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2005-NMCA-105: Dora Jacobo and Manuel Jacobo v. City of Albuquerque and Public Service Company of New Mexico
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Video Replay
13-14
Tuesday, September 13 and Wednesday, September 14, 2005
9 a.m. • State Bar Center, Albuquerque
10.3 General and 1.2 Ethics CLE Credits
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 October 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 Hon. Keith M. Lundin and Henry E. Hildebrand, III, Esq.
☐ Standard $289

Teleseminar
15-16
EEOC Mediation Program: Practical Guidance on Settling Employment Disputes Without Litigation, Part 1 & 2
Thursday, September 15 and Friday, September 16, 2005
11 a.m. via telephone • 2.4 General CLE Credits
The Equal Employment Opportunity Commission has a National Mediation Program, which provides an alternative to resolving employment disputes through the traditional investigative, enforcement and litigation processes. The program is widely misunderstood by practitioners for a variety of reasons, including perceptions that participation is a sign of weakness, requires payout of cash, and is not in the best interest of an employer who expects a charge to result in a “no cause” finding. There is also a widespread misperception that mediators will be biased toward charging parties. Instead, the EEOC mediation program offers an informal process in which the Commission acts as a neutral third party to help opposing parties reach a voluntary resolution of an employment dispute. The decision to mediate is completely voluntary for the charging party and the employer, confidential and free. The program is a valuable alternative for employment practitioners to offer their clients. This two-day program, featuring the participation of EEOC Commissioner Leslie E. Silverman, senior staffers at the EEOC, and leading private practitioners, will examine the practical procedures and benefits of mediation through the EEOC.
☐ Standard $129

Four Ways to Register
PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.
(please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbar.org, click CLE, then area of interest
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199
Name
NM Bar #
Street
City/State/Zip
Phone       Fax
E-mail
Program Title
Program Date
Program Location
Program Cost
☐ Purchase Order (must be attached to be registered)
☐ 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 parties, lawyers, jurors and witnesses:

I will be courteous, respectful and civil to parties, lawyers, jurors and witnesses. I will maintain control in the courtroom to ensure that all proceedings are conducted in a civil manner.

Meetings

September

5   Attorneys Support Group, 5:30 p.m., First Methodist Church
7   Employment and Labor Law Section Board of Directors, noon, State Bar Center
7   Trial Practice Section Board of Directors, 4:30 p.m., State Bar Center
8   Business Law Section Forms Committee, 2:30 p.m., State Bar Center
9   Business Law Section Board of Directors, 4 p.m., State Bar Center
9   Alternative Methods of Dispute Resolution Committee, noon, Second Judicial District Court
10  International and Immigration Law Section Board of Directors, 1:30 p.m., State Bar Center
10  Ethics Advisory Committee, 10 a.m., State Bar Center

State Bar Workshops

September

7   Lawyer Referral for the Elderly Workshop, 9 a.m., Mosquero Senior Center, Mosquero
7   Lawyer Referral for the Elderly Workshop, 1 p.m., Roy Senior Center, Roy
7   Consumer Debt/Bankruptcy Workshop, 6 p.m., Santa Fe Public Library, La Farge Branch, Santa Fe
8   Lawyer Referral for the Elderly Workshop, 10 a.m., Pioneer Senior Center, Tucumcari
14  Family Law Workshop, 6 p.m., State Bar Center
21  Lawyer Referral for the Elderly Workshop, 10 a.m., City of Santa Rosa Senior Center, Santa Rosa

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

COURT NEWS
NM Supreme Court Judicial Performance Evaluation Commission
Upcoming Meeting

The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court for the purpose of providing voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission's next meeting will be from 8 a.m. to 5 p.m., Sept. 15 and 16 at the State Bar Center in Albuquerque. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

Law Library Hours

The New Mexico Supreme Court Law Library will be closed Sept. 10 for Fiesta Weekend.

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.

Proposed Revisions to the Children's Court Rules

The Supreme Court is considering the adoption of proposed revisions to the Children's Court Rules. Attorneys who would like to comment on the proposed revisions should send written comments by Sept. 16 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Aug. 29 (Vol. 44, No. 34) Bar Bulletin.

Proposed Revisions to the Rules Governing Admission to the Bar

The Supreme Court is considering the adoption of proposed revisions to the Rules Governing Admission to the Bar. Attorneys who would like to comment on the proposed revisions should send written comments by Sept. 9 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Aug. 22 (Vol. 44, No. 33) Bar Bulletin.

Proposed Revisions to the Rules of Appellate Procedure

The Supreme Court is considering the adoption of proposed revisions to the Rules of Appellate Procedure. Attorneys who would like to comment on the proposed revisions should send written comments by Sept. 9 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Aug. 22 (Vol. 44, No. 33) Bar Bulletin.

Proposed Revision of the Rules of Criminal Procedure for the District Courts

The Supreme Court is considering the adoption of proposed revisions to the Rules of Criminal Procedure for the District Courts. Attorneys who would like to comment on the proposed revisions should send written comments by Sept. 9 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Aug. 22 (Vol. 44, No. 33) Bar Bulletin.

Rules of Criminal Procedure for District Court Committee Vacancy

One attorney vacancy exists on the Rules of Criminal Procedure for District Court Committee due to the recent resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest or resume to Kathleen J. Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for letters and resumes is Sept. 9.

NM Board of Legal Specialization
Legal Specialists Announced

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

- Appellate Practice
  - Nancy L. Simmons
  - Steven L. Tucker

- Estate Planning, Trusts and Probate Law
  - Judith D. Schrandt

- Family Law
  - Gretchen M. Walther

- Local Government Law
  - David F. Richards
  - Nann. M. Winter

- Real Estate Law
  - Dale W. Ek

- Trial Specialist – Civil Law
  - Scott D. Gordon

- Workers’ Compensation
  - David L. Skinner

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

Comments Solicited

The following attorneys are applying for certification as a specialist in the areas of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA. The Rules of the New Mexico Board of Legal Specialization provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 92860, Albuquerque, NM 87199.

- Employment and Labor Law
  - Daniel M. Faber

- Real Estate Law
  - Bradley D. Tepper
First Judicial District Court
Criminal Bench and Bar Brownbag

The First Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, Sept. 20 in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to any of the First Judicial District Court's Criminal Divisions.

Destruction of Exhibits: Criminal, Civil, Children's Court, Domestic and Probate Cases

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy exhibits filed with the court in criminal, civil, children's court, domestic and probate cases for years 1970 to 1987, including but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through Oct. 28. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by order of the court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

Destruction of Tapes: Criminal, Civil, Children's Court, Domestic and Probate Cases

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy tapes filed with the court in criminal, civil, children's court, domestic and probate cases for years 1974 to 1988, including but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and wish to have duplicates made should verify tape information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Sept. 28.

Judicial Vacancy

A vacancy on the First Judicial District Court will exist as of Sept. 23 due to the resignation of Judge Carol Vigil. The chair of the First Judicial District Court Nominating Commission now solicits nominations and applications for these positions from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm, or e-mailed, faxed, or mailed by contacting Reva Chapman, (505) 277-4700. The deadline for applications has been set for 5 p.m., Sept. 12. Applications received after that time will not be considered.

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, Sept. 6 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.

Destruction of Tapes: Criminal

Pursuant to the Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes filed with the court in criminal cases for years 1978 to 1984, including but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and wish to have duplicates made should verify tape information with the Special Services Division, (505) 841-6717, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Sept. 9.

Destruction of Tapes: Domestic Relations

Pursuant to the Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes and logs filed with the court in domestic relation cases for years 1974 to 1986, including but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and logs, and wish to have duplicates made, should verify tape information with the Special Services Division, (505) 841-6787, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Sept. 5.

Family Court Open Meetings Cancelled

The Family Court judges open meeting scheduled at noon, Sept. 12 has been cancelled. The next open meeting will be held at noon, Nov. 7 in the conference center located on the third floor of Second Judicial District Court, 400 Lomas Blvd. NW. The court apologizes for any inconvenience and looks forward to seeing attendees in November.

Judicial Vacancies

Two vacancies on the Second Judicial District Court will exist as of Sept. 30 due to the resignations of Judges Tommy Jewell and Robert Thompson. The chair of the Second Judicial District Court Nominating Commission now solicits nominations and applications for these positions from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judsel/index.htm, or e-mailed, faxed, or mailed by contacting Reva Chapman, (505) 277-4700. The deadline for applications has been set for 5 p.m., Sept. 16. Applications received after that time will not be considered. The Commission will meet on Oct. 17 and, if the number of applications warrant, Oct. 18.

Notice to Attorneys

Judge Kenneth H. Martinez will fill the criminal court position at the Second Judicial District Court effective Sept. 1. Martinez will assume criminal court cases assigned to Division XXIV. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Sept. 1 to challenge or excuse the judge pursuant to Rule 1-088.1 NMRA.

Swearing-In Ceremony

Judge Kenneth H. Martinez will be formally sworn in as a Second Judicial District Court Judge, Division XXIV, at 4:30 p.m., Sept. 15 in Chief Judge William F. Lang's courtroom, No. 338, of the Bernalillo
County Courthouse, 400 Lomas Blvd. NW. A reception will follow the swearing-in ceremony at La Posada de Albuquerque.

Ninth Judicial District Court Designation of Civil and Adult Criminal Divisions
Pursuant to an administrative order filed Aug. 24, the Ninth Judicial District Court, Curry and Roosevelt County have established the following divisions. Division I and Division II are hereby designated the adult criminal divisions; Division III is hereby designated the civil division and shall preside over the drug court when established; and Division IV is hereby designated as the family division, as described in separate notice.

In order to equally distribute the caseload among the four divisions, case assignments may be made to a division other than which would normally be assigned to that division. All cases now pending or hereinafter filed and not retained by the assigned judge due to familiarity with the case shall be transferred to the appropriate division. Parties who have not previously exercised their right to excuse will have 10 days from Sept. 12 to excuse the judge pursuant to Rule 1-088.1 NMRA.

Designation of Family Court Division
Judge Robert S. Orlik took the oath of office Aug. 19 and will fill the Ninth Judicial District Court Division IV family court position effective Aug. 22. The Family Court Division will consist of all juvenile delinquent (JR), abuse and neglect (JQ), domestic relations (DM), sequestered probate (PQ) and adoption (SA) cases.

Parties who have not previously exercised their right to excuse will have 10 days from Sept. 12 to excuse the judge pursuant to Rule 1-088.1 NMRA.

U.S. District Court for the District of New Mexico
Criminal Local Rules Posted for Public Comment
The Criminal Local Rules of the United States District Court for the District of New Mexico have been approved but are not effective. The Criminal Local Rules have been rewritten in their entirety and are posted for public comment on the court’s Web site, www.nmcourt.fed.us. Members of the bar may e-mail comments no later than Sept. 23 to crlr@nmcourt.fed.us or by mail to U.S. District Court, Clerk’s Office, Suite 270, 333 Lomas Blvd. NW, Albuquerque, NM 87102, Attn: CRLR.

U.S. Bankruptcy Court Chapter 13 Brownbag on BAPCPA
The office of the chapter 13 trustee will hold weekly brownbag sessions covering the NACTT’s consumer bankruptcy practice under BAPCPA. Attendees should bring lunch and a copy of the Bankruptcy Code with BAPCPA changes highlighted. Weekly sessions will be held on Mondays at noon on the tenth floor training room, U.S. Bankruptcy Court, Albuquerque. Presenters on the DVD include Judge Keith Lundin, Judge Ray Mullins, Judge William Brown, Judge Tom Waldron, Chapter 13 Trustee Henry Hildebrand and Attorney Richardo Kilpatrick. Topics covered will include: notice – getting information where it goes; case filing issues – “getting in”; automatic stay/refilling issues; attorney responsibilities – DRAs; chapter 13 – the “new” chapter 13; exemptions; court and clerk responsibilities; discharge and dischargeability; and reaffirmation. Call Kelley Skehen, (505) 243-1335 ext. 3013 for additional information.

Free Court Clerk’s Workshop
The clerk’s office of the U.S. Bankruptcy Court for the District of New Mexico is presenting a free workshop, “In with the New, Out with the Old: What Every Practitioner Needs to Know About the Court’s Rules, Forms, and Procedures Under the New Bankruptcy Law,” from 1:30 to 5 p.m., Oct. 6 in the Betty Bigbee Memorial Auditorium at the State Bar Center, 5121 Masthead St. NE, Albuquerque.

The workshop will cover changes to forms, rules, fees, and procedures. Handouts will be provided. Attorneys and all law office staff members are encouraged to attend. Further information will follow in subsequent editions of the Bar Bulletin and will also be on the court’s website, www.nmcourt.fed.us/web/BCDOCS/bcindex.html.

STATE BAR NEWS
2005 Section Elections
In accordance with the section bylaws, each State Bar section is required to appoint a nominating committee for its annual election and provide notice of the election so that any section member may indicate to the committee his or her interest in serving on the board of directors. The nominating committee appointment deadline was Aug. 31. Other nominating committee information should be sent to Tony Horvat, thorvat@nmbar or via fax, (505) 828-3765, before Sept. 15.

See the Aug. 8 Bar Bulletin (Vol. 44, No. 31) for a complete list of positions to be elected. Nominating committee membership for the Appellate Practice, Children’s Law, Criminal Law, Elder Law, Health Law, Natural Resources, Energy & Environmental Law, Public Law, Real Property, Probate and Trust and Solo and Small Firm Practitioners sections have been published in past issues. Nominating committee information for the Bankruptcy Law and Family Law sections follows:

Bankruptcy Law Section
Arin Elizabeth Berkson, Chair (505) 242-1218 aberkson@swcp.com
Daniel J. Behles (505) 217-3606 dan@beehles.com
Donald Provencio (505) 843-7071
Gerald R. Velarde (505) 248-1828 jerryvelarde@hotmail.com
Thomas D. Walker (505) 766-9272 tdwalker@jtwlawfirm.com

Family Law Section
Linda Lillie Ellison, Chair (505) 883-3070 lle@atkinsonkelsey.com
Catherine Aguilar (505) 747-9895 caguilar@plata.com
Felissa Garcia Kelley (505) 245-7200 thefamilylawfirm@aol.com
Paulette J. Hartman (505) 247-3335 pheart@qwest.net
Mark Terrence Sanchez (505) 397-6551 marksanchez@leaco.net
Attorney Support Group
Monthly Meeting

The next Attorney Support Group meeting will be held at 5:30 p.m., Sept. 12 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month, but is meeting one week later due to the Labor Day holiday.

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

Board of Bar Commissioners
Appointments to New Mexico Legal Aid (NMLA) Board

The Board of Bar Commissioners will make three appointments to the New Mexico Legal Aid (NMLA) Board at its next meeting on Sept. 22. Two of the appointments are for two-year terms to end December 2007 and one appointment is for a one-year term to end December 2006. Members wishing to serve on the NMLA Board should send a letter of interest and brief resume by Sept. 9 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Children’s Law Section Annual Poster and Writing Contest Deadline Extended

The sponsorship deadline has been extended to Sept. 15 for the Children’s Law Section’s 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. Donations may be made 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 Enoch, (505) 841-5001, for more information.

Commercial Litigation Section
Board Meeting in Ruidoso

The next board meeting of the Commercial Litigation Section will be held at 10:30 a.m., Sept. 24 at the State Bar Annual Meeting at the Ruidoso Convention Center. RSVP to membership@nmbar.org and contact Chair Stephen Lauer, slauert@emtisantafe.com or (505) 982-4611, to place an item on the agenda.

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 Sept. 7. (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.

Family Law Section
Annual Meeting

The Family Law Section will hold its annual membership meeting from 7 to 8 a.m., Sept. 24 in conjunction with the State Bar Annual Meeting at the Ruidoso Convention Center. Breakfast will be provided to section members free of charge. RSVP by Sept. 15 to the State Bar, membership@nmbar.org, and contact Chair Linda Ellison, lle@atkinsonkelsey.com, to place an item on the agenda. Section members are also encouraged to attend the family law update CLE presented by John Feder and Tom Montoya from 10:30 a.m. to noon, Sept. 23.

Paralegal Division
Brownbag CLE

Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., Sept. 14 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 “Get the Facts: Witness Interview Techniques,” presented by Jeanne Adams, paralegal and private investigator. For more information, contact Cheryl Passalaqua, (505) 890-6089, or Amy Paul, (505) 883-8181.

Senior Lawyers Division
Annual Meeting

The Senior Lawyers Division will hold its annual membership meeting at noon, Sept. 23 in conjunction with the State Bar Annual Meeting at the Ruidoso Convention Center. The meeting will be held in the same room as the division’s CLE program, “The Dysfunctional Client: Opportunity to Help or Hazard” presented by Judge Ted Baca, Susan Bennett and Mary Ann Green. The CLE program begins at 10:30 a.m. Contact Chair Turner Branch, tbranch@branchlawfirm.com or (505) 243-3501 to place an item on the agenda.

Young Lawyers Division
Annual Meeting

The Young Lawyers Division will hold its annual membership meeting from 10 a.m. to noon, Sept. 24 at the State Bar Annual Meeting at the Ruidoso Convention Center. Contact Chair Roxanna Chacon, lglrmc@zianet.com or (505) 2343-9311 to place an item on the agenda.

Other Bars
Albuquerque Bar Association
Monthly Luncheon and Professionalism CLE

The Albuquerque Bar Association’s monthly luncheon will be held at 11:45 a.m., Sept. 6 at the Albuquerque Petroleum Club. Attorneys who serve and have served in the U.S. military will be acknowledged. These veterans need not be members of the Albuquerque Bar Association to participate. The luncheon address, “Military Law and Lawyers in the New Paradigm,” will be presented by John Hutson, dean and president of the Franklin Pierce Law Center in Concord, N.H. Hutson served as a judge advocate in the U.S. Navy from 1972 to 2000 and was judge advocate general of the Navy from 1997 to 2000.

The CLE, “How to Effectively Represent
Your Client in Mediation,” will be presented by Wendy York, mediator and former district court judge, with a portion of the program to include a panel of mediators presenting techniques or approaches that lawyers have used in mediation that help … or hurt … the chances of settlement. The CLE is from 1:30 to 4 p.m. for 2.5 professionalism CLE credits. The luncheon is $20 for members and $25 for non-members; the luncheon and CLE is $70 for members and $100 for non-members; the CLE only is $50 for members and $75 for non-members. Register online at www.abqbar.com; by email at abqbar@abqbar.com; or phone the Albuquerque Bar office, (505) 243-2615.

Hispanic National Bar Association
30th Annual Convention
Alan M. Varela, president of the Hispanic National Bar Association has announced the 30th Annual HNBA Convention in Washington D.C. at the Mandarin Oriental Hotel Oct. 16 to 20. Registration for the convention can be found at the HNBA Web site, www.hnba.com, and completed entirely online. The convention is open to all interested legal professionals. For more information go to www.hnba.com or contact the HNBA Washington office, (202) 223-4777.

NM Black Lawyers Association
Civil Rights CLE
The New Mexico Black Lawyers Association and the Hispanic National Bar Association will present the CLE program, “Civil Rights Litigation: Sec. 1983, Employment Discrimination, Special Ethical Issues,” Sept. 30 at the State Bar Center. The cost is $120 and attendees will earn 8.0 general, 1.0 ethics and 2.0 professionalism CLE credits. Mail payment and registration to: NMBLA, PO Box 695, Albuquerque, NM 87103-0695. Registration information includes name, bar number, firm/organization, address and phone number. Contact NMBLA President Ray Hamilton, (505) 450-1032, for further information.

Retirement Dinner
The New Mexico Black Lawyers Association will host a retirement dinner honoring Judge Tommy E. Jewel at 6:30 p.m., Sept. 30 at the Albuquerque Petroleum Club. Banquet tickets cost $75 and may be obtained by contacting Hannah Best, HannahBBest@aol.com or (505) 247-2727.

NM Criminal Defense Lawyers Association
DWI CLE
The New Mexico Criminal Defense Lawyers Association will present “Moving Target: The Ever-Changing Landscape of DWI and Misdemeanor Defense in New Mexico,” Sept. 9 at the UNM School of Law. Flem Whited, co-founder National College for DUI Defense, will be the featured speaker. Attendees will receive 6.8 general CLE credits. Visit www.nmcdla.org or email nmcdlaeditor@aol.com for more information.

NM Defense Lawyers Association
Member Luncheon and CLE
The NM Defense Lawyers Association is sponsoring a DLA member luncheon and CLE on Sept. 8 at the State Bar Center. James Johansen will present “Development and Current Status of Bad Faith in NM.” The cost is $25 for members and $45 for non-members. The program will provide 1.2 general CLE credits. Contact Rhonda Dahl, (505) 250-3091 or visit www.nmcdla.org to register.

Annual Meeting Notice
The New Mexico Defense Lawyers Association is proud to announce that the organization’s 2005 Outstanding Civil Defense Lawyer of the Year Award will be given to Charlie Pharris. The award will be presented at the 2005 Annual Meeting on Oct. 27 at the Hyatt Regency in Albuquerque. The featured presenters will be Professor Jim McElhaney and a panel of local judges. Call Rhonda Dahl, (505) 250-3091, for more information.

NM Lesbian and Gay Lawyers Association Potluck with New Mexico Lesbian and Gay Doctors Organization
The New Mexico Lesbian and Gay Lawyers Association will host a potluck social event with New Mexico’s lesbian and gay doctors organization. The event will be held at 6 p.m., Sept. 17. For more information or to RSVP, contact Mike Hely, mikehely@yahoo.com.

NM Women’s Bar Association Annual Gala
The New Mexico Women’s Bar Association will host its annual gala from 5:30 to 10 p.m., Sept. 9 at the Albuquerque Marriott Hotel, located at Louisiana and I-40. The event will feature the innovative music of the Kumusha Women’s Marimba Ensemble. There will be a live and silent auction hosted by Bob Schwartz, Esq. and, of course, delicious food and libations. The Women’s Bar will also be awarding its annual Henrietta Pettijohn Award to Lt. Gov. Diane Denish and its annual scholarship to a deserving University of New Mexico law student.

Monthly Networking Luncheon
The New Mexico Women’s Bar Association’s next networking lunch will be from noon to 1:30 p.m., Sept. 14 at Conrad’s in the La Posada Hotel, Albuquerque. Members and visitors are welcome. Advance reservations are required. Lunch prices range from $6 to $11, and payment is made directly to the restaurant. Anyone interested in attending this meeting should RSVP to Rendic R. Moore, womensbarnm_admnasst@msn.com by Sept. 12.

UNM School of Law
Clinical Law Program
Native American Access to Justice Program
The UNM Clinical Law Program invites volunteer attorneys and tribal court advocates to join the Native American Access to Justice Practitioner Network, a network of attorneys committed to providing pro bono and low cost representation to individuals in areas of unmet need. Network members will provide pro bono or reduced fee representation to Native American clients whose cases the Southwest Indian Law Clinic is not able to accept, but who require assistance with Native American issues in various state, federal, and tribal courts and with governmental agencies.

As a network participant, attorneys will receive client referrals from the program, but decide whether to accept a specific case. Attorneys are responsible for client fee and costs arrangements. In return, network participants will receive free access to Loislaw, four Aspen online practice libraries with
forms (family law, elder law, personal injury and general litigation), and the Navajo Code CD-ROM. UNM law librarians will provide network attorneys with telephone reference service and online legal research training in the use of the program databases. Free online legal research training sessions for participants will also be offered at the UNM Law Library, Crownpoint Institute, San Juan College, UNM Gallup, and others.

The UNM Clinical Law Program is also interested in identifying individuals who are willing to serve as mentors for the Southwest Indian Law Clinic attorneys.

**Law Library**

**Fall Hours**

- Mon. – Thurs. 8 a.m. to 11 p.m.
- Fri. 8 a.m. to 6 p.m.
- Sat. 9 a.m. to 6 p.m.
- Sun. noon to 11 p.m.

**OTHER NEWS**

**Center for Civic Values**

The Center for Civic Values board and staff note with great sorrow the death on Aug. 18 of their friend and colleague Joseph J. Mullins. Joe was a remarkable man and a brilliant lawyer, whose generous spirit and ready humor touched all of those around him. The CCV is honored to have served him, grateful to have known him and deeply saddened by his passing.

The board and staff extend heartfelt thanks to the Mullins family for naming CCV as one of the organizations to receive contributions in his memory. The CCV has already received several donations, to which the organization will add CCV’s $5,000 gift to create the Joseph J. Mullins Memorial Scholarship. All donations to the Memorial will be considered restricted funds, with the principal to be permanently preserved and only the earnings (up to 5% of the total fund) available to award a scholarship to a University of New Mexico School of Law student.

To join the CCV as the organization builds a lasting program to honor Joe, send tax-deductible gifts to: CCV, PO Box 2184, Albuquerque, NM 87103-2184.

**Center for International Legal Studies**

**Visiting Professorships**

The Center for International Legal Studies, in cooperation with law faculties in Eastern Europe and the former republics of the Soviet Union, will offer short-term appointments to as many as 40 senior lawyers from Canada and the U.S. during spring 2007 and autumn 2007. A “senior lawyer” has at least 25 years experience in the area of law he or she proposes to lecture. Teaching terms are between two to six weeks. Subject areas are not limited, but there is special interest in corporate and business law, intellectual property, litigation, arbitration and criminal procedure. These appointments are not remunerated and the appointee is responsible for his or her travel. The host university will assist with lodging.

A one-week orientation seminar in Salzburg, Austria, is mandatory prior to assumption of the appointment. Interviews will be conducted at various locations in summer 2006.

Applications may be requested by e-mail, cils@cils.org, or by fax, (505) 356-0077.

**Christian Attorneys Legal Aid Training**

Training for this developing area of law, for which New Mexico is a leader, will be held from 9 a.m. to 3 p.m., Oct. 15 at the Albuquerque Rescue Mission. Parking for the mission is located off 3rd Street and attendees should enter between Coal and Iron SW. Free lunch, good fellowship and CLE credit will be provided. Contact Jim Roach, (505) 243-4419 or Bill L’Esperance, (505) 266-8482.

**National Notary Association**

**NM Notary Training**

New Mexico Secretary of State Rebecca Vigil-Giron has announced a new partnership with the National Notary Association (NNA) to support continuing education and training for Notaries Public throughout New Mexico. New Mexico notaries will now be able to take a state specific training course online through the NNAs online program at a substantial discount. New Mexico notaries can register for the course through the Secretary of State’s Web site at www.sos.state.nm.us. In addition to the online course, the NNA will host an Identity Theft live training symposium Sept. 20 at the Wyndham Hotel in Albuquerque. The symposium was developed for New Mexico notaries to increase understanding of identity security issues and to increase skills to help prevent identity theft. The Attorney General’s office and the Department of Motor Vehicles will participate in the symposium.

**Web Corner**

**Law Office Management Resources**

By Veronica Cordova

SBNM Webmaster

A significant contribution to the Web site was an extensive library of helpful resources for all legal practitioners made available by the Law Office Management Committee. The committee compiled a host of resources that can aid all attorneys in fundamentals of law office management. Topics cover the business of a law office, client relations, communications, employment issues, forms, insurance, malpractice, and much more. The LOM Committee welcomes input and suggestions for continued success of this project.

Because of the extensive work conducted by the committee and the availability of those resources made available on the Web site, the LOM Committee is sponsoring a program titled “Web Resources for Managing Your Law Practice” at the State Bar of New Mexico Annual Meeting. The program will be held from 3:30 to 5 p.m., Sept. 23. Presenters Mark Fidel and Veronica Cordova will highlight law office management resources and additional resources for every law practitioner.

Members of the legal profession are invited to attend the Annual Meeting Sept. 22-24 at the Ruidoso Convention Center and are especially encouraged to attend the program offered by the LOM Committee. Visit the LOM sub site and plan to attend.

Register online for the Annual Meeting by clicking on “Shop/Register” and enjoy the convenience of online registration services offered at www.nmbar.org. Feel free to call (505) 797-6039 or e-mail vcordova@nmbar.org with comments or suggestions for improvement to the site or with additional information that would be helpful to the committee.
SEPTEMBER

6 Burden of Representing Financially-challenged Companies
Teleconference
TRT, Inc.
2.4 E
(800) 672-6253
www.trtcle.com

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

9 Public Contracts and Procurement Regulations
Albuquerque
Lorman Education Services
6.6 G, .6 E
(715)833-3940
www.lorman.com

7 Protecting Business Assets Through Effective Lawyering
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtcle.com

9 Annual Probate Institute
State Bar Center, Albuquerque
Real Property and Probate Section and Center for Legal Education of NMSBF
7.2 G
(505) 797-6020
www.nmbar.org

10 Democracy and Lawyers
Las Cruces
Anthony Avallone
2.0 G, 1.0 P
(505) 524-8915

7 Real Estate Contracts In New Mexico
Albuquerque
National Business Institute
6.2 G, 1.0 E
(715) 835-8525
www.nbi-sems.com

9 Demonstrative Evidence in Your Personal Injury Trial - When, What, Why and How Much?
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtcle.com

12 Arbitrator Training
Albuquerque
Construction Dispute Resolution Services
14.4 G, 1.2 E, 2.4 P
(505) 466-7011
www.mediate.com/cdram

8 Current Developments in Handling Discrimination Charges at the EEOC and the NM Human Rights Division
VR - Las Cruces
Center for Legal Education of NMSBF
2.7 G
(505) 797-6020
www.nmbar.org

9 Lawyering with Emotional Intelligence
VR - Las Cruces
Center for Legal Education of NMSBF
1.0 E, 2.0 P
(505) 797-6020
www.nmbar.org

13 Major Issues in Mediation
Teleconference
TRT, Inc.
2.4 G
(800) 672-6253
www.trtcle.com

8 Development and Current Status of Bad Faith in NM
State Bar Center
NMDLA
1.2 G
(505) 250-3091
www.nmdla.org

9 Moving Target: The Ever-Changing Landscape of DWI and Misdemeanor Defense in New Mexico
Albuquerque
NM Criminal Defense Lawyers Association
6.8 G
(505) 992-0050
www.nmdcla.org

VR - State Bar Center, Albuquerque
Center for Legal Education of NMSBF
10.3 G, 1.2 E
(505) 797-6020
www.nmbar.org

8 Legislative Process: A 2005 Update
VR - Las Cruces
Center for Legal Education of NMSBF
2.4 G
(505) 797-6020
www.nmbar.org

9 New Mexico Easements: Rights of Way and Other Encumbrances
Albuquerque
Professional Education Systems, Inc.
8.1 G
(715) 883-5296
www.pesi.com
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<tr>
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<th>Date</th>
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<th>Type</th>
<th>Duration</th>
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<td>14 Adoption in New Mexico</td>
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<td>14 Get the Facts: Witness Interview Techniques</td>
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<td>15 Advanced Judgment Enforcement</td>
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<td>15 Responding to Allegations of Sexual or Racial Harrassment</td>
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<td>Sterling Education Services (715) 855-0495</td>
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<td>19 Junk Science or Scientific Evidence?</td>
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<td>20 Land Use Law: Update on Federal Control of Local Use</td>
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<td>Teleconference</td>
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<td>Cannon Financial Institute (800) 775-7654</td>
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<td>21 Aligning Your Practice With the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005</td>
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<td>National Business Institute (715) 835-8525</td>
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<td>21 Sanctions and the Goldilocks Test - Too Soft, Too Hard, or Just Right?</td>
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<td>22 Advanced Gross Receipts and Compensating Taxation in New Mexico</td>
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<td>26 Electronic Discovery Needn’t Be Shocking</td>
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<td>Council on Education in Management (800) 942-4494</td>
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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 Fe, NM 87504-0848 • (505) 827-4860

**EFFECTIVE SEPTEMBER 2, 2005**

### Petitions for Writ of Certiorari Filed and Pending:

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<th>Date Petition Filed</th>
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<td>8/24/05</td>
<td>NO. 29,018 State v. Pamela G. (COA 23,497/23,787) 2/21/05</td>
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<td>NO. 29,105 State v. Cook (COA 25,137) 3/22/05</td>
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<td>NO. 29,100 State v. Casanova (COA 22,952) 3/22/05</td>
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<td>NO. 29,135 State v. Munoz (COA 24,072) 4/15/05</td>
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<td>NO. 29,134 State v. Kathleen D.C. (COA24,540) 4/15/05</td>
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<td>NO. 29,160 Benavidez v. City of Gallup (COA 25,373) 5/3/05</td>
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<td>NO. 29,320 State v. Quelhuis (COA 24,296) 8/12/05</td>
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<td>NO. 29,350 State v. Jensen (COA 24,526) 8/26/05</td>
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<td>NO. 29,385 State Farm v. Luebbers (COA 23,556) 8/26/05</td>
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### Certiorari Granted But Not Yet Submitted To The Court:

(Parties preparing briefs)

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<td>10/19/04</td>
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<td>NO. 28,917 State v. Ponce (COA 23,913)</td>
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<td>NO. 29,042 State v. Frank G. (COA 23,165/23,497)</td>
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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 Fe, NM 87504-0848 • (505) 827-4860

EFFECTIVE SEPTEMBER 2, 2005

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

NO. 29,344  State v. Hughey (COA 24,732)  8/26/05
NO. 29,373  State v. Martinez (COA 25,376)  8/26/05

CERTIORARI GRANTED AND SUBMITTED TO THE COURT

(Submission = date of oral argument or briefs-only submission)

Submission Date
NO. 27,945  State v. Munoz (COA 23,094)  11/18/03
NO. 28,068  State v. Gallegos (COA 22,888)  2/3/04
NO. 28,241  State v. Duran (COA 22,611)  3/31/04
NO. 28,380  Angel Fire v. Wheeler (COA 24,295)  8/9/04
NO. 28,426  Sam v. Estate of Sam (COA 23,288)  9/13/04
NO. 28,471  State v. Brown (COA 23,610)  9/15/04
NO. 28,423  Marquez v. Allstate (COA 23,385)  9/15/04
NO. 27,269  Kmart v. Tax & Rev (COA 21,140)  10/14/04
NO. 28,628  Herrington v. State Engineer (COA 23,871)  11/16/04
NO. 28,500  Manning v. New Mexico Energy & Minerals (COA 23,396)  12/13/04
NO. 28,525  State v. Jernigan (COA 23,095)  12/14/04
NO. 28,410  State v. Romero (COA 22,836)  2/14/05
NO. 28,688  State v. Gutierrez (COA 24,731)  2/14/05
NO. 28,812  Battishill v. Farmers Insurance (COA 24,196)  2/16/05
NO. 28,821  State v. Maese (COA 23,793)  2/16/05
NO. 28,634  State v. Dang (COA 22,982)  2/28/05
NO. 28,537  State v. Garcia (COA 24,226)  3/11/05

PETITION FOR WRIT OF CERTIORARI DENIED:

NO. 29,358  State v. Harbison (COA 24,513)  8/23/05
NO. 29,375  State v. Williams (COA 25,668)  8/23/05
NO. 29,374  State v. Glogston (COA 25,608)  8/23/05
NO. 29,372  State v. Garza (COA 25,678)  8/23/05
NO. 29,368  State v. Hernandez (COA 25,002)  8/23/05
NO. 29,382  State v. McQuerry (COA 25,520)  8/23/05
NO. 29,381  State v. Granados (COA 25,716)  8/23/05
NO. 29,406  Tafoya v. State (12-501)  8/25/05
NO. 29,391  Jimenez v. Tapia (12-501)  8/25/05
NO. 29,408  Templeton v. Janeka (12-501)  8/25/05
NO. 29,389  State v. Ruiz (COA 24,802)  8/29/05

2005 STATE BAR ANNUAL AWARD RECIPIENTS

The awards will be presented during the State Bar’s Annual Meeting Sept. 23-24 at the Ruidoso Convention Center in Ruidoso. To register for the luncheons or to review a complete schedule of events and programs for the Annual Meeting, see the insert in the July 25 issue of the Bar Bulletin or visit the State Bar’s Web site at www.nmbar.org.

FRIDAY, SEPTEMBER 23

Outstanding Judicial Service Award
Judge John W. Pope

Outstanding Local Bar Award
Sandoval County Bar

Outstanding Program Award
New Mexico Hispanic Bar Association Scholarship Program

Professionalism Award
John G. Baugh (posthumously)
Lawrence M. Pickett
Lowell Stout (posthumously)

Quality of Life – Lawyer Award
Susan E. Page

SATURDAY, SEPTEMBER 24

Quality of Life – Legal Employer Award
Aguilar Law Offices, P.C.

Robert H. LaFollette Pro Bono Award
Steve H. Mazer

Fifty-Year Practitioners
William F. Brainerd
Saul Cohen
John P. Eastham
Douglass K. Fischer
Leland B. Franks
Glen L. Houston
Daniel A. Sisk
Justice Harry E. Stowers, Jr.
J. Penrod Toles
Matias A. Zamora

Bar Bulletin - September 5, 2005 - Volume 44, No. 35  15
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OPINION

CYNTHIA A. FRY, JUDGE

1. This case continues a controversy over attorney fees generated from a medical malpractice settlement. See Moffat v. Branch, 2002-NMCA-067, 132 N.M. 412, 49 P.3d 673 (hereinafter Moffat I). Attorney Stephen Moffat asserts that he should be allowed to pursue claims in state court against attorneys Branch and Branney, who procured the settlement for Elizabeth Vincoy, Moffat’s former client. The district court granted summary judgment to Branch and Branney, concluding that Moffat’s claims were barred by the doctrine of res judicata (claim preclusion) due to a prior federal court judgment rejecting Moffat’s attorney charging lien. In light of claim preclusion principles, we conclude that Moffat’s current claim is the “same claim” as the one decided by the federal court, that he had a full and fair opportunity to litigate his claim in federal court, and that he is barred from asserting this claim again. We therefore affirm the district court because “[c]ourts are committed to providing every litigant a full and fair opportunity to sue or defend[,] but once a judgment is rendered after such an opportunity, justice requires that there be an end to the litigation.” Ford v. N.M. Dept' of Pub. Safety, 119 N.M. 405, 409, 891 P.2d 546, 550 (Ct. App. 1994).

BACKGROUND

2. Moffat initially represented the plaintiffs in the medical malpractice action, but was replaced by successor counsel Branch and Branney. Branch and Branney filed a Federal Tort Claims Act (FTCA) lawsuit in federal court and procured a settlement of $4.8 million for Vincoy. Moffat filed an attorney charging lien in federal court seeking a portion of the attorney fees from the settlement.

3. The federal court ruled that Moffat’s attorney charging lien failed as a matter of law in light of New Mexico charging lien law. Vincoy v. United States, No. CIV. 97-296 JCL/LFG, 1999 WL 1581414, at *2 (order) (D.N.M. Dec. 6, 1999). Moffat did not pursue any claims for quantum meruit, unjust enrichment, third-party beneficiary, or promissory estoppel in federal court, and the federal magistrate noted that “[t]he issue of other remedies, if any, is not before the Court.” Id.

4. Moffat then sued Branch and Branney and his former client in state court for a portion of the attorney fees under unspecified theories of recovery. The district court concluded that res judicata did not effectively mandated that the district court should address the merits of Moffat’s amended complaint stated claims for unjust enrichment, quantum meruit, third-party beneficiary, and promissory estoppel against Branch and Branney as well as Vincoy.

5. Moffat appealed to this Court and we ruled in Moffat I that the district court should have allowed Moffat to amend his complaint, as of right, under the Rules of Civil Procedure. 2002-NMCA-067, ¶ 30. We also held, as against Vincoy, that both the original and amended complaints failed to state a claim for which relief could be granted. Id. ¶¶ 32-33. As to Branch and Branney, we affirmed dismissal of the original complaint but concluded that the district court, and not this Court, should address the merits of the amended complaint because Branch and Branney had not filed a motion to dismiss the amended complaint. Id. ¶¶ 30, 35. We expressly limited our ruling “to the procedural right to amend.” Id. ¶ 30.

6. On remand, Moffat pursued his amended complaint against Branch and Branney on contract-related theories. The district court granted summary judgment to Branch and Branney on the basis of claim preclusion, concluding that Moffat was attempting to relitigate the same claim he had asserted in federal court, using different theories. Moffat appeals, contending that: (1) our opinion in Moffat I prevented the district court from ruling that claim preclusion barred his claims, and (2) the federal action did not bar his contract-related claims in state court.

DISCUSSION

Law of the Case

7. Moffat contends that, in Moffat I, this Court concluded that res judicata “did not apply to the other claims [of] promissory estoppel, for example, that were raised in the [a]mended [c]omplaint” and that we effectively mandated that the district court consider the substantive bases of his claims. He argues that we explicitly determined that
res judicata barred only a second claim for a charging lien, not his contract-related claims, and that the law of the case doctrine bars the district court from considering claim preclusion. See Van Orman v. Nelson, 80 N.M. 119, 120, 452 P.2d 188, 189 (1969) (stating that an appellate opinion establishes the law of the case upon remand).

[8] Moffat misunderstands what we decided in Moffat I. In Moffat I, we concluded that his original complaint was “no more than an attempt to relitigate” the very same charging lien that had been rejected by the federal court. 2002-NMCA-067, ¶ 19. After ruling that Moffat had a procedural right to amend his complaint, we then explicitly declined to review the substantive bases of the amended complaint as to Branch and Branney because doing so “would usurp the function of the district court with respect to matters it did not address.” Id. ¶ 29. The district court in Moffat I granted Vinceny’s motion to dismiss the amended complaint and we affirmed that decision. Id. ¶¶ 2, 33. However, Branch and Branney had not yet filed a motion to dismiss the amended complaint. Id. ¶ 29. We remanded for the district court to pass upon the substance of the amended complaint as to Branch and Branney. Id. ¶¶ 29-30. Our role as an appellate court limits our review to those matters decided by the district court; therefore, we had no authority to decide whether Moffat’s amended complaint should prevail or whether Branch and Branney had affirmative defenses, including claim preclusion. See Campos Enters., Inc. v. Edwin K. Williams & Co., 1998-NMCA-131, ¶ 12, 125 N.M. 691, 964 P.2d 855 (stating that this Court is a court of review and cannot review allegations not before the district court); see also Campos de Suenos, Ltd. v. County of Bernalillo, 2001-NMCA-043, ¶ 16, 130 N.M. 563, 28 P.3d 1104 (explaining that this Court typically reviews an affirmative defense only on appeal after a district court decides whether it was proved on the merits).

It was for the district court to evaluate the merits of the amended complaint as well as Branch’s and Branney’s affirmative defense in the first instance.

[9] Contrary to Moffat’s assertions, we did not conclude that Moffat’s contract-related claims were free and clear of any claim preclusion defense. Therefore, law of the case principles are inapplicable to Moffat’s amended complaint and the district court was free to consider the viability of Moffat’s amended complaint as well as any affirmative defenses raised by Branch and Branney.

Claim Preclusion

[10] We review de novo a district court’s application of claim preclusion. Anaya v. City of Albuquerque, 1996-NMCA-092, ¶ 5, 122 N.M. 326, 924 P.2d 735. Defendants have the burden of showing all the elements of claim preclusion. Id. The essence of the claim preclusion doctrine is that “litigants are encouraged and afforded a full and fair opportunity to raise issues that exist between them in a single action [but] there are consequences for the failure to take advantage of this opportunity.” Moffat I, 2002-NMCA-067, ¶ 26 (citation omitted). Thus, “a litigant is ordinarily not entitled to more than one fair bite at the apple[,]” Ford, 119 N.M. at 407, 891 P.2d at 548, and some writers liken the doctrine to a “common-law rule of compulsory joinder” that requires a plaintiff to raise any and all legal theories in a single lawsuit. Robert C. Casad & Kevin M. Clermont, Res Judicata: A Handbook on Its Theory, Doctrine, and Practice 61 (2001).

[11] Four elements must be met for claim preclusion to bar a claim. The two actions (1) must involve the same parties or their privies, (2) who are acting in the same capacity or character, (3) regarding the same subject matter, and (4) must involve the same claim. See Myers, 100 N.M. at 747, 676 P.2d at 824. Moffat contends that his state court action involves neither the same parties nor the same claim as the federal action. Because the prior action was in federal court, federal law determines the preclusive effect of a federal judgment. Ford, 119 N.M. at 409, 891 P.2d at 550 (holding that a federal court claim triggers claim preclusion in state court and that federal law then determines the preclusive effect); see also Wolford v. Lasater, 1999-NMCA-024, ¶ 16, 126 N.M. 614, 973 P.2d 866 (holding that a federal court judgment barred state action claims); see also Restatement (Second) of Judgments § 87 (1982) (stating that “[f]ederal law determines the effects under the rules of res judicata of a judgment of a federal court”). Federal law and New Mexico law are not divergent on claim preclusion doctrine, and both find the Restatement (Second) of Judgments (1982) [hereinafter Restatement], persuasive. Ford, 119 N.M. at 413, 891 P.2d at 554. Because of this lack of divergence, we rely more extensively on New Mexico law for convenience in this opinion.

[12] Before addressing the specific elements of claim preclusion, we must first determine whether Moffat could have raised his contract-related theories in the federal action, because claim preclusion generally will not bar a second action when the litigant could not have raised certain theories or sought certain relief in the first proceeding due to a lack of personal or subject matter jurisdiction. See Bank of Santa Fe v. Marcy Plaza Assocs., 2002-NMCA-014, ¶ 14, 131 N.M. 537, 40 P.3d 442 (stating that claim preclusion applies only when plaintiff has had a “full and fair” opportunity to litigate issues in prior action and that limitations on subject matter jurisdiction in the first action may prevent such an opportunity); Chavez v. City of Albuquerque, 1998-NMCA-004, ¶¶ 12-13, 124 N.M. 479, 952 P.2d 474 (holding that a ruling by a city personnel board did not trigger claim preclusion because it had no jurisdiction to consider all of plaintiff’s claims); Ford, 119 N.M. at 410, 891 P.2d at 551 (stating that “a plaintiff should be permitted to litigate in the second action a ground that the plaintiff did not have an opportunity to assert in the first litigation”); see also Restatement § 26(1)(c) (describing an exception to the rule precluding claim splitting where a plaintiff was unable to pursue a legal theory or remedy in the prior action due to limits on subject matter jurisdiction or other limits on a court’s authority).

[13] Moffat contends that the federal court had only limited jurisdiction to consider his charging lien and would have had no jurisdiction to consider his contract-related claims because there was no diversity of parties. We do not agree. Federal courts have ancillary jurisdiction to entertain such attorney fee disputes in FTCA cases. Harley & Brown v. Ressler & Ressler, 957 F. Supp. 44, 47 (S.D.N.Y. 1997) (stating that “[i]t is well-settled that [a] federal court may, in its discretion, exercise ancillary jurisdiction to hear fee disputes . . . when the dispute relates to the main action” (alterations in original, internal quotation marks and citation omitted)). Such ancillary jurisdiction over attorney fee disputes includes quantum meruit claims. Universal Acupuncture Pain Servs., P.C. v. Quadronio & Schwartz, P.C., 370 F.3d 259, 261-62 (2d Cir. 2004) (remanding an attorney fee dispute for the district court to determine whether former attorney was terminated for cause and, if not, the appropriate quantum meruit relief, and stating that “[w]henever a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney’s fees” (internal quotation marks and citation omitted)). Therefore, when we refer to the federal action, we mean the initial malpractice action as well as the post-settlement attorney fee dispute.

Same Parties or Privies Acting in the Same Capacity

[14] Turning to the elements of claim preclusion, Moffat contends that Branch and Branney were not parties to the federal action, we mean the initial malpractice action as well as the post-settlement attorney fee dispute.
action; therefore, the “same parties” element of claim preclusion is not met. Indeed, Moffat claims that he himself was not a party in the federal action, which he describes as an in rem proceeding, and that he was “only a person asserting a charging lien.” Moffat directs us to Restatement § 34(3), which states that a person who is not a party to an action “is not bound by or entitled to the benefits of the rules of res judicata.” Moffat appears to contend that effectively no one was a party in the federal action. We disagree and conclude that Moffat and Branch and Branney were all parties to the attorney fee dispute and we do not consider any of them to have been “strangers” to the action in federal court. Our conclusion is grounded upon the participation by each party and his submission to the jurisdiction of the court. We also rely on the federal court’s treatment, as a practical matter, of Moffat and Branch and Branney as intervenors in the malpractice action for the purpose of resolving the attorney fee dispute. See Restatement § 34 cmt. a (stating that non-parties may become parties by commencing an action or by “making an appearance or participating in the action in a manner that has the effect of an appearance”). The essence of the Restatement view is that a party is one who has had an opportunity to litigate and has been subject to the jurisdiction of the court. Restatement § 34 cmt. a (stating that “the opportunity to litigate is accorded to persons who are parties”). Here, Moffat filed a charging lien and appeared before the federal court to pursue a portion of the fee. Branch and Branney filed a motion in opposition to Moffat’s request and submitted a successful motion for summary judgment to the federal magistrate.

We conclude that each party sufficiently participated in the attorney fee dispute in federal court so as to have been a party for claim preclusion purposes. See Adams v. Morton, 581 F.2d 1314, 1317 (9th Cir. 1978) (holding that a formal motion to intervene is not required in order to treat a person as a party under the federal rules as long as he participated in an action and the court viewed such participation as formal entry into the dispute). It is irrelevant that Moffat and Branch and Branney are not named in the caption of the underlying malpractice action because they each had the opportunity to litigate the attorney fee dispute before the federal court and actually appeared before that court in order to resolve the dispute. See Clarion Corp. v. Amer. Home Prods. Corp., 464 F.2d 444, 445 (7th Cir. 1972) (discussing that the title of the case may not reflect the true dispute where a settlement has been accepted in the original action and the dispute relates to attorney fees).

Moffat also contends that the case of Bennett v. Kishuk, 112 N.M. 221, 224, 814 P.2d 89, 92 (1991), instructs that an attorney seeking fees cannot be an adversary of his former client for the purposes of claim preclusion. This reading overextends Bennett. In Bennett, our Supreme Court held that, while an attorney’s complaint for fees might trigger a compulsory counterclaim by the attorney’s client for malpractice, a motion by the attorney would not. Id. Thus, the ruling on the attorney’s motion for fees did not result in claim preclusion in the client’s subsequent lawsuit claiming malpractice. Id. Here, the roles are reversed because Moffat is the party seeking recovery. We think implicit in Bennett is the notion of fair notice: that a non-movant would not necessarily know that he or she would have to assert all defenses or claims against a party who has filed a motion. Here, Moffat asserted a lien in federal court and was in an adversarial posture with Branch and Branney before a court of competent jurisdiction. By virtue of his role as the party actively seeking recovery, we think he was on notice that he was required to either pursue all of his theories or seek an express reservation of rights from the court. Thus, we are satisfied that it is both fair and reasonable to treat Moffat and Branch and Branney as parties to the federal action. Therefore the “same party” element of claim preclusion is met.

Same Claim

We now consider whether Moffat’s charging lien claim in the federal action and his amended complaint in state court are the “same claim.” Federal law and New Mexico law both look to Restatement § 24 to evaluate what constitutes the same claim for purposes of claim preclusion. Ford, 119 N.M. at 413, 891 P.2d at 554. Over twenty years ago, our Supreme Court applied the Restatement’s transactional approach to this analysis. Three Rivers Land Co. v. Maddox, 98 N.M. 690, 695, 652 P.2d 240, 245 (1982), overruled on other grounds by Universal Life Church v. Coxon, 105 N.M. 57, 728 P.2d 467 (1986); see generally Restatement § 24 cmt. a at 198 (explaining that a claim is evaluated in factual terms, regardless of the legal theories raised or relief sought, and that under modern procedural rules, this approach “reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so” (internal quotation marks omitted)). This approach disregards the specific legal theories or claims that were or were not invoked in a prior action, and instead directs courts to engage in a pragmatic assessment of the transaction, with a “transaction” being described as “a natural grouping or common nucleus of operative facts.” Anaya, 1996-NMCA-092, ¶ 8 (internal quotation marks and citation omitted). “Underlying the test is the need to balance the interests of [d]efendants and of the courts in bringing litigation to a close and the interest of [a] plaintiff in the vindication of his claims.” Id.

In making a determination of whether a prior action involves the same transaction, we perform a three-step analysis: (1) we assess “the relatedness of the facts in time, space, origin, or motivation;” (2) we determine whether the facts, taken together, “form a convenient unit for trial purposes;” and (3) we consider “whether the treatment of the facts as a single unit conforms to the parties’ expectations or business understanding or usage.” Id. ¶ 12. If a lawsuit involves the same transaction as a prior claim, and the other claim preclusion elements are met, a plaintiff is barred from raising those legal theories that he actually raised in the prior action as well as any theories that he could have raised. Id. ¶ 18; Ford, 119 N.M. at 414, 891 P.2d at 555; Myers, 100 N.M. at 748, 676 P.2d at 825; see also First State Bank v. Muzio, 100 N.M. 98, 101, 666 P.2d 777, 780 (1983) (stating that a default judgment bars later suit on issues which were or could have been determined in the default action), overruled on other grounds by Huntington Nat’l Bank v. Sproul, 116 N.M. 254, 861 P.2d 935 (1993).}

It is clear that Moffat’s contract-related claims and his charging lien involve the same claim under a pragmatic, transactional approach because all three factors weigh heavily against him. In Three Rivers Land Co., our Supreme Court provided guidance on the appropriate level of abstraction in transactional analysis by describing the dispute and transaction in that case as “a land contract.” 98 N.M. at 696, 652 P.2d at 246. But cf. Bank of Santa Fe, 2002-NMCA-014, ¶ 18 (holding that where facts underlying two claims are different in time and origin, they do not arise from a common nucleus of operative facts and are not the same transaction). Through a pragmatic lens, we view the transaction in this case as the representation of Vincenoy in her medical malpractice case, the settlement, and associated attorney fees. In terms of factual relatedness, both the federal action and the state suit involve the same facts—the settlement of the medical malpractice action and Moffat’s assertion that, due to his representation of Vincenoy early in the proceedings, he deserved compensation. The common nucleus of operative facts is the same in both lawsuits; indeed, the federal court evaluated...
some of the facts (whether Moffat produced a recovery fund for Vincoy and whether he was discharged for cause) in its resolution of the charging lien.

{20} In addition, these related facts would form a convenient unit for trial. When the federal court considered the attorney charging lien, it would have been convenient for the court also to consider whether Moffat was terminated for cause, the value of his services, any reliance by Moffat on Branch’s alleged promises, and whether to carve out a portion of the settlement for Moffat. This is particularly true because under the FTCA, any attorney fees paid by Vincoy were capped by federal law at a maximum of twenty-five percent, and it would be a crime to request any additional fees from Vincoy. Moffat I, 2002-NMCA-067, ¶ 34. Therefore, it would have been the most convenient time to resolve the attorney fee dispute in the federal action, before the statutory attorney fee was distributed to Branch and Branney and before Vincoy’s liability to pay out of the settlement funds was extinguished. Where there would be a substantial overlap between the evidence relevant to both actions, “the second action should ordinarily be held precluded.” Restatement § 24 cmt. b. Here, it is probable that the witnesses and evidence Moffat brought in the federal action substantially overlap those he seeks to produce now in state court. Furthermore, even when the overlap of evidence or witnesses between the first action and the second would not be substantial, “the second action may be precluded if it stems from the same transaction or series.” Id.

{21} Finally, in terms of the parties’ expectations or business understanding or usage, it seems reasonable in light of longstanding federal court practice to expect that any and all controversies over attorney fees be litigated fully in the federal court where the lawsuit and settlement are being reviewed. See Pollard v. United States, 69 F.R.D. 646, 647 (M.D. Ala. 1976) (resolving an attorney fee dispute in federal court in the context of an FTCA settlement); Jaslow v. United States, 308 F. Supp. 1164 (E.D.N.Y. 1970) (same); see also Hanna Paint Mfg. Co. v. Rodey, Dickason, Sloan, Akin & Robb, 298 F.2d 371, 372-73 (10th Cir. 1962) (affirming a federal district court’s resolution of an attorney fee dispute between attorney and client, in the context of a substantial judgment against the United States). Therefore, for purposes of claim preclusion, we conclude that Moffat, through his amended complaint, is attempting to bring the “same claim” in state court that he brought in federal court.

Other Arguments

{22} Moffat points to other aspects of this case that he argues prevent claim preclusion from applying. First, he contends that the decision in the federal action would “not foreclose subsequent litigation based upon alternative remedies.” He relies on the attorney charging lien case of Sowder v. Sowder, 1999-NMCA-058, ¶ 16, 127 N.M. 114, 977 P.2d 1034, for the proposition that, even if a charging lien fails, an attorney is “free . . . to seek recovery of . . . fees through another method.” While this is an accurate statement of the law, it does not alter claim preclusion principles that generally require a plaintiff to raise all legal theories in a single action. Sowder did not consider the issue; therefore, it does not stand for the idea that a creditor attorney may serially bring lawsuit after lawsuit on any theory after losing on a charging lien. See Fernandez v. Farmers Ins. Co., 115 N.M. 622, 627, 857 P.2d 22, 27 (1993) (explaining that “cases are not authority for propositions not considered” (internal quotation marks and citation omitted)). The general rule remains that “[d]ifferent legal theories arising out of a given episode do not create multiple transactions and hence multiple claims.” Three Rivers Land Co., 98 N.M. at 695, 652 P.2d at 245 (internal quotation marks and citation omitted); see also Restatement § 25 (stating that a plaintiff is barred from raising any new evidence or theories or asking for any remedies that he or she failed to raise in the first action). We decline to create a special exception to claim preclusion doctrine for attorney charging liens and we see no discord in stating that an attorney is free to pursue both a charging lien and equitable remedies while adhering to established claim preclusion principles. See Thompson v. Montgomery & Andrews, P.A., 112 N.M. 463, 467, 816 P.2d 532, 536 (Ct. App. 1991) (stating that in the context of an attorney charging lien “a district court may freely afford the claimant an opportunity to amend in order to assert viable alternative causes of action”).

{23} Second, Moffat implies that the federal court reserved Moffat’s ability to bring contract-related claims in state court when the federal magistrate stated that “[f]the issue of other remedies, if any, is not before the Court.” We do not agree. To provide safe harbor from claim preclusion, a court must “expressly reserve[] the plaintiff’s right to maintain the second action.” Restatement § 26(1)(b). It is clear that the federal court was not expressly reserving Moffat’s rights to bring a second lawsuit, but was simply noting that Moffat had raised no other remedies for consideration.

{24} Finally, the Restatement provides other exceptions to the rule against claim splitting, such as where the parties have agreed to split claims, where the judgment in the first action was plainly contrary to a legal scheme, where a plaintiff suffers a continuing wrong, or where it is clearly and convincingly shown that an extraordinary reason (such as an invalid restraint on personal liberty or an incoherent judgment in the prior action) justifies departing from the rule. Restatement § 26(1)(a), (1)(d)-(f). None of these exceptions apply in this case. We therefore conclude that Branch and Branney met their burden of showing all the elements of claim preclusion.

{25} We recognize that Moffat may have been denied compensation for his early representation of Vincoy, despite Vincoy’s promises that he would be paid or treated fairly. Nonetheless, Moffat’s opportunity to litigate all of his theories for compensation was in federal court, when the settlement transaction was before a court of competent jurisdiction. Our Supreme Court has stated that “[a] party cannot by negligence or design withhold issues and litigate them in consecutive actions. He may not split his demands or his defenses.” First State Bank, 100 N.M. at 101, 666 P.2d at 780 (internal quotation marks, citation, and emphasis omitted).

Public policy requires an end to litigation and favors judicial economy. Id. The capacity of our courts to hear disputes is finite and, therefore, “[t]he Restatement approach puts some pressure on the plaintiff to present all his material relevant to the claim in the first action.” Myers, 100 N.M. at 748, 676 P.2d at 825 (internal quotation marks and citation omitted). Moffat’s interest in vindicating his rights is greatly outweighed by the interest in judicial economy where, as here, he had a full and fair opportunity to litigate the same claim previously and no exceptional circumstances allow us to avoid application of the rule. Moffat simply failed to make the most of his bite at the apple, and he cannot avoid application of basic claim preclusion principles.

CONCLUSION

{26} The district court properly determined that Branch and Branney proved the elements of claim preclusion and that the claims raised in the amended complaint were barred. Therefore, the district court’s grant of Branch and Branney’s motion for summary judgment is affirmed.

{27} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
IRA ROBINSON, Judge
Certiorari Denied, No. 29,305, August 5, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-104

SOUTHERN FARM BUREAU CASUALTY COMPANY, Plaintiff-Appellant, versus
EDDY HINER, Defendant-Appellee.
No. 24,822 (filed June 9, 2005)

APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY
CHARLES CURRIER, District Judge (Sitting by Designation)

RANDY KNUDSON
DOERR & KNUDSON, P.A.
Portales, New Mexico for Appellant

ERIC D. DIXON
ATTORNEY AND COUNSELOR AT LAW, P.A.
Portales, New Mexico for Appellee

OPINION

JAMES T. WECHSLER, JUDGE

{1} This case requires that we address the requirements of a claim for malicious abuse of process. Defendant Eddy Hiner had previously filed a lawsuit against Plaintiff Southern Farm Bureau Casualty Company (SFBC) and its insured, alleging that the insured had driven his vehicle into storage sheds on Hiner’s property, damaging them. SFBC disputed Hiner’s claim and, when the claim was dismissed, filed this action for malicious abuse of process. Hiner moved for summary judgment, which the district court granted, and SFBC now appeals. We therefore affirm.

Background

{2} In the complaint filed in the underlying lawsuit, Hiner alleged that, on January 20, 2001, SFBC’s insured drove into storage buildings on Hiner’s property and then left the scene. Although SFBC disputes the number of buildings that were damaged, it does not dispute that the next day an officer from the Portales Police Department told Hiner that SFBC’s insured was responsible for hitting the storage buildings. It is also undisputed that SFBC and its insured were subsequently dismissed from the underlying lawsuit and another person was named as the defendant. In his motion for summary judgment, Hiner produced the testimony of a police officer who had told Hiner that SFBC’s insured, and not another person, was responsible for the damage.

{3} Following the dismissal of SFBC and its insured from the underlying lawsuit, SFBC filed this action against Hiner, alleging malicious abuse of process and fraud. In its amended complaint, SFBC alleged that the morning after the accident occurred, Hiner was informed that a person other than SFBC’s insured was responsible for the damage to his property, but Hiner failed to investigate this information and, instead, demanded payment from SFBC and its insured. SFBC also alleged that Hiner falsely exaggerated the amount of damage that occurred, asserted a claim for punitive damages that was without basis, and failed to disclose the name of the person who had claimed responsibility for the property damage.

{4} Hiner moved to dismiss or, alternatively, for summary judgment, arguing that the undisputed facts showed that SFBC had not presented evidence to support all the elements of its claims for malicious abuse of process and fraud, entitling him to judgment as a matter of law. In its response, SFBC argued that disputed issues of material fact remained. The district court agreed with Hiner and granted his motion for summary judgment. In its order granting Hiner’s motion for summary judgment, the court stated in its letter ruling, the elements of the tort of malicious abuse of process are:

(1) the initiation of judicial proceedings against the plaintiff by the defendant; (2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; (3) a primary motive by the defendant in misusing the process to accomplish an illegitimate end; and (4) damages. In short, there must be both a misuse of the power of the judiciary by a litigant and a malicious motive.

DeVaney v. Thriftway Mktg. Corp., 1998-NMSC-001, ¶ 17, 124 N.M. 512, 953 P.2d 277. In this case, there was no dispute about the existence of the first element of the tort. Instead, SFBC’s arguments below and on appeal focus on the second element, the actions of Hiner in the underlying process and the evidence showing that those actions rose to the level of a misuse of the power of the judiciary. SFBC does not raise any argument on appeal with regard to its fraud claim, and we consider any argument that the district court improperly granted summary judgment on that claim to be abandoned. See State v. Foster, 1999-NMSC-007, ¶ 41, 126 N.M. 646, 974 P.2d 140 (“[I]ssues not addressed in an appellant’s brief will be deemed abandoned.”).

{7} In DeVaney, our Supreme Court explained that the second element, misuse of
process, can be satisfied in two ways: by a lack of probable cause to file a complaint or by “some irregularity or impropriety suggesting extortion, delay, or harassment.” *DeVaney*, 1998-NMSC-001, ¶¶ 22, 28. But the Court warned that “we must construe the tort of malicious abuse of process narrowly in order to protect the right of access to the courts.” *Id.* ¶ 19. The Court also warned that “[t]he lack of probable cause must be manifest” in order to establish that the filing of a complaint constituted an improper, overt act in the use of process necessary to establish the second element of the tort of malicious abuse of process. *Id.* ¶ 22.

[8] The district court ruled in this case that the undisputed material facts demonstrated that Hiner had probable cause to file the underlying lawsuit and that SFBC had not been able to raise a factual question about any procedural impropriety. The Court also denied SFBC’s motions for partial summary judgment and reconsideration. We first address whether the court erred in granting Hiner’s motion for summary judgment and then address whether the court erred in denying SFBC’s motions for partial summary judgment and reconsideration.

**Hiner’s Motion for Summary Judgment**

[9] “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. The issue on appeal is whether the [defendant] was entitled to [judgment] as a matter of law. We review these legal questions de novo.” *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582 (citation omitted).

“A defendant seeking summary judgment . . . bears the initial burden of negating at least one of the essential elements upon which the plaintiff’s claims are grounded.” *Blauwkamp v. Univ. of N.M. Hosp.*, 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992). Once such a showing is made, the burden shifts to the plaintiff to come forward with admissible evidence to establish each required element of the claim. *Id.* at 232, 836 P.2d at 1253.

[10] In arguing that there were legal presumptions in favor of trial on the merits and genuine issues of material fact precluding summary judgment, SFBC raises four sub-issues: (1) that the district court incorrectly evaluated the legal significance of Hiner’s voluntary dismissal of the underlying lawsuit; (2) that probable cause cannot be determined as a matter of law if material issues of fact are in dispute; (3) that material issues of fact existed concerning probable cause to sue SFBC directly; and (4) that factual issues existed as to procedural improprieties or misuse of process. The first three of these sub-issues arise from the court’s determination that Hiner had probable cause to file the underlying lawsuit. The fourth sub-issue arises from the court’s ruling that SFBC had not raised a question of fact over a procedural impropriety.

**1) Probable Cause**

[11] *DeVaney* emphasizes that although the filing of a complaint can, in some circumstances, constitute a malicious abuse of process, “the filing of a proper complaint with probable cause, and without any overt misuse of process, will not subject a litigant to liability for malicious abuse of process, even if it is the result of a malicious motive.” *DeVaney*, 1998-NMSC-001, ¶ 20.

[12] It is well-settled that “the existence of probable cause in the underlying proceeding, that is, whether the facts amount to probable cause, is a question of law” which is to “be decided by the trial judge.” *Id.* ¶ 24, 41. When “the essential facts on which the issue of probable cause turns” are not in dispute, the question is one of law and should not be submitted to the jury. *Weststar Mortgage Corp. v. Jackson*, 2003-NMSC-002, ¶ 17, 133 N.M. 114, 61 P.3d 823. Therefore, within the context of a malicious abuse of process claim, if the extent of a plaintiff’s knowledge in the underlying suit at the time of the initiation of the action is not in dispute, the issue becomes one of law. *See id.*

[13] SFBC argues that the question of whether Hiner had probable cause to file the underlying lawsuit should not have been determined as a matter of law because material issues of fact were in dispute surrounding the filing of the complaint and the circumstances leading to its voluntary dismissal. Indeed, *DeVaney* supports the propositions that “some form of recovery for the original-proceeding plaintiff, is conclusive evidence of the existence of probable cause,” and that dismissal can create an inference of lack of probable cause in some circumstances. *Id.* ¶ 23 (internal quotation marks and citation omitted). Nevertheless, a dismissal does not create an issue of fact when other undisputed facts establish that probable cause existed to support the underlying lawsuit at the time it was filed. *See Weststar Mortgage Corp.*, 2003-NMSC-002, ¶ 16 (stating that probable cause is to be judged by the facts as they appeared at the time of filing).

[14] In this case, as the district court determined, there was no factual question because the facts supporting a finding of probable cause at the time the case was filed were undisputed. Hiner produced evidence to support his factual assertion that he had been informed by the police that SFBC’s insured was the person responsible for damaging his property. He produced evidence that the police had told him that another person was not responsible. SFBC did not produce evidence to rebut this testimony, but objected to it on hearsay grounds. The district court did not specifically rule on the issue of whether such a reported conversation was hearsay. However, the district court would not have abused its discretion in ruling that the police officer’s statement was not hearsay because the conversation was not introduced to support its truth, but only to demonstrate that such a conversation had occurred for the purposes of establishing probable cause. *See Rule 11-801(C) NMRA.* Moreover, even if the officer’s statement was hearsay, it still would have been admissible for purposes of establishing probable cause. *See Zamora v. Creamland Dairies, Inc.*, 106 N.M. 628, 632, 747 P.2d 923, 927 (Ct. App. 1987) (stating that “even hearsay evidence may be used to establish probable cause”).

[15] We are not persuaded by SFBC’s argument that *Weststar Mortgage Corp.* supports the assertion that, in addition to Hiner’s knowledge at the time he filed the underlying complaint, a “panorama” of circumstances was relevant to the question of probable cause and that those facts should have been determined by a jury. As we have discussed, our Supreme Court stated in *Weststar Mortgage Corp.* that when the plaintiff’s extent of knowledge at the time of filing the underlying suit is not in dispute, the question of probable cause is one of law and should not be submitted to the jury. *Weststar Mortgage Corp.*, 2003-NMSC-002, ¶ 17.

[16] In this case, there was no dispute that Hiner had been told by the police investigating the property damage that SFBC’s insured, and no one else, was responsible, and that SFBC did not meet its burden in disputing these essential facts. Similarly, Hiner’s motives in filing suit are irrelevant if the complaint was supported by probable cause. *See DeVaney*, 1998-NMSC-001, ¶ 20. In light of the undisputed material facts, the district court did not err in ruling that Hiner had probable cause to file his complaint against SFBC’s insured for damages.

[17] SFBC also argues that the district court erred in determining as a matter of law that Hiner had probable cause to sue SFBC in a direct action for unreasonably denying his claim because SFBC had no contractual relationship with Hiner. SFBC acknowledges that our Supreme Court has recognized that the insurance provider for a tortfeasor may be joined as a necessary party in a case brought pursuant to the Mandatory Financial Responsibility Act, NMSA 1978, §§ 66-5-201 to 66-5-239 (1978, as amended through 2003).
See Raskob v. Sanchez, 1998-NMSC-045, ¶ 20, 126 N.M. 394, 970 P.2d 580. SFBC argues, however, that a plaintiff under that statute “could not proceed against the insurer alone.” 

Martinez v. Reid, 2002-NMSC-015, ¶ 13, 132 N.M. 237, 46 P.3d 1237. Accordingly, SFBC contends that there was no basis for a direct and independent claim against SFBC for its denial of Hiner’s claim.


Based on our Supreme Court’s determination in Hovet that the reasoning of Russell was applicable in insurance contexts other than workers’ compensation and on the narrow construct of the tort of malicious abuse of process, DeVaney, 1998-NMSC-001, ¶ 19, it was not an abuse of process for Hiner to file a direct action against the insurance company. See Hovet, 2004-NMSC-010, ¶¶ 16-17.

(19) SFBC also argues that Hiner did not argue that his claim arose under the Insurance Code and that, even if it does, the Insurance Code permits such an action only when “liability has become reasonably clear.” See § 59A-16-20(E). SFBC argues that in this case the complaint and amended complaint make no such allegation. Instead, SFBC suggests that the contested facts did not establish probable cause for the claim. We disagree. Probable cause does not require certainty; it requires “the reasonable belief, founded on known facts established after a reasonable [pretrial] investigation, that a claim can be established to the satisfaction of a court or jury.” DeVaney, 1998-NMSC-001, ¶ 22 (citation and footnote omitted). At the time Hiner filed his complaint, based on the information given to him by the Portales Police Department, it was reasonable for him to believe SFBC’s insured was the party responsible for the damage to Hiner’s property.

(20) We acknowledge that our Supreme Court stated that any “action for unfair claims practices based on failure to settle may only be filed after the conclusion of the underlying negligence litigation, and after there has been a judicial determination of fault in favor of the third party and against the insured.” Hovet, 2004-NMSC-010, ¶ 25. However, because Hovet was filed after the commencement of the underlying lawsuit in this case, the requirement of a separate lawsuit does not demonstrate a lack of probable cause to file suit at the time the underlying lawsuit was filed. We therefore hold that the district court did not err when it determined that Hiner had probable cause to file his complaint in the underlying lawsuit.

(2) Procedural Impropriety

(21) SFBC also argues, relying on DeVaney, that even if Hiner was able to establish probable cause to file his complaint, factual issues remained regarding procedural improprieties or misuse of the process that precluded summary judgment. See DeVaney, 1998-NMSC-001, ¶ 21, 28. SFBC argued below that evidence of Hiner’s failure to disclose the name of the person who had told him he might be responsible for the damage to SFBC in answers to interrogatories, to the Texas Department of Insurance, to the insurance adjusters, to the district attorney’s office, and during the course of the underlying litigation, constitutes evidence of procedural impropriety sufficient to cause a question of fact. In its supplemental response to Hiner’s motion for summary judgment, SFBC also argued that Hiner made an exaggerated claim for damages. The district court ruled as a matter of law that these allegations were not sufficiently outrageous to create a question of fact about whether a procedural impropriety had occurred.

(22) On appeal, SFBC argues that the district court applied the wrong standard in determining that only outrageous conduct could establish a procedural impropriety. SFBC contends that the district court was weighing facts, which was inappropriate on summary judgment. SFBC also suggests that Hiner’s letter to the Texas Department of Insurance and claim filed against an insurance company could be viewed as extortion. In his answer brief, Hiner points out that it was undisputed that SFBC did not view the letter to the Department of Insurance as extortion or harassment, noting in its communications with the Department that Hiner had been patient in waiting for his claim to be processed. In addition, Hiner argues that his lawsuit and inquiries were based entirely on information he received from the Portales Police Department.

(23) The letter to the Texas Department of Insurance does not constitute legal process. See Weststar Mortgage Corp., 2003-NMSC-002, ¶ 21 (stating that “a report to the authorities of possible criminal activity is not legal process and neither are the pre-trial investigatory actions of the police”). Moreover, as our Supreme Court explained in DeVaney, extortion consists of “using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.” DeVaney, 1998-NMSC-001, ¶ 28 (internal quotation marks and citation omitted). In this case, Hiner did not apply pressure to compel the payment of a different debt. He initiated the lawsuit to compel a payment that he believed was an unpaid debt. See id. ¶ 30 (stating that one example of improper purpose is the initiation of proceedings “primarily for the purpose of inducing settlement in an unrelated proceeding”). SFBC did not produce evidence to show that Hiner’s purpose in failing to mention the name of a person the police had said was not connected to the damage to his property was to induce settlement in an unrelated proceeding. Thus, we find no error in the district court’s determination that SFBC had not met its burden of raising a factual issue as to whether Hiner had committed a procedural impropriety.

SFBC’s Motion for Partial Summary Judgment

(24) SFBC also argues that the district court erred in denying its motion for partial summary judgment, in which SFBC argued that Hiner lacked probable cause to sue SFBC directly. Although a defendant who moves for summary judgment has only to negate one of the essential elements of the claim, see Blauwkamp, 114 N.M. at 231, 836 P.2d at 1252, a plaintiff who moves for summary judgment has the burden of demonstrating that no genuine issue of material fact exists as to each element of the claim. See Mayfield Smithson Enters. v. Com-Quip, Inc., 120 N.M. 9, 12, 896 P.2d 1156, 1159 (1995). Thus, in order to prevail, SFBC had the burden of proving, along with the other elements of malicious abuse of process, that Hiner lacked probable cause to sue SFBC directly.

(25) In light of our earlier determination that Hiner had probable cause to file the underlying lawsuit, we affirm the district court’s denial of SFBC’s motion for partial summary judgment.

Conclusion

(26) For the foregoing reasons, we affirm the district court’s grant of Hiner’s motion for summary judgment and the court’s denial of SFBC’s motions for partial summary judgment and reconsideration.

IT IS SO ORDERED.

JAMES J. WECHSLER,
Judge

WE CONCUR:

CYNTHIA A. FRY, Judge
IRA ROBINSON, Judge
From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-105

DORA JACOBO and MANUEL JACOBO, Plaintiffs-Appellants,
versus
CITY OF ALBUQUERQUE and
PUBLIC SERVICE COMPANY OF NEW MEXICO, Defendants-Appellees.

Nos. 24,256 and 24,459 consolidated (filed June 16, 2005)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
WILLIAM F. LANG, District Judge

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OPINION

Roderick T. Kennedy, Judge

{1} This case arises from the entry of summary judgment in favor of Defendants, Public Service Company of New Mexico (PNM) and the City of Albuquerque (the City). Plaintiffs Dora and Manuel Jacobo alleged they were injured after Dora Jacobo tripped on the concrete base of a light pole on a City street. The case presents two legal questions: whether PNM, who constructed and continues to own the light pole, is protected from Plaintiffs’ claims by the Tort Claims Act (TCA), NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2004). Because we determine that Plaintiffs’ claims are not barred by either statute, we reverse and remand for further proceedings.

BACKGROUND

{2} Plaintiffs sued PNM and the City, alleging that Dora Jacobo was injured on a City street when she tripped over the raised concrete base of a light pole constructed by PNM. A factual dispute appears to remain over whether the City or PNM owns the concrete base of the light pole. Both Defendants moved for summary judgment. PNM argued that under Section 37-1-27, it was not liable for Plaintiffs’ injuries because it had built the light pole more than ten years earlier. The City argued first that it was not liable because PNM owned the light pole. Second, it argued that the immunity granted by the TCA was not waived in this case because Section 41-4-11 only waives immunity for negligent maintenance of sidewalks and not for design defects. In addition, the City argued that it had no notice of the alleged defect and that it was also protected by the statute of repose. See § 37-1-27. The district court granted both the City’s and PNM’s motions. Plaintiffs also moved to amend the complaint to allege, based on the same facts, that the City’s immunity was also waived under Section 41-4-6 (waiving immunity for the negligent operation or maintenance of buildings, public parks, equipment or furnishings), and under Section 41-4-8 (waiving immunity for the negligent operation of utilities). The court denied the motion to amend. This appeal followed.

DISCUSSION

{3} Plaintiffs argue that Section 37-1-27 does not bar Plaintiffs’ claims because PNM is currently the owner of the light pole, has a contractual obligation with the City to maintain it, and has a duty under City ordinances to maintain it. Plaintiffs also argue that the City’s immunity is waived because its duty to maintain the sidewalk in a safe condition is not limited to upkeep and repair, but also includes a duty to inspect and warn pedestrians of any danger. Plaintiffs challenge any determination that the City is protected by Section 37-1-27 and also appeal the denial of their motion to amend.

{4} “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. The issue on appeal is whether the [defendant] was entitled to [judgment] . . . as a matter of law. We review these legal questions de novo.” Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. Both main issues in this case require statutory interpretation, which is a question of law that we review de novo. See Morgan Keegan Mortgage Co. v. Candelaria, 1998-NMCA-008, ¶ 5, 124 N.M. 405, 951 P.2d 1066. “In interpreting statutes, we seek to give effect to the Legislature’s intent, and in determining intent we look to the language used and consider the statute’s history and background.” Key v. Chrysler Motors Corp., 121 N.M. 764, 768-69, 918 P.2d 350, 354-55 (1996).

PNM’s Motion for Summary Judgment

{5} Plaintiffs argue that the protection of Section 37-1-27 should not extend to owners who design and construct an improvement to real property and continue to own it after the ten-year period provided in the statute for bringing claims arising out of construction projects.

{6} Section 37-1-27 reads:

No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, aris-
ing out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, shall be brought after ten years from the date of substantial completion of such improvement; provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith. The date of substantial completion shall mean the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the purpose for which it was intended, or the date on which the owner does so occupy or use the improvement, or the date established by the contractor as the date of substantial completion, whichever date occurs last.

PNM argues at some length that the plain meaning of the statute extends protection to "any person performing . . . construction" and does not exclude owners. See id. PNM then argues that because the statute unambiguously extends protection to any person, such a clear policy statement cannot be negated by other policy considerations.

{7} While we agree with PNM that the statute is clear in its intent to protect builders from liability arising from defective or unsafe conditions created by the construction process after ten years have passed since substantial completion, we are not persuaded that the statute clearly extends protection to continuing owners of the property. As PNM states, the liability of continuing owners is not mentioned in the statute. Despite PNM’s arguments to the contrary, it seems logical to suppose that the legislature did not intend to protect such owners. See Swink v. Fingado, 115 N.M. 275, 283, 850 P.2d 978, 986 (1993) (“Legislative silence is at best a tenuous guide to determining legislative intent[].”).

{8} Moreover, we are not persuaded by PNM’s argument that New Mexico case law supports reading the statute’s protections to include builders who are also owners. Holding that this statute was not special legislation and did not violate equal protection, this Court has said that the protection the statute offered to builders, as opposed to owners, tenants, and materialmen was justified because “[t]hose covered by the statute have no control over the real estate improvement once it is completed and turned over to the owner.” Howell v. Burk, 90 N.M. 688, 694, 568 P.2d 214, 220 (Ct. App. 1977). Thus, this Court explicitly tied the protection of the statute to builders who no longer had any control over the property in question and stated that “[u]nder the statutory language, the owner or tenant of real property . . . does not benefit from the statute.” Id. at 693, 568 P.2d at 219.

{9} More recently, our Supreme Court interpreted Section 37-1-27 “to shift liability from builders to property owners . . . for dangerous conditions arising out of improvements to real property ten years after the completion of a project.” Saiz v. Belen Sch. Dist., 113 N.M. 387, 401, 827 P.2d 102, 116 (1992). The Court stressed that “this Statute was not intended to benefit the owner of real property.” Id. In addition, the Court observed that because joint and several liability was the law at the time the statute was enacted, “the effect of the Statute when passed was to make landowners potentially responsible for all damages.” Id. In our view, our Supreme Court has indicated that the statute was never intended to protect property owners. Moreover, our Supreme Court has observed that the protection provided by the statute of repose “was thought necessary in the wake of judicial decisions exposing those involved in the construction industry to greater liability,” when, due to the passage of time since their involvement, the preparation of a reasonable defense might be impossible. Coleman v. United Eng’rs & Constructors, Inc., 118 N.M. 47, 51, 878 P.2d 996, 1000 (1994). Indeed, as our Supreme Court wrote in Coleman, the history of the enactment of statutes like Section 37-1-27 shows that they were specifically designed to protect architects, builders, and those involved in the construction industry from liability arising out of defective improvements to real property many years after they had any connection to the property. See Coleman, 118 N.M. at 51, 878 P.2d at 1000; see generally Jane Massey Draper, Annotation, Validity and Construction, as to Claim Alleging Design Defects, of Statute Imposing Time Limitations Upon Action against Architect or Engineer for Injury or Death Arising out of Defective or Unsafe Condition of Improvement to Real Property, 93 A.L.R.3d 1242, 1244-45 (1979) (containing a discussion of “statutes imposing time limitations upon an action against an architect or engineer for injury or death arising out of the defective or unsafe condition of an improvement to real property” (footnotes omitted)) (superseded in part by Martha Ratnoff Fleisher, Annotation, Validity, as to Claim Alleging Design or Building Defects, of Statute Imposing Time Limitations Upon Action Against Architect, Engineer, or Builder for Injury or Death Arising out of Defective or Unsafe Condition of Improvement to Real Property, 2002 A.L.R.5th 21 (2002-05) (not yet released for publication)). This same rationale does not apply to property owners.

{10} Both parties cite to out-of-state cases to argue that an owner who is also a builder either is or is not protected. PNM relies on Wright v. Board of Education, 781 N.E.2d 386 (III. App. Ct. 2002), to argue that an owner who is also the builder is protected by the statute of repose. In Wright, the school board (both builder and owner) was deemed protected from an action by a plaintiff who fell when leaving an elementary school. Id. at 387, 393. The Wright court acknowledged that the Illinois appellate courts were split on the construction of the statute, noting that one of its cases had held that “even after the 10-year statutory period, a party who is in a position to correct a design defect loses the protection” of the statute of repose. Id. at 391-92. The Wright court concluded, however, that although the board of education had a duty to maintain as a property owner, that duty was “trumped by the statute of repose . . . because the Board is the owner of the property and the entity that participated in the design and construction of it.” Id. at 393. In reaching this conclusion, the court reasoned that the Illinois statute of repose “eliminate[s] consideration of status . . . [and] protects, on its face, anyone who engages in the enumerated activities.” Id. at 392 (internal quotation marks and citations omitted). PNM argues that this Court also adopted an “activity analysis” in Howell, 90 N.M. at 697, 568 P.2d at 223, and thus the resolution of this appeal should be guided by Wright, 781 N.E.2d at 392. We are not persuaded that such a distinction requires us to determine that PNM is protected by the statute of repose, Section 37-1-27. While it appears undisputed that PNM acted as a builder at the time of construction, it is also currently the owner of the light pole, and it
remains disputed whether it is the owner of the concrete base. If it is the owner of the concrete base, it has separate duties that are independent of its duties as a builder. {11} Plaintiffs argue that New Mexico’s statute of repose, unlike that of Illinois, makes specific references to the date of substantial completion of a project when the owner is able to occupy the premises, thus implying that the owner’s occupation of the property shifts responsibility from builder to owner. See § 37-1-27. Consequently, Plaintiffs contend, we should be persuaded by the reasoning of Stone v. United Engineering, 475 S.E.2d 439, 446-47 (W. Va. 1996), in interpreting the West Virginia statute of repose, which also provides that the statute begins to run from the date when “the improvement to the real property in question has been occupied or accepted by the owner of real property, whichever occurs first.” Id. at 447 (internal quotation marks omitted and emphasis added) (quoting W. Va. Code § 55-2-6a (1983)). The Supreme Court of Appeals of West Virginia determined that the purpose of the statute of repose is to protect architects, builders, and the like from liability “many years after a construction project was completed” and concluded as a matter of law that its statute of repose did not extend to a defendant who not only designed but owned the property. Id.

{12} Regardless of whether the actual wording of New Mexico’s and West Virginia’s statutes is similar or not, in light of our Supreme Court’s statements in Saiz, 113 N.M. at 401, 827 P.2d at 116, and Coleman, 118 N.M. at 51, 878 P.2d at 1000, New Mexico has indicated that ten years after substantial completion of a project, responsibility for the safety of an improvement to real property shifts from a designer, planner, or builder to the owner. See § 37-1-27. In this case, they may both be PNM. The owner of the property is not relieved of liability under Section 37-1-27, but remains liable for injuries arising from unsafe conditions on that property. Id. The district court erred, therefore, in granting summary judgment to PNM on that basis when the question of ownership of the concrete base of the light pole remained unresolved. Because we hold that Section 37-1-27 does not protect owners of property who built the property against claims arising from unsafe conditions of that property, we do not address whether PNM’s duties under contract and City ordinance would also make Section 37-1-27 inapplicable.

{13} Plaintiffs also argue that the district court erred in accepting all the arguments made by the City in its motion for summary judgment. The City argued below that it was not liable for any damages because (1) PNM owned the light pole, (2) the damages resulted from a design defect for which immunity had not been waived under Section 41-4-11, and not from negligent maintenance, which is limited to upkeep and repair, (3) the City had no notice of the dangerous condition, and (4) the claim was barred by Section 37-1-27. {14} Several of these arguments can be addressed summarily. First, in light of our holding that Section 37-1-27 does not bar claims against owners of property, we determine that summary judgment for the City should not have been granted on this basis. Second, as Plaintiffs point out, their claim against the City was not premised on the City’s ownership of the light pole itself, but on whether the City had properly maintained the sidewalk that included the pole’s concrete base. Third, because the City constructed the sidewalk, it was not necessary for Plaintiffs to prove knowledge of any dangerous condition on the sidewalk. See Caroza v. Town of Silver City, 96 N.M. 130, 134, 628 P.2d 1126, 1130 (Ct. App. 1981) (“No burden was imposed upon the public to prove notice of a defect or danger. . . . The only duty of the person injured is to prove the City’s negligence.”). {15} The issue that remains is whether the condition of the concrete base of the light pole was a design defect or whether the allegedly unsafe condition resulted from the City’s failure to maintain the sidewalk. Section 41-4-11 waives immunity for “damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties during the construction, and in subsequent maintenance of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.” Id. Although the City argues for a narrow construction of “maintenance,” stating that the sidewalk was not in need of repair, New Mexico cases have held that the term “maintenance” is not limited to “upkeep and repair” but that “the identification and remediation of roadway hazards constitutes highway maintenance under Section 41-4-11 of the TCA.” Rutherford v. Chaves County, 2003-NMSC-010, ¶ 21, 25, 133 N.M. 756, 69 P.3d 1199; see also Williams v. Cent. Consol. Sch. Dist., 1998-NMCA-006, ¶ 10, 124 N.M. 488, 952 P.2d 978 (observing “that on several occasions our Supreme Court has rejected a narrow view of operation or maintenance with respect to public buildings, in favor of a broad interpretation of Section 41-4-6 which places upon the state a duty to exercise reasonable care to prevent or correct dangerous conditions on public property”). Because Section 41-4-11 waives immunity from liability for negligent maintenance of sidewalks and because that maintenance is broader than simple upkeep and repair, summary judgment was inappropriate in this case.

CONCLUSION

{16} For the foregoing reasons, we reverse the district court’s order granting summary judgment in favor of Defendants PNM and the City, and we remand for further proceedings. We direct the district court to reconsider, in light of our opinion, whether Section 41-4-6 and Section 41-4-8 may also apply.

{17} IT IS SO ORDERED.

RODERICK T. KENNEDY,
Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

JONATHAN B. SUTIN, Judge
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