

The New Mexico Trial Lawyer

Workers' Compensation



Peter D. White, J.D.

As we observe the Labor Day holiday this year we are reminded that there are many of us who do not get a holiday on the day dedicated to our nation's workers. Among those you will see working on Labor Day are our first responders, the men and women who answer the call to protect and serve our citizens whenever the need arises. One such person, Pojoaque Tribal Police Officer Kevin Schultz, drowned eleven years ago while rescuing a twelve year old boy who had fallen into the Rio Grande near Pilar, New Mexico while chaperoning a church youth group outing. The New Mexico Court of Appeals recently ruled that consistent with public expectations that police officers may be required to act in their official capacity while off duty, Officer Schultz's widow's claim for death benefits was compensable. The opinion, *Schultz ex rel. v. Pojoaque Tribal Police Dept.*, ___ NMCA ___, No. 20,508, (August 19, 2013) should serve as the new standard for determining whether off-duty police officers responding to incidents reasonably calling for assistance should be considered to be acting in the course and scope of their employment.

This landmark decision came only after a long and torturous journey that was necessary simply to have

the case reviewed on its merits. The case originally was filed *pro se* by the worker's widow, Cheryl Schultz, fourteen months after Schultz's death. The Pojoaque Tribal Police Department promised to process the paperwork for the workers' compensation claim but failed to do so. The original notice of appeal was found to be untimely and then revived by the New Mexico Supreme Court in 2010. *Schultz ex rel. v. Pojoaque Tribal Police Dept.*, 2010-NMSC-34, 148 N.M. 692. The Court of Appeals then found that although the original complaint could be considered timely, the claim was barred as a result of a recommended resolution that provided for a dismissal of the claim without prejudice when Ms. Schultz failed to timely file a new complaint. *Schultz ex rel. v. Pojoaque Tribal Police Dept.*, 2012-NMCA-015, 269 P.3d 14.

In 2013, the New Mexico Supreme Court ruled that the conduct of the Police Chief reasonably lead Ms. Schultz to believe that compensation would be paid and that Section 52-1-36 would apply to allow her a reasonable time to file a complaint after her reliance on the representations of the employer. *Schultz ex rel. v. Pojoaque Tribal Police Dept.*, 2013-NMSC-013. The New Mexico Supreme Court remanded the case to the Court of Appeals to determine the merits of whether Kevin Schultz died within the course and scope of his

employment as a police officer. The Court expressly overruled previous decisions that treated Section 52-1-36 as a tolling statute, which the Court of Appeals interpreted as only allowing an additional 21 days to file an amended complaint from the date the dismissal without prejudice became effective. Importantly, Section 52-1-36 is now viewed as allowing a worker who has reasonably relied on the representations of an Employer to believe compensation would be paid a reasonable period of time in which to file a complaint.

In opposing the award of death benefits, the Employer and Insurer argued that officer Schultz was not on duty, not in uniform, was

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out of his jurisdiction, and had not even been trained for swift water rescue. However, the third trip to the Court of Appeals proved to be the charm, as the Court, ruling on the merits of the claim for the first time, found that the claim was in fact compensable. *Schultz ex rel. v. Pojoaque Tribal Police Dept.*, ___ NMCA ___, Docket No. 28,508. The Court looked at the demands and expectations society has for our police officers, regardless of whether they are on official duty. "If it is our expectation as a society that police officers put themselves in

harm's way, sometimes irrespective of their on-duty status, then it should also be our expectation that such officers be compensated when they are injured in the course of doing so," wrote New Mexico Court of Appeals Judge Cynthia Fry. *Id.*, at ¶ 29.

When we honor the sacrifice of Kevin Schultz, we should also recognize the efforts of George Weeth, the attorney for Cheryl Schultz, who has worked an estimated four hundred hours on this case from its inception through at least five separate appeals. Attorneys who represent injured workers know the tremendous burden George took on when he began representing Cheryl Schultz. He surely realized the

tremendous uphill battle he faced, and even though he could not have known back then the hundreds of hours he would spend on the case, he still knew he would likely never receive an attorney fee that would cover the time necessary to obtain benefits for his client.

It is through the work of attorneys like George Weeth, buoyed by the courage of clients like Cheryl Schultz, (who turned down a substantial settlement offer in order to see the case through its latest appeal) that we can change the legal landscape to compensate

brave men like Kevin Schultz, who we as a society expect to be heroes whenever the need arises. These people epitomize the ideals that

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we aspire to achieve in our lives. Both Kevin Schultz and George Weeth, Esq. are examples of people who have a vocation rather than a job, and who are willing to endure personal sacrifice for the greater good. These people are motivated by a genuine compassion for others and they deserve our gratitude.

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