

1 FIRST JUDICIAL DISTRICT COURT

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2 COUNTY OF SANTA FE

3 STATE OF NEW MEXICO

4 JUDITH M. ESPINOSA, in her official
5 capacity as Secretary of the New
6 Mexico Environment Department, and the
NEW MEXICO ENVIRONMENT DEPARTMENT,

7 Plaintiff, No. CV-SF-94-196(c)

8 vs.

9 ALFRED E. KEELING, JR., and MARITIA
10 KEELING and KEELING PETROLEUM, INC.,
11 a New Mexico Corporation, individually,
jointly and severally, and as husband and wife,

12 Defendants.

13 PARTIAL TRANSCRIPT OF PROCEEDINGS

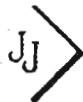
14 THE RULING OF THE COURT

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16 On the 14th day of September, 1995, this matter came
17 on for Request for All Pending Motions before the
18 HONORABLE STEVE HERRERA, Judge of the First Judicial
19 District, State of New Mexico, Division VI.

20 The Plaintiff, JUDITH ESPINOSA and THE NEW MEXICO
21 ENVIRONMENT DEPARTMENT, appeared by Counsel of Record,
22 FELICIA L. ORTH, 1190 St. Francis Drive, Santa Fe, New
23 Mexico 87503.

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The Defendants, ALFRED E. and MARITIA KEELING and KEELING PETROLEUM, appeared by Counsel of Record, PETER V. DOMENICI, JR., 6100 Seagull Lane, N.E., Albuquerque, New Mexico 87109.

At which time the following proceedings were had:



1 estimate available other than the parties generally
2 agreed that it would be costly; that it involved a
3 long-standing gasoline spill that affected a large area
4 of land.

5 The State of New Mexico appropriately has filed
6 to determine who should be responsible for the cleanup of
7 this contamination. The Defendants have now moved to ask
8 the Court to determine whether or not they should be
9 jointly and severally liable, or whether or not they
10 should be severally liable. In other words, whether or
11 not, under a strict liability, they should be held
12 responsible for the entire cost of the cleanup, or
13 whether or not they should be entitled only to their
14 percentage extent of fault in the original contamination.

15 It is fair to say that there is a dispute as to
16 the percentage extent of the fault of the Defendants.
17 And, again, without getting into who says what and how
18 much, it's fair to say there is a considerable dispute as
19 to what is the percentage extent of these Defendants as
20 it relates to this particular contamination.

21 The Defendants, as indicated during their
22 presentation, indicate that they are prepared to prove
23 that their percentage extent of fault is minimal; that
24 it's based on a small leak that occurred some time after
25 the major contamination existed. The Plaintiffs dispute



1 that and are prepared to demonstrate that perhaps their
2 responsibility is a lot greater than they're willing to
3 concede.

4 This state has a history as it relates to the
5 question of joint and several liability. It,
6 historically, if parties were generally jointly and
7 severally liable under negligence for their acts or
8 failure to act that occurred that resulted in a duty and a
9 breach of duty and damages. Scott v. Rizzo, as we know,
10 changed the doctrine of comparative negligence forever in
11 the State of New Mexico and provided that, as a matter of
12 state law, that parties would only be responsible for
13 their comparative fault.

14 Thereafter, in 1990, the legislature did, also,
15 pass Section 41-3-1 on several liability, which,
16 legislatively, abolished joint and several liability,
17 which is real interesting, because it's a question of
18 procedure versus substance, again. And we always get
19 into these disputes about who appropriately had the
20 authority to abolish joint and several liability. But in
21 this case, there's no dispute, because they both jumped
22 on the same wagon about the same time, and appropriately
23 abolished, both legislatively and by Judicial Decree, the
24 doctrine of joint and several liability.

25 41-3(a)-1 provides in pertinent part that the



1 doctrine of comparative fault applies in the State of New
2 Mexico, and the doctrine imposing joint and several
3 liability upon two or more wrongdoers whose conduct
4 proximately caused an injury to any plaintiff, is
5 abolished, except as otherwords provided, thereafter.
6 Then Subsection C provides several exceptions. And
7 Plaintiffs, herein, argue that Subsection 4 should apply
8 to this situation which, "Is to situations not covered by
9 any of the foregoing, and having a sound basis in public
10 policy."

11 And here is the continuing dialog between this
12 Court and our Appellate Courts on public policy. It
13 started with the discussion on our prime facie tort
14 statute. I'm sorry, prime facie tort ruling, which
15 requires the trial courts, at the conclusion of the
16 presentation of all of the evidence, to make a public
17 policy decision about whether or not the case should go
18 forward.

19 Recently, the Supreme Court and the Court of
20 Appeals would reaffirm this court's decision, as I
21 understood the public policy of the State of New Mexico
22 should be. Thereinafter, I had another opportunity to
23 discuss, formally, with the Supreme Court, the question
24 of public policy as it relates to whether or not the
25 state of New Mexico should be held liable for punitive

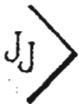


1 damages in a breach of contract action. Again, there was
2 no case law on that, and we had to resort to what should
3 be the public policy of the State of New Mexico as it
4 relates to punitive damages in a breach of contract
5 action.

6 Following that was a case of Baca v. New Mexico
7 Transportation and Highway Department, where the Court
8 ruled, as a matter of public policy, that the trial court
9 should have inherent authority to award attorneys' fees,
10 irrespective or not there is a statute or a contractual
11 provision allowing to do that. And in that regard, the
12 New Mexico Supreme Court and this Court agreed on the
13 public policy. And now, the trial courts do have
14 inherent authority to award attorneys' fees, irrespective
15 or not there is a statute or a contractual provision
16 under the inherent authority of the court.

17 There are at least two or three other cases
18 pending in appellate courts that address some more
19 issues. My point is that the question of whether or not
20 a particular issue has a quote, unquote, sound basis in
21 the public policy, is certainly subject to differing
22 interpretations. And I recognize that I don't always get
23 the last word on this subject, but I do try to get the
24 best word on the subject. So here goes.

25 I think it is without question that the public



1 policy in the State has demonstrated to our legislative
2 leaders and our judicial branch of government that
3 parties should only be responsible for that proportion of
4 fault, and that they should not be responsible jointly
5 and severally for fault that they didn't incur.

6 I try probably as many negligence strict
7 liability jury trials in the courtroom as any judge in
8 the State of New Mexico. And I can tell you that the
9 process of comparative negligence works. And I have seen
10 jurors be able to siphon through evidence and determine
11 the comparative fault of the parties. I have seen them
12 agonize over the comparative fault of identified third
13 parties. I have seen them agonize over the empty chairs.
14 I have seen them agonize over the comparative fault of
15 defendants who settled out of the case and are no longer
16 here. I have seen them agonize over the comparative
17 fault of defendants, one of whom may be represented by
18 counsel and one may be appearing pro se.

19 With that practical experience behind me, I
20 believe that it is fair and just and right that parties
21 be responsible only for that portion of the fault that
22 they did. In that regard, be it strict liability,
23 negligence, they should not bear the responsibility for
24 acts that were not under their direction and control.
25 That is certainly evidenced by our courts' opinions in



1 the cases that have been cited this morning, the
2 Marchese, Jaramillo, Reichert, all these cases
3 demonstrate to me, in a very clear way, that the Supreme
4 Court agrees that percentage of fault should be
5 allocated.

6 Recently, this issue was raised in the context
7 of a police brutality case, in which it was alleged that
8 the comparative fault of the parties should not be
9 compared. Relying on Reichert v. Adler, the Court did
10 find that, irrespective of whether or not both causes of
11 action sound in negligence, one of them sound in strict
12 liability, one we have another theory, after reading the
13 Adler decision in Justice Ransom's well-reasoned opinion,
14 I was convinced that the Supreme Court has reaffirmed its
15 commitment to several liability, and has directed the
16 trial courts to continue to compare the relative fault of
17 the parties.

18 For the foregoing reason, the Court finds that
19 the motion filed on behalf of the Defendant is well-
20 taken. Again, I disagree that the public policy of the
21 State of New Mexico is otherwise, and I specifically find
22 that 41-3(a)-1 Subsection 4, if it has applicability to
23 this case, that the Court finds that the Court's ruling
24 has a sound basis in public policy. And that the State
25 of New Mexico and the Plaintiff herein, has failed to

