



Summer 1994

Workers' Compensation Law - Pursuing the Benevolent Purpose of New Mexico's Workers' Compensation Statute as a Reimbursement Statute: *Montoya v. AKAL Security, Inc.*

Vickie R. Wilcox

Recommended Citation

Vickie R. Wilcox, *Workers' Compensation Law - Pursuing the Benevolent Purpose of New Mexico's Workers' Compensation Statute as a Reimbursement Statute: Montoya v. AKAL Security, Inc.*, 24 N.M. L. Rev. 577 (1994).

Available at: <https://digitalrepository.unm.edu/nmlr/vol24/iss3/21>

WORKERS' COMPENSATION LAW—Pursuing the
"Benevolent Purpose" of New Mexico's Workers'
Compensation Statute as a Reimbursement Statute:
Montoya v. AKAL Security, Inc.

I. INTRODUCTION

In *Montoya v. AKAL*, the New Mexico Supreme Court held that the workers' compensation statute is a reimbursement statute for the employer, overruling almost twenty-eight years of decisions interpreting the statute as an election statute for the employee.¹ Overruling *Castro v. Bass*² and its progeny, the court stated that if an employee proves "that a third-party release or satisfaction of judgment has not discharged fully the employer's liability to pay benefits," the employee may still receive workers' compensation benefits from the employer.³ If the employee deals in good faith and at arm's length with the third-party tortfeasor, the employer's liability is reduced by the amount received from the third-party.⁴ This Note discusses the history of workers' compensation law and examines the supreme court's reasoning for abandoning the rule of election and adopting the view that New Mexico has a reimbursement statute. Finally, this Note offers a brief critique of the *Montoya* decision.

II. STATEMENT OF THE CASE

On June 3, 1987, while Carmela Montoya (Montoya) was working as a security guard at Santa Fe Vocational Technical School (School) as an employee for AKAL Security, Inc. (AKAL), she was attacked and severely injured.⁵ AKAL's workers' compensation insurance carrier, Royal Insurance Company (Royal), paid medical benefits⁶ and later temporary total disability benefits⁷ to Montoya.

A year after Montoya began receiving benefits from Royal, she initiated a suit against the School to recover damages for her injuries.⁸ Montoya informed Royal that she was suing the School, and in early 1990, she informed Royal that she intended to settle the action against the School.⁹

1. 114 N.M. 354, 838 P.2d 971 (1992) (citing N.M. STAT. ANN. § 52-5-17 (1978 & Supp. 1986)).

2. 74 N.M. 254, 392 P.2d 668 (1964).

3. *Montoya*, 114 N.M. at 358, 838 P.2d at 975.

4. *Id.*

5. *Id.* at 354, 838 P.2d at 971.

6. *Id.*

7. *Id.* at 355, 838 P.2d at 972.

8. *Id.*

9. *Id.*

The suit against the School was settled and was subsequently dismissed with prejudice.¹⁰ Shortly after the case was dismissed, Royal terminated Montoya's workers' compensation benefits.¹¹ Montoya filed a claim to reinstate the benefits, but AKAL successfully obtained a summary judgment barring Montoya's claim.¹² In granting the summary judgment, the workers' compensation judge relied on New Mexico's workers' compensation statute¹³ and on *Castro v. Bass*¹⁴ which had held that an employee's receipt of damages, regardless of the amount awarded or recovered was "an award for all injuries."¹⁵ In an unpublished opinion, the New Mexico Court of Appeals affirmed the denial of benefits.¹⁶

The New Mexico Supreme Court granted certiorari, and in an opinion written by then-Chief Justice Ransom, it rejected the *Castro* rule relied upon by the lower courts.¹⁷ The supreme court adopted the view that a worker is not automatically precluded from resuming workers' compensation benefits from an employer after the worker receives a judgment or settlement from a third-party tortfeasor.¹⁸ Accordingly, the supreme court reversed the court of appeals and remanded the case to the workers' compensation judge for further proceedings under the new rule.¹⁹

III. REIMBURSEMENT AND ELECTION STATUTES

In the United States between 1908 and 1950, workers'²⁰ compensation laws were enacted by every state legislature to compensate for the injury and death an employee might suffer in the course of his employment.²¹ Although each jurisdiction has its own unique statute, the various statutes generally include provisions prohibiting the employee from suing the employer for damages, eliminating the need to prove an employer's fault, and rendering irrelevant any employee fault.²² All state workers' com-

10. *Id.*

11. *Id.*

12. *Id.*

13. N.M. STAT. ANN. § 52-5-17 (1978 & Supp. 1986).

14. 74 N.M. 254, 392 P.2d 668 (1964).

15. *Montoya*, 114 N.M. at 356, 838 P.2d at 973, (quoting *Seminara v. Frank Seminara Pontiac-Buick, Inc.*, 95 N.M. 22, 24, 618 P.2d 366, 368 (Ct. App. 1980)).

16. *Montoya*, 114 N.M. at 354, 838 P.2d at 971.

17. *Id.* at 357, 838 P.2d at 974.

18. *Id.*

19. *Id.* at 358, 838 P.2d at 975.

20. Recently, the term "workmen's compensation" has been replaced by "workers' compensation." For consistency, "workers'" will be used rather than "workmen's" in this Note.

21. See, e.g., WILLIAM R. DITTMAR, *WORKMEN'S COMPENSATION* 7 (2d ed. 1959); see also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 80 (5th ed. 1984). Prosser explains the need for workers' compensation laws in the following way: "Under the common law system, by far the greater proportion of industrial accidents remained uncompensated, and the burden fell upon the worker who was least able to support it. Furthermore, the litigation which usually was necessary to any recovery meant delay, pressure upon the injured person to settle his claim in order to live, and heavy attorney's fees and other expenses which frequently left him only a small part of the money finally paid." *Id.* (citations omitted).

22. DITTMAR, *supra* note 21, at 8; see also BLACK'S LAW DICTIONARY 1605 (6th ed. 1990) ("The effect of most workers' compensation acts is to make the employer strictly liable to an employee for injuries sustained by the employee which arise out of and in the course of employment, without regard to the negligence of the employer or that of the employee.").

pensation statutes inherently provide for this compromise between limited liability for the employer and virtually guaranteed but limited recovery for the employee. Thus, the "employer [makes] substantial concessions as the price of his limited liability; the employee [gives] up his right against his own employer to bring damage suits."²³

Despite the defining characteristic of this compromise between employer and employee, the specific details of how to carry out the policy goals vary in the state statutes, especially when an employee sues a third-party tortfeasor. Statutes dealing with third-party tortfeasors are defined as being either election statutes or reimbursement statutes. The two types of statutes have different underlying philosophies and have different effects on an employee trying to recover from an injury.

Basically, election statutes emphasize the need for the employee to choose an action. An employee who chooses either to receive compensation or to pursue recovery from a third-party tortfeasor may be later precluded from pursuing the option not chosen, even if the option chosen was unsuccessful.²⁴ On the other hand, reimbursement statutes limit double recovery by emphasizing the employer's right to reimbursement from any recovery the employee may receive from a third-party tortfeasor.²⁵

A. Election Statutes

Under an election statute, an employee whose injury is the result of a third party's negligence must elect to pursue either compensation from his employer or damages from the third-party tortfeasor.²⁶ Harsh results often occur under these statutes when an employee makes a poor choice in deciding which party to recover from and as a result loses any right to recovery.²⁷

23. 2A ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 71.20 (1990); *see also* PROSSER, *supra* note 21, § 80 573-74:

(I)njured employees receive immediate relief, a fruitful source of friction between the employer and the employee has been eliminated, . . . a tremendous amount of burden and expensive litigation has been eliminated, and a more harmonious relation between the employers and the employees exists than was possible under the old system.

(quoting 1 WILLIAM R. SCHNEIDER, *WORKMEN'S COMPENSATION* 6 (2d ed. 1932)).

24. *See* *Castro v. Bass*, 74 N.M. 254, 258-59, 392 P.2d 668, 672-73 (1964); LARSON, *supra* note 23, §§ 73.00 & 73.10.

25. *See, e.g., Castro*, 74 N.M. at 261, 392 P.2d at 675, (Noble, J., dissenting) (discussing third-party recovery and stressing the reimbursement rights of the employer under the statute).

26. LARSON, *supra* note 23, § 73.10. Usually, the employee is barred from pursuing the second action, regardless of which action he pursued first. "Occasionally the election works only one way; for example, in Texas a prior third-party suit bars a compensation claim, but a prior compensation claim does not bar a later third-party suit, although it reduces the recoverable damages by the amount of compensation." *Id.* (citations omitted). In the United States, only a few jurisdictions have election statutes. *Id.*

27. If a worker sued a third-party and received a verdict but no or little judgment, the worker was precluded from receiving workers' compensation benefits. *See Montoya*, 114 N.M. at 356, 838 P.2d at 973 (noting that in *Seminara v. Frank Seminara Pontiac-Buick, Inc.*, 95 N.M. 22, 24, 618 P.2d 366, 368 (Ct. App. 1980), "[t]he Court refused to deem as a nonexistent remedy an election that results in no award.").

Election statutes have several purported justifications, including preventing double recovery for the same injury.²⁸ An employee is precluded from receiving full damages for his injury from a tort action in addition to receiving compensation for his injury from workers' compensation. However, this justification is without merit; modern workers' compensation statutes preclude double recovery by requiring that the employer's entire statutory liability for workers' compensation benefits be reimbursed from the employee's recovery from the third party.²⁹

Another justification without merit is that the employee's pursuit of an action against a third party might prejudice an employer's right to reimbursement because the employee is in control of the litigation.³⁰ However, the employer is not really prejudiced because he is reimbursed from any recovery the employee receives from a third-party tortfeasor.³¹ Additionally, as a protective measure, some jurisdictions require that the employee notify the employer of his intent to bring the action,³² and other jurisdictions require that the employee receive the employer's approval before the employee settles the action.³³ In New Mexico, the workers' compensation judge reviews the actions of the employee to ensure that the employer's right to reimbursement has not been prejudiced.³⁴ These measures reduce the risk of prejudice to the employer by giving the employer various degrees of control over the action against the third-party tortfeasor.

Despite these arguments for election statutes, the statutes and their harsh results³⁵ are "out of place in workers' compensation, and the current trend is to abolish the requirement" of election.³⁶

B. Reimbursement Statutes

A majority of jurisdictions avoid the harsh rule of election and instead interpret their workers' compensation statutes to be reimbursement sta-

28. See, e.g., LARSON, *supra* note 23, § 73.30.

29. *Id.*; see also *Castro*, 74 N.M. at 260, 392 P.2d at 674 (Noble, J., dissenting) (Employer's right to share in recovery from third party is "not only to the extent of the compensation then paid but to the extent of his full liability to the employee.").

30. LARSON, *supra* note 23, § 73.30, at 14-363.

31. *Id.* at 14-364.

32. *Id.* (citing *U.S.F. & G. Co. v. New York, N.H. & H.R. Co.*, 125 A. 875 (Conn. 1924); *Travelers Ins. Co. v. Georgia Power Co.*, 181 S.E. 111 (Ga. App. 1935); *Hartquist v. Tamiami Trails Tours*, 190 So. 533 (Fla. 1939); *Maryland Casualty Co. v. Simmons*, 193 So. 2d 446 (Fla. 1966)). Notice and consent from an employer were required before an employee could settle if the employee still wanted to receive workers' compensation benefits in New Mexico. See *Castro*, 74 N.M. at 258, 392 P.2d at 672 (interpreting *White v. New Mexico Highway Comm'n*, 42 N.M. 626, 83 P.2d 457 (1938)).

33. LARSON, *supra* note 23, § 73.30 (citing *Breese v. Price*, 633 P.2d 987 (Cal. 1981)).

34. In *Montoya* the court stressed that the worker must deal at arm's length and in good faith with the third-party tortfeasor, or the employer might not be liable for the full amount of compensation remaining after reimbursement. *Montoya*, 114 N.M. at 358, 838 P.2d at 975.

35. See LARSON, *supra* note 23, § 73.21. The harsh results occur when the employee makes a poor choice and recovers little or nothing. "[A] workman who is supposed to be within the protection of the beneficent system of workmen's compensation can lose both compensation and common-law rights by making a bad guess as to which is the appropriate remedy." *Id.*

36. *Id.* § 73.10. Two years prior to deciding *Castro*, the Supreme Court of New Mexico recognized that the "general trend seem[ed] to be away from the requirement of election of remedies." *Brown v. Arapahoe Drilling Co.*, 70 N.M. 99, 104, 370 P.2d 816, 821 (1962).

tutes.³⁷ Under a reimbursement statute, an employee whose injury is the result of a third-party tortfeasor's negligence may proceed against both the third-party tortfeasor and against the employer.³⁸ However, the employee may not keep both recoveries.³⁹ Usually, workers' compensation statutes provide for reimbursement to the employer for any compensation paid, and then the employee receives any excess recovery.⁴⁰ The employee therefore receives compensation, but does not receive double recovery from both the third-party tortfeasor and his employer.⁴¹

C. Workers' Compensation in New Mexico

New Mexico courts have consistently recognized two general purposes for the workers' compensation statute: to prohibit double recovery for the employee and to protect the employer's right to reimbursement from the proceeds of a third-party action.⁴² Despite the apparent continuity in the courts' understanding of the statute's goals, the courts have vacillated between interpreting the New Mexico statute as an election statute for the employee and a reimbursement statute for the employer. Vacillation occurs when the courts favor one goal over the other and choose to interpret the statute accordingly.

Prior to 1964, the New Mexico Supreme Court viewed the workers' compensation statute as a reimbursement statute for the employer.⁴³ The court was more concerned with reimbursing the employer than with forcing an unfair election on the employee. For example, in *Kandelin v. Lee Moor Contracting Co.*,⁴⁴ the employer contended that the statutory provision, "shall not be entitled to receive both damages and compensation," precluded the employee from receiving workers' compensation in addition to later seeking damages.⁴⁵ In response to the employer's argument, the court stated:

[t]here might be some force to this argument if compensation from the employer had made the plaintiff financially whole. If he had been made financially whole, he could not expect to be paid twice for his injuries; but compensation under said acts falls far short of making the plaintiff financially whole. Certain necessary expenditures for medicine and medical care were paid in full but the plaintiff loses

37. LARSON, *supra* note 23, § 73; *see also* Reed v. Styron, 69 N.M. 262, 266, 365 P.2d 912, 916 (1961) ("Many states have reimbursement statutes.").

38. LARSON, *supra* note 23, § 73.

39. *Id.* § 71.21; *see also* Castro, 74 N.M. at 263, 669 P.2d at 677 (Noble, J., dissenting) ("It is clear to me that the legislature contemplated the two remedies [tort recovery and workers' compensation] and only intended that the employee not receive two recoveries for his own benefit.").

40. LARSON, *supra* note 23, § 71.20.

41. *Id.* § 71.21.

42. *See, e.g.,* Montoya, 114 N.M. at 355, 838 P.2d at 972 (citing Brown, 70 N.M. at 104-05, 370 P.2d at 820).

43. Montoya, 114 N.M. at 355-56, 838 P.2d at 972-73 (citing Royal Indem. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 144, 353 P.2d 358, 363 (1960)).

44. 37 N.M. 479, 24 P.2d 731 (1933).

45. *Id.* at 486, 24 P.2d at 734.

one-half of his wages and receives nothing for the pain and suffering, or for his physical impairment.⁴⁶

Thus, the court focused on reimbursing the employer rather than on imposing a rule of election on the employee.⁴⁷ Additionally, the court's interpretation of the statute precluded double recovery by reimbursing the employer from the recovery from the tortfeasor for the total amount of the benefits the employer paid.⁴⁸ Other early New Mexico cases interpreted the statute as a reimbursement statute and met the goals of preventing double recovery by reimbursing the employer for his liability, without unnecessary harshness for the employee.⁴⁹

In 1964, the supreme court in *Castro v. Bass* abandoned the view that New Mexico's workers' compensation statute was a reimbursement statute.⁵⁰ In *Castro*, the employer paid the injured employee total disability benefits and hospital and medical expenses.⁵¹ When the employee then sued the tortfeasor, the employer intervened in the case, "claiming to be subrogated to the rights of the workman to the extent of its liability to the workman"⁵² The employee recovered damages from the tortfeasor, and the court entered judgment on the employer's complaint in intervention for payments to and on behalf of the employee.⁵³ Soon after, the employee filed suit to continue workers' compensation, contending that there was no double recovery because the recovery from the tort action was inadequate and the amount recovered was less than the employee would have been entitled to for total and permanent disability, or for 65% disability, if the compensation was paid for the maximum amount of time.⁵⁴

The supreme court interpreted the workers' compensation statute to be an election statute and held that an employee who collects a judgment from a tortfeasor is barred from subsequently seeking workers' compensation, even if the judgment against the tortfeasor is for less than what might have been received under the workers' compensation statute.⁵⁵ The court based its decision on the need to limit the double recovery that might arise if the employee recovered damages from a tortfeasor and also workers' compensation from the employer.⁵⁶ The court stated that "when damages are sought and recovered from the tortfeasor, the

46. *Id.* (quoting *McArthur v. Dutee W. Flint Oil Co.*, 146 A. 484 (R.I. 1929)).

47. *See id.*

48. *Id.* at 489, 24 P.2d at 736. In addition, the court held that the employee's cause of action was still assigned pro tanto to the employer, even though the employer had sued the third-party tortfeasor and recovered on the action. *Id.* at 488-89, 24 P.2d at 736.

49. *See, e.g., Brown v. Arapahoe Drilling Co.*, 70 N.M. 99, 105, 370 P.2d 816, 820 (1962) ("The intent of the statute is to prevent double recovery, not to preclude any recovery at all."); *Royal Indem. Co. v. Southern Cal. Petroleum Corp.*, 67 N.M. 137, 144, 353 P.2d 358, 363 (1960); *White v. New Mexico Highway Comm'n*, 42 N.M. 626, 83 P.2d 457 (1938).

50. 74 N.M. 254, 392 P.2d 668 (1964).

51. *Id.* at 255, 392 P.2d at 669.

52. *Id.*

53. *Id.*

54. *Id.* at 257, 392 P.2d at 670.

55. *Id.* at 258, 392 P.2d at 671.

56. *Id.*

amount of the recovery is for the full loss or detriment suffered by the injured party and makes him financially whole.”⁵⁷ Notably, the *Castro* court’s analysis that a tort action against a non-employer was for the full amount of the employee’s damages preceded adoption of comparative negligence in New Mexico.⁵⁸

The majority decision in *Castro* resulted in a particularly harsh rule of election in New Mexico.⁵⁹ As the *Montoya* court recognized, after *Castro*, a jury determination of damages, or a settlement with the third party, regardless of how large or how small, was an award for all injuries and barred the worker from receiving workers’ compensation.⁶⁰

The dissent in *Castro*, which was discussed at length by the *Montoya* court,⁶¹ analyzed the statute as an employer reimbursement statute rather than as an election statute for the employee.⁶² According to Justice Noble, the intent of the statute was to reimburse the employer pro tanto for any compensation paid to the employee after the employee received a recovery against a third-party tortfeasor.⁶³ Thus, the statute would allow one and only one full recovery for the employee by allowing the employer to receive compensation not only for the benefits already paid, but also “to the extent of his full liability to the employee.”⁶⁴ If workers’ compensation benefits were paid to an employee⁶⁵ and subsequently the employee sought a recovery from a third party and dealt with the third party in good faith, there would be no harm to the employer and no double recovery for the employee. In essence, the focus of the statute should be on good faith dealing by the employee and fair reimbursement for the employer. “It is the prejudice to the employer’s right of reimbursement by some act of the employee under such circumstances as would prevent recoupment by the employer that prevents an award in compensation after a recovery from a third-party tortfeasor.”⁶⁶ Although Justice Noble was the minority in *Castro*, his analysis was discussed at length eighteen years later in *Montoya* when the New Mexico Supreme Court reached similar conclusions.⁶⁷

57. *Id.* at 258, 392 P.2d at 671 (citing *Jackson v. Southwestern Pub. Serv. Co.*, 66 N.M. 458, 349 P.2d 1029 (1960)).

58. See *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981) (adopting comparative negligence in New Mexico).

59. *Montoya*, 114 N.M. at 357, 838 P.2d at 974 (“The focus of *Castro* on double recovery skews the purpose of Section 52-5-17 from equitable allocation of responsibility toward an unnecessarily harsh rule of election.”).

60. *Id.* at 356, 838 P.2d at 973 (citing *Seminara v. Frank Seminara Pontiac-Buick, Inc.*, 95 N.M. 22, 24-25, 618 P.2d 366, 368-69 (Ct. App. 1980)); see also *Apodaca v. Formwork Specialists*, 110 N.M. 778, 780, 800 P.2d 212, 214 (Ct. App. 1990) (interpreting *Castro* to require an election of remedies); *Britz v. Joy Mfg.*, 97 N.M. 595, 597, 642 P.2d 198, 200 (Ct. App. 1982); *Security Ins. Co. of Hartford v. Chapman*, 88 N.M. 292, 296, 540 P.2d 222, 226 (1975).

61. *Montoya*, 114 N.M. at 356, 838 P.2d at 973.

62. *Castro*, 74 N.M. at 261, 392 P.2d at 674, (Noble, J., dissenting).

63. *Id.*

64. *Id.*

65. It is the receipt of workers’ compensation that gives the employer the right to reimbursement. *Id.* at 262, 392 P.2d at 674 (Noble, J., dissenting).

66. *Id.* (citing *White v. New Mexico Highway Comm’n*, 42 N.M. 626, 83 P.2d 457 (1938)).

67. *Montoya*, 114 N.M. at 356, 838 P.2d at 973. Three judges concurred with Chief Justice

IV. *MONTOYA* OVERRULES *CASTRO*

In *Montoya*, the New Mexico Supreme Court returned to the reasoning and decisions of cases prior to *Castro*.⁶⁸ In its analysis, the court first reviewed the history of the workers' compensation statute, from *Kandelin* to the post-*Castro* cases.⁶⁹ The court also discussed the plain language of New Mexico's workers' compensation statute⁷⁰ and then the broader objective of the statute.⁷¹ The court reasoned that even though the statute evinces a legislative intent to prevent double recovery to a worker,⁷² the statute does not require an "election."⁷³

Despite the fact that language of the statute might appear to require an election, the court stated that it did not, and in fact, the broad objective of the statute was not to force an election, but "to achieve an equitable distribution of the risk of loss."⁷⁴ Under New Mexico's statute, an equitable distribution of the risk of loss does occur without forcing election, because when an employee receives compensation it automatically effects an assignment of the third-party action to the employer, and the employer is then reimbursed.⁷⁵ From this analysis, the court observed that it was difficult to perceive of any danger of double recovery and thus the *Castro* line of cases were inequitable.⁷⁶ The goals of eliminating double recovery for the employee and also reimbursing the employer were met without forcing an election.⁷⁷ In essence, according to the court, the fear of double recovery had been a driving force behind the earlier cases forcing election on the employee, even though it had been continuously addressed by the statute itself.⁷⁸

Finally, the court offered a useful analysis of double recovery in workers' compensation by acknowledging that workers' compensation actions in New Mexico exist in a larger legal environment than just Chapter 52 of the New Mexico Statutes.⁷⁹ Despite the court's claim that

Ransom's decision, but Justice Montgomery did not participate in the decision. *Id.* at 358, 838 P.2d at 975.

68. *Id.* at 357, 838 P.2d at 974 ("Castro and its progeny hereby are overruled to the extent that they are inconsistent with this opinion.").

69. *Id.* at 355-56, 838 P.2d at 972-73; *Kandelin v. Lee Moor Contracting Co.*, 37 N.M. 479, 24 P.2d 731 (1933); *Castro v. Bass*, 74 N.M. 254, 392 P.2d 668 (1964).

70. N.M. STAT. ANN. § 52-5-17 (1978 & Supp. 1986).

71. *Montoya*, 114 N.M. at 357, 838 P.2d at 974 (discussing N.M. STAT. ANN. § 52-5-17 (1978 & Supp. 1986)).

72. "[T]he claimant shall not be allowed to receive payment or recover damages for those injuries or disablement and also claim compensation from the employer . . ." N.M. STAT. ANN. § 52-5-17 (1978 & Supp. 1986).

73. *Montoya*, 114 N.M. at 357, 838 P.2d at 974.

74. *Id.*

75. *Id.*

76. See *supra* note 60 and accompanying text.

77. *Montoya*, 114 N.M. at 357, 838 P.2d at 974.

78. See *id.*

79. In the past, the court has refused to acknowledge that workers' compensation actions are affected by common law. Prior to *Montoya*, the courts were reluctant to evaluate the workers' compensation statute with regard to such issues as comparative versus contributory negligence. See, e.g., *Taylor v. Delgarno Transp., Inc.*, 100 N.M. 138, 140-41, 667 P.2d 445, 447-48, (1983) (stating

it did not overrule *Castro* based upon the adoption of comparative negligence in New Mexico,⁸⁰ the court discussed the effects of several liability and comparative negligence in reducing an employee's recovery against a third-party tortfeasor and further limiting the chance of double recovery.⁸¹ With the adoption of comparative negligence and several liability, the court had rejected the concept that a cause of action was indivisible.⁸² As a result, an employee's recovery against one party may not be for the full amount of damages if more than one party was at fault, and the employee can no longer be said, as a matter of law, to have been made financially whole.⁸³ Thus, "the ameliorative principles of comparative negligence erode the fear of double recovery that gave rise to imposition of the fiction that a worker elected to be made financially whole from satisfaction of a third-party claim."⁸⁴

In addition, the court also stated that a worker is not financially whole when he receives less than the compensation to which he is entitled under the statute.⁸⁵ Problems with satisfaction of an action against a third-party tortfeasor do not go to double recovery, but instead to the amount of reimbursement or credit to the employer.⁸⁶ With this analysis, the court in effect eliminated the *Castro* rule of election.

V. CRITIQUE: AN ANALYSIS OF THE COURT'S DECISION

For too long, workers' compensation law has been burdened by the fiction that it is purely statutory and separate from common law.⁸⁷ Prior to *Montoya*, an injured worker sought damages from a third-party tortfeasor whose liability, after the adoption of comparative negligence, was usually less than the full amount of the employee's damages. Common law reduced the employee's recovery from the tortfeasor. Yet, statutory law precluded him from seeking damages from his employer, or continuing

that the workers' compensation act was not affected by the adoption of pure comparative negligence and the abolition of joint and several liability, and holding that the workers' compensation act was not affected by common-law changes in tort law because it is an exclusive statutory remedy).

The *Montoya* court may have been influenced by the legislature's recent enactment of N.M. STAT. ANN. § 52-1-10.1 (Repl. Pamp. 1991), which reduces the employer's reimbursement proportionally with his percentage of fault for the employee's injury. The legislature enacted this statute following the New Mexico Supreme Court decision in *Taylor*, where Chief Justice Payne and Justice Sosa dissented because of the practical effect of comparative negligence in tort actions arising in circumstances where workers' compensation was also involved. "Under current New Mexico law, a workman will not recover the entire amount of his damages from a third-party tortfeasor if the employer was partially negligent. Double recovery can occur only if the workers' compensation benefits paid exceed the negligent employer's proportionate share of liability." *Taylor*, 100 N.M. at 142, 667 P.2d at 449 (Payne and Sosa, JJ., dissenting).

80. *Montoya*, 114 N.M. at 358, 838 P.2d at 975.

81. *Id.* at 357-58, 838 P.2d at 974-75.

82. *Id.* at 357, 838 P.2d at 974, (citing *Bartlett v. New Mexico Welding Supply, Inc.*, 98 N.M. 152, 157, 646 P.2d 579, 584 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982); *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981)).

83. *Montoya*, 114 N.M. at 357, 838 P.2d at 974.

84. *Id.*

85. *Id.* at 358, 838 P.2d at 975.

86. *Id.*

87. See, e.g., *Taylor v. Delgarno Transp., Inc.* 100 N.M. 138, 141, 667 P.2d 445, 448 (1983).

workers' compensation benefits even if his tort recovery was less than what he might have received in compensation benefits.⁸⁸ The judicial facade that workers' compensation was statutory and isolated, despite the fact that it existed within the legal environment of the common law, forced the worst of all possible worlds on an injured employee. Under comparative negligence it was impossible to receive full recovery, let alone double recovery.

As a practical matter, the court's assertion in *Montoya* that it did not rely on comparative negligence to overturn *Castro*⁸⁹ seems unlikely. As discussed above,⁹⁰ the recurring theme in *Castro* was that a tort action, unlike other recoveries, was for the full amount of damages.⁹¹ In light of the fact that the *Castro* court relied so heavily on the distinction between partial recoveries, such as those from workers' compensation benefits, and full recoveries from tort actions,⁹² it is hard to believe that *Castro* was not overturned sooner. As soon as comparative negligence was adopted in New Mexico, the *Castro* decision and analysis became ineffective because a full recovery could never occur unless a third party was solely and entirely responsible for the injury. Although comparative negligence may have distributed the risk more equitably in other tort areas, it reduced equity in workers' compensation cases.

When considering that the goal of workers' compensation is to more equitably distribute the risk of loss,⁹³ it is hardly contestable that *Montoya* was a good judicial decision. However, it is less clear that *Montoya* was a good judicial decision based on procedural and doctrinal considerations. If workers' compensation is truly statutory, the court should refrain from drastically changing interpretations that have existed for almost three decades.⁹⁴ Perhaps more practically, the court should finally acknowledge that workers' compensation is not purely statutory.⁹⁵ Doctrines such as

88. See *id.*

89. *Montoya*, 114 N.M. at 358, 838 P.2d at 975 ("[I]t is not upon the doctrine of comparative negligence that we conclude *Castro* was wrong. We reject the fiction that a worker has been made financially whole when the worker has received less than the compensation and related benefits to which [sic] entitled to under the Act.").

90. See *supra* note 57 and accompanying text.

91. *Castro v. Bass*, 74 N.M. 254, 257-58, 392 P.2d 668, 671-72 (1964).

92. *Id.* at 258, 392 P.2d at 672 (comparing the partial recovery of compensation and full recovery from tort action, "in this argument the plaintiff loses sight of the difference in the recovery against a tortfeasor and the receipt of compensation payments").

93. See, e.g., *Montoya*, 114 N.M. at 357, 838 P.2d at 974.

94. See, e.g., *Taylor v. Delgarno Transp., Inc.*, 100 N.M. 138, 141, 667 P.2d 445, 448 (1983) (When addressing whether comparative negligence affected workers' compensation, the court stated that it "would have to either ignore the Act or hold a portion of the Act unconstitutional in addition to overruling numerous prior New Mexico cases. *This is for the Legislature to do and not the courts.*") (emphasis added).

95. See *Herrera v. Springer Corp.*, 85 N.M. 6, 14, 508 P.2d 1303, 1311 (Ct. App.) (Sutin, J., concurring in part, dissenting in part) (noting the "judicial mess of the past caused by language used in [the workers' compensation statute]. The time has come to avoid skirting around a conflict in decisions, error appearing therein, and vagueness of expression. A definite rule is necessary to guide the legal profession and district courts in the future. Legislative amendment of [the statute] is mandatory."), *rev'd on other grounds*, 85 N.M. 201, 510 P.2d 1072 (1973).

Although the court in *Herrera* was addressing another issue in workers' compensation, that of

comparative negligence and joint and several liability should be considered openly instead of disingenuously brushed over in judicial opinions.

VI. CONCLUSION

In *Montoya* the New Mexico Supreme Court overruled its previous decision in *Castro* and adopted the view that New Mexico's workers' compensation statute is a reimbursement statute rather than an election statute. The court rejected the fiction that an employee was made financially whole when he received less than the compensation and related benefits to which he was entitled under the Act.⁹⁶ As a result, an employee is no longer precluded from receiving workers' compensation benefits from his employer, pursuing an action against a third-party tortfeasor, and then resuming his workers' compensation benefits if the recovery against the third-party tortfeasor is less than the amount the employee was entitled to receive under the workers' compensation statute. The *Montoya* court's interpretation of the statute pursues the benevolent purposes of the workers' compensation act.

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subrogation, Justice Sutin's statements are pertinent. At times, the concepts of subrogation and reimbursement and the concepts of election and reimbursement seemed to be confused in New Mexico. New Mexico does not have a subrogation statute, but the employer is assigned a right to reimbursement. *Herrera*, 85 N.M. at 8, 508 P.2d at 1305. When discussing subrogation, the courts have said the statute is not a subrogation statute but a reimbursement statute. This discussion is different from the discussion of whether or not the underlying philosophy behind the statute is that of a reimbursement statute or an election statute.

This confusion is exemplified in cases after *Castro* but prior to *Montoya* which referred to the statute as a reimbursement statute when discussing subrogation. See, e.g., *Schulte v. Baber Well Serv. Co.*, 98 N.M. 547, 650 P.2d 831 (Ct. App. 1982); *Transamerica Ins. Co. v. Sydow*, 97 N.M. 51, 57, 636 P.2d 322, 328 (Ct. App. 1981) (Sutin, J. dissenting) (The act "has erroneously been held to be a reimbursement statute since *Kandelin* . . ."); *Herrera*, 85 N.M. at 8, 508 P.2d at 1305 ("Our Supreme Court has consistently held that [the workers' compensation statute] is a reimbursement statute . . ."). The statute "does not deal with the right of subrogation, but with the right of reimbursement."); *Security Ins. Co. of Hartford v. Chapman*, 88 N.M. 292, 296, 540 P.2d 222, 226 (1975) (The act "has been consistently interpreted as a reimbursement statute . . .").

96. *Montoya*, 114 N.M. at 358, 838 P.2d at 975.