SUPREME COURT
STATE OF NEW MEXICO
COMMEMORATIVE
APPELLATE OPINIONS

VOLUME 6

JUSTICE KENNETH B. WILSON

1990

FOREWORD

Honorable Charles C. Currier (Retired)
Fifth Judicial District Court

Although it may be a cliché that life experiences affect, if not inform, our decisions, the life experiences of Justice Ken Wilson (Ken, with respect), have affected and informed his decisions. After high school, Ken worked in the oil fields of the Permian Basin in Southeast New Mexico and West Texas. A chance opportunity opening occurred with the New Mexico State Police and Ken joined the force, He quickly became the youngest sergeant (supervisor level) at the time with NMSP. Not satisfied with just enforcing the law, Ken decided to become a lawyer. One problem was he did not have a bachelor's degree. The idea of spending seven years in college was daunting but, nevertheless, Ken applied to and was admitted to Baylor University. Ken's tenacity allowed him to obtain both his bachelor's degree and law degree in only four years.

Ken's legal career and personal life continued to demonstrate tenacity. Ken was a part-time cattle rancher and, after over forty years, continues to be a roper—header not heeler. Ken's legal career includes all facets of the law. Not many attorneys can boast of being first chair trial attorneys in civil jury trials, representing both plaintiffs and defendants and as a prosecutor and defense attorney, in criminal cases.

In November 1989, Justice Larrabee unexpectedly resigned. His seat was up for election in 1990. Ken decided to apply even though, if appointed, he would have to run a statewide campaign in his first year in office. Ken had never run a political campaign before. Undeterred, Ken went full bore ahead, just like a good header. He applied and was appointed on December 29, 1989.

Ken's service on the Supreme Court, unfortunately in my view, was short lived. Eleven months after his appointment, and following a statewide race, Ken ceded his seat to Judge Franchini, a popular (well deserved) and long serving district court judge from Albuquerque. Nevertheless, while campaigning throughout New Mexico, Ken completed his duties as a member of the Supreme Court until, literally, two days before Justice Franchini was sworn in. Because of Ken's short tenure on the Court the number of decisions from which we can discern his judicial philosophy, is limited. However, Ken authored fourteen majority opinions, three dissents and two concurrences in his eleven months on the Supreme Court.

From these few cases we can discern at least some of Ken's guiding principles. Perhaps best summarized in Justice Wilson's opinion in *Grantland v. Lea Regional Hospital*, 1990-NMSC-076. In Grantland, plaintiff filed an application with the Medical Legal Panel as required under the Medical Malpractice Act. A dispute arose as to whether defendant was covered under the act. While that issue was being contested, the three-year statute of limitations expired. It turned out that the defendant was not covered by the act. Plaintiffs filed their complaint in district court. Defendant claimed the defense of the statute of limitations. The trial court denied the defense and defendant appealed. The Court Appeals reversed the trial court.

The most junior Justice Wilson, in the face of a vigorous dissent by his most senior Chief Justice, reversed the Court of Appeals. In explaining his ruling, Justice Wilson quoted from *Otero v. Zouhan* 1985-NMSC-021, stating that, "We see no justice in strictly applying the Act now to void the complaint filed and thus circumvent the tolling provision of the Act that would have applied to save [claimant's] cause of action if the trial court's ruling and the time consumed in appellate proceedings had not intervened. Such "Catch-22's" are procedural anomalies that do not deserve perpetuation." This was a classic example of justice prevailing over mere procedure.

In *McConal Aviation Inc. v. Commercial Aviation Insurance Co.,* 1990-NMSC-093, Justice Wilson explained and expanded the collateral source rule. New Mexico practitioners were reminded that a settlement by a defendant in a negligence claim cannot be used to offset damages in a contract dispute with a separate defendant, even if related to the same incident. In his opinion, Justice Wilson reached out to a remote federal district court medical malpractice case, *Rose v. Hakim*, 335 F. Supp 122 (D.C.C. 1971). There, several defendants were sued but some settled. The non-settling tortfeasor, after trial, was not allowed an offset to the judgment against it for what the other defendants paid in settlement. This principle has helped to encourage settlements in New Mexico contract, tort and medical malpractice cases.

In criminal law, Justice Wilson correctly discerned the intent of the legislature in enacting the statute against forgery. In *State v. Ruffins*, 1990-NMSC-035, Justice Wilson resolved conflicting opinions in the Court of Appeals. The act of forgery is completed, and not merely attempted, when the instrument is delivered, regardless of whether it is honored. The statute, §34-5-14, has not been amended subsequent to that opinion.

Although Justice Wilson's tenure on the Supreme Court was short lived, his presence was, and is, still being cited by practitioners throughout New Mexico. Ken continues to practice law, which he loves but not quite as much as roping, header not heeler.

BIOGRAPHY

Justice Kenneth Belton Wilson was born on February 23, 1938, in Dickens, Texas. Wilson has had an interesting breadth of jobs throughout his life, including oilfield worker, police officer, rancher, businessperson, and attorney. From 1960 to 1970, he served as a New Mexico State Police Officer. While with the NMSP, Justice Wilson filled a number of roles: Search and Rescue Team member, Pistol Team member, Training Academy Instructor, Highway Patrol Officer, and ultimately Sergeant. He also chaired the Advisory Committee of the Department of Public Safety.

In 1973, Justice Wilson received his Bachelor of Business Administration from Baylor University in Waco, Texas. Wilson received his Juris Doctor from Baylor Law the following year. He was admitted to practice law in Texas in 1974 and New Mexico in 1975. At the federal level, Justice Wilson was admitted to practice in the Western District of Texas in 1977 and, later, the District of New Mexico.

Before becoming a judge, Justice Wilson was a trial attorney in Roswell, New Mexico for more than a decade, specializing in civil, criminal, and personal injury law. Wilson also worked as an Assistant District Attorney in both Lincoln and Chaves Counties. In addition, he was a member of the American Bar Association, New Mexico Trial Lawyers Association, and Roswell Trial Lawyers.

In 1989, New Mexico Governor Garrey E. Carruthers appointed Wilson to replace Supreme Court Justice Charles B. Larrabee upon his retirement. During his tenure, Justice Wilson held the Hanna seat. He served as a Justice from December 29, 1989, until November 30, 1990, after a narrow defeat by Gene E. Franchini in that year's general election.

Upon leaving the bench, Justice Wilson returned to private practice. Wilson worked independently and at the law firm now named Hennighausen Olsen & McCrea, L.L.P. for many years, arguing before the New Mexico Court of Appeals as recently as 2015. He also taught at the Federal Law Enforcement Training Center in Artesia, New Mexico. Justice Wilson lives on a farm outside of Roswell, where he raises competitive Quarter Horses. Wilson and his family have a long history of competing in calf roping events. Riding family horse "Cutie," he was named New Mexico's 2005 Team Roping Rookie of the Year by the American Quarter Horse Association.

NEW MEXICO SUPREME COURT OFFICIAL CITATIONS

JUSTICE KENNETH B. WILSON

NEW MEXICO SUPREME COURT CASES REPORTED

JUSTICE KENNETH B. WILSON

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-018

Filing Date: February 14, 1990, Filed. As Corrected March 12, 1990

Docket No. 17,965

GEMMA O. ROSELLI,

Plaintiff-Appellee,

v.

RIO COMMUNITIES SERVICE STATION, INC., a New Mexico corporation, THE ESTATE OF VITO ROSELLI, Deceased, and VINCENT R. ROSELLI, individually, and in his capacity as personal representative of the Estate of Vito Roselli,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
Mayo T. Boucher, District Judge

Rhodes & Salmon
William C. Salmon
Albuquerque, New Mexico

for Appellants.

Eaves, Darling, Anderson & Porter
Robert D. Gorman
Albuquerque, New Mexico

for Appellee.

OPINION

WILSON, Justice.

{1} Rio Communities Service Station, Inc. (Rio), Vito Roselli's Estate (Estate) and Vincent R. Roselli (Vincent), defendants-appellants, appeal the trial court's order and partial final summary judgment in favor of Gemma O. Roselli (Gemma), plaintiff-appellee. We reverse and remand for a trial on the merits.

FACTS

{2} In 1974 Vito Roselli (Vito) married Gemma. At that time, Vito separately owned all Rio's stock and the land beneath Rio, and was Rio's president. Gemma separately owned a personal residence, household furnishings, and a vehicle. The couple later transmuted their separate property into community property, and Gemma became an officer and director of Rio. Vincent, Vito's son from a prior marriage and also a Rio officer and director, began working at Rio in July 1973. He claims that in 1976, Vito orally promised him forty-nine percent of Rio's stock if he worked at Rio for five years. Vincent completed five years' work at Rio in 1981 and later obtained blank stock certificates, for forty-nine percent of Rio's stock, which Vito did not sign. The parties dispute Vito's intent to transfer Rio stock to Vincent. Vito fixed compensation amounts for himself and Vincent, and use Rio funds for personal expenses. Vincent and Gemma knew approved of Vito's use of Rio funds. On June 18, 1981, Vito and Gemma bought two Northern Life Insurance Company (Northern) policies, totaling $30,351.39, naming Gemma as beneficiary. Vito was the policies' owner and insured, and Rio paid the premiums. In March 1983 Vito named Vincent beneficiary of these policies, without Gemma's knowledge. Vito also directed Northern to mail policy information to his office, rather than his home. In May 1983 Vito began an extra-marital affair, which Gemma discovered at trial. Vincent alleges that Gemma also had an extra-marital affair.

{3} On September 22, 1983, Vito and Gemma executed a warranty deed conveying the land to Rio. Gemma claims she executed the deed in exchange for Vito's oral promise to leave her all his property at his death. She also claims Vito did not intend to transfer the land's title to Rio at that time. The couple kept the deed at home. A few years before his death, Vito gave Vincent the deed and told him to take it home. Vincent kept the deed in his home floor safe, along with personal papers and some corporate insurance papers. Vincent never looked at the deed, and Vito never discussed it with him.

{4} On September 27, 1983, Vito executed a will leaving Gemma all his property, except for $100 bequests to his children. Upon execution, Vito told a testamentary witness that he signed the will only to satisfy Gemma and he intended to make a new will leaving her nothing. That same day Vito bid his accountant to transfer forty-nine percent of Rio's stock to Vincent, claiming the board of directors unanimously approved the transfer. Gemma did not approve the transaction. Corporate books and subsequent tax returns show Vincent owned forty-nine percent of Rio's stock. In May 1984 Vito gave Vincent title to a Chevy El Camino vehicle, but kept possession. Vincent claims Vito intended him to have the vehicle at Vito's death.

{5} On June 21, 1984, Vito executed a new will leaving twenty-six percent of his Rio stock to Vincent, $100 bequests to his other children, a ring to his brother, and the rest of his estate to Gemma. Also on June 21, 1984, Vito bought a Republic National Life Insurance Company (Republic) policy, totaling $20,057, naming Gemma as beneficiary. Rio also paid this policy's premiums. At some point, the parties discussed an agreement in which Gemma would receive all insurance policy proceeds upon Vito's death, and Vincent would receive all interests in Rio. The parties dispute whether they agreed to this plan. In August 1984 Vito and Gemma renewed their marriage vows.

{6} A few days before his death, Vito retrieved the deed from Vincent and took it to a meeting with his attorney on May 19, 1986. At that meeting, Vito told his attorney that Gemma had renounced all interest in the land. On May 21, 1986, Vito died. That same day, Vito's attorney wrote advising him to record the deed. His attorney recorded the deed on May 25, 1986, six days after Vito's death. At Vito's death the Northern policies paid $5,893.09 in Rio debts. The rest of the proceeds, $24,458.30, were paid jointly to Gemma and Vincent and deposited in a certificate of deposit pending appeal. Gemma received the Republic policy proceeds at Vito's death.

{7} On October 20, 1986, Gemma filed an eight-count complaint against the defendants seeking: (1) a declaratory judgment entitling Gemma to one-half the Northern policies' proceeds and seventy-four percent of Rio's stock; (2) quiet title to the land or, if the deed was valid, a lien on Rio's stock equal to her community property interest in the land; (3) remedies for fraud and breach of contract not to revoke the 1983 will; (4) reimbursement of $10,000 insurance proceeds paid on Rio's behalf; and (5) costs and attorney fees. Gemma twice amended her complaint, additionally alleging slander of title and a community property interest in Rio stock registered in Vincent's name.

{8} The defendants denied Gemma's claims and counterclaimed for declaratory judgment that: (1) Rio owns the land; (2) Vincent owns seventy-five percent of Rio's stock, or may recover forty-nine percent of Rio's stock for breach of contract; (3) Vincent and Rio are each entitled to one-half the insurance policies' proceeds; (4) Vincent and Rio are each entitled to one-half the value of Rio funds Vito used for personal expenses, plus a lien on the couple's community property for that amount; (5) Vincent is entitled to the 1979 El Camino vehicle, its reasonable rental value and damages; and (6) defendants are entitled to costs and attorney fees. Gemma denied these counterclaims.

{9} On May 2, 1988, the defendants moved for judgment on the pleadings or partial summary judgment as to Gemma's claims of slander of title, quiet title, fraud, and breach of contract to make or not revoke a will. On June 3, 1988, Gemma moved for summary judgment as to these claims plus the deed's invalidity or Gemma's lien against the land, entitlement to the insurance proceeds, reimbursement of proceeds paid on Rio's behalf, and dismissal of defendants' claims for reimbursement and title to the vehicle. On August 2, 1988, the trial court entered a partial final summary judgment in Gemma's favor as to quiet title to the land, entitlement to insurance policy proceeds, and ownership of the vehicle. The trial court dismissed with prejudice defendants' claims for vehicle ownership and reimbursement. The trial court found genuine issues of material fact existed as to slander of title and Rio's stock ownership, and denied summary judgment on those claims. The defendants appeal the trial court's judgment, which was stayed pending appeal.

ISSUES

{10} On appeal, the defendants claim: (1) the deed was delivered and had consideration; (2) entitlement to the Northern and Republic policies' proceeds; and (3) the trial court erred by granting partial final summary judgment for Gemma. Defendants abandoned their claim of vehicle ownership, listed in the docketing statement, by failing to brief the issue on appeal. **State v. Doe,** 93 N.M. 621, 623, 603 P.2d 731, 733 (Ct. App. 1979). Defendants also claim a right to reimbursement for Rio funds Vito used for personal expenses; however, they cite no authority for this argument as required by SCRA 1986, 12-213. "We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority. We therefore will not do this research for counsel." **In re Adoption of Doe,** 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984) (citations omitted). We will not review this issue since it was briefed without cited authority. **See id.**

{11} Summary judgment is proper as a matter of law when no genuine issues of material fact exist. SCRA 1986, 1-056(C) (Cum. Supp. 1989); **Westgate Families v. County Clerk of Inc. County of Los Alamos,** 100 N.M. 146, 148, 667 P.2d 453, 455 (1983). The trial court may enter a final judgment as to less than all claims presented, "only upon an express determination that there is no just reason for delay." SCRA 1986, 1-054(C)(1). The trial court has discretion to determine whether just reason for delay exists and its decision will not be disturbed, absent an abuse of discretion. **Navajo Ref. Co. v. Southern Union Ref. Co.,** 105 N.M. 616, 617, 735 P.2d 533, 534 (1987); **Banquest/First Nat'l Bank v. LMT, Inc.,** 105 N.M. 583, 585, 734 P. 2d 1266, 1268 (1987). A trial court abuses its discretion when its decision is contrary to logic and reason. **Three Rivers Land Co. v. Maddoux,** 98 N.M. 690, 694, 652 P.2d 240, 244 (1982), **reversed on other grounds, Universal Life Church v. Coxon,** 105 N.M. 57, 59, 728 P.2d 467, 469 (1986); **Newsome v. Farer,** 103 N.M. 415, 420, 708 P.2d 327, 332 (1985). As a matter of policy this court disfavors adjudicative fragmentation of related legal and factual issues, and piecemeal appeals. **Navajo Ref. Co.,** 105 N.M. at 617, 735 P.2d at 534; **Banquest/First Nat'l Bank,** 105 N.M. at 585, 734 P.2d at 1268.

{12} Issues remaining at trial include ownership of Rio's stock, Gemma and Vincent's breach of contract claims, and slander of title. The remaining appellate issues are: (1) delivery of the deed; and (2) ownership of the Northern and Republic policies' proceeds.

I. DELIVERY OF THE DEED

{13} In our view, genuine issues of material fact exist as to delivery of the deed. The record contains conflicting evidence regarding this issue. There is evidence that Gemma executed the deed to Rio in exchange for Vito's promise to leave her all of his property at his death. The record also indicates that Vito executed the 1983 will to fraudulently induce Gemma to sign the deed. In contrast, there is evidence that the parties orally agreed that Vincent would receive all Rio interests and Gemma would receive all insurance proceeds. There is evidence that Vito gave the deed to Vincent, who was at that time an officer and director of Rio. There is also evidence that Vito physically gave the deed to an attorney and made contemporaneous statements that Gemma no longer had any interest in the real estate, which he claimed belonged to the corporation. A question of fact exists as to whether the deed was delivered.

{14} Gemma further asserts that her execution and delivery of the deed to Vito was part of an agreement that Vito would not revoke his 1983 will, leaving Gemma all of his property. Gemma asserts Vito breached that contract, by revoking his 1983 will and giving the deed to Vincent and his attorney.

{15} We note that the law in New Mexico clearly requires that a contract not to revoke a will: (1) have its material provisions stated in the will, (2) be expressly referred to in the will, or (3) be evidenced in a writing signed by the decedent. NMSA 1978, § 45-2-701(A) (Repl. Pamp. 1989); **In re Estate of Vincioni,** 102 N.M. 576, 698 P.2d 446 (Ct. App.), **cert. denied,** 102 N.M. 613, 698 P.2d 886 (1985). Before the alleged breach of contract not to revoke a will can be considered, the statutory requirements must be satisfied. Given these facts, summary judgment as to delivery of the deed was improper.

II. OWNERSHIP OF THE INSURANCE POLICIES' PROCEEDS

{16} We also find that genuine issues of material fact exist as to ownership of the insurance policies' proceeds. As stated, the record contains evidence that the parties may have agreed that Gemma would accept the Republic and Northern policies' proceeds, and in exchange, Vincent would own all Rio's stock. The Republic proceeds were paid to Gemma upon Vito's death. This possible agreement, combined with the other appellate issues presented, raises a question of fact which would preclude summary judgment on this issue.

{17} Gemma claims a community property interest in the Northern policies' proceeds, while Vincent claims those proceeds as Vito's named beneficiary. Before ownership of the proceeds can be determined, we must decide whether one spouse may give community property to a third party, without the other spouse's consent. We must also examine spousal management rights concerning community property.

{18} While we find no New Mexico case directly on point, we are persuaded to adopt the rule that payment of life insurance policy premiums with community funds results in a community property interest in policy proceeds. **See Aetna Life Ins. Co. v. Bunt,** 110 Wash. 2d 368, 754 P.2d 993 (1988). In New Mexico either spouse alone has the power to manage, control, or dispose of the entire community personal property, unless one spouse is otherwise designated. NMSA 1978, § 40-3-14 (Repl. Pamp. 1989). However, the statute alone does not answer the question of whether one spouse alone may give that community property to a third party. This question was examined in **Barela v. Barela,** 95 N.M. 207, 619 P.2d 1251 (Ct. App. 1980). In **Barela** the husband acquired an insurance policy, prior to his marriage, and named his mother as beneficiary. He later married and then died. His wife claimed a one-half interest in the policy's proceeds as community property, on grounds that community funds paid most of the policy's premiums. The **Barela** court noted that New Mexico law allowed Barela, as manager of community personal property, to dispose of community personal property, both before and after the Community Property Act of 1973 was enacted. **See** NMSA 1978, § 40-3-6 et seq.; NMSA 1978, § 40-3-14(A) or (B)(1). That court concluded that Barela's marriage and the community property law did not invalidate his power to designate his mother as the policy's beneficiary.

{19} Other community property jurisdictions impose a fiduciary duty upon spouses managing community property. The Washington state statute controlling management of community property is similar to New Mexico's, giving either spouse the power to manage and dispose of all personal community property. **See** Wash. Rev. Code § 26.16.030 (1987). In applying its management statute, Washington courts have held that each spouse owes a fiduciary duty to the other in the management of the community assets. **In re Marriage of Matson,** 107 Wash. 2d 479, 730 P.2d 668 (1986). Similarly, in **Compton**

v. Compton, 101 Idaho 328, 335, 612 P.2d 1175, 1182 (1980), the Idaho court imposed a fiduciary duty upon spouses managing community assets, based on Idaho community property law and the confidential relationship between spouses.

{20} The state of Texas has also concluded that disposal of community property by the husband in violation of the wife's community property interest is a constructive fraud. In **Carnes v. Meador,** 533 S.W.2d 365, 371 (Tex. Ct. App. 1975), the Texas court stated,

> If a spouse disposes of community property in fraud of the other spouse's rights, the aggrieved spouse has a right of recourse first against the property or estate of the disposing spouse; and, if that proves to be of no avail, then the aggrieved spouse may pursue the proceeds to the extent of her community interest into the hands of the party to whom the funds have been conveyed.

{21} The Texas courts have further observed that a husband may not give his and his wife's interest in community property to a third person to work a fraud upon the wife. A husband's exercise of dominion and control over a community asset, in fraud of the wife's interests, is in effect a gift of the community property to himself. **Martin v. Moran,** 11 Tex. Civ. App. 509, 32 S.W. 904 (1895). "The husband can give **his** interest in the community property to another, but he cannot give his wife's interest to himself." **Id.** at 511, 32 S.W. at 906. (emphasis added).

{22} It appears to be well-settled in California that when life insurance premiums are paid with community property funds, the resulting policy is a community asset. **Life Ins. Co. of N. Am. v. Cassidy,** 35 Cal. 3d 599, 676 P. 2d 1050, 200 Cal. Rptr. 28 (1984). The interest of the surviving spouse may not be defeated by a gift of the policy proceeds to a third party beneficiary without the spouse's consent. A spouse who is placed in this position may recover his or her community share in the proceeds. **Id.** at 602, 676 P.2d at 1053, 200 Cal. Rptr. at 31.

{23} Summarizing the law from other community property jurisdictions, we determine the best rule to be:

> (1) each spouse has the power to manage and dispose of the community's personal property;
> (2) subject to a fiduciary duty to the other spouse; and
> (3) absent intervening equities, a gift of substantial community property to a third person without the other spouse's consent may be revoked and set aside for the benefit of the aggrieved spouse.

{24} In this case, Vito had the power to designate a beneficiary other than his wife pursuant to his management powers. However, he could not exercise that power in violation of his fiduciary duty to Gemma, in fraud of her rights or to give community property to himself. We find that material issues of fact exist which the trial court must determine in light of the law discussed above. Summary judgment was improper on this issue.

{25} We also find these issues inseparably intertwined with those remaining at trial. The parties' breach of contract claims are inseparable from the ownership claims to the land, Rio's stock, and the insurance proceeds. Resolving these issues separately would conflict with our policy against fragmenting issues and piecemeal appeals. We conclude the trial court had good reason to delay entry of judgment, and it abused its discretion by entering a partial final summary judgment on these issues. Accordingly, we reverse and remand for a trial on the merits.

{26} IT IS SO ORDERED.

KENNETH B. WILSON,
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-032

Filing Date: April 3, 1990

Docket No. 18,448

JOHN LORENTZEN,

Plaintiff-Appellee,

v.

MANUEL T. SANCHEZ and FELICITA SANCHEZ, his wife, et al.,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Albert S. "Pat" Murdoch, District Judge

Melvin D. Rueckhaus
Clara Ann Bowler
Albuquerque, New Mexico

for Appellants.

James C. Hall
Frank P. Dickson, Jr,
Albuquerque, New Mexico

for Appellee.

OPINION

WILSON, Justice.

{1} Manuel T. and Felicita Sanchez (the Sanchezes), defendants-appellants, appeal a trial court judgment which modified a real estate contract between the Sanchezes and John Lorentzen (Lorentzen), plaintiff-appellee. The trial court modified the contract to reflect the court's finding that the Sanchezes did not convey full fee simple title to the property and ordered the Sanchezes to refund seventy-five percent of the purchase price to Lorentzen. We reverse.

STATEMENT OF FACTS

{2} On April 9, 1985, the parties entered into a real estate contract in which Lorentzen bought and the Sanchezes sold a half-acre parcel of unimproved real estate for $10,000. The contract required a $2,500 downpayment and three annual payments of $2,500 at ten-percent annual interest, and required the Sanchezes to execute a warranty deed and place it in escrow.

{3} The parties' agreement was on a printed real estate contract form which included the following additional typed and initialed paragraph:

> The Purchaser agrees to commence and complete as soon as possible a suit to quiet the title to the property herein conveyed at his own cost and the Escrow Agent herein is hereby empowered to insert in the Warranty Deed after the wording "more particularly described as" the full survey description approved in the Quiet Title Decree. It being further provided, however, that in the event the Quiet Title Suit is prevented from reaching its conclusion within six months hereof that the Purchaser may instruct the Escrow Agent to deliver to the Seller the Special Warranty Deed escrowed herewith, whereupon the Seller shall immediately pay $2,500.00 to Purchaser. Otherwise this contract shall remain in full force and effect. [Emphasis added.]

{4} Lorentzen paid the downpayment and the first annual payment, totaling $5,000. Lorentzen did not elect to rescind the contract within the six month period provided by the contract and sued to quiet title to the property on October 17, 1985, eight days after the six month period expired. Lorentzen joined the Sanchezes as involuntary plaintiffs in that suit. Lorentzen cured an alleged title defect by purchasing the interest of third parties who claimed a fractional interest in the property, and on October 1, 1986, he obtained a judgment quieting title in his name. The next day Lorentzen notified the Sanchezes of his judgment and offered to pay them a token amount for a quitclaim deed to the property, rather than the agreed contract price. The Sanchezes moved to set aside the judgment and on April 2, 1987, the trial court entered an amended judgment stating that Lorentzen's title to the property was subject to the Sanchezes' real estate contract.

{5} On May 14, 1987, Lorentzen filed a complaint against the Sanchezes seeking: (1) an injunction prohibiting the Sanchezes from enforcing the contract; (2) modification of the contractual purchase price and reimbursement of $2,500 for overpayment of the modified contract price; and (3) $20,000 in damages which Lorentzen spent purchasing third parties' interests in the property, due to the Sanchezes' breach of title warranty. The trial court granted the injunction on the condition that Lorentzen continue payments under the original contract into escrow. The trial court found that the Sanchezes only owned a one-fourth interest in the property when the contract was made, and that Lorentzen paid $20,000 to third parties to cure defects in the property's title. The court also found that Lorentzen was not aware of any specific title problems with the Sanchezes' property until after the contract was executed. The parties agreed that the contract was not ambiguous, fraudulent, or the result of mistake. The trial court concluded that the Sanchezes breached their title warranty and thus, Lorentzen should only pay twenty-five percent of the purchase price; $2,500. The Sanchezes appeal the trial court's judgment.

ISSUES

{6} On appeal the Sanchezes claim that substantial evidence does not support the trial court's judgment modifying the contract price upon its finding that the Sanchezes owned and conveyed a one-fourth interest in the property. Lorentzen argues that the Sanchezes breached title warranties by not delivering full fee simple title to the property, thus entitling him to a reduction of the purchase price.

{7} Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. **Register v. Roberson Constr. Co.,** 106 N.M. 243, 245, 741 P.2d 1364, 1366 (1987). In deciding whether substantial evidence supports the trial court's ruling we must determine whether Lorentzen contracted to assume the responsibility and costs for curing any title defects, in lieu of exercising his option to rescind the contract and obtaining a refund of the purchase price. We find this issue to be dispositive of this case. In answering this question we examine the contract's provisions, which embody the parties' intent. **Boatright v. Howard,** 102 N.M. 262, 694 P.2d 518 (1985). "In construing the terms of the contract, each part of the contract is to be accorded significance according to its place in the contract so as to ascertain and give effect to the intentions of the parties." **Brooks v. Tanner,** 101 N.M. 203, 206, 680 P.2d 343, 346 (1984). "[W]here there is inconsistency in a contract, matter deliberately added by the parties to the contract form must prevail." 17A C.J.S. **Contracts** § 310 (1963). **See also NLRB v. Boyer Bros.,** 448 F.2d 555, 560 (3d Cir. 1971), **cert. denied, Boyer Bros. v. NLRB,** 409 U.S. 878, 93 S. Ct. 132, 34 L. Ed. 2d 132 (1972).

{8} The real estate contract gave Lorentzen six months to conclude a suit to quiet title to the property. If the property's title was defective Lorentzen could cure any title defects at his own cost and amend the deed to describe the actual property interest conveyed or he could rescind the contract and recover his purchase price payments.

{9} Lorentzen asserts that the Sanchezes breached the warranty deed covenants. Such covenants include the warranty that "'the grantor * * * has good right to sell and convey the [granted premises] * * *'" NMSA 1978, § 47-1-37. This warranty was included in the contract form. However, the parties deliberately added to the contract the typed paragraph noted above, in which Lorentzen agreed to quiet title to the property at his own expense or opt to rescind the contract within six months. Under the law stated above, this language must take precedence over that in the contract form.

{10} "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." **United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.,** 108 N.M. 467, 471, 775 P.2d 233, 237 (1989). A purchaser of real estate may waive title defects by falling to object to them at closing, when the contract provides the purchaser with the option of waiving any title defects or rescinding the contract. **See Jones v. Dickens,** 394 F.2d 233 (10th Cir. 1968).

{11} The record indicates that Lorentzen was a licensed real estate broker who had a real estate company. He personally negotiated this contract with the Sanchezes and bought the Sanchez property and adjoining property as part of a plan to develop a seventeen-acre tract. The contract itself shows that Lorentzen was aware that the Sanchez property was not without title problems. Lorentzen elected to clear title at his own cost, thereby waiving his right of rescission and reimbursement, as well as his right to challenge the title conveyed. **See id.**

CONCLUSION

{12} The Sanchezes had no duty to perfect the property's title, as Lorentzen contracted to assume that burden. Without a duty there can be no breach. As Lorentzen received everything he bargained for, the district court erred in reducing the contract price. Accordingly, we reverse and remand to the trial court to enter judgment consistent with this opinion.

{13} IT IS SO ORDERED

KENNETH B. WILSON,
Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

Justice Kenneth B. Wilson

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-035

Filing Date: April 11, 1990

Docket No. 18,587

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

MARTHA RUFFINS,

Defendant-Appellant.

Certification from the New Mexico Court of Appeals
Reuben E. Nieves, District Judge

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

for Appellant.

Hal Stratton, Attorney General
Margaret McLean, Assistant Attorney General
Santa Fe, New Mexico

for Appellee.

OPINION

WILSON, Justice.

{1} The court of appeals certified this matter to us, pursuant to NMSA 1978, Section 34-5-14(C) (Repl. Pamp. 1981), to clarify the elements required to prove a completed forgery. We determine: (1) whether the crime of forgery requires physical delivery, the passage of interests to a holder, or delivery and the passing of interests to a holder; (2) if physical delivery is sufficient, whether the delivery must be accepted; and (3) if delivery is not sufficient, whether the common law crime of uttering is included in NMSA 1978, Section 30-16-10(B) (Repl. Pamp. 1984). We conclude that either physical delivery or the passing of an interest, whether accepted or not, is sufficient to complete the crime of forgery. Given our holding, we need not address the third issue presented.

BACKGROUND

{2} This case arose from the following facts. On December 18, 1986, Martha Ruffins (Ruffins), defendant-appellant, and three male companions visited an Allsups store and asked the night clerk, Pauline Halley (Halley), for directions. The four left the store and later returned. During the second visit Halley scolded Ruffins for walking behind the counter area, which was prohibited to customers. The four then left the store. After Ruffins's second visit Halley noticed her purse, which contained her checkbook, was missing and called the police.

{3} On December 19, 1986, Ruffins and her companions visited Cook's Truck Stop (Cook's). Ruffins handed the cashier, June Sonnemaker (Sonnemaker), a two-party check to cash. Ruffins's companions indicated that she wanted to cash the check to pay for gas while they waited for food at the restaurant. The check, drawn from Daniel and Pauline Halley's account, was payable to Ruffins for $80 and was signed "Mrs. Pauline Halley." Ruffins insisted that Sonnemaker cash the check, claiming she knew the restaurant's cook and had identification. Sonnemaker refused to cash the check, gave it back to Ruffins and canceled the foursome's food order. The four then left Cook's, presumably taking the forged check with them.

{4} Ruffins was charged with forgery and larceny under $100, based on these events. A jury acquitted Ruffins of the larceny charge, but convicted her of forgery. Ruffins was sentenced to one year imprisonment, to be served concurrently with a one year habitual offender enhancement, and two years suspended. Ruffins appealed her conviction and sentence to the court of appeals, which then certified this matter to us to resolve conflicts in New Mexico's legal requirements for a completed forgery.

ISSUES

{5} On appeal Ruffins claims: (1) her acts constituted attempted forgery and her counsel's failure to request such a jury instruction rendered him ineffective; and (2) the State's failure to introduce the forged check precluded her conviction. We examine each issue in turn.

I. FORGERY

(A) Statutory Elements of Forgery

Under our statute, forgery consists of:

> A. falsely making or altering any signature to, or any part of, any writing purporting to have any legal efficacy with intent to injure or defraud; or
>
> B. knowingly **issuing or transferring** a forged writing with intent to injure or defraud.

NMSA 1978, § 30-16-10 (Repl. Pamp. 1984) (emphasis added). New Mexico Uniform Jury Instruction SCRA 1986, 14-1644, defines "issuing or transferring" as knowingly **giving or delivering** a false instrument to a victim, with intent to injure, deceive or cheat. A committee commentary to this instruction states that it contains all the elements of forgery and requires the jury to determine only physical delivery. The commentary also notes that the court of appeals, relying on Uniform Commercial Code (UCC) definitions of the forgery statute's terms, has held that forgery additionally requires an "issuing or transfer of an interest and not merely a physical transfer." **See also State v. Linam**, 90 N.M. 729, 730, 568 P.2d 255, 256 (Ct. App.), **cert. denied**, 91 N.M. 3, 569 P.2d 413 (1977); **State v. Tooke**, 81 N.M. 618, 619, 471 P.2d 188, 189 (Ct. App. 1970).

(B) New Mexico Case Law

{6} Several New Mexico cases construe our forgery requirements. In **State v. Tooke** the court of appeals upheld a conviction of attempted forgery where the defendant presented a forged check to a clerk to cash, and the clerk told the defendant the check must be "okayed." The defendant then physically gave the check to the "okayer," who held the check while calling "Safety Check" to verify its validity. The "okayer" then refused to cash the check. **See Tooke**, 81 N.M. 618, 471 P.2d 188 (1970).

{7} In applying the forgery statute to these facts, the court interpreted the statute's terms "issuing" and "transferring" to "encompass a delivery to one who is a holder with the passing of interests from one to another." **Id.** at 619, 471 P. 2d at 189. In interpreting the forgery statute, the court relied on the following UCC definitions:

> (1) "issue" is "the first delivery of an instrument to a holder," NMSA 1978, Section 55-3-102(1)(a);
> (2) "delivery is a "voluntary transfer of possession," NMSA 1978, Section 55-1-201(14) (Cum. Supp. 1989);
> (3) A check's "holder" is one who has legally acquired its possession by indorsement **or** delivery, NMSA 1978, Section 55-1-201 (20) (Cum. Supp. 1989); and
> (4) A "transfer" occurs when an instrument vests the transferor's rights in the transferee, NMSA 1978, Section 55-3-201(1).

{8} Based on the above considerations, the court of appeals concluded that the defendant's physical transfer of the check to the "okayer" did not pass any interests in the check. Thus, the crime of forgery was incomplete and the defendant was properly convicted of attempted forgery.

{9} Seven years later in **State v. Linam**, 90 N.M. 729, 730, 568 P.2d 255, 256 (Ct. App.), **cert. denied**, 91 N.M. 3, 569 P.2d 413 (1977), the court of appeals upheld a defendant's forgery conviction on facts similar to those in **Tooke**. In **Linam**, the defendant physically gave a forged check to a bank teller to cash. The teller questioned the check's validity and took it to her supervisor. The supervisor compared the payor's indorsement on the check with that on the signature card, and concluded they did not match. The police were then called and arrested the defendant. The defendant argued that the evidence only supported a conviction for attempted forgery, since the facts in his case were indistinguishable from those in **Tooke**. The court of appeals disagreed and reasoned that in this case "interests" passed to the teller, who had immediate authority to cash the check; whereas in **Tooke**, the check was referred to an "okayer" as a preparatory step to cashing the check. The fact that the teller referred the check to her supervisor did not convert the forgery into an attempt. Thus, the defendant was properly convicted of forgery.

{10} Judge Sutin, specially concurring in **Linam**, determined that the court's distinction between **Tooke** and **Linam** was "a distinction without a difference." In his view, the defendants' actions in these two cases were virtually identical and both defendants should be guilty of the same offense. Judge Sutin reasoned that **Tooke** was overruled by the jury instruction requiring the jury to determine only physical delivery, and a transfer of interests was not required to prove forgery. **See Linam**, 90 N.M. at 731, 568 P.2d at 257.

(C) Clarification

{11} In our view, a forgery is completed when a defendant possessing the requisite intent: (1) falsely makes or alters a writing which purports to have legal efficacy; (2) physically delivers a forged writing; **or** (3) passes an interest in a forged writing. **See** NMSA 1978, § 30-16-10(B) (Repl. Pamp. 1984). Only the second and third methods of forgery are at issue in this case.

(1) Delivery

{12} Under our statute, physical delivery of a forged instrument is sufficient to constitute "issuing or transferring" a forged instrument and no "interests" need pass. Section 30-16-10(B) clearly states that a forger may either issue **or** transfer a forged writing. We agree with Judge Sutin that the defendants' actions in **Tooke** and **Linam** are indistinguishable and the crimes in each case should be the same. We further agree that Ruffins's actions in the present case are indistinguishable from those of the defendants in **Tooke** and **Linam**. In each case the defendant physically delivered a forged instrument to another for cashing, but the prospective cashiers refused to cash the check.

{13} The court of appeals' requirement that interests must pass to complete a forgery appears to be based on the UCC's definition of "transfer" as an occurrence which vests the transferor's rights in the transferee. **See** NMSA 1978, § 55-3-201(1). By requiring both delivery **and** the passing of an interest, the court effectively substitutes the word **and** for **or** in the statutory phrase "issuing **or** transferring." **See** § 30-16-10(B). "The word 'or' is given a disjunctive meaning unless the context of the statute demands otherwise." **Public Serv. Co. v. New Mexico Pub. Serv. Comm'n**, 106 N.M. 622, 624, 747 P.2d 917, 919 (1987).

{14} While examination of the UCC definitions is illuminating, in a criminal case it is even more important that a person of ordinary intelligence have adequate warning of what conduct is forbidden. When a statute does not define its terms, general rules of statutory construction dictate that we interpret those terms in the common, ordinary sense. **United States v. Mayberry**, 774 F.2d 1018, 1020 (10th Cir. 1985), **superseded on other grounds**, 18 U.S.C. § 3013(d) (1988); **United States v. Austin**, 614 F. Supp. 1208, 1218 n. 66 (D.N.M. 1985); **Security Escrow Corp. v. Taxation & Revenue Dep't**, 107 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct. App. 1988). Here the court of appeals, rather than the legislature, specifically defined the terms "issue" and "transfer"; thus, we look to the ordinary meanings of these words. "Issue" is ordinarily defined as the act of giving out, making available, or offering for action or distribution. **See Webster's Third New International Dictionary** 1201 (1971). "Transfer" is ordinarily defined as "the conveyance of right, title, or interest." **Id.** at 2427. Such definitions of these terms are not only consistent with those of the UCC, but accurately reflect the ordinary meanings of those terms as understood by persons of common intelligence.

{15} Applying these definitions to our statute, a defendant **issues** a forged writing when he or she knowingly physically delivers the false instrument, offers the false instrument, or otherwise makes the false instrument available for action. A defendant **transfers** a forged writing when he or she knowingly conveys an interest contained in the false instrument. For instance, a stock certificate may be forged to indicate a false owner. The false owner could then transfer the ownership of the forged stock by a written assignment. Although the forged certificate itself would not be physically delivered to the party to be defrauded, the assignment of ownership would be a transfer of interest in a forged instrument, and the crime of forgery would be complete.

{16} Therefore, a defendant may issue or transfer a forged writing either by a physical delivery of the forged instrument for action by a third party **or** by passing an interest in the forged instrument to a third party. Accordingly, we overrule **Tooke** and **Linam** to the extent they conflict with this opinion.

(2) Acceptance of Delivery

{17} Forgery is complete when the false instrument is issued or transferred with the requisite intent, regardless of its acceptance. **State v. Garcia**, 26 N.M. 70, 72, 188 P. 1104 (1920); 37 C.J.S. **Forgery** § 3 (1943). Our forgery statute does not require that the defendant gain, or that the prospective victim experience a loss or injury to complete the crime. **See Linam**, 90 N.M. at 730, 568 P.2d at 256. A prospective victim's refusal to accept a forged check, does not change the fact that the defendant offered it for action as genuine. In that situation, the defendant's actions would constitute forgery rather than an attempt. Thus, we conclude that acceptance of a forged instrument is unnecessary to complete the crime of forgery. We overrule **State v. Lopez**, 81 N.M. 107, 464 P.2d 23 (Ct. App. 1969), **cert. denied**, 81 N.M. 140, 464 P.2d 559 (1970), to the extent it suggests otherwise.

{18} Under our forgery statute, as clarified, Ruffins's actions constituted the completed crime of forgery and she was not entitled to a jury instruction for attempted forgery. Ruffins was not denied effective assistance of counsel. Having found that physical delivery is sufficient to complete the crime of forgery, we need not address whether our forgery statute encompasses uttering.

II. FAILURE TO INTRODUCE THE FORGED CHECK

{19} Ruffins next contends that the prosecution's failure to enter the forged check into evidence at trial precludes her conviction for the offense. Ruffins relies on **Woods v. State**, 142 Tex. Crim. 569, 155 S.W.2d 615 (1941) to support her position. In **Woods**, the check was available, the State marked it as an exhibit, and a witness identified it. However, the State did not formally introduce the check into evidence, as Texas law required.

{20} New Mexico law allows proof of a material fact by circumstantial evidence and inference. **State v. Brown**, 100 N.M. 726, 676 P.2d 253 (1984). Thus, a forged check proven by these means need not be introduced into evidence. In this case the forged check was returned to Ruffins and was not available at trial. However, Sonnemaker's description of the check's contents was sufficient proof under New Mexico law. Adopting the Texas rule would preclude convicting all forgers wise enough to regain possession of their forged checks when potential victims refused to cash them. We conclude that the State's failure to introduce the forged check at trial did not preclude Ruffins's conviction for forgery. We affirm Ruffins' conviction and sentence.

{21} IT IS SO ORDERED

KENNETH B. WILSON, Justice

WE CONCUR:

DAN SOSA, JR., Chief Justice

RICHARD E. RANSOM, Justice

JOSEPH F. BACA, Justice

SETH D. MONTGOMERY, Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-038

Filing Date: April 12, 1990

Docket No. 18,304

COUNTY OF LOS ALAMOS,

Petitioner,

v.

JOE D. TAPIA,

Respondent.

Original Proceeding on Certiorari
Patricio M. Serna, District Judge

Byron L. Treaster
Los Alamos, New Mexico

for Petitioner.

Griffith, Boone & Cruse
P. Reid Griffith, Jr.
Los Alamos, New Mexico

for Respondent.

OPINION

MONTGOMERY, Justice.

{1} In the trial of a criminal case, after jeopardy attaches,[1] one of three outcomes is possible: The trial may be completed and the defendant acquitted; the trial may be completed and the defendant convicted; or the trial may not be completed at all, in which case it will have been aborted by some ruling of the trial court. In the first situation, it has been settled for almost a century that the Double Jeopardy Clause of the United States Constitution[2] precludes further prosecution of the defendant. **United States v. Ball**, 163 U.S. 662, 669, 16 S. Ct. 1192, 1194, 41 L. Ed. 300 (1896). **Ball** also firmly established that, in the second situation, reprosecution of the defendant is not barred if his or her conviction is set aside on appeal. **Id.** at 671-72, 16 S. Ct. at 1195.[3] The third situation has presented great difficulty for the courts; sometimes, depending on the reasons for the trial court's aborting the trial, double jeopardy will preclude a retrial; sometimes it will not.[4]

{2} This case is one of those falling into the third category. The defendant's trial was aborted during the testimony of the county's first witness when the trial court ruled that his arrest had been illegal and that all evidence in support of the charge had to be suppressed. The court dismissed the charge and the state appealed to the court of appeals. The court of appeals dismissed the appeal, holding that the Double Jeopardy Clause barred further prosecution.[5] We granted certiorari

[1] Jeopardy attaches in a jury trial when the jury is empaneled and sworn; it attaches in a bench trial when the court begins to hear evidence. **Serfass v. United States**, 420 U.S. 377, 388, 95 S. Ct. 1055, 1062, 43 L. Ed. 2d 265 (1975); **State v. James**, 93 N.M. 605, 606, 603 P.2d 715, 716 (1979).

[2] U.S. Const. amend. V (" . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *"). The corresponding provision in the New Mexico Constitution is N.M. Const. art. II, § 15. The Double Jeopardy Clause applies to the states through the fourteenth amendment. **Benton v. Maryland**, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707 (1969). We have held that the New Mexico provision should be interpreted in the same way as the federal clause. **State v. Rogers**, 90 N.M. 604, 566 P.2d 1142 (1977).

[3] However, if the defendant's appeal is successful because the prosecution's evidence was insufficient to convict, double jeopardy prevents a retrial. **Burks v. United States**, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

[4] **See United State v. Scott**, 437 U.S. 82, 92-95, 98 S. Ct. 2187, 2194-96, 57 L. Ed. 2d 65 (1978).

[5] When further prosecution is barred by double jeopardy, an appeal by the state, which if successful would lead to reprosecution, will be dismissed. **See e.g**, **Smalls v. Pennsylvania**, 476 U.S. 140, 145, 106 S. Ct. 1745, 1749, 90 L. Ed. 2d 116 (1986); **United States v Jorn**, 400 U.S. 470, 476, 91 S. Ct. 547, 552, 27 L. Ed. 2d 543 (1971). **See also United States v. Scott**, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978) (judgment of acquittal may not not be appealed); **State v. Mares**, 92 N.M. 687, 594 P.2d 347 (Ct. App. 1979) (court of appeals cannot review acquittal); NMSA 1978, § 39-3-3(C)

and now reverse the court of appeals, remanding to the district court for trial.

I.

{3} In the early morning hours of January 27, 1987, a police officer in Los Alamos observed defendant, at a point near the Los Alamos-Santa Fe County line, running a stop sign and driving with an inoperative tail light. The officer pursued defendant with emergency lights flashing, and defendant drove across the county line a short distance into Santa Fe County. There he stopped; and the officer, after observing his behavior, administered a field sobriety test and placed him under arrest. Defendant was cited for driving while intoxicated and later tried in Los Alamos Municipal Court, where he was convicted. He then appealed to the district court in a trial **de novo**.

{4} At trial, the county first called the arresting officer. His testimony was interrupted by a defense motion to suppress all evidence resulting from the arrest on the ground that the arrest was illegal under the Fresh Pursuit Act, NMSA 1978, Sections 31-2-1 to -8 (Repl. Pamp. 1984). Defense counsel questioned the officer on voir dire, establishing the fact that the arrest occurred in Santa Fe County. The evidence in support of the DWI charge consisted of the officer's observations, the field sobriety test, and a breath test. Defense counsel submitted a trial brief seeking suppression of the evidence and dismissal of the charge of driving while intoxicated. The trial judge heard oral argument, following which he granted the motion to suppress and to dismiss and later entered a written decision containing these rulings:

> 6. Defendant's arrest by Officer Davis and all fruits of that arrest, inlcuding [sic] [including] statements made by the defendant, testimony concerning observations of the defendant made by the officer, testimony concerning field sobriety tests administered to Defendant by the officer and testimony or documentary evidence concerning the results of any chemical or breath tests are inadmissible as fruits of the illegal arrest, and should be suppressed.
> 7. The charge of driving while intoxicated and the charge of running a stop sign should be dismissed because the arrest of Defendant was illegal and all evidence in support thereof has been suppressed.

{5} The county appealed to the court of appeals. While the appeal was pending, the court of appeals decided another case involving similar facts, ruling that the Fresh Pursuit Act did not authorize an officer deputized in one county to pursue a suspect into another county and arrest him there for DWI. On certiorari, we reversed this ruling and held that an arrest under these circumstances is valid under the Fresh Pursuit Act. **Incorporated County of Los Alamos v. Johnson**, 108 N.M. 633, 776 P.2d 1252 (1989). In that case the defendant had been convicted by the trial court, so the result of this Court's review was simply to reinstate the conviction. 108 N.M. at 635, 776 P.2d at 1254. In the present case, however, the defendant's trial had not been concluded; accordingly, the county on appeal sought to have the district court's dismissal of the charge reversed and to have the case remanded for trial.

{6} Tapia moved to dismiss the appeal on double jeopardy grounds. The court of appeals granted the motion holding, in a two-to-one decision, that the constitutional prohibition against double jeopardy barred further proceedings. The court reasoned, relying on **Smalis v. Pennsylvania**, 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986), and **Sanabria v. United States**, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978), that the district court's dismissal constituted an "acquittal." In his opinion for the court, Judge Hartz said:

(no appeal shall be taken by state where Double Jeopardy Clause prohibits further prosecution). **Cf. Serfass v. United States**, 420 U.S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975) (government appeal from pre-trial order not barred since jeopardy had not attached); **United States v. Wilson**, 420 U.S. 332, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1975) (government appeal from postverdict ruling not barred; double jeopardy not implicated where no dancer of subjecting defendant to second trial).

> The district court's ruling was as much a determination of the facts in this case as is a directed verdict in a civil case resulting from the failure of a plaintiff to offer any admissible evidence on an element of the cause of action * * *. The prosecution had no admissible evidence to convict defendant; so it failed to satisfy its burden of proof. An acquittal is nothing more than a determination that the prosecutor has failed to meet the burden of proof.

Dissenting, Chief Judge Bivins took the view, in reliance on **United States v. Scott**, 437 U.S. 82, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978), and **United States v. Martin Linen Supply Co.**, 430 U.S. 564, 97 S. Ct. 1349, 51 L. Ed. 2d 645 (1977), that the trial court's dismissal was not an acquittal because it was not an adjudication of defendant's factual guilt or innocence; it was instead a ruling on a question of law and one that, moreover, the defendant himself had procured through his motion to abort the trial.

{7} We granted certiorari to resolve these conflicting views and to provide our own input into the confusing welter of cases that suffuse this area of double-jeopardy jurisprudence.[6]

II

{8} We think that Judge Bivins had the better of the analysis. Despite the court of appeals' statement, the district court's ruling was **not** a determination of the facts in the case and, while it may have had the same effect insofar as the defendant was concerned, it was quite unlike a directed verdict in which the plaintiff or the state fails to offer sufficient evidence to satisfy its burden of proof. The trial court's ruling was in no sense a decision on the quantum of proof offered by the county, on its probative value, on the credibility of the evidence, or on any other question relating to the sufficiency of the county's case; it was purely and simply a ruling on the legality of defendant's arrest and the consequent admissibility **vel non** of the prosecution's evidence. The charge of DWI was dismissed, not because of an insufficiency of evidence to prove that defendant was guilty beyond a reasonable doubt, but because "the arrest of Defendant was illegal and all evidence in support thereof ha[d] been suppressed." Thus, the court of appeals was simply wrong when it said, later in its opinion, that "the basis of the dismissal was factual innocence;" the basis of the dismissal was that all evidence in support of the charge had been suppressed (albeit, as we now know, incorrectly). For this reason, the decision in **Smalis v. Pennsylvania**—that a defendant who demurs to the evidence as "insufficient to establish his factual guilt" has been acquitted, 476 U.S. at 144, 106 S. Ct. at 1744—is inapposite to this case.

{9} In this area of the law, as in many others, characterizations and labels abound. What was the trial court's "dismissal," really? Was it really an "acquittal"—in which case the interdictions of **Smalis** and **Sanabria** absolutely prohibit retrial (and hence mandate dismissal of the appeal)—or was it, really, the "functional equivalent"[7] of a mistrial requested by the defense, in which "the Double Jeopardy Clause is not offended by a second prosecution." **United States v. Scott**, 437 U.S. at 93, 98 S. Ct. at 2195 (citing **United States v. Jorn**, 400 U.S. 470, 485, 91 S. Ct. 547, 557, 27 L. Ed. 2d 543 (1971)). Or was it, really, not the equivalent of a mistrial but a "termination" of the trial in defendant's favor before any determination of factual guilt or innocence, like the dismissal for preindictment delay in **Scott**, 437 U.S. at 94-95, 98 S. Ct. at 2195-96?

{10} In **Scott**, the midtrial dismissal for preindictment delay was held not to bar further prosecution, and the distinction referred to above

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[6] **See Burks v. United States** 437 U.S. at 9, 98 S. Ct. at 2146: "The Court's holdings in this area * * * can hardly be characterized as models of consistency and clarity." **See also United States v. DiFrancesco**, 449 U.S. 117, 127, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980): "That its [i.e., the Double Jeopardy Clause] application has not proved to be facile or routine is demonstrated by acknowledged changes in direction or in emphasis."

[7] **Cf. Serfass**, 420 U.S. at 392, 95 S. Ct. at 1064 (dismissal of indictment before trial not functional equivalent of acquittal on the merits).

between an acquittal for insufficient evidence and a termination of the trial on a basis unrelated to factual guilt or innocence was firmly recognized.

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant.

Scott, 437 U.S. at 98-99, 98 S. Ct. at 2198. The Court relied on the definition of "acquittal" provided in **United States v. Martin Linen Supply Co.**, 430 U.S. at 571, 97 S. Ct. at 1354:

> [A] defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor] correct or not, of some or all of the factual elements of the offense charged."

Scott, 437 U.S. at 97, 98 S. Ct. at 2197 (brackets in original).

{11} Out of the distinction in **Scott** and **Smalis** between acquittals for "evidentiary insufficiency" and dispositions for some other reason has crept another label: reversals for "trial error." On the same day that the Supreme Court decided **Scott** it handed down **Burks v. United States**, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), in which it said:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, **e.g.**, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.

437 U.S. at 15, 98 S. Ct. at 2149. To these examples of a defective judicial process the Court might have added preindictment delay (Scott), an improperly drafted information (**Lee v. United States**, 432 U.S. 23, 97 S. Ct. 2141, 53 L. Ed. 2d 80 (1977),[8] and an involuntary plea of guilty (**United States v. Tateo**, 377 U.S. 463, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964)). Especially noteworthy in the present case was the classification in **Burks** of the "incorrect receipt or rejection of evidence" as "trial error." The current viability of this classification is indicated in the relatively recent case of **Lockhart v. Nelson,** 488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988), in which the Court held that, where a reviewing court sets aside a defendant's conviction because evidence essential to the conviction was erroneously admitted, the Double Jeopardy Clause does not preclude a retrial:

> Burks was careful to point out that a reversal based solely on evidentiary insufficiency has fundamentally different implications, for double jeopardy purposes, than a reversal based on such ordinary "trial errors" as the "incorrect receipt or rejection of evidence." * * * While the former is in effect a finding "that the government has failed to prove its case" against the defendant, the latter "implies nothing with respect to the guilt or innocence of the defendant," but is simply "a determination that [he] has been convicted through a judicial **process** which is defective in some fundamental respect."

488 U.S. at 33, 109 S. Ct. at 290, 102 L. Ed. 2d at 273 (quoting **Burks,** 437 U.S. at 14-16, 98 S. Ct. at 2148-50) (brackets and emphasis in original). **See also Palmer v. Grammer**, 863 F.2d

[8] **See also Illinois v. Somerville**, 410 U.S. 458, 98 S. Ct. 1066, 35 L. Ed. 2d 425 (1973) ("fatally deficient" indictment).

588 (8th Cir. 1988) (discussing **Burks** and **Lockhart**).

{12} Thus, **Lockhart** carries forward the distinction recognized in **Smalis, Scott** and **Burks** between an acquittal for evidentiary insufficiency (i.e., failure of the prosecution to offer sufficient evidence to satisfy the trier of fact beyond a reasonable doubt) and a midtrial termination in favor of the accused based on a fundamental defect in the judicial process such as incorrect (in some critical respect) receipt or rejection of evidence. In the present case—the court of appeals' conclusions to the contrary notwithstanding—the trial court's ruling was not one based on evidentiary insufficiency but rather was based on the complete exclusion of all evidence offered by the prosecution because of an erroneous interpretation of the statute under which defendant was arrested. We believe that this is the kind of "trial error" for which the county can appeal and after which, if the appeal is successful, the defendant can be retried. **See People v. Greer**, 91 Mich. App. 18, 282 N.W.2d 819 (1979) (retrial not barred after reversal of midtrial dismissal based on improper search, because dismissal was unrelated to factual guilt or innocence and therefore defendant had been neither acquitted nor convicted). **Contra**, **United States v. Baptiste**, 832 F.2d 1173 (9th Cir. 1987).[9]

{13} To some extent, and even though the United States Supreme Court has not so ruled, the statements in **Burks** and **Lockhart** might appear to represent a relaxation of the vigorous pronouncements in **Sanabria** that:

> [W]hen a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous.

437 U.S. at 64, 98 S. Ct. at 2179; **see also id.** at 69, 98 S. Ct. at 2181; and in **Arizona v. Washington**, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d at 717 (1978), that:

> The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal [is] based upon an egregiously erroneous foundation."

434 U.S. at 503, 98 S. Ct. at 829 (quoting **Fong Foo v. United States**, 369 U.S. 141, 143, 82 S. Ct. 671, 672, 7 L. Ed. 2d 629 (1962)).

{14} But it will be observed that in **Sanabria** and **Fong Foo** there was an actual **judgment of acquittal**. This, perhaps, goes to show that, in this area at least, labels do have some constitutional significance.[10] The policy against allowing the state to appeal from a judgment of acquittal, and against allowing retrial of the accused after such a judgment, is so strong that it simply will brook no relaxation, whether or not there has been a "trial error" or other defect in the process leading to the judgment. Once an accused is actually, and in express terms, acquitted by a court, the finality of that judgment will not yield to any attempts to dilute it.

III.

{15} Still, labels and rubrics, while they may facilitate analysis and help square the result in a particular case with controlling precedents, ultimately fail to provide a satisfactory explanation for a given result. A better explanation, perhaps, may be found in the policies served by

[9] We might agree in the abstract with the dissent that "[a] ruling on the factual elements of a case often times cannot be easily disentangled from . . . trial procedures." However, in this case we find that the procedural necessity to abort the trial arose with the court's ruling on the preliminary suppression issue and prior to any putative determination of the sufficiency of the evidence on the merits. Any comments by the court on the sufficiency of the evidence therefore were surplusage; there were no findings to make, no discretion to be exercised. The fact that the court entered such findings cannot be determinative any more than the court's denomination of its action as a dismissal rather than an acquittal. For this reason, we believe **Baptiste** to have been wrongly decided.

[10] However, according to the Supreme Court, the word "acquittal" has no "talismanic quality" for purposes of the Double Jeopardy Clause. **Serfass**, 420 U.S. at 392, 95 S. Ct. at 1064.

the Double Jeopardy Clause and in the policies underlying the rules that deny it application in all circumstances.

{16} The purposes of the Clause are set out in this oft-quoted passage in **Green v. United States**, 355 U.S. 184, 187-88, 78 S. Ct. 221, 223-24, 2 L. Ed. 2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

To the three goals articulated in this passage—enabling an accused to escape embarrassment, expense and ordeal, to be free from anxiety and insecurity, and to reduce the possibility of an unjust conviction—may be added a fourth: to protect the defendant's" valued right to have his trial completed by a particular tribunal." ' **United States v. Jorn**, 400 U.S. at 484, 91 S. Ct. at 557 (quoting **Wade v. Hunter**, 336 U.S. 684, 689, 69 S. Ct. 834, 837, 93 L. Ed. 974 (1949)). This interest of the accused may be subsumed in one or more of the three noted in **Green**, but it has often been singled out by the Supreme Court (or one or more of its Justices dissenting on a particular occasion) as deserving of protection under the Double Jeopardy Clause.

{17} Still another formulation is "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." **United States Jorn,** 400 U.S. at 486, 91 S. Ct. at 558. Much of the policy—not all, to be sure—behind the Double Jeopardy Clause is thus simply to protect the defendant's interest in repose. **See Lockhart v. Nelson**, 488 U.S. at 47-48, 109 S. Ct. at 294, 102 L. Ed. 2d at 278 (Marshall, J., dissenting).

{18} It is clear from the cases applying the Clause that the protection it affords to criminal defendants is not absolute. **See, e.g.**, **United States v. DiFrancesco**, 449 U.S. at 132, 101 S. Ct. at 434. If it were, many of those cases, extending well back into the nineteenth century—**e.g.**, **United States v. Perez**, 9 Wheat. 579, 6 L. Ed. 165 (1824) (mistrial declared for "manifest necessity" not a bar to second trial); **United States v. Ball**, (successful appeal of conviction precludes plea of double jeopardy on retrial)—would have been decided differently. The purposes enunciated in **Green** are frustrated to some extent whenever a defendant is retried; the defendant probably always undergoes additional embarrassment, expense and ordeal, continues to live in anxiety and insecurity, and remains subject to the possibility that even though innocent he may be found guilty. These interests, as the Court has recognized on numerous occasions, often are subordinated to the countervailing interest of society in the orderly administration of justice. **See, e.g.**, **Lockhart,** 488 U.S. at 47-48, 109 S. Ct. at 294, 102 L. Ed. 2d at 278 (defendant's interest in repose balanced with society's interest in administration of justice); **Scott**, 437 U.S. at 92, 98 S. Ct. at 2194 (propriety of mistrial requires balancing defendant's right to have trial completed by a particular tribunal against public interest in insuring that justice is meted out to offenders); **Illinois v. Somerville**, 410 U.S. at 470, 93 S. Ct. at 1073 (quoting **Wade v. Hunter**, 366 U.S. at 689, 69 S. Ct. at 837). . . . (defendant's "valued right" to have trial completed by particular tribunal must in some instances be subordinated to public's interest in fair trials designed to end in just judgments); **Downum v. United States**, 372 U.S. 734, 736, 83 S. Ct. 1033, 1034, 10 L. Ed. 2d 100 (1963) (defendant's right to have his trial completed by particular tribunal may be subordinated to the public interest when there is imperious necessity" to do so).[11]

[11] **See also State v. Saavedra**, 108 N.M. 38, 41, 766 P.2d 298, 301 (1988) (when retrial after declaration of mistrial would not create unfairness to the accused, his interest against

{19} The public's interest in the "orderly administration of justice" has been variously described. **See, e.g.**, **United States v. Tateo**, 377 U.S. at 466, 84 S. Ct. at 1589 ("punishing one whose guilt is clear after he has obtained [a fair] trial"); **United States v. Scott**, 437 U.S. at 92, 98 S. Ct. at 2194 ("insuring that justice is meted out to offenders"); **Burks v. United States**, 437 U.S. at 15, 98 S. Ct. at 2149 ("insuring that the guilty are punished"); **Arizona v. Washington**, 434 U.S. at 509, 98 S. Ct. at 832 ("giving the prosecution one complete opportunity to convict those who have violated its laws").

{20} Although, as has been noted, the rights secured by the Double Jeopardy Clause are not absolute, they come very close to being so treated in the situation described earlier—where the trial court has entered a judgment of acquittal. In that case the defendant's interest in being free of governmental oppression, **Scott**, 437 U.S. at 99, 98 S. Ct. at 2198, is at its zenith, whereas the government, having had one "full and fair opportunity" to vindicate society's interest, **Arizona v. Washington**, 434 U.S. at 505, 98 S. Ct. at 830 is denied another. Almost the same level of protection is granted to the defendant's interests in cases where he or she is convicted but the conviction is reversed by an appellate court for evidentiary insufficiency. Here again, the government has had its full and fair opportunity to convict but has failed to muster the necessary evidence, **Burks**, 437 U.S. at 11, 98 S. Ct. at 2147, and so again the defendant's rights are ascendant in the balance.

{21} At the opposite end of the spectrum is the case in which the defendant is convicted and his conviction is set aside on appeal on a ground other than insufficiency of the evidence to prove the offense. In that case, although the defendant may on retrial suffer the same anxiety and ordeal as he did the first time around, no one doubts that society's interest in administering its laws completely overrides the defendant's interest in freedom from these hardships. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." **United States v. Tateo**, 377 U.S. at 466, 84 S. Ct. at 1589.

{22} Toward the middle of the spectrum are the cases which have caused difficulty over the past thirty years. These are the cases where the trial is aborted for some reason and the state seeks to place the defendant on trial again. Lying close to the cases where the defendant is acquitted or his conviction is set aside for evidentiary insufficiency is the case in which a mistrial is declared but the trial court is found to have abused its discretion in so declaring—i.e., the mistrial is found to have been for reasons other than "manifest necessity." In this case the defendant's interest in escaping the evils of a new trial and in having his fate determined by the first tribunal outweighs society's interest in trying to convict and punish him. **See, e.g.**, **United States v. Jorn; Downum v. United States**. In making this determination it is relevant, of course, that the defendant either did or did not seek or consent to the mistrial or that, on the other hand, the state requested or the court **sua sponte** declared the mistrial. Where the government, through the prosecution or the court, is the moving party, the defendant's interest carries greater weight because he or she has not voluntarily surrendered it, and the government is held to a strict standard of necessity in aborting the trial and requiring the defendant to start over.[12]

{23} At the same time, where a reviewing court is satisfied that indeed the trial court not only had good reasons for declaring a mistrial, but practically was **compelled** by the circumstances to do so—as where reversal on appeal of any conviction would be a virtual certainty, **Illinois v. Somerville**, or where there was a serious likelihood of juror bias engendered by improper comments to the jury, **Arizona v. Washington—** the trial court's decision to declare a mistrial

retrial may be subordinated to the public interest in substantive justice) (citing **Arizona v. Washington**, 434 U.S. at 505, 98 S. Ct. at 830).

[12] For a recent case in this Court applying this standard **see Callaway v. State**, 109 N.M. 416, 785 P.2d 1035 (1990).

will be accorded respect and the defendant will be required to undergo reprosecution. In such a case, especially since the likelihood of governmental oppression or manipulation is much reduced or nonexistent, the public's interest in fair trials designed to end in just judgments will prevail over the defendant's valued right to have his trial concluded before the first jury empaneled. **Arizona v. Washington**, 434 U.S. at 508, 516, 98 S. Ct. at 831, 835. **A fortiori**, where the defendant **has** sought a mistrial and thereby—at least arguably—manifested a willingness to proceed to trial again despite the disadvantages, the strength of his interest is diluted and the government's interest presses more forcefully, particularly since there is little likelihood of governmental oppression or manipulation in that case. **See Lee v. United States**.

{24} Finally, we come to a case like the one at bar—an instance of "trial error" in which the trial has been aborted by a trial court ruling favorable to the defendant in the sense that he or she has prevailed, at least for the time being, but no judgment of acquittal has been entered. Without canvassing the myriad possibilities that can arise in this category, we can perhaps generalize by laying that, at least where the government has not been responsible for the error and has not sought termination of the trial, the defendant's interest in ridding himself or herself of the evils attendant upon another trial may be subordinated to society's interest in the correct application of its laws. **See**, **e.g.**, **United States v. Scott**. In the present case Tapia waited until jeopardy had attached before requesting that the evidence obtained as a result of his (then arguably illegal) arrest be suppressed.[13] Having waited until then, and having moved to terminate the trial through a dismissal of the charge rather than to pursue his valued right to have his trial completed by the first tribunal, he does not have a strong claim to protection of this interest. Looking at the case from the county's standpoint, it did not bring about the termination of the trial; the dismissal was entered, obviously, over its objection. There was no opportunity for oppression or manipulation on the part of the prosecution. And, most importantly, the county and the entire state have a keen interest in the correct interpretation and application of all laws governing arrests, such as the Fresh Pursuit Act. The county's desire to retry Tapia is not a case of "'honing its trial strategies and perfecting its evidence through successive attempts at conviction,'" **Lockhart v. Nelson**, 488 U.S. at 44, 109 S. Ct. at 292, 102 L. Ed. 2d at 276 (Marshall, J., dissenting) (quoting **Tibbs v. Florida**, 457 U.S. 31, 41, 102 S. Ct. 2211, 2218, 72 L. Ed. 2d 652 (1982)), or of asking for a chance to "'supply evidence . . . which it failed to muster in the first proceeding.'" **Id**. 488 U.S. at 47, 109 S. Ct. at 294, 102 L. Ed. 2d at 278 (quoting **Burks v. United States,** 437 U.S. at 11, 98 S. Ct. at 2147).

{25} In the circumstances of this case at least, we agree with the Court of Appeals for the Fifth Circuit, passing upon a question expressly reserved in **Serfass**, 420 U.S. at 394, 95 S. Ct. at 1065 that "a defendant who for reasons of trial tactics delays until midtrial a challenge to the indictment that could have been made before the trial—and before jeopardy has attached—is not entitled to claim the protection of the double jeopardy clause when his objections to the indictment are sustained." **United States v. Kehoe**, 516 F.2d 78, 86 (5th Cir. 1975) (footnote omitted). We also agree with the United States Supreme Court: "That any judicial system should encourage litigants to raise objections at the earliest rather than latest possible time seems self-evident." **United States v. Tateo**, 377 U.S. at 468 n. 4., 84 S. Ct. 1590 n. 4. Prohibiting retrial of the defendant in these circumstances could discourage trial courts from granting valid motions to suppress, knowing that an improper denial of such a motion could be corrected on appeal but that an improper granting of the motion would prohibit further prosecution. **Cf. id.** at 466, 84 S. Ct. at 1589: "[I]t is at least doubtful that appellate courts

[13] He had, of course, known of the ground for his motion to suppress well before his trial. He had in fact even argued the illegality of the arrest and consequent inadmissibility of the evidence at his trial in municipal court. Our rules of criminal procedure provide that a motion to suppress evidence is to be made within twenty days after entry of a plea, SCRA 1986, 5-212(C), but they do not **require** that such a motion be made prior to trial. **See** id., Committee Commentary; **State v. Doe**, 93 N.M. 143, 148, 597 P.2d 1183, 1188 (Ct. App. 1979) (defendant's duty to move for suppression of evidence before trial is discretionary).

would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution."

{26} We conclude that double jeopardy does not prevent further prosecution of Tapia on remand and that his motion to dismiss the county's appeal should have been denied by the court of appeals.

IV.

{27} Although the court of appeals did not pass upon the merits of the county's appeal, it would serve no purpose to remand the case to that court for a ruling. The district court's order dismissing the charges against Tapia was erroneous; the arrest was valid, and the evidence obtained pursuant thereto should not have been suppressed. **Incorporated County of Los Alamos v. Johnson**.

{28} In ruling in this fashion, we are cognizant of the factual differences between this case and **Johnson**. In **Johnson**, the police officer followed the defendant for several miles and observed him making an improper left turn, driving erratically, and touching or straddling the highway's yellow center line and white side line. This erratic behavior gave rise to a reasonable suspicion that the defendant in that case was driving while intoxicated. In the present case the district court found no basis for such a suspicion, finding instead that the officer had observed only defendant's running a stop sign and operating his motor vehicle with an inoperative tail light—petty misdemeanors under the applicable municipal ordinances.

{29} It is not disputed that, if the officer had authority under the Fresh Pursuit Act to pursue Tapia into Santa Fe County and stop him there for violation of the municipal ordinances, the officer's subsequent administration of a field sobriety test, based on his observations at that time, and his arrest of defendant for DWI were valid. The principal opinion in **Johnson** holds that, since the officer had reasonable grounds to believe the suspect there was driving while intoxicated and since the officer had no way of knowing whether, upon conviction, the suspect would be guilty of a "misdemeanor" (for a second or subsequent conviction of DWI) or a "petty misdemeanor" (for a first conviction), the pursuit was authorized under the Fresh Pursuit Act and the arrest was valid. In a specially concurring opinion, however, Justice Baca (joined by Justice Ransom) eschewed, for purposes of construing the Fresh Pursuit Act, the distinction between a misdemeanor and a petty misdemeanor and took the view that the Fresh Pursuit Act authorizes pursuit of a suspect into another county, whether the pursuing officer has reasonable cause to believe the suspect guilty of a misdemeanor or only of a petty misdemeanor. Justices Baca and Ransom, in other words, construed the term "misdemeanor" in NMSA 1978, Section 31-2-8(B), as including a "petty misdemeanor."

{30} We believe that this construction of the statute is correct and that, accordingly, the arrest in the instant case was valid. The policy consideration identified by Justice Scarborough in **Johnson** (removing DWI drivers from New Mexico roads in order to protect the public) may be absent under this broadened interpretation, but it nonetheless finds support in other policies: The municipal officer is not required to remember the perhaps arbitrary classification of the degree of misdemeanor offense in making the decision whether to pursue or not to pursue, and the suspect is not encouraged to streak for the county line (or other territorial boundary) in an effort to escape prosecution for one or more offenses, even if those offenses are properly classified as "petty."

{31} The decision of the court of appeals is reversed, and the cause is remanded to the district court with instructions to vacate the order of dismissal and to reinstate the cause for trial on the merits.

{32} IT IS SO ORDERED.

SETH D. MONTGOMERY,
Justice

DAN SOSA, JR.,
Chief Justice

RICHARD E. RANSOM,
Justice

JOSEPH F. BACA,
Justice

KENNETH B. WILSON,
Justice, dissents

DISSENT

WILSON, Justice, dissenting.

{33} I respectfully dissent from the majority opinion in the following respects.

{34} I agree with the majority that NMSA 1978, Section 31-2-8 (Repl. Pamp. 1984) of the Uniform Act on Fresh Pursuit authorizes the extraterritorial arrest of petty misdemeanants who are apprehended after hot pursuit. A reading of the statute requires such an interpretation, and public policy demands that petty misdemeanants not be allowed a safe haven across county lines.

{35} I cannot agree with the majority, however, that the defendant in this case may be retried on the same charges which he successfully defeated at his trial on the merits. This conclusion is even more compelling under the majority's opinion which recognizes that the previous law would not have allowed the police officer to pursue and arrest this defendant, a petty misdemeanant, across county lines. Without the benefit of our present opinion, the district court accurately interpreted and applied the law as it existed at the time of trial; the district court's judgment should now be upheld.

{36} The majority interprets the district court's "dismissal" of all charges against the defendant as "trial error" rather than acquittal. However, "what constitutes an acquittal' is not to be controlled by the form of the judge's action." **United States v. Martin Linen Supply Co.**, 430 U.S. 564, 571, 97 S. Ct. 1349, 1354, 51 L. Ed. 2d 642 (1977) (citing **United States v. Sisson**, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970)). Rather, the appellate courts must determine whether the ruling of the judge below, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." **Id.** 430 U.S. at 571, 97 S. Ct. at 1355. The district court in this case called its ruling a dismissal; it was a "legal determination on the basis of facts adduced at the trial relating to the general issue of the case." **United States v. Sisson**, 399 U.S. 267, 290 n. 19, 90 S. Ct. 2117, 2130 n. 19, 26 L. Ed. 2d 608 (1970). As such, it is the functional equivalent of an acquittal on the merits. **See also Burks v. United States**, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

{37} Once a judgment of acquittal has been entered, whether it is based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, it may not be appealed and terminates the prosecution. **United States v. Scott**, 437 U.S. 82, 91, 98 S. Ct. 2187, 2913, 57 L. Ed. 2d 65 (1978). "Thus when a defendant has been acquitted at trial he may not be retried on the same offense, even if the legal rulings underlying the acquittal were erroneous." **Sanabria v. United States**, 437 U.S. 54, 64, 98 S. Ct. 2170, 2179, 57 L. Ed. 2d 43 (1978).

{38} A ruling on the factual elements of a case of ten times cannot be easily disentangled from the trial procedures involved. This is reflected in the plethora of United States Supreme Court cases recently emerging regarding double jeopardy. Each new case modifies the legal analysis espoused in the preceding cause and alters the standard of review on the issue.

{39} This ever-changing area of law must be applied to the particulars of this case. Noting the current persuasion of the United States Supreme Court, and giving thoughtful consideration to the policies underlying the double jeopardy doctrine as enunciated in the majority opinion above, I am compelled to find that double jeopardy bars retrial in this case. The district court received evidence during a trial on the merits, made findings of fact and conclusions of law based on the evidence presented, and determined that there was not reasonable suspicion to stop the defendant for DWI. The district court made a legal ruling, supported by the facts, that the plaintiff could not provide sufficient evidence to bear its burden of proof. Once the defendant moved to suppress all of the plaintiff's evidence as inadmissible fruit of an illegal arrest, there was no other evidence available to prove the defendant's guilt. Consequently, the district court dismissed all charges against the defendant.

{40} While the majority concludes that the defendant's motion to dismiss all charges was **essentially** a motion for a mistrial or a motion to stay the proceedings to allow the plaintiff an appeal, I believe the defendant will be surprised to learn that he had made such a request. It is my opinion that the defendant specifically requested a final adjudication of the charges against him and that the district court in this case clearly acquitted him of these charges, in substance as well as in form.

{41} The case before us is on all fours with a Ninth Circuit case in which the court of appeals found double jeopardy barred the defendant's retrial. In **United States v. Baptiste**, 832 F.2d 1173 (9th Cir. 1987) the defendant was charged with driving under the influence of alcohol. Trial was held before the magistrate court, and after the government presented its case and rested, the defendant moved for a judgment of acquittal. The magistrate court determined that the police officer lacked probable cause to order the defendant out of his car. Consequently, the court refused to consider any evidence submitted by the government and dismissed the charges. The government appealed, and the district court thereupon dismissed the case on double jeopardy grounds. Shortly thereafter, the district court sua sponte vacated its dismissal and remanded the case for a retrial, finding that the magistrate court erred in determining there was no probable cause. The district court decided that the erroneous probable cause determination by the magistrate court resulted in the suppression of evidence and a simple dismissal rather than a judgment of acquittal.

{42} As in the case before us, the government in the **Baptiste** case argued on appeal that the magistrate did not evaluate the evidence, but rather dismissed the case on a perceived violation of state law. However, the Ninth Circuit disagreed. They stated:

> The proper analysis is that because the magistrate refused to consider any of the government's evidence, there was no evidence available to prove Baptiste's guilt. This can only mean that the "evidence was legally insufficient to convict." Hence, the magistrate's action is properly characterized as a judgment of acquittal. **See [U.S. v.] Ember**, 726 F.2d [522] at 524, [(9th Cir. 1984)]. That the magistrate may have erred in his ruling is irrelevant. **See Sanabria**, 437 U.S. at 68-69, 98 S. Ct. at 2181 (erroneous evidentiary ruling leading to erroneous judgment of acquittal for insufficient evidence bars further prosecution).

United States v. Baptiste, 832 F.2d 1173, 1175 (9th Cir. 1987). I find this legal analysis in the **Baptiste** case convincing, especially in light of the remarkable factual similarities to the case at bar.

{43} On the issue of whether retrial is permissible because the district court's dismissal came as the result of the defendant's motion to suppress evidence, as opposed to an unqualified demand for acquittal and dismissal, I find the distinction irrelevant. After a lengthy discussion of the effect of a defendant's request on a double jeopardy proceeding, whether it be the defendant's motion for a new trial or a motion for acquittal, the United States Supreme Court stated: "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy." **Burks v. United States**, 437 U.S. 1, 17, 98 S. Ct. 2141, 2150, 57 L. Ed. 2d 1 (1978). In so ruling, the Supreme Court weighed the policy reasons behind allowing retrial where the accused successfully seeks review of a conviction and expressly overruled prior decisions suggesting that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency. I agree that it is immaterial that the trial termination in this case followed the defendant's motion to dismiss since the dismissal was the functional equivalent of an acquittal.

{44} The majority opinion also makes much of the fact that the defendant waited until jeopardy had attached to raise his motion to suppress, stating:

> Having waited until then, and having moved to terminate the trial through a dismissal of the charge rather than to pursue his valued right to have his trial completed by the first tribunal, he does not have a strong claim to protection of this interest. Looking at the case from the county's standpoint, it did not bring about the termination of the trial; the dismissal was entered, obviously, over its objection.

What the majority is saying, although carefully camouflaged, is that the defendant waived his constitutional right of jeopardy by objecting belatedly to the evidence. I disagree; constitutional rights should not be jeopardized by tactical decisions or cosmetic procedures.

{45} First, it should be noted that our local rules, specifically SCRA 1986, Rule 5-601, do not mandate a specific time in which to file a motion to suppress evidence. The "defendant's duty to move for suppression of evidence before trial is discretionary." **State v. Doe**, 93 N.M. 143, 148, 597 P.2d 1183, 1188 (Ct. App. 1979) (interpreting prior Rule 18, N.M.R. Crim. P.).

> Although orderly procedure requires the motion to be made earlier [interpreting Fed. R. Crim. P. 41(e)], the court in its discretion may entertain a motion at the trial stage. That discretion should be liberally exercised in the furtherance of justice. **Gallegos v. United States,** 237 F.2d 694 (10th Cir. 1956). In other words, the failure of defendant to file a motion to suppress prior to trial did not foreclose defendant's right to object to the admission of evidence during the trial. **Glisson v. United States**, 406 F.2d 423 (5th Cir. 1969).

Id. at 148, 597 P.2d at 1188.

{46} Second, unlike **State v. Aragon**, 89 N.M. 91, 547 P.2d 574 (Ct. App.), **cert. denied**, 89 N.M. 206, 549 P.2d 284 (1976), **overruled on other grounds**, **State v. Rickerson**, 95 N.M. 666, 625 P.2d 1183, **cert. denied**, 454 U.S. 845, 102 S. Ct. 161, 70 L. Ed. 2d 132 (1981), the failure of the defendant here to file his motion to suppress prior to trial did not result in prejudice to the plaintiff. The plaintiff in this case had advance notice that the defendant would be raising this motion to suppress evidence; the defendant had raised the motion previously at the municipal court level. While the plaintiff now complains that the defendant's motion to suppress was untimely, the plaintiff did not raise this critical issue itself in a pretrial hearing; nor did it object to the district court's ruling to dismiss or offer to proceed with trial by presenting other evidence against the defendant after the district court granted the defendant's motion to suppress. Furthermore, the plaintiff failed to protect its anticipatory appellate rights by failing to specifically request the district court to declare a mistrial for manifest necessity or stay the proceedings in order to take an interlocutory appeal. The majority apparently agrees with Judge Bivins's dissent in the court of appeals's opinion below that "the proper procedure would have been to allow the county to proceed, and if it had no further proof, then dismiss. If defendant had insisted on completion of his trial, as he should have, this issue would not have arisen."

{47} As the Supreme Court stated in **Sanabria v. United States**, "[l]egal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight." 437 U.S. 54, 65, 98 S. Ct. 2170, 2179, 57 L. Ed. 2d 43 (1978). I believe the plaintiff in this case received a fair opportunity to bring the full weight of the state against the defendant in district court; I therefore do not think it now rightfully can claim that no jeopardy attached simply because the defendant successfully challenged the evidence against him.

{48} For the reasons stated above, I respectfully dissent.

KENNETH B. WILSON,
Justice, dissents

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-045

Filing Date: May 3, 1990

Docket No. 18,710

KATHLEEN KUEFFER,

Plaintiff-Appellant,

v.

WILLIAM C. KUEFFER and SANTA FE DESIGN ASSOCIATES, INC., a New Mexico corporation,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Steve Herrera, District Judge

Levy & Geer
Robert D. Levy
Albuquerque, New Mexico

for Appellant.

Herrera, Baird & Ares
Leland G. Ares
Santa Fe, New Mexico

for Appellees.

OPINION

WILSON, Justice.

{1} Kathleen Kueffer (Ms. Kueffer), plaintiff-appellant, sued her former husband William C. Kueffer (Mr. Kueffer) and Santa Fe Design Associates, Inc. (SFDA), defendants-appellees, for breach of contract and breach of fiduciary duty. The trial court found that Mr. Kueffer breached the contract but did not breach a fiduciary duty to Ms. Kueffer. The court entered judgment for Ms. Kueffer on the breach of contract claim and awarded her compensatory damages; however, the court refused to award her punitive damages and prejudgment interest on that claim. Ms. Kueffer appeals the court's judgment and we affirm in part and reverse in part.

FACTS

{2} The Kueffers' marriage was dissolved by partial decree on July 10, 1987. The decree did not divide the couple's community assets and debts. The Kueffers divided those items by a written contract (the Kueffer contract) which provided that: (1) Mr. Kueffer would receive the couple's interests In SFDA and would hold Ms. Kueffer harmless for SFDA debts incurred after July 1987; (2) the couple would divide equally their sixty-four percent interest in net proceeds from a contract between SFDA and John Conron (the Conron contract) (3) Mr. Kueffer would manage the couple's interest in the Conron contract as a fiduciary; and (4) Mr. Kueffer would only deduct costs related to the Conron Development Project (the Project) from Ms. Kueffer's share of the gross proceeds from the Conron property's sale. The Kueffer contract defined "net proceeds" as "limited to the funds or land received, pursuant to the [Conron Contract], less any claim Conron has been paid arising from the actual [Conron Property Development Project]."

{3} When the Kueffers negotiated their contract Mr. Kueffer was aware of plans to sell the Conron property, including the couple's interest in that property. SFDA then had several outstanding debts, including delinquent gross receipts taxes, an architectural fee, and a loan. During the contract negotiations, Mr. Kueffer represented that SFDA had a zero net value and that the couple's interest in the Conron contract had no value.

{4} On December 13, 1988, the Conron property sold and SFDA's share of the sale proceeds was

$155,000. In dividing these proceeds, Mr. Kueffer's accountant determined that Ms. Kueffer was entitled to thirty-two percent of the net proceeds. He defined "net proceeds" as gross less offsets related to the Project. He then deducted two costs related to the Project: $12,912.73 for a hydrological test and $7,566.78 for a gross receipts tax. Also deducted from the gross proceeds were amounts for SFDA's outstanding debts noted above. After these deductions the gross proceeds equaled $82,570.33. On February 23, 1989, Mr. Kueffer through SFDA paid Ms. Kueffer $26,423.15 as her share of the net sale proceeds after the above deductions. On February 27, 1989, Ms. Kueffer filed a complaint against Mr. Kueffer and SFDA for breach of contract and breach of fiduciary duty based on the defendants' alleged failure to distribute to her the "net sale proceeds" as defined in the Kueffer contract. She sought specific performance of the contract or money damages, plus punitive damages, costs, interest, and attorney fees. The defendants sought dismissal of the complaint with prejudice, claiming Ms. Kueffer was liable for SFDA debts incurred prior to July 1987, and the net sale proceeds were properly distributed to her under the contract.

{5} The trial court found that Mr. Kueffer breached the contract by improperly deducting amounts for SFDA's outstanding debts from Ms. Kueffer's share of the net sale proceeds; however, he did not breach a fiduciary duty since the Kueffer contract was ambiguous and he acted in good faith. On August 2, 1989, the trial court entered its final judgment awarding Ms. Kueffer damages of $16,623.40 plus fifteen percent interest; representing her share of the net sale proceeds ($43,076.56) minus funds previously received ($26,423.15). The court denied Ms. Kueffer's claims for prejudgment interest, punitive damages, costs and fees. The defendants paid Ms. Kueffer $18,112.18 in satisfaction of this judgment. Ms. Kueffer appeals.

ISSUES

{6} On appeal Ms. Kueffer argues that substantial evidence does not support the trial court's failure to:

(1) award prejudgment interest on the breach of contract claim;
(2) award punitive damages on the breach of contract claim; and
(3) find that Mr. Kueffer breached his fiduciary duty to Ms. Kueffer.

We review each issue in turn.

{7} In determining whether substantial evidence supports the trial court's decision we resolve all disputed facts in favor of the prevailing party and indulge all reasonable inferences in support of the decision, disregarding all inferences or evidence to the contrary. **Brannock v. Brannock**, 104 N.M. 385, 387, 722 P.2d 636, 638 (1986). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. **Register v. Roberson Constr. Co.**, 106 N.M. 243, 245, 741 P.2d 1364, 1366 (1987). Trial court findings supported by substantial evidence will not be overturned on appeal. **Elephant Butte Resort Marina, Inc. v. Wooldridge,** 102 N.M. 286, 291, 694 P.2d 1351, 1356 (1985).

1. Prejudgment Interest

{8} Ms. Kueffer claims the trial court erred in failing to award prejudgment interest on the breach of contract claim from the date the proceeds were distributed to the date of judgment. An injured party is entitled to prejudgment interest as a matter of right when the amount due under the contract can be ascertained with reasonable certainty by a mathematical standard feed in the contract or by established market prices. **Bill McCarty Constr. Co. v. Seegee Eng'g Co.**, 106 N.M. 781, 783, 750 P.2d 1107, 1109 (1988); **Grynberg v. Roberts**, 102 N.M. 560, 562, 698 P.2d 430, 432 (1985). When the contractual debt owed is ascertainable by these means the legal annual interest rate, presently fifteen percent, applies. **Id.**; **see also** NMSA 1978, § 56-8-3 (Repl. Pamp. 1986). The trial court has discretion to award prejudgment interest, if justice requires, when the contract amount is not ascertainable by the above means. **United Nuclear**

Corp. v. Allendale Mut. Ins. Co., 103 N.M. 480, 488, 709 P.2d 649, 657 (1985). A mere difference of opinion as to the amount owed will not relieve the breaching party from liability for prejudgment interest. **Id.** Prejudgment interest is meant to compensate a plaintiff for injuries resulting from the defendant's failure to pay and the loss of use and earning power of plaintiff's funds expended as a result of the defendant's breach. **Id.**

{9} In this case, the Kueffer contract contained a mathematical standard defining the "net proceeds" due Ms. Kueffer. There is no question that the amount owed was ascertainable by using this standard and subtracting the appropriate costs from the sale proceeds. The fact that Mr. Kueffer disagrees with the allowable deductions from the sale proceeds does not alter this fact. We conclude that Mr. Kueffer used and retained Ms. Kueffer's money without her consent, contrary to Section 56-8-3(B), and must pay fifteen percent annual interest. To rule otherwise would allow Mr. Kueffer to avoid paying prejudgment interest merely by contesting the amount owed and permit him to use Ms. Kueffer's money free of charge. We reverse the trial court on this point and remand with instructions to enter judgment for Ms. Kueffer for fifteen percent annual prejudgment interest from the date of distribution to the date of judgment.

2. Punitive

{10} Ms. Kueffer also claims the trial court erred in failing to award punitive damages on her breach of contract claim. Under New Mexico law, a plaintiff cannot recover punitive damages for breach of contract unless that breach is "'maliciously intentional, fraudulent or oppressive, or committed recklessly or with a wanton disregard of the rights of the plaintiff."' **Art Janpol Volkswagen, Inc. v. Fiat Motors, Inc.**, 767 F.2d 690, 696 (10th Cir. 1985) (citation omitted). **See also** SCRA 1986, 13-1827; **Boudar v. E.G. & G., Inc.**, 106 N.M. 279, 283, 742 P.2d 491, 495 (1987). An award of punitive damages is within the trial court's discretion. **New Mexico Hosp. Ass'n v. A.T. & S.F. Memorial Hosp., Inc.**, 105 N.M. 508, 513, 734 P.2d 748, 753 (1987). A trial court abuses its discretion when its decision is contrary to logic and reason under the circumstances. **Newsome v. Farer**, 103 N.M. 415, 420, 708 P.2d 327, 332 (1985); **Martinez v. Ponderosa Prod., Inc.**, 108 N.M. 385, 386, 772 P.2d 1308, 1309 (Ct. App.), **cert. denied**, 108 N.M. 273, 771 P.2d 981 (1989).

{11} In this case, Mr. Kueffer testified that since the contract exempted Ms. Kueffer from liability for SFDA debts arising after July 1987, he assumed that she would remain jointly liable for SFDA debts incurred prior to that time and that he could properly deduct such debts from the sale proceeds prior to distribution. There is no evidence that Mr. Kueffer's interpretation of the contract was intentionally malicious, oppressive, reckless, or in wanton disregard of Ms. Kueffer's rights. We agree that the contract was ambiguous and his interpretation of it, though mistaken, did not render him liable for punitive damages. We affirm the trial court's denial of punitive damages as substantial evidence did not support such an award.

3. Breach of Fiduciary Duty

{12} Ms. Kueffer next claims the trial court erred in failing to find Mr. Kueffer breached a fiduciary duty to her, even if he acted in good faith. A fiduciary is obliged "to act primarily for another's benefit in matters connected with such undertaking." **Black's Law Dictionary** 563 (5th ed. 1979). A fiduciary breaches this duty by placing his interests above those of the beneficiary. **Gelfand v. Horizon Corp.**, 675 F.2d 1108, 1110 (10th Cir. 1982).

{13} Mr. Kueffer was obliged to protect Ms. Kueffer's interests in the sale proceeds. The record contains substantial evidence supporting the trial court's finding that Mr. Kueffer's deduction of SFDA costs from Ms. Kueffer's share of the proceeds was due to his interpretation of the contract and did not result from a subordination of

Ms. Kueffer's interests. We affirm the trial court on this issue.

CONCLUSION

{14} We reverse the trial court's refusal to award prejudgment interest and remand for action consistent with this decision. We affirm the court on the other issues presented. The parties will bear their own costs on appeal.

{15} IT SO ORDERED.

KENNETH B. WILSON,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-046

Filing Date: May 8, 1990

Docket No. 18,751

STATE OF NEW MEXICO,

Petitioner,

v.

JONATHAN M., a child,

Respondent.

Original Proceeding on Certiorari
Lalo Garza, District Judge

Hal Stratton, Attorney General
Margaret B. Alcock, Assistant Attorney General
Santa Fe, New Mexico

for Petitioner.

Jacquelyn Robins, Chief Public Defender
Peter Rames, Assistant Appellate Defender
Santa Fe, New Mexico

for Respondent.

OPINION

Wilson, Justice.

{1} We granted the State's petition for a writ of certiorari to clarify whether NMSA 1978, Section 32-1-27(F) (Repl. Pamp. 1989) prohibits the admission of statements made by a child under the age of fifteen years in a hearing to adjudicate delinquency. The district court held that such statements were admissible and the court of appeals, in an unpublished memorandum opinion, reversed the district court. We affirm the court of appeals and reverse the district court.

FACTS

{2} On September 26, 1987, Lawrence G. Nilsen (Nilsen) was cleaning his computer store. Jonathan, a thirteen-year-old boy who lived in the neighborhood, was the only other person present in the store. Nilsen went into the store's back office to retrieve his glasses. When he exited the office he was hit on the back of the head and knocked unconscious. When he regained consciousness he realized his throat had been cut and he was bleeding profusely. Nilsen's wounds prevented him from speaking and he urged Jonathan, who was still in the store, to call an ambulance for assistance. After some delay, Jonathan called for assistance then left the store. When ambulance personnel arrived at the store, Nilsen was in critical condition and was unable to tell them what happened.

{3} That evening Jonathan's mother called the police and said that her son had reported the incident. The police asked Jonathan and his mother to meet them at the store to explain what had happened. At the meeting, Jonathan made certain statements that were introduced into evidence at a delinquency hearing. At the time of the meeting Jonathan was not a suspect in the case and was not in custody. Inconsistencies in Jonathan's statements and other circumstances contributed to the district court's finding that he had committed aggravated battery and was a delinquent child in need of supervision.

ISSUE

{4} The single issue in this case is whether the district court erred in admitting statements made by a child under age fifteen against that child at a hearing to adjudicate delinquency. Section 32-1-27(F) clearly states that: "[n]otwithstanding any other provision to the contrary, no confessions, statements or admissions may be introduced against a child **under the age of fifteen years prior to an adjudication on the allegations of**

the petition." (emphasis added). When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation. **Storey v. University of N.M. Hosp./BCMC**, 105 N.M. 205, 207, 730 P.2d 1187, 1189 (1986); **New Mexico Beverage Co. v. Blything**, 102 N.M. 533, 534, 697 P.2d 952, 953 (1985); **State v. Michael R.**, 107 N.M. 794, 796, 765 P.2d 767, 769 (Ct. App.), **cert. denied**, 107 N.M. 748, 764 P.2d 879 (1988).

{5} We must construe this statute in view of the express legislative purposes of the Children's Code. **See Doe v. State**, 100 N.M. 579, 581, 673 P.2d 1312, 1314 (1984). The purposes of the Children's Code are:

> A. first to provide for the care, protection and wholesome mental and physical development of children coming within the provisions of the Children's Code and then to preserve the unity of the family whenever possible * * *.
>
> B. 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, and to provide a program of supervision, care and rehabilitation * * * [.]
> * * * * * *
>
> E. to provide judicial and other procedures through which the provisions of the Children's Code are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights are recognized and enforced[.]

NMSA 1978, § 32-1-2 (Repl. Pamp. 1989).

{6} In **Doe** we held that Section 32-1-27 does not prevent the admission of either voluntary statements or answers to "threshold or general on-the-scene questioning" in a hearing to adjudicate delinquency. 100 N.M. at 581, 673 P.2d at 1314. The defendant In that case was seventeen years old. We did not determine whether such statements would be admissible if made by a child under age fifteen. The State argues that the restrictions in Section 32-1-27(F) only apply to children's statements made in circumstances In which a **Miranda** warning would be required if those statements had been made by one over age fifteen. Along these lines, the State urges this court to extend the holding in **Doe** to cover children under the age of fifteen.

{7} Section 32-1-27(F) clearly prohibits the admission of statements made by children under age fifteen in proceedings prior to adjudication. As stated above, we must interpret this language in accord with its plain meaning. This interpretation is consistent with the purposes of the Children's Code. Once a child is deemed "within the Children's Code" the court must fashion a remedy beneficial to both the child and society. It is at the remedial stage, after adjudication, that statements made by a child under age fifteen aid the court's determination of how to provide the child with the necessary care, protection, supervision, or rehabilitation. **See generally State v. Favela**, 91 N.M. 476, 576 P. 2d 282 (1978) (Children's Code establishes system of treatment, care and rehabilitation for children who have committed delinquent acts), **overruled on other grounds**, **State v. Pitts**, 103 N.M. 778, 714 P.2d 582 (1986).

{8} Children of tender years lack the maturity to understand constitutional rights and the force of will to assert those constitutional rights. Children are encouraged to respect and obey adults and should not be expected to assert their constitutional rights even under the most perfunctory questioning by any adult, particularly an adult of authority. By prohibiting the admission of statements made by children under age fifteen, Section 32-1-27(F) encourages children to freely converse with adults without fear that their statements will be used against them at a later date. In contrast, an adult or a child over age fifteen is unlikely to make an involuntary statement in a noncustodial, noncoercive atmosphere or after receiving **Miranda** warnings. The additional protection that Section 32-1-27(F) grants children under age fifteen helps to balance these differences in sophistication.

CONCLUSION

{9} We conclude that the district court improperly admitted Jonathan's statements in the delinquency hearing, contrary to Section 32-1-27(F). Accordingly, we affirm the court of appeals and reverse the district court. We remand this matter for proceedings consistent with this opinion.

{10} IT IS SO ORDERED.

KENNETH B. WILSON,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

RICHARD E. RANSOM,
Justice

SETH D. MONTGOMERY,
Justice

JOSEPH F. BACA,
Justice, specially concurring

SPECIAL CONCURRENCE

BACA, Justice (Specially Concurring).

{11} Although I concur in the judgment of the court, I believe the majority's conclusion can be reached without umbrage to the rationale of **Doe v. State**, 100 N.M. 579, 673 P.2d 1312 (1984), and without judicial expansion of the policy on which the Children's Code is based. I write separately to explain how the majority's conclusion can be distinguished from **Doe** based solely on interpretation of the statutory language. As the majority indicates, when statutory language is clear and unambiguous, we should give effect to that language and refrain from further interpretation. **See Storey v. University of N.M. Hosp./BCMC**, 105 N.M. 205, 730 P.2d 1187 (1986).

{12} In **Doe**, we focused on NMSA 1978, Section 32-1-27(C) and (D) (Repl. Pamp. 1989), to determine that the Children's Code's additional protections were implicated only in a situation where **Miranda** safeguards come into play. We emphasized the language of subsection (C) stating that no suspected delinquent child could be **"Interrogated or questioned"** without having been advised of his constitutional rights and without a valid waiver. **Doe**, 100 N.M. at 582, 673 P.2d at 1315. With reference to subsection (D), we emphasized that "the state must prove that the statement or confession offered in evidence was **elicited** only after a knowing, intelligent and voluntary waiver of the child's constitutional rights was obtained." **Id.**

{13} Subsection (F) states: **"Notwithstanding any other provision** to the contrary, **no confessions, statements or admissions may be introduced** against a child under the age of fifteen years prior to an adjudication on the allegations of the petition." (Emphasis added.) Subsection (F) does not contain the ameliorating language that the **Doe** opinion emphasizes to indicate the legislative intent that Section 32-1-27 applies only in the post- **Miranda** situation. It does not refer to interrogation, questioning, or elicited statements, and it does not require a knowing, intelligent and voluntary waiver of constitutional rights. In the context of subsections (C), (D), and (E), **Doe** reasonably interpreted this language to show the legislature's intent that these requirements refer to post- **Miranda** constitutional safeguards, which can be implicated only in the post- **Miranda** context. However, subsection (F) broadly excludes all confessions, statements or admissions, "[n]otwithstanding any other provisions." This broad exclusion, without qualification, by its plain language is not limited to the post- **Miranda** context, and it demonstrates the intent to give children under the age of fifteen broader protection.

{14} I believe that analysis of the statutory language clearly indicates the legislature's intent regarding subsection (F) and further judicial gloss on the statute is unnecessary. I would hold simply that the language employed by the legislature indicates its intent that children under the age of fifteen should be treated differently than older minors. Accordingly, I would exclude on this basis all statements, confessions or admissions, both prior or subsequent to **Miranda,** before an adjudication on the allegations of the petition.

JOSEPH F. BACA,
Justice, specially concurring.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-055

Filing Date: June 12, 1990

Docket No. 19,012

STATE OF NEW MEXICO,

Petitioner,

v.

ALEX JOE PORTILLO, a/k/a JUAN ANTHONY PORTILLO,

Respondent.

Original Proceeding on Certiorari
W. C. "Woody" Smith, District Judge

Hal Stratton, Attorney General
Gail MacQuesten, Assistant Attorney General
Santa Fe, New Mexico

for Petitioner.

Jacquelyn Robins, Chief Public Defender
Sheila Lewis, Assistant Appellate Defender
Santa Fe, New Mexico

for Respondent.

OPINION

WILSON, Justice.

{1} At issue is the application of the six-month rule of SCRA 1986, 5-604(B) of the Rules of Criminal Procedure for the District Courts. In this case the police mistakenly arrested an innocent man whose name and description were similar to those of a fugitive defendant. The public defender, counsel for the fugitive defendant, asserts that the arrest of that innocent man started the speedy trial clock as to the fugitive defendant. Consequently, the public defender claims that Rule 5-604(D) mandates a dismissal of the indictment against the fugitive defendant after six months. The trial court agreed and dismissed the indictment. The court of appeals affirmed the dismissal. We reverse.

FACTS AND PROCEDURE

{2} On June 21, 1985, a grand jury indicted Mr. Alex Joe Portillo, a/k/a Juan Anthony Portillo (referred to herein as the fugitive defendant), on charges of distributing a controlled substance and possession of drug paraphernalia. The fugitive defendant pled not guilty at his arraignment on May 23, 1986. When he failed to appear for a motion hearing on September 19, 1986, the trial court issued a warrant for his arrest.

{3} On January 30, 1988, the police mistakenly arrested a different man, Alex Joe Portillo, on the warrant for the fugitive defendant's failure to appear. The booking slip for Alex Joe Portillo's arrest shows that he resembles the fugitive defendant originally arrested and arraigned on the indictment. The mistakenly arrested Alex Joe Portillo was unable to make bond and so remained in custody until March 18, 1988. Although represented by the public defender, Alex Joe Portillo's true identity and liberty remained challenged as the public defender and the district attorney began an inept investigation to confirm whether there were in fact two different Portillos.

{4} On June 27, 1988, 'the fugitive defendant, Juan Anthony Portillo, walked into the police department with his parole officer and had a second set of inked fingerprints taken. Despite the reappearance of the real defendant in this case and the availability of additional identification information, the district attorney was not satisfied that Alex Joe Portillo was the wrong man. In fact, six months after the innocent man's arrest, the district attorney was still maintaining an alleged investigation into the enigmatic Portillos. Finally, it was determined conclusively that Alex Joe Portillo, arrested on January 30, was not the fugitive defendant indicted on drug charges.

{5} Almost seven months and three trial settings later, counsel for Alex Joe Portillo moved to dismiss the **indictment** for violation of the six-month rule of SCRA 1986, 5-604(B). The trial court granted the motion and ordered the indictment dismissed with prejudice. The district attorney moved the court to reconsider its ruling, but this motion was denied. The district attorney then filed a second motion for reconsideration and requested an evidentiary hearing to present testimony that Alex Joe Portillo was not the fugitive defendant indicted by the grand jury. The trial court heard the district attorney's offer of proof and argument that the charges against the mistakenly arrested Alex Joe Portillo should be dismissed, but the indictment should remain in force against the fugitive defendant. The trial court refused, however, to conduct an evidentiary hearing on the issue and denied the district attorney's second motion for reconsideration. Thereupon, the district attorney (the state) appealed. The court of appeals upheld the trial court's dismissal; we granted certiorari.

ISSUES

{6} The dispositive issue before this court is whether the trial court erred in dismissing the indictment against the fugitive defendant based on a finding that an innocent man also named Alex Joe Portillo had been arrested and not brought to trial within the time period required by the six-month rule of SCRA 1986, § 5-604(B). In our discussion we address the following points:

> (1) Alex Joe Portillo's standing to advocate the dismissal of the fugitive defendant's indictment; and
>
> (2) Whether a violation of Alex Joe Portillo's rights can inure to the benefit of the fugitive defendant.

DISCUSSION

{7} It cannot be asserted by the public defender in this case that the speedy trial period has run for the fugitive defendant as his failure to appear tolled the six-month rule. **See** SCRA 1986, 5-604(B)(5); **State v. Flores,** 99 N.M. 44, 653 P.2d 875 (1982). Further, the state does not claim that Alex Joe Portillo should be retained as a defendant in this case; it is uncontroverted that he was improvidently arrested due to a mistake in identity. The question that remains, however, is the effect of the time limit for Alex Joe Portillo upon the case pending against the fugitive defendant. We conclude that there is no connection.

{8} A basic concept of American jurisprudence is that the person asserting a constitutional or statutory right must be the person whose rights are at issue, that is, the person complaining must be the real party in interest. As stated at 67A C.J.S. **Parties** Section 11b (1978):

> The general rule at common law is that every action must be brought in the name of the person whose legal right has been invaded or infringed. It has been held to be a general principle applicable to all actions at law that they should be brought by the person whose legal rights have been affected.

See also Eastham v. Public Employees' Retirement Ass'n Bd., 89 N.M. 399, 553 P.2d 679 (1976) (court found plaintiffs had no standing to sue because they lacked personal stake in the outcome of the controversy); **Kuhn v. Burroughs,** 66 N.M. 61, 342 P.2d 1086 (1959) (plaintiffs lacked standing to sue state because insufficient interest in subject matter of suit).

{9} It is clear that Alex Joe Portillo is neither the person indicted nor the person who will benefit by the dismissal of the indictment against the fugitive defendant; Alex Joe Portillo does not have standing to pursue a dismissal of the indictment. Moreover, the fugitive defendant may not take advantage of the remedies available to Alex Joe Portillo for a violation of the innocent man's rights.

{10} SCRA 1986, 5-604(D) states in pertinent part: "In event the trial of any person does not commence within the time specified in Paragraph B of this rule . . . the information or indictment filed against such person shall be dismissed with prejudice." The public defender relies heavily upon the statutory language: "any person." However, it should be noted that Rule 5-604(D) grammatically links the term "any person" with the latter reference "such person." In other words, when the trial of Person A **(any person)** is not commenced within the time limit, the information or indictment filed against Person A **(such person)** shall be dismissed. To hold that the failure to bring a particular person to trial within the time limit justifies the dismissal of an indictment against some other person not only contravenes the clear wording of the statute, but flies in the face of logic. We refuse to read Rule 5-604(D) in such a tortured manner. As we have repeatedly stated, principles of statutory construction require that a statute be interpreted with logic and common sense to avoid an absurd result. **See New Mexico Hosp. Ass'n v. A.T. & S.F. Memorial Hosps., Inc.,** 105 N.M. 508, 734 P.2d 748 (1987); **Shaw v. Warner,** 101 N.M. 22, 677 P.2d 635 (Ct. App.), **cert. denied,** 101 N.M. 11, 677 P.2d 624 (1984).

{11} This is not a question of whether an innocent man has fewer rights than a fugitive; it is a question of whether a violation of an innocent man's rights can inure to the benefit of a fugitive who has not had his rights abridged and who is not before the court. The fugitive defendant cannot benefit by this case, but this does not lessen in any way the rights of Alex Joe Portillo. The latter is certainly entitled to have all charges against him dismissed with prejudice, and he may have civil remedies available to him us well. Likewise, regardless of the wrongs inflicted upon Alex Joe Portillo and regardless of his rights and remedies, the fugitive defendant has no reason to complain, nor has he.

{12} The public defender states that the purpose behind the six-month rule is the prompt trial and resolution of criminal cases. **See State v. Mendoza,** 108 N.M. 446, 774 P.2d 440 (1989). While that general statement is correct, the criminal case against the fugitive defendant cannot be continued until he is rearrested. The charges against Alex Joe Portillo have been resolved by dismissal. To dismiss the charges against the fugitive defendant would serve no purpose other than to allow a fugitive to profit from his wrongful flight. Although we note that this case is the result of the judicial system's failure to act quickly in confirming that the wrong man had been arrested, the manner in which the state and the public defender handled Alex Joe Portillo should not be used to deny the people of the State of New Mexico the opportunity to bring a fugitive to justice.

{13} We find that the trial court erred in entering its order dismissing the indictment against the fugitive defendant in this case. We therefore remand with instructions to proceed in a manner consistent with this opinion.

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

KENNETH B. WILSON,
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-058

Filing Date: June 15, 1990

Docket No. 18,805

MARY MORGAN,

Petitioner-Appellant,

v.

TEXAS AMERICAN BANK/LEVELLAND,

Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
Patrick J. Francoeur, District Judge

Templeman & Crutchfield
C. Barry Crutchfield
Lovington, New Mexico

for Appellant.

James F. McDowell, III
Clovis, New Mexico

for Appellee.

OPINION

WILSON, Justice.

{1} This case arose under an action initiated by Texas American Bank Levelland (the Bank), respondent-appellee, to foreclose a it held on real property owned by Mary Morgan (Morgan), petitioner-appellant. During this action a mortgage First Federal Savings & Loan Association of Clovis (First Federal) held on the north 75.35 feet of the property (the front parcel) was also foreclosed. The front parcel was sold at a judicial sale and the trial court determined that Morgan could redeem the parcel for the sum of $64,177.34 plus ten percent interest from May 5, 1989, until paid. Morgan appeals the redemption price set by the trial court.

FACTS

{2} Morgan originally owned an undivided one-half interest in real property in joint tenancy, subject to First Federal's mortgage on the front parcel. Morgan's joint tenant later mortgaged his undivided one-half interest in the entire property to the Bank and then conveyed his remaining interest in the entire property to Morgan. Morgan then owned the front parcel subject to First Federal's mortgage and subject to the Bank's mortgage on an undivided one-half interest in that parcel. Morgan owned the rear parcel subject to the Bank's mortgage on an undivided one-half interest in that parcel. As a result, First Federal held a first priority mortgage on the front parcel, Morgan held a second priority position as to her original undivided one-half interest in the front parcel, and the Bank held a second priority mortgage on the remaining undivided one-half interest in the front parcel. The Bank held a first priority mortgage on a one-half undivided interest in the rear parcel.

{3} At a foreclosure sale on April 2, 1986, the Bank bid $115,000 for the entire property; representing the amount of First Federal's first priority mortgage ($39,318.40) plus the amount it was entitled to recover under the judgment of foreclosure ($75,681.60). The Bank paid $39,318.40 to First Federal in cash at the sale.

{4} On April 9, 1986, Morgan petitioned the trial court to redeem the front parcel and deposited $40,000 with the court clerk, representing the amount the Bank paid First Federal for its first priority mortgage plus interest. The Bank rejected Morgan's tendered redemption claiming the redemption price was $115,000. Morgan appealed the matter to this court to determine the terms and conditions of her redemption rights.

{5} On appeal we determined that the Bank had no claim against Morgan's original undivided one-half interest in the property. **Texas American Bank/ Levelland v. Morgan,** 105 N.M. 416, 733 P.2d 864 (1987). On remand, the trial court could not determine what portion of the Bank's bid was attributable to the front parcel of the property and ordered that the property be resold in separate parcels.

{6} On June 29, 1987, the trial court entered a second judgment and decree of foreclosure and ordered that the property be resold in two separate parcels. At the second sale on April 7, 1989, the Bank bid $65,000 for the front parcel, representing a credit for the amount it previously paid to First Federal ($39,318.40) plus an additional $25,429.70. The Special Master's Deed was drafted on April 13, 1989, and the court confirmed the sale on April 20, 1989. Morgan then petitioned the trial court to allow redemption of the front parcel for $40,000. The trial court determined that, as of May 5, 1989, the proper redemption price for that parcel consisted of:

1.	The amount paid to First Federal;	$39,318.40
2.	Costs of the sale;	$ 256.13
3.	One-half of the amount bid in excess of the lien payment to First Federal and costs;	$12,712.73
4.	Ten-percent interest on the amount paid to First Federal from April 26, 1986, to May 5, 1989.	$11,890.08
	TOTAL	$64,177.34

The trial court reasoned that since Morgan and the Bank each held a second priority position as to an undivided one-half interest in the front parcel, Morgan's redemption price must include one-half of the amount the Bank bid in excess of the lien payment and costs for that parcel. The trial court also stated that interest on $64,177.34 would continue to run until Morgan tendered a redemption payment.

{7} On September 18, 1989, the trial court entered an order of redemption after Morgan deposited $65,795.92 with the court. Morgan appeals the trial court's set redemption price.

ISSUES

{8} On appeal, Morgan claims the trial court erred in setting the redemption price at $64,177.34 and seeks a determination of the proper amount needed to redeem the front parcel. In addressing these issues we must determine:

(1) when Morgan's right of redemption arose; and
(2) the proper redemption price.

1. Right of Redemption

{9} After a judicial sale of real property, the former owner may redeem the property:

> (1) by paying to the purchaser . . . at any time within nine months from the **date of sale,** the amount paid, with interest from the **date of purchase** at the rate of ten percent a year, together with all taxes, interest and penalties thereon, and all payments made to satisfy in whole or in part any prior lien or mortgage not foreclosed, paid by the purchaser, with interest on such taxes, interest, penalties and payments made on liens or mortgages at the rate of ten percent a year from the date of payment; or
>
> (2) by petitioning the district court in which the judgment or decree of foreclosure was entered for a certificate of redemption and by making a deposit of the amount set forth in Paragraph (1) . . . in cash in the office of the clerk of the district court in which the order, judgment or decree under which the sale was made was entered, at any time within nine months from the date of sale. [Emphasis added.]

NMSA 1978, § 39-5-18(A) (Cum. Supp. 1989).

{10} In determining when Morgan's right of redemption arose we must define the statutory terms "date of sale" and "date of purchase." "Statutes should be construed so as to promote public convenience and to avoid inequity, absurdity, and hardship." **State ex. rel. Bd. of County Comm'rs v. Jones,** 101 N.M. 660, 661, 687 P.2d 95, 96 (1984). "When a statute uses terms of art, we interpret these terms in accordance with case law interpretation or statutory definition of those words, if any." **Buzbee v. Donnelly,** 96 N.M. 692, 700, 634 P.2d 1244, 1252 (1981).

{11} The Uniform Commercial Code (UCC) states that a "sale" is accomplished when a seller passes title to a buyer for a price. NMSA 1978, § 55-2-106(1). **See also Valdez v. Garcia,** 79 N.M. 500, 501, 445 P.2d 103, 104 (Ct. App.), **cert. denied,** 79 N.M. 449, 444 P.2d 776 (1968). Under this definition, the "date of sale" is the date the property's title passes to the buyer. "[A] 'purchase' includes taking by sale . . . or any other voluntary transaction creating an interest in property[.]" NMSA 1978, § 55-1-201(32) (Cum. Supp. 1989). A "purchase" is complete when the court confirms it and the purchaser receives an interest in the property, **i.e.,** title. **See Speckner v. Riebold,** 86 N.M. 275, 277, 523 P.2d 10, 12 (1974); **Baker v. Murphrey,** 250 N.C. 346, 350, 108 S.E.2d 644, 648 (1959); 59 C.J.S. **Mortgages** 734(b) (1949). Thus, the "date of purchase" is the date the purchase is completed.

{12} The first sale on April 26, 1986, was invalidated and the property was ordered resold in two separate parcels. In that transaction the Bank **did not** obtain title to the front parcel. Thus, no "sale" or "purchase" occurred. Since a "sale" is a prerequisite to obtaining the right of redemption, that transaction did not give Morgan a right of redemption and she was not subject to interest charges from that date. **See** NMSA 1978, § 39-5-18(A).

{13} The second sale was the only sale completed. The Special Master's Deed was drafted on April 13, 1989, and trial court confirmed the sale on April 20, 1989. In this case the "date of sale" and "date of purchase" refer to April 20, 1989, the date the trial court confirmed the second sale and the Bank obtained title to the front parcel. Morgan's right of redemption arose on that date.

2. Redemption Price

{14} The trial court held that the proper redemption price consisted of: (1) the amount paid to First Federal; (2) sale costs; (3) one-half of the remaining sale proceeds; and (4) interest on the amount paid to First Federal from the date of the first sale (April 26, 1986) until tender of the redemption price. We disagree with the court's fourth criterion.

{15} Foreclosure proceedings may be simplified by viewing each transaction separately and clearly identifying the parties' capacities. This case has been made unduly complex by the fact that the $39,318.40 the Bank tendered to First Federal in the first sale was not returned when the sale was invalidated. While the Bank's premature payment to First Federal may give rise to separate and distinct rights and liabilities between the parties, that case is not before us.

{16} "A bid may be withdrawn at any time before it is accepted. . . ." 59 C.J.S. **Mortgages** 734(b) (1949). A bidder does not receive any right to the property until the sale is confirmed by the court, then a legal "sale" has occurred. **See Speckner v. Riebold,** 86 N.M. 275, 277, 523 P.2d 10, 12 (1974); **Baker v. Murphrey,** 250 N.C. 346, 350, 108 S.E.2d 644, 648 (1959); 59 C.J.S. **Mortgages** 734(b). Thus, any interest earned on a bid amount belongs to the bidder when the sale is confirmed. Absent a valid sale, the bid and its accrued interest remained the Bank's property and should have been returned when the sale was invalidated.

{17} Similarly, the party seeking redemption may withdraw money tendered to the court or the purchaser until the tender is accepted. **See** 59 C.J.S. **Mortgages** 850(e) (1949). Interest on the purchase price ceases to run when the party seeking redemption validly tenders the redemption price to the purchaser. **See** NMSA 1978, § 39-5-18 (Cum. Supp. 1989); **Evensen v. Pubco**

Petroleum Corp., 274 F.2d 866, 873 (10th Cir. 1960); 59 C.J.S. **Mortgages** 850(g) (1949). The party seeking redemption owns any interest accrued on money deposited to redeem the property.

{18} The proceeds from the second sale of the front parcel should have been distributed first to discharge First Federal's mortgage, with the remaining proceeds to be equally divided between the Bank and Morgan. Thus, Morgan and the Bank were each entitled to $12,712.73, as their respective share of the sale proceeds.

{19} Once the foreclosure sale was confirmed, Morgan was entitled to redeem the property by paying the amount the Bank paid, $65,000, less Morgan's share of the sale proceeds, $12,712.73, plus interest from the "date of purchase", April 20, 1989. The fact that Morgan received part of the sale proceeds and used those proceeds to redeem the land sold need not confuse the issue. Similarly, the fact that the Bank was both a purchaser and a mortgagee should not confuse the issue.

{20} The statutory interest rate began to run on the redemption price of $52,287.27 ($65,000 - $12,217.73) from April 20, 1989, the "date of sale." Morgan could then redeem the property within nine months of that date by paying $52,287.27 plus ten percent annual interest from April 20, 1989, until tender of the redemption price.

CONCLUSION

{21} We conclude that the trial court improperly calculated the redemption price to include interest on the amount paid to First Federal, from April 26, 1986, until paid. The proper redemption price equals $52,287.27 plus ten percent annual interest from April 20, 1989, and any taxes, interest or penalties thereon until the date payment was made, September 18, 1989. We reverse and remand to the trial court for proceedings consistent with this opinion.

{22} IT IS SO ORDERED.

KENNETH B. WILSON,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-072

Filing Date: July 17, 1990

Docket No. 18,212

OIL TRANSPORT COMPANY,

Plaintiff-Appellant,

v.

NEW MEXICO STATE CORPORATION COMMISSION, ERIC P. SERNA, JOHN H. ELLIOTT and JEROME D. BLOCK,

Defendants-Appellees,

and

GROENDYKE TRANSPORT, INC., ALFRED HITE and SHELBY HITE, d/b/a ASH, INC., and STEERE TANK LINES, INC.,

Intervenors-Appellees.

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Roger L. Copple, District Judge

Jones, Snead, Wertheim, Rodriguez & Wentworth
James G. Whitley
Elizabeth Woldman
Santa Fe, New Mexico

for Appellant.

Hal Stratton, Attorney General
Joseph Van R. Clarke, Assistant Attorney General
Santa Fe, New Mexico

for Appellees Corporation Commission.

Raymond G. Sanchez
F. M. Mowrer
Albuquerque, New Mexico

for Intervenor Ash, Inc.

Civerolo, Hansen & Wolf
Wayne C. Wolf
Bruce T. Thompson
Albuquerque, New Mexico

for Intervenor Groendyke.

Jack A. Smith
Albuquerque, New Mexico

for Intervenor Steere Tank Lines, Inc.

OPINION

WILSON, Justice.

{1} This matter coming on for consideration by the court on motion for rehearing and the court having considered said motion and being sufficiently advised, now, therefore, the opinion handed down on April 24, 1990 is hereby withdrawn and the opinion filed this date is substituted therefor.

{2} Oil Transport Company (OTC) appeals a district court judgment affirming New Mexico State Corporation Commission's (Commission) orders denying OTC's application for a certificate of public convenience and necessity and granting Ash, Inc.'s (Ash) application. We reverse in part, affirm in part, and remand with instructions.

FACTS

{3} In December 1986 Ash applied to the Commission for a certificate of public convenience and necessity to transport petroleum products statewide. **See** NMSA 1978, §§ 65-2-80 to -127

(Repl. Pamp. 1981). OTC filed a similar application in February 1987. The Commission heard Ash's application on March 25 and 26, 1987, and heard consolidated applications of OTC and Mission Petroleum Carriers, Inc. (Mission) on May 6, 7, and 8, 1987. OTC and Steere Tank Lines, Inc. (Steere) intervened to protest Ash's application. Ash, Steere, and Groendyke Transport, Inc. (Groendyke) intervened to protest the OTC and Mission applications. Prior to Ash's application hearing, and again on April 13, 1987, OTC moved to consolidate the Ash and OTC application hearings for comparative review. The motions were denied by operation of law when the Commission failed to act on them prior to entering final orders on each application. The Commission granted Ash's application on October 19, 1987, and denied the OTC and Mission applications on October 29, 1987.

{4} On January 7, 1988, OTC separately appealed both Commission orders to the district court claiming they were arbitrary, biased, and unsupported by substantial evidence. OTC also claimed the Commission's failure to consolidate the Ash and OTC applications denied OTC due process and equal protection. OTC consolidated its appeals on March 7, 1988. On February 3, 1988, the Commission filed its answer, in which it denied its orders were improper and claimed OTC lacked standing to appeal the grant of Ash's application since OTC was merely an intervenor in that proceeding. On April 18, 1988, OTC amended its appellate complaints to include claims that the Commission discriminated against OTC, a Nevada corporation owned by a Lebanese national, in violation of 42 U.S.C. Sections 1981 and 1983 (1982) and erred in assessing record preparation costs against OTC. OTC also sought attorney fees under 42 U.S.C. Section 1988 (1982). The Commission denied these claims. The district court granted Ash, Groendyke, and Steere the right to intervene in these proceedings pursuant to Section 65-2-120(C).

{5} On August 11, 1988, the district court vacated the Commission's orders and remanded for **comparative review** of the Ash and OTC applications and a resolution of conflicts in the Commission's findings of fact and conclusions of law. The court declined to review OTC's discrimination claims and claims for attorney fees and costs, since they were not raised before the Commission. The court concluded the Commission's grant of Ash's application was supported by substantial evidence and ordered the Commission to correct a clerical error in Ash's certificate if, **after comparative review,** Ash qualified for a certificate.

{6} On August 30, 1988, OTC moved the court to reconsider its conclusion that substantial evidence supported the Commission's grant of Ash's application, as it conflicted with the court's vacation and remand of the Commission orders. The court denied this motion on September 2, 1988, stating there was no conflict since the two applications were **not mutually exclusive as an economic fact.** The court retained jurisdiction to review the Commission's orders entered upon remand.

{7} On remand, the Commission affirmed its orders on grounds that Ash presented substantial evidence the public needed **its** services and OTC did not. The Commission also found OTC's intervenors showed substantial evidence that granting OTC's application would contravene public convenience and necessity. The Commission again concluded that the applications were **not mutually exclusive** as an economic fact, but did not make a comparison of Ash and OTC's qualifications as carriers.

{8} On October 12, 1988, OTC moved the district court for relief from the Commission's orders on the above grounds. On December 13, 1988, the court denied this motion, finding that the Commission complied with the remand instructions and that the orders were supported by substantial evidence. OTC appeals the district court's judgment.

ISSUES

{9} On appeal OTC asserts: (1) the Commission's denial of its application was not supported by substantial evidence; (2) the Commission's orders were arbitrary; (3) the Commission's orders were domestically biased against OTC, in violation of 42 U.S.C. Sections 1981 and 1983 (1982); and (4) the Commission erred in assessing record preparation costs against OTC. No appeal was taken from the district court's order directing the Commission to comparatively review the Ash and OTC applications. In view of this fact, the issue before us is not whether a comparative review was required, but rather, whether the Commission complied with the district court's order and comparatively reviewed the applications.

{10} On review we must determine whether the Commission's orders were: (1) within the scope of its authority; (2) supported by substantial evidence; (3) arbitrary, capricious, or fraudulent; or (4) the result of bias or an abuse of discretion. NMSA 1978, § 12-8-22(A) (Repl. Pamp. 1988); **Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n,** 101 N.M. 470, 477, 684 P.2d 1135, 1142 (1984). In making this determination, we independently review the whole record for district court error. **National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,** 107 N.M. 278, 282, 756 P.2d 558, 562 (1988). On appeal we may correct an administrative agency's misapplication of the law. **Conwell v. City of Albuquerque,** 97 N.M. 136, 138, 637 P.2d 567, 569 (1981); **Ortiz v. New Mexico Employment Sec. Dep't**, 105 N.M. 313, 315, 731 P.2d 1357, 1359 (Ct. App. 1986).

{11} OTC does not dispute the Commission's authority to decide common carrier applications. The Commission has constitutional authority to determine matters of public convenience and necessity relating to common carriers. N.M. Const. art. XI, § 7. The Commission also has statutory authority to establish reasonable license requirements to perform its functions. NMSA 1978, § 65-2-83 (C) and (D) (Cum. Supp. 1989). We discuss OTC's issues in this context.

(I) SUBSTANTIAL EVIDENCE

{12} OTC argues substantial evidence does not support the Commission's denial of OTC's application due to its failure to consider Ash's evidence of public need for a statewide petroleum carrier in evaluating OTC's application. Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. **National Council on Compensation Ins. v. New Mexico State Corp. Comm'n,** 107 N.M. 278, 282, 756 P.2d 558, 562 (1988); **Viking Petroleum, Inc. v. Oil Conservation Comm'n,** 100 N.M. 451, 453, 672 P.2d 280, 282 (1983).

(a) Certificate Requirements

{13} Except as provided in NMSA 1978, Section 65-2-84 (Repl. Pamp. 1981), the Commission shall issue a certificate of public convenience and necessity authorizing the applicant to provide transportation as a common carrier under the Motor Carrier Act if it finds:

> (1) that the person is fit, willing and able to provide the transportation to be authorized by the certificate and to comply with the Motor Carrier Act and regulations of the commission; and
>
> (2) on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need.

NMSA 1978, § 65-2-84(D) (Repl. Pamp. 1981). **See also Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n,** 101 N.M. 470, 473, 684 P.2d 1135, 1138 (1984). Notwithstanding an applicant's prima facie showing pursuant to Section 65-2-84(D), the Commission must deny an application if it finds, based on intervenor and protestant evidence, that a grant would be inconsistent with public convenience and necessity. **Id.** at 473-74, 684 P.2d at 1138-39; **see also** §§ 65-2-84(E), (F).

(b) Public Need

{14} The Commission denied OTC's application in part for failure to show, in its hearing, a public need for its services. The Commission's order was based on a strict interpretation of NMSA 1978, Section 65-2-84(D) (Repl. Pamp. 1981), which requires **"persons supporting the issuance of the certificate** . . ." to present evidence the public needs their services. (emphasis added). We disagree with this interpretation of the statute.

{15} Prima facie evidence of public need is established by identifying: (1) commodities to be shipped; (2) points to and from which traffic moves; (3) the volume of freight to be tendered to the applicant; and (4) why present freight transportation services fall to meet present demands. **See Refrigerated Transp. Co. v. Interstate Commerce Comm'n,** 616 F.2d 748, 751 (5th Cir. 1980); **Novak Contract Carrier Application,** 103 M.C.C. 555, 557 (1967). "[P]ublic need is a fact and is not the exclusive property of any party or supporting witness, and that having been proven by any one of several applicants for the same authority, or by all of them collectively, the public interest must control as to which shall receive the operating rights." **Contractors Transport Corp. Extension-Iron and Steel Articles,** 126 M.C.C. 637, 641 (1977). This court has held that the statutory terms "convenience" and "necessity" refer to a definite need by the general public, rather than individuals. **Transcontinental Bus Sys., Inc. v. State Corp. Comm'n,** 61 N.M. 369, 372, 300 P.2d 948, 951 (1956); **Ferguson-Steere Motor Co. v. State Corp. Comm'n,** 63 N.M. 137, 146, 314 P.2d 894, 903 (1957). "Once it has been determined that consolidation of several proceedings is appropriate, it is axiomatic that the evidence adduced in one of the proceedings becomes a part of the entire consolidated record and is to be considered in making decisions on the merits of each of the other embraced proceedings." **Contractors Transport Corp. Extension-Iron and Steel Articles,** 126 M.C.C. at 640-41.

{16} In this case, the Commission twice determined that the Ash and OTC applications were not mutually exclusive. Nevertheless, the district court ordered a comparative review of the Ash and OTC applications on remand and that order has not been appealed. Thus, under the above law, Ash and OTC's evidence of "public need" was also consolidated.

{17} Both Ash and OTC presented evidence of commodities to be shipped, points of transportation, and prospective freight volume. Ash presented evidence that, in many areas of New Mexico, only one carrier was available to transport petroleum products. Its witnesses stated they needed more than one carrier to meet their demands and to encourage competition among carriers. Ash also presented evidence that the New Mexico economy could support more carriers and present demands exceeded available services. In addition, Ash presented evidence that its customers were pleased with its performance and would use it, as well as other certified carriers, to transport statewide. Intervenors in Ash's case objected to the wording of its application and generally stated that present carrier services met state demands.

{18} OTC presented evidence that only one statewide carrier was presently certified. Its witnesses stated they needed more statewide carriers to increase competition in the industry, to ensure product transportation, and to allow business expansion. Some of OTC's witnesses stated they would need less carrier service, as New Mexico business was declining. OTC's intervenors presented evidence that New Mexico business was declining and OTC's certification would harm present carriers.

{19} After hearing this evidence, the Commission determined that Ash presented sufficient evidence of "public need" and OTC did not. This finding is contrary to the law stated above. We conclude that the Commission should have considered Ash's evidence of "public need" in evaluating OTC's application and its failure to do so deprived OTC of the substantial evidence necessary to support its application.

(II) ARBITRARY, CAPRICIOUS OR FRAUDULENT

{20} OTC next claims the Commission's disparate treatment of Ash and OTC was arbitrary.

An administrative agency acts arbitrarily or capriciously when its action is unreasonable, irrational, wilful, and does not result from a sifting process. **Perkins v. Department of Human Servs.,** 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987); **Garcia v. New Mexico Human Servs. Dep't,** 94 N.M. 178, 179, 608 P.2d 154, 155 (Ct. App.) (quoting **Olson v. Rothwell,** 28 Wis.2d 233, 239, 137 N.W.2d 86, 89 (1965), **reversed on other grounds,** 94 N.M. 175, 608 P.2d 151 (1980).

{21} The Commission separately evaluated the "public need" evidence presented by Ash and OTC, contrary to the law stated above. The Commission then found "public need" supported only Ash's application. Once a "public need" was shown, the Commission had no rational basis for denying OTC's application for failure to show "public need" for **its** services.

{22} It appears that once the determination of no mutual exclusivity was made, the Commission did not thereafter consider the consolidated record in denying OTC's application in finding nos. 5, 6, 9 and 10. However, in finding no. 12, the Commission found, based on the record **of the Ash application,** that OTC's application was not consistent with "public convenience and necessity." If the Commission refused to look at the consolidated record on "public need" when it would help OTC while looking at the consolidated record on "public convenience and necessity" when it would hurt OTC, such decision making is clearly arbitrary. We conclude the Commission's decision was arbitrary.

(III) BIAS OR ABUSE OF DISCRETION

(a) Bias

{23} OTC next argues the Commission unconstitutionally applied NMSA 1978, Section 65-2-84(D) (Repl. Pamp. 1981) to deny OTC's application. Specifically, OTC alleges the Commission's orders were domestically biased against OTC, in violation of 42 U.S.C. Sections 1981 and 1983 (1982), and it seeks attorney fees under 42 U.S.C. Section 1988 (1982). In support, OTC cites Commission findings that: (1) OTC was a Nevada corporation owned by a Lebanese national; and (2) Ash, a New Mexico corporation, provided twenty-two jobs for New Mexicans.

{24} As stated, the district court declined to hear these issues, first raised on appeal. "[I]ssues not raised in administrative proceedings will not be considered for the first time on appeal." **Wolfley v. Real Estate Comm'n,** 100 N.M. 187, 189, 668 P.2d 303, 305 (1983). **See also Kaiser Steel Corp. v. Revenue Div.,** 96 N.M. 117, 120, 628 P.2d 687, 690 (Ct. App.), **cert. denied,** 96 N.M. 116, 628 P.2d 686 (1981). The district court may remand original issues to the Commission, if it is necessary to dispose of the case. NMSA 1978, § 12-8-22(B) (Repl. Pamp. 1988). The district court determined that these issues were not dispositive of the case and did not remand them. We find the Commission's failure to jointly consider the applicants' "public need" evidence dispositive of this case and affirm the district court's refusal to consider these claims.

(b) Abuse of Discretion

{25} OTC next claims that the Commission abused its discretion by originally failing to consolidate the Ash and OTC applications. **See Ashbacker Radio Corp. v. Federal Comm. Comm'n,** 326 U.S. 327 (1945). An agency abuses its discretion when its decision is not in accord with legal procedure or supported by its findings, or when the evidence does not support its findings. **Perkins v. Department of Human Servs.,** 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987). An agency also abuses its discretion when its decision is contrary to logic and reason. **Id.** The Commission has discretion to consolidate hearings. N.M. State Corp. Comm'n R.P. 44 (Nov. 14, 1985). The Commission may prescribe its own procedural rules within constitutional limits. N.M. Const. art. XI, § 4; **In re Atchison, T. & S.F. Ry.,** 37 N.M. 194, 20 P.2d 918 (1933).

{26} Even were we to assume the Commission had discretion not to consolidate the applications originally, the Commission had no discretion to ignore the district court's order requiring a comparative review. As stated, the Commission twice determined that the applications were not mutually exclusive. However, since the district court ordered a comparative review of both applications, including "public need" evidence, we conclude the Commission abused its discretion by falling to consolidate the evidence of public need when considering OTC's application.

(IV) COMPARATIVE REVIEW OF OTC AND ASH AS CARRIERS

{27} The Commission failed to make findings or conclusions regarding the comparative merits of OTC and Ash, despite the district court's instructions that the Commission should make a comparative review of the Ash and OTC applications to determine whether either or both should be awarded permits. The record supports the Commission's finding that there is a public need and necessity for the services to be rendered by Ash and OTC. It is therefore necessary that the Commission make a comparative review of the whole record. After reviewing both the Ash and OTC application proceedings and all of the evidence presented, it should make a determination of whether the grant of a certificate to OTC would be "inconsistent with the public convenience and necessity" and whether OTC is "fit, willing and able to provide transportation to be authorized by the certificate and to comply with the Motor Carrier Act and the regulations of the commission." NMSA 1978, § 65-2-84(D)(1) (Repl. Pamp. 1981).

{28} The Commission should make additional findings of fact as may be necessary to support its decision.

(V) RECORD PREPARATION COSTS

{29} Last, OTC argues it should not be assessed preparation costs for a record that the Commission is required to keep in triplicate. The Commission is statutorily required to keep three copies of all **witness testimony** at its hearings. NMSA 1978, § 63-7-13 (Repl. Pamp. 1989). The Commission is not required to keep three copies of the entire record, as OTC suggests. Commission Rule 64 requires the appellant to pay appellate record preparation costs. N.M. State Corp. Comm'n R.P. 64 (Nov. 14, 1985). As stated, the Commission may prescribe such rules. N.M. Const. art. XI, § 4; **In re Atchison, T. & S.F. Ry.,** 37 N.M. 194, 20 P.2d 918 (1933). Thus, the Commission's assessment of record preparation costs against OTC was proper.

{30} We reverse and remand to the Commission with instructions that, having determined a lack of mutual exclusivity, it enter additional findings of fact and conclusions of law, based upon the entire consolidated record, as to whether the grant of a certificate to OTC would be, "inconsistent with the public convenience and necessity" and whether OTC is, "fit, willing and able to provide the transportation to be authorized by the certificate and to comply with the Motor Carrier Act and regulations of the commission." NMSA 1978, § 65-2-84(D)(1) (Repl. Pamp. 1981).

{31} IT IS SO ORDERED.

WE CONCUR:

KENNETH B. WILSON,
Justice

RICHARD E. RANSOM,
Justice

STEVE HERRERA,
District Judge
(sitting by designation)

Not participating:

DAN SOSA, JR.,
Chief Justice

JOSEPH F. BACA,
Justice

Justice Kenneth B. Wilson

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-075

Filing Date: August 8, 1990

Docket No. 18,029

DOROTHY M. FOLZ, as Personal Representative of Sylvester C. Folz, Deceased, Steve D. Folz, Deceased, DOROTHY M. FOLZ, Individually, and RITA GARCIA, as Personal Representative of the Estate of Leo L. Garcia, Deceased,

Petitioners,

v.

THE STATE OF NEW MEXICO and THE NEW MEXICO HIGHWAY DEPARTMENT, an agency,

Respondents.

Original Proceedings on Certiorari
Lorenzo R. Garcia, District Judge

Louis Marjon
Albuquerque, New Mexico

James P. Cunningham
Phoenix, Arizona

Civerolo, Hansen & Wolf,
William P. Gralow
Albuquerque, New Mexico
Gallagher & Casados
J. E. Casados
Albuquerque, New Mexico

for Petitioners.

Butt, Thornton & Baehr
J. Duke Thornton
Albuquerque, New Mexico
Carpenter & Goldberg
William H. Carpenter
Albuquerque, New Mexico

for Respondents.

Michael B. Browde
Albuquerque, New Mexico

for Amicus Curiae New Mexico Trial Lawyers Association.

Atwood, Malone, Mann & Turner
Steven L. Bell
Roswell, New Mexico

for Amicus Curiae New Mexico Defense Lawyers Association.

Simons, Cuddy & Friedman
Charlotte H. Hetherington
Santa Fe, New Mexico

for Amicus Curiae Rish Management.

OPINION

RANSOM, Justice.

{1} This wrongful death and personal injury action was brought against the state and its agency, the Highway Department, and against Slurry Seal, Inc., a highway construction company. Plaintiffs claimed that negligence in the control of traffic at a mountain-site construction project contributed to deaths and injuries from a runaway truck driven by Enrique Peters. A verdict of $651,686.85 was rendered against the Department. Under the Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (Repl. Pamp. 1989), the statutory immunity from tort liability enjoyed by a governmental entity does not apply to highway maintenance. Section 41-4-11(A). Liability, however, is limited to $500,000 "for all claims arising out of a single occurrence," Section 41-4-19(A)(3), and no judgment may include an award for exemplary or punitive damages. Section 41-4-19(B).

{2} We issued our writ of certiorari to the court of appeals to review (1) whether the "single occurrence" limit of $500,000 applies to the sum of damages caused by the runaway truck's successive and separate collisions with multiple vehicles; (2) whether the bar to punitive damages against the Department affects the mandate of the New Mexico uniform jury instruction on wrongful death that, in fixing the amount of damages it deems fair and just, the jury should include in its award compensation for "mitigating or aggravating circumstances" attending the wrongful act, neglect, or default, SCRA 1986, § 13-1830; and (3) whether, to recover for severe shock from witnessing the death of her husband and fatal injuries to her son, an injured passenger in one of the automobiles was required to prove by expert medical testimony, or otherwise, a physical manifestation of her emotional injury.

{3} We affirm the court of appeals in its application of the "single occurrence" limit of $500,000; we reverse its finding of error in the trial court's wrongful death instruction that included a reference to "aggravating circumstances;" and we take this opportunity to reexamine the tort of negligent infliction of emotional distress articulated in **Ramirez v. Armstrong,** 100 N.M. 538, 673 P.2d 822 (1983). Specifically, we reject the **Ramirez** requirement that "[t]here must be some physical manifestation of, or physical injury to the plaintiff resulting from the emotional injury." **Id.** at 542, 673 P.2d at 826.

{4} In 1981 the Department contracted with Slurry Seal to resurface a mountainous portion of Highway 82 between Cloudcroft and Alamogordo. Plaintiffs alleged that defendants knew or should have known this portion of the highway contained steep downhill grades and had a history of runaway trucks, and that they were negligent in failing to design and implement an appropriate traffic-control plan for the project. On July 22, 1981, Slurry Seal was working on a stretch of highway that ran between milepost 8.1 to the east and a tunnel to the west. For some distance east and west beyond milepost 8.1 and the tunnel, the construction company had placed a series of signs warning motorists to be prepared to stop. As the work crew resurfaced the eastbound (uphill) lane, an escort vehicle was to shuttle traffic alternately up and down the westbound lane.

{5} At the time of the tragedy giving rise to this lawsuit, the escort vehicle was proceeding uphill through the construction site, leading a line of seven to twelve eastbound vehicles. A flagman at the uphill end of the construction had stopped about ten westbound cars when there came into view a heavily-laden truck proceeding at great speed downhill in the westbound lane. Its wheels were smoking. The truck, driven by Peters, had experienced brake failure and was out of control. Peters managed to swerve around the stopped, westbound vehicles and back into the westbound lane. By this time the escort vehicle and the first two cars in the line of vehicles proceeding uphill had cleared the construction area and had returned to the eastbound lane. Peters, unable to stop or avoid the oncoming traffic, sideswiped the third vehicle as its driver, Nette Motten, attempted to maneuver into the uphill lane and out of the path of the runaway truck. Peters' truck continued downhill and collided with three other vehicles, one driven by George Allegar, another by Sylvester Folz, and a third by Sherri Calkins. Finally, the truck struck a Slurry Seal construction vehicle and came to a stop. In striking these five vehicles, Peters' truck had travelled a distance of 500 to 600 feet. The jury allocated twenty percent of the fault to Peters, thirty-five percent to Slurry Seal, and forty-five percent to the Department.

{6} Thomas Tallant, the minor son of Nettye Motten, was injured. Sylvester Folz died at the scene of the accident. His wife, plaintiff Dorothy Folz, suffered multiple injuries, while their son Steven died several days later as the result of his injuries. Leo Garcia, an employee of Slurry Seal, was thrown from the construction vehicle and burned to death in a fire caused by a ruptured gasoline tank. The jury awarded damages as follows: Dorothy Folz, individually, $306,907.10;

Dorothy Folz, as personal representative of the estate of Sylvester Folz, $206,203.18; Dorothy Folz, as personal representative of the estate of Stephen Folz, $329,107.02; Rita Garcia, as personal representative of the estate of Leo Garcia, $500,000; and Nettye Motten, on behalf of Thomas Tallant, $105,975.76. The verdict against the state was $651,686.85, or forty-five percent of the total. The court entered judgment for plaintiffs but limited the damages recoverable against the state to a total of $500,000 on the basis of the liability cap.[1]

{7} Department's acts gave rise to a single occurrence. Plaintiffs contend each collision of the runaway truck was a separate occurrence, and, therefore, the statutory limitation of $500,000 applies separately to all victims injured as a result of each of five occurrences. The court of appeals concluded that plaintiffs' aggregate recovery against the state must be limited to $500,000 because plaintiffs' injuries arose from a single occurrence as that term is used in Section 41-4-19(A)(3).[2] We agree.

{8} The term "single occurrence" is not defined in the Tort Claims Act. In its opinion, the court of appeals drew upon the interpretation given that term in the judicial decisions of other jurisdictions concerned with the meaning of liability insurance contracts. Within that context three approaches have been used: (1) looking to **the effects of the accident,** that is, the number of injured persons, **e.g.**, **Kuhn's of Brownsville, Inc. v. Bituminous Casualty Co.,** 197 Tenn. 60, 270 S.W.2d 358 (1954); (2) looking to **the proximate cause or causes** of the injury or injuries, **e.g., Home Indemnity Co. v. City of Mobile,** 749 F.2d 659 (11th Cir. 1984); and (3) looking to **the event which triggered liability,** that is, the one event of an unfortunate character that takes place without foresight or expectation and subjects the insured to liability. **See, e.g., Shamblin v. Nationwide Mut. Ins. Co.**, 332 S.E.2d 639 (W. Va. 1985). **See generally** Annotation, **What Constitutes Single Accident or Occurrence Within Liability Policy Limiting Insurer's Liability to a Specified Amount per Accident or Occurrence,** 64 A.L.R. 4th 668 (1988).[3]

[1] Section 41-4-19(A) of the New Mexico Tort Claims Act provides:

In any action for damages against a governmental entity or a public employee while acting within the scope of his duties as provided in the Tort Claims Act, the liability shalt not exceed:

(1) the sum of one hundred thousand dollars ($100,000) for damages to or destruction of property arising out of a single occurrence;

(2) the sum of three hundred thousand dollars ($300,000) to any person for any number of claims arising out of a single occurrence for all damages other than property damage as permitted under the Tort Claims Act; or

(3) the sum of five hundred thousand dollars ($500,000) for all claims arising out of a single occurrence.

[2] Although not at issue in this case and not necessary to our decision here, Section 41-4-19 does not purport to limit the liability of the state and its entities in the aggregate. Rather, this Section specifically applies to the liability of "a governmental entity or public employee." "[I]t is only when the public entity is itself acting through its employee . . . that the Tort Claims Act comes into play. The public entity can act only through its employees, and the act of the offending employee is the act of the public entity under [the] traditional tort [doctrine of **respondeat superior]." Silva v. State,** 106 N.M. 472, 477, 745 P.2d 380, 385 (1987). It thus would appear that multiple governmental entities each could be liable for concurrent negligence to the limits of the Act under consideration here, but only for that portion of the total liability attributed to the entity or its employees.

[3] It must be acknowledged that the legislature certainly might have used the term "single occurrence" in a different sense than the one used in the insurance industry. In addition, principles of statutory construction and contract circumstances may lead to differing interpretations of similar terms. The Tort Claims Act is in derogation of plaintiffs' common-law right to sue the defendants and, therefore, is strictly construed **Methola v. County of Eddy,** 95 N.M. 329, 622 P.2d 234 (1980); **see also Holiday Management Co. v. City of Santa Fe,** 94 N.M. 368, 610 P.2d 1197 (1980) (declining to construe waiver provisions of Tort Claims Act in a manner inconsistent with remedial purpose of common-law abrogation of sovereign immunity). While the limitation of liability may form one of the objectives of both insurance companies and the New Mexico legislature, the Tort Claims Act also embodies a governmental desire to balance with this objective the needs of citizens for compensation and the need to impose duties of reasonable care on public employees. **See** NMSA 1978, § 41-4-2 (Repl. Pamp. 1989). Nevertheless, when the legislature does not provide an express definition of an essential statutory term, it must be assumed that the legislature was aware of the construction given that term in the judicial decisions of other jurisdictions. **Cf. Buzbee v. Donnelly,** 96 N.M. 692, 699-700, 634 P.2d 1244, 1251-52 (1981) (interpreting undefined statutory term "directly negat[ing] . . . guilt" in terms of case-law interpretation of the term "direct evidence"). Cases that determine what constitutes a "single occurrence" within the financial limitations of a contract for liability insurance are, therefore, of some relevance.

{9} —"Effects" (number of injured persons) does not determine number of occurrences. With regard to statutory maximum awards, legislatures have used three approaches to address recovery for multiple plaintiffs or claims: the "per incident or occurrence" standard; the "per person or claimant" standard; and the "per claim" standard. **See** Annotation, **Validity and Construction of Statute or Ordinance Limiting the Kinds or Amount of Actual Dies Recoverable in Tort Action Against Governmental Unit,** 43 A.L.R. 4th 19, 26 (1986).[4] New Mexico utilizes a "per person" standard permitting an award of damages up to $300,000 to each person for all claims arising out of a single occurrence, **see** Section 41-4-19(A)(2), subject further to a higher $500,000 limit for all claims arising out of a single occurrence. **See** § 41-4-19(A)(3).

{10} Under the New Mexico scheme it cannot be argued that the number of injured persons was intended to determine the number of occurrences, **i.e.,** that the legislature intended to adopt the so-called "effects" approach in articulating the "single occurrence" standard. While the limitation on all claims of individual persons is determined by subsection (A)(2), subsection (A)(3) clearly addresses the aggregate claims of multiple plaintiffs with any number of claims arising out of the same occurrence. This interpretation is consistent with both the express and implicit interpretations given similar "per person" and "per occurrence" limitation provisions in other jurisdictions. **See, e.g., Gleason v. City of Oklahoma City,** 666 P.2d 786 (Okla. Ct. App.) (when aggregate limitation on damages not reached, multiple claimants were each entitled to recover up to "any claimant" limitation for all claims arising out of a single occurrence because aggregate limitation "obviously" contemplated multiple claimants in single occurrence), **cert. denied,** 666 P.2d 786 (1983).

{11} —"Proximate cause" alone does not determine number of occurrences. The court of appeals purported to adopt the general view of a large number of jurisdictions that look to the proximate cause or causes of the accident to determine whether the accident constitutes a single occurrence or multiple occurrences. It would look to the concurrent cause attributable to the governmental entity and include within a "single occurrence" all resulting harm closely connected in time and location. The court stated:

> The term "single occurrence," contained in Section 41-4-19, refers to "the act or omission" of the governmental entity or public employee . . . and applies to claims which arose from the same proximate cause [and] embrace[s] those situations where the events resulting from the negligent act or acts of a governmental entity or public employee are closely linked together in time and location.

Because the sequence of events in this case all "derived from the same proximate cause and were closely connected in both time and location," the court concluded there was but a single occurrence. The court did not analyze, however, how the successive acts of design (planning) and of implementation or supervision were to be treated as the "same proximate cause" when they concurred to contribute to the accident. In light of this latter consideration, we do not base our application of the statute under the facts here on the notion that the sequence of events giving rise to liability "derived from the same proximate cause."

{12} We believe the suggestion of the court of appeals that the term "single occurrence" refers to the "act or omission of the governmental entity" which gave rise to the action is misleading. In some cases, a single, negligent act on the part of the state may coincide with the event that gives rise to damages and liability, such as in the negligent operation of a motor vehicle by an

[4] The doctrine of governmental sovereign immunity has been abolished or substantially abridged in virtually all jurisdictions either through legislation or judicial decision. In conjunction with abolition of immunity (and sometimes in response), numerous jurisdictions, including New Mexico, have passed legislation limiting the damages recoverable against governmental tortfeasors. As with examination of the cases interpreting the term "occurrence" in liability insurance contexts, it also is instructive to compare the New Mexico damage limitation with the limiting legislation of other jurisdictions.

agent of the state. In many other cases, multiple negligent acts or omissions of the state will antedate the event giving rise to liability. In such a case, the term "single occurrence" refers to all harm that, although proximately caused by a particular risk arising from the concurrent operation of one or more successive acts or omissions on the part of a governmental entity, was triggered by a particular event giving rise to liability.[5]

{13} —"Triggering event" for injuries within singular risk of harm determines occurrence. Our construction of the meaning of "single occurrence" and our application of that term here are based on the fact that all the injuries (1) lay within a singular risk of harm created by the concurrent operation of the Department's negligent acts and omissions, and (2) were triggered by a discrete event[6]—the runaway truck. The Department committed at least two negligent acts or omissions (planning and implementation) that, although committed successively, combined concurrently with the negligence of the other tortfeasors to proximately cause indivisible harm to each of multiple persons facing the singular risk of a runaway truck. In contrast, Peters, the driver of the runaway truck, may have committed one or more discrete torts with respect to each of the five collisions. Each such discrete tort would have been separated in time, place, and (perhaps) nature, and each in succession would have combined with the negligence of the Department and Slurry Seal to proximately cause the same harm.

{14} We are concerned, however, with the relationship of the Department's negligent conduct to this accident scene, not that of Peters, and we define the scope of a "single occurrence" accordingly. The negligent acts and omissions of the Department and Slurry Seal, although taking place at different points in time, combined to form but a singular, unitary, ongoing risk—that a runaway truck would strike one or more vehicles in an escorted caravan as the result of the collective failure of these parties to design and implement an effective traffic-control plan. Moreover, although the Department could have taken steps to eliminate the danger from runaway trucks, it had no control over whether the driver of a runaway truck would commit additional, independent tortious acts once the truck went out of control. Thus, from the perspective of the governmental entity, there was but a "single occurrence," because the collisions between the truck and each of the five vehicles lay within the scope of consequences portended by its negligence, and because the driver's loss of control was the triggering event that brought this negligence to its tragic fruition.[7]

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5 From this perspective it is apparent that the state's total potential liability for an ongoing risk of harm attending a project like this construction project never would be limited to $500,000 for the duration of the project. Here, a separate occurrence would have existed had the events in this case been repeated by a second runaway truck that same day, regardless of whether a subsequent negligent act was committed by the Department. **See Mason v. Home Ins. Co.,** 177 Ill. App. 3d 454, 532 N.E.2d 526 (1988) (finding a separate occurrence each time another customer was served contaminated food), **appeal denied,** 125 Ill. 2d 567, 537 N.E.2d 811 (1989).

6 The event that triggers liability may be a discrete act or omission of the governmental entity, as with the negligence of a public employee that coincides with injury, or the triggering event may be attributable to other persons or forces regardless of whether that event itself constitutes concurring fault.

7 The court of appeals suggested that, when multiple parties suffer injury, the sequence of events, **e.g.**, the successive acts of the driver in this case, must be linked together closely in time and space to be considered a single occurrence. Other courts likewise have relied upon the time and space **See Shamblin v. Nationwide Mut. Ins. Co.**, 332 S.E.2d 639 (W.Va. 1985) (one occurrence held to exist when one employee driver of insured negligently radioed second employee driver that it was safe to pass truck, and second employee's negligent attempt to pass resulted in an accident, because acts were closely related in time and concurrently caused the accident); **Olsen v. Moore,** 56 Wis. 2d 340, 202 N.W.2d 236 (1972) (one occurrence held to exist when insured's vehicle struck two vehicles almost simultaneously, there was virtually no time or space interval between impacts, and insured never regained control over the vehicle prior to striking second automobile). Petitioner points out the anomaly of a factor requiring events to be "closely linked in time and space," given the court of appeals' purported adoption of a causation approach to the interpretation of a "single occurrence." **Cf.** W.P. Keeton, D.B. Dobbs, R.E. Keeton & D. G. Owen, **Prosser and Keeton on the Law of Torts,** 43 at 283 (5th ed. 1984) (on unforeseeable consequences: "Remoteness in time or space may give rise to the likelihood that other intervening causes have taken over the responsibility. But when causation is found . . . it is not easy to discover any merit whatever in the contention that such physical remoteness should of itself be dispositive].").

{15} Although not directly at issue here, it is useful to note a case that held more than one occurrence existed when successive acts of negligence concurred to create multiple risks. In **Home Indemnity Co. v. City of Mobile,** 749 F.2d 659 (11th Cir. 1984), an insurer brought a declaratory judgment action in federal district court, seeking adjudication of the meaning of the term "occurrence" in its policy with the City. Significantly, this policy was purchased in response to the City's exposure to limited liability as a result of the state legislature's partial abrogation of sovereign immunity. The "per occurrence", term in the insurance policy was intended by the parties to cover the City's exposure to $100,000 of liability for property damages "arising out of a single occurrence."

{16} The controversy over the meaning of this provision arose when the City's storm drain system overflowed and caused extensive flooding after three heavy rains in 1980 and 1981.[8] In over 200 different lawsuits, homeowners whose property was damaged by the flooding had alleged that the City was negligent in the planning, construction, operation, and maintenance of its surface water drainage system. The court rejected as too narrow the insurer's argument that equated a separate "occurrence" with all flooding caused by each rainfall, and the court rejected as too broad the homeowners' argument that equated a separate "occurrence" with each incident of property damage.

{17} As in this case, the governmental entity's alleged negligence involved more than one act or omission. Although these acts and omissions occurred at separate times, they created risks that, in various combinations, operated concurrently. Unlike this case, however, the risk created by the alleged negligent construction and maintenance of **each particular storm drain,** although operating concurrently with other acts of negligence by the City, **created a separate risk** of flood damage. Each storm drain represented a singular or unitary risk. Faced with these facts, the Eleventh Circuit Court of Appeals held that:

> [E]ach discrete act or omission, **or series of acts or omissions,** . . . which caused water to flood and damage properties . . . is a single "occurrence" within the terms of the insurance policy. Thus, if on account of the City's negligence a drain on one street was blocked so that water flooded ten houses, . . . that would be one "occurrence". . . . If, at some other location, on account of negligence on the part of the City, a storm sewer spilled over, . . . that would be another occurrence. . . .

749 F.2d at 663 (emphasis added).[9] In the present case, while a series of acts or omissions on the part of the Department created an undue risk of injury, these acts contributed to a unitary risk, and only one triggering event occurred giving rise to liability. **Cf. Maurice Pincoffs Co. v. St. Paul Fire and Marine Ins. Co.,** 447 F.2d 204 (5th Cir. 1971) (each of eight different instances in which the insured sold contaminated

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Further, petitioner argues, a time and space factor quite probably would call on fact finders to make subjective and unprincipled decisions. For example, had the truck in this case proceeded another quarter mile down the road, still out of control, before striking a sixth vehicle, would this collision have constituted a separate occurrence? Under the theory we adopt today, the same negligent acts and omissions on the part of the Department would have subjected it to "single occurrence" liability for a (hypothetical) sixth collision with the same runaway truck. To the extent no independent, intervening cause cut the chain of causation flowing from the Department's negligence, the sixth collision would have lain within the scope of the same risk of harm that subjected the Department to liability for the previous five collisions.

[8] **City of Mobile** concerned the same facts at issue in **Home Indemnity Co. v. Anders,** 459 So. 2d 836 (Ala. 1984), **appeal after remand sub nom., Home Indemnity Co. of New York v. City of Mobile,** 477 So.2d 312 (Ala. 1985), in which the Alabama Supreme Court interpreted the term "occurrence" under the state's tort claims act to refer to all injuries resulting from the same proximate cause. **Anders,** however, declined to decide the facts under this definition, holding that, in light of the pendency of over 200 other suits by injured homeowners, such a determination lay beyond the jurisdictional scope of the declaratory action brought by the City and its insurer. **Anders,** 459 So.2d at 843-44.

[9] The court was not clear as to whether it would find three occurrences to exist if, **e.g.**, a single, negligently maintained storm drain had flooded a certain number of houses during each of the heavy rains. However, in light of the court's discussion of **United States Fire Insurance Co. v. Safeco Insurance Co.,** 444 So. 2d 844 (Ala. 1983), such a conclusion seems likely. **See** 749 F.2d at 662.

bird seed was a separate occurrence subjecting the insured to liability).

{18} We hold, therefore, that all injuries proximately caused by the governmental agency's successive negligent acts or omissions that combined concurrently to create a singular, separate, and unitary risk of harm fell within the meaning of a "single occurrence" when triggered by the discrete event of one runaway truck.

{19} Wrong death instruction not error. Defendants objected to the jury instruction on damages for wrongful death, UJI Civ. 18.30 (Repl. Pamp. 1980), because the instruction directs the jury to consider, among other factors, the "mitigating or aggravating circumstances attending the conduct which results in death."[10] This instruction is based on the New Mexico wrongful death statute, NMSA 1978, Section 41-2-3 (Repl. Pamp. 1989), which provides in part:

> [T]he jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default.

{20} Defendants contend that the language of UJI Civ. 18.30, directing the jury to consider mitigating or aggravating circumstances in awarding damages, is contrary to the Tort Claims Act, which provides that no judgment against a governmental entity under the Act shall include an award of exemplary or punitive damages. Section 41-4-19(B). The court of appeals agreed that UJI Civ. 18.30 improperly allowed for the imposition of punitive damages against the state. The court based this conclusion on: (1) the interpretation given similar language in the wrongful death statutes of certain other jurisdictions, and (2) the close parallel between the language in the instruction given and the "aggravating and mitigating circumstances" element in SCRA 1986, § 13-1827, the uniform instruction on punitive damages. We find neither of these considerations persuasive.

{21} The court of appeals opinion relied heavily on the Arizona Supreme Court's interpretation of that state's wrongful death statute."[11] The court of appeals' reliance on Arizona law was misplaced. The Arizona court based its interpretation on the legislative history of the Arizona wrongful death statute; however, New Mexico

[10] UJI Civ. 18.30 has been amended since the time of the Folz trial in August 1984. The uniform instruction now refers to the "mitigating or aggravating circumstances attending the wrongful act, neglect or default." SCRA 1986, 13-1830.

[11] Three jurisdictions in addition to New Mexico appear to have statutes that use the term "mitigating or aggravating circumstances" in defining the measure of damages that may be recovered in a wrongful death action: Arizona, Missouri, and Colorado. **See generally** 1 S. Speiser, **Recovery for Wrongful Death** 3:4 (2d ed. 1975 & Cum Supp. 1988). Although we do not discuss the Missouri and Colorado statutes in detail in the body of this opinion, we describe them briefly below.

Missouri provides for the recovery of damages as the jury deems "fair and just" having regard for pecuniary losses and the value of services, consortium, companionship, comfort, instruction, guidance, counsel, **training and support**. Additionally, the pain and suffering of the decedent expressly is included in the measure of recovery. Finally, "[t]he mitigating or aggravating circumstances attending the death may be considered by the trier of the facts." **See** Mo. Rev. Stat. § 537.090 (1986). The Missouri Supreme Court has held that, while damages for aggravating circumstances in a sense may be considered punitive in nature, there can be no recovery in a wrongful death case for punitive damages as such. **Glick v. Ballentine Produce, Inc.,** 396 S.W.2d 609, 616 (Mo. 1965), **appeal dismissed,** 385 U.S. 5 (1966). A party may, however, plead and submit appropriate instructions on the question of mitigating or aggravating circumstances, if the evidence justifies it. To submit the issue to the jury, Missouri requires "a showing of willful misconduct, wantonness, recklessness, or a want of care indicative of indifference to consequences." **Richeson v. Hunziker,** 349 S.W.2d 50, 53 (Mo. 1961). **Cf. Morrissey v. Welsh Co.,** 821 F.2d 1294, 1302 (8th Cir. 1987) (purpose of Missouri statute is to punish wrongdoer).

By contrast, the Colorado statute, like the Arizona statute, provides for damages the jury deems "fair and just . . . having regard to the mitigating or aggravating stances attending any such wrongful act, neglect or default. . . ." Colo. Rev. Stat. 13-21-203 (Repl. Pamp. 1987). Unlike Arizona, however, the Colorado statute has been interpreted to allow the award of compensatory damages only. **Moffat v. Tenney,** 17 Colo. 189, 30 P. 348 (1892).

courts previously have considered the meaning of the "mitigating or aggravating circumstances" language in our statute in light of its history and have come to a contrary conclusion.

{22} In **Boies v. Cole,** 99 Ariz. 198, 407 P.2d 917 (1965) (en banc), the Arizona Supreme Court reinstated a punitive award in a wrongful death action. The court began its analysis with the observation that, at one time, Arizona's wrongful death statute expressly had allowed for exemplary damages, Ariz. Rev. Stat. § 2147 (1887), but that this provision thereafter had been eliminated. The amended statute, providing for such damages as the jury deemed "fair and just," was held to provide for recovery of compensatory damages only. **See Downs v. Sulphur Spring Valley Elect. Coop.,** 80 Ariz. 286, 297 P.2d 339 (1956).

{23} In July 1956, however, the Arizona legislature again amended the statute. The amended statute provides for the award of such damages as are "fair and just . . . also hav[ing] regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default." **See Boies,** 99 Ariz. at 204, 407 P.2d at 920 (quoting Ariz. Rev. Stat. §§ 12-611, -613). The **Boies** court reasoned that this additional phrase, coming so close on the heels of its decision in **Downs,** indicated a legislative intent once again to provide for punitive damages.[12]

{24} New Mexico's wrongful death statute has a different history. The original New Mexico statute was, in pertinent part, identical to the Arizona statute construed in **Boies:** the jury was to award such damages as it deemed "fair and just . . . having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default." 1882 N.M. Laws, Ch. 61, § 3. To this statute, New Mexico then **added** an express provision **allowing for punitive damages. See** 1891 N.M. Laws, Ch. 49, § 2. These provisions of the statute have not been amended subsequent to 1891. **Cf.** § 41-2-3.

{25} In 1969, based on this sequence of events, the court of appeals itself rejected the argument that "the reference to mitigating or aggravating circumstances refers only to exemplary damages." **Stand v. Hertz Corp.,** 81 N.M. 69, 78, 463 P.2d 45, 54 (Ct. App. 1969), **aff'd,** 81 N.M. 348, 467 P.2d 14 (1970). A different interpretation, the court reasoned, would have rendered superfluous the addition of the express provision for punitive damages. **Id. Stang** noted the effect given this statutory language in **Kilkenny v. Kenney,** 68 N.M. 266, 361 P.2d 149 (1961). **Kilkenny** held, based in part on this language, that there may be recovery for the decedent's pain and suffering and for the cost of medical care between the time of the injury and death, in addition to damages based on the present worth of the life of the decedent to the decedent's estate (including both pecuniary and non-pecuniary value). **Cf. Mangus v. Miller,** 35 Colo. App. 335, 535 P.2d 219 (phrase "mitigating or aggravating circumstances" in Colorado wrongful death statute contemplates circumstances not relating to the wrongful act itself; rather language contemplates circumstances affecting actual damages suffered by the surviving party entitled to sue, either by way of diminishment or enhancement), **cert. dismissed,** 189 Colo. 481, 569 P.2d 1390 (1975).

{26} Although a jury usually is not instructed to consider "mitigating or aggravating circumstances" in determining compensatory damages, it must be remembered that a wrongful death action, as a statutory action, is **sui generis.** Common law concepts, while informative, are not dispositive of statutory law. Irrespective of exemplary damages, this Court has long recognized that:

> The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb by making negligence that

[12] In Arizona, unlike New Mexico, the plaintiff is not entitled to a separate instruction on punitive damages once the jury has been instructed in accordance with the "aggravating circumstance" language of the wrongful death statute, since the two instructions deal "with the same subject matter." **Quinonez v. Andersen,** 144 Ariz. 193, 199, 696 P.2d 1342, 1348 (Ct. App. 1984).

> causes death costly to the wrongdoer. **Hogsett v. Hanna, supra**; **Trujillo v. Prince,** 42 N.M. 337, 78 P.2d 145 (1938); **Tauch v. Ferguson-Steere Motor Co.,** 62 N.M. 429, 312 P.2d 83 (1957).

Stang v. Hertz Corp., 81 N.M. at 350-51, 467 P.2d at 16-17. Our statute plainly distinguishes between compensatory and exemplary damages but does not restrict the required consideration of mitigating or aggravating circumstances to the latter. Moreover, the statute's specific allowance of such consideration comports well with common trial experience that mitigating and aggravating circumstances indeed do have an effect on jury awards of compensatory damages. Under our fault system, there is a policy of deterrence associated with responsibility for compensatory damages. This fact is at the heart of fault versus no-fault policy considerations. It is a question separate from that of punitive damages.

{27} Significantly, there is an established practice in this state to instruct juries on "mitigating or aggravating" circumstances bearing on wrongful death damages. If the statutory construction expressed by this experience is to give way to the pure logic that separates damages from fault as argued in the special concurrence of Justice Montgomery, then it should be for the legislature and not this Court to express a legislative intent contrary to the construction given the statute by existing appellate decisions and by the uniform jury instructions mandated by this Court.

{28} By virtue of the statute's failure to restrict the required consideration of mitigating or aggravating circumstances to exemplary damages, and by virtue of the purpose and meaning of the statute as construed in our previous cases and uniform jury instructions, we conclude that consideration by the jury of mitigating or aggravating circumstances in setting compensatory damages comports with Section 41-2-3.

{29} What is more important here, however, is that the instructions in this case did not fail to provide adequate guidance to the jury on the task that lay before it. The prohibition in Section 41-4-19(B) barring award of exemplary damages against the state was made quite clear. In reviewing claimed error in jury instructions, appellate courts should consider the instructions as a whole. Instructions will be held adequate if they fairly represent the law applicable to the issue in question. **See Sturgeon v. Clark,** 69 N.M. 132, 138, 364 P.2d 757, 761 (1961). As discussed above, the wrongful death instruction given in this case was an adequate statement of the law. We note that no punitive damage instruction was submitted to the jury as to any defendant, and, moreover, that the trial court orally advised the jury on two different occasions that it was not to award punitive damages against the state. In a wrongful death action in which the state is a defendant and punitive damages are sought against another party, it may prove helpful for the court specifically to instruct the jury that, as to the state, no damages may be awarded under UJI Civ. 13-1827 to punish for acts that were willful, wanton, malicious, reckless, grossly negligent, fraudulent, or in bad faith. Here, however, we believe it unlikely that, having been cautioned by the judge and having before it no instruction on punitive damages, the jury was confused by the "mitigating or aggravating circumstances" language as applied to the Department, and we conclude there was no error.

{30} Emotional distress of **family member.** Following the collision, Dorothy Folz removed herself from the wreckage and witnessed her husband take his last breath. As she unsuccessfully tried to remove their son Steven, she heard him screaming, "Daddy, don't die, Daddy, please don't die." As a rescuer led Folz away from the wreck, she could still hear her son imploring his father not to die. Steven had suffered a severed spinal cord from which he died a few days later. Folz, herself, suffered multiple injuries.

{31} Folz was taken by ambulance to a hospital in Alamogordo where she was reunited immediately with her son. Both subsequently were evacuated by helicopter to a hospital in El Paso. The hospital physician who treated Folz testified that she was shaken and pale, that she complained of a headache and backache, and that she had scratches on her body and forehead. The doctor's diagnosis was that she had sustained a mild head injury and a mild cervical spine injury. In addition, the doctor administered medication to calm her because she was upset about Steven. Folz remained in the hospital for forty-eight hours and was discharged.

{32} A few days later, Folz was rehospitalized complaining of headaches and pains in her chest and abdomen. Upon examination, it was discovered that she had a fractured rib and was suffering from ileus, which is a blockage of the intestinal tract. The doctor stated that the ileus was "secondary to possible fracture of the rib." At trial, the doctor opined as lying within a reasonable medical probability that the ileus also could have been induced by stress.

{33} In **Ramirez** this Court articulated the elements necessary to establish a claim for the recovery of damages due to the negligent infliction of emotional distress. The Court adopted the following standards:

> 1. There must be a marital or intimate family relationship between the victim and the plaintiff, limited to husband and wife, parent and child, grandparent and grandchild, brother and sister, and to those persons who occupy a legitimate position in loco parentis;
> 2. The shock to the plaintiff must be severe and must result in a direct emotional impact upon the plaintiff from the contemporaneous sensory perception of the accident, as contrasted with learning of the accident by means other than contemporaneous sensory perception or learning of the accident after its occurrence;
> 3. There must be some physical manifestation of, or physical injury to the plaintiff resulting from the emotional injury;
> 4. The accident must result in physical injury or death to the victim.

100 N.M. at 541-42, 673 P.2d at 826-27. In addition, the plaintiff must prove the requisite elements of a cause of action in negligence.

{34} The **Ramirez** court specifically addressed whether a bystander, **not in any physical danger,** could recover from the emotional shock of witnessing a person injured through the negligence of another. The Court began its analysis by listing the three rules that had been utilized by other jurisdictions to circumscribe the liability for negligent infliction of emotional distress to a bystander: (1) the "impact" rule, (2) the "zone of danger" rule, and (3) the **Dillon** rule. **Id.** at 540, 673 P.2d at 825.

{35} Under the impact rule, liability for emotional distress due to witnessing injury to a third person exists only when the plaintiff also suffers physical injury from the same force that injured the third person. **See Saechao v. Matsakoun,** 78 Or. App. 340, 717 P.2d 165 (en banc) (adopting impact rule because it provides clear relationship between compensability and the plaintiff's status as a victim of a breach of duty), **rev. dismissed,** 302 Or. 155, 727 P.2d 126 (1986). **But see Gates v. Richardson,** 719 P.2d 193, 195 n.1 (Wyo. 1986) listing the numerous jurisdictions that have abolished the impact rule). The zone of danger rule would allow recovery if the plaintiff. personally was within the zone of danger of physical impact. **See Bovsun v. Sanperi,** 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984); **see also Restatement (Second) of Torts** 436 (1965) (endorsing zone of danger rule). The **Bovsun** court held that a plaintiff may recover damages for injuries caused by witnessing serious injury or death of an immediate family member, when the defendant also negligently exposed the plaintiff to the same risk of bodily injury or death. 61 N.Y.2d at 230-31, 461 N.E.2d at 848, 473 N.Y.S.2d at 362.

{36} In rejecting the limitations of both the impact and zone of danger rules, the court in **Dillon v. Legg,** 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (en banc), premised liability for negligent infliction of emotional distress on the foreseeability of the risk of injury. The **Dillon** court developed three factors to determine liability—the plaintiff's proximity to the accident, contemporaneous observation of the accident, and relationship to the accident victim. **Id.** at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80. The standards adopted in **Ramirez** were modeled upon these factors. Since **Ramirez,** at least one jurisdiction has eschewed even the restrictions of **Dillon** and would permit compensation of psychic injury simply on the basis of its reasonable foreseeability. **Paul v. Hanks,** 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

{37} The court in **Paugh** also rejected as artificial the requirement that there must be some manifestation of physical injury proximately related to the mental distress in order for the emotional injury to be compensable. The necessity that some sort of physical injury result from the emotional harm has been seen as a mechanism to ensure that the emotional distress is serious enough to be compensable. **See, e.g., Payton v. Abbott Labs,** 386 Mass. 540, 437 N.E.2d 171 (1982). In rejecting the requirement of physical manifestation, the **Paugh** court, 6 Ohio St. 3d at 77, 451 N.E.2d at 765, embraced the reasoning of **Leong v. Takasaki,** 55 Haw. 398, 403, 520 P.2d 758, 762 (1974):

> Because other standards exist to test the authenticity of plaintiff's claim for relief, the requirement of resulting physical injury, like the requirement of physical impact, should not stand as another artificial bar to recovery, but merely be admissible as evidence of the degree of mental or emotional distress suffered.

{38} Paugh focused on the seriousness of the emotional distress as a prerequisite for stating a claim for relief. It held emotional injury may be redressed if: (1) it were severe and debilitating, and (2) "a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." **Paugh**, 6 Ohio St. 3d at 78, 451 N.E.2d at 765 (citing **Rodrigues v. State,** 52 Haw. 156, 173, 472 P.2d 509, 520 (1970)). In **Binns v. Fredendall,** 32 Ohio St. 3d 244, 245, 513 N.E.2d 278, 280 (1987), the Ohio Supreme Court further held that, when the plaintiff also suffered contemporaneous physical injury, negligently inflicted emotional injury "need not be severe and debilitating in order to be compensable."

{39} Other jurisdictions have declared objective manifestation of physical injury to be an artificial barrier to recovery for negligent infliction of emotional distress. **See, e.g., Molien v. Kaiser Foundation Hosps.**, 27 Cal.3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (en banc); **Gammon v. Osteopathic Hosp. of Maine, Inc.,** 534 A.2d 1282 (Me. 1987); **Gates,** 719 P.2d at 200. **But see Payton,** 386 Mass. at . . . , 437 N.E.2d at 175 n. 5 (listing the numerous jurisdictions that require a showing of physical manifestation as a precondition to recovery for emotional distress).

{40} We are convinced the genuineness of such a claim adequately is guaranteed by the threshold requirements that (1) a marital or intimate family relationship existed between the plaintiff and the victim, (2) the severe emotional trauma suffered by the plaintiff was a consequence of contemporaneous sensory perception of the accident, and (3) the victim suffered physical injury or death. **See Ramirez,** 100 N.M. at 541-42, 673 P.2d at 826-27. "It is hard to imagine a mental injury that is more believable than one suffered by a person who witnesses the serious injury or death of a family member." **Gates,** 719 P.2d at 197. In **Ramirez** this Court articulated the interest that was deserving of legal protection when we noted that "[t]he tort of negligent infliction of emotional distress is a tort against the integrity of the family unit." 100 N.M. at 541, 673 P.2d at 825. The prerequisites stated above are sufficient to ensure the legitimacy of a claim that seeks redress for such a tort. **See Gates,** 719 P.2d at 200.

{41} As with any negligence action, the plaintiff has the burden to prove damages. Physical manifestation of the emotional trauma would be relevant toward establishing the extent of the injury. **Paugh**, 6 Ohio St. 3d at 77, 451 N.E.2d at 765 ("Proof of a resulting physical injury is admissible as evidence of the degree of emotional distress suffered."). However, physical manifestation should not be the sine qua non by which to establish damages resulting from emotional trauma. Modern advances in medical and psychiatric science have eliminated the practical necessity that led to the requirement of evidence of resulting physical injury to validate a claim of emotional distress. **See Gammon,** 534 A.2d at 1284 ("'[T]he state of modern medical science' plus the factors deemed relevant in determining foreseeability provide sufficient guarantee against fraudulent claims and against undue burden on defendants.") (quoting **Culbert v. Sampson's Supermarkets, Inc.,** 444 A.2d 433, 436-37 (Me. 1982)). Moreover, the requirement of physical manifestation is in different cases over-inclusive (allowing recovery for trivial distress if accompanied by physical symptoms) and underinclusive (denying recovery for severe distress if not accompanied by physical symptoms). **Molien,** 27 Cal.3d at 929-30, 616 P.2d at 820, 167 Cal. Rptr. at 838.

> The essential question is one of proof; whether the plaintiff has suffered a serious and compensable injury should not turn on this artificial and often arbitrary classification scheme. . . . [T]he jurors are best situated to determine whether and to what extent the defendant's conduct caused emotional distress, by referring to their own experience. . . . [T]his is a matter of proof to be presented to the trier of fact. The screening of claims on this basis [**i.e.,** resulting physical injury] . . . is a usurpation of the jury's function.

Id. at 930-31, 616 P.2d at 821, 167 Cal. Rptr. at 839 (citations omitted).

{42} The case at bar amply demonstrates the illogic of requiring as a threshold element the presence of physical injury to manifest the emotional trauma induced by the contemporaneous sensory perception of the death or physical injury of a close loved one. In their motion for directed verdict, defendants maintained that Folz failed to present any evidence of physical gestation of her emotional injury. Defendants[13] further asserted that, because Folz received injuries of her own and suffered stress from all of the events following the accident, it was not possible to identify specific physical injury caused by having perceived death or injury to her husband or son. We agree, but we do not conclude that Folz therefore failed to establish the prima facie elements of her claim.

{43} The irony of this case is that Folz satisfies the impact rule allowing recovery by a nonfamily member for emotional distress, i.e., the most narrow standard upon which to base a claim for negligent infliction of emotional distress. Unlike the children in **Ramirez,** who were pure bystanders, Folz was a direct victim of the negligence of the defendants. "As such, the emotional . . . injuries which have den as a proximate result of the defendant[s'] tortious act are compensable under the traditional rule for recovery. The tortfeasor takes his victim as he finds him, the effect of his tortious act upon the person being the measure of damages." **Binns,** 32 Ohio St. 3d at 246, 513 N.E.2d at 280. In denying defendants' motion for directed verdict in this case, then-District Judge Lorenzo Garcia correctly observed that, in effect:

> Where the bystander receives a physical injury, apart from the emotional injury, you have a merging of the evidence, a merging of the issues, and should the court impose such a stringent standard as to require the doctor to say, well, this percent of the emotional injury came from viewing the loss of a loved one, and this percent came from pain and suffering in the accident or physical trauma in the accident, it would place an unreasonable burden on a plaintiff.

{44} Nor do we believe it mandatory for the plaintiff to produce expert medical testimony in order to establish the claim for emotional injury. The court of appeals erroneously proceeded on the assumption that such testimony

[13] This argument actually was made by a party who did not participate in the appeal. However, defendants here joined in this party's motion during the argument on directed verdict. Consequently, we do not find it inappropriate to attribute this line of argument to these defendants.

is required. Although in many cases expert testimony will be required to establish causation and damages, such testimony is not always necessary. **See Leong**, 55 Haw. at 411-13, 520 P.2d at 766-67 (discussing role of expert). As we stated in **Gerety v. Demers,** 92 N.M. 396, 411, 589 P.2d 180, 195 (1978), "the use of expert medical testimony should be employed when the trial court reasonably decides that it is necessary to properly inform the jurors on the issues."

{45} Upon revisiting **Ramirez** we hold, as a threshold requirement to establish the genuineness of a claim for negligent infliction of emotional distress, it is sufficient to allege and prove that (1) the plaintiff and the victim enjoyed a marital or intimate family relationship, (2) the plaintiff suffered severe shock from the contemporaneous sensory perception of the accident, and (3) the accident caused physical injury or death to the victim. When the plaintiff suffers physical injury, apart from the emotional injury, the severe shock from contemporaneous sensory perception involving a family member need not be distinguished from distress attributable to the plaintiff's physical injury. In any event, damages are not recoverable for grief or sorrow normally attending the death of a family member. **See** SCRA 1986, § 13-1830.

{46} The testimony of Folz and her physician and the facts and circumstances of this case provided substantial evidence to satisfy each threshold requirement as well as the requisite elements of negligence. Therefore, the trial court properly submitted the claim for resolution by the jury.

{47} For the foregoing reasons, we affirm the court of appeals' application of the "single occurrence" provisions of Section 41-4-19(A)(3) of the Tort Claims Act. We reverse the court on its interpretation of the wrongful death instructions given in this case, and we reverse the court's conclusions regarding Folz' claim for negligent infliction of emotional distress. We remand for entry of judgment consistent with this opinion.

{48} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice (specially concurring)

KENNETH B. WILSON,
Justice (dissenting in part)

SPECIAL CONCURRENCE

MONTGOMERY, Justice (Specially Concurring).

{49} I join in the Court's opinion dealing with the single-occurrence and emotional-distress issues. In addition, I concur in the Court's reversal of the court of appeals on the compensatory-damage instruction issue because, as intimated by the majority, the defendants have not shown that they were prejudiced by the trial court's instructions—that, in other words, the jury included, as part of the damage awards to the petitioners for their respective decedents' wrongful deaths, amounts representing punitive or exemplary damages. I disagree, however, that the instruction given in this case, and the Uniform Jury Instruction on wrongful death generally, represent a correct statement of the law. In an appropriate case I would vote to reverse a damage verdict based on that instruction.

{50} UJI 13-1830 instructs the jury that in fixing the amount of damages which it deems fair and just it shall include **compensation** for the following elements of damages proved by the plaintiff: (1) reasonable expenses of necessary medical care and treatment (including funeral and burial expenses); (2) pain and suffering experienced by the decedent between the time of injury and death;

(3) the monetary worth the decedent's life; and (4) the mitigating or aggravating circumstances attending the (defendant's) wrongful act, neglect or default. This is an incorrect statement of the law. The plaintiff in a wrongful death case is entitled to compensation for the **losses** resulting from the defendant's acts or omissions; the plaintiff is not entitled to compensation for any mitigating or aggravating circumstances attending those acts or omissions, unless such "compensation" is awarded by way of punitive or exemplary damages. The whole theory of our tort law is to compensate the victim for his or her losses, not (unless punitive damages are awarded) to punish the tortfeasor. **See Restatement (Second) of Torts** 903 (1977) (damages represent **compensation** for harm sustained by victim); **cf. Fredenburgh v. Allied Van Lines,** 79 N.M. 593, 596, 446 P.2d 868, 871 (1968) (measure of compensatory damages is that which fully and fairly **compensates** for injuries received). This is, or should be, as true for wrongful death actions as it is for other actions founded on negligence, with respect to **all** of which (not just **"sui generis"** claims for wrongful death) our tort law has the dual objectives of compensating victims and deterring negligence. **See Restatement (Second) of Torts, supra**, 901; W. Keeton, D. Dobbs, R. Keeton, D., Owen, **Prosser and Keeton on Torts** 4, at 25 (5th ed. 1984). When compensatory damages are assessed these objectives are achieved by measuring the extent of the victim's losses and imposing liability on the tortfeasor for those losses, not by assessing the culpability of the tortfeasor's conduct and adjusting damages up or down depending upon the degree of the tortfeasor's fault.

{51} The purpose of punitive damages, on the other hand, is only to punish the wrongdoer. **Montoya v. Moore,** 77 N.M. 326, 330-31, 422 P.2d 363, 366 (1967); **cf. Fredenburgh,** 79 N.M. at 598, 446 P.2d at 873. This purpose is achieved, in an appropriate case (when there has been the requisite proof of opprobrious conduct—malicious or willful, wanton, etc., behavior—and when punitive damages may lawfully be recovered from the tortfeasor), by making it clear that in addition to the sum necessary to compensate the victim for the losses resulting from the tortfeasor's conduct, a separate amount is being assessed by way of punishment and as an example to deter others from such conduct. When there is an appropriate case, the trial judge must determine whether the jury should be permitted to award punitive damages and, if so, he or she must instruct the jury under UJI 13-1827.

{52} In fixing an award of compensatory damages, it makes no sense for the jury to consider the "mitigating circumstances" of the tortfeasor's conduct. The jury's task is to determine the amount of money necessary to make the plaintiff whole (insofar as that can be done by an award of money) and to fix the compensatory damages accordingly. It does not matter, under our scheme of tort law, that the defendant's conduct is serious or trivial; if the plaintiff has been harmed end the defendant is legally responsible, at least in part, for that harm, the plaintiff is entitled to recover his or her damages. (Of course, if the defendant's conduct is not the sole cause of the harm, his or her liability may be reduced under principles of comparative fault.) The same is true of "aggravating circumstances" attending the tortfeasor's conduct. The plaintiff is entitled to, and required to accept, a determination of the amount of his or her loss; and the aggravation, or lack of it, attending the defendant's conduct is relevant, if at all, only in determining comparative fault and in assessing punitive damages if the trial judge so permits.

{53} I therefore believe UJI 13-1830 should be revised to delete the defendant's "mitigating or aggravating circumstances" as an element of the damages for which a wrongful-death plaintiff is entitled to compensation. Nor should the jury be allowed to "consider" such circumstances in fixing the otherwise proper elements of compensatory damages, as it was in this case. The circumstances surrounding the defendant's conduct, whether mitigating or aggravating, have no place in fixing the amount of the plaintiff's loss.

{54} Our wrongful death act, Section 41-2-3, does not require a different conclusion. Since 1891, the statute has authorized both compensatory and exemplary damages in a wrongful death case. (The legislature made an exception, for wrongful death claims against the state, when it passed the Tort Claims Act and decreed in Section 41-4-19(B) that there could be no exemplary or punitive damages against a governmental entity.) In **Cerrillos Coal R.R. v. Deserant,** 9 N.M. 49, 49 P. 807 (1897), this Court construed the act as follows:

> Neither does the question of mitigating or aggravating circumstances have any weight so far as the damages denominated by our statute "compensatory" are concerned. If there should be a recovery full compensation should be awarded, mitigating or aggravating circumstances having effect only on the question of allowing or not allowing exemplary damages in addition to full compensation.
>
> Our statute appears to mean, that if there are "aggravating circumstances attending the wrongful act, neglect or default" for which the defendant is responsible, then exemplary damages should be added to those which are merely compensatory.

9 N.M. at 68, 49 P. at 813. Contrary to the majority's reading of the subsequent case law concerning the "mitigating or aggravating circumstances" language in the statute, nothing establishes that this early interpretation of the act was incorrect.

{55} In **Kilkenny v. Kenney,** the only reference to the statutory phrase in question was the following:

> [W]e are of the opinion that the provision in [§ 41-2-3], which allows a consideration of the mitigating or aggravating circumstances attending the wrongful act, when considered with the language contained in [§ 41-2-1], warrants the allowance to the administrator of the decedent's damages prior to death, provided they are not the same as those for which the husband, individually, has a right of recovery.

68 N.M. at 270, 361 P.2d at 152. The only issue in **Kilkenny** addressed in this connection, then, was whether or not damages sustained by the decedent between the date of injury and the date of death were recoverable. The Court gave no indication of why or how the statutory phrase "mitigating or aggravating circumstances" bore any relationship to this question; the reference to that phrase in the opinion seems to have been dictum of the purest sort.

{56} Similarly, when the court of appeals said in **Stand v. Hertz Corp.,** 81 N.M. at 78, 463 P.2d at 54, that **Kilkenny** and **Cerrillos** cannot be reconciled in the effect given to the statutory phrase, the court was referring to a conflict that does not exist. **Kilkenny** had indeed held that damages prior to death might be recovered and this did indeed conflict with the holding in **Cerrillos** that damages for the decedent's pain and suffering could not be recovered. To that extent **Kilkenny** overruled **Cerrillos sub silentio,** and that disavowal was made express by this Court on appeal in **Stand v. Hertz Corp.,** 81 N.M. at 352, 467 P.2d at 18. But in construing the statutory phrase "mitigating or aggravating circumstances" as superfluous if limited to the conditions for awarding punitive damages, the court of appeals in **Stang** went much further than necessary; its statements on this score are dicta like those in **Kilkenny,** and they were not approved by this Court (except by very oblique inference) on the appeal in **Stang**.

{57} This reading of our wrongful death act is consistent with that in Missouri, where the courts have held that an increase in damages by reason of aggravating circumstances is punitive in nature. **See Wiseman v. Missouri Pac. R.R.**, 575 S.W.2d 742 (Mo. App. 1978); **Williams v. Excavating & Foundation Co.,** 230 Mo. App. 973, 93 S.W.2d 123 (1936). As this Court has noted a number of times, our wrongful death act was taken from Missouri, and the views of the Missouri courts are persuasive in interpreting the act. **See Langham v. Beech Aircraft Corp.,** 88 N.M. 516, 520, 543 P.2d 484, 488 (1975) (citing cases); **Cain v. Bowlby,** 114 F.2d 519, 523 (10th Cir.), **cert. denied,** 311 U.S. 710 (1940).

{58} I would thus hold, in an appropriate case, that it is error to permit the jury, in effect, to award punitive damages against the state by considering any aggravating circumstances attending the state's conduct. However, there is no showing that the jury did this in the present case. On the contrary, the instructions the court gave informed the jury with reasonable clarity that it was not to award punitive damages against the state, and there is no indication on this record that the jury nonetheless did so by burying a punitive-damage award in its compensatory-damage determination.

{59} In the first place, the trial court's compensatory-damage instructions modified UJI 13-1830 by authorizing only indisputably permissible damage elements: (1) reasonable medical and funeral expenses, (2) pain and suffering of the decedent, and (3) the monetary worth the decedent's life. It is true that the court's instructions went on, incorrectly in my view, to permit the jury to **consider** the aggravating or mitigating circumstances attending the conduct which resulted in the decedent's death. Whether the jury did so or not is purely a matter of conjecture. It was, in any event, instructed that the only allowable elements of damage were those intended to compensate for losses suffered by the decedent or his family. In addition, as the majority opinion notes, the jury was admonished not to award punitive damages against the state. It is presumed that the jury properly followed the court's instructions. **See Rancheros Exploration & Dev. Corp. v. Miles,** 102 N.M. 387, 390, 696 P.2d 475, 478 (1985).

{60} This Court has said that the appellant has the burden of showing he has been prejudiced by an erroneous instruction—that the Court does not correct harmless error. **Jewell v. Seidenberg,** 82 N.M. 120, 124, 477 P.2d 296, 300 (1970); **see also Johnson v. Nickels,** 66 N.M. 181, 183-84, 344 P.2d 697, 699 (1959) (errors not shown to be prejudicial to a substantial right of complaining party will be disregarded). While this rule might not operate unfailingly in all cases, in this case the defendants are asking us to speculate on the effect of the trial court's wrongful-death instruction. The evidence at trial included the following amounts for lost earnings: (1) Sylvester Folz, $390,458.00; (2) Steven Folz, $225,501.00; and (3) Leo Garcia, $263,173.00. The damage awards were, respectively: (1) $206,203.00, (2) $329,107.00, and (3) $500,000.00. In the case of Sylvester Folz, the award was less than the evidence as to loss of earnings. In the cases of Steven Folz and Leo Garcia, while the damage awards exceeded the amounts claimed as lost earnings, significant sums could well have been awarded for other components of each decedent's monetary worth and for the pain and suffering experienced by each, as well as for Steven's medical expenses. We cannot say from the figures alone that the damage awards exceeded the amounts reasonably allowable as compensation under the court's instructions; we might speculate just as easily that the jury **reduced** its determination of compensatory damages on account of mitigating circumstances. In any event, the defendants have not even attempted to carry their burden to show that the awards were excessive or, if they were, that such excessiveness represented punitive damages.

{61} I therefore conclude that reversible error by the trial court has not been shown and that it was error for the court of appeals to reverse on this ground.

SETH D. MONTGOMERY,
Justice (Specially Concurring).

DISSENT IN PART

WILSON, Justice, concurring in part and dissenting in part.

{62} I join in the majority opinion with respect to the emotional distress issue. Further, I agree with and adopt Justice Montgomery's special concurrence regarding the uniform jury instruction on damages for wrongful death. I disagree, however, with the majority's determination that the Department's negligent acts and omissions gave rise to a single occurrence.

{63} The term "occurrence" is not defined in the Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (Repl. Pamp. 1989); we are required, therefore, to interpret it in its ordinary, everyday sense. **See United States v. Mayberry,** 774 F.2d 1018, 1020 (10th Cir. 1985) (word to be interpreted in its ordinary, everyday sense if not defined in statute). **Webster's Third New International Dictionary** 1561 (1971) defines "occurrence" as "something that happens unexpectedly and without design." This definition is consistent with the common usage of the words "accident" or "events" as explained in **Saint Paul-Mercury Indem. Co. v. Rutland,** 225 F.2d 689, 691 (5th Cir. 1955): "It can hardly be denied that when ordinary people speak of an 'accident' in the usual sense, they are referring to a single, sudden, unintentional occurrence. They normally use the word 'accident' to describe the **event** [emphasis in the original], no matter how many persons or things are involved." **See also Newmont Mines Ltd. v. Hanover Ins. Co.,** 784 F.2d 127, 135 (2d Cir. 1986) ("occurrence" ordinarily understood to denote something that happens without design or expectation); **but cf. Uniroyal, Inc. v. Home Ins. Co.,** 707 F. Supp. 1368, 1379-1390 (E.D.N.Y. 1988) (policy language reflecting intent of parties included new definition of "occurrence" to provide coverage for gradual, prolonged events that may be excluded by instantaneous connotation of "accident"; court therefore adopted standard for number of "occurrences" that was not result-oriented).

{64} These three terms, "occurrence," "accident," or "event," have been used synonymously by courts dealing with questions of interpretation similar to the issue before us today. **See, e.g., Newmont Mines Ltd.,** 784 F.2d 127, 135 (2d Cir. 1986) ("event" and "incident" correctly used interchangeably and synonymously with "occurrence"); **Hartford Accident & Indem. Co. v. Wesolowski,** 33 N.Y.2d 169, 172, 305 N.E.2d 907, 910, 350 N.Y.S.2d 895, 899 (1973) ("accident" and "occurrence" synonymous); **Shamblin v. Nationwide Mut. Ins. Co.,** 332 S.E.2d 639, 644 (W. Va. 1985) ("occurrence" was the "event," the "collision," or the "accident" from which liability arose). The facts and issues of the present case provide another appropriate context in which to discuss the meaning of these words within the framework of the classic dichotomy between cause and effect.

{65} The majority combines two of the possible approaches suggested by **Hartford Accident,** namely, the proximate cause test and the event test, to create a new definition of occurrence. Its hybrid definition of "single occurrence" is as follows: "[A]ll injuries **proximately caused** by the governmental agency's successive negligent acts or omissions that combined concurrently to create a singular, separate, and unitary risk of harm fell within the meaning of a 'single occurrence' when triggered by the discrete **event** of one runaway truck." (Emphasis added.)

{66} I believe a simpler and more practical approach is to determine whether there has been but "one event of an unfortunate character that takes place without one's foresight or expectation." **Shamblin,** 332 S.E.2d at 644. Regardless of who or what created the risk of harm, the question is whether there was only one resulting "occurrence"; liability did not arise until there was an event, or in this case, a traffic accident.

{67} In **Shamblin** the insured argued that the two separate acts of negligence by two of its employee-drivers in two of its insured vehicles required a conclusion that there were two "occurrences." The Supreme Court of Appeals of West Virginia disagreed, stating:

> In the case before this Court there may or may not have been two antecedent negligent acts but there was only one resulting "occurrence," the event from which liability arises, namely, the collision. The subject matter of the insurance is not "cause[s]" but "liability" and the basis for liability is an event (the collision) resulting in bodily injury or property damage. "[A]n occurrence means one event, not several events, and the question here is which event is the occurrence contemplated by the policy definition. The cases have consistently construed 'occurrence' or 'accident' in liability policies to mean

> the event for which the insured becomes liable, and not some antecedent cause of the injury."

Shamblin, 332 S.E.2d at 644 (quoting **Champion Int'l Corp. v. Continental Casualty Co.,** 546 F.2d 502, 508 (2d Cir. 1976), **cert. denied,** 434 U.S. 819 (1977)). The **Shamblin** court also cited **Hartford Accident** as "[a]nother case equating 'occurrence' with a single liability-triggering 'event,' regardless of the details of how or why the event happened." **Shamblin,** 332 S.E.2d at 644. Quoting **Hartford Accident** with approval, the **Shamblin** court reflected:

> The **[Hartford Accident]** court therein held that there was only one "occurrence," not two occurrences, within the meaning of an automobile liability insurance policy, when an insured vehicle struck one oncoming vehicle and then ricocheted off and struck a second vehicle more than 130 feet away. The court recognized three approaches to determining whether there was one or more than one "occurrence" for liability insurance purposes: (1) looking to the proximate cause of the injuries or damages, (2) looking to the number of persons suffering a loss, and (3) looking to that one event of an unfortunate character that takes place without one's foresight or expectation and which is objectively descriptive of what happened. The court concluded that the third approach was the most practical of the three approaches. In applying this "event" test the court examined the closeness in time of the two impacts (only instants apart) and stated: "We think in common understanding and parlance there was here but a single, inseparable 'three-car accident.'"

Shamblin, 332 S.E.2d at 644 (quoting **Hartford Accident,** 33 N.Y.2d at 174, 305 N.E.2d at 910, 350 N.Y.S.2d at 899-900).

{68} In its opinion in the present case the majority concludes that the one event of an unfortunate character which took place without foresight or expectation and which is objectively descriptive of what happened was a runaway truck. While I agree that the runaway truck, as well as the construction operation and the vehicle escort procedure, caused the accident, none of these circumstances alone was the event from which the liability arose nor are they objectively descriptive of what happened. Instead, I am convinced by the analysis in the **Shamblin** case that, despite the many antecedent causes, the resulting occurrence from which liability arose was the collision or the traffic accident.

{69} In determining whether there was a single accident (occurrence) or a series of accidents (occurrences), it is appropriate and helpful to examine the anatomy of a traffic accident. Fortunately, we have the benefit of a great body of knowledge from the study and experience of experts in this field. Authorities agree that a traffic accident may be broken down into at least four segments as follows: (1) point of perception; (2) period of evasion; (3) point of no escape; and (4) point of impact (first contact). The point of perception occurs when a driver perceives that an accident is imminent. The period of evasion is that period of time when the driver takes evasive action to avoid the accident. The point of no escape is that point reached when evasive tactics are superfluous and an accident is unavoidable. The point of first impact, or first contact, is when the vehicle or vehicles actually collide. **See** J. Baker & L. Fricke, **The Traffic-Accident Investigation Manual** 15-26 (9th ed. 1986).

{70} By analyzing an accident through its various segments, it is possible to determine whether an accident was a single occurrence with its segments identical or whether the accident was a series of occurrences with its segments separate and distinct. Two comparative hypotheticals are illustrative.

{71} Assume that an obstruction blocks the traffic lane of a highway. Driver A approaches the obstruction and stops in the traffic lane; Driver B approaches and stops behind Driver A. Driver C approaches, is unable to stop, and crashes into Driver B. Driver B is carried forward into Driver

A; Driver A is carried forward into the obstruction. In this hypothetical, the only point of perception is the point of time at which Driver C perceives that a collision is imminent. Drivers A and B may not perceive any danger at all. The period of evasion is when Driver C attempts to stop or avoid colliding with Driver B. Neither Driver A nor Driver B may be in positions to take evasive action as they are already stopped by the obstruction. The point of no escape is that point of time when Driver C cannot stop or turn and collides with Driver B. This point is, effectively, the same for all of the drivers and vehicles as the impacts are, for all intents and purposes, simultaneous, overlapping, or otherwise indistinguishable. From my analysis, this was a single accident or occurrence.

{72} Assume, however, that Driver A approaches the obstruction and crashes into it. Driver B approaches and crashes into Driver A. Driver C now approaches and crashes into Driver B. In this hypothetical, the point of perception is the point of time that each individual driver sees that the highway is obstructed and a collision is imminent. The period of evasion for each driver is when each is attempting to stop or avoid the collision. The point of no escape for each driver is that point of time when each cannot avoid a collision. Likewise, the impacts are clearly separate and distinct. From my analysis, the second hypothetical was a series of distinguishable accidents or occurrences.

{73} The task now is to determine whether the accident in the case before us more closely fits the first hypothetical or the second. Conveniently, the accident under discussion is an excellent example to make this analysis. The runaway truck came downhill in the westbound lane where a series of cars had stopped at the construction site. Had the truck collided into the rear car causing an accordion-type crash, this accident, like the first hypothetical, would meet the criteria for a single occurrence. However, the runaway truck managed to pass the cars stopped in the westbound lane and continued on to sideswipe an oncoming vehicle which was attempting to regain the eastbound lane. The truck then continued downhill, striking three other vehicles before colliding with a construction vehicle which burst into flames. Each of the five vehicles involved in the collisions had different points of perception, had varying periods of evasion, had successive points of no escape, and had separate and distinguishable points of impact.

{74} For the reasons stated above, I respectfully dissent from the majority's definition of "single occurrence" as used in Section 41-4-19(A)(3) of the Tort Claims Act.

KENNETH B. WILSON,
Justice, concurring in part
and dissenting in part

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-076

Filing Date: August 20, 1990

Docket No. 19,230

JAMES R. GRANTLAND and BETTY GRANTLAND, husband and wife,

Petitioners,

v.

LEA REGIONAL HOSPITAL, INC.,

Respondent.

Original Proceeding on Certiorari
William J. Schnedar, District Judge

Gary C. Mitchell
Ruidoso, New Mexico

for Petitioner.

Atwood, Malone, Mann & Turner
Rod M. Schumacher
Roswell, New Mexico

for Respondent.

OPINION

WILSON, Justice.

{1} Defendant-respondent Lea Regional Hospital, Inc. (Regional) filed a motion in district court to dismiss the medical malpractice complaint of plaintiffs-petitioners James R. and Betty Grantland (Grantlands) on the basis that the statute of limitations barred their recovery. When the district court denied Regional's motion, Regional filed an interlocutory appeal to the court of appeals. The court of appeals reversed the district court. We granted certiorari and now reverse the court of appeals.

{2} Pursuant to the Medical Malpractice Act, NMSA 1978, Sections 41-5-1 to -28 (Repl. Pamp. 1989) (the Act), on May 14, 1986, Grantlands filed an application with the New Mexico medical review commission (the commission) requesting consideration of their claim of medical malpractice against Regional. Grantlands alleged that Regional committed medical malpractice in the care and treatment of James R. Grantland from mid-June through July 1983. In September 1986, Grantlands made further inquiry of the commission as to Regional's status as a qualified health care provider. On October 8, 1986, the commission advised Grantlands that Regional had not contributed to the patient's compensation fund and therefore was not a qualified health care provider under the Medical Malpractice Act.

{3} In the meantime, on September 12, 1986, Grantlands filed a medical malpractice complaint against Regional in district court. The district court found that Grantlands did not know or have reason to know that Regional was not a qualified health care provider for the purposes of the Act, and even though the Grantlands' complaint was filed in district court more than three years after the date of the alleged malpractice, it was not barred by the statute of limitations as a matter of law.

{4} The single issue in this case is whether the filing of a medical malpractice application with the New Mexico medical review commission tolls the statute of limitations as to nonqualified health care providers.

{5} In 1976, the New Mexico legislature created a medical review commission to review all medical malpractice claims against "health care providers covered by the Medical Malpractice Act." § 41-5-14(A). **See generally** Kovnat, **Medical Malpractice Legislation in New Mexico,** 7 N.M.L. Rev. 5 (1976-77). The intent of the Act is to prevent the filing of nonmeritorious malpractice lawsuits. **Otero v. Zouhar,** 102 N.M. 482, 697 P.2d 482 (1985). To facilitate this purpose, the Act provides that prior to filing a complaint in any court against a "qualifying health care provider," the cat must submit an application to the medical review commission. § 41-5-15(A). Upon receipt of an application a panel is selected, § 41-5-17, and after consideration of all relevant material, the panel decides only two questions, namely, "(1) whether there is substantial evidence that the acts complained of occurred and that they constitute malpractice; and (2) whether there is a reasonable medical probability that the patient was injured thereby." § 41-5-20. Submission of a case for the consideration of the panel tolls the statute of limitations period until thirty days after the panel's final decision is entered in the permanent files of the commission and a copy is served upon the claimant and his attorney by certified mail. § 41-5-22.

{6} In its opinion the court of appeals relies upon **Otero v. Zouhar,** 102 N.M. 482, 697 P.2d 482 (1985). A comprehensive reading of this case convinces us that claimants who make a good-faith attempt to comply with the Medical Malpractice Act should not be deprived of their day in court by placing form above substance. As stated in **Zouhar:**

> We see no justice in strictly applying the Act now to void the complaint filed and thus circumvent the tolling provision of the Act that would have applied to save [claimant's] cause of action if the trial court's ruling and the time consumed in appellate proceedings had not intervened. Such "Catch-22's" are procedural anomalies that do not deserve perpetuation.

102 N.M. at 485, 697 P.2d at 485.

{7} Similarly, in **Jiron v. Mahlab,** 99 N.M. 425, 659 P.2d 311 (1983) we allowed the claimants to circumvent Section 41-5-15(A) and file their medical malpractice complaint in district court before applying for the commission's review in order to protect their constitutional right of access to the courts. In that case we said: "The institution of the Medical Review Commission as a forum for screening medical malpractice claims appears to work well in most instances. Nevertheless, when a statute or rule operates to deprive an individual of a protected right, it may be held constitutionally invalid as applied to that individual." 99 N.M. at 426, 659 P.2d at 312.

{8} Like the claimants in **Zouhar** and **Jiron,** Grantlands are in a "Catch-22" position. Had Grantlands filed a complaint in district court and then discovered after the statute of limitations had run that Regional was a qualified health care provider, strict adherence to the Act would eliminate Grantlands' chance of recovery. In this case the opposite situation occurred: Grantlands filed an application with the commission and before they were notified that Regional was not a qualified health care provider, the statute of limitations barred their filing in district court. We cannot accept this result. If we require claimants to file in district court at the peril of losing their case before the classification of the health care provider is known, then every claim will be filed in district court as a safety precaution, and the purpose behind the Act (to prevent court filing of nonmeritorious malpractice claims) will be defeated. The medical profession likely will suffer the ill effects of their members being accused publicly, and perhaps unjustly, of malpractice, the cost of health care may escalate as medical malpractice insurance premiums reflect the number of medical malpractice cases being filed in the courts, and the courts will be burdened with premature and frivolous medical malpractice claims.

{9} We hold that Section 41-5-22, which tolls the statute of limitations period upon submission of a case to the commission, should be enforced according to its terms whether the commission's determination is that the health care provider is not qualified and the claim is consequently rejected, or whether the commission determines that the health care provider is qualified and the claim is resolved on its merits. To the extent that **Otero v. Zouhar** holds Section 41-5-22 inapplicable to nonqualified health care providers, it is overruled.

{10} The court of appeals is reversed, and the district court is affirmed with directions to proceed in a manner consistent with this opinion.

{11} IT IS SO ORDERED.

KENNETH B. WILSON,
Justice

WE CONCUR:

RICHARD E. RANSOM,
Justice

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

DAN SOSA, JR.,
Chief Justice, dissenting

DISSENT

SOSA, Chief Justice (dissenting).

{12} I respectfully dissent. I agree with the court of appeals that the hospital's motion to dismiss should be granted on the basis that the filing of the complaint after the statute of limitations period expired barred recovery.

{13} Section 41-5-13 of the Medical Malpractice Act, NMSA 1978, Sections 41-5-1 through -28 (Repl. Pamp. 1989 & Gum. Supp. 1990), is controlling as to whether any medical malpractice action has been timely filed. **Armijo v. Tandysh,** 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), **cert. denied,** 459 U.S. 1016 (1982). The three-year limitations period under Section 41-5-13 begins to run from the date of the alleged act of malpractice, but, upon submission of the case to the medical review panel, the limitations period is tolled and shall not commence to run again until thirty days after the panel's final decision is entered and the claimant is notified. **See** § 41-4-22. However, in **Otero v. Zouhar,** 102 N.M. 482, 697 P.2d 482 (1985), this court, while reaffirming its exclusive constitutional power to regulate all pleading, practice and procedure affecting the judicial branch, held:

> **Submission of an application to the medical review commission** tolls the statute of limitations, as to that particular **"qualified"** defendant, until 30 days after the commission has entered its decision, § 41-1-22, but it **has no effect on tolling the statute of limitations applicable to any "non-qualified" health provider**. . . .

Id. at 484, 697 P.2d at 484 (emphasis added).

{14} The facts in the present case are distinguishable from those presented in **Otero v. Zouhar.** There the patient initially contacted the superintendent of insurance regarding the status of the health care providers he intended to sue, but received inaccurate information about their status. He was advised at the time he filed suit in district court that two of the providers were non-qualifying when in fact they were qualified. There was no dispute that the third provider was qualified. The patient was faced with the dilemma of observing the joinder requirement and filing suit against all three providers before the limitations period expired in order to preserve his cause of action against the non-qualified parties, and, at the same time, violating the mandate in Section 41-5-15(A), which prohibits the filing of a malpractice action against a qualified provider before submitting an application for medical review.

{15} This court excused the untimely filing of the complaint and ruled that the patient was entitled to rely upon the information from the superintendent of insurance. The court also ruled that, while the district court's dismissal with prejudice procedurally was infirm, its ruling to stay the proceedings until the commission had considered the matter acted to allow review, preserve the complaint, and obviate the necessity of refiling or obtaining an order to reinstate the complaint following the commission's decision. The concern recognized in **Otero v. Zouhar** was that "[p]laintiffs should not be denied their day in court because of incorrect rulings [by the trial court] and attendant delays incurred by appellate procedures." 102 N.M. at 485, 697 P.2d at 485. The court suggested that each case should be decided on the individual circumstances so as not to "improperly elevate procedural considerations over plaintiff's constitutional right to petition for redress of grievance." **Id.** at 486, 697 P.2d at 486. The present case displays none of these concerns nor prejudice to the Grantlands as the result of some procedural anomaly. **See Jiron v. Mahlab,** 99 N.M. 425, 659 P.2d 311 (1983) (where requirement of Act causes undue delay prejudicing plaintiff, right of access to courts is unconstitutionally deprived).

{16} Section 41-5-5 establishes qualifications to be covered under the Act and provides that **non-qualifying** health care providers shall not benefit from any provision of the Act in the event of malpractice claims against them. Section 41-5-15(A) specifies that "[n]o malpractice action may be filed in any court against a **qualifying** health care provider before application is made to the medical review commission and its decision is rendered." (Emphasis added.) Both provisions suggest to a potential plaintiff that an initial inquiry is necessary to ascertain the status of the health care provider involved. These provisions along with the relevant case law place a potential plaintiff on notice that the manner in which to commence an action may differ depending upon the status of the health care provider. It is incumbent upon a potential plaintiff to determine the status of a health care provider against whom they intend to allege a medical malpractice claim. This determination can be accomplished without diminishing the risk of compromise to one's constitutional right of access to the courts.

{17} The Grantlands allege that medical malpractice was committed during the period from mid-June to the end of July 1983. An application for medical review was filed on May 14, 1986, and a complaint was filed in district court on September 12, 1986. The record indicates that the Grantlands were notified by the commission of its decision in October 1986.

{18} Unlike the plaintiff in **Otero v. Zouhar,** the Grantlands did not contact the superintendent of insurance regarding the status of the hospital. Instead they chose to file an application with the medical review commission very near the expiration of the limitations period. In the event the Grantlands were uncertain about the proper course of action, they could have filed their application with the commission and also filed a complaint in district court to protect their claim without compromising the limitations period and winding up in a procedural Catch 22 position. **See Jiron v. Mahlab,** 99 N.M. 425, 659 P.2d 311 (supreme court approved plaintiff's filing his complaint in district court before applying for review by medical review commission because unbending adherence to timing requirements would likely have eliminated his right of action). This type of "safety precaution" necessarily would not defeat a primary purpose of the Act to prevent nonmeritorious claims from being filed nor open the flood gates to "premature and frivolous medical malpractice claims."

{19} Accordingly, I would not overrule any part of **Otero v. Zouhar,** and would quash the writ of certiorari as improvidently granted.

DAN SOSA, JR.,
Chief Justice, dissenting

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-083

Filing Date: August 27, 1990, Filed. As Corrected August 31, 1990. As Corrected October 23, 1990. As Corrected October 25, 1990

Docket No. 18,296

LAWRENCE TRUJILLO,

Petitioner,

v.

THE CITY OF ALBUQUERQUE, et al.,

Respondents.

Original Proceeding on Certiorari
Albert S. "Pat" Murdoch, District Judge

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OPINION

RANSOM, Justice.

{1} Lawrence Trujillo obtained a personal injury judgment of $547,905.80 against the City of Albuquerque. His injuries occurred when a City employee, Clarence M. Wright, drove a City crane through a red light and collided with a cement truck driven by Trujillo. Negligent maintenance of the crane's brakes and its negligent operation were found by the court in this non-jury trial to be concurrent proximate causes of the collision.

{2} The trial court determined that, under Section 41-4-19(A)(2) of the Tort Claims Act, NMSA 1978, Sections 41-4-1 to -27 (Repl. Pamp. 1986), the accident involved two occurrences, and thus that the limit of the City's liability under the Tort

Claims Act was twice the $300,000 cap for "any person for any number of claims arising out of a single occurrence." The court of appeals reversed this determination. The court of appeals also reversed the trial court's ruling that the damage provisions in question violated Trujillo's right to equal protection under the federal and state constitutions. We granted certiorari to review these issues. Amicus briefs were filed in this Court and before the court of appeals by the New Mexico Trial Lawyers Association (NMTLA), the New Mexico Municipal League, the New Mexico Medical Society, and the Risk Management Division of the State General Services Department (Risk Management). Upon review of the opinion of the court of appeals, the briefs, and the record, we affirm in part, reverse in part, and remand with instructions.

{3} Negligent maintenance and negligent operation of vehicle gave rise to a since occurrence. The trial court found two proximate causes produced the accident: (1) the City's negligent maintenance of the crane's brakes, and (2) Wright's negligent operation of the crane. Trujillo argues that under a causation theory there are two occurrences. However, in **Folz v. State, 110** N.M. 457, **797** P.2d 246 (1990), this Court rejected a causation rationale relied upon by the court of appeals to define a single occurrence in that case. In **Folz** we held that, when a governmental entity has committed successive negligent acts or omissions, the determination of the number of occurrences cannot be made simply by counting the number of such acts or omissions. As did the court of appeals in the present case, we specifically noted in **Folz** that multiple proximate causes attributable to the governmental entity may combine with other concurrent causes to produce but a single occurrence.

{4} Here, the City's negligent maintenance of the crane's brakes produced a risk of harm that was concurred in and triggered by Wright's negligent operation of the crane. The risk created by the faulty brakes gave rise to liability only when Wright drove the crane into the intersection. Therefore, we hold there was but a single occurrence when successive negligent acts or omissions of the governmental entity combined concurrently to create a singular risk (of collision) and to proximately cause injury triggered by a discrete event (the crane's entry into the intersection).[1]

{5} Constitutionality of individual cap—nature of the issue. The trial court found Section 41-4-19 to be unconstitutional because "no rational distinction [exists] between victims of a tort inflicted by a private person and victims of a tort inflicted by a public employee or [a governmental] entity." The court of appeals (applying heightened or intermediate scrutiny rather than the rational basis test employed by the trial court) reversed, stating "the Act's limitation on damages does substantially further an important state interest—the need to protect the public treasury from large awards." **See Richardson v. Carnegie Library Restaurant,** 107 N.M. 688, 692-98, 763 P.2d 1153, 1157-63 (1988) (discussing rational basis, intermediate scrutiny, and strict scrutiny tests under equal protection analysis). Because we do not believe a sufficient factual basis exists for the court of appeals' determination, we reverse and remand for further proceedings.

{6} Interest of tort victims in "full recovery of damages" calls for intermediate scrutiny of Section 41-4-19(A)(2) under Article II, Section 18 of the New Mexico Constitution. As we use the term, "full recovery of damages" is delimited only by the measure of damages recognized in law as recoverable by any person wronged by the conduct of another. In **Richardson** we held that a tort victim's interest in full recovery of damages implicitly was protected under the state constitutional right of access to the courts. 107 N.M. at 692, 763 P.2d at 1157. We previously have recognized the right of access to the courts as a protected interest under the due process clause of Article II, Section 18 of the New Mexico Constitution. **See id.** at 696, 763 P.2d at 1161 (quoting **Jiron v. Mahlab,**

[1] Although the court found Wright failed to yield the right-of-way, failed to stop for a red light, failed to maintain a proper lookout, and drove inattentively, these were not separate triggering events but were acts and omissions that concurred to constitute a discrete triggering event.

99 N.M. 425, 426, 659 P.2d 311, 312 (1983)). **Richardson** applied the equal protection clause of Section 18 to determine whether the damage cap in the dram shop act, NMSA 1978, 41-11-1 (Repl. Pamp. 1986), discriminated between different classes of tort victims on an impermissible basis. **Id.** 107 N.M. at 698, 763 P.2d at 1162; **see** N.M. Const. art. II, 18 ("No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.").

{7} We declined to decide in **Richardson,** however, whether to apply strict scrutiny to such equal protection challenges in the future, "principally because we concluded that the damage cap [in the dram shop act] is constitutionally invalid under the lesser, intermediate scrutiny test." **Id.** at 696, 763 P.2d at 1161.[2] The plurality came to this conclusion because "no argument [was] presented . . . to persuade us that the classifications created by the legislation are constitutionally legitimate." **Id.** at 699, 763 P.2d at 1164. **Cf. id.** at 702, 763 P.2d at 1167 (Ransom, J., specially concurring in result, but reserving judgment on ultimate question of statute's constitutionality) ("This case does not demonstrate . . . that a substantial state interest might not have been shown if the defendant had pressed forward responsibly with the burden enunciated by this Court today."). Because this case is to be remanded for further proceedings, we find it necessary to decide the question avoided in **Richardson**—whether to apply strict or merely intermediate scrutiny.

{8} —When particular closes of tort victims receive unequal treatment, importance of right to full recovery of damages requires more than rational basis review. Richardson appeared to base its interpretation of Article II, Section 18 in part on the history of tort recovery in New Mexico as an aspect of the right of access to the courts. 107 N.M. at 691, 692, 763 P.2d at 1156, 1157 (approving as correct the amicus curiae analysis that traced jury and access-to-court rights to their roots in Spanish and Mexican laws, **Siete Partidas, Fuero Juzgo,** and Kearney Code; such rights, amicus argued, formed an integral part of civil law prior to statehood and were incorporated into the New Mexico Constitution).[3] The right to recover monetary damages for tortious injury has played a vital role in New Mexico since before the time of statehood as one aspect of the individual right to petition for redress of grievances. **See id.** at 696, 763 P.2d at 1161.

{9} However, we do not interpret **Richardson's** rejection of minimum rationality review as resting on the bare fact that monetary damages for tortiously inflicted injury were awarded prior to statehood. Instead, **Richardson's** application of heightened scrutiny ultimately rests on the continued importance of the right to such compensation today and on the possibility that the rights of particular classes of tort victims will be sacrificed to social expediency in the legislative process. **See id.** at 698-99, 763 P.2d at 1163-64 (tort victim's right to be compensated for injury and the sensitivity of particular classes of tort victims to injustice wrought by legislation limiting this right justify application of heightened scrutiny).

{10} Our fault system of recovery, while by no means indispensable to our society in an abstract sense,[4] today serves the important social

[2] Some form of strict or heightened scrutiny will be employed when legislation affects a fundamental right or an important individual interest, or when the legislature classifies on the basis of membership in a suspect or semi-suspect class of persons. **See Richardson,** 107 N.M. at 693, 763 P.2d at 1158. Legislative classifications will be upheld under strict scrutiny only if the proponent of a classification's validity demonstrates that "the law . . . advances a compelling state interest by the least restrictive means available." **Bernal v. Fainter,** 487 U.S. 216, 219 (1984). Under intermediate scrutiny the proponent must demonstrate that the legislative classification is substantially related to an important governmental interest. **Richardson,** 107 N.M. at 695, 763 P.2d at 1160.

[3] Before the court of appeals in the present case, NMTLA argued that a right to full legal redress was incorporated into New Mexico law by way of the Kearney Code provision guaranteeing "just remedy" for legal wrongs. NMSA 1978, "Bill of Rights," Territorial Laws and Treaties, Pamp. 3, at 1. While, as discussed in the text of this opinion, we do not elevate a tort victim's interest in full recovery of damages to the level of a fundamental right as urged by NMTLA, we base our determination of the appropriate level of scrutiny in part on our state's traditional solicitude for such interests.

[4] We note that a number of jurisdictions consider the constitutionality of legislative modifications of common-law rights

functions of redistributing the economic burden of loss from the injured individuals on whom it originally fell, deterring conduct that society regards as unreasonable or immoral, and providing a vehicle by which injured victims may obtain some degree of compensation and satisfaction for wrongs committed against them and by which society may give voice and form to its condemnation of the wrongdoer. The debate over the policy question of whether the tort system is the best mechanism for performing the functions currently allocated to it is one of great current concern and importance. It is entirely appropriate that policy choices flowing from such debate take place in the legislative sphere. However, counterposed to society's interest in the workings of the tort system are undeniably important and substantial individual interests.

{11} While, as explained below, we decline to express an opinion on the constitutionality of this particular statute, we firmly adhere to the proposition that the legislature, in effecting its policy choices, may not disregard lightly the important and substantial individual interests served by the recovery of tort damages. We are satisfied that we "neither trample arbitrarily upon the legislature's preferred position of direct, political accountability . . . nor do we forsake our duty to protect individuals" when we employ heighten scrutiny "in those limited circumstances when the class implicated is so sensitive to injustice and the rights affected are so substantial and important" as they are here. **Richardson,** 107 N.M. at 698, 763 P.2d at 1163.

{12} Although the distinctive features of our Constitution's text and history always must play an important role in this Court's interpretation of the scope and meaning of its provisions, the ample authority cited in **Richardson** from other jurisdictions also supports our decision to apply at least some form of intermediate scrutiny to damage caps such as those contained in the Tort Claims Act. **Id.** at 695 n. 5, 763 P.2d at 1160 n. 5 (citing **Coburn v. Agustin,** 627 F. Supp. 983, 995 (D. Kan. 1985) (medical malpractice); **Farley v. Engelken,** 241 Kan. 663, 672, 740 P.2d 1058, 1064 (1987) (medical malpractice); **Sibley v. Board of Supervisors of La. State Univ.,** 477 So. 2d 1094, 1107 (La. 1985) (medical malpractice); **Arneson v. Olson,** 270 N.W.2d 125 (N.D. 1978) (medical malpractice)). **See also Boswell v. Phoenix Newspapers, Inc.,** 152 Ariz. 9, 730 P.2d 186 (1986) (media defamation statute), **cert. denied,** 481 U.S. 1029 (1987); **Kenyon v. Hammer,** 142 Ariz. 69, 688 P.2d 961 (1984) (statute abolishing "discovery rule" in medical malpractice actions); **Wright v. Central Du Page Hosp. Ass'n,** 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (medical malpractice); **Kansas Malpractice Victims Coalition v. Bell,** 243 Kan. 333, 757 P.2d 251 (1988) (medical malpractice); **Duren v. Suburban Community Hosp.,** 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (1985) (medical malpractice); **Lyles v. Commonwealth Dep't of Transp.,** 512 Pa. 322, 516 A.2d 701 (1986) (tort claims act); **Lucas v. United States,** 757 S.W.2d 687 (Tex. 1988) (medical malpractice); **Condemarin v. University Hosp.,** 775 P.2d 348 (Utah 1989) (provisions of Utah governmental immunity act that applied to government-run hospitals); **Sofie v. Fibreboard Corp.,** 112 Wash. 2d 636, 771 P.2d 711 (tort reform bill), **modified on other grounds** . . . Wash. 2d . . . , 780 P.2d 260 (1989).

{13} —Principle of equal access to the courts limits power of the legislature. In listing jurisdictions that applied strict scrutiny to damage caps, **Richardson,** 107 N.M. at 695, 763 P.2d at 1160, cited the 1985 Montana case of **Pfost v. State,** 219 Mont. 206, 713 P.2d 495 (1985) (tort claims act limit on damages). **See also White v. State,** 203 Mont. 363, 661 P.2d 1272 (1983)

in terms of whether the legislature has provided a quid pro quo to plaintiffs in the form of an adequate substitute remedy or corresponding benefit. **See, e.g., Smith v. Department of Ins.,** 507 So. 2d 1080, 1088-89 (Fla. 1987); **Wright v. Central Du Page Hosp. Ass'n,** 63 Ill. 2d 313, 328, 347 N.E.2d 736, 742 (1976); **Kansas Malpractice Victims Coalition v. Bell,** 243 Kan. 333, 344, 757 P.2d 251, 258-59 (1988); **Carson v. Maurer**, 120 N.H. 925, 943, 424 A.2d 825, 837-38 (1980); **Lucas v. United States,** 757 S.W.2d 687, 690-91 (Tex. 1988). Legislative provision for a quid pro quo is not an essential requirement under our equal protection analysis; however, as explained in footnote 6 of this opinion, such provision may affect the ultimate balancing to be performed under heightened scrutiny.

(pre- **Pfost** tort claims act limit on economic and noneconomic damages). In **Meech v. Hillhaven West, Inc.,** 238 Mont. 21, 776 P.2d 488 (1989), the Montana Supreme Court overruled **Pfost** and **White.** These two cases had based the existence of a fundamental right to recovery of tort damages on the "speedy remedy" provisions of the Montana Constitution. **Meech,** 238 Mont at 27-30, 776 P.2d at 491-92, traced such access-to-court provisions of state constitutions back to the Magna Carta and, relying on Montana precedent predating **Pfost,** held that this article of the Montana Constitution "did not constrict legislative powers because [it] only provided a mandate to the courts to provide equal access to causes of action recognized at law." 238 Mont. at 27, 776 P.2d at 491-92 (citing **Shea v. North-Butte Mining Co.,** 55 Mont. 522, 179 P. 499 (1919); **Stewart v. Standard Pub. Co.,** 102 Mont. 43, 55 P.2d 694 (1936); **Reeves v. Ille Elec. Co.,** 170 Mont. 104, 551 P.2d 647 (1976)). **But see Lucas,** 757 S.W.2d at 690 (open court guarantee of Texas Constitution based on provisions of Magna Carta and necessitated judicial review of medical malpractice cap).

{14} We do not interpret the New Mexico Constitution creating a mandate only to the judicial branch to provide equal access to the courts. In our tripartite system of state government, each branch at times properly may exercise its constitutional authority in matters that affect the word of a coordinate branch. **See, e.g., State ex rel. Chavez v. Vigil-Giron,** 108 N.M. 45, 766 P.2d 305 (1988) (judicial review of constitutional amendment on judicial reform that was drafted by the legislature and ratified by the voters). We adhere to the view expressed by the Kansas Supreme Court, among others, that "our constitution does not make this court the critic of the legislature; rather, this court is the guardian of the constitution." **Samsel v. Wheeler Transp. Servs., Inc.,** 246 Kan. 336, 338, 789 P.2d 541, 549 (1990) (finding statutory limit on noneconomic tort damages constitutional under a form of intermediate scrutiny). We would ill serve our role as guardian of the constitution were we to exclude the legislature from the reach of the constitutional guarantee of equal access to the courts: Thus restricted, that guarantee would become largely "toothless." **Meech,** 238 Mont. at 64, 776 P.2d at 514 (Sheehy, J., dissenting).

{15} —Nature of the individual interest and nature of the classification are the sole determinate of level of scrutiny. Risk Management argues that we should apply a different level of scrutiny to the Tort Claims Act than we did to the dram shop act, because "damage limitations [in tort claims acts] typically [bind] governmental waivers of immunity within reasonable parameters." Risk Management points out that courts in other states have applied a less strict standard when reviewing equal protection challenges to legislation limiting governmental liability. **Compare Cauley v. City of Jacksonville**, 403 So. 2d 379 (Fla. 1981) ($50,000 limit on liability of state or subdivision upheld under rational basis review) **with Smith v. Department of Ins.** 507 So. 2d 1080 (Fla. 1987) ($450,000 cap on recovery of noneconomic damages in general tort reform statute found unconstitutional under a form of heightened scrutiny); **Jones v. State Bd. of Medicine,** 97 Idaho 859, 871, 555 P.2d 399, 411 (1976) (intermediate, "means-focus" scrutiny applied to medical malpractice cap), **cert. denied,** 431 U.S. 914 (1977) **with Leliefeld v. Johnson,** 104 Idaho 357, 659 P.2d 111 (1983) (rational basis applied to tort claims act); **Estate of Cargill v. City of Rochester,** 119 N.H. 661, 406 A.2d 704 (1979) (governmental tort cap upheld under rational basis standard), **appeal dismissed,** 445 U.S. 921 (1980) **with Carson v. Maurer,** 120 N.H. 925, 424 A.2d 825 (1980) invalidating medical malpractice cap under form of intermediate scrutiny).

{16} We are not persuaded. We note first that Idaho's "means-focus" standard of review, unlike the variety of heightened scrutiny adopted in **Richardson,** is triggered only when the legislative classification patently lacks a reasonable relationship to the legislative purpose **and** is discriminatory on its face. **Leliefeld** applied rational basis review to the statutory limit on governmental liability because the purpose of the statute under consideration appeared to bear a reasonable relationship to the classification scheme created. 104 Idaho at 373, 659 P.2d at 127 (citing **Jones,** 97 Idaho at 871, 555 P.2d at 411). By contrast, in terms of the threshold inquiry established in **Richardson,** the damage cap contained in Section 41-4-19(A)(2) is identical to the damage cap contained in the dram shop act.

{17} Second, the New Hampshire Supreme Court applied minimum rationality review in **Estate of Cargill** solely because the damage cap in New Hampshire's tort claims act implicated neither a suspect class nor a fundamental right. 119 N.H. at 666-67, 406 A.2d at 707. The court did not discuss the possibility of an intermediate level of review. That the damage cap applied to the **government** was considered by the court only in determining whether the classification bore a rational relationship to its purpose, not in deciding which level of scrutiny to apply. **Id.** at 666-68, 406 A.2d at 706-07. The court's application of a type of "heightened scrutiny" to the medical malpractice cap in **Carson,** therefore, appears to have modified the law:

> In **[Estate of Cargill]** we applied the rational basis test in evaluating classifications which . . . place restrictions on an individual's right to recover in tort. **We now conclude, however, that the rights involved herein are sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.**

Carson, 120 N.H. at 932, 424 A.2d at 830 (emphasis added). **See also State v. Brosseau,** 124 N.H. 184, 197, 470 A.2d 869, 877 (1983) (Douglas and Batchelder, JJ., specially concurring) (under **Carson,** right of tort victim to recover for injuries is an important substantive right, and doctrine of sovereign immunity should be declared unconstitutional to the extent it denies a just remedy to an injured party).

{18} By contrast, the Florida Supreme Court clearly relied on the fact that the damage cap at issue limited governmental liability when it applied a different level of review in **Cauley.** The court noted, 403 So. 2d at 384-85, that under the rule set forth in **Kluger v. White,** 281 So. 2d 1 (Fla. 1973), the Florida Constitution limited the state legislature's authority to cap tort damages only when (1) the right affected was statutory and predated the enactment of the Florida Constitution, or (2) the right had become part of the state's common law prior to that time. Since there existed no common law or statutory right to sue a municipality at the time of the enactment of the state constitution, the court concluded that the state constitution did not limit the legislature's plenary authority to abrogate sovereign immunity. 403 So. 2d at 385; **see also** Fla. Const. art. X, § 13 (right to authorize suit against the state reserved for legislature). **Cf. Smith v. Department of Ins.,** 507 So. 2d at 1088 (under **Kluger,** legislation capping medical malpractice damages would be upheld only if (1) it provided a reasonable alternative remedy or commensurate benefit, or (2) there was a showing of overpowering public necessity and no alternate method for meeting such public necessity).

{19} We decline to follow Florida's "vested rights" approach. Our equal protection inquiry does not seek to identify particular causes of action (or particular legal remedies) as being "so important that they must be insulated from whatever inhibition the political process might impose." J. Fly, **Democracy and Distrust: A Theory of Judicial Review,** 75 n.*. Our inquiry instead concerns itself with how decisions effecting policy choices between **existing** rights and governmental goals distribute their resultant costs and benefits **See id.; see also Lucas,** 757 S.W.2d at 690 (litigant's right of redress under state constitution measured in terms of whether litigant possessed cognizable cause of action presently recognized at common law). The nature of the individual interest and of the legislative classification determines the appropriate level of scrutiny, not the importance of the government's goal or the vagaries of history.

{20} This case presents no issue, nor do we purport to decide, whether the New Mexico Constitution requires judicial or legislative recognition of liability for a particular type of tort. However, our common and statutory law presently recognize a right to recover damages for persons injured by the torts committed in INS case. So long as the state chooses to provide particular rights to litigants, it must allow litigants to exercise these rights in a manner that comports with principles of equal protection and equal access to the courts, and it may not limit the exercise of such rights selectively unless the limitation is justified by a counterbalanced state interest of sufficient weight. **See generally Griffin v. Illinois,** 351 U.S. 12 (1956) (right of criminal appeal); **Boddie v. Connecticut,** 401 U.S. 371 (1971) (state law regarding divorce); L. Tribe, **American Constitutional Law** 16-11 (2d ed. 1988).

{21} —Constitutionality of Section 41-4-19(A)(2) to be determined under intermediate rather than strict scrutiny. Strict scrutiny is appropriate when the classification involves a fundamental right or a suspect class. **Richardson,** 107 N.M. at 693, 763 P.2d at 1158. As noted in **Richardson,** the tort victim's interest in full recovery of damages is protected only implicitly by the right of access to the courts. 107 N.M. at 692, 763 P.2d at 1157. **Cf. Plyler v. Doe,** 457 U. S. 202 (1982) (recognizing education as an important interest but not a fundamental right). Moreover, tort victims do not fit the criteria of a "suspect class". **See United States v. Carolene Prods. Co.)** 304 U.S. 144, 152-53 (1938) (defining suspect class); **City of Cleburne v. Cleburne Living Center, Inc.,** 473 U.S. 432, 446 (1985) declining to afford suspect class status to mentally retarded persons because "mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions"). We conclude strict scrutiny should not be applied to the cap contained in Section 41-4-19(A)(2). A tort victim's interest in full recovery of damages calls instead for a form of scrutiny somewhere between "the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny." **Richardson,** 107 N.M. at 697, 763 P.2d at 1162 (quoting **L. Tribe, supra** 16-32, at 1601). We hold, therefore, that intermediate scrutiny should be applied in this case.

{22} Article II, Section 4 does not require application of strict scrutiny. Trujillo and amicus curiae NMTLA argue that, in addition to Article II, Section 18 of the state constitution, a plaintiff's right to full recovery of tort damages is protected under Article II, Section 4, which provides:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

{23} We do not believe this provision provides additional support to Trujillo. We find somewhat nebulous any connection that may exist between it and the damage cap contained in Section 41-4-19(A)(2). Even were we to assume that the damage cap implicates the constitutional provisions of Article II, Section 4, here we do not believe these provisions afford more protection to victims of governmental torts than do the provisions of Article II, Section 18.

{24} Existence of alternative means of achieving governmental goal is material to determination of whether classification is substantially related to important governmental interest; issue of constitutionality not fully litigated below. Under the rational basis test, the opponent of the legislative classification has the burden to demonstrate that the law at issue treats like-situated persons unequally on the basis of a classification scheme unrelated to some real distinction, or that the legislation lacks a reasonable relationship to a legitimate governmental purpose. **Richardson,** 107 N.M. at 695, 763 P.2d at 1160. When, by contrast, the opponent of a statute has established that the validity of the statute is to be tested under heightened scrutiny, it is the party maintaining the statute's validity who "must prove that the classification is substantially related to an important governmental interest." **Id.**

{25} Here, we are inclined to take it as self-evident that "preservation of the public treasury" constitutes an important governmental interest. **See, e.g., Smith v. City of Philadelphia,** 512 Pa. 129, 139, 516 A.2d 306, 311 (1986), **appeal dismissed,** 479 U.S. 1074 (1987). However, a determination that the classification is aimed at furthering an important governmental interest does not necessarily imply that the classification is "substantially related" to the interest so identified. **See Jones,** 97 Idaho at 871-74, 555 P.2d at 411-14 (record demonstrated neither the existence of a medical malpractice insurance crisis nor the relationship between the legislatively created limit on tort damages and any abatement of alleged crisis); **Sibley,** 477 So. 2d at 1109 (proponent of legislative classification must demonstrate that it substantially furthers legitimate governmental interest); **Arneson,** 270 N.W.2d at 136 *{*629}* (evidence at trial supported trial court's finding that medical malpractice cap was not related to any real cost crisis in obtaining malpractice insurance); **Condemarin,** 775 P.2d at 366, 369, 373 (with each justice writing separately, a majority held that proponents of damage cap on malpractice actions against government-run hospitals failed to demonstrate that statute had a substantial effect on protecting state treasury). Relying on **City of Philadelphia,** the court of appeals in this case concluded that such a substantial relationship existed because placing a cap on damages necessarily limited the impact of large jury awards on public funds. We do not believe sufficient facts are known from which the court reasonably could reach this conclusion. Accordingly, we reverse the court of appeals.

{26} —Requirement of a substantial relationship and the existence of less restrictive alternatives. Trujillo and NMTLA contend the damage cap is unconstitutional because it burdens **only** the constitutionally protected interests of those who have suffered catastrophic injuries and who, therefore, are in greatest need of compensation. The damage cap, they contend, thus impermissibly relies on the most discriminatory means to achieve the legislative ends, while other, less burdensome means exist that equally would further the legislative purpose.

{27} The City and Risk Management argue that, under intermediate scrutiny, the state has no burden to show that less restrictive alternatives would not serve its purpose as well as the means chosen, so long as the means chosen do materially advance this purpose. They contend the court of appeals was correct in its determination that the legislative classification substantially furthered the government's important purpose since large individual awards in excess of present municipal insurance policies would have a devastating, destabilizing impact on government finances. Moreover, Risk Management argues, "each dollar protected under the tort claims limit is a dollar's worth of preservation of governmental funds."

{28} We do not agree entirely with either formulation of the requirement that a "substantial relationship" exist between the government's classification scheme and its declared purpose. Trujillo and NMTLA suggest the required fit between means and ends under intermediate scrutiny is the same as the required fit under strict scrutiny; the City and Risk Management suggest the fit need be no tighter than that required under the test of minimum rationality. Intermediate scrutiny, while allowing for a more flexible accommodation of legislative purposes than strict scrutiny, does not abandon totally the concern with over- and under-inclusiveness that, under strict scrutiny, is given form as the least restrictive alternative test.[5]

{29} "An insistence on assessing the importance of the state interest by balancing it against the burdens imposed on the individual and on

[5] For example, in **Craig v. Boren,** 429 U.S. 190 (1976), the Supreme Court applied intermediate scrutiny to invalidate legislation that banned the sale of 3.2% beer to males under twenty-one, but allowed sale of such beer to females over eighteen. The Court rejected the argument that the statute bore a substantial relationship to the government's important purpose in promoting public safety because "the [statistical] showing offered by the appellees does not satisfy us that sex represents a legitimate, **accurate** proxy for the regulation of drinking and driving." 429 U.S. at 204 (emphasis added). **Craig** does not control our development of intermediate scrutiny under the New Mexico Constitution. Nonetheless, **Craig** is informative and cannot be reconciled with the notion that, under intermediate scrutiny, a classification only need further to some extent the important governmental interest being pursued.

society . . . seems a hallmark of a new form of heightened scrutiny." L. Tribe, **supra** 16-32, at 1602; **see, e.g., Plyler v. Doe,** 457 U.S. 202 (1982) (state's interest in preserving limited educational funds for legal residents did not justify statute's burden on the interests of children of illegal aliens). An indirect means by which courts may assess this balance is to determine whether alternatives exist that would not burden protected interests as heavily as the classification scheme chosen. **See, e.g., Caban v. Mohammed,** 441 U.S. 380 (1979); **Craig v. Boren,** 429 U.S. 190 (1976); **see generally** L. Tribe, **supra** 16-32, at 1603.

{30} Indeed, perhaps the most objective method by which a court may assess the balance struck by the legislature consists in determining the extent to which the government's goals might be advanced by means that burden protected interests less than the means chosen. Such a method eschews reliance on subjective notions of the importance of particular individual interests versus the importance of particular governmental purposes. While the "least restrictive alternative" need not be selected if it poses serious practical difficulties in implementation, the existence of "less restrictive alternatives" is material to the determination of whether the classification substantially furthers an important governmental interest.[6]

{31} —Facts were not developed sufficiently to allow a determination of substantial relationship between classification and important governmental **interest.** Given the nature of the substantial relationship requirement as applied to the issues in this case, we do not believe a reviewing court should content itself merely with anecdotal or speculative showings of a fit between means and ends. **See Schlieter v. Carlos,** 108 N.M. 507, 510, 775 P.2d 709, 712 (1989) (per curiam) (declining to accept certification by federal district court of equal protection challenge to damage cap in Medical Malpractice Act when facts had not been developed at trial to show whether damage cap was substantially related to important governmental interest); **see also Sibley,** 477 So. 2d at 1109 (proponent of constitutionality of statute discriminating between tort victims on the basis of their physical condition was obliged to produce evidence to establish that classification at issue substantially furthered a legitimate state interest); **Jones,** 97 Idaho at 871-74, 555 P.2d at 411-14 (remanding for full development of record as to any real health care industry crisis to which a cap on medical malpractice recoveries may bear a fair and substantial relationship).

{32} Here, the individual damage cap in the Tort Claims Act discriminates between tort victims, first, on the basis of the identity of the tortfeasor and, second, on the basis of the amount of damages. On the basis of this classification, the legislature chose to burden the interests of only those individual tort victims whose injuries are caused by a governmental tortfeasor and whose damages exceed $300,000 for all claims.[7] **Cf. Richardson,** 107 N.M. at 698, 763 P.2d at 1163 (on classifications created by damage cap under the dram shop act).

{33} It may appear obvious that the victims of governmental torts who suffer catastrophic injury place the greatest drain on the treasury **individually,** and that the damage cap therefore is substantially related to the goal of protecting governmental funds for other services. However, this obvious proposition does not establish whether large damage awards to such individuals would create a real problem for entities of state government, or **the extent of that problem.** Nor

[6] As noted in footnote 4 of this opinion, legislative provision for a quid pro quo to plaintiffs in the form of an adequate substitute remedy may affect the balancing process described in **Richardson** and developed further in the body of this opinion. To the extent the proponent of the legislative classification shows that an adequate substitute remedy has been provided to tort victims affected by a legislatively enacted cap, it becomes doubtful whether less restrictive alternatives exist that would further the legislative goal as well or better than the means chosen.

[7] One additional level of classification would be applicable to discussion of the aggregate damage cap contained in Section 41-4-19(A)(3), as it provides for further limits on damages recoverable by multiple victims of governmental torts whose injuries stem from the same "occurrence." An analysis of the constitutionality of that Section therefore may present considerations not addressed in this opinion.

does this proposition establish the effect on the state treasury of **the claims of this class of tort victims in the aggregate** as compared to the aggregated claims of those with individual claims of $300,000 or less. These latter questions must be answered if we are to determine whether the individual damage cap substantially advances the state's chosen goal.[8] While it may be that in other cases this Court can assess whether a substantial nexus exists between legislative means and ends without the benefit of such an evidentiary record, here the government's putative goal inextricably is tied to the risk of large damage awards. The existence, nature, and magnitude of this risk, as well as the justification for the means chosen to deal with it, ultimately depend on empirical data.

{34} Risk Management presents statistics to show that, assuming insurance policies providing $300,000 coverage for single occurrences, many municipalities in this state currently lack the resources to satisfy the $247,906 judgment awarded in this case in excess of the $300,000 limit. However, no evidence properly has been developed to show that greater insurance coverage is unavailable, or to show the likelihood that juries will award damages in excess of insurance policies which, practically speaking, these municipalities could obtain, or to show whether other risk spreading means exist to protect municipalities from large awards. Moreover, since, unlike some states, New Mexico has not created separate statutes for municipalities as opposed to other entities of state government, any determination that the cap is constitutional as applied to municipalities would not necessarily amount to a determination that the same cap is constitutional as applied to such other entities. **See City of Cleburne,** 473 U.S. at 447-50 (zoning ordinance unconstitutional as applied). At most, Risk Management's argument constitutes a justification for giving some form of prospective application to any final determination that the damage cap at issue in this case is unconstitutional. **Cf Hicks v. State,** 88 N.M. 588, 593-94, 544 P.2d 1153, 1158-59 (1975) (decision abolishing sovereign immunity to be applied prospectively); **Norris v Saueressig,** 104 N.M. 85, 717 P.2d 61 (Ct. App. 1985) (prospective application of rule declaring military benefits to be community property), **aff'd,** 104 N.M. 76, 717 P.2d 52 (1986).

{35} Here, the district court made its ruling on the assumption that the statute was subject to rational basis review prior to our decisions in **Richardson** and **Schlieter.** The City then did not have notice that it bore the burden to present evidence in support of the constitutionality of the statute, nor does it appear that it was given an opportunity to do so. As did the Supreme Court of Louisiana under similar circumstances, we decline to "penalize the defendant for its failure to anticipate our interpretation" of the requirement of proof it bears in this case. **Sibley,** 477 So. 2d at 1109. **See generally Montoya v. Ortiz,** 24 N.M. 616, 175 P. 335 (1918) (appellate court vested with broad discretion to remand case for a new trial or other proceedings, and such will be ordered when it appears that justice so requires). **Cf. McGrail v. Fields,** 53 N.M. 158, 203 P.2d 1000 (1949) (when trial court's erroneous application of statute of limitations in quiet title action prevented it from reaching question of laches, new trial allowed

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[8] Although we do not attempt to catalog all the variables that may affect the closeness in fit between the state's chosen means and ends, we give the following examples to demonstrate the impossibility of judging this question in the abstract. It is statistically possible, for instance, that the number of persons with claims in excess of $300,000 is so small relative to the class of persons with damage claims less than or equal to $300,000 that the state treasury would be better protected by allowing only those persons with claims over the present liability cap to recover, by limiting all persons with claims against the state to recovery of a certain percentage of their incurred damages, or by some other means. Wisconsin's health care liability statute, for example, apparently does not place an absolute cap on recoverable damages. **See State ex rel. Strykowski v. Wilkie,** 81 Wis. 2d 491, 511, 261 N.W.2d 434, 443 (1978). Instead, it limits to $500,000 the amount a victim may collect from judgments in excess of $1,000,000 per year, with a further $500,000 cap on recovery that is triggered only if the legislatively created compensation fund should fall below a certain level. This latter $500,000 limit does not apply to medical expenses. **Id.** Additionally, as the trial court noted in this case, the fact that the legislature did not provide a mechanism for adjusting the damage cap to account for inflation or other financial variables could mean that, regardless of whether the damage cap was constitutionally sound when passed, it is by now constitutionally infirm. **Cf. Carolene Prods.,** 304 U.S. at 153 (under rational basis review, the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist).

solely on that issue). We therefore conclude that this case should be remanded to the district court for development of the factual record.

{36} In remanding this case we do not intend, as intimated by the dissent of Justice Montgomery, that the trial court will bind us with ultimate findings of legislative fact relevant to the constitutionality of the individual cap contained in Section 41-4-19(A)(2) of the Tort Claims Act. Such legislative facts, as so well described by Justice Montgomery, are determinative of policy questions that affect the common law, statutory construction, and constitutional review. This Court is not bound by the weight or determinative character assigned legislative facts by the trial court.

{37} Although we do not know what will be forthcoming from competent advocacy before the trial court, the majority of this Court believes that the empirical data relevant to the State of New Mexico more likely will be developed through expert testimony and other evidence in an adversary evidentiary hearing than through "Brandeis briefs" submitted by the parties on appeal. Given the magnitude of the constitutional issue before us today, we believe it unwise to rush to a premature decision. The advocates of constitutionality in cases involving heightened scrutiny should provide this Court with the best evidence available to support or rebut studies, reports, findings, anecdotes, and speculation that might otherwise be available to us.

{38} Moreover, this Court is not limited to consideration of the legislative facts developed at trial, and remand of this case for an evidentiary hearing does not preclude us from mailing use of the judicial-notice procedure described by Justice Montgomery. Additionally, if the parties cannot provide the appropriate foundation of legislative facts either at trial or on appeal, we may choose to limit our decision to the case at bar and defer the ultimate resolution of the constitutional question until such a foundation is presented. **See Richardson,** 107 N.M. at 702, 763 P.2d at 1167 (Ransom, J., specially concurring in result, but reserving judgment on ultimate question of statute's constitutionality).

{39} For the foregoing reasons, this case is remanded to the district court for further proceedings consistent with this opinion.

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

RICHARD E. RANSOM,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

JOSEPH F. BACA,
Justice

KENNETH B. WILSON,
Justice specially concurring

SETH D. MONTGOMERY,
Justice concurring in part,
dissenting in part

SPECIAL CONCURRENCE

WILSON,
Justice, specially concurring.

{41} I concur that it is appropriate to remand this case to develop additional facts. However, I am not convinced that this is the appropriate time to decide the issue of heightened scrutiny, and like Justice Montgomery, would prefer to leave those doubts for another day.

{42} Further, while I concur that this case involves a single occurrence, in light of my recent dissent in **Folz v. State, 110** N.M. **457** , **797** P.2d **246** (1990), I take exception to the analysis used by the majority in reaching that conclusion.

DISSENT IN PART

MONTGOMERY,
Justice (Concurring in Part,
Dissenting in Part).

{43} I join in the Court's opinion and ruling on the single-occurrence issue in this case. I dissent from the disposition of the constitutional issue. Since the Court does not rule on the constitutionality of the statute imposing the damage Lap, I will not express a view on that question either. I confess to some skepticism about the Court's linchpin proposition that a tort victim's interest in "full recovery of damages" is entitled to constitutional protection in this state; but it will be time enough to develop a definitive opinion on this issue when, and if, a majority of the Court actually decides it in a case in which I participate.[9]

{44} I recognize that the proposition was articulated in **Richardson v. Carnegie Library Restaurant,** as a predicate for applying heightened scrutiny analysis to the dram-shop liability limitation in that case. In light of the Court's opinions in the case, however, it is difficult to understand why heightened scrutiny was necessary. Under the reasoning in the plurality and dissenting opinions not even minimal scrutiny would have saved the statute. For the plurality, Justice Walters was "unable to discern or discover" any "legitimate or substantial reason" for limiting the liability of a tavernkeeper. 107 N.M. at 699, 763 P.2d at 1164. The only justification offered in Justice Stowers' dissent was that the statute avoided "overburdening" tavernkeepers. **Id.** at 704, 763 P.2d at 1169. The plurality, in other words, was unable to find **any** public purpose in the statute; the dissent offered only protection of a certain class of tortfeasors, without any explanation of why or how that purpose satisfied even a rational-basis test.

{45} Both the plurality opinion in **Richardson** and the majority opinion in this case anchor a victim's interest in full recovery in the constitutional right of access to the courts. **See id.** at 692, 696, 763 P.2d at 1157, 1161. As recognized by the majority here, however, some state constitutional provisions that the courts shall be open to every person, that a speedy remedy shall be afforded for every injury, and that no person shall be deprived of full legal redress have been construed as mandating only that the courts shall provide equal access to causes of action and remedies established by the courts or the legislature, not that the legislature's power to limit causes of action is constricted. **See, e.g., Meech v. Hillhaven West, Inc.,** 238 Mont. 21, 37-42, 776 P.2d 488, 498-500 (1989). The majority embraces a more expansive view of the right of equal access to the courts, apparently holding (though never explicitly saying) that the right of access entails also a right to some unspecified amount of money—"full recovery"—and that our state Constitution limits the power of the legislature to place restrictions on this expanded right.

{46} Neither the plurality opinion in **Richardson** nor the majority opinion here ever explains why our Constitution should be construed as affording an injured person a right to any monetary recovery, much less "full" recovery.[10] **Richardson** and the Court here merely posit that there is some sort of right in the Constitution, emanating from or related to the right of equal access to the courts—which I certainly agree **is** fundamental and unquestionably present in several clauses of our Constitution—entitling an aggrieved party to remuneration and constraining the power of the legislature to limit or qualify it.

{47} The majority notes that the power of our state legislature is confined by the Constitution and that the courts, as guardians of the Constitution, have the authority and responsibility to determine when and to what extent legislation has exceeded the bounds imposed by it. But the question before us does not turn on any such elementary principle; it rather depends on whether

[9] The majority says near the end of its opinion that if and when this case returns to us after development of a fuller evidentiary record on remand, decision of the constitutional issue may be limited to the case at bar and "ultimate resolution" of that issue deferred to another case. To a considerable extent, therefore, the majority's pronouncements in its opinion in this case represent **obiter dicta.**

[10] Contrary to the majority's intimation, **Richardson** did not trace a right of full recovery to the due process and equal protection clauses of our Constitution or to the constitutional rights to jury trial and equal access to the courts; it merely described how an **amicus curiae,** the Trial Lawyers Association, had made this argument, purporting to found it on our Constitution's antecedents in Spanish and Mexican law and the Kearney Code. **See** 107 N.M. at 691, 763 P.2d at 1156.

we read the Constitution as extending to certain litigants a "substantial and important" **(Richardson,** 107 N.M. at 698, 763 P.2d at 1163) right to full recovery. Along with the majority, I believe that no specific right to recovery, no cause of action, no entitlement to monetary redress is "so important" that it must be "elevated . . . to the level of a fundamental right," as it would be if it were found, expressly or impliedly, in the Constitution.[11] The questions of how much money an individual receives, and from whom he or she receives it and under what circumstances, are for the legislature (and, when it has not acted, the courts through common-law adjudication) to prescribe in regulating the economic affairs of our society.

{48} I thus am highly dubious over the basic predicate to the majority's entire heightened scrutiny analysis in this case. However, as I say, I prefer to leave those doubts for another day. For present purposes I am concerned that the Court has ducked the constitutional issue and sent it back to the district court for a trial on whether the legislature properly devised the legislation at issue to accomplish its purpose.

{49} The majority says that sufficient facts were not developed at trial from which the court of appeals could conclude that the statutory damage cap is substantially related to the admittedly important governmental interest in preserving the public treasury. I am at a loss to know what "facts," within the abilities of the parties to this lawsuit to prove, are supposed to be established on remand. Presumably those "facts" will relate to the impact on municipalities' treasuries (and perhaps the treasury of the state at large) from large damage awards. Perhaps they will also relate to the ability of municipalities to obtain liability insurance with certain dollar limits and the variable cost of such insurance at greater and lesser limits. The majority suggests that the parties should provide evidence on whether large damage awards to individuals who suffer catastrophic injury do in fact create problems for governmental entities, what the extent of those problems may be, and what the effects of large damage claims may be in the aggregate, as compared to an aggregation of smaller claims. Similarly, evidence is to be adduced, or may be adduced, on the effects of inflation and whether or not some adjusting mechanism in the statute could have been implemented.

{50} In my view, the existence of these and similar fact questions does not provide us with an adequate excuse to avoid deciding the constitutional question on this appeal. While development of the kind of record desired by the majority may always or usually be proper to facilitate constitutional adjudication of the sort involved here, I do not believe that we should suggest that it is required to enable us to fulfill our responsibility. We should decide the case on the basis of such facts as are available to us from the record, from parties' briefs (including the voluminous and able briefs of the several **amici**), and from such other sources, including our own experience, as may occur to us. To remand for a trial—even a trial before a district judge, as opposed to a jury of six or twelve laypersons—is to prolong the course of litigation unnecessarily, to tax the parties' resources unfairly, and to ask for a record on facts which may or may not have been considered by the legislature when it adopted the statute and in any case may not enable any member of this Court to come to a more confident decision than any of us might reach without such supra-legislative scrutiny.

{51} It seems to me that the majority is asking for development of a record containing legislative facts, as that term has been developed by Professor Kenneth Culp Davis and as it is otherwise used in the literature. **See, e.g.**, G. Currie, **Appellate Court Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation,** 1960 Wis. L. Rev.

[11] The majority states that the right to recover monetary damages is one aspect of the right to petition for redress of grievances, citing **Richardson,** 107 N.M. at 696, 763 P.2d at 1161. Of course, while **Richardson** did declare the right to full recovery to be a right entitled to constitutional protection—a declaration with which I disagree—the opinion in that case links the right to petition for redress of grievances to the right of equal access to the courts, **not** to the putative right to recover monetary damages.

39, K. Davis, **Judicial Notice,** 55 Colum. L. Rev. 951 (1955); C. McCormick, **Judicial Notice,** 5 Vand. L. Rev. 296 (1952).

> When a court or an agency finds facts concerning the immediate parties - - who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts.
>
> Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take
>
> . . . .
>
> The exceedingly practical difference between legislative and adjudicative facts is that, apart from facts properly noticed, the tribunal's findings of adjudicative facts must be supported by evidence, but findings or assumptions of legislative facts need not, frequently are not, and sometimes cannot be supported by evidence.

K. Davis, **supra,** 55 Colum. L. Rev. at 952-53.

{52} Assuming that we do have need for additional "legislative facts" to decide this appeal, the next question is: How are such facts to be established? Professor McCormick quotes from **United States v. Carolene Products Co.,** 304 U.S. 144, 153 (1938):

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, **Borden's Farm Products Co. v. Baldwin,** 293 U.S. 194 [(1934)], and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist. **Chastleton Corp. v. Sinclair,** 264 U.S. 543 [(1924)]."

C. McCormick, **supra,** 5 Vand. L. Rev. at 316. He goes on to say:

> The usual resort, however, for ascertainment of legislative facts is not through formal proof by sworn witnesses and authenticated documents but by the process of judicial notice. Is judicial notice here trammeled by the usual requirement that the facts noticed must be certain and indisputable? Such a requirement seems inappropriate here where the facts are often generalized and statistical and where their use is more nearly argumentative, or as a help to value-judgments, than conclusive or demonstrative.

Id.

{53} This position—that legislative facts, in order to be judicially noticed, need not be certain and indisputable—is reflected in the comments of the Advisory Committee for the Federal Rules of Evidence concerning Fed. R. Evid. 201.

> The Advisory Committee . . . embraced the general rule that legislative facts need not be developed through evidentiary hearings. Rule 201 of the Federal Rules of Evidence governs judicial notice of adjudicative facts. No evidentiary rule refers to judicial notice of legislative facts because, as the Advisory Committee noted, "any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording

opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level" are inappropriate to judicial access to legislative facts. Fed.R. Evid. 201 note.

Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151, 1163 n. 24 (D.C. Cir. 1979), **cert. denied,** 447 U.S. 921 (1980). The District of Columbia Circuit Court of Appeals goes on to point out that courts consistently have considered legislative facts that were not the product of trial-type proceedings, citing as examples **Muller v. Oregon,** 208 U.S. 412, 421-22 (1908) (in which Louis D. Brandeis filed one of his famous briefs); **Paris Adult Theatre I v. Slaton,** 413 U.S. 49, 63 (1973); **Frontiero v. Richardson,** 411 U.S. 677, 686 (1973).

{54} Our own rule of evidence on judicial notice, SCRA 1986, 11-201, taken from the federal rule, also applies only to judicial notice of adjudicative facts.

{55} It would seem, then, that this Court—or any court, trial or appellate—may take judicial notice of legislative facts by resorting to whatever materials it may have at its disposal establishing or tending to establish those facts. Of course, when a trial court takes notice of such facts, it should insure that they are made part of the record so that their ascertainment and effect can be reviewed on appeal. Similarly, if an appellate court judicially notices certain legislative facts as supporting a particular ruling—whether of constitutional law, statutory interpretation or common-law adjudication—the facts so noticed should probably be set out in the opinion, so that the bar and the public may likewise evaluate the correctness of and the implications flowing from those facts.

{56} It would be inappropriate, however, for a trial court to "find" the legislative facts leading to a ruling on a question of law. Unlike the operative facts affecting the particular parties in the particular circumstances of a particular lawsuit—the adjudicative facts—the legislative facts relevant to a question of law cannot be binding on an appellate court and must always be open to redetermination and reevaluation.

{57} It is considerations like these that lead me to the conclusion that remand for an evidentiary hearing on the "facts" relating to the "fit" between legislative classification and legislative purpose in this case is inappropriate. The trial court cannot find the facts and foreclose this Court from finding different facts. The trial court's evaluation of the import of whatever facts it takes notice of may be quite different from the one adopted by an appellate court on review.

{58} Then there are other, but similar, practical considerations. On remand, who will have the burden of proof? There are several indications in the majority opinion that, despite the presumption of constitutionality that usually attaches to legislation, the City will have the burden both to produce evidence and to persuade the trial court that the missing "facts" are as it, as proponent of the legislation, claims them to be. What facts must the City prove? It must prove—I assume, but am not sure—that there is a substantial relationship between the legislative purpose of conserving public funds (so that they may be allocated among competing demands for public resources and so that taxes may be kept low) and the means chosen to effectuate this purpose (the limitation on recovery). What if the City does not carry its burden? What if the evidence is evenly balanced, so that the City fails to persuade the fact-finder that there is the required substantial relationship? Then not only will the City lose this particular lawsuit; the statute will be declared unconstitutional and the damage limitation—for the City of Albuquerque, for all other municipalities in the state, and for the state itself—presumably will fall.

{59} It is one thing to place the burden of persuasion upon a party to a lawsuit when the effect of not carrying that burden will be limited to the outcome of the particular lawsuit. It is quite another to make the constitutionality of legislation depend upon whether a single party does or does not carry his, her or its burden of proof in that suit.

{60} Why should the constitutionality of legislation depend upon how well a party performs the evidence-producing function in a particular case? If the issue is the constitutionality of a statute **as applied** to the particular parties in the particular circumstances, it may well make sense for the outcome to depend on proof of specific facts as to how the statute operates in the specific circumstances. Where the issue is not limited to the statute's validity or invalidity as applied, there is far too much at stake to leave the question in the hands of the parties to a given lawsuit.

{61} Suppose the parties lack the resources to provide the requisite demonstration, through evidence, of the fit between ends and means? The parties may not only lack the resources and the ability to adduce the relevant evidence; what resources they have may be dissipated or significantly diluted through the Court's requirement that they go back to trial and prove the imponderables with which they are now saddled. Part of the damage award to Mr. Trujillo will now be used up in proving that the legislature was not sufficiently careful in devising alternative means for accomplishing its admittedly important public purpose. When the occurrences and other specific facts surrounding a dispute must be proved to the satisfaction of the fact-finder, it is appropriate to make one or the other of the disputants carry the burden of establishing or disproving those facts at the risk of losing; but when the validity of a legislative enactment of general application, based on facts and value judgments quite outside the details of a particular dispute, depends on what those parties can prove, the court in which the dispute is tried becomes a mini-, and in some ways a super-, legislature.

{62} This dispute has been in court since 1985. The parties are entitled to an answer. They should not be sent back to the trial court for more discovery, investigation of the reasons why the legislature might or might not have acted as it did, a trial on that question, and another inevitable appeal. If, in order to decide **this** appeal, we feel that we need additional information, we should ask the parties to supplement their briefs and provide it to us. We should not defer the question; it is the kind of question this Court and appellate courts all over the country answer every day.

SETH D. MONTGOMERY,
Justice (concurring in part,
dissenting in part).

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-085

Filing Date: September 6, 1990, Filed. As Corrected October 11, 1990

Docket No. 18,626

JOHN B. WORK,

Petitioner,

v.

STATE OF NEW MEXICO,

Respondent.

Original Proceeding on Certiorari
Art Encinias, District Judge

Rothstein, Bennett, Daly, Donatelli & Hughes
Martha A. Daly
Mark H. Donatelli
Santa Fe, New Mexico

for Petitioner.

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

for Respondent.

OPINION

MONTGOMERY, Justice.

{1} We granted certiorari to consider this case in connection with the then pending case of **Zurla v. State.** We recently decided **Zurla,** 109 N.M. 640, 789 P.2d 588 (1990), holding that in the circumstances of that criminal case the defendant's right to a speedy trial was violated. We now reach the same result in this case and take the opportunity it affords to explain one of the aspects of our decision in **Zurla:** the function of the presumption of prejudice arising from a finding that there has been a lengthy delay in bringing the defendant to trial.

I.

{2} Defendant John Work was arrested and charged in magistrate court on April 24, 1986 with criminal solicitation. On September 22, 1986, the magistrate dismissed the charge without prejudice, noting that "this matter will be presented to the Santa Fe County Grand Jury." On December 17, 1987, defendant was indicted on four counts of criminal solicitation and one count of aggravated battery. Jury trial was scheduled for August 22, 1988. On July 11, 1988, defendant moved to dismiss the indictment on speedy trial grounds. After a hearing, the trial court granted the motion and dismissed the indictment with prejudice.

{3} The state appealed to the court of appeals, which reversed the trial court and held that defendant was not denied his right to a speedy trial. The court of appeals ruled that, although there was a "presumptively prejudicial" delay preceding defendant's motion to dismiss the indictment, an independent balancing of the four factors described in **Barker v. Wingo,** 407 U.S. 514 (1972), led to the conclusion that defendant's right to a speedy trial was not violated. The principal basis for this conclusion was that defendant had not established prejudice from the delay, as contemplated by the fourth **Barker** factor. The court of appeals held that defendant had the "burden of proof" to show prejudice and that there was no such showing in this case. Thus, although the court found in favor of defendant on the first and third **Barker** factors (length of the delay and assertion of the right, respectively), it ruled for the state on the second and fourth factors (reasons for the delay and prejudice) and held that, on balance, defendant's speedy trial right was not violated.

II.

{4} Length of the Delay. The trial court, relying on **Kilpatrick v. State,** 103 N.M. 52, 702 P.2d 997 (1985), had analyzed the delay in this case as covering the entire time period from defendant's arrest on April 24, 1986, to the date of the hearing on the motion to dismiss the indictment, August 18, 1988. This was a period of twenty-eight months. The court of appeals held that it was error to include the period of preindictment delay following dismissal of the magistrate court charges because there were no charges pending against defendant during this time and he was not subject to any restraints on his liberty. Excluding the fifteen-month period between magistrate court dismissal and grand jury indictment, the court held that the remaining thirteen-month period was nevertheless sufficient to give rise to a presumption of prejudice which required an inquiry into the remaining three **Barker** factors.

{5} We agree with the court of appeals that the delay between time of arrest and dismissal of the indictment, even excluding the fifteen months between dismissal of the magistrate charges and filing of the indictment, was sufficiently lengthy to give rise to a presumption of prejudice. **See United States v. Martinez,** 776 F.2d 1481, 1483 (10th Cir. 1985) (only prejudice shown to trial court was "the presumption arising out of the length of the delay itself."). Because of our holding on the other **Barker** factors, we find it unnecessary to review the court of appeals' holding with respect to the intervening fifteen-month period or the trial court's contrary holding; the delay was presumptively prejudicial in any event, and this first **Barker** factor should be weighed against the state.

{6} Reason for the Delay. We note, as did the court of appeals, that several periods of delay before dismissal of the magistrate charges and following the indictment were attributable to defendant, and agree with the court of appeals that primary responsibility for these delays should not be weighed against the state. We thus find the reason for the delay to be neutral or, as the court of appeals implicitly held, somewhat in favor of the state. Although we recognize that if the preindictment period were considered this factor would weigh strongly against the state, as the trial court found, we do not consider it further since any such holding would only strengthen our determination that the trial court reached the right result.

{7} Assertion of the Rib. The court of appeals found that defendant had timely asserted his right to a speedy trial and weighed this factor in his favor. This was based on the fact that defendant had filed his speedy trial motion on July 11, 1988, about seven months after the indictment and about five weeks before trial was scheduled to begin. We agree with the court of appeals' analysis on this factor.

III.

{8} Prejudice to the Defendant. The point over which we disagree with the court of appeals is its analysis of the issue of prejudice to the defendant. The court held that "the presumption of prejudice due to a lengthy delay is merely a 'triggering mechanism' that necessarily brings into play an inquiry of the other three **Barker** factors" and that the presumption does not carry forward into the analysis of the fourth factor. Relying on **State v. Tartaglia**, 108 N.M. 411, 773 P.2d 356 (Ct. App.), **cert. denied,** 108 N.M. 318, 772 P.2d 352 (1989), the court held that the defendant had the burden of proving that the delay prejudiced him; the court held that he failed to meet this burden. Defendant argues that, upon a finding of presumptively prejudicial delay, the burden shifts to the state to establish lack of prejudice.

{9} In **Zurla** we held that:

> Once the defendant has demonstrated presumptively prejudicial delay and thus triggered the **Barker v. Wingo** analysis, the presumption of prejudice does not disappear. Rather, the burden of persuasion rests with the state to demonstrate that, on balance, the defendant's speedy trial right was not violated. To the extent it suggests

the state does not have this burden, **Tartaglia** is overruled.

Zurla v. State, 109 N.M. at 646, 789 P.2d at 594.

{10} Here there was a presumption that defendant had been prejudiced by the delay. This, as the court of appeals held, is not by itself sufficient to resolve the separate factor of prejudice. However, contrary to the court of appeals' rulings in **Tartaglia,** in **Zurla,** and in this case, the presumption of prejudice does not simply vanish once the court proceeds to analyze the other **Barker** factors; it "carries forward" and serves to shift to the state the burden to demonstrate that, on balance, the defendant's speedy trial right has not been violated.

{11} As the Supreme Court held in **Barker,** the state can discharge this burden in a variety of ways. It can show that one or more of the following circumstances exist:[1] There were good reasons for the delay; the defendant did not timely assert his right and acquiesced in the delay; or the defendant was not actually prejudiced by the delay. The Supreme Court made it clear that none of these factors is either a necessary or a sufficient condition to a finding that there has been a deprivation of the right to a speedy trial; none of them has any "talismanic quality," and each can be assigned different significance or different weight in the "difficult and sensitive balancing process" that must take place in deciding whether the right has been violated. **See Barker,** 407 U.S. at 533. Because no factor is indispensable to a finding of violation and because each must be evaluated on a spectrum of significance, it is a mistake to think that a simple finding of, for example, "prejudice" or "no prejudice" will suffice to resolve the issue and can be made merely by assigning the "burden of proof" to one party or the other. **See Moore v. Arizona,** 414 U.S. 25 (1973).

{12} On the question of prejudice, the delay may be so lengthy that the presumption of prejudice becomes well-nigh conclusive and proof of actual prejudice is unnecessary. **See United States v. Avalos,** 541 F.2d 1100, 1116 (5th Cir. 1976) (where first three **Barker** factors weigh heavily in favor of accused, accused need demonstrate no prejudice at all; prejudice becomes totally irrelevant), **cert. denied,** 430 U.S. 970 (1977). In another case, the presumption standing by itself may be entitled to very little or no weight. **See Zurla,** 109 N.M. at 646, 789 P.2d at 594; **State v. Holtslander,** 102 Idaho 306, 313, 629 P.2d 702, 709 (1981) (where defendant does not attempt to show actual prejudice, presumption of prejudice should be given very little, if any, weight). Either party may offer evidence on the issue, defendant to corroborate the presumption and the state to rebut it by showing an absence of prejudice. If neither party comes forward with facts, the "probability of prejudice" **(see Dickey v. Florida,** 398 U.S. 30, 56 (1970) (Brennan, J., concurring))[2] will remain just that—a probability; but it may have greater or lesser significance in the balancing process depending on the length of the delay and the weights assigned to the other factors.

{13} In this case the state did not attempt to rebut the presumption of prejudice. Defendant, on the other hand, reinforced it by showing that his defense was potentially impaired through weakness of a witness's memory and the witness's consequent inability to corroborate defendant's version of the events surrounding the alleged offense. Defendant also demonstrated that the state's consideration of first degree murder charges against him caused him humiliation and embarrassment and affected his reputation in Santa Fe. Although the court of appeals found that these latter circumstances (under the rubric "anxiety and concern of the accused") did not entail stress exceeding that attending most criminal prosecutions, the existence of such anxiety and concern is nonetheless a sub-factor to be

[1] As indicated in **Barker,** this list is not all-inclusive; other circumstances excusing the delay or militating against a finding that the defendant's right to a speedy trial has not been violated are possible.

[2] "In essence . . . there is little difference between [Justice Brennan's] approach [in **Dickey]** and the one we adopt today." **Barker v. Wingo,** 407 U.S. at 530 n.30.

considered in the analysis. We conclude that this factor, prejudice to the defendant, weighs in his favor.

IV.

{14} Summarizing, we find that the reason for the delay, if the period between dismissal of the magistrate charges and indictment by the grand jury is excluded from the analysis, weighs slightly in favor of the state. The other three factors—lengthy delay, assertion of the right, and actual prejudice to the defendant—weigh in defendant's favor. The strength of these latter factors is not overwhelming, but on balance we conclude that the trial court reached the correct result[3]—that the defendant's right to a speedy trial had been violated, and that the state had not carried its burden of persuasion to show that the lengthy delay should be excused.

{15} The court of appeals is reversed, and the cause is remanded to the trial court with instructions to dismiss the indictment with prejudice.

{16} IT IS SO ORDERED.

SETH D. MONTGOMERY,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

RICHARD E. RANSOM,
Justice (Specially Concurring)

JOSEPH F. BACA,
Justice (Dissenting)

KENNETH B. WILSON,
Justice (Dissenting)

[3] **See State v. Holtslander,** 102 Idaho at 309 n.2, 629 P.2d at 705 n.2: "It should be noted that each of the **Barker** factors involves primarily factual inquiries, so that the decision of the trial court granting a dismissal is entitled to great weight."

SPECIAL CONCURRENCE

RANSOM,
Justice (specially concurring).

{17} I agree with the principles of the continuing presumption of prejudice, weight, balancing, and burdens as relied upon in the opinion announced by the Court today. However, in this case of greater than average complexity I find the presumption of prejudice entitled to little weight when consideration is limited to the thirteen-month delay consisting of five months during which charges were pending in the magistrate court and eight months following the indictment. In balancing other factors, I note the allegation of anxiety and concern over the possibility of being indicted on murder charges refers on its face to the fifteen-month preindictment period. Moreover, much of the alleged memory loss on the part of the witness also may have occurred during this period of time. To the extent that the prejudice alleged does not relate unambiguously to the period of delay considered by the majority, it does little to shift the balance in petitioner's favor. **Cf. Zurla v. State,** 109 N.M. 640, 789 P.2d 588, 595-96 (1990) (minimal prejudice established when record did not show the relationship between the inordinate delay in bringing defendant to trial and the allegation that two exculpatory witnesses could no longer be located).

{18} There exists, however, ample authority that formal dismissal of charges for tactical reasons does not stop the running of the speedy trial right. **See United States v. Lara**, 520 F.2d 460 (D.C. Cir. 1975) (when dismissal of indictment in District of Columbia and reindictment in Florida were attributable to governmental forum shopping, interim during which no charges were pending counted under speedy trial analysis); **State v. McCrary,** 100 N.M. 671, 675 P.2d 120 (1984) **(Lara** rule not applied when **nolle prosequi** had been entered in good faith in order to allow the prosecution of more serious charges); **see also United States v. Avalos**, 541 F.2d 1100, 1111-13 (5th Cir. 1976) (four-month period between government dismissal of arrest warrants and indictment before a different district court that was attributable to government's desire to find a prosecutor who was willing to present testimony of particular witness was tactical delay and weighed heavily against the government) **United States v. Thomas**, 527 F. Supp. 261 (1981) (period following formal dismissal of charges because of governmental forum shopping counted under speedy trial analysis). **See generally United States v. McDonald,** 456 U.S. 1 (1982) (speedy trial clause has no application after government, acting in good faith, formally drops charges); **Dillingham v. United States,** 423 U.S. 64 (1975) (arrest constitutes a condition initiating running of speedy trial right). **But see United States v. Loud Hawk,** 474 U.S. 302 (1986) (fact that government's desire to prosecute defendants was public knowledge did not affect defendants' liberty interests and thus was not sufficient under **McDonald** to allow consideration of the time during which court's dismissal of the indictment was appealed and no charges were pending against defendants).

{19} The **Lara** line of cases recognizes that when a bad faith, tactical dismissal has been shown: (1) substance rules over form, and the speedy trial analysis includes this period of time even though no format charges were pending; and (2) the delay caused by the government's tactics weighs heavily in favor of defendant. Although it might be argued from the Court's focus on the defendants' liberty interests in **Loud Hawk** that it is irrelevant whether charges are dismissed in good faith or in bad faith, I note that there was no issue in **Loud Hawk** of a bad faith dismissal. Moreover, the interests protected by the speedy trial right include more than just the defendant's liberty interest. **See United States v. Marion,** 404 U.S. 307, 320 (1971) (sixth amendment intended to minimize interference with defendant's liberty and to avoid disruption of employment, curtailment of associations, subjection to obloquy, and creation of anxiety in defendant as well as in defendant's family and friends). These other interests are implicated directly by bad faith dismissals. Therefore, unless and until advised differently by the Supreme Court, I would recognize the **Lara** exception as an aspect of federal constitutional jurisprudence.

{20} Citing **United States v. Pino,** 708 F.2d 523 (10th Cir. 1983) (bad faith not shown under due process analysis when government delayed prosecution of defendant to await outcome of stronger case against third party), the court of appeals analogizes the fifteen-month preindictment delay in this case to "investigative delay." **Cf. Johnson v. United States,** 434 A.2d 415 (D.C. Cir. 1981) (good faith dismissal to investigate case not counted in speedy trial analysis). I disagree with the court of appeals' characterization. Here, the reason given for the state's dismissal of the original charges in April 1986 was to procure the testimony of Gloria Bustos without jeopardizing its prosecution of her case. However, delay cannot be excused by reasons unconnected with the case itself. **See Zurla,** 109 N.M. at 640, 789 P.2d at 596. Moreover, **Avalos** held that dismissal motivated by the government's desire to obtain the testimony of a particular witness constituted tactical delay, did not stop the running of defendant's speedy trial right, and weighed heavily against the state. 541 F.2d at 1111-13; **see also Redd v. Sowders,** 809 F.2d 1266 (11th Cir. 1987) (delay in prosecution caused by desire to obtain testimony of co-defendant without jeopardizing its case against the latter because of his fifth amendment privilege against self-incrimination constituted advantage seeking delay under speedy trial analysis).

{21} Additionally, the trial court noted in its findings that the state offered no explanation at all for a five-month delay between resolution of the charges against Bustos and petitioner's indictment in December 1987, and that this "casts doubt on the State's entire explanation." Being generous to the state, one might accept that it dismissed charges against petitioner solely in order to allow prosecution of its case against Bustos without having to present her testimony against petitioner.[4] One similarly might infer that the state simply was negligent in delaying peti-

[4] The question can be posed, however, as to why the state sought **dismissal** of the metropolitan court charges rather than a **continuance.** Whatever the prosecutor's motives, preventing the running of the six-month rule is one consequence that attended the dismissal. **See** SCRA 1986, 5-604.

tioner's indictment after the charges against Bustos had been resolved. The fact remains that the **dismissal** was for tactical reasons.

{22} I conclude that the fifteen-month period of time between dismissal of the metropolitan court charges and indictment in district court should be counted for speedy trial purposes as well as the thirteen-month period following indictment. In total then, the length of the delay is twenty-eight months. The presumption of prejudice as applied to the record becomes considerably stronger and weighs heavily against the state. Moreover, when the delay caused by tactical reasons is considered in conjunction with the reasons for the delay after reindictment, the "reasons for delay" factor weighs substantially in favor of petitioner, rather than slightly in favor of the state. Therefore, I conclude that the delay deprived petitioner of his right to a speedy trial guaranteed by the sixth amendment.

{23} Finally, it is important to view in context the citation to **Holtslander** for the proposition that a trial court's determination of speedy trial claims is due some deference. **State v. Grissom,** 106 N.M. 555, 561, 746 P.2d 661, 667 (Ct. App.), **cert denied,** 106 N.M. 439, 744 P.2d 912 (1987), held that, "on appeal, a reviewing court is required to independently balance the factors considered by the trial court. . . ." Although it is entirely reasonable to defer to the trial court's findings of fact, we should not defer to his judgment of the constitutional significance of those facts. **See Lara,** 520 F.2d at 464-65 (substantial basis existed for trial court's finding that government dismissal was attributable to forum shopping, and this delay held on appeal to be unnecessary and unconscionable); **Aguilar v. State,** 106 N.M. 798, 799, 751 P.2d 178, 179 (1988) (in analyzing coerced confession claims, duty of appellate court is to make independent determination of the ultimate question of voluntariness based on totality of circumstances).

RICHARD E. RANSOM,
Justice (Specially Concurring)

DISSENT

WILSON, Justice, dissenting.

{24} My application of the first **Barker v. Wingo,** 407 U.S. 514 (1972) factor to the facts in this case precludes my concurrence in the majority opinion.

Length of the Delay

{25} I disagree with the majority's determination that the delay in this case was presumptively prejudicial. While I agree with the majority (excepting Justice Ransom's special concurrence) that the fifteen-month period between the magistrate court dismissal and the grand jury indictment should not be considered, I do not believe that the remaining thirteen-month period was sufficiently lengthy to give rise to a presumption of prejudice triggering an inquiry into the speedy trial factors of **Barker.**

{26} The majority and Justice Ransom's special concurrence treat the total thirteen-month period as one continuous delay. However, actually two proceedings developed. The first period of five months began with the defendant's arrest on April 24, 1986, and resulted in the magistrate court's dismissal of the charges without prejudice on September 22, 1986. The second period of eight months began with the defendant's grand jury indictment on December 17, 1987, and resulted in another dismissal on August 18, 1988, following the defendant's assertion of his speedy trial rights.

{27} The proposition that the thirteen-month delay should be viewed in its sequence of two proceedings, consisting of five and eight months respectively, is consistent with this court's holdings in similar cases. In **New Mexico ex rel. Delgado v. Stanley,** 83 N.M. 626, 495 P.2d 1073 (1972) this court held that the speedy trial clock, interrupted by a nolle prosequi filing, started again with a subsequent indictment. **See also State v. McCrary,** 100 N.M. 671, 675 P.2d 120 (1984); **State v. Grissom,** 106 N.M. 555, 746 P.2d 661 (Ct. App. 1987).

{28} Moreover, practical demands of the judicial process necessitate some flexibility in this case in light of the state's obligation to retry the case from beginning to end. This is not to say that the five-month delay initiated by the first filing should be discounted. But in cases such as this where the state justifiably dismissed the original charges, it should be given a reasonable period of time to bring the second action to a conclusion.

{29} The record of this case lacks any suggestion that the state acted with bad motive or deliberate delay. I take exception to Justice Ransom's special concurrence which criticizes the state for dismissing the first action for tactical reasons or for reasons "unconnected" to this case. The state dismissed the charges against the defendant in order to complete a prosecution against a codefendant and to secure testimony against the defendant. In dismissing a case which could not be substantiated by compelling evidence and in attempting to prepare the most persuasive case before bringing the defendant to trial, the state should not be condemned, but on the contrary, should be commended.

{30} The Supreme Court stated in **Barker:** "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." **Barker,** 407 U.S. at 530. As I believe the thirteen-month period in this case was not presumptively prejudicial, at this point my analysis should rest. However, I take this opportunity to comment on the remaining three **Barker** factors and their relevancy in this case.

Reason for the Delay

{31} I agree with the majority that the reason for the delay in this case should weigh somewhat in favor of the state.

Assertion of the Right

{32} The majority in this case agrees with the court of appeals's analysis that the defendant's assertion of his right to a speedy trial was timely. I respectfully disagree.

{33} The defendant in this case not only failed to assert his right to a speedy trial in a timely manner, but substantially contributed to the delay of both the first and second proceedings. The defendant twice waived the time limits for preliminary hearings and on three occasions obtained additional time in which to file pretrial motions while he sought a writ of superintending control from this court. The defendant should not be allowed to complain of a delay that he has in part caused himself. **See State v. Taranga,** 105 N.M. 592, 734 P.2d 1275 (Ct. App.), **cert. denied,** 105 N.M. 521, 734 P.2d 761 (1987), **overruled on other grounds, Zurla v. State,** 109 N.M. 640, 789 P.2d 588 (1990). **See also United States v. Loud Hawk,** 474 U.S. 302 (1986) (even in limited class of cases where pretrial appeal is appropriate, delays from such appeal ordinarily will not weigh in favor of a defendant's speedy trial claim; a defendant who resorts to pretrial appeal normally should not be able to return to the trial court and reap the reward of dismissal for failure to receive a speedy trial).

{34} If the requirement of assertion has any validity, it is to put the state on notice that the defendant does not acquiesce to the delay and that the state must go forward in all due haste with his prosecution. The defendant's complaint of delay, filed approximately five weeks prior to the scheduled trial, was not calculated to put the state on notice that the defendant wanted a speedy trial in time for the state to react effectively. Instead, the defendant lay behind the log for as long as possible and then brought his demand for a speedy trial at a time when he had finally eliminated any possible recourse from the appellate courts and when the state was helpless to respond. This case is a classic example of the type of defense trial tactics described in **Barker.** The Court noted: "The record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried." **Barker,** 407 U.S. at 535. As in the **Barker** case, the defendant in this case did not seek a speedy trial, but to the contrary, attempted to escape the consequences of a trial altogether.

Prejudice to the Defendant

{35} The majority states that once a presumption of prejudice is shown, such presumption "carries forward" and shifts the burden of persuasion to the state. In its analysis the majority relies upon **Zurla v. State,** 109 N.M. 640, 789 P.2d 588 (1990). It is my opinion that **Zurla** misapplied **Barker;** I consequently cannot agree with the majority's conclusion in this case that the defendant was actually prejudiced.

{36} Zurla, having determined that the length of the delay was presumptively prejudicial, proceeded to analyze the remaining three **Barker** factors. In its discussion of the fourth factor, prejudice to the defendant, the court stated: "Once the defendant has demonstrated presumptively prejudicial delay and thus triggered the **Barker v. Wingo** analysis, the presumption of prejudice does not disappear. Rather, the burden of persuasion rests with the state to demonstrate that, on balance, the defendant's speedy trial right was not violated." **Zurla,** 109 N.M. at 646, 789 P.2d at 594. The court continued: "Neither has the state shown how the evidence controverts the 'presumption of prejudice' as applied to the loss of this testimony, which, as noted above, was facially material to Zurla's defense." **Zurla,** 109 N.M. at 648, 789 P.2d at 596. **Zurla** erroneously "carried forward" or superimposed the presumption of prejudice onto the fourth factor of prejudice to the defendant.

{37} Barker provides a functional balancing test with which to determine whether a defendant's right to a speedy trial has been violated. **Barker** lends no support for the majority's proposition that the presumption of prejudice initially found to exist, the factor which triggers the further inquiry into the remaining three **Barker** factors, "carries forward" and attaches to the fourth factor. To the contrary, in balancing the factors within the factual context of the **Barker** case, the Supreme Court illustrated how to even-handedly weigh each piece of evidence without a compelling presumption tipping the scales one way or another. **See also United States v. Loud Hawk,** 474 U.S. 302 (1986) (employing **Barker** test, Supreme Court held possibility of prejudice not sufficient to weigh fourth factor in defendant's favor).

{38} Additionally, practical and rational constraints foreclose the success of the majority's theory. If we require the state to affirmatively disprove prejudice to a defendant in a case where the defendant has not attempted to show the same, we are placing the burden upon the state to positively prove a negative. As stated in **State v. Tartaglia,** 108 N.M. 411, 415, 773 P.2d 356, 360 (Ct. App.), **cert. denied,** 108 N.M. 318, 772 P.2d 352 (1989), **overruled, Zurla v. State,** 109 N.M. 640, 789 P.2d 588 (1990):

> Second, it is difficult to conceive of how the state could come forward and effectively rebut a presumption of prejudice from time lapse alone without knowing, at the least, how defendant claims he was prejudiced. For example, how could the state rebut a claim that a potential exculpatory witness has disappeared, causing prejudice to the defense, when the state may be unaware of the existence of such a person? How could the state rebut claims of anxiety and concern without some claim made by defendant that he, in fact, suffered such consequences from the delay? To state the proposition that the state must affirmatively rebut prejudice without knowing what prejudice defendant claims shows the impossibility of adopting defendant's position.

How can the state be expected to shadowbox its way through such an undefinable maze? The state should not be required to affirmatively prove that the defendant did not suffer prejudice by the delay. **See United States v. Martinez,** 776 F.2d 1481 (10th Cir. 1985) (when defendant failed to articulate any specific harm suffered as a consequence of prosecutorial delay, and when only prejudice shown was presumption arising out of length of delay itself, defendant's speedy trial right not violated).

{39} In my view, the better rule is to hold that the question of actual prejudice is a factor which must be determined on balance. If a defendant brings forth evidence of prejudice, the state will have the burden of rebutting such evidence. If no evidence of prejudice is offered, then the scales are balanced. In this latter situation the question of actual prejudice would be neither for nor against either party, but neutral.

{40} In the present case the defendant contended that he suffered humiliation, embarrassment, anxiety, and concern. He further claimed that one witness could not remember a specific conversation which allegedly occurred between the defendant and that witness. However, the defendant was unable to remember how much of the conversation the witness heard, and the witness did not testify regarding his alleged memory loss. Speculative allegations of an impaired defense and uncorroborated, general assertions of memory deterioration are unpersuasive and are subject to careful scrutiny as to their impact on a particular case when a defendant offers no proof regarding how the witness, if present, would testify. **See United States v. Jenkins,** 701 F.2d 850 (10th Cir. 1983); **State v. Grissom,** 106 N.M. 555, 746 P.2d 661 (Ct. App. 1987).

{41} I believe the evidence of actual prejudice introduced by the defendant in this case failed to show that the defendant's anxiety and concern exceeded that ordinarily attendant to criminal prosecutions. Further, the evidence did not demonstrate that the defense witness's testimony would have been different without the delay or that, if the testimony had been available, it would have been material to the defendant's defense. But for the heavy thumb of presumption which the majority placed on the scales, the defendant's claim of prejudice would fail.

Summation

{42} Excepting the period of time between the magistrate court's dismissal of the charges and the grand jury indictment, and considering the time necessary to complete two judicial proceedings, I do not think the length of the delay was presumptively prejudicial. However, assuming the delay was determined to be sufficiently lengthy to give rise to a presumption of prejudice, I believe the second **Barker** factor (reason for the delay) should weigh somewhat in favor of the state, the third factor (assertion of the right) should weigh in favor of the state, and the fourth factor (prejudice to the defendant) should remain neutral. Balancing these four factors thus, I conclude that the defendant was not denied a speedy trial under the **Barker** announcements. I would remand this matter to the trial court with instructions to reinstate the case for trial.

KENNETH B. WILSON,
Justice (Dissenting)

Justice Kenneth B. Wilson

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-086

Filing Date: September 25, 1990

Docket No. 18,685

CARL A. HAALAND and MARILYN R. HAALAND,

Plaintiffs-Appellees and Cross-Appellants,

v.

CLIFFORD A. BALTZLEY,

Defendant-Appellant and Cross-Appellee.

APPEAL FROM THE DISTRICT COURT OF SAN MIGUEL COUNTY
Jay G. Harris, District Judge

Daniel J. O'Friel, Ltd.
Daniel J. O'Friel
Linda Martinez-Palmer
Santa Fe, New Mexico

for Appellees.

Michael L. Gregory
Las Vegas, New Mexico

for Appellant.

OPINION

WILSON, Justice.

{1} Plaintiffs filed a complaint seeking to recover their interest in a horse business. The jury returned a verdict in favor of plaintiffs for $61,938.50. The trial court entered judgment in the amount of the jury verdict plus costs. Defendant appeals the judgment and plaintiffs cross appeal. We affirm the trial court.

STATEMENT OF FACTS

{2} The plaintiffs Haaland and defendant Clifford A. Baltzley and his wife Nola Baltzley entered into an oral agreement in the summer of 1984 to acquire, promote, breed and sell Norwegian Fjord horses. The parties intended that they would be equal partners in a corporation. The Haalands and Baltzley each contributed cash and assets valued at $20,741.50 to the business.

{3} Mr. Baltzley is eighty-nine years old and the parties contemplated that Carl Haaland, age forty, would contribute his knowledge of the breed, his Norwegian contacts, and his public relations skills to help sell and promote the breed so that the venture would have an opportunity to grow. Haaland would also be responsible for training, grooming and caring for the horses. Baltzley would contribute his business knowledge, his experience in breeding pedigree animals and his experience with corporations.

{4} It was also agreed that Baltzley would provide funds in excess of the capital contribution made by each party. He would be compensated for those advances together with interest at ten percent per annum.

{5} In fact, the parties failed to properly establish and capitalize the corporation or issue corporate stock and essentially conducted their business as an oral general partnership. It does not appear that any assets were ever actually transferred to the corporation other than the four horses initially belonging to plaintiffs.

{6} Until May 1985, the partners purchased horses from Harold Jacobson in Colorado. By that time Mr. Baltzley had paid, or agreed to pay, Harold Jacobson a total of $186,860.05, including interest. A total of thirty-three horses were purchased with this amount.

{7} The partnership operated from July 1984 to January 9, 1986, the date when the Haalands resigned from Norwegian Fjord Horses, Inc. On May 20, 1987, the Haalands, through counsel, demanded payment from Baltzley for their interest in the business in the amount of $55,673.30.

{8} The Haalands also entered into an employment contract with defendant Baltzley in March 1985. This contract was for ranch management and construction services at the Bar X Bar Ranch, and was not directly related to the horse business. In November 1985 defendant Baltzley discharged Carl and Marilyn Haaland from the employment contract. They left the Bar X Bar Ranch and have not, since that date, worked with the horses, contributed to the corporation or participated in promotion or sale of the horses. They both resigned as corporate officers on January 9, 1986.

{9} After the Haalands resigned, the Baltzleys continued to provide for the horses and to make some sales. The Haalands took no further action in regard to their interest in the business until February 1987, when they demanded an accounting. The total income for the enterprise was reported in April 1987 as $92,448.35.

{10} At trial, Carl Haaland testified that he believed the horse business agreement to be continuing after he left the ranch and resigned as a corporate officer. Defendant Baltzley agreed. The Haalands claimed that they were entitled to one-half of the horses and one-half of the fair debt as of the date of their appearance in court.

STATEMENT OF THE ISSUES

On appeal, defendant argues that:

> (1) The trial court erred in dissolving the partnership at the time of trial;
> (2) The jury disregarded the court's instructions;
> (3) The jury verdict was not supported by substantial evidence.

{11} In their cross appeal, plaintiffs argue that the trial court erred in not assessing prejudgment interest.

DISCUSSION

{12} At the close of trial, the trial court entered its judgment dissolving the partnership. Defendant argues that the trial court erred in dissolving the partnership based upon two theories:

> (1) That a dissolution of partnership is an equitable procedure and could not be done by jury verdict;
> (2) That the dissolution of the partnership is a separate proceeding which was not pled or litigated by the parties.

{13} The first assertion of appellant is answered by observing that the jury verdict found the value of plaintiffs' interest in the partnership at the time of trial without regard as to whether or not the partnership would be dissolved at that time. The second assertion is answered by the record of this case. In discussions in the court record defendant's counsel, immediately prior to the submission of the case to the jury, stated that he believed the partnership should be dissolved upon rendering of the verdict. The plaintiffs Baltzley, through their counsel, concurred.

{14} In addition, the parties stipulated that whatever the jury verdict might be Mr. Baltzley would, after the verdict, own the entire business together with all assets, and the Haalands would either receive payment for their interest in the business, or would pay whatever amount they owed to Mr. Baltzley. The parties' stipulation that the court should dissolve the partnership and that the verdict with payment to or from the Haalands would terminate the parties' relationship constituted a stipulation that the court should enter judgment dissolving the partnership. Facts stipulated to are not reviewable on appeal. **See Coldwater Cattle Co. v. Portales Valley Project, Inc.,** 78 N.M. 41, 428 P.2d 15 (1967). This stipulation of the parties, together with the theory of the case as submitted to the jury under jury instructions, became the law of the case, binding upon the parties to the controversy. **See Peay v. Ortega,** 101 N.M. 564, 686 P.2d 254 (1984); **American Tel. & Tel. Co. v. Walker,** 77 N.M. 755, 427 P.2d 267 (1967).

{15} Defendant asserts in his appeal that the jury instructions required the jury to determine the net value of the partnership at the time of dissolution and award the Haalands one-half of that amount. He argues that instead the jury verdict was based upon a purported contract for Baltzley to purchase the Haalands' interest in the partnership.

{16} At the time of trial, exhibit No. 120 was introduced into evidence to show the value of the partnership in November 1985, the approximate date when the Haalands ceased active participation in the venture. Exhibit 120 shows a total asset value of $238,000, reduced by pasture expenses of $3,190, by a promissory note in favor of defendant Baltzley in the amount of $82,933.04, by a promissory note to Mr. Jacobson in the amount of $25,000, and further reduced by a debt in the amount of $3,000, for a net value of $123,877. One-half of that amount is $61,938.50, the amount of the jury verdict. Therefore, the verdict was not based on any alleged contract to purchase the Haalands' interest, but was in fact based upon the jury's calculation of the Haalands' one-half of the net value of the partnership. Thus the jury did not disregard the court's instructions.

{17} Defendant continues to argue that the evidence would have supported a further reduction from the net value of the partnership for expenses which he paid over and above the operation's income from 1985 to the date of trial. The question, however, is not whether the evidence would have supported a different verdict, but whether there is evidence to support the result that was reached. **See Tapia v. Panhandle Steel Erectors Co.,** 78 N.M. 86, 428 P.2d 625 (1967). The jury was not required to accept the evidence offered by Baltzley; they could have determined that the value of the partnership did not change after 1985.

{18} A jury verdict will not be disturbed when supported by substantial evidence. **See Getz v. Equitable Life Assurance Soc'y,** 90 N.M. 195, 561 P.2d 468, **cert. denied,** 434 U.S. 834 (1977). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. **Toltec Int'l, Inc. v. Village of Ruidoso,** 95 N.M. 82, 619 P.2d 186 (1980). On appeal all disputed facts are resolved in favor of the successful party with all reasonable inferences indulged in support of a verdict and all evidence and inferences to the contrary disregarded, and although contrary evidence is presented which may have supported a different verdict, the appellate court will not weigh the evidence or foreclose a finding of substantial evidence. **Id.** In this case there were five days of testimony and 115 documentary exhibits. We find there was substantial evidence in the record to support the jury's finding that the Haalands' one-half interest in the property was $61,938.50.

{19} Plaintiffs urge upon this court the proposition that they should receive prejudgment interest on the amount of the jury verdict. The awarding of prejudgment interest is within the sound discretion of the trial court, except that it should be awarded as a matter of right in those cases where the amount due under a contract can be ascertained with reasonable certainty by a mathematical standard fixed in the contract or by established market prices. **Shaeffer v. Kelton,** 95 N.M. 182, 619 P.2d 1226 (1980). It is clear in this case that the amount owed the Haalands could not be determined by mathematical certainty prior to trial. In addition, the date of dissolution of the partnership was the date of trial, therefore no prejudgment interest would have been due.

CONCLUSION

{20} Finding no error, we affirm the judgment of the trial court.

{21} IT IS SO ORDERED.

KENNETH B. WILSON,
Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-090

Filing Date: October 9, 1990

Docket No. 18,860

SNYDER RANCHES, INC.,

Petitioner-Appellant,

v.

OIL CONSERVATION COMMISSION OF THE STATE OF NEW MEXICO and MOBIL PRODUCING TEXAS & NEW MEXICO, INC.,

Respondents-Appellees.

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
R. W. Gallini, District Judge

Carpenter, Crout & Olmsted
Michael R. Comeau
Rebecca Dempsey
Santa Fe, New Mexico

Neal & Neal,
J. W. Neal
Hobbs, New Mexico

for Appellant.

Robert G. Stovall
Santa Fe, New Mexico

for Appellee Oil Conservation Commission.

Montgomery & Andrews
W. Perry Pearce
Santa Fe, New Mexico

for Appellee Mobil Producing Texas & New Mexico, Inc.

OPINION

WILSON, Justice.

{1} Petitioner-appellant Snyder Ranches, Inc. (Snyder Ranches) appeals a district court judgment in favor of respondents-appellees Mobil Producing Texas & New Mexico, Inc. (Mobil) and the Oil Conservation Commission of the State of New Mexico (Commission). We affirm the district court.

{2} Mobil filed an application with the Oil Conservation Division of the Energy, Minerals, and Natural Resources Department of the State of New Mexico for authority to inject salt water through a disposal well into an underground formation known as the Silura-Devonian. Mobil's disposal well is located in the section adjoining Snyder Ranches's property, less than one-quarter mile west of the western boundary of Snyder Ranches's land. Expert testimony established that a northwest-southeast trending sealing fault lies east of the disposal well which will stop the migration of the injected salt water at the fault line. Snyder Ranches protested Mobil's application, and the case was heard by the Commission. At this hearing both Mobil and Snyder Ranches appeared through counsel and presented testimony and exhibits. The Commission granted Mobil's application. Snyder Ranches then petitioned the district court for a review of the Commission's order. After studying the exhibits, briefs, and transcript of the proceedings before the Commission, the district court concluded that the Commission order granting Mobil's application was supported by substantial evidence, not contrary to law, and not arbitrary or capricious.

{3} On appeal Snyder Ranches claims that substantial evidence does not support the district court's finding that salt water injected by Mobil would not move into the formation underlying Snyder Ranches's property. Snyder Ranches insists that the evidence before the court shows clearly that the fault line in question crosses a corner of their property and, since it is uncontroverted that the salt water will migrate to the fault, the salt water will cause underground encroachment on some portion of its land. Snyder Ranches argues that when the Commission granted Mobil's application, it authorized a trespass by Mobil upon Snyder Ranches's property, and therefore the permit to inject salt water is illegal.

{4} Snyder Ranches raised several other correlative issues, and all parties filed extensive briefs justifying their legal positions. As we find the trespass issue dispositive, we do not reach the other points of appeal.

{5} We may have arrived at a different result than the Commission or the district court if we were the fact finders in this case. However, we are constrained by the following standard which limits our review.

> The district court may not on appeal substitute its judgment for that of the administrative body, but is restricted to considering whether, as a matter of law, the administrative body acted fraudulently, arbitrarily, or capriciously, whether the administrative order is substantially supported by evidence, and generally whether the active administrative body was within the scope of its authority.

Elliott v. New Mexico Real Estate Comm'n, 103 N.M. 273, 275, 705 P.2d 679, 681 (1985).

> On appeal to this Court, the review of an administrative decision is the same as before the district court. However, our review requires a two-fold analysis. Ultimately, we must decide whether the district court was correct in finding substantial evidence to support the [administrative body's] order. In making that decision, we must independently examine the entire record.
>
> In **Duke City Lumber Co. v. New Mexico Environmental Improvement Board,** 101 N.M. 291, 681 P.2d 717 (1984), this Court held that for purposes of reviewing administrative decisions the substantial evidence rule is expressly modified to include whole record review. Under whole record review, the court views the evidence in the light most favorable to the agency decision, but may not view favorable evidence with total disregard to contravening evidence.
>
> . . . The reviewing court needs to find evidence that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency.

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).

Id. at 282, 756 P.2d at 562 (citations omitted). "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. . . ." **Perkins v. Department of Human Servs.,** 106 N.M. 651, 655, 748 P.2d 24, 28 (Ct. App. 1987).

> On appeal, the role of an appellate court in determining whether an administrative agency has abused its discretion by acting in an arbitrary and capricious manner, is to review the record to determine whether there has been unreasoned action without proper consideration in disregard for the facts and circumstances. Where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though another conclusion might have been reached.

Id. at 655, 748 P. 2d at 28 (citations omitted).

{6} In this case an exhibit was introduced which shows the fault line touching the western boundary of Snyder Ranches's property. Snyder Ranches argues that this contact is proof positive that the fault line must include part of their land. We do not agree. The fact that the fault line and the boundary line merge at a particular point does not mean that the fault line encompasses land beyond the boundary line. While we recognize that a boundary line is an imaginary line infinitely narrow, whereas the pencil mark upon a plat is extremely large in proportion to the scale of the overall plat, and while we recognize that a fault line drawn upon a plat is by necessity arbitrary, as the twisting path of a fault line cannot be accurately represented by a straight line upon a plat, these are considerations for the fact finder who is in the best position to weigh the evidence and determine the facts of the controversy.

{7} Having found substantial evidence to support the Commission and district court's conclusions, our analysis should end. However, in order to avoid future error, we take this opportunity to answer Snyder Ranches's assertion that the granting of Mobil's application to inject salt water into the disposal well authorizes a trespass against Snyder Ranches's property. We do not agree.

{8} The State of New Mexico may be said to have licensed the injection of salt water into the disposal well; however, such license does not authorize trespass. The issuance of a license by the State does not authorize trespass or other tortious conduct by the licensee, nor does such license immunize the licensee from liability for negligence or nuisance which flows from the licensed activity. **See Lummis v. Lilly,** 385 Mass. 41, . . . , 429 N.E.2d 1146, 1150 (1982); **Summer v. Township of Teaneck,** 53 N.J. 548, 556, 251 A.2d 761, 765 (1969). In the event that an actual trespass occurs by Mobil in its injection operation, neither the Commission's decision, the district court's decision, nor this opinion would in any way prevent Snyder Ranches from seeking redress for such trespass.

{9} The district court is affirmed.

{10} IT IS SO ORDERED.

KENNETH B. WILSON,
Justice

WE CONCUR:

DAN SOSA, JR.,
Chief Justice

JOSEPH F. BACA,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-093

Filing Date: October 10, 1990

Docket No. 18,466

McCONAL AVIATION, INC.,

Plaintiff-Appellee,

v.

COMMERCIAL AVIATION INSURANCE COMPANY,

Defendant-Appellant.

Appeal from the District Court of Lea County
Patrick J. Francoeur, District Judge

Carpenter, Crout & Olmsted
Rebecca Dempsey
Santa Fe, New Mexico

McClure & Eyler
Richard R. Eyler
Ann C. Rice
Denver, Colorado

for Appellant.

Hinkle, Cox, Eaton, Coffield & Hensley
Nancy S. Cusack
Albert L. Pitts
Roswell, New Mexico

for Appellee.

OPINION

WILSON, Justice.

{1} Defendant Commercial Aviation Insurance Company, Inc. (Commercial) appeals a trial court judgment awarding Plaintiff McConal Aviation, Inc. (McConal) $65,000 in damages plus interest and costs, without credit for amounts paid by another settling defendant. We affirm the trial court.

FACTS

{2} In October 1984 Falcon Insurance Agency (Falcon) and McConal agreed that Falcon would obtain property insurance for an aircraft owned by McConal. McConal executed an installment contract to pay for the insurance and Falcon indicated that the policy was effective beginning October 12, 1984. Falcon then contacted Aviation General Insurance Company, Inc. (Aviation), an insurance broker, to obtain an insurance binder for McConal's policy. At Aviation's request Commercial issued a binder for a thirty-day period, ending November 12, 1984. Commercial then sent Aviation a letter requesting that McConal fill out an application for insurance and return it before the binder expired. Although Aviation apparently received a timely completed application and subsequently forwarded it to Commercial, Commercial did not receive it until November 25, 1984, thirteen days after the binder expired.

{3} McConal was unaware that its aircraft was insured for only one month. On November 21, 1984 the aircraft was involved in a crash and sustained $47,369.30 in damages. When McConal requested monies to repair the aircraft, Falcon disclosed that the insurance was not in effect at the time of the crash and refused to pay.

{4} On August 26, 1985 McConal sued Falcon, Aviation, and Commercial alleging breach of contract, negligence, bad faith, and deceptive trade practices. Specifically, McConal alleged: (1) Falcon breached its contractual duty to procure property insurance for the aircraft; (2) Falcon was Commercial's agent and Commercial was thus liable as its principal; and (3) Aviation was negligent in failing to forward to Commercial the information necessary to continue McConal's policy. McConal sought compensatory damages, punitive damages, and treble damages pursuant to the Unfair Trade Practices Act, NMSA 1978, Section 57-12-1.

{5} Falcon never appeared in the action. A week prior to trial, Aviation settled with McConal for $40,000 and trial was held solely against Commercial. The trial court granted Commercial's motion for a directed verdict as to the negligence count, and McConal withdrew the deceptive trade practices claim. Thus the only claim remaining for the jury was for breach of contract against Commercial.

{6} Among the proposed jury instructions Commercial submitted was a modified version of SCRA 1986, 13-1825 (UJI 1825), which the court rejected on grounds that the jury was not entitled to be informed of a prior settlement. The jury was not told of the other original defendants and was merely instructed as to McConal's damages. The jury returned a $65,000 verdict in McConal's favor.

{7} After the verdict, Commercial argued that it should receive a $40,000 credit towards the judgment, representing the amount of Aviation's settlement with McConal. The trial court denied Commercial's motion for a credit for the settlement amount and entered judgment against Commercial for $65,000. Commercial appeals the trial court's judgment.

ISSUES

{8} On appeal Commercial claims the trial court erred in: (1) refusing to submit Commercial's requested jury instruction based on UJI 1825, and (2) refusing to credit the amount of Aviation's settlement with McConal toward the judgment against Commercial. We address each issue in turn.

DISCUSSION

1. Jury Instruction

{9} Commercial first claims the trial court erred by refusing to submit its modified version of the uniform jury instruction on contribution among tortfeasors.

{10} The directions for use of UJI 1825 state that "[t]his instruction is to be used **only** where a **joint tortfeasor** has been released in conformity with the Uniform Contribution Among Tortfeasors Act, 41-3-1, NMSA 1978. . . ." (emphasis added). For purposes of the Contribution Among Tortfeasors Act, "the term 'joint tortfeasors' means two or more persons jointly or severally **liable in tort** for the same injury to person or property, whether or not judgment has been recovered against all or some of them." NMSA 1978, § 41-3-1 (Repl. Pamp. 1989)(emphasis added).

{11} In this case Commercial successfully obtained a dismissal of the complaint of negligence and the matter went to the jury only on the breach of contract claim. Therefore, the jury was not deciding a tort claim but a contract claim. Also, there was never a determination of liability against Aviation, so there has been no finding that any defendant is a tortfeasor. Thus the trial court did not err; the instruction was properly refused.

2. Credit of McConal's Settlement

{12} Commercial contends that the trial court committed reversible error by refusing to credit the amount paid in settlement by Aviation to the verdict entered against Commercial. Commercial asserts that the failure to credit the amount paid by Aviation results in an impermissible double recovery by McConal. The argument is based on the contention that "McConal sued several Defendants to redress the one wrong which it suffered. It was clearly seeking only one recovery arising from the one incident." We cannot agree.

{13} The jury found that a valid contract existed between McConal and Commercial and then found damages of $65,000 resulted from Commercial's breach of the contract. The claim against Aviation was for negligence in failing to forward the application. Had that claim also gone to the jury it might well have awarded McConal additional damages caused by Aviation's negligence. That would not have represented double recovery for the same wrong, and this fact is not changed by Aviation's decision to settle any claims against it.

{14} McConal, on the other hand, asserts that the settlement with Aviation falls squarely within the confines of **Exum v. Ferguson,** 97 N.M. 122, 637 P.2d 553 (1981), and therefore should not be credited against the jury award against Commercial. We agree that **Exum** controls in this case.

{15} In **Exum** the plaintiff sued two defendants, one of whom settled with the plaintiff prior to trial. The case proceeded against the remaining defendant based on a breach of contract claim. The defendant requested that the amount of the settlement be credited against the jury award, based on the Uniform Contribution Among Tortfeasors Act. The trial court refused to credit the settlement amount against the damages awarded by the jury for breach of contract. This court upheld the trial court, pointing out that no tort claim had been made against the remaining defendant. We held that "[b]ecause Occidental's and Ferguson's suits were based on different theories of liability, they are not joint tort-feasors and Ferguson is not entitled to a credit of Occidental's settlement." **Id.** at 125, 637 P.2d at 556. Likewise, this case was not tried under a tort theory. Therefore, Commercial and Aviation are not joint tortfeasors, and Commercial is not entitled to credit for the settlement paid by Aviation.

{16} Commercial attempts to distinguish **Exum** by pointing out that in that case it was the insurer that had settled with the plaintiff on a breach of contract claim and the case proceeded to trial on tort claims against another defendant, whereas in this case an alleged tortfeasor settled with McConal and only the breach of contract suit against the insurer was tried. We find this distinction to be irrelevant. As in **Exum,** there are no joint tortfeasors involved in this case.

{17} Commercial also argues that in New Mexico a plaintiff cannot recover more than his actual losses. While this is a correct statement of the general rule, an exception is the collateral source rule. The collateral source rule allows a plaintiff to recover his full losses from the responsible defendant, even though he may have recovered part of his losses from a collateral source.

> As a general rule, benefits received by the plaintiff from a source collateral to the tortfeasor or contract breacher may not be used to reduce the defendant's liability for damages. This rule holds even though the benefits are payable to the plaintiff because of the defendant's actionable conduct and even though the benefits are measured by the plaintiff's losses.

D. Dobbs, **Handbook on the Law of Remedies** § 3.6, at 185 (1973).

{18} We find persuasive the case of **Rose v. Hakim,** 335 F. Supp. 1221 (D.D.C. 1971) cited by McConal. The **Hakim** case involved a malpractice claim where the plaintiff settled with two of the medical practitioners for the sum of $270,000 and then took the defendant hospital to trial, recovering a jury verdict of $294,777.25, representing full compensation to the plaintiff. After the jury verdict the defendant hospital claimed the right to credit for the $270,000 paid by the settling defendants.

{19} In rejecting the hospital's claim, the court noted that the settling defendants were found to be free of fault by the jury and that they were therefore not tortfeasors, as they had committed no tort. The amounts paid by the settling defendants were, "in the legal sense, voluntary. They were, in legal terminology, collateral sources." **Id.** at 1236. The court then quoted **Hudson v. Lazarus,** 217 F.2d 344, 346 (D.C. Cir. 1954):

> "In general the law seeks to award compensation, and no more, for personal injuries negligently inflicted. Yet an injured person may usually recover in full from a wrongdoer regardless of anything he may get from a 'collateral source' unconnected with the wrongdoer. Usually the collateral contribution necessarily benefits either the injured person or the wrongdoer. Whether it is a gift or the product of a contract of employment

> or of insurance, the purposes of the parties to it are obviously better served and the interests of society are likely to be better served if the injured person is benefitted than if the wrongdoer is benefitted."

335 F. Supp. at 1236. We agree with the **Hudson** court that if a collateral resource is to benefit a party, it should better benefit the injured party than the wrongdoer.

{20} There are also sound policy reasons for not permitting the offset. The policy of New Mexico is to favor amicable settlement of claims without litigation. **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). We feel compelled to enforce the terms and expectations of the settling parties. **See D. D. Williamson & Co. v. Allied Chem. Corp.,** 569 S.W.2d 672 (Ky. 1978). In **Williamson,** one defendant (Allied) argued that it was entitled to a credit against a jury award to the extent of a settlement paid by another defendant (PB&S). The plaintiff Williamson, like McConal, insisted that he should retain the benefit of his bargain and settlement with PB&S and that Allied should not benefit from the settlement to which it was not a party. The **Williamson** court said:

> Williamson and PB&S reached an arms length negotiated settlement. PB&S bought its peace and Williamson sold its claim against PB&S for a price satisfactory to the settling parties. Allied and Williamson took their dispute to the jury. To now allow Allied to benefit from PB&S's generosity discourages the policy of encouraging and finalizing partial settlements. . . .
>
> . . . .
>
> We conclude in this case that the same policy militates in favor of allowing the plaintiff to enjoy a favorable settlement or being bound by a poor settlement.

569 S.W.2d at 674.

{21} In agreeing to settle, McConal and Aviation both gambled that they were faring better than if they had gone to trial. Both remain bound to that settlement, even if subsequent events should prove them wrong. Yet if we were to allow Commercial the offset it seeks, the odds would be better for a defendant who refuses to settle and proceeds to trial; he might well have part of his liability borne by a party who had not been adjudged liable and might never have been even if he had gone to trial. In short, Commercial would reap the benefit of a settlement to which it was not a party.

CONCLUSION

{22} We conclude that the same policy which binds a plaintiff to a poor settlement permits him to enjoy a favorable settlement. There was no error in refusing to offset the judgment and therefore the trial court is affirmed.

{23} IT IS SO ORDERED.

KENNETH B. WILSON,
Justice

WE CONCUR:

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice specially concurring

SPECIAL CONCURRENCE

MONTGOMERY,
Justice, specially concurring.

{24} I concur in the result. I agree that the trial court did not err by refusing to give the jury a modified UJI 1825 instruction. **Exum v. Ferguson** holds that UJI 1825 is not applicable where joint tortfeasors are not involved, 97 N.M. at 125, 637 P.2d at 556. This does not answer the question whether the jury should be instructed as to a settlement by a previous defendant when the case proceeds to determine the remaining defendant's breach of contract, but I would hold that the remaining defendant's entitlement to a credit for the other defendant's settlement is a question of law. The credit, if any, should be applied by the court, not the jury.

{25} Is the remaining defendant entitled to a credit for the settlement previously made with another defendant? I do not believe that this question can be answered, as this Court answered it in **Exum,** by simply classifying the claim against the remaining defendant as a contract claim rather than a tort claim and the defendants as severally liable rather than liable as joint tortfeasors. The question should instead be answered by identifying and evaluating the relevant policies in favor of and opposed to each answer and deciding which policy or policies should be given primacy in this case.

{26} The first policy is that against awarding a claimant compensation that exceeds his losses—the policy against duplicate recovery. This is a venerable policy in American law. **See, e.g.**, **Hale v. Basin Motor Co.,** 110 N.M. 314, 795 P.2d 1006 (1990) (citing **Hood v. Fulkerson,** 102 N.M. 677, 680, 699 P.2d 608, 611 (1985)); W. Keeton, D. Dobbs, R. Keeton & D. Owens, **Prosser and Keeton on the Law of Torts** § 48, at 330 (5th ed. 1984) [hereinafter Prosser & Keeton]. It clearly is being denied effect in this case.

{27} The plurality speculates that, had the claim against Aviation gone to the jury it might well have awarded McConal additional damages. However, there is no indication that the jury would have done so. McConal sued Commercial for the costs of repairing its airplane, transportation and storage charges, and interest on a loan. The jury's verdict awarded McConal only slightly more than the requested damages. Although McConal refers in its brief to other amounts which it might have claimed from Aviation, we are pointed to nothing in the record indicating that McConal's loss was other than the single, indivisible, unitary loss which Commercial alleges it was.

{28} Had the case gone to the jury against both defendants, the jury would have returned a verdict against one and exonerated the other. McConal concedes that the claims asserted against Commercial and Aviation—a claim for breach of a contract of insurance and a claim for negligent failure to procure insurance, respectively—were mutually exclusive. Since the case proceeded against only one defendant, what is the justification for allowing the plaintiff to retain more than the amount of its damages?

{29} The policy against duplicate recovery, while no doubt strong and long-standing, does admit of exceptions. One of those exceptions—perhaps the most pervasive—is provided by the collateral source rule.[1] (I shall return below to consideration of the policy underlying that rule.) Since the policy has exceptions, one might wonder what the reason is for the policy itself. Is the law so niggardly in its conferral of benefits and recognition of rights that it simply cannot stand to see a claimant receive more than his or her out-of-pocket losses, no matter what the circumstances? Again, the collateral source rule stands as an obstacle to an across-the-board enforcement of any such penurious policy.

{30} It is commonly assumed that the policy against duplicate recovery prevents unjust enrichment, **see, e.g.**, Prosser & Keeton at 330; but this only raises further questions: What is "enrichment," and when will it be deemed "unjust"?

{31} Another relevant policy is the one relied on in the plurality opinion—the policy favoring settlements. The theory is that if the nonsettling defendant knows that its liability will be reduced because of the previous settlement, it will have no incentive to make a settlement itself; it will have every incentive to gamble on a favorable outcome at trial, and the policy favoring settlements will thereby be frustrated. Looked at from the standpoint of the nonsettling defendant, this theory probably makes sense. However, from the

[1] It is widely believed that the collateral source rule has little or no application to contract claims. **See, e.g., Restatement (Second) of Contracts** § 347, comment e (1979); D. Dobbs, **Handbook on the Law of Remedies** § 8.10, at 587 (1973). For an exhaustive demonstration that this is not correct, **see generally** J. G. Fleming, **The Collateral Source Rule and Contract Damages,** 71 Calif. L. Rev. 56 (1983).

standpoint of the **claimant** the opposite is probably true. If the claimant knows that the previous settlement will be credited to any judgment against the nonsettling defendant, the claimant will have every reason to settle for as much as he or she can get; if, on the other hand, the settlement is not credited, the claimant will have every reason to "go for broke" and press the case to trial against at least one defendant. A victory at trial will mean no reduction, whereas a loss will leave the claimant at least partially compensated through the settlement(s) with the previous defendant(s).

{32} I hesitate to endorse a result in this case that fuels the fire in lawsuits of this sort and encourages claimants to bring as many claims[2] as they can devise against as many defendants as they can find and then proceed to settle with each defendant in turn, making a settlement that, among other things, finances the litigation against the remaining defendant(s) and enables the claimant to gamble for the big stakes. However, I conclude that the answer to the question whether settlement is encouraged or discouraged by crediting the amount of the first settlement against any later judgment probably is neutral and really depends on the size of the settlement in relation to the nonsettling defendant's exposure and the claimant's potential recovery. If the previous settlement is relatively large, as in this case, then crediting it against an ultimate recovery diminishes the remaining defendant's incentive to settle and correspondingly increases the pressure on the claimant to compromise, rather than risk the cost of going to trial when the marginally greater recovery will be reduced if the claimant is successful. On the other hand, if the amount of the settlement is small in relation to the exposure and potential recovery, then crediting it does not materially lessen the claimant's risk in going to trial and provides the nonsettling defendant little incentive to reduce his own risk by making a settlement before trial.

{33} Still another policy in the mix is that which underlies the collateral source rule: the policy that a wrongdoer should not benefit from a fund provided by a collateral source and that, as between an innocent plaintiff and a culpable defendant, if one party is to benefit from a fund received from another source, it is preferable to allocate the benefit to the innocent party. In this case, it is clear that McConal's loss will be compensated in full. The only question is whether the $40,000 paid by Aviation will augment McConal's recovery or will reduce Commercial's liability.

{34} I answer this question by resorting to the policy of expecting (and therefore, in the context of this case, requiring) the insurance company and the agent-broker to get their act together. McConal bought and paid for property damage insurance. The insurance company denied liability, pointing the finger at the agent; the agent claimed that it was not responsible and that, at least by implication, it had not failed in its duty to procure insurance from the insurer. Meanwhile, the insured was not compensated for its loss and had to commence litigation. It had done everything required of it to see that its property was insured; the insurer and the agent between them evaded responsibility and placed the onus of going forward on the insured. The insured had to undergo the delays, inconvenience, uncertainties and expense of litigation; the insurer and the agent between them could keep the insured's money until they either voluntarily settled or the court told one of them to pay.

{35} Under these circumstances it does not seem unreasonable to require the insurer, Commercial, to pay what it contracted to pay and to allow the insured, McConal, to keep what the agent, Aviation, voluntarily contributed in order to settle its alleged liability.

> If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the

[2] **E. g.,** a claim against one defendant for negligence, a claim against another for an intentional tort, a claim against another for breach of warranty (contract), and a claim against still another for strict liability.

> wrongdoer shall be relieved of his full responsibility for his wrongdoing. We think we may judicially note that notwithstanding that the law contemplates full compensation, incidental losses and handicaps are suffered in a great number of . . . cases which are not, and cannot be, fully compensated.

Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958). **See also Helfend v. Southern Cal. Rapid Transit Dist.,** 2 Cal. 3d 1, 12, 84 Cal. Rptr. 173, 180, 465 P.2d 61, 68 (1970):

> [T]he plaintiff rarely actually receives full compensation for his injuries as computed by the jury. The collateral source rule partially serves to compensate for the attorney's share and does not actually render "double recovery" for the plaintiff.

{36} The insurance company in this case, seeking a judicial determination as to the existence of coverage under its policy, might not fit the classical picture of the "wrongdoer" who is denied an offset of the benefit under the collateral source rule. However, Commercial and Aviation between them did force McConal to endure the "losses and handicaps" entailed by the delay in payment and the necessity for litigation. One of these losses—not insignificant in amount, I have no doubt—was the attorney's fees. Under the policy of the collateral source rule—that the "windfall" is to be allocated to the innocent claimant rather than the arguably culpable defendant who a jury has determined breached its contract—I concur in giving the plaintiff the "duplicate recovery" realized in this case.

SETH D. MONTGOMERY,
Justice specially concurring

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-099

Filing Date: November 14, 1990

Docket No. 18,997

STATE OF NEW MEXICO, ex rel.
S. E. REYNOLDS, State Engineer, and
THE UNITED STATES OF AMERICA,

Plaintiffs,

v.

R. LEE AAMODT, et al.,

Defendants.

Certification from the
United States District Court
for the District of New Mexico
Hon. E. L. Mechem, Senior Judge

Peter Thomas White,
Special Assistant Attorney General
Santa Fe, New Mexico

for Plaintiff Reynolds.

Simms & Stein, P.A.
Richard A. Simms
Jay F. Stein
Santa Fe, New Mexico

for Defendant Bishop's Lodge.

Compton, Hickey & Ives
Peter N. Ives
Santa Fe, New Mexico

Sheehan, Sheehan & Stelzner, P.A.
Charles F. DuMars
Albuquerque, New Mexico

for Defendant Spencer.

OPINION

Wilson, Justice.

{1} The United States District Court for the District of New Mexico certified the following questions to this court:

> (1) Whether NMSA 1978, Section 72-12-8(B) (Repl. Pamp. 1985), or Regulation 1-9 of the Rules and Regulations Governing Drilling 5 of Wells and Appropriation and Use of Ground Water in New Mexico requires annual filings of applications for extensions of time to place water to beneficial use to preserve permits for the use of ground water.
>
> (2) Whether the failure to file annually for such an extension of time results in the expiration of the permit.
>
> (3) Whether the actions of the State Engineer in accepting and approving applications for extensions of time to place water to beneficial use which are filed after the expiration of the one-year period and after the time established by the State Engineer in the relevant permits are valid.

FACTS

{2} This matter comes upon a statement of stipulated facts as follows:

{3} On August 7, 1979, after application by defendant Spencer to the State Engineer's office to change the location of a well and the planned purpose of use of underground waters, the State Engineer, after public notice and absent any protest, approved the applicant's transfer and extended the time for filing of proof of application of water to beneficial use to August 31, 1983. From August 31, 1983 to August 31, 1985, annual applications for extension of time were filed and granted. On December 31, 1986, an application for extension of time was filed and granted for the period August 31, 1985 to August 31, 1986, although the application was filed after the expiration of the last extension. No application to extend time was filed thereafter until September 28, 1989, when five applications were filed for the preceding five years. The late applications were accepted by the State Engineer and extension was granted until August 15, 1990.

ISSUE

{4} The single issue underlying the questions certified to us is whether the failure to file an application for extension of time to put water to beneficial use prior to the expiration of the last extension granted automatically terminated the permit. We answer this issue in the negative.

DISCUSSION

{5} The defendant Bishop's Lodge contends that the failure to file applications for extensions of time prior to the expiration of the last extension granted should automatically terminate the water permit. This contention is inconsistent with Section 72-12-8(B), which provides in applicable part: "Upon application to the state engineer **at any time** and a proper showing of reasonable cause for delay or for non-use, or upon the state engineer finding that it is in the public interest, the state engineer may grant extensions of time. . . ."(Emphasis added).

{6} The general rules of statutory construction require that words of a statute should be given their ordinary, everyday meaning, and in the absence of a clear and express legislative intention to the contrary, the language of the statute is conclusive. **United States v. Austin,** 614 F. Supp. 1208 (D.N.M. 1985). Section 72-12-8(B) clearly states that the applications for extension of time may be made "at any time." For us now to hold that the application must be submitted prior to the expiration of the last extension would contravene the clear and unambiguous language of the statute. In addition, we believe our interpretation of this statute is consistent with the clearly expressed legislative mandate to the State Engineer.

{7} NMSA 1978, Section 72-2-8(A) (Repl. Pamp. 1985), states as follows:

> A. The state engineer may adopt regulations and codes to implement and enforce any provision of any law administered by him and **may issue orders necessary to implement his decisions** and to aid him in the accomplishment of his duties. **In order to accomplish its purpose, this provision is to be liberally construed.** (Emphasis added.)

{8} The legislature granted the State Engineer broad powers to implement and enforce the water laws administered by him. We have long recognized the State Engineer's authority to do so. In **City of Albuquerque v. Reynolds,** 71 N.M. 428, 439, 379 P.2d 73, 81 (1962), we stated that "[h]aving the statutory power and duty to prohibit 6 the taking . . . to protect existing rights, the state engineer has reasonably exercised his power by imposing suitable conditions so as to permit such taking as will not result in impairment."

{9} Likewise in **State v. Myers,** 64 N.M. 186, 193, 326 P.2d 1075, 1080 (1958), we stated:

> [W]e must presume that the action of the state engineer is correct. . . .
>
> "On review of the acts or orders of administrative bodies, the courts will presume, among other things, that the administrative action is correct and that the orders and decisions of the administrative body are valid and reasonable; presumptions will not be indulged against the regularity of the administrative agency's action." (Quoting 73 C.J.S. **Public Administrative Bodies & Procedures** § 205 (1951).

{10} By our action today we continue a long tradition of upholding the State Engineer's authority to take reasonable and appropriate action to protect and administer the water laws of New Mexico.

CONCLUSION

{11} We conclude that the failure to file an application for extension of time to place water to beneficial use prior to the expiration of the last extension granted does not automatically terminate water permits. The retroactive approval by the State Engineer of applications for extension of time was permissible.

{12} IT IS SO ORDERED.

KENNETH B. WILSON,
Justice

WE CONCUR

JOSEPH F. BACA,
Justice

SETH D. MONTGOMERY,
Justice

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-105

Filing Date: November 27, 1990

Docket No. 18,483

WATSON TRUCK & SUPPLY COMPANY, INC., and
THE HOME INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

JAMES MALES,

Defendant-Appellant.

Appeal from the District Court of Lea County
Alvin F. Jones, District Judge

M. J. Collopy
Hobbs, New Mexico

Montgomery & Andrews
Sarah M. Singleton
Santa Fe, New Mexico

for Appellant.

R. E. Richards
Sam Laughlin, Jr.
Hobbs, New Mexico

for Appellees.

OPINION

{1} James Males appeals the trial court's finding of a resulting trust in settlement proceeds from a previous lawsuit and the court's consequent award of $85,724.80 plus interest in favor of Watson Truck & Supply Company and of Home Insurance Company. Finding a lack of substantial evidence to support a resulting trust or breach of a contractual duty of good faith owed by Males to Watson and Home, we reverse.

{2} Males was injured in a natural gas explosion at the warehouse of Watson Truck & Supply Company. He sued Watson and the various contractors who built the Watson warehouse and installed its heating system. He also sued Hobbs Gas Company for its failure to "oderize" the natural gas supply. Watson was defended by its insurer, Home Insurance Company. Watson filed a cross-claim against Hobbs and the other defendants for property damage sustained in the explosion.

{3} By the morning of trial, Males had settled his claims against all of the defendants other than Watson, Hobbs, and Craig Electric Company, the general contractor. After the jury was selected Craig offered to settle with Watson for a total of $375,000. Counsel for Males, Craig, and Watson and Home then held a settlement conference in which they entered into a "Mary Carter" agreement to settle the various claims between them.[1] Watson and Home agreed that Males would receive the entire $375,000 offered by Craig and that both Watson and Males would release and discharge Craig. In addition, Watson and Home agreed to pay Males $125,000 on the condition that if Males received in excess of $500,000 as a result of a jury verdict against Hobbs, Males would pay Watson and Home the excess amount up to $125,000. The agreement thus guaranteed

[1] "Mary Carter" agreements derive their name from the case of **Booth v. Mary Carter Paint Co.,** 202 So. 2d 8 (Fla. Ct. App. 1967), **overruled on other grounds, Ward v. Ochoa,** 284 So. 2d 385 (1973). Such agreements typically involve, as here, a settlement between a plaintiff and one or more defendants who guarantee the plaintiff a specified recovery. As here, the amount paid by a settling defendant depends on the amount later received by the plaintiff from the nonsettling defendants. As is also typically true, Watson was not released as a defendant from the lawsuit. It is this last feature of Mary Carter agreements in particular that has evoked their condemnation by some courts and forms the core objection of Justice Wilson in his special concurrence urging that they be declared void as against public policy.

Males recovery of $500,000, even if the jury returned a verdict in favor of Hobbs, and allowed him to recover up to $1,000,000 before having to reimburse Watson and Home money from the $125,000 they had contributed to the settlement.

{4} The jury returned a verdict in favor of Males for $839,312 in compensatory damages and found Hobbs forty-percent responsible for the explosion, a proportionate liability of $335,724.80. The jury also awarded Males $250,000 in punitive damages against Hobbs. Shortly after trial, one of Males's attorneys wrote to Home's counsel the following: "As per our settlement agreement, we will pay to Home the amount of $85,724.00 representing the amounts awarded to Mr. Males over the $500,000.00 when such funds are received." This letter represents the only written reference to the settlement agreement at issue.

{5} Subsequent to the trial, Hobbs paid Males its portion of the compensatory award ($335,724.80), but appealed the $250,000 award of punitive damages. While the appeal was pending, Males offered to settle the punitive damage award against Hobbs for $164,250.20 plus interest from the date of judgment. Hobbs accepted the offer and obtained a release and satisfaction from Males of his entire judgment. Excluding interest, Males received exactly $500,000 from Hobbs. Watson and Home were never requested to participate in the final settlement discussions. They were informed of the settlement between Males and Hobbs after the fact.

{6} On February 2, 1988, Watson and Home petitioned the district court to enforce their settlement agreement with Males. Specifically, Watson and Home claimed a right to payment of $85,724.80 plus costs. The district court concluded: (1) the settlement agreement created a beneficial interest in Males's judgment against Hobbs for amounts exceeding $500,000; (2) upon entry of Males's judgment against Hobbs, a resulting trust was created in favor of Watson and Home as to amounts over $500,000; (3) Males settled and compromised the judgment with Hobbs in willful disregard of the rights and interest of Watson and Homes to that portion of the judgment in excess of $500,000; (4) Males owed Watson and Homes a duty of good faith to act with fairness and due diligence in dealing with their rights and interest in the judgment against Hobbs, and Males violated this duty when he settled with Hobbs without Watson and Home's knowledge or consent. The district court entered judgment against Males in the amount of $85,724.80 plus fifteen-percent interest from December 15, 1987, until paid.

{7} Substantial evidence does not support finding of resulting trust. A resulting trust arises when a person makes a disposition of property under circumstances that raise an inference that he does not intend that the transferee have the beneficial interest in the property. **Restatement (Second) of Trusts** 404 (1959). Since the person who holds the property is not entitled to the beneficial interest, the beneficial interest "springs back or results to the person who made the disposition or to his estate, and the person holding the property holds it upon a resulting trust for him or his estate." **Id.** at 323. Unlike an express trust, the inference that the person who holds title to the property was not intended to also have the beneficial interest arises from the character of the transaction itself rather than from any declaration of intention by the party making the disposition of the property. **Id.** at 324.

{8} Our decisions and the **Restatement (Second) of Trusts** recognize three general situations in which a resulting trust may arise:

> (1) where an express trust fails in whole or in part;
> (2) where an express trust is fully performed without exhausting the estate;
> (3) where property is purchased and the purchase price is paid by one person and at his direction the vendor conveys the property to another.

Bassett v. Bassett, 110 N.M. 559, 798 P.2d 160, 167 (1990); **Restatement (Second) of Trusts** §§ 411-429, 430-439, 440-460 (1959); **see also McCord v. Ashbaugh,** 67 N.M. 61, 352 P.2d 641

(1960) (where new owner of land reconveyed property to former owners without consideration to satisfy forest service requirements relative to transfer of grazing permit, former owner had only bare legal title and not beneficial interest); **McDermott v. Sher,** 59 N.M. 142, 280 P.2d 660 (1955) (drawing distinction between express and resulting trusts); **Browne v. Sieg,** 55 N.M. 447, 234 P.2d 1045 (1951) (evidence sufficient to show resulting trust where mother provided purchase money for real estate and son took title in his own name for mother's convenience in dealing with the property).

{9} It is apparent that none of these situations correspond to the facts of this case. It is equally apparent that Males never took title to, or recovered, any property in which Males was **not** entitled to the beneficial interest therein; this was the substance of the agreement between the parties—that Males was to have the first $500,000 of any **recovery** from Hobbs. Watson and Home, of course, claim a beneficial interest in the **judgment** rendered against Hobbs to the extent that it exceeded $500,000, to wit $85,724.80. Watson and Home assert that Males became a trustee for this amount for their benefit and owed them the duty of a trustee to act with good faith, reasonable diligence and skill. We cannot agree. It is undisputed that the parties never discussed Males's right to compromise any judgment rendered against Hobbs. There were no discussions at the time the parties entered into the agreement concerning the rights of the various parties if an appeal were to be taken. Absent express or implied terms of agreement, it cannot reasonably be suggested that the parties somehow intended to create a beneficial interest in the excess amount of any judgment so as to guarantee recovery for Watson and Home.

{10} Nor does the nature of the transaction itself raise any inference that Males intended Watson and Home to have a vested interest in the judgment. We have been cited to no authority showing that such a settlement agreement would create a resulting trust or impose the duties of a trustee in favor of one of the settling parties who may claim some contingent interest in the verdict nor has our own research disclosed such authority. We believe the agreement did not create a trust at all; rather it was a straightforward contractual arrangement providing for recoupment of funds, and the obligation to reimburse Watson and Home was subject to the condition precedent that Males receive more than $500,000 from Hobbs. The only written reference to the agreement suggests no more than this, that Males agreed to pay excess funds when received.

{11} The parties in this case never had a meeting of minds on the question of Males's right to settle. The matter remained outside the scope of their agreement. This Court will not rewrite a contract to create an agreement for the benefit of one of the parties that, in hindsight, would have been wiser. **Cf. Smith v. Price's Creameries,** 98 N.M. 541, 650 P.2d 825 (1982). Substantial evidence does not support a conclusion that the parties agreed Watson and Home would obtain an interest in any uncollected judgment that would restrict Males's right to settle the claim. We therefore conclude the trial court's finding of a resulting trust also is unsupported by substantial evidence. It follows that Males had no duty of good faith **as a trustee** to include Watson and Home in his settlement negotiations with Hobbs and to obtain their consent to any compromise of the verdict against Hobbs.

{12} Moreover, we believe that in compromising the verdict Males breached no general duty of good faith imposed in the performance of contractual agreements. Whether express or not, every contract imposes upon the parties a duty of good faith and fair dealing in its performance and enforcement. **Spencer v. J.P. White Bldg.,** 92 N.M. 211, 585 P.2d 1092 (1978); **Restatement (Second) of Contracts** 205 (1979). "Broadly stated, that covenant requires that neither party do anything which will deprive the other of the benefits of the agreement." **Romero v. Mervyn's,** 109 N.M. 249, 257, 784 P.2d 992, 1000 (1989) (quoting **Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. of California,** 36 Cal.3d 752, 768, 686 P.2d 1158, 1166, 206 Cal. Rptr. 354, 362 (1984)). Absent any honest pursuit of interests to which a party to a contract is entitled, **i.e.**, absent cause or excuse, his or her intentional use of the contract to the detriment of another party is wrongful, constitutes bad faith, and clearly is a breach of the covenant of good faith and fair dealing. **See Romero,** 109 N.M. at 258, 784 P.2d at 1001 (contract entered into with "fingers crossed" simply to end an encounter, without intending to follow through on promise). Application of the covenant of good faith and fair dealing becomes difficult, however, under circumstances where, as here, it may be argued that from the covenant there is to be implied in fact a term or condition necessary to effect the purpose of a contract. In this case, because we have decided that the parties reached no agreement on whether Watson and Home would obtain an interest in any uncollected judgment that would restrict Males's right to settle the claim, we cannot with consistence imply a term to effect such a purpose under the covenant of good faith and fair dealing.

{13} Given the fact the parties reached no agreement on the circumstances wherein Males might compromise a right to actually receive in excess of $500,000, we believe that Males did not act inconsistently with the justifiable expectations of Watson and Home in reaching a settlement with Hobbs. Under their agreement Watson and Home may never have anticipated receiving any reimbursement of the $125,000 settlement unless Males were to receive in excess of $625,000 from Hobbs. We do not know.

{14} Validity of Mary Carter agreements not adequately raised or briefed. Males also raises on appeal an issue of whether the settlement agreement between himself and Home, Watson, and Craig was void under **Alder v. Garcia,** 324 F.2d 483 (10th Cir. 1963), since it was an assignment to a joint tortfeasor of a future recovery on behalf of an injured party. Because we find the agreement did not restrict Males's right to compromise the verdict against Hobbs, and under the terms of the agreement Watson and Home were due no excess funds, we do not address this issue. As pointed out in the special concurrence of Justice Wilson, since **Alder** was decided, the adoption of comparative negligence has effected an abolition of the right of contribution between concurrent tortfeasors. The **Alder** decision was based upon public policy considerations expressed in the Uniform Contribution Among Tortfeasors Act, NMSA 1978, Sections §41-3-1 to -3-8 (Repl. Pamp. 1989), which no longer has any force when joint and several liability is superseded by comparative fault. **See Wilson v. Galt,** 100 N.M. 227, 668 P.2d 1104 (Ct. App.), **cert. quashed,** 100 N.M. 192, 668 P.2d 308 (1983). Additionally, we believe the issue raised by Males is distinct from the issue of the validity of Mary Carter agreements generally. We are not prepared to rule on such an important public policy question without the latter issue having been raised, briefed, and argued by the parties.

{15} For the foregoing reasons, the judgment of the district court is reversed.

{16} IT IS SO ORDERED.

RICHARD E. RANSOM,
Justice

WE CONCUR

JOSEPH F. BACA,
Justice

KENNETH B. WILSON,
Justice specially concurring

SPECIAL CONCURRENCE

WILSON,
Justice, specially concurring.

{17} I must specially concur as I agree with the result reached by the majority, but for different reasons. I believe Males should prevail in this case because the settlement agreement between Males and Watson and Home is void as against the laws and public policy of New Mexico.

{18} The district court, in an attempt to find equity in this case, determined that the settlement agreement between Males and Watson and Home created a resulting trust in favor of the latter. In my view, however, the agreement between the parties is an old fashioned "Mary Carter" agreement. This type of settlement agreement has been a growing, but not widely recognized problem in civil litigation for over twenty years. While warnings on the subject proliferate, and many courts have rendered Mary Carter agreements invalid as against public policy, frequent variations of the agreements continue to flourish under creative guises. Thus, in the case before us the district court may not have recognized the Mary Carter agreement as such and may have determined instead that a resulting trust was created. However, as admitted by Watson's counsel during oral argument before our court, this case is on all fours with a Mary Carter agreement. I agree and disapprove of its use for a number of reasons.

{19} First, such agreements skew the trial process. As explained in Entman, **Mary Carter Agreements: An Assessment of Attempted Solutions,** 38 U. Fla. L. Rev. 521, 574 (1986):

> Mary Carter agreements are used purposely to defeat any system of equitable sharing and to shift liability to the nonsettling defendant through manipulation of the trial process. One effect of a Mary Carter agreement on the trial process can be to present to the jury a sham of adversity between the plaintiff and one codefendant, while these parties are actually allied for the purpose of securing a substantial judgment for the plaintiff and, in some cases, exoneration for the settling defendant.

For instance, after a plaintiff settles with one defendant before trial, that defendant is present at trial with an identity of interest in the plaintiff's case. The possible collusion between the plaintiff and the settling defendant creates an inherently unfair trial setting for the nonsettling defendant and may lead to an inequitable attribution of guilt and damages to the latter, **i. e.,** the settling defendant may collaborate with the plaintiff in jury selection challenges, motion objections, or trial strategy regarding evidence of comparative fault and damages. This cooperative effort between the plaintiff and the settling defendant throughout trial will work to assure a substantial damage award against the nonsettling defendant and will, of course, benefit the settling defendant indirectly through the Mary Carter agreement with the plaintiff.

{20} Second, a defendant's alignment with a plaintiff's interests in a case may violate ethical standards of professional conduct regarding conflicting interests, unjustified litigation, and candor and fairness toward a tribunal. **See** Rules of Professional Conduct, SCRA 1986, 16-102(D), 16-301, 16-303, 16-304, 16-305. These ethical problems inherent in Mary Carter agreements were discussed in the case of **Lum v. Stinnett,** 87 Nev. 402, 410, 488 P.2d 347, 352 (1971) wherein the court stated: "'A lawyer may not, in order to get decided a question of law in which he is interested, foist a fictitious controversy on the court . . . he may not . . . ostensibly appear for a stooge client when he really represents others.'" (quoting H. Drinker, **Led Ethics** 75 (1953)). Legal procedures should be honest endeavors by attorneys on behalf of their clients to accomplish justice. Mary Carter agreements are the antithesis of such honesty.

{21} Third, Mary Carter agreements are champertous and violate New Mexico rules regarding the capacity of parties in a legal action. As explicated in **Lum v. Stinnett,** the common law offenses of maintenance and champerty are fully resurrected by the use of Mary Carter agreements. 14 C.J.S. **Champerty and Maintenance** Section 1b (1939) defines maintenance as "officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it." Champerty is "maintenance with the additional feature of an agreement for the payment of compensation or personal profit from the subject matter of the suit." **Id**. 2. Similar to the situation in **Lum v. Stinnett**, in the present case Watson and Home die not have a valid concern in Males's suit against Hobbs. Instead, Watson and Home's interest was to reap the benefits of a substantial damage award against their codefendant, Hobbs. Watson and Home's Mary Carter agreement with Males fits squarely within the definitions of maintenance and champerty above. Moreover, Watson and Home's conduct contravened New Mexico Rule 1-017 of the Rules of Civil Procedure for the District Courts which requires that "every action shall be prosecuted in the name of the real party in interest." SCRA 1986, 1-017. The test for determining the real party in interest is "'whether one is the owner of the right being enforced and is in a position to discharge the defendant from the liability being asserted in the suit.'" **Edwards v. Mesch**, 107 N.M. 704, 706, 763 P.2d 1169, 1171 (1988) (quoting **L.R. Property Management, Inc. v. Grebe**, 96 N.M. 22, 23, 627 P.2d 864, 865 (1981)). In this case, Watson and Home could not have discharged Hobbs from the liability asserted by Males; they were not the real parties in interest at the commencement of Males suit, not did such interest transfer to them upon their settlement with Males. Further, counsel for Watson and Home testified that "Mr. Males ceased to have an individual right because of the settlement, and Watson and Males had a joint right." The real party in interest actually was a coalition of Males and Watson and Home. This kind of legal posturing stymies fair play in our judicial system.

{22} Fourth, mary Carter agreements allow a defendant to do indirectly what is prohibited by statutory and case law. In **Alder v. Garcia**, 324 F.2d 483 (10th Cir. 1963) the court interpreted our state tort law under the Uniform Contribution Among Tortfeasors Act, NMSA 1953, Sections §24-1-11 to §24-1-18 (the Uniform Act) in a factual situation similar to the case at bar. Garcia was injured while moving a hay elevator owned by Valley Gold Dairies. The machine was manufactured by Deere & Company. Lloyd's was the insurer of Valley Gold Dairies. Garcia initially sued Valley Gold Dairies; this controversy was settled by payment of $40,000 from Lloyd's to Garcia, a release of Valley Gold Dairies, and an assignment by Garcia to Lloyd's of one-half of any recovery or settlement not to exceed $80,000 that Garcia might obtain in a future action from Deere & Company. Garcia subsequently filed suit against Deere & Company. When Deere & Company learned of Garcia's assignment with Lloyd's in the original suit, it settled with Garcia by payment to Garcia of $40,000. Lloyd's then discovered this settlement between Garcia and Deere & Company and brought suit against both of them to enforce its initial settlement with Garcia. The Tenth Circuit opinion quoted Section §24-1-15 of the former Uniform Act above (identical to the current Section §41-3-5 of the Uniform Contribution Among Tortfeasors Act, NMSA 1978, Sections §41-3-1 to §41-3-8 (Repl. Pamp. 1989)) and Subsection §24-1-12(3) (identical to the current Subsection §41-3-2(C)). The court went on to state: "The purpose of [the Uniform Contribution Among Tortfeasors Act, NMSA 1953, §§ §24-1-11 to §24-1-18] is to provide for a proportionate allocation of the burden among tort-feasors who are liable." **Alder,** 324 F.2d at 485. Given the strict statutory prohibition against contribution from a settling tortfeasor and the enunciated policy underlying the Uniform Act's provisions, the Tenth Circuit held that payment to Lloyd's from Deere & Company, indirectly through the settlement assignment with Garcia, would allow Lloyd's to benefit "in a manner contrary to the public policy of the state as expressed in the New Mexico Contribution Among Joint Tortfeasors Act." **id.** at 485. Thus, the court held the assignment by Garcia to Lloyd's void and unenforceable.

{23} Watson and Home argue on appeal that the **Alder** case is no longer meaningful as precedent as it was decided at a time when the statutory right to contribution and indemnity between joint tortfeasors existed. While it is true that the law of torts has been modified since 1963 with the creation of pure comparative negligence, the public policy behind the Uniform Act stands undiminished: to apportion the burden among those liable according to the proportionate fault of each. **Sea Alder v. Garcia,** 324 F.2d 483 (10th Cir. 1963); **Scott v. Rizzo,** 96 N.M. 682, 634 P.2d 1234 (1981). Actually, the present law of pure comparative negligence encourages Mary Carter devices.

> The plaintiff entering into such an agreement is, as always, guaranteed some recovery. The plaintiff also secures assistance from the settling defendant, during the trial, in placing maximum blame on the nonsettling

> defendant, minimum blame on the plaintiff, and a high value on the plaintiff's injuries. In return, the settling defendant limits his liability to a specified amount, or possibly eliminates all liability if there is a verdict against the nonsettling defendant of sufficient size according to the terms of the Mary Carter agreement. The absence of joint and several liability of tortfeasors, therefore, serves only to enhance the attractiveness of Mary Carter agreements.

Entman, **Mary Carter Agreements: An Assessment of Attempted Solutions,** 38 U. Fla. L. Rev. 521, 558 (1986).

{24} The federal court in **Alder** was unwilling to allow a Mary Carter agreement to circumvent New Mexico's statutory law and its corresponding public policy. For the same reason, I am unwilling today to condone the instant settlement agreement between Males and Watson and Home.

{25} Watson and Home admit that NMSA 1978, Subsection §41-3-2(C) (Repl. Pamp. 1989) (effective since the time of Males's settlement agreement with Watson and Home) disallows contribution to a settling defendant from another joint tortfeasor whose liability to the plaintiff is not extinguished by the settlement. Watson and Home claim, however, that NMSA 1978, Subsection §41-3A-1(F) (Repl. Pamp. 1989) contravenes other sections of the statute by granting parties the right to contract for indemnity or contribution. On appeal Watson and Home argue that they are not claiming to be entitled to contribution from Hobbs; rather, they are seeking recovery through their contract with Males for indemnity pursuant to Subsection (F) of §41-3A-1.

{26} This argument is defective because the alleged contract for indemnity was contingent upon Males recovering against Hobbs. While Watson and Home had a right to contract with Males for a settlement of the issues between them, they may not recover indirectly through Males that which they cannot recover directly from Hobbs. Subsection §41-3A-1(F) does not give Watson and Home the right to do circuitously what is prohibited by statutory and case law in New Mexico.

{27} Watson and Home urge that the finding of a resulting trust was within the equitable powers of the district court. I note that equity is "a synonym of right and justice." **Ortiz v. Lane,** 92 N.M. 513, 516, 590 P.2d 1168, 1171 (Ct. App. 1979). It requires that "'one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. [citation omitted] Its compulsion is one of fair play."' **Id.** at 516, 590 P.2d at 1171 (quoting **McNeely v. Walters,** 211 N.C. 112, 113, 189 S.E. 114, 115 (1937)). "Equity has no relief for a party who, in the practice of one fraud, has become the victim of another." **Menard v. Menard,** 295 Mich. 80, 84, 294 N.W. 106, 107 (1940).

{28} In the case before us, the district court attempted to find equity by determining that a resulting trust had been created in favor of Watson and Home. While I also acknowledge the inequitable results of Males's settlement agreement with Hobbs, I cannot overlook the Mary Carter agreement made by Watson and Home and its inherent inequity towards Hobbs. As Justice Ransom pointed out in oral argument when he heard Watson and Home's complaint of foul play: "But now it's the other way around [i. e., now Watson and Home are suffering from an ex parte settlement by Males], and it seems as though what's sauce for the goose is sauce for the gander." As I find this philosophy to be the essence of Mary Carter agreements and because I believe the use of such agreements undermine a judicial system developed to fairly encourage equity and truth, I contend they are void as against the laws and public policy of New Mexico. Accordingly, I think their use should be prohibited in this state.

KENNETH B. WILSON,
Justice specially concurring

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: 1990-NMSC-109

Filing Date: November 28, 1990

Docket No. 18,506

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

DENNIS A. YBARRA,

Defendant-Appellant.

Appeal from the District Court of Eddy County
James L. Shuler, District Judge

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

for Appellant.

Hal Stratton, Attorney General
Anthony Tupler, Assistant Attorney General
Santa Fe, New Mexico

for Appellee.

OPINION

{1} Defendant-appellant Dennis A. Ybarra appeals his conviction of first degree murder. We reverse.

{2} On June 22, 1988, Ybarra and his girlfriend's brother, Ricky Garcia, quarreled outside of Ybarra's apartment. Garcia knocked Ybarra down by striking him in the face twice and then kicked him in the chest while Ybarra lay on the ground. A witness later testified that, as Garcia left the apartment, Ybarra threatened to get even with Garcia. Ybarra then went to the local police department with his brother to file a complaint against Garcia. When Ybarra was told that a complaint could not be filed until morning because a judge was not available, Ybarra became angry and said that the police would find Garcia in pieces. Consequently, the police agreed to escort Ybarra back to the apartment to collect his belongings. However, Ybarra left two or three minutes ahead of the police and arrived at the apartment to find that Garcia had returned as well. Ybarra got out of the truck and moved towards Garcia, waving a knife as he approached. Garcia retreated and kicked Ybarra in the knee. Ybarra then stabbed Garcia.

{3} Garcia was taken to the local hospital where he underwent surgery to repair the stabbing damage to his abdominal organs. Complications to the stab wounds developed, and Garcia was transferred to another hospital where he died on the operating table several days after the incident.

{4} After the stabbing, the police took Ybarra to the police station. Although Ybarra was placed under arrest, he was not advised of his rights under **Miranda v. Arizona,** 384 U.S. 436 (1966). The police then transported Ybarra to the hospital for treatment to his knee which had been injured in the incident.

{5} Ybarra arrived at the emergency room in handcuffs with two police officers assisting him. There he was treated by Nurse Price. Officer Wright remained with Nurse Price and Ybarra during the medical treatment and while Nurse Price asked Ybarra several questions. Nurse Price first asked Ybarra how he hurt his knee. He said that Garcia had kicked him. She then asked, "Are you the one that stabbed him?" Ybarra replied, "Yes." Nurse Price told Ybarra that Garcia was not doing well, to which Ybarra responded that Garcia deserved it and that if he'd had a gun he would have shot him. Nurse Price asked Ybarra what kind of knife he used to stab Garcia. Ybarra responded with a description.

She also asked why he had stabbed Garcia, and Ybarra said that he had done it because of the earlier beating and because Garcia had kicked him in the knee during the stabbing encounter. Finally, Officer Wright who had been present in the room with Nurse Price and Ybarra during the questioning asked Ybarra if he knew where the knife was. Ybarra replied that he did not know what happened to it.

{6} At trial Ybarra objected to the introduction of his statements to Nurse Price and requested the court to suppress the testimony concerning such statements as being the result of an impermissible custodial interrogation. The state's response was that there was no interrogation. The state argued that since the police did not instigate or participate in the conversation between Nurse Price and Ybarra, and since Nurse Price was not an agent for the police, it was not a custodial interrogation. Thus, the state contended, a **Miranda** warning was not required.

{7} After hearing testimony and argument of counsel, and after researching the issue itself, the trial court found: (1) There was an interrogation, and Ybarra was in police custody at the hospital; (2) There was not a coordinated plan between the police and Nurse Price to elicit information from Ybarra for his prosecution; (3) The police had a duty to inform Ybarra of his **Miranda** rights; (4) Nurse Price's conversation with Ybarra began in order to aid in the diagnosis and treatment of his injury, and therefore any statements by Ybarra regarding his injuries would be admissible; (5) Ybarra's nonresponsive or volunteered statements also would be admissible; (6) Nurse Price was faced with the compelling emergency of Garcia's treatment which caused her to ask questions about the kind of knife used in the stabbing, and therefore, under the rescue doctrine, Ybarra's statements regarding this matter would be admissible; and (7) Officer Wright's question in the hospital and Ybarra's response would be suppressed.

{8} On appeal Ybarra maintains his claim that the trial court erred in admitting the testimony regarding his statements to Nurse Price. Ybarra asserts that these statements were the result of a custodial interrogation in violation of the **Miranda** warning rule. The state admits that the conversation between Nurse Price and Ybarra was inadmissible under the rescue doctrine and concedes: "There is not a proper factual predicate to reach the issue of the rescue doctrine." **See People v. Riddle,** 83 Cal. App. 3d 563, 576, 148 Cal. Rptr. 170, 177 (1978) (failure to give **Miranda** warning excused when there exists: (1) an urgent need and no other course of action promises relief; (2) the possibility of saving human life by rescuing a person in danger; and (3) rescue as the primary purpose and motive of the interrogator), **cert. denied,** 440 U.S. 937 (1979). On appeal the state resurrects its original argument, namely, that the trial court erred in finding an interrogation. The state contends, however, that the court's decision allowing the testimony should be sustained under the "right for any reason" doctrine. See **State v. Hensel,** 106 N.M. 8, 738 P.2d 126 (Ct. App.) (trial court will be affirmed on appeal if right for any reason), **cert. denied,** 105 N.M. 720, 737 P.2d 79, **cert. denied,** 484 U.S. 958 (1987).

{9} We affirm the trial court's finding of interrogation, but reverse the court's ruling that the rescue doctrine permitted the admission of Ybarra's statements to Nurse Price regarding Garcia. As we find this issue of custodial interrogation dispositive, we do not reach the other points of error raised by Ybarra on appeal.

{10} In **Miranda v. Arizona,** 384 U.S. 436, 444 (1966) the United States Supreme Court held that the fifth amendment of the Federal Constitution prohibits the use of "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless [the prosecution] demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." This **Miranda** protection "comes into play whenever a person in custody is subjected to either express questioning or its functional equivalent." **State v. Edwards,** 97 N.M. 141, 143-44, 637 P.2d 572, 574-75 (Ct. App.), **cert. denied,** 97 N.M. 621, 642 P.2d 607 (1981). An interrogation, therefore, is the threshold requirement when a defendant alleges a violation of his **Miranda** rights. **Id.** at 144, 637 P.2d at 575.

{11} The United States Supreme Court first addressed the meaning of "interrogation" in the case of **Rhode Island v. Innis.** The Court stated:

> The term "interrogation" under **Miranda** refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the **Miranda** safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.

Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

{12} Returning to the issue again in **Arizona v. Mauro,** 481 U.S. 520 (1987), the United States Supreme Court questioned whether the police actions in question "rose to the level of interrogation—that is, in the language of **Innis,** whether they were the 'functional equivalent' of police interrogation." **Id.** at 527. In **Mauro** the defendant was allowed to speak with his wife in the presence of a police officer who recorded the defendant's conversation. The Court held that under both **Miranda** and **Innis** the defendant was not interrogated because there was no evidence that the police instigated or participated in the defendant's discussion with his wife, that the police used the defendant's wife for the purpose of eliciting incriminating statements, or that the defendant felt that he was being coerced to incriminate himself in any way. Id. at 527-28. Additionally, the Court noted that the police officers had attempted to dissuade the defendant's wife from speaking with her husband and that the defendant had been given advance warning that he would be allowed to speak to his wife only with a police officer present. **Id.** at 528, 522.

{13} Other courts also have grappled with the definition of "interrogation." In **United States v. Webb,** 755 F.2d 382 (1985), **cert. denied,** 479 U.S. 1038 (1987) a jail officer asked the defendant a preliminary question in order to determine where in the jail population to place the defendant. The defendant responded with a confession. Relying on **Innis,** the United States Court of Appeals for the Fifth Circuit held that the jail officer's question was not a question normally attendant to custody and therefore it fell within the **Innis** definition of "interrogation." Ruling the defendant's statements inadmissible, the court concluded that even if no express questioning was involved, "the entire episode . . . was reasonably likely to elicit an incriminating response, and [the jail officer] should have known that such a response was reasonably likely." **Id.** at 389. In **People v. Hawkins,** 53 Ill.2d 181, 290 N.E.2d 231 (1972) the court held that no interrogation existed when the defendant confessed to his father in the presence of the police because the latter neither induced the defendant's statement nor used the father to interrogate the defendant. The New York Court of Appeals reached a different result in the case of **People v. Jones,** 47 N.Y.2d 528, 393 N.E.2d 443, 419 N.Y.S.2d 447 (1979). In **Jones** the court found interrogation even though the police did not actively participate in obtaining the defendant's confession. The court stated:

> The government, of course, cannot avoid constitutional restrictions by using a private individual as its agent, nor can it claim that only a private act is involved when government officers, subject to constitutional limitations, have participated in the act. Under such circumstances the constitutional restrictions on governmental activity cannot be said to be inapplicable.
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> In order to properly assess the significance of the police participation in this case it must be borne in mind that the purpose of

> the **Miranda** rule—the requirement that the defendant be advised of his rights before being questioned—is "to dispel the compulsion inherent in custodial surroundings." It is, of course, intended to regulate police conduct and here the People note that . . . the police did not take an active part in obtaining the confession. . . . But the police were not merely anonymous observers. They actively participated in the arrest, one of them clearly identified himself to the defendant and both of them escorted the defendant to the place where he was interrogated while they awaited the outcome of the questioning. . . . The participation by the police was sufficient to create the type of custodial atmosphere which the **Miranda** rule was intended to alleviate.

Id. at 533-34, 393 N.E.2d at 445-46, 419 N.Y.S.2d at 450 (citations omitted). The New Mexico Court of Appeals interpreted "interrogation" in the case of **State v. Gurule,** 91 N.M. 332, 573 P.2d 687 (Ct. App. 1977), **cert. denied,** 91 N.M. 491, 576 P.2d 297 (1978) wherein the court held that the defendant's statements were not made as the result of interrogation by the police. Rather, the court determined that the statements to the police and the ambulance driver were unsolicited remarks and that the defendant's statements to the physician and to a person to whom the defendant was talking by telephone were merely overheard by the police.

{14} The **Gurule** case is distinguishable on its facts from the case before us. In the present case, Ybarra was being questioned by Nurse Price while under the close, direct scrutiny of a police officer. Although the evidence supports the trial court's finding that no collusion existed between Nurse Price and the police, the same evidence supports the court's finding that Officer Wright, rather than warning Ybarra of his right to remain silent, sat quietly listening, rather enjoying the conversation taking place. As in **People v. Jones,** the police placed Ybarra under arrest and escorted him to the hospital emergency room where he was interrogated by Nurse Price while Officer Wright awaited the outcome of the questioning. Moreover, at the end of the exchange between Nurse Price and Ybarra, Officer Wright actively participated in the conversation with Ybarra by risking an improper question himself. Under these circumstances, there was custodial interrogation.

> On appeal, a trial court's denial of a motion to suppress will not be disturbed if supported by substantial evidence, unless it also appears that the determination of the court was erroneously premised. The appropriate standard for review on appeal is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party; all reasonable inferences in support of the court's decision will be indulged in, and all inferences or evidence to the contrary will be disregarded.

State v. Boeglin, 100 N.M. 127, 132, 666 P.2d 1274, 1279 (Ct. App. 1983) (citations omitted). **See also Arizona v. Mauro,** 481 U.S. 520, 528 n. 6 (1987) ("Our decision today does not overturn any of the factual findings of the Arizona Supreme Court. Rather, it rests on a determination that the facts of this case do not present a sufficient likelihood of incrimination to satisfy the legal standard articulated in **Miranda v. Arizona** and in **Rhode Island v. Innis.** ").

{15} While we are mindful that not all statements "obtained by the police after a person has been taken into custody are to be considered the product of interrogation," **Innis,** 446 U.S. at 299, based on the trial court's findings in this case, we conclude that the compulsion present in the emergency room atmosphere rose above that inherent in custody itself. Although the police did not create that compulsion, they took advantage of it by subjecting Ybarra to circumstances which they knew or should have known were reasonably likely to elicit incriminating responses. Therefore, with the standard of review enunciated above in mind, we affirm the trial court's ruling of interrogation as to the statements between Nurse Price and Ybarra regarding Garcia. We hold, however, that the court misapplied the law; the rescue doctrine is inapplicable, and the statements at issue should have been suppressed.

{16} Finally, the state argues that if the trial court erred, it was harmless. We must disagree. Clearly, the erroneous admission of Ybarra's statements to Nurse Price reflecting Ybarra's deliberate intention could not be harmless in a first degree murder trial. The state conceded as much during the motion hearing on this issue. The state admitted that, other than Nurse Price's testimony, it did not have the evidence available to try Ybarra for first degree murder. This is not a case where the total evidence was so overwhelming that the statements in question contributed nothing towards the conviction. **Cf. State v. Finnell,** 101 N.M. 732, 688 P.2d 769 (court found error in admission of defendant's statement harmless beyond a reasonable doubt in view of other evidence of defendant's guilt), **cert. denied,** 469 U.S. 918 (1984). We find the trial court's error was not harmless, and Ybarra's conviction is reversed on this issue.

{17} This case is remanded to the trial court to proceed in a manner consistent with this opinion. Upon remand we further instruct the trial court to review the videotape of Ybarra's interrogation in order to determine whether his statements to the police were voluntary.

{18} IT IS SO ORDERED.

KENNETH B. WILSON, Justice

WE CONCUR:

DAN SOSA, JR., Chief Justice

RICHARD E. RANSOM, Justice

SETH D. MONTGOMERY, Justice

JOSEPH F. BACA, Justice, dissenting

DISSENT

BACA, Justice (Dissenting).

{19} I would affirm the district court and admit the testimony regarding Ybarra's statements to Nurse Price. I believe the statements neither resulted from police interrogation nor its functional equivalent, and accordingly, Ybarra's statements were not elicited in violation of **Miranda.** "Coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." **Colorado v. Connelly,** 479 U.S. 157, 167 (1986). The purpose of the **Miranda** warnings is to "prevent[] governmental officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." **Arizona v. Mauro,** 481 U.S. 520, 529-30 (1987). The police did not exercise their potentially coercive power to obtain a confession, and I do not believe that constitutional protections would be perverted by the district court's admission of Ybarra's statements.

{20} Miranda warnings are required when the person in custody is subjected to an interrogation. Interrogation is defined as "questioning **initiated by law enforcement officers** after the person has been taken into custody." **Miranda v. Arizona,** 384 U.S. 436, 444 (1966) (emphasis added). This meaning has been expanded to "refer[] not only to express questioning, but also to any words or actions **on the part of the police** . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." **Rhode Island v. Innis,** 446 U.S. 291, 303 (1987) (emphasis added). **Accord State v. Edwards,** 97 N.M. 141, 143-44, 637 P.2d 572, 574-75 (Ct. App.), **cert. denied,** 97 N.M. 621, 642 P.2d 607 (1981) (custodial interrogation occurs when the person in custody is exposed to either express questioning or its functional equivalent).

{21} In the instant case, although uncontroverted that Ybarra was in police custody, the officer did not expressly interrogate Ybarra.[1] A nurse acting as a private individual questioned Ybarra. Protections against self-incrimination do

[1] After Ybarra had made his incriminating statement to the nurse, Officer Wright did ask Ybarra one question regarding the whereabouts of the knife. The district court, however, properly excluded that conversation; this analysis applies to the activity leading up to that improper question.

not apply to "confessions elicited by private individuals." **People v. Miller,** 137 A.D.2d 626, 628, 524 N.Y.S.2d 727, 729 (1988). Accordingly, in **Miller** the court admitted statements elicited by the suspect's mother in the presence of the police because the mother was not acting as a police agent. In the instant case, the district court found: "There was no plan between officer Wright or any other Artesia police officer and the nurse to elicit information to assist them in a prosecution." Nurse Price was neither an agent of the police, nor, as discussed below, was she used as a police instrumentality intended to subject Ybarra to an express interrogation.

{22} Because there was no express questioning of Ybarra, the next line of inquiry is whether the circumstances of the exchange between the nurse and Ybarra constituted the functional equivalent of express questioning. In other words, did Officer Wright's actions rise to the level of interrogation. To resolve this question we should consider both the intent of the officers and the existence of compulsion from the perspective of Ybarra. **See Mauro,** 481 U.S. at 520.

{23} In **Mauro,** the Court examined the intent of the police and found that although the police were present during the suspect's conversation with his wife at the police station there was no interrogation. In reaching that conclusion, the Court noted that the officers had not acted with the intent to elicit incriminating statements, and they had not participated in or instigated the suspect's conversation with his wife. **Id.** at 528. In the instant case, Officer Wright brought Ybarra to the emergency room for treatment and not to elicit incriminating statements. security concerns required the officer's presence in the treatment room. Until the end of the exchange between the nurse and Ybarra, Officer Wright remained silent. Nothing suggests that Officer Wright encouraged or colluded with the nurse. In other words, Officer Wright did not instigate or participate in the challenged conversation between the nurse and Ybarra. Furthermore, although Officer Wright may have known that the possibility of incrimination may have existed, "officers do not interrogate a suspect by hoping that he will incriminate himself." **Id.** at 529. Absent any active police participation, or any plan to compel Ybarra to make such incriminating statements, Officer Wright's conduct, under the first prong of the test, did not constitute express questioning or its functional equivalent.

{24} The next consideration is Ybarra's perception of the official compulsion flowing from the atmosphere in the emergency room. The majority found that the coupling of Ybarra's custody with the nurse's questions created an environment that was inherently coercive. I disagree. The officer's presence served a legitimate security function and did not produce official compulsion above the level inherent in the custody itself. Ybarra's being in custody, while itself producing some anxiety, could not turn the nurse's discussion with him into an interrogation. The nurse could not exert official pressure such that her questions would constitute at, interrogation. **Cf. Mauro** (no official compulsion was found where the incriminating conversation was recorded at a police station with the police officers present).

{25} The majority objects to the officer's conduct because he took advantage of the situation. However, so long as Officer Wright's conduct complied with constitutional requirements, taking advantage of an investigative lead does not violate **Miranda.** Whether such action was fair in any sense other than its constitutionality is irrelevant to the issue before us.

{26} Accordingly, I would affirm the district court's decision to admit the testimony. The decision, however, should be sustained under the "right for any reason" doctrine. **See State v. Hensel,** 106 N.M. 8, 738 P.2d 126 (Ct. App.) (trial court will be affirmed on appeal if right for any reason), **cert. denied,** 105 N.M. 720, 737 P.2d 79, **cert. denied,** 484 U.S. 958 (1987). The "rescue doctrine" does not apply to these facts.

JOSEPH F. BACA,
Justice dissenting