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Evidence

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EVIDENCE

I. INTRODUCTION

During the survey period, approximately January 1988 through July 1989, several evidence questions arose. The courts considered the admissibility of a telephone confession,[1] the relationship between a presumption and the burden of proof,[2] self-authentication,[3] and hearsay.[4] In perhaps the most important case, *State v. McCarty*,[5] the court enunciated a balancing test trial courts must apply before precluding testimony as a sanction for failure to comply with rules of discovery.

II. ADMISSIBILITY

In *State v. Roybal*,[6] the court of appeals considered the use of hearsay during a preliminary determination of the admissibility of a telephone confession and the foundational requirements for identifying the caller.[7] The defendant called the owner of a bicycle shop, confessed that he had taken a bicycle from the shop, and offered to pay for the bicycle.[8] During the conversation, the defendant gave the shop owner the telephone number of his mother so that the owner could call and have her arrange payment.[9]

When the prosecution attempted to introduce the telephone conversation, the defense objected on foundational grounds because the owner could not identify the voice he heard on the telephone as the defendant's.[10] The court sustained the objection.[11] On rebuttal, the state made an offer of proof, presenting the owner's testimony as to the conversation.[12] To establish a foundation for the testimony, the state called the investigating officer, who testified that he had checked with the telephone company on the number given by the caller and found that it belonged to a member of the defendant's family.[13] Based on this foundation, the trial

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1. State v. Roybal, 107 N.M. 309, 756 P.2d 1204 (Ct. App.), *cert. denied*, 107 N.M. 267, 755 P.2d 605 (1988). *See infra* notes 6-22 and accompanying text.
2. Mortgage Inv. Co. of El Paso v. Griego, 108 N.M. 240, 771 P.2d 173 (1989). *See infra* notes 122-40 and accompanying text.
3. State v. Griffin, 108 N.M. 55, 766 P.2d 315 (Ct. App.), *cert. denied*, 108 N.M. 97, 766 P.2d 1331 (1988); Levy v. Disharoon, 106 N.M. 699, 749 P.2d 84 (1988). *See infra* notes 41-54 and accompanying text.
4. State v. Duran, 107 N.M. 603, 762 P.2d 890 (1988); State ex rel. Elec. Supply Co. v. Kitchens Constr., 106 N.M. 753, 750 P.2d 114 (1988); Zamora v. Creamland Dairies, 106 N.M. 628, 747 P.2d 923 (Ct. App. 1987). *See infra* notes 55-105 and accompanying text.
5. 107 N.M. 651, 763 P.2d 360 (1988). *See infra* notes 106-21 and accompanying text.
6. 107 N.M. 309, 756 P.2d 1204 (Ct. App.), *cert. denied*, 107 N.M. 267, 755 P.2d 605 (1988).
7. *Id.* at 310, 756 P.2d at 1205.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

court accepted the state's offer of proof and admitted the evidence.[14] The defendant contended that the trial court erred in admitting the telephone confession as evidence when the only foundation for the confession was unsubstantiated hearsay.[15]

The court first noted that the trial was conducted without a jury. In a bench trial, the trial court is presumed to have disregarded improper evidence, and erroneous admission of evidence is not reversible error unless it appears the trial court must have relied on it in reaching its decision.[16]

Under evidentiary rule 11-104(A), preliminary questions, such as the identity of the caller in *Roybal*, are determined by the trial judge.[17] When the trial judge rules on a preliminary question, he or she is not bound by the rules of evidence.[18] In *Bourjaily v. United States*,[19] the United States Supreme Court held that rule 104(a) authorizes the use of hearsay in determining preliminary questions of admissibility. The trial judge receives the hearsay evidence and gives it the weight his judgment and experience dictate.[20]

The New Mexico court also found that the investigating officer's testimony was not the sole evidence establishing the defendant as the caller. The caller provided facts of a personal nature from which the court could properly have inferred that the caller was the defendant.[21]

Finally the court pointed out that any error in the admission of this evidence would not have been reversible error in any case because the testimony was not vital to the state's case. Even where errors are of constitutional dimension, reversal is not required where the error is harmless beyond a reasonable doubt.[22]

In *Cumming v. Nielson's, Inc.*,[23] the court of appeals considered whether photographs showing the condition of a highway three weeks after an accident were admissible under the "feasibility of precautionary measures" exception to evidentiary rule 11-407.[24] The plaintiff claimed the evidence

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14. *Id.*

15. *Id.*

16. *Id.* (citing City of Roswell v. Gallegos, 77 N.M. 170, 420 P.2d 438 (1966); In re Doe, 89 N.M. 700, 556 P.2d 1176 (Ct. App. 1976)).

17. SUP. CT. RULES ANN. 11-104 (Recomp. 1986) provides:

> (A) Questions of admissibility generally. Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making this determination it is not bound by the rules of evidence except those with respect to privileges.

18. *Roybal*, 107 N.M. at 311, 756 P.2d at 1206. *See supra* note 17.

19. 483 U.S. 171 (1987).

20. *Roybal*, 107 N.M. at 311, 756 P.2d at 1206 (citing *Bourjaily*, 483 U.S. at 181 (quoting United States v. Matlock, 415 U.S. 164, 175 (1974))).

21. *Id.*

22. *Id.* at 312, 756 P.2d 1207 (citing State v. Martinez, 99 N.M. 48, 653 P.2d 879 (Ct. App.), *cert. denied*, 99 N.M. 47, 653 P.2d 878 (1982)).

23. 108 N.M. 198, 769 P.2d 732 (Ct. App.), *cert. denied*, 108 N.M. 97, 766 P.2d 1331 (1988).

24. SUP. CT. RULES ANN. 11-407 (Recomp. 1986) provides:

> When, after an event, measures are taken which, if taken previously, would have

was admissible in this instance because it showed that a highway contractor had completed the project "in the manner planned."[25] The court found this irrelevant to any of the issues in the case, particularly to the condition of the highway at the time of the accident.[26]

The plaintiff was injured when her vehicle was struck head-on by a vehicle driven by an intoxicated driver.[27] The highway on which the accident occurred was under construction at the time, and Nielson's was performing the work under contract with the State Highway Department.[28] The plaintiff sued the driver, several "dramshop defendants," Nielson's, and the Highway Department.[29] At the initial trial, the plaintiff received a judgment against the other driver.[30] The issues on appeal related only to Nielson's and the other driver.[31]

The plaintiff cited a number of cases in support of her contention that subsequent remedial measures are admissible to show the feasibility of precautionary measures in cases in which the defendant denies such measures were feasible.[32] The court held that because the contractor never denied that precautionary measures were feasible, maintaining instead that it had complied at all times with the specifications of the project, the exception did not apply.[33]

Furthermore, the court found no merit in plaintiff's contention that the exception applied because the photographs could be used to impeach the testimony of Nielson's witnesses as to the condition of the highway and structures on the night of the accident.[34] The court did not see how photographs taken three weeks after the accident could be relevant for this purpose.[35]

The second evidentiary issue the court addressed was the exclusion of evidence of future medical treatment. Plaintiff sought to introduce, through testimony of an expert medical witness, evidence of the necessity of future medical treatment to her leg. The witness could not state with any medical probability that such treatment would be necessary.[36]

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made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

25. *Cumming*, 108 N.M. at 204, 769 P.2d at 738.
26. *Id.*
27. *Id.* at 199, 769 P.2d at 733.
28. *Id.* at 200, 769 P.2d at 734.
29. *Id.* at 199, 769 P.2d at 733.
30. *Id.*
31. *Id.* After filing her notice of appeal, the plaintiff settled with the Highway Department and the dramshop defendants. *Id.*
32. *Id.* at 204, 769 P.2d at 738.
33. *Id.*
34. *Id.*
35. *Id.* at 205, 769 P.2d at 739.
36. *Id.*

The court held that evidence as to future medical treatment must be stated in terms of medical probability.[37] The witness in this case could not state a medical probability that the plaintiff's leg would heal.[38] He could only state that the plaintiff might require surgery if the leg did not heal.[39] The court found the proffered testimony tantamount to saying that the "plaintiff may require an operation," which is insufficient to support an award of costs for a speculative operation.[40]

III. AUTHENTICATION

The court addressed the question of self-authentication of documents in *State v. Griffin*,[41] a case involving an habitual offender proceeding. The defendant was convicted of aggravated assault and negligent use of a deadly weapon and was charged in a supplemental information with the commission of four prior felonies.[42]

During the course of the hearing, several state's exhibits were introduced into evidence as self-authenticating. These included the judgments and sentences of prior convictions, a plea agreement on a prior involuntary manslaughter conviction, fingerprint records, and photographs.[43] On appeal, the defendant claimed that the state's exhibits were not self-authenticating.[44]

The court disagreed, holding that copies of official records are self-authenticating under evidentiary rule 11-902(D) when they meet the requirement of certification by the custodian of the record in compliance with evidentiary rule 11-902(A), (B), or (C).[45] The court rejected the defendant's argument that certification pertaining to a prison records manager requires the certification of the warden.[46] The court stated that rule 11-902(B) only requires that a public officer who has a seal and official duties in the district or political subdivision of the signing officer certify under seal that the signer has the official capacity and that the signature is genuine.[47]

In *Levy v. Disharoon*,[48] the plaintiff filed suit in equity seeking a partnership accounting. During the course of the trial, a number of

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37. *Id.* (citing Regenold v. Rutherford, 101 N.M. 165, 679 P.2d 833 (Ct. App.), *cert. denied*, 107 N.M. 77, 678 P.2d 705 (1984)).

38. *Id.* at 205, 769 P.2d at 739.

39. *Id.*

40. *Id.* (citing Michael v. West, 76 N.M. 118, 121, 412 P.2d 549, 551 (1966)).

41. 108 N.M. 55, 766 P.2d 315 (Ct. App.), *cert. denied*, 108 N.M. 97, 766 P.2d 1331 (1988).

42. *Id.* at 56, 766 P.2d at 316.

43. *Id.* at 57, 766 P.2d at 317.

44. *Id.* at 59, 766 P.2d at 319.

45. *Id.* SUP. CT. RULES ANN. 11-902(A) (Recomp. 1986) provides for self-authentication of documents bearing a seal and a signature. SUP. CT. RULES ANN. 11-902(B) (Recomp. 1986) provides for self-authentication of documents which are not under seal. SUP. CT. RULES ANN. 11-902(C) (Recomp. 1986), not applicable in this case, provides for authentication of foreign public documents.

46. *Griffin*, 108 N.M. at 59, 766 P.2d at 319. The authenticity of one document not under seal was certified by the Secretary of State. *Id.*

47. *Id.*

48. 106 N.M. 699, 749 P.2d 84 (1988).

letters, reports, sales agreements, and other documents maintained by the aircraft title company involved in the purchase of the partnership's aircraft were introduced into evidence.[49] The custodian of the records did not testify in court as to their trustworthiness.[50]

Under the hearsay exception provided by evidentiary rule 11-803(E), records kept in a regularly conducted activity are admissible if the custodian of the records or other qualified witness appears in court to identify them and to testify as to the mode of their preparation and safekeeping.[51] On appeal, Levy maintained that the records in question did not need to be authenticated by a custodian as a condition of admission because they were self-authenticating under evidentiary rule 11-902.[52] The court disagreed, holding that the records in question did not fall within the narrow exception of self-authenticating documents and should not have been admitted without a proper foundation.[53] Nonetheless, there was no reversible error, since the facts established by the improperly admitted evidence were supported by other competent evidence.[54]

IV. HEARSAY

In *State v. Duran*,[55] the supreme court considered a prosecutor's attempt to introduce otherwise inadmissible statements in the guise of impeaching his own witness with a prior inconsistent statement. The defense alleged that the prosecution called a defense alibi witness during its case-in-chief only to elicit prior inconsistent statements made by her regarding a conversation with the defendant. The defense characterized this as a subterfuge designed to avoid the hearsay rule.[56]

The defendant was convicted of first degree murder and armed robbery. On appeal, he claimed that he was denied the right to a fair trial because the prosecution shifted the burden of proof in trying to prove his guilt by showing he had no alibi.[57] The prosecution called a potential defense

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49. *Id.* at 705, 749 P.2d at 90.

50. *Id.*

51. *Id.* (citing State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976), *overruled on other grounds*, Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982)).

52. SUP. CT. RULES ANN. 11-902 (Recomp. 1986) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal.
(2) Domestic public documents not under seal.
(3) Foreign public documents.
(4) Certified copies of public records.
(5) Official Publications.
(6) Newspapers and periodicals.
(7) Trade inscriptions and the like.
(8) Acknowledged documents.
(9) Commercial paper and related documents.
(10) Presumptions under Acts of Congress.

It is not clear which subsection Levy intended to invoke.

53. *Levy*, 106 N.M. at 705, 749 P.2d at 90.

54. *Id.*

55. 107 N.M. 603, 762 P.2d 890 (1988).

56. *Id.* at 606, 762 P.2d at 893.

57. *Id.* at 605-06, 762 P.2d at 892-93.

alibi witness and tried to impeach her by showing she was partial to the defendant.[58] In the process, the prosecution also elicited a statement from the witness that the defendant allegedly made to her.[59]

Under New Mexico law, the credibility of a witness may be attacked by any party, including the party calling him.[60] Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[61] A prior statement by a witness who testifies at the trial or hearing and is subject to cross-examination concerning the statement is not hearsay if the statement is inconsistent with the witness' testimony.[62]

In this case, the witness, Rose Montoya, gave a prior statement to the police when she answered the question, "Did [the defendant] ask you to tell the police that you drove him to the Mills?" She replied, "He said that I was his only alibi."[63] At trial, the prosecution asked the witness, "Did the defendant tell you to tell the story about driving him to the Mills' house?"[64] The trial transcript shows that the prosecutor's purpose was to impeach the witness' credibility.[65]

The supreme court held that the witness' statement to the police was not hearsay because she testified at trial and was subject to cross-examination regarding the statement.[66] However, her prior statement contained a statement by the defendant which was hearsay.[67] Since the defendant never testified, the statement allegedly attributed to him by Montoya in her prior statement could not be used as substantive evidence against him.[68]

The court held that the validity of Montoya's prior statement could be used to impeach her credibility at trial, but the hearsay content of what defendant had purportedly said to her should have been excised or inadmissible because it did not fall within any exception to the hearsay rule.[69]

In addition to finding the admission of defendant's hearsay statement made to Montoya to be constitutionally improper, the court also held that the prosecution's calling of Montoya in its case-in-chief for the purpose of impeachment was improper.[70] The prosecution had elicited only evidence from Montoya which was cumulative and consistent with

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58. *Id.* at 606, 762 P.2d at 893.
59. *Id.* at 606-09, 762 P.2d at 893-96.
60. SUP. CT. RULES ANN. 11-607 (Recomp. 1986).
61. SUP. CT. RULES ANN. 11-801(C) (Recomp. 1986).
62. SUP. CT. RULES ANN. 11-801(D)(1) (Recomp. 1986).
63. *Duran,* 107 N.M. at 606, 762 P.2d at 893.
64. *Id.* The court noted that the question was not only leading but also misleading in its characterization of Montoya's prior statement. *Id.*
65. *Id.* at 606, 762 P.2d at 893.
66. *Id.* at 608, 762 P.2d at 895.
67. *Id. See supra* text accompanying note 63.
68. *Id.* at 608, 762 P.2d at 895.
69. *Id.*
70. *Id.*

her prior statement.[71] Impeachment would be proper only after the defendant had presented his alibi, thereby allowing the state to impeach the alibi witness.[72] Nonetheless, the court declined to say the impropriety prejudiced the defendant and found no reversible error.[73]

In *State ex rel. Electric Supply Co. v. Kitchens Construction*,[74] the supreme court addressed the question of the admissibility of computerized business records under the hearsay exception provided by evidentiary rule 11-803. This case involved a suit filed by Electric Supply Co., Inc. (ESCO) against Kitchens Construction (Kitchens) to recover the cost of certain materials ESCO had supplied to Klein Electric Company (Klein), a subcontractor of Kitchens.[75]

At trial, ESCO introduced into evidence computer-generated invoices and picking lists for the materials at issue which had been supplied to Klein. At the time of shipment, the picking lists had been entered into the ESCO's computer data base.[76] The information in the data base was then used to generate invoices.[77] The invoices introduced into evidence by ESCO were similar to the original invoices, but they were produced for the trial and differed somewhat in format from those originally sent to Klein.[78]

Kitchens claimed that the invoices were inadmissible under evidentiary rules 11-803 and 11-1001 through 1003, because they were produced for the litigation and were generated from data different from the data used for the original invoices.[79] Kitchens contended that under the best evidence

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71. *Id.* at 609, 762 P.2d at 896.

72. *Id.*

73. *Id.* at 608-09, 792 P.2d at 895-96. In reaching this conclusion, the court referred to the harmless error standard for evaluating appeals involving constitutional errors established in Chapman v. California, 386 U.S. 18 (1967). Under *Chapman,* unless the beneficiary of the error can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained, the conviction must be reversed." *Id.* at 24. Under the federal rule, the state would have the burden of proving harmless error. *Id.* In *Duran*, the court found there was "sufficient evidence to convict the defendant." 107 N.M. at 609, 762 P.2d at 896. While the implication is that the court's finding meets this standard, it is at least arguable that the two are not the same and that the *Chapman* standard is higher.

74. 106 N.M. 753, 750 P.2d 114 (1988).

75. The suit was filed under the Little Miller Act, N.M. STAT. ANN. § 13-4-19 (Repl. Pamp. 1985), which was intended to protect suppliers of materials under any subcontract involving state construction projects. *State ex rel. Electric Supply Co.*, 106 N.M. at 755, 750 P.2d at 116.

76. *Id.* at 754, 750 P.2d at 115.

77. *Id.*

78. *Id.* at 754-55, 750 P.2d at 115-16. The original invoices were described by catalogue number; the invoices introduced at trial described items by brand name. *Id.* Kitchens complained that Electric Supply Co. offered no testimony correlating the numbers and brand names. *Id.*

79. *Id.* at 754-56, 750 P.2d at 115-17. SUP. CT. RULES ANN. 11-803(F) (Recomp. 1986) provides a hearsay exception to records of a regularly conducted activity

> made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the [record], all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

rule either the original invoices or their duplicates should have been offered.[80]

The court disagreed, pointing out that under rule 803(F) computer data compilations may be construed as business records themselves and should be treated as any other record of a regularly conducted activity.[81] If the data on which a computer printout is based were stored and compiled at the time of the underlying transactions, it is admissible, even though the printout is produced at a subsequent date.[82] If entries to the database were made in the regular course of business for business purposes, there is no need to produce the original files.[83] As long as the custodian of the records or any other qualified person testifies about the foundational requirements, the records are admissible. A qualified person, as established by *State v. Ruiz*,[84] is one capable of testifying to the manner of preparation of the records and their safekeeping. Finally, the court pointed out that evidentiary rule 11-1001(C) provides that a computerized data compilation or printout is an original record.[85]

In this case, the court held that the invoices did not appear to have been produced in anticipation of litigation, but were generated from an already existing data base made at the time of the parties' relationship.[86] Two witnesses, presumably familiar with the manner of preparation and safekeeping of the data compilation, testified to the procedure used to prepare the records.[87]

The court of appeals addressed the general definition of hearsay in *Zamora v. Creamland Dairies*.[88] Creamland Dairies had received information that someone was making unauthorized sales of milk at a residence in Albuquerque.[89] The dairy hired a private investigator, Caristo, to investigate the allegations.[90] During his surveillance, Caristo observed Zamora, a Creamland route driver, loading ten cases of Creamland milk at a market into a truck owned by the owners of the house and unloading them at the house.[91] Caristo prepared a report of the investigation and included photographs implicating Zamora.[92] During this period, Creamland's manager was informed by another employee that Zamora had been disposing of Creamland products improperly.[93]

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80. *State ex rel. Elec. Supply Co.*, 106 N.M. at 754-56, 750 P.2d at 115-17.

81. *Id.* at 756, 750 P.2d at 117 (citing Rosenberg v. Collins, 624 F.2d 659, 665 (5th Cir. 1980)).

82. *Id.* (citing Westinghouse Elec. Supply Co. v. B.L. Allen, Inc., 138 Vt. 84, 100, 413 A.2d 122, 132 (1980)).

83. *Id.* (citations omitted).

84. 94 N.M. 721, 725, 617 P.2d 160, 164 (Ct. App. 1980).

85. *State ex rel. Electric Supply Co.*, 106 N.M. at 756, 750 P.2d at 117.

86. *Id.*

87. *Id.*

88. 106 N.M. 628, 747 P.2d 923 (Ct. App. 1987). For a discussion of the substantive issues in this case, see Survey, *Torts*, 20 N.M.L. REV. 431-32 (1990) (this issue).

89. *Id.* at 630, 747 P.2d at 925.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

The manager confronted Zamora with the information and asked him to take a stress analyzer test which he failed.[94] At that point the manager directed Caristo to turn the results of his investigation over to the appropriate law enforcement officials.[95]

Caristo contacted the Second Judicial District Attorney who informed him that he would have to report the matter to the Albuquerque Police Department before the district attorney could act.[96] Caristo submitted a summary of his investigation and filled out an Offense and Incident Report.[97] Zamora was indicted and brought to trial.[98] At the trial, after the close of the state's case, the trial court directed a verdict in favor of Zamora, who then filed suit for malicious prosecution against the defendants.[99] The district court granted summary judgment in favor of the defendants.[100] Zamora appealed, and the court of appeals affirmed.[101]

One of the issues raised during the appeal was whether the trial court should have stricken, in whole or in part, affidavits submitted by the defendants in support of their motions for summary judgment. Zamora first argued that the affidavits submitted by Creamland's manager, Finch, were based on hearsay.[102] The court of appeals disagreed. The affidavits were introduced not to prove the truth of the assertion that Zamora had engaged in the conduct reported to Finch, but rather to show that Finch had probable cause to believe that Zamora had committed those acts, and Finch therefore acted reasonably in directing Caristo to report the results of his investigation to the authorities.[103] Thus Finch's statements did not fall within the definition of hearsay contained in evidentiary rule 11-801(C).[104] The court also noted that even hearsay may be used to establish probable cause.[105]

V. PRECLUSION OF TESTIMONY AS A SANCTION FOR FAILURE TO COMPLY WITH DISCOVERY RULES

In *McCarty v. State,*[106] the supreme court granted certiorari to decide whether it was proper to preclude the testimony of a defense witness as

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94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 631, 747 P.2d at 926.
99. *Id.*
100. *Id.* at 630, 747 P.2d at 925.
101. *Id.*
102. *Id.* at 631, 747 P.2d at 927. SUP. CT. RULES ANN. 1-056(E) (Recomp. 1986) states in part: "Supporting and opposing affidavits shall be made of personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."
103. *Zamora,* 106 N.M. at 631-32, 747 P.2d at 926-27.
104. SUP. CT. RULES ANN. 11-801 (Recomp. 1986) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."
105. *Zamora,* 106 N.M. at 632, 747 P.2d at 927 (citing Seelig v. Harvard Coop. Soc'y, 355 Mass. 532, 246 N.E.2d 642 (1969) and State v. Deltenre, 77 N.M. 497, 424 P.2d 782 (1966), *cert. denied,* 386 U.S. 976 (1967)).
106. 107 N.M. 651, 763 P.2d 360 (1988).

a sanction for failure to comply with a prosecution demand for notice of alibi.[107]

Upon demand a defendant intending to offer evidence of an alibi in his defense must inform the district attorney of his intention in writing at least ten days prior to the start of the trial.[108] In *McCarty*, the state filed a demand for notice of alibi.[109] The defense did not submit a notice of alibi, but filed a witness list containing the names and addresses of two witnesses without identifying them as alibi witnesses.[110] When the defense sought to have these witnesses testify at trial as to the defendant's whereabouts during the hours immediately preceding the crime, the trial court ruled this was evidence of an alibi and refused to permit the testimony.[111]

To resolve the issue of whether preclusion of the testimony was an appropriate sanction for violation of the discovery rule, the court adopted a test which balances "the potential for prejudice to the prosecution against the impact on the defense."[112] The test also considers whether the evidence was material to the verdict[113] and whether preclusion would protect the adversary system and be in the interest of the "fair and efficient administration of justice."[114] The trial court should consider four specific factors: (1) the effectiveness of less severe sanctions; (2) the impact of preclusion on the evidence at trial and the outcome of the case; (3) the extent of prosecutorial surprise or prejudice; and (4) whether the violation was willful.[115] The court cautioned that before a trial judge exercises his discretion to preclude testimony, he must weigh these factors to avoid violating the defendant's sixth amendment right to a fair trial.[116]

In this case, the impact on the case was significant because the jury was denied a chance to hear testimony that the defendant was elsewhere at a time when the state's key witness testified the defendant was casing the store later burglarized.[117] Second, the prosecution was not unduly surprised or prejudiced since the defense listed only two witnesses, both

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107. *Id.* at 651, 763 P.2d at 360.

108. SUP. CT. RULES ANN. 5-508 (Recomp. 1986) provides:

> [U]pon the written demand of the district attorney . . . a defendant who intends to offer evidence of an alibi in his defense shall, not less than ten (10) days before trial or such other time as the district court may direct, serve upon such district attorney a notice in writing of his intention to claim such alibi. Such notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as known to the defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi.

109. *McCarty*, 107 N.M. at 651, 763 P.2d at 360.

110. *Id.*

111. *Id.* at 652, 763 P.2d at 361.

112. *Id.* at 653, 763 P.2d at 362 (citing Escalera v. Coombe, 826 F.2d 185, 189-91 (2d Cir. 1987), *vacated and remanded*, 108 S. Ct. 1004 (1988)).

113. *Id.* (citing *Escalera*, 826 F.2d at 189-91).

114. *Id.* (quoting Taylor v. Illinois, 484 U.S. 400, 414-15 (1988)).

115. *Id.*

116. *Id.* at 655, 763 P.2d at 364. The *McCarty* test appears to apply to other discovery violations as well. *See* Manlove v. Sullivan, 108 N.M. 471, 476, 775 P.2d 237, 243 (1989).

117. *Id.* at 654, 763 P.2d at 363.

of whom the prosecution had interviewed.[118] Third, McCarty's counsel's actions were not clearly willful or used to gain tactical advantage.[119] Further, the court stated that neither the purpose nor the intent of the notice-of-alibi rule was frustrated in this case and the exclusion of the evidence was an abuse of discretion on the part of the trial judge.[120] The court reversed and remanded for a new trial.[121]

VI. PRESUMPTIONS

In *Mortgage Investment Co. of El Paso v. Griego*,[122] a key issue was the operation of a presumption under New Mexico law. A mortgage investment company loan officer was shot to death in his office during business hours.[123] His widow's workers' compensation death benefits were terminated by the employer after the apprehension and conviction of the party responsible for the death.[124] The employer alleged that the killing was not work-related.[125] The decedent's widow sued for reinstatement of the benefit which hinged on a determination that the death arose out of and was incident to his employment.[126]

After a bench trial, the trial court found that neither side had produced sufficient credible evidence for the court to determine whether the death was work-related.[127] The court, therefore, declined to reinstate the widow's benefits and denied reimbursement for benefits paid.[128] The court of appeals reversed, basing its decision on *Ensley v. Grace*[129] which held that when death occurs at work and the cause of death is unknown and unexplained the claimant is entitled to a presumption that death arose out of the employment.[130] The supreme court reversed the court of appeals and affirmed the trial court.[131]

Until the adoption of the Rules of Evidence in 1973, courts followed the "bursting bubble" theory of presumptions.[132] Under this rule, a presumption "ceases to exist upon the introduction of evidence which would support a finding of its nonexistence."[133] This gave way in 1973 to evidentiary rule 301 which provided that "a presumption imposes on the party against whom it is directed the burden of proving that the

118. *Id.*
119. *Id.*
120. *Id.* at 654-55, 763 P.2d at 363-64.
121. *Id.* at 655, 763 P.2d at 364.
122. 108 N.M. 240, 771 P.2d 173 (1989).
123. *Id.* at 241, 771 P.2d at 174.
124. *Id.* at 242, 771 P.2d at 175.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. 76 N.M. 691, 417 P.2d 885 (1966).
130. *Mortgage Inv. Co.*, 108 N.M. at 242, 771 P.2d at 175.
131. *Id.*
132. *Id.* at 243, 771 P.2d at 176.
133. *Id.* (citing Trujillo v. Chavez, 93 N.M. 489, 492, 601 P.2d 736, 739 (Ct. App. 1979)).

nonexistence of the presumed fact is more probable than its existence."[134] Under this rule, the presumption may still be considered as persuasive proof, even after the introduction of evidence to the contrary.[135]

In 1980, the rule was amended to eliminate the shift in the burden of persuasion. Rule 301 now reads:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.[136]

In this case, the trial judge found that the employer failed to rebut the presumption that the death arose out of the victim's employment.[137] As the factfinder, he could have accepted the presumption as sufficient proof to support the claimant's contention.[138] However, he was not required to accept it as such.[139] The supreme court held that the trial judge correctly determined the claimant failed to meet her burden of persuasion that the death was work-related.[140]

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134. *Id.* (citing State Farm Auto. Ins. Co. v. Duran, 93 N.M. 489, 492, 601 P.2d 722, 725 (Ct. App. 1979).
135. *Id.*
136. SUP. CT. RULES ANN. 11-301 (Recomp. 1986) (formerly N.M. STAT. ANN. RULE OF EVIDENCE 301 (1978 & Repl. Pamp. 1983)).
137. *Mortgage Inv. Co.*, 108 N.M. at 244, 771 P.2d at 177.
138. *Id.*
139. *Id.*
140. *Id.* at 244-45, 771 P.2d at 177-78.