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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
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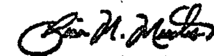

LINDA JOYCE GARCIA,

Petitioner-Appellee

vs.

No. 28,106
Bernalillo County
DM 94-2778

JERRY M. GARCIA,

Respondent-Appellant.

APPELLANT'S REPLY BRIEF

Respectfully submitted,

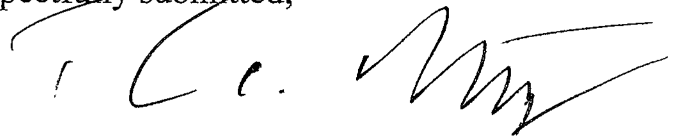

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TABLE OF CONTENTS

Table of Authorities ii

Law of the Case Argument 1

Construction Of The Marital Settlement
Agreement 12

Conclusion 14

References to the recorded transcript are by elapsed time from the start of the recording, with the first entry after "TR" the hour, and the second entry the minute.

Statement of Compliance. The body of the Reply Brief consists of 3,728 words and does not exceed 4,400 words. The word count is obtained from Corel Wordperfect 8.0.

TABLE OF AUTHORITIES

New Mexico Cases

Bell v. New Mexico Interstate Stream Commission, 1996-NMCA-010, ¶17, 121 N.M. 328, 911 P.2d 222 (Ct. App. 1995)....................8

Berry v. Meadows, 103 N.M. 761, 767-768, 713 P.2d 1017 (Ct. App. 1986)........12

Chavez-Rey v. Miller, 99 N.M. 377, 380, 658 P.2d 452 (Ct. App. 1982)................8

In re Estate of Keeney, 121 N.M. 58, 60, 908 P.2d 751, 753.................................10

Jemko, Inc. v. Liaghat, 106 N.M. 50, 55, 738 P. 2d 922, 927 (Ct. App. 1987) 6

LeClert v. LeClert, 80 N.M. 235, 453 P.2d 755 (1969)...12

Madrid v. Madrid, 101 N.M. 504, 684 P.2d 1169 (Ct.App.1984)............................9

Norris v. Saueressig, 104 N.M. 85, 86, 717 P.2d 61 (Ct. App. 1985)....................12

Montgomery Ward v. Larragoite, 81 N.M. 383, 386, 467 P.2d 399 (S. Ct. 1970)...8,9,11

Nichols Corp. v. Bill Stuckman Constr., Inc., 105 N.M. 37, 39, 728 P.2d 447 (1986)...12

Pacheco v. Quintana, 105 N.M. 139, 143-144 730 P.2d 1 (Ct. App. 1986)...........12

Ruggles v. Ruggles, 116 N.M. 52, 860 P.2d 182 (S. Ct. 1993)..........................13,14

Scanlon v. Las Cruces Public Schools, 2007-NMCA-150, ¶7, 143 N.M. 48, 172 P.3d 185...4

Schmidt v. St. Joseph's Hosp., 105 N.M. 681, 684-85, 736 P.2d 135, 138-39 (Ct. App. 1987)..10

Selby v. Roggow, 1999-NMCA-044, 20 ¶¶ 10-11, 126 N.M. 766, 975 12 P.2d 379......6,9,10

State v. Breit, 1996-NMSC-067, ¶ 12, 122 N.M. 655, 930 P.2d 792......5

Terry v. Biswell, 66 N.M. 201, 345 P.2d 217 (1959)......8

Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co., 83 N.M. 558, 560, 494 P.2d 971, 973 (1972)......4,5

Williams v. Yellow Checker Cab Co., 77 N.M. 747, 427 P.2d 261 (1967)......12

Woolwine v. Furr's, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987)..6

New Mexico Statutes

NMSA 1978, §39-1-1(1953)......6

§ 21-9-1, N.M.S.A., 1953 Comp......8

New Mexico Rules of Civil Procedure

Rule 1-054.1 *Committee Comment*......9

Rule 5, § 21-2-1(5), N.M.S.A., 1953 Comp......8

Cases From Other Jurisdictions

Fields v. City of S. Houston, Texas, 922 F.2d 1183, 1188 (5th Cir. 1991)......10

Law Of The Case Argument. Linda Joyce ("Linda") repeatedly claims that in the prior appeal of this case, this Court *affirmed* the district court's calculation of the amount of benefits which would be due to Linda if the district court should determine that Linda is entitled to begin receiving benefits before Jerry Garcia ("Jerry") retires.[1] This claim that the Court of Appeals affirmed the amount of retirement benefits properly payable to Linda from Jerry as her community property share of the retirement benefits is manifestly untrue. In its *Memorandum Opinion*, the Court of Appeals determined:

> "We express no opinion as to the amount of benefits that would be due Wife if the district court should determine that Wife is entitled to begin receiving benefits before Husband retires." February 13, 2007 *Memorandum Opinion*, p. 7.

Linda does not mention nor attempt to explain this language. Had the Court of Appeals intended to affirm the district court's determination that Linda was due $590 per month from Jerry as her proper share of the retirement benefits at issue, the Court of Appeals would have so held. But it did not so hold.

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[1]These claims include those made in the *Answer Brief*, p. 2, line 13; page 4, last paragraph; page 8, third paragraph; page 10, line 4; page 11, line 4; page 14, second paragraph; page 20, line 5 from the bottom; page 21, lines 6-8.

The determination of the Court of Appeals that "We express no opinion ..." is in stark contrast to the January 3, 2007 *Proposed Summary Disposition* issued by this Court:

> "Therefore, if the district court is correct that Wife is entitled to begin receiving benefits, we propose to hold that the correct amount of benefits appears to be $590.00 per month." (RP 99-100)

Following the January 26, 2007 *Memorandum In Partial Opposition To Proposed Summary Affirmance*, the Court of Appeals did not hold that the correct amount of benefits was $590 per month; instead, the Court of Appeals expressed no opinion on the issue. Therefore, the Court of Appeals did not affirm the amount of payment, and this issue was properly before the district court and is properly before this Court for the reasons which follow.

Before addressing the law of the case issue in more detail below, it is noted that Linda confuses two separate issues raised by Jerry in the first appeal. In his November 6, 2006 *Docketing Statement* in the first appeal, Jerry raised two separate issues concerning the calculation of the amount of the benefits as follows: (RP 84-85)

> ***"Issue 3.*** Whether the district court erred as a matter of law in its failure to apply the factors in the *Marital Settlement Agreement* formula ... because the Court failed to determine the community interest in the retirement benefits (and thus Linda's ½ share) as of August 31, 1994 as required therein, rather than determine the

community benefits as of the date of the hearing, which is what the district court did?"

"**Issue 4**. Whether assuming, *but not conceding*, the district court made [the] correct factual determinations concerning the factors to apply to the *Marital Settlement Agreement* formula ... whether the district court erred as a matter of law in [its] failure to properly apply the correct mathematical equation to the formula?" (Emphasis added.)

In the January 3, 2007 *Proposed Summary Disposition,* RP 97, second paragraph (RP 97), the Court of Appeals clarified the problem presented as Issue 4, which was the use of 824 as the number of total months spent earning retirement allegedly used in determining Wife's retirement. The Court of Appeals stated that even though Wife's counsel allegedly used a formula based on 824 as the denominator, the intended denominator was ½ of that amount, or 412.

Following the Court of Appeals' clarification of the proper number to use as a denominator in the formula, Jerry stated in his January 26, 2007 *Memorandum In Partial Opposition To Proposed Summary Affirmance*, page 6:

"D. Issue 4. *Except for the foregoing*, [referring to Issue 3], Jerry Garcia does not dispute the arithmetic based [on] utilization of a denominator of 824, not 2 x 824, as following filing of the Docketing Statement, and a subsequent discussion with opposing counsel, the use of the figure 824 [is] the intended figure."

The Court of Appeals understood the distinction between Issue 3 and Issue 4 in its February 13, 2007 *Memorandum Opinion*, discussing Issue 3 on page 5,

line 1 to page 6, line 14 (RP 108-109), and then discussing Issue 4 separately on page 6 (RP 109), stating:

> "Finally, as the fourth issue in his docketing statement, Husband disputed the use of "824" as the denominator in the formula set out in the MSA to compute Wife's benefits. [DS 9] We proposed to affirm on this issue and Husband has indicated that he agrees with our proposed disposition. [MIO 6]"

Following discussion of these issues, the Court of Appeals concluded that:

> "We express no opinion as to the amount of benefits that would be due Wife if the district court should determine that Wife is entitled to begin receiving benefits before Husband retires." February 13, 2007 *Memorandum Opinion*, p. 7. (RP 110)

Therefore, the Court of Appeals did not affirm the district court's determination that the correct amount of benefits payable to Linda is $590.00 per month, as the Court of Appeals had previously proposed.

The correct computation of benefits was properly before the district court and is properly before this Court.

In *Scanlon v. Las Cruces Public Schools*, 2007-NMCA-150, ¶7, 143 N.M. 48, 172 P.3d 185, this Court determined:

> "Under the law of the case doctrine, "[i]f an appellate court has considered and passed upon a question of law and remanded the case for further proceedings, the legal question so resolved will not be determined in a different manner on a subsequent appeal." *Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 83 N.M. 558, 560, 494 P.2d 971, 973 (1972). Our notice of proposed disposition did

> not reflect any evidence that this Court "considered and passed upon" the issues raised by the Scanlons in their cross-appeal, since it made no mention of the issues at all. *Id.* Facing such a notice, the Scanlons might reasonably have believed that this Court wished to reserve judgment on the remaining issues until the district court applied the correct law. While it would have been advisable for the Scanlons to file a memorandum in opposition to the proposed disposition in order to seek clarification, under the circumstances of this case, we will not penalize the Scanlons for the ambiguity of our notice. *See State v. Breit*, 1996-NMSC-067, ¶ 12, 122 N.M. 655, 930 P.2d 792 (noting that application of the doctrine of law of the case is discretionary with the court and stating that an appellate court "will not apply this doctrine to perpetuate an obvious injustice"). Accordingly, we address any of the Scanlons' claims on appeal that were preserved below."

In the February 13, 2007 *Memorandum Opinion*, this Court stated:

> "In his docketing statement. Husband also argued that the district court erred as a matter of law when applying the MSA formula to determine Wife's share of his retirement benefits because it "failed to determine the community interest in the retirement benefits as of August 31, 1994." [DS 8] In our earlier notice, we indicated that we did not understand this issue because it appeared that the district court applied the formula set forth in the MSA. [RP 20 ¶ 5]
>
> "Husband now seeks to clarify this issue arguing that the district court improperly allocated benefits to Wife based upon Husband's salary at the time of the hearing, or when he became eligible for retirement, instead of at the time he and Wife divorced. [MIO 2-6] He claims that the court improperly included post-divorce increases in the retirement plan when awarding Wife her share. [MIO 5] Furthermore, he relies in part on federal law to support his claim that, even if Wife is entitled to payments before Husband retired, those payments must be based on Husband's earnings and the relevant percentage of salary that Husband was entitled to while married to Wife. [MIO 3-4]

"We decline to address Husband's arguments as to benefit computation because they were not raised in the district court. *See Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) ("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court."). Although we have not been provided with a copy of the transcript from the hearing on Wife's motion, Husband admits that he did not raise this issue at the hearing on Wife's motion nor did he introduce any evidence to support his interpretation of the terms of the MSA. [DS 5-7; MIO 3] It appears that Husband did raise this issue in his motion for rehearing, albeit in a somewhat cryptic manner because he did not include any of the analysis or argument set forth in his memorandum in opposition nor did he include the exhibit that he has attached to the memorandum in opposition. [RP 62-65] *Cf Jemko, Inc. v. Liaghat*, 106 N.M. 50, 55, 738 P. 2d 922, 927 (Ct. App. 1987) ("It is improper to attach to a brief documents which are not part of the record on appeal.").[2] We note that Husband's motion to reconsider was denied by operation of law. *See* NMSA 1978, §39-1-1(1953). The lack of analysis contained in the motion for rehearing and the failure of the district court to act upon the motion lead us to conclude that the district court never considered the arguments set forth in Husband's motion for reconsideration and clarified in his memorandum filed with this Court. As a result, Husband's arguments are not properly before us on appeal. See *Selby v. Roggow*, 1999-NMCA-044, 20 ¶¶ 10-11, 126 N.M. 766, 975 12 P.2d 379 (declining to consider additional information that was presented in the motion for rehearing because the trial court, which denied the motion by not acting on it within thirty days, did not consider the additional information when ruling on the motion)." (RP 108-109)

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[2]Although appellant did attach an Exhibit to the January 26, 2007 *Memorandum In Partial Opposition To Proposed Summary Affirmance*, it was made clear to this Court (page 3 thereof) that the information supplied was simply argument in the form of an exhibit, and that the exhibit was not evidence received by the trial court in the prior hearing. (Jerry was pro se at the time of the first hearing resulting in the first appeal.)

Because the Court of Appeals did not express an opinion as to the proper calculation of the amount of benefits, the trial court was able to receive the information which Jerry wished to present, which the trial court received into evidence. (7-25-07 hearing; Exhibit D).

Also, the trial court apparently believed it had authority to modify its previous judgment in other respects, because it did. The district court modified its previous judgment contained in its July 19, 2006 *Minute Order* by eliminating the provision in that order permitting Jerry to pay a minimum of $50 per month to reduce and retire the arrearage. RP 61. This provision was not carried forth to the new September 27, 2007 *Order On Hearing Following Remand*, which is the order under appeal.

Further, on remand, the trial court made findings of fact for the apparent purpose of justifying the trial court's decision concerning the calculation of benefits. *See* August 31, 2007 *Findings Of Fact And Conclusions Of Law*, ¶¶13-14, (RP 170), and ¶s 13-14 of September 27, 2007 *Order On Hearing Following Remand*, (RP 181-182).[3]

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[3]Jerry attacked these findings (actually conclusions of law) on pages 42-44 of the *Brief in Chief*.

Therefore, the Court of Appeals' prior decision contemplated further proceedings at which further evidence might be adduced. *Bell v. New Mexico Interstate Stream Commission*, 1996-NMCA-010, ¶17, 121 N.M. 328, 911 P.2d 222 (Ct. App. 1995). Further evidence was adduced, and, it is asserted, the trial court incorrectly determined the amount of benefits which is due to Linda, as set forth in the *Brief in Chief*.

In this connection, Jerry wishes to point out that a post trial motion which is denied by operation of law preserves the issue raised in that motion for appeal:

> "We believe that on May 10, 1968, 30 days after the filing of the motion, it is deemed overruled by operation of law if no ruling has been entered. This would be true in non-jury cases by virtue of § 21-9-1, N.M.S.A., 1953 Comp., and would follow in jury cases as logical under our Rule 5, § 21-2-1(5), N.M.S.A., 1953 Comp. ... ***Since the trial court's ruling on the motion prior to the expiration of the 30 day period would have been reviewable here, we hold that its failure to rule cannot avoid our review, and we will consider a motion for new trial timely filed as having been denied by the court if denied by operation of law.*** *Terry v. Biswell*, 66 N.M. 201, 345 P.2d 217 (1959)." *Montgomery Ward v. Larragoite*, 81 N.M. 383, 386, 467 P.2d 399 (S. Ct. 1970). (Emphasis added.)

See also, *Chavez-Rey v. Miller*, 99 N.M. 377, 380, 658 P.2d 452 (Ct. App. 1982).

In his August 2, 2006 *Motion For Rehearing*, Jerry stated:

> "The amount of benefits payable to Petitioner violates ¶s II(A)(5) and II(B)(4) of the *Marital Settlement Agreement* and *Madrid v. Madrid*, 101 N.M. 504, 684 P.2d 1169 (Ct.App.1984), because it grants Petitioner a portion of Jerry Garcia's retirement benefits earned after divorce." (RP 64)

Jerry requested that the district court:

> "Determine that post-divorce contributions to his retirement not be divided or distributed to Petitioner, and that the retirement benefits be determined as of August 31, 1994 as provided in the Marital Settlement Agreement;" (RP 65)

The requests made to the Court clearly placed in issue the proper calculation of the amount of benefits in accordance with the *Marital Settlement Agreement* provisions which accorded Jerry the separate interest in the pension benefits following divorce. This request was denied by operation of law 30 days later under former law. *See* Rule 1-054.1 *Committee Comment.* According to the holding of *Montgomery Ward v. Larragoite*, 81 N.M. 383, 386, 467 P.2d 399 (S. Ct. 1970), this issue was preserved for appeal.

In its February 13, 2007 *Memorandum Opinion* concerning this issue, the Court of Appeals cited *Selby v. Roggow* 1999-NMCA-044, ¶¶10-11, 126 N.M. 766, 975 P.2d 379 for its determination that Jerry's arguments were not properly before the Court of Appeals on appeal.

Selby stated:

> "When attachments to the motion for rehearing are properly before this Court for review, we will consider the documents in determining whether Plaintiffs have controverted Defendants' claim. For example, in *In re Estate of Keeney*, 121 N.M. 58, 60, 908 P.2d 751, 753, we held that we could consider de novo affidavits submitted along with a motion for reconsideration of summary judgment. "If the trial court does consider the new material and still grants summary judgment, 'the appellate court may review all of the materials *de novo*.'" *Id.* at 61, 908 P.2d at 754 (quoting *Fields v. City of S. Houston, Texas*, 922 F.2d 1183, 1188 (5th Cir. 1991)). Conversely, however, if the trial court did not consider the additional information, the reviewing court will generally decline to review such matters as not properly before it. *See Schmidt v. St. Joseph's Hosp.*, 105 N.M. 681, 684-85, 736 P.2d 135, 138-39 (Ct. App. 1987); *see also Estate of Keeney*, 121 N.M. at 60, 908 P.2d at 753 ("Because the trial court in Schmidt did not consider the affidavits when making its determination as to summary judgment, this Court could not review them as they were not among the affidavits upon which the trial court's decision was based.").

In consideration of this issue, a distinction needs to be made on the one hand with respect to the exhibit attached to the *Memorandum In Opposition* which attempted to explain the alleged trial court error in computing the benefits payable to Linda (see footnote 2 above), with the contentions raised in the *Motion For Rehearing* referenced above on pages 8-9. Under the authorities cited, the exhibit (construed as an evidentiary exhibit, and not as a demonstrative exhibit as an aid to explanation) could not be reviewed by this Court if the trial court had not had the opportunity to review it. Under this view, even if the demonstrative exhibit

had been attached to the *Motion For Rehearing*, the Court of Appeals still could not review it, since the motion was denied by operation of law, and not after review by the trial court.

The foregoing notwithstanding, *the issue of the proper calculation of the amount of benefits due Linda* was properly presented to the trial court in the *Motion For Rehearing*, and this issue was preserved for appeal under the holding of *Montgomery Ward v. Larragoite*, 81 N.M. 383, 386, 467 P.2d 399 (S. Ct. 1970).

Therefore, when this Court determined that it expressed no opinion on the calculation issue, after initially proposing to affirm that issue, the calculation issue was properly before the trial court on remand and is properly before this Court on appeal. Had this Court affirmed the calculation issue, the undersigned, on behalf of Jerry, would have submitted a motion for rehearing in this Court containing the above analysis, because one reason Jerry filed the *Motion For Rehearing* in the district court was to alert the trial court to error and preserve the issue for appeal.

Linda argues that her counsel's argument to the Court at the July 19, 2006 hearing was an "offer of proof". *Answer Brief*, page 20. However, there is no record cited (and the undersigned could not locate any) indicating this argument was an "offer of proof". Of course the "offer of proof" doctrine has no

applicability here. "An offer of proof is essential to preserve error where evidence has been excluded. *Williams v. Yellow Checker Cab Co.*, 77 N.M. 747, 427 P.2d 261 (1967)." *Nichols Corp. v. Bill Stuckman Constr., Inc.,* 105 N.M. 37, 39, 728 P.2d 447 (1986).

Lastly, the division of the *accrued benefits* (Brief in Chief, page 7) is not only what the parties agreed to, but is clear New Mexico law. Petitioner is not entitled to retirement benefits that accrued prior to her second marriage to respondent. *Pacheco v. Quintana*, 105 N.M. 139, 143-144 730 P.2d 1 (Ct. App. 1986); The PCA retirement rights accrued by husband during coverture were earned by community labor and constituted a contingent interest in retirement benefits. *Berry v. Meadows*, 103 N.M. 761, 767-768, 713 P.2d 1017 (Ct. App. 1986); "In 1969, the New Mexico Supreme Court ruled that the portion of military retirement credits accrued during marriage was community property. *LeClert v. LeClert*, 80 N.M. 235, 453 P.2d 755 (1969)." *Norris v. Saueressig*, 104 N.M. 85, 86, 717 P.2d 61 (Ct. App. 1985)

Accordingly, the Court of Appeals should reverse the decision of the trial court concerning the calculation of the amount of benefits payable to Linda as set forth in the *Brief in Chief.*

Construction of the Marital Settlement Agreement.

In its February 13, 2007 *Memorandum Opinion*, this Court reversed the minute order of the district court and remanded for an evidentiary hearing as to when the parties intended that Wife would be entitled to Husband's retirement benefits based upon the ambiguous language of the MSA. (RP 109-110).

Following the remand hearing, it is uncontroverted that the extrinsic evidence failed to determine when the parties intended that Linda would be entitled to Jerry's retirement benefits, because there was no communication between the parties or their counsel concerning this issue, other than the *Marital Settlement Agreement* and the March 28, 1995 *Domestic Relations Order Dividing Civil Service Retirement System Benefits*. Contrary to Linda's assertion, Jerry attempted to point out what the evidence elicited concerning each of the parties' subjective intentions. However, these intentions were not communicated to the other party. Accordingly, there was no meeting of the minds regarding this issue. Linda does not contradict this contention.

However, the proper determination of the trial court does not end there. The Court was still required to apply the provisions of the *Marital Settlement Agreement* and the *Domestic Relations Order Dividing Civil Service Retirement System Benefits* and the holding of *Ruggles v. Ruggles*, 116 N.M. 52, 860 P.2d 182 (S. Ct. 1993). Regarding this issue, the interpretation of the *Marital Settlement*

Agreement cannot contradict its terms. *Brief in Chief*, page 32 and authorities cited therein. To this document, is added the *Domestic Relations Order Dividing Civil Service Retirement System Benefits*, which was not presented to the Court at the first 2006 hearing, but informs both issues presented to this Court: 1) When was Linda to receive benefits? and 2) how much was she to receive? As argued on page 7 of the *Brief in Chief*, the *Domestic Relations Order* specifically states that Linda "*is entitled to receive her share of the benefits directly from the Office Of Personnel Management*". But that is not what the trial court did. The trial court ordered Jerry, not the Office of Personnel Management to make payments to Linda. This was error. It is clear that the Office of Personnel Management cannot make payments to a retiree until he retires. As stated in *Ruggles*:

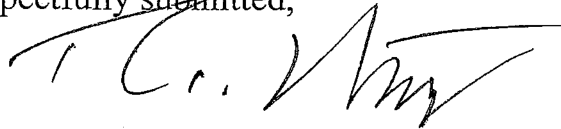
> "We are inclined to agree with Joseph that a voluntary property settlement between divorcing spouses, dividing their community property as they see fit, is sacrosanct and cannot be upset by the court granting the divorce, absent fraud, duress, mistake, breach of fiduciary duty, or other similar equitable ground for invalidating an agreement." *Ruggles v. Ruggles*, 116 N.M. at 70.

CONCLUSION

The Court should reverse the trial Court on the above issues, and require the Court to issue a *Domestic Relations Order* that the Office of Personnel

Management remit to Joyce $374.53 per month, plus applicable cost of living benefits thereon, commencing upon Jerry's retirement from Civil Service.

Respectfully submitted,



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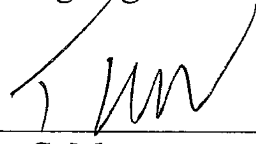
CERTIFICATE OF SERVICE

I certify I have caused to be mailed to the Honorable Stan Whitaker, and the Honorable Ernesto J. Romero, County Courthouse, POB 488, Albuquerque, New Mexico and opposing counsel, a copy of the foregoing on October 14, 2008.



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