Inside This Issue:

Bernalillo County Metropolitan Court 6
Judicial Appointment

Board of Bar Commissioners 7
Meeting Agenda

Web Corner 9
Hearsay 11

Legal Education Calendar
Writs of Certiorari
List of Court of Appeals' Opinions
2005-NMCA-126: State v. Sean Ross Stewart
2005-NMCA-127: Phillip Salazar v. Richard Torres, Individually and as Owner and Operator of Richard L. Torres Concrete Company
Advisory Opinion 2005-03: Ability of Lawyer or Lawyer's Agent to Record Telephone Interview with Witness Who has Expressed Unwillingness to Speak "On the Record"

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.

Special Insert:
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Also Available:
- 2005 New Mexico Advance Legislative Service
- New Mexico One Source of Law™
- 2005 Updates to New Mexico Statutes Annotated 1978™
The Basics of Real Estate Transactions from Negotiation to Closing
Tuesday, December 13, 9 a.m.-3 p.m.
5.6 General and 1.0 Ethics CLE Credits

Who better to address fundamental real estate issues in New Mexico than two well-recognized New Mexico attorneys with extensive real estate experience. John F. McCarthy of White, Koch Kelly & McCarthy PA and John Patterson of Scheuer, Yost & Patterson will take you through a real estate transaction in New Mexico from contract to closing. This extensive program will cover such issues as merchantable title, liens, easements, encroachments, boundary disputes, surveys, water and mineral rights, environmental compliance, financing, title commitments and policies, and title conveyance.  $179

Current Legailities and Realities of the End-of-Life Debate
Tuesday, December 13, 8 a.m.-Noon
3.5 General and 1.0 Ethics CLE Credits

The legalities and realities involved in the Terri Schiavo case have once again stirred the debate over end-of-life issues. Right-to-life versus right-to-die? What is medically implied by persistent vegetative state, hospice and palliative care? What legal devices in New Mexico can families use for protection? Should a line be drawn between federalism and social policy? Does the federal government have any right to intervene in situations in which palliative care is necessary to sustain life? In this seminar, these complex issues and more are discussed.  $129

Recognizing Animal Interests in the Law
Tuesday, December 13, 9 a.m.-3:30 p.m.
7.2 General CLE Credits

Steven M. Wise, legal scholar and best-selling author of Rattling the Cage (2000) and Drawing The Line (2002) opens this full day seminar with an examination of how courts historically view the interests of non-human animals and ways of persuading them to recognize those interests. Wise is joined by Joyce Tischler, Co-Founder and Executive Director of the Animal Legal Defense Fund, who focuses on the problem of securing legal recourse against animal cruelty. David Thompson, a litigator with the NM Attorney General’s Office, then examines ways in which animal interests can be found within state jurisdiction of New Mexico. The day concludes with sessions on animal interests in disaster planning, the essential role of city government in protecting animal interests and a panel discussion moderated by attorney Merry Stubblefield.  $189

Adoption Law: The Basics and Beyond
Tuesday, December 13, 9 a.m.-4:30 p.m.
7.2 General and 1.2 Ethics CLE Credits

This seminar will focus upon statutory law, regulations, pertinent legislative issues, and emerging trends in adoption law. Also discussed will be intermediate and advanced coverage on such issues as the Indian Child Welfare Act, interstate compact, psychological impact, recent case law development, and ethical considerations with regard to confidentiality. Whether you need to know the basics of completing an adoption for a client or the future direction of adoption law, this seminar is for you.  $209

2005 Professionalism: Lawyers Concerned for Lawyers Substance Abuse and Addiction Issues in the New Mexico Legal Community
Tuesday, December 13, 12:30-2:30 p.m.
2.0 Professionalism CLE Credits

$59

FOUR WAYS TO REGISTER
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(Please have credit card information ready)
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Make check payable to: CLE
☐ VISA ☐ MC ☐ American Express ☐ Discover
Credit Card # ____________________
Exp. Date ________________________
Authorized Signature ______________
TABLE OF CONTENTS

Notices ................................. 6–10
Hearsay ................................. 11
Legal Education Calendar ........................................ 12–15
Writs of Certiorari ........................................ 16–17
List of Court of Appeals’ Opinions ........................................ 18
Opinions ................................. 19–30

From the New Mexico Court of Appeals
No. 24,624: State v. Sean Ross Stewart ........................................ 19
No. 23,841: Phillip Salazar V. Richard Torres, Individually and as Owner and Operator of Richard L. Torres Concrete Company ........................................ 24

From the State Bar of New Mexico Ethics Advisory Committee
Advisory Opinion 2005-03: Ability of Lawyer or Lawyer’s Agent to Record Telephone Interview with Witness Who has Expressed Unwillingness to Speak “On the Record”.... 29

Advertising ............................. 31–36

Professionalism Tip

With respect to other judges:
In all written and oral communications, I will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

Meetings

December

5 Taxation Section Board of Directors noon, via teleconference
5 Attorney Support Group 5:30 p.m., Office of Scott Vorhees, Santa Fe
7 Employment and Labor Law Section Board of Directors noon, State Bar Center
8 Public Law Section Board of Directors, noon, RMD Legal Bureau, Santa Fe
9 Board of Bar Commissioners 11:30 a.m., State Bar Center
9 Real Property, Probate and Trust Section Annual Meeting, 1 p.m., State Bar Center
9 Solo and Small Firm Practitioners Section Annual Meeting 1 p.m., State Bar Center
9 Prosecutors Section Board of Directors, 3 p.m., State Bar Center
12 Section Chair Orientation Meeting, 10 a.m., State Bar Center

State Bar Workshops

December

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

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
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.

Law Library
December Hours

The New Mexico Supreme Court Law Library will be closed on the following dates and times.

December 23—Will close at 1 p.m.
December 24—Closed
December 26—Closed
December 30—Will close at 1 p.m.
December 31—Closed

Notice on Address Changes

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

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

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.

First Judicial District Court
Destruction of Tapes
Criminal, Civil, Children’s Court, Domestic,
Incompetency/Mental Health, Adoption and Probate Cases
1976 to 1987

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy tapes filed with the court, in Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate cases for years 1976 to 1987, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes, and wish to have duplicates made, should verify tape information with the Special Services Division (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Dec. 14 by Order of the Court.

Destruction of Exhibits
Criminal, Civil, Children’s Court, Domestic,
Incompetency/Mental Health, Adoption and Probate Cases
1978 to 1987

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st 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 1978 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 Jan. 13, 2006. Counsel for parties are advised that exhibits can be retrieved through Jan. 13, 2006.

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.

Reassignment of Cases

Effective Dec. 16, a general reassignment of all civil and domestic cases in Division III and Division VII of the 1st Judicial District Court will occur due to a division transfer and judge appointment.

All cases assigned to District Judge Daniel Sanchez, Division VII, will be reassigned to District Judge Raymond Ortiz, Division III. All cases assigned to Division III (formerly District Judge Carol J. Vigil’s cases) will be reassigned to District Judge Daniel Sanchez, Division VII.

Parties who have not previously exercised their right to challenge or excuse will have ten days from Dec. 16 to challenge or excuse the judge pursuant to Rule 1-088.1.

Sixth Judicial District Court
Change of Physical Location of Public Auctions

Effective immediately, the 6th Judicial District Court will hold all public auctions in the foyer/lobby of the Grant County Courthouse, Silver City, New Mexico.

Bernalillo County Metropolitan Court
Judicial Appointment

Governor Bill Richardson announced the appointment of Julie Altwies to serve as a judge on the Bernalillo County Metropolitan Court, Division IV, in Albuquerque. Altwies lives in Albuquerque and is a graduate of the University of New Mexico and the UNM School of Law. She has served as deputy district attorney in the 13th Judicial District (Sandoval County) for the past year. From 1988 to 2004, Altwies served as deputy district attorney in Bernalillo County. She has been honored as prosecutor of the year by both the New Mexico’s District Attorney’s Association and Mothers Against Drunk Driving. Altwies is a former member of the board of directors of the Sexual Assault Nurse Examiners Program and the Albuquerque Rape Crisis Center. Altwies was one of four candidates recommended to Governor Richardson by the Judicial Nominating Commission. She fills the vacancy left by the resignation of Judge Charles Barnhart. Altwies stands for election in 2006.
**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 Dec. 9 Meeting Agenda 11:30 a.m., Bar Center, Albuquerque**

1. Swearing-in of new commissioners
2. Approval of Oct. 28 meeting minutes
3. Finance Committee report
4. Acceptance of October financials
5. Approval of bylaw amendment
6. Proposed disciplinary rule change
7. Appointment to Board of Bar Commissioners
8. Appointments to Center for Civic Rights IOLTA Grant Committee
9. Appointments to Rocky Mountain Mineral Law Foundation
10. International and Immigration Law Section bylaw amendment
11. American Bar Association (ABA) delegate report
12. Committee reports
   A. Ethics Advisory Committee
   B. Law Office Management Committee
13. Appointments to Supreme Court committees and boards
14. Appointments to Board of Bar Commissioners internal committees
15. Update on Casemaker
16. President’s report
17. Executive director’s report
18. Division reports
19. 2006 Board of Bar Commissioners meeting schedule
20. Presentation of outgoing commissioner plaques
21. New business

**Election of Commissioners**

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.

**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.

**Natural Resources, Energy and Environmental Law Section**

- **Annual Meeting**
  The Natural Resources, Energy and Environmental Law Section will hold its annual membership meeting at noon, Dec. 16, in conjunction with Environmental Justice and the Public Welfare: Evolving Concepts of the Public at the State Bar Center. Contact Chair Dan Long, dwl@modrall.com or (505) 848-1800, to place an item on the agenda. Attendees of the CLE will receive 5.0 general and 2.0 professionalism CLE credits. The section member discount price is $159. Register online at www.nmbar.org and select CLE or call (505) 797-6020.

**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 appeared in the Nov. 28 (Vol. 44, No. 47) Bar Bulletin. 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 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.

**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 Creditors’ Rights and Wrongs, 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, escobedos7174@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. The cost is $59 standard/$49 section members for 2.0 general CLE credits. 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.
Bar of Michigan and long-time champion in honor of the late director of the State 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. The ABA presents this award each year 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.

**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. The outstanding judge and attorney awards will be presented and elections for the board of directors and officers of the association will be held. Records Management, presented by Mark Fidel, will address why an effective records management program not only makes good business sense but can help a law practice avoid liability issues regarding clients’ records. What to Consider When Opening Your Law Office, presented by Ron Taylor, will discuss everything you ever wanted to know about opening your law office but were too frightened to ask. The CLE, for 1.0 ethics and 2.0 general credits, 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 to 400 Gold SW, Suite 620, Albuquerque 87102; or call (505) 243-2615 or (505) 842-1151.

Note the following upcoming 2006 luncheons and CLE programs: noon, Jan. 3, U.S. District Court Chief Judge Martha Vazquez and CLE, Consumer Law, presented by Ric Feferman; noon, Feb. 7, Mayor Martin Chavez and CLE, Water Law.

**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. The ABA presents this award each year 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**

Correction to *Res Publica*

The New Mexico Hispanic Bar Association would like to apologize for omission errors in *Res Publica*, published in the Nov. 21 (Vol. 44, No. 46) *Bar Bulletin*. Ernestine R. “Tina” Cruz, Albuquerque, and Brian Colon, Albuquerque, who have contributed a great deal of time and work to the organization, should have been listed as members of the association's board of directors.

**Holiday Scholarship Fundraiser**

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

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.com.

**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). Copies of the proposed updates are available. 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 videoconferencing.

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 aide 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.

We Want to Hear from You

The Bar Bulletin is now accepting Letters to the Editor. Submit letters to notices@nmbar.org.

The editorial policy of the State Bar of New Mexico may be found on the Web at www.nmbar.org under Publications/Media, Bar Bulletin.

By Veronica Cordova, Assistant Director of Administration

The State Bar is continually updating content and working to improve the features and functionality of our site. In addition, we know the value of providing additional service to members by providing resources that help promote strong participation and diversity within the legal profession. This month’s attention is focused on the site area entitled Other Bars/Legal Groups.

Various bar groups are listed in this area and include the New Mexico Commission on Professionalism, Equal Access to Justice, the New Mexico Hispanic Bar Association, the New Mexico Women’s Bar Association and Legal Specialization. These groups communicate to members through the Web and provide resources and information pertinent to their associations. Visit these sites to see how these groups can meet specific needs.

In addition to customized Web sites for groups, quick links to other legal sites that serve the community can be accessed directly from this area. They include the Center for Civic Values, the UNM School of Law and voluntary New Mexico associations. These links and resources are an extensive compilation of Web sites that members have found of value.

Other New Mexico bar groups and organizations interested in a Web site may take advantage of substantial savings on a Web presence through the State Bar at a nominal annual fee. To establish a Web site on www.nmbar.org, call (505) 797-6039 or e-mail vcordova@nmbar.org.

Our goal is to make our Web site a primary gateway to information about the Bar and to provide easy access to other legal entities or law-related resources. As always, ideas and suggestions to improve the Web site are welcome.
Visit the State Bar advisory opinion archive and topical index on the State Bar Web site,* www.nmbar.org, for assistance in interpreting the New Mexico Rules of Professional Conduct.

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More Resources

• Risk Management Hotline, (800) 326-8155.

• Original questions, involving one’s own conduct, should be sent to the Ethics Advisory Committee, c/o State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860 or membership@nmbar.org.

*The published advisory opinions are also available at the UNM School of Law Library and the Supreme Court Library.
Susan Page, deputy district attorney with Bernalillo County, has received the annual Quality of Life—Lawyer Award from the New Mexico State Bar Association. Page received the award for her exemplary commitment to helping others maintain a balance between work and life. She is the head of the special proceedings division at the Bernalillo County District Attorney’s office.

Daniel M. Salazar of the Law Office of Daniel M. Salazar was awarded the Contract Attorney of the Year Award from the public defenders office in Santa Fe in recognition of his commitment to assisting indigent persons with legal problems. Salazar is known for taking cases that other lawyers won’t touch, treating clients with respect and traveling to all corners of the state to assist accused persons.

David H. Kelsey, managing partner of the divorce and family law firm Atkinson & Kelsey, PA, is listed in the 2006 edition of The Best Lawyers in America. He has been listed in every New Mexico edition of Best Lawyers for 24 years and is the only full-time practicing New Mexico family law attorney to achieve this distinction. Kelsey has practiced law for 44 years and is a past president of the State Bar of New Mexico.

Lynn E. Mostoller has joined the Keleher & McLeod law firm. Mostoller was a clerk for Judge Harris Haertz of the U.S. Court of Appeals, 10th Circuit. She earned her law degree from the UNM School of Law.

Modrall Sperling law firm announces that 19 of its members have been recognized in the 2006 edition of The Best Lawyers in America.

Larry P. Ausherman, natural resources law, energy law
Douglas A. Baker, business litigation, commercial litigation
Suzanne M. Barker, trusts and estates
Duane E. Brown, securities law, public finance law, corporate law
John R. Cooney, business litigation, natural resources law, commercial litigation, energy law
Dale W. Ek, banking law, real estate law, financial institutions and transactions law
Dennis J. Falk, securities law, public finance law, corporate law
Paul M. Fish, bankruptcy and creditor-debtor rights law
Kenneth L. Harrigan, business litigation, personal injury litigation, commercial litigation
William R. Keleher, bankruptcy and creditor-debtor rights law
James M. Parker, securities law, health care law, tax law, employee benefits law, trusts and estates
Marjorie A. Rogers, employee benefits law
Ruth M. Schifani, real estate law, financial institutions and transactions law
Douglas G. Schneebeck, commercial litigation
William C. Scott, environmental law
Lynn H. Slade, natural resources law, energy law
Walter E. Stern, III, natural resources law, energy law
Timothy R. Van Valen, tax law

P. J. Hartman has been elected president of Outcomes, Inc., a not-for-profit agency established in 1951 whose mission is to strengthen and enrich individual and family life in New Mexico. Offering counseling, adoption education, parenting education, support services to elders, and career and job services programs, Outcomes, Inc. addresses human needs and challenges and serves its client community and other agencies with professionalism, integrity and respect for individual and cultural diversity.

Editor’s Note: 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.
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>Entertainment Law</td>
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<td>5–8</td>
<td>Juvenile Justice Conference</td>
<td>State Bar Center, Albuquerque NM Children Youth &amp; Families Department</td>
<td>20.1 G&lt;br&gt;(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 Center for Legal Education of NMSBF</td>
<td>7.5 G, 1.2 E&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbar.org</td>
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<td>State Bar Center, Albuquerque Parks Law Office</td>
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<td>VR, State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
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<td>Public Health Emergencies</td>
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<td>6</td>
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<td>Teleseminar Center for Legal Education of NMSBF</td>
<td>1.2 G&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbar.org</td>
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<td>6</td>
<td>BAPCPA 2005 and Its Affect on Businesses</td>
<td>PERA Building, Santa Fe Center for Legal Education of NMSBF</td>
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<td>Legal Research and Super Search Strategies on the Internet</td>
<td>State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
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<td>Public Health Emergencies</td>
<td>VR, Branigan Library, Las Cruces Center for Legal Education of NMSBF</td>
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<td>2005 Professionalism: Lawyers Concerned for Lawyers</td>
<td>VR, Branigan Library, Las Cruces Center for Legal Education of NMSBF</td>
<td>2.0 P&lt;br&gt;(505) 797-6020&lt;br&gt;www.nmbar.org</td>
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<td>8</td>
<td>Civil Procedure In NM</td>
<td>State Bar Center, Albuquerque NMDLA</td>
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<td>8</td>
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<td>Medicare’s New Drug Coverage: The Impact on Your Clients</td>
<td>VR, Branigan Library, Las Cruces Center for Legal Education of NMSBF</td>
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<td>Taxing Planning Aspects of Mergers, Sales and Spinoffs</td>
<td>Teleseminar Center for Legal Education of NMSBF</td>
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<td>Tax-Exempt Organizations</td>
<td>State Bar Center, Albuquerque Lorman Education Services</td>
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</table>
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State Bar Center, Albuquerque
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State Bar Center, Albuquerque
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<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Location</th>
<th>Host/Provider</th>
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<td>15</td>
<td>Dementia, Capacity and Undue Influence of the Elderly</td>
<td>VR, State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
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<td>16</td>
<td>Environmental Justice &amp; the Public Welfare: Evolving Concepts of the Public Interest</td>
<td>State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>5.0 G, 2.0 P</td>
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<tr>
<td>15–16</td>
<td>Ethical Issues in Civil Litigation, Part 1 &amp; 2</td>
<td>Teleseminar</td>
<td>Center for Legal Education of NMSBF</td>
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<td>Managing Ethics Issues in Your Day-to-Day Practice in New Mexico</td>
<td>State Bar Center, Albuquerque National Business Institute</td>
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<td>(715) 835-8525</td>
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<td>Hot Topics in New Mexico Creditors’ Rights</td>
<td>State Bar Center, Albuquerque National Business Institute</td>
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<td>Clarifying the Policy’s Intent: Keys to Litigating New Mexico Bad Faith Cases</td>
<td>State Bar Center, Albuquerque National Business Institute</td>
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<td>Lawyerizing with Emotional Intelligence</td>
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<td>21</td>
<td>Maximize Your Edge! Advanced Negotiation Strategies</td>
<td>State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>6.6 G, 1.2 E</td>
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<td>The Annual Review of Civil Procedure</td>
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<td>How to Win Your Next Jury Trial Using the Power Trial Method</td>
<td>VR, State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
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<td>Cashing Out: Six Ways Business Owner Clients Can Sell Their Business</td>
<td>VR, State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
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# WRITS OF CERTIORARI

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

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

**Effective December 2, 2005**

## Petitions for Writ of Certiorari Filed and Pending:

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Petitioner</th>
<th>Docket Number (COA)</th>
<th>Date Filed</th>
</tr>
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<tbody>
<tr>
<td>NO. 28,954</td>
<td>State v. Schoonmaker</td>
<td>23,927</td>
<td>1/21/05</td>
</tr>
<tr>
<td>NO. 29,105</td>
<td>State v. Cook</td>
<td>25,137</td>
<td>3/22/05</td>
</tr>
<tr>
<td>NO. 29,128</td>
<td>State v. Stephen F.</td>
<td>24,007</td>
<td>4/26/05</td>
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<tr>
<td>NO. 29,144</td>
<td>State v. Bounds</td>
<td>25,131</td>
<td>4/26/05</td>
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<td>NO. 29,151</td>
<td>State v. Bounds</td>
<td>25,131</td>
<td>4/26/05</td>
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<td>NO. 29,153</td>
<td>State v. Armijo</td>
<td>24,951</td>
<td>4/26/05</td>
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<tr>
<td>NO. 29,158</td>
<td>State v. Otto</td>
<td>23,280</td>
<td>4/26/05</td>
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<tr>
<td>NO. 29,179</td>
<td>State v. Taylor</td>
<td>23,477</td>
<td>5/9/05</td>
</tr>
<tr>
<td>NO. 29,174</td>
<td>State v. Vincent</td>
<td>23,832</td>
<td>5/20/05</td>
</tr>
<tr>
<td>NO. 29,232</td>
<td>Reyes v. State</td>
<td>12-501</td>
<td>6/2/05</td>
</tr>
<tr>
<td>NO. 29,213</td>
<td>State v. Evans</td>
<td>25,332</td>
<td>6/8/05</td>
</tr>
<tr>
<td>NO. 29,203</td>
<td>Hassler v. Affiliated Foods</td>
<td>25,093</td>
<td>6/13/05</td>
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<tr>
<td>NO. 29,223</td>
<td>State v. Ransom</td>
<td>25,171</td>
<td>6/13/05</td>
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<tr>
<td>NO. 29,244</td>
<td>State v. Attsom</td>
<td>25,274</td>
<td>6/20/05</td>
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<tr>
<td>NO. 29,286</td>
<td>State v. Gutierrez</td>
<td>25,279</td>
<td>7/11/05</td>
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<tr>
<td>NO. 29,258</td>
<td>State v. Hunter</td>
<td>24,166</td>
<td>7/11/05</td>
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<tr>
<td>NO. 29,218</td>
<td>Montoya v. Ulibarri</td>
<td>12-501</td>
<td>7/15/05</td>
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<tr>
<td>NO. 29,272</td>
<td>US Xpress v. State</td>
<td>24,702</td>
<td>7/15/05</td>
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<tr>
<td>NO. 29,257</td>
<td>State v. Kirby</td>
<td>24,845</td>
<td>8/1/05</td>
</tr>
<tr>
<td>NO. 29,325</td>
<td>Jacobo v. City of Albuquerque</td>
<td>24,459/24,256</td>
<td>8/5/05</td>
</tr>
<tr>
<td>NO. 29,323</td>
<td>Jacobo v. City of Albuquerque</td>
<td>24,459/24,256</td>
<td>8/5/05</td>
</tr>
<tr>
<td>NO. 29,393</td>
<td>Jacobs v. City of Albuquerque</td>
<td>24,459/24,256</td>
<td>8/5/05</td>
</tr>
<tr>
<td>NO. 29,232</td>
<td>Flores v. Clovis College</td>
<td>25,627</td>
<td>8/5/05</td>
</tr>
<tr>
<td>NO. 29,334</td>
<td>State v. Garvin</td>
<td>24,299</td>
<td>8/5/05</td>
</tr>
<tr>
<td>NO. 29,275</td>
<td>Moffat v. Branch</td>
<td>24,307</td>
<td>8/5/05</td>
</tr>
<tr>
<td>NO. 29,350</td>
<td>Doe v. Santa Clara Pueblo</td>
<td>25,125</td>
<td>8/12/05</td>
</tr>
<tr>
<td>NO. 29,340</td>
<td>State v. Fielder</td>
<td>24,190</td>
<td>8/12/05</td>
</tr>
<tr>
<td>NO. 29,336</td>
<td>State v. Kerby</td>
<td>24,350</td>
<td>8/12/05</td>
</tr>
<tr>
<td>NO. 29,320</td>
<td>State v. Quilhua</td>
<td>24,296</td>
<td>8/12/05</td>
</tr>
<tr>
<td>NO. 29,351</td>
<td>Lopez v. San Felipe Pueblo</td>
<td>25,884</td>
<td>8/12/05</td>
</tr>
<tr>
<td>NO. 29,385</td>
<td>State Farm v. Luebbers</td>
<td>23,556</td>
<td>8/26/05</td>
</tr>
<tr>
<td>NO. 29,344</td>
<td>State v. Hughley</td>
<td>24,732</td>
<td>8/26/05</td>
</tr>
<tr>
<td>NO. 29,373</td>
<td>State v. Martinez</td>
<td>25,376</td>
<td>8/26/05</td>
</tr>
<tr>
<td>NO. 29,361</td>
<td>State v. McDonald</td>
<td>24,359</td>
<td>9/2/05</td>
</tr>
<tr>
<td>NO. 29,362</td>
<td>State v. Romero</td>
<td>25,164</td>
<td>9/2/05</td>
</tr>
<tr>
<td>NO. 29,410</td>
<td>State v. Ten Gaming Devices</td>
<td>24,479</td>
<td>9/2/05</td>
</tr>
<tr>
<td>NO. 29,411</td>
<td>State v. McClure</td>
<td>25,436</td>
<td>9/2/05</td>
</tr>
<tr>
<td>NO. 29,436</td>
<td>Martinez v. Mills</td>
<td>24,673</td>
<td>9/2/05</td>
</tr>
<tr>
<td>NO. 29,442</td>
<td>State v. Jojola</td>
<td>24,148</td>
<td>10/13/05</td>
</tr>
<tr>
<td>NO. 29,441</td>
<td>State v. Jojola</td>
<td>24,148</td>
<td>10/13/05</td>
</tr>
<tr>
<td>NO. 29,435</td>
<td>State v. Duhan</td>
<td>24,222</td>
<td>10/13/05</td>
</tr>
<tr>
<td>NO. 29,456</td>
<td>State v. Salazar</td>
<td>24,465</td>
<td>10/14/05</td>
</tr>
<tr>
<td>NO. 29,485</td>
<td>State v. Freeman</td>
<td>24,245</td>
<td>11/4/05</td>
</tr>
<tr>
<td>NO. 29,476</td>
<td>Salazar v. Torres</td>
<td>23,841</td>
<td>11/7/05</td>
</tr>
<tr>
<td>NO. 29,484</td>
<td>State v. Wilson</td>
<td>25,017</td>
<td>11/14/05</td>
</tr>
<tr>
<td>NO. 29,437</td>
<td>City of Sunland Park v. Harris</td>
<td>23,593</td>
<td>11/14/05</td>
</tr>
</tbody>
</table>

## Certiorari Granted but not yet Submitted to the Court:

(Parties preparing briefs)

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Petitioner</th>
<th>Docket Number (COA)</th>
<th>Date Writ Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 28,867</td>
<td>State v. Rodriguez</td>
<td>23,455</td>
<td>10/19/04</td>
</tr>
<tr>
<td>NO. 28,917</td>
<td>State v. Ponce</td>
<td>23,913</td>
<td>12/6/04</td>
</tr>
<tr>
<td>NO. 28,995</td>
<td>State v. Saloman</td>
<td>24,986</td>
<td>1/14/05</td>
</tr>
<tr>
<td>NO. 29,478</td>
<td>State v. Monteleone</td>
<td>24,811/24,795</td>
<td>11/15/05</td>
</tr>
</tbody>
</table>
## 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 December 2, 2005**

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Party</th>
<th>Court of Appeal No.</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 27,945</td>
<td>State v. Munoz</td>
<td>COA 23,094</td>
<td>11/18/03</td>
</tr>
<tr>
<td>NO. 28,068</td>
<td>State v. Gallegos</td>
<td>COA 22,888</td>
<td>2/3/04</td>
</tr>
<tr>
<td>NO. 28,426</td>
<td>Sam v. Estate of Sam</td>
<td>COA 23,288</td>
<td>9/13/04</td>
</tr>
<tr>
<td>NO. 27,269</td>
<td>Kmart v. Tax &amp; Rev</td>
<td>COA 21,140</td>
<td>10/14/04</td>
</tr>
<tr>
<td>NO. 28,628</td>
<td>Herrington v. State Engineer</td>
<td>COA 23,871</td>
<td>11/16/04</td>
</tr>
<tr>
<td>NO. 28,500</td>
<td>Manning v. New Mexico Energy &amp; Minerals</td>
<td>COA 23,396</td>
<td>12/13/04</td>
</tr>
<tr>
<td>NO. 28,525</td>
<td>State v. Jernigan</td>
<td>COA 23,095</td>
<td>12/14/04</td>
</tr>
<tr>
<td>NO. 28,410</td>
<td>State v. Romero</td>
<td>COA 22,836</td>
<td>2/14/05</td>
</tr>
<tr>
<td>NO. 28,688</td>
<td>State v. Gutierrez</td>
<td>COA 24,731</td>
<td>2/14/05</td>
</tr>
<tr>
<td>NO. 28,812</td>
<td>Battishill v. Farmers Insurance</td>
<td>COA 24,196</td>
<td>2/16/05</td>
</tr>
<tr>
<td>NO. 28,537</td>
<td>State v. Garcia</td>
<td>COA 24,226</td>
<td>3/11/05</td>
</tr>
<tr>
<td>NO. 28,660</td>
<td>State v. Johnson</td>
<td>COA 23,463</td>
<td>3/11/05</td>
</tr>
<tr>
<td>NO. 28,816</td>
<td>Romero v. City of Santa Fe</td>
<td>COA 24,775</td>
<td>5/9/05</td>
</tr>
<tr>
<td>NO. 28,898</td>
<td>Deflon v. Sawyers</td>
<td>COA 23,013</td>
<td>5/10/05</td>
</tr>
<tr>
<td>NO. 28,823</td>
<td>Payne v. Hall</td>
<td>COA 22,383</td>
<td>6/13/05</td>
</tr>
<tr>
<td>NO. 28,997</td>
<td>Maestas v. Zager</td>
<td>COA 24,200</td>
<td>6/14/05</td>
</tr>
<tr>
<td>NO. 28,983</td>
<td>Callahan v. New Mexico</td>
<td>COA 23,645</td>
<td>8/16/05</td>
</tr>
<tr>
<td>NO. 29,058</td>
<td>Sanchez v. Pellicer</td>
<td>COA 25,082</td>
<td>9/29/05</td>
</tr>
<tr>
<td>NO. 29,016</td>
<td>State v. Jade G.</td>
<td>COA 23,810</td>
<td>10/11/05</td>
</tr>
<tr>
<td>NO. 29,017</td>
<td>State v. Jade G.</td>
<td>COA 23,810</td>
<td>10/11/05</td>
</tr>
<tr>
<td>NO. 29,042</td>
<td>State v. Frank G.</td>
<td>COA 23,165/23,497</td>
<td>10/11/05</td>
</tr>
<tr>
<td>NO. 29,018</td>
<td>State v. Pamela G.</td>
<td>COA 23,497/23,787</td>
<td>10/11/05</td>
</tr>
<tr>
<td>NO. 29,159</td>
<td>State v. Romero</td>
<td>COA 24,390</td>
<td>11/14/05</td>
</tr>
<tr>
<td>NO. 29,134</td>
<td>State v. Kathleen D.C.</td>
<td>COA24,540</td>
<td>11/14/05</td>
</tr>
<tr>
<td>NO. 29,190</td>
<td>Aguilera v. Board of Education</td>
<td>COA 23,895</td>
<td>11/14/05</td>
</tr>
<tr>
<td>NO. 29,202</td>
<td>Montgomery v. Lomos Altos</td>
<td>COA 24,297</td>
<td>11/16/05</td>
</tr>
<tr>
<td>NO. 29,196</td>
<td>Grine v. Peabody</td>
<td>COA 24,354</td>
<td>11/16/05</td>
</tr>
<tr>
<td>NO. 29,135</td>
<td>State v. Munoz</td>
<td>COA 24,072</td>
<td>11/16/05</td>
</tr>
<tr>
<td>NO. 29,117</td>
<td>State v. Zamora</td>
<td>COA 23,436</td>
<td>11/16/05</td>
</tr>
<tr>
<td>NO. 29,226</td>
<td>Upton v. Clovis</td>
<td>COA 24,051</td>
<td>12/12/05</td>
</tr>
<tr>
<td>NO. 29,246</td>
<td>Chavarria v. Fleetwood</td>
<td>COA 23,874/24,444</td>
<td>12/12/05</td>
</tr>
<tr>
<td>NO. 29,100</td>
<td>State v. Casanova</td>
<td>COA 22,952</td>
<td>12/12/05</td>
</tr>
<tr>
<td>NO. 29,178</td>
<td>State v. Maestas</td>
<td>COA 24,507</td>
<td>12/13/05</td>
</tr>
<tr>
<td>NO. 28,950</td>
<td>State v. Nyce</td>
<td>COA 25,075</td>
<td>12/13/05</td>
</tr>
<tr>
<td>NO. 29,160</td>
<td>Benavidez v. City of Gallup</td>
<td>COA 25,373</td>
<td>12/13/05</td>
</tr>
<tr>
<td>NO. 29,206</td>
<td>State v. Maldonado</td>
<td>COA 23,637</td>
<td>12/13/05</td>
</tr>
</tbody>
</table>

### CERTIORARI GRANTED AND SUBMITTED TO THE COURT:

**Submission Date**

<table>
<thead>
<tr>
<th>Case Number</th>
<th>Party</th>
<th>Court of Appeal No.</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 29,425</td>
<td>State v. Flores</td>
<td>COA 23,507</td>
<td>11/28/05</td>
</tr>
<tr>
<td>NO. 29,451</td>
<td>State v. Gutierrez</td>
<td>COA 25,386</td>
<td>11/28/05</td>
</tr>
<tr>
<td>NO. 29,499</td>
<td>State v. Tortelli</td>
<td>COA 25,327</td>
<td>11/28/05</td>
</tr>
<tr>
<td>NO. 29,509</td>
<td>State v. Vasquez</td>
<td>COA 25,772</td>
<td>11/28/05</td>
</tr>
</tbody>
</table>

### PETITION FOR WRIT OF CERTIORARI DENIED:

- NO. 29,425: State v. Flores (COA 23,507) 11/28/05
- NO. 29,451: State v. Gutierrez (COA 25,386) 11/28/05
- NO. 29,499: State v. Tortelli (COA 25,327) 11/28/05
- NO. 29,509: State v. Vasquez (COA 25,772) 11/28/05

### UNPUBLISHED DECISION FILED:

- NO. 29,347: State v. Deflon v. Sawyers (COA 23,013) filed 11/21/05
### Published Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>Court District</th>
<th>Case Description</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 24671</td>
<td>5th Jud Dist Lea</td>
<td>CR-03-380, State v. Michael Pittman (reverse)</td>
<td>11/23/05</td>
</tr>
</tbody>
</table>

### Unpublished Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>Court District</th>
<th>Case Description</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>NO. 26027</td>
<td>3rd Jud Dist Dona Ana</td>
<td>CR-04-1297, State v. Jorge Chacon (affirm)</td>
<td>11/21/05</td>
</tr>
<tr>
<td>NO. 25915</td>
<td>11th Jud Dist San Juan</td>
<td>CR-04-1161, State v. Lawrence Martinez (reverse)</td>
<td>11/21/05</td>
</tr>
<tr>
<td>NO. 25948</td>
<td>2nd Jud Dist Bernalillo</td>
<td>LR-04-146, State v. Epigmenio Delgado (affirm)</td>
<td>11/21/05</td>
</tr>
<tr>
<td>NO. 25833</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CV-04-8184, Dennis Carrillo v. Qwest Corporation and Ben Romero (affirm)</td>
<td>11/21/05</td>
</tr>
<tr>
<td>NO. 25817</td>
<td>11th Jud Dist San Juan</td>
<td>CR-05-173, State v. Larry Burr (affirm)</td>
<td>11/21/05</td>
</tr>
<tr>
<td>NO. 24798</td>
<td>13th Jud Dist Valencia</td>
<td>CV-00-666, Douglass Fischer, Dennis and Pauline Chavez v. Josefo Martinez, Monty Judd, Timothy and Roberta McGrew. (affirm)</td>
<td>11/21/05</td>
</tr>
<tr>
<td>NO. 25936</td>
<td>1st Jud Dist Rio Arriba</td>
<td>CV-03-278, Elmer, Josie, Jennifer and Kimberly Velasquez v. Presbyterian Health Services (affirm)</td>
<td>11/22/05</td>
</tr>
<tr>
<td>NO. 25990</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CV-04-6191, David and Kimberly Rankin v. Margaret Herrington (dismiss)</td>
<td>11/23/05</td>
</tr>
</tbody>
</table>

Slip Opinions for Published Opinions may be read on the Court’s website: [http://coa.nmcourts.com/documents/index.htm](http://coa.nmcourts.com/documents/index.htm)
CCV Board Approves $195,000 for 2006 Grants

The CCV Board of Directors approved a 21% increase in the IOLTA grant budget for 2006 funding, raising the total available to $195,000. Any New Mexico 501(c)(3) organization that provides civil legal services for the poor, law-related education for the public or improvements in the administration of justice is eligible to apply for IOLTA funding.

Applications were due on November 1, will be considered by the IOLTA Grant Committee on November 17, submitted to the CCV Board on December 14, and forwarded to the State Supreme Court for its review and approval.

Grantees are usually notified of the Court’s decisions by February 1.

2006 IOLTA Grant Committee

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Kim A. Griffith, Esq.
Sheehan Sheehan & Stelzner

John P. Hays
Cassatt Hays & Friedman

The Hon. John Pope
13th Judicial District Court

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Each year, hundreds of New Mexico attorneys submit Trust Account Certification forms that are noncompliant with the Rules Governing Discipline and/or with the Rules of Professional Conduct. Many of these are due to what we’ve been told is a lack of clarity in how to properly complete the form. We’ve read your comments and heard your concerns, and big improvements are on the way.

Thanks to the collaborative efforts of the State Bar of New Mexico, the State Supreme Court, the Disciplinary Board and CCV, your 2006 licensing form will include a new and improved (and much easier to complete) Trust Account Certification and IOLTA Participation section.

Thank you to the lawyers and law firms on these pages for your participation in the IOLTA program. You are making a difference in the lives of more than 350,000 New Mexicans each year!

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“Equal justice under law . . . is not merely a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.”

Justice Lewis Powell, Jr.
OPINION

RODERICK T. KENNEDY, Judge

{1} Defendant appeals his convictions for two separate counts of battery against a household member, two counts of aggravated battery, one count of child abuse, and negligent cruelty to animals. His convictions stem from when Defendant, over a five-hour period, alternately slapped, punched, and kicked his girlfriend Lynda Wilkins (Mother), her thirteen-month-old son (Child), and the family’s puppy. Defendant argues that his two separate convictions for battery against Mother violated double jeopardy because Defendant’s assaults were not sufficiently distinct. Defendant also argues that his convictions of both aggravated battery and child abuse violated double jeopardy because child abuse is a specific type of aggravated battery. Finally, Defendant argues that there was insufficient evidence to convict him of negligent cruelty to animals because the evidence only showed that he acted intentionally when he kicked the puppy.

{2} We hold that Defendant’s two counts of battery against a household member were sufficiently distinct because a reasonable jury could conclude, based on the evidence presented at trial, that the assaults occurred at different times and were punctuated by an assault on another victim. We hold that double jeopardy challenges and arguments seeking to invoke the general/specific rule must be analyzed separately. In analyzing the two challenges separately, we hold that insofar as Defendant challenges his convictions of aggravated battery and child abuse under double jeopardy, his numerous acts over the course of the morning were sufficiently distinct to justify at least three counts, if not more. We also hold that the general/specific rule is inapplicable to the statutes at hand and that child abuse under NMSA 1978, § 30-6-1(D) (2004) is not a specific type of misdemeanor aggravated battery under NMSA 1978, § 30-3-5(B) (1969). Finally, we hold that there was sufficient evidence for the jury to find that Defendant committed negligent animal cruelty to animals because he acted with a higher mens rea than required. We affirm Defendant’s convictions.

FACTUAL AND PROCEDURAL HISTORY

{3} At approximately 3:15 a.m. on January 1, 2003, Mother was awakened by the sound of Child screaming. Ten minutes later, upon hearing Child screaming again, she went into her back living room. There, she found Defendant punching Child in the chest. Defendant was telling Child to “shut the fuck up.” Mother picked up Child and walked away. Defendant followed and grabbed Child away from her. Defendant started punching Child again as he took Child back to the back living room, cursing at Child. Defendant threw Child on the couch. Mother tried to intervene, asking Defendant to leave. Defendant threw a plate of food at her but missed. At this point, or possibly later, when Mother tried to get Defendant away from Child, Defendant punched her in the chest, once in the stomach, once in the back, and kicked her as she tried to get away. It is unclear whether the punching and kicking occurred at one time or over the course of the morning.

{4} Defendant next started pacing around the house, an activity that went on for some time. Around this time, Defendant also kicked Mother’s puppy in the head because the puppy was looking at him. He kicked the puppy a second time while he was walking to the kitchen and said that he would kill the puppy if she looked at him again.

{5} Although Defendant had earlier told Mother not to do so, Mother picked up Child again to calm down the infant. Defendant snatched Child from her, threw Child back on the couch and slapped Child. He again instructed Mother not to touch Child. He then threw Child onto a chair and told Child not to move; when Child kept crying, Defendant began punching Child in the chest. The evidence does not indicate how long this episode of punching lasted.

{6} At approximately 5 a.m. Mother went into the master bedroom to retrieve Child’s diaper bag. Mother told Defendant that she was leaving. Defendant cursed at her, blaming her for “trying to save that little bitch.” (referring to Child). Defendant told Mother to sit down, get in her face, and threatened to blow up her house. When Mother returned to the back living room where Child still sat in the chair, Defendant taunted her inability to go comfort Child.

{7} Some time later, Defendant walked past Child and kicked Child in the face. Child fell to the floor. When Mother tried to go to Child, Defendant punched her in the jaw. Defendant then picked up Child and threw Child back into the chair. Mother was again told not to touch Child. Defendant put his own children back to bed.
Child remained in the chair until approximately 6 a.m., when Defendant allowed Mother to put Child to bed. Later, Defendant found Child sitting, not lying, in the bed. Defendant grabbed Child by the arm and started punching Child in the chest again. Mother was present but too scared to intervene. She testified that “there was a couple of times where he would punch [Child] and [Child] would like aaaaagh, like he couldn’t breathe he was punching him so hard and he wouldn’t stop.”

Defendant then grabbed Child and threw Child back into the chair located in the back living room. Defendant kept making trips to the kitchen, finally returning with a steak knife. Defendant started sticking the knife in the couch and remote control. Mother at some point tried to leave, but Defendant would not let her.

At approximately 7 to 7:30 a.m., Mother put Child to bed for the second time. Mother returned to the couch with Defendant. Around 8:15 a.m., she managed to sneak away from the house with Child and her daughter.

On November 13, 2003, a jury convicted Defendant of seven counts: Counts One and Four, battery against a household member (of Mother); Count Two, child abuse (of Child); Count Three, false imprisonment (of Mother); Counts Five and Six, aggravated battery (of Child); and Count Seven, cruelty to animals. Defendant appealed.

DISCUSSION

Standard of Review

We review Defendant’s double jeopardy and statutory construction arguments de novo. See State v. McClenond, 2001-NMSC-023, ¶ 2, 130 N.M. 551, 28 P.3d 1092; State v. Schoonmaker, 2005-NMCA-012, ¶ 19, 136 N.M. 749, 105 P.3d 302. Insofar as Defendant challenges the sufficiency of the evidence, “we consider the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences in favor of the verdict.” State v. McGee, 2004-NMCA-014, ¶ 6, 135 N.M. 73, 84 P.3d 690. We do not re-weigh the evidence or substitute our judgment for the jury’s. Id.

Double Jeopardy: Multiple Convictions of the Same Charge

Defendant challenges his conviction of two counts of battery against a household member as violating double jeopardy. See NMSA 1978, § 30-3-15 (2001) (defining battery against a household member); N.M. Const. art. II, § 15 (stating New Mexico’s double jeopardy protections). This is a unit of prosecution challenge. See State v. Boergadine, 2005-NMCA-028, ¶ 14, 137 N.M. 92, 107 P.3d 532 (stating that there are two types of double jeopardy multiple punishment issues: “multiple convictions under one statute (unit of prosecution cases) and multiple convictions under multiple statutes for the same course of conduct (double description cases”). A unit of prosecution challenge uses a two-step inquiry. Id., ¶ 15. The first question is whether the unit of prosecution is clearly defined by the statute at issue. Id. The second question is whether the charged acts were sufficiently distinct. Id. Only if the second question is answered in the negative do we then apply the rule of lenity. Id.

Neither party addresses whether a unit of prosecution is clearly defined in Section 30-3-15. See In re Doe, 98 N.M. 540, 541, 650 P.2d 824, 825 (1982) (stating that courts should not address issues that the parties do not raise on appeal). We therefore ask whether Defendant’s acts were sufficiently distinct to warrant two counts of battery against a household member. See Boergadine, 2005-NMCA-028, ¶ 15 (setting forth the two-part inquiry for unit of prosecution challenges). This determination uses a flexible set of factors including: “(1) temporal proximity of the acts; (2) location of the victim(s) during each act; (3) existence of an intervening event; (4) sequencing of acts; (5) defendant’s intent as evidenced by his conduct and utterances; and (6) the number of victims.” Id., ¶ 21 (internal quotation marks and citation omitted); see also Herron v. State, 111 N.M. 357, 361, 805 P.2d 624, 628 (1991) (stating the same test); State v. Morro, 1999-NMCA-118, ¶ 19, 127 N.M. 763, 987 P.2d 420 (same). “We may also consider whether Defendant’s acts were performed independently of the other acts in an entirely different manner, or whether such acts were of a different nature.” Boergadine, 2005-NMCA-028 ¶ 21 (internal quotation marks and citation omitted).

Using the factors set forth above, we address Defendant’s conviction of two counts of battery against a household member.

Defendant’s Acts Were Distinct and Support Two Counts of Battery Against a Household Member

The first factor we analyze is the temporal proximity of the two charged events. See id. In this case, we will analyze the first factor with the fourth factor of the sequencing of acts. See id. The first jury instruction for battery against a household member said that “[D]efendant intentionally touched or applied force to [Mother] by slapping/punching her in the face.” The second instruction said that “[D]efendant intentionally touched or applied force to [Mother] by punching her in the chest and about the body.” As Defendant points out, Mother’s testimony about when certain events occurred is unclear. She testified that after Defendant had kicked Child in the face, she went to help Child and Defendant punched her in the jaw. She also testified about Defendant punching and kicking her when she was trying to get Defendant away from Child.

It is somewhat unclear when this hitting and kicking occurred or if it occurred all at once. However, it appears that Mother referred to the earlier part of the morning. She testified that after she first found Defendant punching Child at approximately 3:25 a.m., she picked up Child, walked away, and Defendant then tucked Child away from her. After Defendant threw Child back on the couch, she tried to get Defendant off Child. She then repeatedly testified to being too scared to intervene in Defendant’s subsequent assaults on Child, and to Defendant taunting her for not being able to intervene. A jury could reasonably infer that Mother’s fear of intervening, a fear significant enough to prevent her from helping Child, must have stemmed from Defendant punching and kicking her earlier. See Swafford v. State, 112 N.M. 3, 14, 810 P.2d 1223, 1234 (1991) (permitting multiple punishments “where examination of the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses”).

That the factual basis for the two separate charges of battery against a household member were temporally discrete is also supported by the way that Mother’s testimony was elicited. Mother testified that Defendant punched her in the jaw. The State then asked her whether that punch was the only time that Defendant had touched her during the course of these events. She replied “[n]o,” meaning that sometime during a four-hour period, Defendant had struck her again. This span of time was from approximately 3:25 a.m., the time Mother first witnessed Defendant punching Child in the chest, and 7 or 7:30 a.m., the last time Defendant allowed her to put Child to bed. Mother then related to the jury “[w]hat else happened” between them as follows: “Between me trying to get [Defendant] away from [Child], trying to separate them, I got punched in my chest.
and once in my stomach and once in my back. I got kicked on my butt as I was trying to get away from him.” When asked about the chronology, she did not remember. She said: “The only thing that I can say for sure when it happened is when I got punched in the jaw from him kicking [Child] off the chair.” Mother knew exactly when she got punched in the jaw, but not the other exact time or times that Defendant struck her, which indicates that the two sets of events were temporally discrete. See id.

{18} The next factor is the location of the victim during each act. Boergadine, 2005-NMCA-028, ¶ 21. Defendant argues that because the first blows occurred between the back living room and the kitchen, and the punch in the jaw occurred in the back living room itself, this movement is de minimis compared to the movement described in State v. Mares, 112 N.M. 193, 200, 812 P.2d 1341, 1348 (Ct. App. 1991). There, we said that while the continuing struggle took place “in the car, on the ground, and in the bushes, we cannot determine from the record exactly how far [the] defendant transported the victim” during the assault. Id. We agree that the lack of a significant change in location in the case before us weighs in favor of Defendant’s argument that the two counts of battery against a household member were not sufficiently distinct.

{19} However, the other factors do not weigh in Defendant’s favor. The third factor is the existence of any intervening events. Boergadine, 2005-NMCA-028, ¶ 21. Our Supreme Court has considered a struggle to be a significant intervening act. See State v. Cooper, 1997-NMSC-058, ¶ 61, 124 N.M. 277, 949 P.2d 660. There was evidence of several acts between the acts which formed the bases for the two counts of battery against a household member. Mother testified that after Defendant had kicked Child in the face, she went to help Child and Defendant punched her in the jaw. She then testified that at some other time Defendant punched and kicked her when she was trying to get Defendant away from Child. Between each of these acts is an assault on Child. We hold that in this case the assault on Child was a significant intervening event. See Boergadine, 2005-NMCA-028, ¶ 21. We also hold that this intervening assault represents an additional victim under the sixth factor of our analysis. See id.

{20} The fifth factor is “[D]efendant’s intent as evidenced by his conduct and utterances.” Id. (internal quotation marks and citation omitted). Defendant argues that in order to convict him of two distinct crimes, there must be sufficient evidence of “a break and a reformulation of intent.” For support of this argument, Defendant relies on State v. Handa, 120 N.M. 38, 897 P.2d 225 (Ct. App. 1995). There, in considering whether firing three shots was sufficient to uphold two separate and distinct offenses, we said that we required “proof that each shot was a separate and distinct act.” Id. at 44, 897 P.2d at 231. There, “the three shots were not separate and considered distinct acts but part of a single contact arising from a single, sustained intent. Thus, each shot was accompanied by one protracted intention.” Id. (internal quotation marks and citation omitted). The defendant’s intent was one factor among many. See id. (analyzing other factors in deciding whether the acts were sufficiently distinct). Also, we again note the existence in this case of an intervening assault on a different victim. The jury in this case found that Defendant had the requisite intent to commit those assaults against the different victims. Therefore, we hold that, at a minimum, Defendant’s conduct in assaulting Child in between his first and second assaults on Mother evidenced that he did not have “a single, sustained intent” to assault her. See id. This fact also justifies holding that Defendant’s acts were performed independently of each other. See Boergadine, 2005-NMCA-028, ¶ 21. These factors considered, we therefore hold that in total, the evidence supported two separate charges of battery against a household member. See Swafford, 112 N.M. at 14, 810 P.2d at 1234 (permitting multiple punishments “where examination of the facts presented at trial establish that the jury reasonably could have inferred independent factual bases for the charged offenses”).

Double Jeopardy Challenges and General/Specific Challenges Require Separate Analyses

{21} Defendant argues that convicting him of both aggravated battery and child abuse violated double jeopardy because, he claims, “child abuse is a specific type of aggravated battery.” Defendant asserts that the State only presented evidence that Defendant acted “intentionally, [and] cruelly punished” Child, and presented “no evidence of criminal negligence.” He further argues that the legislature never “intended the intentional infliction of blows to a child to be charged and punished as both an aggravated battery charge and as child abuse.” Finally, Defendant asserts that his conduct was unitary and that we should apply the rule of lenity because, he claims, child abuse is always a “continuing crime.”

{22} Our Supreme Court discussed the general/specific rule in State v. Cleve, 1999-NMSC-017, 127 N.M. 240, 980 P.2d 23. “[I]f two statutes, one general and one special, punish the same criminal conduct, the special law operates as an exception to the general law to the extent of compelling the state to prosecute under the special law.” Id. ¶ 17. Our Supreme Court later clarified that the application of the general/specific rule requires a separate inquiry than that used for double jeopardy challenges. See State v. Santillanes, 2001-NMSC-018, ¶ 14, 130 N.M. 464, 27 P.3d 456. Insofar as Defendant raises double jeopardy issues, we address those first before turning to his challenges invoking the general/specific rule.

Double Jeopardy: Double Description

{23} The first prong of analyzing Defendant’s second double jeopardy challenge requires us to ask “whether the conduct underlying the offenses is unitary, i.e., whether the same conduct violates both statutes.” Swafford, 112 N.M. at 13, 810 P.2d at 1233. Conduct is not unitary “if the defendant commits two discrete acts . . . separated by sufficient indicia of distinctness.” Id. This inquiry uses the same factors set forth above in our unit of prosecution double jeopardy analysis. Compare State v. Meadors, 121 N.M. 38, 49-50, 908 P.2d 731, 742-43 (1995) (applying the Herron factors in a double description case), with Boergadine, 2005-NMCA-028, ¶ 21 (applying the Herron factors in a unit of prosecution case). Furthermore, “if the conduct is separate and distinct, inquiry is at an end.” Swafford, 112 N.M. at 14, 810 P.2d at 1234 (assuming that conduct was unitary and proceeding to the next prong of the inquiry); see also Cleve, 1999-NMSC-017, ¶ 30 n.2 (same).

{24} Here, the jury was instructed that in order to find Defendant guilty of child abuse under Count Two, it had to find that Defendant acted intentionally when he “caused [Child] to be placed in a situation which endangered the life or health of [Child] OR caused [Child] to be cruelly punished.” The jury was also instructed that in order to find Defendant guilty of aggravated battery under Count Five, it had to find that “[D]efendant intentionally touched or applied force to [Child] by punching him in the chest; . . . [D]efendant
intended to injure [Child]; . . . [D]efendant caused painful temporary disfigurement.” The instruction for Count Six was identical to the instruction for Count Five except that it alleged that Defendant had committed aggravated battery “by punching and/or kicking [Child] in the face.” We hold that all three of these counts were sufficiently distinct to warrant three separate charges, and might have warranted even more.

{25} At approximately 3:25 a.m., Mother discovered Defendant punching Child in the chest. Numerous intervening events and different conduct followed, including: Mother rescuing Child, a tug-of-war between Mother and Defendant over Child, Defendant beginning to hit Child again as he held Child up in the air, Defendant throwing a plate of food at Mother, Defendant’s pacing throughout the house, Defendant preventing Mother from going to Child, Defendant complaining about how Mother spoiled Child, and Defendant waking up his own children and instructing them to gather their belongings. Mother then picked up Child to comfort him. Defendant saw Mother holding Child, snatched Child away, threw him on the couch and slapped him. The first incident of punching Child in the chest was sufficiently distinct from the later slap to have warranted convicting Defendant of aggravated battery under Count Five and child abuse under Count Two. We also note there was another later and sufficiently distinct incident of Defendant punching Child in the chest. While Defendant’s children were by this time waiting in the hallway after having gathered their belongings, Defendant threw Child into a chair located in the back living room. Defendant told Child not to move and Child kept crying, so Defendant kept punching him in the chest. This was at approximately 5:30 a.m. This act alone is sufficiently displaced by time, Defendant’s conduct, and intervening events to be considered a distinct act. A jury could have reasonably selected one of the two chest-punching incidents to justify aggravated battery under Count Five, and selected between the remaining chest-punching incident and the slap to have justified child abuse under Count Two.

{26} More events followed the events justifying the first two counts that additionally justified another count of aggravated battery under Count Six. After the above events, Defendant went into the master bedroom. Mother came into the room to get Child’s diaper bag. She told Defendant that she was leaving. Defendant replied, “[a]nd don’t you think you should have fucking thought about that before you started all this shit trying to save that little bitch[?]” Defendant told Mother to sit down or she would make the situation worse, and did so face-to-face. He then threatened to blow up her house, saying that if he and his children would not have a place to live, neither would she. Also, while walking from one room to the other, Defendant kicked the puppy in the head because the puppy was looking at him. On his way back to the kitchen, Defendant kicked the puppy again and told Mother that if the puppy looked at him again, he would kill the puppy. Mother then put the puppy outside. It is only after these events that Defendant walked past Child and kicked him in the face, causing Child to fall to the floor with a bloody nose. This event is sufficiently distinct under the test laid out above to have warranted the separate charge of aggravated battery in Count Six. See Boergadine, 2005-NMCA-028, ¶ 21 (setting forth factors in considering whether charged acts are distinct).

{27} Following Defendant kicking Child in the face, numerous events followed that might have also justified child abuse (under Count Two), aggravated battery (under Count Five), or even additional counts which the State could have brought (since as discussed above, we found three distinct acts even before Child was kicked in the face). See, e.g., Cleve, 1999-NMSC-017, ¶ 26 (noting “the judiciary’s longstanding deference to prosecutorial discretion”). For example, there was evidence that Child might have lost consciousness momentarily after Defendant kicked him in the face. There was also evidence that Defendant had hit Child so hard in the chest that he damaged Child’s liver. However, Defendant would not allow Mother to leave, thereby preventing her from getting medical care for Child until 10 a.m., nearly seven hours after Defendant first hit Child in the chest.1

The jury instruction for Count Two also allowed the jury to convict Defendant if he caused Child to be “placed in a situation that may [have] endanger[ed] [his] life or health.” See § 30-6-1(D)(1). Additionally, sometime after Defendant kicked Child, he allowed Mother to put Child to bed around 6 a.m. However, upon discovering that Child was sitting, not lying, in bed, he again started punching Child in the chest. Defendant took Child back to the living room, throwing Child on the floor and causing the back of Child’s head to strike the floor. Defendant then went to the kitchen and returned with a steak knife six to seven inches long, which he proceeded to use to stab the couch and remote control. There were numerous sufficiently distinct acts in this case to have justified Defendant being charged with three separate counts. See, e.g., State v. Guilez, 2000-NMSC-020, ¶ 13, 129 N.M. 240, 4 P.3d 1231 (“The act required to commit child abuse was completed, although continuing, before the act of reckless driving began. Under our cases this conduct is not unitary.”). Since Swafford instructs us that “if the conduct is separate and distinct, inquiry is at an end,” we need not engage in further analysis. Swafford, 112 N.M. at 14, 810 P.2d at 1234.

Sufficient Evidence of Negligent Cruelty to Animals

{28} Defendant argues that there was insufficient evidence to show that he negligently mistreated an animal under NMSA 1978, § 30-18-1(B) (2001), because all the evidence showed that he intentionally mistreated the puppy under Section 30-18-1(E) (defining extreme cruelty to animals as “intentionally or maliciously torturing” or injuring an animal). The jury was instructed that in order to convict Defendant of negligent cruelty to animals, it had to find that “[D]efendant did negligently mistreat a puppy by kicking it in the head and body.” The jury was instructed that criminal negligence is acting “with willful disregard of the rights or safety of others and in a manner which endangered” the puppy. See UJI 14-133 NMRA.

{29} Mother testified that when Defendant was walking around her house, he kicked her puppy in the head because the puppy was looking at him. Mother testified that:

[Defendant] kicked [the puppy], he kicked her once and he walked towards the master bedroom and he kicked her so hard her head was down like this and her tongue was hanging out of her mouth. And, you know, she shook it off the first time and then he came back on his way back into the kitchen, she was looking at him again so he kicked her again and it took her like a little bit longer to snap out of the second kick and he said if she fucking looks at him...

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1 Mother testified that she did not have either a phone or a vehicle.
again, he was going to kill her.
So I had to put her outside.
Defendant argues that the jury may not, on this evidence, convict him of being criminally negligent. We disagree.
{30} The question is not whether the evidence is sufficient to support a conviction for a different charge, but whether the evidence was sufficient to show that Defendant acted with willful disregard for the puppy’s safety. See id. In judging the sufficiency of evidence to support a conviction, “[w]e view the evidence in the light most favorable to supporting the verdict and resolve all conflicts and indulge all permissible inferences in favor of upholding the verdict.” State v. Apodaca, 118 N.M. 762, 765-66, 887 P.2d 756, 759-60 (1994). We then ask whether, in this light, the evidence “could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt.” Id. at 766, 887 P.2d at 760 (internal quotation marks and citations omitted).
{31} Defendant relies on State v. Jacobs, 102 N.M. 801, 701 P.2d 400 (Ct. App. 1985), for the proposition that when the evidence shows intentional conduct, a conviction for criminally negligent conduct cannot stand. This interpretation is too broad. The issue in that case was whether the evidence was sufficient to show negligent arson. Id. at 803, 701 P.2d at 402. We held that there was no evidence of damage to nearby businesses or homes as required by the negligent arson statute, NMSA 1978, § 30-17-5(B) (1970). Jacobs, 102 N.M. at 803, 701 P.2d at 402. We also noted that the evidence in that case showed that the defendant had the specific intent required for intentional arson. Id.; see § 30-17-5(A) (requiring that the fire be started “with the purpose of destroying or damaging any building” or another’s property). General criminal intent, i.e., acting deliberately and intentionally, was not at issue there. See UJI 14-1701 NMRA Committee commentary (stating that the “willful or malicious” mens rea for arson has been equated with “deliberate and intentional or the like”). Here, on the other hand, extreme cruelty to animals does not have a specific intent element. See § 30-18-1(E). The evidence was sufficient here to show that Defendant acted with willful disregard for the puppy’s safety because, as Defendant concedes, he acted intentionally in kicking the puppy.
{32} Defendant appears to argue that all the evidence in this case tended to show that he acted with general criminal intent instead of general criminal negligence. General criminal intent has been defined as acting “intentionally,” which in turn has also been termed acting “purposely.” See UJI 14-141 NMRA; UJI 14-610 NMRA. Criminal negligence, on the other hand, has been equated with recklessness. See Jacobs, 102 N.M. at 803, 701 P.2d at 402. A few jury instructions specific to certain criminal negligence crimes use the phrases “wholly indifferent to the consequences” and “reckless disregard.” See, e.g., UJI 14-1704 NMRA (defining negligence in the context of arson); UJI 14-602 NMRA (defining negligence in the context of criminal child abuse). The jury instruction for general criminal negligence, used in this case, defines criminal negligence and recklessness as acting with “willful disregard of the rights or safety of others.” UJI 14-133. The question then is whether evidence that a defendant acted intentionally, purposely, or deliberately, in harming an animal, is sufficient to establish that the defendant acted with “reckless disregard” for that animal’s safety. For purposes of the animal cruelty statute, we hold that it is.
{33} Most of the case law in New Mexico has been focused on the difference between ordinary civil negligence and criminal negligence. See, e.g., Santillanes v. State, 115 N.M. 215, 218-23, 849 P.2d 358, 361-66 (1993). Here, we are asked to focus on the difference between criminal negligence/recklessness and intentional/purposeful conduct. At least one other jurisdiction has stated that, “[t]he Model Penal Code provides that when recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly.” Simmons v. State, 72 P.3d 803, 813 (Wyo. 2003) (internal quotation marks and citation omitted); see also 1 Wayne R. LaFave, Substantive Criminal Law § 5.4(f) n.40.1 (2d ed. Supp. 2005). Considering the extent to which New Mexico has relied upon the Model Penal Code to frame the distinction before us, we find this reasoning compelling. See, e.g., UJI 14-1704 (Committee comment) (citing the Model Penal Code with approval). “When [recklessness] suffices to establish an element, such element also is established if a person acts purposely or knowingly.” Model Penal Code § 2.02(5) at 226 (Official Draft 1962).
Subsection (5) makes it unnecessary to state in the definition of an offense that the defendant can be convicted if it is proved that he was more culpable than the definition of the offense requires. Thus, if the crime can be committed recklessly, it is no less committed if the actor acted purposely.
Id. explanatory note cmt. at 228; see also Simmons, 72 P.3d at 813-14. We hold that where, as here, Defendant concedes that he acted purposely, i.e. “it is his conscious object to injure an animal, this is sufficient evidence to establish that he had a “willful disregard” for that animal’s safety. See Model Penal Code § 2.02(2)(a)(i) at 225; UJI 14-133.
CONCLUSION
{34} We hold that Defendant’s two counts of battery against a household member along with his two counts of aggravated battery with one count of child abuse were sufficiently distinct to warrant separate convictions. We also hold that the general/specific rule is inapplicable to the statutes at hand and that child abuse under Section 30-6-1(D) is not a specific type of misdemeanor aggravated battery under Section 30-3-5(B). Finally, we hold that there was sufficient evidence for the jury to convict Defendant of negligent cruelty to animals insofar as he acted with a higher mens rea than the statute required. We therefore affirm.
{35} IT IS SO ORDERED.
RODERICK T. KENNEDY, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Chief Judge
JONATHAN B. SUTIN, Judge
Certiiorari Granted, No. 29,476, November 7, 2005

From the New Mexico Court of Appeals

Opinion Number: 2005-NMCA-127

PHILLIP SALAZAR,
Plaintiff-Appellant,
versus
RICHARD TORRES, individually and as owner and operator of
RICHARD L. TORRES CONCRETE COMPANY,
Defendant-Appellee.

No. 23,841 (filed: September 12, 2005)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
ROBERT L. THOMPSON, District Judge

RICHARD J. SHANE
MYRA F. MOLDENHAUER
RILEY, SHANE & HALE, P.A.
Albuquerque, New Mexico
for Appellee

ROD DUNN
Rio Rancho, New Mexico

KERRY MORRIS
MORRIS LAW FIRM
Albuquerque, New Mexico
for Appellant

OPINION

IRA ROBINSON, JUDGE

{1} Phillip Salazar (Worker) appeals from an order of the district court granting the motion for summary judgment of Defendants Richard Torres and Richard L. Torres Concrete Company (together, Employer). The question presented on appeal is whether Worker is precluded from pursuing his common law claims for damages pursuant to Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148 because he has already received workers’ compensation benefits. We hold that receipt of workers’ compensation benefits does not bar Worker’s Delgado claims. Therefore, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

{2} Phillip Salazar was an employee of Richard L. Torres Concrete Company when he was injured. Worker was injured after being instructed by Employer to start a truck by pouring gasoline into the carburetor. While Worker was pouring gasoline into the truck’s carburetor, Employer instructed Employer’s son (Son) to climb into the cab of the truck and start the ignition. Worker was unaware that the truck’s ignition was about to be started. When Son started the ignition, the engine ignited the container of gasoline in Worker’s hand. The resulting fire severely burned Worker.

{3} Following Worker’s injury, he received workers’ compensation benefits from Employer’s insurer and settled his claim for indemnity benefits. Worker then filed a complaint in district court against Employer seeking monetary damages pursuant to Delgado. In his complaint, Worker alleged that, by ordering Son to start the truck while Worker was pouring gasoline into its carburetor, Employer “engage[d] in an intentional act . . . without just cause or excuse” that was virtually certain to cause serious injury to Worker that he “reasonably [should have] expected [would] result in the injury . . . [to] [W]orker,” and that Employer “utterly disregarded the consequences” to Worker. Id. ¶ 26. Employer subsequently filed a motion for summary judgment, arguing that the exclusivity provisions of the Workers’ Compensation Act (Act), NMSA 1978, §§ 52-1-1 to -1-70 (1929, as amended through 2004) preclude Worker from bringing any other actions against Employer for his injuries. Following Worker’s response to Employer’s motion, Employer, for the first time in its reply to the response, contended that Worker’s version of the facts, even if true, would not rise to the level of egregiousness sufficient to support a Delgado claim. The district court granted Employer’s summary judgment motion, but did not explain the reasoning behind its decision. Worker appeals.

STANDARD OF REVIEW

{4} Summary judgment is appropriate where “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” Rule 1-056 NMRA. In this case, neither party argues that genuine issues of material fact exist. Therefore, we “review the disposition of the summary judgment motion[] de novo.” State Farm Mut. Auto. Ins. Co. v. Barker, 2004-NMCA-105, ¶ 4, 136 N.M. 211, 96 P.3d 336. We also review the district court’s decision de novo because it involves a question of statutory construction. See Cerrillos Gravel Prods., Inc. v. Bd. of County Comm’rs, 2004-NMCA-096, ¶ 4, 136 N.M. 247, 96 P.3d 1167.

DISCUSSION

I. WORKERS’ COMPENSATION ACT

{5} “The purpose of the Act is to ‘assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers at a reasonable cost to the employers.’” Morales v. Reynolds, 2004-NMCA-098, ¶ 6, 136 N.M. 280, 97 P.3d 612 (quoting NMSA 1978, § 52-5-1 (1990)). To achieve this objective, the Act strikes a bargain between workers and employers “based on ‘a mutual renunciation of common law rights and defenses by employers and employees alike.’” Delgado, ¶ 12 (quoting § 52-5-1). “The injured worker receives compensation quickly, without having to endure the rigors of litigation or prove fault on behalf of the employer.” Id. In exchange, the employer is assured that the injured worker “will be limited to compensation under the Act and may not pursue the unpredictable damages available outside its boundaries.” Id.

A. Compensation for Accidental Injuries

{6} The Act provides that, with some inapplicable exceptions, each employer in New Mexico “shall become liable to and shall pay to any such worker injured by accident arising out of and in the course of his employment . . . compensation in the manner and amount at the times required in the . . . Act.” NMSA 1978, § 52-1-2. Based on this provision, our Supreme Court has long held that compensation is only available to workers who are accidentally injured; non-accidental injuries are not compensable under the Act. Delgado, 2001-NMSC-034, ¶ 13; see Arambula v. Banner Mining Co., 49 N.M. 253, 263-64, 161 P.2d 867, 873-74

24 BAR BULLETIN - DECEMBER 5, 2005 - VOLUME 44, NO. 48
established that there are circumstances in which an injured worker may pursue remedies outside of the Act for his work-related injuries. An exception to the Act’s exclusivity provisions was first recognized by this Court in Gallegos v. Chastain, 95 N.M. 551, 553, 624 P.2d 60, 62 (Ct. App. 1981), overruled by Delgado, 2001-NMSC-034, ¶ 23. In Gallegos and its progeny, our courts held that a worker was not precluded from seeking relief outside of the Act when his injury was the result of his employer’s “actual intent to injure” him. Id.; see Coleman v. Eddy Potash, Inc., 120 N.M. 645, 905 P.2d 185 (1995); Johnson Controls World Servs., Inc. v. Barnes, 115 N.M. 116, 118, 847 P.2d 761, 763 (Ct. App. 1993).

{10} Subsequently, in Delgado, our Supreme Court overruled the Gallegos “actual intent” test and replaced it with a broader standard. 2001-NMSC-034, ¶ 23. Under Delgado, a worker may pursue remedies outside of the Act if his “employer intentionally inflicts or willfully causes . . . [him] to suffer an injury.” Id. ¶ 24. The Court based its decision on the fact that the Act requires workers and employers to be “held to the same standard of conduct.” Id. Because a worker may not recover for injuries that are the result of his willfulness, the Court held that an “employer may not enjoy the benefits of exclusivity” if the worker was injured due to the employer’s willful act. Id. ¶¶ 21, 24. The Court further held that a worker’s injury is the result of a willful act if “(1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury.” Id. ¶ 26.

{11} In this case, Worker alleges that he was injured because Employer commanded Son to start the ignition of the truck. From Worker’s perspective, the injury was unexpected and, therefore, accidental. Because Worker was accidentally injured while performing a task for his Employer, his injury is clearly compensable under the Act. See Cisneros, 107 N.M. at 791, 765 P.2d 764.

{7} In this case, Worker alleges that he was injured because Employer commanded Son to start the ignition of the truck. From Worker’s perspective, the injury was unexpected and, therefore, accidental. Because Worker was accidentally injured while performing a task for his Employer, his injury is clearly compensable under the Act. See § 52-1-2.

B. Exclusivity of the Act’s Remedies

{8} Because we conclude that the Act required Employer to compensate Worker for his injury, our next inquiry is whether Worker’s receipt of compensation bars him from pursuing his tort claims against Employer. The Act provides that its remedies are exclusive. § 52-1-6(E). By complying with the terms of the Act, each employer and its workers are presumed to have “surrender[ed] . . . their rights to any other method, form or amount of compensation or determination thereof or to any cause of action at law, suit in equity or statutory or common-law right to remedy or proceeding whatever for.” § 52-1-6(D).

{9} Although the Act’s exclusivity provisions are broadly written, our courts have accepted the expedient and certain remedy under the Act, rather than pursuing the slow and uncertain remedy of tort damages. See Jones v. VIP Dev. Co., 472 N.E.2d 1046, 1054 (Ohio 1984) (noting that limiting a worker’s compensation to the benefits available under the Act may encourage intentional misconduct by employers). Moreover, we note that employers may attempt to force the choice upon their workers by initiating the claim for workers’ compensation. See Eldridge v. Circle K Corp., 1997-NMCA-022, ¶ 12, 123 N.M. 145, 934 P.2d 1074; NMSA 1978, § 52-5-5(A) (1993) (stating that “any party may file a claim” for compensation under the Act). We refuse to require workers to confront such a question when, as a result of their injury, their “families may depend for livelihood on the compensation [available] under the Act.” Delgado, 2001-NMSC-034, ¶ 31. Further, “[m]ost seriously injured workers are not in a financial position to wait out a lengthy, expensive and risky court proceeding to be compensated for the injury, due to the problems of pressing medical bills, and often the inability to work.” Jones, 472 N.E.2d at 1054. As a result, “[t]o consider the receipt of benefits a forfeiture of an employee’s right to pursue the employer in the courts would not only be harsh and unjust, it would also frustrate the laudable purposes of the Act.” Id.

{12} In Eldridge, the worker, an employee of Circle K, was shot and killed by a customer. Circle K initiated and filed its own action with the Workers’ Compensation Administration (WCA), requesting a determination of benefits due to worker’s estate. Subsequently, the personal representative of worker’s estate filed a civil action in district court against Circle K, claiming intentional wrongful acts. The Workers’ Compensation Judge denied the personal representative’s motion to dismiss and determined that he had jurisdiction to decide the question whether Circle K’s acts were intentional, or whether worker’s death was accidental. The personal representative appealed.

{13} We held that if a worker claims a cause of action based on deliberate, intentional injury by the employer, “the district court should exercise initial jurisdiction to determine jurisdiction.” Id. ¶ 26. Further, upon claimant’s request, the Workers’ Compensation Judge (WJC) should defer, suspending further action, until the tort claim is finally resolved, including appeal if necessary, so that if the tort action fails, workers’ compensation proceedings could
then move forward. *Id.* We reasoned that since the WCJ presides over an administrative court of limited jurisdiction with restricted opportunities for discovery, limited testimony, and no jury trial, Worker’s ability to prove his claim for intentional wrongful acts may suffer from the restricted workers’ compensation process and his constitutional right to a jury trial may be jeopardized. *Id.* ¶ 24. We added that “[w]e can best achieve the legislative goal by allowing the WCJ to decide claims that clearly fall within the Act [accidents], and shifting to the district court the task, for which it is better equipped, of deciding whether claims have been stated that [are intentional acts that] fall outside the Act.” *Id.* ¶ 29.

{14} In our case, as in Eldridge, Employer initiated the workers’ compensation claim with its insurer. Also, as in Eldridge, Worker’s Delgado claim presents material issues concerning Employer’s subjectivity, and thus the proper forum to determine the issues of willful or intentional misconduct that fall outside the Act is with the district court. Finally, an employee is not required to suspend the workers’ compensation proceeding in order to bring the tort claim because this would be inconsistent with the legislative intent of the Act which is “to assure the quick and efficient delivery of indemnity and medical benefits to injured and disabled workers [for accidental injuries].” § 52-5-1. To illustrate, an injured worker who is injured by the simple negligence of his employer is afforded the quick and efficient delivery of medical care and disability benefits under the Act, but to preclude that worker from any benefits because of his employer’s willful or intentional misconduct would be unjust and illogical. If a worker can pursue a workers’ compensation claim with the WCA after an unsuccessful tort claim, as in Eldridge, then clearly, a worker should be able to receive such benefits initially, and then pursue a tort claim against employer for willful or intentional misconduct thereafter.

“The *quid pro quo* in which the exclusivity provisions have their genesis does not sanction absolving an employer from its own intentional acts. Consequently, when [this Court] confront[s] a case in which the employer has acted intentionally or deliberately, our decisions do not impose the Act’s exclusivity preclusions.” *Martin-Martinez v. 6001, Inc.*, 1998-NMCA-179, ¶ 6, 126 N.M. 319, 968 P.2d 1182.

{15} The dissent expresses concern that “the majority [is] almost entirely engaged in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct,” the employer may pursue a civil action against his employer and also pursue benefits under the Workers’ Compensation Act); *Jones, 472 N.E.2d* at 1054 (holding that an employee injured by his employer’s misconduct may pursue common-law damages and a claim for workers’ compensation).

{16} We disagree with the dissent for two major reasons. First, the balance between the worker and the employer in the Act was designed for accidental events or acts, not willful or intentional acts. Second, it is not the worker who should give up anything when his employer has committed a willful or intentional injury upon him. It is the employer who should be penalized by giving up something because he has violated the bargained-for rules of the game and destroyed the equilibrium of a fair and equal balance. “The Act is designed to provide quick and reliable recovery for injured workers while at the same time protecting society by shifting the burden of caring for injured workers away from society and toward industry.” *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 36, ___, N.M. __, __ P.3d __ (No. 27,950, slip op., Aug. 15, 2005). Further, though it was the legislature’s intention for accidentally-injured employees to receive compensation quickly, certainly the Act cannot be utilized as a shield for the employer’s willful or intentional misconduct because such intentional misconduct was not bargained for by employees and is, therefore, outside the scope of the Act. To allow that would encourage employers to weigh the economic costs of compliance with safety regulations and concerns against the costs of worker’s compensation insurance. In essence, employers would choose the least expensive course of conduct, even if that were to be the intentional injury of an employee. We believe it is good policy for an employer to initiate a worker’s claim for quick and needed assistance. But, such an initiative should not be utilized as a tactic for invoking the exclusivity provisions of the Act and barring the worker from a tort claim.

{17} Therefore, we hold that Worker’s receipt of compensation under the Act does not bar his tort claim against Employer for damages caused by Employer’s intentional or willful conduct. *Accord Gagnard v. Baldridge, 612 So.2d 732, 736 (La. 1993)* (holding that when an employee is injured by his employer’s tortious conduct, his employer owes him damages and compensation under the Act); *Woodson v. Rowland, 407 S.E.2d 222, 228 (N.C. 1991)* (holding that “when an employer intention-
intentionally or willfully injuring workers.” Delgado, 2001-NMSC-034, ¶ 31. Second, “we seriously doubt that employers are willfully injuring their workers with such frequency that the consequence of our decision to” subject such employers to tort liability after they have compensated workers under the Act “will be to ‘wreak havoc’ with the workers’ compensation system.” Id.

II. EMPLOYER’S REMAINING ARGUMENTS

A. Election of Remedies Doctrine

{20} In support of its motion for summary judgment, Employer argued that Worker was barred by the election of remedies doctrine from pursuing his tort claims. On appeal, Employer renews this argument.

{21} The election of remedies doctrine is intended “to prevent vexatious and multiple litigation of causes of action arising out of the same subject matter.” Three Rivers Land Co. v. Maddoux, 98 N.M. 690, 693, 652 P.2d 240, 243 (1982), overruled on other grounds by Universal Life Church v. Coxon, 105 N.M. 57, 58, 728 P.2d 467, 469 (1986). However, the doctrine “has been constantly criticized as harsh and not a favorite of equity.” Id.

{22} Under the election of remedies doctrine, “if a party has two inconsistent existing remedies on his cause of action and makes choice of one, he is precluded from thereafter pursuing the other.” Romero v. J.W. Jones Constr. Co., 98 N.M. 658, 661, 651 P.2d 1302, 1305 (Ct. App. 1982) (internal quotation marks and citation omitted).

Two remedies may be inconsistent for a number of reasons, including that one remedy is based on a theory that “involves the negation or repudiation of another asserted” remedy; “one statutory remedy explicitly precludes another;” or “a double recovery would result.” 25 Am. Jur. 2d Election of Remedies § 20 (2004).

{23} Although Employer fails to explain why it believes that the remedies Worker seeks are inconsistent, the only viable theory of inconsistency is double recovery, i.e., if Worker received his tort damages and his compensation under the Act, he would doubly recover. However, as we have noted above, Worker may not recover twice for the same injury. His tort damages must be offset by his compensation under the Act. See Montoya, 114 N.M. at 357, 838 P.2d at 974. Because Worker may not be doubly compensated for his injury, we hold that his remedies are not inconsistent. See Woodson, 407 S.E.2d at 233 (holding that “[a]llowing an injured worker to pursue both avenues to relief does not run afoul of the goal of the election doctrine, which is to prevent double redress of a single wrong.”). Therefore, the election of remedies doctrine does not apply.

B. Collateral Estoppel and Invited Error

{24} Employer also argues that Worker’s claim is barred by collateral estoppel. Because the WCA entered an order in which it found that Worker’s injury was accidental, Employer argues that Worker is now barred from arguing that his injury was the result of Employer’s willful or intentional conduct. However, as we have discussed above, Employer’s alleged misconduct does not change the fact that Worker’s injury was accidental from his perspective. See e.g., Woodson, 407 S.E.2d at 233 (noting that “[i]t is . . . not inherently inconsistent to assert that an injury caused by the same conduct was both the result of an accident, giving rise to the remedies provided by the Act, and an intentional tort”).

{25} Employer also argues that Worker’s tort claim is barred by invited error. To support this argument, Employer reads Worker’s tort claim as an attack on the jurisdiction of the WCA. We are not persuaded. We fail to see how Worker is arguing that the WCA lacked jurisdiction to hear his claim for workers’ compensation.

C. Accord and Satisfaction

{26} Employer also argues that Worker’s claim is barred because his acceptance of the WCA’s Recommended Resolution constituted an accord and satisfaction of his claims relating to his injury. Employer’s argument is based on its assertion that Worker may not sue in tort if he has already received compensation under the Act. In response, Worker argues that the Recommended Resolution only settled his claims under the Act, not his tort claims. We agree with Worker.

D. Pleadings

{27} Finally, Employer argues that even if true, Worker’s allegations do not satisfy the elements necessary to support a Delgado claim. However, Worker’s complaint tracks the language of Delgado verbatim in so far as alleging the mental state on Employer’s part, and Employer never submitted an affidavit in contesting these allegations. Our law simply requires notice pleading, Schmitz v. Smentowski, 109 N.M. 386, 389-90, 785 P.2d 726, 729-30 (1990), and without any motion for summary judgment supported by Employer’s own affidavit regarding willfulness, we hold that Worker’s allegations tracking the language of Delgado were sufficient to withstand what was tantamount to a motion to dismiss for failure to state a claim.

CONCLUSION

{28} We hold that Worker’s tort claim is not barred by his receipt of compensation under the Act. As a result, we conclude that, on this record, Employer was not entitled to judgment as a matter of law and its motion for summary judgment should have been denied. Therefore, we reverse and remand for proceedings consistent with this opinion.

{29} IT IS SO ORDERED.

IRA ROBINSON, Judge

I CONCUR:

MICHAEL E. VIGIL, Judge

LYNN PICKARD, Judge

(specially concurring in part and dissenting in part)

PICKARD, Judge (specially concurring in part and dissenting in part)

{30} I am unable to concur in the majority opinion’s holding, which permits workers to accept the benefits of the workers’ compensation system and then sue employers in tort. In addition, while I do not disagree with much of what is contained in the majority opinion on the other issues discussed, I write separately because, if this jurisdiction is going to allow employers to fund tort suits against themselves, I believe we would be wise to adopt a special pleading rule such as is present in the majority of states, which is to the effect that the worker’s tort complaint must allege specific facts from which a conclusion can be drawn that the exclusivity bar of the Workers’ Compensation Act is not present.

1. Tort Suit Following Collection of Benefits

{31} As the majority notes, Worker received workers’ compensation benefits, settled his claim for indemnity benefits, and then filed a complaint in district court. Majority Opinion, ¶ 3. In fact, his complaint was filed just days after a mediation conference in which the recommended resolution, ultimately accepted by both parties, was to settle Worker’s claim for permanent partial disability for a lump sum, representing all future benefits except medical expenses, which were left open.

{32} In ruling that Worker may accept compensation and then turn around and sue in tort, the majority follows a number of cases allowing such a procedure. However, there are a number of other cases that do not

{33} There appear to be various formalistic reasons why some cases do not allow tort suits to follow successful claims for compensation. For example, the Medina case held that the doctrine of election of remedies precluded the worker from pursuing the inconsistent remedies of claiming that an event was an accident and at the same time intentional. 927 S.W.2d at 600-02. The Williams case also referred to election of remedies and, in addition, referred to other cases indicating that a worker’s compensation award is res judicata as to the accidental, as opposed to intentional, nature of the worker’s injuries. 695 N.E.2d at 635. I agree with the majority that such formalism is not warranted in determining whether a worker can collect compensation benefits and then sue in tort, and I agree that there is nothing inconsistent in viewing the accidental nature of the injuries from the worker’s perspective while viewing the intent requirement from the employer’s perspective. See Larson’s § 103.02 (explaining that it is not inconsistent to analyze the incident from the perspective of the person having the burden of establishing the affirmative, which would be different for workers than for employers).

{34} To me, the real reason for holding one way or another on the issue at hand, at least in the absence of legislative guidance such as was present in the Gagnard case, 612 So. 2d at 735, should be one’s views of the policy and philosophy behind the Workers’ Compensation Act. Even the seminal Delgado case recognizes that the Act represents a bargain between employers and workers pursuant to which each gives up rights and obligations in return for some other benefit. 2001-NMSC-034, ¶ 12. The Act balances a worker’s need for expeditious payment of benefits and an employer’s need to limit liability. Id. In my view, the majority tips this balance entirely to the side of the worker, contrary to the mandate of NMSA 1978, § 52-5-1 (1990) (providing that the Act is not to be read in favor of one side or the other, workers or employers), by allowing a worker to obtain the expeditious payment of benefits without giving up anything. This was exactly the rationale of the Williams case in rejecting the worker’s argument that the majority in our case has accepted:

We also reject the Williams’ public policy argument. Specifically, the Williams assert:

Even assuming, arguendo, that an employee was familiar with the Worker’s Compensation Act and realized that by agreeing to receive temporary total disability benefits and having had his medical bills paid by his employer’s compensation carrier, he was waiving his right to pursue an intentional tort claim, the employee is presented with the untenable choice of waiving his right to pursue a legitimate intentional tort claim, or being forced to survive with no income and not having his medical bills paid until a court finally resolves the question of whether he may pursue an action in state court.

We disagree that the election of remedies doctrine places an employee in an “untenable position.” The election of remedies doctrine naturally flows from the exclusivity provision of the Act. That provision “is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts.” 6 LARSON’S WORKERS’ COMPENSATION LAW, § 65.20 at 12-1 to 12-12 (1997); see also Baker, 637 N.E.2d at 1274 (“Workers compensation obviates the uncertainty, delay and expense of common law remedies by substituting a fixed compensation according to reimbursement schedules.”). Given the policies served by the Act, we cannot conclude that an injured employee should benefit from the advantages afforded by the Act and still avail himself of a common law remedy.

695 N.E.2d at 636-37.

{35} Further, it is not only the threat of large damage verdicts that employers avoid by participating in the workers’ compensation system. It is also the costs of litigating in district court, which are not insubstantial, even if the case is concluded on summary judgment motions.

{36} Thus, I would rule that a worker who wished to bring a Delgado claim against the employer should have to forego the benefits provided by the Workers’ Compensation Act, just as the workers did in the Delgado case itself (as was established in the record in this case) and in the Eldridge case, 1997-NMCA-022, ¶ 3. If the tort claim fails, then there would be the possibility that the worker might be able to pursue workers’ compensation benefits. See Larson’s § 102.03[1] (indicating that a choice of an unsuccessful remedy is not an election). In such a case, the sentiments on which the majority rely might carry the day.

2. Pleading Requirements

{37} I concur in the portion of the majority opinion holding that without its own affidavit establishing the facts concerning its state of mind, Employer was not entitled to summary judgment. That portion of the opinion is based on existing New Mexico law, and Worker was not on notice that the allegations of his complaint were insufficient. However, if this state is to place itself in the company of those states that allow workers to collect compensation benefits and then sue in tort, I believe that it would be both prudent and most consistent with the balance struck by the Workers’ Compensation Act to require a worker to plead facts showing that the Delgado standard is met.

{38} Our most recent cases of Dominguez and Morales have required a level of egregiousness of employer behavior comparable to that found in Delgado. See Dominguez v. Perovich Props., Inc., 2005-NMCA-050, ¶¶ 7, 21-22, 137 N.M. 401, 111 P.3d 721; Morales, 2004-NMCA-098, ¶¶ 9-14. Larson’s commends courts for being appropriately conservative in limiting exceptions to exclusivity “to the most egregious cases.” Id. §103.04, at 103-34.1. Larson’s, however, goes a step further, and points out the importance of requiring the pleading of facts that would bring the case within the exception to exclusivity such that bare conclusory allegations are insufficient. Id. §103.05. So as not to require employers to litigate in circumstances where a worker cannot establish the requisite Delgado willfulness at the time of the filing of the complaint, I would adopt a pleading requirement in Delgado cases that requires workers to plead sufficient facts demonstrating that the standard is met or be subject to dismissal for failure to state a claim upon which relief can be granted.

LYNN PICKARD, Judge
ETHICS ADVISORY OPINION
FROM THE STATE BAR OF NEW MEXICO’S ETHICS ADVISORY COMMITTEE

ADVISORY OPINION: 2005-03
DATE: November 19, 2005
TOPIC: Ability of lawyer or lawyer’s agent to record telephone interview with witness who has expressed unwillingness to speak “on the record.”

DISCLAIMER: The Ethics Advisory Committee is constituted for the purpose of advising inquiring lawyers on the interpretation of the Rules of Professional Conduct as applied to the inquiring lawyer’s duties. The committee’s opinions are not binding and are intended only to assist lawyers in the course of their conduct.

RULES IMPLICATED: NMRA 16-804(c) prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation

QUESTION PRESENTED
May a lawyer, or someone under the lawyer’s employment or contract, record an interview of a witness, without the witness’ knowledge, when the lawyer believes, through expressions from the witness (e.g., an expression by the witness that the interview is “off the record”), that the witness would either refuse to give a recorded statement or would not give an accurate statement if the witness knew that the statement was being recorded?

SHORT ANSWER
No, under the facts of the inquiry.

FACTUAL AND HISTORICAL BACKGROUND
This opinion is based upon an inquiry from a lawyer requesting an advisory opinion on whether, in light of ABA Formal Opinion 01-422, a recording can be made of a potential witness. The lawyer states that the witness would either refuse to give a recorded statement or would not give an accurate statement if the witness knew that the statement was being recorded. The request is made in a civil dispute setting outside of the context of a prosecutor or other lawyer involved in the criminal justice system.

ANALYSIS
At the outset, the committee recognizes that it has published two formal opinions on secret recordings of conversations (Formal Opinions 1988-6 and 1996-2). Both opinions made reference to ABA Comm. on Ethics and Professional Responsibility Formal Op. 337 (1974), which was withdrawn by the ABA committee in its more recent ABA Formal Opinion 01-422. Both of the committee’s earlier opinions advise that clandestine recordings, except where expressly permitted by rule, are disfavored if not prohibited. ABA Formal Opinion 01-422 indicates the ABA committee’s view that the rule has somehow been relaxed over time, despite the lack of amendment to the rule. However, having considered the applicable rules and the facts presented to the committee, the withdrawal of the older ABA Formal Opinion does not impact this committee’s analysis of the instant request. Nor is this committee presently inclined to withdraw either Formal Opinion 1988-6 or 1996-2. As set forth particularly in Formal Opinion 1996-2, there may be instances where clandestine recording might be permissible. Analysis of the issue is very fact specific. However, the factual background in this instance does not present a situation in which the committee believes a clandestine recording would be permitted.

Being fact specific, the committee’s analysis does not consider the application of rules, statutes or case law with regard to the investigation of criminal matters by prosecutors or others involved in the criminal justice system with regard to which special substantive or procedural provisions regarding secret recordings may apply. Rather, the focus of this opinion is on civil or other non-criminal proceedings and transactional matters, wherein no special rules exist for the practice.

The committee acknowledges, as the committee did in Formal Opinion 1996-2, that under New Mexico law, the recording of a teleconference is not unlawful as long as one of the parties is aware of the recording. However, the inquiry cannot be based solely on what is legal. As the committee noted in Formal Opinion 1996-2:

It does not necessarily follow from the fact that the secret recording of conversations is lawful, that the making of secret recordings by or at the direction of an attorney is ethical. The Rules of Professional Conduct impose high standards of honesty and integrity on lawyers. The opinions of other bar committees dealing with the subject reflect great difficulty in deciding the extent to which otherwise lawful conduct may not be permitted within the scope of ethical rules applicable to lawyers.

The committee also believes that the following questions, set forth in Formal Opinion 1996-2, remain of vital importance as the lawyer considers whether clandestine recording would be permissible:

In considering whether to engage in the secret recording of a conversation with a potential witness, the lawyer is presented with a number of ethical and practical questions. Will the act of recording likely lead to a controversy which could make the lawyer a witness, for example by making the lawyer’s conduct or alleged misconduct an issue. Did the lawyer make any false statement to get the witness to talk? Did the lawyer fail to disclose something obvious, fail to make clear the lawyer’s role or position in the litigation? Is the witness represented by counsel, or likely to be represented by counsel, in connection with the litigation? Did the lawyer do or say anything which might mislead the witness? Did the lawyer’s actions trick or coerce the witness in any way?

In the instant case, the analysis is not so difficult. The lawyer’s conclusion, that the witness would either refuse to be interviewed or tell falsehoods if the witness knew the interview was being recorded, indicates that the witness believes the interview is not being recorded by the lawyer. Rule 16-804 NMRA 2005 provides:

It is professional misconduct for a lawyer to:
... C. engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The committee believes that the misconduct referenced in 16-804(C) includes both acts of commission and omission. Thus, withholding information under certain circumstances may be just as violative of the rule as providing incorrect information.
The lawyer, having reached the conclusion referenced above, would violate Rule 16-804 if the lawyer recorded the interview without the witness’s knowledge of the recording. This is because, having reached that conclusion regarding the witness, the lawyer knows that the witness does not anticipate that the interview will be recorded, but instead believes it will be “off the record.” Having this knowledge, the lawyer is obligated to tell the witness prior to initiating a recorded interview that the interview will be recorded. Otherwise, the secret recording of the conversation deceives the witness, based on the lawyer’s knowledge that the witness would refuse to proceed if the interview were recorded.

Further, the lawyer cannot instruct someone under the lawyer’s control to record the interview in the lawyer’s stead. Rule 16-804(A) NMRA 2005 defines professional misconduct to include “violation[s] [of] the Rules of Professional Conduct … through the acts of another.” This provision forbids a lawyer’s use of third parties, whether employees, contractors or agents, to commit acts that are forbidden to the lawyer.

The committee recognizes that, as a result of complying with Rule 16-804(C), there is the possibility that efforts to obtain information that would be helpful in litigation or other matters may be impeded. However, the prohibitions of Rule 16-804(C) are mandatory and not merely aspirational. The applicable rules of civil procedure, particularly those involving depositions, may provide the more appropriate method of obtaining or compelling testimony.

**CONCLUSION**

The Rules of Professional Conduct preclude the secret recording of a witness interview by a lawyer, or anyone acting under the lawyer’s control, if such a recording would involve deceiving the witness either by commission or omission. Circumstances that would bar such a recording include, but may not be limited to, instances wherein the witness has made any expression that the witness believes the interview is “off the record” or has indicated that, if a recording were made, no interview would be granted. Despite the withdrawal of ABA Formal Opinion 337, the committee believes that the prudent New Mexico lawyer will still be hesitant to record conversations without the other party’s knowledge and must always consider the obligations placed upon a lawyer by the Rules of Professional Conduct. In so doing, the committee does not mean to opine that under no circumstances would the practice be permissible. Rather, the analysis remains a very fact specific one.
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