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2006 State Bar of New Mexico Budget Disclosure is available online at www.nmbar.org.
In an effort to save money this year, printed copies will be available upon request.
See the Nov. 7 Bar Bulletin.
Depression, Alcohol or 
or Drug Problems?
Help is as close as your phone.

The Lawyers Assistance Program is a statewide network of recovering lawyers and substance abuse professionals dedicated to helping others within the profession get the help they need. Discuss your concerns with professional staff who will answer your questions, provide information, give support and offer a plan of action. At your request, you may be put in touch with an attorney in recovery who can share his or her experience with you.

Free Confidential* 24-Hour Hotline
Albuquerque (505) 228-1948
(800) 860-4914

*The NM Rules of Professional Conduct (Rule 16-803) and the NM Code of Judicial Conduct (Rule 21-300) provide for strict confidentiality.
Get Involved in
State Bar Committees

By joining you will:
• Help Strengthen the Legal Profession
• Work on Legal Causes of Interest
• Increase Access to the Legal System

Each year the State Bar president appoints members to committees that accomplish these goals. Review the descriptions and complete the form below to request an appointment for 2006.

Please check the committee(s) you wish to join.

☐ Alternative Methods of Dispute Resolution (ADR) – Promotes and provides legal education and training in the use of alternative dispute resolution processes.

☐ Bench and Bar Relations – Plans the statewide Bench and Bar Conference.

☐ Client Relations – Advises the State Bar Client Attorney Assistance Program (CAAP), which attempts to resolve minor problems that clients may have with their attorneys. CAAP includes the State Bar's Client Protection Fund, fee arbitration panel, peer assistance program and unauthorized practice of law complaints.

☐ Delivery of Legal Services to People with Disabilities – Provides information and assistance to ensure access to counsel for persons who have a disability.

☐ Diversity in the Legal Profession – Promotes opportunities for minorities in the legal profession and encourages participation by minorities in bar programs and activities.

☐ Ethics Advisory – Assists attorneys with interpretation and application of the Rules of Professional Conduct.

☐ Historical – Acquires, maintains and submits for publication historical information relating to the bar.

☐ Law Office Management – Develops and provides resources for attorneys, especially solo and small firm practitioners and young lawyers, to more effectively manage law practices.

☐ Lawyers Assistance – Provides confidential peer assistance to State Bar members in need of help because of substance abuse, mental illness or emotional distress.

☐ Lawyers Professional Liability – Advises the State Bar regarding risk management activities.

☐ Legal Services and Programs: Planning Subcommittee – Recommends to the State Bar and other appropriate legal service organizations systemic approaches to the effective and efficient delivery of legal services to the poor.

☐ Legal Services and Programs: Pro Bono Subcommittee – Facilitates cooperation and coordination of pro bono opportunities available to the State Bar and the UNM School of Law.

☐ Legal Services and Programs: Funding Subcommittee – Encourages and explores ways to fund non-profit organizations that provide free civil legal services for low-income New Mexicans.

☐ Medical-Legal Grievance Committee: Attempts to resolve specific complaints between the two professions.

☐ Medical-Legal Liaison Committee: Addresses basic issues of mutual concern to the two professions, e.g., the Medical Malpractice Act.

☐ Membership Services – Evaluates and makes recommendations regarding in-house programs. Advises the State Bar on alliance program agreements with vendors of products and services.

☐ New Mexico Medical Review Commission: Attorney and physician panel members screen medical malpractice claims.

☐ Public Legal Education – Provides information and education about the legal profession, the law and services available through the State Bar and other law-related entities.

☐ Quality of Life – Examines issues such as depression, dissatisfaction and balance in order to provide recommendations that will help to alleviate the stress of modern law practice.

☐ Technology Utilization – Assists with the development and promotion of electronic technology applications for the legal profession.

☐ Women and the Legal Profession – Addresses issues affecting women as lawyers and judges and monitors substantive issues of women served by the legal system.

Name: ________________________________________

Address: ______________________________________

City/State: _________________________  Zip: ________

Telephone: ________________  Fax: ________________

E-mail: ________________________________________

Mail To: State Bar of New Mexico,
Membership and Communications Department,
PO Box 92860, Albuquerque, NM 87199-2860
Fax: (505) 828-3765
Request by E-mail: membership@nmbar.org
6

The Impact of Domestic Violence on Children and the Growing Incidence of Juvenile Domestic Violence
Tuesday, December 6 • 9 a.m.-3:30 p.m.
6.2 General and 1.0 Ethics CLE Credits

In this full-day seminar, two troubling topics of domestic violence are covered: the effect of domestic violence on children who witness it and the growing incidence of juvenile domestic violence in which children are the offender. Featured are attorney Sarah Buel who shares her twenty-eight years of experience in working with battered women, abused children and juveniles. She has written extensively on family violence issues and remains committed to improving the court and community response to abuse victims. Dr. Victor LaCerva, current Medical Director of the Family Health Bureau, NM Department of Health will also be featured in this program. He was the co-creator of the award-winning video Stolen Childhood, exploring the adverse impact on children of exposure to domestic violence. He has spent the past fourteen years actively working in violence prevention.

$189

The Annual Review of Civil Procedure
Tuesday, December 6 • 9 a.m.-4:30 p.m.
7.5 General and 1.2 Ethics CLE Credits

This year’s annual review features an in-depth look at significant changes in New Mexico civil procedure, New Mexico case law affecting civil procedure, and an ethics presentation entitled “Coming Attractions” in the New Mexico Rules of Professional Conduct.

$229

Public Health Emergencies
Tuesday, December 6 • 9 a.m.-4 p.m.
4.5 General, 2.0 Professionalism, and 1.2 Ethics CLE Credits

What do legal and medical professionals need to know about the various aspects of public health emergencies? This regional seminar will focus upon federal, state, and local issues related to emergency preparedness and public health emergencies. The day will conclude with a look at both ethical and professional legal considerations.

$199

Legislative Process: A 2005 Update
Tuesday, December 6 • 10 a.m.-Noon
2.4 General CLE Credits

Join us for this informative update on legislative issues before members of the New Mexico House and Senate Judiciary Committees. The speakers discuss recent legislative developments that will be affecting New Mexico practitioners.

$79

DUI in New Mexico
Tuesday, December 6 • 12:30-5 p.m.
5.3 General CLE Credits

This seminar consists of a legal update on evidence issues and a panel discussion on DUI problems and ideas for solutions in New Mexico. The panel is composed of a police officer, a judge, a prosecutor, a defense attorney, and a victim’s representative. Audience participation is sought and problems from Albuquerque and around the state are aired. The day concludes with a planning session for future actions.

$149

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 ____________
Meetings

November

29 Natural Resources, Energy and Environmental Law Section Board of Directors noon, State Bar Center

December

1 Elder Law Section noon, State Bar Center

2 Health Law Section Annual Meeting 5 p.m., Petroleum Club, Albuquerque

3 Board of Editors noon, State Bar Center

5 Young Lawyers Division Board of Directors 10 a.m., State Bar Center

7 Attorney Support Group 5:30 p.m., 411 St. Michael’s Drive, Suite 1, Santa Fe.

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

State Bar Workshops

December

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

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

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

January

25 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar

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

February

22 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar

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

Contributions and announcements to the Bar Bulletin are welcome, but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy available upon request.

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• Professionalism Tip •

With respect to other judges:

I will be courteous, respectful and civil in my opinions.

Professionalism Tip

I will be courteous, respectful and civil in my opinions.
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., Dec. 9, at the Judicial Information Division, 2905 Rodeo Park, Santa Fe. For more information on the commission or with regard to the next scheduled meeting, call (505) 827-4960.

Proposed Amendment of the Rules Governing Discipline

The Supreme Court is considering the amendment of Rule 17-306 of the Rules Governing Discipline. Send written comments by Dec. 9 to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendment was printed on page 18 in the Nov. 21 (Vol. 44, No. 46) Bar Bulletin.

NM Board of Legal Specialization

Comments Solicited

The following attorney is applying for certification as specialists in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicants’ 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.

Federal Indian Law
Carolyn J. Abeita

First Judicial District Court

Destruction of Exhibits

Criminal, Civil, Children’s Court, Domestic,
Incompetency/Mental Health, Adoption and Probate Cases 1979 to 1987

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, incompetency/mental health, adoption and probate cases for years 1979 to 1987 included 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 Dec. 2.

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 by Order of the Court.

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, Dec. 5, 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. Call (505) 841-7644 for an agenda.

Destruction of Exhibits

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy exhibits filed with the Court in the civil cases for years 1991 to 1992, included but not limited to cases which have been consolidated.
Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning Oct. 20 to Dec. 22. Verify exhibit information with the Special Services Division, (505) 841-7596/7405, from 8 a.m. to noon, and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Family Court Open Meetings

The Second Judicial District Children’s Court will hold open meetings to discuss ongoing concerns and projects at noon, Dec. 5, in the Conference Center located on the third floor of the Bernalillo County Courthouse. Contact Sandra Portida, (505) 841-7531, for more information or to have an item placed on the agenda.

Sixth Judicial District Court

Change of Physical Location of Public Auctions

Effective immediately, the Sixth Judicial District Court will hold all public auctions in the foyer/lobby of the Grant County Courthouse, Silver City, New Mexico.

STATE BAR NEWS

ATTORNEY SUPPORT GROUP Change in Meeting Location

The Dec. 5 meeting of the Attorney Support Group will meet at 5:30 p.m. at the office of Scott Voorhees, 411 St. Michael’s Drive, Suite 1, Santa Fe, (505) 820-3302. The January meeting and all subsequent meetings will be held at the usual location, the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Board of Bar Commissioners

Center for Civic Values IOLTA Grant Committee

The Board of Bar Commissioners will appoint two representatives, one-lawyer member and one public non-lawyer member, to the Center for Civic Values IOLTA Grant Committee for three-year terms. Anyone wishing to serve on the committee should send a letter of interest and brief resume by Nov. 28 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to 828-3765.

Disciplinary Board Appointment

The State Bar of New Mexico will make one appointment to the Disciplinary Board for a three-year term. Members wishing to serve on the board should send a letter of interest and brief resume by Dec. 1 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Election of Commissioners

The 2005 election of commissioners for the State Bar of New Mexico Board of Bar Commissioners will be held on Nov. 30. The Third Bar Commissioner District will have a contested election. Positions in the first, second, fifth and sixth districts are uncontested. Ballots for the contested election were mailed Nov. 4 and are due by noon, Nov. 30. See biographies and candidates’ statements in the Nov. 7 (Vol. 44, No. 44) Bar Bulletin, pages 10–11.

No candidates filed for the vacancy in the seventh district, which includes Catron, Doña Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties. The Board of Bar Commissioners will make an appointment for that vacancy at the Dec. 9 meeting. Active State Bar members who practice in the district and are interested in serving on the Board of Bar Commissioners should send a letter by Dec. 8 to Executive Director Joe Conte, PO Box 92860, Albuquerque, NM 87199-2860, or jconte@nmbar.org.

Rocky Mountain Mineral Law Foundation Board

The Board of Bar Commissioners will make one appointment to the Rocky Mountain Mineral Law Foundation Board for a three-year term. Members wishing to serve on the board should send a letter of interest and brief resume by Nov. 28 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to 828-3765.

Board of Editors

Vacancies

Two attorney and one non-attorney terms on the State Bar Board of Editors will expire at the end of 2005. As the editorial board for the Bar Bulletin, the Board of Editors reviews and approves articles submitted for publication. All vacancies are two-year terms, beginning Jan. 1, 2006 and ending Dec. 31, 2007, and may be renewed for one additional two-year term.

Interested attorneys should have previous publishing/editing experience and be available to review articles regularly, as well as be able to attend quarterly board meetings in person or by teleconference. Resumes should be sent by Nov. 30 to Dorma Seago, PO Box 92860, Albuquerque, NM 87199; or by e-mail, dseago@nmbar.org.

Employment and Labor Law Section

Board Meeting

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 Dec. 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.

Health Law Section

Annual Meeting

The Health Law Section will hold its annual meeting at 5 p.m., Dec. 1, at the Petroleum Club, 500 Marquette, Albuquerque. Program to be announced. Contact Chair John Bannerman, (505) 837-1900, or jab@nmcounsel.com, to place an item on the agenda.

Public Law Section

Annual Meeting and Co-sponsorship of Municipal Attorneys’ Seminar

The Public Law Section will hold its annual meeting at 11:45 a.m., Nov. 30, in conjunction with the Municipal Attorneys’ Association Winter Meeting and Seminar at the Marriott Hotel, Albuquerque. All section members are encouraged to attend. Agenda items should be sent to Chair Elect Al Lama, Al.Lama@state.nm.us.

As co-sponsors of the seminar, section members will receive the same discount as
members of the Municipal Attorneys’ Association. Visit www.nmml.org or contact Cherise Montoya, cmontoya@nmml.org or (505) 982-5573, to obtain a registration form.

Real Property, Probate and Trust Section Annual Meeting
The Real Property, Probate and Trust Section will hold its annual membership meeting at 1 p.m., Dec. 9, in conjunction with the 2005 Real Property Institute: Hot Topics in Real Estate at the State Bar Center. All section members are encouraged to attend the meeting. Contact Chair James Widland, jwidland@mstlaw.com, to place an item on the agenda.

Senior Lawyers Division Nominating Committee Report
The report of the Senior Lawyers Division nominating committee follows. Additional nominations may be made in the form of a petition signed by at least 30 members of the division. All members of the State Bar of New Mexico in good standing who are 55 years of age or older and who have practiced law for 25 years or more are members of the division and are eligible for office.

A nomination petition form was included on page 12 of the Nov. 21 (Vol. 44, No. 46) Bar Bulletin. The petition must identify the position sought and state that the member has agreed to the nomination. The deadline for submission of petitions to the State Bar is Dec. 9.

If no additional nominations are received, the nominees listed below are deemed elected by acclamation. If additional nominations are received via nominating petition, ballots will be mailed to all members of the division by Dec. 16.

Position #1
Term: 2006-2008
Nominee: Carter J. Clary
Biography unavailable.

Position #2
Term: 2006-2008
Nominee: R. Thomas Dawe
Biography unavailable

Position #3
Term: 2006-2008
Nominee: Terrence Revo
Biography unavailable

Position #4
Term: 2006-2008
Nominee: Robert S. Simon has been in practice for 35 years, during which he has been sole corporate counsel for three SEC reporting companies: Pier I Imports for ten years, Titan Technology for seven years and Westland Development Co., Inc. for 16 years. He has had a bifurcated practice divided between private practice and corporate counsel functions. His major areas of experience are corporate law, real estate law and securities law. Simon received a B.B.A. in the honors program from the University of Texas in 1967, a law degree from the University of Texas in 1970 and an M.B.A. from Texas Christian University in 1976.

Position #5
Term: 2006-2008
Nominee: Ronald T. Taylor
Biography unavailable.

Solo and Small Firm Practitioners Law Section Annual Meeting, CLE and Reception
The Solo and Small Firm Practitioners Section will hold its annual membership meeting at 1 p.m., Dec. 9, in conjunction with a CLE on collections presented by Richard Feferman at the State Bar Center. All section members and those interested in joining the section are encouraged to attend. Contact Chair Brian Escobedo, escobedo7174@msn.com, or (505) 720-8064, to place an item on the agenda.

The CLE will be held from 2 to 3:40 p.m. See inside back cover of this issue for credit and price information. A reception will follow from 3:40 to 4:30 p.m. Register online at www.nmbar.org and select CLE or call (505) 797-6020.

American Bar Association
2006 Michael Franck Award
The American Bar Association (ABA), through the Center for Professional Responsibility, is pleased to announce the 2006 Michael Franck Award. The award is named in honor of the late director of the State Bar of Michigan and long-time champion of improvements in lawyer regulation in the public interest. Each year, the ABA presents this award to someone whose contributions in the professional responsibility field evidence the highest level of dedication to the legal profession. Additional information and an application form are located online at http://www.abanet.org/cpr/franck.html.

Questions can be directed to cpr@abanet.org or to George Kuhlman. ABA Ethics Counsel, (312) 988-5300. The award will be presented June 1 at the 32nd National Conference on Professional Responsibility in Vancouver, British Columbia. The deadline for nominations is Jan. 6.

NM Hispanic Bar Association
The New Mexico Hispanic Bar Association will hold its Fifth Annual Holiday Scholarship Fundraiser Dec. 8 at the Hotel Albuquerque at Old Town, 800 Rio Grande Blvd., NW, Albuquerque. The “reverse drawing” event begins at 6 p.m. with hors d’oeuvres, entertainment and a cash bar. The following prizes will be awarded in a reverse drawing:

- Last ticket drawn: $5,000
- 2nd to last ticket drawn: $2,000
- 3rd to last ticket drawn: $1,000

Other Bars
Albuquerque Bar Association Annual Meeting Luncheon and CLE
The Albuquerque Bar Association’s annual meeting luncheon will be held at noon, Dec. 6, at the Albuquerque Petroleum Club. Elections for the board of directors and officers of the association will be held. The outstanding judge and attorney awards will be presented. The CLE program will be Records Management, presented by Mark Fidel, and What to Consider When Opening Your Law Office, presented by Ron Taylor, for 1.0 ethics and 2.0 general credits. The CLE will be held from 1:30 to 4:30 p.m. Lunch only: $20 members/$25 non-members; lunch and CLE: $80 members/$115 non-members; and CLE only: $60 members/$90 non-members. Register by noon, Dec. 5, at www.abqbar.com, by e-mail at abqbar@abqbar.com, by mail or phone to the Bar office at 400 Gold SW, Suite 620, ABQ 87102 or (505) 243-2615 or (505) 842-1151.

Participants do not need to be present to win. The ticket price is $100, which will admit two people. To purchase a ticket or for more details, contact Rosalie Fragoso, (505) 883-1772 or rfragoso@nixlawfirm.

UNM School of Law

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
CONSTRUCTION DISPUTE RESOLUTION SERVICES
Arbitration Training Course

Construction Dispute Resolution Services, LLC (CDRS), is pleased to announce that they will offer four arbitration training courses each year instead of the twice-a-year schedule offered in the past. The last course in September was full several weeks before the program was held at the State Bar Center. The arbitration training course offers the following MCLE credits: 14.4 general, 1.2 ethics and 2.4 professionalism. Although the course is conducted by CDRS, it is a basic arbitration training course for anyone interested in becoming an arbitrator or in learning the arbitration process. The next arbitration training course is being offered on Dec. 2 and 3 at the State Bar Center. Details of the course and registration information can be found on the CDRS Web site: www.constructiondisputes-cdrs.com, or call (505) 466-7011.

National Association of Legal Professionals
Annual Charity Auction

The National Association of Legal Professionals (NALS of Albuquerque, formerly known as AALP) proudly announces the annual charity auction to be held from 6 to 10 p.m., Dec. 16, at the Hotel Albuquerque, Old Town, to benefit Red Cross Katrina Relief. Dinner begins at 6 p.m. followed by the auction, which will feature unique holiday items, gift baskets/cards/certificates. Call Debra Torres, NALS treasurer, (505) 883-3070, for details.

NM Medicaid Program
Free Insurance Coverage for Working Disabled Clients

Medicaid category 043 for the working disabled individual provides full Medicaid benefits for qualified individuals. Coverage includes prescriptions, rehabilitation, doctor visits, lab work etc. Brochures, applications, and more information are available by contacting the phone number below.

To locate the nearest support division office (ISD), phone (888) 997-1583 or go to http://www.state.nm.us/hsd/offices.html. For more information or assistance, contact Janet Murray, outreach coordinator for The Working Disabled Individuals Medicaid Division of Vocational Rehabilitation at (800) 318-1469 or (505) 954-8573. For technical information, such as problems with the application process/denial at ISD, phone (888) 997-2583.

Workers’ Compensation Administration
Brownbag Lunch

The Workers’ Compensation Administration is holding a brownbag lunch with judges and mediators at noon, Dec. 7, at the Workers’ Compensation Administration Office, 2410 Centre SE, Albuquerque. Attorneys who are not in the Albuquerque area may attend by video conference from the nearest field office. Call the Dispute Resolution Bureau, (800) 255-7965, for further information.

Medical Fee Schedule Updates

Notice is hereby given that at 1:30 p.m., Dec. 5, a hearing will be held to consider updates to the medical fee schedule (MAP). Submit written comments pertaining to MAP by Dec. 12.

The hearings will be conducted at the Workers’ Compensation Administration, 2410 Centre Ave., SE, Albuquerque. Videoconferencing may also be made available in the WCA Field Offices. Contact Renee Blechner, (505) 841-6083, a week prior to the hearings to reserve videconferencing.

Comments made in writing and at the public hearing will be taken into consideration. Address written comments to Alan M. Varela, WCA Director, c/o General Counsel Office, PO Box 27198, Albuquerque, NM 87125-7198.

Inquire at the WCA clerk’s office, 2410 Centre Ave., SE, Albuquerque, NM 87106 or (505) 841-6000, for copies of the proposed rule change and the fee change. Inquire at the WCA clerk’s office about postage cost and envelope size needed and plan to include a postage-paid, self-addressed envelope with the request.

Any individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any form of auxiliary aid or service to attend or participate in the hearings or meetings should contact Renee Blechner, (505) 841-6083, or inquire about assistance through the New Mexico relay network, (800) 659-8331.

Holiday Food Drive -
Oct. 14- Nov. 29th

It is estimated that 20 percent of New Mexico’s population (29 percent of children) live in poverty, and thousands of people are at risk of being hungry every single day. The legal community can help those in hunger by donating food at the State Bar Center at 5121 Masthead NE, Albuquerque. The Holiday Food Drive is being held from Oct. 14 to Nov. 29th. Please bring nonperishable food items to the State Bar Center. The food will be distributed through Roadrunner Food Bank. Your generous contributions to this effort will help hungry people in our community.

Thank you for joining us in the cause.
State Bar Staff
Bernalillo County Metropolitan Court Judge Kevin L. Fitzwater is one of ten judges nationwide who has been selected to serve on the new advisory board to the Judges’ Criminal Justice and Mental Health Leadership Initiative. He will attend the first meeting in Washington, D.C., in early December. Other members of the board will include jurists from the Ohio State Supreme Court, Dade County District Court and others interested in improving the court system’s ability to manage and treat criminal defendants with mental illnesses. Recommendations developed by the new advisory board will be shared with a number of national associations that work with judges and courts on mental health issues.

Cuddy, Kennedy, Albetta & Ives, LLP, is pleased to announce the expansion of their Albuquerque offices and to welcome the following attorneys into the firm (see also back cover).

Eleanor Katherine Bratton, a New Mexico native, joined the firm as an associate in September. Her practice consists primarily of litigation, administrative proceedings and appeals in the substantive areas of employment and civil rights, all aspects of public and private education and tort law. She has developed subspecialties in special education and disabilities law, personnel, procurement, staff training and development, representation of homeowners’ associations and adoptions. Bratton practices in the Albuquerque office.

Michelle M. Demmert joined the firm as of counsel in September. She practices in the areas of federal Indian law, tribal law and school law. Demmert was the administrator and chief judge of the Northwest Intertribal Court System in Washington state. She is the current chief judge of the Muckleshoot Tribal Court of Justice, the presiding judge at the Confederated Tribes of the Chehalis Tribe, an appellate judge for the Suquamish Tribe and has pro tempore assignments at the Tulalip, Jamestown S’Klallam and Sauk-Suiattle tribes. She is an enrolled member of the Tlingit Tribe.

Evelyn A. Peyton joined the firm as an associate in April. Her main areas of practice are education and employment law. She was an associate with the firm of Bergeson & Eliopoulos in San Jose, CA, where she practiced intellectual property, employment and complex commercial litigation. Peyton practices in the Santa Fe office.

Shana Siegel Baker joined the firm as an associate in September. She was an assistant public defender practicing in both children’s and magistrate courts. Baker also served as a deputy public defender for the Colorado state public defender in Denver. Her main areas of practice are education law and employment law. Baker practices in the Santa Fe office.

Margaret (Maggie) Coffey-Pilcher joined the firm as an associate in November. Her main areas of practice are Indian law, employment law and education law. She is Comanche and was born in Lawton, OK. She practices in the Albuquerque office.

The Seventh Judicial District Attorney’s Office has received an award from the New Mexico Department of Finance and Administration for accounting function responsibility for fiscal year 2005. The Seventh District was the only district attorney’s office and one of only five agencies in the state to receive the award, which is based on standards for timely completion of the annual audit, strong fiscal management and oversight, timely record keeping, effective and timely financial reporting, effective automated system operations and timely payments to vendors and employees.

Chief Justice Retired Joseph F. Baca was recently honored by the Mexican American Legal Defense and Education Fund (MALDEF) with its Legal Service Award. The award was presented in San Antonio, Texas, at MALDEF’S 21st Annual Texas Gala. MALDEF was founded 37 years ago to promote and protect the rights of the 40 million Latinos living in the U.S. Justice Baca was also appointed to a two-year term on the American Bar Association’s Standards Review Committee, which writes the rules and reviews disputes about those rules that govern the accreditation of American law schools. In addition, Justice Baca is in the middle of a two-year term as president of the George Washington University Law School Alumni Association. Since his retirement from the New Mexico Supreme Court, Justice Baca has been engaged in mediations and arbitrations for private parties and government agencies.

Sandra Beerle has joined the law firm of Rodey, Dickason, Sloan, Akin & Robb, PA, as an associate in the litigation department, focusing primarily on health law litigation. Before coming to Rodey, she served as a judicial law clerk for New Mexico Supreme Court Justice Pamela B. Minzner and for New Mexico Court of Appeals Judge Michael D. Bustamante. Beerle received her J.D., magna cum laude, from the UNM School of Law in 2002 and her undergraduate degree in 1978, cum laude, from the University of New York.

Santa Fe County Magistrate Judge Bill Dimas has announced that he will not seek re-election to a fourth term next year and that he intends to retire in June before his current term ends in December 2006. After nearly a dozen years on the bench, Judge Dimas says it’s time to step aside, enjoy retirement and let a younger person take his place. Dimas worked as a Santa Fe police office and was best known in the 1960s as a radio personality.

Editor’s Note: The list of attorneys appearing under “The Best Lawyers in America, Twelfth Edition” (see page 15 in the Nov. 14 [Vol. 44, No. 45] Bar Bulletin) were submitted individually and in no way represents a full compilation of the recipients of this recognition. The contents of Hearsay and In Memoriam are submitted by members or derived from news clippings. Send items to: Editor, PO Box 92860, Albuquerque, NM 87199-2860 or notices@nmbar.org.
## November

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<td>28</td>
<td>Best Practices for Estate Planning and Recovery for Elderly Clients in New Mexico</td>
<td>Albuquerque National Business Institute</td>
<td>(715) 835-8525</td>
<td><a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>Burden of Representing Financially-Challenged Companies</td>
<td>TRT, Inc.</td>
<td>(800) 672-6253</td>
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<td>2005 Professionalism: Lawyers Concerned for Lawyers Substance Abuse and Addiction Issues in the New Mexico Legal Community</td>
<td>State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>(505) 797-6020</td>
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## December

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<td>Tricks, Traps and Ploys Used in Construction Scheduling</td>
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<td>Entertainment Law</td>
<td>State Bar Center, Albuquerque</td>
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<td>In-Depth Title Insurance Principles for the Advanced Practitioner in New Mexico</td>
<td>State Bar Center, Albuquerque National Business Institute</td>
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<td>(715) 835-8525</td>
<td><a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>Juvenile Justice Conference</td>
<td>State Bar Center, Albuquerque NM Children Youth &amp; Families Department</td>
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<td>(505) 660-7816</td>
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<td>6</td>
<td>The Annual Review of Civil Procedure</td>
<td>VR, State Bar Center, Albuquerque</td>
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<td>Copyrights and Your Clients: Not Just for Adults</td>
<td>State Bar Center, Albuquerque Parks Law Office</td>
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<td>(505) 842-1919</td>
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<td>Public Health Emergencies</td>
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<td>Negotiating and Structuring the Sale of Private Businesses: Non-Tax Considerations</td>
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<td>BAPCPA 2005 and Its Affect on Businesses</td>
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<td>Legal Research and Super Search Strategies on the Internet</td>
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<td>Civil Procedure In NM</td>
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<td>Gross Receipts and Compensating Tax for Beginners</td>
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<td>Medicare’s New Drug Coverage: The Impact on Your Clients</td>
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<td>Taxing Planning Aspects of Mergers, Sales and Spinoffs</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 Fé, NM 87504-0848 • (505) 827-4860

EFFECTIVE NOVEMBER 23, 2005

PETITIONS FOR WRIT OF CERTIORARI FILED AND PENDING:

Date Petition Filed

NO. 29,539 State v. Long (COA 5,793) 11/14/05
NO. 29,538 State v. Gallegos (COA 24,480) 11/14/05
NO. 29,537 State v. Rodarte (COA 25,273) 11/14/05
NO. 29,536 Romero v. Moya (12-501) 11/14/05
NO. 29,535 Tafoya v. Hatch (12-501) 11/14/05
NO. 29,534 State v. Clark (COA 25,859) 11/10/05
NO. 29,533 State v. Kerby (COA 25,891) 11/10/05
NO. 29,531 State v. Jones (COA 24,864) 11/8/05
NO. 29,528 State v. Jensen (COA 24,905) 11/7/05
NO. 29,527 State v. Chee (COA 25,112) 11/7/05
NO. 29,526 State v. Segura (COA 25,964) 11/4/05
NO. 29,525 Williams v. Williams (COA 25,765) 11/4/05
NO. 29,497 Cosby v. LeMaster (12-501) 11/4/05
NO. 29,523 State v. Miranda (COA 24,247) 11/3/05
NO. 29,521 State v. Parra (COA 25,484) 11/3/05
NO. 29,520 State v. Gierer (COA 25,488) 11/2/05
NO. 29,519 Wells Fargo v. Gilmore (COA 25,674) 11/2/05
NO. 29,517 State v. Bonjour (COA 25,633) 11/2/05
NO. 29,516 State v. Nance (COA 25,730) 11/1/05
NO. 29,515 Shiver v. NM Mutual Casualty (COA 25,106) 11/1/05
NO. 29,513 State v. Grorjan (COA 25,699) 10/31/05
NO. 29,512 Martinez v. Los Alamos (COA 25,681) 10/31/05
NO. 29,509 State v. Vazquez (COA 25,772) 10/27/05
NO. 29,507 State v. Noriega (COA 25,593) 10/27/05
NO. 29,505 State v. Bocanegra (COA 25,382) 10/26/05
NO. 29,499 State v. Tortelli (COA 25,327) 10/21/05
NO. 29,495 State v. Campos (COA 25,513) 10/20/05
NO. 29,451 State v. Gutierrez (COA 25,386) 9/13/05
Response filed 11/14/05

CERTIORARI GRANTED BUT NOT YET SUBMITTED TO THE COURT:

(Parties preparing briefs)

Date Writ Issued

NO. 28,867 State v. Rodriguez (COA 23,455) 10/19/04
NO. 28,917 State v. Ponce (COA 23,130) 12/6/04
NO. 28,995 State v. Salomon (COA 24,986) 1/14/05
NO. 28,954 State v. Schoonmaker (COA 23,927) 1/21/05
NO. 29,105 State v. Cook (COA 25,137) 3/22/05
NO. 29,128 State v. Stephen F. (COA 24,007) 4/26/05
NO. 29,144 State v. Bounds (COA 25,131) 4/26/05
NO. 29,151 State v. Bounds (COA 25,131) 4/26/05
NO. 29,153 State v. Armijo (COA 24,951) 4/26/05
NO. 29,158 State v. Otto (COA 23,280) 4/26/05
NO. 29,179 State v. Taylor (COA 23,477) 5/9/05
NO. 29,174 State v. Vincent (COA 23,832) 5/20/05
NO. 29,232 Reyes v. State (12-501) 6/2/05
NO. 29,213 State v. Evans (COA 25,332) 6/8/05
NO. 29,203 Hassler v. Affiliated Foods (COA 25,093) 6/13/05

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) 11/3/03
NO. 28,241 State v. Duran (COA 22,611) 3/29/04
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. 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) 2/14/04
## 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 November 23, 2005**

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<td>Romero v. City of Santa Fe (COA 24,775)</td>
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<td>Aguilara v. Board of Education (COA 23,895)</td>
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<td>State v. Zamora (COA 23,436)</td>
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<td>Upton v. Clovis (COA 24,051)</td>
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<td>Benavidez v. City of Gallup (COA 25,373)</td>
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<td>State v. Maldonado (COA 23,637)</td>
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### Writ of Certiorari Quashed:

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### Unpublished Decision Filed:

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### Petition for Writ of Certiorari Denied:

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**Published Opinions**

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The principal issue presented by this case is whether an employer who mistakenly notifies the Workers’ Compensation Administration (WCA) of its acceptance of a mediator’s recommended resolution may obtain relief from the binding effect of the recommended resolution pursuant to NMSA 1978, Section 52-5-9(B)(2) (1986, as amended through 1989). We hold that an employer may not resort to Section 52-5-9(B)(2) and that NMSA 1978, Section 52-5-5(C) (1986, as amended through 1990) provides the exclusive procedure for obtaining relief from the binding effect of an accepted recommended resolution on the grounds of mistake.

On June 26, 2001, Rafael Medina (Worker) filed a complaint with the WCA. The complaint recited that Worker had been injured when a board was flipped up, striking Worker and causing severe injuries. The complaint stated that Worker’s average wage was “$11.00 per hour at 40 hours per week plus overtime” and that Worker’s weekly compensation rate was “$440.00.”

The complaint stated that Worker’s average wage was “$11.00 per hour at 40 hours per week plus overtime” and that Worker’s average weekly wage was $369.95 and Worker was entitled to total temporary disability compensation at a rate of $246.63 per week.

Worker filed a response arguing that NMSA 1978, Section 52-5-10 (1986, as amended through 1990) governs the issuance of supplemental compensation orders, and that the procedure contemplated by Section 52-5-10 was available to workers as a means of enforcing compensation orders, but was not available to an employer seeking to modify a recommended resolution. Worker asserted that Employer’s Application was more properly characterized as a request to modify the Recommended Resolution; that under our decision in Norman v. Lockheed Eng’g & Science Co., 112 N.M. 618, 817 P.2d 1260 (Ct. App. 1991), Employer was limited to the procedure provided by Section 52-5-5(C) in seeking modification of the Recommended Resolution on the ground of mistake; and, that Employer’s Application was untimely under Section 52-5-5(C).

6, 2001, Worker filed a notice accepting the Recommended Resolution. On January 22, 2002, the clerk of the WCA filed a Notice of Completion, reciting that “[t]he foregoing cause is now completed. The parties have resolved the issues. No further action is required in this cause at this time, and the Administration file shall be closed.”

On March 29, 2002, Employer filed an Application to Workers’ Compensation Judge requesting a supplemental compensation order. In support of its application, Employer asserted that after it had agreed to the Recommended Resolution, it realized that the weekly compensation rate of $440.00 set out in the Recommended Resolution was substantially greater than the figure supported by Employer’s records of Worker’s earnings. According to Employer, Worker’s average weekly wage was $369.95 and Worker was entitled to total temporary disability compensation at a rate of $246.63 per week.

Worker filed a response arguing that NMSA 1978, Section 52-5-10 (1986, as amended through 1990) governs the issuance of supplemental compensation orders, and that the procedure contemplated by Section 52-5-10 was available to workers as a means of enforcing compensation orders, but was not available to an employer seeking to modify a recommended resolution. Employer asserted that Employer’s Application was more properly characterized as a request to modify the Recommended Resolution; that under our decision in Norman v. Lockheed Eng’g & Science Co., 112 N.M. 618, 817 P.2d 1260 (Ct. App. 1991), Employer was limited to the procedure provided by Section 52-5-5(C) in seeking modification of the Recommended Resolution on the ground of mistake; and, that Employer’s Application was untimely under Section 52-5-5(C).

On October 19, 2001. A Recommended Resolution was issued on October 19, 2001. The Recommended Resolution contained the following finding, which is the focus of this appeal: “At the time of the accident Worker was earning $11.00 per hour and his compensation rate is $440.00 per week.” (Emphasis added).

The Recommended Resolution advised the parties that “[a]ny party who fails to file the notice of acceptance or rejection of this Recommended Resolution with the Workers’ Compensation Administration within thirty [(30)] days of receipt will be bound by the Recommended Resolution as stated above.”

On November 1, 2001, Employer filed a notice stating that it accepted the Recommended Resolution. On November 12, 2001, Worker filed a notice accepting the Recommended Resolution. On January 22, 2002, the clerk of the WCA filed a Notice of Completion, reciting that “[t]he foregoing cause is now completed. The parties have resolved the issues. No further action is required in this cause at this time, and the Administration file shall be closed.”

APPEAL FROM THE NEW MEXICO
WORKERS’ COMPENSATION ADMINISTRATION
GREGORY GRIEGO, Workers’ Compensation Judge

VICTOR S. LOPEZ
Albuquerque, New Mexico
for Worker-Appellant/Cross-Appellee

MAX J. MADRID
SUSAN BISON
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
Albuquerque, New Mexico
for Employer/Insurer-Appellees/Cross-Appellants

OPINION

A. JOSEPH ALARID, JUDGE

The principal issue presented by this case is whether an employer who mistakenly notifies the Workers’ Compensation Administration (WCA) of its acceptance of a mediator’s recommended resolution may obtain relief from the binding effect of the recommended resolution pursuant to NMSA 1978, Section 52-5-9(B)(2) (1986, as amended through 1989). We hold that an employer may not resort to Section 52-5-9(B)(2) and that NMSA 1978, Section 52-5-5(C) (1986, as amended through 1993) provides the exclusive procedure for obtaining relief from the binding effect of an accepted recommended resolution on the grounds of mistake.

On June 26, 2001, Rafael Medina (Worker) filed a complaint with the WCA. The complaint recited that Worker had been injured when a board was flipped up, striking Worker and causing severe injuries. The complaint stated that Worker’s average wage was “$11.00 per hour at 40 hours per week plus overtime” and that Worker’s average weekly wage was $369.95 and Worker was entitled to total temporary disability compensation at a rate of $246.63 per week.

Worker filed a response arguing that NMSA 1978, Section 52-5-10 (1986, as amended through 1990) governs the issuance of supplemental compensation orders, and that the procedure contemplated by Section 52-5-10 was available to workers as a means of enforcing compensation orders, but was not available to an employer seeking to modify a recommended resolution. Worker asserted that Employer’s Application was more properly characterized as a request to modify the Recommended Resolution; that under our decision in Norman v. Lockheed Eng’g & Science Co., 112 N.M. 618, 817 P.2d 1260 (Ct. App. 1991), Employer was limited to the procedure provided by Section 52-5-5(C) in seeking modification of the Recommended Resolution on the ground of mistake; and, that Employer’s Application was untimely under Section 52-5-5(C).

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The Workers’ Compensation Judge (WCJ) issued a Memorandum Opinion on April 12, 2002. The WCJ treated Employer’s application for a supplemental compensation order as a request for modification of the Recommended Resolution on the ground of mistake.

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Employer from seeking a modification of the Recommended Resolution pursuant to Section 52-5-9. Turning to the merits, the WCJ concluded that “[c]onsidering the totality of the circumstances in this case, . . . there was a mistake made in the calculation of the average weekly wage and resulting compensation rate.” On May 8, 2002, the WCJ entered an order consistent with its Memorandum Opinion. The WCJ vacated the portion of the Recommended Resolution setting a weekly compensation rate of $440.00 and directed that a hearing should be set to determine an average weekly wage and compensation rate.

On January 30, 2003, the WCJ entered a Compensation Order. The WCJ found that the October 19, 2001, Recommended Resolution “contained a material error as regards [t]he compensation rate for Worker.” The WCJ concluded that “[m]istake exists in the Recommended Resolution of October 19, 2001, warranting relief under Section 52-5-9(B)(2) NMSA.” The WCJ corrected the Recommended Resolution to provide for an average weekly wage of $346.66 and a weekly compensation rate of $243.11.

On February 21, 2003, the WCJ entered an order settling attorney’s fees. The WCJ awarded Worker’s counsel $8,007.00 plus tax and directed that Worker and Employer should each pay one half of the attorney’s fees.


DISCUSSION
1. Worker’s Appeal
a. Merits

This appeal turns upon the interplay of two statutes, Sections 52-5-5(C) and 52-5-9. In reviewing the WCA’s application of these statutes to the present case, we apply the standards set out in Chavez v. Mountain States Constr., 1996-NMSC-070, 21-25, 122 N.M. 579, 929 P.2d 971. We note that Worker does not attack the WCJ’s finding that the Recommended Resolution as accepted by Employer mistakenly overstated the weekly compensation rate. The issue before us is the legal effect of that mistake.

Section 52-5-5(C) provides:

Upon receipt, every claim shall be evaluated by the director or his designee, who shall then contact all parties and attempt to informally resolve the dispute. Within sixty days after receipt of the claim, the director shall issue his recommendations for resolution and provide the parties with a copy by certified mail, return receipt requested. Within thirty days of receipt of the recommendation of the director, each party shall notify the director on a form provided by him of the acceptance or rejection of the recommendation. A party failing to notify the director waives any right to reject the recommendation and is bound conclusively by the director’s recommendation unless, upon application made to the director within thirty days after the foregoing deadline, the director finds that the party’s failure to notify was the result of excusable neglect. If either party makes a timely rejection of the director’s recommendation, the claim shall be assigned to a workers’ compensation judge for hearing.

Section 52-5-9 provides:

A. Compensation orders are reviewable subject to the conditions stated in this section upon application of any party in interest in accordance with the procedures relating to hearings. The workers’ compensation judge, after a hearing, may issue a compensation order to terminate, continue, reinstate, increase, decrease or otherwise properly affect compensation benefits provided by the Workers’ Compensation Act . . . or in any other respect, consistent with [the Workers’ Compensation Act], modify any previous decision, award or action.

B. A review may be obtained upon application of a party in interest filed with the director at any time within two years after the date of the last payment or the denial of benefits upon the following grounds:

. . . .

(2) mistake, inadvertence, surprise or excusable neglect.

In Armijo v. Save ‘n’ Gain, 108 N.M. 281, 286, 771 P.2d 989, 994 ( Ct. App. 1989), we held that a party who desires to set aside an acceptance of a recommended resolution must apply to the WCA to set aside the acceptance within the same time limits set out in Section 52-5-5(C) for applying for leave to file a belated rejection. In Armijo, we upheld a denial of a worker’s application to withdraw an acceptance because it was filed nine weeks after she had filed her acceptance of the recommended resolution. Id. Armijo establishes that an application to withdraw an acceptance pursuant to Section 52-5-5(C) is subject to the same deadline as an application for leave to file a belated rejection. Id. Under Armijo, Employer’s March 29, 2002, Application was clearly untimely under Section 52-5-5(C). Id.

In Norman, we considered the relationship between Section 52-5-5(C) and Section 52-5-9. 112 N.M. at 621, 817 P.2d at 1263. Norman involved an attempt by an employer to obtain review under Section 52-5-9 of a recommended resolution in response to which the employer had belatedly filed a notice of rejection outside the time limits of Section 52-5-5(C). Norman, 112 N.M. at 619, 817 P.2d at 1261. We held that a recommended resolution that has become conclusively binding by operation of Section 52-5-5(C) is a compensation order for purposes of Section 52-5-9. Id. at 621, 817 P.2d at 1263. However, we recognized that “allowing a party up to two years to assert mistake or excusable neglect as a basis for filing a rejection to the recommended resolution would make a nullity of the time limits in Section 52-5-5(C).” Id. at 622, 817 P.2d at 1264.

We agree with the WCJ that the present case is distinguishable from Norman because Employer in the present case notified the WCA of its acceptance, whereas the employer in Norman became conclusively bound by operation of law due to its failure to respond within the time limit imposed by Section 52-5-5(C). However, in view of our holding in Armijo, applying the same time limits to applications to withdraw an acceptance, and applications to file a belated rejection, we conclude that Norman also should apply in the context of an untimely application to withdraw an acceptance where the party’s acceptance is based on a mistake as to the correct weekly compensation rate. If we did not apply Norman in the present context, the thirty-day deadline of Section 52-5-5(C) would be rendered a nullity in cases involving untimely applications to withdraw an acceptance based upon...
mistake. Under Norman, Section 52-5-9(B)(2) does not provide a basis for obtaining relief from a recommended resolution on the basis of mistake once the time limits of Section 52-5-5(C) governing withdrawal of an acceptance have expired. 112 N.M. at 622, 817 P.2d at 1264. We therefore vacate the January 30, 2003, Compensation Order, and remand with instructions to the WCJ to treat the Recommended Resolution as conclusively binding the parties.

b. Attorney’s Fees

{15} In determining Worker’s attorney’s fees, the WCJ based his award on the assumption that Worker was entitled to benefits measured by the January 30, 2003, Compensation Order, which relied on a weekly compensation rate of $243.11. Because our decision vacates the January 30, 2003, Compensation Order and reinstates the Recommended Resolution, which relies on a weekly compensation rate of $440.00, the amount of benefits recovered by Worker will increase substantially. On remand, the WCJ should take into account this substantial increase in the amount of benefits recovered by Worker. See Fryar v. Johnson, 93 N.M. 485, 488, 601 P.2d 718, 721 (1979) (applying prior law; discussing factors to be considered in determining attorney’s fees award to worker’s counsel). Additionally, the WCJ appears to have declined to award any attorney’s fees for work done by Worker’s counsel in defending the Recommended Resolution. Since Worker is now the prevailing party on the issue of the binding effect of the Recommended Resolution, it is appropriate for the WCJ to consider the hours expended by Worker’s counsel on that issue. See id. (noting relative success and time expended by attorney as an appropriate consideration in setting amount of fee).

{16} Worker raises two additional concerns, which we address, because they likely will arise on remand. Worker points out that attorney’s fees are to be calculated using the “present value of the award.” See NMSA 1978, § 52-1-54(E)(2) (1987, as amended through 2003). Worker argues that since we are vacating the Compensation Order, reinstating the Recommended Resolution and remanding for recalculation of attorney’s fees, the calculation of the present value of the award should reflect the value of medical benefits that Worker has received subsequent to the date of the now vacated February 21, 2003, order settling attorney’s fees.

{17} By judicial decision and statute, New Mexico law distinguishes between past and future medical benefits for purposes of calculating attorney’s fees in workers’ compensation cases. The cost of medical services that have already occurred are included in calculating the present value of the award. See Bd. of Educ. v. Quintana, 102 N.M. 433, 435, 697 P.2d 116, 118 (1985) (applying prior law); see also Buckingham v. Health South Rehab. Hosp., 1997-NMCA-127, ¶¶ 35-38, 124 N.M. 419, 952 P.2d 20 (Boisson, J., specially concurring, writing for two-judge majority on question of how future medical benefits fit into calculation of claimant’s attorney’s fees) (providing historical analysis of role under New Mexico workers’ compensation law of past and future medical benefits in calculating claimant’s attorney’s fees). However, Section 52-1-54(H) provides that “[t]he value of future medical benefits shall not be considered in determining attorney fees.”

{18} In Davis v. Homestake Mining Co., we held that the present value of the award “means the value computed as of the date of the award to the workman.” 105 N.M. 2, 5, 727 P.2d 941, 944 (Ct. App. 1986). In the present case, the Recommended Resolution proposed that Employer/Insurer are required to pay for continuing reasonable and necessary medical care for the work injury with the authorized health care provider. This includes treatment for dental treatment/replacement, and TMJ treatment as per the recommendations made by [the authorized health care provider].

{19} As discussed above, the Recommended Resolution became conclusively binding upon the parties upon the expiration of sixty days from the date the party received it. Applying Davis, we hold that medical benefits yet to be received as of that date constitute future medical benefits, and the value of those benefits may not be considered in determining attorney’s fees even though the value of those benefits may be calculated with certainty at this point in time. 105 N.M. at 5, 727 P.2d at 944. However, under our decision in Buckingham, the fact that Worker was awarded future medical benefits may be considered in fixing an appropriate fee, even though the value of those benefits may not. 1997-NMCA-127, ¶ 35.

{20} Worker argues that his counsel’s facility in Spanish should have been considered by the WCJ in determining attorney’s fees. A worker’s compensation judge exercises broad discretion in awarding attorney’s fees. See generally Cordova v. Taos Ski Valley, Inc., 1996-NMCA-009, 121 N.M. 258, 910 P.2d 334. We agree with Worker that facility in a non-English speaking claimant’s own language can be a proper factor in awarding attorney’s fees. See Fryar, 93 N.M. at 488, 601 P.2d at 721 (holding that attorney’s ability, experience, and skill may be considered in fixing amount of attorney’s fees). Worker’s counsel bears the burden of providing evidentiary support for his assertion that his language ability actually facilitated his representation of Worker. Id. On remand, the WCJ should consider this factor upon a proper evidentiary showing by Worker’s counsel. We emphasize that the WCJ has considerable discretion as to the weight it assigns to this factor. Cordova, 121 N.M. at 264, 910 P.2d at 340 (observing that “[f]ee calculation should not be reduced to a mechanical or formulaic process”).

2. Employer’s Cross-Appeal

{21} Employer has cross-appealed, arguing that it made an offer of judgment based on a weekly compensation rate of $246.63 and that this offer was greater than the amount awarded by the January 30, 2003, Compensation Order awarding a weekly compensation rate of $243.11. Employer argues that under Section 52-1-54(F), Employer should have been required to bear one hundred per cent of the attorney’s fees due to Worker’s counsel. Our disposition of Worker’s appeal in which we reinstated the Recommended Resolution with its weekly compensation rate of $440.00 has eliminated the factual predicate for Employer’s argument: Employer’s offer based on a weekly compensation rate of $246.63 was less than the amount that we have determined Worker should receive using the reinstated weekly compensation rate of $440.00. The fee-shifting mechanism of Section 52-1-54(F) therefore is unavailable to Employer.

CONCLUSION

{22} We remand to the WCA with instructions to vacate the January 30, 2003, Compensation Order and to treat the Recommended Resolution as conclusively binding. On remand, the WCJ should reconsider the amount of attorney’s fees to be awarded Worker’s counsel. We affirm the WCJ’s refusal to shift Employer’s attorney’s fees to Worker pursuant to Section 52-1-54(F).
We award Worker’s counsel attorney’s fees for work on this appeal in an amount to be fixed by the WCJ on remand.

I CONCUR:
A. JOSEPH ALARID, Judge

MICHAEL D. BUSTAMANTE, Chief Judge
JAMES J. WECHSLER, Judge (dissenting).

WECHSLER, Judge (dissenting).

We agree with the special concurrence in Armijo that Section 52-5-5(C) “applies only to a situation where a party has failed to notify the director of acceptance or rejection of the recommendation.” Armijo, 108 N.M. at 286, 771 P.2d at 994 (Apodaca, J., specially concurring). That section merely limits to thirty days the opportunity for a party conclusively bound by a recommended resolution due to the failure to notify the director of a recommendation based on the parties’ excusable neglect to provide the required notification. It does not apply to a mistake which forms the foundation for a compensation order. Norman only forecloses the use of Section 52-5-9(B) when the circumstances of a party failing to provide timely notification under Section 52-5-9(C) apply. Norman, 112 N.M. at 621-22, 817 P.2d at 1263-64. I do not agree that the failure to apply Norman in this case renders Section 52-5-5(C) a nullity because of the limited application of 52-5-5(C) to excusable neglect for failure to provide notification concerning acceptance or rejection of a recommended resolution.

JAMES J. WECHSLER, Judge

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-124

Topic Index:
Appeal and Error: Costs on Appeal
Substantial or Sufficient Evidence; and Transcript
Evidence: Admissibility of Evidence
Property: Restrictive Covenants
Remedies: Emotional Distress

THOMAS E. JONES,
Plaintiff-Appellant,
versus
JAKE SCHOELKOPF and
ANDREA SCHOELKOPF,
Defendants-Appellees.
No. 25,055 (filed September 22, 2005)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
VALERIE MACKIE HULING, District Judge

THOMAS E. JONES
Albuquerque, New Mexico
Pro Se Appellant

BRIGGS F. CHENEY
Albuquerque, New Mexico
for Appellees

OPINION

LYNN PICKARD, Judge

{1} Plaintiff appeals from the decision of the trial court, which allowed to stand a six-foot wall that Defendants had built at or near their lot line across the street from Plaintiff’s house. Plaintiff claimed that the wall violated the restrictive covenants applicable to the neighborhood, which Plaintiff alleged prohibited walls higher than three feet and prohibited walls in a 25-foot set-back area. Defendants claimed, and the trial court found, that the intent of the covenants was not violated; that the covenants were ambiguous; that the covenants provided for an architectural control committee that could permit the wall they built, but there was no such committee in existence; and that changes in society since the covenants were enacted in the 1950s made a three-foot wall unreasonable. The trial court allowed 30 days for the formation of an architectural control committee and allowed it to make decisions about the completion of the wall, but prohibited the committee from ordering the wall’s removal.

{2} On appeal, Plaintiff argues that (A) the trial court’s ruling was incorrect as a matter of evidence and property law, (B) the trial court erred in denying him a jury trial on his claim of emotional distress damages, (C) the trial court erred in admitting evidence of a zoning decision allowing Defendants’ wall, and (D) the trial court erred during the pendency of the appeal by requiring the entire transcript to be produced and requiring Plaintiff and Defendants to share equally in its cost. We agree in part with Plaintiff’s first issue, but do not find reversible error in any of the other issues. We remand with directions that the trial court exercise its equitable discretion in a manner such that the rights of all parties are considered, for example, allowing a reasonable time be given for an architectural control committee to be constituted, following which that committee will decide whether it is reasonable for some variation of Defendants’ wall to be allowed to stand, and if no such committee is timely formed, then the trial court is directed to evaluate the reasonableness of Defendants’ wall in light of the principles contained in this opinion.

FACTS AND PROCEDURE

{3} The Altura Addition to the City of Albuquerque was platted and replatted in the 1950s. Protective covenants were imposed, and the ones applying to the property at issue had as their purpose “the establishment, creation and maintenance of a high type residential district.” The set-
back provisions applying to the property at issue stated:

No building shall be erected on any lot in the above mentioned Zone C nearer than twenty-five (25) feet to the front lot line, nor more than forty (40) feet, nor nearer than twenty-five (25) feet to a side street line, and no building shall be erected nearer than five (5) feet to an interior lot line.

The covenants provided that an architectural control committee would approve all plans for buildings and additions, and they further provided that “[n]o fences or walls shall be erected, placed or altered on any lot nearer to any street than the minimum building setback line unless similarly approved. Approval shall be as provided in paragraph fifteen (15).” Paragraph 14 designated the original members of the committee and the method for election of committee members after 1963, and paragraph 15 provided that:

In the event the Committee . . . fails to approve or disapprove within thirty (30) days after plans and specifications have been submitted to it, in writing, or in any event, if no suit to enjoin the construction has been commenced prior to the completion thereof, approval will not be required and the related covenants shall be deemed to have been fully complied with.

The covenants also stated that “no fence, garden wall or other like structure fronting on any street or avenue shall exceed three feet in height.” Finally, the covenants provided that they would remain in existence for 25 years and would be automatically extended for successive ten-year periods unless a majority of the owners agreed to change them.

{4} Plaintiff has lived in the Altura Addition since 1965. Defendants moved in across the street from Plaintiff’s property in 2002. Defendants live on a corner lot, and their side yard faces Plaintiff’s property. When Defendants purchased the property, a six-foot tall cinder block wall surrounded their backyard, but the wall was beyond the set-back area from the street. Having no actual knowledge of the covenants and desiring to enlarge and improve their backyard for their two small children, Defendants took down the existing wall and rebuilt a similar wall within a few feet of the sidewalk on the side street. A diagram of Defendants’ property, showing the location of the old and new walls, together with their orientation toward Plaintiff’s property follows:

The tear-down of the old wall and construction of the footing and cinder block portions of the new wall took two days, a Friday and Saturday, following which Plaintiff objected and notified Defendants of the covenants. Defendants halted the finish work on the wall, and Plaintiff filed suit less than 20 days thereafter. In fact, Plaintiff’s complaint alleged and Defendants admitted that the pouring of the footings and installation of the cinder blocks took place entirely on Saturday. One Defendant testified that the wall was “far from completed” when suit was filed.

{5} Plaintiff’s evidence at trial concentrated on the covenants, Defendants’ constructive notice of them, and the intrusiveness of the new wall at or near the lot line in comparison to the open-looking streetscape elsewhere on the immediate block. Defendants’ evidence concentrated on their desire to enlarge and improve their backyard for the sake and safety of themselves and their small children; their efforts, all unavailing but after the fact, to locate an architectural control committee that could approve their wall; the fact that there are other similar walls in the Altura Addition; and the fact that other, more modern, high-end subdivisions have similar walls. In fact, the parties and the court toured the Altura Addition and several other neighborhoods to demonstrate these points. In response, Plaintiff pointed out that Defendants had located only 6 similar walls in Altura out of a total of 170 properties.

{6} Following closing argument and the submission of post-trial briefs and requested findings and conclusions, the trial court made its own findings and conclusions and ruling. The trial court’s ultimate ruling allowed the newly built wall to stand. However, the trial court allowed 30 days for the formation of an architectural control committee that could oversee the completion of the wall, and in the absence of such formation the court permitted the wall to be completed at Defendants’ discretion.

{7} There appear to be three legal bases for the trial court’s decision: (1) that the covenants were ambiguous insofar as what constitutes a “high type” neighborhood and what “fronting” is supposed to mean when referring to a side street; (2) that there had been a “sufficient and radical change in conditions and circumstances” such that a three-foot requirement for a wall is no longer reasonable in today’s society; and (3) that the covenants contemplated variances from their strict terms regarding walls and fences with such variances being approved by the architectural control committee so that in the absence of such a committee, Defendants have been deprived of their contractual rights for which the court will provide a remedy by taking the place of the committee. Because the court found the wall reasonable in today’s society and not inconsistent with “high-type” neighborhoods, the court permitted the wall to stand.

DISCUSSION

{8} Plaintiff’s challenge to the trial court’s decision attacks both the findings of fact and conclusions of law. To the extent that Plaintiff contends that there are insufficient factual bases for the findings of fact, we review the evidence in the light most favorable to support the trial court’s findings, resolving all conflicts and indulging all permissible inferences in favor of the decision below. *Clovis Nat’l Bank v. Harmon*, 102 N.M. 166, 168-69, 692 P.2d 1315, 1317-18 (1984). To the extent that Plaintiff contends that there are errors of law in the trial court’s conclusions or in those findings that function as conclusions, we apply a de novo standard of review. *Gutierrez v. Connick*, 2004-NMCA-017, ¶ 7, 135 N.M. 272, 87 P.3d 552. When the facts are not in dispute, but the parties disagree on the legal conclusion to be drawn from those facts, we review the issues de novo. *Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶ 24, 136 N.M. 630, 103
P.3d 554. Whether language in a document is ambiguous is ordinarily a question of law. Wilcox v. Timberon Protective Ass’n, 111 N.M. 478, 484, 806 P.2d 1068, 1074 (Ct. App. 1990).

A. Property Law Issues
   1. General Rules Regarding Covenants

   [9] We recently set forth the following general principles regarding restrictive or protective covenants:

   Montoya v. Barreras, 81 N.M. 749, 751, 473 P.2d 363, 365 (1970), teaches that restrictive covenants have historically been “used to assure uniformity of development and use of a residential area to give the owners of lots within such an area some degree of environmental stability.” They have allowed the creation of stable arrangements of land use, and because their use is a concomitant right of property ownership, they can be used for any purpose that is not illegal or against public policy. See generally Restatement (Third) of Property (Servitudes) § 1.1 cmt. a (2000).

   Furthermore, “such covenants constitute valuable property rights of the owners of all lots in the tract.” Montoya, 81 N.M. at 751-52, 473 P.2d at 365-66, and we have repeatedly recognized that reliance on restrictive covenants is a valuable property right. Wilcox, 111 N.M. at 485, 806 P.2d at 1075[.]


   [10] Plaintiff relies on the notion that the covenants should be enforced to ensure the stability of an open and inviting neighborhood in accordance with the express terms of the covenants, while Defendants rely on the notion that the covenants were drafted to allow for change in appropriate circumstances such as those found by the trial court. We believe that Plaintiff has the better argument.

2. Ambiguity

   [11] Defendants’ contention, both below and on appeal, is that the covenants are ambiguous as to fences in the set-back area from side streets. The trial court agreed and found ambiguity in this regard. However, Defendants concede in their brief to this Court that they “have not disputed that the wall which is the subject of this lawsuit is not consistent with the restrictions as they were created” in the protective covenants. We agree with this assessment. The covenants expressly provide that no fences or walls are to be built in the set-back area and that the set-back area is 25 feet from any side street line. Further, the covenants limit walls to three feet. Finally, the covenants set square footage and cost standards and require houses to be not more than 40 feet from the street, thereby insuring that houses are both attractive and visible from the street, together with some amount of yard space fronting the streets. The only reasonable conclusion to be drawn from these provisions is that the intent of the covenants was to create a neighborhood that was open and inviting, with front yards and yards located on side streets to be at least 25 feet in width and viewable from the streets absent approval by the architectural control committee.

   [12] Any ambiguity in these provisions is solely the sort of ambiguity that is produced by the bare fact that two people read the provisions differently. We have held that such does not create ambiguity, and instead ambiguity is only created when provisions are reasonably and fairly susceptible to two constructions. See Levenson v. Mobley, 106 N.M. 399, 401, 744 P.2d 174, 176 (1987). The same principle holds true for covenants. See Montoya, 81 N.M. at 750, 473 P.2d at 364 (stating that alleging a restriction is ambiguous does not make it so). Therefore, this portion of the trial court’s rationale was erroneous.

3. Changed Circumstances


   But the degree of change must be so significant and so radical as to frustrate the original purpose of the grantors such that the original intent can no longer be carried out. See id.

   [14] Here, Defendants contend that the only intent is to create and maintain a “high-type” residential district, which can be accomplished either with or without six-foot walls at the lot lines. But the intent may also be gleaned from the wording of the covenants, and the covenants expressly restrict buildings and walls in the 25-foot set-back areas. Cf. State v. Stephens, 111 N.M. 543, 547, 807 P.2d 241, 245 (Ct. App. 1991) (holding, in the context of construction of statutes, that a distinct provision of a statute addressing certain conduct should prevail over a more general provision). In other words, the intent of the grantor was to create a high-type residential district by specifically requiring front and side yards visible from the streets, among other requirements.

   [15] There was also no evidence that societal conditions had changed such that high walls at or near the lot lines were so necessary to deter crime or provide for the safety of Defendants’ children that the intent of the grantor would be frustrated if such high walls were not allowed. The sole evidence introduced regarding crime was a photo of the neighborhood showing a neighborhood watch sign, which the testimony indicated meant that neighbors would watch out for one another to deter thefts. In addition, the trial court indicated that it would take judicial notice that “things are worse now than they probably were in 1958,” but in the same breath said that “there’s still a place for these children to be.” The court was referring to the existing enclosed backyard, which the evidence indicated that Defendants wanted enlarged to enhance their own quality of life by providing a larger, sunnier backyard.

   [16] There was also evidence that neighborhood residents had raised their children without problems and without walls that violated the covenants and that residents of the neighborhood liked walking around and being able to see the yards and houses and accordingly would not want high walls at the lot lines. Moreover, the fact that 6 of 170 lots have walls to some greater or lesser degree in violation of the covenants does not work a change sufficient to set aside the covenants. See Wilcox, 111 N.M. at 486, 806 P.2d at 1076 (holding that where only 10 of 412 lots were in violation of the covenants, the covenants were not rendered obsolete by a substantial change). In sum, we do not believe that the evidence was sufficient, even in the light most favorable to support the trial court’s ruling, to support a finding that such a radical change had taken place since the 1950s that the set-back and height restrictions on walls would serve no purpose.

   [17] This case is thus distinguishable from Mason, 80 N.M. at 355-56, 359-60, 456 P.2d at 188-89, 192-93, in which our Supreme Court upheld the trial court’s decision not to enforce a restriction prohibiting the use of property for trade or commerce, when the character of the community of Cloudcroft had changed from a...
small summer resort, comprised solely of residences, to a full-service village. In such a case, where a property was no longer suitable for residential purposes due to the changes in the surrounding properties, it was inequitable to enforce the restriction. \( \text{ld. at 359-60, 456 P.2d at 192-93; see Williams v. Butler, 76 N.M. 782, 784, 418 P.2d 856, 857 (1966)} \) (indicating that it is only when the purposes of the covenants are completely defeated that the covenants will not be enforced). In contrast, in this case, the degree of change is not so great, and we cannot say that it would be inequitable to enforce the set-back and height restrictions on fences and walls, given the evidence of the vast degree of compliance and preferences of the neighbors in the rest of the neighborhood. “Substantial change which does not destroy the benefits arising out of a restrictive covenant is insufficient to warrant” setting aside a covenant. \( \text{Whorton v. Mr. C’s, 101 N.M. 651, 654, 687 P.2d 86, 89 (1984). Thus, this portion of the trial court’s rationale also was erroneous.} \)

4. Covenants as Vehicle for Change

\{18\} Defendants argue, and the trial court found, that with no viable architectural control committee, Defendants have been deprived of their contractual rights. While this argument has some force, we do not agree with the remedy argued by Defendants and adopted by the trial court. Nor do we agree that a committee would necessarily act reasonably if it approved of Defendants’ wall.

\{19\} It is clear that the covenants contemplated an architectural control committee. The original committee was required to review and approve “construction plans and specifications and a plan showing the location of the structure” to insure “quality of workmanship and materials, harmony of external design with existing structures, and as to location with respect to topography and finished grade elevation, and as to orientation with respect to then existing houses.” The covenants also contemplated that the committee would review additions to houses, as well as fences and walls proposed within the set-back areas. However, this does not mean that the architectural control committee was a “vehicle for change” as argued by Defendants. The vehicle for change was the provision allowing a majority of the lot owners to vote to change the covenants.

\{20\} The architectural control committee was empowered to grant variances with respect to walls and fences in the set-back area. But this power would have to be exercised reasonably. \( \text{See Appel v. Presley Cos., 111 N.M. 464, 466, 806 P.2d 1054, 1056 (1991)} \) (holding that when covenants require the approval of plans, structures, or exceptions to the covenants, the entity providing approval or disapproval must act reasonably); \( \text{Cypress Gardens, Ltd. v. Platt, 1998-NMCA-007, ¶ 21-23, 124 N.M. 472, 952 P.2d 467 (same). And because lot owners have a right to enforcement of the covenants as valuable property rights, see Wilcox, 111 N.M. at 485, 806 P.2d at 1075, the architectural control committee could not grant variances in a way that would “destroy the general scheme or plan of development.” Appel, 111 N.M. at 466, 806 P.2d at 1056.} \)

\{21\} In this case, the evidence was that the committee had fallen into disuse. However, Defendants, being unaware of the covenants, did not seek to have their plans approved by an architectural control committee until after they had already completed the cinder block work on the wall. There was evidence that such a committee could “probably” have been revived.

\{22\} In the absence of the committee, the trial court held that Defendants were deprived of their contractual rights and the court could substitute itself for the committee and make decisions as long as they were reasonable. \( \text{See id.; Cypress Gardens, Ltd., 1998-NMCA-007, ¶ 21-23. We find no support in these cases for the proposition that the trial court can simply substitute itself for a committee, particularly in circumstances in which the person required to go before the committee has not done so and has proceeded on a weekend day to build the basic framework of a structure in violation of the covenants.} \)

\{23\} It is true that a court of equity has broad powers. \( \text{See Plaza Nat’l Bank v. Valdez, 106 N.M. 464, 467, 745 P.2d 372, 375 (1987)} \) (stating that a court sitting in equity “may avil itself of those broad and flexible powers which are capable of being expanded to deal with novel cases and [e]quity has the inherent power to supply a method in any suit to protect the rights of all interested parties” (citation omitted)). But, as indicated in the immediately preceding quotation, in fashioning relief, the court must protect the rights of all parties.

\{24\} We have recently stated the standard of review for the exercise of equitable powers: “The question of whether, on a particular set of facts, the district court is permitted to exercise its equitable powers is a question of law, while the issue of how the district court uses its equitable powers to provide an appropriate remedy is reviewed only for abuse of discretion.” \( \text{United Props. Ltd. v. Walgreen Props., Inc., 2003-NMCA-140, ¶ 7, 134 N.M. 725, 82 P.3d 535. Under the circumstances of this case, in which Defendants did have a contractual right to an architectural control committee where they could present their plans for a nonconforming wall, and in the absence of such a committee, we are of the opinion that the legal standards for a potential exercise of equitable discretion are met.} \)

\{25\} However, in apparently failing to consider the rights of all parties, we believe that the trial court abused its discretion. In particular, we deem it noteworthy that Defendants did not seek out an architectural control committee prior to making structural alterations on their property, and Defendants appeared oblivious to the existence of any controls on their property even though the trial court correctly found that they were on constructive notice of the covenants. Further, the trial court erroneously ruled that the covenants were ambiguous and did not give any weight to the existence of the covenants regarding set-back and wall height, having found, also erroneously, that the changes in circumstances rendered them inapplicable. Finally, the trial court did not appear to give due weight to the specific covenant regarding set-backs.

\{26\} In the only case that the parties were able to locate or that we have been able to locate having facts comparable to ours, the court held that the non-existence of an architectural control committee did not negate specific covenants disallowing certain buildings. \( \text{Schick v. Perry, 364 P.2d 116, 118-19 (Utah 1961)} \) (holding that landowners could not build a horse stable prohibited by the covenants on the ground that the committee was no longer in existence). To be sure, the court in that case appeared to hold that the committee could not have approved the horse stable in any event, although that is not so clear to us. What we glean from the case is that the fact a committee falls into disuse does not excuse compliance with the remainder of the covenants.

\{27\} In our view, a more appropriate exercise of discretion would have been to allow either Plaintiff or Defendants and their neighbors a reasonable opportunity to reconstitute the architectural control committee. If the neighbors could not constitute a committee in a reasonable time, only then would we agree with the trial court that
in the exercise of its equity jurisdiction it could make a reasonable decision itself. Its decision, however, should not be premised on any notion of ambiguity or that circumstances have changed to such a degree that the set-back and height limitation on fences are no longer enforceable. Moreover, its decision must take into consideration the explicit prohibitions in the covenants. It is one thing to make exceptions that involve a few feet of discrepancy from the set-back lines or to allow a shorter fence closer to the street; it is quite another to make an exception that completely negates the explicit language of the covenants.

{28} This is not to say that the trial court could not arrive at some different equitable solution. The decision as to what relief to grant once the equities are balanced is initially for the trial court. But the trial court must consider the rights of all parties, and in this case we have held that just as Defendants have a right to have a committee consider their proposal to build a wall near the lot line, so too Plaintiff has a right under the covenants not to have a tall wall fronting his property in the absence of a committee’s reasonable approval.

B. Emotional Distress Damages

{29} Plaintiff alleges that the trial court erred in denying his request for a jury trial on his claim of damages from emotional distress. We disagree. The only evidence of emotional distress presented below was that Plaintiff suffered tension from this dispute with his neighbors. This is precisely the type of emotional distress that our cases require to be suffered by people living in society without resorting to the courts for redress. That is the reason our courts have provided extremely narrow circumstances for the award of emotional distress damages without evidence of other injury. See Trujillo v. N. Rio Arriba Elec. Coop., 2002-NMSC-004, ¶ 28, 131 N.M. 607, 41 P.3d 333; Williams v. Stewart, 2005-NMCA-061 ¶ 38, 137 N.M. 420, 112 P.3d 281. The trial court was correct in dismissing Plaintiff’s request for a jury trial on his claim for emotional distress. We note that no evidence was adduced below of any other damages alleged to have been caused by the violation of the covenant. Cf. Leigh v. Vill. of Los Lunas, 2005-NMCA-025, ¶¶ 13-14, 137 N.M. 119, 108 P.3d 525 (holding that damages for violation of covenant are measured by the value of the property before and after the violation).

C. Admission of Evidence of Zoning Decision

{30} The trial court admitted evidence of the City’s approval, in the context of a request for a variance, of Defendants’ wall. Plaintiff contends that this decision was erroneous. In admitting the evidence, the trial court fully recognized that covenants could provide more stringent requirements than those set forth in the zoning laws. The trial court admitted the evidence in contemplation of a decision on the reasonableness of the wall in the event it found the covenants prohibiting it unenforceable. We find no error in the trial court’s decision. Evidence may be admissible for one purpose but not another. See State v. Wyman, 96 N.M. 558, 560, 632 P.2d 1196, 1198 (Ct. App. 1981). Here, the trial court properly admitted the evidence for one purpose, recognizing that it was not admissible to vary from the covenants to the extent that the covenants were enforceable. We find no error in the trial court’s decision in this regard.

D. Cost of Transcript

{31} Plaintiff contends that the trial court erred in requiring the designation of the entire transcript on appeal and in requiring Plaintiff to pay for any of it. Plaintiff initially filed a designation of no transcript, see Rule 12-211(C)(1) NMRA, on the ground that his appeal was based on the documents, such as the covenants, and therefore no transcript would be necessary. Defendants objected and applied for an order under that same rule, requiring Plaintiff to designate the transcript. The trial court allowed Defendants to designate the entire transcript, but ruled that Plaintiff would be required to bear half the cost.

{32} Plaintiff’s docketing statement contended that the trial court erred in not upholding the protective covenants, which he alleged prohibited the wall; erred in “holding that [P]laintiff was not damaged by [D]efendants” and that Plaintiff was not entitled to have a jury assess this damage for emotional distress; and erred in admitting evidence of the decision of the zoning authorities. Plaintiff specifically challenged several of the trial court’s findings of fact. {33} In contending that he did not need to designate any transcript because he was relying on the documents and in arguing that he did not need to designate any transcript because “[t]here is nothing in the transcript that will aid the plaintiff in this appeal,” Plaintiff misinterprets the function of an appellate court and Plaintiff’s, as the appellant’s, role in challenging the trial court’s findings and its rulings. We have explained how an appellant is to challenge a trial court’s factual findings in Martinez v. Southwest Landfills, Inc., 115 N.M. 181, 184-86, 848 P.2d 1108, 1111-13 (Ct. App. 1993). There, we stressed the importance of setting forth the substance of all of the evidence bearing on a proposition and then explaining why that evidence, when viewed in the light most favorable to the decision, does not support the decision. Id.

{34} Rule 12-211(C)(1) states that “[t]he appellant shall designate all portions of the proceedings material to the consideration of the issues presented in the docketing statement . . ., but shall designate only those portions of the proceedings that have some relationship to the issues on appeal.” What the first clause of this sentence means is the same thing that Martinez requires, i.e., that the appellant must designate all portions of the proceedings bearing on the propositions that the appellant will be challenging. The appellant cannot rely solely on the portions of the proceedings that favor its position. If the appellant does not designate the necessary portions, the appellee may do so or may rely on the proposition that the appellant has not brought a sufficient record to the appellate court, but the appellee may do the latter at its peril. Compare Luxton v. Luxton, 98 N.M. 276, 279, 648 P.2d 315, 318 (1982)(holding that when an appellant did not insure that exhibits relevant to the issues were part of the record on appeal, the Court would rule against her substantial evidence issue), with State v. Archuleta, 118 N.M. 160, 161-62, 879 P.2d 792, 793-94 (Ct. App. 1994)(holding that when an appellee could have designated portions of the record that the appellant did not designate and did not point out what testimony was missing, the Court would rule on the issues based on the record designated by appellant).

{35} Thus, inasmuch as Plaintiff challenged the basis of the trial court’s decision and specifically challenged findings of fact, Defendants were properly proceeding in accordance with Rule 12-211(C)(1) to ask the trial court to require Plaintiff to designate the entire transcript. The trial court’s ruling, requiring Plaintiff to pay half the cost of the transcript, was within its authority because the trial court could not be certain whether the entire transcript was necessary and because this Court will determine who shall pay the cost of the transcript in any event. See Rule 12-403 NMRA (providing that the prevailing party shall recover costs unless the court shall otherwise determine and that costs include the cost of the transcript ordinarily paid for by appellant).

{36} Because Plaintiff did not prevail totally on appeal and in light of our remand,
we believe that the trial court’s equal division of the cost of the transcript was appropriate. Likewise, Plaintiff may recover from Defendants one-half of his other costs on appeal, consisting of the payment of the docket fee and the record proper.

CONCLUSION

{37} The decision of the trial court is reversed and remanded for further proceedings in accordance with this opinion. The trial court may allow a reasonable time for formation of an architectural control committee, which can determine whether it would be reasonable to waive the setback requirement for some variation of Defendants’ wall. It is clear to us, however, that a solid, six-foot wall at or near the lot line is in violation of the covenants and therefore unreasonable at this time. If the trial court chooses this avenue of relief and if no committee is formed, the trial court may make the same determination, giving due consideration to the rights of both Plaintiff and Defendants. If supported by the evidence, the trial court may exercise its discretion in some other way, including requiring the wall to be completely torn down, partially torn down and lowered, moved back, or some combination of these or other remedies. In other respects, the decision is affirmed, and Plaintiff is awarded half the costs of the docket fee and record proper.

{38} IT IS SO ORDERED.
LYNN PICKARD, Judge

WE CONCUR:
MARTHA M. JOHNSON, Chief Judge
CYNTHIA A. FRY, Judge

Certiorari Denied, No. 29,489, November 4, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-125

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
LAVERNE WATCHMAN,
Defendant-Appellant.
No. 23,997 (filed September 23, 2005)

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY
GRANT L. FOUTZ, District Judge

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OPINION

IRA ROBINSON, Judge

{1} Laverne Watchman (Defendant) appeals the judgment and sentence of the district court convicting her after a jury trial of one count of child abuse not resulting in death or great bodily harm. On appeal, Defendant contends that (1) Jury Instruction No. 2, instructing the jury on the offense of negligent child abuse, was erroneous; (2) the district court erroneously allowed Lieutenant Mangum to offer lay opinion testimony; and (3) the evidence was insufficient to support a conviction for negligent child abuse. We affirm.

1. SUFFICIENCY OF THE EVIDENCE

{2} Defendant contends that there was insufficient evidence to convict her of child abuse. In analyzing sufficiency of the evidence issues, the inquiry is whether substantial evidence exists of either a direct or circumstantial nature to support a verdict of guilt beyond a reasonable doubt with respect to each element of a crime charged. State v. Apodaca, 118 N.M. 762, 765-66, 887 P.2d 756, 759-60 (1994). “A reviewing court must view the evidence in the light most favorable to the state, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict.” State v. Reyes, 2002-NMSC-024, ¶ 43, 132 N.M. 576, 52 P.3d 948 (quoting State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988)). The reviewing court does not weigh the evidence or substitute its judgment for that of the fact finder as long as there is sufficient evidence to support the verdict. State v. Mora, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789.

{3} In order to find Defendant guilty of child abuse not resulting in death or great bodily harm, the State was required to prove beyond a reasonable doubt the satisfaction of the jury that (1) Defendant caused the child to be placed in a situation which endangered the life or health of the child; (2) Defendant acted with reckless disregard, and to find Defendant acted with reckless disregard, the jury must find that Defendant’s willful conduct created a substantial and foreseeable risk, Defendant disregarded that risk, and was wholly indifferent to the consequences of her conduct and the welfare and safety of the child; (3) the child was under the age of eighteen; and (4) this happened in New Mexico on or about July 22, 2001. See UJI 14-604 NMRA 2002.

{4} The State presented evidence that on July 22, 2001, early Sunday morning, at about 1:30 a.m. in McKinley County, Defendant appeared to be intoxicated and left her twenty-one-month-old child alone and asleep on the seat of her truck with the windows slightly opened in the parking lot of Cowboy’s Saloon. Saturday night is usually the busiest night of the week for Cowboy’s with approximately 200-240 people in the bar that night. There were frequent fights, vandalism, and loitering in the parking lot of Cowboy’s. The child was holding a bottle of spoiled milk, the child smelled foul, and there were extensive amounts of empty beer and other alcohol containers in the interior of the truck. When Defendant approached the police, who were investigating the condition of the child, she expressed concern about the condition of her truck, rather than her child. At that time, the officer noticed the odor of alcohol on Defendant’s breath, her eyes appeared watery and bloodshot, she staggered when she walked, and she had slurred speech.

{5} In light of the evidence presented, it is...
not unreasonable for the jury to have determined that Defendant was guilty of one count of child abuse. The child was placed in a dangerous situation, which was created by Defendant because the child was in the cab of an unlocked truck, at approximately 1:30 a.m., in a high traffic area (Cowboy’s parking lot, with approximately 200-240 people in the bar that night) unprotected and vulnerable to any passerby. “[C]hildren, who are often times defenseless, are in need of greater protection than adults.” State v. Lucero, 87 N.M. 242, 245, 531 P.2d 1215, 1218 (Ct. App. 1975). Furthermore, it is reasonably foreseeable that the child could have climbed out of the truck and wandered about the busy parking lot endangering himself by encountering an unsuspecting driver or rowdy patrons. See State v. Mc-Gruder, 1997-NMSC-023, ¶ 37, 123 N.M. 302, 940 P.2d 150 (1997) (holding that to support a conviction for child abuse, there must be reasonable probability or possibility that the child will be endangered); see also State v. Ungarten, 115 N.M. 607, 609, 856 P.2d 569, 571 (Ct. App. 1993). Also, according to Defendant’s brief-in-chief, Defendant’s truck was parked in Cowboy’s parking lot no longer than thirty minutes and Defendant was not allowed to enter the bar because she was drunk. The officer noticed alcohol on Defendant’s breath, her eyes were watery and bloodshot, she staggered when she walked, and she had slurred speech. All this indicates that Defendant drove to Cowboy’s drunk with the child in the truck. Also, but for the interaction by Defendant’s truck was parked in Cowboy’s parking lot. Also, but for the interaction by Defendant’s truck was parked in Cowboy’s parking lot.

{6} In both McGruder and Ungarten, our appellate courts have held that the children involved were situated directly in the line of physical danger and, in Castañeda, this Court held that the facts supported a finding that the defendant acted with reckless disregard for the safety of her children by placing them in a situation “that may cause harm.” 2001-NMCA-052, ¶ 17.

{7} Here, Defendant placed her child directly in the path of danger because evidence was presented that Cowboy’s parking lot was a dangerous place because there were frequent fights and police were called out there occasionally. Additionally, since it was highly probable that Defendant was driving drunk, our case is indistinguishable from Castañeda, in that Defendant acted with a reckless disregard for the safety of her child by placing him in a situation “that may [have] cause[d] harm” to him by possibly getting into an automobile accident. Id.

{8} Lastly, the fact that Defendant left her child in the truck, exposed to a variety of alcoholic beverages, perpetuated Defendant’s disregard for her child’s safety by exposing him to a substantial and foreseeable risk of the consumption of such easily accessible toxic spirits, thus endangering his health. Similarly, in State v. Graham, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285, our Supreme Court held that evidence of a marijuana roach that was found on the floor and a marijuana bud that was found in the crib in the master bedroom was sufficient to support a finding that defendant caused the children to be placed in a situation that may have endangered their life or health and did so with a reckless disregard as required to support a child abuse conviction. Here, the child was left in the truck with numerous varieties of alcohol (thirty-one beers, a bottle of Garden Deluxe, and a half-full bottle of Goldschlager), which were easily accessible to the child. The jury need not speculate, nor be advised, of the dangers of the common knowledge affects of alcohol poisoning. See State v. Privett, 104 N.M. 79, 82, 717 P.2d 55, 58 (1986) (“[1]t is well recognized that laymen are capable of assessing the effects of intoxication as a matter within their common knowledge and experience.”).

{9} “The jury, as the trier of fact, was entitled to weigh this evidence.” State v. Hunter, 101 N.M. 5, 7, 677 P.2d 618, 620 (1984). We, therefore, hold that a rational jury could have relied on the foregoing evidence to satisfy each element of the child abuse instruction and, as stated in Hunter, “[t]his Court will not substitute its determination for that of the jury.” Id.

II. JURY INSTRUCTION

{10} Defendant contends that it was fundamental error for the district court to give the child abuse instruction when (1) it failed to instruct the jury correctly on the criminally-negligent intent required for the offense of negligent abuse of a child because the court refused Defendant’s proposed alteration of the jury instruction defining reckless disregard as not being extreme carelessness; (2) the instruction misdirected the jury as to the intent element, improperly mixing objective and subjective standard of proof; (3) the jury was not sufficiently instructed on the law on what was a foreseeable risk to Defendant; and (4) the jury should have been instructed that the State had the burden to prove Defendant had a subjective awareness of the risk of serious injury to her child. We disagree.

{11} “The propriety of jury instructions given or denied is a mixed question of law and fact. Mixed questions of law and fact are reviewed de novo.” State v. Salazar, 1997-NMSC-044, ¶ 49, 123 N.M. 778, 945 P.2d 996. We must also determine whether a reasonable juror would have been confused or misled by the instruction. State v. Benally, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. “Fundamental error only applies in exceptional circumstances when guilt is so doubtful that it would shock the judicial conscience to allow the conviction.” State v. Cunningham, 2000-NMSC-009, ¶ 13, 128 N.M. 711, 998 P.2d 176 (internal quotation marks and citation omitted).

{12} The district court offered the State’s proposed jury instruction on the elements of child abuse. The instruction stated that (1) Defendant caused the child to be placed in a situation which endangered the life or health of the child; (2) Defendant acted with reckless disregard, and to find Defendant acted with reckless disregard, the jury must find that Defendant’s willful conduct created a substantial and foreseeable risk, Defendant disregarded that risk, and Defendant was wholly indifferent to the consequences of the conduct and the welfare and safety of the child; (3) the child was under the age of eighteen; and (4) this happened in New Mexico on or about July 22, 2001. It differed from UJI 14-604 by omitting “knew or should have known” and inserting the word “willful.”

{13} During the jury conference, Defendant’s attorney agreed with the State’s substitution of “willful.” Thus, an instruction concerning negligent criminal intent becomes moot because “willful” overstated the State’s burden of persuasion, which benefitted the Defendant. “[T]o allow a defendant to invite error and to subsequently complain about that very error would subvert the orderly and equitable administration of justice.” State v. Young, 117 N.M. 688, 690, 875 P.2d 1119, 1121 (Ct. App. 1994). Therefore, fundamental error has no application where Defendant, by her own actions, invites the error. See State v. Handa, 120 N.M. 38, 46, 897 P.2d 225, 233 (Ct. App. 1995).
Further, “knew or should have known” was an element that was omitted from the jury instruction. However, replacing “knew or should have known” with “willful,” not only adequately addressed the omitted language, but benefitted Defendant because it increased the State’s burden to prove Defendant knew her actions constituted an unlawful act. Our Supreme Court recognized such a rationale in Territory v. Gallegos, 17 N.M. 409, 413, 130 P. 245, 247 (1913), where they held that “defendants cannot complain of this defect because it was favorable to them.” See Territory v. Salazar, 3 N.M. 321, 325-26, 5 P. 462, 464 (1885) (“[T]he giving to the jury an instruction as to murder in the second degree was more favorable to the defendant than the evidence in the case warranted. It was, therefore, if error at all, such error as was not prejudicial to him, and of which consequently he has no right to complain.”). Applying principles, we hold that a reasonable jury would not have been confused or misdirected by the proffered jury instruction and that fundamental error did not occur.

Alternatively, Defendant’s proposed alteration, defining reckless disregard as not being extreme carelessness, misstates the law. In State v. Armijo, 1999-NMCA-087, ¶ 24, 127 N.M. 594, 985 P.2d 764, this Court recognized “that there are a host of cases standing for the proposition that the uniform jury instructions and use notes are to be followed without substantial modification.” Defendant’s proposed alteration, defining “reckless disregard” as not being extreme carelessness, is not in the applicable Uniform Jury Instructions. Moreover, the definition of “reckless disregard” as incorporated into UJI 14-604 is taken directly from case law that does not include Defendant’s proposed language. Therefore, we agree with the district court’s decision not to add Defendant’s proposed language because “[i]t is not error for a trial court to refuse instructions which are inaccurate.” State v. Gaitan, 2002-NMSC-007, ¶ 17, 131 N.M. 758, 42 P.3d 1207 (internal quotation marks and citation omitted).

{15} Defendant also contends that the jury instruction fails to advise on the law of what a foreseeable risk is to Defendant in the context of tort liability. She contends the jury was not provided with any guidance as to how she might disregard a risk of which she might not be subjectively aware, i.e., the dangerousness of Cowboy’s parking lot.

{16} We find that Defendant’s subjective awareness of the reputation of Cowboy’s parking lot is irrelevant because it was undisputed that Defendant was intoxicated, left her twenty-one-month-old child with spoiled milk, and access to alcohol in the cab of her pickup truck unattended, in the parking lot of a bar late on a Saturday night (early Sunday morning). As earlier discussed, this evidence independently involves Defendant’s willful disregard of her child’s safety, regardless if she parked in Cowboy’s parking lot or elsewhere. Alternatively, a reasonable person in Defendant’s position would have been aware of the risks involved in becoming impaired and leaving her child unsupervised in a bar parking lot near closing time. Assuming, without deciding, that Defendant’s subjective awareness was a proper matter for the jury to consider, it was considered. Thus, as we held in State v. Vialpando, 93 N.M. 289, 292, 599 P.2d 1086, 1089 (Ct. App. 1979), “[i]t is for the trier of fact to determine the weight and sufficiency of [this] evidence, including all reasonable inferences.” Therefore, since Defendant was convicted under the higher burden of “willfulness,” there is no doubt there was sufficient evidence to demonstrate Defendant’s awareness and the risk to the child’s safety and her disregard of the consequences.

III. LAY OPINION TESTIMONY

{17} We find that Defendant’s subjective awareness of the reputation of Cowboy’s parking lot is irrelevant because it was undisputed that Defendant was intoxicated, left her twenty-one-month-old child with spoiled milk, and access to alcohol in the cab of her pickup truck unattended, in the parking lot of a bar late on a Saturday night (early Sunday morning). As earlier discussed, this evidence independently involves Defendant’s willful disregard of her child’s safety, regardless if she parked in Cowboy’s parking lot or elsewhere. Alternatively, a reasonable person in Defendant’s position would have been aware of the risks involved in becoming impaired and leaving her child unsupervised in a bar parking lot near closing time. Assuming, without deciding, that Defendant’s subjective awareness was a proper matter for the jury to consider, it was considered. Thus, as we held in State v. Vialpando, 93 N.M. 289, 292, 599 P.2d 1086, 1089 (Ct. App. 1979), “[i]t is for the trier of fact to determine the weight and sufficiency of [this] evidence, including all reasonable inferences.” Therefore, since Defendant was convicted under the higher burden of “willfulness,” there is no doubt there was sufficient evidence to demonstrate Defendant’s awareness and the risk to the child’s safety and her disregard of the consequences.

IV. CONCLUSION

{18} On appeal, Defendant also contends that the district court erroneously allowed Lieutenant Mangum of the Gallup Police Department to offer lay opinion testimony. This Court “review[s] the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse.” State v. Sarracino, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. However, under Rule 12-216(A) NMRA 1996, an issue may not be raised for the first time on appeal. Review of the record indicates that Defendant did not raise any objection concerning the lay opinion testimony of Lieutenant Mangum, nor did she claim fundamental or plain error here. We, therefore, may not address this issue because “[i]t is . . . trial counsel’s duty to state . . . objections so that the trial court may rule intelligently on them and so that an appellate court does not have to guess at what was and what was not an issue at trial.” State v. Lucero, 116 N.M. 450, 453, 863 P.2d 1071, 1074 (1993).

IT IS SO ORDERED.

IRA ROBINSON, Judge
WE CONCUR:
JONATHAN B. SUTIN, Judge
MICHAEL E. VIGIL, Judge
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Michelle M. Demmert joined as Of Counsel in September 2005.

Evelyn A. Peyton joined as an associate in April 2005 and practices in the Santa Fe office.

Shana Siegel Baker joined as an associate in September 2005 and practices in the Santa Fe office.

Margaret (Maggie) Coffey-Pilcher joined as an associate in November 2005 and practices in the Albuquerque office.

Biographical summaries are listed in Hearsay, page 10 in this issue.

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