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**21** Divorce Practice with Larry Rice

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He has lectured at six ABA conventions and state bar associations across the country. Family Law practitioners refer to his presentations as “the Disney World of seminars – fast-paced, fun, and fantastic.” Listed in Who’s Who in American Law, Who’s Who in the World, and Best Lawyers in America, Larry Rice is a nationally known small-firm lawyer who entertains while providing “practical, useful, detailed” information.

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For further information, please contact the following: Celia Ludi - ADR Director, First Judicial District Court • (505) 827-5072 • sfedcal@nmcourts.com  
David Levin - Director, Court Alternatives, First Judicial District Court • (505) 841-7475 • albddipl@nmcourts.com

- [ ] Standard Fee $95  
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- [ ] Government/Paralegal $85  
- [ ] April 28 - Santa Fe

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Professionalism Tip

With respect to opposing parties and their counsel:
I will agree to reasonable requests for extensions of time or waivers of formalities when legitimate interests of my client will not be adversely affected.

Meetings

March
29
Prosecutors Section Annual Meeting
noon, Sandia Casino and Resort

April
5
Employment and Labor Law Section
Board of Directors, noon, State Bar Center

7
Elder Law Section Annual Meeting
11:30 a.m., State Bar Center

Legal Services and Programs
Legislative Funding Committee
noon, Metro Court

Ethics Advisory Committee
10 a.m., State Bar Center

Taxation Section
Board of Directors
noon, via teleconference

Public Legal Education Committee
noon, Lewis and Roca, State Bar Center

Children’s Law Section Board of Directors
noon, Juvenile Justice Center

State Bar Workshops

March
28
Family Law Workshop
6 p.m., TVI-South Valley Campus, Multi-purpose Room, Albuquerque

30
Lawyer Referral for the Elderly Workshop
Topic: Advance Directives/Guardianship
1:15 p.m., Meadowlark Senior Center, Rio Rancho

April
4
Criminal Law Workshop
6 p.m., Las Vegas VFW, Las Vegas

4
Lawyer Referral for the Elderly Workshop
9 a.m., Chaves County Joy Center, Roswell

5
Lawyer Referral for the Elderly Workshop
9 a.m., Hagerman Joy Center, Hagerman

5
Consumer Debt/Bankruptcy Workshop
6 p.m., Mesalands Community College, Room A-215, Tucumcari

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

COURT NEWS

NM Supreme Court
Proposed Revisions to District Court Rules and Rules of Appellate Procedure

The Supreme Court is considering proposed revisions to District Court rules and Rules of Appellate Procedure. Written comments on the proposed amendments may be sent to Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, New Mexico 87504-0848, by April 10. The proposed revisions were printed in the March 20, (Vol. 45, No. 12) Bar Bulletin.

First Judicial District Court
Destruction of Tapes
Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1977 to 1986

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy tapes filed with the court, in Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate cases for years 1977 to 1986, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and wish to have duplicates made should verify tape information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after April 20 Order of the Court.

Family Law Brownbag Meeting

The 1st Judicial District Court will host its family law brownbag meeting at noon, April 11, in the Grand Jury Room, second floor, of the Steve Herrera Judicial Complex in Santa Fe. The meeting will focus on advisory consultations and the law. Presentations will be made by Family Court Services and by attorneys. For more information or to suggest agenda items to be discussed, contact Elege Simons, (505) 982-3610, or esimons@rubinkatzlaw.com. Provide one dollar, name and State Bar number and receive 1.0 CLE credit, pending approval.

Second Judicial District Court
Arbitration Standing Committee

An Arbitration Standing Committee has been established pursuant to LR2-601(B), whereby “the court may appoint standing committees of judges, lawyers and others to provide guidance and assistance” for the court-annexed alternative dispute resolution programs which are administered by Court Alternatives.

For more information or to convey concerns or suggestions regarding the arbitration program, contact Committee Chair John “Pat” Massey, (505) 268-6707, or mlolllc@qwest.net.

Sixth Judicial District Court
New Office Hours

Effective March 21 new office hours for the 6th Judicial District, counties of Grant and Luna, will be from 8 a.m. to noon and from 1 to 5 p.m. All offices located in both courthouses will be closed during the lunch hour.

Federal Courts
Increase to the Civil Filing Fee
Effective April 9

Amended Notice

On Feb. 8, 2006, the President signed into law the Deficit Reduction Act of 2005, which included a provision increasing the civil filing fee by $100 to $350. This change in the civil filing fee will become effective April 9, 2006, 60 days from the date the bill was signed into law by the President.

The Act increases the filing fee for civil actions prescribed by 28 U.S.C. §1914(a) from $250 to $350. The civil filing fee was last increased in 2005 when it was adjusted from $150 to $250. The filing fee for a writ of habeas corpus will continue to be $5. The Act also increases the Court of Appeals filing fee to $450. Including the $5 docketing fee, the total fee for taking an appeal will increase to $455.

Quality of Life Quote

The passions, values and ideas that motivate us in our life can also inspire us in the workplace. Finding a way to use our gifts and talents, express our creativity, develop our character, build our relationships, and feel the satisfaction of a “job well done” will not only produce a paycheck, but also a fulfilling life.

Roy Lessin

6 BAR BULLETIN - MARCH 27, 2006 - VOLUME 45, NO. 13
State Bar News
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., April 3, 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.

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 summer 2006. 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.

Commissioner Vacancies

Sixth Bar Commissioner District

A vacancy in the 6th Bar Commissioner District, representing Chaves, Eddy, Lea, Lincoln and Otero counties was created due to Jane Shuler Gray’s appointment to a judgeship in the 5th Judicial District. The board will make an interim appointment at its April 21 meeting to fill the vacancy until the next regular election of commissioners is held in November, at which time the remainder of the unexpired term will be filled. Active status members with a principal place of practice located in the 6th Bar Commissioner District are eligible to apply. Applicants should plan to attend the four remaining board meetings scheduled for July 20 in Taos, Sept. 15 in Tucumcari, Nov. 2 in Roswell and Dec. 15 in Albuquerque. Anyone interested in serving on the board should submit a letter of interest and resume to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199, by April 10.

Appointment to Judicial Standards Commission

The Board of Bar Commissioners will make an appointment to the Judicial Standards Commission for a four-year term. The responsibilities are to receive, review, and act upon complaints against state judges, including supporting documentation on each case, as well as other issues that may surface. The commission meets once every eight weeks in Albuquerque and additional hearings may be held as many as four to six times a year. The time commitment is significant and the workload is voluminous. Applicants should consider all potential conflicts caused by service on this commission. Send a letter of interest and brief resume by April 10 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 98260, Albuquerque, NM 87199-2860; or fax (505) 828-3765.

Elder Law Section
Annual Meeting, CLE and Reception

The State Bar Elder Law Section will hold its annual meeting at 11:30 a.m., April 7, at the State Bar Center prior to the Third Annual Elder Law Seminar. Send agenda items to Chair Mary Smith, msmith@ago.state.nm.us. Lunch will be provided and reservations are required. Send a message to membership@nmbar.org or call (505) 797-6033 to reserve a lunch.

The seminar will begin at 1 p.m. and will conclude at 5 p.m. followed by a reception. Attendees will earn 2.7 general and 1.0 ethics CLE credits. The section member discount price is $119. Register online at www.nmbar.org and select CLE or call (505) 797-6020. See the CLE insert for more information.

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 meeting. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be April 5. (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.

National Consortium on Racial and Ethnic Fairness in the Courts
18th Annual Meeting

The 18th Annual Meeting of the National Consortium on Racial and Ethnic Fairness in the Courts will be held April 25–28 at the Hotel Albuquerque, Old Town, Albuquerque. The event, co-chaired by Justice Patricio Serna of the New Mexico Supreme Court and Judge Theresa Gomez from Metropolitan Court, is expected to draw 250–300 attendees from across the country. The National Consortium is devoted to enhancing racial and ethnic fairness in the courts. Members include judicial
The State Bar 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. 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.


Junior Judges Community Service Program

The Young Lawyers Division is seeking volunteer attorneys to lead discussions with third, fourth and fifth grade students about judging for themselves what the right choice may be in difficult situations and about the potential consequences of bad behavior. Topics include cheating, bullying, drugs and alcohol, and gangs and weapons. The Junior Judges Program will take place in Albuquerque elementary schools on May 5 in approximately one-hour units. Volunteer attorneys will show a brief video and then engage students in discussion about the possible choices and consequences of particular situations. A full curriculum and teaching video will be provided to attorney volunteers. For more information or to volunteer, contact Martha Chicoski, Robles, Rael & Anaya, P.C., (505) 242-2228, or martha@robes-rael-law.com by April 14.

Prosecutors Section Annual Meeting and Award Presentation

The State Bar Prosecutors Section will hold its annual meeting from noon to 1 p.m., March 29, (lunch provided) during the Association of District Attorneys 2006 Spring Conference 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.

The annual award will be presented to five prosecutors at noon on March 30.

Technology Committee PowerPoint for Lawyers

The Technology Committee will hold a free workshop from 6 to 8 p.m., April 3, at the State Bar Center, Albuquerque. The workshop will demonstrate the use of PowerPoint at trial and the role of paralegals in its preparation. Paralegals and support staff are all invited to attend. Class is limited to 11 attendees. Reservations should be made by April 2 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 State Bar 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.

Junior Judges Community Service Program

The Young Lawyers Division is seeking volunteer attorneys to lead discussions with third, fourth and fifth grade students about judging for themselves what the right choice may be in difficult situations and about the potential consequences of bad behavior. Topics include cheating, bullying, drugs and alcohol, and gangs and weapons. The Junior Judges Program will take place in Albuquerque elementary schools on May 5 in approximately one-hour units. Volunteer attorneys will show a brief video and then engage students in discussion about the possible choices and consequences of particular situations. A full curriculum and teaching video will be provided to attorney volunteers. For more information or to volunteer, contact Martha Chicoski, Robles, Rael & Anaya, P.C., (505) 242-2228, or martha@robes-rael-law.com by April 14.
NM Women's Bar Association
The New Mexico Women's Bar Association (NMWBA), in conjunction with the University of New Mexico Law School Women's Law Caucus, is having a “mixer” for law students, NMWBA members and other practitioners from 5:30 to 7:30 p.m., March 28, at the UNM Law School. This annual event offers the opportunity for law students to get to know NMWBA members and learn about the NMWBA. Likewise, NMWBA members have the opportunity to get to know their future colleagues and fellow members. Beer, soft drinks and munchies will be served. For more information, e-mail Rendie Moore at womensbarNM_admnasst@msn.com, Sue Chappell at sgc@sutinfirm.com, or Erin Ferreiera at ferreiera@law.unm.edu.

UNM School of Law
Mexican American Law Student Association’s (MALSA) Eleventh Annual Fighting for Justice Banquet
The 11th Annual Fighting for Justice Banquet will be held April 1 at the Sandia Resort and Casino, 30 Rainbow Road NE, Albuquerque. The keynote speaker will be The Honorable Patricia Madrid, New Mexico attorney general. Cocktails, music and a silent auction will begin at 6 p.m., and the program and dinner will begin at 7 p.m. Former New Mexico Supreme Court Chief Justice Dan Sosa, Jr. is the 2006 award recipient. For more information or to R.S.V.P., contact Dahlia Olsher, olsherda@law.unm.edu or (505) 243-6147.

OTHER NEWS
Legal FACS
Torrance County Pro Se Forms Clinic
Legal FACS, a self-help non-profit legal program, will conduct a free Pro Se Forms Clinic from 9 a.m. to noon, April 19, at the Neil Mertz Judicial Complex (Highway 14 on the west side of the road just before Estancia). The clinic is for self-represented litigants and domestic violence victims who cannot afford to hire an attorney for their divorce, legal separation, annulment, name change, child custody orders, spousal/child support enforcement orders and/or other related family matters. Litigants will have the opportunity to discuss their case with an attorney and visit with a paralegal and/or domestic violence victim advocate.

Individuals interested in the clinic must call Legal FACS, (505) 256-0417. Legal FACS will conduct intake to verify qualification for the program. (Income guidelines are used to determine eligibility.) All pro se litigants must make an appointment and will be seen by appointment only on April 19.

Legal Services Corporation (LSC)
Singleton Appointed to Board of Directors
Swearing in and Reception
President Bush has appointed Santa Fe attorney Sarah M. Singleton to the Board of Directors of the Legal Services Corporation. The Senate confirmed her appointment March 13, and she will serve on the LSC until July 2008. The LSC funds local legal aid programs throughout the country. In New Mexico, LSC funds NM Legal Aid and the DNA People’s Legal Services. Both organizations provide legal assistance to low income New Mexicans.

Singleton has long been active in the State Bar’s Legal Services and Programs Committee and currently co-chairs the New Mexico Supreme Court’s Access to Justice Commission. She is a past president of the State Bar and her devotion to civil legal services has spanned more than three decades.

Singleton will be sworn in for this position at 4:30 p.m., April 5, by Chief Justice Richard C. Bosson at the State Bar Center in Albuquerque. A reception will follow the swearing-in ceremony, also at the Bar Center. All members of the Bar and public are invited and encouraged to attend. R.S.V.P. by April 3 to jconte@nmbar.org or (505) 797-6099.

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 submission of nominations is April 28.

See the March 20th (Vol. 45, No. 12) Bar Bulletin for award criteria and previous recipients.
Save the Date

State Bar of New Mexico’s 2006 Annual Meeting

Reaching for Excellence

July 20-22, 2006 • Taos Convention Center, Taos, NM

Hotel Blocks:

- Best Western Kachina Lodge - $89 - $99 (505) 758-2275
- Brooks Street Inn Bed & Breakfast - $109 (800) 758-1489
- Casa Benavides Bed & Breakfast - $99 - $199 (800) 552-1772 or (505) 758-1772
- Casa de las Chimeneas Inn & Spa - $180 - $275 (877) 758-4777 or (505) 758-4777
- Comfort Suites - $99 (888) 751-1555
- El Monte Sagrada Resort & Spa - $329 (505) 737-9826
- Hotel La Fonda - $99 - $159 (800) 833-2211 or (505) 758-2211
- Inn on La Loma Plaza - $135 - $325 (800) 530-3040 or (505) 758-1717
- SOLD OUT - Sagebrush Inn - $109 (800) 428-3626 or (505) 758-2254
- Taos Inn - $155 - $185 (505) 758-2233
- Touchstone Inn, Spa & Gallery $145 - $195 (800) 758-0192 or (505) 758-0192

Be sure to mention the “State Bar of New Mexico room block” for the special discounted rates.

Book early! Fiestas de Taos is also that weekend and many of the hotels are booking up fast.

Look for the Annual Meeting Preview with registration info in mid-May in the Bar Bulletin.
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<th>Event Description</th>
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<td>5.5 G, 0.5 E</td>
<td>(800) 835-8525</td>
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<td>29</td>
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<td>29</td>
<td>Applying Legal Ethics sans Rationalization Santa Fe, NM</td>
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<td>30</td>
<td>Position Yourself to Win: A Visual Model for Persuasive Legal Writing</td>
<td>State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
<td>6.8 G</td>
<td>(505) 797-6020</td>
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<td>Prescriptions for Electronic Discovery Teleconference</td>
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<td>Provocative Legal Ethics Outcomes</td>
<td>Santa Fe, NM</td>
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<td>31</td>
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<td>1.0 G, 1.0 E, 1.0 P</td>
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<td>31</td>
<td>Discipline of Students with Special Needs Albuquerque Lorman Education Services</td>
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<td>(715) 833-3940</td>
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<td>31</td>
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G = General  
E = Ethics  
P = Professionalism  
VR = Video Replay  

Programs have various sponsors; contact appropriate sponsor for more information.
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<tr>
<th>Date</th>
<th>Event Title</th>
<th>Date &amp; Time</th>
<th>Location</th>
<th>Speaker</th>
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<td>5.0 G (505) 622-6510</td>
<td>Paralegal Division of New Mexico</td>
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<td>11–12</td>
<td>Allocating the Economic Interests of LLC Members, Parts 1 &amp; 2 Teleseminar</td>
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<td>11</td>
<td>Experts: Work Products and Discovery</td>
<td>6.0 G (800) 835-8525</td>
<td>National Business Institute</td>
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<td><a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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<td>11</td>
<td>Successfully Collecting Debts and Judgments</td>
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<td>TRT, Inc.</td>
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<td><a href="http://www.trtcle.com">www.trtcle.com</a></td>
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<td>12</td>
<td>Effective Jury Persuasion</td>
<td>1.0 G (505) 883-8181</td>
<td>Paralegal Division of New Mexico</td>
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<td>17</td>
<td>Boundary Disputes: Resolving Conflicts Without Going to Court</td>
<td>6.0 G (800) 835-8525</td>
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<td><a href="http://www.nbi-sems.com">www.nbi-sems.com</a></td>
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## WRITS OF CERTIORARI

**Effective March 27, 2006**

### PETITIONS FOR WRITS OF CERTIORARI FILED AND PENDING:

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<td>29,716</td>
<td>State v. Martin S. (COA 25,797)</td>
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<td>State v. Urdiales (COA 25,144)</td>
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<td>Wood v. Educational Retirement Board (COA 24,819)</td>
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### CERTIORARI GRANTED BUT NOT YET SUBMITTED TO THE COURT:

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WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

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

EFFECTIVE MARCH 27, 2006

WRITS OF CERTIORARI

NO. 29,604 State v. Bravo (COA 23,992) 2/2/06
NO. 29,580 State v. Graham (COA 25,836) 2/9/06
NO. 29,518 Torrez v. State (COA 25,895) 2/9/06
NO. 29,673 Torres v. Board of Regents (COA 26,009) 3/20/06
NO. 29,677 Torres v. Board of Regents (COA 26,009) 3/20/06

CERTIORARI GRANTED AND SUBMITTED TO THE COURT

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

Submission Date

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STATE OF NEW MEXICO, Plaintiff-Appellee, versus MANUEL MARTINEZ, Defendant-Appellant.

No. 28,623 (filed: February 16, 2006)

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY
WILLIAM A. MCBEE, District Judge

JOHN BIGELOW, Chief Public Defender
NANCY M. HEWITT, Assistant Appellate Defender
Santa Fe, New Mexico for Appellant

PATRICIA A. MADRID, Attorney General
VICTORIA M. WILSON, Assistant Attorney General
Santa Fe, New Mexico for Appellee

OPINION

RICHARD C. BOSSON, CHIEF JUSTICE

[1] Defendant Manuel Martinez is charged with two counts of first degree murder and one count of kidnapping, robbery and aggravated burglary. The charges arise from the killings of Ervin and Julia Tafoya in their home. The State seeks the death penalty for both killings based on the aggravating circumstance that the victims were killed in the commission of a kidnapping. See State v. Ogden, 118 N.M. 234, 239, 880 P.2d 845, 850 (1994). The State also seeks the death penalty for the murder of Mrs. Tafoya. The aggravating circumstance that she was intentionally killed in the commission of a kidnapping existed because Mrs. Tafoya was intentionally killed in the commission of a kidnapping. See § 31-20A-5(B).

[2] Defendant moved to dismiss all of the aggravating circumstances thereby making him ineligible for the death penalty. See State v. Ogden, 118 N.M. 234, 239, 880 P.2d 845, 850 (1994) The district court conducted an evidentiary hearing and determined there was sufficient evidence to establish probable cause that all the alleged aggravating circumstances were present. On interlocutory appeal, pursuant to Ogden, we find no probable cause to support the murder-of-a-witness aggravating factor for either killing. However, we affirm the district court’s decision finding probable cause existed that Mrs. Tafoya was intentionally killed in the commission of a kidnapping.

BACKGROUND

[3] Ervin and Julia Tafoya operated a rock and gem store attached to their residence in Hobbs, New Mexico. The couple was elderly and in poor health. Mr. Tafoya used a cane to walk, and Mrs. Tafoya was on oxygen because of health problems. Mrs. Tafoya’s mobility was extremely limited and she usually stayed in her bedroom, sitting in a chair.

[4] On July 24, 2003, Mr. and Mrs. Tafoya were robbed and attacked in their home. The Tafoyas’ daughter, Rosetta Bland, discovered the couple when she came to check on them that evening. When she entered their home, Ms. Bland noticed certain things out of place. The back door was closed and one of her father’s shirts was covering the window of the door. Usually, this window was never covered. Once inside, Ms. Bland noticed there were items from a chest of drawers scattered all over the floor. Mrs. Tafoya, who was still conscious, said they were robbed and instructed her daughter to check on her father in the other room because she had heard him fall. Ms. Bland went into the kitchen and found her father dead on the kitchen floor near the entrance way to the gem store. Ms. Bland returned to her mother and turned on the lights to find her covered in blood and bound to her chair by her husband’s suspenders with her hands tied behind her back.

[5] Mrs. Tafoya had stab wounds to her neck and chest as well as defensive wounds to her arms and hands. She died two days later of her injuries. Mr. Tafoya had multiple stab wounds throughout his body.

[6] Subsequently, the police conducted several interviews with Defendant. Defendant changed his story many times, first denying involvement, then claiming he was only the lookout. He finally admitted to being present in the house when the murders occurred and to stealing a gun and some jewelry, but he maintained that another man actually did the killings. Defendant stated he went to the Tafoya home with the intention of stealing rocks and gems to buy drugs, but, in his words, the robbery had “gone bad.”

[7] Defendant moved to dismiss all the aggravating circumstances, but after an evidentiary hearing the district court ruled there was probable cause to proceed with the death penalty. On interlocutory appeal, the State argues the district court correctly found probable cause to go forward on the murder-of-a-witness aggravating factor with respect to both killings. The State’s overarching theory is that both victims were killed to prevent them from reporting the burglary and robbery of their home and gem store. The State points to the Tafoyas’ elderly age and disabilities, reasoning that Defendant did not need to kill them to succeed in the robbery, and therefore, the motive must have been to silence them as witnesses. The State also relies on evidence that Defendant attempted to conceal his involvement in both crimes, thereby giving
rise to an inference that Defendant’s motive for murder was to conceal his identity.

[8] The State further argues for a second aggravating factor with respect to the murder of Mrs. Tafoya; that Defendant had the intent to kill her during the commission of a kidnapping. Defendant challenges the trial court’s finding of probable cause regarding both the aggravating factors. We now review both determinations.

**DISCUSSION**

**Standard of Review**

[9] In *Ogden*, we held that a pretrial ruling is appropriate to assess aggravating death penalty factors, and thereby prevent unwarranted death penalty prosecutions and needless waste of time, expense and judicial resources. 118 N.M. at 238-39, 880 P.2d at 849-50. “Pretrial review of aggravating circumstances is intended to screen out only those cases in which the State does not have any significant factual or legal basis for pursuing the death penalty . . . .” Id. at 240, 880 P.2d at 851. Accordingly, we apply a probable cause standard of review. Id.

[10] The standard of review for rulings on probable cause will be affected depending on whether the question is one of fact, law or mixed fact and law. Id. at 239, 880 P.2d at 850. When the district court is presented with a question of fact or a mixed question of fact and law, as in this case, it should dismiss when there is no probable cause to believe the aggravating circumstance is present. Id. The State bears the burden of persuasion to establish probable cause. Id. at 240, 880 P.2d at 851. The district court does not weigh the evidence and, on appeal, we review questions of fact to “see whether the district court correctly evaluated probable cause to support the aggravating circumstance.” Id.; accord *State v. Coffin*, 1999-NMSC-038, ¶ 48, 128 N.M. 192, 991 P.2d 477. Probable cause exists when there is “that degree of evidence to bring within reasonable probabilities the fact that [an aggravating circumstance] was committed by the accused.” *State v. Young*, 2004-NMSC-015, ¶ 2, 135 N.M. 458, 90 P.3d 477 (quoting *State v. Garcia*, 79 N.M. 367, 368-69, 443 P.2d 860, 861-62 (1968)).

**Aggravating Circumstances**

[11] To avoid the arbitrary imposition of capital punishment, the State must insure that aggravating factors “justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Zant v. Stephens*, 462 U.S. 862, 877 (1983); see also *McCleskey v. Kemp*, 481 U.S. 279, 305 (1987); *Gregg v. Georgia*, 428 U.S. 153, 197 (1976). To justify the death penalty, the United States Supreme Court has mandated that states create a sentencing scheme that insures the punishment of death is only applied to “materially more ‘depraved’” murderers, a narrowly tailored class of the worst offenders. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980); see also *State v. Clark*, 108 N.M. 288, 304, 772 P.2d 322, 338 (1989), overruled on other grounds by *State v. Henderson*, 109 N.M. 655, 789 P.2d 603 (1990) (citing Godfrey). To this end, the Capital Felony Sentencing Act enumerates seven aggravating circumstances that make a first degree murder eligible for the death penalty. The two at issue here are murder of a witness, and murder with intent to kill, during the commission of a kidnapping. See § 31-20A-5(B), (G).

**Murder of a Witness**

[12] A first degree murder becomes death eligible if the murder is of a “witness to a crime or any person likely to become a witness to a crime, for the purpose of preventing report of the crime or testimony in any criminal proceeding.” Section 31-20A-5(G); see also UJI 14-7023. To establish this aggravating factor at trial, the State must prove beyond a reasonable doubt that (1) the victim was a witness to a crime or was likely to become a witness to a crime, and (2) the defendant murdered the victim with the motive to prevent the victim from reporting the crime or testifying in a criminal proceeding. UJI 14-7023. The crime witnessed must be separate from the murder. *Id.* The key is the defendant’s motive or reason for killing the victim. *Clark*, 108 N.M. at 304, 772 P.2d at 338. At the pretrial *Ogden* stage, the issue is whether the State can show “probable cause” to believe a jury could reasonably find that the defendant killed the victim as a witness. *State v. Willis*, 1997-NMSC-014, ¶ 18, 123 N.M. 55, 933 P.2d 854.

[13] When ruling on the existence of probable cause that murder was committed for the purpose of silencing a witness, we bear in mind the legislative policy in enumerating a limited number of narrowly tailored aggravating circumstances. In creating these limited circumstances in Section 31-20A-5(B), our Legislature determined that murderers who kill witnesses to prevent them from testifying or reporting a separate crime, represent a narrowly tailored class. Narrowing the class of murders to which the death penalty applies, in part to those murders committed to avoid detection and arrest, withstands Eighth Amendment scrutiny and is therefore a constitutional application of the death penalty. *Clark*, 108 N.M. at 304, 772 P.2d at 338.

[14] In so narrowing this class of murderers, the Legislature, lest it run afoul of the Eighth Amendment, did not intend to cast a net wide enough to include every murder, or even every murder in which another crime occurs and the defendant later attempts to conceal involvement or avoid apprehension. See *State v. Cleve*, 1999-NMSC-017, ¶ 14, 127 N.M. 240, 980 P.2d 23 (stating that when enacting a statute, the Legislature is presumed to know the law). By definition, every murder involves a victim who is a potential witness. *People v. Davis*, 794 P.2d 159, 187 (Col. 1990). Moreover, in almost every murder, the killer makes some attempt to tamper with evidence and conceal his guilt. Constitutional narrowing requires more.

[15] In this context, what distinguishes murderers deserving of the death penalty is concrete evidence indicative of the murderer’s intent at the time of the killing, something more than mere incidental efforts to avoid detection after the killing has already taken place. To satisfy Eighth Amendment scrutiny, our statute narrows the class of offenders to those whose specific intent or motivation for the killing is to silence a potential witness and prevent report of a crime. *Id.* (noting that focus on the purpose of the murder narrows the class of murders for which the aggravating circumstance applies); *Clark*, 108 N.M. at 304, 772 P.2d at 338, see also *State v. Flores*, 2004-NMSC-021, ¶ 16, 135 N.M. 759, 93 P.3d 1264 (stating the court construes a statute, if possible, so that it will be constitutional). Because the specific intent requirement is directed toward attendant circumstances of the crime, a defendant acts “purposely” when he is aware of the existence of such circumstances or he believes or hopes that they exist.” *Wayne L. LaFave, Substantive Criminal Law § 5.2 (2d ed. 2003).*

[16] To support the aggravating factor of silencing a witness to prevent the report of another crime, we have previously relied on such evidence as the defendant’s own incriminating statements about killing to prevent testimony, prior crimes that are probative of the defendant’s motive, and the lack of other plausible motives for the killing. *State v. Allen*, 2000-NMSC-002, ¶ 79, 128 N.M. 482, 994 P.2d 728 (citing cases). Circumstantial evidence of intent surrounding the crimes may also be
considered. See State v. Frank, 92 N.M. 456, 458, 589 P.2d 1047, 1049 (1979) (“Intent is subjective and is almost always inferred from other facts in the case.”); UJI 14-141, 201 (intent may be inferred from surrounding circumstances). The crime the victim witnessed must be separate from the murder; it must be a second, underlying crime serious enough that the defendant kills specifically to silence the victim and prevent the victim’s report or testimony against him. Cf. UJI 14-7023 (requiring the crime the victim witnessed be a separate crime from the murder); State v. Treadway, 2006-NMSC-008; State v. Smith, 1997-NMSC-017, ¶ 10, 123 N.M. 52, 933 P.2d 851.

[17] Our cases concerning the evidence necessary to support the murder-of-a-witness aggravator represent a broad spectrum. We analyze those cases as a guide to help determine where on this spectrum the two Tafoya murders fit.

[18] On one end are those cases involving direct evidence of a killer’s motive. Evidence of this type commonly involves incriminating statements by the killer that the victim was silenced to prevent report of an underlying crime. See Allen, 2000-NMSC-002, ¶ 80 (stating defendant told wife he killed his rape victim to prevent her from reporting the rape); Coffin, 1999-NMSC-038, ¶ 49 (stating defendant told witness he killed the victim because the witness victimized him killing another man); Clark, 108 N.M. at 304, 772 P.2d at 338 (stating defendant believed he could not let his rape victim go “because that would be the end for him”); cf. Smith, 1997-NMSC-017, ¶ 11 (indicating the defendant’s motive to kill was the belief the victim was possessed by the devil and none of his statements indicated an intent to kill victim as a potential witness).

[19] Although not as compelling as incriminating statements, a defendant’s prior crimes may be strong circumstantial evidence of a motive to silence. See Allen, 2000-NMSC-002, ¶ 80; Clark, 108 N.M. at 304, 772 P.2d at 338. In Allen, the defendant had a prior conviction in which he threatened to kill one of the witnesses if she testified. 2000-NMSC-002, ¶ 80. In Clark, the defendant had a prior conviction for kidnapping and rape in which the victim had supplied critical evidence against him. 108 N.M. at 304, 772 P.2d at 338. Notably, these strong indicators of a witness-oriented motive, incriminating statements and prior convictions, are absent from this case.

[20] At the other end of the spectrum are those cases in which the evidence is insufficient to satisfy the specific intent requirement of the statute. For example, in Treadway, we held the evidence was insufficient to support the specific purpose of killing to prevent report of a crime. 2006-NMSC-008, ¶ 6. The defendant in that case shot a store clerk during a robbery as the clerk picked up a cue stick and the telephone. Id. This Court acknowledged the clerk’s act of picking up the telephone supported an inference that the clerk may have intended to call the police. Id. at 5. Nonetheless, we noted the short period of time, only a few seconds, between when the clerk grabbed the phone and the defendant shot him, and the “paucity of additional evidence” of defendant’s motive for the killing. Id. at 6. Despite evidence that the defendant subsequently took steps to conceal his identity and cover up his crimes, we concluded in Treadway that the evidence was insufficient to determine whether the clerk was killed to silence him. Id.

[21] Somewhere in between these two polar opposites, Allen and Clark at one end and Treadway at the other, are those cases in which there is no direct evidence of the defendant’s motive, but there is enough circumstantial evidence to allow the jury to decide if the aggravating factor is present. A prime example comes from the Willis case. In Willis, 1997-NMSC-014, ¶ 3, neighbors called police reporting yelling, scuffling, and a female crying from inside the victim’s apartment. The police arrived two minutes later, but by then the house was quiet. Id. The victim was found dead in her apartment. Id. A neighbor told police he saw a man matching Willis’s physical characteristics running from the alley behind the house. Id. The evidence indicated that Willis had gone to the victim’s house to steal her supply of drugs and money, but not to kill her. Id. ¶ 7. There was also evidence that Willis was attempting to rob the victim, that she struggled with him and screamed loud enough to alert the neighbors, thereby leaving Willis only a short time in which to commit the murder before the police arrived. Id. The evidence suggested that Willis killed the victim to silence her as she attempted to report the crime by screaming. We found probable cause to proceed on the murder-of-a-witness aggravator. Id. ¶ 16.

[22] While Willis was a close case, the circumstantial evidence that the victim was killed to silence her—she was a robbery victim, she screamed loud enough to alert the neighbors, and she was silent upon the quick arrival of the police—had a direct link to the requisite motive. Such a link was enough to establish probable cause that the case fit within the narrow circumstance in which our legislature has found the death penalty permissible.

[23] Another example of a case without direct evidence is our opinion in Henderson, 109 N.M. 655, 789 P.2d 603, overruled on other grounds by Clark v. Tansy, 118 N.M. 486, 882 P.2d 522 (1994), which represents the closest case to date. In that case, the defendant went to the victim’s house apparently to engage in sexual intercourse. Id. at 657, 789 P.2d 605. Although he first denied it, Henderson ultimately admitted he raped the victim. Id. There was evidence of a struggle with the victim while Henderson severely beat and strangled her. Id. He attempted to wipe his fingerprints from the scene following the killing. Id. The next day, he went back to the victim’s house,
broke in, again tried to wipe fingerprints from the scene, and then turned on gas jets in an attempt to destroy the entire crime scene. Id.

[24] On appeal, this Court unanimously concluded there was sufficient evidence of another aggravator, that the victim was intentionally killed in the commission of criminal sexual penetration.5 However, in a sharply divided opinion, in which the majority changed from its original decision upon rehearing,6 three justices held there was sufficient evidence that the victim was killed to silence her as a witness. Id. at 660, 789 P.2d at 608. The majority concluded there were only two plausible motives for the killing, to silence a witness or to overcome the resistance of the rape victim. Id. A combination of the lack of any other plausible motive, the defendant’s extreme and repeated attempts to destroy evidence, and some, undefined “other evidence in the record” led the majority to conclude the evidence was sufficient. Id.

[25] The State relies heavily upon Henderson in applying the murder-of-a-witness aggravating factor to both killings. It argues that probable cause is met because there are no other plausible motives for the killings, and Defendant attempted to destroy evidence and conceal his involvement in the crimes. We agree that Henderson is the closest case favoring affirmance on this issue. Although a second plausible motive existed for that killing—to overcome resistance to rape—the Henderson Court seemed to conclude that it was sufficient to prove: (a) the murder-of-a-witness motive was equally plausible, (b) other than those two, there were no other plausible motives, and (c) there were attempts to destroy evidence. The State asks us to construe Henderson to hold that this evidence would permit a jury to conclude the Tafoyas were murdered to prevent them from being witnesses. As noted above, however, in Henderson, this Court referred to “other evidence in the record” in concluding there was sufficient evidence to support the aggravating circumstance. See Henderson, 109 N.M. at 660, 789 P.2d at 608.

[26] The State appears to cite to Henderson for a universal proposition that the murder-of-a-witness aggravator fits whenever there is no other plausible motive for the killing and there is evidence of concealment after the crime. This interpretation of Henderson arguably finds some support in our own precedent. See Allen, 2000-NMSC-002, ¶ 79 (quoting Henderson as holding the aggravator was supported by “the lack of any other plausible motive, together with the acts of the defendant in attempting to avoid detection by destroying evidence at the scene that would tie him [or her] to the crime”); Smith, 1997-NMSC-017, ¶ 11 (“In Henderson, the lack of any other plausible motive supported the State’s theory that the defendant had murdered the victim to avoid detection of his rape of her.”). In Allen, there was evidence the defendant attempted to avoid detection by disposing of the body in a remote location and cleaning the pick-up he used to abduct her. 2000-NMSC-002, ¶ 80. Further, the State argued that because the defendant did not know the victim, the jury should infer that “there was no other plausible motive for the killing.”* Id. More accurately, it seems that these cases stand for the proposition that the evidence in Henderson only supported the murder-of-a-witness aggravator. Nonetheless, because it is unclear what evidence the Henderson majority was referring to when it said “other evidence in the record,” we believe Henderson can be understood, at least arguably so, to mean that lack of other plausible motives and post-crime destruction of evidence is sufficient to satisfy the aggravator.

[27] We find this construction of Henderson deeply disturbing. As we have previously discussed, proof of the aggravator requires evidence that the murder of a witness is specifically “for the purpose of preventing report of the crime.” Section 31-20A-5(G). When this evidence is purely circumstantial, it must have a direct link to the motive, such as in Willis. By contrast, proof of a negative—the lack of any other plausible motive—is not the equivalent of affirmative proof of a specific motive. The State does not meet its burden of proving an essential element of death eligibility merely by showing the lack of alternatives. The language and intent of the statute, and the constitutional requirement of narrowing require more. Moreover, the commonplace event that a murderer tries to destroy incriminating evidence does not elevate the lack of other plausible motives to proof of a specific motive to silence a witness.

[28] We are always reluctant to overturn precedent. See Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 15, 134 N.M. 43, 73 P.3d 181 (noting that stare decisis promotes: “1) stability of the law; 2) fairness in assuring that like cases are treated similarly; and 3) judicial economy”). Before doing so, we will look to a number of factors:

1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule “no more than a remnant of abandoned doctrine;” and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have “robbed the old rule” of justification.


[29] In this case, only the first factor comes into play. We find the potential interpretation of Henderson—that the murder-of-a-witness motive is established when there is no other plausible motive and the defendant takes steps to destroy evidence or conceal involvement in the crime—to be unworkable. Read this way, it would open up a majority of murder cases to death eligibility. Many murders involve at least one other crime, and many murderers take some post-crime action to avoid detection. Yet, many murders will not involve a clear-cut motive, and in such cases should not become death eligible, essentially by default, simply because no other plausible motive appears more

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5 See § 31-20A-5(B) (making death eligible a murder “committed with intent to kill in the commission of or attempt to commit…criminal sexual penetration”).

6 Initially, a majority of Chief Justice Sosa and Justices Ransom and Montgomery ruled there was insufficient evidence that the victim was killed to silence her as a witness. See Henderson, 109 N.M. at 666-67, 789 P.2d at 614-15 (Montgomery, J., concurring in part and dissenting in part).

7 We note, however, that there was substantial other, direct evidence of motive in Allen, including the defendant’s statement that he killed the victim so she would not report the rape. 2000-NMSC-002, ¶ 80. There was also the defendant’s prior conviction resulting from a witness reporting the crime, even though the defendant threatened to kill her if she did. Id.
likely. Consistent with the Constitution and our legislative mandate, death penalty eligibility requires more in the way of compelling evidence that, as a matter of probabilities, the killing was specifically for the purpose of silencing a witness.

{30} Because Henderson is subject to an interpretation that appears to relax the constitutional and statutory standard in an impermissible manner, we find it “so unworkable as to be intolerable.” Trujillo, 1998-NMSC-031, ¶ 34. To the extent Henderson, 109 N.M. at 659-60, 789 P.2d at 607-08, can be read as upholding the murder-of-a-witness motive, when the only evidence of motive is the lack of other plausible motives and attempts to destroy evidence or conceal involvement in the crimes, then to that extent, Henderson must be overturned, and we do so in this opinion.

{31} Having excised the foregoing proposition from Henderson from our murder-of-a-witness jurisprudence, we return to our spectrum of cases to determine the outcome of the present case. Within this spectrum, the cases are distinguished by the quantum and quality of evidence presented by the State that is relevant to the aggrandizing factor. In all the above cases, there is a murder, a separate crime that precedes or coincides with the murder, and attempts to cover-up the crimes by tampering with evidence or lying to police. But that alone is not enough. What makes the evidence enough for probable cause is something more; there must be some additional evidence of motive to bring within “reasonable probabilities” that the killing was “for the purpose of preventing report of the crime” by a witness, and not for some other motive, immaterial to death penalty considerations. Young, 2004- NMSC-015, ¶ 2 (emphasis added); see § 31-20A-5(G).

{32} At the easier end of the analysis is the Clark/Allen line of cases in which the additional evidence of motive comes directly from the defendant’s own statements or there is other direct evidence such as a prior crime. At the more difficult end is a case like Willis where we are left to infer the defendant’s motive from minimal circumstantial evidence. The key is to determine from the record whether there is a direct link from the circumstantial evidence that makes it reasonably probable, not just possible, that the defendant’s motive was to silence a witness. With these considerations in mind, we turn to the two victims in this case to determine if probable cause exists that either was murdered to prevent the report of another crime.

{33} The State presented sufficient evidence of a robbery or burglary taking place at the Tafoya residence. From this, there is probable cause to believe that Mr. and Mrs. Tafoya were witnesses or likely to become witnesses to the robbery and burglary. Thus, the first element was satisfied. It is the second element, evidence of Defendant’s specific intent to silence a witness, that is more problematic.

{34} For this element, we look to the record for evidence that Defendant’s intent or motivation behind the killings was to silence the victims. See UJI 14-7023; Willis, 1997-NMSC-014, ¶ 18; Clark, 108 N.M. at 304, 772 P.2d at 338. The evidence suggests the house and store were robbed. Gems and a gun missing from the house were later connected to Defendant, the house was in disarray, and Defendant admitted he went to the house to steal and called it a robbery “gone bad.” There was evidence Defendant may have attempted to conceal his involvement in the robbery by placing a shirt in the back door of the house so that no one could look in, by hiding the gems and gun, and by misleading police about his involvement in the crimes.

{35} The record is devoid of circumstantial evidence with a direct link to the requisite motive. We are left with nothing but speculation as to Defendant’s motive. Cf. State v. Flores, 1996-NMCA-059, ¶ 15, 122 N.M. 84, 920 P.2d 1038 (probable cause cannot be based on speculation). It is not unusual for a criminal to take steps to avoid detection while committing a crime, like posting a lookout during a drug deal or wearing a ski mask during a bank robbery. Defendant’s placement of a shirt over the window in the door here is no different than this common behavior. Similarly, Defendant’s efforts to hide the gems and the gun he took from the shop, and then lie to police about his role in the killings are symptomatic of nearly every crime. If this were enough to satisfy probable cause, the murder-of-a-witness aggravating factor would be broadened far beyond the narrow class of offenders the Legislature intended for the ultimate sanction.

{36} Defendant did tell police he went to the Tafoya house to steal gems so he could use them to buy drugs, and he characterized his crime as a robbery gone bad. This is not a statement that indicates an intent to silence a witness. Cf. Smith, 1997-NMSC-017, ¶ 11 (holding murder-of-a-witness aggravator not established when the defendant indicated a different motive).

{37} The circumstantial evidence surrounding each individual killing does not shed any more light on Defendant’s motive. Beginning with Mr. Tafoya, the record indicates he was found face down in the kitchen near the entry way to the store with multiple stab wounds. There is no other evidence concerning the circumstances of his death. This makes Defendant’s motive even less clear.

{38} Mr. Tafoya’s murder best resembles the killing in Treadway. It appears Mr. Tafoya was killed very quickly after confronting Defendant, leaving Defendant little time to form the specific intent to kill for the purpose of silencing a witness. See Treadway, No. 26,218, slip op. at 6. We note the same “paucity of additional evidence” that made the evidence of motive insufficient in Treadway, where at least there was some circumstantial evidence (reaching for the phone) with a direct link to the requisite motive. Id.; see supra note 4. And unlike Willis, there is no evidence the victim screamed and alerted the neighbors, causing the robber to kill the potential witness and then flee for fear of imminent capture. In short, we are struck by the absence of circumstantial evidence that might enlighten us, or a jury, as to why Mr. Tafoya was killed.

{39} Similarly, the circumstances of Mrs. Tafoya’s killing have no direct link to the murder-of-a-witness motive. We note there are differences between the two killings. Most notably, Mrs. Tafoya not only witnessed the robbery, but may have also witnessed her husband’s murder, when she heard him fall. Thus, it is reasonable to infer that Mr. Tafoya was killed first, before Defendant discovered Mrs. Tafoya in the home. It is possible, therefore, that Defendant felt compelled to kill Mrs. Tafoya because she was a potential witness to her husband’s murder in addition to the robbery/burglary. Cf. Henderson, 109 N.M. at 660, 789 P.2d at 608 (noting in State v. Guzman, 100 N.M. 756, 676 P.2d 1321 (1984), that having two potential witnesses increases the chance someone would report the accused and make the motive more likely to silence a witness). There is, however, no concrete evidence that Defendant actually considered this reason.
for the killings. Without other evidence, we are left with nothing more than a guess. [40] Additionally, Mrs. Tafoya was elderly and disabled, and her hands were bound behind her back, which makes it possible that the only reason she was tied down was to prevent her from reporting the crime and ultimately to silence her as a witness. But, none of this evidence establishes anything more than a possibility that Mrs. Tafoya may, or may not, have been killed because she was a potential witness against Defendant. Contrary to the State’s assertions, the evidence she was elderly and incapacitated, does not add to the probable cause calculation. Essentially, the probative nature of this evidence derives from the question it begs, “What other reason could Defendant have had to kill her?” Although it is true that her disabled state may eliminate the possibility she was killed for trying to resist, or for other motives, this only proves a negative. The lack of other plausible motives, as we have said earlier in the opinion with regard to Henderson, does not prove the opposite, the motive for the killing. The murder-of-a-witness aggravator cannot be established by default. [41] Due to the lack of evidence on motive, we cannot leave the jury to speculate about a fundamental element of death eligibility. The State has not produced a record that narrows the motive as a matter of “reasonable probabilities” to this aggravating factor. Accordingly, we hold that the murder-of-a-witness aggravating circumstance for the killings of both Mr. and Mrs. Tafoya should have been dismissed by the court at the conclusion of the Ogden hearing.

Murder in the Commission of Kidnapping

[42] A first degree murder becomes death eligible if it “was committed with intent to kill in the commission of or attempt to commit kidnapping.”[sic] Section 31-20A-5(B). The elements of murder in the commission of a kidnapping are: (1) the crime of kidnapping or attempted kidnapping was committed; (2) the victim was murdered in the commission of the kidnapping; and (3) the defendant had the intent to kill. UJI 14-7015; Allen, 2000-NMSC-002, ¶ 72. This does not require the defendant to have the specific intent to kidnap and then murder the victim, but rather only the intent to kill during a kidnapping. See § 31-20A-5(B); Allen, 2000-NMSC-002, ¶ 74. As with the murder-of-a-witness aggravating factor, we review the evidence of murder in the commission of a kidnapping under the probable cause standard. We find there is probable cause to believe all three elements are present. [43] The first element satisfies probable cause because Mrs. Tafoya was found with her hands bound behind her back and she had severe injuries from which she ultimately died. See NMSA 1978, § 30-4-1(A)(4) (1995) (“Kidnapping is the unlawful . . . restraining . . . or confining of a person, by force . . . with intent . . . to inflict death [or] physical injury . . . .”). [44] In regard to the second element, Defendant argues probable cause cannot be met because the State cannot show the killing was committed in the commission of the kidnapping. He argues the defensive wounds on Mrs. Tafoya’s hands indicate she sustained all her injuries prior to being restrained. Since there was no evidence of the timing of her other wounds, Defendant concludes, she may have received the mortal blows before the kidnapping and not in the commission of the kidnapping. We are not persuaded. [45] Mrs. Tafoya was alive when she was found, leaving open the possibility she suffered some of her more serious wounds after being restrained. Even Defendant admits it is a “reasonable interpretation” to conclude some of Mrs. Tafoya’s injuries were inflicted after she was kidnapped. Furthermore, it seems improbable that Defendant would administer all of the mortal blows to Mrs. Tafoya and only tie her up afterwards. [46] The third element is also satisfied as there is probable cause that Defendant had the intent to kill when he murdered Mrs. Tafoya. Defendant’s motive and the manner in which Mrs. Tafoya was killed suggests an intentional killing. See Rojo, 1999-NMSC-001, ¶ 34 (stating motive and manner of killing supports deliberate intention to take life); State v. Griffin, 116 N.M. 689, 695, 866 P.2d 1156, 1162 (1993) (holding close range shooting involving multiple gun shots supports intent to kill). Mrs. Tafoya was stabbed multiple times to the neck and chest. She was beaten so severely her eye came out of place. She had defensive wounds on her hands. When found, she told her daughter that the perpetrator beat her, she begged him to stop, but he just laughed at her. There is probable cause to believe Defendant had the intent to kill. [47] We acknowledge Defendant’s argument that the force used to commit the murder must be “separate and distinct” from the force used to commit the kidnapping; it cannot be one unitary act. See Henderson, 109 N.M. at 661, 789 P.2d at 609. In the case at hand, there is ample evidence of a separate and distinct kidnapping occurring prior to the murder. See Allen, 2000-NMSC-002, ¶¶ 67-69 (finding murder and kidnapping were distinct where all of the elements of kidnapping were met prior to strangulation); State v. Jacobs, 2000-NMSC-026, ¶¶ 57, 129 N.M. 448, 10 P.3d 127; cf. State v. Foster, 1999-NMSC-007, ¶ 30, 126 N.M. 646, 974 P.2d 140 (kidnapping and murder are not unitary conduct when the force used to complete kidnapping is different from the force used to kill the victim). Here, the force used to commit the kidnapping was tying up the victim. The force used to kill her was stabbing her in the chest. Accordingly, this conduct is not unitary and Henderson is inapposite.

CONCLUSION

[48] For the killings of both Mr. and Mrs. Tafoya, we reverse the finding of probable cause with respect to the murder-of-a-witness aggravating circumstance. With respect to the murder of Mrs. Tafoya, we affirm the finding of probable cause that she was killed in the commission of a kidnapping, making that crime death eligible. We remand for further proceedings in both prosecutions not inconsistent with this opinion.

[49] IT IS SO ORDERED.
RICHARD C. BOSSON,
Chief Justice

WE CONCUR:
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
PETRA JIMÉNEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice

APPENDIX

Published as Opinion Number: 2006-NMSC-008

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Filing Date: May 6, 2002
Docket No. 26,218

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus

MICHAEL TREADWAY,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF CURRY COUNTY
David W. Bonem, District Judge

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Jeffrey J. Buckels,
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Albuquerque, New Mexico
for Appellant

Patricia A. Madrid,
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for Appellee

DECISION

Petra Jimenez Maes, Justice

{1} Defendant, Michael Treadway, was convicted of felony murder after shooting and killing Red Prather, a store owner in Texico, during a robbery. Because Defendant was sentenced to death, we have jurisdiction over his appeal pursuant to Article VI, Section 2 of the New Mexico Constitution. Defendant presents numerous arguments to this Court as to why his death sentence should be vacated. These include: that there was insufficient evidence to prove the murder of a witness aggravating circumstance according to which he was sentenced; that this case is indistinguishable from any killing in the course of an armed robbery and therefore that to permit the death penalty to stand would constitute judicial creation of an “armed robbery aggravator” and would violate separation of powers; that premeditation generally was eliminated from the case when the charge of premeditated murder was dismissed and so there can be no sufficient intent to support the murder of a witness aggravator; that the death penalty is applied to Defendant disproportionately; that the prosecutor engaged in prejudicial misconduct; that evidentiary rulings during the penalty phase of the case limited the defense case and resulted in jury passion and prejudice; that the trial court improperly permitted the prosecution to rebut its own evidentiary presentation; that there was instructional error; that the Capital Felony Sentencing Act, NMSA 1978, §§ 31-20A-1 to 6 (1979, as amended through 1991), is unconstitutional in six separate respects; and that there was cumulative error.

{2} Defendant’s principal argument is that there was insufficient evidence to prove the aggravating circumstance of murder of a witness beyond a reasonable doubt. We agree. We begin our analysis by noting that the murder of a witness aggravator requires the killing of a witness to a crime with specific intent, that is “for the purpose of preventing report of the crime or testimony in any criminal proceeding.” See NMSA 1978, § 31-20(A)-5(G) (1981); see also State v. Henderson, 109 N.M. 655, 665, 789 P.2d 603, 613 (1990) (Ransom, J., concurring in part and dissenting in part) (finding, under statute, that a specific criminal intent is required), overruled on other grounds by Clark v. Tansy, 118 N.M. 486, 493, 882 P.2d 527, 534 (1994). Therefore, the issue is whether there was sufficient evidence that Defendant killed Red Prather to prevent him from reporting the robbery then in progress or to prevent him from testifying to the facts thereof. We hold that as a matter of law, there was insufficient evidence to prove the murder of a witness aggravating circumstance.

FACTS

{3} On December 11, 1997, Defendant and two others decided to rob a store called the Play-A-Rama. They had been using cocaine, marijuana, and alcohol. The three of them first drove around the area to plan their crime and discuss the robbery. They returned to the store a short time later. Defendant, who had made himself a mask and armed himself with a loaded revolver, told the others to drop him off, drive around for a few minutes, and come back and pick him up. There was no discussion among the three of actually carrying out a shooting.

{4} Defendant was dropped off and walked into the store wearing the mask so as not to be recognized. The store was empty. Prather was in the back. He came into the store area and found Defendant near the counter. Defendant pointed the gun in the direction of Prather and demanded his wallet. Prather said he did not have any money. In his confession, Defendant stated that Prather came toward Defendant as if he were going to “get” him. Prather grabbed hold of a sawed-off pool cue with a nail in the end as well as the telephone.

{5} The prosecution argued from circumstantial evidence that Prather did not come toward Defendant in a threatening manner; rather Defendant shot Prather because he had grabbed the phone. The prosecution argued alternatively, however, that Defendant may have shot because Prather refused to hand over his wallet. Police found the pool cue on the counter and the telephone on the floor around Prather’s feet. Defendant shot Prather three times, took the wallet, and fled.

{6} His accomplices picked up Defendant after he left the Play-A-Rama. They went to Defendant’s girlfriend’s house. Defendant told the others to go back to the store, remove Defendant’s fingerprints from the door area and, as if to buy cigarettes, pretend to discover the body, and report that Prather had been shot. They tried to carry this out, but in the course of police questioning, they confessed to their roles in the crime and stated that Defendant told them he had shot Prather. Meanwhile, Defendant tried to cover up the crime by treating his hands with wax to remove gunpowder residue, setting fire to the clothes he was wearing and other evidence, and hiding the gun. Defendant told his girlfriend to say he was with her at the relevant time. Defendant later confessed to the killing.

STANDARD OF REVIEW

{7} The sufficiency of the evidence is reviewed pursuant to a substantial evidence standard, State v. Sutphin, 107 N.M. 126, 131 753 P.2d 1314, 1319 (1988). “[T]he relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Garcia, 114 N.M. 269, 274, 837 P.2d 862,867 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). This Court evaluates the sufficiency of the evidence in a criminal case by viewing the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences to uphold the conviction, and disregarding all evidence and inferences to the contrary. State v. Rojo, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. We will not substitute our judgment for that of the fact finder, nor will we re-weigh the evidence. State v. Hernandez, 115 N.M. 6, 26, 846 P.2d 312, 332 (1993).

DISCUSSION

{8} The basis for concluding that there was insufficient evidence to support a conviction, under the aggravating circumstance of the murder of a witness, is that the facts are insufficient to support the conclusion that Defendant shot Prather because Prather could be shown to have had the intent to
report the crime of the ongoing robbery. We take as our analytical starting point Garcia, 114 N.M. 269, 837 P.2d 862. In that case, the evidence was that the defendant and the ultimate victim, Gutierrez, had a history of animosity. Id. at 270, 837 P.2d at 863. On the day of the killing, these two and some others bought some liquor and went to a house where a party was going on. Id. Garcia and Gutierrez began arguing. Id. They appeared to reconcile but then resumed arguing. Id. They were told to “take it [their argument] to the street.” Garcia remarked, “‘Remove [him] away from me or you’re not going to be seeing him for the rest of the day.’” Id.

[9] The trial court in Garcia denied a defense motion for directed verdict on the charge of first-degree premeditated murder, and the defendant was convicted by the jury. Id. at 271, 837 P.2d at 864. Considering the difference between first- and second-degree murder, we reversed, holding that the evidence was insufficient to support a first-degree murder conviction because no rational jury could have found premeditation and deliberation beyond a reasonable doubt. Id. at 274, 837 P.2d at 867. We said the appellate court’s role in such a situation is to determine whether any rational jury could have found each element of the crime beyond a reasonable doubt:

This does not involve substituting the appellate court’s judgment for that of the jury in deciding the reasonable-doubt question, but it does require appellate court scrutiny of the evidence and supervision of the jury’s fact-finding function to ensure that, indeed, a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction.

Id.

[10] “The legislature has given us the responsibility to review death sentences on appeal and determine whether the evidence supports the jury’s finding of a statutory aggravating circumstance. In assessing the death penalty we must apply that ‘greater degree of scrutiny’ called for by the Constitution,” Henderson, 109 N.M. at 660-61, 789 P.2d at 608-09 (citation omitted). The manner of killing in this case, three gunshots at close range, including one in the eye, supports an intent to kill. See Jackson, 443 U.S. at 325. However, we do not believe that this evidence supports the further intent to kill Prather for the purpose of preventing the report of a crime. Additionally, although Defendant sought to conceal his identity and attempted to cover up the crime, this evidence alone is inadequate to support the specific intent required by Section 31-20(A)-5(G) because there existed other plausible motives for the killing. See Henderson, 109 N.M. at 660, 789 P.2d at 608 (stating that such evidence can be sufficient to support this aggravating circumstance when there is a “lack of other plausible motive”).

[11] Finally, we acknowledge that the evidence, including Defendant’s statement, indicates that Prather grabbed the telephone immediately before being shot, supporting an inference that Prather intended to call the police. Nevertheless, we do not believe that this evidence, even when viewed in conjunction with the other evidence, supports a reasonable inference that Defendant formed a specific intent to kill for the purpose of preventing the report or a crime. According to the record, only a few seconds elapsed between Prather’s reaching for the telephone and the shooting. While it is true that “[a] calculated judgment and decision may be arrived at in a short period of time,” UJI 14-201 NMRA 2002, we believe that the paucity of additional evidence supporting an inference of a specific purpose to prevent the report of a crime, coupled with the heightened scrutiny that we are bound to apply in cases involving the extraordinary penalty of death, counsels against reliance on this rule in the present case.

[12] Our conclusion that there is insufficient evidence to support the aggravating circumstance in this case is reinforced by the actions of the prosecutor and the trial judge. At the close of the State’s case in chief, Defendant moved for a directed verdict on the charge of deliberate intent first degree murder. Following a discussion among the trial judge, the prosecutor, and defense counsel, the prosecutor agreed to dismiss the charge, and the trial judge accepted the dismissal. The State argues before this Court that the dismissal of the charge did not require the trial judge to rule on the issue of deliberation. We disagree. Defendant’s motion for directed verdict sought a ruling that there was insufficient evidence of a deliberate intent to kill. The prosecutor, by agreeing to dismiss the charge, conceded this claim. The trial judge’s decision to accept the prosecutor’s acquiescence in the dismissal of the charge is a ruling that as a matter of law the State presented insufficient evidence to establish a deliberate intent to kill, and this ruling operated as an acquittal on the charge of deliberate intent first degree murder. See County of Los Alamos v. Tapia, 109 N.M. 736, 739, 790 P.2d 1017, 1021 (1990). (“A defendant who demurs to the evidence as ‘insufficient to establish his factual guilt’ has been acquitted. . . .” (quoting Smalis v. Pennsylvania, 476 U.S. 140, 144 (1986)). It would be anomalous for this Court to conclude that there was sufficient evidence of a specific intent to kill for the purpose of preventing the report of a crime when the prosecutor and the trial judge determined that there was not an adequate opportunity for “careful thought” or a “calculated judgment,” especially considering the gravity of the penalty at issue.

CONCLUSION

[13] For these reasons, we conclude that the State failed to present sufficient evidence to support a finding beyond a reasonable doubt of the essential elements of the aggravating circumstance of murder of a witness for the purpose of preventing the report of a crime. Accordingly, the judgment of the trial court is reversed and the case remanded for imposition of life sentence. In light of this reversal, we need not review the remainder of the issues raised by Defendant on appeal.

[14] IT IS SO ORDERED.

signed 5-6-02

PETRA JIMENEZ MAES,
Justice

WE CONCUR:
signed 5-6-02
PATRICIO M. SERNA,
Chief Justice
signed 5-6-02
JOSEPH F. BACA, Justice
signed 5-6-02
GENE E. FRANCHINI, Justice
signed 5-6-02
PAMELA B. MINZNER, Justice
From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-008

STATE OF NEW MEXICO,
Plaintiff-Appellee,

versus

MICHAEL TREADWAY,
Defendant-Appellant.
No. 26,218 (filed: February 16, 2006)

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
DAVID W. BONEM, District Judge

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OPINION

PETRA JIMENEZ MAES, JUSTICE

[1] Defendant, Michael Treadway, was convicted of felony murder after shooting and killing Red Prather, a store owner in Texico, during a robbery. Because Defendant was sentenced to death, we have jurisdiction over his appeal pursuant to Article VI, Section 2 of the New Mexico Constitution. Defendant presents numerous arguments to this Court as to why his death sentence should be vacated. These include: that there was insufficient evidence to prove the murder of a witness aggravating circumstance according to which he was sentenced; that this case is indistinguishable from any killing in the course of an armed robbery and therefore that to permit the death penalty to stand would constitute judicial creation of an “armed robbery aggravator” and would violate separation of powers; that premeditation generally was eliminated from the case when the charge of premeditated murder was dismissed and so there can be no sufficient intent to support the murder of a witness aggravator; that the death penalty is applied to Defendant disproportionately; that the prosecutor engaged in prejudicial misconduct; that evidentiary rulings during the penalty phase of the case limited the defense case and resulted in jury passion and prejudice; that the trial court improperly permitted the prosecution to rebut its own evidentiary presentation; that there was instructional error; that the Capital Felony Sentencing Act, NMSA 1978, §§ 31-20A-1 to 6 (1979, as amended through 1991), is unconstitutional in six separate respects; and that there was cumulative error.

[2] Defendant’s principal argument is that there was insufficient evidence to prove the aggravating circumstance of murder of a witness beyond a reasonable doubt. We agree. We begin our analysis by noting that the murder of a witness aggravator requires the killing of a witness to a crime with specific intent, that is “for the purpose of preventing report of the crime or testimony in any criminal proceeding.” See NMSA 1978, § 31-20(A)-5(G) (1981); see also State v. Henderson, 109 N.M. 655, 665, 789 P.2d 603, 613 (1990) (Ransom, J., concurring in part and dissenting in part) (finding, under statute, that a specific criminal intent is required), overruled on other grounds by Clark v. Tansy, 118 N.M. 486, 493, 882 P.2d 527, 534 (1994). Therefore, the issue is whether there was sufficient evidence that Defendant killed Red Prather to prevent him from reporting the robbery then in progress or to prevent him from testifying to the facts thereof. We hold that as a matter of law, there was insufficient evidence to prove the murder of a witness aggravating circumstance.

FACTS

[3] On December 11, 1997, Defendant and two others decided to rob a store called the Play-A-Rama. They had been using cocaine, marijuana, and alcohol. The three of them first drove around the area to plan their crime and discuss the robbery. They returned to the store a short time later. Defendant, who had made himself a mask and armed himself with a loaded revolver, told the others to drop him off, drive around for a few minutes, and come back and pick him up. There was no discussion among the three of actually carrying out a shooting. 

[4] Defendant was dropped off and walked into the store wearing the mask so as not to be recognized. The store was empty. Prather was in the back. He came into the store area and found Defendant near the counter. Defendant pointed the gun in the direction of Prather and demanded his wallet. Prather said he did not have any money. In his confession, Defendant stated that Prather came toward Defendant as if he were going to “get” him. Prather grabbed hold of a sawed-off pool cue with a nail in the end as well as the telephone.

[5] The prosecution argued from circumstantial evidence that Prather did not come toward Defendant in a threatening manner; rather Defendant shot Prather because he had grabbed the phone. The prosecution argued alternatively, however, that Defendant may have shot because Prather refused to hand over his wallet. Police found the pool cue on the counter and the telephone on the floor around Prather’s feet. Defendant shot Prather three times, took the wallet, and fled.

[6] His accomplices picked up Defendant after he left the Play-A-Rama. They went to Defendant’s girlfriend’s house. Defendant told the others to go back to the store, remove Defendant’s fingerprints from the door area and, as if to buy cigarettes, pretend to discover the body, and report that Prather had been shot. They tried to carry this out, but in the course of police questioning, they confessed to their roles in the crime and stated that Defendant told them he had shot Prather. Meanwhile, Defendant tried to cover up the crime by treating his hands with wax to remove gunpowder residue, setting fire to the clothes he was wearing and other evidence, and hiding the gun. Defendant told his girlfriend to say he was with her at the relevant time. Defendant later confessed to the killing.

STANDARD OF REVIEW


“[T]he relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential
elements of the crime beyond a reasonable doubt.” State v. Garcia, 114 N.M. 269, 274, 837 P.2d 862,867 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). This Court evaluates the sufficiency of the evidence in a criminal case by viewing the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences to uphold the conviction, and disregarding all evidence and inferences to the contrary. State v. Rojo, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. We will not substitute our judgment for that of the fact finder, nor will we re-weigh the evidence. State v. Hernandez, 115 N.M. 6, 26, 846 P.2d 312, 332 (1993).

DISCUSSION

[8] The basis for concluding that there was insufficient evidence to support a conviction, under the aggravating circumstance of the murder of a witness, is that the facts are insufficient to support the conclusion that Defendant shot Prather because Prather could be shown to have had the intent to report the crime of the ongoing robbery. We take as our analytical starting point Garcia, 114 N.M. 269, 837 P.2d 862. In that case, the evidence was that the defendant and the ultimate victim, Gutierrez, had a history of animosity. Id. at 270, 837 P.2d at 863. On the day of the killing, these two and some others bought some liquor and went to a house where a party was going on. Id. Garcia and Gutierrez began arguing. Id. They appeared to reconcile but then resumed arguing. Id. They were told to “take it [their argument] to the street.” Garcia remarked, “Remove [him] away from me or you’re not going to be seeing him for the rest of the day.” Id.

[9] The trial court in Garcia denied a defense motion for directed verdict on the charge of first-degree premeditated murder, and the defendant was convicted by the jury. Id. at 271, 837 P.2d at 864. Considering the difference between first- and second-degree murder, we reversed, holding that the evidence was insufficient to support a first-degree murder conviction because no rational jury could have found premeditation and deliberation beyond a reasonable doubt. Id. at 274, 837 P.2d at 867. We said the appellate court’s role in such a situation is to determine whether any rational jury could have found each element of the crime beyond a reasonable doubt:

This does not involve substituting the appellate court’s judgment for that of the jury in deciding the reasonable-doubt question, but it does require appellate court scrutiny of the evidence and supervision of the jury’s fact-finding function to ensure that, indeed, a rational jury could have found beyond a reasonable doubt the essential facts required for a conviction.

Id. (10) “The legislature has given us the responsibility to review death sentences on appeal and determine whether the evidence supports the jury’s finding of a statutory aggravating circumstance. In assessing the death penalty we must apply that ‘greater degree of scrutiny’ called for by the Constitution.” Henderson, 109 N.M. at 660-61, 789 P.2d at 608-09 (citation omitted). The manner of killing in this case, three gunshots at close range, including one in the eye, supports an intent to kill. See Jackson, 443 U.S. at 325. However, we do not believe that this evidence supports the further intent to kill Prather for the purpose of preventing the report of a crime. Additionally, although Defendant sought to conceal his identity and attempted to cover up the crime, this evidence alone is inadequate to support the specific intent required by Section 31-20-1A-5(G) because there existed other plausible motives for the killing. See Henderson, 109 N.M. at 660, 789 P.2d at 608 (stating that such evidence can be sufficient to support this aggravating circumstance when there is a ‘lack of other plausible motive’).

[11] Finally, we acknowledge that the evidence, including Defendant’s statement, indicates that Prather grabbed the telephone immediately before being shot, supporting an inference that Prather intended to call the police. Nevertheless, we do not believe that this evidence, even when viewed in conjunction with the other evidence, supports a reasonable inference that Defendant formed a specific intent to kill for the purpose of preventing the report or a crime. According to the record, only a few seconds elapsed between Prather’s reaching for the telephone and the shooting. While it is true that “[a] calculated judgment and decision may be arrived at in a short period of time,” UJI 14-201 NMRA 2002, we believe that the paucity of additional evidence supporting an inference of a specific purpose to prevent the report of a crime, coupled with the heightened scrutiny that we are bound to apply in cases involving the extraordinary penalty of death, counsels against reliance on this rule in the present case.

[12] Our conclusion that there is insufficient evidence to support the aggravating circumstance in this case is reinforced by the actions of the prosecutor and the trial judge. At the close of the State’s case in chief, Defendant moved for a directed verdict on the charge of deliberate intent first degree murder. Following a discussion among the trial judge, the prosecutor, and defense counsel, the prosecutor agreed to dismiss the charge, and the trial judge accepted the dismissal. The State argues before this Court that the dismissal of the charge did not require the trial judge to rule on the issue of deliberation. We disagree. Defendant’s motion for directed verdict sought a ruling that there was insufficient evidence of a deliberate intent to kill. The prosecutor, by agreeing to dismiss the charge, conceded this claim. The trial judge’s decision to accept the prosecutor’s acquiescence in the dismissal of the charge is a ruling that as a matter of law the State presented insufficient evidence to establish a deliberate intent to kill, and this ruling operated as an acquittal on the charge of deliberate intent first degree murder. See County of Los Alamos v. Tapia, 109 N.M. 736, 739, 790 P.2d 1017, 1021 (1990). (“A defendant who demurs to the evidence as ‘insufficient to establish his factual guilt’ has been acquitted. . . .” (quoting Smalis v. Pennsylvania, 476 U.S. 140, 144 (1986)). It would be anomalous for this Court to conclude that there was sufficient evidence of a specific intent to kill for the purpose of preventing the report of a crime when the prosecutor and the trial judge determined that there was not an adequate opportunity for “careful thought” or a “calculated judgment,” especially considering the gravity of the penalty at issue.

CONCLUSION

[13] For these reasons, we conclude that the State failed to present sufficient evidence to support a finding beyond a reasonable doubt of the essential elements of the aggravating circumstance of murder of a witness for the purpose of preventing the report of a crime. Accordingly, the judgment of the trial court is reversed and the case remanded for imposition of life sentence. In light of this reversal, we need not review the remainder of the issues raised by Defendant on appeal.

IT IS SO ORDERED.

PETRA JIMENEZ MAES,
Justice

WE CONCUR:

PATRICIO M. SERNA, Chief Justice
JOSEPH F. BACA, Justice
GENE E. FRANCHINI, Justice
PAMELA B. MINZNER, Justice
Opinion

LYNN PICKARD, JUDGE

[1] In this case, we decide whether the trial court abused its discretion in refusing to set aside a default judgment of foreclosure on a finding that the defendant had not presented a meritorious defense. Holding that the trial court acted within its discretion, we affirm.

BACKGROUND

[2] This case arises out of a default judgment of foreclosure entered in favor of Plaintiff-Appellee, Magnolia Mountain Limited Partnership. Defendant-Appellant, Ski Rio Partners, does not dispute that the note was in default, but many of the other pertinent facts are disputed. Defendant’s basic argument is that although it was properly served with a complaint for foreclosure, it did not answer the complaint because it relied to its detriment on Plaintiff’s assertion that if Defendant cooperated, Plaintiff would not actually pursue foreclosure. Under established New Mexico law, a defendant seeking to set aside a default judgment must show grounds for relief under Rule 1-060(B)(3) NMRA, which the foregoing facts tend to establish, and one or more meritorious defenses. Sunwest Bank v. Rodriguez, 108 N.M. 211, 213, 770 P.2d 533, 535 (1989).

As discussed fully below, New Mexico case law generally requires us to accept all facts pleaded by the defendant in a motion to set aside a default judgment as true. See id. at 214-15, 770 P.2d at 536-37. Over the course of this litigation, however, Defendant has put forth at least four different versions of the disputed facts. Thus, we begin by setting forth the procedural history of the case and briefly explaining Defendant’s factual allegations at each stage of the proceedings below.

FACTS AND PROCEDURAL HISTORY

[3] In 1998, Plaintiff sold Defendant some property in Northern New Mexico known as the Ski Rio Resort. The property was the subject of a mortgage and promissory note for $400,000 executed by Plaintiff and Defendant. Defendant asserts that it was “arguably in default” and admits that “it had not made all payments timely.” After sending several demand letters threatening immediate foreclosure, Plaintiff filed its foreclosure complaint on February 28, 2003. Defendant was properly served with the complaint on March 10, 2003. Defendant did not answer the complaint. Plaintiff moved for an entry of default judgment on April 24, 2003, and on May 6, 2003, Judge Sam Sanchez entered the default judgment. A sale was conducted by a special master on June 4, 2003, at which Plaintiff bought the property.

[4] On August 8, 2003, Defendant moved to set aside the default judgment. In its motion, Defendant argued that Plaintiff’s actions constituted fraud, misrepresentation, and misconduct, and that such a showing was all that was required to set aside the judgment under Rule 1-060(B)(3). Defendant argued that it was not required to show “that there would have been a different result had the fraud not occurred.”

[5] In support of its arguments, Defendant attached an affidavit from its Project Manager, George Wollmann, which alleged the following facts. Upon receiving the foreclosure complaint, Defendant immediately contacted David Hendricks, the owner of the Plaintiff partnership. Mr. Hendricks stated that “if [Defendant] did not disagree with the dollar amount sought in the summons that [it] did not need to file an answer.” Mr. Wollmann had suggested getting a New Mexico attorney, but one of Defendant’s partners “did not want to waste the money if it was not necessary.” Mr. Wollmann voiced this concern to Mr. Hendricks, who responded that “if [Defendant] did not disagree with the amount there was no reason to get an attorney to file an answer.” Mr. Hendricks also said that there would be “plenty of opportunities to cure the defaults and that a lot of things had to happen and that the foreclosure process was very slow in New Mexico.” Finally, there was a possibility that Defendant would sell the resort, and Mr. Hendricks told Defendant that if the planned sale went through, the sale would “occur before foreclosure and eliminate the controversy.” In its motion, Defendant alleged that, because it trusted Mr. Hendricks, it chose not to answer the complaint.

[6] Defendant’s motion also asserted that before and after the complaint was filed, it was trying to sell the resort and had found a potential buyer who was in the process of obtaining financing. Mr. Hendricks had “suggested” that Defendant “could sell the Resort before Mr. Hendricks took further action.” Mr. Hendricks was an active participant in the negotiations with the potential buyer, cooperating in ironing out
the details relating to water rights. Even after he had “secretly” obtained the default judgment and had bought the property at the foreclosure sale, Mr. Hendricks continued to pretend to cooperate with Defendant in its efforts to sell the resort. Because Mr. Hendricks had “led [Defendant] to believe that . . . he was content waiting for the sale . . . or making other arrangements,” Defendant took no actions regarding the foreclosure complaint.

[7] After argument, Judge Sanchez granted Defendant’s motion and set aside the judgment, allowing Defendant to answer the complaint. Defendant answered the complaint and also for the first time deposited $528,854.05, which it characterized as the sum demanded by Plaintiff plus interest, into the court registry. Defendant included in its answer a third-party complaint against Mountain Highlands L.L.C., the current owner of the property, which was later dismissed from the case. Then, Plaintiff filed a motion asking Judge Sanchez to reconsider his decision setting aside the judgment. Before Judge Sanchez ruled on the motion to reconsider, Mountain Highlands removed him from the case by exercising a peremptory excusal. The case was reassigned to Judge Peggy Nelson.

[8] In both the response to Defendant’s initial motion to set aside and the motion for reconsideration, Plaintiff argued that allegations of fraud were not alone sufficient to set aside a default judgment. Instead, Plaintiff asserted that a default judgment should be set aside only if a defendant can also show one or more meritorious defenses to the underlying action. Thus, Defendant filed an answer to the original foreclosure complaint alleging five defenses on the merits: unclean hands, waiver, laches, estoppel, and a separately numbered defense that “Plaintiff’s claims are barred in whole or part by Plaintiff’s own fraudulent conduct.” Defendant also included a counterclaim, which sought damages and other relief.

[9] In support of its claims, Defendant modified its factual allegations as follows, but no new affidavits were ever filed. Defendant now claimed that it had been “negotiating” with Mr. Hendricks since December 2002, and that throughout the negotiations, Mr. Hendricks was “well aware of [Defendant’s] intentions to either pay the amount owing . . . or sell the property to a third party.” Mr. Hendricks “knew or should have known that Ski Rio had the ability to pay the amount owing . . . on short notice.” Further, Mr. Hendricks “assured” Defendant that there was no reason to get an attorney or file a response to the foreclosure complaint. Mr. Hendricks made these “assurances” knowing they were false and with the intent to deceive Defendant so that it would not respond to the complaint.

[10] After hearing argument, Judge Nelson found that Defendant’s response to the complaint did not assert any meritorious defenses. She then reinstated the default judgment. Judge Nelson allowed Defendant to file supplemental briefing on the issue of meritorious defenses. In the supplemental briefing, Defendant asserted several new defenses and made the following modifications to its factual allegations. Plaintiff, through Mr. Hendricks, “introduced” Defendant to the potential buyer of the property. Plaintiff told Defendant that “Plaintiff understood that it would get paid from the proceeds of the sale prior to any foreclosure taking place.” As a result, Plaintiff indicated that the foreclosure was “no longer an issue.” Finally, Mr. Hendricks “promised that he would not have to foreclose the property” so long as Defendant sold it to a particular buyer.

[11] After supplemental briefing and another hearing, Judge Nelson again denied the motion to set aside the default judgment. This appeal followed. In its appellate briefs, Defendant has yet again revised its facts. Now it alleges as follows. Defendant had told Plaintiff that it “stood ready and able to pay the mortgage, should [Plaintiff] deem payment necessary. Instead of paying the amount alleged to be owing, as [it] would have done,” Defendant “accepted [Plaintiff’s] promise that [Plaintiff] would not foreclose.” The result was that Plaintiff “secretly foreclosed on the mortgage and promissory note, robbed [Defendant] of its redemption rights, purchased the property for itself, and thereafter sold it for a handsome profit.”

STANDARD OF REVIEW

[12] We generally review a trial court’s denial of a motion to set aside a default judgment for abuse of discretion. Sunwest Bank, 108 N.M. at 213, 770 P.2d at 535. Our Supreme Court has specifically held that the meritorious defense component of the analysis is also reviewed for abuse of discretion. Id. at 214, 770 P.2d at 536 (“The finding of a meritorious defense is addressed to the sound discretion of the trial court[].”).

DISCUSSION

Changing Factual Bases

[13] We first address the standard for conducting the meritorious defense analysis, as set forth in Sunwest Bank, 108 N.M. 211, 770 P.2d 533. In Sunwest Bank, our Supreme Court began by explaining that the reason for requiring a showing of a meritorious defense is “to ascertain whether there is any possibility that the outcome of the suit after trial will be different from the result achieved by the default.” Id. at 214, 770 P.2d at 536. In order to allow for this determination, the Court held that the defendants must do more than assert “bare legal conclusions that lack factual support.” Id. Rather, they must “set[] forth relevant legal grounds substantiated by a credible factual basis.” Id. (quoting Kirtland v. Fort Morgan Auth. Sewer Serv., Inc., 524 So.2d 600, 606 (Ala. 1988)). Although this showing requires more than “the mere notice requirements that would suffice if plead[ed] before default,” Sunwest Bank, 108 N.M. at 214, 770 P.2d at 536, “facts stated in the . . . motion should be accepted as true.” Id. at 215, 770 P.2d at 537.

[14] The standard set forth in Sunwest Bank is not completely clear. Specifically, it is unclear how the trial court is to determine whether the claims are supported by a “credible” factual basis when there has been no evidentiary hearing. Id. at 214, 770 P.2d at 536. “Credibility” is defined as “[t]he quality that makes something . . . worthy of belief.” Black’s Law Dictionary 396 (8th ed. 2004). Thus, because Sunwest Bank also says that factual allegations should be “accepted as true” (i.e., believed), we do not think that the Court intended the word “credible” to be given its ordinary meaning.

[15] We take guidance in resolving this difficulty from Kirtland, 524 So.2d 600, which is the case our Court quoted for the proposition that a “credible factual basis” is required for a showing of a meritorious defense. Sunwest Bank, 108 N.M. at 214, 770 P.2d at 536. Kirtland also states that the movant must set forth “a clear and specific statement showing, not by conclusion, but by definite recitation of facts, that an injustice has been probably done by the judgment,” 524 So.2d at 606 (internal quotation marks and citations omitted), and that the movant must “counter the cause of action averred in the complaint with specificity.” Id. There is nothing in any of these statements, or in Sunwest Bank, indicating that a court conducting a meritorious defense analysis should weigh
evidence to determine “credibility” in the normal sense of the word. Thus, the most logical reading of Sunwest Bank is that a litigant attempting to show a meritorious defense is subject to a heightened pleading requirement, similar to the pleading requirement under Rule 1-009 NMRA. See, e.g., Rule 1-009(B) (“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”)).

[16] We also note that Kirtland, 524 So. 2d at 606, relied on the Restatement (Second) of Judgments § 67 (1982), which states that the test employed in assessing whether a meritorious defense has been asserted is “essentially the same as used in considering summary judgment.” Id. cmt. e. In New Mexico, summary judgment is proper where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Ocanca v. Am. Furniture Co., 2004-NMSC-018, ¶ 12, 135 N.M. 539, 91 P.3d 58. In other words, the goal at the summary judgment stage is to determine whether there is a viable legal theory and whether there are genuine disputes with regard to the facts that must be proven in order to prevail on that legal theory.

[17] We agree with the Restatement that the meritorious defense analysis is analogous to the summary judgment analysis. As with summary judgment, the point of requiring a showing of meritorious defense is to ensure that there is a reason to conduct a trial, i.e., to ensure that the movant has a viable legal theory and that there are genuine issues of fact that require submission to a factfinder. See Sunwest Bank, 108 N.M. at 214, 707 P.2d at 536 (“The object is to ascertain whether there is some possibility that the outcome of the suit after trial will be different from the result achieved by the default.”). Thus, we determine that the Sunwest Bank standard is best summarized as follows: parties seeking to set aside a default judgment must assert a valid legal theory and allege with some particularity facts that would support that legal theory; such facts are to be taken as true, but in order to reopen the judgment and proceed to trial, the factual issues presented must be genuine.

[18] In the present case, Defendant argues that the trial court must have ignored the relevant standard from Sunwest Bank. It argues that in “light of the overwhelming evidence demonstrating [Defendant’s] meritorious defenses, the only reasonable means by which the court below could have denied [Defendant’s] motion is by weighing the facts asserted against those asserted by [Plaintiff].” Aside from this conclusory statement, Defendant fails to point to anything indicating that the trial court misapplied the relevant standard. Moreover, Defendant failed to designate any of the transcripts as part of the record on appeal. Plaintiff asserts that the trial court “expressly refrained from weighing facts, and held that there was no meritorious defense shown based on [Defendant’s] stated allegations.” Under these circumstances, we assume that the trial court followed the controlling law from Sunwest Bank and made its ruling based on Defendant’s stated allegations. See State v. Garcia, 83 N.M. 794, 795, 498 P.2d 681, 682 (Ct. App. 1972) (“[U]pon a doubtful or deficient record, every presumption must be indulged by this Court in favor of the correctness and regularity of the trial court’s judgment.”).

[19] However, for the reasons that follow, we also hold that the trial court would not have abused its discretion had it refused to rely on some of Defendant’s later-pleaded allegations. Defendant’s factual allegations have changed significantly over the course of these proceedings. Thus, we take guidance from a recent New Mexico case dealing with changing facts in the summary judgment context. In Rivera v. Trujillo, this Court upheld a district court’s grant of summary judgment in a case involving an automobile accident. 1999-NMCA-129, ¶¶ 1-2, 12, 128 N.M. 106, 990 P.2d 219. In deposition testimony, one of the plaintiffs had admitted that he “black out” prior to the accident. Id. ¶ 10. When his attorney asked him what he understood the term “black out” to mean, the plaintiff replied, “More or less passing out, losing consciousness.” Id. He also agreed that one who blacked out while driving would lose control of the vehicle. Id. Then, after the defendant had moved for summary judgment, the plaintiff submitted an affidavit in opposition to the motion. Id. ¶ 3. The affidavit stated that at his deposition, the plaintiff had not understood the meaning of the term “black out.” Id. ¶ 11. The affidavit also asserted that he had only meant to say that he suffered memory loss following the accident, and that he had never intended to say that he lost consciousness prior to the accident. Id. ¶ 20. This Court held that the plaintiff’s affidavit did not create a genuine issue of material fact. Id. ¶ 12. The Court stated that “while it is not the judge’s role to weigh the evidence at summary judgment,” factual disputes must nonetheless be “genuine.” Id. ¶ 8. The Court noted that most of the federal circuit courts have held that a plaintiff may not defeat summary judgment by raising a “sham issue of fact.” Id. ¶ 9. The Court then adopted that doctrine as “consistent with New Mexico law.” Id.

The Court concluded that the allegations in the plaintiff’s affidavit were an attempt to create a sham issue of fact: “Such post-hoc efforts to nullify unambiguous admissions under oath will not create a factual dispute sufficient to evade summary judgment.” Id. ¶ 12.

[21] While we understand that it is not our place to weigh the facts, we hold that, in accordance with Rivera, factual disputes in the context of the meritorious defense analysis must be genuine and attempts to create sham issues of fact will not be sufficient to support reopening the judgment. In this case, as in Rivera, we find that the inconsistencies in Defendant’s allegations could have led the trial court to believe that Defendant was attempting to create a sham issue of fact. As detailed above, Defendant based its arguments in the initial motion to set aside on Plaintiff’s alleged statement that “there was no reason for [Defendant] to get an attorney and file a response to the complaint, and that [Defendant] would have plenty of time to cure the alleged late payments on the promissory note.” This alleged statement, however, was nothing more than Defendant’s argument, which was in turn based on Mr. Wollmann’s affidavit. The affidavit’s statements concerning getting an attorney were focused on whether an answer to the complaint needed to be filed, and Mr. Hendricks indicated that if there was no contention that the dollar amount of money owed was incorrect, an answer did not need to be filed. The affidavit continued with Mr. Wollmann affirming that Mr. Hendricks told him that foreclosures “typically” took up to a year or more in New Mexico and for that reason there would be time to cure. An available inference from this affidavit was that Plaintiff was going to continue the suit to foreclosure. There was no promissory language in this affidavit. In Defendant’s motion to set aside reinstated default judgment, however, Defendant alleges that Plaintiff “promised,” both before and after filing the complaint, not to foreclose.

[22] Defendant’s assertions regarding the alleged “promise” not to foreclose are belied by not only its own affidavit but also by the record in this case. As to the allegation that Plaintiff made a promise not to foreclose
before filing the complaint, we note the existence in the record of the two demand letters sent from Defendant to Plaintiff. Both letters were sent before the complaint was filed, and Defendant does not deny having received them. The first letter, sent approximately two and one-half months before the complaint was filed, states that the note is in “serious default,” and ends by remarking that, “you need to pay off this debt or if not, [Plaintiff] must proceed toward foreclosure.” The second letter, sent by Plaintiff’s attorney nearly two months prior to the filing of the complaint, states that “[w]e are instructed to inform you that if all amounts due are not paid by ten days from the date of this notice . . . we will commence a suit for foreclosure[.]” Thus, Defendant’s assertion that Plaintiff had “promised” not to foreclose in the period leading up to the filing of the complaint is simply not plausible. As to Defendant’s assertion that Plaintiff filed the complaint and yet simultaneously and subsequently “promised” not to foreclose, we note that Defendant did not make any such allegation in its initial motion to set aside the default judgment. Thus, in accordance with *Rivera*, the trial court would not have abused its discretion had it chosen to disregard that allegation.

[23] In sum, we reiterate our assumption that the trial court accepted all of Defendant’s initial factual allegations as true, but we hold that due to the inconsistencies in Defendant’s own allegations, the trial court would not have abused its discretion if it had refused to rely on some of Defendant’s later-pleaded factual assertions. *Cf. Freeman v. San Diego Ass’n of Realtors*, 91 Cal. Rptr. 2d 534, 540 n.3 (Ct. App. 1999) (“[Plaintiff] may not avoid defects of her earlier pleadings by omitting facts that made the earlier pleadings defective or alleging new facts inconsistent with the allegations of the earlier pleadings.”).

[24] We now turn to the specific defenses raised by Defendant. Addressing each in turn, we hold that the trial court did not abuse its discretion in finding these defenses to be non-meritorious.

**Promissory Estoppel**

[25] Defendant first asserts that Plaintiff should not have been allowed to foreclose on the property based on the doctrine of promissory estoppel. The elements of promissory estoppel are:

1. An actual promise must have been made which in fact induced the promisee’s action or forbearance;
2. The promisee’s reliance on the promise must have been reasonable;
3. The promisee’s action or forbearance must have amounted to a substantial change in position;
4. The promisee’s action or forbearance must have been actually foreseen or reasonably foreseeable to the promisor when making the promise; and
5. Enforcement of the promise is required to prevent injustice.

*Strata Prod. Co. v. Mercury Exploration Co.,* 121 N.M. 622, 628, 916 P.2d 822, 828 (1996). According to Defendant, these elements are satisfied because (1) Plaintiff promised not to foreclose and in reliance on that promise, Defendant did not pay the amount owing, even though it otherwise could and would have; (2) this reliance was reasonable by virtue of the parties’ long business history; (3) Plaintiff should have foreseen that Defendant would rely on the promise; and (4) “manifest injustice” will result if the promise is not enforced.

[26] We reject Defendant’s argument because neither the initial motion to set aside the default judgment nor any of the documents filed in support of it (affidavit or memorandum of argument) contended that Plaintiff in fact “promised” not to foreclose on the note. Moreover, we are not convinced by Defendant’s assertion that it reasonably relied on any promise. As Defendant itself states, its principal owner is “an experienced and prominent Dallas real estate investor” who has “transacted more than $600 million in land development projects.” Thus, this is not a case in which one party is susceptible to being easily misled or taken advantage of due to unequal experience or bargaining power. *Cf. Fleet Mortgage Corp. v. Lacy*, No. 87 C 03804, 1990 WL 70852, at * 3 (N.D. Ill. May 10, 1990) (vacating a default judgment of foreclosure and stating that “[t]he Lacys claim they have put their life savings into the building. We believe equity would be served by allowing the Lacys the opportunity to defend on the merits against the loss of their investment”). In view of the circumstances of this case, we hold that it would have been well within the trial court’s discretion to find that no promise was made and even if one were made, Defendant’s reliance on it was unreasonable as a matter of law.

[27] We also agree with Plaintiff that any reliance by Defendant on the alleged promise would likely have been unreasonable due to the equivocal and ambiguous nature of most of the statements on which Defendant relies. At the beginning of this litigation, for example, Defendant only asserted (in the affidavit of its Project Manager) that Plaintiff said Defendant that “if [Defendant] did not disagree with the dollar amount sought in the summons, [it] did not need to file an answer.” Defendant at this early stage also asserted reliance on Plaintiff’s statement that “[Defendant] would have plenty of time to cure the alleged late payments on the promissory note.” The implication from this statement was that Plaintiff was proceeding toward foreclosure, and therefore Plaintiff’s statement to Defendant was mere opinion as to how long foreclosure would take. Defendant does not allege any specific promissory language on which it relied.

[28] Finally, with regard to the last element of promissory estoppel, we do not believe that “manifest injustice” will result from our refusal to enforce the “promise.” As a general matter, we find no injustice in requiring defendants to respond to complaints for foreclosure. We acknowledge that promissory estoppel might be a valid theory in a case where a default judgment defendant alleged from the outset that the plaintiff had made assurances that the foreclosure proceeding was just a formality and should be ignored. This, however, is not such a case.

**Waiver**

[29] Defendant next asserts that Plaintiff’s foreclosure claim is barred on a theory of “[w]aiver by acquiescence.” Waiver by acquiescence “arises when a person knows he is entitled to enforce a right and neglects to do so for such a length of time that under the facts of the case the other party may fairly infer that he has waived or abandoned such right.” *Sisneroz v. Polanco*, 1999-NMCA-039, ¶ 16, 126 N.M. 779, 975 P.2d 392 (internal quotation marks and citation omitted). However, “a trial court should not infer acquiescence from doubtful or ambiguous acts.” *Id.*

[30] Defendant argues that Plaintiff waived its right to foreclose by waiting “almost two and one-half years” to file the complaint. This period of time, Defendant argues, is “a reasonable period of time, under the circumstances, for [Defendant] to fairly infer that [Plaintiff] waived its right to foreclose.” Plaintiff points out that the terms of the note and mortgage specifically preclude waiver of rights under those instruments, unless such waivers are in writing and signed by the mortgagee. We do not disagree with Defendant that “[a] written contract may be modified
by a subsequent oral agreement, even though the written contract requires that modifications be in writing.” Powers v. Miller, 1999-NMCA-080, ¶ 8, 127 N.M. 496, 984 P.2d 177. However, in view of the clear provisions in the note and mortgage, we hold that the trial court would not have abused its discretion in finding that, as a matter of law, Defendant could not have “fairly inferred” a waiver based on Plaintiff’s statements and actions. We also note that Plaintiff’s actions in waiting two and one-half years to foreclose are at best “doubtful and ambiguous” as indicators that it was intending to permanently waive its right to foreclose.

[31] We also agree with Plaintiff that a finding of waiver under these circumstances would have negative policy consequences. As Plaintiff argues,

if a lender’s willingness to negotiate with a debtor regarding a default resulted in . . . waiver of its right to pursue its contractual remedies, lenders would refuse to communicate with defaulting borrowers, would refuse to negotiate terms of payment, and would refuse to cooperate with reasonable attempts to sell property securing debts.

Laches

[32] Next, Defendant argues that Plaintiff was barred from foreclosing based on the doctrine of laches. Laches is an equitable defense under which an action is barred if four elements are present: (1) conduct by the defendant for which the plaintiff seeks a remedy; (2) avoidable delay by the plaintiff in bringing suit; (3) lack of knowledge on the defendant’s part that the plaintiff would eventually seek to enforce the right; and (4) “prejudice to the defendant in the event relief is accorded to the complainant or the suit is not held to be barred.” Martinez v. Martinez, 2004-NMCA-007, ¶ 21, 135 N.M. 11, 83 P.3d 298. We agree with Defendant that the first two elements are met. However, as explained above in our analysis of the waiver defense, we do not see how Plaintiff’s actions in waiting some length of time before filing suit for foreclosure could have given Defendant any reasonable expectation that Plaintiff had decided to permanently forego the remedy of foreclosure.

[33] As to the fourth element of laches, Defendant argues that it has been prejudiced because Plaintiff foreclosed on its property and it thereby lost a significant amount of money. We do not agree that this is the type of prejudice contemplated by the doctrine of laches. A defendant who loses a lawsuit is always “prejudiced” in the sense that he or she suffers harm. However, to support a defense of laches, the prejudice alleged must be a result of the delay itself, not merely a result of the suit being brought or the defendant losing the suit. Brown v. Taylor, 120 N.M. 302, 306, 901 P.2d 720, 724 (1995) (citing Garcia v. Garcia, 111 N.M. 581, 589, 808 P.2d 31, 39 (1991) for the proposition that the “party asserting a laches defense must show injury or prejudice resulting from the delay”). Defendant has offered no reason why it was prejudiced by Plaintiff’s delay in filing the action. We thus hold that the trial court did not abuse its discretion in finding that Defendant had not presented a meritorious defense of laches.

Novation

[34] In the statement of issues in its brief in chief, Defendant lists novation as one of its defenses. Nowhere else does the brief in chief mention novation. See Stewart v. Lucero, 1996-NMCA-027, ¶ 8 n.1, 121 N.M. 722, 918 P.2d 1 (“[P]oints of error identified in the statement of proceedings but neither briefed nor supported by authority [are] considered abandoned.”). However, Plaintiff does address novation in its answer brief, and Defendant addresses Plaintiff’s arguments in its reply brief. Ordinarily, an issue is abandoned on appeal if it is not raised in the brief in chief. Barreras v. N.M. Motor Vehicle Div., 2005-NMCA-055, ¶ 1, 137 N.M. 435, 112 P.3d 296. However, in the interest of completeness, we exercise our discretion to briefly address the novation defense.

[35] Novation occurs where the following four elements are present: “1) an existing and valid contract; 2) an agreement to the new contract by all the parties; 3) a new valid contract; and 4) an extinguishment of the old contract by the new one.” Mauldsby v. Magnnuson, 107 N.M. 223, 226, 755 P.2d 67, 70 (1988) (internal quotation marks and citation omitted). Defendant appears to argue that (1) it agreed, at Plaintiff’s request, to sell the property to a specific buyer; (2) this agreement constituted new consideration, which formed a new contract; and (3) this new contract replaced the old contract that was memorialized in the note and mortgage. In the affidavit accompanying its original motion to set aside the default judgment, however, Defendant’s Project Manager made the following statement: “Throughout all these conversations, [Mr. Hendricks] led me to believe that he was content with waiting for the sale of the property to Mr. Sunday or making other arrangements for payment of the outstanding balance in the event that the sale was not completed.” To the extent that Defendant now alleges that it promised to sell the property to a specific buyer at Plaintiff’s request, we disregard this allegation because it directly contradicts the facts asserted in the Project Manager’s affidavit. Cf. Healthsource, Inc. v. X-Ray Associates., 2005-NMCA-097, ¶ 19, 138 N.M. 70, 116 P.3d 861 (following the Texas rule that “where an obligation in the pleading does not conform to the writing exhibited as a basis thereof, the document rather than the pleading controls.”); see also Freeman, 91 Cal. Rptr. 2d at 540 n.3 (“[W]e disregard allegations . . . contradicted by the express terms of an exhibit incorporated into the complaint. [Plaintiff] may not avoid defects of her earlier pleadings by omitting facts that made the earlier pleadings defective or alleging new facts inconsistent with the allegations of the earlier pleadings.” (citation omitted)). Moreover, there was no new consideration for the new contract. Thus, we hold that the trial court did not abuse its discretion in deciding that the defense of novation was non-meritorious as a matter of law.

Unclean Hands

[36] Defendant next asserts that because foreclosure is an equitable remedy, Plaintiff should be barred from seeking foreclosure on a theory of unclean hands. The doctrine of unclean hands generally prevents a complainant from recovering where he or she “has been guilty of fraudulent, illegal or inequitable conduct in the matter with relation to which he [or she] seeks relief.” Home Savs. & Loan Ass’n v. Bates, 76 N.M. 660, 662, 417 P.2d 798, 799 (1966).

[37] First, although the parties have not specifically argued this point, it seems unlikely that the defense of unclean hands is applicable under these circumstances. Generally, the doctrine is appropriately invoked only where the complainant “dirtied [his or her hands] in acquiring the right he [or she] seeks to assert.” Romero v. Bank of the Southwest, 2003-NMCA-124, ¶ 38, 135 N.M. 1, 83 P.3d 288 (internal quotation marks and citation omitted).

Here, there has been no allegation of impropriety in the execution of the note and mortgage. Thus, Plaintiff apparently has done nothing inequitable in “acquiring the right” to foreclose. Second, we note that particular deference is given to trial court rulings involving unclean hands. See
Wolf & Klar Cos. v. Garner, 101 N.M. 116, 118, 679 P.2d 258, 260 (1984) (“The application of doctrines of ‘clean hands’ or other such equitable defenses rests in the sound discretion of the trial court. Absent a clear abuse of discretion, the trial court’s exercise thereof will not be disturbed on appeal.”) (citation omitted). Finally, we note that “equity aids the vigilant, not those who slumber on their rights.” Thompson v. Montgomery & Andrews, P.A., 112 N.M. 463, 467, 816 P.2d 532, 536 (Ct. App. 1991) (internal quotation marks and citation omitted). Despite Defendant’s protestations that Plaintiff led it astray, we do not find it “vigilant” to purposefully ignore a complaint for foreclosure. For all of these reasons, we hold that the trial court did not abuse its discretion in finding that unclean hands was not a meritorious defense to the foreclosure action.

Cure

[38] Finally, Defendant asserts that “cure,” which it defines as “ability to pay,” is a meritorious defense in a foreclosure action. Defendant further argues that when Judge Sanchez initially set aside the default judgment, it deposited the total amount alleged to be owing into the court registry. This action, Defendant argues, cured the alleged default “as a matter of law.”

[39] Plaintiff first argues that Defendant’s cure argument was not properly preserved for appeal because it was not raised in the Motion to Set Aside Reinstated Default Judgment. In order to preserve an issue for appeal, the issue must have been raised before the trial court such that it “appear[s] that [the] appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.” Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). Because Judge Nelson’s “Order Denying Ski Rio’s Motion to Set Aside Reinstated Default Judgment” is the final order that we are reviewing in this appeal, we would tend to agree with Plaintiff that Defendant did not “fairly invoke[] a ruling of the trial court” with regard to its cure defense. However, because Defendant did raise the cure defense in its original motion to set aside the default judgment, we will briefly address it.

[40] Plaintiff argues that even if the cure defense was preserved, it fails as a matter of law because default is cured by tender, and not by the mere ability to pay or even an offer to pay. We agree. In Miller v. Johnson, 1998-NMCA-059, 125 N.M. 175, 958 P.2d 745, we held that buyers under a real estate contract had failed to cure a default. See id. ¶ 2. The real estate contract at issue in Miller provided that all defaults had to be cured within thirty days. Id. ¶ 7. On the last day on which the default could be cured, the buyers’ attorney was informed by the escrow agent that payment would not be accepted without a written statement from the sellers indicating that repairs to the property had been performed. Id. ¶ 11. The buyers’ attorney called the sellers’ attorney and said that funds were available to pay the total amount due, but that the escrow agent would not accept the money. Id. ¶ 12. However, the buyer did not actually deliver any funds within the time for curing default. Id. We held that these actions did not constitute a tender sufficient to cure the default. Id. ¶ 22.

[41] We defined tender as follows: “Tender is an offer to perform coupled with the present ability of immediate performance, so that the obligation could be satisfied but for the other party’s refusal to cooperate.” Id. ¶ 21. We then held that tender had not occurred:

It is undisputed that Buyers did not deliver a check to pay the default in the monthly installments prior to the expiration of the cure period. The offer to deliver a check merely evidences an intention and does not constitute a tender, since the offer to deliver a check, as opposed to the presence of a check in the default amount, does not satisfy Buyers’ obligation to cure the payment defaults.

Id. ¶ 22. In view of our holding in Miller, we agree with Plaintiff that having the ability to pay and depositing money in the court registry only after a judgment of foreclosure has been set aside are not actions sufficient to constitute cure.

[42] In support of its cure argument, Defendant cites two cases from other jurisdictions that do not support its position. See Sanders v. Kerwin, 413 N.E.2d 668, 671 (Ind. Ct. App. 1980) (holding that the allegation that only $275 dollars was owed is a meritorious defense to a claim for $475); James V. Zelch, M.D., Inc. v. Reg’l MRI of Orlando, Inc., No. 812826, 2003 WL 1393743, ¶ 17 (Ohio Ct. App. March 20, 2003) (vacating default judgment when the defendant had shown a meritorious defense by attaching to the motion a settlement agreement that purported to release the defendant from all liability).

[43] Defendant does point to one unpublished federal district court decision that appears to support the argument that “ability to pay” is a defense to an action for foreclosure. Fleet Mortgage Corp., 1990 WL 70852, at *3. In Fleet Mortgage Corp., the defendants defaulted on payments due on their home mortgage. Id. at *1. The mortgage company filed a foreclosure complaint, and at least one of the defendants admitted that she had been personally served with a summons and complaint, but asserted that she “did not know what to do” and did not understand that a default judgment would be entered if she did nothing. Id. at *1. When the defendants failed to respond to the complaint, a default judgment of foreclosure was entered and the mortgage company purchased the property at the foreclosure sale. Id. In support of their motion to vacate the default judgment, the defendants submitted affidavits stating that they were “ready, willing and able to pay” the money owed because they now had “access to the necessary funds.” Id. at *3. The court vacated the default judgment, holding that ability to pay was a viable defense and that the affidavits “provide[d] a sufficient factual basis for the [Lacy’s] defense.” Id. We note that there is no indication in the Fleet Mortgage Corp. case that the defendants at any point actually tendered the money owing to the mortgage company. Rather, they relied solely on their ability to pay.

[44] We decline to follow Fleet Mortgage Corp. While the result in that case may have been justified by the particular circumstances present, we believe that adoption of “ability to pay” as a generally available defense to foreclosure would have negative policy consequences. If that were the rule, a foreclosure defendant could simply ignore the complaint, allow a default judgment to be entered, spend time gathering funds, and then move to have the default judgment set aside on the basis that the default could now be “cured.” Of course, such a defendant would still be required to show grounds to set aside the judgment under Rule 1-060(B). See Sunwest Bank, 108 N.M. at 213, 770 P.2d at 535 (“A party seeking relief from a default judgment must show the existence of grounds for relief under Rule 1-060(B), and a meritorious defense.”). But the practical effect of adopting the “ability to pay” defense would be to eliminate the meritorious defense requirement as to default judgments of foreclosure. Thus, we hold that the trial court did not abuse its discretion in finding that cure under the factual circumstances of
this case is not a meritorious defense to a foreclosure action.

CONCLUSION

{45} We hold that the trial court did not abuse its discretion in finding that none of Defendant’s proffered defenses were meritorious. Thus, we affirm the trial court’s order refusing to set aside the default judgment.

{46} Plaintiff’s request for attorney fees, as provided in the note and mortgage, is granted. Plaintiff may either ask this Court to set an amount by motion providing this Court with sufficient information to make an award, see Rule 12-403(B)(3) NMRA for time limits, or Plaintiff may have the district court set an amount in its judgment or the mandate.

{47} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

IRA ROBINSON, Judge

RODERICK T. KENNEDY, Judge

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-028

JERRY V. MAYEUX and
SALLY BROWN MAYEUX,
Plaintiffs-Appellants,
versus
JAMES R. WINDER and
KATRINA ERICA WINDER,
Defendants-Appellees.
No. 25,355 (filed: December 21, 2005)

APPEAL FROM THE DISTRICT COURT OF SIERRA COUNTY
THOMAS G. FITCH, District Judge

BEVERLY J. SINGLEMAN
HUBERT & HERNANDEZ, P.A.
Las Cruces, New Mexico
for Appellants

JOSEPH CERVANTES
CERVANTES MOBERLY, P.C.
Las Cruces, New Mexico
for Appellees

OPINION

LYNN PICKARD, Judge

{1} In this case, we decide whether the trial court abused its discretion in finding that the managing member of a limited liability land development company (the LLC) did not breach his fiduciary duty to the other members of the LLC. In doing so, we must decide which party should bear the burden of proof in such a case and whether the burden of proof issue was adequately raised below. We also address whether the trial court abused its discretion in (1) allowing the testimony of a witness who was not on Defendant’s pretrial witness list and (2) determining that Defendant was the prevailing party for purposes of assessing costs. Finding no abuse of discretion with regard to any of these issues, we affirm.

BACKGROUND

{2} In 1997, Plaintiffs Jerry and Sally Mayeux purchased a lot from Defendant Jim Winder located in one of Defendant’s subdivisions. (While Winder and his wife were both named defendants, we refer to them as “Defendant,” since all the relevant actions in the case were taken by Mr. Winder.) Because Plaintiffs liked Defendant’s style of subdividing, they told him that they would be interested in investing in similar projects. In 1998, the parties purchased some land located in Lincoln and Torrance counties and created a limited liability company, which they called Corona Ranch LLC. Plaintiffs and Defendant and his wife were the only members of the LLC. Under the parties’ operating agreement, Defendant was to be the sole managing member of the LLC, and he was authorized to exercise “general supervision, direction and control” over the LLC. The operating agreement also contained a mandatory buyout provision, in which the parties agreed that if Plaintiffs wanted to withdraw from the LLC, Defendant would be required to buy them out. The agreement contained a formula for calculating the purchase price under the mandatory buyout provision.

{3} In addition to Corona Ranch, Defendant was involved in several other land development LLCs. He marketed all of his properties, including the Corona Ranch properties, under one trade name, “Heritage Ranch.” Although the parties dispute the level of involvement, Plaintiff Sally Mayeux was involved in bookkeeping for the Corona Ranch LLC. Facts surrounding Sally Mayeux’s involvement in the LLC’s financial affairs, and the trial court’s eventual findings regarding this issue, will be discussed more fully below.

{4} Plaintiffs claim that sometime in 2002, they began to suspect that Defendant was using funds from the Corona Ranch LLC to pay for expenses generated by his other land development projects. At this time, they informed Defendant that they wanted to exercise their rights under the buyout provision. Plaintiffs claimed that their interest in the LLC was worth $1,500,792. Defendant replied that he would buy them out at a price of $205,000. Plaintiffs rejected Defendant’s offer and filed suit.

{5} Plaintiffs’ original complaint claimed breach of contract based on Defendant’s failure to comply with the terms of the buyout provision and fraud based on a breach of fiduciary duty in connection with misappropriation of funds. The complaint also requested an accounting and damages for breach of the covenant of good faith and fair dealing. Plaintiffs later amended their complaint to add a claim for conversion. At trial, Plaintiffs’ primary contention seems to have been that Defendant’s improper usage of funds had devalued the worth of the company. Plaintiffs specifically allege that Defendant (1) paid his life insurance premiums with LLC funds when there was no benefit to the LLC; (2) paid for advertising for his other Heritage Ranch properties with LLC funds; (3) watered his cattle improperly, causing the nearby village of Corona to refuse to renew an agreement under which water was provided to the Corona Ranch subdivision; (4) paid the water bill for the subdivision with LLC funds, charged the residents fees for water, and then did not reimburse the LLC; (5) hired other people to manage the LLC and paid them with LLC funds, even though the parties had agreed that he...
would perform all the management duties himself with no extra compensation; (6) claimed that a zoning restriction precluded him from subdividing as planned when in fact there was no such zoning restriction; and (7) failed to keep proper records of expenditures.

[6] After approximately a year and a half of litigation, Defendant moved to amend his answer to include counterclaims seeking recovery based on Plaintiffs’ management of the LLC’s capital accounts. It appears that the trial court never formally ruled on the motion to amend, but the court’s findings and conclusions show that the counterclaims were litigated and that Plaintiffs prevailed on them.

[7] In July 2004, the trial court conducted a three-day bench trial, hearing extensive testimony and admitting numerous exhibits. Plaintiffs testified on their own behalf and put on testimony from numerous fact witnesses. Defendant testified and put on testimony from his accountant and an expert accountant. Defendant testified that based on advice from his accountant, he now valued Plaintiffs’ interest in the LLC at $306,666, rather than the approximately $200,000 that he had initially offered. The trial court also allowed Defendant to call Ken Binkley, a partner in the advertising agency employed by Defendant. Plaintiffs objected to Binkley’s testimony on the ground that he was not on Defendant’s pretrial witness list. Finding no prejudice to Plaintiffs, the trial court allowed the testimony.

[8] After trial, the court issued a memorandum decision. It noted that “[t]he gravamen of the suit is that [Defendant] breached his fiduciary responsibility as Manager of Corona Ranch LLC by self-[-]dealing.” The court stated:

Having heard the testimony of the parties and their witnesses I am satisfied that [Defendant] did not breach his fiduciary duty to the [Plaintiffs] nor did he breach his contract with them. I am satisfied that there has been no fraud. I am satisfied that the various expenses were reasonably allocated between the various entities and under consistently applied methods. ... I find that [Defendant] performed his job as Manager of Corona Ranch LLC in good faith and in the best interest of the Company.

The court denied Defendant’s counterclaims, stating, “I do not make a credit for a negative capital account as I was not satisfied with the proof of that amount.”

[9] The court awarded Plaintiffs $306,666 for their interest in the LLC, the amount Defendant acknowledged at trial to be owing. The court clarified its decision by adopting many of Defendant’s proposed findings of fact and conclusions of law. We address the substance of some of the court’s findings and conclusions in our discussion below. Subsequently, the court entered a Judgment and Final Decree, which adopted the memorandum decision and awarded Defendant costs as the prevailing party.

**DISCUSSION**

1. **BREACH OF FIDUCIARY DUTY CLAIM**

[10] On appeal, Plaintiffs have abandoned their other claims and argue only that they are entitled to damages based on Defendant’s breach of fiduciary duty. Their primary contention seems to be that the trial court applied the wrong standard to their breach of fiduciary duty claim by (1) putting the burden on Plaintiff to show a breach of fiduciary duty rather than requiring Defendant to demonstrate the propriety of his conduct, (2) requiring proof by a preponderance of the evidence rather than by clear and convincing evidence, and (3) failing to apply the high standard appropriate to fiduciary duty claims and instead applying the lower standard appropriate to breach of contract claims. Plaintiffs also argue that the trial court generally abused its discretion in finding, on the evidence presented, that Defendant did not breach his fiduciary duty. Plaintiffs’ theory for this argument seems to be that Defendant’s failure to keep detailed, written records was enough by itself to constitute a breach of fiduciary duty.

[11] Plaintiffs’ appellate briefing sets forth the facts in a light favorable to Plaintiffs. For example, Plaintiffs contend that they “proved” several different instances of self-dealing at trial. They also argue that “[t]here was substantial evidence in the case at bar that [Defendant] placed his own interests above those of Corona Ranch LLC and the [Plaintiffs] as minority, non-managing members in using Corona Ranch LLC assets and monies to benefit his private ranching operation and other land development LLCs in which [Plaintiffs] had no interest.” We note that when we review a trial court’s factual findings, the presence of evidence supporting the result opposite from that reached by the trial court is not relevant. See Hernandez v. Mead Foods, Inc., 104 N.M. 67, 71, 716 P.2d 645, 649 (Ct. App. 1986) (holding that the plaintiff’s statement that substantial evidence supported his claims represented “a basic misunderstanding of the function of appellate review,” and noting that “[t]he question is not whether substantial evidence would have supported an opposite result; it is whether such evidence supports the result reached”), limited on other grounds by Graham v. Presbyterian Hosp. Ctr., 104 N.M. 490, 723 P.2d 259 (Ct. App. 1986).

[12] Despite these statements regarding the strength of their own evidence, Plaintiffs do not appear to actually argue that the trial court’s findings were not supported by substantial evidence. Nor do Plaintiffs identify any of the trial court’s findings to which they take exception. See Rule 12-213(A)(4) NMRA (“A contention that a verdict, judgment or finding of fact is not supported by substantial evidence shall be deemed waived unless the argument has identified with particularity the fact or facts which are not supported by substantial evidence.”).

[13] Under these circumstances, we need not conduct a thorough review for substantial evidence. However, we note that Defendant testified at trial as to the propriety of the expenditures and other actions challenged by Plaintiffs. It was up to the trial court to determine whether Defendant was a credible witness and we will not second-guess the trial court’s judgment in that regard. Nor are Plaintiffs aided by their citation to Lawson v. Rogers, 435 S.E.2d 853, 857 (S.C. 1993), for the proposition that every presumption should be made against a fiduciary who is unable to account for challenged expenses with written receipts, invoices, or time cards. In that case, the trial court ruled against the fiduciary on the facts; here, even if a presumption applied, the trial court apparently found it was overcome by the credibility of Defendant’s and his witnesses’ testimony. We hold that, to the extent Plaintiffs make a substantial evidence claim, Defendant’s testimony alone would have been a sufficient basis for the trial court to rule as it did. See State ex rel. Martinez v. Lewis, 116 N.M. 194, 207, 861 P.2d 235, 248 (Ct. App. 1993) (“[W]hen there is testimony going both ways, an appellate court will not say that the trial court erred in finding on one side of the issue.”).

[14] We now turn to Plaintiffs’ argument that the trial court erred in applying the wrong legal standards to their breach of fiduciary duty claim. We review this question de novo. See State v. Torres, 1999-
NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20
("[T]he threshold question of whether the trial court applied the correct evidentiary rule or standard is subject to de novo review on appeal.").

{15} Plaintiffs first argue that the trial court erred when it put the burden on them to prove that Defendant breached his fiduciary duty. Plaintiffs argue that "[t]he burden of proving fair dealing should have been shifted to [Defendant] to prove fair dealing by clear and convincing evidence, which he failed to prove." We answer this contention both procedurally and on the merits.

{16} First, as a matter of procedure, we question whether Plaintiffs fairly invoked a ruling on the question of burden of proof. See Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). To be sure, the trial court was aware that Plaintiffs wanted Defendant to explain various expenses, and Plaintiffs did request a conclusion that Defendant bore the burden of accounting for expenditures by clear and convincing evidence. However, immediately thereafter, Plaintiffs requested a conclusion that the burden was a preponderance of the evidence, and as noted above, Plaintiffs’ complaint contained no independent count for breach of fiduciary duty and instead mentioned breach of fiduciary duty only in their count for fraud, a count on which they would ordinarily bear the burden of proof by clear and convincing evidence. See UJI 13-304 NMRA.

{17} Thus, if the trial court did not fully appreciate Plaintiffs’ burden of proof argument, it may be fairly said that Plaintiffs had no one to blame but themselves. Nevertheless, because we are to exercise our discretion to entertain issues on their merits, we will proceed to consider the merits of Plaintiffs’ stated breach of fiduciary duty issues. See Aken v. Plains Elec. Generation & Transmission Coop., Inc., 2002-NMSC-021, ¶ 21, 132 N.M. 401, 49 P.3d 662.

{18} In support of their argument that a defendant in a breach of fiduciary duty case should bear the burden of showing fair dealing, Plaintiffs cite to two out-of-jurisdiction cases. See Oakhill Assoc., v. D’Amato, 638 A.2d 31 (Conn. 1994); Cronin v. McCarthy, 637 N.E.2d 668 (Ill. App. Ct. 1994). Plaintiffs have not cited, nor have we located, any authority stating that this is the rule in New Mexico. Cf. Sanchez v. Saylor, 2000-NMCA-099, ¶¶ 51-52, 129 N.M. 742, 13 P3d 960 (citing Oakhill and Cronin and holding that this Court need not decide whether to adopt the rule from those cases as an “affirmative defense” to a claim against a fellow partner for reimbursement of expenses). Thus, we address as a novel issue the appropriate party on which to place the burden of proof in a breach of fiduciary duty case. We hold that under the facts of this case, the burden was mostly on Plaintiffs to show that Defendant breached his fiduciary duty, and that where the burden may have been on Defendant, there is no indication from the record that the trial court erroneously placed the burden on Plaintiffs.

{19} We tend to agree with Plaintiffs that in some instances, the burden should be on the fiduciary to show proper dealings. For example, in a case involving a transaction that creates a facial presumption of self-dealing, such burden shifting might be appropriate. Many of the cases stating Plaintiffs’ preferred rule involve such transactions. Oakhill Associates, 638 A.2d at 32, for example, involved a dispute over a nearly $300,000 construction project where the owner of the defendant construction company performing the services was also a partner in the plaintiff partnership.

{20} Hum v. Ulrich, 458 N.W.2d 615 (Iowa Ct. App. 1990), similarly involved a facially suspect transaction. In Hum, one partner sold assets of a partnership as well as some of his personal assets to one buyer for a lump sum. Id. at 616. He then labeled a small portion of the sale price as compensation for the partnership assets and claimed the rest as compensation for his personal assets. Id. at 617. The court noted that if the fiduciary allocated a larger amount of the sale price to his personal assets, he would have “more money in his own pocket because he would not have to split [that part of the sale price] with [his partner.]” Id. Because of that “clear conflict of interest,” the court held that the burden of proof should lie with the fiduciary. Id.; see also Cleary v. Cleary, 692 N.E.2d 955, 958 (Mass. 1998) (“[t]he general rule is that one acting in a fiduciary capacity for another has the burden of proving that a transaction with himself was advantageous for the person for whom he was acting” (internal quotation marks and citation omitted) (emphasis added)); Walsh v. Walker, No. B159560, 2004 WL 1759250, at * 7 (Cal. Ct. App. Aug. 6, 2004) (unpublished) (“[D]uring the existence of the fiduciary relationship any transaction by which one of the co-adventurers secures an advantage over the other is presumptively fraudulent and casts a burden on such party gaining the advantage to show fairness and good faith in all respects.”) (quoting Davis v. Kahn, 86 Cal. Rptr. 872, 878 (Ct. App. 1970) (emphasis added)). But see Silverberg v. Colantino, 991 P.2d 280, 286 (Colo. Ct. App. 1998) (“Defendants cite several Illinois cases for the proposition that, when there is a question concerning breach of fiduciary duty by a managing partner, that partner carries the burden of proving his or her innocence. However, such is not the rule in Colorado.” (citing Cronin, 637 N.E.2d 668, other internal citations omitted, and relying on an ordinary contract case)).

{21} Here, most of the expenditures challenged by Plaintiffs were not presumptively suspect as were the transactions in Oakhill Associates and Hum. Plaintiffs’ argument was essentially that Defendant made a series of relatively small expenditures from Corona Ranch LLC funds that benefitted his other companies. For example, some of Plaintiffs’ proposed findings of fact, all of which the trial court rejected, included the following:

38. Corona Ranch LLC purchased a Ford Explorer with Corona Ranch money and titled the vehicle in the Defendant’s name and paid $500 to Defendant Katrina Winder’s sister. 

46. From 1999 to December 2002 [Defendant] paid from Corona Ranch LLC funds the sum of $300 to Hatch Mercantile ....

50. From 1999 to December 2002 [Defendant] paid from the Company funds the sum of $4,161.00 to Cheryl Vana as labor ....

52. From 1999 to December 2002 [Defendant] paid from Corona Ranch LLC funds the sum of $1,179.35 in office supplies and $4,415.13 in postage ....

Many of Plaintiffs’ other proposed findings involved transfers of funds from Corona Ranch LLC to other companies owned in whole or part by Defendant.

{22} Unlike the transactions in Oakville Associates and Hum, we cannot say that most of these expenditures are presumptively unfair or even suspect. Many of them, such as the expenditures for postage, office supplies, labor, and the vehicle, are presumptively legitimate. As for the amounts paid to Defendant’s other businesses, they come closer to creating a presumption of impropriety, but there are also legitimate explanations...
for those expenditures. At trial, Defendant testified at length regarding his financial management of the various companies. Defendant explained that he would often make an expenditure that benefitted several of his companies, drawing the necessary funding from one of the companies, and then writing reimbursement checks to that company from the other companies. The trial court must have believed this testimony because it specifically held that “I am satisfied that the various expenses were reasonably allocated between the various entities and under consistently applied methods.”

[23] Thus, to the extent that most of Plaintiffs’ complaints concern matters on which they retained the burden of proof, we hold that no error occurred. See Nat’l Plan Adm’rs, Inc. v. Nat’l Health Ins. Co., 150 S.W.3d 718, 733 (Tex. Ct. App. 2004) (holding that the burden remains on the plaintiff to show a breach of fiduciary duty where a transaction is not presumptively unfair); Interlake Porsche & Audi, Inc. v. Bucholz, 728 P.2d 597, 604-05 (Wash. Ct. App. 1986) (holding that “mere allegations” of self-dealing do not shift the burden to the fiduciary and even once a plaintiff has shown self-dealing with regard to one transaction, “the burden does not shift to the fiduciary to prove the fairness of all transactions complained of”). It may be that, with regard to some of the expenses, the burden should have been shifted to Defendant, but as to these, as will be seen below, we cannot say that the trial court did not find in favor of Defendant pursuant to the proper burden and standard of proof.

[24] We also deem it noteworthy that Plaintiff Sally Mayeux was involved in the record keeping for the LLC. The parties heavily dispute the degree of her involvement and the duties she performed. For example, Defendant asserts that she “assumed and was assigned all bookkeeping [and accounting] responsibilities” for the company, that she “received all bank statements and cancelled checks . . . directly from the company bank,” and that she “prepared and delivered financial statements and reports” to an accountant. Plaintiffs minimize Ms. Mayeux’s role, stating that she merely “enter[ed] numbers from check registers kept by [Defendant] into a computer bookkeeping program.”

[25] The trial court found the following facts:

63. Sally Mayeux generated, kept and maintained the financial books and records of Corona Ranch, LLC, and performed the responsibilities of bookkeeper for Corona Ranch, LLC between 1999 and mid-2002.

64. Sally Mayeux is formerly a licensed certified public accountant with education and experience to qualify her as the bookkeeper and accountant for Corona Ranch, LLC.

... 

72. Between 1999 and mid-2002, Sally Mayeux received all cancelled checks and bank statements from the Corona Ranch, LLC operating account . . .

... 

74. Between 1999 and mid-2002, Sally Mayeux prepared monthly financial reports for Corona Ranch, LLC including a general ledger, income statement, balance sheet, bank reconciliation, and other financial reports.

The trial court also entered the following conclusion of law:

101. By receiving monthly checks and bank statements, and preparing the financial statements, [Plaintiffs] waived, and are now estopped, from asserting any challenge to the expenses incurred, paid and allocated by [Defendant] as Manager of Corona Ranch, LLC.

[26] Plaintiffs’ awareness of and involvement in the financial affairs of the company further support our conclusion that it was fair for Plaintiffs to bear the burden of showing that Defendant’s facially legitimate expenditures were improper. In Dufoe v. Dufoe, No. 99-0463, 2000 WL 702303, at ** 2-3 (Iowa Ct. App. May 31, 2000) (unpublished), the Iowa Court of Appeals held that the burden of proving a breach of fiduciary duty remained on the plaintiff where he had prepared tax returns for the partnership. The court held that while the defendant partner had commingled personal and partnership funds, the burden of proving a breach of fiduciary duty remained on the plaintiff because he was “fully aware” of the commingling due to his involvement in the record keeping and tax preparation. Id. at * 3. Like the plaintiff in Dufoe, Plaintiffs were involved in the record keeping for the LLC, and we find such involvement to weigh in favor of requiring them to prove a breach of fiduciary duty.

[27] In sum, we hold that in a case such as the present one where (1) a plaintiff challenges expenditures that do not themselves create a presumption of self-dealing and (2) the plaintiff is involved in the financial affairs of the partnership or LLC such that he or she has access to the entity’s records, the burden of proving a breach of fiduciary duty remains on the plaintiff. To the extent that one or two categories of expenses do raise a possible inference of self-dealing, there is nothing in the record clearly showing that the trial court did not properly apply the burden and standard of proof. Specifically, the trial court’s findings with regard to the presumptively legitimate expenses placed the burden of proof on Plaintiffs and explicitly ruled that Defendant’s evidence preponderated. With regard to other expenses, the trial court did not place the burden of proof on Plaintiffs, did not use the preponderance of the evidence standard, and instead affirmatively found that Defendant’s expenditures were properly accounted for. Under these circumstances, and in view of our concerns expressed above that Plaintiffs may not have presented their case in such a way that the trial court would have clearly understood what they were arguing, Plaintiffs have not convinced us that the record in this case shows such clear error as to call for a reversal. See Gonzales v. Lopez, 2002-NMCA-086, ¶ 27, 132 N.M. 558, 52 P.3d 418 (noting that appellant bears the burden of clearly demonstrating how the trial court erred); see also State v. Rojo, 1999-NMSC-001, ¶ 53, 126 N.M. 438, 971 P.2d 829 (“Where there is a doubtful or deficient record, every presumption must be indulged by the reviewing court in favor of the correctness and regularity of the [trial] court’s judgment.” (internal quotation marks and citation omitted)).

[28] Next, Plaintiffs argue that the trial court applied the wrong substantive standard to their breach of fiduciary duty claim. Plaintiffs claim that rather than applying the high standard applicable to fiduciary duty claims, the court relied either on the lower standard applicable to contract claims or on the standard articulated in the parties’ operating agreement, which is in good faith in the best interests of Corona Ranch LLC, and with such care including reasonable inquiry, using ordinary prudence, as a person in a like position would use under similar circumstances.

[29] As a general matter, we agree with Plaintiffs that a fiduciary relationship imposes a duty on the fiduciary that is greater than the duty of good faith and
fair dealing implied in all contractual relationships. See Walta v. Gallegos Law Firm, P.C., 2002-NMCA-015, ¶ 40, 131 N.M. 544, 40 P.3d 449. However, Plaintiffs have not pointed us to anything in the record indicating that the trial court actually applied an incorrect standard. In support of their argument, Plaintiffs rely on the following statement in the trial court’s memorandum decision: “I find that [Defendant] performed his job as manager of Corona Ranch LLC in good faith and in the best interest of the company.” Plaintiffs also rely on several findings by the trial court, all of which contain variations on the statement that Defendant’s actions were taken “in good faith and in the best interests of Corona Ranch, LLC using reasonable inquiry and ordinary prudence of a person in a like position under similar circumstances.”

{30} We do not agree that these statements indicate that the trial court was unaware of the higher standard applicable to fiduciary relationships. Because the parties’ agreement required Defendant to act “in good faith and in the best interests of the company,” and because Plaintiffs’ complaint alleged a breach of the duty of good faith and fair dealing, it is not surprising that the trial court would enter findings of fact using the language appropriate to those claims. Because none of the findings of which Plaintiffs complain actually mention fiduciary duty, we assume that those findings relate to Plaintiffs’ contract claims, rather than their breach of fiduciary duty claim. See Rojo, 1999-NMSC-001, ¶ 53 (“Where there is a doubtful or deficient record, every presumption must be indulged by the reviewing court in favor of the correctness and regularity of the [trial] court’s judgment.”) (internal quotation marks and citation omitted).

{31} We also note that in its memorandum decision, the trial court specifically stated, “I am satisfied that [Defendant] did not breach his fiduciary duty to [Plaintiffs] nor did he breach his contract with them.” This mention of both theories of recovery further indicates that the court was aware of the difference between the two theories and did not improperly conflate them. For these reasons, we hold that the trial court did not apply the wrong legal standard to Plaintiffs’ breach of fiduciary duty claim.

{32} Finally, in a variation of what appears to be their substantial evidence argument, Plaintiffs argue that the trial court abused its discretion in finding no breach of fiduciary duty on the facts of this case and Plaintiffs ask us to award damages. We will only overturn a decision under the abuse of discretion standard where “the court’s ruling exceeds the bounds of all reason” or is “arbitrary, fanciful, or unreasonable.” Edens v. Edens, 2005-NMCA-033, ¶ 13, 137 N.M. 207, 109 P.3d 295 (internal quotation marks and citation omitted). Unless this standard is met, we will not substitute our judgment for that of the trial court. Melboom v. Watson, 2000-NMSC-004, ¶ 29, 128 N.M. 536, 994 P.2d 1154.

{33} In this case, the trial court heard three days of testimony. Defendant testified for several hours, and a brief overview of his testimony indicates that he explained to the court the contested expenditures. The trial court specifically found that “the various expenses were reasonably allocated between the various entities and under consistently applied methods.” Plaintiffs disagree with this finding, but they do not explicitly challenge the sufficiency of the evidence supporting it. Thus, as stated above, we need not review the evidence that was before the trial court to see whether the findings are supported by substantial evidence. However, we are certain that Defendant’s testimony alone would have been a sufficient basis on which the trial court could have decided that there was no breach of fiduciary duty. See Sanchez, 2000-NMCA-099, ¶ 12 (noting that we are entitled to disregard any evidence contrary to the trial court’s findings). Since the trial court explicitly found that the contested expenditures were proper, we hold that the court did not abuse its discretion in ruling on the basis of that factual finding that Defendant had not breached his fiduciary duty.

2. TESTIMONY OF AN UNDISCLOSED WITNESS

{34} Plaintiffs next argue that the trial court abused its discretion in allowing Ken Binkley, a partner in the advertising firm used by Defendant, to testify even though he was not on Defendant’s pretrial witness list. We do not find an abuse of discretion unless “the court’s ruling exceeds the bounds of all reason” or is “arbitrary, fanciful or unreasonable.” Edens, 2005-NMCA-033, ¶ 13.

{35} Defendant argues that Plaintiffs did not properly preserve their objection on this point. In order to preserve an issue for appeal, it must “appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.” Woolwine, 106 N.M. at 496, 745 P.2d at 721. When Defendant expressed a desire to call Binkley, the trial court asked Plaintiff for a response. The following colloquy took place between the court and Plaintiffs’ attorney:

[ATTORNEY]: Your honor, he wasn’t identified—advertising has been an issue from day one. It’s not something that he has just recently found out. I just grabbed my deposition of Mr. Binkley and it was just nothing more than trying to get copies of the invoices is what it was.

[THE COURT]: Well, there has been some fairly extensive testimony concerning the allocations.

[ATTORNEY]: Twelve pages is the extent of my deposition, your honor.

[THE COURT]: I can’t see the prejudice to plaintiffs by allowing this witness to come up, so your permission is granted.

Based on the attorney’s statement, the trial court would have understood that Plaintiffs objected to Binkley’s testimony on the grounds that (1) they would be prejudiced because they were unprepared to question him and (2) there was no legitimate reason for Defendant to have failed to disclose before trial the intention to call him. Under these circumstances, we hold that the objection was properly preserved because Plaintiffs “fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.” See Woolwine, 106 N.M. at 496, 745 P.2d at 721.

{36} The trial court has “broad discretion to admit or refuse testimony of witnesses whose identity was not revealed” before trial. Montoya v. Super Save Warehouse Foods, 111 N.M. 212, 215, 804 P.2d 403, 406 (1991). Our Supreme Court has held that “[o]nly rarely could a court commit reversible error in the exercise of discretion in allowing a witness to testify, notwithstanding the failure to give timely notice of the witness.[].” Id. Our cases have generally held that undisclosed witness testimony should be excluded under two circumstances: (1) where prejudice to the appellant is severe because the testimony of the witness is crucial to the appellee’s case and (2) where the appellee has gained a tactical advantage by willfully failing to disclose the intention to call a witness.

{37} In Khalsa v. Khalsa, 107 N.M. 31, 751 P.2d 715 (Ct. App. 1988), we explained the type of prejudice warranting reversal on the basis of undisclosed witness testimony. We held that the trial court had abused
its discretion in allowing the “surprise testimony” of a doctor, which was “the only evidence supporting the trial court’s denial of joint custody.” Id. at 35, 751 P.2d at 719. We noted that if we considered the doctor’s testimony, we would have no choice but to find that the trial court’s ruling was supported by substantial evidence, but that in the absence of the testimony, there was no evidence whatsoever supporting the ruling. Id. at 33, 751 P.2d at 717. In State v. Griffin, 108 N.M. 55, 58, 766 P.2d 315, 318 (Ct. App. 1988), we relied on Khalsa to support our holding that the trial court had not abused its discretion in allowing the testimony of two undisclosed witnesses. The prosecutor in Griffin had not submitted a witness list, and the trial court continued the proceeding for an afternoon so that the defendant could interview two witnesses. Id. The defendant did not thereafter ask for more time. Id. We held that reversal was not required because the defendant had not shown prejudice. Id. We noted that the witnesses’ testimony was ascertainable because the State’s exhibits should have clued the defendant in to the likely substance of the witnesses’ testimony, and that the defendant had not shown how his cross-examination of the witnesses could have been improved by an additional opportunity to interview them. Id. [38] In Lewis ex rel. Lewis v. Samson, 2001-NMSC-035, ¶ 6-17, 131 N.M. 317, 35 P.3d 972, our Supreme Court indicated the type of willful behavior that warrants disallowing the testimony of an undisclosed witness. The trial court in Lewis refused, as a discovery sanction, to allow the testimony of a witness disclosed on the eve of trial. Id. ¶ 11-13. Our Supreme Court upheld that decision, noting that the plaintiff had failed on many occasions to disclose her intention to add witnesses. Id. ¶ 14. The Court stated: “This type of conduct, if tolerated, would frustrate the general purposes of discovery and the specific purpose of witness disclosure.” Id. ¶ 15. Cf. McCartney v. State, 107 N.M. 651, 653, 763 P.2d 360, 362 (1988) (holding that, in the criminal context, it would be “consistent with the purposes of the Confrontation Clause” to exclude witness testimony where it appeared that the failure to identify witnesses before trial was “willful and motivated by a desire to obtain a tactical advantage” (internal quotation marks and citation omitted)).

[39] Here, Plaintiffs have alleged no prejudice besides their “lack of preparation and ability to counter ... Binkley’s testimony with that of another witness so late in the trial.” However, Plaintiffs have not indicated that they requested the opportunity to put on a rebuttal witness. Nor have Plaintiffs shown that they asked for more time to conduct another deposition or interview of Binkley. See In re Estate of Heeter, 113 N.M. 691, 694, 831 P.2d 990, 993 (Ct. App. 1992) (“This [C]ourt will not search the record to find evidence to support an appellant’s claims.”). As in Griffin, Plaintiffs have not demonstrated how their cross-examination of Binkley would have been materially improved had they had the opportunity to further interview him. Thus, Plaintiffs’ allegations of prejudice do not rise to the level where we can say the trial court abused its discretion in allowing the testimony. Moreover, there is no showing that Defendant willfully failed to disclose his intention to call Binkley in order to gain a tactical advantage. Under these circumstances, we hold that the trial court did not abuse its discretion in allowing Binkley to testify.

3. AWARD OF COSTS

[40] Finally, Plaintiffs argue that the trial court abused its discretion in awarding costs to Defendant as the prevailing party. Our Rules of Civil Procedure state that the prevailing party shall recover its costs “unless the court otherwise directs.” Rule 1-054(D)(1) NMRA. We have held that the trial court has broad discretion to award costs or to refuse to award them. See In re Adoption of Stailey, 117 N.M. 199, 203, 870 P.2d 161, 165 (Ct. App. 1994). In exercising this discretion, the court should “approach the issue of awarding costs on a case-by-case basis, based on the equities of the situation.” Marchman v. NCNB Tex. Nat’l Bank, 120 N.M. 74, 94, 898 P.2d 709, 729 (1995) (internal quotation marks and citation omitted). However, a court does not have discretion to require the prevailing party to pay a losing party’s costs unless “the costs are intended to serve as a sanction and the court clearly expresses its reasons for imposing such sanction.” Stailey, 117 N.M. at 204, 870 P.2d at 166. [41] The issue we must determine is whether the trial court abused its discretion in concluding that Defendant was the prevailing party. A prevailing party is defined as “the party who wins the lawsuit—that is, a plaintiff who recovers a judgment or a defendant who avoids an adverse judgment.” Dunleavy v. Miller, 116 N.M. 353, 360, 862 P.2d 1212, 1219 (1993). We have also defined the prevailing party as “[t]he party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention.” Hedicie v. Gunville, 2003-NMCA-032, ¶ 26, 133 N.M. 335, 62 P.3d 1217 (internal quotation marks and citation omitted). Finally, we have reiterated that the prevailing party is the party that wins on the “main issue of the case.” Id. [42] Plaintiffs argue that they are the prevailing party because (1) they recovered a money judgment, (2) Defendant lost on his counterclaims, and (3) the judgment was 50% higher than Defendant’s pretrial offer of settlement. Defendant essentially argues that he is the prevailing party because Plaintiffs lost on the claims for breach of contract, fraud, breach of the covenant of good faith and fair dealing, and conversion and because the trial court’s accounting awarded Plaintiffs exactly the amount Defendant said their interest was worth at trial, an amount that was nearly $900,000 less than Plaintiffs requested. [43] Under these facts, we hold that the trial court did not abuse its discretion in finding Defendant to be the prevailing party and awarding him costs. We do agree with Plaintiffs that this is a close case because Defendant lost on his counterclaims and had to pay Plaintiffs more than he offered pretrial. For these reasons, it would not be unreasonable to conclude that Plaintiffs were the prevailing party. However, where a trial court must exercise discretion in deciding between two possible rulings, either of which would be reasonable, we will not reverse the court’s decision. See Talley v. Talley, 115 N.M. 89, 92, 847 P.2d 323, 326 (Ct. App. 1993) (“When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion.”). [44] Moreover, we agree that Defendant’s arguments are stronger than Plaintiffs’ on the prevailing party issue. The valuation of Plaintiffs’ interest in the LLC was clearly the heart of the case. As Plaintiffs acknowledge, all the counts in their complaint asserted “alternative legal remedies that [Plaintiffs] claimed entitled them to a higher amount owed for their partnership interest,” although some of their other counts would also have supported their claims for punitive damages. With regard to that partnership interest, the trial court entered judgment for Plaintiffs in the amount of $306,666, the exact amount Defendant agreed was owing at trial, instead of the nearly $1.2 million Plaintiffs...
claimed. Thus, in light of the above and in light of the fact that it is Plaintiffs who are appealing, it seems fair to say that Defendant won on the “main issue of the case.” See Hedicke, 2003-NMCA-032, ¶ 26. For this reason, we hold that the trial court did not abuse its discretion in determining that Defendant was the prevailing party and, as such, was entitled to costs.

CONCLUSION

{45} We affirm the decision of the trial court.

{46} IT IS SO ORDERED.

LYNN PICKARD, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

IRA ROBINSON, Judge

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-029

STATE OF NEW MEXICO ex rel. CHILDREN,
YOUTH & FAMILIES DEPARTMENT,
Petitioner-Appellee,
versus
JOSEPH M.,
Respondent-Appellant,

In the Matter of VICTOR M. and DOMINIC M.,
Children.
No. 25,471 (filed: January 18, 2006)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
JOHN J. ROMERO, District Judge

REBECCA J. LIGGETT
Children's Court Attorney
Children, Youth & Families
Department
Santa Fe, New Mexico
for Appellant

MARY JO SNYDER
Santa Fe, New Mexico
for Appellee

OPINION

MICHAEL E. VIGIL, Judge

{1} The opinion filed on December 12, 2005, is hereby withdrawn, and the following opinion is substituted therefor. In other respects, the motion for rehearing is denied.

{2} Joseph M. (Father) appeals the termination of his parental rights. He argues that the district court’s decision is not supported by evidence that the court could have properly found to be clear and convincing. We agree and reverse.

BACKGROUND

1. NEGLECT/ABUSE PROCEEDINGS

{3} On April 25, 2003, the Children, Youth & Families Department (Department) filed a “Neglect/Abuse Petition” alleging that Father and Mother were abusing and/or neglecting their two children, Dominic M. and Victor M. Father and Mother were never married, but lived as a family unit with the children. Father is the natural father of Dominic M., and the legal father of Victor M. He agreed to have his name appear on Victor M.’s birth certificate as the father, and he is the only father Victor M. has ever known, although he is neither the biological nor adoptive father of Victor M. The Department based its allegations on numerous referrals suggesting that Father and Mother had substance abuse problems and that their children had witnessed domestic violence in the home, as well as allegations of a cigarette burn, Father’s threat to beat a child, and Mother’s endangering a child by holding onto him during an episode of domestic violence. Based on these allegations, the Department took the children into custody.

{4} On July 25, 2003, Father and Mother pled no contest to the allegation that their children had been neglected and/or abused, and the district court adopted the Department’s findings, including a finding that the children’s “[p]arents [were] not able to care for [them] in a safe and stable home due to substance use, violence, unsanitary/unsafe environment, and untreated mental health issues.” As a result, the district court gave the Department temporary legal custody of the children and ordered the Department to implement its proposed treatment plans.

{5} Father’s treatment plan required him to (1) “participate in an alcohol/drug assessment and follow recommendations”; (2) “participate in a domestic violence program for offenders”; (3) “participate in weekly, supervised counseling at the Department’s discretion”; (4) “complete a psychological-social assessment and follow recommendations”; (5) “participate [in] and successfully complete parenting classes”; (6) “participate in family counseling when appropriate at the Department’s discretion”; and (7) “furnish [the] Department with relative names and addresses for possible placement for children and sign necessary releases.”

2. FATHER’S INCARCERATION

{6} The “Neglect/Abuse Petition” filed by the Department did not refer any specific physical harm to the children, although the Department had also received information that the children had ingested cocaine and there were allegations of some specific harm or threats of harm contained in the application for temporary custody order. A test of the children’s hair subsequently confirmed the cocaine allegation. As a result, Father was arrested on June 3, 2003, and charged with two counts of child abuse and one count of possession of drug paraphernalia. On May 4, 2004, Father pled no contest to two counts of negligently caused child abuse, and on July 13, 2004, he was sentenced to a six-year prison term with three years suspended.

{7} Father was therefore in jail for somewhat less than half of the time from the time the Department took custody of the children until the hearing on the petition to terminate parental rights. Specifically, he was in the Bernalillo County Detention Center from June 3, 2003, until September 27, 2003, and again for about a month in May 2004.
Then, from the time he was sentenced on July 13, 2004, through the date of the trial on the petition to terminate parental rights, which commenced on October 26, 2004, he was in the Roswell Correctional Center. No services were made available to Father under any treatment plan during the time that Father was incarcerated. One of the State’s witnesses, Jude DeMoss, testified she did not know how to go about getting services for him during that time.

3. EVIDENCE ON TERMINATION OF PARENTAL RIGHTS

[8] Reunification of the children with both parents was always the goal of the Department. The Department subsequently determined that reunification of the children with the parents was no longer an appropriate goal, and three days after Father was sentenced on the negligent child abuse charges, the Department moved to terminate the couple’s parental rights. The decision to terminate parental rights was made in compliance with the Department’s policy, described to us as follows at oral argument:

The Department does have a policy of not terminating parental rights unless it’s to both parents or all people who have a legal relationship to the child in order to free the child for adoption because that’s the purpose of terminating parental rights. So when the Department states and under its policy that it’s not going to terminate the parental rights of mother then it’s not going to go ahead and terminate the parental rights of father. That’s assuming that mother is an appropriate parent for the child or the child could be returned to mother. So we’re not creating a legal relationship with just the one parent and taking away the responsibilities of the other parent. And that’s unless the—there’s some clinical indication on the part—as far as the child is concerned that indicate that terminating the parental rights would be in their best interest without terminating all the parental rights.

[9] The State presented evidence chronicling the Department’s involvement with Mother and Father at the termination hearing. Between May 2003, and the parents’ termination hearing, Father received services from at least twelve individuals employed by at least five different agencies, including the Department, All Faiths Receiving Home (All Faiths), Dragonfly Services (Dragonfly), High Desert Family Services (High Desert) and the Criminal Custody Program (CCP). These individuals and entities provided a somewhat disjointed program of individual, coupled, and family services including therapy, counseling, supervised visitation, and observation. These services were frequently interrupted, transferred, or inconsistently administered due to a variety of issues including staff turnover, lack of communication by the Department with the providers about the nature of service they were to provide, incarceration of Father, refusal by providers to treat Mother due to her uncontrolled behavior, skipped visits, and a falling out between Mother and one provider.

[10] Two salient points emerged during the hearing: Mother failed to make progress towards becoming an adequate parent while Father did make some progress. The testimony of the State’s witnesses clearly established that Mother had numerous issues that interfered with her ability to properly parent her children. Jennifer Perea, a therapist employed by High Desert, testified that during her observation of the family Mother had several inappropriate and violent outbursts and that she engaged in violent play with her youngest son. At one point, Mother and her son were wielding toy guns and pretending to shoot Ms. Perea. Ron Keltner, a social worker employed by the Department, testified that Mother consistently engaged in inappropriate and problematic behaviors with her children. Further, many of the witnesses who worked with Mother also noted that she made little progress toward becoming an adequate parent. In particular, Nancy Johnson, a licensed professional clinical counselor who worked with Mother and Father on parenting issues, testified that it was difficult to keep Mother on track and that she tended to become absorbed in her own issues. As a result, Mother made no progress toward becoming an adequate parent during her sessions with Ms. Johnson. In light of all the evidence concerning Mother, we affirmed the termination of her parental rights in a separately filed memorandum opinion, concluding that clear and convincing evidence supported that decision.

[11] On the other hand, nearly all of the State’s witnesses acknowledged the positive progress that Father made toward becoming an adequate parent. Sheila Genoni, a parent educator and family advocate employed by All Faiths, noted that Father was very attentive and that he made good progress during his work with her. Ms. Johnson observed positive changes in Father and noted that he listened, learned, and asked some good questions. She thought that Father could learn to be an adequate parent. Jennifer Oesterling, a therapist employed by Dragonfly, agreed that, over the course of her work with the family, she saw some personal growth in Father. Jeremy Brazfield, a social worker employed by the Department, observed that Father demonstrated an interest in learning how to become a better parent and showed some progress toward that goal. Mr. Brazfield also noted that he did not see any obvious barriers to Father learning to be an adequate parent. Netti Clegg, a licensed independent social worker employed by Dragonfly, noted that unlike the vast majority of her counseling clients, Father accepted her suggestions. Finally, Mr. Keltner testified that Father was compliant and stable during the time that Mr. Keltner had the case and that Father worked toward completing his treatment plan. He took classes on anger management, substance abuse, and parenting while he was incarcerated.

[12] The record also reveals that Father had successfully dealt with his substance abuse problems. With the exception of a disputed test in the Spring of 2004, that was never proved, all of Father’s urinalysis results were negative. At the termination hearing, Father testified that he had not used drugs or alcohol since June 3, 2003. He had also been involved in Alcoholics Anonymous and Narcotics Anonymous. Ms. Oesterling testified that she found Father’s claims that he had overcome his cravings for alcohol to be credible. Mr. Keltner testified that he saw no evidence that Father was drinking.

[13] To be sure, some problems were noted along with these positive observations. The State’s witnesses observed that Father had several issues to resolve regarding his interaction with his children. Mr. Brazfield observed that Father had difficulty picking up on the children’s verbal and non-verbal cues. Ms. DeMoss also observed that Father had difficulty relating to the children. Mr. Brazfield’s opinion was that Father made “rote” progress, but not significant enough progress for Brazfield to say that there was real behavioral change. Additionally, Father acknowledged that his children had witnessed domestic violence in his home, and Father did not seem to appreciate the seriousness of the children’s witnessing the domestic violence.

[14] Following the termination hearing, the...
district court entered an order terminating Mother and Father's parental rights. Father appeals.

STANDARD OF REVIEW

{15} “The grounds for any attempted termination [of parental rights] shall be proved by clear and convincing evidence.” NMSA 1978, § 32A-4-29(I) (2003); In re Doe, 98 N.M. 198, 200, 647 P.2d 400, 402 (1982). “For evidence to be clear and convincing, it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder’s mind is left with an abiding conviction that the evidence is true.” In re Adoption of Doe, 98 N.M. 340, 345, 648 P.2d 798, 803 (Ct. App. 1982) (internal quotation marks and citation omitted). However, we will not reweigh the evidence and “we must view it in a light most favorable to affirmation.” State ex rel. Children, Youth & Families Dep’t v. Vanessa C., 2000-NMCA-025, ¶ 24, 128 N.M. 701, 997 P.2d 833. Therefore, we must determine “whether, viewing the evidence in a light most favorable to affirming the termination of [Father’s] parental rights, the [district] court could properly determine that the clear and convincing standard was met.” Id.

DISCUSSION

{16} In a proceeding to terminate parental rights, we “give primary consideration to the physical, mental and emotional welfare and needs of the child, including the likelihood of the child being adopted if parental rights are terminated.” NMSA 1978, § 32A-4-28(A) (2005). However, a child is not “entitled to a ‘better’ environment than that provided by the [parent], if the one provided by the [parent] is acceptable to society.” State ex rel. Dep’t of Human Servs. v. Natural Mother, 96 N.M. 677, 681, 634 P.2d 699, 703 (Ct. App. 1981). Further, “parental rights are among the most basic rights of our society and go to the very heart of our social structure.” In re Doe, 98 N.M. at 200, 647 P.2d at 402 (internal quotation marks and citation omitted). Therefore, a parent’s rights may not be terminated simply because “a child might be better off in a different environment.” State ex rel. Children, Youth & Families Dep’t v. Patricia H., 2002-NMCA-061, ¶ 21, 132 N.M. 299, 47 P.3d 859 (internal quotation marks and citation omitted).

{17} Father’s parental rights were terminated on grounds that he abused or neglected his children as provided in the Abuse and Neglect Act, NMSA 1978, §§ 32A-4-1 to -33 (1993, as amended through 2005). Before the court may terminate parental rights based on abuse or neglect, it must find

(1) that the children were abused or neglected, (2) that the conditions and causes of the abuse and neglect were unlikely to change in the foreseeable future, and (3) that the [Department] made reasonable efforts to assist [Father] in adjusting the conditions which rendered [him] unable to properly care for the children.


{18} Father concedes that the district court properly concluded that his children had been neglected and/or abused, but contends that termination of his parental rights was not supported by sufficient evidence because the latter two requirements were not met. We agree.

{19} From the inception, the treatment goal of the Department was reunification of the children with both parents. As such, Mother and Father were treated as a unit, and consistent with the treatment plans, Father was “committed” to Mother “and to the reunification of their family.” In fact, treatment providers noted that Father was determined to make things work with Mother because she needed help and he did not want to abandon her, “abandonment” being a huge issue and problem for her. As we have already noted, Mother failed to become an adequate parent despite the substantial efforts of the Department to help her for over a year. When the Department decided to change the permanency plan of the children from reunification to termination of parental rights and adoption, it described Father’s “lack of progress” as centering on his “primary motivations” being his desire to help Mother have a family rather than be a good parent or attend to the safety needs of the children. On appeal, the Department continues to argue that “Mother’s presence in the home is a threat to the well-being of Children,” and that “it is clear that Father had no intention of raising Children without Mother.” The Department asserts, “[p]erhaps the most dangerous condition that Father was unable or unwilling to remedy is the presence of Mother in the home.” However, the option of raising the children without Mother was never included as a goal in any of the treatment plans adopted by the Department or ordered by the court for Father.

{20} The Department has a statutory duty it must perform before parental rights may be terminated because of abuse and neglect. That duty is to engage in “reasonable efforts” to “assist the parent in adjusting the conditions that render the parent unable to properly care for the child” unless certain exceptions, not applicable here, are present. Section 32A-4-28(B)(2). Whether the Department has made reasonable efforts “var[ies] with a number of factors, such as the level of cooperation demonstrated by the parent and the recalcitrance of the problems that render the parent unable to provide adequate parenting.” Patricia H., 2002-NMCA-061, ¶ 23. When a parent is in an abusive relationship and the abuser is obviously and physically harming the children, parental rights can be terminated of the parent who is doing nothing to prevent the abuse. See In re L.N.M., 105 N.M. 664, 668-69, 735 P.2d 1170, 1174-75 (Ct. App. 1987) (involving a partner who beat the child). However, when the behavior of the parent’s partner is more subtle, such that it is difficult for a person of ordinary intelligence and sensibilities to realize that the partner’s self-centeredness or other characteristic is harming the children, we believe that more is required of CYFD than simply expecting the parent to know and appreciate the harm being caused. We deem it noteworthy that no treatment plans were ever formulated or implemented in this case for Father to separate from Mother and raise the children without Mother. Compare In re D.L.S., 432 N.W.2d 31, 37 (Neb. 1988) (pointing out that the plan required the mother to decide what to do about her relationship with her husband who was abusive toward her and the child, and she divorced him). In fact, Father was never specifically and pointedly told that a failure to separate from Mother could constitute a basis for terminating his rights as a parent because that relationship rendered him unable to properly care for his children.

{21} The only evidence that was introduced on this question was the following. Mr. Keltner, a treatment social worker with the Department, was asked whether the issue ever came up that Father would be able to function as a parent on his own. His response was that Mother and Father held themselves out as a couple and it was never mentioned to him that Mother and Father were planning on separating, and one or the other taking primary parental responsibility. Mr. Brazfield, a social worker with the Department, was asked whether there was ever an attempt on the part of the Department to assist Father to live independently of Mother. His negative
answer was that the reference was made for both parents, and that both parents were dealt with as a unit instead of separately except when Father was incarcerated and Mother was treated alone. When he was asked whether he had any discussion with Father about his choice to remain with Mother, he only answered, without elaboration, “We talked about it, yes.” Mr. Brazfield later testified that it was suggested to Father that he might have a better chance of regaining custody if he were not with Mother. Ms. Johnson, the licensed parental counselor assigned to provide treatment, testified that the “gate was not open” for Father to have adequate parenting skills if he was not willing to raise the children without Mother, but she never told him she needed to see him separately. Further, she was “not sure” whether it would have “left the gate open” if she had worked with Father individually, although “it was certainly possible” for Father to have developed “adequate parenting skills.”

(22) We are not persuaded that the foregoing evidence was sufficient to put Father on notice that his relationship with Mother was a condition and cause of the abuse and neglect of his children which had to end for him to be able to parent his children. See In re Minor T., 674 N.W.2d 442, 461 (Neb. 2004) (stating that a plan must “correct, eliminate, or ameliorate” the condition on which the adjudication is based) (internal quotation marks and citation omitted). Nor are we persuaded that the Department’s actions can be construed as a reasonable effort to assist Father. Instead, the record reveals that the Department treated Mother and Father as a unit. Importantly, there was no evidence of any specific discussion with Father indicating that he would have to leave Mother to become a successful parent and no part of the treatment plan listed this factor as an element. We conclude that the record does not contain evidence that the district court could have properly found to be clear and convincing that the Department made reasonable efforts to help Father terminate his relationship with Mother so he could become an adequate parent.

(23) We therefore hold that the district court could not have found that the clear and convincing standard was met when it ultimately found that “it is unlikely that [Father] will be able to properly parent the children in the foreseeable future.” Under the circumstances of this case, where the social workers agreed that Father was motivated to comply with the Department and made some steps to improve his parenting skills, and where the problem was mainly with Mother, although it was understandable that a person in Father’s position might not appreciate this, it was incumbent on the Department to have a specific treatment plan or specifically alert Father to the consequences of his staying with Mother. Absent that happening, the district court could not have properly found that the clear and convincing standard was met under the facts of this case. Therefore, we reverse.

(24) IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:
LYNN PICKARD, Judge
IRA ROBINSON, Judge

OPINION

JONATHAN B. SUTIN, JUDGE

(1) De Baca County Sheriff Gary Graves appealed to this Court from an adverse probable cause determination made by the district court under Article X, Section 9 of the New Mexico Constitution governing elections to recall elected county officials. See N.M. Const. art. X, § 9(B) (providing for district court adjudication to establish probable cause that grounds exist for a recall election). Under Article X, Section 9(B), a probable cause determination was required upon presentation to the district court of a petition of De Baca County voters containing “factual allegations supporting the grounds of malfeasance or misfeasance in office.” Id.

BACKGROUND

(2) Petitioners filed a petition pursuant to N.M. Const. art. X, § 9, to recall Sheriff Graves. The petition listed several grounds on which Petitioners alleged that Sheriff Graves had committed malfeasance or misfeasance in office. After a two-day hearing, the district court announced from the bench that it found probable cause to believe Sheriff Graves had committed acts of malfeasance or misfeasance while in
office. The district court entered an order on September 6, 2005, memorializing its oral ruling.

3) The next day, Sheriff Graves filed a motion to alter the court’s order or, alternatively, to grant a new trial. The court denied the motion by letter decision filed on September 30, 2005. In the meantime, on about September 14, 2005, the De Baca County Clerk scheduled a recall election to take place on November 9, 2005. See N.M. Const. art. X, § 9(C) (requiring the county clerk to place the recall question on the ballot for a special election once signatures on the circulated petition are verified).

4) On October 6, 2005, Sheriff Graves filed a notice of appeal to this Court from the district court’s probable cause order. He simultaneously filed in the district court an application for a stay pending appeal, pursuant to Rule 1-062(D) NMRA. The district court heard argument on the stay application on October 26, 2005, and denied the application from the bench. An order denying the stay application was entered November 15, 2005.

5) On November 3, 2005, Sheriff Graves filed an emergency motion in this Court for a stay of the district court’s September 6, 2005, order in order to forestall the special election pending the appeal. He asserted that the district court’s failure, to that date, to enter an order denying the stay application was an attempt on the part of the court to allow the recall election to go forward on November 9, before any appellate review of the probable cause order could take place—thus violating Sheriff Graves’ absolute right to an appeal. Following Petitioners’ response to Sheriff Graves’ emergency motion, this Court entered a stay order on November 7, 2005.

6) De Baca County nevertheless held the recall election on November 9, 2005. On the same day, Sheriff Graves filed a motion for a temporary restraining order and preliminary injunction in this Court to stop the election or, alternatively, to enforce this Court’s stay order. Sheriff Graves also filed in this Court a motion for a contempt order against the County Clerk. Neither the County nor the County Clerk was a party to the proceeding in the district court. Likewise, neither the County nor the County Clerk was, or is, a party to this appeal. We denied relief and entered an amended stay order, nunc pro tunc to clarify our previous order. We also held a telephone hearing with legal counsel for Sheriff Graves, legal counsel for Petitioners, and legal counsel for the County in order to discuss expediting oral argument on appeal. We set an expedited oral argument in this appeal for November 22, 2005. In the telephone hearing, the County, though not a party, was invited to attend oral argument. Further, we confirmed with Petitioners’ counsel that Petitioners had not waived their position that this Court lacked jurisdiction to entertain the appeal and that they could argue lack of jurisdiction at the oral argument. The recall election was completed on November 9, 2005, resulting in a vote to recall Sheriff Graves.

7) On November 10, 2005, Petitioners filed a motion in this Court to dismiss this appeal sua sponte and to cancel the oral argument scheduled for November 22, 2005. Petitioners essentially asserted that no constitutional, statutory, or Supreme Court rule grants jurisdiction in this Court to address the district court’s probable cause determination. Petitioners also asserted that the issues Sheriff Graves raised on appeal were moot as a result of the recall election result. On November 18, 2005, Petitioners filed an alternative motion to dismiss, contending that the appeal should be dismissed based on Sheriff Graves’ failure to post the supersedeas bond, as required by our stay order filed November 7, 2005, and by our amended stay order filed November 9, 2005.

8) After our review of the jurisdiction and other issues presented in the appeal, we certified this appeal to the Supreme Court pursuant to NMSA 1978, § 34-5-14(C) (1972). The Supreme Court declined certification. For the reasons that follow, we exercise jurisdiction and dismiss the appeal.

JURISDICTION

9) The recall provisions for elected county officials set out in Article X, Section 9 of the New Mexico Constitution provide no guidance with regard to the appeal process. Article VI, Section 2 of the New Mexico Constitution, however, specifically provides that an aggrieved party shall have an absolute right to one appeal. Article VI, Section 29 of the New Mexico Constitution relates to the jurisdiction of the Court of Appeals and provides that this Court shall exercise jurisdiction as provided by law. This is a civil action, and by statute, the Court of Appeals has jurisdiction in any civil action not specifically reserved to the jurisdiction of the Supreme Court by constitution or law. (NMRA lists the categories of appeals that “shall be taken to the Supreme Court.” None of the appeals listed specifically covers a recall election or a probable cause determination of the district court in a recall election. Consistent with Section 34-5-8(A), Rule 12-102(A)(4) requires appeals to be taken to the Supreme Court when jurisdiction has been specifically reserved to the Supreme Court by the New Mexico Constitution or by Supreme Court order or rule. As to the Court of Appeals, Rule 12-102(B) states that all other appeals shall be taken to the Court of Appeals.

10) We recognize that the recall provisions for elected officials set out in Article X, Section 9 do not furnish guidance with regard to the appeal process. However, no constitutional or statutory provisions require that issues relating to Article X, Section 9 recall elections be appealed to the Supreme Court. In regard to the recall of local school board members, Article XII, Section 14 of the New Mexico Constitution states that “[p]rocedures for filing petitions and for determining validity of signatures shall be as provided by law.” Legislative instruction is found in the Local School Board Member Recall Act (the Recall Act), NMSA 1978, §§ 22-7-1 to -16 (1977, as amended through 1993). Section 22-7-12(A) of the Recall Act governs a board member’s right to appeal the determination of a district court and limits the appeal to only the Supreme Court. But nothing in N.M. Const. art. XII, § 14 or the Recall Act applies to recall elections under Article X, Section 9.

11) Chapter 1 of the New Mexico Statutes is the New Mexico Election Code. NMSA 1978, §§ 1-1-1 to -24-4 (1969, as amended through 2005). Section 1-1-19 sets out the types of elections covered by the Code. County official recall elections are not listed. However, Sections 1-24-1 to -4, governing special elections, might arguably be construed to apply to county official recall elections. If these special election provisions were construed to apply to county official recall elections, then perhaps the appeal provision relating to contested elections in Section 1-15-4, which vests appellate jurisdiction in the Supreme Court, might apply to the contest of a county official recall election. In the present case, Sheriff Graves’ appeal was filed before the election occurred and was not, when filed, a contest of an election.
It does not appear that the Election Code expressly covers the appeal in this case.

[14] Based on the foregoing discussion of jurisdiction, we conclude that this Court has jurisdiction to entertain this appeal. We view the Supreme Court's declination of our certification of this case to constitute an affirmation of our jurisdiction of this appeal.

WE DISMISS THE APPEAL

[15] Avenues were open, beginning in early September 2005 following the district court's probable cause determination and certainly by September 14, 2005 following the setting by the County of the recall election for November 9, 2005, for Sheriff Graves to join the County and/or the County Clerk (together, the County) as a party in the pending or a separate action and to pursue effective relief seeking to enjoin the election pending review of the district court's probable cause decision. See N.M. Const. art. VI, § 3 (providing that the Supreme Court has power to issue writs of injunction necessary for the exercise of its jurisdiction); Rule 12-504 NMRA (governing procedure for issuance of writs in the exercise of the Supreme Court's original jurisdiction, including stays); see also N.M. Const. art. VI, § 13 (providing that district courts have power to issue writs of injunction); Rule 1-066 NMRA (governing procedure for issuance by district courts of temporary restraining orders and preliminary injunctions). Instead, valuable time lapsed while Sheriff Graves failed to timely and effectively pursue relief to enjoin the election. As a consequence, the election was held, with a completed electoral result.

[16] A constitutionally prescribed political election process was set in progress, with mandatory action required on the part of the County officials to hold an election following a threshold court determination of probable cause and a properly circulated recall petition triggering the mandated election. Article X, Section 9 involves the judiciary in the political election process. Although nothing in the Constitution or laws suggests that a probable cause determination of the district court under Article X, Section 9 is completely off limits in regard to appellate review from a jurisdiction standpoint, we nevertheless view the district court's probable cause determination as part and parcel of the political election process and appellate courts must be cautious about interfering with that process. In some instances, it might be appropriate to postpone or enjoin an election pending review of an Article X, Section 9 probable cause determination. However, the target of the recall must act effectively and expeditiously to seek relief before the special election is held. In order to seek to vindicate his political rights before the election took place, Sheriff Graves, the target of the recall, should have taken whatever steps were available to join or otherwise sue the County and to attempt to obtain injunctive relief to enjoin the election pending review of whether the election could lawfully be held. He failed to take those steps. Under these circumstances, we will not enter the political fray. Absent effective and expeditious action, it is not the duty of this Court to protect the target’s political rights by addressing the district court’s probable cause determination on appeal after the election has occurred.

[17] Under the circumstances, we do not feel compelled to address issues raised by Sheriff Graves for the ultimate purpose of overturning a mandated and completed recall election. We therefore decline to address the issue Sheriff Graves raised in this appeal, namely, whether the district court erred in its probable cause determination. The election having been held, we consider the issues moot.

CONCLUSION

[18] We dismiss Sheriff Graves' appeal.

[19] IT IS SO ORDERED.

JONATHAN B. SUTIN,
Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

CEelia foY CastILLO, Judge
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New Mexico Legal Aid (NMLA) has an opening for a Regional Managing Attorney in its Roswell, NM office. NMLA provides civil legal services for low-income individuals and families in areas which include domestic relations, domestic violence, housing, public benefits, and consumer issues among others. Duties include the daily management of NMLA offices in Roswell and Clovis, NM. Requirements: Looking for highly motivated individual who is passionate and strongly committed to helping the disadvantaged in the community. Three (3) years of legal experience including supervisory responsibilities. Must possess strong written and oral communication skills, law office management experience, will oversee litigation and manage an individual caseload and build collaborative relationships within the community. Licensed to practice law in New Mexico. Willingness to consider applicants for Staff Attorney position. Must possess at least one year of legal experience in civil representation. Competitive salary based on experience. Excellent fringe benefits (health, dental, life and long-term disability), paid holidays, generous personal and sick leave. NMLA is an EEO/AA Employer. Send Resume to: Gloria A. Molinar, Human Resource, NMLA, 300 N. Downtown Mall, Las Cruces, NM 88001; gloriama@nmlegalaid.org

Real Estate/Land Use Law Attorney

The Law Firm of Rodey, Dickason, Sloan, Akin & Robb, P.A. is accepting resumes for an attorney with 2-4 years experience in the real estate and/or land use area. A New Mexico practitioner with a strong academic background preferred. Firm offers excellent benefit package. Salary commensurate with experience. Please send resume, references and a writing sample to Deborah E. Mann, P.O. Box 1888, Albuquerque, NM 87103 or via e-mail to hr@rodey.com. All inquiries kept confidential.

Assistant District Attorney

The Fifth Judicial District Attorney’s office has immediate positions open to new as well as experienced attorneys in Roswell, Chaves County and Hobbs, Lea County. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan with starting salary range of an Assistant District Attorney to a Senior Assistant District Attorney ($38,384.00 to $45,012.28) dependent upon experience. Please send resume to Floyd D. “Terry” Haake, District Attorney, 102 N. Canal, Suite 200, Carlsbad, NM 88220 or e-mail to thaake@da.state.nm.us.

Water Law Attorney

Rodey, Dickason, Sloan, Akin & Robb, P.A. is accepting resumes for an attorney with 2-4 years experience in New Mexico water law. Prefer New Mexico practitioner with strong academic credentials and broad water law background. Firm offers excellent benefit package. Salary commensurate with experience. Please send resume, references and a writing sample to Deborah E. Mann, P.O. Box 1888, Albuquerque, NM 87103 or via e-mail to hr@rodey.com. All inquiries kept confidential.

Associate Trial Attorney- 8th Judicial District (Taos County)

The Eighth Judicial District Attorney’s Office is accepting applications for the position of Associate Trial Attorney (ATA) in the Taos Office. This position will have primary responsibility for Domestic Violence felony and misdemeanor prosecutions. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Daniel L. Romero, Chief Deputy District Attorney, 920 Salazar Road, Suite A, Taos, NM 87571. Position open until selection made.

Associate or Contract Attorney

Seeking a motivated associate attorney or contract attorney with strong research and writing skills. Please forward resume and writing sample to Larry@beall-kiehler.com.

Associate Trial Attorney

The Fourth Judicial District Attorney’s office, Las Vegas, New Mexico, has a position for an Assistant Trial Attorney. This is an entry-level position. Salary is dependent upon the District Attorney’s Personnel and Compensation Plan and experience. Please send Resume and letter of intent to Richard D. Flores, Fourth Judicial District Attorney, P.O. Box 2025, Las Vegas, New Mexico 87701 or by e-mail to rflows@da.state.nm.us.

Deputy District Attorney

The Fourth Judicial District Attorney’s office, Las Vegas, New Mexico, has a position for a Deputy District Attorney. Salary is dependent upon experience and the District Attorney’s Personnel and Compensation Plan. Please send Resume and letter of intent to Richard D. Flores, Fourth Judicial District Attorney, P.O. Box 2025, Las Vegas, New Mexico 87701, or by e-mail to rflows@da.state.nm.us.

Assistant District Attorney

The Fourth Judicial District Attorney’s office, Las Vegas, New Mexico, has a position for an Assistant District Attorney. Salary is dependent upon the District Attorney’s Personnel and Compensation Plan and experience. Please send Resume and letter of intent to Richard D. Flores, Fourth Judicial District Attorney, P.O. Box 2025, Las Vegas, New Mexico 87701, or by e-mail to rflows@da.state.nm.us.

Attorney - Consulting

Do you have a litigation-tested forms library of your own pleadings you’d like to publish? Interested in consulting with our company on deadline related practice tips in state and federal court? LawToolBox has a proven business model providing a web-based litigation practice software, that calculate deadlines, assembles first draft of pleadings, and sends email reminders with practice. We are looking for an attorney to consult with us or rolling out our product in New Mexico. Send resume and references to jbg@lawtoolbox.com.

City of Santa Fe, New Mexico Is Currently Accepting Applications For The Following Position:

City Attorney - Performs managerial and professional duties to carry out the efficient and effective litigation of civil or criminal cases and the ongoing legal processes of city government. Lead city legal advisor in all civil and criminal matters. Juris Doctorate degree from an accredited college or university required. Apps or resumes due no later than 5:00 p.m. on 04/07/06. Salary D.O.E. For detailed information please contact (505)955-6597 or visit our website at www.santafenm.gov. EEO/AA

Attorney

FT Managing Staff Attorney for legal service program serving the elderly. Duties include supervising Staff Attorneys, assuring compliance with contracts and grants, serving as liaison with program funders, scheduling and attending workshops requiring in-state travel, providing legal information, advice, brief services and referrals through a legal helpline. Grantwriting, Spanish helpful. Requires current license to practice law in NM. Benefits. Send letter of interest with salary requirements along with resume to HR-LREP MSA, P.O Box 92860, Albuquerque NM 87199 or fax (505) 797-6019 or e-mail HR@nmbar.org. First resume review March 30th. Position open until filled. E.O.E.

Associate or Contract Attorney

Seeking a motivated associate attorney or contract attorney with strong research and writing skills. Please forward resume and writing sample to Larry@beall-kiehler.com.

Associate Trial Attorney

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Deputy District Attorney

The Fourth Judicial District Attorney’s office, Las Vegas, New Mexico, has a position for a Deputy District Attorney. Salary is dependent upon experience and the District Attorney’s Personnel and Compensation Plan. Please send Resume and letter of intent to Richard D. Flores, Fourth Judicial District Attorney, P.O. Box 2025, Las Vegas, New Mexico 87701, or by e-mail to rflows@da.state.nm.us.
Senior Trial Attorney
Tenth Judicial District
Attorney's Office
Senior Trial Attorney wanted for employment with the Tenth Judicial District Attorney's Office, which includes Quay, Harding and De Baca Counties. Qualifications and salary are pursuant to the New Mexico District Attorney's Personnel & Compensation Plan. (Salary is approximately $42,500.00 to $50,000.00 depending on experience). Position opens on July 1, 2006. Resumes can be faxed to Tenth Judicial District Attorney Ronald W. Reeves at (505) 461-3966, or mailed to P.O. Box 1141, Tucumcari, NM 88401. The Tenth Judicial District Attorney's office is an Equal Opportunity Employer.

Natural Resource Law

Corporate Staff Attorney
Corporate Staff Attorney for Regional Home Builder — Licensed in New Mexico and able to coordinate firms in New Mexico, Arizona and Texas. General employment law experience and ability to administer real estate contracts are a must. Salary is dependent on experience. Applicants must include salary requirements. Company is an Equal Opportunity Employer and requires drug testing upon conditional offer of employment. Apply via email to CKephart@rayleevantage.com.

Legal Assistant
Hatch, Allen & Shepherd, P.A. a busy general civil litigation firm is seeking an experienced full-time legal assistant to join our team. Applicant must have experience in Microsoft Word, heavy tape transcription and the ability to draft legal documents required. A minimum of 5 years in medical malpractice, and/or insurance defense experience preferred. We offer a great work environment and competitive salary. Generous insurance and 401K benefits. Please fax resume to Gayle Nissen at (505) 341-3434 or mail to PO Box 94750, Albuquerque, NM 87199-4750.

Paralegal
The Santa Fe office of the Rodey Law Firm seeks Paralegal to assist attorneys in multiple practice areas. Position requires proficiency in litigation, including document control and trial preparation, and ability to support utilities practice. Familiarity with operations and procedures of governmental agencies at state, county and local levels. Ideal candidate must demonstrate flexibility, initiative, attention to detail and strong organizational ability. Excellent computer skills needed. Recent law firm experience required. Firm offers great work environment, competitive salary and excellent benefits. Please forward resume and cover letter to hr@rodey.com or mail to Human Resources Manager, Rodey Law Firm, P.O. Box 1888, Albuquerque, NM 87103.

Paralegal/Legal Assistant
The U.S. Department of Energy, National Nuclear Security Administration, Sandia Site Office, Albuquerque, NM is requesting information from qualified paralegals/legal assistants. Interested parties must be a graduate of an accredited paralegal program or possess a B.A. or B.S. degree; have a minimum of 3 years experience as a paralegal or legal assistant in a private law firm, or corporate or government legal department; possess strong organizational skills; and have solid experience with Microsoft Word, Outlook, Excel, Lexis/Nexis, and Internet legal resources. In addition, interested parties must possess a DOE Q-Security Clearance or meet the eligibility criteria for obtaining a security clearance. Interested parties are urged to review the eligibility criteria at 10 CFR § 710.8 before applying. Duties will include: maintaining legal files/records management system in SSO Counsel's Office; conducting legal research and preparing legal memoranda and other documents; conducting litigation management audits pursuant to 10 CFR § 719; and providing general administrative support. Send resume with references to: DOE/NNSA, Sandia Site Office/CABM/PLA, P.O. Box 5400, Albuquerque, NM 87185-5400.

Receptionist
Small, busy law firm is looking to hire a receptionist. Our practice is primarily in the areas of Estate Planning, Probate and Elder Law. Excellent benefits. Please fax resume to 505-237-9440, or send to: Swaim, Schrandt & Millet, P.C., 4830 Juan Tabo NE, Suite F, Albuquerque NM 87111.

Full Time Legal Secretary
Established medium-sized law firm seeks full time legal secretary. Applicants should have 3 years experience in civil litigation and Workers Compensation. Must be a team player who can perform multi-tasks in a high volume, fast paced practice. Please submit cover letter, resume and salary requirements to Office Manager, YLAW, 4908 Alameda Blvd. NE, Albuquerque, NM 87113 or email to fruzig@ylawfirm.com. No phone calls please.

Legal Secretary/Receptionist
Downtown Albuquerque law firm seeking part-time, experienced, legal secretary/receptionist. A self-motivated, team-player and organized individual a must. Hours 9:00 to 2:00., Mon. through Friday. Send resumes to P.O. Box 1447, Santa Fe, NM 87504.

Paralegal Position

Services
Merge Your CR/DR Practice with Our Practice
You provide initial client base, we provide support staff, billing support and advertising/marketing support. Like having your own practice without the admin headaches. Call David Crum @ 385-9417 or e-mail to David@nmlawyers.com. All inquiries confidential.

Fine Print
Legal evidence photography call Kathleen 345-0791.
Office Space

Louisiana/Candelaria Corner
Beautiful 1000 sq. ft. office suite. Excellent parking. 889-3899.

Albuquerque Office Space
1019 2nd N.W. One block to federal court, offices from $450. month includes reception area, conference room, utilities, DSL. Lisa Torraco 480-8218.

Office Alternatives
A full service business environment available by the hour, day or monthly. Office & meeting space conveniently located in Albuquerque at I-25 & Paseo. No lease, no long term commitment. Call Deb Austin at 796-9600 or (877) 345-3525 www.officealternatives.com.

Uptown Square Office Building
Prestigious Uptown location, high visibility, convenient access to I-40, Bank of America, companion restaurants, shopping, two-story atrium, extensive landscaping, ample parking, full-service lease. Two different suite sizes, 850 SF and 3747 SF. Buildouts for larger suite include reception counter/desk, separate kitchen area, storage and 6-7 windowed offices. Competitive Rates. Available Now. Single attorney space available. One-third of 1300SF (approx. 450SF), shared conference room, reception area, coffee bar, etc. w/building owners. $600/month. One (1) year lease. Call Ron Nelson or John Whisenant 883-9662.

Prof. Office Space
190 sf; Triad Bldg @ Indian School/Girard, easy access to I-25, 1-40, UNM, hospitals, downtown; incl janitorial & utilities; common areas: lobby, conf rm, kitchen; copy svc's available; security system; child friendly setting; call 991-3213.

Private Offices Available

Two Offices Available
Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

Downtown
Beautiful adobe building near MLK on north I-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $300 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

Office Space
With the recent retirement of Joel Roth and the ascension of Raymond Ortiz to the bench, VanAmberg, Rogers, Yeta & Abeita, LLP, have office space and staff capacity available at 347 E. Palace Avenue, Santa Fe. References and associations likely for practitioners with complimentary practices. Inquiries at 505-988-8979.

Albuquerque Offices For Rent
Albuquerque offices for rent 820 2nd NW, one block from courthouses, copier, fax, high-speed internet, off street parking, library, statues up to date, telephone system, conference room, receptionist, rates depending on space rented $500 to $1,000 monthly. Call Ramona @ 243-7170 for appointment.

Uptown
1000 square foot suite with 3 offices, conference room, reception area, $1500 mo. includes janitorial and utilities. Office furniture available. Quick I-40 access. 10 minutes to courts. 830-2020.

Professional Office Spaces
For Rent
Beautiful spacious non-smoking office(s) for rent. Office rent includes additional space for staff member(s), use of shared conference rooms and employee lounge. Receptionist and copier service are also available. Excellent opportunity for new attorney interested in referrals. Call 244-3861 for more information.

Executive Office Suites
Conference room, reception area, break room, built-in staff stations. Corner of Louisiana and Candelaria. 889-3899.

Office Space – Uptown Area
Office space for rent with secretarial area for up to two secretaries in beautiful building near Louisiana and Menaul with seven other attorneys. Rent includes reception services and shared use of four conference rooms. Space is available immediately. Contact Cathy Davis of Hunt & Davis, P.C. at 881-3191 for more information.

Business Opportunities

For Sale - Fee Simple
ISUEDRUNKDRIVERSNM.COM domain name. Only 10% of under 21-year olds use the yellow pages, the rest use the web. Can be stand-alone site or redirected to your existing site. Alfred 924-2020

Miscellaneous

Searching For Will
Searching for will of David R. Poquette, deceased in December 2, 2005, believed to have been drawn by Karl Werner. Call Law Offices of Brad L. Hays (505) 892-1050.

Searching For A Will
I am searching for a will for Sandra Marie Offerdahl. Date of death was February 28, 2006. Contact Info: Joanne Offerdahl; Home: 505-869-9942; Cel: 505-507-6273.

Will of Loren Bishop
If you have any information concerning a Will for LOREN BISHOP, who died in November 2005, Please contact Deborah Rupp Goncalves, attorney for an heir, (505) 884-4300.

Searching for Will

American Limousine

54 BAR BULLETIN - MARCH 27, 2006 - VOLUME 45, NO. 13
**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

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.

- 8:45 a.m. CLE Registration
- 9:00 a.m. **1031 Exchanges**
- 10:30 a.m. Break
- 10:45 a.m. **CLE (continued)**
  - James J. Owens, Esq.
- 11:45 p.m. Lunch (provided at State Bar Center)
- Noon Adjourn to Golf Tournament

**NOTE FOR GOLF TOURNAMENT:** All questions should be directed to James J. Owens, Esq. at the Wellesley Family Law Center: (505) 266-0800, Ext. 109.

*Please Note: No auditors permitted*

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**Immigration Fundamentals: Keeping Families Together**

Two Dates, Two Locations

- **State Bar Center, Albuquerque**
  - Thursday, April 20, 2006
  - Las Cruces (location TBA) - Friday, May 12, 2006

2.0 General CLE Credits

**Co-Sponsor: International & Immigration Law Section**

How do I get my wife to the United States? Does my husband have to leave the United States to get legal permanent residence in the United States? How can I help my child when they are over 21 years old? These questions and many more will be answered as we maneuver through the maze known as family based immigration law.

- 9:00 a.m. Nonimmigrant Visas:
  - How to get your family member into the U.S.
  - Mary Ann Romero, Esq.
- 10:00 a.m. Break
- 10:15 a.m. Immigration Visas:
  - How to keep your family member in the U.S.
  - Mary Ann Romero, Esq.
- 12:15 p.m. Adjourn and Lunch (provided at each location)

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**REGISTRATION**

**Tips on Section 1031 Exchanges for Real Estate and Beyond, Part 2**
- **Wednesday, April 19, 2006** • State Bar Center, Albuquerque • 2.5 General CLE Credits
- □ Standard Fee (CLE and Lunch) - $85

**Immigration Fundamentals: Keeping Families Together**
- **Two Dates, Two Locations: Thursday, April 20, 2006 • State Bar Center, Albuquerque**
- **Friday, May 12, 2006 • Las Cruces (Location TBA)**
- 2.0 General CLE Credits
- □ April 20 - Albuquerque | □ May 12 - Las Cruces
- □ Standard Fee - $95 | □ International & Immigration Law Section Members, Government, Paralegal - $85

Name: ____________________________________________ NM Bar#: ___________________
Firm: ______________________________________________________________________________
Address: _____________________________________________________________________________
City/State/Zip: ________________________________________________________________________
Phone: ________________________________________ Fax : _________________________________
E-mail address: _______________________________________________________________________

Payment Options: □ Enclosed is my check in the amount of $ _______________ (Make Checks Payable to: CLE)
□ VISA □ Master Card □ American Express □ Discover □ Purchase Order (Must be attached to be registered)
Credit Card Acct. No. __________________________________________ Exp. Date ___________
Signature __________________________________________________________

Mail this form to: CLE, PO Box 92860 Albuquerque, NM 87199 or Fax to (505) 797-6071.

Register Online at www.nmbar.org
Atkinson & Kelsey thanks the Samaritan Counseling Center’s Ethics in Business Awards Selection Committee for choosing our firm as the winner of one of three Ethics Awards in the For-Profit Business Category.

We also thank the student research team from the Anderson Schools of Management at the University of New Mexico, and offer warmest congratulations to all the other winners.