary Counsel
Albuquerque

for Board.

Howard L. Everidge
Phoenix

Pro Se.

## OPINION

**{1}** In May 1982, Howard L. Everidge (Everidge), an attorney admitted to practice in New Mexico, was served with a Specification of Charges alleging a number of instances of misconduct arising out of his representation of a client in a wrongful death action.

**{2}** It was alleged that in April 1980, Everidge had accepted $6,900.00 from a client to be used as costs in connection with a wrongful death case which arose the accidental death of the client's husband. Everidge was also alleged to have agreed with the client that he would ultimately reimburse her for the costs from his share of any recovery and that if there was no recovery, he would repay her the $6,900.00. It was further alleged that Everidge never placed this money is a trust account, but instead proceeded to use it for personal and business-related expenses. Everidge then had allegedly moved to Arizona without notice to his client before completing any meaningful work or incurring any costs in connection with the case, thereby forcing his client to seek other counsel to complete the litigation. Finally, it was alleged that none of the $6,900.00 had ever been returned to the client.

**{3}** Everidge admitted that he received and spent the $6,900.00 but claimed that it was simply an interest-free loan to him in exchange for his agreement to accept the client's case on a 25% contingency fee basis. He acknowledged that the money had not been repaid but insisted that he intended to repay it when he could afford to do so.

**{4}** Everidge further maintains that the Disciplinary Board (Board) is obligated to honor an agreement between the former chief disciplinary counsel and himself, whereby he was to received a private informal admonition pursuant to NMSA 1978, Supreme Court Rules Governing Discipline, Rule 4(a)(6). Therefore, Everidge claims that he should be given an informal admonition for this conduct, as he was offered by the former chief disciplinary counsel and had orally agreed to accept it. Although the admonition was never formally issued, he contends that the Board and this Court are without jurisdiction to proceed, since this matter was to have been disposed of by this agreement.

**{5}** When the former chief disciplinary counsel resigned his position prior to the administration of the informal admonition, Everidge's file was forwarded to the acting disciplinary counsel. The file was still an "open" file in that the admonition had not been issued. It was reviewed by the chairman of the Board, who directed that further investigation be undertaken. NMSA 1978, Supreme Court Rules Governing Discipline, Rule 8(b), directs that "upon his own motion, the chairman of the board may order an investigation **at any time.** (emphasis added)." We find that the chairman's order to the disciplinary counsel to conduct further investigation of a pending matter was within his power under Rule 8(b).

**{6}** Thereafter, a hearing was held before the Board's hearing committee in October 1982.

The hearing committee found that the money had been a loan to Everidge but that he had failed to disclose to the client all facts necessary to enable her to decide if this arrangement would be beneficial to her interests. It further found that Everidge was in violation of NMSA 1978, Code of Professional Responsibility, Rule 7-101(A)(3) (Repl. Pamp.1982), by "damag[ing] his client during the course of the professional relationship * * *" and NMSA 1978, Code of Professional Responsibility, Rule 1-102(A)(6) (Repl. Pamp.1982), by "engaging in other conduct that adversely reflects on his fitness to practice law." The hearing committee recommended that Everidge be placed on probation and be ordered to return a portion of the $6,900.00 to the client.

**{7}** A panel of the Board then reviewed this matter pursuant to NMSA 1978, Supreme Court Rules Governing Discipline, Rule 8(b)(3)(i). The panel partially adopted the findings of the hearing committee but rejected the hearing committee's finding that the $6,900.00 was a loan to Everidge. The panel found that the money was an advance for costs and should have been placed in a trust account with unexpended portions returned to the client. The panel also found as erroneous the hearing committee's findings that Everidge was not in violation of certain rules. In addition, the panel found that Everidge was in violation of NMSA 1978, Code of Professional Responsibility, Rules 1-102(A)(4), 2-110(A)(3), 5-101(A), 5-103(A), 5-104(A), 9-102(B)(3) and 9-102(B)(4) (Repl. Pamp.1982).

**{8}** Although the findings and the recommendation of the Board's panel differ from the findings and recommendation of the hearing committee, Rule 8(i) allows the Board to disapprove the findings of a hearing committee for errors of law or lack of supporting evidence and to recommend discipline appropriate to the approved findings. The Board's panel correctly followed this Rule.

**{9}** The Board recommended to the New Mexico Supreme Court that Everidge be suspended from the practice of law for at least one (1) year with reinstatement conditional upon full restitution to the client and a showing that he had taken and passed the Multi-state Professional Responsibility Examination.

**{10}** On May 11, 1983, a hearing was held before the New Mexico Supreme Court to determine whether the Board's findings and recommendation should be upheld. Counsel for the Board and Everidge appeared.

**{11}** Everidge claims that his current problems with the Board are simply the result of an accident of fate in that the former chief disciplinary counsel resigned before admonishing him and argues that he should not be punished for past acts that arose out of his lack of experience. We determine that Everidge is not before this Court because of an accident of fate but because he took $6,900.00 from his client on the pretense of needing it to cover the costs of her litigation and then converted it to his own use.

**{12}** We also note Everidge's apparent lack of concern about refunding the $6,900.00 to his client. He claims to have offered to repay the money by installment but acknowledges he has tendered to payments to her. He also admits that in the lawsuit brought against him by the client, he has denied owing her any money. We find this attitude reprehensible.

**{13}** We adopt the findings of the Board and follow its recommendation. Everidge is hereby suspended from the practice of law in all courts of the State of New Mexico for a period of not less than one (1) year beginning May 11, 1983. At the end of this period, Everidge may move for reinstatement only upon a showing that he has made restitution to the client in the amount of $6,900.00, that he has taken and passed the Multi-state Professional Responsibility Examination with a score set by this Court under the Rules for Admission to the New Mexico State Bar and that he has paid all outstanding costs.

**{14}** Costs of this action are assessed against Everidge in the amount of $1,512.92.

**{15} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**HARRY E. STOWERS, JR.,**
**Justice**

Justice H. Vern Payne

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-057**

**Filing Date: July 15, 1983**

**Docket No. 14,301**

**FIRST STATE BANK,**

**Plaintiff-Appellee,**

**v.**

**EDWARD J. MUZIO, MARIE L. MUZIO, HIS WIFE,**

**Defendants-Appellants,**

**v.**

**BANK OF NEW MEXICO, AS ASSIGNEE OF MOUNTAIN STATES FINANCIAL CORPORATION, TIMOTHY M. PADILLA AND MICHAEL ALARID, JR.,**

**Defendants-Appellees.**

**Appeal from District Court Sandoval County, Mayo T. Boucher, District Judge.**

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for Plaintiff-Appellee.

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Zachary L. McCormick
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Timothy Padilla
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**OPINION**

**PAYNE, Chief Justice.**

**{1}** This case presents the question of whether a party who has failed to raise the issues of homestead exemption and collection priorities in a prior default judgment action may be barred from litigating these same issues in a later foreclosure action.

**{2}** First State Bank brought an action against Edward Muzio seeking judgment on a $9,500.00 promissory note for which he was guarantor. After Muzio failed to appear and defend the action, the trial court entered a default judgment against him for the amount of the note plus interest. In a subsequent foreclosure action, First State Bank obtained a creditor's lien against real property owned by Muzio and his wife. Thereafter, Muzios requested the trial court to find that they were entitled to the statutory homestead exemption and priorities for the collection of debts under the Community Property Act, N.M.S.A. 1978, Sections 40-3-6 through 40-3-17. The trial court found that those issues were res judicata on the ground that they were not raised in the prior default judgment action. Additionally, the trial court found that any right to raise those issues was waived by Muzios under the terms of the guaranty agreement. The trial court, therefore, entered judgment of foreclosure against Muzios. Muzios now appeal this judgment.

**I.**

**{3}** In New Mexico, a foreclosure on community real property based on a judgment entered solely against one spouse should not affect the

community interest of the other spouse. **See** N.M.S.A. 1978, § 40-3-13. In the instant case, the husband's signature on the guaranty can do no more than commit his separate property and his share of the community property to satisfy the judgment because he is without power to encumber the community real property absent his wife's joinder. **Matter of Estate of Shadden,** 93 N.M. 274, 599 P.2d 1071 (Ct. App.1979), **cert. denied,** 93 N.M. 172, 598 P.2d 215 (1979). However, in this case, the guaranty signed only by the husband attempts to encumber the entire community estate. The contract provides in paragraph nine (9) that:

> Any married person who signs this Guaranty hereby does so as an individual and as a person exercising his or her right to manage, control, dispose of and encumber the entire community estate of the husband and wife of which said person may be one of the spouses, whether the person be a Borrower, the spouse of a Borrower, the spouse of a Guarantor, one of the Guarantors, a third party, or any combination thereof. Any execution or other legal process that may issue shall and may be satisfied from any separate property, community property, property held in joint tenancy, property held as tenants-in-common, or in any other manner, whether of equal or unequal interest, in which any Guarantor or his or her spouse have an interest, without regard to any priority or exemption. Any reference to property includes real property, personal property, and both. [Emphasis added.]

Although the plain language of the guaranty urges us to conclude that the husband, by signing the guaranty, encumbered the entire community estate, we cannot agree. This type of contract clause violates long-standing New Mexico law. **Arnett v. Reade,** 220 U.S. 311, 31 S. Ct. 425, 55 L. Ed. 477 (1911) (applying New Mexico law); **Matter of Estate of Shadden, supra; Stroope v. Potter,** 48 N.M. 404, 151 P.2d 748 (1944); **Davidson v. Click,** 31 N.M. 543, 249 P. 100 (1926); **Adams v. Blumenshine,** 27 N.M. 643, 204 P. 66 (1922). Additionally, Section 40-3-13 specifically requires both spouses to join if the entire community real property is to be encumbered.

**II.**

**{4}** Next, we consider the issue whether Muzios expressly waived any claim they had to argue the questions of homestead exemption and collection priorities. The guaranty provides in paragraph ten (10) that:

> The Guarantors hereby waive any claim of exemption or priority and consent that any subsequent execution for the indebtedness may be satisfied without limitation or exclusion by any exemption or priority. . . .

**{5}** We have previously recognized the right of a surety to waive his defenses under a guaranty agreement. **American Bank of Commerce v. Covolo,** 88 N.M. 405, 540 P.2d 1294 (1975). We have also held, with respect to interpreting these types of contracts, that we are bound by the specific provisions in the contract.

> In construing these contracts, we are guided by the principle that a guarantor or surety is entitled to a strict construction of his undertaking, and his liability is not to be extended by implication beyond the express terms of the contract or its plain intent. [Citation omitted.]

**Id.** at 409, 540 P.2D 1298. Likewise, we hold that the specific terms of the guaranty contract control the rights of the parties in the instant case. In this case, the husband chose to expressly waive the benefit of his exemption when he signed the guaranty. Clearly, this waiver was an integral part of the credit which was extended, and we are thus reluctant to impair arms-length contractual obligations and allow him to violate his guaranty contract. We have held that citizens have the right to make their contracts in their own way. **Rubalcava v. Garst,** 53 N.M. 295, 206 P.2d 1154 (1949).

Like other jurisdictions, we characterize these types of defenses as benefits or rights, which may be waived at the surety's discretion. **In Re Gunzberger,** 268 F. 673 (M.D.Pa.1920); **In Re Moore,** 112 F. 289 (M.D. Ala.1901); **Wright v. Wright,** 103 F. 580 (W.D.Pa.1900). We emphasize, however, that our holding on this issue is specifically limited to the husband in that his signature, and not his wife's, appears on the guaranty contract. Thus, we hold that upon execution of the guaranty, the husband encumbered only his share of the community real property, and waived his right to argue the issues of exemption and priority.

**III.**

**{6}** Even if the husband had not expressly waived his right to raise the questions of exemption and priority, he would be barred by the doctrine of res judicata from litigating these questions which he failed to raise in a prior proceeding with the same party. Although both the trial court and parties on appeal appear at times to use the terms collateral estoppel and res judicata synonymously, the facts of the instant case require application of the doctrine of res judicata. We view the questions of exemption and priority as integral components of the guaranty cause of action pled in the original complaint. **Compare Raven v. Marsh,** 94 N.M. 116, 607 P.2d 654 (Ct. App.1980). Because these questions are portions of the same cause of action dealt with in the default judgment action, and are not new, unlitigated issues, they should be governed by the doctrine of res judicata, not by collateral estoppel. **Torres v. Village of Capitan,** 92 N.M. 64, 582 P.2d 1277 (1978); **City of Santa Fe v. Velarde,** 90 N.M. 444, 564 P.2d 1326 (1977).

**{7}** For res judicata to apply, the traditional rule is that the second suit must have the following relationship to the first suit:

1. The **parties** must be the same or in privity;
2. The **cause of action** must be the same;
3. There must have been a **final decision** in the first suit;
4. The first decision must have been **on the merits.**

**Torres v. Village of Capitan, supra; City of Santa Fe v. Velarde, supra; Adams v. Cox,** 55 N.M. 444, 234 P.2d 1043 (1951).

**{8}** On June 4, 1980, a default judgment was entered against the husband based on a personal guaranty of a promissory note which attempted to encumber the entire community estate. On appeal, Muzios attempt to re-litigate the validity of the homestead and priority claims which were specific clauses within the original guaranty contract. Muzios argue that although the homestead and priority claims were incorporated into the guaranty, they were not issues decided in the default judgment. We disagree. We find it significant that the husband was properly notified of his opportunity to attack the validity of the guaranty and its related questions of exemptions and priority at trial. However, he chose not to defend and judgment was entered as a judgment on the merits. **See McKee v. United Salt Corp.,** 96 N.M. 382, 630 P.2d 1237 (Ct. App.1980). As to whether a default judgment is conclusive on matters which might have been litigated in the action in which default was entered, we recognize that not all courts are in agreement. **See, e.g., Hambly v. Aetna Cas. & Sur. Co.,** 51 A.D.2d 567, 378 N.Y.S.2d 632 (1976); **Central State Bank v. Hudik-Ross Co., Inc.,** 164 N.J. Super. 317, 396 A.2d 347 (1978); **Royal Coachman Color Guard v. Marine Trading,** 398 A.2d 382 (Me. 1979); **Mitchell v. Chastain Finance Co.,** 141 Ga. App. 512, 233 S.E.2d 829 (1977). Some courts see this issue as one which turns upon whether there is an identity of causes of action in the two cases. **Lynch v. Lynch,** 250 Iowa 407, 97 S.W.2d 105 (1959). However, other courts have held that the doctrine of res judicata applies to issues which were not specifically raised, but which could properly have been considered and determined in the prior action. **In Re Nicholas' Estate,** 144 W. Va. 116, 107 S.E.2d 53 (1959); **A.B.C. Truck Lines v. Kenemer,** 247 Ala. 543, 25 So.2d 511 (1946); **Barrow v. Santa Monica**

**Builders Supply Co.,** 9 Cal.2d 601, 71 P.2d 1108 (1937); **Tingwall v. King Hill Irr. Dist.,** 66 Idaho 76, 155 P.2d 605 (1945). We find the rule enunciated in this second line of cases to be better reasoned and more applicable to the facts of the instant case.

**{9}** We adopt the well-settled rule of law expressed in other jurisdictions which states that a prior default judgment bars a subsequent suit on issues which were, or could have been, determined in the earlier action. **Hambly v. Aetna Cas. & Sur. Co., supra; Mitchell v. Insurance Co. of North America,** 40 A.D.2d 873, 338 N.Y.S.2d 92 (1972); **Mitchell v. Chastain Finance Co., supra.** We recognize that this rule is based on three long-standing and well-reasoned principles of public policy. First, public policy favors an end to litigation. The New Mexico Court of Appeals discussed this principle in **Royal Intern. Optical v. Texas State Optical,** 92 N.M. 237, 586 P.2d 318 (Ct. App.1978), **cert. denied,** 92 N.M. 260, 586 P.2d 1089 (1978):

> It has long been the rule that a final judgment is conclusive as to a claim in controversy between the parties as to every matter which was offered to sustain or defeat the claim. **'Public policy requires that there be an end to litigation and that rights once established by final judgment shall not again be litigated in any subsequent proceeding.'** [Emphasis added.] [Citations omitted.] This rule of law has been consistently followed. **Board of County Com'rs of Quay County v. Wasson,** 37 N.M. 503, 24 P.2d 1098 (1933); **Miller v. Miller,** 83 N.M. 230, 490 P.2d 672 (1971).

**Id.** at 243, 586 P.2d AT 324. Second, public policy favors judicial economy and thus forbids a defendant to split up his defenses in order to present them in a piecemeal fashion.

**A party cannot by negligence or design withhold issues and litigate them in consecutive actions.** [Citations omitted.] He may not split his demands or his defenses. [Citations omitted.] **Equity will not deal with a case by piecemeal.** [Emphasis added.] [Citations omitted.]

**Brunswig Drug Co. v. Springer,** 55 Cal. App.2d 444 at 447, 130 P.2d 758 at 761 (1942). Third, where a party has an opportunity to present his defense and neglects to do so, public policy requires that he take the consequences of his negligence.

> 'The defendant in an action is ordinarily required to set up all his defenses which do not constitute separate causes of action, and if he neglects to do so is concluded by the judgment rendered in such action. **The judgment operates as res judicata, not only in regard to the existence of the plaintiff's cause of action, but as to the nonexistence of the defense which was not pleaded. The reason for this rule lies in the principle that there must be an end to litigation, and, where a party has an opportunity to present his defense and neglects to do so, the demands of the law require that he should take the consequences.'** [Emphasis added.]

**Price v. Sixth Dist. Agricultural Ass'n,** 201 Cal. 502 at 506, 258 P. 387 at 391 (1927). Thus, based on the previously cited opinions and substantial public policy, we hold that a default judgment bars a subsequent suit on issues which were, or could have been determined in that default judgment action.

**{10}** We note, however, that because wife's signature does not appear on the guaranty contract, she cannot be barred by the doctrine of res judicata from litigating the questions as they relate to her own interests.

**IV.**

**{11}** Finally, the husband argues that the judgment debt against him, as guarantor, be reduced pro-rata with the judgment debt of George Dermksian, the borrower. Specifically, the husband contends that payments of $9,806.68 and

$34,169.71 received in partial satisfaction of Dermksian's judgment should reduce pro-rata his judgment debt to First State Bank. In our view, this argument is contrary to the express terms of the guaranty. Paragraph three (3) of the guaranty contract specifically provides:

The obligations hereunder are joint and several, and independent of the obligations of Borrowers, and a separate action or actions may be brought and prosecuted against Guarantors, or any one of them, whether or not an action is brought against Borrowers or whether or not Borrowers be joined in any such action or actions. . . .

**{12}** Thus, upon execution of the guaranty, the husband agreed to pay a specific sum to First State Bank, regardless of the obligations of Dermksian. The husband admits there is no New Mexico authority for his contention that his judgment debt should be reduced pro rata with the judgment debt of Dermksian. Instead, he urges this Court to consider principles of equity to reach the result he seeks. We reject this approach. To agree with the husband's contention would require this Court to ignore the plain and express language of the guaranty contract. Thus, we affirm the trial court's finding that the husband's debt should not be reduced pro-rata with the debt of Dermksian.

**V.**

**{13}** Accordingly, the judgment of the trial court is affirmed as to the husband only, and the case remanded for further proceedings consistent with this opinion.

**{14} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-058**

**Filing Date: July 20, 1983**

**Docket No. 14,608**

**JULIE ANN CHRISTIANSEN,**

**Petitioner-Appellee and Cross-Appellant,**

**v.**

**RALLAND CHRISTIANSEN,**

**Respondent-Appellant and Cross-Appellee.**

**Appeal from the District Court of Los Alamos County,**
**Michael Francke, District Judge.**

Rothstein, Bailey, Bennett & Daly
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for Appellant and Cross-Appellee.

Griffith & Cruse
Prentis Reid Griffith, Jr.
Los Alamos, New Mexico

for Appellee and Cross-Appellant.

## OPINION

**PAYNE, Chief Justice.**

**{1}** This appeal arises from a suit for dissolution of marriage. While married, the parties entered into a written agreement which purported to divide, **inter alia,** their community interest in the family residence, transmute the community interest in husband's retirement funds into his own separate property, and require each party to give their child $5,000 upon the sale of the family residence. The trial court ruled, however, that this agreement was inadmissible because it had not been properly acknowledged pursuant to NMSA 1978, Section 40-2-4. The trial court also held that the parties were jointly responsible for providing post-minority education for their child, that husband's retirement funds were community property, and that both parties' attorneys' fees and wife's expert witness fees were to be treated as community debts paid for out of community assets. On appeal, husband argues that the trial court's failure to admit evidence of the marital agreement constitutes reversible error. On cross-appeal, wife challenges the trial court's ruling on the issue of post-minority education and the award of attorneys' fees. We reverse in part and affirm in part.

### I.

**{2}** We first consider whether an unacknowledged marital agreement is binding between the parties to that agreement. Wife argues it is not. Although the agreement was not acknowledged by the parties, there is substantial evidence in the record that wife "proved" the agreement. Section 40-2-4 provides:

> All contracts for marriage settlements and contracts for separation, must be in writing, and **executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.** [Emphasis added.]

We find it significant that wife, who now seeks to invalidate the marital agreement on grounds of improper acknowledgment, testified at trial that she had executed the agreement, and that her signature was valid. Under similar facts and an identical statute, a California court upheld the validity of a marital agreement which was not acknowledged at the time of execution. **See In Re Marriage of Cleveland,** 76 Cal. App.3d 357, 142 Cal. Rptr. 783 (1977); **see also Tyre v.**

**Lewis,** 276 A.2d 747 (Del.Ch. 1971); **McAlpine v. McAlpine,** 116 Me. 321, 101 A. 1021 (1917); **Rittener v. Sinclair,** 374 So.2d 680 (La.Ct. App.1978). The California court looked to the fact that husband and wife testified under oath as to the validity of their signatures on the unacknowledged agreement, and held these statements were sufficient **proof** under the statute, thus making the agreement binding between the parties. In the present case, wife **proved** the marital agreement by testifying under oath at trial as to the validity of her signature.

**{3}** Wife attempts to distinguish the **Cleveland** ruling by arguing that in the instant case there is no proof of husband's signature. Specifically, she contends that even if this Court should adopt the **Cleveland** decision and hold that subsequent testimony can "prove" the marital agreement, the fact remains that she was the only witness to her signature, in violation of NMSA 1978, Section 14-13-8, which requires two witnesses to each signature as well as a "certificate." Reliance on this statute is misplaced. This statute is inapplicable where the wife orally "proved" the agreement. Although husband did not testify to his signature at trial, that does not render the agreement ineffective. At the time husband testified at trial, the trial court had already ruled the agreement and any testimony regarding it inadmissible. Husband has never challenged the validity of his signature on the agreement. Because we hold the agreement was "proved" by wife's subsequent testimony under oath, we find that the trial court erred in refusing to admit it into evidence.

## II.

**{4}** We next consider whether the trial court erred in ordering the parties jointly responsible for the post-minority education of their child. **Spingola v. Spingola,** 93 N.M. 598, 603 P.2d 708 (1979). NMSA 1978, Section 40-4-7 does not give the trial court jurisdiction over post-minority education for children. It provides in pertinent part:

> The district court shall have exclusive jurisdiction of all matters pertaining to the guardianship, care, custody, maintenance and education of the children, and with reference to the property decreed or funds created for their maintenance and education, **so long as they, or any of them remain minors.** [Emphasis added.]

Because the parties' child was beyond the age of minority, we hold this statute to be controlling. The trial court's order is overruled insofar as it requires either party to pay for the post-minority support of their child.

## III.

**{5}** Last, we consider whether the trial court abused its discretion when it included attorneys' fees and wife's expert witness fees as community debts to be paid out of community assets. We find no abuse of discretion on the part of the trial court. Wife specifically attacks the trial court's failure to find that she was unable to pay her court costs which, she argues, should be paid by husband and not by community assets. The record indicates, contrary to her argument, that she had ample funds to pay her own attorneys' fees and expert witness fees. In addition to acquiring one-half of the assets upon division of the property, wife received an additional $7,000 and testified that she had another $2,300 in the bank at the time of trial.

**{6}** We hold, therefore, that it was proper for the trial court to view these expenses as community debts and to consider the financial resources of both parties when making an award of attorneys' fees and court costs. This does not contradict the legislative intent expressed in Section 40-4-7, that a court may make an order "as will ensure either party an efficient preparation and presentation of his case." **See generally Hertz v. Hertz,** 99 N.M. 320, 657 P.2d 1169 (1983).

**{7}** We find that the trial court's order on this issue does not constitute an abuse of discretion.

**{8}** This matter is remanded to the trial court for further proceedings consistent with this opinion.

**{9} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM F. RIORDAN,**
**Justice**

**HARRY E. STOWERS,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-060**

**Filing Date: July 21, 1983**

**Docket No. 14,361**

**HERBERT CHARLES BLATCHFORD, JR.,**

**Petitioner-Appellee,**

**v.**

**MACARIO GONZALES, ADMINISTRATOR, FORENSIC HOSPITAL,**

**Respondent-Appellant.**

**APPEAL FROM DISTRICT COURT SAN MIGUEL COUNTY, Donaldo A. Martinez, District Judge.**

Petition for Writ of Certiorari Denied
January 9, 1984

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for Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** Blatchford, a Navajo Indian, was convicted of accessory to criminal sexual penetration and kidnapping of a Navajo Indian child, and sentenced to life imprisonment. He was confined to the state mental hospital in San Miguel County where he filed a petition for writ of habeas corpus. However, he failed to pursue his post-conviction remedies under NMSA 1978, Crim.P.R. 57(j) (Repl. Pamp.1980), before applying for the writ. The district court granted the writ over objections by the State that Blatchford failed to exhaust his remedies under Rule 57(j). In granting the writ, the court below held that the State did not have jurisdiction over Blatchford for a crime committed on Indian land. It reached this result by concluding that the situs of the offense is a dependent Indian community. We reverse on two grounds.

**{2}** First, we hold that the district court is without jurisdiction to grant the writ of habeas corpus, given the fact that Blatchford failed to exhaust his post-conviction remedies.

**{3}** Rule 57(j) states that "[a] prisoner must exhaust his remedy under this rule [Rule 57] before applying for a writ of habeas corpus." The main purpose of the rule is to provide a uniform procedure for determining if the prisoner is entitled to relief. It would be premature to hear applications for writs of habeas corpus if other post-conviction remedies are available.

**{4}** Second, we hold that Yah-Ta-Hey, the community where the crime occurred, is not a dependent Indian community with exclusive federal jurisdiction. We will consider this issue to afford guidance in further considerations of this matter should Blatchford pursue other remedies.

**I.**

**{5}** The offense occurred in the Yah-Ta-Hey community, located approximately two miles from the Navajo Indian Reservation. The general area surrounding Yah-Ta-Hey has become a "checkerboard area," resulting from a sequence

of Federal withdrawals and expansions of Indian reservation lands, and has been the source of some confusion on matters of jurisdiction.

**{6}** Although Yah-Ta-Hey is the site of an Indian trading post and other related businesses, the trading post is owned by non-Indians and the site is on land which had been granted in fee by the United States. Sixty to seventy percent of the community is Indian. As part of their benefits of membership in the tribe, Navajos in the vicinity vote in tribal elections. But they also vote in state and county elections. Since Yah-Ta-Hey is primarily a site for Indian trading, no federal services are administered there. A Navajo living in the area who desires such services must go either to nearby Rock Springs or to Crownpoint, forty miles away, given the fact that Crownpoint has jurisdiction over the Yah-Ta-Hey area for providing many Indian services. County and state police, as well as tribal police and FBI officers, patrol the Yah-Ta-Hey community. The Navajo Tribal Code recognizes the Yah-Ta-Hey area as within its jurisdiction and consequently has designated Yah-Ta-Hey as a Chapter where meetings and tribal businesses are conducted.

## II.

**{7}** Blatchford contends that the situs of the crime scene, Yah-Ta-Hey, is "Indian country" as defined by 18 U.S.C. Section 1151 (1976), so as to require exclusive federal jurisdiction under 18 U.S.C. Section 1153 (1976). We do not agree.

**{8}** The term "Indian country" as used in Section 1151 includes Indian reservations, dependent Indian communities, and all Indian allotments. Since Yah-Ta-Hey is neither located on an Indian reservation nor on an allotment, jurisdiction rests on the claim that the area in question is a dependent Indian community within Indian country.

**{9}** Section 1151(b) defines "Indian country" as:

> all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State, * * *.

The foregoing language resulted from two earlier Supreme Court decisions, **United States v. McGowan,** 302 U.S. 535, 58 S. Ct. 286, 82 L. Ed. 410 (1938) and **United States v. Sandoval,** 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913). These cases held that Indian country includes tribal Indian communities under federal protection that did not originate in either a federal or tribal act of **reserving,** or were not specifically designated a reservation. At the same time, it is apparent that Indian reservations and dependent Indian communities are not two distinct definitions of place, but definitions which largely overlap. **See United States v. McGowan,** 302 U.S. at 538-39, 58 S. Ct. at 287-288; **see also** F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 38 (1982). Nevertheless, the appropriate test to determine whether a community is within the definition of Indian country under Section 1151 is not how the land was acquired, but whether the land has been **set apart** for use and occupancy of Indians. **United States v. McGowan,** 302 U.S. at 539, 58 S. Ct. at 288; **United States v. Mound,** 477 F. Supp. 156 (D.S.D.1979); **Youngbear v. Brewer,** 415 F. Supp. 807 (D.N.D. Iowa 1976), **aff'd,** 549 F.2d 74 (8th Cir.1977); **State v. Youngbear,** 229 N.W.2d 728 (Iowa 1975); **cf. United States v. Sandoval,** 231 U.S. at 40, 34 S. Ct. at 3 (noting that Congress reserved public lands for Indian use and occupancy); **accord United States v. Martine,** 442 F.2d 1022 (10th Cir.1971) (endorsing **Sandoval** approach).

**{10}** Other important factors were outlined in **Martine** to include: 1) the area in question; 2) the relationship of the inhabitants of the area to Indian tribes and to the federal government; and 3) the established practice of the government agencies toward the area. **Id.** at 1023. Additionally, in **United States v. Morgan,** 614 F.2d 166 (8th Cir.1980), a relevant factor was "cohesiveness" manifested either by economic pursuits in the area, common interests, or needs of the

inhabitants as supplied by that locality. **Id.** at 170. The crucial consideration, however, is whether the community or land has been **set apart** for use, occupancy and protection of dependent Indian peoples. **United States v. Mound,** 477 F. Supp. at 160. This crucial factor is nothing more than an expanded concept of the original definition of a dependent Indian community set forth in **McGowan** as a community in which the United States retained "title to the lands which it permits the Indians to occupy" and "authority to enact regulations and protective laws respecting [the] territory." **Id.** 302 U.S. at 539, 58 S. Ct. at 288.

**{11}** Blatchford contends that Yah-Ta-Hey, although presently situated two miles outside the original boundaries of the Navajo Indian Reservation, was annexed to the reservation as a result of President Woodrow Wilson's Executive Order of 1917, which "set apart for the use and occupancy of the Navajo" and other Indians certain federal lands. **Executive Order No. 2513 of January 15, 1917.** He argues that aboriginal Indian title to the Yah-Ta-Hey area was never extinguished after the United States sold the land in 1866 to the Atlantic & Pacific Railroad Company and pledged to extinguish Indian title "as rapidly as may be consistent with public policy and the welfare of the Indians." Act of July 27, 1866, ch. 278, § 2, 14 Stat. 292 at 294. In addition, he argues that Indian title was not automatically extinguished in 1872, when the railroad line was definitely located. In short, Blatchford argues that the 1917 Order set the Yah-Ta-Hey area apart within the meaning of the test set forth in **McGowan** and its progeny, because aboriginal title to the area was never effectively extinguished. We disagree.

**{12}** At the outset, we find error in the district court's finding that the 1917 Order encompassed the Yah-Ta-Hey area. The record shows that Yah-Ta-Hey is situated in Section 7 of Township 16 North, Range 18 West. We note that the 1917 Order embraced only three partial sections of Township 16 North, Range 18 West. **Landy v. Federal Deposit Insurance Corporation,** 486 F.2d 139, 151 (3rd Cir.1973), **cert. denied,** 416 U.S. 960, 94 S. Ct. 179, 40 L. Ed. 2d 312 (1974) (noting that an appellate court can properly take judicial notice of any matter of which any court of original jurisdiction may properly take notice); **see also Varcoe v. Lee,** 180 Cal. 338, 181 P. 223 (1919). These scattered sections do not embrace or overlap Section 7. Thus, even assuming that aboriginal Indian title had never been extinguished, the 1917 Order did not embrace the Yah-Ta-Hey area so as to set it apart for use and occupancy of the Navajo. Moreover, we find it difficult to conclude that an Executive Order, such as the 1917 Order, could validly set apart **private** fee land, given the well settled principle that the Executive may not act as lawmaker and take private property for public use. **Youngstown Sheet & Tube Co. v. Sawyer,** 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

**{13}** But even if we assumed, **arguendo,** that the 1917 Order did encompass the Yah-Ta-Hey area, Indian title to the area was nonetheless extinguished. Aboriginal Indian title is a permissive right of occupancy granted by the federal government to the aboriginal possessors of land. **Johnson and Graham's Lessees v. M'Intosh,** 21 U.S. (8 Wheat.) 543 (1823); **accord United States v. Santa Fe Pacific R. Co.,** 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941); **Beecher v. Wetherby,** 95 U.S. 517, 525, 24 L. Ed. 440 (1877); **Buttz v. Northern Pacific Railroad Co.,** 119 U.S. 55, 66, 75 S. Ct. 100, 104, 30 L. Ed. 330 (1866); **Fellows v. Blacksmith,** 60 U.S. 366, 15 L. Ed. 684 (1856); **United States v. Gemmill,** 535 F.2d 1145 (9th Cir.1976). The right to extinguish original Indian title rests exclusively with Congress irrespective of who holds the underlying fee title in the land. **Oneida Indian Nation v. County of Oneida,** 414 U.S. 661, 667-69, 94 S. Ct. 772, 777-778, 39 L. Ed. 2d 73 (1974); **United States v. Santa Fe Pacific R. Co.; United States v. Kabinto,** 456 F.2d 1087 (9th Cir.1972); **Narragansett Tribe, Etc. v. So. R.I. Land Devel.,** 418 F. Supp. 798 (D.R.I.1976). However, courts have required a showing of a clear and specific indication of congressional intent to extinguish Indian title. **E. g., United States v. Santa Fe Pacific R. Co.; see Tee-Hit-Ton Indians v. United States,** 348 U.S. 272, 277, 75 S. Ct. 313, 316, 99 L. Ed. 314

(1955); **Buttz v. Northern Pacific Railroad Co., supra; United States v. Pueblo of San Ildefonso,** 206 Ct.Cl. 649, 513 F.2d 1383 (1975).

**{14}** Blatchford contends that the only possible evidence of any congressional intent to extinguish Indian title to the Yah-Ta-Hey area is the language of the Act of July 27, 1866, ch. 278, Section 2, 14 Stat. 294 (Act of 1866), which states in relevant part:

> The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act * * *.

**{15}** Blatchford argues that the foregoing language, in and of itself, does not necessarily mean that Indian title to the Yah-Ta-Hey area was automatically extinguished in 1872 when the railroad line was definitely located. We agree that the language of the Act of 1866 does not manifest any clear and specific congressional intent to extinguish Indian title to the Yah-Ta-Hey area, but hold that Congress has otherwise acted to extinguish Indian title to the land.

**{16}** Although "extinguishment [of Indian title] cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards," **United States v. Santa Fe Pacific R. Co., supra,** 314 U.S. at 354, 62 S. Ct. at 255, when the government clearly intends to extinguish Indian title the courts will not inquire into the means or propriety of the action:

> Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable issues. [Citation omitted.] As stated by Chief Justice Marshall in **Johnson v. M'Intosh** [citation omitted], "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. [Citation omitted.]

**Id.** at 347, 62 S. Ct. at 252. The relevant question, therefore, is whether there was any governmental action intended as a revocation of Indian occupancy rights.

**{17}** Although the Navajos in 1867 were brought back from Bosque Redondo to an area that includes northwest New Mexico, the "tribe's traditional and historic hunting grounds, pasture, residency and occupancy," the Navajos were a conquered nation, forcibly removed "by sword" from their lands. **See, e.g.,** I COAN, A HISTORY OF NEW MEXICO, at 126-27 (1925). In 1868, treaty was entered into by and between the United States and the Navajos to establish a reservation for the Navajos. Treaty with the Navajo Indians, June 1, 1868, United States-Navajos, 15 Stat. 667. Article IX of that treaty stipulated:

> [The Navajos] will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation.

**Id.** at 670. By Article XIII of the Treaty, the Navajos agreed to "make the reservation * * * their permanent home," and not to "make any permanent settlement elsewhere, * * *" **Id.** at 671.

**{18}** From the foregoing treaty provisions, it is clear that Indian title to the Yah-Ta-Hey area, and other areas surrounding the reservation, was extinguished as pledged by Congress in the Act of 1866. **Accord United States v. Santa Fe Pacific R. Co.** (Requesting and accepting a new reservation tantamount to an extinguishment by "voluntary cession" within the meaning of same Act); **Buttz v. Northern Pacific Railroad Co.** (Indian title extinguished because, among other things, the Indians "retired" from the occupancy of the lands outside the reservation to the reservation set apart for them by treaty). Further, the

military action of the government in forcibly removing the Indians to and from Bosque Redondo prior to signing the treaty is a strong indication of the sovereign's intent to revoke the Navajo rights of permissive occupancy in and around the area in question. **See United States v. Santa Fe Pacific Railroad Co.; see also United States v. Gemmill.**

**{19}** From the foregoing, we conclude that Yah-Ta-Hey is not a valid extension of the 1868 Navajo Indian Reservation, and as such has not been validly set apart for the use and occupancy of the Navajo and other Indians within the meaning of **McGowan** and its progeny. Such a conclusion is a significant factor in determining that Yah-Ta-Hey is not a dependent Indian community. **United States v. Mound,** 477 F. Supp. at 160. Hence, the crime did not occur in Indian country.

**III.**

**{20}** Had the crime been committed in Indian country, we would have been required to hold that the original state court lacked jurisdiction to try and convict Blatchford, as the State of New Mexico has not accepted jurisdiction of such lands under Public Law 280 or any other federal statute. On its face, NMSA 1978, Section 31-10-3 seems to indicate a conflict on this issue which we discuss.

**{21}** Congress enacted the Act of August 15, 1953, Public Law 280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360), which delegated to six states jurisdiction over most crimes and many civil matters arising on Indian country within their borders. New Mexico was not among these six states. Nevertheless, Section 6 of the original Act gave the consent of the United States to any state to amend "where necessary" its state constitution **or** statutes to remove "any legal impediment" to the assumption of jurisdiction under the Act. The basis for this section was that the eleven states admitted to the Union after 1889 were required to disclaim jurisdiction over Indian lands as a condition of their admission. **See Dick v. United States,** 208 U.S. 340, 28 S. Ct. 399, 52 L. Ed. 520 (1908); **see also** F. COHEN, **supra,** at 368. This section, of course, applied to New Mexico, and as a result, New Mexico inserted such a disclaimer in its constitution. N.M. Const. art. 21, sec. 2.

**{22}** In light of the fact that several other "disclaimer" states have acted legislatively to accept some jurisdiction under Public Law 280 without an amendment to their state constitutions (these states include Arizona, Idaho, Montana, North Dakota, South Dakota, Utah, and Washington), the question arises whether New Mexico has accepted jurisdiction under the Act pursuant to Section 31-10-3, which states:

> **All Indians, committing against** the person or property of **another Indian,** or other person, any of the following crimes, namely: murder, manslaughter, **criminal sexual penetration,** assault with intent to kill, arson, burglary and larceny, within the state of New Mexico and either within or without an Indian reservation, **shall be subject therefor to the laws of this state relating to such crimes, and shall be tried therefor in the same courts** and in the same manner, and shall be subject to the same penalties as are all persons charged with the commission of such crimes, respectively, **and the courts are hereby given jurisdiction in all such cases.** [Emphasis added.]

**{23}** The language of the statute clearly purports to grant jurisdiction to the state courts for crimes over which the federal courts would otherwise have exclusive jurisdiction. **See** 18 U.S.C. § 1153 (1976). Section 31-10-3 was, however, originally enacted in 1889, and has incurred very little change through subsequent codification and compilation. Hence, it can hardly be said that Section 31-10-3 was enacted in response to the invitation of Public Law 280, permitting the State to assume either criminal or civil jurisdiction over Indians in Indian country. Neither has there been any other federal jurisdictional grant of authority. As we stated in **Chino v. Chino,** 90 N.M. 203, 561 P.2d 476 (1977):

> [T]he New Mexico Enabling Act * * * disclaimed jurisdiction over the Indians. The State of New Mexico has declined to assume jurisdiction over the Indian reservations within the state by failing to take affirmative steps under Public Law 280, enacted by Congress in 1953, or under more recent congressional acts.

**Id.** at 206, 561 P.2d. 476 [footnotes omitted]. **See Your Food Stores, Inc. (NSL) v. Village of Espanola,** 68 N.M. 327, 361 P.2d 950 (1961).

**{24}** However, because we have concluded that the crime did not occur in Indian country, we hold that Blatchford was properly tried and convicted in the original state court below. Accordingly, we reverse the district court's order granting Blatchford's writ of habeas corpus.

**{25}** Reversed and remanded.

**{26} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM F. RIORDAN,**
**Justice**

**HARRY E. STOWERS,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-062**

**Filing Date: August 4, 1983**

**Docket No. 14,456**

**GEORGE F. LUJAN,**

**Petitioner-Appellant,**

**v.**

**NEW MEXICO STATE POLICE BOARD,**

**Respondent-Appellee.**

**APPEAL FROM DISTRICT COURT**
**SANTA FE COUNTY,**
**Tony Scarborough, District Judge.**

David R. Sierra
Santa Fe, New Mexico

Sarah M. Singleton
Santa Fe, New Mexico

for Appellant.

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Santa Fe, New Mexico

for Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** George Lujan was terminated by the New Mexico State Police from his job as a civilian supply agent. The New Mexico State Police Board upheld Lujan's termination, and the district court affirmed. On appeal, Lujan claims he was denied procedural due process because: (1) the Chairman of the State Police Board refused to disqualify himself against claims of bias and partiality; and (2) Assistant Attorneys General represented both the Board and the Police Chief. We affirm.

**{2}** Prior to the termination hearing, Lujan moved to disqualify Mahlon Love, Chairman of the State Police Board, alleging that he was biased and incapable of rendering an impartial decision. Lujan based his motion upon two alleged "confrontations" he had with Love within the preceding two years. Lujan's motion was denied on the ground that there was no good cause for disqualification. Although Love presided at the hearing, he did not participate in the vote that upheld Lujan's termination.

**{3}** Lujan did not argue that the decision was not supported by substantial evidence nor did he attack it on the merits. A challenge of a decision on pure procedural grounds as Lujan has done in this case is moot, unless the procedural defects violate some constitutional or statutory prohibition. **Accord United States v. Pratt,** 645 F.2d 89 (1st Cir.1981), **cert. denied,** 454 U.S. 881, 102 S. Ct. 369, 70 L. Ed. 2d 195 (1981) (noting that unless procedural delays in obtaining transcripts rise to the level of due process violation, no affordable remedies are available); **Micelli v. LeFevre,** 444 F. Supp. 1187 (S.D.N.Y.1978) (holding that statutory requirements for filing notice of appeal cannot be attacked on due process grounds in the absence of some showing that the failure to file resulted from ineffective assistance of counsel or improper conduct by the State); **cf. Shaw v. Stone,** 506 F. Supp. 571 (M.D.Ga.1981), **aff'd,** 695 F.2d 528 (11th Cir.1983) (absence of the Chief Justice from oral argument does not create an error of constitutional due process proportions).

**{4}** 1. Lujan contends that Love's failure to disqualify himself denied him a fair hearing because the two alleged "confrontations" he had with Love amounted to at least the "appearance of

bias" within the meaning of NMSA 1978, Code of Judicial Conduct Canon 3 (Rep. Pamp.1981 and Supp.1982). He relies on **Reid v. New Mexico Bd. of Examiners,** 92 N.M. 414, 589 P.2d 198 (1979).

**{5}** In **Reid,** we reversed a Board of Examiners' decision revoking an optometrist's license to practice, because the Board failed to disqualify one of its members on the basis of bias. Although he admitted telling the optometrist's secretary that the optometrist would be losing his job, the Board member in **Reid** thought he could render a fair and impartial decision. The test we set forth in **Reid** was whether there is "any indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him." **Id.** at 416, 589 P.2d at 200; **see generally Gibson v. Berryhill,** 411 U.S. 564, 93 S. Ct. 1689, 36 L. Ed. 2d 488 (1973).

**{6}** The two incidents relied upon by Lujan to establish bias or an indication of possible temptation to try the case with bias differ substantially from the incident in **Reid.** The first incident occurred in September of 1979, when Love went to the supply room to obtain supplies from Lujan. Lujan testified at trial that he "made the transfer out, and * * * told [Love] that [the order] had to be approved by Captain Pickett." Upon Captain Pickett's approval, Lujan gave Love the requested items. The second incident occurred in September of 1980, when Love requisitioned a cap shield from the supply room. Lujan informed Love that he could not fill his order because Love was not on the list of personnel approved to requisition supplies, whereupon Love obtained approval for his order from Larry Montoya, another employee who was on the approved list. While Lujan was getting the cap shield, Love told Montoya, "I guess George [Lujan] doesn't understand. The Chief has told him thirteen or fourteen different times that I am the boss."

**{7}** In our view, both incidents fall far short of showing a possible temptation to try the case with bias on the part of Love. Since the first incident merely indicates a casual over-the-counter transaction between two people, it lacks the negative confrontation alleged by Lujan. Although in the second incident Lujan believes he "upset" Love, we search the record in vain for any conduct or harsh language on the part of Love that would indicate a "possible temptation of bias." In fact, the record shows that aside from these minor incidents both parties got along well.

**{8}** 2. Lujan next contends that he was denied due process because both the Board and the Police Chief were represented by Assistant Attorneys General. We disagree.

**{9}** Lujan neither alerted the Board or the district court of any conflicts or prejudice as a result of the nature of his representation, nor did he move to disqualify adverse counsel during the initial stage of the proceeding. On the contrary, he stipulated that the Police Chief's attorney neither counseled nor advised the Board on any matter pertaining to his termination. Moreover, we note that counsel for the Police Chief is paid by the New Mexico State Police, and his office is at the State Police complex in Santa Fe. In contrast, counsel for the Board is paid by the State Attorney General, and does not maintain an office at the Santa Fe State Police complex.

**{10}** We agree with Lujan that a fair trial in a fair tribunal is an essential requirement of due process, and that this concept applies to administrative agencies as well as to courts. **Withrow v. Larkin,** 421 U.S. 35, 95 S. Ct 1456, 43 L. Ed. 2d 712 (1975); **Tumey v. Ohio,** 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927). Safeguarding this requirement is especially essential in administrative proceedings where certain basic rights are overlooked in the interest of administrative efficiency and expedition. **National Labor Relations Board v. Phelps,** 136 F.2d 562 (5th Cir. 1943). Nevertheless, we find that Lujan's rights were not violated.

**{11}** The decision of the district court is affirmed.

**{12} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM FEDERICI,**
**Justice,**

**WILLIAM F. RIORDAN,**
**Justice**

**HARRY E. STOWERS,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, respectfully dissenting**

**DISSENT**

**SOSA, Senior Justice, dissenting.**

**{13}** I respectfully dissent. I believe that Mahlon Love, Chairman of the State Police Board, should have recused himself from presiding over Mr. Lujan's termination hearing. I would reverse and remand for a new hearing.

**{14}** It is the general rule in New Mexico that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including * * * where: (a) he has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding. * * *" NMSA 1978, Code of Judicial Conduct Canon 3(C) (Supp.1982). Such a rule is based on the principle that "the administration of justice **should reasonably appear to be disinterested** as well as be so in fact." **Public Utilities Commission v. Pollak,** 343 U.S. 451, 467 (1952) (Frankfurter, J., not participating) (emphasis added).

**{15}** The principles behind disqualification requirements apply to adjudicatory procedures of an administrative tribunal as well as to a court. **Wall v. American Optometric Association, Inc.,** 379 F. Supp.175 (N.D.Ga.), **aff'd mem.,** 419 U.S. 888, 95 S. Ct. 166, 42 L. Ed. 2d 134 (1974); 1 Am. Jur.2d **Administrative Law** § 63 (1962). New Mexico applies these principles to administrative proceedings. **Reid v. New Mexico Board of Examiners,** 92 N.M. 414, 589 P.2d 198 (1979). The basis for the standard for disqualification of an administrative hearing officer which is set forth in **Reid** is that "our system of justice requires that the appearance of complete fairness be present." **Reid,** 92 N.M. at 416, 589 P.2d at 200.

**{16}** In the instant case, as in **Reid,** there was an appearance of impropriety. Although Mr. Love did not vote on the issue of termination, he did preside over the hearing. Mr. Love also was present during the Board's deliberations on the issue of whether he should be disqualified. A review of the record reveals that Mr. Love thought that Mr. Lujan might have been trying to agitate him when Mr. Lujan refused to issue him supplies without appropriate authorization. In addition, at the beginning of the hearing, Mr. Love was a potential witness against Mr. Lujan. I would hold that because there was an appearance of impropriety, Mr. Love's failure to recuse himself constituted reversible error. I would reverse and remand for a new hearing before a State Police Board free from **even the appearance** of partiality.

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-063**

**Filing Date: August 10, 1983**

**Docket No. 14,633**

**JAMES K. WEAVER,**

**Plaintiff-Appellant,**

**v.**

**NORMA B. WEAVER,**

**Defendant-Appellee.**

Rodey, Dickason, Sloan, Akin & Robb
Joseph J. Mullins
Albuquerque

for Plaintiff-Appellant.

Hannah B. Best
Albuquerque

for Defendant-Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** We reverse the trial court.

**{2}** James K. Weaver brings his second appeal, challenging an amended final divorce decree increasing alimony. In the first appeal, husband had moved the trial court to decrease or terminate alimony. He contended that Norma, his former wife, no longer needed alimony after receiving a $200,000 inheritance. The trial court denied the motion and found wife needed at least $872.65 a month, based upon a sliding-scale formula to increase alimony automatically as husband's income increased. We reversed and remanded the case for reconsideration as it did not appear from the record that the trial court had considered the $200,000 inheritance in determining wife's needs. We also struck the sliding scale formula. The unpublished decision asked the trial court to consider the inheritance. However, on remand, the trial court further increased alimony to $2,154.00 per month. Husband appeals. Once again we reverse.

**{3}** First, Husband argues that the trial court exceeded this Court's mandate. We agree. It appears that the trial court either misunderstood or ignored the holdings of the decision on the first appeal. We cannot understand how a consideration of increased assets of a wife could support an increase instead of a decrease in alimony. In **Burnworth v. Burnworth,** 93 N.M. 714, 605 P.2d 222 (1980) this Court stated:

> It is well settled that it is the duty of the lower court on remand of a cause to comply with the mandate of the appellate court, and to obey the directions therein without variation * * *.
>
> The mandate of the appellate tribunal is law to the trial court, and must be strictly obeyed. Where the mandate directs that a particular judgments be entered, **that a specified ruling be made, or that a designated course be pursued,** the inferior tribunal must yield obedience to the directions given. [Emphasis added.]

93 N.M. at 714-15, 605 P.2d at 222-23, **quoting with approval Glaser v. Dannelley,** 26 N.M. 371, 374, 193 P.2d 76, 77 (1920). In our unpublished decision on the first appeal we stated:

> There is evidence in the record pertaining to the wife's $200,000.00 inheritance and to the wife's net and gross worth, which includes her property. * * * [A]lthough the trial court made a finding that the wife still was in need of alimony, **there are no findings of fact to indicate**

> **that the trial court weighed and considered the wife's inheritance,** or the property she owns. [Emphasis added.]

**{4}** Pursuant to our mandate, the trial court was to enter "additional findings consistent with the Decision of the Court." The mandate clearly designated the course to be pursued: wife's need for alimony was to be reappraised, and findings entered indicating that the $200,000 inheritance had been considered. By virtue of the trial court's failure to follow our mandate, its decision is erroneous as a matter of law.

**{5}** Second, husband contends that increased alimony constitutes an abuse of discretion. We recognize alimony is within the trial court's sound discretion, and its determination will be altered only upon a showing of abuse thereof. **Hertz v. Hertz,** 99 N.M. 320, 657 P.2d 1169 (1983) (awarding alimony, based upon erroneous factors, constitutes abuse); **see, e.g., Ellsworth v. Ellsworth,** 97 N.M. 133, 637 P.2d 564 (1981) (failure to consider contrasting nature of assets is an abuse of discretion); **Seymour v. Seymour,** 89 N.M. 752, 557 P.2d 1101 (1976) (failure to consider income-producing nature of assets is an abuse).

**{6}** Wife's net worth is not in dispute. In **Ellsworth,** the Court stated, "income produced by property may normally be considered in setting alimony." 97 N.M. at 135, 687 P.2d at 566. In **Seymour** the alimony award was reversed, in part, because Mrs. Seymour received property worth approximately $167,000, a portion of which was "capable of generating some income." 89 N.M. at 755, 557 P.2d at 1104. In the present case, the trial court found wife's 1980 income to be $10,150, all of which was generated by her assets. However, three assets from the inheritance capable of generating income were erroneously excluded from wife's income. These assets are 331 shares of AT & T stock with a market value of $16,550; money market funds in the amount of $60,000 (subsequently reduced to $21,000); and certain commercial rental property. The court's Finding number 4 which dealt with her assets does not mention the stock or the money market funds, and concludes that wife had a net loss for 1980 from the rental property. It was error to fail to include income from these assets because they are part of wife's income-producing capability. Whether income is produced depends, to a large extent, on how she chooses to manipulate the assets.

**{7}** Further, in its Finding number 1, the trial court found wife's monthly need to be $3,000, despite the fact that her own budget estimate of needs was only $2,514.67 per month. Need is the first criterion in determining alimony.

**{8}** We are reluctant to calculate alimony on appeal, and therefore remand the matter with directions to the trial court to redetermine alimony based upon the undisputed facts in the record.

**{9}** In light of the case precedents and the facts of this case, and pursuant to NMSA 1978, Section 40-4-7, monthly alimony, if any can be justified, could not exceed the original amount of $872.65 awarded before the wife received her significant inheritance. The reductions should be retroactive to September 1980, the date husband's motion was filed. **Cf. Montoya v. Montoya,** 95 N.M. 189, 619 P.2d 1233 (1980). Husband will be given credit for past overpayments, if any.

**{10}** The parties shall bear their own costs and attorney fees for this appeal.

**{11} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**HARRY E. STOWERS,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-070**

**Filing Date: September 14, 1983**

**Docket No. 14,769**

**ROY EDDIE MERRILL,**

**Petitioner-Appellee,**

**v.**

**PAMELA DAVIS, FORMERLY PAMELA D. MERRILL,**

**Respondent-Appellant.**

**Appeal from the District Court of Mckinley County, Louis E. DePauli, District Judge.**

Shaw, Thompson, Webber & Giles
William F. Webber
Albuquerque, New Mexico

for Appellant.

Mason & Rosebrough
James Jay Mason
Gallup, New Mexico

for Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** This appeal challenges the trial court's property settlement and denial of alimony following the divorce of Pam Davis (Appellant) and Eddie Merrill (Appellee).

**{2}** Appellant and Appellee were first married in November 1965 and divorced in February 1973. Five months after the divorce, they began cohabiting. They remarried in February 1978, but permanently separated in November 1978. Their second divorce was not entered until 1982.

**{3}** During the period of cohabitation and prior to remarriage, the parties maintained a joint bank account. While cohabiting but before remarriage, Appellee purchased one hundred percent of the stock of Davis Tractor Company and managed the retail tractor business.

**{4}** Also during the period of cohabitation but before remarriage, Appellee began construction of a house on property which he and Appellant had purchased at tenants in common. Appellee paid $18,000 toward the price of the land and material to construct the house. The money was proceeds of the sale of another house which had been awarded to Appellee as separate property by the original divorce decree in February 1973.

**I.**

**{5}** Appellant argues that the conduct of the parties creates an implied agreement to pool earnings and share accumulations acquired during cohabitation. Accordingly, she alleges that she has a one-half interest in the Davis Tractor Company stock, and that there should not be an $18,000 separate property lien on the land which was purchased as tenants in common.

**{6}** The trial court found that the joint bank account, living as husband and wife, and Appellee's discontinuance of child support payments were not substantial evidence of an implied agreement to pool their resources and share equally in the accumulated property. We do not recognize an implied agreement as grounds for granting Appellant an interest in the property.

**{7}** Appellant also argues that **Dominguez v. Cruz,** 95 N.M. 1, 617 P.2d 1322 (Ct. App.1980) provides logical support for recognizing an implied agreement. In **Dominguez,** the court of

appeals stated that "[I]f an agreement such as an oral contract can exist between business associates, one can exist between two cohabiting adults who are not married if the essential elements of the contractual relationship are present." **Id.** at 2, 617 P.2d at 1323. However, in **Dominguez,** there was an express oral agreement to hold property jointly. It is unnecessary for us to decide whether an express agreement between cohabiting adults may create property rights similar to those created by marriage. In this case, the issue is whether an agreement implied from conduct as married partners creates the security and rights created by marriage.

**{8}** Initially, we note that common-law marriage is not acknowledged in New Mexico. **In re Estate of Lamb,** 99 N.M. 157, 655 P.2d 1001 (1982); **Dominguez,** 95 N.M. 1, 617 P.2d 1322; **In re Gabaldon's Estate,** 38 N.M. 392, 34 P.2d 672 (1934). For a marriage to be valid, it must be formally entered into by contract and solemnized before an appropriate official. **Hazelwood v. Hazelwood,** 89 N.M. 659, 556 P.2d 345 (1976); NMSA 1978, §§ 40-1-1 and -2.

**{9}** Common-law marriage is not recognized because of "the possibility of fraud arising from claims of common-law marriage and the uncertainty which such claims of marriage inject into the affairs of individuals. . . ." **In re Estate of Lamb,** 99 N.M. at 160, 655 P.2d at 1004; **see also In re Gabaldon's Estate,** 38 N.M. at 396, 34 P.2d at 675. Recognition of the implied agreement as argued by Appellant would inject even greater uncertainty than a common-law marriage in such matters as wrongful death actions and estate settlements. As we have stated, the problem would be "the ease with which a mere adulterous relation may become, in the mouths of interested and unscrupulous witnesses, a common-law marriage [or an implied agreement to share in the property acquired during cohabitation]." **In re Gabaldon's Estate,** 38 N.M. at 396; 34 P.2d at 675. If we were to say that the same rights that cannot be gained by common-law marriage may be gained by the implications that flow from cohabitation, then we have circumvented the prohibition of common-law marriage.

**{10}** It is the policy of this state to foster and protect the institution of marriage. **In re Estate of Lord,** 93 N.M. 543, 602 P.2d 1030 (1979). The state's interest in marriage is recognized by statute which prescribes that the contract of matrimony be solemnized. NMSA 1978, §§ 40-1-2 and -3. We agree with the court, in **Hewitt v. Hewitt,** 77 Ill.2d 49, 31 Ill. Dec.827, 394 N.E.2d 1204 (1979), where it stated:

> "[M]arriage is a civil contract between three parties—the husband, the wife, and the State. (Citations omitted.) . . . [T]he State [has] a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will."

77 Ill.2d at 63-64, 31 Ill. Dec. at 833, 394 N.E.2d at 1210.

**II.**

**{11}** With regard to alimony, Appellant contends that the trial court's finding of a stipulation that "neither party will pay alimony to the other" is not supported by substantial evidence. She argues that failure to grant her alimony is an abuse of discretion.

**{12}** We agree, and Appellee concedes that the trial court was in error in its finding of a stipulation concerning alimony, but this finding was harmless error with regard to permanent alimony. **Kennedy v. Bond,** 80 N.M. 734, 460 P.2d 809 (1969). Although Appellant did not specifically pray for alimony in her answer to Appellee's petition for divorce, she did request that the court:

> 2. Determine the parties' respective interests in jointly owned property and their responsibilities for jointly owned debts, and divide them equitably. . . .
>
> 7. Order such other relief as the Court deems appropriate.

We have recognized that "even though not specifically requested, the court may, in an effort to

equitably divide the community property, grant an award of alimony." **Ridgway v. Ridgway,** 94 N.M. 345, 346, 610 P.2d 749, 750 (1980); **see also Worland v. Worland,** 89 N.M. 291, 551 P.2d 981 (1976).

**{13}** The trial court decreed that Appellant receive $58,500 as the balance due from her half of the community property following the second divorce. She is thirty-six years old, has a B.A. from the University of Texas at El Paso, and voluntarily withdrew from her teaching position subsequent to the second separation to continue her studies. The trial court received Appellant's evidence regarding her prayer for alimony. The record fails to disclose that she is in need of alimony or otherwise entitled to it for an equitable division of the property. **Hertz,** 99 N.M. 320, 657 P.2d 1169 (1983); **Ridgway,** 94 N.M. 345, 610 P.2d 749; **Weaver v. Weaver,** 100 N.M. 165, 667 P.2d 970 SBB 916 (1983). Each of the parties received $93,882.87 as his or her respective share of community property.

**{14}** Appellant also contends that Appellee was obligated to support her during the interim between separation and divorce, from November 1978 to August 1982. She received $17,627.87 from Appellee during this period. She asserts the trial court erred in deducting this sum from her share of community property. Appellant argues that **Hurley v. Hurley,** 94 N.M. 641, 615 P.2d 256 (1980) requires that she not be forced to use her share of the property settlement to meet her daily living expenses. We find that **Ellsworth v. Ellsworth,** 97 N.M. 133, 637 P.2d 564 (1981) is dispositive. In **Ellsworth,** this Court stated:

> The language in **Hurley** must be read in the context of the particular facts in that case and should not be read as an absolute prohibition on use of community property sales proceeds for support, since some situations may arise when fairness requires such use. To the extent that the **Hurley** case would preclude any consideration of the community property awarded to a spouse in reaching an equitable award of alimony, it is specifically overruled.

97 N.M. at 135, 637 P.2d at 566.

**{15}** The issue is whether Appellant was entitled to temporary alimony during separation prior to divorce. We have already established that her answer was sufficient to request alimony. The trial court did have authority to grant temporary alimony during the pendency of the divorce proceeding. NMSA 1978, § 40-4-7(A). However, she is not entitled to support during separation as a matter of right. **Lauderdale v. Hydro Conduit Corp.,** 89 N.M. 579, 555 P.2d 700 (Ct. App.1976).

**{16}** It is clear that Appellee voluntarily contributed the money during separation. There is some dispute as to whether it was agreed that the money was an advancement of Appellant's share of community property. However, she testified that the post-separation payments were considered to be "partly" in settlement of the community property division. When the payments are submitted in a divorce case for consideration by the court, the payments are subject to such action and classification as the court in its discretion may take. The court may make such award, or categorize the payment as in its discretion may seem just and fair. **Scanlon v. Scanlon,** 60 N.M. 43, 287 P.2d 238 (1955). Even if the parties had clearly agreed to alimony, the court still has discretion to deny or to award alimony and to consider the payment for support. **Brister v. Brister,** 92 N.M. 711, 594 P.2d 1167 (1979); **Ferret v. Ferret,** 55 N.M. 565, 237 P.2d 594 (1951). Here, there was no clear separation agreement, and we cannot say, based on the facts in the record, that the trial court abused its discretion in finding the payments to be an advancement of wife's division of the community property.

**III.**

**{17}** Appellant contends that the trial court erred in finding that $18,000 which resulted from the sale of the house awarded to Appellee in the first divorce was separate property. This money was used as the down payment to purchase

another property which they held as tenants in common. We find that the stipulation incorporated in the first divorce decree is dispositive of this issue. In January 1973 the parties agreed:

> 3. The community property of the parties has been divided between them to their mutual satisfaction except for the dwelling house owned by them in Gallup, New Mexico. The equity of the parties is somewhat in excess of $6,500.00. . . . The Defendant shall convey by quitclaim deed her interest in the dwelling house to the Plaintiff and he shall pay her her one-half of the total equity at the rate of One Hundred and no/100 ($100.00) Dollars a month without interest.

The stipulation was incorporated in the final decree and the house was designated as husband's separate property. NMSA 1978, § 40-3-8.

**{18}** It is clear that Appellant's interest in the Gallup house was $3,250.00, and not $9,000.00, as contended. Appellee satisfied all but $350.00 of his obligation to pay off Appellant's equity interest by conveying $600.00 and a Volkswagen worth $2,300.00, which she agrees was given in lieu of her share of equity. We agree with the result in **Parks v. Parks,** 91 N.M. 369, 574 P.2d 588 (1978), where this Court declared:

> Where the decree is clear and unambiguous, neither pleadings, findings, nor matters dehors the record may be used to change its meaning or even to construe it. It must stand and be enforced as it speaks.

91 N.M. at 372, 574 P.2d at 591 (citations omitted).

**IV.**

**{19}** Finally, Appellant contends that she is entitled to $2,500.00 in attorney fees because she has earned only $3,000.00 over the past three years and the economic disparity between her and Appellee inhibits presentation of her claim. We disagree.

**{20}** In light of the property awarded Appellant on division of the community property, we find that she has sufficient resources to bear her own expenses of attorney fees. **Fitzgerald v. Fitzgerald,** 70 N.M. 11, 369 P.2d 398 (1962).

**{21}** The judgment of the trial court is hereby affirmed.

**{22} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM R. RIORDAN,**
**Justice**

**HARRY E. STOWERS,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-076**

**Filing Date: September 30, 1983**

**Docket No. 15,036**

**IN THE MATTER OF BUFORD NORRID ATTORNEY AT LAW.**

Disciplinary Proceeding

## OPINION

**{1}** On November 10, 1982, Buford Norrid (Norrid) pled guilty in Federal Court to willful failure to file his federal income tax return for the tax year 1976 in violation of 26 U.S.C. Section 7203 (1976). Norrid was given a one year suspended sentence with three years supervised probation.

**{2}** On February 14, 1983, this Court suspended Norrid pursuant to NMSA 1978, Supreme Court Rules Governing Discipline Rule 13, and referred the matter to the Disciplinary Board.

**{3}** A Specification of Charges was filed against Norrid on February 16, 1983, alleging that Norrid had willfully failed to file his 1976, 1977 and 1978 federal income tax returns. In his Answer to the charges, Norrid admitted the allegations.

**{4}** A hearing was held in Carlsbad on March 31, 1983, at which time the hearing committee appointed to hear the charges (Committee) listened to Norrid's explanation of his conduct and recommended that Norrid's suspension be six months in duration without automatic reinstatement.

**{5}** On May 20, 1983, a panel of the Disciplinary Board (Panel) heard oral argument on the issue of the length of Norrid's suspension. On July 8, 1983, the Panel affirmed the recommendation of the Committee and suggested to this Court that an exception be made to NMSA 1978, Supreme Court Rules Governing Discipline Rule 4(a)(2) to permit Norrid to be automatically reinstated at the conclusion of the six months suspension.

**{6}** This matter came before this Court on August 3, 1983, for oral argument. We adopt the Disciplinary Board's finding that Norrid's conduct adversely reflected upon his fitness to practice law in violation of NMSA 1978, Code of Professional Responsibility Rule 1-102(A)(6) (Repl. Pamp.1982). We are mindful that Norrid has now fully paid his back taxes and the penalties he incurred. However, it is the policy of this Court that attorneys should not be allowed to practice law while on probation under a criminal sentence. **See In re Melvin Lee Griffin, Attorney at Law,** S. Ct.No. 14995 (Filed September 19, 1983).

**{7}** We therefore disbar Norrid until he is no longer on probation. At the end of this period, Norrid may move for reinstatement only upon a showing that he has taken and passed the Multistate Professional Responsibility Examination with a score set by this Court under the Rules for Admission to the New Mexico State Bar and that he has paid all outstanding costs.

**{8}** Costs of these proceedings are assessed against Norrid in the amount of $199.74.

**PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM F. RIORDAN,**
**Justice**

**HARRY E. STOWERS,**
**Justice**

Justice H. Vern Payne

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-078**

**Filing Date: October 6, 1983**

**Docket No. 15,111**

**IN THE MATTER OF CONTEMPT OF COURT OF PATRICIA PALAFOX AND RICHARD ESPER, ATTORNEYS AT LAW.**

Disciplinary Proceeding

## OPINION

**{1}** Ronnie Van White (White) was indicted in Dona Ana County, New Mexico, for drug related offenses. White retained Richard D. Esper (Esper), a member of the bar of Texas and some other jurisdictions, to represent him. Because Esper is not a member of the New Mexico Bar, he contacted Patricia L. Palafox (Palafox), a member of the New Mexico Bar, and requested her to associate with him in order for him to appear in New Mexico and represent White. Palafox agreed and entered a joint appearance in the case with Esper. However, at no time during the proceedings did Palafox appear in trial court with Esper, nor did the trial court require her to do so. Apparently, Palafox was never notified by either the trial court, the clerk, or Esper of any pre-trial hearing or of the trial.

**{2}** Thereafter, White was convicted and Esper advised him to obtain public defender *{*564}* representation for his appeal because White had not paid Esper and could not afford retained counsel for his appeal. Neither Palafox nor Esper prepared the docketing statement for White's appeal, although Esper did make some attempts to assist the public defender.

**{3}** NMSA 1978, Crim.P. Rule 53.1 (Cum. Supp.1983) (emphasis added), provides in pertinent part:

> (a) **Nonadmitted counsel.** [C]ounsel not admitted to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or territory, may participate in proceedings before New Mexico courts **only** in association with counsel licensed to practice law and in good standing in New Mexico, who, **unless excused by the court, must be present in person in all proceedings before the court.** New Mexico counsel must sign the first motion or pleading and New Mexico counsel's name and address must appear on all subsequent pleadings.

**{4}** In addition, NMSA 1978, Crim., Child. Ct., Dom. Rel. & W/C App. Rule 205(b) (Spec. Supp.1983) provides:

> (b) **Attorney responsible.** Trial counsel shall be responsible for preparing and filing the docketing statement unless relieved by order of the appellate court.

**{5}** Both Esper and Palafox agree that they did not comply with Rule 53.1, although they argue that since the trial court did not require Palafox to appear or insist upon her name being on subsequent pleadings, they should not be held in contempt of court for failure to follow the Rules of Criminal Procedure. In addition, Esper and Palafox also agree that they did not comply with Rule 205(b) requiring trial counsel to prepare the docketing statement for White's appeal. Esper, however, argues that he should not be held in contempt of court for failure to comply with Rule 205(b) since he was not aware of it and he had been informed by the appellate public defender that he would prepare and file the docketing statement. We disagree with both arguments.

**{6}** Both Rule 53.1 and Rule 205(b) are clear and unequivocal. Counsel is required to follow both rules. After hearing the explanations of counsel, we determine that both Palafox and Esper are in contempt of court for not complying with Rule 53.1 and Rule 205(b). **Cf. State**

**v. Fulton,** 99 N.M. 348, 657 P.2d 1197 (Ct. App.1983).

**{7}** While the Court commends both Esper and Palafox for their candor at the hearing before this Court, we feel compelled to impose a fine for willful failure to follow the rules.

**{8}** Each counsel is ordered to pay a fine of $250.00 to the clerk of the Supreme Court within ten days.

**{9} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM FEDERICI,**
**Justice**

**WILLIAM F. RIORDAN,**
**Justice**

**HARRY E. STOWERS,**
**Justice**

## CONCURRENCE

**{10}** Justice Sosa concurs with the finding of contempt as to Esper, but disagrees with finding Palafox in contempt for the reason that NMSA 1978, Crim.P. Rule 52 provides "an attorney who **willfully** fails to observe the requirements of these rules . . . may be held in contempt". Justice Sosa feels the record is devoid of a willful failure by Palafox to observe the rules.

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-087**

**Filing Date: November 3, 1983**

**Docket No. 14,866**

**TERRANCE WINE AND MARIE WINE, HIS WIFE,**

**Plaintiffs-Appellants,**

**v.**

**W. S. NEAL, ET AL.,**

**Defendants-Appellees.**

**Appeal from the District Court of Bernalillo County, A. Joseph Alarid, District Judge.**

Dubois, Caffrey, Cooksey & Watkins
Michael P. Watkins
Albuquerque, New Mexico

for Appellants.

Timothy M. Padilla
Thomas F. Hooker, Jr.
Albuquerque, New Mexico

for Appellee Stafford.

R. Kevin Thomsen,
Albuquerque, New Mexico

for Appellees Grieve.

William G. Walker
Santa Fe, New Mexico

for Appellee Sandia Land Developers.

Paul Bardacke, Attorney General
Paula Forney-Thompson, Assistant Attorney General
Taxation & Revenue Dept.
Santa Fe, New Mexico

Amicus Curiae.

## OPINION

**PAYNE, Chief Justice.**

**{1}** This appeal challenges the trial court's failure to quiet title to land purchased by and deeded to the Wines at a tax sale auction. The trial court, on motion for summary judgment, ruled that the tax sale was void due to insufficient notice.

**{2}** In September 1980 the Wines purchased land which was sold to satisfy delinquent property tax. Stafford and the Grieves had purchased the land in January 1973 from Sandia Corporation. Stafford paid all property taxes in 1973, 1974, and 1975. However, in 1976, 1977, 1978, and 1979 the taxes were not paid.

**{3}** Prior to the sale the Taxation and Revenue Department sent timely notice, pursuant to NMSA 1978, Section 7-38-66(B) (Cum. Supp.1981), to "2316 CMN S LS Artesanos N.E." The address as listed on the tax record was 2316 CMN D LS Artesanos NW. Stafford's name and address was the only one listed. He had moved from Camino de los Artesanos, N.W. more than one and a half years before notice was sent. He did not apprise the Department of his change of address. Section 66 reads in part:

> B. At least twenty days, but not more than thirty days before the sale date, the department shall notify by certified mail, return receipt requested, to the address as shown on the latest property tax schedule each property owner whose real property will be sold that his real property will be sold to satisfy delinquent taxes. * * *

* * * * * *

D. Failure of the department to mail the notice by certified mail, return receipt requested, or failure of the department to receive the return receipt shall invalidate the sale; provided, however, that the receipt by the department of a return receipt indicating that the taxpayer does not reside at the address shown on the latest property tax schedule shall be deemed adequate notice and shall not invalidate the sale.

**{4}** Following the tax sale, the Wines initiated this action to quiet title. The trial court entered partial default judgment awarding them title in fee simple. Subsequently, Stafford and the Grieves (hereinafter "Stafford") filed a counterclaim to regain title.

**{5}** Following a hearing on the cross-motions for summary judgment, and briefs being submitted, the trial court entered judgment for Stafford. It found that "[t]he tax sale and resulting tax deed to the Plaintiffs Terrence Wine and Marie Wine, having been conducted without notice required by § 7-38-66(B), N.M.S.A., 1978 (1981 Supp.) are void."

**{6}** We reverse the summary judgment.

**{7}** Initially we note that the judgment did not indicate whether the ruling was one of law only, or based upon undisputed facts. The record may be interpreted as creating a factual issue of whether notice reached the correct address. If so interpreted, then the trial court's statement in the judgment that there was no notice may be a finding of fact, and we would be bound inasmuch as there was no challenge of such a finding by Wines.

**{8}** We recognize that we must liberally construe the trial court's findings of fact to sustain a judgment, if possible. **Arnold v. Ford Motor Co.,** 90 N.M. 549, 566 P.2d 98 (1977); **Mathews v. New Mexico Light & Power Co.,** 46 N.M. 118, 122 P.2d 410 (1942). As we stated in **Arnold,** "failure of the court to use the specific words * * * does not change the clear meaning of the court's findings * * *." 90 N.M. at 551, 566 P.2d at 100.

**{9}** However, this case is easily distinguished. In **Arnold,** the lower court found that a certain vehicle was "defective." But it failed to specifically find that the "defect resulted from factory material or workmanship." Because of this omission, Ford contended that the court erred in finding a breach of the express warranty. On appeal, we affirmed the trial court. We found substantial evidence to support the finding and the trial court's clear meaning was apparent.

**{10}** Here, however, it is not clear that the trial court's judgment was a finding that notice never reached the correct address, nor is such a finding supported by the evidence. One and a half years after attempted delivery, Ms. Tapia, the occupant of the property at issue, merely stated that **she** "never received * * * notification of an attempt to deliver certified mail" to Stafford. Her statement does not rebut the statement that the post office did attempt to deliver the notice to the address; that there was no response at the address; and that the letter was never claimed. We cannot affirm the trial court on this ground. **Cf. Jones v. Friedman,** 57 N.M. 361, 258 P.2d 1131 (1953).

**{11}** Stafford did not argue that notice did not reach the correct address. In his cross-motion, he asserted that the sale is invalid merely because the address printed on the letter is "not the same as the address shown on the latest property tax schedule." He concluded that the sale and deed are void because of "improper **issuance** of notice."

**{12}** At the hearing on the cross-motions, Stafford made it even clearer that he was not challenging whether notice actually reached the correct address. He commented, "whether or not the notice was actually delivered to the address or not doesn't really make any difference * * * what we have here is a situation where the notice was sent to the wrong address." The trial court entered judgment on Stafford's motion for summary judgment; it did not resolve a factual issue.

**{13}** It appears to us that the trial court found the notice did not satisfy NMSA 1978, Section 66(B) because the address was not printed correctly on the certified letter. We hold that the incorrect address on the envelope is immaterial if the notice actually got to the right address. The statute does not turn on the technical accuracy of the address typed on the envelope which is merely a delivery vehicle, but upon mailing the notice "to the address" shown on the latest tax schedule.

**{14}** With regard to the delivery issue, the certified letter was returned to the Department stamped "addressee unknown." Stafford no longer lived at the address shown on the latest property tax schedule, and he failed to provide a correct address as required by law. This does not invalidate the sale. NMSA 1978, § 7-38-66(D). There is no basis in the statute for voiding the tax sale merely because the proper address was not correctly printed on the notice envelope.

**{15}** We find that the notice substantially complied with Section 66 as required by NMSA 1978, Section 7-38-70 (Cum. Supp.1981).

**{16}** In **Maxwell v. Page,** 23 N.M. 356, 168 P. 492 (1917), this Court recognized that the "curative feature of the [Property Tax Code] statute stands out conclusively against any technical objection to a tax title." **Id.** at 365, 168 P. at 495. The curative nature arises from the legislative action which "stringently limits the grounds upon which a successful attack upon a tax deed issued by the state may be made." **Bailey v. Barranca,** 83 N.M. 90, 92, 488 P.2d 725, 727 (1971); **see also Maxwell,** 23 N.M. at 365, 168 P. at 495.

**{17}** The Legislature enacted, and the courts adopted, the "curative" policy to "[attempt] to clothe tax titles with a measure of certainty and security." **Bailey,** 83 N.M. at 92, 488 P.2d at 727; **see also First National Bank v. State,** 77 N.M. 695, 427 P.2d 225 (1967). As we stated in **Bailey,** "The very purpose of the curative statute is to stabilize and render tax sales efficient, to collect delinquent taxes and confer on the purchasers something of substance." 83 N.M. at 92, 488 P.2d at 727 (citations omitted).

**{18}** Although the statutes at issue in **Bailey** and the cases cited therein have been repealed, the curative nature of the statute has not. NMSA 1978, Sections 7-38-66 and -70 (Cum. Supp.1981) specifically limit an attack upon a tax sale.

**{19}** We therefore reverse the trial court and remand the case for further proceedings, consistent with this opinion.

**{20} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**HARRY E. STOWERS, JR.,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-101**

**Filing Date: December 7, 1983**

**Docket No. 15,062**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**ARTURO HERNANDEZ,**

**Respondent.**

**Original Proceeding on Certiorari,**
**John B. Walker, District Judge.**

Paul Bardacke, Attorney General
Marcia E. White, Assistant Attorney General
Santa Fe, New Mexico

for Petitioner.

Janet Clow, Chief Public Defender
J. Thomas Sullivan, Appellate Defender
Santa Fe, New Mexico

for Respondent.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** A petition for a writ of certiorari challenged the court of appeals ruling that Arturo Hernandez was denied his constitutional right to effective counsel. We reverse the court of appeals and reinstate the judgment of the trial court.

**{2}** In November 1982, Hernandez was convicted of three counts of armed robbery. The day of trial, prior to swearing in the jury, Graham, defense counsel for Hernandez, indicated that his client wanted him to withdraw from the case. He requested the trial be postponed until new counsel be secured. Hernandez also requested new counsel of the court.

**{3}** Hernandez alleged that he was denied a fair trial because attorneys Graham and Juarez became law partners the very day of trial. Juarez had previously been defense attorney for co-defendant Ramirez. However, in February 1982, Ramirez entered a guilty plea to the charge of armed robbery and was placed on probation. In return, he promised to testify for State in the prosecution of Hernandez. Graham had not represented Defendant, nor had he been associated with Juarez at that time.

**{4}** The trial court denied Defendant's and Graham's motion to substitute counsel. It felt that the matter was raised to delay the trial and that the conflict of interest was a "very slight technicality of a matter of a few hours." In addition, it stated that Mr. Juarez "is no longer in any way representing any of the co-defendants in this matter. . . ."

**{5}** The court of appeals reversed the trial court. It focused on the fact that Hernandez does not need to show actual prejudice to obtain new counsel. **State v. Tapia,** 75 N.M. 757, 411 P.2d 234 (1966). It found the right to effective counsel was denied by a possible conflict arising on the morning of trial.

**{6}** A defendant is entitled to effective representation of counsel. U.S. Const. amend. VI; N.M. Const. art. II, § 14. Where a constitutional right to counsel exists, there is a correlative right to representation that is free from conflicts of interest. **Wood v. Georgia,** 450 U.S. 261, 271, 101 S. Ct. 1097, 1103, 67 L. Ed. 2d 220 (1981). Representation of two defendants by the same attorney is not **per se** a violation of constitutional guarantees of effective counsel. Only where a court requires an attorney to represent two co-defendants whose interests are in conflict is one of the defendants'

Sixth Amendment right to effective counsel denied. **Holloway v. Arkansas,** 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978); **Glasser v. United States,** 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). In dicta, we acknowledged that a conflict of interest may arise where two attorneys, part of the same association, represent a criminal defendant and a co-defendant turned prosecution witness. **State v. Robinson,** 99 N.M. 674, 662 P.2d 1341 (1983). In **Robinson,** the defendant claimed he was denied his constitutional right to effective assistance of counsel where he and a co-defendant were arrested for armed robbery and killing a police officer. Both were represented by the public defender's office. The grand jury failed to indict the defendants. Subsequently, the co-defendant was arrested for another crime. He reached a plea agreement with the police where he would testify against Robinson for the earlier crimes charged. He was represented by the public defender at the time of this plea negotiation. But the trial court ruled that because the public defender was not representing Robinson at the time of the plea agreement, the constitutional right was not denied even though the same defender had previously represented Robinson. We affirmed the decision on appeal.

**{7}** "[T]he possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." **Cuyler v. Sullivan,** 446 U.S. 335, 350, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980). An actual conflict exists if a defendant's counsel " **actively** represented conflicting interests." **Robinson,** 99 N.M. at 679, 662 P.2d at 1345 (emphasis added). Here, the court of appeals held that the actual conflict arose the morning of trial. But the law partnership did not exist at the time of Ramirez's plea agreement, nor was Graham representing Hernandez at the time. This conflict is too slight to find that Graham "actively represented conflicting interests."

**{8}** The court of appeals decision places importance on the notion that Hernandez did not need to show actual prejudice from the conflicting interests. The dispositive issue, however, is whether there was an actual conflict of interest. The issue differs from that dealt with in **Holloway.** In the **Holloway** case, three men robbed a restaurant. During the robbery, one female employee was raped once; another, twice. Campbell confessed that he stood, with a rifle, as a lookout one flight of stairs above the site of the robbery and rapes, and had not taken part in the rapes. 435 U.S. at 477-78, 98 S. Ct. at 1175-76. Campbell and Holloway were identified as the robbers; and Holloway as one of the rapists. The same attorney represented both at trial. He was unable to guide their direct testimony, lest he prejudice the other. The Supreme Court recognized that this conflict was suspect. The trial court failed to ascertain its magnitude despite defense counsel's motion, and joint representation was improperly required. Reversal was automatic.

**{9}** Here we have no indication of a conflict or of joint representation. The **Holloway** holding is not applicable to this case.

**{10}** The facts in **Tapia** are also distinguishable from the facts in this case. There, the right to effective counsel was denied because there was an "apparent conflict of interest." 75 N.M. at 760, 411 P.2d at 236. The principal evidence against Tapia, which led to a first degree murder conviction, consisted of two statements by his co-defendant. Both were on trial together. Separate counsel was not appointed despite the need for "vigorous opposition" to the co-defendant's statements. **Id.** Also, the co-defendant was not subject to cross-examination because he was not the state's witness.

**{11}** However, in the instant case, Ramirez had pled guilty nine months before trial commenced. Juarez's representation of co-defendant ended long before he joined Graham as a partner. There is no joint representation. In addition, Ramirez as the state's witness was subject to cross-examination. There was no indication that Graham had any reason not to actively oppose the inculpatory statements of Ramirez. We hold that these facts do not support a finding of an actual conflict of interest.

**{12}** For the reasons stated, we reverse the court of appeals.

**{13} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM R. FEDERICI,**
**Justice**

**WILLIAM RIORDAN,**
**Justice**

**HARRY E. STOWERS, JR.,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1983-NMSC-108**

**Filing Date: December 28, 1983**

**Docket No. 14,910**

**IN THE MATTER OF THE FORFEITURE OF 1982 FORD BRONCO, BROWN AND CREAM IN COLOR, LIC. GJ 3201, VIN: IFMEU15G4CLA67351. STATE OF NEW MEXICO,**

**Appellee,**

**v.**

**SCOTT STEVENS,**

**Appellant.**

**Appeal from the District Court of Curry County, Fred T. Hensley, District Judge.**

James F. McDowell, III
Clovis, New Mexico,
Ted Hartley
Clovis, New Mexico

for Appellant.

Paul Bardacke, Attorney General
Ida M. Lujan, Assistant Attorney General
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Charles J. Plath, Assistant, District Attorney
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for Appellee.

**OPINION**

**PAYNE, Chief Justice.**

**{1}** This appeal challenges the trial court's order forfeiting a 1982 Ford Bronco to the Clovis Police Department, pursuant to NMSA 1978, Section 30-31-34(D).

**{2}** On December 12, 1982, Wayne Thatcher and Glen Corbin went to Scott Stevens' house, where they were informed that they could get some marijuana. Stevens told them that it would cost two hundred dollars apiece. After he received four hundred dollars, Stevens drove to Tahoka, Texas to make the purchase. He was to pick up the marijuana on December 13, 1982. The next day, he was to give Corbin and Thatcher their shares of the purchase.

**{3}** On December 13, 1982, the Clovis Police were tipped off regarding Stevens' activities. At 1:30 a.m., December 14, 1983, two officers stopped the 1982 Ford Bronco driven by him. A search warrant was executed and a shopping bag, which contained 11.4 ounces of marijuana, was found in the Bronco.

**{4}** Stevens was arrested and charged with possession of over eight ounces of marijuana with the intent to distribute in violation of the Controlled Substances Act. In addition, the police department requested judgment forfeiting the Ford Bronco to the Department.

**{5}** Although the criminal charges were dismissed and filed in an Air Force military court, the trial court ordered the forfeiture. It held that the vehicle was used to transport marijuana for the purpose of sale. We affirm.

**{6}** Stevens contends that the trial court's findings of fact are not reasonably supported by the evidence. One finding states that Stevens told Thatcher and Corbin that he knew where they could get a "large amount of marijuana in Texas." Stevens maintains that the record is silent as to the amount that would be purchased.

**{7}** It is undisputed that 11.4 ounces of marijuana was found in the Bronco. It cost six hundred dollars, according to Stevens. The trial judge

could reasonably infer that this is a large amount. The quantity is relevant only to the extent it amounted to a felony (NMSA 1978, § 30-31-34(G) (Repl. Pamp.1980)), which it did. NMSA 1978, § 30-31-23(B)(3) (Repl. Pamp.1980). The trial court's finding is a reasonable inference, and does not merit reversal. **Pacheco v. Martinez,** 97 N.M. 37, 636 P.2d 308 (Ct. App.1981).

**{8}** Stevens also argues that the trial court took Thatcher's testimony out of context. Finding No. 3 is that Thatcher believed that he was purchasing two hundred dollars worth of marijuana from Stevens. Thatcher reiterated the same opinion to Stevens' attorney on cross-examination. In response to the question, "Did you consider that you were purchasing it from [Stevens]?", Thatcher said, "I gave him my money, and he was going to give me pot." Accordingly, this finding is reasonably supported by the evidence.

**{9}** Stevens also challenges the trial court's finding that the "sole purpose of transportation of the marijuana was to complete the sale." Stevens alleges that this is an erroneous legal conclusion. His argument is that he, Corbin, and Thatcher were all partners. Title passed to all three upon delivery of the goods to him as an agent in Tahoka, Texas, as it does in a commercial transaction. The sale was completed before transporting the marijuana. Accordingly, Stevens cites **State v. Barela,** 93 N.M. 700, 604 P.2d 838 (Ct. App.1979), **cert. denied,** 94 N.M. 674, 615 P.2d 991 (1980) and argues his vehicle is not subject to forfeiture.

**{10}** In **Barela,** the undercover police agent purchased marijuana from Barela in his kitchen. Then Barela gave the undercover agent a ride from his house, transporting the marijuana. The court of appeals held that Barela's vehicle was not subject to forfeiture because the sale was completed before the drug was transported.

**{11}** Stevens' argument lacks merit. Although **Barela** held that transportation of the marijuana must be for the purpose of sale, we find this interpretation to be contrary to the meaning of NMSA 1978, Subsection 30-31-34(D) (Repl. Pamp.1980). The statute reads in relevant part:

> The following are subject to forfeiture:
>
> * * * * * *
>
> D. all conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation for the purpose of sale of property described in Subsections A or B * * * *

**{12}** According to our interpretation of Subsection 30-31-34(D), a vehicle is subject to forfeiture if used to transport an illegal substance. The transportation need not be for the purpose of sale. Section 30-31-34 must be read according to its "grammatical sense." **Aetna Finance Co. v. Gutierrez,** 96 N.M. 538, 541, 632 P.2d 1176 (1981). Of primary importance is the rule that a restrictive clause only applies to the words or phrase immediately preceding it, and not to others more remote. **In re Goldsworthy's Estate,** 45 N.M. 406, 412, 115 P.2d 627, 631 (1941). A comma must not be placed between the restrictive clause and that which it restricts. **Hughes v. Samedan Oil Corp.,** 166 F.2d 871, 873 (10th Cir.1948); see generally J. Hodges & M. Whitten, **Harbrace College Handbook,** § 12d at 120 (7th ed.1972), which states that restrictive clauses follow and limit the words they modify and are not set off by commas.

**{13}** Applying these rules, the restrictive clause at issue in Section 30-31-34 is "for the purpose of sale." It is not separated by a comma from "or in any manner to facilitate transportation", which is the immediately preceding phrase. The clause restricts this phrase. But it does not restrict "to transport", which is set off by a comma and is more remote. The only way in which the restrictive clause could apply to the phrase "to transport" is if commas were to enclose the clause "for the purpose of sale." If so, then the restriction would apply to several antecedents which are themselves separated by a comma. **See St. Louis-San Francisco Railroad v. Bengal Lumber Co.,** 145 Okla. 124, 291 P. 52 (1930).

**{14}** The other issues are moot, given the interpretation we have placed upon the statute.

**{15}** For the reasons stated, we affirm the trial court in forfeiting the vehicle.

**H. VERN PAYNE,**
**Chief Justice**

**WE CONCUR:**

**WILLIAM RIORDAN,**
**Justice**

**HARRY E. STOWERS, JR.,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1984-NMSC-002**

**Filing Date: January 4, 1984**

**Docket No. 14,435**

**GAS COMPANY OF NEW MEXICO, A DIVISION OF SOUTHERN UNION COMPANY, A DELAWARE CORPORATION,**

**Appellant,**

**v.**

**NEW MEXICO PUBLIC SERVICE COMMISSION,**

**Appellee,**

**ATTORNEY GENERAL OF THE STATE OF NEW MEXICO,**

**Intervenor.**

**Appeal from Public Service Commission.**

Motion for Rehearing denied March 1, 1984

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## OPINION

**PAYNE, Justice.**

**{1}** This appeal challenges Public Service Commission's decision to impute as income to Gas Company 75% of Southern Union Refining Company's (SURCO's) gross revenue from the sale of liquid gas, thereby reducing the cost of gas charged to utility customers.

**{2}** Gas Company purchases natural gas at the wellhead. But the gas contains impurities, heavier hydrocarbons, which condense in high pressure transmission lines, sometimes causing operational difficulties. To remove impurities, the gas is processed by SURCO, an affiliate of Gas Company. Heavier gasses are separated by condensation. However, only one-seventh of the condensed liquid gas (NGLs) is extracted for quality purposes; the rest is extracted because it is profitable. The NGL's primarily propane and ethane, are sold at two and one-half to three times the price of gaseous methane, which is sold to utility customers.

**{3}** This action arose when Gas Company petitioned to modify SURCO's payment agreement. The Commission and the State Attorney General objected, contending the present terms were unreasonable. Under the present agreement, the price paid by SURCO for fuel (btu's used in processing) and shrinkage (btu's removed from the gas stream in NGLs) is similar to that paid by any utility customer for btu's consumed. In the Commission's order, the price arrangement is described as follows:

> At its Lybrook plant, SURCO buys wet gas from GASCO [Gas Company] for the purpose of extracting certain entrained

liquids. In return for the right to process the gas, SURCO pays GASCO the average wellhead cost for the gas SURCO uses in processing, plus a gathering charge.

**{4}** The Commission decided that the existing agreement is unreasonable, concluding:

> [T]he agreement between them [GASCO and SURCO] does not fairly, justly and reasonably compensate GASCO, and that the contract is not reasonable as to cost and conditions, and does not effectively preclude the possibility of cross subsidization between GASCO's utility operations and SURCO's processing operations. . . .

**{5}** The Commission's conclusion relied on a study by an expert witness, Dr. Kirsch, which showed:

> [W]hen SURCO's overall net natural gas liquid [NGL] revenues per MCF of gas processed at Lybrook were compared with the average net NGL revenues of five interstate pipelines, SURCO's revenues were found to be larger. In 1980, SURCO derived approximately $2,298,678 more in net revenues than an average interstate pipeline would have by processing the same amount of gas, under arms-length agreements.
>
> The evidence also shows that in 1980, for the 21.34 million MCF of gas processed at Lybrook, GASCO received approximately $2,702,067 less from SURCO than if GASCO's contract reimbursed it at the same rate which, on the average, a comparable interstate pipeline received from its gas processors.

**{6}** A New Mexico gas consumer's utility bill has two components: first, a service charge; and second, a cost of gas factor. Under this latter factor, the consumer pays the cost of purchasing, gathering, and transporting the gas **MINUS any revenues Gas Company receives from processors** for the sale of NGLs. **N.M. Pub. Serv. Comm'n Gen. Order No. 36.** The Commission found that Gas Company received $2.7 million less revenue than it should have from processors. Accordingly, the Commission ordered that 75% of SURCO's gross revenues be imputed to Gas Company to compensate it in closer conformity with the gas processing industry, and decreasing the cost of gas factor.

**I.**

**{7}** Gas Company contends that the Commission employed an erroneous legal standard to find the payment agreement unreasonable. It alleges that the only correct standard is whether cost allocations prevent cross-subsidization and the Commission cannot look at SURCO's profits.

**{8}** The Commission's authority to review transactions between an affiliate and the public utility is not limited to reviewing cost allocations. This conclusion is based on our interpretation of the legislative grant of authority. The Commission has jurisdiction to review a **Class I** transaction, which is defined as:

> [T]he sale, lease or provision of real property, water rights or other goods or services by an affiliated interest to any public utility with which it is affiliated, or **by a public utility to its affiliated interest.** (Emphasis added.)
>
> NMSA 1978, § 62-3-3(J) (Cum. Supp. 1982). Gas Company is a division of Southern Union Corporation, which is the parent company of SURCO. The same Board of Directors presides over all three companies. The shares decision-making process makes Gas Company and SURCO an affiliated interest. Hence, the sale of natural gas by the public utility to its affiliate is subject to agency review. The Commission's power of review extends to the following components of the affiliate transaction:
>
> B. In order to assure reasonable and proper utility service at fair, just and

> reasonable rates, the commission may investigate:
>
> (1) **Class I** transactions to determine the reasonableness of the **cost and contract conditions** to the utility in any such transaction.
>
> * * * * * *
>
> D. The commission may issue such orders in connection with an evidentiary proceeding involving a public utility as it finds appropriate and necessary to assure that appropriate **cost allocations** are made and that **no cross-subsidization** occurs between the utility and an affiliated interest. (Emphasis added.)

NMSA 1978, § 62-6-19 (Cum. Supp.1982).

**{9}** The primary purpose of extending jurisdiction to **Class I** transactions was to protect against cross-subsidization. The danger results from the shared decision-making process by which the utility may be able to allocate some of the profits of its regulated service to its unregulated affiliate. R. Posner, ECONOMIC ANALYSIS OF THE LAW, § 12.3, at 259 (2d ed. 1977). For example, in **Maestas v. New Mexico Public Service Commission,** 85 N.M. 571, 514 P.2d 847 (1973), this Court recognized that there was a possibility of abuse between the parent, Gas Company and its producing subsidiary. There, the parent could negotiate contracts with its subsidiaries at favorable rates, and thereby accrue hidden profits. However, the likelihood of harm was mitigated by the fact that the parent and its producing subsidiary were nonaffiliated. The producer sold its gas to other companies rather than to the parent. However, in a **Class I** transaction where Gas Company sells to its affiliate, the possibility of harm is real. Therefore, the Commission can review all contract provisions to insure that they do not adversely affect rates charged by the utility. The utility's profit was not the Legislature's concern because the Commission adjusts rates to provide an allowed guaranteed return. The danger is that the affiliate or parent may accrue hidden profits.

**{10}** To prevent cross-subsidies, the Legislature, in Section 62-6-19, subjected all contract terms to scrutiny, including the price term. SURCO's revenues, as compared with other gas processors, is one viable indicia of whether the price charged by Gas Company is reasonable. This conclusion is especially true in light of the trade practice of setting price as a percentage of the processor's gross revenues.

**{11}** Accordingly, we hold that the Commission's power to review contract conditions includes an inquiry as to whether a fair and reasonable price is paid by SURCO for NGLs purchased. And the Commission had authority to impute income to Gas Company for rate-making purposes, an approach we specifically authorized in **Maestas. See City of Charleston v. Public Service Commission,** 95 W.Va. 91, 120 S.E. 398 (1923) (The utility sold gas to its affiliates at a price considerably below that charged other wholesale customers. The court ordered that the utility's income be increased, at least in accounting, to reflect the higher price.); **Cf.** Annot; 16 A.L.R.4th 454, § 11(b) (1982).

**{12}** Gas Company also argues the Commission placed utility customers in the role of investors by imputing a portion of SURCO's gross revenues to Gas Company's income and by erroneously requiring a utility to charge its customer, SURCO, for its subjective value of service rather than for the cost of service.

**{13}** We agree that a utility customer is not a partner or beneficiary of the utility and does not share the profits or risks of the utility or its affiliate. In this regard, we follow the United States Supreme Court in **Board of Public Utility Commissioners v. New York Telephone Co.,** 271 U.S. 23, 46 S. Ct. 363, 70 L. Ed. 808 (1926), where it stated:

> The customers are entitled to demand service and the company must comply. The company is entitled to just compensation and, to have the service, the customers must pay for it. The relation between

> the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. (Citation omitted.) . . . [Rather], Customers pay for service, not for the property used to render it. . . . By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company.

**Id.** at 31-32, 46 S. Ct. at 366.

**{14}** We also agree that a customer who receives service from the utility should not pay for its subjective value. If it did, prices would vary significantly between residential and commercial customers, and even between commercial customers using btu's in a manufacturing process, and customers using them to heat an office; the difference in price due to the usefulness to each customer. Such rate discrimination is prohibited by NMSA 1978, Section 62-8-6 (Cum. Supp.1982). But we find that the Commission did not charge SURCO a subjective value for services, nor did it grant customers an entitlement to Gas Company's profits. Instead, by requiring a portion of SURCO's gross revenues imputed to Gas Company's income, the Commission only mandated that SURCO pay a fair and reasonable price for NGLs extracted from the gas stream.

**{15}** We find there is no merit to Gas Company's claim that the wrong legal standard was applied in evaluating the reasonableness of its transaction with SURCO.

**II.**

**{16}** After concluding that the contract was evaluated by the appropriate legal standard, we next decide whether the Commission's finding that Gas Company was inadequately compensated and order requiring 75% of SURCO's gross revenue to be imputed to GAS Company were reasonable. When reviewing appeals from administrative bodies this Court's inquiry has consistently been limited to whether the administrative body acted fraudulently, arbitrarily or capriciously; whether the order was supported by substantial evidence; and generally, whether the action of the administrative body was within the scope of its authority. **Llano, Inc. v. Southern Union Gas Co.,** 75 N.M. 7, 399 P.2d 646 (1965). In this instance, the sole issue is whether the Commission's order was reasonable, which finding requires that it be supported by substantial evidence. **Rinker v. State Corp. Commission,** 84 N.M. 626, 506 P.2d 783 (1973); **Llano, Inc.,** 75 N.M. at 14-15, 399 P.2d at 651; **Transcontinental Bus System v. State Corp. Commission,** 67 N.M. 56, 352 P.2d 245 (1960). Substantial evidence requires that we review the whole record instead of refusing to consider evidence unfavorable to the findings. **Duke City Lumber Co. v. New Mexico Environmental Improvement Board,** (1983).

**{17}** The reasonableness of the Commission's finding that Gas Company was not fairly, justly and reasonably compensated is supported by the expert testimony of Dr. Kirsch. Gas Company argues his sample, upon which his expert opinion was based, was not representative because it only included five companies. Further, Gas Company speculates that the differences in revenue earned many be due to different contract provisions, or differing efficiency of the respective processing plants.

**{18}** Although five companies, quantitatively, is a small sample, it represents 7.5% of the total U.S. production of NGLs. The sample was derived by representative, statistical means. Furthermore, Gas Company's own expert witness based testimony on only six companies studied. In addition, Gas Company did not present evidence of a more representative sample, nor of a different conclusion derived by some other means. Mere conjecture and innuendo do not create a legitimate inference casting doubt on the representative sample, and are insufficient to meet Gas Company's burden of proof to annul the Commission's order. **Cf. Alto Village Services Corp. v. New Mexico Public Service Commission,** 92 N.M. 323, 587 P.2d 1334 (1978).

**{19}** We find that Dr. Kirsch's testimony was evidence from which the Commission could reasonably infer that Gas Company did not receive a fair and reasonable price for the NGLs purchased by SURCO.

**{20}** We recognize that a fair and reasonable price demanded of a regular customer must be "just and reasonable" and for "adequate, efficient and reasonable service." NMSA 1978, §§ 62-8-1, -2. Due to Gas Company's monopoly position, a rate is set so that it compensates the utility for the cost of service and a reasonable return on invested capital. These rates, which basically recover cost, are the maximum the public utility can charge a utility customer. R. Posner, **supra,** § 12.2, at 254-55.

**{21}** However, the Commission acted reasonably in finding that SURCO did not fairly compensate Gas Company by paying only cost plus a reasonable return as a regular ratepayer. SURCO is different from a ratepayer in that the ratepayer purchases btu's to consume heat energy for personal convenience or business. On the other hand, SURCO purchases gas for the NGLs content. Shrinkage removes the btu's in the gas stream, but the energy is not consumed. Energy is converted into a liquid form and resold at a substantial profit. Natural gas is SURCO's primary raw material, some of which is consumed in processing. However, the primary purpose for purchasing the gas is not to consume it, rather to resell the entrained NGLs.

**{22}** The unreasonableness of Gas Company's assertion that "cost plus" is a fair price is depicted by the allocative function of pricing. Assume all gas processors are entitled to have access to the wet gas gathered from the wellhead by Gas Company. How would the processing rights be allocated? In the market, people have to back up their value assertions with money. R. Posner, **supra,** § 19.1 at 402. The market operates like an auction: the **highest** bidder would receive the opportunity to earn the $18.8 million in gross revenue paid SURCO. If SURCO only bid cost for the processing rights, a competing processor would have most likely won the bid, and taken the processing rights. But the market was precluded; there was no bidding, and the Commission noted that there is no evidence that SURCO even paid for the rights, nor was the assignment of all rights approved by the agency. Instead, it appears that the affiliate relationship was the sole basis for allocating the rights to the valuable NGLs.

**{23}** In addition, we find that the Commission's remedy of imputing a percentage of SURCO's gross revenue to Gas Company's income from gas processors for rate-making purposes is reasonable in light of evidence of the gas processing trade practice. Gas Company's own market survey shows that 83.7% of seventy-two contracts reviewed set the natural gas owner's compensation, or price, by some measure of economic value of the liquids. Therefore, it was not unreasonable for the Commission to conclude that Gas Company's price must take into account the perceived economic worth of the NGLs.

**{24}** Furthermore, the 75% figure was derived from Dr. Kirsch's study. The Commission held:

> 25. Using the range between $2,298,678 and $2,702,067 as GASCO's revenue shortfall and SURCO's windfall, the evidence indicates that in 1980, GASCO should have been paid approximately 75% of gross revenues from Lybrook sales.

This figure was also supported by the fact that during the year SURCO and Gas Company entered into the processing agreement, SURCO paid in excess of 77% of its gross revenues for the processing rights.

**{25}** We find that the Commission applied the correct legal standard in evaluating the affiliate transaction. Further, the Commission's order finding 1) the existing agreement unreasonable because it fails to fairly, justly and reasonably compensate the public utility, and 2) that 75% of SURCO's 1980 gross revenues be imputed to Gas Company for rate-making purposes, is reasonable

because it is supported by substantial evidence. The Commission's order is hereby affirmed.

**{26} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM F. RIORDAN,**
**Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1984-NMSC-004**

**Filing Date: January 5, 1984**

**Docket No. 15,070**

**NAOMI AGUILAR,**

**Petitioner,**

**v.**

**PENASCO INDEPENDENT SCHOOL DISTRICT NO. 6 AND MOUNTAIN STATES MUTUAL CASUALTY COMPANY,**

**Respondents.**

**Original Proceeding on Certiorari,**
**Joseph E. Caldwell, District Judge.**

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**OPINION**

**PAYNE, Justice.**

**{1}** We granted Naomia Aguilar's petition for writ of certiorari to review the opinion of the court of appeals remanding this case with instructions that another judge make the appropriate fee award.

**{2}** In her workmen's compensation action, Aguilar was successful in collecting a judgment of $4,184.93 against the School District as compensation and medical expenses. The trial court awarded $13,280.65 as attorney's fees. In reversing the fee award, the court of appeals inferred that the high fee suggested personal embroilment of the trial judge. We reverse only the portion of the case as it relates to the disqualification of the trial judge to make the fee decision.

**{3}** The court of appeals relied on **Wollen v. State,** 86 N.M. 1, 518 P.2d 960 (1974), to conclude that the fee award must be made by another judge. However, subsequent to the court of appeals opinion in this case, we reversed **Wollen.** In **State v. Stout,** 100 N.M. 472, 672 P.2d 645 (Opinion on reh'g, 1983), we ruled that an attorney charged with contempt by the trial judge is not automatically entitled to a hearing in front of a new judge. We indicated that a new judge must be appointed only if the trial judge "has become so embroiled in the controversy that he cannot fairly and objectively hear the case. * * *" **Id.** at 475, 672 P.2d 648.

**{4}** We concur with the court of appeals opinion dealing with disability and attorney fees, to the extent it discusses summary procedure and bad faith, and the basis for the fee award.

**{5}** The trial judge did not indicate any possible embroilment until his final, concluding statement at the fee hearing. He had conducted three days of hearings without any indication in the record of his taking an "activist" stance contrary to the **Mayberry** rule. **Mayberry v. Pennsylvania,** 400 U.S. 455, 91 S. Ct. 499, 27 L. Ed. 2d 532 (1971). There was no suggestion that the judge had an unfavorable personal attitude toward School District.

**{6}** Although the trial court's final statement, referred to in the court of appeals opinion, strongly denounced respondent School District for its trial tactics, it merely underscores facts. The trial judge stated that the

defendants were unreasonable in discussing the merits of the case. He further stated, "[T]his case took more preparation for its, what would seem relatively simple issue, than any case that I have ever had before me under Workmen's Compensation law. And I have never had a Defense so vigorously contested with so little evidence. . . ."

**{7}** Review of the record bears out the trial court's expression as being supported by the facts. The main issues were whether Aguilar was injured as she claimed, and the extent of her disability. The School District tried to impute bad motives to Aguilar for filing her claim. It tried to show that she was justifiably not rehired as a cook by referring to incidents which occurred years earlier and after which she had been twice rehired. In our opinion, such issues were not entirely relevant and certainly increased the time spent to litigate the matter. The fee awarded does not necessarily need to be less than the compensation recovered, but must be based on matters other than punitive awards for bad faith efforts of respondents.

**{8}** This matter is remanded to the same trial court to review the fee award, in light of this Opinion and that of the court of appeals.

**{9}** We order the court of appeals opinion to be published with this one.

**{10} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM R. FEDERICI,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM RIORDAN,**
**Justice**

**HARRY E. STOWERS, JR.,**
**Justice**

## APPENDIX

No. 5927.

Court of Appeals of New Mexico.

July 26, 1983.

**WOOD, Judge.**

**{11}** The appeal in this compensation case presents issues (A) as to the extent of plaintiff's disability, and (B) the propriety of the award of attorney fees. The fee question presents issues as to (1) summary procedure and bad faith; (2) basis of the fee award; and (3) embroilment of the trial court.

A. **Disability**

**{12}** The trial court found that plaintiff was totally disabled from November 19, 1979 to January 29, 1980, and fifty percent disabled from January 29, 1980 to October 29, 1980. Plaintiff's cross-appeal contends the trial court erred in failing to find her disability continued after October 29, 1980. The trial court could properly view the evidence as showing that after October 29, 1980, plaintiff was performing work for which she was fitted and was not partially disabled. NMSA, 1978, § 52-1-25. The cross-appeal is without merit; the judgment awarding disability is affirmed.

B. **Attorney Fees**

**{13}** The defendant's appeal challenges the propriety of an award of $13,280.65 as attorney fees. We reverse the fee award and, thus, disallow any award of attorney fees in the appeal. The record indicates that the fee award was, in part, punishment of the defendants and suggests personal embroilment of the trial judge. On remand the fee award is to be made by another judge. **See Wollen v. State,** 86 N.M. 1, 518 P.2d 960 (1974).

1. **Summary procedure and bad faith.**

**{14}** Findings Nos. 4 and 5 together read:

4. Workmen's Compensation cases by statute are contemplated to be summary in nature, and the parties are charged with the responsibility of litigating in good faith those issues about which there is a reasonable dispute of the facts.

5. Defendants' attorney insisted in bad faith upon making plaintiff prove each and every issue of the case even though there was no reasonable dispute about most of them.

**{15}** (a) The New Mexico statutes do **not** provide for summary trial of compensation claims. The statutes provide for a "civil complaint" and 30 days to answer, that unless otherwise provided by the compensation statute the rules of civil procedure apply. The statutes state a preference for early handling inasmuch as claims are to be advanced and disposed of as promptly as possible. However, nothing indicates a summary trial. **See** NMSA 1978, §§ 52-1-32, 52-1-34, 52-1-35 and 52-1-39.

**{16}** (b) The trial court found that the defendants' attorney acted in bad faith in "making plaintiff prove each and every issue of the case even though there was no reasonable dispute about most of them." As a general proposition, plaintiff had the burden of persuading the trial court as to all elements of her compensation claim. **Mayfield v. Keeth Gas Company,** 81 N.M. 313, 466 P.2d 879 (Ct. App.1970). Plaintiff had this burden, regardless of any "bad faith" by the defendants' attorney.

**{17}** (c) The defendants' attorney objected to evidence of **temporary** disability and objected to evidence of **total** disability on the basis that these two items were not raised by the pleadings. The objections were proper objections; they did not show bad faith. The trial court admitted the evidence and allowed an amendment to the pleadings to conform to the evidence.

**{18}** (d) There was a reasonable dispute as to whether plaintiff suffered an accidental injury while at work, and whether plaintiff suffered a disability from the alleged injury. These two items were contested, and well tried, by the attorneys for plaintiff and for defendants. The trial court remarked "the evidence that was submitted by the Plaintiff in this case is very weak." The defendants' contest of these items did not show bad faith.

**{19}** (e) The testimony raised the issue of notice. **See** NMSA 1978, § 52-1-29. It is fairly debatable as to which party interjected notice into the case through evidence; notice was not raised as an issue in the pleadings. Assuming that the defendants' attorney first interjected the notice issue into the trial, once notice became an issue plaintiff had to prove notice in order to obtain a judgment for compensation. **Geeslin v. Goodno, Inc.,** 75 N.M. 174, 402 P.2d 156 (1965). Plaintiff had no difficulty with this proof; the written report to the compensation insurer was admitted as an exhibit. In making the attorney fee award the trial court commented on the notice issue. Notice, **qua** notice, was a minor issue. Most of the notice testimony was directly relevant to the question of whether an accident had occurred. Contesting the accident did not show bad faith; the sideshow of notice, **qua** notice, did not show bad faith.

**{20}** (f) Neither the district court file nor the transcript of proceedings through the trial of the compensation claim raises an inference of bad faith on the part of the defendants' attorney.

**{21}** (g) The bad faith issue arises only in connection with the attorney fee award. Plaintiff moved for an award, supporting it with an affidavit which, if not contested, would provide evidentiary support for an award. **Lopez v. K.B. Kennedy Engineering Co.,** 95 N.M. 507, 623 P.2d 1021 (Ct. App.1981). The defendants did not file a counter affidavit; they moved to strike the affidavit, and this was granted. At the hearing on the question of the fee award, the trial court pointed out that the defendants' counsel not only refused to permit the fee question to be submitted on affidavit, but also refused to have the question presented through a telephone conference call. The defendants insisted on a hearing. The record

shows that the defendants' counsel was an obstructionist in resolving the question of attorney fees. The trial court could properly find that the defendants' counsel acted in bad faith on the fee issue, but the finding is not so limited and, for that reason, is factually erroneous.

**{22}** (h) What is the consequence of the attorney's bad faith? None of the factors in **Fryar I** (**Fryar v. Johnsen,** 93 N.M. 485, 601 P.2d 718 (1979)), provide for a fee award based on the attorney's bad faith. It is plaintiff's burden to produce evidentiary support for a fee award. **Morgan v. Public Service Co. of New Mexico,** 98 N.M. 775, 652 P.2d 1226 (Ct. App.1982). The consequence is that the time, effort and skill of plaintiff's attorney, utilized in connection with the fee hearing, provide a basis for increasing the fee award.

**{23}** Our point is that the findings as to summary procedure and the bad faith of the defendants' attorney do not support the fee award.

2. **Basis for the fee award.**

**{24}** Finding No. 6 states:

> 6. Taking into account defendants' offers of settlement made more than thirty days prior to trial, the present value of the award, the chilling effect of miserly fees, the time and effort expended by plaintiff's attorney, the extent to which the issues were contested, the novelty and complexity of the case, the fees normally charged for similar services, the ability, experience, skill and reputation of the plaintiff's attorney, the relative success of the plaintiff, and amount of the fees involved, and the relevant rate of inflation and rise in the cost of living, a reasonable attorney's fees to be awarded to plaintiff is $13,280.65.

**{25}** (a) Finding No. 6 is not a finding of fact. It refers to various **Fryar I** factors, but the reference is to taking them into account. How were they taken into account? Findings are of ultimate facts. NMSA 1978, Civ.P.R. 52(B)(1)(b) (Repl. Pamp.1980). The trial court considered that a settlement offer was made more than 30 days prior to trial, but how did it consider the offer? How did it consider the time and effort of plaintiff's attorney? How did it consider the relative success of plaintiff? We do not know. This finding does not support the fee award.

**{26}** (b) The defendants made a written offer of settlement more than 30 days prior to trial. At the fee hearing, the defendants pointed out that the settlement offer exceeded the amount of compensation that plaintiff recovered. The defendants overlook the ambiguity in the offer concerning medical expenses and the weaseling in the offer concerning attorney fees. The settlement offer is not to be broken down between compensation and medical benefits, because attorney fees may be awarded for the recovery of both. **See Schiller v. Southwest Air Rangers, Inc.,** 87 N.M. 476, 535 P.2d 1327 (1975). Because of the ambiguity of the offer, it cannot be held that plaintiff failed to collect compensation in excess of the amount offered. NMSA 1978, § 52-1-54(D).

**{27}** (c) The defendants claim that all but the last $1,000.00 of the fee award was based on the time expended by plaintiff's attorney. The trial court's remarks from the bench support this claim, but these remarks were not included in the defective finding. **Jennings v. Gabaldon,** 97 N.M. 416, 640 P.2d 522 (Ct. App.1982), points out that the fee award may not be based solely on the time expended by plaintiff's attorney. The propriety of this restriction is illustrated in this case; the trial court could not have properly based a portion of the fee award solely on the claim of plaintiff's attorney that 10.3 hours were expended in drafting and filing the complaint of one and one-half pages.

**{28}** (d) The defendants claim that the last $1,000.00 of the fee award was for the hearing on the fee award. We do not know if this is so; it is not revealed by the defective finding. However, there is evidence to support this additional $1,000.00 if this amount was awarded on the basis of the fee hearing. The evidence is the time, travel and court appearance by the plaintiff's attorney. **See Bufalino v. Safeway Stores, Inc.,** 98 N.M. 560, 650 P.2d 844 (Ct. App.1982).

**{29}** (e) A factor to be considered in awarding an attorney fee is the relative success of the worker in the court proceeding. **Fryar II** (**Johnsen v. Fryar,** 96 N.M. 323, 630 P.2d 275 (Ct. App.1980)). Plaintiff sought a permanent partial disability of fifty percent; she recovered temporary total disability of slightly over ten weeks, and temporary partial disability of fifty percent for nine months. Her total award for compensation was $2,157.52; her award for medical and medical travel to time of trial was $2,027.41. Assuming the defendants are correct, the fee award through trial was $12,280.65. The fee awarded must be reasonable in relation to the success obtained. **Hensley v. Eckerhart,** . . . U.S. . . . , 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). The issues tried—notice, accident, disability—were neither unusual nor complicated. **Fryar II.** In light of the issues litigated, a fee award of $12,000.00 is, on its face, unreasonable in relation to the success obtained.

3. **Trial court's embroilment.**

**{30}** The trial court said:

> (a) I share some of plaintiff's "anger about the absolute recalcitrance on the part of the Defendant . . . to come to any reasonable and acceptable discussion of what can be proven and disproven."
>
> (b) "Defendants have, to this very day, [been] unreasonabl[y] recalcitran[t] in discussing the merits of this case. And litigating every possible issue into the ground regardless of whether there exists any reasonable basis to do so or not."
>
> (c) If the defendants had not insisted on a hearing on the question of fees "we could have saved . . . [t]he Court's afternoon and which I have various other matters, including what I feel is an abandoned attempt at this point to try [to] improve the courtroom, because I have lost my ability to present my case before the current commission on [the] budget hearing."

**{31}** The evidence would have sustained a finding of **no** accident. The trial court's acknowledged irritation goes (1) to the defendants insisting that there be a trial of the case on the merits; (2) the defendants insisting on a hearing on the question of the fee award; and (3) because of the fee hearing, the trial judge was unable to appear at a budget hearing.

**{32}** The fee award is reversed. The cause is remanded with instructions that an appropriate fee award be made by another judge. The award is to be based on the record, and without any additional evidence.

**{33}** No costs are awarded.

**{34}** **IT IS SO ORDERED.**

**WOOD,**
**Judge**

**HENDLEY,**
**Judge**

**LOPEZ,**
**Judge**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1984-NMSC-005**

**Filing Date: January 5, 1984**

**Docket No. 14,652**

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**v.**

**BRYAN McCRARY AND BART DEWAYNE BURDICK,**

**Defendants-Appellants.**

**Appeal from the District Court of Lea County, William J. Schnedar, District Judge.**

Norvell & Glover
David L. Norvell
Albuquerque, New Mexico

for Defendant-Appellant Burdick.

Sarah M. Singleton
Santa Fe, New Mexico

for Defendant-Appellant McCrary.

Paul Bardacke, Attorney General
Barbara F. Green, Assistant Attorney General
Santa Fe, New Mexico

for Appellee.

**OPINION**

**PAYNE, Justice.**

**{1}** This appeal challenges the first degree murder convictions of Bryan McCrary and Bart D. Burdick.

**{2}** McCrary had attended a carnival in Hobbs and felt he was cheated out of sixty-four dollars. He and Burdick decided they would get revenge by shooting the tires of the carnival trucks. Armed with two .22 caliber rifles, two 30-30 caliber rifles, a shotgun, and accompanied by William Sutton, they returned to the carnival site at 1:30 a.m.

**{3}** With Burdick driving, the group contend they circled the area two to three times in a pickup truck. Stopping momentarily and then driving along slowly, they discharged about twenty-five shots into several tractor-trailers and cabs. Loretta DeGracia was in a sleeper cab of one of the trucks. Curtains were pulled in the windows above the bed. She was killed by a high-caliber bullet in the head.

**{4}** We first address the issues raised by both appellants. McCrary and Burdick claim: (a) the evidence does not support first degree murder convictions; (b) they were denied a speedy trial; and (c) the trial court's refusal to instruct on second degree murder was in error.

**{5}** McCrary and Burdick contend that the evidence does not support a finding that they acted with a "depraved mind regardless of human life." NMSA 1978, § 30-2-1(A)(3) (Cum. Supp.1983). McCrary adds that a first degree murder conviction must be supported by evidence that he had a subjective knowledge that his act was greatly dangerous to the lives of others. He argues that the circumstances support only a second degree conviction because they demonstrate an objective knowledge.

**{6}** McCrary alleges that a subjective knowledge that the shooting would be dangerous to any person within the truck is negated because they waited until they thought all people had left the carnival, circled two or three times to make sure no one would get hurt, and they only intended to shoot the tires. Also, a police detective indicated that all mobile homes and campers

were located a hundred feet from the damaged trucks. The campers and mobile homes were not struck by the shots.

**{7}** The standards of proving the defendant's culpable knowledge for a depraved mind murder are given in the Uniform Jury Instructions, 2.05 and 2.10. Instruction 2.05 states:

> The defendant is charged with first degree murder by an act greatly dangerous to the lives of others indicating a depraved mind without regard for human life. For you to find the defendant guilty . . . , the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> . . . .
>
> 4. The defendant knew that his act was greatly dangerous to the lives of others. . . .

NMSA 1978, UJI Crim. 2.05 (Repl. Pamp.1982). But to prove the lesser included offense of second degree, Instruction 2.10 requires the state to prove "[t]he defendant knew that his acts created a strong probability of death or great bodily harm to [name of victim] [or any other human being]." NMSA 1978, UJI Crim. 2.10(2) (Repl. Pamp.1982) (footnotes omitted).

**{8}** The committee commentary to the Uniform Jury Instruction 2.05 provides that the first degree depraved mind murder instruction sets forth a subjective test while second degree murder requires an objective test. The committee commentary is persuasive authority, although it is not binding on this Court. **Rutherford v. Darwin,** 95 N.M. 340, 622 P.2d 245 (Ct. App.1980).

**{9}** We agree that the first degree instruction requires a subjective knowledge. However, the knowledge is not that asserted by McCrary. Defendants did not have to actually know that DeGracia was in the sleeper compartment. Rather, sufficient subjective knowledge exists if Defendants' conduct was very risky, and under the circumstances **known to Defendants** they should have realized this very high degree of risk. **See** W. LaFave & A. Scott, Jr., **Handbook on Criminal Law** § 70 (1972).

**{10}** As is generally the case in a first degree murder case, the element of intent is seldom susceptible to direct proof and accordingly may be proved by circumstantial evidence. **State v. Manus,** 93 N.M. 95, 98, 597 P.2d 280, 283 (1979). Seldom will an accused admit at trial that he actually knew his acts placed another's life in great danger. In these instances, the jury decides whether there is a subjective knowledge of risk by considering "what the defendant should realize to be the degree of risk, in the light of the surrounding circumstances which he knows. . . ." W. LaFave & A. Scott, Jr., **supra,** at 542.

**{11}** There is reasonable support in the evidence for the jury to find that Defendants knew their act was greatly dangerous to the lives of others. Although Defendants claim that they only intended to shoot the tires, and not to harm anyone, the jury could disregard their claim. Not a single tire was shot, yet there were twenty-five bullet holes in the upper parts of the vehicles. In light of the surrounding circumstances, Defendants should have realized the risk of someone sleeping in the sleeper compartment. McCrary and Burdick repeated several times that they only wanted to shoot low lest they injure someone. Also, they contemplated slashing the tires but this plan was rejected because of the danger of being caught. This testimony supports a jury determination that Defendants had reason to know people were in the area. We will not consider the weight of the evidence if substantial evidence supports the verdict. **See State v. Lankford,** 92 N.M. 1, 582 P.2d 378 (1978). Accordingly, we affirm the jury's finding of first degree murder.

**{12}** Each defendant claims a violation of his right to a speedy trial under NMSA 1978, Crim.P. Rule 37 (Cum. Supp.1983). Rule 37 requires that an indictment or information be dismissed with prejudice if trial of any person does not commence within six months, **inter alia,** after the charges are filed, after the mandate of an appeal is filed, or within an extension granted by the Supreme Court. Eighteen months passed

between Defendants' arrest and trial. This delay triggers an inquiry into the factors balanced to ascertain whether one's right to a speedy trial was violated. **State v. Tafoya,** 91 N.M. 121, 570 P.2d 1148 (Ct. App.1977).

**{13}** The four factors that must be weighed are the "length of delay, the reason for the delay, the defendant's assertion of his right and prejudice to the defendant." **State v. Harvey,** 85 N.M. 214, 215-16, 510 P.2d 1085, 1086-87 (Ct. App.1973); **see also Barker v. Wingo,** 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Contrary to Defendants' assertion, we do not find an unjustified delay which compels relief.

**{14}** On April 25, 1981, Defendants were charged with an open charge of murder. In June, Magistrate Judge Hallam ordered that they be bound over for trial in the district court for "2d Degree Murder or lesser Offense." In disregard of the bind-over order, State filed an information charging defendants with first degree murder. In July, Defendants moved to dismiss the information because it did not conform to the bind-over order. This motion was denied. Defendants filed an interlocutory appeal on September 15, 1981. In January 1982, the court of appeals reversed the trial court, holding that "the information must charge substantially the same offense as that charged by the magistrate." **State v. McCrary,** 97 N.M. 306, 312, 639 P.2d 593, 599 (Ct. App.1982).

**{15}** In January 1982, prior to the court of appeals ruling, State obtained from this Court an extension of the six-month requirement under Rule 37. The petition was joined by opposing counsel's stipulation. This Court granted until July 1982 to bring the matter to trial. After the court of appeals mandate was issued, trial was scheduled for June 8, 1982.

**{16}** On May 26, 1982 State filed **nolle prosequis** to dismiss its informations, which charged second degree murder. A grand jury indictment was acquired in August 1982. Defendants were charged with first degree murder. Trial commenced on October 27, 1982 and on October 28, the jury returned a verdict of guilty of first degree murder.

**{17}** First, the delay, occasioned by Defendants' resistance to a first degree murder charge, and their interlocutory appeal, does not impugn bad motives to State as a denial of Defendants' right to a speedy trial. We are not penalizing Defendants for exercising their right of appeal, or for securing their rights to be charged according to the bind-over order. Rather, we simply conclude that this time lapse was justified and cannot be charged against State for the speedy trial calculation.

**{18}** Second, Defendants certainly cannot complain of the time lapse due to the stipulated extension. By agreeing to the extension, they failed to assert their right to a speedy trial from January until July 1982.

**{19}** Third, Defendants allege that the **nolle prosequis** were not filed in good faith, and that the dismissals were sought only to gain a tactical advantage. Citing **United States v. Lara,** 520 F.2d 460 (D.C. Cir.1975), Defendants allege that delay caused by tactical maneuvering requires that the time between filing to dismiss and the grand jury indictment must be counted for purposes of Rule 37. However, **Lara** is distinguishable from the instant case. In **Lara,** the prosecution moved to dismiss charges against defendants in the District of Columbia for violating the narcotics laws. Subsequently, an indictment alleging substantially the same charges was obtained in the Southern District of Florida. The court found that the tactic was employed because the prosecution believed Florida would be more sympathetic to its case. A nineteen-month delay resulted. The speedy trial guarantee was violated because the court found the delay to be unconscionable and unjustified.

**{20}** Here, however, the maneuvering was not done to get a tactical advantage. The bind-over order required a charge of second degree murder or less. The State, since July 1981, maintained that first degree murder was the appropriate charge. It is generally easier to prove second

degree than first because the former is a lesser included offense. NMSA 1978, § 30-2-1(B) (Cum. Supp.1983).

**{21}** The **nolle prosequis** were necessary so State could prosecute for what it long maintained as the appropriate crime. This was not bad faith. For good cause, State may terminate and reinstitute a criminal prosecution. **See State ex rel. Delgado v. Stanley,** 83 N.M. 626, 495 P.2d 1073 (1972).

**{22}** The speedy trial guarantee is to prevent lengthy incarceration prior to trial, to reduce impaired liberty while an accused is released on bail, and to shorten the disruption of life caused by pending and unresolved criminal charges. **United States v. MacDonald,** 456 US. 1, 8, 102 S. Ct. 1497, 1502, 71 L. Ed. 2d 696 (1982). Accordingly, once charges are dropped in good faith, the delay is not scrutinized by the speedy trial clause of the Sixth Amendment of the federal constitution. **Id.** at 7, 102 S. Ct. at 1501. During the interval between dismissal and the first degree murder indictment, Defendants were not in custody. The bonds were discharged and Defendants were released without prejudice. The time period from May 26 to August 27, 1981 is not attributable to State as delay, denying a speedy trial. Although trial took place eighteen months after Defendants' arrest, we find no violation of the right to a speedy trial.

**{23}** Defendants argue that the trial court erred in failing to give State's requested instruction on second degree murder as a lesser included offense. When State submitted the instruction, counsel for Defendants objected. By objecting, Defendants have waived any error that might have occurred. As we stated in **State v. Trujillo,** 27 N.M. 594, 603, 203 P. 846, 849 (1921), with regard to submitting jury instructions for the court, "It will be available error only in case the court fails to agree with [defendant's trial] counsel as to the proper scope of the instructions." **See also State v. Najar,** 94 N.M. 193, 196, 608 P.2d 169, 172 (Ct. App.1980). Here, the trial court concurred with Defendants' position; it did not "fail to agree." They cannot now complain that it was reversible error. **Cf. State v. Doe,** 672 P.2d 654 (1983) (failure to instruct on general criminal intent was not jurisdictional error requiring automatic reversal, where respondent did not tender such instruction or object to not giving the instruction); and **State v. Garcia,** 46 N.M. 302, 128 P.2d 459 (1942) (defendant acquiesced in the trial court's instructions and could not claim initially on appeal that such instructions were improper).

**{24}** Burdick separately disputes an alleged prosecutorial failure to rebut his own witness's statement which tended to exculpate defendants, while McCrary contends the trial court erroneously precluded cross-examination into Sutton's juvenile adjudication and that it erred in refusing admission of a police report. We find these other issues raised by Defendants to be without merit.

**{25}** For the reasons given, the trial court and jury conviction of first degree murder is affirmed.

**{26} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM FEDERICI,**
**Chief Justice**

**WILLIAM F. RIORDAN,**
**Justice**

**HARRY E. STOWERS,**
**Justice**

**DAN SOSA, JR.,**
**Senior Justice, respectfully dissenting**

**DISSENT**

**SOSA, Senior Justice, dissenting.**

**{27}** I respectfully dissent from the majority opinion only as to its discussion regarding the trial court's failure to instruct on second degree

murder. I believe the failure to give the instruction here deprived Defendants of a fair trial.

**{28}** As the majority opinion rightly indicates, second degree murder requires objective knowledge on the part of a defendant that a person will be killed or seriously harmed. First degree murder on the other hand requires a subjective knowledge that death or serious injury will result. These two tests differ substantially and required precise instructions to guide the jury in determining which particular degree of homicide Defendants may have committed. The majority acknowledges the evidence was conflicting as to whether Defendants McCrary and Burdick were subjectively aware that their behavior would create a strong probability of death or great bodily harm. This is supported by the fact that the magistrate in the bind over order originally found probable cause only for second degree murder. In addition the prosecution itself requested an instruction on second degree murder, thereby indicating its view that the evidence would support such a conviction. Finally, the trial judge indicated that based on the evidence, he would have convicted on second degree murder. There was thus a clear factual issue whether Defendants had subjective or objective awareness of the danger of their acts.

**{29}** Defendants were entitled to have the jury consider this factual question. Absent a second degree murder instruction, there is simply no guarantee that the jury ever considered whether Defendants acted with the objective knowledge that death or serious injury would result, as required by second degree murder, or whether they acted with an actual subjective awareness as required by first degree murder. Commentary to the Uniform Jury Instructions on second degree murder indicates that an instruction on second degree murder should not be given where the evidence only supports first degree murder. NMSA 1978, UJI Crim. 2.11 (Repl. Pamp.1982), Committee Commentary. The evidence in this case did not exclusively support first degree murder. Failure to give a second degree murder instruction deprived Defendants' jury of an instruction on a lesser included offense of the offense charged, NMSA 1978, Section 30-2-1B (Cum. Supp.1983), as well as an instruction clearly warranted by the evidence presented. This deprived Defendants of their right to a fair trial and was fundamental error. **See State v. Vallejos,** 86 N.M. 39, 519 P.2d 135 (Ct. App.1974).

**{30}** State v. Najar, 94 N.M. 193, 608 P.2d 169 (Ct. App.1980) is the most recent authority directly relied upon by the majority for its conclusion that Defendants waived any error that occurred by objecting to the prosecution's tender of the instruction. The **Najar** court however, referred to the fundamental error doctrine by concluding that the conviction there would stand since no such error existed. The implication is clear: the presence of fundamental error is grounds for reversal. Fundamental error exists in the instant case.

**{31}** In my view, because fundamental error is involved, there is abundant authority for fully considering the instruction issue notwithstanding any asserted waiver on Defendants' part. This Court clearly may consider errors not properly preserved for appeal where such errors deprive the accused of a fundamental right. **State v. Ramirez,** 98 N.M. 268, 648 P.2d 307 (1982); **State v. Baca,** 89 N.M. 204, 549 P.2d 282 (1976); **State v. Vallejos;** NMSA 1978, Crim., Child.Ct., Dom. Rel. & W/C App.R. 308 (Repl. Pamp.1983).

**{32}** The failure to instruct on second degree murder is inconsistent with **State v. Doe,** 672 P.2d 654 (1983), and **State v. Jackson,** 672 P.2d 660 (1983). Together these cases stand for the proposition that fundamental error may lie for failure to properly instruct the jury on the necessary elements of an offense presented by the evidence. **Jackson** reversed a murder conviction and remanded for a new trial since the second degree murder instruction given did not contain the necessary elements of that offense not covered in other instructions. In **Doe** the defendant's failure to tender an instruction on general criminal intent or to object to the failure to give the instruction was held not reversible error. However, the holding was based not only on the failure to object but on the conclusion that the instructions

adequately addressed the necessary elements of the crime at hand.

**{33}** The instant case is not simply one wherein the instruction given differed from the required instruction in some important respects. Here, despite the request for an instruction on the lesser included offense of second degree murder, it was altogether omitted. Defendants may well be guilty of first degree murder or they may be guilty of second degree murder. Whether they acted with a subjective awareness or an objective knowledge that death or serious injury would result was a question of fact that should have been submitted to the jury under proper instruction. It was not. The defendant in **Jackson** presumably will have his jury properly instructed on retrial. The defendant in **Doe** had her jury properly instructed. The Defendants here did not. Under the circumstances, the failure to instruct deprived Defendants of a fair trial.

**{34}** Defendants' objection to the instruction, viewed by the majority as a waiver, should be immaterial in light of the fact that the prosecution itself requested it. In the federal courts, the long established rule is that an instruction on a lesser included offense must be given where the evidence would permit a jury to rationally find a defendant guilty only of that lesser offense. **Keeble v. United States,** 412 U.S. 205, 208, 93 S. Ct. 1993, 1995, 36 L. Ed. 2d 844 (1973); **Sansone v. United States,** 380 U.S. 343, 349, 85 S. Ct. 1004, 1009, 13 L. Ed. 2d 882 (1965); **Stevenson v. United States,** 162 U.S. 313, 323, 16 S. Ct. 839, 842, 40 L. Ed. 2d 980 (1896). Some states have held that reversible error exists in homicide cases where a trial court does not **sua sponte** give a lesser included offense instruction warranted by the evidence. **See, e.g., State v. Thomas,** 112 Ariz. 261, 540 P.2d 1242 (1975); **State v. Taylor,** 112 Ariz. 68, 537 P.2d 938 (1975), **cert. denied,** 424 U.S. 921, 96 S. Ct. 1127, 47 L. Ed. 2d 328 (1976); **State v. Jones,** 220 Kan. 136, 551 P.2d 801 (1976). Michigan limits this rule to first degree murder cases since second degree murder is a lesser included offense and since there are significant differences in sanctions between first and second degree murder. **People v. Jenkins,** 395 Mich. 440, 236 N.W.2d 503 (1975). The court in **Jenkins** concluded that the trial judge is required to give a lesser included offense instruction warranted by the evidence even over objection. **Id.** While I believe this latter rule to be a sound one, the majority need not go this far to reach a just result in this case.

**{35}** In first degree murder cases, where either the prosecution or the defense requests a second degree murder instruction warranted by the evidence, it should be given where failure to do so would result in fundamental error. This limited rule would assure murder trials wherein juries are given complete instructions warranted by the evidence. It would also render less likely the possibility that a jury, deprived of proper instruction on a lesser included offense, might convict on a greater offense whose sanction far exceeds what a particular defendant deserves. This approach would make it more likely that culpable defendants will be convicted of precisely that degree of homicide of which they are guilty.

**{36}** The majority result on the other hand essentially countenances a practice wherein the defense or the prosecution is allowed to take an all or noting gamble that the jury will either convict on the greater offense of first degree murder or acquit. Under this practice, some defendants will suffer greater sanctions than they justly deserve while other culpable defendants will go free.

**{37}** For these reasons, I would reverse and remand for a new trial wherein a second degree murder instruction should be given.

**DAN SOSA, JR.,**
**Senior Justice**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1984-NMSC-007**

**Filing Date: January 11, 1984**

**Docket No. 15,144**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**D.A. McCALL, A/K/A D. McCALL,**

**Respondent.**

**Original Proceeding on Certiorari,**
**Gerald R. Cole, District Judge.**

Motion for Rehearing Denied March 20, 1984

Paul Bardacke, Attorney General
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Santa Fe, New Mexico

for Petitioner.

Marchiondo & Berry
Michael Vigil
Albuquerque, New Mexico

for Respondent.

**OPINION**

**PAYNE, Justice.**

**{1}** This appeal comes before us on writ of certiorari to the court of appeals. McCall was convicted of three counts of fraud, three counts of securities fraud, three counts of conspiracy to commit fraud, and two counts of solicitation to commit fraud. The court of appeals set aside all of the convictions except for those of conspiracy to commit fraud. We issued a writ of certiorari to consider whether the fraud and securities fraud convictions were properly set aside. We reverse the court of appeals and reinstate the convictions for both fraud and securities fraud.

**{2}** The relevant facts are summarized in the court of appeals opinion.

**{3}** The court of appeals reversed the fraud convictions because it held that a victim is an essential element of the crime of fraud; but there was no individual victim. The court reasoned that no lender suffered any loss in any of the three transactions for which McCall was convicted. Therefore, proof of misrepresentations without evidence of damages is not sufficient to convict him of perpetrating a fraud.

**{4}** Although damages are essential to recover on a civil claim for fraud, **Bank of Commerce v. Broyles,** 16 N.M. 414, 120 P. 670 (1911), **rev'd on other grounds,** 234 U.S. 64, 34 S. Ct. 730, 58 L. Ed. 1214 (1914), monetary loss is not a requisite of a criminal conviction. The court of appeals relies on **Annot.,** 53 A.L.R.2d 1215, § 2 (1957), to assert that injury or loss is an essential element of the crime of fraud. And from this proposition, the court extrapolated that absent damages to the financial entities which gave up the money, the convictions cannot stand. However, this Annotation does not state that the crime requires financial losses; to the contrary, it reads in relevant part:

> [T]he courts are divided on the question whether an actual financial loss is required to constitute the crime [of obtaining a thing of value under false pretense], and whether, in credit transactions, the adequacy of the security offered, though misrepresented, constitutes a defense.
>
> *** * * [A] majority of courts [have held] * * * that a pecuniary loss by the victim is not an essential element of the**

> **crime** and that the adequacy of the security offered to obtain a loan or credit, if materially misrepresented, constitutes no defense.

**Id.** at 1215-16 (emphasis added).

**{5}** New Mexico, consistent with the majority of jurisdictions, does not require pecuniary loss by the victim as an element of the crime. The only elements are stated in NMSA 1978, Section 30-16-6 (Cum. Supp.1983). The statute provides that fraud is the "intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations." **Id.** The plain language of this section provides that the crime occurs with the taking or misappropriation. The relevant issue in evaluating McCall's fraud convictions is whether he acquired the loans by fraudulent conduct, practices, or representations. **State v. Stettheimer,** 94 N.M. 149, 607 P.2d 1167 (Ct. App.1980) (fraudulent obtainment of a loan may be the basis for a criminal fraud conviction); **see also** Survey on New Mexico Law: April 1, 1980-March 1980, 12 N.M.L. Rev. 229, 255.

**{6}** The court of appeals erred in holding that repayment by the borrowers negated any loss and precluded the fraud conviction. Previous decisions have rejected the defense of repayment. In **State v. Schifani,** 92 N.M. 127, 584 P.2d 174 (Ct. App.), **cert. denied,** 92 N.M. 180, 585 P.2d 324 (1978), the defendant obtained money by fraudulently representing that he would invest it. He argued his statements should be ignored because he repaid the money, and, therefore, his fraud conviction should be set aside. But the court of appeals correctly reasoned that "Defendant's fraud was complete when he got the money from the victims; repayment did not mitigate defendant's offense." **Id.** at 130, 584 P.2d at 177 (citations omitted); **see generally State v. Thoreen,** 91 N.M. 624, 578 P.2d 325 (Ct. App.) (the crime of fraud is complete once the taking occurs), **cert. denied,** 91 N.M. 610, 577 P.2d 1256 (1978).

**{7}** The policy advanced in **Stettheimer** supports the fraud convictions; that is, due to fraudulent representations, the creditor is forced to assume a greater risk than he would have assumed if the debtor's representations had been true. 94 N.M. 149 at 153, 607 P.2d 1167 at 1171.

**{8}** In addition, the policy expounded in **People v. Martin,** 102 Cal. 558, 36 P. 952 (1894), supports the fact that the manner of acquisition is dispositive of whether there was a crime; pecuniary loss by a victim is irrelevant. There, the defendant was convicted of obtaining money by false pretenses. He asserted that his victim's conduct was dishonest, therefore the state was barred from prosecuting. But the court held that "The offense is committed against the public, and not against the individual. The guilty party is prosecuted in the interest of the state, and not in the interest of the party defrauded of his property." **Id.** at 953; **see also People v. Webb,** 143 Cal. App.2d 402, 300 P.2d 130 (1956) (jury instruction that murder was an offense against the public and not the individual held to be proper).

**{9}** This policy expressed in **Martin** is especially applicable here. MFA loans are provided by the government to facilitate housing for low income persons. **See State v. Griffin,** 100 N.M. 75, 665 P.2d 1166 (Ct. App.1983). If one person fraudulently obtains money from the fund, an eligible borrower may be precluded from being considered for a loan, due to depleted funds. The crime is against the public both in a real sense as well as theoretically.

**{10}** The court of appeals also set aside McCall's securities fraud convictions. The court reasoned that because there was insufficient evidence of fraud, there could be no conviction for securities fraud. Because we find that the proof for the fraud convictions was adequate, we also reverse the court of appeals on this issue and reinstate the securities fraud convictions.

**{11}** In light of our reversal of the court of appeals, point III(B) of its opinion, which deals

with the disparity of sentences imposed, is no longer applicable even if correct. We point out that under NMSA 1978, Crim.P. Rule 57.1 (Repl. Pamp.1980), the trial court has authority to modify a defendant's sentence.

**{12} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM RIORDAN,**
**Justice**

**HARRY E. STOWERS, JR.,**
**Justice**

**WILLIAM R. FEDERICI,**
**Chief Justice, not participating**

**DAN SOSA, JR.,**
**Senior Justice, not participating**

**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**Opinion Number: 1984-NMSC-009**

**Filing Date: January 12, 1984**

**Docket Nos. 15,101, 15,102**

**STATE OF NEW MEXICO,**

**Petitioner,**

**v.**

**JANET PEDRONCELLI,**

**Respondent,**

**JANET PEDRONCELLI,**

**Petitioner,**

**v.**

**STATE OF NEW MEXICO,**

**Respondent.**

**Original Proceedings on Certiorari,**
**Harry E. Stowers, Jr., District Judge.**

Paul Bardacke, Attorney General
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for State of New Mexico.

Scott McCarty
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for Janet Pedroncelli.

**OPINION**

**PAYNE, Justice.**

**{1}** Janet Pedroncelli was elected Secretary-Treasurer of the union CWA Local 8611. In her official capacity, she was custodian of the credit union funds. She negotiated twenty-two checks and fourteen cash withdrawal vouchers over a six-month period, embezzling a total of $16,571.

**{2}** Pedroncelli was charged by criminal information with one count of embezzlement over $2,500, in violation of NMSA 1978, Section 30-16-8, a third degree felony. She was found guilty by a jury. She appealed, alleging, **inter alia,** that the trial court erred in failing to direct a verdict of acquittal because each misappropriating act was under a $2,500 amount. The court of appeals reversed, but did not remand for acquittal. It held that the evidence "prove[d] 36 separate acts of embezzlement of over $100 but not more than $2,500, all fourth degree felonies." The court of appeals concluded:

> The State could have charged defendant in 36 counts; it chose to charge in only one. **See State v. Gurule,** 90 N.M. 87, 559 P.2d 1214 (Ct. App.1977). We * * * reverse the conviction because numerous embezzlements could not be aggregated to increase numerous fourth degree felonies to the status of a third degree felony. **See** § 30-16-8; **Sanchez v. State,** 97 N.M. 445, 640 P.2d 1325 (1982).

The matter was "remanded for correction of the judgment and sentence to reflect conviction on one count of embezzlement of more than $100 but less than $2,500."

**{3}** We reverse the court of appeals and affirm the trial court.

**{4}** Although the court of appeals relied on **Sanchez,** its decision lacks further explanation of why the jury could not conclude that only one crime had occurred. In **Sanchez,** we affirmed the trial court's determination that the indictment was faulty because it was vague. Defendants were charged with having "'received, retained or disposed' of 72 different items that belonged

to four separate parties." **Id.** at 446, 640 P.2d at 1326. The indictment accumulated these charges into one count, thereby elevating the crime to a third degree felony.

**{5}** The controlling rationale of **Sanchez** was that an accused is entitled to be apprised of the crime(s) with which he is charged in sufficient detail to permit him to prepare his defense. While we continue to subscribe to this latter principle, as reflected in **Sanchez,** we observe that Pedroncelli is not aided by such reasoning. We are not here concerned or presented with a vague or otherwise defective charging instrument.

**{6}** Nor do the circumstances presented in the case at bar implicate a double jeopardy problem. The "same evidence" test determines, for double jeopardy purposes, whether two or more offenses actually constitute a single offense. **State v. Tanton,** 88 N.M. 333, 540 P.2d 813 (1975); and **Owens v. Abram,** 58 N.M. 682, 274 P.2d 630 (1954), **cert. denied,** 384 U.S. 917, 75 S. Ct. 300, 99 L. Ed. 719 (1955). The "same evidence" test would preclude the State from bringing separate charges for any of the thirty-six isolated acts of embezzlement, **along with** the charge which formed the basis for Pedroncelli's conviction. The issue, though, is not whether Pedroncelli is subject to thirty-six (or one or more thereof) separate prosecutions for fourth degree embezzlement, **in addition to** her prosecution for third degree embezzlement. Rather, the salient question compelling our consideration is whether the jury could properly consider Pedroncelli's repeated defalcations, **in toto,** as a single crime. We conclude that the jury could so consider the evidence herein.

**{7}** The "single larceny doctrine" has been addressed or some of its related aspects have been discussed in prior New Mexico appellate decisions. **See State v. Allen,** 59 N.M. 139, 280 P.2d 298 (1955); **State v. Romero,** 33 N.M. 314, 267 P. 66 (1928); **State v. Klasner,** 19 N.M. 474, 145 P. 679 (1914); **State v. Boeglin,** 90 N.M. 93, 559 P.2d 1220 (Ct. App.1977); and **State v. Bolen,** 88 N.M. 647, 545 P.2d 1025 (Ct. App.1976), **cert. denied,** 89 N.M. 5, 546 P.2d 70 (1976). In **Allen,** we held that the trier of fact could determine whether distinct or successive takings constituted single or multiple offenses. We quoted approvingly from 36 C.J. **Larceny** § 219, at p. 798:

> 'Where the property is stolen from the same owner and from the same place by a series of acts, if each taking is the result of a separate, independent, impulse, each is a separate crime; but if the successive takings are all pursuant to a single, sustained, criminal impulse and in execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse between each act.'

**Allen,** 59 N.M. at 140-41, 280 P.2d at 299.

**{8}** We readopt the above-quoted reasoning and hold that where the State obtains an indictment or files an information or misdemeanor complaint that contains a single charge which is premised upon a series of takings or conversions from one victim, the factfinder may, upon the trial of that charge, determine if the successive takings or conversions are associated with a single, sustained criminal intent. Those convicted of such crimes may, on appeal, challenge the sufficiency of the evidence which supports the finding that the takings or conversions were allied with one common intent element. **Compare State v. Lucero,** 98 N.M. 311, 648 P.2d 350 (Ct. App.1982), **cert. denied,** 98 N.M. 336, 648 P.2d 794 (1982) (sufficient evidence supported jury's finding that the defendant intended to commit a theft **at the time** he entered the burglarized premises).

**{9}** Embezzlement is admittedly distinguishable from larceny. Unlike larceny it is purely a statutory crime which did not exist at common law. **Territory v. Maxwell,** 2 N.M. (Gild) 250 (1882); **State v. Bryant,** 99 N.M. 149, 655 P.2d 161 (Ct. App.1982). Larceny involves an original wrongful taking or trespass, whereas embezzlement involves lawfully possessed

property that an offender later converts to his own use. **State v. Peke,** 70 N.M. 108, 115, 371 P.2d 226, 230 (1962), **cert. denied,** 371 U.S. 924, 83 S. Ct. 293, 9 L. Ed. 2d 232 (1962); and **Bryant,** 99 N.M. at 150, 655 P.2d at 162; **see also** NMSA 1978, UJI Crim. 16.00 and 16.31 (Repl. Pamp.1982 and Supp.1983).

**{10}** These differences do not, however, preclude reliance upon **Allen** or other "single larceny" decisions. Both of these crimes encompass the requirement that the taking or conversion occur contemporaneously with an intention to deprive the owner of the property. NMSA 1978, UJI Crim. 16.00 and 16.31 (Repl. Pamp.1982 and Supp.1983). Accordingly, the factfinder may, in either case, evaluate the evidence to determine if one protracted intention accompanies the several takings or conversions that may be implicated within a single charge.

**{11}** The Legislature defines what behavior constitutes a unit of prosecution. **United States v. Johnson,** 612 F.2d 843, 845 (4th Cir.1979). The legislative intent is determined primarily by the language of the statute itself; the words are given their ordinary meaning unless a different intent is clearly indicated. **Winston v. New Mexico State Police Board,** 80 N.M. 310, 454 P.2d 967 (1969); **State v. Tapia,** 89 N.M. 221, 549 P.2d 636 (Ct. App.), **cert. denied,** 89 N.M. 206, 549 P.2d 284 (1976).

**{12}** NMSA 1978, Section 30-16-8 states, "Embezzlement consists of the embezzling or converting to [one's] own use of anything of value, with which [one] has been entrusted, with fraudulent intent to deprive the owner thereof." According to the plain language of this statute, embezzlement is a betrayal or violation of one's entrustment. The nature of the entrustment involved in a particular case should be considered in ascertaining the number of crimes committed and the permissible unit of prosecution employed in that case. The evidence adduced at Pedroncelli's trial sufficiently showed her continuing intention to violate her ongoing entrustment as an elected union official. Thus, the proof was consistent with the third degree felony charge.

**{13}** We agree with Judge Donnelly's dissent from the Court of Appeals' Opinion herein and order its publication. He correctly relies upon a case from another jurisdiction which closely resembles the instant case. **See Nelson v. State,** 208 Tenn. 179, 344 S.W.2d 540 (1960) (appropriation of union's funds by officers thereof who cashed a series of checks over several months was held to be pursuant to a single continuing intent and a general scheme).

**{14}** We hereby reverse the court of appeals and the defendant's conviction as a third degree felon is affirmed.

**{15} IT IS SO ORDERED.**

**H. VERN PAYNE,**
**Justice**

**WE CONCUR:**

**WILLIAM FEDERICI,**
**Chief Justice**

**DAN SOSA, JR.,**
**Senior Justice**

**WILLIAM F. RIORDAN,**
**Justice**

**HARRY E. STOWERS,**
**Justice, not participating**

No. 5988.

Court of Appeals of New Mexico.

Aug. 11, 1983.

**MARY C. WALTERS,**
**Chief Judge.**

**{16}** Janet Pedroncelli was charged by criminal information with one count of embezzlement over $2,500, in violation of NMSA 1978, § 30-16-8, a third degree felony. Following a jury trial

in which she was found guilty, she appeals. Her first point alleges error in the court's failure to direct a verdict of acquittal, on grounds that each of the series of defalcations proved was under a $2,500 amount.

**{17}** The other two issues raised are whether defendant's counsel should have been allowed to testify regarding use of double-vouchering evidence, and whether certain jurors should have been discharged for cause.

**{18}** We reverse on the first issue, and remand for correct sentencing.

**I.**

**{19}** The criminal information charged that between October 17, 1979, and April 18, 1980, defendant "did not embezzle or convert to Defendant's own use a thing of value, to wit: CWA Local 8611 Credit Union funds with which Defendant had been entrusted with fraudulent intent to deprive CWA Local 8611 and the membership, the owners thereof, said things of value exceeding $2,500. . . .' The proofs were that 22 checks, ranging in amounts from $300 to $1,000 each, were drawn on credit union funds and endorsed by defendant during the charged period. There were, in addition, 14 cash voucher withdrawals of credit union funds, each for $200, paid to defendant over the same period. The evidence served to prove 36 separate acts of embezzlement of over $100 but not more than $2,500, all fourth degree felonies. Section 30-16-8.

> The State could have charged defendant in 36 counts; it chose to charge in only one. **See State v. Gurule**, 90 N.M. 87, 559 P.2d 1214 (Ct. App.1977). We do not agree that acquittal is required, but we reverse the conviction because numerous embezzlements could not be aggregated to increase numerous fourth degree felonies to the status of a third degree felony. **See** § 30-16-8; **Sanchez v. State**, 97 N.M. 445, 640 P.2d 1325 (1982).

**II.**

**{20}** Before trial, defendant moved to preclude the State from showing that on several occasions defendant had doubly charged her employer, Mountain Bell, and the union for time spent on union business. There had been an agreement between those concerned that the union would pay defendant the same wage she earned at Mountain Bell while she was engaged in union business, and that Mountain Bell would not pay her but would excuse her absences from work while she was so engaged.

**{21}** Defense counsel sought to testify that Sandra Norman, the assistant district attorney who had filed the information, had represented that evidence of double vouchering would not be presented, yet the witness list showed the names of witnesses who would testify only to that fact. The trial court refused, under rule of court, to permit counsel to testify, but the assistant who purportedly made the representations was called by the defense and she testified.

**{22}** Defense's argument has two heads: (1) the witness list was received the day before the scheduled trial and, therefore, provided inadequate notice and opportunity for defendant to locate a rebuttal witness to testify on the double vouchering evidence, and (2) the State's intention to call such witnesses violated the earlier representations of the State's attorney, upon which defendant had relied.

**{23}** Although peripheral facts were developed going to both arguments, we think defendant's own statement to the court induced the court's ruling. During his argument on the motion, counsel said:

> I would also suggest, your honor, that my notes indicate that * * * on June 2, when Mr. Pedroncelli was deposed, that's when [the State's attorney] in response to my question, told me about using the double voucher theory. Now as far as evidence is concerned, your honor, I have been speaking as an officer of the court on a

> preliminary matter. I'd be happy to be sworn. And I have Sandra Norman who is right here; she can say a lot more accurately than I can what she and Mr. Walker discussed.

Thus, counsel admitted that a week before trial he knew of the State's plan to use double-vouchering evidence and, secondly, he offered Ms. Norman's testimony as more accurate than his own regarding the representations he said he had relied on. Ms. Norman testified that she had only agreed that the State would not pursue a second count based on the double-vouchering acts. Defendant was skewered by her testimony.

**{24}** We find no error in the court's refusal to permit counsel to testify. None of the cases cited by defendant lead us to a contrary conclusion.

**III.**

**{25}** Defendant finally claims that three jurors who responded affirmatively when asked,

> Do you all feel that to make a fair determination of guilt or innocence you are required to know both sides of the story?

should have been excused for cause. Defendant subsequently challenged them peremptorily and none of them served on the jury.

**{26}** Defendant's claim fails for two reasons: First, she failed to fully establish that the veniremen complained of should have been excused for cause. After the three indicated that they would have to hear both sides, defendant should have explained the presumption of innocence to them and defendant's freedom from proving that innocence, and then asked if they would be able to follow the legal requirements of the presumption. Defendant must allege, and the record must show that defendant was denied a fair and impartial jury. **State v. Sluder**, 82 N.M. 755, 487 P.2d 183 (Ct. App.1971). If there is a genuine concern about the partiality of a prospective juror, defendant must take adequate steps to establish such bias in the record. **See State v. Dobbs**, 100 N.M. 60, 665 P.2d 1151 (Ct. App.1983). Here, the mere statement by the jurors that they had to hear both sides was insufficient to establish that they would not be willing to follow the law as instructed.

**{27}** The second problem with defendant's claim is that none of the veniremen complained of ever served on the jury. Even if the challenges for cause had been erroneously overruled, and even though defendant may have exhausted his peremptory challenges, there is no ground for reversal unless it is established on appeal that an objectionable juror was forced upon the challenging party and sat on the jury. **State v. Bailey**, 27 N.M. 145, 198 P. 529 (1921); **Colbert v. Journal Publishing Co.**, 19 N.M. 156, 142 P. 146 (1914); **Territory v. Young**, 2 N.M. 93 (1881). Here, none of the prospective jurors who had indicated they needed to hear both sides served on the jury. Defendant's third point cannot be sustained.

**{28}** The conviction of embezzlement of over $2,500 is reversed. The matter is remanded for correction of the judgment and sentence to reflect conviction on one count of embezzlement of more than $100 but less than $2,500.

**{29} IT IS SO ORDERED.**

**MARY C. WALTERS,**
**Chief Judge**

**WE CONCUR:**

**WILLIAM R. HENDLEY,**
**Judge**

**DONNELLY,**
**Judge, concurring and dissenting**

**DISSENT IN PART**

**DONNELLY, Judge (concurring in part and dissenting in part).**

**{30}** I concur in the majority opinion affirming defendant's conviction and finding that the trial

judge did not err in (1) denying the motion for acquittal, (2) the admission of evidence, or (3) his rulings upon defendant's challenges to prospective jurors.

**{31}** I respectfully dissent from the holding of the majority reversing defendant's conviction for embezzlement of over $2,500.00. As shown by the record, defendant was charged with one count of embezzlement over $2,500.00 under NMSA 1978, § 30-16-8, a third degree felony. At trial, the State introduced evidence showing that defendant, while an employee of CWA Local 8611, cashed 22 checks and made 14 cash withdrawals of monies of the union without authorization or authority totalling $16,571.00 between October 17, 1979 and April 18, 1980. The checks and cash withdrawal vouchers were drawn on several different accounts held by the union at Mountain States Federal Credit Union.

**{32}** The information filed against defendant charged a single count of embezzlement, not a series of separate embezzlements. Whether the acts of the defendant constituted separate offenses or one continuing offense was a factual question of defendant's intent, properly to be determined by the jury. **See State v. Clokey**, 89 N.M. 453, 553 P.2d 1260 (1976); **State v. Allen**, 59 N.M. 139, 280 P.2d 298 (1955).

**{33}** In **State v. Allen**, involving a charge of larceny, the court quoted with approval from **People v. Cox**, 286 N.Y. 137, 36 N.E.2d 84, 136 A.L.R. 943 (1941): "As long as the larceny is held to be pursuant to a single intent, and one complete, illegal scheme, it matters not the length of the period over which the takings continued.'

**{34}** This same rule was discussed in **Nelson v. State**, 208 Tenn. 179, 344 S.W.2d 540 (1960), a case similar to the instant cause. There, defendant were charged with illegally diverting monies of a labor union. From the summer of 1956 through January 1958, they signed and cashed 85 union checks totalling $6,148.28. No single check exceeded or equalled the amount of $100.00. The court held:

> [T]he general law seems to be in other States that if each taking of these separate checks is the result of a separate independent impulse or intent each taking is a separate crime, but "On the other hand, where it appears that successive takings are actuated by a single, continuing, criminal impulse or intent or are pursuant to the execution of a general larcenous scheme, it has been held . . . that such successive takings constitute a single larceny, regardless of the extent of the time which may have elapsed between each taking.' [ **Annot**.,] 136 A.L.R., 948, 950 [(1942)] * * *. **"Whether a series of successive acts of taking constitutes several thefts or one single crime must be determined by the particular facts and circumstances of each case**.' [**Id.,** at] Page 951. [Emphasis added.]

**{35}** Similarly, **State v. Van Auken**, 77 Wash.2d 136, 460 P.2d 277 (1969), held that charges of embezzlement of money or property lawfully received do not depend on the time of acquisition or whether parts of the total which has been misappropriated come into possession of the accused at different times. **See** Annot. 136 A.L.R. 948.

**{36}** Defendant did not submit an alternative requested instruction or challenge the instruction given on the single charge of embezzlement. **See** NMSA 1978, U.J.I. Crim. 16.31 (Repl. Pamp.1982). Under the evidence herein, the jury could properly have found that defendant's actions of embezzlement constituted an intent to commit one continuing criminal scheme rather than a series of separate crimes. As stated the Committee Commentary to U.J.I. 16.31, "Embezzlement, like larceny, is divided into degrees depending on the value of the property.'

**{37}** In determining whether the evidence supports a criminal charge or an essential element thereof, the reviewing court must view the evidence in a light most favorable to the State, resolving all conflicts therein and indulging in all

permissible inferences therefrom in favor of the verdict. **State v. Tovar**, 98 N.M. 655, 651 P.2d 1299 (1982). NMSA 1978, Crim. P.R. 7(a) (Repl. Pamp. 1980), provides further that a criminal information shall not be deemed invalid "nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected, because of any defect, error, omission, imperfection or repugnancy therein which does not prejudice the substantial rights of the defendant upon the merits.' Under the facts here no prejudice has been shown.

**{38}** I would affirm defendant's conviction as a third degree felony.

**THOMAS A. DONNELLY,**
**Judge**