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2005-NMCA-062: State v. Charles Maestas
State Bar Lending Library
A Free Membership Service

Visit the State Bar’s newly remodeled Lending Library and browse through books on the following topics:

• Client Materials
• Client Relations
• Law Office Management
• Law Practice
• Legal Career
• Marketing
• Professionalism and Risk Management
• Solo and Small Firm Practice
• Technology

A full listing of titles is located on www.nmbar.org. Click on “Attorney Services/Practice Resources” in the top navigation bar and select “Lending Library.”

Books and tapes may be borrowed for two weeks; shipping is available for members who reside outside the Albuquerque area.

Place an Order by using the e-mail link membership@nmbar.org, visiting the State Bar Center at 5121 Masthead NE, Albuquerque, NM or calling (505) 797-6033.
2005 Advance Legislative Service of the State of New Mexico is now available.

Official Copy of all the enacted laws of the 47th Legislature of the State of New Mexico and signed by the governor.

Also contains Table of Changes to the NMSA 1978, Tables of the Disposition of Laws, Concordance (Chapter Number to Bill Number; Senate Bill Number to Chapter Number; House Bill Number to Chapter Number) and an Index.

Also contains handwritten markings by the Governor including line item veto strike-throughs and initialing.

New Mexico Compilation Commission
Marketed to the Private Bar by Conway Greene Co.
Contact us at 1-866-240-6550

$84.00 per 4 volume set plus shipping

State agency and local public body subscribers to the ALS will receive the 2005 Advance Legislative Service from the New Mexico Compilation Commission.
SEMINAR REGISTRATION FORM
State Bar Center

JUNE

17
Annual Tax Symposium
Live Program • Friday, June 17, 2005
State Bar Center, Albuquerque • 9.0 General CLE Credits

Co-Sponsor: SBNM Taxation Section

The Annual Tax Symposium will feature problems currently facing the federal tax system and the role and response of the Taxpayer Advocate Service; new securities law requirements under Sarbanes Oxley and its effects on corporate tax departments; the IRS’s new tax shelter reporting requirements and its potential impact on attorneys, accountants, and financial advisors; and an update on important tax cases and IRS decisions issued in the last year. Recent legislative tax initiatives in New Mexico; as well as court and administrative tax decisions, current hot topics specific to New Mexico, and a final session on the complexities of tax free Section 1031 exchanges will also be explored.

☐ Standard and Non-Attorney $209
☐ Tax Section Member, Government & Paralegal $189

21
Legal Resources on the Web: Inexpensive Ways to Meet a Newly Emerging Research Standard of Competence
Live Program • Tuesday, June 21, 2005 • Noon-1 p.m.,
Western New Mexico University Library, Silver City • 1.2 General CLE Credits

A lawyer’s duty of competent representation includes a duty to know and research the law, consistent with a standard of “common or ordinary” professional skill. The methods and techniques for “common or ordinary” research skills are not static, however. At a minimum, a lawyer’s research skills must be greater than the average layman’s legal research skills. When the average layman is able to freely locate legal information on the Internet, the traditionally low threshold for research skill is forced upward.

In this survey course, participants will learn to locate free legal resources using the Internet, focusing on New Mexico and federal primary material, and reliable secondary sources. Participants will also learn what gaps in coverage still exist in free Internet materials. Participants will also survey inexpensive licensed databases that are currently on the market, which are an excellent supplement to free Internet resources, and learn about the pros and cons of these various products.

☐ Standard Fee $39

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.
(Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbar.org, click CLE, then area of interest
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

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Credit Card # __________________
Exp. Date __________________
Authorized Signature __________________
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• Professionalism Tip •

With respect to the courts and other tribunals:

Before dates for hearings or trials are set, or immediately after dates have been set, I will verify the availability of participants and witnesses and will also notify the court (or other tribunal) and opposing counsel of any problems.

Meetings

June
13
Taxation Law Section Board of Directors, noon, via teleconference
15
Law Office Management Committee, noon, State Bar Center
15
Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 13th floor conference room
17
Family Law Section Board of Directors, 9 a.m., via teleconference
20
Lawyers Professional Liability Committee, noon, State Bar Center
21
Children’s Law Section Board of Directors, noon, Juvenile Justice Center

State Bar Workshops

June
22
Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces
22
Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center
23
Consumer Debt/Bankruptcy Workshop*, 5:30 p.m., Branigan Library, Las Cruces
27
Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces
27
Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-877-6227; or visit the SBNM Web site, www.nmbar.org.
NOTICES

COURT NEWS

Supreme Court Judicial Performance Evaluation Commission Upcoming Meeting
The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next meeting will be from 8 a.m. to 5 p.m., June 24 at the Ninth Judicial District Court, 700 N. Main, Ste. 14, Clovis. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

New Mexico Board of Legal Specialization Legal Specialists Announced
The New Mexico Supreme Court Board of Legal Specialization is pleased to announce the following attorneys as Board Certified Specialists:

- Appellate Practice
  Kim E. Kaufman

- Federal Indian Law
  Stephanie Pho-Poe Kiger

- Local Government Law
  Karen L. Townsend

- Trial Specialist – Criminal Law
  Douglas E. Couleur

- Workers’ Compensation
  Mark D. Jarner

To receive information on any of the Certified Specialty areas, call the Legal Specialization Administrative Office, (505) 797-6057.

First Judicial District Court

Family Law Brownbag Meeting
The First Judicial Court will host its family law brownbag meeting at noon, June 14 in the Grand Jury Room, second floor of the Steve Herrera Judicial Complex in Santa Fe. The event will feature a meeting with Margaret Kegel, the domestic relations hearing officer. For more information, or to suggest agenda items to be discussed, contact Elege Simons, (505) 982-3610 or esimons@rubinkatzlaw.com. Provide $1, your name and bar number and receive 1.0 general CLE Credit.

Second Judicial District Court Destruction of Exhibits: Criminal and Children
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in the criminal cases for years 1980 to 1991, and children cases for years 1985 to 1989, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Exhibits may be retrieved from now until July 16. Attorneys who have cases with exhibits should verify exhibit information with the Special Services Division, at 841-7596/7405, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by order of the court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

Destruction of Exhibits: Domestic
Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the court in the domestic cases for years 1980 to 1985, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Exhibits may be retrieved from now until July 22. Attorneys who have cases with exhibits should verify exhibit information with the Special Services Division, at 841-7596/7405, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by order of the court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

Judges Nominating Commission
Eleven applications have been received in the Judicial Selection Office as of 5 p.m., June 3 for the judicial vacancy in the Second Judicial District Court, due to the creation of a new judicial position by the New Mexico State Legislature. The District Judges Nominating Commission will meet at 9 a.m., July 6 at the Bernalillo County Courthouse, southwest corner of Lomas and Fourth Street, in Albuquerque to evaluate the applicants for the judicial position. The commission meeting is open to the public. Those wishing to make public comment to the commission should be present by the start of the meeting. The names of the applicants in alphabetical order are:

- Dawn T. (Penni) Adrian
- Julie N. Altweis
- Michael D. Cox
- Stanley D. Harada
- Kenneth H. Martinez
- William E. Parnall
- Gail K. Prosser
- Kathleen M. Rhinehart
- Christopher Schultz
- Reed S. Sheppard
- Christopher Sturgess

Third Judicial District Court Judicial Nominating Commission
Seven applications have been received in the Judicial Selection Office as of 5 p.m., June 6 for the judicial vacancy in the Third Judicial District due to the resignation of the Honorable Grace B. Duran. The Third Judicial District Nominating Commission will meet at 9 a.m., June 27 at the Third Judicial District Courthouse in Las Cruces, 201 W. Picacho, to evaluate the applicants for the judicial position. The commission meeting is open to the public. Anyone wishing to make public comment to the commission should be present at the beginning of the meeting. The names of the applicants in alphabetical order are:

- William R. Babington, Jr.
- Marci E. Beyer
- James T. Locatelli
- James T. Martin
- Michael T. Murphy
- Mary E. Price
- Beverly J. Singleman

Seventh Judicial District Court Nominating Commission Announcement of Meeting
The Seventh Judicial District Nominating Commission will reconvene at the Socorro
Commission
Judges Nominating
Commission
District Court
Ninth Judicial
the resignation of the Hon. Thomas G. Fitch.
June 23 to consider Gov. Bill Richardson’s re-
County Courthouse in Socorro on at 9 a.m.,
met on May 23.
Judicial District Nominating Commission
forwarded to the governor after the Seventh
Reynolds and Cynthia Rose Wimberly were
Th e names of John R. Gerbracht, Matthew G.
applicants for the judicial position.  Th e
N. Main Street, in Clovis to evaluate the
1 at the Curry County Courthouse, 700
State Legislature. Th e District Judges Nomi-
Bernalillo County Metropolitan Court
Judges Nominating
Commission
Four applications have been received in
the Judicial Selection Office as of 5 p.m.,
June 3 for the judicial vacancy in the Ninth
Judicial District Court, due to the creation of
a new judicial position by the New Mexico
State Legislature. The District Judges Nomi-
Nominating Commission will meet at 9 a.m., July
1 at the Curry County Courthouse, 700
N. Main Street, in Clovis to evaluate the
applicants for the judicial position.  The
commission meeting is open to the public.
Those wishing to make public comment
to the commission should be present by
the start of the meeting.  The names of the
applicants in alphabetical order are:
Robert S. Orlik
Kent Peterson
David P. Reeb, Jr.
Michelle O. Reeves

Eleventh Judicial
District Court
Judges Nominating
Commission
Five applications have been received in
the Judicial Selection Office as of 5
p.m., June 3 for the judicial vacancy in
the Eleventh Judicial District Court, due to
the creation of a new judicial position by the New Mexico State Legislature. The
District Judges Nominating Commission
will meet at 9 a.m., July 5 at the McKinley
County Courthouse in Gallup to evaluate
the applicants for the judicial position.
The commission meeting is open to the public.
Those wishing to make public comment
to the commission should be present by
the start of the meeting.  The names of the
applicants in alphabetical order are:
Robert A. Aragon
Peter S. Burns
Douglas W. Decker
Linda G. Padilla
R. David Pederson

Bernalillo County
Metropolitan Court
Judges Nominating
Commission
Fourteen applications have been received in
the Judicial Selection Office as of 5 p.m.,
June 3 for the two judicial vacancies in the
Bernalillo County Metropolitan Court, due to
the creation of two new judicial positions
by the New Mexico State Legislature. The
Bernalillo County Metro Court Judges
Nominating Commission will meet at 9
a.m., July 11 at the Metropolitan Court-
house, northwest corner of Lomas and
Fourth Street, in Albuquerque to evaluate
the applicants for the judicial position.  The
commission meeting is open to the public.
Those wishing to make public comment
to the commission should be present by
the start of the meeting.  The names of the
applicants in alphabetical order are:
Rosemarie L. Allred
Julie N. Atrwies
Rachel L. Walker Al-Yasi
Edward L. Benavidez
Ronald R. Bratton
Clyde DeMersseman
Maria Dominguez
Sandia Engel
Christopher M. Harrington
Linda Mott
Andrew P. Ortiz
Juan A. Pino
Keith Rinaldi
Linda S. Rogers

Eddy County
Magistrate Court
Judicial Appointment
Gov. Bill Richards has appointed Daniel
Reyes, Jr. to serve as magistrate judge in
Eddy County.  Reyes replaces Larry Wood,
who retired from the bench in April.  Reyes,
a native of Artesia, has a 19-year history in
public office in Eddy County.  Reyes was first
elected as mayor of Artesia in 1998 and was
re-elected for a second term.  He served as
Pro-Tempore for the Artesia City Council,
where he fulfilled two terms and also served
on the Artesia Public School Board of
Education for four years.  Currently, he is
the owner of T-Shirt Express in Artesia and
is a veteran of the New Mexico National
Guard. Reyes’ term will expire in December
2006.

STATE BAR NEWS
Lawyers Assistance Committee
Wanted: Lawyers in Recovery in Las Cruces
The Lawyers Assistance Committee is
looking for attorneys in recovery in Las
Cruces who are willing to make 12-Step
calls.  Attorneys who are able to help, call
Bill Stratvert, (505) 242-6845.

Pro Hac Vice
The New Mexico Supreme Court has
established a new rule for practice by non-
admitted Lawyers before state courts (Pro
Hac Vice).  The new Rule 24-106 NMRA,
is effective for cases filed on or after Jan.
20, 2005.  Attorneys authorized to practice law
before the highest court of record in any
state or territory wishing to enter an appear-
anee, either in person or on court papers, in
a New Mexico civil case should consult the
new rule.  This rule requires non-admitted
lawyers to file a registration certificate with
the State Bar of New Mexico, file an affidavit
with the court and pay a nonrefundable fee
of $250. Fees collected under this rule will
be used to support legal services for the poor.
For more information on the rule, a copy
of the registration certificate and sample
affidavit, go to www.nmbar.org.  For ques-
tions about compliance with the rule, please
contact Richard Spinello, Esq., Director of
Public and Legal Services, State Bar of New
Mexico, (505) 797-6050, (800) 876-6227,
or rspinello@nmbar.org.

Taxation Section
Annual Meeting
The Taxation Section will hold its annual
meeting immediately following the Third
Annual Tax Symposium June 17.  The Tax
Symposium is a full-day CLE and will be
held from 8 a.m. to 5 p.m. at the State Bar
Center.  Contact Marjorie Rogers, (505)
848-1844 or mrogers@modrall.com, to
place an item on the agenda.

Technology Utilization
Committee
Tech Up! Court Forms
Reviewed
A review of the forms available through
the New Mexico Supreme Court’s Web site,
their quirks and some tips on use will be
addressed from 5 to 6 p.m., June 23 at the
State Bar Center. The presentation is one of
the Technology Committee’s ongoing, free

other bars
albuquerque bar association
monthly luncheon and cle

the albuquerque bar association’s monthly luncheon will be held at noon, july 5 at the albuquerque petroleum club. the luncheon speaker will be ed boles, who will present a special showing of the duke city’s landmark and historic zones in observance of albuquerque’s 300-year celebration. the cle program following the lunch will be historic preservation laws and regulations presented by charles price and bill dodge. register online at www.abqbar.com, by e-mail dana.hardy@gmail.com.

hispanic national bar association
30th annual convention

alan m. varela, president of the hispanic national bar association has announced the 30th annual hnbca convention in washington d.c. at the mandarin oriental hotel oct. 16 to 20. the convention provides an opportunity to network with hundreds of the most influential hispanics in the nation and will include world-class legal education seminars focusing on crucial issues facing the legal profession and the nation. on oct. 19 a professional job fair will be held for law students and experienced attorneys seeking employment with fortune 500 corporations and the nation’s most prestigious law firms. “unidos en washington” will feature social events at various venues, such as the mexican cultural institute for a “taste of latin america and the caribbean.”

registration for the convention can be found at the hnbca web site, www.hnba.com, and completed entirely online. the convention is open to all interested legal professionals. there are special discounted rates for hnbca members as well as those who sign up for the early bird rate now until aug. 31. job fair employers may also register online at the hnbca web site for the job fair. the registration fee for job employers includes day passes for two interviewers, prominent listing in the convention program book and one full day of interviews with one of the highest caliber talent pools in the united states. the hnbca is a non-profit, national association that represents the interests of over 27,000 hispanic american attorneys, judges, law professors, law students and legal professionals throughout the united states and puerto rico. for more information go to www.hnba.com or contact the hnbca washington office, (202) 223-4777.

other news
aclu of new mexico luncheon

the aclu of new mexico amicus club and the federalist society are presenting “an independent judiciary” – a luncheon discussion featuring judge harris l. harz and prof. james w. ellis. the luncheon will take place from 11:30 a.m. to 1 p.m., june 30 in the second floor hospitality room of the flying star downtown, 723 silver sw, albuquerque. lunch and meet and greet begin at 11:30 a.m. speakers begin at noon. seating is limited so r.s.v.p. is required to george bach, (505) 400-3423, gbach@aclunm.org, or wade jackson, (505) 348-2243, wade Jackson@nmcourt.fed.us.

nm board of social work examiners
attorney position available

the nm board of social work examiners is seeking to fill an attorney position on its board that meets six times per year. attorneys interested in being appointed should contact vedra baca, (505) 476-4890.

nm center on law and poverty
statewide legal services training 2005

the nm center on law and poverty has announced its annual statewide legal services conference, a training that addresses poverty law issues. the conference will be held june 22 and 23 at the state bar center. the conference will feature a keynote address from chief justice richard c. bosson of the new mexico supreme court. training seminars on ethics and professionalism will also be offered. the conference will feature introductory courses for new attorneys, sessions for support staff, and advanced training on substantive topics of law. topics to be covered include: consumer law, family law, medicaid, fair hearings, investigative and discovery techniques, housing law, injunctive relief, and much more. for more information, including how to register for the event, visit www.nmpovertylaw.org or contact stacey leaman, (505) 255-2840, stacey@nmpovertylaw.org. cle credit is pending.

taxation and revenue department
managed audit program

the new mexico taxation and revenue department is taking a closer look at individuals who legally should be filing new mexico personal income tax returns as residents. there is a significant amount of income going unreported by people who live in new mexico full time but claim their residence to be one of the seven states that does not have an income tax, despite the 185-day physical presence statute that went into effect in 2003. attorneys may want to advise taxpayers who are concerned they should have previously filed resident new mexico tax returns to take advantage of the taxation and revenue department’s managed audit program. taxpayers can avoid paying both penalty and interest if eligible for the program and if the assessment is paid within 30 days from the assessment date. call (505) 827-0929 for more information about the managed audit program.

unm law library
summer hours

law library hours through aug. 21:
mon. – thurs. 8 a.m. to 9 p.m.
fr. 8 a.m. to 6 p.m.
sat. 9 a.m. to 6 p.m.
sun. noon to 9 p.m.

reference:
mon. – fri. 9 a.m. to 6 p.m.
sat. noon to 4 p.m.
sun. noon to 4 p.m.

exceptions:

july 4 closed
2005 Leadership Training Institute

Applications Being Accepted

Participants will learn what it means to be a leader and how to communicate, motivate, inspire and succeed.

The Institute takes place over four sessions, August 12-13, September 1-2, September 29-30 and November 3-4, with all but one session being held at the State Bar Center in Albuquerque. Class size is limited through a competitive enrollment process. Topics covered include:

- team building
- leadership principles
- communications and media skills
- New Mexico Judiciary
- emotional intelligence

- strategic planning
- quality of life
- time management
- public service
- fundraising

All active New Mexico licensed lawyers are welcome to apply, deadline is June 20. Tuition is $350. Limited financial assistance and scholarships are available. For a complete Leadership Training Institute brochure and to apply, visit www.nmbar.org. For more information, contact Executive Director Joe Conte, (505) 797-6099 or jconte@nmbar.org.
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<td>Fundamentals of Arbitration</td>
<td>Teleconference TRT, Inc.</td>
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<td>(800) 672-6253</td>
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21 Legal Resources on the Web: Inexpensive Ways to Meet a Newly Emerging Research Standard of Competence
Silver City Center for Legal Education of NMSBF
1.2 G (505) 797-6020 www.nmbar.org

21 Recreating Yourself in the Practice of Law
VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF
1.2 E, 2.0 P (505) 797-6020 www.nmbar.org

21 The Quality of Justice
VR - State Bar Center, Albuquerque Center for Legal Education of NMSBF
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22 2005 Professionalism: Lawyers Concerned for Lawyers
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22 They Took My Stuff! How Do I Get it Back?
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22 What's New in Estate Planning: Select Developments
Teleconference Center for Legal Education of NMSBF
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23 Common Sense Ethics - Histories and Mysteries
Teleconference TRT, Inc.
2.4 E (800) 672-6253 www.trtcle.com

23 Employment Law Update
Albuquerque Sterling Education Services
8.0 G (715) 855-0495 www.sterlingeducation.com

23 Planning Management’s Testing for Sarbanes-Oxley
Teleconference Lorman Education Services
1.8 G (715) 833-3940 www.lorman.com

23 Sexual Harassment Training Under AB 1825
Teleconference Lorman Education Services
2.4 G (715) 833-3940 www.lorman.com

23 Protecting Business Assets Through Effective Lawyering
Teleconference TRT, Inc.
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28 Legal Ethics
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2.4 E (715) 833-3940 www.lorman.com

28 Orders of Protection in New Mexico
Albuquerque Lorman Education Services
7.2 G (715) 833-3940 www.lorman.com

28-30 Public Sector Employment Law Update
Albuquerque Council on Education in Management
19.8 G (800) 942-4494 www.counciloned.com

29 The Tangled Webs of Impaired Lawyers
Teleconference TRT, Inc.
2.4 P (800) 672-6253 www.trtcle.com

30 Class Action Law Suits
Roswell Paralegal Division of New Mexico
1.0 G (505) 622-6510

30 Justice in the Jury Room
Teleconference TRT, Inc.
2.4 E (800) 672-6253 www.trtcle.com

30 Schiavo Lite: Directive or Discordance, and Assisted Reproduction and Stem Cell Research
State Bar Center, Albuquerque Health Law Section and Center for Legal Education of NMSBF
1.2 G (505) 797-6020 www.nmbar.org
### WRITS OF CERTIORARI

**As updated by the Clerk of the New Mexico Supreme Court**

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective June 8, 2005**

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**Effective June 8, 2005**

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<tr>
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<td>Herrington v. State Engineer</td>
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**Certiorari Denied:**

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**Writ of Certiorari Quashed:**

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RULES/ORDERS
From the New Mexico Supreme Court

No. 29,056

ORDER OF SUSPENSION

WHEREAS, this matter came on for consideration by the Court upon the certification filed herein by the Minimum Continuing Legal Education Board that certain active members of the State Bar of New Mexico failed to comply with MCLE requirements for the 2004 reporting year; and

WHEREAS, the Clerk of this Court, on May 12, 2005, having issued or attempted to serve by first-class mail to the last known address shown on the official roll of attorneys a “Citation and Order to Show Cause” and “Order” to each delinquent attorney, and the time within which to comply having expired, and said delinquent attorney having remained in noncompliance with MCLE requirements for the 2004 reporting year, and the Court being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that effective June 3, 2005, the following named members of the State Bar of New Mexico be and hereby are SUSPENDED from the practice of law in the courts of this state by reason of noncompliance with MCLE requirements for the 2004 reporting year.

IT IS FURTHER ORDERED that the Clerk of this Court shall change the status of membership in the bar for each attorney listed below as shown on the official roll of attorneys, and that notice thereof be given to each judge in the state of New Mexico and be published in the Bar Bulletin:

James W. Anthony
PO Box 597
Aztec, NM 87410-0597

John L. Barnes
307 W. 7th Street, #1800
Fort Worth, TX 76102-5118

Shawn Allen Brown
941 Calle Mejia, #1109
Santa Fe, NM 87501-1467

Jeffrey J. Dempsey
1111 6th Street NW
Albuquerque, NM 87102-1336

Reginald J. Garcia
PO Box 1966
Albuquerque, NM 87103-1966

Hazen H. Hammel
1801 Lomas Blvd. NW
Albuquerque, NM 87104-1205

Sylvia T. Hendren
PO Box 38550
Colorado Springs, CO 80937-8550

Peter N. Ives
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Santa Fe, NM 87502-2788

Roy A. Jacobson, Jr.
PO Box 548
Jackson, WY 83001-0548

Monty Kimball
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Alpine, TX 79831-0539

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Breckenridge, CO 80424-0288

Thomas Andrew Morton
1176 Flamingo Ave.
El Cajon, CA 92021-3322

Gary Wayne Nelson
PO Box 1092
Albuquerque, NM 87103-1092

Robert D. Sckalor
23 Atwood Ave.
Sausalito, CA 94965-2245

Anthony Spratteley
401 NW Lp.
Rio Rancho, NM 87144-0800

Joseph D. Talley
518 N. Shipp St.
Hobbs, NM 88240-5725

Ronald D. Tym
6170 Flemington Rd.
Dayton, OH 45459-1904

IT IS SO ORDERED.

WITNESS, Honorable Richard C. Bosson, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 3rd day of June, 2005.

Kathleen Jo Gibson,
Chief Clerk of the Supreme Court of the State of New Mexico
Defendant appeals from convictions following a jury trial for possession of a controlled substance, contrary to NMSA 1978, Section 30-31-23(D) (1990), and tampering with evidence, contrary to NMSA 1978, Section 30-22-5 (1963, prior to 2003 amendment). Defendant initially appealed her convictions to the Court of Appeals on several grounds, including whether her conviction for possession of a controlled substance and tampering with evidence violated her right to be free from double jeopardy. State v. Franco, 2004-NMCA-099, ¶ 1, 136 N.M. 204, 96 P.3d 329. The Court of Appeals reversed on the double jeopardy issue and remanded to the district court with instructions to vacate Defendant’s conviction and sentence for possession of a controlled substance. Id. ¶ 24. The State petitioned this Court for certiorari, and we now hold the two convictions did not violate the constitutional prohibition against double jeopardy. We therefore reverse the Court of Appeals on this issue, and we affirm Defendant’s judgment and sentence.

The following facts were testified to at trial. Police obtained a warrant to search an apartment of a suspected drug dealer. The warrant was granted the day after Defendant’s boyfriend, “Patrick,” sold cocaine at the apartment to an undercover police officer. As officers arrived to execute the warrant, they observed several people in front of the apartment whom they secured before entry. Officer Moyers knocked at the partially opened front door, identified himself as a police officer and announced he had a search warrant. After waiting a few seconds, he entered the apartment, which was a small, one-room efficiency, consisting of a combined living room, bedroom, and kitchen, and a walled-off bathroom. As he entered, Moyers saw two men jump up from the couch, and he ordered them to the ground. As Officer Edmondson entered immediately behind Moyers, he saw Moyers securing one of two men. As he began securing the second, he saw Defendant run into the bathroom. Edmondson could see Defendant facing the bathroom window, but he did not see anything in her hand or see her throw anything out the window. Moyers, who did not notice Defendant when he entered, ran into the bathroom to secure the area. When he went into the bathroom, Defendant was standing between the toilet and window, facing the door. After securing her, he searched the bathroom, but he did not find any contraband or indication the toilet had been flushed to dispose of evidence. Officers initially located drug paraphernalia in the kitchen area, including pipes to smoke crack, brillo pads to filter the crack in the pipes, razor blades, baking soda to cook powder cocaine into crack for smoking, and a spoon with white residue. After conducting a more thorough search, police discovered a Tylenol bottle containing 7.32 grams of crack cocaine outside the apartment, directly under the bathroom window.

Defendant admitted she was in the apartment for about thirty to forty-five minutes before police arrived. She also admitted handling a similar Tylenol bottle during that time, until “L.D.,” the owner of the apartment, told her not to handle it and took possession of the bottle. She denied knowing what the bottle contained or throwing it out the window. Defendant claimed she entered the bathroom before police arrived and was fixing her hair when they arrived. According to Moyers, Defendant told him and Edmondson that she would admit the cocaine was hers if they did not arrest her. In addition, according to Edmondson, Defendant asked whether she would be arrested if she admitted the “dope” was hers. Defendant testified the officers told her she would not be arrested if she admitted it was hers, which she refused to do. Defendant was arrested and charged with possession of a controlled substance and tampering with evidence.

The jury convicted Defendant on both charges. The Court of Appeals concluded the charge of possession should be viewed as a lesser-included offense of the charge of tampering with evidence, and therefore convictions for both offenses violated double jeopardy.
jeopardy. For the following reasons, we disagree.

II.

[5] Whether Defendant’s conviction for the violation of Sections 30-31-23(D) and 30-22-5 constitutes multiple punishment for the “same offense” as barred by the double jeopardy clause is a question of legislative intent, which we review de novo. See State v. Foster, 1999-NMSC-007, ¶ 28, 126 N.M. 646, 974 P.2d 140. To determine whether these statutes are the “same offense” for double jeopardy purposes, we apply a two-part test: (1) “whether the conduct underlying the offenses is unitary;” and, if so, (2) “whether the legislature intended to create separately punishable offenses.” Swafford v. State, 112 N.M. 3, 13, 810 P.2d 1223, 1233 (1991).

[6] In applying the first part of this test, the Court of Appeals concluded Defendant’s conduct was unitary. The State argued Defendant’s conduct was not unitary because the jury could have concluded that Defendant possessed the cocaine before the police arrived and subsequently tampered with the evidence by throwing it out the window. Id. However, the court limited its assessment to the State’s legal theory at trial, which was that Defendant was in possession when she ran to the bathroom and threw the bottle. Id.

[7] We do not agree with the Court of Appeals’ analysis to the extent it suggests the State’s legal theory necessarily determines whether conduct may be considered unitary. “The conduct question depends to a large degree on the elements of the charged offenses and the facts presented at trial.” Swafford, 112 N.M. at 13, 810 P.2d at 1233. The proper analytical framework is whether “the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses.” Id. at 14, 810 P.2d at 1234. If, after examining the elements and the facts, “it reasonably can be said that the conduct is unitary, then one must move to the second part of the inquiry.” Id. On the other hand, separate punishments may be imposed if the offenses are “separated by sufficient indicia of distinctness.” Id. at 13, 810 P.2d at 1233. To determine whether a defendant’s conduct was unitary, we consider such factors as whether acts were close in time and space, their similarity, the sequence in which they occurred, whether other events intervened, and the defendant’s goals and mental state during each act. See State v. Dominguez, 2005-NMSC-001, ¶ 23, 137 N.M. 1, 106 P.3d 563.

[8] The jury was instructed that it could find Defendant committed possession of cocaine if it was on her person or in her presence, she exercised control over it, and she knew or believed it was cocaine or some other unlawful or regulated drug or substance. UJI 14-3102, 14-3130 NMRA 2005. The jury was instructed it could find Defendant tampered with evidence if she threw cocaine out the window and she intended to prevent the apprehension, prosecution or conviction of herself or others. UJI 14-2241 NMRA 2005. While the prosecutor’s legal theory might have tied the State in proving tampering with evidence, see State v. Smith, 104 N.M. 729, 730, 726 P.2d 883, 884 (Ct. App. 1986), that theory did not limit the evidence the jury could consider to find Defendant guilty of possession.

[9] Based on the elements stated in the instructions and the evidence produced at trial, the jury had an independent factual basis for finding each act. The jury could reasonably find Defendant possessed cocaine and exercised control over it before the police arrived. The jury could reasonably find the act of possession was distinct from the act of tampering.

[10] Defendant testified she was inside the apartment for thirty to forty-five minutes before the police arrived; it was a one-room efficiency apartment. Defendant was in close proximity to drug paraphernalia commonly used to smoke and/or cook crack cocaine, as well as to possible cocaine users and/or dealers. She admitted handling the Tylenol bottle before police arrived, and she was warned not to handle the bottle. In addition, there was evidence to support a reasonable inference that the crack belonged to Defendant or her boyfriend. The jury could reasonably infer Defendant tried to destroy the evidence because she knew or believed there was an illegal substance inside the bottle before police arrived. Because Defendant threw the cocaine out the window after police arrived, rather than leaving the evidence for police to discover, the jury could have found two distinct acts, committed at different times, in different locations, with a different mental state and purpose, and separated by the intervening arrival of the police.

[11] Nevertheless, the jury might have based its verdict on the theory that Defendant possessed the cocaine when she tampered with evidence. In that event, the conduct was unitary. Because the jury could have based its verdict on the theory Defendant possessed the cocaine at the time she threw it out the window, we presume unitary conduct. See Foster, 1999-NMSC-007, ¶¶ 27-28 (applying presumption the legal theory that potentially violates double jeopardy is relevant in determining whether conduct is unitary when the State charged kidnapping under alternative theories and it was unclear from the verdict on which theory the defendant was convicted); State v. Crain, 1997-NMCA-101, ¶ 22, 124 N.M. 84, 946 P.2d 1095 (presuming conviction was based on a theory that violated double jeopardy when kidnapping was charged under alternative theories, but State tried case on only one theory and the verdict did not indicate which alternative was used to convict defendant). Because we presume the conduct was unitary, we proceed to the second part of the Swafford analysis to determine whether the Legislature intended to allow multiple punishments based on the facts and circumstances of this case.

[12] The same act may result in violations of more than one statute. Swafford, 112 N.M. at 8, 810 P.2d at 1228. The test for determining conduct is unitary helps us decide whether more than one act has occurred. Id. at 13, 810 P.2d at 1233. The test for determining whether more than one act has occurred was never intended to be the sole test for determining whether the Legislature intended to punish conduct under more than one statute. See State v. Mora, 2003-NMCA-072, ¶ 20, 133 N.M. 746, 69 P.3d 256 (noting that while criminal sexual contact of a minor and attempted criminal sexual penetration of a minor may both arise from the same conduct on specific facts, we do not look at the specific facts of the offense under Swafford; rather, we look at the statutory elements). “The sole limitation on multiple punishments is legislative intent.” Swafford, 112 N.M. at 13, 810 P.2d at 1233, and, unless the Legislature clearly authorized multiple punishments, we apply the test articulated in Blockburger v. United States, 284 U.S. 299, 304 (1932), to determine that intent. Under the Blockburger test, we compare the elements of the relevant statutes to determine whether the Legislature intended to authorize separate punishments under each statute. Id. at 304. Under that additional test, “the evidence
and proof offered at trial are immaterial.” Swafford, 112 N.M. at 8, 810 P.2d at 1228. “If that test establishes that one statute is sub-
sumed within the other, the inquiry is over and the statutes are the same for double jeopardy purposes . . . .” Id. at 14, 810 P.2d at 
1234. However, if each offense requires proof of an element that the other does not, a presumption that separate punishments were 
intended arises. Id. The presumption may be rebutted by other indicia of legislative intent, such as the language, structure, history, 
and purpose of the statutes. Id. Other factors that are probative of legislative intent to punish are whether the statutes are violated 
together and the quantum of punishment. Id. at 14-15, 810 P.2d at 1234-35.

{13} The Court of Appeals held the Legislature did not intend separate punishments and therefore the convictions violated double 
jeopardy. See Franco, 2004-NMCA-099, ¶ 22. Although the court articulated the proper test for determining legislative intent un-
der Swafford, it applied a much different test. To determine under Blockburger whether one offense subsumed another, the court 
considered only the theory that Defendant tampered with evidence by throwing cocaine out the window with the requisite intent. 
Id. The court then held the possession conviction was subsumed within the tampering conviction, “‘because Defendant possessed 
the cocaine when she was in the act of throwing it out the window.’” Id. In other words, the Court of Appeals construed Swafford to 
support treating the offense of possession as subsumed within the offense of tampering because under the State’s legal theory the act 
of possessing cocaine was necessarily included in the act of throwing cocaine. See id. We conclude this was the wrong analysis.

{14} As Swafford suggested, we treat statutes written in the alternative as separate statutes for purposes of the Blockburger analysis. 
See State v. Rodriguez, 113 N.M. 767, 771, 833 P.2d 244, 248 (Ct. App. 1992). This means that instead of looking at the statute in 
the abstract, we look at the “legal theory” of the offense that is charged. Id. Nevertheless, we then compare “‘the elements of 
the specific criminal cause of action for which the defendant was convicted without examining the facts in detail.’” Id. (quoting Pan-
delli v. United States, 635 F.2d 533, 538 (6th Cir. 1980)). The reason for this approach is that a statute that serves several purposes 
and has been written in the alternative may “have many meanings and a wide range of deterrent possibilities.” Pandelli, 635 F.2d at 
538-39 (quoted in Rodriguez, 113 N.M. at 771, 833 P.2d at 248). Unless we focus on the relevant alternatives, we run the risk of 
misconstruing legislative intent.

{15} We are more likely to depart from a strict application of Blockburger when a defendant is charged with multiple alternatives of 
a compound statute and it is unclear which alternative the jury relied on. Compare Mora, 2003-NMCA-072, ¶¶ 21-22, 27 (analyzing 
the elements of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor and, because each statute 
could be violated without violating the other, concluding neither was subsumed within the other although other indicia of legislative 
intent precluded multiple punishment) with Rodriguez, 113 N.M. at 771-72, 833 P.2d at 248-49 (concluding the crime of dangerous 
use of explosives was subsumed in the crime of arson under the alternatives charged for each offense). We also have considered 
the State’s legal theory in determining the appropriate unit of prosecution when a defendant was charged with multiple violations of a 
single statute. See generally State v. LeFebre, 2001-NMCA-009, ¶ 23, 130 N.M. 130, 19 P.3d 825 (holding the Legislature did not intned multiple punishments for resisting, evading or obstructing an officer in different ways in a single high-speed chase).

{16} In this case, when we compare the elements of the two statutes, it is clear that each statute requires proof of an element the other 
does not. Possession of a controlled substance requires proof Defendant knew or believed it was cocaine or some other substance 
that is regulated, which is not required to prove tampering. Tampering with evidence requires proof Defendant intended to prevent 
the apprehension, prosecution or conviction of herself or others, which is not required to prove possession. Although tampering can 
be committed in different ways, see § 30-22-5(A), the element of intent distinguishes the offense of tampering from the offense of 
possession, however the offense of tampering is committed. Similarly, the element of knowledge distinguishes the offense of pos-
session from the offense of tampering, however the offense of tampering is committed. Application of the Blockburger test therefore 
results in a presumption that the Legislature intended a separate punishment for each crime.

{17} The Court of Appeals concluded the possession statute was subsumed within the tampering statute by analogy to the holding in 
session of marijuana was a lesser offense necessarily included in the greater offense of distribution of marijuana.” Id. at 396, 534 
P.2d at 488. The court reasoned that the prohibited conduct of distribution was equivalent to the act of delivery and that the act 
of delivery was equivalent to the act of transferring or “making over the possession or control.” Id. at 395, 534 P.2d at 487. Thus 
the court concluded one cannot distribute marijuana without also possessing marijuana. Id. However, Medina was decided under 
the “necessarily included” test, an evidence-based approach that Swafford later rejected in favor of the Blockburger tests, which is 
an elements-based approach. The “necessarily included test” is a subset of the “same evidence” and “necessarily involved” tests, 
because it focuses on the facts that will sustain a conviction, as well as defendant’s conduct. See Swafford, 112 N.M. at 10-12, 810 
P.2d at 1230-32 (describing the tests our courts had used in the past to develop multiple punishment theory). While Rodriguez and 
its progeny teach us to look at the State’s legal theory in charging compound crimes, and perhaps in evaluating whether multiple 
violations of a single statute have occurred, we have never departed from the Blockburger test, which focuses on elements, by 
examining the conduct or evidence in detail. In fact, we have indicated that examination was neither required nor appropriate. See LeFebre, 2001-NMCA-009, ¶ 22; Rodriguez, 113 N.M. at 771, 833 P.2d at 248. The Court of Appeals’ opinion is a departure from the 
Blockburger test that is inconsistent with Swafford. We must look for legislative intent in another way, and we must recognize 
the presumption that results from the Blockburger test, whether applied in its strict or modified form.

{18} The presumption that results under Blockburger from comparing the elements of tampering with evidence and the elements 
of possession is supported by other indicia of legislative intent to punish Defendant’s conduct under both statutes. The possession 
and tampering statutes are directed at different social purposes. Possession of cocaine is regulated by a comprehensive scheme of 
penalties designed to protect the public from the dangers of drug abuse. See State v. Reams, 98 N.M. 372, 377, 648 P.2d 1185, 1190
The tampering with evidence statute is aimed at the preservation of evidence for trial. In addition, the crimes are not necessarily violated together, which supports an inference the Legislature intended multiple punishment. See State v. Sosa, 1997-NMSC-032, ¶ 36, 123 N.M. 564, 943 P.2d 1017 (“The fact that each statute may be violated independent of the other will also lend support to the imposition of sentences for each offense.”). Possession of a controlled substance certainly can be committed without tampering with evidence. Conversely, tampering with evidence, even if the evidence is illegal drugs, probably can be committed without legally possessing the drugs; one might exercise control over a controlled substance with intent to hamper law enforcement without knowing the nature of the evidence. Finally, the quantum of punishment is the same for both statutes, which suggests the Legislature did not intend one offense to subsume the other, but intended separate punishment for each. Cf. Swafford, 112 N.M. at 15, 810 P.2d at 1235 (“Where one statutory provision incorporates many of the elements of a base statute, and extracts a greater penalty than the base statute, it may be inferred that the legislature did not intend punishment under both statutes.”).

III.

We conclude the Legislature intended separate punishments for possession of a controlled substance and for tampering with evidence. We conclude convictions for possession of cocaine and tampering with evidence did not violate Defendant’s double jeopardy rights. Even if based on unitary conduct, the convictions are valid because there are sufficient indicia of legislative intent for separate punishment. The Court of Appeals properly exercised caution in analyzing the facts of this case. Had the jury convicted Defendant on a basis that the constitutional protection against double jeopardy precluded, reversal would have been appropriate. We conclude this is not such a case. Defendant’s convictions are affirmed.

IT IS SO ORDERED.

PAMELA B. MINZNER,
Justice

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
OPINION
Roderick T. Kennedy, Judge

[1] Carol Platt Cagan, J.D. Wolf, and Lobo Land (Plaintiffs), filed two cases against the Village of Angel Fire and its officials (referred to collectively as the Village). The first case (Case I) was dismissed with prejudice for failure to prosecute. The dismissal of Case I was pending, Plaintiffs filed a second case (Case II) that included claims similar to those in Case I. The district court granted summary judgment to the Village in Case II on grounds that collateral estoppel and res judicata barred Plaintiffs’ entire complaint as a result of the dismissal of Case I. It is from this order that Plaintiffs appeal.

[2] The application of res judicata does not require the end of one case to give it preclusive effect as against another. We therefore affirm the district court’s dismissal of three of Plaintiffs’ claims in Case II, as these claims are barred by res judicata. Lastly, one claim in Case II did not share enough in common with the Case I claims to be precluded by res judicata; as to that claim we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

[3] This is not the first time Plaintiffs have asserted that the Village has made politically motivated decisions against established Village policies and ordinances concerning Plaintiffs’ businesses. In Case I, on February 17, 2000, Plaintiffs filed a complaint against the Village. The Case I complaint asserted a 42 U.S.C. § 1983 (1996) claim. Case I also contained claims for assault, battery, defamation, intentional interference with contractual relations, conversion, anticipatory breach of contract, and damage to property. The critical claims for the purposes of this appeal are the Section 1983 claim and the anticipatory breach of contract claim, involving the alleged breach of an April 6, 1998, agreement amended June 30, 1998 (Agreement and Amendment).

[4] On October 23, 2001, the Village filed a motion to dismiss Plaintiffs’ complaint in Case I for failure to prosecute their claims. It appears from the record proper that Plaintiffs never responded to the motion. On September 11, 2002, the Village filed a second motion to dismiss Plaintiffs’ complaint in Case I for failure to prosecute their claims, on grounds that Plaintiffs failed to take any significant action on their complaint within the previous two years. Two days later, on September 13, 2002, new counsel for Plaintiffs entered an appearance in Case I. On the same day, new counsel for Plaintiffs filed a second complaint. This Case II complaint again named the Village as a Defendant. It also named A.L. “Bubba” Clanton, individually and as the Village mayor, and Don Lusk, individually and as the Village administrator.

[5] On November 13, 2002, the Village filed its answer to the complaint in Case II, raising the affirmative defenses of collateral estoppel and res judicata. Case I was not dismissed until December 4, 2002. After oral argument from the parties, the district court dismissed the Case I complaint with prejudice. Two months later, the Village filed a motion for summary judgment in Case II on the grounds that the Case II claims were barred by collateral estoppel and res judicata given the district court’s dismissal of Case I. After hearing oral argument, the district court granted the Village’s motion for summary judgment, dismissing Plaintiffs’ complaint in Case II in its entirety.

DISCUSSION

Collateral Estoppel Will Not Be Addressed

[6] The district court’s order dismissed the complaint in Case II in its entirety, but did not indicate the grounds upon which it relied for

1 Each of Plaintiffs’ cases named the Village and a number of its officials. Even though each of the complaints named different Village officials in their individual capacities, Plaintiffs do not raise their identities as an issue. For this reason only, we refer to all of the defendants collectively as the Village.

2 The Case I complaint had named as a defendant then-mayor Barbara Cottam. The Case II complaint asserts its claims against Clanton as her “successor.” The Case II claims against Lusk also designate Lusk as a “successor” to the former administrator, who was not, however, named in Case I.

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its decision. Plaintiffs assert that their case was not barred because of collateral estoppel. However, the Village concedes in its answer brief that the doctrine of collateral estoppel does not apply to this appeal. Consequently, we will not address collateral estoppel as a sufficient justification for dismissing Case II, only addressing whether res judicata precludes adjudication of the Case II claims.

Standard of Review

(7) Although the parties disagree about the type of order from which the appeal is taken, they agree that the standard of review is de novo.3 The decision of whether res judicata applies to bar a party’s claims is a question of law that we review de novo. Anaya v. City of Albuquerque, 1996-NMCA-092, ¶ 5, 122 N.M. 326, 924 P.2d 735. As the party seeking to bar Plaintiffs’ claims, the Village had the burden of establishing the elements of res judicata. Id.

Res Judicata

1. Requirement of Adjudication on the Merits and Rule 1-041 NMRA Dismissals

(8) In order for the doctrine of res judicata to apply, the action asserted to have preclusive effect must have concluded with a final adjudication on the merits. See Myers v. Olson, 100 N.M. 745, 747, 676 P.2d 822, 824 (1984) (“Under the doctrine of res judicata, a prior judgment on the merits bars a subsequent suit involving the same parties or privies based on the same cause of action.”). Therefore, the first question is whether the Case I order of dismissal with prejudice for failure to prosecute pursuant to Rule 1-041(E)(1) NMRA constitutes an adjudication on the merits. Other than Smith v. Walcott, 85 N.M. 351, 512 P.2d 679 (1973), there appears to be no other cases directly addressing this question. A few cases have implied that such a dismissal does constitute an adjudication on the merits. See, e.g., Eager v. Belmore, 53 N.M. 299, 307, 207 P.2d 519, 524 (1949) (reaffirming that Rule 1-041(E) has the effect of a statute of limitation and affirming that an order dismissing a complaint with prejudice pursuant to a Rule 1-041(E) motion for failure to prosecute barred the defendant from asserting his cross-complaint). The parties in this appeal argue different interpretations of Smith to support their contentions.

(9) Before addressing Smith, it should be noted that Rule 1-041 was amended in 1990. See Vigil v. Thriftway Mkts. Corp., 117 N.M. 176, 178-79, 870 P.2d 138, 140-41 ( Ct. App. 1994) (discussing the amendment of Rule 1-041). Cases filed before January 1, 1990, rely on Rule 1-041 NMRA (Recomp. 1986) (referred to as the former rule), under which a dismissal for failure to prosecute within three years specifically operated to bar a subsequent action on the same subject matter.4 The current Rule 1-041 (referred to as Rule 1-041 or the current rule) provides for when the dismissal of an action is with prejudice and without prejudice. See Rule 1-041(E)(1)(2). Subsection (E) is at issue in this appeal. It states:

(1) Any party may move to dismiss the action, or any counterclaim, cross-claim or third-party claim with prejudice if the party asserting the claim has failed to take any significant action to bring such claim to trial or other final disposition within two (2) years from the filing of such action or claim. An action or claim shall not be dismissed if the party opposing the motion is in compliance with an order entered pursuant to Rule 1-016 NMRA or with any written stipulation approved by the court.

(2) Unless a pretrial scheduling order has been entered pursuant to Rule 1-016 NMRA, the court on its own motion or upon the motion of a party may dismiss without prejudice the action or any counterclaim, cross-claim or third party claim if the party filing the action or asserting the claim has failed to take any significant action in connection with the action or claim within the previous one hundred and eighty (180) days. A copy of the order of dismissal shall be forthwith mailed by the court to all parties of record in the case. Within thirty (30) days after service of the order of dismissal, any party may move for reinstate the action. Upon good cause shown, the court shall reinstate the case and shall enter a pretrial scheduling order pursuant to Rule 1-016 NMRA. At least twice during each calendar year, the court shall review all actions governed by this paragraph.

Id. Subsection (E) was essentially rewritten and differs from the former rule in several ways. It provides for dismissal of an action with prejudice by a motion that is not in written form. Rule 1-041(E)(1). Also omitted from the current rule is the former rule’s language describing the res judicata effect of a dismissal with prejudice. Rule 1-041(E)(2) also now provides for the dismissal of an action without prejudice for lack of prosecution, either by motion of a party or on the court’s own motion. See id.; Vigil, 117 N.M. at 179, 870 P.2d at 141 (discussing dismissals under the current version of Rule 1-041(E)(2)). Although a dismissal without prejudice was not expressly provided for in the former rule, cases filed before the current rule took effect in 1990 nevertheless recognized the court’s inherent power to dismiss a case sua sponte for lack of prosecution. See, e.g., Smith, 85 N.M. at 354, 512 P.2d at 682. The question then is whether the Case I dismissal with prejudice under Rule 1-041(E)(1) operates as an adjudication on the merits. In this case, we hold that it does.

(10) In Smith, the plaintiff’s first case was dismissed sua sponte in 1970 for lack of prosecution after the defendants admitted some of the debt alleged and promised to pay in their answer. Smith, 85 N.M. at 353, 512 P.2d at 681. In 1972, the plaintiffs filed in the same district court a claim that the defendants had not paid on the same promissory note that was the subject of the first case, further asserting the defendants’ admission in the first case as to their liability under the note and the specific amount owed. Id. The defendants filed an answer and motion to dismiss the second case. Id. at 354, 512 P.2d at 682. The defendants also filed a motion under the first

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3 The district court’s order and the parties’ pleadings indicate it was a motion for summary judgment that was at issue.
4 Former Rule 1-041(E)(1) stated: “In any civil action or proceeding pending in any district court in this state, . . . when it shall be made to appear to the court that the plaintiff therein or any defendant filing a cross-complaint therein has failed to take any action to bring such action or proceeding to its final determination for a period of at least three (3) years after the filing of said action or proceeding or of such cross-complaint unless a written stipulation signed by all parties to said action or proceeding has been filed suspending or postponing final action therein beyond three (3) years, any party to such action or proceeding may have the same dismissed with prejudice to the prosecution of any other or further action or proceeding based on the same cause of action set up in the complaint or cross-complaint by filing in such pending action or proceeding a written motion moving the dismissal thereof with prejudice.”

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case pursuant to the former Rule 1-041(E) seeking dismissal with prejudice. Id. The same district judge that entered the 1970 order of dismissal entered another order dismissing the complaint in the first case with prejudice. Id.

(11) Our Supreme Court determined that the 1970 order dismissing the complaint in the first case, entered sua sponte by the district court without a motion or hearing, did not constitute an adjudication on the merits; thus, the doctrine of res judicata did not apply. Id. at 355, 512 P.2d at 683. The Court further determined that the district court’s 1970 sua sponte order, entered pursuant to the court’s inherent power to dismiss a cause for failure to prosecute, constituted a final order and effectively terminated the case until properly reinstated. Id. Since no case was pending in 1972, there was no cause of action to dismiss “with prejudice.” Id. The Court also noted that the district court had not followed any of the procedures contemplated by Rule 1-041(E) in entering the original sua sponte dismissal. Id. at 354, 512 P.2d at 682. The Court stated that the rule contemplated a hearing on a motion to dismiss where the parties have an opportunity to present evidence on the issue of whether a party has taken any action to bring the case to its final determination. Id.

(12) Smith is distinguishable here on its facts. Unlike Smith, where the dismissal was sua sponte by the court, in this case the Village filed a motion for summary judgment pursuant to Rule 1-041(E) and oral argument was held. See id. at 354, 512 P.2d at 682. Contrary to Plaintiffs’ assertions, Smith is not therefore direct authority for their argument that a dismissal for lack of prosecution is not an adjudication on the merits. Smith differs in that it holds that an adjudication on the merits does not flow from a sua sponte order of dismissal for lack of prosecution absent a hearing. Id. at 354-55, 512 P.2d at 682-83. Here, we hold that when a dismissal with prejudice for lack of prosecution is entered pursuant to a written motion and after a hearing on the merits where the losing party has had notice and an opportunity to be heard, a dismissal under Rule 1-041(E)(1) constitutes an adjudication on the merits.

(13) This holding is also supported by the relationship between Subsections (B) and (E)(1) of Rule 1-041. Both Subsections (B) and (E)(1) “require longer periods of inaction and have very strict standards,” Vigil, 117 N.M. at 180, 870 P.2d at 142, that result in “a serious sanction for extremely dilatory parties and their counsel.” Id. at 179, 870 P.2d at 141. However, Subsection (E)(2) was “designed to serve a different purpose” than Subsections (B) and (E)(1). Id. Like Subsection (E)(2), Subsection (B) allows for an involuntary dismissal for failure to prosecute. Rule 1-041(B), (E)(2). Unlike Subsection (E)(2), however, Subsection (B) actually states that, absent the court’s indicating otherwise, such a dismissal “operates as an adjudication upon the merits.” Rule 1-041(B).

(14) The Village’s motion to dismiss in Case I asserted both subsections as a basis for dismissal. We note that notice and an opportunity to be heard are essential to a decision on the merits, even if a written motion under Subsection (E)(1) is not. Otero v. Sandoval, 60 N.M. 444, 446, 292 P.2d 319, 320 (1956). The existence of a decision on the merits only becomes an issue when res judicata is asserted. Rule 1-041(B) cases provide us with some guidance in this regard. For example, in Lowery v. Atterbury, 113 N.M. 71, 823 P.2d 313 (1992), our Supreme Court rejected a due process challenge to a sua sponte dismissal with prejudice for lack of prosecution under Rule 1-041(B). Lowery, 113 N.M. at 73, 823 P.2d at 315. Although lacking notice and a hearing before dismissal, the Court held that the order did not violate due process rights. Id. (reaffirming established authority that Rule 1-041(B) does not require notice and a hearing); cf. Newsome v. Fayer, 103 N.M. 415, 417, 708 P.2d 327, 329 (1985) (rejecting a due process challenge to an order of dismissal, and concluding that such an order under Rule 1-041(B) for failure to comply with a court order was not an adjudication on the merits, and neither notice nor a hearing were required). However, while dismissal under Rule 1-041(B) may not require a notice and a hearing, for an order of dismissal to have res judicata effect, notice and a hearing must be provided, and the result is an adjudication on the merits. See Otero, 60 N.M. at 445-46, 292 P.2d at 320 (concluding that mandate of Rule 1-041(B) that “any dismissal not provided for in this rule . . . operates as an adjudication upon the merits” only applies to a dismissal where the party had notice (internal quotation marks, citation, and emphasis omitted)). Under these circumstances, the requirements of notice and a hearing remain essential for an adjudication on the merits.

(15) The order of dismissal entered pursuant to the Village’s motion for summary judgment under Subsections (B) and (E)(1) of Rule 1-041 constituted an adjudication on the merits. Therefore, the doctrine of res judicata applies. To the extent that the other elements of res judicata are met, this doctrine will act as a bar to Plaintiffs’ claims.

2. The Fact That Case I and Case II Were Pending at the Same Time Does Not Preclude the Application of Res Judicata

(16) Plaintiffs argue that because Case II was filed while Case I was still pending, res judicata is inapplicable. However, as Plaintiffs point out, there is a New Mexico case that directs us to the opposite conclusion. In Carter v. Thurber, 106 N.M. 429, 744 P.2d 557 (Ct. App. 1987), the plaintiff appealed from a summary judgment dismissing with prejudice his state court action against the defendants. Id. at 430, 744 P.2d at 558. The trial court determined that the plaintiff’s state court claims were barred by res judicata because of a prior dismissal for lack of prosecution in a federal district court case. Id. The plaintiff argued that because the state court action was filed before the federal action, it did not constitute a subsequent action and, therefore, res judicata was inapplicable. Id. The plaintiff relied on Myers, which stated: “Under the doctrine of res judicata, a prior judgment on the merits bars a subsequent suit involving the same parties or privies based on the same cause of action.” Carter, 106 N.M. at 432, 744 P.2d at 560 (internal quotation marks and citation omitted). Relying on the rationale of an Arizona case, this Court concluded that res judicata applied because “if two actions involving the same issues and parties are pending at the same time when a judgment in one becomes final, it may be raised in bar of the other, regardless of which action was begun first.” Id.

(17) Here, Case I was filed first, but was still pending at the time Case II was filed. Plaintiffs argue that Case II does not constitute a “subsequent” suit because it was filed while Case I was still pending. However, under Carter, res judicata is applicable regardless of the fact that the cases overlapped. See id. For this reason, we conclude that the timing of Cases I and II does not bar the application of res judicata.

3. Which of Plaintiffs’ Case II Claims Involve the Same Causes of Action and Subject Matter as Plaintiffs’ Case I Claims?

(18) We next address whether the elements of res judicata are met. “Res judicata applies when four elements are met: (1) identity of
parties or privies, (2) identity of capacity or character of persons for or against whom the claim is made, (3) same cause of action, and (4) same subject matter.” Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 694, 652 P.2d 240, 244 (1982), rev’d on other grounds by Universal Life Church v. Coxon, 105 N.M. 57, 59, 728 P.2d 467, 469 (1986). Plaintiffs appear to concede that the first two prongs of this test are not at issue, and do not argue whether or not they are met. Even though a question of privity might arise on the facts before this Court, we may not fairly address an issue that is abandoned and to which the Village did not have an opportunity to respond. Therefore, we deal only with the cause of action and subject matter requirements of res judicata in these cases.

To answer the question of whether the causes of action are the same, we must determine whether Case I and Case II arose out of the same transaction or series of connected transactions. Three Rivers Land Co., 98 N.M. at 695, 652 P.2d at 245. Three Rivers Land Co. adopted the Restatement (Second) of Judgments §§ 24, 25 (1982), as a guideline for determining what constitutes a cause of action for the purposes of res judicata. Three Rivers Land Co., 98 N.M. at 695, 652 P.2d at 245. Restatement (Second) of Judgments § 24 is titled “Dimensions of ‘Claim’ for Purposes of Merger or Bar—General Rule Concerning ‘Splitting.’” Restatement, supra, § 24, at 196. Section 24 states that:

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff’s claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a “transaction,” and what groupings constitute a “series,” are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.

Id. Restatement (Second) of Judgments § 25, entitled “Exemplifications of General Rule Concerning Splitting,” provides:

The rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action

(1) To present evidence or grounds or theories of the case not presented in the first action, or

(2) To seek remedies or forms of relief not demanded in the first action.

Id. Applying these principles and the transactional test adopted in Three Rivers Land Co., we must “examine the operative facts underlying the claims made in the two lawsuits.” Anaya, 1996-NMCA-092, ¶ 8. We thus address each of Plaintiffs’ claims in Case II separately to decide whether they involve the same cause of action and subject matter.

a. Breach of Contract and Anticipatory Breach

The complaint in Case I asserted that under terms of the Agreement and Amendment the Village agreed to include Plaintiffs’ property in the Village assessment district. By including the property in the assessment district, the Village was obligated to provide and maintain all roads and utilities to the property, the work for which was to be completed and accepted by the Village no later than November 2001. The complaint asserted anticipatory breach of contract based on the allegation that the Village breached the Agreement and Amendment by abandoning the assessment district and failing to commence installation of the infrastructure as promised.

The breach of contract claim asserted in Case II alleged as completed the same actions that constituted the anticipatory breach claim in Case I, namely that in May 1999 the Village narrowed the scope of the assessment district to include only water and sewer in violation of the Agreement and Amendment. The breach of contract claim in Case II thus was based on Plaintiffs’ allegations that the Village failed or refused to honor its obligations to provide the services as promised by the same Agreement and Amendment, and thus the same claim relied upon for the anticipatory breach of contract claim asserted in Case I. The Case II claim for actual breach added no more than an allegation that the Village accomplished the breach that Case I said would happen. Otherwise, both causes of action relied upon the Village’s breach of the Agreement and Amendment.

There is not much functional difference between claiming anticipatory and actual breach of a contract. Plaintiffs could have asserted their breach of contract claim in Case I, and would have been entitled there to damages for total breach. Anticipatory breach of contract is defined as a breach caused by “a party’s anticipatory repudiation, i.e., unequivocally indicating that the party will not perform when performance is due.” Black’s Law Dictionary 182 (7th ed. 1999). We have held that where a defendant’s actions evince “a distinct, unequivocal, and absolute refusal to perform according to the terms of the agreement,” a plaintiff can demonstrate sufficient repudiation justifying nonperformance of the contract. Gilmore v. Duderstadt, 1998-NMCA-086, ¶ 15, 125 N.M. 330, 961 P.2d 175 (internal quotation marks and citations omitted). In Gilmore, we indicated that if anticipatory repudiation was proven on retrial, the plaintiff would be entitled to his compensatory damages for the total breach. Id. ¶ 20.

The subject matter of this action arose in May 1999 when the Village notified Plaintiffs that it decided to narrow the scope of the assessment district to include only water and sewer despite the promises it had made in the Agreement and Amendment. See id. ¶¶ 15, 20. The causes of action and subject matter were the same because they arose out of the same Agreement and Amendment and refusal of the Village to honor its promises. Thus, Defendants could have asserted their breach of contract claim in Case I and would have been entitled to damages for the total breach. See, e.g., id. ¶ 20.

Thus, there is no practical distinction to make between the causes of action in Case I and Case II. See Anaya, 1996-NMCA-092, ¶ 6 (stating that the third and fourth prongs of the res judicata test require that the two claims represent the “same subject matter” and the “same cause of action”). Since the action is brought against the Village, and constitutes the same cause of action and subject matter, there is no difference between the claims Plaintiffs brought in Case I for anticipatory breach and the breach of contract claim brought in Case II. We therefore hold that once dismissed in Case I, the contract claim in Case II was barred by res judicata. See id. ¶ 5.

b. Plaintiffs’ Inverse Condemnation/Fifth Amendment Takings Claim and Due Process/Section 1983 Claims (Counts II and III) Involve the Same Subject Matter and Cause of Action

In Counts II and III of Case II, Plaintiffs alleged that the Village’s failure to provide and maintain roads and utilities as promised
in the Agreement and Amendment constituted a taking without due process or compensation. This claim also arises out of the same transaction as the anticipatory breach of contract claim in Case I. The remedy Plaintiffs seek (money damages) is also the same. The only difference between these claims is the legal theory asserted. See Restatement (Second) of Judgments § 25 (extinguishing the plaintiff’s claim in the second action despite the presentation of theories not asserted in the first action). Plaintiffs could have as easily brought this claim in Case I. See City of Sunland Park v. Macias, 2003-NMCA-098, ¶ 18, 134 N.M. 216, 75 P.3d 816 (“Res judicata bars not only claims that were raised in the prior proceeding, but also claims that could have been raised.”); Restatement (Second) of Judgments § 25 cmt. d. 5

Restatement (Second) of Judgments § 24 cmt. c (“That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims.”). As these claims arose out of the same transaction, res judicata bars Plaintiffs’ Fifth Amendment takings claims and due process/Section 1983 claims in Case II. See Anaya, 1996-NMCA-092, ¶ 6 (setting forth the elements of res judicata).

**c. Plaintiff Cagan’s Civil Rights Claim in Case II, Count IV Was Not Adjudicated on Its Merits in Case I and Is Not Barred**

[26] Plaintiffs assert that the Village failed to meet their burden of proving that summary judgment as to the Section 1983 claim alleged in Count IV was proper because dismissal of this claim was not requested or addressed in the Village’s motion or at the hearing. See Pollock v. State Highway & Transp. Dept., 1999-NMCA-083, ¶ 5, 127 N.M. 521, 984 P.2d 768 (stating that the party moving for summary judgment “has the burden of establishing a prima facie case showing there was no genuine issue of material fact” for each issue (internal quotation marks and citation omitted)). We agree.

[27] The Village’s motion for summary judgment argued that the doctrine of res judicata barred Plaintiffs from bringing the claims raised in Counts I, II, and III. The Village also sought summary judgment on Count IV, but on different grounds. It asserted that Count IV was barred by the statute of limitations because the retaliatory incident alleged in Count IV occurred on June 28, 2000, and the Case II complaint was not filed until September 13, 2002. The Village later withdrew this argument and did not request summary judgment in writing on an alternative ground for Count IV. Nevertheless, the order granting the Village’s motion for summary judgment determined that the complaint should be dismissed in its entirety. We conclude that the Village was not entitled to summary judgment as a matter of law on this count for the reasons set forth below. See Martinez v. Logsdon, 104 N.M. 479, 482-83, 723 P.2d 248, 251-52 (1986) (indicating that the court would not be barred from granting summary judgment sua sponte if proper, i.e., there were no material fact issues in dispute and the moving party was entitled to summary judgment as a matter of law).

[28] Plaintiffs’ Section 1983 claim in Case I was based on allegations that in retaliation for Plaintiffs’ political opposition to them or their official actions: (1) the Village interfered with their contractual rights to deliver concrete by ordering the subcontractor of the project to terminate Plaintiffs because they supported certain candidates for the Village positions; (2) the Village red-tagged two of their concrete trucks, forcing them to dump a load of concrete for violating a state regulation requiring concrete to be off-loaded within ninety minutes; (3) the Village denied their bid to do work for the Village, even though their bid was the lowest one; and (4) the Village interfered with Plaintiff Cagan’s ability to operate a business by failing to timely approve her plans to relocate her business, thus requiring her to store retail inventory, delaying the approval of her sign permit, and threatening to require her to remodel her business to meet building codes not enforced against other similarly situated businesses. Plaintiffs claimed that these actions (1) deprived them of their constitutional rights of free speech and association because the Village had a pattern of retaliating against businesses based on their political beliefs, racial background, and religious practices, (2) interfered with and threatened their contract and commercial use of property rights merely because they supported certain candidates for Village positions, and (3) violated their due process and equal protection rights by selectively enforcing state regulations and zoning laws against them.

[29] In Count IV of Case II, Plaintiffs’ allege that the Village violated Plaintiff Cagan’s first amendment rights by interfering with her right to petition the courts. Specifically, the complaint asserted that on June 28, 2000, Clanton and Lusk ordered that the utilities to Cagan’s residence be shut off, ordered that Cagan be restrained and handcuffed, and required Cagan to immediately pay for the water bills she had disputed. The Case II complaint alleged that these actions were in retaliation for Cagan’s having filed the lawsuit in Case I, and for her continuing protest of the wrongful actions of the Village and its officials. The Village asserts that although the actual forms of retaliation may differ between Cases I and II, Plaintiffs used the same legal theories for both. Consequently, the Village argues, Plaintiffs’ Section 1983 retaliation claims arise from the same series of connected transactions, namely the Village’s alleged wrongful conduct.

[30] These allegations constitute a different claim because the facts supporting it occurred after Case I was filed. The situation is analogous to DiMatteo v. County of Dona Ana, 109 N.M. 374, 379, 785 P.2d 285, 290 (Ct. App. 1989), where this Court concluded that a prior judgment on the plaintiff’s claim for medical benefits did not bar subsequent litigation as to his disability benefits. The plaintiff alleged that he became disabled after the original award of medical benefits. Id. at 376, 785 P.2d at 287. Here, too, we confront facts that arose subsequent to an initial claim.

[31] The Village argues that Plaintiffs could have amended their complaint in Case I to include these additional forms of retaliation because Case I was not dismissed until December 4, 2002, approximately two and a half years after the June 2000 handcuffing incident. The question is whether this claim could have been raised in Case I. Macias, 2003-NMCA-098, ¶ 18 (“Res judicata bars not only claims that were raised in the prior proceeding, but also claims that could have been raised.”). Arguably, it could have been raised in Case I by supplemental pleading. Elec. Supply Co. v. United States Fid. & Guar. Co., 79 N.M. 722, 725, 449 P.2d 324, 327 (1969)

5 “Successive actions changing the theory or ground. Having been defeated on the merits in one action, a plaintiff sometimes attempts another action seeking the same or approximately the same relief but adding a different substantive law premise or ground. This does not constitute the presentation of a new claim when the new premise or ground is related to the same transaction or series of transactions, and accordingly the second action should be held barred.”
(concluding that the defendant did not waive a statute of limitations defense by failing to apply to the court to file a supplemental answer under Rule 1-015(D) NMRA; Rule 1-015(D) may have permitted supplementation, but cannot be read to require it to avoid waiver). The case that the Village relies upon for its arguments is distinguishable because it involved an amended pleading, not a supplemental pleading. See Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶¶ 83-85, 134 N.M. 77, 73 P.3d 215 (rejecting the plaintiffs’ argument that they were denied a full and fair opportunity to litigate their claims and holding that where there was no abuse of discretion in the trial court’s denial of an untimely amendment under Rule 1-015, the plaintiff cannot avoid the preclusive effect of the trial court’s ruling on a subsequent action). The case at hand involves a supplemental pleading alleging facts arising after the original pleading was filed, whereas an amended pleading includes facts that occurred before. See Elec. Supply Co., 79 N.M. at 725, 449 P.2d at 327. However, the subject matter of Count IV was pled in Case II and is based on different Village officials and different actions. We hold that Count IV should not be precluded, and reverse the district court’s dismissal of this count.

4. Exceptions to the General Rule on Claim Splitting Do Not Apply

[32] Plaintiffs also assert that the Village’s arguments fail to consider Restatement (Second) of Judgments § 26(1)(a) (1982), which provides exceptions to the general rule on claim splitting. Section 26(1)(a) provides, in relevant part:

(1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein[.]

Restatement (Second) of Judgments § 26 cmt. a states in pertinent part:

Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff’s claim is effective as an acquiescence in the splitting of the claim.

[33] Plaintiffs’ argument is that the Village consented to the splitting of claims by failing to inform the court at the hearing on the second motion to dismiss Case I that Case II was pending or that collateral estoppel and res judicata might bar Case II. We disagree. The Village asserted the affirmative defense that the claims asserted in Case II were barred by collateral estoppel and res judicata. It filed a motion for a protective order and motion to stay discovery in Case II, stating its intention to file a motion for summary judgment in Case II asserting the claims were barred by collateral estoppel and res judicata. The Village then filed its motion arguing that Plaintiffs were barred by the order dismissing Case I with prejudice. Although Plaintiffs argue that the Village’s motion for protective order and subsequent summary judgment motion did not constitute an objection to claim splitting because they were filed after Case I was dismissed, the Village raised the affirmative defenses of collateral estoppel and res judicata in its answer, which was filed while both cases were pending. The Village’s acts were sufficient to bring to the attention of the district court and Plaintiffs that the Village objected to claim splitting.

[34] In addition, the cases relied upon by Plaintiffs are distinguishable. See, e.g., Klipsch, Inc. v. WWR Tech., Inc., 127 F.3d 729, 734 (8th Cir. 1997) (describing how the defendants did not object in any way to the plaintiffs’ maintenance of two suits until after judgment had been entered in first suit). Also, in Gilles v. Ware, 615 A.2d 533, 536, 546 (D.C. 1992), the only objection to claim splitting was in the form of a motion to stay state court proceedings pending resolution of the federal court proceeding. The court determined that the defendants failed to clearly register their objection to the claim splitting. Id. at 547. Furthermore, in Funkhouser v. Hurricane Fence Co., 524 S.W.2d 780, 783 (Tex. Civ. App. 1975), the court concluded that the defendant consented to claim splitting by failing in any way to bring its objection to the attention of the trial court. Thus, raising the affirmative defense of res judicata in the Village’s answer to the complaint in Case II was sufficient to make known its objection to Plaintiffs’ attempt to maintain two actions on parts of the same claim.

[35] In addition, Plaintiffs argue that Restatement (Second) of Judgments § 26(1)(c) also applies. It states:

(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief[.]

Plaintiffs argue that Section 26(1)(c) of the Restatement (Second) of Judgments authorizes the court to allow Case II to proceed on the ground that at the time that they filed the complaint in Case I, the issue as to whether the Village breached the Agreement and Amendment was premature. They further contend that because performance under the Agreement and Amendment was not yet due when they filed Case I, it was reasonable to assert the claims in Case II after the date of performance passed. Restatement (Second) of Judgments § 26(1)(c) indicates that the exception applies to situations where formal barriers prevented the plaintiff from fully presenting its claim in the first action, such as jurisdictional or procedural barriers. Id. cmt. c. However, as discussed above, Plaintiffs did not have to wait for the performance date to mature before seeking damages for total breach of contract. Therefore, this exception is inapplicable to the case before us.

[36] Plaintiffs further contend that the exception stated in Section 26(1)(e) of the Restatement (Second) of Judgments applies because it allows a second action to be maintained based on a continuing wrong. Plaintiffs assert that when the Village actually failed to perform as promised under the Agreement and Amendment, it continued the “anticipatory breach” envisioned in the complaint filed in Case I. Restatement (Second) of Judgments § 26(1)(e) states:

(e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course[.]
The comment to Section 26(1)(e), provides in pertinent part: “A judgment in an action for breach of contract does not normally preclude the plaintiff from thereafter maintaining an action for breaches of the same contract that consist of failure to render performance due after commencement of the first action.” Id. cmt. g. However, the comment further states:

[I]f the initial breach is accompanied or followed by a ‘repudiation’ . . . and the plaintiff thereafter commences an action for damages, he is obliged in order to avoid ‘splitting,’ to claim all his damages with respect to the contract, prospective as well as past, and judgment in the action precludes any further action by the plaintiff for damages arising from the contract.

Id. (citation omitted). Here, the Village repudiated the contract in May 1999 when it indicated it would not provide the services promised under the Agreement and Amendment. Therefore, Plaintiffs were obligated to claim all the damages arising from the contract, past and prospective, when they filed the complaint in Case I. See Gilmore, 1998-NMCA-086, ¶ 15. For this reason, this exception is also inapplicable.

Finally, Plaintiffs argue that the exception stated in Section 26(1)(f) of the Restatement (Second) of Judgments provides the policy basis for concluding that the district court erred in dismissing Case II on grounds of res judicata. Section 26(1)(f) states:

(f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

The comment to Section 26(1)(f) indicates that this section applies to extraordinary circumstances where other significant policies outweigh barring the claim. Id. cmt. i. However, this exception “is not lightly to be found but must be based on a clear and convincing showing of need.” Id. Some examples provided in the comment include when personal liberty is at stake, and cases involving civil commitment of the mentally ill or child custody. Id. Plaintiffs have not met their burden of establishing a clear and convincing showing of need. Nor do the circumstances in this case present an extraordinary situation. For these reasons, Section 26(1)(f) of the Restatement (Second) of Judgments is inapplicable.

Related Motions

{38} Plaintiffs filed a motion to supplement the record proper, which was held in abeyance pending submission to a panel for a decision. The parties dispute the conversations between their counsel about the entry of appearance of Plaintiffs’ new counsel, and Plaintiffs have filed a motion to supplement the record by submitting affidavits concerning the succession of their counsel.6 We deny the motion to supplement the record.

CONCLUSION

{39} Since the Village met its burden of showing that res judicata barred Plaintiffs’ Case II, Counts I to III, we affirm the district court’s dismissal of those counts. As Plaintiffs’ Count IV involved a different set of facts than found in Plaintiffs’ Case I, we reverse the district court’s decision that res judicata barred Count IV of Plaintiffs’ complaint in Case II. Finally, we hold that the exceptions to the claim-splitting rule do not apply to this case.

{40} IT IS SO ORDERED.
RODERICK T. KENNEDY,
Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
CELIA FOY CASTILLO, Judge

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6 The parties argue over whether Plaintiffs’ counsel was aware of the Village’s second motion to dismiss at the time counsel for Plaintiffs filed the complaint in Case II. This argument is immaterial to the analysis of the issues, but for the panel’s information, Plaintiffs claim that the Village served the second motion to dismiss only on their former counsel, who was still counsel of record, despite Plaintiffs’ knowledge that new counsel would be appearing in Case I. It does not seem improper to serve pleadings only on counsel of record, if Plaintiffs’ new counsel had not yet entered a formal appearance on their behalf with the district court.
OPINION
LYNN PICKARD, JUDGE

{1} On motion for rehearing, the opinion filed March 1, 2005, is withdrawn, and the following opinion is substituted in its place. The motion for rehearing is otherwise denied.

{2} Defendant was convicted of second degree murder for the beating death of his wife. The cause of death was contested at trial, with Defendant presenting expert testimony that the death was caused by a liver condition and the State presenting expert testimony that the death was caused either by smothering in the course of a kidnaping or rape, or as a result of multiple complications of mechanical injuries to the head, i.e., being beaten about the head. This case requires us to decide whether Defendant was entitled to instructions on nondeadly force self-defense or involuntary manslaughter based on these facts. We hold that both of these instructions are applicable to the facts of this case, where there was evidence, although contradicted, that the force Defendant used was necessary to protect himself from attack and that this force would ordinarily not result in death or great bodily harm, but unexpectedly did so result in this case. We therefore reverse the conviction. Defendant also raises the issue that his sentence was improperly aggravated because there was no jury finding beyond a reasonable doubt of any aggravating factors. This issue was recently decided in Defendant’s favor in State v. Frawley, 2005-NMCA-017, ¶¶ 1, 11-14, 137 N.M. 18, 106 P.3d 580, cert. granted, 2005-NMCERT-002, ___ N.M. ___, ___ P.3d ___[No. 29,011 (filed March 14, 2005)], but we need not reach it here in light of our disposition.

FACTS AND PROCEEDINGS

{3} Defendant was charged with first degree murder (deliberate intent or in the commission of the felonies of kidnaping or criminal sexual penetration), criminal sexual penetration, kidnaping, three counts of tampering with evidence, and escape from a community custody electronic monitoring program. At trial, the jury was instructed on these charges, as well as the lesser included offenses of second degree murder and voluntary manslaughter for the murder count, and various lesser included offenses on the kidnaping and criminal sexual penetration counts. The jury acquitted Defendant of kidnaping, criminal sexual penetration, their lesser included offenses, and one count of tampering with evidence; it convicted Defendant of second degree murder and the remaining counts of tampering and escape. This appeal involves only the murder conviction.

{4} The charges arose from the death of Defendant’s wife (the victim). It was undisputed that the marriage involved domestic violence. Several months before her death, the victim had kicked Defendant out of the house and obtained a restraining order against him. One month later, an incident occurred at the place where Defendant was living that resulted in Defendant’s being convicted of aggravated battery and aggravated assault against a household member. As a result of his arrest for this incident, Defendant was put on electronic monitoring and instructed to have no contact with the victim. Nonetheless, there was evidence that Defendant contacted the victim, stating his eagerness to reconcile. The evidence also revealed that the victim was not blameless in her contacts with Defendant, inasmuch as both the prior incident and the incident that resulted in her death occurred at the place Defendant was living, the victim’s having gone there.

{5} The evidence concerning the night of the victim’s death consisted of Defendant’s statements to others and the forensic testimony. Defendant’s statements indicated that the victim came to his room at 3:00 in the morning and was very intoxicated. They watched television and then began trading insults. The victim urinated in her pants and took her hand and rubbed Defendant’s face with the urine. The couple then fought physically (including a strike by Defendant that made the victim’s nose bleed), made up, and fought again, after which they made up, made love, and fought again. This fighting included the victim’s pinning Defendant beneath her, punching him in the face, and elbowing him in the mouth, during which time Defendant bit her. Defendant admitted that he hit the victim four or five times during the last fight and, after the victim grabbed Defendant by the genitals, he also bit her and struck her
again on the side of the head to get her to release her grip. Eventually, they stopped fighting and went to sleep. When Defendant woke up at 9:30, the victim was not breathing, and Defendant went to his parents’ house nearby to summon help. Defendant turned himself in and an officer saw that he had fingernail and other scratches on his face and neck and redness on his shoulder; the officer remarked that the fight appeared to be “pretty vicious” by looking at Defendant.

[6] The evidence showed that the victim had two black eyes; bleeding on the white of one eye; bruises and scrapes around the forehead, lips, ear, and nose; a broken nose; bleeding into the scalp; small bruises on the strap muscles of the neck; defensive wounds to the hands; and numerous bite marks. The evidence also showed that the victim had a blood alcohol content of .082 percent at the time of death and a liver condition often associated with obesity or consumption of alcohol. The victim was slightly over five feet tall and weighed 155 pounds.

[7] The medical evidence concerning the cause of death was disputed. The State’s expert explained that it was a complex case with no obvious cause of death. She testified that there was no reason for the victim to be dead except for the possibility of injuries to the brain or asphyxia, such as by smothering, which could explain the scraping around the nose or the bruises to the neck. There was testimony, however, that the autopsy report did not reveal evidence of injury to the brain or significant indications of asphyxia, perhaps because the victim did not live long enough after injury for these indications to manifest themselves. Nonetheless, the State’s expert opinioned that the victim died as a result of “complications of mechanical injuries to the head,” which would include all of the possibilities of brain injury, mechanical occlusion of the nose, and strangulation, all being in the presence of alcohol, which would compromise the victim’s life systems. After consultation with colleagues, the State’s expert said there was no doubt that this was a homicide, as it fit the pattern of sexual homicide. The State’s expert stated that “[the victim] had had intercourse; [s]he was in bed . . . [s]he had bite marks. All of those things go together in forensic pathology. Asphyxia, beating, bite marks, sex, domestic violence, all go together.” The defense expert testified that the victim died a natural or accidental death as a result of the liver condition because there was no other clear cause of death, although he acknowledged that the State’s theories could be possibilities.

**DISCUSSION**

[8] Defendant contends that the trial court erred in refusing his requested instructions on nondeadly force self-defense, UJI 14-5181 NMRA, and involuntary manslaughter, UJI 14-231 NMRA. The propriety of jury instructions is a mixed question of law and fact. *State v. Gaitan*, 2002-NMSC-007, ¶ 10, 131 N.M. 758, 42 P.3d 1207. When considering a defendant’s requested instructions, we view the evidence in the light most favorable to the giving of the requested instruction. *State v. Hill*, 2001-NMCA-094, ¶ 5, 131 N.M. 195, 34 P.3d 139. With those facts in mind, we then review the issue de novo. *Id.; see Gaitan*, 2002-NMSC-007, ¶ 10. In the case of self-defense, there must be some evidence, even if slight, to support the defense. *State v. Duarte*, 1996-NMCA-038, ¶ 3, 121 N.M. 553, 915 P.2d 309. In the case of lesser included offense instructions, there must be some view of the evidence that could sustain a finding that the lesser offense was the highest degree of crime committed. *State v. Pettigrew*, 116 N.M. 135, 138, 860 P.2d 777, 780 (Ct. App. 1993).

[9] The trial court denied the instruction on self-defense, and the State supports such denial, on the ground that the instruction on nondeadly force self-defense is inapplicable as a matter of law when the victim dies. The trial court also denied the instruction on involuntary manslaughter. The State supports this denial on the grounds that, because self-defense was negated, there was no lawful act to be committed in an unlawful manner, the battery committed on the victim was not a misdemeanor, and the Supreme Court rejected involuntary manslaughter as a verdict in cases of imperfect self-defense in *State v. Abeyta*, 120 N.M. 233, 240, 901 P.2d 164, 171 (1995), abrogated on other grounds by *State v. Campos*, 1996-NMSC-043, ¶ 32 n.4, 122 N.M. 148, 921 P.2d 1266. Under the facts of this case, we disagree with enough of these propositions to warrant a reversal.

[10] The premises underlying the State’s argument concerning the self-defense instructions are that there are two uniform jury instructions, UJI 14-5171 NMRA and UJI 14-5181, one for deadly force and one for nondeadly force, and that the former is used when death is the result, and the latter is used when there is no death. (There is also a deadly force self-defense instruction for use when death does not result. UJI 14-5183 NMRA.) These premises are logical, at least on first glance, and there are cases from other jurisdictions that support them. *See, e.g.*, *State v. Rhodes*, 688 So. 2d 628, 640 (La. Ct. App. 1997) (stating, without much analysis, in response to a defendant’s argument that his requested instruction on nondeadly force should be given, that such instruction should be given only when the force does not result in death and that when the force does result in death, the stricter standard requiring defendant to reasonably believe he is in imminent danger of death or great bodily harm applies); *Ferrel v. State*, 55 S.W.3d 586, 592 (Tex. Crim. App. 2001) (“Because we have found that the actual blow of the bottle indisputably caused serious bodily injury to [the victim], [the defendant] by definition used deadly force.”).

[11] But we are more persuaded by cases such as *Southard v. State*, 422 N.E.2d 325, 330 (Ind. Ct. App. 1981), *Commonwealth v. Bastarache*, 414 N.E.2d 984, 996 (Mass. 1980), and *State v. Hare*, 575 N.W.2d 828, 832-33 (Minn. 1998). In *Southard*, the court stated that “self-defense is available to an accused who accidentally kills his assailant while asserting reasonable force to repel the assailant.” 422 N.E.2d at 330. In *Bastarache*, the court said that a defendant could use “nondeadly force to protect himself, even from a drunk susceptible to injury, if he reasonably believed that his personal safety . . . was in peril,” even in cases of the death of the victim, 414 N.E.2d at 996 and n.15.

[12] *Hare* is the case that is most closely analogous to this case. After stating that instructions on self-defense must be given with “analytic precision,” the court continued:

Hare contends that the trial court should have given [the nondeadly force self-defense instruction] in this case because he claimed that [the victim’s] death was accidental. This contention has merit. We have repeatedly cautioned trial courts that when a defendant, asserting self-defense, claims that the resulting death was unintentional, [the deadly force
Defendant’s act was a sign to prevail, Defendant had to rely on the jury’s reasonable doubt that the death was accidental, [the deadly force self-defense instruction] clearly does not fit. Likewise, . . . this court made it clear that if a defendant claims that he intentionally stabbed the victim in self-defense but without intending to kill the victim, the language in [the deadly force self-defense instruction] providing, “the killing must have been done in the belief that * * *” is inappropriate because it implies that the defendant must believe it necessary to kill in order for the killing to be justified.

We are of the opinion that the propositions in these cases are most consistent with existing New Mexico law. For example, in State v. Gallegos, 2001-NMCA-021, ¶¶ 13, 18, 130 N.M. 221, 22 P.3d 689, we held that a defendant was entitled to self-defense instructions even though she claimed the death was accidental. In fact, our uniform jury instructions so contemplate. Although use note 1 to UJI 14-5181 states that it is for use in nonhomicide cases, use note 4 instructs to use the phrase “The force used by defendant ordinarily would not create a substantial risk of death or great bodily harm” if the defendant’s actions do result in death, thereby indicating that UJI 14-5181 is contemplated to be used in certain homicide cases.

The State contends that the Committee Commentary to this use note suggests that it is to be used when the defendant “unintentionally kills a third person in self-defense.” We do not read the Commentary so restrictively. While the phrase should certainly be used in the case of an unintentional killing of a third person during the exercise of self-defense, we do not believe that the Commentary was intended to cover the field.

In this case, in the light most favorable to Defendant, the evidence was that he was both humiliated and attacked by the victim. The attack, consisting of hitting, scratching, pinning down, and grabbing, allowed Defendant to respond with the like force of hitting, punching, grabbing, and biting. The victim’s injuries, in the light most favorable to Defendant, were a broken nose, and various cuts and bruises. The cause of death was disputed, and in the light most favorable to Defendant, the cause of death did not exclude an accidental death caused by the exercise of nondeadly force. The nondeadly force self-defense instruction should have been given.

For similar reasons, the involuntary manslaughter instruction should have been given. For purposes of this instruction, Defendant was not contending imperfect self-defense, i.e., that he used excessive force while otherwise lawfully defending himself. See Abeyta, 120 N.M. at 241, 901 P.2d at 172. His contention was that he was always in the lawful exercise of self-defense, but that unusual circumstances caused the victim to die as a result of that lawful exercise, for which the jury might find him culpable.

Involuntary manslaughter includes the killing of a human being either in the commission of an unlawful act not amounting to a felony; in the commission of a lawful act that might produce death, in an unlawful manner; or in the commission of a lawful act that might produce death without due caution or circumspection. State v. Salazar, 1997-NMSC-044, ¶ 54, 123 N.M. 778, 945 P.2d 996. As we have held that self-defense was available to Defendant, the jury could have found that his beating of the victim was in the commission of a lawful act, but without due caution or circumspection due to her drunken state and liver condition. Further, if the jury so found, it would necessarily find that involuntary manslaughter was the highest degree of offense committed. We need not discuss the other methods of possibly committing involuntary manslaughter; it is sufficient if one applies to these facts.

To the extent that the State argues that the beating inflicted on the victim was severe and therefore “her death does not belong in the category of the least-culpable homicides,” we point out that the State is viewing the evidence in the light most favorable to the conviction, as it is entitled to do when defending against a sufficiency of the evidence contention. See State v. Barber, 2004-NMSC-019, ¶ 33, 135 N.M. 621, 92 P.3d 633. However, when evaluating a defendant’s right to have the jury instructed in accordance with the defendant’s tendered instructions, we view the evidence in the light most favorable to the giving of the requested instruction. Hill, 2001-NMCA-094, ¶ 5.

The State argues that permitting an involuntary manslaughter instruction under the facts of this case would be contrary to the doctrine that defendants take their victims as they find them. See, e.g., State v. Munoz, 1998-NMSC-041, ¶¶ 19-22, 126 N.M. 371, 970 P.2d 143; State v. Duffy, 1998-NMSC-014, ¶¶ 2, 28, 126 N.M. 132, 967 P.2d 807. However, these cases are distinguishable inasmuch as the defendants in them did not claim that their actions that caused the death were lawful. Their claim was limited to the notion that such actions as they took would not ordinarily cause death. Here, Defendant is claiming both that his actions were lawful and that they would not ordinarily cause death.

The State contends that Defendant’s defense was essentially a reasonable doubt defense in the sense that he denied that his actions proximately caused the victim’s death, at least according to the testimony of his expert. However, a jury could have found that his actions did proximately cause the victim’s death, but that those actions were privileged, nondeadly force self-defense that had accidental consequences because of the effect of alcohol on the victim’s life systems. Moreover, for the proximate cause defense to prevail, Defendant had to rely on the jury’s reasonable doubt that the death was a foreseeable result of Defendant’s actions or that Defendant’s act was a sign to prevail.

While there might be a reasonable doubt about whether the death was foreseeable, we do not believe a simple foreseeability instruction adequately conveys to the jurors the idea that they should convict Defendant of involuntary manslaughter if they find that he undertook reasonable self-defense measures in response to the victim’s hitting him and squeezing his genitals, but without due caution and circumspection, thereby accidently causing the victim’s death. Nor does it convey to the jurors that they should acquit if they found that Defendant undertook reasonable self-defense with due caution and circumspection, but still accidently caused
THE VICTIM’S DEATH. A DEFENDANT IS ENTITLED TO HAVE THE JURY INSTRUCTED ON HIS DEFENSES WITH SOME SEMBLANCE OF LIBERALITY. PORE v. STATE, 94 N.M. 172, 174, 608 P.2d 148, 150 (1980). THE LONE FORESEEABILITY INSTRUCTION DID NOT ADEQUATELY INSTRUCT ON DEFENDANT’S THEORY OF THE CASE.


THE TRIAL COURT WAS AWARE OF DEFENDANT’S THEORY OF SELF-DEFENSE AS WELL AS HIS THEORY OF ENTITLEMENT TO AN INVOLUNTARY MANSLAUGHTER INSTRUCTION. THE TRIAL COURT RULED, AS ARGUED BY THE STATE ON APPEAL, THAT THE EVIDENCE AND LAW DID NOT SUPPORT EITHER INSTRUCTION. UNDER THESE CIRCUMSTANCES, IT WOULD BE AN UNWARRANTED USE OF THE PRESERVATION RULE TO HOLD THAT DEFENDANT’S ISSUES WERE NOT PRESERVED BECAUSE COUNSEL MISLED THE TRIAL COURT. Cf. id. at 33-34, 908 P.2d at 263-64 (holding that where the defendant tendered an incorrect instruction, but offered the correct instruction orally and the trial court understood the issue being raised and erroneously ruled on the merits, the appellate court would reach the merits of the issue).

CONCLUSION

[23] WE REVERSE DEFENDANT’S CONVICTION FOR SECOND DEGREE MURDER AND REMAND THAT COUNT FOR A NEW TRIAL.

[24] IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

CELSIA FOY CASTILLO, Judge

MICHAEL E. VIGIL, Judge
This is an appeal from an order granting summary judgment and dismissing a class action lawsuit. The issues primarily concern the application of the discovery rule. The essential elements of fraud are also at issue. Under the circumstances presented, we conclude that publicity concerning a program to use body parts removed in autopsies did not give rise to a duty to inquire as a matter of law and that the district court therefore erred in determining that the statute of limitations bars the claims asserted. Additionally, we hold that fraud was not adequately pleaded because emotional distress damages are not recoverable as part of the fraud claim. We reverse and remand for further proceedings.

Background

This lawsuit arises out of a program that the Los Alamos National Laboratory (LANL) conducted from 1959 through the early 1980s. LANL arranged with the Los Alamos Medical Center (LAMC) and several of its pathologists to have organs, tissues, and other body parts removed in the course of autopsies performed at LAMC and other area hospitals. The body parts were then delivered to LANL so that their plutonium content could be studied. In total, body parts from 407 individuals (the decedents) were collected as part of this program.

It appears that little or no effort was made to obtain the informed consent either of the decedents before their deaths or their families. Further, neither the existence of the program nor its purposes were publicly disclosed until 1993, when a reporter obtained documents using the Freedom of Information Act (FOIA). See generally 5 U.S.C. § 552 (2002).

Plaintiffs filed this class action lawsuit on October 15, 1996, roughly three years after the FOIA disclosure. Initially, the class included the next of kin and/or the immediate family members of all the decedents who were involved in the program. The Regents of the University of California, as operator of LANL, and Lutheran Hospitals & Homes Society of America, Inc., as operator of LAMC, were among the original defendants. The first complaint sought damages for intentional infliction of emotional distress, conversion, fraud, negligence, and civil rights violations. After discovery had been conducted and additional information had been gathered about the program, Plaintiffs obtained leave to amend their complaint to join Dr. Michael W. Stewart as an additional defendant and to add claims for mistreatment of a corpse, breach of contract, civil conspiracy, and aiding and abetting.

The defendants filed a number of motions to dismiss and for summary judgment. The district court dismissed many of the claims, including the claim for fraud. However, the claims for intentional infliction of emotional distress, negligence, mistreatment of a corpse, civil conspiracy, and aiding and abetting remained.

Following protracted negotiations, Plaintiffs obtained settlements with all defendants except Dr. Stewart. The parties agree that a de facto sub-class was thereby created consisting of only those members of the original class who were related to the decedents autopsied during Dr. Stewart’s tenure at LAMC (Plaintiffs).

As the only remaining party-defendant, Dr. Stewart moved the district court to reconsider a motion for summary judgment that he had previously filed, contending that Plaintiffs’ claims against him were barred by the statute of limitations. He based his argument on media coverage relating to the program, including television programs and newspaper articles that were published from the 1980s through the mid-1990s. The district court determined as a matter of law that, in light of this publicity, Plaintiffs should have discovered their claims by June 1995. Because Dr. Stewart was not joined as a party until May 1999, the district court concluded that all Plaintiffs’ remaining claims were barred. Plaintiffs appealed. Standard of Review

The district court’s ruling on the statute of limitations issue presents a question of law that we review de novo. See Bartlett v. Mirabal, 2000-NMCA-036, ¶ 4, 128 N.M. 830, 999 P.2d 1062 (observing that the grant of a motion for summary judgment presents a question of law, which is reviewed de novo). We must review the record in the light most favorable to the non-movant to determine whether there are genuine issues of material fact. Handmaker v. Henney, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879.
[9] The district court’s dismissal of Plaintiffs’ fraud claims also presents a question of law to be reviewed de novo. See City of Sunland Park v. Macias, 2003-NMCA-098, ¶ 9, 134 N.M. 216, 75 P.3d 816.

For purposes of a motion to dismiss, we accept all well-pleaded facts as true and consider whether the plaintiff might prevail under any state of facts provable under the claim. A complaint should not be dismissed unless there is a total failure to allege some matter essential to the relief sought.

Id. (citation omitted).

Statute of Limitations

A. Classification and Accrual of the Causes of Action

[10] The district court and the parties have proceeded on the theory that Plaintiffs’ claims for intentional infliction of emotional distress, negligence, mistreatment of a corpse, civil conspiracy, and aiding and abetting are classifiable as claims for personal injuries, such that the three-year statute of limitations applies. See NMSA 1978, § 37-1-8 (1976) (“Actions must be brought . . . for an injury to the person . . . within three years.”). In light of Plaintiffs’ prayer for damages, by which they primarily seek to recover for pain, suffering, physical injuries, and the emotional distress that they have suffered, we agree with this characterization. See Mantz v. Follingstad, 84 N.M. 473, 478-79, 505 P.2d 68, 73-74 (Ct. App. 1972) (observing that if the object is the recovery of damages for personal injury, the statute of limitations for personal injury claims applies regardless of the form of the claim); cf. Jacobs v. Meister, 108 N.M. 488, 495, 775 P.2d 254, 261 (Ct. App. 1989) (stating that “[d]istress is a personal injury familiar to the law”) (internal quotation marks and citation omitted).

[11] Depending on the nature of the claims asserted and the context out of which they arise, personal injury claims may accrue at the time of the occurrence, the time of injury, or the time of discovery. Dr. Stewart does not contest that the time of discovery applies in this case. We therefore apply the discovery rule for our analyses. See Cummings v. X-Ray Assoc. of N.M., P.C., 1996-NMSC-035, ¶ 49, 121 N.M. 821, 918 P.2d 1321 (“A statute of limitations begins to run when the cause of action accrues, the accrual date usually being the date of discovery.”); see also Roberts v. Southwest Cnty. Health Servs., 114 N.M. 248, 255-56, 837 P.2d 442, 449-50 (1992) (acknowledging the widespread adoption of the discovery rule, as well as the various policy considerations that support it).

B. Application of the Discovery Rule

[12] The discovery rule provides that “the cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that a claim exists.” Id. at 255, 837 P.2d at 449. There has been no suggestion that Plaintiffs had actual knowledge of their claims more than three years before the complaint was filed. Instead, the parties dispute whether Plaintiffs “should have discovered” their claims at an earlier date.

[13] The district court concluded that Plaintiffs should have discovered the basis for their claims by June 1995 in light of the publicity that the program received. The evidence supporting this determination included newspaper articles published in The New York Times, The Albuquerque Tribune, the Los Alamos Monitor, the Albuquerque Journal, and The Santa Fe New Mexican, describing the program or other related studies with varying degrees of specificity. Associated Press releases appeared in a number of out-of-state publications. Several television programs aired, including features on 60 Minutes, The Geraldo Rivera Show, and ABC World News Tonight. Finally, several scientific publications described aspects of the program, and there was also a presidential advisory committee report.

[14] The discovery rule carries an inquiry obligation. A plaintiff must exercise reasonable diligence to discover a claim. Id. The standard of “reasonable diligence” imports an analysis of objectivity. See, e.g., Martinez v. Showa Denko, K.K., 1998-NMCA-111, ¶ 24, 125 N.M. 615, 964 P.2d 176 (stating that tolling of the statute of limitations ends when a plaintiff “acquires knowledge of facts, conditions, or circumstances which would cause a reasonable person to make an inquiry leading to the discovery of the concealed cause of action”) (internal quotation marks and citation omitted). Under this standard, Plaintiffs had an obligation to inquire as to facts that would indicate they had a claim if the publicity reached a level that would objectively make a reasonable person inquire as to the presence of a claim. See id. ¶ 25 (holding that information the plaintiff received from family, newspaper articles, doctors, and her attorney constituted sufficient information to put a reasonable person on notice and imposed a duty on the plaintiff to timely file a claim).

[15] Courts applying this standard have reached different results. By way of example, Dr. Stewart directs our attention to Ball v. Union Carbide Corp., 385 F.3d 713 (6th Cir. 2004), in which the Sixth Circuit held that the plaintiffs had a duty to inquire about potential personal injury claims connected to emissions or releases of local nuclear weapons manufacturing and research facilities based on repeated local and national news media reports and repeated reports of a governmental panel studying the health effects of the operation of the facilities. Id. at 721-23; see also Hughes v. Vanderbilt Univ., 215 F.3d 543, 548 (6th Cir. 2000) (holding that numerous news reports, including report on similar lawsuit, placed the plaintiff on constructive notice of underlying events even though she did not hear or read any of the reports); In re: Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., ___ F.3d ___ (2004 WL 1535828, at * 7, 8)(E.D. Pa. July 6, 2004) (holding that plaintiffs were on notice inquest that their alleged heart problems were related to diet drugs based on the widespread publicity concerning recall of diet drugs and nationwide class action settlement agreement). On the other hand, in O’Connor v. Boeing North American, Inc., 311 F.3d 1139, 1149-52 (9th Cir. 2002), the Ninth Circuit held that “numerous and notorious” newspaper reports concerning the release of potentially hazardous substances did not preclude the possibility that a reasonably diligent person in the locale might not have been aware of the release of the contaminants. The Court stated that such a determination required a fact-intensive examination of the geographic scope of the circulation of various publications, the level of saturation of each publication within the relevant communities, the frequency with which articles . . . appeared in each publication, the prominence of those articles within the publication, and the likelihood that a reasonable person living in [p]laaintiffs’ various communities at the same time as [p]laaintiffs would have read such articles.

Id. at 1152. It is clear that such issues were within the purview of a jury. Id.; see also Bibeau v. Pac. Northwest Research Found. Inc., 188 F.3d 1105, 1110-11 (9th Cir. 1999) (holding that duty of inquiry under discovery rule not triggered by news articles of experiment
causing injury without consideration of reasons plaintiff may not have read the articles); *Orlikow v. United States*, 682 F. Supp. 77, 85 (D.D.C. 1988) (“Without actual notice or without having read the articles it would go too far to state that the statute of limitations began to run when the articles were published. The trier of fact must resolve the issue of diligence and notice.”) (footnote omitted).

{16} Historically, the courts of this state have characterized the application of the discovery rule as a jury question, particularly when conflicting inferences may be drawn. See, e.g., *Roberts*, 114 N.M. at 257, 837 P.2d at 451 (concluding, in a medical malpractice case involving the discovery rule, “that whether plaintiff . . . with reasonable diligence should have known of the injury and its cause is a question of fact”); *Brown v. Behles & Davis*, 2004-NMCA-028, ¶¶ 12, 17, 135 N.M. 180, 86 P.3d 605 (observing that the application of the discovery rule is generally a question of fact and holding that whether a reasonable person would have investigated the public records and discovered the basis for a legal malpractice claim is a question for the jury); *Kevin J. v. Sager*, 2000-NMCA-012, ¶ 20, 128 N.M. 794, 999 P.2d 1026 (“Because there are differing permissible inferences that the fact finder could make . . . summary judgment was not proper in this case. The question of when [p]laintiff knew or had reason to know of the alleged abuse and its impact is a question for the jury to decide.”); *Montoya v. Kirk-Mayer, Inc.*, 120 N.M. 550, 554, 903 P.2d 861, 865 (Ct. App. 1995) (stating that summary judgment is improper when equally logical but conflicting inferences can be drawn from undisputable basic facts); cf. *Romero v. Sanchez*, 83 N.M. 358, 362, 492 P.2d 140, 144 (1971) (holding, in a case involving an action to set aside a deed on grounds of fraud, that whether the claimant should, in the exercise of ordinary diligence, have investigated the public records raises a question of fact); *Medina v. Fuller*, 1999-NMCA-011, ¶ 22, 126 N.M. 460, 971 P.2d 851 (holding that “[w]here there are disputed questions of material fact as to whether a plaintiff is barred by the statute of limitations, these questions are to be decided by a jury”) (internal quotation marks and citation omitted).

{17} In this case, Dr. Stewart attached written copies of the articles and transcripts of the various publicity concerning the program, but did not present evidence addressing other facts which would allow a factfinder to determine the level of awareness the publicity would generate to a reasonable person in Plaintiffs’ communities. Without this type of information, we believe that a reasonable inference could be reached that the publicity did not generate a duty to inquire on the part of a reasonable diligent person in Plaintiffs’ situation in Plaintiffs’ communities. We note that some of the Plaintiffs are elderly and live in a small, isolated village in Northern New Mexico and at least one is primarily Spanish speaking and claimed that he could not have understood the publicity without an interpreter.

{18} Moreover, the impact of the publicity raises additional questions of fact. As mentioned above, the various articles, reports, and broadcasts describe the program with varying degrees of specificity. Much of the publicity appears to have been lacking pertinent details, such as the secretive nature of the program and LANL’s failure to obtain informed consent. As such, it remains an open question whether reasonably prudent persons in Plaintiffs’ position would have realized that their decedents might have been involved with the program. Cf. *Brown*, 2004-NMCA-028, ¶ 17 (holding that even if the claimant was on inquiry notice, it was nevertheless a question for the jury whether a search of the records would have revealed the basis for the claim).

{19} In addition, the summary judgment record does not lead to the single conclusion that a reasonably diligent person who made inquiry based upon the publicity would have learned of a claim. See *O’Connor*, 311 F.3d at 1155-56 (stating that application of discovery rule requires that reasonable inquiry provide notice of claim). At oral argument, Dr. Stewart’s counsel provided the following scenario leading from the available publicity in 1994 to notice of a claim. February 1994 articles in *The Albuquerque Tribune* and the *Los Alamos Monitor* stated that Dr. Stewart performed autopsies as part of the program in the relevant time period. The article in *The Albuquerque Tribune* indicated that information was published in scientific studies. *The Albuquerque Tribune* published an article the following day stating that autopsies of the general population were performed at LAMC. Three additional articles in February 1994 discussing autopsies of persons not part of Plaintiffs’ class indicated that family members had not given permission to remove and study body parts of the deceased. *The Santa Fe New Mexican* published several articles on the program during February through April 1994. It stated that a congressional committee was investigating whether permission had been granted for the use of the body parts in the program. The *Associated Press* then picked up the story, and articles were published nationwide. *The Albuquerque Journal* carried an article in August 1994. According to Dr. Stewart’s counsel, Plaintiffs could have gone to the scientific studies, which were not classified, to identify the personal characteristics and date of death of their decedents to learn of their involvement in the program.

{20} Dr. Stewart’s argument requires a plaintiff to track through various information sources in order to reach the point of knowledge sufficient to form a belief that the plaintiff may have a claim. Moreover, for Plaintiffs to even understand that they had a claim, they would need to suspect that an autopsy had been performed on their relative. By its very nature, information about the autopsy of a deceased relative is not readily understood or conceptualized. Consequently, we consider Dr. Stewart’s reasoning too tenuous to conclude that the sole reasonable inference is that an inquiry would necessarily lead to sufficient notice.

{21} Therefore, we conclude that the district court erred in ruling that Plaintiffs’ claims are time barred as a matter of law. We acknowledge that the application of the discovery rule may be summarily resolved in exceptional cases. See *Brunacini v. Kavanagh*, 117 N.M. 122, 127, 869 P.2d 821, 826 (Ct. App. 1993) (“Although the time when a party is deemed to have discovered [the basis for a claim] is generally a question of fact, nevertheless, where the undisputed facts show that [p]laintiffs knew, or should have been aware of the negligent conduct on or before a specific date, the issue may be decided as a matter of law.”). However, we see nothing to take this case outside of the general rule. The issue of whether, in the exercise of reasonable diligence, Plaintiffs should have made themselves aware of the foregoing articles, broadcasts, and reports is a question of fact for the jury to decide. Similarly, the jury should be permitted to determine whether Plaintiffs should have discovered the basis for their claims in a more timely fashion by virtue of the publicity.

C. Consideration of Alternative Bases for Affirmance

{22} Dr. Stewart suggests several alternative bases for affirmance of the district court’s order. Although we may affirm a district court ruling that differs from the theory relied upon below, we only do so when it is fair to the appellant. See *State v. Franks*, 119 N.M. 174, 177, 889 P.2d 209, 212 (Ct. App. 1994). “Only rarely will it be fair to affirm on a ground that was not raised in the lower court.” *Rupp v. Hurley*, 1999-NMCA-057, ¶ 25, 127 N.M. 222, 979 P.2d 733.
1. Standing

(23) Dr. Stewart argues that certain class representatives lack standing because they did not execute a consent form for the performance of an autopsy. Because standing is jurisdictional, Dr. Stewart’s apparent failure to raise this issue below does not prevent consideration of it on appeal. See Town of Mesilla v. City of Las Cruces, 120 N.M. 69, 70, 898 P.2d 121, 122 (Ct. App. 1995) (providing that “standing is a jurisdictional question that may be raised at any time”) (internal quotation marks and citation omitted).

(24) However, even when issues may be raised for the first time on appeal, issues that rely on facts may not be reviewable based on the state of the record. Cf. State v. Wood, 117 N.M. 682, 687, 875 P.2d 1113, 1118 (Ct. App. 1994) (declining to review an issue that is permitted to be raised for the first time on appeal due to the lack of a factual basis in the record). In this case, because standing was not raised below, Plaintiffs were not on notice that they had to introduce facts relevant to the issue. As a result, we believe it would be unfair to address Dr. Stewart’s issue, based on facts offered below for a different purpose, to hold that Plaintiffs lack standing. See Eldin v. Farmers Alliance Mut. Ins. Co., 119 N.M. 370, 376, 890 P.2d 823, 829 (Ct. App. 1994).

2. Existence of a Legal Duty of Care

(25) In his briefs to this Court, Dr. Stewart contends that Plaintiffs’ claims hinge on medical forms used by LAMC to obtain consent to perform autopsies. Because only one of the class representatives was a signatory to one of these authorization forms, Dr. Stewart argues that most of the class representatives lack standing to pursue claims against him.


By contrast, Dr. Stewart’s argument appears to be addressed to the question of legal duty. Specifically, we understand Dr. Stewart to contend that he did not owe a legal duty of care apart from any duty that might have arisen from the consent forms.

(27) This argument fails for two reasons. First, we find nothing in the amended complaint or the other pertinent pleadings to indicate that Plaintiffs’ claims are predicated on the consent forms. Rather, Plaintiffs’ tort claims appear to rest on the duty of ordinary care that applies generally to all foreseeable claimants, dependent on public policy considerations. See Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 7, 134 N.M. 43, 73 P.3d 181 (observing that the existence of a legal duty is dependent upon foreseeability and public policy). Plaintiffs also rely on Jaynes v. Strong-Thorne Mortuary, Inc., 1998-NMSC-004, ¶ 23, 124 N.M. 613, 954 P.2d 45 in which our Supreme Court stated that a duty of care is owed by those with custody of the dead to family members. See also Flores v. Baca, 117 N.M. 306, 310, 871 P.2d 962, 966 (1994). To the extent that consent is an issue, it appears to take the form of an affirmative defense. As such, it has no bearing on the immediate question of the existence of a duty.

(28) Second, Plaintiffs dispute Dr. Stewart’s claim that consent forms were executed in all cases. Plaintiffs contend that a significant number of the decedents were “coroner’s cases,” in which no consent form was required or used. Accordingly, a genuine issue of material fact appears to exist, such that summary judgment could not properly have been granted on the consent theory. See Gardner-Zemke Co. v. State, 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990) (“If genuine controversy as to the facts exists, a motion for summary judgment should be denied and the factual issues should proceed to trial.”).

3. Class Certification

(29) Dr. Stewart also attacks the validity of the class certification on two grounds. First, he suggests that the district court’s failure to expressly certify Plaintiffs as a sub-class should prevent them from proceeding with the appeal. However, as stated above, the district court appears to have implicitly certified the sub-class when it authorized the settlements. Furthermore, Dr. Stewart points to no New Mexico authority indicating that the district court’s failure to formally recognize the validity of the sub-class should prevent Plaintiffs from proceeding with an appeal from the dismissal of their claims. Dr. Stewart does not argue that this time was before the FOIA disclosure. Because of the relative viability of the Fraud Claims

(30) Among the various causes of action in the amended complaint, Plaintiffs assert claims for fraud. The gravamen of these claims is that the defendants, including Dr. Stewart, fraudulently induced class members to consent to autopsies without disclosing the defendants’
secret intent to remove and destroy body parts for purposes of scientific research unrelated to the cause of death. The district court dismissed these claims, apparently on the ground that an action for fraud cannot be maintained unless pecuniary losses are provable. Plaintiffs appeal this ruling.

33 As an initial matter, Dr. Stewart contends that the viability of the fraud claims is not properly before this Court. Specifically, Dr. Stewart argues that Plaintiffs failed to perfect their appeal from the order dismissing their claims for fraud because that order was not attached to the notice of appeal. However, the Rules of Appellate Procedure merely require the final order to be attached. See Bd. of County Comm’rs v. Ogden, 117 N.M. 181, 184, 870 P.2d 143, 146 (Ct. App. 1994) (“As we read [Rule] 12-202(B) [NMRA], attachment of only the relevant final judgment perfects an appeal from any previous oral or written orders encompassed in that judgment, as long as error has otherwise been preserved.”). Plaintiffs did attach a copy of the final order, by which summary judgment was granted as to all pending claims, and the case was dismissed. Their appeal from this order simultaneously perfected an appeal from the district court’s previous interlocutory order dismissing the fraud claim. See id. (holding that attachment of the final order granting summary judgment was sufficient to perfect an appeal from a previous ruling on a motion to dismiss).

34 The elements of fraud include (1) a misrepresentation of fact, (2) either knowledge of the falsity of the representation or recklessness on the part of the party making the misrepresentation, (3) intent to deceive and to induce reliance on the misrepresentation, and (4) detrimental reliance on the misrepresentation. See UJI 13-1633 NMRA; see also Unser v. Unser, 86 N.M. 648, 653-54, 526 P.2d 790, 795-96 (1974) (defining fraud as “a misrepresentation of a fact, known to be untrue by the maker, and made with an intent to deceive and to induce the other party to act upon it with the other party relying upon it to his injury or detriment”). UJI 13-1633 enables a party to recover damages proximately caused by fraud. Our case law provides, in the general sense, that a plaintiff alleging fraud may recover “such damages as are the direct and natural consequences” of the reliance on a fraudulent representation. Indus. Supply Co. v. Goen, 58 N.M. 738, 743, 276 P.2d 509, 512 (1954).

35 As a general rule, emotional distress damages are not available in a fraud claim because of the lack of pecuniary loss. 2 Dan B. Dobbs, Law of Remedies § 9.2(4), at 560 (2d ed. 1993). The theory of the general rule is that fraud is an economic tort which protects economic interests, and other torts protect interests in personality. As a result, even though fraudulent misrepresentation may cause emotional distress, such distress has not generally been recognized as an element of damage. Id. The Restatement of Torts compports with this general rule. See generally Restatement (Second) of Torts § 525 (1977). New Mexico has not addressed the issue. Our cases involving actionable fraud have been commercial in nature, and the damage awards have been calculated accordingly. See, e.g., Register v. Roberson Constr. Co., 106 N.M. 243, 246-47, 741 P.2d 1364, 1367-68 (1987) (observing that either benefit of the bargain or out-of-pocket losses may constitute appropriate measures of damages for fraud); Chromo Mountain Ranch P’ship v. Gonzales, 101 N.M. 298, 300-01, 681 P.2d 724, 726-27 (1984) (upholding contract reformation and awarding interest in a constructive fraud case).

36 Plaintiffs urge that we make an exception to the general rule based on Flores. In Flores, our Supreme Court recognized a claim for emotional distress damages in connection with the breach of a funeral and burial services contract. Flores, 117 N.M. at 308, 871 P.2d at 964. The Court reasoned, quoting Dobbs, Law of Remedies, that contracts for funeral and burial services are entered to provide well-being for survivors such that “emotional distress damages would seem to be recoverable” as “contemplated damages for a loss of that well-being in the event of breach.” Id. at 311, 871 P.2d at 967 (internal quotation marks and citation omitted). Plaintiffs urge that we extend this approach to include not only breach of contract, but also the tort of fraud.

37 We are not inclined to do so in this case. First, the approach set forth by Professor Dobbs is reasonable. As accepted by our Supreme Court, when parties to a contract contemplate the emotional distress damages, the contract would be frustrated unless such damages could be awarded upon breach. Id. In the tortious circumstances of fraudulent concealment as alleged in this case, there is no meeting of the minds or expression of the parties’ intent as with a contract. Second, this point out the difficulty with recognizing emotional distress damages for fraudulent concealment. Because a funeral and burial services contract contemplates the mental well-being of the living, it is possible to address damages with clarity in discussing the family’s rights as intended third-party beneficiaries of the contract. Id. at 310-11, 871 P.2d at 966-67. The claim in this case does not present such clarity. Rather, we agree with the approach of Professor Dobbs that, in this case, fraud that “amounts to or is a part of a dignitary invasion such as a battery, an outrageous infliction of emotional distress, or a libel,” allows a plaintiff to “recover emotional harm damages on such a theory, with recovery of purely economic damages on the fraud theory.” Dobbs, supra, § 9.2(4), at 562.

38 We are supported in this view by our Supreme Court’s limitations in cases involving emotional distress. The tort of negligent infliction of emotional distress is “extremely narrow” and is limited to bystander recovery. See Fernandez v. Walgreen Hastings Co., 1998-NMSC-039, ¶ 6, 126 N.M. 263, 968 P.2d 774. The tort of intentional infliction of emotional distress requires extreme or outrageous conduct and severe distress. See Trujillo v. N. Rio Arriba Elec. Cooper., Inc., 2002-NMSC-004, ¶ 25, 131 N.M. 607, 41 P.3d 334. We agree with Professor Dobbs that many of the cases seeming to allow emotional distress damages for fraud are actually not cases supporting the proposition that emotional distress damages are awardable without more on a fraud theory or are cases that contain little analysis. See Dobbs, supra, § 9.2(4), at 560. Therefore, we are hesitant to rely on them to effect a change in an area of the law that has been so carefully circumscribed by our Supreme Court. Moreover, to the extent that a case could be made for allowing the fraud claim to go forward with limitations analogous to those found in our Supreme Court cases, we believe that little of any practical effect would be accomplished, and we fear that such a holding might have unforeseen consequences of opening the door to emotional distress claims that should not be allowed for the same policy reasons expressed in our existing cases on emotional distress claims. See Trujillo, 2002-NMSC-004, ¶ 28.

39 Plaintiffs have alleged claims of intentional infliction of emotional distress, negligence, mistreatment of a corpse, civil conspiracy, and aiding and abetting that remain viable in this case. The district court properly dismissed Plaintiffs’ claims for fraud.

Conclusion

40 We uphold the dismissal of Plaintiffs’ claims for fraud. However, we conclude that the application of the statute of limitations
presents a jury question. We therefore reverse and remand for further proceedings.

MICHAEL E. VIGIL, Judge

(Concurring In Part And
Dissenting In Part)

I agree with the majority opinion in all respects except its conclusion that the fraud claims were properly dismissed. Defendants obtained dismissal of the fraud claims pursuant to Rule 1-012(b)(6) NMRA on the basis that damages in a fraud action are limited to pecuniary, actual monetary losses, and plaintiffs only alleged they suffered non-pecuniary mental or emotional distress damages as a result of the fraud. No New Mexico case has ever limited fraud damages to pecuniary, actual monetary losses, and whether a claim for fraud is stated when only such damages are alleged is a question of first impression in New Mexico.

Allowing the recovery of mental or emotional distress damages in appropriate cases is consistent with evolving New Mexico tort and contract law. In Flores, 117 N.M. at 314, 871 P.2d at 970, our Supreme Court held that where plaintiffs proved severe emotional distress, they were entitled to recover damages for mental anguish caused by a breach of a funeral contract.

I agree that awarding mental and emotional distress damages in a fraud case should not be without limitations. However, the issue is before us pursuant to Rule 1-012(b)(6). A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 1-012(B)(6) tests the legal sufficiency of the complaint. “A motion to dismiss should be granted only when appears that the plaintiff is not entitled to recover under any facts provable under the complaint.” Kirkpatrick v. Introspect Healthcare Corp., 114 N.M. 706, 709, 845 P.2d 800, 803 (1992); see Noriega v. Stahmann Farms, Inc., 113 N.M. 441, 442, 827 P.2d 156, 157 (Ct. App. 1992) (“A motion to dismiss for failure to state a claim should be granted only if it appears that plaintiff cannot recover, or be entitled to relief, under any state of facts provable under the complaint.”).

In this case Plaintiffs allege that Dr. Stewart and Defendants fraudulently induced them to authorize autopsies of their loved ones to determine the cause of death without disclosing their secret intent to remove and destroy body parts for purposes of scientific research unrelated to the cause of death. All the elements of a fraud claim under UJI 13-1633 are stated: (1) Defendants’ misrepresentation of a fact; (2) Defendants’ knowledge of the falsity of their representation; (3) Defendants’ intent to deceive and induce reliance on the misrepresentation; and (4) detrimental reliance on the misrepresentation. See Unser, 86 N.M. at 653-54, 526 P.2d at 795-96. As to damages, UJI 13-1633 simply states, “[a] party is liable for damages proximately caused by [his] [her] fraudulent misrepresentation,” and Plaintiffs allege, “[a]s a direct and proximate result of the fraud, [P]laintiffs and the members of the class have suffered damages, including loss, serious anguish, severe mental and emotional distress, pain, and suffering.”

Numerous decisions from many states have already held, in varying contexts, with various limitations, that mental or emotional distress damages are recoverable in a fraud action. See Steven J. Gaynor, Annotation, Fraud Actions: Right to Recover for Mental or Emotional Distress, 11 A.L.R.5th, 88 (1993). One approach to balancing the various interests is expressed by Andrew L. Merit, Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society, 42 Vand. L. Rev. 1, 1 (1989). Even the authority relied upon by the majority states, “[c]ases involving mishandling of dead bodies have long recognized emotional harm damages, fraud or no fraud.” Dobbs, supra, § 9.2(4), at 565. Professor Dobbs concludes his discussion of this issue by stating.

There are assuredly cases in which some kind of intangible-harm damages should be awarded when the defendant’s misconduct consists in part of fraudulent representations. Given the plenteous supply of tort doctrine for redress of emotional harm claims, however, there may be little or no need to add such a claim to fraud cases, where it would be quite likely to become a routine allegation. When it is coupled with punitive damages, it may, in addition, tend to weigh the misconduct twice. In any event, if emotional harm damages are to be permitted in fraud cases, it would be desirable to identify particular elements that especially justify such recovery. This might be done most readily by recognizing that the emotional harm recovery should be awarded when the elements of some other tort, such as intentional infliction of distress, can be shown, and that fraud itself would in some cases tend to show some of the elements of the intentional infliction tort.

Id.

Since I am unable to agree with the majority that mental or emotional damages are never recoverable in any fraud case under any circumstances, I respectfully dissent from that portion of the opinion affirming dismissal of the fraud claims. In all other respects I agree with the majority.

MICHAEL E. VIGIL, Judge
OPINION
CYNTHIA A. FRY, JUDGE

[1] In this appeal we consider whether coercion is an essential element of second degree criminal sexual penetration perpetrated in the commission of another felony (CSP II (felony)), contrary to NMSA 1978, § 30-9-11(D)(5) (2003). Defendant Charles Maestas, who was an Española municipal judge at the time of the charged events, appeals his convictions of five counts of requesting or receiving sexual favors “conditioned upon or given in exchange for promised performance of an official act” (official acts prohibited), NMSA 1978, § 10-16-3(D) (1993), a fourth degree felony, and five counts of CSP II (felony). The underlying felony for each CSP II conviction was official acts prohibited. We conclude coercion is not an essential element of CSP II (felony). We also find no error in the trial court’s evidentiary rulings and affirm Defendant’s convictions.

BACKGROUND

[2] Defendant’s convictions arose from allegations that he accepted sexual favors from Victim in exchange for leniency in the resolution of charges against Victim in municipal court. At trial, Defendant’s theory was that Victim plotted to seduce Defendant and then falsely claimed that Defendant coerced her into various sex acts so that she could sue Defendant’s employer, the City of Española, for violation of her civil rights.

[3] In support of his theory, Defendant presented evidence that Victim heard rumors that Defendant was giving preferential treatment to women in the city jail in exchange for sexual favors. Several months later, when Victim had several traffic charges pending before Defendant, Victim hid a tape recorder under her clothing and recorded two sexual encounters with Defendant. There was also evidence that Victim was gleeful when she learned about Defendant’s subsequent arrest and said, “We got him.”

[4] The State presented evidence supporting a different theory. Victim testified that she first appeared before Defendant in municipal court on several traffic code violations. Victim pleaded guilty, whereupon Defendant told Victim to come with him to his office. Defendant told Victim that she faced possible jail time of seventy to ninety days and about $700 in fines. Victim began crying. When she got up to leave, Defendant took her hand and said, “[M]aybe you could do something for me to take away your fines and you won’t go to jail.” Victim understood that Defendant was asking her for sex. She initially declined, but she was afraid Defendant would take her children away “because I knew he has the power to take them away because he’s a Judge.” Victim told Defendant she would have to think about it, and Defendant told Victim to ask the court clerk to set another court date.

[5] Although it is unclear what happened between this first encounter in Defendant’s office and the first sexual encounter, at some point following the initial court date, according to Victim, Defendant picked Victim up at her office and took her to his house, where they had sexual intercourse. Because Victim had complied with Defendant’s request for sex, she testified, “I figured he would drop everything [and] my kids wouldn’t get taken away[].”

[6] Sometime later, in response to a mailed notice, Victim went back to court, where Defendant talked to Victim (presumably in Defendant’s office) about helping her with her fines. She told Defendant she thought her fines were cleared, and Defendant told her they were not. He then asked Victim to do him a favor, closed the door, and asked her to perform oral sex; Victim complied. Defendant then told Victim to make another court date.

[7] Victim testified about two other incidents when Defendant picked her up. On one occasion he took her to his house, and on another, Defendant took Victim in his vehicle to an area near the community college, where he parked. On both occasions Defendant asked Victim for oral sex, and Victim complied. On another occasion, Defendant came to Victim’s office and asked for oral sex, which Victim performed in Defendant’s truck. While these encounters were taking place, nothing was happening with Victim’s court case. She kept appearing in court, but nothing was dropped.

[8] At about this time, Victim heard from a friend that Defendant had done something similar to another woman, so Victim decided to tape-record Defendant. Victim recorded Defendant once at his office and once at his house.

[9] On the first tape, Defendant and Victim discussed Victim’s fines, potential jail time, and suspended driver’s license. Defendant told Victim that if she would get her license cleared up, he would assess only $17 in fees on each charge for a total of $68. Defendant then commented on Victim’s breasts and lips. He scheduled Victim’s next court date and said, “We’ll see if we can try and get together before that. . . . Give me a call when you’re ready.”
On the second tape, Victim stated that she was at Defendant’s house, waiting for him. When Defendant arrived, Victim asked, “Okay what am I going to get out of this? . . . Will you lower my fines?” Defendant responded, “Oh yeah.” A sex act then ensued, the two said goodbye, and Victim stated on the tape, “I just exchanged . . . giving head to the judge to change my[,] to lower my fines.”

The audiotapes made by Victim ultimately led to Defendant’s arrest. He was charged with six counts each of CSP, extortion, and official acts prohibited, which corresponded with the six sexual encounters Victim reported. Several other women then alleged that they had also performed sexual favors for Defendant in exchange for lenient treatment in court, and these allegations gave rise to additional charges.

At trial, the court instructed the jury on ten counts of sexual misconduct involving three women, nine counts of extortion, eight counts of official acts prohibited, and one count of stalking. The jury acquitted Defendant of all charges pertaining to the women other than Victim. With respect to Victim, the jury convicted Defendant of five counts of official acts prohibited and five counts of CSP II (felony), and it acquitted him of one count of CSP, one count of criminal sexual contact, one count of official acts prohibited, and all counts of extortion. We discuss additional background information in our analysis of the appellate issues.

**DISCUSSION**

**Jury Instructions**

Defendant argues the jury instructions on the elements of CSP II (felony) were flawed because they did not tell the jury it could only convict Defendant if it found that Defendant coerced Victim into engaging in the various sex acts alleged. Defendant contends that, even if the jury agreed with his view of the evidence -- i.e., that Victim enticed Defendant into having sex and that the sex was therefore consensual -- the jury instructions nonetheless compelled the jury to convict Defendant.

The issue of whether a given jury instruction is proper presents a mixed question of law and fact, which we review de novo. *State v. Gaitan*, 2002-NMSC-007, ¶ 10, 131 N.M. 758, 42 P.3d 1207; *State v. Salazar*, 1997-NMSC-044, ¶ 49, 123 N.M. 778, 945 P.2d 996. A jury instruction is proper, and nothing more is required, if it fairly and accurately presents the law. *State v. Duncan*, 1998-NMSC-008, ¶ 1, 124 N.M. 143, 951 P.2d 1172; *State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. “[J]uror confusion or misdirection may stem not only from instructions that are facially contradictory or ambiguous, but from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law.” *Id.*

We limit our review to the instructions pertaining to Victim because only those instructions gave rise to convictions. The trial court instructed the jury that, with respect to each count of CSP, there were three alternatives, including CSP II (felony), where the underlying felony was official acts prohibited. The jury did not arrive at a verdict on the other alternatives, so we are concerned only with the instruction on CSP II (felony; official acts prohibited), which reads as follows:

For you to find the Defendant guilty of criminal sexual penetration while committing another felony as charged in the alternative to Count [___], the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The Defendant caused [Victim] to engage in [sex act];
2. The Defendant committed the act during the commission of violating official acts prohibited; . . .
3. This happened in New Mexico on or about . . . [date].

This instruction referred the jury to another instruction that defined official acts prohibited as follows:

1. That the defendant requested or received a thing of value from [Victim];
2. That the thing of value was given in exchange for a promised performance by the Defendant of an official act;
3. This happened in New Mexico on or about . . . [date].

Defendant argues, and we agree, that CSP II (felony) is a “compound crime” like felony murder. *State v. Tsethlikai*, 109 N.M. 371, 373, 785 P.2d 282, 284 (Ct. App. 1989) (stating that a compound crime consists of two crimes, a predicate offense that is a prerequisite and the compound offense itself). Thus, he argues that in order to prove CSP II (felony), the State had to prove the elements of third degree CSP (CSP III) plus the elements of the underlying felony. CSP III is statutorily defined as “all criminal sexual penetration perpetrated through the use of force or coercion.” § 30-9-11(E). Therefore, Defendant contends the State had to prove CSP perpetrated through force or coercion plus the elements of the underlying felony. Because the concept of force or coercion was not mentioned in either the instruction on the elements of CSP II (felony; official acts prohibited) or the instruction on the elements of official acts prohibited, Defendant maintains the instructions lacked an essential element and resulted in jury confusion and an erroneous conviction.

We disagree with the premise underlying Defendant’s logic -- that proof of the elements of CSP III is necessary in order to prove CSP II (felony). We reach this conclusion through an examination of the governing statute. § 30-9-11.

Section 30-9-11(A) defines the base crime of criminal sexual penetration as “the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.” This definition says nothing about force or coercion; instead, it speaks in terms of “causing” a person to engage in a sex act.

Section 30-9-11(D) then defines second degree CSP, which is at issue here, as follows:

D. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

1. on a child thirteen to eighteen years of age when the perpetrator is in a position of authority over the child and

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uses this authority to coerce the child to submit;

(2) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;

(3) by the use of force or coercion that results in personal injury to the victim;

(4) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;

(5) in the commission of any other felony; or

(6) when the perpetrator is armed with a deadly weapon.

We first observe that force or coercion is an express element of only three out of the six alternative grounds for CSP II. Under a guiding principle of statutory construction, it appears that the legislature knew how to require the element of force or coercion and yet chose not to include it when the crime is perpetrated on an inmate, § 30-9-11(D)(2), when the accused is armed with a deadly weapon, § 30-9-11(D)(6), or when the accused is armed with a deadly weapon, § 30-9-11(D)(5), or when the accused is armed with a deadly weapon, § 30-9-11(D)(6).

and yet chose not to include it when the crime is perpetrated on an inmate, § 30-9-11(D)(2), in the commission of any other felony, § 30-9-11(D)(5), or when the accused is armed with a deadly weapon, § 30-9-11(D)(6). See State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064 (explaining that in ascertaining legislative intent we start by looking at the words chosen by the legislature). Because the legislature omitted from the definition of CSP II (felony) a requirement for force or coercion, we cannot agree with Defendant that the legislature intended that CSP II (felony) necessarily includes the elements of CSP III, which is defined as all CSP “perpetrated through the use of force or coercion.” § 30-9-11(E). This omission of any requirement of force or coercion is even more striking in the context of CSP I (on a child under thirteen years of age). If Defendant is correct in this case, then force or coercion is also required for CSP I, which we are certain the legislature did not intend.

Defendant relies on various New Mexico cases to support his position that force or coercion is an essential element of CSP II (felony). We are not persuaded. It is true that in State v. Piso, 119 N.M. 252, 889 P.2d 860 (Ct. App. 1994), we said “unless there is force or coercion beyond that inherent in almost every CSP, the proper charge is CSP III.” Id. at 259, 889 P.2d at 867. However, in Piso, we were discussing whether the trial court should have instructed the jury that CSP III was a lesser included offense of CSP II (felony) and that false imprisonment was a lesser included offense of kidnapping under the circumstances of that case. Id. at 259-60, 889 P.2d at 867-68. Similarly, in State v. Corneau, 109 N.M. 81, 85-87, 781 P.2d 1159, 1163-65 (Ct. App. 1989), our discussion of the force used to perform the act of CSP was in the context of determining whether charges of false imprisonment and CSP II (felony; false imprisonment) violated the prohibition against double jeopardy. In neither case were we confronted with the issue presented here. See Ramirez v. Davison Prod. Partners, Inc., 2000-NMCA-011, ¶ 10, 128 N.M. 601, 995 P.2d 1043 (explaining that “cases are not authority for propositions they do not consider”).

Other cases on which Defendant relies are similarly distinguishable. State v. Lucero, 118 N.M. 696, 884 P.2d 1175 (Ct. App. 1994), and State v. Johnson, 102 N.M. 110, 692 P.2d 35 (Ct. App. 1984), overruled in part on other grounds by Manlove v. Sullivan, 108 N.M. 471, 775 P.2d 237 (1989), unlike the present case, each involved a conviction for CSP III. State v. Gillette, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985), concerned CSP II where the victim was a minor and the perpetrator was in a position of authority and used his authority to coerce the child’s submission, charged under what is now Section 30-9-11(D)(1). Gillette, 102 N.M. at 698, 702, 699 P.2d at 629, 633. As noted, this form of CSP II requires coercion, while the statutory language defining CSP II (felony) does not.

Defendant next points to the contrast between the elements of the crimes with which he was alternatively charged -- CSP II (felony; extortion) and CSP III -- and the crime of which he was convicted, CSP II (felony; official acts prohibited). He contends that the instructions for both CSP II (felony; extortion) and CSP III required an element of coercion, while the instructions for CSP II (felony; official acts prohibited) did not. In order to convict Defendant of CSP II (felony; extortion), the jury would have had to find that (1) “Defendant caused [Victim] to engage in [a specified sex act]” committed “during the commission of extortion;” and (2) “Defendant used threats of fines, jail and/or to separate her from her children, intending to wrongfully compel [Victim] to do something she would not have done, to-wit: engage in [the sex act].” In order to return a conviction for CSP III, the jury would have had to find that “Defendant caused [Victim] to engage in [a specified sex act]. . . . used threats of fines, jail and/or to separate her from her children” and that Victim believed Defendant would carry out the threats. Thus, because the instructions for CSP II (felony; extortion) and CSP III contained elements of coercion, and because the instruction for CSP II (felony; official acts prohibited) did not, Defendant argues that, even if the jury believed all of Victim’s sexual contact with Defendant was purely consensual, it makes sense that the jury could have acquitted Defendant of CSP II (felony; extortion) and CSP III, and yet also convicted him of CSP II (felony; official acts prohibited).

Defendant contends the only logical conclusion is that coercion must also be an essential element of CSP II (felony; official acts prohibited).

We disagree. Defendant overlooks those parts of the CSP II (felony; official acts prohibited) instructions requiring the jury to find that Defendant caused Victim to engage in the various sex acts and that the acts occurred during the commission of the underlying felony. The emphasized words constitute a requirement that there be a causal connection between the felony and the sex act. This requirement is enough to insure that an accused will not be convicted for engaging in purely consensual sex.

Our Supreme Court has analyzed the requirement for a causal connection in the analogous context of felony murder. Felony murder consists of “all murder perpetrated: . . . in the commission of or attempt to commit any felony[,]” State v. Harrison, 90 N.M. 439, 441, 564 P.2d 1321, 1323 (1977), superseded by rule on other grounds as stated in Tafoya v. Baca, 103 N.M. 56, 60, 702 P.2d 1001, 1005 (1985). Thus, “there must be a causal relationship between the felony and the homicide[,]” Id. In defining what causal relationship is necessary, the Court stated that “causation must be physical; causation consists of those acts of [the] defendant or his accomplice initiating and leading to the homicide without an independent force intervening, even though [the] defendant’s or his accomplice’s acts are unintentional or accidental.” Id. at 441-42, 564 P.2d at 1323-24 (footnote omitted).
We hold that force or coercion is not an essential element of CSP II (felony). Through its definitions of CSP II, the legislature intended to punish those who participate in certain sexual activity, even without force or coercion, when the participant is in a position of authority over an inmate, when the participant is armed with a deadly weapon, or when the sex act is caused by the defendant in the commission of any other felony. Although some felonies underlying CSP II (felony) may themselves require force or coercion, not all felonies will require such force or coercion. The legislature did not limit CSP II to only felonies involving force or coercion, but simply required that the CSP be caused by the defendant “in the commission of any other felony.” § 30-9-11(D)(5).

It is apparent, then, that “any other felony” includes felonies that have no element of force or coercion and, therefore, any felony may serve as the underlying felony for a conviction of CSP II (felony). The legislature has determined as a matter of policy that sex acts occurring in certain specified contexts are more blameworthy than CSP III, and we will not second guess that determination. See Torres v. State, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (“[I]t is the particular domain of the legislature, as the voice of the people, to make public policy.”).

Defendant’s final argument attacking the jury instructions relies on affidavits signed by six jurors after the jury rendered its verdict and had been discharged. The affidavits generally state that the jurors did not vote to convict Defendant of “Criminal Sexual Penetration, rape or extortion for sex.” Defendant argues that these affidavits corroborate the jury’s acquittal of Defendant on certain other charges and demonstrate the jury’s confusion.

We do not agree. First, apart from the affidavits, the record does not indicate that the jury acquitted Defendant of the charges on which he relies. In fact, the record reflects neither acquittal nor conviction on these charges, which were presented to the jury in the instructions and one verdict form as alternatives to the CSP II charge on which Defendant was convicted. Second, it is settled law that jurors may not impeach their verdict by affidavit after they are discharged. Lamkin v. Garcia, 106 N.M. 60, 62, 738 P.2d 932, 935 (Ct. App. 1987); see also, Rule 11-606(B) NMRA (prohibiting a juror from testifying “as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions . . . or concerning the juror’s mental processes in connection therewith, [the verdict]”). The only exception to this rule permits a juror to testify regarding “whether extraneous prejudicial information was improperly brought to the jury’s attention or whether any outside influence was improperly brought to bear upon any juror.” Id. This exception does not apply in this case.

**Testimony of Witness Lisak**

Defendant argues the trial court erroneously permitted Dr. David Lisak to testify for the State as a rebuttal witness. He argues that Lisak’s testimony did not provide “reliable [or] relevant assistance to the jury of any material factual issue.” Defendant appears to be contending that Lisak’s testimony should have been excluded on the ground that the State failed to establish (1) the reliability of the scientific method relied upon and (2) that the testimony would assist the jury. See State v. Alberico, 116 N.M. 156, 166-68, 861 P.2d 192, 202-04 (1993) (explaining that expert testimony should not be admitted unless the expert is qualified, the testimony will assist the trier of fact, and the expert will testify regarding scientific or other specialized knowledge).

The State claims Defendant failed to preserve this argument below. However, it is clear from the record that the State and the trial court knew Defendant was making an Alberico-type objection, and that the trial court directed the prosecutor to attempt to lay an appropriate foundation. See State v. Varela, 1999-NMSC-045, ¶ 26, 128 N.M. 454, 993 P.2d 1280 (explaining that in order to preserve an issue for appeal, the defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling on the objection). We conclude Defendant preserved his objection, and we review the trial court’s admission of the evidence for abuse of discretion. State v. Woodward, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995).

Outside the presence of the jury, Lisak testified to his qualifications, which Defendant does not challenge. Lisak then testified that the scientific understanding of the impact of trauma on victims comes from forty years of observational study of victims of sexual trauma, domestic violence, or combat trauma. These studies have been published in peer-reviewed journals for decades. In addition, the results of these studies are taught at the university level. He explained that he had been asked to testify regarding how certain characteristics make victims more or less vulnerable to victimization, how victims respond to threats, and how trauma affects memory.

The trial court concluded that Lisak’s testimony could be helpful to the jury, and, in the presence of the jury, Lisak testified that the more vulnerable a person is — whether due to financial concerns, lack of educational opportunity, legal troubles, lack of family support, or a history of substance abuse or prior victimization — the more vulnerable that person is to victimization. He also testified that if a perpetrator has more power than the victim, it is easier for the perpetrator to commit an assault, such as a sexual assault, on the victim. In fact, if there is a significant power differential, the perpetrator can communicate a threat with a glance or a gesture. Finally, Lisak testified that studies show that victims of trauma tend to remember the core details of the trauma very clearly, but the peripheral details of the trauma tend to be lost.

The trial court did not abuse its discretion in admitting this testimony. Lisak’s testimony established that the scientific observation of victims has been going on for decades and that the results of those studies have been peer-reviewed and taught for an equally long period of time. This testimony reasonably supported the reliability of the general conclusions Lisak stated. See State v. Torres, 1999-NMSC-010, ¶ 25, 127 N.M. 20, 976 P.2d 20 (explaining that, in considering the reliability of scientific evidence, a trial court should consider whether a theory has been tested, subjected to peer review, subjected to standards, and whether it is generally accepted in the field). In addition, we do not agree with Defendant that these conclusions “were not tethered in a reliable way to [a] factual proposition at issue.” Lisak’s testimony could have helped the jury to understand why the alleged victims may have agreed to provide sexual favors to Defendant, and consequently, the testimony may have assisted the jury in deciding the ultimate factual question of guilt or innocence.
Exclusion of Evidence of Prostitution

[34] Defendant claims the trial court violated his right of confrontation and his right to present evidence in his own defense when it excluded evidence that Victim ran a house of prostitution. In a motion in limine, Defendant stated that he sought to cross-examine Victim on this issue and to ask another witness, Leroy Salazar, whether he had evicted Victim from public housing for running a brothel.

[35] We note at the outset that Defendant cites no case law on the substance of these issues and presents only a cursory argument in support of his contentions. We therefore address Defendant’s arguments in similar, summary fashion.

[36] In determining whether the trial court unduly restricted Defendant’s right to cross-examine Victim, we undertake de novo review. State v. Martinez, 1996-NMCA-109, ¶ 14, 122 N.M. 476, 927 P.2d 31. “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” State v. Gonzales, 1999-NMSC-033, ¶ 22, 128 N.M. 44, 989 P.2d 419 (internal quotation marks and citations omitted). Here, as best we can tell from the record, the trial court excluded any mention of Victim’s alleged prostitution because Defendant failed to meet his burden under the so-called rape shield law. See NMSA 1978, § 30-9-16(A) (1993) (precluding admission of evidence of a victim’s past sexual conduct unless the trial court determines that “the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value”). Because defense counsel laid the foundation for admission of this evidence during an in camera hearing that does not appear in the record, we are unable to assess the propriety of the trial court’s determination that Defendant failed to meet his burden. We therefore indulge every presumption “in favor of the correctness and regularity of the lower court’s judgment.” In re Ernesto M., Jr., 1996-NMCA-039, ¶ 19, 121 N.M. 562, 915 P.2d 318.

[37] Similarly, with respect to Defendant’s intention to ask witness Salazar on direct about Victim’s alleged prostitution, we review the trial court’s exclusion of this evidence for abuse of discretion. Woodward, 121 N.M. at 4, 908 P.2d at 234. It appears the trial court relied on the same ground for excluding this testimony — Defendant’s failure to meet his burden under the rape shield law. In order to present evidence of Victim’s alleged prostitution, Defendant had to establish that the evidence was material and that its prejudicial effect did not outweigh its probative value. § 30-9-16(A). While this evidence was certainly relevant to Defendant’s theory of the case, which portrayed Victim as the instigator of the sex acts in question, without the benefit of a complete record of the relevant hearing, we cannot say the trial court abused its discretion if it concluded that the evidence’s inflammatory nature outweighed its probative value. See State v. Jim, 107 N.M. 779, 780, 765 P.2d 195, 196 (Ct. App. 1988) (“It is the defendant’s burden to bring up a record sufficient for review of the issues he raises on appeal.”).

CONCLUSION

[38] For the foregoing reasons, we affirm Defendant’s convictions.

[39] IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:
LYNN PICKARD, Judge
CELIA FOY CASTILLO, Judge
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