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STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

APPLICATION OF NEARBURG EXPLORATION COMPANY L.L.C. FOR TWO NON-STANDARD GAS SPACING AND PRORATION UNITS, LEA COUNTY, NEW MEXICO.

CASE NO. 12662 (*de novo*)

APPLICATION OF THE OIL CONSERVATION DIVISION FOR AN ORDER CREATING, RE-DESIGNATING AND EXTENDING THE VERTICAL AND HORIZONTAL LIMITS OF CERTAIN POOLS IN LEA COUNTY, NEW MEXICO.

CASE NO. 12908-A (*severed and re-opened)*

ORDER NO. R-11768-A

ORDER ON PRE-HEARING MOTIONS OF REDROCK

BY THE DIVISION DIRECTOR:

This matter has come before the Division Director of the Oil Conservation Division on motion of Redrock Operating Ltd. Co. (hereinafter referred to as "Redrock") for an Order striking certain exhibits and limiting evidence during the hearing of this matter, and the consolidated response to the motions of Nearburg Exploration Company L.L.C. (hereinafter referred to as "Nearburg"), and the Division Director, on this ____ day of October 2002, having reviewed the motions, the response, the pre-hearing statements, and the proposed exhibits submitted by Nearburg,

FINDS:

1. Redrock has filed two motions in this matter. The first is a motion *in limine*, which seeks to exclude from the hearing of this matter any evidence concerning settlement, discovery, contracts, title or "Redrock's overriding royalty." The second, a motion to strike, objects to Nearburg's proposed Exhibit 2 (the chronology), Exhibit 12 (a title opinion), Exhibit 13 (a letter and title opinion), and Exhibit 23 (a letter and an assignment).

2. In both motions, Redrock expresses concern that admission of these items might unduly influence the Commission, might cause the Commission to be prejudiced against Redrock, or misdirect the Commission's attention away from violations of rules and regulations of the Oil Conservation Division that Redrock alleges were made by Nearburg. Redrock also expresses concern that the Commission will be asked to interpret or construe contracts.

3. Nearburg provided a consolidated response to the motions. Nearburg argues that the motion to strike is improper in this context because the evidence sought to be stricken is not contained in a pleading, and does not conform to NMRA 2002, Rule 1-012(f). Nearburg argues that the motion *in limine* is vague and lacks specificity, and that Redrock's failure to specify which arguments and exhibits it seeks to exclude means the motion *in limine* must be dismissed. Nearburg argues that its Chronology and its proposed Exhibit 12 (the title opinion) will not be offered to establish title, but instead to help explain how the present dispute arose. Nearburg argues that proposed Exhibits 13 and 23 are necessary to establish the relevant pool boundaries and the boundaries of the gas storage unit. Nearburg argues that its proposed Exhibit 23, pertaining to the Llano well, is relevant to the issue of the appropriate spacing unit. Nearburg argues that all of the objections lodged by Redrock go to the weight of the evidence, not its admissibility.

4. The New Mexico Rules of Evidence apply in hearings before the Commission, but the rules are relaxed where justice requires. Rule 1212, 19 NMAC 15.N.1212 (the New Mexico Rules of Evidence apply in hearings before the Commission, but "... such rules may be relaxed ... where ... the ends of justice will be better served."). Rule 1212 adopts a standard that is similar to that applied by the New Mexico Courts. See Ferguson-Steere Motor Co. v. State Corporation Commission, 314 P.2d 894, 63 N.M. 137 (1957). The rule has its limitations. See *e.g.* Bransford v. State Taxation and Revenue Department, 125 N.M. 285, 960 P.2d 827 (Ct.App. 1998)(*legal residuum* rule).

5. Evidentiary issues like those presented here do not arise often in disputes before the Commission. It is well known that the Commission is well known as a body possessing special expertise, technical competence and specialized knowledge in matters relating to the regulation of oil and natural gas exploration and production. Santa Fe Exploration 114 N.M. at 114-115 ("[T]he resolution and interpretation of [conflicting evidence] requires expertise, technical competence, and specialized knowledge or engineering and geology as possessed by Commission members."). See also Viking Petroleum v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983)(the Oil Conservation Commission has experience, technical competence and specialized knowledge dealing with complex matters relating the regulation of exploration and production of oil and natural gas, and the sometimes arcane rules that govern such operations), Grace v. Oil Conservation Commission, 87 N.M. 205, 208, 531 P.2d 939 (1975)(same).

6. The Commission's special expertise, technical competence and specialized knowledge make it unlikely that it will be unfairly swayed or prejudiced by evidence that might normally be admitted to a jury. The Commission is quite capable of giving such evidence its proper weight. And for the same reason, it is unlikely that objections to the admissibility of evidence based on Rule 11-403 of the Rules of Evidence on the grounds of prejudice or confusion will be well-taken.

7. Case No. 12622 concerns the application of Nearburg to create non-standard 160 acre spacing units comprising the northeast quarter and the southeast quarter of Section 34 (Township 21, Range 34 East, NMPM, Lea County, New Mexico). Case No. 12908-A is a nomenclature case originally filed by the Division in which it is proposed that the East Grama Ridge-Morrow Gas Pool be contracted to exclude the east half of Section 34, and the Grama Ridge-Morrow Gas Pool be extended to include the east half of that section. The relevance of Nearburg's proposed exhibits, other evidence and argument should be evaluated according to the goals of the proceeding as set forth in the applications.

8. Taking the specific objections of Redrock one by one, Redrock objects to the introduction of any evidence regarding settlement. The only such evidence that seems to be offered at present is contained in Nearburg's proposed Exhibit 2, the chronology. Nearburg offers the chronology to review in demonstrative form the events of the last three years that led to the filing of the applications. See Nearburg's consolidated response, at 8. Nearburg also argues that the chronology is responsive to the issue raised by Redrock: "how did Nearburg get into this mess." See Redrock's Motion in Limine, at 2. Redrock argues that evidence of settlement negotiations is admissible so long as the conduct or statements contained in those proceedings are not offered to establish liability.

9. Rule 11-408 of the Rules of Evidence, NMRA 2002, provides that "[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount, is not admissible to prove liability of the claim or its amount." The Rule does not prohibit admission of such evidence for another purpose, and the mere fact that a settlement has occurred may be admissible. See Fahrbach v. Diamond Shamrock, Inc., 1996-NMSC-063, 122 N.M. 543, 928 P.2d 269. However, "matters regarding settlement are not usually relevant." Fahrbach, 122 N.M. at 548. Moreover, the rule "... generally counsels the trial court to exclude evidence of settlement unless the party wishing to introduce such evidence establishes a valid purpose." Examples of a valid purpose are provided in Fahrbach; the purpose described by Nearburg (to give context to these proceedings) is not one of them.

10. As noted, Rule 1212 of the rules and regulations of the Oil Conservation Division requires adherence to the New Mexico Rules of Evidence except where relaxation of the rules is necessary to serve "... the ends of justice ..." Here, the fact that

settlement negotiations occurred, or their day-to-day progress, is not critical to the Commission's deliberations and relaxation of the Rules of Evidence in this instance is not required by the ends of justice. Accordingly, the chronology should be revised to exclude such references.

11. Redrock also objects to any evidence concerning "discovery." It is not clear what discovery Redrock is concerned with, and no specific objection is made to any particular exhibit or line of questioning or argument. Therefore, no specific ruling can issue on this point unless and until evidence is offered during the hearing of this matter. It should be noted that if the Commission is asked to resolve and remaining procedural matters during the hearing of this matter, it may need to receive evidence concerning "discovery" in order to render a proper ruling.

12. Redrock objects to evidence being received by the Commission concerning "contracts," "title," or "Redrock's overriding royalty." Redrock specifically objects to Nearburg's proposed Exhibit 12, a title opinion, Exhibit 13, a letter and a title opinion, and Exhibit 23, a letter and assignment. With respect to Redrock's overriding royalty, Redrock asserts that its existence has been admitted to by Nearburg, and also asserts that there is no issue whether the royalty interest exists as described, citing to the record of the Division case for this assertion.

13. It appears, on review of Nearburg's pre-hearing statement and Exhibits 12, 13 and 23, that this evidence (denoted as "land testimony" by Nearburg) presents a history of Section 34 and of the two pools at issue here, and is apparently being offered by Nearburg to explain how this controversy arose. This kind of contextual evidence is always helpful to the Commission.

14. However, Exhibit 12, a title opinion issued to Roca Resources Company, Inc., appears to raise hearsay concerns. But its admissibility cannot be assessed until a foundation is presented during the hearing. Exhibit 13 appears to be a document prepared by Redrock and may therefore be admissible under the hearsay exception in NMRA 2002, Rule 11-801(D)(2)(a) (admission of party opponent). Once again, its admissibility cannot be assessed until a foundation is presented during the hearing. Exhibit 23 consists of a letter that may constitute hearsay, and an assignment that appears not to be hearsay. See Rule 11-803(N)(records of documents affecting an interest in property) or Rule 11-803(O)(statements in documents affecting an interest in property). No ruling can be made on the documents that comprise Exhibit 23 until a foundation is laid during the hearing.

15. Redrock also expresses a broader concern that the Commission will be invited to decide "contractual" issues between the parties. Nearburg, in its consolidated response to the motion *in limine* and motion to strike, states that its Exhibit 13 "... will not be offered for the purpose of establishing title or arguing title issues." See Nearburg's Consolidated Response, at 8. In the remainder of its response and in its amended pre-

hearing statement, Nearburg does not raise any contractual or title issues, and its pledge not to raise such issues on page 8 of the consolidated response appears to be a broad one. Therefore, no protective order is necessary at this time; if such issues arise during the hearing of this matter, Redrock should make objection at the time evidence is offered.

16. Redrock also lodges an objection to the chronology as a whole (Nearburg's proposed exhibit 2) on the grounds that the exhibit is argumentative, contains hearsay, contains extraneous matters and contains matters beyond the jurisdiction of the Commission.

17. The New Mexico Rules of Evidence permit admission of a summary of "... voluminous writings ... which cannot be conveniently be examined in court ..." NMRA 202, Rule 11-1006. An adequate foundation for introduction of a summary under Rule 1006 can be established by a witness who either prepared the summary or had a supervisory role and knowledge of how it was prepared. Cafeteria Operators v. Coronado - Santa Fe Associates, 1998-NMCA-005, 124 N.M. 440, 952 P.2d 435. Nearburg appears to view the chronology as a summary, admissible under Rule 1006. A foundation will have to established during the hearing for admission under Rule 1006, and a ruling on this point will have to await the hearing.

18. However, proposed Nearburg Exhibit 2 appears to be a hybrid; while it is partly a summary of documents, it is also partly a chronology of events. Review of the document discloses that documents representing each entry are not going to be in the record (even if all references to settlement are disregarded). The chronology is probably best characterized as a demonstrative aid to Nearburg's witnesses rather than as a summary. It may be admitted as s demonstrative aid or, if the proper foundation is laid during the hearing, as a summary pursuant to Rule 11-1006. It should be noted that documents similar to Nearburg's chronology are routinely accepted by the Oil Conservation Division and the Commission and have been helpful to provide necessary background and orientation --- however, because of the *legal residuum* rule, such documents have only rarely been relied upon in rendering a decision.

19. Redrock objects to "extraneous matters" in the chronology, and this objection seems to be one of relevance. Redrock has not identified which items are "extraneous." Therefore, no ruling can be made on this point. Redrock also objects to inclusion in the chronology of matters that are "beyond the jurisdiction" of the Commission. Once again, no specific items are referred to. This may be an argument related to Redrock's concerns about "contractual" or "title" issues discussed earlier, in which Redrock's concerns have been addressed. Reviewing the chronology, it appears that any given item, such as the offer of the State Land Office to lease acreage on December 21, 1999, may relate to a matter that is "beyond the jurisdiction" of the Commission in terms of regulatory authority, but that it is nevertheless relevant and admissible to provide background and context for the present controversy. No ruling on this point can be made due to the lack of specificity.

IT IS THEREFORE ORDERED THAT:

1. Redrock's motions concerning the chronology (Nearburg's proposed Exhibit 2) are granted in-part and denied in-part. Redrock's objection to the document in its entirety is denied subject to a proper foundation being laid by Nearburg during the hearing of this matter, either as a summary or as a demonstrative aid. Redrock's objection to evidence of settlement negotiations contained within Exhibit 2 is granted; Nearburg shall remove all such references and resubmit the document. Redrock's objections to material within Exhibit 2 concerning "extraneous matters" and to "matters beyond the jurisdiction of the Commission" are denied for lack of specificity.

2. Redrock's motions concerning the title opinion (Nearburg's proposed Exhibit 12) are denied subject to a proper foundation being laid by Nearburg during the hearing.

3. Redrock's motions concerning the letter and title opinion (Nearburg's proposed Exhibit 13) are denied subject to a proper foundation being laid by Nearburg during the hearing.

4. Redrock's motions concerning the letter and assignment (Nearburg's proposed Exhibit 23) are denied subject to a proper foundation being laid by Nearburg during the hearing.

5. Redrock's motion *in limine* concerning contracts, title and Redrock's overriding royalty are denied. If Nearburg raises these issues for the purpose of obtaining a Commission ruling on such matters (rather than for the purpose of providing context, as they are presently offered), Redrock may raise an appropriate objection.

6. A ruling on Redrock's motion *in limine* concerning "discovery" is deferred to the hearing upon appropriate objection.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

LORI WROTENBERY
Director

S E A L

1997-NMCA-002, 122 N.M. 679, 36 N.M. St. B. Bull. 5 BAERWALD V. FLORES (Ct. App. 1996) 930 P.2d 816, 1996 N.M. App. Lexis 102

DONNA L. BAERWALD, Plaintiff-Appellant,

vs.

PATRICIA A. FLORES, Defendant-Appellee.

Docket No. 17,160
COURT OF APPEALS OF NEW MEXICO
1997-NMCA-002, 122 N.M. 679, 36 N.M. St. B. Bull. 5, 930 P.2d 816, 1996 N.M. App. LEXIS 102
November 22, 1996, Filed
APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY. JAMES A. HALL, District Judge.

Petition for Writ of Certiorari Denied January 9, 1997. Released for Publication January 16, 1997. As Corrected January 31, 1997.

COUNSEL

DENNIS P. MURPHY, MONTOYA, MURPHY & GARCIA, Santa Fe, NM, for Appellant.
THOMAS A. SIMONS IV, ROBERT D. SCKALOR, SIMONS, CUDDY & FRIEDMAN, LLP, Santa Fe, NM, for Appellee.

JUDGES

LYNN PICKARD, Judge. WE CONCUR: RUDY S. APODACA, Chief Judge, THOMAS A. DONNELLY, Judge.
AUTHOR: LYNN PICKARD

OPINION

*{*681}* **OPINION**

PICKARD, Judge.

{1} This case requires us to determine whether the trial court abused its discretion by qualifying a biomechanical engineer to testify as an expert witness regarding causation of temporomandibular joint (TMJ) injuries. On the facts before us, we conclude that the trial court did not abuse its discretion in this ruling or in related evidentiary rulings.

BACKGROUND AND ISSUES

{2} This case arises out of an auto accident. The jury found that Defendant was negligent, but that the negligence did not cause Plaintiff's injuries. Accordingly, judgment was entered for Defendant. Plaintiff appeals alleging as error that: (1) the trial court abused its discretion by qualifying the biomechanical engineer as an expert; (2) NMSA 1978, Section 61-23-3(E) (Repl. Pamp. 1993) requires that an engineer be licensed in New Mexico before he or she is competent to give expert testimony; (3) the trial court erred in allowing the engineer to give an opinion on medical causation; (4) the contents of an article upon which the witness relied were inadmissible

hearsay; (5) the trial court should have admitted evidence in the form of correspondence that Defendant attempted to change the mind of another expert witness who evaluated Plaintiff at Defendant's request, but whose testimony was favorable to Plaintiff; (6) the trial court should have taken judicial notice and informed the jury of the New Mexico engineering statutes; and (7) the trial court improperly admitted an erroneous summary of Plaintiff's acupuncture records. We consolidate the first two and second two issues and discuss them at some length. We discuss the other issues more summarily. We affirm.

FACTS

{3} Plaintiff was driving west on Airport Road in Santa Fe when Defendant pulled out in front of her from an intersection. The vehicles collided, and Plaintiff claimed injuries as a result. Her complaint sought damages, including compensation for lost wages and medical bills resulting from injury to her temporomandibular joints. At trial, Plaintiff introduced expert testimony from her oral maxillofacial surgeon that the collision caused her TMJ injuries. Dr. Mark McConnell, another oral maxillofacial surgeon, who performed an independent medical examination at Defendant's request, also testified that Plaintiff's injuries resulted from the collision.

{4} Defendant called two expert witnesses. One was Eugene Vander Pol of Comprehensive Medical Review, a California litigation support service. Mr. Vander Pol held himself out as an expert, not in any medical field, but in the field of biomechanical engineering. Over Plaintiff's objections to his general qualifications as well as to the specific subject of his testimony, the trial court qualified Mr. Vander Pol as an expert in the field of biomechanical engineering, and allowed Mr. Vander Pol to give his opinion that it was unlikely that Plaintiff's injuries resulted from a collision such as occurred in this case. Mr. Vander Pol based his opinion in part on an article by physicians who were also engineers. The article contended, based on an analysis of gravitational units or G-forces, that TMJ injuries could not result from rear-end collisions. Plaintiff unsuccessfully objected to a discussion of the article's contents through the testimony of Mr. Vander Pol, claiming a lack of foundation and hearsay.

{5} Dr. Samuel Jacobson, a physician affiliated with the same litigation review service *{*682}* as Mr. Vander Pol, also testified that Plaintiff's TMJ injuries were caused by pre-existing dental and degenerative processes, and not by the accident. The jury ultimately found for Defendant, and Plaintiff now appeals.

DISCUSSION

Expert Witness Qualifications

{6} "The rule in this State has consistently been that the admission of expert testimony or other scientific evidence is peculiarly within the sound discretion of the trial court and will not be reversed absent a showing of abuse of that discretion." **State v. Alberico**, 116 N.M. 156, 169, 861 P.2d 192, 205 (1993). Nevertheless, the abuse of discretion standard is not a "rubber stamp"

on the trial court's decision, and it does not prevent an appellate court from "conducting a meaningful analysis of the admission [of] scientific testimony[.]" **Id.** at 170, 861 P.2d at 206.

{7} In conducting this analysis, we begin with NMRA 1996, 11-702. It states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

The trial court qualified Mr. Vander Pol to testify on behalf of Defendant as an expert in the field of biomechanics. Plaintiff contends that the trial court erred because Mr. Vander Pol did not have sufficient qualifications principally because he was not licensed as an engineer under either the California statutes or the New Mexico statutes.

{8} Plaintiff relies primarily on Section 61-23-3(E) (defining the practice of engineering as including the giving of expert technical testimony) for the proposition that Mr. Vander Pol's lack of an engineer's license makes him ineligible to testify as an expert witness in any engineering field. The New Mexico Supreme Court governs the admissibility of evidence by procedural rules it adopts. **State ex rel. Reynolds v. Holguin**, 95 N.M. 15, 17, 618 P.2d 359, 361 (1980). The rules of evidence prevail if there is a variance between the rules and a statute. **Id.** NMRA 11-702 makes witness qualifications a question for the trial court, and we resolve any apparent conflict between that rule and the statute in the rule's favor. The trial court therefore did not err in qualifying the witness despite the language of Section 61-23-3(E).

{9} Plaintiff also contends that Mr. Vander Pol's failure to be licensed anywhere is fatal to his qualification as an expert witness. An expert witness, however, may be qualified on foundations other than licensure under NMRA 11-702. **Madrid v. University of Cal.**, 105 N.M. 715, 717, 737 P.2d 74, 76 (1987). Mr. Vander Pol's qualifications as a biomechanical engineer included a bachelor's degree and a master's degree in mechanical engineering with emphasis in biomechanical engineering. He was licensed as an engineer intern in California. He testified that he performed research in the area of biomechanics, although it appeared that the research was limited to case work performed for the litigation review service for which he had worked for one year and to reading the scientific literature related thereto. Mr. Vander Pol testified that he had read almost all of the scientific literature on TMJ and he had specifically studied the biomechanics of TMJ. He had been qualified to testify as an expert in four states.

{10} Given the foregoing evidence, we cannot hold that the trial court abused its discretion in determining that Mr. Vander Pol was qualified to testify as an expert in biomechanics. **See Shamalon Bird Farm, Ltd. v. United States Fidelity & Guar. Co.**, 111 N.M. 713, 714, 809 P.2d 627, 628 (1991) (trial court has wide discretion to determine whether witness is qualified to testify as an expert); **Smith v. Smith**, 114 N.M. 276, 281, 837 P.2d 869, 874 (Ct. App. 1992) (no set criteria can be laid down to test qualifications of expert). Considering Mr. Vander Pol's

graduate degree in engineering and practice in the field, the trial court could reasonably determine that he possessed knowledge and experience that would assist the jury in understanding the biomechanical aspects of this case. **See** NMRA 11-702.

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{11} Mr. Vander Pol testified extensively on the amount of force exerted on the human body by the accident expressed in terms of G-forces. He based this testimony on his study of biomechanics and engineering. He testified about the weights and speeds of the vehicles involved and extrapolated his information based on pictures of the vehicles and the amount of damage done by the accident. This was proper testimony, and Plaintiff does not challenge it except on the grounds of lack of qualifications generally.

Substance of Expert Witness Testimony

{12} Plaintiff does, however, vigorously challenge Mr. Vander Pol's opinion that the accident did not likely cause her TMJ injuries. The issue we address is whether that opinion is prohibited by the general rule that expert testimony must be helpful to the jury in terms of the relevance, reliability, and validity of the testimony, **see Daubert v. Merrell Dow Pharmaceuticals**, 509 U.S. 579, 589-95, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993), or the specific rule that nonmedical experts cannot testify on issues of medical causation, **see Woods v. Brumlop**, 71 N.M. 221, 225, 377 P.2d 520, 523 (1962) (cause and effect of a physical condition lies in a field in which only medical expert can give competent opinion).

{13} First, in her brief in chief, Plaintiff contends it was error to allow Mr. Vander Pol to testify that, in his opinion, it was extremely unlikely that **Plaintiff** could have sustained **her** TMJ injury in this motor vehicle collision. Mr. Vander Pol never testified that it was unlikely this accident caused the Plaintiff her TMJ injuries, because the trial judge did not allow him to so testify.

{14} The testimony was:

Q. Do you have an opinion as to whether this accident caused Ms. Baerwald's claim for TMJ injury?

A. Yes I do.

OBJECTION, your honor.

COURT. Go ahead with your question, sir.

Q. What is your opinion?

OBJECTION, your honor.

CT. I ask you to rephrase the question as to whether an accident such as this could cause TMJ injury, not specific to Ms. Baerwald since he has not examined her.

Q. Mr. Vander Pol, could an accident, such as the one Ms. Baerwald was involved in, could it have . . . could it cause a TMJ injury?

A. It's extremely unlikely. . . .

{15} Contrary to Plaintiff's contention, it is clear from the testimony that the trial court limited Mr. Vander Pol's opinion to his area of expertise, that is, the effects of forces on the human body, and refused to allow him to offer an opinion as to the causation of Ms. Baerwald's specific injury by this particular accident.

{16} Second, in making our determination, we also note that our Supreme Court, in **Madrid**, 105 N.M. at 716, 737 P.2d at 75, said: "It is common knowledge that frequently those most knowledgeable in biomechanics, relating to the relationship between trauma and injury, are Ph.D.'s, not M.D.'s." Courts in other jurisdictions have admitted expert testimony by biomechanical engineers on the causation of various injuries. **See Arnold v. Riddell, Inc.**, 882 F. Supp. 979 (D. Kan. 1995) (biomechanical engineer testified about causation of quadriplegia from various forces, including effect of particular football helmet); **Dorsett v. American Isuzu Motors, Inc.**, 805 F. Supp. 1212 (E.D. Penn.) (biomechanical engineer testified as to type of injuries caused by rollover of vehicle), **aff'd**, 977 F.2d 567 (3rd Cir. 1992).

{17} In this case, when Defendant tendered Mr. Vander Pol's opinion about the causation of TMJ injuries, Plaintiff objected that allowing Mr. Vander Pol to so testify would be "junk science" and would violate the rule prohibiting nonmedical witnesses to testify as to medical causation. The trial court noted that Plaintiff had presented no evidence that biomechanical engineering was junk science, and Mr. Vander Pol himself testified that part of the biomechanical engineering he practiced was the study of the causation of various types of injuries. In addition, Mr. Vander Pol testified that he had "read pretty much all the literature that's out there on the biomechanics of the *{*684}* TMJ and talked to physicians, biomechanical

physicians on the TMJ." In light of the testimony and in light of the cases indicating that biomechanical experts may testify about the relationship between trauma and injury, we cannot say that the trial court did not carefully perform its gatekeeping functions. Accordingly, we cannot say that the trial court erred in allowing Mr. Vander Pol to state his opinion as to whether the accident in question was capable of producing a TMJ injury of the type claimed by Plaintiff.

{18} We next turn to Plaintiff's contention that the trial court erred in admitting Mr. Vander Pol's discussion of a medical article, which no medical expert said was authoritative. The thesis of the article, as explained by Mr. Vander Pol, is that it is unlikely for accidents creating low G-forces to cause TMJ when ordinary chewing creates 115 Gs. Mr. Vander Pol's testimony was that the accident at issue here exposed Plaintiff to 5.6 Gs. Plaintiff contends that Mr. Vander Pol's testimony in this regard resulted in the introduction into evidence of inadmissible hearsay. In our view, the admissibility of Mr. Vander Pol's testimony about the article is dependent on his qualifications to testify as an expert witness on the causation of TMJ injuries. If he was not qualified, it would follow that the contents of the article upon which he relied should not have been admitted in any fashion through his testimony. If, however, he was qualified, then he is permitted to both testify as to the foundation for the article under NMRA 1996, 11-803(R) (learned treatises) and testify about the article as explaining the basis for his opinion under NMRA 1996, 11-703. Under NMRA 11-803(R), expert witnesses may establish as reliable articles in periodicals that are called to their attention on direct examination, and then such articles are admissible as learned treatises notwithstanding their hearsay nature. Under NMRA 11-703, the expert may rely on an article because it is the expert who determines, based on study and experience, whether the article is reliable and therefore the article becomes, in effect, the expert's own opinion. **See Mannino v. International Mfg. Co.**, 650 F.2d 846, 851-53 (6th Cir. 1981).

{19} This case is not like **Sewell v. Wilson**, 101 N.M. 486, 488-90, 684 P.2d 1151, 1153-55 (Ct. App.), **cert. quashed**, 101 N.M. 362, 683 P.2d 44 (1984), and cases cited therein, relied on by Plaintiff. In those cases, the nontestifying experts' letters expressing opinions in the particular cases were actually admitted into evidence. Moreover, at least in **Sewell**, there was no testimony that the testifying expert relied on the document. **Id.** Here, in contrast, the article was a general article, Mr. Vander Pol testified that he relied on it, and the article itself was not admitted into evidence.

Other Issues

{20} We now turn to Plaintiff's remaining claims, all of which are evidentiary issues. The general standard of review for these issues is abuse of discretion. **City of Santa Fe v. Komis**, 114 N.M. 659, 663, 845 P.2d 753, 757 (1992). First, Plaintiff asked the trial court to take judicial notice of the New Mexico engineering statutes, and to inform the jury of their content, in order to show Mr. Vander Pol's lack of qualifications. Under NMRA 1996, 11-403, the trial court may exclude relevant evidence if its cumulative nature would substantially outweigh its probative value. Plaintiff had the opportunity to attack, and did attack, Mr. Vander Pol's qualifications on

these grounds during voir dire of the witness in the jury's presence and on cross-examination. The witness testified in front of the jury that he was not registered as an engineer in New Mexico and testified extensively about California's requirements. The trial court specifically noted this testimony and commented that the jury did not need to see the statutes. The trial court could therefore properly deny the requests for judicial notice and introduction into evidence of the statutes as calling for cumulative evidence. Thus, refusal of Plaintiff's requests was not an abuse of discretion.

{21} Plaintiff also contends that the trial court improperly excluded evidence in the form of correspondence that Defendant had tried to persuade Dr. McConnell, an oral maxillofacial surgeon who would testify favorably to Plaintiff, to change his mind. Here again, Plaintiff had ample opportunity *{*685}* to accomplish what she wanted through direct examination. Plaintiff did point out through examination that Defendant sent Mr. Vander Pol's report and the article to Dr. McConnell and questioned whether these documents would change his opinion on the issue of causation. The letters themselves, that Plaintiff wanted to introduce, contained prejudicial references to insurance. We hold that the trial court also properly found this evidence cumulative, and did not abuse its discretion in excluding the correspondence. To the extent that Plaintiff was precluded from showing that Dr. McConnell prepared his opinion at Defendant's request, we do not think that the minimal probative value that such evidence may have had in showing that Dr. McConnell was not biased in favor of Plaintiff made exclusion of this evidence reversible error. **See** NMRA 11-403.

{22} Last, Plaintiff complains that the trial court improperly admitted an inaccurate summary chart of Plaintiff's acupuncture records as substantive evidence because the chart omitted references to Plaintiff's jaw pain. NMRA 1996, 11-1006 states:

> The contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Central to Plaintiff's argument is that Defendant laid no foundation for admission of the chart. Nevertheless, NMRA 1996, 11-901(B)(3) allows for authentication of evidence through "comparison by the trier of fact or by expert witnesses with specimens which have been authenticated." The trial court could properly have found the chart authentic by comparing it with the acupuncture records already in evidence, and thus there was a proper foundation for admission of the chart.

{23} As for Plaintiff's claim that the chart was "erroneous" for leaving out her complaints of jaw pain, we do not believe that the chart was erroneous. The chart was titled "From Records of Southwest Acupuncture" and was a list of each of the dated records with a summary of Plaintiff's complaints. Consistent with the actual records, the third entry states "pain on both sides of jaw

(from accident)." Plaintiff's claimed inaccuracy is that the chart summary does not contain reference to the undated first page of the records, which also refers to jaw pain from the accident. Because the chart does not purport to be complete, because it does refer to jaw pain on Plaintiff's third visit, and because the actual records were before the jury and could have been pointed out by Plaintiff, we do not believe that her claim of erroneous information has merit. **See Coates v. Johnson & Johnson**, 756 F.2d 524, 550 (7th Cir. 1985).

{24} Moreover, under these circumstances, any dispute about the accuracy of the summary would go to the weight and credibility of the summary, not its admissibility. **See In re Richardson-Merrell, Inc. Bendectin Prods. Liab. Litig.**, 624 F. Supp. 1212, 1225 (S.D. Ohio 1985), **aff'd**, 857 F.2d 290 (6th Cir. 1988), **cert. denied**, 488 U.S. 1006 (1989); **accord Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.**, 772 F.2d 505, 515 n.9 (9th Cir. 1985) (inaccuracies in summaries under Federal Rule 1006 may be brought out on cross-examination), **cert. denied**, 494 U.S. 1017, 108 L. Ed. 2d 496, 110 S. Ct. 1321 (1990); **see also** 29A Am. Jur. 2d **Evidence** § 1067 (1994) (summaries admissible even if inaccurate); John P. Ludington, Annotation, **Admissibility of Evidence Summaries Under Uniform Evidence Rule 1006**, 59 A.L.R.4th 986 § 14 (1988) (discrepancy between underlying documents and summary goes to credibility, not admissibility). Furthermore, the fact that the summary in question here was merely a summary of documents that were already before the jury, rather than of evidence that had not been admitted, weighs heavily in favor of the trial court's decision. **See Harris Mkt. Research v. Marshall Mktg. & Communications, Inc.**, 948 F.2d 1518, 1525 (10th Cir. 1991). The trial court did not abuse its discretion in allowing the summary chart of Plaintiff's acupuncture records to be admitted into evidence.

*{*686}* **CONCLUSION**

{25} The judgment is affirmed.

{26} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

RUDY S. APODACA, Chief Judge

THOMAS A. DONNELLY, Judge

1997 N.M. LEXIS 128 BAERWALD V. FLORES (S. Ct. 1997)

DONNA L. BAERWALD, Plaintiff-Petitioner,

vs.

PATRICIA A. FLORES, Defendant-Respondent.

NO. 24,016
SUPREME COURT OF NEW MEXICO
1997 N.M. LEXIS 128
January 09, 1997, Decided

OPINION

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number **17160.**

1996-NMSC-063, 122 N.M. 543, 35 N.M. St. B. Bull. 49 FAHRBACH V. DIAMOND SHAMROCK (S. Ct. 1996) 928 P.2d 269, 1996 N.M. Lexis 435

RUTH FAHRBACH, Plaintiff-Appellant, and STEWART FOREMAN and BRETT MICHAEL FOREMAN,
Intervenors-Plaintiffs-Appellants,
vs.
DIAMOND SHAMROCK, INC., PHILLIPS PETROLEUM COMPANY, PETROLANE GAS SERVICES, LTD., and/or PETROLANE INCORPORATED, Defendants-Appellees.

Docket No. 22,276
SUPREME COURT OF NEW MEXICO
1996-NMSC-063, 122 N.M. 543, 35 N.M. St. B. Bull. 49, 928 P.2d 269, 1996 N.M. LEXIS 435
October 25, 1996, Filed
APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY. Peggy J. Nelson, District Judge.

COUNSEL

Law Offices of Simon & Oppenheimer, Jane Bloom Yohalem, Santa Fe, NM, Maryellen R. Duprel, Taos, NM, Skinner, Beattie & Wilson, P.C., Donald G. Beattie, Altoona, IA, for Appellants.

Catron, Catron & Sawtell, P.A., Michael Pottow, Santa Fe, NM, Dines, Wilson & Gross, P.C., Alan R. Wilson, Christina Gratke Nason, Albuquerque, NM, for Appellee Petrolane.

JUDGES

PAMELA B. MINZNER, Justice. WE CONCUR: RICHARD E. RANSOM, Justice, DAN A. McKINNON, III, Justice.

AUTHOR: PAMELA B. MINZNER

OPINION

{*545} OPINION

MINZNER, Justice.

Plaintiffs Ruth Fahrbach, Stewart Foreman, and Brett Michael Foreman (collectively "Plaintiffs") appeal from a defense verdict in a personal injury action. Plaintiffs had sued several defendants in tort and breach of warranty arising from a gas explosion at the Thunderbird Lodge in the Taos Ski Valley in 1992 and had settled with three defendants prior to trial. On appeal Plaintiffs contend that the trial court erred in instructing the jury because (1) the trial court informed the jury that a settlement had been reached prior to trial; and (2) the trial court instructed the jury to consider the fault of a nonparty not listed in the pretrial order. We hold that the trial court may inform the jury of the fact of settlement if the court has reason to believe (a) that it should do so in order to assist the jurors in understanding their responsibilities, and (b) that it can do so without prejudice to any party. We review the trial court's decision to instruct the jury on the fact of settlement for abuse of discretion, and we hold that in this case no abuse occurred. We also conclude that, on the facts of this case, Plaintiffs were not on sufficient notice

of the nonparty's potential liability, and the trial court erred in instructing the jury to consider that party's fault. However, we conclude that the error was harmless. We therefore affirm the judgment of the trial court.

I. FACTS

Plaintiffs were injured when leaking gas from a line servicing a neighboring business, Terry Sports, Inc., drifted downhill into the Thunderbird Lodge, causing an explosion. The propane gas line was found to be exposed several inches above the ground for a span of some ten feet, despite gas industry regulations and New Mexico law requiring propane gas lines to be buried. Plaintiffs sued Petrolane Gas Services ("Petrolane"), the supplier of propane to Terry Sports; Terry Sports, Inc.; New Mexico Propane/Heritage; the Thunderbird Lodge, Inc.; Diamond Shamrock, Inc., the purchaser of the ethyl mercaptan (a substance used to odorize propane), who injected it into the propane sold to Petrolane; and Phillips Petroleum Company, the manufacturer of the ethyl mercaptan.

Prior to trial, Plaintiffs settled with New Mexico Propane/Heritage, Terry Sports, and the Thunderbird Lodge. During a pretrial hearing in this case, the trial court indicated its intention to inform the jury that three former co-defendants had settled with Plaintiffs. The trial court explained that jurors find it confusing to be asked to allocate liability among tortfeasors when, without explanation, some of the tortfeasors are not present in court.

> THE COURT: The last trial that I did . . . ended up being one where there were great debates about whether or not to inform the jury that other parties had settled out, about not to consider that, because they are going to get to assess their own fault. And I think it was confusing to the jury not to tell them--not the specifics of what went on, but some of how this case started and where it stood now.

Accordingly, prior to voir dire, the trial court informed the jury that Plaintiffs had originally sued three additional parties and that these parties had settled with Plaintiffs prior to trial. The court stated as follows:

> I'll also advise you that in addition to the Defendants present in the courtroom today, the Plaintiffs originally sued New Mexico Propane of Taos, Incorporated, the Thunderbird Lodge, and Terry Sports. Those parties have settled the Plaintiffs' claims and they will not be participating in this action, although you will hear evidence concerning their conduct and you will have an opportunity, if selected as a juror, to assess fault concerning some or all of those parties.

The trial proceeded with the three remaining defendants, Phillips Petroleum Company, Diamond Shamrock, and Petrolane Gas Services (collectively "Defendants"). During trial Plaintiffs argued, among other things, that *{*546}* Petrolane was negligent in adequately warning

its own employees concerning the possibility of odor fade, odor confusion, and other characteristics of propane odorized with ethyl mercaptan in conjunction with propane line maintenance. Plaintiffs presented two witnesses to testify, respectively, about the scope of instruction and Petrolane's alleged failure to warn its local district managers of the hazards inherent in maintaining propane gas lines. The two witnesses were David Archuleta, Petrolane's Taos district manager, and James Myers, an employee of Suburban Propane. The testimony of these witnesses indicated that Suburban Propane had trained Petrolane employees in propane line maintenance. Other testimony revealed that Suburban Propane or one of its parent corporations formerly owned Petrolane.

Plaintiffs had not named Suburban Propane in their complaint. None of the defendants specifically pleaded Suburban Propane's liability in their answers, although the liability of "others" was asserted as a general defense. Additionally, the pretrial order did not list Suburban Propane as being potentially liable.

After presentation of the evidence, at a hearing to finalize the jury instructions, Defendants asked the court to instruct the jury to consider whether Plaintiffs' injuries were caused by Suburban Propane's negligence in failing to properly train Petrolane employees. Plaintiffs objected, contending that Suburban Propane and Petrolane were not separate entities. The trial court overruled the objection and instructed the jury on several theories of liability, including the theory that Suburban Propane had failed to adequately train Petrolane employees. The special verdict form first asked, "Question No. 1: was any defendant, Diamond Shamrock Refining and Marketing Company, Phillips Petroleum Company or Petrolane negligent?" If the jury answered affirmatively, it was instructed to answer several questions about the allocation of fault. Suburban Propane was subsequently listed as one of the parties to whom the jury was authorized to allocate fault, but only if the jury determined any of the three named defendants had been negligent and that the negligence of a named defendant contributed to Plaintiffs' injuries.

During deliberation the jury posed the following question to the court: "Is Suburban included with Petrolane on question # 1 [regarding Petrolane's liability for Plaintiffs' injuries]? If not, how do we separate them?" The court responded: "Suburban is not included on question # 1. Please follow the instructions on the Special Verdict Form."

The jury ultimately returned the verdict form with an answer to the first question indicating that none of the three named defendants had been negligent. The jury also found that the product at issue was not defective. Following the verdict, Plaintiffs moved for a new trial alleging that (1) the trial court erred in informing the jury that three defendants named in the complaint had settled with Plaintiffs prior to trial; and (2) the trial court abused its discretion in instructing the jury regarding Suburban Propane's fault, a defense which had not been included in the pretrial order. After a hearing on the merits the trial court denied the motion, holding that Rule 11-408 NMRA 1996 did not preclude the court from informing jurors that some former defendants had settled with Plaintiffs, and that there was sufficient evidence introduced at trial to support a separate instruction of Suburban Propane's alleged negligence.

Plaintiffs appeal from the judgment on the verdict, raising the same two issues argued before

the court in their motion for a new trial. Plaintiffs have since settled with both Phillips Petroleum Co. and Diamond Shamrock. Petrolane is the sole remaining defendant on appeal.

II. TRIAL COURT'S ADVICE TO JURY REGARDING SETTLEMENT

Plaintiffs argue on appeal that the trial court gave the jury advice that was inconsistent with Rule 408 of the New Mexico Rules of Evidence. Rule 11-408 NMRA 1996, states as follows:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting {*547} to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.

Plaintiffs reason that Rule 11-408 NMRA 1996 promotes a public policy favoring compromise and settlement, that it achieves this goal by insulating parties against inferences of liability due to their conduct or statements during settlement negotiations, and that it should be construed to prevent juries from drawing equally improper inferences of liability from the fact of settlement by others. Plaintiffs specifically contend that the jury could have inferred that the parties who were primarily responsible had settled with and compensated Plaintiffs and that no further compensation was appropriate. Plaintiffs also argue that after the trial court had divulged the fact of settlement, Defendants' counsel made additional references to the settlement, and these additional references enhanced the prejudicial effect of the initial disclosure. On the facts of this case, we conclude that Plaintiffs have not shown any error.

Rule 11-408 NMRA 1996 expressly excludes evidence of offers to settle when used against a party as an admission of the claim's weakness. **See generally** 2 **McCormick on Evidence** § 266, at 194-95 (John W. Strong, ed., 4th ed. 1992) ("To invoke the exclusionary rule, there must be an actual dispute, preferably some negotiations, and at least an apparent difference of view between the parties as to the validity or amount of the claim.") (footnotes omitted). By its express terms, Rule 11-408 NMRA 1996 excludes evidence of a settlement only when that evidence is introduced to prove liability or non-liability of a claim or its amount. **See El Paso Elec. Co. v. Real Estate Mart, Inc.**, 98 N.M. 570, 573-74, 651 P.2d 105, 108-09 (Ct. App.) (evidence introduced to impeach), **cert. denied**, 98 N.M. 590, 651 P.2d 636 (1982). The rule usually provides support for an objection to evidence offered against a party by another party when settlement negotiations fail. **See** 2 **McCormick, supra**, § 266, at 194. New Mexico cases have "interpreted the rule to protect only those parties to a compromise." **See State v. Martinez**, 95 N.M. 795, 802, 626 P.2d 1292, 1299 (Ct. App. 1979).

As stated explicitly in the rule itself, Rule 11-408 NMRA 1996 does not provide a blanket exclusion whenever the evidence at issue concerns a settlement. **See id.** To the contrary, evidence of settlement is admissible to show bias or prejudice, to rebut a contention of undue delay, to prove obstruction of a criminal investigation, or for various other purposes. **State v. Doak**, 89 N.M. 532, 535, 554 P.2d 993, 996 (Ct. App. 1976) (evidence introduced to show bias and lack of credibility); **see also Jesko v. Stauffer Chem. Co.**, 89 N.M. 786, 789, 558 P.2d 55, 58 (Ct. App. 1976) (evidence admitted to prove authority to act). **Compare Groves v. Compton**, 167 W. Va. 873, 280 S.E.2d 708, 711 (W. Va. 1981) (trial court may on its own initiative determine appropriate method of handling settlements paid by joint tortfeasors; trial court erred in refusing to permit plaintiff's counsel to respond to defense counsel's suggestion that nonparty was not party to lawsuit because of bias toward plaintiff) **with Owens-Corning Fiberglas Corp. v. American Centennial Ins. Co.**, 74 Ohio Misc. 2d 272, 660 N.E.2d 828, 831 (Ohio Com. Pl. 1995) (in ruling on motion in limine to exclude references to settlement, trial court admitted evidence in order to avoid "confusion and speculation by the jurors, resulting in unfair prejudice" toward party). Therefore, we do not construe Rule 11-408 NMRA 1996 as precluding the trial court from advising the jury, where appropriate, regarding a settlement that has eliminated one or more parties. **See Kennon v. Slipstreamer, Inc.**, 794 F.2d 1067, 1070 (5th Cir. 1986) ("In a case such as this one, where the absence of defendants previously in court might confuse the *{*548}* jury, the district court may, in its discretion, inform the jury of the settlement in order to avoid confusion.").

However, matters regarding settlement are not usually relevant to the issues being tried, which are the negligence of the remaining defendants, the amount of the plaintiffs' damages, and apportioning the damages caused by the defendants' negligence. **See generally Wilson v. Gillis**, 105 N.M. 259, 261-62, 731 P.2d 955, 957-58 (Ct. App. 1986) (discussing effect of settlement on liability of non-settling parties), **cert. denied**, 105 N.M. 230, 731 P.2d 373 (1987); **Wilson v. Galt**, 100 N.M. 227, 232, 668 P.2d 1104, 1109 (Ct. App.) (an injured party may pursue recovery from each severally liable tortfeasor without reduction, even if the settling tortfeasor paid more in settlement than its apportioned share of total damages as determined), **cert. quashed** , 100 N.M. 192, 668 P.2d 308 (1983). Although Rule 11-408 NMRA 1996 offers little specific guidance to the trial court in exercising its discretion, it provides general guidance by promoting a public policy favoring settlements. Rule 11-408 NMRA 1996 generally counsels the trial court to exclude evidence of settlement unless the party wishing to introduce such evidence establishes a valid purpose. We agree with Plaintiffs that "the rule is, in effect, a statement of policy regulating the advisability of the jury being told of a settlement," and that the policy applies "with equal force to the comments of the court or of counsel made in argument to the jury or in voir dire." **See Kennon**, 794 F.2d at 1070-71 (judge's statement to the jury regarding settlement reviewed for compliance with Federal Rule of Evidence 408).

Thus, a trial court need not disclose the existence of a settlement and should not grant a party's request that it do so absent a proper purpose, one not excluded by Rule 11-408 NMRA 1996, and one that is consistent with the other purposes expressly mentioned. **Compare Morea v. Cosco, Inc.**, 422 Mass. 601, 664 N.E.2d 822, 824 (Mass. 1996) (court prospectively adopts

court rule that "when there is no significant risk that the jury's factfinding function will be distorted, evidence of the settlement should be excluded.") **with Soria v. Sierra Pac. Airlines**, 111 Idaho 594, 726 P.2d 706 (Idaho 1986) (whether settlement should be disclosed to the jury rests in the broad discretion of the trial court; in this case, trial court decision to exclude evidence affirmed). "The decision of whether to admit such evidence for another purpose is committed to the discretion of the trial court." **Id.** at 718. **Contra Peck v. Jacquemin**, 196 Conn. 53, 491 A.2d 1043, 1046 (Conn. 1985) (permitting prior settlement with former defendant to be brought to the attention of the jury was error in light of statute prohibiting disclosure).

One court has analyzed the power to introduce evidence of settlement for purposes not excluded by a rule analogous to Rule 11-408 NMRA 1996 as within the trial court's authority to manage the trial and rule on evidentiary matters. **DuCote v. Commercial Union Ins. Co.**, 616 So. 2d 1366, 1371-72 (La. Ct. App.), **writ denied**, 620 So. 2d 877 (La. 1993). "Whether the evidence is admissible shall be determined by rules concerning relevancy and possible outweighing prejudice." **Soria**, 726 P.2d at 718; **see also** Rule 11-402 NMRA 1996, Rule 11-403 NMRA 1996. We agree with this approach. It provides the trial court the flexibility to address unusual circumstances within familiar limitations. **See generally** 2 **McCormick**, **supra**, § 266, at 196-97. It neither creates unlimited discretion nor authorizes conduct that is unreviewable as a practical matter. **See Cleere v. United Parcel Serv.**, 669 P.2d 785, 790 (Okla. Ct. App. 1983) (jury verdict reversed and cause remanded for new trial; defendant did not show that evidence of release fell within "other purpose" of rule).

In this case, the trial court apparently concluded that the absence of certain defendants previously discussed or represented in court might be confusing to the jury, and unnecessary confusion could be avoided without prejudice to any party. Plaintiffs do not contend that the trial court erred either in identifying potential confusion or in believing that prejudice could be avoided. Rather, they argue "that the confusion identified by the court is **always** present in a situation where a plaintiff, in a tort action, settles with *{*549}* some defendants and not with others." They suggest that the trial court adopted a "blanket exception" to the exclusion policy of Rule 11-408 NMRA 1996, and argue that "such a blanket exception is not analogous either to the exceptions listed in the face of Rule 408, or to the additional exception which has been permitted by the courts of New Mexico for evidence relevant to a material fact in issue other than liability." They urge that, as applied to the facts of this case, such an exception "swallows the rule."

Plaintiffs acknowledge that a trial court can address jury confusion, when some defendants have settled and others remain before the court, without undermining the policy expressed in Rule 11-408 NMRA 1996.

> Jurors can be told that they will be required to evaluate the relative liability of a number of persons, some of whom are parties and some of whom are not; that there are a number of reasons why a tortfeasor might not be joined as a party; and that the jury should not speculate about the reasons why some of the tortfeasors are not parties in the case before them.

We agree with Plaintiffs that there is no "blanket exception" that authorizes a trial court to inform a jury of a prior settlement in order to avoid any possibility of jury confusion. **See Owens-Corning Fiberglas Corp.**, 660 N.E.2d at 831 (trial court found specific prejudice in case involving a number of excess insurers). However, in this case, we are not persuaded that the court erred in determining that disclosure was appropriate.

In exercising its authority to manage the course of trial, the court must ensure that the jury understands its authority and responsibilities in allocating liability among multiple tortfeasors. In this case, the trial court apparently concluded that unnecessary confusion could be avoided without prejudicing any party, and Plaintiffs have acknowledged that this conclusion was not unreasonable. Plaintiffs have suggested that other instructions would have been more appropriate, and we agree that other instructions might have been more appropriate. The instructions Plaintiffs have described in their Brief-in-Chief might have been more appropriate, simply because they are more general. However, there is no indication that Plaintiffs suggested this alternative to the trial court.

A party may seek a limiting instruction. **See Owens-Corning Fiberglas Corp.**, 660 N.E.2d at 831 ("If requested, this court would entertain the inclusion of a limiting instruction to the jurors concerning their consideration of the evidence."). When evidence is admissible for one purpose but not for another, the Rules of Evidence require that the trial court shall, upon request, limit the evidence to its proper scope and instruct the jury accordingly. Rule 11-105 NMRA 1996. Thus, for example, in a situation where one or more defendants have settled, and the trial court decides to instruct the jury of that fact, a party then may request additional jury instructions, such as an instruction that the jury has a duty to decide whether the defendants are liable to the plaintiff; to determine the total amount of damages, if any, that would compensate the plaintiff; and to allocate the damages among the parties the court instructs the jury it may consider. Alternatively, a party may suggest a different method of instructing the jury, one that minimizes even further the possibility of the jury drawing inappropriate inferences. Had Plaintiffs suggested at trial the alternative language they have suggested on appeal, we would have faced a different question; the question in those circumstances would have been whether the court abused its discretion in rejecting the alternative language. In the absence of a request for a limiting or different instruction, however, we cannot say the trial court erred in phrasing its remarks. **See** Rule 12-216(A) NMRA 1996 ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked . . . ."); **cf. El Paso Elec. Co.**, 98 N.M. at 574, 651 P.2d at 109 (noting that party objecting to evidence did not ask for an explanatory instruction).

We conclude that the trial court properly attempted to eliminate what it reasonably perceived as unnecessary confusion. That attempt was well within its authority to manage the course of trial. Rule 11-408 NMRA 1996 does not by its terms preclude such an *{*550}* attempt. Plaintiffs neither suggested particular wording to the court nor offered a limiting instruction. On these facts, we cannot say that the trial court's action was inconsistent with the policy underlying Rule 11-408 NMRA 1996. We therefore hold that the trial court did not abuse its discretion in informing the jury of the fact of settlement.

III. ATTRIBUTING FAULT TO SUBURBAN PROPANE

At trial, Plaintiffs introduced testimony relating to Suburban Propane's failure to warn Petrolane's employees. On direct examination, Plaintiffs extensively questioned Petrolane's Taos district manager, David Archuleta, on the instruction he received from the safety department, which was headquartered in Whippany, New Jersey. Plaintiffs intended to establish that Petrolane's safety department had failed to properly warn its employees, including Archuleta, of propane's elusive odor during propane gas line maintenance, and that this failure to warn amounted to negligence on Petrolane's part. However, Plaintiffs' line of questioning incorrectly suggested that the New Jersey safety department was part of Petrolane. Petrolane, on rebuttal, established that the safety department in New Jersey was part of Suburban Propane, a completely separate entity. Plaintiffs did not introduce any other evidence making Petrolane vicariously liable for Suburban Propane's actions.

Plaintiffs contend that the trial court erred in permitting the jury to allocate fault to Suburban Propane. Specifically, Plaintiffs argue that it was an abuse of discretion for the trial court to instruct the jury on a defense which was not raised in the pleadings nor in the pretrial order and which was not tried with Plaintiffs' express or implied consent. Plaintiffs contend that Defendants' pleadings and responses to discovery misled them into concluding that Suburban Propane and Petrolane were a single entity for purposes of allocating fault. They contend that the trial court should have denied the request for instructions regarding Suburban Propane because the defense theory was not included in the pretrial order, and thus they were unfairly surprised at the close of trial. Plaintiffs also argue that the improper charge to the jury influenced the outcome of the case and was not harmless error. We hold that the trial court erred in instructing the jury regarding Suburban Propane's role in training Petrolane's employees, but that the error was harmless.

Notice pleading is intended to be supplemented by discovery and other pretrial activity. Our rules of procedure anticipate clarification, development, and even, at least sometimes, simplification of the issues in the course of trial preparation. **See United Nuclear Corp. v. General Atomic Co.**, 93 N.M. 105, 120, 597 P.2d 290, 305 (holding that "parties are expected to disclose at a pre-trial hearing all the legal and factual issues which they intend to raise"), **cert. denied**, 444 U.S. 911, 62 L. Ed. 2d 145, 100 S. Ct. 222 (1979). However, by the time of entry of the pretrial order, our rules contemplate that the issues to be tried will have been identified. "The principle is well established that a pretrial order, made and entered without objection, and to which no motion to modify has been made, 'controls the subsequent course of action.'" **Blumenthal v. Concrete Constructors Co.**, 102 N.M. 125, 131, 692 P.2d 50, 56 (Ct. App. 1984) (quoting NMSA 1978, Civ. P.R. 16 (Repl. Pamp. 1980)). A pretrial order narrows the issues for trial, reveals the parties' real contentions, and eliminates unfair surprise. **State ex rel. State Highway Dep't v. Branchau**, 90 N.M. 496, 497, 565 P.2d 1013, 1014 (1977). Ordinarily, only those theories of liability contained in the pretrial order will be considered at trial.

Nevertheless, to prevent manifest injustice, the trial court may in its discretion modify the order to conform to the evidence, which is then subject to review for abuse of discretion. **Id.** ; **see**

also Mantz v. Follingstad, 84 N.M. 473, 475, 505 P.2d 68, 70 (Ct. App. 1972) (pretrial order, while becoming the law of the case, does not prevent the trial court from changing its mind about the applicable law in order to prevent perpetuating error). Further, courts have wide latitude to amend the pretrial order to conform to the evidence. **HBE Leasing Corp. v. Frank**, 22 F.3d 41, 45 (2d Cir. 1994). In this *{*551}* case, the pretrial order should have controlled. Suburban's contributory fault was not timely raised. It was not raised in the pretrial order nor tried by express consent. Further, Plaintiffs' claim that Suburban Propane and Petrolane constituted a single entity lacked support in the evidence produced at trial. We will not rely on Petrolane's failure of proof to conclude that comparative fault of Suburban was an issue tried by implication.

The pretrial order was signed December 16, 1993. Thereafter Petrolane filed a motion in limine asking the trial court to require Plaintiffs to refer to Petrolane and Suburban Propane as separate entities because several references in earlier depositions and trial exhibits referred to Suburban Propane and Petrolane as one entity. The trial court conducted a hearing on January 3, 1994 and granted the motion. Plaintiffs note that in response to discovery requests Petrolane had identified Myers as a Petrolane employee. However, depositions taken of Myers and Joe Monesmith, who identified themselves as Suburban Propane managers, indicated that Suburban Propane had been involved in Petrolane's employee safety and instruction program and that there was some distinction between the two entities. The trial court's pretrial grant of Petrolane's motion in limine should have alerted Plaintiffs that Suburban Propane's actions might not provide evidence of Petrolane's fault.

Because Plaintiffs contended that Suburban Propane played a role in training Petrolane's employees and because Petrolane presented evidence at trial that Suburban Propane was a distinct, separate entity, Suburban Propane's relationship to Petrolane became an issue relevant to the other issues being tried. **See** 3 James W. Moore, **Moore's Federal Practice** P 16.11 (2d ed. 1995) (stating that the pretrial order should bind the parties to the issues to be tried, subject to appropriate modification that will permit all bona fide issues to be tried without surprise and prejudice); **Hardin v. Manitowoc-Forsythe Corp.**, 691 F.2d 449, 452-53 (10th Cir. 1982) (where evidence is presented on an issue beyond scope of pretrial order, rule relating to amendments to conform to the evidence may effect an amendment of the pretrial order). Plaintiffs have not directed this Court to any evidence in the record that Petrolane and Suburban Propane are the same entity, **see In re Estate of Heeter**, 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct. App.) ("court will not search the record to find evidence to support an appellant's claims"), **cert. denied**, 113 N.M. 690, 831 P.2d 989 (1992), and Plaintiffs did not offer a jury instruction that is of record on the question of what relationship existed between Petrolane and Suburban Propane. **See, e.g., Lamkin v. Garcia**, 106 N.M. 60, 64, 738 P.2d 932, 936 (Ct. App.) (defendants are entitled to jury instructions on all correct theories of their case which are supported by the evidence), **cert. denied**, 106 N.M. 7, 738 P.2d 125 (1987). Although not specifically pled nor raised by a requested instruction that can be found in the record, the single-entity claim was tried by the parties. However, there was no evidence to support plaintiffs' single-entity claim and no evidence to support a theory that Petrolane was vicariously liable for the conduct of Suburban Propane employees.

Under these circumstances, we cannot conclude that Plaintiffs impliedly consented to trial of all issues raised by the evidence that Suburban Propane was a separate entity. **See** Rule 1-015(B) NMRA 1996 (amendments to conform to the evidence); **see also Hardin**, 691 F.2d at 459 (implied consent found when the party opposing the amendment himself produced evidence on the new issue). We do not think that the lack of evidence to support Plaintiffs' single-entity claim or a theory of vicarious liability is an adequate basis for permitting Petrolane to raise the contributory fault of Suburban Propane as an affirmative defense at the close of trial. Defendants' theory that Suburban Propane had been contributorily negligent differed from Plaintiffs' claim that Petrolane and Suburban Propane were a single entity. Rather, as Plaintiffs persuasively argue:

> All of the evidence introduced by the Plaintiffs about the training of Petrolane employees was introduced because it was relevant to Plaintiffs' claim that Defendant Petrolane was negligent in failing to follow its own safety procedures and in failing to adequately train its line staff in proper *{*552}* safety procedures, given the high probability of confusing the odor of propane gas with that [of] other foul odors such as the smell of sewer gas.

The question for the trial court and the issue on appeal is whether Plaintiffs had sufficient notice, notwithstanding the pretrial order, that Suburban Propane would be an entity against whom Defendants might assert comparative fault. We conclude that, on these facts, Plaintiffs did not have sufficient notice to support an instruction on the comparative fault of Suburban Propane.

Plaintiffs argue that the jury might have reasoned that Suburban Propane failed to train Petrolane's employees to be aware of the high likelihood of confusing the smell of propane gas, that because Suburban Propane failed to train Petrolane's employees about the potential of confusion, the employees believed that the reported smell was that of sewer gas, rather than propane. The inference Plaintiffs draw is that had Suburban Propane properly trained Petrolane employees, those employees would have ordered the lodge evacuated or at least cautioned against lighting a match, and therefore the negligence of Suburban Propane, rather than any negligence of Petrolane employees, caused Plaintiff's injuries. Plaintiffs contend that it is not possible to say with a high degree of assurance that the error in instructing the jury did not affect the outcome. Therefore, they argue, the error was not harmless. **See Mallard v. Zink**, 94 N.M. 94, 607 P.2d 632 (Ct. App.) (reversing trial court's decision granting a directed verdict for one of two co-defendants), **writ quashed**, 94 N.M. 629, 614 P.2d 546 (1979).

After a thorough examination of the record, we conclude that the court's instructing the jury on Suburban Propane was error, but nevertheless, the error was harmless. "Under [Rule 1-061 NMRA 1996], error is not grounds for setting aside a verdict unless . . .'inconsistent with substantial justice.'" **Gallegos v. Citizens Ins. Agency**, 108 N.M. 722, 733, 779 P.2d 99, 110 (1989). "The Rule is a mandate to . . . grant a new trial, set aside a verdict, or vacate, modify, or

otherwise disturb a judgment **when**, and **only when**, it is clear that refusal to take such action will be substantially unjust." 7 James W. Moore et al., Moore's Federal Practice P 61.03 (2d ed. 1996) (emphasis in original). "An error in instructions to the jury is harmless, and reversal is not required, if the erroneous instruction does not affect the substantial rights of the parties." Moore, **supra**, P 61.09.

The issue, then, is whether the error prevented substantial justice. Here, Plaintiffs have not alerted the court to any direct evidence that the error in instruction contributed to [or directly resulted in] the jury's verdict. Rather, they merely speculate that "the improper charge to the jury influenced the outcome of the case." We cannot conclude as a matter of law that the jury relied on the Suburban Propane instruction to absolve Petrolane from liability. In fact, we think it is highly unlikely that the jury would have absolved Petrolane entirely on the basis that Suburban Propane's failure to train had been the proximate cause of the accident. The jury would have had to conclude not only that Petrolane employees were unaware of the likelihood of confusion but also that their lack of knowledge excused what would have otherwise been negligent conduct. Yet they were instructed that ignorance of certain rules and regulations would not excuse compliance with the standard set by those rules and regulations. Given this instruction, we think it more likely that the jury had another basis or bases for not finding that Petrolane acted negligently. Hence, we are willing to construe the jury's verdict as a finding that Petrolane's employees acted with due care in handling the situation with which they were presented, and to conclude that the jury's verdict renders the trial court's instructions regarding Suburban Propane harmless error.

IV. CONCLUSION

The trial court did not err in disclosing the existence of a settlement with several former defendants to the jury. Plaintiffs have not shown an abuse of discretion in the decision to disclose. The trial court erred in allowing the jury to consider Suburban Propane's fault. The court's ruling on the motion in limine did not put Plaintiffs on sufficient *{*553}* notice that Suburban Propane was a separate, potentially liable entity to whom the jury could attribute fault, and Plaintiffs' claim that Suburban Propane and Petrolane were a single entity did not permit a conclusion that Suburban Propane's contributory fault was an issue tried by implication. However, because the jury found that Petrolane was not negligent, the instructions regarding Suburban Propane were harmless. We affirm the judgment of the trial court on both issues raised on appeal. No costs are awarded.

IT IS SO ORDERED.

PAMELA B. MINZNER, Justice

WE CONCUR:

RICHARD E. RANSOM, Justice

DAN A. McKINNON, III, Justice

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* must be
legal residuum

* Rule that provides for relaxed admission of evidence

* make specific objections

Tom: seeks to exclude settlement, discovery, contacts, title,
Redrock overriding royalty

ORR - Tom: admitted (Newberry) that Redrock has a 10% ORR in S/2 (Transcript p25)
Bill: did not address

Bill's Response:
Chronology -
- statements may be hearsay, if no testimony supports
- settlement: Rule 408
not for purpose of proving liability
- Redrock apparently is concerned that Comm'n will view its participation in such settlement discussions as an admission of liability —
- Newberry notes that the fact that settlement negotiations have occurred is admissible, just not ~~discussions had~~ statements made during the discussions
- title opinion - not relevant to title of any particular tract

"pool boundary" Ex. 13 re: communication with gas storage unit
Ex. 23 re: 1978 letter - drainage in Marcus might occur across §34

spacing unit
Ex. 23

weight not admissibility.

Beerwald 122 NM 679
"summary" = weight
Grace 87 NM 205
experience, specialized knowledge of Comm

influence or distract / 403
Bill: protects jury
not to be used in bench trials — Schultz 24 F.3d 626, 632
"not to be used where jury not involved".
Colt States 635 F.2d 517, 519

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:

APPLICATION OF NEARBURG EXPLORATION COMPANY L.L.C. FOR TWO NON-STANDARD GAS SPACING AND PRORATION UNITS, LEA COUNTY, NEW MEXICO.

CASE NO. 12662 (*de novo*)

APPLICATION OF THE OIL CONSERVATION DIVISION FOR AN ORDER CREATING, RE-DESIGNATING AND EXTENDING THE VERTICAL AND HORIZONTAL LIMITS OF CERTAIN POOLS IN LEA COUNTY, NEW MEXICO.

CASE NO. 12908-A (*severed and re-opened)*

ORDER NO. R-11768-A

ORDER ON PRE-HEARING MOTIONS OF REDROCK

BY THE DIVISION DIRECTOR:

This matter has come before the Division Director of the Oil Conservation Division on motion of Redrock Operating Ltd. Co. (hereinafter referred to as "Redrock") for an Order striking certain exhibits and limiting evidence during the hearing of this matter, and the consolidated response to the motions of Nearburg Exploration Company L.L.C. (hereinafter referred to as "Nearburg"), and the Division Director, on this ____ day of October 2002, having reviewed the motions, the response, the pre-hearing statements, and the proposed exhibits submitted by Nearburg,

FINDS:

1. Redrock has filed two motions in this matter. The first is a motion *in limine*, which seeks to exclude from the hearing of this matter any evidence concerning settlement, discovery, contracts, title or "Redrock's overriding royalty." The second, a motion to strike, objects to Nearburg's proposed Exhibit 2 (the chronology), Exhibit 12 (a title opinion), Exhibit 13 (a letter and title opinion), and Exhibit 23 (a letter and an assignment).

2. In both motions, Redrock expresses concern that admission of these items might unduly influence the Commission, might cause the Commission to be prejudiced against Redrock, or misdirect the Commission's attention away from violations of rules and regulations of the Oil Conservation Division that Redrock alleges were made by Nearburg. Redrock also expresses concern that the Commission will be asked to interpret or construe contracts.

3. Nearburg provided a consolidated response to the motions. Nearburg argues that the motion to strike is improper in this context because the evidence sought to be stricken is not contained in a pleading, and does not conform to NMRA 2002, Rule 1-012(f). Nearburg argues that the motion *in limine* is vague and lacks specificity, and that Redrock's failure to specify which arguments and exhibits it seeks to exclude means the motion *in limine* must be dismissed. Nearburg argues that its Chronology and its proposed Exhibit 12 (the title opinion) will not be offered to establish title, but instead to help explain how the present dispute arose. Nearburg argues that proposed Exhibits 13 and 23 are necessary to establish the relevant pool boundaries and the boundaries of the gas storage unit. Nearburg argues that its proposed Exhibit 23, pertaining to the Llano well, is relevant to the issue of the appropriate spacing unit. Nearburg argues that all of the objections lodged by Redrock go to the weight of the evidence, not its admissibility.

4. The New Mexico Rules of Evidence apply in hearings before the Commission, but the rules are relaxed where justice requires. Rule 1212, 19 NMAC 15.N.1212 (the New Mexico Rules of Evidence apply in hearings before the Commission, but "... such rules may be relaxed ... where ... the ends of justice will be better served."). Rule 1212 adopts a standard that is similar to that applied by the New Mexico Courts. See Ferguson-Steere Motor Co. v. State Corporation Commission, 314 P.2d 894, 63 N.M. 137 (1957). The rule has its limitations. See *e.g.* Bransford v. State Taxation and Revenue Department, 125 N.M. 285, 960 P.2d 827 (Ct.App. 1998)(*legal residuum* rule).

5. Evidentiary issues like those presented here do not arise often in disputes before the Commission. ~~It is well known that~~ the Commission is well known as a body possessing special expertise, technical competence and specialized knowledge in matters relating to the regulation of oil and natural gas exploration and production. Santa Fe Exploration 114 N.M. at 114-115 ("[T]he resolution and interpretation of [conflicting evidence] requires expertise, technical competence, and specialized knowledge or engineering and geology as possessed by Commission members."). See also Viking Petroleum v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983)(the Oil Conservation Commission has experience, technical competence and specialized knowledge dealing with complex matters relating the regulation of exploration and production of oil and natural gas, and the sometimes arcane rules that govern such operations), Grace v. Oil Conservation Commission, 87 N.M. 205, 208, 531 P.2d 939 (1975)(same).

6. The Commission's special expertise, technical competence and specialized knowledge make it unlikely that it will be unfairly swayed or prejudiced by evidence that might normally be admitted to a jury. The Commission is quite capable of giving such evidence its proper weight. And for the same reason, it is unlikely that objections to the admissibility of evidence based on Rule 11-403 of the Rules of Evidence on the grounds of prejudice or confusion will be well-taken.

7. Case No. 12622 concerns the application of Nearburg to create non-standard 160-acre spacing units comprising the northeast quarter and the southeast quarter of Section 34 (Township 21, Range 34 East, NMPM, Lea County, New Mexico). Case No. 12908-A is a nomenclature case originally filed by the Division in which it is proposed that the East Grama Ridge-Morrow Gas Pool be contracted to exclude the east half of Section 34, and the Grama Ridge-Morrow Gas Pool be extended to include the east half of that section. The relevance of Nearburg's proposed exhibits, other evidence and argument should be evaluated according to the goals of the proceeding as set forth in the applications.

8. Taking the specific objections of Redrock one by one, Redrock objects to the introduction of any evidence regarding settlement. The only such evidence that seems to be offered at present is contained in Nearburg's proposed Exhibit 2, the chronology. Nearburg offers the chronology to review in demonstrative form the events of the last three years that led to the filing of the applications. See Nearburg's consolidated response, at 8. Nearburg also argues that the chronology is responsive to the issue raised by Redrock: "how did Nearburg get into this mess." See Redrock's Motion in Limine, at 2. Redrock argues that evidence of settlement negotiations is admissible so long as the conduct or statements contained in those proceedings are not offered to establish liability.

9. Rule 11-408 of the Rules of Evidence, NMRA 2002, provides that "[e]vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount, is not admissible to prove liability of the claim or its amount." The Rule does not prohibit admission of such evidence for another purpose, and the mere fact that a settlement has occurred may be admissible. See Fahrbach v. Diamond Shamrock, Inc., 1996-NMSC-063, 122 N.M. 543, 928 P.2d 269. However, "matters regarding settlement are not usually relevant." Fahrbach, 122 N.M. at 548. Moreover, the rule "... generally counsels the trial court to exclude evidence of settlement unless the party wishing to introduce such evidence establishes a valid purpose." Examples of a valid purpose are provided in Fahrbach; the purpose described by Nearburg (to give context to these proceedings) is not one of them.

10. As noted, Rule 1212 of the rules and regulations of the Oil Conservation Division requires adherence to the New Mexico Rules of Evidence except where relaxation of the rules is necessary to serve "... the ends of justice ..." Here, the fact that

settlement negotiations occurred, or their day-to-day progress, is not critical to the Commission's deliberations and relaxation of the Rules of Evidence in this instance is not required by the ends of justice. Accordingly, the chronology should be revised to exclude such references.

11. Redrock also objects to any evidence concerning "discovery." It is not clear what discovery Redrock is concerned with, and no specific objection is made to any particular exhibit or line of questioning or argument. Therefore, no specific ruling can issue on this point unless and until evidence is offered during the hearing of this matter. It should be noted that if the Commission is asked to resolve and remaining procedural matters during the hearing of this matter, it may need to receive evidence concerning "discovery" in order to render a proper ruling.

12. Redrock objects to evidence being received by the Commission concerning "contracts," "title," or "Redrock's overriding royalty." Redrock specifically objects to Nearburg's proposed Exhibit 12, a title opinion, Exhibit 13, a letter and a title opinion, and Exhibit 23, a letter and assignment. With respect to Redrock's overriding royalty, Redrock asserts that its existence has been admitted to by Nearburg, and also asserts that there is no issue whether the royalty interest exists as described, citing to the record of the Division case for this assertion.

13. It appears, on review of Nearburg's pre-hearing statement and Exhibits 12, 13 and 23, that this evidence (denoted as "land testimony" by Nearburg) presents a history of Section 34 and of the two pools at issue here, and is apparently being offered by Nearburg to explain how this controversy arose. This kind of contextual evidence is always helpful to the Commission.

14. However, Exhibit 12, a title opinion issued to Roca Resources Company, Inc., appears to raise hearsay concerns. But its admissibility cannot be assessed until a foundation is presented during the hearing. Exhibit 13 appears to be a document prepared by Redrock and may therefore be admissible under the hearsay exception in NMRA 2002, Rule 11-801(D)(2)(a) (admission of party opponent). Once again, its admissibility cannot be assessed until a foundation is presented during the hearing. Exhibit 23 consists of a letter that may constitute hearsay, and an assignment that appears not to be hearsay. See Rule 11-803(N)(records of documents affecting an interest in property) or Rule 11-803(O)(statements in documents affecting an interest in property). No ruling can be made on the documents that comprise Exhibit 23 until a foundation is laid during the hearing.

15. Redrock also expresses a broader concern that the Commission will be invited to decide "contractual" issues between the parties. Nearburg, in its consolidated response to the motion *in limine* and motion to strike, states that its Exhibit 13 "... will not be offered for the purpose of establishing title or arguing title issues." See Nearburg's Consolidated Response, at 8. In the remainder of its response and in its amended pre-

hearing statement, Nearburg does not raise any contractual or title issues, and its pledge not to raise such issues on page 8 of the consolidated response appears to be a broad one. Therefore, no protective order is necessary at this time; if such issues arise during the hearing of this matter, Redrock should make objection at the time evidence is offered.

16. Redrock also lodges an objection to the chronology as a whole (Nearburg's proposed exhibit 2) on the grounds that the exhibit is argumentative, contains hearsay, contains extraneous matters and contains matters beyond the jurisdiction of the Commission.

17. The New Mexico Rules of Evidence permit admission of a summary of "... voluminous writings ... which cannot be conveniently be examined in court ..." NMRA 202, Rule 11-1006. An adequate foundation for introduction of a summary under Rule 1006 can be established by a witness who either prepared the summary or had a supervisory role and knowledge of how it was prepared. Cafeteria Operators v. Coronado - Santa Fe Associates, 1998-NMCA-005, 124 N.M. 440, 952 P.2d 435. Nearburg appears to view the chronology as a summary, admissible under Rule 1006. A foundation will have to established during the hearing for admission under Rule 1006, and a ruling on this point will have to await the hearing.

18. However, proposed Nearburg Exhibit 2 appears to be a hybrid; while it is partly a summary of documents, it is also partly a chronology of events. Review of the document discloses that documents representing each entry are not going to be in the record (even if all references to settlement are disregarded). The chronology is probably best characterized as a demonstrative aid to Nearburg's witnesses rather than as a summary. It may be admitted as a demonstrative aid or, if the proper foundation is laid during the hearing, as a summary pursuant to Rule 11-1006. It should be noted that documents similar to Nearburg's chronology are routinely accepted by the Oil Conservation Division and the Commission and have been helpful to provide necessary background and orientation --- however, because of the *legal residuum* rule, such documents have only rarely been relied upon in rendering a decision.

19. Redrock objects to "extraneous matters" in the chronology, and this objection seems to be one of relevance. Redrock has not identified which items are "extraneous." Therefore, no ruling can be made on this point. Redrock also objects to inclusion in the chronology of matters that are "beyond the jurisdiction" of the Commission. Once again, no specific items are referred to. This may be an argument related to Redrock's concerns about "contractual" or "title" issues discussed earlier, in which Redrock's concerns have been addressed. Reviewing the chronology, it appears that any given item, such as the offer of the State Land Office to lease acreage on December 21, 1999, may relate to a matter that is "beyond the jurisdiction" of the Commission in terms of regulatory authority, but that it is nevertheless relevant and admissible to provide background and context for the present controversy. No ruling on this point can be made due to the lack of specificity.

IT IS THEREFORE ORDERED THAT:

1. Redrock's motions concerning the chronology (Nearburg's proposed Exhibit 2) are granted in-part and denied in-part. Redrock's objection to the document in its entirety is denied subject to a proper foundation being laid by Nearburg during the hearing of this matter, either as a summary or as a demonstrative aid. Redrock's objection to evidence of settlement negotiations contained within Exhibit 2 is granted; Nearburg shall remove all such references and resubmit the document. Redrock's objections to material within Exhibit 2 concerning "extraneous matters" and to "matters beyond the jurisdiction of the Commission" are denied for lack of specificity.

2. Redrock's motions concerning the title opinion (Nearburg's proposed Exhibit 12) are denied subject to a proper foundation being laid by Nearburg during the hearing.

3. Redrock's motions concerning the letter and title opinion (Nearburg's proposed Exhibit 13) are denied subject to a proper foundation being laid by Nearburg during the hearing.

4. Redrock's motions concerning the letter and assignment (Nearburg's proposed Exhibit 23) are denied subject to a proper foundation being laid by Nearburg during the hearing.

5. Redrock's motion *in limine* concerning contracts, title and Redrock's overriding royalty are denied. If Nearburg raises these issues for the purpose of obtaining a Commission ruling on such matters (rather than for the purpose of providing context, as they are presently offered), Redrock may raise an appropriate objection.

6. A ruling on Redrock's motion *in limine* concerning "discovery" is deferred to the hearing upon appropriate objection.

DONE at Santa Fe, New Mexico, on the day and year hereinabove designated.

STATE OF NEW MEXICO
OIL CONSERVATION DIVISION

LORI WROTENBERY
Director

S E A L