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2006-NMCA-018, No. 24,662: Daniel Hernandez v. Wells Fargo

Special Insert:
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- Rules of Appellate Procedure;
- Rule Set 17A – Client Protection Fund eff. 12/13/05
- Fully amended Criminal Rules for the United States District Court for the District of New Mexico, eff. 11/1/05
- Uniform Jury Instructions for Civil Cases – including voir dire, juror conduct and lost evidence; and
- Uniform Jury Instructions in Criminal Cases – including amended instructions in criminal sexual acts and new instructions in Insurance cases.

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State agency and local public body subscribers to the New Mexico Rules Annotated will automatically receive supplements. If you have any questions regarding your subscription, please contact the New Mexico Compilation Commission at 505 827-4821
Pro Se Can You See: Navigating the Fog of the Pro Se Litigant
Tuesday, March 7
10 a.m. – Noon
And
1 p.m. – 3 p.m.
State Bar Center
1.0 Ethics and 1.0 Professionalism CLE Credits

Pro Se adversaries present a multitude of ethical challenges for attorneys, only some of which are covered by the Rules of Professional Conduct. The perils of dealing with unrepresented parties are always present, and the usually clear-cut standards of what constitutes fairness to opposing counsel can become blurry indeed. Pro se litigants pose special problems for government attorneys as well.

"Pro Se Can You See" is a two-hour CLE seminar focusing on both the professional rules and the ethical principles that can come into play when your client’s adversary is representing himself or herself. Through the use of challenging interactive hypotheticals and lively discussion, the program will examine both common and uncommon dilemmas, not only identifying relevant rules, but also tools and concepts that can prove invaluable when the rules fail to provide a clear path to the right course of action. This seminar will fulfill one hour of ethics and one hour of professionalism with two hours of stimulating inquiry.

$79

Workplace Privacy
Tuesday, March 7
9 a.m. – Noon
State Bar Center
3.0 General CLE Credits

It is now technically possible for employers to monitor almost every aspect of their employees’ work activities. Video cameras, keystroke loggers, remote control programs, URL logs, software scanners, telephone and voice mail monitoring technology, and email filters are just some of the technologies that employers can use to monitor employee activities. What are these technologies? What are the federal and state laws that restrict employer monitoring of employee activities? What federal and state laws govern employer inquiries into employee personal information pre- and post-hire. What are the competing rights of employers and employees concerning workplace privacy?

$109

Identity Theft
Tuesday, March 7
1 p.m. – 4 p.m.
State Bar Center
3.0 General CLE Credits

There was a time when one’s identity was determined by a set of fingerprints. In today’s world, identities are increasingly defined by information stored on computers, printed on paper, and carried in wallets containing plastic used for financial and other purposes. With that change has come a crisis in which identities are being nabbed in record numbers. What is being done to protect individuals and to bring identity thieves to justice? Join us for this informative seminar on these separate, but inter-related legal hot topics.

$109

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MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

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Authorized Signature ______________
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Meeting:

Professionalism Tip •

With respect to my clients:

I will keep my client informed about the progress of the work for which I have
been engaged or retained, including the costs and fees.

State Bar Workshops

February

22

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

23

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

23

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

23

Lawyer Referral for the Elderly Workshop
1:15 p.m., Meadowlark Senior Center
Rio Rancho

March

10

Lawyer Referral for the Elderly Workshop
1 p.m., Eastern Plains Housing, Clovis

14

Lawyer Referral for the Elderly Workshop
10:30 a.m., Jemez Valley Community Center, Jemez Pueblo

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

COURT NEWS

NM Supreme Court
Board of Legal Specialization
Comments Solicited

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

Appellate Practice
Alice Tomlinson-Lorenz

Legal Specialists Announced

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

Employment and Labor Law
Scott D. Gordon
Sean Olivas

Federal Indian Law
Jana L. Walker

Real Estate Law
Albert T. Ussery

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

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., Feb. 24, at 2905 Rodeo Park East, Building #5, Santa Fe, for the purpose of interviewing judges in the 4th and 8th Judicial Districts.

Law Library

For the convenience of state employees, the judiciary and the general public, the Supreme Court Law Library is open extended hours:

Monday–Friday, 8 a.m.–5:30 p.m.
Saturday, 10 a.m.–3 p.m.
Closed holiday weekends

Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Web site: www.supremecourtlawlibrary.

Second Judicial District Court

Destruction of Exhibits

Pursuant to the Supreme Court Ordered Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy exhibits filed with the Court in the civil cases for the year 1992 included but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning Feb. 2 to April 6. Attorneys who have cases with exhibits should verify exhibit information with the Special Services Division, (505) 841-7596/5452, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

STATE BAR NEWS

15th Annual Summer Law Clerk Program

The State Bar of New Mexico is partnering with major New Mexico law firms and governmental law departments to provide excellent employment opportunities for diverse and deserving law students at the University of New Mexico School of Law. The Summer Law Clerk Program provides law students who have capable research and writing skills with the opportunity to demonstrate the drive and excellence that law firms and agencies value most in making employment decisions.

The State Bar and its participating firms and agencies recognize that differences in the social, educational and economic backgrounds of individual law students can often create barriers to employment that

Thirteenth Judicial District
Civil ADR Program

The 13th Judicial District Court has expanded the Alternative Dispute Resolution (ADR) services to include a new Civil ADR program that joins the existing Magistrate Court, Domestic Relations, and Children’s Court (Abuse and Neglect) mediation programs.

The new Civil ADR program may apply to all civil lawsuits, including domestic and probate cases and will include both traditional mediation and settlement facilitation. Mediation and settlement facilitation services will be provided by attorneys and other ADR professionals with specific subject area knowledge who are then compensated by a flexible party-pay system. Civil cases in which damages sought do not exceed $10,000 are now eligible to have the mediation or facilitation fees paid by the court. In order to support this effort, the 13th Judicial District Court is currently updating the list of mediators and settlement facilitators interested in providing ADR services for the Court. For more information or to request a packet, contact Teresa Berry, director of ADR programs, (505) 235-3525, or tberry@earthlink.net.
have nothing to do with performance or the potential for success as an attorney. The rigorous application and interview process combines a unique learning experience for law students with a unique insight into the qualifications and potential of our applicants.

Working with law firms and agencies that are committed to the ideal of diversified applicant pools, the Summer Law Clerk Program has been bringing down artificial barriers to employment, producing quality law clerks and diversifying attorney applicants for nearly a generation.

Law firms or agencies interested in participating in the 2006 Summer Law Clerk Program should contact Art Jaramillo, ajaramillo@aol.com, by 5 p.m., March 1. Interviews will be held at UNM on March 4.

Address Changes for Bench & Bar Directory

The State Bar staff is updating information for the 2006–07 Bench & Bar Directory. Address changes will be accepted through April 1. Information submitted to the State Bar beyond that date is not guaranteed to be in the new membership directory. To verify attorney information, go to www.nmbar.org, “Attorney/Firm Finder” and search by name. If changes are necessary, submit in writing to Pam Zimmer, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 797-6019; or e-mail to address@nmbar.org.

Attorney Support Group

The next Attorney Support Group meeting will be held at 5:30 p.m., March 6, at 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.

Bankruptcy Law Section

The U.S. Trustee will conduct a second brown bag training session on the Means Test and completion of the Statement of Current Monthly Income form under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA). The brown bag will be conducted at noon, Feb. 24, at the Creditor’s Meeting Room (room 12411) located on the 12th floor of 500 Gold Avenue, SW, Albuquerque. The brown bag will be primarily for those who were unable to attend the first brown bag conducted on Jan. 13, though all are welcome to attend.

Board of Bar Commissioners

Casemaker Free Online Legal Research Coming Soon for New Mexico Lawyers

The State Bar of New Mexico is proud to offer its newest member benefit, Casemaker. Casemaker is online legal research made available to State Bar members at no charge. That’s free legal research.

Casemaker will be available from the State Bar’s Web site at www.nmbar.org with an anticipated launch date of July 2006 as part of the annual meeting in Taos. The library will include most everything needed for the New Mexico lawyer, including federal material. Watch for more information about Casemaker and visit www.casemaker.us. Contact Joe Conte, jconte@nmbar.org, or (505) 797-6099, with questions.

Board of Editors Quarterly Inserts Call for Writers

In response to the results of the 2005 Publication Survey wherein members of the State Bar indicated their needs and desires for a supplemental publication to the Bar Bulletin, the Board of Editors is preparing to publish four special-topic inserts in the Bar Bulletin. The first insert will feature the important U.S. or New Mexico Supreme Court decisions of the last three years, discussing the issues that have had and will continue to have the greatest impact on New Mexico. The board is calling for writers to submit articles on this topic to Dorma Seago, dseago@nmbar.org., by March 31.

The second quarterly insert will feature articles on Realism in Television’s Treatment of the Law. Articles will discuss the impact of popular television law shows on the public’s perceptions and expectations of the legal system and the attorney/client relationship as influenced by television’s fictional portrayals. The board invites interested writers to submit articles on this topic as well.

Topics for the remaining two quarterly inserts have yet to be decided, and the board welcomes suggestions of topics that would interest the membership at large, including suggestions for reviews of current books on legal issues. Submit ideas to Dorma Seago dseago@nmbar.org.

Employment and Labor Law Section

Board Meetings Open to Section Members

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be March 1. (Lunch is not provided). For information about the section, visit the State Bar Web site, www.nmbar.org, or call Carlos Quiñones, section chair, (505) 248-0500.

Health Law Section

Legislative Update on Health Law and Medical Related Bills

The State Bar Health Law Section will hold a luncheon program from 11:45 a.m. to 1:15 p.m., March 16, at the State Bar Center. Barbara C. Quissell and Gabriel M. Parra will present Legislative Update on Health Law and Medical Related Bills. Lunch will be provided free of charge to section members ($8 for non-members). Reservations are required to ensure an adequate number of lunches. R.S.V.P. to membership@nmbar.org or (505) 797-6033 by March 14. CLE credit will not be provided.

Paralegal Division

Monthly Brown Bag CLE for Attorneys and Paralegals

The Paralegal Division invites members of the legal profession to bring a lunch and join their monthly CLE from noon to 1 p.m., March 8, at the State Bar Center. Nancy Sandstrom, Children’s Court TCAA, will present Adoptions in New Mexico. Participants will earn 1.0 general CLE credit. The cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. Registration begins at 11:30 a.m. For more information, contact Cheryl Passalaqua, (505) 872-7470, or Amy Paul, (505) 883-8181.

Prosecutors Section

Annual Meeting

The State Bar Prosecutors Section will hold its annual meeting from noon to 1 p.m., March 29, (lunch provided) at the Sandia Casino and Resort located just east off I-25 at the Tramway Exit. Agenda items should be sent by March 22 to James R.W.
Braun, james.braun@usdoj.gov, or (505) 346-7296. Send an R.S.V.P. for lunch to membership@nmbar.org.

Annual Awards
The State Bar Prosecutors Section is soliciting nominations for awards that the section will present to five prosecutors at the Association of District Attorneys’ 2006 Spring Conference, March 30, at the Sandia Casino and Resort. The five award categories are as follows:

• Prosecutor of the Year: The nominee must have five or more years of full-time prosecution experience. The nomination should address the individual’s outstanding characteristics, prosecution history, work with the public and contributions to the quality of prosecution and the image of prosecutors.

• Law Enforcement Prosecutor: This nomination should address the support and assistance the nominee has provided to law enforcement agencies and his or her commitment of time in assisting law enforcement.

• Community Service Prosecutor: This nomination should address the service the nominee has provided to the community and the results of those efforts; e.g., volunteering at rape crisis centers, nursing homes, youth mentorship organizations, etc.

• Legal Impact Prosecutor: Along with the nominee’s outstanding character, this nomination should address the significant impact that resulted from the nominee’s efforts in criminal prosecution(s) and the significant and positive impact or effect on the law.

• Rookie Prosecutor of the Year: The nominee must have been prosecuting for no more than two years. The nomination should address the nominee’s dedication to criminal prosecution and commitment to making prosecution a career.

Nominations should be submitted by March 1 to James R.W. Braun, c/o U.S. Attorney’s Office, PO Box 607, Albuquerque, NM 87105, or e-mail james.braun@usdoj.gov. The nominees will be presented to a selection committee.

Public Law Section Nominations Sought for Public Lawyer Award
The State Bar Public Law Section is currently accepting public nominations for the ninth annual Public Lawyer of the Year Award, which will be presented on Law Day, May 1. Send nominations by May 1, 2006, to Doug Meiklejohn by e-mail, dmeiklejohn@nmelc.org, or by mail to New Mexico Environmental Law Center, 1405 Luisa St. #5, Santa Fe, NM 87505. The selection committee will consider all nominated candidates and may itself nominate candidates. See the Jan. 23, Vol. 45, No. 4, Bar Bulletin for more details and award criteria.

Solo and Small Firm Practitioners Section
The Solo and Small Firm Practitioners Section will have a brown-bag lunch meeting at noon, Feb. 21, at the State Bar Center. The meeting will include a roundtable discussion on How the Heck do Solo Attorneys Avoid Becoming Isolated? R.S.V.P. by Feb. 17 so that adequate space can be reserved. E-mail Emily Horvat, thorvat@nmbar.org, or call (505) 797-6033. to the rule, the State Bar of New Mexico collects a registration fee of $250 from non-admitted attorneys intending to appear in civil actions before New Mexico courts. The Bar holds these fees in a special fund (the State Bar Pro Hac Vice Fund) which is distributed annually to nonprofit organizations providing or supporting the provision of civil legal services to the poor. The 2006 Grant Application and Guidelines are now available online at www.nmbar.org. The deadline for the 2006 grant application is March 3.

Technology Utilization Committee
Tables: Creative Ways to Think Outside the Box
The Technology Utilization Committee will be holding a free workshop from 5 to 6 p.m., Feb. 23, at the State Bar Center. In this one-hour session, participants will learn how easy it is to use Microsoft Word Tables for creating indexes and various lists to organize all types of data. Paralegals, attorneys and support staff are all invited to attend. The class is limited to 11 attendees. Reservations should be made by Feb. 21 with Mary Patrick, CLE program coordinator, mpatrick@nmbar.org, or (505) 797-6059. CLE credit will not be provided.

Young Lawyers Division 2006 Summer Fellowships
The Young Lawyers Division (YLD) is currently accepting applications for its 2006 Summer Fellowships. Two fellowships will be awarded to two law students who are interested in working in unpaid legal positions in the public interest or government sector during the summer of 2006. The fellowship awards, depending on the circumstances of the position, could be up to $3,000. All documents must be submitted to: J. Brent Moore, YLD Summer Fellowship Coordinator, Office of General Counsel, New Mexico Environment Department, 1190 St. Francis Dr., Suite N-4050, Santa Fe, NM 87501. Applications must be postmarked by March 31. Direct questions to J. Brent Moore, (505) 476-3783. See the Feb. 13, Vol. 45, No. 7, Bar Bulletin for more details and award criteria.

Dismas House Community Service Project
The Young Lawyers Division is seeking volunteer attorneys to provide an evening of training to the residents of Dismas House on the following topics: criminal law, restoration of driver’s license, employment discrimination, landlord-tenant law and family law. Dismas House is a non-profit transitional home that facilitates rehabilitation and provides life skills training to non-violent former inmates returning to society. For more details, contact Briana H. Zamora, YLD director at large, bhzamora@btblaw.com. Volunteers are needed on the following dates: March 15, June 14, Sept. 20 and Dec. 13.

Other Bars
Albuquerque Bar Association
Monthly Luncheon and CLE
The Albuquerque Bar Association’s monthly luncheon will be held at noon, March 7, at the Albuquerque Petroleum Club. The legislative update will be presented by State Senator Cisco McSorley. For an additional fee, the program is eligible for an optional 1.0 general CLE credit. The CLE program, Family Law Update, from 1:30 to
3:45 p.m., will be presented by Gretchen Walther, David Walther and Tom Burrage for 2.0 general CLE credits. Lunch only: $20 members/$25 non-members; lunch with 1.0 general CLE credit: $40 members/$55 non-members; lunch and both CLEs: $80 members/$115 non-members; Family Law CLE only: $40 members/$60 non-members.

Register for lunch by noon, March 6. Lunch is an additional $5 without reservations. Register at www.abqbar.com; by e-mail at abqbar@abqbar.com; or by mail to ABA, 400 Gold SW, Suite 620, Albuquerque 87102; or call (505) 842-1151 or (505) 243-2615.

The Association will collect new or gently used children’s books for the Read to Me Book Drive, sponsored by The Albuquerque Business Education Compact. The goal is to place books in the hands of children in need to encourage reading and participation in the Summer Reading program at their local library. Bring books to the luncheon or deliver them to the Association office at 400 Gold SW, Suite 620, Albuquerque.

**Pictorial Register**

The Albuquerque Bar Association’s Pictorial Register is now available. Pre-ordered directories are being delivered. Anyone who ordered a directory and did not receive one should call (505) 842-1151 or e-mail abqbar@abqbar.com. Additional directories may be purchased for $20 (plus $2 for mailing). To order a copy:

2. E-mail abqbar@abqbar.com.
3. Call (505) 243-2615 or 842-1151.
4. Fax to (505) 842-0287.
5. By mail, 400 Gold SW, Suite 620, Albuquerque, NM 87102

**OTHER NEWS**

**NM Workers’ Compensation Administration Notice to Attorneys**

The New Mexico Workers’ Compensation Administration will be destroying all exhibits and depositions filed in causes closed in 2003 (excluding causes on appeal). The exhibits and depositions are stored at 2410 Centre Ave SE, Albuquerque. For further information, contact Clerk of the Court Alex Maestas, (505) 841-6843, or (800) 255-7965. Exhibits and depositions not claimed by Feb. 28 will be destroyed.

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**MCLE** – mcle@nmbar.org or www.nmmcle.org

**2005 MCLE Annual Compliance Reports will be sent to active licensed NM attorneys at the end of February. Did you complete your 2005 credit requirements?**

**Yes** - The Annual Report will indicate you completed the required 15 credits in 2005.

**No, Help!** - The Annual Report will indicate your status as non-compliant, and you will be subject to the $100 late compliance sanction. Access www.nmmcle.org for approved courses, access www.nmbar.org for upcoming CLE courses, and look in your weekly Bar Bulletin for approved courses. Please remember that 2005 deficits can only be completed via approved live seminars or live teleconferences, no online or DVD self-study programs.

**I’m not sure** - Access www.nmmcle.org to view your credits earned, contact MCLE at mcle@nmbar.org or (505) 797-6015.

**MCLE Rule Changes for 2006**

Effective January 1, 2006 every active licensed New Mexico attorney shall complete twelve (12) hours of continuing legal education during each compliance year. One (1) hour (credit) of continuing legal education is equivalent to sixty (60) minutes of instruction.

Of the (12) credits of approved continuing legal education, at least one (1) credit must be ethics and only one (1) credit must be professionalism.

**Self-Study:** No more than four (4) credits may be given during one (1) compliance year for self-study activities. Self-study credits may be applied only to the continuing legal education requirements for the year in which they are earned, and may not be carried over to subsequent year requirements or backward to prior year requirements.

Access www.nmmcle.org for more information regarding the 2006 rule changes.

**LEGAL SPECIALIZATION** – ls@nmbar.org or (505) 797-6057

Updated Specialty Area Standards and Applications are now available on the web. Go to www.nmbar.org, Other Bars/Legal Groups. The standards reflect the changes of the MCLE Rules and other concerns of the Specialty Area Committees and Board of Legal Specialization.

Find a Board Certified Specialist

A list of board certified specialists can be found in the bench and bar directory behind the Court Regulated Programs tab, on the LS subsite, and by searching for specialists in the Attorney/Firm finder section of www.nmbar.org.

**Welcome new board members Catherine Oliver, Board Certified Specialist in Family Law, and Monica Ontiveros, Board of Bar Commissiones Liaison.**

Access www.nmbar.org, Other Bars/Legal Groups, for additional information regarding the Legal Specialization program.
CALL FOR NOMINATIONS

STATE BAR OF NEW MEXICO
2006 ANNUAL AWARDS

Nominations are being accepted for the 2006 annual awards to recognize those who have distinguished themselves or who have made exemplary contributions to the State Bar or legal profession in 2005 or 2006. Awards will be presented at the 2006 Annual Meeting, July 21–22, at the Taos Convention Center in Taos.

A letter of nomination for each nominee should be sent to: Joe Conte, Executive Director, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; faxed to (505) 828-3765 or e-mailed to sbnm@nmbar.org.

Deadline for nomination submissions is March 31.

Consideration should be given to the following award descriptions and criteria when submitting nominations. (Previous recipients for the past five years are listed below, unless otherwise noted.)

1. Professionalism Award: This award is given to one or more attorneys or judges who, over long and distinguished legal careers, have, by their ethical and personal conduct, exemplified for their fellow attorneys, the epitome of professionalism. This award is limited to one per year, with the exception of an additional posthumous award. Nominations will be reviewed by the Commission on Professionalism to be recommended to the Board of Bar Commissioners for selection. Previous recipients: John G. Baugh; Lawrence M. Pickett; Lowell Stout; Toby Grossman; Joseph P. Paone; William S. Dixon; Richard L. Gerding; Paul A. Kastler; Neil P. Mertz; Betty Reed; and Felix Briones Jr.

2. Seth D. Montgomery Distinguished Judicial Service Award: This award is given to judges who have distinguished themselves through long and exemplary service on the bench. The award is generally given to judges who have or soon will be retiring and is not necessarily an annual award. This award is limited to one per year, with the exception of an additional posthumous award. Previous recipients: Frank H. Allen, Jr.; Gene E. Franchini; Joseph F. Baca; and Rudy S. Apodaca.

3. Outstanding Judicial Service Award: This award is given to judges whose recent activities have significantly advanced the administration of justice or improved the relations between the bench and the bar. This award is limited to one per year, and is not necessarily given annually. Previous recipients: John W. Pope; Grace B. Duran; Anne Kass; Lynn Pickard; Geraldine E. Rivera; Albert S. Murdoch; and Neil P. Mertz.

4. Courageous Advocacy Award: This award is given to one or more members of the bar who have distinguished themselves, during their legal careers, by courageous advocacy of unpopular causes, often without compensation and without concern for the impact of such advocacy upon their own practice. This award is not necessarily given annually. Previous recipients: David S. Campbell; Randolph H. Barnhouse; and Carmen E. Garza.

5. Robert H. LaFollette Pro Bono Award: This award is presented to an attorney who has made an exemplary contribution of time and effort, without compensation, to provide legal assistance to people who could not afford the assistance of an attorney. It is intended to reflect such contribution over an attorney's career, rather than during the past year. This award is not necessarily given annually. Previous recipients: Steve H. Mazer; Sage and Burks, PC; Albert W. Schimmel, III; Nicholas T. Leger; Cristen Conley; and Barbara V. Johnson.

6. Distinguished Bar Service Award - Lawyer: This award is given to attorneys who have given long and valuable service to the State Bar of New Mexico over a significant period of time. It is intended to recognize long-term commitment to bar services and significant contributions to the legal profession. This award is not necessarily given annually. Previous recipients: Briggs F. Cheney; Russell D. Mann; Michael T. Murphy; Joyce Stowers; James R. Crouch; Robert J. Desiderio; Jan B. Gilman-Tepper; Raymond Hamilton; Henry F. Narvaez; and Presiliano A. Torrez.

7. Distinguished Bar Service Award - Nonlawyer: This award is given to one or more nonlawyers who, over a period of time, have served or assisted the legal profession of the State Bar of New Mexico in a significant way. This award is not necessarily given annually. Previous recipients: Kay L. Homan; Michelle Giger; Edwina Logan Hambor; Carol Herrera; Louise Kodituwakku; Garry Spencer; and Harold Daum.
8. Outstanding Contribution Award: This award is given annually to those members of the bar who have made outstanding and extraordinary contributions of their time and talents to Bar activities during the past year. Previous recipients (for last three years): 2004 - Leigh Anne Chavez; Rosemary Maestas-Swazo; 2003 - Daniel J. Behles; Michael F. Hacker; Ronald E. Holmes; Thomas J. “Budd” Mucci; and Jason Neal. 2002 - Roger Eaton; Jeffrey L. Lowry; Gary O’Dowd; Peter H. Pierotti; Robert E. Sabin; Barbara L. Shapiro; Sarah M. Singleton; Alan M. Varela; Elizabeth S. Vencill; Mitchell L. Winick; and Geno Zamora.

9. Outstanding Local Bar Award: This award is given to one or more local bar associations that have had the most outstanding programs and activities for their members and for the public at large. This award is not necessarily given annually. Previous recipients: Sandoval County Bar; San Juan County Bar; Colfax-Union County Bar; Curry-Roosevelt County Bar; Chaves County Bar; and Lea County Bar.

10. Outstanding Program Award: This award is given to recognize programs of the bar that serve the mission of being a united, inclusive organization serving the legal profession and the public. This award is not necessarily given annually. Previous recipients: New Mexico Hispanic Bar Scholarship Program; Lawyers’ Assistance Program; Consumer Debt Workshops; Consumer Attorney Assistance Program (CAAP); Cross-Cultural Exchange Project; Lawyers Care Referral Program; Southwest Bench and Bar Conference; and Summer Law Clerk Program.

11. Outstanding Section/Committee Award (New Award created in 2005): This award is intended to recognize a State Bar section or committee that has made outstanding or extraordinary contributions to State Bar activities, programs or the legal profession during the past year. Previous recipients: Bankruptcy Law Section.

12. Pioneer Award: This award is presented to an attorney who has, on his/her own initiative and through considerable creativity, made an exemplary contribution to the State Bar in an area considered to be new, relatively unexplored and of considerable interest and benefit to members of the bar. This award is not necessarily given annually. Previous recipients: Arturo L. Jaramillo; Stephen E. Doerr; Justice Gene E. Franchini; John M. Greacen; and Rex D. Throckmorton.

13. Outstanding Young Lawyer of the Year Award: This award is given to one or more attorneys who have during the formative stages of their legal careers by their ethical and personal conduct exemplified for their fellow attorneys the epitome of professionalism. In addition to a commitment to clients’ causes, this attorney has demonstrated a commitment to public service and in so doing has enhanced the image of the legal profession in the eyes of the public. To qualify for this award, an attorney must have practiced no more than five years or must be no more than 36 years of age. Previous recipients: Morris J. “Mo” Chavez; Brian S. Colón; Roxanna M. Chacon; H. Nicole Schamban; and Trent A. Howell.

14. Outstanding Contribution to People with Disabilities Award: This award is intended to recognize and honor exceptional achievements and contributions to further promote and protect the rights of people with disabilities. It is intended to acknowledge contributions to furthering the rights, dignity, and access to justice for people with disabilities. This award is not necessarily given annually. Nominations will be reviewed by the Committee for the Delivery of Legal Services to People with Disabilities to be recommended to the Board of Bar Commissioners for selection. Previous recipients: Tara C. Ford; Rita Nuñez Neumann; Albert T. Gonzales, Sr.; Ann T. Sims; Peter M. Cubra; V. Colleen Miller; and Therese E. Yanan.

15. Quality of Life - Legal Employer Award: This award is intended to honor and recognize legal employers who have demonstrated exemplary commitment in supporting programs designed to enhance the quality of life for employees. The employer must show a commitment to the quality of life of the individuals employed there through programs, activities, office policies or other means. Nominations will be reviewed by the Standing Committee on Quality of Life to be recommended to the Board of Bar Commissioners for selection. This award is not necessarily given annually. Previous recipients: Aguilar Law Offices, PC; New Mexico Environmental Law Center; Swaim, Schrandt & Davidson, PC; New Mexico Court of Appeals; and Daniel J. O’Brien.

16. Quality of Life - Lawyer Award: This award is intended to recognize an attorney who demonstrates exemplary commitment to and value of an overall balance/quality of life. It is intended to honor and publicly recognize an attorney who demonstrates to colleagues, family and friends that he/she consistently works to improve quality of life, and has an ongoing commitment to personal and professional fulfillment. Nominations will be reviewed by the Standing Committee on Quality of Life to be recommended to the Board of Bar Commissioners for selection. This award is not necessarily given annually. Previous recipients: Susan E. Page; Wayne E. Bingham; Charles W. Daniels; Philip B. Davis; and JoAnn S. Jaramillo.
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Attorney Raymond Mensack of Albuquerque is the new general counsel for the Bernalillo County Metropolitan Court. Mensack, who has extensive legal experience in litigation, corporate and securities law and Internet law, began his new position in early January. He graduated from the University of Pennsylvania Law School with a juris doctorate in 1994. After a clerkship for the Pennsylvania Appellate Court, he worked for Drinker, Biddle and Reath in Philadelphia. He also worked for the firm of Bingham, Dana and Gould in Boston and New York. Mensack came to New Mexico in 2002 and became a litigator for Little and Dranttel, PC, a firm specializing in contract and business law. He likes to run with his dog, Tipper, ride his Harley or play serious golf. He is also an aspiring novelist, with two drafts in the works.

Joshua Asher Sutin has been selected by Texas Monthly magazine as one of the state’s 2005 Rising Stars. To qualify, the lawyer must have been practicing law for 10 years or less or be age 40 or younger. Sutin, the son of New Mexico Court of Appeals Judge Jonathan B. Sutin, is one of five members of that family to graduate from the UNM School of Law. Sutin, whose specialization is taxation, is with Cox, Smith, Matthews, Inc., a San Antonio, Texas, law firm. He has been practicing law for eight years.

Gene Henley has been named a deputy court administrator with the Bernalillo County Metropolitan Court. Henley, 48, will oversee the court’s fiscal services, facilities management, purchasing and information technology operations. Henley served five years as the deputy director of the National Hispano Cultural Center. He was also employed previously as deputy superintendent at the New Mexico State Department of Regulation and Licensing in Santa Fe. With over 10 years’ experience in New Mexico state government, Henley has a B.B.A. and M.B.A. in finance and administration.

Patrick A. Casey of the firm of Patrick A. Casey, PA, has become a Fellow of the American College of Trial Lawyers. Founded in 1950, the college is composed of the best of the trial bar from the United States and Canada. After careful investigation, fellowship is extended by invitation only to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Casey is an alumnus of the University of Arizona School of Law. He is a past president of the New Mexico Trial Lawyers Association, the Western Trial Lawyers Association and the 1st Judicial District Association.

Patrick L. McDaniel, an attorney and shareholder practicing divorce and family law with Atkinson & Kelsey, PA, has published, “Civil Domestic Violence Litigation,” in the November–December 2005 issue of The New Mexico Trial Lawyer magazine. McDaniel is a Diplomate of the American Trial Advocacy Institute, member and past chair of the American Bar Association’s Marital Torts Committee/Family Law Section and a member of the ABA’s Elder Law and Trial Practice Techniques committees. He also serves on the Board of Samaritan Counseling Center and is The New Mexico Trial Lawyer’s domestic relations editor. Before becoming an attorney, McDaniel pursued a career as an educator and an educational consultant. He served on national committees to address school dropout issues, including committees under the auspices of the Ford Foundation and the Council of Great City Schools. He also served as the national president of the National Association for Year-Round Education, and during his tenure won an award from the Albuquerque Human Rights Council for work as a consultant on educational equity. In addition, he earned national recognition from the American Educational Research Association for his educational research.

Stuart R. Butzier of the Modrall Sperling law firm has been reappointed by the State Bar Board of Commissioners as a trustee to the Rocky Mountain Mineral Law Foundation for a three-year term. Organized in 1955, the Rocky Mountain Mineral Law Foundation is an educational organization dedicated to providing scholarly research on the laws and issues affecting domestic and international mineral and water resources. Butzier has served in a number of capacities, including mining co-chair of the foundation’s 52nd Annual Institute to be held in July in Santa Fe, planning committee chair of the Uranium Special Institute to be held in April, and New Mexico reporter for the foundation’s mineral law newsletter. At Modrall Sperling, Butzier concentrates his practice in natural resources, environmental and public lands law. He is a member of the firm’s natural resources and environment department and chairs the mining practice group.

Ethan Epstein of the Modrall Sperling law firm has been elected to membership in the New Mexico Amigos, official goodwill ambassadors for the State of New Mexico. The Amigos are noted for their annual goodwill flights, for which they charter an aircraft and make trips to other states, Canada and Mexico to focus attention on New Mexico. The governor of New Mexico accompanies the Amigos on these goodwill flights, and in each city visited, the Amigos exchange ideas with local groups and prominent citizens. In addition to the goodwill flights, the Amigos also act as hosts for important groups visiting the state and support the programs of other organizations acting in the interest of New Mexico. Epstein practices in Modrall Sperling’s transactions department, focusing primarily on federal tax planning, federal tax litigation and probate litigation.

Judge John Pope received the Citizen of the Year Award from the Valencia County Hispano Chamber of Commerce.
IN MEMORIAM

Keith Farnam Quail of Prescott, Arizona, died Oct. 6 on his 92nd birthday. He is survived by his wife Geri, two daughters, Sandra Nitsche and Barbara Malone, eight grandchildren and three great-grandchildren.

Quail served in the jungles of Burma in WWII where he trained mortar crews who later became known as Merrill’s Marauders. He was awarded a bronze star. He graduated from Washburn University in Topeka in 1937 and served as law clerk to the presiding judge of the U.S. 10th Circuit Court of Appeals, to a justice of the Kansas Supreme Court and to Chief Judge Sam Bratton of the U.S. 10th Circuit Court of Appeals. He was a tax attorney for the New Mexico Bureau of Revenue and also maintained the law firm of Favour and Quail in Prescott from 1947 to 1999. He was president of the Yavapai County Bar, served on the board of directors of the Arizona State Bar and was president from 1956–1957. He was also state chairman of the American Trial Lawyers Association and a fellow-ship member of the International Society of Barristers. He enjoyed team roping and was president and life member of the Yavapai Cattle Grower’s Association. He was also an avid pilot. He devoted much of his time to civic affairs. He was a member of the board of directors and vice-president of the Yavapai College Foundation, captain of the Yavapai Mounted Sheriff’s Posse, president of White Mountain Range Riders, legal counsel for the Foundation of the First Congregational Church Foundation and a substantial financial contributor to various charitable organizations.

“He was probably the very best lawyer Prescott has ever seen, from its territorial days to way into the future. He was recognized by every trial lawyer’s association in the country as one of the best of the best. Keith was a lawyer’s lawyer,” said Mike Murphy of the firm of Murphy, Lutey, Schmitt and Fuchs. Quail shared an office with the firm for 10 years after he retired from Favour and Quail.

Baudelio “Bobby” Ramirez, a former municipal judge and Chaves County flood commissioner, died from complications of a stroke. He was 64. His wife, Maria, said Ramirez had relatives at his side when he died Jan. 25.

Shapiro and Bettinger LLP is honored to announce that Greg Chase will join the law firm as a partner. The new name for the firm will be Shapiro Bettinger Chase LLP. Greg has 26 years of experience in civil litigation, including personal injury, wrongful death, products liability, premises liability and professional malpractice claims. Since 1980, he has tried over 50 civil jury trials and over 25 non-jury trials in state and federal courts all over New Mexico.

Immediately after graduating from law school, Chase moved to Albuquerque and spent over two years working as an assistant public defender. In 1993, the New Mexico Supreme Court appointed him to serve on the Disciplinary Board, where he volunteered from 1993 to 1998, acting as vice-chair from 1997 to 1998. He continued to act as a reviewing officer, a hearing officer and assistant Bar counsel. He currently serves as an adjunct faculty member at the UNM School of Law, where he teaches trial practice. In 2005, he was inducted into the American College of Trial Lawyers. Chase has been listed in the Best Lawyers in America since 2001.

Chase will join partners Daniel Shapiro, Carl Bettinger and associate Kallie Dixon.

Ann Yalman has been appointed a municipal court judge by the City of Santa Fe City Council. She will serve until 2008, completing the remainder of former Municipal Judge Frances Gallegos’ term. Yalman has nearly 30 years’ experience as an attorney and a probate and federal magistrate judge.

Bob Armstrong and the entire Armstrong family were honored by the Historical Society and Foundation for Southeast New Mexico at its 224th annual Heritage Award Dinner. The Armstrong family has been involved in the Roswell community for five generations as farmers, ranchers, engineers, attorneys and developers in the oil and gas industry. Bob Armstrong graduated from NMMI and Washington and Lee University in Lexington. He received his juris doctorate form the University of Texas Law school and practiced law in Roswell.
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NO. 29,641 Fallis v. Blair (12-501) 1/26/06
NO. 29,640 Jacobs v. Ulibarri (12-501) 1/26/06
NO. 29,639 State v. Howard (COA 26,074) 1/25/06
NO. 29,636 State v. Catt (COA 25,894) 1/23/06
NO. 29,635 State v. Trambley (COA 25,909) 1/23/06
NO. 29,634 State v. Garcia (COA 24,941) 1/19/06
NO. 29,599 State v. Dubois (COA 24,607) 1/19/06
NO. 29,632 State v. Collins (COA 26,012) 1/17/06
NO. 29,591 State v. Christa S. (COA 25,949) 1/17/06
NO. 29,626 Muniz v. Janecka (12-501) 1/12/06
Response due 3/13/06
NO. 29,620 State v. Parsons (COA 25,737) 1/6/06
Response due 2/4/06
NO. 29,609 State v. Fritz (COA 24,358) 12/29/05
Response due 12/30/05
NO. 29,598 Krieger v. Wilson (COA 24,421/24,497) 12/20/05
Response filed 2/9/06
NO. 29,569 State v. Watkins (COA 26,052) 12/2/05
Response filed 2/6/06

CERTIORARI GRANTED but not yet Submitted to the Court:

(Parties preparing briefs) 

Date Writ Issued

NO. 28,995 State v. Salomon (COA 24,986) 1/14/05
NO. 28,954 State v. Schoonmaker (COA 23,927) 1/21/05
NO. 29,105 State v. Cook (COA 25,137) 3/22/05
NO. 29,144 State v. Bounds (COA 25,131) 4/26/05
NO. 29,151 State v. Bounds (COA 25,131) 4/26/05
NO. 29,153 State v. Armijo (COA 24,951) 4/26/05
NO. 29,174 State v. Vincent (COA 23,832) 5/20/05
NO. 29,213 State v. Evans (COA 25,332) 6/8/05
NO. 29,203 Hassler v. Affiliated Foods (COA 25,093) 6/13/05
NO. 29,223 State v. Ransom (COA 25,171) 6/13/05
NO. 29,286 State v. Guiterrez (COA 25,279) 7/11/05
NO. 29,218 Montoya v. Ulibarri (12-501) 7/15/05
NO. 29,257 State v. Kirtich (COA 24,845) 8/1/05
NO. 29,334 State v. Garvin (COA 24,299) 8/5/05
NO. 29,340 State v. Fielder (COA 24,190) 8/12/05
NO. 29,336 State v. Kerby (COA 24,350) 8/12/05
NO. 29,373 State v. Martinez (COA 25,376) 8/26/05
NO. 29,411 State v. McClure (COA 25,436) 9/23/05
NO. 29,436 Martinez v. Mills (COA 24,673) 9/23/05

Certiorari Granted and Submitted to the Court:

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

Submission Date

NO. 28,426 Sam v. Estate of Sam (COA 23,288) 9/13/04
NO. 28,471 State v. Brown (COA 23,610) 9/15/04
NO. 28,628 Herrington v. State Engineer (COA 23,871) 11/16/04
NO. 28,500 Manning v. New Mexico Energy & Minerals (COA 23,396) 1/12/04
NO. 28,410 State v. Romero (COA 22,836) 2/14/05
NO. 28,688 State v. Gutierrez (COA 24,731) 2/14/05
NO. 28,660 State v. Johnson (COA 23,463) 3/11/05
NO. 28,816 Romero v. City of Santa Fe (COA 24,775) 5/9/05
NO. 28,894 Deflon v. Sawyers (COA 23,013) 6/18/05
NO. 28,823 Payne v. Hall (COA 22,435) 6/13/05
NO. 28,997 Maestas v. Zager (COA 24,200) 6/14/05
NO. 28,983 Callahan v. New Mexico (COA 23,645) 8/16/05
NO. 28,058 Sanchez v. Pellicer (COA 25,082) 9/29/05
NO. 29,016 State v. jalillo (COA 23,810) 10/11/05
NO. 29,017 State v. jalillo (COA 23,810) 10/11/05
NO. 29,042 State v. Frank G. (COA 23,967) 10/11/05
NO. 29,018 State v. Pamela G. (COA 23,967) 10/11/05
NO. 29,157 State v. Romero (COA 24,390) 11/14/05
NO. 29,134 State v. Kathleen D.C. (COA 24,540) 11/14/05
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 February 20, 2006

Writs of Certiorari

NO. 29,190 Aguilera v. Board of Education (COA 23,895) 11/14/05
NO. 29,202 Montgomery v. Lomos Altos (COA 24,297) 11/16/05
NO. 29,196 Grine v. Peabody (COA 24,354) 11/16/05
NO. 29,226 Upton v. Clovis (COA 24,051) 12/12/05
NO. 29,246 Chavarria v. Fleetwood (COA 23,874/24,444) 12/12/05
NO. 29,178 State v. Maestas (COA 24,507) 12/13/05
NO. 28,950 State v. Nyce (COA 25,075) 12/13/05
NO. 29,160 Benavidez v. City of Gallup (COA 25,373) 12/13/05
NO. 29,332 Flores v. Clovis College (COA 25,627) 2/13/06
NO. 29,158 State v. Otto (COA 23,280) 2/13/06
NO. 29,272 US Xpress v. State (COA 24,702) 2/14/06
NO. 29,275 Moffat v. Branch (COA 24,307) 2/15/06
NO. 29,385 State Farm v. Luebbers (COA 23,556) 2/15/06
NO. 29,232 Reyes v. State (12-501) 2/15/06
NO. 29,435 State v. Duhon (COA 24,222) 2/27/06
NO. 28,867 State v. Rodriguez (COA 23,455) 2/27/06
NO. 29,410 State v. Ten Gaming Devices (COA 24,479) 2/27/06
NO. 29,258 State v. Hunter (COA 24,166) 3/13/06
NO. 28,917 State v. Ponce (COA 23,913) 3/13/06
NO. 29,128 State v. Stephen F. (COA 24,007) 3/14/06
NO. 29,179 State v. Taylor (COA 23,477) 3/15/06
NO. 29,325 Jacobo v. City of Albuquerque (COA 24,459/24,256) 3/15/06
NO. 29,323 Jacobo v. City of Albuquerque (COA 24,459/24,256) 3/15/06
NO. 29,362 State v. Romero (COA 25,164) 3/27/06
NO. 29,350 Doe v. Santa Clara Pueblo (COA 25,125) 3/27/06
NO. 29,351 Lopez v. San Felipe Pueblo (COA 25,884) 3/27/06
NO. 29,344 State v. Hughey (COA 24,732) 3/27/06
NO. 29,244 State v. Atton (COA 25,274) 3/27/06
NO. 29,320 State v. Quihuis (COA 24,296) 3/27/06
NO. 29,361 State v. McDonald (COA 24,559) 3/27/06

Petition for Writ of Certiorari Denied:

NO. 29,606 Nationsbank v. Showalter (COA 25,105) 2/8/06
NO. 29,619 State v. Prichard (COA 25,435) 2/8/06
NO. 29,631 State v. Ortiz (COA 26,090) 2/8/06

Writ of Certiorari Quashed:

NO. 29,546 Martin v. Snedeker (12-501) 2/9/06
### Published Opinions

<table>
<thead>
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<th>No.</th>
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<th>Case Title</th>
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<td>24833</td>
<td>2nd Jud Dist Bernalillo CV-03-366</td>
<td>Celnik v. Congregation B’nai Israel (affirm)</td>
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<td>1st Jud Dist Santa Fe CR-01-955</td>
<td>State v. Anthony Romero (remand)</td>
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<td>State v. Alonzo Clemonts (reverse)</td>
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### Unpublished Opinions

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<td>26000</td>
<td>11th Jud Dist San Juan CR-04-1257</td>
<td>State v. Steven Rodman (affirm)</td>
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<td>26103</td>
<td>2nd Jud Dist Bernalillo LR-05-16</td>
<td>State v. Craig Martinez (affirm)</td>
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<tr>
<td>25905</td>
<td>5th Jud Dist Lea CR-04-235</td>
<td>State v. Sophia Carrasco (affirm)</td>
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<td>25969</td>
<td>11th Jud Dist San Juan CR-05-40</td>
<td>State v. Timothy Jefferson (affirm)</td>
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</tr>
<tr>
<td>26062</td>
<td>1st Jud Dist Santa Fe CV-99-250</td>
<td>Tapia v. Department of Public Safety, Darren White, Steve Culberth, Laurie Culberth, Robert Mundy (dismiss)</td>
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<tr>
<td>25477</td>
<td>2nd Jud Dist Bernalillo CV-04-5528</td>
<td>Franco v. City of Albuquerque (affirm)</td>
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<tr>
<td>25269</td>
<td>1st Jud Dist Santa Fe CR-02-910</td>
<td>State v. Edward Santana (affirm)</td>
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<tr>
<td>26153</td>
<td>5th Jud Dist Chaves CR-04-467</td>
<td>State v. Francisco Luevano (affirm)</td>
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<tr>
<td>26215</td>
<td>WCA-05-2690, Perez v. Alamo Apartments, Inc. and WCA Uninsured Employers’ Fund (dismiss)</td>
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<td>26162</td>
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<tr>
<td>26211</td>
<td>2nd Jud Dist Bernalillo DM-04-4637</td>
<td>McNally v. McNally (affirm)</td>
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<tr>
<td>25696</td>
<td>13th Jud Dist Sandoval JQ-03-7</td>
<td>State ex rel. CYFD v. Deborah D. (affirm)</td>
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<td>24340</td>
<td>3rd Jud Dist Dona Ana CV-02-1458</td>
<td>Prime Corporation d/b/a Lorenzo’s Italian Restaurant v. Toby Joy and Shamrock Foods Compay, Inc. (reverse)</td>
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<tr>
<td>26025</td>
<td>13th Jud Dist Cibola CV-02-318</td>
<td>Roybal v. Cibola General Hospital, Karl Gutierrez M.D., Gilbert Gutierrez, M.D., and Gutierrez Medical Group, Inc. (affirm in part, dismiss in part)</td>
<td></td>
<td>2/10/06</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)
Pro Se Can You See: Navigating the Fog of the Pro Se Litigant

Friday, February 24, 2006 • State Bar Center, Albuquerque via Satellite
1:00 - 3:00 p.m. 1.0 Ethics CLE Credit

Also to be broadcast via Satellite at the following locations:
KENW-TV, 52 Broadcast Center, Portales, NM
Milton Hall, NMSU, Las Cruces, NM
(For map and parking pass: http://www.nmsupolice.com/permit/parking.asp)
NMSU – Carlsbad, Room 153, 1500 University Drive, Carlsbad, NM
Santa Fe Community College, Room 216, 6401 Richards Ave., Santa Fe, NM

Co-Sponsor: SBNM Commission on Professionalism  •  Presenter: Jack Marshall, Esq.

Pro Se adversaries present a multitude of ethical challenges for attorneys, only some of which are covered by the Rules of Professional Conduct. The perils of dealing with unrepresented parties are always present, and the usually clear-cut standards of what constitutes fairness to opposing counsel can become blurry indeed. Pro se litigants pose special problems for government attorneys as well.

“Pro Se Can You See” is a two-hour CLE seminar focusing on both the professional rules and the ethical principles that can come into play when your client’s adversary is representing himself or herself. Through the use of challenging interactive hypotheticals and lively discussion, the program will examine both common and uncommon dilemmas, not only identifying relevant rules, but also tools and concepts that can prove invaluable when the rules fail to provide a clear path to the right course of action. This seminar will fulfill one hour of ethics and one hour of professionalism with two hours of stimulating inquiry.

Please Note: No auditors permitted.

CLE on the Road
Las Cruces Video Replays
Branigan Library, 200 E. Picacho

Pro Se Can You See
1.0 Professionalism and
1.0 Ethics CLE Credits
Thursday, March 9
10 a.m. - Noon

Pro Se Can You See
1.0 Professionalism and
1.0 Ethics CLE Credits
Thursday, March 9
1 - 3 p.m.

ATTENTION: Look for an expanded display of American Bar Association publications at our seminars!
**Rocky Mountain Regional Young Lawyers Conference**

**211 Old Santa Fe Trail, Santa Fe, New Mexico 87501**

www.innatloretto.com • 800-727-5531

**Thursday, March 2 - Saturday, March 4, 2006** including 4.0 General and 1.0 Ethics CLE Credits (1.0 Professionalism CLE Credit Optional)

* Hosted by the Young Lawyers Division of the State Bar of New Mexico and Co-Sponsored by the Center for Legal Education of the New Mexico State Bar Foundation and the American Bar Association Young Lawyers Division (AB/YLD)

**Standard Fee $219**

**YLD Member $159**

**PLEASE NOTE:** Hotel accommodations and skiing are not included. For hotel accommodations, call Inn and Spa at Loretto. Ask for special rate for Rocky Mountain Regional Young Lawyers Conference of $106.00. A ski representative will be available for sign-ups at registration on Thursday, March 2, 2006 from 6:00-7:30 p.m. Sign-up on Thursday evening is strongly encouraged due to start time for skiing on Friday.

**NATIONAL TELESEMINARS**

11 a.m. via telephone

**MARCH**

### Structuring, Administering and Defending FLPs

Family Limited Partnerships are among the most popular vehicles for passing businesses and other forms of wealth between generations of family. This program will provide an intermediate-level guidance about structuring and administering FLPs to withstand the scrutiny and possible challenge of the IRS. 1.0 General CLE Credits • $67

**2006 UCC 3 (Negotiable Instruments/ Commercial Paper) Update**

Article 3 of the Uniform Commercial Code governs negotiable instruments/commercial paper – short-term, unsecured loans by corporations and other businesses, typically to finance inventories and accounts receivable. This program will legal developments affecting businesses, including those related to consumer transactions and electronic transactions. 1.0 General CLE Credits • $67

### Employment Taxes: Principles and Techniques in S Corps and LLCs

This program will outline the substantial differences in the application of FICA in the context of S Corps and LLCs, the two most popular choices of entity for small and medium size businesses. The program will devote significant attention to the planning opportunities and techniques for minimizing the incidence of FICA tax on owner-employees. 1.0 General CLE Credits • $67

**APRIL**

### Letters of Credit: Use in Business and Commercial Transactions

Letters of credit are third party payment mechanisms that are used to facilitate efficient payment in commercial transactions. This program will review the various uses, requirements, and parties involved in the use of letters of credit, including a review of applicable provisions under UCC Article 5. 1.0 General CLE Credits • $67

### Allocating the Economic Interests of LLC Members, Parts 1 & 2

This timely, advanced program discusses the most current and important issues in employee benefits law and practice. Included will be discussion of any recently enacted legislation and recent regulatory, case law, and other developments affecting employee benefits. Those attending benefit from the insight of practitioners who have nationally recognized expertise and Federal Government officials who are involved in formulating policy and regulations in the topic areas. 3.6 General CLE Credits • $199 Standard

### 2006 Estate Planning Valuation Update

So much of the success of an estate plan depends on obtaining a certain valuation. This program will review recent developments in valuing property interests and businesses for purposes of estate planning, and trends in valuation, including case law developments. 1.0 General CLE Credits • $67

### Limited Liability Entities - 2006

This fourteenth annual update will include a look at recent developments in compensating service providers, new trends in the treatment of LLEs under bankruptcy, drafting issues such as the impact on duties of the selection of a centralized or de-centralized management structure, and some other new directions in LLCs. 3.6 General CLE Credits • $199 Standard

### Annual Spring Employee Benefits Law and Practice Update

This timely, advanced program discusses the most current update on the statutes, regulations, and cases governing employer-sponsored health plans. This presentation offers a framework for understanding ERISA, HIPAA, COBRA, and tax law aspects of health plans and their administration. Any new legislation, regulations, and recent case law in this area will be discussed. 3.6 General CLE Credits • $199 Standard
The Third Annual Elder Law seminar will focus on current medical and legal issues designed to help attorneys and their elder clients. Included will be details of resuscitation and intubation, ramifications from the Terri Schiavo case, effect of the new federal statute and rules on the prescription needs of the elderly, approaches that can be taken when clients show symptoms of incompetency, and a look at case decisions involving elder issues by a judge from the second judicial district.

### Introduction

**1:00 p.m.**

**Introductory Remarks**

**3:10 p.m.**

**Break**

**Dr. Peter Petracek, M.D., Professor of Medicine, University of New Mexico Medical School**

**3:25 p.m.**

**In the Wake of Terri Schiavo: Effects and Ramifications**

**Prof. Ruth L. Barch, The University of New Mexico School of Law**

**4:15 p.m.**

**Proceedings for the Elderly**

**Hon. Clay P. Campbell, 2nd Judicial District**

**5:00 p.m.**

**Adjourn and Reception (State Bar Center)**

**Mary Smith, Elder Law Section**

**5:00 p.m.**

**Adjourn and Reception (State Bar Center)**

### Tips on Section 1031 Exchanges for Real Estate And Beyond, Part 2

**State Bar Center, Albuquerque • Wednesday, April 19, 2006**

**2.5 General CLE Credits**

**Standard Fee (CLE and Lunch) $85**

This program is a cross-disciplinary forum in 2006 geared toward Family Law attorneys, accountants, realtors, and investors. The second program continues with an advanced look at 1031 Exchanges, presented by the 1031 Exchange Experts of Greenwood Village, Colorado. Each forum consists of a morning CLE program followed by an afternoon of golf duplicating the Ryder Cup format. The CLE takes place at the State Bar Center in Albuquerque with this round of golf being played at Sandia Golf Course. Celebrate meeting all the last minute deadlines of tax season by refreshing yourself with a great CLE program and an exciting team formatted golf event.

### The 21st Annual Bankruptcy Year In Review

**Friday, March 10, 2006 • State Bar Center, Albuquerque**

**6.0 General and 1.0 Ethics CLE Credits**

**Standard Fee $189**

**Bankruptcy Section Member, Government, Paralegal $179**

The seminar will focus on developments in case law and bankruptcy practice, and ethics issues, resulting from enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The seminar will also cover, in a more abbreviated form than in past years, developments in case law on bankruptcy issues in 2005, both nationally and locally, with special emphasis on decisions by the U.S. Supreme Court, 10th Circuit, 10th Circuit BAP and New Mexico bankruptcy judges.

### Real World Toxicology for the Courtroom: Legal Evaluation Strategies for Forensic, Tort, & Environmental Cases

**Tuesday, March 14, 2006 • State Bar Center, Albuquerque**

**5.5 General CLE Credits**

**Standard Fee $159**

**Co-sponsor:** Bankruptcy Law Section

**Presenter:** Sol Bobst, PhD, President and Principal of CERATOX Consulting, Houston

Toxicology spans relevant legal issues in cases involving criminal defense, worker’s compensation, employment screening, toxic tort litigation, and environmental contamination. Communicating complex science concepts in the courtroom can be challenging and requires planned preparation. This seminar will address strategies that can be used for presenting “real world questions” as a context for decision making in these cases.
Friday, March 17, 2006 • State Bar Center, Albuquerque • 5.0 General and 1.0 Ethics CLE Credits

Standard Fee $189

The focus of this seminar will be upon the nuts and bolts of how to present and defend a personal injury case. This seminar is designed for the new attorney who does not have experience in personal injury cases, or who is simply looking for a refresher from the perspectives of experienced practitioners.

8:30 a.m. Registration
9:00 a.m. Personal Injury: The Plaintiff's Perspective
James C. Ellis, Esq.
Disciplinary Board
1:45 p.m. Ethical Issues in Personal Injury (1.0 E)
Anne L. Taylor, Esq.
10:00 a.m. Personal Injury: The Defense Perspective
John S. Steff, Esq.
2:45 p.m. Damages
Presenter TBA
11:15 a.m. The Police Officer and PI Investigations
3:00 p.m. Q & A Panel and Discussion
Presenter TBA
11:45 a.m. Lunch (provided at the State Bar Center)
4:30 p.m. Adjourn and Reception (State Bar Center)

Get Organized and Get Things Done: Practical Time Management for Lawyers
Friday, March 24, 2006 • State Bar Center, Albuquerque • 3.2 General CLE Credits

Standard Fee $105

Are you carrying a heavy case load, completing work at the last minute, plagued by constant interruptions, inundated with information, drowning in paper, overloaded by e-mail, handling too much of the work load yourself, or spending too much time at the office? In short, do you seem to have too much to do and not enough time?

This fast-paced and entertaining seminar provides practical and effective skills and techniques for managing your time, projects, information, paper, e-mail and staff. Learn how to control your workload, manage your busy schedule, focus on your priorities, and meet deadlines from a guy who knows the stresses and strains of the profession. Irwin Karp is an attorney with over 25 years of experience and was managing partner, law office administrators will benefit from this informative session.

9:00 a.m. Registration
10:00 a.m. Planning Your Workload and Determining Priorities
James C. Ellis, Esq.
11:45 a.m. Effective Communications in the Law Office
John S. Steff, Esq.
12:15 p.m. Develop Your Personal Action Plan
James C. Ellis, Esq.
12:30 p.m. Adjourn and Luncheon (provided at the State Bar Center)
3:40 p.m. adjourn

Position Yourself to Win: A Visual Model for Persuasive Legal Writing
Thursday, March 30, 2006 • State Bar Center, Albuquerque • 6.8 General CLE Credits

Standard Fee $189

Position Yourself To Win transforms the abstract idea of “writing” into the concrete task of organizing ideas, defines the components of that effort and provides practical tools to manage them. This seminar was developed by Walter Lowney utilizing his fifteen years of experience with the Federal Bar Association, Hoover-Allen Hamilton, the US State Department, NASA, AT&T, and various bar associations. The emphasis is upon learning by doing to assure command of the five steps most essential to persuasive communication. Lowney is a former law partner, associate general counsel for the U.S. EEOC, instructor at Boston University, and leader of clinical practice classes at the University of Pennsylvania. His first legal writing seminar in 2004 for the State Bar of New Mexico received rave reviews.

8:00 a.m. Registration
8:30 a.m. Workshop Overview
James C. Ellis, Esq.
9:00 a.m. How To Group, Sequence and Connect Ideas
Anne M. Malott, Esq.
10:00 a.m. Break
10:15 a.m. The CCI Method Applied to Legal Correspondence
John S. Steff, Esq.
11:15 a.m. How To Write A Fast, Coherent Draft
Anne L. Taylor, Esq., Disciplinary Board
1:45 p.m. Fee Arbitration Program: Question & Answers
Presenter TBA
2:45 p.m. How To Use A Case Theory To Guide Research
Presenter TBA
3:00 p.m. Noon Lunch (provided at the State Bar Center)
4:45 p.m. Workshop Closing/Final Questions
5:00 p.m. Adjourn

Avoiding and Resolving Fee Disputes: What You Must Do; What You Should Do.
Friday, March 31, 2006 • State Bar Center • 1.0 General, 1.0 Professionalism and 1.0 Ethics CLE Credit

This class will explain the Disciplinary Rules and cases that govern how attorney fees should be handled and explore the options attorneys and clients have in resolving a fee dispute. Procedures and forms for filing a dispute with the State Bar’s fee arbitration program will also be discussed.

1:00 p.m. Attorney’s Fees: Ethical Duty
James C. Ellis, Esq.
3:15 p.m. Break
2:00 p.m. Fee Arbitration Program: Question & Answers
3:30 p.m. Presenter TBA
2:15 p.m. Client/Attorney Agreements
4:30 p.m. Adjourn/Reception in Lobby

State Bar of New Mexico 3rd Annual November 26 - December 3, 2006

CLE at Sea
Look for details in the March 13th Bar Bulletin

CLE Insert
From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-004

Topic Index:
Insurance: Coverage; Exclusion Clause; and Homeowner's Insurance

CARY BATTISHILL, Plaintiff-Respondent,
versus
FARMERS ALLIANCE INSURANCE COMPANY, Defendant-Petitioner.
No. 28,812 (filed: January 9, 2006)

ORIGINAL PROCEEDING ON CERTIORARI
GARY L. CLINGMAN, District Judge
CORD D. BORNER
LEE M. ROGERS, JR.
ATWOOD, MALONE, TURNER & SABINE, P.A.
Roswell, New Mexico
for Petitioner

JAMES E. TEMPLEMAN
TEMPELMAN & CRUTCHFIELD, P.C.
Loving, New Mexico
for Respondent

GARY R. KILPATRIC
MONTGOMERY & ANDREWS, P.A.
Santa Fe, New Mexico
for Amicus Curiae

RICHARD HODYL, JR.
MECKLER, BUGLER & TILSON, L.L.P.
Chicago, Illinois
for Amicus Curiae

Property Casualty Insurers Association of America

OPINION

PAMELA B. MINZNER, JUSTICE

[1] Appellant Farmers Alliance Insurance Company appeals from the Court of Appeals’ opinion reversing summary judgment in its favor on Appellee Cary Battishill’s claim under a homeowner’s policy. See Battishill v. Farmers Alliance Ins. Co., 2004-NMCA-109, 136 N.M. 288, 97 P.3d 620. The question on appeal is whether the policy section covering all risks except “vandalism and malicious mischief” excluded acts of arson. The Court of Appeals held that the phrase “vandalism and malicious mischief” did not encompass acts of arson because both terms were susceptible to different interpretations, Id. ¶ 22, and because the structure of the policy, taken as a whole, supported an interpretation in favor of the insured. Id. ¶ 24.

[2] We conclude, contrary to the Court of Appeals, that the phrase “vandalism and malicious mischief,” included acts of arson. The clarity of the exclusion in the all-risk section of the policy precludes an interpretation in favor of the insured.

FACTS

[3] Battishill is the owner of a rental house that was insured under a homeowner’s hybrid policy issued by Farmers Alliance. The hybrid policy provides “all-risk” coverage on the dwelling itself and “named peril” coverage on personal property. The all-risk coverage insures against all risks causing physical loss to the dwelling, unless specifically excluded. The named perils coverage insures for “direct physical loss to [personal] property” caused by specific perils including “fire or lightning” and “vandalism or malicious mischief.”

[4] It is undisputed that Battishill’s house was partially damaged by a fire on or about June 24, 2002. The house had been vacant for more than thirty consecutive days prior to the fire, and did not contain any of Battishill’s personal property. After an investigation, it was determined that the fire was incendiary in nature. Battishill filed a claim under his homeowner’s insurance policy. Farmers Alliance denied coverage based on an exclusion in the policy for loss caused by “[v]andalism and malicious mischief if the dwelling has been vacant for more than 30 consecutive days immediately before the loss.” Id. ¶ 4.

[5] The district court granted summary judgment in favor of Farmers Alliance, holding that the vacancy exclusion was unambiguous and excluded coverage. The Court of Appeals reversed the district court’s decision and concluded that “a common and ordinary meaning of ‘vandalism’” supports coverage, and therefore, “on a narrow construction of the exclusion” the insured was entitled to recover. Id. ¶ 25. In addition, the Court of Appeals held that the all-risk and named perils coverages were structurally similar and that a reasonable insured “would read the policy as covering destruction by arson” even if the dwelling had been vacant for more than thirty consecutive days. Id.

DISCUSSION

A. Standard of Review and Burden of Proof

[6] We review both issues de novo. “The interpretation of an insurance contract is a matter of law about which the court has the final word.” Rummel v. Lexington Ins. Co., 1997-NMSC-041, ¶ 60, 123 N.M. 752, 945 P.2d 970. “[U]nder an all-risk policy, the insured must initially prove that the loss or damage was caused by some event or risk other than normal depreciation or inherent vice or defect.” 1 ERIC MILLS HOLMES & MARK S. RHODES, HOLMES’S APPLEMAN ON INSURANCE, § 1.10, at 43 (2d ed. 1996). In this case, it is undisputed that the damages were caused by arson; therefore, Battishill has met his burden. The burden then shifts
to Farmers Alliance “to prove that the loss is not covered by evidence showing an exception, exclusion or other limitation applies.” Id.; see also id. at 45 (“That the insurer has the burden of proof to prove no coverage under an all-risks policy is the American rule in all states, with the possible exception of Texas.”).

B. “Vandalism and Malicious Mischief” as Ambiguous Terms

[7] The insurance policy at issue did not define “vandalism and malicious mischief” and it failed to mention arson. These terms are essential in determining whether the exclusion was applicable in this case. If arson constitutes “vandalism and malicious mischief,” then the exclusion precludes coverage because it is undisputed that the dwelling was vacant for more than thirty consecutive days. [8] The Court of Appeals stated that “an insurance policy is not rendered ambiguous merely because a term is not defined; rather, the term must be interpreted in its usual, ordinary, and popular sense.” Battishill, 2004-NMCA-109, ¶ 11. We agree and hold that the common and ordinary meaning of “vandalism,” “malicious mischief,” and “arson” may be ascertained from a dictionary. See, e.g., Estes v. St. Paul Fire & Marine Ins. Co., 45 F. Supp. 2d 1227, 1229 (D. Kan. 1999) (relying on Webster’s Third New International Dictionary’s definitions of “vandalism” and “arson” to determine that “[a]rson of a private dwelling clearly is within the plain and ordinary meaning of vandalism”). [9] Webster’s Third New International Dictionary defines “vandalism” as “willful or malicious destruction or defacement of things of beauty or of public or private property.” WEBSTER’S THIRD NEW INT’L DICTIONARY 2532 (2002). It defines “malicious mischief” as “willful, wanton, or reckless damage or destruction of another’s property.” Id. at 1367. “Arson” is defined as “the willful and malicious burning of or attempt to burn any building, structure, or property of another (as a house, a church, or a boat) or of one’s ownusually with criminal or fraudulent intent.” Id. at 122. Burning is a form of damage, destruction, or defacement. From these definitions, we conclude that arson is a form of “vandalism and malicious mischief.” See Am. Mut. Fire Ins. Co. v. Durrence, 872 F.2d 378, 379 (11th Cir. 1989) (per curiam) (“[A] common sense interpretation of the insurance contract’s ‘Vandalism or Malicious Mischief’ provision which contains the ‘vacancy’ exclusion, suggests that it would apply to a fire set in a vacant house by an unknown arsonist or vandal.”); Costabile v. Metro. Prop. & Cas. Ins. Co., 193 F. Supp. 2d 465, 478 (D. Conn. 2002) (predicting “that the Connecticut Supreme Court would conclude that arson . . . is a type of vandalism”); United Capital Corp. v. Travelers Indem. Co. of Illinois, 237 F. Supp. 2d 270, 274 (E.D.N.Y. 2002) (“Although there is somewhat conflicting case law on the issue, courts generally agree that the ordinary use of the word vandalism would include an arson.”); Brinker v. Guiffrida, 629 F. Supp. 130, 136 (E.D. Pa. 1985) (“Willfully and intentionally damaging a dwelling by setting it on fire is certainly damaging the dwelling by vandalism and malicious mischief, as well as arson.”).

[10] Although the Court of Appeals recognized that arson may be considered a type of vandalism, it also reasoned that “apart from the dictionary, there exists a sense that the common and ordinary meaning of vandalism is something different than that of arson.” Battishill, 2004-NMCA-109, ¶ 13; see also id. ¶ 17 (“While vandalism can also be read to generally and broadly mean willful or malicious destruction of a dwelling, its common and ordinary meaning is not necessarily or only defined that way.”). The Court of Appeals noted that “‘arson’ and ‘vandalism’ have been described as ‘distinct perils’ in the general view of ‘ordinary business people.’” Id. ¶ 13 (quoting MDW Enter., Inc. v. CNA Ins. Co., 772 N.Y.S.2d 79, 83 (App. Div. 2004))). We believe that it may be necessary to look beyond the dictionary definition to ascertain the common and ordinary meaning of a word or words in some cases; however, in this case, the dictionary provides appropriate common and ordinary definitions of “vandalism,” “malicious mischief,” and “arson.”

[11] We are not persuaded a historical examination of the term “vandalism” is appropriate. The common and ordinary meaning of an undefined term should be based upon contemporary usage, where possible, because the issue is how a reasonable insured would understand the term at the time of purchase. See, e.g., Gen. Accident Fire & Life Assurance Corp. v. Azar, 119 S.E.2d 82, 85 (Ga. App. 1961) (“Certainly it does not seem logical that the classic definition was intended by either the insurer or the insured in this case . . . ”). We agree with Farmers Alliance, who argued that “the ancient connotations of ‘vandalism’ have given way, in modern usage of the term, to a very broad meaning of the word that includes the destruction of property generally.” [12] Even if historically the term vandalism was limited to “behavior primarily directed at property having artistic, historical, architectural, literary, musical, personal or emotional significance or value” and to “damage that is not devastating.” Battishill, 2004-NMCA-109, ¶¶ 17, 21, in contemporary usage, the terms vandalism and malicious mischief are not so limited. See, e.g., Gen. Accident Fire & Life Assurance Corp., 119 S.E.2d at 84-85 (“[I]n ordinary usage [vandalism] is not limited to destruction of works of art, but has been broadened in its meaning to include the destruction of property generally.”). Both definitions specify certain states of mind (willful, malicious, wanton, or reckless) and address certain types of results (destruction, defacement, or damage) to property, while neither definition limits the types of property or extent of damage. [13] The Court of Appeals rejected contemporary usage because it did not believe that this usage was “correct in the context of dwelling insurance, purchased to insure against the dreaded risk of fire.” Battishill, 2004-NMCA-109, ¶ 14; see also id. ¶ 21 (“[T]o a reasonable insured, the desire to have fire coverage, unquestionably extremely important for an insured, predominates.”). We acknowledge that an insured’s purposes in purchasing insurance are important considerations. Our interpretation of language within an insurance policy, however, is not based on a subjective view of coverage, but rather “our focus must be upon the objective expectations the language of the policy would create in the mind of a hypothetical reasonable insured who, we assume, will have limited knowledge of insurance law.” Computer Corner, Inc. v. Fireman’s Fund Ins. Co., 2002-NMCA-054, ¶ 7, 132 N.M. 264, 46 P.3d 1264. When the terms used have a common and ordinary meaning, that meaning controls in determining the intent of the parties. We believe that contemporary usage provides the common and ordinary meaning that is appropriate on these facts. [14] The common and ordinary meaning of the terms used in the all-risk coverage section results in broad coverage and a narrow exclusion. This section covers fire, including arson, as a form of direct physical loss to the dwelling, unless an enumerated
exclusion is applicable. The exclusionary clause precludes coverage when the loss was caused by “[v]andalism and malicious mischief if the dwelling has been vacant for more than 30 consecutive days immediately before the loss.” Battishill, 2004-NMCA-109, ¶ 4. We have concluded that arson is a type of vandalism and malicious mischief. Moreover, the vacancy requirement was met. Consequently the exclusionary clause applies and precludes coverage. We next address the Court of Appeals’ conclusion that when the policy is read as a whole, structural similarities between the all-risk and named perils coverage support a different interpretation.

C. Ambiguity Within the Policy as a Whole

{15} Battishill argues that the policy read in its entirety is ambiguous, requiring an interpretation in his favor. Although the Court of Appeals recognized that “[t]he all-risk and named-perils personal property coverages are clearly separate coverages with likely different underwriting analysis based on different risks,” Battishill, 2004-NMCA-109, ¶ 23, it ultimately agreed with Battishill’s contentions. The Court of Appeals identified structural similarities that supported construing the policy in his favor.

{16} We agree with the Court of Appeals that the two coverages are separate and distinct; however, we disagree with the Court’s analysis of the structural similarities. It is not necessary to read the coverages together to construe the all-risk dwelling exclusion at issue, because the exclusion read alone is clear and unambiguous. See Costabile, 193 F. Supp. 2d at 476-78 (holding the language providing all-risk coverage was unambiguous, while the language providing coverage against named perils was ambiguous). But see United Capital Corp., 237 F. Supp. 2d at 274-76 (recognizing that the ordinary use of the word vandalism would include an arson, the Court nevertheless concluded that the policy as a whole was ambiguous because fire and vandalism were listed separately in another section of the policy). Unless it is necessary to read the coverages together, we believe there is a risk of creating, rather than identifying, ambiguity.

{17} We recognize that it is the law in New Mexico that “an insurance policy which may reasonably be construed in more than one way should be construed liberally in favor of the insured.” Erwin v. United Benefit Life Ins. Co., 70 N.M. 138, 144, 371 P.2d 791, 794-95 (1962). However, that rule “applies only where the language in the policy is ambiguous.” Safeco Ins. Co. of Am. v. McKenna, 90 N.M. 516, 520, 565 P.2d 1033, 1037 (1977). “Resort will not be made to a strained construction for the purpose of creating an ambiguity when no ambiguity in fact exists.” Id. In this case, the language in the exclusion is clear and unambiguous. We only look to other sections in a policy for clarification, not in an attempt to create an ambiguity where none exists. See, e.g., Rummel, 1997-NMSC-041, ¶ 20 (“If any provisions appear questionable or ambiguous, we will first look to whether their meaning and intent is explained by other parts of the policy.”). An “ambiguity does not exist simply because a controversy exists between the parties, each favoring an interpretation contrary to the other.” 2 Lee R. Russ & Thomas F. Segalla, COUCH ON INSURANCE § 21:11 (3d ed. 2005).

{18} Our cases provide some guidance in determining whether an ambiguity exists, but they do not support a conclusion of ambiguity in this case. “Ambiguities arise when separate sections of a policy appear to conflict with one another, when the language of a provision is susceptible to more than one meaning, when the structure of the contract is illogical, or when a particular matter of coverage is not explicitly addressed by the policy.” Rummel, 1997-NMSC-041, ¶ 19. In this case, separate sections of the policy do not conflict with one another because the all-risk dwelling coverage and the named-perils coverage are separate and distinct coverages, each providing separate coverage for different risks to different property under different terms. “Vandalism” and “malicious mischief” have a common and ordinary meaning in contemporary usage. Both terms, by their definitions, include arson. The structure of the contract appears logical; the two sections can be read independently and provide a sensible result. Finally, although arson is not explicitly addressed by the policy, arson is included within various terms used in the policy. For example, arson is included within the terms “fire,” “vandalism,” and “malicious mischief.”

{19} For purposes of the all-risk coverage, fire, vandalism, and malicious mischief are included, unless an exclusion applies. We recognize that arson can be viewed as a type of fire, and arson can be viewed as a form of vandalism and malicious mischief. However, the fact that there is an overlap within the named perils section does not create an ambiguity within the all-risk section. See Costabile, 193 F. Supp. 2d at 476; cf. United Capital Corp., 237 F. Supp. 2d at 277 (distinguishing Costabile on the basis that “the structure of the policy . . . provides no basis for limiting the ambiguity to only one type of coverage”). Fire, vandalism, and malicious mischief are not covered by the all-risk dwelling coverage as enumerated risks. Rather, it can be inferred that fire, vandalism, and malicious mischief are covered, unless they fit within an explicit exception. Therefore, even though arson is a form of fire, to which no exception applies, it is encompassed within the definitions of vandalism and malicious mischief, to which an exception does apply.

{20} The exclusion within the all-risks section is clear and unambiguous, and it should be applied as written. See Costabile, 193 F. Supp. 2d at 478 (“The language of the policy in Coverages A and B is not ambiguous: the willful destruction of property is not covered if the building has been vacant or unoccupied for thirty consecutive days.”); see also COUCH 3d § 21:11 (“[I]t is a well settled rule that the question of construction can only arise where the language of a policy is susceptible to more than one meaning, and that clear and unambiguous clauses must be accepted as the expression of the intent of the parties, and enforced by the courts as written.”). We conclude that the policy read as a whole provides no basis for interpreting the exclusion in favor of Battishill.

CONCLUSION

{21} We reverse the Court of Appeals’ conclusion that the common and ordinary meaning of “vandalism and malicious mischief” does not include “arson.” We also reverse the Court of Appeals’ holding that taken as a whole, the homeowner’s insurance policy supports a construction in favor of Battishill. We conclude that the exclusion precluded coverage, and we affirm the district court’s grant of summary judgment.

{22} IT IS SO ORDERED.

PAMELA B. MINZNER, Justice

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
Appeal from the District Court of Lea County

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FRANKLIN H. MCCALLUM
HOBBS SALT WATER DISPOSAL SYSTEM, whose General Partner is RICE OPERATING COMPANY, et al.,
Defendants-Appellees.

No. 25,213 (filed: November 22, 2005)

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY

GARY L. CLINGMAN, District Judge

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for Appellants

WILLIAM F. MCNEILL, MARILYN CATES, and THE BLACK TRUST,
Plaintiffs-Appellants,

versus

RICE ENGINEERING AND OPERATING INC., RICE OPERATING COMPANY,
HOBBS SALT WATER DISPOSAL SYSTEM, whose General Partner is
RICE OPERATING COMPANY, et al.,
Defendants-Appellees.

No. 25,213 (filed: November 22, 2005)

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-015

Opinion

JONATHAN B. SUTIN, Judge

[1] Appellees’ motion for rehearing filed November 1, 2005, is denied. The formal opinion filed in this appeal on October 21, 2005, is withdrawn and this opinion is filed in its stead.

[2] This is the second appeal arising from a dispute over the disposal of salt water generated from oil and gas drilling. See McNeill v. Rice Eng’g & Operating, Inc., 2003-NMCA-078, 133 N.M. 804, 70 P.3d 794. Salt water is a waste product from oil and gas drilling operations. It is disposed of in wells used to reinject the water into geological formations comparable to those from which the product originated. Plaintiffs, the appellants in this appeal, are owners of, and heirs and successors-in-interest to, lands called the McNeill Ranch (the Ranch). Defendants, the appellees in this appeal, are operators of a salt water disposal system called the Hobbs Salt Water Disposal System (the Disposal System). As part of the Disposal System, salt water was injected into a disposal well called Well E-15 (E-15) situated on the Ranch. The salt water was transported by pipeline from oil and gas drilling operations participating in the Disposal System. This appeal primarily involves a statute of limitations bar of Plaintiffs’ trespass and conversion claims relating to the disposal of salt water transported to E-15 by pipeline from off-site oil and gas drilling operations over a span of thirty-six years. We conclude that material issues of fact exist that mandate trial on the trespass and conversion claims relating to the disposal of salt water transported to E-15 by pipeline from off-site oil and gas drilling operations over a span of thirty-six years. We conclude that material issues of fact exist that mandate trial on the trespass claim and thus reverse the district court’s grant of summary judgment in favor of Defendants as to that claim. We affirm the grant of summary judgment on Plaintiffs’ other claims.

BACKGROUND

(3) E-15 was drilled in 1957 by Defendants’ predecessor-in-interest Pan American Petroleum Corporation (Pan American). The Ranch was owned by Will Terry. Commensurate with drilling E-15, Pan American negotiated a Property Damage Release (the Release) with Terry. The parties dispute whether the Release related only to damages from the initial construction of the well and pipelines or whether the Release also covered the disposal of the salt water on the Ranch. In 1958 Defendant Rice Engineering and Operating, Inc. took over the operation of the Disposal System and negotiated a right-of-way with Terry for pipelines that would run over and through the Ranch. Id. ¶ 3.

(4) When Terry died in 1968, title to the Ranch passed into a testamentary trust in which Terry’s daughters, including Muriel Terry McNeill, had interests. After the daughters’ deaths years later, the Ranch passed to Plaintiffs, descendants of Terry, namely, William F. McNeill and Marilyn Cates, and to the Black Trust, a trust in which certain other descendants of Terry hold an interest. Plaintiff William F. McNeill occupied the Ranch under a lease from 1993 to 1995. Plaintiffs acquired title in 1995. Plaintiffs leased the Ranch to Paige McNeill, William F. McNeill’s son, in November 1997. We refer to Plaintiffs’ predecessors in interest as “Predecessors” in this opinion.

(5) Plaintiffs sued Defendants on October 27, 1998. In their complaint, Plaintiffs sued Defendants for subsurface trespass caused by the disposal of the salt water into E-15 and also for injury caused by leakage from the salt water pipeline on Plaintiffs’ land. In November 2000, the district court granted partial summary judgment against Plaintiffs on the disposal claim on the limited ground that “the Release unambiguously granted [Defendants] the right to dispose of off-site salt water produced into Well E-15.” Id. ¶ 9. Trial on the leakage claim resulted in a verdict in January 2001 in favor of Plaintiffs for $70,000. Plaintiffs appealed from the partial summary judgment. This Court in April 2003 reversed on the ground that genuine issues of material fact existed in regard to the effect of the Release. Id. ¶ 42. The Release, which we concluded was ambiguous, is fully set out in McNeill. See id. ¶ 15.

(6) On remand from the McNeill reversal, Plaintiffs continued their trespass and conversion claims, arguing the doctrine of fraudulent concealment and the discovery rule in order to avoid the bar of the four-year statute of limitation, NMSA 1978, § 37-1-4 (1980). The district court, in November 2003, again entered a partial summary judgment. The court determined that any trespass claim for damages occurring outside the four years preceding
the filing of the complaint on October 27, 1998, was barred. The court also determined that there was no evidence of fraudulent concealment or any concealment of Defendants’ activities in the operation of E-15. In addition, presumably based on Defendants’ defense that Plaintiffs had to be in possession of the Ranch to assert their claims, the court held that “Plaintiffs’ trespass claim ends when the ranch was leased to Paige McNeill on or about November 1, 1997.” The court also entered summary judgment against Plaintiffs on their conversion claim.

[7] In the partial summary judgment, the court also stated:

The Court finds an issue of material fact exists as to what was open and obvious to the previous owner(s) of the ranch and what he (they) knew, should have known or had constructive notice of regarding the operation of the E15 SWD Well. Summary Judgment is denied as to the claim of trespass.

Both parties agree to appear that the partial summary judgment disposed of the pre-October 27, 1994, claims.

[8] Following entry of this partial summary judgment, in a stipulated dismissal order, Plaintiffs released all claims and causes of action “in any way related, whether directly or indirectly, to the disposal and/or injection of produced waters in the E-15 Well from October 27, 1994 through the infinity of time.” However, Plaintiffs expressly reserved their right to appeal from the court’s unfavorable partial summary judgment, leaving open the possibility of pursuing claims dismissed in the partial summary judgment. Thus, the trespass claims in this case have been split into two groups based upon the date of the trespass: (1) Plaintiffs have settled with Defendants as to trespass claims arising on or after October 27, 1994 (four years prior to the filing of this suit); and (2) Plaintiffs reserved the right to appeal the district court’s dismissal of any trespass claims arising prior to October 27, 1994. This is that appeal.

[9] There is no dispute that from 1958 through 2003 Defendants pumped into E-15 large amounts of salt water from oil and gas drilling operations outside the Ranch. Plaintiffs contend on appeal that this constituted a continuing trespass and continuing wrong, and through application of the doctrine of fraudulent concealment or the discovery rule that they can prove facts that would allow recovery of damages for that disposal. Plaintiffs further contend that summary judgment was improper because material facts are in dispute.

{10} In arguing that their conversion claim is viable, Plaintiffs assert Defendants intentionally failed to enter into a salt water disposal agreement with Predecessors for the disposal of the salt water. They further assert that Plaintiffs intentionally deprived Predecessors and Plaintiffs of compensation due them by exercising dominion over and converting to Defendants’ own use money that was to be used to compensate Predecessors.

**DISCUSSION**

**CONTENTIONS IN DETAIL**

{11} Defendants assert that the single disposition fact on appeal is that Plaintiffs acquired title to the Ranch in 1995. According to Defendants, Plaintiffs have no right to recover for tortious conduct that occurred before they acquired title. See, e.g., Caledonian Coal Co. v. Rocky Cliff Coal Mining Co., 16 N.M. 517, 524, 120 P. 715, 717-18 (1911) (holding that the plaintiff seeking to recover value of coal removed from land “must show some property right or interest in the coal which is not established by possession of the land merely,” since removal by trespass is “a permanent injury to the freehold, for which injury the owner of the fee is alone entitled to recover”). As a corollary, Defendants also contend that Plaintiffs are in no position to invoke the doctrine of fraudulent concealment or the discovery rule in order to escape the bar of the statute of limitations as to their claims to recover damages predating October 27, 1994, since they did not own the property until 1995.

{12} Further, Defendants assert that, even were Plaintiffs to have otherwise ascertainable claims, the continuing trespass theory cannot assist Plaintiffs because, under that doctrine, each injury gives rise to a new cause of action allowing a plaintiff to recover only for injuries that occurred within the statutory period. See Valdez v. Mountain Bell Tel. Co., 107 N.M. 236, 239-40, 755 P.2d 80, 83-84 (Ct. App. 1988) (holding causes of action for damage to home from water seepage caused by placement of utility pole in drainage ditch arose with each new, successive injury, with the statute of limitations beginning to run from the date of each injury); Breiggar Props., L.C. v. H.E. Davis & Sons, Inc., 52 P.3d 1133, 1135 (Utah 2002) (involving debris dumped on land, and stating “[i]n the case of a continuing trespass or nuisance, the person injured may bring successive actions for damages until the nuisance [or trespass] is abated, even though an action based on the original wrong may be barred, but recovery is limited to actual injury suffered within the three years prior to commencement of each action” (internal quotation marks and citation omitted) (alteration in original)).

{13} Defendants similarly assert that the continuing wrong theory does not assist Plaintiffs because their right to sue for installment payments commences to run from the time each installment is due. See Plaatje v. Plaatje, 95 N.M. 789, 790-91, 626 P.2d 1286, 1287-88 (1981) (holding cause of action based on breach of monthly obligation in divorce to pay retirement benefits accrued when each installment became due); see also State ex rel. Pub. Employees Ret. Ass’n v. Longacre, 2002-NMSC-033, ¶ 23, 133 N.M. 20, 59 P.3d 500 (citing Plaatje for the proposition that the statute of repose in Longacre could prevent recovery for the total amount of an obligation or liability owed without completely eliminating the right to recover where there was a “continuing wrong”).

Defendants point out that even the continuing trespass cases relied on by Plaintiffs limited recovery to the statutory limitation period immediately preceding the filing of the complaint. See United States v. Hess, 194 F.3d 1164, 1176-77 (10th Cir. 1999); Nieman v. NLO, Inc., 108 F.3d 1546, 1559 (6th Cir. 1997); City of Shawnee v. AT&T Corp., 910 F. Supp. 1546, 1562 (D. Kan. 1995) (mem. & order).

{14} In regard to Defendants’ standing-based defense that Plaintiffs cannot sue for injuries or damages occurring before they acquired title to the Ranch, Plaintiffs assert this argument was not raised in the district court and Defendants cannot raise the issue for the first time on appeal. Also, Plaintiffs contend that, if this issue is addressed, there exist genuine issues of material fact as to Plaintiffs’ relationships to Predecessors and inheritance of Predecessors’ rights and claims and thus Plaintiffs’ right to assert claims of trespass and wrongdoing occurring during the previous ownership of the Ranch. Plaintiffs also indicate that facts in addition to these record facts would have been more fully developed to defeat Defendants’ position had the issue been raised below.

{15} On the question of when the statute of limitations as to Plaintiffs’ claims began to run, Plaintiffs assert that the statute did not begin to run with each disposal of salt
water, but, rather, when the trespass was removed. They also assert that the statute did not begin to run as to their right to compensation until the wrong ceased, i.e., until final non-payment.

(16) Plaintiffs further assert that Defendants misunderstand Plaintiffs’ continuing trespass and continuing wrong theories. Plaintiffs explain that Defendants’ arguments and legal authority contemplate and address only circumstances in which trespass was open and obvious to or actually known by the party bringing suit and not continuing trespass and continuing wrong when there has been fraudulent concealment or where the discovery rule applies. Plaintiffs contend they presented evidence creating genuine issues of material fact, in that the evidence indicated Predecessors had insufficient notice and knowledge of the salt water disposal, Predecessors could not with reasonable diligence have discovered the trespass and wrong, and Defendants and their predecessor-in-interest concealed their activities. Last, Plaintiffs assert their conversion claim is viable.

(17) We first consider the preservation of the standing-based defense. We next turn to analyze the fraudulent concealment and discovery rule issues. Finally, we consider Plaintiffs’ claim for conversion. We hold that Defendants did not preserve their standing-based defense. As to Plaintiffs’ pre-October 27, 1994, trespass claims, we hold that the district court did not err in concluding Defendants did not fraudulently conceal their activities. However, we hold that because there exist genuine issues of material fact, Plaintiffs should be permitted to attempt to show that the discovery rule applies in trespass cases and to prove that, under the discovery rule, the statute of limitations did not begin to run until Defendants knew or by the exercise of reasonable diligence should have known of the disposal complained of by them in this action. Finally, we hold that Plaintiffs’ conversion claim was appropriately dismissed.

1. DEFENDANTS DID NOT RAISE THE DEFENSE OF STANDING BELOW

(18) In the district court, Defendants relied on the argument that Plaintiffs did not have possession of the Ranch prior to 1993 and thus had no trespass claim before that date. This argument was essentially the same in their two motions for summary judgment. However, on appeal Defendants have abandoned that argument. Instead, Defendants argue that Plaintiffs cannot recover for trespass, continuing trespass, or continuing wrong occurring during the period before they acquired title to the Ranch. Defendants argue that Plaintiffs did not own the Ranch until 1995. Thus, Defendants argue that the district court properly granted summary judgment on Plaintiffs’ pre-October 27, 1994, claims.

(19) Plaintiffs argue that Defendants did not preserve this argument below. We agree. All of Defendants’ arguments below were addressed towards possession, not title or ownership. We do not address defenses raised for the first time on appeal. Rule 12-216(A) NMRA (“To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked.”); W. Farm Bureau Mut. Ins. Co. v. Barela, 79 N.M. 149, 152, 441 P.2d 47, 50 (1968) (stating “in determining whether it was error to grant summary judgment, this court is limited to matters presented in the pleadings, affidavits and pre-trial depositions, and defenses cannot be invoked for the first time on appeal.”).

2. THE MERITS OF PLAINTIFFS’ CONTENTIONS

A. THE ESSENCE OF PLAINTIFFS’ CASE

(20) Plaintiffs’ claims at issue are those for injuries that occurred between 1958 and October 27, 1994. For survival, the claims depend on establishing a trespass and accrual that starts the statute of limitations running for all of those claims at a point in time after October 27, 1994. Plaintiffs contend they can establish that post-October 27, 1994, point through proof of continuing torts with application of the fraudulent concealment doctrine, the discovery rule, or the law that sets the accrual date as to continuing torts to be the date of the last injury or the date the continuing tort is removed or is otherwise over and done with.

(21) Intermixed and perhaps material to both the trespass and conversion claims is Plaintiffs’ contention that an oil and gas industry standard in relation to the disposal of salt water requires the party disposing of the salt water to negotiate a salt water disposal agreement with the surface owner that grants permission for the disposal. Plaintiffs state that, in the absence of such an agreement, the surface owner must be compensated. Not having obtained such an agreement, Plaintiffs contend, Defendants must pay compensation. In addition, Plaintiffs contend that at the very least, if Defendants had a right to use Plaintiffs’ land, Defendants were required to exercise any right they had to use the land reasonably and an issue of fact exists as to whether Defendants exercised the right reasonably. Excessive use, Plaintiffs assert, is a trespass with or without an agreement. According to Plaintiffs, the industry standard, the violation of the standard, the concealment, the discovery, the nature (permanent, temporary, or continuing) of the trespass and wrong, the accrual date, and excessive use require resolution of genuine issues of material fact, precluding summary judgment.

B. THE TOLLING AND FRAUDULENT CONCEALMENT ISSUES


(23) As to the fraudulent concealment doctrine, we have not seen, and Plaintiffs have not pointed out, anything in the record that raises a genuine issue of material fact as to whether Defendants engaged in fraudulent concealment. The elements of fraudulent concealment include intentional misrepresentation or concealment upon which there was detrimental reliance. See Cont’l Potash, Inc., 115 N.M. at 698, 858 P.2d at 74 (stating elements of fraudulent concealment). The evidence Plaintiffs presented does not give rise to reasonable inferences tending to establish these elements. The absence of any salt water disposal agreement does not suggest that Defendants intentionally concealed anything from Plaintiffs or Predecessors. And Predecessors’ lack of knowledge or understanding about the nature and extent of the disposal operation suggests nothing about either Defendants’ intentions or
Predecessors’ reliance. Those factual contentions are insufficient to create a genuine issue of material fact of fraudulent concealment on Defendants’ part. On a motion for summary judgment, “the party claiming that a statute of limitation should be tolled has the burden . . . to show at least a reasonable doubt as to the existence of a genuine factual issue on tolling of the statute[,]” sufficient to create reasonable doubt as to whether the statute ran as a matter of law. Ocana v. Am. Furniture Co., 2004-NMSC-018, ¶ 12, 135 N.M. 539, 91 P.3d 58 (internal quotation marks and citations omitted). To avoid summary judgment, the “party opposing the motion should produce specific evidentiary facts that demonstrate a need for a trial on the merits.” Cates v. Regents of N.M. Inst. of Mining & Tech., 1998-NMSC-002, ¶ 24, 124 N.M. 633, 954 P.2d 65; Collado v. City of Albuquerque, 120 N.M. 608, 615, 904 P.2d 57, 64 (Ct. App. 1995). We hold that the district court did not err in granting partial summary judgment dismissing Plaintiffs’ claims that, for their success, rely on proof of fraudulent concealment.

C. THE ACCRUAL, CONTINUING TRESPASS AND CONTINUING WRONG ISSUES

[24] Plaintiffs’ continuing trespass theory is that each disposal of off-site salt water was a trespass and each new disposal was an aggravation or continuation of the trespass. Under this theory, Plaintiffs assert that the statute of limitations began to run on the date of the latest disposal, i.e., the date of the latest trespass. Plaintiffs cite various types of cases to support this contention. See City of Shawnee, 910 F. Supp. at 1561-62 (applying the continuing trespass doctrine to the presence of a cable transmitting pulses of information and determining that the statute of limitations did not begin to run until the trespass was removed); Vial v. S. Cent. Bell Tel. Co., 423 So. 2d 1233, 1236 (La. Ct. App. 1982) (applying a continuing trespass theory to mislabeled conduits and manholes, and stating that “[w]here the trespass is a continuing one . . . prescription does not begin to run until the offending object [conduits and manholes] is removed”); see also Cassinos v. Union Oil Co. of Cal., 18 Cal. Rptr. 2d 574, 583 (Ct. App. 1993) (mentioning “continuing nuisance which cannot be abated” in discussing a measure of damage in trespass case involving subsurface migration of off-site wastewater injected into an oil well); Knight v. City of Missoula, 827 P.2d 1270, 1277 (Mont. 1992) (applying a continuing nuisance theory to creation, continuing use, and lack of maintenance of a road, and stating rule that where a “nuisance is of a temporary, continuing nature, the statute of limitations is tolled until the source of the injury is abated”). Plaintiffs assert further that they have shown at the very least that there exist genuine issues of material fact as to whether the trespass was continuing and as to what the date was of the last trespass.

[25] Plaintiffs’ continuing wrong theory is the concept of tortious conduct causing a continuing or repeated injury which, like continuing trespass, gives rise to a cause of action that accrues when the wrong is “over and done with.” They cite Tiberi v. Cigna Corp., 89 F.3d 1423 (10th Cir. 1996), and Eli Lilly & Co. v. EPA, 615 F. Supp. 811 (S.D. Ind. 1985). Tiberi applied the continuing wrong doctrine in an action against an insurer for various torts including breach of fiduciary duty in connection with termination of a contract. 89 F.3d at 1430. Eli Lilly & Co. applied the continuing wrong theory in a misappropriation of data action. Eli Lilly & Co. stated that “[t]he continuing wrongful conduct of the defendant toward the plaintiff which establishes a status quo of continuing injury may give rise to a continuing cause of action. Where the wrong is continuing, the statute of limitations does not begin to run until the wrong is over and done with.” 615 F. Supp. at 822 (internal quotation marks and citations omitted). Drawing a similarity between the present case and continuing wrong cases involving contract obligations to make periodic payments, Plaintiffs contend that they can sue for all non-payments of compensation owed for each disposal of off-site salt water. They contend further that issues of fact exist as to whether the wrong was continuing, or was single with continuing effects, and as to when the wrong was completed.

[26] Barring application of the discovery rule for relief, the question is, when did the statute of limitations begin to run for pre-October 27, 1994, injuries? In applying the statute of limitations to bar Plaintiffs’ claims, the district court necessarily determined either that the claims accrued upon the original trespass or that the statute began to run with respect to each new trespass as it occurred. Whichever approach taken by the district court, it must have decided that the statute ran its course before Plaintiffs filed their lawsuit. Plaintiffs contend the court erred because the statute did not begin to run until the last new trespass or wrong was over and done with or abated. This issue requires us to resolve a question of law and our review is de novo. Hasse Contracting Co. v. KBK Fin., Inc., 1999-NMSC-023, ¶ 9, 127 N.M. 316, 980 P.2d 641 (“Appellate courts review matters of law de novo.”)

[27] The trespass or nuisance of which Plaintiffs complain is not the E-15 structure or injury caused by the structure, but rather the injection of salt water into the subsurface. The appellate briefs do not indicate whether the flow of salt water through the pipeline and into the well was continuous or intermittent. For the purposes of the issue, however, whether the flow was continuous or intermittent is irrelevant. The question is whether the flow could have been shut off, abating the alleged trespass. See Valdez, 107 N.M. at 239, 755 P.2d at 83 (reciting law that “[a] permanent structure or nuisance is one that may not be readily remedied, removed or abated at a reasonable expense, or one of a durable character . . . costing as much to alter as to build”). We will assume, based on the briefs, that the salt water could be shut off, although the record lacks evidence as to the cost that would have to be incurred in shutting the flow off.

[28] We therefore see the injury in the present case as continuing or temporary, not permanent, in character. See Hess, 194 F.3d at 1176 (stating that continuing gravel extractions over years was a continuing or temporary trespass, and not a permanent or fixed trespass); Valdez, 107 N.M. at 240, 755 P.2d at 84 (holding that the statute of limitations begins to run from the date of each injury where a structure causes temporary but repeated injuries, in contrast to the statute running from the date of construction where the existence of the structure itself is the injury); Haas v. Sunset Ramblers Motorcycle Club, Inc., 726 N.E.2d 612, 613-14 (Ohio Ct. App. 1999) (defining a permanent nuisance as a completed tortious act with injury in the absence of any further activity by the tortfeasor and defining a continuing nuisance as ongoing tortious conduct “perpetually generating new violations”).

[29] Under the circumstances in this case, we reject a theory or rule requiring a holding that Plaintiffs’ cause of action for thirty-six years of continuing trespass or continuing wrong did not accrue until a disposal of salt water or a failure to compensate for a disposal occurred sometime after October 27, 1994. Although it appears, as Plaintiffs show, that some
jurisdictions set the cause of action accrual date for a claim for damages for all injuries from the continuing trespass to be the date of the last injury, we think the better rule to apply in the present case is one that sets the accrual date as in Hess v. Valdez, and Hoas. The accrual date is the date of each particular injury which, for an intermittent injury, is the date of that discrete injury, or for a continuous injury, each new day. Thus, Plaintiffs could theoretically avoid the statute of limitations bar only if their theories of fraudulent concealment or the discovery rule can operate to provide a date of accrual after October 27, 1994. Having held that Plaintiffs cannot rely on the doctrine of fraudulent concealment, they have only the discovery rule to advance. Therefore, unless Plaintiffs are able to apply the discovery rule to extend the date of accrual to after October 27, 1994, the district court did not err in granting partial summary judgment dismissing Plaintiffs’ claims that, for their success, rely on proving a cause of action accrual date after October 27, 1994. We now turn to the discovery rule.

D. UNDER THE DISCOVERY RULE, WHETHER ISSUES OF FACT PRECLUDE SUMMARY JUDGMENT AS TO THE ACCRUAL DATE OF PLAINTIFFS’ TRESPASS CLAIM

(30) Plaintiffs contend, citing various New Mexico discovery rule cases, that their evidence showed a continuing trespass, that they and their Predecessors were unable to discover, did not know, and with reasonable diligence could not have known of, the injury and the cause. See Roberts v. Sw. Cnty. Health Servs., 114 N.M. 248, 257, 837 P.2d 442, 451 (1992) (invoking medical malpractice); Martinez-Sandoval v. Kirsch, 118 N.M. 616, 620-21, 884 P.2d 442, 451 (1992) (invoking the discovery rule).

(31) Defendants sought summary judgment essentially based on several documents and affidavits regarding the documents. The documents collectively gave rise to an inference that Predecessors knew or reasonably could have discovered that the Disposal System involved transfer of salt water to E-15 from outside the Ranch’s boundaries. In addition to the documentary evidence, Defendants presented an affidavit of the president of Rice Operating Company, Loy Goodheart. Goodheart, who was a field engineer with Rice Engineering in 1958, discussed how substantial the construction and installation of the Disposal System was and that it took about two years to complete. Pipelines were first laid out and then were buried. Goodheart stated that because the pipes were laid out beyond the boundaries of the Ranch, “the Terrys could see the construction of the disposal system went from beyond and through the boundary of their property.” At no time did Predecessors object to the pipelines for E-15 gathering salt water from beyond the boundaries of the Ranch or take legal action to halt disposal or seek compensation on a per barrel basis.

(32) In opposition to Defendants’ motion for summary judgment, Plaintiffs relied on the Release, under which salt water disposal would take place only if “production is encountered on the above described lands,” and that the Release excluded “right-of-ways for salt water gathering system beyond the boundaries of this Trust,” thereby, according to Plaintiffs, leading one to believe that no off-site salt water would be pumped into the Ranch. Plaintiffs further relied on an affidavit of Plaintiff William F. McNeill stating the following material facts:

4. I know that neither my grandparents nor my parents understood the nature and extent of the salt water disposal operations that were conducted on this property. From my earliest years growing up on the ranch (I was born on the ranch in 1943), I knew that there were numerous pipelines, tank batteries and other numerous miscellaneous items of equipment located on the ranch that had to do with oil and gas production. None of these were labeled with respect to their function or purpose. There was no way to distinguish without specifically researching into the subject as to which pipes were being used for production, transport or disposal of oil, gas, or waste materials. In most instances the pipes that appeared above ground were only a small portion of what I presumed would be the total amount of pipe buried under the ground.

5. Neither my grandparents nor my parents had any knowledge that the Defendants were disposing of millions of barrels of produced water a year through the E-15 Well. In fact they did not know that salt water disposal operations of this or any magnitude were taking place in that Well. There is no record that I can find to show that the Defendants or their predecessors sought or obtained my families’ permission to pump millions of barrels of liquid waste into our land for as long as they chose to do so without any compensation.

6. I discovered the true nature of what the Defendants were doing with the E-15 Well in 1995 when I discovered liquid waste dumped onto our property at the site. When I contacted the Defendants to ask what permission they had to do this, I was told they didn’t need any permission. This event caused me to start looking into the situation. I was surprised and somewhat shocked when my investigation revealed that the Defendants had been disposing of (and presumably being paid for) almost unlimited amounts of liquid waste into our property without ever obtaining my families’ permission to do so or ever compensating us for the damages incurred as a result of these operations.

(33) Plaintiffs also relied on an affidavit of their expert, Ronald Britton, which stated that while certain portions of the Disposal System are visible, “[a] good portion of the system exists underground” and the function of the valves, pipes, and other bits of equipment that are above ground is not open and obvious to the untrained eye. The affidavit also states that disposal systems are not open and obvious in any way, shape, or form. In addition, the affidavit states that there is no readily apparent means for lay people to know, from looking at the various above ground components that the system was being used to dispose of off-site salt.
where there are genuine issues of material fact. See Rule 1-056(C) NMRA; Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. “We construe reasonable doubts as to the existence of a genuine factual dispute in the nonmovant’s favor.” Rivera v. Trujillo, 1999-NMCA-129, ¶ 7, 128 N.M. 106, 990 P.2d 219. “Summary judgment is an extreme remedy that should be imposed with caution.” Ocuna, 2004-NMSC-018, ¶ 22. “If there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied.” Id. (internal quotations marks and citation omitted).

{39} Defendants can hardly be heard to complain in regard to this determination. Nowhere in their answer brief on appeal do they answer Plaintiffs’ contentions as to the existence of genuine issues of material fact. Defendants rely solely on positions that Plaintiffs have no ascertainable claims because they did not acquire title until 1995 and that the “continuing” elements of the trespass and wrong theories were inapplicable.

{40} We get the impression from the two judgments issued by the district court that the court sees no basis on which Predecessors and Plaintiffs could not have been aware from 1958 to October 1994 that E-15 was being used for off-site salt water disposal. The ultimate outcome in this case may well be either that Predecessors or Plaintiffs knew of or should have discovered the disposal, or that Plaintiffs are unable to satisfy their burden to prove the opposite. However, Plaintiffs’ evidence before the district court at the time of the partial summary judgment created genuine issues of material fact on the question of discovery. The court cannot look down the line and short circuit the result where such fact issues are presented.

E. CONVERSION ISSUE

{41} Plaintiffs claim that Defendants were paid money from participants in the Disposal System; that money Defendants were paid by participants in the Disposal System was owed to Plaintiffs but converted or diverted away from Plaintiffs; that Defendants took and kept money from Plaintiffs that belonged to Plaintiffs; that Defendants’ use of E-15 brought Defendants enormous profits; that Defendants never obtained a salt water disposal agreement from Plaintiffs or Predecessors; and that Defendants intentionally deprived Plaintiffs of compensation Defendants owed Plaintiffs for the use of the land.

{42} Plaintiffs do not point to any factual basis in the record to support their claim that money paid to Defendants by participants in the Disposal System was emarked for or even somehow indirectly owed to persons whose land Defendants used to dispose of salt water, including Plaintiffs and Predecessors. Nor do Plaintiffs point to any facts in the record to support any sort of legal duty on the part of Defendants to turn over or redirect funds it received from disposal operations to persons whose lands were used for disposal, including Plaintiffs and Predecessors.

{43} Moreover, Plaintiffs cite no legal authority applicable to the contentions they present. Plaintiffs cite general conversion law. See Nosker v. Trinity Land Co., 107 N.M. 333, 338, 757 P.2d 803, 808 (Ct. App. 1988). General conversion law does not fit. Plaintiffs have presented no evidence indicating a right to possession of the money they claim. See id. Nor have they presented evidence indicating an unlawful exercise of dominion and control over money belonging to Plaintiffs in defiance or exclusion of Plaintiffs’ rights as owner. See id. Plaintiffs’ claim is little more than an assertion of an intentional design and refusal to pay money for the use of Plaintiffs’ land, more akin to a claim for unjust enrichment. The claim does not fit under traditional conversion theory and Plaintiffs provide no remotely persuasive legal authority in support of their claim. We conclude that summary judgment was properly granted on Plaintiffs’ conversion claim.

CONCLUSION

{44} We reverse the district court’s grant of partial summary judgment dismissing Plaintiffs’ trespass claims for pre-October 27, 1994, injury to the Ranch, insofar as the dismissal precluded a trial on the issue of whether, under the discovery rule, Plaintiffs’ trespass cause of action did not accrue and the statute of limitations as to Plaintiffs’ trespass claim did not begin to run until a date after October 27, 1994. Nothing in this opinion is intended to preclude Defendants from asserting lack of standing on remand based on alleged lack of ownership. We affirm summary judgment as to all other claims that the judgment dismissed.

{45} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge
CYNTHIA A. FRY, Judge
From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-016

STATE OF NEW MEXICO, Plaintiff-Appellant,
versus
CLARENCE HARBISON, Defendant-Appellee.
No. 24,940 (filed: November 28, 2006)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
RICHARD J. KNOWLES, District Judge

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OPINION

JAMES J. WECHSLER, JUDGE

[1] The State of New Mexico appeals the district court’s grant of Defendant’s motion to suppress evidence. The State argues that the district court erred in granting the motion with regard to a rock of crack cocaine Defendant allegedly threw underneath a car before being handcuffed because Defendant was not seized by the arresting officer until he was placed in handcuffs and therefore Defendant abandoned the crack cocaine. The State also argues that Defendant’s seizure was supported by reasonable suspicion. Because we believe, based on the totality of the circumstances, that the arresting officer had reasonable suspicion to briefly detain Defendant, we reverse the district court’s grant of Defendant’s motion to suppress evidence.

FACTUAL AND PROCEDURAL HISTORY

[2] On June 13, 2003, Albuquerque Police Department detectives from the Northeast Impact Team organized and executed an undercover “buy-bust” operation in northeast Albuquerque. The detectives chose the neighborhood in question because they had received “reports of the prevalence of drugs and drug dealing in the area.” Six of the detectives involved in the operation, who were part of the “arrest team,” were dressed in jeans, shirts, and black “tuck” vests that said “Albuquerque Police” with a badge on the front and the word “Police” on the back. The remaining team member, Detective J.R. Potter, who was undercover, wore plain clothes without any insignia identifying him as a detective. All of the detectives were driving unmarked police vehicles.

[3] The “buy-bust” operation consisted of Detective Potter posing as a drug purchaser by driving through the neighborhood and nodding at individuals on the corner. “[I]f he got a nod back...he would turn around” and attempt to buy drugs from the individual. At approximately 9:22 p.m., Detective Ray Soto, one of the “arrest team” members, observed Detective Potter interacting with an individual. After pulling his vehicle away from the individual, Detective Potter, using his radio, informed Detective Soto and the rest of his team members that he had just made a cocaine “buy” from that individual. Detective Potter described the suspect as a “black male[,] gray sweatshirt, black pants.” He also informed the detectives that the suspect’s sweatshirt was emblazoned with the phrase: “Real Men Don’t Need Directions” and gave a height estimate of the suspect. The suspect was later identified as Lawrence Clark.

[4] Within thirty seconds of Detective Potter’s cocaine purchase, the remaining members of the “arrest team” arrived and observed a group of “eight to ten subjects” near a building approximately fifty feet away from where the buy had occurred. In addition to this group standing outside, there was a female sitting inside a Bronco SUV and three males inside another car, all within the immediate vicinity in question. As the detectives approached the group of people who were standing by the building, Detective Soto testified that he could see a subject fitting the suspect’s description among the group.

[5] Defendant, who was in the group, was not standing immediately next to Clark. They were described as being “at ten and two [o’clock] in relation to each other around the circle.” The officers did not observe any interaction between Defendant and Clark. As the detectives got out of their vehicles, the group began to scatter. Detective Soto had his gun drawn. Clark attempted to run and was captured and placed under arrest.

[6] Defendant also departed from the group, in the opposite direction from Clark, in what Detective Soto described as a “slow run.” Detective Soto pursued Defendant, with his gun drawn, shouting “Police; don’t move. Please don’t move.” After Detective Soto told Defendant to get on the ground, Defendant stopped running and “went to his knees” in front of a car and “threw something under the car.” Detective Soto placed Defendant in handcuffs and looked under the car to see what Defendant had thrown. He found a broken glass crack pipe, a lighter, and a small piece of what was later identified as crack cocaine. Detective Soto testified that as he turned around to face Defendant, he noticed that Defendant, while handcuffed, “had his finger on his coin pocket” and was trying to remove something. Detective Soto then reached into Defendant’s pocket and retrieved a second rock of crack cocaine. Defendant was formally arrested and charged with possession of crack cocaine and drug paraphernalia.

[7] Defendant filed a motion to suppress evidence, arguing that Detective Soto lacked reasonable suspicion when he pursued and seized Defendant. After hearing argument, the district court granted Defendant’s motion and entered the order from which the State now appeals.

STANDARD OF REVIEW

[8] The applicable standard of review of a ruling on a motion to suppress is...
“whether the law was correctly applied to the facts, viewing the facts in the light most favorable to the prevailing party.”
State v. Joe, 2003-NMCA-071, ¶ 6, 133 N.M. 741, 69 P.3d 251. We “must defer to the district court with respect to findings of historical fact so long as they are supported by substantial evidence.” State v. Jason L., 2000-NMSC-018, ¶ 10, 129 N.M. 119, 2 P.3d 856. We will indulge in all reasonable inferences in support of the district court’s ruling and disregard all evidence and inferences to the contrary.
Id. The issues of whether Defendant was seized and whether Defendant abandoned evidence prior to being seized by police detectives are legal issues that we review de novo. See State v. Rector, 2005-NMCA-014, ¶ 4, 136 N.M. 788, 105 P.3d 341 (reviewing de novo the issue of whether the defendant abandoned contraband prior to being seized by police officers); State v. Walters, 1997-NMCA-013, ¶ 8, 123 N.M. 88, 934 P.2d 282 (“Seizure under the Constitution is a question of law, but it is a question of fact whether a person was accosted and restrained in such a manner that a reasonable person in the same circumstances would believe he was not free to leave.”). We review determinations of reasonable suspicion and probable cause de novo. State v. Urioste, 2002-NMSC-023, ¶ 6, 132 N.M. 592, 52 P.3d 964.

ABANDONMENT ARGUMENTS

{9} The State appears to argue that the initial encounter between Detective Soto and Defendant was consensual and therefore Defendant abandoned the evidence he allegedly threw under the car. As a result, the State’s position appears to be that no seizure took place until Defendant was handcuffed. We do not agree. Our case law recognizes three types of encounters between police officers and citizens in the context of crime investigation. They are “consensual encounters, investigatory detentions, and arrests.” State v. Ryon, 2005-NMSC-005, ¶ 20, 137 N.M. 174, 108 P.3d 1032. “Consent is an exception to the Fourth Amendment probable cause and reasonable suspicion requirements that police often rely on to investigate suspected criminal activity.” Id. To determine whether a police-citizen encounter is consensual, we consider “the totality of the circumstances surrounding the encounter [to ascertain whether] the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” Walters, 1997-NMCA-013, ¶ 12 (internal quotation marks and citation omitted).

{10} In this case, the record indicates that Detective Soto had his weapon drawn and pursued Defendant while commanding him to stop and get down on the ground. A reasonable person would not have felt free to leave in that situation. See Jason L., 2000-NMSC-018, ¶ 17 (stating that the “use of aggressive language or tone of voice indicating that compliance with an officer’s request is compulsory” by armed police officers, in addition to threatening presence of several officers, could be considered as factors in determining that a reasonable person would not feel free to leave) (internal quotation marks and citations omitted). The initial contact between Officer Soto and Defendant cannot be characterized as a consensual encounter.

{11} The State also argues that Defendant abandoned the drug paraphernalia and a crack rock because he fled from Detective Soto and therefore he was not seized until Detective Soto placed him in handcuffs. The crux of the State’s argument is that California v. Hodari D., 499 U.S. 621 (1991), and Rector stand for the proposition that once a person flees from an officer, the person is not seized for Fourth Amendment purposes until the person is physically apprehended. However, our reading of Hodari D. and Rector does not lead us to the State’s conclusion that Defendant was not seized until Detective Soto placed him in handcuffs.

{12} The defendant in Hodari D. was standing on a street curb, in a high crime area, when he saw an unmarked police cruiser approaching. Hodari D., 499 U.S. at 622-23. The defendant apparently “panicked” at the sight of the police cruiser and fled. Id. at 623. One of the officers in the cruiser chased the defendant, and as he ran, noticed that the defendant discarded what was later determined to be a rock of crack cocaine. Id. The California Court of Appeal held that the defendant was seized when he saw the officer chasing him and that the seizure was unreasonable under the Fourth Amendment. Id. The issue in Hodari D. was whether a person who flees in the face of a “show of authority” by police has been seized or arrested for Fourth Amendment purposes. Id. at 625-26. The United States Supreme Court held that a person is not seized for Fourth Amendment purposes when the person does not yield to a show of authority by police. Id. at 626. As a result, the defendant in Hodari D. was not seized until he was tackled by the police officer who was chasing him. Id. at 629. Therefore, the rock cocaine that the defendant had discarded while being chased was deemed to have been abandoned even though the officer conceded did not have reasonable suspicion to pursue him. Id. at 624 n.1, 629.

{13} This Court dealt with a similar issue in Rector, in which the defendant also discarded a rock of crack cocaine while being chased by police officers. Rector, 2005-NMCA-014, ¶ 3. The defendant also argued that the evidence should have been suppressed by the district court because the police officers lacked reasonable suspicion for an investigatory stop and because the officer’s discovery of the cocaine was the result of an illegal seizure. Id. ¶ 1. Relying on Hodari D., this Court stated that “a seizure requires either physical force . . . or, where that is absent, submission to the assertion of authority.” Rector, 2005-NMCA-014, ¶ 6 (internal quotation marks and citation omitted). Therefore, we affirmed the district court’s denial of the defendant’s motion to suppress, stating that the defendant “neither submitted to the officers’ show of authority nor was he physically restrained until he was grabbed and handcuffed by” the arresting officer. Id. ¶ 8.

{14} This case is not like Hodari D. and Rector. Defendant initially fled from Detective Soto at a “slow run” for less than one minute. As previously indicated, Detective Soto was pursuing Defendant with his gun drawn. In response to Detective Soto’s command, Defendant stopped running and dropped to his knees. There is no question that Detective Soto was expressing a show of authority when he was chasing Defendant, while wearing his police vest, with his gun drawn, and commanding him “[p]lease don’t move” and to get on the ground. See United States v. Wood, 981 F.2d 536, 539 (D.C. Cir. 1992) (stating that when presented with a question of whether a defendant was seized before being physically apprehended “we must determine (1) whether [the police officer] used a ‘show of authority’ to seize the appellant and (2) whether the appellant submitted to the assertion of authority”). It would appear from the record that Defendant was indeed obeying Detective Soto’s command when he stopped running and began to kneel, and, at that time, he “submitted to the officers’ show of authority” sufficiently to trigger a seizure for Fourth Amendment purposes despite not yet having been physically apprehended.
See Rector, 2005-NMCA-014, ¶ 8.

[15] As we previously stated, we must defer to the district court’s findings of historical fact. Jason L., 2000-NMSC-018, ¶ 10. The district court found that “as [Defendant] went to his knees, he threw something under the car.” Officer Soto testified that he did not know Defendant threw something until he heard “glass on the ground” after Defendant’s knees hit the ground. Therefore, our deferential standard of review allows for the inference that Defendant knelt first and then discarded the contraband. See id. Because Defendant submitted to Detective Soto’s authority when he stopped running and began to kneel, Defendant did not abandon the cocaine evidence prior to being seized as did the defendants in Hodari D. and Rector.

[16] This case is also not like United States v. Lender, 985 F.2d 151 (4th Cir. 1993), upon which the State relies in making the argument that Defendant’s conduct in stopping and kneeling was not a submission to Detective Soto’s authority, but was instead, a “momentary halt.” In Lender, two police officers patrolling an area known for high drug activity observed the defendant, who was in a group of four to five men, engaging in what appeared to be a drug transaction. Id. at 153. As the officers approached the group, it began to disperse. Id. When one of the officers asked the defendant to stop, he refused, instead telling one of the officers, “You don’t want me; you don’t want me.” Id. As the defendant continued to walk away, “both officers observed him bring his hands to the front of his waist as though reaching for or fumbling with something in that area.” Id. One of the officers again asked the defendant to stop, and as the defendant appeared to comply, “a loaded semi-automatic pistol fell from his waist to the ground.” Id. Both the defendant and one of the officers simultaneously reached for the weapon. Id. The other officer immediately subdued the defendant, who was then arrested for carrying a concealed weapon. Id.

[17] In affirming the trial court’s denial of the defendant’s motion to suppress, the Fourth Circuit Court of Appeals stated that the defendant’s “momentary halt on the sidewalk with his back to the officers” did not constitute “a yielding to their authority” for purposes of determining when he was seized. Id. at 155. Rather, the Court stated that the defendant’s statements and fumbling prior to stopping, in addition to his conduct in immediately reaching for the pistol when it fell, were not consistent with conduct indicating he was yielding to the officers’ authority. Id. The Court stated that the defendant’s conduct was more “consistent with preparation to whirl and shoot the officers.” Id.

[18] The record indicates that Defendant in this case did not exhibit conduct even remotely similar to that of the defendant in Lender. Defendant, in dropping to his knees, did nothing to indicate he was going to continue fleeing, much less attack Detective Soto. Instead, even though Defendant may have been attempting to deceive Detective Soto by discarding contraband, he was still seized because he complied with Detective Soto’s command to cease running and get down on the ground. See In re A.T.H., 106 S.W.3d 338, 348-49 (Tex. Ct. App. 2003) (holding that a juvenile was seized for Fourth Amendment purposes when he obeyed a police officer’s order to place his hands above his head, even though he attempted to hide contraband, because the defendant “attempted to conceal a baggie while still complying with [the officer’s] request”).

REASONABLE SUSPICION

[19] Our determination that Defendant did not abandon the evidence he discarded does not end our inquiry. The State argues that the district court erred in granting Defendant’s motion to suppress because Detective Soto’s encounter with Defendant was supported by reasonable suspicion. As an initial point, Defendant argues that the State has waived this issue by conceding the point in its proposed findings of fact and conclusions of law, proposing a conclusion of law stating, “The police officers did not have reasonable suspicion to stop or detain the defendant.” The State argues both that the concession was a typographical error and that the issue was preserved because the prosecutor and Defendant argued the issue below and because the district court ruled on the issue. We agree with Defendant that the State’s proposed findings purport to concede the issue. However, the issue of reasonable suspicion was litigated at length at the motion to suppress hearing, and our review of the transcript and the record indicate that the district court made a ruling on the issue. Therefore, despite the State’s curiously drafted findings and conclusions, we believe the issue was preserved for review. See State v. Vandenberg, 2003-NMSC-030, ¶ 52, 134 N.M. 566, 81 P.3d 19 (“To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked.”) (internal quotation marks and citation omitted).

[20] We therefore address the issue of whether Detective Soto had reasonable suspicion to pursue and detain Defendant. In “appropriate circumstances, a police officer may detain a person in order to investigate possible criminal activity, even if there is no probable cause to make an arrest.” State v. Eli L., 1997-NMCA-109, ¶ 8, 124 N.M. 205, 947 P.2d 162 (internal quotation marks and citation omitted). “Such circumstances must arise from the police officer’s reasonable suspicion that the law is being or has been broken.” Id. (internal quotation marks and citation omitted). “A reasonable suspicion is a particularized suspicion, based on all the circumstances that a particular individual, the one detained, is breaking, or has broken, the law.” Jason L., 2000-NMSC-018, ¶ 20. The officer may not rely upon “[u]nsupported intuition and inarticulate hunches.” Id. (internal quotation marks and citation omitted).

[21] The State argues that Detective Soto developed reasonable suspicion to detain Defendant because (1) Detective Soto testified that he was familiar with multiple-person drug sales, (2) Defendant was standing in a group of eight to ten individuals near where one of those individuals had recently sold crack cocaine to an undercover detective, (3) Defendant initially fled from Detective Soto, and (4) Clark fled in the opposite direction of Defendant. We agree with Defendant that “New Mexico has not dispense[d] with the requirement of individualized, particularized suspicion.” Jason L., 2000-NMSC-018, ¶ 21 (alteration in original) (internal quotation marks and citation omitted). In addition, “[a] person’s mere propinquity to others independently suspected of criminal activity does not, without more, authorize a [seizure of the person] unless the officer has reasonable suspicion [of criminal activity] directed specifically at that person.” State v. Morris, 72 P.3d 570, 580 (Kan. 2003). However, in this case, Detective Soto had individualized conduct on the part of Defendant to factor into his reasonable suspicion determination based on Defendant’s flight.

[22] The consideration of a defendant’s flight from police officers as a factor in determining reasonable suspicion is an issue of first impression in New Mexico. The United States Supreme Court dealt with a similar issue in Illinois v. Wardlow, 528 U.S. 119 (2000), in a manner which
we find instructive. {23} In Wardlow, two police officers were driving through an area known for heavy narcotics trafficking when they noticed the defendant. Id. at 121. The officers were traveling as part of a four-car caravan because they anticipated finding a crowd “in the area, including lookouts and [narcotics] customers.” Id. The officers noticed the defendant standing next to a building and holding an opaque bag. Id. at 121-22. The defendant looked in the officer’s direction and fled. Id. at 122. The officers followed the defendant in their vehicle and observed him as he “ran through the gangway and an alley,” and eventually caught up to and detained the defendant. Id. One of the officers “immediately conducted a protective patdown search for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions.” Id. The search yielded the discovery of a loaded .38-caliber pistol, which led to the defendant’s arrest and subsequent conviction for unlawful use of a weapon by a felon. Id.

{24} The United States Supreme Court held that the officers had reasonable suspicion to briefly detain the defendant. Id. at 124-25. It reasoned that “it was not merely [the defendant’s] presence in an area of heavy narcotics trafficking that aroused the officers’ suspicion, but his unprovoked flight upon noticing the police.” Id. at 124. It further stated that:

Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such. In reviewing the propriety of an officer’s conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior. Id. at 124-25. The Court also instructed that an individual has the right, when approached by a police officer who does not have reasonable suspicion, “to ignore the police [officer] and go about his business.” Id. at 125. However, it stated that flight is not akin to a mere refusal to cooperate.

Id. Instead, it stated that flight, at the very least, creates an ambiguity regarding the lawfulness of the individual’s conduct and that officers, when confronted with such flight, are allowed to briefly stop the individual and resolve the ambiguity. Id. at 125-26. Moreover, the Court stated that reasonable suspicion “requires a showing considerably less than preponderance of the evidence.” Id. at 123.

{25} Other federal and state jurisdictions have held that a defendant’s flight need not necessarily be “headlong” as articulated in Wardlow, in order to be a factor in determining the presence of reasonable suspicion under the totality of circumstances. See, e.g., United States v. Hauk, 412 F.3d 1179, 1184, 1192 (10th Cir. 2005) (relying on Wardlow in stating that police officers’ observation of an unidentified individual entering the defendant’s house, coupled with the defendant’s attempt to retreat into his house and immediately “close the door” after responding to the officers’ knock were factors in providing reasonable suspicion and justification for the officers’ protective sweep of the defendant’s home without a warrant); People v. Rushdoony, 97 P.3d 338, 342-43 (Colo. Ct. App. 2004) (relying on Wardlow in interpreting the defendant’s behavior as flight when the defendant “immediately” backed away from a dumpster in which he was digging and moved toward his car when he was approached by police, and determining that the defendant’s flight, coupled with the fact that there had been recent burglaries in the area and the lateness of the hour, justified a brief investigatory stop by police); State v. Cushing, 2004 UT App 200, 528 U.S. at 124-25 (stating that a part of the circumstances analysis involves allowing “officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person”) (internal quotation marks and citation omitted). Detective Soto also stated that he pursued Defendant because he and his fellow officers were outnumbered, and he was concerned that Defendant might pose a threat to the safety of the officers if allowed to leave the officers’ line of sight.

{26} As stated in Wardlow, our totality of the circumstances analysis must not be guided by a requirement of “scientific certainty from . . . law enforcement officers where none exists.” Wardlow, 528 U.S. at 125. Instead, we are to base our reasonable suspicion determination on “commonsense judgments and inferences about human behavior.” Id. Indeed, the circumstances in this case indicate a stronger inference of Defendant’s involvement in criminal activity than Wardlow because, in this case, known criminal activity had just taken place. In Wardlow, although the area was known for heavy drug trafficking, the officers had not just observed the commission of a crime. See id. at 121. It does not matter that Detective Soto did not actually see Defendant commit a crime or that the individual who actually sold narcotics to Detective Potter, Clark, was easily identifiable. The totality of the circumstances, indicating the existence of criminal activity and Defendant’s flight from the group at the location of the criminal activity, gave rise to the reasonable inference that Defendant was also engaged in conducting their “buy-bust” operation in an area known for “the prevalence of drugs and drug dealing.” More significantly, Detective Soto approached a group of eight to ten people knowing that one of them had just committed a crime by selling drugs to an undercover police officer approximately one minute earlier. Defendant fled from Detective Soto in a “slow run” and initially disregarded Detective Soto’s commands to stop running. Detective Soto articulated that he was familiar with multiple-person drug transactions and that he suspected Defendant of being a part of one, along with Clark and the other individuals in the immediate vicinity of Clark. He stated that he was familiar with situations where drug dealers were not working alone, but rather employed other individuals to “hold [drugs] for them” or act as lookouts. See Griffin, 61 P.3d at 116-17 (stating that a part of the totality of the circumstances analysis involves allowing “officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person”) (internal quotation marks and citation omitted). Detective Soto also stated that he pursued Defendant because he and his fellow officers were outnumbered, and he was concerned that Defendant might pose a threat to the safety of the officers if allowed to leave the officers’ line of sight.

{27} As stated in Wardlow, our totality of the circumstances analysis must not be guided by a requirement of “scientific certainty from . . . law enforcement officers where none exists.” Wardlow, 528 U.S. at 125. Instead, we are to base our reasonable suspicion determination on “commonsense judgments and inferences about human behavior.” Id. Indeed, the circumstances in this case indicate a stronger inference of Defendant’s involvement in criminal activity than Wardlow because, in this case, known criminal activity had just taken place. In Wardlow, although the area was known for heavy drug trafficking, the officers had not just observed the commission of a crime. See id. at 121. It does not matter that Detective Soto did not actually see Defendant commit a crime or that the individual who actually sold narcotics to Detective Potter, Clark, was easily identifiable. The totality of the circumstances, indicating the existence of criminal activity and Defendant’s flight from the group at the location of the criminal activity, gave rise to the reasonable inference that Defendant was also engaged in conducting their “buy-bust” operation in an area known for “the prevalence of drugs and drug dealing.” More significantly, Detective Soto approached a group of eight to ten people knowing that one of them had just committed a crime by selling drugs to an undercover police officer approximately one minute earlier. Defendant fled from Detective Soto in a “slow run” and initially disregarded Detective Soto’s commands to stop running. Detective Soto articulated that he was familiar with multiple-person drug transactions and that he suspected Defendant of being a part of one, along with Clark and the other individuals in the immediate vicinity of Clark. He stated that he was familiar with situations where drug dealers were not working alone, but rather employed other individuals to “hold [drugs] for them” or act as lookouts. See Griffin, 61 P.3d at 116-17 (stating that a part of the totality of the circumstances analysis involves allowing “officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person”) (internal quotation marks and citation omitted). Detective Soto also stated that he pursued Defendant because he and his fellow officers were outnumbered, and he was concerned that Defendant might pose a threat to the safety of the officers if allowed to leave the officers’ line of sight.
in the criminal activity. Detective Soto was justified in pursuing Defendant and briefly detaining him for his own safety and to resolve the ambiguity created by Defendant’s flight and subsequent refusal to heed directions. See id. at 125-26 (stating that flight, although by itself not necessarily indicative of wrongdoing may, when viewed in totality of the circumstances, give rise to reasonable suspicion allowing the officer to briefly detain the fleeing individual in order to “resolve the ambiguity”); Hauk, 412 F.3d at 1193 (stating that when viewed in the totality of the circumstances, facts giving rise to a concern for officer safety may justify a brief protective search of a defendant’s home).

CONCLUSION

(28) When viewed under the totality of the circumstances, Detective Soto had reasonable suspicion to pursue and briefly detain Defendant based on Defendant’s flight in conjunction with the known criminal activity that had just taken place at the location. Therefore, we reverse the district court’s order granting Defendant’s motion to suppress evidence.

[29] IT IS SO ORDERED.
JAMES J. WECHSLER, Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
IRA ROBINSON, Judge

OPINION

JONATHAN B. SUTIN, JUDGE

1. Defendant was charged by a grand jury with committing seventeen counts of various sexual offenses against his biological daughter (Victim). The offenses included criminal sexual penetration (CSP), attempted CSP, criminal sexual contact of a minor (CSCM), and incest. The indictment stated that the offenses occurred between October 1, 1995, and February 25, 2003, although in the separate counts, the State charged more narrow time frames. During some of this time, Victim was under the age of thirteen. Following the trial, the seventeen counts were consolidated into six: one count each of CSCM with a minor under the age of thirteen, incest, attempt to commit CSP, and attempt to commit incest, and two counts of CSP of a minor. Defendant was convicted of all six counts.

2. Defendant appeals on four grounds: (1) whether there was sufficient evidence of attempted CSP and attempted incest where Defendant claims that Victim’s testimony was not credible, (2) whether the district court erred in instructing the jury that it could convict Defendant of CSCM for touching Victim’s breasts and/or her vagina, (3) whether the district court abused its discretion in allowing, under Rule 11-801(D)(1)(b) NMRA, a prior statement, which Defendant argues was not consistent with Victim’s testimony at trial, and (4) whether Defendant was denied notice and the ability to defend because of the large time spans submitted in the jury instructions. We affirm.

BACKGROUND

(3) Victim testified that she was seven years old when her mother moved out of the house, and left her and her three brothers with Defendant, Victim’s father. She testified that about six months after her mother left, Defendant started touching her inappropriately. Victim and her family lived in Roswell on and off from the time that Victim was seven until she was fourteen. During some of that time, Victim and her brothers lived in Artesia with Defendant’s father, Defendant’s stepmother, and his stepstalker who Defendant lived in Arizona. Victim testified that no sexual misconduct occurred during this time in Artesia though Defendant visited her during that time. During the time in Artesia, Victim disclosed to Defendant’s stepstalker (Victim’s stepaunt) that “John” had touched her and “made her put her mouth there.” Victim’s stepaunt believed that by “John” Victim was referring to Defendant, whose middle name is John and who is known as John. At trial, Victim never testified that oral sexual contact occurred.

(4) At some point, Defendant retrieved Victim and her brothers and moved them first to Arizona, then to Washington, then back to Roswell in April 2002, shortly after Victim turned fourteen. Victim testified that, after moving back to Roswell, Defendant committed CSCM and digital CSP on her approximately a dozen times. She also testified that Defendant committed penile CSP on her three times since moving back to Roswell. For two of the acts of CSP, Victim was unable to give a specific date. Two of Victim’s brothers testified to seeing inappropriate contact between Defendant and Victim during this time period. As for the third instance of CSP, Victim testified that it happened on February 25, 2003, the day before she was taken into foster care. Victim testified in detail as to Defendant’s conduct on this date. The incident was not witnessed by anyone else and Defendant denied that it ever occurred. He also generally denied having had any sexual contact with or penetration of Victim. We discuss the facts in more detail later in this opinion as necessary.

DISCUSSION

I. THE STATE PRESENTED
SUBSTANTIAL EVIDENCE OF ATTEMPTED CSP AND ATTEMPTED INCEST

[5] Defendant first argues that the State failed to establish substantial evidence of counts four and five, charging attempted CSP under NMSA 1978, § 30-9-11 (2003), and attempted incest under NMSA 1978, § 30-10-3 (1963). These counts were based on the conduct that occurred February 25, 2003, the day before Victim was put into foster care. Defendant argues that “[t]he only evidence, direct or circumstantial, that [Defendant] attempted CSP or attempted incest on February 25, 200[3] was the directly controverted testimony of the alleged victim.” Defendant argues that Victim’s uncorroborated, contradictory testimony does not establish beyond a reasonable doubt that the alleged attempted CSP and attempted incest occurred.

[6] Victim testified as follows: On the night of February 25, 2003, she had fallen asleep in her father’s room watching TV. Her father’s live-in girlfriend, Donna, was not at the house at the time. When she woke up, her father was on top of her and there were candles lit in the room. Her father then retrieved some condoms out of his closet and put one on his penis. Her father told her that he wanted to “come inside her.” He then placed his penis inside her vagina and started pushing, and it was very uncomfortable and hurt. She tried to scream or make a noise but could not get a sound out. At one point she managed to push him off of her and she went running to the bathroom to get away from him. He then called her back to the bedroom. She tried to throw her back onto the bed but he managed to escape her grip. Defendant stated a second time that he wanted to come inside of her. Victim grabbed her pajamas, ran back to the bathroom, got dressed and went back to where she normally slept.

[7] On cross-examination, defense counsel elicited testimony from Victim establishing that the day after this incident she told a police detective that she had never seen any condoms at the house and that she had never seen a condom. Defendant raises other contradictions, including, for example, that Victim testified that Defendant told her not to attribute any sexual contact to him but to tell the police the sexual contact was by a boyfriend, whereas, on cross-examination Victim testified that she told the detective her father had never discussed the sexual contact with her; that Victim denied any inappropriate contact by her father and was not lying to protect him; and that she told the detective she was a virgin.

[8] Defendant’s insufficiency of evidence point is based solely on his argument that Victim’s testimony regarding attempted CSP and attempted incest was not sufficiently credible to permit the jury to find Defendant guilty beyond a reasonable doubt. Defendant also challenges the sufficiency of the evidence by questioning whether a reasonable person could think Defendant was not credible, viewing the evidence in a light most favorable to the State. For that proposition, he relies on State v. Dominguez, 115 N.M. 445, 455, 853 P.2d 147, 157 (Ct. App. 1993), as citing the case of State v. Sparks, 102 N.M. 317, 694 P.2d 1382 (Ct. App. 1985), which merely states that substantial evidence is evidence that is acceptable to a reasonably mind as adequate support for a conclusion and holds that the jury could reasonable have believed that the defendant acted in a particular manner. Id. at 320, 694 P.2d at 1385. Defendant’s authority does not support his proposition. Defendant’s standard is simply incorrect.

[9] “When determining the sufficiency of the evidence, the court views the evidence in a light most favorable to the verdict, considering that the State has the burden of proof beyond a reasonable doubt.” State v. Garcia, 2005-NMSC-017, ¶ 12, 138 N.M. 1, 116 P.3d 72. We view the evidence in the light most favorable to the verdict and disregard any contrary evidence. State v. Bennett, 2003-NMCA-147, ¶ 19, 134 N.M. 705, 82 P.3d 72. “If evidence is in conflict, or credibility is at issue, we accept any interpretation of the evidence that supports the trial court’s findings[.]” State v. Wynn, 2001-NMCA-020, ¶ 5, 130 N.M. 381, 24 P.3d 816. As an appellate court, we do not “substitute our judgment for that of the factfinder concerning the credibility of witnesses or the weight to be given their testimony.” State v. Sanders, 117 N.M. 452, 457, 872 P.2d 870, 875 (1994).

“An appellate court does not observe the demeanor of live witnesses, cannot see a shift of the eyes, sweat, a squirm, a tear, a facial expression, or take notice of other signs that may mean the difference between truth and falsehood to the fact finder.” Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 127, 776 P.2d 363, 366 (Ct. App. 1988).

[10] In prosecutions for criminal sexual penetration, “[t]he testimony of [the] victim need not be corroborated” and lack of corroboration has no bearing on weight to be given to the testimony. NMSA 1978, § 30-9-15 (1975). The appropriate formulation of the evidence test in CSP cases was succinctly stated in State v. Hunter, 101 N.M. 5, 7, 677 P.2d 618, 620 (1984):

[11] While the evidence was conflicting, it was not incredible. The jury, as the trier of fact, was entitled to weigh this evidence. The jury simply believed the victims’ testimony and the evidence supporting it over Defendant’s assertions that the incidents had not occurred. This Court will not substitute its determination for that of the jury.

(Citation omitted.)

[12] While Victim’s testimony may have been to some degree impeached, it was nonetheless in the province of the jury as factfinder to decide whether to believe the Victim. Here the jury obviously determined Victim’s testimony to be sufficiently credible for conviction. We will not disturb that determination. We thus conclude that there was sufficient evidence of attempted CSP and attempted incest. We hold that the district court did not err in denying the motion for directed verdict as to counts four and five charging attempted CSP and attempted incest.

II. THE DISTRICT COURT DID NOT ERR IN INSTRUCTING THE JURY THAT IT COULD CONVICT DEFENDANT OF CSCM FOR TOUCHING “EITHER/OR” TWO DISTINCT PARTS OF VICTIM


[14] The district court instructed the jury that in order to convict Defendant of CSCM of a child under the age of thirteen, it must conclude that Defendant touched or applied force “to the vagina and/or breast” of Victim. Defendant argues that the district court erred in submitting this instruction to the jury. Defendant maintains that use of the disjunctive “negated the unanimity required to convict the Defendant,” citing United States v. Powell, 226 F.3d 1181, 1194-96 (10th Cir. 2000), and United States v. Daily, 921 F.2d 994, 1001 (10th Cir. 1990), overruled on other grounds as recognized by United States v. Wiles, 102 F.3d 1043 (10th Cir. 1996) (holding that materiality is an element of perjury that must be found by a jury and that there was a structural error in not requiring the jury...
to find materiality), judgment vacated by sub nom., United States v. Schleibaum, 522 U.S. 945 (1997) (referring to Johnson v. United States, 522 U.S. 461, 465-67 (1997)), holding that materiality is an element of perjury which must be found by a jury and that a plain error analysis, rather than a structural error analysis, applies to the question of whether the district court erred in not requiring the jury to find materiality when the issue was not preserved). Neither Powell nor Daily assists Defendant.

[15] Defendant quotes Daily as stating “when requesting a statute which specifies various ways in which a particular crime may be committed . . . if the State alleges the several acts in the disjunctive, it fails to inform the Defendant of the act he is charged with committing and is insufficient.” Defendant cut language out of Daily and thereby cut out what was stated in Daily. The actual language in Daily is a quote from 1 C. Wright, Federal Practice and Procedure § 125, at 372-74 (1982). Daily, 921 F.2d at 1001. It discusses variances between statutes and indictments, stating:

Frequently a statute will specify various ways in which a particular crime may be committed. It is enough to allege one of these ways without negating the others. Or the pleading may allege commission of the offense by all the acts mentioned if it uses the conjunctive “and” where the statute uses the disjunctive “or.” But if the indictment or information alleges the several acts in the disjunctive it fails to inform the defendant which of the acts he is charged with having committed, and it is insufficient. Id. Daily pertains to the language in an indictment, not a jury instruction. We do not accept Defendant’s apparent, unexplained view that Daily supports his position that a disjunctive in a jury instruction is error.

[16] Similarly, Defendant appears to cite Powell as holding or indicating that a “jury instruction deprived Defendant of a unanimous jury verdict.” In Powell, the jury was instructed that it could convict the defendant of kidnapping under 18 U.S.C. § 1201 (1998) (amended 2003), if it found that the defendant “seized, confined, inveigled, decoyed, kidnapped, abducted or carried away” the victim. Powell, 226 F.3d at 1189. The district court had also instructed the jury with a general “unanimity instruction,” which stated “[y]our verdict must represent the collective judgment of the jury. In order to return a verdict, it is necessary that each juror agree to it. Your verdict, in other words, must be unanimous.” Id. at 1194 n.6. The defendant was convicted and argued on appeal that the lower court erred in not specifically instructing the jury that it must agree unanimously on the means of kidnapping. Id. at 1194-95. The appellate court reviewed the issue for plain error as it was not preserved below. Id. at 1194. The United States Court of Appeals, after noting that other federal circuit courts disagreed, held that there was not plain error and that the jury need not unanimously agree as to the means by which the act of kidnapping was committed. Id. at 1195-96. Thus, Powell holds the opposite of what Defendant contends, namely, that the jury instruction did not deprive Defendant of a unanimous verdict.

[17] Focusing only on the part of the body at issue in this case, we conclude that the two theories upon which the jury could convict Defendant of CSCM, namely: (1) touching or applying force to Victim’s breasts, or (2) touching or applying force to her vagina, were simply alternative means by which Defendant could commit CSCM, rather than distinct elements of CSCM. The statute prohibits unlawful and intentional touching of the intimate parts of a child. NMSA 1978, § 30-9-13(A) (2003). “Intimate parts” are further defined as including the primary genital area and the breasts. Id. The jury instruction elaborates on what parts of the anatomy constitute the primary genital area and lists vagina. UJI 14-925 NMRA (use note 4). Thus, these two acts are merely two means of satisfying the same element, which is touching the “intimate parts” of a child. Finally, we note that the use note to the jury instruction directs the court to insert one or more of the body parts listed, without stating that the body parts must be listed in the conjunctive only. UJI 14-925 (use note 4). We conclude that the jury instruction did not erroneously negate the unanimity required to convict Defendant of CSCM. While we do not know whether the jury unanimously agreed on which of the alternative means by which Defendant committed CSCM, we do know that the jury unanimously agreed that Defendant committed CSCM, which is the controlling inquiry. Cf. Salazar, 1997-NMSC-044, ¶ 42.

[18] We conclude that the jury was not impermissibly instructed that it could convict Defendant of CSCM of a minor under the age of thirteen for touching Victim’s breasts and/or vagina.

III. THE DISTRICT COURT DID NOT ERR IN ADMITTING PRIOR CONSISTENT STATEMENTS UNDER RULE 11-801(D)(1)(b) NMRA

[19] Victim testified that she had told her stepaunt and her stepgrandmother that her father had touched her in inappropriate places. She testified that she did not remember the details of the conversations. Later, over objection, the State elicited testimony from Victim’s stepaunt that Victim told her that “John” had “made her put her mouth there.” When the State asked the question which elicited this testimony, and before the stepaunt responded to the question, defense counsel objected on the grounds of hearsay and a bench conference was held about the testimony. The State responded that the testimony was offered as a prior consistent statement under Rule 11-801(D)(1)(b). The district court allowed the testimony on that ground. Defendant now argues that this statement was not consistent with Victim’s trial testimony.

[20] In addition, the State elicited from the Victim’s stepgrandmother that the stepaunt told her that Victim had told the stepaunt that Victim “had been played with with a hand and mouth in that area.” Defendant did not object on any ground to this testimony during the trial, but on appeal argues that the statement was not a prior consistent statement. The State does not raise lack of preservation or suggest that the plain error standard should be applied to this issue, but rather proceeds to address this evidentiary issue under an abuse of discretion standard.

[21] We review evidentiary decisions by the district court for an abuse of discretion. Salazar, 1997-NMSC-044, ¶ 65. Under Rule 11-801(D)(1)(b), a prior consistent statement is not considered hearsay and is admissible to “rebut an express or implied charge of recent fabrication or improper influence or motive.” State v. Sandate, 119 N.M. 235, 239, 889 P.2d 843, 847 (Ct. App. 1994); see Rule 11-801(D)(1)(b). The prior consistent statement must have been made before the alleged motive to fabricate occurred. State v. Casaus, 1996-NMCA-031, ¶ 18, 121 N.M. 481, 913 P.2d 669. The statement must also be consistent with the statement made in court. Sandate, 119 N.M. at 239, 889 P.2d at 847. New Mexico has had only a few opportunities to develop a standard for determining whether a prior statement is consistent with a statement.
at trial. Our Supreme Court has decided that prior statements which vary slightly from testimony at trial are admissible as non-hearsay under Rule 11-801(D)(1)(b).

See Salazar, 1997-NMSC-044, ¶ 67 (concluding that negligible differences in testimony from a prior statement are inconsequential). Salazar stated that “the primary inquiry is whether the [prior statement] and trial testimony were substantially similar as to all material facts presented.” Id. However, prior statements cannot be used to “fill in the gaps left by the faulty memory of a witness who actually testifies at trial.” Sandoate, 119 N.M. at 240, 889 P.2d at 848.

[22] In this case, the State argued at trial that the stepaunt’s statement was admissible to rebut Defendant’s claim that Victim fabricated all allegations of molestation or sexual activity due to pressure from either the police or the State Health and Human Services Department. Defendant does not question whether the prior statement preceded the alleged motive to fabricate; he only argues that Victim’s statement to her stepaunt was not consistent with Victim’s testimony at trial. Defendant points out that Victim told her stepaunt that “John” had done this and did not say it was her father. He also points out that Victim never testified at trial as to any oral sexual contact.

[23] As to Victim’s implication of “John” rather than “my dad” or “my father” in her prior statement, John is Defendant’s middle name and Defendant goes by the name of John. In our view, given that Defendant’s name is John, the statements are consistent with each other as to the perpetrator. The fact that Victim’s younger brother is also named John does not negate the consistency when Defendant also went by John. Thus, we see no abuse of discretion based on the claimed discrepancy between the prior statement of Victim to her stepaunt about “John” and Victim’s testimony at trial.

[24] The difference in the testimony regarding the oral sexual contact is more troubling. The stepaunt stated that Victim said that “John” had “made her put her mouth down there.” The stepgrandmother mentioned oral contact as well as other contact. However, when Victim testified about what she told her stepaunt, Victim stated only that she told her that Defendant was touching her in inappropriate spots. Victim stated nothing at trial that would indicate she performed or attempted oral sexual contact, that oral sex was performed or attempted on her, or that she told her stepaunt anything about oral sexual contact.

[25] The question of whether the prior statements regarding oral sexual contact were “substantially similar” to Victim’s trial testimony boils down to the level of specificity required; that is, whether the statements must be consistent as to every detail or consistent with the facts viewed more broadly. Viewed more broadly, the statements all show criminal sexual contact and to that extent they are consistent. Viewed more narrowly, there is a discrepancy.

[26] It may be that, in some cases, a more narrow view of the facts may be appropriate. That is, the distinction between oral and other sexual contact may, under other circumstances, be significant enough for us to conclude that the district court abused its discretion in determining that a prior statement was a prior consistent statement. However, in this case, we believe that a broader view of the facts elicited in the statements is warranted given that Defendant’s charge of fabrication is based on a broad-scale claim that there was never any sexual contact over the substantial periods of time to which Victim testified. Under the circumstances, we think the prior statements elicited from both the stepaunt and the stepgrandmother as having been made when Victim was twelve are similar enough to Victim’s trial statement of sexual contact to pass abuse of discretion muster and thus to be admissible under Rule 11-801(D)(1)(b).

IV. DEFENDANT RECEIVED SUFFICIENT NOTICE OF THE CHARGES AGAINST HIM AND WAS NOT PREJUDICED BY THE JURY INSTRUCTIONS

[27] Finally, Defendant contends that the State denied him constitutional due process and the ability to defend against two of the charges because of the large time spans covered in the jury instructions and because the charges were given to the jury “with respect to the same time period and with no distinct difference in the alleged conduct.” Count two charged Defendant with CSP based on sexual intercourse occurring between April 12, 2002, and February 24, 2003, approximately a ten-month span. Count six charged Defendant with CSP based on digital penetration occurring sometime between June 2002 and February 2003, approximately an eight-month span. Defendant relies on State v. Baldonado, 1998-NMCA-040, 124 N.M. 745, 955 P.2d 214, which sets out a multi-factor test to review the reasonableness of the State’s efforts to narrow the time frame for the crimes charged in the indictment.

[28] Under Rule 12-216(A) NMRA, “[t]o preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[,]” Case law instructs that “[i]n order to preserve an error for appeal, it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked.” State v. Varela, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (internal quotation marks and citation omitted). “The primary purposes of the preservation requirement are (1) to alert the trial court to a claim of error so that it has an opportunity to correct any mistake, and (2) to give the opposing party a fair opportunity to respond and show why the court should rule against the objector.” State v. Montoya, 2005-NMCA-005, ¶ 7, 136 N.M. 674, 104 P.3d 540 (internal quotation marks and citation omitted), cert. granted, 2005-NMCERT-001, 137 N.M. 17, 106 P.3d 579.

[29] Defendant contends that he preserved this issue during his motion for directed verdict at the close of the State’s case and again at the close of the evidence. During the motion for directed verdict, the State requested permission to amend the charges to include ten counts of CSP based on digital penetration from June 2002 through February 2003 based on Victim’s testimony that Defendant committed digital CSP on her about once a month during that time period. Defendant responded that under Baldonado and the doctrines of fair notice and due process, the State should not be allowed to submit that number of charges based on Victim’s testimony that digital penetration happened once a month. Rather, Defendant argued that one count of CSP during the time period would be fair and reasonable. The district court only allowed one count of penile CSP and one count of digital CSP to go to the jury for the time period at issue. Defendant expressed no objection at the time.

[30] Later, at the close of evidence, the district court asked Defendant if he had any objections to the State’s proposed jury instructions. Even though Defendant asked for clarification that the jury instructions concerning digital and penile CSP for the time frames charged were based on a continuing course of conduct and span of time, Defendant made no objection to these
instructions nor in any other way alerted the court that he believed the instructions were erroneous. Defendant in fact stated that he was satisfied that the instructions correctly instructed the jury. We conclude that Defendant did not preserve his arguments that under Baldonado he did not receive fair notice of the charges against him and that there was a violation of due process because of the broad period of time covered in the instructions as submitted to the jury.

Moreover, Baldonado sets out a detailed nine-factor test for determining whether the State could have set forth more specific dates in the indictment and whether the defendant faced any prejudice under the specific dates in the indictment and whether the defendant faced any prejudice under the instruction. We hold that summary judgment was proper because Plaintiff failed to meet his burden to rebut Bank's prima facie evidence that the overdraft fee was not grossly disproportionate to the value received by Plaintiff and affirm.

{3} Moreover, Baldonado sets out a detailed nine-factor test for determining whether the State could have set forth more specific dates in the indictment and whether the defendant faced any prejudice under the instruction. We hold that summary judgment was proper because Plaintiff failed to meet his burden to rebut Bank's prima facie evidence that the overdraft fee was not grossly disproportionate to the value received by Plaintiff and affirm.

FACTS AND PROCEDURAL BACKGROUND

(2) Plaintiff maintains a checking account with Bank, a nationally chartered bank. Plaintiff occasionally used a debit card to make purchases that are charged against his account. On more than one occasion, Plaintiff used his debit card for a purchase transaction when his checking account did not have sufficient funds. On such occasions, Bank approved the transaction, covered the difference, and charged Plaintiff an overdraft fee between $28 and $31. Most of the overdrafts were in amounts less than the overdraft fee. Plaintiff sued Bank under Section 57-12-2(E)(2), alleging that Bank’s overdraft fees are extensions of credit that are unconscionable because of a gross disparity between the value received (Bank coverage of the overdrafts) and the price paid (the resultant overdraft fee).

{3} Bank moved for summary judgment, arguing that Plaintiff’s UPA claim is preempted by the National Banking Act, 12 U.S.C. §§ 21-216 (2000) (NBA), and that the overdraft fees are not unconscionable as a matter of law. Bank’s motion for summary judgment included an affidavit of Bank Vice President Victor A. Valdez and supporting documentation of a 1997 Account Agreement and a 1999 Account Agreement (Account Agreements). The Account Agreements set forth Bank’s rights to cover or to decline transactions, including electronic transactions when presented on insufficient funds, and to charge Plaintiff a resultant fee. Valdez’s affidavit also referred to and attached a 2000 Consumer Account Fee and Information Schedule, which provided Plaintiff with information on available overdraft protection plans and overdraft fees. Plaintiff signed account applications in which he acknowledged having received and being bound by the Account Agreements and the Consumer Account Fee. In addition, Valdez’s affidavit referred to attached bank statements in which Bank gave Plaintiff notice of his overdrafts, provided the amounts of the overdraft fees that Plaintiff agreed to pay, notified Plaintiff that it was Bank’s policy to approve as many debit card transactions as possible, and offered Plaintiff the option to apply for overdraft protection.

(4) In response to Bank’s motion for summary judgment, Plaintiff disputed receiving all of the above-noted documentation, disputed the reasonableness and justification for Bank’s overdraft
policies, and argued that preemption did not apply. The trial court granted summary judgment in Bank's favor, determining that there was no genuine issue of material fact with respect to Bank's statement of material facts, and that (1) federal law preempted Plaintiff's claim, and (2) as a matter of law, Bank was otherwise entitled to summary judgment.

STANDARD OF REVIEW
{5} Summary judgment is properly granted when no genuine issues of material fact exist “and the movant is entitled to judgment as a matter of law.” Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. We review de novo the issue of whether the movant was entitled to judgment as a matter of law. Id. The movant must make a prima facie showing that summary judgment is merited. Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992). Upon such a prima facie showing, the burden shifts to the party opposing summary judgment to show specific evidentiary facts in the form of admissible evidence that require a trial on the merits. Id. at 334-35, 825 P.2d at 1244-45; Ciup v. Chevron U.S.A., Inc., 1996-NMSC-062, ¶ 7, 122 N.M. 537, 928 P.2d 263. General assertions of the existence of a triable issue are insufficient. See Clough v. Adventist Health Sys., Inc., 108 N.M. 801, 803, 780 P.2d 627, 629 (1989) (“[M]ere argument or bare contentions of the existence of a material issue of fact is insufficient.”); Spears v. Canon de Carnue Land Grant, 80 N.M. 766, 769, 461 P.2d 415, 418 (1969) (“Mere argument or contention of existence of material issue of fact . . . does not make it so. The party opposing a motion for summary judgment cannot defeat the motion . . . by the bare contention that an issue of fact exists, but must show that evidence is available . . . .”) (citation omitted); Schmidt v. St. Joseph's Hosp., 105 N.M. 681, 683, 736 P.2d 135, 137 (Ct. App. 1987) (stating that “a general allegation without an attempt to show the existence of those factual elements comprising the claim or defense” is insufficient to overcome a motion for summary judgment) (internal quotation marks and citation omitted).

PLAINTIFF’S FAILURE TO MEET HIS BURDEN
{6} Section 57-12-2(E)(1), (2) defines an “unconscionable trade practice” as: [A]n act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts which to a person’s detriment:

1. takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
2. results in a gross disparity between the value received by a person and the price paid.

{7} Plaintiff premises his claim on Bank’s alleged violation of Section 57-12-2(E)(2), arguing specifically that Bank made an extension of credit that was unconscionable because it resulted in a gross disparity between the value received and the price paid. Plaintiff claims that the overdraft fees are excessive for the services rendered and that the amount of the overdraft fees and the actual expenses incurred by Bank for processing Plaintiff’s overdraft debit transactions do not justify the amount of the fees imposed.

{8} As a national bank, Bank is subject to the NBA and regulations of the Office of the Comptroller of the Currency (OCC) under its authority to supervise and regulate federally chartered banks pursuant to the NBA. See 12 U.S.C. § 1 (2000). In connection with its motion for summary judgment, Bank presented evidence that it established its overdraft fees in accordance with sound banking principles under the OCC regulation pertaining to a national bank’s adoption of customer fees. Specifically, Bank submitted Valdez’s affidavit stating that the fees aid in offsetting Bank’s costs in processing the overdrafts. Valdez stated that Bank’s costs included resultant “postage and mailing costs, costs associated with time spent by [b]ank tellers or customer service representatives with account holders whose accounts are overdrawn, and, in some cases, costs related to collection activities to recover overdrawn amounts or write-offs of overdrawn amounts.” Valdez indicated that the amount of the fees is designed, in part, to deter Bank customers from repeatedly overdrawing their accounts and to encourage them to keep track of their account balances. Additionally, Valdez stated that the amount of overdraft fees must remain competitive with that of other large banks to discourage customers who habitually overdraw their accounts from choosing Bank. He further stated that, as part of Bank’s business plan and marketing strategy, Bank chooses to approve as many transactions as possible, both to provide a better experience for most customers “by avoiding public rejection in the grocery line,” and to make the debit card more reliable for merchants. Lastly, Valdez stated that the overdraft fees contribute to its income and are at amounts that are competitive with other banking institutions, adding to the safety and soundness of banking practices. Putting aside any issue of whether Bank’s actions comply with OCC regulation, Valdez’s affidavit meets the requirements of a prima facie showing that there is no gross disparity between the value received by Plaintiff and the fee he paid for that value. See Rivera v. Brazos Lodge Corp., 111 N.M. 670, 672, 808 P.2d 955, 957 (1991) (“A prima facie showing contemplates such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. The movant need not demonstrate beyond all possibility that no genuine factual issue existed.”) (citation omitted); Oschwald v. Christie, 95 N.M. 251, 253, 620 P.2d 1276, 1278 (1980) (discussing prima facie cases for summary judgment and concluding that the affidavit of the movant did make a prima facie case).

{9} In response to Bank’s motion for summary judgment. Plaintiff argued that the overdraft fees were unconscionable as a matter of fact, unreasonable, and grossly higher than Bank’s costs. He further argued that Bank’s interests in deterrence of customer abuse and protection of its market position could best be accomplished by denying overdraft transactions or charging a reasonable fee. Plaintiff submitted his own affidavit in which he denied receiving both the 1997 Account Agreement and the Fee and Information Schedule. He also denied that his actions were the cause of the overdrafts. He further stated:

4. I do not believe that deterring overdrafts is the reason that Wells Fargo charges high overdraft fees.
5. I do not prefer to pay an extremely high overdraft fee than to have a transaction publicly denied. I also believe that many bank customers feel the same way I do.
6. I do not believe that Wells Fargo charges high overdraft fees in order to deter those who overdraft their accounts from banking with Wells Fargo. I believe that they could achieve this same goal by not approving overdrafts.

. . .
8. I believe that the overdraft fees charged by Wells Fargo are grossly unfair. [10] The shortcoming of Plaintiff’s response is that it does not counter Bank’s motion and affidavit in a manner to place material facts at issue. Plaintiff makes only general statements expressing his contrary beliefs and arguments without rebuttering Bank’s evidence that its overdraft fees were not disproportionate. See Martínez v. Metzgar, 97 N.M. 173, 175, 637 P.2d 1228, 1230 (1981) (“Belief or opinion testimony alone, no matter how sincere it may be, is not equivalent to personal knowledge. . . . Therefore, these statements do not create a genuine issue of material fact which would preclude summary judgment . . . .”)(citation omitted); Pedigo v. Valley Mobile Homes, Inc., 97 N.M. 795, 798, 643 P.2d 1247, 1250 (Ct. App. 1982) (noting that “factually unsupported opinion testimony” is “not sufficient to defeat a motion for summary judgment”). Regardless of whether Bank could have addressed overdrafts differently, the Valdez affidavit states that Bank approved the transactions based, in part, on concerns with public embarrassment for its customers. In establishing its fees, Bank considered more than its actual cost in providing the service in order to address deterrence, its competitive position, and the maintenance of its safety and soundness as a banking institution. Plaintiff’s beliefs are not relevant except as to the value he received in a transaction. See § 57-12-2(E)(2); see also Martínez, 97 N.M. at 175, 637 P.2d at 1230; Pedigo, 97 N.M. at 798, 643 P.2d at 1250. His only statement in this regard is that he would prefer to be publicly denied approval than charged an overdraft fee. This statement, however, is only a general attack on the value he received. As with Plaintiff’s other statements, it does not raise an evidentiary issue that there was a gross disparity between the overdraft fee and the benefit received. See Bixby v. Reynolds Mining Corp., 113 N.M. 372, 374, 826 P.2d 968, 970 (1992) (“Conclusions that are stated in an affidavit, unsupported by any factual basis . . . are not sufficient to raise issues of material fact. The opposing party must set forth more than mere argument.”)(citation omitted); Clough, 108 N.M. at 803, 780 P.2d at 629; Spears, 80 N.M. at 769, 461 P.2d at 418; Schmidt, 105 N.M. at 683, 736 P.2d at 137.

{11} Plaintiff’s argument in his response also does not directly address the issue of the disproportionate relationship of the overdraft fee to the value Plaintiff received. It is not enough to make the general statement that a reasonable jury could find in his favor. Plaintiff stresses the amount of his overdrafts in relation to the overdraft fee. However, the amount of the overdraft is not the focus of the overdraft fee. As contemplated by the Account Agreements, the overdraft fees are for the processing of Plaintiff’s debit transactions made on insufficient funds. They are not interest or compensation for the use of money, transactions for which there is a direct relationship between the amount extended and the amount charged. See Video Trax, Inc. v. NationsBank, N.A., 33 F. Supp. 2d 1041, 1050 (S.D. Fla. 1998) (holding that overdraft and not sufficient fund (NSF) fees, charged to compensate the bank for processing bad checks, are not imposed in connection with an extension of credit involving interest within the meaning of 12 U.S.C. § 85 and 12 C.F.R. § 7.4001(a) (1997), but arise from the terms of the deposit agreements); First Bank v. Tony’s Tortilla Factory, Inc., 877 S.W.2d 285, 287 (Tex. 1994) (holding that a bank’s fees for checks drawn on an account with insufficient funds do not constitute interest because the fees “are an additional charge supported by a distinctly separate and additional consideration, [for processing the overdrafts,] other than the simple lending of money”).

{12} Although Plaintiff argues in his reply brief that there is a distinction between an overdraft check and an overdraft debit transaction, for the purposes of this opinion, we do not agree. When Plaintiff used his debit card beyond the cash balance that was in his checking account, Bank charged an overdraft fee for each item paid beyond the balance in Plaintiff’s account. Plaintiff’s use of the debit card was comparable to writing a check. See Gale v. Hyde Park Bank, 384 F.3d 451, 452 (7th Cir. 2004) (recognizing that like a checking account, use of a debit card requires that the bank balance supports each new transaction regardless of whether the transaction is immediately posted).

CONCLUSION

{13} We affirm the trial court’s grant of summary judgment on the merits of Plaintiff’s unconscionability claim because Plaintiff did not meet his burden in responding to Bank’s motion and affidavit.

{14} IT IS SO ORDERED.

JAMES J. WECHSLER,
Judge

WE CONCUR:
JONATHAN B. SUTIN, Judge
CELIA FOY CASTILLO, Judge
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