

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

COURT OF APPEALS OF NEW MEXICO  
ALBUQUERQUE  
FILED

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Wendy E. Jones

**DAN LOPER d/b/a RIO LECHE DAIRY CO.,**

**Plaintiff/Appellant,**

**v.**

**Court of Appeals No. 31,357**

**JMAR, a New Mexico general partnership,**

**Defendant/Appellee.**

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**Appeal from District Court, Curry County  
No. D-0905-CV-2007-0013  
Honorable David P. Reeb, Jr.**

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**APPELLANT'S REPLY BRIEF**

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## I. SUMMARY OF PROCEEDINGS

### A. Nature of the Case

Distillation of the two opening briefs permits the Nature of the Case to be summarized: Dr. Loper entered into a lease purchase agreement with JMAR. He leased land upon which JMAR was to build a turn-key, operational dairy. The lease facilities were poorly constructed, virtually no engineering input was involved, and there were no design plans or specifications, except for the main panel wall, but not other parts, of the electrical system. There were no designs for the buildings, floors, footings, yards, plumbing, distant electrical service.

JMAR used a novice electrician, Kyle Snider, with only one previous dairy experience – and that experience was building a similar planless dairy for JMAR. Snyder made construction errors separate and apart from the design, or lack of design. Snider, settled with Loper for his torts; Loper reserved his design claims against JMAR.

The dairy's electrical systems failed. Although problems did not appear immediately, latent defects became intermittently evident; they allowed stray voltage to be released, probably when livestock, water, or wind caused contact between improperly placed wiring or defectively installed connections. This

intermittent, transitory voltage, present one hour and gone the next depending on variable circumstances, is called “stray voltage”.

Wiring defects were identified when Dr. Loper had independent electrician for possible stray voltage. This occurred because Dr. Loper was unable to identify any other cause for his herd’s diminished production and poor performance. A commercial electrical firm from Roswell, Precision Electric, found the stray voltage. An engineer, Professor LaVerne Stetson, who is among leading academics to publish on stray voltage, confirmed the problems when he inspected the facility.

Very low voltage levels of stray current adversely impact dairy cows. Stray voltage prevents cows from letting down their milk. By retaining some milk in their utters, cows develop mastitis and other virulent infections. These infections compromise the cow’s utter, ability to produce milk. Professor Stetson and Dr. Robert Corbett a veterinarian, proved these points.

Loper settled his claims against Snider Electric. He reserved claims against JMAR, the lease contracting party responsible to design and lease the facilities. The release reserves Loper’s claims against JMAR. The court ruled Loper’s claims against JMAR were compromised when Loper settled with Snider. JMAR contends the *doctrine of circuitry* of actions mandates this outcome.

JMAR also won summary judgment on causation after excluding opinions of Professor Stetson, Plaintiff's expert, contending his testimony was not reliable because there was no documented direct evidence of sufficient stray voltage to be harmful to cows. Loper contends, on appeal, these two rulings are incorrect.

**B. Course of Proceedings at the Disposition**

Loper's negligence and breach of contract claims against JMAR assert damages due to stray voltage and for breach of the lease. The trial court entered summary judgment, applied the *doctrine of circuity* of actions on all claims involving electrical matters, and found that Stetson's testimony should be precluded. (RP 3343-3344 RP 3411-3412).

This case could not be appealed immediately because additional contract claims, unrelated to the electrical problems at the dairy, involving whether Loper was entitled to buildings left either incomplete or unstarted required trial before an appeal here. This trial occurred in early 2011 and did not produce new appellate issues.

**II. SUMMARY OF THE FACTS**

**A. The Trial Court's Ruling on Causation and its Exclusion of Professor Laverne Stetson's Testimony as an Expert Witness was Erroneous. Stray Voltage at Rio Leche Dairy Caused by Deficient Wiring at the Time of Construction Proximately Caused Milk Loss.**

This controversy is resolved by reference to Stetson's reports, which were permitted by the trial court to be excessively tested, to the point of four (4)

depositions. Stetson gave one report and one affidavit. (RP 1294-95, 3191-98)

Professor Stetson reached these conclusions:

1. Electrical design deficiencies were present in the facilities. (RP 3193-94, ¶¶ 8-9; RP 3198, ¶ 7).

2. Stray voltage waxes and wanes; it is transitory, as improper grounding can be revealed when connections across points that should be prevented from transmitting electrical current are connected by moisture, water, steel pipes moved by a cow passing by, etc. (RP 3193, ¶¶ 7.3, 7.4).

3. Contact by cows, or other transitory actions causes stray voltage damages cows and causes declines in milk production. This occurs of the stray voltage is at or above 0.5 volts. (RP 3197, ¶¶ 2-4, 7; RP 3193, ¶ 7.6). At best the defense did not see the significance of this evidence, or use it in depositions. Instead it chose to ask overly broad deposition questions lacking sufficient specificity for a scientific response.

Professor Stetson also testified that:

1. As facilities designer, JMAR was responsible for problems with the dairy because it was built with no plans. (RP 3192, ¶ 7.1).

2. Inexperienced people built the dairy. (RP 3192, ¶ 7.2).

3. With reasonable certainty, “the manner in which the dairy parlor was constructed [caused] its development of stray voltage and stray

voltage did develop because of large amount of currents used on mechanical systems proximately caused injury.” (RP 3193-94, ¶ 9; RP 3198, ¶ 7).

4. The level of stray voltage detected was sufficient to cause injury to the cows. It can wax and wane. (RP 3193, ¶¶7.3, 7.4) Evidence adduced from electrician DeGray confirmed stray voltage was present and great enough to be harmful. (RP 3160-61; RP 3143, ¶ 3 and 4; RP 3153, 60:25-61:3.)

Professor Stetson’s opinions were buttressed by DeGray’s testimony in open court. DeGray’s testimony included facts like those Stetson said would, if presented, establish presence of stray voltage in sufficient quantity to damage cows. Even without DeGray’s testimony, Stetson had adequate evidence of stray voltage to prove proximate cause harm to the dairy herd. These included:

1. Deposition of Robert Seeley, Precision Electric employee.
2. Affidavit of Vern Fry, herdsman.
3. Precision Electric inspection summaries.
4. Snider’s answers to interrogatories and responses to requests for admission.
5. Deposition of general contractor.

(RP 2166, 42:10-44:15; RP 93; RP 3191, ¶ 4).



Stetson testified that as little as a half volt of stray voltage will interfere with the cows' milk letdown stimulus, a sensitive neurological response signaling the cow to allow herself to be milked. He knew DeGray found stray voltage measuring 115 volts – 230 times the level that can damage cows in the dairy. He also found high readings in other locations. (RP 3116, 66:10-68:11).

Stetson's opinions are based on proper science. (RP 3192, ¶ 4 & ¶ 7.2). They have all indicia of trustworthiness. They are supported by peer-reviewed literature, objective methodologies, ability to quantify error rate, and reasonable scientific methodologies. (RP 3081; RP 3411).

#### **B. Settlement with Snider**

The trial court's decision against Loper on the basis of the *doctrine of circuity* of actions is inconsistent with the settlement agreement and does not implement any New Mexico public policy. As the Appellant Brief-in-Chief recites (p.16) the settlement agreement provides in pertinent part:

Loper agrees to defend, indemnify, and hold Snider and his insurer harmless from...claims...for indemnification or contribution...by...JMAR...in any way....

(RP 3321-22). The settlement agreement continues:

Loper agrees to reduce any judgment...against JMAR...to extinguish any claim which JMAR...would otherwise have against Snider for indemnity or contribution.

(RP 3322, ¶ 2.3).

### III. ARGUMENT

#### A. Issues Presented

Succinctly restated Appellant presents these issues:

1. Was engineer Stetson's testimony improperly excluded and was there sufficient evidence to prove causation?
2. Does the *doctrine of circuitry* of actions preclude prosecution of claims against JMAR because settlement was reached with Snider?

#### B. Reply Concerning Appellee' Argument

Summary judgment was not properly granted. Error occurred below.

#### C. Standard of Review

No disagreement between the Parties.

#### D. Substantive Error of Trial Court

The trial court's exclusion of Professor Stetson's testimony is manifestly erroneous. The highly experienced engineer, who has published extensively on stray voltage and its risk to dairies, had ample evidence to support his opinion there was much stray voltage in Loper's dairy as a result of construction defects, which harmed Loper's cows. The work of Precision Electric, related by serviceman, Mr. Robert Seely, and owner, Don DeGray supply precise evidence that stray levels significantly above a threshold injury level of 0.5 volts, and the defense's

threshold of 2.0 volts, was present in the barn. (RP 3211, 60:25-69:18) The trial court committed manifest error by overlooking these facts. This is particularly true of the trial court's refusal to recognize the import of Precision's working papers produced at the outset of the case and disclosed by the first deposition taken by the parties. (RP 3191, ¶¶4.1, 4.7)

The trial court erred when it declined to consider this evidence and DeGray's testimony when it ruled on the renewed motion for summary judgment. (RP 3313-3314). The trial court previously noted it could not ignore the evidence given in court and it had accepted Mr. DeGray's testimony. (RP 3131, 114:10-117:9, CD Dates: See attached 12-08-08, 11:58:17) The trial court later ignored this evidence and granted summary judgment. This is a manifest error. *Parkhill v. Alderman-Cave Mining*, 2010 NMCA ¶ 46, 149 N.M. 140, 149, 245 P.3d 545, 594.

**E. Professor Stetson Opined that Stray Voltage Hurt the Cows.**

JMAR contends (Ans. Br. 7) Professor Stetson is not qualified to describe the impact of stray voltage on cows. First, Appellee fails to come to grips with Stetson's credentials, underlying facts and opinions. He made it clear that stray voltage is not always present at the point where the contact permitting current to migrate to an unwanted location occurs. It may shock animals elsewhere. Appellee misunderstands stray voltage. (Ans. Br. 12). Stetson explained this repeatedly. (RP 3193 ¶¶7.3-7.4). Second, while Appellee complains of no proof

of a temporal relationship between stray voltage and diminished milk production, it concedes one exists while contending it is not sufficient. *Id.* Again, the point is not correct. Stetson relied on Precision Electric's contemporaneous-with-injury voltage readings (conceded at Ans. Br. p. 13). Repairs had been made before Stetson arrived. He properly relied upon observations by professionals, just as a physician seeing a patient after an episode would rely on medical records of predecessor physicians. Nothing in this Court's precedent suggests any insufficiency in doing so.

**F. Dr. Corbett's Opinions Sufficed to Prove Causation, Nonetheless.**

Appellee attacks Dr. Robert Corbett, a nutritionist and veterinarian, as lacking foundation, too. The trial court ignored Dr. Corbett's testimony in excluding Professor Stetson's opinions and granting summary judgment on causation. (RP 1221-1234) Corbett performed an analysis, using the scientific method, just as physicians and veterinarians routinely perform in their diagnostic processes. i.e., a differential diagnosis in which the panoply of possibilities are considered, and systematically is winnowed to the most probable cause. Dr. Corbett concluded stray voltage caused by deficient or defective wiring injured Loper's herd. (RP 1274, ¶ 24).

Dr. Corbett did opine that *undetected* stray voltage caused harm. (Ans Br 16). Had the stray voltage been detected it would have been corrected. This

feigned distinction in the Answer Brief is not a distinction at all. JMAR does concede Dr. Corbett did opine that stray voltage caused harm, thereby rendering Appellee's position void for its own internal inconsistency. Appellee first says Dr. Corbett did not offer definitive opinions and then attacks the definitive opinions he gave. "Every sweet has its sour". R Waldo Emerson, *Compensation* (Harvard Press 1903). Appellee's inconsistency proves Emerson's point.

Simply, Dr. Corbett considered, on a scientifically-reasonable differential diagnostic basis, the most probable cause of harm in this case and concluded stray electrical voltage (which was promptly repaired when detected, but not until after loss was sustained) was the proximate cause of harm. Dr. Corbett's testimony was admissible and provided a proper predicate for Professor Stetson's opinions. The error to exclude Professor Stetson's analysis and conclusions was a manifest one.

**G. The Trial Court Erred in Adopting and Applying the *Doctrine of Circuity* of Actions and Granting Summary Judgment Under It**

Central to the trial court's summary judgment ruling was its adoption of the *doctrine of circuity*, a legal theory not previously applied in New Mexico and seldom seen outside an insurance context. The parties appear to agree, as Appellant noted in Loper's Brief-in-Chief (p. 30), the *doctrine of circuity* of actions stems from insurance law, originating principally in Texas, and relates to a distinction between a release and a covenant not to sue, or a release with a reservation of claims. The doctrine is used to extinguish claims when a plaintiff

would end up indemnifying another party for the plaintiff's own claim. *Refinery Holding Co., LC, v. TRMI Holdings, Inc.*, 302 F.3d 343 (5th Cir. 2000). The phrase "circuitry of actions" is sometimes discussed in the context of counterclaims, and the compulsory counterclaim rule is said to avoid circuitous actions in which a plaintiff sues, a defendant defends, but does not assure the defendant's counterclaims against the plaintiff until a separate suit. The ultimate resolution of matters between the parties can become circuitous without a compulsory counterclaim rule. 35A *CJS Federal Civil Procedure* § 383.

The Appellee's position is that distinct direct claims against JMAR, not bearing on the performance of the electrical subcontractor building the commercial dairy in question, are barred by the *doctrine of circuitry*. In other words, the Appellee's position is that the *circuitry doctrine* precludes any direct tort claims against JMAR because settlement terms were reached with Snider. JMAR perceives no distinction between the designer's negligence for the manner in which the electrician was engaged to perform electrical service and the service itself.

Rio Leche does see a distinction. Snider settled his installation omissions—incomplete wiring, insufficient joints at fuse boxes, inadequate efforts to assure sufficient insulation, or mis-selection of materials. JMAR is responsible for how the barn was designed, including how the electrical system was designed within the barn, and the design deficiencies proximately causing loss.

Virtually all large tort cases involve potential contribution issues that can arise when one or more tortfeasors consider entering into settlement agreements. The same is also true for other tort cases in which liability may be shared by multiple defendants or even unnamed tortfeasors.” ...a settling tortfeasor may or may not be protected from contribution liability according to whether other conditions have been satisfied.” *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d. 414 (Tex 1984)(mixed questions of New Mexico and Texas law).

Common law rules concerning contribution among tortfeasors, or separation of claims, changed when the state adopted the *Uniform Contribution Among Tortfeasors Act*, NMSA §§ 24-1-11 *et seq.* Even a satisfaction of judgment does not operate to discharge other tortfeasors now. *Herrera v. Uhl*, 80 N.M. 140, 141, 452 P.2d 474, 475 (1969). The issue here is not so much *contribution* as *indemnification*, while the two (2) are connected. Circuity of actions seeks to prevent dual lawsuits where (a) the plaintiff could recover from the defendant, and (b) the defendant could then seek indemnification from a released party because “the circuity of these actions seems wasteful at best.” Perlman, *Interference With Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrines*, 49 U.ChiL.Rev 61 (Winter 1982). The doctrine prevents a circular chain of indemnification which effectively prevents the court from granting any meaningful relief. *Walmart Stores, Inc., v. RLI Ins. Co.*, 292 F.3d 583 (8th Cir.

2002) (generally, courts will not allow parties to engage in circuitous action when the foreseeable end result is to put the parties back in the same position in which they began.”

Here, it is clear the parties did not intend to ever be back where they began. Snider was to be released for what Snider did. But, if the defense claimed, as it does here, that Snider was accountable for JMAR’s wrongful conduct, then the plaintiff would bear the burden of distinguishing between Snider’s torts and those of JMAR. Indeed, to the extent that what Snider did might have given rise to vicarious liability against JMAR ceased, the direct claims against JMAR are preserved in the release.

There simply is no circuitry here. Distinct claims against JMAR are maintained. The trial court’s failure to discern the direct claims from the vicarious claims was an error. Testimony by Dr. Robert Corbett, and Professor Laverne Stetson supported the direct claims against JMAR<sup>1</sup>. Summary judgment was improvidently granted below on the direct claims for negligence.

#### **IV. CONCLUSION**

Dr. Loper adduced competent evidence from his engineering witness to prove causation. Consistently, the witness, Professor Emeritus Laverne Stetson,

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<sup>1</sup> Appellee claims that Appellant could have pursued his negligence claims against JMAR at trial. This argument is without merit. The direct negligence claims against JMAR relate to electrical matters which the trial court clearly ruled were precluded by the doctrine of circuitry. (RP 3343) That ruling is the subject of this appeal and was properly preserved by Appellant.



the most published person known in the area of stray voltage in dairy facilities, defended his opinion that design defects in the dairy JMAR agreed to build for Rio Leche proximately caused loss.

The trial court went where no New Mexico court has gone before—to adopt the *doctrine of circuitry of actions* and thereby treat the distinct torts of JMAR, as designer, and those of Snider, the electrician as artisan, without distinction. It erroneously concluded that indemnification provisions in the Snider release give rise to circuitous claims precluded by the law. Summary judgment should not have been granted below.

Respectfully submitted:

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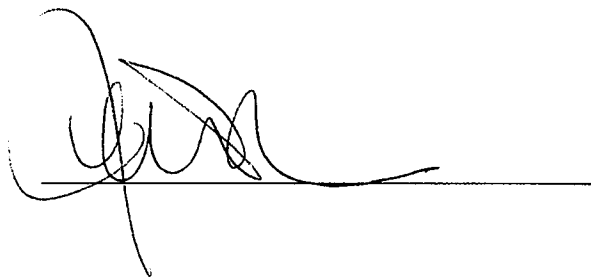
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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the above Appellant's Reply Brief was sent by First-class U.S. mail on this 3<sup>rd</sup> day of January, 2012 addressed to:

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A handwritten signature in black ink, appearing to read "Randy Knudson", is written over a horizontal line. The signature is stylized and cursive.