NEW MEXICO LAW REVIEW

Volume 18
Issue 2 *Summer 1988*

Summer 1988

Construction Law

Stanley C. Sager

Claudia L. Ray

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STANLEY C. SAGER* AND CLAUDIA L. RAY**

I. INTRODUCTION

Construction law's development into an emerging field of legal specialization justifies a separate survey article on this subject. Since this is the first survey article on construction law, the authors examine selected earlier New Mexico cases and statutory law as background for the cases decided during the survey period. The discussion which follows refers to statutes affecting the construction industry, interprets legal duties flowing from relationships within a construction project, and discusses circumstances which affect the contractual obligation to arbitrate a dispute.

II. CONSTRUCTION DEFINED

The term "construction" has been defined in New Mexico in several different contexts, and the meaning has varied with the context. Whether work on a construction project is considered as construction, as alteration, as demolition, as installation, or as none of the above, may control the applicability of statutory law and case law.[1]

In *Universal Communication Sys., Inc. v. Smith*,[2] decided within the survey period, the New Mexico Supreme Court defined construction in the context of the Public Works Minimum Wage Act.[3] The issue was whether installation of a

*Shareholder, Sager, Curran, Sturges & Tepper, P.C., Albuquerque, New Mexico.

**Offices of Claudia L. Ray, Gallup, New Mexico.

1. Contexts include contracts for construction, licensing statutes, statutes providing security to contractors, materialmen, and suppliers on construction projects, such as the Federal Miller Act and the New Mexico Little Miller Act, statutes of limitation, wage acts, procurement statutes, and other statutory enactments. Within the New Mexico statutes affecting construction, different terms are used to describe the activities governed by each statute. For example, the Construction Industries Licensing Act protects the general welfare of the people by requiring the licensing of contractors who *construct, alter, repair, install, or demolish* property described in an itemized list. N.M. STAT. ANN. §§60-13-1 to -59 (Cum. Supp. 1987). The Mechanic's and Materialmen's Lien statutes permit the filing of a lien upon specific property by those who have provided labor and materials for the *construction, alteration, or repair* of any building or other structure. N.M. STAT. ANN. §§48-2-1 to -17 (Repl. Pamp. 1987). The Little Miller Act, contained within the Public Works Contract statute, requires a bond from a contractor engaged in *construction, alteration, improvement, or repair* of a public work. N.M. STAT. ANN. §13-4-18 (Repl. Pamp. 1985) *repealed by* Act of April 7, 1987, ch. 109, §1, 1987 N.M. Laws 726 (codified at N.M. STAT. ANN. §13-4-18 (Repl. Pamp. 1988)). The replacement section requires a performance and payment bond for "a construction contract" without defining construction.

2. 104 N.M. 754, 726 P.2d 1384 (1986).

3. N.M. STAT. ANN. §§13-4-11 to -17. The Act provides:

> [E]very contract in excess of twenty thousand dollars ($20,000.00), to which the state or any political subdivision thereof is a party, for construction, alteration, demolition, or repair, or any combination of these . . . shall contain a provision stating the minimum

replacement telecommunications system on the University of New Mexico campus, using existing tunnels under the University for cable location, was construction.[4] The court defined construction as "the creation of something new."[5] It found that there had been no erection or alteration of any university building or structure in the performance of Universal Communication System's work.[6] The court therefore concluded that the installation of the telecommunications system was not construction and, as a result, the Public Works Minimum Wage Act did not apply.[7]

The *Universal* court's determination that the Public Works Minimum Wage Act does not govern "installation" raises questions for the practitioner who must advise clients about the applicability of construction-related statutes. Activities which do not constitute construction under *Universal* guidelines may constitute construction in a different setting and, thus, fall under some other New Mexico construction-related statute. For example, although the Public Works Minimum Wage Act, as interpreted in *Universal*, excludes "installation" from construction activities, the Construction Industries Licensing Act includes "installing" when it defines "contractor" and "contracting" in requiring the licensing of persons who perform construction and related work.[8] The Act reads: "Contracting includes but is not limited to constructing, altering, repairing, installing, or demolishing any" of a numbered list of various types of work, including electrical wiring.[9] The Act defines electrical wiring as "general distribution or use of electrical energy."[10] Furthermore, the Construction Industries Division regulations, issued pursuant to the Licensing Act, require licenses for installers of telephone communication systems, public address systems, and other types of wiring.[11] Thus, Universal Communication System's installation of the conduit is considered construction under the licensing statute governing contracting. However, the identical activity is not construction under the Public Works Minimum Wage Act.

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wages to be paid various classes of laborers and mechanics which shall be based on the wages that will be determined by the chief of the labor and industrial bureau.

The statute protects contractor's employees from being paid substandard wages on state projects. Some Universal employees were being paid as unskilled laborers while performing work as installers and some workers were being paid as installers while performing work as technicians.

4. *Universal*, 104 N.M. at 755, 726 P.2d at 1385.

5. *Id.* at 756, 726 P.2d at 1386 (quoting BLACK'S LAW DICTIONARY 283 (Rev. 5th ed. 1979)). In an earlier case, the court had found that construction has resulted when the structure of a building is so completely changed that it properly can be called a new building. Board of Comm'rs. of Guadalupe County v. State, 43 N.M. 409, 94 P.2d 515 (1939).

6. *Universal*, 104 N.M. at 756, 726 P.2d at 1386.

7. *Id.* The term "installation" does not appear in the wage act although it appears in the Construction Industries Licensing Act. *See supra*, note 1. In Fleming v. Phelps-Dodge Corp., 83 N.M. 715, 716, 496 P.2d 1111, 1112 (1972), the court held that alteration has a separate meaning from construction, repairing, installing or demolishing; otherwise, each term would not be used in the statute. The court's determination that installation is not covered by the Public Works Minimum Wage Act, thus permitting substandard wages to be paid by Universal Communication Systems, runs counter to the Act's purpose, which is to protect workers from substandard wages when working on a public project.

8. N.M. STAT. ANN. §60-13-3 (Repl. Pamp. 1984 & Cum. Supp. 1988).

9. *Id.*

10. N.M. STAT. ANN. §60-13-32.

11. Construction Industries Division Regulation, Section 602.00 E3, E7, E8.

Another statutory setting which provides still another definition of construction is the Resident Contractor Preference Act of the Public Works Contracts statutes, of which the Minimum Wage Act is also a part.[12] These statutes give a preference to local contractors for "all contracts for the construction of public works or for the repair, reconstruction, including highway reconstruction, demolition, or alteration thereof."[13] If the *Universal* rule were applied consistently, the literal language of the Resident Contractor Preference statute would not provide a preference to an in-state installer over an out-of-state installer since installation is not an activity which is listed in the statute.

Another section of the New Mexico Public Works Contracts statute,[14] which is called the "Little Miller Act" after the Federal Miller Act[15] requires that persons who contract with the state, with municipalities, or with other public entities for the "construction, alteration, improvement, or repair" of any public building, structure, or highway must provide a surety bond assuring the performance of the contract, including payment to those providing labor and materials to the project.[16] The word "improvement" in the list of protected activities is an addition not found in the statutes previously cited. The Little Miller Act gives a right to sue on the bond to anyone who furnishes labor or materials in the prosecution of work required by the contract.[17] Since the right to sue is given to those who furnish labor or materials in the "improvement" of a public building, installers of a telecommunications system arguably could proceed against a Little Miller Act bond, at least when providing labor under a contract wherein the installation was incidental to the construction.

Another statutory context in which the definition of construction is important is the statute of limitations applying to construction.[18] The bar of this ten-year statute of limitations, sometimes called a statute of repose,[19] applies to "physical improvements to real property."[20]

New Mexico's Mechanic's and Materialmen's Lien statutes[21] provide security to those who furnish labor and materials used in the "construction, alteration, or repair . . ." of any privately owned project. Applying the reasoning from *Universal* to this statute, the statute would not apply to payment for labor and for materials *installed* in a private project since installation is not a term used in the statute. Such a narrow interpretation of the lien statute, however, runs

12. N.M. STAT. ANN. §§13-4-1 to -43 (Repl. Pamp. 1988).

13. *Id.* §§13-4-1 and -2.

14. *Id.* §§13-4-18 and -19. These sections of the Public Works Contracts statute govern public contract payment requirements, including payment to persons performing work or providing materials to a public works project, and require that a payment bond be provided to assure a source of payment for these persons. Under a private contract, a lien may be filed on the real property if payment is not made pursuant to the contract. *See infra*, note 22.

15. 40 U.S.C. §§270a to 270d (1978).

16. N.M. STAT. ANN. §13-4-18.

17. *Id.* §13-4-19.

18. *Id.* §37-1-27 (1978).

19. Newhall v. Field, 13 N.M. 82, 79 P. 711 (1905).

20. *Id.* In Delgadillo v. City of Socorro, 104 N.M. 476, 723 P.2d 245 (1986), the issue was whether gas lines are physical improvements to real property. The answer to this question determined whether the statute of limitations barred the suit. *See infra*, note 101 and accompanying text.

21. N.M. STAT. ANN. §§48-2-1 to -17 (Repl. Pamp. 1987).

counter to the statutes' purpose, which is to provide security for creditors,[22] and to the liberal interpretation which the New Mexico court has given to the Mechanic's and Materialmen's Lien statutes.[23]

The conclusion to be drawn from the *Universal* case is that the practitioner must look at the particular statute or statutes that apply to the client's work in order to define construction and to appropriately advise the client regarding a statute's impact on the client's business. Uniformity of language in the statutes that apply to the construction industry would reduce uncertainty and provide a predictable answer about whether a certain activity is construction, alteration, or repair, no matter how the question arises.

III. RELATIONSHIPS IN THE CONSTRUCTION INDUSTRY

The lawyer who regularly practices construction law sooner or later will encounter theories of recovery based on contract law, negligence, negligence per se (code and statutory violations), malpractice of architects and engineers, strict liability, warranty, implied warranty, misrepresentation, including interference with contractual relationships and with prospective advantage, fraud, statutory and contractual lien foreclosure, workmen's compensation, and a complex web of combinations of the foregoing. A modern construction project involves many parties with divergent interests which may only hypothetically center on successful completion of the project as a team effort. The parties to a project may include, but are not limited to, the owner, the contractor, the subcontractors, the architects and engineers and their consultants, the permanent and interim lenders, the tenants, the invitees, the workmen, regulatory agencies, guarantors, sureties, subsequent owners, suppliers and materialmen, and finally, the passerby who is injured while walking past the project. The New Mexico courts have addressed only a few of the duties existing among these diverse parties. The cases which follow touch on the duty of care, on warranties available in the construction industry under New Mexico common law, and on who bears the responsibility of providing a safe work place.

A. Safe Work Place

In the most meaningful construction law case decided during the survey period, the New Mexico Supreme Court articulated the factors which determine who must assume the duty to provide a safe work place at the construction site.[24] The defendant in *Valdez v. Cillessen & Son, Inc.*, contracted with the Indian Housing Authority to construct housing at Picuris Pueblo.[25] Defendant Cillessen, the general contractor for the project, subcontracted with Allstate Lathing and

22. *See id.* §48-2-2. "Every person performing labor upon, providing or hauling equipment, tools, or machinery for, or furnishing materials to be used in the construction, alteration, or repair of any building . . . or any other structure, has a lien upon the same." *Id.* No specific reference is made to "installing." *Id.*

23. Lembke Const. Co. v. J.D. Coggins Co., 72 N.M. 259, 382 P.2d 983 (1963).

24. Valdez v. Cillessen & Son, Inc., 105 N.M. 575, 734 P.2d 1258 (1987). The right to control the work is the pivotal factor. *See infra*, note 35.

25. *Id.* at 576, 734 P.2d at 1259.

Plastering (Allstate) to provide the lath and plaster work.[26] Allstate hired Archie Valdez as an employee to perform plastering work.[27] Valdez was injured when a lean-to scaffolding, which Allstate owned and erected, collapsed beneath him.[28]

Allstate did not carry workmen's compensation insurance.[29] After Allstate filed bankruptcy, Valdez sued Cillessen on six counts.[30] The trial court granted summary judgment on the punitive damages claim, and partial summary judgment on certain other claims[31] and both parties appealed.[32]

The supreme court considered counts one and three as a single claim, finding that the general contractor's failure to warn, alleged in count one, went to the right to control the work, agency and vicarious liability, alleged in count three.[33] The court acknowledged that the general rule is that one who hires an independent contractor is not liable for injuries to the employee of the independent contractor.[34] However, the court recognized that when the general contractor retains control of the work performed by the independent contractor, the general contractor may be liable to the independent contractor's injured employee.[35]

Cillessen argued that the general rule, which the court had applied in *Fresquez v. Southwestern Industrial Contractors & Riggers, Inc.*[36], warranted summary judgment.[37] The *Fresquez* court had held that the general contractor would not

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* The six counts follow:

> Count I: Alleges that Cillessen, as the general contractor, knew or should have known of dangerous construction of the scaffolding, and failed to warn plaintiff or to take any other steps to prevent exposure to danger and is, therefore, liable in compensatory and punitive damages. Count II: Alleges that Cillessen was negligent per se, predicating the claim on Cillessen's alleged violation of state and federal regulations concerning the type of scaffolding that should have been used, and claims compensatory and punitive damages for Cillessen's gross negligence. Count III: Alleging that Cillessen retained the right of control over Allstate, plaintiff claims Allstate was Cillessen's agent and, therefore, is vicariously liable in compensatory and punitive damages. Count IV: Asserts that Cillessen negligently hired Allstate, and is liable for compensatory and punitive damages. Count V: Alleges that Valdez was a third party beneficiary of the contract between Cillessen and Indian Housing Authority requiring workmen's compensation coverage, and Cillessen breached the contract. Count VI: Alleges that Valdez was a third party beneficiary of the contract between Cillessen and Allstate requiring workmen's compensation coverage, and Cillessen breached the contract.

Id.
31. *Id.*
32. *Id.*
33. *Id.* at 578, 734 P.2d at 1261.
34. *Id.* Valdez noted the general rule and then determined that an exception to that rule applied in this case.
35. *Id.*

> One who entrusts work to an independent contractor but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

RESTATEMENT (SECOND) OF TORTS §414 (1965). In this case, if Cillessen retained the right to control the work, then he had a duty to warn Valdez or Allstate about the unsafe scaffolding and to take measures to insure the safety of Valdez.
36. 89 N.M. 525, 554 P.2d 986 (Ct. App.), *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976).
37. *Valdez*, 105 N.M. at 579, 734 P.2d at 1262.

be held liable when the injury to the subcontractor's employee resulted from faulty equipment owned and operated by the subcontractor, even if the subcontractor were performing inherently dangerous work.[38] Since Allstate owned and operated the equipment which injured Valdez, the application of this rule, without further analysis, would favor Cillessen.[39] The *Valdez* court, however, refused to conclude that Cillessen was not liable. It focused on Cillessen's right to control the work.[40] The court determined that the general contractor would be liable if the general contractor retained the right to control the work of the subcontractor and if the general contractor knew or should have known of the unsafe condition.[41] Citing evidence from the record, the court concluded that genuine issues of material fact regarding the extent of Cillessen's control precluded summary judgment.[42]

Valdez's second count alleged that violations of OSHA regulations constitute negligence per se.[43] The court pointed out that New Mexico and federal regulations specifically provide that violations of the statute will not enlarge statutory or common law rights, liabilities, and duties of employers and employees.[44] Consequently, while violations of OSHA regulations were admissible as evidence on the question of Cillessen's negligence, this would not provide the basis for a separate count of negligence per se and summary judgment for the defendant was proper.[45]

Another count alleged that Cillessen had used negligent practices in hiring Allstate, making Cillessen liable for the physical injury that Valdez suffered.[46] Plaintiff's theory was that Cillessen should be liable for physical harm caused to third persons for its alleged failure to exercise reasonable care in employing a subcontractor.[47] The court ruled that the employee of the independent contractor is not a party entitled to any benefit under this theory.[48] Permitting the employee of an independent contractor to sue the general contractor would increase the general contractor's liability beyond the liability he would experience if he used his own employees to do the work.[49] Therefore, the court ruled that as a matter of law Valdez had no cause of action for negligent hiring against Cillessen, and summary judgment was proper.[50]

38. *Id.* (citing Fresquez v. Southwestern Indus. Contractors & Riggers, Inc., 89 N.M. 525, 554 P.2d 986 (Ct. App.) *cert. denied*, 90 N.M. 8, 558 P.2d 620 (1976)).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 580, 734 P.2d at 1263.
43. *Id.* at 577, 734 P.2d at 1260.
44. *Id.* at 578, 734 P.2d at 1261.
45. *Id.*
46. *Id.* at 577, 734 P.2d at 1260.
47. *Id.* at 580, 734 P.2d at 1263 (citing RESTATEMENT (SECOND) OF TORTS §411 (1965)).
48. *Id.* (citing New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976)). The *Valdez* court pointed out that the *Montanez* court said that an employee of an independent contractor is not a third party under §§413, 416, and 427 RESTATEMENT (SECOND) OF TORTS (1965). In this case, §411 supplies the applicable rule and the court found that Valdez was not a third party under the rule, thus expanding the application of *Montanez*. 105 N.M. at 580, 734 P.2d at 1263.
49. *Valdez*, 105 N.M. 580, 734 P.2d at 1263.
50. *Id.*

In dictum, the court suggested that if Allstate was Cillessen's agent, rather than a subcontractor, then Valdez may be able to recover under Cillessen's workmen's compensation coverage.[51] This suggests that general contractors may become liable for injury to the employees of their subcontractors if the substance of the independent contractor relationship does not comport with its form.

Two final counts alleged that Valdez was a third party beneficiary of the Cillessen-Indian Housing Authority contract and of the Cillessen-Allstate contract.[52] Each of these contracts contained a provision requiring that workmen's compensation insurance be purchased.[53] Neither contract specified which or whose workmen were protected by the insurance.[54] Valdez argued that the court should allow parole evidence to clarify the intentions of the parties, while Cillessen argued that nothing in the contract indicated that it was intended to benefit Valdez.[55] Based on the ambiguity in the contract, the court concluded that an issue of material fact existed regarding whether Valdez was a third party beneficiary, and summary judgment was improper.[56] In a dissenting opinion, Justice Stowers argued that the Cillessen-Allstate contract contained no promise by Cillessen which Valdez could enforce by suing Cillessen.[57] Justice Stowers argued that the action would lie against the promisor (Allstate) by the third party (Valdez) to enforce the promise made for his benefit.[58] The contract contained a promise by Allstate to carry insurance but no promise by Cillessen to compel Allstate to keep that promise.[59] Consequently, Justice Stowers argued, the trial court correctly concluded that there was no ambiguity and that summary judgment was proper.[60] A clause added to the contractual requirement for carrying workmen's compensation coverage specifying for whose benefit the insurance is required should preclude Valdez's third party beneficiary argument.

Of greater concern remains the possibility of increased liability upon the general contractor when the court finds that the acts done by the general contractor are evidence of a right to control the work. In *Valdez*, the court noted that Cillessen agreed to be held liable for any violations of labor standard provisions contained in the contract between Cillessen and the Indian Housing Authority, that Cillessen issued detailed instructions to Allstate concerning its work, fired the employees of subcontractors, instructed employees of subcontractors on how to do their jobs and assigned employees to tasks other than those they had been hired to do.[61] This evidence created an issue regarding the right to control the work on the jobsite.[62] Owners, general contractors, architects, and engineers

51. *Id.*
52. *Id.* at 581, 734 P.2d at 1263.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 582, 734 P.2d at 1264 (Stowers, J., dissenting).
58. *Id.* From Valdez's point of view, this action would be without value since Allstate had no insurance and had declared bankruptcy.
59. *Id.*
60. *Id.*
61. *Id.* at 580, 734 P.2d at 1262.
62. *Id.*

need to provide general supervision or oversight to assure that the construction meets the specifications.[63] However, practitioners must advise their clients of the potential liability they assume when they retain the right to control their subcontractor's work. In *Valdez*, the general contractor treated the subcontractors' employees as his own,[64] which was more than required to assure that the job specifications were met. In addition, the court focused on the detailed instructions Cillessen gave to Allstate regarding the required temperature for applying the stucco, the type of lime and cement to use, and how to apply the building paper, mesh, and stucco.[65] Whether these detailed instructions were simply a reiteration of the contract specifications or represented an active involvement in the control of the work remains an issue for the trial court.

B. Contractual Duty

In *Wendenberg v. Allen Roofing Co., Inc.*,[66] a homeowner contracted to have a urethane foam roof applied to his house in a workmanlike manner. The New Mexico Supreme Court established the standard for determining whether there has been a negligent breach of a contractual duty to perform work in a workmanlike manner in *Andriola v. Milligan*[67]: "[W]here a person is employed in work of skill, the employer buys both his labor and judgment, and he ought not to undertake work if he cannot succeed, and he should know whether it will or not." The *Wendenberg* court held that the roofing contractor breached its duty to install the roof in a workmanlike manner because the roofer undertook the work when he knew or should have known that a foam roof would delaminate when applied over an asphalt base.[68]

Comparing the *Andriola* standard with the duty set out in New Mexico Uniform Jury Instruction 13-826[69] suggests that the *Wendenberg* court imposed a weightier burden upon the person who is employed to provide work of skill, than does the U.J.I. The added burden is to know whether or not the work undertaken will succeed. Implicitly, however, the degree of skill and judgment, including knowing whether the work will succeed or not, may simply be measured by the skill and knowledge of the reasonably prudent person engaged in similar work.

The *Wendenberg* case is a clear indication that an owner is entitled to skill and to judgment. Practitioners must caution their clients that they may be held accountable both for negligent work and for non-negligent work when a reasonably prudent contractor would not have gone forward with the work.

Finally, in *Wendenberg*, the court refused to apply terms of a limited warranty

63. *Cf. Fresquez*, 89 N.M. 525, 554 P.2d 986.

64. *Valdez*, 105 N.M. at 580, 734 P.2d at 1262.

65. *Id.*

66. 104 N.M. 231, 719 P.2d 809 (1986).

67. 52 N.M. 65, 67, 191 P.2d 716, 717 (1948), *quoted in Wendenberg*, 104 N.M. at 233, 719 P.2d at 811.

68. 104 N.M. at 233, 719 P.2d at 811. Expert testimony that foam cannot be effectively applied over an asphalt base supported the court's finding of an error in judgment by the roofer.

69. The U.J.I. requires the use of the degree of skill of a reasonably prudent person in the undertaking of work which either requires some learning or special training or experience, but does not specify that work ought not be undertaken when it cannot be reasonably performed. N.M. U.J.I. Civ. 3-826.

delivered after the work was completed, when that warranty restricted requirements which had been imposed upon the contractor by the terms of the contract.[70] The court held that a guarantee limiting the warranty given in the contract is ineffective because the terms of a contract cannot be unilaterally changed by one party.[71]

C. Warranty

Three cases, none of which are from the survey period, address and clarify the warranties available in the New Mexico construction industry. In *Newcum v. Lawson*,[72] (Newcum II), the purchaser of a home (Newcum) sued his vendor (Lawson) for breach of contract. Lawson bought the home from the builder. He impleaded the builder seeking indemnification on negligence and breach of contract theories.[73] Lawson had failed to reveal to Newcum, who purchased the home from Lawson, that water intermittently entered the underground heating and ventilation ducts.[74] The trial court found that the builder had expressly warranted his workmanship and that the house was free from material defects to the Lawsons, the first purchasers of the house.[75] In addition, the trial court found that the builder had breached an implied warranty of habitability.[76]

On appeal, the court of appeals held that a disclaimer of the implied warranty of habitability by the builder was effective in relation to the Lawsons, the first purchasers of the house.[77] However, the court of appeals upheld the trial court's finding that the builder had given an express warranty to the Lawsons when the home was built, and that the builder had breached this warranty.[78] The Lawsons also argued that the builder gave them an express warranty after he had built the house, when the water problem was discovered.[79] The builder came to the house to determine the source of the water intrusion and told the Lawsons that the "problem causing the water to accumulate in the air conditioning and heating duct work was that of excessive watering of the landscaping."[80] The Lawsons argued that they relied on this statement by the builder and that the builder should be held liable for their reliance on this "warranty".[81] The builder countered that his statement was simply an opinion and not a warranty.[82] The court agreed that this statement did not constitute an actionable express warranty and defined

70. 104 N.M. at 233, 719 P.2d at 811. The roofer promised that the roof would "work just fine." After completing the roof, the roofer sent the homeowner a warranty which provided that the roofer would not be responsible for leaks or consequential damages for improper application or failure of any component underlying the roofing membrane.

71. *Id.*

72. 101 N.M. 448, 684 P.2d 534 (Ct. App. 1984).

73. *Id.* at 451, 684 P.2d at 537.

74. *Id.* at 452, 684 P.2d at 538.

75. *Id.* at 454, 684 P.2d at 540.

76. *Id.* at 455, 684 P.2d at 541.

77. *Id.*

78. *Id.*

79. *Id.* at 453, 684 P.2d at 539.

80. *Id.*

81. *Id.*

82. *Id.*

warranty as "an assurance by one party to a contract of the existence of a fact upon which the other party may rely."[83] The court pointed out that an express warranty must be made at the time of the sale[84]: "[A]ny affirmation of the quality or condition of the thing sold, (not uttered as matter of opinion or belief,) *made by the seller at the time of sale,* for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase; if so received and relied on by the purchaser, is an express warranty."[85]

The court in *State, ex rel. v. Gathman-Matotan Architects and Planners, Inc.*,[86] held that an architect warrants only that he will use the skill customarily demanded of his profession. Emphasizing that an architect is not held to the Uniform Commercial Code's implied warranty for the sale of goods, the court found that architects do not warrant that their plans are fit for their intended purpose.[87]

The lawyer advising an owner should be aware that the fact that an architect's only warranty is to use reasonable skills may provide a dilemma to a building owner when one considers that the obligation of the contractor is simply to build that which is designed.[88] The problem becomes evident in a hypothetical situation when the particular design of the architect or engineer does not work as built, and in providing the design, the designer complied with the applicable standard of care, and the contractor built the project in accordance with the plans and specifications. In such a situation, the owner has a structure which will not work as contemplated and no effective legal remedy against the designer or the contractor. While contractual warranties may be imposed in owner/designer contracts, in the experience of the authors such provisions are excluded from the designers' professional liability coverage.

D. Contract Law

A construction contract case worth consideration as background for the practitioner who feels there are unique rules for the interpretation of construction contracts is *Shaeffer v. Kelton*,[89] involving a contract for the development and

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83. *Id.* (quoting Steadman v. Turner, 84 N.M. 738, 507 P.2d 799 (Ct. App. 1973)).

84. *Id.*

85. *Id.* (quoting Shippen v. Bowen, 122 U.S. 575 (1887) (emphasis theirs)).

86. 98 N.M. 790, 653 P.2d 166 (Ct. App.), *cert. quashed*, 99 N.M. 47, 653 P.2d 878 (1982). *See supra*, note 69.

> Traditionally, architects, along with other professionals such as doctors and lawyers, do not promise a certain result. The professional is usually employed to exercise the customary or reasonable skills of his profession for a particular job. He "warranties" his work only to the extent that he will use the skill customarily demanded of his profession. *Id.*

Id. at 793, 653 P.2d at 169.

87. *Id.* Under New Mexico's Uniform Commercial Code, N.M. STAT. ANN. §55-2-315 (1978) 'sale of goods' the seller warrants that the goods sold are fit for their intended purpose if the seller knows of a particular purpose for which the goods are sold and the buyer relies on the seller's skill or judgment to select or furnish suitable goods.

88. Staley v. New, 56 N.M. 756, 250 P.2d 893 (1952). The exception to this rule occurs when the two functions of design and construction are combined in one party such as in the design-build contract. Clear v. Patterson, 80 N.M. 654, 459 P.2d 358 (1969).

89. 95 N.M. 182, 619 P.2d 1226 (1980). A general contractor contracted to develop and sell real property to the defendant. When the building was substantially complete, the general contractor sought to close the deal with the defendant, who then refused to pay on the grounds that he was withdrawing from the deal. The issue became what form of contract was entered into by the parties, who breached the contract, and what damages were owed as a consequence of the breach.

conveyance of real estate. The court considered whether a contract should be classified as a real estate contract or as a construction contract as a step in determining the legal effect of the contract.[90] The court refused to classify the contract saying that the "objective in construing a contract is not to label it with specific definitions or to look at form above substance, but to ascertain and enforce the intent of the parties as shown by the contents of the instrument."[91] General rules for contract interpretation apply to the construction contract.

IV. INTERPRETATIONS OF STATUTORY LAW AFFECTING THE CONSTRUCTION INDUSTRY

The cases which follow interpret the Little Miller Act, the lien statute, or the ten-year statute of limitations.

A. Little Miller Act

The court in *Nichols v. Stuckman*[92] considered the Little Miller Act and re-emphasized that the purpose of the Act is to provide a remedy, equivalent to the materialmen's lien, which can be used on public works projects. In addition, the court restated that, in contrast to the Federal Miller Act, the New Mexico Little Miller Act protects third tier suppliers of materials to state public construction projects.[93] Counsel for third tier suppliers, such as persons selling materials to subcontractors, should therefore be aware of the protection afforded third tier clients by the Little Miller Act.

State ex rel. Goodmans v. Page & Wirtz[94] provides additional interpretation of the Little Miller Act by stating that notice of nonpayment under the bond given before, but not after, final delivery of materials is not a fatal defect to the action, although the Act requires written notice within ninety days from the date on which the last of the materials was furnished. Noting that the Little Miller Act is by nature a remedial statute, the court refused to narrowly construe the notice provision.[95]

B. Mechanic's Lien Statute

Aztec Wood Interiors v. Andrade Homes interprets section 48-2-10.1 of the New Mexico lien statute to bar a subcontractor from enforcing a lien if the owner

90. *Id.* at 184-85, 619 P.2d at 1298-99. The court emphasized the applicability of standard legal concepts in construction disputes.

91. *Id.* at 185, 619 P.2d at 1299. The court listed rules for the interpretation of a contract which include: 1. the contract should be considered as a whole; 2. every word, phrase, or part should be given a meaning and significance according to its importance in the contract; 3. uncertainties should be construed most strongly against the drafters. When, as in this case, the written contract is ambiguous, the intent of the parties may be determined by the language used in the contract, the conduct of the parties and the objectives which the parties sought to accomplish at the time the contract was executed. In addition, the waiver of an express contractual condition may be implied in the conduct of the parties. *Id.*

92. 105 N.M. 37, 728 P.2d 447 (1986). *See supra*, note 1. The mechanic's and materialmen's lien permits a contractor or supplier who provides labor, materials, services, or goods to a job to place a lien on specific property to recover unpaid charges.

93. *Id.* at 41, 728 P.2d at 451.

94. 102 N.M. 22, 690 P.2d 1016 (1984).

95. *Id.* at 25, 690 P.2d at 1019 (1984) (citing N.M. STAT. ANN. §13-4-19(A) (Repl. Pamp. 1985).

makes final payment before the lien is filed.[96] A subcontractor brought suit against a contractor and against owners on a debt and to foreclose a mechanic's lien.[97] After completing construction, the contractor gave the owner an affidavit reciting that there were no outstanding liens against the property; subsequently, the plaintiff filed a lien.[98] The court stated that in order to claim the protection afforded by the lien statute, a subcontractor must file its lien before the owner makes payment to the contractor.[99] The statute requires an owner to wait twenty days before payment is made to the contractor if the contractor's affidavit shows there are unpaid subcontractors.[100] Absent such an affidavit, the owner may make final payment.[101] Section 48-2-10.1 protects innocent owners from liens once final payment is made to the contractor; thus, the duty is on the subcontractor to file his lien before final payment is made. The *Aztec Wood* case provides a liberal interpretation to protect the homeowner from having to pay twice for the same work and practitioners should advise clients to file liens immediately upon completion of their work.

C. Statute of Limitations

The ten-year statute of limitations provides that no action arising out of defective or unsafe condition of a physical improvement to real property shall be brought after ten years from substantial completion.[102] In *Howell v. Burk*, the Court of Appeals said that this statute is designed to protect builders from increased hazards resulting from the judicial extension of liability.[103] In *Terry v. New Mexico State Highway Comm'rs.*, the court made one exception to the ten-year limit.[104] The court determined that when the cause of action accrues late in the ten-year period, a plaintiff may be denied due process because he has an unreasonably short limitation period.[105] Therefore, the *Terry* court held that a suit filed within three years of an accident which occurred three months before the end of the ten-year period was timely filed.[106] This interpretation of the

96. 104 N.M. 45, 716 P.2d 236 (1986). N.M. STAT. ANN. §48-2-10.1 (Repl. Pamp. 1987) reads:

> A. Payment by the owner . . . to any person entitled to such payment of all amounts due and owing for any construction, . . . which could give rise to a lien . . . shall discharge all such liens unless prior to such payment any person who is entitled to such lien has filed for record his lien. . . .

97. *Aztec Wood*, 104 N.M. at 45, 716 P.2d at 236.

98. *Id.* at 46, 716 P.2d at 237.

99. *Id.*

100. N.M. STAT. ANN. §48-2-10.1. *See supra*, note 96. Section B. reads in pertinent part: "If notice has been given to the owner (of liens), . . . , payment in full . . . shall not avail the owner . . . of the benefits of Subsection A. . . ."

101. *Aztec Wood*, 104 N.M. at 46, 716 P.2d at 237.

102. N.M. STAT. ANN. §37-1-27 (1978) reads:

> No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property . . . shall be brought after ten years from the date of substantial completion of such improvement. . . .

103. 90 N.M. 688, 693, 568 P.2d 214, 219 (Ct. App.), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977).

104. 98 N.M. 119, 645 P.2d 1375 (1982).

105. *Id.* at 122, 645 P.2d at 1378.

106. *Id.* at 123, 645 P.2d at 1379.

statute, in essence, extends the time for filing suit although the accident must occur within the ten-year period.

Since the ten-year statute of limitation applies only to physical improvements to real property, the court in *Delgadillo v. City of Socorro* addressed the question of whether gas lines are physical improvements to real property.[107] The court defined physical improvements to real property as "the enhancement or augmentation of value or quality: a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs."[108] The court held that a gas line, under this definition, is a physical improvement.

V. ARBITRATION

The New Mexico arbitration statute governs arbitration in the New Mexico construction industry. The court in *Shaw v. Kuhnel* held that an unregistered Texas architectural corporation and an unlicensed Texas contractor could not enforce an arbitration clause in a contract because foreign corporations which transact business in this state without a certificate of authority are prohibited from maintaining any action, suit, or proceeding in New Mexico.[109] With considerable logic the court held that the issue of fraud in the inducement of the execution of the contract is not arbitrable, reasoning that if there is fraud the contract is invalid as a whole, making the arbitration clause a moot issue.[110]

In *Board of Educ. Taos Mun. Schools v. The Architects, Taos,* the court considered a contract to arbitrate when the defendant architects raised the right to arbitrate as an affirmative defense.[111] Although the architects raised the affirmative defense in their answer, they went forward with interrogatories, filed numerous motions, and obtained a trial setting.[112] The architects then claimed that the suit should be barred because of the enforceable contract to arbitrate.[113] Despite the strong policy favoring arbitration and resolving doubts concerning the waiver of an agreement to arbitrate in favor of arbitration, the right can be waived if the party opposing arbitration can show prejudice.[114] Reasoning that discovery is severely limited in arbitration and that the architects in this case had invoked the machinery of the judicial process through use of the discovery process, the court held that the architects had waived their right to compel arbitration.[115]

107. 104 N.M. 476, 723 P.2d 245 (1986).
108. *Id.* at 478, 723 P.2d at 247 (citation omitted).
109. 102 N.M. 607, 698 P.2d 880 (1985).
110. *Id.* at 608-09, 698 P.2d at 881-82.
111. 103 N.M. 462, 709 P.2d 184 (1985).
112. *Id.* at 463, 709 P.2d at 185.
113. *Id.*
114. *Id.*
115. *Id.* at 465, 709 P.2d at 187.

VI. CONCLUSION

The emerging field of construction law challenges the practitioner to develop expertise in many traditional areas of the law, from contracts, torts, insurance, sureties, to other areas, in order to represent adequately those who participate in construction. Legal expertise is not the only asset which the practicing attorney should bring to the construction arena, however. Construction disputes require knowledge of the basic vocabulary of those who design and build the structures, and the ability to understand the meaning of construction documents. Those documents proliferate in a complex project, and the patience needed to winnow the relevant documents from the irrelevant is a slowly acquired talent for those with little prior construction background. The time required to develop construction expertise is well spent for those interested in this field of rapidly expanding legal activity.