SUPREME COURT
STATE OF NEW MEXICO
COMMEMORATIVE
APPELLATE OPINIONS

VOLUME 5

JUSTICE JOSEPH F. BACA

1989–2002

FOREWORD

Honorable Kenneth J. Gonzales
United States District Judge
United States District Court, District of New Mexico

It is a fitting historical tribute to our former New Mexico Supreme Court Justices that these volumes of their opinions, especially apart from our reporter system, have been assembled. Deservedly included are those of the Honorable Joseph F. Baca. Indeed, Justice Baca's contribution to the Court, the State, and the orderly development of the law in New Mexico is worthy of celebration. As one of many of his former judicial law clerks and a friend, I am honored to prepare this introduction.

By the time Justice Baca retired from the Court in 2002, he had authored 159 majority opinions and, just as importantly, 82 dissenting opinions, throughout which his fierce commitment to independent thinking is clear. His tremendous impact on the law and the people of New Mexico is evident in the hundreds of other cases in which he joined in the majority, concurring, or dissenting opinions.

Justice Baca arrived at the Court in 1989 with a perspective shaped by his faith, love for family, determined work ethic, fidelity to the law, and deep commitment to public service. Even before he penned his first appellate court decision, he had served his country and community in important ways that informed his judgment: in addition to serving honorably in the military, he was a delegate to the New Mexico Constitutional Convention, a prosecutor, a civil practitioner, and a 17-year trial judge in the Second Judicial District Court, where he also served as chief judge. His rooted sense of fairness and expansive view of both an individual's constitutional rights and rights to recovery were always grounded on firm legal principles. His approach to any case before him was both clear-eyed and open-minded.

One of his most prominent and high-profile opinions includes a showdown between the executive and judicial branches of government. In *State ex rel. Taylor v. Johnson*, certain executive branch members—the Governor and Secretary of the New Mexico Human Services Department—refused to comply with the Court-issued Writ of Mandamus, which prohibited them from implementing an unconstitutional program. This left the Court in the unusually weighty and precarious position of determining how to compel compliance from a separate but equal branch of government. Recognizing the necessity of ensuring that the Court's authority and credibility were respected, the Court forewarned the executive branch members that it had the power to implement the full extent of contempt sanctions—including fines and imprisonment. Appreciating the delicate nature of the conflict between these two branches of government, Justice Baca sagely decided the most appropriate sanction was to hold the Governor and HSD Secretary in contempt and order compliance within a specified time, reserving further sanctions, if necessary. That this sanction proved effective is a testament to Justice Baca's sharp-sighted judgment.

Just as crucial was Justice Baca's work to establish important precedent in New Mexico, a state where legal precedent was still lacking. And his ground-breaking opinions run the legal spectrum, including criminal law, tort law, and family law. For example, in *State v. Anderson* and its companion opinion, *State v. Duran*, the Court, for the first time, held that DNA evidence was admissible in New Mexico courts. In the area of tort law, Justice Baca's opinion in *Wilschinsky v. Medina* established that physicians owe a duty of care to a third party who may foreseeably be harmed by the physician's negligent treatment of their patient. In *Calkins v. Cox Estates*, the Court adopted the *Palsgraf* foreseeability standard. In *Schmitz v. Smentowski*, the Court established a new tort, recognizing a claimant's right to a remedy against a defendant who, although acting lawfully, nonetheless intentionally causes injury without adequate justification. In the area of family law, the Court, in *Oldfield v. Benavidez*, recognized for the first time that parents have a clearly established right to familial integrity under the Fourteenth Amendment. And as compiled in this volume, there are many more examples. The impact of these diverse,

far-reaching decisions cannot be overstated, and the common thread connecting them is clear: Justice Baca's unwavering commitment to justice.

Justice Baca's faithfulness to the high court's duty to the litigants is evident in his opinions. He took great care to ensure that his reasoning spoke directly to the parties in each case, tuning his words for those who did not prevail. His writing, intentionally free of unnecessary verbiage and flowery tones, reflects the core instructional value of appellate opinions for trial lawyers and trial judges—especially those whose decisions were reversed. And he wholeheartedly embraced his responsibility to write, as he said, "for the ages."

As a friend and mentor to his many law clerks, Justice Baca often reminded us that judges and lawyers occupy positions of power to do good. He instructed, though, of the difference between being in a position of power to do good and doing good in a position of power, demonstrating that the latter often requires courage. A study of Justice Baca's opinions reveals his courage.

BIOGRAPHY

Justice Joseph F. Baca was born in Albuquerque on October 1, 1936. When he was 12 years old Baca was inspired to become a lawyer after hearing radio addresses by U.S. Senator and lawyer Dennis Chavez.

In 1960, Baca graduated from the University of New Mexico with a bachelor's degree. He received his law degree from George Washington University in Washington D.C. in 1964 and was later admitted to the State Bar of New Mexico. In 1992, he earned an LLM degree from the University of Virginia.

He began his long career in public service as a clerk at the New Mexico Department of Transportation; then worked as an Assistant District Attorney in Santa Fe. Later he practiced law at two small Albuquerque law firms. In 1969, he was elected as a delegate to the New Mexico Constitutional Convention.

In 1972, Governor Bruce King appointed Baca to fill a judicial vacancy at the Second Judicial District Court in Albuquerque. He held that position for sixteen years, serving as Chief Judge from 1982 to 1983. Baca was elected to the New Mexico Supreme Court in 1988. He served as Chief Justice from October1, 1994 to April 1, 1996, and again from June 1, 1996, to January 8, 1997.

Justice Baca during his long judicial career has served in numerous capacities. He is an elected member of the American Law Institute. He was appointed by President Clinton and confirmed by the US Senate to the State Justice Institute Board of Directors. He was a long-time member of the ABA's Law School Accreditation Committee and Council and served on numerous site evaluation teams both in this country and abroad.

Justic Baca is the recipient of numerous awards, including the J. William Fulbright Award for Distinguished Public Service from George Washington University Law School and the Outstanding Judicial Service Award from the New Mexico Bar Association. Twice named by Hispanic Business Magazine as one of the "100 Most Influential Hispanics in America" and was also selected as one of seven lawyers on the Hispanic National Bar Association's "Short List" sent to three Presidents with recommendation for appointment to the United States Supreme Court. Justice Baca was awarded an Honorary Doctor of Laws Degree by George Washington Law School in 1992.

After thirty years as a jurist, Justice Baca retired from the bench in 2002. Most of his law clerks attended his retirement ceremony. At that event, other justices recognized Justice Baca's role as a driving force behind the repair and restoration of the historic Supreme Court Building to its original appearance. The New Mexico Hispanic Bar Association presented Justice Baca's bronze bust to the Court that remains on display in the Law Library. After his retirement, Justice Baca performed mediations and arbitrations until he took inactive status in 2022.

NEW MEXICO SUPREME COURT OFFICIAL CITATIONS

JUSTICE JOSEPH F. BACA

NEW MEXICO SUPREME COURT CASES REPORTED

JUSTICE JOSEPH F. BACA

Justice Joseph F. Baca

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-031

Filing Date: May 23, 1989

Docket No. 17,938

PATRICIA D. RANDOLPH,

Petitioner-Appellant,

v.

NEW MEXICO EMPLOYMENT SECURITY DEPARTMENT AND SWEETWATER PRINTING COMPANY,

Respondents-Appellees.

Appeal from the District Court of Bernalillo County
W.C. Smith, District Judge

Karen J. Meyers
Legal Aid Society of Albuquerque, Inc.
Albuquerque, New Mexico

for Appellant.

Constance Reischman
Albuquerque, New Mexico

for Appellee NM Employment Security Department.

Sweetwater Printing Company
Albuquerque, New Mexico

Pro Se.

OPINION

BACA, Justice.

{1} Petitioner-Appellant, Patricia D. Randolph, appeals from an order of the district court, which affirmed a decision of the New Mexico Employment Security Department (NMESD) Board of Review (Board) to disqualify Randolph from unemployment benefits because she voluntarily quit her work without good cause. Randolph contends that the district court erred in finding that: (1) she was generally paid in a timely manner although she was requested to delay cashing her paycheck on one occasion; (2) she voluntarily participated in some of the Bible study classes conducted at work; (3) she accepted employment knowing that the employer carried her spiritual belief into the work day; and (4) she was not subjected to unsuitable working conditions. Randolph also challenges the conclusions of law of the district court that she voluntarily quit without good cause and that the Board's decision is supported by substantial evidence and in accord with the law. Upon a whole record review of the Board's decision, we reverse.

{2} The record reveals the following facts pertinent to our inquiry. Randolph worked for Sweetwater Printing Company (Sweetwater) as a graphic artist from May 12, 1986, to June 5, 1986, and briefly in 1981. On three occasions during Randolph's employment in 1986, her weekly paychecks, due on Fridays, did not arrive on time. On another occasion, Randolph's employer asked her to delay cashing a paycheck she received on Friday until the following Monday. Randolph often complained to her employer about the late paychecks to no avail. Further, Sweetwater held daily Bible study classes at work. At the time Randolph was hired, she was aware that her employer was a devout Christian of the Pentecostal sect. Randolph contends that the cumulative effect of religious influence in the work environment amounted to religious harassment.

{3} A NMESD claims examiner issued its initial determination, concluding that Randolph voluntarily quit her employment without good cause connected with her work. On appeal, the Appeals Tribunal of the Department of Labor (Appeals Tribunal) found that Randolph had

legitimate concerns regarding her working conditions, including the payment of timely wages and the interjection of religion into the work place. Randolph listed untimely receipt of paychecks as one reason for quitting her employment on her application for unemployment benefits. The Board reversed, and the district court affirmed its decision.

{4} We note that the NMESD claims examiner also determined that Randolph left her employment with Sweetwater on June 5, 1986, to accept another job; however, we disagree with the dissent that this finding should affect our decision in this case. Under NMSA 1978, Sections 51-1-8(G) and (M) (Repl. 1987), the Board's decision is the final NMESD administrative decision from which a writ of certiorari can be taken to the district court. The initial determination of the NMESD claims examiner is not before this court. Indeed, the discussions of the Appeals Tribunal and Board focused solely on whether Randolph quit or was discharged from her employment and whether the receipt of late paychecks and religious harassment constituted good cause to quit. Contrary to the suggestion contained in the dissent, the district court's findings only addressed the issues of late paychecks and religious harassment. In fact, the NMESD did not submit a proposed "other employment" finding to the district court nor did the district court make such a finding. Moreover, the claims officer made his determination solely on the basis of a letter Sweetwater submitted to NMESD. Although Randolph did inform Sweetwater that she would be leaving to take other employment, she testified before the Appeals Tribunal that she had fabricated this story to assuage her pride over criticism by her employer. Finally, no evidence existed at the time of the Appeals Tribunal hearing that Randolph had ever held employment subsequent to quitting her job at Sweetwater.

{5} The scope of judicial review of findings of facts by administrative agencies is the whole record standard of review. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.,** 101 N.M. 291, 681 P.2d 717 (1984). In reviewing the whole record, the court determines whether the administrative decision was supported by substantial evidence. **Rodman v. New Mexico Employment Sec. Dep't,** 107 N.M. 758, 764 P.2d 1316 (1988). To make a "substantial evidence" determination, the court must be satisfied that the evidence demonstrates the reasonableness of the decision. **National Council v. New Mexico State Corp. Comm'n,** 107 N.M. 278, 756 P.2d 558 (1988).

{6} The reviewing court must find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the agency's conclusion. **National Council on Compensation Ins.,** 107 N.M. at 282, 756 P.2d at 562. "No part of the evidence may be exclusively relied upon if it would be unreasonable to do so." **Id.** Furthermore, the court may not accept part of the evidence and disregard other convincing evidence in the whole record. **Duke City,** 101 N.M. at 294, 681 P.2d at 720. To decide if the district court was correct in finding substantial evidence to support the order of the Board, we must independently examine the entire record. **National Council,** 107 N.M. at 282, 756 P.2d at 562.

{7} At issue is whether Randolph left her employment voluntarily without good cause in connection with her employment, NMSA 1978, § 51-1-7A (Repl. 1987), disqualifying her from unemployment benefits. Randolph must prove that she was confronted with necessitous circumstances of such magnitude that she had no alternative than to leave her employment. **Ribera v. Employment Sec. Comm'n,** 92 N.M. 694, 594 P.2d 742 (1979). Additionally, the decision to voluntarily terminate employment must be reasonable. **Toland v. Schneider,** 94 Idaho 556, 494 P.2d 154 (1972). Randolph alleges she had good cause to quit her employment because Sweetwater rendered tardy paychecks to her, violating an agreed upon pay schedule between them. Whether a failure to receive timely wages consistently constitutes good cause to voluntarily quit employment is a question of first impression in New Mexico.

{8} Every employer in New Mexico must designate regular paydays as days fixed for the

payment of wages. NMSA 1978, § 50-4-2(A). Both Randolph and her employer testified before the hearing of the Appeals Tribunal that paychecks were due on Fridays. At that hearing, a witness for the employer testified that he did not know whether Randolph received timely wages. He also testified that Sweetwater experienced financial difficulties during Randolph's employment and that people were asked to bear with the company. The employer testified that her records indicated that she paid Randolph on time, excluding the time she told Randolph to delay cashing her check. The employer further testified that she would have to see the check itself to determine if Randolph received late paychecks. For the record, the hearing officer then requested copies of those cancelled paychecks from the employer within five days of the hearing. The cancelled checks showed that three of the four checks paid were dated on the Monday following the Friday payday. This documentary evidence supported the testimony of Randolph before the Appeals Tribunal regarding her receipt of tardy paychecks.

{9} When an employer consistently fails to provide paychecks on established paydays to his or her employee, the employee has good cause to voluntarily quit employment. Our research has disclosed few jurisdictions which discuss cases pertinent to this issue. In **Zablow v. Department of Employment Sec.,** 137 Vt. 8, 398 A.2d 305 (1979), an employee, on three or four occasions during employment, received tardy paychecks. The employee tried to resolve this problem without any success. The court concluded that the employee had good cause to leave employment under these circumstances. In **Emgee Eng'g Co. v. Unemployment Compensation Bd. of Review,** 30 Pa. Commw. 290, 373 A.2d 779 (1977), the court found that several instances of tardy payment of wages within a two-month period and employer's refusal to guarantee timely future payment of wages to employees provided employees with cause of a necessitous and compelling nature for leaving employment. The court also noted that cash flow problems of a company do not constitute a sufficient reason for an employer to make tardy wage payments to its employees.

{10} NMESD misplaces reliance on **Koman v. Commonwealth, Unemployment Compensation Bd. of Rev.,** 61 Pa. Commw. 604, 435 A.2d 277 (1981), and **Vancheri v. Unemployment Compensation Bd. of Rev.,** 177 Pa. Super. 553, 112 A.2d 433 (1955). In **Koman,** the court concluded that an employee quit employment without a compelling reason following receipt of late paychecks in two isolated incidences once after the employer's office was closed for one week and another time after an error by employer's bookkeeper required a corresponding adjustment of the employee's wages. In **Vancheri,** the court found that an employee, who worked for his employer for two years, did not have good cause to voluntarily quit employment where he refused to heed his employer's request to wait for one paycheck until completion of a construction job, four days later. The case at bar, however, is distinguishable because Sweetwater, following the commencement of Randolph's short employment, immediately rendered three tardy paychecks to Randolph, after three designated paydays had passed. Indeed, the one timely paycheck received on the designated payday could not be cashed promptly.

{11} NMESD further submits that Randolph's complaint of late paychecks is unfounded because she left work Fridays at 4:00 for a weekly doctor's appointment. NMESD did not present this evidence at the hearing of the Appeals Tribunal. NMESD attempted to introduce this new evidence in a letter of appeal written by the employer to the Board as part of its written argument before the Board. Randolph objected to the consideration of this new evidence in a written response, asserting that such statements should be struck from the record or found to be irrelevant in consideration of the appeal.

{12} The Board of Review must conduct its hearings in a manner affording due process rights to the parties including the right to cross-examine witnesses, offer rebuttal evidence, and make objections to the introduction of offered improper evidence. N.M. Employment Sec. Dep't Reg. 518 (Oct. 1, 1974; repub. Nov. 5, 1987). The Board of Review may hear and

decide a case before it either upon the evidence in the record made by the Appeals Tribunal, or upon the oral or written arguments presented to the court. N.M. Employment Sec. Dep't Reg. 528 (Oct. 1, 1974). In making its decision, the Board does not consider new evidence or information brought before it by the parties. Because this new evidence raised by NMESD and Sweetwater was improperly tendered to the Board, we will not consider it in our review of the whole record. Furthermore, we observe in passing that the cancelled checks dated on Mondays do not substantiate that Randolph's paycheck was disbursed on a Friday and was not received because Randolph had left work for her afternoon doctor's appointment.

{13} Finally, Randolph contends that she was subjected to unsuitable work conditions rising to the level of religious harassment. In **Davis v. New Mexico Employment Sec. Dep't,** 105 N.M. 55, 728 P.2d 465 (1986), we considered whether the employee entered employment with knowledge of the work conditions. Where conditions were known or revealed, the employee has been held to have accepted the conditions precluding a subsequent voluntary quit by employee with good cause. **Id.** at 56, 57, 728 P.2d at 466, 467. On review of the whole record, we conclude that Randolph, who previously worked for her employer in 1981, was aware of the religious beliefs of her employer and how those religious beliefs affected the work environment in 1981 and 1986.

{14} It is uncontroverted that three of the four paychecks were not received on the designated payday. Further, one paycheck received on the designated payday could not be cashed promptly. This practice gives rise to good cause to quit. Therefore, no substantial evidence exists in the whole record to support disqualification of Randolph's receipt of unemployment benefits.

{15} The order of the district court imposing a disqualification of unemployment benefits upon Randolph on the grounds that she voluntarily quit without good cause connected with her work is reversed. The cause is remanded for a computation and award of appropriate benefits.

{16} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

TONY SCARBOROUGH,
Justice

RICHARD E. RANSOM,
Justice

HARRY E. STOWERS, JR.,
dissents with opinion

DISSENT

STOWERS, Justice, dissenting.

{17} I respectfully dissent from the majority opinion that Patricia D. Randolph (Randolph), petitioner-appellant, voluntarily quit her work for good cause; receipt of late paychecks. I would affirm the trial court's denial of Randolph's claim for unemployment compensation benefits.

{18} In my view, the New Mexico Employment Security Department (NMESD) correctly found that Randolph quit work to accept another job with a former employer. The record indicates that Randolph was dissatisfied with her job and her employer. Randolph told her employer and co-workers she quit work to accept a job with a former employer. On the day Randolph quit, she told her employer she was meeting a former employer to display her portfolio. Randolph's claim that she quit due to late paychecks and religious harassment, arose **only** when she filed an unemployment benefits claim.

{19} On review, we determine whether the trial court correctly found that the whole record contains substantial evidence to support the agency's decision. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.,** 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). The trial court must adopt administrative findings supported

by substantial evidence. **New Mexico Human Services Dep't v. Garcia,** 94 N.M. 175, 177, 608 P.2d 151, 153 (1980) (citation omitted). Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. **Register v. Roberson Constr. Co., Inc.,** 106 N.M. 243, 245, 741 P.2d 1364, 1366 (1987). Although trial court evidentiary review favors the agency, unfavorable evidence may not be completely ignored. **Garcia,** 94 N.M. at 177, 608 P.2d at 153.

{20} The trial court concluded that Randolph voluntarily quit work without good cause in connection with her work and denied her benefits claim pursuant to NMSA 1978, Section 51-1-7(A) (Repl. Pamp. 1987). Good cause is established when vast compelling and necessitous circumstances exist such that there is no alternative to leaving gainful employment. **Ribera v. Employment Sec. Comm'n,** 92 N.M. 694, 695, 594 P.2d 742, 743 (1979). See also 81 C.J.S. **Social Security** § 226(a) (1977). Good cause is an objective measure of real, substantial and reasonable circumstances which would cause the average able and qualified worker to quit gainful employment. **Kistler v. Commw. Unemployment Compensation Bd.,** 52 Pa. Commw. 465, 467, 416 A.2d 594, 596 (1980). **See also** Annotation, **Unemployment Compensation: Harassment or Other Mistreatment by Employer or Supervisor as "Good Cause" Justifying Abandonment of Employment,** 76 A.L.R.3d 1089, 1092-93 (1977); 76 Am. Jur. 2d **Unemployment Compensation** § 59 (1975). Good cause also includes good faith; the desire to work and be self-supporting. Annotation, 76 A.L.R.3d at 1093; 76 Am. Jur. 2d **Unemployment Compensation** § 59 (1975).

{21} The record indicates Randolph quit work to accept another job. This was not a compelling or necessitous cause which left Randolph no alternative to quitting her job. Thus, substantial evidence supports the trial court's finding that Randolph voluntarily quit her employment without good cause and its judgment should be affirmed.

HARRY E. STOWERS, JR.,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-047

Filing Date: June 29, 1989

Docket No. 17,658

TUI WILSCHINSKY, IRENE ROKSTAD WILSCHINSKY, in their own behalf and as parents and next friends of Zoe Wilschinsky, Taflyn Wilschinsky, and Tara Rokstad,

Plaintiffs,

v.

HELEN MEDINA and MICHAEL STRAIGHT, M.D.,

Defendants.

Certification from the United States District Court
James A. Parker, U.S. District Judge

Stephen Durkovich
Albuquerque, New Mexico

for Plaintiffs.

Rodey, Dickason, Sloan, Akin & Robb, P.A.
W. Mark Mowery
Santa Fe, New Mexico

for Defendant Medina.

Campbell & Black, P.A.
John H. Bemis
Bradford C. Berge
Santa Fe, New Mexico

for Defendant Straight.

Hatch, Beitler, Allen & Shepherd, P.A.
Phyllis A. Dow
Albuquerque, New Mexico

for Amicus Curiae New Mexico Medical Society.

OPINION

BACA, Justice.

{1} This certification from the United States District Court raises a fundamental question whether a third party, who is injured by a person under the influence of medications administered to her as an outpatient in a doctor's office, can recover directly from the doctor when and if the doctor failed to follow proper medical procedures, and when and if it can be proven the third party suffered injuries which proximately resulted from that doctor's act of malpractice. The district court certified the following three questions to this court:

1. Does the legal duty of a physician practicing in New Mexico to use reasonable care in treating a patient extend only to the patient or also to others who may foreseeably be harmed by the physician's negligent treatment of the patient?
2. If the legal duty extends to others in addition to the patient, what is the nature and extent of the duty owed to the plaintiffs in this case?
3. If the legal duty extends to others in addition to the patient, does the New Mexico Medical Malpractice Act . . . [NMSA 1978, §§ 41-5-1 to 41-5-28 (Repl. Pamp. 1986)] apply to claims based on malpractice asserted by non-patients against a physician who is qualified under the provisions of the Medical Malpractice Act?

{2} The issues certified arose under the following circumstances. Plaintiffs Tui Wilschinsky and members of his family filed suit in the United States District Court against Helen Medina, alleging Medina was the driver of a car that struck and injured Wilschinsky in the presence of his family. Plaintiffs then filed an amended complaint seeking to join Dr. Michael Straight as an additional defendant, alleging Dr. Straight was negligent in administering to Medina two drugs that have known

side effects causing drowsiness and impairment of judgment. Dr. Straight moved to dismiss.

{3} The facts, as developed by depositions of the parties, indicate on the morning of the accident Medina was suffering from a debilitating migraine headache. She had taken the drug Percodan at about 8:00 a.m. Dr. Straight had previously prescribed this drug for Medina's headache problems, which Dr. Straight had been treating since October 1983. On the morning of August 7, 1985, Medina went to Dr. Straight's office and complained the Percodan was not helping. Dr. Straight administered by injection a drug named Meperidine, which is composed of equal parts of Phenergan and Demerol. When Medina complained of nausea, Dr. Straight administered a second drug, either Vistaril or Tigan, to combat Medina's nausea. It is unclear exactly how long Medina remained in the office, and exactly how much time elapsed between the administration of these drugs and her accident. According to Dr. Straight, roughly seventy minutes may have passed between the first injection and Medina's accident. Again according to Dr. Straight, the drug Meperidine would have peaked in Medina's system between thirty and fifty minutes after the injection. Meperidine's effects may have been enhanced by both prior and subsequent drugs.

{4} The above facts taken together show that Dr. Straight administered drugs in his office to Medina, which drugs could cloud a person's judgment and physical abilities and create a risk to that person in driving a car; that Medina was involved in a serious car accident within a short time of receiving medication; and that Wilschinsky suffered injuries from that accident. Based on these facts, we granted certification because whether a doctor may owe a duty to a third person such as Wilschinsky involves an important interpretation of New Mexico law, and our answer to that question would materially advance the federal litigation by resolving whether Dr. Straight can be joined in the Wilschinskys' lawsuit.[1]

[1] We note that while certification was granted in this case prior to this court's per curiam opinion in **Schlieter v. Carlos,** 108 N.M. 507, 775 P.2d 709 (1989), we could have granted certification in this case by applying the standards articulated in **Schlieter.**

I

{5} Whether a practicing physician in New Mexico owes a duty to third persons who foreseeably may be harmed by the physician's negligence in treatment of his patient is an issue of first impression in this state. In addressing this question generally, we focus on the patient-care setting that gave rise to this certification. The recent growth in use of outpatient clinics, day surgery units, and extensive office procedures is a new development in health care, unforeseen at the time when most state legislatures adopted malpractice legislation. It is encouraged by insurance policies that offer only partial coverage for patients admitted into hospitals over night. As more extensive medical procedures are shifted to an outpatient setting, the risk of injuries to the general public from patients driving under the influence of drugs increases.

{6} The existence of duty is a question of law. **Schear v. Board of County Comm'rs,** 101 N.M. 671, 687 P.2d 728 (1984). In analyzing whether a duty exists we note the following language from Prosser:

> Changing social conditions lead constantly to the recognition of new duties. No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists.

W. Page Keeton, **Prosser & Keeton on the Law of Torts,** § 53, at 359 (5th ed. 1984) (footnote omitted).

{7} The finding of a duty involves the court in a careful balancing. We must "take into account the likelihood of injury, the magnitude of the burden of guarding against it and the consequences of placing that burden upon the defendant." **Kirk v. Michael Reese Hosp. & Medical Center,** 117 Ill.2d 507, 526, 111 Ill. Dec. 944, 953, 513 N.E.2d 387, 396 (1987). At the outset

we note the salient alleged facts: testimony was offered to show the drugs administered included at least one narcotic; this narcotic's effect may have been enhanced by two additional drugs in Medina's blood stream; the effect of the narcotic would have peaked near the time of the accident; and the drugs have side effects that could impair a person's ability to make rational judgments and impair a person's ability to drive an automobile.

{8} Heretofore, courts have recognized two sources of duty for the medical profession to third parties: when a doctor exerts control over a patient, or when a doctor is aware of threats against specific, identifiable third parties. In the control cases, courts have relied upon Section 315 of the Restatement (Second) of Torts to find a special relationship between doctor and patient, which creates a special duty to control that patient's actions. Restatement (Second) of Torts § 315 (1965). This doctrine, holding institutions and doctors potentially liable for patients with known "dangerous propensities" has been recognized in New Mexico. **See Kelly v. Board of Trustees,** 87 N.M. 112, 529 P.2d 1233 (Ct. App.), **cert. denied,** 87 N.M. 111, 529 P.2d 1232 (1974); **see also Stake v. Woman's Div. of Christian Serv.,** 73 N.M. 303, 387 P.2d 871 (1963). We do not find the facts here to raise an issue of patient control. Liability under these facts must stem from the doctor's control over his offices and the administration of powerful drugs in those offices, not from a duty to control a patient with known dangerous propensities.

{9} A second, though not mutually exclusive, line of cases has followed from **Tarasoff v. Regents of University of California,** 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In **Tarasoff,** a psychiatrist, aware of specific threats to the life of an individual, abided by professional ethics in failing to disclose his patient's threats to authorities or to the person threatened. The court found the doctor breached a duty to warn when a specific, identifiable third party was known to the doctor. Again, this duty to warn specific, identifiable third parties is **not** an issue raised by the facts of this certification. The only issue raised by these facts is whether a doctor owes a duty to third parties from treatment of an outpatient when the doctor has given the patient an injection of drugs that could clearly impair the patient's ability to reason and to operate an automobile.

{10} Cases from other jurisdictions have addressed similar, though not precisely equivalent facts. In **Gooden v. Tips,** 651 S.W.2d 364 (Tex. Ct. App. 1983), the Texas Court of Appeals concluded that a doctor, who had prescribed quaaludes to a patient with a known propensity to abuse drugs, might be liable to a third party injured in an automobile accident. The **Gooden** court specifically found no duty "to **control** the actions of the patient," but only a duty to warn the patient. **Gooden,** 651 S.W.2d at 371. The **Gooden** court relied upon authority from several jurisdictions. **See Wharton Transp. Corp. v. Bridges,** 606 S.W.2d 521 (Tenn. 1980) (cause of action for indemnity by trucking company for doctor's negligent failure to perform an adequate physical upon company's driver); **Freese v. Lemmon,** 210 N.W.2d 576 (Iowa 1973) (cause of action by injured pedestrian against doctor for failing to diagnose patient's epileptic condition); **Kaiser v. Suburban Transp. Sys.,** 65 Wash. 2d 461, 398 P.2d 14 (1965) (cause of action for failing to warn patient of dangerous side effects of drug prescribed to bus driver).

{11} Both **Gooden** and **Kaiser** created third-party liability when a doctor apparently had negligently prescribed a potentially dangerous drug. The Illinois Supreme Court, however, recently declined to find third-party liability for the allegedly negligent prescription of drugs to a psychiatric patient whose accident on the morning of his release injured a passenger. **Kirk,** 117 Ill. 2d at 53, 111 Ill. Dec. at 956, 513 N.E. 2d at 399. That case may be distinguishable from an evolving policy to create a duty in that the driver-patient had consumed an alcoholic beverage after his release and prior to the accident. In any case, we note the facts before us do **not** involve prescription and we specifically decline to address the issue of whether under any facts, negligently prescribing drugs could give rise to third-party liability. This case raises the third-party liability

issue in the context of injections given in a doctor's office and we turn, therefore, to those few cases which have discussed injuries involving patients who have been treated or injected in the doctor's care.

{12} In **Joy v. Eastern Maine Medical Center,** 529 A.2d 1364 (Me. 1987), the Supreme Court of Maine allowed a third-party cause of action against a doctor whose treatment included fitting his patient with an eyepatch. The court wrote "when a doctor knows, or reasonably should know that his patient's ability to drive has been affected, he has a duty to the driving public." **Id.** at 1366. In **Welke v. Kuzilla,** 144 Mich. App. 245, 375 N.W.2d 403 (1985), the Michigan Court of Appeals found that an injection given on the evening prior to the accident created a cause of action in malpractice for the third-party victim. The facts in these two cases are markedly different from the present case.

{13} The facts of this certification present a stronger argument for finding a duty than any of the cases described above. Unlike **Joy**, facts here do not suggest that Medina should have known the extent of her risk in accepting medication. In **Joy**, the doctor argued the eyepatch created an obvious impairment for which no reasonable person required a warning. Here, one side effect of the drugs may have been impairment of the patient's ability to reason. In addition, it will require medical testimony to explain the probable diminishment of capacity when Demerol is administered, either by itself, or in combination with other drugs. Unlike **Welke,** facts here also suggest a stronger argument for proximate cause, as Dr. Straight injected Medina within seventy minutes of the accident. Finally, unlike the prescription cases, the administration of these drugs was within the doctor's presence, in the doctor's office under his direction and timing, making reasonable preventative measures of whatever type easier to implement, and, at the same time, creating a higher degree of patient reliance on the doctor's professional judgment.

{14} Having canvassed other jurisdictions, we return to the balance set forth from the **Kirk** opinion: the likelihood of injury, the reasonableness of the burden of guarding against it, and the consequences of burdening the defendant. The likelihood of a vehicular accident immediately following injection of a narcotic in combination with other drugs is high. When the narcotic is administered by a doctor in his office, the burden of guarding against that foreseeable danger is not unreasonable if the doctor is judged by standards of normal medical procedures, rather than subjected to after-the-fact speculative attack. Finally, if the scope of the doctor's duty is limited to the professional standards of acceptable medical practice, the additional burden on the doctor's treatment decisions is negligible.

{15} The dissent reaches a different conclusion concerning the burdens placed on doctors by this opinion. The dissent expresses concern about the burdens already placed on a doctor's practice by threat of litigation from patients. We are not, however, addressing the larger issues of malpractice in this opinion, and by recognizing a duty based on standards for malpractice we are attempting to balance fairness to the innocent injured person with fairness to the doctor's treatment decisions. The dissent also claims lawyers are not subject to liability to third parties and are treated differently. The comparison to lawyers is not apt. **Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.,** 106 N.M. 757, 750 P.2d 118 (1988), cited by the dissent, involved a litigant's attempt to sue his adversary's attorney for that attorney's alleged bad acts during a trial. This court specifically weighed the harm suffered by the litigant against the policy of holding lawyers to a single standard of behavior. Lawyers are bound to zealously represent their clients, with ethical codes and rules to define the limits of that representation, and disciplinary proceedings to punish lawyers' excesses. To have held lawyers liable to the party opposing the lawyers' clients would have been to imply representation in direct conflict with the representation actually undertaken. The dissent's analogy to **Garcia** might have been apt for a situation more like **Tarasoff,** when the court imposed on psychiatrists a duty to warn third parties despite their professional code of client confidentiality. Here, however, we

have defined the doctor's duty in terms of medical standards already in place. Finally, contrary to the dissent's characterization of **Garcia,** that opinion recognized third-party causes of action against lawyers when lawyers were engaged in will drafting and examination of titles. The case, therefore, cannot be cited for the overbroad interpretation that this court rejected all third-party causes of action against lawyers.

{16} The additional burden placed on doctors by this opinion is negligible because the duty we recognize is consistent with professional standards in the medical community and the liability falls under the rubric of the Medical Malpractice Act (see below). Applying the **Kirk** balance, therefore, we find Dr. Straight owed a duty to the driving public when he administered these drugs to Helen Medina under these particular circumstances.

II

{17} Having recognized a duty under these facts, we next address the scope of that duty. First, we re-emphasize the narrow factual scope of the duty recognized. The duty is not to the entire public for any injuries suffered for which an argument of causation can be made. The duty specifically extends to persons injured by patients driving automobiles from a doctor's office when the patient has just been injected with drugs known to affect judgment and driving ability. No other facts are before us, and this case may not be construed to create a general duty to the public.

{18} Second, we note factual issues that preclude our finding as a matter of law the duty would be adequately discharged by a warning. The parties contest whether Dr. Straight did warn his patient, but even if he did the adequacy of a warning is a fact issue when evidence suggests the drugs may have affected the patient's ability to comprehend the warning. It is claimed the physician should have explained that the patient would have to remain under observation until fit to drive, or that no injection would be given until transportation was available, or that other similar measures should have been taken to safeguard the patient. The timing and adequacy of any warnings, if given, are fact questions for the jury to decide in order to determine the proportionate fault, if any, of the physician.

{19} In determining what measures might have been taken, we find the standard for argument to the jury should be that which the medical community has determined. We cannot intrude on the medical profession's own careful balancing of treatment and risk. We endorse, therefore, those policies which already exist for the administration of powerful drugs in outpatient settings. Medical standards for the administration of drugs must define the duty owed by Dr. Straight, both as to his patient, and to the Wilschinskys. We do not live in a risk-free society, but rather a risk-allocative one. Where doctors are bound to administer to the sick and take an oath to that effect, they should not be asked to weigh notions of liability in their already complex universe of patient care. If, on the other hand, a doctor fails to meet the standards of his own community in caring for his patient, his liability is defined by the Medical Malpractice Act, with limits set regardless of the injuries suffered or the parties affected.

III

{20} The final question certified to this court is whether the Medical Malpractice Act applies to this action. No language in the Act specifically addresses the issue of third-party recovery for an act of malpractice. In reviewing the Act, we construe all of its provisions together in order to determine the intent of the legislature on this issue. **Quintana v. New Mexico Dep't of Corrections,** 100 N.M. 224, 668 P.2d 1101 (1983), **rev'd on other grounds sub nom. Devine v. New Mexico Dep't of Corrections,** 866 F.2d 339 (10th Cir. 1989).

{21} The New Mexico Medical Malpractice Act was enacted by the legislature in order to meet an insurance crisis, to promote health care

in New Mexico by providing a framework for tort liability with which the insurance industry could operate. **See** NMSA 1978, § 41-5-2 (Repl. Pamp. 1986); **see also Medical Malpractice Legislation in New Mexico,** 7 N.M.L. Rev. 5 (1976-77). Through several procedural measures and by establishing a limitation on full recovery for malpractice injury, the Act restricted and limited plaintiffs' rights under the common law. The established principle of strict statutory construction for acts passed in derogation of the common law would apply. 3 N. Singer, **Sutherland Statutory Construction,** § 61.01 (4th ed. 1985).

{22} While the legislature did not directly address potential recovery by third parties, one provision of the Act might be read to exclude third-party actions from the Act's ambit. Under paragraph C of the definitional section, 41-5-3, the legislature wrote: "'[M]alpractice claim' includes any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient[.]" Read to this point, the legislature's definition clearly extends the Act's coverage to acts of malpractice resulting in injury **to the patient.**

{23} After language explicating the range of allowable patient claims, the definition under Section 41-5-3(C) continues: "'[M]alpractice claim' does not include a cause of action arising out of the driving, flying or nonmedical acts involved in the operation, use or maintenance of a vehicular or aircraft ambulance[.]" By this language, the legislature created a specific exception or a negative definition for "malpractice claim."

{24} The facts of this certification arise from a health care provider's potentially negligent acts in the administration of medical treatment resulting in an injury to a third party. Thus, the activity at issue falls neither within the articulated ambit of the statutory definition, nor within the ambit of the exclusion. Under principles of narrow construction, generally we would find this cause of action is not covered by the definitional section and is therefore outside the Act. **See** 1A N. Singer, **Sutherland Statutory Construction,** § 20.08 (4th ed. 1985) (definitions of legislature binding on the courts).

{25} Here, however, we note several factors which should affect our analysis. First, the nonmedical nature of the articulated exclusion in paragraph C is at least some evidence the legislature foresaw and intended broad application of the concept of a "malpractice claim." Second, the specific cause of action recognized by this court did not exist in 1976. Therefore, the legislature did not intentionally fail to address this issue. Third, if we recognize a third-party cause of action for the Wilschinskys and it is not covered by the Act, a third party would be placed in a better position to achieve full recovery from an act of malpractice than would the patient malpracticed upon. Finally, the clear intent of the legislature, as articulated in Section 41-5-2, was to make malpractice insurance available to health care providers.

{26} While courts normally are bound to follow legislative definitions, they are not bound when a definition would result in an unreasonable classification. 1A, N. Singer, **Sutherland Statutory Construction** § 20.08 (4th ed. 1985). Here, an unreasonable classification would result, as only patients with direct injuries from acts of malpractice would be denied full recovery under the Act. The Supreme Court of Arkansas has stated that courts must follow statutory definitions "unless the definition is arbitrary, creates obvious incongruities in the statute, defeats a major purpose of the legislation or is so discordant to common usage as to generate confusion." **Bird v. Pan Western Corp.,** 261 Ark. 56, 60, 546 S.W.2d 417, 419 (1977). A major purpose of the Medical Malpractice Act was to meet a perceived insurance crisis and to regulate the tort liability of medical professionals for acts of medical malpractice. When we find, as we do here, a clash between the intent of the legislature and its own definitional section, we seek to harmonize the two. **Town of Scituate v. O'Rourke,** 103 R.I. 499, 239 A.2d 176 (1968). We, therefore, read the language "which proximately results in injury to the patient" as not having been intended to restrict the definition of "malpractice claim" to only those instances

resulting in injury to patients. Instead, based on the causes of actions that were known to the legislature at the time this act was adopted, we find this language to refer to the legal standards of proximate cause, requiring causes of action to survive that test. We find the legislature intended to cover all causes of action arising in New Mexico that are based on acts of malpractice.

{27} Other jurisdictions, faced with questions about the coverage of malpractice procedures to third-party actions have required those actions to proceed through malpractice. **See Faden v. Robbins,** 88 A.D.2d 631, 450 N.Y.S.2d 238 (1982) (chiropractor's third-party complaint against physicians for alleged malpractice on chiropractor's patient); **Gobble v. Baton Rouge Hosp.,** 415 So.2d 425 (La. Ct. App. 1982) (loss of consortium claim to proceed through malpractice where alleged malpractice caused death); **Davis v. Acton,** 373 So.2d 952 (Fla. Dist. Ct. App. 1979) (third-party complaint against consulting physician). While both New York and Florida have different statutory language than New Mexico, the Louisiana court interpreted language almost identical to that found in the New Mexico Medical Malpractice Act. **See** LA. Rev. Stat. Ann. §§ 40:1299.31-40:1299.48 (West 1977). The Louisiana court found language allowing claims to be brought by "a patient or his representative" did not restrict the class of persons who might bring an action. **Gobble,** 415 So.2d at 426. Even when the language reviewed by other courts has not been identical to that reviewed by this court, the thrust of those decisions has been similar. The Florida court wrote, "the gravamen of the third-party action is predicated upon the allegation of professional negligence by a practicing physician." **Davis,** 373 So.2d at 953. We find this underlying logic compelling. **See also Welke v. Ruzilla,** 144 Mich. App. 245, 375 N.W.2d 403 (1985); **Durflinger v. Artiles,** 234 Kan. 484, 673 P.2d 86 (1983).

SUMMARY

{28} We find, as a matter of law, a duty was owed to the public who might be injured by a patient's impaired ability to drive when a doctor administered powerful drugs in his office. The doctor had an obligation to follow acceptable medical procedures. The Wilschinskys' cause of action falls within the purpose of the New Mexico Medical Malpractice Act and should be pursued according to its guidelines.

JOSEPH F. BACA,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

RICHARD E. RANSOM,
Justice (Specially Concurring)

TONY SCARBOROUGH,
Justice, dissents

SPECIAL CONCURRENCE

RANSOM, Justice (Specially concurring).

{29} I specially concur to express chagrin that seeds of further interprofessional discord needlessly may be sown by certain language in the dissent. Justice Scarborough asserts that the majority opinion has extended the liability burden of physicians despite this Court's having rejected extension of the burden of lawyers to include liability to the courtroom adversary of an attorney's client. In point of fact, the opinion of this Court to which the dissent refers, **Garcia v. Rodey, Dickason, Sloan, Akin & Robb P.A.,** 106 N.M. 757, 750 P.2d 118 (1988), was decided on public policy considerations that support preservation of a lawyer's special allegiance to a client in an **adversary** proceeding. As **Garcia** specifically observes, appropriate means do exist to redress a grievance concerning an attorney's alleged misconduct toward the adversary. "Within the action out of which a grievance arises, remedies are provided for the benefit and relief of parties wronged through reasonable reliance upon misrepresentations of an adversary's attorney." 106 N.M. at 763, 750 P.2d at 124.

{30} It is certainly no extension of the liability burden of physicians under tort law to say that a doctor has a duty to refrain from optional outpatient administration of mind altering medication that, under the circumstances, gives rise to an unreasonable risk of injury to others. Reasonableness turns on the foreseeability of injury and the options available to the doctor in treatment of the patient. The conduct of the physician is measured by what a reasonably well-qualified doctor may do under similar circumstances.

{31} With respect to the propriety of our accepting certification from the federal court, we have recently held by per curiam opinion that:

> The intent of the certification of facts and determinative answer requirements is that this Court avoid rendering advisory opinions. Relative to the first requirement, it is sufficient if the certification of facts and the record contain the necessary factual predicates to our resolution of the question certified, and it is clear that evidence admissible at trial may be resolved in a manner requiring application of the law in question.

Schlieter v. Carlos, 108 N.M. 507, 508, 775 P.2d 709, 710 (1989). Here, it is absolutely clear from the record that evidence admissible at trial will require a jury instruction in accordance with the law of this opinion, and that the jury's findings in accordance with that law will determine the proportionate liability, if any, of the defendant doctor. Our resolution of this legal issue will materially advance the ultimate termination of the litigation. **See id.**

RICHARD E. RANSOM,
Justice

DISSENT

SCARBOROUGH, Justice, dissenting.

{32} I respectfully dissent from the majority opinion. The majority expand the scope of a physician's duty to third parties and thus significantly enlarge a physician's potential liability. In assessing the consequences of their holding, the majority conclude that "the burden on the doctor's treatment decisions is negligible." In fact, one can readily assume just the opposite: the burdens already imposed on treatment decisions by physicians have driven many from the practice of medicine, and the majority opinion will further exacerbate the existing medical liability crisis. Along this same line of reasoning, the majority note that we live in a "risk-allocative" society. While this may be true, consideration of such issues is a task best left to the legislature rather than to the judiciary. There are no data before us from which this Court can appropriately determine "risk-allocative" issues.

{33} The majority assume that there are facts before us. This is not so. There has been no fact finding by the trial court. We do not know what the facts are or will be. The majority opinion, therefore, is little more than an advisory opinion decided in a factual vacuum in contravention of our longstanding rule that appellate decisions be fact specific.

{34} The majority's assumption that the "recent growth" of new and unforeseen practices by physicians somehow justifies the destruction of patient-client liability constraints finds no support in the facts before us, or in any facts of which we could properly take judicial notice. From time immemorial, patients have been treated in their homes or in the offices of physicians and clinics of physicians. There is no factual basis upon which this court can extend tort liability of physicians to include third parties.

{35} We have declined to burden attorneys with tort liability to third parties. **Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.,** 106 N.M. 757, 750 P.2d 118 (1988). This Court in **Garcia v. Rodey** was not prepared to extend the legal duty of an attorney to non-client thirty parties who may be injured by the services or advice of the attorney to this client. I am not prepared to extend the liability burden of physicians which the majority opinion would impose.

{36} While I agree with the majority that the limits imposed on a physician's liability are appropriately set by the Medical Malpractice Act, I believe this issue is not ripe for our resolution. The question of liability limits is not before us by certification, and the issue has not been addressed by the parties in any manner.

{37} My disagreement with the majority opinion notwithstanding, I further conclude that the instant case is not properly before us. Three legal questions were certified to this Court for our response, but the certification request entered by the U.S. District Court was not accompanied by a sufficient factual predicate in the form of findings or stipulated facts. And for this reason I would decline to accept certification.

{38} In New Mexico, the process of certification from federal courts is governed by SCRA 1986, 12-607, which implements NMSA 1978, Section 34-2-8 (Repl. Pamp. 1981). SCRA 12-607 requires a certification request to include "either a statement by the certifying court of the facts relevant to the question certified, showing the nature of the controversy in which the questions arose, or a stipulation of such facts by the parties, which has been approved by the certifying court." SCRA 12-607(C)(3). The certification request before us does not include a stipulation of the facts, nor does the certifying court provide sufficient nondisputed facts relevant to the questions of law certified to us. It is essential that the material facts have been either agreed upon or determined by the certifying court before we attempt to form an authoritative statement of New Mexico law on the issues. I strongly disfavor giving an advisory opinion unless it is fact intensive.

{39} I find considerable support for my conclusion. "Certification would be a pointless exercise unless the state court's answers are regarded as an authoritative and binding statement of state law." 17A C. Wright, A. Miller & E. Cooper, **Federal Practice and Procedure** § 4248 at 179 (2d ed 1988). Without sufficient, nondisputed facts we cannot authoritatively answer the questions of law before us. I would not go as far in this regard as the Supreme Court of Wyoming which has said it will not answer a certified question of state law "until there is nothing left for the [federal] court to do but apply our answer to the question and enter judgment consistent with the answer or answers." **In re Certified Question from the District Court,** 549 P.2d 1310, 1311 (Wyo. 1976). Instead, I would look to the Supreme Court of Maine, which was one of the first state courts to adopt certification procedures more than twenty-five years ago. In 1966, the Maine court held:

> If we are to participate and yet not render purely advisory opinions, we think it will be incumbent upon us to respond to questions only when it is apparent from the certification itself that all material facts have been either agreed upon or found by the court and that the case is in such posture in all respects that our decision as to the applicable Maine law will in truth and in fact be "determinative of the cause" as the statute conferring jurisdiction upon us requires.

In re Richards, 223 A.2d 827, 833 (Me. 1966). **See also** R. Field, V McKusick & L. Wroth, **Main Civil Practice** § 76B Commentary (1967 Supp.).

{40} The absence of sufficient nondisputed facts occurs most often in certifications from federal district courts. Certification requests from federal appellate courts will normally include findings of facts. The burden to provide sufficient nondisputed facts rests with the district courts:

> Due regard for the interests of the states in conserving their judicial resources requires that the district courts be careful in their use of certification procedures. **This is particularly true in cases in which the unclear legal issue is identified in advance of trial and there are factual disputes to be resolved.** (Emphasis added)

1A J. Moore, W. Taggart, A. Vestal, J. Wicker & B. Ringle, **Moore's Federal Practice** § 0.203[5]

Pt. 2 at 2162 (2d ed 1989). Whether a certification request provides sufficient nondisputed facts must of necessity be determined on a case-by-case basis. An example of an effective certification request from a district court to this Court can be seen in **Hamilton Test Systems, Inc. v. City of Albuquerque,** 103 N.M. 226, 704 P.2d 1102 (1985), which provided stipulated facts. This Court should not make common law in a vacuum. It is, therefore, imperative that we preserve the procedural parameters for certification we have set forth in SCRA 1986, 12-607.

{41} Absent a certification request providing sufficient, nondisputed facts, I do not believe we should contemplate rendering an opinion in the instant case. I dissent.

TONY SCARBOROUGH,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-071

Filing Date: November 29, 1989

Docket No. 17,600

STATE FARM MUTUAL INSURANCE COMPANY,

Plaintiff-Appellee,

v.

DEWEY CONYERS and KAY CONYERS, his wife,

Defendants-Appellants.

Appeal from the District Court of Grant County V. Lee Vesely, District Judge

Duhigg, Cronin & Spring
Frank L. Spring
David M. Berlin
Albuquerque, New Mexico
Bruce P. Moore
Albuquerque, New Mexico

for Appellants.

Foy, Foy & Jollensten
Celia Foy Castillo
Silver City, New Mexico

for Appellee.

OPINION

BACA, Justice.

{1} Dewey and Kay Conyers appeal from a district court order granting State Farm Mutual Insurance Company (State Farm) summary judgment, holding that the substantive law of New Mexico should apply in determining the amount of policy proceeds State Farm owed the Conyers and that State Farm did not owe the Conyers any further payments under its policy. The main issue of whether the court erred in granting State Farm summary judgment can be divided into three sub-issues: (1) whether the Conyers had sufficient minimum contacts with New Mexico for the court to properly exercise personal jurisdiction over them under NMSA 1978, Section 38-1-16(A)(1) (Repl. Pamp. 1987) of the New Mexico long-arm statute; (2) whether minimum contacts existed to satisfy due process; and (3) whether New Mexico should change its approach to contractual choice of law rules. We affirm.

{2} In August 1982, Kay Conyers purchased automobile insurance in Silver City, New Mexico, from State Farm agent, Roy Lewis, covering the Conyers Ford truck with $25,000 in underinsured motorist coverage. In June 1984, Kay Conyers purchased additional automobile insurance from Roy Lewis in Silver City covering the Conyers' Jeep with $25,000 in underinsured motorist coverage. On each insurance application, Kay Conyers gave a Silver City mailing address and listed her husband's and her New Mexico driver's license numbers. The Ford truck had a New Mexico license plate until February 1987.

{3} Dewey Conyers was a union ironworker who was assigned jobs with different companies at various job sites in and out of New Mexico. The Conyers, by affidavit, state that they resided in Silver City from May 1981 to April 1982, and from August 1982 to January 1983. The Conyers lived in Silver City between jobs. From January 1983 until December 26, 1984, the Conyers lived in California. After December 26, 1984, the Conyers moved to Tonopah, Nevada. On March 28, 1985, Dewey Conyers, a passenger in an automobile driven by Jerry Jordan (Jordan), was injured in an automobile accident in Nevada. Allstate Insurance Company (Allstate), the liability insurance carrier for Jordan, paid Dewey Conyers $25,000, the policy liability limits. State Farm paid Dewey Conyers underinsured

motorist benefits of $25,000 under the policy covering the Jeep but failed to tender an additional $25,000 under the other policy. Conyers claimed his medical expenses exceeded $25,000 and demanded the entire $50,000 in underinsured motorist benefits available under both policies from State Farm.

{4} Subsequently, State Farm brought a declaratory judgment action in the New Mexico district court, seeking a determination that it owed no further payments to Dewey Conyers because it could offset against its underinsured motorist coverage limits the amount of $25,000 liability coverage Allstate previously paid. The Conyers entered a special appearance before the court contesting the court's jurisdiction over them and filed a motion to dismiss the declaratory judgment for lack of personal jurisdiction, improper venue, forum non conveniens, and failure to state a claim upon which relief can be granted. On July 29, 1987, the court denied the motion. On May 8, 1987, the Conyers moved for partial summary judgment contending that Nevada law should apply to determine the distribution of the underinsured motorist proceeds. On May 29, 1987, State Farm moved for summary judgment, which the court granted.

PERSONAL JURISDICTION

{5} We first consider whether the court had personal jurisdiction over the Conyers in New Mexico under Section 38-1-16, our long-arm statute. The long-arm statute sets out five different types of acts, which if conducted in the State of New Mexico, submit the actor to the jurisdiction of the courts of this state if any cause of action should arise from such acts. These include the transaction of any business, the operation of a motor vehicle, the commission of a tort, the contracting to ensure, and residence within the state for divorce actions if one spouse continues to live in New Mexico.

{6} We use a three-step test to decide whether personal jurisdiction exists over nonresident, out-of-state defendants: (1) the defendant's act must be one of the five enumerated in the long-arm statute; (2) the plaintiff's cause of action must arise from the act; and (3) minimum contacts sufficient to satisfy due process must be established by the defendant's act. **Salas v. Homestake Enterprises, Inc.,** 106 N.M. 344, 345, 742 P.2d 1049, 1050 (1987). State Farm did not specify which of the five acts enumerated in the long-arm statute it relied on to assert personal jurisdiction over the Conyers. State Farm did allege in its complaint that it issued an insurance policy to the Conyers in Silver City, New Mexico. By purchasing insurance in New Mexico, the Conyers transacted business in this state. On appeal, the Conyers do not assert that another section of the long-arm statute is applicable.

{7} The Conyers argue that State Farm failed to meet one element of the **Salas** in personam jurisdiction test set out above, by failing to show that its cause of action directly arose from the defendant's transaction of business in the State of New Mexico. In **Winward v. Holly Creek Mills, Inc.,** 83 N.M. 469, 472, 493 P.2d 954, 957 (1972), we stated that a close relationship must exist between the act committed by the defendant and the plaintiff's claim. "'[T]he statutory phrase "arising from" requires only that the plaintiff's claim be one which lies in the wake of the commercial activities by which the defendant submitted to the jurisdiction of the [forum's] courts.'" (Quoting **Koplin v. Thomas Haab Botts,** 73 Ill. App.2d 242, 253, 219 N.E.2d 646, 651 (1966).) The Conyers maintain State Farm's cause of action is not related to the purchase and sale of insurance; rather they claim the accident in Nevada forms the prerequisite of State Farm's liability. The Conyers misconstrue the "arising from" element of the personal jurisdiction test by an inappropriate contrast between the accident and State Farm's claim. The correct determination should be whether State Farm's cause of action arose from business activities performed in New Mexico by the defendants. The Conyers submitted themselves to the jurisdiction of New Mexico courts by conducting business in New Mexico. They cannot now escape jurisdiction by claiming that the accident itself occurred outside the state boundaries. State Farm's cause of action

for declaratory judgment to determine the extent of insurance coverage is closely related to the transaction of business between State Farm and the Conyers—the negotiation and purchase of insurance in New Mexico. Indeed, if the Conyers had not purchased insurance in New Mexico, no cause of action would exist. This transaction of business in New Mexico between State Farm and the Conyers creates sufficient minimum contacts with New Mexico for the court to exercise personal jurisdiction over the Conyers.

MINIMUM CONTACTS—DUE PROCESS

{8} The Conyers also assert that the court erred in finding that they had sufficient minimum contacts with New Mexico to satisfy due process constraints. Precedent exists in New Mexico which establishes that the "transaction of any business" element of the long-arm statute is sufficient to fulfill the due process standard of minimum contacts. This is true only if the cause of action arises from the particular transaction of business, and the minimum contacts were purposefully initiated by the defendant. **Customwood Mfg., Inc. v. Downey Constr. Co.,** 102 N.M. 56, 691 P.2d 57 (1984). For a forum to assert personal jurisdiction over defendants, due process requires that defendants "have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" **International Shoe Co. v. Washington,** 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945) (quoting **Milliken v. Meyer,** 311 U.S. 457, 463, 61 S. Ct. 339, 342, 85 L. Ed. 278 (1940)). To judge minimum contacts, "a court properly focuses on the relationship among the defendant, the forum, and the litigation.'" **Keeton v. Hustler Magazine, Inc.,** 465 U.S. 770, 775, 104 S. Ct. 1473, 1478, 79 L. Ed. 2d 790 (1984) (quoting **Shaffer v. Heitner,** 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)).

{9} The key focus in analyzing minimum contacts is that the defendant by some act "purposefully avails [him] self of the privilege of conducting activities within the forum State, thus invoking the benefits . . . of its laws. **Hanson v. Denckla,** 357 U.S. 235, 253, 78 S. Ct. 1228, 1239,2 L. Ed. 2d 1283 (1958). "[W]here the defendant 'deliberately' has engaged in significant activities within a state, **Keeton v. Hustler Magazine, Inc.,** [465 U.S.] at 781 [104 S. Ct. at 1481], or has created 'continuing obligations' between himself and residents of the forum, **Traveler's Health Ass'n v. Virginia,** 339 U.S. [643, 648, 70 S. Ct. 927, 930, 94 L. Ed. 1154 (1950)], he manifestly has availed himself of the privilege of conducting business there." **Burger King Corp. v. Rudzewicz,** 471 U.S. 462, 475-76, 105 S. Ct. 2174, 2183-84, 85 L. Ed. 2d 528 (1985). We also review the nature of the transaction, the applicability of New Mexico law, the contemplation of the parties and the location of potential witnesses to determine if minimum contacts exist. **Kathrein v. Parkview Meadows, Inc.,** 102 N.M. 75, 76-77, 691 P.2d 462, 463-64 (1984). Finally, we observe that a single transaction of business within this state can subject a nonresident defendant to the jurisdiction of our courts, if the cause of action being sued upon arises from that particular transaction of business. **Customwood Mfg., Inc. v. Downey Constr. Co.,** 102 N.M. at 56, 691 P.2d at 57 (1984).

{10} We note that the Conyers voluntarily initiated contacts with State Farm by purchasing automobile insurance in 1982 and 1984 in Silver City, New Mexico, before the Nevada accident. In 1985, Kay Conyers obtained insurance coverage again in the Silver City State Farm office on a Ford Bronco. In **McGee v. International Life Insurance Co.,** 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957), the issuance of a single reinsurance agreement in California was deemed a sufficient contact to permit California to exercise jurisdiction over a Texas defendant. The Conyers' activities in New Mexico manifest a purposeful intent to transact business in this state. By transacting business in New Mexico **several** times, the Conyers created continuing obligations between State Farm and themselves. The Conyers did not choose another state to purchase their insurance. When the Conyers chose New Mexico in which to transact business, they reasonably could contemplate that New Mexico law

would apply. State Farm's agent and employees, potential witnesses, are located in Silver City. We hold that the Conyers' conduct and connection with New Mexico was "such that [they could] reasonably anticipate being haled into court [in New Mexico]." **World-Wide Volkswagen Corp. v. Woodson,** 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980). This court is satisfied that the exercise of personal jurisdiction over the Conyers comports with notions of substantial justice and fair play. Thus, the Conyers had sufficient minimum contacts with New Mexico to satisfy due process.

CHOICE OF LAW

{11} The Conyers urge us to adopt the contractual choice of law rules found in Restatement (Second) of Conflict of Laws and hold Nevada, not New Mexico law applicable.[1] Section 193 provides:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws, § 193 (1971). Under New Mexico law underinsured motorist protection can be stacked, **Konnick v. Farmers Insurance Co. of Arizona,** 103 N.M. 112, 703 P.2d 889 (1985), and underinsured motorist benefits can be offset by the tortfeasor's liability coverage. **Schmick v. State Farm Auto. Ins. Co.,** 103 N.M. 216, 223, 704 P.2d 1092, 1099 (1985). Here, Allstate has paid $25,000 to the Conyers in liability coverage. Under New Mexico law, State Farm is liable for $50,000 under the underinsured policies by stacking but is entitled to a $25,000 offset. Thus, State Farm, having paid $25,000 to the Conyers, owes them no further payments. In contrast, under Nevada law, a liability insurance carrier cannot offset the benefits it owes by the amount received from the tortfeasor's carrier so the Conyers could recover an additional $25,000 in benefits from State Farm. **Mid-Century Ins. Co. v. Daniel,** 101 Nev. 433, 705 P.2d 156 (1985). Conyers asserts that we should reconsider or modify the **Schmick** decision; we decline to do so.

{12} The Conyers maintain the lex loci contractus rule is mechanically applied and does not provide predictability or uniformity. The Restatement's significant relationship test is neither less confusing nor more certain that the lex loci contractus approach. **See General Tel. Co. of the Southwest v. Trimm,** 252 Ga. 460, 311 S.E. 2d 460 (1984), **see also Smith Choice of Law in the United States,** 38 Hastings L.J. 1041 (1987) (jurisdictions use various choice of law approaches rather than applying the Restatement (Second) approach exclusively). New Mexico courts have not necessarily mechanically applied the lex loci contractus rule. **See Miller v. Mut. Benefit Health & Accident Ass'n,** 76 N.M. 455, 415 P.2d 841 (1966); **Ratzlaff v. Seven Bar Flying Serv., Inc.,** 98 N.M. 159, 646 P.2d 586 (Ct. App.), **cert. denied,** 98 N.M. 336, 648 P.2d 794 (1982); **Eichel v. Goode, Inc.,** 101 N.M. 246, 680 P.2d 627 (Ct. App. 1984). In any event, in this case it is not necessary for us either to reaffirm a lex loci contractus rule categorically or to adopt or reject for all cases the Restatement (Second) "significant relationship" tests. Even were we to apply a Restatement (Second) analysis, New Mexico law would still govern the outcome of this particular dispute.

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[1] Alternatively, the Conyers urge adoption of the often-called "lex loci solutionis" rule from the first Restatement to the effect that the law of the place of performance of the contract governs issues regarding performances and/or breach of the contract. Even if this rule applied, it is far from clear where performance of the contract in this case would take place. The record is unclear where demand for payment was made and, even if made in Nevada, there is no showing that payment would be made there. For the reasons stated in the text, we are satisfied that New Mexico law should control in this case, even if there were any indication that performance of the promises in the State Farm policies was to occur in Nevada.

{13} Under Section 193 of Restatement (Second), the rights created by a contract of casualty insurance are determined by the law of the state which the parties understood was to be the principal location of the insured risk, unless some other state has a more significant relationship to the transaction and the parties under Section 6. As pointed out more fully below, there was no material fact presented to the district court on summary judgment as to any state other than New Mexico being the principal location of either vehicle during the term of the policies in question. As for the principles set out in Section 6,[2] we do not believe that any of the factors listed in subsection (2) militates particularly strongly in favor of applying Nevada law. Although we may presume that Nevada's policy is to apply its rule in cases like the present, we doubt that its interest in determining the particular issue in this case is very strong. On the other hand, New Mexico has a statutorily enunciated policy of applying an offset to the underinsured motorist coverage proceeds, as we held in **Schmick.** Uniformity of result points strongly in the direction of applying New Mexico law; different results for two insureds, one of whom lived in New Mexico and bought the policy here but who happened to be injured in Nevada, and another for the Conyers—both insureds having their rights adjudicated in the courts of New Mexico—would seem to be an anomalous outcome. The policy of New Mexico's law governing a contract of insurance applied for and issued in this state (and presumably conforming to this state's laws and insurance regulations), on a vehicle at least assumed to be located here and owned by an individual who declared his residence as being here, seems to us to weigh more heavily than any possibly countervailing policy that would underlie applicability of Nevada law.

{14} Here, Kay Conyers applied for insurance coverage for herself and her husband in Silver City, New Mexico, in 1982, and in 1984 on a Ford truck carrying a New Mexico license plate. Sufficient facts indicate that Kay Conyers signed the insurance contracts in Silver City, New Mexico. Thus, New Mexico was the principal location of the insured risk, at least as disclosed in the application to State Farm. The Conyers concede that Dewey Conyers purchased insurance while he was a New Mexico resident. The record does not reveal that the Conyers ever informed Roy Lewis of their move to Nevada. State Farm issued insurance believing the Conyers resided in New Mexico and had no reason to change this belief. An affidavit by a State Farm employee stated that Kay Conyers never told them that her permanent address had changed to a Nevada address even when she applied for insurance coverage personally in 1985 in the Silver City office. We hold the court properly applied New Mexico law to determine whether State Farm could offset the liability coverage Allstate previously paid. The court properly concluded State Farm did not owe any further payments to the Conyers under the **Schmick** analysis.

{15} The Conyers also contend that, even if the lex loci contractus rule applies, the court could not properly determine that New Mexico law controls without the two insurance policies before it for review. The Conyers argue the trial court could not determine that the last act necessary to make the policy effective occurred in New Mexico. When interpreting a contract under the lex loci contractus rule, courts look to the law of the place where the contract was consummated, **Pound v. Insurance Co. of North America,** 439 F.2d 1059 (10th Cir. 1971), unless

[2] Choice-of-Law Principles
(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
  (a) the needs of the interstate and international systems,
  (b) the relevant policies of the forum,
  (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
  (d) the protection of justified expectations,
  (e) the basic policies underlying the particular field of law,
  (f) certainty, predictability and uniformity of result, and
  (g) ease in the determination and application of the law to be applied.
Restatement (Second) of Conflict of Laws, § 6 (1971) (emphasis theirs).

this construction conflicts with the settled public policy of New Mexico. **Sandoval v. Valdez,** 91 N.M. 705, 580 P.2d 131 (Ct. App. 1978). A contract is consummated where the last act necessary for its formation was performed. **Pound,** 439 F.2d at 1062. In **Brashar v. Mobil Oil Corp.,** 626 F. Supp. 434, 436 (D.N.M. 1984), the court held that the last act necessary for an agreement's formation is accomplished when a party to a contract places the last signature on the contract. A contract is made at the place where the last signature is affixed. **Id.**

{16} We have already observed that the Conyers conceded that Dewey Conyers purchased automobile insurance from State Farm when he was a New Mexico resident, that the Conyers purchased insurance in Silver City, New Mexico, and that sufficient facts indicate that Kay Conyers signed the applications in Silver City. Thus, the last act necessary to make insurance effective occurred in New Mexico. The applications in pertinent part also provided: "It is understood and agreed that no insurance is effective hereunder (a) **unless** the binder is completed designating the company accepting this application and signed by an authorized agent of such company, **or** (b) until the date of the policy or binder issued by the company accepting this application." Coverage on the Ford truck began on August 16, 1982, and coverage on the Jeep began on June 25, 1984, under part (a) of the applications; the contracts became fully effective on those dates. Moreover, the binders were completed designating State Farm as the accepting company and were signed by Roy Lewis, State Farm's authorized agent in New Mexico. The court could apply New Mexico law without the insurance policies because it could decide where the contract was made.

{17} Finally, the Conyers assert that even if this court correctly found the existence of personal jurisdiction over the Conyers and applied New Mexico law, an issue of material fact remains regarding the residency of Dewey Conyers, thereby precluding the grant of summary judgment for State Farm. However, as noted above, the residency of Dewey Conyers is not a material fact in this case; even if he is or was a resident of Nevada, New Mexico law should still control for the reasons stated earlier in this opinion. The Conyers' contention is meritless. We conclude that the court properly granted State Farm summary judgment. For the foregoing reasons, the decision of the trial court is affirmed.

{18} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1989-NMSC-073

Filing Date: November 30, 1989

Docket No. 17,999

ELMER and PHIL SANCHEZ,

Plaintiffs-Appellants,

v.

LORENZO HERRERA, et al.,

Defendants-Appellees.

Appeal from the District Court of Rio Arriba County
Roger L. Copple, District Judge

James A. Burke
Santa Fe, New Mexico

for Appellants.

Sommer, Udall & Hardwick, P.A.
Eric Sommer
Kimball Udall
Santa Fe, New Mexico

for Appellees.

OPINION

BACA, Justice.

{1} The Sanchez family appeals from a declaratory judgment in favor of State Farm Mutual Insurance Company on two issues: first, whether a gunshot accident within the insured's truck falls within the liability coverage on the truck; and second, whether the insured can stack the limits of medical payments coverage from five separate policies. The parties are in agreement on facts sufficient to decide the legal question of the insurer's duty to the insured for this type of accident. There is also no dispute that in order for the Sanchezes to stack medical payments from five policies, there must, as a matter of law, exist some ambiguity in those policies. We hold the Sanchez' policy offers coverage for this type of accident, but that the policies unambiguously precluded the stacking of medical payments. Accordingly, we reverse in part and affirm in part, and remand to the trial court for further proceedings.

FACTS

{2} Plaintiff Elmer Sanchez, his friend Mario Herrera, and a third companion were returning from a three-day hunting trip in a pickup truck owned by Elmer's father, Phillip Sanchez. They were carrying their guns loaded in the cab. Seeing what they took to be a Game and Fish Department roadblock, the young men braked the pickup, and with the engine still running, attempted to empty their guns and avoid a possible fine. While emptying his gun inside the truck, Herrera accidentally fired and a bullet passed through Elmer Sanchez' foot.

{3} Phillip Sanchez carried liability insurance on the truck that provided coverage for damages "caused by accident resulting from the ownership, maintenance or use of your car." Sanchez also carried medical coverage up to a limit of $5,000.00 on the truck, and he carried identical coverage with varying limits on four other family vehicles under separate policies. All of this insurance was with one company, State Farm. After the accident, claims were made against the truck's liability coverage, the medical payments coverage, and against the four other policies' medical payments provisions.

{4} State Farm paid $5,000.00, the limit under the truck's medical coverage. State Farm refused to pay any money under liability because, State Farm argued, the accident did not result from use of the truck. State Farm also refused to pay medical benefits based on the other four policies. It

argued that those policies restricted coverage to owned vehicles listed on each policy, and did not cover Sanchez vehicles generally.

COVERAGE

{5} The parties agree that coverage extends only over those activities that are connected with use of the vehicle. They also agree that use of a pickup for hunting is foreseeable, and that transportation of guns would be incident to use of the vehicle for hunting. The parties disagree, however, both on whether emptying guns within the pickup's cab could be considered incident to the vehicle's use for hunting, and on what degree of connection is required between the use of the vehicle and the injury. State Farm maintains the proper test in New Mexico is whether the use of the vehicle is the efficient and predominating cause" of the accident, citing **Pecos Valley Cotton Oil, Inc. v. Fireman's Fund Ins. Co.,** 780 F.2d 892, 894 (10th Cir. 1986). Sanchez argues the connection should be considered in terms of the duty owed by the insurer, and not in terms of proximate causation.

Efficient and predominating cause does not apply.

{6} Pecos Valley, cited by State Farm, involved a truck driver who was injured as he was unloading cottonseed into a bin. An iron door used to cover the bin was in an open position, but due to an improper weld, the door fell and injured the truck driver. The question before the Tenth Circuit was whether the truck's liability policy, which contained a loading and unloading limitation clause, would cover the accident, or whether coverage should be under the seed bin's insurance. The federal court held that for automobile liability insurance coverage to extend in New Mexico, the use of the vehicle must be the "efficient and predominating cause" of the accident, citing **Southern California Petroleum Corp. v. Royal Indem. Co.,** 70 N.M. 24, 369 P.2d 407 (1962). **Pecos Valley,** 780 F.2d at 894. The federal court noted that this court's discussion of the test in **Southern California Petroleum Corp.,** while providing some guidance, was dictum. **Id.** at 894 n.3.

{7} In **Southern California Petroleum Corp.,** a drilling company's negligence created a hazardous condition that led to an explosion when other subcontractors were pouring a mixture of concrete and water into a well casing. The trial court held that the antecedent negligence was the "efficient and predominating cause" of the accident. 70 N.M. at 27, 369 P.2d at 410. The managing oil company, held responsible for the negligence in the trial court, then sought a declaratory judgment that it was insured under the vehicle liability coverage of its subcontractors who poured the concrete and water. The appellate court noted argument that the pumping operation was part of the chain of causation, but cited to an annotation of "loading and unloading" cases that set forth the "efficient and predominating" causation test. 70 N.M. at 30, 369 P.2d at 413. This court held, however, that it need not reach the issue of causation in that case.

{8} Whether or not the "efficient and predominating" test for causation in loading and unloading cases has been adopted in New Mexico, a question we find not well settled, the test should not be applied to these facts. In both **Pecos Valley** and **Southern California Petroleum Corp.,** the issue before the court clearly dealt with a commercial context in which one company's business operation overlapped another's. Insurance had specifically foreseen this problem, and the vehicle insurance contained a specific clause to define the company's limits in the "loading and unloading" context. In the case before us, there is no issue of overlapping liability in a commercial setting. This is also not a "loading and unloading" case, as those terms are generally understood in the insurance context.[1]

[1] The parties referenced "loading and unloading" cases track fact patterns of hunters getting in and out of trucks. The better rule appears to be that all activities are analyzed in terms of being incident to hunting and thereby covered under vehicular liability. However, at least one court has considered "loading and unloading" for hunting to be a separate "use" and then analyzed whether the particular activity in question bore a close enough causal connection to "loading and unloading." **See Toler v. Country Mut. Ins. Co.,** 123 Ill. App.3d 386, 78 Ill. Dec. 790, 462 N.E.2d 909 (1984) ("loading and unloading" clause held at issue with inquiry whether there was a causal connection between injury and "loading or unloading"). This seems an unnecessary step, particularly when

There must be a reasonable causal connection between use of the vehicle and the injury.

{9} Other jurisdictions have addressed the question of causation for fact patterns similar to the one before us. Generally, courts have firmly rejected any notion of proximate causation and have required instead only that there be some causation between the injury and the use of the vehicle. **Quarles v. State Farm Mut. Auto. Ins. Co.,** 533 So.2d 809 (Fla. Dist. Ct. App. 1988) (finding a significant causal connection without stating a general standard); **Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co.,** 521 A.2d 308 (Me. 1987) (reasonable causal connection between use of vehicle and injury); **State Capital Ins. Co. v. Nationwide Mut. Ins. Co.,** 318 N.C. 534, 350 S.E.2d 66 (1986) (test is not proximate cause, but causal connection); **Kohl v. Union Ins. Co.,** 731 P.2d 134 (Colo. 1986) (en banc) (injury must be causally related to a conceivable use of the vehicle). We agree with these courts that the proper inquiry in hunting accidents involving automobiles is whether the use made of the vehicle at the time of the accident logically flows from and is consistent with the foreseeable uses of that vehicle.

Reasonable causation applied.

{10} In reviewing hunting accidents, courts have identified at least five fact patterns, which are listed here in descending order of judicial preference for extending coverage: 1) accidents in which the actual movement of the vehicle caused the firing of the gun, as in transport; 2) accidents in which the discharged gun was being removed from or placed in a gun rack in the vehicle; 3) accidents in which the gun was being loaded into or unloaded from the vehicle; 4) accidents arising from use of the vehicle as a gun rest; and 5) accidents in which the vehicle is described as a "mere situs" for the accident, such as when children play with guns in a standing vehicle. **See Quarles,** 533 So.2d 809, 811-12. Clearly, this case does not involve either gun play or use of the vehicle as a gun rest. It is more analogous either to the accidental discharge of a gun while a vehicle is in motion, or to the loading and unloading of guns into or from a vehicle. Under recognized categories, we conclude this accident was reasonably connected with use of a vehicle.

{11} If we analyze these facts without reference to other jurisdictions, we still conclude that emptying a gun within the cab of a pickup truck is foreseeably incident to use of that vehicle for hunting. Inclement weather is a frequent condition of hunting trips, and a vehicle is a logical shelter. It is foreseeable that, however unwise it may be, some hunters will load and unload their guns within their trucks. Therefore, by applying the test that we adopt today of reasonable causation between the use of the vehicle and the injury, we hold there is coverage.

STACKING OF MEDICAL PAYMENTS PROVISIONS

{12} Sanchez also appeals the district court's summary judgment in favor of State Farm on the issue of stacking. Stacking involves adding the maximum coverage under one policy to the maximum of a second policy until the insured's damages are fully compensated or his or her combined policy limits are exhausted. **See Lopez v. Foundation Reserve Ins. Co.,** 98 N.M. 166, 168, 646 P.2d 1230, 1232 (1982). Sanchez argues that he should be able to add the coverage provided by each of five policies carried with State Farm on separate family vehicles for total medical coverage of $21,000.00. State Farm paid out $5,000.00 on the truck in which the accident occurred, but argues that each of the other policies clearly restrict coverage to only that vehicle, owned by the insured, that is listed on **that particular policy.** The district court held the policies were unambiguous, and, because the policies precluded stacking, the court granted summary judgment for State Farm. We affirm.

{13} The question of whether medical payments provisions in insurance policies should

there is no "loading and unloading" clause in the pertinent insurance contract. In addition, there would be superfluous confusion in this case because emptying a gun in synonymous with "unloading".

be stacked has not previously been considered in New Mexico. In a series of opinions, however, this court has addressed the issue of stacking uninsured motorist benefits under automobile policies. **Lopez,** 98 N.M. 166, 646 P.2d 1230 (stacking of uninsured motorist coverage not precluded by the policy terms and should be allowed); **Schmick v. State Farm Mut. Ins. Co.,** 103 N.M. 216, 704 P.2d 1092 (1985) (New Mexico's statute mandating uninsured motorist coverage was intended to cover accidents with underinsured motorists as well); **Jimenez v. Foundation Reserve Ins. Co.,** 107 N.M. 322, 757 P.2d 792 (1988) (stacking should be allowed pursuant to New Mexico's statute even when the insurance contract clearly precludes stacking).

{14} State Farm argues these cases are distinguishable from the present issue because the legislature mandated uninsured motorist coverage in NMSA 1978, Section 66-5-301(B), whereas medical coverage exists only by virtue of contracts freely entered into between the insured and State Farm. We agree, and find that our prior decisions concerning stacking are not directly analogous to the present case, because of the strong public policy in New Mexico regarding uninsured motorist coverage. We thus resort to traditional methods of contract interpretation to assist our resolution of this issue.

{15} This court has established two principles for analyzing stacking questions, and both are applicable in the absence of a statute. First, an insurance company may have a duty specifically to exclude stacking if the policy as a whole encourages the insured to expect coverage. **Lopez,** 98 N.M. at 168, 646 P.2d at 1232. Second, such exclusionary provisions will be enforced only if they are both unambiguous **and** not in conflict with statutory public policy. **Jimenez,** 107 N.M. at 324, 757 P.2d at 794. Therefore, in this case a failure by State Farm to exclude the stacking of medical payments could make the contract ambiguous as a matter of law, requiring reversal.

{16} The relevant portions of the insurance policy at issue state:

> We will pay for medical expenses for **bodily** injury sustained by:
>
> 1. a. the first **person** named in the declarations;
>
> b. his or her **spouse;** and
>
> c. their **relatives.**
>
> These **persons** have to sustain the **bodily injury:**
>
> a. while they operate or occupy a vehicle covered under the **liability** section. . . . [Emphasis in original.]

{17} Further, the liability section of each policy purchased by Sanchez provides:

> We will:
>
> 1. pay damages which an **insured** becomes legally liable to pay because of:
>
> a. **bodily injury** to others, and
>
> b. damage to or destruction of property, including loss of its use, caused by accident resulting from the ownership, maintenance or use of **your car**. . . .
>
> [Emphasis in original.]

"Your car," as defined by the policy, is the vehicle described on the "Declarations Page" of each policy. The declarations page of each policy owned by Sanchez lists only one vehicle—the sole vehicle insured by that policy.

{18} Additionally, each policy contains an exclusionary clause, as follows:

> THERE IS NO COVERAGE:
>
> 4. FOR MEDICAL EXPENSES FOR BODILY INJURY:
>
> a. SUSTAINED WHILE OCCUPYING OR THROUGH BEING STRUCK BY A VEHICLE OWNED BY YOU, YOUR SPOUSE, OR ANY RELATIVE, WHICH IS NOT INSURED UNDER **THIS COVERAGE;**. . . . [Emphasis added.]

{19} We examine this language for ambiguity and to determine whether it specifically rejects stacking.

Standard for ambiguity in the context of insurance contracts.

{20} When this court reviews a contract for ambiguity, it examines the entire document in an attempt to ascertain the intent of the parties, and it will not find ambiguity unless the contract is "reasonably and fairly susceptible of different constructions." **Leveson v. Mobley,** 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). If the contract is unambiguous, the court is bound to enforce its terms. **CC Housing Corp. v. Ryder Truck Rental, Inc.,** 106 N.M. 577, 746 P.2d 1109 (1987).

{21} When a court examines the words of an insurance contract for ambiguity, a particular concern arises due to the nature of the contract. Modern contract theory emphasizes the importance of the bargain as an element of a typical contract. **See e.g. Restatement (Second) of Contracts** § 17 (1981). This model of a bargained-for enterprise carried out by, if not equally shrewd, at least free-willed parties, does not fit insurance contracts. The typical insured does not bargain for individual terms within policy clauses; the insured makes only broad choices regarding general concepts of coverage, risk, and cost. Not only does the insurance company draft the documents, but it does so with far more knowledge than the typical insured of the consequences of particular words.

{22} New Mexico law recognizes the special nature of insurance contracts and has developed principles of construction that favor both the insured and the avowed purpose of insurance, the provision of coverage. **See e.g. King v. Travelers Ins. Co.,** 84 N.M. 550, 505 P.2d 1226 (1973) (if one party prepares an instrument, ambiguities construed against drafter); **Anaya v. Foundation Reserve Ins. Co.,** 76 N.M. 334, 414 P.2d 848 (1966) (ambiguities construed in favor of the insured). **See also** 7 S. Williston, **A Treatise on the Law of Contracts,** § 900 (3d ed. 1963) (courts construe insurance contracts in favor of their purpose—coverage of the insured).

{23} Thus, our analysis of the insurance contract at issue turns on whether the relevant provisions create an ambiguity or a reasonable expectation that coverage will be stacked. If they do, we interpret the contract against the insurer; if not, absent any countervailing legislative pronouncement evincing public policy regarding medical payments, we interpret the contract according to its plain meaning.

Expectations of the insured.

{24} In **Lopez,** the sole apparent cause of ambiguity arose from the payment of separate premiums. Separate premiums give rise to expectations of greater coverage. **See Jimenez,** 107 N.M. 322, 324-25, 757 P.2d 792, 794-5; **see also Lopez,** 98 N.M. at 170, 646 P.2d at 1234. The reasonable expectations of the insured thus provide the criteria for examining an insurance contract on the basis both of the actual words used and of unresolved issues that the insurance company has an obligation to address.

{25} Sanchez argues that expectations arise not only because of separate premiums paid, but also because of the nature of uninsured motorist coverage. As this court has previously discussed, a problem with uninsured motorist coverage is that a pedestrian, killed by an uninsured driver, could have collected on more than one vehicle or policy (separate premiums paid in both cases), but if that same person were in an insured vehicle, he or she only could have recovered under that one policy or vehicle. **See Lopez,** 98 N.M. at 169, 646 P.2d at 1233. This would have lead to the insured's being better covered as a pedestrian or in an unowned vehicle.

{26} Medical payments, like uninsured motorist coverage, follows the person, leading to the same incongruities, and the same frustration of the insured's expectations. If the insured paid premiums on two cars and is injured while **outside** of one car, he or she could recover under **both** policies, whereas if injured inside one car, the insured could recover only under that car's policy. Because

most people would expect to carry their maximum amount of coverage while inside an insured car, the preclusion of medical payments recovery would, like with uninsured motorist coverage, frustrate the insured's legitimate expectations. The insurance company's failure to explicitly address those expectations became its failure to clarify ambiguity under **Lopez.** State Farm argues here, however, that two policy sections unambiguously precluded stacking, making any contrary intention of the insured unreasonable, and we agree.

Exclusionary clause is unambiguous.

{27} The relevant portions of the policy, **supra,** clearly indicate that medical coverage is for the vehicle described in the policy only and, therefore, unambiguously rejects stacking. Faced with this clear and unambiguous language, any contrary reading by Sanchez clearly was not reasonable, and he could not have reasonably understood the policy to provide for stacking under these circumstances.

{28} The policies state that State Farm will pay medical expenses to certain enumerated parties while they operate a vehicle covered under the liability section. The liability section obligates the insurer to pay for loss resulting from the use of "your car," which is defined as the one car owned by Sanchez that the policy covers. The policy further excludes injury sustained while occupying any vehicle owned by Sanchez that is not insured by the coverage of the policy.

{29} We find that this language clearly and unambiguously excludes stacking of medical coverage. The four other policies on vehicles owned by appellant's father specifically exclude medical coverage for injury incurred through the use of any vehicle owned by Sanchez but not listed on the policy. **Compare Lopez,** 98 N.M. at 168, 646 P.2d at 1232 (rejecting insurer's contention of unambiguity because the policy did not consider multiple premiums).

{30} Sanchez contends, nevertheless, that the exclusionary clause is subject to an alternative interpretation. He maintains that the term "coverage" in the clause, "[t]here is no coverage: . . . [f]or medical expenses for bodily injury (a) sustained while occupying . . . a vehicle . . . which is not insured under **this coverage"** (emphasis added) can be interpreted not to refer to the single policy, but to all policies purchased from State Farm. Thus, the exclusion refers to vehicles owned by Sanchez but insured by an alternative carrier; the clause can be read as an attempt by State Farm to capture all of the family's insurance business. Sanchez cites **Schmick** as authority that "coverage" is susceptible to plural as well as singular meaning. **See** 103 N.M. at 219, 704 P.2d at 1095.

{31} We reject this attempt to demonstrate an ambiguity. To hold otherwise would require an unreasonable construction that would import different meanings to the two uses of the term "coverage" in the same sentence.

{32} Thus, we hold that the insurance policy unambiguously reflects the agreement of the parties to exclude stacking of medical coverage. Because we are not faced with any countervailing legislative policy mandating a different interpretation, we abide by the canons of contract construction and find that the unambiguous terms should be enforced.

{33} State Farm is entitled to preclude stacking. We hold the medical payments from the Sanchez' five policies may not be stacked. Accordingly, we affirm this portion of the trial court's rulings.

{34} We remand to the district court for further proceedings in accord with the first part of this opinion.

{35} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-002

Filing Date: January 10, 1990

Docket No. 17,975

ROGER SCHMITZ,

Plaintiff,

v.

LEO R. SMENTOWSKI and KEITH MOCK and OPAL MOCK,

Defendants,

v.

COLORADO NATIONAL BANK-EXCHANGE,

Cross-Defendant-Appellant,

v.

KEITH MOCK and OPAL MOCK,

Cross-Claimants-Appellees,

v.

LEO R. SMENTOWSKI and MARCELLA SMENTOWSKI,

Cross-Defendants.

Appeal from the District Court of Union County
Joseph E. Caldwell, District Judge

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OPINION

BACA, Justice.

{1} This is an appeal from the judgment of the district court of Union County of a jury verdict in favor of appellees, cross-claimants below, the Mocks, against appellant, cross-defendant below, the Colorado National Bank-Exchange (the Bank). This case has presented us with multiple claims and asks us to consider an issue of first impression in this jurisdiction.

{2} The Bank contends that the trial court erred in allowing judgment based on a theory of prima facie tort, arguing that we should not recognize the cause of action; that the Mocks did not demonstrate that the Bank was motivated solely by disinterested malevolence as required in a prima facie tort action; that the elements of prima facie tort were improperly pleaded and proved; that the Bank as a holder of a promissory note could not have been found negligent with regard to that note as a matter of law; that the resulting trust under which the note was held could not affect the Bank's right to that note; that the court abused its discretion by allowing the Mocks to amend their complaint to include prima facie tort, and that this abuse violated the Bank's due process rights. The Mocks, in turn, maintain that

the Bank did not properly preserve its allegations for appeal, that they in fact are the rightful claimants of the note, and that they properly pleaded and proved their theory of prima facie tort. We agree with the Mocks' substantive claims and affirm the judgment below.

FACTS.

{3} In 1979, the Mocks purchased two adjacent ranches from the Pogues and the Edmondsons (neither party is involved in this suit) as part of a three-party land exchange effectuated pursuant to Section 1031 of the Internal Revenue Code, I.R.C. § 1031 (1969), whereby they sold a feed lot and farm to Schmitz, plaintiff below, in exchange for cash and a promissory note in the amount of $230,000. The Pogues received the cash as payment in full, while the Edmondsons were paid in part in cash, with the balance in the form of a note payable in annual installments of $35,838.66. Pursuant to the exchange, the Mocks received deeds to and possession of the two ranches; Schmitz received deed to and possession of the feed lot; the Pogues were paid in full, and Schmitz owed the Mocks $230,000 represented by the note. The note was made payable on its face to Smentowski, an accountant acting as strawman to facilitate the three-way tax-free exchange of property. Smentowski had no personal interest in the note. He held legal title in trust for the true parties in interest. The Mocks gave Edmondsons a first mortgage in their newly acquired ranch to secure their $230,000 debt on the property; the payments on the note received by Smentowski from Schmitz were paid directly to the Edmondsons to cover the mortgage payments.

{4} In 1981, Smentowski received a loan from the Bank. The Bank took possession of the note, so that the Smentowski loan would appear to bank examiners to be backed by more collateral than it in fact was. The evidence indicates that all parties to the transaction, including the Bank, had actual knowledge that Smentowski did not have any beneficial interest in the note—thus, the Bank knew that it had no interest in the note as collateral and that others had claims and defenses to the note. However, despite this knowledge, in 1986, when Smentowski defaulted on his loan, the Bank attempted to collect the balance due on the note from Schmitz. The Bank notified Schmitz of Smentowski's default and requested that he direct future payments on the note into the court. Edmondsons thus did not receive his mortgage payments; they accelerated the mortgage and threatened foreclosure against the Mocks. The Mocks were forced to borrow on their cattle line of credit to prevent foreclosure, and this prevented them from using the line of credit to pursue their business of cattle raising.

{5} Schmitz named Smentowski, the Bank, and the Mocks as defendants in his interpleader suit. The Mocks responded, filing cross-claims against Smentowski in gross negligence and fraud, and against the Bank in negligence. They subsequently amended their complaint against the Bank to include theories of fraud and conspiracy to defraud. On the morning of trial, the Mocks requested leave to amend their cross-claims to include theories of resulting trust and prima facie tort. The court allowed the resulting trust theory and reserved judgment on the prima facie tort. Subsequently, toward the end of Mocks' case, they moved to amend their pleadings to conform to the evidence, and the court allowed the prima facie tort theory.

{6} The trial court directed a verdict against Smentowski, ruling he was a fiduciary holding title to the note in a resulting trust. The court also ruled against the Mocks on their conspiracy claim. The jury found the Bank was a mere holder of the note, not a holder in due course, and thus took the note subject to claims and defenses against it. The jury also found for the Mocks on their negligence and prima facie tort claims, awarding them the note and punitive and compensatory damages.

{7} The Bank and the Mocks have raised several threshold issues, which we must resolve before reaching the substantive issues presented regarding the prima facie tort claim. The Bank claims that the district court violated its procedural due process rights and abused its discretion

by allowing the Mocks to introduce the tort claim through amended pleadings late in the trial. The second threshold issue is raised by the Mocks, who claim that the Bank is precluded from pursuing its various points on appeal because it did not include them in their docketing statement. We address each issue in turn.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE THE BANK'S DUE PROCESS RIGHTS BY ALLOWING THE MOCKS TO PROCEED ON THE THEORY OF PRIMA FACIE TORT.

A. Abuse of Discretion.

{8} The Bank contends that the trial court abused its discretion by allowing the Mocks to amend their complaint at trial to conform to the evidence and to reflect their prima facie tort theory, relying on SCRA 1986, 1-015(B). It claims it did not expressly or impliedly consent to try the theory; it objected to the motion to amend and to subsequent jury instructions on prima facie tort; it was surprised by the theory and had no notice of it prior to trial and therefore was prejudiced because it could not defend properly.

{9} The theory of pleadings is to give the parties fair notice of the claims and defenses against them, and the grounds upon which they are based. **Seasons, Inc. v. Atwell,** 86 N.M. 751, 753, 527 P.2d 792, 794 (1974). It is true that, before a party may take a case to a jury on a particular theory, that theory must have been pleaded, or tried with the consent of the opponent. **Ciesielski v. Waterman,** 86 N.M. 184, 186, 521 P.2d 649, 651 (Ct. App.), **rev'd on other grounds,** 87 N.M. 25, 528 P.2d 884 (1974). However, notice pleading does not require that every theory be denominated in the pleadings—general allegations of conduct are sufficient, as long as they show that the party is entitled to relief and the averments are set forth with sufficient detail so that the parties and the court will have a fair idea of the action about which the party is complaining and can see the basis for relief. **Id.; Kisella v. Dunn,** 58 N.M. 695, 700, 275 P.2d 181, 186 (1954); **see** SCRA 1986, 1-008.

{10} The Mocks, in their original pleadings, stated the essential elements of prima facie tort as an alternative cause of action with sufficient particularity to give the Bank notice of their theory—our system of notice pleading does not require more. Although perhaps not as artful as would be hoped for, the pleadings outline the elements necessary to prove prima facie tort, by alleging:

(1) that the Bank had knowledge of Smentowski's strawman status;
(2) that the transfer of the note to the Bank was wrong because the Bank knew it had no interest in the note;
(3) the Bank accepted the note with knowledge that the Mocks would be injured;
(4) the Mocks were injured by the Bank's acts.

{11} This recital is sufficient, as a bare minimum, to give notice that the Mocks were complaining of a lawful act, conducted with the intent to injure and without sufficient economic or social justification, that did injure them, i.e. a prima facie tort. **See Azby Brokerage, Inc. v. Allstate Ins. Co.,** 681 F. Supp. 1084, 1087 (S.D.N.Y. 1988); **Porter v. Crawford & Co.,** 611 S.W.2d 265, 268 (Mo. Ct. App. 1980).

{12} It is insufficient for the Bank to complain that they did not recognize the theory underlying the allegations, and, in fact, they were apprised of the Mock's theory before the trial began.

{13} In the present case, although we recognize that the Mock's initial pleadings were not a model of clarity, we are convinced that they adequately presented the elements of prima facie tort. The Bank did not object at trial to the introduction of evidence, and yet it claims that it did not consent to the theory and was prejudiced by the amendment. Simply because the Bank did not recognize the prima facie tort claim is not grounds for a finding that the court abused its

discretion. However, because of the novelty of the prima facie tort claim and in the interest of justice, we have examined the Bank's claim of prejudice, and we find that the Bank vigorously defended the issues pertaining to the prima facie tort claim and was not prejudiced.

{14} Leave to amend pleadings should "be freely given when justice so requires." SCRA 1986, 1-015(A). Amendments are within the trial court's discretion and will be reversed on appeal only for abuse of discretion. **Montano v. House of Carpets, Inc.,** 84 N.M. 129, 130, 500 P.2d 414, 415 (1972). Amendments to conform the pleadings to the evidence should be allowed when the issues are tried by the express or implied consent of the parties. SCRA 1986, 1-015(B); **Csanyi v. Csanyi**, 82 N.M. 411, 412, 483 P.2d 292, 293 (1971). Even if the party has not consented to amendment, a trial court is required to allow it freely if the objecting party fails to show he will be prejudiced thereby. SCRA 1986, 1-015(B); **Wynne v. Pino,** 78 N.M. 520, 523, 433 P.2d 499, 502 (1967).

{15} The Bank argues that, although issues and evidence relating to the prima facie tort may have been presented at trial, the evidence was relevant to the claims initially pleaded by the Mocks, fraud and negligence, and was only incidental to the prima facie tort cause of action. As such, the Bank maintains that it cannot be charged with impliedly consenting to the theory.

{16} Courts have found that, although evidence is not objected to at trial, there is no implied consent to a new theory or issue when the evidence is relevant to other pleaded issues, **see Moya v. Fidelity & Cas. Co.,** 75 N.M. 462, 406 P.2d 173 (1965); **Wynne v. Pino,** 78 N.M. at 523, 433 P.2d at 502, and have determined that the amendment should not be allowed if the opposing party has been prejudiced by the amendment. **See Camp v. Bernalillo County Medical Center,** 96 N.M. 611, 613, 633 P.2d 719, 721 (Ct. App. 1981) (finding prejudice when the party was not allowed to present evidence that would have rebutted the moving party's theory as later presented in the amended complaint). We agree with the Bank that they did not consent to the trying of the case on a prima facie tort theory, and we proceed to determine whether in fact the Bank was prejudiced by the amendment.

{17} The test of prejudice is whether the party had a fair opportunity to defend and whether it could offer additional evidence on the new theory. **Id.** Prejudice means undue difficulty in prosecuting the suit because of the change in theory. **Deakyne v. Comm'rs of Lewes,** 416 F.2d 290 (3d Cir. 1969).

{18} The Bank initially claims prejudice because it had no notice of Mocks' theory and could not present evidence of economic self interest, profit motive and business advantage as a defense. It also contends that the Mocks had to show that the Bank was motivated solely by disinterested malevolence, and the Bank was prejudiced because it was unable to contest this element. As our discussion of the elements of prima facie tort, **infra,** shows, the Bank states the elements too strongly, but we also find that the Bank did present such evidence. Throughout the trial, the Bank attempted to demonstrate that it was only acting out of its own interest in moving against the note. However, the evidence also demonstrates that the jury could find that, in ruthlessly and recklessly pursuing its own interest, the Bank acted with disregard for the interests of others and should have known that its actions would inflict injury. This adequately fits within the contours of a New Mexico prima facie tort.

{19} The Bank argues that it was prejudiced because it was unable to gain the knowledge that punitive damages **may** not be available under prima facie tort. The Bank, however, does not direct the court to any authority stating that punitive damages **are** not available, citing only **Brown v. Missouri Pacific Ry. Co.,** 720 S.W.2d 357 (Mo. 1986), **cert. denied,** 481 U.S. 1049, 107 S. Ct. 2180, 95 L. Ed. 2d 836 (1987), which found it unnecessary to address the issue of punitive damages. Our research indicates that punitive damages are contemplated under prima facie tort. **See** Restatement (Second) of Torts § 870 comment m (1977). Because we see no reason

why punitives should not be available, we find no prejudice to the Bank on this point.

{20} The Bank claims prejudice because it did not know that a prima facie tort claim must be exclusive and that no established tort theory can be available. However, the evidence shows that the Mocks did not have any other tort claim available upon which they could recover, and consequently there was no prejudice.

{21} The Bank also contends that a prima facie tort theory requires that the act complained of must be otherwise lawful, and it was prejudiced because it was unable to develop evidence to contest this element. We find it hard to believe that the Bank is now claiming that its actions in moving against the note were unlawful and therefore they should be relieved of their tort liability because they were prejudiced in being unable to present such evidence. In any case, courts considering prima facie tort claims have determined that this requirement merely restates the issue discussed above, that the plaintiff can have no other tort theory available to support recovery, and we therefore find the Bank was not prejudiced by this claim. **See Bandag of Springfield, Inc. v. Bandag, Inc.,** 662 S.W.2d 546, 554 (Mo. Ct. App. 1983).

{22} Lastly, the Bank argues that it was prejudiced because it could not develop evidence for the balancing approach we adopt today in determining whether an act complained of can be determined tortious as a matter of law before the facts are submitted to the jury. The judge must engage in the balancing process and apply the factors discussed **infra** to determine whether liability in tort will exist for the type of injury complained of. Restatement (Second) of Torts § 870 comment k (1977). The jury then applies the standards developed by the court to the facts it finds. **Id.** We find that the trial judge did engage in this balancing test, that the factors to be considered were fully developed at the trial, and therefore the Bank was not prejudiced.

{23} Thus, we hold that the Bank was not prejudiced by the pleading amendment. The Mocks pleaded with sufficiency to give the Bank notice of its claim, and, in any case, the Bank was not prejudiced by the amendment to conform to the evidence.

B. Due Process.

{24} The Bank contends that the trial court, by allowing the trial amendments, violated its procedural due process rights, as guaranteed by the United States and New Mexico Constitutions. **See** U.S. Const. amend. V, XIV; N.M. Const. art. II, § 18. In essence, the Bank argues that due process requires regular procedures to ensure fairness, that there was no state interest in allowing the Mocks to amend their complaint, that the Bank had no notice of the Mocks' heretofore unrecognized theory, and thus its fundamental right to reasonable notice and a fair opportunity to defend was violated.

{25} The Bank's argument falls on a variety of grounds, the most obvious being that it was not denied process—it participated in a full trial, with every opportunity to be heard, and with fair procedures. The trial court considered the Bank's arguments against the Mocks' amendment, and found them unpersuasive. We have already held that the court did not abuse its discretion in allowing the amendments; in other words, we have determined that the ruling was fair. We are at a loss to understand how much more process the Bank feels it is due. **See In re Miller,** 88 N.M. 492, 497-98, 542 P.2d 1182, 1187-88 (Ct. App. 1975), **rev'd on other grounds,** 89 N.M. 547, 555 P.2d 142 (1976).

II. THE BANK PROPERLY PRESERVED ITS RIGHT TO APPEAL.

{26} The Mocks contend that the Bank did not preserve its right to claim error on appeal because it did not raise the issues in its docketing statement. Although the court of appeals requires a docketing statement as a jurisdictional matter for perfecting appeals, this court does not. "It is within our discretion to consider error preserved

below and presented in appellant's brief after having been omitted from the docketing statement." **Gallegos v. Citizens Ins. Co.,** 108 N.M. 722, 731, 779 P. 2d 99, 108 (1989). The docketing statement is not jurisdictional to this court. **Id.** Thus, we will consider the substantive issues raised on this appeal.

III. THE BANK'S CLAIM TO THE NOTE AS A HOLDER.

{27} The Bank makes several claims to the note. It claims that, as a holder of the note, it cannot be liable on the note for negligence, and it contends that the trial court erred in not directing a verdict in its favor on this point. It also contends that the court erred in finding that, if the Bank was found by the jury not to be a holder in due course, the Mocks would be entitled to the note because of the resulting trust. We address each issue in turn.

A. Negligence.

{28} The Bank argues that the U.C.C. allows a holder to be negligent in taking a negotiable instrument and refers us to several cases regarding holder in due course status. It is true that a holder in due course can attain that status despite his negligence in taking the instrument. He is only required to take for value, in good faith, and without notice of claims or defenses. NMSA 1978, § 55-3-302(1). It is true that good faith as used in the relevant sections of the U.C.C. is a subjective standard and requires actual knowledge of a claim or defense for the status of holder in due course to be lost (although a jury may find from the facts and circumstances of a transaction that a holder had notice). J. White & R. Summers, **Handbook of the Law Under the Uniform Commercial Code** 563 (2d ed. 1980). However, the Bank's argument puts the cart before the horse. The jury found that the Bank was a mere holder; it was not entitled to holder in due course status because of its **knowledge** that Smentowski had no beneficial interest in the note (and therefore had notice of claims and defenses). The Mocks did not prevail on their claim that the Bank was only a holder because the Bank was negligent in taking the note—they prevailed because the Bank acted in bad faith and with notice of claims and defenses. In addition, the record indicates that the trial court sustained the Bank's motion for directed verdict on the issue of negligence as a defense to a holder, and we need not consider this issue further.

B. Resulting Trust.

{29} The Bank contends that the finding that Smentowski held the note in a resulting trust is irrelevant to whether the Bank had any right to the note. To properly rule on this contention, we must first determine whether a resulting trust was created, and, if so, what affect the resulting trust had on the Bank's interest.

{30} New Mexico has long recognized the doctrine of resulting trusts. **See Mapel v. Starriett,** 28 N.M. 1, 205 P. 726 (1922). It is an inference made by law from the circumstances and nature of the transaction between the parties, when the circumstances indicate that the party holding legal title to the property was not intended to have a beneficial interest in it. Thus, the courts infer that the holder of title holds it in trust for the beneficial owner, although there is no express intention to create a trust. **See McDermott v. Sher,** 59 N.M. 142, 280 P.2d 660 (1955).

{31} In the case at bar, Smentowski, legitimately acting as a strawman for the real estate transaction, held the note, without any personal interest in it, for the Mocks, thereby creating a resulting trust. The Bank did not offer any evidence to rebut the inference and to show that Smentowski had a personal interest in the note.

{32} The Bank properly points out that the trial court found it to be a holder of the note, and that, as a holder, it possessed the note and had rights in it, subject to claims and defenses. **See** NMSA 1978, §§ 55-3-301, 306, 419. The jury determined, however, that the Bank was not a holder in due course, and thus not exempt from certain

defenses. **See id.** § 55-3-307. The Bank contends, nevertheless, that the trial court erred in ruling that, as a matter of law, should the Bank be found not to be a holder in due course, the Mocks were automatically entitled to the note because Smentowski held the note as a trustee in a resulting trust for the benefit of the Mocks.

{33} We believe that the Bank has misconstrued the issue. The court did determine that Smentowski held the note in a resulting trust, and properly so. Our reading of the record does not indicate that the trial court ruled that, as a matter of law, if the Bank was found to be a mere holder of the note, the Mocks were automatically entitled to the note because of the resulting trust. By finding the resulting trust the court found that the Mocks had a legitimate interest in the note, and that Smentowski had none. The Bank claims that it is irrelevant as to it that Smentowski had no interest in the note. However, the resulting trust is relevant to the Bank because it was determined that the Bank knew of it, and thus the Bank lost its holder in due course status. The significance of the resulting trust is that it established the Mocks' claim to the note and Schmitz' defense to payment to the Bank. The jury found that the Bank took the note with notice of the trust (i.e. the Mocks' claim) and not in good faith. Thus, the jury found that the Bank was not entitled to holder in due course status, and took subject to claims and defenses of which it knew.

IV. THE PRIMA FACIE TORT.

{34} This court is faced today with two questions: Should a cause of action in prima facie tort be recognized in New Mexico, and, if so, did the Mocks prove that the Bank committed a prima facie tort?

A. Prima Facie Tort and New Mexico Jurisprudence.

{35} The Bank contends that we should refuse this opportunity to recognize prima facie tort. It claims that the two jurisdictions that have recognized prima facie tort as a specific tort cause of action, New York and Missouri, have found prima facie tort to be arcane and unworkable, spawning much litigation without appreciable benefit to plaintiffs. We disagree, and hold today that prima facie tort is recognized in New Mexico. As will be shown, it accords with our recent tort jurisprudence, and, if properly used, provides a remedy for plaintiffs who have been harmed by a defendant's intentional and malicious acts that fall outside of the rigid traditional intentional tort categories.

{36} Prima facie tort is not a recent innovation; its development has been discussed in various law reviews and decisions spanning practically a century. **See Beardsley v. Kilmer,** 236 N.Y. 80, 140 N.E. 203 (1923); Holmes, **Privilege, Malice, and Intent,** 8 Harv. L. Rev. 1 (1894); Brown, **The Rise and Threatened Demise of the Prima Facie Tort Principle,** 54 Nw. U.L. Rev. 563 (1959) (hereinafter Brown); Forkosch, **An Analysis of the "Prima Facie Tort" Cause of Action,** 42 Cornell L.Q. 465 (1957).

{37} The theory underlying prima facie tort is that a party that intends to cause injury to another should be liable for that injury, if the conduct is generally culpable and not justifiable under the circumstances. Restatement (Second) of Torts § 870 (1977). With variations in the several jurisdictions that have adopted the tort, its elements are generally recognized to be:

1. An intentional, lawful act by defendant;
2. An intent to injure the plaintiff;
3. Injury to plaintiff, and
4. The absence of justification or insufficient justification for the defendant's acts.

Porter v. Crawford & Co., 611 S.W.2d 265, 268 (Mo. Ct. App. 1980); **see ATI, Inc. v. Ruder & Finn, Inc.,** 42 N.Y.2d 454, 458, 368 N.E.2d 1230, 1232, 398 N.Y.S.2d 864, 866 (1977).

{38} Although the concept that unjustified intentionally caused harm should be the basis for liability has been utilized without denominating

the theory as prima facie tort throughout recent jurisprudence, **see, e.g., Diaz v. Kay-Dix Ranch,** 9 Cal. App. 3d 588, 592 n.3, 88 Cal. Rptr. 443, 445 n.3 (1970); **Moran v. Dunphy,** 177 Mass. 485, 59 N.E. 125 (1901); **Tuttle v. Buck,** 107 Minn. 145, 119 N.W. 946 (1909); **Mangum Electric Co. v. Border,** 101 Okla. 64, 222 P. 1002 (1923), New York was the first state to adopt prima facie tort as a specific cause of action. **See Advance Music Corp. v. American Tobacco Co.,** 296 N.Y. 79, 70 N.E.2d 401 (1946); Brown, 54 Nw. U.L. Rev. at 566. The cause of action as it developed in New York, became stylized, as courts added requirements; for example, that special damages be proven, that the complaint not plead any other tortious conduct, that the activity complained of be otherwise lawful and not fit into any other established tort category, and that the activity complained of be motivated by a solely malicious intent. Note, **Prima Facie Tort,** 11 Cumb. L. Rev. 113, 116-18 (1980). In recent years, New York has retreated somewhat from these requirements, allowing alternative pleadings and expanding the definition of prima facie tort. **Board of Educ. v. Farmingdale Classroom Teachers Ass'n, Local 1889,** 38 N.Y.2d 397, 406, 343 N.E.2d 278, 284-85, 380 N.Y.S.2d 635, 644-45 (1975).

{39} Restatement (Second) of Torts § 870 (1977) has adopted a much more general theory of prima facie tort, providing that: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."

{40} The Restatement approach embodies a balancing process, because "not every intentionally caused harm . . . deserves a remedy in tort." **Id.** comment e. Thus, the activity complained of is balanced against its justification and the severity of the injury, weighing: (1) the injury; (2) the culpable character of the conduct; and (3) whether the conduct is unjustifiable under the circumstances. **Id.** The dual nature of the determination is manifested by the requirement that the conduct be both culpable—wrongful or improper in general—and unjustifiable—under the circumstances no privilege should apply. **Id.**

{41} The Restatement further breaks down the analytical process into four considerations that should be considered in balancing the above factors: "(1) the nature and seriousness of the harm to the injured party, (2) the nature and significance of the interests promoted by the actor's conduct, (3) the character of the means used by the actor and (4) the actor's motive." **Id.**

{42} It is apparent from a discussion of the Restatement view that, although it considers the same factors as do the New York courts, it does so in a more flexible way, by balancing the factors rather than by creating stylized requirements.

{43} Instructive to this court in our consideration of prima facie tort is the Missouri experience. In **Porter v. Crawford & Co.,** 611 S.W.2d 265 (Mo. Ct. App. 1980), the court addressed the issue we consider today: whether to allow recovery in tort for a lawful act performed maliciously and with the intent to injure the plaintiff. **Id.** at 266. **Porter** involved an automobile accident, where the defendant-insurance agent settled the plaintiff's claim and delivered a check to plaintiff in release of claims. Plaintiff deposited the draft and wrote checks against it, while, without plaintiff's knowledge, the defendant cancelled the draft. Plaintiff incurred injuries as a consequence, and brought suit alleging that, by acting with careless and reckless disregard for plaintiff's rights and without just cause, the defendant had maliciously acted with intent to injure plaintiff. **Id.** at 267.

{44} The Missouri court examined the New York experience and the Restatement view, and fashioned a prima facie tort doctrine that combined the fundamental policy view of the Restatement with the analytically consistent aspects of the New York experience. We feel that their approach was analytically sound, and we adopt it, with refinements as discussed below.

{45} To constitute a prima facie tort, the tortfeasor must act maliciously, with the intent to cause injury, and without justification or with insufficient justification. One early development in New York was that the defendant was required to have acted with "disinterested malevolence"—the intent to harm being the sole motivation for the action. This was a means to determine if otherwise lawful conduct was done without any beneficial end but solely to injure the plaintiff. **See Porter,** 611 S.W.2d at 269.

{46} We reject this approach in favor of the balancing approach sanctioned by the Restatement. A sole intent to injure is, by definition, unjustifiable—a purpose other than to injure the plaintiff is a justification for the act. **Id.** Thus, if a defendant offers a purpose other than the motivation to harm the plaintiff as justification for his actions, that justification must be balanced to determine if it outweighs the bad motive of the defendant in attempting to cause injury. **See id.;** Restatement (Second) of Torts § 870 comment c (1977); **but see Rodgers v. Grow-Kiewit Corp.-Mk.,** 535 F. Supp. 814, 816 (S.D.N.Y.), **aff'd** 714 F.2d 116 (2d Cir. 1982) ("[M]otives of profit, economic self-interest or business advantage are by their terms not malicious, and their presence, even if mixed with malice or personal animus, bars recovery under prima facie tort.")

{47} We believe that to allow a defendant to escape liability solely because he can demonstrate some economic benefit to himself from the complained of act would defeat the policy behind our recognition of prima facie tort—to allow a plaintiff to recover for intentionally committed acts that, although otherwise lawful, are committed with the intent to injure. Thus, we hold that the act must be committed with the intent to injure plaintiff, or, in other words, without justification, but it need not be shown that the act was solely intended to injure plaintiff. **Porter,** 611 S.W.2d at 269; Restatement (Second) of Torts § 870 (1977); **see Speer v. Cimosz,** 97 N.M. 602, 606, 642 P.2d 205, 209 (Ct. App.), **cert. denied,** 98 N.M. 50, 644 P.2d 1039 (1982); **Bynum v. Bynum,** 87 N.M. 195, 197-98, 531 P.2d 618, 620-21 (Ct. App.), **cert. denied,** 87 N.M. 179, 531 P.2d 602 (1975).

{48} We also accept the view held by New York and Missouri that prima facie tort may be pleaded in the alternative; however, if at the close of the evidence, plaintiff's proof is susceptible to submission under one of the accepted categories of tort, the action should be submitted to the jury on that cause and not under prima facie tort. **Bandag of Springfield, Inc. v. Bandag, Inc.,** 662 S.W.2d 546, 552-53 (Mo. Ct. App. 1982); **Farmingdale Classroom Teachers Ass'n,** 38 N.Y.2d at 406, 343 N.E.2d at 284-85, 380 N.Y.S.2d at 644-45. Thus, double recovery may not be maintained, and the theory underlying prima facie tort—to provide remedy for intentionally committed acts that do not fit within the contours of accepted torts—may be furthered, while remaining consistent with modern pleading practice. **Id.**

B. Adoption of Prima Facie Tort Is Consistent with New Mexico Jurisprudence.

{49} Contemporary scholarship recognizes that there exists a residue of tort liability, which has escaped categorization in the forms of tort action, that is available for development into recognized torts as the need arises. **Brown**, 54 Nw. U.L. Rev. at 573; **Porter,** 611 S.W.2d at 268. In recognizing the tort of prima facie tort, this court is acting well within the tradition of the development of tort law in this jurisdiction. New Mexico has recognized that tort law is not static—it must expand to recognize changing circumstances that our evolving society brings to our attention. Thus, in other areas, we have recognized that intentional, malicious conduct that injures another, even though it may not have been recognized by the heretofore accepted areas of intentional tort, can serve as a basis for tort liability. We have also been very willing to adopt the view of the Restatement of Torts to assist our development of new tort areas.

{50} Accordingly, New Mexico has recognized as tortious inducing a breach of contract,

adopting the view promulgated in Restatement of Torts § 766 (1939). **Wolf v. Perry,** 65 N.M. 457, 461, 339 P.2d 679, 681 (1959) (requiring that "one who, without justification or privilege to do so, induces a third person not to perform a contract with another, is liable to the other for the harm caused thereby"); **see also Williams v. Ashcraft,** 72 N.M. 120, 381 P.2d 55 (1963) (recognizing the tort of wrongful interference with another's business relations). We have adopted the cause of action of intentional interference with prospective contractual relations, relying on the tort as articulated in Restatement (Second) of Torts § 766(B) (1977). **M & M Rental Tools, Inc. v. Milchem, Inc.,** 94 N.M. 449, 452-54, 612 P.2d 241, 244-46 (Ct. App. 1980) (one who, with "bad motive," intentionally interferes with another's prospective contractual relations, is subject to liability); **Anderson v. Dairyland Ins. Co.,** 97 N.M. 155, 158-59, 637 P.2d 837, 840-41 (1981). These torts reflect the underlying theory of prima facie tort as applied to contractual relations—the underlying malicious motive of a defendant's actions, done without justification, makes an otherwise lawful act, competition, tortious.

{51} New Mexico has also recognized the tort of intentional infliction of emotional distress, relying on Restatement (Second) of Torts § 46 (1965), **Mantz v. Follingstad,** 84 N.M. 473, 479-80, 505 P.2d 68, 74-75 (Ct. App. 1972); **Ramirez v. Armstrong,** 100 N.M. 538, 673 P.2d 822 (1983), and we have recognized that the intentional and wrongful deprivation of the right to vote or hold public office creates tort liability. **Valdez v. Gonzalez,** 50 N.M. 281, 176 P.2d 173 (1946).

{52} In light of this prior jurisprudence, it becomes evident that we have traditionally afforded relief for wrongs intentionally and maliciously committed, giving credence to the maxim of prima facie tort theory: "prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, * * * requires a justification if the defendant is to escape." **Aikens v. Wisconsin,** 195 U.S. 194, 204, 25 S. Ct. 3, 5, 49 L. Ed. 154 (1904).

C. Application to the Case at Bar.

{53} All that remains is for us to determine whether the Bank committed a prima facie tort against the Mocks. It is uncontradicted that the Bank was acting in an otherwise lawful manner. It took possession of a note as collateral on a loan, and when Smentowski defaulted on the loan, it moved to protect its interest and notified the payor to send its payment directly to the Bank.

{54} It is also uncontradicted that the Mocks were injured by the Bank's actions. The mortgage on their ranch was not paid in a timely manner because the proceeds of the note were not turned over to Edmondson, precipitating a foreclosure action. To prevent the loss of the ranch, the Mocks were forced to borrow on their line of credit that they otherwise would have used to purchase cattle, and they thereby lost profit and were forced to under-utilize their land.

{55} The second element of prima facie tort raises more substantial problems. The tort requires that the defendant not only intend the act, but that he also intend the harm. The Bank contends that the Mocks have not demonstrated that the Bank was motivated solely by a malicious intention to harm the Mocks; that the Bank, because it was motivated at least in part by economic self-interest, cannot be liable. As discussed above, we have rejected the requirement that the action be solely motivated by the intent to harm, as accepted by New York, in favor of the Restatement's balancing approach, whereby motives such as economic self-interest are weighed as an issue of justification.

{56} The Bank contends that, nevertheless, our precedent dictates that we should adopt a standard of sole motivation to harm, citing **M & M Rental Tools,** 94 N.M. 449, 612 P.2d 241 (Ct. App. 1980). However, **M & M** dealt with interference with prospective contract; the rights involved with prospective contract are speculative, and more concrete rights are entitled to a greater degree of protection. **Dairyland Ins. Co.,** 97 N.M. at 158-59, 637 P.2d at 840-41.

The rights implicated by a prima facie tort are not prospective—real, concrete damages must be proven, and we see no reason to adopt a higher standard of intent.

{57} The Bank further contends that even Missouri requires that disinterested malevolence be shown, citing us to **Kiphart v. Community Fed. Sav. & Loan Ass'n,** 729 S.W.2d 510 (Mo. Ct. App. 1987), and **Centerre Bank of Kansas City v. Distributors, Inc.,** 705 S.W.2d 42 (Mo. Ct. App. 1985). Missouri does require that specific intent to injure be shown; merely showing the intent to do the act is insufficient. **See Kiphart,** 729 S.W.2d at 516. However, it does not require that the intent be solely to injure, and it requires that the intent be balanced to determine if the activity was beyond the bounds of what society should tolerate. **Porter,** 611 S.W. 2d at 270. In **Kiphart,** the court found no specific intent to harm. The activity complained of was an interrogation to determine whether the plaintiff, a teller, was responsible for a cash shortfall. The court determined that, under the circumstances, the Bank was justified, and that it did not go so beyond the bounds of what it was entitled to do in protecting its economic interest to show a specific intent to harm. 729 S.W.2d at 517.

{58} Centerre is interesting because the bank's actions there demonstrate why the Colorado National Bank stepped beyond the bounds of justifiable activity. In **Centerre,** the bank extended loans to a corporation. Upon the corporation's subsequent sale, the bank called its demand note, because it no longer considered the loan good. The bank eventually sued to collect, and the defendant corporation and personal guarantors counterclaimed, alleging **inter alia,** prima facie tort. The counterclaimants demonstrated that the bank knew that by calling its note it would put the corporation out of business, and presented evidence of personal animus toward the corporation's new owners. The court expressed doubt regarding the evidence of intent to injure, but resorted to the balancing test and determined that the bank was justified in calling the loan because it was acting to protect its **valid** business interest. 705 S.W.2d at 54; **see also Bank of Boston Int'l v. Arguello Tefel,** 644 F. Supp. 1423 (E.D.N.Y. 1986).

{59} The facts of **Centerre** demonstrate how the case at bar is easily distinguishable, and points out the crucial issue for us to decide in determining whether the requisite intent is present. The Colorado National Bank was not acting pursuant to a valid business interest. It did not make a valid business decision to call the note, and cannot now hide behind its claim that it was merely protecting its loan as a business justification. The standard for prima facie tort is whether there is an absence of justification or insufficient justification for the defendant's act. **Kiphart,** 729 S.W.2d at 516. In this case, the Bank's acts are not sufficiently justifiable—it knew Smentowski had no interest in the note and had accepted it initially not as collateral but to satisfy the bank examiners. The Bank does not contend that it did not intend the act, but maintains that it did not intend the harm and that its motive was justified and not malicious. The real issue for this court is whether the Bank's intentional act, without sufficient justification and with the certain knowledge that by moving against the note in which it had no interest it would injure an innocent party, rises to the level of intending the harm.

{60} The Mocks contend that a prima facie tort requires nothing more than a showing that the act complained of was wrongful, intentional, and without justification, and that the injury was a natural and foreseeable consequence of the act. In other words, they argue that it is not necessary that the Bank possessed ill will or a malicious motive, i.e. that it intended to harm them, as long as it intended the act that caused the harm. Thus, they claim that because the Bank intended to move against the note, because this act was wrongful and unjustified under the circumstances, and because it caused the Mocks financial injury, the Bank is liable for prima facie tort.

{61} We disagree with this analysis. To allow such a lax standard would be to invite every victim of an intentional act to bring an action in prima facie tort and would subvert the purpose of prima facie tort by eliminating the element

requiring that a defendant intended injury to the plaintiff.

{62} Nevertheless, we do agree that the Bank's actions did rise to the level of intending to commit the harm. Thus, we hold that, when a defendant, such as the Bank, has intentionally acted with the certainty that injury will necessarily result, the intent to injure has sufficiently been proved to allow a court to resort to the Restatement's balancing approach to determine whether the tort has been committed. This approach differs from that adopted to New York, yet we believe that the balancing approach allows this lessened degree of proof of intent to be considered. **See Brown,** 54 Nw. U.L. Rev. at 569-70; **Morrison v. National Broadcasting Co.,** 24 A.D.2d 284, 266 N.Y.S.2d 406 (1965) (finding liability for intentional, foreseeable infliction of harm in tort, although not in the narrow confines of the prima facie tort doctrine as it had by then evolved in New York), **rev'd on other grounds,** 19 N.Y.2d 453, 227 N.E.2d 572, 280 N.Y.S.2d 641 (1967); **Smith v. Fidelity Mut. Life Ins. Co.,** 444 F. Supp. 594, 598 n. 6 (S.D.N.Y. 1978); **but see Donahue v. Pendleton Woolen Mills, Inc.,** 633 F. Supp. 1423 (S.D.N.Y. 1986) (where plaintiff alleged defendant acted in reckless disregard of plaintiff's rights and not that defendant intended to injure plaintiff, no cause of action in prima facie tort).

{63} Nevertheless, the Bank argues that the Mocks had alternative theories for tort relief available, specifically in fraud and conversion, and thus they should not have been allowed to proceed on the theory of prima facie tort. We agree that prima facie tort should not be used to evade stringent requirements of other established doctrines of law. **See, e.g., Lundberg v. Prudential Ins. Co. of America,** 661 S.W.2d 667, 671 (Mo. Ct. App. 1983) (prima facie tort cannot be used to avoid employment at will doctrine); Restatement (Second) of Torts § 870 comment j (1977) ("In determining whether a new tort can appropriately eliminate a restrictive feature of a traditional tort it is important to give careful consideration to the nature of the restriction."). However, it is apparent that the Mocks possessed claims in neither fraud nor conversion. A fundamental element of fraud is a misrepresentation of fact, made with the intent to deceive a third party and to induce his reliance. **Cargill v. Sherrod,** 96 N.M. 431, 631 P.2d 726 (1981). On the facts presented, it is apparent that the Bank did not misrepresent facts to the Mocks to induce their reliance, and a cause of action in fraud would not lie. A cause of action in conversion requires proof of wrongful possession of property inconsistent with the owner's rights. **Molybdenum Corp. v. Brazos Eng'g Co.,** 81 N.M. 708, 710, 472 P.2d 971, 973 (1970). The present facts indicate that the Bank lawfully came into possession of the note; it was their subsequent activity that was tortious. Thus, the Mocks could not have proceeded with either theory.

{64} The Bank also contends that the Mocks pursued the prima facie tort theory rather than that of the fraud to evade the stringent clear and convincing standard of proof required to prove fraud. As already discussed, the Mocks had no basis to pursue the fraud theory. In addition, the court properly instructed the jury that the standard of proof for prima facie tort was by a preponderance of the evidence.

{65} Thus, it is apparent that the Mocks did present the elements of a prima facie tort, and it is therefore necessary to resort to the balancing test to determine whether the Bank's acts could reasonably have been found by the jury to be tortious. The factors we consider are: (1) the nature and seriousness of the harm to the injured party; (2) the interests promoted by the actor's conduct; (3) the character of the means employed by the actor, and (4) the actor's motives. Restatement (Second) of Torts § 870 comments f, g, h & i (1977); **Lundberg,** 661 S.W.2d at 671. In considering the first factor, physical, concrete harm is weighed more heavily than emotional or prospective economic harm. With reference to the second, the court must consider established privileges or rights. In balancing the third consideration, conduct offensive to society's concepts of fairness and morality favors liability, and in determining the last, the degree of malice is significant. **Id.**

{66} Here, the Mocks received palpable economic injury. As a result of the Bank's actions, they were forced to pay off the mortgage in toto, borrowing funds from their line of credit, and thereby suffering injury to their ranching business. With regard to the second factor, although under other circumstances the Bank would be privileged to protect its loan and move against the collateral, the Bank's knowledge that it had no interest in the note negates its right to move against it. Thus, the character of the means used favors the Mocks. In considering the third factor, again, although under different circumstances the Bank would have rightfully acted as it did, the evidence indicates that the Bank was concerned solely with its own economic well-being, without privilege, to the exclusion of any harm its actions would cause to innocent parties that would result. Its knowledge of the underlying factors makes its means offensive and unfair and denotes that the Bank was acting under the color of economic privilege to harm innocent people—means that were both offensive and unfair. Finally, the Bank's motive, although not actually to injure the Mocks, was with such utter disregard for the Mocks' interests as to rise to the level of specific intent to injure. The Bank's argument that it acted solely for its own economic benefit does not negate its culpability under these circumstances.

{67} It was proper for the court below to balance these factors, and, as we have demonstrated, the jury's decision was reasonable. We therefore AFFIRM.

{68} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

KENNETH B. WILSON,
Justice

Justice Joseph F. Baca

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-020

Filing Date: February 15, 1990,
As Corrected March 15, 1990

Docket No. 18,126

ALVIN SMITH,

Plaintiff-Appellee,

v.

FDC CORPORATION,

Defendant-Appellant,

v.

ROGER COX,

Intervenor-Appellant.

Appeal from the District Court of San Juan County
James L. Brown, District Judge

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Farmington, New Mexico

for Appellant FDC.

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for Appellee.

OPINION

BACA, Justice.

{1} Following a bench trial for damages based on claims of age and race discrimination in employment in violation of the New Mexico Human Rights Act, NMSA 1978, Sections 28-1-1 to -7, 28-1-9 to -14 (Repl. Pamp. 1987), before the District Court of San Juan County, FDC Corporation (FDC), defendant below, and Roger Cox, intervenor, appeal the judgment of the court in favor of plaintiff Smith and the award of damages of $54,134 to be assessed against Cox for violation of a post-judgment discovery order. We affirm in part and reverse in part.

FACTS

{2} Smith, a Navajo Indian, worked at FDC's concrete factory and had been employed there for approximately ten years prior to his discharge in December 1983. At that time, Smith was fifty-nine years old; he was the only Native American employed at the plant, and fewer than five percent of the plant's employees were over age fifty. Although the job involved physical labor, Smith was qualified and physically and mentally able to perform the tasks required of him.

{3} Smith was fired purportedly for being disrespectful to his supervisor and for operating a machine in an unsafe manner. A machine upon which Smith was working evidently was accidentally started up, threatening the foreman with physical injury. However, evidence indicated that the machine was under the control of the supervisor, not Smith, at the time of the incident and that the foreman was operating the machine contrary to prudent safety measures. Additionally, although other incidents of unsafe operation of machinery had occurred at the plant, only Smith was terminated purportedly for unsafe practices; the other unsafe incidents all involved younger and non-Indian employees who were

not discharged, although the accidents were at least of equal severity.

{4} Several incidents indicate that age and race-based animus was directed toward Smith. The factory work force consisted mainly of young Hispanic employees. On several occasions, Smith's foreman called him "old man" and intimated a desire that Smith retire soon.

{5} Smith was hired in 1973 at a wage of $4.00 per hour. After his termination, Smith attempted to find other work; however he was unable to locate full-time employment, although he occasionally hauled wood. He also received public assistance payments and social security.

{6} Smith, after a judgment in his favor, initiated further discovery in aid of its execution. Cox, allegedly the sole shareholder of FDC but not a named party in this suit, was subpoenaed, and he was asked to produce certain documents. FDC was also issued a subpoena duces tecum. When Cox failed to comply with the discovery requests in a timely manner, the court sanctioned him by ordering him to personally satisfy the judgment.

{7} Appellants have presented the following issues for our consideration: (1) whether there is substantial evidence to support the trial court's finding of discrimination and award of damages; (2) whether the court should have set off plaintiff's earnings from hauling wood, public assistance, and social security in determining damages; (3) whether the award of attorney fees was reasonable; and (4) whether the court improperly assessed the judgment against a nonparty as sanctions for noncompliance with discovery requests.

I. WERE THE TRIAL COURT'S FINDINGS OF DISCRIMINATION AND DAMAGES SUPPORTED BY SUBSTANTIAL EVIDENCE?

{8} The New Mexico Human Rights Act, NMSA 1978, Section 28-1-7, which tracks the language of the federal Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2, makes it unlawful for an employer to discriminate against an individual on the basis of age or race.

{9} In this suit based on NMSA 1978, Section 28-1-7, for Smith to prevail he was required to demonstrate that FDC discriminated against him in terminating his employment because of his race or age. Although the burdens of proof and methodology for proving employment discrimination under the New Mexico Human Rights Act have not previously been addressed by this court, the United States Supreme Court has considered this question in interpreting the Civil Rights Act of 1964, **see McDonnell Douglas Corp. v. Green,** 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).[1] The evidentiary methodology adopted therein provides guidance for proving a violation of the New Mexico Human Rights Act. Our reliance on the methodology developed in the federal courts, however, should not be interpreted as an indication that we have adopted federal law as our own. Our analysis of this claim is based on New Mexico statute and our interpretation of our legislature's intent, and, by this opinion, we are not binding New Mexico law to interpretations made by the federal courts of the federal statute.

{10} The **McDonnell Douglas** methodology, whereby the burden of persuasion shifts in intermediate stages, was developed because often direct proof of discrimination is not available. The analysis allows proof of discriminatory intent absent direct proof. **Texas Dep't of Community Affairs v. Burdine,** 450 U.S. 248, 256, 101 S.

[1] The **McDonnell Douglas** methodology allows proof of discriminatory intent absent direct proof by creating a presumption of discrimination. Initially, a plaintiff bears the burden of showing a prima facie case by "eliminat[ing] the most common nondiscriminatory reasons" for the employer's actions. **Burdine,** 450 U.S. at 254, 101 S. Ct. 1094. The burden then "shift[s] to the employer to articulate some legitimate, nondiscriminatory reason" for his actions. **McDonnell Douglas,** 411 U.S. at 802, 93 S. Ct. at 1824. Then, the plaintiff has the opportunity to show that the articulated reason is pretextual. **Id.** at 804-05, 93 S. Ct. at 1825-26. This burden merges with the plaintiff's ultimate burden of proof of intentional discrimination. **Burdine,** 450 U.S. at 256, 101 S. Ct. at 1095.

Ct. 1089, 1095, 67 L. Ed. 2d 207 (1981). This framework, however, is not a required method of proof; it is only a tool to focus the issues and to reach the ultimate issue of whether the employer's actions were motivated by impermissible discrimination. **See id.** at 253 n. 6, 101 S. Ct. at 1094 n. 6; **Hagelthorn v. Kennecott Corp.,** 710 F.2d 76, 81 (2d Cir. 1983).[2]

{11} A prima facie case of discrimination may be made out by showing that the plaintiff is a member of the protected group, that he was qualified to continue in his position, that his employment was terminated, and that his position was filled by someone not a member of the protected class. **Hawkins v. CECO Corp.,** 883 F.2d 977, 982 (11th Cir. 1989); **Haskell v. Kaman Corp.,** 743 F.2d 113, 119 n.1 (2d Cir. 1984).[3] A prima facie case may also be made out through other means; not all factual situations will fit into any one type of analysis, although unlawful discrimination may nevertheless be present. For example, a prima facie case can be shown absent a demonstration that the plaintiff was replaced by someone not in the protected class if he can show that he was dismissed purportedly for misconduct nearly identical to that engaged in by one outside of the protected class who was nonetheless retained. **McDonald v. Santa Fe Trail Transp. Co.,** 427 U.S. 273, 282-84, 96 S. Ct. 2574, 2579-81, 49 L. Ed. 2d 493 (1976); **Nix v. WLCY Radio/Rahall Communications,** 738 F.2d 1181, 1185-86 (11th Cir. 1984). This prima facie case may then be rebutted by evidence that the plaintiff was dismissed based on a nondiscriminatory motivation. However, the entire **McDonnell Douglas** framework may be bypassed through a showing of intentional discrimination; the purpose of the test is to allow discriminated-against plaintiffs, in the **absence** of direct proof of discrimination, to demonstrate an employer's discriminatory motives. **See Loeb v. Textron, Inc.,** 600 F.2d 1003, 1018-19 (1st Cir. 1979). When direct evidence of discriminatory motive exists, each element of the **McDonnell Douglas** test need not be proved—the New Mexico Human Rights Act prohibits discrimination based on age and race, and if a plaintiff, such as Smith, can show through direct evidence that he was discriminated against because of an impermissible categorization, that is all that is required for him to prevail. **See Trans World Airlines, Inc. v. Thurston,** 469 U.S. 111, 121, 105 S. Ct. 613, 621, 83 L. Ed. 2d 523 (1985); **Spagnuolo v. Whirlpool Corp.,** 641 F.2d 1109, 1112-13 (4th Cir.), **cert. denied,** 454 U.S. 860, 102 S. Ct. 316, 70 L. Ed. 2d 158 (1981); **Loeb,** 600 F.2d at 1014.

{12} FDC contends that there is no evidence supporting the court's finding of discrimination. It maintains that the statistical evidence presented was flawed and did not show that the composition of the work force demonstrated an unlawful pattern of discrimination. It argues that no evidence was submitted regarding the racial background of the work force, and that any evidence of the racial composition in the record is meaningless without evidence of the pool from which employees were drawn. Much of its argument is based on the contention that the evidence offered regarding the racial composition of the work force was based on a superficial analysis of surnames, which it maintains is not determinative of race. It further argues that there was a failure of proof concerning the race of other employees who were involved in accidents but were not dismissed.

{13} In reviewing a decision to determine whether it is supported by substantial evidence,

[2] We are aware that the Supreme Court has recently revisited the questions of burdens of proof in a title VII case, the proper methodology in proving a prima facie case, and the use of statistical evidence. **See Wards Cove Packing Co. v. Atonio,** . . . U.S. . . . , 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989). **Wards Cove** is inapplicable to the case before us today; it considers a claim of disparate impact in the context of alleged discriminatory hiring practices. As such, it does not provide guidance to us in this case where direct evidence of discrimination has been shown and the claim is one of disparate treatment, and we express no opinion as to its applicability to New Mexico law.

[3] One way of meeting the initial burden of persuasion is through the use of statistical evidence that may be introduced by a plaintiff to assist him in demonstrating an inference of discrimination through a pattern of discriminatory activity. **Haskell v. Kaman Corp.,** 743 F.2d 113, 119 (2d Cir. 1984); **Laugesen v. Anaconda Co.,** 510 F.2d 307, 317 (6th Cir. 1975) (statistical evidence in individual suit goes to weight of evidence). It is not required, especially if the plaintiff can demonstrate direct evidence of discrimination.

we examine the record for relevant evidence such that "a reasonable mind might accept as adequate to support a conclusion." **Toltec Int'l, Inc. v. Village of Ruidoso,** 95 N.M. 82, 84, 619 P.2d 186, 188 (1980). We resolve disputed facts in favor of the party prevailing below, indulging all reasonable inferences in favor of the verdict and disregarding contrary inferences, and we do not independently weigh conflicting evidence. **Id.**

{14} Smith presented evidence that he was a member of two protected groups. He also presented evidence that he was qualified at the time of his termination to fully perform his job, that he was fired, and that other factory workers, who were not members of protected groups, were not dismissed when they committed similar safety infractions. Evidence was presented regarding the racial composition of the work force that indicated that there were few older or Native American workers in the plant. Although FDC is correct in arguing that the proof of the race of other employees, including those involved in accidents, is unsophisticated, there was evidence that Smith was the oldest employee in the work force and one of only several Native Americans. FDC did not rebut the anecdotal evidence presented, which was sufficient to support the inference that Native Americans and older workers were underrepresented in the work force, and company records submitted to the court supported Smith's testimony. FDC presented evidence demonstrating that Smith was legitimately terminated because of the accident that could have injured the foreman. Smith then presented evidence that this was a pretext, that the foreman caused the accident, and that others who were not members of protected groups but were guilty of similar safety infractions were not terminated. There was thus ample evidence in the record for the trial court to determine that the reason for the dismissal was race or age-based animus and not a valid business judgment.[4]

{15} Furthermore, Smith presented direct evidence of age-based animus—Smith was called "old man," and the foreman had indicated that he was happily anticipating Smith's retirement. FDC contends that "old man" is simply a term of respect, an argument we find wholly unconvincing; in the trial court's discretion, it could easily be determined that such statements evinced age-based animus and evidence of discriminatory intent. **See Scofield v. Bolts & Bolts Retail Stores,** 21 Fair Empl. Prac. Cas. (BNA) 1478, 1480, 1979 WL 291 (S.D.N.Y. 1979) (holding that the plaintiff made out a prima facie case of age discrimination based upon a showing that she was a member of the protected group, she was qualified and capable of doing her job, she was discharged, and that her manager called her "old woman," thus evincing age-based animus sufficient to demonstrate discriminatory intent). We find adequate evidence to support the trial court's similar determination here.

{16} Thus, we find that Smith did make out a case that he was terminated because of his age and race, he did identify age and race-based animus, and he did demonstrate that he was treated differently than similarly situated young, non-Native Americans, to a degree sufficient to support the trial court's judgment.

II. DAMAGES

{17} FDC contends that the trial court's award of damages was not supported by substantial evidence. It maintains that the trial court did not consider that Smith, subsequent to his termination, had alternative sources of income that should have offset and mitigated the damage award.

{18} Specifically, FDC contends that Smith's income from hauling wood should have been considered by the court. Smith testified at trial

[4] Although we agree with appellant that no evidence was offered regarding the racial composition of the pool of applicants from which the work force was drawn and although Smith bore the burden of coming forth with evidence of discrimination, this lack of evidence is not determinative, especially as this was not a case alleging discriminatory hiring practices. Such statistical evidence may be helpful in showing intent to discriminate absent direct evidence of such intent, or in a disparate impact situation, where such intent is not determinative.

that he hauled one load of wood per day, twice a week, earning $60 per load. Smith also received public assistance and social security. FDC estimates that, combining these sources of income, Smith earns over $6,000 more per year than he did while employed by appellant, and contends that, if Smith worked five days a week, he would make much more.

{19} Further, FDC contends that there is no substantial evidence to support the court's finding that Smith earned $4.00 per hour while employed by FDC, stating that the only evidence was that Smith earned $4.00 per hour when he was hired in 1973 and that there was no evidence of his earnings at the time of his termination. FDC also assigns error to the court's finding of lost future income, contending that no economic forecast or statistical analysis was submitted concerning job market fluctuations or the likelihood of Smith not being able to find future employment.

A. The Rate of Pay

{20} An award of damages will not be disturbed if the trial court's determination is based on substantial evidence; it will not be reversed unless "it appears to have resulted from passion, prejudice, partiality, undue influence or some corrupt cause or motive, where there has been palpable error or the measure of damages has been mistaken." **Powers v. Campbell,** 79 N.M. 302, 304, 442 P.2d 792, 794 (1968) (quoting **Hammond v. Blackwell,** 77 N.M. 209, 421 P.2d 124 (1966)). On review, the evidence is considered in a light favorable to the verdict. **Nash v. Higgins,** 75 N.M. 206, 209, 402 P.2d 945, 947 (1965). Furthermore, in an employment discrimination case, once discriminatory activity has been proved, courts are willing to award damages despite uncertainty and the lack of precise measurement of injury as long as there is some evidence of damage, because of the public policy inherent in the law condemning invidious discrimination. **See Hairston v. McLean Trucking Co.,** 520 F.2d 226, 232-33 (4th Cir. 1975); **United States v. United States Steel Corp.,** 520 F.2d 1043, 1050 (5th Cir. 1975), **cert. denied,** 429 U.S. 817, 97 S. Ct. 61, 50 L. Ed. 2d 77 (1976); **Pettway v. American Cast Iron Pipe Co.,** 494 F.2d 211, 260-61 (5th Cir. 1974).

{21} We are at a loss to understand why evidence of plaintiff's wages at the time of his dismissal was not elicited from plaintiff at trial. Although future earnings may be speculative and difficult to precisely measure, surely Smith's current wage rate at the time of his dismissal was easily susceptible of proof and would have greatly aided the court in its determination of damages. Nevertheless, we find that there was sufficient evidence for the court to form a basis for its permissible speculation into Smith's lost earnings. **See White v. Carolina Paperboard Corp.,** 564 F.2d 1073, 1091 (4th Cir. 1977) (allowing trial court to speculate amount of lost income based on known earnings); **Brown v. Rollins, Inc.,** 397 F. Supp. 571, 578 (W.D.N.C. 1974) (back pay determination based on evidence of other employee's earnings). Smith presented evidence that he was hired at $4.00 per hour at 1973 and that the starting wage for workers at the plant was $3.75 an hour in 1983. The calculation of back pay by the court was permissibly based on this evidence.

B. Should the Court have Deducted Welfare Payments, Social Security, and Income from Self-Employment from Its Award?

1. Self-Employment

{22} The court could reasonably have determined that evidence of Smith's income from hauling wood was speculative and that the income he gained from the activity was sporadic and uncertain, and thus it reasonably refused to offset the damage award. Once discrimination has been proved, the employer bears the burden of uncertainty in damage calculation. **See Hairston,** 520 F.2d at 233. Because Smith was discriminatorily denied his employment, there is evidence he lost income. Although the court must mitigate damages if there is evidence supporting such a determination, **see Vigil v. Arzola,**

102 N.M. 682, 689, 699 P.2d 613, 620 (Ct. App. 1983), **rev'd on other grounds,** 101 N.M. 687, 687 P.2d 1038 (1984), **overruled on other grounds, Chavez v. Manville Prod. Corp.,** 108 N.M. 643, 777 P.2d 371 (1989), we find that the court here could properly determine that the evidence of mitigation presented was too speculative to require that Smith's income from hauling wood should be applied to offset the damage award.

2. Welfare and Social Security

{23} Public assistance and social security constitute benefits from a collateral source, and they are not subject to offset from an award of damages. **See Trujillo v. Chavez,** 76 N.M. 703, 708, 417 P.2d 893, 897 (1966); **Mobley v. Garcia,** 54 N.M. 175, 177-78, 217 P.2d 256, 257 (1950); **see also Maxfield v. Sinclair Int'l,** 766 F.2d 788, 793-95 (3d Cir. 1985), **cert. denied,** 474 U.S. 1057, 106 S. Ct. 796, 88 L. Ed. 2d 773 (1986); **Littlejohn v. Null Mfg. Co.,** 31 Empl. Prac. Dec. (CCH) para. 33,587 (W.D.N.C. 1983), **aff'd,** 732 F.2d 150 (4th Cir.), **cert. denied,** 469 U.S. 900, 105 S. Ct. 276, 83 L. Ed. 2d 212 (1984). Public sources that provide subsistence income do not constitute a windfall such that they should be offset against a damage award, especially when considered in light of the discriminatory activities of FDC that forced Smith and his family onto the public dole.

C. Was the Award of Front Pay Appropriate?

{24} FDC argues that the award of damages for future lost earnings, or front pay, was unsupported by the evidence and was error. Nevertheless, evidence was presented that Smith attempted to find work and was unable to do so, and, in consideration of the discrimination precipitating Smith's situation: it was not inappropriate for the court to estimate future lost earnings based upon Smith's past income. **See Patterson v. American Tobacco Co.,** 535 F.2d 257, 269 (4th Cir.) (allowing back pay award to be supplemented at trial court's discretion "by an award equal to the estimated present value of lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume his new position"), **cert. denied,** 429 U.S. 920, 97 S. Ct. 314, 50 L. Ed. 2d 286 (1976); **Whittlesey v. Union Carbide Corp.,** 742 F.2d 724, 729 (2d Cir. 1984) (allowing trial court discretion in age discrimination case to award front pay for four-year period from trial to compulsory retirement age). As the court in **Whittlesey** stated:

> [W]e think that front pay is, in limited circumstances, an appropriate remedy under the [Age Discrimination in Employment Act]. It serves a necessary role in making victims of discrimination whole in cases where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment.

742 F.2d at 729; **see also Maxfield,** 766 F.2d at 795-97 (upholding award of front pay when reinstatement not feasible).

{25} We find that evidence of Smith's inability to find full-time employment in his locality, despite his strenuous efforts, constitutes sufficient evidence of his inability to mitigate damages to support the court's discretion in determining that future employment would be unlikely and to support an award of front pay.

III. WAS THE AWARD OF ATTORNEY'S FEES REASONABLE?

{26} FDC contends that the attorney's fees awarded, $9,750, were excessive, arguing that it does not believe that the hours that Smith's attorney claims were spent in preparation for this case were accurate and that two of Smith's causes of action, under 42 U.S.C. Section 2000e (1964) and 42 U.S.C. Section 1981 (1870), were dismissed.

{27} Reasonable attorney's fees may be awarded at the court's discretion to a prevailing

complainant pursuant to NMSA 1978, Section 28-1-13(D) (Repl. Pamp. 1987). As we have recently stated: "[T]he allowance of attorney fees is discretionary, but the exercise of that discretion must be reasonable when measured against objective standards and criteria." **Lenz v. Chalamidas,** 109 N.M. 113, 118, 782 P.2d 85, 90 (1989) (construing materialmen's lien statute). In determining the reasonableness of a fee award, a court should consider a variety of factors, including: (1) the time and effort required, considering the complexity of the issues and the skill required; (2) the customary fee in the area for similar services; (3) the results obtained and the amount of the controversy; (4) time limitations; and (5) the ability, experience, and reputation of the attorney performing the services. **Id.** at 118, 782 P.2d at 90; **Thompson Drilling, Inc. v. Romig,** 105 N.M. 701, 705, 736 P.2d 979, 983 (1987).

{28} In this case, the court made a finding of fact that, after considering the above factors and the hourly records submitted by Smith's attorney, the fee award was appropriate. The award was less than that requested by Smith's attorney. Additionally, Smith prevailed at trial on his claims of age and race discrimination, and the fee awarded was reasonable in terms of the total damage award to Smith. Although Smith did not prevail on his claims based on federal law, those claims involved the same underlying occurrences and similar relief—Smith's attorney did not waste time pursuing spurious claims. Accordingly, we conclude that the trial court did not abuse its discretion in awarding attorney fees, especially in light of the attorney's efforts subsequent to trial both in pursuing this appeal and in attempting to collect upon the judgment.

IV. WAS THE JUDGMENT PROPERLY ASSESSED AGAINST A NONPARTY FOR VIOLATION OF A DISCOVERY ORDER?

{29} The parties dispute the factual predicate of this issue. However, they do agree on the facts necessary for our resolution. Intervenor-appellant Cox is an officer and shareholder of FDC. Subsequent to the trial, Smith sought to depose Cox to assist in execution of the judgment, and he also issued a subpoena duces tecum requiring FDC to provide certain documents pertaining to FDC's assets. Although the parties dispute the scope of the subpoena, whether Cox had knowledge of the request for documents, and whether Smith attempted to pierce the corporate veil to find Cox personally liable for the judgment, these facts are unnecessary for our disposition. It is undisputed, however, that Cox was not named a party to this suit prior to trial, and Smith did not attempt to bring Cox into the suit as a party post judgment. After the judgment was entered, Cox and FDC did not comply with the discovery requests, and Smith moved the court for an order compelling discovery. Cox and FDC failed to comply with the order, and the court ordered sanctions to be assessed against Cox, holding him personally liable for the judgment.

{30} Cox contends that he was never a party to the lawsuit and that, as a nonparty, the only appropriate sanction for noncompliance with discovery was a contempt order. He further contends that because the notices of deposition in aid of execution of the judgment were filed prior to the judgment, they were void ab initio; that the court erred in imposing liability on Cox because it did not issue a writ of execution, and that because the sanction order deprived Cox of property without the due process of law, it violated the United States and New Mexico Constitutions.

{31} Smith, on the other hand, contends that the sanctions against Cox were justified under the circumstances. He asserts that Cox's gross noncompliance with the order compelling discovery justified the sanction and that such a sanction was within the trial court's discretion.

{32} Because we find that Cox's first contention is valid, we reverse that part of the judgment requiring that Cox be personally liable. Because we find that the court abused its discretion by sanctioning a nonparty in this way, we also find it unnecessary to address the other issues raised by Cox.

{33} Upon a deponent's failure to comply with a discovery request, the party seeking discovery may apply for an order to compel. SCRA 1986, 1-037(A). Failure to comply with such an order is cause for sanctions. **See id.** 1-037(B). The choice of sanctions lies within the discretion of the trial court, and it will be reversed only for an abuse of discretion. **United Nuclear Corp. v. General Atomic Co.,** 96 N.M. 155, 239, 629 P.2d 231, 315 (1980), **cert. denied,** 451 U.S. 901, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981).

{34} SCRA 1986, 1-037(B) states in pertinent part:

> (1) If a **deponent** fails to be sworn or to answer a question after being directed to do so by the court in which the action is pending, the failure may be considered **a contempt of court.**
>
> (2) If a **party** or an officer, director or managing agent of a party or a person designated * * * to testify on behalf of a party fails to obey an order to provide or permit discovery, * * * the court in which the action is pending may make **such orders in regard to the failure as are just,** and among others the following:
>
> (a) an order that the **matters regarding which the order was made** or any other designated facts **shall be taken to be established** for the purposes of the action in accordance with the claim of the party obtaining the order[.] [Emphasis added.]

{35} Smith argues that, because his discovery was directed toward finding information regarding piercing the corporate veil with regard to Cox, the court properly deemed those facts true. He contends that, having thus determined that the corporate veil was pierced, the court appropriately ordered Cox to personally be liable on the judgment.

{36} This argument, however, is flawed because Cox was never made a party to the suit. SCRA 1986, 1-037(B)(1) addresses sanctions available to a deponent who is nonresponsive to discovery requests and states that only contempt is available. On the other hand, SCRA 1986, 1-037(B)(2) has much broader sanctions available, but these may only be directed against a nonresponsive **party.**

{37} Accordingly, we hold that an order requiring that the judgment be paid by a nonparty is not an appropriate sanction for violation of a discovery order. We therefore reverse that portion of the judgment.

{38} We are not unmindful that this may well leave Smith unable to collect on the judgment, and we are reluctant to allow FDC to evade its responsibility in this matter. On the other hand, we find that the trial court abused its discretion in assessing the judgment against Cox, and we find that its order cannot stand. Therefore, we do not want this opinion to be construed as leaving Smith without recourse. He may petition the trial court to join Cox as a party pursuant to SCRA 1986, 1-019 and then pursue post-judgment discovery in execution of the judgment. Alternatively, he may bring suit against FDC and Cox to pierce the corporate veil, **see Scott v. AZL Resources, Inc.,** 107 N.M. 118, 753 P.2d 897 (1988), or he may take any other appropriate action to collect the judgment.

{39} We therefore affirm in part and reverse in part, while leaving Smith the opportunity to pursue any appropriate action against Cox, either in this proceeding in an action pursuant to execution of the judgment, or in a separate proceeding. Accordingly, we REVERSE in part and AFFIRM in part.

JOSEPH F. BACA,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

KENNETH B. WILSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-044

Filing Date: May 2, 1990

Docket No. 18,157

FRED M. CALKINS, JR., Personal Representative of the Estate of Daniel Enriquez, Deceased,

Petitioner,

v.

THE COX ESTATES,

Respondent.

Original Proceeding on Certiorari
Philip R. Ashby, District Judge

Stephen Durkovich
David A. Archuleta
Albuquerque, New Mexico

for Petitioner.

Butt, Thornton & Baehr, P.C.
John A. Klecan
Albuquerque, New Mexico

for Respondent.

OPINION

BACA, Justice.

{1} Petitioner, personal representative of the estate of Daniel Enriquez, brought a wrongful death suit against respondent, the decedent's landlord, alleging negligence. The decedent, an eight-year old boy, was killed when he was struck by an automobile on a frontage road in the vicinity of the apartment complex where he lived. Petitioner appeals the trial court's grant of respondent's motion for summary judgment, which was affirmed by the court of appeals. The motion was based on the contention that the lessor had no duty to maintain a fence located on his property. The court of appeals affirmed on the ground that the lessor did not owe a duty to the child.

{2} This court granted certiorari, and we address the following issue: whether a lessor owes a duty of care to his tenants to maintain the common areas of the leased premises—in this case a playground adjacent to an area leading to a highway—in a reasonably safe condition. We agree with petitioner that a duty was owed by respondent to decedent to maintain the common area, and we reverse and remand for trial in a manner consistent with this opinion.

{3} Because this case is before this court on a grant of summary judgment, we must consider the affidavit evidence submitted by petitioner in a light most favorable to him, resolving all inferences and disputes of evidence in his favor, for the purposes of this appeal. **See, e.g., Knapp v. Fraternal Order of Eagles,** 106 N.M. 11, 12, 738 P.2d 129, 130 (Ct. App. 1987).

{4} Daniel Enriquez, the decedent, lived with his grandparents in an apartment complex owned by respondent. Behind the complex, on land owned and maintained by respondent, was a playground built by respondent for the use of the children residing in the complex. Enriquez was playing in this area with a friend on the day in question. Located behind the play area was an arroyo, which led to the Metropolitan Flood Control ditch, and subsequently to an unfenced road adjoining Interstate 25, approximately 945 feet away. The playground was separated from the arroyo by a fence built by the landlord, but the fence had fallen into disrepair. Children habitually crossed through the fence to play in the outer environs. Young Enriquez, too, took advantage of the opportunity to escape through a hole in the fence into the world beyond, ultimately giving his life to the traffic on the frontage road.

{5} This case raises issues of duty and proximate cause. Integral to both elements is a question of foreseeability. In determining duty, it must be determined that the injured party was a foreseeable plaintiff—that he was within the zone of danger created by respondent's actions; in other words, to whom was the duty owed? In determining proximate cause, an element of foreseeability is also present—the question then is whether the injury to petitioner was a foreseeable result of respondent's breach, i.e. what manner of harm is foreseeable? Both questions of foreseeability are distinct; the first must be decided as a matter of law by the judge, using established legal policy in determining whether a **duty** was owed petitioner, and the second, **proximate cause**, is a question of fact.

{6} As defined by New Mexico law, "negligence encompasses the concepts of foreseeability of harm to the person injured and of a duty of care toward that person." **Ramirez v. Armstrong**, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983). A duty to an individual is closely intertwined with the foreseeability of injury to **that individual** resulting from an activity conducted with less than reasonable care by the alleged tortfeasor. **See id.**; **Palsgraf v. Long Island R.R.**, 248 N.Y. 339, 162 N.E. 99 (1928). "If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant." **Ramirez**, 100 N.M. at 541, 673 P.2d at 825.

{7} A plaintiff must show that defendant's actions constituted a wrong against him, not merely that defendant acted beneath a required standard of care and that plaintiff was injured thereby. He must show that a relationship existed by which defendant was legally obliged to protect the interest of plaintiff. This concept limits liability for negligent conduct—a potential plaintiff must be reasonably foreseeable to the defendant because of defendant's actions. **See Palsgraf**, 248 N.Y. at 342, 62 N.E. at 100.

{8} The court must determine **as a matter of law** whether a particular defendant owes a duty to a particular plaintiff. **Schear v. Board of County Comm'rs**, 101 N.M. 671, 672, 687 P.2d 728, 729 (1984). The existence of a duty is a question of policy to be determined with reference to legal precedent, statutes, and other principles comprising the law. W. P. Keeton, D. B. Dobbs, R. E. Keeton & D. G. Owen, **Prosser and Keeton on the Law of Torts** 37 (5th ed. 1984) (hereinafter cited as **Prosser & Keeton**);[1] **see Ramirez**, 100 N.M. at 541, 673 P.2d at 825.

{9} This difficult question, whether respondent had a duty toward the young child, can be answered with reference to our statutes and well-established common law traditions. The issue presented involves the duty of a landowner to maintain a common area. Specifically, the question is whether respondent, who undertook to provide a playground for children in a potentially hazardous area, was under a legal obligation to maintain the playground in a reasonably

[1] Duty thus defines the legal obligations of one party toward another and limits the reach of potential liability. The obligations of a party may be formulated in one of two distinct categories: An affirmative duty to conform one's actions to a specific standard of care vis-a-vis a specific individual or group of individuals may be found in a specific statutory or common-law standard that creates the affirmative duty toward a party, or the standard of care may be found in a general negligence standard, requiring the individual to use reasonable care in his activities and dealings vis-a-vis society as a whole. In this regard, the potential tortfeasor's duty, and ultimately his potential liability, is manifest with regard to the foreseeability that his actions conducted below the standard of care will injure the particular victim.

This concept has been expressed as a distinction between the use of duty as an affirmative or defensive argument. **See Fazzolari v. Portland School Dist. No. 1J**, 303 Or. 1, 734 P.2d 1326 (1987) (en banc). When the duty arises because of a statutory or common-law relationship mandating an obligation to a party, it may be termed an affirmative duty. When the term "duty" is used in this manner to refer to a legally obligatory course of conduct toward a certain type of individual, it affirmatively serves the injured party as the basis for his claim of liability. **See id.** at 1328. All that is required for a court to conclude that a defendant owed a plaintiff a duty is that the plaintiff be a person foreseeably within the scope of defendant's duty to use reasonable care. On the other hand, when the term is invoked in a suit alleging common-law negligence based on a claim that the defendant has acted in a manner falling below the general standard of care, it is being used defensively to limit the potential scope of a defendant's liability. In essence, it involves a claim that the defendant cannot be liable to a plaintiff, despite admittedly negligent actions, because the plaintiff was not a party that foreseeably could be harmed by those activities.

safe condition, so that children playing on the playground would be unable to escape from the playground and potentially be injured beyond its confines.

{10} Petitioner has asked us to define respondent's duty in terms of the general negligence standard of care—the landlord owes his tenants a duty to protect them from foreseeable harm caused by unsafe conditions on the landlord's property. He requests that the duty be framed as requiring the landlord to take reasonable steps commensurate with foreseeable harm, to protect the safety of his tenants. In terms of the present case, he contends that the jury should be allowed to balance the reasonableness and costs of respondent maintaining, or even erecting, a fence against the foreseeability of resulting harm.

{11} Petitioner correctly states the law as it concerns the general negligence standard of care and determination of duty. New Mexico law recognizes that there exists a duty assigned to all individuals requiring them to act reasonably under the circumstances according to the standard of conduct imposed upon them by the circumstances. **See, e.g., Huntsman v. Smith**, 62 N.M. 457, 463, 312 P.2d 103, 107 (1957) (duty to repair wall if a reasonably prudent person would anticipate a risk to safety); **Krametbauer v. McDonald**, 44 N.M. 473, 104 P.2d 900 (1940) (bus driver assumed duty to use reasonable care to protect children in her charge). The determination of duty in any given situation involves an analysis of the relationship of the parties, the plaintiff's injured interests and the defendant's conduct; it is essentially a policy decision based on these factors that the plaintiff's interests are entitled to protection. **Prosser & Keeton, supra**, 53. Our courts have answered the questions of whether, under certain circumstances, a duty of care is owed, making further analysis unnecessary. **See, e.g., Lopez v. Maez**, 98 N.M. 625, 651 P.2d 1269 (1982) (establishing that a tavern owner owes a duty to third parties that may be harmed by his inebriated patrons); **Srader v. Pecos Constr. Co.**, 71 N.M. 320, 378 P.2d 364 (1963) (duty owed to wife of worker on construction site based on ordinance requiring floor openings be covered). Our precedent in these areas has established that there is a policy in our law to protect certain interests, and thus the balancing implicit in the legal determination of a duty has been established by our legal tradition.

{12} In the case presented to us today, it is not necessary for us to balance the policy interests to determine whether defendant owed plaintiff a duty. Reference to our statutes and common law establishes that plaintiff was owed a duty based on the landlord-tenant relationship. Thus, we find that the present case does not require us to frame respondent's duty as broadly as requested by petitioner.[2]

{13} It is well established in New Mexico jurisprudence that, although a landlord is under no affirmative obligation to inspect or maintain areas over which control has been relinquished, a landowner is responsible for maintaining, in a reasonably safe condition, areas that expressly or impliedly are reserved for the common use of some or all of his tenants. NMSA 1978, § 47-8-20(A)(3) (Cum. Supp. 1989) (obliging an owner to "keep common areas of the premises in a safe condition"); **Hogsett v. Hanna**, 41 N.M. 22, 63 P.2d 540 (1936); **Torres v. Piggly Wiggly Shop Rite Foods, Inc.**, 93 N.M. 408, 410, 600 P.2d 1198, 1200 (Ct. App.), **cert. denied**, 93 N.M. 683, 604 P.2d 821 (1979); SCRA 1986, 13-1314, 1315; **see** Restatement (Second) of Torts, 360 (1965).

{14} On the facts as presented for this appeal, it is apparent that the play area in the apartment complex in which Enriquez lived, which was owned by respondent, was an area reserved for the common use of the tenants. As such, respondent was obligated to maintain and repair it.

[2] A comparison with **Huntsman** is particularly instructive on this point. A similar issue was presented by **Huntsman.** Did the owner of a fence have a duty to keep it in repair so as not to injure the property of his neighbor? However, in that case, there was no legal duty established by the relationship between the parties, and the court applied general tort standards to find a duty based on the foreseeability of injury to a reasonably prudent person. In the present case, the relationship is one of landlord and tenant, and our law has defined the duty of care owed.

Respondent chose to erect a fence and he reaped the economic benefits from providing a fenced play area at the complex. Undoubtedly at least one purpose of the fence was to keep children playing behind the complex in the area and out of the arroyo. Every landlord is not required, as a matter of law, to fence in his property or to insure the safety of his tenants' children.[3] However, when a landowner undertakes to provide a common area for the use of his tenants, he undertakes to maintain it in a reasonably safe condition. Parents have the primary obligation of ensuring the safety and well-being of their children, but they are also entitled to rely on their landlord's taking reasonable precautions to maintain the common areas of the property in a reasonably safe condition. **See Moreno v. Stahmann Farms, Inc.**, 693 F.2d 106, 109 (10th Cir. 1982).[4]

{15} Respondent contends that he cannot be liable for injuries occurring beyond his property's borders—his duty is only to keep the property safe so that invitees are not injured on the premises. He maintains that the scope of the duty must be limited to the scope of the landlord-tenant relationship, and that a landlord is not required to become an insurer of his tenants.[5]

{16} We do not interpret the law of landlord-tenant and negligence so rigidly. The scope of the landlord's duty, as described previously, is to maintain the common areas of his property in a reasonably safe condition. However, injury resulting from a breach of that duty need not occur on the property for the lessor to be liable, if the breach proximately causes the harm. We are not requiring a landlord to protect his tenants from dangers beyond the premises—we merely require that he keep his premises in a reasonably safe condition. If the injury occurs outside the boundaries of the property, but a jury can find that the landlord's breach was responsible for the injury, we find no reason to deny liability as a matter of law. Having established a duty, the foreseeability of injury determines the scope of the duty. As an Arizona court recently stated: "The fact that [plaintiff's] injury occurred beyond the boundaries of the leased premises may well be relevant in determining whether the Landlord acted reasonably, but it does not compel the conclusion that the Landlord owed [plaintiff] no duty of care in the first place." **Udy v. Calvary Corp.**, 162 Ariz. 7, 780 P.2d 1055, 1060 (Ct. App. 1989); **see also Limberhand v. Big Ditch Co.**, 706 P.2d 491 (Mont. 1985).

{17} Accordingly, we hold that respondent-landlord's duty was to maintain the common areas of his property in a safe condition, as a reasonably prudent person would under the circumstances. Statute dictates that a landlord has a responsibility to maintain the common areas

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[3] Our statement should not be interpreted as meaning that a lessor can evade liability in a situation similar to that presented today by refusing to erect a fence if one is required, or by tearing down a fence if one already exists. Absent a statutory or common law duty, a landlord's duty is to act reasonably under the circumstances.

[4] **Moreno** is particularly instructive. The court relied on a master-servant relationship rather than a landlord-tenant relationship in finding a duty of care, the duty being "to protect the servant from injury," and because the employer had chosen to provide housing, the duty required him to provide reasonably safe housing. 693 F.2d at 108. This standard is similar to the one we establish today regarding common areas under a landlord's control—the lessor must maintain the premises in a reasonably safe condition. In **Moreno**, the court determined that, under the circumstances, where the employer knew that children lived in the dwelling and that the dwelling was near an irrigation ditch, the reasonably safe standard required the employer to erect a fence.

[5] The district court decided the summary judgment motion on the issue of duty. The court of appeals decision, and the respondent in his brief, however, appear to have confused the question of duty with that of proximate cause. Once a duty is established, either by reference to statutory or common law duties or by reference to the general negligence standard, the question of the scope of that duty is a question of proximate cause.

The court of appeals expressed the issue of duty as whether the landlord's failure to maintain the fence subjected it to liability for injury suffered by the tenant who left the play area through a hole in the fence and traveled some 945 feet across property not owned by the landlord to be struck by a vehicle on the frontage road. The court held that the defendant's duty did not extend to a harm occurring so far from its property, basing this conclusion on a narrow reading of the landlord's duty and public policy.

The error inherent in this formulation of the issue is apparent. The landlord's duty was to maintain the common areas in a reasonable condition—it is not to protect the tenants from harm. However, the question whether the landlord should be subject to liability for the tenant's injury depends on whether the breach of duty was the proximate cause of injury; it is not a question of whether the scope of the duty extends to off-premises injur

reserved to the use of the tenants. This responsibility creates a duty to use care for the benefit of the tenants. The limits of this duty should be determined not with reference to geographical boundaries, but with reference to the foreseeability of injury to the petitioner from the unsafe condition.

{18} The legal question of duty for the court to decide then becomes whether the plaintiff in a case may foreseeably be injured by a breach of the duty. In this case, young Enriquez was a foreseeable plaintiff. The landlord was aware that children played in the area—he erected a playground for them; and Enriquez was foreseeably playing in the area—he lived in the building. Thus, it was reasonably foreseeable that, because of respondent's failure to exercise reasonable care in maintaining the fence, Enriquez would be harmed.[6]

{19} Although it is apparent that respondent was under a duty to use due care with regard to Enriquez, it is yet to be determined whether respondent breached his duty and did not use due care in maintaining the common area. It may have been reasonable, under the circumstances, balancing the costs of maintaining the fence with the foreseeable harm, for the landlord not to have fixed the holes. Whether respondent's conduct constituted a breach of his duty to maintain common areas in a reasonably safe condition is a question of fact that the jury must decide on remand. **See Cross v. City of Clovis**, 107 N.M. 251, 255, 755 P.2d 589, 593 (1988). In determining whether respondent acted reasonably or breached his duty, it may be relevant to the jury that the injury occurred off the premises. However, the location of the accident is not relevant to the question of duty.[7]

[6] Respondent also maintains that we should uphold the summary judgment below because its alleged negligence could not be the proximate cause of decedent's injury as a matter of law because it was not a substantial factor in producing the result. He argues that the chain of causation urged by petitioner is too tenuous to support the claim, and that because decedent's injury was so remote geographically from respondent's alleged breach of duty, the court did not err in making a threshold determination that the breach could not be a proximate cause of the injury. He contends that the fence was far removed from the accident site, that other routes besides the hole in the fence provided access to the arroyo and onto the highway, and that the fence could not be a legal cause of injury because it only led to the arroyo, which is not a hazard.

Respondent's contentions fall for several reasons. First, New Mexico does not apply the substantial factor test as a test of proximate cause; the question is one of foreseeability. Second, remoteness is not a geographic determination; it requires a finding that the alleged cause was not a probable or foreseeable result of a breach. Third, the arroyo may not have been the hazard, but petitioner offered evidence as to the chain of causation that may indicate that the decedent's trail to the road may have been foreseeable. This is not a situation where a judge can determine that reasonable minds cannot differ; the discussion below indicates that the evidence was controverted.

Petitioner submitted, as part of his motion in opposition to summary judgment, an affidavit from an expert witness, which indicated that the Fence was required to enclose the playground. The immediately adjacent arroyo leading to the flood control ditch and onto the frontage road and freeway represented a danger that would foreseeably attract children to potential injury. The affidavit indicated that, although the distance of the hazards from the playground was relatively great, this did not diminish the potential danger to the children using the area. Young children, initially attracted to the playground, would inexorably be attracted to and proceed through the breach in the fence, on through the natural attractions of the arroyo, the flood control ditch, the frontage road, and onto the freeway. Thus, because of the hole in the fence, the natural curiosity of young children leads them, with some degree of certainty, inevitably to the hazard of the freeway, despite its distance from the apartment complex. Additionally, evidence indicated that children often used the holes in the fence as a route of access into the adjacent arroyo.

Because of the natural progression of these hazards, extending from the hole in the fence, petitioner contends that the danger was reasonably foreseeable as a result of the landlord's negligent maintenance of the fence and the playground common area. Petitioner further contends that the accident involving Enriquez occurred in just such a foreseeable manner. Enriquez, with a friend, crawled through the hole in the fence, proceeding down the arroyo, through the flood control ditch, and down the frontage road to his demise.

A court may decide questions of negligence and proximate cause, if no facts are presented that could allow a reasonable jury to find proximate cause, i.e. if a reasonable jury could not find that respondent reasonably could foresee that Enriquez may climb through the fence and be injured as a result. **See, e.g., Bouldin v. Sategna**, 71 N.M. 329, 378 P.2d 370 (1963) (deciding that, as a matter of law, an automobile owner cannot reasonably foresee car theft, and therefore his negligence in leaving his keys in the car is not the proximate cause of subsequent negligent driving by the thief). In this case, petitioner offered evidence that the manner of harm was reasonably foreseeable. Whether the injury was too remote, or whether intervening, superseding acts will be determined to have caused the injury, is thus a question for the jury.

[7] One further issue for the jury to consider in their determination of breach of duty is the open and obvious nature of the hole in the fence. It may be found that Enriquez' grandmother

{20} In accordance with the foregoing opinion, we remand to the district court for a determination of this matter on the merits. This court has already resolved the question of the duty owed by the respondent-landlord to the petitioner-tenant. Respondent owes a duty to use reasonable care in maintaining the common areas of the apartment complex in a reasonably safe condition. The district court will consequently present to the jury two factual issues: (1) breach of duty—whether, under the circumstances, respondent breached his duty when he did not repair the holes in the fence; and (2) proximate cause—whether the injury to Enriquez was a natural and probable result of respondent's lack of maintenance of the fence in the common area. If the jury finds that the lessor did not act negligently, of course, it will not have to reach the question of proximate cause.

IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

SETH D. MONTGOMERY,
Justice

KENNETH B. WILSON,
Justice

RICHARD E. RANSOM,
Justice (dissenting)

was or should have been as aware of the danger as the landlord. However, although the open and obvious nature of the danger is one factor to be considered in determining whether the landlord was negligent, it is not determinative of the issue, and does not, without more, remove responsibility from the landlord. **See Moreno**, 693 F.2d at 108-09; **Udy**, 780 P.2d at 1062; Restatement (Second) of Torts 360 comment b (1965). This would present a situation of comparative negligence, which is an issue of fact for the jury. **City of Albuquerque v. Redding**, 93 N.M. 757, 759-61, 605 P.2d 1156, 1158-60 (1980).

DISSENT

RANSOM, Justice (dissenting).

{21} My colleagues rationalize that failure to repair holes in a playground fence gave rise to a fact issue as to breach of the landlord's well-recognized duty to maintain common areas in a reasonably safe condition, that this duty of ordinary care was owed to a child tenant as a matter of law, and that the linchpin of liability is whether an injury was caused as a natural and probable result of any such breach of that duty. The opinion specifically introduces foreseeability as an integral element of proximate causation, and, in that connection, uses the phrase "natural and probable result" in place of "natural and continuous sequence." See SCRA 1986, 13-305 (proximate cause defined). Thus, the clear foreseeability of the child leaving the premises and eventually meeting his death on some street becomes the **factual test** of both breach of duty to maintain the common area[1] and proximate causation. More precisely, I believe, this case turns on the presence or absence **in law** of a duty to the child to maintain the fence to avoid foreseeable risk of harm nearly one-fifth of a mile from the apartment complex.

{22} As an aside, I must disagree with my colleagues that foreseeability is an integral element of proximate cause. Foreseeability is an element of proximate cause only when it may be said that an independent intervening act has produced that which was not foreseeable as a result of an earlier act or omission. SCRA 1986, 13-305, -306. I do not see that issue in the instant case. Petitioner, on the other hand, would pose the issue as whether the breach of the landlord's duty to maintain the fence was too remote as a matter of law **to constitute a proximate cause** of the child's death on the frontage road. However, I do not consider remoteness to be a proximate cause

[1] The majority opines, "[I]t is yet to be determined whether respondent breached his duty and did not use due care in maintaining the common area. It may have been reasonable, under the circumstances, balancing the costs of maintaining the fence with the foreseeable harm, for the landlord not to have fixed the holes."

issue either. **See Kelly v. Montoya**, 81 N.M. 591, 470 P.2d 563 (Ct. App. 1970). Remoteness delimits the risk of injury that reasonably may give rise to the existence of duty. I concur with the court of appeals. The frontage road hazard was too remote as a matter of law to constitute a risk of injury reasonably giving rise to any duty to maintain the playground fence.

{23} It may be unreasonable and, therefore, negligent not to avoid a foreseeable risk of harm unless the risk is remote as a matter of law. Remoteness, however, is not a fact. It is a policy. Failure to maintain a fence, foreseeability of a risk of harm, and proximate causation may give rise to genuine issues of fact; but those issues are not material to a determination of whether there exists in law a duty to avoid that which may be remote as a matter of public policy. Said another way, it is not unreasonable in law to fail to avoid that which Is remote.

{24} In general, the author of the majority opinion is correct in stating that, "In determining duty, it must be determined that the injured party was a foreseeable plaintiff—that he was within the zone of danger created by respondent's actions; in other words, to whom was a duty owed?" This **foreseeability** issue is, indeed, the teaching of the majority opinion authored by Chief Justice Cardozo in **Palsgraf.** No peril to Helen Palsgraf was foreseeable from the conduct of the railroad's guard in pushing aboard the passenger from whom was dislodged an apparently innocuous but fateful package of fireworks. Helen Palsgraf was injured many feet away by scales thrown down by the shock of the exploding fireworks.

{25} I agree with the majority in the instant case that whether a duty was owed must be decided as a matter of law using existing legal policy. The crux of the duty analysis that is required, however, is not a factual foreseeability determination, but rather it is a legal policy determination. This distinction is critical. In New Mexico, as stated in the majority opinion, we define negligence as an act foreseeably involving an unreasonable risk to that individual who complains of injury. See also, SCRA 1986, 13-1601. Foreseeability is most often a question of fact and only rarely, as in **Palsgraf**, may foreseeability be considered a false jury issue. More often, duty as a matter of law turns not on an absence of the fact issue of foreseeability, but rather the policy issue of whether it is reasonable to impose a duty to avoid a risk of injury which, although foreseeable, is remote.

{26} Declining to decide **Palsgraf** on the absence of foreseeability as a fact, Justice Andrews, dissenting, would have decided the case on proximate causation, which to him meant that, "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily [decides whether] to trace a series of events beyond a certain point. This is not logic. It is practical politics." **Id.** Except where foreseeability is factually absent, as in **Palsgraf**, I would utilize this policy concept in deciding duty as a matter of law, unfettered by proximate cause principles that have their own factual application. I would call this policy concept the doctrine of remoteness. Under the doctrine of remoteness, foreseeability is not controlling. Remoteness and foreseeability are separate and divergent roads by which we approach the question of duty.

{27} In **Ramirez v. Armstrong**, 100 N.M. 538, 673 P.2d 822 (1983), observing that the interest to be protected was more important than foreseeability in the recognition of a cause of action for negligent infliction of emotional distress, this Court said of **Palsgraf:**

> Duty and foreseeability have been closely integrated concepts in tort law since the court in **Palsgraf v. Lone Island Railroad Co.**, 248 N.Y. 339, 162 N.E. 99 (1928) stated the issue of foreseeability in terms of duty. If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant. Dean Prosser defines duty, in negligence cases, "as an obligation to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." W. Prosser,

> **The Law of Torts** 53 (4th ed. 1971). He recognizes, however, that "there is nothing sacred about 'duty,' which is nothing more than a word, and a very indefinite one, with which we state our conclusion." **Id.** 43. The key to Dean Prosser's definition is the requirement that the obligation of the defendant be one to which the law will give recognition and effect.

Id. at 541, 673 P.2d at 825. The grant or denial in law of recognition and effect to an obligation, as to bystanders subject to emotional distress, is a matter of public policy driven by the doctrine of remoteness. The doctrine is not necessarily dependent upon considerations of time and space; although, in the instant case, our policy determination involves those considerations. Nor is foreseeability controlling. It is in the denial of obligation as a matter of fact that foreseeability and proximate cause are controlling.

{28} While purporting to acknowledge the possibility of a duty to maintain the playground fence to avoid foreseeable risk of harm to tenant children attracted to adjoining property, the court of appeals finds no duty when the attraction is too remote. Factually, the court of appeals notes, plaintiff does not dispute that the young boy had to traverse the following path to reach the spot where the accident occurred: First, he had to walk 94 feet to the arroyo, then proceed along the arroyo approximately 559 feet to reach a diversion channel. Upon reaching the diversion channel, the boy then had to travel 294 feet along the channel, at which point he was required to scale a ditch bank approximately 20 feet high, finally arriving at the shoulder of the frontage road where he was hit by a car.

{29} As a matter of policy, it strikes me as it did the trial court and the court of appeals that it would be unreasonable to impose a duty on the part of the landlord to safeguard eight-year-old tenants from risks of injury on streets not immediately adjoining the property. There is no showing of any affirmative conduct of the landlord, relied upon by the tenants, that gives rise to a duty to restrain the child from exploring the wonders of a world one-fifth of a mile from the apartment complex. Again, this is not a case of a youngster chasing a ball from an unfenced playground onto the street, or of a youngster attracted through a hole in the fence to a nuisance existing on adjacent property. As a matter of public policy, absent an affirmative undertaking relied upon by the tenants, it simply is not reasonable to require a landlord to restrain a third or fourth grade boy from leaving his apartment complex.

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-053

Filing Date: May 30, 1990

Docket No. 18,794

DAVID F. MONTOYA and ELIZABETH MONTOYA, husband and wife, d/b/a PAPAS FRITAS, et al.,

Plaintiffs-Counter-Defendants-Appellees,

v.

VILLA LINDA MALL, LTD., a New Mexico limited partnership, et al.,

Defendants-Counter-Claimant-Appellants.

Appeal from the District Court of Santa Fe County
Petra Jimenez Maes, District Judge

Sutin, Thayer & Browne, P.C.
Mary E. McDonald
Maryanne Reilly
Santa Fe, New Mexico

for Appellants.

Roth, VanAmberg, Gross & Rogers
Michael P. Gross
F. Joel Roth
Santa Fe, New Mexico

for Appellees.

OPINION

BACA, Justice.

{1} Villa Linda Mall (Villa Linda) defendant below, appeals the award of attorney's fees to Montoyas. The Montoyas prevailed at the district court on claims of negligent misrepresentation and constructive fraud relating to their lease for commercial space. They received a damage award of $66,800 set off by a $10,200 award for Villa Linda's counterclaim for past due rent based on a breach of the lease. The district court awarded Montoyas $42,825 in attorney's fees pursuant to the lease.

{2} Montoyas were food vendors who contracted with appellants to lease retail space in the Villa Linda Mall (Mall). They occupied the space in July 1985, signed the lease agreement but subsequently vacated the premises in June 1986. Villa Linda reentered the space and has since relet.

{3} The Montoyas brought suit alleging, inter alia, that misrepresentations had been made to them prior to the execution of the lease that were not memorialized in the lease, specifically that the Mall was projected to have 85 percent occupancy when it opened and that appellant would aggressively promote the Mall. The Montoyas did not pursue any claims based on the contract at trial, although Villa Linda did counterclaim for breach of contract.

{4} Article 28 of the contract states:

> In the event that at any time during the term of this lease either Landlord or Tenant shall institute any action or proceeding against the other relating to the provisions of this lease, or any default hereunder, then, and in that event, the unsuccessful party in such action or proceeding agrees to reimburse the successful party for the reasonable expenses of attorney's fees and disbursements incurred therein by the successful party.

Pursuant to this provision, the district court awarded Montoyas attorney's fees of $42,825 and denied Villa Linda's claim for $5,000 in attorney's fees. Villa Linda contests only this aspect of the judgment and contends that Article

28 does not authorize attorney's fees for the tort claims upon which Montoyas prevailed. It argues that, because it prevailed on its claim based on the contract, it should have been awarded fees for that portion of its expenses and that the general rule, requiring a party to be responsible for its own costs in pursuing legal action, should have been applied against the Montoyas.

{5} We consider whether the contract provision authorizes attorney's fees for this tort action, and we affirm.

{6} New Mexico adheres to the so-called American rule that, absent statutory or other authority, litigants are responsible for their own attorney's fees. **McClain Co. v. Page & Wirtz Constr. Co.,** 102 N.M. 284, 694 P.2d 1349 (1985). Authority can be provided by agreement of the parties to a contract. **Id.** The scope of that authority is defined by the parties in the contract, and a determination of what fees are authorized is a matter of contract interpretation. **See Dennison v. Marlowe,** 108 N.M. 524, 526-27, 775 P.2d 726, 728-29 (1989).

{7} The issue presented here turns on interpretation of Article 28 of the contract. That provision authorizes attorney's fees to the prevailing party in any action "relating to the provisions of this lease, or any default hereunder." Villa Linda argues that this unambiguously precludes attorney's fees for Montoyas' tort claims, while authorizing Villa Linda fees for its counterclaim because it "prevailed" thereon.

{8} It is black letter law that, absent an ambiguity, a court is bound to interpret and enforce a contract's clear language and cannot create a new agreement for the parties. **See CC Housing Corp. v. Ryder Truck Rental, Inc.,** 106 N.M. 577, 746 P.2d 1109 (1987). However, we do not agree with Villa Linda that Article 28 is unambiguous in allowing recovery only for claims of breach. It allows reasonable attorney's fees for actions that relate to the lease, and we hold that the language is broad enough to encompass suit based on tort claims that relate to the contract in a direct way, as do Montoyas' claims. The lease sets forth the obligations and rights of the parties as they pertain to the lease of space in the Villa Linda Mail, and Montoyas' suit was related directly to the space leased.[1]

{9} "[E]very word or phrase must be given meaning and significance according to its importance in the context of the whole contract." **Bank of N.M. v. Sholer,** 102 N.M. 78, 79, 691 P.2d 465, 466 (1984). The usual and customary meaning is given to language used in a contract. **Sun Vineyards, Inc. v. Luna County Wine Dev. Corp.,** 107 N.M. 524, 760 P.2d 1290 (1988). Moreover, the law favors a reasonable construction of contract language. **Brown v. American Bank of Commerce,** 79 N.M. 222, 441 P.2d 751 (1968). Article 28 of the contract authorizes an attorney's fees award when suit is brought "relating to the provisions of this lease, **or** any default hereunder." (Emphasis added.) The word "or" is ordinarily given a disjunctive meaning. **First Nat'l Bank v. Bernalillo County Valuation Protest Bd.,** 90 N.M. 110, 112, 560 P.2d 174, 176 (Ct. App. 1977). It signifies an alternative—either one or another possibility is contemplated. **See id.** If we were to interpret Article 28 as Villa Linda asks, we would be assigning no meaning to the language "relating to the provisions of this lease" different than would be assigned to the phrase "or any default hereunder." We believe the word "or" in this context was used in its ordinary meaning, and thus it would be unreasonable to interpret the "relating to the provisions of this lease" language as referring only to a suit for default on the terms of the contract. A reasonable construction of Article 28 is that the language

[1] Villa Linda cites **Security Pacific National Bank v. Williams,** 213 Cal. App. 3d 927, 262 Cal. Rptr. 260 (1989), as authority for the proposition that a cause of action premised on fraud or misrepresentation in the inducement does not warrant an award of attorney's fees simply because a contract with a provision authorizing attorney's fees is part of the factual background of the case. We find this case inapposite. It is based in part on interpretation of a California statute requiring reciprocity in contractual obligations to pay attorney's fees "incurred to enforce that contract." **Id.** at 295, 213 Cal. App. 3d at. New Mexico has no such statute and leaves the parties free to define their own obligations in the contract, without restrictions (except those applying generally to contract law) regarding the scope of an attorney's fees provision. **Cf. Dennison,** 108 N.M. at 526-27, 775 P.2d at 728-29.

was intended to broaden the scope of authority for an award of attorney's fees.

{10} If, as Villa Linda maintains, its interpretation of Article 28 is that attorney's fees are recoverable only in a suit on the contract, the language would be reasonably susceptible to more than one interpretation. Villa Linda drafted the language at issue, and uncertainties are construed against the drafter. See **Manuel Lujan Ins., Inc. v. Jordan,** 100 N.M. 573, 673 P.2d 1306 (1983).[2]

{11} Villa Linda also contends that, because Montoyas breached the lease, they are not entitled to an award of attorney's fees, relying on **McClain Co. v. Page & Wirtz Construction Co.,** 102 N.M. 284, 694 P.2d 1349 (1985). In **Page & Wirtz,** this court declined to reverse the trial court's refusal to award attorney's fees pursuant to a construction contract where both parties were found to have breached the agreement and neither party sustained their allegations at trial. The claims of both parties were dismissed with prejudice. Nonetheless, on appeal Page & Wirtz claimed it did not breach the agreement and that the contract entitled it to costs. The court noted that there were no New Mexico cases on point and quoted from **United States ex rel. A.V. DeBlasio Construction, Inc. v. Mountain States Construction Co.,** 588 F.2d 259, 263 (9th Cir. 1978), stating:

> In seeking attorney's fees, [appellant] asked the court to enforce part of the very contract for whose termination [appellant] was partly at fault. The court **in its discretion could conclude** that allowing attorney's fees when both parties had acted improperly would be **inequitable and unreasonable.**

Page & Wirtz, 102 N.M. at 285, 694 P.2d at 1350 (emphasis added).

{12} We find that **Page & Wirtz** does not demand the conclusion that, as a matter of law, there is no **authority** for attorney's fees under the contract when a breaching party prevails at trial. **Page & Wirtz** upheld the trial court's discretion to refuse to allow attorney's fees, but did not remove discretion to find otherwise. An examination of the cases relied on by **Page & Wirtz** bolsters this conclusion. **See Mountain States Constr. Co.,** 588 F.2d at 263 (in contract where both parties to blame for dissension, but termination by defendant-owner was wholly arbitrary, trial court's refusal to allow attorney's fees was within its discretion); **Cable Marine, Inc. v. M/V Trust ME II,** 632 F.2d 1344, 1345 (5th Cir. 1980) (when attorney's fees authorized by contract rather than by statute, trial court does not have same degree of equitable discretion to deny fees, but it could, "in its sound discretion," refuse an award "when it believes that such an award would be inequitable and unreasonable"); **First Atlantic Bldg. Corp. v. Neubauer Constr. Co.,** 352 So. 2d 103, 106 (Fla. Dist. Ct. App. 1977) (defendant shown to have breached contract yet claimed attorney's fees because, although plaintiff prevailed and was awarded damages for breach, it did not receive relief requested, and court denied request because plaintiff lost on merits and had breached contract).

{13} A review of this authority indicates that the denial of attorney's fees is within the trial court's discretion when the prevailing party has breached the contract. We hold that it is also within the court's discretion to allow the prevailing party to recover such fees despite its breach when, as in the case before us, the nonbreaching party took action that precipitated the breach.

[2] Thus, Villa Linda's argument that this case should be analyzed as two distinct actions—one in tort for which no attorney's fees are authorized, and one in contract—fails. It claims that because it prevailed on the breach of contract claim, it is the only party authorized to receive the award of attorney's fees by the contract. As we have already indicated, the Montoyas' claims are related to the lease so as to bring them within the scope of Article 28. This determination makes **State Trust & Saving Bank v. Hermosa Land & Cattle Co.,** 30 N.M. 566, 240 P. 469 (1925), controlling on this question; the common sense rule that the party winning the net award should be considered to have prevailed requires that the Montoyas be awarded the attorney's fees. Our decision turns on the broad language employed in Article 28, which makes the authority relied on by Villa Linda inapposite. **Cf. Fortier v. Dona Anna Plaza Partners,** 747 F.2d 1324 (10th Cir. 1984) (contract provided for attorney's fees for claims arising only under the contract, and claims of negligence and fraud did not give rise to fee award).

{14} We AFFIRM the district court's award.

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

JOSEPH F. BACA,
Justice

WE CONCUR:

RICHARD E. RANSOM,
Justice

KENNETH B. WILSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-094

Filing Date: October 16, 1990, As Corrected December 4, 1990, As Corrected December 11, 1990

Docket No. 18,835

AMERICAN GENERAL FIRE AND CASUALTY COMPANY,

Plaintiff-Appellant,

v.

PROGRESSIVE CASUALTY COMPANY,

Defendant-Appellee.

Appeal from the District Court of Bernalillo County Burt Cosgrove, District Judge

Sager, Curran, Sturges & Tepper, P.C.
Christopher P. Bauman
Matthew P. Holt
Albuquerque, New Mexico

for Appellant.

Gallagher, Casados & Mann, P.C.
J.E. Casados
M. Clea Gutterson
Albuquerque, New Mexico

for Appellee.

OPINION

BACA, Justice.

{1} American General Fire and Casualty Company (American General) brought suit against Progressive Casualty Company (Progressive) alleging breach of contract, violation of statute, and bad faith. At the conclusion of American General's case in chief, the district court granted Progressive's motion to dismiss, finding that Progressive had no duty to defend the insured. We reverse the judgment of the district court and remand for disposition in accordance with this opinion.

{2} James Wade suffered from multiple sclerosis that confined him to a wheelchair. Both parties to this suit provided him insurance coverage. American General had issued a homeowner's insurance policy to Wade. The policy excluded coverage for injuries arising out of "ownership, maintenance, or use" of a motor vehicle. Progressive provided automobile insurance coverage. Wade owned a van equipped with a ramp, which allowed him to be loaded into and unloaded from the van. He was, however, unable to operate the ramp and enter or exit the vehicle without assistance. In March 1986, Jody Michael, an employee of James Wade, filed suit alleging Wade was liable for injuries suffered by Michael when she attempted to move Wade in his wheelchair onto a ramp.

{3} American General proceeded to defend Wade in the suit based on the allegations in the complaint, which did not indicate that the injuries were incurred while Wade was disembarking from the van. During its defense, it learned that Michael's alleged injuries had been incurred while she was unloading Wade from the van. At that point, American General requested Wade to notify his automobile insurance carrier of the suit because its coverage specifically excluded injury incurred in an accident related to a motor vehicle, and Wade notified Progressive.

{4} Progressive refused to defend Wade, despite American General's subsequent formal demand for Progressive to defend and to reimburse American General for its expenses incurred in defense. Progressive claimed that it provided no coverage for Wade in this matter, claiming general policy exclusions and relying on the policy defense that the injury did not arise out of

"ownership, maintenance, or use" of the insured vehicle. The Michael law suit was subsequently settled by American General for $16,000, and the suit was dismissed. American General incurred costs in defending Wade of over $5,000. American General then brought this suit, which was dismissed based on a finding that Progressive had no duty to defend Wade because the alleged negligence did not arise out of the "ownership, maintenance, or use" of the vehicle.

{5} Progressive's insurance policy agreement states in part:

> **We** will pay, on behalf of any insured person, damages, other than punitive damages, for which an **insured person** is legally liable because of **bodily injury** and **property damage** caused by accident and arising out of the ownership, maintenance **or** use of your insured car or **utility trailer**.
>
> **We** will defend any suit or settle any claim for these damages, as **we** think appropriate.

{6} Several issues are raised on appeal regarding whether the negligence arose out of the "ownership, maintenance, or use" of the vehicle, making Progressive responsible, and whether and to what extent Progressive had a duty to defend.

I. THE INJURIES AROSE OUT OF USE OF THE VAN.

{7} The injuries arose when Michael was trying to unload Wade in his wheelchair from the van. She was using a hydraulic lift, but apparently the brake on the chair was set, and she was unable to push Wade over the edge created by the ramp on the side of the van. She tried to lift the wheelchair over the edge and allegedly sustained a back injury.

{8} Sanchez v. Herrera, 109 N.M. 155, 783 P.2d 465 (1989), is controlling on the issue before us. Progressive refers us to the law of other jurisdictions, but in the face of New Mexico precedent directly on point, we find it unnecessary to go beyond our borders to determine the applicable law.[1]

{9} In **Sanchez** we determined that the unloading of guns in the cab of a pickup truck was "foreseeably incident to use of that vehicle." **Id.** at 157, 783 P.2d at 467. In that case we adopted the following rule to determine coverage: "whether the use made of the vehicle at the time of the accident logically flows from and is consistent with the foreseeable uses of that vehicle." **Id.** We found coverage because the use of the vehicle for hunting was foreseeable, transportation of weapons in the cab was incident to that foreseeable use, the use of the vehicle as shelter was foreseeable and incident to its use while hunting, and the loading and unloading of weapons in the vehicle, however unwise, was foreseeable. **Id.**

{10} Application of the principles articulated in **Sanchez** is straightforward. The immediate cause of Michael's alleged injuries was Wade's negligence in setting the brake on the wheelchair that made its normal movement difficult and caused her to attempt to lift him onto the ramp. This occurred while Michael was assisting Wade out of the van. It is foreseeable, and in

---

[1] Progressive's analysis is flawed in two respects. It relies on precedent from outside our jurisdiction that is based on a different statutory scheme and that applies different tests to determine whether an injury arose out of the operation and use of a vehicle. **See, e.g., Gilbertson v. State Farm Mut. Auto Ins.,** 845 F.2d 245 (10th Cir. 1988) (Minnesota law requires the injury to arise out of use of the vehicle as a vehicle; vehicle must be more than mere situs—it must be an active accessory; and there must be a causal relationship between accident and vehicle); **Reynolds v. Allstate Ins. Co.,** 400 So. 2d 496 (Fla. App. 1981) (Florida law requires relationship between injury and use of automobile as mobile vehicle) **Waldbillig v. State Farm Mut. Auto. Ins. Co.,** 321 N.W.2d 49 (Minn. 1982) (Minnesota statute precludes recovery when vehicle not being used for transportation).

The second error is Progressive's focus on the van as the "mere situs" of Michael's injury and its misconstruing of **Sanchez** in this regard. **Sanchez** establishes a "reasonably foreseeable" test whereby coverage exists when the injury is causally connected to and incident to a reasonably foreseeable use. Situs per se is not the issue. By focusing on the location of the accident without analysis regarding how the situs relates (or fails to relate) to the use, Progressive turns a blind eye to the requirements of our law.

fact a necessary condition, that, in using the van, Wade would have to enter into and exit from the vehicle.[2] Because Wade was confined to a wheelchair, loading and unloading him with the use of the hydraulic lift was reasonably foreseeable. Incidental to this foreseeable use was that he would need assistance—he was physically unable to do this task alone. The injury to Michael occurred while assisting Wade to disembark. The cause of the accident was reasonably connected to a use of the vehicle, and this accident was within the scope of Progressive's coverage.

II. PROGRESSIVE'S INDEPENDENT DUTY TO DEFEND.

{11} The duty of an insurer to defend arises from the allegations on the face of the complaint or from the known but unpleaded factual basis of the claim that brings it arguably within the scope of coverage. **Albuquerque Gravel Prods. Co. v. American Employers Ins. Co.,** 282 F.2d 218 (10th Cir. 1960). The duty may arise at the beginning of litigation or at some later stage if the issues are changed so as to bring the dispute within the scope of policy coverage. **Pendleton v. Pan Am. Fire & Casualty Co.,** 317 F.2d 96 (10th Cir.), **cert. denied,** 375 U.S. 905 (1963). It appears, therefore, that at some point in the litigation, because the alleged injuries to Michael fell within the scope of Wade's automobile insurance coverage, Progressive was obligated to defend the suit. Progressive, however, presents several alternative grounds upon which it argues that the district court's ruling should be upheld.

A. American General was not a "Mere Volunteer" and is Entitled to Subrogation.

{12} An insurer's duty to defend arises out of the nature of the allegations in the complaint. **See Foundation Reserve Ins. Co. v. Mullenix,** 97 N.M. 618, 642 P.2d 604 (1982). On its face, the Michael's complaint appeared to implicate the American General homeowner's coverage, and American General was obligated to defend. Progressive contends that, once American General discovered the true nature of the underlying allegations, it knew that it was not obligated to defend and continued in this matter as a volunteer. **See Fireman's Fund Am. Ins. Cos. v. Phillips, Carter, Reister and Assocs.,** 89 N.M. 7, 546 P.2d 72 (Ct. App.) (subrogation generally not allowed when another's debts officiously paid), **cert. denied,** 89 N.M. 5, 546 P.2d 70 (1976). However, American General was obligated to deal with Wade as a fiduciary and was under a duty to pursue the case or settle in good faith. **See Chavez v. Chenoweth,** 89 N.M. 423, 553 P.2d 703 (Ct. App. 1976); **Allstate Ins. Co. v. Auto Driveaway Co.,** 87 N.M. 77, 529 P.2d 303 (Ct. App. 1974). Even if American General had developed a belief that the injury was beyond the scope of its coverage, its duty to Wade and its status as already having begun representation precludes classification of the insurer as a volunteer. **See Mullenix,** 97 N.M. at 620, 642 P.2d at 606; **Auto Driveaway,** 87 N.M. at 78, 529 P.2d at 304; **see also State Farm Fire & Casualty Co. v. Cooperative of Am. Physicians, Inc.,** 163 Cal. App. 3d 199, 209 Cal. Rptr. 251 (1984) (defending insurer claiming noncoverage not a volunteer in settling because under duty to defend and settle based on allegations on face of complaint); **Rooney v. Township of W. Orange,** 200 N.J. Super. 201, 491 A.2d 23 (1985) (once demand made, insurer had duty to defend and was not volunteer). Progressive's own inaction in failing to provide a defense forced American General to continue its representation, and it cannot now hide behind its own misdeeds to force American General to bear the burden of the defense.

[2] We do not analyze this as a "loading and unloading" case. The injury occurred as incident to a necessary and foreseeable element of using the van—exiting upon arrival at the destination. The precedent cited by Progressive would all support this view and apparently establish coverage, despite its application of more stringent tests. **See, e.g., Galle v. Excalibur Ins. Co.,** 317 N.W.2d 368, 370 (Minn. 1982) (unloading injuries work related and not from use of vehicle for transportation; "person injured when he is entering a car intending to become a passenger would be allowed recovery"); **Reynolds,** 400 So. 2d at 497 (causal relationship required between use as vehicle and injury).

{13} We hold that American General was not acting as a volunteer. Its defense was required by law and its fiduciary obligations to the insured, and it is entitled to subrogation for the costs of defense and good faith, reasonable settlement.

B. American General's Failure to Reserve its Rights against Wade does not Preclude Subrogation Against Progressive.

{14} Progressive maintains that American General failed to obtain a reservation of rights that would have notified Wade that the insurer was undertaking the defense yet reserving the right to deny coverage. This omission, Progressive maintains, is fatal to American General's subsequent attempt to deny coverage.

{15} It is true that a liability insurance carrier that assumes the defense in an action against its insured with knowledge of possible grounds for noncoverage and that does not reserve its right to later deny coverage is precluded from later asserting that no coverage exists. **Pendleton,** 317 F.2d at 99. "[T]he insurer's unconditional defense of an action brought against its insured constitutes a waiver of the terms of the policy and an estoppel of the insurer to assert the defense of noncoverage." **Id.**

{16} American General undoubtedly lost its right to assert noncoverage **against Wade** by its failure to expressly reserve its rights. It is not, however, precluded from asserting subrogation against Progressive. The reason for the rule estopping the insurer from denying coverage without the reservation of rights is the presumptive potential of prejudice **to the insured** caused by the insurer's total control of the litigation, the insured's reliance on the insurer, and the insurer's fiduciary duty **vis-a-vis the insured**. **Id.** The rule does not operate to preclude a suit such as this whereby one insurer attempts to assert that another insurer provided primary coverage. Progressive simply was not, and could not have been, a party to a reservation of rights agreement between American General and Wade. Any omission on the part of American General in no way implicates Progressive; American General had no duty in this regard toward Progressive, and the reasons for the rule as articulated above indicate that a dispute between two insurers over coverage is not within the scope of the rule.[3]

III. THE REASONABLENESS OF THE SETTLEMENT.

{17} Progressive argues that, even if we find it had a duty to defend and American General can assert subrogation, it is subrogated only to the extent that the settlement with Michael was reasonable and we must remand for such a determination.

{18} American General and Wade notified Progressive of the original suit, and American General made demand upon Progressive to assume Wade's defense. Progressive refused to defend, breaching its duty to Wade. An insurer suffers serious consequences upon its unjustified failure to defend after demand, including loss of the right to claim the insured settled without its consent and liability for a judgment entered against the insured or good faith settlement agreed to by the insured. **State Farm Fire & Casualty Co. v. Price,** 101 N.M. 438, 684 P.2d 524 (Ct. App.) (unjustifiable failure to defend subjects insurer to liability for good faith settlement), **cert. denied,** 101 N.M. 362, 683 P.2d 44 (1984). However, the settlement must be reasonable, and the insurer is not precluded from asserting as a defense that the settlement was unreasonable. **See id.**; **Lujan v. Gonzales,** 84 N.M. 229, 501 P.2d 673 (Ct. App.), **cert. denied,** 84 N.M. 219, 501 P.2d 663 (1972). There are no indications that American General settled the claim with Michael in bad faith or unreasonably—at the time of settlement it was not clear that American General would not be liable

[3] The nature of an action in subrogation dictates the same result. American General as subrogee steps into the shoes of Wade and asserts its rights derivatively. **State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co.,** 78 N.M. 359, 431 P.2d 737 (1967). This suit in no way implicates Wade, and the absence of a reservation giving Wade notice is simply irrelevant to this suit.

for the settlement and costs of defense. Moreover, Progressive had the opportunity to participate in the defense and settlement negotiations, yet waived its right to participate and breached its obligation to defend. However, Progressive is only liable for a reasonable settlement, and on remand the reasonableness of the settlement shall be determined.

IV. COSTS AND ATTORNEY'S FEES.

A. The Attorney's Fees Incurred in the Defense of Wade.

{19} Progressive maintains that American General cannot recover the costs incurred in defense of Wade. It argues American General as a subrogated insurer has only the rights Wade would have against Progressive and is entitled to recover only the amount actually paid out to discharge the obligation. Because Wade paid no attorney's fees and therefore has no right to fees against Progressive, American General has no such right.

{20} We reject this argument. We have already determined that Progressive had a duty to defend, and, because of the nature of the coverages involved, the obligation fell exclusively to Progressive. It refused to fulfill its obligation, forcing American General to continue defense or potentially subject itself to liability for breach of its good faith and fiduciary obligations to Wade. Progressive's breach of its duty did not relieve it of its obligations, even though the defense was undertaken by the other insurer. **See Price,** 101 N.M. at 442-43, 684 P.2d at 528-29 (secondary insurer not relieved of obligation to defend, even though primary insurer provided defense); **Lujan,** 84 N.M. at 238, 501 P.2d at 682 (insurer liable to insured for reasonable expenses incurred in defense for breach of duty to defend). If Wade had provided the defense himself, Progressive would have been liable for his attorney's fees. American General undertook the defense, as it undertook to pay the settlement, and as subrogee it is able to assert these costs against Progressive.

{21} We have previously determined that an excess insurer exposed to liability by virtue of its coverage that has undertaken a defense has the right to be reimbursed for those costs under a theory of subrogation against the primary insurer that refused to defend, **State Farm Mutual Automobile Insurance Co. v. Foundation Reserve Insurance Co.,** 78 N.M. 359, 431 P.2d 737 (1967). It would certainly be anomalous in a situation like this where the defending insurer was ultimately not responsible for coverage to not require the insurer responsible for coverage to bear the costs of defense.

B. No Pro Rata Distribution.

{22} Progressive further argues that if we find it is responsible for defense costs and attorney's fees, then we must determine that the costs should be distributed between both insurers pro rata based on the extent of each insurer's potential liability.[4]

{23} Although it is true that the duty of an insurer to defend is distinct from its obligation to pay, **Mullenix,** 97 N.M. at 619, 642 P.2d at 605, and that American General's duty to undertake

[4] In support of this argument, Progressive refers us to **CC Housing Corp. v. Ryder Truck Rental, Inc.,** 106 N.M. 577, 746 P.2d 1109 (1987), and **American Employers' Insurance Co. v. Continental Casualty Co.,** 85 N.M. 346, 512 P.2d 674 (1973). We find this precedent inapposite to the issue before us. **CC Housing,** while not addressing proration in the context of the duty to defend, did determine that two insurers, both primarily liable, should prorate a loss in proportion to their respective policy limits. In **American Employers'** two insurers both had a duty to defend and **to provide coverage for the liability**. We were unable to ascertain which insurer provided primary coverage and held both insurers liable for a pro rata share of the cost of defense based on the maximum exposure of each insurer. More to the point is **State Farm Mutual Automobile Insurance Co. v. Foundation Reserve Co.,** 78 N.M. 359, 431 P.2d 737 (1967), which considered how to apportion defense costs when only one insurer provides primary coverage. Plaintiff insurance company was secondarily liable to defendant insurer. Defendant refused to defend or pay, despite its duty and demand, and plaintiff, pursuant to its duty, undertook defense and settlement and brought suit as a subrogee. We affirmed the trial court's judgment for the amount of defendant's coverage plus plaintiff's attorney's fees and costs incurred in the initial defense.

Wade's defense arose when it appeared from the face of the complaint that the accident fell within the scope of the homeowner's policy, **see Western Commerce Bank v. Reliance Insurance Co.,** 105 N.M. 346, 732 P.2d 873 (1987), in this case, because of the mutual exclusivity of the two policies, the liability and sole responsibility for coverage ultimately fell to Progressive. Nonetheless, Progressive refused to undertake the defense and left it to American General to protect its interests.[5] This is not a case of overlapping liability where pro rata distribution of costs would be required. In other words, even if we were to apply pro rata distribution of costs based on the applicable policy limits of each insurer, Progressive's policy limits are in some amount greater than zero while American General's policy limit is zero. Accordingly, a pro rata distribution would require Progressive to pay all costs of defense. **See State Farm Mutual Ins. Co. v. Foundation Reserve Co.,** 78 N.M. 359, 431 P.2d 737 (1967); **see also Continental Casualty Co. v. Zurich Ins. Co.,** 57 Cal. 2d 27, 366 P.2d 455, 17 Cal. Rptr. 12 (1961) (all insurers obligated to defend must pay pro rata cost of defense to extent each insurer **paid cost of judgment**); **Aetna Casualty & Surety Co. v. Coronet Ins. Co.,** 44 Ill. App. 3d 744, 358 N.E.2d 914 (1976) (breach by primary insurer of duty to defend; excess insurer entitled to recover all attorney's fees despite its liability for part of judgment). Only Progressive is liable, and Progressive should have undertaken the defense as soon as it became apparent that the suit was covered by the automobile policy.

{24} We do agree with Progressive, however, that its duty to defend did not arise until demand was made. **See Price,** 101 N.M. at 443, 684 P.2d at 529. Prior to the demand, American General was acting pursuant to its own independent obligation to defend Wade under the facts as they appeared in the complaint. Progressive is thus not responsible for the costs of the litigation incurred prior to demand. **See Rooney v. Township of W. Orange,** 200 N.J. Super. 201, 491 A.2d 23 (1985).

{25} We therefore hold that the accident involving Michael was within the scope of Wade's automobile insurance coverage provided by Progressive. We also hold that Progressive had a duty to provide a defense for Wade and that the duty arose upon its notification of the relevant facts underlying the incident that indicated that the injuries to Michael were incurred in connection with the use of the automobile.

{26} Accordingly, we reverse the judgment of the district court and remand for a factual determination of the reasonableness of the Michael settlement, the costs incurred in defense of Wade subsequent to Progressive's receipt of notice that the suit implicated its coverage, and for resolution of the remaining claims raised regarding bad faith and violation of the various statutory unfair trade practices causes of action.

{27} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

I CONCUR:

KENNETH B. WILSON,
Justice

SETH D. MONTGOMERY,
Justice (specially concurring)

SPECIAL CONCURRENCE

MONTGOMERY, Justice (Specially Concurring).

{28} I join in Parts II-B, III and IV of the circulating opinion. As to Part II-A, I would point out that the equitable remedy of subrogation

[5] In **Mullenix** we determined that the independent duty to defend continues even after it appears from facts established after the complaint has been filed that liability or coverage differs from that originally anticipated. However, in this case, where American General ultimately has no coverage liability **and** the other insurer has liability, we do not analyze this in the context of American General's independent duty to defend. The question is one of American General's subrogation and its ability to assert derivatively Wade's claim against Progressive for refusing to defend.

generally presupposes that one secondarily liable pays the debt of another primarily liable and, either by contract or by operation of law, becomes entitled to the rights and remedies of the original creditor. **See State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co.,** 78 N.M. 359, 363, 431 P.2d 737, 741 (1967). In this case, as the plurality opinion points out, the liabilities of the two insurers were mutually exclusive; only one was primarily liable, and the other was not liable at all. Therefore, even assuming the correctness of the holding in Part I that there was coverage under the Progressive policy, American General's claim for subrogation does not fit the classical model of the remedy.

{29} However, I believe extending the remedy of subrogation to an insurer in American General's position is consistent with the equitable principles underlying the doctrine. American General was caught in a dilemma: It had to defend the lawsuit based on the allegations in the complaint, and it could not abandon the defense when it discovered the facts affecting coverage and Progressive refused to defend. A reasonable settlement was in its insured's best interests, and American General was certainly not a "volunteer" in making such a settlement. Under these circumstances, assigning Mr. Wade's rights and remedies against Progressive to American General seems consistent with "equity and good conscience." **See id.**

{30} As for Part I of the plurality opinion, while I have serious reservations about the result and rationale in **Sanchez v. Herrera,** 109 N.M. 155, 156-57, 783 P.2d 465, 466-67 (1989), in the interest of **stare decisis** I concur in the result in this case.

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-100

Filing Date: November 19, 1990

Docket No. 18,916

FARMERS, INC., a New Mexico corporation,

Plaintiff-Appellant,

v.

DAL MACHINE AND FABRICATING, INC., an Arkansas corporation,

Defendant-Appellee,

and

JACK OGDEN,

Intervenor-Appellee.

Appeal from the District Court of Luna County
Manuel D.V. Saucedo, District Judge

Jeffreys, Cooper & Associates
Kent Cooper
Deming, New Mexico

for Appellant.

Edward L. Hand
Deming, New Mexico
Sherman and Sherman, P.C.
Benjamin M. Sherman
Deming, New Mexico

for Appellees.

OPINION

BACA, Justice.

{1} This controversy arose out of a transaction involving the sale and delivery of a trailer. In June 1985, while on personal business, appellee Jack Ogden learned that appellant Farmers, Inc. (Farmers) was interested in purchasing a gooseneck trailer. As a result, Ogden referred Farmers to Valley Farm Parts (VFP), an equipment dealer in Wilcox, Arizona. Apart from being a customer of both Farmers and VFP, Ogden had no association with either party. In July 1985, Farmers ordered a gooseneck trailer through VFP for the price of $5,800 delivered to Deming, New Mexico. Dal Machine & Fabricating, Inc. (Dal), an Arkansas company, was to construct the trailer. After agreeing on a price, Farmers dealt directly with Pal regarding specifications and manufacturing details. After the specifics were confirmed, Farmers sent a check for $1,680 payable to Dal for the down payment.

{2} When the trailer was ready for delivery, VFP was terminating its relationship with Dal and made arrangements with Ogden to deliver the trailer to Deming for $1,000. Before picking up the trailer, Ogden stopped in Deming to discuss the delivery arrangement with Farmers' manager. At that time, Ogden informed the manager that he would have to pay the balance due on the trailer before Dal would release it. The manager assured Ogden that, upon delivery of the trailer, a check for $4,120 would be issued to reimburse Ogden and to pay for the delivery. As agreed, Ogden delivered the trailer and received Farmers' check for $4,120. Shortly thereafter, the trailer proved defective and Farmers stopped payment on its check to Ogden.

{3} Farmers filed suit against Dal to recover the down payment, and Ogden intervened to recover the balance paid and the delivery fee. Farmers appeals from the judgment in favor of Ogden for $4,120, contending: (1) that the judgment granted relief that was not within the theory of the case; and (2) the relief granted was contrary to the prayer for relief requested in the complaint. We affirm the trial court on both issues.

I. WHETHER THE JUDGMENT GRANTED RELIEF WITHIN THE THEORY OF THE CASE.

{4} Appellant contends that the court erred by granting relief that was not within the theory of the case as tried. Appellant asserts that although the court limited the theories of the case to contract and agency, a judgment was entered based on the theory of negotiable instruments. Specifically, appellant argues that the court's conclusions of law demonstrate that the decision was based entirely on NMSA 1978, Sections 55-3-101 to -805, the article in the Uniform Commercial Code dealing with negotiable instruments. As a consequence, appellant contends it was prejudiced because it was unable to raise various defenses arising out of NMSA 1978, Sections 55-3-302(2) and -305. We disagree and find that the trial court's conclusions of law are subject to an interpretation sounding in contract. The challenged conclusions state:

> 8. A check is not just a mere order for payment of money. It is a **contractual obligation** of the drawer.
>
> 9. A check on which payment has been stopped comes within the classification of "money due by contract."
>
> 10. When Farmers stopped payment on the check to Ogden, it was liable to Ogden for the consequences of its conduct. In such event the relation between Farmers and Ogden became the same as if the check had been dishonored and notice thereof given to Farmers.
>
> (a) The effect, so far as Farmers is concerned, is to change its conditional liability to one free from condition, and Farmers' situation is like that of the maker of a promissory note, due on demand.
>
> 11. Farmers' defenses against Dal are not available to Farmers against Ogden who had no knowledge of the trailer not conforming to specifications.

(emphasis added) (citations omitted).

{5} When a conclusion of law is challenged, the standard of review is whether the law was correctly applied to the facts. **Texas Nat'l Theatres, Inc. v. City of Albuquerque,** 97 N.M. 282, 639 P.2d 569 (1982). We view the findings of fact in a manner most favorable to the appellee, indulging the decision with all reasonable inferences in support of it and disregarding all contrary evidence. **Id.** at 287, 639 P.2d at 574. In this case, we find that the law of contracts was correctly applied to the undisputed findings of fact.

{6} Moreover, the court's findings of fact do not support any conclusions based on the law of negotiable instruments. The conclusions of law must be founded on and supported by the findings of fact. **In re Will of Carson,** 87 N.M. 43, 529 P.2d 269 (1974). The unchallenged findings make no mention of facts relating to negotiable instruments, although these findings of fact do support conclusions that relate to contract law. The trial court's findings of fact are to be liberally construed so as to sustain the judgment. **See Wine v. Neal,** 100 N.M. 431, 671 P.2d 1142 (1983). Moreover, although we find no discrepancy in the court's decision, if a conflict did exist between the conclusions of law and the findings of fact, the latter would prevail. **See Carson,** 87 N.M. at 44, 529 P.2d at 270.

{7} The findings support the conclusion that a contract existed for delivery of the trailer. The court found that Farmers agreed to the delivery plans, knew the price of the trailer on delivery, and guaranteed Ogden payment of $4,120 upon delivery. Ogden agreed to pick up the trailer, but only after confirming with Farmers that payment was due on delivery. The court further found that Ogden relied on Farmers' assurances before he undertook the trip to Arkansas to procure the trailer from Dal. Because appellant has not disputed these findings, we accept them as the basis for the court's decision. **Kerr v. Akard Bros. Trucking Co.,** 73 N.M. 50, 385 P.2d 570 (1963). In light of these findings, Ogden fulfilled his obligations under the contract for delivery.

{8} The presumption upon review favors the correctness of the trial court's actions. Appellant must affirmatively demonstrate its assertion of error. **See State v. Serrano,** 76 N.M. 655, 417 P.2d 795 (1966); **State v. Weber,** 76 N.M. 636, 417 P.2d 444 (1966). Appellant has failed to show that the court's conclusions were based erroneously on the law of negotiable instruments. The court's mere reference to the check, as the form of payment, fails to persuade us that the law of negotiable instruments was applied. We find that the form the payment took is irrelevant. Regardless of how the payment was made, Farmers' contractual liability was not discharged. Upon reviewing the record, we find that the judgment is subject to an interpretation based on a straightforward contract theory. Therefore, Farmers' argument regarding its possible statutory negotiable instruments defenses is moot because the court's decision was not based on the law of negotiable instruments, but on contract law.

II. WHETHER THE RELIEF GRANTED WAS CONTRARY TO THE PRAYER FOR RELIEF REQUESTED IN THE COMPLAINT.

{9} Appellant asserts that the trial court erred in granting a judgment for relief that was contrary to the relief Ogden requested. In his complaint in intervention, Ogden asked for the following alternative prayers for relief:

> 1. Should Plaintiff Farmers, Inc. recover from Dal Machine and Fabricating, Inc., that Plaintiff in intervention likewise recover from said company the sum of $4,120.00.
>
> 2. Should Defendant Dal Machine and Fabricating, Inc. be given judgment against Farmers, Inc. that Plaintiff in intervention be given judgment against Farmers, Inc. in the sum of $4,120.00.

{10} It is appellant's contention that the court should be limited to granting the relief appellee requested. Therefore, appellant argues that because it obtained a favorable judgment against Dal, Ogden should have also secured a judgment against Dal. Appellant asserts that the judgment granting inconsistent relief was unfair because appellant relied on the unamended pleadings to structure its own pleadings. As a result, appellant failed to file a cross claim against Dal. Ogden contends, however, that such relief was within the theory of the case and that appellant was on notice of the relief requested, asserting that after discovery disclosed that he lacked the necessary privity with Dal, he sought relief only against appellant.

{11} The purpose of the pleadings is to give fair notice of the claims and defenses so that the opposing party may prepare for trial. **Las Luminarias of N.M. Council of Blind v. Isengard,** 92 N.M. 297, 587 P.2d 444 (Ct. App. 1978) (Sutin, J., concurring). The pleadings, however, are not dispositive of the issues, and recovery may be founded on other grounds not specifically stated in the complaint. **Harbin v. Assurance Co. of Am.,** 308 F.2d 748 (10th Cir. 1962). In addition, SCRA 1986, 1-054(D) states: "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." As a consequence of this rule and the above stated underlying policy, we have previously held that the trial court may grant any appropriate relief to which the party is entitled regardless of the prayer for relief in the complaint. **Appelman v. Beach,** 94 N.M. 237, 608 P.2d 1119, **cert. denied,** 449 U.S. 839 (1980); **First Nat'l Bank in Albuquerque v. Energy Equities, Inc.,** 91 N.M. 11, 569 P.2d 421 (Ct. App. 1977).

{12} We acknowledge that under certain circumstances the court's power to grant any appropriate relief is limited. The present case, however, does not fall within any exceptions. Appellant refers us to authority wherein the court granted relief that was neither requested by the pleadings nor within the theory of the case—i.e., where the opposing party had no notice that the matters pertinent to the relief were to be covered at trial. **See Federal Nat'l Mortgage Ass'n v. Rose Realty, Inc.,** 79 N.M. 281, 282, 442 P.2d

593, 594 (1968); **Holmes v. Faycus,** 85 N.M. 740, 516 P.2d 1123 (Ct. App. 1973). For example, in **Holmes** the court erred by granting relief for constructive eviction because the theory was neither stated in the pleadings nor within the theory of the case. Consequently, the losing party had no notice of the claim nor any opportunity to respond to this theory. Under those circumstances, an award of the unrequested relief would constitute a violation of that party's due process rights.

{13} In the instant case, however, no such violation occurred. The theory of recovery was pled in contract, and the relief granted was within that theory of the case. Moreover, appellant was on notice of the relief sought. The pretrial order clearly stated that the contested issue was appellant's obligation to pay Ogden. Appellant, along with the other parties, viewed and signed the pretrial order. It is well-settled law that the pretrial order sets out the issues for trial and becomes the law of the case. **State ex rel. State Highway Dep't v. Branchau,** 90 N.M. 496, 565 P.2d 1013 (1977). The function of a pretrial order is to avoid the damaging technicalities of the pleading process. At a pretrial conference, the parties should raise all legal issues in the lawsuit. **See id.** Based on the pretrial order, Ogden did notify both the court and appellant regarding the relief it was seeking. Appellant cannot now claim it was misled. Because the order was not modified at trial, appellant is bound by it. **Johnson v. Citizens Casualty Co.,** 63 N.M. 460, 321 P.2d 640 (1958).

{14} In addition to the pretrial notice, the trial court also granted Ogden's motion to sever the trial so that the issue involving appellant's obligation to pay Ogden could be resolved separately. Although the trial was subsequently reconsolidated, the act of severance provided further notice that Ogden was seeking recovery solely against appellant.

{15} In accordance with the foregoing, we affirm the judgment of the district court.

{16} IT IS SO ORDERED.

JOSEPH F. BACA, Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

KENNETH B. WILSON,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-114

Filing Date: December 20, 1990, As Corrected January 29, 1991

Docket No. 18,227

FRED LANDAVAZO,

Plaintiff-Appellee,

v.

JOSE SANCHEZ, EPIFANIA SANCHEZ, CELSO SANCHEZ, LILLIE CHACON, E.B. SANCHEZ, and THE COUNTY OF VALENCIA,

Defendants-Appellants.

Appeal from the District Court of Valencia County
Gerard W. Thomson, District Judge

Pedro G. Rael
Los Lunas, New Mexico

for Appellants Sanchez & Chacon.

Esquibel, Sanchez & Griego
Thomas Esquibel
Michael R. Griego
Los Lunas, New Mexico

for Appellant County of Valencia.

Williams, Conroy & Sims
Anthony J. Williams
Belen, New Mexico

for Appellee.

OPINION

BACA, Justice.

{1} On the court's own motion, the opinion filed December 5, 1990, is hereby withdrawn and the opinion filed this date is substituted therefor.

{2} This is an appeal from a judgment awarding plaintiff-appellee Landavazo damages in a suit for ejectment and inverse condemnation. The issues revolve around the Juan P. Sanchez Road, which is maintained by the County of Valencia and borders Landavazo's property. This road is also necessary for access to defendants-appellants Sanchezes' property.

{3} Landavazo claims that in 1983, while in the process of maintaining the roadway, the county widened it, and that this constituted a taking of Landavazo's bordering property. In 1985, Landavazo filed suit against the Sanchezes and the county in ejectment and inverse condemnation.

{4} Landavazo introduced evidence in the form of testimony of several witnesses, a survey made after the county widened the road, and a comparison aerial photo taken of the property in 1972 before the widening. This evidence demonstrated a significant change in the boundaries and supported the court's finding that a taking had indeed occurred. The trial court found for Landavazo, determining that evidence existed to hold that the widening was an unlawful taking of his property without compensation. Landavazo was awarded $5,000.00 plus interest, costs, and attorney's fees. The decision of a majority of the court is to affirm on all issues. Part IV of this opinion expresses a dissenting view with regard to attorney's fees; and Justice Montgomery's separate opinion contains the majority view on that issue.

{5} The appellants, County of Valencia and the Sanchezes, raise several points on appeal. Many can be answered in terms of substantial evidence. We will address those issues jointly. The remaining issues are: 1) whether the plaintiff's complaint was sufficient to state a claim upon which relief could be granted; 2) whether

the court erred in refusing to grant defendants' default motion on the day of the trial; and 3) whether the award of costs and attorney's fees was consistent with NMSA 1978, Section §42A-1-25 (Repl. Pamp. 1981).

I. SUBSTANTIAL EVIDENCE

{6} The county claims reversible error in that the evidence failed to establish a precise boundary, the precise value of the property in question, and whether maintenance of the Juan P. Sanchez Road constituted a taking. Appellants Sanchezes on the other hand claim that the trial court committed error by refusing to accept the county's determination that the road was twenty-eight feet wide and by not following the Middle Rio Grande Conservancy District maps to establish boundary lines. These are all questions of substantial evidence

{7} It is not this court's task to reweigh evidence. If substantial evidence supports a trial court's conclusion it will not be disturbed on appeal. **Elephant Butte Resort Marina, Inc. v. Wooldridge,** 102 N.M. 286, 291, 694 P.2d 1351, 1356 (1985). Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion. **Register v. Roberson Constr. Co.,** 106 N.M. 243, 741 P.2d 1364 (1987); **Tapia v. Panhandle Steel Erectors Co.,** 78 N.M. 86, 428 P.2d 625 (1967). Evidence is substantial even if it barely tips the scales in favor of the party bearing the burden of proof. **Lumpkins v. McPhee,** 59 N.M. 442, 453, 286 P.2d 299, 310 (1955). Landavazo presented a survey prepared by a professional surveyor (Carlton survey) that, when compared with an aerial photo of the property in 1972 taken before the widening, showed a change in boundaries. This, together with testimonial and other evidence, is sufficient to tip the scales in Landavazo's favor. This court views the evidence in the light most favorable to support the findings of the trial court. **Lujan v. Pendaries Properties, Inc.,** 96 N.M. 771, 774, 635 P.2d 580, 583 (1981); **Tapia,** 78 N.M. at 89, 428 P.2d at 628. This is all we need determine for these boundary issues: "On appeal, the scope of review is limited to examining the record only to determine if there is substantial evidence to support the district court's ruling." **Brannock v. Brannock,** 104 N.M. 385, 387, 722 P.2d 636, 638 (1986).

{8} In determining the value of the property taken, the court computed the actual acreage taken by adding the distance from point to point along the roadway as established by the Carlton survey and multiplying the resulting sum by thirteen feet. The thirteen feet represented the difference between fifteen feet, the average width of the roadway prior to the taking, and twenty-eight feet, the average width of the roadway after the taking. The court then multiplied the resulting square footage of 19,942 square feet by the stipulated value of the land at $0.28 per square foot. The court then rounded the figure down to $5,000. No evidence of either diminution or enhancement of the remaining land was offered. Based upon the evidence the court necessarily concluded that the value of the remaining property was the same before and after the taking. This constituted substantial evidence for the damages found by the court.

II. DID THE COMPLAINT FAIL TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED?

{9} The county claims that because Landavazo cited a repealed statute in his complaint, he failed to state a claim upon which relief could be granted. This is an ill-founded assertion. Landavazo set out, with some specificity, his claim giving notice to the county, enabling it to defend. Nothing more is required. The purpose of pleadings is to facilitate a proper decision on the merits, not to decide the outcome of the entire proceeding on a clumsily drafted complaint. **Hambaugh v. Peoples,** 75 N.M. 144, 401 P.2d 777 (1965). A proper decision on the merits is always preferred over a dismissal on the pleadings. The words "inverse condemnation" were used in the pleading. Further, language in the pleading was sufficient to alert the county that indeed inverse condemnation was intended even though

the wrong statute was cited. Substantial justice was accomplished by accepting the complaint as sufficient. **Morrison v. Wyrsh,** 93 N.M. 556, 603 P.2d 295 (1979). Finally, a specific citation to a statute is unnecessary in a complaint. It is sufficient for a party to refer to the statute "in some general term with convenient certainty." SCRA 1986, 1-009(H). Landavazo was sufficiently specific in his complaint and stated a claim upon which relief could be granted.

III. MOTION FOR DEFAULT

{10} The trial court acted within its discretion in denying the Sanchezes' motion for default. Landavazo had failed to respond to their counterclaim at the time of trial. The Sanchezes did not comply with SCRA 1986, 1-055, which requires an affidavit, a written application for default, and service upon the defaulting party no less than three days before the hearing. Here, when the court was confronted with a motion for default on the day of trial, it properly denied the motion and tried the matter on its merits. Judgments by default are not favored in New Mexico. **Rodriguez v. Conant,** 105 N.M. 746, 737 P.2d 527 (1987). Whether a default should be granted lies within the discretion of the trial court. **Hubbard v. Howell,** 94 N.M. 36, 607 P.2d 123 (1980); **see** SCRA 1986, 1-055. The trial court was well within the bounds of its discretion in denying a default judgment.

IV. ATTORNEY'S FEES AND COSTS

{11} With regard to attorney's fees this opinion expresses a dissenting view. The trial court erred in awarding attorney's fees under NMSA 1978, Section §42A-1-25 (Repl. Pamp. 1981). Attorney's fees are provided in condemnation proceedings under this statute in three instances: 1) when the condemnor has abandoned condemnation; 2) when the condemnation proceedings have been dismissed; or 3) when there is a final determination that the condemnor **does not have the right to take the property.** None of the three instances is applicable in this case.

{12} Landavazo argues that his original proceeding before the county commission seeking redress for the taking constituted a "condemnation proceeding." He contends that the county went no further than to declare the width of the road—finding no taking had occurred—and invited him to sue, and these actions constituted an abandonment of the condemnation proceeding. The above actions of the county commission were not a condemnation proceeding; hence there was no abandonment. There was no later abandonment or dismissal of condemnation proceedings—the county vigorously pursued this matter when sued by Landavazo in inverse condemnation. The only other possible theory to award Landavazo attorney's fees under this statute is under Subsection (3). Landavazo did indeed win below and was awarded money damages for the county's taking of his property. There was, however, no determination that the county **did not have the right** to take the property sought, but merely that it must pay for it.

{13} Section § 42A-1-25(A)(3) provides for an award of litigation expenses to a condemnee when "there is a final determination that the condemnor **does not have a right** to take the property sought to be acquired in the condemnation proceeding." (Emphasis added.)

{14} The trial court in this case necessarily determined that the county had the right to take the property when it required the county to pay the Sanchezes for the land. Had it determined the county had no right to take the property, it would neither have allowed the taking nor required payment for the property. There **was not** a determination that the county had no right to take the property. Conclusion of law no. 5 stated: "The County of Valencia had no right to take Plaintiff's property **without paying compensation."** (Emphasis added.) It follows that when the trial court mandated the payment of compensation it also found a right in the county to take the property.

{15} A statute must be construed according to its plain meaning. **Brown v. Bowling,** 56 N.M. 96, 240 P.2d 846 (1952); **Security Escrow**

Corp. v. State Taxation & Revenue Dep't, 107 N.M. 540, 760 P.2d 1306 (Ct. App. 1988). Where a statute's terms are plain and unambiguous there is no room for construction. **Hendricks v. Hendricks,** 55 N.M. 51, 226 P.2d 464 (1951); **State v. Michael R.,** 107 N.M. 794, 765 P.2d 767 (Ct. App.), **cert. denied,** 107 N.M. 748, 764 P.2d 879 (1988).

{16} The distinction is not between traditional condemnation proceedings and inverse condemnation proceedings. The statutory language is plain and should be interpreted in the same manner regardless of whether the proceeding is instituted by the state or by the condemnee. Eminent domain is liberally interpreted in this state in favor of the state. The state is rarely precluded from pursuing a taking.

> The decision of the grantee of the power of eminent domain as to the necessity, expediency, or propriety of exercising that power is political, legislative or administrative, and its **determination is conclusive and not subject to judicial review,** absent fraud, bad faith, or clear abuse of discretion. The determination of the question of necessity may not be easily or casually overthrown by the courts, but strong and convincing evidence of the most conclusive character is required to upset the determination.

North v. Public Serv. Co., 101 N.M. 222, 229, 680 P.2d 603, 609 (Ct. App. 1983), **cert. denied,** 101 N.M. 11, 677 P.2d 624 (1984) (emphasis added) (citation omitted).

{17} The trial court ordered the county to pay just compensation for the taking of land it had a right to take, but had never paid for. This is not equivalent to a determination by the district court that there was no necessity and therefore no right to take. There has been no showing, as required by **North,** of fraud, bad faith, or a clear abuse of discretion by strong and convincing evidence of the most conclusive character; therefore, it is inappropriate to overturn the county's determination that this taking was necessary. In my view, attorney's fees may not be awarded. The trial court does have the jurisdiction to award all other costs to the prevailing party. The judgment of the trial court is affirmed. Justice Ransom and the author of this opinion dissent as to the award of attorney's fees.

{18} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

RICHARD E. RANSOM,
Justice

DAN SOSA, JR.,
Chief Justice

SETH D. MONTGOMERY,
Justice, specially concurring

PATRICIO M. SERNA,
District Judge, specially concurring

SPECIAL CONCURRENCE

MONTGOMERY, Justice (Specially Concurring).

{19} We concur with Justice Baca's opinion, except that we disagree with his conclusion that the trial court erred in awarding attorney's fees. A majority of the Court has concluded that Mr. Landavazo could recover his attorney's fees from the County in this inverse condemnation action. This opinion therefore announces the ruling of the Court on this issue and explains our reasoning.

{20} We begin with recognition of the thoroughly settled law in New Mexico that a landowner's exclusive remedy for a public (or other—e.g., a private water-right holder or a public utility) authority's taking of his or her property in the exercise of the authority's power of eminent domain, when the authority fails to pay or even offer just compensation, is to sue the authority in an action for inverse condemnation. **Kaiser**

Steel Corp. v. W. S. Ranch Co., 81 N.M. 414, 421-22, 467 P.2d 986, 993-94 (1970); **Garver v. Public Serv. Co. of New Mexico,** 77 N.M. 262, 269-70, 421 P.2d 788, 792-94 (1966); **North v. Public Serv. Co. of New Mexico,** 101 N.M. 222, 226, 680 P.2d 603, 606 (Ct. App.), **cert. denied,** 101 N.M. 11, 677 P.2d 624 (1984).

{21} In this case, the county sent its road grader out to Mr. Landavazo's property to widen the Sanchez road. The result was that almost 20,000 square feet of Mr. Landavazo's farmland were stripped away and became part of the widened roadway. When Landavazo appealed to the county to rectify the situation, the county first retained a surveyor to determine the width of the widened road and then told Mr. Landavazo that, if he did not agree with the county's actions, he could "take it to court."

{22} At that point, under the thoroughly settled New Mexico law just mentioned, Mr. Landavazo's options were severely limited. He could not successfully sue the county in ejectment, or for trespass, or for an injunction, or for compensatory or punitive damages. His only recourse, in order to obtain the "just compensation" that was his due under N.M. Const. Article II, Section 20—the $5,000 that the district court ultimately awarded him—was to hire an attorney and incur the $15,000 attorney's fee that the court ultimately found he reasonably incurred.

{23} The county had been instructed by our Eminent Domain Code to "make reasonable and diligent efforts to acquire [the] property by negotiation." NMSA 1978, § 42A-1-4 (Repl. Pamp. 1981). Section §42A-1-6 provided, and still provides, that an action to condemn property "may not" [i.e., shall not] be maintained unless the condemnor makes a good faith effort to acquire the property by purchase before commencing the action. The Code contained, and still contains, other provisions protecting a landowner like Mr. Landavazo, such as Section §42A-1-5 (providing for appraisal to determine just compensation) and Section §42A-1-10 (providing for deposit of probable compensation before entry by the condemnor is permitted). Nevertheless, the county chose to ignore these provisions, to simply **take** Mr. Landavazo's property, and to tell him that, if he did not like it, he could "take it to court."

{24} Had the county proceeded by direct condemnation and, under Section §42A-1-5(E), tendered the amount it believed was just compensation, Mr. Landavazo would have had an election. He could have accepted the amount tendered and not hired an attorney, or he could have engaged an attorney to seek a greater award than the amount tendered. Had he done the latter, the absence of a provision in the Code awarding him his attorney's fees would have been appropriate on the theory that he could pay his attorney out of the increased award if he were successful; if not successful, he would have no one but himself to blame for not accepting the amount tendered in the first place.

{25} The county, however, did not proceed by direct condemnation and did not otherwise attempt to negotiate with Mr. Landavazo. The district court concluded that its taking of Landavazo's property without compensation was "unlawful" and that the county "had no right" to take the property without paying compensation. On these facts, and in light of our statutory scheme, we believe the district court's conclusions were correct.

{26} The question before us is whether Section §42A-1-25(A)(3) should be construed to permit an award of attorney's fees to the condemnee in an inverse condemnation action. Although the statute undoubtedly is drafted with the direct condemnation situation primarily in mind, it does not on its face preclude application to the inverse condemnation situation. The statute mandates award of litigation expenses under any of the prescribed circumstances simply to "the condemnee." At the same time, the section providing for inverse condemnation, Section §42A-1-29(A) (Cum. Supp. 1990), refers to the plaintiff in an inverse condemnation suit as the "condemnee," so the possibility of an award of litigation expenses to the plaintiff in an inverse condemnation action is expressly left open by Section § 42A-1-25.

{27} Hence the necessity of construing the phrase "does not have a right" in this section cannot be avoided. The phrase can be construed as Justices Baca and Ransom construe it—namely, by holding that it applies only when the court determines that the public authority either did not have the power of eminent domain in the first place or that the taking was not for a public purpose. But if so construed, the statute becomes somewhat meaningless in the inverse condemnation situation, because then the landowner will not be limited to inverse condemnation as his exclusive remedy; in fact, he will not even **have** the right of inverse condemnation, because the taker of the property, by hypothesis, will not have been exercising the power of condemnation. Lacking the "right" (i.e., the power) to condemn the property, the taker would be liable in ejectment, or for trespass, or for compensatory or punitive damages. The landowner would not be limited to an award of just compensation—the difference between the value of his property before the taking and that afterwards. Inverse condemnation would have no application.

{28} It seems to us to make more sense to hold that the phrase "does not have a right" in the inverse condemnation situation means that the condemning authority has proceeded wrongfully in taking the landowner's property without paying or offering just compensation. Such an interpretation is consistent with the measures in the Eminent Domain Code, referred to above, protecting the landowner from abuse and requiring the condemnor to proceed by way of direct condemnation. Our construction has the salutary effect of encouraging entities with the power of eminent domain to proceed under the Eminent Domain Code and offer just compensation. It discourages them from simply taking property and forcing landowners to sue for what would have been offered had the condemnors proceeded lawfully in the first place.

{29} Our construction is also consistent with Section 213 of the American Law Institute's **Model Eminent Domain Code** (1974), which provides for an award of the plaintiff's litigation expenses in an inverse condemnation action. The section also provides that a condemnor "shall" commence a condemnation action when it wishes to acquire property and "shall not" intentionally make it necessary for the landowner to commence an action. These admonitions reflect the same approach as is taken in our Eminent Domain Code. If a condemnor's taking is unintentional, or if a landowner sues for inadvertent damaging of his property, then the basis for applying Section §42A-1-25 to the condemnor's actions—i.e., that the actions were wrongful; that the condemnor "did not have the right" to take them—might not be present. But here, where the county deliberately chose to take the property first and litigate afterwards, forcing the landowner to initiate the lawsuit, the district court properly concluded that the county did not have the right to take the property.

{30} Accordingly, the judgment awarding attorney's fees is affirmed.

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1991-NMSC-021

Filing Date: February 28, 1991

Docket No. 19,488

DON E. HERMAN, Surviving Spouse of Patricia D. Herman, Deceased,

Petitioner,

v.

MINERS' HOSPITAL,

Respondent.

Original Proceeding on Certiorari
Gregory D. Griego, Hearing Officer

Kastler and Kamm
Terrence R. Kamm
Raton, New Mexico

for Petitioner.

Montgomery & Andrews, P.A.
Katherine W. Hall
Santa Fe, New Mexico

for Respondent.

OPINION

BACA, Justice.

{1} This appeal is before us on writ of certiorari to the court of appeals. Petitioner Don Herman seeks to appeal the judgment of the court of appeals, which reversed an award of death benefits made by a hearing examiner of the Workers' Compensation Division. We have granted the petition, and we reverse the judgment of the court of appeals, reinstating the award of benefits.

{2} Respondent Miners' Hospital (Hospital) employed Herman's spouse, the decedent, as a nurse. On July 21, 1986, decedent died as a result of a heart attack suffered at work. She had been treated at the Hospital for the heart attack immediately prior to her death, and she died at the Hospital. Decedent's heart attack occurred during a period when she suffered from substantial stress related to her employment. Following her death, the Hospital, as employer, did not file a first report of accident, and petitioner filed a claim for death benefits on July 20, 1988, almost two years after the death.

{3} The Workers' Compensation hearing examiner determined that decedent died in an accident arising out of and in the course of her employment and that her death was causally connected to employment-related stress. The examiner also concluded that the Hospital had actual notice of the accident and that the Hospital's failure to file a first report of accident tolled the statute of limitations. **See** NMSA 1978, §§ 52-1-58 & -59. Accordingly, Herman was awarded benefits as surviving spouse.

{4} The court of appeals reversed in a memorandum opinion, holding that the claim was barred by the notice requirements of the Workers' Compensation Act, NMSA 1978, Section 52-1-29, and that the claim was barred by the statute of limitations contained in Section 52-1-31(B). We consider those two issues: whether the claim was barred by the notice requirements, and whether it was barred by the statute of limitations, as well as a third issue raised before the court of appeals but not discussed: whether the finding of causation was supported by substantial evidence.[1]

[1] The relevant statute, and that considered by the hearing examiner and the court of appeals, is the one in effect at the time the cause of action accrued, i.e. when the employee knew or should have known of the existence of a compensable injury. **Noffsker v. Barnett & Sons,** 72 N.M. 471, 384 P.2d 1022 (1963); **Strickland v. Coca-Cola Bottling Co., 107 N.M. 500, 760 P.2d 793 (Ct.App.), cert. denied,** 107 N.M. 413,

I. IS THE HEARING EXAMINER'S FINDING THAT DECEDENT'S HEART ATTACK WAS CAUSALLY RELATED TO ON-THE-JOB STRESS SUPPORTED BY SUBSTANTIAL EVIDENCE?

{5} The essence of the Hospital's claim is that Herman failed to carry his burden to show that the heart attack resulted from decedent's employment, and thus there was not substantial evidence supporting the hearing examiner's finding of causation. It argues that under whole record review the finding must be reversed because the totality of the evidence indicates that the finding was not reasonable.

{6} On appeal, to determine whether a challenged finding is supported by substantial evidence, we have always given deference to the fact finder, even when we apply, as here, whole record review. **See Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.,** 101 N.M. 291, 681 P.2d 717 (1984); **Tallman v. ABF (Arkansas Best Freight),** 108 N.M. 124, 767 P.2d 363 (Ct.App.), **cert. denied,** 109 N.M. 33, 781 P.2d 305 (1988). When applying whole record review, the reviewing court "views the record evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence." **National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,** 107 N.M. 278, 282, 756 P.2d 558, 562 (1988) (citations omitted). Substantial evidence on the whole record is such evidence that demonstrates the reasonableness of the administrative decision. **Id.** To determine whether a finding of fact is amply supported by the whole record, we do not rely solely on one part of the evidence if to do so would be unreasonable. We must find "evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." **Id.** We will not, however, substitute our judgment for that of the agency; although the evidence may support inconsistent findings, we will not disturb the agency's finding if supported by substantial evidence on the record as a whole. **Tallman**, 108 N.M. at 129, 767 P.2d at 368. As long as substantial evidence supports the findings of the hearing officer, an appellate court will not disturb those findings on appeal. **Yates v. Matthews**, 71 N.M. 451, 379 P.2d 441 (1963).

{7} Section 52-1-28(B) requires that where an employer denies a disability is a result of an accident, the claimant "must establish that causal connection as a probability by expert testimony of a health care provider." In other words, Herman had to show by medical evidence that decedent's death and heart attack was a medically probable result of the work-related stress. **See Anderson v. Mackey,** 93 N.M. 40, 42, 596 P.2d 253, 255 (1979).

{8} The Hospital asserts that a possible cause only becomes a probable cause "'when in the absence of other reasonable causal explanations **it becomes more likely than not that the injury was a result of its action.** '" **Bufalino v. Safeway Stores, Inc.**, 98 N.M. 560, 565, 650 P.2d 844, 849 (Ct. App. 1982) (quoting **Parker v. Employers Mut. Liab. Ins. Co.**, 440 S.W.2d 43, 47 (Tex. 1969)). **Bufalino** determined that speculation—which "arises when the probabilities of an event happened in one or two ways and there is not evidence as to which way it did happen"—is improper as a basis for determining causation. **Id.** The Hospital, however, does not reflect on **Bufalino's** determination that the fact finder is given deference when faced with conflicting medical testimony regarding causation and medical probability. **See, id.; see also Yates,** 71 N.M. at 453-54, 379 P.2d at 442-43 (trier of fact must resolve disagreement and determine true facts). As we will show, our review of the evidence indicates this latter proposition is dispositive.[2]

759 P.2d 200 (1988). Accoringly, we apply the statutory provisions in effect on July 1, 1986, and statutory references are to provisions contained in the original 1978 compilation.

[2] The Hospital also refers us to **Renfro v. San Juan Hospital, Inc.**, 75 N.M. 235, 403 P.2d 681 (1965). In that case, however, the medical evidence could at best indicate that the work-related accident was one possible cause of plaintiff's injuries, whereas in this case, although certain medical

{9} Three medical experts presented evidence, two on behalf of Herman and one for the Hospital. All testified that several factors could cause a heart attack and that several of the factors were present in decedent. Stress was identified as a minor risk factor. All of the experts agreed that smoking, high cholesterol, high blood pressure, diabetes, and a family history of heart disease were major factors. The Hospital's expert indicated that job-related stress was one of many minor factors, while Herman's experts testified it was one of four minor factors. The Hospital's expert testified that as the number of risk factors present in a patient increased, the risk of heart attack multiplied. One of Herman's experts testified that stress appeared to have exacerbated decedent's high blood pressure, which caused heart damage. This evidence was contradicted by other testimony.

{10} We conclude that, even under whole record review, the testimony supports the hearing examiner's findings. Whole record review is not an excuse for an appellate court to reweigh the evidence and replace the fact finder's conclusions with its own. It allows the reviewing court greater latitude to determine whether a finding of fact was reasonable based on the evidence, and we hold that, in this case, even though the examiner was faced with conflicting evidence, its finding was reasonable. In **Oliver v. City of Albuquerque**, 106 N.M. 350, 352, 742 P.2d 1055, 1057 (1987), we noted that when a pre-existing condition is aggravated by employment-related stress, the requirement of a job-related injury is met. Thus, Herman only had to show to a medical probability that the stress aggravated what may have been a pre-existing condition.

{11} In the present case, the Hospital's expert stated there was no causal connection, and one of claimant's experts is contended to have been discredited. However, claimant's other expert, a cardiologist, presented evidence to the effect that stress, although a minor risk factor when compared to several major risks that afflicted decedent, is a factor causing heart attacks. Evidence also was presented that the more factors present in a patient, the greater the likelihood of heart disease. Thus, the evidence is sufficient for us to sustain the fact finder under the **Oliver** standard and applying whole record review. Herman was not required to prove that stress was the only factor causing the fatal heart attack; he needed to show that the heart attack more likely than not was the result of stress. **Bufalino,** 98 N.M. at 565, 650 P.2d at 849.

{12} We find the evidence presented here susceptible to a conclusion similar to that articulated in **Oliver.** To conclude otherwise, under these facts, would sanction a rationale that a finder of fact could never reach a determination of "medical probability" when opposing parties presented experts with diametrically opposed opinions. Conflicting evidence does not, by itself, demand a conclusion that only a "medical possibility" has been shown. The evidence presented here, simply stated, is that stress is a factor, albeit minor, in causing heart disease; the risk of heart disease multiplies with each additional risk; decedent was under employment-related stress both from an incident the day of her attack and from daily stress, and she had a heart attack. Moreover, there was contested evidence that, as evidenced by the autopsy, stress exacerbated decedent's hypertension and that absent the stress, decedent would have lived another five to ten years. There was sufficient medical testimony presented to support the hearing examiner's decision.

II. DID THE HOSPITAL HAVE ACTUAL NOTICE?

{13} Section 52-1-29(B) excuses the written notice requirements of subsection (A), and states:

> No written notice is required to be given where the employer or any superintendent

evidence indicated that the immediate cause of the heart attack was stress, other evidence was to the effect that stress was not the cause. In other words, the instant case presents us, as it did the hearing examiner, with conflicting evidence that required the finder of fact to determine facts based on its evaluation of credibility, demeanor, and other relevant factors, not evidence that required the fact finder to speculate as to causation.

> or foreman or other agent in charge of the work in connection with which the accident occurred had actual knowledge of its occurrence.

{14} The Hospital argues that we are presented with a narrow legal issue: whether knowledge of an on-the-job heart attack constitutes actual knowledge of an accident sufficient to satisfy Section 52-1-29(B). This appears to be the position of the court of appeals, which, despite the hearing examiner's finding of actual notice based on the Hospital employees' knowledge of the time, place, and circumstances of the accidental death, determined that "there is no evidence in the record that [the Hospital] knew that the heart attack was caused by the decedent's employment."

{15} In a workers' compensation case where a dependent seeks benefits based on the worker's death by heart attack, the death is analyzed as the disability, the heart attack as the injury, and the employment-related stress as the accident. **Oliver**, 106 N.M. at 351, 742 P.2d at 1056 (analyzing whether a fire fighter who died as a result of a heart attack was entitled to benefits pursuant to Section 52-1-28). In the instant case, the hearing examiner made a finding that the Hospital had actual notice based on the circumstances. Those circumstances incontrovertibly included knowledge of the heart attack (the injury) and the death (disability). The remaining questions of fact were whether the Hospital had knowledge of the job-related stress (the accident) and causation between the accident and the injury, and the examiner found that it did.

{16} We conclude that ample evidence supports the finding of knowledge under the unique facts and setting of this case. The Hospital knew of the decedent's heart attack—not only did she suffer the heart attack at work, but she was treated and died there. The Hospital also knew of her stressful schedule. Decedent worked a forty-hour week; she was on call an additional eighty hours a week, she attended school, and she was involved in merger plans, all with the Hospital's knowledge. Moreover, testimony indicated that decedent had an argument with one of the hospital's surgeons on the day of her death.[3]

{17} The court of appeals rejected petitioner's argument that Section 52-1-29(B) was satisfied because the Hospital's knowledge of decedent's death by heart attack at work constituted knowledge of the accident. We agree with that court to the extent that it opined that the employer must have knowledge of the accident, not merely the injury, **see Herndon v. Albuquerque Public Schools**, 92 N.M. 635, 593 P.2d 470 (Ct. App. 1978), and that, although a heart attack can be compensable under New Mexico law, **see Oliver**, 106 N.M. at 352, 742 P.2d at 1057; **Sanchez v. Board of County Comm'rs**, 63 N.M. 85, 313 P.2d 1055 (1957), not every heart attack is compensable—it must relate to the employment. **See Wilson v. Navajo Freight Lines, Inc.**, 73 N.M. 470, 473, 389 P.2d 594, 596 (1964). An element of causation must be present, and the employer must have knowledge that a work-related accident caused the injury for the actual notice requirement to be met. **See Herndon**, 92 N.M. at 642, 593 P.2d at 477; 2B A. Larson, **The Law of Workmen's Compensation** 78.31(a)(2). The employer has actual notice of a job-related accident as required by the statute

[3] The Hospital argues that the purported knowledge of the testifying physician (who apparently was an independent physician at the Hospital and was not on the staff) regarding job-related stress does not establish the Hospital's knowledge of the accident. In this regard the Hospital misapprehends the role of an appellate court in reviewing the evidence and the function of circumstantial evidence in establishing facts, including actual knowledge. **See Professional Insurors, Inc. v. Buck Scott & Son Motor Co.**, 110 N.M. 299, 795 P.2d 991 (1990). We extend every reasonable inference to the finder of fact to determine whether a finding is supported. In this case, in the context of the hospital setting, we find the hearing officer's inferences from the testimony of the physician (even assuming **arguendo** that his knowledge does not constitute knowledge of the Hospital) that a staff physician, who induces stress by dressing down an employee, has knowledge of a stressful environment and therefore knowledge of the accident. We reject the Hospital's argument that only the knowledge of decedent's immediate supervisor or the knowledge of the personnel director are relevant. In a hospital setting, the knowledge of a staff surgeon may suffice to meet the requirements of Section 52-1-29(B). Moreover, we find the examiner's finding of actual knowledge of the accident a reasonable inference from the Hospital's knowledge of decedent's schedule in the context of the hospital setting.

when he has knowledge of the injury and "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." 2B A. Larson, **supra,** 78.31(a)(2) at 15-133 to -136 (footnotes omitted); **see Collins v. Big Four Paving, Inc.**, 77 N.M. 380, 383, 423 P.2d 418, 420 (1967) (actual knowledge "does not mean first-hand knowledge, but only 'knowledge' as the word is used in common parlance. . . . 'Actual knowledge' is knowledge sufficient to impress a reasonable man, i.e., knowledge obtained in the daily affairs of life, but not absolute certainty.") (citations omitted).

{18} The finding that the Hospital had actual knowledge of the circumstances of decedent's accidental death, which we have found supported by the evidence, constitutes a finding of causation. Such a conclusion need not rest on the admittedly flimsy logic that knowledge of the stress, heart attack, and death necessarily leads to the conclusion that an employer knew of causation. The hearing examiner was entitled to draw inferences from the facts presented. **See Powers v. Riccobene Masonry Constr., Inc.**, 97 N.M. 20, 636 P.2d 291 (Ct. App. 1980). The totality of the facts and circumstances determine whether an employer has actual knowledge of a compensable injury. **Rohrer v. Eidal Int'l**, 79 N.M. 711, 713, 449 P.2d 81, 83 (Ct. App. 1968). The examiner could reasonably infer from the evidence presented that the Hospital through its employees knew that the work-related stress induced the heart attack and gave rise to a potential claim.

{19} Moreover, the reasons and policies underlying the notice requirement support our conclusion. The requirement is designed to protect the employer, allowing it to investigate the facts and circumstances surrounding an injury while the facts are accessible. It allows the employer to act to prevent the filing of fictitious claims and to make sure an injured employee receives proper medical attention. **See Herndon,** 92 N.M. at 641, 593 P.2d at 476 (citing **Ogletree v. Jones,** 44 N.M. 567, 106 P.2d 302 (1940)); **Beckwith v. Cactus Drilling Corp.**, 84 N.M. 565, 568, 505 P.2d 1241, 1244 (Ct. App.), **cert. denied,** 84 N.M. 560, 505 P.2d 1236 (1973). Under the circumstances of the instant case, it is apparent that the reasons behind the notice requirement cannot be further served. The Hospital was in as good a position (if not better) as decedent or Herman to investigate the situation and provide prompt medical assistance. **See Collins**, 77 N.M. at 383, 423 P.2d at 420 (although bodies not yet discovered, employer and insurer had benefit of all known facts within a few days of decedents' disappearance in plane wreck, and under the circumstances further investigation would serve no purpose).

{20} The court of appeals apparently felt compelled to reverse the hearing examiner by our opinion in **Wilson v. Navajo Freight Lines, Inc.**, 73 N.M. 470, 389 P.2d 594 (1964). In **Wilson,** the fact finder had **denied** the employee-claimant benefits. The employee had been a truck driver who, while driving through Missouri for the defendant-employer, suffered a heart attack. The employer was not given written notice, and we refused to hold that, as a matter of law, the employer's notice of a heart attack that occurred on the job constituted knowledge of the accident. **Id.** at 473, 389 P.2d at 596. **Wilson** is readily distinguished from the case at bar. The hearing examiner found actual notice based on the unique circumstances and setting of this case, and on review we find substantial support for that finding.[4]

III. WAS THE STATUTE OF LIMITATIONS TOLLED?

{21} NMSA 1978, Section 52-1-58 requires an employer to file a written report of a compensable accidental injury suffered by an employee

[4] Moreover, a common-sense consideration of this problem demonstrates the logic of our conclusion and the reasonableness of the hearing examiner's inferences. Whereas a trucking company may not be in a position to know reasonably that a heart attack suffered by a driver somewhere in Missouri is related causally to the employment and, therefore, the result of a work-related accident, a hospital could know reasonably that a heart attack suffered by a nurse while under stress both from an accident that same day and from the daily demands of her occupation is connected causally to her employment, at least to the extent that it has notice of a potential claim.

with the labor commissioner within ten days of the injury. Section 52-1-59 provides that the effect of a failure to file is that no claim for compensation is barred prior to the filing of the appropriate report. Section 52-1-31(B) contains the otherwise applicable statute of limitations and the procedure for filing a claim upon the death of a worker for which compensation may be received. Eligible dependents are entitled to recover benefits, although no claim can be filed unless notice has been given as required by Section 52-1-29 and a claim is filed within a year of the worker's death.

{22} In the present case, the claim was filed almost two years after decedent's demise. The hearing examiner, however, found the statute of limitations was tolled and the claim was not barred because of the Hospital's failure to file a first report of accident as required by Section 52-1-58. The court of appeals held otherwise, determining that, because it reversed the examiner's finding of actual notice, **Wilson** required the conclusion that the statute of limitations was not tolled. **See** 73 N.M. at 474, 389 P.2d at 596. Although the court of appeals properly construed **Wilson**, it applied an erroneous factual predicate. Our conclusion that the Hospital did have notice mandates the application of Section 52-1-59 to toll the time limitation. The Hospital had actual notice of the compensable injury, yet failed to file a written report as required. Thus, we hold that the claim is not time barred. **See Wilson**, 73 N.M. at 474, 389 P.2d at 596; **Sanchez v. Bernalillo County**, 57 N.M. 217, 257 P.2d 909 (1953); **Cisneros v. Molycorp, Inc.**, 107 N.M. 788, 765 P.2d 761 (Ct. App.), **cert. denied**, 107 N.M. 785, 765 P.2d 758 (1988).

{23} Accordingly, we reverse the decision of the court of appeals and reinstate the judgment of the worker's compensation hearing officer.

{24} IT IS ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1991-NMSC-048

Filing Date: May 8, 1991, As Amended

Docket Nos. 19,052, 19,268

STATE OF NEW MEXICO, ex rel. TOM UDALL, Attorney General,

Plaintiff-Appellant,

v.

COLONIAL PENN INSURANCE CO., FIREMAN'S FUND INSURANCE CO., AMERICAN FUND INSURANCE CO.,

Defendants-Appellees,

and

STATE OF NEW MEXICO, ex rel. TOM UDALL, Attorney General,

Plaintiff-Appellant and Cross-Appellee,

v.

DEAN WITTER REYNOLDS, INC.,

Defendant-Appellee and Cross-Appellant.

Appeal from the District Court of Santa Fe County
Steve Herrera, District Judge

Motion for Rehearing Denied July 17, 1991

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OPINION

BACA, Justice.

{1} The state appeals from summary judgment granted in two lawsuits that have been consolidated on appeal. In appeal number 19,052 we affirm the summary judgment granted in favor of three insurers, defendants-appellees Colonial Penn Insurance Company (Colonial), Fireman's Fund Insurance Company, and American Insurance Company (the latter two responded together and are jointly referred to as "Fireman's Fund"). In appeal number 19,268 the state appeals summary judgment entered in favor of Dean Witter Reynolds, Inc. (Dean Witter), and we reverse.

{2} On April 26, 1984, the State Investment Officer, Philip Troutman, purchased 75,000 shares of stock in Schlumberger, Inc. After placing the order, Troutman became aware that Schlumberger was not a United States corporation; in fact it was incorporated in the Netherlands Antilles, although it did business in the United States. Believing this investment may have been contrary to New Mexico law, Troutman contacted the attorney general's office on April 27th. That office advised Troutman to deal with the

stock using the mandated prudent man test and on June 21st issued an opinion that the purchase was illegal. The stock was sold in 1986—the state claims a loss of approximately $1.2 million.

{3} The state and Dean Witter had entered into a professional services contract dated September 28, 1983, whereby Dean Witter would advise the State Investment Council and Officer regarding investment of the equity portion of the State Permanent Fund and Severance Tax Fund. It is alleged that Dean Witter advised the state to purchase Schlumberger stock and that Dean Witter knew of the limitations on stock purchases.

{4} The three insurance companies issued public employee blanket bonds covering New Mexico state employees, including Troutman, for unfaithful performance of their duties. In September 1985 the state notified appellees of potential claims on the bond arising out of the Schlumberger transaction. Colonial denied the claim in October. Relying on time-to-sue provisions in the contracts, the other insurers also denied the claim, in November 1988.

I. NONPAYMENT ON THE PERFORMANCE BONDS—THE INSURERS.

A. Time-to-sue provisions do not violate public policy.

{5} The bond contracts all contained provisions similar to the following:[1]

> This endorsement shall be deemed cancelled as to any Employee: (a) Immediately upon discovery by the Insured of any act on the part of such Employee which would constitute a liability of the Company under the applicable Insuring Agreement covering such Employee[.]
>
> . . . .
>
> No suit, action or proceeding of any kind to recover on account of loss under this endorsement shall be brought after the expiration of three years from the cancellation of this endorsement as an entirety provided, however, that if such limitation for bringing suit, action or proceeding is prohibited or made void by any law controlling the construction of this endorsement, such limitation shall be deemed to be amended so as to be equal to the minimum period of the limitation permitted by such law.

{6} The state contends the time-to-sue provisions as asserted against the sovereign violate public policy and should be declared void. Our courts consistently have held that contractual limitations on actions, including time-to-sue provisions, will be enforced unless they violate public policy. **See, e.g., Green v. General Accident Ins. Co. of Am.,** 106 N.M. 523, 525, 746 P.2d 152, 154 (1987); **Diebold Contract Servs., Inc. v. Morgan Drive Away, Inc.,** 95 N.M. 9, 11, 617 P.2d 1330, 1332 (Ct. App. 1980). We reaffirm the principle that limitations on actions that violate public policy are unenforceable, but hold that the case at bar does not present such public policy considerations to require us to negate a contractual provision.

{7} The state argues that preservation of the public fisc constitutes a strong public policy violated by a limitation on the time to sue and refers to a line of authority holding that **statutes of limitations** cannot be asserted against the state to defeat a claim. **See, e.g., Ross v. Daniel,** 53 N.M. 70, 201 P.2d 993 (1949); **State v. Roy,** 41 N.M. 308, 68 P.2d 162 (1937). Such limits cannot be asserted against the state unless the statute expressly includes the state within its ambit, or the legislative intent is such that by clear implication the state is included. **Ross,** 53 N.M. at 75, 201 P.2d at 996; **Roy,** 41 N.M. at 312-13, 68 P.2d at 164-65.

{8} A statute of limitations, however, differs from the provisions at issue in the instant case. The time-to-sue provisions are contractual

[1] This language is quoted from Colonial's contract.

clauses agreed to between the state and the insurers to apply to a specific issue. As such they more closely resemble a statute of limitations that by its terms expressly is applied against the state than a statute of general applicability.

{9} The provisions also present a countervailing public policy consideration—the freedom to contract.

> New Mexico . . . has a strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals. "Great damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in "a legal relationship voluntarily assumed by the parties."

United Wholesale Liquor Co. v. Brown-Forman Distillers Corp., 108 N.M. 467, 471, 775 P.2d 233, 237 (quoting **City of Artesia v. Carter,** 94 N.M. 311, 314, 610 P.2d 198, 201 (Ct. App.), **cert. denied,** 94 N.M. 628, 614 P.2d 545 (1980)). This court has previously enforced contractual provisions against the state to the detriment of the sovereign. **See, e.g., Vinnell Corp. v. State,** 85 N.M. 311, 512 P.2d 71 (1973) (state liable to construction contractor for increased costs caused by misleading specifications on theory of breach of implied warranty of correctness). We also have rejected the argument that a public contract should be construed liberally in favor of the public interest when to do so would be unreasonable and require abrogation of accepted rules of contract interpretation. **Schultz & Lindsay Constr. Co. v. State,** 83 N.M. 534, 536, 494 P.2d 612, 614 (1972).[2]

{10} The state, nonetheless, contends that the provisions at issue were neither bargained for nor essential to the agreement and asserts, therefore, that the public interest inherent in the doctrine that statutes of limitations should not apply against the state outweighs the policy in favor of freedom to contract. Stated another way, if a time-to-sue provision is analogous to a statute of limitations that expressly includes within its purview the state, because the provision was not bargained for, the state has not consented to be governed by it. We find no evidence to support this contention. **See Koenig v. Perez,** 104 N.M. 664, 726 P.2d 341 (1986) (after movant makes out a prima facie showing for summary judgment, burden shifts to opposing party to show reasonable doubt). "Generally, a party who executes and enters into a written contract with another is presumed to know the terms of the agreement, and to have agreed to each of its provisions in the absence of fraud, misrepresentation or other wrongful act of the contracting party." **Smith v. Price's Creameries,** 98 N.M. 541, 545, 650 P.2d 825, 829 (1982). The state has offered no evidence to demonstrate that the contract was unconscionable or one of adhesion, that it was in an unequal bargaining position with the insurers. **Cf. Guthmann v. La Vida Llena,** 103 N.M. 506, 709 P.2d 675 (1985); **Albuquerque Tire Co. v. Mountain States Tel. and Tel. Co.,** 102 N.M. 445, 697 P.2d 128 (1985). In **Sanchez v. Kemper Insurance Cos.,** 96 N.M. 466, 467, 632 P.2d 343, 344 (1981), we noted several policy reasons for time-to-sue provisions, including removal of uncertainty regarding the insurer's liability. Such a provision is an essential element of the bond contract and forms part of the bargain. Even if, as the state claims, it did not negotiate actively over the provisions, the limitations on the right to sue were part of the agreement and represented an element of the consideration.[3]

B. Fireman's Fund is not estopped.

{11} Although it did not deny the claim until 1988, Fireman's Fund is not estopped from asserting the time-to-sue provisions. The state

[2] Moreover, the legislature has demonstrated its intent that the state should enter into and be bound by contracts by allowing suit based on valid written contracts. **See** NMSA 1978, 37-1-23 (Repl Pamp. 1990).

[3] Furthermore, an insurer need not demonstrate prejudice from the lack of timely filing. It must show only the breach of a time-to-sue provision. **Green**, 106 N.M. at 525, 746 P.2d at 154; **Sanchez,** 96 N.M. at 468, 632 P.2d at 345.

refers us to authority for the proposition that a time-to-sue provision is tolled in the period between the insurer's notice of the claim and its denial. **See Solomon Lieberman and Chevra Lomdei Torah v. Interstate Fire and Casualty Co.,** 768 F.2d 81 (3rd Cir. 1985); **Ford Motor Co. v. Lumbermens Mut. Casualty Co.,** 413 Mich. 22, 319 N.W.2d 320 (1982). This rule has not achieved universal acceptance. **See International School Servs., Inc. v. Northwestern Nat'l Ins. Co.,** 710 F. Supp. 86 (S.D.N.Y. 1989) (choice of law question presented by assertion of tolling issue). The facts presented, however, render that authority inapposite, and we express no opinion on that issue. The state gave Fireman's Fund notice of an act constituting **potential** liability in 1985—the state does not point to any evidence to support that it asserted a claim to recover a specific amount of loss before expiration of the three-year period. The state, simply by selling the stock, could have reduced the act constituting the potential liability to a dollar amount that could then be asserted against the insurer, but it did not. Fireman's Fund, although on notice of a potential claim, had no notice of an actual claim until after the stock was sold at a loss. The state has not indicated that such notice was given within three years, and we hold that, even if the time to sue would have been tolled after notice to the insured, the state did not present a cognizable claim within the required period.

{12} Fireman's Fund also is not estopped to assert the three-year time-to-sue provision even though it gave notice to the state that the **statute of limitations** may affect payment on the bond. Equitable estoppel requires that the party asserting estoppel lacks knowledge of the truth and relies on the other party's misrepresentation. **See Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.,** 99 N.M. 95, 101, 654 P.2d 548, 554 (1982). The state knew of the three-year time-to-sue provision. No evidence of the state's reliance on the insurer's statement and on the six-year statute of limitations has been presented, and, moreover, since: the state knew of the contractual limitation, such reliance would not have been reasonable. **See C & L Lumber and Supply, Inc. v. Texas Am. Bank/Galeria,** 110 N.M. 291, 795 P.2d 502 (estoppel requires that reliance be reasonable).

C. The time-to-sue provisions began to run when the illegal act was discovered.

{13} The state asserts that damages and even the fact of loss were not ascertainable until after the sale of the stock. Therefore, the cause of action did not accrue until it was remediable in court, and the time to file suit did not begin to run until the sale of the stock.

{14} We disagree. The contract indicates that: (1) the time-to-sue was within three years of the cancellation of the bond, and (2) the bond was deemed cancelled when the state discovered any act by an employee that would constitute a liability on the bond. The illegality was discovered almost immediately after the state purchased the stock, and by its clear terms, the contract requires that suit be brought within three years of that date.

II. SUMMARY JUDGMENT IN FAVOR OF DEAN WITTER.

A. Filing of late notice of appeal was within court's discretion.

{15} Dean Witter filed a cross appeal, arguing that the court erred when it allowed the state to file notice of appeal thirty-five days after entry of judgment. A notice of appeal must be filed within thirty days of entry of judgment. SCRA 1986, 12-201(A). The time period may be extended "upon a showing of excusable neglect: or circumstances beyond the control of the appellant." 12-201(E)(2).

{16} We review the court's decision to extend the time to file notice of appeal applying an abuse of discretion standard. **See Guess v. Gulf Ins. Co.,** 94 N.M. 139, 607 P.2d 1157 (1980). The circumstances below were sufficiently unique to excuse the state's failure to file in a timely manner, and we affirm the court's use of discretion.

B. Liability of the Investment adviser—Dean Witter.

{17} The state sued Dean Witter claiming the investment adviser was liable for damages incurred by the state in the illegal purchase of the Schlumberger stock. The complaint alleged breach of contract, breach of fiduciary duty, negligent misrepresentation, and fraud.

{18} The state maintains that there were genuine issues as to material facts in this case, making summary judgment inappropriate. **See State v. Intern Indem. Corp.,** 105 N.M. 611, 735 P.2d 528 (1987); SCRA 1986, 1-056(C). If genuine controversy as to material facts exists, a motion for summary judgment should be denied, and the case should proceed to trial. **Great W. Constr. Co. v. N.C. Ribble Co.,** 77 N.M. 725, 427 P.2d 246 (1967).

1. The purchase was illegal.

{19} The state's claims are predicated on the illegality of the transaction giving rise to Dean Witter's contractual liability. Thus, as a threshold matter, we confront whether the purchase of stock in a corporation that does business and maintains corporate offices in the United States, but technically has been formed and registered abroad, is legal.

{20} Our constitution provides in part that "stocks eligible for purchase [by the State Investment Officer] shall be restricted to those stocks of businesses incorporated within the United States." N.M. Const. art. XII, 7. Legislation allows the state to invest in "common and preferred stocks and convertible issues of any corporation organized and operating within the United States." NMSA 1978, 6-8-9(F) (Repl. Pamp. 1988) The court below concluded that the term "incorporated" as used in the constitutional provision has the same meaning as the statutory clause, "organized and operating," and that a company "organized and operating within the United States" is also "incorporated within the United States," even though it technically may be incorporated outside of the United States.

{21} Section 6-8-9 was adopted by the 1957 legislature—the same legislature that proposed the amended Article XII, Section 7 for ratification by the electorate—and the statute was promulgated contingent upon the constitutional amendment taking effect. Dean Witter suggests that the contemporaneous proposal of the amendment and adoption of the statute indicates that the terms—"incorporated within the United States" and "organized and operating within the United States"—must be interpreted to mean the same thing. We must determine, first, whether that assertion is correct, and, second, what the terms at issue mean.

{22} We interpret our constitution to carry out its spirit, avoiding legal technicalities and subtle niceties. **Gomez v. Board of Educ.,** 76 N.M. 305, 309, 414 P.2d 522, 525 (1966).

> "What the framers of the Constitution intended as disclosed by the language employed is, of course, the interpretation properly to be given the instrument. . . . We should, as nearly as we may, endeavor to look at the instrument from the vantage point of the framers the better to understand their view of the matter and the meaning likely intended. . . .
>
> . . . And whenever we refer to the framers that term is to be taken as embracing the people who adopted it. We are not unmindful of the rule of construction applicable to a Constitution that its language is to be taken in its common and ordinary sense and as likely understood by the people who adopted it. . . ."

State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 691, 437 P.2d 143, 152 (1968) (quoting **Todd v. Tierney,** 38 N.M. 15, 24-25, 27 P.2d 991, 997 (1933)).

{23} A contemporaneous construction by the legislature of a constitutional provision is a "safe guide to its proper interpretation," and creates "a strong presumption" that the interpretation was proper. **Humana of New Mexico, Inc. v. Board**

of County Comm'rs, 92 N.M. 34, 582 P.2d 806 (1978).[4]

{24} Dean Witter thus asserts that, pursuant to these canons of construction, we must find that the statute and amendment have identical meanings. We disagree. The statute and amendment have different meanings—it would torture the language to determine otherwise. In **State v. Ball,** 104 N.M. 176, 181, 718 P.2d 686, 691 (1986), we construed the constitution in light of legislative inaction—the contemporary legislators felt that an amendment did not compel a change in an existing statute.[5] If we had construed the constitution differently, we would have in effect determined that the contemporary legislators, with knowledge of the existing statute, had proposed the amendment yet not altered the conflicting and, therefore, unconstitutional statute. Here, on the other hand, we are not being asked to declare the statute unconstitutional,[6] and we are not forced to choose between the language of the constitution and a contemporaneous construction by the legislature. The amendment and the statute can be construed to have different yet consistent meanings.

{25} Nonetheless, we are asked to conclude that the statute and constitution are redundant. To the contrary, we believe the legislature intended some further restriction on investment by passing the statute.[7]

{26} While we agree with Dean Witter that the statutory language "organized and operating within the United States" would include Schlumberger, we do not agree that Schlumberger is "incorporated within the United States" as required by the constitution. "Incorporated" is defined as "united in one body: formed into a corporation: made a legal entity." **Webster's Third International Dictionary** (1976). The plain meaning, as understood by the electorate when ratifying the constitutional amendment, requires that to be eligible for investment, the corporation must have been formed or made a legal entity in the United States. Schlumberger was formed and made a legal entity in the Netherlands Antilles. Accordingly, we hold the purchase violated Article XII, Section 7.

2. Delegation of the investment officer's duties.

{27} The court determined the duties imposed by law on the State Investment Office, Officer, and Council were nondelegable as a matter of law; the contract did not delegate to Dean Witter any of the state's duties, nor did it require Dean Witter to recommend only stock technically incorporated in the United States. The state argues that whether any of the responsibilities of the Investment Officer were or could have been delegated by contract to Dean Witter did not dispose of the issues in this case on summary judgment. It asserts that Dean Witter was contractually obligated to provide the state with investment advice consistent with legal requirements and maintains that Dean Witter is estopped to are an illegal delegation.

[4] What we have meant by "contemporaneous construction," however, is not always clear. **Compare Humana,** 92 N.M. at 36, 582 P.2d at 808 (contemporaneous construction is construction given in light of modern, current conditions **with State v. Ball,** 104 N.M. 176, 181, 718 P.2d 686, 691 (1986) (contemporary construction is that given by legislature in office at time amendment adopted).

[5] **See also State ex rel. Gomez v. Campbell,** 75 N.M. 86, 400 P.2d 956 (1965). In **Campbell,** the framers did not change an existing statute when they adopted the constitution. Accordingly, we determined that the framers did not intend the constitution to alter that pre-existing law. **Id.** at 94, 400 P.2d at 962.

[6] **Cf. Ball,** 104 N.M. at 178, 718 P.2d at 688 ("It is the duty of this Court to uphold statutes unless it is satisfied beyond all reasonable doubt that the Legislature went outside the Constitution in enacting the challenged legislation." **Board of Trustees v. Montano,** 82 N.M. 340, 481 P.2d 702 (1971) (presumption that statute as passed by legislature is constitutional); **Humana,** 92 N.M. at 36, 582 P.2d at 808 (same).

[7] If the legislature had intended the statute to be identical to the constitution, it could have used the same language in both. It chose, however, to use different language, and we construe the intent in passing the statute to have been to create a different standard. **See Montoya v. McManus,** 68 N.M. 381, 362 P.2d 771 (1961) (legislative intent determined from language of act).

{28} Dean Witter contends the duties and responsibilities of the State Investment Officer, as set forth in Sections 6-8-4 and -7, cannot be delegated—possession by an outside advisor of even a portion of the State Investment Officer's decision-making power would be unlawful.

{29} At issue in this suit are claims either on or relating to the contract for advice regarding investment of the Permanent Funds. It is not claimed, nor does it appear, that the contract was illegal. The question can be framed as an estoppel. Alternatively, it can be framed simply as, because this suit is not to hold Dean Witter liable for an act that state officers could not delegate but rather for lawfully-assumed contractual duties, Dean Witter's assertion that the state could not delegate its liability is not relevant to this lawsuit. The question is not whether, as a matter of law, Dean Witter could be delegated the duty to insure that constitutional requirements were met. To the contrary, the issue is whether, within the scope of the duties and potential liabilities established within the contractual relationship, Dean Witter was required to advise the state to make lawful investments. We hold that the contract did not delegate nondelegable duties to Dean Witter, and Dean Witter is estopped to assert that doctrine as a bar to suit on the contract.

3. The contract obligated Dean Witter to give advice that conformed to applicable law.

{30} The district court concluded that the contract did not obligate Dean Witter to provide advice consistent with New Mexico Constitution, Article XII, Section 7, or to recommend only stock of companies technically incorporated within the United States. A contract incorporates the relevant law, whether or not it is referred to in the agreement. **Montoya v. Postal Credit Union,** 630 F.2d 745 (1980). In construing a contract, the law favors a reasonable rather than unreasonable interpretation. **Brown v. American Bank of Commerce,** 79 N.M. 222, 441 P.2d 751 (1968). Contracts in violation of our public policy, as manifest in positive law, are unenforceable. **DiGesu v. Weingardt,** 91 N.M. 441, 443, 575 P.2d 950, 952 (1978) (split use of single liquor license would circumvent statute limiting number of licenses and contract to so do not enforceable). The state did not contract with Dean Witter for illegal investment advice. To interpret the contract otherwise would not be reasonable and potentially would place the contract in jeopardy of being declared unenforceable as violative of public policy. Thus, we hold that the contract included reference to the relevant constitutional provision.[8]

{31} The contract included a provision exculpating Dean Witter from liability for losses except those arising out of "knowing willful misfeasance, bad faith, or reckless disregard." Our review of the record indicates controverted material issues of fact with regard to "knowing willful misfeasance, bad faith, or reckless disregard" of Dean Witter's contractual obligations, including whether Dean Witter had notice of the constitutional limitations, and we reverse the award of summary judgment on the breach of contract claim.

4. A fiduciary relationship end.

{32} The district court concluded the contract did not create a fiduciary duty between the state and Dean Witter; the facts of this case indicated that no fiduciary relationship existed; Dean Witter did not breach a fiduciary duty, and Dean Witter was entitled to summary judgment on the state's claim of breach of fiduciary duty.

{33} Dean Witter argues that a fiduciary duty is limited to trustee or quasi-trustee relationships, to certain principal-agent relationships, and to partnership relationships. We disagree. Investment advisers enter into relationships of "'trust and confidence' with their clients." **SEC v. Capital Gains Research Bureau, Inc.,** 375 U.S. 180, 190 (1963).[9] In the Investment

[8] It is irrelevant that the contract is unambiguous. **See Brown,** 79 N.M. at 226, 441 P.2d at 755 (interpretation of unambiguous contract must be reasonable and requires ascertaining of intent from language used).

[9] "Fiduciary" has been defined as "holding in trust or confidence." **State v. Moss,** 83 N.M. 42, 44, 487 P.2d 1347, 1349 (Ct. App. 1971); **see also Swallows v. Laney**, 102 N.M. 81, 84, 691 P.2d 874, 877 (1984) ("A fiduciary relationship exists

Advisers Act of 1940, 15 U.S.C. Sections 80b-1 to 80b-21 (1988), Congress recognized that the investment adviser is a fiduciary. **Capital Gains Research Bureau,** 375 U.S. at 194. As a fiduciary, an adviser is under "an affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation 'to employ reasonable care to avoid misleading' his clients." **Id.** (quoting Prosser, **Law of Torts** 534-35 (1955), and 1 Harper & James, **The Law of Torts** 541 (1956)). Accordingly, we reverse the award of summary judgment on the cause of action for breach of fiduciary duty.

5. Causation.

{34} There are material issues of fact regarding whether the advice given by Dean Witter caused the loss to the state. We do not view as a bar to recovery that the state, pursuant to legal requirements, did not immediately divest itself of ownership in the illegal stock. Nor do we find dispositive that state officers made the immediate decision to purchase the stock. The question is whether the advice was counter to a duty created by the contract, and whether such advice proximately caused the state's losses.

6. Tort claims in negligent misrepresentation and fraud.

{35} In two separate counts, the state asserted causes of action in negligent misrepresentation and fraud. The court granted summary judgment on both, finding that Dean Witter did not misrepresent or omit material facts in connection with the stock purchase and did not commit fraud.

{36} The state argues there are factual questions that made summary judgment inappropriate. Dean Witter asserts that an action in negligent misrepresentation is grounded in negligence principles, **Maxey v. Quintana,** 84 N.M. 38, 499 P.2d 356 (Ct. App.), **cert. denied,** 84 N.M. 37, 499 P.2d 355 (1972), and the state failed to show a duty or causation. We have already determined that the contract created a duty and that there was a question of fact regarding causation.

{37} Dean Witter, however, contends in the alternative that we should affirm because a cause of action cannot be maintained where the misrepresentation is the same conduct upon which the claim for breach of contract is premised. **See Rio Grande Jewelers Supply, Inc. v. Data General Corp.,** 101 N.M. 798, 689 P.2d 1269 (1984); **Isler v. Texas Oil & Gas Corp.,** 749 F.2d 22 (1984). Dean Witter overstates the holding of **Rio Grande.**[10] We do agree, however, with the limited rule that the concept of freedom of contract and notions of contractually assumed duties and liabilities can act to limit general tort liability in certain circumstances when limited liability is expressly bargained for. **Isler,** 749 F.2d at 23. "No reason appears to support such a radical shift from bargained-for duties and liabilities to the imposition of duties and liabilities that were expressly negated by the parties themselves when they decided to abandon their status as legal strangers and define their relationship by contract." **Id.** The instant case illustrates that principle and does not require us to consider a broader rule.

{38} The contract contains an exculpatory clause, stating:

> The Contractor shall not be liable for any mistake in judgment or law or for any losses except those arising out of Contractor's own willful misfeasance, bad faith or reckless disregard of Contractor's obligations under this Agreement or as may be otherwise provided by law.

in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of one reposing the confidence.").

[10] Moreover, neither party has addressed the effect of our decision in **Wilburn v. Stewart**, 110 N.M. 268, 794 P.2d 1197 (1990), on the rule as stated in **Rio Grande.** In **Wilburn,** we overruled that part of **Bell v. Lammon,** 51 N.M. 113, 179 P.2d 757 (1947), relied on by **Rio Grande** for the proposition that the parol evidence rule precluded admission of evidence regarding misrepresentation in the inducement. 110 N.M. at 270, 794 P.2d at 1199.

Thus, the parties contracted away liability for negligence in performance of the contractual duties, such as the negligent misrepresentation alleged here.

{39} The exculpatory language does not, however, exclude liability for fraudulent misrepresentation. "Actionable fraud consists of misrepresentation of a fact, known to be untrue by the maker, and made with an intent to deceive and to induce the other party to act in reliance thereon to his detriment." **Card v. Sherrod,** 96 N.M. 431, 432-33, 631 P.2d 726, 727-28 (1981). Our examination of the evidence presented by the state to defeat the summary judgment motion indicates the existence of questions of fact regarding the fraud claim; thus summary judgment was inappropriate.

{40} In accordance with the foregoing, we affirm in part and reverse in part, and we remand for trial in a manner not inconsistent with our opinion.

{41} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1991-NMSC-094

Filing Date: September 25, 1991

Docket No. 18,938

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MERRILL CHAMBERLAIN,

Defendant-Appellant.

Appeal from the District Court of Bernalillo County
Frank Allen, District Judge

Robert J. Jacobs
Taos, New Mexico

for Appellant.

Tom Udall, Attorney General
Charles Rennick, Assistant Attorney General
Santa Fe, New Mexico

for Appellee.

OPINION

BACA, Justice.

{1} Defendant-appellant Merrill Chamberlain appeals his conviction on a charge of first-degree murder for which he received a life sentence.

{2} On February 21, 1987, Chamberlain hired a female prostitute whom he then brought to his home. That evening she called the police to report a beating. Officers Carrillo and Messimer of the Albuquerque Police Department responded. Chamberlain denied that a woman was present and allowed the police to enter the house, consenting to their search. The officers conducted an initial search of the premises and did not find the woman, although they found evidence that a woman had been in the home. They sought to continue the search and wanted to return to the upstairs, but Chamberlain attempted to withdraw his consent. The officers insisted on continuing to search and accompanied Chamberlain to his bedroom. Chamberlain removed a semi-automatic weapon from the bedroom and took it into the bathroom. He then shot and killed Officer Carrillo.

{3} Two trials were held. In the first, Chamberlain was convicted of several lesser offenses, but a mistrial was declared on the capital charge. This appeal is taken from his conviction in the second trial.

{4} Appellant asserts the court erred in its: (1) refusal to change venue; (2) refusal to strike the jury venire; (3) failure to excise or suppress portions of a tape recording made during the shooting; (4) refusal to propound requested jury instructions; (5) refusal to grant a mistrial for prosecutorial misconduct; (6) failure to instruct the jury that, after it began to consider a lower count, it could not reconsider a higher count; and (7) failure to grant a new trial because of jury experimentation. He also contends he was denied effective assistance of counsel in violation of the sixth amendment and that cumulative error requires reversal. We consider appellant's arguments, and we affirm.

I. CHANGE OF VENUE

{5} Appellant moved for a change of venue pursuant to NMSA 1978, Section 38-3-3 (Repl. Pamp. 1987), arguing that extensive publicity had exposed potential jurors to information regarding the case. The motion was denied with leave to renew after voir dire. The renewed motion was also denied, and appellant asserts the court thereby abused its discretion and violated his right to a fair trial.

{6} The trial court possesses broad discretion in ruling on motions to change venue, and we will not disturb its decision absent a showing of an abuse of that discretion. **State v. Martin,** 101 N.M. 595, 686 P.2d 937 (1984). The burden to show an abuse of discretion lies with the movant. **State v. Jimenez,** 84 N.M. 335, 337, 503 P.2d 315, 317 (1972). Exposure of venire members to publicity about a case by itself does not establish prejudice or create a presumption of prejudice. **State v. McGuire,** 110 N.M. 304, 311, 795 P.2d 996, 1003 (1990); **see also State v. Hargrove,** 108 N.M. 233, 239, 771 P.2d 166, 172 (1989) (fairness does not require jurors who are totally ignorant of facts of case). "The pertinent inquiry is whether 'the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.'" **McGuire,** 110 N.M. at 311, 795 P.2d at 1003 (quoting **Patton v. Yount,** 467 U.S. 1025, 1035 (1984)). The court determined through voir dire that the jurors, although they may have heard of the case, were not incapable of impartiality. More is not required. Appellant has not carried his burden, and we affirm.

II. JURY VENIRE

{7} Appellant argues that he was denied his right to a venire composed from voter registration and driver's license records as required by NMSA 1978, Section 38-5-3 (Cum. Supp. 1990). We resolved this issue in **State ex rel. Stratton v. Serna,** 109 N.M. 1, 780 P.2d 1148 (1989), where we found the plain language of Section 38-5-3 required the jury pool to be expanded ninety days after the next general election, and we refuse to reconsider that conclusion. Appellant's trial took place before the expanded pool took effect. Section 38-5-3 was not violated.

III. FAILURE TO EXCISE OR SUPPRESS PORTIONS OF A TAPE RECORDING

{8} When Officer Carrillo entered Chamberlain's house, he turned on a tape recorder attached to his belt and recorded his conversations with appellant and the other officer, the sound of gun shots, and sounds made by Carrillo after he had been shot. This tape was played to the jury.

A. Failure to Excise.

{9} Appellant argues that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice and the court erred in admitting that portion of the tape containing Carrillo's moans made prior to his death. **See State v. Baca,** 89 N.M. 204, 549 P.2d 282 (1976); SCRA 1986, 11-403. The trial court is vested with great discretion in applying Rule 403, and it will not be reversed absent an abuse of that discretion. **Mac Tyres, Inc. v. Vigil,** 92 N.M. 446, 589 P.2d 1037 (1979). Evidence should be excluded if it is "calculated to arouse the prejudices and I passions of the jury and [is] not reasonably relevant to the issues of the case." **State v. Boeglin,** 105 N.M. 247, 253, 731 P.2d 943, 949 (1987).

{10} Appellant presented a theory of self defense. The tape tended to disprove that theory and was relevant, therefore, to the state's case. The recording showed that Carrillo was talking on his radio prior to being shot. Evidence was presented that police procedure forbid talking on the radio while holding a weapon. The tape also showed the officer was alive after being shot. The tape thus was probative of whether Carrillo drew his weapon prior to being shot and supported the possibility he drew it subsequently.

{11} The evidence was also probative of appellant's intent to kill—the tape showed that Chamberlain shot Carrillo a second time after hearing his moans. **See Boeglin,** 105 N.M. at 253, 731 P.2d at 949 (danger of unfair prejudice from admission of gruesome photographs of victim did not substantially outweigh its value as probative of intent).

{12} Thus, we hold that although the tape may have been prejudicial, it had probative value, and the district court properly and within its discretion balanced the probative value of the tape against its potential for unfair prejudice. The court did not abuse its discretion in admitting

that portion of the tape recording containing the moans of Officer Carrillo.

B. Failure to Suppress.

{13} Appellant argues that although the initial search of his house was proper, he withdrew his consent prior to the shooting and, thus, those portions of the recording made after consent was withdrawn should have been suppressed as product of an illegal search. **See** U.S. Const. amend IV; **see, e.g., United States v. Torres,** 663 F.2d 1019 (10th Cir. 1981) (waiver of fourth amendment rights may be withdrawn); **Mason v. Pulliam,** 557 F.2d 426 (5th Cir. 1977) (consent to search limited by right to reinvoke fourth amendment protections). Appellant also contends that he was in police custody and should have been given **Miranda** warnings. **See Miranda v. Arizona,** 384 U.S. 436 (1966).[1] He asserts he requested an attorney, the request was not honored, the police continued to question him, and those questions and his answers are on the tape. **See Edwards v. Arizona,** 451 U.S. 477 (1981). Accordingly, appellant concludes admission of the tape violated his rights as guaranteed by the fifth and sixth amendments to the United States Constitution.

{14} Initially, we consider a question regarding appellate procedure. In **State v. Chamberlain,** 109 N.M. 173, 783 P.2d 483 (Ct. App.), **cert. denied,** 109 N.M. 154, 782 P.2d 1351 (1989), the court of appeals considered this issue as raised in Chamberlain's appeal of lesser convictions at his first trial. Appellant suggests that the doctrine of law of the case should not apply—the court of appeals decided the issue wrongly, and in the interest of justice, we should exercise our discretion to review the issue. **See Reese v. State,** 106 N.M. 505, 745 P.2d 1153 (1987).

{15} In **Reese,** we reasserted our respect for and continuing adherence to the doctrine of the law of the case. Justice Ransom, specially concurring, emphasized our duty "to pursue a consistent course" when the law of the case is not "'clearly erroneous.'" **Id.** at 507, 745 P.2d at 1155 (quoting **Sanchez v. Torres,** 38 N.M. 556, 567, 37 P.2d 805, 812 (1934)). We held: "Were we to adhere immutably to the law of the case, the defendant . . . would be denied a fair trial," and we granted a new trial because "'the doctrine should not be utilized to accomplish an obvious misjustice, or applied where the former appellate decision was clearly, palpably or manifestly erroneous or unjust.'" **Id.** (quoting 5 Am. Jur.2d **Appeal and Error** 750, at 194 (1962)).

{16} The court of appeals decision in **Chamberlain** is not clearly erroneous or manifestly unjust,[2] and we will not deviate from the law of the case doctrine under these circumstances. As determined by the court of appeals, assuming **arguendo** the illegality of the search, the evidence may have been excluded in a trial on charges regarding the beating of the prostitute, but not in the trial for murder of the police officer. **See** 109 N.M. 173, 175, 783 P.2d 483, 485; **see generally** 4 W. LaFave, **Search and Seizure** 11.4(j), at 460-61 (2d ed. 1987) (in such circumstances, "no exploitation of the prior illegality is involved and . . . the rationale of the exclusionary rule does not justify its extension").

{17} Similarly, the court of appeals' disposition of the fifth and sixth amendment issues was not manifestly unjust. **See** 109 N.M. 173, 783 P.2d at 486. Chamberlain was not in police custody for fifth or sixth amendment purposes when the tape was made. **Miranda** warnings are required before statements made during custodial interrogation can be admitted against a defendant. 384 U.S. at 444. **Miranda** applies to questioning that occurs in a suspect's home after he has been arrested and is no longer free to go as he pleases. **Orozco v. Texas,** 394 U.S. 324 (1969). Warnings are not required, however, every time

[1] Chamberlain relies on **Michigan v. Chesternut,** U.S., 108 S. Ct. 1975, 1978-80 (1988), in support of his argument that he was in police custody. That case, however, while articulating a test not dissimilar to that applicable to determine whether a suspect is in custody for fifth or sixth amendment purposes, considered whether a suspect has been seized for **fourth amendment** purposes. **See Berkemer v. McCarty,** 468 U.S. 420, 436-37 (1984).

[2] In fact, if we were to reconsider these issues, we would decide them as did the court of appeals.

the police interview a suspect, even though there may be coercive aspects to the questioning; a coercive environment requiring warnings occurs "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" **Oregon v. Mathiason,** 429 U.S. 492, 495 (1977); **see California v. Beheler,** 463 U.S. 1121, 1125 (1983) (questioning at police station of suspect not require warnings where no formal arrest or restraint on freedom; **Miranda** applies when suspect's freedom of action is curtailed to "degree associated with a formal arrest"). The relevant inquiry to determine whether an individual is in police custody is "how a reasonable man in the suspect's position would have understood his situation." **Berkemer v. McCarty,** 468 U.S. 420, 442 (1984). Chamberlain was not subject to arrest while the officers conducted their search, nor was he subject to "the functional equivalent of formal arrest." **Id.**

IV. JURY INSTRUCTIONS

{18} Appellant asserts the court erred when it refused his requested jury instructions to support his theory that the police officer's unconstitutional presence at his home constituted provocation so as to reduce murder to manslaughter. **See** NMSA 1978, §§ 30-2-1, -3 (Repl. Pamp. 1984); **State v. Manus,** 93 N.M. 95, 597 P.2d 280 (1979), **overruled on other grounds; Sells v. State,** 98 N.M. 786, 653 P.2d 162 (1982); **Territory v. Lynch,** 18 N.M. 15, 133 P. 405 (1913).

{19} Appellant was entitled to instructions on his theories of the case that are supported by the evidence. **See State v. Venegas,** 96 N.M. 61, 628 P.2d 306 (1981). The court instructed the jury based on the appropriate Uniform Jury Instructions on voluntary manslaughter, provocation, and self-defense. Appellant was not entitled to more. **See Jackson v. State,** 100 N.M. 487, 489, 672 P.2d 660, 662 (1983) ("When a uniform jury instruction is provided for the elements of a crime generally that instruction must be used without substantive modification."); **State v. Jennings,** 102 N.M. 89, 93, 691 P.2d 882, 886 (Ct. App.) ("A failure to instruct on the definition or amplification of the elements of a crime is not error."), **writ quashed,** 102 N.M. 88, 691 P.2d 881 (1984).

{20} We are troubled, however, by appellant's reliance on **Territory v. Lynch,** 18 N.M. 15, 133 P. 405 (1913), as authority for his claim that he was entitled to instructions specifically relating to his theory that the search was illegal and, therefore, his killing of the officer was provoked and he had presented facts warranting instruction. Appellant theorizes that, after he withdrew consent to search and the police remained, their failure to leave constituted an unconstitutional search and was a matter of provocation that would reduce murder to manslaughter. **See** NMSA 1978, 30-2-1, -3 (Repl. Pamp. 1990).

{21} We do not address whether, despite Chamberlain's withdrawn consent, the officers were lawfully on the premises. In this context, that question is irrelevant to whether Chamberlain can assert that the officers' presence constituted provocation to his attack and warranted special instruction to the jury.[3]

{22} In **State v. Manus,** 93 N.M. 95, 597 P.2d 280 (1979), the defendant killed a police officer and asserted a similar argument regarding provocation. We noted that, as a matter of law, the exercise of a legal right cannot constitute provocation such as to lower the grade of homicide and that a police officer "performing lawful acts in the discharge of his duty is engaged in the exercise of a legal right. Acts of a peace officer exercising his duties in a lawful manner cannot rise to the level of sufficient provocation." **Id.** at 100, 597 P.2d at 285. Appellant asserts, nonetheless, that his withdrawn consent made the officers' presence unlawful and withdrew this case from the purview of **Manus.**

{23} In **State v. Doe,** 92 N.M. 100, 583 P.2d 464 (1978), this court rejected the argument that because an arrest was illegal, the arresting officer was not lawfully discharging his duties and,

[3] Moreover, our resolution of this issue demonstrates that the manslaughter instruction given by the court was not warranted by the facts of this case.

therefore, the defendant could not have violated a statute making unlawful a battery upon a police officer done while he is lawfully discharging his duties. **Id.** at 102, 583 P.2d at 466. We determined:

> Even if the arrest was illegal, we cannot condone the use of force in resisting every subsequent act made in good faith by a law enforcement officer. . . . Police officers acting in good faith, although mistakenly, should be relieved of the threat of physical harm.
>
> Self-help measures undertaken by a potential defendant who objects to the legality of the search can lead to violence and serious physical injury. The societal interest in the orderly settlement of disputes between citizens and their government outweighs any individual interest in resisting a questionable search. One can reasonably be asked to submit peaceably and to take recourse in his legal remedies.
>
> We hold that a private citizen may not use force to resist a search by an authorized police officer engaged in the performance of his duties whether or not the arrest is illegal.

Id. at 102-03, 583 P.2d at 466-67 (citations omitted).

{24} We further noted that officers making an arrest "should not lose all . . . authority if the arrest is subsequently judged to be unlawful," and determined that "police officers must be free to carry out their duties without being subjected to interference and physical harm." **Id.** at 103, 583 P.2d at 467. The test to determine whether a police officer is engaged in the performance of his lawful duties is whether the officer is acting as an agent within the scope of his duties, as opposed to engaging in a personal frolic. **Id.**

{25} Even if Chamberlain had terminated his consent to search, and even if the officers would not have had probable cause to continue the search, Officer Carrillo was acting within the scope of his official duties when he continued the search. If the search had been illegal, there are remedies within the law to protect appellant's rights. Those remedies do not include resort to self-help measures. To the extent that it holds otherwise, **Lynch** is no longer good law and is hereby overruled.

V. PROSECUTORIAL MISCONDUCT

{26} Appellant asserts that certain comments made by the prosecution during closing argument warranted a mistrial and that it was error to deny the defense motion. The prosecution is allowed reasonable latitude in closing argument. **State v. Ruffino,** 94 N.M. 500, 612 P.2d 1311 (1980). The district court has wide discretion to control closing argument, and there is no error absent an abuse of discretion or prejudice to defendant. **State v. Jett,** 111 N.M. 309, 314, 805 P.2d 78, 83 (1991). If the defense argument raises certain issues, those issues can be discussed by the prosecution. **Ruffino,** 94 N.M. at 503, 612 P.2d at 1314. The question on appeal is whether the argument served to deprive defendant of a fair trial. **Jett,** 111 N.M. at 314, 805 P.2d at 83.

{27} Appellant raises several areas in which he contends the prosecution's comments constituted error: comments regarding defense counsel; inferences on defendant's right to remain silent; statements regarding defendant's invocation of certain constitutional rights; reference to extraneous criminal acts; and incorrect statements of the law and facts. He points to over twenty statements that he claims were improper. Rather than address each contention individually, it suffices to say that our review of the record indicates that the argument was proper, and certainly, the prosecution's argument did not rise to the level of denying Chamberlain a fair trial. We address several of the contentions broadly to demonstrate the propriety of the state's argument.

{28} Initially, we narrow the scope of the inquiry by noting that many of the asserted errors were not objected to by the defense. Failure to make a timely objection to alleged improper

argument bars review on appeal, unless the impropriety constitutes fundamental error. **State v. Clark,** 108 N.M. 288, 296, 772 P.2d 322, 330 (1989). At the end of the prosecution's closing argument, the defense objected to the argument and moved for a mistrial, contending purported misstatement of the law regarding investigative detention, improper assertions about counsel, and mischaracterization of defendant's case. We have reviewed the other assertions of error for fundamental error; not only did we not find such error, but we have found nothing improper in the state's argument and nothing that would have merited objection.[4]

{29} Despite the objection to statements regarding "investigative detention," appellant has not cited us to the statements in the record, and we have not found any such statements. We have reviewed the statements regarding the officers' reasonable suspicion to continue to investigate. That argument was a proper statement of the law; it was relevant, and was offered to rebut defendant's theory of the case. It was not error.

{30} We have discerned several statements that were directed at defense counsel. They did not impugn the defense personally, but rather were directed at rebutting defense argument. Similarly, the alleged mischaracterization of the defense's case was proper discussion of matters that were first raised by the defense.

{31} Accordingly, we find no reversible error in this alleged prosecutorial misconduct.

[4] The most serious of those contentions is that the state commented on defendant's right to remain silent. Defendant, however, did not assert that right—he testified at trial. The actual statement was that Chamberlain had two years to think about what he wanted to say. Appellant asserts this was a comment on his failure to testify at the first trial. He does not demonstrate, however, how this violated his right to a fair trial in the second trial, nor does he explain that the door to this inquiry was first opened by the defendant himself when he noted the state's failure to cross examine. Moreover, the alleged comment was not "manifestly intended to be or . . . of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify" so as to constitute improper prosecutorial comments. **Clark,** 108 N.M. at 302, 772 P.2d at 336.

VI. JURY DELIBERATIONS

{32} Appellant asserts the court erred when it allowed the jury to return to a consideration of the first degree murder count after it sent a note to the court asking whether it could return to a higher count after going to a lower count. The court referred the jury to its instructions without elaboration.

{33} The record does not disclose the substance of the jury's request. It does not disclose whether the jury had initially voted to acquit Chamberlain of the first degree murder charge. Review of SCRA 1986, 14-250 (uniform jury instruction on jury procedure for various degrees of homicide), demonstrates that, although the jury is instructed not to proceed to consideration of a lesser degree unless, "after reasonable deliberation," it does not agree on the defendant's guilt of the higher degree, the jury is not required to acquit the defendant of the higher degree before proceeding to the lesser degree. Appellant merely speculates on the deliberations of the jury when he asserts it had acquitted him of the higher charge.

{34} Thus, we do not find error. Jurors are encouraged to consult with one another before reaching a conclusion. **See** SCRA 1986, 14-6008. The court is not permitted to interfere with the jury's discretion to deliberate. **See State v. McCarter,** 93 N.M. 708, 710, 604 P.2d 1242, 1244 (1980). In **State v. Castrillo,** 90 N.M. 608, 566 P.2d 1146 (1977), we considered the double jeopardy implications of the failure to return a verdict. We noted 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." **Id.** at 612, 566 P.2d at 1150. We also reflected on the meaning of the jury's consideration of a lesser offense, asserting that the jury must consider lesser offenses "if the vote is not unanimous or if the vote is unanimous for acquittal." **Id.** at 611, 566 P.2d at 1149. We refuse to speculate on the meaning of the jury's consideration of the lesser offense in the present case. Because appellant has not demonstrated the jury acquitted him of

first degree murder, we do not find error in its reconsideration of that question.

VII. JURY EXPERIMENTATION

{35} After the verdict was entered, defense counsel learned that the jury conducted experiments regarding a noise on the tape to determine whether it was the sound of Officer Carrillo's gun being withdrawn from his holster. Defendant moved for a new trial. The court denied the motion, ruling there was no improper experimentation and that a request for an evidentiary hearing was prohibited by SCRA 1986, 11-606.

{36} In this case we do not consider evidence not properly admitted or experimentation based on facts or evidence not properly before the jury. **Cf. State v. Doe,** 101 N.M. 363, 683 P.2d 45 (Ct. App. 1983), **cert. denied,** 101 N.M. 276, 682 P.2d 61 (1984) (newspaper story regarding witness intimidation read by juror); **Duran v. Lovato,** 99 N.M. 242, 656 P.2d 905 (Ct. App. 1982), **cert. denied,** 99 N.M. 226, 656 P.2d 889 (1983) (jurors made independent speed tests during lunch break). The gun, holster, and tape—the instruments used by the jury to conduct the experiment—were admitted properly and were before the jury for its examination during deliberation. The question is whether it constituted improper experimentation when the jury tested the evidence before them in a way not discussed at trial and, if so, whether rule 606(B) allows the court to take evidence from jurors regarding its analysis of the evidence.

{37} Appellant asserts that the experiment created new or extrinsic evidence that may have tainted the trial. The authorities cited, however, considered actual extrinsic evidence that came to the jury outside of the court and the trial process. **See, e.g., United States v. Hornung,** 848 F.2d 1040 (10th Cir. 1988) (juror conversed with an acquaintance regarding the defendant); **Marino v. Vasquez,** 812 F.2d 499 (9th Cir. 1987) (juror conducted test to verify testimony at home using her husband's gun); **Bayramoglu v. Estelle,** 806 F.2d 880 (9th Cir. 1986) (juror called law librarian to discuss degrees of murder); **Jennings v. Oku,** 677 F. Supp. 1061 (D. Hawaii 1988) (jury conducted experiment out of court using a juror's car that was not in evidence and not even same model as the one at issue); **Durr v. Cook,** 442 F. Supp. 487 (W.D. La. 1977) (juror reenacted crime outside of court); **Gorz v. State,** 749 P.2d 1349 (Alaska Ct. App. 1988) (juror personally investigated amount of time to walk from crime scene to where defendant had been observed). Unlike the cited cases, however, the jury in the instant case did not consider evidence or statements that were not presented to the court.

{38} In **State v. Dascenzo,** 30 N.M. 34, 226 P. 1099 (1924), this court considered a conviction for the sale of liquor. A bottle containing liquor taken from the appellant's premises was properly in evidence, and on appeal the court determined the propriety of the jury opening the bottle to smell its contents. This court held that the independent jury analysis was proper, stating:

> No juror can receive evidence without the exercise of some of its senses. Jurors are permitted to exercise their sense of sight, in seeing the witnesses, including the defendant, as they testify, and of observing their demeanor; they are also permitted to exercise their sense of hearing, in listening to the tone, as well as the steadiness or unsteadiness, of the voice, all for the purpose of deciding whether or not such witnesses are testifying truthfully or falsely. When physical things are introduced in evidence, jurors are permitted to look at them, to decide what they think concerning them. When liquor is introduced in evidence, jurors are allowed to look at it, and to take into consideration its color and appearance in deciding what they think it is. Again, if a bullet is introduced in evidence in a homicide case, and it becomes material to determine its size, caliber, or anything else concerning its physical appearance, jurors are permitted to look at it, and frequently take it in their hands and feel it, in order to determine what they think about it, and how its size and appearance harmonizes or

> conflicts with other evidence introduced in the case.
>
> We can appreciate no distinction between these matters of common procedure and allowing jurors to smell liquor after it has been introduced in evidence. **By so doing, the juror did not gain independent evidence upon which to reach his conclusion, but simply tested the evidence already introduced, in order to properly determine its truth or probative value.** In deciding every case, jurors must necessarily take into consideration their knowledge and impressions founded upon experience in their everyday walks of life, and the fact that these things affect them in reaching their verdict cannot be reversible error, because, indeed, jurors without possessing such knowledge and impressions could not be had. After the liquor in this character of a case has been received in evidence, to deny the jurors the right to look upon it, smell of it, and take into consideration its appearance and odor in determining what it is, results in closing their eyes against the acquisition of the truth.

Id. at 36-37, 226 P. at 1100 (emphasis added).

{39} That case, in relevant part, is virtually indistinguishable from the case at bar. The evidence—the gun, the holster, and the tape—was properly before the jury; the jury used its experience and senses to examine that evidence. This conclusion accords with contemporary authority that has considered this question. **See, e.g. People v. Kurena,** 87 Ill. App. 3d 771, 410 N.E.2d 277 (1980) (in murder trial where victim stabbed to death, jurors properly fashioned cardboard knife with which they evaluated evidence presented at trial because the actual knife had been admitted into evidence and the experiments had been attempts to verify the testimony); **State v. Ashworth,** 231 Kan. 623, 647 P.2d 1281 (1982) (jury properly conducted experiment using exhibits submitted to it to test veracity of testimony); **State v. Thompson,** 164 Mont. 415, 524 P.2d 1115 (1974) (jury may use physical evidence in conjunction with testimony to determine credibility as long as it acts in accordance with testimony and no new facts discovered; juror experiment with revolver not error); **see generally** Annotation, **Propriety of Juror's Tests or Experiments in Jury Room,** 31 A.L.R.4th 566 (1984). Although potential error may occur if an experiment creates a new evidentiary fact outside of the record for the jury, **see Simon v. Kuhlman,** 549 F. Supp. 1202, 1206 (S.D.N.Y. 1982); **State v. Asherman,** 193 Conn. 695, 741, 478 A.2d 227, 254 (1984), the jury must be allowed latitude to evaluate evidence and to use its experience to deliberate. **United States v. Avery,** 717 F.2d 1020, 1026 (6th Cir. 1983), **cert. denied,** 466 U.S. 905 (1984) (upholding conviction when the jury performed experiment using material entered into evidence).

{40} We find no distinction based on appellant's assertion that evidence had not been presented on the exact issue of whether the noise on the tape in fact had been caused by Carrillo pulling the gun from the holster. Apparently experts had not been able to ascertain whether the noise on the tape resulted from the officer pulling his weapon. The jury is not bound by expert opinion. **State v. McGhee,** 103 N.M. 100, 103, 703 P.2d 877, 880 (1985). Moreover, in evaluating the evidence presented, the jury is given latitude to use its judgment, and although no testimony had been elicited on the exact issue, the background information was all properly before the jury. In support of his claim of self-defense, defendant claimed that Officer Carrillo had pulled his weapon prior to being shot; the state attempted to prove the weapon had not been drawn until after the initial shooting. Furthermore, evidence had been presented at trial regarding how the pistol and holster functioned, and certain testimony raised the inference that the noise on the tape may have been caused by the gun being pulled from the holster. The jury was required to evaluate these conflicting versions of the truth, and it properly used the evidence before it to perform its duty. **See United States v. Hawkins,** 595 F.2d 751, 753 (D.C. Cir. 1978), **cert. denied,** 441 U.S. 910 (1979).

{41} Rule 606(B) deals with the competency of jurors as witnesses. That rule prohibits a juror from testifying as a witness regarding jury deliberations, "except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." SCRA 1986, 11-606(B). Because no new evidentiary facts went before the jury during deliberations, testimony could not be elicited from the jury regarding its deliberations. **See** 3 J. Weinstein & M. Berger, **Weinstein's Evidence,** para. 606[04] (1988) (Rule 606(B) bars jurors from testifying regarding the processes by which a verdict was reached, although it does not prohibit testimony on experiments that create knowledge that has not been obtained through evidence).

VIII. INEFFECTIVE ASSISTANCE OF COUNSEL

{42} Appellant raises nine points that he contends violated his right to the effective assistance of counsel as guaranteed by the sixth amendment to the United States Constitution.

{43} "The standard for ineffective assistance of counsel in New Mexico is whether defense counsel exercised the skill of a reasonably competent attorney. The defendant bears the burden of demonstrating both the incompetence of his attorney and resulting prejudice, and absent such a showing counsel is presumed competent." **State v. Jett,** 111 N.M. 309, 315, 805 P.2d 78, 84 (1991) (citations omitted). It is not sufficient that the defendant generally complains of substandard performance by counsel; the defendant must point to acts or omissions by counsel that he complains fail below the standard of reasonable competence. **State v. Brazeal,** 109 N.M. 752, 757, 790 P.2d 1033, 1038 (Ct. App.), **cert. denied,** 109 N.M. 631, 788 P.2d 931 (1990). In reviewing a claim of ineffective assistance of counsel, the court will not second guess trial tactics and strategy of counsel: "Bad tactics and improvident strategy do not necessarily amount to ineffective assistance of counsel." **State v. Orona,** 97 N.M. 232, 234, 638 P.2d 1077, 1079 (1982); **see State v. Newman,** 109 N.M. 263, 268, 784 P.2d 1006, 1011 (Ct. App.), **cert. denied,** 109 N.M. 262, 784 P.2d 1005 (1989).

{44} Appellant first asserts that one attorney was inadequate to provide a defense in this case and that the public defender and the attorney below violated his rights by failing to provide a second attorney.[5] Initially, we note that, while it is uncontestable that a criminal defendant is entitled to representation, **Gideon v. Wainwright,** 372 U.S. 335 (1963),[6] we have not been directed to, nor have we found, authority requiring as a constitutional minimum the appointment of more than one attorney. Moreover, appellant's contention can only have merit if he can demonstrate that the counsel provided was unable to provide reasonably competent representation and that appellant was prejudiced thereby. This claim thus appears more reasonably considered in the context of specific claims of inadequate representation, which we deal with below. We refuse to hold that more than one attorney must be appointed to represent an indigent defendant based merely on the claim that a case is complex and a conviction would carry serious consequences to the defendant.

{45} Appellant's second and third claims are that counsel provided ineffective assistance by failing to hire a ballistics expert and an audio forensics expert. Our review indicates that these were matters of trial strategy and did not constitute ineffective assistance. The ballistics evidence put on by the prosecution was imprecise and subject to vigorous cross examination. The defense made a tactical decision to limit the amount and specificity of the evidence in this area. It also appears that the defense, in Chamberlain's first trial, did hire an audio expert; that expert's analysis was available to defense

[5] **Keenan v. Superior Court,** 30 Cal. 3d 750, 640 P.2d 108, 180 Cal. Rptr. 489 (1982), cited by appellant, is inapposite to the case before us, both in its procedural posture (it was a mandamus review) and its legal authority (it reviewed California statute applying an abuse of discretion standard).

[6] This right is also guaranteed by statute. **See** NMSA 1978, §§ 31-15-1 to -12, 31-16-1 to -10 (Repl. Pamp. 1984 and Cum. Supp. 1990).

counsel in the second trial. Moreover, the audio enhancement was inconclusive, and except for his mere assertions of prejudice, appellant has not shown that further analysis of the tape would be fruitful.

{46} In **State v. Vigil,** 110 N.M. 254, 258, 794 P.2d 728, 732 (1990), we rejected a similar contention regarding ineffective assistance of counsel when the defense attorney failed to use expert testimony, stating:

> We will not substitute our own judgment over trial tactics for the judgment of defense counsel when it is not clear that the defendant was deprived of a meritorious defense because the judgment of defense counsel was without excuse or justification.

We do not believe that defendant was deprived of a defense because of defense counsel's strategy. This conclusion is bolstered by appellant's inability to demonstrate prejudice, or what an expert could have presented to further his defense.

{47} Appellant claims he was denied effective assistance of counsel because his attorney visited only once prior to trial. We agree with **State v. Brusenhan,** 78 N.M. 764, 438 P.2d 174 (Ct. App. 1968), that the amount of time counsel spent with defendant, without more, does not constitute ineffective assistance of counsel.

{48} Appellant asserts trial counsel provided ineffective assistance because on two occasions counsel failed to provide for appellant's presence at hearings. The record, however, affirmatively indicates that appellant was present at the hearings.

{49} Appellant has raised several other claims of ineffective assistance. We have examined those arguments, and find them devoid of merit. The alleged bases for ineffective assistance resulted from tactical decisions and have not been demonstrated to have prejudiced appellant.

{50} As is apparent from the foregoing discussion, appellant's claim of cumulative argument must fail.

{51} In accordance with our opinion, we affirm the judgment of the district court.

{52} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

DAN SOSA, Jr.,
Chief Justice

RICHARD E. RANSOM,
Justice (Specially Concurring)

SPECIAL CONCURRENCE

RANSOM, Justice (specially concurring).

{53} I specially concur to voice two reasons why I do not believe that the majority of this panel should speak for the Court on the soundness of the common-law principle, articulated in **Territory v. Lynch,** 18 N.M. 15, 133 P. 405 (1913), that an illegal or unlawful arrest, under certain circumstances, may represent adequate provocation of violence to warrant the giving of a manslaughter instruction when the defendant has been charged with murder.

{54} First, the manslaughter instruction based upon provocation **was given** in this case, and the jury was **not** instructed that the conduct of the officers was lawful and could not constitute provocation. It seems that Chamberlain was in no way prejudiced in his ability to argue that he was provoked by the refusal of the officers to leave his home when he revoked his permission to be there. It would have been helpful to Chamberlain's case for the court to have instructed the jury that the presence of the officers was unlawful, if that were the case, but for the court to have given such an instruction it would have had to decide collateral legal issues such as probable

cause to believe that a crime had been committed and the existence of exigent circumstances to justify the warrantless search. I would approach the question before us as being whether it is error for the court to refuse to decide and/or instruct on such a collateral issue, or whether the court correctly left the entire matter of provocation for full argument to the jury on the facts as presented. Consequently, I find it unnecessary to decide the validity of **Lynch.**

{55} Second, even were I to reach the issue, I would find the **Lynch** rule inapposite here. The **Lynch** line of cases follow an established common-law rule that an illegal **arrest** that is an arrest without probable cause, may constitute sufficient provocation to justify giving a manslaughter instruction. There is scant authority to suggest that an illegal **search** of one's home (a trespass), represents adequate provocation to warrant the instruction. **See** 40 C.J.S. **Homicide** §§ 85(b) (1991) (illegal arrest); **id.** 86 (offense against property). It would seem unnecessary to address the continuing validity of the former common-law rule involving illegal arrest in the context of this case. Also, New Mexico never has followed a rule that the fact of an illegal arrest automatically reduces murder to manslaughter; like most other jurisdictions the defendant must still prove he in fact was filled with passion aroused by the illegal arrest sufficient to meet the usual provocation tests. **See Lynch,** 18 N.M. at 33, 133 P. at 409 ("If in fact the outrage of an attempted illegal arrest has not excited the passions, a killing in cold blood will be murder.").[1]

{56} Indeed, I believe that unlawful conduct of an arresting law enforcement officer, under certain circumstances, may constitute adequate provocation to warrant a conviction for voluntary manslaughter rather than murder. I would not agree that the test of whether the manslaughter instruction should be given is merely whether the officer was "acting within the scope of his official duties" as the majority of this panel indicates. This would seem to be the net effect of overruling **Lynch,** and adopting in this murder/manslaughter case, the test announced in **State v. Doe,** 92 N.M. 100, 583 P.2d 464 (1978), to determine if an officer is engaged in the lawful discharge of his duties for purposes of NMSA 1978, Section 40A-22-23 (battery upon a police officer).[2]

{57} I find significant the distinction between the principles of justification or excuse rejected in **Doe** and the principle at work in **Lynch** which is related to mens rea or "the character of the homicide." **See Lynch,** 18 N.M. at 33, 133 P. at 409. In **Doe** the Court determined that the fact of illegality of an arrest is no defense to a charge of battery against a police officer. In effect, this ruling abolished the common-law right to resist with reasonable force an illegal arrest. **See generally** Annotation, **Modern Status of Rules as to Right to Forcefully Resist Illegal Arrest** 44 A.L.R.3d 1078 (1972). However, I am of the opinion that the rationale which denies resistance on the part of a citizen to an illegal or unlawful arrest should not determine the character of a homicide (identified by mens rea) that may grow out of such an arrest. I am not inclined to overrule **Lynch** to the extent it is inconsistent with the rule announced in **Doe.** Additionally, some forms of unlawful conduct on the part of police officers, such as the excessive use of force, in performance of their official duties, as in making an arrest, any arrest, may certainly give rise to adequate provocation. Use of the simple test in **Doe** (acting within scope of official duties) would not seem to take this into account and easily might be misunderstood on this point.

RICHARD E. RANSOM,
Justice

[1] In connection with the propriety and character of jury instructions to be given when provocation is put in issue by unlawful conduct on the part of arresting officers, Professor LaFave observes the circumstances may require more than the mere fact of illegality:

If an illegal arrest may be a reasonable provocation in some circumstances, it would seem that these circumstances should includezxx the fact that the defendant knew or at least believed that his arrest was illegal; and perhaps that the defendant knew or believed he was innocent of the crime for which he was arrested, since an innocent man would more reasonably be provoked by an illegal arrest than a guilty one.

[2] W. LaFave & A. Scott, **Substantive Criminal Law** 7.10(b) (4) (1986).

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1992-NMSC-030

Filing Date: May 13, 1992

Docket No. 19,992

KIM KNOWLES,

Plaintiff-Appellant,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, an insurance corporation,

Defendant-Appellee.

Appeal from the District Court of Santa Fe County
Steve Herrera, District Judge

Catron, Catron & Sawtell, P.A.
Michael T. Pottow
Santa Fe, New Mexico

for Appellant.

Civerolo, Hansen & Wolf, P.A.
Bruce T. Thompson
Donald G. Bruckner, Jr.
Albuquerque, New Mexico

for Appellee.

OPINION

BACA, Justice.

{1} Plaintiff-appellant Kim Knowles appeals the trial court's grant of summary judgment in favor of defendant-appellee United Services Automobile Association ("USAA"). We reverse.

I.

{2} On April 1, 1989, USAA issued a personal umbrella policy to appellant that provided both excess liability and basic coverage insurance to appellant. The umbrella policy covered "injury or damage for which [appellant] becomes legally liable" and included coverage for wrongful eviction. The policy obligated USAA to defend against any suit brought against appellant for damages covered under the policy's basic coverage. The policy, however, contained a number of exclusions to its basic coverage, including an exclusion for injury that was "expected or intended" by appellant.

{3} During the term of the policy, Edward Montoya filed a complaint against appellant (the "Montoya complaint") alleging that appellant placed a locked gate across a road on appellant's property that interfered with Montoya's use of an easement across appellant's property. After Montoya instigated his suit for damages and injunctive relief, appellant tendered the defense to USAA, and USAA declined to defend. After Montoya dismissed his claim for damages, appellant instituted the instant action to recover defense costs incurred in the suit filed by Montoya. Both appellant and USAA agreed that no factual dispute existed, and both made motions for summary judgment. In his motion for summary judgment, appellant claimed that the Montoya complaint alleged facts that triggered the umbrella policy's coverage and that Montoya's claim for damages did not fall within one of the policy's exclusions. In its motion for summary judgment, USAA claimed that Montoya's claim was an expected or intended result of appellant's actions and thereby excluded from coverage. The trial court granted USAA's motion and this appeal followed.

II.

{4} The only issue raised by this appeal is whether USAA had a duty to defend appellant in

the lawsuit brought against him by Montoya. The duty to defend is distinct from the duty to indemnify. **Insurance Co. of N. Am. v. Wylie Corp.**, 105 N.M. 406, 409, 733 P.2d 854, 857 (1987). The duty to defend is a contractual obligation emanating from the insurance policy, **see id.**, and arising when "the injured [third] party's complaint states facts which bring the case within the coverage of the policy, not whether [the injured third party] can prove an action against the insured for damages." **American Employers' Ins. Co. v. Continental Casualty Co.**, 85 N.M. 346, 348, 512 P.2d 674, 676 (1973) (quoting 1 Rowland H. Long, **The Law of Liability Insurance** § 5.02 (1973)). In the instant case, the umbrella policy requires USAA to defend appellant against "any suit for damages . . . even if groundless or if fraudulent" if the basic coverage provisions of the policy apply. Thus, the issue on appeal is resolved by determining whether the basic coverage provisions of the umbrella policy cover damages as alleged by the Montoya complaint and whether the policy excludes coverage.

A.

{5} The umbrella policy obligates USAA to "pay for injury or damage for which [appellant] becomes legally liable" provided that such liability arises from an occurrence taking place while the policy is in effect. The policy defines "injury" to include "wrongful eviction." The policy provides both excess liability protection for occurrences for which appellant has primary insurance and basic coverage to insure against "liability occurrences that are not covered by primary insurance." However, the basic coverage provision "applies only if [the occurrences] are not excluded in this policy." The policy lists a number of exclusions including an exclusion for "injury or damage which is expected or intended by an insured."

{6} Appellant contends that the facts alleged in the Montoya complaint constitute an action for wrongful eviction because Montoya alleged that he was deprived of his use of an easement as a result of appellant's actions. **See, e.g.**, **487 Elmwood, Inc. v. Hassett**, 486 N.Y.S.2d 113, 116 (App. Div. 1985) (encroachment on easement is partial eviction). Because the Montoya complaint alleged a wrongful eviction, appellant argues that the basic coverage provisions of the umbrella policy are applicable. On appeal, USAA does not contest that the allegations in the Montoya complaint constituted a claim for wrongful eviction but rather contends that the policy covers only negligent wrongful eviction and not wrongful eviction resulting from appellant's intentional acts. Thus, the issue on appeal is resolved by interpreting the exclusionary clauses of the umbrella policy.

B.

{7} As outlined above, the policy attempts to exclude coverage for "injury or damage which is expected or intended by an insured." Appellant argues that he did not subjectively expect or intend the harm alleged in the Montoya complaint as evidenced by his affidavit submitted in support of his motion for summary judgment. Because exclusionary clauses must be narrowly construed, **King v. Travelers Insurance Co.**, 84 N.M. 550, 556, 505 P.2d 1226, 1232 (1973), appellant concludes that the basic coverage exclusions do not exclude coverage. In the alternative, appellant argues that the policy provisions extending coverage for wrongful eviction and then excluding coverage for damage "intended or expected by the insured" create an ambiguity that should be construed against USAA. **See Stanback v. Westchester Fire Ins. Co.**, 314 S.E.2d 775 (N.C. Ct. App. 1984).

{8} USAA contends that New Mexico law allows an insurance policy to exclude injuries arising from intentional acts so long as the exclusionary clause is clear and does not conflict with statutory law, **Safeco Insurance Co. of America v. McKenna**, 90 N.M. 516, 519, 565 P.2d 1033, 1036 (1977), and that the exclusionary clause in question here is clear. USAA cites cases from other jurisdictions holding that an insurance policy insuring against specified intentional acts while excluding other intentional acts relieves the insurer of a duty to defend the insured against the excluded acts. **See, e.g.**,

Shapiro v. Glen Falls Ins. Co., 347 N.E.2d 624, 625-26 (N.Y. 1976) (insurance carrier relieved of duty to defend where policy excluded coverage of intentional acts by insured). USAA argues that because the law presumes that a person intends the foreseeable results of his or her intentional acts, **Deseret Federal Savings Ass'n v. United States Fidelity & Guarantee Co.**, 714 P.2d 1143, 1146 (Utah 1986), damages claimed in the Montoya complaint are excluded from coverage even though appellant thought that he had a legal right to erect the gate. **See Red Ball Leasing, Inc. v. Hartford Accident & Indem. Co.**, 915 F.2d 306, 311 (7th Cir. 1990) (repossession of leased trucks by leasing company under mistaken belief that lessee was in default is intentional act excluded from coverage under policy). Finally, USAA contends that, while ambiguities are construed in favor of the insured, **Foundation Reserve Insurance Co. v. McCarthy**, 77 N.M. 118, 119, 419 P.2d 963, 964 (1966), the clause at issue here is not ambiguous.

{9} The obligation of the insurer is a question of contract law and will be determined by reference to the terms of the insurance policy. **Safeco Ins. Co.**, 90 N.M. at 520, 565 P.2d at 1037. An insurance contract should be construed as a "complete and harmonious instrument designed to accomplish a reasonable end." **Id.** A clause in an insurance policy is ambiguous if it is "'reasonably and fairly susceptible of different constructions.'" **Sanchez v. Herrera**, 109 N.M. 155, 159, 783 P.2d 465, 469 (1989) (quoting **Levenson v. Mobley**, 106 N.M. 399, 401, 744 P.2d 174, 176 (1987)). When an insurance contract is ambiguous, it must be construed against the insurance company as the drafter of the policy. **King**, 84 N.M. at 555, 505 P.2d at 1231. Exclusionary clauses in insurance policies are to be narrowly construed, **id.** at 556, 505 P.2d at 1232, with the reasonable expectations of the insured providing the basis for our analysis. **Sanchez**, 109 N.M. at 159, 783 P.2d at 469. However, an insurance policy may exclude injuries arising from intentional acts so long as the exclusionary clause is clear and does not conflict with statutory law. **Safeco Ins. Co.**, 90 N.M. at 519, 565 P.2d at 1036.

{10} While we have not yet addressed the issue, numerous other courts have examined insurance policy clauses that purport to exclude injuries expected or intended by the insured. **See** James L. Rigelhaupt, Jr., Annotation, **Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured**, 31 A.L.R. 4th 957 (1984 & Supp. 1991). These cases are split as to whether or not, as a matter of law, such clauses are ambiguous. **Id.** at 972. A case cited to us by both appellant and USAA that we find persuasive is **United Services Automobile Ass'n v. Elitzky**, 517 A.2d 982 (Pa. Super. Ct. 1986). In **Elitzky**, the Elitzkys purchased a homeowner's policy from the insurer that provided coverage for bodily injury and property damages subject to an exclusionary clause that negated coverage for damage "expected or intended by the insured." During the term of the policy, the Elitzkys were sued by Judge Bruno for malicious defamation and intentional infliction of emotional injury for their alleged "malicious, intentional and reckless conduct" during prior litigation over which Judge Bruno had presided. The insurer filed an action for a declaratory judgment seeking a determination that it would not be obligated to defend or indemnify the Elitzkys because the damages alleged by Judge Bruno were caused by the Elitzkys' intentional conduct and were thus excluded by the policy. The trial court, in denying the declaratory judgment, held that because Judge Bruno's causes of action were based on intentional torts, damages arising from the Elitzkys' acts were excluded by the policy. The trial court concluded that the insurer did not have a duty to defend the Elitzkys. **Id.** at 984-85.[1]

{11} On appeal, the Superior Court of Pennsylvania interpreted the phrase "expected or intended" as used in the homeowner's policy. Prior to concluding that in the context of interpreting an insurance contract that the terms "expected" and "intended" were synonymous, **id.** at 991, the **Elitzky** court discussed three possible

[1] The court declined to determine whether the insurer would be required to indemnify the Elitzkys because the issue was not ripe for determination. **Id.**

interpretations of "intended" in exclusionary clauses. The first interpretation was that an exclusionary clause only excludes coverage for the harm caused when the insured acted with specific intent to cause the damage. **Id.** at 986 (citing **Pachucki v. Republic Ins. Co.**, 278 N.W.2d 898 (Wis. 1979)). The court declined to adopt this interpretation, because "such an approach would award wrong-doers by affording them insurance coverage just because their plans went slightly awry," and could create problems of proof.[2] **Id.** at 988. The second interpretation focused on whether the insured committed an intentional act and, if so, the exclusionary clause excludes coverage for injuries that are the "natural and probable consequence" of the intentional act. **Id.** at 986 (citing **Argonaut Southwest Ins. Co. v. Maupin**, 500 S.W.2d 633 (Tex. 1973)). The second interpretation was rejected by the **Elitzky** court because it improperly interjected tort principles into what was essentially an issue of contract interpretation. **Id.** at 988. The third interpretation was that an exclusionary clause excludes harm of the same general type as the insured intended. **Id.** at 987 (citing **Riverside Ins. Co. v. Wiland**, 474 N.E.2d 371 (Ohio Ct. App. 1984)). The court adopted this approach because it was consonant with policies underlying insurance law. **Id.** According to the court, this approach balances the policy of construing ambiguous clauses in favor of the insured against an insurance company's right to not insure against harm deliberately caused by the insured. **Id.** In addition, this approach fosters the public policy that an insured not be encouraged to act wrongfully because of knowledge that such an act is insured. **Id.**

{12} The exclusionary clause in question in the instant case excludes "injury or damage which is expected or intended by an insured." We are persuaded by the rationale of the **Elitzky** court that the exclusionary clause at issue in the instant case should be construed to exclude harm of the same general type as intended by the insured. We adopt this approach because we believe that it is consistent with the rationales of our prior cases and it "affords maximum coverage to insured persons," **Elitzky**, 517 A.2d at 988, thereby giving effect to the reasonable expectations of the insured. **Sanchez**, 109 N.M. at 159, 783 P.2d at 469.

{13} In construing the exclusionary clause under the facts of this case, we conclude that appellant intended or expected harm of the same general type as was alleged by the Montoya complaint. The Montoya complaint alleged that appellant placed, reinforced, and locked the gate to exclude others from using the road or entering the property. The requisite intent necessary for an intentional tort such as wrongful eviction is "that the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." **Restatement (Second) of Torts** § 8A (1965). While appellant may not have intended or expected to cause any harm to Montoya, he desired to limit access to the road. Thus, the harm alleged in the Montoya complaint was of the same general type as that expected or intended by appellant. Thus, coverage for appellant's acts was apparently excluded from coverage by the policy's exclusionary clause. Because basic coverage was excluded, USAA would not, under this interpretation, have a duty to defend appellant. This interpretation, however, does not end our inquiry; we must also determine whether the exclusionary clause is repugnant to the insuring clause.

III.

{14} As just noted, while USAA would not have a duty to defend appellant if the insurance contract is construed as above, we also must determine whether the exclusionary clause, as construed, irreconcilably conflicts with the insuring clause. **See Federal Ins. Co. v. Century Fed. Sav. & Loan Ass'n**, 113 N.M. 162, 824 P.2d

[2] The problem of proof that the **Elitzky** court discussed was that of proving that the subjective intent of the insured was to cause the specific injury that occurred. **Id.** at 988. "An insured would be entitled to coverage unless he admitted that he intended the precise injury which occurred. We hope it is not too jaundiced a view of human nature to express doubt that such testimony would be forthcoming." **Id.** In the instant case, we are presented with the converse fact situation. Here, appellant claims that the exclusionary clause should not preclude coverage because appellant asserts that he did not intend to cause the specific harm that resulted.

302 (1992); **Insurance Co. of N. Am. v. Wylie Corp.**, 105 N.M. 406, 410, 733 P.2d at 858; **King**, 84 N.M. at 555, 505 P.2d at 1231. In construing exclusionary clauses, we must endeavor to give effect to the reasonable expectations of the insured. **Federal Ins. Co.,** 113 N.M. at 168-69, 824 P.2d at 308-09 (and cases cited therein). In **Federal Insurance Co.**, we examined a specific exclusionary clause in the insurance policy that would have nullified the policy's broad grant of coverage. **Id.** at 163-65, 824 P.2d at 303-05. Because the exclusionary clause was in irreconcilable conflict with the insuring clause, we refused to enforce the repugnant exclusionary clause. To enforce the repugnant exclusionary clause would have "deprived the insured of the insurance coverage which the insured reasonably understood was afforded by the policy for which premiums were paid." **Id.** at 169, 824 P.2d at 309.

{15} As in **Federal Insurance Co.**, the effect of the exclusionary clause at issue in the instant case is to nullify a broad grant of coverage. The policy promises to cover "injury or damage for which an insured becomes legally liable," including those damages arising from wrongful eviction and other intentional torts such as libel, slander, defamation, invasion of privacy, assault, battery, and malicious prosecution. The policy promises to provide excess liability insurance for those risks that appellant was required to insure under his primary liability insurance and basic coverage for occurrences not covered by primary insurance. While the coverage sections of the policy occupy only several paragraphs, the policy exclusions cover nearly two and one half pages of the six page agreement. In addition, the title of the policy, "Personal Umbrella Policy," connotes broad coverage. The exclusion of coverage for acts intended or expected by appellant is repugnant to the insuring clause that promises broad coverage for injuries arising from wrongful eviction. The reasonable expectations of the insured can be upheld only if the repugnant clause is not given effect. **See Federal Ins. Co.,** 113 N.M. at 169, 824 P.2d at 309.

{16} We hold that the clause excluding coverage for "expected or intended" harm is repugnant to the clause offering coverage for wrongful eviction, and, as such, is ineffective to preclude coverage in this case. Because the exclusionary clause is ineffective and the Montoya complaint alleged sufficient facts to fall within the coverage provisions of the policy, we hold that USAA had a duty to defend appellant. The order of the district court is reversed and this action is remanded for further proceedings consistent with this opinion.

{17} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

SETH D. MONTGOMERY,
Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1992-NMSC-042

Filing Date: July 14, 1992

Docket No. 19,905

PATRICIA ROBERTS,

Petitioner,

v.

SOUTHWEST COMMUNITY HEALTH SERVICES,

Respondent.

Original Proceeding on Certiorari
Susan M. Conway, District Judge

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OPINION

BACA, Justice.

{1} This appeal arises from a medical malpractice claim brought by petitioner Patricia Roberts against respondent Southwest Community Health Services ("SCHS"). The trial court granted a summary judgment motion in favor of SCHS after determining that petitioner's claim was barred by the relevant statute of limitations. Petitioner appealed the summary judgment to the Court of Appeals, which affirmed in an unpublished opinion. We granted certiorari and address two related issues: (1) Whether a distinction between qualified and nonqualified health care providers should be made for the purpose of applying the Medical Malpractice Act's statute of limitations; and (2) if so, whether the statute of limitations for a personal injury caused by the medical malpractice of a nonqualified health care provider accrues at the time of the negligent act or when the plaintiff discovers her injury and its cause. Because we find that a distinction does exist, we reverse and remand to the trial court.

I

{2} For purposes of this appeal, the relevant facts are as follows. On November 9, 1984, petitioner underwent surgery at Presbyterian Hospital, a hospital owned by SCHS. Over the next four years, petitioner suffered from discomfort and medical problems in her abdomen. In January of 1989, petitioner learned that a sponge had been left in her abdomen during the 1984 surgery and had the sponge removed.

{3} On April 9, 1990, petitioner filed a complaint for medical negligence that alleged that Drs. Fisk and Smith, the surgeons who had performed the surgery, and the nurses employed by SCHS had negligently failed to remove the sponge from petitioner during the 1984 operation. The complaint alleged that Dr. Fahy, a

radiologist, was negligent in failing to discover the sponge. The complaint also alleged that the health care providers had fraudulently concealed the fact of the negligence. The complaint joined SCHS under the theory of respondeat superior.

{4} Drs. Fisk and Smith, who were both qualified health care providers under the Medical Malpractice Act, NMSA 1978, Sections 41-5-1 through -28 (Repl. Pamp. 1989 & Cum. Supp. 1992) (the "Act"), made a motion for summary judgment, asserting that petitioner's claim was barred by the statute of limitations, Section 41-5-13. Although it was not a qualified health care provider, SCHS also moved for summary judgment based on the three year statute of limitations in Section 41-5-13. The trial court granted the summary judgment motions of Dr. Smith and SCHS and dismissed Smith, SCHS, and all of the employees of SCHS with prejudice. The trial court, however, found that questions of fact regarding the allegation of fraudulent concealment against Fisk remained and that summary judgment as to Fisk was therefore not appropriate.

{5} Petitioner, Fisk, Smith, and Fahy made a subsequent joint motion to dismiss the complaint with prejudice as to those parties. Petitioner filed a timely appeal of the summary judgment in favor of SCHS and, in an unpublished opinion, the Court of Appeals affirmed, holding that the statute of limitations is not a "benefit" of the Act and that the claim accrued at the time of the wrongful act causing injury. Because of an apparent conflict in the case law, we accepted petitioner's application for certiorari. We reverse the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

II

{6} In 1976, in response to a perceived medical malpractice insurance crisis, the legislature passed the Medical Malpractice Act.[1] The Act establishes medical malpractice liability coverage, Section 41-5-25, and, in addition, provides other benefits to those providers who choose to become qualified in accordance with Section 41-5-5(A). Section 41-5-5(C) of the Act specifically limits its benefits to those health care providers who accept the burdens of qualification.[2]

{7} Prior to passage of the Act, we held that the statute of limitations in a medical malpractice action begins to run at the time of the negligent act that causes injury. **Roybal v. White,** 72 N.M. 285, 383 P.2d 250 (1963). However, in a case that arose before the passage of the Act but that was decided after passage of the Act, the Court of Appeals held that the statute of limitations in a medical malpractice case begins to run not at the time of the negligent act but rather at the time that the plaintiff suffers injury. **Peralta v. Martinez,** 90 N.M. 391, 564 P.2d 194 (Ct. App.), **cert. denied,** 90 N.M. 636, 567 P.2d 485 (1977). According to the **Peralta** court, "the limitation period begins to run from the time the injury manifests itself in a physically objective manner **and** is ascertainable." **Id.** at 394, 564 P.2d at 197. Thus, for cases that arose prior to the passage of the Act or that are not governed by the limitations provisions of the Act, the judicial interpretations of the statute of limitations are conflicting.[3]

{8} For those actions that are governed by the limitations provisions of the Act, the statute of limitations begins to run on the date that the malpractice occurred and expires three years from that date. Section 41-5-13. In a case interpreting this statute of limitations, **Armijo v. Tandysh,** 98 N.M. 181, 646 P.2d 1245 (Ct.

[1] Ruth L. Kovnat, **Medical Malpractice Legislation in New Mexico,** 7 N.M. L. Rev. 5, 7 (1976-1977). For a general discussion of the Act, **see id.** at 17-34.

[2] The relevant portion of the statute reads:

C. A health care provider not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of a malpractice claim against it.

NMSA 1978, § 41-5-5(C).

[3] One commentator has explained that a medical malpractice cause of action could accrue at one of three distinct times: "when the wrongful act occurred, when the pain was first felt, or when the cause of the pain and, consequently, the wrongful act were discovered." Ron Horn, Note, **The Statute of Limitations in Medical Malpractice Actions,** 6 N.M. L. Rev. 271, 272 (1976).

App. 1981), **cert. quashed,** 98 N.M. 336, 648 P.2d 794, **cert. denied,** 459 U.S. 1016 (1982), the Court of Appeals held that, because the Act codified the common law rule of **Roybal,** the statute of limitations of the Act was not a "benefit" of the Act and, as such, was equally applicable to qualified and nonqualified health care providers. We granted certiorari in this case to decide whether the statute of limitations under the Medical Malpractice Act applies to nonqualified health care providers and, if not, to clarify when a personal injury cause of action for medical malpractice against a nonqualified health care provider accrues.

III

{9} Contrary to the Court of Appeals' opinion in **Armijo,** petitioner contends that the Act differentiates between "qualified health care providers" and "nonqualified health care providers" because only health care providers meeting the Act's qualifications, Section 41-5-5(A), may claim the benefits of the Act, Section 41-5-5(C). Petitioner argues that the statute of limitations, Section 41-5-13, is a "benefit" of the Act because it bars any medical malpractice claims against qualified health care providers arising three years after the act of malpractice, whether or not such claims are discoverable. Petitioner contends that the statute of limitations for personal injury, NMSA 1978, Section 37-1-8 (Repl. Pamp. 1990), is applicable to malpractice claims against a nonqualified health care provider, such as SCHS. Petitioner claims that there is a conflict in the case law interpreting when a personal injury cause of action arising from medical malpractice against nonqualified health care providers accrues. As discussed above, **Roybal** held that a personal injury claim accrues at the time of the negligent act. 72 N.M. at 287, 383 P.2d at 252. However, the Court of Appeals, in a pre-Act case, held that the cause of action accrues at the time of the injury. **Peralta,** 90 N.M. at 393, 564 P.2d at 196 (criticizing **Roybal**). Petitioner asks us to reconsider **Roybal,** overrule **Armijo,** and adopt the rule from **Peralta, i.e.,** that the cause of action accrues at the time of the injury.

{10} Not surprisingly, SCHS claims that the Act's three year statute of limitations applies to all health care providers, whether they are "qualified" or "nonqualified." Amicus Curiae, aligned with SCHS, cites language from the Act's statute of limitations to support this contention: "No claim for malpractice . . . may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred. . . ." Section 41-5-13. Amicus argues that the legislature's omission of the word "qualified" from this provision indicates that the legislature intended all health care providers to receive the benefit of its protection. Citing **Armijo,** 98 N.M. at 184, 646 P.2d at 1248, Amicus also contends that the Act merely codified the existing common law rule of **Roybal** that the cause of action accrues at the time of the wrongful act. SCHS and Amicus argue that the Act's statute of limitations cannot be considered as a "benefit" to qualified health care providers and, consequently, the statute of limitations contained in the Act applies equally to qualified and nonqualified health care providers.

A

{11} In **Armijo,** the Court of Appeals considered due process and equal protection challenges to the validity of the statute of limitations under the Act. 98 N.M. at 183-84, 646 P.2d at 1247-48. The plaintiff in **Armijo,** as personal representative of decedent's estate, alleged that the physician-defendant's malpractice had caused decedent's death, which occurred several months after the alleged negligent act. The plaintiff filed his complaint more than three years after the date of the alleged wrongful act but prior to three years after decedent's death. Thus, if the Act's statute of limitations for medical malpractice applied, the claim would be barred; if, however, the wrongful death statute of limitations applied, plaintiff's claim would not have been barred. **Id.** at 183, 686 P.2d at 1247. The plaintiff argued that the statutory schemes violated equal protection because they established different statutes of limitations for qualified and nonqualified health care providers. The **Armijo** court disagreed, reasoning that because the statute merely codified

the existing common law rule of **Roybal,** the Act's statute of limitations could not be considered as a "benefit." "There being no distinction, for limitation of action purposes, between qualified and nonqualified health care providers, there is no basis for this equal protection argument." **Id.** at 184, 646 P.2d at 1248.

{12} Whether such a distinction can be drawn is a matter of statutory construction. In construing a statute, our primary focus is to ascertain and give effect to the intent of the legislature. **State ex rel. Klineline v. Blackhurst,** 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). Our interpretation of legislative intent comes primarily from the language used by the legislature, and we will consider the ordinary meaning of such language unless a different intent is clearly expressed. **Schmick v. State Farm Mut. Auto. Ins. Co.,** 103 N.M. 216, 219, 704 P.2d 1092, 1095 (1985). Statutes should be construed so as to facilitate their operation and the achievement of the goals as specified by the legislature. **Miller v. New Mexico Dep't of Transp.,** 106 N.M. 253, 255, 741 P.2d 1374, 1376 (1987). We must "read the act in its entirety and construe each part in connection with every other part to produce a harmonious whole." **Klineline,** 106 N.M. at 735, 749 P.2d at 1114. In construing an act as a whole, we will give effect to each portion of the statute, if possible. **Methola v. County of Eddy,** 95 N.M. 329, 333, 622 P.2d 234, 238 (1980).

{13} The Act was enacted by the legislature in response to a perceived medical malpractice insurance crisis in New Mexico. Kovnat, **supra** note 1, at 7. The purpose of the Act is to "promote the health and welfare of the people of New Mexico by making available professional liability insurance for health care providers in New Mexico." Section 41-5-2. To achieve this goal, the legislature offered health care providers "benefits" such as malpractice liability coverage, Section 41-5-25; limitations of malpractice awards, Section 41-5-6; limitations of personal liability of health care providers for future medical expenses, Section 41-5-7; and a mandatory procedure for reviewing medical malpractice claims before such claims can be brought in a district court, Sections 41-5-14 to -21. However, the legislature conditioned a health care provider's entitlement to these "benefits" on meeting the qualifications of the Act. Section 41-5-5(A). The Act specifically denies any of its benefits to those who do not qualify. Section 41-5-5(C). Thus, the legislature encouraged health care providers to become qualified by accepting the burdens of qualification, and offered certain benefits in return.

{14} SCHS argues that we must construe the term "benefit" as the legislature understood that term when the statute was enacted. **Wellborn Paint Mfg. Co. v. New Mexico Employment Sec. Dep't,** 101 N.M. 534, 537, 685 P.2d 389, 392 (Ct. App. 1984). SCHS contends that because the legislature merely codified the common law rule of **Roybal** it did not intend to confer a benefit on qualified health care providers. While we agree with SCHS that the statute of limitations of the Act arguably codified the common law rule of **Roybal,** we must disagree with SCHS that, by codifying the **Roybal** rule, the legislature did not intend to confer a "benefit" on qualified health care providers. This argument assumes that, in "merely codifying" the **Roybal** rule, the legislature mechanistically enacted the common law and, thus, did not confer a benefit on qualified health care providers. We believe that it is equally plausible that the legislature, in response to the perceived medical malpractice crisis, chose the time of the negligent act rule specifically to confer its benefit on qualified health care providers. Moreover, we cannot blithely assume that the legislature was not aware that the time of the negligent act rule had been under what had been characterized as a "constant intellectual bombardment." **Ruth v. Dight,** 453 P.2d 631, 634 (Wash. 1969) (en banc). The **Ruth** court cited twenty-three cases, dating back as far as 1934, adopting the discovery rule. **Id.** at 636. Thus, at the time that the legislature considered the Act, the bombardment was in full tilt. Surely, in considering such wide-ranging legislation as the Act, the legislature must have canvassed the current trends in malpractice law. By codifying the **Roybal** rule, we believe that the legislature specifically chose to insulate qualified health

care providers from the much greater liability exposure that would flow from a discovery-based accrual date.

{15} SCHS also argues that the "benefits" of the Act are only those "benefits" for which the qualified health care provider paid by underwriting the Patient's Compensation Fund. As SCHS recognizes, however, the Act established "new procedural and substantive restrictions on malpractice liability." One of the "procedural restrictions" that the Act established is its statute of limitations, which bars malpractice claims that are not initiated within three years of the date of the wrongful act. Section 41-5-13. In contrast, the personal injury statute of limitations, Section 37-1-8, bars actions that are not brought within three years of the accrual of the cause of action. In the absence of explicit instructions from the legislature, when a cause of action accrues under a statute of limitations is a judicial determination. **See Roybal,** 72 N.M. at 287, 383 P.2d at 252; **see also Harig v. Johns-Manville Prods. Corp.,** 394 A.2d 299, 302 (Md. 1978) (accrual of cause of action is judicial determination in absence of explicit statutory definition); **Franklin v. Albert,** 411 N.E.2d 458, 462 (Mass. 1980) (same); **Raymond v. Eli Lilly & Co.,** 371 A.2d 170, 172 (N.H. 1977) (same); **Berry v. Branner,** 421 P.2d 996, 999 (Or. 1966) (in banc) (same).

{16} The instant case illustrates why the statute of limitations of the Act, Section 41-5-13, must be considered to be a benefit of the Act. If the statute of limitations of the Act applies, petitioner's claim is barred because it was filed more than three years after the negligent act even though petitioner may not have discovered her injury. If, however, the statute of limitations for personal injury, Section 37-1-8, applies, petitioner's claim may not be barred, depending upon when the cause of action accrued. **See Peralta,** 90 N.M. at 394, 564 P.2d at 197 ("Limitation period runs from the time the injury manifests itself in a physically objective manner **and** is ascertainable."); **cf. Crumpton v. Humana, Inc.,** 99 N.M. 562, 563, 661 P.2d 54, 55 (1983) (quoting **Peralta** and stating that the "statute of limitations commences running from the **date of the injury** or **the date of the alleged malpractice.").** We can see no greater benefit to SCHS than for the cause of action to be barred by the statute of limitations.

{17} The statutory construction principles outlined above compel a similar result. SCHS contends that the legislature purposefully omitted the word "qualified" from the Act's statute of limitations, Section 41-5-13, and that this omission indicates that the legislature intended the statute to apply to all health care providers, regardless of whether the particular health care provider chose to become qualified under Section 41-5-5(A). In making this argument, however, SCHS ignores a cardinal principle of statutory construction, **i.e.,** that the Act should be read as a whole, giving effect to each portion of the statute. As petitioner observes, the entire Act is directed towards health care providers qualifying under Section 41-5-5(A). That, indeed, is the essence of Section 41-5-5(C), which reads: "A health care provider not qualifying under this section shall not have the benefit of any of the provisions of the Medical Malpractice Act in the event of a malpractice claim against it." Moreover, with three exceptions,[4] the Act, in referring to "health care providers," does not specifically state that such providers must be "qualified," even when those references are to substantive "benefits" of the Act.[5] Were we to adopt SCHS's

[4] Sections 41-5-14, which creates the Medical Review Commission, refers to "health care providers covered by the Medical Malpractice Act" and to "health care providers qualified under the Medical Malpractice Act." Similarly, Section 41-5-15, which requires submission of claims to the Commission prior to filing suit, refers to "qualifying health care provider." Even so, immediately after these two references, the legislature reverts back to the term "health care provider" without qualification. **See** §§ 41-5-16, -17, -19, -20. The third occurrence, in Section 41-5-25(B), imposes an annual surcharge on "all health care providers qualifying under" Section 41-5-5(A)(1) to finance the Patient's Compensation Fund. Again, in subsequent references, the legislature returns to the term "health care provider" without qualification. **See** § 41-5-25(C).

[5] § 41-5-6(D) (limiting a "health care provider's" personal liability); § 41-5-7(B) (providing that a patient shall be furnished with all medical care made necessary by the "health care provider's" malpractice); § 41-5-7(E) (limiting liability of "health care provider" for medical care and related benefits to $ 200,000.000); § 41-5-7(H) (making "health care provider" personally liable for punitive damages); § 41-5-8

interpretation, each provision under the Act not specifically referring to "qualified" health care providers would be available to every health care provider, regardless of whether that provider qualified under the Act or not. Such an interpretation would make a mockery of the Act and defy the statutory construction principles outlined above. To accept SCHS's argument would render Section 41-5-5(C) a nullity. **Cf. Klineline,** 106 N.M. at 735, 749 P.2d at 1114 (interpreting one part of statute so as not to render another part of statute superfluous).

{18} In an attempt to persuade us to uphold **Armijo,** SCHS argues that the construction given to the Act above will result in future litigants challenging the Act because the provisions, as construed, violate equal protection. **See Armijo,** 98 N.M. at 183-84, 646 P.2d at 1247-48. SCHS contends that we could avoid this constitutional problem by simply following **Armijo.** While we agree with SCHS that "a central objective of statutory construction is to refrain from undermining the constitutionality of the legislature's handiwork," **see Huey v. Lente,** 85 N.M. 597, 598, 514 P.2d 1093, 1094 (1973), we note that petitioner also invokes the **Huey** principle to support her argument that we should overrule **Armijo** in order to avoid the question of whether Section 41-5-13 is unconstitutional as depriving her and other similarly situated claimants of their right to access to the courts. In any event, we need not reach either constitutional question here. Whether or not the distinction between qualified and nonqualified health care providers under the Act creates an equal protection problem and whether or not the statute gives rise to other constitutional issues are questions not presented by the instant appeal. The parties have not briefed these issues and we will not decide them now.

{19} Thus, in construing the Act as a whole, we hold that the Act's statute of limitations, Section 41-5-13, does not apply to health care providers, such as SCHS, that have not qualified under Section 41-5-5(A). Cases holding to the contrary are hereby overruled.[6]

B

{20} As discussed in Section II, **supra,** the cases interpreting when a cause of action for medical malpractice outside of the ambit of the Act accrues are conflicting. In **Roybal,** we held that a cause of action in a medical malpractice case accrues at the time of the wrongful act. 72 N.M. at 287, 383 P.2d at 252. However, the Court of Appeals has held that a cause of action accrues when a physically objective and ascertainable injury to the plaintiff occurs. **Peralta,**

(making evidence of prejudgment payment of injured person's medical expenses by "health care provider" inadmissible at trial); § 41-5-9(D) (allocating burden of proving need for medical care has subsided or abated or that medical care is not reasonably necessary to "health care provider"); § 41-5-10(A), (D), (E) (describing procedures for future examination by "health care provider" of patients receiving medical care pursuant to judgment or settlement); § 41-5-11(A), (B) (providing that any prejudgment payment of medical expenses shall inure to the exclusive benefit of the "health care provider" and preserving right of "health care provider" to recover such payments in the event the provider is not found liable); § 41-5-13 (providing accrual rule and statute of limitations for medical malpractice actions against "health care provider"); § 41-5-16(A), (B), (C) (discussing procedures for completing application for Commission review of malpractice claim against "health care provider"); § 41-5-17(A), (B), (C), (D), (E), (H) (establishing procedures for Commission panel selection to review malpractice claims against "health care provider"); § 41-5-19(A), (B) (discussing hearing procedures for claims brought against "health care provider"); § 41-5-20(D) (providing that panel's report shall be sent to the "health care provider's" professional licensing board); § 41-5-25 (A), (C), (D), (H) (discussing operation of Patient's Compensation Fund with respect to "health care provider"); § 41-5-27 (discussing reporting duties of district court with respect to judgments against "health care providers").

[6] Our holding today that nonqualified health care providers may not partake of any of the benefits of the Act is consistent with our holding in **Grantland v. Lea Regional Hosp., Inc.,** 110 N.M. 378, 796 P.2d 599 (1990). In **Grantland,** we held that Section 41-5-22, which tolls the Act's statute of limitations period upon the filing of a claim with the Medical Review Commission, applies to nonqualified as well as qualified health care providers. **Id.** at 380, 796 P.2d at 601. Section 41-5-22 cannot be considered a "benefit" of the Act because, by tolling the statute of limitations, it acts to the nonqualified health care provider's detriment. Further, as we noted in **Grantland,** enforcing Section 41-5-22 against nonqualified health care providers is consistent with one of the purposes of the Act, **i.e.,** to prevent the filing of nonmeritorious malpractice claims in district court. **Id.**

90 N.M. at 394, 564 P.2d at 197.[7] The instant case has required us to examine the rationale of these cases to determine whether the time of the negligent act rule retains its vitality. We conclude that it does not and accordingly overrule those cases that are inconsistent with the following discussion.

{21} The facts in **Roybal** were similar to those in the instant case. In **Roybal,** the plaintiffs filed a medical malpractice complaint alleging that Mrs. Roybal had suffered injuries arising out of an operation performed by the defendant-physician. The complaint alleged that a sponge had been left in plaintiff's abdomen, which required a further surgery to remove the sponge. Mrs. Roybal sought damages resulting from the alleged malpractice, and her husband sought damages for loss of consortium, services, and medical expenses. Because the complaint was filed over ten years after the first surgery, the trial court found that both causes were barred by the statute of limitations. **Roybal,** 72 N.M. at 286, 383 P.2d at 251. On appeal, we held that the cause of action accrued at the time of the negligent act and affirmed the trial court. **Id.** at 287, 383 P.2d at 252.

{22} In **Roybal,** we relied on **Kilkenny v. Kenney,** 68 N.M. 266, 361 P.2d 149 (1961), for our formulation of the time of the negligent act rule. In **Kilkenny,** we considered a medical malpractice action brought by a decedent's surviving husband. On December 11, 1955, Mrs. Kilkenny, a diabetic, was admitted to a hospital to have her diet adjusted. The following day, while in the exclusive care of the defendants, Mrs. Kilkenny went into a diabetic coma from which she died on December 2, 1958. Her husband, who filed his complaint November 12, 1959, asserted three causes of action, one of which was for personal injuries caused to the decedent by the defendant. This cause of action sought to recover medical expenses of the decedent between the time of the negligent act and the time of death. **Id.** at 267-69, 361 P.2d at 150-52. We held that the statute of limitations, NMSA 1953, Section 23-1-8, barred the husband's action for personal injury because "the same should have been filed within three years **from the date of the injury." Id.** at 270, 361 P.2d at 151 (emphasis added).

{23} In **Kilkenny,** the date of the negligent act that caused Mrs. Kilkenny to lapse into a coma was the same as the date of the injury. Thus, when we applied the date of the negligent act rule in **Roybal,** we equated the date of the negligent act with the date of the injury and perhaps misconstrued the rule to be applied when the injury either does not occur or manifest itself on the same date as the negligent act. In **Peralta,** the Court of Appeals recognized this incongruity in **Roybal** and held that the cause of action for personal injuries caused by medical malpractice accrues at the time of the injury to the plaintiff. 90 N.M. at 393, 564 P.2d at 196. **Peralta** also listed further reasons, which we find persuasive, for refusing to follow **Roybal.** First, the relevant statute of limitations, in the instant case Section 37-1-8, "does not state that the limitation period runs from the time of the wrongful act." **See id.** at 392, 564 P.2d at 195. Second, there is no cause of action for malpractice in the absence of an injury. **Id.** at 393, 564 P.2d at 196. Third, in personal injury cases not involving malpractice, a cause of action accrues at the time of the injury. **Id.** (citing **New Mexico Elec. Serv. Co. v. Montanez,** 89 N.M. 278, 551 P.2d 634 (1976); **Chavez v. Kitsch,** 70 N.M. 439, 374 P.2d 497 (1962)).[8]

[7] In **Crumpton v. Humana, Inc.,** 99 N.M. 562, 563, 661 P.2d 54, 55 (1983), we cited **Peralta** with approval. In **Crumpton,** we interpreted the statute of limitations under the Act, Section 41-5-13, and the general three-year statute of limitations, Section 37-1-8. We held that either statute of limitations commences to run "from the **date of injury** or **the date of the alleged malpractice." Crumpton,** 99 N.M. at 563, 661 P.2d at 55.

[8] In addition, in other professional malpractice cases the statute of limitations begins to run when the plaintiff suffers injury. **See, e.g., Spurlin v. Paul Brown Agency, Inc.,** 80 N.M. 306, 307, 454 P.2d 963, 964 (1969) (insurance agent malpractice); **Chisholm v. Scott,** 86 N.M. 707, 709, 526 P.2d 1300, 1302 (Ct. App. 1974) (accountant malpractice). In legal malpractice cases, the statute of limitations accrues when the "harm or damage [is] ascertainable or discoverable." **Jaramillo v. Hood,** 93 N.M. 433, 434, 601 P.2d 66, 67 (1979).

{24} Moreover, our decision in **Roybal** was premised in part on the date of the negligent act rule as being the majority rule. **Roybal,** 72 N.M. at 287, 383 P.2d at 252 (citing Annotation, **When Statute of Limitations Commences to Run Against Malpractice Action Against Physicians, Surgeons, Dentists, or Similar Practitioners,** 80 A.L.R.2d 368 (1961); Annotation, **When Statute of Limitations Commences to Run Against Actions Against Physicians, Surgeons, or Dentists for Malpractice,** 144 A.L.R. 209, 212 (1943); Annotation, **When Statute of Limitations Commences to Run Against Actions Against Physicians, Surgeons, or Dentists for Malpractice,** 74 A.L.R. 1317 (1931)). While the date of the negligent act rule may have been the majority rule when **Roybal** was decided, it has been under "constant intellectual bombardment," **Ruth,** 453 P.2d at 634, and no longer retains that position. The great weight of authority, both in decisions and commentary, today recognizes some form of the "discovery rule," **i.e.,** that the cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that a claim exists. David A. Sonenshein, **A Discovery Rule in Medical Malpractice: Massachusetts Joins the Fold,** 3 W. New Eng. L. Rev. 433, 433-34 & n.1 (1981) (citing cases and statutes in forty-one jurisdictions adopting some form of discovery rule); Kovnat, **supra** note 1, at 17; Horn, **supra** note 3, at 272-73; Robert A. Brazener, Annotation, **When Statute of Limitations Commences to Run Against Malpractice Action Based on Leaving Foreign Substance in Patient's Body,** 70 A.L.R. 3d 7 (1976 & Supp. 1991). **See also** W. Page Keeton, et al., **Prosser & Keeton on Torts** § 30 (5th ed. 1984 & Supp. 1988); Ralph V. Seep, Annotation, **Accrual of Cause of Action for Purpose of Statute of Limitations in Medical Malpractice Actions Under Federal Tort Claims Act—Post-Kubrick Cases,** 101 A.L.R. Fed. 27 (1991).

{25} Our decision to adopt the discovery rule is bolstered by weighing policy considerations on both sides of the issue. One policy consideration that a statute of limitations seeks to further is basic fairness to the defendant. **Harig v. Johns-Manville Prods. Corp.,** 394 A.2d 299, 302 (Md. 1978). Under this broad umbrella fall purposes such as encouraging promptness in instituting a claim, suppressing stale or fraudulent claims, and avoiding inconvenience. **Id.** In addition, a statute of limitations is a statute of repose that encourages plaintiffs to bring their actions while the evidence is still available and fresh. **Franklin v. Albert,** 411 N.E.2d 458, 463 (Mass. 1980).

{26} While protecting the defendant is a laudatory goal, the statute of limitations should "reflect a policy decision regarding what constitutes an 'adequate period of time' for 'a person of ordinary diligence' to pursue his claim." **Harig,** 394 A.2d at 302 (quoting **Walko Corp. v. Burger Chef Sys., Inc.,** 378 A.2d 1100, 1104 (Md. 1977); **McMahan v. Dorchester Fertilizer Co.,** 40 A.2d 313, 315 (Md. 1944)). In most situations, the plaintiff in a tort action knows immediately of both the wrongful act and of the injury and, in fairness to the defendant, the cause of action accrues at the time of the negligent act. **See id.** at 303. However, in situations where professional malpractice is the cause of the injury, "the fact that a tort has been committed may go unnoticed for years, because the plaintiff is unqualified to ascertain the initial wrong and could not reasonably be expected to know of the tort until actual injury is experienced." **Id.** "The manifest injustice of the [time of the negligent act] doctrine is that, rather than punishing negligent delay by the plaintiff, it punishes 'blameless ignorance' by holding a medical malpractice action time-barred before the plaintiff reasonably could know of the harm he has suffered." **Franklin,** 411 N.E.2d at 463.

{27} In the context of malpractice by an accountant, our Court of Appeals has explained why the time of the injury rule is appropriate:

> In medical malpractice cases the injury occurs, and is often easily ascertained, at the time of the negligent act or omission. In a tax deficiency situation, the injury occurs only when the party aggrieved receives notice by mail from the tax commissioner.

> A person needs special training to know whether his tax return has been erroneously prepared. No special training is required to feel pain. In the relationship of accountant and client, the trust and confidence that the client places in the professional person places him in a vulnerable position should that trust and confidence be misplaced. It is the policy of the law to encourage that trust and confidence; likewise it is the duty of the law to protect the client from the negligent acts of the professional person.

Chisholm v. Scott, 86 N.M. 707, 709, 526 P.2d 1300, 1302 (Ct. App. 1974) (citations omitted). While the **Chisholm** court distinguished medical malpractice from other types of professional malpractice, we believe that the rationale from **Chisholm** is applicable in cases such as the instant case in which the injury does not necessarily manifest itself at the time of the negligent act. Although the plaintiff in a medical malpractice case may not require any special knowledge or training to know that she suffers from pain, in the absence of such knowledge or training, she may be unable to ascertain the cause of that pain, **i.e.,** the professional malpractice of a physician. The doctor-patient relationship, even more so than the accountant-client relationship, places the patient in a vulnerable position that requires the patient to place his or her confidence and trust in the doctor. The policy of the law must encourage the confidence and trust required in the doctor-patient relationship. Moreover, the law has a duty to protect the patient from injury caused by a negligent act of a physician. Thus, we hold that, in situations such as the instant case, the cause of action accrues when the plaintiff knows or with reasonable diligence should have known of the injury and its cause.

{28} Our above discussion does not necessarily preclude SCHS from claiming on remand that this action is time-barred. We believe that whether plaintiff in the instant case knew or with reasonable diligence should have known of the injury and its cause is a question of fact that is specifically within the trial court's competence. Accordingly, we reverse and remand with instructions for further proceedings consistent with this opinion.

{29} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

RICHARD E. RANSOM,
Chief Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1992-NMSC-044

Filing Date: July 27, 1992

Docket No. 19,707

SANTA FE EXPLORATION COMPANY,

Petitioner-Appellant,

v.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,

Respondent-Appellee,

and

STEVENS OPERATING CORPORATION,

Petitioner-Cross-Appellant,

v.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO,

Respondent-Cross-Appellee.

Appeal from the District Court of Chaves County
W. J. Schnedar, District Judge

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Ernest L. Padilla
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OPINION

BACA, Justice.

{1} This appeal involves a series of orders issued by the New Mexico Oil Conservation Commission (the "Commission") and the New Mexico Oil Conservation Division (the "Division"). These orders established and govern the production of oil from the North King Camp Devonian Pool (the "Pool") in which appellant, Santa Fe Exploration Company ("Santa Fe"), and cross-appellant, Stevens Operating Corporation ("Stevens"), owned interests. After the Division approved Steven's request to drill a well at an unorthodox location and limited production from the well, both Santa Fe and Stevens petitioned the Commission for a de novo review. After consolidation of the petitions, the Commission, in its final order, approved the Stevens well, placed restrictions on Stevens's production from this well, and limited oil production from the entire Pool. Pursuant to NMSA 1978, Section 70-2-25 (Repl. Pamp. 1987), both Santa Fe and Stevens appealed the final order of the Commission to the district court, which affirmed. Both parties appeal the decision of the district court. We note jurisdiction under Section 70-2-25 and affirm.

I

{2} In December 1988, at the request of Santa Fe, the Division issued Order No. R-8806, which established the Pool and the rules and regulations governing operation of the Pool. These rules established standard well spacings and a standard

unit size of 160 acres; regulated the distances that wells could be placed from other wells, the Pool boundary, other standard units, and quarter-section lines; set production limits for wells in the Pool; and outlined procedures for obtaining exceptions to the rules. The order also approved Santa Fe's Holstrom Federal Well No. 1 (the "Holstrom well") for production, which Santa Fe began producing at the rate of 200 barrels per day.

{3} In April 1989, Curry and Thornton ("Curry"), predecessors in interest to Stevens, applied to the Division to drill a well in the Pool and for an exception to the standard spacing and well location rules. Curry requested the non-standard spacing because it claimed that geologic conditions would not allow for production of oil from their lease from an orthodox well location. Santa Fe[1] opposed the application, claiming that the well would impair its correlative rights to oil in the Pool. In its Order No. R-8917, the Division approved Curry's application to drill the well at the unorthodox location but imposed a production penalty limiting the amount of oil that Curry could produce from the well to protect correlative rights of other lease holders in the Pool.

{4} In May, Stevens, which had replaced Curry as an operator in the Pool, applied to the Division for an amendment to Order No. R-8917. Stevens requested that, instead of drilling the well authorized by Order No. R-8917, it be allowed to enter an existing abandoned well and drill directionally to a different location. The requested well, if approved and drilled, would also be at an unorthodox location. Santa Fe opposed the amendment and objected to the original production penalty, which it contended should have allowed less production from the Stevens well. The Division approved Stevens's application and issued Order No. R-8917-A amending Order No. R-8917. The amended order, while allowing directional drilling to an unorthodox location, required Stevens to otherwise meet the requirements of the original order, including the original production penalty.

{5} Stevens proceeded to drill the well authorized by the amended order. When the well failed to produce oil, Stevens contacted the Division Director and requested approval to re-drill the well to a different location and depth. The Director permitted Stevens to continue drilling at its own risk and subject to subsequent orders to be entered after notice to all affected parties and a hearing. Stevens drilled and completed this well (the "Deemar well") and filed an application for a de novo hearing by the Commission to approve production from the well and to consider the production penalty. **See** NMSA 1978, § 70-2-13 (Repl. Pamp. 1987) (decisions by the Director may be heard de novo by the Commission). Santa Fe also filed an application for a de novo hearing opposing Stevens's application or, in the alternative, urging that a production penalty be assessed against the Stevens well.

{6} The Commission consolidated the petitions and, after notice to the parties and a hearing, entered Order No. R-9035. This order estimated the total amount of oil in the Pool and the amount of oil under each of the three tracts in the Pool.[2] The order set the total allowable production from the Pool at the existing production rate of 235 barrels per day,[3] and allocated production to the two wells in accordance with the relative percentages of oil underlying each of the three tracts. Under this formula, Stevens was allowed to produce 49 barrels per day from its Deemar well, Santa Fe was allowed to produce 125 barrels per day from its Holstrom well, and the undeveloped tract left in the Pool would be allowed to produce

[1] Santa Fe and Exxon USA were co-owners of both the lease and the production from the Holstrom well. While both Santa Fe and Exxon USA contested the application, for the sake of simplicity we will refer to them collectively as "Santa Fe."

[2] The order estimated oil productive rock volume in the Pool to be 10,714 acre-feet and allocated the oil as follows: 21% to the tract on which Stevens held the lease and where the unorthodox well was located (E/2 W/2 of section 9); 53% to the tract on which Santa Fe held the lease and where the Holstrom well was located (SE/4 of section 9); 26% to the tract on which Santa Fe held the lease and where no producing well was located (NE/4 of section 9).

[3] At the time, Santa Fe was producing 200 barrels per day of oil from its Holstrom well. Under the production penalty formula imposed by the prior Division order, Stevens would have been allowed to produce 35 barrels per day from its Deemars well.

61 barrels per day, if developed. The order also allowed the production to be increased to 1030 barrels per day if all operators voluntarily agreed to unitize operation of the Pool.

{7} Pursuant to NMSA 1978, Section 70-2-25(A), both Santa Fe and Stevens applied to the Commission for a rehearing. Santa Fe contended that the second attempt at directional drilling was unlawful; that it was denied due process and equal protection by the ex parte contact between Stevens and the Division Director; that the findings of the Commission apportioning production were not supported by the evidence; that the reduction of production was not supported by the evidence and was erroneous, capricious, and contrary to law; and that the unitization was illegal and confiscatory to Santa Fe. Stevens argued that the order was contrary to law because it would result in the drilling of an unnecessary well on the undeveloped tract, which would result in waste; that the order was arbitrary, capricious, unreasonable, and contrary to law because it exceeded the Commission's statutory authority; that the order violated its due process rights; and that the findings regarding recoverable reserves were contrary to the evidence and arbitrary and capricious. When the Commission took no action on the applications for rehearing, the petition was presumed to be denied and each party appealed to the district court, which consolidated the appeals. **See** NMSA 1978, Section 70-2-25.

{8} On appeal to the district court, Santa Fe contended that Order No. R-9035 was arbitrary and capricious, that it was not supported by substantial evidence, that the Commission exceeded its statutory authority, and that the Commission Chairman's bias against Santa Fe denied it due process. Stevens contended that the order was arbitrary, capricious, and unreasonable; that it was contrary to law; and that it denied Stevens' rights to due process. The trial court, after a review of the evidence presented at the Commission's hearings, affirmed the Commission's order. The trial court also dismissed, with prejudice, Santa Fe's contention of bias.

{9} Pursuant to Section 70-2-25, both Santa Fe and Stevens appeal the district court decision to this Court. Santa Fe contends (1) that it was denied procedural due process because the Commission was biased; (2) that the district court erred when it failed to consider the question of bias; (3) that the Division violated its own regulations and procedures; (4) that the Commission abused its discretion when it lowered allowable production from the Pool; and (5) that the Commission decision was not supported by the evidence and was arbitrary and capricious. Stevens contends (1) that the Commission exceeded its authority when it reduced allowable production in an attempt to unitize operation of the Pool; (2) that the order violated the Commission's statutory duty to prevent waste; (3) that the order was not supported by substantial evidence; and (4) that its rights to due process were violated. Because of a substantial overlap of issues raised by Santa Fe and Stevens, we consolidate these issues and address the following: (1) whether the Commission's actions violated due process rights of either Santa Fe or Stevens; (2) whether by issuing Order No. R-9035 the Commission exceeded its statutory authority or violated any of its own rules; (3) whether the Commission's order was supported by substantial evidence; and (4) whether the Commission's order was arbitrary and capricious.

II

{10} Before addressing the substance of this appeal, we first must address an issue of appellate procedure. Santa Fe contends that the Commission, in its answer brief, has disregarded SCRA 1986, 12-213 (Cum. Supp. 1991), by failing to provide proper citation to the record proper, transcript of proceedings, and exhibits on which it relied. In light of this failure, Santa Fe urges us to disregard the Commission's arguments or, in the alternative, to accord the Commission's arguments less weight.

{11} We agree with Santa Fe that the Commission failed to provide proper citations in its answer brief. Rule 12-213(B) requires an answer brief to meet the same requirements as the brief in chief, which include "citations to authorities and

parts of the record proper, transcript of proceedings or exhibits relied on." Rule 12-213(A)(3). The Commission's answer brief contains numerous factual statements without a single citation to the record below, except for a passing reference to several findings made by the Commission (but without citation to where such findings appear in the Record Proper) and one citation to the record in which the Commission's brief quoted Santa Fe's brief in chief and citation. The Court of Appeals, in addressing a similar violation, stated:

> We caution [appellant's] counsel regarding violations of our appellate rules. [Appellant] provided no citations to the parts of the record and transcript he relied on, a violation of SCRA 1986, 12-213(A)(1)(c) and (A)(2). Technically, we have no duty to entertain any of [appellant's] contentions on appeal due to this procedural violation. **See Bilbao v. Bilbao**, 102 N.M. 406, 696 P.2d 494 (Ct. App. 1985). [Appellant's] counsel also failed to provide case authority for several of his issues, a violation of Rule 12-213(A)(3). We remind counsel that we are not required to do his research. **In re Adoption of Doe** [, 100 N.M. 764, 676 P.2d 1329 (1984)]. We will not review issues raised in appellate briefs and unsupported by cited authority. **Id.**

Fenner v. Fenner, 106 N.M. 36, 41-42, 738 P.2d 908, 913-14 (Ct. App.), **cert. denied**, 106 N.M. 7, 738 P.2d 125 (1987). As the Court of Appeals advised appellant's counsel in **Fenner**, we advise counsel for the Commission "to read and follow the appellate rules to avoid future violations." **Id.** at 42, 738 P.2d at 914.

III

{12} We turn now to the due process claims of Santa Fe and Stevens. Santa Fe claims that it was denied procedural due process for three separate reasons: (1) the Commission was biased by the ex parte communication between the Division Director and Stevens thereby tainting its decision; (2) the Division Director's approval of the second directional drilling attempt was given prior to notice and a hearing; and (3) the Commission failed to give notice that it was going to consider limiting allowable production from the Pool. Stevens, while contesting Santa Fe's charge of bias, contends that its procedural due process rights were violated because the Commission failed to give adequate notice of its intent to limit production from the entire field. Stevens also claims that its substantive due process rights were violated by the Commission's allegedly erroneous determination of the recoverable reserves underlying the Pool. We address each contention below.

A

{13} Santa Fe argues that its procedural due process rights were denied because the Division Director had ex parte contact with Stevens prior to Stevens's second directional drilling attempt, conditionally approved the drilling, and then participated in the affirmance of this decision as a member of the Commission. This action, Santa Fe contends, gives the appearance of impropriety and irrevocably taints the Commission's decision, and, as such, renders the decision voidable. **See, e.g.**, **Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.**, 685 F.2d 547, 564 (D.C. Cir. 1982). Santa Fe also contends that the district court erred when it dismissed its claim of bias with prejudice. Santa Fe argues that the court should have allowed its discovery motion on the issue of bias rather than dismissing with prejudice. These actions, Santa Fe concludes, violated its rights to procedural due process.

{14} At a minimum, procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation and an opportunity to defend. **Reid v. New Mexico Bd. of Examiners in Optometry**, 92 N.M. 414, 415-16, 589 P.2d 198, 199-200 (1979). In addition, the trier of fact must be unbiased and may not have a predisposition regarding the outcome of the case. **Id.** at 416, 589 P.2d at 200. Our cases also require the appearance of fairness to be present. **Id.**

> The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an 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. The above principles are applicable to administrative proceedings, such as the instant case, where the administrative agency adjudicates or makes binding rules that affect the legal rights of individuals or entities. **Id.** Due process safeguards are particularly important in administrative agency proceedings because "many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed." **Id.**

{15} In **Reid**, the Board of Examiners in Optometry initiated disciplinary proceedings against Dr. Reid for alleged misconduct. Prior to the hearing and pursuant to a statute, Reid disqualified two of the five Board members. At the hearing, Reid moved to disqualify one of the remaining Board members, Dr. Zimmerman, on the basis of bias. Reid based his motion on Zimmerman's prior statements that Reid would lose his license after the hearing. After Zimmerman testified that he could render a fair and impartial decision, the Board denied Reid's request to disqualify Zimmerman. The Board revoked Reid's license to practice and he appealed to the district court, which affirmed. **Id.** at 415, 589 P.2d at 199. On appeal to this Court, Reid claimed that Zimmerman's testimony indicated prejudgment and that the failure to disqualify Zimmerman deprived him of his right to due process. We agreed and held that the Board's failure to disqualify Zimmerman violated Reid's due process rights because Zimmerman's prior statements indicated bias against Reid. **Id.** at 416, 589 P.2d at 200.

{16} The instant case is distinguishable from the **Reid** case. Unlike the appellant in **Reid**, Santa Fe failed to raise the issue of the Division Director's bias at the Commission hearing, even though it was aware of the prior ex parte contact. Unlike the Board member in **Reid**, the Director in the instant case did not express an opinion regarding the outcome of the case prior to the hearing. The Director merely permitted Stevens to drill a second exploratory well at its own risk and conditioned approval of production from the well on further Commission action. He made no comment on the probability of Commission approval or on the possible production penalties that could be assessed. Additionally, at the original hearing, the Director could have approved Stevens's request to drill the well to a different depth. Moreover, by statute, the Director is a member of the Commission, NMSA 1978, Section 70-2-4 (Repl. Pamp. 1987), and has a duty to prevent waste, NMSA 1978, Sections 70-2-2, -3 (Repl. Pamp. 1987) (defining and prohibiting waste); NMSA 1978, Section 70-2-11 (Repl. Pamp. 1987) (setting out duties). Here, the Director avoided waste by allowing the second well to be drilled, which eliminated the expense of removing the drilling rig from the drilling site and moving the rig back after approval was obtained. As **Reid** is distinguishable, we hold that the Commission did not violate Santa Fe's procedural due process rights by virtue of bias.

{17} In addition, Santa Fe was not denied due process when the district court dismissed its claim of bias with prejudice. The court allowed briefing on the question of whether to vacate the claim of bias and whether dismissal of the bias claim should be with or without prejudice. More is not required. **See Lowery v. Atterbury**, 113 N.M. 71, 73, 823 P.2d 313, 315 (1992). **See also**, **Jones v. Nuclear Pharmacy, Inc.**, 741 F.2d 322, 325 (10th Cir. 1984) (procedural due process not violated where petitioner given opportunity to address issue by memorandum).

B

{18} We next address other claims by the parties that their respective rights to procedural due process were denied. Santa Fe contends that the Commission's actions impaired its constitutionally protected property rights with neither adequate notice nor an opportunity to be heard regarding two separate issues: (1) whether the

Commission should grant permission for Stevens's second directional drilling attempt; and (2) whether the Commission should reduce the Pool wide allowable production. Stevens also contends that it was denied procedural due process when the Commission failed to provide notice prior to the hearing that Pool wide allowables might be reduced as a consequence of the hearing.

1

{19} Santa Fe's first argument is that, by allowing Stevens to drill the second well without notice or a prior hearing, the Commission denied Santa Fe due process. Before due process is implicated, the party claiming a violation must show a deprivation of life, liberty, or property. **Reid**, 92 N.M. at 415-16, 589 P.2d at 199-200. In the instant case, the property right implicated is Santa Fe's right to produce the oil underlying its tract in the Pool. This right was not implicated by virtue of Stevens drilling a well, but rather would be implicated by Stevens being allowed to produce oil from the well. Santa Fe had notice and an opportunity to be heard before the Commission granted Stevens permission to produce oil from the Deemar well. Because no due process right was implicated, we find no violation of due process.

2

{20} Citing **Jones** and **McCoy v. New Mexico Real Estate Comm'n**, 94 N.M. 602, 614 P.2d 14 (1980), both Santa Fe and Stevens claim that the Commission deprived them of procedural due process. They argue that the Commission failed to give adequate notice that it would consider limiting production from the Pool. Both claim that the only issues before the Commission were whether the Deemar well should be approved and what production penalty should be imposed. Because the Commission went beyond these issues and decided an issue of which the parties neither had notice nor an opportunity to be heard, both parties conclude that the Commission violated their due process rights.

{21} Curiously, none of the parties cited **National Council on Compensation Insurance v. New Mexico State Corporation Commission**, 107 N.M. 278, 756 P.2d 558 (1988), which we find controlling. In **National Council**, the National Council on Compensation Insurance ("NCCI") filed a premium rate increase for all worker's compensation carriers operating in New Mexico with the State Insurance Board. Prior to a hearing considering the rate increase, the Insurance Board, by letter and a subsequent mailed notice, informed NCCI that a hearing had been scheduled to allow public written and oral comments regarding the proposed rate increases and to allow NCCI to present its filing. The notice provided that the hearing would consider whether the proposed rate increase was excessive, inadequate, or unfairly discriminatory. After the hearing, the Insurance Board denied NCCI's rate increase request, and NCCI appealed. **Id.** at 280-82, 756 P.2d at 560-62. On appeal, NCCI contended that its procedural due process rights were denied because the notice provided was not sufficiently specific to allow NCCI to prepare for issues to be addressed at the hearing. **Id.** at 283, 756 P.2d at 563. We disagreed and held that the notice provided comported with due process requirements because "the notice provided NCCI an opportunity to be heard by reasonably informing NCCI of the matters to be addressed at the hearing so that it was able to meet the issues involved." **Id.** at 284, 756 P.2d at 564. In other words, general notice of issues to be presented at the hearing was sufficient to comport with due process requirements.

{22} Like the notice given to NCCI in **National Council**, both Santa Fe and Stevens were reasonably informed as to the issues that the Commission would address at its hearing on the consolidated petitions. The parties themselves had each requested a de novo review by the Commission of Stevens's application for a non-standard well location. Santa Fe requested that the Commission deny the application or, in the alternative, impose a production penalty to protect its correlative rights. Stevens requested approval of its Deemar well for production and asked the Commission to reconsider the production penalty. At the hearing, the parties presented the evidence and requested that the Commission

provide them the relief that each sought: the right to produce its proportionate share of the oil from the Pool. The parties knew, prior to the hearing, that the Commission would be considering production rates from the various wells and the correlative rights of all parties concerned.

{23} The cases relied upon by the parties are either distinguishable or support the result we reach today. In **McCoy**, we considered whether a realtor's right to procedural due process was violated when her license was revoked by the Real Estate Commission. In that case, the district court based its decision on an issue raised by the Real Estate Commission for the first time on appeal. Because the realtor was denied notice and any opportunity to prepare her case and be heard on that issue in the district court, we held that the district court's decision violated due process. **McCoy**, 94 N.M. at 603-04, 614 P.2d at 15-16. In **Jones**, the appellant claimed that he was denied due process when the trial court did not allow him to present testimony at a hearing to determine whether a settlement agreement should be approved. The Tenth Circuit disagreed, and, held that, because the appellant was given notice and had the opportunity to be heard by submitting a lengthy memorandum, he was not denied due process. **Jones**, 741 F.2d at 325.

{24} Unlike the appellant in **McCoy**, the parties in the instant case had adequate notice of the issues that were going to be addressed to allow them to prepare their cases. In fact, the evidence presented by the parties at the Commission's hearing shows that they had notice of the very issues that the Commission eventually considered: allocation of production from the Pool, protection of the correlative rights of Pool members, and prevention of waste in the Pool. The parties presented evidence of the size, shape, location, and structure of the reservoir. The parties presented evidence that the Stevens well was located so that it could effectively drain the entire reservoir and destroy correlative rights of the other parties unless a production penalty was assessed. The parties presented evidence of the efficient production rate of the Santa Fe well. Expert testimony presented at the hearing demonstrated that the oil in the Pool could be produced more efficiently under unitized operation. While the Commission crafted a unique solution to the problem presented to it, the **process** by which the Commission reached this solution was not unique. The parties had general notice of the issues to be determined, and evidence was presented at a hearing before the Commission made its final decision. Under these circumstances, we hold that Stevens and Santa Fe had adequate notice so as to be reasonably informed of the issues to be decided by the Commission. Thus, we find no violation of procedural due process here.

C

{25} The final due process argument that we discuss is whether Stevens's substantive due process rights were violated by the Commission's determination of the recoverable reserves underlying the Pool. Stevens argues that the setting of low allowable production from the well was an arbitrary decision that will deprive it of a valuable property right. Stevens, citing **Schware v. Board of Bar Examiners**, 60 N.M. 304, 291 P.2d 607 (1955), **rev'd**, 353 U.S. 232 (1957), claims that this is a violation of substantive due process. We disagree. As discussed in Section VI, **infra**, the Commission did not act in an arbitrary or capricious manner. Moreover, as demonstrated in Section IV, **infra**, the Commission's actions were consistent with its statutory duties to prevent waste and protect the correlative rights of other producers in the Pool.

IV

{26} The next issue that we address is whether the Commission exceeded its statutory authority or violated its rules when it issued Order No. R-9035. Both Santa Fe and Stevens contend that Order No. R-9035, while not requiring unitization, effectively unitizes operation of the Pool. They argue that the Commission does not have the statutory authority to require unitization of the Pool because, under the Statutory Unitization Act, NMSA 1978, Sections 70-7-1 to -21 (Repl. Pamp.

1987), unitization is available only in fields that are in the secondary or tertiary recovery phase. They assert that, because the Commission order effectively unitizes the Pool, a field in the primary development phase, the Commission exceeded its statutory authority. In addition, Santa Fe contends that the Commission violated its own rules when it allowed Stevens's second directional drilling attempt and that Order No. 9035 is void. The Commission argues that its actions were proper under the Oil and Gas Act, NMSA 1978, Sections 70-2-1 to -36 (Repl. Pamp. 1987 & Cum. Supp. 1991), and argues that the Statutory Unitization Act is inapplicable to the instant case.

A

{27} "The Oil Conservation Commission is a creature of statute, expressly defined, limited and empowered by the laws creating it." **Continental Oil Co. v. Oil Conservation Comm'n**, 70 N.M. 310, 318, 373 P.2d 809, 814 (1962). The Oil and Gas Act gives the Commission and the Division the two major duties: the prevention of waste and the protection of correlative rights. NMSA 1978, § 70-2-11(A); **Continental Oil Co.**, 70 N.M. at 323, 373 P.2d at 817. Correlative rights are defined as

> the opportunity afforded . . . to the owner of each property in a pool to produce without waste his just and equitable share of the oil . . . in the pool, being an amount, so far as can be practicably determined and so far as can be practicably obtained without waste, substantially in the proportion that the quantity of recoverable oil . . . under the property bears to the total recoverable oil . . . in the pool and, for such purpose, to use his just and equitable share of the reservoir energy.

NMSA 1978, § 70-2-33(H). In addition to its ordinary meaning, waste is defined to include "the locating, spacing, drilling, equipping, operating or producing, of any well or wells in a manner to reduce or tend to reduce the total quantity of crude petroleum oil . . . ultimately recovered from any pool." NMSA 1978, § 70-2-3(A).

{28} The broad grant of power given to the Commission to protect correlative rights and prevent waste allows the Commission "to require wells to be drilled, operated and produced in such manner as to prevent injury to neighboring leases or properties." NMSA 1978, § 70-2-12(B)(7). In addition, the Division and the Commission are "empowered to make and enforce rules, regulations and orders, and to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." NMSA 1978, § 70-2-11.

{29} In the instant case, evidence presented to the Commission indicated that the Pool was located under three separate tracts of land. The Commission was called upon to determine the total amount of oil in the Pool and the proportionate share underlying each tract. Stevens's Deemar well was located so that it could produce oil from the top portion of the Pool, thereby avoiding waste that would have occurred unless the well was allowed. However, the well was located so that it could effectively drain the entire Pool. The Commission, charged with the protection of correlative rights of the other lease owners in the Pool, placed a production penalty on the well to protect these rights. Thus, the Commission attempted to avoid waste while protecting correlative rights. We hold that, under the facts of this case, the Commission did not exceed the broad statutory authority granted by the Oil and Gas Act.

{30} Moreover, we are unpersuaded by the argument of both Stevens and Santa Fe that the Statutory Unitization Act prohibits the Commission's actions. They argue that, by enacting the Statutory Unitization Act, the legislature intended to limit the availability of forced unitization to secondary and tertiary recovery only. Both Santa Fe and Stevens quote the following language from the Statutory Unitization Act to support their argument:

> It is the intention of the legislature that the Statutory Unitization Act apply to any type of operation that will substantially increase the recovery of oil above the amount that

> would be recovered by **primary recovery alone** and not to what the industry understands as exploratory units.

Section 70-7-1 (emphasis added by Stevens and Santa Fe). They assert that this section precludes unitization of a field in primary production such as the Pool. We disagree.

{31} We read the above quoted language from Section 70-7-1 merely to say that the Statutory Unitization Act is not applicable to fields in their primary production phase, such as the Pool in the instant case. Nothing contained in the Statutory Unitization Act, including the above quoted section, however, limits the authority of the Commission to regulate oil production from a pool under the Oil and Gas Act. The Commission still must protect correlative rights of lease holders in the Pool while preventing waste. The Commission still has broad authority "to do whatever may be reasonably necessary to carry out the purpose of this act, whether or not indicated or specified in any section hereof." NMSA 1978, § 70-2-11(A). As discussed above, in the instant case the Commission's actions were within its statutory authority. We hold that the circumstances of this case do not implicate the Statutory Unitization Act and that the Commission's actions in effectively unitizing operation of the Pool were an appropriate exercise of its statutory authority under the Oil and Gas Act.

B

{32} Santa Fe contends that, by issuing Order No. R-9035, the Commission abused its discretion by failing to follow the rules and regulations established by Order No. R-8806. That order established the Pool and set out special rules and regulations designed to prevent waste and protect correlative rights.[4] The order also established notice and hearing requirements before the Commission could allow a non-standard well to be drilled in the Pool. Santa Fe contends that, by allowing Stevens to drill a well at a non-standard location, **i.e.**, to within 70 feet of Santa Fe's lease line, without prior notice and a hearing, the Commission violated its own rules. Santa Fe also contends that lowering the allowable production from the Holstrom well to 125 barrels of oil per day without adequate notice is a violation of these rules. Santa Fe concludes that, because Order No. 9035 was issued in a manner inconsistent with these rules, the order is void and Order Nos. 8917 and 8917-A should be reinstated. We disagree.

{33} The Commission's actions in this case did not violate the Commission's rules established by Order No. 8806. While the Director did allow Stevens to make a second attempt to drill a well at an unorthodox location without notice to other lease holders in the Pool, the other lease holders had notice of the subsequent hearing to determine whether this well would be allowed to produce oil. In addition, this action was designed to further the Director's statutory duty to prevent waste by preventing added expense in the development of the field. Moreover, the Director could have approved drilling the second Stevens attempt at the hearing that it held prior to issuing Order No. 8917-A. Thus, the Commission's actions did not violate the rules established by Order No. 8806 and the Commission did not abuse its discretion in this matter.

V

{34} The next issue that we address is whether the Commission's Order No. R-9035 is supported by substantial evidence. Stevens argues that the Commission, in determining correlative rights of Santa Fe, did not refer to the recoverable oil underlying the tract. Stevens claims that this resulted in the Commission apportioning more oil in the Pool to Santa Fe than Santa Fe deserves based on evidence introduced at the hearing. Santa Fe contends that the Commission ignored testimony of its expert witnesses that

[4] These rules provided that the standard size for proration unit was to be 160 acres, that a well could not be located closer than 660 feet from the outer boundary of a proration unit nor nearer than 1320 feet from the nearest well in the Pool, and that the maximum production allowed from a standard production unit would be 515 barrels per day.

indicated that a greater portion of the Pool was under its tract. Santa Fe concludes that the Commission underestimated its proportionate share of oil in the Pool and that this estimate is not supported by substantial evidence.

{35} Substantial evidence is relevant evidence that a reasonable mind would accept as sufficient to support a conclusion. **Rutter & Wilbanks Corp. v. Oil Conservation Comm'n**, 87 N.M. 286, 290, 532 P.2d 582, 586 (1975). In determining whether there is substantial evidence to support an administrative agency decision, we review the whole record. **Duke City Lumber Co. v. New Mexico Envtl. Improvement Bd.**, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). In such a review, we view the evidence in a light most favorable to upholding the agency determination, but do not completely disregard conflicting evidence. **National Council**, 107 N.M. at 282, 756 P.2d at 562. The agency decision will be upheld if we are satisfied that evidence in the record demonstrates the reasonableness of the decision. **Id.**

{36} Stevens contends that the Commission did not consider the recoverable reserves underlying the Santa Fe tract, **see** NMSA 1978, Section 70-2-33(H) (correlative right based on recoverable reserves), thereby overestimating the amount of oil under the Santa Fe tract. Stevens also contends that the Commission ignored testimony by Stevens's expert witnesses indicating that more of the Pool was under Stevens's tract than the Commission ultimately concluded. Stevens concludes that the record lacks substantial evidence to uphold the Commission's estimate of Santa Fe's proportionate share of oil in the Pool. Santa Fe contends that the Commission underestimated its proportional share of oil because the Commission failed to accept as conclusive the engineering and geologic evidence presented by Santa Fe of the location and extent of the Pool, which would result in a higher proportion of the oil being allocated to Santa Fe. Santa Fe concludes that the Commission's estimate of Santa Fe's proportionate share of oil in the Pool is not supported by substantial evidence.

{37} In any contested administrative appeal, conflicting evidence will be produced. In the instant case, the resolution and interpretation of such evidence presented requires expertise, technical competence, and specialized knowledge of engineering and geology as possessed by Commission members. **See** NMSA 1978, § 70-2-4 (commissioners to have "expertise in regulation of petroleum production by virtue of education or training"); NMSA 1978 § 70-2-5 (director is "state petroleum engineer" who is "registered by the state board of registration for professional engineers and land surveyors as a petroleum engineer" or "by virtue of education and experience [has] expertise in the field of petroleum engineering"). Where a state agency possesses and exercises such knowledge and expertise, we defer to their judgment. **Stokes v. Morgan**, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984); **Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n**, 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984). We have reviewed the record and, in light of the standard of review detailed above, find that the decision of the Commission was reasonable and is supported by substantial evidence.

VI

{38} The final issue raised by this appeal is whether the decision of the Commission is arbitrary and capricious.

> Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and "'is the result of an unconsidered, wilful and irrational choice of conduct and not the result of the 'winnowing and sifting' process.'" **Garcia v. New Mexico Human Servs. Dep't**, 94 N.M. 178, 179, 608 P.2d 154, 155 (Ct. App. 1979) (quoting **Olson v. Rothwell**, 28 Wis. 2d 233, 239, 137 N.W.2d 86, 89 (1965)) [, **rev'd**, 94 N.M. 175, 608 P.2d 151 (1980)]. An abuse of discretion is established if the agency or lower court has

> not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. **Le Strange v. City of Berkeley**, 26 Cal. Rptr. 550, 210 Cal. App. 2d 313 (1962). An abuse of discretion will also be found when the decision is contrary to logic and reason. **Newsome v. Farer**, 103 N.M. 415, 708 P.2d 327 (1985); **Sowders v. MFG Drilling Co.**, 103 N.M. 267, 705 P.2d 172 (Ct. App. 1985).

Perkins v. Department of Human Servs., 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987).

{39} In the instant case, the action of the Commission is not arbitrary and capricious. As discussed in Section IV, **supra**, the Commission did not exceed its statutory authority nor violate its rules when it issued the final order in this case. As discussed in Section III, **supra**, the Commission did not deprive either Santa Fe or Stevens of their due process rights. As demonstrated in Section V, **supra**, the findings of the Commission were supported by substantial evidence. The Commission considered the evidence presented by the parties, and, in light of its statutory duties to protect correlative rights and avoid waste, fashioned a creative solution to resolve this dispute. While the Commission's solution was unique, such a result is not arbitrary or capricious "if exercised honestly and upon due consideration, even though another conclusion might have been reached." **Perkins**, 106 N.M. at 655-56, 748 P.2d at 28-29 (citing **Maricopa County v. Gottsponer**, 723 P.2d 716 (Ariz. App. 1986)). In accordance with the foregoing discussion, we hold that Order No. R-9035 is not arbitrary and capricious.

{40} The judgment of the trial court is AFFIRMED.

{41} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

RICHARD E. RANSOM,
Chief Justice

JAY G. HARRIS,
District Judge

Justice Joseph F. Baca

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1992-NMSC-070

Filing Date: December 29, 1992

Docket No. 19,944

SUSAN KIRKPATRICK, d/b/a KIRKPATRICK & ASSOCIATES,

Plaintiff-Appellant,

v.

INTROSPECT HEALTHCARE CORPORATION, a New Mexico corporation, d/b/a INTROSPECT HEALTHCARE OF NEW MEXICO and DANIEL LOPEZ,

Defendants-Appellees.

Appeal from the District Court of Bernalillo County
Burt Cosgrove, District Judge

Sager, Curran, Sturges & Tepper
C. Kristine Osnes
Stanley C. Sager
Albuquerque, New Mexico
The Payne Law Firm, P.C.
H. Vern Payne
Albuquerque, New Mexico

for Appellant.

Richard N. Feferman
Albuquerque, New Mexico

for Appellees.

OPINION

BACA, Justice.

{1} Plaintiff-appellant, Susan Kirkpatrick ("Kirkpatrick") brought suit against Introspect Healthcare Corporation and Daniel Lopez (together referred to as "Introspect"), alleging breach of contract and several related counts. Pursuant to Introspect's motion under SCRA 1986, 1-012(B)(6) (Repl. Pamp. 1992), the trial court dismissed Kirkpatrick's complaint for failure to state a claim upon which relief can be granted. Kirkpatrick appeals the dismissal of her complaint. Her appeal raises the following issues: (1) Whether the trial court erred in dismissing Kirkpatrick's breach of contract claim; (2) whether the contract is ambiguous; (3) whether the trial court erred in dismissing the additional counts raised in Kirkpatrick's complaint; and (4) whether the trial court misapplied SCRA 1986, 1-054(C)(1) (Repl. Pamp. 1992). We note jurisdiction under SCRA 1986, 12-102(A)(1) (Repl. Pamp. 1992) and reverse.

I

{2} Kirkpatrick, an interior designer, entered into a written contract with Introspect Healthcare Corporation in September of 1989. The contract required Kirkpatrick to create the interior design for the Desert Hills adolescent mental healthcare facility and to sell furnishings to Introspect to complete the designs. Kirkpatrick was to perform 23 itemized services during the course of the Desert Hills project, all related to the creation and development of the facility's interior design. The terms of the contract provided that the fee for Kirkpatrick's interior design services would be generated through markups on furnishings that Kirkpatrick purchased and resold to Introspect for use in Desert Kills. The contract required Introspect to pay Kirkpatrick $ 12,000 during the beginning stages of the project. After Introspect paid an initial $ 6,000, the contract required Kirkpatrick to design the interior and specify all the furnishings for Desert Hills. A second payment of $ 6,000 was due after Introspect approved of Kirkpatrick's "interior specifications, selections and drawings." Both $ 6,000 payments were to be deducted from Kirkpatrick's design fee generated from the sale of furnishings.

{3} Introspect paid Kirkpatrick $ 12,000 at the outset of the Desert Hills project. Kirkpatrick proceeded to create the interior designs and to specify furnishings for Desert Hills. In December of 1989, Introspect sent a letter to Kirkpatrick, notifying her that it was over budget on the Desert Hills project and requesting that certain revisions and modifications be made to Kirkpatrick's designs and specifications.

{4} In January of 1990, Introspect advised Kirkpatrick that bids to provide the furnishings for Desert Hills were being obtained from other sources. Unable to realize a portion of her design fee from the sale of furnishings, Kirkpatrick brought suit for damages, alleging breach of contract, negligent misrepresentation, fraudulent representation, loss of reputation, mental anguish and distress, and violations of the New Mexico Unfair Trade Practices Act. Alternatively, Kirkpatrick sought recovery for the reasonable value of her services under a quantum meruit theory.

{5} Introspect filed a motion to dismiss all counts of the complaint under Rule 12(B)(6), arguing that Kirkpatrick failed to state a claim on which relief could be granted. The trial court made a preliminary decision to grant Introspect's motion to dismiss. Kirkpatrick subsequently moved the trial court to enter final judgment pursuant to SCRA 1986, 1-054(C)(1), for the purpose of facilitating immediate appeal, and alternatively sought permission to amend her complaint. On May 17, 1991, the trial court issued an order and judgment, dismissing Kirkpatrick's complaint, entering final judgment pursuant to SCRA 1986, 1-054(C)(1), and denying Kirkpatrick permission to amend. Kirkpatrick appeals, contending that the trial court erred by dismissing her complaint.

II

{6} We first address whether the trial court erred in dismissing Kirkpatrick's breach of contract claim for failure to state a claim upon which relief can be granted. A motion to dismiss made pursuant to Rule 12(B)(6) tests the legal sufficiency of plaintiff's complaint. **Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.,** 106 N.M. 757, 760, 750 P.2d 118, 121 (1988). A motion to dismiss should be granted only when it appears that the plaintiff is not entitled to recover under any facts provable under the complaint. **Castillo v. County of Santa Fe,** 107 N.M. 204, 206, 755 P.2d 48, 50 (1988). We limit our inquiry to the contents of Kirkpatrick's complaint and the attached contract and assume that the facts alleged in the complaint are true. **Id.** at 205, 755 P.2d at 49.

{7} Introspect argues that the trial court properly granted its motion to dismiss. In essence, Introspect claims that the contract between the parties, requiring the purchase and sale of "furnishings," constituted a contract for the sale of goods, **see** NMSA 1978, Section 55-2-105 (defining "goods"), and is therefore governed by Article 2 of New Mexico's Uniform Commercial Code (NMSA 1978, §§ 55-2-101 to -725 (Orig. Pamp. & Cum. Supp. 1992)) ("the UCC"). The linchpin of Introspect's argument is that all facts alleged by Kirkpatrick, taken as true, fail to state an actionable claim for breach of contract because the contract between the parties fails to state a quantity term as required by the UCC's Statute of Frauds. **See** NMSA 1978, § 55-2-201(1). The trial court agreed and dismissed Kirkpatrick's claim for breach of contract.

{8} In addressing Introspect's argument that Kirkpatrick's count for breach of contract fails because the contract lacked a quantity term, a threshold question is presented as to whether Article 2 of the UCC applies to the contract between the parties. Article 2 applies to contracts for the sale of goods and has no application to contracts for services. NMSA 1978, § 55-2-102.

{9} In this case, Kirkpatrick and Introspect entered into a mixed contract, both for interior design services and the sale of goods. There are two generally recognized tests used to determine whether mixed contracts are subject to Article 2. **See** James J. White & Robert S. Summers, **Uniform Commercial Code** § 1-1, at 26 (3d ed. 1988). A minority of jurisdictions divide

a mixed contract for goods and services into its component parts and apply Article 2 solely to the transaction for the sale of goods. **See, e.g., Foster v. Colorado Radio Corp.,** 381 F.2d 222, 226 (10th Cir. 1967). New Mexico and a majority of jurisdictions apply the "primary purpose" test. **See, e.g., State ex rel. Concrete Sales & Equip. Rental Co. v. Kent Nowlin Constr., Inc.,** 106 N.M. 539, 541, 746 P.2d 645, 647 (1987). Under this test, Article 2 applies to mixed contracts only if the primary purpose of the contract is to sell goods rather than to provide services. **Id.**

{10} A leading case associated with the primary purpose test is **Bonebrake v. Cox,** 499 F.2d 951 (8th Cir. 1974). In **Bonebrake,** the parties contracts for the sale and installation of used bowling equipment. In holding the UCC applicable because the "sale of goods" aspect of the contract predominated over the substantial labor and installation services involved, the Eighth Circuit Court of Appeals stated that:

> The test for inclusion or exclusion [from Article 2] is not whether [the contracts] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved . . . or is a transaction of sale, with labor incidentally involved. . . .

Id. at 960.

{11} The application of the primary purpose test articulated in **Bonebrake** to mixed contracts for design services and the sale of goods has never been addressed by this Court. Other jurisdictions, however, have addressed this issue. In **Care Display, Inc. v. Didde-Glaser, Inc.,** 589 P.2d 599 (Kan. 1979), the Supreme Court of Kansas applied the **Bonebrake** test to a mixed contract for goods and design services. In **Care Display, Inc.,** the plaintiff entered into an oral contract with the defendant for the design and construction of a trade show exhibit. **Id.** at 602. The plaintiff sued the defendant when bids were solicited from other exhibit makers after the course of communication between the parties indicated the existence of an exclusive contract. **Id.** at 602-03. After losing a jury verdict for breach of oral contract, the defendant appealed and argued that any oral contract between the parties was barred by the UCC's Statute of Frauds. **Id.** at 602.

{12} The Supreme Court of Kansas applied the "primary purpose" test to the contract between the parties and held Article 2 of the UCC inapplicable. **Id.** at 605-06. While the contract involved the sale of goods, the Court held that its primary purpose was the rendition of services through the use of the plaintiff's specialized knowledge and expertise to create a "unique setting in which to exhibit and promote [the defendant's] products. . . ." **Id.** at 605. Accordingly, the sale of goods was merely incidental to the rendition of services. **Id.**

{13} We find the rationale of **Care Display, Inc.** instructive and hold that Article 2 of the UCC does not apply to the contract between Kirkpatrick and Introspect. Examination of the contract as a whole makes it clear that the contract's primary purpose was to provide interior design services. The contract itemized 23 different services to be performed, including developing an appropriate ambience and community image for the facility, developing, selecting, and specifying interior finishes and layouts, developing the facility's color schemes, and suggesting changes to the architectural plans. By performing these and other enumerated services, Kirkpatrick was to use her experience and expertise to develop a distinctive interior design for the Desert Hills healthcare facility. Although the contract clearly contemplated that Kirkpatrick would purchase and resell goods to Introspect, in the form of furnishings, this was only one aspect of a predominantly service-oriented contract.[1] Because

[1] Kirkpatrick argues in her brief-in-chief that the contract between the parties is solely for the performance of professional services. She relies on NMSA 1978, Section 61-24C-3(B), when arguing in her brief-in-chief that "the New Mexico legislature has recognized that interior designer contracts are contracts for services" and contends that the UCC never applies to interior design contracts such as the contract in this

the primary purpose of the contract between the parties was for the provision of services, rather than for the sale of goods, Article 2 of the UCC does not apply to the contract in this case.[2] Consequently, Introspect's argument that the contract is unenforceable because it lacks a quantity term, in violation of the UCC's Statute of Frauds, is without merit. We find that Kirkpatrick's breach of contract claim was legally sufficient to survive Introspect's 12(B)(6) motion and hold that the trial court erred when it dismissed the claim for failure to state a claim upon which relief can be granted.

III

{14} We next address the issue of whether the contract is ambiguous. The parties disagree about whether the contract obligated Introspect to purchase furnishings from Kirkpatrick. Whether or not a contract is ambiguous is a question of law for the court. **Trujillo v. CS Cattle Co.,** 109 N.M. 705, 709, 790 P.2d 502, 506 (1990). When determining whether a contract is ambiguous, the court must consider the contract as a whole. **Levenson v. Mobley,** 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). A contract is ambiguous only if it is reasonably susceptible to different constructions. **Trujillo,** 109 N.M. at 709, 790 P.2d at 506. An ambiguity is not established simply because the parties differ on the contract's proper construction. **Id.** When the language of the contract clearly and unambiguously expresses the agreed-upon intent of the parties, this Court will give effect to such intent. **Id.** When the resolution of the issue depends upon the interpretation of documentary evidence, this Court is in as good a position as the trial court to interpret the evidence. **City of Raton v. Vermejo Conservancy Dist.,** 101 N.M. 95, 103, 678 P.2d 1170, 1178 (1984).

{15} We hold that the contract between the parties unambiguously required Introspect to purchase furnishings for the Desert Hills project from Kirkpatrick. The contract explicitly states that the fee for Kirkpatrick's interior design services would be "included in the furnishings that would be purchased for the facility." This same provision provides that the furnishings would be "priced at retail less 35-45%." These terms are reasonably susceptible to only one interpretation: Kirkpatrick's design fee was to be generated from the sale of furnishings to Introspect. Thus, Introspect had an obligation to purchase furnishings from Kirkpatrick.

{16} Introspect looks to a separate provision in the "services" portion of the contract to support its argument that the purchase of furnishings from Kirkpatrick was wholly optional. The provision, which was listed as one of 23 services to be provided under the contract, states that Kirkpatrick would "purchase all furnishings [for Desert Hills], carpet, tile, etc. as requested by owner." Introspect argues that this provision should be interpreted to mean that no obligation to buy furnishings arose because Introspect did not specifically request furnishings from Kirkpatrick. We find this to be a strained interpretation of the contract between the parties and inconsistent with the contract language. **See Gardner-Zemke Co.**

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case. Such reliance on the professional and occupational licensing statutes for interior designers, NMSA 1978, §§ 61-24C-1 to -16 (Repl. Pamp. 1990), is misplaced. These licensing statutes are intended to set standards and requirements for the practice of and entrance into the profession of interior design and do not represent a legislative proclamation that interior design contracts are solely service contracts exempt from the UCC. A sale of goods does not lose its character as such merely because it is in the context of a professional services contract. Accordingly, we decline to hold that Article 2 of the UCC is never applicable to the sale of goods in the context of a mixed contract for goods and services. Instead, we determine whether Article 2 applies to a given mixed contract on a case-by-case basis, scrutinizing the contract itself to determine whether the primary purpose of the contract is for sales or services. **See, e.g., Air Heaters, Inc. v. Johnson Elec., Inc.,** 258 N.W.2d 649, 653 (N.D. 1977). Article 2 applies to a mixed contract when the primary purpose of the contract is for the sale of goods.

[2] Although decided prior to **Bonebrake's** oft-quoted articulation of the "primary purpose" test, **Aluminum Co. of America v. Electro Flo Corp.,** 451 F.2d 1115 (10th Cir. 1971), provides a helpful example of a mixed contract predominately for the sale of goods with design services incident thereto. Comparison between the mixed contract in **Aluminum Co. of America** and the contract in the instant case illustrates the distinction between mixed contracts primarily for the sale of goods and mixed contracts where design services predominate.

v. State, 109 N.M. 729, 734, 790 P.2d 1010, 1015 (1990). To make a reasonable interpretation of a contract, "the language of the entire contract must be considered, and selected portions cannot support a claim of ambiguity." **Id.** To hold that the words "as requested by owner" relieve Introspect of any obligation to purchase furnishings would require us to ignore the express terms of the contract, which specifically call for Kirkpatrick's design fee to be raised from the sale of furnishings. The contract, considered as a whole, clearly required Introspect to purchase furnishings from Kirkpatrick.

{17} In raising a second argument that it had no obligation to purchase furnishings, Introspect maintains that the $ 12,000 it paid to Kirkpatrick during the beginning stages of the Desert Hills project constituted payment in full for her design services. This argument contradicts the clear language of the contract and, if accepted, would require this Court to create a new agreement between the parties. This we will not do. **See Montoya v. Villa Linda Mall, Ltd.,** 110 N.M. 128, 129, 793 P.2d 258, 259 (1990). The terms of the contract state that the initial $ 12,000 paid would be deducted from the final design fee generated from the sale of furnishings. These terms reveal that the $ 12,000 paid during the early stages of the project constituted prepayment of part of the total design fee and was never intended to constitute the design fee in its entirety.

{18} Finally, Introspect argues that the contract should not be enforced because the contract, lacking a specific quantity term, imposes an obligation upon Introspect to purchase goods which it never agreed to buy. Introspect's argument suggests that enforcement of its contract with Kirkpatrick perpetrates the very evil sought to be averted by the UCC's Statute of Frauds, which seeks to prevent the "enforcement of alleged promises that were never made," 2 Ronald A. Anderson, **Uniform Commercial Code,** § 2-201:5, at 14 (3d ed. 1982), in part by requiring that a contract for the sale of goods contain a quantity term. While Article 2 of the UCC does not apply to the mixed contract in this case, we nevertheless address Introspect's argument that enforcement of the contract effectuates a sale of goods that it never agreed to purchase.

{19} One inherent aspect of the contract between the parties was that the specific types and quantities of furnishings needed for Desert Hills were not ascertainable until after the interior designs were created. The contract contemplated that the types and quantities of furnishings to be purchased for Desert Hills would be determined after the development of the interior designs. The furnishings that Introspect was to purchase for Desert Hills were to be ascertained according to a final design plan, subject to Introspect's approval.

{20} Pursuant to this scheme, the contract first required Kirkpatrick to design the interior of Desert Hills and to specify the furnishings for the facility after Introspect's initial payment of $ 6,000. The contract then required Introspect to examine and approve Kirkpatrick's "interior specifications, selections and drawings" before making a second $ 6,000 payment. Implicit in Introspect's opportunity to approve of Kirkpatrick's selections and specifications at this stage of the project was the opportunity for Introspect to reject Kirkpatrick's specifications, in all or in part, and withhold payment of the second $ 6,000 until the parties could reach an agreement on the types and amounts of furnishings to be used in the Desert Hills facility. Hence, the fact that Kirkpatrick's selected furnishings were ultimately subject to Introspect's approval served to protect Introspect from being forced to purchase unspecified or unknown quantities of furnishings.

{21} While we hold that the terms of the contract required Introspect to purchase furnishings from Kirkpatrick and that the contract provided Introspect with the opportunity to inspect and approve of Kirkpatrick's suggested furnishings prior to purchase, resolution of these issues does not dispose of this case. Because the trial court rendered judgment on the pleadings pursuant to Rule 12(B)(6), many factual questions remain unanswered.

{22} For example, the contract called for Introspect to approve of Kirkpatrick's specified

furnishings prior to making a second $ 6,000 payment. Introspect, however, made a single payment of $ 12,000 at the beginning of the project and may not have had the opportunity to approve of Kirkpatrick's designs and selections as contemplated by the contract. Thus, a factual question is presented about whether the parties ever finalized an agreement about the types and amounts of furnishings Introspect was to purchase for Desert Hills. A letter mailed by Introspect to Kirkpatrick attempted to make changes to certain furnishings to be purchased for Desert Hills and provides strong indication that the parties had either previously agreed to the furnishings to be purchased or were in the process of doing so at the time the letter was sent. Nonetheless, this letter does not clarify the nature and terms of the agreement between Kirkpatrick and Introspect, and a factual inquiry will need to be made at the trial court level in order to ascertain the complete agreement between the parties.

{23} Furthermore, Introspect has asserted several counterclaims in its answer to Kirkpatrick's complaint which raise factual issues about the conduct of the parties and the circumstances surrounding the creation and performance of the contract.[3] Resolution of these counterclaims may even justify Introspect's noncompliance with the terms of the contract in this case. It is well-settled that an appellate court will not determine questions of fact on appeal. **See Western Bank v. Fluid Assets Dev. Corp.,** 111 N.M. 458, 460, 806 P.2d 1048, 1050 (1991); **Watson Land Co. v. Lucero,** 85 N.M. 776, 778, 517 P.2d 1302, 1304 (1974). Thus, we remand the case to the trial court for a trial on the merits to determine whether Introspect breached the contract between the parties and to determine resulting damages to Kirkpatrick in the event that Introspect is found to have breached the contract.

[3] In its answer to Kirkpatrick's complaint, Introspect asserted counterclaims for fraud, misrepresentation, unfair and deceptive trade practices, breach of fiduciary duty, and breach of contract.

IV

{24} Kirkpatrick maintains that the trial court erred by not considering the sufficiency of the other counts raised in her complaint. We agree. Separate causes of action with distinct theories of liability must be separately evaluated. **See Trujillo v. Berry,** 106 N.M. 86, 88, 738 P.2d 1331, 1333 (Ct. App.), **cert. denied sub nom.** 106 N.M. 24, 738 P.2d 518 (1987). Review of the record and proceedings below reveal that although Introspect moved to dismiss all counts alleged in Kirkpatrick's complaint, the parties only addressed the legal sufficiency of Kirkpatrick's breach of contract claim. The trial court did not evaluate the sufficiency of Kirkpatrick's other counts at any point during the proceedings. We cannot say that Kirkpatrick failed to state a claim upon which relief can be granted as to these alternative counts without the trial court conducting a separate assessment of each distinct claim. Therefore, the trial court erred by dismissing Kirkpatrick's entire complaint. We remand this case for consideration of her alternative claims.

V

{25} We next examine whether the trial court misapplied SCRA 1986, 1-054(C)(1) ("Rule 54(C)(1)").[4] After the trial court made a preliminary ruling to grant Introspect's motion to dismiss, Kirkpatrick moved to have the trial court enter final judgment under Rule 54(C)(1) to facilitate immediate appeal and alternatively, for leave to amend her complaint. The trial court denied Kirkpatrick's request to amend, dismissed all of Kirkpatrick's claims, and certified the claims as final for immediate review under Rule 54(C)(1).

[4] Because Fed. R. Civ. P. 54(b) and SCRA 1986, 1-054(C)(1) treat the entry of final judgment for cases involving multiple claims in a substantially similar manner, we consider materials interpreting the multiple claim aspect of Fed. R. Civ. P. 54(b) helpful when construing SCRA 1986, 1-054(C)(1). **See Lowery v. Atterbury,** 113 N.M. 71, 73, 823 P.2d 313, 315 (1992).

{26} We believe the trial court misapplied Rule 54(C)(1). The rule states that when trying a lawsuit involving multiple claims, a trial court may "enter a final judgment as to one or more **but fewer than all of the claims**. . . ." SCRA 1986, 1-054(C)(1) (emphasis added). The purpose behind entering final judgment "as to one or more but fewer than all of the claims " is to facilitate immediate appeal of separate claims in those cases where injustice would result if appeal on the separate claims is postponed until the entire case has been finally adjudicated. **See** 10 Charles A. Wright & Arthur R. Miller, **Federal Practice and Procedure** § 2654, at 35 (1983). The rule does not apply to cases in which all the claims in a lawsuit have been finally decided because immediate appeal is already available as a result of final judgment on all the issues in the case. **See id.,** § 2656, at 55. The trial court's certification of all of Kirkpatrick's claims pursuant to New Mexico Rule 54(C)(1) violated the express language and purpose of the Rule.

{27} The trial court should have granted Kirkpatrick's leave to amend. Pleadings are meant to facilitate, rather than deter, the resolution of litigation on the merits. **Dale J. Bellamah Corp. v. City of Santa Fe,** 88 N.M. 288, 291, 540 P.2d 218, 221 (1975) (citing 3 J. Moore, **Federal Practice** P15.02 (2d ed. 1974)). Consequently, "amendments to pleadings are favored, and should be liberally permitted in the furtherance of justice." **First Nat'l Bank of Santa Fe v. Southwest Yacht & Marine Supply Corp.,** 101 N.M. 431, 434, 684 P.2d 517, 520 (1984). The record discloses that Kirkpatrick's counsel repeatedly asked for leave to amend during the course of a hearing on whether to certify Kirkpatrick's case for appeal or, alternatively, to permit her complaint to be amended. Despite these arguments and Rule 15's admonition that "leave shall be freely given when justice so requires," SCRA 1986, 1-015(A) (Repl. Pamp. 1992), the trial court denied the motion to amend and entered final judgment to facilitate immediate appeal for the stated purpose of getting an advisory opinion from this Court on the legal issues involved. Denying leave to amend has resulted in a waste of judicial resources because the case must now be remanded for factual determinations that should have been conducted by the trial court prior to dispatching the case to this Court on appeal.

VI

{28} Finally, Introspect raises arguments that the contract is unenforceable due to a lack of mutuality of obligations and that Kirkpatrick's complaint is barred by the doctrine of accord and satisfaction. We have examined these issues and find them to be without merit. The judgment and order of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

{29} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

SETH D. MONTGOMERY,
Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1993-NMSC-007

Filing Date: January 14, 1993, As Corrected February 25, 1993, Second Correction July 1, 1993

Docket No. 19,728

STATE of New Mexico,

Plaintiff-Appellee,

v.

Ralph HERNANDEZ,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY
V. Lee Vesely, District Judge

Robert J. Jacobs
Taos, NM

for Defendant-Appellant.

Tom Udall, Atty. Gen.
Gail MacQuesten, Asst. Atty. Gen.
Santa Fe, NM

for Plaintiff-Appellee.

OPINION

BACA, Justice.

{1} Defendant Ralph Hernandez appeals his conviction on charges of first degree felony murder, aggravated burglary, attempted robbery, and battery. Because Defendant was sentenced to life imprisonment for the first degree murder conviction,[1] we note jurisdiction under SCRA 1986, 12-102(A)(2) (Repl.Pamp.1992).

{2} Defendant raises numerous issues that he contends mandate a reversal including: (1) Whether he was denied effective assistance of counsel; (2) whether the trial court erred when it refused to grant Defendant's motion for a continuance in order to allow additional time for his trial counsel to prepare; (3) whether the trial court erred by failing to exclude testimony of a prosecution witness who was present during other prosecution witnesses' testimony; (4) whether the trial court erred when it admitted various photographs and a videotape; (5) whether the trial court erred by denying Defendant's motion for recusal; (6) whether the trial court erred when it refused to order the sheriff to bring a potential juror to court for jury duty; (7) whether the trial court erred when it denied Defendant's motion for a change of venue; (8) whether the trial court erred when it denied Defendant's challenges for cause of various potential jurors; (9) whether the trial court erred when it informed the jury that the State would not seek the death penalty; (10) whether the trial court erred when it gave the felony murder instruction to the jury; (11) whether the trial court erred when it qualified one of the State's expert witnesses; (12) whether the trial court erred when it denied Defendant's motion in limine and motion for a continuance based on prosecutorial misconduct; (13) whether the trial court erred when it failed to rule on the sufficiency of the evidence prior to submitting the case to the jury; (14) whether there was sufficient evidence to convict Defendant; and (15) whether Defendant was denied his right to a fair trial because of cumulative error. We find no merit to any of Defendant's arguments and affirm.

[1] In addition to the life sentence for murder, defendant was sentenced to 9 years imprisonment plus two years enhancement for the aggravated burglary, eighteen months imprisonment for the attempted robbery, and six months imprisonment for the battery. The aggravated burglary sentence runs consecutively with the murder sentence and the other sentences run concurrently with the murder sentence.

I

{3} On April 18, 1989, officers from the Silver City Police Department discovered a woman's body in an apartment in Silver City. The body, which was later identified as that of Peggy Brown, was found lying on the bedroom floor of the apartment. Dark hairs that did not appear to match Brown's hairs were found in her mouth and on the bed. The police also found blood on her bed, pillows, sheets, and clothing. Brown's purse and its contents were scattered about on the living room floor. Brown's body had a black eye, a bloody nose, several bruises, and a cut lip. The bedroom was in a state of disarray that suggested that a struggle had ensued before Brown's death. The police took pictures of the position and condition of the body and of the interior and exterior of the apartment and recorded a videotape of the apartment. In addition, the police lifted fingerprints and palmprints from the apartment and Brown's purse.

{4} On August 8, 1989, David Salaiz contacted the police with information regarding Brown's murder. Salaiz told the police that he had been drinking with Defendant when Defendant related the following story to Salaiz. According to Salaiz, Defendant stated that he had needed money to purchase drugs, entered Brown's apartment looking for something that he could sell, encountered Brown, who began to scream, struggled with Brown, and suffocated Brown with a pillow. Defendant then told Salaiz that no one else knew of his involvement in the murder, and that, consequently, he would have to kill Salaiz. Salaiz claimed that Defendant pulled a knife, and a fight, in which Salaiz was cut, ensued. Salaiz eluded Defendant and contacted the police, who investigated Salaiz's story. The police found blood at the location where Salaiz claims that Defendant attacked him.

{5} The police then contacted Defendant and, with his permission, obtained a hair sample from him. This sample was sent to the FBI and compared with the hairs found in Brown's apartment. The FBI determined that the hairs found in Brown's apartment had been forcibly removed and were a microscopic match with the hair sample taken from Defendant. On the basis of Salaiz's statement and the hair analysis, the Silver City police obtained a warrant for Defendant's arrest and, after his arrest, he was charged with murder, aggravated burglary, attempted robbery, and battery regarding the incident at Brown's apartment and aggravated battery of Salaiz. A lawyer was appointed to represent Defendant, who was indigent.

{6} Prior to trial, defense counsel made numerous motions, the most important of which was his motion for a continuance. In making this motion, defense counsel contended that he and Defendant's expert witnesses needed additional time to prepare for trial. Defendant also moved to exclude the testimony of Detective Bruce, contending that Bruce's testimony was tainted because he was allowed, over objection, to listen to other witnesses' testimony at a preliminary hearing. In addition, Defendant moved to exclude the photographs and videotape of Brown's apartment, contending that the prejudicial nature of this evidence outweighed its probative value. Over two months prior to trial, the trial court heard these motions and, with the exception of excluding some of the photographs as cumulative, denied Defendant relief.

{7} One week prior to trial, Defendant again moved for a continuance to allow his counsel and expert witness additional time to prepare for trial. Defense counsel claimed that the Public Defender's office had not provided the necessary funds to hire co-counsel familiar with scientific evidence, a forensics expert, or a hair analysis expert. Defense counsel also claimed that he needed additional time to locate two witnesses who he claimed could provide Defendant with an alibi. In addition, Defendant wanted to delay his trial until after the DNA analysis from another murder case was available. After the trial court denied this motion, Defendant moved to recuse the judge, whose mother was a friend of the victim. This motion was also denied.

{8} Defendant's trial began on October 29, 1990. Prior to voir dire and over objection of

defense counsel, the court informed the jury venire that the State would not be seeking the death penalty. During voir dire, many of the potential jurors indicated that they had heard publicity regarding the case; however, most said that they could not remember what they had heard. After voir dire, Defendant moved for a change of venue, and the trial court denied the motion.

{9} At trial the following evidence, viewed in the light most favorable to upholding the verdict, **State v. Sutphin,** 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988), was introduced. Medical testimony indicated that Brown had been killed on either Sunday night, April 16, 1989, or the following morning and that Brown had probably died from suffocation. The State's main witness, David Salaiz, testified that Defendant had admitted to him (Salaiz) that he (Defendant) had entered Brown's apartment to find something to sell to enable Defendant to purchase drugs, encountered Brown, who screamed, and killed Brown by suffocating her with a pillow. Salaiz testified that after Defendant finished telling the story, he became violent and attacked Salaiz with a knife. Salaiz testified that he subdued Defendant, went to the police, gave details about Defendant's story, and submitted a signed statement. On cross-examination, Salaiz testified that he had been given a reward for coming forward with information regarding the murder. In addition, he testified that he had previously been convicted of attempted criminal sexual contact of a minor, possession of cocaine, and larceny and that other charges were currently pending against him. Salaiz's testimony was partially corroborated by Silver City police officer Hall, who testified that he found a trail of blood in the Murray Hotel where Salaiz claims that Defendant attacked him.

{10} The State also introduced hair identification evidence, which linked Defendant to Brown's murder. Arnold Bentz, who, over Defendant's objection, was qualified as an expert witness based on job experience, testified that he had separated the hairs collected at the crime scene into those matching the victim's hair and those not matching the victim's hair. Doug Diedrick, an expert in hair identification, testified that the hair samples taken from Defendant microscopically matched the hairs collected at Brown's apartment. Both Bentz and Diedrick testified on cross-examination that hair identification could not positively identify someone.

{11} The State also introduced forensic evidence collected at Brown's apartment. James Bell, a forensic serologist, testified that numerous items found in Brown's apartment tested positive for the presence of blood. On cross-examination, Bell testified that the blood had not been type checked or compared to the blood of Brown, Defendant, or any other suspect. The State also introduced evidence that DNA testing was inconclusive.

{12} At the close of the State's evidence, Defendant offered testimony that attacked Salaiz's credibility. In addition, Defendant offered testimony that attempted to establish an alibi for Sunday night, April 16. Further, Defendant offered testimony that tended to rebut Salaiz's account of Defendant's assault on him.

{13} After Defendant rested and prior to the jury being instructed, Defendant objected to the felony murder instruction, arguing that this charge was not supported by the evidence. The trial court overruled the objection and instructed the jury on first degree willful and deliberate murder, first degree felony murder, second degree murder, aggravated burglary, attempted robbery, battery, and aggravated battery. The jury found Defendant guilty of felony murder, aggravated burglary, attempted robbery and battery and not guilty of aggravated assault of Salaiz. This appeal ensued.

II

{14} The most important issue that Defendant raises in this appeal is whether he was denied effective assistance of counsel in violation of the Fourteenth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution. A closely related issue,

which we address first, is whether the trial court erred when it failed to grant Defendant a continuance to allow his counsel more time to prepare his defense and to obtain expert witnesses.

A

{15} Defendant contends that the trial court erred when it denied his motion for a continuance. Prior to trial, Defendant's trial counsel sought a continuance to obtain an expert on hair analysis, to obtain co-counsel knowledgeable in scientific evidence, to develop a defense based on a DNA analysis in another pending murder case, and to allow his expert witness more time to prepare forensic evidence. Citing **Peralta v. State,** 111 N.M. 667, 808 P.2d 637 (1991), Defendant argues that the trial court erred in denying his motion for a continuance to allow his counsel and forensics expert more time to prepare because their failure to be prepared was not chargeable to Defendant. Defendant also cites **March v. State,** 105 N.M. 453, 734 P.2d 231 (1987), to support his contention that the trial court's denial of his motion for a continuance deprived him of a potential avenue of defense. Finally, Defendant cites **State v. Brazeal,** 109 N.M. 752, 790 P.2d 1033 (Ct.App.), **cert. denied,** 109 N.M. 631, 788 P.2d 931 (1990), for the proposition that the denial of his motion for a continuance created a presumption of ineffective assistance of counsel.

{16} Defendant first contends that he was deprived of a potential avenue of defense because his forensic expert witness did not have adequate time to prepare her evidence and testimony. Defendant asserts that he was unable to obtain an expert witness prior to moving for a continuance because, until just before he made his motion for a continuance, the public defender's office had failed to provide funding for the expert witness. Citing **Peralta,** Defendant argues that the public defender's office failure to fund a forensics expert should not be imputed to him.

{17} Defendant's reliance on **Peralta,** however, is misplaced. In **Peralta,** the defendant was convicted in metropolitan court of driving under the influence of alcohol and other related traffic violations. The defendant appealed his conviction to the district court, which, after refusing to grant the defendant's motion for a continuance, dismissed the appeal when the defendant and his counsel appeared at the hearing and were not prepared to proceed. On appeal, we reversed, holding that "justice and fairness preclude dismissal [of an appeal as of right] based upon a court appointed public defender's lack of preparedness." **Peralta,** 111 N.M. at 668, 808 P.2d at 638. The issue in **Peralta** was not whether the trial court abused its discretion by denying the motion for a continuance, but whether the trial court erred in dismissing the appeal for a lack of the preparedness of the defendant's counsel. **Id.** In **Peralta,** we suggested that reversal of a conviction is not necessarily required when appointed counsel, who claimed to be inadequately prepared, proceeded to trial and presented an effective defense. **See Peralta,** 111 N.M. at 668-69, 808 P.2d at 638-39 (citing **State v. Lucero,** 104 N.M. 587, 725 P.2d 266 (Ct.App.1986) (affirming denial of motion to dismiss appointed counsel where representation found to be effective); **State v. Maes,** 100 N.M. 78, 665 P.2d 1169 (Ct.App.1983) (same)). Like the defendants in **Lucero** and **Maes,** Defendant in the instant case proceeded to trial and presented an adequate defense. **See** Section II-B, **infra.** Thus, **Peralta** is inapposite to the case at bar.

{18} Defendant also contends that the trial court erred when it failed to grant his motion for a continuance because it denied him effective assistance of counsel. As Defendant concedes, the denial of a motion for a continuance rests within the sound discretion of the trial court. **State v. Pruett,** 100 N.M. 686, 687, 675 P.2d 418, 419 (1984). The burden of establishing an abuse of discretion rests with Defendant. **See March,** 105 N.M. at 455, 734 P.2d at 233. Only in extraordinary instances will the denial of a continuance create a presumption of ineffective assistance of counsel. **See Brazeal,** 109 N.M. at 756, 790 P.2d at 1037 ("'[O]nly an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates

the right to the assistance of counsel.'" (quoting **Morris v. Slappy,** 461 U.S. 1, 11-12, 103 S. Ct. 1610, 1616, 75 L. Ed. 2d 610 (1983))).

> [A]ppellate courts will not presume denial of effective assistance of counsel because of the trial judge's refusal to grant a continuance unless, under the circumstances, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."

Id. (quoting **United States v. Cronic,** 466 U.S. 648, 659-60, 104 S. Ct. 2039, 2047-48, 80 L. Ed. 2d 657 (1984)).

{19} In determining whether the denial of a continuance raises a presumption of ineffective assistance of counsel, we examine the circumstances surrounding the continuance motion to determine whether the defendant would have necessarily been prejudiced by the denial. **Id.** 109 N.M. at 756-57, 790 P.2d at 1037-38. Factors that we consider include, but are not limited to, the amount of time available to prepare a defense, the complexity of the issues involved in the case, the experience of trial counsel, and the reasons proffered by trial counsel for requesting a continuance. **Id.** If the denial of a continuance precludes the defendant from raising a potential avenue of defense, a presumption of prejudice is appropriate. **See March,** 105 N.M. at 455-56, 734 P.2d at 233-34; **see also Brazeal,** 109 N.M. at 757, 790 P.2d at 1038.

{20} Defendant contends that the trial court's denial of his motion for a continuance deprived him of a likely defense, thereby raising a presumption of ineffective assistance of counsel. Defendant asserts that, in the absence of a continuance, his counsel was unable to obtain an expert witness on hair analysis or to obtain co-counsel familiar with scientific evidence. Defendant also contends that the denial of his continuance motion deprived his forensic expert witness of the opportunity to analyze the evidence and prepare for trial. Defendant asserts that assistance in these areas was especially critical to his defense because the only evidence introduced to convict him was the testimony of Salaiz and the hair analysis. Defendant claims that forensic evidence could have disproved Salaiz's story and that a hair expert could have discredited the State's hair evidence, which linked Defendant to Brown's murder. In addition, Defendant contends that, because his motion for a continuance was denied, he was unable to obtain DNA results from another murder case in which Amy Sanchez, an elderly woman, was raped and killed. His defense theory was that whoever had raped and murdered Sanchez had also murdered, and possibly raped, Brown. Defendant, citing **March,** concludes that the trial court's denial of his continuance motion deprived him of a potential avenue of defense.

{21} In **March,** defense counsel, who had been appointed less than one month earlier, moved for a continuance on the day before the defendant's second trial for burglary to permit a forensic evaluation to determine whether or not the defendant could raise the defense of a lack of capacity to form specific intent. At a hearing regarding the continuance motion, defense counsel presented evidence that, at the time of the burglary, the defendant had suffered from uncontrollable behavioral outbreaks and schizophrenia. Additional evidence showed that the defendant suffered from hypoglycemia and had had a cancerous brain tumor surgically removed three months prior to the trial date. This evidence suggested that the defendant may have had the tumor when he allegedly committed the burglary. The trial court denied the defendant's continuance motion, ruled that the medical evidence presented at the continuance hearing would be inadmissible at trial, and granted the State's motion to exclude any reference to schizophrenia and the brain tumor. **March,** 105 N.M. at 454-56, 734 P.2d at 232-34. After the defendant was convicted, he appealed. We reversed, holding that "[t]he end result of the trial court's rulings was to completely deprive defendant of any potential defense of incapacity," thereby denying the defendant his right to due process. **Id.** at 456, 734 P.2d at 234.

{22} The instant case, however, is distinguishable from **March.** Unlike the defendant in **March,** Defendant in the instant case was not deprived of a potential avenue of defense. Defense counsel in the instant case was appointed one year prior to trial and had adequate time and opportunity to prepare a defense. While Defendant complains that, in the absence of a hair identification expert, his counsel was unable to refute the State's hair identification evidence, the record shows that counsel adequately attacked that evidence. During cross-examination of the State's expert witnesses on hair identification, defense counsel established that hair analysis could not absolutely prove identity. Thus, defense counsel adequately placed the State's identification evidence into question.

{23} Defendant also asserts that the denial of his continuance motion precluded him from exploring other possible defenses requiring the expertise of a forensic expert. Perhaps Defendant's forensics expert, Dr. Griest, could cast doubt on Salaiz's testimony that he had had an altercation with Defendant after confessing to the murder by analyzing the blood splatters at the scene of the altercation, the Murray Hotel. Perhaps Griest could narrow the time when the victim was murdered to a period of time during which Defendant had an alibi. Perhaps the DNA testing from the Sanchez case would exonerate Defendant in that case and allow him to argue that whoever raped and killed Sanchez had also killed Brown. Unlike the defendant in **March,** however, Defendant in the instant case was unable to show, after nearly a year of investigation, that any of these defense theories had any reasonable possibility of success. Thus, the instant case is distinguishable from **March,** in which the trial court rulings completely deprived the defendant of a potential avenue of defense, incapacity. 105 N.M. at 456, 734 P.2d at 234.

{24} Defendant also contends that the trial court erred in denying his continuance motion because his inexperienced trial counsel needed more time to prepare and required assistance from more experienced counsel due to the complex issues involved in this case. He asserts that an examination of the factors enunciated in **Brazeal** support his conclusion that his counsel should be presumed to be ineffective. A close examination of **Brazeal,** however, shows that it supports the opposite conclusion. As in **Brazeal,** we consider factors such as the amount of time available to prepare a defense, the complexity of the issues involved in the case, the experience of trial counsel, and the reasons proffered by trial counsel for requesting a continuance. 109 N.M. at 756-57, 790 P.2d at 1037-38.

{25} In beginning this inquiry, we again note that defense counsel in the instant case had adequate time, almost one year, to prepare his case. **See id.** (appointment of counsel less than one week prior to trial, without more, insufficient to raise presumption of ineffective assistance of counsel).[2] While Defendant contends that his trial counsel was inexperienced and needed co-counsel to adequately prepare a defense, we have never held that a defendant was constitutionally entitled to more than one attorney. **See State v. Chamberlain,** 112 N.M. 723, 733-34, 819 P.2d 673, 683-84 (1991) (refusing to hold that more than one attorney constitutionally required even in complex case carrying serious consequences for the defendant if convicted). Moreover, even though Defendant's trial counsel was inexperienced, we cannot conclude that, under the circumstances of this case, "'the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.'" **Brazeal,** 109 N.M. at 756, 790 P.2d at 1037

[2] **Brazeal** cites numerous cases supporting this conclusion, including **Avery v. Alabama,** 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940) (capital conviction affirmed where defense counsel appointed less than three days before trial); **Chambers v. Maroney,** 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970) (counsel not ineffective even though defendant did not meet him until minutes before retrial); **United States v. Rodgers,** 755 F.2d 533 (7th Cir.) (no presumption of prejudice when counsel appointed two days before jury selection and four days before trial), **cert. denied,** 473 U.S. 907, 105 S. Ct. 3532, 87 L. Ed. 2d 656 (1985); **State v. Nieto,** 78 N.M. 155, 429 P.2d 353 (1967) (conviction upheld even though continuance denied when counsel employed six days prior to trial).

(quoting **Cronic,** 466 U.S. at 659-60, 104 S. Ct. at 2047). Thus, a presumption of ineffective assistance is not raised by the trial court's denial of Defendant's motion for a continuance. In addition, the trial court did not abuse its broad discretion in denying the motion for a continuance. **See Pruett,** 100 N.M. at 687, 675 P.2d at 419.

B

{26} Because Defendant has failed to show that his trial counsel's performance should be presumed to be ineffective, he must show that his counsel's actual performance at trial was ineffective. **See Brazeal,** 109 N.M. at 757, 790 P.2d at 1038. For many of the same reasons that he asserted that the denial of his continuance motion was error, Defendant asserts that his trial counsel was ineffective: (1) the Public Defender failed to provide funds to hire expert witnesses prior to trial; (2) his trial counsel was inexperienced and unprepared for trial; and (3) his trial counsel was unable to obtain co-counsel to assist in analyzing scientific evidence and prepare for cross-examination of expert witnesses. He asserts that these errors and omissions, taken together, show that his trial counsel failed to exercise the skill, judgment, and diligence of a reasonably competent attorney.

{27} To prevail on his claim of ineffective assistance of counsel, however, Defendant bears the burden of showing both that his attorney's performance fell below that of a reasonably competent attorney, and that, as a result of his attorney's incompetence, he suffered prejudice. **State v. Gonzales,** 113 N.M. 221, 229-30, 824 P.2d 1023, 1031-32 (1992). Absent a showing of both incompetence and prejudice, counsel is presumed competent. **State v. Jett,** 111 N.M. 309, 315, 805 P.2d 78, 84 (1991). On review, we need not consider the two prongs of the test in any particular order.

> "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies * * *. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."

Brazeal, 109 N.M. at 758, 790 P.2d at 1039 (alterations in original) (quoting **Strickland v. Washington,** 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984)).

{28} In determining whether a defendant suffered prejudice for any acts or omissions of his trial counsel, we examine the record to see if there is "a reasonable probability that 'but for' counsel's unprofessional error, the result of the proceeding would have been different." **State v. Taylor,** 107 N.M. 66, 73, 752 P.2d 781, 788 (1988) (citing **Strickland,** 466 U.S. at 694, 104 S. Ct. at 2068), **overruled on other grounds, Gallegos v. Citizens Ins. Agency,** 108 N.M. 722, 731, 779 P.2d 99, 108 (1989). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" **Brazeal,** 109 N.M. at 758, 790 P.2d at 1039 (quoting **Strickland,** 466 U.S. at 694, 104 S. Ct. at 2068).

{29} Defendant points to numerous acts and omissions of his trial counsel related to the trial court's failure to grant his continuance motion that he contends establish ineffective assistance of counsel: defense counsel failed to obtain an expert witness on forensics, hair analysis, or fingerprints; defense counsel and the Public Defender's Office failed to provide co-counsel knowledgeable about scientific evidence; defense counsel was inexperienced and unprepared for trial; and defense counsel had not adequately investigated the case. Defendant, however, has not demonstrated, nor have we discerned, prejudice resulting from these alleged deficiencies by trial counsel.

{30} Defendant first complains that his trial counsel failed to employ experts in the area of hair analysis, forensics, and fingerprint analysis. Assuming arguendo that competent trial counsel would have employed experts in these areas, Defendant has not shown that "that 'but

for' counsel's unprofessional error, the result of the proceeding would have been different." **Taylor,** 107 N.M. at 73, 752 P.2d at 788. In regards to the hair identification evidence, Defendant's trial counsel was able to discredit the State's hair identification evidence by eliciting on cross-examination of the State's expert witnesses that hair analysis could not conclusively establish identity. Defendant does not explain how a hair analysis expert would be able to cast further doubt on this evidence.

{31} Regarding the forensics expert, Defendant claims that a forensics expert could have assisted his defense in three areas: (1) she could have analyzed the blood spatters at the Murray Hotel and cast doubt on Salaiz's testimony; (2) she could have reexamined the State's forensics evidence and somehow linked the murder of Brown to the rape and murder of Sanchez; and (3) she could narrow the time when Brown was killed to a two to three hour period for which Defendant had an alibi. Again, however, Defendant fails to show that any of these contentions would probably change the outcome of the case. As to Defendant's first claim, that analysis of the blood spatters at the Murray Hotel would discredit Salaiz's testimony, defense counsel had already discredited Salaiz's testimony by calling several witnesses who described him as a liar. In spite of this testimony, the jury chose to believe him regarding Defendant's "confession" to Brown's murder and to not believe him regarding the aggravated assault.

{32} Defendant's second contention is that a re-examination of the State's forensics evidence could exonerate Defendant by showing that whoever had killed Brown had also killed Sanchez. Defendant wanted his forensics expert to examine the blood in Brown's apartment and slides taken from Brown. The blood in Brown's apartment had not been tested to see if it came from the victim or the perpetrator and, consequently, did not implicate Defendant in Brown's murder. During his closing argument, defense counsel was able to capitalize on the State's failure to perform this blood analysis. The slides indicated that Brown had not been raped and in no way implicated Defendant in her murder. Defendant has failed to show that a re-examination of these slides could establish a link between Brown's murder and Sanchez's murder. Moreover, establishing a link would be helpful to the defense only if Defendant could show that he was not the perpetrator of Sanchez's murder. However, this avenue was eliminated because the State had compared samples from Defendant to samples from the Sanchez case. The record is not clear as to whether these DNA samples identified Defendant as Sanchez's rapist or whether the results were too inconclusive to eliminate Defendant as a suspect. In addition, Defendant has not shown that a fingerprint analysis could have linked any other suspect with Brown's murder.

{33} Defendant's third contention is that his forensics expert could narrow the time of Brown's death to a two to three hour period for which Defendant had an alibi. On appeal, however, Defendant does not show that his forensics expert could have narrowed the time of death to such a period of time. In addition, Defendant presented alibi testimony at trial. We cannot say that but for counsel's failure to employ a forensics expert the result of Defendant's trial would have been different.

{34} Defendant's other contentions regarding ineffective assistance of counsel are related and will be considered together. Defendant asserts that his trial counsel was inexperienced and unprepared for trial, that defense counsel and the Public Defender's Office failed to provide co-counsel knowledgeable about scientific evidence, and that defense counsel had not adequately investigated the case. Our review of the record, however, indicates that Defendant was adequately represented. Trial counsel adequately cross-examined the State's witnesses, including its expert witnesses, and offered witnesses to attack the credibility of Salaiz. Moreover, we do not inquire as to how many attorneys are employed to represent a criminal defendant but rather examine whether he was adequately represented. **Chamberlain,** 112 N.M. at 733-34, 819 P.2d at 683-84. While trial counsel failed to locate two witnesses that Defendant argues were

critical to establish his alibi defense, Defendant has failed to demonstrate that the potential witnesses were willing to testify and would have given favorable evidence. **United States v. Rodgers,** 755 F.2d 533, 541 (7th Cir.), **cert. denied,** 473 U.S. 907, 105 S. Ct. 3532, 87 L. Ed. 2d 656 (1985); **Brazeal,** 109 N.M. at 758, 790 P.2d at 1039. Furthermore, counsel introduced other alibi witness testimony. Our review of the record satisfies us that Defendant was not denied effective assistance of counsel.

III

{35} The next issue that we address is whether the trial court erred when it allowed Detective Bruce to testify after he remained in the courtroom during other witnesses' testimony at the preliminary hearing and then again at trial. At trial, Defendant moved to exclude Bruce's testimony. Citing SCRA 1986, 11-615; **State v. Hovey,** 106 N.M. 300, 304, 742 P.2d 512, 516 (1987); and **State v. Reynolds,** 111 N.M. 263, 268-70, 804 P.2d 1082, 1087-89 (Ct.App.1990), **cert. denied,** 111 N.M. 164, 803 P.2d 253 (1991), Defendant contends that, by allowing Bruce to hear the testimony of other witnesses, his testimony was tainted and that the trial court abused its discretion by failing to exclude Bruce's testimony. We disagree.

{36} Under SCRA 1986, 11-615, a party may request that the trial judge exclude witnesses from the courtroom while other witnesses are testifying. However, the rule does not allow the trial judge to exclude "a person whose presence is shown by a party to be essential to the presentation of his cause." **Id.** The trial court has broad discretion in the application of Rule 11-615. **Hovey,** 106 N.M. at 304, 742 P.2d at 516. We will not disturb the decision of the trial court absent a clear abuse of this discretion and prejudice to the complaining party. **State ex rel. State Hwy. Dep't v. First National Bank in Albuquerque,** 91 N.M. 240, 242, 572 P.2d 1248, 1250 (1977).

{37} In the instant case, we find neither an abuse of discretion nor prejudice to Defendant. Bruce was the police officer charged with investigating this murder case. As part of his duties as the investigating officer, Bruce had on prior occasions interviewed all of the witnesses and already knew what they would say. If hearing the testimony of the other witnesses caused Bruce to change his testimony at trial, defense counsel could impeach that testimony with Bruce's investigative reports and testimony from the pretrial hearing. In addition, as the investigating officer, Bruce remained at counsel table to assist the State in presenting its case. While exclusion of similar testimony may be appropriate under different circumstances, under the facts of this case the trial court did not abuse its discretion.

IV

{38} The next issue that we address is whether the trial court erred when it admitted various photographs and a videotape of the victim's apartment. Prior to trial, Defendant moved to exclude the videotape and photographs contending that the probative value of this evidence was outweighed by its prejudicial effect. **See** SCRA 1986, 11-403. Defendant argues that the photographs and videotape showed "numerous images of the body of the victim" that made this evidence prejudicial and inflammatory. In addition, Defendant argues that the evidence was not relevant because the condition and position of the body as well as the fact that the victim's death was not accidental were not at issue in the case. **See** SCRA 1986, 11-402 (irrelevant evidence is inadmissible). Defendant concludes that the trial court abused its discretion by failing to exclude this evidence.

{39} The trial court may, in its discretion, exclude relevant evidence, such as photographs and videotapes, if the evidence is "calculated to arouse the prejudices and passions of the jury and [is] not reasonably relevant to the issues of the case." **State v. Boeglin,** 105 N.M. 247, 253, 731 P.2d 943, 949 (1987). We will not disturb the trial court's decision in the absence of an abuse of discretion. **Id.** (upholding admission of photograph of victim's wound even though fact that defendant had inflicted wound not at issue).

{40} We have viewed the videotape and studied the photographs and cannot say that the trial court abused its discretion in admitting either into evidence. Most of the photographs and a majority of the videotape show the exterior and interior of Brown's apartment. Of the nine photographs admitted into evidence, only one gives a view of the victim's body. In the approximately twenty minute videotape that the jury viewed, the victim's body was in view for approximately one minute. Defendant objected to any view of the victim's body because "[t]he condition and position of the body were not issues, nor was the fact that death was not accidental." We disagree. Defendant was charged with first degree willful and deliberate murder, NMSA 1978, Section 30-2-1(A)(1) (Repl.Pamp.1984), thereby making intent to kill an issue in the case.[3] Pictures of the condition and position of the body as well as the disarray in the bedroom and blood on the bed would allow the jury to draw the inference that a struggle had ensued prior to the victim's death and, thus, are relevant to show that Defendant had the requisite intent to kill. Moreover, Defendant was charged with felony murder, Section 30-2-1(A)(2), aggravated burglary, NMSA 1978, Section 30-16-2 (Repl.Pamp.1984), attempted robbery, NMSA 1978, Section 30-28-1 (Repl.Pamp.1984), and battery, NMSA 1978, Section 30-3-4 (Repl.Pamp.1984). Pictures of the possible places of entry into the apartment, the overturned purse and its contents, and the victim's bruised and bloodied face are relevant to these charges. Thus, the photographs and videotape were highly relevant to the charges against Defendant. **See Boeglin,** 105 N.M. at 253, 731 P.2d at 949.

{41} Moreover, we do not believe that Defendant suffered any undue prejudice by the admission of the photographs and videotape. The trial court minimized possible prejudice to Defendant by ordering the State to edit the videotape prior to trial and exercising control over the presentation of the tape at trial. **See id.** In addition, the State was not allowed to admit all of the available still photographs at trial. Further, the photographs and videotape were not "calculated to arouse the prejudices and passions of the jury." **State v. Bell,** 90 N.M. 134, 139, 560 P.2d 925, 930 (1977). Because the probative value of this evidence outweighed the possible prejudice to Defendant, we find no abuse of discretion.

[3] In addition, our recent decision in **State v. Ortega,** 112 N.M. 554, 817 P.2d 1196 (1991), makes intent to kill an issue in felony murder. **See** Section VI-E, **infra.**

V

{42} The next issue that we address is whether the trial court erred when it denied Defendant's motion for recusal. Early on in this case, the judge offered to recuse himself because his mother was a friend of the victim. At that time, Defendant declined the judge's offer. After the judge denied Defendant's motion for a continuance, in part because the judge stated that such a continuance would be unfair to the victims, Defendant moved to recuse the judge. Citing SCRA 1986, 5-106(E) (Repl.Pamp.1992), Defendant now argues that the trial judge erred by failing to recuse himself because, under the facts of this case, his impartiality could be called into question.

{43} While we agree with Defendant that a district judge should voluntarily enter a recusal in any case where his or her impartiality could reasonably be questioned, SCRA 1986, 5-106(E), such recusal is within the sound discretion of the trial judge. **State v. Fero,** 105 N.M. 339, 343, 732 P.2d 866, 870 (1987). Voluntary recusal is reserved for compelling constitutional, statutory, or ethical reasons because "[a] judge 'has a duty to **sit** where **not disqualified** which is equally as strong as the duty to **not sit** where **disqualified.**'" **Gerety v. Demers,** 92 N.M. 396, 400, 589 P.2d 180, 184 (1978) (quoting **Laird v. Tatum,** 409 U.S. 824, 837, 93 S. Ct. 7, 14, 34 L. Ed. 2d 50 (1972) (Rehnquist, J., mem.)).

{44} Defendant contends that, because the judge's mother was a friend of the victim, the judge was biased against him and the judge's impartiality could be questioned. He concludes that the judge abused his discretion by failing

to recuse himself. We disagree. In order to require recusal, bias must be of a personal nature against the party seeking recusal. **State v. Case,** 100 N.M. 714, 717, 676 P.2d 241, 244 (1984). Personal bias cannot be inferred from an adverse ruling or the enforcement of the rules of criminal procedure. **See id.** In the instant case, the judge had previously informed the parties of his mother's friendship with the victim. Because Defendant did not think that recusal of the trial judge was necessary until after an adverse ruling, we hold that the trial judge did not abuse his discretion by declining to recuse himself.

VI

{45} Defendant raises several issues relating to jury selection, function, and instruction including: (1) Whether the trial court erred when it refused to order the sheriff to bring a potential juror to court for jury duty; (2) whether the trial court erred when it denied Defendant's motion for a change of venue; (3) whether the trial court erred when it denied Defendant's challenges for cause of various potential jurors; (4) whether the trial court erred when it informed the jury that the State would not seek the death penalty; and (5) whether the trial court erred when it gave the felony murder instruction to the jury. We discuss each issue separately.

A

{46} Defendant first contends that the trial court erred when it failed to delay voir dire (and ultimately trial) and send the sheriff to bring an absent prospective juror to the courtroom. Citing NMSA 1978, Section 38-5-2 (Repl.Pamph.1987), Defendant claims that the trial court abused its discretion by excusing the potential juror based on an alleged emotional disorder, without taking evidence on that matter.

{47} We need not address whether the trial court abused its discretion in excusing the absent juror because Defendant has failed to demonstrate, nor do we discern, any resulting prejudice.[4] The absent potential juror was the 58th prospective juror chosen and jury selection ended at number 38. Thus, we find no error.

B

{48} Defendant also contends that the trial court erred when it denied his motion to change venue. Defendant asserts that pervasive pretrial publicity made a change of venue necessary to ensure a fair trial. **See Rideau v. Louisiana,** 373 U.S. 723, 726, 83 S. Ct. 1417, 1419, 10 L. Ed. 2d 663 (1963) (due process violated by denial of motion for change of venue after recorded confession broadcast three times). As Defendant concedes, granting or denying a motion for a change of venue is within the sound discretion of the trial court. **State v. Hargrove,** 108 N.M. 233, 239, 771 P.2d 166, 172 (1989). On appeal, the trial court's ruling will not be disturbed absent an abuse of this discretion, and the burden of establishing an abuse of discretion rests with the moving party. **Id.** Potential jurors' exposure to pretrial publicity, by itself, does not require a change of venue and does not raise a presumption of prejudice. **Chamberlain,** 112 N.M. at 726, 819 P.2d at 676. "[T]he pertinent inquiry is whether 'the jurors * * * had such fixed opinions that they could not judge impartially the guilt of the defendant.'" **State v. McGuire,** 110 N.M. 304, 311, 795 P.2d 996, 1003 (1990) (citations

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[4] Defendant has cited no authority for the proposition that a trial court's failure to bring all potential venire persons to the court prior to jury selection amounts to an abuse of discretion. We have found no authority to support defendant's position; in fact, our research indicates that

> In the absence of statute, jurors who do not answer to their names do not need to be sent for, and it is not the practice to issue attachments for missing persons on the jury list when there are enough in attendance to complete the jury.
>
> * * * [A]n accused has no vested right to any particular juror or jurors; all that he can insist on is an impartial jury of the requisite number in his own case and, at the most, a substantial compliance with the statutes governing the selecting and summoning of jurors.

47 Am.Jur.2d **Jury** §§ 191-192 (1969) (footnotes omitted). In the instant case, Defendant asserts neither that there were insufficient venire persons to complete the jury nor that the trial court failed to comply with the statutes governing selecting and summoning jurors.

omitted) (alterations in original) **quoted in Chamberlain,** 112 N.M. at 726, 819 P.2d at 676.

{49} Citing **State v. Shawan,** 77 N.M. 354, 423 P.2d 39 (1967), Defendant claims that he was prejudiced by pretrial publicity. However, **Shawan** is distinguishable. The defendant in **Shawan** was tried for a second time for assault with the intent to kill after his first conviction was reversed. Prior to jury selection, the defendant moved for a change of venue and filed an affidavit alleging that a front page newspaper story printed the day before the second trial was to start would deny him a fair trial because of public excitement and local prejudice. The story contained an account of the evidence to be introduced at trial, the defendant's prior criminal record, and the fact that the defendant had been travelling in a stolen car prior to the assault. The defendant introduced a copy of the story as an exhibit and offered to call witnesses to testify that the story had also been broadcast on the local radio on the day before trial. After voir dire indicated that a number of jurors had either read the newspaper story or heard the radio broadcast, the defendant renewed his motion, which was denied, and, after being tried and convicted, the defendant appealed. Because the release of the story on the eve of trial had created "an atmosphere incompatible with impartiality," we held that the trial court abused its discretion. **Id.** at 358, 423 P.2d at 42.

{50} Unlike the defendant in **Shawan,** Defendant in the instant case did not introduce evidence that he was deprived of a fair and impartial jury. Unlike the record in **Shawan,** the record before us in this case does not contain any example of pre-trial publicity that could have prejudiced the jurors. In fact, Defendant in the instant case failed to file an affidavit alleging that the venire members had been exposed to pre-trial publicity or that pre-trial publicity created an atmosphere of impartiality. Our review of the record on appeal shows that, while many of the prospective jurors had read or heard about the case, all but a few could not remember what they had heard or read. Defendant was able to question these jurors and was able to challenge those who indicated partiality. We hold that Defendant has failed to meet his burden of proving that the trial court abused its discretion by failing to grant a motion for a change of venue.

C

{51} A related issue that Defendant raises on this appeal is whether the trial court erred when it denied his challenges for cause of various potential jurors. Defendant's challenges can be classified in three categories: (1) prospective jurors who had read or heard about the case, **see State v. Pace,** 80 N.M. 364, 456 P.2d 197 (1969); (2) prospective jurors who knew the victim, **see State v. Dobbs,** 100 N.M. 60, 665 P.2d 1151 (Ct.App.), **cert. quashed,** 100 N.M. 53, 665 P.2d 809 (1983); and (3) a prospective juror who could not serve on a jury for an extended period of time. Defendant concludes that he was denied a fair and impartial jury by failure of the trial court to excuse various jurors for cause.

{52} Whether a prospective juror should be excused for cause rests within the sound discretion of the trial court. **State v. Sutphin,** 107 N.M. 126, 129, 753 P.2d 1314, 1317 (1988). Because the trial judge is in the best position to assess the demeanor and credibility of prospective jurors, we will not disturb his ruling absent a manifest error or a clear abuse of that discretion. **State v. Wiberg,** 107 N.M. 152, 156, 754 P.2d 529, 533 (Ct.App.), **cert. denied,** 107 N.M. 106, 753 P.2d 352 (1988). The burden of establishing an abuse of discretion rests on the moving party. **Id.** at 156-57, 754 P.2d at 533-34. We have reviewed the tapes of the voir dire of those jurors challenged for cause by the Defendant that he now claims mandate reversal. In each case, the prospective juror stated that he or she could render a fair and impartial verdict. The trial court did not abuse its discretion in denying these challenges for cause.

D

{53} Defendant also argues that the trial court erred when it informed the jury that the State

would not seek the death penalty. By so arguing, Defendant overlooks established New Mexico precedent and a comment to the Uniform Jury Instructions to the contrary. **State v. Martin,** 101 N.M. 595, 605, 686 P.2d 937, 947 (1984) (proper for judge to instruct jury in capital case that the State would not seek death penalty); SCRA 1986, 14-6007 Comment 1 (same). The trial court did not err in informing the jury that the State would not seek the death penalty in this case.

E

{54} Defendant also contends that the trial court erred when it gave the felony murder instruction to the jury. Citing our recent opinion in **State v. Ortega,** 112 N.M. 554, 817 P.2d 1196 (1991), Defendant claims that the felony murder jury instruction given at his trial, which was identical in form to that given in **Ortega,** failed to include an essential element of the crime: the intent to kill. At trial, Defendant objected to the felony murder instruction, arguing that the evidence introduced did not support instructing the jury on this count; however, he did not object to the lack of the intent to kill element in the instruction. As Defendant recognizes, his failure to object to the lack of intent in the instruction may be raised as a basis for appeal only if it constitutes fundamental error. **Id.** at 566, 817 P.2d at 1208. Under the analysis set forth in **Ortega,** Defendant concludes that the trial court committed fundamental error because he lacked the intent to kill: if the jury believed the testimony of David Salaiz, he (Defendant) cannot be convicted of felony murder because the killing was accidental.

{55} In **Ortega,** the defendant, Richard Ortega, was charged with murder in connection with the stabbing deaths of two victims. At the close of evidence, the trial court instructed the jury to consider three different murder theories: willful and deliberate murder under NMSA 1978, Section 30-2-1(A)(1), and SCRA 1986, 14-201; felony murder under Section 30-2-1(A)(2), and SCRA 1986, 14-202; and second degree murder under Section 30-2-1(B) and SCRA 1986, 14-211. **Ortega,** 112 N.M. at 564-65, 567, 817 P.2d at 1206-07, 1209. After the jury found him guilty of felony murder, Ortega appealed, claiming that the felony murder statute and the instructions proffered by the trial court unconstitutionally established a presumption of mens rea or, in the alternative, that the felony murder statute unconstitutionally created a strict liability crime. While we did not find that our felony murder statute was unconstitutional, **see Ortega,** 112 N.M. at 575-76, 817 P.2d at 1217-18 (BACA, J., dissenting in part), we interpreted the statute to contain an element of intent to kill in addition to the intent to commit the underlying felony. **Id.** at 563, 817 P.2d at 1205 (majority opinion). We defined that intent to kill as follows:

> The intent to kill need not be a "willful, deliberate and premeditated" intent as contemplated by the definition of first degree murder in Subsection 30-2-1(A)(1), nor need the act be "greatly dangerous to the lives of others, indicating a depraved mind regardless of human life," as contemplated by the definition in Subsection (A)(3). Indeed, an intent to kill in the form of knowledge that the defendant's acts "create a strong probability of death or great bodily harm" to the victim or another, so that the killing would be only second degree murder under Section 30-2-1(B) if no felony were involved, is sufficient to constitute murder in the first degree when a felony **is** involved—or so the legislature has determined. Second degree murder, in other words, may be elevated to first degree murder when it occurs in circumstances that the legislature has determined are so serious as to merit increased punishment * * *.

Ortega, 112 N.M. at 563, 817 P.2d at 1205.

{56} As in **Ortega,** the jury in the instant case was instructed on willful and deliberate murder, felony murder, and second degree murder regarding the death of Brown. The jury in the instant case, like the jury in **Ortega,** found Defendant

not guilty on the willful and deliberate murder charge but guilty of felony murder. The verdict of not guilty to the charge of willful and deliberate murder in the instant case is consistent with evidence presented at trial. The State's expert witness testified that the cause of Brown's death was suffocation. The victim had numerous bruises on her body and other external injuries to her face. The disarray of the apartment and the unnatural position of the victim's body indicated that the victim may have been involved in a struggle prior to her death. Salaiz testified that Defendant told Salaiz that he (Defendant) had panicked during the burglary and placed a pillow over the victim's head to quiet her screams. Salaiz also testified that Defendant had said "I killed the old lady. I didn't mean to." While this evidence may have been sufficient to support a conviction for willful and deliberate murder, the jury could have concluded that Defendant, like the defendant in **Ortega,** had not given careful thought to his proposed course of action, had not weighed considerations for and against that course of action, and had not considered the reasons for or against such action. **See Ortega,** 112 N.M. at 567, 817 P.2d at 1209; SCRA 1986, 14-201.

{57} The above evidence is also consistent with a conviction for felony murder. Defendant seizes on his statement, as testified to by Salaiz, "I didn't mean to [kill Brown]," and our statement in **Ortega** "[a]n unintentional or accidental killing will not suffice [to support a conviction for felony murder]," 112 N.M. at 563, 817 P.2d at 1205, to argue that he did not have sufficient intent to kill. We disagree. As we stated in **Ortega,** "intent to kill in the form of knowledge that the defendant's acts 'create a strong probability of death or great bodily harm' to the victim or another, so that the killing would be only second degree murder under Section 30-2-1(B) if no felony were involved, is sufficient to constitute murder in the first degree when a felony **is** involved." **Id.** In the instant case, as in **Ortega,** the jury must have concluded that, during the course of the predicate felonies, Defendant caused the victim's death and could have concluded that he knew that his actions of holding a pillow over the victim's face for several minutes created a strong probability of death or great bodily harm. **See Ortega,** 112 N.M. at 566-69, 817 P.2d at 1208-11. Thus, the jury would have been justified in rendering a guilty verdict on the charge of second degree murder. "Second degree murder * * * may be elevated to first degree murder when it occurs [during the commission of a dangerous felony] * * *." **Id.** at 563, 817 P.2d at 1205.

{58} "The doctrine of fundamental error * * * will be invoked by an appellate court only when the question of guilt is so doubtful that it would shock the conscience to permit the verdict to stand, or when the court considers it necessary to avoid a miscarriage of justice." **Id.** at 566, 817 P.2d at 1208. In the instant case, as in **Ortega,** "we not only have confidence in the jury's verdict * * *; we think it would be a miscarriage of justice to upset the verdict[] and remand for a new trial, the outcome of which most assuredly would be the same." **Id.** at 566-67, 817 P.2d at 1208-09.

VII

{59} The next issue raised by Defendant is whether the trial court erred when it qualified Arnold Bentz as an expert witness for the State. At trial, the State offered Bentz as an expert on hair analysis based on his job training and experience. Defendant objected, claiming that this experience was insufficient to qualify Bentz as an expert. The trial court qualified Bentz as an expert, and he testified as to his role in the investigation, which was to separate hairs collected from the crime scene into those matching the victim's hair and those not matching the victim's hairs. Defendant now claims that Bentz lacked the scientific education and training necessary to qualify him as an expert witness.

{60} Under SCRA 1986, 11-702, a trial court must make a two-prong inquiry before allowing expert testimony to be introduced. First, the trial court must determine whether scientific, technical, or other specialized knowledge will assist the jury in its understanding or in determining a fact at issue. **Id.** Second, the trial court must determine whether the proffered expert witness

is qualified based on his or her "knowledge, skill, experience, training, or education." **Id.** We review the determination of the trial court that Bentz was qualified to give expert testimony for an abuse of discretion. **See Madrid v. University of California,** 105 N.M. 715, 717, 737 P.2d 74, 76 (1987); **State v. Newman,** 109 N.M. 263, 265, 784 P.2d 1006, 1008 (Ct.App.), **cert. denied,** 109 N.M. 262, 784 P.2d 1005 (1989).

{61} Defendant asserts that, because Bentz lacked a scientific education and training, he was not properly qualified as an expert witness, and that the trial court abused its discretion in allowing him to testify. As we noted in **Madrid,** however, the use of the disjunctive "or" in the rule "indisputably recognizes that an expert witness may be qualified" on the basis of any one of the five factors. 105 N.M. at 717, 737 P.2d at 76. The evidence introduced at trial demonstrated that Bentz had in excess of sixteen years of job experience performing trace evidence analysis, including hair analysis. Based on this evidence, the trial court did not abuse its discretion in qualifying Bentz as an expert witness. Any perceived deficiency in Bentz's education and training is relevant to the weight accorded by the jury to his testimony and not to the testimony's admissibility.

VIII

{62} The next issue raised by Defendant is whether the trial court erred when it denied his motion in limine or motion for a continuance based on a prosecutorial misconduct. In June of 1990, Defendant requested that the State turn over certain slides in its possession to Dr. Griest. Griest was told by the State's agent, Captain Hall, that the slides either did not exist or were lost. Griest finally received the slides approximately one week prior to trial, and Defendant moved for a continuance, contending that the delayed delivery of the evidence in the State's possession was too late for Griest to prepare for trial. When the trial court denied the motion for a continuance, Defendant made a motion in limine to prohibit the State's expert from testifying about the slides. This motion was also denied. Citing **State v. Wisniewski,** 103 N.M. 430, 708 P.2d 1031 (1985), and SCRA 1986, 5-501 (Repl.Pamp.1992), Defendant claims that an agent's misconduct in misplacing evidence should be imputed to the District Attorney. Defendant cites SCRA 1986, 5-505(B) (Repl. Pamp.1992), for the proposition that the trial court should have granted his motion in limine to preclude the State's expert from testifying regarding the evidence or granted a continuance to allow his expert to prepare for trial.

{63} The State has a duty to disclose the results of scientific tests or experiments that are within the control or possession of the State and that are known or with reasonable diligence should be known to the prosecutor. Rule 5-501(A)(4). Information within the custody or control of an agent of the State is presumed to be within the control of the prosecutor. **See Wisniewski,** 103 N.M. at 435, 708 P.2d at 1036 (extending prosecutor's duty to disclose exculpatory information to police who are part of prosecutorial team). When the State fails to deliver such evidence to the defendant, the trial court may, in its discretion, resort to several sanctions, including limiting the admissibility of the evidence or granting a motion for a continuance. Rules 5-501(G) & 5-505(B). On review, however, the defendant bears the burden of showing that he was prejudiced by the nondisclosure. **See State v. Griffin,** 108 N.M. 55, 58, 766 P.2d 315, 318 (Ct.App.) (interpreting Rule 5-501(A)(5)), **cert. denied,** 108 N.M. 97, 766 P.2d 1331 (1988).

{64} In the instant case, Defendant has failed to meet his burden of showing prejudice. The evidence in question, the slides taken from the victim, showed that she was not raped prior to her death. Nothing contained in the slides implicated Defendant in her murder. Thus, we find no prejudice here. The trial court did not err in refusing to grant Defendant's motion for a continuance nor his motion in limine.

IX

{65} Defendant next contends that the trial court erred when it failed to rule on the sufficiency of

the evidence prior to submitting the case to the jury. At the close of the State's case, Defendant moved for a directed verdict based on insufficient evidence, and the trial court denied the motion. Defendant then presented his case, and, after the trial court submitted the case to the jury, Defendant moved for a mistrial because the trial court had failed to again rule on the sufficiency of the evidence. Citing SCRA 1986, 5-607(K) (Repl. Pamp.1992), and **State v. Lard,** 86 N.M. 71, 519 P.2d 307 (Ct.App.1974), Defendant claims that the trial court erred by failing to consider the sufficiency of the evidence before presentation of the case to the jury, even though he did not renew his directed verdict motion.

{66} We agree with Defendant that the trial court must rule on the sufficiency of the evidence before presenting the case to the jury. SCRA 1986, 5-607(K) ("[at the close of all evidence, the trial] court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made"). We do not agree, as Defendant suggests, that this procedural lapse by the trial court merits reversal. As the Court of Appeals has held, we hold that the failure of the trial court to rule on the sufficiency of the evidence before presentation of the case to the jury merely preserves the issue of sufficiency of the evidence for appellate review. **See Lard,** 86 N.M. at 73, 519 P.2d at 309.

X

{67} The above discussion necessarily suggests the next issue that we address: Whether there was sufficient evidence introduced at trial to support Defendant's conviction. Defendant asserts that the only evidence linking him to Brown's murder and the burglary, attempted robbery, and battery was the testimony of David Salaiz and hair samples collected at the scene. Defendant argues that the State's expert testimony indicated that the hair samples found in Brown's apartment, while matching Defendant's hair, could also have come from another person. In addition, Defendant asserts that testimony indicated that Salaiz had the reputation of being a liar, that Salaiz had incentives to lie, **i.e.,** reward money and favorable treatment on pending criminal matters, and that the jury did not believe Salaiz's testimony as illustrated by its not guilty verdict on the aggravated battery charge against defendant.[5] Defendant concludes that his conviction was not supported by substantial evidence.

{68} Our review consists of determining "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." **Sutphin,** 107 N.M. at 131, 753 P.2d at 1319. "Substantial evidence is that evidence which is acceptable to a reasonable mind as adequate support for a conclusion." **State v. Isiah,** 109 N.M. 21, 30, 781 P.2d 293, 302 (1989). We view the evidence in the light most favorable to supporting the verdict and resolve all conflicts and indulge all inferences in favor of upholding the verdict. **Sutphin,** 107 N.M. at 131, 753 P.2d at 1319. We may not reweigh the evidence nor substitute our judgment for that of the jury. **Id.**

{69} In light of the above standard of review, Defendant's contention of insufficient evidence to support his guilty verdicts must fail. The evidence adduced at trial favorable to supporting the verdicts is as follows. Salaiz testified that Defendant told him (Salaiz) that he (Defendant) had entered the victim's apartment to steal something to sell to obtain money to purchase drugs. Salaiz also testified that Defendant related that, while in the apartment, he encountered the victim who started to scream, he panicked, and then he killed the victim. The State also introduced expert testimony that hairs found at the murder scene matched known hair samples of Defendant. While Defendant attacked Salaiz's credibility and the validity of the hair identification, our duty on appeal is neither to substitute our judgment for that of the jury nor reweigh the

[5] Defendant also contends that even if the jury believed Salaiz's testimony regarding Defendant's involvement in the burglary at Brown's apartment, this testimony does not establish that Defendant had the intent to kill Brown as required by **Ortega.** We have already discussed this issue in Section VI-E, **supra,** and see no reason to repeat that discussion here.

evidence. As indicated by the verdicts, the jury believed Salaiz's testimony regarding the murder and burglary and could have found that the hair analysis, while not conclusive in establishing Defendant's identity as the murderer, linked Defendant to the murder. Thus, as the above discussion indicates, substantial evidence supports Defendant's conviction.

XI

{70} Defendant's final argument is that the above claims of error, taken cumulatively, amount to a violation of his right to due process. The doctrine of cumulative error "requires reversal of a defendant's conviction when the cumulative impact of errors which occurred at trial was so prejudicial that the defendant was deprived of a fair trial." **Martin,** 101 N.M. at 601, 686 P.2d at 943. In the instant case, the only error committed by the trial court was its failure to anticipate our opinion in **Ortega,** which changed the law regarding felony murder. Our review of the record indicates that Defendant received a fair trial; therefore, we do not find cumulative error.

{71} In accordance with the foregoing discussion, the decision of the trial court is AFFIRMED.

{72} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

RICHARD E. RANSOM,
Chief Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1993-NMSC-015

Filing Date: March 05, 1993, As Corrected July 1, 1993

Docket No. 20,083

Richard J. SHOVELIN,

Plaintiff-Appellee, and Cross-Appellant,

v.

CENTRAL NEW MEXICO ELECTRIC COOPERATIVE, INC.,

Defendant-Appellant, and Cross-Appellee.

APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY
Edmund H. Kase, III, District Judge

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for Plaintiff-Appellee.

OPINION

BACA, Justice.

{1} Defendant-appellant, Central New Mexico Electric Cooperative (the "Cooperative"), appeals a jury verdict and judgment in favor of plaintiff-appellee, Richard J. Shovelin. The jury determined that the Cooperative and Shovelin had entered into an implied employment contract and that the Cooperative had breached the contract. The jury awarded Shovelin $ 107,885 in damages on his breach of contract claim. In accordance with the trial court's instructions, however, the jury did not award Shovelin any damages on his retaliatory discharge claim. The Cooperative appeals this judgment and raises one issue that it contends mandates reversal of the contract judgment. This issue, which is an issue of first impression in New Mexico, is whether the doctrine of collateral estoppel should have precluded Shovelin from relitigating an issue that was previously decided by an administrative agency, in this case the Employment Security Department (the "ESD"). The Cooperative also maintains that the trial court erred when it failed to grant the Cooperative's motion for a judgment on the pleadings or, in the alternative, its motion for summary judgment regarding Shovelin's retaliatory discharge claim. Shovelin cross-appeals, contending that (1) the trial court correctly determined that public policy supported his right to seek office, (2) the trial court erred when it declined to grant his motion for partial summary judgment on the retaliatory discharge claim, and (3) the trial court erred when it instructed the jury not to consider his retaliatory discharge claim if it found in his favor on his breach of contract claim. We note jurisdiction under SCRA 1986, 12-102(A)(1) (Repl.Pamp.1992), and affirm in part and reverse in part.

I

{2} Shovelin was employed by the Cooperative as an energy conservation advisor. At the same time, Shovelin was also a volunteer medical technician and a volunteer firemen. These volunteer duties required Shovelin to take time off from his work at the Cooperative. In 1986, Shovelin considered running for mayor of Mountainair, New Mexico. When Shovelin told his supervisor at the Cooperative, Fain Lawson, that he intended to run for mayor, Lawson told

Shovelin that the Cooperative felt that the mayoral duties would further, and to an unreasonable extent, interfere with Shovelin's employment. Lawson warned Shovelin that he would be terminated from employment with the Cooperative if he were elected mayor. In spite of this warning, Shovelin ran for mayor of Mountainair. On March 4, 1986, Shovelin was elected mayor of Mountainair, and the Cooperative terminated his employment.

{3} Following his termination, Shovelin filed for unemployment compensation, which the Cooperative contested. After a hearing on the matter, the ESD determined that Shovelin had voluntarily left his employment with the Cooperative without good cause and denied Shovelin unemployment benefits pursuant to NMSA 1978, Section 51-1-7(A) (Repl.Pamp.1983). Shovelin, who was represented by counsel at all stages of the ESD proceedings, appealed this determination to the district court, which reversed. The Cooperative appealed to this Court, and, in an unpublished decision, we held that the ESD decision was supported by substantial evidence.

> The evidence shows that [Shovelin's] decision not to comply with the [Cooperative's] reasonable condition of employment was the cause for his termination. Under these circumstances, ESD correctly determined that [Shovelin] left his employment voluntarily without good cause in connection with his employment and was therefore disqualified from receiving unemployment benefits under the provisions of Section 51-1-7(A).

Shovelin v. Employment Sec. Comm'n, No. 17,046, slip op. at 2 (N.M. Oct. 2, 1987). Accordingly, we reversed the district court and reinstated the ESD decision. **Id.**

{4} While the appeal of the ESD decision was pending, Shovelin filed the instant action against the Cooperative in state court. His complaint alleged that the Cooperative breached an implied employment contract and that the Cooperative had violated his federal constitutional rights. After answering Shovelin's complaint, the Cooperative removed the action to federal court pursuant to 28 U.S.C. § 1441(a) (1988). Upon the Cooperative's motion, the federal district court ruled that "[Shovelin] fail[ed] to state a federal claim for violation of his constitutional rights because there [was] no governmental action involved in his dismissal from employment." **Shovelin v. Central New Mexico Elec. Coop.,** No. 87-0598 JC, slip op. at 4 (D.N.M. Aug. 17, 1988). The federal court dismissed the federal constitutional claim and remanded the breach of contract claim to the state court.

{5} After the case was transferred back to state court, the Cooperative moved for summary judgment, contending that evidence adduced during discovery failed to create an issue of genuine fact as to whether Shovelin was anything other than an at-will employee and that the doctrine of collateral estoppel precluded Shovelin from relitigating the reasons for his termination. Shovelin subsequently moved to amend his complaint to add a cause of action for retaliatory discharge. The trial court denied the Cooperative's summary judgment motion and granted Shovelin's motion to amend his complaint.

{6} On July 17, 1990, Shovelin filed his first amended complaint, alleging breach of an employment contract and retaliatory discharge. On January 18, 1991, Shovelin moved for summary judgment on his retaliatory discharge claim, and, subsequently, the trial court denied this motion. The Cooperative, on March 11, 1991, moved for judgment on the pleadings or, in the alternative, summary judgment on the retaliatory discharge claim. The Cooperative contended that the pleadings failed to allege a public policy violation sufficient to support a claim for retaliatory discharge under New Mexico law. The trial court denied both of the Cooperative's motions.

{7} In June of 1991, the trial court conducted a jury trial. At the close of the evidence, the trial court instructed the jury on Shovelin's breach of an implied employment contract and retaliatory discharge claims. The trial court instructed the jury to first consider the breach of contract claim.

The jury was also instructed not to consider Shovelin's retaliatory discharge claim unless it entered a verdict in favor of the Cooperative on the breach of contract claim. The jury returned a verdict in favor of Shovelin on his breach of contract claim and awarded him $ 107,885 in damages. In accordance with the trial court's instructions, the jury did not award Shovelin damages on his retaliatory discharge claim. From this verdict, the Cooperative appeals, contending that (1) the trial court erred when it denied the Cooperative's motion for summary judgment based on the doctrine of collateral estoppel, and (2) the trial court erred when it denied the Cooperative's motion for summary judgment or judgment on the pleadings in regard to Shovelin's retaliatory discharge claim. Shovelin cross-appeals, contending that (1) the trial court correctly determined that public policy supported his retaliatory discharge claim, (2) the trial court erred when it denied his motion for summary judgment on the retaliatory discharge claim, and (3) the trial court erred when it instructed the jury not to consider the claim of retaliatory discharge if it found for Shovelin on his breach of contract claim. As to the collateral estoppel issue, we hold that the trial court did not abuse its discretion in declining to apply the doctrine of collateral estoppel to the facts of this case, and, accordingly, we affirm the judgment in favor of Shovelin. As to the retaliatory discharge issue, we hold that the trial court erred when it refused to grant the Cooperative's motion for a judgment on the pleadings because Shovelin failed to allege a public policy violation sufficient to support a claim for retaliatory discharge under New Mexico law. Accordingly, we remand with instructions to dismiss with prejudice Shovelin's retaliatory discharge claim.

II

{8} The first issue that we address is whether the trial court erred when it declined to apply the doctrine of collateral estoppel. The Cooperative asserts that the trial court should have applied the doctrine of collateral estoppel and that Shovelin should have been precluded from relitigating the basis and reasons for his termination. According to the Cooperative, application of collateral estoppel is appropriate because (1) Shovelin was a party to the ESD hearing; (2) the cause of action in the instant case is different from the cause of action in the ESD proceeding; (3) the issue—whether Shovelin's separation from employment was voluntary or involuntary—is the same in both of the actions; and (4) the issue was necessarily determined in the prior litigation. The Cooperative cites numerous cases from other jurisdictions supporting its contention that the adjudicative determinations of an administrative tribunal should be given preclusive effect in subsequent litigation. **See, e.g., University of Tennessee v. Elliott,** 478 U.S. 788, 799, 106 S. Ct. 3220, 3227, 92 L. Ed. 2d 635 (1986). The Cooperative concludes that, because the trial court erred when it failed to apply collateral estoppel to preclude Shovelin from relitigating the basis and reasons for his termination, the judgment should be reversed and remanded with instructions to enter a dismissal with prejudice against Shovelin.

{9} Shovelin, on the other hand, contends that the trial court correctly refused to apply the doctrine of collateral estoppel. Shovelin asserts that giving an administrative agency ruling such preclusive effect would violate various constitutional guarantees: (1) Separation of powers pursuant to Article III, Section 1 of the New Mexico Constitution; (2) his right to a jury trial pursuant to Article II, Section 12 of the New Mexico Constitution; and (3) his right to due process. In addition, Shovelin contends that an application of collateral estoppel would be contrary to the legislative intent and purpose underlying the unemployment insurance structure. Finally, Shovelin contends that the application of collateral estoppel is inappropriate because the issue decided during the ESD proceedings is different from the issue decided by the jury in the instant action. Shovelin concludes that the trial court did not err in refusing to apply collateral estoppel and that the judgment should be affirmed.

{10} The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of "'ultimate facts or issues actually and necessarily decided in a prior suit.'" **International Paper**

Co. v. Farrar, 102 N.M. 739, 741, 700 P.2d 642, 644 (1985) (quoting **Adams v. United Steelworkers,** 97 N.M. 369, 373, 640 P.2d 475, 479 (1982)). Before collateral estoppel is applied to preclude litigation of an issue, however, the moving party must demonstrate that (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation. **Silva v. State,** 106 N.M. 472, 474-76, 745 P.2d 380, 382-84 (1987). If the movant introduces sufficient evidence to meet all elements of this test, the trial court must then determine whether the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior litigation. **Id.** at 474, 745 P.2d at 382. This issue is within the competence of the trial court, and we review the trial court's determination for an abuse of discretion. **See id.** at 476, 745 P.2d at 384.

{11} In **Silva,** we approved of the use of both offensive and defensive collateral estoppel. **See id.** at 474-76, 745 P.2d at 382-84 (citing **inter alia Blonder-Tongue Labs., Inc. v. University of Illinois Found.,** 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971), and **Parklane Hosiery Co. v. Shore,** 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)). We held in **Silva** that, under the facts of that case, the use of offensive collateral estoppel against the defendant was inappropriate because the ultimate issues of fact in that litigation were not actually and necessarily determined by the prior litigation. **Id.** at 476, 745 P.2d at 384. In contrast, in the instant case the Cooperative asks us to reverse the trial court's determination that defensive collateral estoppel did not preclude Shovelin from relitigating the issue of whether he voluntarily left his employment with the Cooperative.

{12} The threshold question presented by this appeal, which, as noted above, is one of first impression in New Mexico,[1] is whether under the doctrine of collateral estoppel issues resolved in an administrative agency adjudicative decision should be given preclusive effect in later civil trials. We need not answer this question in a vacuum as it has been addressed by numerous courts and authorities. **See, e.g., United States v. Utah Constr. & Mining Co.,** 384 U.S. 394, 421-22, 86 S. Ct. 1545, 1560, 16 L. Ed. 2d 642 (1966); **Ryan v. New York Tel. Co.,** 62 N.Y.2d 494, 478 N.Y.S.2d 823, 467 N.E.2d 487 (N.Y.1984); Rex R. Perschbacher, **Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings,** 35 Fla.L.Rev. 422 (1983); Restatement (Second) of Judgments § 83 (1982) (hereinafter the "Restatement"). These authorities and cases acknowledge that administrative adjudicative determinations may be given preclusive effect if rendered under conditions in which the parties have the opportunity to fully and fairly litigate the issue at the administrative hearing. **See, e.g., Utah Constr. Co.,** 384 U.S. at 422, 86 S. Ct. at 1560 ("When an administrative agency is acting in a judicial capacity and resolves disputed questions of fact properly before it which the parties have had an opportunity to litigate, the courts have not hesitated to apply **res judicata** to enforce repose."); **Ryan,** 478 N.Y.S.2d at 825-26, 467 N.E.2d at 489-90 ("[C]ollateral estoppel [is] applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law.") (citations omitted); Restatement § 83 ("[A] valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.").

{13} In the instant case, the Cooperative argues that the ESD determination that Shovelin

[1] The Cooperative, citing **Property Tax Department v. Molycorp, Inc.,** 89 N.M. 603, 605, 555 P.2d 903, 905 (1976), contends that "[a]djudicative determinations by administrative tribunals are subject to collateral estoppel effect." **Molycorp,** however, is inapposite because in that case we held that neither the doctrine of res judicata nor that of collateral estoppel applied to the facts of the case. 89 N.M. at 605, 555 P.2d at 905.

voluntarily left his employment should be given preclusive effect. The Cooperative argues that the ESD acted in a judicial capacity to resolve disputed issues of fact that were properly before it and that the parties had an adequate opportunity to litigate the issue. In addition, the Cooperative points out that the Unemployment Compensation Law in effect when Shovelin left his employment with the Cooperative, NMSA 1978, Sections 51-1-1 to -54 (Repl.Pamp.1983 & Cum. Supp.1986),[2] was silent as to whether an ESD decision could be given preclusive effect under the doctrine of collateral estoppel. As the Cooperative maintains, the legislature subsequently amended the Unemployment Compensation Law to provide that findings of fact or law from any unemployment compensation proceeding may not be given preclusive effect under the doctrines of res judicata or collateral estoppel in a separate proceeding between an individual and his present or former employer. NMSA 1978, § 51-1-55 (Repl.Pamp.1990). Citing **Martinez v. Research Park, Inc.,** 75 N.M. 672, 681, 410 P.2d 200, 206 (1965), **overruled on other grounds by Lakeview Investments, Inc. v. Alamogordo Lake Village, Inc.,** 86 N.M. 151, 155, 520 P.2d 1096, 1100 (1974), the Cooperative contends that by enacting Section 51-1-55 the legislature changed the existing law. In other words, the Cooperative argues that the prior law allowed a court to give an ESD determination preclusive effect under the doctrine of collateral estoppel and that the trial court erred when it failed to preclude relitigation of the reason for Shovelin's termination of employment.

{14} While we agree with the Cooperative that in enacting Section 51-1-55 the legislature intended to change the Unemployment Compensation Law, we cannot agree that the trial court must therefore apply the doctrine of collateral estoppel to every ESD determination that arose before amendment of the statute. The doctrine of collateral estoppel is a judicially created doctrine, **see** Perschbacher, **supra,** at 426-39, and, absent a statute to the contrary, whether to apply such a judicially created doctrine is a judicial determination. **See Roberts v. Southwest Community Health Servs.,** 114 N.M. 248, 252, 837 P.2d 442, 446 (1992) (holding that accrual of cause of action is judicial determination in absence of explicit statutory definition). Thus, the absence of a statute in the version of the Unemployment Compensation Law in effect when the instant case arose did not necessarily require the trial court to apply the doctrine of collateral estoppel. Whether the doctrine should be applied is within the trial court's discretion, and we review that decision for an abuse of discretion. **See Silva,** 106 N.M. at 476, 745 P.2d at 384.[3]

{15} If we assume without deciding that, as the Cooperative argues, the Cooperative met its burden and proved that the application of collateral estoppel was appropriate, the trial court could then determine whether Shovelin was given a full and fair opportunity to litigate the issues at the ESD hearing. While the trial court did not state its reason for declining to apply the doctrine of collateral estoppel, we believe that Shovelin did not have a full and fair opportunity at the ESD hearing to litigate the issue of whether he was voluntarily or involuntarily discharged. In making this determination, we weigh countervailing factors including, but not limited to, the incentive for vigorous prosecution or defense of the prior litigation; procedural differences between the prior and current litigation, including the presence or absence of a jury; and the possibility of inconsistent verdicts. **See Silva,** 106 N.M. at 476, 745 P.2d at 384. A balancing of these factors shows that the trial court did not abuse its discretion in refusing to apply the doctrine of collateral estoppel to the facts of this case.

[2] Unless otherwise noted, all citations to provisions of the Unemployment Compensation Act refer to the version of the statute found in the 1983 Replacement Pamphlet and the 1986 Cummulative Supplement.

[3] Citing N.M. Constitution Article IV, Section 34; **Stockard v. Hamilton,** 25 N.M. 240, 180 P. 294 (1919); and **Cass v. Timberman Corp.,** 110 N.M. 158, 793 P.2d 288 (Ct.App.), **withdrawn,** 110 N.M. 158, 793 P.2d 288 (Ct.App.1990), the Cooperative also argues that Section 51-1-55 cannot be applied retroactively. As demonstrated above, however, we are not giving Section 51-1-55 retroactive effect but rather are interpreting the common law doctrine of collateral estoppel.

{16} The first factor, whether Shovelin had the incentive to vigorously litigate the prior action, weighs in favor of upholding the trial court's refusal to apply collateral estoppel. At stake in the initial hearing was Shovelin's right to receive unemployment compensation. The amount in controversy in that litigation is small indeed when compared to the amount that Shovelin could possibly have been, and eventually was, awarded by the jury in his breach of contract action. Our determination on this matter comports with court decisions in other jurisdictions and the prevailing attitude in the scholarly literature. **See, e.g., McClanahan v. Remington Freight Lines, Inc.,** 517 N.E.2d 390, 394-95 (Ind.1988) (declining to apply offensive collateral estoppel to issue litigated at prior unemployment compensation hearing because such hearings were "designed for quick and inexpensive determinations of unemployment benefits"); **Board of Educ. v. New York State Human Rights Appeal Bd.,** 106 A.D.2d 364, 482 N.Y.S.2d 495, 497 (App. Div.1984) (refusing to apply defensive collateral estoppel to administrative agency decision in part because size of unemployment claim was small in comparison with employment discrimination claim); **Bresnahan v. May Dep't Stores Co.,** 726 S.W.2d 327, 334 (Mo.1987) (en banc) (Blarkmar, J., dissenting) (citing Restatement § 28(5)(c) & cmt. j); Restatement § 28(5)(c) (maintaining that collateral estoppel not applicable when party "did not have an adequate . . . incentive to obtain a full and fair adjudication in the initial action"); Restatement § 28(5)(c) cmt. j ("[T]he amount in controversy in the first action may have been so small in relation to the amount in controversy in the second that preclusion would be plainly unfair."); Committee on Benefits to Unemployed Persons, American Bar Ass'n, **The Preclusive Effect of Unemployment Decisions in Subsequent Litigation,** 4 Lab.Law. 69, 75 (1988) ("In sum, the incentive to fully litigate an unemployment claim pales in comparison to the incentive to fully participate in a civil suit, such that no collateral estoppel effect should attach to unemployment decisions."); Gregg J. Cavanagh, **The Collateral Estoppel Effect of Administrative Unemployment Insurance Decisions in Subsequent State and Federal Litigation,** 2 Lab.Law. 839, 840 (1986) ("The significance of [applying collateral estoppel to administrative unemployment insurance decisions to preclude subsequent litigation] is that decisions in administrative matters involving relatively small amounts of money can now have a potentially determinative impact upon subsequent civil suits in which substantial actual, compensatory, or punitive damages are at stake."); Merry Evans, Comment, **Collateral Estoppel and the Administrative Process,** 53 Mo.L.Rev. 779, 791 (1988) (hereinafter "Comment") ("If the interests at stake in an administrative hearing are relatively minor compared to those at stake in a subsequent legal proceeding, it may be unfair to afford the administrative proceeding a preclusive effect."). Moreover, because this is an issue of first impression in New Mexico, Shovelin had no way of knowing that an adverse determination by the ESD could be used to preclude his breach of contract claims. **See** Perschbacher, **supra,** at 458.[4] Thus, Shovelin did not have an adequate incentive to litigate the issue at the ESD hearing.

{17} The second factor is whether procedural differences between the ESD proceedings and the breach of contract action would make it unfair to give preclusive effect to the ESD decision. The Unemployment Compensation Law is designed to "lighten [the] burden which now so often falls with crushing force upon the unemployed worker and his family," Section 51-1-3, by quickly placing the benefits into the hands of the unemployed worker. **See, e.g.,** § 51-1-8(I) (requiring prompt payment of benefits even though appeal is pending); § 51-1-8(M) (giving appeals of district court decisions to the Supreme Court priority over most other civil cases). In passing the Unemployment Compensation Law, the legislature intended that the procedural steps should be reduced to a minimum to allow the unemployed worker to obtain a prompt decision regarding his or her benefits. **Kennecott Copper Corp. v. Employment Sec. Comm'n,** 78 N.M. 398, 402, 432 P.2d 109, 113 (1967).

[4] This problem is more acute when, as often is the case, the worker seeking unemployment benefits is not represented by counsel. **See** Comment, **supra,** at 791.

{18} The proceedings in a district court are similar to those in an ESD hearing in several significant ways. First, issues of fact and law decided in the ESD proceedings, like issues decided in a district court, are reviewable, Section 51-1-8(G) (appeal of hearing officer determination to board of review), Section 51-1-8(M) (appeal of board of review decision to district court), including a final appeal from district court to this Court, Section 51-1-8(M).[5] As in the district court, the ESD must give the parties appealing the initial decision of a claims examiner notice and an opportunity to be heard prior to issuing a decision, and the parties must be given written notice of the decision and the reasons for the decision. Section 51-1-8(C). In addition, like a proceeding in the district court, the parties may subpoena witnesses, **see** Section 51-1-8(K), and may present evidence and argument. **See** § 51-1-8(C) & (G). Finally, both the unemployed person and the former employer may be represented by counsel. **Cf.** § 51-1-8(L) (department may be represented by attorney).

{19} While an ESD hearing is similar in many ways to a trial in a district court, important differences between the two proceedings exist. Unlike a trial in district court, an ESD hearing does not have to "conform to common law or statutory rules of evidence or other technical rules of procedure." Section 51-1-8(J). Unlike a trial in district court, the petitioner in an ESD proceeding has no method of gaining or compelling any meaningful discovery. In addition, the claims examiners, hearing officers, and board of review members, unlike a judge in a district court, need not be lawyers. **See** § 51-1-8(B), (C), & (E) (providing for appointment of agency officials without regard to legal educational qualifications); N.M. Const. art. VI, § 14 (defining qualifications for district judge). In addition, the petitioner in an ESD proceeding is not entitled to a jury trial. **See** § 51-1-8.

{20} In the instant case, the ESD proceeding was conducted by a hearing examiner during a two and one-half hour telephone conference. The hearing was conducted shortly after Shovelin's discharge, which provided minimal time for discovery. However, Shovelin was represented by counsel and availed himself of the opportunity to appeal the decision to the district court and ultimately to this Court. Even so, our assessment of the procedural differences between the agency and court actions discussed above leads us to conclude that the ESD decision was reached by an informal process, which militates against giving collateral estoppel effect to that decision in subsequent litigation in district court. **Accord Caras v. Family First Credit Union,** 688 F. Supp. 586, 589-90 (D.Utah 1988); **Salida Sch. Dist. v. Morrison,** 732 P.2d 1160, 1164-65 (Colo.1987) (en banc); **McClanahan,** 517 N.E.2d at 394-95; **Board of Educ. v. Gray,** 806 S.W.2d 400, 403 (Ky.Ct.App.1991). Even though the trial court's refusal to preclude relitigation led to inconsistent verdicts, a weighing of the fairness factors enumerated in **Silva** leads us to conclude that Shovelin did not have a full and fair opportunity to litigate the issue of whether he was voluntarily discharged at the ESD hearing.

{21} A policy consideration, as articulated in the Restatement, lends further support to our conclusion. Applying the doctrine of collateral estoppel to preclude Shovelin from relitigating the reason for his termination would be incompatible with the legislative policy underpinning the Unemployment Compensation Law. **See** Restatement § 83(4) & cmt. h ("[I]ssue preclusion may be withheld so that the parties will not be induced to dispute the administrative proceeding in anticipation of its effect in another proceeding."). As demonstrated above, the Unemployment Compensation Law is intended to

[5] Citing **Stall v. Bourne,** 774 F.2d 657 (4th Cir.1985), **withdrawn,** 783 F.2d 476 (4th Cir.1986); and **Leong v. Hilton Hotels Corp.,** 698 F. Supp. 1496, 1500 (D.Haw.1988), the Cooperative maintains that, because the ESD decision was subject to judicial review, we should be "particularly inclined to conclude that collateral estoppel should bar re-litigation." While we agree that whether a party availed himself of the opportunity to appeal an administrative decision is an important factor to consider when determining whether collateral estoppel is applicable, we note that this is merely one factor that we must consider in the calculus of whether a party had the full and fair opportunity to litigate. **See Silva,** 106 N.M. at 476, 745 P.2d at 384 (citing non-exclusive list of factors to consider when determining whether party had full and fair opportunity to litigate).

expeditiously place unemployment compensation benefits in the hands of those persons who without fault become unemployed. If a collateral estoppel effect is given to determinations of the ESD in cases such as the instant case, unemployed workers may forgo asserting their rights under the Unemployment Compensation Law to preserve their right to seek further civil redress. Alternatively, if the unemployed decides to assert his or her rights under the Unemployment Compensation Law, employers and the unemployed, armed with the knowledge that the ESD determination may preclude subsequent litigation, may try to turn ESD proceedings into full blown trials. This would thwart the legislative intent that unemployment benefits quickly flow to those in need—the unemployed. **Accord Storey v. Meijer, Inc.,** 431 Mich. 368, 429 N.W.2d 169, 174 (1988) ("There is also a substantial risk that the potential application of collateral estoppel will cause a qualified claimant to forego a claim for unemployment compensation in order to protect the right to pursue a civil claim with its full range of benefits. . . . This would unquestionably frustrate the legislative purpose of the [Michigan unemployment compensation] act[,] . . . [which is] to benefit unemployed in financial straits, not to penalize them for being in that condition.") (citation omitted); **see also Mack v. South Bay Beer Distribs., Inc.,** 798 F.2d 1279, 1284 (9th Cir.1986); **Mahon v. Safeco Title Ins. Co.,** 199 Cal.App.3d 616, 245 Cal.Rptr. 103, 107 (1988); **Salida Sch. Dist.,** 732 P.2d at 1164-65; **McClanahan,** 517 N.E.2d at 394-95. We hold that, under the facts of this case and the Unemployment Compensation Law in effect when Shovelin was terminated, the trial court did not abuse its discretion when it refused to apply the doctrine of collateral estoppel and preclude relitigation of the reason for Shovelin's termination.

III

{22} The next issue that we address is whether the trial court erred when it denied the Cooperative's motion for a judgment on the pleadings or, in the alternative, the Cooperative's motion for summary judgment in regard to Shovelin's retaliatory discharge claim.[6] The Cooperative maintains that, as a matter of law, Shovelin's amended complaint failed to state a claim for retaliatory discharge because (1) the public policy asserted by Shovelin was inconsistent with New Mexico's rule of employment at will, and (2) the public policy asserted by Shovelin was insufficient to support a claim for retaliatory discharge under New Mexico law. Accordingly, the Cooperative maintains that the trial court erred when it failed to grant the Cooperative's motion for a judgment on the pleadings regarding the retaliatory discharge claim. We agree.

{23} A motion to dismiss on the pleadings, SCRA 1986, 1-012(C) (Repl.Pamp.1992), is similar to a motion to dismiss for failure to state a claim upon which relief can be granted, SCRA 1986, 1-012(B)(6) (Repl.Pamp.1992), and, in situations such as the instant case, is treated identically. **See** 5A Charles A. Wright & Arthur R. Miller, **Federal Practice and Procedure** § 1369, at 532 n. 6 (1990) (discussing similar Fed.R.Civ.P. 12). Under Rule 12(B)(6), a motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. **Gonzales v. United States Fidelity & Guar. Co.,** 99 N.M. 432, 433, 659 P.2d 318, 319 (Ct.App.1983).

> In determining whether a complaint states a claim upon which relief can be granted, we assume as true all facts well pleaded. In addition, a motion to dismiss a complaint is properly granted only when it appears that the plaintiff cannot recover or be entitled to relief under any state of facts provable under the claim. Only when there is a total failure to allege some matter which is essential to the relief sought should such a motion be granted. Moreover, a motion

[6] Citing **Galvan v. Miller,** 79 N.M. 540, 548, 445 P.2d 961, 969 (1968), Shovelin contends that the Cooperative does not have standing to raise this issue because the jury did not consider the retaliatory discharge claim, and that, therefore, the Cooperative is not an aggrieved party. However, the Cooperative did have to defend against the retaliatory discharge claim and, thus, is an aggrieved party.

to dismiss for failure to state a claim is granted infrequently.

Las Luminarias of the N.M. Council of the Blind v. Isengard, 92 N.M. 297, 299-300, 587 P.2d 444, 446-47 (Ct.App.1978) (citations omitted). In his amended complaint, Shovelin alleged that the Cooperative discharged him in retaliation for being elected mayor of Mountainair.[7]

{24} The tort of retaliatory discharge was first adopted in New Mexico by the Court of Appeals as a narrow exception to the rule that an at-will employee may be discharged with or without cause. **Vigil v. Arzola,** 102 N.M. 682, 688, 699 P.2d 613, 619 (Ct.App.1983), **rev'd in part on other grounds,** 101 N.M. 687, 687 P.2d 1038 (1984), **modified by Boudar v. E.G. & G.,** 106 N.M. 279, 280-81, 742 P.2d 491, 492-93 (1987) (allowing retroactive application), **and modified by Chavez v. Manville Prods. Corp.,** 108 N.M. 643, 649-50, 777 P.2d 371, 377-78 (1989) (lowering plaintiff's burden of proof of retaliatory discharge to a preponderance of the evidence and allowing recovery of damages for emotional distress). In **Chavez v. Manville Products Corp.,** we adopted the **Vigil** court's definition of the retaliatory discharge cause of action:

> "For an employee to recover under this new cause of action, he must demonstrate that he was discharged because he performed an act that public policy has authorized or would encourage, or because he refused to do something required of him by his employer that public policy would condemn."

108 N.M. at 647, 777 P.2d at 375 (quoting **Vigil,** 102 N.M. at 689, 699 P.2d at 620). The employee must also show a causal connection between his actions and the retaliatory discharge by the employer. **Id.** If the employee proves his case by a preponderance of the evidence, **id.** at 649, 777 P.2d at 377,[8] he is entitled to recover damages for his pecuniary loss as well as damages for emotional distress. **Id.** at 649-50, 777 P.2d at 377-78.

{25} The linchpin of a cause of action for retaliatory discharge is whether by discharging the complaining employee the employer violated a "clear mandate of public policy." **See Vigil,** 102 N.M. at 688, 699 P.2d at 619. A clear mandate of public policy sufficient to support a claim of retaliatory discharge may be gleaned from the enactments of the legislature and the decisions of the courts and may fall into one of several categories. First, legislation may define public policy and provide a remedy for a violation of that policy. **Id.** at 688-89, 699 P.2d at 619-20 (citing the New Mexico Human Rights Act as an example). Second, legislation may provide protection of an employee without specifying a remedy, in which case an employee would seek an implied remedy.

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[7] Count II of the amended complaint reads as follows:

COUNT TWO: RETALIATORY DISCHARGE

15. Plaintiff exercised his civic right when he campaigned for public office.

16. However, [the Cooperative] automatically and prematurely discharged [Shovelin] once he was elected Mayor of Mountainair.

17. [Shovelin's] election as Mayor was the sole reason he was discharged.

18. [Shovelin's] election as Mayor did not adversely affect his job performance for [the Cooperative].

19. [The Cooperative's] misconduct contravened state public policy which supports an employee's right to hold public office and supports the public's right to vote for candidates of their choice, as long as it does not adversely affect the employer's business operation.

. . .

20. [The Cooperative's] misconduct proximately caused [Shovelin] to suffer economic and emotional injury in an amount to be proven at trial.

[8] In **Chavez,** we noted that, in similar situations, some jurisdictions utilize a shifting burden of production under which the plaintiff must prove a causal connection between the employer's improper motive and the employee's discharge from employment. 108 N.M. at 648 n. 2, 777 P.2d at 376 n. 2 (citing **inter alia Burrus v. United Tel. Co.,** 683 F.2d 339 (10th Cir.), **cert. denied,** 459 U.S. 1071, 103 S. Ct. 491, 74 L. Ed. 2d 633 (1982)). If the plaintiff meets this burden, the burden of production shifts to the employer to articulate a legitimate reason for the discharge. **Id.** The plaintiff then is given the opportunity to show that the reason given by the employer was a pretext. **Id.** While we have utilized a similar system in the context of employment discrimination cases, **see Martinez v. Yellow Freight System, Inc.,** 113 N.M. 366, 826 P.2d 962 (1992) (decided under the New Mexico Human Rights Act, NMSA 1978, Sections 28-1-1 to -7, 28-1-9 to -14 (Repl.Pamp.1991)), we do not consider whether to adopt such a procedure here as this issue has not been raised by the parties to this appeal.

Id. at 689, 699 P.2d at 620. Third, legislation may define a public policy without specifying either a right or a remedy, in which case the employee would seek judicial recognition of both. **Id.** Finally, "[t]here may, in some instances, be no expression of public policy, and here again the judiciary would have to imply a right as well as a remedy." **Id.**

{26} Every statute enacted by the legislature is in a sense an expression of public policy but not every expression of public policy will suffice to state a claim for retaliatory discharge. "'[U]nless an employee at will identifies a specific expression of public policy, he may be discharged with or without cause.'" **Id.** (quoting **Pierce v. Ortho Pharmaceutical Corp.,** 84 N.J. 58, 417 A.2d 505, 512 (1980)). Accordingly, the courts interpreting New Mexico law have adhered to the rule that retaliatory discharge is a narrow exception to the rule of employment at will and have refused to expand its application. **See Zaccardi v. Zale Corp.,** 856 F.2d 1473, 1475-76 (10th Cir.1988) (discharge for refusal to take polygraph examination did not violate public policy); **Ellis v. El Paso Natural Gas Co.,** 754 F.2d 884, 885 (10th Cir.1985) (discharge for use of employer's grievance procedure did not violate public policy); **Jeffers v. Butler,** 762 F. Supp. 308, 310 (D.N.M.1990) (holding that no public policy stated where employee, and not public at large, would benefit from employee's whistle-blowing actions), **aff'd without opinion,** 931 F.2d 62 (10th Cir.1991); **Salazar v. Furr's, Inc.,** 629 F. Supp. 1403, 1409 (D.N.M.1986) (family unity is not public policy protected by retaliatory discharge cause of action); **Paca v. K-Mart Corp.,** 108 N.M. 479, 480-81, 775 P.2d 245, 246-47 (1989) (discharge for violation of company policy did not violate public policy); **Francis v. Memorial Gen. Hosp.,** 104 N.M. 698, 701, 726 P.2d 852, 855 (1986) (nurse discharged for refusing to follow employer's policy regarding "floating" did not state claim for retaliatory discharge); **Maxwell v. Ross Hyden Motors, Inc.,** 104 N.M. 470, 474, 722 P.2d 1192, 1196 (Ct. App.1986) (Unemployment Compensation Law does not establish public policy prohibiting discharge in bad faith and without notice); **Zuniga v. Sears, Roebuck & Co.,** 100 N.M. 414, 416-17, 671 P.2d 662, 664-65 (Ct.App.) (discharge based on employer's erroneous belief that employee had attempted to steal from employer did not violate public policy), **cert. denied,** 100 N.M. 439, 671 P.2d 1150 (1983).[9] In fact, in only three reported cases have the courts in this state recognized a public policy sufficient to support a cause of action for retaliatory discharge: **Salazar,** 629 F. Supp. at 1409 (recognizing retaliatory discharge cause of action when employee discharged to prevent vesting of pension benefits); **Boudar,** 106 N.M. at 283, 285, 742 P.2d at 495, 497 (recognizing retaliatory discharge cause of action when plaintiff discharged for whistleblowing); **Vigil,** 102 N.M. at 690, 699 P.2d at 621 (recognizing retaliatory discharge cause of action when plaintiff discharged for reporting misuse of public funds). Whether an employee has stated a sufficient public policy to recover for the tort of retaliatory discharge is determined on

[9] Other cases mentioning retaliatory discharge without discussing whether the plaintiff cited sufficient public policy include **Aviles v. Lutz,** 887 F.2d 1046, 1048 (10th Cir.1989) (holding that district court properly dismissed plaintiff's tortious interference with employment rights claims because district court lacked subject matter jurisdiction); **Romero v. Mason & Hanger-Silas Mason Co.,** 739 F. Supp. 1472, 1476 & n. 2, 1479 (D.N.M.1990) (declining to decide whether plaintiff stated claim under state law and remanding action to state court); **Russillo v. Scarborough,** 727 F. Supp. 1402, 1413 (D.N.M.1989) (holding that plaintiff failed to allege that his termination violated public policy), **aff'd on other grounds,** 935 F.2d 1167 (10th Cir.1991); **McGinnis v. Honeywell, Inc.,** 110 N.M. 1, 8-9, 791 P.2d 452, 459-60 (1990) (not considering whether termination was affront to public policy because employee's recovery on breach of contract claim precluded recovery for retaliatory discharge); **Sanchez v. The New Mexican,** 106 N.M. 76, 79, 738 P.2d 1321, 1324 (1987) (holding that employee's discharge was not as a matter of law retaliatory); **Silva v. Albuquerque Assembly & Distribution Freeport Warehouse Corp.,** 106 N.M. 19, 21, 738 P.2d 513, 515 (1987) (finding no error when jury instructed that employee could recover for either breach of implied employment contract or retaliatory discharge); **Shores v. Charter Services, Inc.,** 106 N.M. 569, 570-71, 746 P.2d 1101, 1102-03 (1987) (holding that Workmen's Compensation Act, NMSA 1978, Sections 52-1-1 to -69 (Orig.Pamp. & Cum. Supp.1986), and retaliatory discharge provided mutually exclusive remedies when employer fails to qualify under the Act); **Williams v. Amax Chemical Corp.,** 104 N.M. 293, 294, 720 P.2d 1234, 1235 (1986) (Workmen's Compensation Act does not provide compensable retaliatory discharge claim).

a case-by-case basis. **Vigil,** 102 N.M. at 689, 699 P.2d at 620.

{27} Shovelin articulates the following public policies that he contends are sufficient to avoid a dismissal for failure to state a claim: "(1) A citizen's right to pursue and hold public office if duly elected; and (2) [t]he public's right to vote for and elect political candidates of their choice." Shovelin purports to find these expressions of policy in several sections of the New Mexico Constitution,[10] a federal statute,[11] and several state statutes.[12] We cannot agree.

{28} One category of statutes that create public policy potentially sufficient to support a cause of action for retaliatory discharge includes those statutes providing protection of an employee without specifying a remedy. **Vigil,** 102 N.M. at 689, 699 P.2d at 620. The **Vigil** court cited two examples of statutes that would meet this criteria and that are relevant to the instant case: (1) NMSA 1978, Section 1-20-13, which prohibits an employer from discharging an employee because of the employee's political beliefs or intention to vote; and (2) NMSA 1978, Section 38-5-18 (Cum.Supp.1982), which prohibits an employer from discharging an employee if the employee receives a summons or serves as a juror. **See Vigil,** 102 N.M. at 689, 699 P.2d at 620. Because each of these statutes clearly defines public policy supporting the employee's exercise of his civic duties, an employer may be held civilly liable to a wrongfully discharged employee as well as criminally liable for a violation of the statute. An implied remedy is given to the wrongfully discharged worker because absent such a remedy the statute would vindicate the State's interests without addressing the rights of the individual harmed by the violation of public policy.

{29} Only one of the provisions cited by Shovelin, Section 3-8-78, falls within the category of statutes cited by **Vigil.** Section 3-8-78 creates criminal sanctions against an employer if the employer discharges, penalizes, or threatens to discharge or penalize an employee because of the employee's intention to vote or refrain from voting in a municipal election. Shovelin contends that Section 3-8-78, which mirrors Section 1-20-13 as cited in **Vigil,** expresses a public policy protecting electoral freedom. We do not give that section such a broad reading. While Section 3-8-78 clearly expresses a public policy that supports an employee's right to vote and would, in a case in which the employer interfered with the employee's right to vote or abstain from voting, support a cause of action for retaliatory discharge, it is not implicated in the instant case. Shovelin does not allege that the Cooperative interfered with his right to vote in the election but rather with his right to run for office. Thus, Shovelin's first contention must fail.

{30} The next category of statutes that create a public policy potentially sufficient to support a cause of action for retaliatory discharge includes those statutes defining public policy without specifying either a right or a remedy, in which case the employee would seek judicial recognition of both. **Vigil,** 102 N.M. at 689, 699 P.2d at 620. As examples of this category, the **Vigil** court cited two California appellate decisions: **Petermann v. Local 396, International Brotherhood of Teamsters,** 174 Cal.App.2d 184, 344 P.2d 25 (1959), and **Tameny v. Atlantic Richfield Co.,** 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330 (1980). In **Petermann,** the employee alleged that he was fired because he refused to commit perjury at the request of his employer. 344 P.2d at 26. The **Petermann** court recognized that the state's perjury statute reflected a public policy encouraging truthful testimony to ensure the proper administration of justice. 344 P.2d at 27. Similarly, in **Tameny** the employee alleged that he was fired because he had refused to engage in illegal price fixing. 610 P.2d at 1332.

[10] Shovelin cites the following sections of the New Mexico Constitution: Article II, Section 17 (free speech); Article II, Section 8 (free and open elections); Article VII, Section 1 (voter qualifications); Article VII, Section 2 (qualifications to hold elective office); Article VII, Section 5 (candidate receiving highest vote total is elected).

[11] Shovelin cites 18 U.S.C. § 245(b) (1988) (making intimidation or interference with elections a federal crime).

[12] Shovelin cites numerous sections from the Municipal Election Code, NMSA 1978, Sections 3-8-1 to -80 & 3-9-1 to -16 (Repl.Pamp.1985 & Supp.1992).

The **Tameny** court recognized that allowing an employee who is terminated in retaliation for refusing to commit a crime to assert a cause of action for retaliatory discharge "reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes." 610 P.2d at 1335. To fully effectuate these policies, each court found that the plaintiff had stated a cause of action for wrongful discharge and may have been entitled to civil relief. **Petermann,** 344 P.2d at 28; **Tameny,** 610 P.2d at 1336-37.

{31} In the instant case, Shovelin cites several statutes that, under proper circumstances, may be sufficient to support an action for retaliatory discharge. Initially, Shovelin cites 18 U.S.C. § 245(b), which prevents and punishes the violent interference with voting rights. **See Johnson v. Mississippi,** 421 U.S. 213, 95 S. Ct. 1591, 44 L. Ed. 2d 121 (1975). Shovelin does not allege, however, that the Cooperative interfered, violently or otherwise, with his right to vote. Shovelin also cites NMSA 1978, Section 3-8-76, which prohibits bribing a person to induce him to vote or refrain from voting, and NMSA 1978, Section 3-8-79, which prohibits a conspiracy to violate the Municipal Election Code. Both of these statutes are inapposite, however, because Shovelin contends neither that the Cooperative offered a bribe to influence his vote nor that the Cooperative conspired in any way to violate the Municipal Election Code.

{32} Shovelin cites numerous other statutory provisions from the Municipal Election Code that he contends support a public policy encouraging a citizen to pursue and hold office, including Section 3-8-28 (defining candidate qualifications), Section 3-8-32(A) (guaranteeing right of properly elected candidate to hold office), and Sections 3-8-40 & -41 (guaranteeing the right to vote in municipal elections). None of these sections, however, are specific enough expressions of public policy to state a claim for relief under the facts of this case. **See Vigil,** 102 N.M. at 689, 699 P.2d at 620.

{33} The final category of public policy as discussed in **Vigil** is limited to those instances in which the legislature did not express public policy but such policy was nonetheless recognized by a court. **Id.** In such instances, the employee must seek judicial recognition of both the right and the remedy. **Id.** The **Vigil** court cited two examples of when the judiciary may properly recognize an implicit right and remedy for the employee when his discharge violates public policy: **Palmateer v. International Harvester Co.,** 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981), and **Cloutier v. Great Atlantic & Pacific Tea Co.,** 121 N.H. 915, 436 A.2d 1140, 1144 (1981) (holding that public policy giving rise to wrongful discharge action not exclusively found in statutes). In **Palmateer,** the Illinois Supreme Court, in the absence of a statutory expression of public policy, implied a right and a remedy for an employee who was discharged for assisting in the investigation and prosecution of crime because "'[p]ublic policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to effective implementation of that policy.'" 52 Ill. Dec. at 17, 421 N.E.2d at 880 (quoting **Joiner v. Benton Community Bank,** 82 Ill.2d 40, 44 Ill. Dec. 260, 262, 411 N.E.2d 229, 231 (1980)).

{34} Shovelin asserts that **Vigil** and **Chavez,** 108 N.M. 643, 777 P.2d 371, created a common law right to political expression. In addition, Shovelin contends that Article II, Section 17 of the New Mexico Constitution supports a public policy in favor of freedom of political expression. Finally, Shovelin cites numerous other New Mexico constitutional provisions that he contends create a public policy encouraging a citizen to pursue and hold public office, including: Article II, Section 8 (prohibiting interference with right to vote); Article VII, Section 1 (defining voter qualifications); Article VII, Section 2 (defining qualifications to hold office); and Article VII, Section 5 (stating that candidate receiving highest vote total is elected to office). Shovelin concludes that these expressions of public policy are sufficient to state a cause of action for retaliatory discharge. We do not agree.

{35} Neither **Vigil** nor **Chavez** supports the broad proposition that Shovelin asserts. In **Vigil,**

the Court of Appeals held that the plaintiff stated a cause of action for retaliatory discharge when he alleged that he was fired for reporting his employer's misuse of public funds. 102 N.M. at 690, 699 P.2d at 621. In other words, the public policy recognized by the **Vigil** court was the right to expose misuse of public money by the employer and not, as Shovelin asserts, the right to political expression. In **Chavez,** we intimated that the right to political expression may have been a clear mandate of public policy. 108 N.M. at 649, 777 P.2d at 377. However, we did not address that issue because neither party appealed the trial court's determination that the employer had violated a clear public policy by allegedly firing the employee for refusing to participate in the employer's lobbying efforts. 108 N.M. at 647 n. 1, 777 P.2d at 375 n. 1.

{36} In **Chavez,** we cited **Novosel v. Nationwide Insurance Co.,** 721 F.2d 894, 898-900 (3d Cir.1983), in which the Third Circuit Court of Appeals held that the protection of a private employee's freedom of political expression was a clearly mandated public policy under Pennsylvania law. **Chavez,** 108 N.M. at 647 n. 1, 777 P.2d at 375 n. 1. We did not, however, adopt the approach taken by the Third Circuit in **Novosel** and are not inclined to adopt that approach now. In **Novosel,** the Third Circuit, sitting in a diversity case, broadly interpreted Pennsylvania law regarding retaliatory discharge. **See** 721 F.2d at 903 (Becker, J., dissenting from denial of petition for rehearing en banc). The Third Circuit held that under the free speech provisions of the Pennsylvania and federal constitutions the plaintiff stated a cause of action for retaliatory discharge when he was fired for refusing to support his employer's lobbying efforts. **Id.** at 899 (majority opinion). The broad reading and application of Pennsylvania law by the Third Circuit has proven to be unfounded. **See, e.g., Paul v. Lankenau Hosp.,** 375 Pa.Super. 1, 543 A.2d 1148, 1155, 1157 (1988) ("[I]f we were to allow a broad application of the public policy exception, the at-will employment doctrine would almost certainly be dismembered by individual judicial notions of what constitutes the public weal."), **rev'd in part on other grounds,** 524 Pa. 90, 569 A.2d 346 (1990); **see also Lee v. Wojnaroski,** 751 F. Supp. 58, 62 (W.D.Pa.1990). Other Pennsylvania decisions, like similar decisions in New Mexico, have narrowly interpreted the public policy exception to the rule of at-will employment. **Compare Reuther v. Fowler & Williams, Inc.,** 255 Pa.Super. 28, 386 A.2d 119, 120-21 (1978) (holding that employee has a cause of action when discharged for serving on jury); **and Hunter v. Port Auth.,** 277 Pa.Super. 4, 419 A.2d 631, 631 (1980) (holding that public employer could not deny employment based on conviction when offender was subsequently pardoned) **with Boudar,** 106 N.M. at 283, 742 P.2d at 495 (recognizing retaliatory discharge cause of action when plaintiff discharged for whistleblowing); **and Vigil,** 102 N.M. at 690, 699 P.2d at 621 (recognizing retaliatory discharge cause of action when plaintiff discharged for reporting misuse of public funds). In fact, we have not found a single case adopting or endorsing the public policy recognized in **Novosel** to support a claim for retaliatory discharge.

{37} Shovelin cites four cases from other jurisdictions that he contends have followed **Novosel** and have allowed a private employee to support a claim of retaliatory discharge for the violation of a public policy as evidenced by a constitutional provision: **Bloom v. General Electric Supply Co.,** 702 F. Supp. 1364, 1367 (M.D.Tenn.1988); **Parnar v. Americana Hotels, Inc.,** 65 Haw. 370, 652 P.2d 625, 631 (1982); **Burk v. K-Mart Corp.,** 770 P.2d 24, 28 (Okla.1989); and **Palmateer,** 52 Ill.Dec. at 15, 421 N.E.2d at 878. While each of these cases recite the proposition that a constitutional provision may reflect a public policy sufficient to support a claim for retaliatory discharge, none of the cases specifically involve a constitutional provision. In both **Bloom** and **Parnar,** the public policy was derived from statutes. **Bloom,** 702 F. Supp. at 1368; **Parnar,** 652 P.2d at 631. In **Burk,** the Oklahoma Supreme Court adopted the tort of retaliatory discharge but did not address any specific constitutional provisions that would support such a cause of action. **See** 770 P.2d at 26. In **Palmateer,** the employee stated a cause of action for retaliatory discharge by

alleging that he was discharged for assisting in the investigation and prosecution of crime; he did not allege that his discharge caused the violation of a constitutional right. 52 Ill.Dec. at 17, 421 N.E.2d at 880. Since the decision in **Palmateer,** Illinois has refused to recognize a retaliatory discharge cause of action based on state and federal constitutional rights to free speech. **See, e.g., Barr v. Kelso-Burnett Co.,** 106 Ill.2d 520, 88 Ill.Dec. 628, 630-31, 478 N.E.2d 1354, 1356-57 (1985) (holding that state and federal constitutional provisions, such as right to free speech, limit power of government and are not limitation on relationship between private employer and its employees). Numerous courts in other jurisdictions have agreed. **See Lee v. Wojnaroski,** 751 F. Supp. at 62-63 (holding that discharge for alleged political activities did not state a claim for wrongful discharge under Pennsylvania law); **Newman v. Legal Servs. Corp.,** 628 F. Supp. 535, 540 (D.D.C.1986) (holding that allegations that plaintiffs were discharged for exercising constitutional rights of freedom of speech and association are not actionable against private employer); **Grzyb v. Evans,** 700 S.W.2d 399, 401-02 (Ky.1985) (rejecting public policy exception to employment at will based on constitutional right of freedom of association); **Allen v. Safeway Stores, Inc.,** 699 P.2d 277, 283 (Wyo.1985) (rejecting public policy exception to employment at will based upon state and federal constitutional rights to free speech).

{38} Taking all well-pleaded facts in Shovelin's complaint as true, the complaint fails to state a claim upon which relief can be granted because, as a matter of law, it fails to assert a sufficient public policy to support a claim of retaliatory discharge. Accordingly, the trial court erred when it failed to grant the Cooperative's motion for a judgment on the pleadings on Shovelin's retaliatory discharge claim. Our disposition of this issue makes it unnecessary for us to address the other issues raised by the parties.

{39} The judgment of the trial court is affirmed in part and reversed in part. This case is remanded to the trial court for proceedings consistent with the foregoing discussion.

{40} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

RICHARD E. RANSOM,
Chief Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1993-NMSC-079

Filing Date: December 15, 1993, As Corrected January 25, 1994, Second Correction April 20, 1994

Docket No. 21,359

Chris ARCHIBEQUE,

Plaintiff-Appellant,

v.

Donna MOYA, as an individual and in her official capacity,

Defendant-Appellee.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
Bobby R. Baldock, Circuit Judge

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OPINION

BACA, Justice.

{1} Pursuant to NMSA 1978, Section 34-2-8 (Cum.Supp.1993) and SCRA 1986, 12-607 (Repl.Pamp.1992), we accepted the following certified question of state law from the Tenth Circuit Court of Appeals:

> Does [NMSA 1978, Section 41-4-6 (Repl. Pamp.1989)] of the New Mexico Tort Claims Act, [NMSA 1978, Sections 41-4-1 to -29 (Repl.Pamp.1989 & Cum. Supp.1993)], provide immunity from tort liability to an employee of the state penitentiary whose alleged negligence in releasing a prisoner into the general prison population, which included known enemies of the prisoner, resulted in the prisoner being beaten and injured by one of his enemies?

We hold that immunity is not waived under Section 41-4-6.

I.

{2} Plaintiff-Appellant, Chris Archibeque ("Archibeque"), a prisoner at the Central New Mexico Correction Facility, was transferred to the New Mexico State Penitentiary in Santa Fe (the "penitentiary") on October 18, 1988. Before being released into the general prison population, Archibeque met with Defendant-Appellee Donna Moya-Martinez ("Moya-Martinez"), a prison intake officer. The purpose of this meeting was to discuss whether Archibeque had any known enemies within the general prison population. During the meeting, Archibeque told Moya-Martinez that Alex Gallegos ("Gallegos") was one of his enemies. Moya-Martinez, without checking an available printout of current inmates, told Archibeque that Gallegos was no longer imprisoned at the penitentiary. Moya-Martinez permitted Archibeque to be released into the general prison population. That night, Archibeque was assaulted by Gallegos and several other inmates in the prison weight room.

{3} Archibeque brought a lawsuit in federal district court against Moya-Martinez and other employees of the New Mexico Department of Corrections. Archibeque sought damages under 42 U.S.C. § 1983 (1988), for alleged civil rights violations. Archibeque also sought damages under state law, claiming that his injuries resulted from the negligent operation of the prison facilities and that Section 41-4-6 acted to waive immunity for Moya-Martinez and other corrections employees who had acted negligently.

{4} Prior to trial, the federal district court dismissed Archibeque's claim of negligent operation of the penitentiary. The district court interpreted Section 41-4-6 narrowly and held that the statute did not waive immunity for negligent security and custody of inmates at the penitentiary. Thereafter, Archibeque's civil rights claims were resolved in favor of Moya-Martinez and the other corrections employees.[1] The federal district court denied Archibeque's motion for reconsideration. Archibeque appealed, raising the question certified to this Court by the Tenth Circuit Court of Appeals.

II.

{5} The potential tort liability of governmental entities and public employees is limited by the Tort Claims Act. **See Pemberton v. Cordova,** 105 N.M. 476, 477, 734 P.2d 254, 255 (Ct. App.1987). Section 41-4-4(A) provides that governmental entities and public employees acting within their scope of duty "are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12." Thus, the Act shields governmental entities and public employees from tort liability unless immunity is specifically waived by the Act. **Wittkowski v. State,** 103 N.M. 526, 529, 710 P.2d 93, 96 (Ct. App.), **cert. quashed,** 103 N.M. 446, 708 P.2d 1047 (1985), **overruled on other grounds, Silva v. State,** 106 N.M. 472, 477, 745 P.2d 380, 385 (1987). At issue in this case is the interpretation of the waiver of immunity found in Section 41-4-6, the Act's "premises liability" statute, which states in relevant part:

> The immunity granted pursuant to [Section 41-4-4(A)] does not apply to liability for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings.

Archibeque argues that Moya-Martinez was participating in the operation of the penitentiary when she classified Archibeque as an inmate that could safely be released into the general prison population. Archibeque contends that Moya-Martinez's alleged negligence in misclassifying Archibeque and releasing him into the general population constituted negligent operation of the penitentiary and was effective to waive immunity under Section 41-4-6.

{6} We do not agree with Archibeque that immunity is waived under Section 41-4-6. In two factually similar cases, the Court of Appeals has rejected arguments that are nearly identical to Archibeque's argument. In **Wittkowski,** the decedent's personal representative and survivors sued the New Mexico State Police, the New Mexico Department of Corrections, and various prison officials after two inmates, misclassified as minimum security prisoners, escaped from a low security work project, crossed into Colorado, and killed the decedent during the robbery of a liquor store. 103 N.M. at 527-28, 710 P.2d at 94-95. On appeal, following the trial court's dismissal of the lawsuit, the plaintiffs contended that the Department's immunity was waived under Section 41-4-6. **Id.** at 530, 710 P.2d at 97. The plaintiffs argued that Section 41-4-6 applied to waive immunity because the operation of the penitentiary included the security, custody, and classification of inmates, and the negligent

[1] All of the corrections employees were granted summary judgment before trial except for Moya-Martinez. The case proceeded to trial against Moya-Martinez on Archibeque's civil rights claims. After a bench trial, the federal district court found that Moya-Martinez was not indifferent to Archibeque's rights and dismissed all claims against her.

classification of the inmates facilitated their escape and ultimately lead to decedent's death. **Id.** The Court of Appeals rejected plaintiffs' argument and interpreted Section 41-4-6 narrowly, holding that the statute did not apply to waive immunity because "the injuries alleged did not occur due to a physical defect in a building." **Id.**

{7} The Court of Appeals subsequently applied the holding of **Wittkowski** in **Gallegos v. State,** 107 N.M. 349, 758 P.2d 299 (Ct.App.1987), **cert. quashed,** 107 N.M. 314, 757 P.2d 370 (1988). In **Gallegos,** the plaintiff, a former inmate of the penitentiary, brought suit for damages resulting from injuries he sustained when other inmates assaulted him with a mop wringer. 107 N.M. at 350-51, 758 P.2d at 300-01. After the trial court granted the State's motion for summary judgment, the plaintiff appealed, claiming that immunity was waived under Section 41-4-6 because failure to keep the mop wringer outside the inmates' living area constituted negligent maintenance of the penitentiary. **Id.** at 351, 758 P.2d at 301. The Court of Appeals disagreed, and, applying the rationale of **Wittkowski,** held that immunity was not waived under the plain language of Section 41-4-6. **Id.**

{8} We apply the rule from **Wittkowski** and **Gallegos** and hold that Moya-Martinez's immunity is not waived by Section 41-4-6. The "operation" and "maintenance" of the penitentiary premises, as these terms are used in Section 41-4-6, does not include the security, custody, and classification of inmates. **See Gallegos,** 107 N.M. at 351, 758 P.2d at 301; **Wittkowski,** 103 N.M. at 530, 710 P.2d at 97. The purpose of Section 41-4-6 is to ensure the general public's safety by requiring public employees to exercise reasonable care in maintaining and operating the physical premises owned and operated by the government. **Castillo v. County of Santa Fe,** 107 N.M. 204, 206-07, 755 P.2d 48, 50-51 (1988). Moya-Martinez was not operating and maintaining the prison's physical premises when she negligently classified Archibeque as an inmate that could be released into the general prison population. Rather, she was performing an administrative function associated with the operation of the corrections system. Section 41-4-6 does not waive immunity when public employees negligently perform such administrative functions. To read Section 41-4-6 as waiving immunity for negligent performance of administrative functions would be contrary to the plain language and intended purpose of the statute. **See State v. Riddall,** 112 N.M. 78, 80, 811 P.2d 576, 578 (Ct.App.) (stating that when interpreting a statute, an appellate court is required to consider the plain meaning of the words used and the intended purpose of the statute), **cert. denied,** 112 N.M. 21, 810 P.2d 1241 (1991).

{9} Citing **Bober v. New Mexico State Fair,** 111 N.M. 644, 808 P.2d 614 (1991) and **Castillo,** Archibeque argues that this Court has rejected the narrow reading of Section 41-4-6 found in **Wittkowski** and **Gallegos** in favor of a broader interpretation. Archibeque maintains that immunity must be waived under an expansive reading of Section 41-4-6. In **Bober,** we rejected previous narrow interpretations of Section 41-4-6 and quoted with approval the following language from **Castillo:** "'Section 41-4-6 . . . contemplate[s] waiver of immunity where due to the alleged negligence of public employees an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government. . . .'" **Bober,** 111 N.M. at 653, 808 P.2d at 623 (quoting **Castillo,** 107 N.M. at 205, 755 P.2d at 49). A careful reading of **Bober** and **Castillo** reveals that both cases rejected reading Section 41-4-6 to limit waiver of immunity to those instances where injury occurred due to a physical defect in a building. **Bober,** 111 N.M. at 652-53, 808 P.2d at 622-23; **Castillo,** 107 N.M. at 206, 755 P.2d at 50. **Bober** and **Castillo** favored an interpretation of Section 41-4-6 that permitted waiver of immunity when injury was caused by a dangerous or defective condition on the property surrounding a public building, as well as for injuries caused by defects and dangerous conditions in the building itself. **See Bober,** 111 N.M. at 653, 808 P.2d at 623; **Castillo,** 107 N.M. at 206, 755 P.2d at 50. Notwithstanding, **Bober** and **Castillo** left intact the rule that the security, custody, and classification of inmates does not comprise the "operation" and "maintenance" of penitentiary

premises. While **Bober** and **Castillo** support a broader reading of Section 41-4-6 by expanding the definition of "building," neither case supports the argument that Moya-Martinez's immunity must be waived for her alleged negligence in classifying Archibeque as an inmate suitable for release into the general prison population.

{10} Archibeque also claims that immunity should be waived under Section 41-4-6 because his case is factually analogous to **Castillo.** In **Castillo,** a three-year-old boy was severely bitten by a dog roaming loose on the grounds of a housing project owned and operated by County of Santa Fe. 107 N.M. at 205, 755 P.2d at 49. The trial court dismissed a lawsuit brought by the child's mother against the County and County officials, concluding that the governmental entities and employees were immune from suit under the Tort Claims Act. **Id.** The Court of Appeals affirmed. **Id.** We reversed as to the County Housing Authority, noting that the Housing Authority had a duty to maintain the premises in a safe condition and, under the allegations in Castillo's complaint, appeared to be aware of a continuing dangerous problem with loose-running dogs. **Id.** at 206-07, 755 P.2d at 50-51.

{11} Archibeque argues that his enemy, Gallegos, was like the loose-running dog in **Castillo,** and that the prison in essence failed to maintain the premises in a safe condition by releasing him into the general population with Gallegos present among the inmates. Archibeque's argument ignores an essential aspect of the decision in **Castillo** that distinguishes **Castillo** from the instant case. In **Castillo,** we noted that loose-running dogs presented an unsafe condition upon the land **as to residents and invitees on the premises. See id.** at 207, 755 P.2d at 51. The roaming dogs in **Castillo** presented an unsafe condition for the public generally, or at least that portion of the public residing in or invited to the housing project. In **Castillo,** waiving immunity under Section 41-4-6 was appropriate in light of the statute's purpose to ensure the safety of **the general public.** No similar situation presents itself in the case at bar. While Moya-Martinez's misclassification of Archibeque put him at risk, the negligence did not create an unsafe condition on the prison premises as to the general prison population. Reading Section 41-4-6 to waive immunity every time a public employee's negligence creates a risk of harm for a single individual would subvert the purpose of the Tort Claims Act, which recognizes that government, acting for the public good, "should not have the duty to do everything that might be done," and limits government liability accordingly. **See** Section 41-4-2(A); **Gallegos,** 107 N.M. at 351, 758 P.2d at 301. We reject Archibeque's argument that his case is analogous to **Castillo.**

{12} Finally, Archibeque argues that **Silva** is closely analogous to his case and supports his argument that immunity should be waived under Section 41-4-6. In **Silva,** an inmate with serious psychiatric problems committed suicide while incarcerated at a Corrections Department facility. 106 N.M. at 473, 745 P.2d at 381. Plaintiffs brought a wrongful death action, alleging that the negligent failure to provide Silva with special care for his condition caused his death. **Id.** The trial court dismissed the lawsuit against the Secretary of Corrections and other state defendants and the Court of Appeals affirmed. **Id.** We reversed, holding that the trial court erred by concluding that several statutory waivers of immunity were inapplicable as a matter of law to acts or omissions committed by the Secretary of Corrections while acting within the scope of his duties. **Id.** at 477, 745 P.2d at 385.

{13} We conclude that **Silva** provides no generally applicable principle pertaining to the interpretation of Section 41-4-6 and, therefore, does not support Archibeque's argument that immunity is waived under the facts of this case. At issue in **Silva** was whether the Secretary of Corrections waived immunity under the Tort Claims Act by failing to staff, train, and provide prison health care facilities that would have provided Silva with treatment and oversight for a severe mental disorder characterized by depression and suicidal ideation.[2] **Id.** at 473-74, 745 P.2d at

[2] In **Silva,** the federal district court found that the Secretary

381-82. We noted that the Secretary's immunity **might** be waived under one or more of three provisions of the Tort Claims Act: Section 41-4-6, Section 41-4-9 (immunity waived for negligent operation of any hospital, infirmary, mental institution, clinic dispensary, medical care home, or similar facilities) or Section 41-4-10 (immunity waived for negligent provision of health care services). **Id.** at 477-78, 745 P.2d at 385-86. We then required the finder of fact to determine whether the Secretary breached duties related to any one of the three waiver provisions listed above following further factual development at trial. **Id.** at 478, 745 P.2d at 386.

{14} Nowhere in **Silva** did we determine that the Secretary's actions waived immunity under Section 41-4-6 or interpret Section 41-4-6 to waive immunity under circumstances like those presented in the case at bar. To read **Silva** as a case of general applicability, standing for the proposition that Section 41-4-6 waives immunity whenever injury results from a negligently performed administrative task affecting a single inmate, would again ignore the express language and purpose of Section 41-4-6. Moreover, to read **Silva** as applying generally to cases like the instant case would undermine the purpose of the Tort Claims Act by subjecting the State to liability for virtually any mistake made during the administration of corrections facilities that results in injury to an inmate.[3] **See Gallegos,** 107 N.M. at 351, 758 P.2d at 301. We hold that **Silva** must be limited to its specific facts. Consequently, **Silva** does not control the outcome of the instant case. In conclusion, we answer the Tenth Circuit's certified question by holding that Moya-Martinez's immunity is not waived under Section 41-4-6.

{15} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

GENE E. FRANCHINI,
Justice

RICHARD E. RANSOM,
Chief Justice, specially concurring

SPECIAL CONCURRENCE

RANSOM, Chief Justice (specially concurring).

{16} I concur specially to voice my concern with the majority's statement that: "Reading Section 41-4-6 to waive immunity every time a public employee's negligence creates a risk of harm for a single individual would subvert the purpose of the Tort Claims Act, which recognizes that government, acting for the public good, 'should not have the duty to do everything that might be done,' and limits government liability accordingly." I am certain that if the **operation or maintenance of a public building** were to give rise to an unreasonable risk of harm for even a single individual, the immunity granted pursuant to the Act would not apply.

{17} I concur because there was no showing that the general prison population reflected anything but the reasonable and expected risks of prison life. The classification of Archibeque did not change the condition of the premises. I see Archibeque's injuries as having been proximately caused by a discrete administrative decision. As an alternative to releasing Archibeque into the general population, he could have been placed in administrative segregation, a form of protective custody. The risk arose not from a condition of the premises (as with the wild dogs

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and other corrections personnel had "failed to operate by standards and procedures required by the [Duran] [C]onsent [D]ecree." **Id.** at 473, 745 P.2d at 381.

[3] Even if **Silva** could be read as holding that the Secretary's immunity was waived under Section 41-4-6, it would be factually distinguishable from the instant case for the same reason that **Castillo** is distinguishable. By failing to adhere to the standards required by the Duran Consent Decree, the Secretary of Corrections in **Silva** created a risk of harm to the general prison population, or at least that segment of the population in need of specialized mental health care and corresponding supervision. While a segment of the population at risk might justify waiver of immunity under Section 41-4-6, a situation in which a single inmate is put at risk is not comparable.

in **Castillo** or, arguably, the inadequate health care facilities in **Silva**); it arose from the classification itself.

{18} Also, I believe the "physical defect" basis for the decisions in **Wittkowski** and **Gallegos** is too narrow. I would not readily be persuaded that a general condition of unreasonable risk from negligent security practices falls outside "operation of a building" in the context of a corrections facility. To focus on words such as "security, custody, and classification" does not aid the analysis. The focus must be on the unreasonable risk of injury arising from operation and maintenance of the premises, in which case there is waiver of immunity, as compared to an administrative act such as the classification of an inmate who is thereby put at risk on premises that are operated and maintained without risk beyond that which is reasonable and expected in prison life. Here, it is telling that Archibeque did not argue that his assailant should have been removed from the general prison population, but only that Archibeque himself should have been placed in administrative segregation.

RICHARD E. RANSOM,
Chief Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-006

Filing Date: January 12, 1994, As Corrected February 28, 1994, Second Correction April 20, 1994

Docket No. 21,534

Jacque M. OLDFIELD, Gilbert L. Oldfield, Jessica Rose Oldfield, a minor, and Shamra Michelle Oldfield, a minor,

Plaintiffs-Appellees,

v.

Salvador BENAVIDEZ, Cibola County Sheriff, in his individual capacity, Arthur Fuldauer, social worker, in his individual capacity, and Georgia Sanchez, supervisor of the Grants, New Mexico, office of HSD, in her individual capacity,

Defendants-Appellants.

ORIGINAL PROCEEDING ON WRIT OF ERROR
Art Encinias, District Judge

Herrera, Baird & Long, P.A.
Judith C. Herrera
Nancy R. Long
Santa Fe, NM

for Appellants.

Kent Winchester
Vernon Salvador
Albuquerque, NM

for Appellees.

OPINION

BACA, Justice.

{1} Defendants-Appellants, Salvador Benavidez, Arthur Fuldauer, and Georgia Sanchez (Defendants), petition the Supreme Court to issue a Writ of Error based on the district court's denial of their motion for summary judgment on the issue of qualified immunity. This case arose out of an incident in which the Plaintiff children, Jessica and Shamra Oldfield, were removed from their home for a period of one week and subsequently monitored by the New Mexico Human Services Department (HSD). This action was predicated upon a report of physical and emotional abuse made by Jessica Oldfield. After the children were returned to their custody, Plaintiffs-Appellees, the Oldfields, filed a complaint for damages under 42 U.S.C. Sections 1983 and 1988. The Oldfields alleged violations of their right to familial integrity under the Fourth and Fourteenth Amendments and their right to criticize and complain about public officials under the First Amendment to the United States Constitution. They also alleged violations of procedural and substantive due process rights secured under New Mexico law.

{2} Defendants moved for summary judgment on grounds of qualified immunity arguing there was no clearly established right to familial integrity. The court found, however, that there was a clearly established right to familial integrity and denied Defendants' motion. Pursuant to our decision in **Carrillo v. Rostro,** 114 N.M. 607, 845 P.2d 130 (1992), we review whether the district court erred in denying summary judgment on Defendants' qualified immunity defense.

I

{3} The material facts in this case, construed in a light most favorable to the Oldfields are as follows: On January 30, 1991, Jessica Oldfield wrote a note to her teacher, Jeanette Rhoderick, following a lecture to the class on the dangers of drugs which stated: "Mrs. Rhoderick This is very sad to say but My mom and Dad use mariwana

[sic]! I did not wont [sic] to tell Because I was scrade [sic] to Because my dad will wip [sic] me so hard Ill never be able to sit down agian [sic]. Please help, Please!!" Jessica's teacher, Mrs. Rhoderick, subsequently had a conversation with Jessica about the note. During the discussion, Jessica confirmed that she was afraid of being physically abused by her step-father, Mr. Oldfield, and revealed that she previously had been abused.

{4} Rhoderick reported the possibility that Jessica was being physically abused to the school principal, Loretta Miller. Miller and Rhoderick, together, informed HSD. They did this according to New Mexico law that requires school teachers and school officials to report abuse or neglect if they have "reasonable suspicion" that a child is being abused or neglected. **See** NMSA 1978, § 32-1-15 (Repl.Pamp.1989) (repealed and recodified as NMSA 1978, § 32A-4-3 (Repl.Pamp.1993)). HSD conducted three separate interviews before deciding to petition for an ex parte custody order. Georgia Sanchez, an HSD supervisor, interviewed Jessica twice on January 31. The first interview was with Jessica, Rhoderick, Miller, and a school counselor. The second interview was between Sanchez and Jessica only. Jessica was interviewed again on February 6 by Arthur Fuldauer, the caseworker assigned to investigate her allegations. Subsequent to these interviews, Fuldauer met with another HSD staff member and a member of the Sheriff's Department (who is not named as a Defendant) to discuss Jessica's situation. After the meeting, HSD presented a petition and an affidavit for an ex parte custody order which was granted by the District Court. The order required the Sheriff's Department to take Jessica Oldfield and her sister, Shamra Oldfield, from the Oldfield home and deliver them into HSD's custody. The order stated that because Jessica and Shamra were alleged to be neglected and abused it was necessary for their protection that they be placed in the custody of HSD.

{5} Because the Oldfields lived outside the city limits and within the jurisdiction of Cibola County, the Sheriff's Department was the party authorized by law to serve the order. The Oldfields were served with the order at the Sheriff's office because HSD previously had been informed by personnel at Jessica's school that on a prior occasion Mr. Oldfield had physically and verbally threatened the staff at the school. Consequently, school officials specifically requested that the ex parte custody order not be served on school premises. It was decided, based upon this information, that the order be served upon the Oldfields at the Sheriff's office in order to allow for a maximum amount of safety for the children and others. The entire Oldfield family was brought to the Sheriff's office and Mr. and Mrs. Oldfield were served with the order. The children were placed in foster care and the Oldfields were notified of the upcoming ten-day custody hearing regarding the children.

{6} Subsequently, Fuldauer conducted a videotaped interview of Jessica and again she reported that her mother and step-father used drugs. She also reported that she had been hit with a belt many times by Mr. Oldfield. She was scared that he would seriously hurt her if she went home. A clinical psychologist, Michael Rodriguez, also interviewed Jessica and Shamra and Jessica again reported abuse. Rodriguez concluded that Jessica's fear was "genuine" and that a "hasty return home does not appear to be appropriate."

{7} At the custody hearing, the district court entered an order stating that there was "probable cause to believe that the children will be subject to injury by others if not placed in the custody of the department." The order provided that legal custody of the children would remain with HSD pending adjudication and that physical custody of the children would be returned to the parents. The order also provided that Gilbert Oldfield should undergo counseling and that Jessica should complete her evaluation with Dr. Rodriguez. After the children returned, the Oldfields decided to send one child to each set of grandparents, one to Farmington and one to California, for the remainder of the school year and for an indefinite time after that. Due to the absence of the children and Gilbert Oldfield's compliance with counseling, HSD moved to dismiss the action and the district court granted the motion.

{8} The Oldfields filed a complaint against Sheriff Benavidez, Arthur Fuldauer and Georgia Sanchez alleging that Defendants conspired to petition for the ex parte custody order as retaliation against them for the Oldfields complaining about Sheriff Benavidez's alleged sexual harassment of Jacque Oldfield. The Oldfields contended that prior to Jessica reporting abuse to her teacher, Sheriff Benavidez, while still a deputy, visited the Oldfield home several times when Gilbert Oldfield was not present and solicited sexual intercourse from Jacque Oldfield. She rejected these advances and Gilbert Oldfield met with Ed Craig, who was the sheriff of Cibola County at the time, to complain. Craig testified in his deposition that he reprimanded Benavidez. Benavidez then allegedly threatened Gilbert that he would get even.

{9} The Oldfields also alleged that Fuldauer "unprofessionally and unlawfully coached the children prior to their interrogations, misrepresented what they had stated in his testimony in the custody hearing, excluded evidence which was contrary to his predisposed hostility to the parents and drafted his reports with the intention of insuring that the children would be taken from the parents." The Oldfields alleged that Sanchez was aware of Fuldauer's conduct and failed to take any action to correct it. Finally, the Oldfields contended that HSD should have conducted further investigation before applying for an ex parte order and that the ex parte order was obtained by using false information from Benavidez and Fuldauer. In summary, the Oldfields alleged that Defendants conducted their investigation and made their decisions on the basis of retaliation and their predispositions against Plaintiff parents. Defendants' motion for summary judgment based on qualified immunity was denied by the district judge and they appeal to this Court.

II

{10} We first address whether the district court erred in denying Defendants' motion for summary judgment on the basis of qualified immunity. Summary judgment is appropriate only when "there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." **Frontier Leasing, Inc. v. C.F.B., Inc.,** 96 N.M. 491, 493, 632 P.2d 726, 728 (1981). All factual disputes and inferences are construed in favor of the non-moving party. **See Wheeler v. Board of County Comm'rs,** 74 N.M. 165, 171, 391 P.2d 664, 668 (1964).

{11} Defendants argue that the trial court erred in denying their motion for summary judgement because they are entitled to qualified immunity. Plaintiffs, on the other hand, argue that Defendants are not entitled to qualified immunity because Defendants conspired to temporarily remove their children from the home as retaliation for complaining about Sheriff Benavidez's harassment of Jacque Oldfield, and in so doing, violated their right to familial integrity. We cannot agree with Plaintiff's contentions.

{12} The granting of qualified immunity results in immunity from suit rather than a mere defense to liability and is lost if a case is erroneously allowed to go to trial. Therefore, the district court's denial of summary judgment based on qualified immunity is appealable before a final judgment is rendered at the trial court level. **Mitchell v. Forsyth,** 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). Generally, child welfare workers are entitled to qualified immunity "to ensure that an effective child-abuse investigation system exists." **Stem v. Ahearn,** 908 F.2d 1, 5 (5th Cir.1990), **cert. denied,** 498 U.S. 1069, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991). It is an accommodation by the courts to the "conflicting concerns" of government officials seeking freedom from personal monetary liability and harassing litigation and injured persons seeking redress for the abuse of official power. **Anderson v. Creighton,** 483 U.S. 635, 638, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987). Qualified immunity shields government officials from liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." **Id.**

{13} The qualified immunity doctrine requires summary judgment even if Plaintiffs' constitutional rights were violated "unless it is further

demonstrated that their conduct was unreasonable under the applicable standard." **Davis v. Scherer,** 468 U.S. 183, 190, 104 S. Ct. 3012, 3017, 82 L. Ed. 2d 139 (1984). The doctrine protects government officials performing discretionary functions from suit to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." **Harlow v. Fitzgerald,** 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). The test for qualified immunity is two pronged and requires us to determine: (1) whether at the time of the alleged conduct there was a clearly established constitutional right that was violated, and (2) whether a reasonable person would have known that his or her conduct violated that constitutional right. **Id.; Anderson,** 483 U.S. at 639, 107 S. Ct. at 3038.

{14} We begin our analysis with the first prong of the **Harlow** test and ask whether there was a clearly established right to familial integrity when HSD obtained temporary custody of the Oldfield children via an ex parte order. The right to familial integrity embodied in the Fourteenth Amendment, **see Griffin v. Strong,** 983 F.2d 1544, 1547 (10th Cir.1993), is a substantial right and one that has been clearly established by the Supreme Court in several cases. **See Stanley v. Illinois,** 405 U.S. 645, 652, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551 (1972) (unwed father has substantial interest in retaining custody of children born out of wedlock with whom he maintained strong parental relationship); **May v. Anderson,** 345 U.S. 528, 533, 73 S. Ct. 840, 843, 97 L. Ed. 1221 (1953) (recognizing in dictum parents' right to "care, custody, management and companionship" of their children); **Prince v. Massachusetts,** 321 U.S. 158, 166, 64 S. Ct. 438, 442, 88 L. Ed. 645 (1944) (stating that parents have a fundamental interest in the religious upbringing of children); **Meyer v. Nebraska,** 262 U.S. 390, 400, 43 S. Ct. 625, 627, 67 L. Ed. 1042 (1923) (stating that parents have a liberty interest in controlling the education of their children). We find these cases compelling and hold that there is a clearly established right to familial integrity embodied in the Fourteenth Amendment.

{15} Having determined that the right to familial integrity is a clearly established right, we next discuss the second prong of the **Harlow** test and ask whether a reasonable person would have known that his or her conduct violated that constitutional right. This inquiry is fact specific. **See Griffin,** 983 F.2d at 1548. The Supreme Court recognized in **Anderson** that many constitutional rights are clearly established but at the same time so general that it is often unclear to officials whether particular conduct violated the right. 483 U.S. at 639, 107 S. Ct. at 3038. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." **Id.** at 640, 107 S. Ct. at 3039. We find the right to familial integrity to be such a right. Although the general right to familial integrity is clearly established, the parameters of the right have never been clearly established, and the right is not absolute or unqualified. "The state has a 'traditional and "transcendent interest"' in protecting children from abuse and from situations where abuse might occur." **Griffin,** 983 F.2d at 1548 (quoting **Maryland v. Craig,** 497 U.S. 836, 855, 110 S. Ct. 3157, 3168, 111 L. Ed. 2d 666 (1990)); **see also Lehr v. Robertson,** 463 U.S. 248, 256, 103 S. Ct. 2985, 2990, 77 L. Ed. 2d 614 (1983) (relationship between parent and child merits constitutional protection in "some cases"); **New York v. Ferber,** 458 U.S. 747, 757, 102 S. Ct. 3348, 3355, 73 L. Ed. 2d 1113 (1982) ("The prevention of . . . abuse of children constitutes a government objective of surpassing importance. . . ."); **Prince,** 321 U.S. at 166, 64 S. Ct. at 442 ("[T]he family itself is not beyond regulation in the public interest). Although parents have certain rights regarding their children, the children also have certain fundamental rights which often compete with the parents' interests. **See Woodrum v. Woodward County,** 866 F.2d 1121, 1125 (9th Cir.1989) (though liberty interest exists in the maintenance of the family, this interest must be weighed against the interests of the child). The state itself has

a compelling interest in the health, education, and welfare of its children. **See Santosky v. Kramer,** 455 U.S. 745, 766, 102 S. Ct. 1388, 1401, 71 L. Ed. 2d 599 (1982) (state has **parens patriae** interest in the welfare of children). The Fourteenth Amendment right to familial integrity, therefore, "involve[s] a weighing of the parents' rights against the interests of the child and the state. Whether a plaintiff's constitutional rights are violated, then, 'would depend on a balancing of these two conflicting interests.'" **Franz v. Lytle,** 791 F. Supp. 827, 833 (D.Kan.1992) (quoting **Whitcomb v. Jefferson County Dep't of Social Servs.,** 685 F. Supp. 745, 747 (D.Colo.1987)). Because the liberty interest in familial relationships must "always be balanced against the governmental interest involved, it is difficult, if not impossible, for officials to know when they have violated 'clearly established' law." **Frazier v. Bailey,** 957 F.2d 920, 931 (1st Cir.1992); **see also Franz,** 791 F. Supp. at 833 (holding that "[a] reasonable official, 'knowing only that [he] must not infringe on family integrity, would not necessarily know what conduct was prohibited.'" (quoting **Frazier,** 957 F.2d at 931)).

{16} The government has a compelling interest in the welfare of children, and the relationship between parents and their children may be investigated and terminated by the state, provided constitutionally adequate procedures are followed. **Santosky v. Kramer,** 455 U.S. 745, 766, 102 S. Ct. 1388, 1401, 71 L. Ed. 2d 599 (1982). The state has a "right—indeed, duty—to protect minor children through a judicial determination of their interests in a neglect proceeding." **Stanley,** 405 U.S. at 649, 92 S. Ct. at 1212. In fact, it is "well established that officials may temporarily deprive a parent of custody in 'emergency' circumstances 'without parental consent or a **prior** court order.'" **Robison v. Via,** 821 F.2d 913, 921 (2d Cir.1987) (quoting **Duchesne v. Sugarman,** 566 F.2d 817, 826 (2d Cir.1977)); **see also Myers v. Morris,** 810 F.2d 1437, 1462 (8th Cir.) (stating that constitutionally protected interest in family relations is limited by compelling government interest in protection of minor children, particularly in circumstances where protection may be necessary as against the parents themselves), **cert. denied,** 484 U.S. 828, 108 S. Ct. 97, 98 L. Ed. 2d 58 (1987).

{17} In this case, whether Defendants are entitled to qualified immunity turns on the reasonableness of their belief that a sufficient emergency existed to warrant taking Jessica and Shamra into temporary custody. This analysis is not one of hindsight, but rather is determined by Defendants' action "in the context of circumstances with which [Defendants were] confronted." **Anderson,** 483 U.S. at 639, 107 S. Ct. at 3038.

{18} We find that the Oldfields have failed to establish that the removal of their children was an act of conspiracy by Defendants in retaliation for the Oldfields' complaint regarding Benavidez. We also find that the Oldfields have failed to show that the procedures used by HSD in responding to Jessica's allegations of child abuse "violated the nebulous right of familial integrity." **Hodorowski v. Ray,** 844 F.2d 1210, 1217 (5th Cir.1988).

{19} We begin our factual analysis by addressing Plaintiffs' contentions that the removal of the children was purely an act of conspiracy between Defendants in retaliation for reporting Benavidez's inappropriate conduct toward Jacque Oldfield. The Oldfields allege that their right to familial integrity was violated because Benavidez initiated temporary custody proceeding against them as a method of retaliation for their complaints. The Oldfields, however, fail to allege in their complaint any specific facts to prove that Benavidez was involved in the initiation of proceedings by HSD officials to obtain temporary custody of the Oldfield children. HSD requested the ex parte custody order in response to Jessica's note to her teacher and her subsequent conversations with her teacher and other HSD officials. The ex parte custody order was ordered by a neutral judge. The only evidence before the judge was an affidavit for ex parte custody order and a neglect and abuse petition. The affidavit included: (1) the exact wording of Jessica's note to her teacher reporting abuse; (2) information on Jessica's conversation with her teacher

and with the psychologist who examined her; and (3) information regarding a previous abuse and neglect investigation conducted on the Oldfields. The neglect and abuse petition was simply a standard form with names and addresses filled in. It contained no substantive information.

{20} The decision to seek the ex parte custody order was made without any information from Benavidez. The only involvement by the Sheriffs Department was the presence of Deputy Sheriff Gene Johnson at the meeting in which Fuldauer, another HSD official, and Johnson determined what course of action would be best for Jessica and Shamra's wellbeing. The record fails to disclose any facts that suggest improper communications between Benavidez and Johnson, nor are there any facts that implicate Johnson in the alleged conspiracy. Indeed, Johnson is not a named defendant. Finally, no information other than that found in the affidavit and in the neglect and abuse petition was presented to the judge from any of the Defendants. There is no evidence in the record to suggest that Benavidez prompted Jessica to report her parents or write the note. Moreover, Benavidez provided no information to the judge who issued the ex parte order. In fact, Benavidez became involved in the Oldfield case **after** the ex parte custody order was issued and, then, only because the school requested that the order be issued by the Sheriff's Department and not on school premises. Even if Benavidez had every intention to retaliate against the Oldfields, there is no evidence that he did so by initiating proceedings to take custody of the Oldfields' children.

{21} We next address the Oldfields' argument that HSD should have conducted further investigation before applying for an ex parte order and that the ex parte order was obtained by using false information from Benavidez and Fuldauer. The removal of Jessica and Shamra via an ex parte order was due to Defendants having probable cause to believe that the Oldfield children were being abused or neglected by one or both of their parents and that removal was necessary to insure their safety. **See** NMSA 1978, §§ 32-1-1 to -53 (Repl.Pamp.1989) (repealed 1993); Child Protective Services—Procedures, Ten Day Ex Parte Custody Hearing, N.M. Human Serv. Dep't Reg. PR 4.4.2 (Dec. 11, 1989); NMSA 1978, § 32A-4-16 (Repl.Pamp.1993). Jessica and Shamra were removed from their home temporarily because Jessica reported physical and emotional abuse to her teacher. Jessica's teacher and principal contacted HSD as required by law. HSD investigated by interviewing Jessica several times and determined that Jessica and Shamra were in possible danger if they remained in the home at that time. They had probable cause to believe Jessica and Shamra were in danger of further abuse because of Jessica's fear of retaliation by her step-father, a prior report by Jessica's school that Gilbert Oldfield had been verbally and physically threatening to school officials,[1] and a criminal conviction for previous drug involvement that corroborated Jessica's story. Defendants believed that the Oldfield children were being abused and that Gilbert Oldfield might retaliate against Jessica for reporting the abuse. In these circumstances, we think Defendants' actions in temporarily removing the Oldfield children from the home were objectively reasonable, and as a matter of law violated no particular right to familial integrity. Defendants' motion for summary judgment based on qualified immunity should have been granted.

III

{22} We next address Defendants' argument during oral arguments that the Oldfields' First Amendment claim lacks merit and is irrelevant to the facts in this case. In their complaint, the Oldfields alleged that Defendants' conduct in requesting temporary custody of Jessica and Shamra via an ex parte order violated their First Amendment rights. The Oldfields argued that Defendants conspired to temporarily remove their children from the home as retaliation for

[1] The Oldfields contend that Gilbert Oldfield was not threatening to school officials in any way during the prior incident. HSD would have no reason to disbelieve a report by school officials that Gilbert Oldfield had been verbally and physically threatening. HSD properly considered this information in its investigation.

complaining about Sheriff Benavidez's harassment of Jacque Oldfield. The Oldfields contended that their First Amendment right to complain and criticize public officials without retaliation was violated. We disagree.

{23} The Oldfields were not restrained from exercising their right to complain about Sheriff Benavidez's harassment of Jacque Oldfield, and, in fact, Sheriff Benavidez was reprimanded for his inappropriate conduct towards Jacque Oldfield. The heart of the Oldfields' claim is that their First Amendment rights were violated because Benavidez initiated temporary custody proceedings against them. As discussed above, the Oldfields failed to provide any specific facts to prove that Benavidez or any of the other defendants were involved in the initiation of custody proceedings as a form of retaliation. Consequently the Oldfields' First Amendment claim must fail. We remand this case to the district court for proceedings consistent with this opinion. The decision of the district court is REVERSED.

{24} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

RICHARD E. RANSOM,
Chief Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-044

Filing Date: April 6, 1994

Docket No. 20,379

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff-Appellee,

v.

JAMES A. HIATT and LAUREL ANN HIATT,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
Larry Johnson, District Judge

Motion for Rehearing: None

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OPINION

BACA, Justice.

{1} Defendants-Appellants, James A. Hiatt and Laurel Ann Hiatt (the Hiatts), appeal the denial of their motion to set aside a default judgment entered against them. The Hiatts argued to the trial court that the judgment should have been set aside under SCRA 1986, 1-060(B)(4) (Repl. Pamp. 1992), because the trial court lacked personal jurisdiction over them when it entered the default judgment, and that, consequently, the judgment was void. On appeal, the Hiatts present a single issue: Whether the trial court had personal jurisdiction over them when it entered the default judgment. We review this case pursuant to SCRA 1986, 12-102(A)(1) (Repl. Pamp. 1992), and reverse.

I

{2} This case arose out of two loans made to the Deerfield Development Corporation (Deerfield), a New Mexico corporation. by First National Bank of Lea County (the Bank). Both loans were made pursuant to an agreement, which was executed on June 28, 1982, in Lea County, New Mexico. The loan principal was for $ 735,500. The agreement was also signed by four guarantors: Thomas and Janet David, who were residents of New Mexico, and the Hiatts, who were residents of California. After the agreement was signed on behalf of the Bank and Deerfield and by the Davids as guarantors on June 28, it was forwarded to California, where it was signed by the Hiatts as guarantors on July 9, 1982. On the same day, the Hiatts also signed a guaranty agreement, which was expressly incorporated by reference into the loan agreement, guaranteeing Deerfield's payment of loans made pursuant to the loan agreement in an amount not to exceed $ 735,500. The guaranty agreement recited that the Bank was unwilling to extend credit to Deerfield unless the guaranty was duly executed by the Hiatts. Mr. David, an officer of Deerfield, had requested the Hiatts to guarantee the loan in early 1982. Pursuant to the terms of the loan agreement, Deerfield gave the Bank a promissory note dated June 28, 1982, in the amount of $ 640,000, due and payable in full, with interest, on June 28, 1983. Contemporaneously with its execution of the promissory note, Deerfield executed and delivered to the Bank a mortgage on real property in Lea County as security for payment of the

note. The note indicated that it was also secured by the Davids' and the Hiatts' guarantees, as well as by an assignment of a certificate of deposit for $ 140,000 and an assignment of life insurance on Mr. David's life.

{3} Some payments were made on the promissory note. On December 16, 1982, the Bank made an additional loan to Deerfield and Deerfield accordingly gave the Bank another promissory note, dated December 16, 1982, in the principal amount of $ 211,000, due and payable on December 16, 1983. The second note did not mention on its face whether it was secured by the Hiatts' guaranty and the record fails to disclose that the Hiatts guaranteed the second loan. Sometime before February 6, 1984. Deerfield defaulted on both notes. The total amount owing on the first note as of February 6, 1984, was $ 255,306.23. The total amount owing on the second note as of the same date was $ 228,452.50. and the total on both notes was $ 483,748.73. Although the complaint ultimately filed by the Bank, which by then had changed its name to First City National Bank (First City), alleged that the second loan was made pursuant to the terms of the June 28, 1982, loan agreement, we do not assume this allegation to be true because we find that the Hiatts are not subject to personal jurisdiction in New Mexico courts, and, therefore, will not further discuss the second loan.

{4} On February 20, 1984, First City[1] filed a complaint in the District Court of Lea County, New Mexico. naming Deerfield, as well as various parties who had signed guarantees on behalf of Deerfield, or who had an interest of record in the subject real property, as defendants. On March 19, 1984, the Hiatts were personally served in California with the summons and complaint. The Hiatts did not file an answer or any other responsive pleading and did not enter an appearance. On September 19, 1986, the case proceeded to judgment against all parties. On October 14, 1988, a deficiency judgment was entered in favor of the FDIC and against the Hiatts in the sum of $ 580,692.82.

{5} On February 12, 1991, the Hiatts filed a motion to set aside the judgment under SCRA 1986, 1-060(B). The Hiatts argued in their motion that the judgment was void because the court lacked personal jurisdiction over them.

{6} The trial court in its findings of fact and conclusions of law determined that the Hiatts had been personally served in California with a summons and a copy of the complaint on March 19, 1984. The trial court found that the Hiatts neither pleaded nor otherwise defended in the case until February 12, 1991, when they filed their motion to set aside the default judgment entered against them on September 19, 1986. The trial court also made additional findings and conclusions to support its judgment that the Hiatts had sufficient minimum contacts with New Mexico to be constitutionally subject to suit in this state.

II

{7} The question before us is whether merely signing a guaranty in another state, by itself, subjects the guarantor to personal jurisdiction in New Mexico. In order for our courts to exercise personal jurisdiction over nonresident, out-of-state defendants, the following three-part test must be satisfied:

> (1) the defendant's act must be one of the five enumerated in the long-arm statute; (2) the plaintiff's cause of action must arise from the act; and (3) minimum contacts sufficient to satisfy due process must be established by the defendant's act.

State Farm Mut. Ins. Co. v. Conyers, 109 N.M. 243, 244, 784 P.2d 986, 987 (1989) (citing **Salas v. Homestake Enterprises, Inc.,** 106 N.M. 344, 345, 742 P.2d 1049, 1050 (1987)). The first and third step of this test have been "repeatedly equated" with the due process standard of "minimum contacts." **Kathrein v. Parkview Meadows, Inc.,** 102 N.M. 75, 76, 691 P.2d 462, 463 (1984)

[1] After the filing of the complaint, First City changed its name to Moncor Bank, N.A., which later went into receivership, and FDIC ultimately succeeded to its interest.

(citing **Telephonic, Inc. v. Rosenblum,** 88 N.M. 532, 534, 543 P.2d 825, 827 (1975)). Because we have interpreted the long-arm statute as extending our personal jurisdiction as far as constitutionally permissible, **United Nuclear Corp. v. General Atomic Co.,** 91 N.M. 41, 42, 570 P.2d 305, 306 (1977), it is not necessary to determine whether the Hiatts transacted business within New Mexico in any technical sense. When the state courts have construed the state long-arm statute as being co-extensive with the requirements of due process, "the usual two-step analysis collapses into a single search for the outer limits of what due process permits." **Forsythe v. Overmyer,** 576 F.2d 779, 782 (9th Cir.), **cert. denied,** 439 U.S. 864, 58 L. Ed. 2d 174, 99 S. Ct. 188 (1978).

{8} A state court may exercise personal jurisdiction over a non-resident defendant only if there are "minimum contacts" between the defendant and the forum state. The contacts must be enough so that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." **International Shoe Co. v. Washington,** 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945) (quoting **Milliken v. Meyer,** 311 U.S. 457, 463, 85 L. Ed. 278, 61 S. Ct. 339 (1940)). Before personal jurisdiction can be exercised, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." **Hanson v. Denckla,** 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958).

{9} Although it is essential that the defendant's conduct and connection with the forum state be such "that he should reasonably anticipate being haled into court there," **World-Wide Volkswagen Corp. v. Woodson,** 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980). "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." **Id.** at 295. In fact, this Court recently held that the purposeful availment test of **Hanson** is the "**key** focus" in analyzing minimum contacts questions. **Conyers,** 109 N.M. at 245, 786 P.2d at 988 (emphasis added). Therefore, our inquiry will focus on whether the transaction entered into by the Hiatts amounts to a purposeful decision by the Hiatts to participate in the local economy and to avail themselves of the benefits and protections of New Mexico law. Applying this standard, we conclude that the Hiatts' contacts were insufficient to satisfy the requirements of due process.

{10} It is the required purposefulness on the part of the defendants, in establishing their contact with New Mexico, that is lacking in this case. The record fails to disclose that the Hiatts purposefully availed themselves of the benefits and protections of New Mexico laws. Likewise, the record does not indicate that the Hiatts anticipated that they would derive any economic benefit as a result of their guaranty. The Hiatts maintained no residence or business in New Mexico and do not own any real or personal property in New Mexico. The only contact they have had with New Mexico is to have been guarantors on a loan agreement executed in California, which was entered into pursuant to an agreement which Deerfield and First City had already worked out in New Mexico. The Hiatts "stepped into a business arrangement which [Deerfield] and [First City] had already established, and did not purposefully avail [themselves] of the 'privilege of conducting activities within' New Mexico, 'thus invoking the benefits and protections' of New Mexico law." **Customwood Mfg., Inc. v. Downey Constr. Co.,** 102 N.M. 56, 58, 691 P.2d 57, 59 (1984) (quoting **Hanson v. Denckla,** 357 U.S. at 253)). Additionally, no choice of law provision favoring New Mexico was included as part of the guaranty agreement,[2] and because the agreement was executed in California, the application of our traditional lex loci contractus rule results in the application of California law.

[2] Even had such a clause existed, it is unclear whether that would have been enough to confer personal jurisdiction. **See Telco Leasing, Inc. v. Marshall County Hosp.,** 586 F.2d 49 (7th Cir. 1978) (holding that a choice of law provision in a lease did not serve as a basis for jurisdiction); **see also Northern Trust Co. v. Randolph C. Dillon, Inc.,** 558 F. Supp. 1118, 1123-24 (N.D. Ill. 1983) (holding that a choice of law provision is not sufficient to confer personal jurisdiction over a nonresident defendant).

Walter E. Heller & Co. v. Stephens, 79 N.M. 74, 77, 439 P.2d 723, 726 (1968); **Boggs v. Anderson,** 72 N.M. 136, 140, 381 P.2d 419, 422 (1963).

{11} Although the Hiatts may have reasonably foreseen that the execution or breach of the guaranty agreement would have some impact in this state, they did not take any actions so as to purposefully avail themselves of the benefits and protections of New Mexico law.

{12} Although this Court has not recently considered the question presented in this case—whether assertion of personal jurisdiction over nonresident guarantors offends the requirements of the due process clause—our holding today is consistent with the many other jurisdictions' holdings on this issue.[3] Federal courts presiding over diversity cases and applying state law have held that nonresident guarantors do not purposefully avail themselves of the benefits and protections of the laws of the forum state merely by executing a guarantee of an obligation of a resident debtor in connection with a local project in favor of a resident creditor, particularly where the guarantor has no financial interest in the debtor. For example, in **Arkansas Rice Growers Cooperative Ass'n v. Alchemy Industries, Inc.,** 797 F.2d 565 (8th Cir. 1986), the underlying transaction was the construction of a processing plant in Arkansas. Alchemy Industries, Inc., entered into a contract with an Arkansas corporation for the construction. Several Alchemy shareholders, who were residents of California, guaranteed the construction obligation. After the construction was completed, Alchemy defaulted and the Arkansas corporation sued Alchemy and the individual guarantors. The court upheld a judgment against Alchemy, but reversed the judgment against the guarantors and dismissed those claims for lack of personal jurisdiction. The court held that, "the mere fact that the individual defendants guaranteed an obligation to an Arkansas corporation does not subject the guarantors to jurisdiction in Arkansas." **Id.** at 573. In fact, the court stated that it had found "no case in which a court has asserted jurisdiction over a nonresident guarantor merely because the guarantor is a passive investor in the corporation whose debt the guarantor assures. **Id.** at 574.

{13} Similarly, in **Bond Leather Co. v. Q.T. Shoe Mfg. Co.,** 764 F.2d 928 (1st Cir. 1985), a nonresident guarantor guaranteed a loan to his brother's corporation. Q.T. Q.T. was a Massachusetts corporation engaged in the manufacture of shoes, and it purchased raw leather from Bond, another Massachusetts corporation. The guarantor, a resident of Ohio, had no financial interest in the debtor corporation. Q.T. went bankrupt and Bond filed suit against Q.T. and the guarantor. The court held that the creditor failed "to identify any contract rights created by the guaranty in [the guarantor] which could have been enforced in the Massachusetts courts and which could fairly be said to represent an intent by [the guarantor] to reap the benefits of Massachusetts law." **Id.** at 934. Moreover, the court stated that "absent any intent by [the guarantor] to exploit the local economy, as has been required not only in prior cases addressing jurisdiction over nonresident guarantors but more generally in cases upholding jurisdiction, we cannot say that [the guarantor], on the basis of its isolated acts, availed itself of the benefits of transacting business in Massachusetts and should reasonably have anticipated

[3] We note that in **Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co.,** 77 N.M. 92, 419 P.2d 465 (1966), we found that jurisdiction existed over an Oklahoma resident and a California resident where the defendants were actively engaged in the negotiations of the loan, had been present in New Mexico several times to attend these negotiations, and had been partly responsible for procuring the underlying loan to the corporation. In **Hunter-Hayes** we held that the traditional notions of fair play and substantial justice were not offended by the exercise of jurisdiction. However, **Hunter-Hayes** is not dispositive where, as here, the guarantors mechanically executed the guaranty and mailed it back to the forum. Additionally, **Hunter-Hayes,** was decided before any of the recent seminal Supreme Court cases involving minimum contacts were decided, such as **Asahi Metal Ind. v. Superior Court,** 480 U.S. 102, 94 L. Ed. 2d 92, 107 S. Ct. 1026 (1987), **Burger King v. Rudzewicz,** 471 U.S. 462, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985), **Keeton v. Hustler Magazine,** 465 U.S. 770, 79 L. Ed. 2d 790, 104 S. Ct. 1473 (1984), **Helicopteros Nacionales de Colombia, S.A. v. Hall,** 466 U.S. 408, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984), **World-Wide Volkswagen,** 444 U.S. 286, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980), and **Kulko v. Superior Court,** 436 U.S. 84, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978).

being haled into court there." **Id.** at 934-35 (citing **World-Wide Volkswagen,** 444 U.S. at 297-98) (citation omitted): **see also United Fed. Sav. Bank v. McLean,** 694 F. Supp. 529, 535 (C.D. Ill. 1988) (holding that being a guarantor along with making payments in forum state is an insufficient basis to invoke personal jurisdiction)[4], **Reverse Vending Assoc. v. Tomra Systems US, Inc.,** 655 F. Supp. 1122, 1127 (E.D. Pa. 1987) (holding that "a non-resident defendant's contract, in this case a guaranty, with a Pennsylvania business entity **alone** cannot automatically establish sufficient minimum contacts."); **Northern Trust Co. v. Randolph C. Dillon, Inc.,** 558 F. Supp. 1118, 1123 (N.D. Ill. 1983) (holding there was no personal jurisdiction over nonresident guarantor of equipment lease although payments were made to Illinois bank, the guaranty was accepted in Illinois, and it provided that it would be governed by Illinois law); **Liberty Leasing Co. v. Milky Way Stores, Inc.,** 352 F. Supp. 1210, 1211 (N.D. Ill. 1973) (holding no personal jurisdiction over nonresident guarantor); **Misco Leasing, Inc. v. Vaughn,** 450 F.2d 257, 260 (10th Cir. 1971) (holding that being a guarantor alone is an insufficient basis to invoke personal jurisdiction).

{14} In addition to the federal courts, state courts also hold that merely signing a guaranty, in and of itself, is insufficient contact to confer personal jurisdiction. **See. e.g., Edwards v. Geosource Inc.,** 473 So. 2d 36, 37 (Fla. Dist. Ct. App. 1985) ("signing a promissory obligation, in and of itself, is insufficient contact to confer personal jurisdiction"); **Sibley v. Superior Court,** 16 Cal. 3d 442, 546 P. 2d 322, 325, 128 Cal. Rptr. 34 (Cal. 1976) (holding that petitioner did not purposefully avail himself of the privilege of conducting business in California or of the benefits and protections of California laws where petitioner-guarantor had executed a guaranty in Florida guaranteeing payments to a California partnership), **cert. denied,** 429 U.S. 826 (1976); **accord United Buying Group, Inc. v. Coleman,** 296 N.C. 510, 251 S.E.2d 610, 616 (N.C. 1979) ("The mere **act** of signing [a guaranty in favor of a resident of the forum] or endorsement does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident."); **Basic Food Indus., Inc. v. Eighth Judicial Dist. Court,** 94 Nev. 111, 575 P.2d 934, 936 (Nev. 1978) (holding that when "no more appears than that the guarantor has mechanically executed the guaranty and mailed it back to the forum," finding personal jurisdiction would offend traditional notions of fair play and substantial justice).

{15} The FDIC urges us to find that the Hiatts are subject to the exercise of personal jurisdiction in New Mexico based on several cases cited in its brief in chief. However, in all of these cases, the guarantor has been an officer or a director or an active shareholder in the debtor corporation. For example, in **Coleman,** the court upheld personal jurisdiction over the defendant who, in addition to having signed a guaranty, had an interest in a corporation that dealt with the in-state corporation. The court held that where the

> defendant is a principal shareholder of the corporation and conducts business in North Carolina as principal agent for the corporation, then his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him.

251 S.E.2d at 614.[5] Similarly, in **National Can Corp. v. K Beverage Co.,** 674 F.2d 1134, 1137 (6th Cir. 1982), the court held that where the guarantors were officers and shareholders of the debtor corporation, such direct economic interest in the corporation furnished the necessary minimum contacts. **See also Marcus Food Co. v. Family Foods of Tallahassee, Inc.,** 729 F. Supp.

[4] Cases from Illinois may be "persuasive authority" since our long-arm statute was taken from that state. **Customwood,** 102 N.M. at 58, 691 P.2d at 59.

[5] The North Carolina Supreme Court also held that the second defendant-guarantor who had no ties with the debtor corporation was not subject to in personam jurisdiction in North Carolina. The court stated, "the mere **act** of signing such a guaranty or endorsement does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident." **Id.** at 616.

753 (D. Kan. 1990) (guarantor was president and sole shareholder of debtor corporation); **First Sec. Bank v. McMillan,** 627 F. Supp. 305 (W.D. Mich. 1985) (guarantor was officer of debtor corporation); **Marathon Metallic Bldg. Co. v. Mountain Empire Constr. Co.,** 653 F.2d 921 (5th Cir. Unit A Aug. 1981) (guarantor was officer, director and shareholder of debtor corporation); **Continental Bank N.A. v. Everett,** 742 F. Supp. 508 (N.D. Ill. 1990), **aff'd,** 964 F.2d 701 (7th Cir.), **cert. denied,** 121 L. Ed. 2d 688, 113 S. Ct. 816 (1992) (guarantors were officers, directors and shareholders of debtor corporation); **BRS, Inc. v. Dickerson,** 278 Ore. 269, 563 P.2d 723 (Or. 1977) (guarantors were principals and officers of corporate debtor). When a substantive identity between the guarantor and the debtor is shown, as in the above cases, the guarantor may be said to have purposefully availed himself of the benefits and protections of the laws of the forum state and may have the minimum contacts with the forum state sufficient to meet the due process requirements of the exercise of personal jurisdiction by the forum state.

{16} In conclusion, we hold that the signing of a guaranty by a nonresident of a debt owed to a New Mexico creditor does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident. Rather, the circumstances surrounding the signing of such obligations must be closely examined in each case to determine whether the quality and nature of defendant's contacts with New Mexico justify the assertion of personal jurisdiction over him in an action on the obligation. Here, the Hiatts did nothing more than sign a guaranty for a New Mexico corporation in which they had no interest. The Hiatts did not purposefully avail themselves of the benefits and protections of New Mexico law by merely guaranteeing a loan, and hence their activity does not meet the due process requirement of minimum contacts. The judgment of the trial court is REVERSED.

{17} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

RICHARD E. RANSOM,
Justice

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

SETH D. MONTGOMERY,
Chief Justice (Dissenting)

DISSENT

MONTGOMERY, Chief Justice (Dissenting).

{18} In **Burger King Corp. v. Rudzewicz,** 471 U.S. 462, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985), one of the most recent of the "recent seminal Supreme Court cases" cited in footnote 3 to the majority's opinion, the Court said: "The Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." **Id.** at 474. The Court continued:

> Thus where the defendant "deliberately" has engaged in significant activities within a State, **or has created "continuing obligations" between himself and residents of the forum,** he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Id. at 475-76 (emphasis added; citations omitted). And:

> [W]ith respect to interstate contractual obligations we have emphasized that parties who "reach out beyond one state and **create continuing relationships and obligations** with citizens of another state" are subject to regulation and sanctions in the

> other State for the consequences of their activities.

Id. at 473 (quoting **Travelers Health Ass'n v. Virginia,** 339 U.S. 643, 647, 94 L. Ed. 1154, 70 S. Ct. 927 (1950) (emphasis added)).

{19} In the present case, the trial court concluded—upon an admittedly sparse record—that by entering into the loan agreement and personal guaranties with the Bank, the Hiatts purposely availed themselves of the privilege of conducting business in New Mexico. I believe the court was correct in so concluding, based on the following facts (which **do** appear in the record): In early 1982, the Hiatts were requested by Mr. David, an officer of Deerfield, to guarantee a loan to Deerfield in connection with a development project in Hobbs. They agreed to guarantee the loan, and the loan agreement they signed contemplated that the loan was to be secured by various items of collateral, including their personal guaranties and the guaranties of Mr. and Mrs. David. The guaranty that the Hiatts signed, at the same time as they signed the loan agreement in July 1982, recited that they desired that the Bank extend credit to Deerfield and acknowledged that the Bank was unwilling to extend such credit unless they executed the guaranty. The guaranty was a continuing obligation (up to $ 735,500), to last at least until the loan or loans made pursuant to the loan agreement were paid or until the Hiatts gave notice that they would no longer be liable on the guaranty (with respect to loans made after such notice was given). The promissory notes executed pursuant to the loan agreement were payable at the Bank's offices in Hobbs and were secured by a mortgage on real estate in Lea County.

{20} In sum, we have here a loan, made possible in part by the Hiatts' guaranty, to a New Mexico borrower from a New Mexico bank, payable in New Mexico, secured by a mortgage on New Mexico realty, made for the purpose of carrying out a development in a New Mexico community, and guaranteed by New Mexico residents (in addition to the Hiatts). There is no indication that the Hiatts guaranty was not executed "voluntarily" or "deliberately," and their affidavits affirmatively establish that they executed it through their own volition in response to a Deerfield officer's request. Thus, the Hiatts' contact with New Mexico certainly cannot be characterized as "random" or "fortuitous"—nor, I submit, as "attenuated" either. **See Burger King,** 471 U.S. at 475 ("[The] 'purposeful availment' requirement [of **Hanson v. Denckla,** 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)] ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" (citations omitted)). Haling the Hiatts into New Mexico because they facilitated the Deerfield-Bank loan transaction clearly would not be a result of either the Bank's or Mr. David's "unilateral activity."

{21} As noted above, when the activities of a defendant who has availed himself of the privilege of conducting business in a forum "are shielded by 'the benefits and protections of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." **Burger King,** 471 U.S. at 476. **See also Hanson,** 357 U.S. at 253 ("It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."). It cannot be denied that by signing the loan agreement and guaranty in this case the Hiatts invoked a number of benefits and protections under New Mexico law. These protections relate primarily to rights and remedies against the principal obligor, Deerfield, and against their co-guarantors, Mr. and Mrs. David.[6] Under Section 103 of the **Restatement of Security** (1941) (the **Restatement),** the principal obligor on a debt has a duty to the

[6] Under principles of suretyship, the Hiatts as guarantors would also have had rights and remedies against the Bank, such as the right to require the Bank to marshall its assets and exhaust its rights with respect to the collateral before resorting to their obligations as guarantors. However, the Hiatts waived or relinquished most or all of such rights in the guaranty they signed.

surety (the guarantor)[7] as well as to the creditor. When the surety pays out on the guaranty, it has the right to reimbursement against the principal. **Id.** § 104. Under Section 141, the surety who has paid out can be subrogated to the rights of the creditor against the principal, against any property that stands as security, and against any co-sureties. **See In re Flores de New Mexico, Inc.,** 134 B.R. 433, 437 (Bkrtcy. D.N.M. 1991) ("'The familiar rule is that, **instanter** upon the payment by the guarantor of the debt, the debtor's obligation to the creditor becomes an obligation to the guarantor, not a new debt, but, by subrogation, the result of the shift of the original debt from the creditor to the guarantor who steps into the creditor's shoes.'" (quoting **Putnam v. Commissioner,** 352 U.S. 82, 85, 1 L. Ed. 2d 144, 77 S. Ct. 175 (1956))). **See also State Farm Mut. Auto. Ins. Co. v. Foundation Reserve Ins. Co.,** 78 N.M. 359, 363, 431 P.2d 737, 741 (1967) ("The remedy [of subrogation, in the insurance context] is for the benefit of one secondarily liable who has paid the debt of another and to whom in equity and good conscience should be assigned the rights and remedies of the original creditor."); **Fireman's Fund Am. Ins. Cos. v. Phillips, Carter, Reister & Assocs.,** 89 N.M. 7, 9, 546 P.2d 72, 74 (Ct. App.) ("New Mexico has allowed subrogation where one secondarily liable pays a debt and then proceeds against one primarily liable, stating that it is allowed in such a case because the one secondarily liable had a 'legal interest to protect.'"), **cert. denied,** 89 N.M. 5, 546 P.2d 70 (1976).

{22} Under Section 112 of the **Restatement,** a surety also has the right to exoneration against its principal if the surety has a current obligation to pay out on a guaranty of the principal's obligation. Although I know of no New Mexico case that applies this right of exoneration, I see no reason why we would not adopt the law as contained in the **Restatement** and hold that, where the principal obligor can satisfy the obligation himself or itself, "it is inequitable for the surety to be compelled to suffer the inconvenience and temporary loss which a payment by him will entail if the principal can satisfy the obligation." **Id.** § 112, cmt. a; **Gardner v. Bean,** 677 P.2d 1116, 1119 (Utah 1984) ("Exoneration permits a guarantor to compel a principal to pay an entire obligation then due.") (citing **Restatement** § 112)).

{23} With respect to the right of contribution from co-sureties, Section 149 of the **Restatement** gives the surety the right to such contribution if the surety has paid more than the surety's proportionate share. **See First Nat'l Bank v. Energy Equities, Inc.,** 91 N.M. 11. 17, 569 P.2d 421, 427 (Ct. App. 1977) (recognizing right of guarantor to contribution against co-guarantors); **see also Gardner,** 677 P.2d at 1118 (same) (citing **Restatement** § 149 cmt. a).

{24} Thus, under generally accepted principles of suretyship and in light of existing New Mexico caselaw, I surmise that the Hiatts would have, under New Mexico law, the rights of reimbursement and exoneration against their principal, Deerfield, as well as the right of subrogation to the Bank's interest in any assets that stood as security and the right of contribution against their co-guarantors, Mr. and Mrs. David.

{25} Section 164 of the **Restatement,** comment a, states: "Payment by a surety gives rise to rights of reimbursement and contribution. In the ultimate settlement the rights of several parties must be adjudicated. If possible, in order to avoid needless litigation, these rights should be determined in one action." Similarly, the Court in **Burger King** noted that a factor in determining whether the assertion of personal jurisdiction would comport with "fair play and substantial justice" is "the interstate judicial system's interest in obtaining the most efficient resolution of controversies." **Burger King,** 471 U.S. at 477 (quoting **World-Wide Volkswagen Corp. v. Woodson,** 444 U.S. 286, 292, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980)). In light of the foregoing considerations, I suggest that New Mexico is the only place where all the rights of the various

[7] Section 82, comment g, of the **Restatement** states: "The term 'guaranty' is used in this Restatement as a synonym for suretyship. 'Guarantor' is used as a synonym for surety. 'Guarantee' is used as a verb meaning to assume a suretyship obligation."

parties could be adjudicated in a single action. Ironically, statute of limitations considerations aside, the majority's holding requires the FDIC to sue the Hiatts in California and, if the FDIC recovers, the Hiatts to sue Deerfield (if it still exists and has assets) and the Davids in New Mexico for reimbursement and contribution. I see no justification for imposing this circuitous and inefficient, multiple-litigation requirement on the parties to resolve a dispute over what was unquestionably (insofar as the Hiatts were concerned) an interstate commercial transaction—with, however, no feature outside New Mexico other than the fortuitous circumstance that the Hiatts signed the guaranty in California and then "mechanically" mailed it back to New Mexico.

{26} In these days of computers and modems, cellular phones and fax machines, overnight courier services and fiber optic networks, I cannot see why the majority balks at the reality that this nation is not a collection of fifty balkanized republics but is rather an integrated, highly commercialized, free (at least in theory) market, in which territorial divisions operate under the Due Process Clause to protect individual rights—not as **Burger King** said. to act as a shield against interstate obligations voluntarily assumed. **See also Burger King,** 471 U.S. at 476 ("it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted."); **but see Hanson v. Denckla,** 357 U.S. at 251 ("[Territorial] restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."); and **compare Burger King,** 471 U.S. at 472 n. 13 ("Although the protection [of due process] operates to restrict state power, it 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than as a function 'of federalism concerns.'" (quoting **Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,** 456 U.S. 694, 702-03 n.10, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982))).

{27} The majority's footnote 3 denigrates the precedential value of our own case of **Hunter-Hayes Elevator Co. v. Petroleum Club Inn Co.,** 77 N.M. 92, 419 P.2d 465 (1966). In that case we upheld personal jurisdiction over individual nonresident defendants who executed, outside New Mexico, personal guarantees of promissory notes executed by a New Mexico corporation and secured by New Mexico real estate—but payable in Oklahoma. The proceeds from the notes were to be used for construction of a building in New Mexico on the mortgaged land. In a guaranty transaction—where the contacts with New Mexico were certainly more "attenuated" than they are here, since the guaranteed notes were payable in another state—we found that "traditional notions of fair play and substantial justice [were] not offended" by the exercise of personal jurisdiction over the guarantors in New Mexico. **Id.** at 96, 419 P.2d at 467.

{28} Similarly, there are various cases around the country in which, in different contexts, minimal commercial activity within a state has been deemed sufficient for an exercise of personal jurisdiction. **See. e.g., FDIC v. O'Donnell,** 136 B.R. 585, 591 (D.D.C. 1991) (personal jurisdiction exercised over nonresident defendants who guaranteed a promissory note; no "substantive identity" between guarantor and obligor indicated by opinion); **Panos Investment Co. v. District Court,** 662 P.2d 180, 182 (Colo. 1983) (en banc) (jurisdiction over nonresident guarantors upheld: "a guarantee by its very nature is a purposeful act. The obligation to which I the guarantee relates is payable in Colorado. . . . It is not unreasonable to subject a guarantor to the jurisdiction of courts in the very state where an obligation is specifically payable when the makers fail to perform their obligations and the guarantee becomes operable."); **Van Schaack & Co. v. District Court,** 189 Colo. 145, 538 P.2d 425 (Colo. 1975) (en banc) (personal jurisdiction over nonresident issuer of letter of credit upheld based in part on issuer's inducing conduct in forum state); **Stephenson v. Barringer,** 758 F. Supp. 657, 662 (D. Kan. 1991) (personal jurisdiction sustained over nonresident insurance agency that insured risk in forum state; "an

insurance company that reaches across state boundaries and contracts with residents of a foreign state to provide insurance makes itself and its agents amenable to personal jurisdiction in that state"); **Jeffreys v. Exten,** 784 F. Supp. 146, 153 (D. Del. 1992) (personal jurisdiction over nonresident mortgagee of forum state property upheld; mortgagee had "affirmatively taken an interest in [the forum state's] real property and would presumably invoke the protection and benefit of its laws if the mortgage terms were not complied with").

{29} Finally, I wish to register my continuing objection to this Court's rigid adherence[8] to the lex loci contractus choice-of-law rule for deciding which state's law will govern a dispute over a contract. **Cf. Nez v. Forney,** 109 N.M. 161, 164-65, 783 P.2d 471, 474-75 (1989) (Montgomery, J., specially concurring) (criticizing distinction between "substance" and "procedure" in selecting choice-of-law provision in contract case and advocating approach based on respective states' interests in issues involved in controversy). There is no issue in this case concerning the applicability of California or New Mexico law to the Hiatts' guaranty, and I doubt that, even if there were such an issue, there is any conflict between the laws of the two states. In any event, I cannot conceive of a case in which the forum state (here New Mexico) would have a stronger interest in applying its law to the facts of the case—i.e., a more significant relationship with the dispute—than exists in this case.

{30} For the foregoing reasons, I would affirm the trial court's order refusing to set aside the default judgment against Mr. and Mrs. Hiatt.

SETH D. MONTGOMERY,
Chief Justice

[8] In **State Farm Mutual Insurance Co. v. Conyers,** 109 N.M. 243, 246-48, 784 P.2d 986, 989-91 (1989), authored by Justice Baca, author of today's majority opinion, this Court displayed a willingness to consider an approach, such as that embodied in Section 6 of the **Restatement (Second) of Conflict of Laws** (1971), other than the strict lex loci contractus rule.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-048

Filing Date: April 18, 1994

Docket No. 21,142

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JACK M. CLIFFORD,

Defendant-Appellant,

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JACK J. CLIFFORD,

Defendant-Appellant.

CERTIFICATIONS FROM THE NEW MEXICO COURT OF APPEALS
Albert S. Pat Murdoch, District Judge

Motions for Rehearing Denied April 18, 1994

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OPINION

BACA, Justice.

{1} Defendants' motions for rehearing to consider whether Defendants' racketeering convictions should be reversed was considered but not granted. We withdraw our opinion filed March 8, 1994 and substitute the following after reviewing Defendants' motions for rehearing and the State's reply.

{2} Defendants Jack M. Clifford and Jack J. Clifford appeal their convictions on twelve counts of embezzlement, one count of fraud, and one count of racketeering. Pursuant to NMSA 1978, Section 34-5-14(C) (Repl. Pamp. 1990), we accepted certification from the Court of Appeals to address one issue: Whether the trial court erred in instructing the jury on the elements of embezzlement. Because our jurisdiction under Section 34-5-14(C) extends to the entire case, **State v. Orosco,** 113 N.M. 780, 781, 781 n.2, 833 P.2d 1146, 1147, 1147 n.2 (1992), we address the following additional issues: (1) Whether the trial court erred when it allowed the testimony of two attorney witnesses and (2) whether substantial evidence supports the fraud conviction.[1] After considering Defendants' motions for rehearing, we also address whether Defendants' racketeering convictions should be reversed. We affirm in part, reverse in part, and remand for a new trial on the embezzlement and racketeering charges.

I

{3} The following facts viewed in the light most favorable to sustaining the verdict, **see State v.**

[1] Defendants also asserted that the record lacked substantial evidence to support their convictions on embezzlement. Our resolution of the issue certified obviates the need to address that issue.

Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988), were adduced at Defendants' trial. Defendants Jack J. and Jack M. Clifford were involved in countless limited partnerships for the development of real estate. Defendants' land development business consisted of obtaining investors who would advance money to acquire and develop real estate. The property would be improved, refinanced and sold at a profit with the proceeds being distributed to the investors and the Cliffords. At the center of activity was the Clifford Partnership. This partnership consisted of Defendants and acted as a clearinghouse for most of the Cliffords' other entities.

{4} This case centers around a particular limited partnership project known as Clifford Plaza II (CPII). In order to promote CPII, Defendants informed investors that excess funds from the project were to roll into an investment known as Clifford Plaza III (CPIII). This was to be an office building adjacent to and similar to CPII.

{5} During the latter part of 1986 and early 1987, fourteen limited partners invested a total of $ 1,016,000 in CPII. However, the funds being channeled into CPII were transferred into the Clifford Partnership. In fact, on twelve occasions between November 24, 1986 and May 6, 1988, the Cliffords signed checks which transferred a total of $ 1,049,000 from CPII to the Clifford Partnership. The Cliffords spent the transferred money on the ordinary operating expenses of the Clifford Partnership, in which none of the CPII limited partners had any interest. In 1988, the limited partners became suspicious when no financial statement for 1987 was released and the Cliffords would not explain why no statement would be released. The investors hired an attorney, Paul Fish, to investigate the Cliffords' records. Once Fish discovered the transfer of over $ 1 million from CPII to Clifford Partnership, the Cliffords attempted to "cover their tracks" by assigning to CPII limited partnership interests in entities that owned an interest in land known as the Schwartzman property. At the time of the assignment, however, the mortgage underlying the Schwartzman property was about to be in default and the Cliffords lacked the resources to make the mortgage payments. Consequently, the property was repossessed by the mortgagee leaving CPII with nothing.

{6} The transfers of money from CPII to the Clifford Partnership form the basis of the State's embezzlement case and each transfer was charged as a separate count of embezzlement.

{7} The State's fraud charges revolve around the last limited partner into CPII, an entity managed by Gary Swearingen and Valerie Ricks, a father and daughter partnership. Swearingen and Ricks invested $ 461,500 in CPII, made in two installments. They paid $ 255,000 on March 27, 1987 and $ 206,500 on May 5, 1987. By the time of the first installment, the Cliffords had transferred over a half-million dollars from CPII. Before investing in CPII, Swearingen and Ricks were told by the Cliffords that CPII funds would be used to develop CPIII. They were not told that CPII money had been taken and spent by the Cliffords for their own enterprises, and while current CPII financial information was available, the Swearingens were sent the outdated and misleading 1986 financial statements. In fact, the same day Swearingen and Ricks paid $ 255,000 to CPII, the entire sum was transferred to the Clifford Partnership. All but $ 500 of the next installment of $ 206,500 was also diverted by the Cliffords, once again on the very day the funds arrived. Defendants were subsequently charged with and convicted of embezzlement in excess of $ 20,000 and $ 2,500, fraud in excess of $ 20,000, and racketeering. Defendants appealed their convictions to the Court of Appeals which certified the fraudulent intent jury instruction issue to this Court.

II

{8} The first issue that we address is whether the trial court erred when it instructed the jury regarding the embezzlement charges. Both Defendants claim that the trial court erred in instructing the jury because the jury instructions as given omitted an essential element of embezzlement: fraudulent intent. They both contend that this deficiency in instructing the jury mandates

reversal of their convictions for embezzlement. We agree.

{9} In **State v. Green,** 116 N.M. 273, 861 P.2d 954 (1993), we considered the propriety of the uniform jury instruction for embezzlement, SCRA 1986, 14-1641. In **Green,** the trial court's embezzlement instruction tracked the language of the uniform jury instruction. We held that the instruction failed to include fraudulent intent, an essential element required for a conviction under our embezzlement statute, Section 30-16-8 (Repl. Pamp. 1984). **Green,** 116 N.M. at 277, 861 P.2d at 958. While the defendant in **Green** neither objected to the instructions as given nor tendered a correct instruction, we reversed his conviction for embezzlement because the trial court failed to instruct the jury on all elements essential for a conviction. **Id.** at 279, 861 P.2d at 960.

{10} In the case at bar, the trial court gave a series of instructions regarding the numerous charges of embezzlement against Defendants. These instructions followed the language of SCRA 14-1641 and were identical in form to the embezzlement instruction given in **Green.** The trial court also charged the jury with a general intent instruction, which is patterned after SCRA 14-141. As in **Green,** the instructions as given did not instruct the jury that it needed to find that the defendants acted with fraudulent intent to convict them of the embezzlement charges. Moreover, the general intent instruction as given does not correct the error propagated by the failure to instruct on fraudulent intent. **See State v. Bunce,** 116 N.M. 284, 288-89, 861 P.2d 965, 969-70 (1993). We reiterate our holding in **Bunce** that the failure to include an essential element in the elements instruction can never be corrected by including the concept elsewhere in the instructions. **See id.**

{11} While Defendants in the instant case couch their arguments in terms of a constitutional violation, we prefer to decide this issue under the doctrine enunciated in **State v. Osborne,** 111 N.M. 654, 808 P.2d 624 (1991). In that case, the trial court failed to instruct the jury on all essential elements of the crime. We based our reversal on two separate grounds: First, that SCRA 1986, 5-608(A), requires that the jury be instructed on all elements essential for conviction; and second, that a conviction based on a jury instruction that omitted an essential element under the facts of the case amounted to fundamental error. **Osborne,** 111 N.M. at 661-63, 808 P.2d at 631-33.

{12} In this case, we need not resort to an application of the doctrine of fundamental error because Defendants, unlike the defendant in **Green,** offered an instruction on fraudulent intent. We hold that under the facts here, failure to instruct the jury on an essential element of embezzlement—fraudulent intent—is reversible error under Rule 5-608(A). **See Green,** 116 N.M. at 277, 861 P.2d at 958. Accordingly, we reverse Defendants' embezzlement convictions and remand for a new trial on those counts.

III

{13} We next address whether substantial evidence supports the fraud convictions. Defendants contend that there was insufficient evidence to support a verdict of guilty beyond a reasonable doubt that they misrepresented facts and intended to deceive or cheat Gary Swearingen and Valerie Ricks. This is an essential element of fraud and the jury was so instructed in Jury Instruction Number 16.

{14} Our review consists of determining "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." **Sutphin,** 107 N.M. at 131, 753 P.2d at 1319. "Substantial evidence is that evidence which is acceptable to a reasonable mind as adequate support for a conclusion." **State v. Isiah,** 109 N.M. 21, 30, 781 P.2d 293, 302 (1989). We view the evidence in the light most favorable to supporting the verdict and resolve all conflicts and indulge all permissible inferences in favor of upholding the verdict. **Sutphin,** 107 N.M. at 131, 753 P.2d at 1319. We review all of the evidence presented in the case, **State v. Aranda,** 94 N.M. 784, 786, 617 P.2d 173, 175 (Ct. App. 1980), and neither reweigh the evidence nor

substitute our judgment for that of the jury, **Sutphin,** 107 N.M. at 131, 753 P.2d at 1319.

{15} In light of the above standard of review, Defendants' contentions of insufficient evidence to support guilty verdicts of fraud must fail. "Fraud consists of the intentional misappropriation or taking of anything of value which belongs to another by means of fraudulent conduct, practices or representations." NMSA 1978, § 30-16-6 (Repl. Pamp. 1984). There was sufficient evidence presented at trial of all of the above elements so that the jury could have reasonably inferred that Defendants intentionally misappropriated funds invested by Swearingen and Ricks and that they received those funds due to misrepresentations made to Ricks. First, Defendants led Swearingen and Ricks, along with the other limited partners to believe that all funds generated from CPII would be used to develop CPIII and not to maintain the Defendants' own partnerships. Evidence was presented that neither Defendant revealed to Swearingen nor Ricks that funds would be taken from CPII for use in the Clifford Partnership. Moreover, Defendants' offering circular stated that the general partners were accountable to the partnership as fiduciaries and Defendants' own expert testified that this duty required them to use the CPII assets only for the benefit of CPII and CPIII. Evidence was presented, however, showing that the funds invested by Swearingen and Ricks in CPII were immediately diverted from the partnership and expended to meet the obligations of Defendants' other enterprises. The jury could have reasonably found that the Defendants intentionally misappropriated the funds invested by Swearingen and Ricks by fraudulently representing what would be done with those funds.

{16} Defendants raise several arguments. First, Defendants suggest that no fraud occurred because Swearingen and Ricks did not suffer a financial loss. This argument is without merit because a criminal conviction for fraud does not require that the victim suffer a pecuniary loss. **See State v. McCall,** 101 N.M. 32, 32-33, 677 P.2d 1068, 1068-69 (1984).

{17} Defendants also contend that their representation that CPII excess funds would be invested for the benefit of the partnership and its partners was not deceptive because such an investment was made by acquiring interests in the Schwartzman property. However, Defendants immediately used the transferred excess funds, including the money invested by Swearingen and Ricks for their own purposes. Furthermore, interests in the partnerships' owning interests in the Schwartzman property were not transferred to CPII until almost two years later, at which time Defendants' entities were unable to make the mortgage payments due on the property. Whether Defendants actually invested the funds was a matter for the jury to decide, **see State v. Schifani,** 92 N.M. 127, 130, 584 P.2d 174, 177 (Ct. App.), **cert. denied,** 92 N.M. 180, 585 P.2d 324 (1978), and sufficient evidence was presented to support a jury finding that Defendants did not invest the funds for the benefit of the partnership.

{18} Finally, Jack J. Clifford argues that there was no evidence that the investors would not have invested in CPII had they been made aware of the transfer of excess funds to Clifford Partnership. We agree with the Court of Appeals that Ricks's testimony provided the necessary evidence. She testified that she would have "questioned why the transfers were made and what the money was doing there." Ricks also stated that she would not have invested $ 206,500 on May 5 if she had known that Defendants intended to transfer the money to Clifford Partnership. In sum, the jury could have reasonably found from the evidence that Swearingen and Ricks would not have invested in CPII if they had known that the excess funds had been spent for Defendants' own purposes rather than invested.

IV

{19} We next address whether Defendants' racketeering convictions should be reversed. Defendants were convicted for racketeering under NMSA 1978, Section 30-42-4(A) (Repl. Pamp. 1989). Because we are reversing Defendants' embezzlement convictions, Defendants' racketeering convictions must also be reversed. To be

convicted under Section 30-42-4(A), Defendants must have committed at least two punishable offenses that constitute racketeering. **See** § 30-42-4(A). Without the embezzlement convictions, only one predicate offense, fraud, remains. We reverse the racketeering convictions because the law requires us to do so. We do not, however, do so in response to Defendants' arguments on rehearing that the racketeering conviction was properly challenged on appeal. The only mention that the racketeering conviction could not stand, which we could find, was contained in the conclusory sentence of Defendant Jack J. Clifford's brief in chief and Defendant Jack M. Clifford's brief in chief. We remind counsel that we are not required to do their research, **Lee v. Lee (In re Adoption of Doe),** 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984), and that this Court will not review issues raised in appellate briefs that are unsupported by cited authority. **State v. Isiah,** 109 N.M. 21, 25, 781 P.2d 293, 297 (1989). When a criminal conviction is being challenged, counsel should properly present this court with the issues, arguments, and proper authority. Mere reference in a conclusory statement will not suffice and is in violation of our rules of appellate procedure. **See** SCRA 1986, 12-213 (Repl. Pamp. 1992).

V

{20} Finally, having held that Defendants' convictions for embezzlement should be reversed, we need not address whether the district court erred by permitting two attorneys, John Salazar and Paul Fish, to render their opinions regarding the authority of Defendants to act as they did under the provisions of the limited partnership agreement and related documents. Their testimony related solely to the embezzlement convictions and not the fraud convictions that we affirm. On remand, however, suffice it to say that opinion testimony that seeks to state a legal conclusion is inadmissible. **See First Nat'l Bank in Albuquerque v. Sanchez,** 112 N.M. 317, 324, 815 P.2d 613, 620 (1991) (the trial court has "the exclusive province and responsibility" of telling the jury whether conduct is or is not "legal"); **Beal v. Southern Union Gas Co.,** 66 N.M. 424, 436-37, 349 P.2d 337, 346 (1960) (neither expert nor non-expert witnesses are permitted to give opinions on questions of law).

{21} On appeal, we affirm Defendants' fraud conviction. We reverse the embezzlement and racketeering convictions and remand for a new trial on those charges.

{22} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

RICHARD E. RANSOM,
Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-089

Filing Date: August 25, 1994, As Corrected October 19, 1994, As Corrected December 16, 1994

Docket No. 21,069

STATE OF NEW MEXICO,

Petitioner-Appellee,

v.

JAY ALLEN ANDERSON,

Respondent-Appellant.

ORIGINAL PROCEEDING ON CERTIORARI
Ross Sanchez, District Judge

Hon. Tom Udall, Attorney General
Margaret McLean, Assistant Attorney General
Santa Fe, New Mexico

for Petitioner-Appellee.

Sammy J. Quintana, Chief Public Defender
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Rothstein, Walther
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Dan Cron
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William C. Thompson
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for Respondent-Appellant.

OPINION

BACA, Justice.

{1} In this opinion, we address the subject of the admissibility of deoxyribonucleic acid ("DNA") evidence in New Mexico to inculpate the accused and, more specifically, the admissibility of this evidence obtained through the methods utilized by the Federal Bureau of Investigation ("FBI"). We granted the State's petition for writ of certiorari pursuant to SCRA 1986, 12-102(A)(6) (Repl. Pamp. 1992) to review the Court of Appeals' decision holding the State's DNA evidence inadmissible at trial. The Court of Appeals held that the DNA evidence linking Defendant to the crime was inadmissible because the State failed to prove that the FBI's current database and statistical methodology were generally accepted in the scientific community as required by the rule set out in **Frye v. United States,** 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923). **State v. Anderson,** 115 N.M. 433, 853 P.2d 135 (Ct. App.), **cert. granted,** 115 N.M. 145, 848 P.2d 531 (1993). On appeal, the State argues that (1) the **Frye** standard is the appropriate standard to determine the admissibility of scientific evidence such as DNA typing and (2) that the procedures and calculations used in the scientific community to determine the probability of a coincidental match meets the **Frye** standard. Because this Court recently abandoned the use of the **Frye** test in New Mexico to determine the admissibility of scientific evidence, **State v. Alberico,** 116 N.M. 156, 861 P.2d 192 (1993), we address only one issue: Whether the procedures and calculations used in determining the probability of a coincidental DNA match meet the standard provided by our rules of evidence in SCRA 1986, 11-702 (Repl. Pamp. 1994) (testimony by experts), SCRA 1986, 11-703 (Repl. Pamp. 1994) (bases of expert opinion testimony), SCRA 1986, 11-403 (Repl. Pamp. 1994) (exclusion of relevant prejudicial evidence) and explained in detail by this Court in **Alberico.**[1]

[1] We do not consider Defendant's claim that the trial court abused its discretion by failing to consider his motions for reconsideration. We agree with the State that this issue was not properly presented to this Court on appeal as Defendant did not file a petition for writ of certiorari on this issue. Only

We reverse the Court of Appeals and affirm the trial court's ruling.

I. FACTS

{2} Defendant Jay Allen Anderson was indicted and charged with twenty-eight counts including kidnapping, criminal sexual penetration, attempted first-degree murder, and aggravated battery. The charges stemmed from the kidnapping and assault of Joni Hertz in 1988.

{3} In September of 1988, Hertz was driving from Oklahoma to California alone. Although she started out following a friend's vehicle, she became separated from her group. Hertz stopped at a convenience store in Albuquerque after discovering that her wallet had either been stolen or was lost. While she was talking with the clerk, Defendant entered the store and proceeded to join in the conversation. After Hertz told Defendant that she was alone and without any money, Defendant offered to give Hertz a $ 10 loan in exchange for a ride home. She accepted his offer and they drove to a field outside a trailer park.

{4} At the field, Defendant and Hertz engaged in conversation and then, abruptly, Defendant forced Hertz to perform oral sex. After ejaculating and forcing Hertz to swallow his semen, Defendant told Hertz that he was "going to have to kill [her]" because he did not want to get caught for his crime. Hertz pleaded with him not to kill her. Defendant severely beat her and left her unconscious. The plea and disposition agreement states that Defendant beat Hertz with "a block of wood and/or a steel barbell rendering her unconscious and causing injuries to her head requiring over 200 stitches."

{5} After Hertz identified Defendant as the perpetrator, he was arrested. The State recovered a sample of semen from Hertz's vomit and the FBI performed serological tests to compare it with Defendant's DNA profile. DNA testing also showed that blood found on Defendant's jacket was consistent with Hertz's DNA profile. The State moved for a **Frye** hearing and was ordered to disclose everything relating to the DNA typing. Defendant filed a motion in limine requesting that unreliable scientific opinion evidence be ruled inadmissible. After the **Frye** hearing was held, the trial court ruled the DNA typing evidence admissible, stating:

> Testimony by the State's experts and the pertinent scientific literature convinces this Court by a preponderance of the evidence that the FBI's method for computing the statistical frequency of DNA pairings is a valid procedure and is generally accepted in the relevant scientific community.
>
> In summary, the protocol used by the FBI for DNA testing, including their method of computing the statistical frequency of DNA prints meets the standard for acceptance as required by **Frye.** The court also finds and concludes that the procedures are valid and reliable.
>
> . . .
>
> The Court finds and concludes that those scientists most qualified to assess the general validity of the FBI's protocol have spoken on this subject and are the determinative voice as contemplated by the Court in **Frye v. United States.** Motion to Exclude DNA Evidence is denied.

{6} Following this ruling, the State and Defendant entered into a plea and disposition agreement. The agreement set forth the facts surrounding the Defendant's criminal sexual acts. It also contained the results of serological evidence and the DNA typing. It stated:

> DNA typing analyses done by the Federal Bureau of Investigation show that the DNA profile obtained from sperm in the vomit matches the Defendant's DNA profile and the probability of selecting an unrelated individual from the population

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the State filed a petition and we will consider only the issues raised by the State's petition. SCRA 1986, 12-502(C)(2) (Repl. Pamp. 1992).

> with that profile is approximately 1 in 6.2 million. DNA typing of the blood on Defendant's jacket produced a DNA profile matching that of Joni Hertz and the probability of selecting an unrelated individual at random with that same profile is approximately 1 in 30.5 million.

{7} Defendant appealed his conviction, arguing that the trial court committed reversible error by admitting the DNA typing evidence. The Court of Appeals reversed the trial court, holding that the FBI's method of computing population frequency statistics lacks general scientific acceptance because the binning procedure utilized by the FBI was controversial in the scientific community and therefore did not meet the standards of the **Frye** test. **Anderson,** 115 N.M. at 437, 444, 853 P.2d at 139, 146.

II. DNA BACKGROUND

{8} A basic understanding of the scientific principles and techniques underlying DNA typing[2] is essential in order to understand the legal issues relating to its admissibility. Unless otherwise stated, we derive our scientific explanation of DNA and DNA profiling from testimony given at the **Frye** hearing, from a report entitled "DNA Technology in Forensic Science," which the National Research Council published in April 1992, and from **Government of Virgin Islands v. Penn,** 838 F. Supp. 1054, 1057-73 (D.V.I. 1993) and **State v. Vandebogart,** 136 N.H. 365, 616 A.2d 483, 486 (N.H. 1992).

[2] We are aware that DNA typing is commonly referred to as "DNA fingerprinting." Although the term "DNA fingerprinting" was not used in this case, we find the use of this term unfortunate and reject its use in describing DNA profiling evidence because it implies that DNA typing evidence is conclusive. DNA typing evidence is never conclusive because the technology currently available can only determine if the contributor of the known sample could have contributed the unknown (or "evidentiary") sample. The closest science can come, at this point, to determining whether two pieces of DNA match is to make a statistical calculation that the "match" is only a random match.

A. DNA Theory

{9} DNA forensic testing is used to determine the likelihood that a sample of blood, tissue, hair, or sperm came from a given person. DNA is a molecule found in all cells that have a nucleus, including white blood cells, sperm cells, cells surrounding hair roots, and the cells in saliva. DNA provides the genetic blueprint that determines the physical structures and individual characteristics of every living organism. The significant feature of DNA for forensic purposes is that, with the exception of identical twins, no two individuals have identical DNA. Furthermore, because DNA does not vary within a particular individual, a DNA molecule found in one cell will be identical to the DNA found in every other cell of that person's body.

{10} The DNA molecule is shaped like a double helix that resembles a twisted ladder. The "sides" of the ladder are composed of a chain of deoxyribose sugars and phosphates, while the "rungs" consist of a pair of nucleotide bases. The bases are made up of adenine (A), cytosine (C), guanine (G), and thymine (T). According to the "base pair rule," A can only bond with T and G can only bond with C. Thus, the order of the bases on one side of the rung will determine the order on the other side. That is, if one half of the "ladder" had a sequence of bases on its "side" that read "A-G-A-C-T-G," then the complementary strand from the other half of the "ladder" would read "T-C-T-G-A-C." The order in which these base pairs appear on the DNA ladder constitutes the genetic code for the cell. A sequence of base pairs responsible for producing a particular protein is called a" gene." A gene, the basic unit of heredity, consists of a sequence of between 1000 and 2,000,000 nucleotides.

{11} Inheritable characteristics are controlled by pairs of genes, or alleles, that occupy the same sites, or loci, on paired chromosomes. Over 99% of these genes are identical among all human beings. These genes define us as humans, rather than animals, plants, or other forms of life. They account for the many

shared characteristics of all human beings. The remaining genes—known as "polymorphic" genes because they vary in form from person to person—account for our unique characteristics as individuals. Many polymorphic genes are known to have definite functions. Some are responsible for the color of our hair or eyes, some for the shape of our body or the type of our blood. Other polymorphic genes, however, appear to have no function whatsoever. These "junk DNA" segments are called "variable number tandem repeats" ("VNTRs") and they typically consist of varying lengths of repeating sequences of base pairs. The site where a particular VNTR is located is called a "locus." The total fragment length of a polymorphism is called a restriction fragment length polymorphism ("RFLP") and its length is determined by the number of VNTRs. Although all individuals have the same sequence of nucleotides at these VNTR locations, what differs from person to person is the number of times this sequence repeats itself. Thus, differences in DNA are detected by counting the number of times a particular sequence repeats at that VNTR. A variation of even one nucleotide in the sequence of DNA is detectable. Such a variation can be detected by applying a biological catalyst, called a "restriction enzyme" to the DNA. The restriction enzyme cuts the DNA into RFLPs depending on the cutting sites recognized by the enzymes. Because of its extensive variability, the VNTR class of RFLPs is the most useful in distinguishing among individuals.

B. DNA Profiling Techniques

{12} DNA analysis is generally performed by disassembling the ladder in several ways. The FBI, as well as two commercial laboratories, Cellmark and Lifecodes, use the RFLP method of analysis.

> RFLP analysis determines if there is a "match." A "match" does not mean that the suspect was definitely the source of the genetic material found at the crime scene, however, but simply that the suspect cannot be eliminated as the potential source. Even if there is a perfect match, there is a possibility that the two samples came from different people whose DNA patterns at the targeted loci are indistinguishable.

Vandebogart, 616 A.2d at 486. This Court, in an effort to be precise and scientifically accurate, will not paraphrase the operative steps of RFLP but will follow the example of most courts considering DNA methodology and incorporate the FBI written protocol. We reproduce the version used by the New Hampshire Supreme Court in **Vandebogart,** 616 A.2d at 487-88.

1. **Extraction of DNA.** The DNA is first extracted from the evidentiary sample by using chemical enzymes and then purified.
2. **Restriction of digestion.** The DNA is then cut with chemical scissors called "restriction endonucleases" [("restriction enzymes")]. These [enzymes] recognize certain base pairs and sever the DNA molecule at specifically targeted base pair sites to produce RFLPs.
3. **Gel electrophoresis.** The cut fragments of DNA molecules are next placed in an agarose gel which is later electrically [charged] to sort the fragments by length. Because DNA is negatively charged, the fragments will migrate toward the positive end of the gel. The distance traveled will depend upon the length of the fragment with the shorter fragments [because they are lighter] traveling further in the gel. [Fragments of known base pair lengths, called] molecular weight standards, [or] "size markers," are placed in separate lanes to measure the distance that the fragments travel. For comparison, several different samples of DNA from known and unknown sources are run on the same gel, but in different tracks or lanes.
4. **Southern blotting or transfer.** Because the agarose gel is very difficult to work

with, the fragments are transferred to a more functional surface by a method called "Southern transfer" [or "Southern blotting"]. A nylon membrane is placed over the gel, which is set upon a sponge saturated with sodium hydroxide solution. The solution carries the fragments from the gel onto the nylon membrane, and they become permanently fixed on the membrane, referred to as a "blot," in the same pattern as in the gel. Also during this step, a denaturation process severs each double-stranded DNA fragment into two single strands—one inherited from the father and one from the mother.

5. **Hybridization.** Next, a single-locus genetic probe is used to locate a specific polymorphic region of the DNA on the blot. A genetic probe is a single-stranded segment of DNA designed to complement a single-stranded DNA base sequence that is associated with a particular locus on a chromosomal pair. The probe will bond with any single-stranded fragments containing that particular base sequence. The typical result is that the probe will bind to DNA fragments at one or two locations in each lane, depending on whether the individual is homozygous or heterozygous for that particular allele. The genetic probe is tagged with a radioactive marker, which attaches to the probe and emits radiation without altering the function of the probe. The marker is used to determine the probe's position on the blot after it hybridizes with polymorphic segments.
6. **Autoradiography.** Autoradiography is the photographic process that reveals the position of the polymorphic DNA segments. After hybridization, the nylon membrane is placed between two pieces of X-ray film. The radioactive probes expose the film at their respective locations. Black bands appear on the processed film where the radioactive probes have bonded to the RFLPs, producing a DNA "print. " Typically, each probe will expose one or two bands for each DNA sample, which reflects the maternal or paternal contributions to the individual's DNA profile. The position of each band indicates the location of a polymorphic segment on the blot. Location, in turn, indicates the length of the DNA fragment that contains the [polymorphic DNA] segment. Because the length of the DNA fragments varies among individuals, the position of their bands on a DNA print can differentiate individuals.

   After the first probe has been applied and the autoradiography process is complete, the first probe is stripped from the membrane. The hybridization process is then repeated on the same membrane using a second probe. This process is designed to locate a different VNTR base sequence on another chromosomal pair. The FBI usually repeats the hybridization and autoradiography processes using four or five different probes sequentially on a single blot. Repeating the processes with different probes decreases the likelihood that a match between the defendant's profile and the forensic profile is a random event. It is rare for two unrelated persons to have eight or ten matching alleles across four or five different VNTR loci.
7. **Interpretation of autoradiographs.** The final step is to determine if a match exists in the two lanes of the autoradiograph between the DNA sample taken from the suspect and the forensic sample taken from the crime scene or victim. The FBI uses a two-stage procedure for deciding whether a match exists. First, the FBI looks for a visual match. A visual match means that the forensic sample of DNA and the suspect's DNA have the same number of bands in approximately the same locations on each autoradiograph. If no visual match exists, the FBI decides

whether the non-match should be interpreted as inconclusive or as excluding the suspect. If a visual match is declared, the FBI uses a computer-assisted process to verify the existence of a match. Through a series of calculations, the computer will determine whether the difference in size of the fragments detected in the defendant's sample and the forensic samples is within accepted limits. If the size of the suspect's DNA fragments and the forensic samples is within plus or minus two and one-half percent of each other, then the visual match is confirmed. If the difference between the two exceeds the "matching criteria" of plus or minus two and one-half percent, then the autoradiograph is considered either inconclusive or as excluding the suspect. . . .

Once the suspect's DNA profile is declared to match the forensic sample,[3] the FBI relies on statistical methods used in population genetics to calculate the likelihood of a random match. "Fixed bin analysis" is the FBI's method for assigning to each band in a DNA profile a value or frequency that represents how often a particular allele may occur at a specific VNTR locus in a given population. To estimate population frequencies for particular alleles at targeted VNTR loci, the FBI has compiled data bases for Caucasian, Black, Asian, and Hispanic populations. [Although these population studies are broken down by racial groups, they are not further divided into ethnic subpopulations within these groups, such as (within the Caucasian group) Polish or Italian.] The FBI's Caucasian data base was derived from RFLP analyses of blood samples of approximately 225 FBI agent-trainees. The end result of the FBI's fixed bin analysis of RFLPs from a forensic sample is a statistic which estimates the probability that the DNA profile of an individual chosen at random from a given population might match the DNA profile for the forensic sample of the targeted VNTR loci.

To calculate this statistic, the FBI applies the "product rule." Use of the product rule in this context requires two assumptions about the statistical independence of allele matches: (1) that there is no greater or lesser likelihood that a person carrying one allele at a VNTR locus will also carry another particular allele at the same locus; and[] (2) that carrying one pair of alleles at a locus neither increases nor decreases the chance of carrying another particular pair at a different locus on a separate chromosome. If these assumptions are proper, then the product rule indicates that multiplying the population frequencies of all alleles detected in a DNA sample will yield an estimate of how common that DNA profile is in a given population.

Id. at 487-88; **see also Government of Virgin Islands v. Penn,** 838 F. Supp. at 1057-65 (giving a very detailed discussion of DNA, interpretation of autorads, and population genetics and statistics); **People v. Watson,** 257 Ill. App. 3d 915, 629 N.E.2d 634, 638-640, 196 Ill. Dec. 89 (Ill. App. Ct. 1994) (giving a variation of the same outline); **United States v. Jakobetz,** 955 F.2d 786, 792-93 (2nd Cir.), **cert. denied,** 121 L. Ed. 2d 63, 113 S. Ct. 104 (1992) (giving a simplified outline of the DNA technique); **Fishback v. People,** 851 P.2d 884 (Colo. 1993) (giving a slightly different interpretation and statistical analysis); **People v. Wesley,** 140 Misc. 2d 306, 533 N.Y.S.2d 643 (Co. Ct. 1988)

[3] Concluding that the two samples "match" is not the end of the procedure. "A DNA match merely tells the scientist that the person who contributed the known sample is a potential contributor of the unknown sample. The second step of the DNA identification process then involves a determination of the probability that someone other than the contributor of the known sample could have contributed the unknown sample." **United States v. Martinez,** 3 F.3d 1191, 1194 (8th Cir. 1993), **cert. denied,** 126 L. Ed. 2d 697, 114 S. Ct. 734 (1994).

(giving Lifecodes' operative steps for RFLP analysis).

III. STANDARD OF ADMISSIBILITY

{13} This Court recently held in **Alberico,** 116 N.M. at 167, 861 P.2d at 203, that "the **Frye** test 'should be rejected as an independent controlling standard of admissibility.'" **Id.** (quoting **United States v. Downing,** 753 F.2d 1224, 1237 (3d Cir. 1985)). This Court determined that the New Mexico Rules of Evidence should control the admissibility of novel, scientific evidence. Rule 702 of the New Mexico Rules of Evidence provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

SCRA 1986, 11-702.

> This Court also held that
>
> the proper inquiry under Rule 702 is whether the subject of the expert's testimony is grounded in valid, objective science, that is "scientific, technical or other specialized knowledge," and whether the underlying scientific technique or method is reliable enough to prove what it purports to prove, that [it] is probative, so that it will assist the trier of fact.

Alberico, 116 N.M. at 168, 861 P.2d at 204.

{14} We laid out three prerequisites that had to be met under Rule 702 before expert opinion testimony could be admissible. "The first requirement is that the expert be qualified." **Id.** at 166, 861 P.2d at 202. "The second consideration for the admissibility of scientific evidence in the form of expert testimony is whether it will assist the trier of fact." **Id.** According to the Supreme Court of the United States, this condition is primarily one of relevance. **Daubert v. Merrell Dow Pharmaceuticals, Inc.,** 125 L. Ed. 2d 469, 113 S. Ct. 2786, 2795 (1993). In order to satisfy the precondition that the testimony assist, or be "helpful" to the jury, the proponent of the testimony must demonstrate that the evidence bears "a valid scientific connection to the pertinent inquiry." 113 S. Ct. at 2796; **see also Jakobetz,** 955 F.2d at 796 (stating that the test under federal rule 702 subsumes a relevancy analysis and assumes a "threshold level of reliability"). Likewise, the third requirement set out by this Court, "which is closely related to assisting the trier of fact, is that an expert may testify only as to 'scientific, technical or other specialized knowledge'" with a reliable basis. **Alberico,** 116 N.M. at 166, 861 P.2d at 202. In short, "under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." **Daubert,** 113 S. Ct. at 2795.

{15} The **Daubert** Court rejected **Frye's** general acceptance test as the exclusive test for admissibility of novel scientific procedures or theories and redefined the standard for the admission of expert scientific testimony by holding that the **Frye** test was superseded by the adoption of the federal rules of evidence. **Id.** at 2793. The Court also provided a nonexclusive list of factors to be considered by the trial court when determining whether expert testimony as to novel scientific evidence is reliable (the third requirement in **Alberico). Id.** at 2796-97. It is this prong of the test that elicits the most controversy. In **Alberico** this Court favorably cited to **Daubert** for a list of the Supreme Court factors pertinent to the trial court's determination of whether the scientific evidence is reliable. **Alberico,** 116 N.M. at 167, 861 P.2d at 203. These factors include: (1) whether a theory or technique "can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known potential rate of error" in using a particular scientific technique "and the existence and maintenance of standards controlling the technique's operation"; and (4) whether the theory or technique has

been generally accepted in the particular scientific field. **Daubert,** 113 S. Ct. at 2796-97. In **Alberico,** we set out another non-determinative factor—"whether the scientific technique is based upon well-recognized scientific principle and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture." 116 N.M. at 167, 861 P.2d at 203.

{16} Thus, in a case where expert testimony is offered on a scientific topic unfamiliar to lay jurors, "the trial court's first task is to determine whether the testimony is sufficiently reliable and relevant to help the jury in reaching accurate results." **Kelly v. State,** 824 S.W.2d 568, 572 (Tex. Crim. App. 1992) (en banc); **see also Alberico,** 116 N.M. at 168, 861 P.2d at 204 (stating that the "inquiry must focus on the proof of reliability of the scientific technique or method upon which the expert testimony is premised"). If the trial court determines that the proffered expert testimony is reliable under Rule 702, the trial court must then determine if the scientific evidence should be excluded because its probative value is substantially outweighed by an unfair prejudicial effect under Rule 403.

{17} "The admission of expert testimony or other scientific evidence is peculiarly within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion." **Alberico,** 116 N.M. at 169, 861 P.2d at 205.

> An abuse of discretion standard of review, however, is not tantamount to rubber-stamping the trial judge's decision. It should not prevent an appellate court from conducting a meaningful analysis of the admission [of] scientific testimony to ensure that the trial judge's decision was in accordance with the Rules of Evidence and the evidence in the case.

Id. at 170, 861 P.2d at 206. Applying this standard of review and the trial court's standard under Rule 702 for admitting novel, scientific expert testimony, we proceed to determine whether the DNA evidence in this case was admissible.

IV. THE EXPERTS

{18} Stephen P. Daiger, Ph.D., was called as the State's first expert witness at the **Frye**[4] hearing. Following voir dire, the trial court admitted Dr. Daiger as an expert witness in forensic DNA testing, molecular biology, and population genetics based on his familiarity with the FBI's DNA typing procedures. Dr. Daiger is a molecular geneticist affiliated with the University of Texas Health Science Center and the Baylor College of Medicine. He has a Ph.D. in biology and has published numerous articles on the genetics of human disease.

{19} Dr. Daiger's testimony began with a description of the process of obtaining a DNA print on an autorad. He stated that an FBI examiner then makes a qualitative visual analysis. Next, the DNA bands are evaluated by a computer that uses a pre-determined measurement error of two and one-half percent. Dr. Daiger explained that this measurement is referred to as a "fixed bin." Dr. Daiger described the FBI's method of computing population statistics once a "match" has been declared. He stated that the FBI DNA typing and profiling procedures meet the standards of the scientific community and the appropriate standards for forensic testing. Because Defendant is Caucasian, the Caucasian database was used to determine the statistical probability that Defendant's DNA matched the DNA found in Hertz's vomit.

{20} When cross-examined regarding the FBI database, Dr. Daiger stated that the database is comprised of 400 FBI recruits from across the United States and that the database is separated into four ethnic groups—Caucasian, Black, Hispanic, and Asian. Dr. Daiger stated that the FBI population statistics are "intentionally very broad" and err to the accused's benefit to avoid false inclusion. In other words, any error is deliberately generous to the accused to avoid a false

[4] **Alberico** was decided after the hearing conducted in this case. At the time the **Frye** hearing was held, **Frye** was still the controlling law in New Mexico for the admission of novel scientific evidence.

positive. Dr. Daiger further testified that his position is that the calculations done by the FBI, because they are so conservative in their choice of error ranges and in their choice of binning, will always provide an estimate which is either close to the correct estimate or in all cases larger than the correct estimate. That is, they have chosen a series of compromises and conditions that lead them to have an estimate which is always biased in favor of the defendant, and that in a forensic situation is precisely what I would have wanted to see, and I am very comfortable with what they have done.

{21} The State called Dr. Harold Deadman as its second witness. Dr. Deadman is a supervisory special agent for the FBI at its DNA analysis unit. Over defense objection, the trial court qualified Dr. Deadman as an expert witness in the field of DNA typing techniques used by the FBI. Dr. Deadman has a Ph.D. in organic chemistry and has worked in the FBI crime laboratory since 1972 and in its DNA analysis unit since 1987. Dr. Deadman described the six steps in the standard procedure of DNA typing (extraction, fragmentation, gel electrophoresis, Southern blotting, hybridization, and autoradiography). Dr. Deadman, like Dr. Daiger, testified that "the binning process itself is conservative" and described in detail how the binning calculation actually works.

{22} Generally, the DNA profiles for the different racial groups contain two bands or DNA markers. The specific population database can be used to generate an expected frequency for each DNA marker. Once a frequency for a marker is determined, that information can be used to generate a profile frequency. Because it is not possible to measure exactly the size of a particular DNA fragment, the DNA markers from the specific population are used to determine fragment frequencies. Bands are placed in particular bins which are larger than the repeat sequence (RFLP) so that multiple bands are in a bin. Even though a band's real frequency may be low, every band in the bin is added together, creating a higher frequency and requiring a more exact, and more conservative, match. **See Springfield v. State,** 860 P.2d 435, 445 (Wyo. 1993) for a more detailed description of the FBI binning procedure.

{23} In regard to the "match" between Defendant's DNA profile and the DNA profile produced by the semen found in Hertz's vomit, Dr. Deadman also testified that the FBI procedure is generally accepted by the scientific community. He testified that "the probability of selecting someone at random from a Caucasian population and finding and obtaining an individual that's unrelated to the defendant that has a profile like the profile developed in this case [was] . . . approximately one in 6.2 million."

{24} The defense called four expert witnesses. The first expert witness called for the defense was Dr. Randall T. Libby. Over the State's objection, Dr. Libby was qualified as an expert witness in molecular biology and DNA typing. Dr. Libby, a molecular biologist, is a research associate in the Department of Genetics at the University of Washington. He has had ten years of experience using the various procedures involved in RFLP analysis, including DNA extraction, restriction digestion, electrophoresis, Southern blotting, and autoradiography. He has published numerous articles in the field of molecular genetics and reviews articles for the **Journal of Biochemistry**, a major academic journal in the field, and for the National Institute of Health and the American Cancer Society. He has studied the protocols used by the FBI as well as by Lifecodes and Cellmark and has visited all three of those DNA testing laboratories as well as the FBI research laboratory in Quantico, Virginia.

{25} Dr. Libby testified that the FBI has no procedure for verifying the quality of the probes it uses. Additionally, he claimed that a testing laboratory should not be given police reports or anything else with the DNA samples in order to avoid evaluator bias. Dr. Libby testified that the only way to test the reliability of the FBI's procedures is by conducting external proficiency testing. He further stated that the FBI currently conducts only internal testing.

{26} The second witness called was Dr. Laurence Mueller. Dr. Mueller was qualified as an expert in evolutionary biology and population genetics. He is an associate professor at the University of California, Irvine. He has a Ph.D. in ecology and did four years of post-doctoral work at Stanford University in the field of theoretical population genetics. He has published over 25 peer-reviewed articles in the fields of population genetics and evolutionary biology and has written two articles specifically on the population genetics of the VNTR alleles used in DNA typing.

{27} Dr. Mueller testified that the FBI's reliance on the product rule, which produces a resulting statistical probability through the method of multiplying together the frequencies with which each band representative of a DNA fragment appears in a broad database, is very problematic. He testified that the problem with this method is that it is based on the incorrect assumptions that (1) members of the racial groups represented by the broad databases—Caucasians, Blacks, and Hispanics—mate within their groups at random i.e., without regard to religion, ethnicity, and geography; (2) the DNA fragments identified by DNA processing behave independently; (3) there is no natural selection among humans; (4) there are no random genetic drifts;[5] and (5) there are no mutations.

{28} Dr. Mueller further testified that ethnic subgroups tend to mate endogamously (i.e., within a specific subgroup) with persons of like religion or ethnicity or who live within close geographical distance. According to Dr. Mueller such endogamous mating tends to maintain genetic differences between subgroups that existed when ancestral populations emigrated to the United States and has not yet had sufficient time to dissipate. As a result, the subgroups may have substantial differences in the frequency of a given DNA fragment or VNTR allele identified in the processing step of DNA analysis. A given VNTR allele may be relatively common in some subgroups but not in the broader database. In his opinion, as a result of the FBI's failure to account for the possibility of substructures or subgroups within the Caucasian population, in a worst-case scenario the FBI's computed frequency of DNA prints could be off by a factor of millions.

{29} Dr. Mueller disagreed with Dr. Daiger's opinion that the FBI binning method produces a statistically conservative number. He stated that the FBI's statistics could not be considered valid until the issue of substructures in the population had been addressed. Dr. Mueller testified that the procedures the FBI used to compute statistics were not acceptable to population geneticists because the underlying assumptions had not been validated.

{30} Professor Seymour Geisser was the third defense expert witness called. He was qualified as an expert in the fields of statistics, biostatistics and probability theory. Dr. Geisser is the director of the School of Statistics at the University of Minnesota. He has published over 130 peer-reviewed articles, chapters, and books and has received numerous distinguished awards from professional societies in recognition of his eminence in the field of biostatistics and biometry. He has also studied the procedures used to compute frequency statistics by the FBI as well as by Cellmark and Lifecodes. Dr. Geisser's testimony corroborated Dr. Mueller's testimony in that Dr. Geisser questioned the FBI's database because, in his opinion, it did not represent a random sampling of the population. He also believed that the FBI had not made an adequate

[5] Dr. Mueller explained "genetic drift" as follows:

Well, all biological populations, including humans, are finite in size. That is, there's a fixed number of individuals that every generation mate and produce the next generation of offspring.

Now, because of the finite nature of the individuals involved in the mating process, the actual transmission of genetic material from one generation to the next will have with it some kind of sampling variation that's reflected in the finite size of the population.

It's just as if you took a coin which comes up heads half the time and you only flipped it four times. It's very likely that you wouldn't get exactly two heads and two tails. You could get some other combination. The same happens for the transmission of genes. Finite numbers of individuals that take place in reproduction can cause changes in the actual numbers in the next generation.

demonstration that the alleles are independent. Dr. Geisser testified that if the alleles are in fact not independent, the product rule would produce an erroneous result because the product rule depends completely on statistical independence. He further stated that, in light of his concerns with the FBI's methods of computing statistical probabilities, he did not believe that the FBI's procedure was accepted in the scientific community.

{31} Dr. Charles Taylor was called as the fourth and final defense expert witness. Following voir dire, Dr. Taylor was qualified as an expert in the fields of statistics and population genetics. He is a professor of biology at the University of California, Los Angeles, has a Ph.D. in ecology and evolution, and is a specialist in population genetics and the application of statistics and probability theory to problems in biology and genetics. He has published approximately 50 articles in peer-reviewed scientific journals. Dr. Taylor testified that, in his opinion, the FBI procedure for computing the statistical probability that a random person had the same DNA profile as that developed in the case was invalid and not generally accepted in the scientific community. Dr. Taylor testified that "the most serious problem with the population genetics of [the FBI's] analysis is that it assumes there is no population structure. That is to say, it assumes that the Caucasian population is randomly mating and has uniformed [sic] gene frequencies." Dr. Taylor also stated that the FBI uses "different rules for assigning matches and for calculating the probability of those matches." Further, Dr. Taylor testified that the sample from which the FBI extrapolates "the gene frequencies for Caucasians generally, is drawn from a highly non-random sample and it's probably not characteristic of a Caucasian population in the U.S. as a whole." Dr. Taylor presented data from an Oxford University study of human mating patterns in San Francisco that showed humans are far more likely to marry others of their same social, ethnic, and religious group than to marry across these lines. He also refuted Dr. Daiger's testimony that any underestimation of genotype frequency caused by population structure or the lack of statistical independence would be more than made up by the tendency of the FBI procedure to overestimate allele frequency. Dr. Taylor stated that there is no way of knowing how "generous" the FBI's bins would need to be in order to compensate for the concerns raised by the defense experts.

{32} The final State's witness, called in rebuttal, was Dr. Bruce Budowle, the FBI director of research in DNA technology responsible for developing the FBI DNA test. He was qualified as an expert in human genetics, forensic application of DNA typing, and statistics. Dr. Budowle has a Ph.D. in genetics and is a research chemist at the FBI. He testified that there is simply no authority for either the proposition that there is substructure in the Caucasian population or that there is any effect of a substructure, if it exists, on the calculation of a coincidental match.

V. LEGAL DISCUSSION

A. OTHER JURISDICTIONS

{33} Before applying New Mexico law to the use of DNA evidence to inculpate the accused in criminal cases, we believe it would be helpful to set out how other jurisdictions around the country deal with this issue. In our research we have found that different jurisdictions have developed various ways of dealing with DNA typing evidence. A majority of jurisdictions have held that DNA profiling meets the relevancy standards similar to New Mexico's Rule 702. **See. e.g., United States v. Bonds,** 12 F.3d 540, 566-67 (6th Cir. 1993), **aff'g United States v. Yee,** 134 F.R.D. 161 (N.D. Ohio 1991); **United States v. Martinez,** 3 F.3d 1191, 1198-99 (8th Cir. 1993), **cert. denied,** 126 L. Ed. 2d 697, 114 S. Ct. 734 (1994); **United States v. Jakobetz,** 955 F.2d 786, 800 (2d Cir.), **cert. denied,** 121 L. Ed. 2d 63, 113 S. Ct. 104 (1992); **Government of Virgin Islands v. Penn,** 838 F. Supp. 1054, 1073-74 (D.V.I. 1993); **Andrews v. State,** 533 So. 2d 841, 849-50 (Fla. Dist. Ct. App. 1988), **review denied,** 542 So. 2d 1332 (Fla. 1989); **State v. Montalbo,** 73 Haw. 130, 828 P.2d 1274, 1282 (Haw. 1992); **State v.**

Brown, 470 N.W.2d 30, 32-33 (Iowa 1991); **State v. Futrell,** 112 N.C. App. 651, 436 S.E.2d 884, 890-91 (Ct. App. 1993); **State v. Pierce,** 64 Ohio St. 3d 490, 597 N.E.2d 107, 115 (Ohio 1992); **State v. Futch,** 123 Ore. App. 176, 860 P.2d 264, 272-73 (Ct. App. 1993) (en banc); **Kelly v. State,** 824 S.W.2d 568, 574 (Tex. Crim. App. 1992) (en banc); **Spencer v. Commonwealth,** 238 Va. 275, 384 S.E.2d 775, 783 (Va. 1989), **cert. denied,** 493 U.S. 1036, 107 L. Ed. 2d 775, 110 S. Ct. 759 (1990); **Spencer v. Commonwealth,** 238 Va. 295, 384 S.E.2d 785, 797 (Va. 1989), **cert. denied,** 493 U.S. 1093 (1990); **State v. Woodall,** 182 W. Va. 15, 385 S.E.2d 253, 260 (W. Va. 1989); **Springfield v. State,** 860 P.2d 435 (Wyo. 1993).

{34} Even though the clear majority of jurisdictions following the Rules of Evidence in determining admissibility of scientific evidence would admit the DNA evidence, Delaware, a 702 state, allows admission of DNA evidence only "when both the evidence of a match and the statistical significance of the match are admissible." **Nelson v. State,** 628 A.2d 69, 76 (Del. 1993). The court held that "the statistical calculation is essential for the evidence to have relevance or meaning to the trier of fact." **Id.** The Georgia Supreme Court concluded that Lifecode's use of the product rule to determine a coincidental match was not proven reliable because no expert had studied Lifecode's database. The Court, however, allowed the DNA evidence so long as the most conservative number agreed upon by the experts (based only on the database and not a population theory) was the statistic given. **Caldwell v. State,** 260 Ga. 278, 393 S.E.2d 436, 443 (Ga. 1990).

{35} Frye jurisdictions have also found DNA evidence to be admissible (determining the testing methods to be generally accepted in the relevant scientific communities of molecular biology and population genetics). **See. e.g., Fishback v. People,** 851 P.2d 884, 893-95 (Colo. 1993) (en banc); **Smith v. Deppish,** 248 Kan. 217, 807 P.2d 144, 159 (Kan. 1991); **Polk v. State,** 612 So. 2d 381, 391 (Miss. 1992); **People v. Wesley,** 83 N.Y.2d 417, 633 N.E.2d 451, 455-56, 611 N.Y.S.2d 97 (N.Y. 1994); **State v. Ford,** 301 S.C. 485, 392 S.E.2d 781, 784 (S.C. 1990); **State v. Kalakosky,** 121 Wash. 2d 525, 852 P.2d 1064, 1074 (Wash. 1993) (en banc); **cf. State v. Cauthron,** 120 Wash. 2d 879, 846 P.2d 502, 515-17 (Wash. 1993) (en banc) (testimony regarding a DNA match held inadmissible because no probability statistics given). Some **Frye** jurisdictions admit the DNA typing evidence while prohibiting or limiting the admission of evidence regarding the statistical significance of a declared match, **see. e.g., United States v. Porter,** 618 A.2d 629, 641-44 (D.C. 1992) (limiting statistical calculation to the most conservative number); **People v. Mohit,** 153 Misc. 2d 22, 579 N.Y.S.2d 990 (County Ct. 1992) (admitting DNA typing evidence but limiting statistical calculations to the most conservative estimate), and, like Delaware, some **Frye** jurisdictions have completely rejected the DNA evidence on their conclusion that the statistical methodology has not been generally accepted in the field of population genetics. **See. e.g., People v. Barney,** 8 Cal. App. 4th 798, 10 Cal. Rptr.2d 731, 745 (Ct. App. 1992) (prohibiting DNA typing evidence as well as statistical calculations because population geneticists disagreed about the validity of the particular statistical calculation procedures); **Commonwealth v. Curnin,** 409 Mass. 218, 565 N.E.2d 440, 442-45 (Mass. 1991) (holding in case in which no expert testified regarding general acceptance and no study of database had been made that the particular statistical methodology employed was not generally accepted in the relevant scientific field, making the DNA typing evidence meaningless); **State v. Schwartz,** 447 N.W.2d 422, 427-29 (Minn. 1989) (holding in case in which Cellmark laboratory refused to produce information regarding methodology and its database that DNA typing evidence and statistical probabilities were inadmissible and limiting use of population frequency statistics because "juries in criminal cases may give undue weight and deference to presented statistical evidence"); **Vandebogart,** 616 A.2d at 494 (holding because of the debate among population geneticists over population substructure that "the statistical techniques that the FBI used to estimate population frequencies is not generally accepted among

population and human population geneticists," and that a "match is virtually meaningless without a statistical probability expressing the frequency with which a match could occur").

{36} Finally, at least one state court (West Virginia, a jurisdiction that uses the rules of evidence to test admissibility) has held that lower courts may take judicial notice of DNA typing reliability. **Woodall,** 182 W. Va. 15, 385 S.E.2d at 260.

B. Alberico and Daubert Applied

{37} The State originally argued in their brief-in-chief that the **Frye** standard was the appropriate standard for admissibility of novel scientific evidence and that "DNA typing evidence, including the laboratory procedure and the calculation of the probability of a coincidental match, meets the **Frye** standard." In their reply brief, however, the State has changed their argument pursuant to our recent holding in **Alberico** and argues that DNA typing evidence, including the laboratory procedure and the calculation of the probability of coincidental match, meets the standard under Rules 702 and 703 as set out in **Alberico** and **Daubert.** Accordingly, we apply the **Alberico/Daubert** factors to the evidence in this case.

{38} Applying the three prerequisites laid out in **Alberico,** it is clear that all of the experts were qualified. They are all prominent in the field of either molecular biology, population genetics, statistics, or forensic DNA typing. Additionally, there is little question that a DNA profile is relevant to this case. A major issue here is whether Defendant was present at the scene of the crime. Evidence that links Defendant's DNA to DNA gathered from Hertz's clothing and vomit is helpful to the jury in that it would tend to make the existence of the fact that Defendant was present at the crime scene more probable than it would be without the evidence. **See Alberico,** 116 N.M. at 166, 861 P.2d at 202; **Futch,** 860 P.2d at 270; SCRA 1986, 11-403 (Repl. Pamp. 1994). The arguments in this case concern the third prerequisite—whether the subject of the State's expert testimony is grounded in valid, objective science, that is "scientific, technical or other specialized knowledge," and whether the underlying scientific technique or method is reliable enough to prove what it purports to prove. In order to determine if the trial court correctly determined that the DNA typing evidence was reliable and, thus, admissible, we must engage in a review of the **Alberico/Daubert** factors.

1. Whether the Proffered Technique Can Be (and Has Been) Tested

{39} We agree with the Sixth Circuit's analysis of this question in **Bonds,** 12 F.3d at 559, in which the court stated:

> [I]t seems clear that this first **Daubert** factor is not really in dispute. The **Daubert** Court found that "'the criterion of the scientific status of a theory is its . . . refutability.'" Defendants vociferously dispute the accuracy of the match results and the adequacy of the testing done, and in refutation have presented evidence about deficiencies in both the results and the testing of the results. Thus, it appears that by attempting to refute the FBI's theory and methods with evidence about deficiencies in both the results and the testing of the results, the defendants have conceded that the theory and methods can be tested.

Id. at 559 (citation omitted).

2. Whether the Theory or Technique Has Been Subjected to Peer Review and Publication

{40} At the outset, it is important to note that the **Daubert** Court specifically stated that

> [p]ublication (which is but one element of peer review) is not a **sine qua non** of admissibility; it does not necessarily correlate with reliability, and in some instances well-grounded but innovative theories will not have been published. . . . The fact of publication (or lack thereof) in a peer-reviewed journal thus will be a relevant,

> though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

113 S. Ct. at 2797 (citations omitted).

{41} Here, the FBI's procedures have received peer review. Evidence of this fact is the plethora of articles admitted as exhibits in this case. Although many of the articles written by FBI technicians have not been published in a "peer-reviewed journal" in the strict sense of that term,[6] the trial court found that the FBI's techniques received adequate scrutiny through "presentations at scientific conferences, workshops and other forums for the exchange of ideas" and through the dissemination of unpublished and non-peer-reviewed writings. Additionally, the FBI has published numerous articles. Among them are F. Samuel Baechtel, **A Primer on the Methods Used in the Typing of DNA,** 15 Crime Lab. Dig. 3 (Supp. No. 1 1988); Bruce Budowle et al., **An Introduction to the Methods of DNA Analysis Under Investigation in the FBI Laboratory,** 15 Crime Lab. Dig. 8 (1988); F. Samuel Baechtel, **Recovery of DNA from Human Biological Specimens,** 15 Crime Lab. Dig. 95 (1988); Bruce Budowle, **The RFLP Technique,** 15 Crime Lab. Dig. 97 (1988); Catherine Theisen Comey, **The Use of DNA Amplification in the Analysis of Forensic Evidence,** 15 Crime Lab. Dig. 99 (1988); Dwight E. Adams, **Validation of the FBI Procedure for DNA Analysis: A Summary,** 15 Crime Lab. Dig. 106 (1988); William G. Eubanks, **FBI Laboratory DNA Evidence Examination Policy,** 15 Crime Lab. Dig. 114 (1988).

{42} Defendant contends that the trial court erred in finding that the FBI's methods had undergone adequate scrutiny, stating that Dr. Libby and Dr. Taylor had testified that they highly questioned the FBI's published and unpublished materials. Moreover, Defendant asserts that in subsequent cases, the FBI's "Fixed Bin" paper was heavily criticized by a "number of other experts as scientifically inadequate and unfounded." Although we agree that scientists in population genetics have engaged in a heated debate over the accuracy of the FBI's methods, we believe this is a question of weight and not of admissibility. The fact is that the FBI's techniques have been subjected to peer review and publication and, therefore, this factor is satisfied.

3. Consideration of the Known or Potential Rate of Error of the Scientific Technique

{43} This **Alberico/Daubert** factor requires the court to examine the standards controlling the DNA profiling process and the known or potential rate of error that might result from the process. **Daubert,** 113 S. Ct. at 2792. We agree with the District Court of the Virgin Islands that this examination involves two parts. "In the first part, the court examines the means by which the FBI prevents both potential sources of human error in the execution of the process and potential error caused by imperfections inherent in the process." **Penn,** 838 F. Supp. at 1066. The second part of this factor involves the statistics used in DNA profiling. "Since statistics concern estimates, the DNA profiling process involves degrees of uncertainty. The second part of this analysis examines to what extent the FBI attempts to resolve the uncertainties in the defendant's favor." **Id.**

a. Laboratory procedures and processes

{44} The State contends that because "three proficiency tests were conducted without any report of an error," and "the FBI protocol was available to the defense for 13 months to evaluate and samples were available for independent DNA testing," this factor was easily met. Defendant, on the other hand, argues that "the FBI's proficiency testing was inadequate." Defendant directs this Court's attention to a report entitled **DNA Technology in Forensic Science** (1992) ("the NRC report") and

[6] That is, the articles were not sent to a publication where manuscripts are "reviewed by outside experts selected by that journal and the experts criticize the article and send the author their comments." **Bonds,** 12 F.3d at 559 n. 16.

compiled by the Committee on DNA Technology in Forensic Science, the Board on Biology, the Commission on Life Sciences, and the National Research Council. The NRC report states that proficiency testing is the most important type of validation research and that "there is no substitute for rigorous external proficiency testing via blind trials." NRC report at 55. According to Defendant "the FBI's proficiency testing was not blind, it was not external, and it most assuredly was not rigorous. Only nine simulated cases had been processed" and "the analysts knew they were being tested." Moreover, the Defendant asserts that "the FBI had not adequately validated its matching standard. Dr. Geisser testified that the FBI did not have adequate data regarding the measurement error of its test and that what data were available suggested that the FBI's matching criteria is too broad."

{45} Defendant argues that the FBI's statistical estimates are invalid because (1) they depend "on the untested assumption that there is random mating in human populations"; (2) the FBI fails to take into account substructuring of the population; (3) the binning method is not conservative; (4) the FBI's database is inappropriate; and (5) the FBI underestimates the frequency of alleles. Defendant also contends that the DNA evidence should not have been admitted because the FBI's testing methods fail to meet the standards set out by various scientific and professional groups. Defendant's argument is based on the fact that the blood samples of the FBI agents who made up the database used in this case were not divided into ethnic subgroups within the caucasian group. Defendant directs this Court to the scientific literature, including the NRC report and case law (cited in subsection A) criticizing the FBI's matching procedures as well as the product rule.

{46} The NRC report states that rigorous empirical studies are essential for establishing the match standard. "The match criterion must be based on the actual variability in measurement observed in appropriate test experiments conducted in each testing laboratory." NRC report at 54. Furthermore, "the match criterion must be based on reproducibility studies that show the actual degree of variability observed when multiple samples from the same person are separately prepared and analyzed under typical forensic conditions." NRC report at 61-62.

{47} The State has not directed this Court to any testimony or evidence to refute Defendant's claims, and we have been unable to locate any evidence in the record showing that the FBI's procedures include sufficient proficiency testing. We agree with the Sixth Circuit that "the deficiencies in calculating the rate of error and the failure to conduct external blind proficiency tests are troubling." **Bonds,** 12 F.3d at 560. This factor, however, is only part of one factor that is included in a list of non-exclusive factors set out by the **Daubert** Court and, in this instance, speaks to the weight of the evidence and not to its admissibility. **See People v. Moore,** 194 A.D.2d 32, 604 N.Y.S.2d 976, 977 (App. Div. 1993), **appeal denied,** 634 N.E.2d 988 (1994); **cf. Fishback,** 851 P.2d at 893 (holding that questions involving the implementation of particular technology go to the weight and not the admissibility of DNA typing evidence under **Frye).**

b. Resolving statistical uncertainties in the Defendant's favor

{48} Although the Defendant argues that the FBI's methods have a huge potential for error, the State contends that "like other methods of identification, a random match probability is an evidentiary tool to determine the ultimate guilt or innocence of the accused." Moreover, the State argues that "the FBI procedure adequately accounts for any potential substructure and provides an underestimate, i.e., conservative estimate, of the true frequency of a DNA profile." Defendant disagrees with the State's assessment and argues that "the FBI has failed to test the key assumption underlying its statistical estimates—the assumption that VNTR alleles are statistically independent." Defendant directs this Court to a statement made by the State's rebuttal expert witness, Dr. Budowle, that "'**there is no**

evidence to support the assertion that a sample population adequately represents the true population or other subpopulation groups.'" **Anderson,** 115 N.M. at 443, 853 P.2d at 145 (quoting Bruce Budowle & Keith L. Monson, **A Statistical Approach for VNTR Analysis** 3 (unpublished manuscript) (emphasis added by Court of Appeals)).

{49} Defendant's expert testified that there is a method to test whether humans mate randomly. Dr. Mueller testified that the only way to test the theory is to sample a variety of ethnically distinctive subgroups and determine whether they vary significantly in the frequency of alleles. The NRC has recommended that population differentiation be "assessed through direct studies of allele frequencies in ethnic groups." NRC report at 82. Pending completion of such studies, the NRC further recommended that statistical procedures like those used by the FBI to compute the statistics be abandoned in favor of a far more conservative method called "the interim ceiling principle."

{50} "This substructure argument involves a dispute over the accuracy of the probability results, and thus this criticism goes to the weight of the evidence, not its admissibility." **Bonds,** 12 F.3d at 564; **Deppish,** 807 P.2d at 159; **Wesley,** 633 N.E.2d at 457; **Pierce,** 597 N.E.2d at 112, 115; **cf. Kalakosky,** 852 P.2d at 1073 (stating that "alleged infirmities in the performance of a test usually go to the weight of the evidence, not to its admissibility"); **Springfield,** 860 P.2d at 447. The experts clearly outlined the controversy and counsel had the opportunity to engage in vigorous cross-examination. The trier of fact has the right to believe or disbelieve the testimony it hears.

4. The Degree to Which DNA Profiling is Accepted by the Relevant Scientific Community

{51} Although general acceptance is not a requirement for admissibility under Rules 702 and 703, it is a factor the court may consider. "Widespread acceptance can be an important factor in ruling particular evidence admissible, and a 'known technique that has been able to attract only minimal support within the community' may properly be viewed with skepticism. **Daubert,** 113 S. Ct. at 2797 (quoting **Downing,** 753 F.2d at 1238). The concept of examining the "general acceptance" of a particular scientific theory and procedure stems from **Frye,** in which the D.C. Circuit held:

> While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

293 F. at 1014.

{52} The **Frye** test was first adopted in New Mexico in 1952 when this Court affirmed a district court's exclusion of expert opinion testimony regarding truth serum that was not "reliable or generally approved and accepted by members of the medical profession specializing in psychiatry." **State v. Lindemuth,** 56 N.M. 257, 271, 243 P.2d 325, 334 (1952). The **Lindemuth** Court held that in order for scientific evidence to be admissible, the scientific technique or principle about which the expert proposes to testify must be "accorded general scientific recognition." **Id.** at 274, 243 P.2d at 336. The test consistently used in New Mexico to determine "general acceptance" has been to show "that the reliability of the underlying scientific principles has been accepted by the scientific community." **Montoya v. Metropolitan Court,** 98 N.M. 616, 617, 651 P.2d 1260, 1261 (1982); **see also Alberico,** 116 N.M. at 165, 861 P.2d at 201 (noting the ambiguity of the term "general acceptance and stating that the standard provides a safeguard against specious techniques); **State v. Gallegos,** 104 N.M. 247, 253, 719 P.2d 1268, 1274 (Ct. App. 1986) (abrogated by **Alberico,** but citing favorably to **People v. Torres,** 128 Misc. 2d 129, 488 N.Y.S.2d 358 (1985) in which the court determined the battered wife syndrome to have gained "('substantial enough

scientific acceptance to warrant admissibility.'" 488 N.Y.S.2d at 363).

{53} Many jurisdictions still using the **Frye** test have held that the general scientific theory underlying DNA printing analysis is almost universally accepted in the scientific community. **See. e.g., Caldwell,** 393 S.E.2d at 441; **Schwartz,** 447 N.W.2d at 425-26; **Polk,** 612 So. 2d at 391; **People v. Castro,** 144 Misc. 2d 956, 545 N.Y.S.2d 985, 995 (Sup. Ct. 1989); **Spencer,** 384 S.E.2d at 783; **Spencer,** 384 S.E.2d at 797.

{54} In the case at bar the trial court concluded that "testimony by the State's experts and the pertinent scientific literature convinces this court by a preponderance of the evidence that the FBI's method for computing the statistical frequency of DNA prints is a valid procedure and is generally accepted in the relevant scientific community."

{55} The trial court's findings indicate that the degree of acceptance in the scientific community of the theory of DNA profiling and of the basic procedures used by the FBI laboratory in this case is sufficient to meet the general acceptance requirement and the scientific validity requirement. The State's experts, one of whom was from outside the FBI laboratory, testified that the FBI's DNA procedures were generally accepted in the scientific community.

{56} Defendant contends that although the procedures utilized for the DNA typing itself may be generally accepted in the scientific community, the matching and statistical method used by the FBI (the product rule) to determine the probability of a random match has not been generally accepted and, thus, those statistics do not assist The trier of fact. Therefore, Defendant argues, the DNA typing evidence is worthless and neither it nor the statistical calculations should be admissible.

{57} Although the defense experts all testified that the FBI's procedures are not generally accepted in the scientific community, they only established that there is a substantial amount of controversy over whether the statistical probabilities resulting from the FBI's methods are reliable and accurate. "The potential of ethnic substructure does not mean that the theory and procedures used by the FBI are not generally accepted; it means only that there is a dispute over whether the results are as accurate as they might be and what, if any, weight the jury should give those results." **Bonds,** 12 F.3d at 564-65; **see also Montalbo,** 828 P.2d at 1282; **Futrell,** 436 S.E.2d at 890-91; **Pierce,** 597 N.E.2d at 115; **Futch,** 860 P.2d at 273; **Kalakosky,** 852 P.2d at 1072; **Springfield,** 860 P.2d at 447. Defendant's experts indicated that the FBI's methods were flawed because they did not take into account ethnic substructure. The State's experts, however, testified that the results were not distorted by the possibility of ethnic substructure because the FBI's methods are conservative. In fact, we feel it is important to note that Defendant's experts could only speculate as to the effect of ethnic substructure because there is no positive evidence that one exists. Moreover, there was testimony that the FBI's conservative procedures were sufficient to compensate for the possibility of error in data collection and sample size, and that these procedures resulted in statistics that were actually incorrect, in that they overestimated the probability of chance matches within any population.

{58} We hold that questions about the accuracy of results goes to the weight of the evidence and is properly left to the jury. As the Court in **Jakobetz,** 955 F.2d at 800, stated:

> The district court should focus on whether accepted protocol was adequately followed in a specific case, but the court, in exercising its discretion, should be mindful that this issue should go more to the weight than to the admissibility of the evidence. Rarely should such a factual determination be excluded from jury consideration. With adequate cautionary instructions from the trial judge, vigorous cross-examination of the government's experts, and challenging testimony from defense experts, the jury

> should be allowed to make its own factual determination as to whether the evidence is reliable.

{59} Accordingly, we hold that the trial court may only examine whether the principles and methodology used are scientifically valid and generally accepted. The assessment of the validity and reliability of the conclusions drawn by the experts, however, is a jury question. The jury is free to believe or disbelieve the expert testimony. **See State ex rel. Human Servs. Dep't v. Coleman,** 104 N.M. 500, 504, 723 P.2d 971 (Ct. App. 1986). In summary, we hold that under the standard set forth in **Alberico** for the admission of scientific evidence and expert testimony, the trial court did not abuse its discretion by finding the DNA evidence admissible.

C. Rule 703

{60} We next address Defendant's argument that the DNA typing evidence does not meet the standard for admissibility under Rule 703. Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Defendant contends that the FBI's method for calculating the probability of a coincidental match does not use the type of data reasonably relied upon by experts in the field and is, therefore, inadmissible.

{61} We conclude that the State's experts based their opinions on data and facts reasonably relied upon by experts in molecular biology and population genetics. Our determination that the FBI's theory and procedures are "scientifically valid" and "generally accepted" in the pertinent scientific community under Rule 702 indicates that the experts testified about scientific knowledge based on sound methodology. **See Ambrosini v. Labarraque,** 296 U.S. App. D.C. 183, 966 F.2d 1464 (D.C. Cir. 1992) (court must know basis for expert's opinion before it can determine that basis is not of a type reasonably relied on by experts in the field). Accordingly, we find Defendant's argument to be without merit.

D. Rule 403

{62} Having concluded that the trial court did not abuse its discretion in admitting the DNA typing evidence under Rules 702 and 703, we next address Defendant's argument that the DNA evidence was improperly admitted by the trial court under Rule 403 because its probative value is outweighed by the prejudicial impact of the evidence. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Defendant contends that DNA evidence carries with it an "aura of infallibility" that will tend to mislead or confuse the jury, and therefore its probative value is outweighed by its prejudicial impact. We cannot agree.

{63} "The trial court is vested with great discretion in applying Rule 403, and it will not be reversed absent an abuse of that discretion." **State v. Chamberlain,** 112 N.M. 723, 726, 819 P.2d 673, 676 (1991). Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence that tends to suggest decision on an improper basis. **State v. Duncan,** 113 N.M. 637, 643, 830 P.2d 554, 560 (Ct. App. 1990), **aff'd,** 111 N.M. 354, 805 P.2d 621 (1991). Here, the evidence and the testimony were clearly probative because they linked Defendant to the crimes committed upon Hertz. Although we

agree that the aura of infallibility surrounding DNA evidence does present the possibility of a decision based on the perceived infallibility of the evidence, we conclude that the damaging nature of the DNA evidence and the potential prejudice caused by this evidence does not require exclusion. We have already concluded that the FBI's procedures met the requirements of Rules 702 and 703. Defendant had the opportunity to vigorously cross-examine the State's experts and to present his own rebuttal expert witnesses to demonstrate why the results were unreliable, the procedures flawed, and the evidence not infallible. These are "the traditional and appropriate means of attacking shaky but admissible evidence." **Daubert,** 113 S. Ct. at 2798. The trial court did not abuse its discretion in concluding that the probative value of the DNA evidence was not substantially outweighed by any unfair prejudicial effect.

E. The NRC Report

{64} The NRC report was published in 1992 (two years after the **Frye** hearing in this case). We do not impute knowledge of this report's recommendations to the trial judge because it was not available to him or to the experts. The recommendations set out in the report, however, are recognized throughout the forensic scientific community and by various jurisdictions. We find the report persuasive and would like to see DNA typing in this state performed with the report's guidelines in mind, specifically the "ceiling principle" approach. This approach calculates the chance of a random match in a manner that takes into account the criticisms leveled by opponents of the FBI's methodology, most notably the possibility of population substructuring. The approach eliminates ethnicity as a factor in the calculation process and allows the use of the product rule while ensuring that probability estimates are appropriately conservative.

{65} Since the ceiling principle may not be used until the proper population sampling is computed, a "modified ceiling principle" approach has been formulated by the Committee on DNA Technology in Forensic Science which is, in effect, "a more conservative version of the conservative ceiling principle." **Porter,** 618 A.2d at 643. The modified ceiling principle may be utilized immediately because the frequencies are taken from existing databases. The Committee has concluded that when a particular statistical methodology or estimate is called into question, "the solution . . . is not to bar DNA evidence, but to ensure that estimates of the probability that a match between a person's DNA and evidence DNA could occur by chance are appropriately conservative." NRC report at 134. We agree and approve of the NRC report's recommendation that the interim modified ceiling method be utilized until proper population sampling has been computed.

VI. CONCLUSION

{66} In conclusion, we hold that the trial court did not abuse its discretion in concluding that the DNA typing evidence and the accompanying statistical calculations in this case were admissible.[7] Any controversy over the results of the testing and the statistical calculations goes to the weight of the evidence and is properly left to the trier of fact. Accordingly, we reverse the Court of Appeals and affirm the trial court.

{67} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

GENE E. FRANCHINI,
Justice

STANLEY F. FROST,
Justice

[7] This does not mean that DNA typing evidence should always be admitted into evidence. The admissibility of any such evidence remains subject to attack. Issues pertaining to relevancy or prejudice may be raised. In addition, traditional challenges to the admissibility of evidence such as improper procedures, contamination of the sample, or chain of custody questions may be presented. The evidence, in the above instances, may be found to be so tainted that it is totally unreliable and, therefore, must be excluded.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-090

Filing Date: August 25, 1994, As Corrected December 16, 1994

Docket No. 21,188

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

JUAN DURAN,

Defendant-Appellant.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Bruce E. Kaufman, District Judge

Sammy J. Quintana, Chief Public Defender
Christopher Bulman, Assistant Public Defender
Santa Fe, New Mexico

for Defendant-Appellant.

Hon. Tom Udall, Attorney General
Margaret McLean, Assistant Attorney General
Santa Fe, New Mexico

for Plaintiff-Appellee.

OPINION

BACA, Justice.

{1} This opinion is the companion to our opinion in **State v. Anderson** 118 N.M. 284, 881 P.2d 29 (1994) (No. 21,069). In **Anderson,** we hold that deoxyribonucleic acid ("DNA") evidence is admissible in New Mexico courts and that any controversy regarding the procedures used and results obtained goes to the weight of the evidence and is a matter properly left to the jury. **Id.** at 301 881 P.2d at 46. Here, we address the admissibility of testimony and other evidence concerning the "ceiling method" for estimating the population frequency of a DNA pattern. The defendant. Duran, filed an interlocutory appeal in the Court of Appeals and the Court of Appeals certified this appeal to us. NMSA 1978, Section 34-5-14(C) (Repl. Pamp. 1990). We affirm the trial court's ruling that the evidence involving DNA typing and the statistical probabilities based on both the fixed-bin method used by the Federal Bureau of Investigation ("the FBI") (discussed at length in **Anderson** 118 N.M. at 295-301, 881 P.2d at 40-46) and the "modified ceiling principle" method recommended in the report entitled **DNA Technology in Forensic Science** ("the NRC report"), jointly prepared by the Committee on DNA Technology in Forensic Science, the Board on Biology, the Commission on Life Sciences, and the National Research Council (also discussed in **Anderson)** were admissible at trial.

I.

{2} Duran was charged with criminal sexual penetration in the second degree (five counts) and kidnapping. Because this Court has not been supplied with any of the underlying facts in this case, we proceed immediately to recite the procedural history.

{3} After charging Duran, the State notified him that it intended to introduce DNA evidence at trial. Duran filed a motion to exclude the scientific testimony regarding the DNA evidence and requested a hearing pursuant to **United States v. Frye,** 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).[1] The trial court conducted the **Frye** hearing and took judicial notice of the expert

[1] After the court held the hearing in this case, this Court decided **State v. Alberico,** 116 N.M. 156, 861 P.2d 192 (1993), in which we rejected the **Frye** test in favor of the relevancy test for admitting scientific testimony under SCRA 1986. 11-702 (Repl. Pamp. 1991).

testimony presented in **Anderson.** The trial court concluded that the DNA profiling evidence was relevant and admissible and determined that "the protocol and/or procedures employed by the FBI . . . when combined with the calculation of the coincidental match probabilities under the NRC approach, is generally accepted as reliable in the relevant scientific community." Duran requested that the court's order be certified for interlocutory appeal and applied to the Court of Appeals for leave to file the appeal. The Court granted the application and certified the appeal to this Court.

II.

{4} We first address Duran's argument that the trial court abused its discretion in denying his motion to exclude the DNA profiling evidence. Duran incorporates all of the arguments contained in the answer brief of Defendant Jay Allen Anderson in **State v. Anderson** and more specifically argues that the modified ceiling method recommended in the NRC report is "not based on well-recognized scientific principle, and therefore is not valid."

{5} This Court has already determined in **Anderson** 118 N.M. at 301, 881 P.2d at 46, that DNA profiling evidence and probability statistics based on the FBI's fixed-bin method are admissible in New Mexico courts. In **Anderson** we applied the relevancy standard set out in **State v. Alberico,** 116 N.M. 156, 861 P.2d 192 (1993), and concluded that any questions concerning the particular procedures or the statistical methodology used by the FBI to compute probability statistics pertained to the weight of the evidence not its admissibility and was properly left to the jury. **Id.** at 301, 881 P.2d at 46.

{6} Duran's argument, however, presents us with a slightly different question because this appeal, while questioning the validity of DNA typing evidence in general, challenges specifically the modified ceiling method utilized by the FBI to reach a statistical probability that the match was "coincidental." The "ceiling principle" was described in detail by the State's expert witness, FBI special agent Michael Vick:

> [The NRC] recommend[s] that we use something called the 95% upper confidence limit. What that means is that you will take your statistics that you have developed for your different populations and you run it through an equation that they have set forth in the report, that gives you . . . a 95% confidence limit. . . . that [your] figure . . . is correct. . . . Then you. compare that [figure] between all of the different racial categories—the Blacks, the Whites and the Hispanics—and rather than presenting three different statistics, you . . . take the statistic from each of those categories that is the most conservative. So if you have 5% in the Caucasian, 10% in the Blacks, and 8% in the Hispanics, you would take 10% as being the value for that particular band, because that's the most conservative across all three of your databases. . . . So if the figure that you arrived at from your own calculations based on your own data base is 10% or above, in other words, it was 15% or 20%, you can use those calculations. If the 95% upper confidence limit using your database gives you a figure that is below 10%, say 8% or 5%, . . . you can never use anything below 10%.

Agent Vick stated that the ceiling method generally would result in a more conservative estimate than the FBI's fixed-bin method and that the FBI in this case prepared statistical probabilities based on both its fixed-bin method and the modified ceiling principle.

{7} Duran first points out that he is Hispanic and that the defendant in **Anderson** was Caucasian. Duran states that

> because no new database has been developed, the FBI used the same databases in Duran's case as used in Anderson's case. However, rather than making a calculation in Duran's case based on the Hispanic

> database alone, under the modified ceiling principle, the FBI used three databases (Hispanic, Caucasian, and African-American) to generate their probability estimate.

While acknowledging that the ceiling method generally yields a more conservative result than that reached through the fixed-bin method, Duran contends that the ceiling method is not scientifically valid because the NRC's recommendation "was made without actual knowledge of the extent of the problem which it is designed to correct." Duran directs this Court to an article in which many reputable scientists question the use of the NRC's ceiling principle. **See** William C. Thompson, **Evaluating the Admissibility of New Genetic Identification Tests: Lessons from the "DNA War",** 84 J. Crim. L. & Criminology 22 (1993). Basically, these scientists believe that the ceiling method, although more conservative than the fixed-bin method, cannot adequately compensate for the possibility of substructure in the population because no one is certain to what extent subgroups exist in the population, if at all, and to what extent the results will be unreliable if the substructuring theory is valid. Duran contends that because there is much controversy over the substructure argument and how to adequately compensate for substructures in the population, if they exist, the modified ceiling method is not scientifically valid.

{8} Duran further contends that because he is a Hispanic from Northern New Mexico, neither the FBI's fixed-bin method of computing a statistical probability nor the modified ceiling method will yield an accurate result because "the accused is a member of a historically-isolated population arising from a small founder group' representing a relatively small subset of a larger population. Such a group has no way to develop new genes or to have new genes introduced into their system."

{9} Duran's arguments relate to whether the statistical methodology employed by the FBI to reach a result is grounded in valid, objective science. Although we find that the expert testimony in this case reflects an ongoing controversy over how the results of DNA typing evidence should be calculated, we hold that this is "a dispute over the accuracy of the probability results, and thus this criticism goes to the weight of the evidence, not its admissibility." **Anderson** 118 N.M. at 299, 881 P.2d at 44 (quoting **United States v. Bonds,** 12 F.3d 540, 564 (6th Cir. 1993), **aff'g United States v. Yee,** 134 F.R.D. 161 (N.D. Ohio 1991)) (other citations omitted). This "battle of the experts can properly take place before the jury. Defense counsel will have the opportunity to call their own experts and to engage in vigorous cross-examination of the State's experts. "With adequate cautionary instructions from the trial judge, vigorous cross-examination of the [State's] experts, and challenging testimony from defense experts, the jury should be allowed to make its own factual determination as to whether the evidence is reliable." **United States v. Jakobetz,** 955 F.2d 786, 800 (2d Cir.), **cert denied,** 121 L. Ed. 2d 63, 113 S. Ct. 104 (1992). The jury is free to believe or disbelieve the expert testimony and to determine how much weight it will give the results of DNA typing in their deliberations. **Cf. State ex rel. Human Servs. Dep't v. Coleman,** 104 N.M. 500, 504, 723 P.2d 971, 975 (Ct. App. 1986) (results of paternity testing).

{10} Furthermore, following our reasoning in **Anderson,** 118 N.M. at 301, 881 P.2d at 46, we conclude that the DNA typing evidence in this case meets the standard of rules of evidence in SCRA 1986, 11-702 (Repl. Pamp. 1994) (testimony by experts) and SCRA 1986, 11-703 (Repl. Pamp. 1994) (bases of expert opinion testimony). We also conclude that the probative value of the DNA typing evidence outweighs its prejudicial effect, thus satisfying rule of evidence in SCRA 1986, 11-403 (Repl. Pamp. 1994). Here, the evidence and the testimony will be probative because they link Duran to the crimes for which he has been charged. "Although we agree that the aura of infallibility surrounding DNA evidence does present the possibility of a decision based on the perceived infallibilty of the evidence, we conclude that the damaging nature of the DNA evidence and the potential prejudice caused by this evidence does not require exclusion." **Anderson,** 118 N.M. at 302, 881 P.2d at 47.

III.

{11} Next, we address Duran's argument that a further evidentiary hearing is necessary to determine the correct application of the modified ceiling principle method of obtaining a statistical calculation of the probability that someone other than the defendant could have contributed the sample found at the scene of the crime [or on the victim]. Duran contends that a further hearing is necessary because "experts harbor[] differing interpretations of the correct application of the NRC's interim recommendation." We acknowledge that different experts arrive at different numbers using the various methods for calculating statistical probability. However, we believe that both the State's expert testimony and the Defendant's expert testimony regarding statistical results may properly be placed before the jury which will be free to believe or disbelieve any of the testimony before it. This conclusion is in accordance with our conclusion that the jury must make its own determination as to how it will utilize the contradicting expert testimony regarding the DNA typing evidence and its resulting statistical calculations. Therefore, a further evidentiary hearing to determine which statistical calculation should be admitted is unnecessary.

IV.

{12} Finally, we respond to Duran's assertion in his brief-in-chief that "the State's argument that DNA typing evidence should be admissible to inculpate an accused because such evidence also has the potential to exculpate an accused is irrelevant." The State responds to Duran's argument by stating in its answer brief that "the State's intent was to inform this Court and alert this Court that the only challenged use of DNA typing evidence is DNA evidence indicating a match and resulting probability statistic. . . . The defense challenge to the reliability of laboratory methodology, if valid would necessarily bar the use of DNA typing to exculpate an accused." We disagree with the State's comparison between the use of DNA typing evidence to exculpate and inculpate an accused.

{13} The use of DNA typing evidence to exculpate an accused is conclusive. Because a visual match must first be declared before the statistical methodology is employed a visual non-match is conclusive that the known contributor could not be the same person as the unknown contributor of DNA. Because the State appears to be suggesting that the use of DNA typing evidence to exculpate an accused is compromised by the appeals of Duran and Anderson, it is pertinent at this point to clarify that neither our opinion in **Anderson** nor that in this case in any way affects the use of DNA evidence to exculpate a person accused of a crime.

V.

{14} In conclusion, we hold that the trial court did not abuse its discretion in determining that the DNA typing evidence and the accompanying statistical calculations in this case would be admissible at trial. Any debate over the resulting probabilities that the "match" is random goes to the weight of the evidence and is properly left for the jury to determine. Accordingly, we **AFFIRM** the trial court's ruling.

{15} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

SETH D. MONTGOMERY,
Chief Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-103

Filing Date: September 28, 1994, As Corrected December 16, 1994, As Corrected January 17, 1995

Docket No. 20,490

TANA HOWELL, JANET E. BROWN, CATHERINE BARELA, and OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

RICHARD HEIM, Secretary, Human Services Department, State of New Mexico; WILLIAM DUNBAR, Director, Income Support Division, Human Services Department, State of New Mexico, and NEW MEXICO HUMAN SERVICES DEPARTMENT,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Steve Herrera, District Judge

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for Defendants-Appellants.

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OPINION

BACA, Justice.

{1} Defendants-Appellants Richard Heim, William Dunbar, and the New Mexico Human Services Department (collectively referred to as the "HSD") appeal from a trial court order in favor of Plaintiffs-Appellees Tana Howell, Janet Brown, Catherine Barela, and other similarly-situated plaintiffs (collectively referred to as the "Plaintiffs"). The trial court concluded that a regulation promulgated by the HSD, Income Support Div., N.M. Human Serv. Dep't Reg. 346 (Dec. 23, 1991) (referred to as "Regulation 346"), which terminated state-funded general assistance disability benefits for several hundred recipients, applied retroactively and violated the due process clause of the New Mexico Constitution. **See** N.M. Const. art. II, § 18. In its order, the trial court permanently enjoined the HSD from applying and implementing the regulation. On appeal, we decide whether the trial court erred by permanently enjoining HSD from applying and implementing Regulation 346. In deciding this question, we necessarily address four issues: (1) Whether the issues presented by this appeal are moot; (2) whether the HSD had the statutory authority to promulgate Regulation 346; (3) whether Regulation 346 violated the due process clause of the New Mexico Constitution on its face; and (4) whether Regulation 346 violated the due process clause of the New Mexico Constitution when it was applied to the Plaintiffs. We hold that the trial court erred by issuing the permanent injunction and reverse the court's judgment and order.

I.

{2} Regulation 346 imposed a durational limitation on the receipt of general assistance benefits. The HSD is "charged with the administration of all the welfare activities" for the state of New Mexico, including the administration

of assistance to "the needy blind and otherwise handicapped" individuals. NMSA 1978, § 27-1-3 (Repl. Pamp. 1992). Pursuant to its duties, the HSD administered a general assistance program, providing "financial aid to persons between the ages of eighteen and sixty-five with either a temporary disability or a permanent disability as defined by the [HSD]." Criteria, N.M. Human Serv. Dep't Reg. 341, 3 N.M. Reg. No. 7, 31 (April 15, 1992); **see also** § 27-2-7(A)(2) (Repl. Pamp. 1992). Approximately 1500 individuals received benefits payments under this program.

{3} Prior to the enactment of Regulation 346, receipt of general assistance disability benefits was for an unlimited duration. During the 1991-92 fiscal year, the general assistance program was faced with inadequate legislative funding. In response to a projected budgetary shortfall, the HSD promulgated Regulation 346, which stated in relevant part that

> [e]ffective February 1, 1992, assistance provided to individuals receiving General Assistance for the Temporarily Disabled or . . . the Permanently Disabled or any combination of the two categories . . . will be limited to 12 continuous calendar months. For the purpose of this provision, a month of assistance is defined as any month in which a benefit for that month has been or will be issued. Individuals closed for this reason will be precluded from receipt of assistance . . . for a period of 6 calendar months. It will be necessary for an individual to reapply after the period of ineligibility in order for a determination of eligibility to be made.

A public hearing on Regulation 346 was held in Santa Fe, on October 21, 1991. The effective date of Regulation 346 was originally set for November 1, 1991, but was finally set for February 1, 1992. The regulation would adversely affect between 400 and 600 individuals.

{4} On December 23, 1991, the Plaintiffs filed a class action complaint for declaratory and injunctive relief. The Plaintiffs claimed that Regulation 346 "violated the due process clause of Article II, Section 18 of the New Mexico Constitution in arbitrarily acting to terminate desperately needed General Assistance benefits currently received by . . . disabled citizens."[1] The Plaintiffs also alleged that Regulation 346 was invalid because it applied retroactively to terminate benefits. The trial court issued a preliminary injunction. The Legislature then appropriated additional money to meet the 1992 fiscal budget, eliminating the projected shortfall.

{5} The case was heard by the trial court on February 21, 1992. The trial court issued its final judgment and order on February 27, 1992. The court concluded that Regulation 346 was a retroactive enactment that violated the Plaintiffs' due process rights. The court permanently enjoined the HSD from applying and implementing Regulation 346, "and from failing to provide monthly General Assistance disability benefits to the Plaintiffs." On March 13, 1992 the HSD appealed the trial court's judgment and order to this Court.

II.

{6} On appeal, we address whether the trial court erred by permanently enjoining HSD from applying and implementing Regulation 346. As a threshold matter, we address the Plaintiffs' argument that the issues presented by this case are moot because HSD's exigent budgetary circumstances have passed and because Regulation 346 has been superseded by a different, albeit similar, regulation. The Plaintiffs urge that because the issues are moot, we should decline to address the issues presented by this case and summarily affirm the judgment and order of the district court. We disagree.

{7} "The doctrine of mootness is a limitation upon jurisdiction or decrees in cases where no actual controversy exists." **Mowrer v. Rusk,** 95 N.M. 48, 51, 618 P.2d 886, 889 (1980). In general, a case will be dismissed if the issues

[1] The due process clause of Article II, Section 18 of the New Mexico Constitution states that "no person shall be deprived of life, liberty or property without due process of law."

have become moot. **Id.** However, as an exception to the general rule, moot issues will be decided if they are issues of "substantial public interest," and "capable of repetition, yet evading review." **Id.** We hold that this exception applies in the instant case. Whether the HSD violated the Plaintiffs' constitutional rights by promulgating a regulation that limited the duration of time that benefits could be received is an issue of constitutional import and, accordingly, one of "substantial public interest." The issue is also one that is "capable of repetition, yet evading review." While the budgetary crisis that prompted the creation of Regulation 346 has passed similar budgetary shortfalls are likely to occur in the future and will invariably generate the need for similar regulations. In fact, the HSD has already supplanted Regulation 346 with a similar regulation. **See** Limitation of Benefits, N.M. Human Serv. Dep't Reg. 349.3, 3 N.M. Reg. No. 7, 38 (April 15, 1992). Any regulations similar to Regulation 346 will be capable of evading judicial review because a given fiscal year's budgetary shortfall will likely end before the regulation is reviewed by an appellate court. We conclude that review of the issues presented in the instant case is justified, considering that the issues are likely to arise in future cases and, as in the instant case, be capable of evading judicial review.

III.

{8} We next address whether the HSD had the statutory authority to promulgate Regulation 346. The authority of an administrative agency "to promulgate rules and regulations must be found in and is limited by statute." **Winston v. New Mexico State Police Bd.,** 80 N.M. 310, 311, 454 P.2d 967, 968 (1969); **cf. Foster v. Board of Dentistry,** 103 N.M. 776, 777, 714 P.2d 580, 581 (1986) applying the rule that "where rulings by administrative agencies are not in accord with the basic requirements of the statutes relating to those agencies, the decisions of the agencies are void"). The agency's authority is not limited to the express powers granted by statute, but also includes those powers that arise from the statutory language by fair and necessary implication. **Winston,** 80 N.M. at 311, 454 P.2d at 968.

{9} The HSD administers the general assistance program, including payment of disability benefits, under the New Mexico Public Assistance Act (the "Act"), NMSA 1978, Sections 27-2-1 to -47 (Repl. Pamp. 1992 & Cum. Supp. 1994). While no provision of the Act directly addresses how funds should be administered during a budgetary shortfall, the Act does make payment of benefits contingent upon the availability of legislative funds. Section 27-2-7 (Repl. Pamp. 1992) states that public assistance shall be provided to eligible persons under the general assistance program "subject to the availability of state funds." Section 27-2-5(A) (Repl. Pamp. 1992) states that "if the amount of federal and state funds available for public assistance is insufficient to provide the grants for all eligible persons, **the amount of grants to eligible persons may be reduced as necessary.**" (Emphasis added.)

{10} This Court has previously interpreted the Act's provisions as giving the HSD discretion in deciding how to distribute general assistance funds during budgetary shortfalls. In **Garcia v. Health & Social Services Department,** 88 N.M. 419, 540 P.2d 1308 (Ct. App. 1975), **reversed,** 88 N.M. 640, 642-44, 545 P.2d 1018, 1020-22 (1976), the Court of Appeals addressed whether the HSD, confronted by limited funding, had the authority to promulgate a regulation limiting cash assistance to disabled needy persons with no dependents to "'a period of no more than six months in any twelve (12) month period.'" 88 N.M. at 421, 540 P.2d at 1310. The Court of Appeals held that the regulation was in conflict with statutory language "and [was] not authorized by any section of the Public Assistance Act." **Id.** at 422, 540 P.2d at 1311. The Court held that the HSD's methods for confronting a budgetary shortfall were strictly limited by statute. **See id.** The Court held that the HSD could limit the payment of benefits in one of two ways: (1) By reducing the amount of grants to eligible persons under NMSA 1953, Repl. Vol. 3 (Part 1)

(1968), Section 13-17-5(A),[2] and (2) by establishing maximum grant levels for individuals and families under NMSA 1953, Repl. Vol. 3 (Part 1) (1968), Section 13-17-5(B).[3]

{11} On appeal, this Court reversed the decision of the Court of Appeals. We rejected the Court of Appeals' conclusion that the HSD's methods for distributing benefits when faced with limited funds were strictly limited to the specific methods outlined by statute. Instead, we held that the HSD had the authority to impose durational limits:

> [T]he Legislature has [clearly] granted authority to the Health and Social Services Board to limit grants to recipients [when state funds to support the program are unavailable.] [Furthermore,] we cannot believe that the limitation contemplated by the Legislature must be confined to a limitation on the amount of the periodic payments and not on the number or length of time such payments are made.

Health & Social Services Department v. Garcia, 88 N.M. 640, 644, 545 P.2d 1018, 1022 (1976). After noting that courts must be extremely cautious about creating programs that must be funded by legislative appropriations, we affirmed the HSD's authority to promulgate the regulation limiting cash assistance to disabled persons with no dependent children to six months. **Id.**

{12} In the case at bar, we apply the principle from **Garcia** that the HSD has the discretion to decide how to distribute general assistance benefits during times of budgetary shortfalls and may, in its discretion, impose durational limits on receipt of benefits. Although not expressly stated, the Act by implication gives the HSD the authority to impose durational limits on the receipt of benefits by making financial assistance "subject to the availability of state funds." Furthermore, we will not substitute our judgment for that of the administrative body administering a legislatively created program, **Garcia,** 88 N.M. at 643, 545 P.2d at 1021. The administrative body charged with overseeing the program is highly familiar with the program and is in the best position to decide how the limited state funds should be dispensed. In this case, the HSD might have chosen to address the budget shortfall by reducing the monthly benefit amounts of all 1500 disabled citizens receiving general assistance rather than by eliminating benefits for those individuals who had received benefits for twelve continuous calendar months. However, the HSD, not this Court, is in the best position to know which option will have the least amount of negative impact on the body of individuals receiving general assistance disability benefits. As the United States Supreme Court aptly stated:

> We do not decide today that the . . . regulation is wise, that it best fulfills [all] relevant social and economic objectives, . . . or that a [better] system could not be devised. . . . But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, . . . [but this Court is not empowered] to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Dandridge v. Williams, 397 U.S. 471, 487, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970) (citation omitted). We hold that the HSD had the implied authority under the Act to limit the receipt of general assistance to twelve continuous months by enacting Regulation 346.

IV.

{13} We next address whether Regulation 346 violated the due process clause of the New

[2] Section 13-17-5(A), now codified as § 27-2-5(A), stated that "if the amount of federal and state funds available for public assistance is insufficient to provide the grants for all eligible persons, the amount of grants to eligible persons may be reduced as necessary.

[3] Section 13-17-5(B), now codified as § 27-2-5(B), stated that the health and social services board "may set individual and family maximum grant levels for each program."

Mexico Constitution. In essence, the Plaintiffs argue that their substantive due process rights were violated and raise no argument that they were denied procedural due process when the HSD terminated their benefits. The trial court concluded that Regulation 346 violated "the due process clause of Article II, Section 18 of the New Mexico Constitution" because the regulation applied retroactively to adversely affect the Plaintiffs' "property interests in subsistence benefits." The trial court considered Regulation 346 to apply retroactively because the HSD counted months prior to the regulation's enactment when calculating whether a recipient should be terminated from the program after having received benefits for twelve continuous months.

A.

{14} We conclude that Regulation 346 does not violate the due process clause of the New Mexico Constitution on its face. When determining whether a statute or regulation violates due process, we first decide what level of constitutional scrutiny to apply. When government deprives persons of fundamental rights, it must demonstrate that the law promotes a compelling or overriding government interest. John E. Nowak et al., **Constitutional Law,** ch. 13, § IV, at 448 (2d ed. 1983). If no fundamental right is infringed upon, the law need only be rationally related to a legitimate governmental purpose. **See id.** The instant case involves no infringement or deprivation of fundamental rights. "A fundamental right is that which the Constitution explicitly or implicitly guarantees." **Richardson v. Carnegie Library Restaurant, Inc.,** 107 N.M. 688, 696, 763 P.2d 1153, 1161 (1988). While the right to receive public assistance benefits is important, **Goldberg v. Kelly,** 397 U.S. 254, 262, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), such right is a matter of statutory entitlement, **id.**, and is not explicitly or implicitly guaranteed by the New Mexico Constitution. Therefore, the right to receive public assistance payments is not fundamental.

{15} Because the case at bar does not implicate the Plaintiffs' fundamental rights, we must determine whether Regulation 346 is rationally related to a legitimate governmental purpose. In this case, the HSD imposed a durational limit on receipt of general assistance benefits to conserve limited state funds during a budgetary shortfall. This purpose was legitimate because the statutory provisions pertaining to the general assistance program prohibit the program from operating at a deficit. **See** § 27-2-5(A) (stating that the amount of grants may be reduced if federal and state funds are insufficient); § 27-2-7 (mandating that public assistance shall be provided if state funds are available); NMSA 1978, § 27-3-5 (Repl. Pamp. 1992) (stating that "nothing in the Public Assistance Act . . . shall be construed as authorizing or allowing expenditures for the affected programs in excess of the amounts previously appropriated by the legislature for such programs"). The durational limit is rationally related to the HSD's purpose of conserving limited funds because the HSD saved money by eliminating from the general assistance program those individuals who had received twelve consecutive months of benefits. Therefore, Regulation 346 is, on its face, constitutional and does not violate the due process clause of the New Mexico Constitution. **See Osterberg v. State Employees' Retirement Sys.,** 722 F. Supp. 415, 418 (N.D. Ill. 1989) (applying rational basis scrutiny to hold that a legislative enactment denying disability benefits did not violate the Plaintiffs' substantive due process rights).

B.

{16} The trial court found that Regulation 346 violated due process as applied to the Plaintiffs, because the regulation was applied retroactively. The court concluded that Regulation 346 applied retroactively because the HSD included months prior to the regulation's enactment when determining whether an individual should be disenrolled from the general assistance program.

{17} We do not agree that Regulation 346 was retroactively applied. New Mexico law presumes that statutes and rules apply prospectively absent a clear intention to the contrary.

See Swink v. Fingado, 115 N.M. 275, 283, 850 P.2d 978, 986 (1993). A statute or regulation is considered retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions. **Albuquerque v. State ex rel. Village of Los Ranchos de Albuquerque,** 111 N.M. 608, 616, 808 P.2d 58, 66 (Ct. App. 1991), **cert. denied,** 113 N.M. 524, 828 P.2d 957 (1992). "However, a statute does not operate retroactively merely because some of the facts or conditions which are relied upon existed prior to the enactment.' **Id.** A statute or rule "'is not retroactively construed when applied to a condition existing on its effective date even though the condition results from events which occurred prior to the date.'" **Philadelphia v. Phillips,** 179 Pa. Super. 87, 116 A.2d 243, 247 (Pa. Super. Ct. 1955) (quoting **Burger v. Unemployment Compensation Bd. of Review,** 168 Pa. Super. 89, 77 A.2d 737, 739 (Pa. Super. Ct. 1951)).

{18} In the instant case, an affected Plaintiff stopped receiving disability payments on or after the date that Regulation 346 was enacted if that Plaintiff had received twelve continuous months of disability payments. While the HSD included in the twelve-month period any consecutive months prior to enactment of Regulation 346 during which the individual had received payments, this use of past facts did not render the application of Regulation 346 retroactive. Regulation 346 operated prospectively by cutting off benefits at a future point in time and the regulation does not apply retroactively simply because past events were considered when determining durational limits for individuals receiving benefits payments. **Albuquerque,** 111 N.M. at 616, 808 P.2d at 66; **Phillips,** 116 A.2d at 247. In other words, the regulation was not retroactive merely because it utilized the characteristics of a defined group to describe the persons that the statute would affect, even though the defining characteristics arose before the regulation became effective. We hold that the trial court erred by concluding that Regulation 346 applied retroactively and violated the Plaintiffs' due process rights.

V.

{19} In conclusion, we recognize that administration of general assistance benefits "involves the most basic economic needs of impoverished human beings." **See Dandridge,** 397 U.S. at 485. We do not take the temporary termination of such benefits lightly. However, State-funded entitlement programs must necessarily operate within the confines of limited budgets. Receipt of funds from the public treasury is not guaranteed and such noncontractual claims generally enjoy no constitutionally protected status. **See Weinberger v. Salfi,** 422 U.S. 749, 772, 45 L. Ed. 2d 522, 95 S. Ct. 2457 (1975).

{20} We hold that the HSD acted within its statutory authority when it promulgated Regulation 346 and that the regulation did not violate the due process clause of the New Mexico Constitution either on its face or as applied to the Plaintiffs. As the United States Supreme Court stated in **Usery v. Turner Elkhorn Mining Co.,** 428 U.S. 1, 18, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976), it is enough to say that the Act approaches the problem of cost [cutting] rationally; whether a [better cost-cutting] scheme would have been wiser or more practical under the circumstances is not a [relevant] question." The trial court erred by deciding that Regulation 346 was an invalid retroactive regulation that violated due process, and thus erred by enjoining the HSD from applying and implementing Regulation 346. The judgment and order of the trial court is reversed.

{21} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

SETH D. MONTGOMERY,
Chief Justice

RICHARD E. RANSOM,
Justice

STANLEY F. FROST,
Justice

GENE E. FRANCHINI,
Justice (Dissenting)

DISSENT

FRANCHINI, Justice. (dissenting).

{22} I respectfully dissent. The questions before this Court are moot because no budgetary shortfall ever actually existed and Regulation 346 has been superseded by a different regulation. There is no evidence in this record that the projected budgetary crisis precipitating the HSD's action will again arise in the foreseeable future and no evidence whatsoever that judicial review would be evaded if a crisis did in fact exist. The case should be dismissed as moot under **Mowrer v. Rusk,** 95 N.M. 48, 51, 618 P.2d 886, 889 (1980).

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1994-NMSC-121

Filing Date: November 16, 1994, As Corrected March 24, 1995

Docket No. 20,463

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

ANNE LOUISE APODACA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Frank H. Allen, Jr., District Judge.

Benjamin A. Gonzales
Albuquerque, New Mexico

for Defendant-Appellant.

Hon. Tom Udall, Attorney General
Bill Primm, Assistant Attorney General
Santa Fe, New Mexico

for Plaintiff-Appellee.

OPINION

BACA, Chief Justice.

{1} Defendant-Appellant, Anne Louise Apodaca, appeals from convictions of first-degree murder, NMSA 1978, Section 30-2-1(A)(1) (Repl. Pamp. 1984), conspiracy to commit first-degree murder, NMSA 1978, Sections 30-28-2 and 30-2-1(A)(1) (Repl. Pamp. 1984), tampering with evidence, NMSA 1978, Section 30-22-5 (Repl. Pamp. 1984), and conspiracy to commit tampering with evidence, Sections 30-28-2 and 30-22-5. The crimes for which Defendant was convicted stem from the murder of her husband, Edward Apodaca, Sr. The trial court sentenced Defendant to life imprisonment on the murder conviction, nine years imprisonment on the murder-conspiracy conviction, and eighteen months imprisonment each on the tampering and conspiracy to commit tampering convictions. The latter three terms run concurrently with each other but consecutively to the life imprisonment term. On appeal, we address three issues: (1) Whether the State's circumstantial evidence was sufficient to sustain Defendant's first-degree murder conviction if it did not preclude a reasonable hypothesis of innocence; (2) whether the prosecutor's closing statement deprived Defendant of a fair trial; and (3) whether the trial court erred in admitting and excluding various evidentiary information. Because Defendant does not challenge her convictions for tampering with evidence and conspiracy to commit tampering with the evidence, we do not address these convictions. We review this case pursuant to SCRA 1986, 12-102(A)(2) (Repl. Pamp. 1992). We affirm as to each issue; therefore, we need not address the denial of Defendant's motion for a new trial or cumulative error.

I

{2} Sometime during the early morning of April 17, 1990, Edward Apodaca Sr. was shot in the back of the head while he lay sleeping on a couch in his den. The bullet severed his brain stem, instantly immobilizing him. Gunpowder residue on the pillowcase under his head indicated he was shot from a distance of about two feet. No weapon was found in the house and there were no signs of a forced entry or burglary. The bullet came from a .38 pistol; specifically, the .38 pistol that belonged to Defendant's mother, Frizelle Aguilar. **See State v. Aguilar,** 117 N.M. 501, 505, 873 P.2d 247, 251, **cert. denied,** 115 S. Ct. 168, 130 L. Ed. 2d 105, **and cert. denied,** 115 S. Ct. 182, 130 L. Ed. 2d 116 (1994).

II

{3} On appeal, we review "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." **State v. Sutphin,** 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). We view the evidence in the light most favorable to supporting the verdict and resolve all conflicts and indulge all permissible inferences in favor of upholding the verdict. **Id.**

{4} Defendant argues that the State failed to prove that the circumstantial evidence relied upon to support the verdict was "incompatible with her rational theory of innocence," **see State v. Vigil,** 110 N.M. 254, 256, 794 P.2d 728, 730 (1990) (stating that circumstantial evidence **relied upon** to support verdict must be incompatible with any rational theory of defendant's innocence). Defendant alleges that the circumstantial evidence supports her theory that Aguilar, by herself, murdered or arranged for the murder of Apodaca and that Defendant merely helped to conceal the crime. Defendant asserts that "evidence equally consistent with two hypotheses tends to prove neither," **State v. Garcia,** 114 N.M. 269, 275, 837 P.2d 862, 868 (1992) (finding insufficient evidence presented that defendant who committed murder in heat of argument possessed the intent required to sustain first degree murder conviction); **State v. Malouff,** 81 N.M. 619, 621, 471 P.2d 189, 192 (Ct. App. 1970) (finding insufficient evidence to sustain convictions of unlawful taking of motor vehicle). In **Malouff,** the court noted that "when circumstances alone are relied upon, they must point unerringly to defendants and be incompatible with and exclude every reasonable hypothesis other than guilt." **Id.** at 620, 471 P.2d at 190. The court in **Malouff** found that although evidence indicated that a stolen car had been temporarily located in a garage at the defendants' mother's home before it was stripped and then recovered from a wrecking yard, the state presented no evidence that the parts recovered from the garage were taken from the recovered car or that the defendants had exclusive possession of the car parts. "For the jury to have reached the conclusion, that both defendants had control and dominion over the garage they had to speculate. This it may not do." **Id.** at 621, 471 P.2d at 191.

{5} We require that evidence point logically to a defendant and exclude other reasonable hypotheses of innocence to assure that the basis of a conviction is not mere speculation. **Id.** However, this does not mean that we may reweigh the evidence presented to determine the comparative credibility of Defendant's theory. Nor may we substitute our judgment for that of the jury. **State v. Lankford,** 92 N.M. 1, 2, 582 P.2d 378, 379 (1978). Only the jury may resolve factual discrepancies arising from conflicting evidence. **Id.** In **Vigil** we explain that "incompatible with any rational theory of . . . innocence" means "the evidence supporting the verdict [must] provide a sufficient basis upon which to infer guilt beyond a reasonable doubt." **Vigil,** 110 N.M. at 256, 794 P.2d at 730. There is no reasonable-doubt preclusion unless circumstantial evidence **viewed in the light most favorable to the State** also gives rise to an equally reasonable inference of innocence.

{6} Rather than presenting a new standard of review, "'**Garcia** merely reiterate[s] the established law that the standard must be viewed in the context of the state's burden below—to prove each element of the crime beyond a reasonable doubt.'" **State v. Sanders,** 117 N.M. 452, 456, 872 P.2d 870, 874 (1994) (quoting **State v. Orgain,** 115 N.M. 123, 126, 847 P.2d 1377, 1380 (Ct. App.), **cert. denied,** 115 N.M. 145, 848 P.2d 531 (1993)). Our review consists of a two-step process: First we review the evidence under the **Sutphin/Lankford** standard with deference to the trial court's resolution of factual conflicts and inferences; then we make a legal determination of whether the evidence viewed in this manner "could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." **Id.; see also Orgain,** 115 N.M. at 126, 847 P.2d at 1380 (finding as sufficient to sustain conviction of forgery that defendant arranged for and accompanied his accomplice on trips to bank and agreed to

share in proceeds). An appellate court may reject testimony that the factfinder has believed "only if there is a physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions." **Sanders,** 117 N.M. at 457, 872 P.2d at 875. Defendant would have us make inferences or deductions that would cause us to reject testimony relied on by the jury. This we decline to do.

{7} In the present case, the State had the burden of proving beyond a reasonable doubt that Defendant committed first-degree murder. To meet its burden of proof, the State had to prove that (1) Defendant killed Apodaca, (2) the killing was with the deliberate intention to take away his life, and (3) this occurred in New Mexico on or about the 17th day of April, 1990. **See** SCRA 1986, 14-201. Defendant does not dispute that Apodaca was murdered during the early morning hours of April 17, 1990. To prove Defendant killed Apodaca, the State relied on the accomplice theory and had to prove that (1) Defendant intended that the crime be committed, (2) the crime was committed, and (3) Defendant helped, encouraged or caused the crime to be committed. **See** SCRA 14-2822.

A

{8} First we review the evidence under the **Sutphin/Lankford** standard in the light most favorable to sustaining Defendant's conviction of first-degree murder. There is no direct evidence as to who fired the murder weapon. We agree with Defendant that circumstantial evidence substantially implicates Aguilar because she "admitted to hating Apodaca and attempted to obtain his death certificate in order to cash in on the insurance proceeds. . . . [In addition, she] attempted to solicit someone to commit the murder, purchased the gun that was used to commit the murder," and the day after the murder she concealed the gun in a safe deposit box in a Belen bank. **Aguilar,** 117 N.M. at 505, 873 P.2d at 251.

{9} However, the evidence shows that Aguilar was not alone when she placed the gun in the safe deposit box. Defendant accompanied Aguilar and also signed the bank's registration form for the box. Although both Defendant and Aguilar told Detective Cantwell what they had done the day after the murder, neither mentioned that they had gone to Belen. Neither mentioned that they had placed the gun in a safe deposit box. The jury saw the witnesses, heard the testimony, and determined its appropriate credibility. Concealment may be considered as a "circumstance tending to show a consciousness of guilt." SCRA 14-5006. A rational jury could consider Defendant's participation in concealing the murder weapon, combined with all the other evidence presented, as more than merely helping her mother conceal the crime.

{10} Aguilar testified that on the day before the murder the two of them spent the afternoon and evening together and that night "we slept in the very same bed, with her [Defendant's] long, beautiful legs wrapped around my legs." A rational jury could have believed that Aguilar could not have gotten out of bed during the early morning hours to go over to kill Apodaca without Defendant knowing about it. Defendant argues that Aguilar gave her a valium about 10:00 p.m. and, therefore, she could not have participated in the murder. Defendant presents no evidence that a valium would have incapacitated her. However, it is possible that the jury could have dismissed this issue entirely because under the accomplice theory, Defendant did not need to participate in the actual murder. **See State v. Ballinger,** 99 N.M. 707, 710, 663 P.2d 366, 369 (Ct. App. 1983) (holding that even if jury refused to find defendant committed murder, it could have found defendant intended the crime to be committed, it was committed, and he "helped, encouraged or caused" the crime), **rev'd on other grounds,** 100 N.M. 583, 673 P.2d 1316 (1984).

{11} In addition to the events of the day before and after the murder, six witnesses testified that Defendant had told them she wanted her husband dead. Several witnesses suggested to Defendant that she should just divorce her husband. She specifically told two of them she could not do that because she wanted the house and insurance.

Defendant expressly solicited three of these witnesses to kill her husband.

{12} Witness Cynthia Carpenter testified that every day over a period of time Defendant spoke to her about killing Apodaca. Carpenter finally asked her to "cut it out because [she] didn't think it was funny." After the admonition, Defendant mentioned killing her husband only once a week. Witnesses also testified that Defendant inquired about buying or building a silencer for her gun or finding a substance that could not be traced in Apodaca's body. While the witnesses stated that they did not take Defendant's comments seriously, it was the prerogative of the jury to determine what credibility to give the testimony. Defendant presented evidence that people could take advantage of her, that she may have fetal alcohol syndrome, that she is immature and childish, and in anger she would make statements wishing someone were dead. However, a rational jury could view Defendant's statements made in anger wishing someone were dead quite differently from her repeated attempts to find someone to kill her husband. The jury heard testimony that she appeared to be "joking" when she initiated inquiries about killing her husband. The jury decided what weight to give to the testimony. A rational jury could have found beyond a reasonable doubt that Defendant had the requisite intent to kill her husband or that the crime be committed.

{13} Furthermore, the jury could have found a sufficient motive for the murder. Defendant was the beneficiary of several life insurance policies, which if current, would have totaled about $ 400,000. Defendant effectively showed that not all the policies were current. A couple of months before Apodaca's death, the Defendant and Apodaca took out an insurance policy that would pay off the $ 112,000 home mortgage when either of them died. Defendant participated in the purchase of the policy, she wrote the check, picked up the policy, and signed the receipt. Yet during the investigation, Defendant told Detective Cantwell when asked about insurance that "she thought that he had something, but she didn't know what they were. She didn't know anything about his insurance." Defendant argued that she would have taken out term rather than a universal life policy had she intended to "weave this web" to murder Apodaca and collect on the policies. However, the jury rejected Defendant's argument. A rational jury could reasonably infer that Defendant was unconcerned about or unaware of the higher costs of universal life insurance, that she **believed** the policies were in effect, or that she intended to collect the proceeds from the insurance policies that she knew were current and to obtain title to the house.

{14} The evidence also indicates that Defendant acknowledged owning a handgun, a .25 automatic pistol. When she turned the gun over to Detective Wilson, she explained that it would be dirty because she shot it occasionally. A rational jury could have inferred that Defendant knew how to shoot a gun and that she, herself, shot her husband, using her mother's .38 which she then left in her husband's car where her mother testified that she found it the morning after the murder.

{15} The jury weighed Defendant's theories against the testimony of the various witnesses. We may not substitute our judgment for that of the jury. "Considering the evidence and all reasonable inferences therefrom in support of the verdict and not the merit of evidence that may have supported a verdict to the contrary," **Vigil,** 110 N.M. at 256, 794 P.2d at 730, we find the evidence sufficient to support the jury's factual determinations.

{16} Next we make a legal determination of whether the evidence was sufficient to support the verdict. **Sanders,** 117 N.M. at 456, 872 P.2d at 874. The only unresolved legal issue is whether Defendant committed the murder, either directly or as an accomplice, or whether she merely helped Aguilar conceal the murder weapon. The State presented evidence that Defendant repeatedly discussed murdering her husband and asked for advice about how to do so. She attempted to solicit three persons to commit murder for her and stated that she would lose the house if she got a divorce. She acknowledged owning a gun and knowing how to shoot it. She concocted a

false cover story as to her activities the day before and after the murder and accompanied her mother to Belen to conceal the murder weapon. This evidence does not support a finding that Defendant only participated in aiding her mother to conceal the murder weapon. We find overwhelming evidence to support the jury's verdict that Defendant intended to kill Apodaca and she either committed the murder herself or helped, encouraged, or caused it to happen.

B

{17} We next discuss whether the State proved each element of conspiracy beyond a reasonable doubt. To meet its burden of proof under the theory of conspiracy, the State had to prove that (1) Defendant and another by words or acts agreed together to commit first-degree murder, (2) Defendant and another intended to commit first-degree murder, and (3) Apodaca was murdered on or about the 17th day of April, 1990. **See** SCRA 14-2810. Circumstantial evidence and conduct of the parties is sufficient to establish a "common design or agreement to accomplish an unlawful purpose or a lawful purpose by unlawful means." **State v. Chavez,** 99 N.M. 609, 611, 661 P.2d 887, 889 (1983); **State v. Bankert,** 117 N.M. 614, 622, 875 P.2d 370, 378 (1994). The State presented ample evidence that Defendant and Aguilar conspired with each other to intentionally kill Apodaca. In February, 1990, Defendant told Carpenter that she had asked her mother to kill Apodaca, but her mother had said, "No." Defendant stated that she was "going to ask her again."

{18} Witness Joe Scalf testified that while he was painting Defendant's house, Aguilar pointedly offered him $ 5,000 to "eliminate" Apodaca. He laughed off the offer, thinking she was joking. Aguilar approached him again the next day, told him "it was not a bad joke, that [she] was very serious, and reoffered the $ 5,000." While they were talking, Defendant joined the conversation and agreed with Aguilar that Apodaca had to be "eliminated." When Scalf again declined, Aguilar, in Defendant's presence, asked him if he could find someone who would do it. Defendant did not object to her mother's inquiries. **See State v. Gilliam,** 60 N.M. 129, 132-33, 288 P.2d 675, 677 (1955) (finding as admissible statement made in defendant's presence that defendant did not deny or respond to in any way; silence indicated acquiescence in truth of statement).

{19} The evidence also indicates that Defendant and Aguilar were together the day before and after the murder. Their accounts of what they did were sufficiently different to arouse Detective Cantwell's suspicions that they had constructed a false cover story. They failed to mention to Detective Cantwell that they had gone to Belen the day of the murder. In Belen they opened a safe deposit box for the express purpose of concealing the murder weapon, using aliases of F.L. Riley, Jr. and F.L. Riley, Sr. The jury heard Defendant assert that she was distraught by her grandmother's death and funeral the day before Apodaca's murder and could not have participated in the crime. The jury determined the appropriate credibility to give to the evidence presented by both parties. We defer to the jury's resolution of the conflicting testimony. We review the evidence to determine whether it is sufficient to support the verdict of conspiracy to commit first-degree murder. Defendant asserted that she was going to persuade her mother to help her kill Apodaca. She participated in the attempted solicitation of Scalf and agreed that Apodaca had to be eliminated. Defendant spent the day before and after the murder with her mother and both concocted a false cover story. Defendant actively participated in the concealment of the murder weapon by signing the safe deposit registration form. We find the evidence sufficient to support that Defendant and Aguilar together agreed and conspired to commit first-degree murder and intended for the murder to take place.

III

{20} We next address whether the prosecutor incorrectly instructed the jury on the law, thereby depriving Defendant of a fair trial. During

his closing argument, the prosecutor told the jury that "I don't have to prove who pulled the trigger. . . ." and "it doesn't matter who pulled the trigger that night." Defendant argues that the State was obligated to prove that **either** Defendant or Aguilar killed Apodaca. Instead, the State "left it to the jury to decide whether Defendant played a role in that killing." Because Defendant failed to object to this statement during trial, we review for fundamental error. **See Aguilar,** 117 N.M. at 507, 873 P.2d at 253. The doctrine of fundamental error is resorted to when fundamental rights are at stake and "'substantial justice' has not been done," **State v. Osborne,** 111 N.M. 654, 662, 808 P.2d 624, 632 (1991), or "the question of guilt is so doubtful that it would shock the conscience to permit the conviction to stand." **Id.** (quoting **State v. Rogers,** 80 N.M. 230, 232, 453 P.2d 593, 595 (Ct. App. 1969)).

{21} In reviewing the prosecutor's closing argument in its entirety to understand its potential effect on the jury, **State v. Griffin,** 116 N.M. 689, 698, 866 P.2d 1156, 1165 (1993), we find the State properly explained its burden of proof and then told the jury that "the defendant may be found guilty of a crime even though she herself did not do the act constituting the crime, if . . . she intended for it to be committed and it was committed and she either helped, encouraged or caused [the deed]." The State was not "asking the jury to speculate and to guess who killed Ed Apodaca, Sr.," the statement did not shift the burden of proof to the Defendant, and it did not usurp the role of the judiciary. The State merely enunciated its burden of proof under the accomplice theory. **See** SCRA 14-2822. Because we find the prosecutor correctly stated the law, it does not "shock the conscience to permit the conviction to stand." **Osborne,** 111 N.M. at 662, 808 P.2d at 632.

IV

{22} Finally, we decide whether the trial court erred in admitting and excluding various evidentiary information, thus depriving Defendant of a fair trial. Defendant argues that the trial court erred in (1) admitting Aguilar's out-of-court statements to Detective Cantwell, (2) permitting the introduction of the insurance documents contained in Defendant's briefcase without proper authentication, and (3) limiting the presentation of Defendant's case by excluding the introduction of Aguilar's testimony about the death of her ex-husband, Herbert Fischer, testimony about her prior conviction, and her letter to Bud Riley. We discuss these evidentiary issues separately.

A

{23} Defendant argues that the court erred in permitting Detective Cantwell to testify about the statements Aguilar made during the investigation on April 17, 1990. The court permitted Detective Cantwell to compare the statements Defendant and Aguilar gave her concerning their whereabouts the day before and after the murder. On review we defer to the trial judge's decision to admit or exclude evidence and we will not reverse absent a clear abuse of discretion. **Garrett v. Howden,** 73 N.M. 307, 312-13, 387 P.2d 874, 878-79 (1963) (declining to interfere with trial court's decision when full consideration was given to question and court under no misapprehension of law on subject); **accord Griffin,** 116 N.M. at 697, 866 P.2d at 1164 (deferring to trial court absent an abuse of discretion). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." **State v. Simonson,** 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1983). "We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." **State v. Litteral,** 110 N.M. 138, 141, 793 P.2d 268, 271 (1990).

{24} Defendant's statements, admissible against her under SCRA 1986, 11-801(D)(2)(a) (Repl. Pamp. 1994) (admission by party opponent), agree with the first half of Aguilar's statements. Therefore, there can be no prejudice against Defendant for the admission of this portion of Aguilar's statements. **See Vigil,** 110 N.M. at 258, 794 P.2d at 732 (finding statement attributed to defendant not hearsay because it was an admission).

{25} Defendant relies on **State v. Pacheco,** 110 N.M. 599, 798 P.2d 200 (Ct. App.), **cert. denied,** 110 N.M. 533, 797 P.2d 983 (1990), in which the court found that the admission of an out-of-court statement required reversal and a new trial. 110 N.M. at 603-04, 798 P.2d at 204-05. **Pacheco** is distinguished, however, because in that case the affidavit of a third party **who was unavailable for trial** was being used to assert the truth of the matter. The affidavit showed that the defendant had told the third party a false cover story. The prosecution tried to use the affidavit to impeach the defendant after he denied concocting a cover story. **Id.** The court noted that if the third party "had been present and had testified at trial, there would be no hearsay problem, even though his testimony related to out-of-court statements made by defendants." **Id.** at 601, 798 P.2d at 202. In the present case, the State did not introduce Aguilar's statements to prove the truth of the matter asserted, i.e., what Aguilar and Defendant did the day after the murder, thus the statements are not hearsay. The court instructed the jury that the statements were admitted "not for the truth of the statement, but to show why the officer conducted the investigation as she did, from that point forward." **Cf. State v. Montoya,** 114 N.M. 221, 223-24, 836 P.2d 667, 669-70 (Ct. App. 1992) (precluding admission of out-of-court statement offered to show why officers obtained warrant to search defendant's house because statement was highly prejudicial and basis of warrant was collateral issue with negligible probative value). The court agreed that it was important for the jury to understand why Detective Cantwell changed the course of her investigation. Admission of the statements supporting the reasonableness of Detective Cantwell's conduct was not unfairly prejudicial to Defendant. Because we find Aguilar's statements were properly admitted to show the reasonableness of Detective Cantwell's conduct, we do not need to consider Defendant's other arguments.

B

{26} Defendant argues that the trial court erred in admitting some of the contents of Defendant's briefcase. Determination of the trustworthiness of documents is left to the discretion of the court and is reviewable only for an abuse of discretion. **See Kirk Co. v. Ashcraft,** 101 N.M. 462, 468, 684 P.2d 1127, 1131 (1984) (upholding trial court's admission of documents kept in the ordinary course of business); **State v. Wynne,** 108 N.M. 134, 139, 767 P.2d 373, 378 (Ct. App. 1988) (upholding trial court's admission of receipts for purchases of chemicals and equipment as proof defendant had actually made these purchases), **cert. denied,** 108 N.M. 115, 767 P.2d 354 (1989).

{27} Defendant asserts that the insurance policies in the briefcase were inadmissible under any hearsay exception and the admission violates her constitutional rights to confrontation. "The Confrontation Clause of the Sixth Amendment to the United States Constitution and Article II, Section 14, of the New Mexico Constitution guarantee a defendant in a criminal prosecution the right to confront the witnesses against him." **State v. Sanders,** 117 N.M. at 459, 872 P.2d at 877. The right of confrontation is not absolute and "extends only to the right 'to be confronted with the witnesses against him.'" **State v. Barton,** 79 N.M. 70, 74, 439 P.2d 719, 723 (1968). Statements that are not offered for the truth of the matter asserted are not "witnesses against" Defendant. **Cf. id.** (holding that statements to police could not be construed as connecting defendant with crime and therefore person making statement was not a "witness against" defendant).

{28} Defendant argues that the State failed to show "whether that insurance even pertained to Defendant as a beneficiary," **see State v. Young,** 103 N.M. 313, 316, 706 P.2d 855, 858 (Ct. App.), **cert. denied** (Aug. 13, 1985). **Young** requires that the evidence must be "connected with the defendant, the victim, or the crime itself." **Id.** The purpose of authentication is to show that the evidence is what it purports to be. **Id.** at 318-19, 706 P.2d at 860-61. Not all of the insurance policies were offered for the truth of the matter asserted. **See Pacheco,** 110 N.M. at 601, 798 P.2d at 202 (stating out-of-court declarations by defendant to third party were evidence of guilt). All the policies contained either Defendant's or Apodaca's name on them. It was immaterial as to whether the policies

were valid and current. Detective Cantwell repeatedly testified that she "didn't check them out" and found "things being cancelled" and "things lapsing." Had Defendant cross-examined witnesses directly connected with these many policies, she would have produced the same information. The jury was aware that not all the policies were in effect. In reviewing the record, we note that Defendant had told several witnesses that she could not divorce Apodaca and keep the house. She mentioned to one witness that the insurance policies would pay off the mortgage "if anything happened to him." The evidence is relevant because it shows that Defendant had knowledge of the policies. This knowledge, when combined with her statements to various witnesses, is material to the inference of motive.

{29} Defendant had the opportunity to confront witnesses for the two major policies that were offered for the truth of the matter asserted, the $ 112,000 home mortgage policy and the $ 37,000 life insurance policy. See **Sanders,** 117 N.M. at 459, 872 P.2d at 877 (stating that the main purpose of confrontation is to provide an opportunity for cross-examination). Although Defendant's requested limiting instruction was denied, the court and Defendant both acknowledged that the other documents were offered "merely to show that they were in Defendant's possession and control and to show her motive to kill her husband." We find that admission of these documents to show knowledge and motive does not violate Defendant's right to confrontation.

C

{30} Next Defendant argues that the court improperly limited the presentation of her defense by excluding Aguilar's testimony about Fischer's death, testimony about Aguilar's prior conviction for aggravated battery with a deadly weapon, and redacting Aguilar's letter to Riley. The court granted the State's motion in limine that precluded Defendant from introducing evidence that after Fischer committed suicide, Aguilar kept his body in a closet from 1974 to 1977 before turning it over to the authorities. Initially Defendant sought to introduce this evidence to show that Aguilar had knowledge about donating a body to the university. The court granted this limited use of the evidence. Later that day, Defendant decided to use the full evidence to impeach Aguilar and now argues that this evidence shows Aguilar's motive to murder Apodaca. Although Defendant failed to object to the court's decision to preclude this evidence, she contends that her mere mention of the evidence earlier that morning was sufficient to preserve the issue. We disagree.

{31} Defendant had the duty to inform the court of the nature of her objection so that the court could make an informed decision as to its admissibility. **State v. Lopez,** 84 N.M. 805, 809, 508 P.2d 1292, 1296 (1973) (finding defendant's motion for directed verdict based on state's general failure to "prove all essential elements of a prima facie case" was insufficient to serve as notice of objection to venue; purpose of objection is to invoke ruling upon question and it is essential that court is informed of specific grounds for objection). The Defendant not only waited until the afternoon to inform the court as to what evidence she intended to present, she acquiesced to the court's second decision to exclude the evidence with her statement that "I know the Court ruled that we couldn't do that [discuss Fischer's interment], so I wanted to say that [presumably referring to her earlier statement that the evidence went to motive], because I didn't know if it was clear, when we talked about it this morning, as to exactly what we were talking about. I understand the Court's ruling." Defendant acknowledged the court's ruling but did not object to it. **See State v. Lucero,** 104 N.M. 587, 590, 725 P.2d 266, 269 (Ct. App. 1986) (holding "objection must be sufficiently timely and specific to apprise the trial court of the nature of the claimed error and to invoke an intelligent ruling by the court"; when testimony became accusatory, defendant should have objected again).

{32} Before the court can adequately determine whether the evidence is relevant, the Defendant must inform the court how the evidence relates to the issues before it. This the Defendant failed to do. Defendant did argue that Aguilar had

threatened Fischer before he committed suicide. In reviewing the record, it is difficult to connect Aguilar's threats or her decision to inter Fischer in the closet nearly twenty years ago with Apodaca's murder in 1990. No allegations or charges were brought against Aguilar for Fischer's death and there is no proof of any wrongdoing associated with the event. At most the evidence would have confused or misled the jury, possibly resulting in speculation as to whether charges should have been brought against Aguilar nearly twenty years ago. Such digression is specifically what we seek to avoid. **See** SCRA 11-402 (irrelevant evidence inadmissible); **State v. Platt,** 114 N.M. 721, 724, 845 P.2d 815, 818 (Ct. App.) (finding court properly excluded evidence to avoid creating a "trial within a trial" that would distract the jury), **cert. denied,** 114 N.M. 501, 841 P.2d 549 (1992). We find the court did not abuse its discretion.

{33} Defendant argues that the court erred in refusing to permit Defendant to ask questions a third time concerning Aguilar's 1983 conviction for attempting to run over Defendant and Riley, ruling that it also was too remote. Defendant intended to show that Aguilar had already "tried to kill her own daughter and she keeps coming back." We review for an abuse of discretion. **State v. Landers,** 115 N.M. 514, 518-19, 853 P.2d 1270, 1274-75 (Ct. App. 1992) (holding that evidence of defendant's prior sexual conduct with victim of sex crime was relevant to issue of credibility and not offered only to show character or propensity to commit the crime), **cert. quashed,** 115 N.M. 535, 854 P.2d 362 (1993). In order to warrant reversible error, Defendant "must show a reasonable probability that the court's failure to allow the testimony contributed to [her] conviction." **State v. Gonzales,** 112 N.M. 544, 552, 817 P.2d 1186, 1194 (1991).

{34} Defendant acknowledged that the information "already came in through Cynthia Carpenter. . . . [and] through Frizelle [Aguilar]. I was just going to have him explain it." The court only prohibited Defendant's attempt to introduce this same information through Riley. When the court suggested Defendant make a tender, she declined. Defendant has not shown a reasonable probability that the failure to allow the testimony a third time contributed to her conviction. **See Gonzales,** 112 N.M. at 552, 817 P.2d at 1194. We find the court properly exercised its discretion.

{35} Finally, Defendant argues that the court erred in redacting Aguilar's letter of June 1, 1990 to Riley. As previously stated, we review the court's decision to exclude the evidence under the abuse of discretion standard. The letter was not admissible under SCRA 11-801(D)(2)(e) because the conspiracy clearly had ended with Aguilar's arrest on May 3, 1990, if not before. The record indicates that the only portion of the letter that was omitted was the statement that "Snooky [Defendant] is innocent." The essence of this statement was presented through other sentences in the letter that were admitted. The trial court carefully weighed the probative value of this sentence against the danger of unfair prejudice. **See** SCRA 11-403. The court, by permitting the entire letter except for this one sentence, exercised its discretion. We do not find such an exercise of discretion "untenable or not justified by reason."

V

{36} In conclusion, we find the evidence sufficient to sustain Defendant's first-degree murder and conspiracy to commit first-degree murder convictions, that the prosecutor's statement during closing argument did not constitute fundamental error, and that the trial court properly exercised its discretion in admitting some and excluding other evidence offered by Defendant. We affirm.

JOSEPH F. BACA,
Chief Justice

WE CONCUR:

RICHARD E. RANSOM,
Justice

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1995-NMSC-047

Filing Date: July 13, 1995

Docket No. 22,009

ENRIQUE GONZALES and BERLIN PADILLA, as Personal Representative of the Estate of RICARDO GARDUNO, deceased,

Plaintiffs-Appellees,

v.

SURGIDEV CORPORATION, a corporation,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
Joseph E. Caldwell, District Judge

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for Appellees.

OPINION

BACA, Chief Justice.

{1} Appellant Surgidev Corporation appeals the imposition of sanctions in the amount of $ 151,000 by the trial court while the underlying case was pending on appeal. We address two issues: (1) Whether the court had jurisdiction to impose sanctions, and if so, (2) whether the imposition of sanctions was an abuse of discretion. We review this case pursuant to SCRA 1986, 12-102(A)(1) (Repl. Pamp. 1992) (appeals from district court sounding in contract shall be taken to Supreme Court), and affirm.

I

{2} The trial underlying the imposition of sanctions involved personal injuries to Appellees Enrique Gonzales and Ricardo Garduno.[1] Each was blinded in one eye as a result of the use of a defectively designed and marketed intraocular lens (IOL), termed Style 10. The jury found Appellant 60 percent liable for the injuries and returned a total judgment of $ 1,179,990.18. Gonzales was awarded $ 434,990.18 in compensatory damages and $ 350,000 in punitive damages. Garduno was awarded $ 45,000 in compensatory damages and $ 350,000 in punitive damages. Judgment was entered on January 18, 1991. In the trial below, Appellant challenged, among other matters, the state court's jurisdiction based on federal preemption under the Medical Device Amendments of 1976 to the Food, Drug and Cosmetic Act of 1938, 21 U.S.C. § 360c-k (1988). Appellees requested certification to this court to determine whether their state law claims were preempted by federal law. This preemption matter was one of the issues addressed on appeal in **Gonzales v. Surgidev Corp.,** 120 N.M. 133, 139, 899 P.2d 576, 582 (1995) (No. 21,703) [hereinafter **Surgidev I].**

{3} On January 21, 1992, at the threat of a new trial, Appellees requested leave to depose Appellant's former counsel, Hugh Jaeger, under SCRA 1986, 1-027(B) (Repl. Pamp. 1992) (perpetuating testimony while appeal is pending), to preserve evidence about document production, violations of court orders, and damaging

[1] Berlin Padilla is the Personal Representative of the Estate of Ricardo Garduno, deceased.

information concerning the Style 10 IOL. The court took notice of Appellant's efforts to conceal evidence during the trial and granted the request. The first deposition was taken on February 29, 1992. Appellant moved to have any deposition by Jaeger be put under seal, arguing that his statements might violate attorney-client privileges and that in-camera rulings by the court might be required before the testimony could be used for any purpose. This motion was granted. Alleging that Appellant had engaged in "obstructive tactics" during the deposition, Appellees deposed Jaeger a second time on March 6, 1993, in order to complete the first deposition.

{4} On May 6, 1993, Appellees moved to unseal the deposition. In the telephonic conference concerning this motion, the court commented that the issue of sanctions for discovery abuses remained unresolved. The court instructed Appellees to draft an order to unseal the deposition.

{5} On May 13, 1993, after a second telephonic presentment hearing concerning the drafted order, the court again expressed its frustration with Appellant. During this hearing, Appellant objected to the phrase in the drafted order, "The Court being fully advised." Appellant argued that this statement did not adequately express the fact that the court had reviewed only briefs and affidavits and therefore was not "fully advised." Appellant also argued that the "decision [to unseal the deposition had] to be made question by question, line by line" before the court could order Jaeger's deposition to be unsealed. The court stated that it found these objections "absurd" and that these arguments consisted of "maneuvering" and "machinations" that were "obstructive." The court noted that "at some point if we have to have a hearing for everything that is here so that Surgidev can stall a little longer, I'm going to start taking some sanctions against them." The court granted the motion to unseal the deposition upon finding that the attorney-client privilege no longer existed because Jaeger's employment with Appellant had terminated by December 1990, at the latest. The court also found that Appellant engaged in "real stonewalling" with respect to taking Jaeger's deposition. The court noted that even the jury had grave concerns that Appellant had concealed facts in **Surgidev I.** The court then asked Appellees to "set your hearing involving sanctions, based upon the information contained in the deposition."

{6} On May 26, 1993, Appellees requested sanctions against Appellant, based on Jaeger's deposition and the deposition of Appellant's president, Dennis T. Grendahl, taken on March 4, 1993, in preparation for a similar trial in New Jersey. In his deposition, Jaeger testified that he stored approximately 300 boxes of material. Appellant never requested these documents from Jaeger during the **Surgidev I** trial or informed Appellees of their existence, even though some of the materials were relevant to the trial. Appellant's counsel retrieved this material in December 1990, about two weeks after the end of the trial. The trial ended on November 16, 1990, and final judgment was entered on January 18, 1991. Appellant then prepared an incomplete inventory of this material that indicated 100 boxes were possibly relevant in product liability litigation. The boxes contained internal memoranda, sales materials, and tapes. Jaeger also testified that when Appellant's counsel retrieved the documents, they stated that they intended to "deep-six" the documents and that they were aware that Appellant was in contempt of court.

{7} In addition, during **Surgidev I** Appellant and its counsel concealed the existence of Food and Drug Administration (FDA) transcripts concerning the pressure FDA brought to bear on Appellant to remove the Style 10 IOL from the market. Instead of providing discovery information that was damaging or harmful, Appellant was evasive about the reason the Style 10 IOL was taken off the market, the criticism of the lens, and the existence of internal and sales memoranda about the lens. On January 14, 1994, the court entered a final judgment ordering sanctions in the amount of $ 151,000. This judgment forms the basis for this appeal.

II

{8} Appellant raises two arguments to support its contention that the court lacked subject matter

jurisdiction. First, Appellant asserts that the issue of discovery abuses was raised in the lower court and was part of the basis for the award of punitive damages. Therefore, the award of sanctions simply provides Appellees with additional punitive damages. According to Appellant, this constitutes reopening the judgment. **See** SCRA 1-060(B)(2), (3) (permitting relief from final judgment when newly discovered evidence or misconduct of adverse party shown). Appellant argues that newly discovered evidence or fraud cannot, under SCRA 1-060(B)(6), justify reopening the judgment beyond one year after final judgment is entered. Therefore, the court erred in awarding sanctions, which were really just additional punitive damages, more than two years after entry of the judgment. We disagree with Appellant that these sanctions are additional punitive damages under SCRA 1-060.

{9} Appellant's second argument is that SCRA 1-037(B) and (D) permit the imposition of sanctions only by the court in which an action is pending. Appellant contends that the trial court no longer had jurisdiction after rendering final judgment. We disagree. A court retains jurisdiction under its inherent authority to impose sanctions at any time, subject only to constitutional limitations or equitable defenses.

A

{10} We first consider whether the award for punitive damages also included sanctions for Appellant's abuse of the discovery process. We note that Appellant never argued, briefed, or discussed in **Surgidev I** that the award for punitive damages included sanctions for abuse of the discovery process. Likewise, the instructions submitted to the jury do not mention any discovery abuses by Appellant. Rather, the jury received instructions that Appellees bore the burden of proving that Appellant's "misconduct showed an utter indifference to or conscious disregard for the safety of others or was grossly negligent; and [that] punitive damages should be awarded." **Cf.** SCRA 13-1827 (Repl. Pamp. 1991). For exemplary damages, the jury instruction stated that, should the jury "find that the acts of Defendant were willful, wanton, malicious, reckless, or grossly negligent," it could award exemplary or punitive damages that were "reasonably related to the actual damages and injury and not disproportionate to the circumstances." **See id.** The jury instructions made no mention of abuse of the discovery process or Appellant's conduct toward the tribunal.

{11} Appellant bases its argument on the fact that during **Surgidev I** its Senior Regulatory Analyst, Paul Mason, was cross examined about the company's reluctance to provide information during discovery. We agree with Appellant that its recalcitrance was brought before the jury. We disagree, however, that the testimony during **Surgidev I** was offered for the purposes of or sufficient to support an award of sanctions. The purpose of Mason's testimony was to provide the jury with evidence it could weigh in determining whether an award of punitive damages was proper.

{12} The award of punitive damages is based on a party's misconduct towards the individual. **See State v. Powell,** 114 N.M. 395, 400, 839 P.2d 139, 144 (Ct. App. 1992) (Punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."). Punitive damages may be awarded when a party's conduct is "malicious, willful, reckless, wanton, grossly negligent, fraudulent, or in bad faith." SCRA 13-1827. "The purpose of punitive damages is to punish the wrongdoer and to deter the wrongdoer and others in a similar position from such misconduct in the future." **Conant v. Rodriguez,** 113 N.M. 513, 517, 828 P.2d 425, 429 (Ct. App. 1992); **quoted in Duncan v. Henington,** 114 N.M. 100, 102, 835 P.2d 816, 818 (1992). Punitive damages may not be awarded unless there is an underlying award of compensation for damages. **See** SCRA 13-1827. Punitive damages "are not compensation for injury." **Powell,** 114 N.M. at 400, 839 P.2d at 144 (quoting **New York Times Co. v. Sullivan,** 376 U.S. 254, 350, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)).

{13} An award of sanctions is based on a party's misconduct towards the court. **See United**

Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 241, 629 P.2d 231, 317 (1980) (trial courts must "unhesitatingly impose sanctions proportionate to the circumstances" to assure effective discovery), **cert. denied,** 451 U.S. 901, 68 L. Ed. 2d 289, 101 S. Ct. 1966 (1981). The court may award civil contempt sanctions even when the underlying claim is dismissed. **See Cooter & Gell.,** 496 U.S. 384, 395, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990). An award of civil contempt sanctions attempts to "compensate the complainant for losses sustained." **State ex rel. Apodaca v. Our Chapel of Memories of New Mexico, Inc.,** 74 N.M. 201, 204, 392 P.2d 347, 349 (1964).

{14} In awarding sanctions, the court must "insure that a determination of a case on the merits is made only after a full, good faith disclosure of all relevant facts" in order "to preserve the integrity of the judicial process." **Id.** "Courts have supervisory control over their dockets and inherent power to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. The trial judge has such inherent supervisory control that he [or she] can initiate proceedings under Rule 37." **Pizza Hut of Santa Fe, Inc. v. Branch,** 89 N.M. 325, 327, 552 P.2d 227, 229 (Ct. App. 1976). In **Chambers v. NASCO, Inc.,** 501 U.S. 32, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991), the United States Supreme Court stated that the court's inherent powers are governed not by rules or statutes but by the control necessarily vested in courts to manage their own affairs in order to achieve the orderly and expeditious disposition of cases. **Id.** at 49 (quoting **Link v. Wabash R.R.,** 370 U.S. 626, 630-32, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962)). **Chambers** recommended that the court follow the statutes and rules when they are applicable, but when "in the informed discretion of the court, neither the statute nor the rules are up to the task, the court may safely rely on its inherent power." **Id.** at 50.

{15} The information presented during trial for consideration in awarding punitive damages concerned Appellant's failure to remove the Style to IOL from the market and Appellant's failure to warn Appellees or their physicians of the risks involved in using this product. The court recognized that

> the jury did not have a complete record—and I'm not sure to this day we have a complete record of what existed in Surgidev's files or what was available to them for them to be able to reasonably conclude that there was a danger in the application and use of their Style 10 lens in certain kinds of medical procedure[s] that would have prompted a reasonable company to have withdrawn that product from the market at the time the lens was installed in the eye[s] of these two men here in Taos County by Dr. Morrison. The jury found that there was enough evidence that Surgidev knew or should have known of those dangers and knew or should have communicated that information to doctors like Dr. Morrison, and, based upon those concerns, the jury found a punitive damage award against Surgidev corporation in this case.

{16} It is irrelevant that the court noted that the jury awarded significant punitive damages in part because it sensed Appellant's recalcitrance in providing discovery. As the court stated, the jury responded to

> a real bad smell about what was going on. But that's all it was. Until Mr. Jaeger came out with his information, it just smelled bad. But when he came out with his information what was clear was this was going beyond stinky. This was a flagrant violation of orders of discovery.

Therefore, because the concrete factual information available to the court and the jury at the time of trial did not support sanctions, sanctions could not have been included in the award of punitive damages.

{17} However, even had Mason's testimony been sufficient to sustain sanctions during **Surgidev I,** the sanctions would not have been subsumed by the award of punitive damages.

Punitive damages concern Appellant's misconduct towards the injured party and are noncompensatory. **See Powell,** 114 N.M. at 400, 839 P.2d at 144. Civil sanctions, on the other hand, concern Appellant's misconduct towards the tribunal and are compensatory. **See Our Chapel of Memories,** 74 N.M. at 204, 392 P.2d at 349. The court's award of sanctions against Appellant was predicated on Appellant's "pattern and practice of willful failures of discovery." We find that the award of sanctions does not duplicate the award for punitive damages.

B

{18} Appellant next contends that under SCRA 1-037, the court is limited to imposing sanctions to those cases "**in which the action is pending**" before the court. **See** SCRA 1-037(B)(2), (D)(3). This is predicated on the right of the parties to a lawsuit to be assured of finality at some point after the judgment is entered. Once final judgment is entered, Appellant asserts, the district court loses jurisdiction and without jurisdiction, may not order sanctions. We disagree that the court loses jurisdiction to order sanctions once the judgment is accepted on appeal or the case is no longer before the court.

{19} We recognize the long-standing rule that a district court loses its jurisdiction "upon the filing of the notice of appeal." **Kelly Inn No. 102, Inc. v. Kapnison,** 113 N.M. 231, 241, 824 P.2d 1033, 1043 (1992) (quoting **Wagner Land & Inv. Co. v. Halderman,** 83 N.M. 628, 630, 495 P.2d 1075, 1077 (1972)). However, this is not "an inflexible law of nature" but a "pragmatic guideline enabling trial courts to determine when to proceed further with some part of a case and when to refrain because issues already resolved are under consideration by an appellate court." **Id.** As we indicated in **Kelly Inn,** a district court does not lose "jurisdiction to take further action when the action **will not affect the judgment on appeal** and when, instead, the further action enables the trial court to carry out or enforce the judgment." **Id.**

{20} The district court retains jurisdiction to consider "a motion to enter a deficiency judgment" even though an "appeal [is pending] from a judgment adjudicating defendants' indebtedness, foreclosing a lien, and directing judicial sale of the property subject to the lien." **Id.** at 242, 824 P.2d at 1044. The district court may also enforce a declaratory judgment by awarding supplemental relief under NMSA 1978, Section 44-6-9, while an appeal is pending. **Kelly Inn,** 115 N.M. at 242, 824 P.2d at 1044. Likewise, under NMSA 1978, Section 39-3-22 (Repl. Pamp. 1991), the court may fix the amount of a supersedeas bond and, under SCRA 1-062, the court may rule on a motion for a stay of execution of a judgment. **Kelly Inn,** 115 N.M. at 242, 824 P.2d at 1044. Thus, a district court does not lose its jurisdiction over collateral matters merely because the judgment is on appeal. The purpose of divesting a district court of jurisdiction while a judgment is on appeal is to "avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time." **Terket v. Lund,** 623 F.2d 29, 33 (7th Cir. 1980) (quoting 9 Jeremy C. Moore et al., **Moore's Federal Practice** P 203.11 & n.1 (2d ed. 1980)); **quoted in Kelly Inn,** 113 N.M. at 242, 824 P.2d at 1044.

{21} "Finality" is not a technical term but rather a term requiring practical "construction to satisfy the policies of facilitating meaningful appellate review and of achieving judicial efficiency." **Trujillo v. Hilton of Santa Fe,** 115 N.M. 397, 398, 851 P.2d 1064, 1065 (1993); **accord State ex rel. State Engineer v. Parker Townsend Ranch Co.,** 118 N.M. 780, 781, 887 P.2d 1247, 1248 (1994). "Issues 'collateral to' and 'separate from' the decision on the merits [may] fall within a twilight zone of similarity to proceedings that carry out or give effect to the judgment." **Trujillo,** 115 N.M. at 398, 851 P.2d at 1065.

{22} However, sanctions clearly are collateral to or separate from the decision on the merits and fall outside the construct of "finality." **See Cooter & Gell v. Hartmarx Corp.,** 496 U.S. 384, 395, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990) (court may impose contempt sanctions even though underlying action dismissed). The purposes of sanctions are "(1) to enable a party

to obtain the discovery to which it is entitled; (2) to compensate a party for expenses incurred because of violation of the discovery rules by another party; and (3) to deter infractions of the rules and of court orders enforcing them." **Sandoval v. Martinez,** 109 N.M. 5, 9, 780 P.2d 1152, 1156 (Ct. App. 1989); **Chambers,** 501 U.S. at 46 (sanctions serve dual purpose of vindicating judicial authority and making prevailing party whole for expenses incurred by opponent's obstinacy (quoting **Hutto v. Finney,** 437 U.S. 678, 689 n.14, 57 L. Ed. 2d 522, 98 S. Ct. 2565 (1978))).

{23} If a party unearths discovery abuses during the trial, the district court may award sanctions under SCRA 1-037, unless the abuse falls outside this rule. In such a case, the court may rely on its inherent powers. **See Chambers,** 501 U.S. at 50. When the case is pending before the appellate court or has concluded, then the district court has inherent authority to address a matter extrinsic and collateral to the trial on the merits, namely, whether a party abused the discovery process.

{24} In **Willy v. Coastal Corp.,** 503 U.S. 131, 117 L. Ed. 2d 280, 112 S. Ct. 1076 (1992), the United States Supreme Court determined that the lack of subject matter jurisdiction in a federal court does not preclude sanctions under Fed. R. Civ. P. 11 (providing for sanctions if the signature on a pleading, motion, or paper is improper), because the sanctions are not based on the merits of a "case or controversy" over which the court lacked jurisdiction. **Id.** at 138. Likewise, the Court found jurisdiction to impose Rule 11 sanctions even after the plaintiff filed a notice of dismissal. The Court noted that "it is well established that a federal court may consider collateral issues after an action is no longer pending. . . . Thus, even 'years after the entry of a judgment on the merits' a federal court could consider an award of counsel fees." **Cooter & Gell,** 496 U.S. at 395 (quoting **White v. New Hampshire Dep't of Employment Sec.,** 455 U.S. 445, 451 n.13 (1982)). Similarly, when one party frustrated the other party's attempts to discover facts that would establish personal jurisdiction, the Court adopted, under Fed. R. Civ. P. 37(b)(2)(A), the sanction of certifying those facts as true. **See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,** 456 U.S. 694, 709, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982). This inherent power is necessary to protect a party's "right to a fair trial on the merits [and] the integrity of the orders of the court." **United Nuclear,** 96 N.M. at 241, 629 P.2d at 317.

{25} Appellant argues that permitting a party to bring sanctions after the final judgment precludes finality. However, we note that NMSA 1978, Section 37-1-2 (Repl. Pamp. 1990), permits actions founded on a judgment to be brought up to fourteen years after entry of the judgment. A court would undoubtedly have at least the same time period to impose sanctions upon finding an abuse of the discovery process.

{26} Moreover, when we determine that we have rendered a judgment based on extrinsic or collateral fraud, we have always held that the court has inherent power to vacate a final judgment under its powers of equity. **See Hudson v. Herschbach Drilling Co.,** 46 N.M. 330, 332-33, 128 P.2d 1044, 1045 (1942). We have set no time limit on this power. In **Moya v. Catholic Archdiocese,** we vacated a 1978 judgment following a deposition taken eight years later in 1986. 107 N.M. 245, 247, 755 P.2d 583, 585 (1988). We vacated the judgment upon finding "not mere perjury but a deliberate scheme to defraud the court." **Id.**

{27} We agree with Appellant that the court did not specifically find fraud on the court. However, fraud on the court is not the only circumstance in which sanctions may be awarded. We note that an abuse of the discovery process affects more than private litigants. It also affects the integrity of the court and, when left unchecked, would encourage future abuses. "Discovery for all parties will not be effective unless trial courts do not countenance violations, and unhesitatingly impose sanctions proportionate to the circumstances." **United Nuclear,** 96 N.M. at 241, 629 P.2d at 317. Furthermore, we would undoubtedly find the concealment of documents under

the rubric of the attorney-client privilege when that privilege clearly did not exist to constitute a "deliberately planned and carefully executed scheme." **Moya,** 107 N.M. at 250, 755 P.2d at 588.

{28} Although we do not set a time bar to bringing sanctions against a party who has abused the discovery process, we recognize equitable defenses may preclude a party's right to raise a claim. **See Morris v. Ross,** 58 N.M. 379, 381, 271 P.2d 823, 824 (1954). However, because Appellant has not raised an equitable defense, we need not address this issue.

{29} Because the award of sanctions is not an action on the judgment, the court is not limited by the statutory bar of fourteen years. We hold that a party may be held accountable for an abuse of the discovery process under the court's inherent powers to impose sanctions at any time, subject to constitutional limitations or equitable defenses.

III

{30} We now address whether the trial court abused its discretion in awarding sanctions in the present case. We will find an abuse of discretion when the court's decision is "without logic or reason, or . . . clearly unable to be defended." **Newsome v. Farer,** 103 N.M. 415, 420, 708 P.2d 327, 332 (1985); **accord Lowery v. Atterbury,** 113 N.M. 71, 74, 823 P.2d 313, 316 (1992).

{31} Appellant argues that an award of severe sanctions requires a finding by clear evidence of bad faith or willfulness. Appellant misstates the standard. Due process requires a clear showing of willfulness when the sanction imposed is "more stern than reasonably necessary." **United Nuclear,** 96 N.M. at 241, 629 P.2d at 317 (quoting **DiGregorio v. First Rediscount Corp.,** 506 F.2d 781, 789 (3d Cir. 1974)). The court may only impose the sanction of **dismissal** for failure to comply with a court order "when the failure to comply is due to the willfulness, bad faith or fault of the disobedient party." **Id.** at 202, 629 P.2d at 278 (citing **Societe Internationale v. Rogers,** 357 U.S. 197, 212, 2 L. Ed. 2d 1255, 78 S. Ct. 1087 (1958)). The test for willfulness is a "conscious or intentional failure to comply." Willfulness is "distinguished from accidental or involuntary non-compliance" and may be established even where there is "no wrongful intent." **Brookdale Mill, Inc. v. Rowley,** 218 F.2d 728, 729 (6th Cir. 1954); **quoted in United Nuclear,** 96 N.M. at 202, 629 P.2d at 278.

{32} We need not reach the question of whether Jaeger's deposition and the deposition of Appellant's president, Grendahl, with its attached documentation provided clear evidence of Appellant's willful dilatory tactics. The imposition of attorney's fees and expenses is a lesser sanction than "outright dismissal of a lawsuit." **Chambers,** 501 U.S. at 45. The court did not impose sanctions "more stern than reasonably necessary." **United Nuclear,** 96 N.M. at 241, 629 P.2d at 317 (quoting **DiGregorio,** 506 F.2d at 789). Nor was Appellant denied the "right to a fair trial on the merits." **Id.**

{33} "The choice of sanctions . . . lies within the sound discretion of the trial court." **Id.** at 239, 629 P.2d at 315. The court need not exhaust all lesser sanctions, although "meaningful alternatives" must be "reasonably explored" before the sanction of dismissal is granted. **Newsome,** 103 N.M. at 421, 708 P.2d at 333 (quoting **Von Poppenheim v. Portland Boxing & Wrestling Comm'n,** 442 F.2d 1047, 1054 (9th Cir. 1971), **cert. denied,** 404 U.S. 1039, 30 L. Ed. 2d 731, 92 S. Ct. 715 (1972)). Where a lesser sanction is granted, we defer to the trial court's decision absent an abuse of discretion. **United Nuclear,** 96 N.M. at 239, 629 P.2d at 315. On review, we consider the full record to determine whether there was substantial evidence to support the court's award for monetary sanctions against Appellant based on an abuse of the discovery process. **See id.** at 203, 625 P.2d at 279.

{34} The district court stated in its Findings of Fact that Appellant gave false answers to interrogatories by denying knowledge of any criticism of the Style 10 IOL. The court based its finding on the fact that Appellant actually had ongoing

contact with Drs. Apple and Clayman who criticized the Style 10 IOL. The court found Appellant willfully and intentionally withheld a video prepared for a seminar by Dr. Clayman that criticized the Style 10 IOL. In addition to the failure to fully answer interrogatories, the court found that Appellant intentionally withheld documents reasonably requested during discovery, such as internal memoranda, sales memoranda, target reports, FDA inspection reports, records, and demonstrative evidence relating to attendance at medical meetings. The internal memoranda to the sales force suggested strategies that could be used in countering the criticism of the Style 10 IOL and encouraged the sales force to push sales despite the known dangers. The court also found that Appellant provided false and misleading answers to interrogatories, specifically concerning the FDA inspection held in March 1988 that applied pressure on Appellant to remove the Style 10 IOL from the market. Finally, the court found "credible testimony" that "relevant and material documents and demonstrative evidence" were not produced in this case although properly requested and subject to production.

{35} The court found that it was "eminently clear" that Appellant was "stonewalling to the maximum" during the course of this case. Appellant "would not produce anything unless it were by the kicking and screaming of the [Appellees] in this case, and the insistence that it be [produced]." This pattern of behavior went on through the entire case. The court noted that numerous times Appellant said,

> "We don't have it," and then when it would show up later on they would say, "Well, here's part of it," and finally having to produce what now appears to be only a portion of the documents available to them, representing every time, "This is all we have, Judge. This is all we have got."

We agree with the court that, "when a company chooses . . . to not produce, to destroy and to do everything in its power to make sure that the other side does not get what they have a legitimate right to receive under the rules of discovery, then the Court itself feels that it must protect the process of production of documents."

{36} Moreover, the court found Jaeger credible when he testified that Appellant's counsel admitted knowing that the documents were "potentially relevant to product liability litigation" and expressed an intention to destroy them. Therefore, the court determined that Appellant "willfully and intentionally failed to comply with [Appellees'] discovery requests repeatedly throughout this litigation"; "misrepresented material facts to this court"; was not credible; "willfully and intentionally violated discovery rules"; "willfully and intentionally violated court orders in regard to discovery"; "willfully and intentionally [gave] false answers to interrogatories and in testimony"; "willfully, intentionally, and systematically withheld damaging evidence"; and demonstrated "a pattern of abuse of the judicial system and interference with the administration of justice." Based on these findings of fact, the court awarded monetary sanctions.

{37} Appellant argues that "there is a fundamental dispute between Mr. Jaeger's deposition testimony and the affidavits of Mr. Grendahl and Mr. Dittrich[, the attorney who replaced Jaeger as counsel for Appellant], as to whether Surgidev had knowledge that Mr. Jaeger was still in possession of Surgidev files." We note from Mr. Grendahl's deposition, however, that he was aware that Appellant was paying Jaeger about $ 300 per month to store files and that Appellant retrieved the material two weeks after the conclusion of the trial. Although it is reasonable that Appellant did not know specifically what was contained in the 300 boxes of material stored with Jaeger, it would take a stretch of the imagination to believe Appellant "suddenly discovered" this material only upon the conclusion of the trial. Likewise, it is hard to imagine that Appellant would not have retrieved this information immediately had it consisted of beneficial rather than damaging material. Clearly, Appellant knew Jaeger was storing material and, therefore, was under an obligation to make a good faith effort to turn over relevant or potentially relevant material upon a valid request. **See United Nuclear,**

96 N.M. at 225, 629 P.2d at 301 (discussing lack of good faith response to discovery obligations under court's rules and orders).

{38} Appellant also contends that the court only found "that it was '**probable** ' that damaging evidence was not produced and destroyed by [Appellant]." Appellant points out that Jaeger did not know the contents of the material he was storing; nor did he know, when Appellant's counsel made the "deep-six" comment, which specific materials were intended for destruction. Appellant argues that its counsel could have been referring to duplicate documents. Furthermore, because Jaeger's testimony was not based on first-hand knowledge, it was not credible. The question of credibility is appropriately resolved by the fact-finder and we will not reverse absent an abuse of discretion. See Id. at 420, 708 P.2d at 332. We find no abuse of discretion.

{39} Finally, Appellant argues that the documents attached to Grendahl's deposition were never authenticated, were "not part of this appellate record, and therefore [are] of no assistance" to prove that Appellant possessed these documents, that Appellant knew it had them, or that Appellant intentionally withheld them. We disagree. Grendahl produced the documents at a deposition taken in preparation for a lawsuit filed in New Jersey. Our concern is whether the documents existed when Appellant told Appellees in response to proper discovery requests that they did not. The fact that Appellant produced them under a deposition lends sufficient credibility for the purpose of sanctions. Appellant appears to be arguing that we should find its own sworn statement not credible. The rele- vance and authenticity of the documents are issues that would have been resolved in **Surgidev I** had they been properly produced.

{40} Considering Appellant's general recalcitrance to cooperate in the discovery process throughout the entire trial and its willful withholding of information properly requested, we find the court's decision is not "without logic or reason, or . . . clearly unable to be defended." **Newsome,** 103 N.M. at 420, 708 P.2d at 332. Therefore, we find no abuse of discretion in imposing monetary sanctions. The court awarded $ 100,000 to cover the expense of obtaining "those things that just simply should have been provided [that Appellees were forced] to go chase down as hard as they could and ask for the protection of the Court," and $ 51,000 for attorney's fees, costs, and expenses.

IV

{41} In conclusion, we find SCRA 1-060 is not implicated when an award for sanctions concerns a collateral matter, namely, an abuse of the discovery process. Likewise, the statutory limitation of fourteen years on actions concerning a judgment is not applicable in an award of sanctions. Furthermore, we find an award of sanctions is authorized both under SCRA 1-037 and the court's inherent power and may be brought against a party for abuse of the judicial process at any time, subject to constitutional limitations or equitable defenses. We affirm.

{42} IT IS SO ORDERED.

JOSEPH F. BACA,
Chief Justice

WE CONCUR:

RICHARD E. RANSOM,
Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1995-NMSC-070

Filing Date: October 23, 1995

Docket No. 22,662

VALENTINE ESPINOZA and DEBBIE ESPINOZA, husband and wife, both individually and as parents, guardians, and best friends of VALENTINE ESPINOZA, JR.,

Plaintiffs-Appellants,

v.

TOWN OF TAOS, MAYOR ELOY JEANTETE, JOYCE LUCERO, MARK VIGIL, SALLY MARTINEZ, and GAIL MARTINEZ, individually and in their official capacities,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
Joseph E. Caldwell, Jr., District Judge

Released for Publication November 8, 1995, As Corrected December 12, 1995

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OPINION

BACA, Chief Justice.

{1} Appellants Valentine and Debbie Espinoza appeal a summary judgment entered in favor of the Town of Taos. We review pursuant to SCRA 1986, 12-102(A) (Repl. Pamp. 1992) (providing Supreme Court jurisdiction in cases sounding in contract), to determine two issues: (1) Whether the Tort Claims Act, NMSA 1978, §§ 41-4-1 to -27 (Repl. Pamp. 1989 & Cum. Supp. 1995), waives sovereign immunity when a child is injured on a playground during a summer day camp conducted by a municipality, and (2) whether the Town of Taos's summer day camp application may form the basis of a contract remedy for failure to supervise a minor child in the Town's care. We affirm.

I

{2} Appellants enrolled their five-year-old son, Valentine Espinoza, Jr. (Val), and his sister in the Town of Taos's summer day camp program. The Town of Taos actively encouraged Appellant Debbie Espinoza to enroll Val in the program. Because Appellant was concerned about the safety of her two children, she investigated the program. She was told that six camp employees would supervise the children, that the program director would be available for direct supervision, and that the on-site supervisor, Sally Martinez, would physically be present with Val to ensure his safety. Appellant paid $ 40.00 for each child to attend the summer day camp program. The operation of the program called for an active on-site supervisor and three additional employees when the activities of the program were held at Kit Carson State Park. At the time Val was injured, neither on-site supervisor Martinez nor any other person performing her function was present. Furthermore, there were only two employees with the children at the park.

{3} On August 4, 1989, summer day camp had ended for the day and the children were gathered

at the playground waiting for their parents to pick them up. The two employees present with the children were inattentive. Val followed other children up a slide rather than using the steps and was injured when he fell from the top as he attempted to turn around. Appellant Valentine Espinoza arrived immediately after the accident and took his son to the hospital. Gail Martinez told Appellant Debbie Espinoza that the Town of Taos would pay the medical bills, and either Mark Vigil or Joyce Lucero told the Appellants that the Town of Taos had insurance that would cover Val's medical expenses. The Town of Taos did not pay Val's medical expenses. Later it was discovered that Val suffers from asymmetrical facial expression due to permanent nerve damage caused by his fall from the slide.

II

{4} The district court entered summary judgment in favor of the Town of Taos on December 5, 1994. The court found that Section 41-4-6 of the Tort Claims Act does not waive sovereign immunity for the Town of Taos's failure to exercise ordinary care in the supervision of children who participated in its summer day camp program. The court rejected Appellants' contention that the absence of adequate supervision was a dangerous "condition" of the playground for which sovereign immunity had been waived. The court also found that although the application constituted a contract, Appellants could not sue on a breach of contract theory because the parties specifically agreed to exclude any provision for recovery of damages for any injuries sustained by participants. This appeal followed.

III

{5} Appellants contend that the court improperly entered summary judgment. Summary judgment is inappropriate when resolution of a factual dispute is required to determine a legal question before the Court. However, when "there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law" we will uphold the entry of summary judgment. **Roth v. Thompson,** 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). Such is the case before us.

{6} Appellants assert that Section 41-4-6 waives sovereign immunity because "the absence of adequate supervision of children using recreational equipment on property owned and operated by the government has been found to be an unsafe, dangerous or defective condition for which sovereign immunity has been waived." Appellants primarily rely on **Seal v. Carlsbad Independent School District,** 116 N.M. 101, 860 P.2d 743 (1993), in which the Boy Scouts leased a pool from the school district to hold an aquatic camp for disabled scouts. Although the Scouts provided lifeguards, they were in the pool with the children rather than watching over them from the pool deck. The trial court entered summary judgment in favor of the school district because "the operation of a swimming pool is an inherently dangerous activity giving rise to strict liability" for which sovereign immunity is not waived. **Id.** at 102, 860 P.2d at 744. We reversed upon finding that "danger in a swimming pool is not a peculiar risk" that rises to the level of "inherently dangerous." **Id.** at 104, 860 P.2d at 746. Although not addressed by the trial court, we found that Appellant had raised the question of the school district's primary negligence in two respects: (1) primary negligence in not ensuring that a lifeguard was present and acting as such while the pool was being used by the Scouts and (2) primary negligence in not installing lifelines as required by safety regulations. **Id.** Therefore, we remanded for a determination whether the school was liable for concurrent or successive acts of primary negligence," **id.** at 104, 860 P.2d at 746, as owner of the pool "in failing to prevent activities or conditions that are dangerous to those who enter as invitees" **id.** at 105, 860 P.2d at 747. At no point did we address the issue of negligent supervision.

{7} Appellants argue that supervision had always been provided and was expressly promised in the present case, just as lifeguards had always been provided for the aquatic camps in **Seal.** Appellants allege that the injury occurred as a result of the negligence of the Town of Taos in permitting the day camp to operate with

inadequate staffing and that liability is predicated on "traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty," **Bober v. New Mexico State Fair,** 111 N.M. 644, 652, 808 P.2d 614, 622 (1991). Appellants assert that this Court and the Court of Appeals have found the following to be unsafe, dangerous, or defective conditions: the absence of adequate supervision at a swimming pool, **Seal,** 116 N.M. at 104, 860 P.2d at 746; the failure to supervise and make reasonably safe the routing of traffic from the State Fairgrounds, **Bober,** 111 N.M. at 653, 808 P.2d at 623; the failure to keep residents safe from roaming dogs on the common grounds of a county housing project, **Castillo v. County of Santa Fe,** 107 N.M. 204, 205, 755 P.2d 48, P.2d 48, 49 (1988); and the absence of supervision over known dangerous inmates, **Callaway v. New Mexico Dep't of Corrections,** 117 N.M. 637, 642, 875 P.2d 393, 398 (Ct. App.), **cert. denied,** 118 N.M. 90, 879 P.2d 91 (1994). Thus, Appellants argue, the absence of supervision constitutes an "unsafe, dangerous, or defective **condition** " for which governmental immunity has been waived.

{8} Appellee responds that a claim of negligent supervision fits squarely within **Pemberton v. Cordova,** 105 N.M. 476, 734 P.2d 254 (Ct. App. 1987). Furthermore, Section 41-4-6 was adopted "to ensure the safety of the general public by imposing upon public employees a duty to exercise reasonable care in **maintaining premises** owned and operated by governmental entities." **Castillo,** 107 N.M. at 206, 755 P.2d at 50 (emphasis added). However, Section 41-4-6 does not grant a waiver for claims of negligent supervision, **Pemberton,** 105 N.M. at 478, 734 P.2d at 256; negligent design, **see Rivera v. King,** 108 N.M. 5, 12, 765 P.2d 1187, 1194 (Ct. App.), **cert. denied,** 107 N.M. 785, 765 P.2d 758 (1988); negligent inspection, **Martinez v. Kaune,** 106 N.M. 489, 491-92, 745 P.2d 714, 716-17 (Ct. App.), **cert. denied,** 106 N.M. 439, 744 P.2d 912 (1987); or negligent classification of a prison inmate, **Archibeque v. Moya,** 116 N.M. 616, 620, 866 P.2d 344, 348 (1993). We agree.

{9} The Court of Appeals in **Pemberton** found no waiver of sovereign immunity under the Tort Claims Act for the alleged negligent supervision of a child injured while on school grounds by another student. **Id.** at 478, 734 P.2d at 256. **Pemberton** relied on the strict interpretation of Section 41-4-6 that immunity is waived only when injuries resulted from a defect in a building. **Id.** Even had the court used **Bober's** more expansive interpretation that the Tort Claims Act waives immunity for unsafe conditions in buildings **or on the grounds surrounding the buildings,** the holding undoubtedly would not have been different because the critical question is whether the condition creates a potential risk to the general public.

{10} We expanded the definition of "building" under Section 41-4-6 in **Bober,** 111 N.M. at 651, 808 P.2d at 621. We recognized that a landlord has a duty to maintain his common grounds in order to reasonably ensure the safety of the general public. **Id.** at 651 & n.7, 808 P.2d at 621 & n.7. We found that the State Fair had failed to meet its burden of showing that it exercised ordinary care in protecting the traveling public on Louisiana Boulevard from the traffic exiting the Fairground from Tingley Coliseum. Therefore, we reversed a summary judgment based on immunity under the Tort Claims Act entered in favor of the State Fair. 111 N.M. at 652-53, 808 P.2d at 622-23. We made no mention of negligent supervision in **Bober** nor did we specifically address **Pemberton.**

{11} Castillo also involved negligent failure to provide safe common areas. 107 N.M. at 205, 755 P.2d at 49. A child visiting his aunt at her residence in a County of Santa Fe housing complex was severely injured when bitten by dogs running loose on the grounds of the complex. **Id.** We held that the waiver of immunity for public buildings includes the common grounds surrounding the building "to ensure that buildings and property owned and operated by the government are kept safe for the public's use." 107 N.M. at 206-07, 755 P.2d at 50-51. We did not mention negligent supervision.

{12} In **Archibeque,** we distinguished between negligent conduct by public employees in maintaining and operating physical premises owned by the government and negligent performance of

administrative functions. **Id.** at 619, 866 P.2d at 347. We found that Section 41-4-6 did not waive immunity for negligent performance of an employee's duties. Instead, we found that both **Castillo** and **Bober** "permitted waiver of immunity when [an] injury was caused by a dangerous or defective condition on the property surrounding a public building, as well as for injuries caused by defects and dangerous conditions in the building itself." **Archibeque,** 116 N.M. at 620, 866 P.2d at 348. These holdings expanded our earlier interpretations that immunity was waived only for defects in buildings, not the grounds surrounding them. **Id.**

{13} The Court of Appeals, in **Callaway,** held that the New Mexico Department of Corrections "knew or should have known that roaming gang members with a known propensity for violence had access to potential weapons in the recreation area, that such gang members created a dangerous condition on the premises of the penitentiary, and that the danger to other inmates was foreseeable." **Callaway,** 117 N.M. at 643, 875 P.2d at 399. The Court found that the "inmate assailant was unusually dangerous and the prison authorities had knowledge of the danger posed by the inmate." **Id.** Contrary to Appellants' assertion, the Court did not rely on negligent supervision in **Callaway** but observed that the security practices in place resulted in unsafe conditions for the entire prison population. **Id.**

{14} All cases cited by Appellants concern negligent conduct that itself created unsafe conditions for the general public. In the case at bar, the negligent conduct itself did not create the unsafe conditions. The playground was a safe area for children. There were no gangs threatening the children, no free-roaming dogs, no influx of traffic, no improperly maintained equipment. The playground is distinct from, for example, the swimming pool at issue in **Seal.** There, the unsafe condition of the premises was a swimming pool without the superintending lifeguard protection required by statute. Here, the playground itself, particularly the slide, was not a condition requiring supervision. Rather, it was the day-camp undertaking and not the condition of the premises that gave rise to duty. The Legislature has expressly stated that because of the broad range of the government's activities, it "should not have the duty to do everything that might be done" for the benefit of the public. Section 41-4-2(A). Even if the Town of Taos arguably had a duty in this case, there can be no liability for any breach of that duty because immunity has not been waived. **Martinez v. Kaune,** 106 N.M. at 491, 745 P.2d at 716.

IV

{15} We find Appellants' breach of contract claim to be meritless. The Town of Taos did not undertake a contractual obligation for liability in the event of injury to a child attending its summer day camp. At most, the terms of the application merely ensured that space would be provided in the day camp program for children who registered and paid the applicable fee. The application makes no mention of ensuring the safety of the children enrolled and expressly states that the Town will not do so. **See** NMSA 1978, § 37-1-23 (actions against governmental entities must be based on valid written contract). We will not read into a contract conditions not intended by the parties. **See Gallup Elec. Light Co. v. Pacific Improvement Co.,** 16 N.M. 86, 93-94, 113 P. 848, 850 (1911).

V

{16} In conclusion, we find no waiver of sovereign immunity for negligent supervision of children at a playground. We also find no contractual agreement to ensure the safety of the children participating in the summer day camp program. We therefore affirm.

{17} IT IS SO ORDERED.

JOSEPH F. BACA,
Chief Justice

WE CONCUR:

RICHARD E. RANSOM,
Justice

STANLEY F. FROST,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1996-NMSC-014

Filing Date: April 10, 1996

Docket No. 22,965

MILDRED SABELLA,

Plaintiff-Appellant,

v.

MANOR CARE, INC., a/k/a QUALITY INNS INTERNATIONAL, INC., a/k/a QUALITY INNS, INC., a Delaware corporation; and FOUR SEASONS NURSING CENTER, INC., a Delaware corporation,

Defendants-Appellees.

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

Released for Publication April 26, 1996

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OPINION

BACA, Justice.

{1} Appellant Mildred Sabella appeals from a district court order that dismissed her claim against her former employer, Appellee Manor Care, Inc. (Manor Care), for sex discrimination under the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -15 (Repl. Pamp. 1991 & Cum. Supp. 1994) (the "NMHRA"). We address the following issues on appeal: (1) Whether Sabella failed to exhaust her administrative remedies as required by the NMHRA before she filed a complaint in the district court for alleged sex discrimination, and (2) whether Sabella's claim of sex discrimination under the NMHRA is barred by the exclusivity provisions of the New Mexico Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (Repl. Pamp. 1991 & Cum. Supp. 1994) (the "WCA"), or by her recovery under the Act. We note jurisdiction under NMSA 1978, Section 28-1-13(C) (Repl. Pamp. 1991) (providing that judgment of district court in appeal from Human Rights Commission is appealable to Supreme Court), and we reverse and remand.

I.

{2} In 1989 and 1990 Sabella was employed by Manor Care as a housekeeper and laundry aide. Sabella alleges that, from December 11, 1989 to January 11, 1990, her immediate supervisor sexually harassed her. On January 11 the supervisor reassigned her from her position as housekeeper to laundry aide, allegedly for rejecting his advances. Sabella reported the alleged harassment to a senior supervisor, who allegedly told her that it was just his (the immediate supervisor's) way and took no remedial action. On February 8 Sabella filed a grievance with the Equal Employment Opportunity Commission (the "EEOC") and the New Mexico Human Rights Division (the "NMHRD"), reporting the alleged sex discrimination.[1] On February 22 Sabella amended

[1] The New Mexico Human Rights Division regulations define "sex discrimination" to include "sexual harassment." N.M. Human Rights Div. I(A)(27)(a) (September 1988).

her EEOC complaint, alleging that Manor Care retaliated against her for reporting the sexual harassment and forced her to resign.

{3} The NMHRD notified Manor Care that Sabella's complaint was within the jurisdiction of the NMHRA and that it was filed with the EEOC for the purpose of eliminating dual investigations. The NMHRD also informed Manor Care that it would be conducting a non-biased investigation and that Manor Care was required to respond to the complaint.

{4} On October 16, while the investigation was pending, Sabella filed a claim for workers' compensation benefits. She claimed that when she was sexually harassed in December 1989, she was physically assaulted, suffering a bruised breast and emotional trauma. On July 29, 1991, Sabella and Manor Care agreed to settle her workers' compensation claim. Under the agreement Sabella's medical expenses were paid and she received a lump sum settlement. In addition, Sabella signed a Release and Satisfaction of Liability and Future Medical Care, releasing and discharging Manor Care

> of all manner of claims, damages, actions, or causes of action which I ever had or may hereafter have under the Workers' Compensation Act . . . for or on account of or by reason of any injury, damage, loss, pain or suffering or disfigurement resulting to me from injuries or occurrences I allege during December 1989 and January 1990, while working for . . . Manor Care. . . . **This release is not in any way to be considered a release of my EEOC claim against Manor Care, Inc., and may not be used in any fashion in that claim.** (Emphasis added.)

{5} On August 24, 1993, Sabella requested and received an order of nondetermination from the NMHRD pursuant to Section 28-1-10(D) (allowing person filing complaint to NMHRD to request and receive order of nondetermination 180 days after complaint was filed). Sabella then appealed the order to the district court pursuant to Section 28-1-13(A) (allowing person aggrieved by order of NMHRD to appeal to district court and obtain trial de novo).

{6} Manor Care filed a motion to dismiss under SCRA 1986, 1-012(B)(6) (Repl. Pamp. 1992) (providing dismissal of claim for failure to state claim upon which relief can be granted), arguing that Sabella, by filing her grievance solely with the EEOC and not with the NMHRD, failed to exhaust her administrative remedies as required by the NMHRA. Manor Care also argued that in the workers' compensation proceeding Sabella released Manor Care from any future claims, including any claim under the NMHRA. Additionally, Manor Care argued that the WCA provides Sabella's sole and exclusive remedy for her alleged injuries and that she had already received workers' compensation benefits for those injuries. Manor Care filed various exhibits in support of its motion to dismiss, including Sabella's EEOC complaint, her workers' compensation complaint, and the various workers' compensation settlement documents.

{7} In her response to Manor Care's motion, Sabella filed the affidavit of Lillian M. Roybal, Bureau Chief for NMHRD's Investigations and Compliance Bureau, in which Roybal stated that the NMHRD and the EEOC had a work-sharing agreement to avoid duplication of the factual investigations of alleged sex discrimination. The work-sharing agreement provided that the agencies "each designate the other as its agent for the purposes of receiving charges based on race, color, religion, sex or national origin." The district court granted Manor Care's motion to dismiss. Sabella appealed the district court's order to the Court of Appeals, which transferred the matter to this Court pursuant to Section 28-1-13(C).

II.

{8} We analyze a motion to dismiss as a motion for summary judgment, SCRA 1986, 1-012 (C)

Thus, when referring to sex discrimination, this opinion is also referring to sexual harassment.

(Repl. Pamp. 1992), when evidence outside the pleadings is considered. **Sanchez v. Church of Scientology,** 115 N.M. 660, 664, 857 P.2d 771, 775 (1993). Although Manor Care styled its motion under SCRA 1-012(B)(6), it also attached numerous exhibits, including photocopies of Sabella's EEOC complaint, her workers' compensation complaint, and the various workers' compensation settlement documents. The district court in the instant case considered these exhibits in deciding to dismiss Sabella's complaint. Accordingly, the motion should have been viewed as a motion for summary judgment. A motion for summary judgment is granted only when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. SCRA 1-056(C).

III.

{9} We first address whether Sabella failed to exhaust her administrative remedies before filing an appeal in district court. Manor Care relies on **Luboyeski v. Hill,** 117 N.M. 380, 382, 872 P.2d 353, 355 (1994), to argue that before a claim for violation of the NMHRA can be filed in district court, the claimant must first comply with the mandatory grievance procedures provided in the NMHRA. Manor Care further argues that by filing her complaint only with the EEOC and not with the NMHRD, Sabella's claim cannot be heard in district court. We agree that **Luboyeski** requires full compliance with NMHRA grievance procedures as a prerequisite to filing a claim in district court. We disagree, however, that Sabella failed to comply with these procedures. The work-sharing agreement and the NMHRD regulations provide that the NMHRD procedural requirements may be met by filing a complaint with either the NMHRD or the EEOC.

{10} The work-sharing agreement provides in pertinent part:

> In recognition of the common jurisdictions and goals of the two agencies, the NMHRD and EEOC have agreed to this Work Sharing Agreement which is designed to provide individuals with an efficient procedure for obtaining redress for their grievances under the relevant statute.
>
> . . . .
>
> In order to facilitate the assertion of employment rights under Title VII, the EEOC and NMHRD each designate the other as its agent **for the purpose of receiving charges** based on race, color, religion, sex or national origin. (Emphasis added.)
>
> . . . .
>
> Each agency will inform individuals of their right to file with the other agency, and endeavor to aid any person alleging Title VII violations in drafting a charge that will satisfy the requirements of the other agency. The delegation of authority to receive charges as contained in this paragraph does not include the rights of one agency to determine the jurisdiction of the other agency over a charge.

{11} The NMHRD's regulations require that a complaint must be delivered by mail or personal delivery to the NMHRD, and the complaint is deemed filed as of the date it is received at the NMHRD office. However, the regulations also provide that

> for the purpose of complying with the one hundred eighty (180) day requirement of Section 28-1-10(A), . . . complaints which are first filed with any duly authorized civil rights agency holding a work sharing agreement . . . shall be deemed to have been filed with the Human Rights Division. . . .

N.M. Human Rights Div. II(D)(2).

{12} The foregoing provisions do not undermine the NMHRD procedural requirements but instead provide a more efficient method by which the grievance can be processed. Under their work-sharing agreement, the EEOC is an agent of the NMHRD for purposes of filing charges of discrimination pursuant to the NMHRA. Each agency is then required to forward to the other

all charges of employment discrimination within forty-eight hours. Sabella timely filed a claim with the EEOC. Hence, she is deemed to have properly filed her complaint with the NMHRD.

{13} Upon meeting the filing requirements, Sabella could then proceed with her grievance through either the EEOC or the NMHRD. She elected to pursue her claim through the NMHRD. Sabella then requested and received an order of nondetermination from the NMHRD pursuant to Section 28-1-10(D). Having complied with the NMHRD grievance procedures, we hold that Sabella could then appeal to the district court for a trial de novo. Section 28-1-13(A).

{14} Having found that Sabella's EEOC complaint encompasses a NMHRA complaint as well, we find that the release does not discharge Manor Care from an action under the NMHRA.

IV.

{15} We now address whether Sabella's claim for sex discrimination is barred by the exclusivity provision of the WCA. Manor Care argues that Sabella's alleged injuries from sex discrimination—lost wages, pain, suffering, and emotional distress—are contemplated by the WCA. Manor Care further argues that because Sabella actually received a settlement for those injuries under her workers' compensation claim, she is estopped from pursuing her sex discrimination claim and recovering for those same injuries under the NMHRA. Under this set of facts, we disagree that a claim for sex discrimination under the NMHRA is barred by the WCA. Nor are we persuaded that Sabella has assumed contrary positions and that she therefore is estopped from pursuing her claim for sex discrimination. **Cf. Collier v. Wagner Castings Co.,** 81 Ill. 2d 229, 408 N.E.2d 198, 41 Ill. Dec. 776 (Ill. 1980) (stating that employee cannot claim injury is compensable for purposes of workers' compensation and subsequently deny injury was compensable in order to pursue disability claim against employer).

{16} The WCA provides exclusive remedies for disabling injuries incurred in the work place.

> No cause of action outside the Workers' Compensation Act shall be brought by an employee or dependent against the employer or his representative, including the insurer, guarantor or surety of any employer, for **any matter relating to the occurrence of or payment for any injury or death covered by the Workers' Compensation Act.**

Section 52-1-6(E) (emphasis added). When an injury does not fall within the coverage formula of the WCA, the exclusivity provisions of the WCA do not preclude recovery other than under the WCA. This is not to say that further action may be brought when a claimant fails to obtain full compensation for the injuries. Rather, only when the injury falls outside of the ambit of the WCA should other action be available. **See, e.g., Coleman v. Eddy Potash, Inc.,** 120 N.M. 645, 905 P.2d 185 (1995) (stating that worker's claim against his employer for intentional spoliation of evidence is not barred by WCA's exclusivity provisions); **Johnson Controls World Servs., Inc. v. Barnes,** 115 N.M. 116, 847 P.2d 761 (Ct. App.) (stating that on-the-job injuries rendered intentionally may fall outside WCA's exclusivity provision), **cert. denied,** 115 N.M. 79, 847 P.2d 313 (1993).

{17} Although Sabella's claims for workers' compensation and for violation of the NMHRA stem from the same set of facts, each statute remedies two very different types of injuries that Sabella claims to have suffered. In construing a statute, we look to the object the legislature sought to accomplish and the wrong it sought to remedy; the comprehensiveness or adequacy of the remedy provided is a factor to be considered in deciding whether a statute provides the exclusive remedies. **See Michaels v. Anglo-American Auto Auctions, Inc.,** 117 N.M. 91, 869 P.2d 279 (1994) (holding that a cause of action for retaliatory discharge was not barred by the WCA's exclusivity provision). The concerns addressed by the NMHRA are quite different from those addressed by the WCA. **See generally Cox v. Chino Mines/Phelps Dodge,** 115 N.M. 335, 850 P.2d 1038 . In **Cox,** plaintiff was denied workers'

compensation benefits for sexual harassment suffered on the job. The workers' compensation judge found that plaintiff's particular episode of sexual harassment did not arise out of her employment. Our Court of Appeals affirmed on the basis that there was no evidence that either the nature of the job or the job environment created or enhanced the risk of assault. **Id.** at 338, 850 P.2d at 1041. The Court of Appeals also rejected the argument that, in furtherance of public policy, claims of sexual harassment on the job should be compensable under the WCA. The Court indicated it was more persuaded that such claims are properly pursued by the common-law or statutory remedies available, referring to the NMHRA. **Id.**

{18} The NMHRA was enacted in 1969 to eliminate "unlawful discriminatory practice" based on "race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or medical condition." Section 28-1-7(A); **Gandy v. Wal-Mart Stores, Inc.,** 117 N.M. 441, 442, 872 P.2d 859, 860 (1994). As one jurisdiction aptly stated, the law against discrimination "seeks to remedy an evil that 'threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.'" **Reese v. Sears, Roebuck & Co.,** 107 Wash. 2d 563, 731 P.2d 497, 501 (Wash. 1987) (quoting RCW 49.60.010), **overruled on other grounds by Phillips v. City of Seattle,** 111 Wash. 2d 903, 766 P.2d 1099, 1103 (Wash. 1989) (en banc). To that extent, the NMHRA has broad social, political, and economic implications. **Cf. id.**

{19} On the other hand, the WCA was enacted as a response to the ever-increasing number of industrial injuries and the insufficient remedies available to injured workers. The WCA operates so that "employees who suffer disablement as a result of injuries causally connected to their work, shall not become dependent upon the welfare programs of the State but shall receive some portion of the wages they would have earned, had it not been for the intervening disability. . . ." **Casias v. Zia Co.,** 93 N.M. 78, 80, 596 P.2d 521, 523 (Ct. App.) (citation omitted), **cert. denied,** 93 N.M. 8, 595 P.2d 1203 (1979). Further, by complying with the WCA, the employer is not subject to other claims that may arise from the same injury. **See Sanchez v. Hill Lines,** 123 F. Supp. 42, 44 (D.N.M. 1954). Because each statute seeks to remedy distinct infirmities, an action under the NMHRA for sex discrimination cannot be barred by the WCA as a matter of course.

{20} We recognize that these statutory objectives may seem to overlap. Nonetheless, an action under the NMHRA for sex discrimination can proceed when the resulting injuries are not contemplated by the WCA. As one commentator explained, the distinction "cannot be derived solely from either the theoretical components of the tort or from the elements of damage. It must never be forgotten that the compensation act coverage language [includes] . . . 'injury,' or 'personal injury,' or 'death.'" 2A Arthur Larson, **The Law of Workmen's Compensation** § 68.34(a), at 13-178 (1995). Thus, "if the essence of the wrong . . . is personal injury or death, and if the usual conditions of coverage are satisfied, the action must be barred by the exclusiveness clause no matter what its name or technical form may be." **Id.** § 68.34(a), at 13-178 to -179. If the injury is the type for which the WCA provides a remedy, further action must be barred. It logically follows, then, that if the underlying injuries for which the plaintiff is suing are outside of the WCA, the action cannot be barred.

{21} In the instant case, Sabella filed a claim under the WCA for the physical and psychological injuries that she suffered as a result of the sexual assault by her supervisor. Her workers' compensation settlement included amounts for medical treatment and for emotional trauma. In addition, Sabella filed a claim for violation of the NMHRA, asserting that Manor Care sexually discriminated against her by failing to take action against her supervisor and then retaliated against her when she reported Manor Care to the EEOC and the NMHRA. To proceed with her NMHRA claim, then, Sabella bears the burden of proving that her damages under the NMHRA are separate and distinct from those for which she has already been compensated in her workers'

compensation settlement. **Montoya v. AKAL Sec., Inc.,** 114 N.M. 354, 357, 838 P.2d 971, 974 (1992) (stating that double recovery is prohibited as a matter of law).

{22} The district court dismissed Sabella's claim on the basis that it was barred as a matter of law. It was not. Manor Care has argued in the alternative that she should be estopped from asserting any claim other than under the WCA. As we have interpreted the release and the WCA, she preserved an independent claim. However, on the facts of this case, the damage may overlap or coincide. The district judge will be able to determine on remand, better than we can on appeal, whether Sabella's apparently independent claims give rise to actually independent damages.

V.

{23} In conclusion, we hold that because the EEOC and the NMHRD had a work-sharing agreement under which the EEOC and the NMHRD act as the other's agent for purposes of filing claims, Sabella exhausted her administrative remedies before filing her claim in the district court. Further, we hold that under the alleged facts of this case, a claim of sex discrimination under the NMHRA is not barred by the WCA. Accordingly, we reverse and remand for proceedings in which Sabella must prove she suffered injuries for violation of the NMHRA that are distinct from those injuries for which she has been compensated in her workers' compensation settlement.

{24} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

STANLEY F. FROST,
Chief Justice

PAMELA B. MINZNER,
Justice

Justice Joseph F. Baca

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1996-NMSC-029

Filing Date: May 21, 1996

Docket No. 22,790

ADOLFO GARCIA,

Plaintiff-Appellant,

v.

MIDDLE RIO GRANDE CONSERVANCY DISTRICT and ITS BOARD OF DIRECTORS,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Robert L. Thompson, District Judge

Released for Publication June 7, 1996, As Corrected August 5, 1996

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OPINION

BACA, Justice.

{1} Plaintiff-Appellant Adolfo Garcia appeals an order by the district court granting summary judgment in favor of Defendants-Appellees, the Middle Rio Grande Conservancy District and its board of directors (collectively "the MRGCD"). Garcia filed suit, alleging the MRGCD breached an employment contract by demoting him from his position of Division Manager to the position of Equipment Operator, which resulted in a reduction in pay. The district court ruled that, pursuant to NMSA 1978, Section 37-1-23(A) (Repl. Pamp. 1990), the MRGCD is a governmental entity afforded sovereign immunity. We address whether the district court erred in finding the MRGCD immune from a suit of this nature by determining that the Personnel Policy Statement (the Personnel Policy) does not constitute a "valid written contract" between the MRGCD and its employees. We note jurisdiction under SCRA 1986, 12-102(A)(1) (Repl. Pamp. 1992) (providing Supreme Court jurisdiction over appeals from district court in cases sounding in contract), and reverse.

I.

{2} In his complaint, Garcia states that the MRGCD employed him since 1975. He further states that in 1976, the MRGCD hired him as the manager of the Belen Division. In August 1990, however, the MRGCD demoted him from Division Manager to the position of Equipment Operator. This demotion resulted in a reduction in pay from $ 17.17 per hour to $ 11.25 per hour. The MRGCD General Manager did send Garcia a formal letter notifying him of his demotion. However, Garcia alleges he was not informed of any specific conduct, act, or omission attributable to him as a basis for his demotion, nor given notice of, or an opportunity to correct, any deficiencies in his conduct or performance.

{3} The MRGCD has a Personnel Policy which Garcia alleges is a written contract setting forth certain rights, expectations, obligations, and other promises between the MRGCD and its employees. He also alleges that the Personnel Policy provides certain criteria which govern how and by what procedures the MRGCD may demote an employee. Garcia alleges that the

MRGCD demoted him in violation of the Policy, which requires a showing of good cause and notice and opportunity to improve performance, and thereby breached the employment contract.

{4} In its motion for summary judgment, the MRGCD cited Section 37-1-23(A), which provides, "Governmental entities are granted immunity from actions based on contract, **except actions based on a valid written contract.** " (Emphasis added). Thus, under Section 37-1-23(A), a governmental entity is not immune from suit in actions based on valid written contracts. The MRGCD argued that the Personnel Policy is, at most, an implied contract and does not give rise to a "valid written contract" for purposes of Section 37-1-23(A); thus the MRGCD is immune from this suit. The district court agreed and granted summary judgment, concluding that the MRGCD is immune from suits of the type and nature as that brought by Garcia. Garcia now appeals the order granting summary judgment, contending that the Personnel Policy constitutes a written employment contract sufficient to overcome the grant of governmental immunity.

II.

{5} On appeal, the MRGCD argues that the Personnel Policy does not constitute a valid written contract sufficient to overcome the grant of immunity from suits based on valid written contracts. The MRGCD argues the Personnel Policy is, instead, merely "a personnel ordinance or resolution" which is not a valid written contract as required by Section 37-1-23(A). We disagree.

{6} "Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." **Tabet Lumber Co. v. Romero,** 117 N.M. 429, 431, 872 P.2d 847, 849 (1994). We hold that the trial court erred by granting summary judgment in favor of the MRGCD.

A.

{7} In **Hicks v. State,** 88 N.M. 588, 592, 544 P.2d 1153, 1157 (1975), this Court abolished the common-law doctrine of sovereign immunity. **See Hydro Conduit Corp. v. Kemble,** 110 N.M. 173, 177, 793 P.2d 855, 859 (1990). The Court held that the decision would apply only prospectively, beginning with cases accruing on and after July 1, 1976. **Id.** Before the law went into effect, our Legislature reinstated sovereign immunity by enacting 1976 N.M. Laws, Chapter 58. **Hydro Conduit,** 110 N.M. at 177, 793 P.2d at 859. Reinstatement of immunity under Chapter 58, however, is subject to certain exceptions.

{8} One exception applies to contract cases brought against governmental entities. Section 24 of Chapter 58 makes up what is now Section 37-1-23(A), the particular statute at issue in this case, which provides, "Governmental entities are granted immunity from actions based on contract, **except actions based on a valid written contract.** " (Emphasis added). **See Hydro Conduit,** 110 N.M. at 177, 793 P.2d at 849. Thus, a governmental entity's contractual liability can only be based on a valid written contract.

B.

{9} First, we address whether Garcia and the MRGCD entered into an employment contract. "Ordinarily, to be legally enforceable, a contract must be factually supported by an offer, an acceptance, consideration, and mutual assent." **Hartbarger v. Frank Paxton Co.,** 115 N.M. 665, 669, 857 P.2d 776, 780 (1993), **cert. denied,** 510 U.S. 1118, 127 L. Ed. 2d 387, 114 S. Ct. 1068 (1994). Indeed, the conduct of Garcia and the MRGCD indicates an offer of employment, acceptance, and consideration. That is, Garcia was offered and he accepted employment with the MRGCD in 1975, and was offered and he accepted the position of Division Manager in 1976. In each instance, he proceeded to carry out the specific tasks required of him in service of the MRGCD, and the MRGCD compensated him accordingly.

{10} Nevertheless, in New Mexico an employment contract is for an indefinite period and is terminable at the will of either party unless there is a contract stating otherwise. **Hartbarger,** 115 N.M. at 668, 857 P.2d at 779. New Mexico

recognizes two exceptions to this general rule, however: "wrongful discharge in violation of public policy (retaliatory discharge), and an implied contract term that restricts the employer's power to discharge." **Id.** Whether an implied employment contract exists is a question of fact, and it may be "found in written representations such as **an employee handbook,** in oral representations, in the conduct of the parties, or in a combination of representations and conduct." **Id.** at 669, 857 P.2d 780 (emphasis added); **see also Newberry v. Allied Stores, Inc.,** 108 N.M. 424, 427, 773 P.2d 1231, 1234 (1989) (stating that implied contract is agreement in which parties by course of conduct have shown intention to be bound by agreement).

{11} We have held that an employee handbook may constitute an implied employment contract. **Forrester v. Parker,** 93 N.M. 781, 782, 606 P.2d 191, 192 (1980) (holding that personnel policy guide controlled employee-employer relationship and, therefore, constituted implied employment contract). We have also recognized that not all personnel manuals may give rise to an implied employment contract. **Lukoski v. Sandia Indian Management Co.,** 106 N.M. 664, 666, 748 P.2d 507, 509 (1988) (stating that not all personnel manuals will become part of employment contracts (quoting **Leikvold v. Valley View Community Hosp.,** 141 Ariz. 544, 688 P.2d 170, 174 (Ariz. 1984) (en banc))). In New Mexico, "a personnel manual gives rise to an implied contract if it controlled the employer-employee relationship and an employee could reasonably expect his employer to conform to the procedures it outlines." **Newberry,** 108 N.M. at 427, 773 P.2d at 1234 (citing **Forrester,** 93 N.M. at 782, 606 P.2d at 192).

{12} The MRGCD's Personnel Policy contains provisions relating to most every aspect of an employment relationship, including job description, compensation (including salary on promotion, demotion, or transfer), overtime, compensatory time, time clock violations, tardiness, sick leave and annual leave, and holidays. Significantly, Section 502 of the MRGCD's Personnel Policy provides,

> An employee may be demoted or reclassified to another position and pay for which he is qualified, or have his pay in the same position reduced (a) when he would otherwise be terminated; or (b) when he does not possess the necessary qualifications to render satisfactory service in the position he holds, or is recommended for separation during probation; or (c) when he voluntarily requests such demotion or reclassification.

Additionally, the Personnel Policy includes an "Administrative Remedies" section applicable when personnel actions result in suspension, termination, or demotion. The Personnel Policy is specific so that employees may reasonably rely on its provisions and may expect that the MRGCD will conform as well.

{13} Although we recognize that a personnel policy may evidence an implied employment contract, we maintain:

> Employers are certainly free to issue no personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees that the manual is not part of the employment contract. . . . [However,] if an employer does choose to issue a policy statement, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it. Having announced a policy, the employer may not treat it as illusory.

Lukoski, 106 N.M. at 666-67, 748 P.2d at 509-10 (quoting **Leikvold,** 688 P.2d at 174). Thus, we hold that the Personnel Policy is part of MRGCD's and Garcia's implied employment contract.

C.

{14} Next, we address whether Section 37-1-23(A), which waives governmental immunity in cases involving valid written contracts, incorporates an implied employment contract that includes written terms as set forth in a personnel policy. We hold that it does.

{15} The MRGCD contends that because the employment contract can only be implied, it cannot be said to be "written," as required by Section 37-1-23(A) to waive sovereign immunity. We disagree. As we have discussed above, an employment contract may be implied in fact[1] from a term exhibited in writing in, for example, a personnel policy manual. **See, e.g., Hartbarger,** 115 N.M. at 670, 857 P.2d at 781 (noting that in **Forrester,** 93 N.M. at 782, 696 P.2d at 192, implied employment contract included term in personnel policy guide by which employer gave up right to discharge at will).

{16} This waiver of sovereign immunity in cases involving valid written contracts has the practical effect of encouraging parties who contract with governmental entities to do so in writing. We recognize at least two legitimate policy reasons for encouraging written contracts. The first reason stems from the fact that governmental entities enter into more contracts than many entities in the private sector. **Sena Sch. Bus Co. v. Board of Educ.,** 101 N.M. 26, 29, 677 P.2d 639, 642 (discussing reasonableness of two-year statute of limitations under Section 37-1-23(B) for equal protection analysis). The volume of public contracts is such that unless they are put to writing, the terms as to any one would likely be long forgotten in the event a dispute arose. **Id.**

{17} The second reason stems from the fact that governmental entities cannot enter contracts that would either curtail their authority or otherwise fall outside of their designated powers. **Cf. Spray v. City of Albuquerque,** 94 N.M. 199, 201, 608 P.2d 511, 513 (1980) ("There is a distinction . . . '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.'" (quoting **Wills v. City of Los Angeles,** 209 Cal. 448, 287 P. 962, 964 (Cal. 1930)). It follows that unless a governmental entity is authorized to enter into a contract, the contract cannot be enforced as against that entity. If parties evidenced their agreement in writing, courts may more easily determine whether the agreement is a "valid" contract worthy of enforcement.[2]

{18} This point is aptly illustrated in **Trujillo v. Gonzales,** 106 N.M. 620, 621, 747 P.2d 915, 916 (1987), in which Trujillo, a Taos County employee, alleged he accepted employment with the County based on an oral promise by a county commissioner that his employment was for a two-year period. The county commission,

[1] A contract implied in fact is distinguished from a contract implied in law. Implied-in-fact contracts are "based on parties' mutual assent as manifested by their conduct." **Hydro Conduit,** 110 N.M. at 179, 793 P.2d at 861. Implied-in-law contracts, often called quasi-contracts, "are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice." **Id.** (quoting Restatement of Contracts § 5 cmt. a (1932)).

[2] Our attention is drawn to **Zamora v. Village of Ruidoso Downs,** 120 N.M. 778, 907 P.2d 182 (1995), as dispositive authority for holding that a personnel policy guide is a valid written contract for purposes of Section 37-1-23(A). Although in **Zamora** we did not address the issue, it would appear at first blush that by remanding Mr. Zamora's claim for breach of contract to the district court for further proceedings, we recognized a waiver of sovereign immunity. **Zamora** is inapposite to the instant case.

Although Section 37-1-23(A) applies to "governmental entities," and the Village of Ruidoso Downs can certainly be considered a governmental entity, Section 37-1-23(A), nevertheless, does not apply. A plain reading of the subsequent statute, Section 37-1-24, provides:

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 . . . **contract written or unwritten** . . . shall be commenced except within three years. . . .

(Emphasis added). Hence, Section 37-1-24 allows suits against a city, town, or village based on contract, including suits based on **unwritten** contracts. The only requirement is that the suit be brought within the defined statutory period. As we have already recognized in **Spray v. City of Albuquerque,** 94 N.M. 199, 201-02, 608 P.2d 511, 513-14 (1980), this provision conflicts with Section 37-1-23(A) with respect to suits involving cities, towns, and villages. We presume the Legislature intended to exclude cities, towns, and villages from its designation of "governmental entities" in Section 37-1-23(A). **Id**. at 202, 608 P.2d at 514. Accordingly, any proposed application of **Zamora** as authority for waiving sovereign immunity in a suit based on contract against a city, town, or village would be misplaced. **Id**. (stating that when conflict exists between statutes relating to same subject, we interpret them so all statutes are operative).

however, hired him to be an "exempt," at-will, employee. When the County terminated his employment before two years expired, Trujillo sued, alleging breach of contract. **Id.** The County contended that the suit was foreclosed by Section 37-1-23(A), because the underlying agreement was an illegal or unauthorized action. **Id.** On appeal, this Court held that the County's authority to contract is limited and does not allow a commissioner to make oral promises such as the one Trujillo was attempting to enforce. **Id.** at 621-22, 747 P.2d at 916-17. "[A] contract unlawfully entered into, though in good faith, creates no liability on the part of the body politic to pay for it. . . ." **Id.** at 622, 747 P.2d at 917. Accordingly, the Court held the County was immune because Trujillo could allege no valid written contract. **See id.**

{19} The MRGCD has provided neither a legal nor a practical basis on which to except the implied employment contract in the case at bar from "valid written contract" as provided in Section 37-1-23(A). Thus, we hold that "valid written contract" incorporates the implied employment contract between the MRGCD and Garcia.

III.

{20} We conclude that the Personnel Policy comprehensively controls the employer-employee relationship in the MRGCD and that it creates a reasonable expectation for MRGCD employees that the MRGCD will follow the provisions contained within Personnel Policy. Thus, we hold that the Personnel Policy constitutes an implied employment contract. Additionally, we recognize the legitimate policy goals in waiving governmental immunity in cases involving valid written contracts. On the facts of this case, and in view of the legitimate policy goals outlined above, we hold that this implied employment contract, which includes a written personnel policy, constitutes a "valid written contract" required to waive governmental immunity under Section 37-1-23(A).

{21} Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

{22} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

STANLEY F. FROST,
Chief Justice

RICHARD E. RANSOM,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1996-NMSC-064

Filing Date: July 22, 1996

Docket No. 23,226

VIRGINIA MADRID and CHRISTINE RODRIGUEZ,

Workers-Appellants,

v.

ST. JOSEPH HOSPITAL, self-insured, WAL-MART STORES, INC., and NATIONAL UNION FIRE INSURANCE COMPANY,

Employers-Insurers-Appellees.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Gregory D. Griego, Workers' Compensation Judge

Motions for Rehearing Denied December 2, 1996, Released for Publication December 2, 1996

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OPINION

BACA, Chief Justice.

{1} Appellants challenge the constitutionality of the New Mexico Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (Repl. Pamp. 1991 & Cum. Supp. 1995) ("the Act"), under which each was denied the level of permanent partial disability benefits (PPD) she sought.[1] Each Appellant raises similar constitutional challenges to the Act. The Workers' Compensation Administration has no authority to determine the constitutionality of the Act, **Montez v. J & B Radiator, Inc.**, 108 N.M. 752, 754, 779 P.2d 129, 131 (Ct. App.), **cert. denied**, 108 N.M. 771, 779 P.2d 549 (1989); thus, Appellants brought their constitutional challenges before the Court of Appeals. The Court of Appeals consolidated the cases. There being questions under the New Mexico Constitution, and the questions being significant questions of law and of substantial public interest, the consolidated cases were certified to this Court pursuant to NMSA 1978, Section 34-5-14(B)(3) and (4) (Repl. Pamp. 1990) (certification of cases to Supreme Court). We address three constitutional issues on appeal: (1) whether Section 52-1-24 ("Section 24"), which requires use of the American Medical Association Guides, American Medical Association, **Guides to the Evaluation of Permanent Impairment** (4th ed. 1993) [hereinafter "AMA Guide"], to evaluate impairment, embodies an unlawful delegation of legislative authority to a nongovernmental entity; (2) whether the Act is arbitrary and denies workers a meaningful hearing to address the unique aspects of their claim; and (3) whether the Legislature's adoption of the most recent edition of the AMA Guide to evaluate impairment denies workers equal protection in determining the existence or extent of disability. In addition to her constitutional challenges, Appellant Christine Rodriguez ("Rodriguez") contended that there was insufficient evidence to support the workers' compensation judge's finding regarding the date on which she reached maximum medical improvement (MMI)[2], and the value assigned to her for residual physical capacity. We find all challenged portions of the Act constitutional and affirm the workers' compensation judges' determinations of the proper level of benefits available to these Appellants. As to Rodriguez's additional claim, we conclude that the workers' compensation judge's determinations were supported by substantial evidence.

{2} This Court authorized the following organizations to submit amicus curiae briefs: the Workers' Compensation Administration; the American Insurance Association and the Business and Labor Workers' Compensation Coalition; the Trial Lawyers for Public Justice and the New Mexico Trial Lawyers Association; and the New Mexico Defense Lawyers Association.

I.

{3} Appellant Virginia Madrid ("Madrid") was employed as a staff nurse by Appellee St. Joseph Hospital when she sustained an injury to her back. She was assisting a patient who slipped from her grasp and began to fall. In an attempt to help the patient, Madrid was dragged to the floor along with the patient. Madrid underwent treatment for her injury and returned to what she described as light-duty work. With ongoing treatment Madrid reached MMI, which ended her eligibility for temporary disability benefits. She then received an impairment rating of zero percent from her

[1] Permanent partial disability "means a condition whereby a worker, by reason of injury arising out of and in the course of employment, suffers a permanent impairment." Section 52-1-26(B).

[2] MMI is defined within the Act as "the date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated based upon reasonable medical probability as determined by a health care provider." Section 52-1-24.1. Once a worker has achieved MMI, an evaluation of permanent impairment is performed based upon the AMA Guide, Section 52-1-24(A) (impairment; definition), and this impairment rating is used in calculating the extent of disability and any accompanying benefits eligibility. Section 52-1-26(C) (permanent partial disability).

medical care provider, which rendered her ineligible for further workers' compensation benefits. Nonetheless, Madrid alleged that she continued to feel constant back pain, and her doctor continued to restrict her from heavy lifting and twisting. Madrid concluded that she could no longer perform the duties of staff nurse. She resigned from employment with St. Joseph Hospital and began work at Belen Healthcare shortly thereafter. Belen Healthcare paid Madrid a salary equal to or greater than the salary she earned at St. Joseph Hospital.

{4} Following her resignation from St. Joseph Hospital, Madrid filed a workers' compensation claim for PPD benefits. A mediation conference resulted in a recommendation that Madrid was ineligible for PPD benefits due to the lack of an impairment rating on which to calculate benefits. Madrid requested a formal hearing at which she challenged the Act's constitutionality. At the formal hearing, the judge denied Madrid benefits based on her zero percent impairment rating.

{5} The second case concerned Rodriguez, who worked in the electronics department at Wal-Mart. She was responsible for stocking the display shelves and was injured while placing a television on a shelf. Rodriguez continued to work intermittently, while receiving treatment for her injuries. She continued to suffer from pain in her arm, shoulder, and back, which impaired her capacity to work. Rodriguez made a claim for PPD benefits. Her treating physician established that she had reached MMI with an impairment rating of five percent. Rodriguez felt that the measure of benefits to which she would be entitled based on these findings was below the proper level. Consequently she filed a complaint in which she challenged both the Act's constitutionality and the date on which she was deemed to have reached MMI. Mediation led to a formal hearing at which the workers' compensation judge found that Rodriguez had reached MMI at a later date than first noted, and assigned her a disability rating of nine percent. Appellants now appeal.

II.

{6} Appellants contest the mandatory use of the AMA Guide, alleging that the AMA Guide was not developed to measure a worker's disability or to determine the impact of an individual's impairment on his or her capacity to work. Rather, Appellants contend that the AMA Guide was developed solely to assist doctors in the rating of physical impairment, without regard to the impact of the particular impairment on the loss of work capacity. According to Appellants, the practical result of relying on the AMA Guide is that many permanently disabled workers are denied compensation because they do not suffer from an impairment recognized by the American Medical Association ("AMA"). Appellants also contend that use of the AMA Guide ties compensation to a standard that has no relationship to the actual occupational or vocational disability.

{7} We first examine the process by which workers' compensation claims are evaluated. Compensable workplace injuries are divided into four basic categories: (1) temporary total disability; (2) temporary partial disability; (3) permanent total disability; and (4) permanent partial disability. Eligibility for the various temporary benefits provided under the Act ends at the date of MMI. Section 52-1-25. From this point forward, the worker is entitled to further benefits only if he or she can establish a permanent—either partial or total—disability. When a claim for PPD benefits has been filed, a medical professional must utilize the most recent version of the AMA Guide in evaluating whether the worker is physically impaired as a result of a work-related injury. Section 52-1-24(A) (impairment; definition); 1 Carlos G. Martinez, **New Mexico Workers' Compensation Manual** § 8.09, at 8-18 to -23 (1993) (determining permanent partial disability). This initial determination is based on a medical professional's examination of the worker's medical history, a clinical evaluation, treatment, testing, an evaluation of the stability of the medical condition, and other relevant medical information. AMA Guide, **supra**, at 7-10. The medical professional then applies this information to the AMA Guide criteria, making use of his or her experience, training, skill, and thoroughness in examining the worker to arrive at an impairment rating. AMA Guide, **supra**, § 1.3. If the worker has returned to work at wages equal

to or higher than the worker's pre-injury wages, the impairment rating is used as the basis for determining benefits eligibility and for calculating those benefits. Section 52-1-26(D). If the worker is not able to return to work at a rate of pay equal to or higher than the pre-injury wages, the workers' compensation judge applies a statutory formula in order to determine the appropriate level of workers' compensation benefits. Section 52-1-26.1. The formula incorporates the worker's impairment rating, age, education, and residual physical capacity[3] in order to arrive at a disability rating, which determines the level of benefits available. Section 52-1-26(C).

{8} This complex evaluation scheme was designed to achieve the purpose for which workers' compensation was first enacted, which was to protect injured workers from becoming dependent on public welfare and to provide them with some financial security. **Wylie Corp. v. Mowrer**, 104 N.M. 751, 752, 726 P.2d 1381, 1382 (1986). The portion of the Act relevant to partial disability was intended to provide "every person who suffers a compensable injury with resulting permanent partial disability . . . with the opportunity to return to gainful employment as soon as possible with minimal dependence on compensation awards." Section 52-1-26(A).

{9} The Legislature modified portions of the Act in 1990, 1990 N.M. Laws, ch. 2, § 53, in order to "assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers who are subject to the provisions of the Workers' Compensation Act." NMSA 1978, § 52-5-1 (Repl. Pamp. 1991). One of the modifications intended to further these objectives was the required use of the AMA Guide in evaluating impairment. Section 52-1-24(A). Application of the AMA Guide is supposed to achieve objectivity and fairness in the disability determination process because the AMA Guide offers an objective method for evaluating the degree of permanent impairment. AMA Guide, **supra**, at v. With these objectives in mind, we will examine the Act to ensure that its application does not offend the protections afforded by the New Mexico and United States Constitutions.

{10} This Court presumes the Act is constitutional. **See, e.g.**, **Espanola Hous. Auth. v. Atencio**, 90 N.M. 787, 788, 568 P.2d 1233, 1234 (1977) ("It is well settled that there is a presumption of the validity and regularity of legislative enactments."). Absent proof beyond a reasonable doubt that the Legislature has enacted a statute which is unconstitutional, this Court will uphold the statute. **Id.** We will not question the wisdom, policy, or justness of legislation enacted by our Legislature. **Id.** The burden of establishing that the statute is invalid rests on the Appellants. **City of Albuquerque v. Jones**, 87 N.M. 486, 535 P.2d 1337 (1975).

III.

A.

{11} Appellants ask that we resolve whether Section 24 of the Act constitutes an unconstitutional delegation of legislative authority by requiring the use of the most recent edition of the AMA Guide in evaluating impairment. Section 24 provides in pertinent part:

> A. "impairment" means an anatomical or functional abnormality existing after the date of maximum medical improvement as determined by a medically or scientifically demonstrable finding and based upon the most recent edition of the American medical association's [sic] guide to the evaluation of permanent impairment or comparable publications of the American medical association [sic].

Section 52-1-24. Appellants contend that the Legislature improperly delegated its lawmaking power by allowing the AMA, a nongovernmental entity, to establish and periodically change the sole determinative factor of a worker's right to

[3] Residual physical capacity is the worker's physical capacity to perform the job following injury. **Levario v. Ysidro Villareal Labor Agency**, 120 N.M. 734, 736, 906 P.2d 266, 268 .

PPD benefits. We do not find mandatory reference to the AMA Guide in determining impairment for purposes of workers' compensation claims to be a delegation of legislative authority to the American Medical Association.

{12} At the outset we note that the impairment rating is not necessarily the sole determinative factor of a worker's right to PPD benefits. The impairment rating is the sole determinative factor in evaluating disability only where the worker has returned to work at the same or greater rate of pay than that earned prior to the injury. The Act is intended only to prevent the worker from becoming a public charge and to assist the worker in returning to work with minimal dependence on compensation awards. **Wylie**, 104 N.M. at 752-53, 726 P.2d at 1382-83. In those instances where wages decrease as a result of a work-related disability, the impairment rating is not the sole determinative factor of a worker's right to workers' compensation benefits.

{13} The Legislature is generally prohibited from delegating legislative powers. **State v. Spears**, 57 N.M. 400, 405, 259 P.2d 356, 359 (1953). However, this rule is not absolute. Our Legislature has the power to statutorily authorize an agency to formulate rules and regulations so long as it does not give the outside entity the power to determine what the law will be. **Id.** at 406, 259 P.2d at 360 ("If the regulations or actions of an official or board authorized by statute do not in effect determine what the law shall be . . . such regulation or action is administrative, and not legislative, in its nature and effect.").

{14} When a legislature adopts the standards of a private organization into a statutory scheme, as did our Legislature in Section 24, the incorporation is not always a delegation of legislative power. We find no delegation of legislative power in Section 24. Although the issue is one of first impression in New Mexico, many jurisdictions have articulated compelling rationales for allowing adoption of a private organization's standards into a statutory scheme without finding a delegation of legislative authority. This is true even when the standards are subject to periodic revision by the private entity.

{15} Courts in other jurisdictions which have addressed the adoption of private standards by their legislatures have articulated many reasons for allowing such adoptions. As the Supreme Court of Maryland noted:

> [C]ourts have sometimes upheld legislative adoption of private organizations' standards which are periodically subject to revision, in limited circumstances such as where the standards are issued by a well-recognized, independent authority, and provide guidance on technical and complex matters within the entity's area of expertise.

Board of Trustees of the Employees' Retirement Sys. of the City of Baltimore v. Mayor & City Council of Baltimore, 317 Md. 72, 562 A.2d 720, 731 (Md. 1989). A Wisconsin case, **State v. Wakeen**, 263 Wis. 401, 57 N.W.2d 364 (Wis. 1953), provides a clear example of a statute that effectively incorporates the standards developed by a private organization without implicating legislative delegation. In **Wakeen**, the Wisconsin Supreme Court upheld a statute which defined the word "drug" by referencing publications of "'the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary.'" **Id.** at 365 (quoting Wis. Stat. § 151.06(1)). These publications are periodically updated to include new scientific discoveries made by eminent professionals interested in maintaining high standards in science. **Id.** The court found no delegation of legislative power in the statutory reference to the mutable standards of private entities. **Id.** at 369. The decision rested in part on the fact that the publications were not made in response to the statutory reference. **Id.** The eminence of the compilers of these publications further legitimized adoption of the publications by the Legislature. **Id.** Furthermore, the court noted that the United States Congress and many state legislatures have adopted the same standards. **Id.**

{16} Some jurisdictions limit their legislature's authority to reference periodically updated standards, requiring that the arbitrator have a certain amount of discretion in adopting or applying the periodically updated standards. **See, e.g.**, **City of Baltimore**, 562 A.2d at 732. A Maryland court upheld a statute which referenced a private entity's periodically updated list. **Id.** The reference to the list was not a delegation of legislative authority because it was merely advisory, and the agency was free to disregard the list. **Id.** The court concluded that the agency was ultimately responsible for making the relevant determination with the option of rejecting the proposals of the private entity. **Id.**

{17} Moreover, practical necessity may require statutory reference to the standards of private organizations. The Minnesota Supreme Court, in adopting American Bar Association accreditation determinations for evaluation of applicants for admission to the Bar, noted:

> We have neither the time nor the expertise to investigate individually the special training of an applicant or the program offered by specific law schools, and any attempt by us to do so would be inefficient and chaotic. Thus, it does not offend the constitution for us to decide to utilize instead standards developed by a nongovernmental body with expertise in the area. . . .

In re Hansen, 275 N.W.2d 790, 796-97 (Minn. 1978), **appeal dismissed**, 441 U.S. 938, 60 L. Ed. 2d 1040, 99 S. Ct. 2154 (1979). Legislatures encounter resource limitations, as well as other practical obstacles, which render them incapable of developing their own standards. **See, e.g.**, **Lucas v. Maine Comm'n of Pharmacy**, 472 A.2d 904, 911 (Me. 1984) (concluding that "[a] single small state such as Maine does not have available the resources to conduct an ongoing accreditation program."). Furthermore, the technical sophistication required to develop standards in certain fields has a prohibitory impact on legislative development of such standards. **See, e.g.**, **id.** (finding legislature did not have expertise to develop standards for evaluating medical professionals, and approving adoption of standards created by private entity which utilized eminent professionals interested in maintaining high scientific standards).

{18} Finally, where a private organization's standards have significance independent of a legislative enactment, they may be incorporated into a statutory scheme without violating constitutional restrictions on delegation of legislative powers. A private entity's standards cannot be construed as a deliberate law-making act when their development of the standards is guided by objectives unrelated to the statute in which they function. **Lucas**, 472 A.2d at 911 (quoting Jaffe, **Law Making by Private Groups**, 51 Harv. L. Rev. 201, 231 (1936)). In **Lucas**, the Supreme Court of Maine applied this principle to uphold a statute requiring that pharmacists prove that they have received a degree from a school accredited by the American Council on Pharmaceutical Education before working in Maine. **Id.** at 909 ("'Statutes whose operation depends upon private action which is taken for purposes which are independent of the statute' usually pass constitutional muster.") (quoting 1 Kenneth C. Davis, **Administrative Law Treatise** § 3.12, at 196 (2d ed. 1978)). The American Council on Pharmaceutical Education evaluates schools for numerous purposes unrelated to the statutory purpose. **Id.** Based on that principle, the court concluded that the statutory requirement of a degree from a pharmacy school accredited by the American Council on Pharmaceutical Education did not constitute an unlawful delegation of legislative authority. **Id.** at 911. Courts have repeatedly reached the same conclusion in cases involving incorporation of the accreditation determinations of private entities. **See, e.g.**, **Hansen**, 275 N.W.2d at 796 (statute requiring proof of graduation from American Bar Association-accredited law school was intended to achieve a standard of educational excellence rather than to delegate legislative authority to the American Bar Association); **Colorado Polytechnic College v. State Bd. for Community Colleges & Occupational Educ.**, 173 Colo. 39, 476 P.2d 38, 40 (Colo. 1970) (upholding constitutionality

of statute which uses criteria established by nationally-recognized accrediting associations).

{19} All of the aforementioned grounds for incorporating the standards of a private entity without finding a delegation of legislative authority are applicable to Section 24, which references the AMA Guide. Section 24 has incorporated the standards of a well-recognized, independent authority, in order to provide guidance to medical professionals and workers' compensation claims adjudicators on the complex issue of impairment. The AMA Guide was specifically developed to "bring greater objectivity to estimating the degree of long-standing or 'permanent impairment.'" AMA Guide, **supra**, at v. In compiling the AMA Guide, the American Medical Association obtained the assistance of experts in the complex area of permanent impairment, calling on "well-qualified individuals" and "physicians from all the state medical societies and medical specialty societies." **Id.** Many other states use the AMA Guide, or a similar rating method, to evaluate impairment for purposes of workers' compensation benefits.[4]

{20} Contrary to Appellants' argument, use of the AMA Guide as prescribed by Section 24 does allow for an element of discretion as specifically explained by the AMA Guide:

> [N]o formula is known by which knowledge about a medical condition can be combined with knowledge about other facts to calculate the percentage by which the employee's industrial use of the body is impaired. [Therefore, the Workers' Compensation] Commission also must consider the nature of the injury and the employee's occupation, experience, training, and age [to] award proportional compensation.

AMA Guide, **supra**, § 1.4. The AMA Guide is a general framework, requiring flexibility in its application. While the AMA Guide was intended to help standardize the evaluation of a worker's impairment, it was not intended to establish a rigid formula to be followed in determining the percentage of a worker's impairment. Where evidence is conflicting, the ultimate decision concerning the degree of a worker's impairment and disability rests with the workers' compensation judge. Furthermore, where the AMA Guide is an inadequate reference, the statute explicitly allows for reference to other AMA publications. Section 52-1-24. Section 24 clearly has a discretionary component.

{21} It is impractical to expect our Legislature to establish standards for evaluating physical impairment in workers' compensation claims. The New Mexico Legislature could have concluded that it lacked the resources to develop independent standards, opting instead to utilize the standards established by a highly respected entity that possessed the expertise for such an undertaking. Prohibiting the Legislature from adopting the standards developed by experts within a rapidly changing medical specialty would obstruct the Workers' Compensation Administration's efforts to provide accurate evaluations of impairment.

{22} In addition, new developments in medical science relevant to evaluating impairments demand periodic modifications of the standard adopted by Section 24. The AMA Guide is periodically updated to encompass these new developments. AMA Guide, **supra**, at 1. Periodic revisions of the standard will not transform an otherwise constitutional and non-delegatory statutory provision into an unconstitutional delegation of legislative power. Where a standard is periodically updated because of new scientific developments recognized by eminent

[4] **See** Alaska Stat. § 23.30.190 (1990); Ariz. Rev. Stat. Ann. § 23-1065(C) (1995); Colo. Rev. Stat. § 8-42-107(8)(c) (Cum. Supp. 1995); Ga. Code Ann. § 34-9-1(5) (1994); Ky. Rev. Stat. Ann. § 342.730(1)(c) (Michie/Bobbs-Merrill Cum. Supp. 1994); La. Rev. Stat. Ann. § 23.1221(4)(q) (West Cum. Supp. 1996); Me. Rev. Stat. Ann. tit. 39-A, § 153(8) (West Cum. Supp. 1996); Mass. Ann. Laws ch. 152, § 35 (Law. Co-op Cum. Supp. 1996); Mont. Code Ann. § 39-71-703(1)(b)(ii) (1995); Nev. Rev. Stat. § 616C.490(2) (1995); N.H. Rev. Stat. Ann. § 281-A:31-a (Cum. Supp. 1995); N.D. Cent. Code § 65-01-02(26) (1995); Okla. Stat. Ann. tit. 85, § 3(11) (West 1992); R.I. Gen. Laws § 28-33-18(c) (1995); S.D. Codified Laws Ann. § 62-1-1.2 (Supp. 1995); Tenn. Code Ann. § 50-6-241(a)(1) (Supp. 1995).

professionals interested in maintaining high standards in science, the standard may still be adopted by the legislature. **See, e.g.**, **Wakeen**, 57 N.W.2d at 369.

{23} The AMA Guide was developed, and is utilized, for many purposes beyond evaluation of impairment within a workers' compensation claim. While the AMA Guide has become an important tool for evaluating impairment for workers' compensation claims, it is also utilized in adjudicating "Social Security Administration cases, and other types of cases." AMA Guide, **supra**, at 1. Furthermore, the AMA Guide is "useful anywhere when questions arise about people's physical and mental functioning and capabilities." **Id.** Clearly the AMA has developed a standard which has independent significance beyond adjudication of workers' compensation claims. The New Mexico Constitution does not prohibit the Legislature from availing itself of the independent work of a private organization.

{24} In light of all the relevant considerations—the eminence of the medical professionals who compile the AMA Guide, the complexity of the issue of impairment, the number of jurisdictions that have adopted the AMA Guide or similar publications, the practical necessity of adopting this mutable standard, the discretionary component of using the AMA Guide, and the significance of the AMA Guide outside of the statutory reference—we find no delegation of legislative authority in Section 24.

B.

{25} We are also called upon to determine whether the Act violates the Due Process Clause of the New Mexico Constitution. Appellants assert that the scheme utilized to determine eligibility for workers' compensation benefits is arbitrary and capricious, and denies workers an opportunity for a fair and impartial hearing which contemplates the individual circumstances of each case. For the following reasons, we conclude that the Act does not violate due process.

{26} Article II, Section 18 of the New Mexico Constitution prohibits the denial of life, liberty or property without due process of law. Due process involves both substantive and procedural considerations. Substantive due process protects individuals from arbitrary and discriminatory laws, requiring that every law further a proper legislative purpose. **Holford v. The Regents of the Univ. of Cal., Los Alamos Nat'l Lab.**, 110 N.M. 366, 368, 796 P.2d 259, 261 (Ct. App.), **cert. denied**, 110 N.M. 330, 795 P.2d 1022 (1990). Procedural due process requires the government to give notice and an opportunity to be heard before depriving an individual of liberty or property. **Rutherford v. City of Albuquerque**, 113 N.M. 573, 575, 829 P.2d 652, 654 (1992). We interpret Appellants' complaint to address issues of substantive due process. Substantive due process requires a determination of whether the Act bears a rational relationship to a legitimate legislative goal or purpose. **See, e.g.**, **Garcia v. Village of Tijeras**, 108 N.M. 116, 119, 767 P.2d 355, 358 (Ct. App.) ("In order to withstand scrutiny under United States Constitution and similar provisions in our state Constitution, N.M. Const. art. II, §§ 4 & 18, a statute or ordinance must bear a rational relationship to a legitimate legislative goal or purpose."), **cert. denied**, 107 N.M. 785, 765 P.2d 758 (1988).

{27} Appellants have failed to establish that use of the AMA Guide and predetermined modifiers in evaluating disability is arbitrary and lacks some rational relationship to a legitimate legislative purpose. **Id.** Appellants argue that the Act produces arbitrary disability determinations because, unlike the previous versions of the Act, it does not permit the workers' compensation judge to exercise discretion by applying extenuating factors to determine disability. **See, e.g.**, **Anaya v. New Mexico Steel Erectors, Inc.**, 94 N.M. 370, 373, 610 P.2d 1199, 1202 (1980) (stating that disability determination analyzed percentage claimant was unable to perform previous job, taking into consideration "'age, education, training, experience and physical condition and previous work experience'" with emphasis on importance of trial judge's discretion). This Court will not address which version of the Act

is superior; rather, we consider whether the current version of the Act is arbitrary.

{28} Contrary to Appellants' assertions, the current version of the Act requires the workers' compensation judge to consider the unique facts of each worker's claim and is not arbitrary. As discussed earlier, the AMA Guide requires medical professionals to incorporate the unique circumstances of each claim in order to arrive at an impairment rating. Additionally, the Act itself explicitly states that any finding of impairment may be modified by the claimant's age, education, and physical capacity. **See** §§ 52-1-26, -26.4. It is evident that the AMA Guide is what it purports to be—a guideline to be used in conjunction with the expertise of the medical professional in order to arrive at a percentage of impairment based on the unique circumstances of each claim. **See** AMA Guide, **supra**, § 1.3. Therefore, the amended version of the Act incorporates discretionary factors to determine disability and does not produce arbitrary disability awards.

{29} Appellants further argue that the Act is arbitrary because some conditions which result in impairment are not contained in the AMA Guide. **See, e.g.**, **Sutton v. Quality Furniture Co.**, 191 Ga. App. 279, 381 S.E.2d 389, 389-90 (Ga. App. Ct. 1989) (illustrating that some impairments, such as chronic pain, are not addressed by the AMA Guide), **cert. denied** (May 11, 1989). This argument fails because other comparable AMA publications may be utilized to evaluate impairment when the AMA Guide is insufficient. **See** § 52-1-24(A). Similarly, other jurisdictions allow workers' compensation judges to consider generally-accepted standards in awarding workers' compensation benefits when the injury at issue is not covered by the AMA Guide. **See, e.g.**, **Dayron Corp. v. Morehead**, 509 So. 2d 930, 931 (Fla. 1987) ("When an injury is not covered by the AMA Guides, it is permissible to rely upon medical testimony of permanent impairment based upon other generally accepted medical standards."); **Slover Masonry, Inc. v. Industrial Comm'n**, 158 Ariz. 131, 761 P.2d 1035, 1039 (Ariz. 1988) (noting that where the AMA Guide is inadequate, the administrative law judge may turn to other factors in assessing impairment). Under the Act, application of the AMA Guide in evaluating impairment does not preclude use of other AMA publications in evaluating impairment. Further, the AMA Guide explicitly provides that it "does not and cannot provide answers about every type and degree of impairment." AMA Guide, **supra**, § 1.3. It is a "guideline to be used in conjunction with the expertise of the medical profession." **Id**. While the Legislature intended to preclude arbitrary determinations, it did not intend to exclude determinations by medical professionals in situations not covered by the Guide. Thus, the Act does not produce an arbitrary determination of disability.

{30} Finally, we disagree with Appellants' assertion that the Act provides insufficient guidance in evaluating impairment for purposes of determining disability. New Mexico has previously determined a worker's disability based on capacity to perform work. **See, e.g.**, **Medina v. Zia Co.**, 88 N.M. 615, 617, 544 P.2d 1180, 1182 ("The primary test for disability is the capacity to perform work."), **cert. denied**, 89 N.M. 6, 546 P.2d 71 (1976). Currently, the Act utilizes loss of earning capacity in evaluating disability. **See** § 52-1-26(D) ("If, on or after the date of maximum medical improvement, an injured worker returns to work at a wage equal to or greater than the worker's pre-injury wage, the worker's permanent partial disability rating shall be equal to his impairment"). Appellants contend that this change in the Act results in disability determinations which are unrelated to capacity to perform work. Thus, Appellants argue that the Act unconstitutionally denies workers their right to a fair and impartial determination of disability based on the extent of incapacity to perform past, relevant work. Due process does not require the Legislature to maintain the same compensation scheme indefinitely. Appellants have no constitutional right to the previously-utilized definition of "disability." The Act, as well as the term "disability" as used within the Act, are sui generis. **See, e.g.**, **Consolidated Freightways Inc. v. Subsequent Injury Fund**, 110 N.M. 201, 204, 793 P.2d 1354, 1357 (Ct. App. 1990) (recognizing the sui generis nature of the Act). The term

"partial disability" is defined within the Act at Section 52-1-26(B) and does not refer to incapacity to perform past, relevant work. The Act defines disability, provides adequate guidelines for determining eligibility for workers' compensation benefits, and ensures that workers receive a fair and impartial determination of disability.

{31} We conclude that the Act is not arbitrary and ensures a fair and impartial determination of disability. Thus, the Act is not violative of substantive due process.

C.

{32} Next we are asked to address whether the Act violates equal protection. Appellants contend that mandatory application of the most recent edition of the AMA Guide in evaluating impairment results in similarly-situated workers receiving different impairment ratings based solely on when they obtain MMI. We find no equal protection violations resulting from mandatory application of the most recent edition of the AMA Guide.

{33} The Act specifies that, upon achieving MMI, an evaluation of impairment must be completed based on the most recent version of the AMA Guide. **See** § 52-1-24(A). This impairment rating is used in evaluating eligibility for workers' compensation benefits and the magnitude of those benefits. **See** § 52-1-26. Appellants object to the fact that workers suffering identical injuries on the same day, and achieving MMI on different dates, could receive an evaluation of impairment based on different versions of the AMA Guide. The use of different versions of the AMA Guide could result in a benefit award for one of the workers greater than that given to another. Appellants conclude that the scheme allows an unreasonable and arbitrary classification to effect workers' compensation awards.

{34} The equal protection clauses found in the United States and New Mexico Constitutions prohibit the government from creating statutory classifications that are unreasonable, unrelated to a legitimate statutory purpose, or are not based on real differences. U.S. Const. amend. XIV; N.M. Const. art. II, § 18; **Plyler v. Doe**, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982) ("In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose."); **Thompson v. McKinley County**, 112 N.M. 494, 429-30, 816 P.2d 494, 498-99 (1991) (Equal Protection Clauses of state and federal constitutions prohibit statutes which "create[ ] classifications that are unreasonable, that do not relate to the statutory purpose, and that are not based on real differences.").

{35} As a threshold matter, we must decide whether the legislation at issue results in dissimilar treatment of similarly-situated individuals. **Montez**, 108 N.M. 752, 755, 779 P.2d at 132 (beginning analysis with determination that workers' compensation statute did not create two separate classifications subject to different treatment). Appellants incorrectly conclude that workers suffering identical injuries on the same day are similarly situated. Where one worker requires substantial recovery time before reaching MMI, and another worker requires minimal recovery time before reaching MMI, the workers are not similarly situated. Categorizing workers according to the date of MMI ensures that similarly-injured workers who achieve MMI on the same date will be evaluated for impairment under the same version of the AMA Guide. The time of injury alone is insufficient to determine whether workers are similarly situated.

{36} The Act insures that every worker will be evaluated for impairment and will receive benefits based on current medical advances. To require a worker to undergo an impairment evaluation based on outdated medical information, simply because the worker was injured before the release of more up-to-date medical information, would deprive the late-recovering worker of the opportunity to be evaluated according to current medical developments. Had the Act failed to provide for application of only the most recent

medical developments, it could have resulted in disparate treatment of similarly-situated workers. However, as drafted, the Act ensures that each worker will receive an impairment rating and subsequent disability rating based on current medical developments.

{37} We conclude that the legislation at issue is rationally related to its purpose and does not result in dissimilar treatment of similarly-situated individuals. Thus, we find that mandatory application of the most recent edition of the AMA Guide in evaluating impairment does not violate equal protection.

D.

{38} Having determined that the Act is constitutionally sound with respect to the issues raised by Appellants, we turn to Rodriguez's contention that the workers' compensation judge erred in concluding that she achieved MMI on April 6, 1993. In reviewing a workers' compensation decision we evaluate whether, based on the whole record, the decision is supported by substantial evidence. **Tallman v. ABF**, 108 N.M. 124, 130, 767 P.2d 363, 369 (Ct. App.), **cert. denied**, 109 N.M. 33, 781 P.2d 305 (1988). We must evaluate whether there is sufficient evidence "for a reasonable mind to accept as adequate to support the conclusion reached." **Id.** at 128, 767 P.2d at 367.

{39} MMI is "the date after which further recovery from or lasting improvement to an injury can no longer be reasonably anticipated based upon reasonable medical probability as determined by . . . health care providers." Section 52-1-24.1. One physician testified that MMI was achieved on April 6, 1993, while another physician indicated that MMI was attained on July 21, 1994. Both physicians agreed that Rodriguez suffers from myofacial pain which is chronic and incapable of demonstration through objective findings. The workers' compensation judge was responsible for resolving any conflicts in medical testimony as to the date of MMI. **Sanchez v. Molycorp, Inc.**, 103 N.M. 148, 152, 703 P.2d 925, 929 . Rodriguez currently has the same diagnosis and symptoms as were present on April 6, 1993. The evidence shows that a reasonable mind could find that Rodriguez reached MMI on April 6, 1993. **See Tallman**, 108 N.M. at 128, 767 P.2d at 367. There is substantial evidence to support the judge's determination that Rodriguez reached MMI on April 6, 1993.

{40} Additionally, Rodriguez contends that the workers' compensation judge lacked substantial evidence to support the assignment of a value of one as her residual physical capacity, asserting that the value should have been two. Residual physical capacity is a value ranging from one to eight, which is assigned to a disabled worker based on the difference between the worker's usual and customary work and the worker's residual physical capacity. **See** § 52-1-26.4. Rodriguez contests the residual physical capacity value assigned to her based on the fact that before she was injured she was able to lift from forty to sixty pounds at work, while after she was injured she was restricted to lifting only thirty pounds. Thus, Rodriguez could lift medium weights prior to injury and only light weights after the injury. **Id.** Rodriguez argues that the workers' compensation judge incorrectly utilized the medium lifting capacity value of one in determining disability rather than the light lifting capacity value of two which should have been used. Had the workers' compensation judge applied a light lifting capacity value, Rodriguez would have received a disability rating of thirteen percent rather than the nine percent disability rating assigned to her.

{41} Rodriguez admitted that she generally only lifted light objects prior to her injury. In order to obtain the light lifting designation, Rodriguez had the burden of proving that she was unable to lift up to twenty-five pounds frequently. **Gallegos v. City of Albuquerque**, 115 N.M. 461, 462, 853 P.2d 163, 164 (Ct. App.) (holding that the burden is on the worker to establish entitlement to benefits), **cert. denied**, 115 N.M. 535, 854 P.2d 362 (1993). Rodriguez failed to satisfy this burden. A review of all of the evidence shows that a reasonable mind could find

that Rodriguez's residual physical capacity is one and that her permanent partial disability is limited to nine percent.

IV.

{42} In sum we hold that all challenged portions of the Act are constitutionally sound. We further hold that the workers' compensation judge's findings as to the date on which Rodriguez reached MMI and the value assigned to her for residual physical capacity are supported by substantial evidence. Thus, we affirm the worker's compensation judges' determination of the proper level of benefits available to both Appellants.

{43} IT IS SO ORDERED.

JOSEPH F. BACA,
Chief Justice

WE CONCUR:

PAMELA B. MINZNER,
Justice

LOUIS P. McDONALD,
District Judge, (Sitting by designation)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1997-NMSC-043

Filing Date: August 8, 1997

Docket No. 23,435

LEXINGTON INSURANCE COMPANY,

Cross-Plaintiff and Third-Party Plaintiff-Appellant,

v.

KENNETH RUMMEL, INTERNATIONAL SURPLUS LINES INSURANCE COMPANY, et al.,

Cross-Defendants and Third-Party Defendants-Appellees.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Gerald R. Cole, District Judge

As Corrected October 15, 1997, Second Correction December 15, 1997

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OPINION

BACA, Justice.

{1} This is an appeal from a district court order granting International Surplus Lines Insurance Company's (ISLIC) motion for summary judgment on Lexington Insurance Company's (Lexington) claim of prima facie tort. Lexington's allegation of prima facie tort arose out of ISLIC's entry into a settlement agreement in a personal injury case. According to Lexington, the settlement agreement was designed to injure Lexington by shifting partial liability for a judgment, which ISLIC and other insurers should have paid, onto Lexington. The district court granted ISLIC's motion for summary judgment because Lexington failed to present evidence supporting each element of prima facie tort. Lexington appealed that order. The Court of Appeals certified the case to this Court pursuant to NMSA 1978, § 34-5-14(C) (1972), because the appeal raised questions of substantial public interest concerning the elements of prima facie tort. We hold that the district court correctly determined that Lexington failed to raise material issues of fact as to whether ISLIC committed a prima facie tort and we affirm the order granting ISLIC summary judgment.

I.

{2} Kenneth Rummel was injured during a robbery at the Circle K store where he was employed. Rummel sued Circle K, alleging that his injuries arose out of the negligence and outrageous conduct of Circle K, and obtained a judgment against Circle K for $ 1,042,844.28 in compensatory damages and $ 10,700,000 in punitive damages. Circle K maintained numerous insurance policies that should have been sufficient to cover this judgment. The following table and narrative are provided to clarify how the various insurance policies purchased by Circle K relate to one another.

Circle K	$ 250,000 (self-insured retention)
Columbia	$ 750,000 (primary insurance)
ISLIC	$5,000,000 (excess insurance)
Lexington	$10,000.000 (excess insurance)

{3} Circle K held a self-insured retention under which is assumed the risk of the first $ 250,000 of liability. A Columbia Casualty Company (Columbia) policy indemnified Circle K for damages in excess of $ 250,000 but not exceeding $ 1,000,000. Circle K had a comprehensive catastrophic liability insurance policy from ISLIC which applied to damages over $ 1,000,000 and provided $ 5,000,000 in coverage. Circle K also had a policy issued by Lexington providing $ 10,000,000 in coverage and expressly excluding coverage of punitive-damage liability. Lexington's policy contained a condition precedent to coverage, requiring that the total limits of all the underlying coverage be paid before Lexington's obligation to pay would arise.

{4} Following entry of the judgment against Circle K, ISLIC offered to defend Circle K's appeal, only later deciding to enter into a settlement agreement with Rummel. The settlement agreement allowed ISLIC to receive full credit for payment of its policy limits without actually paying Rummel the entire $ 5,000,000 of coverage. Circle K was undergoing bankruptcy reorganization and the settlement agreement allowed Circle K to meet its $ 250,000 self-insurance obligation by granting Rummel a $ 500,000 unsecured claim in the reorganization. The settlement agreement also provided that ISLIC would pay Rummel $ 1.625 million against the punitive damages award and reimburse Circle K for two thirds of the workers' compensation benefits paid by Circle K to Rummel. Circle K agreed to release any further claims it may have had against ISLIC and assigned Rummel all of its causes of action and rights against the insurance companies that had not participated in the settlement agreement.

{5} ISLIC was the only insurance company that acknowledged liability for the judgment against Circle K. Therefore, Rummel, both individually and as the assignee of Circle K and ISLIC, filed a complaint against the other insurance companies, including Lexington. Lexington has refused to provide coverage for the judgment, raising multiple defenses including: (1) the compensatory judgment did not reach the threshold level necessary to invoke coverage under the Lexington policy; (2) the underlying insurance companies have failed to pay their full policy limits.

{6} In response to Rummel's complaint, Lexington filed a counter-claim and third-party complaint, alleging that ISLIC, Circle K, Rummel, and Rummel's attorney had committed prima facie tort by entering into the settlement agreement.[1] Lexington claimed that the settlement agreement was designed to shift partial responsibility for the judgment onto Lexington. According to Lexington, the shift in responsibility was accomplished in part through assignment of ISLIC's coverage to the punitive damages award, leaving the compensatory damage award unpaid. Because the total punitive damage award was $ 10,700,000, all of Circle K's, Columbia's, and ISLIC's coverage, amounting to $ 6,000,000, could be assigned to the punitive damages award without satisfying that portion of the judgment. More importantly, by assigning this coverage to the punitive damages award, the compensatory damage award remained unpaid after the policies underlying Lexington's were exhausted. The end result is that Lexington may have to provide coverage for the punitive damage award.

{7} In its counter-claim, Lexington alleged that ISLIC and Circle K had committed prima facie tort by entering into a secret settlement agreement with Rummel "in order to protect their own interest at the expense of Lexington." Lexington alleged that the act of entering into the settlement agreement was "done all for the purpose of forcing Lexington through financial duress and coercion to pay Rummel and [his attorney] additional sums of money on the Judgment even though all parties knew about but were deliberately indifferent to the terms of Lexington's excess insurance policy which on the facts and on the face of the policy did not impose any liability on Lexington for payment of the . . . Judgment."

{8} In response to Lexington's counter-claim ISLIC filed a motion for summary judgment, arguing that Lexington had not alleged facts

[1] Lexington eventually dismissed its third-party complaint against Rummel's attorney.

sufficient to satisfy all the elements of prima facie tort. In particular, according to ISLIC, there were no facts supporting the necessary prima facie tort element of intent to injure. The district court agreed and entered an order granting ISLIC's motion for summary judgment. Lexington appeals that order.

II.

{9} On appeal, we address whether the district court erred in granting summary judgment based on its finding that Lexington failed to allege facts sufficient to establish all of the elements of prima facie tort. Summary judgment is proper where there are no genuine issues as to material facts, entitling the movant to judgment as a matter of law. **See** Rule 1-056(C) NMRA 1997; **Fleet Mortgage Corp. v. Schuster**, 112 N.M. 48, 49, 811 P.2d 81, 82 (1991). The movant must make a prima facie showing of entitlement to summary judgment, shifting the burden to the opponent to show a reasonable doubt as to whether a genuine issue for trial exists. **See Fleet**, 112 N.M. at 50, 811 P.2d at 83. We hold that the district court properly granted this motion for summary judgment.

{10} New Mexico officially recognized a cause of action for prima facie tort in **Schmitz v. Smentowski**, 109 N.M. 386, 394, 785 P.2d 726, 734 (1990). Prima facie tort occurs when a lawful act is conducted with an intent to injure and without sufficient economic or social justification, resulting in injury. **See id.** at 390, 785 P.2d at 730. The generally recognized elements of prima facie tort adopted by this Court in **Schmitz** are: (1) an intentional and lawful act; (2) an intent to injure the plaintiff; (3) injury to the plaintiff as a result of the intentional act; (4) and the absence of sufficient justification for the injurious act. **Id.** at 394, 785 P.2d at 734. The terms malice and intent to injure have been used synonymously within our jurisprudence on prima facie tort. **See, e.g.**, **id.** at 395, 785 P.2d at 735 (utilizing malice and intent to injure interchangeably in discussing prima facie tort).

{11} In recognizing prima facie tort, this Court emphasized the importance of limiting the cause of action. **See id.** at 398, 785 P.2d at 738. Prima facie tort was not intended to provide a remedy for every intentionally caused harm. **Id.** at 394, 785 P.2d at 734. Rather, the cause of action provides a remedy for acts committed with an intent to injure the plaintiff and without justification. **Id.** at 395, 785 P.2d at 735. Therefore, balancing the malicious intent of the defendant against both the justifications for the injurious act offered by the defendant and the severity of the injury is a necessary step in assessing whether a prima facie tort has been committed. **Id.** at 394-95, 785 P.2d at 734-35. Where there is no evidence of intent to injure, there is no need to proceed with the balancing test.

{12} We therefore focus on whether Lexington produced evidence of ISLIC's intent to injure Lexington which would necessitate application of the balancing test. Plaintiffs bear a heavy burden to establish intent to injure. **See, e.g.**, **Boatmen's Bank of Butler v. Berwald**, 752 S.W.2d 829, 833 (Mo. Ct. App. 1988) (there is "a heavy burden of proving 'actual intent' of [the defendant] to injure. . . ."); **Riley v. Riley**, 847 S.W.2d 86, 89 (Mo. Ct. App. 1992) ("The intent to cause injury carries a heavy burden of proof.").

{13} As in **Schmitz**, we find Missouri case law instructive in defining the type of proof necessary to support the prima facie tort element of intent to injure. For example, in **Kiphart v. Community Federal Savings & Loan Association**, 729 S.W.2d 510 (Mo. Ct. App. 1985), a bank was accused of prima facie tort for interrogating a teller in order to determine whether the teller was responsible for a cash shortfall. The court reversed a judgment in favor of the teller's prima facie tort claim, holding that the bank had acted to protect its economic interest, a conclusion resulting from the absence of evidence of the bank's intent to harm the teller. **See id.** at 517. In **Centerre Bank of Kansas City v. Distributors, Inc.**, 705 S.W.2d 42, 53 (Mo. Ct. App. 1985), evidence was presented at trial that a bank called in a note knowing that a corporation would go out of business as a result. The Missouri appellate court expressed doubt as to the sufficiency of the evidence that the bank acted out of personal animus

toward the corporation's owner. **See id.** at 54. The court concluded that the plaintiff had failed to establish the element of intent to injure, noting instead that the bank was acting to protect a valid business interest. **Id.** at 53-54 (finding business interests relevant to the issue of intent to injure).

{14} Intent to injure is distinct from intent to commit the act which results in injury. **See Schmitz**, 109 N.M. at 397-98, 785 P.2d at 737-38; **see also Boatman's**, 752 S.W.2d at 833 ("Proof on the element of intent to injure must be of an 'actual intention' to injure, not merely an intent to do the act which may result in the claimed injury."). The plaintiff must produce more than a showing that injury is a natural and foreseeable consequence of the act. **See Schmitz**, 109 N.M. at 398, 785 P.2d at 738 (discussing evidence of intent to injure beyond mere intent to commit the act that caused the harm). Additionally, the plaintiff must demonstrate more than mere insensitivity towards the injured party. **See Boatman's**, 752 S.W.2d at 833-34. After all, "to allow such a lax standard would be to invite every victim of an intentional act to bring an action in prima facie tort and would subvert the purpose of prima facie tort by eliminating the element requiring that a defendant intended injury to the plaintiff." **Schmitz**, 109 N.M. at 398, 785 P.2d at 738.

{15} In its Motion for Summary Judgment, ISLIC asserted that Lexington had failed to establish sufficient evidence of the prima facie tort element of intent to injure. Specifically, Lexington failed to establish that ISLIC's act of entering into the settlement agreement was committed to injure Lexington, an element needed to rebut ISLIC's Motion for Summary Judgment. Instead, Lexington's allegations show that ISLIC was motivated by a desire to protect both itself and its insured from liability for Rummel's judgment. Lexington alleged that "ISLIC chose to protect its own pocketbook to the tune of $ 3,300,000 by undermining Lexington's policy, fostering Rummel's litigation against Lexington;" and that ISLIC entered into the settlement agreement because "it was a financially good deal for ISLIC to help Rummel target Lexington in order to get Rummel off ISLIC's back." Additionally, Lexington alleged that "without notice to Lexington, they entered into pleadings which led to bankruptcy orders in Circle K's bankruptcy proceedings in Arizona to gain concessions for Circle K Corporation and to gain certain benefits for International Surplus Lines [and Rummel], for the purpose of shifting the burden of the Judgment . . . to Lexington." These factual allegations indicate that ISLIC was motivated by the legitimate business purpose of reducing its own liability and the liability of its insured in the face of an enormous judgment, rather than by an intent to injure Lexington.

{16} ISLIC intended to reduce its liability for the judgment. ISLIC was obviously aware that the settlement agreement could shift liability for the judgment onto Lexington. ISLIC certainly displayed insensitivity towards the potential injury to Lexington which was the natural and foreseeable result of the settlement agreement. Yet, the record is devoid of evidence of ISLIC's malicious intent to injure Lexington. Thus, there was no need for a trier of fact to balance the intent to injure against the justifications for the injurious act. Lexington has failed to produce evidence sufficient to raise a material question as to whether ISLIC intended to injure Lexington.

{17} Having failed to provide any evidence to support the intent element of prima facie tort, Lexington has not rebutted ISLIC's prima facie showing of entitlement to summary judgment. The district court properly disposed of Lexington's prima facie tort claim by granting ISLIC's motion for summary judgment. We find no merit in Lexington's other arguments and affirm the court below.

{18} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

GENE E. FRANCHINI,
Chief Justice

DAN A. McKINNON, III,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1997-NMSC-044

Filing Date: September 3, 1997

Docket No. 22,891

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DEAN SALAZAR,

Defendant-Appellant.

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

Released for Publication September 19, 1997,
As Corrected October 15, 1997, Second Correction February 4, 1998

Rita LaLumia
Santa Fe, NM

for Petitioner.

Hon. Tom Udall, Attorney General
Bill Primm, Assistant Attorney General
Santa Fe, NM

for Respondent.

OPINION

BACA, Justice.

{1} Pursuant to Rule 12-102 NMRA 1997, the Defendant-Appellant Dean Salazar ("Defendant") seeks review of a jury verdict convicting him of first degree murder, shooting into an occupied vehicle, and felon in possession of a firearm. He was sentenced to life imprisonment plus ten and one half years. The Defendant died in prison while the appeal of his conviction was pending before this Court.

{2} As a threshold matter, we consider whether the Defendant's death requires abatement of all proceedings had in this prosecution from its inception; ("**ab initio**"). Assuming no abatement is required, we are asked to examine whether the trial court correctly instructed on jury unanimity requirements and lesser included offenses. Last, we consider whether the trial court's evidentiary rulings violated the Defendant's rights.

{3} This Court declines to abate this case **ab initio,** upholding the conviction and concluding that no error occurred warranting relief.

I.

{4} In the early morning of November 20, 1994, the Defendant shot and killed Josephine Manzanares ("Manzanares") while she was driving on Llano Road in Santa Cruz, New Mexico. Prior to her death, Manzanares had been involved in a relationship with the Defendant for approximately eight years. The relationship was a troubled one, characterized by hostility and allegations of drug abuse. Manzanares and the Defendant had two children together, Willy and Anthony, who were four and five years old, respectively, at the time of the shooting. The children lived with Manzanares and her parents, and the Defendant's access to the children often had been an issue of contention in the relationship.

{5} The defense and prosecution presented very different versions of the facts surrounding the shooting. The Defendant testified at trial and alleged the following facts. After the Defendant spent the night of November 19, 1994, consuming alcohol and drugs, he encountered Manzanares on Llano Road on the morning of November 20th. A dispute occurred between them regarding drugs, their relationship, and the

Defendant's access to the children. After the dispute, Manzanares left the area in her car, driving down Llano Road. The Defendant followed in another vehicle. The two cars eventually were side by side, driving on Llano Road. Manzanares yelled, waved her hands at the Defendant, and veered her car at his vehicle several times. Then, Manzanares leaned over while driving as if she was reaching for something. The Defendant believed that she was reaching for a gun, and he responded by grabbing a pistol that he had with him in the car. He then held it out the window to show Manzanares the weapon so that she would "back off." At that point, the Defendant's weapon accidentally discharged, shooting Manzanares in the neck and killing her.

{6} The Defendant also alleged that he did not realize that the bullet had hit Manzanares or that his sons, Willy and Anthony, as well as Manzanares' five-year-old nephew, Eddie, were in her car at the time. After the gun discharged, Manzanares' car went to the side of the road, but the Defendant did not stop because he was afraid Manzanares or her family would call the police. As a convicted felon, the Defendant knew that he was not permitted to possess a gun. Instead, the Defendant went to his brother's house where he was later apprehended by police.

{7} The State presented evidence suggesting a different series of events than that offered by the Defendant. Anthony, the Defendant's son, testified that he was a passenger in Manzanares' car at the time of the incident. He stated that the Defendant followed Manzanares' vehicle down Llano, and although Manzanares attempted to drive fast, a truck in the road forced her to slow her car. Anthony further testified that during the pursuit, he raised his hand to wave at the Defendant and the Defendant waved back to him. Anthony concluded by testifying that the Defendant pulled alongside Manzanares' car and "pointed the gun to my mom and shot her through the neck."

{8} Eddie, who was also a passenger in Manzanares' car, testified that Manzanares had refused to talk to the Defendant and drove away with Eddie and the other boys in her car. Eddie did not see Manzanares with a gun, and he stated that she did not veer her car at the Defendant's vehicle as she drove away. He also testified that the Defendant shot Manzanares and then left the scene.

{9} After the incident, Manzanares' car hit a wall near the home of Fidencio Trujillo. Trujillo testified that when he went to the crash scene, the boys said, "My dad shot my mom." Similarly, one of the children later told a police officer on the scene, "My daddy shot my mom." When asked who his father was, the child responded "Dean Salazar." Later that same day, Sgt. Branch of the Espanola Police Department spoke with the Defendant's son, Anthony, and Manzanares' nephew, Eddie. Branch videotaped these interviews with the two boys in which he asked them several questions regarding the day's events and the role of the Defendant.

{10} The Defendant was unconscious and unresponsive when he was located by the Espanola Police Department and taken into custody. He was admitted to Espanola Hospital for treatment of a drug-induced coma. The morning following the arrest, Sgt. Branch went to the hospital, met with the Defendant, and advised him of his Miranda rights. The Defendant invoked his right to counsel. Branch left the room, but Branch testified that the Defendant called him back later because the Defendant wanted to "tell his side of the story." Branch stated that he then re-Mirandized the Defendant before proceeding with questions. During this questioning, the Defendant made incriminating statements involving the shooting of Manzanares.

{11} Branch recorded this second encounter, but it is unclear whether the entire interview was captured on tape. The Defendant alleges that Branch failed to inform him of his right to remain silent, and the tape does not include the issuance of that warning. However, Branch testified that he gave that particular warning before turning on the tape recorder. Branch did not obtain an express waiver of the Defendant's Fifth

or Sixth Amendment rights, either verbally or on a pre-printed Waiver of Rights form.

{12} Even if adequate warnings were given, the Defendant contends that the drugs he took made it impossible for him to knowingly, intelligently, or voluntarily waive his rights. Conflicting expert testimony was given as to the Defendant's level of intoxication while in the hospital and the effect of the drugs on the Defendant's capacity to waive his rights. The trial court found that the Defendant's statements were made after advice of rights, and with a knowing, intelligent, and voluntary waiver of those rights.

{13} Also during trial, the State re-called Branch to the stand for the purpose of offering into evidence the videotapes of the boys' interviews from the day of the shooting. Over the Defendant's hearsay objection, the State argued that the tapes were admissible to rebut a defense suggestion of recent fabrication or improper motive or influence over the children by the family of Manzanares. The trial court admitted the videotapes and played them for the jury at trial.

{14} At the trial's conclusion, the judge instructed the jury on two theories of first degree murder: deliberate murder and depraved mind murder. The defense requested jury instructions for involuntary and voluntary manslaughter. The judge refused to give the requested instructions. During deliberations, the jury asked the judge whether unanimity was required as to a theory of first degree murder. He answered that the jury need only be unanimous as to a verdict for first degree murder.

{15} The jury convicted the Defendant of first degree murder using a general verdict form which did not indicate whether deliberate murder or depraved mind murder was the underlying theory of conviction. The jury also convicted the Defendant of shooting into an occupied vehicle and felon in possession of a firearm under NMSA 1978, Section 30-3-8(B) (1993) and Section 30-7-16 (1987). He was acquitted on three counts of child abuse. This appeal of the first degree murder conviction followed.

{16} Subsequently, on or about February 7, 1997, the Defendant died in prison while this appeal was pending. The Defendant's family decided not to move this Court for substitution of the Defendant under Rule 12-301(A) NMRA 1997. The Defendant's counsel has since moved for abatement of all proceedings had in this prosecution from its inception.

{17} We review five issues on appeal: (1) whether the Defendant's death while his appeal was pending requires abatement of criminal proceedings in this case to their inception; (2) whether the trial court erred in instructing the jury that it need not be unanimous on one theory of first degree murder where alternative theories of first degree murder were submitted to the jury; (3) whether it was error for the court to refuse to give jury instructions on voluntary and involuntary manslaughter; (4) whether the trial court erred in not suppressing the Defendant's post-arrest statements; and (5) whether it was error to admit videotaped statements of the children at trial.

{18} First, we hold that abatement **ab initio** is not required in this case. Second, we affirm the jury's verdict, concluding that there is no requirement of jury unanimity on a single theory of first degree murder where alternative theories of first degree murder are submitted and where substantial evidence exists in the record supporting at least one of the theories presented. Finally, we find that the trial court's jury instructions and evidentiary rulings did not constitute error warranting reversal.

II.

{19} As a threshold matter, we first address whether the Defendant's death in prison requires abatement of all proceedings in this case **ab initio.** We hold that it does not.

{20} The abatement issue has been handled differently by various jurisdictions, but the majority rule is that the prosecution abates from the inception of the case upon death of a criminal defendant. **See, e.g.**, **Jackson v. State**, 559 So.

2d 320, 321 (Fla. Dist. Ct. App. 1990); **Gollott v. State**, 646 So. 2d 1297, 1299 (Miss. 1994); **People v. Matteson**, 75 N.Y.2d 745, 551 N.E.2d 91, 92, 551 N.Y.S.2d 890 (N.Y. 1989).[1] This is also the current rule under existing New Mexico law. **State v. Doak**, 89 N.M. 532, 533, 554 P.2d 993, 994.

{21} However, several jurisdictions have adopted substantial changes to this rule or have abandoned it altogether. **See, e.g.**, **State v. Jones**, 220 Kan. 136, 551 P.2d 801, 803-04 (Kan. 1976) (recognizing that the death of a defendant during pendency of an appeal does not abate the case from the beginning and that the appeal may be prosecuted notwithstanding death); **Jones v. State**, 302 Md. 153, 486 A.2d 184, 187 (Md. 1985) (limiting abatement **ab initio** to cases where a statutory right to appeal has not been exercised or is pending); **People v. Peters**, 449 Mich. 515, 537 N.W.2d 160, 164 (Mich. 1995) (holding that an order of restitution could be enforced notwithstanding defendant's death pending appeal); **Garcia v. State**, 840 S.W.2d 957, 958 (Tex. Crim. App. 1992) (holding that the death of appellant during pendency of discretionary review resulted in abatement of the appeal but not in abatement from inception of the proceedings). A more recent trend offers courts options in deciding how an appeal should be handled upon the death of an appellant. **See, e.g.**, **State v. McGettrick**, 31 Ohio St. 3d 138, 509 N.E.2d 378, 381-82 (Ohio 1987); **State v. Makaila**, 79 Haw. 40, 897 P.2d 967, 972 (Haw. 1995).

{22} In **McGettrick**, the defendant was convicted of bribery, but died while his appeal was pending. **McGettrick**, 509 N.E.2d at 380. Defense counsel subsequently sought to have the entire proceeding abated **ab initio.** Id. The court eventually held that abatement of all proceedings was not required. **Id.** In doing so, it invoked the state's appellate procedure rule governing the substitution of a party. **Id.** at 381. The court reasoned that under certain circumstances, the rule permitted defendant's personal representative or the State to move for substitution. **Id.** Under such a motion, "proceedings [could] then be had as the court of appeals directs." **Id.** at 381-82. According to the court, such action could involve substituting any proper party for the decedent, including his attorney of record. **Id.** at 382.

{23} The Supreme Court of Hawaii followed suit in **State v. Makaila**, 897 P.2d at 972. In **Makaila**, the defendant was convicted of murder but died of cancer during the pendency of his appeal. **Id.** at 968. In refusing to strictly apply the abatement **ab initio** rule, the court cited **McGettrick** and the similarity of the Ohio and Hawaii rules governing substitution of parties. **Id.** at 970. The court held that any appropriate party, including the State, could move for substitution of the decedent. **Id.** at 972. However, where no such motion was made, the appellate court, in its discretion, either could abate the case to its inception or enter such other order as the appellate court deemed appropriate under its rules. **Id.**

{24} Like the **McGettrick** and **Makaila** courts, we reject a strict application of the abatement **ab initio** rule. New Mexico's rule of appellate procedure addressing the death and substitution of parties is very similar to, if not identical with, its counterparts in Ohio and Hawaii. The New Mexico Rule states in relevant part:

> If a party dies after notice of appeal is filed or while a proceeding is otherwise pending, the personal representative of the deceased party may be substituted as a party on motion filed in the appellate court by the representative or **any other party. . . .** If the deceased party has no representative, **any party may suggest death on the record and proceedings shall then be had as the appellate court directs. . . .**

Rule 12-301 NMRA 1997 (emphasis added).

The language of the rule clearly permits the personal representative or "any other party" to seek

[1] For a complete list of jurisdictions following the abatement **ab initio** rule, see Tim A. Thomas, Annotation, **Abatement of State Criminal Case by Accused's Death Pending Appeal of Conviction**, 80 A.L.R.4th 189, 191 (1990).

substitution of the deceased. As with the earlier cited cases, we conclude that this language permits the deceased's representative or the State to seek substitution.

{25} Furthermore, the language "as the appellate court directs" gives the court substantial discretion in determining how such a substitution should be conducted after death has been noted on the record. We hold that this broad language permits the appellate court, on its own initiative, to appoint a substitute for a deceased party-defendant. Such court action is warranted where (1) the remaining parties have not tendered a motion for substitution, (2) where the court determines that continuing the appeal will not prejudice the rights or interests of the deceased, and (3) where concluding the appeal would be in the best interests of the decedent's estate, the remaining parties, or society. Allowing courts to make substitutions on their own initiative is necessary for the effective exercise of discretion in these instances. Without such power, exercise of the court's discretion would hinge entirely on the motions of the parties, and we do not read such a limitation in the language of New Mexico's rules.

{26} Permitting the court, in its sound discretion, to continue an appeal in certain circumstances provides for more complete consideration of the interests involved than a strict application of the abatement rule would allow. **See, e.g.**, **Jones**, 551 P.2d at 804 (concluding that the interests of the family of the defendant and the public in a final determination of a criminal case, as well as the possibility that collateral rights might be affected by the criminal proceeding, warrant permitting the appeal to continue despite the death of the defendant); **Gollot**, 646 So. 2d at 1304 ("Leaving convictions intact without review by this Court potentially leaves errors uncorrected which will ultimately work to the detriment of our justice system."); **Commonwealth v. Walker**, 447 Pa. 146, 288 A.2d 741, 742 (Pa. 1972) (rejecting both a motion for abatement **ab initio** and a motion to dismiss the appeal, concluding that it is in the interests of society and the estate of the defendant that any challenge initiated against the propriety or constitutionality of a criminal proceeding be fully reviewed); **State v. McDonald**, 144 Wis. 2d 531, 424 N.W.2d 411, 413-14 (Wis. 1988) (allowing an appeal to proceed and recognizing that because collateral proceedings could be affected by the outcome in a criminal case, it is in the interests of society to have a complete review of the merits; also recognizing that a criminal defendant's right to direct appeal is an integral part of a final determination of the merits and serves as a safeguard to protect the defendant against errors).

{27} In this case, we permit the appeal to move forward and appoint defense counsel of record as the Defendant's substitute for the remainder of the proceeding. First, no prejudice is suffered by the deceased or his interests in allowing the appeal to continue. Before his death, all issues in this case were fully briefed, argued, and submitted to this Court. The Defendant had an opportunity to participate fully in his appeal. Nothing in the record indicates that the issues, as presented, misrepresent the appellate aims or positions of the Defendant. Second, the final decision in this appeal had been drafted and the filing of the opinion was imminent at the time of the Defendant's death. The Defendant's death during pendency of the appeal had no effect on this Court's handling of the issues. Third, concluding this appeal would be in the best interests of society. The opinion in this case clarifies important issues involving the law of first degree murder in New Mexico. Also, substantial collateral rights might be affected by the conclusion or abatement of this appeal.

{28} Hence, we reject the notion that, without a motion for substitution by a defendant's representatives, an appellate court is compelled to abate the entire proceeding upon the death of a defendant. Instead, once death is suggested on the record, the court, in its sound discretion, may consider two courses of action. First, it may allow or provide for substitution of the decedent and permit continuation of the appeal. Second, where no substitution is sought by either the court or the parties, the court shall then abate the entire proceeding **ab initio.**

{29} However, where a court elects to abate a case, it cannot do so in piecemeal fashion, permitting a trial court verdict to stand and dismissing or abating only the appeal. In New Mexico, a criminal defendant, like Salazar, who was sentenced to life imprisonment is entitled to a direct appeal as of right under the New Mexico Constitution. N.M. Const. art. VI, § 2. This right is best vindicated by permitting the courts either (1) to continue the appeal where a party moves for substitution or where the court deems that the interests involved warrant completion of the review, or (2) to completely abate the proceedings to their inception.

{30} This holding applies only to cases involving the death of a defendant who possesses a direct appeal as of right to a criminal conviction. It does not apply to defendants who die during pendency of discretionary post-conviction remedies; where a defendant dies pending such discretionary actions, the petition will be dismissed as moot, and the verdict will stand. **See, e.g.**, **Dove v. United States**, 423 U.S. 325, 46 L. Ed. 2d 531, 96 S. Ct. 579 (1976).

{31} As noted earlier, the New Mexico Court of Appeals in **Doak**, 89 N.M. at 533, 554 P.2d at 994, adopted a strict application of the abatement **ab initio** rule. We recognize the policy concerns articulated in **Doak** but do not find that the rights and interests involved in cases of this nature are best vindicated through rigid application of the abatement **ab initio** rule. Thus, we hold that New Mexico is not bound by strict application of the rule, and to the extent that **Doak** conflicts with our above analysis, it is hereby overruled.

III.

{32} In this case, the State tried the Defendant on dual theories of first degree murder: deliberate murder and depraved mind murder. The jury returned a general verdict of guilty of first degree murder. We hold that the trial court correctly instructed the jury that unanimity is not required as to one theory of first degree murder where alternative theories are presented to the jury, and furthermore, a jury's general verdict will not be disturbed in such a case where substantial evidence exists in the record supporting at least one of the theories of the crime presented to the jury.

A.

{33} The Defendant contends that various provisions of New Mexico uniform jury instructions and judicial rules require that the jury be unanimous on one of the alternative murder theories presented. We disagree.

{34} The Defendant correctly asserts that several New Mexico uniform jury instructions and judicial rules refer to jury unanimity. However, these provisions give little guidance to the question of whether all jurors must agree on one theory of murder. The rules and instructions either refer generally to a requirement of jury unanimity or require only that the jury agree on a verdict. **See, e.g.**, Rule 5-611(A) NMRA 1997. No provision explicitly or implicitly requires jury unanimity on an underlying theory of murder. Therefore, we are not persuaded by the Defendant's arguments that these provisions require unanimity on either deliberate or depraved mind murder.

{35} The Defendant also asserts that alternative theories of first degree murder should be treated like step-down instructions for lesser included offenses. More specifically, the Defendant argues that, the same way a jury is required to consider step-down instructions in sequence and find unanimously as to lesser included offenses, a jury is required to find unanimously as to alternative theories of first degree murder.

{36} We disagree with this analysis for two reasons. First, Rule 5-611 NMRA 1997, demands only that the jury be unanimous in order to enter a guilty verdict. The jury is not required to agree unanimously on one alternative theory of that lesser offense. Thus, the ambiguity in this section surrounding the meaning of "unanimous" is similar to that noted in the provisions discussed earlier and provides little guidance here.

{37} Second, two alternative theories of first degree murder are very different from a greater offense and its lesser included offense. NMSA 1978, Section 30-2-1(A) (1994), states:

> A. A murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused:
>
> (1) by any kind of willful, deliberate and premeditated killing;
>
> (2) in the commission of or attempt to commit any felony; or
>
> (3) by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life.

Whoever commits murder in the first degree is guilty of a capital felony.

In considering first degree murder, the degree of offense and range of punishments is the same regardless of the theory. **Id.** It is not critical which of the theories is considered first by the jury. However, there is significant difference when considering lesser included offenses. As one "steps down" from a greater offense to a lesser offense, the degree of offense and punishment is less. There is, therefore, good reason with lesser included offenses to determine at which level of offense the jury has agreed, and we are not persuaded by the Defendant's analogy between first degree murder instructions and step down instructions for lesser included offenses.

B.

{38} The Defendant argues that his conviction violates the New Mexico Constitution's guarantee of due process and that the weight of authority requires that a jury be unanimous on one of the alternative theories of first degree murder presented. We disagree.

{39} The New Mexico Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. N.M. Const. art. II, § 18. Case law clearly demonstrates that a unanimous verdict on the crime charged is required for conviction in a criminal case. **See, e.g.**, **State v. Cavanaugh**, 116 N.M. 826, 831, 867 P.2d 1208, 1213 . However, common law analyses of due process have not required jury unanimity on a particular theory of the crime charged. **See, e.g.**, **Schad v. Arizona**, 501 U.S. 624, 641, 115 L. Ed. 2d 555, 111 S. Ct. 2491 (1991); **State v. James**, 698 P.2d 1161, 1165 (Alaska 1985); **People v. Brown**, 35 Cal. App. 4th 708, 41 Cal. Rptr. 2d 321, 324 (Ct. App. 1995); **State v. Jones**, 257 Kan. 856, 896 P.2d 1077, 1087 (Kan. 1995); **People v. Sullivan**, 173 N.Y. 122, 65 N.E. 989, 990 (N.Y. 1903); **Wilson v. State**, 737 P.2d 1197, 1204 (Okla. Crim. App. 1987).

{40} In **Schad**, the defendant was tried on dual theories of first degree murder: felony murder and premeditated intentional murder. **Schad**, 501 U.S. at 629. The trial court instructed the jury on both theories and told the jury that it must be unanimous in its verdict of guilty or not guilty. **Id.** The jury returned a general verdict of guilty of first degree murder, and the defendant appealed, arguing that the trial court erred in not requiring the jury to agree on one theory of first degree murder. **Id.** The Supreme Court upheld the conviction, concluding that the trial court had not violated the defendant's due process rights by not requiring the jury to agree on one theory of first degree murder. **Id.** at 645 ("The jury's options in this case did not fall beyond the constitutional bounds of fundamental fairness and rationality.").

{41} The Supreme Court reasoned that the two mental states, premeditation and a killing committed during a felony could "reasonably reflect notions of equivalent blameworthiness or culpability." **Id.** at 643; **State v. Ortega**, 112 N.M. 554, 578 n.7, 817 P.2d 1196, 1220 n.7 (1991) (Justice Baca concurring in part and dissenting in part). The Court also noted the widespread acceptance of the two theories as alternative means of satisfying the **mens rea** element of the single crime of first degree murder. **Schad**, 501 U.S. at 642.

{42} These rationales also apply to the immediate case. Depraved mind murder involves blameworthiness and culpability comparable to deliberate premeditated murder. **See Ortega**, 112 N.M. at 563, 817 P.2d at 1205 (discussing the required scienter showings for each of the three available first degree murder theories). This conclusion is supported by the Legislature's treatment of depraved mind murder. It is treated and punished in the same manner as deliberate intent and felony murder, and the theories are all recognized as capital offenses and named explicitly as forms of first degree murder. NMSA 1978, § 30-2-1(A) (1994). It would make little sense to insist that somehow depraved mind murder differs significantly in blameworthiness, depravity, or culpability from other theories like deliberate and felony murder with which it is similarly labeled, included, and punished.[2] Thus, as with the cases cited earlier involving theories of felony and deliberate murder, there was no requirement that the jurors in this case unanimously agree on one of the alternative theories presented, deliberate or depraved mind murder. Unanimity was only required with regard to the overall charge of first degree murder.

C.

{43} The preceding cases require some showing of substantial evidence supporting the conviction. We held in **State v. Olguin** that due process does not require a general verdict of guilt to be set aside so long as **one of the two** alternative bases for conviction is supported by sufficient evidence. **State v. Olguin**, 1995-NMSC-79, P2, 120 N.M. 740, 906 P.2d 731; **see also Griffin v. United States**, 502 U.S. 46, 49-51, 116 L. Ed. 2d 371, 112 S. Ct. 466 (1992) (finding no due process requirement to set aside general guilty verdict where evidence was inadequate to support a conviction as to one of the alternative theories of the crime presented); **Turner v. United States**, 396 U.S. 398, 420, 24 L. Ed. 2d 610, 90 S. Ct. 642 (1970).

[2] Defendant does not raise, and we do not address, whether the Legislature's decision to include depraved mind murder as a form of first degree murder was proper.

{44} We review the sufficiency of the evidence presented on the first degree murder theories in this case under a substantial evidence standard. **State v. Sutphin**, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). Under such a standard, sufficient evidence to uphold a conviction exists where "substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to conviction." **Id.** Also, "a reviewing court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." **Id.** "The fact finder may reject a defendant's version" of the facts. **Id.** "Where a jury verdict in a criminal case is supported by substantial evidence, the verdict will not be disturbed on appeal." **Id.**

{45} The State presented substantial evidence at trial on deliberate intent murder and depraved mind murder, therefore satisfying the requirements of **Olguin**. To convict the Defendant on the deliberate intent theory of first degree murder, the State had to prove beyond a reasonable doubt that:

> 1. The Defendant killed Josephine Manzanares; and
>
> 2. The killing was with the deliberate intention to take away the life of Josephine Manzanares.

See UJI 14-201 NMRA 1997. To convict the Defendant on the depraved mind theory of first degree murder, the State had to prove beyond a reasonable doubt that:

> 1. The Defendant shot at Josephine Manzanares;
>
> 2. The Defendant's act caused the death of Josephine Manzanares;
>
> 3. The act of the Defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life; and

4. The Defendant knew that his act was greatly dangerous to the lives of others.

See UJI 14-203 NMRA 1997.

{46} Substantial evidence was presented on both of these theories of first degree murder. In addressing the first theory, there was no question as to whether the Defendant shot and killed Manzanares. The only element in contention was whether the Defendant deliberately intended to kill Manzanares. The children's testimony alleging that the Defendant pursued Manzanares, pointed the gun, and fired provides an adequate source of direct evidence that the Defendant acted with deliberation, intending to kill Manzanares. **State v. Hamilton**, 89 N.M. 746, 750-51, 557 P.2d 1095, 1099-1100 (1976) (equating express malice and deliberate intent); **State v. Smith**, 26 N.M. 482, 491-92, 194 P. 869, 873 (1921) (holding that express malice, a concept now incorporated in the "deliberate intention" element of willful and deliberate murder, can be inferred from the evidence presented). In addition, the jury reasonably could have decided that the Defendant's past conflicts with Manzanares provided circumstantial evidence of a motive for intentional killing. The Defendant's contention that the shooting was accidental or that he could not have formed specific intent due to his intake of drugs does not make the evidence presented against him insufficient. The jury heard evidence regarding the Defendant's version of the facts and was free to reject that testimony. **Sutphin**, 107 N.M. at 131, 753 P.2d at 1319.

{47} Similarly, the State also presented substantial evidence supporting a finding of depraved mind murder. Only the third and fourth elements of that crime were at issue in this case, and the State presented evidence that would allow a jury to reasonably arrive at a guilty verdict. The children testified that they had waved at the Defendant and that he waved back during the pursuit, so the jury could reasonably determine that the Defendant knew of the children's presence in the car when he fired into the vehicle. This act was both dangerous to the driver and the passengers since a bullet fired from the Defendant's car could have hit any one of the occupants or could have disabled the car, causing the driver to lose control. Additionally, once the driver had been shot, the children were left in a very dangerous situation since the driver was unable to control the car. Furthermore, at least one other third party driver was on the road at the time of the shooting, and the Defendant also knew that the area was populated. Thus, a jury could have found that he acted with a depraved mind and without regard for human life. **State v. McCrary**, 100 N.M. 671, 673, 675 P.2d 120, 122 (1984) (finding that acts involving extreme risk suggest that defendant knew that his acts were greatly dangerous to the lives of others). Because substantial evidence was presented on both theories of first degree murder presented in this case, the Defendant's conviction presents no conflict with this Court's holding in **Olguin**. **Olguin**, 1995-NMSC-79, P2, 120 N.M. 740, 906 P.2d 731.

{48} The law in **Olguin** is consistent with the position taken in other jurisdictions on this issue. **See, e.g.**, **State v. Wilson**, 220 Kan. 341, 552 P.2d 931 (Kan. 1976) (holding that if substantial evidence was presented supporting either theory of first degree murder presented by the State, jury verdict of guilty would not be disturbed), **overruled on other grounds by State v. Quick**, 226 Kan. 308, 597 P.2d 1108 (Kan. 1979); **State v. Hazelett**, 8 Ore. App. 44, 492 P.2d 501, 503 (Or. Ct. App. 1972) (requiring that substantial evidence be presented on at least one of the alternative theories of the crime presented). However, many jurisdictions demand a higher evidentiary showing where alternative theories of conviction for the same crime are presented. These jurisdictions hold that substantial evidence must be presented to support a finding of commission of **each** of the alternative bases submitted for the jury's consideration. **James**, 698 P.2d at 1167; **State v. Arnett**, 158 Ariz. 15, 760 P.2d 1064, 1069 (Ariz. 1988). However, even under this more rigorous evidentiary standard, the facts in the current case would not amount to a violation of the Defendant's due process rights. As discussed earlier, substantial evidence was presented at trial as to both deliberate and depraved

mind murder. Thus, not only did the State present substantial evidence to meet the **Olguin** standard in New Mexico, but it also presented enough evidence to satisfy the more stringent standard adopted by some jurisdictions.

IV.

{49} The trial court's refusal to instruct the jury on voluntary and involuntary manslaughter did not constitute error warranting relief. The propriety of jury instructions given or denied is a mixed question of law and fact. Mixed questions of law and fact are reviewed de novo. **State v. Attaway**, 117 N.M. 141, 144, 870 P.2d 103, 106 (1994).

{50} A defendant is entitled to an instruction on a theory of the case where the evidence supports the theory. **State v. Benavidez**, 94 N.M. 706, 708, 616 P.2d 419, 421 (1980), **overruled on other grounds by Sells v. State**, 98 N.M. 786, 788, 653 P.2d 162, 164 (1982); **State v. Diaz**, 1995-NMCA-66, P24, 121 N.M. 28, 908 P.2d 258; **State v. Arias**, 115 N.M. 93, 96, 847 P.2d 327, 330 , **overruled on other grounds by State v. Abeyta**, 1995-NMSC-52, P21, 120 N.M. 233, 901 P.2d 164. Failure to give an instruction which is warranted by the evidence is not harmless error. **Arias**, 115 N.M. at 97-98, 847 P.2d at 331-32. However, sufficient evidence to sustain a conviction on the charge is generally required before an elements instruction will be required. **Benavidez**, 94 N.M. at 708, 616 P.2d at 421. Furthermore, to receive a jury instruction on a lesser included offense, there must be evidence that the lesser offense is the highest degree of crime committed. **State v. Southerland**, 100 N.M. 591, 596, 673 P.2d 1324, 1329 (Ct. App. 1983), **overruled on other grounds by State v. Orosco**, 113 N.M. 780, 833 P.2d 1146 (1992).

A.

{51} The evidence did not warrant a jury instruction on voluntary manslaughter, and therefore, the trial court did not err by refusing to give such an instruction. The Defendant requested an instruction for voluntary manslaughter under UJI 14-220 NMRA 1997, contending that he was provoked. The instruction points out that provocation is the difference between second degree murder and voluntary manslaughter. **Id.** Sufficient provocation involves "any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror, or other extreme emotions." UJI 14-222 NMRA 1997. However, sufficient provocation does not exist where "an ordinary person would have cooled off before acting." **Id.**

{52} The Defendant alleged at trial that Manzanares had threatened him on several occasions and that he had been involved in hostile arguments with Manzanares immediately before the shooting. The Defendant also asserted that while both parties were driving on Llano Road, Manzanares veered her car at him and reached under the seat as if to retrieve a gun. The defense argues that a jury, upon hearing this testimony, could have concluded that Manzanares' actions aroused anger, rage, fear, or terror such that the Defendant temporarily lost self-control and had no time to "cool off" before shooting Manzanares. Defendant argues that it was error for the court not to allow an instruction on voluntary manslaughter.

{53} We disagree and conclude that the trial court correctly ruled that the evidence did not warrant such an instruction. Other testimony by the Defendant precludes the possibility that he acted out of provocation and therefore eliminates any reason to instruct on voluntary manslaughter. The Defendant testified that as he waved the gun out the window, it accidentally discharged. Hence, according to the Defendant's own testimony, the shooting of Manzanares was accidental, not voluntary or intentional. Moreover, at no time during trial did the Defendant testify that he killed Manzanares because she provoked him. As such, the evidence did not support a jury verdict of voluntary manslaughter, and thus, the court's decision refusing the instruction was proper. **State v. Manus**, 93 N.M. 95, 101, 597 P.2d 280, 286 (1979) (holding voluntary manslaughter instruction not required where defendant's testimony is exculpatory and does not indicate provocation or heat of passion). Therefore, we need

not address whether a voluntary manslaughter instruction was warranted as the highest degree of crime committed.

B.

{54} The trial court's decision not to give an instruction on involuntary manslaughter did not constitute reversible error. In **State v. Yarborough**, 1996-NMSC-68, P20, 122 N.M. 596, 930 P.2d 131, this Court held that involuntary manslaughter, whether premised upon a lawful or unlawful act, requires a showing of criminal negligence. In its holding, the Court noted that involuntary manslaughter is the killing of a human being without malice by any of three courses of conduct: 1) the commission of an unlawful act not amounting to a felony; 2) the commission of a lawful act that might produce death, in an unlawful manner; or 3) the commission of a lawful act that might produce death without due caution and circumspection. **Yarborough**, 1996-NMSC-068, P8, 122 N.M. 596, 930 P.2d 131.

{55} In this case, the Defendant requested an instruction on involuntary manslaughter based on a lawful act. Yet, in transporting the gun, the Defendant perpetrated an unlawful act. **See** NMSA 1978, Section 30-7-16(A) (1987) (proscribing transportation or possession of gun by a convicted felon and making such an act a fourth degree felony). Further, in waving the gun at Manzanares through the window of a moving vehicle, the Defendant arguably was in violation of NMSA 1978, Section 30-7-4(A)(3) (1993), endangering the safety of another by handling a firearm in a negligent manner. Finally, if the Defendant intentionally shot at the vehicle, he was guilty of a third degree felony. **See** NMSA 1978, § 30-3-8(B) (1993). On this basis, the Defendant was not entitled to an instruction on involuntary manslaughter premised upon a lawful act.

{56} The Defendant also requested an instruction on involuntary manslaughter committed by an unlawful act not amounting to a felony. However, in the Defendant's requested instruction, he asked the jury to find involuntary manslaughter if it determined that the Defendant "shot at Josephine Manzanares." We do not believe that the act described in the instruction, shooting at Manzanares, can be described other than as felonious conduct. Therefore, discharging the gun does not fit the **Yarborough** paradigm of an unlawful act not amounting to a felony.

{57} Furthermore, the requested instruction incorrectly characterized the law of involuntary manslaughter premised upon an unlawful act not amounting to a felony. "Shooting at Manzanares" suggests, to a certain degree, an intentional act, and wrongly describes the mens rea associated with involuntary manslaughter. NMSA 1978, § 30-2-3 (1994) (describing manslaughter as the killing of a human being without malice); **State v. King**, 90 N.M. 377, 380, 563 P.2d 1170, 1173 (stating that the involuntary manslaughter statute excludes all cases of intentional killing), **overruled on other grounds by State v. Reynolds**, 98 N.M. 527, 650 P.2d 811 (1982). It is not error for a trial court to refuse instructions which are inaccurate. **Goodman v. Venable**, 82 N.M. 450, 452, 483 P.2d 505, 507 (Ct. App. 1971); **cf. State v. Gallegos**, 113 N.M. 339, 341, 825 P.2d 1249, 1251 (1992).

{58} In sum, the trial court did not err in denying either of the instructions offered on involuntary manslaughter. The court correctly refused the inaccurate instructions tendered by the Defendant. Moreover, the Defendant's act of "shooting at Manzanares" was neither a lawful act, nor was it an unlawful act not amounting to a felony. As such, the evidence on record was insufficient to warrant an involuntary manslaughter instruction. **State v. Taylor**, 107 N.M. 66, 70, 752 P.2d 781, 785 (1988) (holding that the evidence did not support an instruction for involuntary manslaughter in any of the three ways provided for by statute), **overruled on other grounds by Gallegos v. Citizens Insurance Agency**, 108 N.M. 722, 779 P.2d 99 (1989).

V.

{59} The trial court did not err by admitting the Defendant's post-arrest statements into evidence. Whether a confession is voluntary is reviewed de novo upon appeal. **Attaway**, 117 N.M. at 145,

870 P.2d at 107. In reviewing voluntariness, the appropriate standard applicable to coerced confession claims requires that the appellate court examine the entire record and circumstances surrounding the confession. **Aguilar v. State**, 106 N.M. 798, 799, 751 P.2d 178, 179 (1988). Here, the Defendant maintains that he was not properly advised of his rights before being interrogated and that if he waived his rights or if an implied waiver can be interpreted from the facts, the waiver was not knowingly and intelligently given. We disagree, concluding that the trial court properly refused to suppress the Defendant's statements.

{60} In **Miranda v. Arizona**, 384 U.S. 436, 475, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), the Supreme Court held that the Fifth and Fourteenth Amendments of the United States Constitution prohibit the use of incriminating statements by an accused following his arrest or being held in custody, unless all interrogation is preceded by advice to the defendant that he has the right to remain silent and to the presence of an attorney furnished free of charge if the defendant cannot afford one. **Miranda** also held that when an accused indicates that he wishes to remain silent, the interrogation must cease; if he requests counsel, questioning must cease until an attorney for the defendant is found and present. **Id.** Statements or admissions elicited contrary to the requirements of **Miranda** are subject to suppression on motion of the defendant. **State v. Boeglin**, 100 N.M. 127, 132, 666 P.2d 1274, 1279.

{61} The events surrounding the questioning of the Defendant were probative of the adequacy of warnings given to the Defendant, his level of understanding, and whether the Defendant knowingly, willingly, and intelligently waived his rights under **Miranda**. First, we conclude that the Defendant received adequate notice of rights. Testimony indicates that Branch gave complete **Miranda** warnings to the Defendant. The Defendant argues that because Branch did not read the warnings from a card but instead gave the warnings from memory, there is no conclusive proof that the warnings were complete. However, in addition to Branch's testimony that the warnings were complete, other evidence also indicates that the warnings were complete and understood. In Branch's first encounter with the Defendant, the Defendant immediately invoked his right to counsel upon receiving the **Miranda** warnings from Branch. We believe that this indicates not only that the warnings were given, but also, that the Defendant understood what his rights were and that he did not have to talk to the police if he did not wish to do so. The Defendant had also been convicted on two prior felony charges; his immediate invocation of his right to counsel might be interpreted as an indication of the Defendant's familiarity with his rights and understanding of the process for asserting them.

{62} The Defendant made a knowing, wilful, and intelligent waiver of his rights when he elected to speak with the police after his arrest; therefore, the trial court correctly refused to suppress his statements from evidence. Waiver, after invoking the right to counsel, "depends upon the totality of the circumstances and the particular facts, including consideration of the mental and physical condition, background, experience, and conduct of the accused." **Boeglin**, 100 N.M. at 132, 666 P.2d at 1279. The State has the burden of establishing that a defendant waived his constitutional rights and every reasonable presumption against waiver is indulged. **State v. Young**, 117 N.M. 688, 694, 875 P.2d 1119, 1125 . However, after a suspect invokes his right to counsel, he may be interrogated if he himself "initiates further communication, exchanges, or conversations with the police." **Id.** (quoting **Edwards v. Arizona**, 451 U.S. 477, 484, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981)). When a suspect initiates a conversation with police knowingly and intelligently, his statement may be admitted. **Oregon v. Bradshaw** 462 U.S. 1039, 1046, 77 L. Ed. 2d 405, 103 S. Ct. 2830 (1983).

{63} The Defendant initiated the second encounter with Sgt. Branch, waiving his Miranda rights knowingly and intelligently. Therefore, his subsequent statements were correctly permitted into evidence at trial. As indicated earlier, after invoking his right to counsel, the Defendant suggested that he wanted to talk to the police again. At that point, Branch had already exited from the

Defendant's room, and the Defendant clearly knew that he was under no obligation to speak with the police. However, after the Defendant suggested that he wanted to talk, a hospital worker found Branch, who then entered the Defendant's room for the second time. The Defendant did not object to Branch's return and the subsequent interrogation, even after Branch again told the Defendant of his rights under **Miranda**. Hence, the interrogation was not coercive or violative of the Defendant's rights by virtue of Branch's second visit to the hospital room. The Defendant initiated this encounter.

{64} The Defendant argues that if there was a waiver of his **Miranda** rights which could be inferred from his initiation of discussion with the police, that waiver was made unknowingly and unintelligently due to partial incapacitation from his drug-induced coma. However, significant evidence indicated that the level of drugs remaining in the Defendant's bloodstream at the time of interrogation was not so significant as to render the Defendant incapable of fully considering his actions and statements to authorities. cf. **State v. Setser**, 1997-NMSC-4, 122 N.M. 794, 932 P.2d 484 (1997). Furthermore, the Defendant's actions and statements while in the hospital suggest mastery of his faculties and an ability to understand and convey events of the previous forty-eight hours. In sum, the facts suggest that the Defendant was informed of his rights, understood those rights, and invoked his right to counsel. However, after some contemplation, the Defendant chose to speak with the police by his own volition, and the trial court correctly refused to suppress those statements.

VI.

{65} The trial court did not err by admitting into evidence the videotaped statements of the boys who were riding in the back of Manzanares' vehicle at the time of the shooting. The videotaped statements were admitted over a hearsay objection by the trial court as prior consistent statements offered to rebut a charge of recent fabrication or improper influence. We review the trial court's admission of this evidence under an abuse of discretion standard. **State v. Bell**, 90 N.M. 134, 138, 560 P.2d 925, 929 (1977).

{66} Rule 11-801(D)(1)(b) NMRA 1997 states that a prior consistent statement offered to rebut a charge of recent fabrication or improper influence is not hearsay. Generally, two conditions must be met before a prior consistent statement may be admitted. **State v. Sandate**, 1995-NMCA-017, P 18, 119 N.M. 235, 889 P.2d 843. "First, the prior statement must be consistent with testimony given by the declarant at trial. Second, the statement must be admitted to rebut an express or implied charge of recent fabrication or improper influence or motive." **Id.** In addition to these general requirements, many courts have adopted a third requirement that "a prior consistent statement must also have been made before the motive to fabricate existed." **Id.** ; **see also Tome v. United States**, 513 U.S. 150, 130 L. Ed. 2d 574, 115 S. Ct. 696 (1995); **Nitz v. State**, 720 P.2d 55, 64 (Alaska Ct. App. 1986). New Mexico has followed the lead of the Supreme Court, recently adopting this third requirement in **State v. Casaus**, 1996-NMCA-031, P12, 121 N.M. 481, 913 P.2d 669. We conclude that the videotaped testimony in this instance met these requirements, and its admission was not an abuse of the trial court's discretion.

{67} The testimony at trial was consistent with the videotaped testimony of the boys. The Defendant contends that the boys' testimony at trial was characterized by less detailed and less responsive answers than those on the videotape. However, only negligible differences existed between the videotaped interviews and the trial testimony of the boys. There is no allegation by the defense that substantial inconsistencies or changes exist between the live and taped testimonies; the Defendant only claims that the trial testimony was not as complete as the taped version. These minor differences can easily be attributed to the passage of time and the anxiety which often accompanies testifying in court. In sum, the primary inquiry is whether the taped interview and trial testimony were substantially similar as to all material facts presented. We believe that to be the case here.

{68} The record indicates that defense counsel implied during trial that the boys recently had altered their testimony due to some improper motive or influence. Citing the **Sandate** case, the Defense contends on appeal that Rule 801(d)(1)(B) is

intended to cover only those situations where the witness deliberately changes his story and where the witness has been impeached with a prior inconsistent statement. **Sandate**, 1995-NMCA-17, P20, 119 N.M. 235, 889 P.2d 843. Under such an interpretation of the rule, according to the Defendant, the taped interviews of the boys are not admissible because the boys were never impeached with a prior inconsistent statement, nor did defense counsel allege that the boys had recently fabricated or consciously changed their stories.

{69} However, the issue here does not involve an allegation that a witness is consciously misleading or changing his story, but instead that a young and impressionable witness has been improperly influenced. The record indicates that defense counsel said several times in the opening statement that the boys' feelings about the Defendant had been negatively influenced by their grandparents and possibly by their counselor. Defense counsel also sought testimony on cross-examination of the boys regarding whether others had told them "bad things" about the Defendant and whether the boys still liked the Defendant. Such tactics by the defense appeared aimed at demonstrating that the boys' trial testimony might have been improperly influenced or colored, even subconsciously, by adults with access to the children during the time prior to trial. We conclude that such a suggestion constitutes an allegation of improper influence which warranted admission of the prior taped testimony.

{70} Finally, the videotaped statements were made prior to the existence of a motive to improperly influence the children. The videotaped interviews took place almost immediately after the shooting. Testimony indicates that the children often heard negative comments regarding the Defendant from family members long before the incident. The Defendant contends that the influence exerted over the children predating the shooting precludes admission of the videotaped interviews. We disagree.

{71} Any motive to improperly influence the testimony of the children would not have existed until the shooting took place. While negative comments about the Defendant predated the shooting, there would have been no reason or opportunity for the family or counselor to influence testimony regarding the shooting until the incident had actually taken place. No evidence indicates that the children's counselor or grandparents had an opportunity to improperly influence the children between the time of the shooting and the interview. Moreover, no evidence suggests that the children would be motivated to wrongly implicate the Defendant in murder based merely on past negative comments. Hence, the trial court did not err by admitting the videotaped testimony to rebut a suggestion of improper influence.

VII.

{72} The Defendant's appeal should not be abated **ab initio.** We also affirm the conviction, holding that the trial court correctly instructed the jury that unanimity is not required as to one particular theory of first degree murder where alternative theories are presented and substantial evidence exists to support at least one of the theories of the crime. In addition, the trial court did not err by rejecting the jury instructions requested by the Defendant for lesser included offenses. Furthermore, the Defendant is not entitled to relief based upon the trial court's refusal to suppress his post-arrest statements to police. Finally, we conclude that the trial court correctly admitted the videotaped interviews of the children to rebut a suggestion by the defense of improper influence.

{73} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

GENE E. FRANCHINI,
Chief Justice

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

DAN A. McKINNON, III,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1998-NMSC-015

Filing Date: May 29, 1998, As Corrected, October 22, 1998

Docket No. 24,547

STATE OF NEW MEXICO, ex rel., J. PAUL TAYLOR, MURRAY RYAN, MARY JANE GARCIA, RITA HARRINGTON, JEANETTE JORDAN, DOROTHY MARTINEZ, NORMA RUIZ, PATRICIA QUINTANA and ROBERTA VASQUEZ,

Petitioners,

v.

HON. GARY JOHNSON, Governor of the State of New Mexico, and WILLIAM H. JOHNSON, Secretary of the New Mexico Human Services Department,

Respondents.

ORIGINAL PROCEEDING OF WRIT OF MANDAMUS

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OPINION

BACA, Justice.

{1} The Constitution of the State of New Mexico commands that "the powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others. . . ." N.M. Const. art. III, § 1. The case before us does not concern the merits of public assistance reform or conflicts of political ideology. Rather, it concerns only the sanctity of the New Mexico Constitution and the judiciary's obligation to uphold the principles therein. "It is the function of the judiciary . . . to measure the acts of the executive and the legislative branch solely by the yardstick of the constitution." **State v. Mechem**, 63 N.M. 250, 252, 316 P.2d 1069, 1070 (1957), **overruled on other grounds by Wylie Corp. v. Mowrer**, 104 N.M. 751, 726 P.2d 1381 (1986). It is with this yardstick that we take the measure of this case.

{2} This case began as a challenge of the power of the Executive to effect an extensive overhaul of the state's public assistance system without legislative participation. In the course of the proceedings before this Court,

two issues presented themselves. First, the question arose whether Respondents had exceeded their constitutional powers in enacting and implementing certain welfare regulations. Subsequently, after this Court ruled Respondents had violated the constitutional provisions established by the separation of powers doctrine, the question arose whether Respondents had honored this Court's order. This question implicated an even more fundamental concept: respect for the rule of law. We address both questions in this opinion.

{3} Petitioners filed a Verified Petition for a Writ of Mandamus directed at Governor Gary Johnson and the Secretary of the New Mexico Human Services Department[1] (Respondents). Petitioners alleged that Respondents exceeded their constitutional authority by implementing significant public assistance policy changes without legislative approval. This Court, in a decision rendered from the bench on September 10, 1997, held that Respondents violated the separation of powers provision in Article III, Section 1 of the New Mexico Constitution. Pursuant to this holding, we issued a Writ of Mandamus requiring Respondents: 1) to desist from the implementation of their public assistance changes; and 2) to administer the public assistance program in full compliance with existing law until it is constitutionally altered or amended by legislation signed into law by the Governor.

{4} On October 24, 1997, Petitioners filed a motion to hold Respondents in contempt of court, alleging that Respondents were continuing to implement their public assistance changes. On December 10, 1997, the Court held a hearing requiring Respondents to show cause why this Court should not hold them in contempt for failing to comply with the Writ.

{5} We first restate the holding and fully articulate the reasoning behind our September 10, 1997, decision holding that Respondents violated Article III, Section 1 of the state constitution. Second, we determine that Respondents have not complied with the Writ and, therefore, hold Respondents in indirect civil contempt.

I.

{6} Congress enacted the federal Aid to Families with Dependent Children program (AFDC) as part of the Social Security Act of 1935. **See** 42 U.S.C. §§ 601-687 (1994). AFDC created a new federal-state public assistance partnership. The federal government established the primary framework for public assistance programs and offered funding for states that implemented their programs consistent with federal guidelines.

{7} Soon after the federal government passed AFDC, New Mexico elected to join the federal program, passing implementing legislation now called the Public Assistance Act (NMPAA), NM Laws 1937, ch. 18.[2] The NMPAA authorizes administration of the AFDC program and sets the basic formula for determining eligibility. NMSA 1978, § 27-2-5(A) (1982). The Legislature also created the New Mexico Human Services Department (HSD), NMSA 1978, § 27-1-1 (1977), to work with the federal government in administering public assistance programs. NMSA 1978, §§ 27-1-2 (1937), 27-1-3 (1982), 27-2-15 (1937).

{8} In the decades following passage of federal AFDC, Congress made major adjustments to the program. In such instances, the New Mexico Legislature passed, and a governor signed into law, bills adopting the federal changes in New Mexico. **See, e.g.**, NMSA 1978, § 27-2-10 (1973) (food stamp program); NMSA 1978,

[1] The petition named then-Secretary Duke Rodriguez as a party. Secretary Rodriguez resigned during the course of these proceedings. His replacement, Bill Johnson, as current HSD Secretary, is now a party to this matter and subject to this Court's decision.

[2] The original 1937 legislative enactment was not entitled the "Public Assistance Act." The Legislature, in amending the original enactment in 1973, created this title and designated various sections of Chapter 27, Article 2 for which the title applied, NMSA 1978, § 27-2-1 (1973), including some sections of the original enactment, **e.g.**, NMSA 1978, § 27-2-17 (1937). Other sections of the original enactment, **e.g.**, NMSA 1978, § 27-1-2 (1937), are not included within the scope of the officially-titled Public Assistance Act. Section 27-2-1.

§ 27-2-12 (1973, as amended 1993) (medical assistance); NMSA 1978, § 27-2-6.2(A) (1988) (work requirements).

{9} The most recent change in federal AFDC occurred with the enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRA), Pub. L. 104-193, 110 Stat. 2105 (codified at 42 U.S.C.A. §§ 601-19 (West Supp. 1997)). The PRA repealed federal statutory and regulatory constraints on state administration of public assistance, permitting the states to create their own programs. To increase states' flexibility, the PRA replaced the former AFDC funding structure with a block grant program called Temporary Assistance to Needy Families (TANF). States now are eligible to receive TANF funds and use them as they wish in their own programs, subject only to minimal federal PRA guidelines.[3]

{10} The PRA's passage spurred legislative and executive action in New Mexico. Anticipating federal public assistance reform legislation in 1995, Governor Johnson submitted a state public assistance reform bill to the New Mexico Legislature in the 1996 legislative session. However, the bill died after failing to reach the floor of the New Mexico House of Representatives. After Congress passed and the President signed the PRA in 1996, the New Mexico Legislature, this time on its own initiative, began considering public assistance reform during its 1997 session. The New Mexico House of Representatives and Senate both passed substantially identical bills both known as the Family Assistance and Individual Responsibility Act (FAIR). The Act would have created a new NMPAA section to accommodate the TANF block grant program requirements and would have authorized HSD to administer the program.

{11} Soon thereafter, Governor Johnson vetoed the FAIR Act and line-item vetoed language in the General Appropriations Act that allotted money for the FAIR program. He stated in his veto messages that, as the Executive, he possessed authority to exercise the discretion left to the states under the PRA. House Executive Message No. 14 (3/19/97). The Governor argued that the proposed state legislation encroached upon the executive's authority. **Id.**

{12} Immediately following his veto, Governor Johnson announced the creation of his own public assistance reform plan, a program he labeled "PROGRESS." His proposed plan modified aspects of public assistance eligibility, support services, and delivery in New Mexico. Governor Johnson also stated that he intended to implement the program's public assistance changes through administrative regulation. Subsequently, HSD held public hearings regarding the proposed regulatory changes, and Respondents' program was adopted, taking effect on July 1, 1997.

{13} On July 21, 1997, Petitioners filed a Verified Petition for Writ of Mandamus. The Petitioners asserted that Governor Johnson and then-Secretary of HSD, Duke Rodriguez, unlawfully implemented Respondents' program without seeking legislative approval, in violation of both state statute and the New Mexico Constitution's separation of powers provision. This Court held oral argument on September 10, 1997. In a unanimous decision, the Court ruled from the bench that Respondents had violated the New Mexico Constitution, Article III, Section 1. The Court ordered Respondents to:

> a) desist from the implementation of their PROGRESS program, and b) to administer the Public Assistance Program in full compliance with New Mexico statutes until such time as existing law is altered

[3] The PRA limits TANF block grant eligibility to federally approved state plans that: 1) generally limit lifetime benefits using federal funds to a period no longer than five years; 2) reduce assistance for a recipient's failure to cooperate in establishing paternity or in payments of child support; 3) eliminate aid to teenage parents who do not attend high school or other equivalent training programs; 4) generally deny assistance to teenage parents who do not live in adult-supervised settings; 5) deny assistance to minor children who are absent from the home for a significant period; 6) impose mandatory work requirements; and 7) receive appropriated TANF grant funds from their state legislature. Pub. L. 104-193, §§ 103, 901, 110 Stat. 2105, 2134-42 (Sec. 408), 2347.

> or amended by the passage of a bill by the state legislature which is then signed into law by the governor in accordance with the provisions of the New Mexico Constitution.

Transcript of Oral Argument at 36 (9/10/97). When announcing the holding, the Chief Justice also asked the parties, "Are there any questions from counsel?" **Id.** There were none, and the Court issued the Writ.

II.

{14} As a threshold matter, we address whether the Verified Petition for Original Writ of Mandamus is properly before this Court. Specifically, we consider two sub-issues: 1) whether this action is properly before this Court as an original proceeding; and 2) whether a writ of mandamus will issue to enjoin a state official from acting or whether it will only issue to compel an official act.

{15} This Court has original jurisdiction in this proceeding pursuant to Article VI, Section 3 of the New Mexico Constitution. The Court may invoke original jurisdiction even when a matter might have been brought first in the district court. **See** Rule 12-504(B)(1)(b) NMRA 1998 (party seeking mandamus must set forth circumstances making Supreme Court's exercise of original jurisdiction necessary and proper); **see also State ex rel. Clark v. Johnson**, 1995-NMSC-51, 120 N.M. 562, 569, 904 P.2d 11, 18 (discussing the criteria relevant to the exercise of original jurisdiction).

{16} In **State ex rel. Clark**, two state legislators and a taxpayer sought a declaratory judgment and either a writ of mandamus or a writ of prohibition to preclude Governor Johnson from implementing Indian gaming compacts and revenue-sharing agreements that were entered without legislative consent. **See State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 566, 904 P.2d at 15. This Court exercised original jurisdiction because: 1) the issue presented a fundamental question of great public concern; 2) the relevant facts were virtually undisputed and no further factual questions existed for the district court to decide; 3) the purely legal issue eventually would have come before this Court; and 4) the petitioners and the respondents desired an early resolution of the dispute. **State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 569, 904 P.2d at 18.

{17} We conclude that similar facts in this case provide a basis for our exercise of original jurisdiction. The Respondents' actions implicate the doctrine of separation of powers. The balance and maintenance of governmental power is of great public concern. Also, no factual issues require further clarification; this dispute concerns a purely legal question—the limits upon executive and legislative power under the state constitution. Moreover, because of these questions' significance to the balance of power among government branches, we have no doubt that they eventually would have reached this Court. Last, early resolution of this case is desirable. As public assistance reform proposals are made, it is important that both the legislative and executive branches clearly understand their constitutional obligations and limitations. Furthermore, since the conclusion of this case affects numerous citizens and the efficient administration of public assistance, an immediate hearing of these issues benefits all concerned parties. Therefore, it is both necessary and proper for this Court to exercise original jurisdiction in this case.

{18} We also note that "mandamus is an appropriate means to prohibit unlawful or unconstitutional official action." **State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 570, 904 P.2d at 19. As our courts have held since territorial days, the authority to prohibit unlawful official conduct is implicit in the nature of mandamus. **See In re Sloan**, 5 N.M. 590, 25 P. 930, **cited in State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 569-70, 904 P.2d at 18-19. New Mexico courts commonly use forms of prohibitory mandamus. **See** State ex rel. Clark, 1995-NMSC-51, 120 N.M. at 570, 904 P.2d at 19; **see also Stanley v. Raton Bd. of Educ.**, 117 N.M. 717, 718, 876 P.2d 232, 233 (1994); **State ex rel. Bird v. Apodaca**,

91 N.M. 279, 282, 573 P.2d 213, 216 (1977). Since Petitioners are alleging that the Respondents engaged in unlawful or unconstitutional official acts, Petitioners may request mandamus as the necessary relief.

III.

{19} Next we address whether the Respondents' actions constituted a violation of the New Mexico Constitution's separation of powers provision. Respondents contend that implementation of Respondents' program does not unconstitutionally infringe upon the Legislature's authority. Instead, they argue first that, as agents of the executive branch, they may implement the policy changes without seeking the direct participation of the Legislature. Respondents also contend that the Legislature conferred discretionary authority upon HSD to construct plans, make rules, and enact all regulations necessary to secure federal public assistance funds and to comply with federal law. As part of this position, Respondents assert not only that they were given discretionary authority to make such adjustments, but also that New Mexico and federal law compelled them to make the policy changes. We disagree.

A.

{20} Article III, Section 1 of the New Mexico Constitution prohibits any branch of government from usurping the power of the other branches:

> 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. . . .

NM Const. art. III, § 1. This provision articulates one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty. **See Gregory v. Ashcroft**, 501 U.S. 452, 458-59, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); **The Federalist** No. 47, at 332 (James Madison) (M. Walter Dunne 1901) (discussing Montesquieu).

{21} Within our constitutional system, each branch of government maintains its independent and distinct function. **See** State v. Fifth Judicial Dist. Court, 36 N.M. 151, 153, 9 P.2d 691, 692 (1932) (noting that "the Legislature makes, the executive executes, and the judiciary construes the laws."). We have said that only the legislative branch is constitutionally established to create substantive law. **See** State ex rel. Sofeico v. Heffernan, 41 N.M. 219, 230-31, 67 P.2d 240, 246 (1936) (stating that the Legislature, rather than the State Game Commission, has the power to define what constitutes a game animal, because only the Legislature constitutionally "can create substantive law"); **State v. Armstrong**, 31 N.M. 220, 255, 243 P. 333, 347 (1924) (stating that the Legislature possesses the sole power of creating law). We also have recognized the unique position of the Legislature in creating and developing public policy. "It is the particular domain of the legislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, [but] to a lesser extent, [and only] as authorized by the constitution or legislature." **Torres v. State**, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (discussing the judiciary's role in determining the existence of a tort duty).

{22} A governor's proper role is the execution of the laws. NM Const. art. V, § 4. Public assistance programs must be administered, and we recognize that such administration involves discretion by executive agencies. Yet, such discretion is not boundless. Generally, the Legislature, not the administrative agency, declares the policy and establishes primary standards to which the agency must conform. **See State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority**, 76 N.M. 1, 13, 411 P.2d 984, 993 (1966). The administrative agency's discretion may not justify altering, modifying or extending the reach of a law created by the Legislature. **See, e.g.**, **Chalamidas v. Environmental**

Improvement Div. (In re Proposed Revocation of Food and Drink Purveyor's Permit, 102 N.M. 63, 66, 691 P.2d 64, 67 (stating that an "agency cannot amend or enlarge its authority through rules and regulations"); **Rainbo Baking Co. v. Commissioner of Revenue**, 84 N.M. 303, 306, 502 P.2d 406, 409 (Ct. App. 1972).

{23} While recognizing the specific roles of each branch of government, we also note that absolute separation of powers is "neither desirable nor realistic," **State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 573, 904 P.2d at 22, and that the constitutional doctrine of separation of powers permits some overlap of governmental functions, **Mowrer v. Rusk**, 95 N.M. 48, 53, 618 P.2d 886, 891 (1980). Nonetheless, this Court must give effect to Article III, Section 1, and will not be reluctant to intervene where one branch of government unduly encroaches or interferes with the authority of another branch. **State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 573, 904 P.2d at 22; **Rusk**, 95 N.M. at 54, 618 P.2d at 892. Such an infringement occurs when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions. **State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 574, 904 P.2d at 23 (citing **Nixon v. Administrator of Gen. Servs.**, 433 U.S. 425, 433, 53 L. Ed. 2d 867, 97 S. Ct. 2777 (1977)).

{24} "The test is whether the Governor's action disrupts the proper balance between the executive and legislative branches." **State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 574, 904 P.2d at 23. If a governor's actions infringe upon "the essence of legislative authority—the making of laws—then the governor has exceeded his authority." **State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 573, 904 P.2d at 22. A violation occurs when the Executive, rather than the Legislature, determines "how, when, and for what purpose the public funds shall be applied in carrying on the government," **State ex rel. Schwartz v. Johnson**, 1995-NMSC-83, P14, 120 N.M. 820, 907 P.2d 1001 (quoting **State ex rel. Holmes v. State Bd. of Fin.**, 69 N.M. 430, 441, 367 P.2d 925, 933 (1961)). In addition, infringement upon legislative power may also occur where the executive does not "execute existing New Mexico statutory or case law [and rather attempts] to create new law." **State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 573, 904 P.2d at 22.

B.

{25} We have no doubt that Respondents' program implements the type of substantive policy changes reserved to the Legislature. Their changes substantially altered, modified, and extended existing law governing the structure and provision of public assistance in New Mexico. **See Chalamidas** 102 N.M. at 66, 691 P.2d at 67; **Rainbo**, 84 N.M. at 306, 502 P.2d at 409. Furthermore, by refusing to permit legislative participation in fashioning public assistance policy changes, Respondents "attempt to foreclose legislative action in [an] area[] where legislative authority is undisputed." **State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 574, 904 P.2d at 23. We hold that Respondents' program constitutes executive creation of substantive law, and as such, is an unconstitutional encroachment upon the Legislature's role of declaring public policy.

{26} The substantial nature of the Respondents' adjustments to public assistance policy are best illustrated: 1) by comparing existing New Mexico public assistance standards with Respondents' changes; and 2) by placing those changes in the context of the range of policy options available to the New Mexico Legislature.

{27} First, federal AFDC statutes required that a child be "dependent" to qualify for assistance. Generally, this meant that a child had to be from a one-parent household to be eligible for benefits. 42 U.S.C. § 606(a). The PRA eliminated this federal requirement and gave the states the option to use TANF funds to support needy children in two-parent families as well. Pub. L. 104-193, § 103, 110 Stat. 2105, 2113 ("Sec. 401(a)(4)"), 2134 ("Sec. 408(a)(1)(A)"). Although New Mexico had the option under federal law to maintain its existing "dependent" requirement, Respondents eliminated the requirement in New Mexico through the new administrative

regulations. Income Support Division Financial Assistance Program, NM Human Serv. Dep't, 8 NMAC 3.FAP.407 (July 1, 1997). Respondents' actions effectively denied the Legislature any participation in this decision.

{28} Second, the old federal AFDC program contained ancillary job training and limited work requirements. **See** Pub. L. 104-193, § 103, 110 Stat. 2105, 2133 (Sec. 407(e)). New Mexico's current law reflects this. NMSA 1978, § 27-2-6.2 (1988). The PRA replaced these programs with mandatory work requirements. **See** Pub. L. 104-193, § 103, 110 Stat. 2105, 2133 ("Sec. 407(e)"). Respondents' program imposed a mandatory work requirement through regulations and adopted work schedules that exceed those included in the PRA. 8 NMAC 3.FAP.415.3 and 415.5 (July 1, 1997). Again, the Legislature had no participation in deciding the extent of work requirements appropriate for New Mexico.

{29} Third, under the old federal framework, eligible individuals were deemed "entitled" to benefits. This meant that states were not free to make waiting lists or establish limits on the duration of assistance. The new PRA permits states to limit or end this entitlement. Pub. L. 104-193, § 103, 110 Stat. 2105, 2113 (Sec. 401(b)). Respondents' program eliminated the entitlement in New Mexico. 8 NMAC 3.FAP.419 (July 1, 1997). The Legislature had no influence in deciding, as a matter of public assistance policy, whether an entitlement should have been maintained in New Mexico.

{30} Finally, federal AFDC did not impose any durational limits on eligibility for benefits. However, according to the PRA, states cannot use TANF block grant money to provide assistance to persons for more than five years. Pub. L. 104-193, § 103, 110 Stat. 2105, 2137 (Sec. 408(a)(7)(A)). Hence, if a state chooses, it may provide assistance without durational limits, but public assistance payments exceeding five years must be funded entirely by state coffers. Pub. L. 104-193, § 103, 110 Stat. 2105, 2138 (Sec. 408(a)(7)(F)). Respondents' program set a durational limit of three years in New Mexico. 8 NMAC 3.FAP.419 (July 1, 1997). The Legislature, had it been given the option, might have chosen not to impose a durational limit. Or alternatively, it might have chosen to set a limit of shorter or longer duration. Promulgation of the new program's three year limitation denied the Legislature any participation in deciding what, if any, time limits would be appropriate for New Mexico.

{31} Although this is not a complete list of the changes affected by Respondents' regulations, these examples represent a substantial change in New Mexico's public assistance eligibility or delivery standards without the participation of the Legislature. Indeed, little of New Mexico's public assistance program remains intact in the wake of Respondents' changes. Such results, by their very nature, set fundamental standards and make vital policy choices, a role reserved for the Legislature. **See** NM Const. art. IV, § 1; **State ex rel. Sofeico**, 41 N.M. at 230-31, 67 P.2d at 246; **Armstrong**, 31 N.M. at 255, 243 P. at 347.

{32} We also believe that the past practices of the New Mexico Legislature and Executive are instructive on these issues. In the past, when states were given the option to adopt federal public assistance policy changes, such changes were examined and adopted through the full legislative process and eventually signed into law by a governor. **See, e.g.**, NMSA 1978, § 27-2-10 (authorizing a food stamp program to carry out the federal Food Stamp Act and associated regulation); NMSA 1978, § 27-2-12 (authorizing the medical assistance division to provide medical assistance by regulation); NMSA 1978, § 27-2-6.2(A) (limiting employment and training requirements in programs established or conducted by the Human Services Department). Thus, the Respondents' unilateral implementation of the public assistance changes represents a substantial break with past practice, ignoring the New Mexico Legislature's consistent role in creating state public assistance policy.

{33} In sum, when the federal government enacted the PRA, New Mexico faced three questions: 1) whether to continue to use the state's existing public assistance framework; 2) whether to create a new program for the delivery of public assistance services, and if so, the identification

of its essential structure and elements; and 3) whether to administer a program with federal funding which would be subject to new federal restrictions. These issues go to the core of public assistance policy. By implementing their plan through HSD regulations rather than through the required legislative process, Respondents made these core policy choices themselves, thereby preventing the constitutionally required input of the people's elected law-making representatives.

C.

{34} The NMPAA does not confer upon Respondents discretionary authority to implement the PROGRESS program changes. Respondents cite to eight primary sections of the NMPAA that they contend confer discretionary authority upon HSD.[4] As a general matter, Respondents make much of the language calling for "consistency with federal law" included in some of these cited sections. Respondents argue that this language indicates that the New Mexico Legislature has delegated expansive authority to HSD to promulgate any necessary regulations which will maintain conformity between New Mexico and federal public assistance law. We disagree.

{35} Taken as a whole, these references to consistency merely recognize that HSD acts with the federal government to cooperatively administer certain public assistance programs such as AFDC and Medicaid. Such "boilerplate" language recognizing the cooperative nature of the federal and state relationship cannot be used to justify the unfettered discretionary authority that Respondents urge. Nor can this language be used to ignore the substantive commands of the New Mexico Legislature.

{36} The language invoked by Respondents is a limitation on HSD, not a **carte blanche** grant of discretionary authority. The language indicates that where joint federal/state programs are involved, New Mexico's regulation of the programs cannot violate federal guidelines. The phrases "must be consistent" or "as required by federal law" by their very nature suggest that, even though the programs are administered jointly, there are aspects of the programs that are regulated solely by federal law. The states are at liberty to determine some elements of the subject programs, but state power is limited in that the states cannot contradict federal controls over a program. Viewed in this context, we have no doubt that the "consistency" language is a limitation on HSD discretion and not a delegation of legislative power.

{37} This Court used similar "consistency" language in **Katz v. New Mexico Department of Human Services**, 95 N.M. 530, 624 P.2d 39 (1981). We stated in **Katz** that:

> Compliance with the federal requirements is a condition to the receipt of federal funds. Section 27-2-12, N.M.S.A. 1978, therefore requires that [HSD] must operate

[4] The cited sections include:

NMSA 1978, § 27-1-3(D) (1937), which states that HSD may "formulate detailed plans, make rules and regulations and take action deemed necessary and desirable to carry out the provision of Chapter 27 NMSA1978 and which is not inconsistent with the provisions of that Chapter."

NMSA 1978, § 27-1-3(J) (1937), which authorizes HSD to "administer such other public welfare functions as may be assumed by the state after the effective date of the section;"

NMSA 1978, § 27-2-3 (1975), which requires that, "consistent with the federal act and subject to the availability of federal and state funds," HSD will set a standard of need which establishes "a reasonable level of subsistence;"

NMSA 1978, § 27-2-4 (1975), which sets out five specific conditions for public assistance eligibility. The section begins, "Consistent with the federal act, a person is eligible for public assistance grants under the Public Assistance Act if . . . ;"

NMSA 1978, § 27-2-5 (1982), which sets forth the methodology for determining the amount of grants, permitting across the board reductions, "as necessary," should the amount of federal and state funds be insufficient to provide maximum grants for all eligible persons;

NMSA 1978, § 27-2-10 (1973), which authorizes HSD to establish a food stamp program in New Mexico subject to the continuation of the federal program and availability of federal funds;

NMSA 1978, § 27-2-15 (1937), which designates HSD as the state agency that will cooperate with the federal government in the administration of the federal Social Security Act;

NMSA 1978, § 27-2-16 (1984), which authorizes HSD to administer programs for the aged, blind, and disabled in the "amounts consistent with federal law to enable the state to be eligible for Medicaid funding."

> the [Medicaid] program **consistent with the federal act**.

Id. at 532, 624 P.2d at 41 (emphasis added). Respondents contend that this language supports their argument that HSD has broad discretionary authority to do whatever is necessary to conform New Mexico's public assistance programs to federal guidelines. We disagree.

{38} In **Katz,** a patient applied to the New Mexico Human Services Department seeking Medicaid coverage for medical treatment rendered by a chiropractor and a physical therapist. **Id.** at 531, 624 P.2d at 40. The patient appealed HSD's denial of Medicaid funding for her treatment arguing that state and federal regulations required that HSD pay for the services. **Id.**

{39} Analyzing first the federal statutes governing Medicaid, this Court ruled that "payment of services of chiropractors and physical therapists under the Medicaid program is optional [by the states] and not mandated by federal law. . . ." **Id.** at 532, 624 P.2d at 41. The Court then turned to an analysis of New Mexico regulations to determine whether New Mexico had opted to cover such services. **Id.** It concluded that New Mexico regulations did not cover them. **Id.** Thus, according to state and federal law, HSD was not required to pay for the chiropractic services and physical therapy received by the claimant.

{40} Contrary to Respondents' assertion, **Katz** was not decided as a matter of HSD discretionary authority. The claimant's arguments were rejected because federal and state law did not list or provide for payment of chiropractic services and physical therapy. If anything, **Katz** stands for the proposition that HSD discretion is strictly limited by the state and federal statutes and regulations which govern Medicaid services. Thus, Respondents' arguments with regard to **Katz** are without merit.

{41} Respondents also assert that, aside from the provisions referring to consistency with federal law, other NMPAA provisions empower them with the discretionary authority to implement the new regulations.[5] However, the NMPAA contains significant evidence of a legislative intent to limit HSD's authority. Section 27-2-4 lists specific eligibility requirements and appears to be an exclusive listing. Within that provision, subsection 27-2-4(C) states that a benefits recipient must "meet all qualifications for **one of the public assistance programs authorized by the Public Assistance Act.** " (emphasis added). The NMPAA only authorizes the implementation of four programs: AFDC, Medicaid, the General Assistance Program, and the Food Stamp Program.

{42} In addition, the Legislature specifically directs that HSD not act "inconsistent with the provisions" of the NMPAA. Section 27-1-3(D). Given the general principles that the Legislature is the policy-making body, that it may create agencies to carry out legislative initiatives, and that, in creating an agency, it sets boundaries for the agency's exercise of the authority granted by the Legislature, we conclude that, in its efforts to cooperate with federal authorities, HSD has no mandate to ignore existing New Mexico statutes. In the present circumstances, the NMPAA constrains, rather than enlarges, HSD's authority. In addition, we reject any notion that the PRA confers authority upon the executive branch to ignore duly enacted state legislation or to make the legislative policy choices embodied in the new public assistance changes. The PRA confers upon the states the essential choices of public assistance policy. Pub. L. 104-193, § 103, 110 Stat. 2105, 2113 (Sec. 401(a)(1)), 2124 (Sec. 404(a)), 2138 (Sec. 408(a)(7)(E), (F)). The PRA neither explicitly or implicitly gives that authority solely

[5] These provisions, in short, give HSD authority: 1) to adopt, amend and repeal bylaws, rules, and regulations, Section 27-1-2(E); 2) to establish, extend and strengthen public assistance programs for children, Section 27-1-2(L); 3) to establish and administer a program for relief, Section 27-1-2(M); 4) to formulate detailed plans, make rules and regulations and take action deemed necessary or desirable to carry out the provisions of [the NMPAA], Section 27-1-3(D); 5) to cooperate with the federal government in matters of mutual concern pertaining to public assistance, Section 27-1-3(E); and 6) to administer such other public assistance functions as may be assumed by the state after the effective date of this section, Section 27-1-3(J).

to the executive of the state. Furthermore, federal law cannot enlarge state executive power beyond that conferred by the state constitution. **State ex rel. Clark**, 1995-NMSC-51, 120 N.M. at 577, 904 P.2d at 26 (finding an identical argument by the Governor to be "inconsistent with core principles of federalism"); **cf. New York v. United States**, 505 U.S. 144, 176, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (striking act of Congress requiring states to act).

{43} In a similar vein, Respondents also argue that the PRA imposes conditions on New Mexico and that the Legislature's acceptance of TANF funds, absent required changes in the NMPAA, leaves the implementation of those obligatory changes to the Executive. It is true that "under Congress' spending power, 'Congress may attach conditions on the receipt of federal funds.'" **New York v. United States**, 505 U.S. 144, 167, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992) (quoting **South Dakota v. Dole**, 483 U.S. 203, 206, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987)). However, as indicated above, we conclude that many provisions contained in Respondent's program were not required by the PRA.

{44} Finally, we reject Respondents' contention that if the Legislature disagrees with Respondents' program, the appropriate remedy is for the Legislature to redirect HSD's discretionary authority with new statutes during the next legislative session. This argument has no merit. Only a simple majority is required to pass a bill through both legislative chambers. NM Const. art. IV, § 17. A governor is constitutionally entitled to veto the legislation if he does not agree with it. NM Const. art. IV, § 22. The Legislature then has the option of attempting to override the veto, by securing a two-thirds majority. **Id.** The counterbalance of a governor's veto power against the Legislature's ability to override the veto is the mechanism that forces the two branches to compromise and work together to create law.

{45} The alleged remedy that Respondents' urge is impractical, and more importantly, it would subvert the system of checks and balances of the New Mexico Constitution. Through HSD regulation, Governor Johnson implemented new public assistance policies in exactly the form that he deemed appropriate for New Mexico. If the Legislature were now to pass statutory amendments by a simple majority in an attempt to "redirect" HSD's discretion, the Governor's signature would still be required for such changes to become law.

{46} Respondents' position is impractical because the Governor would have no reason to accept, or even consider, such changes. He already has the public assistance policies in place that he favors via administrative regulation. Therefore, no incentive exists for him to consider any public assistance changes suggested by the Legislature. Consequently, the Governor could, and almost certainly would, veto any bill submitted to him altering the program that he already put in place unilaterally.

{47} With the administrative changes to public assistance already in place and a veto of any proposed amendments assured, the Legislature could convince the Governor to compromise only if, from the outset, the Legislature had the necessary votes for a veto-override. This scenario, in effect, would force the Legislature to garner a veto-override majority of two-thirds to bring about any consideration of amendments to the existing public assistance regulations.

{48} Respondents' recommendation for further legislative action turns our constitutional system of checks and balances on its head. The New Mexico Constitution requires that the Legislature first have the opportunity to debate and vote on core policy changes; only then may the Governor exercise his veto powers and force the Legislature to consider a veto-override. In this case, the Governor already has usurped the legislative function, initiating public policy changes which should find their genesis only in the Legislature. Requiring legislative action to change the Governor's program now would place the Legislature in a position of responding to, rather than initiating, core public policy choices.

D.

{49} Because the substantive public assistance policy changes promulgated in Respondents' plan required legislative participation and because neither state statute nor federal law conferred discretionary authority upon Respondents to institute the policy changes, we conclude that Respondents violated Article III, Section 1 of the New Mexico Constitution. From this conclusion, a writ of mandamus was issued September 10, 1997.

IV.

{50} In the months that followed the Writ, Respondents made no attempt to comply with the Writ and openly defied this Court. During this time, Respondents were advised by several legal authorities that they should comply with this Court's Writ. The New Mexico Attorney General assured Respondents that no irreconcilable conflicts existed between state and federal law and stressed the importance of relinquishing the Respondents' public assistance program. HSD's general counsel also advised Respondents to return to New Mexico's existing program until the Legislature passed a bill and the Governor signed it into law. Despite this overwhelming advice to comply with the Court's Order, Respondents continued implementation of their public assistance program.

{51} After several failed attempts to seek Respondents' compliance, Petitioners filed a Motion for Supplemental and Further Relief. Respondents did not deny that they were disobeying the Court's Writ. Respondents admitted that the Writ compelled them to cease their public assistance program and reinstate New Mexico's existing program. However, HSD continued to encourage implementation of Respondents' new public assistance regulations, except with respect to a waiver of the work requirement penalty.

{52} On October 24, 1997, Petitioners filed a motion to have this Court declare Respondents in contempt of court. The petition alleged that Respondents continued to carry out their public assistance program. Respondents replied that they could not comply with the Court's Writ because the existing state statutes were contrary to federal PRA guidelines. Specifically, Respondents asserted that state statutes: 1) provided benefits to unqualified aliens, felons, and parole violators, and 2) did not include mandatory work requirements.

{53} Before considering contempt proceedings, the Chief Justice strongly encouraged the parties to engage in good-faith negotiations or mediation toward settlement. Despite the Chief Justice's encouragement, Respondents refused to consider any proposals, and they continued to implement their own public assistance program.

{54} On December 8, 1997, the Petitioners filed a Supplemental Memorandum concerning possible sanctions and urged the Court to consider imposing contempt sanctions against both the Governor, and newly-appointed HSD Secretary Bill Johnson. In response, Respondents only repeated the argument that they could not comply with the Court's Writ because NMPAA conflicted with federal law. Pursuant to motion, the Court then initiated contempt proceedings, setting a hearing for Respondents to show cause why they should not be held in contempt.

{55} At the contempt hearing, Respondents maintained that harmonizing the Court's Writ with the federal funding requirements in the PRA was impossible. Respondents reasoned that because the federal government no longer funds the federal AFDC program, HSD was unable to return to the existing New Mexico law. Respondents also asserted that the state would lose federal public assistance funds as a result of complying with the Court's Writ.

{56} Respondent's misrepresentation of the loss of federal funding was an attempt to mislead this Court. Respondents first asserted that reinstituting the prior AFDC program would result in the loss of the entire amount of federal welfare funding. Yet, the actual penalty for noncompliance with the PRA's requirements and penalties

would be a loss of no more than 5% of the entire federal funding amount. Federal Register Vol. 62, No. 224, Nov. 20, 1997. Although this may be a substantial amount, it would not be the death knell for the state's welfare program that Respondents would have us believe. Second, Respondents suggested that New Mexico would suffer immediate funding consequences if they followed the Court's Writ. However, existing federal authority indicates that if any federal funds were going to be withheld from New Mexico, such a decision would not be made anytime in the near future. **Id.** Hence, the tone of urgency and desperation adopted by Respondents was at best unnecessary, and at worst, misleading. Third, contrary to Respondents' assertions, nothing in the record indicates that anyone from either HSD or the Governor's Office made any inquiries with federal agencies regarding the imposition of possible penalties or exceptions. We are not convinced that Respondents actually pursued this avenue as a possible solution to this case. Finally, Respondents' counsel misused legal authority in an attempt to mislead this Court. During oral argument, Respondents' counsel cited to a proposed rule, treating it as applicable federal law. We specifically object to this misrepresentation and to counsel's attempt to lead this Court astray.

{57} FAIR, the Legislature's proposed public assistance program that the Governor vetoed, may not have been acceptable to the Governor, but it did comply with the PRA. The Governor has every right to veto legislation but he must be mindful of his veto's consequences. The Governor should have foreseen that vetoing the proposed public assistance program left the prior AFDC program as the only viable public assistance program. Implementing Respondents' own welfare program without legislative approval was not an option.

V.

{58} Next we address application of the appropriate contempt sanction. "Without question, the power of the judiciary to compel compliance with its orders, extends to the executive branch." **Westefield v. IRS**, 172 B.R. 178, 179-80 (Bankr. W.D.N.Y. 1994) (quoting **McBride v. Coleman**, 955 F.2d 571, 581-82 (8th Cir. 1992) (Lay, J. concurring in part, dissenting in part)). "The executive branch of government has no right to treat with impunity the valid orders of the judicial branch." **Nelson v. Steiner**, 279 F.2d 944, 948 (7th Cir. 1960) (**quoted in McBride**, 955 F.2d at 582 (Lay, J. concurring in part, dissenting in part)).

{59} By statute, the New Mexico Supreme Court has the authority to hold an individual in contempt of court and to punish, by "reprimand, arrest, fine or imprisonment." NMSA 1978, § 34-1-2 (1929). In determining the appropriate punishment for civil contempt, the Court exercises its discretion. The Court considers the character and degree of harm threatened by continued contemptuous acts and whether contemplated sanctions will cause compliance with the Court's order. **State v. Pothier**, 104 N.M. 363, 369, 721 P.2d 1294, 1300 (1986). Courts consider the seriousness of the consequences of continued contemptuous behavior, the public's interest in ending defendants' defiance, and the importance of avoiding future defiance. **Case v. State**, 103 N.M. 501, 502, 709 P.2d 670, 671 (1985).

{60} A court may directly order an individual to comply with its order to purge himself or herself of contempt and may stay further sanctions if the individual complies with the order by a specified date. **See State ex rel Dep't. of Corrections**, 911 P.2d 48, 55 (Colo. 1996) (en banc) (affirming a contempt order against an executive director and administrative officer of the Department of Corrections that had awarded damages to the party moving for contempt). Other state courts have used direct orders or injunctions to compel executive branch members to comply with court orders. **See Whitehead v. Nevada Comm'n on Judicial Discipline**, 110 Nev. 128, 906 P.2d 230, 236-37 (Nev. 1994) (holding attorney general's action in counseling others to defy a court order proper subject of contempt proceedings but electing to defer adjudication until such time as the advisees, having been fully informed, continue to resist court order).

{61} Some state courts have fined executive branch members in their individual capacities when their actions were willful and performed in bad faith. **E.g.**, **Ross v. Superior Court**, 19 Cal. 3d 899, 569 P.2d 727, 738, 141 Cal. Rptr. 133 (Cal. 1977) (en banc) (affirming trial court decision holding members of board of supervisors individually in contempt of court and imposing a fine on each member); **but see United Mine Workers v. Faerber**, 179 W. Va. 77, 365 S.E.2d 357, 359-60 (W. Va. 1987) (denying motion to impose damages award for contempt against an executive officer in his personal capacity due to the absence of malice or a willful, knowing disobedience of court order, relying on two cases, **Class v. Norton**, 505 F.2d 123, 127-28 (2d Cir. 1974); **Woolfolk v. Brown**, 358 F. Supp. 524, 537 (E.D. Va. 1973) (involving state welfare officials; violation of court orders)); **In re S.C.**, 802 P.2d 1101, 1103-1104 (Colo. Ct. App.1989) (holding juvenile court properly found four Colorado Department of Institutions officials in contempt of court for refusing to accept a juvenile committed to a receiving center and did not abuse its discretion in imposing fines as a sanction). Individual executive branch members have had to pay personal contempt fines when the individual has notice of the judgement and is able to comply with the court order and nonetheless refuses to comply with the judgement. **Ross**, 569 P.2d at 730. Some states also have restricted an individual member from using certain state funds to pay the fine. **See id**..

{62} Courts may also impose imprisonment in a civil contempt action to coerce compliance. **State ex rel. Dept. of Human Servs v. Rael**, 97 N.M. 640, 642, 642 P.2d 1099, 1101 (1982); **Niemyjski v. Niemyjski**, 98 N.M. 176, 177, 646 P.2d 1240, 1241 (1982). It is clear this Court has authority to implement the full extent of contempt sanctions against executive branch members, including fines and imprisonment.

{63} Petitioners urge this Court to consider appointing a special master to oversee the program and to ensure compliance. Under Petitioners' proposal, the special master would recommend to this Court the appropriate sanction. Petitioners suggest that if Respondents continue to refuse to comply with the Writ, then this Court could expand the special master's authority, assigning the special master to administer the entire public assistance program. However, we do not feel that such an appointment is appropriate.

{64} We hold that the most appropriate contempt sanction is an order directing Respondents to cease and desist immediately from implementing the Respondents' public assistance program within seven days. The Court will consider imposing further sanctions if Respondents do not comply. Here, the Court's Writ requires Respondents to stop implementing an unconstitutional program. Respondents do not have the discretion to continue an unconstitutional act. Moreover, Respondents had more than adequate notice and were advised to comply with the Writ.

{65} We hold that Respondents acted in defiance of this Court's Order and have shown no justification for failing to comply with it. Accordingly, we find Respondents in indirect civil contempt, and after reviewing all sanctions within our contempt power, we hold that the most appropriate sanction is a direct order to comply within a specified time, with further sanctions if Respondents do not immediately comply. We maintain jurisdiction to impose additional contempt sanctions if we later determine that they are necessary and appropriate.

{66} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

GENE E. FRANCHINI,
Chief Justice

PAMELA B. MINZNER,
Justice

PATRICIO M. SERNA,
Justice

DAN A. McKINNON, III,
Justice

Justice Joseph F. Baca

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1998-NMSC-031

Filing Date: September 8, 1998, As Amended December 29, 1998

Docket Nos. 18,296, 19,118

LAWRENCE TRUJILLO,

Plaintiff-Appellee,

v.

CITY OF ALBUQUERQUE, et al.,

Defendants-Appellants.

LISA M. ROGERS and THE FIRST NATIONAL BANK OF ALBUQUERQUE AS CONSERVATOR FOR THE ESTATE OF CRYSTAL ROGERS, a minor,

Plaintiffs-Appellants,

v.

CITY OF ALBUQUERQUE and RICHARD ARAGON,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Frank H. Allen, Jr., District Judge

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OPINION

BACA, Justice.

{1} These consolidated appeals involve separate tort claims brought against the City of Albuquerque (City) pursuant to the New Mexico Tort Claims Act (TCA), NMSA 1978, § 41-4-1 to 4-27 (1976, as amended through 1996). Plaintiffs from both cases challenged the constitutionality of the damages limitation in Section 41-4-19(A) of the TCA, arguing that the cap violates their rights of equal protection under the New Mexico and United States Constitutions.

{2} In considering the constitutionality of the cap, it first is necessary to determine the applicable analysis for this type of equal protection challenge. In a previous appeal of this case before this Court, we adopted an intermediate scrutiny equal protection analysis. **See Trujillo v. City of Albuquerque**, 110 N.M. 621, 623, 798 P.2d 571, 573 (1990) [hereinafter **Trujillo I**]. After lengthy reexamination of the parties' arguments and consideration of law-of-the-case and stare decisis principles, this Court now reverses that decision. We hold that the damages cap in this case is subject to rational basis scrutiny, and rational basis will be the constitutional test applied to cap challenges of this nature from this point forward.

{3} However, the parties in this case justifiably relied on the constitutional standard articulated in **Trujillo I**, a standard that perhaps was unduly and artificially narrowed in **Trujillo v. City of Albuquerque**, 119 N.M. 602, 603, 893 P.2d 1006, 1007 (1995) [hereinafter **Trujillo II**]. Fairness requires that this Court adhere to the standard under which the current parties were instructed to litigate this dispute. Thus, with regard to the current parties only, this Court employs a certain form of intermediate scrutiny in its constitutional analysis. In doing so, we agree that the trial court correctly held the TCA cap to be unconstitutional. However, this Court limits this holding to the case before us, holding that in all subsequent cases of this nature, courts shall apply a rational basis standard in analyzing constitutional challenges to the TCA cap.

I.

{4} The TCA damages cap in New Mexico, as applied to the injuries occurring in these cases in 1984 and 1985, limited recovery to $ 300,000 per occurrence. **See** NMSA 1978, § 41-4-19(A)(2) (1983). This appeal arises from two consolidated personal injury actions filed against the City. In the first case, Lawrence Trujillo sued the City after his truck collided with a crane operated by a City employee. After a non-jury trial, the district court found that the City had failed to maintain the crane properly and that the employee had operated the crane negligently. The trial judge held **inter alia** that the TCA cap was unconstitutional, awarding $ 547,905.80 in damages to Trujillo.

{5} The second case also arose from injuries sustained in a collision. The accident occurred when Plaintiff Lisa Rogers failed to see a stop sign, partially hidden by foliage, at the entrance of an intersection. Rogers entered the intersection without stopping, and a vehicle driven by an off-duty City police officer struck Rogers' car. Rogers suffered some injuries, and her minor daughter, a passenger in the car, was permanently paralyzed. After Rogers sued, a jury apportioned negligence in the case between the

accident participants and those responsible for maintenance of the property and areas near the intersection. It awarded Rogers $ 400,000 and her daughter $ 8.3 million in damages from the City, both amounts exceeding the liability of the City under the TCA cap. At a subsequent post-trial hearing, the district judge reduced the award[1] and concluded that the TCA cap was unconstitutional.

{6} Upon review of Trujillo's case, the Court of Appeals reversed the trial court's decision and held that the TCA cap did not violate Trujillo's equal protection rights. Subsequently, the Supreme Court granted certiorari to review the decision. In Rogers' appeal, the Court of Appeals, without deciding the other issues, certified the question of the TCA cap's constitutionality to the Supreme Court.

{7} This Court consolidated the appeals and entered its opinion on August 27, 1990. In the opinion, the Supreme Court first adopted an intermediate scrutiny equal protection analysis of the TCA cap's constitutionality. **Trujillo I**, 110 N.M. at 623, 798 P.2d at 573. Under intermediate scrutiny, the City would be required to demonstrate that: (1) the cap serves an important government interest, and (2) a substantial relationship exists between the cap and the important government interest. **See id.** at 624 n.2, 798 P.2d at 574 n.2. Although the **Trujillo I** Court arrived at a conclusion on the applicable standard of constitutional scrutiny, the Justices concluded that the factual record was inadequate for a conclusion of the claims, and therefore, the Court remanded the case to the district court for further factual development.[2] **See id.** at 632, 798 P.2d at 582. In determining the importance of the government interest, the Court requested evidence on "the nature and magnitude" of the risk that the burden on public coffers would be increased by elimination of the TCA cap. **Id.** at 631, 798 P.2d at 581. Particularly, the Court asked for information concerning the relative cost of "the claims of [catastrophically injured] tort victims in the aggregate as compared to the aggregated claims of those with individual claims of $ 300,000 or less." **Id.** at 630, 798 P.2d at 580. Second, with regard to the "substantial relationship" prong of the intermediate scrutiny analysis, the Court wanted information on whether the increased costs would create a "real cost crisis" that would affect the provision of important government services. 110 N.M. at 628-29, 798 P.2d at 578-79.

{8} During the subsequent remand hearing of approximately three weeks, the parties developed and presented evidence to the district court related to the operation and effect of the cap with respect to the city. The evidence included testimony from twelve witnesses and the admission of over 200 documentary exhibits. The district court denied attempts to include empirical evidence concerning New Mexico municipalities other than Albuquerque. After the hearing, the judge submitted his findings and conclusions, holding that the City had met its burden of demonstrating that the TCA cap was substantially related to an important City interest.

{9} On September 6, 1994, the Supreme Court filed a divided plurality opinion in review of the evidentiary hearing. The opinion affirmed the holding that the TCA cap was constitutional under the limitations pursuant to which the case was tried. However, after a rehearing on the case, the Court withdrew its plurality opinion. In the subsequent Order, the Court noted that the trial court had erred in excluding evidence from other municipalities and ordered a remand for another evidentiary hearing. **See Trujillo II**, 119 N.M. at 603, 893 P.2d at 1007. The Court stated that the City's burden upon remand would be to establish a substantial relationship between the TCA cap and the protection of the public fisc as "an indivisible and statewide whole," both at the time the legislature enacted the cap and at the time the causes of action accrued. **Id**.

[1] The court reduced Rogers' judgment to $ 290,000 and her daughter's award to $ 6,017,500.

[2] Near this time, the Plaintiffs filed a motion with the Supreme Court seeking determination of the non-constitutional issues on appeal. Soon thereafter, the Court entered an order affirming all issues except the finding of multiple occurrences. It also directed payment of damages up to the amount of the TCA cap. The City made payment in partial satisfaction of the judgment on April 12, 1991.

{10} Upon remand, the Risk Management Division of the State of New Mexico and the New Mexico Municipal League intervened as defendants. Plaintiffs subsequently filed a motion asking the district court to set the scope of the proceedings for the second evidentiary hearing. The district court limited the evidentiary hearing to evidence within the 1976-1977 and 1984-1985 time frames, and the Supreme Court, upon challenge by the parties, affirmed these parameters.

{11} The second evidentiary hearing occurred from April 28, 1997, through May 8, 1997, and again, the parties submitted substantial testimonial and documentary evidence. The district court rendered its findings of fact and conclusions of law soon thereafter, holding that the limit on the Plaintiffs' damages was unconstitutional. The court also awarded post-judgment interest, but the award of interest was withdrawn after rehearing on the issue. Plaintiffs then filed their notice of appeal on the case, and Defendants filed a notice of cross-appeal soon thereafter.

{12} In this appeal, we first consider whether this Court's use of intermediate scrutiny was appropriate for the equal protection analysis. After careful reconsideration of applicable legal and policy arguments on the issue, we hold that the **Trujillo I** Court should not have adopted intermediate scrutiny for the analysis of these claims. Instead, the rational basis analysis should apply to comparable cases in the future.

{13} Despite this adoption of the rational basis test, the law-of-the-case doctrine and principles of equity require application of intermediate scrutiny, as that standard was posited in our previous orders in this case, with regard to the parties now before us. Applying that form of intermediate scrutiny, we uphold the district court's ruling, concluding that the City failed to meet its burden of proving a substantial relationship between the cap and an important government interest during the limited time frames our prior orders held to be relevant.

II.

{14} In **Meyer v. Jones**, 106 N.M. 708, 710-11, 749 P.2d 93, 95-96 (1988), this Court noted that when a statute is attacked on equal protection grounds, one of three possible analyses generally is applied to determine the statute's constitutionality: (1) rational basis scrutiny, (2) intermediate scrutiny, or (3) strict scrutiny. Generally, when social and economic legislation is challenged on equal protection grounds, the legislation is considered presumptively valid and is subjected to the rational basis test. **Espanola Hous. Auth. v. Atencio**, 90 N.M. 787, 788-89, 568 P.2d 1233, 1234-35 (1977); **McGowan v. Maryland**, 366 U.S. 420, 425, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961). To successfully challenge a statute under the rational basis test, a plaintiff is required to show that the statute's classification is not rationally related to the legislative goal. **See Richardson v. Carnegie Library Restaurant, Inc.**, 107 N.M. 688, 694, 763 P.2d 1153, 1159 (1988).

{15} Intermediate scrutiny is the next level of equal protection analysis after rational basis scrutiny. The analysis is more probing and requires higher evidentiary burdens than rational basis scrutiny. For a statute to pass constitutional muster under intermediate scrutiny, the government must demonstrate that the classification is substantially related to an important government interest. 107 N.M. at 693-94, 763 P.2d at 1158-59. The intermediate scrutiny standard is used to assess legislative classifications "infringing important but not fundamental rights, and involving sensitive but not suspect classes." **Richardson**, 107 N.M. at 693, 763 P.2d at 1158. For example, classifications based on gender and illegitimacy traditionally have been measured under intermediate scrutiny. **See City of Cleburne v. Cleburne Living Ctr.**, 473 U.S. 432, 440-41, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).

{16} The final level of equal protection analysis is strict scrutiny. Strict scrutiny involves the closest analysis and highest evidentiary burdens. Challenged legislation garners strict scrutiny if it affects the exercise of a fundamental right or a suspect classification such as race or ancestry.

See Meyer, 106 N.M. at 711, 749 P.2d at 96. When a statute involving such rights or classifications is challenged, the government must demonstrate a compelling state interest for the challenged classification. **See State v. Edgington**, 99 N.M. 715, 718, 663 P.2d 374, 377.

{17} In **Trujillo I**, this Court's essential holding was that the constitutionality of the TCA cap must be decided under intermediate scrutiny equal protection analysis. **See Trujillo I**, 110 N.M. at 623, 798 P.2d at 573; **see also Richardson**, 107 N.M. at 696, 763 P.2d at 1161. Thus, the City had to prove two elements: 1) that an important government interest was involved, and 2) that the TCA cap was substantially related to that important government interest. **See Trujillo I**, 110 N.M. at 628, 798 P.2d at 578. This Court, mindful of the stare decisis and law-of-the-case ramifications, now rejects the standard for equal protection analysis applied in **Trujillo I** and concludes that rational basis scrutiny is the appropriate analysis to be employed hereafter in all equal protection challenges to the TCA cap.

A.

{18} In adopting heightened scrutiny in its review of the TCA cap, the **Trujillo I** Court reasoned that a tort victim's full recovery is implicitly protected by the right of access to the courts under the New Mexico Constitution. **See** N.M. Const. art. II, § 18; **Trujillo I**, 110 N.M. at 623, 798 P.2d at 573. The Court relied heavily upon **Richardson**. **See generally** 107 N.M. at 692-99, 763 P.2d at 1157-64. In **Richardson**, this Court reviewed whether a damages-cap statute could limit the damages for which dramshop owners are liable. **See Id.** at 690, 763 P.2d at 1155. In striking down the statute, the Court reasoned that the damage limitation infringed upon the tort victim's interest in full recovery of damages that is implicitly protected under the state constitutional right of access to the courts. **See Id.** at 692, 763 P.2d at 1157. The Court subjected the damage limitation statute to intermediate scrutiny on the constitutional question, concluding that the statute's proponents failed to demonstrate that the statute was substantially related to an important government interest. **See Id.** at 699, 763 P.2d at 1164.

{19} Although we have no quarrel with **Trujillo I** and **Richardson** 's recognition of the principle of equal access to the courts, we disagree with the over extension of that principle. Particularly, this Court differs with **Trujillo I** 's implicit rationale that the right of access to the courts is synonymous with the purported right of full recovery against the state and its political subdivisions. We hold that the constitutional principles that protect access to the courts are not implicated by the TCA cap to a point that would require raising the level of scrutiny.

{20} New Mexico's guarantee of access to the courts does not create a right to unlimited government tort liability. Article II, Section 18 of the New Mexico Constitution states in relevant part, "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws." N.M. Const. art. II, § 18. From this general principle, this Court has recognized an implicit right of access to the courts. **See Richardson**, 107 N.M. at 692, 763 P.2d at 1157.

{21} Access to the courts encompasses the ability of a party to have access to the judiciary to resolve legal claims. **See State v. DeFoor**, 824 P.2d 783, 791 (Colo. 1992) (en banc); **Doe v. Schneider**, 443 F. Supp. 780, 787 (D. Kan. 1978). Nevertheless, such access is not boundless. **See Jiron v. Mahlab**, 99 N.M. 425, 426, 659 P.2d 311, 312 (1983). A right of access to the courts does not guarantee the continued existence of a cause of action or remedy. **See Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy**, 740 F.2d 1362 (6th Cir. 1984). Furthermore, the fact that a plaintiff is denied an adequate remedy when suing the state does not constitute a violation of one's right to court access. **See DeFoor**, 824 P.2d at 791.

{22} In **DeFoor**, a Colorado state highway worker displaced a boulder while working on a roadway with heavy machinery. **See** 824 P.2d

at 785. The boulder rolled and struck a tour bus, killing nine bus passengers and injuring twenty-five. When the tourists sued, they challenged the constitutionality of Colorado's cap on damage awards against the state. **See id.** They argued that the cap violated their right of equal court access since it limited recovery to $ 400,000 for any single occurrence injuring more than two people. **See** 824 P.2d at 786. The Colorado Supreme Court, sitting en banc, held that the limitation was not a violation of the right of access to the courts. **See id.** It reasoned that the Colorado constitutional court-access provision did not "purport to control the scope or substance of remedies afforded to Colorado litigants." 824 P.2d at 791. The provision merely "assures litigants 'that courts of justice shall be open to every person and a speedy remedy afforded for every injury.'" **Id.** (quoting, **Curtiss v. GSX Corp.**, 774 P.2d 873, 876 (Colo. 1989)).

{23} We conclude that the right of access to the courts does not create a right to unlimited government tort liability. First, the rationale in **DeFoor** applies with equal force to the issues here. Like **DeFoor**, nothing within New Mexico's constitutional provision itself purports to control the scope or substance of remedies afforded. Because the TCA cap in New Mexico does not prevent a plaintiff from utilizing the courts to prosecute a claim of negligence, there is no state constitutional impairment of the right of access. Second, the broad scope of government duties suggests that a government's potential liabilities should be treated differently than those of other defendants. In drafting the TCA cap, the New Mexico Legislature considered such issues:

> The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity. On the other hand, the legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act. . . .

NMSA 1978, § 41-4-2(A) (1976). In addition, this Court has recognized the substantial policy reasons that support limiting damage awards against the government. For example, in **Marrujo v. New Mexico State Highway Transp. Dep't.**, 118 N.M. 753, 887 P.2d 747 (1994), this Court upheld the constitutionality of the TCA's strict notice period under the rational basis test and noted that TCA claims are entitled to different treatment than claims involving private parties:

> The legislature never intended government and private tortfeasors to receive identical treatment. The liabilities of the private tortfeasor in no way compare with the potential liabilities of the [Highway] Department for the multitude of daily injuries and deaths on the State's highways. The duty of care of a single motorist is not analogous to the all but impossible task of monitoring the countless conditions that determine the safety of the state highways. . . . The right to sue the government is a statutory right and the legislature can reasonably restrict that right.

Marrujo, 118 N.M. at 760-61, 887 P.2d at 754-55 (citations omitted). Thus, as a matter of policy, the New Mexico Legislature and this Court have recognized the unique nature of the duties adopted by the state that set it apart from other litigants.

{24} Third, the history of statutorily created causes of action against government entities strongly suggests that damage limitations are permissible. Sovereign immunity was recognized for many years as a common law defense to claims against government entities in New Mexico. **But see Hicks v. State**, 88 N.M. 588, 590, 544 P.2d 1153, 1155 (1975) (eliminating the common law defense of sovereign immunity in tort claims against the government, to which

the legislature responded by enacting the TCA). However, throughout the twentieth century the legislature created various statutory causes of action that partly waived sovereign immunity. For example, in 1941 N.M. Laws, ch. 192, § 2, the legislature partly waived sovereign immunity for injuries caused by the operation of motor vehicles. Liability in those instances was limited to the insurance purchased by the government entity sued. **Id.** In another example, the legislature enacted the Public Officers and Employees Liability Act, 1975 N.M. Laws, ch. 334, partially waiving immunity and limiting liability to the insurance coverage available under NMSA 1953, § 5-13-10 (Repealed 1976). This Court, commenting on the net effect of such statutes noted:

> [These statutes] represent legislative attempts to circumvent and avoid the harsh, unconscionable and unjust results stemming from court-created immunity, which already completely protects the state against suits from its negligent acts, by providing compensation for those injured by the state. . . . **Neither statute permits any situation to arise in which the state or its political subdivisions could suffer any real liability since any judgment has to be limited to the policy limits.**

Galvan v. City of Albuquerque, 87 N.M. 235, 237, 531 P.2d 1208, 1210 (1975) (emphasis added). **Galvan** demonstrates that when the legislature authorized suit against government entities before the existence of the TCA, liability commonly was limited. Thus, this Court perceives the TCA cap as a natural extension of a long-held practice and public policy of limiting damage awards against government entities.

{25} Finally, neither the New Mexico courts nor the legislature has ever concluded that the right of access to the courts creates with it a right to full recovery of damages against the state and its political subdivisions. The **Trujillo I** Court noted that the protection of one's lawful recovery of damages has "played a vital role in New Mexico since before the time of statehood." **Trujillo I**, 110 N.M. at 624, 798 P.2d at 574. The **Trujillo I** Court relied heavily on **Richardson** in asserting the primacy of this doctrine but never stated how this doctrine necessarily permits the type of recovery sought here against a government entity. We do not believe that the Court's reliance on **Richardson**, a case that did not involve public entities, answers this inquiry. On the contrary, legislative history and case law strongly suggest that the right of access to the courts is not implicated by the TCA cap.

B.

{26} Rational basis scrutiny is the appropriate equal protection analysis to be employed. The interests at stake in a challenge of the TCA cap are of an economic or financial nature, and this Court is unconvinced that the Plaintiffs' equal protection rights are affected so substantially that intermediate scrutiny is warranted. Under an analysis of either federal or state constitutional equal protection law, the TCA cap should be subject to rational basis review.

{27} Federal case law clearly employs rational basis scrutiny in analyzing equal protection claims where limits have been placed upon damage awards. The lead case on this topic is **Duke Power Co. v. Carolina Envtl. Study Group, Inc.**, 438 U.S. 59, 57 L. Ed. 2d 595, 98 S. Ct. 2620 (1978). In that case, the United State Supreme Court explained why a rational basis analysis is the appropriate method for testing the constitutionality of a cap on damages:

> The liability-limitation provision [is] a classic example of an economic regulation-a legislative effort to structure and accommodate "the burdens and benefits of economic life. . . . The burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." That the accommodation struck may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational.

438 U.S. at 83-84 (quoting **Usery v. Turner Elkhorn Mining Co.**, 428 U.S. 1, 15, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976)); **see also** 438 U.S. at 93 (noting that equal protection arguments track and duplicate due process arguments and often are not subjected to a separate analysis). Because the U.S. Supreme Court has spoken directly on this issue, we consider the matter conclusively resolved as a matter of federal constitutional law.

{28} Under the New Mexico Constitution, we find a similar result. At its core, the TCA cap is economic legislation. It attempts to regulate the burdens and benefits of economic life, and in doing so, is subject to rational basis scrutiny. **See Duke Power Co.**, 438 U.S. at 83. Furthermore, case law from other jurisdictions strongly suggests that legislative classifications of this nature do not require heightened constitutional scrutiny.

> It has been said that "every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial function." **Village of Belle Terre v. Boraas**, 416 U.S. 1, 8, 94 S. Ct. 1536, 1540, 39 L. Ed. 2d 797 (1974). Absent invidious discrimination, however, the mere existence of a classification does not justify this court overturning the action of the elected legislature on equal protection grounds. . . . Because the statute does not abridge a fundamental constitutional right or adversely affect a suspect class, "the sole requirement is that the challenged classification rationally relates to a legitimate state interest." **Opinion of the Justices**, 117 N.H. 533, 537, 376 A.2d 118, 120 (1977); **see McGowan v. Maryland**, 366 U.S. 420, 426-28, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961).

Cargill's Estate v. City of Rochester, 119 N.H. 661, 406 A.2d 704, 707 (N.H. 1979).

{29} The application of rational basis scrutiny to the damages cap challenge in this case comports not only with the analysis of the United States Supreme Court in **Duke Power Co.**, but also with the majority of our sister states. Most states employ some type of tort cap that limits the damages recoverable against the state or other political subdivisions. James L. Isham, Annotation, **Validity and Construction of Statute or Ordinance Limiting the Kinds or Amount of Actual Damages Recoverable in Tort Action Against Governmental Unit**, 43 A.L.R. 4th 19, 24-25 (1986 & Supp. 1996). Where such caps have been challenged, most jurisdictions have employed a rational basis analysis for review of the subject claims. **See generally id.** (listing the jurisdictions that have considered cap challenges and noting the types of analyses employed). Although other courts' conclusions on the issue do not bind us, we find that the overwhelming weight of precedent suggests application of rational basis scrutiny to economic legislation of the type represented by the TCA cap.

{30} For these reasons, rational basis scrutiny will be the applicable constitutional analysis employed for evaluating equal protection challenges to the TCA cap. However, in adopting the rational basis test, we hasten to add that we are not adopting the test characterized as a "virtual rubberstamp" by **Richardson**, 107 N.M. at 698, 763 P.2d at 1163 (quoting Laurence H. Tribe, **American Constitutional Law** § 16-32, at 1610 (2d. ed. 1988)); as "toothless" by **Trujillo I**, 110 N.M. at 628, 798 P.2d at 578 and as "preordaining" the result by applying no real scrutiny. **Alvarez v. Chavez**, 118 N.M. 732, 735, 886 P.2d 461, 464 .

{31} The rational basis inquiry does not have to be "'largely toothless.'" **DeFoor**, 824 P.2d at 787 n.4 (criticizing our characterization in **Trujillo I**). The Colorado court cited two examples of cases in which it struck down either a legislative classification or a statute, both using the rational basis test. **See id.** In addition, the United States Supreme Court has at least twice in recent years used the rational basis test to strike down legislation. **See, e.g., Cleburn**, 473 U.S. at 441-47; **Hooper v. Bernalillo County Assessor**, 472 U.S. 612, 616, 86 L. Ed. 2d 487, 105 S. Ct. 2862 (1985).

{32} Thus, we do not deem it necessary to our role as "guardian of the constitution," **see Trujillo I**, 110 N.M. at 626, 798 P.2d at 576 (quoting **Samsel v. Wheeler Transp. Servs., Inc.**, 246 Kan. 336, 789 P.2d 541, 549 (Kan. 1990)), to employ any standard other than rational basis scrutiny to social and economic legislation such as damage caps. In fact, we agree with the partial concurrence and dissent in **Trujillo I**, 110 N.M. at 633, 798 P.2d at 583 (Montgomery, J., concurring in part and dissenting in part), that the damage cap at issue in **Richardson** would be held unconstitutional under the standard we adopt today. We also are confident that this modern articulation of the rational basis standard would have reached the same result that was achieved in Court of Appeals cases applying a fourth type of scrutiny defined as "heightened" rational basis analysis. **See Alvarez**, 118 N.M. 732, 738-39, 886 P.2d 461, 467-68 ; **Corn v. New Mexico Educators Fed. Credit Union**, 119 N.M. 199, 202-04, 889 P.2d 234, 237-39 (Ct. App. 1994). We expressly overrule **Alvarez** and **Corn** to the extent that they adopt a fourth tier of review that has not been utilized in our own cases. However, the rational basis test that we articulate today subsumes that fourth tier and addresses the concerns that caused the Court of Appeals to adopt a fourth tier of review.

C.

{33} Through the principle of stare decisis, this Court's use of the intermediate scrutiny standard in **Trujillo I** generally would become binding in analyzing future constitutional challenges to the TCA cap. Stare decisis is the judicial obligation to follow precedent, and it lies at the very core of the judicial process of interpreting and announcing law. **See State ex rel. Callaway v. Axtell**, 74 N.M. 339, 343, 393 P.2d 451, 454 (1964); **Planned Parenthood v. Casey**, 505 U.S. 833, 854, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992). It promotes very important principles in the maintenance of a sound judicial system: 1) stability of the law, **see, e.g., State v. Jones**, 44 N.M. 623, 634, 107 P.2d 324, 331 (1940) (Bickley, C.J., concurring) (stating that the object of stare decisis is to promote "uniformity, certainty, and stability in the law"); Note, **Constitutional Stare Decisis**, 103 Harv. L. Rev. 1344, 1347 (1990); 2) fairness in assuring that like cases are treated similarly, **see, e.g., City of Las Vegas v. Oman**, 110 N.M. 425, 433, 796 P.2d 1121, 1129 ; and 3) judicial economy, **see, e.g., id.** (discussing how stare decisis discourages the relitigation of similar issues).

{34} However, the principle of stare decisis does not require that we always follow precedent and may never overrule it. Instead, the doctrine states that "in both common law and constitutional cases . . . 'any departure from [precedent] . . . demands special justification.'" Note, **Constitutional Stare Decisis**, 103 Harv. L. Rev. at 1346 (quoting **Arizona v. Rumsey**, 467 U.S. 203, 212, 81 L. Ed. 2d 164, 104 S. Ct. 2305 (1984)). Particular questions must be considered before overturning precedent: 1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule "no more than a remnant of abandoned doctrine;" and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have "robbed the old rule" of justification. **Planned Parenthood**, 505 U.S. at 855; **see also Patterson v. McLean Credit Union**, 491 U.S. 164, 173, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989) (noting that special circumstances to reverse precedent might include "subsequent changes or development in the law" or showing that the precedent has become a "detriment to coherence and consistency in the law").

{35} This Court always demonstrates the highest regard for stare decisis, but when one of the aforementioned circumstances convincingly demonstrates that a past decision is wrong, the Court has not hesitated to overrule even recent precedent. **See First Fin. Trust Co. v. Scott**, 1996-NMSC-65, 122 N.M. 572, 576, 929 P.2d 263, 267 (1996). Furthermore, the application of stare decisis is less compelling in tort cases than in property and contract settings. **See Bogle**

Farms, Inc. v. Baca, 1996-NMSC-51, 122 N.M. 422, 430, 925 P.2d 1184, 1192 (1996); **Beavers v. Johnson Controls World Servs.**, 118 N.M. 391, 399, 881 P.2d 1376, 1384 (1994).

{36} This Court concludes, under an analysis of stare decisis principles, that the intermediate scrutiny analysis adopted in **Richardson** and **Trujillo I** should be overruled. Primarily, as evidenced by our analysis of **Richardson** and **Trujillo I** in the preceding section, this Court believes that intermediate scrutiny, as a matter of law, was incorrectly adopted for the analysis of the TCA damage cap. In that sense, this Court is compelled to depart from **Trujillo I** because we conclude that it constitutes a "detriment to coherence and consistency in the law." **See Patterson**, 491 U.S. at 173.

{37} Furthermore, events after the **Trujillo I** and **Trujillo II** remands demonstrate that implementation of intermediate scrutiny in assessing challenges to the TCA cap is unduly burdensome so as to be intolerable. **See Planned Parenthood**, 505 U.S. at 855. First, this case has been enormously time-consuming and financially burdensome, lasting several years, encompassing two lengthy district court evidentiary proceedings, and requiring numerous appeals to this Court. Continued application of the intermediate scrutiny standard would involve further protracted and expensive evidentiary trials whenever similar claims are brought. We conclude that such a process results in tremendous inefficiency of court time and resources as well as hardship on litigants.

{38} Second, during these proceedings, evidence issues posed substantial problems for the district courts. The parties disagreed several times about the parameters of admissible evidence, resulting in several interim appeals to this Court. The evidence eventually obtained was, at best, difficult to understand, and at worst, misleading. In particular, the trials focused on limited "windows" of experience with the TCA cap. The hearings exhaustively analyzed the effects of "cap-busting" cases within the windows but failed to address the trends and relevant information that might have occurred outside the periods considered. In the end, two very qualified district judges arrived at completely different results in the two evidentiary trials. Moreover, we harbor questions whether our prior orders appropriately directed the parties to the proper time frames. We limited the inquiry to the years 1976 and 1984-85, **see Trujillo II**, 119 N.M. at 603, 893 P.2d at 1007, whereas perhaps the time frame of inquiry should not have been limited in this fashion. In light of our holding, however, we need not resolve these questions.

{39} This Court concludes that such a fact-finding process does very little to clarify the types of issues presented in this appeal. Hence, continued adherence to this process could result in a skewed administration of the statute or in the "checkerboard" constitutionality determinations of which the now-withdrawn plurality opinion warned. **Trujillo v. City of Albuquerque**,-NMSC-18,296 and 19,118, slip op., pages 17-18 (Sept. 6, 1994). In sum, we believe that, even considering stare decisis principles, both the substance of the law as well as the procedural realities in this case warrant reversal of **Trujillo I** 's adoption of intermediate scrutiny to test the TCA cap.

III.

{40} Although we adopt rational basis as the standard for analysis of TCA cap claims, the Court upholds the district court's application of intermediate scrutiny and the damages awarded with regard to the parties before us. Law-of-the-case principles strongly encourage our application of intermediate scrutiny to the Plaintiffs' claims in this case. Generally, the law-of-the-case doctrine stands for the proposition that "the law applied on the first appeal of a case is binding in the second appeal" of that case. **Farmers' State Bank v. Clayton Nat'l Bank**, 31 N.M. 344, 353, 245 P. 543, 547 (1925). Law-of-the-case doctrine "is a matter of precedent and policy; it is a determination that, in the interests of the parties and judicial economy, once a particular issue in a case is settled it should remain settled." **See State v. Breit**, 1996-NMSC-67, P12, 122 N.M. 655, 930 P.2d 792.

{41} The application of the law-of-the-case doctrine, however, is discretionary and flexible;

it will not be used to uphold a clearly incorrect decision:

> [S]ince the doctrine of the law of the case is merely one of practice or court policy, and not of inflexible law, so that appellate courts are not absolutely bound thereby, but may exercise a certain degree of discretion in applying it, there are many holdings in which the courts have retreated from any inflexible rule requiring the doctrine to be applied regardless of error in the former decision, and it has been said that the doctrine should not be utilized to accomplish an obvious injustice, or applied where the former appellate decision was clearly, palpably, or manifestly erroneous or unjust.

Reese v. State, 106 N.M. 505, 506, 745 P.2d 1153, 1154 (1987) (quoting, 5 Am. Jur. 2d **Appeal and Error** § 750 at 194 (1962)); **see also Killeen v. Community Hosp.**, 101 Misc. 2d 367, 420 N.Y.S.2d 990, 992 (Sup. Ct. 1979) (law-of-the-case is discretionary); **Greene v. Rothschild**, 68 Wash. 2d 5, 414 P.2d 1013, 1013-14 (Wash. 1966) (if application of the doctrine would work a manifest injustice to one party, the erroneous decision should be disregarded and set aside). Hence, the law-of-the-case doctrine generally would not be used to support application of **Trujillo I** because, as noted earlier in this Opinion, both the substance of the law and the resulting difficulties in applying the decision demonstrate that **Trujillo I** is clearly erroneous.

{42} However, law-of-the-case doctrine provides for discretionary application, and more so than stare decisis, considers the justness of applying a particular rule to the parties. **See Reese**, 106 N.M. at 506-07, 745 P.2d at 1154-55. In the interests of justice, this Court applies to the parties before us the intermediate scrutiny standard, with its structural and temporal limitations, adopted in **Trujillo I** and **Trujillo II**. The court proceedings in this case span several years and involve two remands for two very long evidentiary trials. Early within that context, this Court instructed the parties to structure their arguments and evidence presentations to answer whether the TCA cap was substantially related to an important government interest. The resulting complications associated with application of that test and a reanalysis of the relevant law demonstrates that use of this standard was error. This observation, however, does not alter the fact that the parties in this case justifiably relied on the **Trujillo I** adoption of intermediate scrutiny. We recognize the difficulties created by our reversal of that test, but we hold that it would not be in the interests of justice, after such substantial reliance, to apply the rational basis test to the parties before us. For that reason, we hold that intermediate scrutiny should be the standard by which the immediate parties' claims are measured.

{43} In doing so, this Court upholds the district court's analysis under the particular and rather unique form of intermediate scrutiny adopted in **Trujillo I**, **Trujillo II**, and subsequent orders of this Court. Although the trial court's conclusion is subject to de novo review, we conclude that such an analysis would not alter the district court's finding. We agree that the Defendants failed to demonstrate the TCA cap bore a substantial relationship to an important government interest under the structural and temporal limitations established by our previous orders. Therefore, Plaintiffs are entitled to their full measure of damages obtained upon judgment.

IV.

{44} Plaintiffs claim that they are entitled to post-judgment interest pursuant to NMSA 1978, § 41-4-19(B) (1991) and 56-8-4(D)(1993). Section 41-4-19(B) provides:

> No judgment against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act shall include an award for exemplary or punitive damages or for interest prior to judgment.

Section 56-8-4(D) immunizes the state and its political subdivisions from post-judgment interest, "except as otherwise provided by statute or

common law." Plaintiffs argue: (1) that these two statutes should be read **in pari materia** so that Plaintiffs may recover post-judgment interest, and (2) that prior Court of Appeals decisions have not read, construed or applied the two pertinent statutory provisions in this manner to reach a considered and coherent construction of the statutes.

{45} Statutory construction is a question of law which we review de novo. **See State v. Rowell**, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). "Where two statutes are related to the same general subject, the court will generally construe them **in pari materia** to give effect to each." **State v. Alvarado**, 1997-NMCA-26, P6, 123 N.M. 187, 936 P.2d 869.

{46} Applying the above principles to the issue before us, we hold that Plaintiffs may not recover post-judgment interest against Defendants under the TCA. As recognized by the Court of Appeals in **Folz v. State**, 115 N.M. 639, 857 P.2d 39, 43 , Section 41-4-19(B) does not explicitly prohibit the recovery of post-judgment interest. However, when this statute is read **in pari materia** with Section 56-8-4(D), post-judgment interest is prohibited on recoveries from the state and its political subdivisions. **See Yardman v. San Juan Downs, Inc.**, 120 N.M. 751, 762, 906 P.2d 742, 753 (Ct. App. 1995) (holding "an award of post-judgment interest on judgments against a governmental entity is not permitted under the Tort Claims Act"); **Fought v. State**, 107 N.M. 715, 716, 764 P.2d 142, 143 (Ct. App. 1988) (same). The plaintiffs in **Foltz** were entitled to collect post-judgment interest under Section 41-4-19(B) because they filed their claim prior to the effective date of Section 56-8-4(D), unlike the plaintiffs in **Fought** and **Yardman**.

{47} Section 56-8-4(D) contemplates that the state and its political subdivisions will not be immune from post-judgment interest where a statute or the common law explicitly provides. Section 41-4-19(B) does not so provide. The Section does not expressly state that the immunity provided to the state and its political subdivisions for post-judgment interest is waived under the TCA. **Cf. Kirby v. New Mexico State Highway Dep't.**, 97 N.M. 692, 699, 643 P.2d 256, 263 (holding NMSA 1978, § 39-3-30 gives express authority, without exception, to recovery of costs against any losing party, including state and political subdivisions in claims brought under TCA). Further, as the Court recognized in **Fought**, at common law, judgments against any party, including the state, did not bear interest. **See Fought**, 107 N.M. at 716, 764 P.2d at 143. We thus conclude that Plaintiffs are not entitled to post-judgment interest.

V.

{48} In conclusion, this Court adopts rational basis scrutiny as the equal protection analysis to be used in TCA cap challenges from this point forward. We expressly overrule any case law to the extent that it conflicts with this holding. However, with regard to the parties and claims currently before us, principles of equity require application of intermediate scrutiny, as adopted in **Trujillo I** and **Trujillo II**. Under this form of intermediate scrutiny, this Court upholds the finding of the district court, invalidating the TCA cap and permitting recovery of the Plaintiffs' full damages, but disallowing Plaintiffs' claim for post-judgment interest.

{49} IT IS SO ORDERED.

JOSEPH F. BACA, Justice

WE CONCUR:

GENE E. FRANCHINI,
Chief Justice

PATRICIO M. SERNA,
Justice

THOMAS A. DONNELLY,
Court of Appeals Judge

LYNN PICKARD,
Court of Appeals Judge

Justice Joseph F. Baca

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1999-NMSC-013

Filing Date: February 22, 1999, As Corrected July 9, 1999

Docket No. 24,717

CATHY JEAN COATES and MADELINE DURAN,

Plaintiffs-Appellees and Cross-Appellants,

v.

WAL-MART STORES, INC., d/b/a SAM'S CLUB,

Defendant-Appellant and Cross-Appellee.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
James A. Hall, District Judge

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OPINION

BACA, Justice.

{1} Wal-Mart Stores, Inc. (Wal-Mart) appeals the district court's judgment in favor of former employees, Appellees Cathy Jean Coates (Coates) and Madeline Duran (Duran). On cross-appeal, Coates and Duran appeal the court's denial of prejudgment interest on punitive damage awards. On certification from the Court of Appeals, pursuant to NMSA 1978, § 34-5-14 (1972), this Court now considers the following issues: 1) whether the exclusivity provision in the New Mexico Workers' Compensation Act, NMSA 1978, §§ 52-1-1 to -70 (1929, as amended through 1993), bars a common law sexual harassment tort; 2) whether the district court erred in several evidentiary rulings; 3) whether the district court erred in not including an "intervening cause" jury instruction; 4) whether there was cumulative error requiring reversal; 5) whether substantial evidence exists to support an intentional infliction of emotional distress claim and the award of punitive damages; 6) whether the district court erred in not remitting the damage award; and 7) whether the district court erred or abused its discretion in not awarding prejudgment interest on the punitive damages award. After careful review, we affirm the district court's rulings and judgment.

I.

{2} This case stems from supervisor Toby Alire's (Alire) alleged sexual harassment of Coates and Duran while all three were employees at Sam's Club, a division of Wal-Mart. Coates and Duran claim that Alire physically and verbally sexually harassed them on several occasions between 1993 and 1994. Appellees further contend that Wal-Mart knew of this sexual harassment, yet failed to protect them or reprimand Alire.

{3} Between the spring of 1993 and 1994, Coates and Duran reported several incidents of sexual harassment to management. Several other women who claimed Alire had also sexually harassed them, or who had witnessed Alire harassing Coates and Duran, also reported several incidents to management.

{4} Sam's Club manager, Tom Romero, personally witnessed one incident of Alire's sexual harassment. Romero reported the incident, and several others that had been reported to him, to Alire's immediate supervisor. In turn, Alire's immediate supervisor reported the incidents to Sam's Club's assistant manager. Romero requested that the assistant manager give Alire a written reprimand. The assistant manager never reprimanded Alire.

{5} Besides Romero, an assistant manager and general manger also observed Alire's behavior. In August 1993, both the assistant manager and general manager watched and laughed as Alire made lewd and vulgar suggestions to Duran. Neither manager initiated disciplinary action against Alire.

{6} In December of 1993, Duran claimed that Alire approached her while she was on a forklift and grabbed her breasts from behind. Duran reported the incident to the assistant and general manager along with other on-going harassment. Again, Wal-Mart did not investigate or reprimand Alire.

{7} A week after this incident, Wal-Mart informed Duran that it had decided to make Alire her supervisor. Duran claimed that Wal-Mart told her that the decision was final and that if she objected her only alternative was to quit. Duran quit her job near the end of December 1993. However, before she left, Duran again told the assistant manager of the many incidents of sexual harassment and assault that had occurred since the spring of 1993. The assistant manager reported each incident to the general manager. Wal-Mart still did not take any action against Alire.

{8} After Duran quit, Coates and other female employees continued to complain about Alire's continued sexually harassing behavior. In February 1994, Coates and Kim Martinez (Martinez), another female employee, reported to the store's manager that Alire had allegedly pulled Martinez' blouse open to look at her breasts. Wal-Mart took no action either to investigate or to reprimand Alire regarding the incident. Incidents of sexual harassment continued into the spring of 1994, and despite many complaints, Wal-Mart never disciplined Alire.

{9} In March 1994, a supervisor saw Alire make an obscene gesture to Coates and heard Coates scream. Wal-Mart again did not respond to Alire's actions and permitted Alire to remain a supervisor.

{10} Later in March 1994, Wal-Mart held a management meeting and permitted Coates and Martinez to describe the incidents of Alire's sexually harassing behavior. After the meeting, Wal-Mart transferred Alire to a different department. However, Alire still remained a supervisor and was not otherwise disciplined.

{11} Wal-Mart then transferred Alire to a department immediately adjacent to Coates' workstation, Coates still had contact with Alire and reported to management that his angry manner frightened her. Wal-Mart took no action in this regard and in May 1994, Coates quit.

{12} A month after Coates left Wal-Mart, the Rio Grande Sun published a newspaper article reporting Alire's arrest for the assault, kidnapping, and rape of his girlfriend. Wal-Mart's general manager read the article and reported it to national headquarters. Wal-Mart continued to employ Alire, even after his conviction. However, Wal-Mart did terminate Alire while in jail, after his continued absence violated Wal-Mart's leave policies.

{13} After leaving Wal-Mart's employment, Coates and Duran filed a claim against Wal-Mart alleging negligent supervision and intentional

infliction of emotional distress. Coates and Duran also filed a claim against Alire individually.

{14} Before trial, Wal-Mart filed a motion for summary judgment claiming that the Workers' Compensation Act's (WCA) exclusivity provision barred Coates and Duran from raising a claim outside the WCA. The court denied the motion and the matter then proceeded to trial.

{15} Wal-Mart also filed a motion in limine to exclude the newspaper article and any other evidence regarding Alire's arrest. Wal-Mart argued that the acts for which Alire was arrested and convicted occurred after Coates and Duran left Wal-Mart. The court granted the motion. However, after Coates and Duran announced that they had settled with Alire, the court reversed its ruling on the motion in limine and allowed the facts of Alire's arrest into evidence.

{16} The court also admitted the testimony of an expert specializing in preventing and responding to workplace sexual harassment. Coates and Duran introduced the expert's testimony in response to Wal-Mart's claim that it had adopted model corporate policies concerning sexual harassment.

{17} The court, however, excluded evidence of Coates' ex-husband's incarceration and inability to provide child support. The court also excluded evidence of Duran's own incarceration and background. Wal-Mart claimed that such evidence would have contradicted the claim that Alire's actions caused them severe emotional distress. The court also excluded from evidence photographs of a forklift that would allegedly show the impossibility of Duran's claim that Alire had jumped on a forklift and performed lewd acts behind her, although the court allowed the photographs to be used for demonstrative purposes.

{18} Wal-Mart moved for a directed verdict at the close of Appellees' case and at the close of all evidence. The court denied both motions.

{19} The jury found in favor of Duran and Coates on both the negligent supervision and intentional infliction of emotional distress claims. The jury awarded Duran $ 84,000 in compensatory damages for the negligent supervision claim, $ 30,000 in compensatory damages for the intentional infliction of emotional distress claim, and $ 1,200,000 in punitive damages. Coates received $ 48,000 in compensatory damages for the negligent supervision claim, $ 15,000 for the intentional infliction of emotional distress claim, and $ 555,000 in punitive damages. The court also awarded ten percent prejudgment interest on the compensatory damages but did not award prejudgment interest on the punitive damage awards.

{20} Wal-Mart filed a motion for judgment notwithstanding the verdict or, in the alternative, for remittitur. The district court subsequently denied this motion. Wal-Mart then appealed the verdict and judgment to the Court of Appeals. Coates and Duran, in a cross-appeal, also appealed the denial of prejudgment interest on the punitive damage awards. The Court of Appeals then certified the matter to this Court for our review.

II.

{21} The question whether the WCA covers an injury that occurred in the workplace is a question of law, which we review de novo. **See Cox v. Chino Mines/Phelps Dodge**, 115 N.M. 335, 337, 850 P.2d 1038, 1040 . We also review the court's ruling on a motion for summary judgment under a de novo standard of review, while determining whether any genuine issues of material fact exist and whether the movant was entitled to judgment as a matter of law. **See** Rule 1-056(C) NMRA 1999; **Gallegos v. State Bd. of Educ.**, 1997-NMCA-040, ¶12, 123 N.M. 362, 940 P.2d 468.

{22} The WCA was created to offset the lost wages of a worker injured by a work-related accident, while promoting a policy in which workers would not become dependant on state welfare programs. **See Casias v. Zia Co.**, 93 N.M. 78, 80, 596 P.2d 521, 523. The WCA was the result of a bargain struck between employers

and employees. In return for the loss of a common law tort claim for accidents arising out of the scope of employment, the WCA ensures that workers are provided some compensation during recovery to keep their family off welfare. **See Aranda v. Mississippi Chem. Corp.**, 93 N.M. 412, 416, 600 P.2d 1202, 1206 (Ct. App. 1979). Likewise, while the employer gives up any common law defenses, the WCA assures the employer limited and determinate liability. **See Sanchez v. Hill Lines, Inc.**, 123 F. Supp. 42, 43 (D.N.M. 1954).

{23} Wal-Mart contends that Appellees are barred from raising a tort claim because the WCA provides the exclusive remedy for work-related injuries. Relying on NMSA 1978, § 52-1-9 (1973), otherwise known as the "exclusivity provision," Wal-Mart argues that the WCA provides employees with the exclusive remedy for **any** personal injury in the workplace in lieu of any other liability. We disagree.

{24} While it is true that the basic essence of the exclusivity provision is that the WCA's remedy is exclusive to all other remedies against the employer for the same injury, the exclusivity provision is not an absolute bar. "The exclusivity provided for by the New Mexico Workmen's Compensation Act is the product of a legislative balancing of the employer's assumption of liability without fault with the compensation benefits to the employee. . . ." **Dickson v. Mountain States Mut. Cas. Co.**, 98 N.M. 479, 480, 650 P.2d 1, 2 (1982). However, the WCA will preclude other claims only if the injury falls within the scope of the WCA. **See Coleman v. Eddy Potash, Inc.**, 120 N.M. 645, 652, 905 P.2d 185, 192 (1995). The WCA only covers work-related accidents and only injuries that fall within the act's coverage. A claim falls outside the WCA for work-related injuries if: 1) the injuries do not arise out of employment, **see Cox**, 115 N.M. at 337-38, 850 P.2d at 1040-41; 2) substantial evidence exists that the employer intended to injure the employee, **see Johnson Controls World Servs., Inc. v. Barnes**, 115 N.M. 116, 118, 847 P.2d 761, 763 ; or 3) the injuries are not those compensable under the WCA, **see Sabella v. Manor Care, Inc.**, 121 N.M. 596, 599, 915 P.2d 901, 904 (1996). Although any one of the preceding exceptions removes the claim from the coverage of the WCA, all three exceptions exist here.

A.

{25} Injuries caused by sexual harassment do not arise out of employment. **See Cox**, 115 N.M. at 338, 850 P.2d at 1041. Accordingly, Appellees' claims are not compensable under the WCA. In **Cox**, a claimant appealed a Workers' Compensation Administration decision which denied her compensation benefits and dismissed her claim with prejudice. The Court of Appeals considered whether the claimant had sustained an injury "arising out of" her employment as defined under the WCA as a result of incidents of sexual harassment. The claimant argued that her injuries arose out of the workplace and were thus compensable under WCA. She also contended that she should be compensated under the WCA as a matter of public policy. Pointing to the New Mexico Human Rights Act, NMSA 1978, §§ 28-1-1 to -7, 28-1-9 to -14 (1969, as amended through 1991), and the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1988), as examples, she claimed that the law, as a matter of public policy, provides remedies for sexual harassment in the workplace. Thus, she argued, providing similar remedies under the WCA would be consistent with such public policy.

{26} The Court of Appeals held that although the claimant's injury may have been causally related to her employment, sexual harassment does not amount to an accident "arising out of her employment" under the WCA. **Cox**, 115 N.M. at 338, 850 P.2d at 1041. The Court of Appeals also noted that while the Human Rights Act and the Civil Rights Act of 1964 also provide remedies for sexual harassment, these acts address concerns that are quite different from those that the WCA addresses. **See id.** The Court of Appeals stated that "the way to maintain public policies against sexual harassment on the job is to pursue the common-law or statutory

remedies available to promote these policies and not to engraft those policies onto a very different legislative scheme such as the Workers' Compensation Act." **Cox**, 115 N.M. at 338-39, 850 P.2d at 1041-42; **see also Byrd v. Richardson-Greenshields Sec., Inc.**, 552 So. 2d 1099, 1104 n.7 (Fla. 1989) (stating that "as a matter of public policy, sexual harassment should and cannot be recognized as a 'risk' inherent in any work environment.").

{27} We agree with the Court of Appeals and hold that injuries caused by sexual harassment do not arise from employment and are thus not compensable under the WCA. The WCA only covers accidental injuries that occur in the workplace. **See Coleman**, 120 N.M. at 652-53, 905 P.2d at 192-93. This Court will not adopt a rationale that would catagorize sexual harassment as an accident.

{28} Sexual harassment is not an "accident" that invokes WCA coverage. **See Ortiz v. Ortiz & Torres Dri-Wall Co.**, 83 N.M. 452, 453, 493 P.2d 418, 419 (stating that '"in the sense of the statute, 'accidental injury' or 'accident' is an unlooked for mishap, or untoward event which is not expected or designed."')(quoting **Lyon v. Catron County Comm'rs**, 81 N.M. 120, 125, 464 P.2d 410, 415 (Ct. App. 1969))). Sexual harassment is not an accident but rather is a form of discrimination, which as matter of public policy is not accepted in society. Employers must be responsible for maintaining a workplace free from sexual harassment. **See Sabella**,121 N.M. at 601, 915 P.2d at 906 (holding that "under the alleged facts of [that] case, a claim of [sexual harassment] under the [Human Rights Act] is not barred by the WCA."). Allowing a worker subjected to sexual harassment to seek civil damages "not only vindicates the state's interest in enforcing public policy but also adequately redresses the harm to the individual naturally flowing from the violation of public policy." **Michaels v. Anglo Am. Auto Auctions, Inc.**, 117 N.M. 91, 93, 869 P.2d 279, 281 (1994). Therefore, we hold that the WCA's exclusivity provision does not preclude an employee from seeking a remedy outside the WCA for injuries caused by sexual harassment.

B.

{29} The exclusivity provision also does not bar Appellees' claims because sufficient evidence exists to show that Wal-Mart acted intentionally. **See Beavers v. Johnson Controls World Servs., Inc.**, 120 N.M. 343, 347, 901 P.2d 761, 765 (citing **Barnes**, 115 N.M. at 118, 847 P.2d at 763). If an employer intended to injure an employee, the employer may be subject to a common-law tort action outside the exclusivity provision of the WCA. **See Gallegos v. Chastain**, 95 N.M. 551, 553-54, 624 P.2d 60, 62-63 (Ct. App. 1981).

{30} In **Beavers**, an employee testified, among other things, that her supervisor belittled and denigrated her in front of co-workers and that his conduct resulted in her becoming extremely depressed, suffering acute mental distress necessitating hospitalization. The employee also presented evidence that despite her supervisor's knowledge of her work-related stress and hospitalization, the supervisor continued to ridicule and disparage her in front of other company employees. The company asserted that the employee's claim for mental distress was barred by the exclusivity provision. The Court of Appeals held that the employee had both alleged and presented sufficient evidence in her complaint that her supervisor acted intentionally. **See Beavers**, 120 N.M. at 348, 901 P.2d at 766. The court also concluded that the exclusivity provision did not bar her cause of action outside the WCA. **See id.**

{31} In this case, like **Beavers**, the Appellees have alleged and presented sufficient evidence at trial that Wal-Mart's supervisors acted intentionally. Appellees presented evidence that despite Wal-Mart's knowledge of Alire's conduct, it failed to take any actions to protect Appellees or discipline Alire. Appellees complained to several managers about Alire's conduct on several different occasions. Two managers personally observed Alire's conduct, yet took no action to either protect Appellees, or to discipline Alire. Under these circumstances, we conclude that sufficient evidence exists for a jury to conclude that Wal-Mart's actions were intentional and

thus, the exclusivity provision does not bar Appellees' claims.

C.

{32} The exclusivity provision also does not prohibit Appellees from raising a claim outside the WCA because their injuries are not those compensable under the WCA. "When an injury does not fall within the coverage formula of the WCA, the exclusivity provisions of the WCA do not preclude recovery other than [that provided] under the WCA." **Sabella**, 121 N.M. at 599, 915 P.2d at 904. Psychological injuries are not compensable under the WCA if they are not "primary mental impairment" or "secondary mental impairment" as set forth in the WCA. Primary mental impairment is limited "to sudden, emotion-provoking events of a catastrophic nature . . . as opposed to gradual, progressive stress-producing causes such as . . . harassment . . . over [a] period of time." **Jensen v. New Mexico State Police**, 109 N.M. 626, 629, 788 P.2d 382, 385 ; **see also** § 52-1-24 (B) (defining "primary mental impairment "). Secondary mental impairment results from a physical impairment caused by an accidental injury. **See** NMSA 1978, § 52-1-24 (C) (defining "secondary mental impairment").

{33} Here, Duran testified that she experienced severe emotional distress because of Alire's actions and Wal-Mart's failure to respond to her complaints. She testified that she gained excessive weight and could not leave her house for three months because she was humiliated, embarrassed, afraid, and claustrophobic. Duran testified that she experienced these feelings from the time of the sexual harassment up until the trial. Coates testified that she too suffered from severe emotional distress, insomnia, and fear. Coates also claims that her fear was more intense after Alire was arrested.

{34} Psychological injuries occurring over a period of time, as happened here, are not compensable under the WCA. **See Jensen**, 109 N.M. at 629, 788 P.2d at 385. Appellees' alleged injuries started from the time of the sexual harassment, which occurred for over a year, up to the time of trial. Appellees' alleged injuries were the result of neither a sudden event nor an accidental injury, and thus were neither primary nor secondary injuries under the WCA. Since Appellees' psychological injuries do not fall within the WCA's coverage, they are not compensable under the WCA and thus, the exclusivity provision does not bar Appellees' claim. **See Beavers**, 120 N.M. at 347, 901 P.2d at 765.

D.

{35} In short, the WCA exclusivity provision does not bar Appellees' tort claims because injuries caused by sexual harassment do not arise out of employment. Also, the exclusivity provision does not bar Appellees' tort claims because substantial evidence exists from which a jury could conclude that Wal-Mart's actions were intentional. Finally, the exclusivity provision does not bar Appellees' tort claims because Appellees' prolonged psychological injuries do not fall within the WCA's coverage. Thus, for all of the foregoing reasons, the exclusivity provision does not bar Appellees' claims.

III.

{36} Next, we address whether the trial court's exclusion of certain evidence was prejudicial error or an abuse of discretion. "Admission or exclusion of evidence is a matter within the discretion of the trial court and the court's determination will not be disturbed on appeal in the absence of a clear abuse of that discretion." **State v. Valdez**, 83 N.M. 632, 637, 495 P.2d 1079, 1084 (Ct. App.), **aff'd** 83 N.M. 720, 497 P.2d 231 (1972). '"An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case.'" **State v. Apodaca**, 118 N.M. 762, 770, 887 P.2d 756, 764 (1994) (quoting **State v. Simonson**, 100 N.M. 297, 301, 669 P.2d 1092, 1096 (1993)). A trial court abuses its discretion by its ruling only if '"we can characterize it as

clearly untenable or not justified by reason.'" **Id.** (quoting **State v. Litteral**, 110 N.M. 138, 141, 793 P.2d 268, 271 (1990)).

{37} Evidence is relevant if it tends to make a fact in issue more or less probable and any doubt should be resolved in favor of admissibility. **See** Rule 11-401 NMRA 1999. All relevant evidence is generally admissible. **See** Rule 11-402 NMRA 1999. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. **See** Rule 11-403 NMRA 1999. "The complaining party on appeal must show the erroneous admission and exclusion of evidence was prejudicial in order to obtain a reversal." **Cumming v. Nielson's, Inc.**, 108 N.M. 198, 203-04, 769 P.2d 732, 737-38 .

A.

{38} Wal-Mart contends that evidence of Alire's conviction was irrelevant, prejudicial and thus inadmissible. We disagree. The evidence of Alire's conviction on sexual assault charges is relevant to Wal-Mart's reaction to and knowledge of Alire's conduct. This reaction and knowledge are relevant to rebut Wal-Mart's claim that it had in place a policy that was effective in protecting its employees from sexual harassment **after** it had notice of an employee's misconduct. **Cf. Gomez v. Martin Marietta**, 50 F.3d 1511, 1518 (10th Cir. 1995) ("[An employer's] treatment of other arguably similar misconduct is clearly probative of whether its treatment of [an employee] breached its obligation to discipline its employees consistently.") This is especially relevant since Wal-Mart continued to employ Alire after he was convicted of kidnapping and rape. Moreover, Wal-Mart has not offered any proof that the admission of the evidence unfairly prejudiced it, especially since Wal-Mart itself opened the door to the evidence's use by raising the defense that it had policies in place to prevent sexual harassment. **Cf. State v. Gonzales**, 113 N.M. 221, 228, 824 P.2d 1023, 1030 (1992) (upholding the admission of certain impeachment evidence, because among other things, the complaining party had "opened the door" for the evidence). Given testimony that Wal-Mart continually failed to protect Coates and Duran and discipline Alire, at worst, the evidence was merely cumulative. **See** 113 N.M. at 229, 824 P.2d at 1031 (holding that the trial court did not err in admitting evidence, because among other things, the evidence was cumulative (citing to **State v. Moore**, 94 N.M. 503, 505, 612 P.2d 1314, 1316 (1980))). Under these circumstances, we conclude that the evidence regarding Alire's conviction was highly relevant and well within the court's discretion to allow its admission.

B.

{39} Wal-Mart challenges the admission of the expert testimony on the ground that "such testimony did not assist the trier of fact in understanding the evidence or in determining an issue of fact." We disagree. "The admission of expert testimony . . . is within the sound discretion of the trial court and will not be reversed absent a showing of the abuse of that discretion." **State v. Gilbert**, 100 N.M. 392, 400, 671 P.2d 640, 648 (1983); **accord Fuyat v. Los Alamos Nat'l Lab.**, 112 N.M. 102, 106, 811 P.2d 1313, 1317 . "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." Rule 11-702 NMRA 1999. This case involves sexual harassment, and the expert testified regarding the minimum standards for an effective sexual harassment corporate policy. She also testified as to how an employer should enforce its sexual harassment policy in a manner likely to protect employees. Wal-Mart, as a defense, had claimed that it had a good sexual harassment policy. The expert's testimony was relevant to refute Wal-Mart's defense and assist the jury in understanding the issue. Under these circumstances, we conclude that the testimony assisted the jury in understanding the evidence and in determining a factual issue of consequence to the case.

C.

{40} Wal-Mart argues that the court erred in excluding evidence of Coates' ex-husband's murder conviction, his incarceration, and his failure to support their children, as well as evidence of Duran's own incarceration. Wal-Mart alleges that the evidence is relevant to the cause of Appellees' emotional distress. We hold that the court properly excluded the evidence.

{41} As for the exclusion of the evidence regarding Coates' ex-husband, we note that he had been in jail almost ten years before the alleged emotional distress occurred. Nevertheless, his incarceration and failure to support their children do have some probative value as to the stress Coates was suffering. At trial, the defendant proffered the evidence of Coates' ex-husband's conviction, incarceration, and failure to pay child support to show the cause of Coates' stress. Because the cause of Coates' stress was, without a doubt, a fact that was of consequence to the case, the evidence would not appear to be inadmissible on Rule 11-401 or Rule 11-402 grounds.

{42} Nevertheless, we conclude that the evidence was properly excluded under Rule 11-403. As the trial court held, "there is some very limited probative value to the evidence . . . but I think that what little probative value there is to that is evidence, it is substantially outweighed by the danger of unfair prejudice. Therefore, pursuant to Rule [11-]403, [we] exclude the evidence." Rule 11-403 stipulates: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." As noted, the trial court concluded that the proffered evidence had little probative value. Given the length of time between the ex-husband's incarceration and Coates' distress, we do not find this conclusion to be illogical or contrary to the facts and circumstances of the case. We also note that, although the court did not admit specific evidence of her ex-husband's conviction, it did permit Wal-Mart to ask Coates about her marriage and divorce. For all these reasons, we conclude that the trial court acted within its discretion in excluding the evidence of the ex-husband's conviction, incarceration, and failure to pay child support.

{43} As for the trial court's exclusion of direct evidence regarding Duran's driving while under the influence conviction, we conclude, for reasons similar to those listed above, that the trial court properly acted within its discretion in disallowing this proffered evidence. **Cf.** Rule 11-609 NMRA 1999 (allowing for evidence of crimes not involving dishonesty or false statements, only if, among other things, "the probative value of admitting this evidence outweighs its prejudicial effect"). Moreover, although the court forbade Wal-Mart from presenting direct evidence of the conviction, it did allow Wal-Mart to present evidence to the jury that indirectly tended to show that Duran had been arrested, incarcerated, and otherwise punished for her alleged misconduct. Moreover, Duran freely testified to the matter. Under these circumstances, we conclude that, even if the trial court erroneously excluded the evidence, the error was harmless.

D.

{44} Finally, Wal-Mart argues that the court improperly excluded as evidence photographs of a forklift that would allegedly show the impossibility of an incident in which Duran claimed that Alire jumped on a forklift to perform lewd acts from behind her. We disagree. The court properly excluded the photographs of the forklift as untimely and because Wal-Mart failed to comply with the pretrial order. Wal-Mart never identified the exhibit for the Appellees and the court, as the court's pretrial order required. Wal-Mart produced the photographs only when it attempted to introduce them into evidence on the last day of trial. Thus, the court properly excluded the photographs as a sanction. Moreover, since the court still allowed Wal -Mart's witness to draw diagrams of the forklift and to testify that it was impossible for a second person to get up on the forklift and perform lewd acts from behind another person on the forklift, Wal-Mart was not prejudiced by the exclusion of the photographs.

IV.

{45} We next address whether the district court erred in refusing to include an independent intervening cause instruction. We hold that the court did not err. An intervening cause instruction is necessary when the evidence shows that something "interrupted and turned aside a course of events and produced that which is not foreseeable." UJI 13-306 NMRA 1999. No evidence exists that any other cause other than Wal-Mart's and Alire's acts and omissions caused harm to Appellees. Thus, the district court correctly held that an intervening cause instruction was not warranted. Moreover, Wal-Mart was not harmed by not having an intervening cause instruction because the court still allowed the jury to consider other factors that Wal-Mart alleged had caused stress in Appellees' lives.

V.

{46} Next, we consider whether substantial evidence supports the jury's verdict in favor of the Appellees for intentional infliction of severe emotional distress, as well as for future and punitive damages. We hold that it does. In considering a substantial evidence claim, "we resolve all disputed facts in favor of the successful party, indulge all reasonable inferences in support of a verdict, and disregard all evidence and inferences to the contrary." **Clovis Nat'l Bank v. Harmon**, 102 N.M. 166, 168-69, 692 P.2d 1315, 1317-18 (1984).

{47} To recover for intentional infliction of emotional distress, the claimant must show that the tortfeasor's conduct was extreme and outrageous under the circumstances, that the tortfeasor acted intentionally or recklessly, and that as a result of the conduct the claimant experienced severe emotional distress. **See** UJI 13-1628 NMRA 1999. Punitive damages are warranted if the misconduct was malicious, willful, reckless, wanton, fraudulent, or in bad faith. **See** UJI 13-1827 NMRA 1999.

{48} Substantial evidence exists in the record to support the jury's decision that Wal-Mart intentionally inflicted severe emotional distress on the Appellees and that Wal-Mart's misconduct merits an award of punitive damages. Although Wal-Mart argues that it should not be responsible for the actions of one employee, Alire, "the actions of the employees [should be viewed] in the aggregate to determine whether [the employer] had the requisite culpable mental state because of the cumulative conduct of the employees." **Clay v. Ferrellgas, Inc.**, 118 N.M. 266, 270, 881 P.2d 11, 15 (1994). In this case, it was not only Alire's conduct but also the conduct of several of Wal-Mart's managers which caused the Appellees' emotional distress. Moreover, although the other managers' acts and omissions each alone may be insufficient proof of intent, when viewed cumulatively, they may establish a clear and convincing inference of actual malice. **See id.** (citing to **Herron v. Tribune Publ'g. Co.**, 108 Wash. 2d 162, 736 P.2d 249, 256 (Wash.1987) (en banc)). Alire's conduct was outrageous, and apparently Wal-Mart was aware of this since Alire's conduct was witnessed by high level supervisory personnel. Under these circumstances, a reasonable fact-finder could conclude that Wal-Mart intentionally allowed the harassment to continue with "utter indifference to the consequences." **Gonzales v. Surgidev Corp.**, 120 N.M. 133, 145, 899 P.2d 576, 588 (1995) (quoting **Ferrellgas**, 118 N.M. at 270, 881 P.2d at 15 (quoting UJI 13-1827 SCRA 1986)). Thus, we hold that sufficient evidence exists to support the jury's verdict of intentional infliction of emotional distress and to warrant punitive future damage awards.

VI.

{49} Next, we address the issue whether the court erred in refusing to remit the damage awards. Wal-Mart contends that the award was manifestly excessive. "In determining whether a jury verdict is excessive, the court does not weigh the evidence but determines the excessiveness as a matter of law." **Chavez-Rey v. Miller**, 99 N.M. 377, 379, 658 P.2d 452, 454 . The trial court, unlike the appellate court that views the record cold, is in the unique position to observe the witnesses and their demeanor as well as the

jurors' attitude during the trial. **See Grammer v. Kohlhaas Tank & Equip. Co.**, 93 N.M. 685, 695, 604 P.2d 823, 833 (Ct. App. 1979). "The amount of awards necessarily rests with the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is just compensation, and, in the final analysis, each case must be decided on its own facts and circumstances." **Powers v. Campbell**, 79 N.M. 302, 304, 442 P.2d 792, 794 (1968). After careful review, we hold that the trial court did not err in refusing to remit the compensatory damage awards.

{50} In **Allsup's Convenience Stores v. North River Ins. Co.**, 1999-NMSC-006, 127 N.M. 1, 976 P.2d 1, we provided an analytical framework for determining whether a trial court erred in granting a motion for remittitur.

> The trial judge . . . has limited superintendence when ordering a remittitur in that the exercise of such discretion must be supported by express reasons, **see** [**Rety v. Green**, 546 So. 2d 410, 418 (Fla. Dist. Ct. App. 1994)], and those reasons must establish the presence of "passion, prejudice, sympathy, partiality, undue influence, or some corrupt cause or motive." **See** [**Richardson v. Rutherford**, 109 N.M. 495, 503, 787 P.2d 414, 422 (1990)). . . .] In the present scenario, the appellant attacks the reasons for remittitur given by the trial judge by demonstrating that the record supports the contention that there was no error in the verdict. The burden then shifts to the appellee to show there was error to support the judge's reasoning.

Id. P 19. Although the facts in **Allsup's** are distinguishable from those before us now, we conclude that the analytical framework in **Allsup's** controls the case at bar.

{51} **Allsup's** involved the review of a **grant** of a motion for remittitur. Here, by contrast, we are reviewing the denial of such a motion. Nonetheless, the burden-of-proof principles set forth in **Allsup's** guide us in our disposition of the case before us. Specifically, we conclude that because Wal-Mart is appealing a denial of a remittitur, it bears the burden of showing that the record supports its contention that there was error in the verdict. Put another way, Wal-Mart must show that the verdict (i.e., damage awards) was infected with "passion, prejudice, partiality, sympathy, undue influence, or some corrupt cause or motive." **Id.**

{52} At trial, the Appellees presented evidence of compensatory damages using an economic expert along with their own testimony. Wal-Mart did not dispute the damage figures. The jury accordingly allocated different damage amounts to each Appellee. Wal-Mart has not shown anything in the record to prove that the compensatory damage awards were excessive. Nor has it shown that the jury was inflamed with some sort of improper prejudice against it. For this reason, Wal-Mart has not borne its burden of proving error. Accordingly, we affirm the trial court's refusal to remit the compensatory damage awards.

{53} Likewise, we hold that the court did not abuse its discretion by refusing to remit the punitive damages. "The amount of [the] award of punitive damages [was not] so unrelated to the injury and actual damages proven as to plainly manifest passion and prejudice rather than reason or justice." **Chavez-Rey**, 99 N.M. at 379, 658 P.2d at 454. As we stated earlier, Alire's conduct was outrageous, and apparently Wal-Mart was aware of this, since Alire's conduct was witnessed by high-level supervisory personnel. Moreover, as before, Wal-Mart has not shown that the jury was inflamed with some sort of improper prejudice in rendering the punitive damage awards. For this reason, Wal-Mart failed to carry its burden of proof on appeal. Accordingly, we affirm the trial court's refusal to remit the punitive damage awards.

VII.

{54} Next, we consider whether the court erred in not awarding prejudgment interest on the punitive damage award. Coates and Duran argue that the court erred in ruling that prejudgment

interest could not be applied to punitive damages. We disagree.

{55} The trial court has the discretion to award prejudgment interest. **See** NMSA 1978, § 56-8-4(B) (1851-1852); **Navajo Tribe v. Bank of New Mexico**, 700 F.2d 1285, 1290 (10th Cir. 1983) ("This court is . . . convinced . . . that were the New Mexico Supreme Court to pass on [the] issue it would hold that award of prejudgment interest is a question of law solely within the sound discretion of the court."). "'Awarding prejudgment interest on compensatory damages . . . ensures that just compensation to the tort victim is not eroded by the dilatory tactics of the tortfeasor. . . .'" **Calleon v. Miyagi**, 76 Haw. 310, 876 P.2d 1278, 1290 (Haw. 1994) (quoting **Digital & Analog Design Corp. v. North Supply Co.**, 63 Ohio St. 3d 657, 590 N.E.2d 737, 741 (Ohio 1992)). Prejudgment interest serves two purposes, promoting early settlements and compensating persons; however, it was never intended to encompass an award of punitives. **See Murphy v. United Steelworkers of Am. Local No. 5705**, 507 A.2d 1342, 1346 (R.I. 1986); **see also Ramada Inns, Inc., v. Sharp**, 101 Nev. 824, 711 P.2d 1, 2 (Nev. 1985) (per curiam) ("Because the amount of punitive damages to be awarded is not known until the judgment is rendered, we hold that prejudgment interest may not be granted by a trial court on punitve damage awards."). "Interest is awarded to make the tort victim whole, and has no bearing on the question of punishing the tortfeasor and comprises a sanction wholly separate from any punitive damages awarded." **d' Arc Turcotte v. Estate of LaRose**, 153 Vt. 196, 569 A.2d 1086, 1088 (Vt. 1989).

{56} Because a tort victim can be made whole even if prejudgment interest is not awarded on punitive damages, we find that the district court did not abuse its discretion in not awarding prejudgment interest on the punitive damage award. **See Ellis County State Bank v. Keever**, 888 S.W.2d 790, 796 (Tex. 1994) (stating that "punitive damages, being inherently penal in character, should not be enlarged by the imposition of prejudgment interest in the absence of an express legislative intent to do so."). Apart from those states whose cases have already been cited in this opinion, many other states have held that awarding prejudgment interest on a punitive damages award is inappropriate. **See, e.g., Matanuska Elec. Ass'n, Inc. v. Weissler**, 723 P.2d 600, 610 (Alaska 1986); **Wheeler Motor Co.. v. Roth**, 315 Ark. 318, 867 S.W.2d 446, 451-52 (Ark. 1993); **Lakin v. Watkins Associated Indus.**, 6 Cal. 4th 644, 863 P.2d 179, 190-92 (Cal. 1993); **Ballow v. PHICO Ins. Co.**, 878 P.2d 672, 683 (Colo. 1994) (en banc); **Peterson v. First Nat'l Bank**, 423 N.W.2d 889, 890 (Iowa Ct. App. 1988); **Jordan v. Intercontinental Bulktank Corp.**, 621 So. 2d 1141, 1158 (La. Ct. App.1993); **Dees v. American Nat'l. Fire Ins. Co.**, 260 Mont. 431, 861 P.2d 141, 150-51 (Mont. 1993); **Poling v. Wisconsin Physicians Service**, 120 Wis. 2d 603, 357 N.W.2d 293, 298 (Wis. Ct. App. 1984) (stating "the [plaintiffs] concede that the award of prejudgment interest on the bad faith and punitive awards is inappropriate.").

VIII.

{57} Finally, we address whether there was cumulative error. Reversal may be required when the cumulative impact of errors during a trial is so prejudicial that a party was denied a fair trial. **See State v. Jett**, 111 N.M. 309, 315, 805 P.2d 78, 84 (1991). However, since no prejudicial errors or irregularities exist in the points raised on appeal, no errors exist to cumulate in denial of a fair trial. **See id.** (citing **State v. Stephens**, 99 N.M. 32, 38, 653 P.2d 863, 869 (1982)).

IX.

{58} Based on the forgoing discussion, we affirm the district court's judgment and denial of prejudgment interest on the punitive damage awards.

{59} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Chief Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

GENE E. FRANCHINI,
Justice (Concurring in part, dissenting in part)

DISSENT

FRANCHINI, Justice (Concurring in part and dissenting in part).

{60} I agree with the majority that the exclusivity provisions of the Workers' Compensation Act (WCA) do not apply to this case. However, I dissent from the result reached by the majority for three reasons. First, I think the trial court erred in admitting the extremely prejudicial evidence of Alire's arrest and conviction. Second, in my view, Wal-Mart was entitled to present to the jury fully and fairly its theory that the degree of emotional distress suffered by the Plaintiffs' had other causes than those alleged by the Plaintiffs. Third, I do not believe substantial evidence supports the verdict on intentional infliction of emotional distress or the award of punitive damages.

{61} The Plaintiffs do not deny that when the two-page newspaper article detailing Alire's arrest for the May 25, 1994 beating of his girlfriend was read to the jury pool, there was an audible gasp from the prospective jurors. A brief excerpt of the article reads:

> It was obvious . . . that the victim had been beaten as her left eye had a severe hemotoma [sic] covering the area around it. In addition, it was reported that the victim had serious bruising over her body including her chest, arms, shoulders and face. In addition, [police] . . . noticed bruising consistent with a person being choked on both sides of her neck.

The article goes on to describe how the victim, in her interview with police, "appeared visibly shaken and shocky [sic], her mannerism was that of a person who had been severely beaten." The article further pointedly noted that before Alire allegedly raped the victim on the morning after he beat her, he "allegedly called his employer, Sam's Club [a division of Wal-Mart] in Santa Fe, and told them he would not be at work that day." Additionally, according to the article, "Alire was charged with false imprisonment and assault and battery in August 1993, but the district attorney's office said those charges apparently were dropped because of insufficient evidence." Upon hearing the gasp from the jury, counsel for Wal-Mart asked that the venire be stricken and a mistrial granted, but the trial court denied the request.

{62} Rule 11-401 NMRA 1999 defines "relevant evidence" as "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." Rule 11-402 NMRA 1999 states: "All relevant evidence is admissible, except as otherwise provided by . . . these rules or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." Rule 11-403 NMRA 1999 provides that, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ."

{63} The majority opinion sees relevance in the above newspaper article and the fact of Alire's subsequent conviction for false imprisonment and aggravated battery in that they somehow "rebut Wal-Mart's claim that it had in place a policy that was effective in protecting its employees from sexual harassment **after** it had notice of an employee's misconduct." Apparently the majority is disturbed that Wal-Mart did not fire Alire upon publication of the newspaper article, even though the article itself notes that similar charges had been made and dropped against Alire in the

past. For my part, I simply do not understand the majority's "notice and protection" rationale since there is no evidence that there were any complaints by Wal-Mart employees that they needed protection from Alire after publication of the newspaper article. Indeed, Alire was jailed the week **before** the newspaper article was published and it appears from the article that he remained there, unable to make bond. Additionally, I note that Wal-Mart's sexual harassment policy as applied to its employees generally was not on trial in this case—else this suit would have been brought under the New Mexico Human Rights Act or Title VII of the federal Civil Rights Act. Rather, two individual plaintiffs sued Wal-Mart for tort damages done to them particularly. Those plaintiffs, Coates and Duran, had already left employment with Wal-Mart months **before** publication of the newspaper article, so I fail to see how the article or evidence of Alire's later conviction was relevant to Coates and Duran's case for damages against Wal-Mart.

{64} It is easy to see how the common perception might be that if Alire was the kind of person who would commit such abominable acts against his girlfriend as were detailed in the newspaper article, he probably did whatever Coates and Duran said he did to them at Wal-Mart. In a court of law, however, evidence offered to show that a defendant must have done a particular act on a particular occasion because it conforms to his alleged character is highly suspect and generally inadmissible. **See** Rule 11-404(A) NMRA 1999; **see also Baum v. Orosco**, 106 N.M. 265, 267, 742 P.2d 1, 3 (admissibility of character evidence in a civil case is even narrower than in a criminal case). Similarly, however influential on popular opinion, evidence of other wrongful behavior is generally considered non-probative and irrelevant in a court of law, at least in New Mexico. **Compare** Rule 11-404(B) NMRA 1999 (exceptions listed for admission of evidence of other wrongful behavior do not include Plaintiffs' implied theory that Alire acted in conformity with his alleged propensity for bad acts) **with** Fed. R. Evid. 415 (allowing "admission of evidence regarding "Similar Acts" in Civil Cases Concerning Sexual Assault"). Perhaps these are the reasons the trial court initially granted Wal-Mart's motion in limine to exclude the newspaper article and evidence of Alire's conviction. Inexplicably, the trial court later reversed itself—even going so far as to allow a poster-sized blow-up of the newspaper article to be presented to the jury—and I believe it did so in error.

{65} In my view, the newspaper article and evidence of Alire's conviction had no probative value or relevance to the case brought to trial by Coates and Duran. Its singular effect was to inflame the jury against Alire—and Wal-Mart by association since two were joined together as Defendants in Plaintiffs' Complaint. When Coates and Duran settled their claims against Alire for $ 100 apiece on the day the petit jury was impaneled, dismissing him from the suit, the jury could not hold him responsible for his conduct. Instead, the jury could only express its disgust by punishing Wal-Mart. Thus, in light of the gasp of horror from the venire in response to the newspaper article regarding Alire's arrest, I cannot agree with the majority's conclusion that "Wal-Mart has not offered any proof that the admission of the evidence unfairly prejudiced it." Moreover, because Plaintiffs asked for punitive damages in their Complaint and because I think it is likely that the facts surrounding Alire's arrest and conviction played a role in the jury's assessment of such damages, I cannot agree with the majority's conclusion that, "at worst, the evidence was merely cumulative." I would hold that the evidence of Alire's arrest and conviction should have been excluded.

{66} The second reason I dissent from the majority opinion is that I believe Wal-Mart should have been allowed to present fully to the jury its theory and evidence regarding possible contributing causes of the Plaintiffs' emotional distress. Wal-Mart's evidence had to do not just with the fact that Coates' ex-husband was incarcerated for murder and could not pay child support, but also with the fact that Duran had her driver's license suspended for 100 years and had spent 29 days in jail for driving under the influence and disorderly conduct during the period she claimed to be suffering from emotional distress as a result

of Alire's actions. To my mind (and perhaps the jury's), these facts might very well have had an on-going, detrimental impact on the emotional health of the Plaintiffs, as the majority concedes in Paragraph 41 with regard to "the stress Coates was suffering."

{67} The majority justifies exclusion of this concededly relevant evidence by repeating the trial court's opinion that the probative value of such evidence against the Plaintiffs "is substantially outweighed by the danger of unfair prejudice." However, neither the trial court nor the majority specifies the prejudicial aspect of such evidence. Surely the evidence could not have been more prejudicial than the newspaper article about Alire admitted against Wal-Mart? In any event, the prejudicial nature of potentially excludable evidence is not measured by the degree that it inflames the jury against a party, but insofar as it unfairly does so or confuses the issues in a case or misleads the jury. **See** Rule 11-403.

{68} I note that if Wal-Mart had been allowed to present its evidence against Coates and Duran on the causation issue directly and forcefully instead of indirectly and weakly, the jury might well have viewed Wal-Mart's theory as an appalling, added indignity perpetrated on Alire's victims. In my view, Wal-Mart had the right to run that risk without interference from the trial court, with the possibility that the jury would be persuaded that the Plaintiffs' causation theory was oversimplified and inaccurate. For this reason, even on the limited, indirect evidence that was admitted, I think Wal-Mart was entitled to an instruction presenting its theory of intervening causation to the jury. **Cf. Poore v. State**, 94 N.M. 172, 174-75, 608 P.2d 148, 150-51 (1980) (reversing trial court's refusal to give a criminal defendant's requested intervening cause instruction and holding that a defendant "should be accorded some semblance of liberality in having the jury instructed with particularity as to his defenses that are supported by the evidence").

{69} The third reason I dissent from the majority opinion is that I am not persuaded by Section V of the opinion that substantial evidence supports the jury's verdict on intentional infliction of emotional distress or the award of punitive damages against Wal-Mart. On the IIED award, the only intentional acts alleged are those of Alire, but there is no suggestion that Wal-Mart "'commanded or expressly authorized'" those acts, so Wal-Mart cannot be held liable on that basis. **Gallegos v. Chastain**, 95 N.M. 551, 554, 624 P.2d 60, 63 (holding that battery of co-worker by another employee was not the intentional tort of the employer) (quoted authority omitted). Moreover, I do not think this Court can simply impute Alire's acts to Wal-Mart without discussion beyond the statement in Paragraph 48 that "apparently Wal-Mart was aware" of Alire's conduct. **See Martin-Martinez v. 6001, Inc.**, 1998-NMCA-179, ¶¶13-20, 126 N.M. 319, 968 P.2d 1182 (refusing to impute manager's abusive actions towards employee to employer on alter ego or managerial capacity theories), cert. denied, 972 P.2d 351 (1998). For this reason, in addition to disagreeing with Section V, I also disagree with Section II(B) of the majority opinion. **Cf. Coates v. Wal-Mart Stores, Inc.**, 1999-NMSC-013 at ¶¶9-12, 976 P.2d 999, 127 N.M. 47 (rejecting contention that **Beavers v. Johnson Controls World Serv., Inc.**, 120 N.M. 343, 901 P.2d 761 (Ct. App. 1995), relied on in Section II(B), was decided on imputation of employee's intentional acts to employer).

{70} On the punitive damages award, I do not believe a showing was made in this case that the failings of high level supervisory personnel in dealing with Alire were "**maliciously** intentional." **See, e.g., Green Tree Acceptance, Inc. v. Layton**, 108 N.M. 171, 174, 769 P.2d 84, 87 (1989) (noting that intentional conduct is only properly the subject of an award of punitive damages "when the wrongdoer's conduct may be said to be 'maliciously intentional'") (quoted authorities omitted). The majority opinion cites a libel case, **Herron v. Tribune Publishing Co.**, 108 Wash. 2d 162, 736 P.2d 249, 256 (Wash. 1987 (en banc), cited in a **Cf.** string citation by this Court in **Clay v. Ferrellgas, Inc.**, 118 N.M. 266, 270, 881 P.2d 11, 15 (1994), for the proposition that the other managers' omissions may establish an inference of "actual malice." "Actual

malice" in a libel case, however, is a specialized term of art that until now has not been properly applicable in a punitive damages case not involving libel. Without discussion, the majority opinion makes it proper in New Mexico in this non-libel case and into the future.

{71} Lastly, while I agree with the majority's holding that the trial court properly refused to impose prejudgment interest on the punitive damages awarded to the Plaintiffs, it should be clear from the above discussion that I do not believe the issue should have been reached. Wal-Mart, like any party, deserved a fair trial before a jury fully presented with proper evidence and instructions, not an unfair trial on evidence improperly admitted. I would have ordered reversal and remand to ensure such a trial in this case. The majority holding otherwise, I respectfully dissent.

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2000-NMSC-004

Filing Date: January 12, 2000, As Corrected February 15, 2000, As Corrected February 29, 2000

Docket No. 25,207

DAVID MEIBOOM and GARY DOBERMAN,

Plaintiffs-Respondents,

v.

STEPHEN WATSON,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Susan M. Conway, District Judge

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OPINION

BACA, Justice.

{1} Petitioner-Defendant, Stephen Watson, challenges the Court of Appeals' holding that the district court erred by denying plaintiffs' motion for relief from a stipulated dismissal pursuant to Rule 1-060(B)(6) NMRA 1999. **See Meiboom v. Watson**, 1998-NMCA-91, P17, 125 N.M. 462, 963 P.2d 539. We have jurisdiction pursuant to NMSA 1978, § 34-5-14(B) (1972), and on certiorari we consider: 1) whether the Court of Appeals, by concluding that the district court retained jurisdiction over plaintiffs' Rule 1-060(B)(6) motion, improperly overruled this Court's opinion in **King v. Lujan**, 98 N.M. 179, 646 P.2d 1243 (1982), which held that the statute of limitations is **not** tolled by a dismissal for lack of prosecution; and 2) whether the Court of Appeals erred by concluding that the district court failed to fully evaluate the merits of plaintiffs' motion. Although we conclude the district court improperly denied plaintiffs' motion for lack of jurisdiction, we hold that **King** was not overruled. We also reverse the Court of Appeals' holding that the district court failed to fully evaluate the merits of the motion and we affirm the district court's denial of plaintiffs' Rule 1-060(B)(6) motion.

I.

{2} This case arose from a failed business relationship. In 1984, Watson started a small business to produce and sell paper products made from cotton denim rag scraps. In 1990, Watson entered into a business relationship with Gary Doberman and David Meiboom to establish Denim Paper Products, Inc., a rag waste recycling business. By February 1991, both parties had a falling out and retained counsel. In April 1994, the parties reached an agreement to dissolve the partnership. As part of the agreement, Watson agreed to purchase plaintiffs' stock in the company and agreed to disclose the status of existing and potential contracts with Denim Paper.

{3} In October 1993, two years after the agreement, plaintiffs filed a complaint alleging that

Watson had made fraudulent misrepresentations about the status of Denim Paper's negotiations with Levis Strauss & Co. In November 1993, Watson filed a motion to dismiss the complaint for failure to plead fraud with sufficient particularity. In January 1994, the district court granted the motion to dismiss without prejudice and allowed plaintiffs to file an amended complaint. Plaintiffs amended the complaint and Watson filed another motion to dismiss on the same grounds. In April 1994, the district court agreed that the amended complaint again failed to plead fraud with particularity, but still granted the motion in part and denied it in part, allowing the complaint to proceed only as to those areas where plaintiffs' attorney provided specific responses to the allegations of fraud. The district court also limited discovery and recommended that plaintiffs depose key witnesses so that it could "decide if we have a cause of action here."

{4} In February 1995, the district court found that no significant action had been taken on the case and, sua sponte, dismissed the action without prejudice for lack of prosecution. Plaintiffs moved to reinstate the case, and despite the motion's failure to comport with local rules and its characterization by the district court as "the barest motion I've seen in ten years on the bench," the court nonetheless agreed to reinstatement subject to plaintiffs satisfying certain conditions. The conditions included deposing key witnesses by a certain date and preparation of pretrial orders. Plaintiffs failed to comply with the court's conditions. On June 28, 1995, the district court approved a stipulated dismissal of the complaint and the order was filed on August 15, 1995.

{5} Represented by new counsel, plaintiffs filed a Rule 1-060(B)(6) motion for relief from the stipulated dismissal on August 29, 1996, more than one year after the dismissal order was filed. They alleged that their previous attorney repeatedly misled them and lied about the status of their case well after it was dismissed.

{6} Watson opposed the motion arguing that, based on our reasoning in **King v. Lujan**, the district court lacked jurisdiction to grant relief because the statute of limitations had expired on the original cause of action. **See King**, 98 N.M. 179, 646 P.2d 1243. Alternatively, Watson argued that the plaintiffs failed to establish "exceptional circumstances" sufficient to support relief under Rule 1-060(B)(6). **See Marberry Sales Inc. v. Falls**, 92 N.M. 578, 580, 592 P.2d 178, 180 (1970). In November 1996, the district court addressed the merits of the motion but found that, based on **King**, the jurisdictional issue controlled the disposition of the matter and denied plaintiffs' motion to reinstate the case.

{7} Distinguishing the facts of this case from **King**, and relying on **Wershaw v. Dimas**, 1996-NMCA-118, P4, 122 N.M. 592, 929 P.2d 984, and **Gathman-Matotan Architects and Planners, Inc. v. State Dep't of Fin. & Admin.**, 109 N.M. 492, 494-95, 787 P.2d 411, 413-14 (1990), the Court of Appeals reversed the district court. **Meiboom**, 1998-NMCA-91, PP1, 9, 125 N.M. at 463, 464, 963 P.2d at 540, 541. The Court of Appeals in **Meiboom** held that the district court had jurisdiction to consider the merits of the motion despite the expiration of the statute of limitations, 1998-NMCA-91, PP1, 9, 125 N.M. at 463, 464, 963 P.2d at 539, and remanded the matter for a hearing on the merits, **see Meiboom**, 1998-NMCA-91, P13, 125 N.M. at 465, 963 P.2d at 542, concluding the district court "did not thoroughly evaluate the parties' evidence on the merits of the Plaintiffs' motion for reinstatement," **Meiboom**, 1998-NMCA-91, P16, 125 N.M. at 465, 963 P.2d at 542. Defendant now appeals this ruling, arguing essentially two points. First, Watson argues that the Court of Appeals impermissibly overruled this Court's opinion in **King v. Lujan** and therefore asserts that the district court correctly determined that **King** deprived the district court of jurisdiction. In the alternative, Watson argues if the district court did have jurisdiction then it properly evaluated the merits of the case, and therefore that the Court of Appeals erred in remanding for a more thorough evaluation.

{8} We hold that the district court improperly based its denial of plaintiffs' motion for lack of jurisdiction on **King**. In addition, since we conclude that **King** and **Wershaw** are both premised on a Rule 1-041(E)(2) NMRA 1999 (as amended

through 1990) analysis, which we identify as significantly different than the Rule 1-060(B)(6) motion at issue here, we find that they are not controlling authority in this case. As such, we hold that the Court of Appeals' decision does not overrule **King**. We also reverse the Court of Appeals' order remanding the matter and conclude that the district court sufficiently addressed the merits of plaintiffs' motion. Accordingly, we affirm the district court's denial of plaintiffs' motion on the merits.

II.

{9} Although we ultimately conclude that the district court's reliance on **King** to deny plaintiffs' motion for lack of jurisdiction was improper, we disagree with Watson's claim that the Court of Appeals' opinion in **Meiboom** overrules **King**. The Court of Appeals correctly determined that **King** 's analysis of the statute of limitations issue did not deprive the district court of jurisdiction. However, its interpretation and application of **Wershaw** and **Gathman-Matotan** to support the conclusion that the district court had jurisdiction in this matter is misplaced.

A.

{10} At the November 1996 hearing to consider plaintiffs' request for relief, the district court judge denied the motion for lack of jurisdiction concluding "the basis of [my ruling] is basically **King v. Lujan**." The Court of Appeals correctly determined that the district court erred by relying on **King** to conclude that it lacked jurisdiction because the statute of limitations had run.

{11} In **King**, this Court held that the statute of limitations is not tolled by a suit dismissed without prejudice. 98 N.M. at 181, 646 P.2d at 1245; **see also Gathman-Matotan** 109 N.M. at 495, 787 P.2d at 414 (limiting **King** 's scope to dismissals for lack of prosecution). **King** held that because the statute of limitations had run four years before plaintiff had filed a motion to reinstate the case, the trial court lacked jurisdiction and thus erred by granting plaintiff's motion to reinstate. **King**, 98 N.M. at 181, 646 P.2d at 1245. The Court also balanced the interests of the parties stating that "[a] party who has slept on his rights should not be permitted to harass the opposing party with a pending action for an unreasonable time." **Id**.

{12} In assessing the applicability of **King** to the facts of this case, we disagree with the district court's conclusion that **King** "must have been a 60(B)(6) case because the reinstatement was well over a year after the order of dismissal for lack of prosecution." In **King,** the Court never explicitly states the specific rule by which the moving party sought relief. Our own review of **King** leads us to conclude that those plaintiffs were seeking relief under Rule 1 -041(E)(2), which governs reinstatement of matters dismissed for lack of prosecution. The opinion makes several references to and discusses the guiding principles of Rule 1-041 and makes no reference to Rule 1-060(B)(6). **See King**, 98 N.M. at 180-81, 646 P.2d at 1244-45. Both **Wershaw**, 122 N.M. at 594, 929 P.2d at 986, and **Gathman-Matotan**, 109 N.M. at 494-95, 787 P.2d at 414-14, cite **King** with approval and both discuss the relationship between Rule 1-041 dismissals for lack of prosecution and statute of limitations concerns. Since we conclude that the decision in **King** was premised on Rule 1-041(E)(2), while plaintiffs in the present case seek relief under Rule 1-060(B)(6), **King** has no relevance to this case.

{13} Thus, we disagree with the district court's conclusion that based on **King**, "this Court does not have the jurisdiction to reinstate the case because the statute of limitations . . . has passed." If we were to agree with the district court's interpretation that **King** was in fact a Rule 1-060(B)(6) case, it would serve to obviate the underlying purposes of Rule 1-060(B)(6). It would render nonexistent the ability of a court's equitable powers to grant relief from final judgment in Rule 1-060(B)(6) cases after the statute of limitations has run. **See In Re Drummond**, 1997-NMCA-94, P16, 123 N.M. 727, 945 P.2d 457 (affirming trial court's reopening an adoption decree for a "best-interests-of-the-child-determination" after the statutory one-year deadline for attacking decrees

had passed because exceptional circumstances existed); **Wehrle v. Robison**, 92 N.M. 485, 486-87, 590 P.2d 633, 634-35 (1979) (stating that a request for relief from a property settlement agreement incorporated into a dissolution of marriage decree, based on mistake, fraud, and misrepresentation, could be made outside statutory time limit if within the deadlines in Rule 1-060(B)); **see also Fuller v. Quire**, 916 F.2d 358, 360-61 (6th Cir. 1990) (affirming district court's reinstatement of personal injury action under Fed. R. Civ. P. 60(b)(6), two years after dismissal, and five years after the accident, where attorney's inexcusable misconduct resulted in dismissal for lack of prosecution); **McKinney v. Boyle**, 404 F.2d 632, 634 (9th Cir. 1968) (directing district court to consider reinstatement under Fed. R. Civ. P. 60(b)(6), five-and-a-half years after dismissal of personal injury action, where attorney did not have authority to settle; on remand, the trial court could consider whether the motion was filed within a reasonable time); **but see State ex rel. Speer v. District Court**, 79 N.M. 216, 221, 441 P.2d 745, 750 (1968) (stating that notwithstanding the one-year limitation for seeking relief from judgments obtained through fraud under what is now Rule 1-060(B), the limitations provisions in NMSA 1953 § 75-18-8(H) took precedence over Rule 1-060(B) rights.) Interpreting **King** as being based on Rule 1-041 avoids these consequences.

{14} We emphasize that we are not overruling **King** but rather clarifying its scope. Our interpretation does not abrogate **King** 's principle that "[a] party who has slept on his rights should not be permitted to harass the opposing party with a pending action for an unreasonable time." **King**, 98 N.M. at 181, 646 P.2d at 1245. There is, however, an overriding interest in protecting the finality of judgments and we believe that the requirements for granting Rule 1-060(B)(6) relief are sufficient to avoid unfairly subjecting non-moving parties to the threat of indefinitely extending the time for bringing suit or seeking relief from final judgments. As such, we do not disturb **King** 's holding that "when an action is dismissed without prejudice because of a failure to prosecute, the interruption [of the statute of limitations] is considered as never having occurred." **King**, 98 N.M. at 180-81, 646 P.2d at 1244-45. **B.**

{15} Relying on **Wershaw**, the Court of Appeals determined that the district court had jurisdiction to consider the merits of plaintiffs' Rule 1-060(B)(6) motion. **Meiboom**, 1998-NMCA-91, PP9-10, 125 N.M. at 464, 963 P.2d at 541. The Court of Appeals' application of **Wershaw** 's holding that a case may be reinstated even after the statute of limitations has run, upon a timely showing of good cause, is inapposite to the facts of this case. **See Wershaw**, 122 N.M. at 594, 929 P.2d at 986.

{16} **Wershaw** held that the expiration of the statute of limitations does not prevent reinstatement of a case where a matter has been dismissed for lack of prosecution upon a showing of good cause.[1] **See id**. **Wershaw** stated that because the rules of civil procedure had changed since **King**, it was unnecessary to file a new complaint to reinstate a case that had been dismissed without prejudice for lack of prosecution. 122 N.M. at 594, 929 P.2d at 986; **see** Rule 1-041(E)(2). We do not disturb **Wershaw** 's holding.

{17} We do, however, disagree with the Court of Appeals' interpretation of **Wershaw** to the extent that it ignored the different effect that statute of limitations concerns have on Rule 1-041(E)(2) and 1-060(B) motions. **See Meiboom**, 1998-NMCA-91, PP10-14, 17, 125 N.M. at 464-465, 963 P.2d at 541-542. **Wershaw** involved a Rule 1-041(E)(2) motion **timely** filed within thirty days of dismissal for lack of prosecution, while this case involves a motion for relief under Rule 1-060(B)(6) filed over one year **after** a stipulated dismissal. The Court of Appeals concluded that these distinctions were "inconsequential" and that instead, **Wershaw**, like this case, involved a "running of the statute of limitations" issue. **Meiboom**, 1998-NMCA-91, P10, 125 N.M. at 464, 963 P.2d at 541.

[1] We note, however, that if the statute of limitations had expired and the moving party filed outside the thirty-day time limit, relief under Rule 1-041(E)(2) would be denied and the district court would lack jurisdiction to reinstate the case.

{18} We disagree. This case does not involve a motion for relief under Rule 1-041(E)(2), nor does the fact that plaintiffs' case was reinstated subject to conditions that were never satisfied place this matter within the scope of Rule 1-041(E)(2). Both Watson and plaintiffs voluntarily stipulated to a dismissal, and thus the Court of Appeals' analysis of Rule 1-041(E)(2) and references to **King, Gathman-Matotan**, and **Wershaw** are not relevant.

{19} By relying on **Wershaw** to reverse the district court, the Court of Appeals ignored the significantly different requirements for relief contained in Rules 1-041(E)(2) and 1-060(B)(6). We think it relevant that **Wershaw** involved a motion timely filed within the thirty-day limit, while here, plaintiffs' motion for relief was filed over one year after a voluntary dismissal. A party seeking reinstatement under Rule 1-041(E)(2) has thirty days to file a motion. Rule 1-060(B)(6), on the other hand, has no specific time limitation and instead requires only that the motion be filed within a "reasonable time." Rule 1-041(E)(2) requires only a showing of good cause, **see Wershaw** 122 N.M. at 594, 929 P.2d at 986, while Rule 1-060(B)(6) has a higher standard requiring that the moving party demonstrate exceptional circumstances, **see Resolution Trust Corp. v. Ferri**, 120 N.M. 320, 324, 901 P.2d 738, 742 (1995). For these reasons, we conclude the district court erred when determining it did not have jurisdiction under **King**.

C.

{20} This Court may "affirm a district court ruling on a ground not relied upon by the district court, [but] will not do so if reliance on the new ground would be unfair to appellant." **State v. Franks**, 119 N.M. 174, 177, 889 P.2d 209, 212 (citation omitted). This Court, however, "on appeal . . . will not assume the role of the trial court and delve into . . . fact-dependant inquiries." **Pinnell v. Board of County Comm'rs**, 1999-NMCA-74, P14, 127 N.M. 452, 982 P.2d 503. In **Allsup's Convenience Stores Inc. v. North River Ins. Co.**, we stated, "While we could affirm a trial ruling which is right for the wrong reason we may not do so in the absence of any substantial evidence supporting what would be the right reason." 1999-NMSC-6, P20, 127 N.M. 1, 976 P.2d 1 (citation omitted). Here, substantial evidence existed to support the district court's decision to deny plaintiffs' Rule 1-060(B)(6) motion. Thus, even if the district court offered erroneous rationale for its decision, it will be affirmed if right for any reason. Although the district court's decision was primarily based on its misapprehension of **King**, we find sufficient evidence in the record to support the conclusion that plaintiffs failed to meet the reasonable time requirement necessary for relief under Rule 1-060(B)(6).

{21} Having concluded that neither **King** nor **Wershaw** are applicable to this case, we now turn to the question of what is procedurally required before a district court can rule on the merits of a Rule 1-060(B)(6) motion. We have stated that "the voluntary dismissal of a suit leaves a situation, . . . the same as though the suit had never been brought; . . . all prior proceedings and orders in the case are vitiated and annulled, and jurisdiction of the court is immediately terminated." **McCuistion v. McCuistion**, 73 N.M. 27, 29, 385 P.2d 357, 358 (1963). It is our task to determine the factors, under Rule 1-060(B)(6), a court must consider when evaluating whether the procedural requirement of reasonable time has been met.

{22} Resolution of this question is not determined only by an assessment of whether the statute of limitations has run. Instead, the language of Rule 1-060(B)(6) states that the motion "shall be made within a reasonable time." In **Freedman v. Perea**, we stated, "The only time limit on a motion seeking relief under Rule 60(b)(6) is that it be made within a reasonable time." 85 N.M. 745, 746-47, 517 P.2d 67, 68-69 (1973) (quoting **Chavez v. Village of Cimarron**, 65 N.M. 141, 146, 333 P.2d 882, 885 (1958)); **see also Watkins v. Lundell**, 169 F.3d 540, 544 (8th Cir. 1999) (stating that, "before considering the merits of a Rule 60(b)(6) motion, we must consider whether the motion was made within a reasonable time."). Therefore, we believe the reasonable time determination is a threshold inquiry.

{23} The reasonable time standard has generally been undefined. In **Freedman**, this Court stated, "What constitutes a reasonable time . . . depends on the circumstances of each case." 85 N.M. at 747, 517 P.2d at 69; **see also Home Savings and Loan Ass'n v. Esquire Homes, Inc.**, 87 N.M. 1, 2, 528 P.2d 645, 646 (1974).

{24} In attempting to define what constitutes "the circumstances of each case," reference to federal precedent is instructive. Federal Rule of Civil Procedure 60(b)(6), which is similar to New Mexico's Rule 1-060(B)(6), also has a reasonable time provision. In determining whether a 60(b)(6) motion has been timely filed, federal courts have considered numerous factors, including: "the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and [the consideration of] prejudice [if any] to other parties." **Kagan v. Caterpillar Tractor Co.**, 795 F.2d 601, 610 (7th Cir. 1986) (quoting **Ashford v. Steuart**, 657 F.2d 1053, 1055 (9th Cir. 1981) (per curiam) (alteration in original)); **see also In re Emergency Beacon Corp.**, 666 F.2d 754, 760 (2nd Cir. 1981) ("What qualifies as a reasonable time . . . depends largely on the facts of a given case, including the length and circumstances of the delay and the possibility of prejudice to the opposing party."); **Gilbert v. Dresser Indus. Inc.**, 158 F.R.D. 89, 96 (N.D. Miss. 1993) ("What constitutes a reasonable time is interrelated with all other circumstances either mitigating against or justifying relief under the rule and balanced, as always, with the importance of preserving final judgments.") (citation and internal quotation marks omitted); 11 Charles Alan Wright & Arthur R. Miller, **Federal Practice & Procedure** P 2866, at 382-89 (2d ed. 1995) (discussing reasonable time requirement); 12 James W. Moore, **Moore's Federal Practice** P 60.65[1], at 60-197 to-99 (3d. ed. 1997).

{25} These factors share many similarities with an inquiry on the merits specifically with the factors used to determine whether the moving party has demonstrated "exceptional circumstances," **see** discussion **infra**, Part III. It is important to note that these are two separate, albeit, related inquiries. In some instances, because the facts relevant for a determination of the threshold procedural issue and those used for a determination on the merits, are the same, an examination of whether a motion was filed within a reasonable time will require an examination of the underlying merits of a Rule 1-060(B)(6) motion. **Cf. Emergency Beacon Corp.**, 666 F.2d at 760-61 (court made separate inquiry regarding whether motion was timely filed, and under separate heading discussed the merits of the moving party's motion for relief from the final judgment).

{26} In the present case the statute of limitations had expired several months before plaintiffs filed their Rule 1-060(B)(6) motion; additionally, the district court's findings show that plaintiffs filed their motion more than one year after the stipulated dismissal and approximately three months after plaintiffs state they learned their case had been voluntarily dismissed. **See Meiboom**,1998-NMCA-91, P6, 125 N.M. at 463-464, 963 P.2d at 540-541. Furthermore, the district court found that no significant activity occurred in approximately one-and-a-half years before it dismissed the case for lack of prosecution. These factors lead us to conclude plaintiffs did not file their motion within the procedurally required reasonable time limit. We also conclude this case may be disposed of by our conclusion that the district court both sufficiently addressed the merits of the plaintiffs' motion and correctly determined that plaintiffs failed to establish the exceptional circumstances necessary for reinstatement of their claim.

III.

{27} Watson challenges the Court of Appeals' determination that "the parties did not have the opportunity to fully argue the merits of their case . . . [and that the] district court [improperly] based its ruling on the statute of limitations." **Meiboom**, 1998-NMCA-91, P16, 125 N.M. at 465, 963 P.2d at 542. Although the Court of Appeals determined that the district court did not properly evaluate the merits of plaintiffs' motion

and remanded the case for consideration of the merits, **id.**, our review of the record indicates that the district court made sufficient findings on the merits to satisfy the standards set out in **Ferri**.

A.

{28} A review of the hearing transcript indicates that the district court believed that it could deny plaintiffs' motion both on the jurisdictional question and separately on its merits but believed the jurisdictional issues were dispositive. During the hearing, the court stated that it did not have jurisdiction to reinstate the case because the statute of limitations had run. After briefly discussing the attorney's conduct and that it was not reasonable for plaintiffs to rely on his assertions, the court stated, "but that's not the basis of my ruling particularly . . . [it is] **King v. Lujan**." Based on our foregoing discussion, we agree with the Court of Appeals' conclusion that the district court "erred in holding that it did not have jurisdiction to consider Plaintiffs' motion on the grounds that the statute of limitations had run." **Meiboom**, 1998-NMCA-91, P17, 125 N.M. at 465, 963 P.2d at 542. However, despite denying the motion on jurisdictional grounds the court made specific findings after having considered plaintiffs' and defendant's oral arguments, briefs, affidavits, and other supporting documents. In its ruling the district court found a prima facie case of gross attorney negligence. The court, however, also found that plaintiffs made no prima facie showing that it was reasonable for plaintiffs to rely on their attorney's assertions or that plaintiffs had exercised diligence in pursuing their claim. The court also found that Defendant would be prejudiced by granting plaintiffs relief to reinstate the case under Rule 1-060(B)(6) given that plaintiffs sought not only to reinstate the case, but to add new contract causes of action to their claim and to reinstate claims previously withdrawn by plaintiffs counsel. It is evident from these findings, the district court was applying a **Ferri** analysis to determine whether plaintiffs had proven that they were "diligent in pursuing all claims, but [were] thwarted in these efforts by the gross negligence of the attorney." 120 N.M. at 326, 901 P.2d at 744.

{29} We review the district court's ruling on plaintiffs' Rule 1-060(B)(6) motion for an abuse of discretion. **See Desjardin v. Albuquerque Nat'l Bank**, 93 N.M. 89, 91, 596 P.2d 858, 860 (1979). A reviewing court "cannot merely substitute its judgment for that of the trial court unless there has been a clear abuse of discretion." To reverse the trial court "it must be shown that the court's ruling exceeds the bounds of all reason . . . or that the judicial action taken is arbitrary, fanciful, or unreasonable." **Quintana v. Motel 6, Inc.**, 102 N.M. 229, 232, 693 P.2d 597, 600 (Neal, J., Dissenting) (citations omitted).

{30} Reviewing the district court's determination that Rule 1-060(B)(6) did not apply, we conclude that the district court's denial of plaintiffs' Rule 1-060(B)(6) motion did not exceed the bounds of all reason and that its decision was not arbitrary or unreasonable. Our examination of the record indicates that plaintiffs failed to satisfy the requirements for relief under Rule 1-060(B)(6). Under that rule, a party may seek relief from a final judgment or final order upon a motion filed within a reasonable time for any reason not outlined in Rule 1-060(B)(1)-(5). The language in Rule 1-060(B)(6) does not provide a list of requirements for relief and instead we must turn to common law precedent.

{31} "Rule 60(b)(6) provides a reservoir of equitable power to do justice in a given case, but it is limited to instances where there is a showing of exceptional circumstances." **Battersby v. Bell Aircraft Corp.**, 65 N.M. 114, 332 P.2d 1028 (1958); **see also Deerman v. Board of County Comm'rs**, 116 N.M. 501, 506, 864 P.2d 317, 322 (stating, "New Mexico . . . decisions have stated that a ground for relief under Rule 60(B)(6) must be 'extraordinary' or 'exceptional.'"); **Ackermann v. United States**, 340 U.S. 193, 199, 95 L. Ed. 207, 71 S. Ct. 209 (1950); 12 Moore, P 60.48[3][a] at 6-170 to -71; 11 Wright & Miller, § 2864, at 357 to -60.

{32} Here, plaintiffs allege that the gross negligence of their attorney is an exceptional circumstance warranting relief. In **Ferri**, this Court stated that in some circumstances, a moving party falls within the exception to the general rule that a party is bound by the acts and failures of their lawyers. 120 N.M. at 325, 901 P.2d at 743. A party alleging that their attorney's conduct was grossly negligent such that Rule 1-060(B)(6) relief is warranted, must demonstrate exceptional circumstances by showing that: (1) their attorney's conduct was grossly negligent; (2) the party seeking relief acted in a diligent and conscientious manner in pursuing their claim, **see Ferri**, 120 N.M. at 325-26, 901 P.2d at 743-44; (3) the moving party had a legitimate claim or defense, **see id.** at 323, 901 P.2d at 741; and (4) there is little, if any, likelihood of prejudice to the non-moving party should there be a vacation of the judgment, **cf. Ferri**, 120 N.M. at 325-26, 901 P.2d at 743-44.

{33} Under the first prong, parties seeking relief under Rule 1-060(B)(6) must demonstrate the "existence of exceptional circumstances and reasons for relief other than those set out in Rules 1-060(B)(1) through (5)." **Id.** at 324, 901 P.2d at 742 (quoting **Rodriguez v. Conant**, 105 N.M. 746, 750, 737 P.2d 527, 531 (1987)); **see also, Wehrle v. Robison**, 92 N.M. 485, 487, 590 P.2d 633, 635 (1979). Normally, claims of attorney negligence fall within the ambit of Rule 1-060(B)(1) and "absent additional facts demonstrating exceptional circumstances [it] is not sufficient to invoke [Rule] 1-060(B)(6)." **Ferri**, 120 N.M. at 325, 901 P.2d at 743. However, as **Ferri** states, "when an attorney's conduct rises to the level of **gross negligence**," as is claimed here, "the trial court may find exceptional circumstances warranting reopening a default judgment under SCRA 60(B)(6)." 120 N.M. at 325, 901 P.2d at 743.

{34} Plaintiffs claim that their attorney dismissed the case without their authority, consent, or knowledge. In addition, they claimed that even "until April of 1996, eight months after the stipulated dismissal, their attorney misled Mr. Doberman into believing that the case was still pending and that he was reviewing discovery." Doberman's supplemental affidavit included a list of dates and times of one- or two-minute long-distance calls to their attorney's office and asserts that he inquired about the case and was told that everything was going fine.

{35} Plaintiffs claim that they knew nothing of the dismissals for lack of prosecution or subsequent reinstatements and that they never consented to the stipulated dismissal. In addition, they allege that on several occasions they contacted their attorney to inquire about the status of their case and were repeatedly told that "things were fine," even after entry of the final order of dismissal. Assuming arguendo, as the district court did, that plaintiffs' allegations were true, we could conclude that their attorney's conduct was sufficient to rise to the level of gross negligence, satisfying the first requirement under Rule 1-060(B)(6). **See L. P. Steuart, Inc. v. Matthews**, 117 U.S. App. D.C. 279, 329 F.2d 234, 235 (D.C. Cir.1964) (stating that Rule 60(b)(6) "is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client."). In the present case, the district court found that "under **Ferri**, I would assume gross negligence [by plaintiffs' attorney] - or certainly there's a prima facie case having been made of gross negligence." We do not disturb that conclusion. We are satisfied, based on our review of the record, that the attorney's alleged conduct deviated "so far from the expected standard that it constituted gross neglect." Susan Marie Lapenta, **Inryco, Inc. v. Metropolitan Engineering Co.: Inexcusable Neglect By Whom?**, 45 U. Pitt. L. Rev. 695, 700 (1984).

{36} To satisfy the second requirement, a moving party has the burden of "demonstrating that he or she was diligent in pursuing all claims but was thwarted in those efforts by the gross negligence of the attorney." **Ferri**, 120 N.M. at 326, 901 P.2d at 744; **see also Inryco, Inc. v. Metropolitan Eng'g Co.**, 708 F.2d 1225, 1234 (7th Cir. 1983) (stating that "courts allowing [Rule 60(b)] relief uniformly require a diligent, conscientious client").

{37} The district court found that plaintiffs had not made a prima facie case that it was reasonable to rely on the assertions of their attorney when nothing had happened in their case for a year-and-a-half before the dismissal for lack of prosecution. Having duly considered all of the evidence, the district court properly concluded that plaintiffs, under the **Ferri** standard, were not diligent in pursuing their claims. In supplemental affidavits detailing phone calls to their attorney, Doberman claims that he inquired about his case; however, he concedes that he was the attorney's tax consultant and that many of the calls may have been related to tax matters. Although other courts have granted Rule 1-060(B)(6) relief in cases where the moving party established that they took affirmative steps to pursue their claims, we are not mandated to do so. The district court was in a better position than we are, having presided over numerous delays and motions to dismiss and reinstate, to determine, based on all the Rule 1-060(B)(6) motion's supporting documents, whether plaintiffs failed to actively pursue their claim.

{38} Plaintiffs contend that this holding imposes a heretofore unrecognized duty on plaintiffs to keep abreast of their claims and "make the client responsible for keeping himself independently informed about the status of his case and his legal rights and obligations." We disagree. The **Ferri** standard reflects a balancing of equitable interests between parties. Thus, where a party is seeking relief from a final order, we believe that the moving party should not presumptively be assumed to have acted diligently.

{39} Under the third prong, the moving party must establish that its underlying claims were legitimate. Although the district court made no specific findings on this issue, we find it instructive that during an earlier hearing on plaintiffs' motion for reinstatement, the district court allowed plaintiffs' original attorney to orally respond to the court's questions concerning plaintiffs' allegations. We may assume that plaintiffs' claims, specifically those that survived Watson's two motions to dismiss, were legitimate if the district court saw fit to allow them to continue. Although the district court expressed some reservations about the legitimacy of plaintiffs' claims due to the limited amount of discovery that had occurred, we will not second guess the district court's decision to reinstate the case in April 1994.

{40} Finally, the moving party is required to demonstrate there is little likelihood of prejudice to the non-moving party should relief be granted. **Cf. Ferri**, 120 N.M. at 326, 901 P.2d at 744. The district court found that because plaintiffs would attempt to add new contract causes of action and reinstate other claims previously withdrawn, defendant would be prejudiced by a reinstatement of the action.

{41} Therefore, based on the findings of the district court that there was a substantial likelihood of prejudice to Watson and that the plaintiffs did not diligently pursue their claim, we conclude that plaintiffs failed to satisfy the Rule 1-060(B)(6) requirements for relief under **Ferri** and hold that the district court did not abuse its discretion by denying the motion.

IV.

{42} For the foregoing reasons, we reverse the Court of Appeals and affirm the district court's denial of plaintiffs' Rule 1-060(B)(6) motion for relief.

{43} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Chief Justice

GENE E. FRANCHINI,
Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2000-NMSC-009

Filing Date: March 9, 2000

Docket No. 25,604

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DANNY A. CUNNINGHAM,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Jay W. Forbes, District Judge

Phyllis H. Subin, Chief Public Defender
Will O'Connell, Assistant Appellate Defender
Santa Fe, NM

for Appellant.

Patricia A. Madrid, Attorney General
Arthur W. Pepin, Assistant Attorney General
Santa Fe, NM

for Appellee.

OPINION

BACA, Justice.

{1} Danny A. Cunningham was convicted of deliberate-intent first-degree murder contrary to NMSA 1978, § 30-2-1(A)(1) (1994), and sentenced to life in prison. Cunningham appeals his conviction alleging (1) that the trial court committed fundamental error by failing to instruct the jury on the essential element of unlawfulness once Cunningham had raised the issue of self-defense, and (2) that there was insufficient evidence to prove beyond a reasonable doubt that he formed the mens rea required to sustain his deliberate-intent first-degree murder conviction. We conclude that there was no fundamental error and that there was sufficient evidence of deliberate intent to support the jury's verdict. Cunningham's conviction is therefore affirmed.

I.

{2} In the early morning hours of September 15, 1996, Cunningham and Manuel Vasquez engaged in a shootout in the streets of Carlsbad. Mr. Vasquez was fatally wounded during the altercation and Cunningham was shot in the chest. Cunningham admitted firing numerous shots at Mr. Vasquez, but alleged he did so in self-defense.

{3} Cunningham and the State presented different accounts of the altercation. Cunningham, testifying in his own defense, stated that he was on his way to the river when he encountered a weaving vehicle that he did not recognize. Cunningham testified that only after the other vehicle had executed a U-turn, shined a spotlight in his face, and began shooting at him, did he recognize the driver of the other vehicle as Mr. Vasquez. According to Cunningham, Mr. Vasquez then rammed his truck, pinning his vehicle against a rock wall and a tree. Cunningham returned fire, first with his .22 caliber pistol and then with his .380 caliber pistol, emptying each in turn. He then fired one last bullet from a .357 magnum revolver, hitting Mr. Vasquez in the head, killing him.

{4} Contrary to Cunningham's testimony, the State painted a picture of an ongoing feud between Cunningham and Mr. Vasquez. The State's first witness, Stacie Wallen, testified that she was with Mr. Vasquez a few months earlier when after a high speed chase Cunningham threatened to kill Mr. Vasquez, saying, "I'll kill you, I'll shoot you, I don't care." Cunningham maintained that

he never threatened Mr. Vasquez and only "knew of him."

{5} The State also offered the testimony of Carlos Perez, who immediately before the altercation, saw two trucks following each other at a high rate of speed, nearly bumper to bumper. He identified the first truck as that owned by Mr. Vasquez but was unable to identify the second truck as that owned by Cunningham. The State suggested that this proved that Cunningham was chasing Mr. Vasquez immediately prior to the altercation.

{6} Another State witness, Jean Jones, testified that she looked out her bedroom window after the noise of vehicles colliding into each other and sound of gunfire woke her. She saw that two vehicles had crashed through her rock wall and stopped when they hit her pecan tree. She also testified that she saw a man get out of his truck and momentarily walk up to the other truck before returning to his vehicle and departing the scene. Cunningham, however, stated that he did not remember exiting his vehicle and that he departed as soon as he could. Cunningham could not explain why his .380 caliber handgun along with numerous shell casings were found on the ground outside of Mr. Vasquez' vehicle. Charlie Jones, husband of Jean Jones, testified that he heard a volley of approximately seven or eight shots before he headed down the stairs of their home. While on his way down the stairs, his wife told him that someone was getting out of the truck, and then he heard one other distinct shot. Based on this testimony, the State maintained that Cunningham was the aggressor in causing the altercation and that Cunningham had deliberately, and with premeditation fired the final fatal shot from the .357 magnum revolver once Mr. Vasquez was immobilized. Therefore, the State argued that Cunningham was not entitled to acquittal based on his claim of self-defense.

{7} The jury was instructed on the elements of deliberate-intent first-degree murder pursuant to UJI 14-201 NMRA 1999.[1] The jury was also instructed on the elements of second-degree murder, voluntary manslaughter, and involuntary manslaughter. The jury also received a separate instruction premised on UJI 14-5171 NMRA 1999, the general self-defense instruction.[2] The jury returned a verdict finding Cunningham guilty of deliberate-intent murder, and the judge sentenced him to life in prison.

{8} Cunningham now maintains, relying on the reasoning in **State v. Parish**, 1994-NMSC-72, 118 N.M. 39, 878 P.2d 988 (1994), that the jury instructions were fundamentally flawed by failing to include any reference to "unlawfulness"

[1] The jury instruction provided on deliberate-intent first-degree murder read:

For you to find the defendant guilty of First Degree Murder by a Deliberate Killing, the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

(1) The defendant killed Manuel Vasquez;

(2) The killing was with deliberate intention to take away the life of Manuel Vasquez;

(3) This happened in New Mexico on or about the 15th day of September, 1996.

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.

[2] UJI 14-5171 on self-defense was given as follows:

Evidence has been presented that the defendant killed Manuel Vasquez in self-defense.

The killing is in self defense if:

(1) There was an appearance of immediate danger of death or great bodily harm to the defendant as a result of Manuel Vasquez' use of his vehicle to force Danny Cunningham's vehicle through a rock fence, pinning him there and firing a rifle at him; and

(2) The defendant was in fact put in fear by the apparent danger of immediate death or great bodily harm and killed Manuel Vasquez because of that fear; and

(3) A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self defense. If you have a reasonable doubt as to whether the defendant acted in self defense you must find the defendant not guilty.

in the instruction on deliberate-intent murder.[3] However, Cunningham did not object to the jury instructions as given, and therefore we only review for fundamental error. **See State v. Acosta**, 1997-NMCA-35, 123 N.M. 273, 939 P.2d 1081 (reviewing for fundamental error, an issue not properly preserved and raised for the first time on appeal), **cert. granted**, 123 N.M. 215, 937 P.2d 76 (1997), **cert. quashed**, 124 N.M. 312, 950 P.2d 285 (1997). Additionally, Cunningham maintains that there was insufficient evidence to prove beyond a reasonable doubt that he formed the requisite mens rea required to sustain his deliberate-intent murder conviction. We review each of these claims in turn.

II.

{9} Cunningham correctly asserts that unlawfulness is an element of deliberate-intent murder. Our deliberate-intent first-degree murder statute, NMSA 1978, § 30-2-1(A)(1) (1994), provides that murder is the "killing of one human being by another without lawful justification or excuse." It is presumed that any killing of another is unlawful unless that killing is justified or excused. **See State v. Noble**, 90 N.M. 360, 364, 563 P.2d 1153, 1157 (1977) ("Every killing of a person by another is presumed to be unlawful, and only when it can be shown to be excusable or justifiable will it be held otherwise."). Self-defense as a lawful justification to homicide is defined by NMSA 1978, § 30-2-7(A) (1963). It states that, "Homicide is justifiable when committed . . . in the necessary defense of his life, his family or his property, or in necessarily defending against any unlawful action directed against himself, his wife or family[.]" § 30-2-7(A). Cunningham presented evidence "sufficient to raise a reasonable doubt in the minds of the jury as to whether or not" he acted in self-defense. **Parish**, 118 N.M. at 42, 878 P.2d at 991 (quoting **State v. Martinez**, 95 N.M. 421, 423, 622 P.2d 1041, 1043 (1981)). In fact, the Use Note to UJI 14-5171 on self-defense provides that if the instruction is to be given, then the language "The defendant did not act in self defense" should be inserted into the essential elements section of the jury instructions. Here, the unlawfulness of Cunningham's behavior was at issue and therefore a reference to unlawfulness or self-defense should have been included in the elements section of the jury instructions. However, that does not end our inquiry. The issue before us is whether the district court committed fundamental error by omitting the element of unlawfulness from the elements instruction on deliberate-intent murder when the jury also received a separate proper instruction on self-defense.

III.

{10} The scope of appellate review is defined by Rule 12-216 NMRA 1999. Generally, this Rule limits appellate review to issues that were properly preserved by invoking the trial court's discretion. Rule 12-216 makes it clear that a formal objection is not required in order to preserve the question for review so long as a "ruling or decision by the district court was fairly invoked." Rule 12-216(A). The doctrine of fundamental error, embodied in Rule 12-216(B)(2), is an exception to the general rule requiring preservation of error. This Court outlined the appellate procedure under a claim of fundamental error in **State v. Clark**, stating, "To the extent alleged violations rise to the level of fundamental error, the question will be reviewed on appeal and, if fundamental error exists, a new trial will be ordered." 108 N.M. 288, 297, 772 P.2d 322, 331 (1989), **habeas corpus granted on other grounds**, **Clark v. Tansy**, 118 N.M. 486, 882 P.2d 527 (1994).

{11} Here, Cunningham did not object to the instructions as tendered and he did not offer a curative instruction of his own. By not invoking the trial court's discretion with regard to the propriety of the jury instructions, Cunningham effectively waived appellate review of this issue. **See** Rule 12-216. However, errors in jury instructions have been reviewed for fundamental error in the past. **See State v. Osborne**, 111 N.M. 654,

[3] We note that Cunningham also alleges error in the omission of unlawfulness in the remaining homicide charges, but because he was convicted of deliberate-intent first-degree murder we limit our discussion to that charge.

662, 808 P.2d 624, 632 (1991) (holding that it was fundamental error not to instruct the jury on unlawfulness); **see also State v. Acosta**, 1997-NMCA-35, P21, 123 N.M. 273, 939 P.2d 1081; **State v. Armijo**, 1999-NMCA-87, P6, 127 N.M. 594, 985 P.2d 764. Therefore, we review Cunningham's claims for fundamental error.

A.

{12} Fundamental error in the context of a jury instruction case was first examined in **State v. Garcia**, 19 N.M. 414, 143 P. 1012 (1914). In **Garcia**, the defendant did not object to the jury instructions, and accordingly, the Court examined the claim of error under the doctrine of fundamental error, stating:

> There exists in every court . . . an inherent power to see that a man's fundamental rights are protected in every case. Where a man's fundamental rights have been violated, while he may be precluded by the terms of the statute or the rules of appellate procedure from insisting in this court upon relief from the same, this court has the power, in its discretion, to relieve him and to see that injustice is not done.

Id. 19 N.M. at 421, 143 P. at 1014-15 (opinion on rehearing). Further, **Garcia** emphasized that this Court should "exercise this discretion very guardedly, and only where some fundamental right has been invaded, and never in aid of strictly legal, technical, or unsubstantial claims. . . ." **Id.** This early case established important principles that provide the foundation for our analysis of Cunningham's claim.

{13} More recent cases have provided additional articulations of fundamental error. "Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." **State v. Garcia**, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942). "Each case will of necessity, under such a rule, stand on its own merits." **Id.** "The doctrine of fundamental error is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputably, or open to such question that it would shock the conscience to permit the conviction to stand." **State v. Rodriguez**, 81 N.M. 503, 505, 469 P.2d 148, 150 (1970) (holding that the record did not suggest the indisputable innocence of the appellant, or that his conviction would shock the conscience). "Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." **State v. Baca**, 1997-NMSC-45, P41, 124 N.M. 55, 946 P.2d 1066 (citing **State v. Aguilar**, 117 N.M. 501, 507, 873 P.2d 247, 253 (1994)).

{14} Given these principles, we hold that fundamental error did not occur in this case. Our task is to determine whether "a reasonable juror would have been confused or misdirected" by the jury instruction. **Cf. Parish**, 118 N.M. at 42, 878 P.2d at 991. We do not believe that a reasonable juror would have been confused by the proffered jury instructions. Self-defense was the only claim at issue since Cunningham admitted firing numerous rounds at Mr. Vasquez. Testifying in his own defense, Cunningham only discussed the events in terms of his self-defense. The jury was then given a separate proper self-defense instruction as provided for in UJI 14-5171. The instruction clearly stated, "If you have a reasonable doubt as to whether the defendant acted in self defense you must find the defendant not guilty." Since Cunningham's claim of self-defense was the major issue at trial, and the jury was properly instructed on self-defense, we do not believe that a reasonable juror would have been confused by the jury instructions. The issue of self-defense was at the "foundation of the case" but, because the jury was properly instructed on and decided the issue of self-defense, we do not believe that the omission from the elements section "[took] from the defendant a right which was essential to his defense." **Garcia**, 46 N.M. at 309, 128 P.2d at 462.

{15} This Court also addressed a claim of fundamental error in the context of a jury instruction case in **State v. Osborne**, 111 N.M. 654, 808 P.2d 624 (1991). **Osborne** held that it was fundamental error for a jury not to be instructed on the essential element of unlawfulness in the charge of criminal sexual contact of a minor under NMSA 1978, § 30-9-13 (Cum. Supp. 1990). The **Osborne** Court focused on the issues that the jury was required to decide: "The instructions failed to require the jury to resolve the issue, raised in the evidence at trial. . . ." 111 N.M. at 663, 808 P.2d at 633. Unlike **Osborne**, where the jury was not provided with the opportunity to decide if the defendant's conduct was unlawful because they were not given the appropriate jury instruction, in this case, the jury was provided with a separate self-defense instruction that required them to consider whether Cunningham's killing of Mr. Vasquez was in self-defense. We are convinced that the jury, when presented with the evidence and the jury instructions, concluded that Cunningham was not entitled to acquittal based on his claim of self-defense. We note that Cunningham's version of the facts was different from the State's version, but we trust the jury properly weighed each version. **See State v. Motes**, 118 N.M. 727, 730, 885 P.2d 648, 651 (1994) (noting that determinations of intent were for the jury) (citing **State v. Garcia**, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992)); **cf.** UJI 14-6006 NMRA 1999 (admonishing juries that they "are the sole judges of the facts in this case. It is your duty to determine the facts from the evidence produced here in court.") Furthermore, the evidence as given does not convince us that Cunningham's "innocence appears indisputably, or open to such question that it would shock the conscience to permit the conviction to stand." **Rodriguez**, 81 N.M. at 505, 469 P.2d at 150.

B.

{16} Cunningham places great reliance on our holding in **State v. Parish**, 1994-NMSC-72, 118 N.M. 39, 878 P.2d 988 (1994). He asserts that because this Court reversed in **Parish** when the elements instruction omitted a reference to self-defense or unlawfulness, a similar result is mandated here. Cunningham misinterprets **Parish** and his reliance thereon is misplaced. **Parish** properly analyzed the jury instructions under a reversible error standard because the defendant in **Parish** not only objected to the proffered instructions, he also offered his own correct instructions. **Parish**, 118 N.M. at 41, 44, 878 P.2d at 990, 993. These objections were sufficient to preserve the error for our general appellate review under Rule 12-216. Cunningham, on the other hand, made no objection and did not offer any curative instruction, and thereby, essentially waived appeal on the jury instruction issue absent our review for fundamental error. Since **Parish** was properly decided under a reversible error standard, and not a fundamental error standard, it is not binding in this case.

{17} Furthermore, the factual distinction between **Parish** and this case mandate a different result. The primary difference is that in **Parish** there were two errors in the jury instructions while there is only one error in this case. In **Parish**, this Court found reversible error in jury instructions that failed to instruct the jury on the element of unlawfulness. This Court found a second error in the self-defense instruction because it failed to properly place the burden on the State to prove the defendant did not act in self-defense. **See Parish**, 118 N.M. at 46, 878 P.2d at 995 ("We base our reversal of the manslaughter conviction on the two jury instruction errors just discussed."). The Court stated that an additional instruction could not have cured the omission because "even if the voluntary manslaughter and self-defense instructions are considered together, they do not clearly convey to a reasonable juror that the claim of self-defense negates a specific element of voluntary manslaughter." **Id.** at 118 N.M. at 44, 878 P.2d at 993. We believe that in this case, if the self-defense instruction is read in concert with the deliberate intent murder instruction, a reasonable juror would understand that an acquittal based on self-defense is inconsistent with a guilty verdict on first-degree deliberate-intent murder. Therefore, we find **Parish** both factually and legally distinct from this case.

C.

{18} We believe that this case is analogous to **State v. Armijo**, 1999-NMCA-87, 127 N.M. 594, 985 P.2d 764. **Armijo** discussed the omission of a reference to self-defense or unlawfulness from the elements instruction for aggravated battery when a separate instruction that properly allocated the burden of disproving self-defense was provided. 1999-NMCA-87, P11, 985 P.2d at 767. Thus, **Armijo** is quite similar to this case, in that faced with only one error, the defendant claimed that there was fundamental error. The **Armijo** Court did not highlight the analytical distinction between an evaluation based on the reversible error standard as applied in **Parish** and the fundamental error standard, and thus felt it necessary to factually distinguish **Parish**. **See Armijo**, 1999-NMCA-87, PP15-16, 985 P.2d at 768. We believe that the analysis under a fundamental error standard is distinct from the analysis under a reversible error standard. To claim otherwise would eliminate the preservation of error requirement of our appellate jurisprudence. It would also compromise the intent embodied in Rule 12-216, which makes fundamental error an exception to the general rule requiring preservation of error.

{19} Having factually distinguished **Parish**, the **Armijo** Court held that, "it is sufficient if it [the unlawfulness or self-defense element] is in the defense instruction, even if not in the elements instruction, provided that no other instruction causes the defense instruction to be confusing or meaningless." **Armijo**, 1999-NMCA-87, P26, 985 P.2d at 770. As discussed below, we agree with the proposition that a subsequent correct instruction can correct a deficient elements instruction and we agree with the result reached by the Court of Appeals in **Armijo** under the fundamental error standard.

D.

{20} In **State v. Acosta**, 1997-NMCA-35, 123 N.M. 273, 939 P.2d 1081, the Court of Appeals faced the same two errors at issue in **Parish**. However, the defendant in **Acosta**, like Cunningham, did not preserve the error for review and thus the Court of Appeals properly reviewed only for fundamental error. The **Acosta** Court held that it was fundamental error when the jury instructions omitted the element of unlawfulness once the issue of self-defense had been raised and also when the jury instructions failed to properly allocate the burden of disproving self-defense to the State. **Acosta**, 1997-NMCA-35, P21, 123 N.M. at 279-280, 939 P.2d at 1087-1088. In holding that the district court committed a fundamental error that could not be corrected, the **Acosta** court said, "Because this error in the essential-elements instruction was clear and unambiguous, it could not be cured by the presence of separate instructions for self-defense and defense of another." **Acosta**, 1997-NMCA-35, P18, 123 N.M. at 279, 939 P.2d at 1087 (citing **Parish**, 118 N.M. at 44, 118 P.2d at 993). We agree with the Court of Appeals that the particular error at issue in **Acosta** could not have been corrected by the subsequent self-defense instruction, because the self-defense instruction was also flawed in failing to properly place the burden on the State. **See Acosta**, 1997-NMCA-35, P21, 123 N.M. at 279-280, 939 P.2d at 1087-1088. However, here, we believe that the error in the deliberate-intent murder instruction was corrected by the subsequent proper self-defense instruction.

{21} In this regard, we recognize that we have previously stated, "that the failure to include an essential element in the elements instruction can **never** be corrected by including the concept elsewhere in the instructions." **State v. Clifford**, 117 N.M. 508, 511, 873 P.2d 254, 257 (1994) (emphasis added) (citing **State v. Bunce**, 116 N.M. 284, 861 P.2d 965 (1993)); **accord Acosta**, 1997-NMCA-35, P30, 123 N.M. at 281-282, 939 P.2d at 1089-1090 (Hartz, C.J., dissenting). We note that **Clifford** was decided under a reversible error standard and thus has limited applicability to this case. **Clifford**, 117 N.M. at 511-12, 873 P.2d at 257-58. Furthermore, the analysis under a reversible error standard is decidedly different than the analysis under a fundamental error standard. The main analytical distinction between a

fundamental error analysis and a reversible error analysis is the level of scrutiny afforded to claims of error. Parties alleging fundamental error must demonstrate the existence of circumstances that "shock the conscience" or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked. **Rodriguez**, 81 N.M. at 505, 469 P.2d at 150; **see Baca**, 1997-NMSC-45, P41, 124 N.M. at 63, 946 P.2d at 1074. Parties who have properly preserved an alleged error for appeal are afforded a much less onerous level of scrutiny under a reversible error standard as provided in **Parish**. Therefore, considering the heightened scrutiny of a fundamental error analysis, we hold that in a fundamental error analysis jury instructions should be considered as a whole and a failure to include an essential element in the elements section may be corrected by subsequent proper instructions that adequately addresses the omitted element. Therefore, **Clifford** has no applicability when evaluating a claim of error under the rubric of fundamental error. To the extent that **Clifford** can operate within the confines of the analysis contained in **Parish** under a reversible error standard, the language from **Clifford** is retained, however, we believe that **Parish** provides the proper inquiry and therefore we expressly reaffirm its analysis.

{22} In this case, the elements instruction which omitted the reference to self-defense or unlawfulness was corrected by the subsequent proper instruction on self-defense. The jury was required to decide the issue of unlawfulness and did so when they rejected Cunningham's claim of self-defense.

E.

{23} Finally, this Court in **Garcia** recognized that review for fundamental error was an exercise of the court's inherent power: "There exists in every court . . . an inherent power to see that a man's fundamental rights are protected in every case." 19 N.M. at 421, 143 P. at 1014-15 (opinion on rehearing). This Court, in **State v. Ortega** decided simply that it was not in the interest of justice to exercise this inherent power: "Here, we not only have confidence in the jury's verdict (guilty on two counts of felony murder); we think it would be a miscarriage of justice to upset the verdicts and remand for a new trial, the outcome of which most assuredly would be the same." 112 N.M. 554, 566-67, 817 P.2d 1196, 1208-09 (1991). Likewise, in **State v. Orosco**, 113 N.M. 780, 784, 833 P.2d 1146, 1150 (1992), this Court said, "The trial court's error in failing to instruct on an essential element of a crime for which defendant has been convicted, where there can be no dispute that the element was established, therefore does not require reversal of the conviction." Here, we are convinced that the element of unlawfulness was decided by the jury when they contemplated the separate self-defense instruction. We are further convinced that a reasonable juror, faced with the evidence presented at trial, found no lawful justification for Cunningham's actions, and that he was guilty of deliberate-intent murder. Therefore, it would be improper for this Court to exercise its inherent power in this case when it is unlikely that the interests of substantial justice would be furthered.

{24} Therefore, when the jury received a separate proper instruction on self-defense that provided the jury with the opportunity to decide the issue of unlawfulness the omission from the elements section of a reference to self-defense or unlawfulness in this case does not constitute fundamental error.

IV.

{25} Cunningham also maintains that there was insufficient evidence to prove beyond a reasonable doubt that he formed the requisite mens rea to sustain his deliberate-intent first-degree murder conviction. Cunningham correctly asserts that a conviction of deliberate-intent first-degree murder requires evidence proved beyond a reasonable doubt that he formed the intent to kill Mr. Vasquez prior to committing the act. **See** NMSA 1978, § 30-2-1(A)(1) (1994). "Deliberate intention" is defined as, "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." UJI 14-201 NMRA 1999.

{26} In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict. **See State v. Vernon**, 116 N.M. 737, 738, 867 P.2d 407, 408 (1993); **see also State v. Litteral**, 110 N.M. 138, 793 P.2d 268 (1990). "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, **any** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **State v. Garcia**, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992) (quoting **Jackson v. Virginia**, 443 U.S. 307, 317-19, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)).

{27} We believe that the State proved beyond a reasonable doubt several facts from which a reasonable juror could have found that Cunningham formed the deliberate and premeditated intent required to sustain his conviction. This is particularly true when considering that "intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence." **State v. Vigil**, 110 N.M. 254, 255, 794 P.2d 728, 729 (quoting **State v. Sparks**, 102 N.M. 317, 320, 694 P.2d 1382, 1385). A reasonable juror could have believed the assertions of the State premised on the testimony of Carlos Perez that Cunningham was the aggressor in chasing Mr. Vasquez, thereby causing the armed conflict. This is especially true if one considers the testimony of Stacie Wallen describing Cunningham's threat on Mr. Vasquez' life made after a previous high speed chase.

{28} A reasonable juror could have believed that Cunningham fired the last bullet from his .357 magnum revolver with the deliberate intent to kill Mr. Vasquez as the State maintained. The testimony of both Mr. and Mrs. Jones combined with that of the investigating officer tend to prove that Cunningham exited his vehicle and emptied his .380 handgun while standing next to or in a close proximity to Mr. Vasquez' vehicle. However, Mr. Vasquez was not killed with a .380 shot but with a single shot from Cunningham's .357. The State proved that only one shot out of six had been used in Cunningham's .357 magnum revolver. This fact combined with the testimony of Mr. Jones who said that he heard one distinct shot in addition to the other shots tends to prove that Cunningham had returned to his vehicle after emptying his .380 and deliberately and intentionally fired the fatal shot after Mr. Vasquez was incapacitated and defenseless. A reasonable juror could have concluded that this was an act of a man who had decided "as a result of careful thought and the weighing of the consideration" that he was going to take the life of Mr. Vasquez and he did so by firing the final shot from the .357 magnum revolver. **See** UJI 14-201 NMRA 1999.

{29} Cunningham also relies on **State v. Garcia**, 114 N.M. 269, 837 P.2d 862 (1992), to assert that there was insufficient evidence to prove beyond a reasonable doubt that he formed the mens rea required to sustain his deliberate-intent first-degree murder conviction. However, in **Garcia** reversal was predicated on a factual situation where this Court found no evidence supporting the jury's conclusion that Garcia had weighed and considered the question of killing. **Garcia**, 114 N.M. at 274, 837 P.2d at 867. The Court in **Garcia** considered whether Garcia's statement, "Remove Ray [the victim] away from me or you're not going to see him for the rest of the day," provided the foundation for an inference of deliberation. **Garcia**, 114 N.M. at 275, 837 P.2d at 868. The Court concluded that Garcia's statement did not provide such an inference stating, "Although it suggests that Garcia intended to fight Gutierrez, it certainly does not indicate an intent to kill." **Id.** However, this case is factually different from **Garcia**. Here, according to Stacie Wallen's testimony, Cunningham said, "I'll kill you, I'll shoot you, I don't care." That statement is an unambiguous threat on the life of Mr. Vasquez, and although not direct evidence of an intent to kill at the time of the incident, Cunningham's statement definitely constitutes circumstantial evidence of Cunningham's intention to kill Mr. Vasquez. On this account, we have previously held that "circumstantial evidence is

sufficient to uphold a first-degree murder conviction" and we believe that Cunningham's statement is strong circumstantial evidence of the deliberate intention required to uphold the conviction. **See Motes**, 118 N.M. at 729, 885 P.2d at 650; **accord** UJI 14-201 ("A deliberate intention may be inferred from all of the facts and circumstances of the killing.").

{30} Under any of these theories, the issue of deliberate intent was a question for the jury. **See State v. Garcia**, 95 N.M. 260, 262, 620 P.2d 1,285 (1980). We will not substitute our judgment for that of the trier of fact as long as there is sufficient evidence to support the verdict. **See State v. Hester**, 1999-NMSC-20, P7, 127 N.M. 218, 979 P.2d 729. Reviewing the evidence in the light most favorable to the guilty verdict, we hold that there was sufficient evidence to support the jury's conclusion that Cunningham killed Mr. Vasquez with the requisite intent to justify the verdict of first-degree murder. V.

{31} We hold that the district court did not commit fundamental error when it omitted the element of unlawfulness from the deliberate-intent murder instruction when the jury was provided with a subsequent proper self-defense instruction. We also hold that there was sufficient evidence of deliberation to support Cunningham's conviction. Therefore, Cunningham's conviction is affirmed.

{32} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Chief Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

GENE E. FRANCHINI,
Justice dissenting

DISSENT

FRANCHINI, Justice (Dissenting).

{33} I must dissent from the Court's opinion affirming the conviction of the Defendant for first degree murder under NMSA 1978, § 30-2-1-(A)(1) (1994).[1] I cannot agree that there was sufficient evidence of deliberate intent to permit the jury to find the Defendant guilty of first degree murder.

{34} The majority opinion correctly describes the fight between the Defendant and the victim as a "shootout." Mr. Vasquez's death resulted from a chance encounter between two armed men with a history of bad blood between them. When the fight was over both men had emptied their weapons at each other; Mr. Vasquez was fatally wounded and the Defendant was shot in the chest. Under New Mexico law, this is second degree murder—a killing based on an unconsidered and rash impulse. **See State v. Garcia**, 114 N.M. 269, 273, 837 P.2d 862, 866 (1992).

{35} This Court has previously grappled with the challenge of creating a meaningful distinction between first and second degree murder. **Garcia**, 114 N.M. 269, 837 P.2d 862. In **Garcia**, Justice Montgomery carefully crafted an opinion to provide guidance to New Mexico's appellate and trial courts in making that distinction. **Id.** The **Garcia** Court noted that both murder in the first degree and in the second degree involve intentional killings, but that the law divides along the line of intent in order to separate the most heinous and reprehensible killings-those that are willful, deliberate, and premeditated—from those that are committed without such deliberation. **Garcia**, 114 N.M. at 272-73, 837 P.2d at

[1] I concur in the majority's resolution of the jury instruction question, but note, with some significant concern, that the judge, prosecutor, and defense attorney either did not know or ignored the Use Note to UJI 14-5171 (self defense), as well as the New Mexico case law embodied by **Parish** and its progeny. **See State v. Parish**, 1994-NMSC-72, 118 N.M. 39, 878 P.2d 988 (1994). As this Court has previously observed, "Attorneys and judges have an obligation to keep abreast of current changes in the law." **State v. Lopez**, 1996-NMSC-36, 122 N.M. 63, 66 n.1, 920 P.2d 1017, 1020 n.1 (1996).

865-66. Second degree murder was described as an intentional killing, but one that was committed without deliberation; a rash or impulsive killing. **Id.** at 273, 837 P.2d at 866.

{36} The deliberate intent that separates first degree murder from second is described in the uniform jury instructions in the following manner:

> 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**.

Uniform Jury Instruction (UJI) 14-201 NMRA 1999 (emphasis added).

{37} First degree murder requires evidence of deliberate intent and it is sufficient evidence of deliberation that this case lacks. The only testimony in the case regarding deliberation and premeditation is found in the prosecutor's argument in support of first degree murder. But the opening and closing arguments of attorneys are not evidence. **See** UJI 14-101 NMRA 1999 (opening statement is not evidence) and UJI 14-104 NMRA 1999 (argument of attorneys is not evidence). Completely missing in this case is evidence that the Defendant weighed and considered "the question of killing and his reasons for and against such a choice." **See** UJI 14-201.

{38} In reviewing the evidence presented below, this Court must defer to the fact-finder for resolution of factual conflicts in the evidence, but it retains the responsibility of making the legal determination of whether the evidence in the record supports the conviction. **Garcia**, 114 N.M. at 273-74; 837 P.2d at 866-67. The burden is on the State to prove that a defendant had not only the opportunity to form a deliberate intent to kill, but actually formed that intent. **State v. Motes**, 118 N.M. 727, 729, 885 P.2d 648, 650 (1994).

{39} The prosecutor argued that intent could be inferred from a chase between Mr. Vasquez's truck and another pickup truck before the shootout. The eyewitness to the chase, Carlos Perez, was shown a photograph of the Defendant's truck during direct examination. However, he stated that the Defendant's truck was not the pursuing truck that he had seen the night of the shooting. The prosecutor argued that intent could be inferred from a death threat made during the course of a heated argument between the two men which had occurred several months earlier. This Court determined in **Garcia** that a threat made some 15 minutes before a fatal attack was not sufficient to show whether that defendant had formed the requisite deliberate intent. What can a threat made several months earlier tell us about this Defendant's state of mind the night of the shooting? The testimony of an eyewitness to the shooting, Jean Jones, and the investigating officer, Detective Ballard, fails to support the State's argument that the Defendant stood in close proximity to Mr. Vasquez's truck when he was shooting. Ms. Jones testified that she saw the Defendant get out of his truck, walk briefly toward the front, and then get back in his truck to drive away. She did not see a muzzle flash from a gun being fired then and could not say whether there had been any further shots. Detective Ballard testified that the Defendant's .380 pistol and spent .380 casings were found in the dirt near the stone wall where the Defendant's truck stopped after colliding with Mr. Vasquez's truck.

{40} **Garcia** presented this court with more compelling facts in support of first degree murder than this case. I regretfully conclude that, here, the Court has further blurred the distinction between murder in the first degree and second degree. I fear that once again, we have returned to the situation described in **Garcia** in which

"'virtually all intentional killings will result in jury instructions on first degree murder and the jury will be left to apply its own conception of what deliberate intention means.'" **Id.** at 272, 837 P.2d at 865 (quoting Leo M. Romero, **A Critique of the Willful, Deliberate, and Premeditated Formula for Distinguishing Between First and Second Degree Murder in New Mexico**, 18 N.M. L. Rev. 73, 86 (1988).

{41} I conclude, the facts in this case and the applicable law establish murder in the second degree, i.e. a rash or impulsive intentional killing as a result of a "shootout." The verdict of first degree murder, in my opinion, is not supported by substantial evidence. The majority holding otherwise, I respectfully dissent.

GENE E. FRANCHINI, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2000-NMSC-017

Filing Date: May 25, 2000, As Corrected July 5, 2000

Docket No. 25,577

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

MARCOS MASCARENAS,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Peggy J. Nelson, District Judge

Released for Publication June 13, 2000

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OPINION

BACA, Justice.

{1} Defendant, Marcos Mascarenas, appeals his conviction and sentence of twelve years imprisonment for negligent child abuse resulting in death, contrary to NMSA 1978, § 30-6-1(C) (1973, as amended through 1989).[1] We granted certiorari pursuant to NMSA 1978, § 34-5-14 (1972) (outlining the scope of our appellate jurisdiction) to review the Court of Appeals' decision affirming Mascarenas' conviction for child abuse. **See also** Rule 12-502 NMRA 2000. Mascarenas appeals his conviction on several grounds: 1) fundamental error occurred because the trial court failed to provide the jury with an instruction for negligent child abuse that adequately defined criminal negligence; 2) fundamental error occurred because the jury instructions omitted an essential element requiring that the State prove he acted "without justification"; 3) the child abuse statute is unconstitutionally vague; 4) the trial court committed reversible error by refusing to allow the testimony of his rebuttal expert witness regarding the public's awareness of shaken baby syndrome (SBS); 5) insufficient evidence exists to support the verdict; 6) the trial court improperly admitted evidence of Mascarenas' prior drug use and a prior injury to the child; 7) the State's opening statement and closing argument contained misleading statements about the law and facts not in evidence; 8) his conviction and twelve year sentence, despite lacking criminal intent, amounts to cruel and unusual punishment; and 9) the cumulative effect of the trial court's errors deprived him of his right to a fair trial. Because we reverse Mascarenas' conviction based on the deficiencies in the jury instructions and hold that sufficient evidence exists to support remand, we need not reach his other claims of error.

I.

{2} On October 6, 1996, emergency medical technicians were summoned to render assistance to six-month old Matthew Cisneros, who was

[1] We note that Mascarenas was convicted under the statute, as amended through 1989, prior to the adoption of the 1997 amendment to Section 30-6-1. Unless otherwise indicated, our discussion of Section 30-6-1 refers to the 1989 statute.

suffering from a seizure. Upon arrival, the medical technicians found Matthew unresponsive and displaying signs that his brain was not receiving oxygen. He was transported to the emergency room at Holy Cross Hospital in Taos where tests revealed the likelihood that Matthew had suffered head trauma. The treating physician diagnosed Matthew's injuries as subdural hematoma, cerebral edema, and cardio-pulmonary arrest all of which were consistent with shaken baby syndrome. Matthew later went into complete respiratory and cardiac arrest and was successfully resuscitated. Matthew was transported via helicopter to the Pediatric Intensive Care Unit at University of New Mexico Hospital in Albuquerque. Over the next four days Matthew's neurologic functions deteriorated and brain death was declared on October 10, 1996. Matthew died after he was taken off life support. Mascarenas was subsequently arrested and charged with child abuse resulting in death.

{3} At trial, Mascarenas testified that Matthew was left in his care after Lisa, the child's mother, left for work in the morning. Matthew then became agitated and began crying. Mascarenas testified that he was frustrated that Matthew would not stop crying and admitted that he shook Matthew "hard once." He also testified that he tossed Matthew in the air, took him for a ride in his truck, and fed him in the attempt to calm him down. After returning home, Matthew had a seizure and Mascarenas testified that he and his cousin drove Matthew to Lisa's parents' home a short distance away and then called 911 to summon emergency medical assistance.

{4} During the trial, Matthew's treating doctors, a radiologist, and a pathologist, testified as the State's expert witnesses. They stated that the cause of death was SBS and that Matthew displayed classic SBS symptoms. The radiologist testified that CT scans of Matthew's head indicated that he had suffered two separate injuries, one occurring in the last twelve to eighteen hours, the other, ten to fourteen days earlier. Although the State's expert witnesses testified that it was their opinion that only forceful, repeated shaking could cause the severe injuries associated with SBS, one State expert witness did concede that there was a debate within the medical community as to whether one shake was sufficient to cause the injuries associated with SBS.

{5} Mascarenas based his defense on his lack of knowledge of SBS. He explained that his initial failure to tell family members and medical personnel that he had shaken Matthew was because he did not know that shaking a baby could cause the symptoms Matthew displayed. Medical personnel testified that Mascarenas answered their questions without hesitation. At trial he testified, "I hurt to know that my stupidity and ignorance caused this to my child, to my baby."

{6} Despite his defense, Mascarenas was convicted of negligent child abuse resulting in death and sentenced to twelve years in prison. He now appeals his conviction claiming the jury instructions failed to adequately define the requisite criminal negligence standard. We agree and hold that the failure to adequately define the criminal negligence standard constitutes fundamental error.

II.

{7} Mascarenas did not object to the jury instruction or tender a curative instruction. Because he failed to preserve this error for appeal, we review only for fundamental error. **See State v. Sosa**, 1997-NMSC-32, PP23-24, 123 N.M. 564, 943 P.2d 1017 ("Having failed to proffer accurate instructions, object to instructions given, or otherwise preserve the issue for appeal . . . we will limit our evaluation to the claim of fundamental error."); Rule 12-216 NMRA 2000 (setting forth preservation requirements). In **State v. Clark**, we stated, "To the extent alleged violations rise to the level of fundamental error, the question will be reviewed on appeal and, if fundamental error exists, a new trial will be ordered." 108 N.M. 288, 297, 772 P.2d 322, 331 (1989), **habeas corpus relief granted on other grounds by**, **Clark v. Tansy**, 118 N.M. 486, 882 P.2d 527 (1994). Fundamental error exists "when guilt is so doubtful that it would shock the judicial conscience to allow the conviction

to stand." **State v. Baca**, 1997-NMSC-45, P41, 124 N.M. 55, 946 P.2d 1066. In **State v. Garcia**, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942), this Court observed, "error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive."

III.

{8} Mascarenas claims that fundamental error occurred because the trial court failed to provide the jury with an instruction defining criminal negligence. The jury was provided an instruction which tracked the language of UJI 14-602 NMRA 1999.[2] The negligent child abuse instruction provided to the jury read:

> For you to find Marcos Mascarenas guilty of child abuse resulting in death as charged in Count I, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. Marcos Mascarenas negligently caused Matthew Cisneros to be placed in a situation which endangered the life or health of Matthew Cisneros or to be cruelly punished.
>
> 2. To find that Marcos Mascarenas **negligently** caused child abuse to occur, you must find that Marcos Mascarenas **knew or should have known** of the danger involved in forcefully shaking Matthew Cisneros and **acted with reckless disregard** for the safety or health of Matthew Cisneros.
>
> 3. Marcos Mascarenas[‘] actions resulted in the death of Matthew Cisneros.
>
> 4. Matthew Cisneros was under the age of 18.
>
> 5. This happened in New Mexico on or about the 6th day of October, 1996.

(emphasis added). Mascarenas argues that this instruction fails to adequately define the requisite culpable mental state for criminal negligence by including language confusing criminal negligence and civil negligence. Specifically, he argues that the use of the term "negligently" in the second element of the jury instruction, juxtaposed with the terms "knew or should have known" and "acted with a reckless disregard" creates the "distinct possibility that the jury understood the applicable negligence standard to criminalize 'careless' conduct or perhaps only 'extremely careless' conduct." **See State v. Magby**, 1998-NMSC-42, P15, 126 N.M. 361, 969 P.2d 965 (noting that neither understanding was correct) (citing **State v. Yarborough**, 1996-NMSC-68, P21, 122 N.M. 596, 930 P.2d 131).

{9} Criminal negligence has been defined as including "conduct which is reckless, wanton, or willful." **State v. Arias**, 115 N.M. 93, 96, 847 P.2d 327, 330 , **overruled on other grounds by State v. Abeyta**, 1995-NMSC-52, 120 N.M. 233, 242, 901 P.2d 164, 173; **see also State v. Harris**, 41 N.M. 426, 428, 70 P.2d 757, 757 (1937) (defining criminal negligence as "conduct . . . so reckless, wanton, and willful as to show an utter disregard for the safety of [others]"). In contrast, we have defined civil negligence to include conduct "a reasonably prudent person would foresee as involving an unreasonable risk of injury to [himself] [herself] or to another and which such a person, in the exercise of ordinary care, would not do." UJI 13-1601 NMRA 2000. Mascarenas argues that it is impossible to determine if jurors applied the incorrect civil negligence standard typically invoked by the "knew or should have known" language or the proper criminal negligence standard which requires a finding that he acted in reckless disregard of the danger.

{10} Both parties agree that the State must prove criminal negligence to secure a child abuse

[2] This Court has adopted the new UJI Rule 14-602, effective February 1, 2000. Unless otherwise indicated, all references to Rule 14-602, are to the rule as it existed prior to the latest changes.

conviction under Section 30-6-1(C). **See Santillanes v. State**, 115 N.M. 215, 222, 849 P.2d 358, 365 (1993); **see also Yarborough**, 1996-NMSC-68, P18, 122 N.M. at 602, 930 P.2d at 137 ("Only criminal negligence may be a predicate for a felony unless another intention is clearly expressed by the legislature."). The jury instruction provided by the trial court in this case conformed to the requirements articulated in **Santillanes** and tracked the language of Rule 14-602.[3]

{11} The substantive considerations in this case have already been resolved by our opinion in **Magby** where this Court addressed a challenge similar to Mascarenas' claim. **See Magby**, 1998-NMSC-42, 126 N.M. 361, 969 P.2d 965. In **Magby**, the defendant was charged with abuse of a child resulting in death, in violation of Section 30-6-1(C). After Magby removed the bit and bridle from a horse that a four-year-old girl was sitting on with her mother, the horse bolted into a gallop causing the child to fall. **Magby**, 1998-NMSC-42, P2, 126 N.M. at 362, 969 P.2d at 966. She later died from her injuries. The jury was provided with an instruction containing the same language as the instruction given at Mascarenas' trial: "To find that Robert Leon Magby negligently caused child abuse to occur, you must find that Robert Leon Magby knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of Heather Naylor." **Magby**, 1998-NMSC-42, P5, 126 N.M. at 362, 969 P.2d at 966 (emphasis omitted). Magby tendered a jury instruction that defined "reckless disregard" which the trial court improperly rejected.[4] **Magby**, 1998-NMSC-42, P9, 126 N.M. at 363, 969 P.2d at 967.

{12} At the outset, we note that because Magby offered a proper curative instruction, Magby's conviction was properly reversed under a reversible error standard. **See State v. Cunningham**, 2000-NMSC-9, PP18-19, 128 N.M. 711, 998 P.2d 176. However, because Mascarenas failed to preserve the error we examine the jury instructions for fundamental error. Despite this difference, we find the substantive analysis of the errors in the jury instructions in **Magby** analogous and persuasive. In **Magby**, this Court held that the failure to define reckless disregard "resulted in the distinct possibility of juror confusion as to the mens rea necessary for conviction." 1998-NMSC-42, P1, 126 N.M. at 362, 969 P.2d at 966. This Court concluded that "the ordinary meaning of the terms 'negligently' and 'reckless disregard' may misdirect jurors as to the standard of negligence required for conviction, thereby rendering UJI 14-602 fatally ambiguous." **Magby**, 1998-NMSC-42, P13, 126 N.M. at 364, 969 .2d at 968. **Magby** highlighted the "distinct possibility that the jury understood the applicable negligence standard to criminalize 'careless' conduct or perhaps only 'extremely careless' conduct" neither of which were correct interpretations. **Magby**, 1998-NMSC-42, P15, 126 N.M. at 364, 969 P.2d at 968. The **Magby** Court found that because it was impossible to determine whether the jury had a correct or incorrect understanding of the instructions, reversible error occurred. **See Magby**, 1998-NMSC-42, PP15-16, 126 N.M. at 364, 969 P.2d at 968. The same concerns are implicated in this case.

{13} The Court of Appeals, in its memorandum opinion, concluded that **Magby** was applicable to this case, but refused to address the merits of Mascarenas' claim stating that he had failed to properly preserve the issue for review and that "we decline to consider it as fundamental error." **State v. Mascarenas**,-NMCA-18,871, slip op. at 4 (Jan. 13, 1999). The Court of Appeals also held that **Magby**'s rule was not retroactively applicable. **Id.** We disagree and hold there is a distinct possibility that Mascarenas was convicted of child abuse based on the improper civil negligence standard, a crime which **Santillanes** determined does not exist in New Mexico. **Santillanes**, 115 N.M. at 219, 849 P.2d at 362 ("Our interpretation of this criminal statute requires

[3] We note that UJI 14-602 was amended in 1993 in response to the requirements articulated in **Santillanes**.

[4] The instruction tendered by Magby read:

"For you to find that the Defendant acted recklessly in this case, you must find that he knew or should have known that his conduct created a substantial and foreseeable risk, that he disregarded that risk and that he was wholly indifferent to the consequences of his conduct and to the welfare and safety of others."

that the term 'negligently' be interpreted to require a showing of criminal negligence instead of ordinary civil negligence."). The jury instructions failed to sufficiently define the proper negligence standard for child abuse, and there is no way to determine if the jury based their conviction on the terms "knew or should have known," language typically associated with a civil negligence standard, or on the proper criminal negligence standard which requires that they find defendant acted in "reckless disregard" of the safety of the child. Thus, we find that the trial court's failure to provide the jury with an instruction that adequately defined criminal negligence was an error.

{14} Despite the presence of this error, the State contends that the facts in this case demonstrate circumstances sufficient to distinguish Mascarenas' conduct from Magby's. The State argues that Magby's conduct could have been viewed as merely careless while Mascarenas "acted with great and repeated violence against his baby." Because of this, the State posits that "it is highly unlikely that this jury did not have a correct understanding of the instructions [because] the facts of this case leave little room for speculation as to whether shaking Matthew endangered his life or whether the Petitioner should have known of the danger involved and acted with reckless disregard of that danger." This argument is similar to that addressed by this Court in **Santillanes**. 115 N.M. at 223, 849 P.2d at 366. In **Santillanes**, this Court found that the trial court erred by failing to properly instruct the jury on criminal negligence. However, the Court held that it did not amount to reversible error, reasoning, "no rational jury could have concluded that Santillanes cut his nephew's throat . . . without satisfying the standard of criminal negligence that we have adopted today." **Id.** The **Santillanes** Court was confident that "there could be no dispute that the element of criminal negligence was established by the evidence." **Id.** Based on the comparison of the defendant's conduct in **Magby** and the present case, as well as the reasoning articulated in **Santillanes**, the State argues that no rational jury could have found that Mascarenas shook his baby with such violence without satisfying the requisite criminal negligence standard. We disagree.

{15} In this case, the extent of how severely and how often Matthew was shaken was a disputed issue at trial, and the State's contention that Mascarenas shook Matthew with great and repeated violence was not conclusively established. If the jury believed Mascarenas' defense that he did not know that shaking Matthew could cause the injuries associated with SBS and that he shook the child only "hard once," it is possible that the jury could have, with an instruction properly defining criminal negligence, attributed his conduct to mere carelessness and not reckless disregard of Matthew's safety and health. Therefore, unlike the **Santillanes** Court, we cannot state with confidence that the jury concluded that Mascarenas' actions in shaking his baby satisfied the proper criminal negligence standard. Also, in this case, a rational jury might have concluded that Mascarenas shook his baby "hard once" without acting in "reckless disregard" of Matthew's safety. Thus, despite the State's arguments to the contrary, the factual analogies identified by the State are not relevant here.

{16} We hold that the trial court erred by failing to provide the jury with an instruction that adequately defined the proper culpable mens rea for negligent child abuse.

IV.

{17} In this Court's recent opinion in **Cunningham**, we held that a fundamental error analysis requires that we consider jury instructions as a whole to determine "the existence of circumstances that 'shock the conscience' or implicate a fundamental unfairness . . . that would undermine judicial integrity if left unchecked." 2000-NMSC-9, P21, 998 P.2d at 182. In the context of jury instructions, this Court has held that a reviewing appellate court must determine whether "a reasonable juror would have been confused or misdirected" by the jury instructions provided. **See State v. Parish**, 1994-NMSC-72, 118 N.M. 39, 42, 878 P.2d 988, 991 (1994). In

State v. Allen, we stated that "ambiguous instructions are those that are 'capable of more than one interpretation.'" 2000-NMSC-2, P77, 128 N.M. 482, 994 P.2d 728 (quoting **Parish**, 118 N.M. at 42, 878 P.2d at 991). In this case, there were no other instructions provided to the jury that might have cured any ambiguities. **See Parish**, 118 N.M. at 41-42, 878 P.2d at 990-91 ("If a jury instruction is capable of more than one interpretation, then the court must next evaluate whether another part of the jury instructions satisfactorily cures the ambiguity.").

{18} Despite the error in the jury instruction, the State seeks to save the conviction by directing us to the language in **State v. Carnes**, 97 N.M. 76, 78, 636 P.2d 895, 897 , which states, "The failure to instruct the jury on the **definition or the amplification** of the elements of an offense is not error when there has been a failure to request such an instruction." (emphasis added). Both the State and Court of Appeals cite with approval **Magby**'s reference to **Carnes**, 97 N.M. at 78, 636 P.2d at 897, to support the argument that a failure to adequately define criminal negligence does not rise to the level of fundamental error and reversal would be warranted in future cases only when the defendant offered a curative definitional instruction. **Mascarenas**,-NMCA-18,871, slip op. at 4 (Jan. 13, 1999) (citing **Magby**, 1998-NMSC-42, P18, 126 N.M. at 365, 969 P.2d at 969). Based on this language, the Court of Appeals inferred from **Magby**'s citation to **Carnes** that the omission of the definition of "reckless disregard" in the instructions in this case did not rise to the level of fundamental error. **See Mascarenas**,-NMCA-18,871, slip op. at 4 (Jan. 13, 1999). By relying on this language the State and the Court of Appeals presupposes that the instruction on "reckless disregard" in this case is a mere amplification or definition. We believe the definition of "reckless disregard" is of central importance to Mascarenas' defense, and therefore conclude that the Court of Appeals' and the State's interpretation of **Magby** and their reliance on **Carnes** is misplaced.

{19} **Carnes** and the cases it relied upon involved claims of error predicated on the trial court's failure to or refusal to accept jury instructions that required the amplification or definition of terms. **Carnes**, 97 N.M. at 78, 636 P.2d at 897. The Court in **Carnes** held that the trial court's refusal to accept defendant's tendered instruction defining the term "hostage" in connection with kidnapping charges did not mandate reversal because the term was not a technical term and because "jurors could properly apply the common meaning of hostage . . . and the application of the common meaning did not prejudice defendant." **Carnes**, 97 N.M. at 79, 636 P.2d at 898 (internal citation omitted). "[A] failure to give a definitional instruction is not a failure to instruct on an essential element." **State v. Allen**, 2000-NMSC-2, P76, 128 N.M. 482, 994 P.2d 728 (quoting **State v. Crain**, 1997-NMCA-101, P11, 124 N.M. 84, 946 P.2d 1095).

{20} In this case, clearly the opposite situation exists from that in **Carnes**. We find it instructive that in **State v. Ervin**, upon which **Carnes** relies, the Court stated, "The defendant did not make a tender nor was there evidence which would make this amplification a critical determination." 96 N.M. 366, 367, 630 P.2d 765, 766 (1981) (no evidence presented that the failure to define "dwelling" in connection with a burglary charge was a critical determination). Mascarenas is not merely seeking an amplification of a term his argument that the jury instructions should have included a definition of "reckless disregard" to prevent confusion of the standard necessary to sustain a conviction is, under these facts, a "critical determination." In this case, the trial court's failure to provide the instruction was a critical determination akin to a missing elements instruction. **See State v. Kirby**, 1996-NMSC-69, PP3-6, 122 N.M. 609, 930 P.2d 144 (characterizing a jury instruction that required the State prove the defendant unlawfully drove a wide mobile home transport vehicle "such that an ordinary person would anticipate that death might occur under the circumstances" as a failure to instruct on the essential element of criminal negligence). Because Mascarenas' defense theory rested on the claim that he was unaware of the risks associated with SBS, we agree that the instructions, as provided, failed to conform to the requirements we have outlined in **Magby** and had the potential

effect of confusing the jury as to the proper standard of negligence to apply.

{21} There is simply no way to determine that the jury delivered its verdict on a legally adequate basis. Furthermore, **Magby**'s finding that reversible error existed because the trial court refused defendant's tendered instruction does not preclude this Court from finding that the trial court's failure to define criminal negligence despite Mascarenas' failure to object or tender a curative instruction, also rises to the level of fundamental error. To allow Mascarenas' conviction to stand when there is a distinct possibility that he was convicted under a civil negligence standard and not the proper criminal negligence standard would result in a miscarriage of justice and therefore we find that fundamental error occurred.

V.

{22} Notwithstanding the existence of the fundamental error in the jury instructions, the State argues that **Magby**'s discussion of prospective and retroactive application of judicial rules precludes relief in this case. The State directs us to language in **Magby** where this Court concluded that its holding had "no bearing on cases in which a jury has already rendered a verdict, unless a proper curative instruction was tendered and refused." **Magby**, 1998-NMSC-42, P18, 126 N.M. at 365, 969 P.2d at 969 (citing **Carnes**, 97 N.M. at 78, 636 P.2d at 897). Regarding the decision to only apply its holding prospectively, the **Magby** Court stated:

> We stress that our holding on the negligent child abuse instruction tendered in this case is not applicable retroactively to other cases. As in **Santillanes**, our holding has only prospective application to cases in which a verdict has not been reached and those cases on direct review in which the issue was raised and preserved below.

Magby, 1998-NMSC-42, P18, 126 N.M. at 365, 969 P.2d at 969. Based on this language, the State argues this Court has no power to redress the error in the jury instructions because Mascarenas did not tender a curative instruction, a verdict had already been reached, and the case was pending review at the time **Magby** was decided without having properly preserved the issue for review. The Court of Appeals' unpublished memorandum opinion agreed with the State's argument, holding, "[Mascarenas] cannot avail himself of the Court's decision in **Magby** " because "unlike that case [Mascarenas] failed to object to the jury instruction or tender a curative instruction." **Mascarenas**,-NMCA-18,871, slip op. at 4 (Jan. 13, 1999). We do not disagree with **Magby**'s recitation of the principles of retroactive and prospective application of judicial decisions, however, we hold that they are not relevant to this inquiry. Because this case involves a claim of error requiring the clarification of an existing rule, and not one premised on the application of a new judicial rule, we review for fundamental error and are not bound by **Magby**'s prohibition of retroactive application in this case.

A.

{23} **Magby** relied on **Santillanes** to conclude that its holding on the negligent child abuse instruction was not applicable retroactively to other cases and only prospectively to those cases where a verdict had not been reached and to cases on direct review when the issue was properly preserved. **See Magby**, 1998-NMSC-42, P18, 126 N.M. at 365, 969 P.2d at 969. In **Santillanes**, the Court invoked its inherent power to "give its decision prospective or retroactive application without offending constitutional principles." 115 N.M. at 223, 849 P.2d at 366 (citing **Lopez v. Maez**, 98 N.M. 625, 632, 651 P.2d 1269, 1276 (1982)). The **Santillanes** Court, weighing the considerations outlined in **Linkletter v. Walker**, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965), concluded that the criminal negligence standard it adopted should be given only prospective application. **See Santillanes**, 115 N.M. at 224, 849 P.2d at 367.[5]

[5] We note that our recent opinion in **State v. Ulibarri** recognized that **Santillanes** "failed to mention that the United States Supreme Court had abandoned the **Linkletter** ap-

{24} An appellate court's consideration of whether a rule should be retroactively or prospectively applied is invoked only when the rule at issue is in fact a "new rule." **Santillanes** considered whether its "**new interpretation** of 'negligently' under the child abuse statute, [was] to be given retrospective or prospective application." **Santillanes**, 115 N.M. at 223-25, 849 P.2d at 366-68 (emphasis added). There, we stated that "the issue of retroactive effect arises only when a court's decision overturns prior case law or makes new law when law enforcement officers have relied on the prior state of the law." **Id.** at 223, 849 P.2d at 366; **see also Jackson** 1996-NMSC-54, P5, 122 N.M. at 435, 925 P.2d at 1197 (characterizing a new rule as one "where an appellate decision overrules prior law and announces a new principle"); **Beavers**, 118 N.M. at 398, 881 P.2d at 1383 (quoting with approval **Whenry v. Whenry**, 98 N.M. 737, 739, 652 P.2d 1,188 (1982), which stated "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was clearly not foreshadowed."). In **Teague v. Lane**, 489 U.S. 288, 301, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989), the United States Supreme Court acknowledged the difficulties in considering whether a case announces a new rule stating:

> "[W]e do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."

(internal citations omitted).

{25} Based on this reasoning, we find it more accurate to characterize the holding in **Magby** as merely a clarification of an existing rule and not a new rule. **See Kirby**, 1996-NMSC-69, P5, 122 N.M. at 611, 930 P.2d at 146. **Magby**'s holding did not create a new rule that child abuse should be prosecuted under a criminal rather than civil negligence standard - it merely requires that the jury be properly instructed on the criminal negligence standard previously established by **Santillanes**.

{26} We find support for this conclusion in **Kirby**, 1996-NMSC-69, 122 N.M. 609, 930 P.2d 144. In **Kirby**, the Court was faced with the question of whether it should apply a recently announced rule in **Yarborough** that "the difference 'between reckless disregard' and 'would anticipate that death might occur' evinces a failure to instruct on criminal negligence" retroactively or prospectively. **Kirby** concluded that "the rule of Yarborough was not new law, it was a statement of what the law had been at all times applicable to the instant case." **Kirby**, 1996-NMSC-69, P5, 122 N.M. at 611, 930 P.2d at 146 (citing **State v. Yarborough**, 120 N.M. 669, 672-73, 905 P.2d 209, 212-13).

{27} The same analysis is applicable to the present case. **Magby**'s holding does not represent a new rule of law. It is merely a clarification of the existing rule of **Santillanes** : "The

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proach." **State v. Ulibarri**, 1999-NMCA-142, PP21-23, 128 N.M. 546, 994 P.2d 1164, **aff'd**, 2000-NMSC-7, 128 N.M. 686, 997 P.2d 818; **see Griffith v. Kentucky**, 479 U.S. 314, 322, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987) (stating that the "failure to ap a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication"); **Ulibarri** also observed that "New Mexico courts have not dealt comprehensively with the issue of retroactivity in the context of criminal cases as yet." In the context of criminal cases, **Ulibarri** appears to continue New Mexico's departure from United States Supreme Court precedent on the issue of retroactivity by relying on the criteria set forth in **Linkletter** and echoed by **Santillanes**. **See also**, **Jackson v. State**, 1996-NMSC-54, P6, 122 N.M. 433, 925 P.2d 1195 (citing with approval **Santillanes**' and **Linketter**'s case-by-case determination of prospective or retroactive application of new rules); **see also Beavers v. Johnson Controls World Servs.**, 118 N.M. 391, 393, 881 P.2d 1376, 1378 (1994) (expressly declining to follow the United States Supreme Court's rule of universal retroactivity in civil cases announced in **Harper v. Virginia Dep't of Taxation**, 509 U.S. 86, 113, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993)). We note that our discussion of the issue of retroactive or prospective application of new rules is limited only to an explanation of why it is inapplicable to this case.

mens rea element of negligence in the child abuse statute . . . requires a showing of criminal negligence instead of ordinary civil negligence." **Santillanes**, 115 N.M. at 222, 849 P.2d at 365. In this case, as in **Kirby**, we are only clarifying a "statement of what the law had been at all times applicable to the instant case." **Kirby**, 1996-NMSC-69, P5, 122 N.M. at 611, 930 P.2d at 146. **Magby** did not overturn prior case law and instead merely requires a trial court to fulfill its obligation to ensure that a jury is properly instructed as to the correct mens rea requirement for conviction. **See Santillanes**, 115 N.M. at 223, 849 P.2d at 366; **Jackson**, 1996-NMSC-54, P5, 122 N.M. at 435, 925 P.2d at 1197. Thus, we overrule **Magby** only to the extent that it assumes its holding requiring more precise identification of the distinctions between criminal negligence and civil negligence is a new rule.

B.

{28} This Court is not bound by **Magby**'s conclusions regarding retroactive application because in this case we have determined that fundamental error exists. We conclude that the reasoning advanced by **Magby** fails to contemplate the inherent power of this Court to review for fundamental error. **See Cunningham**, 2000-NMSC-9, P21, 998 P.2d at 182. In **Kirby**, we stated that retroactive application of new rules operates independently of a fundamental error analysis. **Kirby**, 1996-NMSC-69, P4, 122 N.M. at 610-611, 930 P.2d at 145-146. **Kirby** also involved a claim of error in the jury instructions that was raised for the first time on appeal. **Kirby**, 1996-NMSC-69, P3, 122 N.M. at 610, 930 P.2d at 145. A similar error in the jury instructions at issue in **Kirby** was adjudged to be reversible error in **Yarborough**. **See Yarborough**, 1996-NMSC-68, 122 N.M. 596, 930 P.2d 131. The application of **Yarborough** to the facts of **Kirby** would mandate a reversal, however, the Court of Appeals' unpublished memorandum opinion in **Kirby** declared that the rule **Yarborough** announced could only have prospective application and thus the Court of Appeals denied relief. **See Kirby**, 1996-NMSC-69, P4, 122 N.M. at 610-611, 930 P.2d at 145-146. We agree with the rule announced by this Court in **Kirby** that "retrospectivity is irrelevant if the trial court committed fundamental error in instructing the jury." **Id.** In reversing the Court of Appeals, **Kirby** concluded that the issue of whether **Yarborough** should be applied retroactively or prospectively was not a proper characterization of the issue. There, this Court highlighted the relationship of fundamental error to the question of retrospectivity: "the retrospectivity of **Yarborough** is irrelevant if the trial court committed fundamental error in instructing the jury." **Id**.

{29} Furthermore, we have stated: "An exception to the general rule barring review of questions not properly preserved below . . . applies in cases which involve fundamental error. Fundamental error cannot be waived." **State v. Varela**, 1999-NMSC-45, P11, 128 N.M. 454, 993 P.2d 1280 (quoting **State v. Osborne**, 111 N.M. 654, 662, 808 P.2d 624, 632 (1991)). In **Acosta**, the Court of Appeals cited with approval **Kirby**'s conclusion that "cases are not final until there has been a judgment of conviction, sentence, and exhaustion of rights of appeal." 1997-NMCA-35, P10, 123 N.M. 273, 939 P.2d 1081. In the present case, Mascarenas had not already exhausted all his rights of appeal.

{30} Since we hold that this case involves a mere clarification of an existing rule and because we believe that fundamental error exists in this case, we hold that we are not bound by **Magby**'s conclusion that its holding should be applied only prospectively.

VI.

{31} Mascarenas also claims that there was insufficient evidence to support his conviction. Although we reverse Mascarenas' conviction and remand for a new trial based on the deficiencies in the jury instructions, we believe it prudent to address his claim regarding the sufficiency of the evidence. **See United States v. Miller**, 952 F.2d 866, 874 (5th Cir. 1992) ("Although not mandated by the double jeopardy clause, it is

accordingly clearly the better practice for the appellate court on an initial appeal to dispose of any claim properly presented to it that the evidence at trial was legally insufficient to warrant the thus challenged conviction."); **see also State v. Rosaire**, 1996-NMCA-115, P20, 123 N.M. 250, 939 P.2d 597 (stating, "our review of the sufficiency of the evidence is analytically independent from the issue of the defect in the jury instruction."). By addressing Mascarenas' claim of insufficient evidence and determining that retrial is permissible, we ensure that no double jeopardy concerns are implicated. **See Rosaire**, 1996-NMCA-115, P20, 123 N.M. at 254, 939 P.2d at 601 ("We hold that where the trial court errs by failing to instruct the jury on an essential element of the crime, retrial following appeal is not barred if the evidence below was sufficient to convict the defendant under the erroneous jury instruction."); **State v. Post**, 109 N.M. 177, 181, 783 P.2d 487, 491 ("If all of the evidence, including the wrongfully admitted evidence, is sufficient, then retrial following appeal is not barred [by the Double Jeopardy Clause].").

{32} At trial, emergency medical technicians, medical experts and several of Matthew's treating doctors testified about the extent of the injuries and suggested that only repeated hard shakes could have caused Matthew's injuries. Mascarenas also testified about the circumstances surrounding the shaking of the baby. We conclude that reasonable minds could infer that Mascarenas had the requisite intent necessary to support a conviction under the negligent child abuse statute and therefore that retrial is permissible. **See State v. Allen**, 2000-NMSC-2, P65, 128 N.M. 482, 994 P.2d 728 (stating that circumstantial evidence may be used to prove intent); **see also Rosaire**, 1996-NMCA-115, P21, 123 N.M. at 254-255, 939 P.2d at 601-602 ("We consider all of the evidence in support of conviction under the erroneous jury instruction to determine whether Defendant is entitled to acquittal as opposed to retrial.").

VII.

{33} Therefore, for the foregoing reasons, we reverse Mascarenas' conviction and remand for a new trial.

{34} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Chief Justice

GENE E. FRANCHINI,
Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2000-NMSC-033

Filing Date: October 23, 2000

Docket No. 26,254

NICHELLE PONDER,

Plaintiff-Appellee,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Defendants-Appellants.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Frank K. Wilson, District Judge

Released for Publication November 8, 2000

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OPINION

BACA, Justice.

{1} On July 4, 1987, while driving her parents' Ford F100 pickup truck, Plaintiff-Appellee, Nichelle Ponder, was injured in an automobile accident with an unidentified and uninsured motorist leaving her quadriplegic and suffering from severe brain injuries. Defendant-Appellant, State Farm Mutual Automobile Insurance Company, paid Nichelle $ 50,000 in uninsured motorist benefits for the pickup truck, but denied her request to stack the uninsured motorist benefits on her parents' additional seven automobile insurance policies with State Farm. Nichelle subsequently initiated an action against State Farm to collect stacked uninsured motorist benefits. State Farm appeals a bench trial judgment awarding Nichelle $ 381,729.43, consisting of $ 225,000 in uninsured motorist benefits stacked from the additional seven vehicles insured by her parents and $ 156,729.43 in prejudgment interest. We accepted certification from the Court of Appeals to address an issue for which there is substantial public interest in New Mexico. **See** NMSA 1978, § 34-5-14(C) (1972) ("The supreme court has appellate jurisdiction . . . if the court of appeals certifies to the supreme court that the matter involves . . . an issue of substantial public interest."). Specifically, we consider whether the trial court properly determined that Nichelle was a Class I insured entitled to stack uninsured motorist coverage on her parents' eight vehicles, when before her accident, she married, moved away from the family home, and used a vehicle for which she had been rated by State Farm and for which an additional premium had been assessed. We believe that the trial court properly resolved these issues and therefore affirm the trial court's judgment.

I.

{2} Prior to the July 4, 1987 accident, Nichelle lived with her parents, Linda and Hart Ponder, and was listed as the principal driver of the Ford F100 pickup truck, which was insured by State Farm along with seven additional vehicles. Separate premiums were paid for each vehicle. After she was involved in a minor accident in 1985, shortly after receiving her driver's license, State

Farm rated Nichelle and an additional premium was assessed for her use of the pickup truck. At that time, Linda Ponder understood Nichelle to be fully covered and under the terms of the policy, she in fact was fully covered for all the Ponders' vehicles as a Class I insured.

{3} In February 1986, Nichelle married Mike Taylor and both lived with Nichelle's parents until May 1987. Linda Ponder testified that she originally reported Nichelle's marriage, the birth of Nichelle's child, and their change of residence from the Ponder family home to the Diamond A Ranch to Marla Atkinson of Atkinson Agency, a State Farm agency the Ponders had relied upon exclusively for their insurance needs since 1982. Linda Ponder testified that on several occasions she inquired about the adequacy of her daughter's coverage and explained to Atkinson's agents that she wanted "full coverage" for her daughter. She expressed concern to the Atkinson Agency that because Nichelle would be moving out, she wanted to ensure that her daughter's full coverage continued. On these occasions, Linda Ponder was advised by the agency that her daughter was "fully covered," not to concern herself because they would look into it, and not to worry because Nichelle, "as far as they were concerned, was still fully covered." At no time did the Atkinson Agency communicate to Linda Ponder that the change in her daughter's residence would affect the extent of her uninsured/underinsured motorist coverage.

{4} The policies for all eight of the Ponders' vehicles were renewed on May 7, 1987, each for a six-month duration. Prior to issuing the renewal notices, State Farm had been provided with information that Ponder was married, had a child, and was no longer living with her parents. In the renewal notices, Nichelle was still rated on the policy for the F100 pickup truck and an additional premium continued to be assessed and paid. The renewal notices for three of the vehicles contained the language, "Younger drivers included if rated on another vehicle insured by us."

{5} After the accident, Nichelle sought payment under the policy for $ 275,000 in uninsured motorist benefits, which reflected a stacking of uninsured motorist coverage under each of the Ponder's eight vehicles. State farm paid $ 50,000, claiming that she was only covered by uninsured motorist benefits for the Ford F100 pickup truck. Nichelle then filed suit to collect the uninsured motorist benefits on the remaining seven vehicles. Despite finding that Nichelle was not a Class I insured under the express provisions of the policy, the trial court concluded that because Nichelle was listed as the principal driver, and additional premiums were assessed, she was entitled to stack her parents' uninsured motorist coverage on the remaining seven vehicles as a Class I insured. The trial court also awarded Nichelle prejudgment interest. State Farm now appeals the trial court's judgment.

II.

{6} Nichelle and State Farm disagree about the appropriate standard of review. Nichelle suggests this Court need only determine whether substantial evidence exists in the record to support the decision of the trial court. **See Melton v. Lyon**, 108 N.M. 420, 422, 773 P.2d 732, 734 (1989) (using the substantial evidence standard, "the reviewing court must view the evidence in the light most favorable to support the finding, and all reasonable inferences in support of the court's decision will be indulged"). State Farm urges that we apply a de novo review of the trial court's legal conclusions with no formal deference paid to the trial court decision because this question is an important matter of public policy which involves creating a new category of Class I insureds in contravention of existing state law. **See Gabaldon v. Erisa Mortgage Co.**, 1997-NMCA-120, P7, 124 N.M. 296, 949 P.2d 1193, (stating, "The legal consequences flowing from the historical facts will be subject to de novo review if the question involves matters of public policy with broad precedential value beyond the confines of the particular case."), **aff'd in part and rev'd in part on other grounds by Gabaldon v. Erisa Mortgage Co.**, 1999-NMSC-39, P7, 128 N.M. 84, 990 P.2d 197 (stating, "the legal consequences flowing from the historical facts will be subject to de novo review if the question involves matters of public policy with

broad precedential value beyond the confines of the particular case").

{7} We conclude that our determination of whether the trial court erred in holding that Nichelle was a Class I insured, entitled to stack benefits under her parents' multi-vehicle automobile insurance policies, presents a mixed question of law and fact. As such, "we use the substantial evidence standard for review of the facts and then make a de novo review of the trial court's application of the law to those facts." **State v. Reynolds**, 119 N.M. 383, 384, 890 P.2d 1315, 1316 (1995). We review the whole record to determine whether substantial evidence exists to support the trial court's factual determinations. **See Bennett v. City Council for Las Cruces**, 1999-NMCA-15, P20, 126 N.M. 619, 973 P.2d 871; **see also Enriquez v. Cochran**, 1998-NMCA-157, P20, 126 N.M. 196, 967 P.2d 1136 ("Because the trial court's decision must be based on its conclusions about a party's conduct and intent, implicit in the standard of review is the question of whether the court's findings and decision are supported by substantial evidence."). "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." **Landavazo v. Sanchez**, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990) (citations omitted). We review de novo the trial court's application of the law to the facts in arriving at its legal conclusions. **See Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd.**, 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991).

III.

{8} State Farm advances three arguments in its challenge of the trial court's determination that Nichelle was a Class I insured entitled to stack the uninsured motorist benefits for the additional seven vehicles covered by her parents' policies. State Farm claims that under New Mexico law: (1) simply rating a driver for which payment of an additional premium is required does not confer Class I status; (2) the trial court's finding of fact that Nichelle was not a named insured under the express provisions of the policy should have the effect of denying her Class I status; and (3) if this Court finds that Nichelle was in fact a Class I insured, language in the renewal notices for three vehicles purporting to include younger rated drivers as insureds, should be read together with exclusions in the remaining vehicle notices so as to limit stacking to only those additional vehicles. State Farm urges this Court to reject the trial court's extension of the law of stacking and uninsured motorist coverage as a "derogation of the express language of the contract . . . [and] public policy guidelines and considerations heretofore established by our appellate courts."

{9} Nichelle advances a number of arguments in defense of the judgment and the trial court's conclusion that she was a Class I insured. First, Nichelle claims that because she was rated as the principal driver for the F100 pickup truck and assessed additional premiums, and because the policy failed to define certain terms, her status was elevated above that of a mere permissive Class II insured. Second, Nichelle contends that the representations made by the Atkinson Agency to Linda Ponder regarding the extent of her coverage led Linda Ponder to believe that there was no change in coverage after Nichelle moved to the Diamond A Ranch from the Ponder family home. Finally, Nichelle argues that the language in the renewal notices containing the phrase, "Younger drivers included if insured on other vehicles by us" would cause a reasonable insured to believe that she was a Class I insured. We hold that these arguments, taken together, support the trial court's judgment.

A.

{10} Stacking refers to "an insured's attempt to recover damages in aggregate under more than one policy or one policy covering more than one vehicle until all damages either are satisfied or the total policy limits are exhausted." **Morro v. Farmers Ins. Co.**, 106 N.M. 669, 670, 748 P.2d 512, 513 (1988) (citing **Gamboa v. Allstate Ins. Co.**, 104 N.M. 756, 757, 726 P.2d 1386, 1387 (1986), and **Lopez v. Foundation Reserve Ins. Co.**, 98 N.M. 0,166, 646 P.2d 1230, 1232 (1982)).

{11} We resolve questions regarding insurance policies by interpreting their terms and provisions in accordance with the "same principles which govern the interpretation of all contracts." **Rummel v. Lexington Ins. Co.**, 1997-NMSC-41, P18, 123 N.M. 752, 945 P.2d 970 (quoting 2 Lee R. Russ & Thomas F. Segalla, **Couch on Insurance 3d** § 21:1 (1996), and citing **Jaramillo v. Providence Washington Ins. Co.**, 117 N.M. 337, 340, 871 P.2d 1343, 1346 (applying principles of contract interpretation to construe an automobile insurance policy)). Our analysis of the insurance policy proceeds with the primary goal of "ascertaining the intentions of the contracting parties with respect to the challenged terms at the time they executed the contract." **Strata Prod. Co. v. Mercury Exploration Co.**, 1996-NMSC-16, P29, 121 N.M. 622, 916 P.2d 822. "When discerning the purpose, meaning, and intent of the parties to a contract, the court's duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the court may not alter or fabricate a new agreement for the parties." **CC Housing Corp. v. Ryder Truck Rental, Inc.**, 106 N.M. 577, 579, 746 P.2d 1109, 1111 (1987); **see also Montoya v. Villa Linda Mall, Ltd.**, 110 N.M. 128, 129, 793 P.2d 258, 259 (1990) ("It is black letter law that, absent an ambiguity, a court is bound to interpret and enforce a contract's clear language and cannot create a new agreement for the parties."). Thus, when the policy language is clear and unambiguous, we must give effect to the contract and enforce it as written. **See Estate of Griego v. Reliance Std. Life Ins. Co.**, 2000-NMCA-22, P19, 128 N.M. 676, 997 P.2d 150; **Richardson v. Farmers Ins. Co.**, 112 N.M. 73, 74, 811 P.2d 571, 572 (1991) ("Absent ambiguity, provisions of [a] contract need only be applied, rather than construed or interpreted."). In construing insurance policy provisions, "ambiguities arise when separate sections of a policy appear to conflict with one another, when the language of a provision is susceptible to more than one meaning, when the structure of the contract is illogical, or when a particular matter of coverage is not explicitly addressed by the policy." **Rummel**, 1997-NMSC-41, P19, 123 N.M. at 758, 945 P.2d at 976 (citations omitted).

{12} The express language of the State Farm policy is not ambiguous. For purposes of uninsured motorist coverage, the policy clearly includes relatives as insureds.[1] At the time of the accident, Nichelle did not meet the definition of a relative as defined by the policy. It defines a relative as "a person related to you or your spouse by blood, marriage or adoption who lives with you. It includes your unmarried and unemancipated child away at school." Substantial evidence exists to support the trial court's finding that Nichelle was not a Class I insured because she did not live with her parents and was married. Although there was testimony that Nichelle maintained dual residences at the Ponder family home and Diamond A Ranch and had announced her intention to move back to the Ponder family home and obtain a divorce from her husband, the trial court found that Nichelle did not live at the Ponder home. As such, we agree with the trial court's conclusion that "at the time of the accident, Nichelle Ponder was not a Class I insured under any of the express definitions contained in the policy."

{13} Despite our finding that Nichelle was not a Class I insured under the express provisions of the State Farm policy, our inquiry does not end here. New Mexico has, since our decisions in **C.R. Anthony Co. v. Loretto Mall Partners**, 112 N.M. 504, 508-09, 817 P.2d 238, 242-43 (1991), and **Mark V, Inc. v. Mellekas**, 114 N.M. 778, 781-82, 845 P.2d 1232, 1235-36 (1993), no longer restricted contract interpretation to language found within the four corners of an insurance policy. The **Mark V, Inc**. Court recognized that "without a full examination of the circumstances surrounding the making of the agreement, ambiguity or lack thereof often cannot properly be discerned." 114 N.M. at 781, 845 P.2d at 1235. In abandoning reliance only on the four-corners approach, courts are now allowed to consider extrinsic evidence in determining whether an ambiguity exists in the first instance, or to resolve any ambiguities that a court may discover. In **Jaramillo**, we stated that a court may consider extrinsic evidence to make

[1] Section III of the State Farm policy, which outlines uninsured and unknown motorist coverage, defines an insured as:

1. the first person named in the declarations;

its preliminary finding on questions of ambiguity. 117 N.M. at 340-41, 871 P.2d at 1346-36. **Rummel** not only recognized that a court could use extrinsic evidence to determine if an ambiguity existed, but also added that, "if ambiguities cannot be resolved by examining the language of the insurance policy, courts may look to extrinsic evidence such as the premiums paid for insurance coverage, the circumstances surrounding the agreement, the conduct of the parties, and oral expressions of the parties' intentions." 1997-NMSC-41, P21, 123 N.M. at 759, 945 P.2d at 977.

{14} We note, however, that in examining extrinsic evidence we will not give effect to a party's undisclosed intentions. "As a matter of law, one party's subjective impressions, innermost thoughts, or private intentions, do not create an ambiguity." **Hoggard v. Carlsbad**, 1996-NMCA-3, P15, 121 N.M. 166, 909 P.2d 726. In **Hansen v. Ford Motor Co.**, 120 N.M. 203, 206, 900 P.2d 952, 955 (1995), we determined that a party's statements of unilateral, subjective intent, without more, are insufficient to establish ambiguity in light of clear contract language.

{15} Based on our review of the circumstances surrounding the agreement, the conduct of the parties, and their oral expressions of their intentions, we conclude that the Ponders' State Farm policy was ambiguous. Linda Ponder testified that her conversations with the Atkinson Agency between 1986 and 1987, led her to believe that Nichelle's coverage was the same as it had been when she had been originally rated in 1985. She believed that the extent of Nichelle's coverage had not changed and that her offers to make changes to the policy were not necessary.

{16} As early as August 1986, Linda Ponder contacted the Atkinson Agency. During this conversation, Linda Ponder informed the agency that Nichelle Ponder had married, was expecting a baby, and was "moving in and out" of the Ponder family home. Linda Ponder testified that she wanted to know whether the change in her daughter's marital status limited her coverage so that, if necessary, she could take the necessary steps to obtain coverage that would also cover Nichelle on the other Ponder vehicles. Linda Ponder maintained that Atkinson repeatedly used the terms "fully covered" to describe Nichelle's coverage. The agency file partially corroborated Linda Ponder's testimony about Nichelle Ponder's marriage but failed to mention any change in living arrangements.

{17} During another conversation with the Atkinson Agency in May 1987, prior to the expiration of their automobile insurance policies, Linda Ponder testified that she asked about the status of her daughter's coverage because Nichelle was married and planning to move to the Diamond A Ranch, and she wanted to confirm that Nichelle still had insurance coverage. Furthermore, she indicated to Atkinson that she wanted "full coverage" for her daughter to continue and expressed concern that her change of residence would alter the scope of her coverage. She claims that Atkinson reassured her stating, "don't worry, everything's taken care of." We note that Linda Ponder, on cross examination, testified that she did not inquire what "full coverage" meant. Linda Ponder testified that her conversations with the Atkinson Agency between 1986 and 1987 led her to believe that Nichelle's coverage was the same as it had been in 1985 when she had been originally rated and that the extent of coverage did not change and that her offers to make any changes to the policy were not necessary.

{18} The Atkinson Agency maintains that they were never questioned by the Ponders as to what effect Nichelle's change in residence would have on her insured status, and challenges Linda Ponder's claim that the primary purpose of the several conversations with Atkinson was to ascertain the extent of Nichelle's coverage and to instruct Atkinson to ensure that her daughter's insurance coverage was maintained. As such, Herb Atkinson testified that he did not relay to the Ponders that a change in residence would affect the extent of their daughter's coverage.

{19} Examination of the extrinsic evidence in this case supports a finding that the policy was

ambiguous. **See C.R. Anthony Co.**, 112 N.M. at 508-09, 817 P.2d at 242-43; **Mark V, Inc.**, 114 N.M. at 781-82, 845 P.2d at 1235-36. The evidence presented does more than express Ponder's "unilateral, subjective intent." **Hansen**, 120 N.M. at 206, 900 P.2d at 955. The affidavits and trial testimony provide evidence of the oral expressions and intentions of the parties in the formation of the contract.

{20} Herb Atkinson's testimony that a minor, like Nichelle Ponder, who moves out of the house and takes a vehicle would still enjoy full coverage under both the liability and uninsured motorist provisions of her parents' policies, does not alter the fact that there were significant changes in the scope of coverage with regard to Nichelle's ability to stack coverage. Despite Herb Atkinson's testimony that there was no way that he could write a policy that would allow an individual, like Nichelle, who does not own the vehicle, to stack coverage for the seven additional vehicles after she had moved out and no longer qualified as a named insured under the policy, the same conclusion would not be obvious to the typical insured. Had the Atkinson Agency informed the Ponders that because Nichelle was no longer living in the family home, she was no longer entitled to stacking and then followed up by suggesting that they compensate by increasing their uninsured motorist coverage for the F100 pickup truck, we would not be presented with the issues before us today.

B.

{21} In determining whether contractual ambiguities exist, we also examine the effect of State Farm's rating of Nichelle as the principal driver and charging an additional premium for her use of the Ford F100 pickup truck.

{22} New Mexico recognizes two classes of insureds, each with attendant rights for purposes of stacking uninsured motorist coverage benefits. "Class I insureds are the named insured, the spouse, and those relatives that reside in the household while Class II insureds are insured by virtue of their passenger status in an insured vehicle." **Tarango v. Farmers Ins. Co. of Arizona**, 115 N.M. 225, 226, 849 P.2d 368, 369 (1993). "First class insureds are covered by policies no matter where they are or in what circumstances they may be; coverage is not limited to a particular vehicle. On the other hand, second class insureds are covered only because they occupy an insured vehicle." **Gamboa**, 104 N.M. at 758, 726 P.2d at 1388 (citation omitted). Class I insureds may stack all uninsured motorist policies purchased by the named insured because those policies were purchased to benefit the named insured and his or her family, but Class II insureds may only recover under the policy on the car in which they rode because the purchaser only intended occupants to benefit from that particular policy. **Padilla v. Dairyland Ins. Co.**, 109 N.M. 555, 559, 787 P.2d 835, 839 (1990); **Morro v. Farmers Ins. Group**, 106 N.M. 669, 671, 748 P.2d 512, 513 (1988); **Schmick v. State Farm Mut. Auto. Ins. Co.**, 103 N.M. 216, 220, 704 P.2d 1092, 1096 (1985).

{23} In this case, the trial court concluded as a matter of law that, "when an additional premium was paid for Nichelle to be 'rated' on the one policy, she became a Class I insured on that vehicle." State Farm contends, however, that Nichelle was only a Class II permissive user not entitled to stacking benefits. State Farm argues that when it rated Nichelle after the May 1987 renewals, that it was not in consideration for her recent change in residence and marital status, but instead continued to be assessed in consideration for the additional risk created by Nichelle's 1985 accident and her status as an "unmarried female driver under age twenty-one."

{24} Our examination of the facts indicate that Nichelle was more than a mere permissive user of the F100 pickup truck. Here, State Farm's claim that the trial court may have believed that Nichelle was rated in consideration of her change in residence is not dispositive to the resolution of this issue. State Farm received valuable consideration both before and after the May 1987 renewal from the continued assessment of additional premiums in exchange for rating Nichelle as the principal driver of the Ford F100 pickup truck, despite having been informed of the changes in her living

arrangements and marital status. Based on this, we believe that the rating of Nichelle on the F100 pickup truck after her change in living arrangements contributed to the ambiguity in the policy.

{25} The trial court found that contractual ambiguities existed in the State Farm policy. In its conclusions of law the trial court stated, "Any ambiguity in the insurance policy will be construed against the insurer so as to resolve any coverage issue in favor of the insured." We agree with this analysis, and based on our consideration of the express provisions of the policy, as well as the extrinsic evidence of the circumstances surrounding the formation of the contract, we conclude that the State Farm policy is ambiguous.

C.

{26} When interpreting insurance policies, as a matter of public policy, ambiguities are generally construed in favor of the insured and against the insurer. Thus, where the policy is found to be unclear and ambiguous, "the court's construction of an insurance policy will be guided by the reasonable expectations of the insured." **Rummel**, 1997-NMSC-41, P22, 123 N.M. at 759, 945 P.2d at 977. The Court, in **Sanchez v. Herrera**, recognized the relative difference in bargaining power between insurance companies and the typical insured, stating,

> The typical insured does not bargain for individual terms within policy clauses; the insured makes only broad choices regarding general concepts of coverage, risk, and cost. Not only does the insurance company draft the documents, but it does so with far more knowledge than the typical insured of the consequences of particular words.

109 N.M. 155, 159, 783 P.2d 465, 469 (1989).

{27} In **Jaramillo**, however, we noted that while the general rule is to construe insurance policies in favor of the insured, "[the] general rule is not applicable to situations in which a third party who is not expressly named as the insured or who is not an acknowledged family member is seeking coverage under a policy that has not been purchased by the third party." 117 N.M. at 341, 871 P.2d at 1347. Although State Farm acknowledges that the trial court may have impliedly found the insurance policy was ambiguous, it contends that Ponder is a third party and therefore not entitled to the general rule favoring construction in favor of insureds. **Jaramillo** concluded that "if the ambiguity gives rise to the question whether a third party is or is not the intended beneficiary of specific stacking provisions, the third party is not entitled to the rule of construction that ambiguities must be decided against the insurer." 117 N.M. at 342, 871 P.2d at 1348.

{28} We do not dispute **Jaramillo** 's rule regarding third-party beneficiaries and burdens of proof. However, we conclude that Nichelle does not fall in the same category as the type of third-party beneficiaries identified in **Jaramillo**. This case is factually distinguishable from **Jaramillo**. In **Jaramillo**, an employee was seeking to stack benefits under a company automobile insurance policy. In contrast, the evidence in this case, which includes the express policy provisions of the State Farm policy, extrinsic evidence relating to the renewal notices, Linda Ponder's discussions, and contact with the Atkinson Agency, supports an interpretation that Nichelle was not a third-party beneficiary. Nichelle's name appeared in the policy, though as a driver rated for the use of the Ford F100 pickup truck, and according to the testimony of Linda Ponder, she expected her daughter's full coverage to continue with the policy renewals in May 1987. We recognize the rationale behind not permitting third persons, not a party to a contract, from enjoying the benefit of a construction of the policy in their favor. However, in this case, we cannot accept State Farm's suggestion that we apply the rule to Nichelle and characterize her as a third person seeking to benefit from stacking provisions. Given the trial court's findings of fact, we believe that Nichelle is not a third-party beneficiary as described in **Jaramillo**. As such, we conclude that the established principles by which New Mexico law "recognizes the special nature of insurance contracts and has developed principles

of construction that favor both the insured and the avowed purpose of insurance, the provision of coverage" remain the proper means of analyzing and construing the insurance contract in this case. **Sanchez**, 109 N.M. at 159, 783 P.2d at 469.

D.

{29} Accordingly, we find that Linda Ponder had a reasonable expectation that her daughter would maintain the same type and extent of coverage that Nichelle enjoyed while living at the Ponder family home. **See Casias v. Continental Casualty Co.**, 1998-NMCA-83, 125 N.M. 297, 960 P.2d 839. Although the Atkinson Agency may have told Linda Ponder that her daughter was "fully covered" and "not to worry" and although Nichelle may have maintained liability and uninsured motorist coverage under the terms of the policy, we nonetheless believe that based on the oral expressions of the parties and the intentions communicated therein, that Linda Ponder had a reasonable expectation that Nichelle could stack coverage. We find it relevant to our disposition of this case that Nichelle had enjoyed Class I insured status under the express provisions of the policy, prior to her change in residence. Combined with Linda Ponder's attempts to maintain that coverage and the confusion that ensued, we find that based on the ambiguities we have identified in this case, Linda Ponder had a reasonable expectation that her daughter enjoyed the same Class I status she did prior to her change in marital status and residence.[2]

{30} In this case, the trial court specifically found that Nichelle was not a Class I insured under the express terms and provisions of the policies issued to her parents. However, the trial court nonetheless concluded that Nichelle was a Class I insured based on the ambiguity in the policy. Applying **Jaramillo** 's rule that extrinsic evidence may be considered to determine if the terms and conditions of the policy were ambiguous, we conclude from the evidence adduced at trial that substantial evidence exists to support the trial court's decision that Nichelle was a Class I insured.

{31} In affirming the trial court, we are not adopting, at this time, a per se rule that in every circumstance a person, not otherwise a Class I insured under the policy, who is a rated driver, and for whom additional premiums are assessed, is by default a Class I insured. Based on the specific facts presented in this case, we hold that Nichelle had a reasonable expectation of coverage as a Class I insured. Rather than finding as a matter of law that rating a driver and assessing an additional premium automatically confers Class I status, our conclusion is based on our consideration of the extrinsic evidence and the policy language in this case. The fact that State Farm rated Nichelle was only one of many factors that led to the contractual ambiguity which we construed in favor of Nichelle. Despite unambiguous policy language which might have otherwise excluded Nichelle as a Class I insured, the context in which the policy was created and accepted demonstrate a clear intent and a reasonable expectation that Nichelle Ponder maintain her status as a Class I insured. Given the contractual ambiguities in this case, we construe the policy in favor of Nichelle.

IV.

{32} Having concluded that Nichelle is a Class I insured, we now address the question of whether she is permitted to stack the uninsured motorist benefits on all of her parents' vehicles or only the three vehicles which had renewal notices that contained the language, "Younger drivers included if insured on another vehicle by us." As we have noted, New Mexico has refused to enforce insurance policy provisions which purport to limit uninsured motorist coverage. As we have already determined that Ponder was, in this case, a Class I insured, we now consider the effect of the language in the renewal notices for the other

[2] his or her spouse;

remaining vehicles which contain clauses purportedly limiting coverage to certain drivers.[3]

{33} New Mexico has developed a strong policy favoring stacking for Class I insureds and "this Court has consistently refused to enforce exclusions that attempt to limit uninsured motorist coverage to particular circumstances." **Loya v. State Farm Mut. Ins. Co.**, 119 N.M. 1, 6, 888 P.2d 447, 452 (1994). "Insurance policy clauses that prohibit stacking are particularly repugnant to public policy when the injured insured has paid separate premiums for underinsured/uninsured motorist coverage on each vehicle." **Jimenez v. Foundation Reserve Insurance Co., Inc.**, 107 N.M. 322, 324, 757 P.2d 792, 794 (1988). The underlying rationale is that if the damages an insured has suffered have exceeded the policy limits, the insured has a reasonable expectation of coverage under the policies he or she has purchased for their benefit. **Id.**

{34} State Farm correctly acknowledges that it stands on shaky ground when advancing arguments that urge this Court to limit the coverage of a Class I insured. In **Jimenez**, we stated that "an insurer's attempt by a limiting clause to preclude stacking of additional coverage separately paid for by the insured violates the clear policy of the uninsured motorist statute, which intends that an injured party be compensated to the extent of coverage obtained by or for the injured party." 107 N.M. at 325, 757 P.2d at 795; **see also Schmick**, 103 N.M. at 221, 704 P.2d at 1097 ("[The] only limitations to be placed on uninsured/underinsured motorist coverage are that the insured legally be entitled to recover damages and that the negligent driver be either uninsured or underinsured" and holding an exclusionary clause limiting plaintiff's recovery "void as against New Mexico's policy of compensating persons injured through no fault of their own."). In **Loya**, we held that an insurance policy containing an express exclusion limiting a spouse's coverage based on a definition of "spouse" limited to "your husband or wife while living with you" was void. 119 N.M. at 5-6, 888 P.2d at 451-52.

{35} While the notices for only three of the vehicles contains language that includes "younger drivers . . . if rated on another car insured with us," the language in the notices for the other vehicles only contained language identifying the **principal** driver. There were no specific exclusions restricting Nichelle's use of the remaining vehicles. Accordingly, in this case, we conclude that the purported exclusions in the State Farm policy limiting Nichelle's ability to stack coverage to drivers not under 25 shall not be given effect so as to prohibit Nichelle Ponder from stacking coverage for all the vehicles in her parents' policies. Therefore, we hold that the trial court properly concluded that Nichelle is entitled to stack the benefits for all eight vehicles.

V.

{36} State Farm claims that the trial court's award of $ 156,729.43 in prejudgement interest under NMSA 1978, § 56-8-3(A) (1983) (stating that interest shall not exceed fifteen percent in cases where money is due by contract) constitutes a penalty and was therefore an abuse of discretion. Specifically,

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[3] their relatives; and

4. any other person while occupying:

a. your car . . . such vehicle has to be used within the scope of the consent of you or your spouse. . . .

(Emphasis omitted).

2 We note that our disposition of this case might have been different if Nichelle had not been previously insured as a Class I insured for there may have been less credence to the argument that the Ponders had a reasonable expectation that their daughter was covered as a Class I insured.

3 Relevant language in the renewal policies is as follows:

1. 1986 Dodge motor home: "Your premium is based on the following: Principal driver is age 25 or older."

2. 1983 Harley Davidson motorcycle: "There are no principal male or unmarried female operators under age 25 unless rated on another motorcycle insured with us."

3. 1982 Honda motorcycle: "There are no principle male or unmarried female operators under age 25 unless rated on another motorcycle insured with us."

4. 1981 Ford F100: "Principle driver is an unmarried female under age 21."

5. 1985 Ford F250: "There are no unmarried male drivers under age 25. Younger drivers included if rated on another car insured with us."

6. 1986 Nissan 300ZX: "There are no male or unmarried female drivers under age 25. Younger drivers are included if rated on another car insured with us."

7. 1982 Ford F250: "There are no unmarried male drivers under age 25. Younger drivers included if rated on another car insured with us."

8. 1983 Peugeot: No language in record.

State Farm contends that because the trial court created a new class of Class I insureds, thereby extending the current law of stacking in New Mexico, no money was ever due on the contract - thus any interest due should have only accrued from the date of the judgment. **See** § 56-8-3(A). Finally, State Farm claims that the prejudgment interest award constituted a penalty because it amounted to almost seventy percent of the damage award.

{37} "The obligation to pay prejudgment interest under section 56-8-3 arises by operation of law and constitutes an obligation to pay damages to compensate a claimant for the lost opportunity to use money owed the claimant and retained by the obligor between the time the claimant's claim accrues and the time of judgment (the loss of use and earning power of the claimant's funds)." **Sunwest Bank v. Colucci**, 117 N.M. 373, 377, 872 P.2d 346, 350 (1994) (citation omitted). Even for those cases where prejudgment interest is required as a matter of right, "the trial court must consider the equities in each case before awarding prejudgment interest pursuant to Section 56-8-3." **Sunwest Bank**, 117 N.M. at 378, 872 P.2d at 351; **Ranch World of New Mexico, Inc. v. Berry Land & Cattle Co.**, 110 N.M. 402, 404, 796 P.2d 1098, 1100 (1990) (quoting **Shaeffer v. Kelton**, 95 N.M. 182, 188, 619 P.2d 1226, 1232 (1980), for the proposition that prejudgement interest awards should not be made "arbitrarily without regard for the equities of each particular situation").

{38} State Farm argues that because the trial court found that it had paid Nichelle all monies for which she was entitled under the express definitions of the policy, no breach of contract existed," and that its "duty to pay did not become fixed until the court changed the law and extended the scope of uninsured motorist coverage." Because State Farm owed no additional monies and because the "additional coverage was created by the trial court" the prejudgment interest awarded by the trial court constitutes a penalty and an abuse of discretion. State Farm directs us to numerous cases standing for the proposition that prejudgment interest is due as a matter of right "'only when a party has breached a duty to pay a definite sum of money or the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract, or by established market prices.'" **Sunwest Bank**, 117 N.M. at 378, 872 P.2d at 351 (quoted authority omitted).

{39} In this case, we hold that the trial court properly awarded Nichelle prejudgment interest under section 56-8-3(A) in the amount of $ 156,729.43. As indicated above, we do not today announce a per se rule that an insurance company creates a Class I insured by rating a driver and assessing additional premiums. Our holding is very fact-specific and conforms to established legal precedent in New Mexico regarding stacking insurance coverage. Nichelle had a reasonable expectation of coverage under the State Farm policy. As such, we hold that the trial court's application of section 56-8-3(A) and award of prejudgment interest for money due by contract was proper.

{40} Furthermore, the trial court concluded that its award of seven and one-half percent interest was "fair and reasonable, considering the earning power of money [the $ 225,000 damages award]; that it is a case of first impression; and that the contract between the parties is silent regarding the issues which were litigated." Under section 56-8-3(A), the trial court was permitted to assess a maximum prejudgment interest award of fifteen percent. Instead, the trial court's award constituted only seven and one-half percent. The trial court properly considered the equities of the case at hand and we find no abuse of discretion in its judgment.

{41} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

PAMELA B. MINZNER,
Chief Justice

GENE E. FRANCHINI,
Justice

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2001-NMSC-001

Filing Date: December 20, 2000, As Corrected January 23, 2001, As Corrected March 23, 2001

Docket Nos. 25,950, 25,796

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

ALBERT JOHNSON,

Defendant-Respondent.

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

CHUCK WENGER,

Defendant-Respondent.

ORIGINAL PROCEEDINGS ON CERTIORARI

William C. Birdsall and Paul R. Onuska, District Judges

Released for Publication January 8, 2001

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OPINION

BACA, Justice.

{1} In these consolidated cases, we are called upon to clarify the offense of driving while intoxicated (DWI) and define its parameters. We granted certiorari pursuant to NMSA 1978, § 34-5-14(B) (1972) in order to review two cases which have been consolidated to address whether the State can charge a defendant with DWI pursuant to NMSA 1978, § 66-8-102 (1997, prior to 1999 amendment) when the defendant is on private property and in actual physical control of a non-moving vehicle. After a careful and in-depth analysis of the applicable statutes, existing case law, and the policy underlying our DWI legislation, we reject any public/private property distinction with respect to the offense of DWI. As such, the State may charge a person who is in actual physical control of a non-moving vehicle with DWI despite the fact that he or she is on private property. Accordingly, we reverse the Court of Appeals' decisions upholding the district court's orders dismissing the charges against the defendants.

I.

{2} There are no disputed issues of fact in either of these consolidated cases. The parties have stipulated to the facts in their respective cases as follows. On January 10, 1998, an Aztec police officer responded to a dispatch call that reported an intoxicated driver in a Dodge truck with Texas license plate, RL0408. The officer located the described truck parked on private property with the Respondent, Chuck Wenger, seated in the driver's seat. Although the engine of the vehicle was not running, the key was in the ignition. After conducting the standard field sobriety tests, the officer believed that Mr. Wenger was under the influence of an intoxicating liquor and arrested him for DWI. Mr. Wenger's blood alcohol test results indicated .35 and .34 grams

of alcohol in two hundred liters of breath - more than four times the legal limit.

{3} Similarly, on March 15, 1998, a Farmington police officer observed a vehicle parked in the private parking lot of a motel. The officer noticed an individual, later identified as the Respondent, Albert Johnson, sitting in the driver's seat. Mr. Johnson was noticeably nodding his head in an exaggerated manner as if he were extremely fatigued. The vehicle's engine was running, the key was in the ignition, and a large pool of condensation was found under the exhaust pipes, indicating that the car had possibly been at the location for three hours. Observing signs of intoxication, the officer conducted the standard field sobriety tests. As a result of these tests, Mr. Johnson was arrested for DWI. His breath test results indicated a blood alcohol level of .18 and .17 - more than twice the legal limit.

{4} Both Mr. Wenger and Mr. Johnson were charged with DWI. The district court found in both cases that, although Mr. Wenger and Mr. Johnson were in actual physical control of their respective vehicles as defined in **Boone v. State**, 105 N.M. 223, 226, 731 P.2d 366, 369 (1986), neither one of them was "operating" their vehicles because the vehicles were not on a public highway as defined by UJI 14-4511 NMRA 2000. Accordingly, the district court held that neither Mr. Wenger nor Mr. Johnson could be charged under Section 66-8-102 for DWI and dismissed the charges against them. In both cases, the State appealed to the Court of Appeals, which upheld the district court's orders. **See State v. Wenger**, 1999-NMCA-92, P1, 127 N.M. 625, 985 P.2d 1205; **State v. Johnson**,-NMCA-20,230, slip op. (Aug. 19, 1999). In **Wenger** the Court of Appeals held that "when a DWI charge is based on 'actual physical control' rather than 'driving,' that offense must take place on a highway as defined by the Motor Vehicle Code." **Wenger**, 1999-NMCA-92, P13, 127 N.M. at 629, 985 P.2d at 1209 (relying on the definition of "highway" in NMSA 1978, § 66-1-4.8(B) (1991)). In conformity with **Wenger**, the Court of Appeals, by memorandum opinion, upheld the district court's order dismissing the charges against Mr. Johnson. Neither Mr. Wenger nor Mr. Johnson challenge the finding that they were in actual physical control of their vehicles. Likewise, the State agrees that the defendants were on private property at the time of their arrests.

II.

{5} This Court must determine whether the Legislature intended to place a geographical limitation on the offense of DWI depending on the type of activity constituting the "driving" of a vehicle. To resolve this issue we must ascertain and interpret the Legislature's intent in drafting the statutes governing this offense. The standard of review for issues of statutory interpretation and construction is **de novo. See State v. Rowell**, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

{6} The issue presented herein necessitates the interpretation of Section 66-8-102, NMSA 1978, § 66-7-2 (1978), and NMSA 1978, § 66-1-4.4(K) (1991, prior to 1999 amendment). As we engage in our interpretation of these statutes we keep in mind basic rules of statutory construction. "The starting point in every case involving the construction of a statute is an examination of the language utilized by [the Legislature]" in drafting the pertinent statutory provisions. **State v. Wood**, 117 N.M. 682, 685, 875 P.2d 1113, 1116 . "When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." **State v. Jonathan M.**, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990); **accord State v. Shije**, 1998-NMCA-102, P6, 125 N.M. 581, 964 P.2d 142. The plain meaning rule, however, is only a guideline for determining the legislative intent. **Junge v. John D. Morgan Constr. Co.**, 118 N.M. 457, 463, 882 P.2d 48, 54 (Ct. App. 1994). It is the responsibility of this Court to search for and effectuate the purpose and object of the underlying statutes. **See State ex rel. Helman v. Gallegos**, 117 N.M. 346, 353, 871 P.2d 1352, 1359 (1994). These statutes should be harmonized and construed together when possible, in a way that facilitates achievement of their

goals. **See State ex rel. Quintana v. Schnedar**, 115 N.M. 573, 575-76, 855 P.2d 562, 564-65 (1993). Accordingly, we analyze these statutes not only within the statutory scheme of the Motor Vehicle Code but also within the context of the policy underlying the offense of DWI. The purpose of our DWI legislation is to protect the health, safety, and welfare of the people of New Mexico. **See State v. Harrison**, 115 N.M. 73, 77, 846 P.2d 1082, 1086 (Ct. App. 1992); **see also Incorporated County of Los Alamos v. Johnson**, 108 N.M. 633, 634, 776 P.2d 1252, 1253 (1989). We must adhere to this policy as we analyze the applicable statutory provisions.

III.

{7} Our interpretation of the relevant statutory provisions leads us to the conclusion that there is no public/private property distinction in our DWI law. Section 66-8-102 states in pertinent part: "It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle **within this state**." Section 66-8-102(A) (emphasis added). The only geographical limitation to the offense of DWI is found in the operative words "within this state." The plain meaning of "within this state" is quite broad and does not specify a distinction between public and private property in the interior of the State of New Mexico. We cannot ignore the Legislature's choice of words, especially when the Legislature has used more specific phraseology when it has intended to limit the reach of a statute. **See, e.g.**, NMSA 1978, § 66-8-114 (1978) (prohibiting careless driving "on the highway"); **State v. Brennan**, 1998-NMCA-176, PP5-6, 126 N.M. 389, 970 P.2d 161 (holding that, unlike the offense of DWI, careless driving is prohibited on highways alone). In general, therefore, the DWI statute has no geographical limitation and applies to both public and private property.

{8} Moreover, the Legislature further defined the scope of Section 66-8-102 in Section 66-7-2. Section 66-7-2(A) provides the general geographical limitation: "The provisions of Article 7 of Chapter 66 NMSA 1978, relating to the operation of vehicles, refer exclusively to the operation of vehicles upon highways, except where a different place is specifically referred to in a given section." Section 66-7-2(B), which by its express terms applies to DWI, provides an exception to the general geographical limitation: "The provisions of Section[ ] . . . 66-8-102 . . . shall apply upon highways and **elsewhere throughout the state**." (Emphasis added.) "Highway" is defined as "every way or place generally open to the use of the public as a matter of right for the purpose of vehicular travel, even though it may be temporarily closed or restricted for the purpose of construction, maintenance, repair or reconstruction." NMSA 1978, § 66-1-4.8(B) (1991). By providing a definite exception in Section 66-7-2(B), the Legislature clearly intended to prohibit DWI in a geographical area that reached beyond that falling within the definition of "highway." Analyzing these statutes together, therefore, we find that a person can violate Section 66-8-102 on public as well as private property. This interpretation is consistent with other jurisdictions which have determined that "elsewhere" encompasses both public and private property. **See, e.g.**, **Lunceford v. City of Northport**, 555 So. 2d 246, 247 (Ala. Crim. App. 1988); **State v. Budden**, 226 Kan. 150, 595 P.2d 1138, 1141 (Kan. 1979); **Rettig v. State**, 334 Md. 419, 639 A.2d 670, 673-74 (Md. 1994).

{9} The Respondents ask us to go one step further in the interpretation of these statutes and request that this Court find a public/private distinction based on the type of activity that constitutes "driving" under Section 66-8-102. It is well settled that a defendant can be charged with DWI under this section if: (1) the defendant is intoxicated and driving a moving vehicle on a public highway, **see, e.g.**, **State ex rel. Schwartz v. Kennedy**, 120 N.M. 619, 632, 904 P.2d 1044, 1057 (1995); (2) the defendant is intoxicated and driving a moving vehicle on a private street or private property, **see State v. Richardson**, 113 N.M. 740, 741, 832 P.2d 801, 802 ; or (3) the defendant is intoxicated and is in actual physical control of a non-moving vehicle on a public highway, **see Boone**, 105 N.M. at 226, 731 P.2d at 369; **see also State v. Tafoya**, 1997-NMCA-83,

P5, 123 N.M. 665, 944 P.2d 894; **Harrison**, 115 N.M. 73, 846 P.2d 1082. These consolidated cases trigger the last remaining possible prong of the offense of DWI - whether a defendant can be charged with a violation of the DWI statute if he or she is intoxicated and in actual physical control of a non-moving vehicle on private property. The Respondents argue that when a person is on private property a distinction should be drawn between actual physical control and driving. They assert that on private property, actual physical control of a non-moving vehicle is not sufficient to support the State charging a defendant with DWI.

{10} The express provisions of Section 66-8-102 provide no distinction between "actual physical control" and "driving" based on the location of its occurrence. The Respondents, however, base their contentions on this Court's analysis in **Boone**, 105 N.M. at 225-26, 731 P.2d at 368-69, and UJI 14-4511. **Boone** addressed whether motion of a vehicle is a necessary element of the offense of DWI. **Boone**, 105 N.M. at 224, 731 P.2d at 367. The defendant in **Boone** was charged with DWI pursuant to Section 66-8-102 when he was discovered in the driver's seat of his automobile, stopped in a traffic lane late at night with the vehicle's engine running and the lights off. **Id.** This Court held that "the offense of DWI under Section 66-8-102 does not require motion of the vehicle; the offense is committed when a person under the influence drives or is in actual physical control of a motor vehicle." **Id.**

{11} In reaching this holding, this Court concluded, as a matter of law, that the meaning of "drive" in Section 66-8-102 is unclear and therefore relied on the statutory provision defining the term "driver," currently Section 66-1-4.4(K),[1] to interpret the meaning of the term "drive" in the DWI statute. **See Boone**, 105 N.M. at 225, 731 P.2d at 368. Section 66-1-4.4(K) states:

> "driver" means every person who **drives or** is in **actual physical control** of a motor vehicle, including a motorcycle, **upon a highway**, who is exercising control over or steering a vehicle being towed by a motor vehicle or who operates or is in actual physical control of an off-highway motor vehicle[.]

(Emphasis added.) Through reference to this provision, this Court established that "actual physical control" of a vehicle is sufficient to support a DWI conviction.

{12} The Respondents argue that by relying on the definitional statute to support its holding in **Boone**, this Court incorporated the definition of "driver" into Section 66-8-102. Accordingly, they assert that this Court is limited when considering "actual physical control" to activity that takes place "upon a highway." Therefore, relying on this definitional statute, coupled with the fact that they were on private property and not "upon a highway," the Respondents assert they cannot be charged with DWI. The Respondents' analysis, however, is incomplete.

{13} Applying rules of grammar to Section 66-1-4.4(K), the word "drives" and the phrase "actual physical control" are both modified by the phrase "a motor vehicle, including a motorcycle," all of which is in turn modified by the phrase "upon a highway." **See Wilson v. Denver**, 1998-NMSC-16, P16, 125 N.M. 308, 961 P.2d 153 (applying rules of grammar to statutory construction). Therefore, the term "driver," where it is found throughout the Motor Vehicle Code, generally includes persons who drive a motor vehicle upon a highway and persons who are in actual physical control of a motor vehicle upon a highway. **See** NMSA 1978, § 66-1-4 (1991) (stating, "Sections 66-1-4.1 through 66-1-4.20 . . . define terms for general purposes of the Motor Vehicle Code."). Despite the express limitation to "upon a highway" found in this general definitional statute, our analysis does not end here. Instead, we must consider the effect of Section 66-7-2. Section 66-8-102 is among those offenses whose geographical reach is specifically broadened by

[1] In 1986, when **Boone** was decided, the definitional provision of "driver" was found in NMSA 1978, N.M. Laws, Ch. 35, § 4, which in all pertinent aspects is the same as the current definition found at Section 66-1-4.4(K). To minimize any confusion, we will hereinafter refer to Section 66-1-4.4(K) when discussing the general definition of "driver."

Section 66-7-2. The Legislature has expressly and specifically provided that Section 66-8-102 "shall apply upon highways and **elsewhere throughout the state**." Section 66-7-2(B) (emphasis added). Section 66-7-2 does not distinguish between driving and actual physical control and therefore we conclude that this section broadens the geographical reach of Section 66-8-102 to "highways and elsewhere throughout the state" regardless of the conduct which constitutes driving while intoxicated. "When in a specific section of the Motor Vehicle Code a different meaning is given for a term defined for general purposes in Sections 66-1-4.1 through 66-1-4.20 . . . the **specific section's meaning and application of them shall control**." Section 66-1-4(A) (emphasis added). We conclude that Section 66-7-2 is the more specific statute since it refers directly to Section 66-8-102 and acts to clarify its geographical reach. Section 66-1-4.4(K), on the other hand, is the more general non-substantive definitional section which is applicable to all sections of the Motor Vehicle Code and only acts to assist in defining general terms found throughout the Code. Because these statutes cannot be harmonized in a way that reflects the intent of the Legislature, we hold that Section 66-7-2, as the specific statute, shall control.[2] By relying too heavily on the words "upon a highway" in Section 66-1-4.4(K), the Respondents ignore this critical step in the analysis and, as a result, reach a flawed conclusion.[3]

{14} **Boone** supports our conclusion today. This Court recognized the unique nature of the DWI statute in footnote 1 of **Boone**.

> We note that the language in Subsection [66-1-4.4(K)] generally limiting the definition of drivers to persons "upon a highway" does not apply to the offense of DWI. At the time it enacted that definition the Legislature expressly and specifically provided that Section 66-8-102 "shall apply upon highways and elsewhere throughout the state." [Section 66-7-2]. This specific statute will be construed as an exception to the general definitional statute. [Citations omitted.]

105 N.M. at 226 n.1, 731 P.2d at 369 n.1. Today, we simply acknowledge the validity of that reasoning and extend the same rationale to define the geographical reach of the DWI statute - an issue not triggered by the facts in **Boone**. As noted in footnote 1 of **Boone**, therefore, the general definitional statute, which limits the definition of "driver" to persons "upon a highway," does not apply to the offense of DWI. Accordingly, we find that Section 66-8-102 applies to private as well as public property, regardless of whether the intoxicated person is driving or in actual physical control of a vehicle.[4]

[2] Our conclusion is based on express statutory provisions enacted by the Legislature with respect to the offense of DWI. We are not engaging in a general/specific statute analysis as we did in **State v. Cleve**, 1999-NMSC-17, 127 N.M. 240, 980 P.2d 23, and **State v. Guilez**, 2000-NMSC-20, 129 N.M. 240, 4 P.3d 1231. Unlike **Cleve** and **Guilez**, where we analyzed multiple offenses which invoked issues of preemption and double jeopardy, here, we focus only on one statutory offense and a general definitional section of the Motor Vehicle Code.

[3] The dissent also relies too heavily on Section 66-1-4.4(K). The crucial distinction between the majority opinion and the dissent is not in the construction of Section 66-1-4.4(K) but in the fact that the dissent places more emphasis on the general definitional statute than on the statutory provisions that more specifically apply to DWI; Sections 66-8-102 and 66-7-2. This construction of Section 66-8-102 more closely effectuates the intent of the Legislature.

[4] Our statutory construction does not raise concerns regarding the due process rights of the Respondents. The Respondents had fair warning that their conduct would constitute a violation of Section 66-8-102. The test in determining whether such an interpretation and retroactive application of a statute offends due process is whether the construction actually given the statute was foreseeable. **See Bouie v. City of Columbia**, 378 U.S. 347, 350-51, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964). The Court engages in an impermissible interpretation of a statute when the interpretation is "so unexpected, [and] so outlandish, that no reasonable person could have expected it." **Welton v. Nix**, 719 F.2d 969, 970 (8th Cir. 1983). We do not engage in such unexpected and outlandish interpretation by concluding that there is no private/public property distinction in our DWI legislation. To the contrary, given the words "within the state" in Section 66-8-102, and "elsewhere throughout this state" in Section 66-7-2, it is quite foreseeable that this Court would interpret the offense of DWI as having no geographical limitations. As such, Mr. Johnson and Mr. Wenger had fair warning that they could be charged with DWI if they were on private property in actual physical control of a non-moving vehicle.

IV.

{15} The Court of Appeals in **Wenger**, while agreeing with the Respondents' interpretations of the pertinent statutes, also based its holding on UJI 14-4511. 1999- NMCA-92, PP14-15, 127 N.M. at 629, 985 P.2d at 1209. UJI 14-4511 states:

> A person is "operating" a motor vehicle if the person is: [driving the motor vehicle;] [or] [in actual physical control whether or not the vehicle is moving if the vehicle is on a highway;] [or] [exercising control over or steering a vehicle being towed by a motor vehicle;] [or] [in actual physical control of an off-highway motor vehicle].

The committee commentary states:

> Under this instruction anyone under the influence of alcohol or drugs who actually drives a motor vehicle, who exercises control over a vehicle being towed by a motor vehicle, or who operates or is in actual physical control of an off-highway vehicle, anywhere in the state, on the highway or off, is guilty of driving while under the influence. In addition, anyone under the influence of alcohol or drugs who is in actual physical control of a motor vehicle on a street, even if the person is asleep behind the wheel and not actually driving the vehicle, is guilty of driving while under the influence. **See State v. Boone**, 105 N.M. 223, 731 P.2d 366 (1986). However, if the person is in physical control of the vehicle, but not actually driving the vehicle, and the vehicle is off the road, that person is not guilty of driving while under the influence.

We recognize that this Court's approval of this jury instruction may have served to confuse matters further. There is "a presumption that the instructions [adopted by this Court from proposals by standing committees of the Court] are correct statements of law." **State v. Wilson**, 116 N.M. 793, 796, 867 P.2d 1175, 1178 (1994). Because we have not previously considered UJI 14-4511, however, the Court of Appeals was not bound by the UJI in its interpretations of Section 66-8-102 and had the authority to analyze whether UJI 14-4511 constitutes a correct statement of New Mexico law. **Wilson**, 116 N.M. at 795-96, 867 P.2d at 1177-78; **accord State v. Parish**, 1994-NMSC-72, 118 N.M. 39, 47, 878 P.2d 988, 996 (1994).

{16} In analyzing UJI 14-4511, the Court of Appeals characterized as dicta our statement in **Boone**, 105 N.M. at 226 n.1, 731 P.2d at 369 n.1, that the phrase "upon a highway" from the statutory definition of "driver" does not apply to the crime of DWI, and further determined that UJI 14-4511 "more faithfully reflects the statutory language" than footnote 1 in **Boone**. **Wenger**, 1999- NMCA-92, P15, 127 N.M. at 629, 985 P.2d at 1209. While we agree with the Court of Appeals that footnote 1 in **Boone** was dicta and not binding authority, the Court of Appeals should give such language adequate deference and not disregard it summarily. **See Fields v. D & R Tank & Equip. Co.**, 103 N.M. 141, 144, 703 P.2d 918, 921 . Contrary to the Court of Appeals' analysis, as discussed above, UJI 14-4511 does not faithfully reflect the pertinent statutory language of Sections 66-8-102, 66-7-2, and 66-1-4.4(K). As we have made clear in our earlier discussion, Section 66-8-102 does not create a geographical distinction based on whether an individual is driving or in actual physical control of a vehicle. Moreover, the committee's interpretation of the application of UJI 14-4511 is confusing. Pursuant to the commentary, a person who is in actual physical control of an "off-highway vehicle" can be found guilty of DWI regardless of whether the "off-highway vehicle" is on public or private property. Conversely, a person can not be found guilty of DWI if he or she is driving a traditional "vehicle," as distinguished from an "off-highway vehicle," if that vehicle is on private property. We have found no case law and can discern no rationale for distinguishing between actual physical control of a traditional "vehicle" and actual physical control of an "off-highway vehicle." **Cf. State v. Padilla**, 1997-NMSC-22, P9, 123 N.M. 216, 937 P.2d 492 (concluding that the committee

commentary for the UJI did "not withstand scrutiny"). Accordingly, we find that UJI 14-4511, and its accompanying commentary is a misstatement of law and, as such, it is disapproved.

V.

{17} The purpose of our DWI legislation is to protect the public from the risk of harm posed by intoxicated drivers. **See Johnson**, 108 N.M. at 634, 776 P.2d at 1253. "A motor vehicle is regarded as a source of danger when operated carelessly or by one whose responsiveness is diminished by intoxication." **City of Kansas City v. Troutner**, 544 S.W.2d 295, 299 (Mo. Ct. App. 1976). Intoxicated drivers place the public, as well as themselves, at risk. **See Harrison**, 115 N.M. at 77, 846 P.2d at 1086. As such, the potential harm that can result is much greater than if the intoxicated driver was the only one in danger. **See id.** Therefore, "the public's interest in deterring individuals from driving while intoxicated is compelling." **Id.** The policy underlying the DWI statute is to "prevent individuals from driving or exercising actual physical control over a vehicle when they, either mentally or physically, or both, are unable to exercise the clear judgment and steady hand necessary to handle a vehicle with safety both to themselves and the public." **Id.** ; **see also Richardson**, 113 N.M. at 742, 832 P.2d at 803. In fact, the public interest and potential harm posed by intoxicated drivers is so compelling that the offense of DWI is a strict liability crime. **See Harrison**, 115 N.M. at 77-78, 846 P.2d at 1086-87.

{18} The Court of Appeals observed that charging intoxicated drivers on highways with DWI and applying the offense to moving vehicles on private property "clearly serves the underlying policies of the DWI statute." **Wenger**, 1999-NMCA-92, P17, 127 N.M. at 630, 985 P.2d at 1210. The Court proclaimed, however, that "the application of the DWI statute to stationary vehicles on private . . . property would not as clearly serve such purposes." **Id.** Additionally, Respondents argue that "the State's desire to penalize sends the wrong message to the public, for it would encourage drunk drivers, apprehensive about being arrested, to attempt to reach their destination while endangering others on the highway." According to the Respondents, actual physical control of a vehicle is less of a threat to the public than "driving." Accordingly, they conclude that it is reasonable to confine the offense of DWI, when a person is exercising actual physical control of a vehicle, to public highways. Moreover, in their view, it is also reasonable to allow an intoxicated driver to pull completely off the highway to "sleep it off" as long as they are on private property. We disagree.

{19} Although the Respondents do not challenge the finding that they were in actual physical control of their vehicles when they were arrested for DWI, we find it helpful to define "actual physical control" in this case. As our prior case law illustrates, a person is in actual physical control over a vehicle when he or she exercises direct influence over the vehicle. **See, e.g.**, **Boone**, 105 N.M. at 224, 731 P.2d at 367 (upholding a conviction for DWI where the defendant was discovered in the driver's seat of his automobile with the engine running); **State v. Grace**, 1999-NMCA-148, PP12-13, 128 N.M. 379, 993 P.2d 93 (finding substantial evidence of "driving activity" where the defendant was "passed out" in the driver's seat of his vehicle with the engine running), **cert. denied**, No. 25,981 (1999); **State v. Rivera**, 1997-NMCA-102, PP2-5, 124 N.M. 211, 947 P.2d 168 (finding sufficient evidence to support a conviction of DWI where the defendant was found unconscious or asleep at the wheel of his car in the front yard of his house with the car's engine running); **Tafoya**, 1997-NMCA-83, PP2-5, 123 N.M. at 666, 944 P.2d at 895 (upholding a conviction of DWI where the defendant was in a parked vehicle that was inoperable, asleep at the wheel, with the key in the ignition, and the engine not running); **Harrison**, 115 N.M. at 74, 846 P.2d at 1083 (finding substantial evidence to support a DWI conviction where the defendant was discovered unconscious or asleep at the wheel of the automobile, with the engine on, even though the tires were blocked). We find that the clear purpose of the "actual physical control" element of the DWI statute is to deter persons

from placing themselves in a situation in which they can directly commence operating a vehicle while they are intoxicated, regardless of the location of the vehicle. **Cf. City of Cincinnati v. Kelley**, 47 Ohio St. 2d 94, 351 N.E.2d 85, 86-87 (Ohio 1976) (defining "actual physical control" as being physically capable of starting the engine and causing the vehicle to move).

{20} A person under the influence of intoxicating liquor or drugs who exerts actual physical control over a vehicle, is a threat to the safety and welfare of the public. **See Harrison**, 115 N.M. at 76, 846 P.2d at 1085. We recognize that the threat might not be as great as it would be if the intoxicated person was actually driving the vehicle, but a substantial danger to the public still exists. The Court of Appeals in **Harrison** recognized this danger when it stated that "there is a legitimate inference to be drawn that [the defendant] placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away." **Id.** (quoting **Hughes v. State**, 535 P.2d 1023, 1024 (Okla. Crim. App. 1975)). We do not believe, therefore, that the Legislature intended to limit the application of the element of actual physical control in the DWI statute to public highways.

{21} There is no significant difference between the danger posed by an intoxicated person in actual physical control of a vehicle on a public highway and that posed by an intoxicated person in actual physical control of a vehicle on private property. Physical control is a necessary prelude to the operation of a vehicle. **See Troutner**, 544 S.W.2d at 299. As such, it is just as important to regulate physical control of a vehicle on private property as it is on a public highway, especially since there is a widespread use of motor vehicles, not only on highways, but in shopping centers and other places that are private yet open to the public. **See, e.g.**, **Cook v. State**, 220 Ga. 463, 139 S.E.2d 383, 384-85 (Ga. 1964) (finding that the extensive use of private property by the public indicates a need to protect the public from drunk drivers on places other than public streets and highways). Accordingly, it is necessary for the promotion of public safety to interpret the offense of DWI in its entirety to extend to public as well as private property.

{22} The Court of Appeals and the Respondents assert that punishing intoxicated persons who are in actual physical control of a non-moving vehicle on private property would encourage those persons to commence or continue driving even though they felt impaired. We recognize the rationale behind the policy advanced by the Court of Appeals and the Respondents. We believe, however, that encouraging intoxicated drivers to pull completely off the public highway in search of private property when the driver decides he or she is too impaired to continue driving, may pose a greater risk to the public than allowing the driver to simply pull over to the shoulder of the highway. As the Court of Appeals acknowledged, and prior case law holds, allowing an intoxicated person to exercise actual physical control of a non-moving vehicle on a public highway is not in the best interest of public safety. **See Harrison**, 115 N.M. at 76, 846 P.2d at 1085. We do not believe, therefore, that the underlying goal of protecting the public from intoxicated drivers is served by distinguishing between public highways and private property. Public safety is best advanced by deterring impaired persons from driving or placing themselves in a position of actual physical control of their vehicles in the first instance since such control frequently leads to movement of the vehicle, placing the community at risk of severe harm.

{23} Intoxicated drivers have options other than exerting actual physical control over their vehicles. Intoxicated persons can elect a designated driver, or call a friend, family member, or taxi to drive them home. They need not place the public and themselves at risk at all. We cannot place the safety of the public in the hands of drivers whose decision making process is impaired by intoxicating liquor, and allow them to decide the severity of their impairment and the risk to the public of their commencing or continuing driving. We conclude, therefore, that the Legislature did not intend to distinguish between DWI offenses on public property and those on private property,

regardless of whether the person was driving or in actual physical control of their vehicle.

{24} Therefore, we hold that the State may charge a person with DWI pursuant to Section 66-8-102, despite the fact that the defendant is found on private property in actual physical control of a non-moving vehicle. As a result, we reverse the Court of Appeals' opinion in **Wenger**, 1999-NMCA-92, 127 N.M. 625, 985 P.2d 1205 and memorandum opinion in **Johnson**,-NMCA-20,230, disapprove UJI 14-4511 and its accompanying committee commentary, reverse the district court's orders dismissing the charges against Mr. Wenger and Mr. Johnson and order that the charges be reinstated.

{25} IT IS SO ORDERED

JOSEPH F. BACA,
Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

PETRA JIMENEZ MAES,
Justice

PAMELA B. MINZNER,
Chief Justice (dissenting)

GENE E. FRANCHINI,
Justice (dissenting)

DISSENT

MINZNER, Chief Justice (dissenting).

{26} I respectfully dissent. I would affirm the formal opinion of the Court of Appeals' in **State v. Wenger**, 1999-NMCA-92, 127 N.M. 625, 985 P.2d 1205, and the memorandum opinion of the Court of Appeals in **State v. Johnson**, No. 20,230, slip op. (NMCA Aug. 19, 1999). Affirming the Court of Appeals' opinion would allow us to reconcile almost all of what has been written by an appellate court in this state on the issues the appeal raises and also to give some meaning to all of the language in the relevant statutes.

{27} The State has argued that under the Court of Appeals' analysis, NMSA 1978, § 66-7-2 (1978) becomes meaningless. I respectfully disagree with this argument. Section 66-7-2(B) states, in part, that NMSA 1978, § 66-8-102 (1997, prior to 1999 amendment) applies upon highways and elsewhere throughout the state. Under the Court of Appeals analysis, Section 66-8-102 **does** apply elsewhere throughout the state; it applies elsewhere throughout the State when the defendant is found to have been driving, rather than only in actual physical control.

{28} The majority concludes that the Court of Appeals erred in construing the "upon a highway" language of NMSA 1978, **§** 66-1-4.4(K) (1991, prior to 1999 amendment) to modify "in actual physical control" but not "drives."

> Applying rules of grammar to Section 66-1-4.4(K), the word "drives" and the phrase "actual physical control" are both modified by the phrase "a motor vehicle, including a motorcycle," all of which is in turn modified by the phrase "upon a highway."

See Majority Opinion, P13. I respectfully disagree with this conclusion.

{29} We have previously explained that in construing statutes, "Relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote." **Hale v. Basin Motor Co.**, 110 N.M. 314, 318, 795 P.2d 1006, 1010 (1990) (quoted authority omitted). Applying this rule of statutory interpretation, known as the last antecedent rule, we held that under a statute requiring an automobile seller to disclose whether there has been an "alteration or chassis repair due to wreck damage," the phrase "due to wreck damage" only modifies the immediately preceding phrase "chassis work." **Id.** at 317, 795 P.2d at 1009.

{30} Section 66-1-4.4(K) states:

> "driver" means every person who drives or is in actual physical control of a motor vehicle, including a motorcycle, upon a highway, who is exercising control over or steering a vehicle being towed by a motor vehicle or who operates or is in actual physical control of an off-highway motor vehicle.

Applying the last antecedent rule to the definition of driver under Section 66-1-4.4(K), the phrase "upon a highway" modifies the term "motor vehicle," which in turn modifies the phrase "in actual physical control." The term "motor vehicle" does not modify the term "drives." **See Hale**, 110 N.M. at 318, 795. P.2d at 1010 ("As a rule of construction, the word "or" should be given its normal disjunctive meaning unless the context of a statute demands otherwise.") (citations omitted). Therefore, I conclude that a person who drives while intoxicated anywhere within the State of New Mexico is guilty of the offense of driving while intoxicated. I also conclude that an intoxicated person who is in actual physical control of a motor vehicle upon a highway is guilty of the offense of driving while intoxicated, but an intoxicated person who is in actual physical control of a motor vehicle that is not located upon a highway has not committed the offense of driving while intoxicated.

{31} The commentary to our uniform jury instruction, NMRA 2000 UJI 14-4511, seems to me to rely on this distinction between "driving" and being in "actual physical control," and to make a relatively coherent scheme of our statute and cases. The committee commentary accompanying UJI 14-4511 provides that:

> if the person is in physical control of the vehicle, but not actually driving the vehicle, and the vehicle is off the road, that person is not guilty of driving while under the influence.

The Court of Appeals', in relying on the statutory distinction between "driving" and "actual physical control" and our uniform jury instruction, seems to me to make an appropriate choice in statutory interpretation.

{32} Any other statutory construction in light of our cases seems to me to present constitutional concerns regarding the due process rights of the Defendants. "Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." **United States v. Lanier**, 520 U.S. 259, 266, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997). "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." **Bouie v. City of Columbia**, 378 U.S. 347, 352, 12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964).

{33} Prior to our decision in this case, neither the statutory language of Section 66-8-102(A) nor any of our prior holdings would have informed a defendant that being in actual physical control of a motor vehicle, while intoxicated, when the vehicle is not located on a highway is an illegal act. The sole potential basis upon which notice might be premised is the dicta in footnote 1 of **Boone**, stating that the Court did not believe that the language generally limiting the definition of "drivers" to persons "upon a highway" applies to the offense of DWI. **Boone**, 105 N.M. 223, 226, n.1, 731 P.2d 366, 369, n.1 (1986). **Boone** was decided prior to **Hale**. Under **Hale**, "upon a highway" does not modify "drives" as the **Boone** court appears to have believed. Our adoption of UJI 14-4511 seems to me to have been a recognition by this Court that the footnote in **Boone** no longer had any effect.

{34} In addition, I have concerns about whether **Boone** was correctly decided. Section 66-8-102(A) provides:

> It is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state.

{35} In **Boone**, we stated that the DWI statute is ambiguous because the meaning of "drive" is unclear. 105 N.M. at 225, 731 P.2d at 368 (1986). In order to determine the contours of the term "drive" we looked to the Legislature's definition of "driver." **Id.** at 226, 731 P.2d at 369. The Court decided that the term "drive" should apply coextensively with the term "driver," and thereby included the conduct of a driver who was in actual physical control of a motor vehicle upon a highway.

{36} The Court's logic in so holding is unclear. The term "driver" includes persons who drive **or** are in actual physical control of a motor vehicle. The Legislature's usage of the conjunction "or" between "drives" and "in actual physical control" seems a strong indication that the Legislature did not consider the term "drives" to include "in actual physical control." To conclude that the term "drives" is coextensive with the statutory definition of "driver" and thus includes all situations where a driver is in actual physical control of a vehicle seems to me to require something more than the statutory analysis we performed in **Boone**. Perhaps we should never have equated the two terms and instead should have restricted our remarks to stating that the seriousness of the DWI problem in our state justified equating the two terms, but that such a task "requires legislative therapy, not judicial surgery." **State v. Leiding**, 112 N.M. 143, 146, 812 P.2d 797, 800 .

{37} For these reasons, I would affirm.

PAMELA B. MINZNER,
Chief Justice

I CONCUR:

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2001-NMSC-022

Filing Date: July 31, 2001

Docket No. 26,155

STATE OF NEW MEXICO,

Plaintiff-Petitioner,

v.

JOSEPH TRAEGER,

Defendant-Respondent.

ORIGINAL PROCEEDING ON CERTIORARI
Kenneth G. Brown, District Judge

Released for Publication August 16, 2001

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OPINION

BACA, Justice.

{1} The Defendant, Joseph Traeger, appeals his conviction for aggravated battery with a deadly weapon contrary to NMSA 1978, § 30-3-5 (A), (C) (1969). He was also convicted of numerous other related crimes which are not the subject of this appeal.[1] This Court issued a writ of certiorari to the Court of Appeals to consider the propriety of the jury instructions on aggravated battery with a deadly weapon. **See** NMSA 1978, § 34-5-14(B)(4) (1972) (stating that the Supreme Court has jurisdiction to review by writ of certiorari matters including "issues of substantial public interest that should be determined by the Supreme Court"). Specifically, this Court is asked to consider whether a baseball bat, when used to strike a victim, should be considered a deadly weapon without a jury finding to that effect. The State argues that a baseball bat is a "bludgeon" within the definition of a deadly weapon found in NMSA 1978, § 30-1-12(B) (1963). According to this reasoning, a baseball bat would be considered a deadly weapon as a matter of law, or per se. This conclusion would remove the issue of whether a baseball bat is a deadly weapon from the jury. The Court of Appeals declined to classify a baseball bat as a deadly weapon per se, and found reversible error in the jury instructions based on the reasoning in **State v. Bonham**, 1998-NMCA-178, 126 N.M. 382, 970 P.2d 154. **State v. Traeger**, 2000-NMCA-15, PP9-11, 128 N.M. 668, 997 P.2d 142, **cert. granted**, 128 N.M. 690, 997 P.2d 822 (2000). We also decline to hold that a baseball bat is a deadly weapon as a matter of law; however, we reverse the Court of Appeals' opinion based on its application of the reversible error standard in this case. We find that because the Defendant did not preserve the error in the jury instructions, a fundamental error standard applies. We hold that the error in the jury instructions given in this case does not rise to the level of fundamental error, and therefore we affirm the Defendant's conviction for aggravated battery with a deadly weapon.

[1] The Defendant was also convicted of the following: attempted first degree murder contrary to NMSA 1978, § 30-2-1 (1994) and NMSA 1978, § 30-28-1 (1963); criminal sexual penetration contrary to NMSA 1978, § 30-9-11 (1995); and false imprisonment contrary to NMSA 1978, § 30-4-3 (1963). These convictions were affirmed by the Court of Appeals in **State v. Traeger**, 2000-NMCA-15, P21, 128 N.M. 668, 997 P.2d 142, **cert. granted**, 128 N.M. 690, 997 P.2d 822 (2000).

I.

{2} The Defendant and his wife, the victim,[2] separated in February of 1997. After spending some time in Illinois, the victim moved back to New Mexico, but remained separated from the Defendant. On July 7, 1997, the victim went to the Defendant's trailer to pick up some money and some papers. She only planned to stay a few minutes. After the Defendant asked the victim about her plans for their marriage, she responded that she still intended to get a divorce. The Defendant then gave her an envelope, and told her that he would walk her out. The Defendant went into his bedroom while she went to the front door.

{3} Returning from his bedroom, the Defendant suddenly attacked the victim. He was now wearing black gloves, and he grabbed her by the neck and covered her face and nose. After struggling at the front door, the Defendant dragged her into his bedroom, where he wrapped a string around her neck, making it difficult for her to breathe. In an effort to breathe, the victim tried to get her fingers between the string and her neck, causing defensive wounds around her neck. During the encounter, the Defendant said, "Did you really think I was going to let you go? Did you really think you were going to get a divorce? . . . How stupid are you?"

{4} Eventually the Defendant released the string around the victim's neck, and then he grabbed a wooden baseball bat. Holding the baseball bat up, he ordered the victim to remove her clothes. Attempting to placate the Defendant, she told him "wait," "hold-on," "we'll talk," and "let's just talk." This further angered the Defendant and using the baseball bat, he hit her foot like he was hitting a ball. Her foot swelled immediately and she stated, "I freaked out . . . I couldn't stand on it at all." The Defendant continued yelling and calling her a "liar," and stated, "you're not getting out of this room, and you're not going to get out alive." She understood this to mean that the Defendant intended to kill her.

{5} Despite all of the victim's attempts to placate the Defendant, he again demanded that she remove her clothes and he threatened with the baseball bat that, "next it's going to be your head." She then complied by removing her clothes. Although the victim told the Defendant that she did not want to have intercourse, the Defendant forced himself on her and that conduct resulted in his conviction for criminal sexual penetration.

{6} Following the incident, the victim convinced the Defendant to take her to a hospital. Once alone at the hospital, she described the events that led to the injury to her foot to the attending physician, a nurse, and a police officer. At trial, the victim described her injured foot as "shattered" and testified that it had swelled to approximately five times its normal size. She also said that it was broken in five places.

{7} In addition to other crimes, the Defendant was charged with aggravated battery with a deadly weapon. This charge was based on the Defendant's alleged use of the baseball bat in causing injury to the victim's foot. At the close of the evidence at trial, the jury was given two instructions with respect to this aggravated battery charge. First, the jury was given an instruction on the elements of aggravated battery:

> For you to find the defendant guilty of Aggravated Battery with a Deadly Weapon as charged in Count II, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant, Joseph Traeger, hit [the victim] with a baseball bat, **an instrument or object which, when used as a weapon, could cause death or very serious injury** ;
>
> 2. The defendant, Joseph Traeger, intended to injure [the victim];

[2] Although the victim's name has previously been revealed, we choose to refer to her as "the victim" in an effort to respect her "dignity and privacy throughout the criminal justice process." N.M. Const. art. II, § 24(A)(1).

3. This happened in Sandoval County, New Mexico on or about the 6th day of July, 1997.

(Emphasis added.). Second, the jury was instructed on the definition of "deadly weapon" which stated, "A 'deadly weapon' includes bludgeons and any instrument which, when used as a weapon, could cause very serious injury or any weapon which is capable of producing death or great bodily harm." The Defendant did not object to these instructions. After deliberation, the jury convicted the Defendant of aggravated battery with a deadly weapon, contrary to Section 30-3-5.

{8} The Defendant appealed his conviction to the Court of Appeals, arguing that the jury instruction on aggravated battery with a deadly weapon was improper. **Traeger**, 2000-NMCA-15, P1. The Court of Appeals declined to hold that a baseball bat was a deadly weapon as a matter of law. **Id.** P 11. Instead, the court stated that "the question of whether a baseball bat was a deadly weapon should have been left to the jury." **Id.** The court analogized the elements instruction given in this case with the instruction given in **Bonham**, 1998-NMCA-178, P26, which addressed a similar issue under a reversible error standard. **Traeger**, 2000-NMCA-15, PP10-11. In **Bonham**, the Court of Appeals addressed whether the defendant's conviction for aggravated battery with a deadly weapon should be reversed because the jury was not properly instructed on an essential element of the offense. 1998-NMCA-178, P25. The instruction in **Bonham** read in pertinent part: "The defendant did touch or apply force to [the victim] . . . with a hot plate or trivet frame, an instrument or object which, when used as a weapon, could cause death or very serious injury." **Id.** P 26 (emphasis omitted). The Court of Appeals in **Traeger**, concluded that, as in **Bonham**, the grammatical structure of the sentence in the jury instruction improperly took from the jury the decision of whether the baseball bat was a deadly weapon. **Traeger**, 2000-NMCA-15, P10, 11. Therefore, following the precedent set by **Bonham**, the Court of Appeals held that the jury instruction on aggravated battery with a deadly weapon was improper and reversed the Defendant's conviction. 2000-NMCA-15 PP1, 21; **see also Bonham**, 1998-NMCA-178, P27. On appeal to this Court, the State first argues that the Court of Appeals erred in failing to classify a baseball bat as a bludgeon and therefore, a deadly weapon per se. Alternatively, the State argues that even if a baseball bat is not a deadly weapon as a matter of law, the error in the jury instruction did not amount to fundamental error. We address each of these claims in turn.

II.

{9} First, the State argues that a baseball bat is a bludgeon. Since a "bludgeon" is one of the weapons specifically enumerated in Section 30-1-12(B), the State asserts that a baseball bat is a deadly weapon as a matter of law and therefore not a question for the jury. The issue of whether a baseball bat is a deadly weapon per se is purely a question of law. Therefore, we review this issue de novo. **See Churchman v. Dorsey**, 1996-NMSC-33, P10, 122 N.M. 11, 919 P.2d 1076 ("Questions of law . . . are reviewed de novo.") (quoting **Duncan v. Kerby**, 115 N.M. 344, 347-48, 851 P.2d 466, 469-70 (1993)).

{10} Aggravated battery is the "unlawful touching or application of force to the person of another with intent to injure that person or another." Section 30-3-5(A). Aggravated battery is elevated to a third degree felony if perpetrated by "inflicting great bodily harm or . . . with a deadly weapon or . . . in any manner whereby great bodily harm or death can be inflicted." Section 30-3-5(C). In this case, the Defendant's aggravated battery with a deadly weapon conviction is based on his use of the baseball bat to hit the victim's foot. The term "deadly weapon" is broadly defined in Section 30-1-12(B):

> "deadly weapon" means any firearm, whether loaded or unloaded; or any weapon which is capable of producing death or great bodily harm, including but not restricted to any types of daggers,

> brass knuckles, switchblade knives, bowie knives, poniards, butcher knives, dirk knives and all such weapons with which dangerous cuts can be given, or with which dangerous thrusts can be inflicted, including swordcanes, and any kind of sharp pointed canes, also slingshots, slung shots, **bludgeons** ; or any other weapons with which dangerous wounds can be inflicted[.]

(Emphasis added.) The items that are specifically listed in Section 30-1-12(B) are considered "deadly weapons" as a matter of law, or per se. **See, e.g.**, **State v. Conwell**, 36 N.M. 253, 254, 13 P.2d 554, 555 (1932) (considering whether "a certain rock identified at the trial as 3/4ths of an inch thick, 4 inches long, and 3 inches wide" was a deadly weapon). When an individual uses an item that is a deadly weapon as a matter of law, the jury does not consider whether the weapon is a deadly weapon - it is presumed. However, when the item is not specifically listed, it has been the longstanding rule of this State to require a jury finding that the instrument used was a deadly weapon. **See id.** at 255, 13 P.2d at 555. "Where the instrument used is not one declared by the statute to be a deadly weapon, it is ordinarily a question for the jury to determine whether it is so, considering the character of the instrument and the manner of its use." **Id.** ; **accord State v. Mitchell**, 43 N.M. 138, 140, 87 P.2d 432, 433 (1939); **State v. Gonzales**, 85 N.M. 780, 781, 517 P.2d 1306, 1307 .

{11} The State argues that a baseball bat fits the definition of "bludgeon" and therefore is a deadly weapon as a matter of law. **See** § 30-1-12(B) (stating a deadly weapon includes "any kind of sharp pointed canes, also slingshots, slung shots, **bludgeons** ") (emphasis added). The Court of Appeals decided that a baseball bat was not a bludgeon and not specifically listed in Section 30-1-12(B). **Traeger**, 2000-NMCA-15, P11. We agree with the Court of Appeals' conclusion that a baseball bat should not be classified as a bludgeon, and by extension should not be classified as a deadly weapon as a matter of law. However, we do so based on slightly different reasoning.

{12} In their holding the Court of Appeals stated,

> We believe . . . that by including the term bludgeon in the statutory definition, the Legislature used it in its narrow sense—an instrument made for its intended use as a weapon. A baseball bat, on the other hand, is primarily designed to hit a ball, not to be used as a weapon.

Id. We agree with the Court of Appeals that we are bound to effectuate the intent of the Legislature, and to that end, we disagree with the notion that the intent of the manufacturer or the primary purpose of the item should have any relevance in this inquiry. Section 30-1-12(B) represents an identification by the Legislature of those items which are so inherently dangerous that it is unnecessary to have a jury determine the "dangerous weapon" element. Stated another way, the Legislature has identified certain items that are so inherently dangerous that the specific facts regarding the weapon and the method of use are irrelevant to a determination of whether the item is a deadly weapon. For example, a "butcher knife" is not primarily designed to be a deadly weapon, but because of the inherent danger when used on a human being, the Legislature has chosen to classify it as a deadly weapon per se. **See** § 30-1-12(B). However, under the Court of Appeals' "intent of the manufacturer" or "primary purpose" test a butcher knife would not qualify as a deadly weapon. This being said, we agree with the Court of Appeals that it effectuates the legislative intent to give Section 30-1-12(B) a narrow construction. **Traeger**, 2000-NMCA-15, P11. Therefore, if the item is specifically listed in Section 30-1-12(B), it is considered a deadly weapon as a matter of law. If the item is not specifically listed, the question of whether the object is a deadly weapon should be given to the jury to decide. In addressing this question, the jury should consider the character of the object and the manner of its use. **See Conwell**, 36 N.M. at 255, 13 P.2d at 555.

{13} This view is merely an articulation of the long established rule of **Conwell**, 36 N.M. at

255, 13 P.2d at 555. **Conwell** teaches that when an instrument is not declared by the statute to be a deadly weapon it is a jury question, to be determined by "considering the character of the instrument and the manner of its use." **Id.** In this case, the State argues, "the circumstances surrounding [the] use of the bat . . . established the character of the use as in a manner whereby great bodily harm or death can be inflicted within the meaning of [Section 30-3-5]." This argument admits that the specific facts and circumstances of the Defendant's use of the baseball bat are relevant to a determination of whether the bat was used as a deadly weapon. We hold that when the character of the instrument and the manner of its use are necessary to determine whether an item is a deadly weapon, a jury should make that determination.

{14} The State argues that "in modern times, the most common object meeting the dictionary definition of a bludgeon is a baseball bat." The State bolsters this argument by relying on the New Webster's Dictionary definition of a bludgeon as "[a] short, heavy club or weapon, with one end loaded, or thicker and heavier than the other." **See e.g.**, Webster's Ninth New Collegiate Dictionary 162 (1985). We agree that this definition could be read broadly enough to include a baseball bat; however, this Court is not the entity charged with the modernization of the relevant statute.

{15} If we were to conclude that a baseball bat is a bludgeon as described in Section 30-1-12(B), we would be altering a general definitional statute that has broad applicability to a number of criminal infractions. For example, by altering Section 30-1-12(B), we would be altering NMSA 1978, § 30-7-2 (1985), that prohibits the carrying of a deadly weapon. ("Unlawful carrying of a deadly weapon consists of carrying a concealed loaded firearm or any other type of deadly weapon anywhere.") Section 30-7-2 is a strict liability offense if the item that is being carried is specifically listed as a deadly weapon in Section 30-1-12(B). **See** § 30-7-2. However, if the item is not specifically listed then a jury must first determine if the item is in fact a deadly weapon, and that a defendant "carried the instrument because it could be used as a weapon." **State v. Blea**, 100 N.M. 237, 239, 668 P.2d 1114, 1116 (1983). If we were to conclude that a baseball bat was a deadly weapon as a matter of law, it could be argued that the mere carrying of a baseball bat was prohibited. We believe that to criminalize the carrying of a baseball bat, without a jury finding that the baseball bat was a deadly weapon and that the baseball bat was in fact being carried because it could be used as a weapon, is incongruent with New Mexico law.

{16} In the final analysis, we do not believe that our holding today places an overly onerous burden on the State. The State should first determine if the item that was used is specifically listed in Section 30-1-12(B). If the item is not specifically listed then the question of whether the item is a deadly weapon, given the defendant's use and the character of the item, should be submitted to the jury for a finding of fact. We believe that in most cases the requisite showing that an item was used as a deadly weapon will be shown in the State's case-in-chief while establishing other elements of the crime like intent, motive, method, or the resulting injury. Therefore, we decline to classify a baseball bat as a bludgeon and therefore a deadly weapon as a matter of law. Instead, we require that a jury determine, given the defendant's use, if the baseball bat was "capable of producing death or great bodily harm." Section 30-1-12(B); **see also** UJI 14-322 NMRA 2001. In this ruling, we retain the firmly established rule that "where the instrument used is not one declared by the statute to be a deadly weapon, it is ordinarily a question for the jury to determine whether it is so, considering the character of the instrument and the manner of its use." **Conwell**, 36 N.M. at 255, 13 P.2d at 555.

III.

{17} The State next argues that even if a baseball bat is not a deadly weapon as a matter of law, the Court of Appeals erred in applying a reversible error standard when reviewing the propriety of the jury instructions given in this case.

The State asserts that a fundamental error analysis should apply, and that the error in the jury instructions did not rise to the level of fundamental error. We agree with the State's contentions, and hold that no fundamental error occurred in this case.

{18} The Court of Appeals issued its opinion in this case on January 4, 2000, and therefore did not have the benefit of our analysis in **State v. Cunningham**, 2000-NMSC-9, P10, 128 N.M. 711, 998 P.2d 176, which was issued on March 9, 2000. In **Cunningham**, we applied the doctrine of fundamental error to an error in the jury instructions that was not objected to, or raised in the district court. **Id.** Generally, our appellate review is limited to issues that were properly preserved by invoking the trial court's discretion; however, the doctrine of fundamental error provides an exception to our general appellate rules. **See id.** ; **see also** Rule 12-216 NMRA 2001. The doctrine of fundamental error allows an appellate court to review a criminal conviction for errors that "'shock the conscience' or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." **Cunningham**, 2000-NMSC-9, P21. "The doctrine of fundamental error is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputably, or open to such question that it would shock the conscience to permit the conviction to stand." **State v. Rodriguez**, 81 N.M. 503, 505, 469 P.2d 148, 150 (1970). This Court, in its discretion, has the inherent power to relieve a defendant when his or her fundamental rights have been violated, even though "he [or she] may be precluded by the terms of a statute or rules of appellate procedure." **Id.** P 12 (quoting **State v. Garcia**, 19 N.M. 414, 421, 143 P. 1012, 1014-15 (1914)). This Court, however, should "'exercise this discretion very guardedly, and only where some fundamental right has been invaded, and never in aid of strictly legal, technical, or unsubstantial claims.'" **Id.** In this case, the Defendant did not object, or in any other way raise the error in the aggravated battery with a deadly weapon jury instruction. Therefore, we review for fundamental error.

{19} The Court of Appeals decided that the instruction given to the jury in this case was substantially similar to the instruction that was invalidated in **Bonham**, and following that reasoning, held that the error in the instruction amounted to reversible error. **See Traeger**, 2000-NMCA-15, P9; **cf. Bonham**, 1998-NMCA-178, P26. **Bonham** held that the grammatical structure of the instruction formed an "appositive expression" that informed the jury that a trivet was a deadly weapon, instead of requiring that the jury determine the issue. 1998-NMCA-178, P27. The Court of Appeals' opinion in this case applied the same reasoning to a baseball bat. **Traeger**, 2000-NMCA-15, PP10, 11. In our view, the error in the jury instruction in this case amounts to a "strictly legal" and a highly "technical" objection that the doctrine of fundamental error will not protect. **See Cunningham**, 2000-NMSC-9, P12 (stating that fundamental error will not protect "'strictly legal, technical, or unsubstantial claims'" (quoting **Garcia**, 19 N.M. at 421, 143 P. at 1014-15)). However, we are not foreclosing the possibility that in another case, given different facts, a similar instruction could amount to fundamental error. Inherent in fundamental error is the notion that each case must be decided on its own merits. **See State v. Gillihan**, 85 N.M. 514, 516, 514 P.2d 33, 35 (1973) (stating in fundamental error "each case must stand on its own"); **see also Cunningham**, 2000-NMSC-9, P13 (stating that, regarding fundamental error, "each case will of necessity, under such a rule, stand on its own merits." (internal quotation marks and citation omitted)).

{20} The reasoning in **Bonham** was based on the grammatical structure of an isolated elements instruction and revolved around the placement and location of commas. 1998-NMCA-178, P26 ("Thus, the grammatical structure of the sentence informed the jury that the hot plate or trivet was a deadly weapon."). It appears to us that **Bonham** considered the claimed erroneous instruction in isolation without any relation to the other jury instructions. This focused approach is inconsistent with the doctrine of fundamental error. **See Cunningham**, 2000-NMSC-9, P21; **see also** UJI 14-6001 NMRA 2001 ("You must consider these instructions as a whole. You must not

pick out one instruction or parts of an instruction and disregard others."). "Considering the heightened scrutiny of a fundamental error analysis, we hold that in a fundamental error analysis jury instructions should be considered as a whole." **Cunningham**, 2000-NMSC-9, P21.

{21} In this case, when we consider the jury instructions as a whole, we are immediately struck by two instructions that impact our analysis. First, the introductory phrase to the aggravated battery with a deadly weapon instruction instructs the jury that in order to convict the defendant, "the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime." This introductory phrase requires that the jury instructions be written in the affirmative, and then it is left to the jury to decide if each of the elements are positively established beyond a reasonable doubt. In this way, the aggravated battery with a deadly weapon instruction is similar to many of our other jury instructions. For example, the first element in a willful and premeditated murder is to establish that, "the defendant killed [the victim]." UJI 14-201 NMRA 2001. This instruction is also stated in the affirmative and can be read as informing a jury that the defendant killed the victim; however, when read together with the introductory phrase, the jury understands that this is an element that they must decide.

{22} The Defendant asserted at oral argument that the following is a legally correct and a preferred instruction:

> For you to find the defendant guilty of aggravated battery with a deadly weapon as charged in Count 2, the state must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:
>
> 1. The defendant, Joseph Traeger, hit [the victim] with a baseball bat.
>
> 2. A baseball bat is a deadly weapon.
>
> 3. The defendant, Joseph Traeger, intended to injure [the victim].
>
> 4. This happened in Sandoval County, New Mexico on or about the 6th day of July, 1997.

This is a preferred instruction not because it does not inform the jury that a baseball bat is a deadly weapon, but because it parses out the two independent elements: (1) that the Defendant hit the victim with a baseball bat; and (2) that a baseball bat is a deadly weapon. If read literally this instruction could not more clearly and unambiguously inform the jury that a baseball bat was a deadly weapon. In our view, the problem with the instruction at issue in this case is not that it informs the jury that a baseball bat is a deadly weapon, but that it is complicated because it combines two independent elements. Unlike the Defendant's proposed instruction, the instruction given to the jury at trial stated, "the defendant . . . hit [the victim] with a baseball bat, an instrument or object which, when used as a weapon, could cause death or very serious injury." This instruction requires that the jury first find the application of force element, "the defendant . . . hit [the victim]," and then in the same instruction the jury is instructed to contemplate whether the baseball bat is a deadly weapon. It is the combination of these two elements that has resulted in the awkward phraseology. Despite being awkward, we do not believe that this jury instruction deprived the Defendant of a "'right which was essential to his defense and which no court could or ought to permit him to waive.'" **Cunningham**, 2000-NMSC-9, P13 (quoting **State v. Garcia**, 46 N.M. 302, 309, 128 P.2d 459, 462 (1942)).

{23} The second relevant instruction clarifies any complication resulting from the combination of the two elements in the aggravated battery instruction given. The second instruction informs the jury of what constitutes a "deadly weapon." "A 'deadly weapon' includes bludgeons and **any instrument which, when used as a weapon, could cause very serious injury or any weapon which is capable of producing death or great bodily harm**." (Emphasis added.). Given these instructions, in a fundamental error analysis, where the jury instructions are to be read

together, we are convinced that the jury considered the issue of whether the Defendant used the baseball bat as a deadly weapon. Therefore, the error in the jury instructions in this case amounts to a highly technical and a strictly legal objection. Given the facts of this case, this highly technical and strictly legal objection does not rise to the level of fundamental error.

{24} Further, according to the Uniform Jury Instruction in effect at the time, a correct instruction would have read, "The defendant, Joseph Traeger, hit [the victim] with an instrument or object which, when used as a weapon, could cause death or very serious injury." **See** UJI 14-322 and use note 3 NMRA 1998 (prior to Jan. 15, 1998 amendment). Therefore, the only difference between the recommended instruction and the one given in the Defendant's case is that the instrument was actually named: the phrase "a baseball bat" was inserted in addition to simply using the phrase "an instrument or object." Although the district court and **526}* practitioners have an obligation "to keep abreast of current changes in the law," **State v. Lopez**, 1996-NMSC-36, P9 n.1, 122 N.M. 63, 920 P.2d 1017, the error by the district court in including the phrase "a baseball bat" in addition to the general language "an object or instrument" is understandable given the commonly recognized term to identify the instrument. In our view, it was necessary in this case to specifically name the instrument in the jury instructions because there were two counts of aggravated battery charged; one with the baseball bat and one with the cord. Without specifically naming the instrument, the jury would have been unable to discern which count they were considering. The modified Uniform Jury Instructions, UJI 14-322 NMRA 2001, resolves this ambiguity and practitioners should take special care to use the new Uniform Jury Instructions where applicable.

{25} In the final analysis, the doctrine of fundamental error is derived from a court's "'inherent power to see that [an individual's] fundamental rights are protected in every case.'" **Cunningham**, 2000-NMSC-9, P12 (quoting **Garcia**, 19 N.M. at 421, 143 P. at 1014-15 (opinion on rehearing)). We are concerned with situations when "guilt is so doubtful that it would shock the judicial conscience to allow the conviction to stand." 2000-NMSC-9 P13 (quoting **State v. Baca**, 1997-NMSC-45, P41, 124 N.M. 55, 946 P.2d 1066). In this case, we are simply not convinced of the Defendant's innocence. Instead, we are convinced that the Defendant intended, and did in fact, use the baseball bat as a deadly weapon. First, the Defendant hit the victim's foot hard enough that the victim described it as "shattered." Then he threatened "next time it's going to be your head." According to the victim, the Defendant also stated "You're not getting out of this room, and you're not going to get out alive." These are clearly deadly threats coupled with an act that inflicted great bodily harm to the victim. The Defendant's comments and actions were designed to inflict pain and induce fear in order to force submission. This goal was in fact achieved, as the Defendant used the baseball bat to force the victim to remove her clothes and to engage in forced sexual intercourse. Given the Defendant's use of the baseball bat, it does not "'shock the conscience' or implicate a fundamental unfairness within the system" to affirm the Defendant's conviction. 2000-NMSC-9 P13.

IV.

{26} Therefore, we decline to classify a baseball bat as a deadly weapon as a matter of law and instead we retain the rule that if the item is not specifically listed in Section 30-1-12(B), then a jury should make that determination considering the character of the instrument and manner of its use. However, we hold that the error in the jury instructions did not rise to the level of fundamental error, and therefore, the Defendant's conviction for aggravated battery with a deadly weapon is affirmed.

{27} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

PATRICIO M. SERNA,
Chief Justice

PETRA JIMENEZ MAES, Justice

GENE E. FRANCHINI, Justice (specially concurring)

PAMELA B. MINZNER, Justice (specially concurring)

CONCURRENCE

FRANCHINI, Justice. (specially concurring).

{28} I concur in the result but write specially because, unlike the majority, I do not believe the jury instructions were erroneous. Section 30-1-12(B) includes "bludgeons" among its list of objects that are "deadly weapons" as a matter of law. A bludgeon is defined as "[a] short, heavy club or weapon, with one end loaded, or thicker and heavier than the other." New Webster's Dictionary (1981). Thus, when used as a weapon, a baseball bat is a bludgeon by definition. By instructing the jury to determine whether Defendant "hit" the victim with a baseball bat with the intent to injure her, the trial court effectively instructed them to determine whether the baseball bat was used as a weapon. I believe that the difference between this instruction and one that would have asked the jury to determine whether the baseball bat was a "deadly weapon" is a matter of semantics and does not amount to error. I would affirm Defendant's conviction on that basis.

GENE E. FRANCHINI,
Justice

I CONCUR:

PAMELA B. MINZNER,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2001-NMSC-030

Filing Date: September 26, 2001

Docket No. 26,593

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

JAVIER M.,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI
Gary L. Clingman, District Judge

Released for Publication October 15, 2001

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OPINION

BACA, Justice.

{1} The Child, Javier M., appeals his adjudication for minor in possession of alcoholic beverages contrary to NMSA 1978, § 60-7B-1(C) (1998) ("It is a violation of the Liquor Control Act for a minor to . . . possess or permit himself to be served with alcoholic beverages."). The Child asserts that the incriminating statements he made to a police officer while he was detained and not free to leave were obtained in violation of NMSA 1978, § 32A-2-14 (1993). Hence, the Child argues that his statements should not have been admitted as evidence to support his adjudication. We granted certiorari pursuant to Rule 12-502 NMRA 2001 to address whether Section 32A-2-14 provides children with broader rights than those guaranteed by **Miranda v. Arizona**, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). After careful analysis, we find that Section 32A-2-14 evinces a legislative intent to expand the rights of children beyond those embodied in **Miranda** jurisprudence. Thus, we conclude that a child need not be under custodial interrogation in order to trigger the protections of the statute. Instead, we find that the protections are triggered when a child is subject to an investigatory detention. Therefore, Section 32A-2-14 requires that, prior to questioning, a child who is detained or seized and suspected of wrongdoing must be advised that he or she has the right to remain silent and that anything said can be used in court. If a child is not advised of the right to remain silent and warned of the consequence of waiving that right, any statement or confession obtained as a result of the detention or seizure is inadmissible in any delinquency proceeding. **See** § 32A-2-14(D). In the present case, since Javier M. was subject to an investigatory detention and not advised of his right to remain silent, we hold that the incriminating statements he made in response to police questioning are inadmissible and should not have been used to support the Children's Court's finding of delinquency. Accordingly, we reverse the Child's adjudication.

I.

{2} On or about September 17, 1999, at approximately 2:00 a.m., Officer Helton and his partner were dispatched to an apartment in Hobbs, New Mexico, in response to a loud music complaint. As the officers approached the building, they could hear loud music coming from

inside the apartment and observed a female sitting on the stairwell outside the open door of the apartment. When the female saw the officers approaching, she yelled "Five-O" (slang for police), ran into the apartment, and closed the door. The music was turned off and as the officers approached they could hear people "scuffling" around inside. Officer Helton also testified that he could smell alcohol and marijuana coming from inside the apartment. The officers knocked on the apartment door, but no one answered. They called for backup and continued to wait outside the apartment for approximately twenty minutes until someone answered the door. When the door was finally opened, Officer Helton testified that he could smell a stronger odor of alcohol and marijuana and saw several empty beer cans around the apartment. There were approximately ten to fifteen individuals inside. Officer Helton, his partner, and other officers who had arrived,[1] entered the apartment and began separating those individuals who were under eighteen from the adults. The officers determined that all of the individuals who were seventeen and younger would receive citations for curfew violations and be taken home.[2]

{3} Officer Helton first had contact with the Child, Javier M., in the living room of the apartment. The Child was sitting on the couch and neither appeared to be intoxicated nor possessed any beer or other alcoholic beverage. Officer Helton testified, however, that he detected the smell of alcohol on the Child's breath or clothing. In Officer Helton's opinion, there was no question that the Child had consumed alcohol. Officer Helton then asked the Child to step outside onto the stairwell of the apartment. Once on the stairwell, the officer asked the Child his name, his age, and whether he had consumed any alcohol. The Child answered the officer's questions and admitted that he had consumed two beers. Officer Helton issued the Child citations for violating the curfew ordinance and for minor in possession of alcohol. The officer did not recall in what order he asked the Child the questions or which citation he issued first. After the Child was issued the citations he was taken home by another officer.

{4} Officer Helton testified that once contact was made at the apartment, the Child was not free to leave and would not be released until he was taken to his home and a parent or guardian could be contacted. The officer, however, did not recall telling the Child that he was not free to leave. At no time was the Child placed under formal arrest, given **Miranda** warnings, advised of his basic rights pursuant to Section 32A-2-14(C), or asked to waive his rights.

{5} The Child was fifteen years old at the time of the incident. A Petition was filed in Children's Court alleging a violation of Section 60-7B-1C, minor permitting himself to receive and be served alcoholic beverages. The Child filed a motion to suppress his statements admitting that he had consumed alcohol, arguing that the officer interrogated him prior to giving him **Miranda** warnings and prior to advising him of his basic rights under the Children's Code. Following the hearing on the motion, the Children's Court concluded that the Child's **Miranda** rights were not violated because the protections of **Miranda** were not triggered since the Child was not subject to custodial interrogation. The Child was thereafter found to be delinquent by a special master and committed to a youth facility for one year. The Child appealed the finding of delinquency to the Court of Appeals, asserting that his statements should not have been admitted as evidence to support his delinquency since the officer did not advise him of his basic rights pursuant to Section 32A-2-14(C) of the Children's Code. **See State v. Javier M.**,-NMCA-21,568, slip op. (Sept. 20, 2000).

{6} The Court of Appeals agreed with the Children's Court and held that there was "no violation of the Child's right to **Miranda** warnings as he was never in custody and there was

[1] It is unclear from the record how many officers arrived on the scene after Officer Helton and his partner called for backup.

[2] At the time of the incident, Hobbs Police Department was enforcing the Hobbs curfew ordinance. Since the incident, such curfew ordinances have been declared unconstitutional. **See generally ACLU v. City of Albuquerque**, 1999-NMSC-44, P19, 128 N.M. 315, 992 P.2d 866.

no custodial interrogation." **Id.** at 1-2. Moreover, the court rejected the Child's argument that Section 32A-2-14(C) required that a child suspected of a crime must be given **Miranda** warnings even if the child is not in custody or under arrest. **Id.** at 2. Instead, the Court of Appeals held that Section 32A-2-14 "is really nothing more than a codification of **Miranda** . . . [and] thus, there is no requirement that the child be given **Miranda** warnings when the police initiate contact and are trying to determine whether there has been a violation of law." **Id.** The Child sought certiorari in this Court.

II.

{7} The Child presents two issues on appeal in this Court. First, the Child asserts that Section 32A-2-14(C) of the Children's Code "requires that a child be given **Miranda** warnings before being questioned regarding suspected delinquent activity even if the child is not under arrest." Alternatively, the Child argues that even if the Children's Code does not provide him with greater protection than is afforded under **Miranda**, under a pure **Miranda** analysis the Child's statements should have been suppressed because he was subject to custodial interrogation without first being admonished of his constitutional rights under **Miranda**. The State argues that the Child failed to preserve these issues for appeal and, therefore, requests that this Court decline review of this case.

{8} Initially, the State asserts that the Child failed to adequately preserve whether Section 32A-2-14(C) provides greater protection to juveniles because the Child merely cited both **Miranda** and Section 32A-2-14 without arguing that there was any distinction between them. As support for its argument, the State cites State v. Gomez, 1997-NMSC-6, P22, 122 N.M. 777, 932 P.2d 1, and **State v. Paul T.**, 1999-NMSC-37 P13, 128 N.M. 360, 993 P.2d 74. Unlike the present case however, the defendants in **Gomez** and **Paul T.** sought greater constitutional protection of their individual liberties under the New Mexico Constitution than would be available under the federal Constitution. In contrast, the Child in the instant case does not seek greater constitutional protection under our state constitution, but instead simply asserts that the Legislature, by enacting Section 32A-2-14(C), intended to provide children with broader rights under the statute. Therefore, the Child's claim is not subject to the more stringent preservation requirement required by **Gomez**. 1997-NMSC-6, PP22-23, 122 N.M. 777, 932 P.2d 1 (holding that when a party seeks greater protection under the state constitution, the party must also assert in the trial court that "the state constitutional provision at issue should be interpreted more expansively than the federal counterpart **and** provide reasons for interpreting the state provision differently from the federal provision"). Instead, the Child is subject to our general preservation requirement as set forth in Rule 12-216(A) NMRA 2001 that requires only that a "ruling or decision by the district court was fairly invoked."

{9} The facts and arguments presented in the Children's Court were sufficient to meet the basic requirements of Rule 12-216(A). In the Child's motion to suppress, which was timely filed in the Children's Court, the Child asserted that: (1) "the police officer interrogated Child prior to giving the **Miranda** warnings;" **and** (2) "the police officer interrogated Child prior to giving the Children's Basic Rights." Moreover, during Officer Helton's testimony, the officer was asked whether he had advised the child of his **Miranda** rights **or** of his basic rights under the Children's Code. Because the Child cited both **Miranda** and Section 32A-2-14 as grounds for suppressing the Child's statements, we conclude that the Children's Court was sufficiently alerted to the nature of the claimed error and was able to issue an intelligent ruling. **See State v. Lucero**, 104 N.M. 587, 590, 725 P.2d 266, 269 ("The objection must be sufficiently timely and specific to apprise the trial court of the nature of the claimed error and to invoke an intelligent ruling by the court."). Therefore, we find that the issues presented and briefed in this Court were properly preserved for appellate review.

{10} The State also argues that the Child abandoned the issue of whether the Child was in

"custodial interrogation" under **Miranda** since he waived the argument in the Court of Appeals and did not specifically seek certiorari with respect to that issue in this Court. We recognize that on appeal the Child primarily rests the error in this case on the lower court's refusal to find that Section 32A-2-14(C) provides greater protection to children by eliminating **Miranda**'s custodial interrogation requirement. We also recognize that Rule 12-502(C)(2) NMRA 2001 states that "only the questions set forth in the petition will be considered by the Court." However, in order to fully analyze whether Section 32A-2-14 provides greater protection than is mandated by **Miranda**, we must consider the minimum protections available to the Child. Therefore, the issue of whether the Child is subject to custodial interrogation is a foundational issue which is integral to a complete and thorough analysis of the specific question presented in the petition for writ of certiorari. Consequently, we do not expand our inquiry beyond the limited issue presented or broaden our review in contradiction to Rule 12-502(C)(2). Accordingly, we review in full the issues briefed by the Child which include both the underlying constitutional question of whether the Child was subject to custodial interrogation and whether Section 32A-2-14 provides greater protection to children than is mandated by **Miranda**.

III.

{11} In this case, we are asked to evaluate the admissibility of the Child's statements made in response to police questioning. We begin our analysis with the United States Supreme Court's decision in **Miranda**. Only after assessing the minimum constitutional guarantees available to the Child under **Miranda** can we adequately interpret Section 32A-2-14 and determine what, if any, additional protections are available to the Child under the statute.

A.

{12} The Child challenges the admissibility of his statements on the basis of the Fifth Amendment, claiming that his privilege against self-incrimination was violated when Officer Helton questioned him without first advising him of his rights under **Miranda**. The Fifth Amendment mandates that, "No person shall be . . . **compelled** in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V (emphasis added). "The privilege has consistently been accorded a liberal construction." **Miranda**, 384 U.S. at 461. Therefore, "'a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise.'" **Id.** at 462 (quoting **Ziang Sung Wan v. United States**, 266 U.S. 1, 14, 69 L. Ed. 131, 45 S. Ct. 1 (1924)).

{13} Generally, "the constitutional privilege against self-incrimination is available only if it is invoked as the ground for refusing to speak." **State v. Gutierrez**, 119 N.M. 618, 620, 894 P.2d 395, 397 . The United States Supreme Court has long acknowledged that:

> The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been "compelled" within the meaning of the Amendment.

Minnesota v. Murphy, 465 U.S. 420, 427, 79 L. Ed. 2d 409, 104 S. Ct. 1136 (1984) (quoting **United States v. Monia**, 317 U.S. 424, 427, 87 L. Ed. 376, 63 S. Ct. 409 (1943)). Hence, the Fifth Amendment neither prohibits the government from asking questions nor does it forbid an individual from volunteering incriminating statements. **See id.** The Constitution only prohibits government practices and procedures that compel individuals to incriminate themselves. Therefore, as a general rule individuals are not deemed to be "compelled" to speak in violation of the

Fifth Amendment unless the individual invokes the privilege, refuses to answer, and is thereafter forced to answer. **See Gutierrez**, 119 N.M. at 620, 894 P.2d at 397.

{14} The United States Supreme Court in **Miranda**, however, recognized that there are certain situations where the circumstances surrounding the asking of a question by law enforcement are so inherently coercive that any answer is "compelled" under the Fifth Amendment. **See id.** at 621, 894 P.2d at 398 (recognizing that **Miranda** is an "exception" to the general rule that the privilege is not available unless invoked as a ground for refusal to answer"); **see generally Miranda**, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602. The Court identified that there exist such compelling pressures when a person is subject to custodial police interrogation. **See Miranda**, 384 U.S. at 467-68. Because of the compelling pressures present during custodial police interrogation, the Court imposed a prophylactic protection by requiring that suspects be advised of their rights under the Fifth Amendment prior to any questioning. **See id.**

{15} Custodial interrogation occurs when "an individual [is] swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . [so that the individual feels] under compulsion to speak." **Id.** at 461. The Court has reasoned that "custodial police interrogation, by its very nature, isolates and pressures the individual," **Dickerson v. United States**, 530 U.S. 428, 435, 147 L. Ed. 2d 405, 120 S. Ct. 2326 (2000), and that it "conveys to the suspect a message that he has no choice but to submit to the officers' will and to confess," **Murphy**, 465 U.S. at 433. To ensure that accused or suspected individuals do not speak out of compulsion, **Miranda** held that the Fifth Amendment requires that prior to questioning, a person "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." **Miranda**, 384 U.S. at 444; **see Dickerson**, 530 U.S. at 439 (holding that the procedural safeguards pronounced in **Miranda** are constitutionally mandated). If an individual is not apprised of his rights, the Fifth Amendment prohibits the use of any "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant." **Miranda**, 384 U.S. at 444; "Unless and until such warnings and waivers are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]." Id. at 479. Therefore, the **Miranda** protections and the notion of "custodial interrogation" are inextricably intertwined.

{16} In 1967, a year after **Miranda** was decided, the United States Supreme Court held that the Fifth Amendment privilege against self-incrimination is similarly applicable to juveniles. **In re Gault**, 387 U.S. 1, 55, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967). Therefore, at a minimum, if the Child in this case was subject to custodial interrogation, the officer was constitutionally required to advise the Child of his rights under **Miranda** and obtain a voluntary, knowing, and intelligent waiver.

B.

{17} The Child contends that he was subject to custodial interrogation because: (1) as Officer Helton testified, the Child was not free to leave until he was released into the care of his parent or guardian; (2) there were numerous officers at the scene; (3) "all of the persons under seventeen were lined up on the balcony where several officers were keeping control of them and issuing them citations;" and (4) in questioning the Child, Officer Helton knew that his questions were reasonably likely to elicit an incriminating response from the Child. The State argues that the Child was not entitled to **Miranda** warnings because he was subject only to a brief investigatory detention which did not rise to the level of custodial interrogation. Whether a person is subject to custodial interrogation and entitled to the constitutional protections of **Miranda** is a mixed question of law and fact. **United States v. Galindo-Gallegos**, 255 F.3d 1154, 1154 (9th Cir.

2001). "We review mixed questions of law and fact de novo, particularly when they involve constitutional rights." **State v. Hernandez**, 1997-NMCA-6, P18, 122 N.M. 809, 932 P.2d 499.

{18} An individual is subject to custodial interrogation when he or she lacks the freedom to leave to an extent equal to formal arrest. **See California v. Beheler**, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275, 103 S. Ct. 3517 (1983). The lack of freedom to leave, however, is not the only fact that renders an interrogation custodial. **State v. Cooper**, 1997-NMSC-58, P36, 124 N.M. 277, 949 P.2d 660. Additionally,

> **Miranda** was focused upon the private and secret interrogation of a suspect in an isolated environment completely controlled by law enforcement officials. [Citation omitted]. Isolation is the key aspect of the custodial interrogation under **Miranda**. [Citation omitted]. "In this setting, the police have immediate control over the suspect - they can restrain him and subject him to their questioning and apply whatever psychological techniques they think will be most effective." [Citation omitted]. It is much easier, in such a setting, for investigators, intent upon obtaining a confession, to crush a suspect's will.

Id. (quoting **United States v. Mesa**, 638 F.2d 582, 586 (3rd Cir. 1980)). Thus, it is the lack of the freedom to leave, as well as isolation, which implicates the protections of the Fifth Amendment.

{19} In contrast, investigatory detentions, which are Fourth Amendment seizures of limited scope and duration, are generally public, temporary, and substantially less coercive than custodial interrogations. Therefore, investigatory detentions do not implicate the Fifth Amendment in the same way as custodial interrogations. **See Berkemer v. McCarty**, 468 U.S. 420, 440, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984). Police officers are not constitutionally mandated to forewarn citizens subject to investigatory detentions that they have the right not to answer the officer's questions. **See id.** The Fourth Amendment permits a police officer to approach an individual and ask him a moderate number of questions "in order to investigate possible criminal behavior when the officer has 'a reasonable suspicion that the law has been or is being violated.'" **State v. Taylor**, 1999-NMCA-22, P7, 126 N.M. 569, 973 P.2d 246 (quoting **State ex rel. Taxation & Revenue Dep't, Motor Vehicle Div. v. Van Ruiten**, 107 N.M. 536, 538, 760 P.2d 1302, 1304). During such investigatory detentions, the detainee is not obliged to respond and, therefore, there is no violation of the privilege against self-incrimination. **Berkemer**, 468 U.S. at 439. For instance, the Fourth Amendment permits an officer to pull a motorist over to investigate a possible traffic violation. When a motorist is pulled over for a traffic stop, the motorist is subject only to an investigatory detention because the stop is presumptively temporary and brief. **Id.** at 437. The motorist expects that he will only be obliged to spend a short period of time answering questions and then be allowed to continue on his way. **Id.** The temporariness of such a stop is different from a station house interrogation which "is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek." **Id.** at 437-38. Moreover, a traffic stop is typically public and therefore "reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements." **Id.** at 438. Because the atmosphere surrounding such investigatory detentions is not so inherently coercive that the detainee feels compelled to speak, "persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of **Miranda**." **Id.** at 440.

{20} We agree that the Child in this case was not free to leave at the time that Officer Helton questioned him; however, because the detention was temporary, non-coercive, and public we find that the Child was subject only to an investigatory detention and not custodial interrogation. First, Officer Helton reasonably suspected that the Child had committed or was committing a crime. The Child was present at an apartment where it appeared that the occupants of the apartment, by closing the door when the officers

approached and not answering the door for approximately twenty minutes, were attempting to conceal some activity from the approaching officers. Additionally, once the officers gained access they could smell alcohol and marijuana and observed empty beer cans around the apartment. Although Officer Helton did not observe the Child with any alcoholic beverages, the officer specifically smelled alcohol on the Child's person. These instances amount to "specific articulable facts, together with rational inferences from those facts, that, when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." **Taylor**, 1999-NMCA-22, P7, 126 N.M. 569, 973 P.2d 246 (internal quotation marks and citation omitted). Accordingly, the officer reasonably suspected that the Child had committed or was committing a crime and, therefore, it was permissible for the officer to briefly detain the Child to investigate the situation further by asking the Child a few questions to confirm or dispel his suspicions. **See Berkemer**, 468 U.S. at 439.

{21} The detention of the Child did not rise to the status of a custodial interrogation. At the outset, the fact that the Child was issued a citation during the detention does not elevate the investigatory seizure to custodial interrogation. **See Taylor**, 1999-NMCA-22, P9, 126 N.M. 569, 973 P.2d 246 ("[The officer] could have cited Defendant . . . without actually arresting him."). Moreover, there is nothing in the record to indicate that the Child was overpowered by police presence. It is true that there were numerous officers at the apartment, but Officer Helton was the only officer who questioned the Child directly. Thus, the Child's detention was not overly "police dominated" as is the case in custodial interrogation. **See Berkemer**, 468 U.S. at 438 ("The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability."); **cf. Murphy**, 465 U.S. at 433 ("Custodial arrest thrusts an individual into 'an unfamiliar atmosphere' or 'an interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner.'") (quoting **Miranda**, 384 U.S. at 457).

{22} Likewise, it appears from the record that only a short period of time elapsed between the initial contact with the Child and the issuing of the citation, after which the Child was released into the care of another officer who took the Child home. **See Berkemer**, 468 U.S. at 437. We recognize that Officer Helton testified that the Child was not free to leave until he was escorted home by law enforcement; however, at no point during the exchange between Officer Helton and the Child was the Child ever informed that his detention would not be temporary. **See id.** at 442 ("A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time. . . ."). Additionally, the police further detained the Child, not because he was under formal arrest, but because, according to Officer Helton, the Hobbs curfew ordinance in effect at the time required the police to assume a caretaker role over the Child until the Child could be released into the care and custody of his parent or guardian. This continued detention was to ensure the safety of the Child and was not adversarial as is the case when an individual is in custodial interrogation. **See ACLU v. City of Albuquerque**, 1999-NMSC-044, P18, 128 N.M. 315, 992 P.2d 866 ("The stated purposes of the Curfew are to protect minors from each other and others, to enforce parental control, and to protect the public from juvenile criminal activities.").

{23} Last, because the detention occurred in the presence of ten to fifteen other suspects and the questioning occurred on the stairwell of an apartment complex, it was sufficiently public to quell any potential illegitimate tactics the police may have used to elicit self-incriminating statements from the Child. There is nothing in the record to indicate that the "balcony" was confined and isolated away from the public. In fact, the area where the Child was questioned by Officer Helton was continuously referred to as a "stairwell," which was not enclosed. Additionally, the Child was questioned in the presence of ten to fifteen other individuals. "Where officers apprehend a substantial number of suspects and question them in the open prior to arrest, this is ordinarily . . . not custodial questioning. . . ."

United States v. Galindo-Gallegos, 244 F.3d 728, 732 (9th Cir. 2001) (holding that the presence of large numbers of other suspects made stop "public" for purposes of **Miranda** custody analysis). Therefore, we find that although the Child was not free to leave, he was not in custodial interrogation at the time Officer Helton inquired as to whether the Child had consumed any alcohol. Since the Child was not subject to custodial interrogation, we hold that the officer was not required to "**Mirandize** " the Child before questioning him. Therefore, under a pure constitutional analysis, the Child's statements were admissible and properly used as a basis for his adjudication.

IV.

{24} As the Child was not entitled to the protections guaranteed by **Miranda**, we turn now to the Children's Code to determine whether the Code provides the Child with any additional protection. "While the federal constitution provides a minimum level of protection below which the states may not descend, states remain free to provide greater protection." **Jewell v. NYP Holdings, Inc.**, 23 F. Supp. 2d 348, 375 (S.D.N.Y. 1998) (recognizing that as a matter of state law, a state could require greater protection of liberty interest than the minimum adequate to survive scrutiny under the federal Constitution); **Morgan v. Rabun**, 128 F.3d 694, 697 (8th Cir. 1997) ("State law . . . may recognize more extensive liberty interests than the Federal Constitution."). Hence, it is completely within the Legislature's authority to provide greater statutory protection than accorded under the federal Constitution.

{25} In order to determine whether the Legislature intended to provide greater protection to children with respect to the admissibility of a child's statement, we must construe Section 32A-2-14 which governs the basic rights of juveniles in delinquency matters. **See Doe v. State**, 100 N.M. 579, 581, 673 P.2d 1312, 1314 (1984). In interpreting this statute, three necessary issues must be addressed. First, we must determine whether the statute is merely a codification of **Miranda**, requiring that a child be in custodial interrogation to trigger the protections of the statute. Second, if the statute is not a codification of **Miranda**, but an act by the Legislature to grant children greater statutory protection, we must assess at what point during a police/child encounter the protections of the statute are triggered. Last, we must define the scope of the protections afforded under the statute so that both children and law enforcement are aware of their rights and obligations. We review these issues de novo. **See State v. Rowell**, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995) (recognizing that the standard of review for issues of statutory interpretation and construction is de novo **).**

A.

{26} As a threshold inquiry, we must first determine whether the Legislature in enacting Section 32A-2-14, intended simply to codify the Court's holding in **Miranda** or whether they intended to provide greater statutory protection to children when they are questioned by law enforcement. If the statute is merely a codification of **Miranda**, the Child's statements were properly admitted as a basis for the Children's Court's finding of delinquency because the Child was not in custodial interrogation, and therefore not entitled to **Miranda** warnings at the time he was questioned by Officer Helton. To establish whether the Legislature intended to provide additional protections to children than are afforded under **Miranda**, we look to the plain language of the statute, as well as the history and evolution of Section 32A-2-14. **Draper v. Mountain States Mut. Cas. Co.**, 116 N.M. 775, 777, 867 P.2d 1157, 1159 (1994).

1.

{27} Generally, in order to be constitutionally admissible a suspect's statement must be voluntary and must not have been obtained through compulsion or coercion. **See, e.g.**, **Dickerson**, 530 U.S. at 444 (recognizing that a statement or confession made during custodial interrogation is

constitutionally admissible only when warnings are given **and** the statements are shown to have been knowingly, intelligently, and voluntarily made); **Cooper**, 1997-NMSC-58, PP31-32, 124 N.M. 277, 949 P.2d 660 ("It is possible for a suspect to voluntarily waive his or her **Miranda** rights and still make an involuntary confession because police used fear, coercion, hope of reward, or some other improper inducement."). Section 32A-2-14 states in pertinent part:

> (A) A child subject to the provisions of the Delinquency Act [this article] is entitled to the same basic rights as an adult, except as otherwise provided in the Children's Code [this chapter].
>
> . . .
>
> (C) No person subject to the provisions of the Delinquency Act who is **alleged** or **suspected** of being a delinquent child shall be **interrogated** or **questioned** without first advising the child of the child's **constitutional rights** and securing a knowing, intelligent and voluntary waiver.
>
> (D) Before any statement or confession may be introduced at a trial or hearing when a child is alleged to be a delinquent child, the state shall prove that the statement or confession offered in evidence was elicited only after a knowing, intelligent and voluntary waiver of the child's rights was obtained.
>
> (E) In determining whether the child knowingly, intelligently and voluntarily waived the child's rights, the court shall consider the following factors:
>
> (1) the age and education of the respondent;
>
> (2) **whether or not the respondent is in custody** ;
>
> (3) the manner in which the respondent was advised of his rights;
>
> (4) **the length of questioning and circumstances under which the respondent was questioned** ;
>
> (5) the condition of the quarters where the respondent was being kept at the time he was questioned;
>
> (6) the time of day and the treatment of the respondent at the time that he was questioned;
>
> (7) the mental and physical condition of the respondent at the time that he was questioned; and
>
> (8) whether or not the respondent had the counsel of an attorney, friends or relatives at the time of being questioned.

(Emphasis added.). We read this legislation in its entirety and "construe each part in connection with every other part to produce a harmonious whole" and find that taken together, Subsections (C), (D), and (E) adopt the general rule governing admissibility of a suspect's statements. **State ex rel. Klineline v. Blackhurst**, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988). Subsection (C) provides children with the right to be advised of their constitutional rights when they are alleged or suspected of delinquent behavior. **See** Section 32A-2-14(C). Subsection (D) provides the remedy for a violation of the rights granted in Subsection (C) and places the burden on the State to prove that a statement obtained from the child was voluntary. **See** § 32A-2-14(D). Finally, Section 32A-2-14(E) is "'essentially a codification of the totality-of-circumstances test' applied in evaluating a waiver of constitutional rights by an adult, though emphasizing some of the circumstances that may be particularly relevant for a juvenile." **State v. Martinez**, 1999-NMSC-18, P18, 127 N.M. 207, 979 P.2d 718 (quoting **State v. Setser**, 1997-NMSC-4, P13, 122 N.M. 794, 932 P.2d 484). We must next analyze the plain

language of the statute to determine whether the Legislature merely codified the constitutional rule or whether additional statutory protections were intended.

{28} "The starting point in every case involving the construction of a statute is an examination of the language utilized by [the Legislature]." **State v. Wood**, 117 N.M. 682, 685, 875 P.2d 1113, 1116 . Words in the statute should be given their "ordinary meaning unless the legislature indicates a different intent." **State v. Rodriguez**, 101 N.M. 192, 194, 679 P.2d 1290, 1292 (Ct. App. 1984). The Child asserts that the unambiguous plain language of Section 32A-2-14 confirms that the Legislature did not intend to codify **Miranda**. We agree.

{29} In looking to the plain language of Section 32A-2-14(C), we conclude that a child need not be subject to custodial interrogation in order to be afforded the right to be advised of his or her constitutional rights prior to police questioning. Instead of using **Miranda** triggering terms such as "custody" or "custodial interrogation," the Legislature used much broader terms, such as, "alleged," "suspected," "interrogated," and "questioned." Section 32A-2-14(C). First, "alleged" is a specific legal term which pertains to the time period after which a formal petition alleging delinquency has been filed in the Children's Court. **See** Black's Law Dictionary 74 (7th ed. 1999) (defining "alleged" as "accused but not yet tried"). Also, the plain meaning of the term "suspected" refers to a period prior to the filing of a petition when a child is believed to have committed a crime or offense but has not yet been formally charged. **See** Webster's Ninth New Collegiate Dictionary 1189 (1985) (defining "suspect" as "to imagine (one) to be guilty or culpable on slight evidence or without proof"); **Weiland v. Vigil**, 90 N.M. 148, 152, 560 P.2d 939, 943 ("The legislature is presumed to have used no surplus words."). Therefore, "suspected" and "alleged" are two different words with two separate meanings. **See State ex rel. Helman v. Gallegos**, 117 N.M. 346, 355, 871 P.2d 1352, 1361 (1994) ("Each word is to be given meaning."). Under its ordinary meaning, we find that a person can be "suspected" of criminal activity regardless of whether the person is subject to custodial interrogation. Moreover, the term "interrogated" is not synonymous with "custodial interrogation." Rather, "interrogated" generally means express questioning which can be either custodial or investigatory. **See** Black's Law Dictionary 825 (recognizing that interrogation can be either investigatory or custodial; "the formal or systematic questioning of a person . . . [usually] of a person **arrested** for **or suspected** of committing a crime") (emphasis added). Last, "questioned" is a very broad term which means "[a] query directed to a witness." **Id.** at 1259. Given the inclusion of these broad terms within Subsection (C), we conclude that the Legislature did not intend to merely codify **Miranda**, but instead intended to provide protection to children in areas outside the narrow context of custodial interrogation.

{30} The factors in Subsection (E) further support the conclusion that custodial interrogation is not a prerequisite to warnings under the statute. For example, Subsection (E)(2) states that in determining whether the Child voluntarily waived his rights, the court should consider "whether or not [the child] is in custody." Section 32A-2-14(E)(2). Additionally, "the length of questioning and circumstances under which [the child] was questioned" should also be considered. Id. Section 32A-2-14(E)(4). Analyzing Section 32A-2-14 as a whole, we agree that the Legislature would not have included these factors if it intended merely to codify **Miranda** and require custodial interrogation as a predicate to a child being afforded statutory protection. Therefore, although the inclusion of (E)(2) and (E)(4) does not conclusively decide the issue, we agree that these factors lend support to the conclusion that Section 32A-2-14 is not a simple codification of the constitutional rule.

2.

{31} Further, the history and evolution of Section 32A-2-14 also support the finding that the Legislature did not intend to merely codify **Miranda**. Although we primarily look to the plain

language, we may also consider the history and background of the statute to determine the Legislature's intent. **See Blackhurst**, 106 N.M. at 735, 749 P.2d at 1114; **cf. Vigil v. Thriftway Mktg. Corp.**, 117 N.M. 176, 179, 870 P.2d 138, 141 ("When dealing with a statute or rule which has been amended, the amended language must be read within the context of the previously existing language, and the old and new language, taken as a whole, comprise the intent and purpose of the statute or rule."). For instance, unlike the modern version of Section 32A-2-14, its 1972 predecessor specifically included the term "custody" in pronouncing when a child must be advised of his or her constitutional rights. **See** 1972 N.M. Laws, ch. 97, § 25(A) (Repealed 1981) ("A child alleged to be a delinquent child or a child in need of supervision shall from the **time of being taken into custody** be accorded **and advised** of the privilege against self-incrimination. . . .") (emphasis added). When the statute was significantly revised in 1981, however, the term "custody" was omitted. **See** 1981 N.M. Laws, ch. 36, § 21 (codified at NMSA 1978, § 32-1-27) (Repealed 1993). The State argues that it was unnecessary to include the term "custody" in the 1981 and current revision of the statute because the Legislature also included Subsection (A) which did not appear in the 1972 version. Subsection (A) states: "A child subject to the provisions of the Delinquency Act . . . is entitled to the **same basic rights as an adult**, except as otherwise provided in the Children's Code. . . ." Section 32A-2-14(A) (emphasis added). The State asserts that the inclusion of this subsection "is clearly a reference to **Miranda** rights, and that the Legislature had therefore already shown that it intended to apply the whole of **Miranda** jurisprudence to children." According to the State, "if the Legislature intended to apply 'the same basic rights' to children as adults . . . no explicit reference to custody is necessary in Subsection (C)." We disagree.

{32} The State's argument is unsupported by the rules of statutory interpretation, the language of the statute, or the history of Section 32A-2-14. Under the State's interpretation of Subsection (A), Subsection (C) would be redundant and unnecessary. In essence, if the Legislature incorporated "the whole **Miranda** jurisprudence" in Subsection (A), there would be no reason for the Legislature to again codify **Miranda** in Subsection (C). The State's interpretation renders Subsection (C) superfluous. This construction is inconsistent with the rules of statutory interpretation since "[a] statute must be construed so that no part of the statute is rendered surplusage or superfluous." **Katz v. New Mexico Dep't of Human Servs., Income Support Div.**, 95 N.M. 530, 534, 624 P.2d 39, 43 (1981). To the contrary, we conclude that the "same basic rights" referred to in Subsection (A) are those basic rights such as the right to be free from unreasonable search and seizure, and the Sixth Amendment right to confront witnesses. **See, e.g.**, 1972 N.M. Laws, ch. 97 § 25(C) and (J). These rights were specifically enumerated in the 1972 predecessor to Section 32A-2-14, but were omitted in the revised and current version, having been replaced by the all-encompassing Subsection (A).[3] Therefore, to give all subsequent subsections of the statute effect, we find that Subsection (C) is an exercise of the Legislature's "except as otherwise provided" authority under Subsection (A).[4] **See** § 32A-2-14(A) ("A child subject to the provisions of the Delinquency Act . . . is entitled to the same basic rights as an adult, **except as otherwise**

[3] The 1972 predecessor to Section 32A-2-14 included the following sections which were omitted in the 1981 and most recent revision of the statute.

> (C) In a proceeding on a petition alleging delinquency or need of supervision:
>
> . . .
>
> (2) evidence illegally seized or obtained shall not be received in evidence to establish the allegations of a petition against a child over objection; and
>
> . . .
>
> (J) In a proceeding on a petition, a party is entitled to the opportunity to introduce evidence and otherwise be heard on the party's own behalf and to confront and cross-examine witnesses testifying against the party, and to admit or deny the allegations against the party in a petition.

1972 N.M. Laws, ch. 97 § 25 (C) and (J).

[4] Consistent with our conclusion, we find that the subsections following Subsection (A) are written specifically to provide added protection to children or to emphasize some circumstances that may be particularly relevant to juveniles. **See, e.g.** § 32A-2-14(F)-(H).

provided. . . .") (emphasis added). Accordingly, we hold that Subsection (C) is an exception to Subsection (A)'s general recognition that children are "entitled to the same basic rights as adults." **Id.** We conclude Section 32A-2-14 is not a mere codification of **Miranda**, but was intended instead to provide children with greater statutory protection than constitutionally mandated. Therefore, we hold that Section 32A-2-14 does not require that a child be subject to custodial interrogation in order for the protections of the statute to come into force.

B.

{33} Because we hold that the statute is not a codification of **Miranda** but an act by the Legislature to grant children greater statutory protection, we must assess at what point during a police/child encounter the protections of the statute are triggered. The Child argues that Section 32A-2-14 requires police officers to advise a child of his or her "constitutional rights" prior to the officer asking any question that is likely to lead to an incriminating response. The State counters that this standard is unworkable and would present a number of practical difficulties which would conflict with the need for law enforcement to adequately investigate crime. The State maintains that without custodial interrogation to serve as the basis for requiring law enforcement to give constitutional warnings, an officer would have to advise every child of his or her constitutional rights, including juveniles who have done nothing wrong and who are not suspected of any wrongdoing. We agree that the standard proposed by the Child is unworkable; however, we do not agree that the omission of custodial interrogation from the statute will have the effect of which the State is concerned. Instead, the language of the statute provides a standard to determine when the protections of the statute are triggered which falls between the two extremes proposed and anticipated by the parties.

{34} As a prerequisite to requiring that a child be advised of his or her rights under Subsection (C), the Child must be either "alleged" or "suspected" of being a delinquent child. **See** § 32A-2-14(C) ("No person subject to the provisions of the Delinquency Act who is **alleged** or **suspected** of being a delinquent child shall be **interrogated** or **questioned** without first advising the child of the child's constitutional rights and securing a knowing, intelligent and voluntary waiver.") (emphasis added). As previously stated, "alleged" pertains to a time period after which a formal petition alleging delinquency has been filed in the Children's Court. Therefore, police officers may not question children who have had formal charges filed against them without first advising them of their constitutional rights under the statute. Of significance to this case, however, is the term "suspected." "Suspected" means "to imagine (one) to be guilty or culpable." Webster's Ninth New Collegiate Dictionary 1189. Hence, the statute is also triggered when a child is imagined to be engaged in some wrongdoing. Despite the State's contention, therefore, the statute is not triggered when officers are questioning eyewitnesses and other juveniles who could not be suspected of any delinquent behavior.

{35} Furthermore, it is clear, because an officer's suspicion will almost always cause the encounter with the child to be an investigatory detention, that an objective standard would be used in evaluating whether the child is suspected of delinquent activity and therefore entitled to the statute's protections. We believe that determining whether a child is "suspected" of wrongdoing by evaluating the subjective intentions of the officer poses evidentiary difficulty and can be subject to abuse. **See, e.g.**, **Whren v. United States**, 517 U.S. 806, 814, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996) (recognizing that there is evidentiary difficulty in determining subjective intent); **Massachusetts v. Painten**, 389 U.S. 560, 565, 19 L. Ed. 2d 770, 88 S. Ct. 660 (1968) (White, J., dissenting) ("Sending . . . courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."). Therefore, we find that whether a child is "suspected" of wrongdoing should be measured by an objective standard. Such an objective standard already exists in our law.

{36} Police/citizen encounters fall within one of three categories. **State v. Jason L.**, 2000-NMSC-18, P34, 129 N.M. 119, 2 P.3d 856 (Baca, J., dissenting); **United States v. Hill**, 199 F.3d 1143, 1147 (10th Cir. 1999). At one end of the spectrum are consensual encounters which do not generally implicate any constitutional protections. **See Hill**, 199 F.3d at 1147. On the other end are arrests, which are the most intrusive of seizures, and generally trigger both the Fourth Amendment and **Miranda** protections. **See id.** In between are investigatory detentions, or **Terry** stops, which are "Fourth Amendment seizures of limited scope and duration and must be supported by reasonable suspicion of criminal activity." **Id.** We find that, by including the term "suspected" in Section 32A-2-14(C) to describe when the statute's protections are triggered, the Legislature intended to draw the line at investigatory detentions.

{37} Most often, when an officer approaches a child to ask the child questions because the officer "suspects" the child of delinquent behavior, the officer is performing an investigatory detention. The Fourth Amendment allows an officer who has reasonable articulable suspicion of wrongdoing to briefly detain individuals whom he suspects of criminal activity and ask them questions in an attempt to confirm or dispel his suspicions. **Taylor**, 1999-NMCA-22, P7, 126 N.M. 569, 973 P.2d 246; **see State v. Werner**, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994). Given a child's possible immaturity and susceptibility to intimidation, a child who is subject to an investigatory detention may feel pressures similar to those experienced by adults during custodial interrogation. Accordingly, using investigatory detentions as the point at which the statute's protections are triggered furthers the Legislature's intent to be:

> consistent with the protection of the public interest, to remove from children committing delinquent acts the adult consequences of criminal behavior, but to still hold children committing delinquent acts accountable for their actions **to the extent of the child's age, education, mental and physical condition, background and all other relevant factors**.

NMSA 1978, § 32A-2-2(A) (1993) (emphasis added); **see In re Doe**, 88 N.M. 481, 482, 542 P.2d 61, 62 ("Those sections of the Children's Code [referring to a child's constitutional and statutory rights] must be read in light of the legislative purposes expressed in the Code.").

{38} In addition to conforming to the language and purpose of Section 32A-2-14, the "reasonable suspicion" standard places no additional burden on either the courts or law enforcement since the standard is already used to assess whether law enforcement has conformed to the protections of the Fourth Amendment. Hence, it is simple to require that officers who have reasonable suspicion to detain a child, also advise the child of his or her "constitutional rights" under Section 32A-2-14 prior to questioning. Therefore, we hold that the protections of the statute are triggered in two circumstances: (1) after formal charges have been filed against a child; and (2) when a child is seized pursuant to an investigatory detention and not free to leave.

{39} Although we conclude that the Legislature intended to provide children with greater statutory protection by requiring that law enforcement advise children of their constitutional rights prior to questioning during an investigatory detention, we do not find that the Legislature intended to hamper the traditional function of police officers in investigating crime. Accordingly, we reject the Child's proposed standard of requiring warnings whenever an officer asks a question which is likely to lead to an incriminating response. Such a standard unduly burdens a police officer's required duties. For example, under the Child's proposed standard, a preliminary question pertaining to a child's identity or age may lead to an incriminating response and therefore be prohibited without first advising the child of his or her "constitutional rights." **See, e.g.**, **State v. Loo**, 94 Haw. 207, 10 P.3d 728, 730 (Haw. 2000) (illustrating a circumstance in which a minor responding to an officer's inquiry as to his age revealed that the minor had violated

the state statute prohibiting a minor from being in possession of alcohol). Police officers must be free to ask a child questions that are related to the officer's administrative concerns. **See Pennsylvania v. Muniz**, 496 U.S. 582, 601-02, 110 L. Ed. 2d 528, 110 S. Ct. 2638 (1990) (holding that the defendant's answers to questions regarding his name, address, height, weight, eye color, date of birth, and current age posed to him during custodial interrogation were admissible because the questions fell within a "routine booking questions" exception which exempts from **Miranda** 's coverage questions to secure the biographical data necessary to complete booking or pretrial services). The "likely to lead to an incriminating response" standard would be impractical since it would essentially prohibit officers from ascertaining whether a particular individual requires special attention as a juvenile under the Children's Code. **See Doe**, 100 N.M. at 582-83, 673 P.2d at 1315-16 (holding that the predecessor to Section 32A-2-14 is not applicable to threshold questioning). Therefore, we reject the Child's proposed standard and conclude that a child is not entitled to any protections under the statute when an officer asks administrative questions such as those pertaining to a child's name or age.

{40} The statute's protections also do not apply when a child, not subject to investigatory detention, answers general on-the-scene questions or when the child makes a voluntary statement. "It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement." **Miranda**, 384 U.S. at 477-78. As such, "general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected" by our interpretation of Section 32A-2-14. **Id.** at 477. Moreover, volunteered statements of any kind are also not subject to the protections of Section 32A-2-14 since such statements are generally not in response to any "questioning" or "interrogation." **See Doe**, 100 N.M. at 581, 583, 673 P.2d at 1314, 1316 (concluding that a child's statement admitting that he had shot a rifle after police picked up the rifle was volunteered and therefore admissible). We hold, therefore, that the statute does not require that officers give children constitutional warnings prior to: (1) questions pertaining to a child's age or identity; (2) general on-the-scene questioning; or (3) volunteered statements made by a child. The statute only protects against a child's statements which are made during an investigatory detention in response to a police officer's questioning that could not be mere administrative questions and that is intended to confirm or dispel the officer's suspicions that the child is or has committed a delinquent act. Since the Child in this case was subject to investigatory detention, Section 32A-2-14(C) required Officer Helton to advise the Child of his "constitutional rights" prior to questioning.

C.

{41} This brings us to our final task of defining what "constitutional rights" a child must be advised of under Section 32A-2-14(C) when a child is subject to an investigatory detention. Both the State and the Child assume that, by requiring that a child be advised of his or her "constitutional rights" prior to being interrogated or questioned, the Legislature intended the term "constitutional rights" to be synonymous with **Miranda** warnings. **See** Section 32A-2-14(C); **see, e.g.**, **Miranda**, 384 U.S. at 444 (holding that prior to questioning a person must be warned that "he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed."). However, since the Legislature intended to apply the protections of the statute beyond the narrow context of custodial interrogations, we do not assume that the term "constitutional rights" in Subsection (C) refers to the required warnings enumerated in **Miranda**. Instead, we hold that pursuant to Section 32A-2-14, children who are subject to investigatory detentions are statutorily entitled only to be warned of their right to remain silent and that anything they say can be used against them.

{42} In the absence of custodial interrogation an officer is not constitutionally mandated to

give any warnings. Custodial interrogation was the essential predicate to the Court's decision in **Miranda**. **See State v. Nieto**, 2000-NMSC-31, P22, 129 N.M. 688, 12 P.3d 442 (holding that the general right to receive **Miranda** warnings attaches only during custodial interrogation); **see also State v. Chambers**, 84 N.M. 309, 312, 502 P.2d 999, 1002 (1972) (holding that statements made prior to any type of custodial interrogation within the meaning of **Miranda** are voluntary). The inherently coercive atmosphere present during custodial interrogation provides the constitutional justification for mandating that suspects be given warnings, advising them of their right to remain silent and their right to counsel. **See, e.g.**, **Dickerson**, 530 U.S. at 435 (concluding that the "coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself") (internal quotation marks omitted). Absent custodial interrogation the constitutional procedural safeguards pronounced in **Miranda** do not apply. Therefore, in enacting Section 32A-2-14(C), the Legislature is providing juveniles with a separate statutory right, not codifying a constitutional mandate. We must now assess the scope of this statutory right when a child is in an investigatory detention.

{43} Although not constitutionally entitled to **Miranda** warnings in the absence of custodial interrogation, individuals continue to possess the constitutional privilege against self-incrimination during investigatory detentions. The Fifth Amendment privilege against self-incrimination is continuously present although at most times remaining un-invoked. For instance, the privilege releases an individual from the obligation to answer questions posed by law enforcement during an investigatory detention. **See Berkemer**, 468 U.S. at 439 (recognizing that a person detained pursuant to an investigatory detention is not obliged to respond to police questioning). However, if questioning persists and the individual desires the protection of the privilege, "'he must claim it or he will not be considered to have been 'compelled' within the meaning of the [Fifth] Amendment.'" **Murphy**, 465 U.S. at 427 (quoting **Monia**, 317 U.S. at 427); **see also Gutierrez**, 119 N.M. at 620, 894 P.2d at 397 (The constitutional privilege against self-incrimination is available only if it is invoked as the ground for refusing to speak."). Therefore, as a general rule individuals are not deemed to be "compelled" to speak in violation of the Fifth Amendment unless the individual invokes the privilege, refuses to answer, and is thereafter forced to answer. **See Gutierrez**, 119 N.M. at 620, 894 P.2d at 397.

{44} We conclude that the Legislature intended to provide a statutory exception to the general requirement that the child affirmatively invoke the privilege during an investigatory detention in order to be availed of its protection. **See id.** at 621, 894 P.2d at 398 (recognizing that **Miranda** is an "exception to the general rule that the privilege is not available unless invoked as a ground for refusal to answer"). By enacting Section 32A-2-14, the Legislature intended to shift the burden to law enforcement to remind the child during an investigatory detention that the child has no obligation to answer the officer's questions. In accordance with a child's age, immaturity, and inability to appreciate certain rights available to them, advising them that they have the right to remain silent simply makes them aware of it. **See, e.g.**, **Miranda**, 384 U.S. at 468. As a corollary to the advisement of the right to remain silent, we also conclude that under the statute, law enforcement must advise children of the consequences of waiving that right. **See id.** at 469. Law enforcement must also explain that anything the child says may be used against the child in court. **See id.** "This warning is needed in order to make [the child] aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." **Id.**

{45} Even though individuals maintain a right to remain silent when questioned by police during an investigatory detention, individuals do not have a right to have an attorney present during such questioning. There are two constitutional provisions that grant the right to counsel, the

Fifth Amendment and the Sixth Amendment, neither one of which attach during an investigatory detention. "The Sixth Amendment right to counsel does not attach . . . until judicial proceedings have been initiated against the suspect, such as by way of indictment or preliminary hearing." **See State v. Chamberlain**, 109 N.M. 173, 176, 783 P.2d 483, 486 . Additionally, the Fifth Amendment right to counsel pronounced in **Miranda** is so intertwined with the coercive pressures inherent in custodial interrogation that the right does not attach until the suspect is subject to custodial interrogation. **See id.**

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. . . . With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court.

Miranda,384 U.S. at 469-70 (emphasis added). As previously discussed, the circumstances surrounding an investigatory detention are not inherently coercive as they are during custodial interrogation. Consequently, the right to counsel does not attach when an individual is subject to a detention that never escalates to a custodial interrogation.

{46} Moreover, to interpret the term "constitutional rights" in Section 32A-2-14(C) to include the right to counsel during an investigatory detention would present unworkable situations that would greatly infringe on a child's fundamental rights. For example, if an officer was mandated to advise a child that he has the right to counsel during an investigatory detention, which is constitutionally justified only if limited in scope and duration, and the child invokes, the officer would have to further detain the child so that an attorney may be either retained or appointed. This would be a severe infringement on the child's Fourth Amendment rights since a further detention would likely be unlawful under the Fourth Amendment's "reasonable suspicion" requirement. To interpret the term "constitutional rights" to include the right to counsel during investigatory detention would lead to an unreasonable and absurd result. **See State v. Wyrostek**, 108 N.M. 140, 142, 767 P.2d 379, 381 ("[A] court will not give a statute a literal reading when to do so leads to absurd and unreasonable results, or requires useless acts.").

{47} Therefore, we find that the term "constitutional rights" in Subsection (C), as it applies to investigatory detentions, refers to the right to remain silent. By enacting Section 32A-2-14, we conclude that the Legislature intended to exempt children from the general rule of self invocation by requiring that children be reminded of their right not to incriminate themselves and be advised of the consequences of waiving that right. Accordingly, we conclude that when a child is subject to an investigatory detention, law enforcement must advise the child of his or her right to remain silent and that if the right is waived anything that the child says can be used against them in any delinquency hearing.

V.

{48} In the instant case, we agree that the Child's rights under **Miranda** were not violated since the Child was not in custodial interrogation and was, therefore, not entitled to **Miranda** warnings. However, we disagree that Section 32A-2-14(C) is merely a codification of **Miranda**. Instead, we conclude that in enacting Section 32A-2-14(C), the Legislature intended to provide greater protection to juveniles than is afforded to adults in the area of police questioning. As such, we hold that under the Children's Code a child who is detained or seized and suspected of wrongdoing must be advised of his or her right to remain silent and that if the child waives

that right, anything said can be used against them. Because Javier M. was subject to an investigatory detention and was not advised by Officer Helton that he had a right not to answer the officer's questions, we conclude that the statements made by Javier M. should have been suppressed pursuant to Section 32A-2-14(D). Since the Children's Court did not suppress the Child's statements, but instead used the statements as the basis for its finding of delinquency, we reverse the Child's adjudication.

{49} IT IS SO ORDERED.

JOSEPH F. BACA, Justice

WE CONCUR:

PATRICIO M. SERNA,
Chief Justice

PETRA JIMENEZ MAES,
Justice

PAMELA B. MINZNER,
Justice (specially concurring)

GENE E. FRANCHINI,
Justice (specially concurring)

CONCURRENCE

MINZNER, Justice (specially concurring).

{50} I concur in the result reached by the majority opinion; the Children's Court erred when it did not suppress the Child's statements and we should reverse the Child's adjudication of delinquency. I am persuaded that in enacting NMSA 1978, § 32A-2-14 (1993), the Legislature did not intend only to codify **Miranda v. Arizona**, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), but also intended to grant a further statutory right to a child who is "alleged or suspected of being a delinquent child," to be advised of his or her constitutional rights before being "interrogated or questioned." Section 32A-2-14(C). Therefore, Officer Helton was required by Section 32A-2-14(C) to advise the Child of his constitutional rights prior to questioning him. I write separately because I would reverse the Children's Court without reaching all of the issues addressed by the majority.

{51} Officer Helton testified that he detected the odor of alcohol on the Child, and that in his opinion there was no question that the Child had consumed alcohol. Majority Opinion P3. Additionally, Officer Helton directly asked the Child whether he had consumed any alcohol, and he confessed that he drank two beers. **Id.** On these facts it seems clear that Officer Helton questioned the Child, whom he suspected to be delinquent. Therefore, under Section 32A-2-14(C), Officer Helton should have informed the Child of his constitutional rights and obtained a valid waiver before any response was admitted at trial. We therefore need not determine in this case whether the warnings required by statute should have been given at an earlier time.

{52} Although it is not necessary in order to decide this case, it might be helpful to propose a test for future cases in which the application of Section 32A-2-14 is less clear. The Child proposed the test of whether the questioning was likely to elicit an incriminating response. That test seems to me to capture the Legislature's intent in enacting Section 32A-2-14(C). That test provides objective proof of the law enforcement officer's subjective state of mind - that is, whether he or she suspects that the Child was delinquent. The majority proposes an alternative query: whether the child is the subject of an investigatory detention. The question of whether the defendant is subject to an investigatory detention, as a midpoint between a full arrest and a purely consensual encounter, is determined by balancing the degree of the intrusion into a person's privacy against the government's interest in investigating and preventing crime. **State v. Jason L.**, 2000-NMSC-18, P14, 129 N.M. 119, 2 P.3d 856. That question has proved difficult to analyze. **See** 2000-NMSC-18 PP16-19, 129 N.M. 119. The Child's test seems simpler and thus easier for law enforcement to apply; furthermore, it seems more consistent with the text of Section 32A-2-14(C).

{53} The majority expresses concern that the Child's test would unduly hamper law enforcement by requiring warnings prior to questions of a child's age or identity, general on-the-scene questioning, and statements volunteered by the child. Majority Opinion PP39-40. I am not convinced that this is the case. The Child's test looks at the officer's question - prior to any response - and asks whether the question itself objectively evinces the officer's suspicion. If it does, Section 32A-2-14(C) requires prior warnings. Thus understood, the Child's test would not unduly hamper law enforcement. The officer can ask the age and identity of a child even though the circumstances of the case may make those questions likely to elicit an incriminating response because, for example, the child is in possession of alcohol. In that case, the sole remedy provided by Section 32A-2-14(D) is suppression of the child's statement in the absence of an informed waiver. The State would be free to prove the child's age by any other means, and the officer could still testify that he or she observed the child drinking. Volunteered statements do not come as a result of questioning and would thus not require warnings under either test. Finally, on-the-scene questioning ordinarily would not seem to evince the officer's suspicion of a child. If it ever did, I believe the Legislature concluded in Section 32A-2-14 that any responses to those questions should be suppressed.

{54} I also am not persuaded we ought to reach the further question of what advice Officer Helton should have provided the Child. We are agreed that the adjudication must be reversed; the parties appear to agree that if notice of constitutional rights was required, that requirement was not satisfied.

{55} Both parties assumed in their briefing that if the Child was entitled to any warnings, it would be the full set required by **Miranda.** It might be helpful to confirm or dispel that assumption, even though it is not necessary in order to decide this case. Because we are concerned with a statutory right to notice or warnings, the answer depends on what the Legislature intended. Considering the relationship between Section 32A-2-14(C) and **Miranda**, it seems natural to assume the full set of **Miranda** warnings is required, regardless of the stage of the encounter.

{56} The Legislature mandated "advising the child of the child's constitutional rights," and did not limit the scope of the advice. Section 32A-2-14(C). **Miranda** itself describes the right to counsel as "a right to consult with counsel **prior to** questioning," as well as the right to "have counsel present **during any questioning** if the defendant so desires." 384 U.S. at 470 (emphases added). The **Miranda** court clearly tied the right to have counsel present to the right to remain silent: "Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege [against self-incrimination] we delineate today." **Id.** at 471.

{57} As the majority notes, "a child who is subject to an investigatory detention may feel pressures similar to those experienced by adults during custodial interrogation." Majority Opinion P37. Because **Miranda** so clearly tied the right to counsel with the right to remain silent, and because the Legislature declared the intent of the Children's Code to hold children accountable for their actions "**to the extent of** the child's age, education, mental and physical condition, background and all other relevant factors," NMSA 1978, § 32A-2-2(A) (1993) (emphasis added), I see no reason to exclude from the warnings given to a child some mention of the child's right to counsel as further protection of the child's privilege against self-incrimination. In advising of the right to counsel under Section 32A-2-14, to be consistent with **Miranda**, an officer would not need to describe the right as a right to counsel at the time the advice is given; the officer, for example, might advise a child that he or she has the right to consult counsel prior to any further questioning.

{58} For the reasons stated above, I respectfully concur in Sections IV(A)(1) and (2), and in the result of Section IV(B). I agree that we should reverse the Child's adjudication. I would

do so without reaching the analyses contained in Section III, IV(B) and IV(C).

PAMELA B. MINZNER,
Justice

I CONCUR:

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2002-NMSC-005

Filing Date: February 5, 2002

Docket No. 26,108

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

CHRIS TRUJILLO,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Angela Jewell, District Judge

Motion for Rehearing Denied March 19, 2002,
Released for Publication March 21, 2002

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OPINION

BACA, Justice.

{1} Defendant Chris Trujillo was convicted of first-degree depraved-mind murder, conspiracy to commit first-degree depraved-mind murder, aggravated assault, conspiracy to commit aggravated battery, conspiracy to commit shooting at a dwelling or occupied building (great bodily harm), conspiracy to commit shooting at a dwelling or occupied building (resulting in injury), shooting at a dwelling or occupied building (no injury), and conspiracy to commit shooting at a dwelling or occupied building (no injury).[1] The jury found Defendant not guilty of aggravated battery, aggravated assault, shooting at a dwelling or occupied building (great bodily injury), and shooting at a dwelling or occupied building (resulting in injury).

{2} Pursuant to Rule 12-102(A)(1) NMRA 2002, Defendant raises the following issues on appeal: (1) the admission of the tape and transcript of Joseph Ortiz's out-of-court statement violated Defendant's constitutional right to confrontation and due process because it was inadmissible impeachment and hearsay evidence; (2) his conviction for first-degree depraved-mind murder violated due process of law because sufficient evidence did not support the conviction on any theory; (3) Defendant was convicted of a crime that does not exist - conspiracy to commit depraved-mind murder; (4) there was no evidence that Defendant shot at a dwelling or occupied building; (5) Defendant's trial counsel's performance constituted ineffective assistance of counsel; (6) the prosecutor's acts of misconduct distorted the evidence on the

[1] Pursuant to NMSA 1978, § 30-2-1(A)(3) (1994) (first-degree depraved-mind murder); § 30-2-1(A)(3) and NMSA 1978, § 30-28-2(B)(1) (1979) (conspiracy to commit first-degree depraved-mind murder); NMSA 1978, § 30-3-2(A) (1963) and NMSA 1978, § 31-18-16 (1993) (aggravated assault); NMSA 1978, §§ 30-3-5(A) & (C) (1969) and NMSA 1978, § 30-28-2(B)(3) (1979) (conspiracy to commit aggravated battery); NMSA 1978, § 30-3-8(A) (1993) and NMSA 1978, § 30-28-2(B)(2) (1979) (conspiracy to commit shooting at a dwelling or occupied building (great bodily harm)); § 30-3-8(A) and § 30-28-2(B)(3) (conspiracy to commit shooting at a dwelling or occupied building (resulting in injury)); § 30-3-8 (shooting at a dwelling or occupied building (no injury)); and § 30-3-8(A) and § 30-28-2(B)(3) (conspiracy to commit shooting at a dwelling or occupied building (no injury)).

issue of identification, depriving Defendant of due process and a fair trial; (7) the conspiracy charges and Defendant's convictions violate the Double Jeopardy Clause because there is no evidence of any agreement or agreements to support separate charges; (8) the above constitute cumulative error that denied Defendant due process and a fair trial; and (9) Defendant's sentence is disproportionate and in violation of the state and federal constitutional prohibitions against cruel and unusual punishment. We affirm Defendant's convictions for first-degree depraved-mind murder and conspiracy to commit aggravated battery. We vacate Defendant's conviction for conspiracy to commit depraved-mind murder and reverse Defendant's convictions for conspiracy to commit shooting at a dwelling or occupied building (great bodily harm), conspiracy to commit shooting at a dwelling or occupied building (resulting in injury), shooting at a dwelling or occupied building (no injury), and conspiracy to commit shooting at a dwelling or occupied building (no injury).

I.

{3} On July 3, 1997, Defendant and Charlie Allison were outside on a second-floor apartment balcony in the Barelas neighborhood of Albuquerque when they became involved in an argument with four men located at ground level: Joseph Ortiz, Juan Ortega, Jesus Canas, and Javier Mendez. As a result of this argument, shots were fired from the upstairs balcony at a downward angle, killing Mendez and wounding Canas. The State introduced evidence that Defendant and Allison were members of the Barelas gang, and that Ortega, Canas, and Mendez were members of a rival gang, the Juaritos Maravilla.

{4} Ortiz, Allison's cousin, was a former Barelas gang member who had been "ranked out" and was apparently no longer welcome in the area. He testified that he had planned to meet up with Mendez at the apartments on the day of the shooting and that soon after he arrived he heard an argument and gunshots. Shortly after the shots were fired, Ortiz ran after Mendez and found him lying face down in the alley. However, Ortiz apparently could not recall more specific details of the shooting, including who fired the gun. As a result, the prosecutor played the tape of an interview between Ortiz and Detective Shawn conducted a few hours after Mendez was killed. In that interview Ortiz stated that he did not recognize the shooters but described them as a "little guy" wearing light blue jeans and a striped shirt, presumably Defendant, and a "big guy" wearing black jeans and a black t-shirt, presumably Allison. According to Ortiz, even though the bigger guy asked for the gun, the little guy did not want to give it to him, telling the four down below, "You guys think I'm joking," before he began shooting.

{5} Ortega testified that someone on the balcony asked the four men what they were doing in the Barelas neighborhood and that Mendez responded, "We could be anywhere we want, Juaritos." Immediately thereafter shots were fired down at them from the balcony. Ortega stated that Allison was the original shooter, firing two or three times at Mendez, and then Defendant took the gun and shot at Canas and Ortega. On the night of the shooting, Ortega identified Defendant as one of the shooters from a photo array shown to him by Detective Shawn. Ortega again identified Defendant at trial as the second shooter.

{6} Detective Doug Shawn, the officer assigned to the case, testified that he interviewed several eyewitnesses to the shooting, all of whom identified Defendant as one of the shooters and indicated that only one gun had been used. Detective Shawn stated that on the night of the shooting Ortega identified Defendant as one of the shooters from a photo lineup and that he recorded this identification. He also testified that Ortiz identified Defendant as one of the shooters from a photo lineup as well but refused to have his identification recorded.

II.

{7} Defendant was tried, convicted, and sentenced for first-degree murder as a serious

youthful offender pursuant to NMSA 1978, § 31-18-15.3(D) (1993), which allows a district court to "sentence the offender to less than, but not exceeding, the mandatory term for an adult." NMSA 1978, § 31-18-14(A) (1993) grants the district court discretion in sentencing minors who have been convicted of a capital felony: "If the defendant has not reached the age of majority at the time of the commission of the capital felony for which he was convicted, he **may be** sentenced to life imprisonment but shall not be punished by death." (Emphasis added.) Exercising this discretion, the trial court sentenced Defendant to a "term of THIRTY (30) YEARS, BUT NOT LIFE" for his first-degree murder conviction. The trial court also provided that "it is this Court's intention that the Defendant be eligible for good time credit as to the sentence imposed." (Emphasis omitted.) Defendant invoked this Court's mandatory appellate jurisdiction based on his first-degree murder conviction and because he was sentenced to thirty years in prison.

{8} This Court's mandatory appellate jurisdiction is not based on a prison sentence to a term of years, nor is it based on a first-degree murder conviction. Our mandatory appellate jurisdiction is constitutional and is limited to "appeals from a judgment of the district court imposing a sentence of death or life imprisonment." N.M. Const. art. VI, § 2. This Constitutional provision is buttressed by Rule 12-102(A)(1) and NMSA 1978, § 34-5-8(A)(3) (1983) which reiterate this limitation to our jurisdiction. Rule 12-102(A)(1) provides that "appeals from the district courts in which a sentence of death or **life imprisonment** has been imposed" shall be taken to the Supreme Court. Section 34-5-8(A)(3) indicates that the Court of Appeals has appellate jurisdiction over criminal actions, "except those in which a judgment of the district court imposes a sentence of death or **life imprisonment**." (Emphasis added.) While a life sentence has never been interpreted to mean a sentence to imprisonment for the duration of the defendant's natural life, it has been interpreted to mean thirty years of imprisonment before the possibility of parole or reduction of sentence through good time credits. **See Martinez v. State**, 108 N.M. 382, 383, 772 P.2d 1305, 1306 (1989). Defendant in this case was sentenced to thirty years of imprisonment, with the judge explicitly providing that he be eligible for good time credit. This case raises the unique jurisdictional issue of whether a serious youthful offender convicted of first-degree murder is allowed to invoke our mandatory appellate jurisdiction even though he is sentenced to less than life imprisonment due to the discretion afforded district court judges when sentencing serious youthful offenders convicted of a capital felony.

{9} We conclude that serious youthful offenders convicted of first-degree murder shall be allowed to invoke this Court's mandatory appellate jurisdiction under Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A)(1). In New Mexico, "whoever commits murder in the first degree is guilty of a capital felony." Section 30-2-1. "When a defendant has been convicted of a capital felony, he shall be punished by life imprisonment or death." Section 31-18-14(A). Thus, under our law, adults convicted of first-degree murder may appeal directly to the Supreme Court, as of right, because they will always be sentenced to life imprisonment or death, while it appears juvenile offenders convicted of first-degree murder may not be able to appeal their convictions directly to the Supreme Court because the trial court has discretion to sentence them to less than a life sentence. From the onset of New Mexico jurisprudence, first-degree murder convictions have been appealed directly to this Court, and even after the creation of the Court of Appeals, this Court retained this crucial area of jurisdiction. We have developed the entire body of New Mexico case law for first-degree murder cases, and it would only create confusion and inconsistency for the rare case of a serious youthful offender convicted of first-degree murder but sentenced to less than life imprisonment to proceed first to the Court of Appeals when all other first-degree cases proceed directly to this Court. It is unlikely that either the drafters of Article VI, Section 2 of the New Mexico Constitution, or this Court when it adopted Rule 12-102(A)(1), considered, or even foresaw, this issue when adopting the

language limiting our mandatory appellate jurisdiction for criminal appeals to only those "appeals from a judgment of the district court imposing a sentence of death or life imprisonment." N.M. Const. art. VI, § 2. It makes little sense to allow adults convicted of first-degree murder to appeal directly to this Court, but to force juveniles convicted of the same crime to first appeal to the Court of Appeals.

{10} "'It is the duty of this court to interpret the various provisions of the Constitution to carry out the spirit of that instrument.'" **Bd. of County Comm'rs v. McCulloh**, 52 N.M. 210, 215, 195 P.2d 1005, 1008 (1948) (quoting **State ex rel. Ward v. Romero**, 17 N.M. 88, 100, 125 P. 617, 621 (1912)). Furthermore, it is the policy of this Court to construe its rules liberally so that causes on appeal may be determined on their merits. **See Danzer v. Prof'l Insurors, Inc.**, 101 N.M. 178, 180, 679 P.2d 1276, 1278 (1984); **see also Govich v. N. Am. Sys.**, 112 N.M. 226, 230, 814 P.2d 94, 98 (1991); **Lowe v. Bloom**, 110 N.M. 555, 555, 798 P.2d 156, 156(1990). Accordingly, we hold that serious youthful offenders convicted of first-degree murder shall be allowed to invoke this Court's mandatory jurisdiction under Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A)(1). Thus, jurisdiction in this case is proper and we review Defendant's appeal on the merits.

III.

{11} Defendant's first argument is that the trial court erred by admitting the tape and transcript of Ortiz's out-of-court statements. Defendant's argument on this point is two-fold: (1) the trial court's admission of the evidence violated Defendant's constitutional right to confront the witnesses against him; and (2) the trial court erred in ruling that the evidence was admissible.

A.

{12} Defendant first argues that the admission of the tape and transcript of Ortiz's out-of-court statement violated his right to confront the witness against him under the Sixth Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment, and under Article II, Section 14 of the New Mexico Constitution. Defendant asserts that, as a result, the admissibility of this evidence should be reviewed de novo rather than for an abuse of discretion. **See State v. Lopez**, 2000-NMSC-3, P10, 128 N.M. 410, 993 P.2d 727. As a preliminary matter, we must first consider the question of whether Defendant "preserved the confrontation issue for appellate review." **Id.** P 11 (quoting **State v. Ross**, 1996-NMSC-31, 122 N.M. 15, 22, 919 P.2d 1080, 1087) (internal quotation marks omitted).

{13} At trial, Defendant objected to the admission of Ortiz's taped statement on general impeachment and hearsay grounds. However, he did not object to the admission of this evidence on confrontation grounds, nor did he raise or allude to any general constitutional violations which would occur as a result of its admission. As a result, we do not address Defendant's confrontation concerns on appeal. **See State v. Mora**, 1997-NMSC-60, P47, 124 N.M. 346, 950 P.2d 789 (finding that defendant did not preserve the confrontation issue for appellate review because he "did not timely object to the admission of [the deceased witness's] statement on confrontation grounds, nor did he timely object on general constitutional grounds"); **cf. Lopez**, 2000-NMSC-3, PP9-21, 128 N.M. 410, 993 P.2d 727 (reviewing defendant's confrontation concerns after determining that the confrontation issue had been preserved at trial because defendant objected to his inability to cross examine or confront the witness).

B.

{14} At trial, the State called Ortiz as an eyewitness to testify regarding the details of the shooting. On the stand Ortiz stated that he could not recall the particular details of the crime. The prosecutor then requested that the court allow him to play for the jury the tape of Ortiz's July 3rd statement to Detective Shawn in which Ortiz gave a more detailed account of the events.

Defendant objected to the tape being played to the jury, claiming that this was improper impeachment and inadmissible hearsay under Rules 11-613(B), 11-803(E), 11-801(D)(1)(c), 11-804(A)(3), and 11-803(X) NMRA 2002. Despite Defendant's objections, the court admitted the evidence pursuant to Rules 11-803(E), 11-803(X), 11-804(A)(3), and 11-612 NMRA 2002.

{15} As a general rule, the "admission of evidence is entrusted to the discretion of the trial court, and rulings of the trial judge will not be disturbed absent a clear abuse of discretion."[2] **State v. Worley**, 100 N.M. 720, 723, 676 P.2d 247, 250 (1984); **see also Lopez**, 2000-NMSC-3, P10, 128 N.M. 410, 993 P.2d 727; **State v. Torres**, 1998-NMSC-52, P15, 126 N.M. 477, 971 P.2d 1267; **State v. Stout**, 96 N.M. 29, 32, 627 P.2d 871, 874 (1981). In order to find that the trial court abused its discretion in admitting the tape and transcript of Ortiz's interview with Detective Shawn, we must conclude that the trial court's decision was "'obviously erroneous, arbitrary or unwarranted.'" **State v. Brown**, 1998-NMSC-37, P39, 126 N.M. 338, 969 P.2d 313 (quoting **State v. Stills**, 1998-NMSC-9, P33, 125 N.M. 66, 957 P.2d 51).

{16} The trial court found the statement admissible under Rule 11-803(X), and we conclude that it did not abuse its discretion by admitting Ortiz's statement under this Rule. Rule 11-803(X) allows hearsay statements to be admitted if not specifically covered by any other hearsay exception so long as there are "equivalent circumstantial guarantees of trustworthiness" and the court determines that:

> (1) the statement is offered as evidence of a material fact;
>
> (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
>
> (3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id. The dissent argues that our analysis under Rule 11-803(X) is misplaced because this exception "'cannot be read to mean that hearsay which almost, but not quite, fits another specific exception, may be admitted under the 'other exceptions' subsection. . . . '" Dissent P 82 (quoting **State v. Barela**, 97 N.M. 723, 726, 643 P.2d 287, 290). Rather, the dissent urges, the rule "should be used in a novel situation not considered by the drafters and not 'specifically covered by any of the foregoing exceptions. . . .' It should not be used when the statement is of a type expressly considered by other exceptions, but which does not satisfy the rules those exceptions establish." **Id.** This narrow interpretation of the rule has been rejected by a majority of circuits, and we decline to adopt it in our jurisdiction. **See** 5 Jack B. Weinstein & Margaret A. Berger, **Weinsteins's Federal Evidence** § 807.03[4], at 807-26 (Joseph M. McLaughlin ed., 2d ed. 2001) ("Although there was initially some debate about the meaning of this phrase, ['not specifically covered by any of the foregoing exceptions,'] the majority of circuits have concluded that the phrase means only that, if a statement is **admissible** under one of the hearsay exceptions, that exception should be relied on instead of the residual exception. If a hearsay statement is similar to those defined by a specific exception but does not actually qualify for admission under that exception, these courts allow the statement to be considered for admission under the residual exception."). While we agree that the rule cannot be

[2] The dissent agrees that as a general matter we should defer to the discretion of the trial judge on evidentiary matters, but argues that "such deference . . . has less force in this case, where it is less than clear from the record that the trial court relied upon Rule 11-803(X) in its ruling." Dissent P 80. We think the record makes clear that the trial judge relied on Rule 11-803(X), even though it may not have been the cornerstone of its ruling. The dissent cites to no authority to support its conclusion that less deference is due when the trial court admits evidence under a rule that it did not principally rely on, and without some contrary authority, we believe we are obligated to review the trial court's ruling under the well-established abuse of discretion standard. **See State v. Salgado**, 1999-NMSC-8, PP5-11, 126 N.M. 691, 974 P.2d 661; **see also State v. Beachum**, 83 N.M. 526, 527, 494 P.2d 188, 189 ("A decision of the trial court will be upheld if it is right for any reason.").

used to supply the missing elements to admit evidence which almost, but not quite, meets the requirements of another specific exception, it can be used to admit out-of-court statements that otherwise bear indicia of trustworthiness equivalent to those other specific exceptions. In other words, "if a statement is inadmissible under a prior hearsay exception, the statement may nonetheless be considered for admission under the catch-all exception." **United States v. Earles**, 113 F.3d 796, 800 (8th Cir. 1997). If we were to adopt the dissent's reading of this rule, we would deprive the jury of reliable probative evidence relevant to the jury's truth-seeking role. Accordingly, we respectfully disagree with the dissent's reasoning on this point.

{17} "In determining whether a statement is sufficiently trustworthy the statement must be inherently reliable at the time it is made." **Williams**, 117 N.M. at 561, 874 P.2d at 22. "The test under the catch-all rules is whether the out-of-court statement - not the witness's testimony - has circumstantial guarantees of trustworthiness."[3] **Id.** This Court has recognized four primary dangers of hearsay which can potentially make a hearsay statement unreliable.

> They are:
>
> (1) Ambiguity—the danger that the meaning intended by the declarant will be misinterpreted by the witness and hence the jury; (2) Lack of candor—the danger the declarant will consciously lie; (3) Faulty memory—the danger that the declarant simply forgets key material; and (4) Misperception—the danger that the declarant misjudged, misinterpreted, or misunderstood what he saw.

Id. at 560, 874 P.2d at 21 (quoting **State v. Taylor**, 103 N.M. 189, 197, 704 P.2d 443, 451).

{18} With respect to ambiguity, we conclude that there is no danger that the meaning intended by Ortiz will be misinterpreted because the taped statement was played to the jury and the jury had the opportunity to interpret Ortiz's statement themselves rather than rely on some other witness's interpretation. As to lack of candor, we find the fact that Ortiz was not a suspect in the shooting and therefore had no reason to shift blame away from himself, the fact that he implicated his own cousin, Allison, in his statement, and the fact that he likely placed himself and his family in grave danger by giving Detective Shawn a physical description of the shooters, make it less likely that Ortiz would have consciously lied to Detective Shawn about what he observed that night. Similarly, the danger that Ortiz might have a faulty memory is not present here, because Ortiz gave his statement just hours after the shooting. Finally, we find there was little danger that Ortiz misjudged, misinterpreted, or misunderstood what he saw that evening because there were no impediments to his perception and because he was present throughout the event.

{19} The dissent concludes that with respect to the second danger, lack of candor, Ortiz did in fact have a motive to lie and "therefore his statement lacked circumstantial guarantees and was inherently untrustworthy." Dissent P 74. The essence of the dissent's argument on this point is that while one could reason that Ortiz would not have implicated a family member unless he believed it to be true, equally one could reason that he had a motive to shift the blame from his cousin to Defendant because of familial loyalty, fear of retaliation, and his presumed belief that his cousin would be less culpable. Dissent PP75-78. However, this

[3] The dissent notes that the statement lacks circumstantial guarantees of trustworthiness because Detective Shawn, the "person in the best position to gauge the candor of the out of court statement" felt that Ortiz was lying to him. Dissent P 79. We respectfully believe this conclusion is unfounded. First, the dissent's discussion suggests that Detective Shawn found Ortiz's statement generally untruthful. However, Detective Shawn testified that he believed Ortiz was generally telling the truth, but that he was withholding the actual names of the shooters and was only willing to give a physical description of them. Furthermore, Detective Shawn also testified that he believed Ortiz's statement was truthful because it was consistent with other witnesses' testimony and the physical evidence found at the scene. In any event, we do not agree that Detective Shawn is the person in the best position to gauge the candor of Ortiz's statement. It is the court's duty to determine preliminary questions concerning the admissibility of evidence, **see** Rule 11-104(A) NMRA 2002, and this Court reviews the trial court's rulings for an abuse of discretion. **See Lopez**, 2000-NMSC-3, P10, 128 N.M. 410, 993 P.2d 727.

argument does not adequately take into account the fact that Ortiz did not have to implicate his cousin at all. Furthermore, even if Ortiz had believed that his cousin would be less culpable had he not fired the fatal shots, one could also speculate that he would have believed his cousin to be even less culpable had he not fired **any** shots. While we agree that the subjective beliefs of the declarant about legal culpability can be relevant in determining the admissibility of hearsay, **see Torres**, 1998-NMSC-52, P18, 126 N.M. 477, 971 P.2d 1267, Ortiz never testified as to what his subjective beliefs were and we refuse to engage in speculation on that point. **See id.**

{20} Turning to the other three criteria required by the Rule, first, the statement was offered as evidence of a material fact the identity of the shooters. Second, the statement was more probative of the identity of the shooters than any other evidence the State could procure through reasonable efforts - in Ortiz's taped statement he indicated that there was a "big guy" wearing black jeans and a black t-shirt, presumably Allison, and a "little guy" wearing light blue jeans and a striped shirt, presumably Defendant, on the balcony and that the "little guy" did the shooting. However, at trial, after Ortiz had time to appreciate the danger of gang retaliation, and after testifying that it was unacceptable to "rat out" a gang member and that he or one of his family members could be killed for it, Ortiz changed his story and repeatedly stated that he could not recall the details of the shooting on July 3rd, which made the taped statement the most probative evidence on this point that could be procured through reasonable efforts. Finally, the general purposes of these rules and the interests of justice will best be served by the admission of Ortiz's taped statement into evidence, as the circumstances surrounding the statement indicate trustworthiness equivalent to evidence admitted under the other hearsay exceptions.

{21} Under these circumstances, we find that the taped statement and transcript were reliable and important for the jury to consider, as it went to the identity of the shooters. Furthermore, Ortiz was present and available for cross-examination, which meant the jury could observe his demeanor and make its own determinations regarding Ortiz's credibility. **See State v. Sanchez**, 112 N.M. 59, 65, 811 P.2d 92, 98 ("In ruling upon the admissibility of the statement the trial court does not determine the ultimate questions of the declarant's credibility; instead, this is the province of the jury"); **see also** UJI 14-5020 NMRA 2002. We also note that in a recent opinion this Court unanimously concluded that the district court, under the same exact facts, did not abuse its discretion by admitting Ortiz's prior statement under Rule 11-803(X). **State v. Allison**, 2000-NMSC-27, PP27-31, 129 N.M. 566, 11 P.3d 141. Although we did not have an extensive analysis on this issue and we noted that the defendant did not persuade us otherwise, we recognized that the district "court found 'that the circumstances of the original statement, the proximity in time to the shooting itself, all are indicia of reliability in that statement.'" **Id.** P 27. Based on these facts, we find that there are equivalent circumstantial guarantees of trustworthiness to make this statement admissible under Rule 11-803(X) and conclude that the trial court's determination that the evidence was admissible was not erroneous, arbitrary, or unwarranted. We therefore hold that the trial court did not abuse its discretion by admitting the tape and transcript into evidence under Rule 11-803(X).

IV.

{22} Defendant next argues that insufficient evidence supports his conviction for first-degree depraved-mind murder on either a principal or accessory liability theory. Defendant argues that the only evidence presented at trial suggesting that he was the one who shot directly at Mendez was improperly before the court and that no evidence supports the finding that Defendant intended that Allison shoot Mendez or that he encouraged him to shoot. We are unpersuaded by Defendant's arguments and find that there was sufficient evidence at trial to convict Defendant of first-degree depraved-mind murder.

{23} Under a sufficiency of the evidence analysis, we must first determine "whether substantial

evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." **State v. Sutphin**, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). "A reviewing court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." **Id.**; **see also State v. Lankford**, 92 N.M. 1, 2, 582 P.2d 378, 379 (1978). The appellate court has a duty "to determine whether **any** rational jury could have found each element of the crime to be established beyond a reasonable doubt." **State v. Garcia**, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992). "Where a jury verdict in a criminal case is supported by substantial evidence, the verdict will not be disturbed on appeal." **State v. Anaya**, 98 N.M. 211, 212, 647 P.2d 413, 414 (1982).

{24} Depraved-mind murder is "the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused . . . by any act greatly dangerous to the lives of others, indicating a depraved mind regardless of human life." Section 30-2-1(A)(3). In order to convict Defendant of this offense, the State had to prove beyond a reasonable doubt that Defendant committed the crime of depraved-mind murder either as a principal or an accessory. We find there was sufficient evidence to convict Defendant of first-degree depraved-mind murder on either of these theories.

A.

{25} In order to convict Defendant of first-degree depraved-mind murder as a principal, the state had to prove beyond a reasonable doubt each of the following elements of the crime:

> (1) The defendant discharged a firearm several times from the balcony of an apartment dwelling;
>
> (2) The defendant's act caused the death of Javier Mendez;
>
> (3) The act of the defendant was greatly dangerous to the lives of others, indicating a depraved mind without regard for human life;
>
> (4) The defendant knew that his act was greatly dangerous to the lives of others;
>
> (5) This happened in New Mexico on or about the 3rd day of July, 1997

See UJI 14-203 NMRA 2002. Because causation was at issue here, the jury was also instructed that:

> The cause of death is an act which, in a natural and continuous chain of events, produces the death and without which the death would not have occurred. There may be more than one cause of death. If the acts of two or more persons contribute to cause death, each such act is a cause of death.

See UJI 14-251 NMRA 2002.

{26} Defendant does not dispute that the act of shooting from the second floor balcony into a group of people was an act greatly dangerous to the lives of others. Defendant also does not dispute that he knew this act was greatly dangerous to the lives of others. Rather, relying on **State v. Hernandez**, 117 N.M. 497, 873 P.2d 243 (1994), Defendant argues that the State failed to prove that his actions caused Mendez's death, therefore failing to meet its burden as to the causation requirement.

{27} Defendant's reliance on **Hernandez** is misplaced. In that case, we found that the defendant's depraved-mind acts of shooting toward two people at two different times were distinguishable and separate from the shot which actually killed the victim. **See id**. at 499, 873 P.2d at 245. The Court stated that "the attempt to disarm defendant, the elapse of time between the initial random shooting and the shot fired during the struggle, the apparent change in defendant's intent when he stopped the random shooting and returned to his house, all lead us to conclude

there was no evidence that defendant's initial depraved-mind action caused the victim's death." **Id.** (emphasis omitted). None of those factors is present in this case. There is no question that Mendez's death was caused by a depraved-mind act, the hail of bullets from the balcony. The only question for the jury was who was responsible for the bullets that struck and killed him.

{28} At trial, the evidence showed that Defendant and Allison were standing on the second floor balcony and opened fire at a group of rival gang members below. According to Ortiz, Defendant shot at Mendez first and then let Allison shoot Canas and Ortega. Detective Shawn testified that Ortiz identified Defendant from a photo lineup as one of the shooters, but refused to have his response recorded on tape. Ortega testified that Allison shot at Mendez first and then Defendant took the gun from Allison and shot at the other two. He also identified Defendant as one of the shooters from a photo lineup performed by Detective Shawn and again positively identified Defendant as one of the shooters at trial. It is true that the evidence tends to align itself with two different factual conclusions - that either Defendant or Allison shot and killed Mendez. We agree with the Court in **State v. Ortiz-Burciaga**, 1999-NMCA-146, P22, 128 N.M. 382, 993 P.2d 96, however, that under a substantial evidence review, "it is the 'exclusive province of the jury' to resolve factual inconsistencies in testimony." We will not reweigh the evidence or substitute our judgment for that of the jury. **See Sutphin**, 107 N.M. at 131, 753 P.2d at 1319. We conclude that a rational jury could find, from this testimony, that beyond a reasonable doubt Defendant's act of shooting into the crowd caused Mendez's death.

B.

{29} Defendant may also have been convicted of first-degree depraved-mind murder as an accessory to the crime. In order to convict Defendant on this theory, the State had to prove that, even though Defendant did not commit the acts constituting the crime himself:

1. The defendant intended that the crime be committed;
2. The crime was committed; [and]
3. The defendant helped, encouraged or caused the crime to be committed.

UJI 14-2822 NMRA 2002. Defendant argues there is insufficient evidence to establish elements one and three beyond a reasonable doubt - that Defendant intended for Allison to shoot and kill Mendez and that Defendant helped or encouraged him to do it. Defendant maintains that the only testimony regarding the sequence of events surrounding the shooting was from Ortega who testified that Allison shot at Mendez multiple times before Defendant took the gun and shot towards Canas and Ortega. Defendant argues that "Javier, presumably, had long since turned and run, and in all likelihood had already been hit by the fatal bullet" when Defendant began shooting. He also asserts that no evidence showed that Defendant knew anything about Allison's intentions or that he encouraged Allison to shoot Mendez. Defendant argues that mere presence during the commission of the crime is not enough, but rather some outward manifestation of approval is necessary to show that Defendant shared Allison's purpose or intent.

{30} In **State v. Baca**, 1997-NMSC-59, P15, 124 N.M. 333, 950 P.2d 776, we concluded that in order to find the defendant guilty as an accessory to first-degree depraved-mind murder the State was required to show, "either through direct or circumstantial evidence, that [the principal] committed 'an act greatly dangerous to the lives of others indicating a depraved mind without regard for human life' . . . and also that [the accomplice] 'helped, encouraged or caused' [the principal's] act, intending that the crime occur." **Id.** (citations omitted). Based on the evidence summarized below, we conclude the State met its evidentiary burden. There is sufficient evidence to support findings that (1) Allison committed an act greatly dangerous to the lives of others, (2) knowing that the act created a risk of death or great bodily harm, which indicated a depraved-mind, without regard for the lives of others, (3) that Defendant helped him commit that act, and

(4) that Defendant shared Allison's purpose or design.

{31} Ortega testified at trial that he and fellow Juaritos Maravilla gang members were asked what they were doing in the Barelas barrio by people standing on a second-floor apartment balcony. He stated that Mendez answered, "We could be anywhere we want, Juaritos," and immediately thereafter shots were fired down at them from the balcony. As discussed above, there was conflicting testimony about who shot first, Allison or Defendant. However, both Ortega and Ortiz indicated that one of the two men shot first at Mendez and then the other immediately shot at Ortega and Canas. Furthermore, both identified Defendant as one of the shooters from a photo lineup shown to them by Detective Shawn the night of the shooting. Regardless of who shot first, the evidence clearly supports an inference that Defendant helped, encouraged, caused, and intended that the shooting be committed. Defendant's action of taking the gun from Allison to continue the shooting is clear evidence of accessory liability. The fact finder "can reject the defendant's version of an incident." **State v. Vigil**, 87 N.M. 345, 350, 533 P.2d 578, 583 (1975). We are not persuaded that Defendant was merely present during the shooting. We find that there was sufficient evidence for a rational jury to find beyond a reasonable doubt that Defendant helped, encouraged, caused, and intended the shooting which resulted in Mendez's death.

{32} Defendant is liable for the crime of first-degree depraved-mind murder whether or not he fired the fatal shot. It appears that in this case the jury rejected Defendant's version of the incident, and we will not substitute our judgment for that of the jury. We hold that sufficient evidence exists to affirm Defendant's conviction of first-degree depraved-mind murder on either a principal or accessory liability theory.

V.

{33} Defendant was charged and convicted of conspiracy to commit a first-degree depraved-mind murder. The State concedes that this conviction must be vacated because this Court has explicitly held that this is not a cognizable crime in New Mexico. We agree. **See Baca**, 1997-NMSC-059, P 51 (holding that a conviction for conspiracy to commit first-degree depraved-mind murder could not stand under current case law because conspiracy requires both intent to agree and intent to commit the offense which is the object of the conspiracy and depraved-mind murder is an unintentional killing resulting from highly reckless behavior); **cf. State v. Varela**, 1999-NMSC-45, P42, 128 N.M. 454, 993 P.2d 1280 (refusing to extend **Baca's** holding to prohibit the conviction of conspiracy to commit shooting at a dwelling which requires willful, rather than reckless, behavior). Accordingly, we vacate Defendant's conviction and accompanying nine-year concurrent prison sentence for this crime.

VI.

{34} Defendant next argues that his convictions for all counts relating to shooting at a dwelling or occupied building must be reversed because there was no evidence that Defendant shot at a dwelling or occupied building. He asserts that there was no evidence from any witness that any of the shots were directed at any building or that any bullets hit a building. The State asserts without discussion, and without citing to any evidence in the record, that Defendant "willfully discharged the gun at an occupied apartment building." Viewing the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences to uphold a verdict of conviction, we find that there was no evidence to support the jury's conclusion that Defendant shot at a dwelling or occupied building. **See Garcia**, 114 N.M. at 274, 837 P.2d at 867.

{35} "Shooting at a dwelling or occupied building consists of willfully discharging a firearm **at** a dwelling or occupied building." Section 30-3-8(A) (emphasis added). In order to find the Defendant guilty, the State had to prove

beyond a reasonable doubt that Defendant willfully shot a firearm at a dwelling or an occupied building. **See** UJI 14-340 NMRA 2002. The evidence at trial revealed that shots were fired from an apartment balcony downward into a courtyard area. Necessarily, there were other apartment buildings in the vicinity. Nevertheless, the State put forth no evidence from which the jury could infer that any of the shots from any shooter were directed **at** or hit any building, nor did it cite to any in its briefing to this Court. Ortega testified that the shots were first directed at Mendez, and then at himself and Canas. He gave no testimony that shots were fired in any direction other than towards the four men standing at ground level. Della Gonzales also testified that she heard the noise of the bullets from a nearby apartment but that she did not hear the noise of bullets striking a surface or building. Detective J.D. Herrera stated that his findings were consistent with other physical evidence that tended to demonstrate that the shots were fired only downward. There was nothing in his statement that indicated that any of the shots had been fired at any building.

{36} It is the absence of evidence on this point that convinces us that Defendant did not willfully discharge the gun at a dwelling or occupied building or agree with another person to commit such a crime. We therefore reverse Defendant's convictions for conspiracy to commit shooting at a dwelling or occupied building (great bodily harm), conspiracy to commit shooting at a dwelling or occupied building (resulting in injury), shooting at a dwelling or occupied building (no injury), and conspiracy to commit shooting at a dwelling or occupied building (no injury).

VII.

{37} Defendant claims that he received ineffective assistance of counsel at every stage of the trial proceedings. He asserts that defense counsel's performance, viewed cumulatively, fell below that of a reasonably competent attorney and prejudiced his defense. We review each of Defendant's allegations of ineffective assistance of counsel individually in addition to considering their cumulative effect.

{38} Defendant has the burden of showing ineffective assistance of counsel. **See Baca**, 1997-NMSC-59, P24, 124 N.M. 333, 950 P.2d 776. "Assistance of counsel is presumed effective unless the defendant demonstrates both that counsel was not reasonably competent and that counsel's incompetence caused the defendant prejudice." **State v. Gonzales**, 113 N.M. 221, 229-30, 824 P.2d 1023, 1031-32 (1992). "To establish ineffective assistance of counsel, the defendant must point to specific lapses . . . by trial counsel." **State v. Brazeal**, 109 N.M. 752, 757, 790 P.2d 1033, 1038 . "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." **Strickland v. Washington**, 466 U.S. 668, 690, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). However, "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." **Id.** at 691. Accordingly, "defendant must still affirmatively prove prejudice. In other words, 'the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" **Brazeal**, 109 N.M. at 757-58, 790 P.2d at 1038-39 (quoting **Strickland**, 466 U.S. at 694) (internal citation omitted)).

{39} Defendant claims that the following flaws in defense counsel's performance resulted in ineffective assistance: counsel was unprepared to start trial, he failed to review jury questionnaires prior to jury selection, he failed to complete his interview with Ortega, he failed to interview, secure the presence of, or secure a continuance until such time as Canas could be located, he failed to object to prejudicial hearsay statements, he elicited highly prejudicial evidence against his own client, and he failed to challenge an indictment for a nonexistent crime. Even assuming competent counsel would not have performed in such a manner, we do not find the necessary prejudice.

{40} Defendant first argues that even the State in this case acknowledged from the outset that his counsel was ineffective, stating: "What you have here is ineffectiveness of counsel crusading as someone who wants to disqualify me from participation in this case. He is not prepared to proceed today, Your Honor." This comment was apparently made by the prosecutor in response to defense counsel's request for a one-day continuance. This comment must be considered in the context in which it was made; it occurred during a heated exchange between the defense attorney and the prosecutor, in which defense counsel informed the court that the prosecutor had committed an assault and battery on him by removing his eyeglasses from his face during a witness interview. Defense counsel requested the continuance because he claimed that he was so upset by the incident that he felt he could not proceed that day. While we remind counsel of their obligations of civility and professionalism under the Rules of Professional Conduct, **see e.g.,** Rule 16-804 NMRA 2002, we are not persuaded that this incident, or the trial judge's denial of the request for a continuance, resulted in prejudice to the Defendant. Furthermore, just because the prosecutor thought defense counsel to be ineffective does not make it so.

{41} Defendant next argues that his trial counsel failed to review jury questionnaires prior to jury selection. While counsel admitted at the November 9, 1998 hearing that he had not picked up those questionnaires, he specifically referred to them during voir dire, indicating that he had reviewed them. Counsel may not have had as much time to review the jury questionnaires as he would have liked, but the record indicates that he in fact conducted a thoughtful voir dire in which he engaged in an active discussion with the panel. Defendant has identified no prejudice resulting from any lack of preparedness, nor do we find any.

{42} Defendant also claims that his attorney failed to complete his interview with Ortega. Defense counsel told the court that he was not aware that Ortega and Canas had been arrested on material witness warrants until some time after the two had been arrested, but that he and the prosecutor did conduct an interview with Ortega which eventually broke down due to animosity between the lawyers. It is evident from the record that the trial judge recognized that the defense attorney had not completed his interviews at that point and made some arrangement for him to complete them prior to opening statements. Although it appears that defense counsel did not interview Ortega prior to opening statements, the court noted that it would allow counsel to finish interviewing him before he took the stand. It seems clear from the record that defense counsel did interview Ortega, as indicated by the trial judge's statement: "In reference to the interview, that I'm not so much concerned about because that was conducted out of the presence of the jury and the interview, at least with Mr. Ortega, happened." We find nothing in the record to indicate that defense counsel did not avail himself of this opportunity.

{43} Defendant also claims his trial attorney failed to question Ortega about his alleged statement to his friend Juan Landaras on the night of the shooting, that a third person, Little Guero, not Defendant, was the shooter and that counsel failed to challenge Ortega's conflicting identifications of the shooters. However, during cross-examination, defense counsel questioned Detective Shawn about Ortega's alleged statement to Landaras, specifically attacking his failure to follow-up on this information known by one of his detectives, Detective Martinez. Counsel's failure to ask Ortega about this alleged inconsistent identification could have been a rational trial strategy. If counsel had questioned Ortega about this statement on the stand and he had denied making it, Defendant's theory of the case could have been weakened. However, by bringing this evidence in through Detective Shawn, Defendant was able to argue that the police did an inadequate investigation, potentially leaving the jury with reasonable doubt as to the identification of the shooters. As noted in **State v. Swavola**, 114 N.M. 472, 475, 840 P.2d 1238, 1241, "a prima facie case [of ineffective assistance] is not made when a plausible, rational strategy or tactic can explain the conduct of defense counsel."

We find that defense counsel's failure to question Ortega about his alleged statements to Landaras and his failure to challenge his conflicting identifications can be explained as a rational trial strategy and therefore conclude that defense counsel was acting with reasonable competence, and, in any event, did not prejudice Defendant's case.

{44} We next consider Defendant's argument that defense counsel was ineffective in failing to interview, secure the presence of, or secure a continuance until such time as Canas could be located. Defendant supports his argument with his counsel's own statement, "If I would have been able to interview Jesus, put him under oath, we could have had a statement here . . . So I've been thwarted in that." As noted above, Canas and Ortega were arrested and brought in on material witness warrants shortly before trial. However, the court then released the two men, unsure of its authority to keep holding them in detention. Defense counsel was apparently not timely informed that they had been brought in and, therefore, did not have an opportunity to interview them at that time. At the start of trial a week later, Canas did not appear in court, and it was later learned that he had apparently fled to Colorado. During his argument to the court, defense counsel discussed what Canas had told Detective Shawn and argued that Canas' statement that the shooter was "bald" was exculpatory because his client had short hair. Defense counsel also argued that the "issue about baldness and shortness and so forth could have been used to the defendant's advantage as to who was actually doing the shooting." However, in addition to arguing that portions of Canas' statement were exculpatory, defense counsel acknowledged that portions of his statement were inculpatory. Defense counsel also did not dispute the accuracy of the following statement argued to the court by the State:

> I would also say in the interviews Mr. DeVoe [co-defendant Charlie Allison's counsel] conducted with Mr. Huero [sic] and Mr. Canas, Mr. DeVoe showed the two photo arrays of Allison and Trujillo to Iguado [Ortega] and Canas and they reaffirmed their identification of both defendants at Mr. DeVoe's request.

Moreover, Defendant did not demonstrate that had his counsel moved for a continuance until Canas could be located, the motion would have been granted. **See e.g., Gonzales,** 113 N.M. at 230, 824 P.2d at 1032 (finding that in order to prevail on his ineffective assistance of counsel claim, defendant had to first demonstrate that had his counsel moved for severance, the motion would have been granted). Thus, even though he failed to interview, secure the presence of, or secure a continuance until Canas could be located, it appears undisputed that at least portions of Canas' testimony would have been highly inculpatory, and we are not persuaded that his testimony would have been sufficiently exculpatory to result in an acquittal.

{45} Defendant also argues that defense counsel failed to object to prejudicial hearsay statements and elicited highly prejudicial evidence against his own client. He claims that the testimony came out during defense counsel's examination of Detective Shawn, during which defense counsel asked Shawn an open-ended question about one of his interviews. The Detective responded that "Silly tried to sell him a gun, a .25 caliber." Defense counsel moved on with other questions and then moved for a mistrial, or in the alternative, for a curative instruction, after the jury was dismissed for the day, arguing that the statement was overly prejudicial. The trial judge denied both motions and made the following finding:

> First of all, I don't think very many jurors heard it. Second of all, I think it would be to your disadvantage for me to reiterate what it was because then they will really focus on the fact that he allegedly was buying a handgun. So I'm going to leave it alone. And I've instructed the State that that did not open the door and I don't want that pursued, but that's as far as I'm going to go. I think you are stuck with the strategy there.

We find no evidence to suggest that defense counsel purposely elicited the Detective's answer, or could have known it was coming. Moreover, counsel did not draw the jury's attention to it, and it was not repeated by counsel or the prosecutor. Although the statement may have had some prejudicial effect, Defendant has not demonstrated that had this statement not come in, the result of the proceeding would have been different.

{46} Finally, Defendant argues that defense counsel's failure to challenge the indictment for conspiracy to commit depraved-mind murder, a non-existent crime, constituted per se ineffectiveness. We disagree. Defendant was charged with conspiracy to commit depraved-mind murder on July 22, 1997. On November 13, 1997, this Court filed its opinion in **Baca**, 1997-NMSC-59, P51, 124 N.M. 333, 950 P.2d 776, holding that conspiracy to commit depraved-mind murder is not a cognizable crime in New Mexico. Defendant's case did not go to trial until November 9, 1998, leaving counsel nearly a year to challenge the indictment for this crime. Certainly counsel's failure to challenge this indictment prejudiced Defendant as to his conviction for this crime. However, this conviction has been vacated, and Defendant has not demonstrated that had he timely challenged this indictment he would have been acquitted of his other convictions. Thus, even assuming a reasonably competent attorney would have timely objected, Defendant has not demonstrated that "'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" **Brazeal**, 109 N.M. at 757-58, 790 P.2d at 1038-39 (quoting **Strickland**, 466 U.S. at 694).

{47} We consider the entire proceeding as a whole and judge any claim of ineffectiveness on "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" **State v. Richardson**, 114 N.M. 725, 727, 845 P.2d 819, 821 (quoting **Strickland**, 466 U.S. at 686). We conclude that the alleged failings of counsel in this case do not result in ineffective assistance of counsel regardless of whether they are considered individually or cumulatively.

VIII.

{48} We next address Defendant's argument that the prosecutor engaged in prosecutorial misconduct that deprived him of a fair trial. Defendant asserts that the prosecutor's failure to disclose material evidence to the defense, improper use of leading questions, improper introduction of hearsay evidence, use of inflammatory and irrelevant evidence, and improper argument, distorted the evidence on the crucial issue of identification. We review each of Defendant's allegations of prosecutorial misconduct individually in addition to considering their cumulative effect. We conclude, however, that the alleged instances of prosecutorial misconduct in this case do not rise to the level of reversible or fundamental error regardless of whether they are considered individually or cumulatively.

A.

{49} When an issue of prosecutorial misconduct is properly preserved by a timely objection at trial, we review the trial court's ruling on this issue under the deferential abuse of discretion standard because the "trial court is in the best position to evaluate the significance of any alleged prosecutorial errors." **State v. Duffy**, 1998-NMSC-14, P46, 126 N.M. 132, 967 P.2d 807. "The trial court's determination of these questions will not be disturbed unless its ruling is arbitrary, capricious, or beyond reason." **Id.** Our resolution of this issue "rests on whether the prosecutor's improprieties had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." **Id.**

{50} Defendant first argues that the prosecutor engaged in misconduct by failing to disclose material evidence to the defense. Defendant properly preserved this issue by a timely objection at trial. Defense counsel, in a motion to dismiss for prosecutorial misconduct, alleged two instances in which the State failed to provide material evidence to the defense. Defendant first alleged that the State failed to provide accurate "rap sheets" on Ortega and Mendez, stating that neither

record showed that the two men had a criminal history even though testimony presented at trial indicated that both had previously been in Springer Boys Home or the "D home." Defendant also claimed that the State failed to provide a July booking photo taken of Defendant shortly after his arrest. The State has an affirmative duty to disclose "any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution." Rule 5-501(A)(6) NMRA 2002. The United States Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." **Brady v. Maryland**, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). However, "evidence is material under **Brady** 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" **State v. Baca**, 115 N.M. 536, 541, 854 P.2d 363, 368 (quoting **United States v. Bagley**, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)). In our analysis,

> we must avoid concentrating on the suppressed evidence in isolation. Rather, we must place it in the context of the entire record. Evidence that may first appear to be quite compelling when considered alone can lose its potency when weighed and measured with all the other evidence, both inculpatory and exculpatory. Implicit in the standard of materiality is the notion that the significance of any particular bit of evidence can only be determined by comparison to the rest.

Trujillo v. Sullivan, 815 F.2d 597, 613 (10th Cir. 1987).

{51} The trial judge denied Defendant's motion to dismiss on the basis that it came down to a "swearing match" between the two attorneys and she found no prejudice to the Defendant. We do not find the trial court's decision to be arbitrary, capricious, or beyond reason. The court indicated that as to the identity of the shooter, Defendant was not prejudiced because Canas could have testified that the shooter was bald, "but at the same time he may have elicited information that that bald person's name was Silly [Defendant's alias]. It could have gone . . . either way, and again, the prejudice to the defendant, I just don't see it." We agree that viewed in the context of the entire record, there is nothing to indicate that had the July booking photograph been disclosed, the result of the proceeding would have been different. We are also not persuaded that had the defense attorney received the requested rap sheets that contained Ortega's and Mendez's juvenile history, any difference in the outcome would have resulted. While the prosecutor cannot hide information behind other arms of the State, **see Kyles v. Whitley**, 514 U.S. 419, 437, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995), Defendant had knowledge of these two men's juvenile records and has not demonstrated any prejudice which resulted from the State's failure to provide that information. Accordingly, we find that the trial court did not abuse its discretion when it denied Defendant's motion to dismiss for prosecutorial misconduct based on these two discovery violations.

B.

{52} When an issue has not been properly preserved by a timely objection at trial, we have discretion to review the claim on appeal for fundamental error. Rule 12-216(B)(2) NMRA 2002 ("This [preservation] rule shall not preclude the appellate court from considering . . . in its discretion, questions involving: . . . fundamental error or fundamental rights of a party."); **see State v. Allen**, 2000-NMSC-2, P95, 128 N.M. 482, 994 P.2d 728. "Prosecutorial misconduct rises to the level of fundamental error when it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial. An isolated, minor impropriety ordinarily is not sufficient to warrant reversal, because a fair trial is not necessarily a perfect one." **Allen**, 2000-NMSC-2, P95,

128 N.M. 482, 994 P.2d 728 (internal quotation marks and citations omitted). Because Defendant did not properly preserve the following issues for appellate review, we review them for fundamental error.

{53} Defendant argues that the prosecutor improperly led Ortega on the crucial issue of identification, undermining the truth-finding process and violating principles of fundamental fairness. Defendant alleges that the leading questions asked by the prosecutor dominated the questioning of Ortega and were not merely an attempt to lay a foundation or cojole a hostile or timid witness. Defendant specifically cites to two excerpts in the record that he claims were crucial to Defendant's conviction in which the prosecutor improperly elicited testimony on the issue of identification. For example, the prosecutor asked:

Q. Do you know how many shots Charlie fired?
A. Like two.
Q. And then Silly over here took the gun?
A. Yeah.
Q. And he fired the rest?
A. At us, at Javier and Jesus.

Similarly, the prosecutor later asked:

Q. As you look at Silly here in the courtroom today, is his skin - the skin on his face the same or different than it was back then?
A. The same.
Q. And do you see like pimples or acne scars on his face?
A. Yes.

However, the following excerpt preceded both of those identified by Defendant and clearly demonstrates that Ortega identified the Defendant as the second shooter without improper testimony from the prosecutor:

Q. And after Javier said, "I can go anywhere I want, Juaritos, . . . what happened?
A. They started shooting.
Q. . . . How many people shot the gun?
A. Two of them.
Q. Do you see one of those people in the courtroom today?
A. Yes.
Q. Where is he?
A. Right there.
. . .
Q. And what do you know him as?
A. Silly.
. . .
Q. . . . How did this shooting start?
A. When he just - when like - they just started shooting when he said, "Juaritos." When he said, "I could be anywhere I want, Juaritos," they just started shooting.
Q. Who shot the gun first?
A. Charlie.
. . .
Q. Now, you said Charlie started shooting first. Did he fire all the shots?
A. I don't think so.
Q. What happened? What did he do?
A. He was shooting, and these guys over here took the gun away from his hands and started shooting at me and Jesus.
Q. Now, who was Charlie shooting at, if you know?
A. Javier.
Q. And then who took the gun away from Charlie?
A. Silly.
Q. And then where did he shoot?
A. At me and Aaron.

As the Defendant himself concedes, "when allowed to speak freely, Juan clearly testified that Charlie shot Javier and then Silly shot at him and Jesus." Rule 11-611(C) NMRA 2002 states: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." In **State v. Orona**, 92 N.M. 450, 454, 589 P.2d 1041, 1045 (1979), the Court concluded that, under Rule 11-611(C), "developing testimony by the use of leading questions must be distinguished from substituting the words of the prosecutor for

the testimony of the witness." The Court found that the trial court "abused its discretion in such a manner as to violate principles of fundamental fairness" after it permitted every word describing the alleged offense to come from the prosecuting attorney rather than from the witness. **Id.** There, after the witness stated that she could not recall exactly what happened, the prosecutor, over instruction from the court, lead the witness with the only evidence adduced at trial which would support the charge of criminal sexual penetration in the first-degree. At that point the trial court allowed the witness to be led, and 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.'" **Id.** Unlike the testimony in **Orona**, the prosecutor in this case did not substitute his words for those of Ortega. As quoted above, Ortega told the story in his own words. Thus, even assuming the prosecutor improperly led the witness in the excerpts identified by Defendant, we find no prejudice to Defendant on the issue of identification. Accordingly, we conclude that the prosecutor's leading questions did not constitute fundamental error.

{54} Defendant next argues that the prosecutor improperly elicited damaging hearsay testimony on the issue of identification. He claims that it was improper for the prosecutor to question Detective Shawn regarding his identification of the shooters.

{55} Canas was arrested on a material witness warrant but was not interviewed by the defense and apparently fled the jurisdiction prior to trial. During the prosecution's direct examination of Detective Shawn, the prosecutor elicited testimony that indicated he had interviewed three eyewitnesses to the shooting: Ortega, Ortiz, and Canas. He then testified that all three identified both Allison and Defendant as the shooters and that they had all told him that only one gun was used. Defense counsel did not timely object to this line of questioning. Defendant did object when the prosecutor asked the Detective about the witnesses' descriptions of Defendant's acne and during the prosecutor's attempt to have the Detective testify as to Canas' identification of Defendant from the photo array. In both instances the objections were sustained, but no limiting instruction was requested.

{56} We agree that Detective Shawn's statements regarding Canas' identification of Defendant was improper hearsay testimony. However, we conclude that these references to Canas' statement did not deprive Defendant of a fair trial. The jury had testimony from two other eyewitnesses, Ortiz and Ortega, that support its findings of guilt. Ortega unequivocally testified that Defendant and Allison were the shooters, and the jury was given the opportunity to consider Ortiz's prior statement to that effect. Thus, we conclude that Detective Shawn's references to Canas' testimony were not sufficiently prejudicial to require a finding of fundamental error.

{57} Defendant also asserts that the prosecutor repeatedly asked Ortiz inflammatory and irrelevant questions about his experiences as a gang member and his fear of retaliation, serving to arouse the jurors' prejudices and make Defendant look guilty by association. The State responds to this argument by claiming that "the prosecutor went to great pains to neutralize any bad feelings the jurors may have had about gangs and repeatedly cautioned the jury to judge the case only on its facts." At trial, the judge ruled that the State could introduce evidence relating to gang names and affiliation, but limited the scope and the purpose of the testimony so that it would only be admissible "insofar as it's probative of motive, state of mind, intent, and those sorts of things." On direct examination, Ortiz testified that he grew up in Barelas and was basically born and raised in the gang. He stated that he was beaten up by other gang members when he was ranked out because he was no longer hanging out with them. As discussed above, the State also introduced evidence that Detective Shawn interviewed Ortiz the night of the shooting, although Ortiz was reluctant to testify about the details of the shooting or his prior statement at trial. The State also presented evidence that there was a verbal exchange between Allison, Defendant and Mendez and that some gang identification prompted the

shooting. The prosecutor sought to show that Ortiz was aligned with the Barelas, not the Juaritos Maravilla gang. We find that such evidence was inextricably part of the State's case.

{58} Ortiz's former, or current, membership in the Barelas gang was important for two reasons. First, Ortiz's fear of retaliation went to his credibility, by showing that he had valid reasons - including the safety and well-being of himself and his family - for being less than candid about his cousin's and Defendant's involvement in the shooting at trial. Second, Ortiz's "ranking out" of the Barelas gang offered a plausible explanation for the start of the quarrel; his former comrades objected to Ortiz showing back up at the scene of his disgrace. Moreover, in his opening statement, the defense attorney was completely forthright about Defendant's gang affiliation, stating that "there is no question that Chris Trujillo is a gang member." Defense counsel went on to say that "nobody in this room is going to think that Mr. Allison or Mr. Trujillo is a Boy Scout . . . We certainly can't avoid the issue that this involves gangs, something about drugs, certainly some violence." Defense counsel also spoke of a spectrum of gang involvement, trying to demonstrate to the jury that while Defendant was not a Boy Scout, he was also not a gang member "for profit, for criminal acts, for death, destruction, drug dealing, [or] intimidation." Although we recognize the danger of "guilt by association" when evidence of gang membership is introduced, such evidence is admissible to show other important elements of the crime, such as motive or intent. **See State v. Nieto**, 2000-NMSC-31, P25, 129 N.M. 688, 12 P. 3d 442 (finding expert testimony on defendant's gang affiliation and specific rituals and procedures of that gang was admissible to show defendant's alleged motive). We conclude that Defendant's gang membership was undisputed by the defense and that the State used evidence of gangs to the extent that it was relevant to its case. We therefore find no error.

{59} Defendant next claims that the prosecutor improperly injected his own opinion during closing arguments on the definition of "at" for "shooting at a dwelling or occupied building" charges. We do not address this argument since we have reversed Defendant's convictions as to all charges relating to shooting at a dwelling or occupied building.

{60} Defendant's final claim is that the prosecutor "aggravated the damage in closing by repeatedly referring to Jesus' 'story' and identification" as though it were valid evidence properly before the jury for consideration. In closing the prosecutor made two references to Canas' statement:

> Let me take you to the balcony. This is where it happened, and that sounds like a consistent story and that comes from Canas and Iguado and Ortiz, you don't discount that and throw that out and try and derive the story if you're Detective Shawn . . .

The second reference came in the middle of his argument about the consistent statements of Ortega and Ortiz:

> You'd expect two completely different stories if we believe this theory that everyone in gangs lies. But what Detective Shawn found was consistent. Also the statements of Canas was that a skinny, thin Hispanic guy with acne was up on the balcony and a big-boned, heavyset guy with a ponytail significantly bigger than the thin Hispanic guy was up on the balcony and those are the two guys who committed the killing.

"We agree with Defendant that it [was] improper for the prosecution to refer the jury to matters outside the record." **Allen**, 2000-NMSC-2, P104, 128 N.M. 482, 994 P.2d 728. Viewing the prosecutor's statements in the context of the individual facts and circumstances of this case, however, we do not find that they had such a persuasive and prejudicial effect on the jury's verdict that Defendant was deprived of a fair trial. "Parties alleging fundamental error must demonstrate the existence of circumstances that 'shock the conscience' or implicate a fundamental unfairness within the system that would undermine judicial integrity if left unchecked." **State v.**

Cunningham, 2000-NMSC-9, P21, 128 N.M. 711, 998 P.2d 176. The jury had before it evidence from two other eyewitnesses that identified Defendant as one of the shooters. Because we find substantial evidence in the record to support Defendant's convictions, and because Defendant failed to demonstrate circumstances that "shock the conscience" or show a fundamental unfairness, we find no fundamental error.

IX.

{61} Defendant next asserts that the multiple conspiracy charges and convictions violate the Double Jeopardy Clause where there was no evidence of any agreement, let alone separate agreements to support separate charges. Because of our disposition of Defendant's convictions for conspiracy to commit depraved-mind murder and conspiracy to commit shooting at a dwelling or occupied building, the only remaining conspiracy conviction is conspiracy to commit aggravated battery. Thus, we do not address Defendant's double jeopardy argument. We find sufficient evidence to support Defendant's one conviction for conspiracy to commit aggravated battery and affirm this conviction.

{62} Conspiracy is a specific intent crime. **See Baca**, 1997-NMSC-59, P51, 124 N.M. 333, 950 P.2d 776. "In order to be convicted of conspiracy, the defendant must have the requisite intent to agree and the intent to commit the offense that is the object of the conspiracy." **Varela**, 1999-NMSC-45, P42, 128 N.M. 454, 993 P.2d 1280; **see also Baca**, 1997-NMSC-59, P51, 124 N.M. 333, 950 P.2d 776. The agreement need not be verbal, but may be shown to exist by acts which demonstrate that the alleged co-conspirator knew of and participated in the scheme. **See State v. Deaton**, 74 N.M. 87, 90, 390 P.2d 966, 968 (1964). The agreement may be established by circumstantial evidence. **Id.** at 89, 390 P.2d at 967. Both Ortega and Ortiz indicated that one of the two men shot first at Mendez, and then the gun was handed off to the other who immediately shot at Ortega and Canas. At trial, Ortega positively identified Defendant as the second shooter, stating that he took the gun away from Allison and began shooting at Ortega and Canas. According to Ortiz's statement, after Defendant resisted Allison's request for the gun, Defendant told the four down below, "You guys think I'm joking," and began shooting. Furthermore, both Ortiz and Ortega indicated that the shooting was the result of a verbal conflict between competing gang members. Ortega testified that he heard someone on the balcony ask them what they were doing in their barrio - meaning the Barelas barrio - and that he was talking to Canas, Ortega and Mendez, all Juaritos. As noted above, Mendez then responded, "we can go anywhere we want, Juaritos." We find that the passing of the gun between Allison and Defendant and the evidence of a verbal conflict between the competing gang members immediately preceding the shooting is sufficient evidence for a rational jury to find beyond a reasonable doubt that either by words or acts there was an agreement to shoot at the men located below the balcony with a deadly weapon.

X.

{63} Defendant argues that cumulative error requires a reversal in this case. "In New Mexico the doctrine of cumulative error is strictly applied." **Stills**, 1998-NMSC-9, P51, 125 N.M. 66, 957 P.2d 51 (quoting **State v. Martin**, 101 N.M. 595, 601, 686 P.2d 937, 943 (1984)). It cannot be invoked when "'the record as a whole demonstrates that the defendant received a fair trial.'" **Id.** Because we have vacated all convictions for which we found error, and there is otherwise no error to accumulate, we conclude that the defendant received a fair trial and that the doctrine is not applicable in this case.

XI.

{64} Lastly, Defendant claims that his thirty year sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and Article II, Section 13 of the New Mexico Constitution. However, as Defendant did not raise this issue

below, it was not properly preserved for appellate review. "[A] non-jurisdictional claim not raised in the lower court is not properly reviewable on appeal." **State v. Burdex**, 100 N.M. 197, 201, 668 P.2d 313, 317 (finding defendant's constitutional claim of cruel and unusual punishment was not asserted at the trial court and was therefore not properly preserved for appeal because such a claim is non-jurisdictional).[4] We therefore review Defendant's claim for fundamental error.

{65} Defendant asserts that his sentence was disproportionate to his involvement in the crime as evidenced by the fact that the jury did not convict him of willful and deliberate murder, or of aggravated battery against Mendez, but rather of first-degree depraved-mind murder, which meant the jury clearly believed that Allison, not Defendant, shot the fatal shots. Defendant urges us to find that because of these facts, and because he was a child at the time of the crime, his sentence is so disproportionate as to "shock the general conscience" or "violate principles of fundamental unfairness." We acknowledge that "[a] sentence may constitute cruel and unusual punishment if its length is disproportionate to the crime punished," **Burdex**, 100 N.M. at 202, 668 P.2d at 318, and that it is within "the province of the judiciary to review whether a sentence constitutes cruel and unusual punishment in violation of a constitutional provision." **State v. Rueda**, 1999-NMCA-33, P10, 126 N.M. 738, 975 P.2d 351. We conclude that Defendant's thirty year sentence with the possibility of good time credit does not constitute fundamental error.

{66} Section 31-18-15.3(D) provides: "When an alleged serious youthful offender is found guilty of first degree murder, the court shall sentence the offender pursuant to the provisions of the Criminal Sentencing Act. . . . The court may sentence the offender to less than, but not exceeding, the mandatory term for an adult." Adults convicted of first-degree murder "shall be punished by life imprisonment or death." Section 31-18-14(A). However, under the statute, juvenile offenders convicted of first-degree murder "may be sentenced to life imprisonment but shall not be punished by death." **Id.** It is rare that a term of incarceration, "which has been authorized by the Legislature, will be found to be excessively long or inherently cruel." **State v. Augustus**, 97 N.M. 100, 101, 637 P.2d 50, 51 (finding that the trial court's sentence did not constitute cruel and unusual punishment because it did not exhibit a deliberate indifference to defendant's medical needs, even though prior to sentencing defendant underwent open heart surgery and his surgeon expressed his belief that defendant should never be incarcerated due to his medical problems). As summarized above, there was sufficient evidence to convict Defendant of first-degree depraved-mind murder as either a principal or accessory and conspiracy to commit aggravated battery. Accordingly, we conclude that a thirty year sentence with the opportunity for good time was authorized by statute and not constitutionally disproportionate to the crimes involved.

XII.

{67} For the reasons stated above, we vacate Defendant's conviction for conspiracy to commit depraved-mind murder and reverse Defendant's convictions for conspiracy to commit shooting at a dwelling or occupied building (great bodily harm), conspiracy to commit shooting at a dwelling or occupied building (resulting in injury), shooting at a dwelling or occupied building (no injury), and conspiracy to commit shooting at a dwelling or occupied building (no injury). We affirm Defendant's convictions for first-degree depraved-mind murder and conspiracy to commit aggravated battery.

{68} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

[4] Defendant asserts that an unconstitutional sentence is an illegal sentence that may be challenged for the first time on appeal, relying on **State v. Sinyard**, 100 N.M. 694, 695, 675 P.2d 426, 427 and **State v. Smith**, 102 N.M. 350, 351-353, 695 P.2d 834, 835-837. Defendant's reliance on these cases is misplaced. In those cases the defendants were not challenging their sentences as violations of the constitutional prohibition against cruel and unusual punishment, but rather were claiming that their sentences were illegal as not authorized under the applicable statute.

WE CONCUR:

PATRICIO M. SERNA,
Chief Justice

PETRA JIMENEZ MAES,
Justice

GENE E. FRANCHINI,
Justice (concurring in part, dissenting in part)

PAMELA B. MINZNER,
Justice (concurring in part, dissenting in part)

DISSENT

MINZNER, Justice (concurring in part, dissenting in part).

{69} I would remand this case for a new trial. The majority holding otherwise, I respectfully dissent.

{70} I agree that Defendant properly invoked this Court's mandatory appellate jurisdiction, that he failed to preserve a Confrontation Clause claim, that he was improperly convicted of conspiracy to commit depraved mind murder, and that he was improperly convicted of multiple counts of conspiracy to commit shooting at a dwelling or occupied building. Thus, I concur in parts II, III(A), V, and VI.

{71} Defendant's claims of prosecutorial misconduct and cruel and unusual punishment arising from his sentence could arise on remand, so I agree these questions ought to be reached; additionally, I agree with the majority's disposition on the merits. I also agree that there was sufficient evidence to support the conviction of conspiracy to commit aggravated battery. Because we consider improperly admitted evidence when evaluating the sufficiency of the evidence on appeal, **State v. Post**, 109 N.M. 177, 181, 783 P.2d 487, 491 , I agree that there is sufficient evidence supporting the conviction of depraved mind murder as a principal or as an accessory. I therefore also concur in parts IV, VIII, IX and XI.

{72} I would, however, remand for a new trial because I believe for the following reasons that the admission of the tape and transcript of Joseph Ortiz's interview with the police was reversible error. I therefore respectfully dissent from part III(B). The majority admits Ortiz's out of court statements under Rule 11-803(X) NMRA 2002. I disagree for three reasons.

{73} First, I am not persuaded that the requirements for admission under Rule 11-803(X) were satisfied. Further, despite a brief reference to that rule, the trial court may not have admitted the statement on that basis. Finally, I do not think that the use of Rule 11-803(X) in this context comports with its drafters' intentions. Because none of the other rules upon which the State relied appear to be applicable, I would reverse the convictions of depraved mind murder, aggravated assault, and conspiracy to commit aggravated battery, and remand for a new trial on these counts. In view of my disposition of part III(B), I would not reach the ineffective assistance of counsel and cumulative error claims found in parts VII and X.

{74} Rule 11-803(X) provides:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is not included in the hearsay rule] if the court determines that:
>
> (1) the statement is offered as evidence of a material fact;
>
> (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
>
> (3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently

> in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

This rule expressly requires that the proffered statement have "equivalent circumstantial guarantees of trustworthiness." I believe that Ortiz had a motive to lie and therefore his statement lacked circumstantial guarantees and was inherently untrustworthy. I conclude that Rule 11-803(X) does not provide a basis for admitting the statement.

{75} It is true that Ortiz's statement did implicate his own cousin, and one could reason that Ortiz would not implicate a family member with a statement unless he believed it to be true. Ortiz, however, **did** have a motive to shift the blame for the fatal shot from his cousin to Defendant, assuming - as I think we can - that Ortiz was aware that eyewitnesses put both his cousin and Defendant on the balcony, and assuming familial loyalty to his cousin. Although accessory liability might make Defendant legally culpable whether or not he fired the fatal shots, I think it is fair to say that most people would view a shooter who missed his target less culpable than one who slays his target. The fact that Ortiz most likely would view his cousin as being less culpable had he not fired the fatal shots significantly diminishes any circumstantial guarantee of trustworthiness based on the notion that people do not implicate family members unless believing it to be true. **Cf. State v. Torres**, 1998-NMSC-52, P18, 126 N.M. 477, 971 P.2d 1267 (agreeing that, in the analogous context of statements against penal interest, the subjective beliefs of the declarant about legal culpability are relevant to determining the admissibility of the hearsay).

{76} The majority also reasons that because Ortiz put himself and his family in danger by giving a description of the shooters to the police, it is less likely that he lied. Any danger inherent in a **true** identification of a gang member, however, would also seem to argue **against** the candor of such a statement, especially to the police. Faced with the possibility of gang retaliation, Ortiz might have felt pressure to give an incomplete or inaccurate description of the events.

{77} In fact, the State introduced evidence of Ortiz's and Defendant's gang membership to explain why Ortiz may have lied at trial and to provide a motive for the quarrel. I agree that Ortiz's fear of retaliation shows that he has valid reasons for "being less than candid about his cousin's and Defendant's involvement in the shooting at trial." Majority Opinion, P 58. His fear could have had the same effect on his statement to the police. In this vein, Ortiz's "ranking out" of the Barelas gang certainly provided a plausible explanation for the start of the quarrel. It also provides a plausible explanation for a less than candid statement to the police about that quarrel.

{78} Both familial loyalty and fear of retaliation could lead to an inference that Ortiz would not have made the statement to the police unless he believed it to be true. On the other hand, both facts also argue that the statement he gave was less than candid. Evidence that supports two contradictory inferences is properly said to have proved neither. **State v. Garcia**, 114 N.M. 269, 275, 837 P.2d 862, 868 (1992). Familial loyalty and fear of retaliation would seem to argue more forcefully **against** a truthful statement; at the very least they do not provide circumstantial guarantees of trustworthiness. Because Rule 11-803(X) requires an affirmative showing of such guarantees, I do not believe that it provides a basis for admitting this statement.

{79} I also note that the detective who took Ortiz's statement felt that Ortiz was lying to him. On cross-examination, Detective Shawn testified that at the time of the interview he felt that Ortiz knew who the shooters were but was concealing their identity. He also testified that he was unaware at the time of the interview that Ortiz and Allison were cousins. Detective Shawn's frustration that Ortiz was hiding the identity of the shooters is understandable. Either out of fear of gang retaliation or out of familial loyalty to Allison, Ortiz had every motive to be less than

candid with the police. The same motivation that influenced Ortiz to neglect to name the two men on the balcony would, I think, encourage him to shift the blame for the fatal shot from his cousin to Defendant. In this case the person in the best position to gauge the candor of the out of court statement was Detective Shawn, who alone observed Ortiz's demeanor at the time of the interview. When the person in the best position to judge a witness's candor feels that the witness was being less than truthful, I am uncomfortable holding that the witness's statement bears circumstantial guarantees of trustworthiness.

{80} We have said - and as a general matter I agree - that we should defer to the discretion of the trial judge on evidentiary matters. **State v. Ross**, 1996-1996-NMSC-31, 122 N.M. 15, 20, 919 P.2d 1080, 1085. Such deference, however, has less force in this case, where it is less than clear from the record that the trial court relied upon Rule 11-803(X) in its ruling. In fourteen pages of transcript discussion, the trial court only once mentions Rule 11-803(X) and it certainly cannot be said to be the thrust of the State's argument. The State initially proffered the out of court statements under Rule 11-803(E) NMRA 2002. After a lengthy discussion of that rule, the State noted, "There are some other exceptions that I could argue or basis on the rules of evidence that I could argue for the admission of this, but that [, Rule 11-803(E),] I think is [the principal basis]." After Defendant's response to the State's argument, the State proffered several other grounds for the admission of the statement: Rule 11-801(D)(1)(c) NMRA 2002, Rule 11-803(X), Rule 11-804(A)(3) NMRA 2002, and Rule 11-613(B) NMRA 2002. During its discussion of Rule 11-803(X), the State recognized that it had not satisfied all of the requirements of the rule: "I realize that notice should be given sufficiently in advance of trial to allow counsel to prepare, but I think the Court is well aware of the circumstances under which Mr. Ortiz has appeared here. And I think that notice requirement is a somewhat flexible requirement." The trial court never expressly decided whether the notice requirement is flexible enough to allow use of the rule absent notice.

{81} In response to these arguments, the trial court initially indicated that the statement was admissible as a combination of Rule 11-801(D)(1)(c) and 11-803(E). In making its final ruling, the trial court mentions, for the first time, Rule 11-803(X):

> I think [that there are] grounds for me to go ahead and allow it at least to be played for the jury, just not admitted into evidence as an exhibit, but for all the other reasons that were cited by [the State], 803X and some of the other 804-A3. I do believe it's appropriate to allow that.

The court then noted that the State could have impeached Ortiz with every line of the out-of-court statement, and that it was more efficient to just play the tape to the jury. While it is unclear from the transcript what the exact grounds for the trial court's ruling were, it is clear that Rule 11-803(X) did not play a significant role in the deliberations. The trial court never made an express ruling that the three textual requirements of Rule 11-803(X) had been met, nor did it rule that the State's failure to comply with the notice requirement was excusable. Under those circumstances, I am not persuaded that the reasons for the principle of deference apply.

{82} The Court of Appeals has said of the essentially identical predecessor to Rule 11-803(X) that it "cannot be read to mean that hearsay which almost, but not quite, fits another specific exception, may be admitted under the 'other exceptions' subsection. . . ." **State v. Barela**, 97 N.M. 723, 726, 643 P.2d 287, 290 . In this case the State appears to me to rely on this rule in a way the Court of Appeals rejected as contrary to its purpose. As its first sentence makes clear, Rule 11-803(X) should be used in a novel situation not considered by the drafters and not "specifically covered by any of the foregoing exceptions. . . ." It should not be used when the statement is of a type expressly considered by other exceptions, but which does not satisfy the rules those exceptions establish.

{83} In this case, the State initially offered the testimony under Rule 11-803(E) (recorded

recollection), and that was the focus of most of its discussion. The State also offered the hearsay under a number of other rules: Rule 11-613(B) (extrinsic proof of prior inconsistent statements), Rule 11-801(D)(1)(c) (statements of identification), Rule 11-804(A)(3) (one of the definitions of unavailable) and Rule 11-803(X). None appears to support the use of Ortiz's interview with the police.

{84} We have already noted in the related case **State v. Allison**, 2000-2000-NMSC-27, P30, 129 N.M. 566, 11 P.3d 141, that Rule 11-803(E) is not a proper ground for the admission of this statement. In that case, we ultimately allowed the admission of Ortiz's out-of-court statement under Rule 11-803(X), not on the merits, but because the defendant in that case did not argue against the use of that rule. **Id.**, P 31. Rule 11-804(A)(3) is simply the definition of unavailable that would apply to Ortiz and is not a ground for the admission of the statement. Rule 11-613(B) would allow, in this case, for the impeachment of Ortiz with extrinsic proof of those out-of-court statements, but would not allow them to come in for substantive purposes.

{85} Finally, Rule 11-801(D)(1)(c) (statements of identification) would not allow the statements to come in because Ortiz's interview did not identify either of the two shooters but instead described the shooting. Majority Opinion, P 4. **State v. Lopez**, 1997-NMCA-75, 123 N.M. 599, 943 P.2d 1052 recognizes that courts ought to give a narrow interpretation of the word identification, stating: "Identification in its usual sense hinges upon a witness' recognition of a suspect and ability to match the person then to the person now and give assurances that this is the same individual." **Lopez**, 1997-NMCA-75, P11, 123 N.M. 599, 943 P.2d 1052. In this case Ortiz described seeing a "big guy" and a "little guy." He also described what each was wearing and told how the big guy asked for the gun, but the little guy did not want to give it to him. The little guy then yelled at the four below, "You guys think I'm joking," before shooting. Although this description might help the police find the alleged perpetrators, I do not believe we ought to characterize it as a statement of identification under Rule 11-801(D)(1)(c), because in it Ortiz did not match any current suspect to the people he witnessed at the crime scene.

{86} In this case, the State was faced with an out-of-court statement that was almost, but not quite, a recorded recollection under 11-803(E), and was almost, but not quite, a statement of identification under Rule 11-801(D)(1)(c). The statement was thus "specifically covered by [some] of the foregoing exceptions. . . ." Rule 11-803(X). It did not, however, satisfy the requirements of any of those exceptions. In this situation the use of Rule 11-803(X) seems contrary to its purpose, and allows the State to avoid the requirements of the hearsay rule and its normal exceptions.

{87} I would reverse the trial court's determination that Ortiz's hearsay statement was admissible and reverse Defendant's convictions. I do not think that Rule 11-803(X) allows the admission of his statement because the elements of that rule are not met, because the trial court did not seem to rely on that rule in its decision, and because the use of Rule 11-803(X) in this context seems contrary to its purpose. Because I find none of the other rules relied upon by the State and the trial court persuasive, I would remand for a new trial and not allow the substantive use of the evidence. I respectfully dissent from part III(B). I concur in parts II, III(A), IV, V, VI, VIII, IX and XI. Because of my disposition of Defendant's evidentiary objection, I would not reach parts VII or X .

PAMELA B. MINZNER,
Justice

I CONCUR:

GENE E. FRANCHINI,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2002-NMSC-012

Filing Date: April 26, 2002

Docket No. 26,149

LISA GALLEGOS,

Plaintiff-Appellant,

v.

PUEBLO OF TESUQUE d/b/a CAMEL ROCK GAMING CENTER, ZURICH AMERICAN INSURANCE COMPANY, NATIONAL SANITARY SUPPLY COMPANY, INC., RUBBERMAID, INC., and DOES 1-20, inclusive,

Defendants-Appellees.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS
Petra Jimenez Maes and Art Encinias, District Judges

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OPINION

BACA, Justice.

{1} In this case, certified from the Court of Appeals pursuant to NMSA 1978, § 34-5-14(C)(2) (1972), we confront two issues presented in two cases consolidated by the Court of Appeals prior to certification. First, we are asked whether federal or state law, or the terms of the 1995 or 1997 Compacts, provide the state court with subject matter jurisdiction over an action in tort brought

by a non-Indian against an Indian tribe, when the non-Indian was allegedly injured at the tribe's gaming facility and no gaming compact was legally in effect. Second, we are asked to decide whether the Pueblo of Tesuque ("Tesuque") is an indispensable party pursuant to Rule 1-019 NMRA 2002 in an action against Zurich American Insurance Company ("Zurich"), Tesuque's insurance carrier, for breach of contract for failure to pay medical payments, breach of contract for raising a sovereign immunity defense, insurance bad faith, and unfair practices under the New Mexico Trade Practices and Fraud Act, NMSA 1978, § 59A-16-1 to -30 (1984, as amended through 2001). Given the unique circumstances of this case, we confine the application of our analysis to these facts. We hold that (1) the dismissal of Lisa Gallegos' ("Gallegos") complaint was proper as Tesuque had not expressly and unequivocally waived its immunity from suit or consented to state court jurisdiction through a compact or other form, and (2) Tesuque is an indispensable party in this suit against its insurance carrier.

{2} Therefore, we affirm the district court's order granting the motion to dismiss the complaint against Tesuque for lack of subject matter jurisdiction and affirm the district court's order granting the motion to dismiss the complaint against Zurich for failure to join an indispensable party.

I.

{3} On October 28, 1996, Gallegos was a visitor at the Camel Rock Gaming Center ("Casino") located on the Pueblo of Tesuque Indian reservation **.** As Gallegos was entering the walkway from the parking lot, a sudden gust of wind blew a garbage container into her, knocking her down. As a result of this incident, Gallegos allegedly suffered severe contusions and injuries, including a displaced fracture of her right elbow. At the time of the incident, Tesuque, which owned and operated the Casino, had an insurance policy in effect with Zurich. As a result of her injuries, Gallegos asserts that she incurred substantial medical expenses. She reported over $ 20,000 in such expenses to Zurich, which paid a small portion and then discontinued payment.

{4} On December 11, 1997, Gallegos filed a lawsuit in a New Mexico district court against Tesuque and other defendants to recover for the personal injuries she allegedly sustained as a result of the October 28, 1996 incident. Defendants filed a motion to dismiss asserting that Gallegos' lawsuit fell within the exclusive jurisdiction of the tribal court and that the state court lacked jurisdiction over it as Tesuque is immune from suit in state court. On August 3, 1998, the district court granted the motion and dismissed the complaint as to Tesuque, orally finding that the district court lacked jurisdiction to hear the action because no compact covered the date of the incident and Tesuque had not waived its sovereign immunity. The court dismissed the complaint as to the other defendants without prejudice to Gallegos' right to file an amended complaint. Gallegos appealed the district court's order as to Tesuque to the Court of Appeals.

{5} On October 26, 1998, Gallegos filed a separate lawsuit against Zurich and several other defendants. She alleged breach of contract for failure to pay medical payments, breach of contract for raising a sovereign immunity defense, insurance bad faith, and unfair practices under the New Mexico Trade Practices and Fraud Act against Zurich. After filing an answer, Zurich filed a motion to dismiss for failure to join an indispensable party pursuant to Rule 1-019. Zurich claimed that Gallegos was seeking to recover damages for Tesuque's alleged liability, and, thus, Tesuque was an indispensable party. Zurich argued that, since sovereign immunity precluded joinder of Tesuque in an action in state court, the action against Zurich must be dismissed. The district court dismissed Zurich from the lawsuit. Gallegos appealed to the Court of Appeals. The Court of Appeals recognized that any ruling in this case "involved a significant issue of intersovereign law and substantial public interest concerning personal injuries suffered by patrons of our State's tribal-run casinos **after** the invalidation of the original 1995 Gaming Compacts, . . . **but prior to** the effective date of the

Compacts enacted in 1997," and, thus, sought certification to this Court.

II.

{6} We first address the issue of whether the district court had subject matter jurisdiction over the claim brought by Gallegos against Tesuque. In reviewing an appeal from an order granting or denying a motion to dismiss for lack of jurisdiction, the determination of whether jurisdiction exists is a question of law which an appellate court reviews de novo. **See Barnae v. Barnae**, 1997-NMCA-77, PP10-11, 1997-NMCA-77, 123 N.M.583, 943 P.2d 1036; **see also** . . . **Sac and Fox Nation v. Hanson**, 47 F.3d 1061, 1063 (10th Cir. 1995) (concluding that the validity of an assertion of sovereign immunity is a question of law which requires de novo review).

{7} Tesuque argues that it is immune from suit in state court and that the district court properly dismissed the action brought by Gallegos on the basis of lack of subject matter jurisdiction and tribal sovereign immunity. We agree. "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." **Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.**, 498 U.S. 505, 509, 112 L. Ed. 2d 1112, 111 S. Ct. 905 (1991) (quoting **Cherokee Nation v. Georgia**, 30 U.S. 1, 17, 8 L. Ed. 25 (1831)). Indeed, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." **Santa Clara Pueblo v. Martinez**, 436 U.S. 49, 58, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978); **accord** . . . **Hanson**, 47 F.3d at 1063. Although Indian tribes enjoy sovereign authority over their members and territories, their immunity from suit in state court is not absolute. **Santa Clara Pueblo**, 436 U.S. at 58. Article I, Section 8 of the U.S. Constitution provides Congress with the ultimate authority over Indian affairs, and, thus, Congress can expressly authorize suits against Indian tribes through legislation. **Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g**, 476 U.S. 877, 890-91, 90 L. Ed. 2d 881, 106 S. Ct. 2305 (1986); **see** . . . **Santa Clara Pueblo**, 436 U.S. at 58. A tribe can also waive its own immunity by unequivocally expressing such a waiver. **See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.**, 523 U.S. 751, 754 **(1998); Santa Clara Pueblo**, 436 U.S. at 58; **Hanson**, 47 F.3d at 1063; **cf**. . . . **Mescalero Apache Tribe v. New Mexico**, 131 F.3d 1379, 1385-86 (10th Cir. 1997). Thus, tribal immunity is a matter of federal law and is not subject to diminution by the states. **See** . . . **Three Affiliated Tribes**, 476 U.S. at 891. Without an unequivocal and express waiver of sovereign immunity or congressional authorization, state courts lack the power to entertain lawsuits against tribal entities. **See** . . . **Puyallup Tribe, Inc. v. Dep't of Game**, 433 U.S. 165, 172, 53 L. Ed. 2d 667, 97 S. Ct. 2616 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe.")

{8} Gallegos was allegedly injured on Tesuque's reservation while she was patronizing Tesuque's gaming facility. As gaming on tribal lands is governed by the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 (1994 & Supp. V 1999), we must determine what, if any, effect the provisions of the IGRA have on this case and Gallegos' claims.

A.

{9} Before the passage of the IGRA, Congress found that "numerous Indian tribes [had] become engaged in or [had] licensed gaming activities on Indian lands as a means of generating tribal government revenue." 25 U.S.C. § 2701(1) (1994). Existing federal law, however, did not "provide clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3) (1994). Accordingly, in 1988, Congress passed the IGRA which provided "a 'comprehensive regulatory framework for gaming activities on Indian lands' which '[sought] to balance the interests of tribal governments, the states, and the federal government.'" **Pueblo of Santa Ana v. Kelly**, 104 F.3d 1546, 1548 (10th Cir. 1997) ("**Kelly II** ") (quoting **Ponca Tribe of Okla. v.**

Oklahoma, 37 F.3d 1422, 1425 (10th Cir. 1994) **vacated**, 517 U.S. 1129 (1996)). Most importantly, the IGRA established the framework under which Indian tribes and states could negotiate compacts permitting Class III gaming[1] on Indian reservations located within state territory. **See** 25 U.S.C. § 2702 (1994); **Srader v. Verant**, 1998-NMSC-25, P 8, 1998-NMSC-25, 125 N.M. 521, 964 P.2d 82. Class III gaming would be lawful on Indian lands only if such activities were "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . [and that Compact was] in effect."[2] 25 U.S.C. § 2710(d)(1)(C) (1994).

{10} In the IGRA, "Congress attempted to strike a balance between the rights of tribes as sovereigns and the interests that states may have in regulating sophisticated forms of gambling." **State ex rel. Clark v. Johnson**, 120 N.M. 562, 566, 904 P.2d 11, 15 (1995). As previously stated, the state's role with respect to jurisdiction over tribal matters is limited. See Srader, 1998-NMSC-25, PP9-10; **Found. Reserve Ins. Co. v. Garcia**, 105 N.M. 514, 516, 734 P.2d 754, 756 (1987). However, the language of the IGRA allows the states and the tribes to negotiate with respect to jurisdiction. **See** 25 U.S.C. § 2710(d)(3)(C)(ii) (1994) ("Any Tribal-State compact . . . may include provisions relating to - the allocation of criminal and civil jurisdiction between the State and the Indian tribe. . . ."). Thus, according to Congress, a state court may exercise jurisdiction over a tribe pursuant to the IGRA when a tribe and a state have consented to such an arrangement in a gaming compact.[3] **See, e.g.**, **Gaming Corp. of Am. v. Dorsey & Whitney**, 88 F.3d 536, 545-46 (8th Cir. 1996).

{11} Gallegos claims that Tesuque waived its sovereign immunity and consented to be sued in a New Mexico court under either the 1995 or 1997 Compact. This case poses a unique issue because, at the time Gallegos sustained her claimed injuries on October 28, 1996, neither the 1995 nor the 1997 Compact was in effect. Nevertheless, Gallegos asserts that by entering into these compacts and conforming to their mandates, Tesuque waived its tribal immunity, thereby giving subject matter jurisdiction over this case to a New Mexico court. We review Gallegos' arguments under both the 1995 and 1997 Compacts, respectively.

B.

{12} In 1995, the Tribes and the Governor of New Mexico negotiated to enter into tribal-state compacts permitting Class III gaming. **See** . . . **Clark**, 120 N.M. at 567, 904 P.2d at 16. In February 1995, Tesuque signed a gaming compact that the Secretary of the Interior approved and then published in the Federal Register on March 22, 1995. **See** . . . **Pueblo of Santa Ana v. Kelly**, 932 F. Supp. 1284, 1290 (D.N.M. 1996) ("**Kelly I** "), **aff'd**, 104 F.3d 1546 (10th Cir. 1997). Section 8 of that compact stated that, to insure the personal safety and protection of patrons and other invitees of Tesuque's gaming facilities, Tesuque would maintain an insurance policy of no less than one million dollars for personal injury coverage. Also, Tesuque agreed that in the event of any personal injury claim by its patrons or invitees, against it or its gaming enterprise, neither it nor its insurer would assert any

[1] The Act divides gaming into three categories. Class I gaming is comprised of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6) (1994). Class II gaming consists primarily of bingo but includes "pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo," as long as those games are played at the same location as bingo. 25 U.S.C. § 2703(7)(A)(i) (1994). Last, Class III gaming is high-stakes, casino-style gaming, which includes "'slot machines, casino games, banking card games, dog racing, and lotteries.'" **Kelly II**, 104 F.3d at 1549 (quoting **Seminole Tribe of Fla. v. Florida**, 517 U.S. 44, 48, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996)); **see also** 25 U.S.C. § 2703(8) (1994). Under the IGRA, Class I and Class II gaming continue to be within the exclusive jurisdiction of the Indian tribes. **See** 25 U.S.C. § 2710(a) (1994).

[2] The compact goes into "effect" when it is approved by the Secretary of the Interior and the notice is published in the Federal Register. **See** 25 U.S.C. § 2710(d)(3)(B) (1994).

[3] Both Tesuque and Amici for Tesuque argue that the jurisdiction-shifting provisions themselves of the compacts are invalid and therefore do not confer jurisdiction on the state court. As we conclude that neither compact is applicable to Gallegos, we need not address these arguments.

defense of immunity from suit in any action for compensatory damages up to one million dollars to be tried to the court filed in a "court of competent jurisdiction." Gallegos argues that under this compact, Tesuque waived its sovereign immunity and consented to be sued in state court.

{13} The validity of the 1995 Compacts, including the Tesuque Compact, was challenged in **Clark** on the ground that "the Governor of New Mexico lacked the authority to commit New Mexico to these compacts and agreements, because he attempted to exercise legislative authority contrary to the doctrine of separation of powers expressed in the state Constitution." 120 N.M. at 566, 904 P.2d at 15. This Court agreed with the petitioner in **Clark** and held that the Governor lacked the authority under Article III, Section I of the state constitution to bind the state by unilaterally entering into the compacts. **See** . . . **id.** at 578, 904 P.2d at 27. This Court issued a peremptory writ and stayed all actions to enforce, implement, or enable any and all of the gaming compacts and revenue sharing agreements. See id.

{14} Although the 1995 Compacts were described as without legal effect by this Court prior to Gallegos' alleged injury on October 28, 1996, Gallegos maintains that Tesuque's waiver of immunity in the 1995 Compact survived. She makes two arguments to support this contention. First, Gallegos asserts that the 1995 Compact remained in effect pursuant to a federal court's stay of its judgment pending appeal in a collateral case. Second, she argues that Tesuque should be estopped from asserting that the 1995 Compact was not in effect on October 28, 1996, since Tesuque continued gaming activities, continued hosting patrons, and maintained an insurance policy in conformity with the compact. We do not agree with Gallegos' arguments and hold that the 1995 Compact was not in effect in any manner at the time that Gallegos allegedly sustained her injuries. Therefore, any waiver of immunity or jurisdiction-shifting provision within the compact would not cover this claim.

i.

{15} Gallegos first asserts that the Tesuque Compact and its provisions were in effect at the time of her injury pursuant to a stay entered by the federal district court in a collateral case decided subsequent to this Court's decision in **Clark**. To fully understand Gallegos' argument in this regard, we must briefly review and analyze the history of Indian gaming in New Mexico and the procedural posture of **Kelly I** and **Kelly II**. Although the IGRA required a tribal-state compact in order for tribes to lawfully conduct Class III gaming, Tesuque began to conduct some form of Class III gaming on its reservation absent a compact in 1992. **See** . . . **Kelly II**, 104 F.3d at 1549; **Kelly I**, 932 F. Supp. at 1290. In May 1994, Tesuque, along with other pueblos that were engaging in Class III gaming without a compact, "entered into [a] non-prosecution agreement[] with the United States Attorney, whereby the Tribes agreed not to expand their gaming activities beyond specified levels in exchange for the United States Attorney's agreement not to take any enforcement action against them for failing to comply with the provisions of the IGRA." **Kelly I**, 932 F. Supp. at 1290. After the 1995 Compacts had been entered into, the United States Attorney advised the Tribes that he was terminating the non-prosecution agreements. **See** . . . **Kelly II**, 104 F.3d at 1550; **Kelly I**, 932 F. Supp. at 1290. He indicated that "the execution, approval and publication of [the] Tribes' compacts [with New Mexico] should bring them into compliance with applicable federal law." **Kelly I**, 932 F. Supp. at 1290.

{16} **After Clark**, the Tribes continued to participate in Class III gaming. **See** . . . **Kelly I**, 932 F. Supp. at 1290-91. "The United States Attorney warned the Tribes that their gaming activities must cease or casino employees and patrons [would] be subject to federal criminal sanctions and the alleged illegal gaming devices [would] be subject to forfeiture." **Id.** 932 F. Supp. at 1291. Consequently, the Tribes filed an action in the U.S. District Court seeking a declaratory judgment, arguing among other things that the compacts with New Mexico were valid

as the Secretary of the Interior had subsequently approved the compacts and published them in the Federal Register. **See id.** The Tribes argued that the Secretary's approval was conclusive as to the validity of the compacts, despite the Governor's lack of authority to enter into such agreements. **See id.** In January 1996, while the case was pending in federal district court, the Tribes and the United States Attorney entered into a court-approved Stipulation. In the Stipulation, the Tribes agreed to voluntarily comply with the decision of the federal district court to cease all Class III gaming upon a final judgment that the casinos were in violation of federal law, unless a stay pending appeal was granted. Additionally, the Tribes agreed to refrain from taking any and all action to close public highways and thoroughfares crossing Indian land in New Mexico. In return, the United States Attorney agreed to refrain from filing a forfeiture proceeding or otherwise taking civil or criminal enforcement action against the Tribes as long as the terms and conditions of the Stipulation were observed.

{17} On July 12, 1996, the federal district court also declared the 1995 Compacts void. **Kelly I**, 932 F. Supp. at 1299. The district court determined that "the validity of the Plaintiff Tribes' gaming compacts presents a federal question to be decided by this Court." **Id.** at 1293. The court also decided that "a valid compact is a prerequisite to the Secretarial approval necessary to put the compact 'in effect.'" **Id.** at 1292. The court described the IGRA as requiring "the existence of a valid Tribal-State compact independent of the requirement that the compact be in effect by virtue of the Secretary's approval." **Id.** Finally, the court concluded that "Congress intended that state law determine the procedure for executing valid gaming compacts." **Id.** at 1294. The court reexamined New Mexico law independent of this Court's decision in **Clark** and determined that the Governor's actions "encroached upon the Legislature's authority, contrary to the constitutional separation of powers doctrine." **Id.** at 1294-95. The district court, therefore, agreed that the Tribes' compacts were invalid and concluded that the Tribes had failed to satisfy the requirements necessary for them to conduct Class III gaming. **See** . . . **id.** at 1299.

{18} The Tribes, including Tesuque, promptly filed a Notice of Appeal, seeking review of the district court's decision, and a motion requesting a stay of the judgment pending appeal in the Tenth Circuit Court of Appeals. The district court granted the stay pending appeal pursuant to Fed. R. Civ. P. 62(c). The district court recognized that Rule 62(c) applies solely to injunctions and does not generally apply to declaratory judgments but concluded that a declaratory judgment combined with the court-approved Stipulation in this case had the practical effect of granting injunctive relief. **See** . . . **Samuels v. Mackell**, 401 U.S. 66, 72-73, 27 L. Ed. 2d 688, 91 S. Ct. 764 (1971) (concluding that the practical effect of declaratory and injunctive relief is virtually identical). Thus, the district court granted the Tribes' motion for a stay, or injunction pending appeal, thereby permitting the Tribes' casinos and other gaming facilities to remain open pending appeal, even though no compact was in effect. **See** . . . **Kelly II**, 104 F.3d at 1548. On appeal, the Tenth Circuit affirmed the district court's ruling invalidating the compacts. **See** . . . **id.** at 1553. The Tenth Circuit did not decide whether it needed to re-examine state law or defer to this Court's decision in **Clark** but rather decided that in either event it would conclude that the Governor lacked authority to bind the State absent legislative authorization. The compacts were therefore never validly "entered" by the State and, as a result did not comply with the IGRA. **Id.** at 1558. The stay remained in effect until the U.S. Supreme Court denied certiorari on October 6, 1997. **See** . . . **id.** at 1559; **Pueblo of Santa Ana v. Kelly**, 522 U.S. 807, 139 L. Ed. 2d 11, 118 S. Ct. 45 (1997).

{19} The stay was in effect on October 28, 1996 when Gallegos allegedly sustained her injuries. We do not agree that the federal district court's stay revived the 1995 Compact and, consequently, its waiver and jurisdictional provisions. The Stipulation of the parties defined the scope of the stay, as it was the combination of the Stipulation and the declaratory judgment that permitted the granting of the stay. **See** . . .

Shay v. Agric. Stabilization & Conserv. State Comm. for Ariz., 299 F.2d 516, 525 (9th Cir. 1962) (concluding that Rule 62(c) applies to injunctions); **Yankton Sioux Tribe v. Southern Mo. Waste Mgmt. Dist.**, 926 F. Supp. 888, 890 (D.S.D. 1996) (concluding that Rule 62(c) does not apply to declaratory judgment actions). The Stipulation, which was not signed by the State of New Mexico, was not an agreement to revive or validate the 1995 Compacts. Rather it was an agreement to allow the Tribes to continue their gaming activities without a compact in place during the resolution of the federal appeals process, without the threat of civil or criminal prosecution by the federal government.

{20} We conclude that the federal courts addressed issues related but collateral to our decision in **Clark**. In **Kelly I** and **Kelly II**, the federal courts addressed the United States Attorney's threat to prosecute for illegal gaming under the IGRA and, as their opinions make clear, the specific question of the role of state law under the IGRA in determining the validity of a gaming compact. In addressing that question, the federal appellate court concluded that "state law must determine whether a state has validly bound itself to a compact." **Kelly II**, 104 F.3d at 1557. That court also agreed with this Court that as a matter of state law the governor lacked power to "enter into" a valid compact without legislative authorization. **Id.** at 1559. The court summarized its holding as a determination that the Secretary of the Interior could not, under the IGRA, "vivify that which was never alive. " **Id.** at 1548.

{21} We agree with the federal courts that as a result of **Clark** and **Kelly I** and **II**, the compacts have been held void from their inception. In view of these holdings, we also conclude that there never was a valid waiver of immunity nor an agreement to transfer jurisdiction to state court.[4]

ii.

{22} Alternatively, Gallegos contends that Tesuque should be estopped from asserting its sovereign immunity and the state court's lack of jurisdiction and held to the provisions of the 1995 Compact, because it continued to do business under the federal stay without a compact in place. Although Gallegos fails to address in her brief-in-chief what type of estoppel she wants this Court to apply, the basis of her argument is that, under the federal stay, "by accepting and retaining the benefits of illegal gaming activity, [Tesuque] thereby waived and is estopped from asserting [sovereign immunity]." We are not persuaded by this argument.

{23} There are two types of estoppel potentially applicable in this case: judicial and equitable. Judicial estoppel prohibits a party from maintaining inconsistent positions in legal proceedings. Thus, "where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." **Citizens Bank v. C & H Constr. & Paving Co., Inc.**, 89 N.M. 360, 366, 552 P.2d 796, 802 ; see, e.g., **State v. St. Cloud**, 465 N.W.2d 177, 178-80 (S.D. 1991) (judicially estopping a defendant from claiming he was an Indian in state court after he had successfully asserted that he was not an Indian in federal court for purposes of the Major Crimes Act). A party cannot play "'fast and loose'" with the court by changing legal positions in the midst of a suit. **Citizens Bank**, 89 N.M. at 366, 552 P.2d at 802 (quoting **Chapman v. Locke**, 63 N.M. 175, 179, 315 P.2d 521, 524 (1957)). Arguably, Tesuque's present position that the 1995

[4] Gallegos also argues that because the compacts were declared invalid not for any substantive failings, but rather because the Governor lacked power under New Mexico law to ratify the agreements without approval from the Legislature, we should hold that the immunity waiver provisions of the 1995 Compact were in effect at the time of her alleged injury. However, Gallegos cites no authority to support her argument. The 1995 Compact has been determined to have been without legal effect from its inception or void, and the reasons for that determination do not provide a basis for distinguishing among its various provisions. Gallegos' argument seems to us a different way of contending that Tesuque has waived its immunity, a contention that we have answered in the preceding section, or that it should be estopped in asserting its immunity, a contention that we address in the following section.

Compact is invalid conflicts with its position in **Kelly I** and **Kelly II** that the 1995 Compact was valid and in effect. Nonetheless, judicial estoppel is inapplicable. Judicial estoppel cannot be used against a party which espoused a position in an earlier case and lost and is now correctly stating the law that came from that decision.

{24} Equitable estoppel is equally inapplicable in this case. Equitable estoppel "precludes a litigant from asserting a claim or defense that might otherwise be available to him against another party who has detrimentally altered his [or her] position in reliance on the former's misrepresentation or failure to disclose some material fact." **Fed. Deposit Ins. Corp. v. Harrison**, 735 F.2d 408, 410 (11th Cir. 1984). In general, though, courts are reluctant to apply equitable estoppel to a government entity. **Id.** at 410.[5] Indeed, the principle that the state is rarely equitably estopped "has often been regarded as a corollary of the principle of sovereign immunity" in New Mexico. **Taxation & Revenue Dep't v. Bien Mur Indian Market Ctr., Inc.**, 108 N.M. 228, 230-31, 770 P.2d 873, 875-76 (1989).

{25} Gallegos requests that this Court estop Tesuque from asserting sovereign immunity and lack of state court jurisdiction based on Tesuque's continued operation of the casino under the federal stay. However, Gallegos fails to enumerate any overt representations made by Tesuque, beyond its mere operation of business pursuant to the federal stay. Gallegos sets forth no allegations that she detrimentally relied on the 1995 Compact's validity either in her decision to gamble at the Casino or to file her personal injury suit against Tesuque. **See, e.g.**, **Padilla v. Pueblo of Acoma**, 107 N.M. 174, 179, 754 P.2d 845, 850 (1988) (concluding that nothing in the record suggested that the pueblo had concealed any facts or made "any representation upon which [the plaintiff] reasonably could rely that [the pueblo's commercial enterprise] either waived its immunity or was acting in a capacity separate and distinct from the tribe"), **implicitly overruled on other grounds by** . . . **Kiowa Tribe**, 523 U.S. at 760; **United States ex rel. Crow Creek Sioux Tribe v. Hattum Family Farms**, 2000 DSD 7, 102 F. Supp. 2d 1154, 1164-65 (D.S.D. 2000) (concluding that the tribe, as qui tam plaintiff on behalf of the government, was not estopped from asserting contract invalidity where the defendant could not show affirmative misconduct by the tribe or that he had relied on any representation by the tribe in "good faith to his detriment" (internal quotation marks and citation omitted)); **cf**. . . . **Harrison**, 735 F.2d at 413 (finding equitable estoppel applicable to the government when agent assured loan guarantors that their guaranty agreements would not be enforced and the guarantors "detrimentally relied on the representations of FDIC agents concerning the extent of their guaranty liability and the repayment status of their principle [sic] debtor" (footnote omitted)). In fact, Gallegos conceded at the hearing on the motion to dismiss that she waited until the 1997 Compact became effective to file her suit, which indicates that she did not rely on the 1995 Compact in making the decision to exercise her legal rights. Nor does Gallegos allege that Tesuque misinformed her or the public regarding its status. The result of **Clark** and **Kelly I**, that the 1995 Compact was without legal effect as a matter of state law and void as a matter of federal law, was public record in this state.

{26} Gallegos does assert in her reply brief on appeal that she relied, generally, on the insurance

[5] For example, a party asserting equitable estoppel against the federal government must demonstrate that: "(1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury." **Kelly I**, 932 F. Supp. at 1298. In addition to these four factors, the claimant must demonstrate "affirmative misconduct on the part of the government." **Id.** at 1299. ("Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact. Mere negligence, delay, [or] inaction . . . does not constitute affirmative misconduct." (internal quotation marks and quoted authority omitted)). Courts are equally hesitant to apply estoppel against a state governmental entity unless "there is a shocking degree of aggravated and overreaching conduct or . . . right and justice demand it." **Memorial Medical Ctr., Inc. v. Tatsch Constr., Inc.**, 2000-NMSC-30, P10, 2000-NMSC-30, 129 N.M. 677, 12 P.3d 431 (quoting **Wisznia v. Human Servs. Dep't**, 1998-NMSC-11, P17, 1998-NMSC-11, 125 N.M. 140, 958 P.2d 98).

to protect her and "in that reliance she relied on each and every representation the Pueblo made in order that such insurance be there." Gallegos does not argue that the purchase of the insurance policy itself operated as a waiver of sovereign immunity; nor does she argue that the maintenance of insurance operated as a misrepresentation by Tesuque. **See** . . . **Atkinson v. Haldane**, 569 P.2d 151, 167-70 (Alaska 1977) (recognizing that maintenance of insurance policy would not support conclusion that tribe had waived its immunity as tribe purchased insurance policy to protect tribal resources). Rather Gallegos contends that the policy includes a provision waiving Tesuque's sovereign immunity, and, thus, Tesuque should be precluded from raising this defense through its insurance company. While it is true that Tesuque maintained a liability insurance policy at the time of the incident, this Court could not locate any provision in the policy produced in the appellate record indicating that Zurich would not assert sovereign immunity as a defense on behalf of Tesuque. Nor have the parties directed us to such a provision.

{27} Gallegos urges us to look to Tesuque's gaming activities solely as a commercial venture in our review of her arguments. Some courts have examined the type of activity engaged in by the government as an element in their analysis and permitted equitable estoppel when the activity was proprietary or commercial. **See** . . . **Harrison**, 735 F.2d at 410-12. We are persuaded, however, that the determination of whether Tesuque's gaming operation is a commercial or governmental enterprise is unnecessary to our analysis for two reasons. First, the U.S. Supreme Court recently held in **Kiowa Tribe**, 523 U.S. at 760, that Indian tribes have "immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." Thus, at least in the context of a contract dispute, whether a tribe's activity was a commercial or a governmental function appears to be a distinction without a difference. **See id.** ; **Hanson**, 47 F.3d at 1065 (concluding that "without an explicit waiver, the [tribe] is immune from suit in state court - even if the suit results from commercial activity occurring off the [tribe's] reservation."); **see also** . . . **DeFeo v. Ski Apache Resort**, 120 N.M. 640, 643, 904 P.2d 1065, 1068 (Ct. App. 1995) (holding that tribe did not waive sovereign immunity through on-reservation commercial activity, which precluded state court from hearing a personal injury case). Second, the Court in **Kiowa Tribe** reiterated that it was for Congress, not the judiciary, to set the boundaries of tribal immunity, stating "as a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." 523 U.S. at 754. As we recognize that waivers of tribal immunity must be unequivocal and express, **Santa Clara Pueblo**, 436 U.S. at 58, it is therefore imperative that the party asserting equitable estoppel against a tribe allege at a minimum the requisite elements of that claim. Our review of the record reveals that Gallegos has made no such showing.

{28} We are not persuaded that the sole fact that Tesuque was operating a casino is reason enough to set aside the basic canons of tribal sovereignty and estop Tesuque from asserting its immunity. To apply equitable estoppel in this case against a tribe is to, in effect, imply a waiver of its sovereign immunity. **See** . . . **Padilla**, 107 N.M. at 179, 754 P.2d at 850 ("Given the requirement that waiver of tribal immunity be express and unequivocal, . . . it would be difficult at best to support a claim that a tribe could, through other than express and unequivocal conduct, be equitably estopped to assert its immunity."). It is clear that Tesuque operated its gaming facility pursuant to the federal stay but without a compact in place conferring jurisdiction on the state court. However, we conclude that Gallegos has not alleged any conduct on the part of Tesuque that this Court can deem to be of such a nature as to require the extraordinary remedy of equitable estoppel against Tesuque and imply a waiver of its sovereign immunity from suit.

C.

{29} In the alternative, Gallegos argues that the 1997 Compact operates retroactively such that it covers her claim and allows her to bring suit

against Tesuque in state court. Gallegos contends that, even though she sustained her injury prior to the effective date of the 1997 Compact and filed suit after it became effective, she still enjoys the benefit of the Compact's Section 8 jurisdiction-shifting provision and waiver of sovereign immunity, as she is "in the class of intended beneficiaries" of the compact and the contract entered by Tesuque. She argues that "Section 8 provides gaming patrons important rights and remedies that cannot be whisked away without offending the Compact, . . . [and the IGRA]."[6] Although Gallegos concentrates her assertions on the validity of the jurisdiction-shifting provision contained in Section 8, the issue here is whether Gallegos' claims fall within the scope of the 1997 Compact. Gallegos cites no authority for the proposition that compacts of this nature operate retroactively to encompass claims that arise before their effective date, nor does she cite authority that under either traditional contract or statutory canons of construction a compact can be applied retroactively. We are not persuaded.

{30} The 1997 Compact is a contract between the State of New Mexico and Tesuque, codified by the Legislature. **See** § 11-13-1; **Texas v. New Mexico**, 482 U.S. 124, 128, 96 L. Ed. 2d 105, 107 S. Ct. 2279 (1987) (defining a compact as a contract which when approved by Congress has the force of federal law); **Kelly II**, 104 F.3d at 1556 ("A compact is a form of contract."); **Confederated Tribes of the Chehalis Reservation v. Johnson**, 135 Wash. 2d 734, 958 P.2d 260, 267 (Wash. 1998) ("Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts."). Generally, the goal of contract interpretation is to "'ascertain the intentions of the contracting parties.'" **Ponder v. State Farm Mut. Auto. Ins. Co.**, 2000-NMSC-33, P11, 2000-NMSC-33, 129 N.M. 698, 12 P.3d 960 (quoting **Strata Prod. Co. v. Mercury Exploration Co.**, 1996-NMSC-16, 121 N.M. 622, 630, 916 P.2d 822, 830). "'The court's duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the court may not alter or fabricate a new agreement for the parties." Id. (quoting **CC Housing Corp. v. Ryder Truck Rental, Inc.**, 106 N.M. 577, 579, 746 P.2d 1109, 1111 (1987)).

{31} The express language of the 1997 Compact is unambiguous. **See** . . . **Vickers v. N. Am. Land Devs., Inc.**, 94 N.M. 65, 68, 607 P.2d 603, 606 (1980) (noting that a contract is ambiguous only "if it is reasonably and fairly susceptible of different constructions"). Section 9 provides:

> This Compact shall be effective immediately upon the occurrence of the last of the following:
>
> A. execution by the Tribe's Governor after approval of the Tribal Council;
>
> B. execution by the Governor of the State;
>
> C. approval by the Secretary of the Interior; and
>
> D. publication in the Federal Register.

Section 11-13-1(9). Additionally, Section 11 provides that the "Compact shall be binding upon the State and Tribe for a term of nine (9) years **from the date it becomes effective**." Section 11-13-1(11) (emphasis added). According to its own terms, the 1997 Compact became effective on August 29, 1997 upon publication of notice in the Federal Register, **see** 62 Fed. Reg. 45,867 (Aug. 29, 1997), and, on that date, its provisions became "binding upon the State and Tribe." Section 11-13-1(11). Thus, according to the express terms of the compact, it was not in effect in October 1996 when Gallegos' claim arose.

{32} Moreover, the compact is silent as to any retroactive application. We will not imply from this silence such a provision as it is not evident that retroactive application was within the contemplation of the State and Tribe upon making

[6] "Section 8" is a reference to a portion of the Indian Gaming Compact enacted in 1997. It provides for a waiver of tribal sovereign immunity and that "the general civil laws of New Mexico and concurrent civil jurisdiction in the State courts and the Tribal courts shall apply to a visitor's claim of liability for bodily injury." NMSA 1978, § 11-13-1(8)(A), (D) (1997).

this agreement. **See Ponder**, 2000-NMSC-33, P11. To do so would be to create a new contract for the State and Tesuque, and "we must give effect to the contract and enforce it as written." **Id.**

{33} Even if we viewed the 1997 Compact as a statute, the general rule is that statutes apply prospectively unless the Legislature manifests clear intent to the contrary. "When a statute affects vested or substantive rights, it is presumed to operate prospectively only." **Swink v. Fingado**, 115 N.M. 275, 279, 850 P.2d 978, 982 (1993). Furthermore, if the application of a "newly enacted law retrospectively would diminish rights or increase liabilities that have already accrued," then prospective application may be required by the Constitution. **Id.** at 290, 850 P.2d at 993; **see** N.M. Const. art. II, § 19 ("No ex post fact law, bill of attainder nor law impairing the obligation of contracts shall be enacted by the legislature."). However, statutes delineating remedial procedure are to be retroactively applied. **Wilson v. N.M. Lumber & Timber Co.**, 42 N.M. 438, 441, 81 P.2d 61, 63 (1938) ("It is true that statutes relating to practice and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may have arisen before." (internal quotation marks and citation omitted)).

{34} Retroactive application of the 1997 Compact is not appropriate here. "The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." **Kaiser Aluminum & Chem. Corp. v. Bonjorno**, 494 U.S. 827, 855, 108 L. Ed. 2d 842, 110 S. Ct. 1570 (1990) (Scalia, J., concurring). At oral argument, Gallegos relied on **Landgraf v. USI Film Products**, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994), to support her contention that Section 8 of the 1997 Compact should be applied retrospectively as Section 8 only changes the court in which Plaintiff's cause of action can be heard. Indeed, **Landgraf** states that the U.S. Supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." 511 U.S. at 274. However, this is not a case of solely changing the jurisdictional amount-in-controversy limits or simply changing the tribunal in which the case is heard. **See id.** Rather, the 1997 Compact speaks to the rights and obligations of the parties; it affects the substantive rights of Tesuque as a sovereign entity through its waiver of sovereign immunity and submission to the jurisdiction of the state court. **See** § 11-13-1(8); **Landgraf**, 511 U.S. at 270 (framing the basic substantive rights inquiry as "whether the new provision attaches new legal consequences to events completed before its enactment"). Clearly, to apply the waiver of sovereign immunity and the jurisdiction-shifting provision of the 1997 Compact to Gallegos' causes of action "would diminish [Tesuque's] rights or increase [its] liabilities." **Swink**, 115 N.M. at 290, 850 P.2d at 993.

{35} Moreover, as discussed above, the plain language of the 1997 Compact delineates its effective dates and duration. Nothing in its terms evinces an intent that its provisions be applied retroactively. **See** . . . **id.** at 279, 850 P.2d at 982. Finally, as with Gallegos' assertions of equitable estoppel and the applicability of the 1995 Compact, our conclusion that the 1997 Compact cannot be applied retroactively is further supported by the requirement that waivers of tribal sovereign immunity must be unequivocal and express. **See** . . . **Santa Clara Pueblo**, 436 U.S. at 58. The State and Tesuque had the opportunity to define the limitations of their agreement, and we will not infer an intent on either party's behalf contrary to both the compact's plain language and the policies underlying the protection of tribal sovereign immunity. See Ponder, 2000-NMSC-33, P11; **see** . . . **Kiowa Tribe**, 523 U.S. at 757-60. Thus, we conclude that retroactive application of the compact is inappropriate in this case.

D.

{36} No one disputes that the parties to the gaming compacts sought to ensure a forum and compensation for those injured at the tribal

casinos. However, in this case, neither compact covered the date of Gallegos' alleged injury at Tesuque's casino. Thus, we conclude that neither the 1995 nor the 1997 Compact provides jurisdiction over Tesuque in state court for Gallegos' cause of action. As such, Tesuque's sovereign immunity precludes suit in state court as no waiver of its immunity will be implied under these circumstances. We therefore affirm the district court's dismissal of Gallegos' complaint against Tesuque for lack of subject matter jurisdiction in state court.

III.

{37} We next address whether Tesuque is an indispensable party pursuant to Rule 1-019 NMRA 2002 in an action by Gallegos against Zurich, Tesuque's insurance carrier. Gallegos argues that, first, Tesuque is not an indispensable party as Zurich has failed to make the requisite showing of an impact on Tesuque's economic interests and, secondly, that Zurich has direct duties to Gallegos pursuant to the insurance contract between Zurich and Tesuque that do not implicate Tesuque's interests in this suit. We do not agree and conclude that, under the facts and circumstances of this case, Tesuque as a tribe is an indispensable party in this cause of action against its insurance carrier and dismissal is appropriate.[7]

{38} Gallegos' complaint against Zurich alleged breach of contract for failure to pay medical payments, breach of contract for asserting sovereign immunity, insurance bad faith, and unfair practices under the Trade Practices and Fraud Act. The complaint also alleged that Gallegos had a claim of liability arising from the negligent conduct of Tesuque and its "gaming enterprise," which was covered by Tesuque's insurance policy in force and effect at the time of the incident. Zurich admitted in its answer that it had issued a commercial general liability policy to Tesuque, under which it had paid some of Gallegos' claimed expenses. Zurich pleaded Rule 1-019 as an affirmative defense and, consequently, made a motion to dismiss based on Gallegos' failure to join Tesuque as an indispensable party, which the district court granted. The district court made no formal written findings of fact or conclusions of law but stated at the motion hearing that Tesuque's interests were implicated in the lawsuit and that the insurance contract between Zurich and Tesuque necessitated joinder.

{39} Rule 1-019 sets out a three-part analysis by which the court determines which parties are "needed for just adjudication" in any lawsuit. First, the court must determine if the questioned party is necessary to the litigation. **See** Rule 1-019(A). Second, if that party is deemed necessary, the court must then determine if joinder is possible. Third and finally, if the party cannot be joined, the court decides whether "in equity and good conscience" that party is indispensable to the litigation. Rule 1-019(B). If the party is indispensable, the court dismisses the case for nonidentity. **Id.** "The question of indispensability is a factual question that the district court determines, and the district court decides, in its discretion, whether the suit can continue without a specific party." **Srader**, 1998-NMSC-25, P21. Thus, we review a motion to dismiss based on Rule 1-019 for an abuse of discretion. **Id.** "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." **Sims v. Sims**, 1996-NMSC-78, P 65, 1996-NMSC-78, 122 N.M. 618, 930 P.2d 153.

{40} On appeal, Gallegos argues the district court abused its discretion in determining that Tesuque was a necessary party, because Zurich did not "establish that as a factual matter, the Pueblo of Tesuque's economic interests might be implicated by any relief the court could fashion."

[7] Throughout our review, we are mindful that this case presents itself on a motion to dismiss for failure to join an indispensable party and not a motion to dismiss for failure to state a claim. Thus, we confine our discussion only to the issue of whether Tesuque as a tribe is an indispensable party in Gallegos' suit against Zurich, arising from an incident that occurred at a tribal casino when no compact was in place. Nothing in this opinion speaks to the legal validity or invalidity of Gallegos' claims based on the New Mexico Trade Practices and Fraud Act.

Additionally, Gallegos contends that, since she only seeks money damages from Zurich "for its own bad practices" and not from Tesuque, its interests, if any, arising from the insurance contract with Zurich are not implicated. **See** . . . **United States ex rel. Steele v. Turn Key Gaming, Inc.**, 135 F.3d 1249, 1252 (8th Cir. 1998) (per curiam) (concluding that tribe was not indispensable in tribal president's action to invalidate contracts where tribe supported contract invalidation and had filed suit in state court seeking similar relief as the tribal president and, thus, tribe would not be adversely affected by the litigation). She finds distinguishable those cases which conclude that, where a party seeks to void or set aside a lease or contract between another party and an immune tribe, the tribe is an indispensable party. **See** . . . **Enter. Mgmt. Consultants, Inc. v. United States ex rel. Hodel**, 883 F.2d 890, 893-94 (10th Cir. 1989); **Jicarilla Apache Tribe v. Hodel**, 821 F.2d 537, 539-40 (10th Cir. 1987). She concludes that, given the nature of her causes of action, Tesuque is an unnecessary party and her claims can proceed directly against Zurich without joining Tesuque.[8]

{41} Zurich counters that it only has a duty to Tesuque to pay those sums for which Tesuque becomes "legally obligated" through judgment or settlement, and thus it has no duty to Gallegos. Moreover, Zurich argues that Tesuque as a tribe has an interest in defending any claim against it and its insurance policy, an interest it cannot protect if not a party to the litigation. Under the facts and the posture of this case, we agree.

A.

{42} We begin our analysis with the first section of Rule 1-019, which states in part:

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

Rule 1-019(A). The determination that a party is necessary involves "a functional analysis of the effects of the person's absence upon the existing parties, the absent person, and the judicial process itself." **Srader**, 1998-NMSC-25, P22. However, no precise formula exists. **Confederated Tribes of the Chehalis Indian Reservation**

[8] Gallegos relies on **Lumbermen's Mutual Casualty Co. v. Elbert**, 348 U.S. 48, 52, 99 L. Ed. 59, 75 S. Ct. 151 (1954) to support her argument that an insured is not an indispensable party in a direct action against the insurer, and, thus, the district court abused its discretion in dismissing her claims. We find this case to be inapposite. **Lumbermen's Mutual Casualty Co.** concluded that the Louisiana legislature had provided a statutory direct cause of action against an insurer; thus, the insured was not a necessary party. 348 U.S. at 52. Generally in New Mexico, "in the absence of a contractual provision or statute or ordinance to the contrary . . . the injured party has no claim directly against the insurance company." **Raskob v. Sanchez**, 1998-NMSC-45, P3, 1998-NMSC-45, 126 N.M. 394, 970 P.2d 580. An insurer may be joined in a suit against the insured by the injured party where: "1) the coverage was mandated by law, 2) it benefits the public, and 3) no language of the law expresses an intent to deny joinder." **Id.** Here, Tesuque's insurance coverage was not mandated by law, through compact or otherwise. See id. Thus, we are not persuaded by Gallegos' argument pursuant to **Raskob** that her suit can proceed against Zurich without Tesuque. This Court was unable to locate, nor have the parties cited in briefing, any case discussing whether a tribe is an indispensable party in an action against its insurer in a state where no direct cause of action exists statutorily and one is not provided in the insurance contract. When neither party cites any authority for a proposition, this Court presumes none exists. **See** . . . **In re Adoption of Doe**, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984); Rule 12-213(A)(4) NMRA 2002.

v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991). "Courts demonstrate a willingness to bring in an absent person whenever there exists a reasonable possibility that the person's interests will be affected by the conclusion of an action to which he has not been made a party." **Srader**, 1998-NMSC-25, P22. The determination of whether a particular nonpareil should be joined under Rule 1-019 is "'heavily influenced by the facts and circumstances of each case.'" **Confederated Tribes of Chehalis Indian Reservation**, 928 F.2d at 1498 (quoting **Bakia v. County of Los Angeles**, 687 F.2d 299, 301 (9th Cir. 1982)). Examining the facts and circumstances of this case, we conclude that Tesuque is a necessary party based on the contractual relationship between Tesuque and Zurich as well as Tesuque's interest as a sovereign entity in participating in any litigation where its rights and obligations might be adjudicated.

{43} It is the general rule in an action to void or set aside a contract that all the parties to the contract are indispensable to the litigation. **Enter. Mgmt. Consultants**, 883 F.2d at 894 ("'No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.'" (quoting **Jicarilla Apache Tribe**, 821 F.2d at 540)); **United States ex rel. Hall v. Tribal Dev. Corp.**, 100 F.3d 476, 479 (7th Cir. 1996) ("A judicial declaration as to the validity of a contract necessarily affects . . . the interests of both parties to the contract."). Clearly, an insurance policy is a contract between the insured and the insurer. **See** . . . **Jaramillo v. Providence Washington Ins. Co.**, 117 N.M. 337, 340-43, 871 P.2d 1343, 1346-49 (1994). Gallegos, however, is correct that this case does not require the district court to set aside or void the insurance contract between Zurich and Tesuque to resolve her claims. Nonetheless, this lawsuit would require that the court interpret the provisions of the insurance contract, as well as determine the duties and responsibilities under the insurance policy of each of the three parties in relation to each other, as understood by the contracting parties. See Ponder v. State Farm Mut. Auto. Ins. Co., 2000-NMSC-33, P11, 2000-NMSC-33, 129 N.M. 698, 12 P.3d 960; **see also** . . . **N.M. Physicians Mut. Liab. Co. v. LaMure**, 116 N.M. 92, 95, 860 P.2d 734, 737 (1993) ("The parties to an insurance contract may validly agree to extend or limit insurance liability risks."). Indeed, Gallegos' asserted causes of action inherently involve the examination of the policy and an examination of the relationship of the insurer-insured to determine any duty Zurich might have to Gallegos, and Tesuque's role, if any, in the fulfillment of that duty.[9] **See** . . . **Sanchez v. Herrera**, 109 N.M. 155, 159, 783 P.2d 465, 469 (1989) ("The reasonable expectations of the insured . . . provide the criteria for examining an insurance contract on the basis both of the actual words used and of unresolved issues that the insurance company has an obligation to address."). We cannot ignore that Plaintiff asks the court to pass judgment on the conduct of Zurich under the policy pursuant to her claims for no-fault medical payments, insurance bad faith, and unfair trade practices. The propriety or impropriety of Zurich's performance under the insurance policy is of substantial interest to Tesuque, which has paid for the insurance protection in question and on whose behalf Zurich acts.

{44} New Mexico has recognized in the past that contract interpretation as to language or performance necessitated the presence of the contracting parties. **See** . . . **State ex rel. Walker v. Hastings**, 79 N.M. 338, 339-40, 443 P.2d 508, 509-10 (stating that where state contracted with defendant and defendant's actions under that contract as to third party, who had its own agreement with the state, were at issue, "that the nature and extent of the questions which must necessarily be resolved in the interpretation of the [agreement], the fact that the [state] is one of the parties to [the] agreement, and the fact that [defendant] was acting as the agent [of the state] . . . makes the [state] an indispensable party."). We are persuaded under the facts and circumstances of this case that Tesuque has a valid interest in

[9] We decline to discuss the specific provisions of the insurance policy in this case. Although no one disputes its existence, the policy itself was not in front of the district court.

the "judicial determination of the . . . effect of [the insurance] contract and the rights of the parties thereto," which makes it necessary to the lawsuit. **Id.** at 341, 443 P.2d at 511; **see** . . . **Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians**, 862 F. Supp. 995, 1003-04 (W.D.N.Y. 1994) (concluding that tribe was indispensable in franchise agreement litigation as tribe's interest in the language of the franchise agreement to which it was a party was significant).

{45} Our conclusion that Tesuque is a necessary party is further supported by the fact that we cannot say that the interests of Zurich and Tesuque in this contract and this lawsuit are so identical as to preclude the necessity of Tesuque in this litigation. See Golden Oil Co. v. Chace Oil Co., 2000-NMCA-5, P13, 2000-NMCA-5, 128 N.M. 526, 994 P.2d 772 ("The interests of a necessary party will necessarily be impaired and impeded when a trial court rules in its absence, unless the interests of the absentee and one of the extant parties are truly identical"); **cf**. . . . **Turn Key Gaming, Inc.**,135 F.3d at 1252 (factoring into its indispensability analysis the identity of interests between qui tam plaintiff tribal president and tribe). In a liability action against Tesuque, Zurich and Tesuque presumably would share an identity of interests in the outcome of the litigation as Zurich has a duty to defend its insured. **See** . . . **Found. Reserve Ins. Co. v. Mullenix**, 97 N.M. 618, 620, 642 P.2d 604, 606 (1982); **see also** 7C John Alan Appleman, **Insurance Law and Practice**, § 4682, at 16 (1979) ("The insurer is bound to defend the insured against suits alleging facts and circumstances covered by the policy, even though such suits are groundless, false or fraudulent."). Here, however, because Gallegos is suing Zurich for alleged violation of its duties as Tesuque's insurer, we will not presume that Zurich can or will fully represent the interests of Tesuque under the policy, and thus, Tesuque is necessary to the litigation.

{46} Moreover, the fact that Zurich cannot articulate the exact amount of Tesuque's rate increase, if any, or other economic impact to Tesuque, is not fatal to Zurich's claim, as Gallegos contends. The court may consider the "economic impact caused by disputes between non-Indian parties when analyzing the practical effects of permitting litigation without a tribe's inclusion." **Srader**, 1998-NMSC-25, P25. However, economic interests are not the only interests cloaked in the protection of Rule 1-019. **See, e.g.**, **Davis v. United States**, 192 F.3d 951, 959 (10th Cir. 1999) ("The Tribe's claimed interest in determining eligibility requirements [to participate in specially funded programs] and adopting ordinances embodying those requirements is neither fabricated nor frivolous."); **State v. Valdez (In re Valdez)**, 88 N.M. 338, 341, 540 P.2d 818, 821 (1975) (concluding that state department of hospitals was indispensable in a proceeding questioning adequacy of treatment at mental hospital as it had "a great deal of interest in a proceeding which could very possibly result in an order greatly affecting its policies and operations"). Moreover, "Rule 19 does not require an absolute showing that [a party's] interest **will necessarily** be harmed by nonjoinder; rather, it is concerned that nonjoinder 'may' result in such harm." 4 James Wm. Moore, **Moore's Federal Practice**, § 19.03[3][c], at 19-50 (3d ed. 2001); **Davis**, 192 F.3d at 958 (interpreting plain language of "claims an interest" in federal Rule 19 as not to require actual possession of an interest).

{47} Most compelling, however, is that the party in question in this case is a tribe. Tesuque as a tribal entity has an interest in protecting its tribal resources and controlling their dissipation and allocation under its insurance contract. **See** . . . **Atkinson v. Haldane**, 569 P.2d 151, 169 (Alaska 1977). Indeed, as a tribe, Tesuque has a compelling interest "in protecting its sovereign right to litigate on its own behalf and in the forum of its choice." **Golden Oil Co.**, 2000-NMCA-5, P13; see Srader, 1998-NMSC-25, P33. Thus, we conclude that, in Gallegos' claims against Tesuque's insurer, Tesuque is a necessary party, because the interpretation and construction of the contract between Zurich and Tesuque may affect Tesuque's interest as a sovereign entity in that contract, and any "disposition of the action in [its] absence may . . . impair or impede

[Tesuque's] ability to protect [its] interest." Rule 1-019(A)(2)(a). Tesuque is a necessary party to this action against Zurich based on the insurance contract between Tesuque and Zurich and the nature of Gallegos' causes of action.

B.

{48} Once the court determines that a party is necessary, it evaluates whether anything precludes joinder of that party in the lawsuit. As discussed in the first section of this opinion, Tesuque is a tribal entity which enjoys sovereign immunity from suit in state court and thus cannot be joined absent an unequivocal and express waiver or the authorization of Congress. **See** . . . **Santa Clara Pueblo v. Martinez**, 436 U.S. 49, 58, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978); see also Srader, 1998-NMSC-25, P29. As we determined in the preceding section of this opinion: no compact provides the state court with jurisdiction over Tesuque, Tesuque has not explicitly waived its sovereign immunity to participate in this lawsuit, and Congress has not authorized such an action against Tesuque. We need not revisit our analysis as to this point. Tesuque cannot be joined in this action. See Srader, 1998-NMSC-25, P29.

C.

{49} If the court concludes that a party should be joined if feasible but cannot be joined, as in this case, Rule 1-019(B) provides:

> [T]he court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Thus, employing these enumerated, but nonexclusive, factors, the court must determine whether the litigation can proceed without the necessary party or must be dismissed, the necessary party being deemed "indispensable." See State ex rel. Coll v. Johnson, 1999-NMSC-36, 128 N.M. 154, 990 P.2d 1277.

{50} The first factor for the court's consideration is "to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties." Rule 1-019(B). The analysis under this factor mirrors that of the "interest" inquiry of Rule 1-019(A). **Srader**, 1998-NMSC-25, P31. We have already determined above that the interpretation of the insurance contract as to Zurich could prejudice the interests of Tesuque as an absent party. Thus, "we need not revisit our conclusion concerning the substantial interests implicated by this suit." **Id.** Second, we are persuaded that no court-fashioned measures could alleviate the possible prejudice to Tesuque from not being present in an adjudication of its rights and duties under a contract to which it is a party. Contract interpretation, by its nature, requires the court to "ascertain the intentions of the contracting parties" in making their agreement. **Strata Prod. Co. v. Mercury Exploration Co.**, 1996-NMSC-16, 121 N.M. 622, 630, 916 P.2d 822, 830. No remedy can substitute for Tesuque's lack of voice as a sovereign entity in these proceedings.

{51} Finally, the Plaintiff's lack of remedy in state court, or the adequacy thereof, is not a factor to be considered in the indispensability analysis by the court where the necessary party is a tribal entity. **Srader**, 1998-NMSC-25, P33. This Court is aware that the affirmance of the district court's dismissal of Gallegos' causes of action may leave her without a remedy in state court. While we are "sympathetic to [Gallegos']

frustration at [her] inability to achieve jurisdiction over the party at the heart of the dispute, [we] cannot ignore the rule of law on joinder of parties." **Confederated Tribes of the Chehalis Indian Reservation v. Lujan**, 129 F.R.D. 171, 175 (W.D. Wash. 1990). Equally, we cannot ignore the sovereign interests of Tesuque. "As a matter of public policy, the public interest in protecting tribal sovereign immunity surpasses a plaintiff[']s interest in having an available forum for suit." **Srader**, 1998-NMSC-25, P33. Indeed, "'this is not a case where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.'" **Enter. Mgmt. Consultants**, 883 F.2d at 894 (quoting **Wichita & Affiliated Tribes of Okla. v. Hodel**, 252 U.S. App. D.C. 140, 788 F.2d 765, 777 (D.C. Cir. 1986)).

{52} Given the procedural posture of this case and the parties involved, we cannot agree that the district court abused its discretion in its determination that Tesuque was an indispensable party under Rule 1-019, which necessitated the dismissal of Gallegos' suit against Zurich in its entirety. Gallegos has failed to demonstrate that the district court's decision was "clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." **Sims**, 1996-NMSC-78, P65.

IV.

{53} In conclusion, we affirm the dismissal of Gallegos' complaint against Tesuque on the basis that Tesuque is a sovereign entity which had not expressly and unequivocally waived its immunity from suit in state court or consented to state court jurisdiction through a compact or otherwise. Furthermore, we affirm the dismissal of Gallegos' complaint against Zurich, Tesuque's insurance carrier, for failure to join Tesuque as an indispensable party pursuant to Rule 1-019 as Tesuque is a sovereign entity whose interests might be impeded or impaired if its obligations and rights under a contract to which it is a party were adjudicated in its absence.

{54} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

PATRICIO M. SERNA,
Chief Justice

PAMELA B. MINZNER,
Justice

NEIL CANDELARIA,
District Court Judge, (sitting by designation)

WENDY YORK,
District Court Judge, (sitting by designation)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 2002-NMSC-025

Filing Date: July 24, 2002

Docket No. 26,683

STATE OF NEW MEXICO,

Plaintiff-Respondent,

v.

ALFRED ANGEL,

Defendant-Petitioner.

ORIGINAL PROCEEDING ON CERTIORARI,
Michael E. Vigil, District Judge

Released for Publication August 16, 2002
Phyllis H. Subin, Chief Public Defender
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for Petitioner.

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for Respondent.

OPINION

BACA, Justice.

{1} We granted our writ of certiorari to the Court of Appeals pursuant to NMSA 1978, § 34-5-14 (1972), to decide whether this Court should abandon its long-standing jurisdictional exception to the double jeopardy prohibition against successive prosecutions. However, because we conclude that jeopardy did not attach when the magistrate court accepted Defendant's plea but dismissed the charges prior to sentencing, the Double Jeopardy Clause did not bar Defendant's subsequent prosecution in district court. We, therefore, do not reach the jurisdictional exception issue. Accordingly, we reverse the Court of Appeals as to the license charge and affirm, but on different grounds, the felony DWI conviction.

I.

{2} Defendant Angel was arrested on Saturday, January 16, 1999, and charged by criminal complaint with misdemeanor aggravated driving while under the influence of intoxicating liquor (DWI) and related traffic offenses, including driving with a suspended or revoked license. On January 20, the first business day following his arrest, the arresting officer filed a criminal complaint in magistrate court. Defendant pleaded no contest to all charges, and the court accepted the plea and signed the plea agreement. No prosecutor was present. Defendant was released on bond.

{3} On March 15, 1999, a notice of sentencing was sent to the District Attorney's Office stating that sentencing on Defendant's case was set for April 1, 1999. At the sentencing hearing, the State sought to dismiss the criminal complaint so that it could pursue felony DWI and related traffic offenses in district court. On April 22, 1999, the complaint was dismissed without prejudice so that the State could pursue the felony charges.

{4} On August 20, 1999, a grand jury returned an indictment charging Defendant with the same crimes as those filed in magistrate court, except that the DWI was charged as a felony pursuant to NMSA 1978, § 66-8-102(G) (1999). Defendant first appeared in district court on September 13, 1999, and pleaded not guilty to the charges. When discussing bond, the State presented a pre-sentence report from a pending Albuquerque DWI charge which revealed that Defendant had fourteen DWI arrests and a minimum of seven prior convictions. The court set bond at $ 20,000

cash, stating that it was not "comfortable" with releasing Defendant in light of his extensive DWI record.

{5} On February 10, 2000, Defendant filed a motion to dismiss the indictment and remand the case to magistrate court. Defendant argued that his prior no-contest plea in magistrate court was valid and that the district court prosecution violated double jeopardy. The State responded that it was within the magistrate court's discretion to dismiss the complaint upon learning that the misdemeanor DWI was in fact a felony DWI, that the district court prosecution did not violate double jeopardy protections because jeopardy did not attach to Defendant's no-contest plea prior to sentencing, and that the jurisdictional exception applied. The State represented to the court that the District Attorney's office first became aware of the case when it received the April 1 notice of sentencing. The State indicated that an assistant district attorney appeared at the sentencing hearing and notified the judge that the District Attorney's office knew at that point that it was actually a felony DWI. At the hearing on the motion to dismiss, Defendant argued that the magistrate court's acceptance of his no-contest plea constituted a conviction for double jeopardy purposes and thus prohibited the State from subsequently prosecuting him for the same and greater offenses in district court. The district court denied the motion to dismiss, concluding that the magistrate court did not abuse its discretion in dismissing the complaint, and that double jeopardy was not implicated because the magistrate court had not yet sentenced Defendant. Defendant subsequently entered a plea of guilty to felony DWI and driving with a suspended or revoked license. He reserved the right to appeal the denial of his motion on double jeopardy grounds.

{6} The Court of Appeals issued a memorandum opinion which affirmed the denial of Defendant's motion to dismiss as to the felony DWI conviction but reversed as to the license charge. The Court found that the jurisdictional exception applied to the DWI charge because, although jeopardy had attached when the court accepted Defendant's no-contest plea, that court did not have jurisdiction to hear the felony DWI. Thus, the jurisdictional exception permitted the subsequent felony DWI prosecution in district court. However, the Court concluded that because the magistrate court had jurisdiction over the misdemeanor license charge, the subsequent prosecution in district court on that charge violated double jeopardy.

II.

{7} The Double Jeopardy Clause of the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V; **see also** N.M. Const. art. II, § 15 ("Nor shall any person be twice put in jeopardy for the same offense . . ."). This guarantee applies to the states through the due process clause of the Fourteenth Amendment. **Benton v. Maryland**, 395 U.S. 784, 794, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969). Three situations implicate double jeopardy protections: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. **North Carolina v. Pearce**, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969), **overruled on other grounds by** . . . **Alabama v. Smith**, 490 U.S. 794, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989). Defendant argues that this case calls into question the constitutional right to be free from being prosecuted again for the same offense after conviction. We disagree. In order to successfully claim double jeopardy, a former jeopardy must have occurred - there must have been a previous proceeding in which jeopardy attached. **See** . . . **Serfass v. United States**, 420 U.S. 377, 390-91, 43 L. Ed. 2d 265, 95 S. Ct. 1055 (1975); **United States v. Santiago Soto**, 825 F.2d 616, 618 (1st Cir. 1987). We do not believe jeopardy attached to Defendant's plea prior to being sentenced on the misdemeanor charges.

{8} The concept of "attachment of jeopardy" arises from the idea that there is a point in a criminal proceeding at which the constitutional purposes and policies behind the Double Jeopardy

Clause are implicated and the defendant is put at risk of conviction and punishment. **Serfass**, 420 U.S. at 388-91. It is only after a defendant is deemed to have been put in former jeopardy that any subsequent prosecution of the defendant brings the guarantee against double jeopardy into play. **See id.** at 393; **see also Crist v. Bretz**, 437 U.S. 28, 33, 57 L. Ed. 2d 24, 98 S. Ct. 2156 (1978). In a criminal trial, jeopardy attaches at the moment the trier of fact is empowered to make any determination regarding the defendant's innocence or guilt. **Serfass**, 420 U.S. at 388. The United States Supreme Court has held that jeopardy attaches in a jury trial when the jury is empaneled and sworn, and in a bench trial when the court begins to hear evidence. **Id**. The United States Supreme Court has yet to decide when jeopardy attaches to a guilty plea, but it has assumed that jeopardy attaches at least by the time of sentencing on the plea. **See** . . . **Ricketts v. Adamson**, 483 U.S. 1, 8, 97 L. Ed. 2d 1, 107 S. Ct. 2680 (1987). In **State v. Nunez**, 2000-NMSC-13, P28, 129 N.M. 63, 2 P.3d 264, this Court stated that "in the case of a guilty plea or plea of nolo contendere, jeopardy attaches at the time the court accepts the defendant's plea." However, the issue in **Nunez** was not at what point jeopardy attaches to a guilty plea or plea of nolo contendere, but rather whether the defendant's guilty plea waived his double jeopardy claims. Further, in **Nunez** all of the defendants were first put in jeopardy by a civil forfeiture proceeding. Thus, a determination of when jeopardy attaches in a criminal trial was unnecessary to the issues discussed in that case.

{9} **Nunez** relied upon **State v. James**, 94 N.M. 7, 9, 606 P.2d 1101, 1103 , **rev'd**, 93 N.M. 605, 603 P.2d 715 (1979), for this proposition. That case, however, was reversed when this Court decided that the Court of Appeals erred when it determined on the record before it that the defendant had in fact pleaded guilty to the crime. **State v. James**, 93 N.M. 605, 603 P.2d 715 (1979). Because this Court decided that the Court of Appeals lacked substantial evidence to determine that factual question, we did not determine whether jeopardy would have attached at that point. Conversely, in **State v. Alingog**, 117 N.M. 756, 877 P.2d 562 (1994), we suggested that jeopardy did not attach on a guilty plea until judgment is entered. As will be shown, however, that language is also dicta. Thus, the question of when jeopardy attaches to a guilty plea or plea of nolo contendere remains unanswered in New Mexico.

{10} In denying Defendant's motion to dismiss, the district court found that double jeopardy was not implicated because the magistrate court had not yet sentenced Defendant. The district court appears to have been persuaded by the authorities advanced by the State in its response to the motion to dismiss, including **Alingog**, 117 N.M. 756, 877 P.2d 562, **Brown v. Ohio**, 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977), and **United States v. Santiago Soto**, 825 F.2d 616 (1st Cir. 1987). These cases all support the principle that jeopardy attaches when the court enters a judgment and imposes a sentence on the guilty plea, not when the plea was accepted.

{11} In **Alingog**, the defendant was charged in a single proceeding with several misdemeanors and a single felony. 117 N.M. at 758, 877 P.2d at 564. Before trial, the defendant pleaded no contest to the misdemeanors and then asked the court to dismiss the felony charge, arguing double jeopardy prohibited a successive prosecution on the greater offense. **Id.** at 758-59, 877 P.2d at 564-65. The state argued against dismissal on the grounds that the offenses were not the same for double jeopardy purposes. **Id.** at 759, 877 P.2d at 565. The court took the motion under advisement until after the state presented its case on the felony and the defendant renewed her motion to dismiss. **Id.** at 758-59, 877 P.2d at 564-65. The trial court then granted defendant's motion, finding the felony a greater offense of the misdemeanor. **Id.** at 759, 877 P.2d at 565.

{12} On appeal, the state, relying on **Ohio v. Johnson**, 467 U.S. 493, 81 L. Ed. 2d 425, 104 S. Ct. 2536 (1984), argued for the first time that because defendant had not been sentenced on the misdemeanors at the time the felony was dismissed, the misdemeanor convictions did not bar the felony prosecution. **See State v. Alingog**,

116 N.M. 650, 653, 866 P.2d 378, 381 . The Court of Appeals agreed and held that, although **Johnson** had not been raised below, the doctrine of fundamental error excused the state's failure to preserve this issue in the trial court. **See id.** at 653-56, 866 P.2d at 381-84.

{13} On certiorari, this Court noted that, under **Johnson** and **Brown**, the guilty plea did not bar a subsequent prosecution until sentence had been entered on the plea. **Alingog**, 117 N.M. at 759-60, 877 P.2d at 565-66. We stated:

> **Brown** supports the principle that a defendant who pleads guilty to **and is sentenced for** a lesser included offense cannot be reprosecuted for a greater offense arising from the same act. **See** 432 U.S. at 169, 97 S. Ct. at 2227 (stating double jeopardy "forbids successive prosecution and cumulative punishment for a greater and lesser included offense"); **United States v. Santiago Soto**, 825 F.2d 616, 619 (1st Cir. 1987) (holding that under **Brown**, jeopardy attaches not upon acceptance of guilty plea, but at time of imposition of sentence and entry of judgment); **United States v. Combs**, 634 F.2d 1295, 1298 (10th Cir. 1980) (holding that acceptance of guilty plea immediately before trial for greater offense was not a criminal prosecution because "until entry of judgment and sentencing on the accepted guilty plea, defendant had not been formally convicted"), **cert. denied**, 451 U.S. 913, 101 S. Ct. 1987, 68 L. Ed. 2d 304 (1981); **cf**. . . . **Johnson**, 467 U.S. at 501-02, 104 S. Ct. at 2541-43 (distinguishing **Brown** because the defendant there had been sentenced, and therefore, "convicted in a separate proceeding"; and stating the Court did not believe to be present "the principles of finality and prevention of prosecutorial overreaching applied in **Brown"**).

Id. This Court ultimately reversed the Court of Appeals, holding that the state had failed to preserve this argument and that this unpreserved error did not result in a miscarriage of justice. 117 N.M. at 761, 877 P.2d at 567. Although the quoted paragraph was dicta, we believe it was correct in concluding that, had the issue been properly preserved, the guilty plea would not have been a bar to the subsequent prosecution until sentence had been entered on the plea.

{14} In **Santiago Soto**, the defendant entered a plea of guilty in a combined plea and sentencing hearing. 825 F.2d at 617. However, the district court rejected the plea moments later because it questioned the plea's factual basis. **Id.** Then, without sentencing the defendant, the court dismissed the charge sua sponte. **Id.** The defendant did not object to the vacation of his plea, and a federal grand jury later indicted him on two felony charges arising out of the same conduct. **Id.** The defendant moved to dismiss the felony charges on double jeopardy grounds. **Id.** at 617-18. On appeal, the court assumed that the misdemeanor and felony offenses were the same for double jeopardy purposes and went on to consider whether jeopardy attached when the defendant pleaded guilty to the misdemeanor charges but was not sentenced. **Id.** at 618. The court held that "jeopardy did not attach when the district court accepted the guilty plea to the lesser included offense and then rejected the plea without having imposed sentence and entered judgment." **Id.** at 620. The court reasoned that "the mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict or with an entry of judgment and sentence." **Id.**

{15} The purpose of the constitutional protection against successive prosecutions "is to prevent the government from harassing citizens by subjecting them to multiple suits until a conviction is reached, or from repeatedly subjecting citizens to the expense, embarrassment and ordeal of repeated trials." **State v. Lujan**, 103 N.M. 667, 671, 712 P.2d 13, 17 . Defendant's subsequent prosecution in district court violates none of the interests protected by double jeopardy. Defendant's plea to misdemeanor DWI did not carry the same expectation of finality and tranquility that comes with a jury's verdict or with an entry of judgment and sentence, especially in

light of his pending DWI charges and numerous prior DWI arrests and convictions. Furthermore, Defendant did not experience the expense, strain, or embarrassment of a trial. This is not a case where the prosecution has had an opportunity to rehearse its presentation of proof and is now trying to get a conviction a second time. Rather, to end prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws.

III.

{16} We hold that jeopardy did not attach when the magistrate court accepted Defendant's no-contest plea to the misdemeanor offenses and then dismissed the charges prior to sentencing. As a result, Defendant's subsequent prosecution in district court did not implicate double jeopardy protections. Accordingly, we reverse the Court of Appeals as to the license charge, and affirm, but on different grounds, the felony DWI conviction.

{17} IT IS SO ORDERED.

JOSEPH F. BACA,
Justice

WE CONCUR:

PATRICIO M. SERNA,
Chief Justice

GENE E. FRANCHINI,
Justice

PAMELA B. MINZNER,
Justice

PETRA JIMENEZ MAES,
Justice