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2005-NMSC-019: State v. Freddie Rodriguez
2005-NMSC-020: Patricia Tomlinson v. Jacob George, M.D.
2005-NMCA-086: State v. Ruben K. Arroyos
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SEMINAR REGISTRATION FORM
CLE PROGRAMS - State Bar Center

AUGUST

5 & 6
Friday, August 5 & Saturday, August 6, 2005
State Bar Center • 10.3 General and 1.2 Ethics CLE Credits

Co-Sponsor: Bankruptcy Law Section

Congress recently enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). That act represents the most significant change in bankruptcy law since the passage of the Bankruptcy Code of 1978. All bankruptcy cases filed on or after Oct. 17, 2005, will be subject to the act. This will have a profound impact on consumer bankruptcies as well as business reorganizations. Join us as we learn how these changes will impact your practice and the rights of your clients.

An outstanding panel of experts will offer practical advice to debtors' counsel, as well as those attorneys whose clients may be creditors in a bankruptcy proceeding, regarding the requirements, risks, and opportunities presented by the changes in the law. Due to the magnitude of new changes affecting bankruptcy law, the course materials for this seminar will include not only a complimentary redlined copy of the code, but also a complimentary copy of Recent Developments in Chapter 13 by Bankruptcy Judge Keith M. Lundin and Henry E. Hildebrand, III, Esq.

☐ Standard & Non-Attorney $269  ☐ Government & Paralegal $259
☐ Bankruptcy Section Member $249

12
The Annual Review of Civil Procedure
Friday, August 12, 2005
State Bar Center, Albuquerque
7.5 General and 1.2 Ethics CLE Credits

Co-Sponsor: UNM School of Law
Presenters: Professor Norman Bay, Professor Michael Browde, Professor Ted Occhiolina, Adjunct Professor Andrew Schultz

This year's annual review will feature an in depth look at significant changes in New Mexico civil procedure, New Mexico case law affecting civil procedure, and an ethics presentation entitled "Coming Attractions" in the New Mexico Rules of Professional Conduct.

☐ Standard & Non-Attorney $209  ☐ Government & Paralegal $199

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Street _________________________________________________________
City/State/Zip __________________________________________________

Phone ___________________________ Fax ___________________________
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Program Title __________________________________________________
Program Date __________________________________________________
Program Location ________________________________________________
Program Cost
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☐ Check enclosed $
Make check payable to: CLE
☐ VISA ☐ MC ☐ American Express ☐ Discover
Credit Card # ___________________________ Exp. Date _____________
Authorized Signature ______________________________________________
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• Professionalism Tip •

With respect to the public and to other persons involved in the legal system:
I will willingly participate in the disciplinary process.

Meetings

August

1
Attorney Support Group, 5:30 p.m., First Methodist Church

3
Employment and Labor Law Section Board of Directors, noon, State Bar Center

3
Trial Practice Section Board of Directors, 4:30 p.m., State Bar Center

11
Public Law Section Board of Directors, noon, RMD Legal Bureau, Santa Fe

11
Business Law Section Board of Directors, 4 p.m., State Bar Center

13
Ethics Advisory Committee, noon, State Bar Center

15
Lawyers Professional Liability Committee, noon, State Bar Center

State Bar Workshops

August

10
Landlord/Tenant Workshop - Landlords, 6 p.m., State Bar Center

11
Lawyer Referral for the Elderly Workshop, 10 a.m., Belen Senior Center, Belen

24
Family Law Workshop, 5:30 p.m., Branigan Library, Las Cruces

24
Consumer Debt/Bankruptcy Workshop*, 6 p.m., State Bar Center

25
Consumer Debt/Bankruptcy Workshop*, 5:30 p.m., Branigan Library, Las Cruces

29
Consumer Debt/Bankruptcy Workshop*, 6 p.m., Gallup City Council Chambers, Gallup

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.
**NOTICES**

**COURT NEWS**

**Supreme Court**

**Notice on Address Changes**

All New Mexico attorneys must notify the Supreme Court and the State Bar of any changes in address or telephone number. Information may be e-mailed to the Supreme Court, Suprvm@nmcourts.com; faxed to (505) 827-4837; or mailed to PO Box 848, Santa Fe, NM 87504-0848.

Information may be e-mailed to the State Bar, at address@nmbar.org; faxed to (505) 828-3755; or mailed to the State Bar, PO Box 92860, Albuquerque, NM 87199-2860. The State Bar keeps both mailing and directory addresses. Contact the State Bar for more information.

**Commission on Access to Justice**

**Vacancy**

One attorney vacancy exists on the Commission on Access to Justice. Attorneys interested in volunteering their time on this committee may send a letter of interest or a resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for letters and resumes is Aug. 8.

**MCLE Board**

**Vacancy**

One attorney vacancy exists on the MCLE Board due to the resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest or a resume to Kathleen Jo Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for letters and resumes is Aug. 8.

**NM Board of Legal Specialization**

**Comments Sought**

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the certification as a specialist in the area of law and resumes are Aug. 8.

**First Judicial District Court**

**Family Law Brownbag Meeting**

The First Judicial Court will host its family law brownbag meeting at noon, Aug. 9 in the Grand Jury Room, second floor, of the Steve Herrera Judicial Complex in Santa Fe. The event will feature a meeting with local agencies that deal with issues relating to family law. For more information, or to suggest an agency to be invited, 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**

**Children’s Court Monthly Judges’ and Managers’ Meeting**

The Second Judicial District Children’s Court will hold its monthly judges’ and managers’ meeting at noon, Aug. 2 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St, NW, Albuquerque. Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

**Judicial Appointment**

Gov. Bill Richardson has appointed Judge Matthew G. Reynolds to the bench for the Ninth Judicial District Court. After graduating from the New Mexico Military Institute, Martin went on to receive a bachelor’s degree in business from New Mexico State University and a law degree from the University of New Mexico. Martin has served as branch chief for the U.S. Attorney’s Office since 1991. From 1981 to 1987, he served as noncommissioned officer in the U.S. Army Reserve. Martin replaces Judge Grace Duran, who resigned in late May.

**Third Judicial District Court**

**Judicial Appointment**

Gov. Bill Richardson has appointed Judge James Thomas Martin to the bench for the Third Judicial District Court. After graduating from the New Mexico Military Institute, Martin a graduate of Manzano High School in Albuquerque, NM 87199.

**Employment and Labor Law**

Sean Olivas

**Fourth Judicial District Court**

**Judicial Appointment**

Gov. Bill Richardson has appointed Judge Robert S. Orlik to the bench for the Fourth Judicial District Court. Orlik, a resident of Clovis, has worked in private practice since 1978. He also served as chief public defender from 1977 to 1978 and as a judge advocate general for the U.S. Air Force. Orlik is a graduate of Rutgers University School of Law in Camden, New Jersey and received his bachelor’s degree from Rutgers College. Orlik begins as district court judge this month.
Rio Arriba County Magistrate Court
Judicial Resignation

Tommy Rodella, a judge on the Rio Arriba County Magistrate Court, has resigned effective July 20. Rodella was appointed in March of this year.

U. S. District Court for the District of New Mexico Service on Court Committees and Panels

U. S. District Court for the District of New Mexico Chief Judge Martha Vázquez would like to solicit interest of Federal Bar members in future service on the following court committees: Bench and Bar Fund Committee, Pro Se Civil Litigants Committee, Magistrate Judge Merit Selection Panel, CJA Panel Committee, and the Tenth Circuit Advisory Committee. All interested Federal Bar members in good standing should respond indicating their preference to Matthew Dykman, Clerk of the Court, U. S. District Court, Pete V. Domenici Courthouse, 333 Lomas Blvd. NW, Albuquerque, NM 87102, or by e-mail to jbullington@nmcourt.fed.us.

State Bar News Annual Meeting

Resolutions and Motions

The 2005 Annual Meeting of the State Bar of New Mexico will be held at noon, Sept. 23, at the Ruidoso Convention Center in Ruidoso. Resolutions and motions to be considered must be submitted in writing and received in the office of Joe Conte, executive director, PO Box 92860, Albuquerque, NM 87199; fax, (505) 828-3765; or e-mail, jconte@nmbar.org, by 5 p.m., Aug. 23.

Appellate Practice Section Annual Meeting

The annual meeting of the Appellate Practice Section will take place at 1 p.m., Aug. 19 at the State Bar Center. It will be held in conjunction with the 16th Annual Appellate Practice Institute, which will be held that day at the State Bar Center from 8:20 a.m. to 4:30 p.m. All members of the section and other interested persons are invited to attend and to participate.

Attorney Support Group Monthly Meeting

The next Attorney Support Group meeting will be held at 5:30 p.m., Aug. 1 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month.

For more information, contact Bill Stratvert, (505) 242-6845.

Children’s Law Section Annual Poster and Writing Contest

The Children’s Law Section will sponsor its third annual poster and writing contest. This event is a great way for attorneys, their firms, or organization to assist in changing the lives of New Mexico’s troubled youths by supporting children’s artistic talent, and to promote mentorship for positive behavior to children in the delinquency system. The contest is for children who are either currently detained, or involved in such programs as the Youth Reporting Center, Drug Court and anti-domestic violence programs. Contestants in Bernalillo, Sandoval, Valencia and Santa Fe Counties will be asked to create a work based on the theme “My Hero, My Heroine.”

Sponsorship opportunities include cash donations or prizes to award contest winners. Recognition will be given through press releases of the event, thank you signs at each exhibit and special in-person thanks at the awards ceremony at each exhibit location. Awards ceremonies will be held in mid October or early November. Donations will enable contest organizers to purchase art supplies, prizes and set up the exhibit. Monetary donations may be made by Aug. 15 to: Children’s Law Section, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860. Call Linda Yen, (505) 841-5164, or Lorette Enochs, (505) 841-9286 for more information. Letters of interest should be sent to PO Box 92860, Albuquerque, NM 87199-2860. Call Linda Yen, (505) 841-5164, or Lorette Enochs, (505) 841-9286 for more information.

Commission on Professionalism Public Member Vacancies

The State Bar of New Mexico is seeking candidates to fill two public member vacancies on the Commission on Professionalism. Both of the public members positions are for two-year terms. Members who know a non-attorney who would be interested in serving on the commission, should contact Executive Director Joe Conte, (505) 797-6099 or jconte@nmbar.org. Letters of interest should be sent to PO Box 92860, Albuquerque, NM 87199-2860.

Employment and Labor Law Section Board Meetings Open to Section Members

The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Aug. 3. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Cindy Lovato-Farmer, section chair, (505) 667-3766.

International and Immigration Law Section Annual Section Meeting

The International and Immigration Law Section will conduct its annual section meeting at 3 p.m., Aug. 26 at the State Bar Center. Section members are also invited to attend a happy hour and receive a free drink at the Pyramid immediately after the meeting. Attendees are asked to R.S.V.P. to Tony Horvat, (505) 797-6033 or thorvat@nmbar.org.

Paralegal Division Brownbag CLE

Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., Aug. 10 at the State Bar Center. Registration begins at 11:30 a.m. and the cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. The topic for this month’s CLE is “State and Municipal Sex Offender Registration Laws in New Mexico,” presented by Kari Morrissey, Esq. For more information, contact Debi Shoemaker-Scott, (505) 243-1443.

NM Paralegal Day

Gov. Bill Richardson has declared Aug. 26 as Paralegal Day in New Mexico. That date marks the 10th anniversary of the organizational meeting of the Paralegal Division of the State Bar of New Mexico. The Paralegal Division, formerly known as the Legal Assistants Division, was created by the New Mexico Supreme Court to serve the needs of paralegals throughout the state with the following specific goals: to encourage a high

www.nmbar.org
The New Mexico Supreme Court has established a new rule for practice by non-admitted Lawyers before state courts. 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 appearance, 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 questions 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.

**Public Law Section Board Meeting**

The next Public Law Section board meeting will be held at noon, Aug. 11 in the Risk Management Division Legal Bureau Conference Room on the first floor of the Montoya Building, 1100 St. Frances Dr., Santa Fe. Contact Deborah Moll, (505) 827-2000, for more information.

**Technology Utilization Committee Using Excel in the Legal Environment**

The Technology Utilization Committee will be holding a free workshop from 5 to 6 p.m., Aug. 18 at the State Bar Center, Albuquerque. In this one-hour session, participants will learn how easy it is to use Excel for sorting lists and quickly finding information amongst large amounts of data using the Filter and SubTotal tools. Paralegals, attorneys and support staff are all invited to attend. Class is limited to 11 attendees. Reservations should be made by Aug. 16 with Mary Patrick, CLE program coordinator, mpatrick@nmbar.org or (505) 797-6059. CLE credit will not be provided.

**Other Bars**

**Albuquerque Bar Association Military Acknowledgement Luncheon**

The Albuquerque Bar Association will host a luncheon on Sept. 6 acknowledging those attorneys who serve and have served in the U.S. military. The Albuquerque Bar will prepare a roster of attorneys with names, branch of military service, dates of service and rank. Attorneys are asked to send their relevant information as soon as possible. Contact Jeanne Adams, (505) 842-1151, abqbar@abqbar.com or Kathy Brandt, kathybrandt@qwest.net. Service members and veterans need not be members of the Albuquerque Bar Association to participate.

**Doña Ana County Bar Association Open World Program Luncheon**

The Federal Bar Association and the Doña Ana County Bar Association are hosting a luncheon in honor of a Russian delegation of five judges who were selected to participate in the Open World Program. The luncheon begins at noon, Aug. 5 at the New Mexico Farm and Ranch Heritage Museum, 4100 Dripping Springs Road, Las Cruces. Supreme Court Justice Edward L. Chavez will be the featured speaker for the luncheon. Cost of the luncheon is $17 and business attire is encouraged. Attendees should R.S.V.P. to (505) 528-1460 or anita_dial@nmcourt.fed.us by July 26.

**National Association of Counsel for Children 28th National Children’s Law Conference**

This summer, the National Association of Counsel for Children will hold its annual national child advocacy training Aug. 25 to 28 at the Hollywood Renaissance Hotel in Los Angeles. Each year in America, over one million children suffer abuse and neglect. These are serious incidents of beatings, sexual assault, and the kind of neglect that results in serious health problems. NACC members serve as child advocates for these children and guide them through the difficult legal process that determines their fate. The NACC is a nonprofit agency that provides the professional training and technical assistance the child advocates need.
to do their work. For more information, contact NACC at (888) 828-6222, or visit its Web site at www.NACC.childlaw.org.

**Advanced Trial Techniques**

The NM Defense Lawyers Association will present a CLE program Aug. 25 at the State Bar Center entitled “Advanced Trial Techniques.” Registration information will be available soon. Visit the NMDLA Web site at www.nmdla.org or contact Rhonda Dahl, (505) 797-6021, for more information.

**OTHER NEWS**

**UNM Law Library**

Summer Hours
Law Library hours through Aug. 21:
Mon. – Thurs. 8 a.m. to 9 p.m.
Fri. 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.

**YWCA**

**Women on the Move Awards**

Celebrate the Universe of Women with the YWCA by nominating someone for the Women on the Move Awards. Nominations are due by Aug. 12 for the Women on the Move Awards banquet Sept. 15 at the Embassy Suites Hotel and Conference Center in Albuquerque. Contact Elizabeth Armijo, (505) 254-9922 or EArmijo@ywca-nm.org for more information and a nomination packet.

**Shop, Register Online**

By Veronica Cordova
SBNM Webmaster

One of the most expedient features of the State Bar’s Web site is the ability to register for CLE programs, buy additional directories, pay section dues or annual dues, etc., online.

The “Shop/Register” navigation link on the site directs you to featured products and an area where you can browse by category. This area allows the public to pay for attorney referrals, and allows members to register for any number of CLE programs, make pro bono contributions, pay for voluntary bar association memberships or subscribe to the Bar Bulletin – just to name a few options.

The site is protected so users’ personal information is secure and paying for products and services is a simple process. Credit card information is automatically verified so orders are processed quickly. In addition, as products or services are purchased directly from the Web site, automatic tracking gives users the ability to review the purchases they’ve made by navigating to “My NMBar” and clicking on “My Purchases.” This feature provides added convenience for monitoring purchasing activity when using the site.

State Bar members should login immediately upon entering the site, so they can enjoy member discounts as applicable. Pricing information on particular products or services is retrieved so members are assured the best price.

The “Shop/Register” features of the State Bar’s Web site are designed to give users the upmost convenience of the services offered at www.nmbar.org.

Call (505) 797-6039 or e-mail webmaster@nmbar.org comments or suggestions for continued improvement to the site.
BOARD OF EDITORS PUBLICATION SURVEY RESULTS

The Board of Editors, with the endorsement of the Board of Bar Commissioners, conducted an online survey1 of the State Bar membership to determine if there was a need or a desire for a supplemental publication to the Bar Bulletin.

The survey was sent to active and inactive members (approximately 5,000) of the State Bar through an e-mail sent June 3. An Internet link to the survey was also posted to the State Bar Web site’s front page.

The survey was designed to allow a person to take the survey only once (i.e. through one IP address) and required that they only complete the first question dealing with their interest in another publication. The other four questions were voluntary.

As of June 30 at noon, 817 people had taken the survey – resulting in an approximate 16.3-percent response rate to the number of e-mails sent out.

QUESTION 1

The Question

The first question of the survey asked members to rate their level of interest in a possible new publication from five different levels. This question was the only required question to complete the survey.

The Answers

The first question showed that approximately 53 percent of the membership was “interested” or “very interested” in a supplemental publication to the Bar Bulletin. The average responder was a 2.71 on a scale of one to five (with five being the most interested).

Approximately 23 percent of members were either “uninterested” or “very uninterested” in the idea of a new publication. About one quarter (24 percent) of the membership was indifferent.

QUESTION 2

The Question

The second question of the survey asked members how they would like to receive the publication and gave them the two choices – as an insert to the Bar Bulletin or electronically. This question was not required and 742 members gave their opinion.

The Answers

The second question showed that the membership was “split” on how they would like to receive the new publication with 50.1 percent choosing the electronic version and 49.9 percent choosing the insert option.

QUESTION 3

The Question

The third question of the survey asked members how often they would like to receive the publication and gave them the four choices – monthly, quarterly, twice a year and once a year. This question was not required and 717 members expressed their preference.

The Answers

The third question showed that most members are looking for a quarterly publication with 57.5 percent of the responses. Monthly was at 21.1 percent, with twice a year at 10.3 percent and once a year at 11.2 percent.

1 The online survey and compilation of data was conducted through SurveyMonkey.com®, an independent, online survey provider. The information presented here is a summary of that data, intended only to give an overview of the survey results.
QUESTION 4

The Question

The fourth question of the survey asked about the types of stories, or content, of the proposed publication. Members could choose multiple answers and had the opportunity to "write-in" responses. This question was not required and 717 members gave their opinion.

The Answers

The fourth question showed that the majority of readers are interested in current legal issues and substantive legal articles, which garnered 79.9 percent and 73.6 percent of the responses, respectively.

QUESTION 5

The Question

The fifth question of the survey asked what the new publication should be called. Members could choose multiple answers and had the opportunity to "write-in" responses. This question was not required and 641 members gave their opinion.

The Answers

The fifth question showed that the majority of readers liked New Mexico Lawyer, which received 52.7 percent of the responses. There were also numerous write-in suggestions.

Content suggestions included:

(Examples chosen exemplify responses received)

The State Bar should encourage a publication like many other states have of notable opinions by district court judges.

How about humorous legal stories.

Just include these things in the Bar Bulletin.

I already get too much stuff to read.

Substance, please, on New Mexico issues. No time for cute.

Issues of general interest to the profession; e.g., changes in public perception and why, legislation aimed at the profession like the limitation on jury verdicts, quality of life/practice issues like balancing your family and your law practice, and how practice traditions are (or aren’t) changing to accommodate those pressures.

Gossip

How about question and answer forum, for example, a question, ethical or otherwise, a new lawyer might have, you could publish the question and print responses in subsequent issues.

Dialogues with judges, professors and other members of the legal community.

The last thing we need is another publication. Suggest you get with the Bar Bulletin, modernize it expand its content. Save space and highlight the new cases and let us look to the full text online. Please do not create more paper for us to look through on the off chance we might discover something useful.

Suggested names included:

(Examples chosen exemplify responses received)

NM Law Newsletter
Sidebar
New Mexico Lawyer’s Quarterly
Waste Of Dues
New Mexico Legal Grounds
In Brief
Jurisprudencia de Nuevo Mexico
New Mexico Law and Practice
New Mexico Esquire
New Mexico Legal Practice
New Mexico Law News Today
Oyez
Lex Loci
Que Pasa
Issues
Enchantment Law
Today’s New Mexican Lawyer
New Mexico Lawyer’s Journal
The Bureaucratic Boondoggle
Res Ipse
Abiter Dicta
Law Notes
Off Topic
Tips and Quips
Just Tidings
Law Monkey
New Mexico Bailey
2 Employee Health Insurance: A Guide for Practitioners Advising Businesses
Teleseminar
Center for Legal Education of NMSBF
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www.nmbar.org

4 Justice in the Jury Room
Teleconference
TRT, Inc.
2.4 E
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www.trtle.com

4 Planning for Estates Without Estate Tax Concerns
Albuquerque
Sterling Education Services
8.0 G
(715) 855-0495
www.sterlingeducation.com

5-6 Old Dogs, New Tricks: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
State Bar Center, Albuquerque
Bankruptcy Law Section and Center for Legal Education of SBNM
10.3 G, 1.2 E
(505) 797-6020
www.nmbar.org

5 Sanctions and the Goldilocks Test - Too Soft, Too Hard, or Just Right?
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtle.com

8 Managing Absent Employees So It Doesn’t Make You Absent-minded
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtle.com

9 Electronic Discovery Needn’t Be Shocking
Teleconference
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2.4 G
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www.trtle.com

9 Expert Witnesses: From Hiring to Testimony
Teleseminar
Center for Legal Education of NMSBF
1.2 G
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www.nmbar.org

9 Like Kind Real Estate Exchanges
Albuquerque
Lorman Education Services
8.0 G
Albuquerque
(715) 833-3940
www.lorman.com

10 2005 Professionalism: Lawyers Concerned for Lawyers
VR - State Bar Center, Albuquerque
Center for Legal Education of NMSBF
2.0 P
(505) 797-6020
www.nmbar.org

10 State and Municipal Sex Offender Registration Laws in New Mexico
Albuquerque
Paralegal Division of NM
1.0 G
(505) 243-1443
www.nmbar.org

10 What Puts Government Lawyers in a Class by Themselves
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtle.com

11 2005 Professionalism: Lawyers Concerned for Lawyers
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**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 Fé, NM 87504-0848 • (505) 827-4860

**EFFECTIVE JULY 29, 2005**

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PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**EFFECTIVE JULY 29, 2005**

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OPINION

RICHARD C. BOSSON, CHIEF JUSTICE

We examine two issues in the context of police officers lawfully observing a gun from outside a car, and later seizing the gun from under the passenger seat. We first inquire what additional facts must the State prove, beyond the location of the gun, to establish that the passenger, a felon, is in constructive possession of a firearm. Second, we ask what additional facts justify warrantless entry into the car and seizure of the gun consistent with the New Mexico Constitution. In a divided opinion, our Court of Appeals upheld the search and seizure, but held the evidence was insufficient to sustain a conviction for being a felon in possession. We agree with the first holding but disagree that the evidence was insufficient to sustain the conviction. Accordingly, we affirm in part and reverse in part, thereby upholding the judgment of the district court.

BACKGROUND

At around midnight, April 25, 2001, three police officers from the Bosque Farms Police Department and Valencia County Sheriff’s Department were leaving a local gas station when they observed a car drive through the station at an extremely low rate of speed. The vehicle had a dealer demonstration tag rather than a license plate. Realizing that dealer tags were not allowed after dealership business hours, Officer Hatch pulled the vehicle over. Before the car had come to a complete stop, Defendant stepped out of the passenger side of the vehicle and slouched against the vehicle with the right side of his body hidden from view. Defendant stared at Officer Hatch with an aggressive look described as a “thousand yard stare.” Officer Hatch drew his weapon at a low, ready position and ordered Defendant back into the car. Defendant did not respond to the first command but eventually returned to the car.

Officer Hatch and Officer Emmons approached the car. Officer Hatch asked the driver for license, registration, and proof of insurance. The driver only had a New Mexico identification card. The officers then asked if Defendant had a valid driver’s license, so that Defendant could take over for the driver. The officers ran a record check on the names of Defendant and the driver. Officer Emmons cited the driver for not having vehicle registration or insurance.

When the officers approached the car again to give the citations to the driver, Officer Hatch looked through the passenger side window of the vehicle and saw what appeared to be a gun in a holster protruding from underneath the rear of the passenger seat. Once he saw the gun, Officer Hatch told Officer Emmons to stop what he was doing. Out of concern for officer safety, the officers removed the driver and Defendant from the vehicle, patted them down for weapons, handcuffed and detained them. As Defendant got out of the vehicle, Officer Hatch observed a loaded ammunition clip located on top of the passenger seat in what was described as the “palm” of the seat. The clip was five inches by one inch by one-half inch. Officer Hatch moved the seat forward to remove the gun and discovered an open beer bottle, lying directly next to the gun, with the top of the bottle pointing toward the front of the seat. The officer removed the gun, which was a loaded .22 caliber Ruger. Another officer unloaded the gun and a live round from the chamber. The ammunition clip found on Defendant’s seat was determined to fit the gun located under his seat.

After the officers discovered the firearm and the beer bottle, Defendant admitted to drinking in the vehicle, and volunteered that he knew he was not supposed to be around firearms because of his prior felony convictions. The officers arrested Defendant for concealing his identity because he had initially given another name to the officers. The check of Defendant’s criminal history confirmed Defendant’s status as a felon. The officers then arrested Defendant for being a felon in possession of a firearm, and possessing an

6 Defendant challenged the constitutionality of the search. Because this was a bench trial, the parties agreed to conduct the evidentiary hearing regarding the search during the trial. The district court denied the motion to suppress because there were exigent circumstances justifying the search and found Defendant guilty on both counts. On appeal, the Court of Appeals reversed the verdict of being a felon in possession of a firearm, concluding that there was insufficient evidence to prove Defendant’s possession of the firearm beyond a reasonable doubt. State v. Garcia, 2004-NMCA-066, ¶ 1, 135 N.M. 595, 92 P.3d 41. However, the court found the search of the vehicle was constitutional and upheld Defendant’s conviction for possession of an alcoholic beverage in an open container. Id. ¶¶ 30, 34. We granted the State’s certiorari petition to review the felon-in-possession charge. Defendant filed a cross-petition claiming the search of the car was unconstitutional, and seeking to overturn the conviction for possession of an open alcoholic container. We also granted Defendant’s petition.

ARGUMENT

Sufficiency of the Evidence that Defendant was a Felon in Possession

7 We first address the sufficiency of the evidence that led to the conviction for being a felon in possession of a firearm. Because Defendant stipulated to being a convicted felon, our inquiry rests on the sufficiency of the evidence to prove possession.

8 The standard of proof in a criminal case, beyond a reasonable doubt, is the lens through which we judge the sufficiency of the evidence. The proper focus for that lens is State v. Garcia, 114 N.M. 269, 274, 837 P.2d 862, 867 (1992). Relying on commentators and precedent from the New Mexico and United States Supreme Courts, the Court of Appeals indicated that the burden of proof required the jury to be in “‘a subjective state of near certainty of the guilt of the accused.’” Garcia, 2004-NMCA-066, ¶ 8 (quoting State v. Wynn, 2001-NMCA-020, ¶ 5, 130 N.M. 381, 24 P.3d 816). The Court of Appeals further characterized the standard as requiring proof “to a moral certainty,” which it defined as “the highest degree of confidence with which an historical or physical fact can be known.” Id. ¶ 10 (quoted authority omitted). Then, the Court of Appeals concluded that such a high standard of proof made the evidence in this particular case insufficient as a matter of law to conclude that Defendant was in possession of the firearm. Id. ¶ 15.

9 The State protests that the Court of Appeals opinion creates a standard of review in conflict with both the Uniform Jury Instructions and this Court’s previous definitions of beyond a reasonable doubt. See UJI 14-5060 NMRA 2005; State v. Rodriguez, 23 N.M. 156, 167 P. 426 (1917). The Uniform Jury Instructions define reasonable doubt as “a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.” UJI 14-5060. The State further argues that the Court of Appeals’ articulation of the standard confuses the established precedent of this Court by using phrases such as “proof to a near certainty” and “proof to a moral certainty.” Such phrases, the State argues, are unclear, imprecise and potentially confusing, because they are inconsistent with the Uniform Jury Instructions and the case law on which those instructions are founded. Not surprisingly, Defendant agrees with the Court of Appeals and suggests that we modify our Uniform Jury Instructions to conform to these new characterizations.

10 As we see it, both sides are in error. The State mischaracterizes the Court of Appeals opinion as a change in the standard of proof; Defendant erroneously takes the issue one step further and suggests that we modify our Uniform Jury Instructions. We need to be clear on this subject. The definition of proof beyond a reasonable doubt remains today what it has been for decades, perhaps longer. UJI 14-5060 adequately expresses that definition and is to be used in all jury trials, unadorned by any added, illustrative language from this or any other opinion. We do not believe the Court of Appeals intended any such modification of the definition.

11 We do agree with the State that unwarranted focus on phrases like “proof to a near certainty” and “proof to a moral certainty” has the potential to create confusion in the law, leaving an unfortunate impression that the law may be something other than what is stated in UJI 14-5060. Accordingly, we discourage reliance on these alternative formulations. As one scholar has noted in a different context, it is when courts are “explicit in opinions about the application of the standard to the particular facts” that we give the most guidance, rather than when we engage in “ever more puzzling reformulations of the test being applied.” Michael B. Browde, Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution, 18 N.M. L. Rev. 525, 553-54 (1988) (discussing the definition of substantial evidence, in the context of administrative law). We attempt now to clarify our standard of beyond a reasonable doubt by applying it to the facts of this case.

12 When reviewing a verdict for sufficiency of the evidence, our role is to determine whether a rational fact-finder could determine beyond a reasonable doubt the essential facts necessary to convict the accused. State v. Sizemore, 115 N.M. 753, 758, 858 P.2d 420, 425 (Ct. App. 1993). When determining the sufficiency of the evidence, the court views the evidence in a light most favorable to the verdict, considering that the State has the burden of proof beyond a reasonable doubt. State v. Duran, 107 N.M. 603, 605, 762 P.2d 890, 892 (1988), holding superseded as recognized in State v. Gutierrez, 1998-NMCA-172, ¶ 10, 126 N.M. 366, 969 P.2d 970. The court should not re-weigh the evidence to determine if there was another hypothesis that would support innocence or replace the fact-finder’s view of the evidence with the appellate court’s own view of the evidence. Id.; State v. Sutphin, 107 N.M. 126, 130, 753 P.2d 1314, 1318 (1988). However, we have also observed that “[e]vidence equally consistent with two hypotheses tends to prove neither.” Herron v. State, 111 N.M. 357, 362, 805 P.2d 624, 629 (1991). In other words, “evidence equally consistent with two inferences does not, without more, provide a basis for adopting either one—especially beyond a reasonable doubt.” Garcia, 114 N.M. at 275, 837 P.2d at 868.

13 Because Defendant was not in actual possession of the gun, the conviction was based on a theory of constructive possession. For constructive possession, the State must prove both that Defendant knew the gun was present in the car and exercised control over it. See UJI 14-130 NMRA 2005; State v. Morales, 2002-NMCA-052, ¶ 28, 132 N.M.146, 45 P.3d 406. Proximity alone does not constitute possession. UJI 14-130. “[T]his Court must be able to articulate a reasonable analysis that the [fact-finder] might have used.
to determine knowledge and control.”  

14. Knowledge depends on whether the fact-finder had sufficient evidence to conclude that Defendant knew the gun was under his seat. “The State must prove that defendant had physical or constructive possession with knowledge of the presence and character of the item possessed. Such proof may be by the conduct and actions of the defendant.”  


15. The evidence in the present case was sufficient to give rise to a reasonable inference that Defendant had knowledge of the gun. He placed his beer bottle under the seat in a position right next to the gun, such that it would be hard for anyone not to be aware of the gun. Upon getting out of the car, he acted in a manner that arguably showed a consciousness of guilt. Finally, Defendant was sitting on the ammunition clip that matched the gun. The Court of Appeals concluded there was sufficient evidence to support an inference of knowledge, and we agree.  


16. In addition to knowledge, there must be sufficient evidence of control.  

Sizemore, 115 N.M. at 756, 858 P.2d at 423. The Court of Appeals concluded the evidence of control was insufficient, and it is here that we disagree.  

17. The Court of Appeals relied on the principle that this Court has articulated concerning evidence that is equally consistent with two hypotheses.  

See Herron, 111 N.M. at 362, 805 P.2d at 629 (“Evidence equally consistent with two hypotheses tends to prove neither.”). Reasoning that the location of the gun, protruding from the rear of the passenger seat, made the gun equally accessible to both driver and passenger, the Court concluded that the driver could easily have reached over and placed the gun in that position, behind the passenger seat. The Court then concluded that the evidence was equally suggestive of control by either party and thus was not probative of possession by Defendant beyond a reasonable doubt.  

See Garcia, 2004-NMCA-066, ¶ 12, 15. The Court relied on  

State v. Sanchez, 98 N.M. 428, 430, 649 P.2d 496, 498 (Ct. App. 1982), for the proposition that it was required to determine whether the evidence was “inconsistent with every reasonable hypothesis of innocence.”  

18. We think the Court of Appeals was mistaken in its reliance on Sanchez. In Sanchez, the Court concluded that the state’s evidence was inconsistent with every reasonable hypothesis of innocence, and therefore was sufficient to support the conviction. That determination seems appropriate. However, the indication in Sanchez that an appellate court may not affirm a conviction unless the evidence is inconsistent with every reasonable hypothesis of innocence expressly did not survive this Court’s opinion in  

State v. Brown, 100 N.M. 726, 727-28, 676 P.2d 253, 254-55 (1984) (rejecting a Sanchez-based standard of review stated as, “whether a jury could reasonably find that the circumstantial evidence is inconsistent with every reasonable hypothesis of innocence”). After Brown, Sanchez can no longer be relied on for the proposition that substantial evidence in support of a conviction must be inconsistent with any reasonable hypothesis of innocence.  

19. The Court of Appeals has attempted to provide greater clarity to appellate review of the evidence to support a conviction. In that same vein, the Court stated that “[w]here the evidence viewed most favorably to the State necessarily supports a reasonable hypothesis of innocence, the State, by definition, has failed to prove its case beyond a reasonable doubt . . . .”  

Garcia, 2004-NMCA-066, ¶ 16 (emphasis omitted). That statement is no longer an appropriate standard for a New Mexico appellate court after  

Brown.  

Cf. State v. Johnson, 839 So. 2d 1247, 1253 (La. Ct. App. 2003) (relying in part on a Louisiana statute that provides a special rule when circumstantial evidence must be relied upon to support a conviction), rev’d on other grounds, 870 So. 2d 995 (La. 2004). See generally United States v. Bell, 678 F.2d 547, 549 n.3 (5th Cir. 1982) (en banc) (noting that all of the circuit courts “have abandoned the hypothesis of innocence phraseology”).  

20. We recognize the strength of the observation in the special concurrence in Bell, on which the Court of Appeals in part relied,  

see Garcia, 2004-NMCA-066, ¶ 16, that under some circumstances “a reasonable trier of fact must necessarily entertain a reasonable doubt about guilt.”  

Bell, 678 F.2d at 550 (Anderson, J., specially concurring) (emphasis omitted). In the final analysis, however, we think it is unproductive to try to formulate a standard of appellate review in terms of a hypothesis of innocence, because inevitably it appears to intrude upon the role of the jury. As we shall see in the case before us, the State’s evidence supported reasonable inferences of Defendant’s relationship to the gun that the jury was entitled to draw in finding possession beyond a reasonable doubt.  

21. Given that both Defendant and the driver had equal access to the gun, we agree with the Court of Appeals that the State needed something more than physical proximity to establish Defendant’s control. However, unlike the Court of Appeals, we are persuaded that the State presented sufficient additional evidence to meet its burden.  

See State v. Barber, 2004-NMSC-019, ¶ 28, 135 N.M. 621, 92 P.3d 633 (holding, other than location of the drugs, State presented evidence establishing direct connection between drugs and accused, thereby creating inference of control);  

Bauske, 86 N.M. at 486, 525 P.2d at 413 (finding the defendant guilty of constructive possession of heroin when found in police car, in an eyeglass case left by defendant’s wife, in part because the defendant had fresh needle marks and syringes were found in car they had been traveling in).  

22. The most important link between the gun and Defendant was the ammunition clip. The clip was sizeable, located on top of Defendant’s seat, and Defendant had been sitting on it. The clip was easily accessible to Defendant and arguably more accessible to him than to anyone else. The clip was fully loaded and fit the gun located directly under Defendant’s seat, directly linking the clip to the gun. The clip’s principal value was its potential service to this particular gun. Defendant was clearly exercising control over the clip, arguably an exclusive control, by concealing it under his body where it could be easily retrieved to reload the firearm. Control over the clip gives rise to a fair inference of control over the gun, at least in the particular context of this case.  

23. We acknowledge the presence of additional incriminating evidence. The beer bottle was located in a place so near to the gun under the seat that, arguably, Defendant could have been attempting to use the bottle in an unsuccessful attempt to hide the gun. In addition, his unusually aggressive behavior at the outset might suggest not only knowledge of the gun but also an intent to use it.  

See Morales, 2002-NMCA-052, ¶¶ 30-31 (indicating possession could be inferred from the presence of contraband in the car, located under a floor mat beneath where the defendant was seated, plus evidence of extreme measures taken by the defendant to flee). We
also observe that the driver of the car could have claimed the gun as his own, but did not do so. Cf. State v. Lamothe, 738 So. 2d 55, 57 (La. Ct. App. 1999) (concluding evidence of possession was insufficient when the defendant’s mother testified that she owned the car the defendant was driving, and that she had left the gun under the seat, and that he did not know it was there); Woodall v. State, 627 P.2d 402, 403 (Nev. 1981) (concluding evidence of possession was insufficient when the defendant’s companion acknowledged that the weapon belonged to him, and that the defendant did not know it was present).

(24) However, we must hold that these additional pieces of evidence, though helpful to a reasonable fact-finder, would not have been enough, by themselves, to prove control. Instead, the ammunition clip tips the balance in favor of the verdict. Unlike the Court of Appeals, we conclude that this one critical piece of evidence, the ammunition clip, was enough to create an inference of both knowledge and control, particularly when embellished by all the other pieces of incriminating evidence. Put another way, focusing on the presence of the ammunition clip, we conclude that the evidence, viewed most favorably to the State, necessarily does not support any “reasonable hypothesis of innocence,” even though, as we have said earlier, the State’s burden no longer extends that far after Brown.

(25) Other states have determined there was sufficient evidence of constructive possession of a firearm by a felon based on similar facts, specifically with more than one person in the car. See, e.g., United States v. Gorman, 312 F.3d 1159, 1164 (10th Cir. 2002) (holding sufficient connection or nexus existed between the defendant and a gun in a case of non-exclusive possession because the gun was found under the defendant’s seat, was visible and retrievable by defendant, and a magazine of ammunition was hidden in the seat cover); State v. Armentor, 649 So. 2d 1187, 1189-90 (La. Ct. App. 1995) (finding sufficient evidence to support a conviction based on constructive possession when a pistol was found under the passenger seat where the defendant had been seated and fifteen to twenty rounds of ammunition, which matched the pistol, were found in the defendant’s pants pocket); Green v. State, 489 P.2d 768, 768 (Okla. Crim. App. 1971) (holding conviction for possession was supported by sufficient evidence when a firearm was found under the passenger seat where the defendant had been sitting, and the arresting officer observed the defendant trying to place something in the glove compartment which, when searched, yielded an ammunition clip matching the gun under the seat). We cite these cases for illustrative purposes only. We need not adopt their rationale as our own given the presence in this case of evidence, in addition to location, so incriminating to Defendant.

Legality of the Search

(26) Defendant argues that the warrantless search of the car was unconstitutional under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. Defendant challenges only the legality of the search regarding the beer bottle. However, because we reverse the Court of Appeals and affirm the sufficiency of the evidence to convict Defendant for possession of a firearm, the legality of the search and resulting seizure of that firearm is necessarily at issue. In the interest of judicial economy, we decide these similarly situated issues together.

(27) At trial, Defendant filed a motion to suppress the evidence found during the search of the car. The parties agreed to conduct an evidentiary hearing concurrently with the trial. A motion to suppress evidence is a mixed question of law and fact. A motion to suppress evidence and then we review the legal analysis de novo. Id. Since the trial court is in a better position to judge the credibility of witnesses and resolve questions of fact, the factual analysis should be viewed in a light favorable to the prevailing party. Id. ¶ 18.

(28) Defendant argues the search was unconstitutional because there were no exigent circumstances to justify a search without a warrant. Defendant points out that both he and the driver were already handcuffed and detained at the time the car was searched. Officer Hatch testified there was time to get a warrant, and conceded they did not attempt to attain consent to search the car because they believed it was legal to seize an object in plain view.

(29) The plain view doctrine generally allows an officer to seize an object in plain view, but only when the officer is legally allowed to be in the location from which the object can be seen. State v. Williams, 117 N.M. 551, 555-56, 874 P.2d 12, 16-17 (1994). In this case, the officer saw the gun in plain view from outside the car as the driver was being given a traffic citation, thus the requirements of the plain view doctrine were met. However, even with an object in plain view, an officer may not enter the car and seize the object, without either consent, a warrant, or exigent circumstances. See State v. Gomez, 1997-NMSC-006, ¶¶ 33-46, 122 N.M. 777, 932 P.2d 1; Campos v. State, 117 N.M. 155, 159, 870 P.2d 117, 121 (1994); State v. Jones, 2002-NMCA-019, ¶¶ 11-14, 131 N.M. 586, 40 P.3d 1030. New Mexico law departs from federal precedent on this issue. Gomez, 1997-NMSC-006, ¶ 35. Federal precedent allows for searches and seizures from a car without a warrant based on a bright line automobile exception to the warrant requirement.

(30) The State argues that exigent circumstances were present. Exigent circumstances are defined as “an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property.”” Id. ¶ 39 (quoting State v. Copeland, 105 N.M. 27, 31, 727 P.2d 1342, 1346 (Ct. App. 1986)). New Mexico courts have allowed police officers, while conducting an investigatory stop, to carry out a limited search of the car for weapons, if the officer has a reasonable belief the suspect may be armed and dangerous. State v. Arredondo, 1997-NMCA-081, ¶ 15, 123 N.M. 628, 944 P.2d 276, overruled on other grounds by State v. Steinzig, 1999-NMCA-107, ¶ 29, 127 N.M. 752, 987 P.2d 409; State v. Flores, 1996-NMCA-059, ¶¶ 17-18, 122 N.M. 84, 920 P.2d 1038. The circumstances leading to the search must be viewed objectively to determine whether the officer reasonably believed exigent circumstances existed, or whether a reasonable police officer could have believed so. State v. Pierce, 2003-NMCA-117, ¶ 15, 134 N.M. 388, 77 P.3d 292.

(31) As the Court of Appeals correctly emphasized, there must be a reasonable suspicion the suspect is both armed and dangerous. Garcia, 2004-NMCA-066, ¶ 28. An individual in a car with a weapon, by itself, does not create exigent circumstances. In New Mexico it is lawful for a non-felon to carry a loaded handgun “in a private automobile or other private means of conveyance.”” Id. (quoting NMSA 1978, § 30-7-2(A)(2) (2001)); see also N.M. Const. art. II, § 6 (protecting the right to bear arms). Because of that, “it would
be anomalous to treat the mere presence of a firearm in an automobile as supporting a reasonable suspicion that the occupants are inclined to harm an officer in the course of a routine traffic stop.” Garcia, 2004-NMCA-066, ¶ 28. Our courts have also held that an admission regarding the presence of a firearm in the car, on its own, is not sufficient to justify further detention of a motorist. In re Forfeiture of ($28,000.00), 1998-NMCA-029, ¶ 17, 124 N.M. 661, 954 P.2d 93. Therefore, the State was required to show more than just the presence of a gun in the car before the officers could seize it without a warrant.

{32} In this instance, we agree with the Court of Appeals that the State presented such additional evidence. Defendant’s aggressive behavior at the inception of the traffic stop, and his initial refusal to return to the car, led to a reasonable belief that Defendant might be dangerous, thereby causing Officer Hatch to draw his weapon almost at the outset. When the officer later saw the gun, he was entitled to a reasonable suspicion that Defendant was both armed and dangerous. The officers searched the car and seized the gun, not as evidence of a crime, but in a reasonable effort to secure the scene. Under these facts, the officers were entitled to a reasonable, limited search of the car for weapons, even after the suspects had left the car. Arredondo, 1997-NMCA-081, ¶ 17 (“We believe that a limited vehicle search for weapons when an officer reasonably believes he may be in danger comports with Article II, Section 10 of the New Mexico Constitution . . . .”).

{33} Although Officer Hatch searched the car under the mistaken belief that the plain view doctrine permitted him to do so, he also testified that he drew his gun due to Defendant’s behavior and detained them both because of his concern for officer safety. We may uphold a search or seizure if the facts known to the officer, viewed objectively, would provide valid constitutional grounds for the officer’s actions, even though the officer subjectively relied on a legally insufficient theory. State v. Vargas, 120 N.M. 416, 418, 902 P.2d 571, 573 (Ct. App. 1995).

{34} Finally, Defendant also challenges the district court’s failure to suppress evidence, the beer bottle found under Defendant’s seat, which resulted in an open container conviction under Section 66-8-138. The Court of Appeals affirmed the district court’s decision, finding that Defendant’s admission to drinking was the fruit of a lawful entry into the car to seize the firearm. We agree and affirm Defendant’s conviction for that offense as well.

CONCLUSION

{35} We reverse the Court of Appeals sufficiency-of-the-evidence determination and reinstate Defendant’s conviction for being a felon in possession of a firearm. We affirm the Court of Appeals opinion upholding the open container conviction.

{36} IT IS SO ORDERED.

RICHARD C. BOSSON,
Chief Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHAVEZ, Justice
OPINION

PATRICIO M. SERNA, JUSTICE

1. Defendant Richard Lopez was charged with trafficking cocaine, possession of marijuana, possession of drug paraphernalia, and forfeiture of cash. Pursuant to a plea bargain, the State reduced the first charge and dropped the remaining charges. As a result, Defendant pleaded no contest to possession of cocaine, reserving the right to appeal the district court's denial of his suppression motion. The district court granted a conditional discharge, requiring eighteen months of probation. The Court of Appeals reversed the trial court's denial of Defendant's motion to suppress, concluding that the police officers violated the knock and announce rule, and reserved the right to appeal the district court's denial of his suppression motion. The district court granted the State's petition for writ of certiorari. We reverse the Court of Appeals and affirm the district court.

2. The police officers obtained a search warrant for a mobile home in Lincoln County that authorized seizure of illegal and/or stolen firearms, controlled substances, and distribution equipment. The warrant was based on the allegation that a resident of the house, Ramon Sanchez, was involved in the sale of illegal drugs and that he “has/sells stolen firearms to include fully automatic Mini-14’s and sawed-off shotguns.” A confidential informant provided the basis for the information in the warrant and had been present at the residence within the past few days. Defendant had a room in the house. Police officers had conducted prior surveillance. The officers expected to find between two and four people in the residence.

3. The officers, wearing uniforms or vests that identified them as law enforcement, executed the warrant at approximately 3:00 p.m. Four officers knocked and announced their presence, identity, and purpose. Another group of officers was positioned at the other side of the residence with directions to cover the other door. The officers did not hear anything from inside the residence following their knocking. Approximately three seconds after knocking and announcing, the officers opened the unlocked door and entered the residence. While entering the home, the officers continued to announce and identify themselves, stating that they had a search warrant.

4. The officers found Sanchez coming out of the bathroom and Defendant in his bedroom with the door closed. A loaded Ruger Mini-14 was in Defendant’s bedroom closet, and the closet door was open. Defendant was arrested. The police officers found thirty-three marijuana plants, distribution equipment, and paraphernalia. They seized the Ruger Mini-14, thirty-three boxes of ammunition, a plastic bag containing a substance that field-tested positive for cocaine, a green leafy substance in a plastic container, and a digital scale from Defendant’s bedroom, as well as $513 in cash in his pocket.

5. Defense counsel moved to suppress the evidence, arguing that the officers failed to satisfy the requirements of the knock and announce rule because they did not wait long enough after knocking. Defense counsel also asserted that there was insufficient evidence that the residents of the home were violent or were going to use the firearms. The prosecutor argued that the officers had reliable information that the resident was a drug and weapons dealer or was in possession of weapons, which created the factual basis for the officers of a risk of danger justifying a quick entry for their safety. The district judge denied Defendant’s motion to suppress, deciding “[f]or the reasons set forth by the State of New Mexico, I am going to find that the three (3) seconds was adequate time in which to knock and announce because of the exigent circumstances of the reasonable suspicion of firearms being within the house.”

6. Defendant raised two issues in the Court of Appeals: first, he argued that the police officers had violated the knock and announce rule, and second, he argued that the affidavit did not provide sufficient information to establish the confidential informant’s credibility and reliability. The Court of Appeals reversed the district court’s denial of Defendant’s motion to suppress on the first issue and did not reach the second claim. The Court of Appeals concluded that the three-second wait did not satisfy the requirement that the police officers wait a reasonable time before entering and noted that the wait was “not a reasonable amount of time . . . to allow a person to react to a knock and announce and get up from a chair to answer the door.”

7. Defendant appears to argue to this Court that the basis of the warrant was not sufficient to support the presence of weapons in the

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1 We note that the Court of Appeals stated that Defendant pleaded guilty to possession of cocaine, possession of marijuana, possession of drug paraphernalia, and forfeiture.
Defendant contends that there was only probable cause for illegal drugs. Defendant also appears to rely on the items actually found by police, rather than the items listed in the warrant. The State argues that Defendant erroneously describes the record when he claims that there was a mere assertion that firearms were in the residence, attempting to argue that there was insufficient evidence showing the informant’s basis of knowledge regarding the existence of firearms at the residence. The State contends that the issue regarding the informant is not before the Court because Defendant did not file a petition for certiorari on this issue, and that, even if Defendant had done so, that issue was not raised in the Court of Appeals. Thus, the State argues that the latter arguments are not before the Court because Defendant did not file a petition for certiorari on this issue. The State contends that the issue regarding the informant is not before the Court because Defendant did not file a petition for certiorari on this issue. The State contends that the issue regarding the informant is not before the Court because Defendant did not file a petition for certiorari on this issue.

whether the district court properly denied Defendant’s motion to suppress based on a finding that partial compliance with the knock and announce rule was excused because of exigent circumstances.

II. Discussion

[8] In State v. Attaway, 117 N.M. 141, 150, 870 P.2d 103, 112 (1994), this Court held that law enforcement officers are required to knock and announce their identity and purpose prior to executing a search warrant. However, “[w]e expressly endorse[d] the widely accepted, general exception to the rule of announcement based on an officer’s objectively reasonable belief that full or partial compliance with the rule of announcement would increase the risk of danger to the officers effectuating the warrant.” Id. at 151, 870 P.2d at 113.

A. Standard of Review

[9] “The standard of review for suppression rulings is whether the law was correctly applied to the facts, viewing them in a manner most favorable to the prevailing party.” State v. Jason L., 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856 (quotation marks and quoted authority omitted). “[A] trial court is to be given wide latitude in determining that an historical fact has been proven.” Attaway, 117 N.M. at 144, 870 P.2d at 106. The appellate court reviews “these purely factual assessments” for substantial evidence, id., and “[t]he appellate court must defer to the district court with respect to findings of historical fact so long as they are supported by substantial evidence.” Jason L., 2000-NMSC-018, ¶ 10. “[A]ll reasonable inferences in support of the [district] court’s decision will be indulged in, and all inferences or evidence to the contrary will be disregarded.” Id. (quotation marks and quoted authority omitted) (alteration in original); accord State v. Vargas, 1996-NMCA-016, ¶ 8, 121 N.M. 316, 910 P.2d 950. Thus, we must draw all reasonable inferences in support of the district court’s denial of Defendant’s motion to suppress and defer to the district court’s determination of the facts.

[10] The United States Supreme Court has expressed that neither the language of the Fourth Amendment nor the Court’s precedent require specification in the search warrant of the manner in which the warrants must be executed. “On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by a warrant—subject of course to the general Fourth Amendment protection against unreasonable searches and seizures.” Dalia v. United States, 441 U.S. 238, 257 (1979) (footnote omitted). The Supreme Court “held that the common law knock-and-announce principle is one focus of the reasonableness inquiry,” and that “although the standard generally requires the police to announce their intent to search before entering closed premises, the obligation gives way when officers have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or . . . would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.” United States v. Banks, 540 U.S. 31, 36 (2003) (quotation marks and quoted authority omitted) (omission in original). Thus, we measure an officer’s reasonable suspicion under a reasonable suspicion standard.

“[T]his standard—as opposed to a probable cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.” Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (rejecting a blanket rule that any warrant pertaining to a drug investigation would automatically constitute exigent circumstances, and holding that it was reasonable for officers to force open a hotel room door without announcement because the officers had a reasonable suspicion that the occupant might destroy evidence once he knew of their presence). The reasonable suspicion “showing is not high, but the police should be required to make it whenever the reasonableness of a no-knock entry is challenged.” Id. 394-95. We require specific, articulable facts, together with reasonable inferences therefrom, as a basis for concluding that “the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.” Id. at 394. “A de novo standard of review is applied to the ultimate determination of whether the facts constitute exigent circumstances sufficient to make a no knock entry reasonable under the Fourth Amendment.” United States v. Cooper, 168 F.3d 336, 339 (8th Cir. 1999).

[11] Whether exigent circumstances existed to excuse compliance with the knock-and-announce rule is a mixed question of law and fact. Attaway, 117 N.M. at 144-45, 870 P.2d at 106-07. As Defendant argues, and consistent with federal law as discussed above, we review the district court’s determination of exigency de novo. Id. at 145-46, 870 P.2d at 107-08 (“[W]e conclude that the mixed question involved in determining exigency lies closest in proximity to a conclusion of law, and hold that such determinations are to be reviewed de novo.”). In determining whether exigent circumstances existed, the appellate court must “weigh underlying policy considerations, and . . . balance competing legal interests,” specifically between the safety of law enforcement officers and Fourth Amendment privacy interests. Id. at 145, 870 P.2d at 107 (quotation marks and quoted authority omitted). This Court reviews de novo the balance between the degree of intrusion and the risk to officer safety. See Jason L., 2000-NMSC-018, ¶ 14.

[12] “In reviewing the risk of peril exception we follow . . . an objective test of whether, under the facts established, a reasonable, well-trained, and prudent police officer would believe that full or partial compliance with the rule of announcement would create or enhance the danger to the entering officers.” Attaway, 117 N.M. at 153, 870 P.2d at 115; accord State v. Ortega, 117 N.M. 160, 162, 870 P.2d 122, 124 (1994) (stating that an appellate court reviews “the sufficiency of exigent circumstances by determining whether a reasonable, well-trained, and prudent police officer could conclude that swift action was necessary”) (quotation marks and quoted authority omitted). The appellate court must “consider all of the circumstances as found or impliedly found by the trial court to be present at the time of entry.” Attaway, 117 N.M. at 153, 870 P.2d at 115.

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B. The Exigency Exception to the Knock and Announce Rule

{13} In *Attaway*, this Court stated that “[g]eneral knowledge regarding the propensity of armed drug dealers is not sufficient to excuse compliance with announcement requirements,” and that the police officers must “have knowledge of the specific individual’s propensity to use violence before an announced entry would be considered reasonable.” 117 N.M. at 152, 870 P.2d at 114. “The requirement of specificity [regarding law enforcement’s knowledge of the specific individual’s propensity to use violence] is to be liberally construed because direct evidence of a suspect’s propensity rarely will be available.” *Id.* The Court in *Attaway* set out three examples of specific evidence that might support the inference that a particular suspect presents a danger to police officers:

knowledge that a suspect owns weapons and knowledge that the suspect has committed a crime of violence. . . [:] knowledge that the suspect possesses a large cache of illegal or unusually dangerous weapons[,] or [knowledge] that the suspect possesses weapons coupled with other circumstances tending to show violent or unpredictable behavior.

*Id.* at 152-53, 870 P.2d at 114-15. We concluded that such knowledge of any of these factors “may be sufficient to reasonably conclude that the suspect is likely to use those weapons.” *Id.* at 153, 870 P.2d at 115.

{14} The State argues that the facts of this case meet the *Attaway* example of an inference that a suspect who possesses a large cache of illegal or unusually dangerous weapons presents a danger to police officers. The State argues that it can be reasonably inferred that a weapons dealer possesses “a large cache” of weapons, and that the weapons involved, fully automatic Mini-14’s and sawed-off shotguns, were “illegal or unusually dangerous.” Defendant argues that in *Attaway*, 117 N.M. at 153, 870 P.2d at 115, police officers knew that the defendant had a conviction for a weapons offense, had an outstanding warrant from another state, “possessed a large arsenal of weapons including an automatic weapon, two sawed-off shotguns, a couple of rifles, and numerous handguns,” and “had threatened police officers.” In contrast, Defendant contends that the officers in his case lacked knowledge regarding the occupants’ propensities or such specific information about their behavior or conduct. While we agree that the facts in the present matter are not as overwhelming as the facts of *Attaway*, we also agree with the State that we did not hold the facts in *Attaway* to be a minimum necessary to support exigency.

{15} In the present matter, the Court of Appeals, relying on *Attaway*, concluded that “a suspicion of trafficking drugs and of possessing weapons, as presented in the affidavit in this case, does not excuse the failure to satisfy the knock and announce rule.” The Court of Appeals recognized the “large cache” example in *Attaway* but concluded that a specific finding by the trial court to that effect was necessary.

{16} Although the State reasonably argues that the facts of the present case fall within *Attaway’s* example of a large cache of illegal or unusually dangerous weapons, we are concerned that the illustrations in *Attaway* have been incorrectly viewed as an inflexible test requiring particular findings by the trial court rather than as mere examples of specific evidence that support the inference of a violent propensity. The examples are not an exhaustive list of facts that must be explicitly or implicitly found by the trial court; they are simply a few instances of specific evidence supporting the inference. We developed these examples, weapons plus a violent criminal history, possessing a large cache of weapons, and weapons in addition to other circumstances that demonstrate a violent behavior, for illustrative purposes, not, as they have been incorrectly viewed, as self-contained categories to be strictly applied. We believe that these examples, when viewed under the totality of the circumstances of the facts of a case, can continue to be, as we intended in *Attaway*, illustrations of specific evidence that may support an inference of a violent propensity. Thus, if as viewed under the totality of the circumstances of a case, officers have knowledge that a suspect has a violent criminal history and possesses firearms, a court may conclude that an exigency is present. In fact, the knowledge of multiple Mini-14’s and sawed-off shotguns in the present case could reasonably be viewed as a large cache of illegal or unusually dangerous weapons that support an inference that a suspect has violent propensities under the totality of the circumstances. Nonetheless, we wish to clarify that the facts of this case or any exigency case should not be pigeonholed into a set category; instead, each case must be viewed under the totality of the circumstances present.

{17} However, aside from these general examples in *Attaway*, we incorrectly created a bright line rule that the suspicion of drug trafficking and the presence of firearms is always insufficient to constitute an exigency. The Court of Appeals did not engage in the required review of the totality of the circumstances present in this case; rather, the Court instead applied what we view as this bright line test or blanket rule from *Attaway* that the suspicion of drug trafficking and presence of firearms alone is insufficient. The arguments of the parties, as well as the strict application of *Attaway* by the Court of Appeals, lead us to the conclusion that it is necessary to revisit the bright line rule of *Attaway* that concluded that the presence of firearms and illegal drugs is never sufficient to justify an exigency. We agree with the United States Supreme Court that blanket exceptions as well as bright line rules are to be avoided in the analysis of these types of cases.

Although the notion of reasonable execution must . . . be fleshed out, we have done that case by case, largely avoiding categories and protocols for searches. Instead, we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones. *Banks*, 540 U.S. at 35-36.

{18} Therefore, we wish to clarify *Attaway*. We stated that “[g]eneral knowledge regarding the propensity of armed drug dealers is not sufficient to excuse compliance with announcement requirements,” *Attaway*, 117 N.M. at 152, 870 P.2d at 114, which, in the context of the discussion of that case, has been rightly interpreted to mean that evidence of drugs and weapons is insufficient to support an inference of violent propensity justifying exigency. We discussed and rejected a case from another jurisdiction that concluded that, because “guns are tools of the illegal drug trade and . . . a person in possession of both firearms and large quantities of illegal drugs
posses a significant threat to the safety of law enforcement officers,” the “presence of firearms and drugs together give rise to exigent circumstances because of the violence associated with drug trafficking today.” Id. (quotation marks and quoted authority omitted). As Defendant recognizes, Attaway did not involve the mere presence of weapons and the sale of illegal drugs; rather, the officers in that case had reasonable suspicion that Attaway was a “dealer of substantial quantity,” that he had an outstanding California warrant for his arrest, that he had previously been convicted of weapons and drug charges, that he possessed “a large arsenal of weapons,” and that he had actually threatened police officers. Id. at 153, 807 P.2d at 115. With this wealth of evidence, it was not difficult to reach our conclusion that the officers’ manner of entry and execution of the warrant were reasonable. More importantly, the discussion of the presence of weapons and the allegation of drug dealing alone as insufficient to support the finding of a violent propensity was dicta and contained in a plurality opinion.

{19} Given the case before us, where the officers had a reasonable suspicion that the occupant was involved in the sale of illegal drugs and in possession of multiple weapons such as sawed-off shotguns and Mini-14’s, we disavow this dicta and conclude that, as discussed further below, the presence of weapons and the sale of illegal drugs may, when viewed under the totality of the circumstances, equal an exigency justifying an exception to the knock and announce rule. We agree with the special concurrence in Attaway, which cautioned the Court to consider “the factual realities of today’s drug trade.” Id. at 155, 807 P.2d 117 (Baca, J., specially concurring). The special concurrence noted that drug trafficking places law enforcement officers in extreme danger, and concluded that “it may be requiring too much to insist that officers executing a warrant for large quantities of illegal drugs and large quantities of firearms from suspected drug dealers should specifically know of the suspects’ violent propensity before executing a . . . warrant” under the exigency exception to the announcement rule. Id. accord United States v. Kennedy, 32 F.3d 876, 882 (4th Cir. 1994) (“[T]he law has uniformly recognized that substantial dealers in narcotics possess firearms and that entrance into a situs of drug trafficking activity carries all too real dangers to law enforcement officers.”) (quotation marks and quoted authority omitted). Other jurisdictions, under the totality of the circumstances, have affirmed the exigency exception to peril officers when faced with suspects involved in the sale of drugs and the possession of firearms. E.g., United States v. Stowe, 100 F.3d 494, 499 (7th Cir. 1996) (“While the presence of a gun alone is not necessarily enough, drug dealing is a crime infused with violence. The police rightfully feared a possible gun fight. Guns and drugs together distinguish the millions of homes where guns are present from those housing potentially dangerous drug dealers—an important narrowing factor.”) (citation omitted); State v. Wasson, 615 N.W.2d 316, 321 (Minn. 2000) (en banc) (affirming a no-knock entry where the officers had the articulable facts of the sale of drugs and presence of weapons that supported a reasonable suspicion that knocking and announcing entry would be dangerous); White v. State, 155 S.W.3d 927, 928 (Tex. App. 2005) (recognizing that “precedent has long acknowledged the link between drugs, guns and violent behavior” and affirming an execution of a warrant where, following no or partial compliance with the knock and announce rule, the officers believed that the suspect possessed methamphetamine and firearms).

{20} “[I]n each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.” Richards, 520 U.S. at 394. Rather than pigeonholing the facts of the present matter into our dicta in Attaway, we instead must consider the totality of the circumstances present at the time of entry, as found or impliedly found by the trial court, in relation to whether a law enforcement officer would have a reasonable suspicion that compliance with the knock and announce rule would create or enhance the danger to the entering officers.

C. Application of the Exigency Exception

{21} The State argues that, under the totality of the circumstances, the police officers had a reasonable suspicion that waiting to enter the residence would have increased the threat to their safety because the search involved exigent circumstances due to the availability of multiple sawed-off shotguns and Mini-14’s inside the residence. The State asserts that the Court of Appeals’ analysis was inconsistent with the proper standard of review because it failed to indulge in all reasonable inferences in favor of the district court’s ruling. See Jason L., 2000-NMSC-018, ¶ 10. The State contends that the Court of Appeals failed to apply the proper standard when it concluded that “the trial court did not find, nor did the State argue below, that the residence at issue contained a ‘large cache’ of illegal or dangerous weapons.” The State argues that the Court of Appeals erroneously required the State, in whose favor the district court ruled, to have argued that there was a “large cache” of weapons and effectively required the district court to make this specific finding. We agree. We have previously held that explicit findings are not required and that the reviewing court indulges in all reasonable presumptions in favor of the trial court’s ruling. Jason L., 2000-NMSC-018, ¶ 11.

{22} Our example in Attaway concerning a suspect who possesses a large cache of illegal or unusually dangerous weapons did not require a specific finding to this effect. Rather, we were setting out examples of specific evidence that can support an officer’s inference that a suspect has a propensity for violence to justify an exception to the knock and announce rule because “direct evidence of a suspect’s propensity rarely will be available.” Attaway, 117 N.M. at 152, 870 P.2d at 114. We explicitly concluded that, when reviewing the reasonableness of partial compliance with the knock and announce rule, we “consider all of the circumstances as found or impliedly found by the trial court to be present at the time of entry.” Id. at 153, 870 P.2d at 115 (emphasis added). We further noted with approval a case from another jurisdiction that upheld a search following a brief announcement period where the suspect had “‘an array of firearms.’” Id. at 154, 870 P.2d at 116 (quoted authority omitted). “The fact that another district court could have drawn different inferences on the same facts does not mean this district court’s findings were not supported by substantial evidence.” Jason L., 2000-NMSC-018, ¶ 10; accord Attaway, 117 N.M. at 153, 870 P.2d at 115. Here, as in many other cases, the district court did not make specific findings of fact; thus, “we must draw from the record to derive findings based on reasonable facts and inferences and determine whether those facts and inferences support the conclusion reached by the court.” Attaway, 117 N.M. at 153, 870 P.2d at 115, accord Jason L., 2000-NMSC-018, ¶ 11 (noting that a lack of findings of fact from the district court is “a regular occurrence” and that the appellate court “indulge[s] in all reasonable presumptions in support of the district court’s ruling”) (quotation marks and quoted authority omitted). As determined by our standard of review, we agree with the State that, since the district court ruled that there were exigent circumstances, this Court must view the facts in the light most favorable to that ruling and indulge in all reasonable inferences in favor of the district.
court’s ruling. Thus, we accept, based on reasonable inferences, the district court’s determination that the affidavit’s statement that the occupant “has/sells stolen firearms to include fully automatic Mini-14’s and sawed off shotguns” meant that the occupant had multiple weapons of this type in his possession. We take this fact into consideration in determining whether exigent circumstances existed under the totality of the circumstances.

{23} The State argues that the three-second wait should be measured by how long it would take drug dealers in possession of automatic weapons to arm themselves rather than, as the Court of Appeals concluded, the time it would take a person to get up and answer the door. We agree that the appropriate length of time should not be based on the time it takes for one to respond and open the door in the context of exigent circumstances. “[T]he police claim exigent need to enter, and the crucial fact in examining their actions is not time to reach the door but the particular exigency claimed.” Banks, 540 U.S. at 40. In Banks, the Supreme Court rejected the defendant’s argument that a fifteen to twenty second time was too short a period to allow him to respond to the knock and answer the door, and concluded that “when circumstances are exigent because a pusher may be near the point of putting his [or her] drugs beyond reach, it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter.” Id. Thus, in the present matter, we view the officers’ actions in terms of the exigency at issue, the time it would take for occupants to retrieve “fully automatic Mini-14’s and sawed-off shotguns” in order to arm themselves. We note that, if there are exigent circumstances, the officers can altogether dispense with the knock and announce rule or partially comply by knocking and announcing their identity and purpose before forcible entry, leaving the decision to the officers’ judgment based on their experience. Attaway, 117 N.M. at 151, 870 P.2d 113 (stating that, in a case involving the exigency of peril to officers, “partial compliance or non-compliance with the rule of announcement may be excused”); Ortega, 117 N.M. at 163, 870 P.2d at 125 (holding “that if an officer has good reason to believe that evidence will be destroyed, that officer is justified in making an unannounced entry into a person’s residence”).

{24} Defendant argues that Attaway requires that the officers have knowledge of the suspects’ violent propensities and that, in the present matter, “the officers knew nothing of the occupants’ propensities.” While we agree that Attaway requires “knowledge of the specific individual’s propensity to use violence,” we also concluded that “direct evidence” “rarely will be available,” thus necessitating liberal construction of this specificity requirement and allowing evidence which gives rise to an inference of an individual’s propensity, as discussed above. 117 N.M. at 152, 870 P.2d at 114. The State contends that the district court could have reasonably found that a suspect who deals not only in drugs but also in weapons is likely to use those weapons to protect his or her inventory as well as prevent his or her capture with that evidence. The State notes that Defendant, during the hearing, argued that the mere presence of guns was not sufficient without a finding of propensity to resort to violence, and that this Court could thus presume that the district court found such a propensity by finding in favor of the State.

{25} We agree that the district court’s ruling reasonably supports a finding of propensity based on the officers’ belief that there were two to four individuals at the residence with access to multiple firearms. In the present case, the officers believed that the occupants, including an alleged drug dealer, had weapons consisting of “fully automatic Mini-14’s and sawed-off shotguns.” The specific, articulable facts in the present matter of multiple “fully automatic Mini-14’s and sawed-off shotguns,” as well as the allegation that the resident was a drug dealer, viewed in light of the surrounding circumstances, was the basis for the officers’ reasonable suspicion that the occupants had a propensity for violence and justified the exigency exception to the announcement rule.

{26} In Attaway, this Court concluded that the knock and announce rule has at least three purposes: preventing the needless destruction of property, protecting “both the occupant and police from the possible violent response of a startled occupant suddenly confronted with an unannounced entry by an unknown person,” and protecting “the sanctity of the home and individual privacy.” Attaway, 117 N.M. at 147, 870 P.2d at 109. The State observes that, in the present matter, there was no destruction of property because the officers opened the unlocked door and entered the residence, while continuing to announce their identity and purpose. Because the officers wore clearly marked vests and repeatedly announced their identity, the second purpose, protecting against a violent response from a startled occupant suddenly confronted with unannounced entry by unknown people, was also served. The State also contends that the Court of Appeals erroneously focused only on the protection of the privacy interest without consideration of the legitimate interest of police safety, the factor upon which the district court based its ruling. We agree that a reviewing court must consider the issue of officer safety. “The right of the officers to enter the premises matures the moment a detached and neutral judicial officer determines that there is probable cause to search the premises. From that moment, governmental interests in the expeditious and safe execution of a search warrant are legitimate and strong.” Id. at 151, 870 P.2d at 113. As noted above, we specifically endorse the general exception to the rule of announcement based on the officer’s objectively reasonable belief that full or partial compliance with the rule would increase the risk of danger to the officers executing the warrant. Id. at 151, 870 P.2d at 113. Regarding the balance between the degree of intrusion and the risk to officer safety, the State argues that the privacy intrusion was not relatively high because the warrant was executed in the middle of the day, when most people are awake, and that it would be difficult to choose a time which is less invasive. We agree. Cf. id. at 143, 870 P.2d at 105 (upholding forcible entry by officers executing the warrants at 6:00 a.m. on a Saturday morning). The State contends that the threat to officer safety was very significant. Based on the presence of multiple firearms and the allegation of drug dealing where the officers are executing a warrant on a residence, we agree. See generally Maryland v. Buie, 494 U.S. 325, 333 (1990) (“The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. . . . [A]n in-home arrest puts the officer at the disadvantage of being on his [or her] adversary’s ‘turf.’ An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.”). “[T]he essential and difficult question raised by this balancing is how much risk police officers can reasonably be expected to assume before disregarding the rules society has adopted to otherwise circumscribe the exercise of their considerable discretionary authority in carrying out their vital law enforcement duties.” Attaway, 117 N.M. at 145, 870 P.2d at 107 (quotation marks and quoted authority omitted).

We agree that, under the factual circumstances of this case, the degree of intrusion, the execution of a warrant in the late afternoon, balanced against the threat to officer safety, officers executing a warrant involving an alleged drug dealer believed to be in possession
of automatic weapons and sawed-off shotguns, weighs in favor of the safety of law enforcement.

{27} “In New Mexico, the ultimate question in all cases regarding alleged search and seizure violations is whether the search and seizure was reasonable.” Attaway, 117 N.M. at 149, 870 P.2d at 111. “An otherwise legal search pursuant to a warrant is not made unreasonable by an unannounced entry when privacy and occupant safety interests are minimal and the interests of law enforcement are strong.” Id. at 151, 870 P.2d at 113. Under the facts of this case, “[t]he state’s interests in safe execution of a warrant, when coupled with specific knowledge that the occupants of the place to be searched pose a serious risk to the officers, outweigh the occupants’ interests in privacy of the home.” Id. at 152, 870 P.2d at 114.

Absent exigency, the police must knock and receive an actual refusal or wait out the time necessary to infer one. But in a case like this, where the officers knocked and announced their presence, and forcibly entered after a reasonable suspicion of exigency had ripened, their entry satisfied . . . the Fourth Amendment, even without refusal of admittance. Banks, 540 U.S. at 43. The information in the affidavit provided the officers with the information that the occupant was an alleged drug dealer and had multiple fully automatic Mini-14’s and sawed-off shotguns, supporting the officers’ reasonable suspicion that the occupants presented a serious risk and that compliance with the announcement rule was excused.

III. Conclusion

{28} We disapprove of bright line rules delineating reasonableness in knock and announce cases involving the exigency exception. When addressing an exigency issue related to the knock and announce rule, an appellate court must consider the totality of the circumstances present at the time of entry, as found or impliedly found by the trial court, in relation to whether a reasonable officer would believe that compliance with the announcement rule would create or enhance the danger to the entering officers. In the present matter, we conclude that the district court properly found that the officers reasonably suspected a risk of danger and thus correctly concluded that they were entitled to enter without fully complying with the announcement rule. The law enforcement officers’ reasonable suspicion was based on information that the resident was an alleged drug dealer that possessed and sold multiple fully automatic Mini-14’s and sawed-off shotguns at the residence, the time of day the warrant was executed, and their knowledge that there would be two to four individuals inside who could use the weapons against them. We again emphasize that these specific facts are not minimum factors that must be met for a finding of exigency; rather, a reviewing court must look at the totality of the circumstances of the case before it. Under our liberal construction regarding specific evidence supporting an inference of the occupants’ propensity for violence, viewing this evidence in the light most favorable to the district court’s ruling, and considering our concern for police safety when executing warrants, we affirm the court’s decision that the officers faced a serious risk justifying an exception to the knock and announce rule. We affirm the district court and reverse the Court of Appeals on this issue. We remand this case to the Court of Appeals to address Defendant’s argument concerning whether the affidavit provided sufficient information to establish the informant’s credibility and reliability.

{29} IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR.
RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
OPINION

PATRICIO M. SERNA, JUSTICE

{1} Following a jury trial, Defendant Freddie Rodriguez was convicted of tampering with evidence, in violation of NMSA 1978, § 30-22-5 (1963, prior to 2003 amendment), conspiracy to commit tampering with evidence, in violation of NMSA 1978, § 30-28-2 (1979), theft of a credit card, in violation of NMSA 1978, § 30-16-26 (1971), and contributing to the delinquency of a minor, in violation of NMSA 1978, § 30-6-3 (1990). On appeal to the Court of Appeals, Defendant argued that his convictions violated the constitutional protection against double jeopardy. Specifically, he argued that, following an initial proceeding in municipal court, the present matter involved an impermissible second prosecution for the same offense. The Court of Appeals affirmed by memorandum opinion and relied in part on an exception to double jeopardy adopted by this Court, the jurisdictional exception. We granted Defendant’s petition for writ of certiorari to the Court of Appeals to reconsider our continued application of the jurisdictional exception. We limit the application of the jurisdictional exception in New Mexico but affirm Defendant’s convictions.

{2} On May 2, 1999, a sixteen-year-old female, Defendant’s girlfriend, stole a purse out of a truck parked at a restaurant. She joined Defendant, and both of them ran away from the truck. Defendant removed a wallet from the purse before discarding it. The wallet contained five one-dollar bills and some credit cards. When the police recovered the wallet, which had been hidden in some rocks, the money was missing. The police found Defendant and his girlfriend hiding at his mother’s house. Defendant had five one-dollar bills in his possession.

{3} Two days after his arrest, on May 4, 1999, Defendant pleaded no contest in municipal court to charges of accessory (unspecified) and resisting or obstructing an officer. A booking form listed Defendant as having been arrested for the crimes of accessory to larceny and obstructing an officer. The district attorney’s office was unaware of the municipal court proceeding and the plea and made no appearance in municipal court.

{4} Approximately one year later, Defendant was indicted for burglary, misdemeanor larceny, tampering with evidence, theft of a credit card, contributing to the delinquency of a minor, and conspiracy to commit burglary or tampering with evidence. Defendant filed a motion to dismiss, arguing that the indictment, as a successive prosecution, violated his right against double jeopardy. Defendant contended that the two prosecutions were based on the same evidence and that the second prosecution was contrary to case law from the United States Supreme Court. The prosecutor responded by arguing that, with the exception of the larceny count, the crimes charged in district court were not the same as those to which Defendant pleaded no contest in municipal court for purposes of a double jeopardy inquiry. The district court judge found that Defendant had pleaded no contest to accessory to larceny in municipal court and indicated that the municipal court did not have jurisdiction over this offense. The judge dismissed the larceny count on double jeopardy grounds but denied the motion to dismiss with respect to the other charges. A jury trial, at which both occupants of the truck and Defendant’s girlfriend testified, resulted in the present convictions.

{5} In the Court of Appeals, Defendant again argued that his convictions violated his right against double jeopardy. Defendant argued that the offenses from both prosecutions were the same based on the “same evidence” test set out by this Court in State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975). In rejecting Defendant’s argument, the Court of Appeals noted that it had recently applied the jurisdictional exception in State v. Darkis, 2000-NMCA-085, 129 N.M. 547, 10 P.3d 871. As in that case, the Court of Appeals recognized that this Court has “resolutely adhered” to the jurisdictional exception and that the Court of Appeals has no authority to overrule precedent from this Court. See Darkis, 2000-NMCA-085, ¶ 10. The Court noted that “[t]he crimes for which Defendant was charged in the district court were felonies” and that “none of [these] charges . . . could have been heard in the municipal court” because, as a court of limited jurisdiction, it has no power to hear felony charges. As a result, the Court applied the jurisdictional exception. The Court also determined that, even if the Tanton “same evidence” test were applicable, the offenses for which Defendant was convicted in district
court were not the same as the offenses to which he pleaded no contest in municipal court for purposes of double jeopardy.

II. Double Jeopardy, Successive Prosecutions, and the Jurisdictional Exception


The present case involves a second prosecution after conviction. “Where successive prosecutions are at stake, the guarantee serves a constitutional policy of finality for the defendant’s benefit. That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, and from attempts to secure additional punishment after a prior conviction and sentence.” Brown v. Ohio, 432 U.S. 161, 165-66 (1977) (citations, quotation marks, and quoted authority omitted).

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him [or her] to embarrassment, expense and ordeal and compelling him [or her] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he [or she] may be found guilty.


{7} For purposes of double jeopardy, the phrase “same offense” has a specific meaning. “[T]he test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Blockburger v. United States, 284 U.S. 299, 304 (1932), quoted in Swafford v. State, 112 N.M. 3, 8, 810 P.2d 1223, 1228 (1991). This test applies in both multiple punishment and multiple prosecution cases. See United States v. Dixon, 509 U.S. 688, 696-97, 703-04 (1993); State v. Powers, 1998-NMCA-133, ¶¶ 21-29, 126 N.M. 114, 967 P.2d 454 (relying on Dixon for an independent state constitutional analysis). Under this test, the phrase “same offense” has been interpreted to include greater and lesser included offenses, and thus, the State cannot subject a defendant to a second prosecution for a greater offense when the defendant has been prosecuted for a lesser included offense, whether the first prosecution resulted in conviction or acquittal. Brown, 432 U.S. at 169 (“Whatever the sequence may be, the Fifth Amendment forbids successive prosecution . . . for a greater and lesser included offense.”).

{8} Even when two offenses are deemed the same under this analysis, however, there are limited exceptions to the prohibition against successive prosecutions. The United States Supreme Court first recognized the jurisdictional exception in United States v. Ball, 163 U.S. 662, 669-70 (1896). In that case, the Court held that a defective indictment in an initial proceeding does not constitute a permissible basis for a second prosecution if the trial court had jurisdiction over the subject matter and the defendant. Id. In contrast, the Court noted that “[a]n acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense.” Id. at 669. The Court applied this exception a few years later in Diaz v. United States, 223 U.S. 442, 448-49 (1912). The defendant in Diaz was initially tried for and found guilty of assault and battery before a justice of the peace. Id. at 444. Following his conviction, the victim died from the wounds received in the battery, and the defendant was prosecuted for homicide in a court of general jurisdiction. Id. The Court first noted that at the time of the first trial the crime of homicide had not yet been committed and, prior to the death, it was not “possible to put the accused in jeopardy for that offense.” Id. at 449. Notwithstanding the absence of any jeopardy, however, the Court also relied on the fact that the initial tribunal lacked jurisdiction over the greater offense. “[T]he justice of the peace, although possessed of jurisdiction to try the accused for assault and battery, was without jurisdiction to try him for homicide; and, of course, the jeopardy incident to the trial before the justice did not extend to an offense beyond his jurisdiction.” Id.

{9} In State v. Goodson, 54 N.M. 184, 188, 217 P.2d 262, 264 (1950), we adopted the jurisdictional exception articulated in Ball and Diaz in the context of prosecutions for greater and lesser included offenses. In a factual scenario somewhat similar to the one in Diaz, we applied the exception to permit a second prosecution for rape in the district court following an initial guilty plea and sentence for assault and battery before a justice of the peace. Id. at 185, 188, 217 P.2d at 263-65. We explained that

[r]eason and logic do not support a rule whereby one guilty of the crime of rape may escape a possible sentence of 99 years in the penitentiary by the expedient of pleading guilty to a charge of assault and battery in a justice court where the penalty may be as low as a fine of $5.00.

Id. at 188, 217 P.2d at 265. The jurisdictional exception was later applied in a number of New Mexico cases. E.g., Trujillo v. State, 79 N.M. 618, 619, 447 P.2d 279, 280 (1968); State v. Paris, 76 N.M. 291, 298, 414 P.2d 512, 517 (1966); State v. Mabrey, 88 N.M. 227, 228-29, 539 P.2d 617, 618-19 (Ct. App. 1975).

{10} Defendant argues that Goodson, as well as the jurisdictional portion of Diaz, is inconsistent with more recent Supreme Court authority. Specifically, Defendant contends that Diaz was implicitly overruled by Waller v. Florida, 397 U.S. 387 (1970). In Waller, the Supreme Court reviewed a successive prosecution case from Florida, in which an initial conviction was obtained in municipal court followed by a subsequent conviction in state court. Id. at 388-89. The Court noted that a substantial number of jurisdictions “treat[ed] municipalities and the State as separate sovereign entities, each capable of imposing punishment for the same alleged crime.” Id. at 391, and the Court confined itself to the limited question of “the asserted power of the two courts within one State to place petitioner on trial for the same alleged crime.” Id. at 390. In other words, the sole issue before the Supreme Court was whether municipal courts and state courts represent separate sovereigns for purposes of applying the dual sovereignty exception to double jeopardy. In answer to this narrow question, the Court held that dual sovereignty did not apply because political subdivisions such as municipalities are subordinate instrumentalties acting under the sovereignty of the state rather than independent sovereigns. Id. at 392-95.

{11} We have, on three previous occasions, rejected the argument that Waller implicitly abolished the jurisdictional exception or over-

The fatal flaw in this argument is that the facts in *Waller* would not support a claim of the jurisdictional exception and therefore the issue was not addressed by the United States Supreme Court. There was not a claim in . . . *Waller* . . . that the court hearing the lesser charge did not have jurisdiction to hear the greater charge as well.

*Manzanares*, 100 N.M. at 623, 674 P.2d at 513. We concluded that *Waller* was limited to the principle of dual sovereignty and did not undermine New Mexico precedent adopting the jurisdictional exception. *Id.* We further reiterated the reason for the rule:

The problem with tests that do not recognize the jurisdictional exception is that they allow defendants to abuse the multi-level judicial system which exists in New Mexico and in other jurisdictions. Without the exception, a defendant can plead guilty to all misdemeanor charges arising from a criminal act in magistrate court and never be in jeopardy of a felony prosecution involving similar evidence in the district court. . . . [R]eason and logic do not support a rule where one guilty of a crime of homicide by vehicle may escape a possible sentence of three years imprisonment by the expedient of pleading guilty to a charge of DWI or reckless driving where the penalty may be as low as a $25.00 fine and five days in jail. *Id.* at 624, 674 P.2d at 514.

12 In deference to stare decisis, we would not normally revisit our interpretation of *Waller* without a compelling reason. Defendant contends, however, that *Padilla*, *Manzanares*, and *James* are weakened by *Salaz v. Tansy*, 730 F. Supp. 369, 370-73 (D.N.M. 1989), in which the federal court, on habeas review, overturned a New Mexico conviction due to a violation of double jeopardy. In *Salaz*, the court opined that this Court’s interpretation of *Waller in Manzanares* “was too narrow” and that *Waller* implicitly overruled the jurisdictional exception. 730 F. Supp. at 371-72. We do not view this authority as controlling or persuasive for two reasons. First, having been based on a simple disagreement with our interpretation of *Waller*, we are not convinced that a federal court would reach a similar conclusion as *Salaz* under current federal habeas law. See *Williams v. Taylor*, 529 U.S. 362, 402-13 (2000) (discussing the change in law due to a statutory amendment in 1996 that requires a state court’s interpretation of constitutional law to be in direct conflict with a Supreme Court decision or an objectively unreasonable application of Supreme Court precedent and stating that, without a finding of unreasonableness, “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly”).

13 Second, we note that *Diaz* involved two prosecutions by a territorial government, 223 U.S. at 444, and it was well established at that time that the territory’s “judicial tribunals exert all their powers by authority of the United States.” *Grafton v. United States*, 206 U.S. 333, 354 (1907). In other words, the Supreme Court applied the jurisdictional exception in *Diaz* despite two prosecutions by a single sovereign, the United States. Because only a single sovereign was at issue in *Diaz*, its holding was not based on the dual sovereignty exception to double jeopardy. Thus, we do not believe that *Waller*, which solely addressed the question of dual sovereignty, can be viewed as inconsistent with *Diaz* or as overruling that authority by implication. See *Robinson v. Neil*, 366 F. Supp. 924, 928 (E.D. Tenn. 1973). *Waller* stands for the proposition that municipal courts and state courts are the same sovereign for purposes of double jeopardy, but it does not answer the question whether a second prosecution may be brought in state court on a charge that was beyond the municipal court’s jurisdiction. *Diaz* directly addressed the latter point in the context of a first prosecution in a court of limited jurisdiction and a second prosecution in a court of general jurisdiction of the same sovereign; the Court answered the question by allowing the second prosecution. The Supreme Court has specifically directed that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). Because the Supreme Court has not overruled *Diaz*, it remains valid authority on the jurisdictional exception. Moreover, we note that *Salaz* failed to recognize the continued viability of the original form of the jurisdictional exception recognized in *Ball*. There is no question that, irrespective of the lesser included offense principle of *Diaz*, a void judgment does not constitute a former jeopardy. See *Ball*, 163 U.S. at 669; see also *Grafton*, 206 U.S. at 345 (“[B]efore a person can be said to have been put in jeopardy of life or limb the court in which he [or she] was acquitted or convicted must have had jurisdiction to try him [or her] for the offense charged.”). For these reasons, we remain unconvinced that *Waller* has any bearing on the jurisdictional exception.

14 Nonetheless, following our own review of additional Supreme Court authority, we believe that the jurisdictional exception in New Mexico is overly broad. In *Grafton*, the defendant, a member of the military, was tried for and acquitted of homicide before a general court-martial in relation to two killings in the Philippine Islands. 206 U.S. at 341-42. He was then tried before a Philippine court for the crime of assassination as defined in the Philippines Penal Code, where he was convicted of the lesser included offense of homicide. *Id.* at 342-44. The defendant argued that his conviction was the product of an impermissible successive prosecution in violation of double jeopardy. *Id.* at 344. The trial court rejected the defendant’s claim because the military court did not have jurisdiction over capital crimes and the charged offense in the second prosecution, assassination, was defined as a capital offense. *Id.* However, the Supreme Court disagreed.

If tried by the military court for homicide as defined in the Penal Code, and acquitted on that charge, the guaranty of exemption from being twice put in jeopardy of punishment for the same offense would be of no value to the accused, if on a trial for assassination, arising out of the same acts, he could be again punished for the identical offense of which he had been previously acquitted.

*Id.* at 350. “[I]f not guilty of homicide . . . –and such was the finding of the court-martial–he could not, for the same acts and under

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1 While an affirmance by an equally divided Court does not stand as Supreme Court precedent for future cases, it does serve to uphold a lower court’s judgment. See *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910). As a result, *Padilla* is valid New Mexico precedent.
the same evidence, be guilty of assassination . . . .” Id. at 349. Thus, it would appear from Grafton that it is impermissible to subject a defendant to a successive prosecution for a greater offense, together with lesser included offenses, following an acquittal on a lesser included offense, even if the court hearing the initial proceeding lacks jurisdiction over the greater offense. See id. at 352.

{15} At first glance, Grafton appears to be at odds with Diaz. However, Diaz was decided only five years after Grafton, and yet the Court failed to even mention Grafton in Diaz despite the fact that both cases involved double jeopardy challenges, and jurisdictional issues, arising out of prosecutions in the Phillipine Islands. Under these circumstances, we find it unlikely that the Court in Diaz would have either overlooked Grafton or overruled it sub silentio. We think it is much more likely that the Supreme Court believed that these two cases were distinguishable. Grafton differs from Diaz in two important respects. First, Grafton involved an acquittal during the first trial. As a result, the double jeopardy challenge in that case invoked the principle of collateral estoppel. “[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” Ashe v. Swenson, 397 U.S. 436, 443, 445 (1970) (holding that the principle of collateral estoppel is protected by the constitutional right against double jeopardy). The Supreme Court itself even noted recently that, “[i]n fact, Grafton may simply have been decided on grounds of collateral estoppel.” Dixon, 509 U.S. at 709 n.13.

{16} In addition to this significant distinction from Diaz, Grafton, while involving a second prosecution for a greater offense over which the initial court had no jurisdiction, dealt with a conviction from that second prosecution of the same lesser included offense for which the defendant had been tried initially and over which the initial court had jurisdiction. See Grafton, 206 U.S. at 349 (“That [the defendant] will be punished for the identical offense of which he has been acquitted, if the judgment of the civil court, now before us, be affirmed, is beyond question . . . .”); id. at 355 (“[H]aving been acquitted of the crime of homicide, alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, [the defendant] could not be subsequently tried for the same offense in a civil court exercising authority in that Territory.”) (emphasis added). In other words, Grafton involved two judgments on the same crime, homicide, from two courts having jurisdiction over that offense. The importance of this distinction is revealed in the Court’s language in Diaz: “All that could be claimed for [the prior] jeopardy was that it protected the accused from being again prosecuted for the assault and battery, and therefore required that the latter be not treated as included, as a lesser offense, in the charge of homicide, as otherwise might have been done . . . .” Diaz, 223 U.S. at 449.

{17} Reading Diaz and Grafton together, then, Grafton can be viewed as placing two important limitations on the jurisdictional exception. First, the exception cannot be used to permit a successive prosecution for a greater offense following an acquittal of a lesser included offense. Second, the successive prosecution cannot include a lesser offense for which the defendant has been convicted.2 Additionally, we do not believe that the Supreme Court intended to apply the jurisdictional exception in cases that implicate the core concerns of the Double Jeopardy Clause of protecting finality, preventing governmental overreaching, and reducing the risk of erroneous conviction through rehearsed prosecution. Just as the jurisdictional exception prevents defendants from using the protection of double jeopardy to abuse the multi-tiered judicial system in New Mexico, we limit the jurisdictional exception in a manner that will prevent prosecutors from similarly exploiting our judicial structure to defeat a defendant’s double jeopardy rights. Thus, particularly where there have been two trials rather than a guilty plea followed by a trial, the jurisdictional exception will not permit a second prosecution on a greater charge when the State has deliberately sought a separate prosecution on a lesser included charge in a court of limited jurisdiction. Otherwise, the exception would countenance the type of rehearsal of proof, and the accompanying risk of erroneous conviction, that is one of the chief evils double jeopardy seeks to prevent.

{18} The facts in Salaz help illustrate this point. In that case, the defendant was convicted of the misdemeanor of resisting, evading or obstructing a police officer in magistrate court and of the felony of battery upon a peace officer in district court. 730 F. Supp. at 372. The federal court in Salaz focused on the fact that “[t]he prosecutor chose to prosecute the petitioner in separate actions on offenses which arose out of the same alleged criminal act.” Id. at 373 (emphasis added). We agree with the Salaz court that a prosecutorial choice of this type “clearly do[es] not present the type of problems [of abuse of the multi-level judicial system by defendants] which have concerned the New Mexico courts.” Id. at 372-73. Thus, while we disagree with the conclusion in Salaz that the United States Supreme Court has abolished the jurisdictional exception, we agree that the jurisdictional exception might not have been applicable under the factual circumstances of that case.

{19} However, our assessment of Salaz is obscured by the fact that the two charges “were filed on the same date in the same court by the same prosecutor.” 730 F. Supp. at 373 (emphasis added). The “same court” is presumably a reference to the magistrate court. These facts suggest that the charges in Salaz may have been filed in the same criminal complaint, with the defendant pleading guilty to the lesser charge and the magistrate court binding the defendant over for trial on the greater charge. See Rule 6-202(C) NMRA 2005 (governing preliminary examinations); Rule 6-501(B) NMRA 2005 (discussing arraignment and pleas to offenses within the magistrate court’s jurisdiction). If that were the case, then under clearly established Supreme Court precedent the proceeding in district court would be considered a continuation of the magistrate court proceeding, and the defendant’s guilty plea on the lesser included offense would not

2 Although the State or the trial court, on its own motion, would be precluded from placing the lesser included offense in issue, the defendant would be entitled to request a lesser included offense instruction as part of a defense strategy. See Darkis, 2000-NMCA-085, ¶ 20. In such a case, there would be no governmental action with respect to the jury’s consideration of the lesser included offense, cf. Jeffers v. United States, 432 U.S. 137, 152-54 (1977) (discussing double jeopardy in the context of a defendant’s choice to proceed with separate trials on greater and lesser included offenses), and the defendant would not be placed in jeopardy on the lesser included offense a second time because a guilty verdict on that offense would be void and accepted by the trial court as an acquittal on the only charge at issue, the greater offense. See Darkis, 2000-NMCA-085, ¶ 21. This rule is designed to protect the principle that “[a] defendant is entitled to an instruction on a theory of the case where the evidence supports the theory.” State v. Salazar, 1997-NMSC-044, ¶ 50, 123 N.M. 778, 945 P.2d 996.
preclude further prosecution for the greater offense. See Ohio v. Johnson, 467 U.S. 493, 501 (1984) (“Respondent’s argument is apparently based on the assumption that trial proceedings, like amoebae, are capable of being infinitely subdivided, so that a determination of guilt and punishment on one count of a multicontact indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are greater or lesser included offenses of the charge just concluded. We have never held that, and decline to hold it now.”). In such a case, the Double Jeopardy Clause would function only to prevent multiple punishments following conviction of the greater offense. See id. at 501-02. Where there “has been none of the governmental overreaching that double jeopardy is supposed to prevent” and “ending the prosecution . . . would deny the State its right to one full and fair opportunity to convict those who have violated its laws,” defendants are not “entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges.” Id. at 502. Thus, in determining whether to restrict the jurisdictional exception under particular facts, it will be necessary to assess whether there has been prosecutorial overreaching or, instead, whether the defendant has attempted to use double jeopardy as a sword.  

(20) We limit the jurisdictional exception in New Mexico according to the principles discussed above. Beyond these limitations, however, we conclude that Ball and Díaz remain good law and that the jurisdictional exception remains valid in New Mexico in this more limited form. We assess the facts of Defendant’s case in light of our more narrow interpretation of the jurisdictional exception.

III. Application of Double Jeopardy

(21) Defendant pleaded no contest in municipal court to larceny and obstructing an officer, and he was convicted in district court of tampering with evidence, conspiracy to commit tampering with evidence, contributing to the delinquency of a minor, and theft of a credit card. Our first task in reviewing Defendant’s double jeopardy claim is to determine whether the two prosecutions involved the same offense. In resolving this issue, we apply the Blockburger same elements test.

(22) Defendant contends that we should instead rely on the “same evidence” test that we articulated in Tanton and Owens v. Abram, 58 N.M. 682, 274 P.2d 630 (1954). However, Defendant misconstrues these cases as providing a broader definition of “same offense” than Blockburger. On the contrary, not unlike the Blockburger test of “whether each provision requires proof of a fact which the other does not,” Blockburger, 284 U.S. at 304, we have described the “same evidence” test as “whether the facts offered in support of one [offense] would sustain a conviction of the other.” Owens, 58 N.M. at 684, 274 P.2d at 631. Prior to Owens, we had adopted the Blockburger test in New Mexico, State v. Blevins, 40 N.M. 367, 369, 60 P.2d 208, 210 (1936), and other courts, including the United States Supreme Court, have at times mislabeled the Blockburger test as a “same evidence” test. E.g., Sanabria v. United States, 437 U.S. 54, 70 n.24 (1978); Jeffers v. United States, 432 U.S. 137, 144, 147 (1977) (plurality opinion); Salaz, 730 F. Supp. at 370.

(23) To the extent that Owens could be said to have diverged from Blockburger, it would actually represent a more restrictive definition of double jeopardy than Blockburger. In addition to the language quoted above that we believe is similar to Blockburger, we also stated in Owens that “[i]f either information requires the proof of facts to support a conviction which the other does not, the offenses are not the same and a plea of double jeopardy is unavailing.” Owens, 58 N.M. at 684, 274 P.2d at 631 (emphasis added). By assessing whether either crime requires proof of additional facts, unlike Blockburger’s evaluation of whether both crimes require proof of a fact not required by the other, this test would be contrary to the Supreme Court’s holding in Brown, 432 U.S. at 169, because it would not treat greater and lesser included offenses as the same offense; the greater offense would require proof of additional facts to support a conviction. Based on the Supremacy Clause, we would be bound to overrule the “same evidence” test under this interpretation. Instead, we view Owens and Tanton as intending to apply the Blockburger same elements test. Although we have noted that Owens was ambiguous as to whether the inquiry should focus on the facts adduced at trial or on the statutory elements of a crime, Swafford, 112 N.M. at 10, 810 P.2d at 1230, the Supreme Court has explained since we decided Owens that “the Blockburger test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial.” Illinois v. Vitale, 447 U.S. 410, 416 (1980). We clarify that the Blockburger test applies in New Mexico in assessing both multiple punishment and successive prosecution claims. See Swafford, 112 N.M. at 14, 810 P.2d at 1234; Powers, 1998-NMCA-133, ¶ 29.

(24) As the Court of Appeals determined, it is clear from the different elements required that the offenses of tampering with evidence, conspiracy to commit tampering with evidence, and contributing to the delinquency of a minor are not the same offense as larceny or obstructing an officer under the Blockburger test. The Double Jeopardy Clause was not implicated by the prosecution for these offenses in a separate proceeding in district court.

(25) The offense of theft of a credit card, however, is not as clear. This offense is defined as taking a credit card from the person, possession, custody or control of another without the cardholder’s consent, or . . . with knowledge that it has been so taken, acquiring or possessing a credit card with the intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder. Section 30-16-26. The Legislature has provided that “[t]aking a credit card without consent includes obtaining it by conduct defined or known as statutory larceny, common-law larceny by trespassory taking, common-law larceny by trick, embezzlement or obtaining property by false pretense, false promise or extortion.” Id. (emphasis added). Thus, under the alternative of the crime relevant to this case, the offense of theft of a credit card completely subsumes the offense of larceny. See NMSA 1978, § 30-16-1 (1987) (“Larceny consists of the stealing of anything of value which belongs to another.”). See generally State v. Franco, 2005-NMSC-013, ¶ 14 (“[W]e treat statutes written in the alternative as separate statutes for purposes of the Blockburger analysis.”). Larceny is thus a lesser included offense of theft of a credit card. Nevertheless, we do not believe that the municipal court prosecution for larceny involved the same offense as the district court prosecution for theft of a credit card.

3 The Court of Appeals held that theft of a credit card is distinct from larceny because the former requires an intent to use, sell, or transfer the card. However, this element is only necessary for the alternative of acquiring or possessing a credit card; it is not necessary for the alternative of taking a credit card from another without the cardholder’s consent. Section 30-16-26.
The municipal court is not a court of record, so there is no express indication in the record of the factual basis for the larceny conviction. However, the municipal court’s jurisdiction is, for the most part, limited to “all offenses and complaints under ordinances of the municipality.” NMSA 1978, § 35-14-2(A) (1988). The Legislature has authorized municipalities to adopt ordinances “not inconsistent with the laws of New Mexico” and permitted the enforcement of ordinances “by prosecution in the municipal court,” NMSA 1978, § 3-17-1 (1994), but the Legislature limited punishment for most offenses to “a fine of not more than five hundred dollars ($500) or imprisonment for not more than ninety days or both.” Section 3-17-1(C)(1); accord NMSA 1978, § 35-15-3(C) (1987, prior to 2001 amendment) (“The imprisonment shall not exceed ninety days for any one offense . . . .”). Because the municipal court has no jurisdiction over felonies, such as the felony of theft of a credit card, and because municipal ordinances cannot be inconsistent with state law, we conclude that Defendant’s conviction of larceny in the municipal court must have been based on the theft of the purse and cash rather than on the theft of the credit card.

As indicated by the separate treatment of the crimes in Section 30-16-26 and Section 30-16-1, the Legislature intended to distinguish larceny of a credit card from larceny of generic property, such as the purse and cash, and to punish each independently. Cf. State v. Alvarez-Lopez, 2004-NMSC-030, ¶¶ 37-44, 136 N.M. 309, 98 P.3d 699 (discussing a unit of prosecution claim based on separate larceny convictions for general property and firearms), cert. denied, 125 S. Ct. 1334 (2005). For example, had the municipal court proceeding not occurred, Defendant could have been convicted in district court of both larceny, for stealing the purse and cash, and theft of a credit card without offending the multiple punishment prong of double jeopardy. Thus, Defendant’s municipal court conviction of larceny is not the same offense for purposes of double jeopardy as the district court conviction of theft of a credit card. The district court’s dismissal of the larceny charge for the theft of the purse and cash ensured that Defendant was not prosecuted twice for the same offense. 4

In any event, even if the municipal court prosecution had been based on the credit card, we would apply the jurisdictional exception. As we have noted, the municipal court had no jurisdiction to hear the felony charge of theft of a credit card. The limited jurisdiction of the municipal court is analogous to the limited jurisdiction of the justices of the peace in Diaz and Goodson. In addition, unlike in Grafton, Defendant was not acquitted of the charge of larceny. Further, there is no indication of any prosecutorial overreaching. Unlike Salaz, the district attorney’s office that later prosecuted Defendant in district court was unaware of and had no involvement in the municipal court proceeding. In fact, a district attorney is “the law officer of the state and of the counties within his [or her] district,” N.M. Const. art. VI, § 24, and is authorized to prosecute actions “in which the state or any county in his [or her] district may be a party or may be interested” in district court, NMSA 1978, § 36-1-18(A) (2001), or in magistrate court, NMSA 1978, § 36-1-20 (1909). However, in municipal court, it is contemplated that the city attorney, a municipal officer, a police officer, or a private citizen will prosecute the violation of a municipal ordinance. Rule 8-111 NMRA 2005. As we did in Manzanares, we encourage cooperation between prosecutors to avoid unnecessary successive prosecutions, 100 N.M. at 624, 674 P.2d at 514; however, we recognize that the divided authority between state and municipal level prosecutors, particularly given the substantial involvement of police officers in municipal prosecutions and the likelihood of a plea to an officer’s citation or complaint prior to any opportunity for prosecutorial review, will at times impede or even prevent such cooperation. As we stated in Manzanares and James, we do not believe that the logistical difficulties inherent in our multi-tiered judiciary should allow defendants to evade felony charges by pleading to minor charges in municipal court immediately following arrest. See Manzanares, 100 N.M. at 624, 674 P.2d at 514; James, 93 N.M. at 606, 603 P.2d at 716. Defendant’s plea in municipal court only two days after his arrest ensured that the State did not have “the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial.” Johnson, 467 U.S. at 501. In short, the second prosecution did not implicate any of the core concerns of double jeopardy. As a result, the jurisdictional exception precludes Defendant from using double jeopardy as a sword to prevent a full and fair opportunity to convict him of the crimes he committed.

We limit the application of the jurisdictional exception in New Mexico. The exception cannot be applied in the event of an acquittal of a lesser included offense. In addition, the prosecution of a greater offense over which an initial court lacked jurisdiction cannot include a lesser included offense for which the defendant was convicted. Finally, the exception will not apply in cases in which a successive prosecution violates the core concerns of the Double Jeopardy Clause. Despite our limitation of the jurisdictional exception, we affirm Defendant’s convictions because he was not prosecuted twice for the same offense.

IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PETRA JIMENEZ MAES, Justice
PAMELA B. MINZNER, Justice
(specially concurring)
EDWARD L. CHÁVEZ, Justice
(specially concurring)

4 Because the State did not appeal the district court’s dismissal of the larceny charge, it is unnecessary for us to address the district court’s statement that the municipal court lacked jurisdiction over the offense of larceny.
EDWARD L. CHÁVEZ, JUSTICE

(Specially Concurring)

{31} I concur with the result reached by the majority opinion. The thorough discussion of Blockburger persuades me that the Double Jeopardy Clause is not implicated for any of the charges brought in district court. Accordingly, I too would affirm Defendant’s convictions.

{32} I write separately to express my views on the jurisdictional exception to double jeopardy. Although it was unnecessary given our conclusion that double jeopardy is not implicated, the exception was thoroughly discussed by the majority, and because we granted certiorari to consider “our continued application of the jurisdictional exception,” I feel compelled to comment. In my view, the only time the exception could arise under the majority’s approach is when a defendant has either been acquitted or convicted in a court of limited jurisdiction and the State later seeks to prosecute the defendant in a court of general jurisdiction on a greater offense arising from the same transaction or occurrence. In attempting to limit application of the jurisdictional exception, the majority distinguishes between the case in which a defendant pleads guilty in a court of limited jurisdiction and that in which the defendant is actually tried of the lesser offense in the court of limited jurisdiction. Where the defendant pleads guilty to the lesser offense, the majority would apply the jurisdictional exception to permit a prosecution of the greater offense in a court of general jurisdiction. If the defendant is convicted in the court of general jurisdiction of the lesser included offense to which he pled guilty in the court of limited jurisdiction, the majority would cure the double jeopardy problem by voiding the conviction. Opinion, ¶ 16. I disagree with both the distinction drawn by the majority and its cure for the following reasons.

{33} While I appreciate that the majority limits the application of the jurisdictional exception to cases in which a defendant pleads guilty to the lesser offense in a court of limited jurisdiction, as opposed to actually being tried and found guilty, I find the distinction to be without a meaningful difference. A plea of guilty constitutes a conviction, French v. Cox, 74 N.M. 593, 596, 396 P.2d 423, 425 (1964), and upon sentencing in a court of general jurisdiction, a guilty plea bars subsequent prosecution for a greater offense arising from the same act. State v. Angel, 2002-NMSC-025, ¶ 13, 132 N.M. 501, 51 P.3d 1155. In my view, when the State has the necessary facts to charge a defendant with all crimes arising from the event at issue, a defendant’s plea of guilty to a lesser included offense in a court of limited jurisdiction bars a prosecution of the greater offense, even if in a court of general jurisdiction. See State v. Medina, 87 N.M. 394, 396, 534 P.2d 486, 488 (Ct. App. 1975) (when a defendant pleads guilty to a lesser included offense in a court of general jurisdiction, the defendant may not be tried subsequently for the greater offense).

{34} Continuing to apply the jurisdictional exception simply because a defendant has pled guilty necessarily encourages defendants not to enter guilty pleas in courts of limited jurisdiction. While there may be defendants who “abuse the multi-tiered judicial system,” it is at least equally plausible that defendants will plead guilty soon after charges are filed in a court of limited jurisdiction to bring closure to the matter by accepting responsibility for their wrongdoing, avoiding unnecessary expense, and getting on with their lives. A well-stated purpose of the double jeopardy clause is to prevent the government from repeatedly subjecting citizens to the expense, embarrassment, and ordeal of repeated trials. State v. Davis, 1998-NMCA-148, ¶ 16, 126 N.M. 297, 968 P.2d 808. This purpose is frustrated by application of the jurisdictional exception when a defendant pleads guilty to a lesser offense in a court of limited jurisdiction.

{35} My disagreement with the majority’s proposed cure, voiding the subsequent conviction of the same crime to which the defendant pled guilty and for which he was sentenced in the court of limited jurisdiction, is that such an approach is contrary to Article II, Section 15 of the New Mexico Constitution, which provides, “nor shall any person be twice put in jeopardy for the same offense.” Double jeopardy attaches well before a defendant has been tried and convicted. See State v. Nunez, 2000-NMSC-013, ¶ 28, 129 N.M. 63, 2 P.3d 264 (internal footnote omitted) (“In a nonjury trial, jeopardy attaches when the court begins to hear at least some evidence on behalf of the State. In a jury trial, jeopardy attaches at the point when a jury is impaneled and sworn to try the case.”); cf. Angel, 2002-NMSC-025, ¶ 10 (where a defendant enters a guilty plea, jeopardy attaches upon entry of judgment and sentencing). A conviction of a lesser offense necessarily included in a greater offense bars a subsequent prosecution for the greater offense. Medina, 87 N.M. at 396, 534 P.2d at 488.

{36} For the foregoing reasons, I concur in the result but would abolish the jurisdictional exception.

EDWARD L. CHÁVEZ, Justice

I CONCUR:
PAMELA B. MINZNER, Justice

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1 The language I rely on from Article II, Section 15 is similar to the language in the Fifth Amendment to the United States Constitution which provides “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”
OPINION

PATRICIO M. SERNA, JUSTICE

(1) Plaintiff-Petitioner Patricia Tomlinson brought a medical malpractice action against Defendant-Respondent Dr. Jacob George. The district court granted George’s motion for summary judgment based on the ground that Tomlinson failed to file within the three-year statute of repose period. The Court of Appeals affirmed the district court by unanimous opinion based on several cases from this Court, Tomlinson v. George, 2003-NMCA-004, ¶ 25, 27, 133 N.M. 69, 61 P.3d 195, and we granted Tomlinson’s petition for writ of certiorari to the Court of Appeals.

(2) We address whether the fraudulent concealment doctrine equitably tolls the statute of repose, NMSA 1978, § 41-5-13 (1976), so as to permit Tomlinson to file a malpractice action more than three years after the alleged act of malpractice in light of the fact that she was aware of the act four months into the three-year period and thus had approximately two years and eight months within which to file her claim. Under a direct application of the fraudulent concealment doctrine set out in this Court’s opinion in Kern ex rel. Kern v. Saint Joseph Hospital, Inc., 102 N.M. 452, 455-56, 697 P.2d 135, 138-39 (1985), we conclude that the doctrine tolls the statute of repose only when the plaintiff does not discover the alleged malpractice within the statutory period as a result of the defendant’s fraudulent concealment. Thus, because Tomlinson was aware of her claim within the statutory period, the statute of repose is not tolled by the doctrine of fraudulent concealment. We take this opportunity to clarify the fraudulent concealment doctrine and Section 41-5-13, as well as to resolve conflicting Court of Appeals’ cases on this issue, compare Tomlinson, 2003-NMCA-004, ¶ 25 (concluding that Section 41-5-13 is not tolled by fraudulent concealment when the malpractice was discovered six weeks into the statutory period), with Juarez v. Nelson, 2003-NMCA-011, ¶¶ 22-25, 133 N.M. 168, 61 P.3d 877 (concluding that fraudulent concealment tolls Section 41-5-13 when the malpractice was discovered two weeks into the statutory period).

(3) Finally, we conclude that the district court properly found that Tomlinson had a constitutionally reasonable period of time under the statute of repose within which to file her claim under Garcia ex rel. Garcia v. La Farge, 119 N.M. 532, 536-37, 893 P.2d 428, 432-33 (1995) and Cummings v. X-Ray Associates of New Mexico, 1996-NMSC-035, ¶¶ 47-55, 121 N.M. 821, 918 P.2d 1321. We conclude that, under these cases, two years and eight months is not an unreasonably short period of time within which to file a claim so as to render Section 41-5-13 unconstitutional as applied. Thus, we affirm the district court and the Court of Appeals.

I. Facts and Background

(4) Tomlinson fractured and dislocated her wrist in an automobile accident on August 20, 1996. George, an orthopedic surgeon, performed a closed external reduction of the fracture on the day of the injury and applied a cast. George x-rayed Tomlinson’s wrist on August 27, October 1, and November 5, and believed that her wrist was healing properly. George did not treat Tomlinson after November 5, 1996. On December 24, 1996, Tomlinson obtained her original x-rays from George taken on the three dates and saw Dr. Alfred Blue, a Seattle-based reconstructive hand surgeon; Blue opined that George had negligently treated Tomlinson. Both Tomlinson and George agree that Tomlinson knew she had a potential medical malpractice claim against George on December 24, 1996. Between February of 1997 and July of 1999, Tomlinson had several surgeries and numerous treatments and evaluations by other physicians.

(5) Tomlinson filed an application with the New Mexico Medical Review Commission on December 13, 1999. Tomlinson filed a complaint against George for medical malpractice on March 2, 2000. George filed a motion for summary judgment based on Tomlinson’s failure to file within the three-year limitation period of Section 41-5-13. Tomlinson “accept[ed] that [Section 41-5-13] requires the filing of a claim within three years of an occurrence, and if there had not been [a] fraudulent concealment, the last date to file a claim would have been on November 5, 1999.” Tomlinson argued to the district court that George’s alleged fraudulent concealment should toll Section 41-5-13 on a day-for-day basis so that the three-year limitation did not run between November 5, 1996, and December 24, 1996. Although the parties, the district court, and the Court of Appeals assumed, for purposes of the fraudulent concealment discussion,

1 NMSA 1978, § 41-5-22 (1976) provides that “[t]he running of the applicable limitation period in a malpractice claim shall be tolled upon submission of the case for the consideration of the panel and shall not commence to run again until thirty days after the panel’s final decision is entered.”

From the New Mexico Supreme Court

Opinion Number: 2005-NMSC-020

Topic Index:

Civil Procedure: Equitable Claims or Defenses; and Time Limitations

Torts: Medical Malpractice

PATRICIA TOMLINSON,
Plaintiff-Petitioner,

versus

JACOB GEORGE, M.D.,
Defendant-Respondent.

No. 27,817 (filed June 30, 2005)

ORIGINAL PROCEEDING ON CERTIORARI

ROBERT BRACK, District Judge

LYNN S. SHARP
JASON BOWLES
SHARP, JARMIE & BOWLES, P.A.
Albuquerque, New Mexico
for Petitioner

ROGER EATON
MICHAEL J. DOYLE
EATON, MARTINEZ, HART & VALDEZ, P.C.
Albuquerque, New Mexico
for Respondent
that the last possible date of alleged malpractice was on November 5, 1996, Tomlinson contended that oral argument before this Court that the occurrence of alleged malpractice was on August 20, 1996, when George performed a closed external reduction of Tomlinson’s wrist. For clarity of the issues, we agree that it is helpful to identify the actual occurrence date for Section 41-5-13 as August 20, 1996, rather than assume the last day that George saw Tomlinson constituted the date of occurrence. Thus, Section 41-5-13 began to run from this date, and Tomlinson had until August 20, 1999, to file her complaint.

In her complaint, Tomlinson alleged that George failed to inform her on August 27, 1996, when he took a second set of x-rays, that her wrist was improperly set, and that his continued assurances that she was healing properly constituted fraudulent concealment. Tomlinson thus alleges that the period of concealment began on August 27 and ended on December 24, 1996, or approximately four months, when she was informed by Blue that she was, in his opinion, negligently treated by George.

The district court noted that Tomlinson was aware of the alleged malpractice on December 24, 1996. The district court discussed Kern, La Farge, and Cummings, and decided that this Court’s opinions in Cummings and Kern controlled the present case. The district court recognized that Cummings, 1996-NMSC-035, ¶ 54, stated “that only in very few exceptional circumstances may this strict three-year occurrence rule of Section 41-5-13 be relaxed,” and that fraudulent concealment and a “due process argument” were two of the exceptions noted by Cummings. The district court noted that Kern “require[s] that the patient not know of his [or her] cause of action within the statutory period,” and decided that fraudulent concealment under Kern did not toll the statute because Tomlinson discovered the alleged malpractice within the statutory period. Applying the due process analysis of Cummings and La Farge, the district court judge decided, “Discovery having occurred on December 24, 1996, Ms. Tomlinson was only [six] weeks into a [three]-year period within which to file the claim. I can’t determine that [two] years and [forty-six] weeks is ‘an unreasonably short period of time within which to bring an accrued cause of action.’” (Quoting La Farge, 119 N.M. at 541-42, 893 P.2d at 437-38.) For these reasons, the district court granted summary judgment in George’s favor.

II. Discussion

A. Section 41-5-13 and Fraudulent Concealment

Section 41-5-13 provides that “[n]o claim for malpractice arising out of an act of malpractice . . . may be brought against a health care provider unless filed within three years after the date that the act of malpractice occurred.” “The statute of repose of the Medical Malpractice Act forecloses any cause of action that does not accrue within three years of the act of malpractice.” Cummings, 1996-NMSC-035, ¶ 33. “An unduly long statute of repose, or a limit based upon a discovery-based accrual date would place an unfair burden upon the medical profession.” Id. ¶ 38. “The legislature’s solution—rationally related to alleviating [the problem of insurance carriers withdrawing from medical malpractice liability coverage in New Mexico]—was to preclude almost all malpractice claims from being brought more than three years after the act of malpractice.” Id. ¶ 40. This Court has held that the time limitation of Section 41-5-13 is constitutional. Id. ¶ 9. We noted that “[t]he legislature provided a number of incentives to assure participation by health care providers in the burdens of qualification under the Medical Malpractice Act,” id. ¶ 29, and recognized that a significant benefit of qualification “was the specific decision by the legislature ‘to insulate qualified health care providers from the much greater liability exposure that would flow from a discovery-based accrual date.’” Id. ¶ 29 (quoting Roberts v. Sw. Cnty. Health Servs., 114 N.M. 248, 252, 837 P.2d 442, 446 (1992)).

Two basic standards determine the beginning of the time period in which a patient must file a claim for medical malpractice. One is sometimes called the “discovery rule.” The time period under this rule does not begin to run until the patient discovers, or reasonably should discover, the essential facts of his or her cause of action. This discovery date may be the patient’s first subjective awareness that something is wrong—the first feelings of pain or discomfort. The discovery date may also be the first objective confirmation through medical diagnosis that previous medical care was improper. The other standard is sometimes called the “occurrence rule.” This rule fixes the accrual date at the time of the act of medical malpractice even though the patient may be oblivious of any harm.

Id. ¶ 47. We recognized that the plain language of Section 41-5-13 requires a claim to be filed within three years of the occurrence of the negligent act and that Section 41-5-13 operates as a statute of repose rather than a statute of limitation. Id. ¶ 48. “[A] statute of repose terminates the right to any action after a specific time has elapsed, even though no injury has yet manifested itself.” Id. ¶ 50.

Section 41-5-13’s statutorily determined triggering event is, under the occurrence rule, the act of medical malpractice “and does not entail whether the injury has been discovered.” Cummings, 1996-NMSC-035, ¶ 50. “[I]f, four years after the occurrence of medical malpractice, a patient learns they have been injured, their claim is forever barred because Section 41-5-13 functions as a statute of repose.” Id. “The plain language of Section 41-5-13 establishes the date of the act of malpractice as the only relevant factor, without any reference to any subsequent harm.” Id. ¶ 53. The Court noted that “New Mexico appellate courts have consistently construed Section 41-5-13 according to its plain meaning as an occurrence rule.” Id. ¶ 51 (relying on Roberts, 114 N.M. at 250, 837 P.2d at 444, Irvine v. St. Joseph Hosp., Inc., 102 N.M. 572, 698 P.2d 442 (Ct. App. 1984), Kern, 102 N.M. at 455, 697 P.2d at 138, and Keithley v. St. Joseph’s Hosp., 102 N.M. 565, 698 P.2d 435 (Ct. App. 1984)). This Court specifically rejected the plaintiff’s argument that “occurrence” should be “a continuum encompassing both the act of malpractice and the resulting injury.” Id. ¶ 52. We noted a few exceptions to this strict rule, as recognized by the district court in the present case, including the doctrine of fraudulent concealment: “Fraudulent conduct has always provided equitable grounds for relaxing a statutory time limit.” Id. ¶ 54 (relying on Kern, 102 N.M. at 456, 697 P.2d at 139).

The date that George performed the closed reduction on Tomlinson’s wrist, August 20, 1996, is the date that the alleged act of malpractice occurred. Direct application of Section 41-5-13 thus requires Tomlinson to file her suit on or before August 20, 1999. On December 24, 1996, Dr. Blue informed Tomlinson that he believed that George was negligent; thus, Tomlinson was aware of a potential claim for malpractice against George for approximately two years and eight months before the deadline under the statute of repose. Tomlinson filed her application on December 13, 1999, approximately three months and three weeks after the statute of repose deadline.

In order to toll the statute of repose based on the physician’s fraudulent concealment, the plaintiff “has the burden . . . of showing
... that the physician knew of the alleged wrongful act and concealed it from the patient or had material information pertinent to its discovery which he [or she] failed to disclose.” Kern, 102 N.M. at 456, 697 P.2d at 139. See generally Earle v. Ratliff, 998 S.W.2d 882, 888 (Tex. 1999) (recognizing that, to demonstrate fraudulent concealment, the plaintiff must show the health-care provider actually knew a wrong occurred, had a fixed purpose to conceal the wrong, and did conceal the wrong from the patient). In Kern, we concluded that the plaintiff “present[ed] sufficient evidence to raise an issue of material fact regarding [the defendant’s] knowledge of excessive radiation having been administered to [the plaintiff],” including dose levels that were “greatly excessive,” discontinuation of five additional treatments without explanation, and the defendant’s refusal to respond to the plaintiff’s question regarding the early termination of treatment. Id. at 454, 457, 697 P.2d at 137, 140. In an earlier case, the Court of Appeals addressed fraudulent concealment based on the defendant’s and the hospital staff’s refusal to answer the patient’s question as to why a subsequent operation was necessary and the defendant’s later statement that the subsequent operation “was occasioned by negligence of one of the hospital employees.” Garcia v. Presbyterian Hosp. Ctr., 92 N.M. 652, 653, 593 P.2d 487, 488 (Ct. App. 1979); see Hardin v. Farris, 87 N.M. 143, 144, 146, 530 P.2d 407, 408, 410 (Ct. App. 1974) (although decided before our Legislature adopted Section 41-5-13, recognizing that mere silence may constitute fraudulent concealment where the defendant negligently performed a tubal ligation and the plaintiffs supported their allegation that the defendant fraudulently concealed the injury with a surgical pathological report located in the patient’s file which showed that the tubal ligation was not complete).

{12} In the present case, Tomlinson argues that her claim was timely because Section 41-5-13 was tolled by George’s alleged fraudulent concealment based on his assurances that her wrist was healing properly when that was false. George disputed that there was fraudulent concealment on his part. The district court judge noted that Tomlinson based her allegation of fraudulent concealment on these assurances and stated that he did not “believe that this simple assertion is sufficient to establish a material fact on the question of fraudulent concealment;” however, he stated that the more important issue was his decision that the doctrine of fraudulent concealment did not apply when discovery occurred within the statutory period. We agree with the district court that our precedent as discussed above as well as cases from other jurisdictions addressed allegations establishing fraudulent concealment much more clearly than George’s mere assurance regarding Tomlinson’s wrist. See Earle, 998 S.W.2d at 889 (concluding that the plaintiff’s evidence that the physician “must have known that his recommendation of surgery was negligent because it was contraindicated by the objective test results” “shows a difference of opinion . . . and raises a question whether [the physician] was negligent, [but] it falls short of showing [the physician’s] ‘actual knowledge of the fact that a wrong . . . occurred’ necessary for fraudulent concealment”); Skuffeeda v. St. Vincent Hosp. & Med. Ctr., 714 P.2d 235, 238 (Or. Ct. App. 1986) (“We think that deliberate deceptive statements differ from merely careless or innocent misrepresentations in one important respect. Such an innocent contemporaneous representation must misrepresent something other than the careful performance or the success of the very treatment or operation whose failure is the basis of plaintiff’s subsequent complaint.” (quoting Duncan v. Augter, 596 P.2d 555, 564 (Or. 1978))). However, the Court of Appeals assumed that a genuine issue of material fact exists regarding whether George fraudulently concealed any negligence on his part, Tomlinson, 2003-NMCA-004, ¶ 4, and for purposes of this appeal, we also assume without deciding that a genuine issue of material facts exists regarding fraudulent concealment.

{13} Kern specifically addressed fraudulent concealment and Section 41-5-13 and controls the present matter. In Kern, this Court overturned a grant of summary judgment in favor of the defendant in relation to a plaintiff’s claim, which was filed approximately two years and six months after the end of the three-year limitation, where there was a genuine issue of material fact that the defendant fraudulently concealed the act of malpractice for the entire three-year period. 102 N.M. at 454, 456-57, 697 P.2d at 137, 139-40. The Court rejected the plaintiff’s discovery-based argument “that there is no malpractice until there is injury and that the statute, therefore, should not start to run until the injury has manifested itself in a physically objective manner and is ascertainable.” Id. at 454, 697 P.2d at 137. However, “New Mexico recognizes the doctrine of fraudulent concealment in medical malpractice cases,” which “is based not upon a construction of the statute, but rather upon the principle of equitable estoppel.” Id. at 455, 697 P.2d at 138. “The theory is premised on the notion that the one who has prevented the plaintiff from bringing suit within the statutory period should be estopped from asserting the statute of limitation as a defense.” Id. at 455-56, 697 P.2d at 138-39. In order for a patient to toll Section 41-5-13, he or she must demonstrate “that the patient did not know, or could not have known through the exercise of reasonable diligence, of his [or her] cause of action within the statutory period.” Id. at 456, 697 P.2d at 139. Thus, we held that fraudulent concealment does not toll Section 41-5-13 “if the patient knew, or through the exercise of reasonable diligence should have known, of his [or her] cause of action within the statutory period.” Id. “If tolled by fraudulent concealment, the statute commences to run again when the patient discovers, or through the exercise of reasonable diligence should have discovered, the malpractice.” Id. The Court then applied this requirement to the facts presented in that case and held “that petitioner presented sufficient evidence on the issue of [the patient’s] unawareness of the cause of action within the statutory period, to overcome a summary judgment motion.” Id. Thus, not only did this Court, in Kern, emphasize that fraudulent concealment does not toll the statute of repose unless the defendant’s actions prevented the plaintiff from filing the claim within the statutory period, we applied this requirement to the facts in Kern.

{14} Fraudulent concealment is based upon the principle that a defendant who has prevented the plaintiff from bringing suit within the statutory period should be estopped from asserting the statute of repose as a defense based on equitable estoppel. Kern, 102 N.M. 455-56, 697 P.2d at 138-39. However, if a plaintiff discovers the injury within the time limit, fraudulent concealment does not apply because the defendant’s actions have not prevented the plaintiff from filing the claim within the time period and the equitable remedy is not necessary. Stated another way, as a result of the plaintiff’s discovery of the cause of action within the time period of Section 41-5-13, the defendant cannot be said to have prevented the plaintiff from bringing suit before the period has expired, and tolling is not required as a matter of equity.

{15} Applying Kern to this case, Tomlinson must show that she did not know of her cause of action within the statutory period in order to toll the statute of repose. Even assuming that George’s assurances regarding Tomlinson’s wrist constituted fraudulent concealment,
Section 41-5-13 is not tolled, and her claim is barred under Kern.

Both the district court and the Court of Appeals in the present matter reached the same conclusion regarding Kern. The Court of Appeals concluded that “[i]mplicit in Kern is that tolling is not available when the fraudulent concealment of the act of malpractice is discovered within the three-year period.” Tomlinson, 2003-NMCA-004, ¶ 12. We conclude that Kern in fact explicitly holds that the statute of repose is not tolled by fraudulent concealment when the plaintiff knew of his or her cause of action within the statutory period.

The resolution of this case is somewhat complicated by another recent Court of Appeals’ published opinion, which, although decided a short time after Tomlinson, directly conflicts with Tomlinson. Juarez, 2003-NMCA-011, n.4 (“We recognize that our understanding of La Farge and our approach to fraudulent concealment are in direct conflict with a recent decision[ Tomlinson,] of another panel of the Court.”). In Juarez, the plaintiffs filed a wrongful death action on May 27, 1998, three years after the patient’s heart attack but three years and three months after the alleged occurrence of malpractice, arguing that fraudulent concealment should toll the statute of repose. Id. ¶¶ 3-5. The Court in Juarez, along with Tomlinson in her arguments to this Court, relied on cases from the Court of Appeals which predate Section 41-5-13 and this Court’s opinion in Kern. Juarez, 2003-NMCA-011, ¶ 19-21. Because both Hardin, 87 N.M. at 144, 530 P.2d at 408, and Garcia, 92 N.M. at 655, 593 P.2d at 490, were decided under law involving a discovery-based statute of limitations prior to the Legislature’s adoption of Section 41-5-13 and to our opinion in Kern, they are inapplicable with regard to tolling Section 41-5-13.2 As this Court recognized in Cummings, the Legislature specifically chose an occurrence-based statute of repose rather than a discovery-based statute of limitations for medical malpractice actions. Section 41-5-13 provides for a statute of repose which begins to run when the malpractice occurs, not when the injury is discovered. Compare Cummings, 1996-NMSC-035, ¶ 38, with Garcia, 92 N.M. at 655, 593 P.2d at 490 (noting that, at the time applicable to Garcia in contrast to the occurrence-based statute of repose, “a cause of action for personal injuries for malpractice begins to run, not from the time of the malpractice, but from the time the injury manifests itself in a physically objective manner and is ascertainable”) (Andrews, J., dissenting) (citation omitted). Thus, these cases cannot be considered a correct statement of New Mexico law regarding Section 41-5-13 and fraudulent concealment.

Although the Juarez Court relied on portions of Kern, it stated that the requirement that a plaintiff not discover the malpractice within the statutory period in Kern was “non-binding dicta, which [has] been overtaken by the Supreme Court’s more recent pronouncements in” La Farge. Juarez, 2003-NMCA-011, ¶ 17. We do not agree with the Court of Appeals’ conclusion in Juarez that the Kern holding was non-binding dicta despite our implication otherwise in La Farge. Kern expressly addressed the statute of repose in the context of fraudulent concealment and applied the requirement of non-discovery within the statutory period in its analysis of the facts. Thus, requiring the plaintiff to demonstrate that he or she did not know of the malpractice within the statutory period was necessary to the holding in the case and not dicta. La Farge, on the other hand, specifically declined to address the fraudulent concealment claim; thus, we conclude that La Farge’s discussion of fraudulent concealment was dicta, and, as discussed below, in error. The Juarez Court expressed that it had to “choose between competing Supreme Court formulations of the doctrine of equitable estoppel” by following “the more recent statement in La Farge” rather than the holding of Kern. Id. ¶ 22. La Farge, however, did not apply an equitable estoppel analysis; it applied a constitutional analysis. Further, we later limited the La Farge due process analysis in Cummings, which clarified the Legislature’s intent in Section 41-5-13 and held that a plaintiff’s knowledge of malpractice for one and one-half years during the statutory period bars her cause of action. We recognize the confusion regarding Kern caused by La Farge and thus do not fault the Court of Appeals for this determination in Juarez; however, based on Kern, we conclude that it is necessary to overrule Juarez.

Our opinion in La Farge has understandably created confusion for the application of Kern. For clarity, we emphasize that the fraudulent concealment analysis of Kern is distinct and separate from the due process analysis discussed in La Farge and Cummings. In La Farge, we expressly concluded that the fraudulent concealment issue was non-dispositive and moot in a case in which the malpractice was discovered eighty-five days before the running of the statutory time period because we held that such a short period was unconstitutional. 119 N.M. at 537, 893 P.2d at 433. Under a direct application of Kern, the plaintiff in La Farge would have been barred from bringing his claim because he discovered the malpractice within the statutory period. Rather than apply Kern explicitly, we instead noted that Kern’s phrase, “within the statutory period,” was not dispositive because the patient in Kern did not discover the concealment until after the statutory period had expired. Id. at 537 n.1, 893 P.2d at 433 n.1. This observation was in error. As discussed above, the fact that the plaintiff in Kern did not discover the cause of action within the statutory period was dispositive; we held that the plaintiff in Kern “presented sufficient evidence on the issue of [the patient’s] unawareness of the cause of action within the statutory period, to overcome a summary judgment motion.” Kern, 102 N.M. at 456, 697 P.2d at 139. We note that La Farge did not overrule Kern and in fact specifically did not reach or apply any fraudulent concealment analysis. See La Farge, 119 N.M. at 537 & n.1, 893 P.2d at 433 & n.1. Further, because we specifically declined to address the fraudulent concealment issue in La Farge, the discussion regarding the issue was dicta. Thus, Kern and its analysis regarding fraudulent concealment continues to be good law, supported by this Court’s reference to Kern in Cummings, which was decided after La Farge, and we reaffirm Kern. See Cummings, 1996-NMSC-035, ¶ 54.

B. La Farge/Cummings Substantive Due Process Analysis

As we concluded above, Section 41-5-13 is not tolled by George’s alleged fraudulent concealment because Tomlinson knew of her cause of action within the statutory period. Because the doctrine of fraudulent concealment does not allow Tomlinson’s claim to go forward, we next address whether the district court properly applied the substantive due process analysis of La Farge and Cummings.

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2 Although Garcia was published in 1979, the act of malpractice occurred in 1972. 92 N.M. at 652, 593 P.2d at 847. The Garcia Court addressed NMSA 1978, § 37-1-8 (1976), id. at 655, 593 P.2d at 490, a general three year statute of limitation for tort claims that runs from the date of discovery rather than the date of malpractice.
In *La Farge*, we concluded, on constitutional substantive due process grounds, that the plaintiff’s claim should be permitted because the negligent act was not discovered until eighty-five days before the statutory deadline. 119 N.M. at 541-42, 893 P.2d at 437-38. “[A] statute of repose that allows an unreasonably short period of time within which to bring an accrued cause of action violates the Due Process Clause of the New Mexico Constitution.” *Id.* Thus, this Court concluded that an eighty-five day period was “unreasonably short” under the specific facts of the case so as to violate the plaintiff’s due process rights. *La Farge’s* due process analysis and “unreasonably short period of time” standard is further delineated by this Court’s holding in *Cummins*.

Following *La Farge*, we again examined, at length, due process and Section 41-5-13 in *Cummins*. We addressed Section 41-5-13 in a case in which a defendant negligently missed a cancerous mass on x-rays and the plaintiff filed her action after the three-year statute of repose expired. *Cummins*, 1996-NMSC-035, ¶¶ 4-9. Fraudulent concealment was not an issue under the facts of *Cummins*. *Id.* ¶¶ 54, 56. The plaintiff was last treated by the defendant on August 10, 1988, and “[s]he discovered that the masses in her lung and kidney were cancer on February 23, 1990,” approximately a year and a half before the limitations period expired. *Id.* ¶ 57. The plaintiff argued that the occurrence rule of the statute of repose violated her due process rights of access to the courts, contending that “[a] patient may suffer a legitimate injury caused by a verifiable act of malpractice and would nevertheless be barred from legal recovery if the three-year limit runs before the injury becomes evident.” *Id.* ¶ 32. We rejected this claim, concluding that “where there is no cause of action, a plaintiff cannot claim they have been denied access to the courts. And if they have no right of access to the courts, they cannot claim to have been denied due process.” *Id.* ¶ 33. We determined that “[a] plaintiff has no expectancy of a cause of action that has been legitimately denied by the legislature before it accrues.” *Id.* We also noted that we have allowed a claim to be filed in cases involving “peculiar facts” in which a case conflicts with the filing requirements, and “when a good faith effort has been made to comply with the Act.” *Id.* ¶ 56. The Court in *Cummins* noted the holding in *La Farge* that an eighty-five day period of time was “unconstitutionally short.” *Id.* ¶ 55. However, we concluded that the plaintiff’s period of time, approximately one and one-half years, was not too short a time in which to file her claim. The Court concluded that “[t]he most determinative fact against [the plaintiff] is that she did not exercise diligence when she first learned she had been misinformed about the mass in her lung by [the defendant].” *Id.* ¶ 57. The Court relied on the fact that the plaintiff had approximately one and a half years to file her claim before the statute of repose ran; “[i]n other words, she sat on her rights and did not file any claim for more than two years.” *Id.* The plaintiff “lost her medical malpractice claim through her own lack of diligence.” *Id.* “It is irrelevant that the patient loses his or her malpractice claim through blameless ignorance.” *Id.* ¶ 59 (quotation marks and quoted authority omitted).

*Cummins* thus demarcates the outer boundary of *La Farge*; we read these cases as complementary rather than conflicting. While *La Farge* holds that a plaintiff who discovers the injury or malpractice during the statutory period as it runs from the occurrence of the negligent act must have a reasonable period of time from the discovery to file his or her claim, *Cummins* concludes that one and one-half years is a constitutionally reasonable period of time within which to file a claim. See *Cummins*, 1996-NMSC-035, ¶ 57. Section 41-5-13 “forecloses any cause of action that does not accrue within three years of the act of malpractice.” *Id.* ¶ 33. In other words, a plaintiff that discovers his or her cause of action after three years from the date of malpractice is barred by Section 41-5-13 from filing a claim; that is the nature of a statute of repose. Thus, we conclude that this precedent resolves that the *La Farge/Cummins* due process analysis must apply only to claims discovered within the statutory period; if a claim is discovered after the statute has run, Section 41-5-13 is an explicit bar. We have recognized “very few exceptional circumstances” to this “strict three-year occurrence rule,” including fraudulent concealment. *Cummins*, 1996-NMSC-035, ¶ 54.

Because the fraudulent concealment doctrine does not toll Section 41-5-13 for Tomlinson, and because the district court ruled on the issue, we address whether the due process analysis excuses Tomlinson’s late filing. In the present case, the district court determined that, under the substantive due process analysis of *La Farge*, almost three years was not “an unreasonably short period of time within which to bring an accrued cause of action.” We agree. Tomlinson had almost the entire statutory period within which to file her claim. In *La Farge*, we concluded that eighty-five days was an unreasonably short period of time. On the other hand, *Cummins* holds that one and one-half years is not too short a time and that a plaintiff who does not file his or her claim in that period of time loses the claim through a lack of diligence. *Cummins*, 1996-NMSC-035, ¶ 57. Thus, under the *La Farge/Cummins* due process analysis, Tomlinson’s two years and eight months is a constitutionally reasonable period of time within which to file her claim.

**C. Clarification of Tolling Section 41-5-13 Based on Fraudulent Concealment**

Section 41-5-13 requires plaintiffs to file their claims within three years from the date the malpractice occurs. With Section 41-5-13, the Legislature, in order to alleviate the “unfair burden upon the medical profession” created by a discovery rule, “preclude[s] almost all malpractice claims from being brought more than three years after the act of malpractice.” *Cummins*, 1996-NMSC-035, ¶¶ 38, 40. Fraudulent concealment requires a plaintiff to demonstrate that the defendant physician knew of the alleged negligent act and concealed the negligent act from the patient or had material information pertinent to discovery of the negligent act which the defendant failed to disclose. Fraudulent concealment also requires that the plaintiff demonstrate that he or she did not know, and could not have discovered through the exercise of reasonable diligence, his or her cause of action during the statutory period. If a plaintiff demonstrates these requirements, then the equitable principle of fraudulent concealment tolls Section 41-5-13. We conclude that *Kern* provides authority for a day-for-day tolling of the statute of repose: “If tolled by fraudulent concealment, the statute commences to run again when the patient discovers, or through the exercise of reasonable diligence should have discovered, the malpractice.” *Kern*, 102 N.M. at 456, 697 P.2d at 139.

We also reaffirm, however, that the statute of repose is not tolled if the patient knew, or through the exercise of reasonable diligence should have known, of his or her claim within the statutory period. We cannot exercise the equitable principle of fraudulent concealment and deny the defendant’s reliance upon Section 41-5-13 where the plaintiff knew of the cause of action within the statutory period. In such circumstances, the defendant’s actions did not prevent the plaintiff from pursuing the claim. “The limitations period . . . encourages the patient, once the injury has been discovered, to diligently pursue his or her claim.” *Cummins*, 1996-NMSC-035, ¶ 57.
41. We believe this expresses the balance required in equity between not allowing a defendant to benefit from fraudulent concealment that prevents a plaintiff from filing a claim while continuing to require the plaintiff to exercise ordinary diligence in pursuit of his or her cause of action. The tolling of the statute based on equitable estoppel is meant to provide the plaintiff with a fair opportunity to pursue his or her cause of action set against the context of “the specific decision by the legislature to insulate qualified health care providers from the much greater liability exposure that would flow from a discovery-based accrual date,” the “most notable benefit of qualification.” Cummings, 1996-NMSC-035, ¶ 29 (quotation marks and quoted authority omitted). If the plaintiff is aware of his or her claim, or should have been aware through the exercise of reasonable diligence, within the statutory period, the equitable remedy is not applicable. To apply equitable tolling under such circumstances would frustrate the Legislature’s intent by effectively replacing the Legislature’s statute of repose with a discovery-based statute of limitations.

{27} When the plaintiff discovers the cause of action within three years of the date of malpractice, thereby precluding equitable relief for fraudulent concealment under Kern, the plaintiff will necessarily, as a matter of due process, have a reasonable time within which to file a claim, either under the three year limitations period itself or under the La Farge/Cummings due process analysis. Thus, the Kern fraudulent concealment doctrine applies only to claims discovered after the statutory period has expired. Apart and independent from fraudulent concealment, if a plaintiff discovers the potential claim during the statutory period but has an unreasonably short period of time within which to file, a plaintiff may argue to the district court that Section 41-5-13 is unconstitutional as applied under the La Farge/Cummings due process analysis. We conclude that this flexibility provides district courts with some level of discretion to relax Section 41-5-13’s strict three-year occurrence rule in unusual cases involving exceptional circumstances as a matter of fairness while upholding the legislative protection for physicians and assuring New Mexicans access to health care.

III. Conclusion

{28} Tomlinson’s cause of action is barred by operation of Section 41-5-13. Applying the fraudulent concealment analysis of Kern to the present matter, and assuming that George fraudulently concealed his act of alleged malpractice, we conclude that the principle does not toll the statute of repose because Tomlinson discovered the alleged act of malpractice within the statutory period. Tomlinson’s cause of action is barred by Section 41-5-13 because she knew of her cause of action and had over two years and eight months during the statutory period in which to file her claim. George’s alleged fraudulent concealment did not prevent Tomlinson from filing her claim within three years from the date of alleged malpractice. Under our separate substantive due process analysis, we conclude that Section 41-5-13 as applied to Tomlinson is not unconstitutional because two years and eight months is an adequate period of time within which to file a claim.

{29} We conclude that the Court of Appeals and the district court did not err by determining that Tomlinson’s claim should be dismissed by operation of Section 41-5-13. Thus, we affirm the district court’s grant of summary judgment dismissing Plaintiff’s claim.

{30} IT IS SO ORDERED.

PATRICIO M. Serna,
Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PÉTRA JIMENEZ MAES, Justice
MICHAEL E. VIGIL, Judge
New Mexico Court of Appeals (sitting by designation)
JAMES HALL, Judge
District Judge (sitting by designation)
May a deputy marshal, who observes erratic driving behavior, initiate a traffic stop outside his jurisdictional territory, when he is neither cross-commissioned nor in fresh pursuit, and where a local sheriff’s deputy subsequently arrives on the scene, handle the case, and make the arrest?

Defendant correctly observes that NMSA 1978, § 3-13-2(A)(4)(d). It was undisputed that the traffic stop was made outside the limits imposed by Section 3-13-2. The State responds, however, that Deputy Marshal Louick’s stop was justified as a lesser intrusion than the citizen’s arrest that he was entitled to make, and that he acted reasonably and within his authority. As discussed below, we reverse.

Defendant correctly observes that NMSA 1978, § 3-13-2(A)(4)(d). It was undisputed that the traffic stop was made outside the limits imposed by Section 3-13-2. The State responds, however, that Deputy Marshal Louick’s stop was justified as a lesser intrusion than the citizen’s arrest that he was entitled to make, and that he acted reasonably and within his authority. As discussed below, we reverse.

Deputy Marshal Louick testified that he was employed by the Town of Mesilla as a deputy marshal, and has been certified by the State of New Mexico as a law enforcement officer. He also admitted that he had no other authorization as a law enforcement officer, and had not been cross-commissioned, appointed, or cross-designated as a special deputy sheriff of the County of Doña Ana. It is undisputed that, from the initial observation by Deputy Marshal Louick all the way to the location of the stop, Defendant’s vehicle, at no time, was within the jurisdictional boundary of the Town of Mesilla. In district court, Defendant moved to suppress the evidence and dismiss the charges on the grounds that Deputy Marshal Louick lacked jurisdictional authority to stop him. The district court dismissed with prejudice the State’s claims against Defendant, ruling that Deputy Marshal Louick was without authority to stop Defendant outside the town limits of Mesilla. The State appeals.

DISCUSSION

May a deputy marshal, who observes erratic driving behavior, initiate a traffic stop outside his jurisdictional territory, when he is neither cross-commissioned nor in fresh pursuit, and where a local sheriff’s deputy subsequently arrives on the scene, handle the case, and make the arrest?

Deputy Marshal Louick’s jurisdictional territory within the Town of Mesilla. See § 3-13-2(A)(4)(d). It was undisputed that the traffic stop was made outside the limits imposed by Section 3-13-2. The State responds, however, that Deputy Marshal Louick’s stop was justified as a lesser intrusion than the citizen’s arrest that he was entitled to make, and that he acted reasonably and within his authority. We agree.

“Interpretation and application of the law are subject to a de novo review.” State v. Roman, 1998-NMCA-132, ¶ 8, 125 N.M. 688, 964 P.2d 852. Our courts recognize that a municipal police officer may not enforce the motor vehicle code beyond the territorial limits of the officer’s jurisdiction, unless the officer is in fresh pursuit of a defendant fleeing the jurisdiction, or the officer has been cross-commissioned with such authority. Inc. County of Los Alamos v. Johnson, 108 N.M. 633, 634, 776 P.2d 1252, 1253 (1989); see also NMSA 1978, § 66-2-12 (1978); NMSA 1978, § 31-2-8 (1981). Any person, however, may arrest another upon good-faith, reasonable grounds that a felony had been or was being committed, or a breach of the peace was being committed in the person’s presence. State v. Johnson, 1996-NMSC-075, ¶ 18, 122 N.M. 696, 930 P.2d 1148; see also Downs v. Garay, 106 N.M. 321, 323, 742 P.2d 533, 535 (Ct. App. 1987) (holding that a private citizen may arrest another person for breach of peace or a felony committed in the citizen’s presence). In New Mexico, a breach of peace is
considered “a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.” State v. Florstedt, 77 N.M. 47, 49, 419 P.2d 248, 249 (1966) (internal quotation marks and citation omitted). Our Supreme Court held that “a person driving while intoxicated is committing a breach of the peace.” State v. Rue, 72 N.M. 212, 216, 382 P.2d 697, 700 (1963).

This question is one of first impression in New Mexico. We can obtain some guidance from State v. Ryder, 98 N.M. 453, 649 P.2d 756 (Ct. App.) (Ryder I), aff’d on different grounds, 98 N.M. 316, 648 P.2d 774 (1982) (Ryder II). In that case, a Bureau of Indian Affairs officer (BIA officer) stopped non-Indians for running a stop sign on an Indian reservation. Because the BIA officer was not cross-commissioned as a New Mexico peace officer, he did not have the authority to issue a citation for a state traffic offense. Ryder I, 98 N.M. at 454, 649 P.2d at 757. Instead, he detained the non-Indians until a cross-commissioned officer arrived. Id. This Court held that since the BIA officer was without police authority in this case, his actions were converted into those of a “private citizen.” Id. at 456, 649 P.2d at 759. Our Supreme Court took Ryder up on certiorari, and affirmed on different grounds, indicating that the BIA officer was permitted to stop the motorist for running the stop sign and could have given the motorist a federal ticket based on his violation of state law. The Court held that it was not unreasonable for the BIA officer to hold a motorist for ten minutes until a proper officer arrived. Ryder II, 98 N.M. at 318-19, 648 P.2d at 776-77. Nonetheless, that Court did not expressly disapprove our rationale that the BIA officer’s actions were converted into those of a private citizen.

Unlike our present case, evidence used to convict the defendants in Ryder was gathered by both the BIA officer and the proper cross-commissioned officer. Here, the evidence against Defendant was not gathered by Deputy Marshal Louick, but instead, Deputy Girard relied upon the field sobriety tests which he administered independently to arrest Defendant. We make this observation to illustrate that since our Supreme Court held the actions of the BIA officer to be reasonable under Ryder, then clearly, we must conclude the actions of Deputy Marshal Louick were reasonable here.

We read Section 3-13-2 as granting police officers official powers within their own jurisdictions, not divesting the officers of their common law right as citizens to make arrests or detentions. Thus, for the protection of individual liberties, a police officer outside his jurisdictional territory, absent statutory exceptions, cannot invoke a citizen’s arrest where the arrest in question is based on information not readily available to a private citizen. See People v. Niedzwiedz, 644 N.E.2d 53, 55 (Ill. App. Ct. 1994) (stating that “[a] police officer exceeds his authority to make a citizen’s arrest . . . when he uses the powers of his office to gather evidence unavailable to the private citizen outside his jurisdiction”).

In the present case, Deputy Marshal Louick did not use the power of his agency to obtain evidence unavailable to the private citizen. For instance, Defendant’s erratic driving, constant braking, and crossing over the center line into the oncoming lane for a significant distance at 1:30 a.m. would have led any reasonable person, who observed these things, to conclude that Defendant was driving under the influence, which is a breach of the peace and likely to cause a violent collision. See Florstedt, 77 N.M. at 49, 419 P.2d at 249 (defining breach of the peace as “a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community” (internal quotation marks and citation omitted)). As a matter of public safety, we would expect no less from Deputy Marshal Louick.

In support of its rationale, the State relies on State ex rel. State v. Gustke, 516 S.E.2d 283 (W. Va. 1999). In Gustke, a uniformed police officer was driving his marked police vehicle home. Id. at 286. Outside the city limits, he saw a car being driven erratically by the defendant. Id. The officer contacted the county sheriff’s office who had jurisdiction and went on to stop the vehicle himself. Id. Thereafter, a sheriff’s deputy arrived and took over. The defendant was arrested for DUI. Id. The district court dismissed the drunk driving indictment because the police officer who made the stop was outside his agency’s territory and did not have jurisdiction there. Id. at 286-87. The state petitioned its supreme court for a writ of probation, which was granted. Id. at 287. The court acknowledged that the police officer, who made the initial stop, did not have the authority to make the arrest where he did. Id. at 289. However, the court added that “[i]t has often been recognized that a police officer who is without official authority to make an arrest may nevertheless make the arrest if the circumstances are such that a private citizen would have the right to arrest either under the common law or by virtue of statutory law.” Id. The court concluded that “[b]ecause the actions of [the officer] constituted a valid common law citizen’s arrest, the circuit court erred in suppressing all evidence flowing from [the officer’s] stop of [the defendant].” Id. at 293.

Because Defendant’s initial stop was justified as a lesser intrusion than the citizen’s arrest Deputy Marshal Louick was entitled to make, and the investigation which led to Defendant’s arrest was performed by Deputy Girard, who had jurisdictional authority, we conclude the district court erred in suppressing the evidence flowing from Deputy Girard’s investigation, and we need not address the State’s jurisdictional issue. See, e.g., Edwards v. State, 462 So. 2d 581, 582 (Fla. Dist. Ct. App. 1985) (“We cannot think of a more apt illustration of such breach of the individual and collective peace of the people . . . than to have a drunk driver at the wheel of a killing machine that is going all over the road and scaring oncoming drivers to death rather than killing them.”); Molan v. State, 614 P.2d 79, 80 (Okla. Crim. App. 1980) (“[T]his court has held that a law enforcement officer outside his jurisdiction may make a citizen’s arrest.”); State v. Johnson, 661 S.W.2d 854, 859 (Tenn. 1983) (acknowledging that a deputy acting outside of his territorial jurisdiction may be “limited to the authority of a private person” in making an arrest); State v. Harp, 534 P.2d 842, 844 (Wash. Ct. App. 1975) (concluding that an officer acting outside of his territorial jurisdiction could make an arrest as a private citizen could make a felony arrest upon probable cause as a private citizen). Accordingly, we hold that a law enforcement officer acting outside of his or her territorial jurisdiction has the same authority to arrest as does a private citizen.

CONCLUSION

The decision of the district court is reversed, and the cause is remanded to the district court with instructions to vacate the order of dismissal, and to reinstate the cause for a trial on the merits.

IT IS SO ORDERED.

IRA ROBINSON, Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
LYNN PICKARD, Judge
Employer appeals from an order of the worker’s compensation judge (WCJ), which ordered Employer to pay 100% of Worker’s attorney fees. The WCJ ordered Employer to pay 100% of Worker’s attorney fees because the final compensation order that was awarded to Worker was worth a greater amount than Worker’s initial offer for compensation. On appeal, Employer argues that the WCJ erred in awarding Worker 100% of his attorney fees because (1) Worker’s initial offer was “ambiguous,” (2) Worker failed to show that his offer was less than the amount awarded in the final compensation order, and (3) the circumstances of this case, including that Worker’s attorney spent minimal time during the final settlement negotiations, are such that as a matter of law Worker should not have been awarded 100% of his attorney fees. We conclude that Worker’s offer for compensation was not ambiguous. We also conclude that Worker’s offer was less than the amount awarded in the final compensation order, which permitted the WCJ to award Worker 100% of Worker’s attorney fees to be paid by Employer. Finally, we conclude that the WCJ did not abuse its discretion in awarding Worker 100% of his attorney fees to be paid by Employer. Accordingly, we affirm the decision of the WCJ.

FACTS AND BACKGROUND

(2) On January 6, 2000, Worker injured his back in the course and scope of his employment. After the injury to his back, Worker began to see Employer’s health care provider, Dr. Frederick Mosley. In October 2000, Worker elected to change his health care provider and began to see Dr. Erich Marchand, although he continued to be evaluated periodically by Dr. Mosley. Worker began to receive temporary total disability (TTD) benefits from the date of his injury. However, both Worker and Employer continued to negotiate a final settlement regarding the actual TTD rate that Worker was owed and the amount of medical benefits to be paid to Worker.

(3) In March 2003, Worker submitted an offer to allow a compensation order to be taken. The offer included a TTD rate of $260 per week and a provision stating that Worker would not assert any claim for payment of medical bills for treatments Worker received in late 2002. The offer also included the following provision:

2. TTD benefits paid for the time period from the date of injury until . . . [maximum medical improvement (MMI)] as determined by Dr. Marchand.

(4) Employer rejected the offer because it claimed that paragraph two of the offer was too ambiguous. Subsequently, Employer submitted a counteroffer. Employer’s counteroffer also included the TTD rate of $260 per week, which was the rate specified in Worker’s offer. However, Employer’s counteroffer differed from Worker’s offer in two areas. First, Employer agreed in its counteroffer to pay for Worker’s medical bills that Worker incurred in late 2002. Second, unlike Worker’s offer, which specified that Dr. Marchand would determine Worker’s MMI date, Employer’s counteroffer did not provide for a specific doctor to set the MMI date, although it did provide that TTD would be paid until the MMI date.

(5) After Employer submitted its counteroffer, Employer and Worker continued to have discussions regarding the offers. Worker disputed the TTD rate of $260 per week in Employer’s counteroffer. Employer subsequently withdrew its initial counteroffer and submitted a second counteroffer. Employer’s second counteroffer included a higher TTD rate of $268.87 per week. On June 19, 2003, the WCJ entered a compensation order based on a stipulation of the parties. The stipulated compensation order stated that Worker accepted

Worker’s application claimed that the final compensation order exceeded Worker’s offer and, therefore, pursuant to Section 52-1-
he was entitled to have Employer pay 100% of his attorney fees. In its response to Worker’s application, Employer argued that Worker’s offer was too ambiguous to constitute an offer under Section 52-1-54(F)(4). Furthermore, Employer asserted that the final compensation order did not exceed Worker’s offer because the final order did not allow Worker to determine the health care provider who would determine Worker’s MMI date.

The WCJ, after hearing oral arguments regarding Worker’s application, found that Worker’s offer was not so ambiguous as to render the offer unenforceable. Furthermore, the WCJ also found that the final compensation order exceeded Worker’s offer by awarding Worker a higher TTD rate, as well as providing that Employer would pay Worker’s medical bills incurred in late 2002. Thus, the WCJ granted Worker’s application and entered an order directing Employer to pay 100% of Worker’s attorney fees. Employer filed a motion to have the WCJ reconsider this order. After hearing arguments regarding Employer’s motion for reconsideration, the WCJ denied the motion. In the order granting Worker 100% of his attorney fees and denying Employer’s motion for reconsideration, the WCJ provided that Employer and Worker had stipulated that a reasonable attorney fee in this case was $11,750.

DISCUSSION

We begin our analysis of this case by addressing Employer’s contention that Worker’s offer was so ambiguous as to render the offer invalid. We then proceed to analyze Employer’s contention that the final compensation order did not exceed Worker’s offer. We conclude with a short discussion concerning whether the fee shifting provision of Section 52-1-54(F)(4) should apply in this case even though Employer worked diligently toward reaching a settlement with Worker.

Worker’s Offer to Allow a Compensation Order to Be Taken Was Not Ambiguous

Employer argues that it should not be responsible for 100% of Worker’s attorney fees because Worker’s offer to allow a compensation order to be taken was invalid due to an ambiguity within the offer. Specifically, Employer argues that paragraph two of Worker’s offer was ambiguous because it did not specify the actual date that Worker would reach MMI. Employer argues that an ambiguous offer is not the type of offer contemplated by Section 52-1-54(F)(4) and therefore Employer should not be held to the fee shifting provisions of the statute. We review a WCJ’s order awarding attorney fees for an abuse of discretion; however, the review of the application of law to the facts is conducted de novo. *Aguilar v. Peñasco Independent School District No. 6*, 100 N.M. 625, 629, 674 P.2d 515, 519 (1984), as support for the proposition that in a worker’s compensation case an ambiguous offer may be found to be invalid. Employer argues that in *Aguilar* the Supreme Court ruled that because of an ambiguity in the employer’s offer of settlement, it could not be held that Worker had failed to collect compensation in excess of the amount offered. *Id.* This case, however, is distinguishable from *Aguilar*. In *Aguilar*, the Court held that the employer’s offer of settlement was ambiguous, whereas in the present case, we have already determined that Worker’s offer was not ambiguous. *Id.* Furthermore, in *Aguilar*, the ambiguity concerned the combining of medical expenses and attorney fees into one lump sum, which led to confusion as to what funds were earmarked for medical expenses as opposed to what funds were set aside for attorney fees. *See id.* In the present case, the language that Employer argues is ambiguous is simply a term of Worker’s offer that Worker found most favorable to him and Employer found too risky to undertake.

Employer relies on *Aguilar v. Peñasco Independent School District No. 6*, 100 N.M. 625, 629, 674 P.2d 515, 519 (1984), as support for the proposition that in a worker’s compensation case an ambiguous offer may be found to be invalid. Employer argues that in *Aguilar* the Supreme Court ruled that because of an ambiguity in the employer’s offer of settlement, it could not be held that Worker had failed to collect compensation in excess of the amount offered. *Id.* This case, however, is distinguishable from *Aguilar*. In *Aguilar*, the Court held that the employer’s offer of settlement was ambiguous, whereas in the present case, we have already determined that Worker’s offer was not ambiguous. *Id.* Furthermore, in *Aguilar*, the ambiguity concerned the combining of medical expenses and attorney fees into one lump sum, which led to confusion as to what funds were earmarked for medical expenses as opposed to what funds were set aside for attorney fees. *See id.* In the present case, the language that Employer argues is ambiguous is simply a term of Worker’s offer that Worker found most favorable to him and Employer found too risky to undertake.

In *Leo v. Cornucopia Restaurant*, 118 N.M. 354, 362, 881 P.2d 714, 722 (Ct. App. 1994), we held that the purpose of Section 52-1-54(F) is to “encourage settlement of compensation cases by authorizing both parties to make offers of judgment, and by providing a financial sanction against a party that rejects an offer of judgment and fails to obtain a more favorable outcome at the formal hearing.” We have since held that a compensation order entered pursuant to a settlement can be utilized when evaluating whether an offer of judgment has been met under Section 52-1-54(F). *Hise v. City of Albuquerque*, 2003-NMCA-015, ¶¶ 11, 12. We hold that the purpose of Section 52-1-54(F) would be undercut by a determination that parties cannot enter into settlements where the MMI date is to be determined at a later date due to a worker’s continuing healing process. Therefore, we rule that the WCJ did not err when he ruled that Worker’s offer for a compensation order to be taken was not ambiguous and that Worker’s offer was a valid offer pursuant to Section 52-1-54(F)(4).

The WCJ Did Not Err When He Determined that the Final Compensation Order Exceeded Worker’s Offer for a Compensation Order to Be Taken

Employer argues that the final compensation order did not exceed Worker’s offer to allow a compensation order to be taken. Specifically, Employer contends that Worker’s offer sought to gain control of which doctor would determine Worker’s MMI date and the counteroffer also provided that Worker’s MMI date could be determined by a doctor other than Dr. Marchand. We conclude that Worker’s offer was clear as to Worker’s meaning and intent regarding the issues of the determination of Worker’s MMI date and which doctor would determine the date.

Our appellate courts have held that a document is ambiguous if it is susceptible to more than one reasonable interpretation. *Leverson v. Mobley*, 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). However, in this case, the only reasonable interpretation of paragraph two is that Worker offered Employer a settlement based on Dr. Marchand having sole control of determining Worker’s MMI date and that Dr. Marchand would determine Worker’s MMI date at some time in the future. Although we acknowledge that Worker’s offer posed a level of risk for Employer that Employer may not have been willing to take, we conclude that the language of the offer was not susceptible to more than one interpretation and therefore not ambiguous.

The WCJ Did Not Err When He Determined that the Final Compensation Order Exceeded Worker’s Offer for a Compensation Order to Be Taken

Employer argues that it should not be responsible for 100% of Worker’s attorney fees because Worker’s offer to allow a compensation order to be taken was invalid due to an ambiguity within the offer. Specifically, Employer argues that paragraph two of Worker’s offer was ambiguous because it did not specify the actual date that Worker would reach MMI. Employer argues that an ambiguous offer is not the type of offer contemplated by Section 52-1-54(F)(4) and therefore Employer should not be held to the fee shifting provisions of the statute. We review a WCJ’s order awarding attorney fees for an abuse of discretion; however, the review of the application of law to the facts is conducted de novo. *Aguilar v. Peñasco Independent School District No. 6*, 100 N.M. 625, 629, 674 P.2d 515, 519 (1984), as support for the proposition that in a worker’s compensation case an ambiguous offer may be found to be invalid. Employer argues that in *Aguilar* the Supreme Court ruled that because of an ambiguity in the employer’s offer of settlement, it could not be held that Worker had failed to collect compensation in excess of the amount offered. *Id.* This case, however, is distinguishable from *Aguilar*. In *Aguilar*, the Court held that the employer’s offer of settlement was ambiguous, whereas in the present case, we have already determined that Worker’s offer was not ambiguous. *Id.* Furthermore, in *Aguilar*, the ambiguity concerned the combining of medical expenses and attorney fees into one lump sum, which led to confusion as to what funds were earmarked for medical expenses as opposed to what funds were set aside for attorney fees. *See id.* In the present case, the language that Employer argues is ambiguous is simply a term of Worker’s offer that Worker found most favorable to him and Employer found too risky to undertake.

In *Leo v. Cornucopia Restaurant*, 118 N.M. 354, 362, 881 P.2d 714, 722 (Ct. App. 1994), we held that the purpose of Section 52-1-54(F) is to “encourage settlement of compensation cases by authorizing both parties to make offers of judgment, and by providing a financial sanction against a party that rejects an offer of judgment and fails to obtain a more favorable outcome at the formal hearing.” We have since held that a compensation order entered pursuant to a settlement can be utilized when evaluating whether an offer of judgment has been met under Section 52-1-54(F). *Hise v. City of Albuquerque*, 2003-NMCA-015, ¶¶ 11, 12. We hold that the purpose of Section 52-1-54(F) would be undercut by a determination that parties cannot enter into settlements where the MMI date is to be determined at a later date due to a worker’s continuing healing process. Therefore, we rule that the WCJ did not err when he ruled that Worker’s offer for a compensation order to be taken was not ambiguous and that Worker’s offer was a valid offer pursuant to Section 52-1-54(F)(4).
that the final compensation order did not provide Worker with as much control. We agree with Employer that the final compensation order did not give Worker control of choosing the doctor who would determine Worker’s MMI date; however, we disagree with Employer that the final compensation order in this case did not exceed Worker’s offer. Although Worker gained less control of who would determine his MMI date in the final compensation order, we base our conclusion that the final compensation order exceeded Worker’s offer on the provisions in the final order that awarded Worker the cost of medical bills that he incurred in late 2002 and that increased the compensation rate. Worker’s offer did not include a claim for Worker’s medical bills from late 2002. Our Supreme Court has held that past medical expenses are compensation for purposes of determining an award of attorney fees. *Bd. of Educ. v. Quintana*, 102 N.M. 433, 435, 697 P.2d 116, 118 (1985). Here, Worker’s medical bills from late 2002 added up to $4,750.69. Because Worker’s offer did not assert a claim for medical benefits, the final compensation order exceeded Worker’s offer by the full $4,750.69.

In addition, the TTD rate awarded to Worker in the final compensation order exceeded the TTD rate in Worker’s offer for a compensation order to be taken. Worker’s offer included a TTD rate of $260 per week, while the final compensation order awarded Worker a TTD rate of $268.87 per week. Worker below calculated the difference in these rates to be over $4,000 over the period of disability without dispute from Employer. Thus, the final compensation order exceeded Worker’s offer by not only increasing Worker’s TTD rate, but also by awarding Worker $4,750.69 in past medical bills.

Because of these two amounts, the WCJ stated that Worker had “beat” the prior offer rejected by Employer. We understand Employer’s position to be that these amounts pale in comparison to the victory Employer won by getting control over the MMI date. But the facts are that Dr. Marchand predicted an MMI date at a deposition taken two days before Worker’s offer, and by the time of the hearing on attorney fees, it turned out that the MMI date was as Dr. Marchand had predicted. Under these circumstances, the WCJ could have viewed the MMI date dispute as a draw. Therefore, the WCJ could properly have found that the final compensation order exceeded Worker’s offer to allow a compensation order to be taken.

Although Employer Worked Diligently to Reach a Settlement with Worker and Worker’s Attorney Did Not Spend the Bulk of His Time During Settlement Negotiations, the Fee Shifting Provision of Section 52-1-54(F)(4) Is Still Applicable to Employer under the Circumstances in this Case

Employer argues that the WCJ erred when he ordered Employer to pay 100% of Worker’s attorney fees because Worker failed to show that his attorney fees had increased between Worker’s offer for a compensation order to be taken and Employer’s second counteroffer. Citing *Woodson v. Phillips Petroleum Co.*, 102 N.M. 333, 339, 695 P.2d 483, 489 (1985), Employer contends the WCJ should have considered the time and effort expended by Worker’s attorney in determining whether to require Employer to pay 100% of Worker’s attorney fees. We disagree. The time and effort expended by an attorney is relevant to the amount of an attorney fee award, not to the fee-shifting scheme in Section 52-1-54(F). *See Woodson*, 102 N.M. at 339-40, 695 P.2d at 489-90 (holding that amount of attorney fee award was reasonable in light of the factors governing such an award, including the time spent by the worker’s attorney).

Employer claims that the record in this case indicates that between Worker’s offer and Employer’s second counteroffer, it was the effort of Employer that led to a settlement with Worker. Employer directs our attention to the holding in *Leo*, which concluded that the purpose of Section 52-1-54(F) was to encourage settlement. *Leo*, 118 N.M. at 362, 881 P.2d at 722. Therefore, Employer contends that because Employer was the party that attempted to effectuate a settlement in this case, we should reverse the WCJ’s order awarding Worker 100% of his attorney fees to be paid by Employer as being inconsistent with the holding in *Leo*.

Although we recognize that Employer worked in good faith with Worker to reach a settlement, we do not conclude that Employer’s counteroffers were the only offers submitted that attempted to reach a settlement. Worker submitted an unambiguous, reasonable offer, which attempted to settle the case, albeit with terms favorable to Worker. Once Employer rejected Worker’s offer, Employer became vulnerable to the fee-shifting provision of Section 52-1-54(F)(4) if the final compensation order exceeded Worker’s offer. Here, the final compensation order did exceed Worker’s offer, and therefore the WCJ did not err in awarding Worker 100% of his attorney fees to be paid by Employer.

We do not wish to be misunderstood as holding that the factors cited by Employer would not justify a WCJ’s declining to award a worker 100% of his attorney fees under the circumstances of this case, where the facts relating to whether the amount Worker offered was less than the amount in the compensation order presented a close factual issue. Indeed, as the award of attorney fees in workers’ compensation cases is discretionary, *Hise v. City of Albuquerque*, 2003-NMCA-015, ¶ 8, we believe it would have been well within the WCJ’s discretion to consider Employer’s reasonableness and the balance of what Worker gained during the settlement negotiations in the context of law that favors settlements, *see Leo*, 118 N.M. at 362, 881 P.2d at 722, and to have rejected Worker’s request for 100% of his attorney fees. However, the question before us is not whether the circumstances of this case would have supported an opposite result. *See Hernandez v. Mead Foods, Inc.*, 104 N.M. 67, 71, 716 P.2d 645, 649 (Ct. App. 1986), *limited on other grounds by Graham v. Presbyterian Hosp. Ctr.*, 104 N.M. 490, 492, 723 P.2d 259, 261 (Ct. App. 1986). It is whether the circumstances supported the WCJ’s ruling. For all of the foregoing reasons, we cannot say that the WCJ erred as a matter of law.

**CONCLUSION**

We affirm the order of the WCJ awarding Worker 100% of his attorney fees to be paid by Employer pursuant to Section 52-1-54(F)(4), and we remand the matter to the WCJ for proceedings on Worker’s request for additional fees for this appeal.

**IT IS SO ORDERED.**

LYNN PICKARD, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

CYNTHIA A. FRY, Judge
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  Noon  Lunch (Provided at State Bar Center)
  1:00 pm  Annual Meeting of Appellate Practice Section

8:30 am  Recent Developments in Appellate Practice
  Edward Ricco, Esq., Rodey, Dickason, Sloan, Akin & Robb, P.A.
  1:30 pm  Appellate Jurisdiction in New Mexico
            Andrew S. Montgomery, Esq., Montgomery & Andrews, P.A.

9:00 am  Post-Trial Proceedings and Perfecting Your Appeal: Are You Paranoid Or Are They Really Out To Get You?
  Jane B. Yohalem, Esq., Attorney at Law
  2:15 pm  Rising from the Ashes: The Successful Interlocutory Appeal
  Thomas C. Bird, Esq., Keleher & McLeod, P.A.

9:50 am  Break
  3:00 pm  Break

10:05 am  Considerations in the Filing of Extraordinary Writs and Petitions for Certiorari
  Hon. Gene E. Franchini, New Mexico Supreme Court (Retired) and
  Kerry Kiernan, Esq., Sutin, Thayer & Browne, P.C.

11:10 am  Ethics: What's It To Ya?
  Bruce R. Rogoff, Esq., NM Court of Appeals, Pre-Hearing Division

1:00 pm  Annual Meeting of Appellate Practice Section

2:15 pm  Rising from the Ashes: The Successful Interlocutory Appeal
  Thomas C. Bird, Esq., Keleher & McLeod, P.A.

3:00 pm  Break

3:15 pm  Judges’ Panel
  Hon. Edward L. Chavez, NM Supreme Court
  Hon. Pamela B. Minzner, NM Supreme Court
  Hon. Cynthia A. Fry, NM Court of Appeals
  Hon. Lynn Pickard, NM Court of Appeals
  Moderator, Steven L. Tucker

3:30 pm  Judges’ Panel

4:30 pm  Adjourn

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