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2006-NMCA-052, No. 24,719: State v. Bricker
2006-NMCA-055, No. 25,573: Romero v. City of Santa Fe

Main Street, Lincoln, Watson House, ca late 1800s, #105473

Courtesy Palace of the Governors (NMIDCA) www.palaceofthegovernors.org/photoarchives

www.nmbar.org
Friday, June 9, 2006 • 5.75 CLE Credits
Embassy Suites Hotel
1000 Woodward Place, NE • Albuquerque, New Mexico

PROGRAM SCHEDULE

8:30 to 9:00 a.m. Registration
9:00 to 9:45 a.m. Linda Rios, Esq.
Presenting Damages in a Soft Tissue Case
9:45 to 10:30 a.m. Dusti Harvey, Esq.
Presenting Damages in a nursing home case
10:30 to 10:45 a.m. Break
10:45 to 11:30 a.m. William Carpenter, Esq.
Presenting Traumatic Brain Injury Damages
11:30 a.m. to 12:00 noon David Stout, Esq.
Presenting the loss of consortium
12:00 to 1:30 p.m. Lunch
1:30 to 2:15 p.m. Daymon Ely, Esq.
Presenting loss of enjoyment of life damages
2:15 to 3:00 p.m. Randi McGinn, Esq.
Addressing Damages in Voir Dire
3:00 to 3:15 p.m. Break
3:15 to 4:00 p.m. John Lieuwen, Esq.
Taxation Issues on Settlements and Judgments
4:00 to 4:45 p.m. Patrick Sullivan, Esq.
Addressing Damages in Closing
4:45 p.m. Adjourn

SEMINAR REGISTRATION

Please return to: New Mexico Trial Lawyers' Foundation
P.O. Box 301, Albuquerque, NM 87103-0301

TUITION (After June 2, 2006 increases by $10)
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Members can now order Public Information Pamphlets from the State Bar.

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NATIONAL SATELLITE

Advanced Estate Planning Practice Update - Spring 2006
State Bar Center, Albuquerque • via satellite
Thursday, June 1, 2006 • 10 a.m. - 2 p.m.
3.6 General CLE Credits

For practitioners whose experience is at an intermediate (or higher) level, this update offers an opportunity to explore the most current and important issues in estate planning and wealth transfer taxation. Topics are selected with emphasis upon identifying and solving problems that practitioners will confront in their practice, how to bring about desired results, as well as when and why particular procedures or choices are appropriate.

- Standard Fee $199

2006 Tax Symposium: Matters Affecting Federal and State Tax Practice
State Bar Center, Albuquerque
Friday, June 16, 2006
6.5 General CLE Credits

Co-Sponsor: SBNM Tax Section

Presenters: Bruce Fort, Esq., Staff Attorney, NM Taxation and Revenue Department; James H. Maes, Esq., CPA, CFE, Special Agent, NM Taxation and Revenue Department; Alvan Romero, Director of the Tax Fraud Investigations Division, NM Taxation and Revenue Department; Curtis W. Schwartz, Esq., Modrall Sperling Roehl Harris & Sisk; Professor Ira B. Shepard, University of Houston Law Center, Houston, Texas; and Professor Joseph Walsh, Golden Gate University, San Francisco, California,

The focus of the 2006 Tax Symposium will be the IRS new Circular 230 Rules, recent developments in federal income taxation, tax fraud investigations, top tax scams, and state tax issues affecting NM taxpayers.

- Standard Fee, Government & Paralegal $179
- SBNM Tax Section Members $169

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.
(Please have credit card information ready)
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INTERNET: www.nmbar.org, click CLE, then area of interest
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

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Professionalism Tip

With respect to the courts and other tribunals:

I will be a vigorous and zealous advocate on behalf of my client, but I will remember that excessive zeal may be detrimental to my client’s interests or the proper functioning of our justice system.

Meetings

June

5
Attorney Support Group,
5:30 p.m., Law Office of Scott Vorhees, Santa Fe

6
Employment and Labor Law Section Board of Directors, noon, State Bar Center

8
Public Law Section Board of Directors, noon, Risk Management Division, Santa Fe

8
Business Law Section Board of Directors, 4 p.m., State Bar Center

9
International and Immigration Law Section Board of Directors, 1:30 p.m., via teleconference

State Bar Workshops

31
Consumer Debt/Bankruptcy Workshop
6 p.m., Las Vegas VFW, Las Vegas

June

14
Family Law Workshop
6 p.m., Taos Convention Center, Taos

21
Consumer Debt/Bankruptcy Workshop
6 p.m., Carver Library, Clovis

22
Consumer Debt/Bankruptcy Workshop
5:30 p.m., Branigan Library, Las Cruces

28
Consumer Debt/Bankruptcy Workshop
6 p.m., State Bar Center, Albuquerque

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.

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EXECUTIVE Director – Joe Conte
Editor – Dorma Seago
(505) 797-6030; E-mail: notices@nmbar.org
Account Executive – Marcia C. Ulibarri,
(505) 797-6058; E-mail: ads@nmbar.org
Pressman – Brian Sanchez
Print Shop Assistant – Richard Montoya
Mail Handler – Chris Knowles

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NOTICES

COURT NEWS

NM Supreme Court
Law Library

For the convenience of state employees, the judiciary and the general public, the Supreme Court Law Library is open extended hours:
- Monday-Friday, 8 a.m.–5:30 p.m.
- Saturday, 10 a.m.–3 p.m.
Closed holiday weekends;
The library has statutes, rules, regulations, etc., plus free computer access to Westlaw and Lexis. It also has many other computer-based research tools.
Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Website: www.supremecourtlawlibrary.com.

NM Court of Appeals
Open Meeting of Committee on Administrative Appeals

An ad hoc committee of district and appellate judges and lawyers practicing in the area of administrative appeals will meet at 1:30 p.m., July 11, at the State Bar Center. The purpose of the meeting is to evaluate practice and procedures under Section 39-3-1.1 now that the statute is over five years old. Some of the problems that have been noted include: (1) the time for appeal needs clarification; (2) the definition and manner of preparation of the record needs clarification; (3) the rules governing statements of issues could be improved; (4) decisions by administrators, particularly city and county governments, are sometimes inadequate for review; (5) the standards of review do not seem to be complied with; (6) some cases should go directly to the Court of Appeals; and (7) administrative decision makers, district and appellate judges and practitioners could benefit from education on the issues related to Section 39-3-1.1. Those who have interest in this area of law or who have noted these or additional problems should attend this meeting. For more information, contact Judge Lynn Pickard at (505) 827-4903 or coalp@nmcourts.com.

First Judicial District Court
Family Law Brownbag

The First Judicial Court will host its family law brownbag meeting at noon, June 13, in the Grand Jury Room, second floor, of the Steve Herrera Judicial Complex in Santa Fe. The meeting will focus on the role of accountants and/or financial planners in the divorce process. For more information or to suggest agenda items, contact Elege Simons, (505) 988-5600, or esimons@simonsfirm.com. Provide one dollar, name and bar number and receive 1.0 CLE credit, pending approval.

Destruction of Exhibits

Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1974 to 1988

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy exhibits filed with the Court in Criminal, Civil, and Children’s courts, domestic, incompetency/mental health, adoption and probate cases, for years 1974 to 1988, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through June 9.

Counsel who may have cases with exhibits should verify exhibit information with the Special Services Division, (505) 841-7596/5452, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

Second Judicial District Court

Destruction of Exhibits

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy exhibits filed with the Court in criminal cases for years 1984 to 1989 and LR (Metro Court cases) for years 1987 to 1996, included but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved through July 27. Counsel who may have cases with exhibits should verify exhibit information with the Special Services Division, (505) 841-7596/5452, from 8 a.m. to noon and from 1 to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s), and defendant exhibits will be released to counsel of record for the defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

U. S. District Court for the District of New Mexico

Bench & Bar Conference 2006

Registration is now open for judges and attorneys to register for the 2006 10th Circuit Bench & Bar Conference at The Broadmoor Hotel in Colorado Springs, Colorado. Conference dates are September 7–9. The complimentary opening reception will take place at the nearby historic Penrose House where participants can meet and greet the circuit, district, bankruptcy and magistrate judges of the 10th Circuit.

Speakers and panelists include retired Associate Justice Sandra Day O’Connor, Associate Justices Stephen Breyer and Samuel Alito, Solicitor General Paul Clement, Erwin Chemerinsky, Robert Nagel and the “master of charisma,” Richard Greene, one of the leading communication coaches.

Quality of Life Quote

Let freedom reign. The sun never set on so glorious a human achievement.
—Nelson Mandela

—Nelson Mandela
in the world. Legal media and blogging panelists include Linda Greenhouse, Byron York, Nina Totenberg, Eugene Volokh, John Hinderaker and Lyle Denniston. Breakout sessions will include topics on evidence, sentencing, technology, discrimination law, bankruptcy, religion and ethics.

The general registration fee is $250. Special registration rates are available for new attorneys (less than five years of practice) and law school students. The registration deadline is July 31. For additional information, visit http://www.ca10.uscourts.gov/judconf/index.php. For questions, e-mail ca10_judicialconference@ca10.uscourts.gov, or call (303) 844-2067.

Opinion Retrieval System

The Federal Bar Association is sponsoring a program to produce a collection of the Court's opinions on compact disc. The CD collection contains a master disc which includes all documents that are contained in the Court's Opinion Retrieval System and weekly discs which contain documents filed in each of the weeks during the program. The CD collection will be maintained by the 10th Circuit Library, Albuquerque Branch, and can be viewed at the library, or copies of the discs can be provided at no cost. This program will be available until the replacement of the Court's Opinion Retrieval System is implemented in Fall 2006.

STATE BAR NEWS

Annual Meeting

Resolutions and Motions

The 2006 Annual Meeting of the State Bar of New Mexico will be held at noon, July 21, at the Taos Convention Center in Taos. Resolutions and motions to be considered must be submitted in writing and received in the office of Executive Director Joe Conte, PO Box 92860, Albuquerque, NM 87199; fax, (505) 828-3765; or e-mail, jconte@nmbar.org, by 5 p.m., June 21.

Attorney Support Group

The attorney support group monthly meeting in June will be held in Santa Fe rather than Albuquerque. It will be at 5:30 p.m., June 5, at the office of Scott Vorhees, (505) 820-3302, located at 411 St. Michaels Drive, Suite A, Santa Fe (at the intersection of Old Pecos Trail and St. Michaels Drive). The meeting is generally held at 5:30 p.m. on the first Monday of each month at the First United Methodist Church in Albuquerque, and it will be back at that location on July 3. For further information, contact Bill Stratvetr, (505) 242-6845.

Bankruptcy Law Section and Tenth Circuit Bankruptcy Appellate Panel

An open forum presentation for the Bankruptcy Law Section will be held from 4:30 to 6 p.m., June 12, at the State Bar Center. Judge Tom R. Cornish, Eastern District of Oklahoma, Judge Robert E. Nugent, District of Kansas, and Judge William T. Thurman, District of Wyoming, will be conducting the presentation.

Public hearings will begin at 9 a.m., June 13, Pecos Courtroom, Room 340, United States Courthouse, 333 Lomas Boulevard NW, Albuquerque. The same judges will be hearing cases.

The BAP was created by a resolution of the Judicial Council of the 10th Circuit for an initial three-year period beginning July 1. On March 8, 1999, the Judicial Council of the 10th Circuit voted to authorize the permanent establishment of the BAP in the 10th Circuit. All districts in the 10th Circuit have authorized participation in the BAP.

The BAP is composed of nine active bankruptcy judges appointed by the chief judge of the 10th Circuit. A BAP judge may not hear an appeal originating from his or her own district.

The office of the clerk of the BAP is located in Denver, CO. More information may be obtained at www.bap10.uscourts.gov or by calling the BAP Clerk’s Office at (303) 355-2900.

Casemaker

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. Watch for more information about Casemaker and visit www.casemaker.us.

Contact Joe Conte, jconte@nmbar.org, or (505) 797-6099 with questions.

Committee on Women and the Legal Profession

Family Leave Policy Survey

A family leave policy survey, created by the State Bar’s Committee on Women and the Legal Profession, was sent by e-mail to State Bar members on May 17. The committee encourages members to complete the survey by May 31. Results should provide information on the types of leave policies that are in place across different segments of practice, types of policies that are significant to practitioners, ways in which firms/organizations might improve their policies and a means to compare New Mexico with other jurisdictions. The survey may also be accessed through www.nmbar.org.

Employment and Labor Law Section

Board Meetings Open to Section Members

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings. The next meeting will be held at noon, June 6, at the State Bar Center, a departure from its regularly scheduled meeting on the first Wednesday of each month. Lunch is not provided. For information about the section, visit the State Bar Web site, www.nmbar.org, or call Carlos M. Quiñones, section chair, (505) 248-0500.

Indian Law Section

Board Vacancy

A vacancy exists on the Indian Law Section board of directors. The position will be filled by appointment, and the member will serve until the end of the year. Should the member selected wish to serve the remainder of the 2006-2008 term, he or she may run for office in the 2006 election that will be held in the fall. Section members interested in filling the vacancy should contact Christine Morganati at the State Bar, cmorganati@nmbar.org, by the end of the day on June 5.

Solo and Small Firm Practitioners Section

Meeting and CLE

The next meeting of the Solo and Small Firm Practitioners Section will be held June 20 at the State Bar Center in conjunction with the CLE, Lurking Dangers in Real Estate Contracts for all NM Lawyers, presented
by Ron Taylor. The program will begin at 11:45 a.m. with registration and lunch and will conclude at 1:15 p.m. Board members should arrive at 11:20 a.m. The cost of the program is $45, lunch included. To register, call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and click on CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Taxation Section
Annual Meeting and CLE
The Taxation Section will hold its annual meeting at 12:45 p.m., June 16, in conjunction with the 2006 Tax Symposium: Matters Affecting Federal and State Tax Practice. Agenda items should be sent to Chair Marjorie Rogers, mrogers@modrall.com, or (505) 848-1800. The standard cost of the CLE program is $179 for government attorneys and paralegals and $169 for section members. Lunch will be provided. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199. The registration form may be found on the inside back cover of the May 22 Bar Bulletin.

Technology Committee
Tag Up–Free Workshop
The State Bar Technology Committee is presenting a FREE one-hour workshop from 5 to 6 p.m., June 22, at the State Bar Center. The presentation will demonstrate social bookmarking through http://del.icio.us, a free Web-based tool that provides storage of bookmarks and retrieval from any location at which an internet connection exists. People who use computers in multiple locations (e.g., one at home and one at work), or receive repeated requests from colleagues to provide Web site URLs, will find a social bookmarking service very beneficial. Paralegals, attorneys and support staff are welcome, but the class is limited to 11 attendees. Make reservations by June 20 with Mary Patrick, CLE program coordinator, mpatrick@nmbar.org or (505) 797-6059. CLE credit will not be provided.

Young Lawyers Division
Professional Clothing Drive
The Young Lawyers Division is collecting professional clothing to donate to both Dismas House, a nonprofit organization that transitions nonviolent offenders from incarceration to parole, and The Crossroads, a nonprofit organization that assists homeless women and children.

Professional clothing donations are being accepted at the following four locations:
- 13th Judicial District Attorneys Office Cibola County
  515 High Street, Grants
- Cuddy, Kennedy, Albetta & Ives, L.L.P.
  1701 Old Pecos Trail, Santa Fe
- State Bar of New Mexico
  5121 Masthead NE, Albuquerque
- The Romero Law Firm
  1001 5th Street NW, Albuquerque
- Butt, Thornton & Becht, PC.
  4101 Indian School Road NE
  Albuquerque
- State Bar of New Mexico Annual Meeting, Taos Convention Center
July 20-22, 2006

Contact Briana Zamora, bhzamora@btblaw.com, or (505) 884-0777, with questions or to volunteer as a clothing collection point outside of Albuquerque.

OTHER BARS
Albuquerque Bar Association
Monthly Luncheon and CLE
The Albuquerque Bar Association’s monthly luncheon will be held at noon, June 6, at the Albuquerque Petroleum Club. The State of the Courts will be presented by The Honorable Richard C. Bosson, Chief Justice, New Mexico Supreme Court.

The CLE, Inside the Court of Appeals: Pointers on Appellate Practice, will be presented by The Honorable Cynthia Fry, New Mexico Court of Appeals; The Honorable Michael D. Bustamante, Chief Judge, New Mexico Court of Appeals; and Edward Ricco, Rodey Dickason Sloan Akin & Robb PA. The CLE, from 1:30 to 3 p.m., will qualify for 1.5 general CLE credits.

This short CLE will provide insights for appellate practitioners at all levels of experience. The presenters will review briefly the principal procedural steps in an appeal and summarize recent developments in the New Mexico rules and decisional law relating to appellate practice. Two judges from the Court of Appeals will engage in an interactive discussion with participants to provide a description of the Court’s internal procedures, answer questions not covered by the rules and provide practice pointers aimed at making the novice and seasoned appellate practitioner more knowledgeable and effective.

Lunch only: $20 members/$25 non-members; lunch and CLE: $50 members/$70 non-members; CLE only: $30 members/$45 non-members.

Register for lunch by noon, June 5. Lunch is an additional $5 without reservations. Register at www.abqbar.com; by e-mail at abqbar@abqbar.com; by mail to ABA, 400 Gold SW, Suite 620, Albuquerque, NM 87102; by fax to (505) 842-0287; or call (505) 842-1151 or (505) 243-2615.

NM Criminal Defense Lawyers Association
Summer CLE
The Summer CLE of the New Mexico Criminal Defense Lawyers Association will be held from 9 a.m. to 5 p.m., June 23, at the UNM School of Law. Timothy P. O’Toole, chief of the Special Litigation Division of the Public Defender Service for the District of Columbia, will speak on Litigating Eyewitness ID Issues in the Courtroom. Barbara Bergman, UNM law professor and current president of the National Association of Criminal Defense Lawyers, will present Creative Uses of Evidence. Other topics include Winning Motions to Suppress, Case Law Updates and Fourth Amendment Issues. There will be a membership meeting and Driscoll Award presentation at lunch. Registration begins at 8:30 a.m., and participants may earn 6.25 general CLE credits. For more information, visit www.nmcdla.org, e-mail nmcdladir@aol.com, or call (505) 992-0050. Discounts and partial scholarships are available for NMCDLA members.

UNM School of Law
Library Summer Hours
Closed Monday, May 29
Monday–Thursday 8 a.m.–9 p.m.
Friday 8 a.m.–6 p.m.
Saturday 9 a.m.–6 p.m.
Sunday Noon–9 p.m.

Reference
Monday–Thursday 9 a.m.–6 p.m.
Friday 9 a.m.–6 p.m.
Saturday Closed
Sunday Noon–4 p.m.
OTHER NEWS

Legal FACS
Torrance County Pro Se Forms Clinic

Legal FACS will conduct a free pro se forms clinic from 9 a.m. to noon, June 21, at the Neil Mertz Judicial Complex in Estancia (Highway 14, west side of the road). The clinic is for self-represented litigants and domestic violence victims who cannot afford to hire an attorney for 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. All pro se litigants must make an appointment and will be seen by appointment only on June 21.

NM Center on Law and Poverty
2006 Legal Services Training

The New Mexico Center on Law and Poverty announces its annual Statewide Legal Services Conference, a training which addresses poverty law issues. This conference will be of interest to those working in the system of civil legal service providers as a professional or volunteer or to those doing pro bono work in this area.

The conference will be held June 13–14 at the State Bar. The keynote address will be delivered on the morning of June 13th by Lt. Governor Diane Denish. The conference will also feature professionalism training by Chief Justice Richard Bosson, ethics training by Michael Browde of the UNM School of Law, and A Look at the Significant New ABA Standards on Providing Civil Legal Aid with Sarah Singleton. Other topics to be covered include: consumer law, family law, Medicaid, bankruptcy law, predatory lending, depositions, discovery techniques, housing law, unemployment law, and more.

The registration fee is $100 for public interest lawyers and $150 for private attorneys.

To learn more, including how to register for the event, check the Trainings section at www.nmpovertylaw.org; call Stacey Leaman at the Center on Law and Poverty, (505) 255-2840; or e-mail stacey@nmpovertylaw.org. CLE credit is pending.

Amended New Mexico Deed of Trust Act

Analysis Provided by the Real Property, Probate and Trust Law Section Opinion Letters Task Force

The 2006 New Mexico Legislature adopted House Bill 254 (“Amendment”), which amends the existing Deed of Trust Act (§48-10-1, et seq.). This Amendment takes effect on May 17, 2006. While no statute is without issues, the Amendment raises a number of questions, concerns and issues.

1. The Amendment appears to have created an inconsistency within the Deed of Trust Act regarding redemptions. New Section 48-10-16 of the Amendment establishes a redemption period following a trustee’s sale. Section 48-10-14(B), which was not amended, specifically provides, in the pertinent part, that after a trustee’s sale: “the conveyance shall be without right of redemption.”

2. The redemption rights created in Section 48-10-16 of the Amendment appear to conflict with the second sentence in Section 39-5-18(E), which provides: Except as provided in this section as to the rights of an omitted junior encumbrancer, no real estate may be redeemed from a trustee’s sale.

3. Section 48-10-16(A) provides that trust real estate may be redeemed by the beneficiary or by any junior encumbrancer. Under a deed of trust, the “beneficiary” is the lender. No right of redemption by the borrower is created by the Amendment.

4. The Amendment deleted the prior requirement (set forth in Section 48-10-17(A)) that the separate civil action for a deficiency judgment be commenced within twelve months after the date of the sale of the trust real estate. By deleting the language in Subparagraph A, Subparagraph B of that section either states the obvious or creates unnecessary, and potentially confusing, language.

5. Section 48-10-13 of the Amendment creates various procedures related to the public auction trustee’s sale. In particular, Subsection C attempts to establish a procedure to take effect if a sale is held in violation of federal law due to an unknown or undisclosed bankruptcy. The intent of this Section is not obvious, and it is not apparent how this Section will work in practice.

6. The Amendment does not contain any language regarding the applicability of the Amendment to existing deeds of trust. It is not known whether a trustee’s sale remedy is now available pursuant to a document which failed to comply under the prior statute, but which now satisfies the amended Deed of Trust Act. Likewise, it is not known whether the new procedures and rights created by the Amendment, such as redemption rights, apply to existing deeds of trust.

7. It is not readily ascertainable from the Amendment when the statute of limitations starts to run in conjunction with the separate civil action for a deficiency judgment.

8. Section 48-10-17 references real estate “occupied” by a low-income household. The Amendment, however, does not contain any requirement that the trustor/borrower under the deed of trust actually be the same low-income household that is occupying the property.

9. Section 48-10-11(B) uses the term “nonbanking day.” This term is not defined. Moreover, Section 48-10-13(C), which contains similar language regarding days on which a sale can be held, does not reference “nonbanking day.”

It is not known what the cumulative effect of all of the listed items are on the enforceability of the Deed of Trust Act, as amended by the Amendment.

Questions or comments can be addressed to
Section Chair Charles Seibert
cseibert@flash.net.”
Committee Recommends Expansion of DWI/Drug Courts

With success rates better than the national average, the recommendation is now on the table to establish DWI/drug courts in all 33 counties. Presently, there are 31 drug courts in 18 New Mexico counties, operating in district, metropolitan and magistrate courts.

At a news conference held May 16 in the Bernalillo County Metropolitan Court Ceremonial Courtroom, drug court professionals discussed a five-year plan created by the Drug Court Advisory Committee (DCAC) as part of a mandate from the New Mexico Supreme Court. The Court has approved the plan, and full funding is under consideration by the New Mexico State Legislature. Because May is National Drug Court Month, the event was observed with a DWI/drug court graduation presided over by Bernalillo County Metropolitan Court Judge Cristina Jaramillo.

New Mexico Supreme Court Chief Justice Richard Bosson faces the camera of Univision and discusses the DWI/drug court developments in Spanish. Chief Justice Bosson told the reporter that if the five-year plan is fully implemented, drug court services would become available in all New Mexico counties.

A drug court is a specially designed program that combines judicial oversight with drug testing, substance abuse treatment and intense probationary supervision. The formula for this success was first used in the Dade County, FL, courts in 1989. The first drug court was established in New Mexico in Las Cruces in 1994.

“Drug courts work. We have shown this with an excellent track record here in New Mexico. Our goal is to make sure that drug court services are available to every New Mexican who could benefit from them. Secondly, we want to make sure the courts have sustaining funds to keep them going,” said Bernalillo County Metropolitan Court Judge Victoria Grant, president of the New Mexico Association of Drug Court Professionals and the presiding judge of the Metropolitan Court Drug Courts.

Statistics show that within three years after graduation, fewer than 12% re-offend.

“We are looking at creating 18 new drug courts in underserved counties all around New Mexico. That kind of growth will cost about $6.15 million over the next four fiscal years,” said Chief Justice Richard Bosson. “This plan also includes funding to make sure that existing drug courts have adequate funding to continue and expand their programs. We can reduce re-arrest rates to about one quarter of the national average. This is an investment in community safety we must make.”

“Our goal is to make sure that drug court services are available to every New Mexican who could benefit from them.”

—Judge Victoria Grant
## LEGAL EDUCATION

### MAY

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<th>Date</th>
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<td>Effective Jury Persuasion</td>
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<td>Malpractice Insurance: What Attorneys Should Know</td>
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### JUNE

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<td>2006 Estate Planning Update, Parts 1 and 2</td>
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<td>VR</td>
<td>State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
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<td>Immigration</td>
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G = General  
E = Ethics  
P = Professionalism  
VR = Video Replay  
Programs have various sponsors; contact appropriate sponsor for more information.
### June

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<td><strong>Strategic Estate Planning for Small Businesses and Entrepreneurs</strong>&lt;br&gt;Santa Fe First National Bank of Santa Fe</td>
<td>3.5 G, (505) 992-2409</td>
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<td>13–14</td>
<td><strong>Creative Tax Planning for Real Estate Transactions, Parts 1 and 2</strong>&lt;br&gt;Teleseminar&lt;br&gt;State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
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<td><strong>Insurance Coverage Litigation</strong>&lt;br&gt;Albuquerque National Business Institute</td>
<td>5.0 G, 1.0 E, (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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<td><strong>Sarbanes-Oxley: Does Privilege Still Exist?</strong>&lt;br&gt;Teleconference&lt;br&gt;TRT, Inc.</td>
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<td><strong>Moral Character Test: Its Affect on Admissions and Retention</strong>&lt;br&gt;Teleconference&lt;br&gt;TRT, Inc.</td>
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<td><strong>New Animal Legislation in New Mexico</strong>&lt;br&gt;Paralegal Division of New Mexico</td>
<td>1.0 G, (505) 883-8181</td>
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<td><strong>Public Sector Employment Law Update</strong>&lt;br&gt;Albuquerque Council on Education in Management</td>
<td>16.5 G, (800) 942-4494</td>
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<td><strong>Arbitration Training Course</strong>&lt;br&gt;Albuquerque Construction Dispute Resolution Services</td>
<td>12.0 G, 1.0 E, 2.0 P, (505) 474-9050</td>
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<td><a href="http://www.constructiondisputes-cdrs.com">www.constructiondisputes-cdrs.com</a></td>
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<td><strong>Current Issues in Mediation</strong>&lt;br&gt;Teleconference&lt;br&gt;TRT, Inc.</td>
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<td><strong>Legal Aspects of Condominium Development and Homeowners Associations</strong>&lt;br&gt;Albuquerque Lorman Education Services</td>
<td>6.0 G, (715) 833-3940</td>
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<td><strong>Sometimes It’s All About Losses: Understanding the “Passive Activity” and “At Risk” Limitations</strong>&lt;br&gt;Teleseminar&lt;br&gt;State Bar Center, Albuquerque Center for Legal Education of NMSBF</td>
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<td><strong>Deeds Descriptions and the Law</strong>&lt;br&gt;Albuquerque PESI LLC</td>
<td>7.0 G, (715) 833-5296</td>
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<td><strong>Scientific Evidence: Constitutional Issues</strong>&lt;br&gt;Teleconference&lt;br&gt;TRT, Inc.</td>
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<td><strong>Dispute Review Board Training Course</strong>&lt;br&gt;Albuquerque Construction Dispute Resolution Services</td>
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<td><a href="http://www.constructiondisputes-cdrs.com">www.constructiondisputes-cdrs.com</a></td>
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### Writs of Certiorari

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

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

**Effective May 30, 2006**

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

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<td>NO. 29,818</td>
<td>State v. Melissa S. (COA 25,555) 5/18/06</td>
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#### Writs of Certiorari Granted but Not Yet Submitted to the Court:

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<td>Jacobs v. Ulibarri (12-501) 5/2/06</td>
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<td>NO. 29,785</td>
<td>State v. Williams (COA 25,031) 5/1/06</td>
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<td>NO. 29,783</td>
<td>Gardiner v. Galles Chevrolet (COA 26,560) 5/1/06</td>
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<td>NO. 29,782</td>
<td>Flores v. Ulibarri (12-501) 5/1/06</td>
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<td>NO. 29,781</td>
<td>State Farm Insurance v. Jones (COA 25,507) 4/27/06</td>
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<td>NO. 29,779</td>
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<td>NO. 29,775</td>
<td>State v. Martinez (COA 24,601) 4/24/06</td>
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<td>NO. 29,768</td>
<td>Luna v. Lewis Casing Crews (COA 26,338) 4/21/06</td>
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<tr>
<td>NO. 29,763</td>
<td>Rehders v. Allstate Insurance Company (COA 25,284) 4/20/06</td>
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</tbody>
</table>
Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fé, NM 87504-0848 • (505) 827-4860

EFFECTIVE MAY 30, 2006

WRITS OF CERTIORARI

AS UPDATED BY THE CLERK OF THE NEW MEXICO SUPREME COURT

NO. 29,507 State v. Noriega (COA 25,593) 12/7/05
NO. 29,505 State v. Bocanegra (COA 25,382) 12/8/05
NO. 29,538 State v. Gallegos (COA 24,480) 12/12/05
NO. 29,543 State v. Tkach (COA 24,573) 12/20/05
NO. 29,557 State v. Pacheco (COA 24,735) 12/21/05
NO. 29,529 State v. Phillips (COA 24,147) 1/5/06
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NO. 29,581 Carrillo v. Qwest (COA 25,833) 1/19/06
NO. 29,593 State v. Dean (COA 25,854) 1/19/06
NO. 29,624 Maes v. Audubon Indemnity Ins. Group (COA 25,598) 2/2/06
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NO. 29,604 State v. Bravo (COA 23,992) 2/2/06
NO. 29,580 State v. Graham (COA 25,836) 2/9/06
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NO. 29,649 State v. Garcia (COA 26,118) 3/3/06
NO. 29,673 Torres v. Board of Regents (COA 26,009) 3/20/06
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NO. 29,687 State v. Worrick (COA 24,557) 3/20/06
NO. 29,598 Krieger v. Wilson (COA 24,421/24,497) 3/23/06
NO. 29,699 Wood v. Educational Retirement Board (COA 24,819) 4/3/06
NO. 29,715 Weber v. RT Lodge (COA 24,942) 4/10/06
NO. 29,690 State v. Romero (COA 24,389) 4/10/06
NO. 29,735 Allen v. Edelman (COA 26,024) 4/18/06
NO. 29,725 McMinn v. MBF Operating Acquisition Corp. (COA 25,006) 4/20/06
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NO. 29,728 State v. Gastelum (COA 26,092) 5/16/06
NO. 29,739 State v. Santana (COA 25,269) 5/16/06
NO. 29,757 State v. Billips (COA 26,093) 5/17/06
NO. 29,769 State v. Kennedy (COA 24,873) 5/17/06
NO. 29,770 State v. Arroyo (COA 25,447) 5/17/06
NO. 29,766 Ortiz v. Rustys Plumbing (COA 25,959) 5/18/06

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:

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

NO. 28,500 Manning v. New Mexico Energy & Minerals (COA 23,396) 12/13/04
NO. 28,410 State v. Romero (COA 22,836) 2/14/05
NO. 28,688 State v. Gutierrez (COA 24,731) 2/14/05
NO. 28,660 State v. Johnson (COA 23,463) 3/11/05
NO. 28,816 Romero v. City of Santa Fe (COA 24,775) 5/9/05
NO. 28,823 Payne v. Hall (COA 22,383) 6/13/05
NO. 28,997 Maestas v. Zager (COA 24,200) 6/14/05
NO. 29,058 Sanchez v. Pellicer (COA 25,082) 9/29/05
NO. 29,016 State v. Jade G. (COA 23,810) 10/11/05
NO. 29,017 State v. Jade G. (COA 23,810) 10/11/05
NO. 29,134 State v. Kathleen D.C. (COA24,540) 11/14/05
NO. 29,202 Montgomery v. Lomos Altos (COA 24,297) 11/16/05

PETITION FOR WRIT OF CERTIORARI DENIED:

NO. 29,728 State v. Gastelum (COA 26,092) 5/16/06
NO. 29,739 State v. Santana (COA 25,269) 5/16/06
NO. 29,757 State v. Billips (COA 26,093) 5/17/06
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NO. 29,770 State v. Arroyo (COA 25,447) 5/17/06
NO. 29,766 Ortiz v. Rustys Plumbing (COA 25,959) 5/18/06
**OPINIONS**

**AS UPDATED BY THE CLERK OF THE NEW MEXICO COURT OF APPEALS**
Patricia C. Rivera Wallace, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fé, NM 87504-2008 • (505) 827-4925

**EFFECTIVE MAY 19, 2006**

**PUBLISHED OPINIONS**

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<th>Case Title</th>
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<tr>
<td>24972</td>
<td>11th Jud Dist San Juan CV-02-450, FPOA v FARMINGTON CITY OF</td>
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<td>24320</td>
<td>2nd Jud Dist Bernalillo CV-03-2913, ACLU v ABQ (affirm)</td>
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**UNPUBLISHED OPINIONS**

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<tr>
<td>26421</td>
<td>5th Jud Dist Chaves JQ-04-24, CYFD v JEFFREY O (dismiss)</td>
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<td>2nd Jud Dist Bernalillo CV-05-6956, D TESSO v STATE FARM (affirm)</td>
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<td>26247</td>
<td>2nd Jud Dist Bernalillo DR-93-2748, V MARSHALL v J MARSHALL (affirm)</td>
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<td>2nd Jud Dist Bernalillo CV-05-7443, GALLUP SCHOOLS v PELRB (dismiss)</td>
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<td>26477</td>
<td>9th Jud Dist Curry CV-04-99, DISCOVER BANK v C SMITH (reverse)</td>
<td>5/19/2006</td>
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</tbody>
</table>

Slip Opinions for Published Opinions may be read on the Court’s website:
Clerk's Certificate
From the NM Supreme Court

Christopher L. Abeita
The Abeita Law Firm
120 Madeira Dr., NE, Ste. 109
Albuquerque, NM 87108
(505) 869-5402
(866) 340-9872 (telecopier)
chris@abeitalaw.com

Richard L. Alvidrez
Miller Stratvert, P.A.
500 Marquette Ave., NW, Ste. 1100 (87102)
PO Box 25687
Albuquerque, NM 87125-0687
(505) 397-6484 (telecopier)
rcalvidrez@msLaw.com

Claudia Angelica Arevalo
formerly known as
Claudia Angelica Mettas
Arevalo Law Firm, L.L.C.
312 South Convent Ave.
Tucson, AZ 85701
(520) 983-2502 (telecopier)
bailey@nm.net

Arthur Bailey, III
Arthur Bailey, P.C.
1440-B S. St. Francis Dr.
Santa Fe, NM 87505
(505) 954-4808
(505) 983-2502 (telecopier)
bailery@nm.net

Rod D. Baker
Law Office of Rod D. Baker
707 State Hwy. 333, Ste. B
Tijeras, NM 87059
(505) 286-9700
(505) 286-3524 (telecopier)
rdbaker@swcp.com

Sara K. Berger
Small Business
Law Center, L.L.C.
823 Gold Ave., SW
Albuquerque, NM 87102
(505) 242-2788
(505) 242-2431 (telecopier)
sara@nmsmallbusiness.com

Michael J. Cadigan
Cadigan Law Firm, P.C.
707 Broadway, NE, Ste. 301
PO Box 7718
Albuquerque, NM 87194-7718
(505) 830-2076
(505) 830-2385 (telecopier)
cadigan@cadiganlaw.com

Robert Gary Gates
Office of the District Attorney
801 N. Linam
Hobbs, NM 88240
(505) 397-2471
(505) 397-6484 (telecopier)
rcates@da.state.nm.us

Shari D. Caton
Poskus, Caton & Klein, P.C.
1331 17th St., Ste. 500
Denver, CO 80202
(303) 825-4900
(303) 892-2151 (telecopier)
chaney_interior@aol.com

Christopher B. Chaney
U.S. Dept. of the Interior
1849 C St., NW, MS-2429
Washington, DC 20240
(202) 208-2874
(202) 208-6170 (telecopier)
ccurtin@sandia.gov

Darlene Chavira Chavez
Chavira Chavez
Law Group, P.L.L.C.
177 N. Church Ave., Ste. 200
Tucson, AZ 85701-1153
(520) 828-7777
(520) 828-8505 (telecopier)
chavezdc@tabbn.com

Matthew Chavez
80 Gustafson Ct.
Novato, CA 94947
(415) 892-2151
(415) 892-2151 (telecopier)
mvchavez@comcast.net

Deborah Cilento-Foran
formerly known as
Deborah Cilento-Herron
20 Evans Ave.
Timonium, MD 21093
(443) 798-8200
scarletdragon@gmail.com

Michele M. Clark
TX RioGrande
Legal Aid, Inc.
4920 N. IH-35
Austin, TX 78751
(512) 347-2700
(512) 448-3940 (telecopier)
mclark@trlaw.org

Timothy Covell
c/o Ken Covell, Attorney at Law
712 8th Avenue
Fairbanks, AK 99701

Cherie Gonzales Curtin
formerly known as
Cherie Lynn Gonzales
PO Box 20743
Albuquerque, NM 87154-0743
(505) 845-7881
ccurtin@sandia.gov

Margaret Shank Dietrich
PO Box 2326
Santa Fe, NM 87504-2326
(505) 309-2651

Stephen G. Durkovich
560 Montezuma, Ste. 201B
Santa Fe, NM 87501-2590
(505) 986-1800
(505) 986-1602 (telecopier)

Tatiana DuBois Engelman
Cadigan Law Firm, P.C.
707 Broadway, NE, Ste. 301
PO Box 7718
Albuquerque, NM 87194-7718
(505) 243-3588
(505) 243-6642 (telecopier)

Mark J. Fidel
Applied Records
Management
10200 Comanche Rd., NE
PO Box 93923
Albuquerque, NM 87199-3923
(505) 216-1152
(505) 212-0084 (telecopier)
mfidel@comcast.net

Laura M. Franze
Akin Gump Strauss
Hauer & Feld, L.L.P.
1700 Pacific Ave., Ste. 4100
Dallas, TX 75201
(214) 969-2779
(214) 969-4343 (telecopier)
lfranze@akingump.com

Janine Renee Friede
11100 Double Eagle Dr., NE
Albuquerque, NM 87111
(505) 292-5333
jainefriede@comcast.net

Robert D. Frizell
Callister & Reynolds
823 Las Vegas Boulevard South
Las Vegas, NV 89101
(702) 385-3343
(702) 385-2899 (telecopier)
rdf@callister-reynolds.com

Victoria Beatrice Garcia
Office of the Chief Information Officer
5301 Central Ave., NE, Ste. 1500
Albuquerque, NM 87108
(505) 841-6605
(505) 841-4780 (telecopier)
Victoria.Garcia12@state.nm.us

Lee Griffin
1221 Mechem Dr., Ste. 5
Ruidoso, NM 88345
(505) 258-9090
(505) 258-9093 (telecopier)
lee_griffin_4@yahoo.com

Amanda H. Hartmann
PO Box 70053
Albuquerque, NM 87107-0053
(505) 401-7832

Clerk’s Certificate
of Name, Address, and/or Telephone Changes
CLERK CERTIFICATES

David P. Hegge
2646 Quincy St., NE
Albuquerque, NM 87110
(505) 897-1535
DAVID.HEEGGE@cardinal.com

Edward B. Hymson
150 Lombard St., #150
San Francisco, CA 94111
(415) 391-2602
ebhymson@aol.com

Amavalise F. Jaramillo
52 Tavalopa Dr.
Los Lunas, NM 87031

Raeburn S. Josey
formerly known as Raeburn Seley Josey
PO Box 2078
Carlsbad, NM 88221-2078
(505) 247-1954 (telecopier)

Kirtan Khalsa
812 Marquette Ave., NW
Albuquerque, NM 87102
(505) 604-3322
(505) 234-7200

S. Christopher King
827 1/2 E. High St.
Colorado Springs, CO 80903
(719) 338-4643

Laura L. Lansford
11216 Arlen Park Dr.
Huntersville, NC 28078

Tyr Loranger
Office of the District Attorney
PO Box 1209
Espanola, NM 87532-1209
(505) 753-7131 Ext. 101
(505) 753-7133 (telecopier)
TLoranger@da.state.nm.us

Damon P. Martinez
Office of the U.S. Attorney
201 Third St., NW, Ste. 900
PO Box 607
Albuquerque, NM 87103-0607
(505) 346-7274
(505) 346-7296 (telecopier)
Damon.Martinez@usdoj.gov

Delores Korb Mayer
223 N. Guadalupe, #465
Santa Fe, NM 87501
(505) 470-8435

Steve H. Mazar
Bill Gordon & Associates, P.A.
2501 Yale Blvd., SE, Ste. 204
Albuquerque, NM 87106
(505) 265-1000
(505) 242-1841 (telecopier)
smazer@billgordon.com

Julie Ann Meade
Office of the Attorney General
PO Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6693
(505) 827-6081 (telecopier)

Steven S. Michel
2025 Senda de Andres
Santa Fe, NM 87501
(505) 995-9951
(505) 995-9951 (telecopier)
kirtankhalsa@hotmail.com

Todd P. Norvell
1060 Main Ave.
Durango, CO 81301
(970) 247-8850
Norvelltp@co.laplata.co.us

Alfred A. Park
Cagian Law Firm, P.C.
707 Broadway, NE, Ste. 301
PO Box 7718
Albuquerque, NM 87194-7718
(505) 865-0068
(505) 865-4079 (telecopier)

J. Anne Patterson
300 Carlisle Blvd., SE
Albuquerque, NM 87106
(505) 266-6999
japatterson@justice.com

Thomas E. Perkins
5007 Marquette Ave., NE
Albuquerque, NM 87108
(505) 232-7223

Judy A. Pittman
Pittman Law Firm, P.C.
PO Box 1362
Roswell, NM 88202-1362
(505) 622-0020
(505) 622-0700 (telecopier)
pittmanlaw@hotmail.com

Feliz Angelica Rael
PO Box 7334
Albuquerque, NM 87194-7334
(505) 610-5991
frael@swcp.com

Larry M. Reecer
Law Office of
Larry M. Reecer, P.C.
12400 Menaul Blvd., NE,
Ste. 120 (87112)
PO Box 50069
Albuquerque, NM 87181-0069
(505) 889-8928
(505) 889-4644 (telecopier)
LREECER@qwest.net

Susan K. Rehr
14 Demora Rd.
Santa Fe, NM 87508
(505) 466-2353
skrehr@msn.com

Cosme D. Ripol
201 East Broadway
Farmington, NM 87401
(505) 325-7151
(505) 325-1980 (telecopier)
rcd1007@qwest.net

Jane Rocha de Gandara
Rocha de Gandara Law Firm
505 Main St., SW
Los Lunas, NM 87031
(505) 865-0688
(505) 865-4079 (telecopier)
jrochalaw@aol.com

Roman R. Romero
The Romero Law Firm, P.A.
1001 Fifth St., NW
Albuquerque, NM 87102
(505) 345-9616
(505) 243-8826 (telecopier)

F. Joel Roth
12841 W. Chapala Ct.
Sun City West, AZ 85375
(623) 476-5563

Cydni J. Sanchez
Office of the Public Defender
200 Third St., NW, Ste. 740
Albuquerque, NM 87102-3334
(505) 841-6923
(505) 841-6953 (telecopier)
Cydni.Sanchez@state.nm.us

Maria Eufemia Sanchez-Gagne
Office of the Attorney General
PO Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6112 (telecopier)
Msanchez-gagne@ago.state.nm.us

Mathew John Sandoval, Jr.
City of Las Vegas
PO Box 160
Las Vegas, NM 87701-0160
(505) 454-1401
(505) 426-0279 (telecopier)
mjsandoval@ci.las-vegas.nm.us

Ruth V. Siegel
17655 Village Lane
Lockport, IL 60441
(815) 740-7279
rvslb@yahoo.com

Nicole Vadnais Strauasar
7504 Lamplighter Ln., NE
Albuquerque, NM 87109
(505) 858-1902
(505) 858-1902 (telecopier)
nik7313@aol.com

Cheryl Thompson
9320 Golden Glow Ln., NE
(87113)
PO Box 91493
Albuquerque, NM 87199-1493
(505) 792-2831
martimohr@comcast.net

David K. Thomson
Office of the Attorney General
PO Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6020
(505) 827-6036 (telecopier)
DTThomson@ago.state.nm.us

William Brownlow Towle
Ward & Babb, P.C.
3069 Williston Rd.
South Burlington, VT 05403
(802) 863-0307
(802) 863-4587 (telecopier)
towle@wblawyers.com

Raquel O. Velasquez
PO Box 20601
Albuquerque, NM 87154-0601

Keith Wayne Weaver
825 Madison St., NE
Albuquerque, NM 87110
Kwweaver@aol.com

Matthew John Sandoval, Jr.
City of Las Vegas
PO Box 160
Las Vegas, NM 87701-0160
(505) 454-1401
(505) 426-0279 (telecopier)
mjsandoval@ci.las-vegas.nm.us

Ruth V. Siegel
17655 Village Lane
Lockport, IL 60441
(815) 740-7279
rvslb@yahoo.com

Nicole Vadnais Strauasar
7504 Lamplighter Ln., NE
Albuquerque, NM 87109
(505) 858-1902
(505) 858-1902 (telecopier)
nik7313@aol.com

Cheryl Thompson
9320 Golden Glow Ln., NE
(87113)
PO Box 91493
Albuquerque, NM 87199-1493
(505) 792-2831
martimohr@comcast.net

David K. Thomson
Office of the Attorney General
PO Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6020
(505) 827-6036 (telecopier)
DTThomson@ago.state.nm.us

William Brownlow Towle
Ward & Babb, P.C.
3069 Williston Rd.
South Burlington, VT 05403
(802) 863-0307
(802) 863-4587 (telecopier)
towle@wblawyers.com

Raquel O. Velasquez
PO Box 20601
Albuquerque, NM 87154-0601

Keith Wayne Weaver
825 Madison St., NE
Albuquerque, NM 87110
Kwweaver@aol.com
ORDER

WHEREAS, this matter came on for consideration by the Court upon recommendation of the Board of Bar Examiners to amend Rule 15-405 NMRA, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Richard C. Bosson, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rule 15-405 NMRA of the Rules Governing Admission to the Bar hereby are APPROVED;

IT IS FURTHER ORDERED that the amendments of Rule 15-405 NMRA of the Rules Governing Admission to the Bar shall be effective immediately;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the Rule 15-405 of the Rules Governing Admission to the Bar by publishing the same in the Bar Bulletin and the NMRA.

DONE at Santa Fe, New Mexico, this 12th day of May, 2006.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Petra Jimenez Maes
Justice Edward L. Chávez

15-405. Preparation of questions.
The board shall adopt a policy as to the number, preparation and makeup of the questions. The Board of Bar Examiners may utilize the services of exam writers to prepare bar examination questions, either by arranging for the drafting services of qualified persons, including law school professors, or by using the services of the National Conference of Bar Examiners or other appropriate state or national agencies. The Board of Bar Examiners shall not use any questions prepared by any person who is affiliated with, teaches for or has any interest in a bar exam review course or who is in any way involved with assisting bar exam applicants with their exam preparation. The board, or a committee thereof, shall review and approve each question.
From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-022

Topic Index

Civil Procedure: Conflicts of Laws; Statute of Limitations; Summary Judgment; and Time Limitations

Government: Sovereign Immunity

Judgment: Summary Judgment

Other: Comity

Torts: Public Employee Torts; and Tort Claims Act

LAJUSTA SAM, individually and as personal representative of the Estate of Tyler DEXTER SAM, deceased, and as next friend of BRONTE KIERAN S., CORY DEYOUNG S., and BRITNEY LYNN S., minor children, Plaintiffs-Respondents,

versus

The estate of BENNY SAM, JR., and ARIZONA SCHOOL RISK RETENTION TRUST, INC., an Arizona non-profit corporation, Defendants-Petitioners.

No. 28,426 (filed: April 24, 2006)

ORIGINAL PROCEEDING ON CERTIORARI

JOSEPH L. RICH, District Judge

KYLE MICHAEL FINCH
BRIONES LAW FIRM, P.A.
Farmington, New Mexico

PATRICK J. ASCIONE
JUSTIN D. HEIDEMAN
ASCIONE, HEIDEMAN & MCKAY, L.L.C.
Provo, Utah

DAVID W. PETERSON
KELEHER & MCLEOD, P.A.
Albuquerque, New Mexico

EILEEN DENNIS GILBRIDE
JONES, SKELTON & HOCHULI, P.L.C.
Phoenix, Arizona

for Petitioners

for Respondents

OPINION

PETRA JIMENEZ MAES, JUSTICE

{1} This case arises from an accident that occurred in New Mexico and involved an Arizona government employee. As a matter of first impression, we must determine whether a New Mexico district court should, as a matter of comity, recognize the sovereign immunity of a sister state, Arizona. Petitioners urge us to reverse the Court of Appeals’ findings that neither New Mexico’s nor Arizona’s limits on waiver of sovereign immunity apply to Respondents’ claim and that the claim is not barred by either state’s statute of limitations. Both Arizona and New Mexico have waived sovereign immunity through their respective Tort Claims Acts. See NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2004); ARIZ. REV. STAT. ANN. §§ 12-820 to -823 (1984, as amended through 2002). However, the waiver of sovereign immunity in both states is restrained by strict statutes of limitations that bar suits filed a certain amount of time after the alleged tort. Section 41-4-15(A); ARIZ. REV. STAT. ANN. § 12-821. We hold that, in the interests of comity, New Mexico should extend the Tort Claims Act statute of limitations to states with similar tort claims acts when they are sued in New Mexico district courts. We reverse the Court of Appeals’ decision in this case and affirm, with modification, the district court’s ruling that Respondents’ claim was not timely filed.

BACKGROUND

[2] The tragic accident that gave rise to this case occurred in Gallup, New Mexico. Mr. Benny Sam, Jr. (“Sam”) ran over and killed his four-year-old son while backing out of his driveway. The truck Sam was driving belonged to his employer, the Window Rock Unified School District, an Arizona governmental entity. Sam was authorized to drive the truck home for the weekend, and was moving it out of his driveway to work on his personal vehicle when the accident occurred. Throughout the course of the litigation both sides have assumed that Sam was acting in the course and scope of his employment.

[3] Sam later passed away. Subsequently, his wife, both individually and as personal representative of her son’s estate (“Respondents”), sued Sam’s estate (“the Estate”) and the Arizona School Retention Trust, Inc. (“the Trust”) in the New Mexico District Court of McKinley County. The suit was filed one day prior to exactly three years after the accident occurred. Thus, Respondents’ suit was timely filed if New Mexico’s three-year statute of limitations for general tort actions applied, see NMSA 1978, § 37-1-8 (1976), but the New Mexico Tort Claims Act’s two-year statute of limitations for actions against New Mexico governmental entities would bar the suit if applied to the case. See § 41-4-15(A).

[4] The two original defendants, the Trust and the Estate (collectively, “Petitioners”), each filed separate motions for summary judgment based on different rationales. In two separate rulings the district court judge granted the motions. First, the judge dismissed the suit against the Trust and the Estate (collectively, “Petitioners”), sued Sam’s estate (“the Estate”) and the Arizona School Retention Trust, Inc. (“the Trust”) in the New Mexico District Court of McKinley County. The suit was filed one day prior to exactly three years after the accident occurred. Thus, Respondents’ suit was timely filed if New Mexico’s three-year statute of limitations for general tort actions applied, see NMSA 1978, § 37-1-8 (1976), but the New Mexico Tort Claims Act’s two-year statute of limitations for actions against New Mexico governmental entities would bar the suit if applied to the case. See § 41-4-15(A).

The two original defendants, the Trust and the Estate (collectively, “Petitioners”), each filed separate motions for summary judgment based on different rationales. In two separate rulings the district court judge granted the motions. First, the judge dismissed the suit against the Trust because Respondents failed to comply with Arizona’s notice of claim under Ariz. Rev. Stat. Ann. § 12-821.01(A) (requiring persons with a claim against an Arizona governmental entity or employee to give notice to the entity within one hundred and eighty days after the cause of action accrues). Second, the judge granted summary judgment against Respondents for failing to file the complaint within either the one-year statute of limitations period of the Arizona Tort Claims Act, see Ariz. Rev.
The district judge concluded that Respondents’ action was barred by “the statute of limitations of both Arizona and New Mexico.” This conclusion was based on his legal findings that: (1) the public policy behind both states’ tort claims acts is the same; (2) a “public employee in either state in the same situation would only be subject to a one [sic] or two-year statute” of limitations; and (3) to “allow this suit to go forward . . . would undermine the policies and laws of both Arizona and New Mexico.”

Respondents appealed both rulings to the Court of Appeals. The Court first upheld the district court’s determination that Respondents failed to timely appeal the judge’s order of dismissal against the Trust. Sam v. Estate of Sam, 2004-NMCA-018, ¶ 1, 135 N.M. 101, 84 P.3d 1066. Respondents did not challenge this ruling on appeal and it is deemed abandoned. See Deaton v. Gutierrez, 2004-NMCA-043, ¶ 26, 135 N.M. 423, 89 P.3d 672. Second, under a de novo standard of review, the Court reversed the district court’s determination that either Arizona’s or New Mexico’s tort claims act statute of limitations applied to this case. Sam, 2004-NMCA-018, ¶ 12. It first determined that the Arizona Tort Claims Act was inapplicable because New Mexico courts are “not required to recognize Arizona’s statute of limitations . . . or the sovereign immunity granted to its public employees.” Id. ¶ 13. Second, it held that the New Mexico Tort Claims Act was inapplicable because Sam was not employed by New Mexico and was therefore not covered by New Mexico’s Tort Claims Act. Id. ¶ 14. The Court decided that the correct statute of limitations was New Mexico’s general three-year statute of limitations governing tort actions. Id. ¶ 15; see § 37-1-8. The Court determined that because New Mexico generally applies the law of the place where the wrong or tort occurred, the general three-year statute of limitations was appropriate in this case. Sam, 2004-NMCA-018, ¶ 15 (citing Torres v. State, 119 N.M. 609, 613, 894 P.2d 386, 390 (1995)).

**DISCUSSION**

Petitioners argue that the Court of Appeals erred when it applied the general rule that the law of the place of the wrong controls. They claim that the Court of Appeals should have instead performed a comity analysis to determine whether New Mexico should recognize and apply the Arizona one-year statute of limitations or apply the New Mexico Tort Claims Act two-year statute of limitations to Arizona governmental entities sued in New Mexico. Conversely, Respondents argue that they should instead perform a comity analysis that the New Mexico’s Mandator y Financial Responsibility Act (NMMFRA) evinces a strong state interest in compensating victims of negligent acts and that a three-year statute of limitations would make the determination easy and promote predictability and uniformity. Additionally, they argue that a comity analysis is not warranted in this case, but assert that even if we decide to engage in a comity analysis, public policy would dictate that New Mexico’s general three-year statute of limitations applies.

Whether a district court should extend immunity to a sister state as a matter of comity is an issue of first impression in New Mexico. Comity is a principle whereby a sovereign forum state recognizes and applies the laws of another state sued in the forum state’s courts. The sovereign forum state has discretion whether or not to apply the laws of the other state. In order to fully explore this topic, we will discuss the principles behind comity and what factors a New Mexico court should consider to determine if comity should be extended.

The parties disagree about the preliminary matter of what standard of review an appellate court should apply to this issue. Generally, when the facts of a case are not in dispute, we review the grant or denial of a motion to dismiss de novo. See Self v. United Parcel Serv., Inc., 1998-NMSC-023, ¶ 6, 126 N.M. 396, 970 P.2d 582 (reviewing summary judgment). This includes whether a governmental entity has immunity. See Godwin v. Mem’l Med. Ctr., 2001-NMCA-033, ¶ 23, 130 N.M. 434, 25 P.3d 273 (reviewing the New Mexico Tort Claims Act). Respondents urge us to adopt this standard of review for this case. Petitioners argue that we should adopt a dual standard of review for cases involving a district court’s decision to extend comity. They argue that we should review the district court’s decision to use a comity analysis de novo, and then review a district court’s application of comity for abuse of discretion. They argue that an abuse of discretion standard is appropriate because the analysis is fact-sensitive. See, e.g., Jacquet v. Los Angeles Dep’t of Water & Power, 771 P.2d 1074, 1075 (Utah Ct. App. 1989). This two-tiered standard of review is based on analyses from other state courts and federal circuit courts. See Lee v. Miller County, Arkansas, 800 F.2d 1372, 1376 (5th Cir. 1986); Levert v. Univ. of Ill. at Urbana/Champaign, 857 So. 2d 611, 618 (La. Ct. App. 1st Cir. 2003); Univ. of Ia. Press v. Urrea, 440 S.E.2d 203, 204 (Ga. Ct. App. 1993). We agree with Petitioners and adopt this two-tiered standard of review. Therefore, we must first determine whether the district court used a comity analysis to arrive at the proper standard of review.

The district court’s findings of fact and conclusions of law in this case are brief. Although it appears that Petitioners’ Estate did not challenge this ruling on appeal, we must first determine whether the district court used a comity analysis to arrive at the proper standard of review.

Petitioners argue that if we determine that the district court did not apply a comity analysis we should still affirm the district court under the “right for any reason” doctrine. See Maralex Res., Inc. v. Gilbreath, 2003-NMSC-023, ¶ 13, 134 N.M. 308, 76 P.3d 626. “[A]n appellate court ‘will affirm the district court if it is right for any reason and if affirmance is not unfair to the appellant.’” Id. (quoting Moffat v. Branch, 2002-NMCA-067, ¶ 13, 132 N.M. 412, 49 P.3d 673)).

There is no clear indication that the trial court analyzed this case under the principles of comity. Although it structured its conclusions of law in a way that reflects a comity analysis, it did not do so expressly. Therefore, review of the district court’s decision should be de novo because the district court only stated it was granting a motion for summary judgment. In future cases, we will utilize the approach urged by Petitioners. We will review the appropriateness of a district court’s decision to engage in a comity analysis de novo, but will review the district court’s fact-intensive comity analysis for abuse of discretion.

The seminal cases dealing with when and how a forum state should extend immunity under comity to a sister state sued in its courts are Nevada v. Hall, 440 U.S. 410.
(1979), and Franchise Tax Board of California v. Hyatt, 538 U.S. 488 (2003). Both of these cases stand for the principle that a forum state is not required to extend immunity to other states sued in its courts, but the forum state should extend immunity as a matter of comity if doing so will not violate the forum state’s public policies. The Court of Appeals recognized that New Mexico was not required to extend immunity to Arizona. See Sam, 2004-NMCA-018, ¶ 13. However, it then stated that Arizona’s one-year statute of limitations “is not applicable to actions involving [Arizona] employees when the cause of action accrues in New Mexico.” Id. We review Hall and Hyatt as well as decisions from other state courts that have addressed this issue.

[14] In Hall, 440 U.S. 410, California residents were injured in an automobile accident negligently caused by an employee of the University of Nevada driving a University of Nevada vehicle in California. The plaintiffs sued and won in a California court, where the University of Nevada claimed its damages should be limited to $25,000, the maximum recovery allowed under Nevada’s limited waiver of sovereign immunity through its tort claims act. The United States Supreme Court began by recognizing that no state may be sued in its own court without its permission, unless it has expressly waived its sovereign immunity in some manner. Next, the Court stated that a claim of immunity in another state’s courts is possible, but “must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.” Id. at 416.

[15] The University of Nevada argued in favor of a federally enforced mandate of interstate comity that would require California to honor Nevada’s limited waiver of sovereign immunity. In rejecting the University of Nevada’s argument, the Court found that while the United States Constitution, through the Eleventh Amendment, “places explicit limits on the powers of federal courts to entertain suits against a State;” there is no such limitation on a state court entertaining a suit against another state. Id. at 420. Further, the Court held that the Full Faith and Credit Clause only requires “each State to give effect to official acts of other States,” id. at 411, but “does not require a State to apply another State’s law in violation of its own legitimate public policy.” Id. at 422.

[16] However, the Court stated that nothing prevented a forum state from recognizing another state’s immunity, or limited waiver of immunity, in the forum state’s courts based on comity. Id. at 425. The Court noted the presumption that “the States intended to adopt policies of broad comity toward one another.” Id. This presumption is based on the “intimate union of these states, as members of the same great political family,” and the “deep and vital interests which bind them so closely together.” Id. at 425-26 (quoting Bank of Augusta v. Earle, 38 U.S. 517, 590 (1839)). However, in order to refuse to honor the laws of another state, a forum state only needs to declare that the other state’s law would violate its own legitimate public policy. To require more would allow the citizens of one state to determine the public policy of another. Id. In other words, the Court was stating that it would be “wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability,” as long as doing so did not violate the forum state’s public policy. Id. at 426.

[17] The Court concluded that the waiver of immunity in both states was sufficiently different and to apply Nevada law would violate California’s public policy. California law did not set a cap on the damages an injured person could recover from the state when it waived immunity, while Nevada set the limit at $25,000. Id. at 424. This difference was sufficient for California to justify not extending comity to Nevada. Id. at 427-28.

[18] The Court reaffirmed Hall in Hyatt, 538 U.S. 488. There, a taxpayer, a former California resident living in Nevada, brought an action in Nevada state court against a California tax-collection agency for both negligent and intentional torts. Id. at 490-91. Nevada had waived sovereign immunity for intentional acts by similar Nevada agencies, but had not waived immunity for merely negligent acts. Id. at 492-93. The Nevada Supreme Court denied in part the agency’s writ of mandamus by allowing the taxpayer’s claims of intentional torts to proceed in Nevada’s courts, but dismissing the claims for negligent acts. Id. at 492-94. The United States Supreme Court affirmed this decision, stating that the “Nevada Supreme Court sensitively applied principles of comity with a healthy regard for California’s sovereign status, relying on the contours of Nevada’s own sovereign immunity from suit as a benchmark for its analysis.” Id. at 499.

[19] While the particular issue in this case is new to New Mexico, our courts have used a similar comity analysis in other situations. “Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.” Leszinske v. Poole, 110 N.M. 663, 668, 798 P.2d 1049, 1054 (N.M. Ct. App. 1990) (quoting Societe Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522, 543 n.27 (1987)). In Leszinske, a father sued to gain full custody of his children after his ex-wife married her uncle in Costa Rica. The district court in that case conditioned the award of primary custody to the mother on her entering into a valid marriage with the uncle. Id. at 664. The mother went to Costa Rica to marry her uncle because New Mexico considers marriage between an uncle and a niece to be an invalid marriage. Id. at 664-65. In deciding whether to recognize the Costa Rican marriage that undoubtedly went against the public policy of New Mexico to some degree, the Court of Appeals stated that “the dispositive question is whether the marriage offends a sufficiently strong public policy to outweigh the purposes served by the rule of comity.” Id. at 669. The Court found that recognizing a marriage that was invalid under New Mexico law was not sufficiently offensive to New Mexico public policy to outweigh the principles of comity.

[20] Of course, it is well settled that another state court cannot compel a New Mexico court to dismiss a case or refuse to hear one. See Spear v. McDermott, 1996-NMCA-048, ¶ 48, 121 N.M. 609, 916 P.2d 228 (“[N]either the full-faith-and-credit principle nor the concept of comity requires recognition of an attempt by one court to abate or stay proceedings in a different court.”). This case presents a different issue than was involved in Spear. Here, the issue is whether New Mexico courts should apply Arizona’s statute of limitations or extend New Mexico’s statute of limitations to an Arizona public employee based on the principles of comity, not whether it is compelled to do so. Clearly, Hall establishes that New Mexico courts are not compelled to extend immunity, but rather, they are encouraged to do so if it would not violate New Mexico’s public policy. This is where the Court of Appeals in this case erred. It stated that because New Mexico is not required to recognize Arizona’s statute of limitations, it “is not applicable to actions involving [Arizona public] employees when the cause of action accrues.
in New Mexico.” Sam, 2004-NMCA-018, ¶ 13. By stating that the Arizona statute of limitations was not applicable without further discussion, it is uncertain whether the Court considered the question of comity fully or simply felt that it was incapable of applying Arizona law.

[21] Thus, following Leszinski and the seminal cases from the United States Supreme Court, the question in this case is whether the Arizona Tort Claims Act “offends a sufficiently strong public policy to outweigh the purposes served by the rule of comity.” Leszinski, 110 N.M. at 669, 798 P.2d at 1055. As a general rule, comity should be extended. Only if doing so would undermine New Mexico’s own public policy will comity not be extended.

[22] Several other jurisdictions have considered similar issues to the one we decide today. The courts have applied a variety of factors to determine if the forum state should extend immunity based on comity. The factors assist in determining whether extending immunity through comity would violate the forum state’s public policy. These factors include: (1) whether the forum state would enjoy similar immunity under similar circumstances, see, e.g., Head v. Platte County, Missouri, 749 P.2d 6, 10 (Kan. 1988); (2) whether the state sued has or is likely to extend immunity to other states, see, e.g., Morrison v. Budget Rent a Car Sys., 657 N.Y.S.2d 721, 731 (App. Div. 1997); (3) whether the forum state has a strong interest in litigating the case, see, e.g., Ehrlich-Bober & Co. v. Univ. of Houston, 404 N.E.2d 726, 730 (N.Y. 1980); and (4) whether extending immunity would prevent forum shopping, see, e.g., Newberry v. Ga. Dep’t of Indus. & Trade, 336 S.E.2d 464, 465 (S.C. 1985). We likewise consider each of these factors when determining whether recognizing the sovereign immunity of a sister state would be contrary to the public policy of New Mexico.

[23] First, it is clear that a similar action brought against a New Mexico entity or government employee would be barred by the two-year statute of limitations in the New Mexico Tort Claims Act. See § 41-4-15. Like Arizona, New Mexico waived immunity on this type of claim, but did so with a strict statute of limitations. The New Mexico Tort Claims Act expresses a clear public policy that tort claims against negligent New Mexico governmental entities should be allowed, but only if brought within two years of the date of the alleged tort.

[24] The second factor, whether Arizona would extend immunity to New Mexico, has not been addressed by Arizona’s courts. Thus, it is unclear whether Arizona would extend immunity to this state under a comity analysis. However, we believe that New Mexico has an interest in according immunity by comity in this instance in order to encourage Arizona to extend immunity to a New Mexico governmental entity in the future. When faced with deciding whether to grant New Mexico immunity, Arizona and other states will likely consider our decisional law on the subject of comity. Those states may be reluctant to extend immunity to our state if we have previously declined to extend immunity to a sister state. See Morrison, 657 N.Y.S.2d 721 (when determining whether to extend immunity to South Carolina, the New York court examined the Supreme Court of South Carolina’s decision declining to extend immunity to North Carolina by comity).

[25] Regarding the third factor, New Mexico certainly has an interest in litigating this case, but that interest is tempered by the concept of comity and the New Mexico Tort Claims Act. Respondents’ arguments address this factor. They argue that to apply the Arizona statute of limitations would contravene New Mexico’s public policy of adequately compensating victims of automobile accidents. This public policy is contained in the New Mexico Mandatory Financial Responsibility Act (NMMFRA).

See NMSA 1978, §§ 66-5-201 and -201.1 (1983, as amended in 1998); see also Estep v. State Farm Mut. Auto. Ins. Co., 103 N.M. 105, 108, 703 P.2d 882, 885 (1985) (“[t]he fundamental purpose for the enactment of financial responsibility laws [is] protecting innocent accident victims from financial hardship”). Even Respondents note, however, that the NMMFRA does not specifically apply to this case. The NMMFRA requires automobile insurance to ensure compensation for victims of automobile accidents. Sections 66-5-205 to -208. In this case there was insurance, but the statute of limitations may bar Respondents’ recovery under the insurance policy. While the NMMFRA embodies strong public policy in New Mexico, we believe it must be balanced against the equally clear New Mexico public policy of limiting claims against the government contained in the Tort Claims Act. Section 41-4-2.

[26] Through the Tort Claims Act, our Legislature has determined that it is appropriate to allow persons harmed by the negligent acts of New Mexico public employees to recover, but only if they file suit within two years. Arizona has similarly determined that persons harmed by the negligent acts of Arizona public employees can file suit, but they must do so within one year. New Mexico has a particular interest in providing compensation or access to the courts to residents of the state. We believe that we are faced with a situation similar to that which Nevada faced in Hyatt. In Hyatt, the United States Supreme Court approved of Nevada applying its own limited waiver of immunity to California. Hyatt, 538 U.S. at 499. Nevada recognized that both states waived immunity, but differed in how they waived immunity. Nevada had waived immunity for intentional acts but not for negligent acts, while California retained complete immunity for the agency sued. Id. at 493-94. Therefore, not only was it appropriate for Nevada to grant California immunity, but also to only grant to California what it deemed appropriate for itself.

[27] Similarly, we believe that New Mexico should extend a limited grant of immunity to Arizona because both states have done so through tort claims acts. However, we should only extend New Mexico’s two-year statute of limitations instead of applying Arizona’s one-year statute of limitations. Applying Arizona’s one-year statute of limitations is not in accordance with the public policy behind our own two-year statute of limitations. To apply Arizona’s one-year statute of limitations would violate our own public policy of allowing two years to file suit against a governmental agency. This way, we are extending a limited grant of immunity to a sister state under the principles of comity in accordance with our state’s public policy. Extending New Mexico’s two-year statute of limitations fulfills the principles of comity without violating our own public policy.

[28] Finally, extending New Mexico’s statute of limitations to Arizona governmental
entities will limit forum shopping. While we have decided not to recognize Arizona’s one-year statute of limitations because it is not in accordance with New Mexico’s public policy, we are extending New Mexico’s two-year statute of limitations instead of the general three-year statute of limitations. Although this solution may not completely eliminate forum shopping, we believe it will prevent forum shopping to some degree.

CONCLUSION
{29} While we affirm the district court’s grant of Petitioners’ Motion to Dismiss the Estate, we do so for reasons not addressed by the district court. We reverse the Court of Appeals on this issue. The district court should have applied a comity analysis and concluded that the two-year statute of limitations in the New Mexico Tort Claims Act applies to this case. Because Respondents did not file suit within two years of the accident, their suit is barred.

{30} IT IS SO ORDERED.
PETRA JIMENEZ MAES, Justice

WE CONCUR:
RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
EDWARD L. CHÁVEZ, Justice
STATE OF NEW MEXICO,
Plaintiff-Respondent,
versus
WILLIAM P. BROWN,
Defendant-Petitioner.
No. 28,471 (filed: April 24, 2006)

ORIGINAL PROCEEDING ON CERTIORARI
KEVIN R. SWEAZEA, District Judge

STEPHEN KARL KORTEMEIER
THE KORTEMEIER LAW FIRM
Elephant Butte, New Mexico
for Petitioner

PATRICIA A. MADRID
Attorney General
JACQUELINE R. MEDINA
Assistant Attorney General
Albuquerque, New Mexico
for Respondent

RANDI MCGINN
MCCML, P.A.
Albuquerque, New Mexico
for Amicus Curiae

JERRY TODD WERTHEIM
JONES, SNEAD, WERTHEIM & WENTWORTH, P.A.
Santa Fe, New Mexico
for Amicus Curiae

MELISSA HILL
Corrales, New Mexico
for Amicus Curiae

JOHN BIGELOW
Chief Public Defender
SUE HERRMANN
Appellate Defender
Santa Fe, New Mexico
for Amicus Curiae

NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION

NEW MEXICO PUBLIC DEFENDER DEPARTMENT

OPINION

PETRA JIMENEZ MAES, JUSTICE

[1] Defendant-Petitioner William P. Brown (Brown), an indigent defendant represented by pro bono counsel, sought funding for expert witness fees from the New Mexico Public Defender Department (Department) in the district court. The district court denied Brown’s request for funding, concluding that such funding was available only to indigent defendants represented by the Department. The Court of Appeals affirmed. We reverse. We hold that funding for expert witnesses should extend to those indigent defendants represented by pro bono counsel, in addition to those represented by the Department. This rule applies to the case at bar, similar pending actions, and to cases arising in the future.

Background

[2] Brown was charged with three felony offenses and a misdemeanor offense in magistrate court. Stephen Kortemeier, a private defense attorney, entered his appearance on behalf of Brown. Brown completed an Eligibility Determination for Indigent Defense Services form. The magistrate court found Brown to be indigent and unable to obtain counsel, and ordered the appointment of Gregory Gaudette, a contract attorney for the Department, to represent Brown on the criminal charges. Mr. Gaudette filed an entry of Appearance on behalf of Brown, along with a Notice of Intent to Interview State’s Witnesses. Those were the only documents submitted by Mr. Gaudette in connection with Brown’s case. Further, the record indicates that Mr. Kortemeier, not Mr. Gaudette, was listed as Brown’s attorney of record on several documents. Therefore, it appears that Mr. Kortemeier served continuously as Brown’s attorney since his initial entry of appearance, despite the appointment of Department counsel by the magistrate court.

[3] Brown was bound over to the district court for trial. Mr. Kortemeier filed a Declaration of Counsel stating that he had refunded to Brown his original retainer fee and had agreed to represent Brown without charge. Attached to that statement was an Agreed Order of Indigency, in which the State and Brown stipulated that Brown was indigent and had obtained pro bono representation. The Order provided that Brown was “entitled to all services, including waivers of fees and costs, normally provided by the State of New Mexico to an indigent defendant.”
[4] Upon determining that Brown’s case would require the use of experts, Mr. Kortemeier contacted the Department to request funds for expert witness fees. The Department denied the request on the grounds that it was only required to pay expert witness fees for indigent defendants represented by the Department or attorneys on contract with the Department. Mr. Kortemeier was informed that he was not eligible to become a contract attorney for the Department until the next contract period.

[5] Brown then filed a Request for Authorization to Incur Expenses & Fees in the district court. In that request, Brown asked the court for an order authorizing Brown to incur fees to be paid by the State. At the hearing on the request, the district court judge indicated that he could not order the Department to act without giving it notice and an opportunity to respond and issued an Order to Show Cause against the Department.

[6] The State filed a response to Brown’s request to incur fees, arguing that the court could not order the Department to pay expert witness fees for a criminal defendant not represented by the Department. The district court set a presentment hearing on Brown’s request to incur expenses and fees and the proposed Order to Show Cause against the Department. At the conclusion of the hearing, the district court judge stated that he would not enter an order that interfered with the Department’s management of its budget and its attorneys; if Defendant were to accept Department representation, he would receive attorney representation and an array of services standard to the Department, including expert witness fees; and if Brown wished to continue with private defense counsel, he would have to provide for his own expert witness fees. The judge then issued an order stating the above. The court certified the order for interlocutory appeal, noting that the case involved “a controlling question of law as to which there is substantial ground for difference of opinion and further, that an immediate appeal from this order may materially advance the ultimate termination of this case.”

[7] The Court of Appeals granted interlocutory appeal from the order of the district court, and upheld the district court’s decision. State v. Brown, 2004-NMCA-037, 135 N.M. 291, 87 P.3d 1073. Relying heavily on Subin v. Ulmer, 2001-NMCA-105, 131 N.M. 350, 36 P.3d 441, the Court of Appeals held that the district court had no authority to order the payment of expert witness fees for an indigent defendant who is represented by pro bono defense counsel. Brown appealed.

**Discussion**

[8] Because this case implicates two important constitutional rights, the constitutional right to counsel and the constitutional right to be provided with the basic tools of an adequate defense, our review is de novo. See State v. Attaway, 117 N.M. 141, 145, 870 P.2d 103, 107 (1994) (applying de novo standard of review to constitutional claims).

[9] Brown claims that under the Court of Appeals Opinion, he is being forced to choose between pro bono representation without expert witness funding and Department representation with expert witness funding which, Brown contends, is essentially a choice between the constitutional right to counsel and the constitutional right to be provided with the basic tools of an adequate defense. Brown asserts that such a choice is constitutionally impermissible. Judge Vigil, dissenting below, agreed, stating: “The holding of the majority requires Brown to choose between these constitutional rights. However, it is well settled that forcing a criminal defendant to ‘surrender’ one constitutional right ‘in order to assert another’ is ‘intolerable.’” Brown, 2004-NMCA-037, ¶ 47 (Vigil, J., dissenting) (quoting Simmons v. United States, 390 U.S. 377, 394 (1968)).

[10] The State, in contrast, argues that Brown’s constitutional rights have not been impaired by the denial of funding for expert witnesses by the Department. The State argues that since the Department stood ready to represent Brown, “no one was proposing to deny [Brown] anything to which he was constitutionally entitled,” and asserts that “the test is not whether [Brown] was offended by the choice offered to him, which in his mind, amounts to the denial of the right to counsel of choice, but rather, whether the system meets the State’s constitutional obligations.” The State argues that the administrative system enacted by the Legislature (the Indigent Defense Act and the Public Defender Act, discussed in depth below) establishes the constitutional requirements to be satisfied by the Department, and that the Department has fully complied with those standards. In order to refute Brown’s claims to the contrary, the State goes to great lengths to demonstrate that American jurisprudence has clearly established that the Sixth Amendment merely guarantees the right to counsel, not the right to counsel of choice. The State maintains that Brown was offered the right to counsel through the Department, and thus cannot claim that he has been denied a constitutionally protected right.

[11] Our discussion will analyze these constitutional arguments as addressed by the United States Constitution, the New Mexico Constitution, New Mexico’s legislation, and relevant case law.

[12] The right to counsel has long been recognized as a fundamental right at both the federal and state levels. The Sixth Amendment of the U.S. Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” U.S. CONST. amend. VI. That Sixth Amendment guarantee requires that an indigent criminal defendant be provided with counsel at public expense in order to ensure fairness in his or her trial. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (“[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”). The New Mexico counterpart to the federal rule is embodied in the New Mexico Constitution, which states: “In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel.” N.M. CONST. art. II, § 14.


A needy person . . . is entitled to be represented by an attorney to the same extent as a person having his own counsel and to be provided with the necessary services . . . of representation, including investigation and other preparation. The attorney, services and facilities and expenses shall be provided at public expense for needy persons.

Section 31-16-3(A). A “needy person” is defined as one “who, at the time his need is determined by the court, is unable, without undue hardship, to provide for all or a part of the expenses of legal representation from available present income and assets.” Sec-
The Public Defender Act obligates the Public Defender’s Office to “represent every person without counsel who is financially unable to obtain counsel and who is charged in any court within the district with any crime that carries a possible sentence of imprisonment.” Section 31-15-10(B).

[14] The Public Defender Act provides the administrative framework for accomplishing that objective. Herrera, 106 N.M. at 207, 740 P.2d at 1191. However, our primary question in this case—whether indigent defendants represented by pro bono counsel are constitutionally or statutorily entitled to public funding for expert witness fees—is not addressed by these statutes and remains unanswered.

[15] The fundamental right to counsel has been developed and refined in several ways relevant to the issues presented in this case. The Sixth Amendment right to counsel includes the right of a criminal defendant to the effective assistance of counsel, see Cuyler v. Sullivan, 446 U.S. 353, 344 (1980), and the obligation of states to “provide indigent prisoners with the basic tools of an adequate defense.” Britt v. N.C., 404 U.S. 226, 227 (1971). The United States Supreme Court expanded this principle in Ake v. Oklahoma, 470 U.S. 68, 83 (1985), and declared that an expert witness can constitute a basic tool of an adequate defense. New Mexico has embraced these ideals. In State v. Turner, 90 N.M. 79, 82, 559 P.2d 1206, 1209 (N.M. Ct. App. 1976), the Court of Appeals explicitly acknowledged that the basic tools of an adequate defense must be made available to an indigent defendant, provided that the material requested is necessary to the defense. See also State v. Delgado, 112 N.M. 335, 345, 815 P.2d 631, 641 (N.M. Ct. App. 1991) (recognizing, generally, the right of indigent defendants to be provided with the basic tools of an adequate defense).

[16] To decide the issue of whether the rights of indigent defendants to expert witnesses includes the right to funding to pay for those witnesses when the defendant is represented by a pro bono attorney, we must address two relevant New Mexico cases, Quintana, 115 N.M. 573, 855 P.2d 562 (1993) and Subin, 2001-NMCA-105. At the outset, it is interesting to note that Quintana was decided earlier and enjoyed the full support of the members of this Court, while Subin resulted in a 2-1 split among the Court of Appeals panel in 2001. Neither party in Subin sought certiorari review by this Court.

[17] In Quintana, this Court held that New Mexico courts have the statutory power to order the Public Defender Department to represent a particular defendant when the Department has declined to do so. 115 N.M. at 575, 855 P.2d at 564. Noting the constitutional protections afforded indigent defendants, we stated, “[t]here is no doubt that the judiciary has the inherent authority to guarantee the enforcement of constitutional civil liberty protections in criminal prosecutions.” Id. Further, courts “retain the ultimate authority to determine indigence and the discretionary ability to order the appointment of a public defender when . . . necessary to protect the defendant’s constitutional or statutory rights.” Id. at 578, 855 P.2d at 567.

[18] As mentioned previously, the Court of Appeals relied heavily on Subin in reaching its decision in this case. In Subin, the Court of Appeals held that the district court had neither the constitutional nor statutory authority to order the Department to pay the expert witness fees for an indigent defendant who was represented by counsel paid for by members of the defendant’s family. 2001-NMCA-105, ¶ 4. In reaching that conclusion, the court emphasized that the Department was not declining to represent the defendant and thus was not denying the defendant anything to which she was constitutionally entitled. Id. ¶ 5. Instead, the court asserted that the defendant wished to “pick and choose what services she wanted and from whom” and concluded that “indigent defendants have no right to choose their own counsel or to insist that one attorney be substituted for another.” Id. ¶ 6. The court upheld the Department policy requiring that an individual must be a client of the Department, or represented by an attorney on contract with the Department, in order to utilize Department procedures to receive defense services, including expert witness services. Id. ¶ 4.

[19] The Subin court also cited its reluctance to impose “an unwarranted intrusion into the administrative affairs of another agency.” Id. Based on its practical and prudential concerns, together with its determination that there was no constitutional or statutory authority to rule otherwise, the court held that the district court had erred in ordering the payment of expert witness fees for that indigent defendant. Id. Despite that ruling, the Court of Appeals nonetheless ordered payment of the defendant’s expert witness fees by the Department, reasoning that requiring the defendant to abide by its decision would unduly burden the defendant’s constitutional right to a speedy trial. Id. ¶ 15.

[20] Judge Bustamante dissented in Subin. He stated that where “the constitutional right is clear and the statutory law [i.e., the Indigent Defense Act and the Public Defender Act] is honestly open to interpretation, the courts have an obligation to act.” Id. ¶ 22 (Bustamante, J., concurring in part and dissenting in part). Relying on what he termed the “broader rule” of Quintana, he argued that courts “retain power and inherent authority to act to guarantee the enforcement of constitutional civil liberty protections in criminal prosecutions.” Subin, 2001-NMCA-105, ¶ 20 (Bustamante, J., concurring in part and dissenting in part) (quoting Quintana, 115 N.M. at 575, 855 P.2d at 564). Quoting the district court’s decision which had relied on Quintana, Judge Bustamante wrote: “It seems logical to me that if I can appoint a lawyer to represent a criminal defendant I should be able to insure that that lawyer can have the resources to provide that defense.” Subin, 2001-NMCA-105, ¶ 21 (Bustamante, J., concurring in part and dissenting in part) (quoted authority omitted).

[21] Brown argues that the holdings in Subin and Quintana are contradictory and asserts that Quintana should be the proper precedent for this Court to follow. The State argues that the Court of Appeals below was correct in its assertion that Subin and Quintana were not inconsistent and could be reconciled.

[22] Because there is apparent confusion regarding the holdings of these two cases, we hereby clarify that Quintana stands for the broad proposition that the courts serve as the ultimate guardians of an indigent defendant’s constitutional rights. Subin addressed the situation in which the defendant, although indigent, nonetheless retained paid private counsel and was therefore not entitled to receive Department funding for expert witnesses.

[23] The facts in this case are distinguishable from Subin, because Brown’s counsel is pro bono. We believe, therefore, that this case is more logically an extension of Quintana, rather than a “sequel” to Subin.
In Quintana, this Court explicitly recognized the inherent authority of the district courts to ensure protection of the rights of indigent defendants. Here too, the Court is being asked to ensure the protection of an indigent defendant’s constitutional and statutory rights.

[25] Therefore, we agree that Brown, an indigent defendant represented by pro bono counsel, is entitled both to the constitutional right to counsel and the constitutional right to be provided with the basic tools of an adequate defense. Although Brown was initially appointed a Department attorney, we do not believe that alone is enough to ensure that his constitutional rights are protected. Brown is also constitutionally entitled to be provided with the basic tools of an adequate defense. That right is not contingent upon the appointment of Department counsel; it is inherent under the state and federal Constitutions. We agree with Judge Vigil’s dissenting opinion, that the majority in Brown “fail[ed] to give full recognition to Brown’s constitutional right to Mr. Kortemeier’s representation as his pro bono counsel and his constitutional right as an indigent to obtain the basic tools of an adequate defense at public expense.” Brown, 2004-NMCA-037, ¶ 49 (Vigil, J., dissenting). Thus, we conclude that since Brown’s constitutional rights are compromised by his having been denied public funding for expert witness fees, there is a strong constitutional basis for us to reverse the Court of Appeals. We conclude that the more persuasive and reasoned approach in this case is that argued by Brown. That is, indigent defendants represented by pro bono counsel, or Department counsel should have equal access to expert witness funding provided that the expert witness meets all of the standards promulgated by the Department.

[26] We find additional, albeit secondary, support for our decision from the cases of our sister states. It appears that the major-
cases – – –

28

arose regarding the findings of fact and con

argument. During oral argument, disputes

vation in this Court, we set the matter for oral

its first petition for discipline upon stipula

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cerning the Honorable William A. McBee

the Judicial Standards Commission con

At the time Respondent was reproached,

or pro bono counsel, we afforded the same access to expert witness
unding as other defendants represented by

the Department. More specifically, where

a defendant’s indigence has been conclu

sively established, he or she is entitled to

obtain funding for expert witness fees re

gardless of whether he or she is represented

by the Department, by a contract attorney,

or by a private pro bono attorney, subject, of

course, to the same requirements imposed

on all Department clients. Therefore, each

defendant who seeks to establish his or her

indigence should first obtain the necessary
declaration from the court, as mandated by

the Indigent Defense Act. Once indigence

is conclusively established, each defendant

should utilize the same procedures to ap

ly for funding for expert services from the

Department. Each application should be

subject to identical review with funds dis
dtributed in some objective way, regard

less of whether the defendant is represented

by pro bono counsel, contract counsel, or

the Department, and should be subject to

the standard fee schedule promulgated by

the Department. Treating similarly situated

indigent defendants the same under the law

will promote the “fair administration of

justice” and ensure that constitutional and

statutory obligations are satisfied.

Conclusion

{32} For the reasons discussed above, we

hold that indigent defendants represented

by pro bono counsel are entitled to apply

for and receive expert witness fees from

the Department. This Opinion shall apply

to the case at bar, similar pending actions,

and to cases arising in the future. We re

mand to the district court for proceedings

consistent with this Opinion and order that

Brown’s expert witness fees be paid from

Department funds.

{33} IT IS SO ORDERED.

PETRA JIMENEZ MAES,
Justice

WE CONCUR:

RICHARD C. BOSSON, Chief Justice
PAMELA B. MINZNER, Justice
PATRICIO M. Serna, Justice
EDWARD L. CHÁVEZ, Justice

From the New Mexico Supreme Court

Opinion Number: 2006-NMSC-024

INQUIRY CONCERNING A JUDGE
NO. 2004-011

IN THE MATTER OF HONORABLE WILLIAM A. MCBEE,
District Judge, Fifth Judicial District, New Mexico

FORMAL REPRIMAND AND OPINION
No. 29,265 (filed May 16, 2006)

JAMES A. NOEL, ESQ.
RANDALL D. ROYBAL, ESQ.
Albuquerque, New Mexico
for Judicial Standards Commission

C. BARRY CRUTCHFIELD, ESQ.
LAW OFFICES OF TEMPLEMAN
AND CRUTCHFIELD
Lovington, New Mexico
for Respondent

FORMAL REPRIMAND AND OPINION
PER CURIAM

{1} This matter has come before the Court

twice following disciplinary proceedings in

the Judicial Standards Commission con

cerning the Honorable William A. McBee

(Respondent). After the Commission filed

its first petition for discipline upon stipula

tion in this Court, we set the matter for oral

argument. During oral argument, disputes

arose regarding the findings of fact and con

clusions of law issued by the Commission,

which Respondent ostensibly stipulated to

in a contemporaneously filed stipulation

greement and consent to discipline with

the Commission. As a result, upon request

of the Commission’s general counsel, we

remanded this matter to the Commission

for further proceedings.

{2} Upon remand, the Commission’s
general counsel, who was the examiner

assigned to prosecute the disciplinary charges

against Respondent, filed a motion for order
to show cause why Respondent should not

be held in contempt of the Commission for

his alleged intentional misrepresentation

of material facts during the hearing before

this Court. The Commission also amended

its notice of formal proceedings against

Respondent to add a second count alleging

violation of Commission rules and the Code

of Judicial Conduct based on the same

conduct at issue in the contempt motion.

Both the motion and the second count of

the amended notice of formal proceedings

remain pending before the Commission

and are not before this Court at this time.

Accordingly, we express no opinion on the

merits of those pending proceedings.

{3} Although the proceedings against

Respondent remain pending before the

Commission, the Commission neverthe

less filed with this Court a second petition

dource upon stipulation, which

cluded findings of fact and conclusions

of law based on a second stipulation agree

ment and consent to discipline between

the Commission and Respondent. The

pertinent findings of fact are summarized

below. Following a second hearing before

this Court, we granted the stipulated peti

tion and ordered the stipulated discipline

against Respondent. Among other things,

we ordered that Respondent receive a pub

ic reprimand, which we now issue in the

form of this opinion.

FACTUAL BACKGROUND

{4} These proceedings are the result of ac-
tions Respondent took in relation to a criminal proceeding filed in the Fifth Judicial District, where Respondent was at all times relevant to this matter, and is currently, a sitting district court judge. Specifically, the State of New Mexico filed a criminal information charging Tami Busch with two felony counts of trafficking cocaine and five felony counts of distribution of methamphetamine. The case was initially assigned to Judge Gary L. Clingman, who was excused from the case by Ms. Busch.

The following day, Respondent was assigned the case. Respondent did not recuse himself from the case at that time. However, during the course of these proceedings Respondent stipulated “that he was aware that presiding over [Ms. Busch’s] case could give, at a minimum, the appearance to a reasonable person that Respondent was not impartial in that matter on the basis of his personal relationship with Max Proctor, boyfriend to, and attorney for, [Ms. Busch], who subsequently became [Ms. Busch’s] husband.”

At the arraignment, Ms. Busch pled no contest to all seven felony counts filed against her. Her plea was accepted at that time but did not contain an agreement as to sentencing, and Respondent ordered a pre-sentence report at the conclusion of the hearing. The report concluded that Ms. Busch “was a drug dealer” and should be “held accountable for her actions.” The pre-sentence report recommended sentencing Ms. Busch to 18 years for the cocaine charges and 15 years for the methamphetamine charges, to run consecutively for a total of 33 years. The report further recommended suspending all but 5 years, to be served in the Penitentiary of New Mexico, followed by 2 years mandatory parole.

Upon review of the pre-sentence report and all factors surrounding the case, Respondent indicated at a sentencing hearing the following week that he would consider assigning Ms. Busch to participate in a new program, the Lea County Family Drug Court, in lieu of incarceration. However, Respondent continued the hearing to a future unspecified date because the Lea County Family Drug Court was not yet an available sentencing alternative for Ms. Busch.

Approximately two months later, the chief judge for the Fifth Judicial District, the Honorable Jay Forbes, met with Respondent to discuss whether it would be proper for Respondent to preside over Ms. Busch’s case because of the appearance of a personal bias. As the result of the meeting, they agreed that Respondent’s continued involvement in Ms. Busch’s case gave, at a minimum, the appearance that his integrity and impartiality was impaired. Respondent therefore recused from the case one week later.

Following Respondent’s recusal, the case was reassigned to Judge William P. Lynch, who set the matter for sentencing. Prior to the sentencing hearing, Ms. Busch requested that the State be bound by Respondent’s comments during the previous sentencing hearing regarding family drug court. Specifically, Ms. Busch wanted to require Judge Lynch to order family drug court as a sentencing alternative for her. However, at the sentencing hearing, Judge Lynch indicated that he was not bound by Respondent’s consideration of family drug court. At that point, Ms. Busch requested to withdraw her plea to all charges, since she pled no contest believing she would avoid incarceration and be sentenced to family drug court. Judge Lynch indicated that he was not inclined to allow Ms. Busch to withdraw her plea because there was no official court record memorializing any agreement on sentencing associated with her no contest plea. Nevertheless, Judge Lynch continued the sentencing hearing to allow Ms. Busch time to file any motions she believed were necessary to support her position that she should be sentenced to family drug court.

When the sentencing hearing resumed, Ms. Busch argued that Respondent had already sentenced her to family drug court, that Respondent had improperly recused himself from her case, and that her case was not properly assigned to Judge Lynch for sentencing purposes. Shortly after the sentencing hearing Judge Lynch recused himself from the case for procedural reasons and issued an order expressing concern that “Ms Busch [through her counsel] seemed unusually well-informed about matters outside the record in [her] case.” Specifically, Judge Lynch noted that:

Defendant Busch [through her counsel] told me that, if I recuse, Judge McBee will enter an order that will withdraw the recusal he filed as being improvidently ordered. Defendant Busch further told me that Judge McBee does not think he should have recused from this case. Perhaps there was no ex parte contact because the case was no longer pending before Judge McBee, or perhaps

Judge McBee thought no party would gain a procedural or tactical advantage as a result of the communications. Because Assistant District Attorney Terry Haake told me that he was not privy to those conversations, the conversations raise questions [of propriety] in my mind.

Consistent with what Judge Lynch noted in his order, Respondent subsequently revoked his recusal from Ms. Busch’s case in contravention of the agreement Respondent reached with Chief Judge Forbes. Respondent also accepted jurisdiction over sentencing, despite having acknowledged that his participation in Ms. Busch’s case, at a minimum, gave the appearance of impropriety. Respondent now admits that his revocation of recusal and acceptance of jurisdiction in Ms. Busch’s case gave, at a minimum, the appearance to a reasonable person that his integrity and impartiality were impaired. Nevertheless, Respondent ultimately deferred Ms. Busch’s sentence for five years, ordered that she be placed on two years supervised probation, and allowed her to enroll in the Lea County Family Drug Court with the last three years of her deferral to be on unsupervised probation.

DISCUSSION

As Respondent concedes, his conduct violated several provisions of the Code of Judicial Conduct and constitutes willful misconduct in office. Indeed, at every turn, the choices Respondent made with regard to Ms. Busch’s case were in conflict with his obligations under the Code of Judicial Conduct. And at the center of it all was Respondent’s unwillingness to acknowledge the appearance of personal bias in favor of Ms. Busch and his failure to take action to eliminate any appearance of impropriety arising from his participation in Ms. Busch’s case.

For example, from the outset, Respondent should have recused when he was assigned to Ms. Busch’s case in light of his personal relationship with her counsel and his acknowledgment that his continued involvement in the case would foster the appearance of impropriety. Instead, Respondent engaged in persistent attempts to remain involved in Ms. Busch’s case even though he knew, and agreed, that he should not. By failing to step aside even though he knew he should, Respondent’s conduct breached several fundamental ethical duties that every judge is obligated to uphold under the Code of Judicial Conduct.
See Rule 21-100 NMRA (“A judge shall participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.”); Rule 21-200(A) NMRA (“A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”); Rule 21-200(B) NMRA (“A judge shall not allow family, social, political or other relationships to influence the judge’s judicial conduct or judgment.”); Rule 21-400(A)(1) NMRA (“A judge is disqualified and shall recuse himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where the judge has a personal bias or prejudice concerning a party or a party’s lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding.”).

{14} We recognize that Respondent eventually conceded that his continued involvement in Ms. Busch’s case would create, at a minimum, the appearance of impropriety. In fact Respondent initially agreed to recuse from the case after his meeting with Chief Judge Forbes. But by ultimately breaching that agreement and reinserting himself in Ms. Busch’s case, Respondent again displayed an ignorance of, or indifference to, basic judicial responsibilities embodied in our Code of Judicial Conduct. See Rule 21-300(C)(1) NMRA (“A judge shall diligently discharge the judge’s administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration and should cooperate with other judges and court officials in the administration of court business.”). And by temporarily recusing only to reassert jurisdiction over Ms. Busch’s case, even though he knew and agreed he should not, Respondent also breached his duty to perform his adjudicative responsibilities in a prompt, efficient, and fair manner. See Rule 21-300(B)(8) NMRA (“A judge shall dispose of all judicial matters promptly, efficiently, and fairly.”)

{15} Perhaps most troubling are the indications that Respondent may have engaged in ex parte communications concerning his plans to reassert control over the sentencing of Ms. Busch. As noted above, Judge Lynch learned through Ms. Busch’s attorneys that Respondent wanted to revoke his initial recusal and reassert jurisdiction over the case. But because the prosecutor was not aware of Respondent’s plans, Judge Lynch was rightly concerned that Respondent may have engaged in ex parte communications. As evidenced by Respondent’s conceded violations of the Code of Judicial Conduct, such actions are plainly at odds with a judge’s duty to uphold the integrity and impartiality of the judicial system. See Rule 21-300(B)(7) NMRA (“A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.”). Although the prosecution did not object to Respondent’s decision to revoke his recusal and ultimately accepted Respondent’s authority to assume control over the sentencing of Ms. Busch, it does not ameliorate Respondent’s ethical lapses nor does it make legitimate Respondent’s ill-conceived plan to reassert control over Ms. Busch’s case. See Rule 21-400(C) NMRA (providing that a judge who should be disqualified under the terms of the Code may ask the parties to agree to waive disqualification unless the basis for disqualification is personal bias or prejudice).

{16} In light of the foregoing, we agree that the stipulated disciplinary measures for Respondent’s violations of the Code of Judicial Conduct are appropriate. Accordingly, Respondent, the Honorable William A. McBee, is hereby disciplined as follows:

a. Respondent shall receive a public reprimand, which shall be published in the Bar Bulletin;

b. Respondent shall recuse from the matter of State v. Tami Busch, CR-2002-378, as well as any additional current or future matters involving Ms. Busch, and all matters coming before Respondent in which attorney Max Proctor is a party or serves as counsel;

c. Respondent shall disclose to all parties appearing before him in matters in which attorney C. Barry Crutchfield appears as either a party or counsel to a party, all instances in which Mr. Crutchfield represented Respondent;

d. Respondent shall abide by all terms and conditions of the second stipulation and consent to discipline as well as the Code of Judicial Conduct;

e. Respondent shall abide by all orders, directives, guidelines, agreements, and rules issued by, or entered into with, the Chief Judge of the Fifth Judicial District;

f. Respondent shall pay a $1,000.00 fine to a non-profit drug treatment organization or affiliated state agency upon approval by this Court of the intended recipient;

g. Respondent shall pay $2,500.00 in cost reimbursement to the Judicial Standards Commission on or before November 30, 2005, by certified check made payable to the State of New Mexico. Respondent shall promptly file proof of payment with the Commission.

h. Respondent shall be suspended for seven (7) days without pay on or before February 2, 2006, in consultation with the Human Resources Division of the Administrative Office of the Courts;

i. Respondent shall be suspended for an additional thirty (30) days without pay, which shall be deferred for a period of one year and which shall be dismissed upon successful completion of a twelve-month (12) probationary period during which he shall have a mentor who shall monitor Respondent’s docket and provide periodic reports to the Judicial Standards Commission. Upon successful completion of probation, the mentor shall certify to the Commission that Respondent has completed his probation. The thirty-day (30) suspension shall be imposed only by this Court by order following notice and opportunity to be heard; and

j. Respondent shall be held in contempt of the Judicial Standards Commission should he fail to comply with any one of the conditions and terms contained in this formal reprimand and opinion, the second stipulation agreement and consent to discipline, or the amended order of discipline entered by this Court on November 2, 2005.

{17} IT IS SO ORDERED.

Chief Justice Richard C. Bosson
Justice Pamela B. Minzner
Justice Patricio M. Serna
Justice Edward L. Chávez
Judge A. Joseph Alarid (sitting by designation)
OPINION
LYNN PICKARD, JUDGE

[1] Defendant appeals his conviction for one count of criminal sexual penetration of a minor (CSPM). Defendant contends that (1) the trial court erred in admitting Defendant’s videotaped confession over a defense objection that the confession was involuntary; (2) the trial court erred in declaring a mistrial, and because the mistrial ruling was erroneous, Defendant’s retrial should not have been granted due to the lack of manifest necessity. Defendant’s apparent theory was as follows: in the absence of a mistrial, the six-month rule would have run on August 12, 2003; the mistrial ruling was error; therefore, the six-month rule kept running despite the mistrial, and any subsequent prosecution would be untimely.

[7] On December 4, 2003, this Court filed a notice of proposed summary disposition. We proposed to affirm on the ground that the trial court had not abused its discretion in declaring the mistrial. Rather than responding to the notice, Defendant filed a motion to withdraw the appeal. On February 5, 2004, we granted Defendant’s motion, ordering mandate to issue immediately. The mandate was issued on February 20 and filed in the district court on February 23.

[8] In the meantime, the trial court proceeded with Defendant’s trial. There were at least four pretrial conferences and motion hearings in late 2003 and early 2004. The trial was held on February 18, 2004. At trial, the victim and her mother testified, and the videotaped confession was played for the jury. Defendant was convicted of one of the three counts of CSPM and sentenced to eighteen years.

DISCUSSION
1. Defendant’s Confession Was Voluntary

[9] Defendant first argues that the trial court violated his due process rights by admitting his videotaped confession because the confession was involuntary. A confession is involuntary only if official coercion has occurred. State v. Munoz, 1998-NMSC-048, ¶ 21, 126 N.M. 535, 972 P.2d 847. Official coercion occurs when “a defendant’s will has been overborne and his capacity for self-determination [has been] critically impaired.” Id. ¶ 20 (internal quotation marks and citation omitted). If, however, the confession is “the product of an essentially free and unconstrained choice by its maker,” it may be used against the defendant without offending due process. Id. ¶ 21 (internal quotation marks and citation omitted). On appeal, we review the totality of the circumstances to determine as a threshold matter of law whether the State has proved by a preponderance of the evidence that Defendant’s confession was voluntary. Id. ¶ 23.

[10] Defendant argues that the following facts show involuntariness: (1) the questioning occurred late at night and Defendant was tired; (2) the questioning officer repeatedly asserted that the State would have a strong case against Defendant

Facts

[2] On the evening of September 24, 2002, the five-year-old victim reported to her mother that Defendant had molested her. The mother called the police, and at about 11:00 p.m., officers went to Defendant’s house to question him. Defendant agreed to go to the police station for questioning. Defendant was given Miranda warnings and read and signed a waiver indicating that he understood his rights. Defendant was questioned, beginning just before midnight, for between one and two hours. Defendant eventually confessed to one incident of molestation. We provide further detail about the confession in our analysis below.

[3] Defendant was arraigned on November 12, 2002, and charged with three counts of CSPM. The trial court granted an extension of time under Rule 5-604 NMRA to August 12, 2003. Defendant’s trial was set for August 7, 2003. On that day, the trial court began jury selection. In the course of questioning the potential jurors, defense counsel apparently asked a question regarding whether jurors thought a person might make a false confession if coerced. In doing so, defense counsel made reference to the eighteen-year sentence that is possible upon a conviction of first degree CSPM. Counsel also stated that Defendant would spend “the rest of his life in prison” if convicted.

[4] Immediately after these remarks, the State moved for a mistrial on the theory that the venire was tainted because the jurors would know the possible consequences of a guilty verdict. The State argued that this knowledge would be problematic in light of the standard jury instruction that jurors are not to consider the consequences of their verdict. The trial court allowed defense counsel an opportunity to rehabilitate the venire, but ultimately declared a mistrial, finding manifest necessity because the panel was beyond rehabilitation.


[6] In the docketing statement for that appeal, Defendant argued that the mistrial should not have been granted due to the lack of manifest necessity. Defendant’s apparent theory was as follows: in the absence of a mistrial, the six-month rule would have run on August 12, 2003; the mistrial ruling was error; therefore, the six-month rule kept running despite the mistrial, and any subsequent prosecution would be untimely.

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DISCUSSION
1. Defendant’s Confession Was Voluntary

[9] Defendant first argues that the trial court violated his due process rights by admitting his videotaped confession because the confession was involuntary. A confession is involuntary only if official coercion has occurred. State v. Munoz, 1998-NMSC-048, ¶ 21, 126 N.M. 535, 972 P.2d 847. Official coercion occurs when “a defendant’s will has been overborne and his capacity for self-determination [has been] critically impaired.” Id. ¶ 20 (internal quotation marks and citation omitted). If, however, the confession is “the product of an essentially free and unconstrained choice by its maker,” it may be used against the defendant without offending due process. Id. ¶ 21 (internal quotation marks and citation omitted). On appeal, we review the totality of the circumstances to determine as a threshold matter of law whether the State has proved by a preponderance of the evidence that Defendant’s confession was voluntary. Id. ¶ 23.

[10] Defendant argues that the following facts show involuntariness: (1) the questioning occurred late at night and Defendant was tired; (2) the questioning officer repeatedly asserted that the State would have a strong case against Defendant

Facts

[2] On the evening of September 24, 2002, the five-year-old victim reported to her mother that Defendant had molested her. The mother called the police, and at about 11:00 p.m., officers went to Defendant’s house to question him. Defendant agreed to go to the police station for questioning. Defendant was given Miranda warnings and read and signed a waiver indicating that he understood his rights. Defendant was questioned, beginning just before midnight, for between one and two hours. Defendant eventually confessed to one incident of molestation. We provide further detail about the confession in our analysis below.

[3] Defendant was arraigned on November 12, 2002, and charged with three counts of CSPM. The trial court granted an extension of time under Rule 5-604 NMRA to August 12, 2003. Defendant’s trial was set for August 7, 2003. On that day, the trial court began jury selection. In the course of questioning the potential jurors, defense counsel apparently asked a question regarding whether jurors thought a person might make a false confession if coerced. In doing so, defense counsel made reference to the eighteen-year sentence that is possible upon a conviction of first degree CSPM. Counsel also stated that Defendant would spend “the rest of his life in prison” if convicted.

[4] Immediately after these remarks, the State moved for a mistrial on the theory that the venire was tainted because the jurors would know the possible consequences of a guilty verdict. The State argued that this knowledge would be problematic in light of the standard jury instruction that jurors are not to consider the consequences of their verdict. The trial court allowed defense counsel an opportunity to rehabilitate the venire, but ultimately declared a mistrial, finding manifest necessity because the panel was beyond rehabilitation.


[6] In the docketing statement for that appeal, Defendant argued that the mistrial should not have been granted due to the lack of manifest necessity. Defendant’s apparent theory was as follows: in the absence of a mistrial, the six-month rule would have run on August 12, 2003; the mistrial ruling was error; therefore, the six-month rule kept running despite the mistrial, and any subsequent prosecution would be untimely.

[7] On December 4, 2003, this Court filed a notice of proposed summary disposition. We proposed to affirm on the ground that the trial court had not abused its discretion in declaring the mistrial. Rather than responding to the notice, Defendant filed a motion to withdraw the appeal. On February 5, 2004, we granted Defendant’s motion, ordering mandate to issue immediately. The mandate was issued on February 20 and filed in the district court on February 23.

[8] In the meantime, the trial court proceeded with Defendant’s trial. There were at least four pretrial conferences and motion hearings in late 2003 and early 2004. The trial was held on February 18, 2004. At trial, the victim and her mother testified, and the videotaped confession was played for the jury. Defendant was convicted of one of the three counts of CSPM and sentenced to eighteen years.

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[10] Defendant argues that the following facts show involuntariness: (1) the questioning occurred late at night and Defendant was tired; (2) the questioning officer repeatedly asserted that the State would have a strong case against Defendant
based on physical evidence, but no physical evidence was presented at trial; and (3) the officer repeatedly assured Defendant that if he confessed, he would get treatment and a short prison term, but if he refused to confess, he would get an eighteen-year sentence. We address these issues in order, relying, as do the parties, on the contents of the videotaped confession.

{11} Defendant’s first argument is that his fatigue at the time of the interview contributed to the involuntariness of his confession. Defendant notes that it was late at night, that he had gotten little sleep the night before, and that he had worked a full day. As stated, the test for voluntariness is whether official coercion occurred. While a finding that officers took advantage of a defendant’s fatigue or weakened mental state might be relevant, the fact that a defendant was tired does not in itself resolve the issue of whether a confession was involuntary. See People v. Valdez, 969 P.2d 208, 213 (Colo. 1998) (en banc) (“Absent evidence that the officers deprived [the defendant] of food and rest as a means of physical punishment, the fact that [the defendant] happened to be hungry and tired does not support a conclusion that his statements were involuntary.”); Commonwealth v. Fernette, 500 N.E.2d 1290, 1294 (Mass. 1986) (upholding trial court’s finding of voluntariness where “[t]he judge found that even if the defendant were tired and hungry . . . that did not necessarily make the statement involuntary,” and where the defendant’s manner of speech and responses to questions on tape of confession indicated voluntariness); United States v. DiLorenzo, 1995 WL 366377, at *8 (S.D.N.Y. June 19, 1995) (unpublished) (“[A] claim that a defendant was exhausted or suffering from the effects of alcohol is not, in the absence of coercive law enforcement activity, sufficient to characterize his confession as involuntary.”).

{12} Defendant does not argue that the interviewing officer took advantage of his fatigue. Nor does he argue that he was not able to understand the officer’s questions or think rationally due to his fatigue. Our review of the confession indicates that while Defendant did tell the officer that he was tired on several occasions, at no point did he ask the officer to terminate the interview or otherwise indicate that he was concerned about proceeding due to fatigue. Moreover, Defendant’s demeanor indicates that he was not too tired to proceed. At all times, he appears alert and responsive to the officer’s questions. Under these circumstances, we hold that Defendant’s fatigue does not contribute to a finding of involuntariness.

{13} Defendant next argues that the interviewing officer misled Defendant regarding the physical evidence in the case. His brief states, “Throughout the interview, the interviewing officer asserted that the state had a strong case against him—based on the physical evidence.” We first note that while such misrepresentations, if supported by the record, are relevant to the voluntariness inquiry, they do not necessarily invalidate a confession. See, e.g., Frazier v. Cupp, 394 U.S. 731, 737, 739 (1969) (noting that while it was relevant that police had falsely told the defendant that co-conspirator had already confessed, such circumstances were “insufficient . . . to make this otherwise voluntary confession inadmissible”); Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992) (explaining why official deceit about the strength of the case against a defendant does not necessarily rise to the level of official coercion).

{14} More importantly, the record does not support Defendant’s contentions. Defendant does not point to any specific instances during the interview where the officer misrepresented the evidence. We have reviewed the videotape, and we note only the following four instances where the officer referred to the evidence. First, near the beginning of the interview, the officer stated,

I have a pretty good case against you, okay? Right now in the other room here just across the hallway there’s a rack in there, and it’s a stainless steel rack and it’s where we put items of clothing that are involved in circumstances like this, okay? And it’s my opinion that I’m going to find saliva from you on that clothing.

Second, after Defendant had denied any inappropriate behavior, the officer asked, “Why then would I be in possession of panties belonging to [the victim] that I think I’m gonna find your DNA on?” Third, the officer stated that if Defendant was not going to tell the truth and admit what he had done, then he “shouldn’t have given [the victim] her panties back.” Finally, the officer asked the following question: “What’s gonna happen when they pull your DNA from your saliva off of the inside of her panties?” He then explained how saliva can mix with bodily fluids from the victim and would be detectable on clothing.

{15} We disagree with Defendant that these comments constitute police deception about the strength of the physical evidence. The first time the officer mentioned the physical evidence, he stated only that it was his “opinion” that the evidence would incriminate Defendant. None of the officer’s references constitute affirmative statements that incriminating evidence had been found. Rather, all of the statements clearly indicate that scientific testing had not yet been performed on the clothing. Under these circumstances, we cannot say that the officer made untruthful statements about the physical evidence that would contribute to a finding that the confession was involuntary.

{16} Finally, Defendant argues that his confession was involuntary because he was repeatedly promised treatment and a short sentence if he confessed and a lengthy sentence if he did not. Early in the interview, the officer read Defendant the criminal sexual penetration (CSP) statute, see NMSA 1978, § 30-9-11 (2003), and the criminal sexual contact of a minor (CSCM) statute, see NMSA 1978, § 30-9-13 (2003). The officer then pointed out that CSP, when committed on a child under thirteen, is a first degree felony that can carry a prison sentence of eighteen years. See NMSA 1978, § 31-18-15 (2005) (providing a basic sentence of eighteen years for a first degree felony). The officer also pointed out that CSCM carries a mandatory minimum of three years’ imprisonment. See § 30-9-13(B).

{17} Defendant argues that the officer implied that Defendant would get the lesser of these two sentences if he confessed. However, the statements to which Defendant refers mention either a lengthy prison sentence or treatment, not a lengthy sentence or a short sentence. We reproduce two of the statements by way of example.

And then all of this story about “I didn’t do anything” . . . makes you look like a person who is not remorseful. It makes you look like a predator. . . . You’re making a mistake. I think you need help. If you don’t see that, tell me. Say, “Hey I think what I’m doing is okay,” and then this discussion is over and I’ll go about my business of making sure that you spend the next eighteen years in prison. I assure you that that’s what I’ll do, because that’s what’s best for everybody involved.

Then, the officer indicated that if Defendant confessed, he would get treatment.
If you’re somebody that has a problem and you want help overcoming this problem, ‘cause it can be done, it can be fixed. If you’re a person that wants that help, you’re the only one that can tell me. “Hey, I need help[,]” and I’ll get you that help. I’ll make sure that you get the treatment you need so that this never happens again.

[18] After reviewing the tape in its entirety, we agree that the overarching impression left by the officer’s statements was that Defendant would get treatment if he confessed. However, we disagree that the officer implied that Defendant would get treatment instead of prison time or made any inappropriate promises regarding conviction or sentencing that would render the confession involuntary.

[19] In State v. Tindle, 104 N.M. 195, 718 P.2d 705 (Ct. App. 1986), this Court explained when a promise regarding leniency could make a confession involuntary. We began by noting that an express promise of leniency “renders a confession involuntary as a matter of law.” Id. at 199, 718 P.2d at 709. We then held that if a promise is implied, the promise is only one factor to be considered in the totality of the circumstances analysis. See id.

[20] The statements made in this case are certainly not express promises of leniency. We doubt that they even rise to the level of implied promises of leniency. While the officer repeatedly stated that Defendant should confess in order to get needed treatment, Defendant has not cited, nor have we found, any point in the interview where the officer promised Defendant that he would get a lesser sentence, such as the three-year minimum sentence provided for in the CSCM statute, if he confessed. Moreover, the officer never stated that Defendant would receive treatment instead of prison time. In fact, at the end of the interview, Defendant acknowledged that he would be spending some time in prison. Thus, we hold that the statements regarding treatment and prison time, while marginally persuasive, do not contribute materially to a showing that Defendant’s confession was involuntary. Cf. State v. Cooper, 1997-NMSC-058, ¶¶ 48-49, 124 N.M. 277, 949 P.2d 660 (holding confession voluntary where officer responded to the defendant’s question by stating that “in his experience, first offenders who cooperated were less likely to go to jail than other defendants”).

[21] Under the totality of the circumstances analysis, we hold that the videotape shows that Defendant’s confession was voluntary. Despite Defendant’s fatigue and the officer’s suggestion that he should confess in order to get treatment, we cannot say that Defendant’s “will [was] overborne and his capacity for self-determination critically impaired.” See Munoz, 1998-NMSC-048, ¶ 20 (internal quotation marks and citation omitted). Thus, we hold that the State proved the voluntariness of Defendant’s confession by a preponderance of the evidence and the trial court did not err in admitting it.

2. Defendant’s Trial Was Timely Under Rule 5-604 Because Even an Erroneous Mistrial Order Causes the Six-Month Rule to Begin Anew

[22] Defendant next argues that the trial court erred in declaring a mistrial. Consequently, Defendant argues, the six-month rule kept running despite the mistrial, and his eventual trial was untimely.

[23] Rule 5-604(B), known as the “six-month rule,” dictates that a criminal trial must be commenced no more than six months after the latest of several enumerated events occurs. Subsection (B)(3) states that if a mistrial is declared, the six months begins to run on the date that the order declaring a mistrial is filed. The rule also states that if the trial has not been commenced within the relevant time limits, “the information or indictment . . . shall be dismissed with prejudice.” Rule 5-604(F).

[24] As explained above, Defendant was initially scheduled to be tried on August 7, 2003, and, pursuant to an extension granted by the trial court, the six-month period mandated by the rule would have expired on August 12, 2003. On August 7, 2003, following jury selection but before the jury had been sworn in, the trial court found manifest necessity and declared a mistrial, due to statements made by defense counsel.

[25] Defendant acknowledges that ordinarily, the six months starts to run anew upon the filing of an order declaring a mistrial. However, Defendant argues, the trial court erred in granting the mistrial, and thus the rule did not begin to run anew. If this was the case, the six-month period expired on August 12, 2003, and Defendant’s subsequent retrial on February 18, 2004, was untimely. Defendant acknowledges that he filed a notice of appeal from the order granting a mistrial, and he agrees that ordinarily when an appeal is filed, Rule 5-604(B)(4) dictates that the six-month period begins to run anew when the mandate from the appellate court is filed in the district court. Defendant argues, however, that the appeal could not have “reset” the clock because the six months had already run out on August 12, 2003, before the notice of appeal was filed. We reject Defendant’s arguments.

[26] The six-month rule is a “bright-line rule, designed to assure prompt disposition of criminal cases.” State v. Jaramillo, 2004-NMCA-041, ¶ 1, 135 N.M. 322, 88 P.3d 264 (internal quotation marks and citation omitted). However, “the rule is to be read with common sense and not to effectuate technical dismissals.” Id.

[27] In this case, a literal reading of the rule, a common sense interpretation of it, and policy concerns all require us to hold that the mistrial operated to restart the six-month rule, making Defendant’s eventual trial timely. First, a literal reading of the rule defeats Defendant’s arguments. The rule states that the six months begin to run upon “the date [a mistrial] order is filed.” Rule 5-604(B)(3). The rule does not make any distinction between those orders granting a mistrial that are later found to be proper and those that are not. It simply states that the order commences the six-month period. Thus, a literal interpretation of the rule supports our holding.

[28] Second, common sense dictates a holding against Defendant under these circumstances. Applying the common sense approach, past cases have held against defendants despite a delay that technically violates the rule where (1) the delay inures to the benefit of the defendant or (2) the defendant acquiesces in the delay or fails to raise the issue of the six-month rule in a timely manner. See State v. Mendoza, 108 N.M. 446, 449-50, 774 P.2d 440, 443-44 (1989) (holding no violation where delay was for purposes of evaluating the defendant’s competency, which evaluation benefited the defendant, also taking into account failure to raise issue for nearly six months following technical expiration of the period), modified on other grounds as recognized in County of Los Alamos v. Beckman, 120 N.M. 596, 904 P.2d 45 (Ct. App. 1995); State v. Sanchez, 109 N.M. 313, 316-17, 785 P.2d 224, 227-28 (1989) (holding no violation where the defendant acquiesced in delay due to plea bargain, which delay inured to his benefit); Jara-
millo, 2004-NMCA-041, ¶ 15 (holding no violation of rule where the defendant acted as though the co-defendant’s appeal would apply to him and stay the rule; also noting that the defendant failed to raise the issue on at least four occasions after the rule had technically run).

[29] In this case, we acknowledge that the delay caused by the mistrial did not inure to Defendant’s benefit. Defendant argued vehemently against the mistrial, and we do not see how it benefitted him. However, Defendant did acquiesce in the delay and his objection to it was untimely. The record reveals that, during the approximately six months between the time Defendant now argues the rule had run and the time he objected to the delay, Defendant participated in at least four pretrial conferences and hearings without making any objection. In fact, it appears from Defendant’s briefing that he did not make any objection on Rule 5-604 grounds until the morning of his trial on February 18, 2004. See Jaramillo, 2004-NMCA-041, ¶ 15 (noting that the defendant was likely not bothered by the delay because he failed to raise the issue on at least four occasions after the rule had technically run). Moreover, not only did Defendant acquiesce in the delay, he took affirmative action, in the form of appealing the mistrial order, that could have further delayed his trial. Under these circumstances, only a hypertechnical reading of the rule would dictate dismissal. See Mendoza, 108 N.M. at 447, 774 P.2d at 441 (rejecting this Court’s “hypertechnical analysis” of the six-month rule). We decline to read the rule in such a way.

[30] Third, policy concerns require us to reject Defendant’s arguments. Although the six-month rule is not to be used to effectuate technical dismissals, one of its benefits is that it is a bright-line rule that is easily applied. See State v. Cardenas, 2003-NMCA-051, ¶ 12, 133 N.M. 516, 64 P.3d 543. Were we to accept Defendant’s argument, we could be required to evaluate every order declaring a mistrial to determine whether it was properly granted. If it was not, we would have to order dismissal of charges if the six-month rule had expired in the meantime. Such a scenario would be sure to cause additional delay during the appellate process and would defeat the six-month rule’s bright-line nature and ease of application. For all of these reasons, we reject Defendant’s argument that an improperly granted mistrial does not restart the six-month period under Rule 5-604.

3. The Trial Court Had Jurisdiction to Try Defendant Despite His Pending Appeal of the Mistrial Order

[31] Finally, Defendant argues that the trial court lacked jurisdiction to try him because, at the time of trial, Defendant had appealed the mistrial order, but mandate had not yet been issued by this Court. As explained above, Defendant filed a notice of appeal in connection with the order declaring a mistrial on September 5, 2003. On September 16, 2003, the trial court entered an order granting free process on appeal and appointing appellate counsel. On December 4, 2003, this Court filed a notice of proposed summary disposition. Defendant filed a motion to withdraw the appeal, and on February 5, 2003, we granted Defendant’s motion, ordering mandate to issue immediately. The mandate was issued on February 20 and filed in the district court on February 23. In the meantime, Defendant’s trial was held and the jury convicted him on February 18, 2004. Although the record clearly shows that Defendant’s trial was held before the mandate was formally issued by this Court or filed in the district court, we reject Defendant’s arguments.

[32] Defendant argues that because the appeal of the order declaring mistrial was pending in this Court at the time of his trial, jurisdiction was vested in this Court and the district court lacked jurisdiction to try him. Defendant does not cite any cases for this proposition, citing instead an A.L.R. annotation. See A. Petry, Annotation, Jurisdiction to Proceed with Trial of Criminal Case Pending Appeal from Order Overruling Demurrer, Motion to Quash, or Similar Motion for Dismissal, 89 A.L.R.2d 1236 (1963). But that annotation, by its express terms, applies only to appeals that are properly before the appellate court. Id. n.1. A number of civil cases in our state have set forth this same general rule. See, e.g., Kelly Inn No. 102, Inc. v. Kapnison, 113 N.M. 231, 241, 824 P.2d 1033, 1043 (1991) (noting that the filing of a proper notice of appeal divests the trial court of jurisdiction and transfers jurisdiction to the appellate court), limited on other grounds by Trujillo v. Hilton of Santa Fe, 115 N.M. 397, 851 P.2d 1064 (1993). We assume that the rule would apply in this case. See State v. Clemens, 83 N.M. 674, 675, 496 P.2d 167, 168 (Ct. App. 1972) (applying rule in criminal case).

[33] With a few exceptions, this Court has jurisdiction over an appeal only where there is a final judgment or where an appellant has properly filed an application for interlocutory appeal. See generally In re Larry K., 1999-NMCA-078, 127 N.M. 461, 982 P.2d 1060 (setting forth this general rule and noting the few, narrow exceptions to it). Defendant has not argued that any exception to the final judgment/interlocutory appeal rule applies here. Moreover, our cases make clear that, under the New Mexico Constitution, this Court has jurisdiction only “as provided by law.” State v. Griego, 2004-NMCA-107, ¶ 3, 136 N.M. 272, 96 P.3d 1192 (internal quotation marks and citations omitted). Thus, this Court had jurisdiction over Defendant’s prior appeal (thus presumably divesting the trial court of jurisdiction) only if (1) the order declaring mistrial can be characterized as a final judgment or (2) Defendant properly requested, and this Court properly granted, interlocutory review.

[34] Defendant implicitly acknowledges that the order declaring mistrial was not a final order. The general rule is that “an order or judgment is not considered final unless it resolves all of the factual and legal issues before the court and completely disposes of the case.” State v. Heinsen, 2005-NMSC-035, ¶ 14, 138 N.M. 441, 121 P.3d 1040. Unlike orders that match this description, an order declaring mistrial simply terminates the trial before a verdict is reached and does not finally determine any issues in the case. This is especially true where, as here, the order expressly reserves the State’s right to retry the defendant. Thus, we hold that the order declaring mistrial was not a final order that Defendant could appeal as a matter of right. See State v. Apodaca, 1997-NMCA-051, ¶¶ 7-17, 123 N.M. 372, 940 P.2d 478 (implying but not deciding that an order denying to dismiss a charge on double jeopardy grounds following mistrial was not a final judgment appealable of right, but deciding that the defendant nonetheless had a constitutional right to an immediate appeal); see also Larry K., 1999-NMCA-078, ¶ 13 (characterizing Apodaca as “permit[t]ing appeal of an otherwise non-final order”).

[35] Where a non-final order is improperly appealed, the trial court is not divested of jurisdiction. In re Byrnes, 2002-NMCA-102, ¶ 39, 132 N.M. 718, 54 P.3d 996 (“An appeal from a manifestly non-final order cannot divest a court of jurisdiction. Otherwise a litigant could temporarily deprive a court of jurisdiction at any and every critical juncture.”) (internal quotation marks and citations omitted)). Thus, Defendant’s notice of appeal did not divest the trial court of jurisdiction under the general rule as set
[36] Because a mistrial order is not a final order, Defendant argues that we should treat his notice of appeal and/or docketing statement in the prior appeal as an application for interlocutory review. Defendant notes that under Rule 12-203(E) NMRA, “[t]he granting of an application [for interlocutory appeal] shall automatically stay the proceedings in the district court unless otherwise ordered by the appellate court.” We hold that Defendant did not file a proper application for interlocutory review and that this Court did not grant such an application. Thus, we need not address whether the “stay” mandated by Rule 12-203 would deprive the trial court of jurisdiction in the same way that we have assumed a proper appeal of a final order would under the *Kelly Inn* rule.

[37] We reject Defendant’s request to treat his notice of appeal as a request for interlocutory review because we note at least two procedural requirements for interlocutory review that were not complied with in this case. First, the application must be filed in this Court, and it must be filed within ten days of the filing of the contested interlocutory order of the district court. NMSA 1978, § 39-3-3(A)(3) (1972). We note that the applicable Supreme Court rule appears to allow fifteen days in which to file an application. See Rule 12-203(A). However, under the circumstances of this case, the statute trumps the rule and Defendant would have been required to file his application within ten days of the order declaring mistrial. *See State v. Alvarez*, 113 N.M. 82, 85, 823 P.2d 324, 327 (Ct. App. 1991) (holding that the State had to file its appeal that was not constitutionally as of right within statutorily mandated ten days because Supreme Court rule that allowed thirty days in which to appeal only applied to appeals as of right, stating that “[t]he [Supreme Court] cannot create its own appellate jurisdiction for an extra twenty days by virtue of [a rule]”). Thus, the notice of appeal in this case would have been untimely as an application for interlocutory review because the order declaring mistrial was filed on August 21, 2003, and Defendant’s notice of appeal was filed on September 5, 2003, and was filed in the district court, not this Court.

[38] Second, the district court must certify the order for interlocutory review by stating that “the order or decision involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such order or decision may materially advance the ultimate termination of the litigation.” Section 39-3-3(A)(3). The order in this case contains no such language. Defendant argues that by entering an order granting free process on appeal and appointing appellate counsel, the trial court effectively certified its decision for interlocutory review. We disagree. The content required by the statute is clear. We decline to hold that all orders by the trial court that acknowledge that an appeal has been filed operate to certify an issue for interlocutory review. See *Sys. Tech., Inc. v. Hall*, 2004-NMCA-130, ¶ 10, 136 N.M. 548, 102 P.3d 107 (referring to the language of the trial court that authorizes interlocutory appeal as “required”); *Romero v. Pueblo of Sandia/Sandia Casino*, 2003-NMCA-137, ¶ 5, 134 N.M. 553, 80 P.3d 490 (referring to such language as “requisite”); *Ford v. N.M. Dep’t of Pub. Safety*, 119 N.M. 405, 408, 891 P.2d 546, 549 (Ct. App. 1994) (referring to such language as “required”); *see also Comment, New Mexico’s Analogue to 28 U.S.C. § 1292(b): Interlocutory Appeals Come to the State Courts*, 2 N.M. L. Rev. 113, 116 (1972) (noting that “[f]ederal courts also have required that the certificate contain an actual statement that the question meets the criteria imposed by the statute”). We in New Mexico may in fact allow more flexibility than the federal courts, but we do require at least some statement by the trial court that it intends to certify the question.

[39] Relying on *State v. Garcia*, 91 N.M. 131, 571 P.2d 123 (Ct. App. 1977), Defendant argues that by calendaring his appeal and issuing a notice of proposed summary disposition, this Court treated his notice of appeal and docketing statement as an application for interlocutory appeal. However, in Garcia, we denied the application. It was unclear from the opinion whether we denied it on the merits or because the appeal was not properly before us. Thus, that case is not authority for us to say that Defendant’s prior, improper appeal was properly before us. *See Candelaria v. Middle Rio Grande Conservancy Dist.*, 107 N.M. 579, 581, 761 P.2d 457, 459 (Ct. App. 1988) (holding that interlocutory appeals are permitted only where statutory procedures have been complied with). Thus, because Defendant’s notice of appeal and docketing statement would have been untimely as applications for interlocutory review, we lacked the authority to grant interlocutory review.

[40] Finally, Defendant argues that by calendaring his appeal and filing a notice of proposed summary disposition, the Court took jurisdiction of his case, properly or not, and thus the trial court lacked jurisdiction to try him. Defendant argues that under a theory of “apparent authority,” the “orderly administration of justice” required the trial court to stay its hand while this Court decided the appeal. We disagree. The orderly administration of justice would not require a trial court to delay a trial where the defendant did not even suggest to it a lack of jurisdiction and where the procedural posture at the time the trial took place was such that this Court’s jurisdiction, if any, was concluded for all practical purposes. Defendant had moved to dismiss his appeal. We granted the motion and ordered that mandate be issued immediately. There was nothing further for this Court to do except formally issue the mandate. As in *Saudi v. Brieven*, 176 S.W.3d 108, 113-15, 117 (Tex. App. 2004), we think that the orderly administration of justice would counsel against nullifying trial court proceedings that occurred at a time when this Court’s proceedings were effectively at an end.

[41] Thus, because jurisdiction was not properly in this Court and, even if it was, this Court’s jurisdiction was for all practical purposes concluded, we hold that the trial court had jurisdiction when it tried Defendant.

**CONCLUSION**

[42] We affirm.

[43] IT IS SO ORDERED.

LYNN PICKARD, Judge

**WE CONCUR:**

A. JOSEPH ALARID, Judge

JAMES J. WECHSLER, Judge
Defendant John Bricker appeals the denial of his motion to suppress evidence found in his wallet as he was being booked at the police station. He was taken to the police station after having been arrested for driving on a suspended license. The arresting officer observed Defendant driving and knew that Defendant’s license had been suspended. After stopping Defendant, the officer confirmed that the license had been suspended.

We first address whether the custodial arrest was unlawful. A New Mexico Statute requires a citation and release under the circumstances here. We hold that the custodial arrest was unlawful. We then address whether the unlawful custodial arrest was a constitutionally unreasonable seizure, requiring suppression of the evidence obtained from the search of Defendant’s wallet. We hold that the seizure was unreasonable under the New Mexico Constitution and, therefore, the ensuing search during booking was unlawful and the evidence from the search should have been suppressed as the fruit of an unreasonable seizure.

Background

1. Believing that Defendant’s driver’s license had been suspended, Officer Izzy Johnson stopped Defendant on suspicion of driving with a suspended license. Defendant could not produce a driver’s license and Officer Johnson was informed by radio dispatch that the license was suspended. The officer arrested Defendant for driving on a suspended license and took him to the police station for booking.

2. Booking procedures included taking Defendant’s personal property. While removing and going through Defendant’s wallet, the detention officer found a loaded syringe. The contents tested positive for methamphetamine and Defendant was charged with possession of methamphetamine and possession of drug paraphernalia.

3. Defendant moved to suppress the evidence as fruit of an unreasonable seizure under the Fourth Amendment to the United States Constitution and Article II, Section 10 of the New Mexico Constitution. At the suppression hearing, Defendant argued that under NMSA 1978, §§ 66-8-122 (1985) and 66-8-123 (1989), Officer Johnson was not authorized to arrest him and take him to the police station to be booked for driving on a suspended license, but rather required the officer to issue him a citation and release him from custody. Defendant further argued that the detention was therefore unlawful, requiring suppression of the drug-related evidence.

4. Section 66-8-122 requires a person who is arrested for driving on a suspended license to be immediately taken before a magistrate if the person’s license was suspended pursuant to certain laws relating to driving while intoxicated (DWI). § 66-8-122(G). However, when the suspension is not pursuant to those DWI-related laws, Section 66-8-123 requires the arresting officer to release the violator from custody after the officer issues a citation pursuant to which the driver agrees to appear in court.

5. Section 66-8-122 requires the arresting officer to issue him a citation and release him from custody. Defendant further argued that the detention was therefore unlawful, requiring suppression of the drug-related evidence.

6. The State did not offer evidence at the suppression hearing of the basis on which Defendant’s license was suspended. Thus, there is no evidence in the record that Officer Johnson knew the basis on which Defendant’s license had been suspended when he stopped Defendant or when he arrested Defendant and took him to the police station.

7. There was no issue in the district court as to the validity of the traffic stop. The district court denied Defendant’s motion to suppress. Defendant entered a conditional plea and appealed the court’s ruling. The issues are legal questions which we review de novo. State v. Rodarte, 2005-NMCA-141, ¶ 5, 138 N.M. 668, 125 P.3d 647, cert. granted, 2005-NMCERT-012, 138 N.M. 773, 126 P.3d 1137.

8. Sections 66-8-122 and -123 delineate an officer’s authority to arrest and detain when, as in the present case, the traffic-related stop is grounded on the violation of driving on a suspended license. As it relates to a suspended license, Section 66-8-122 reads:

Whenever any person is arrested for any violation of the Motor Vehicle Code . . . or other law relating to motor vehicles punishable as a misdemeanor, he shall be immediately taken before an available magistrate who has jurisdiction of the offense when the:

   . . .

The arrest was pursuant to a municipal ordinance which purportedly permitted the officer to arrest Defendant and take him to the station. The ordinance was not made a part of the record. Further, the issue on appeal regarding the validity and constitutionality of the custodial arrest of Defendant does not require development of or decision in regard to the apparent conflict between the ordinance and the State Statutes that control the issue before us. The State does not contend that the ordinance controls or takes precedence in determining the validity or constitutionality of the custodial arrest.
G. person is charged with driving when his privilege to do so was suspended or revoked pursuant to Section 66-8-111 NMSA 1978 [relating to refusal to submit to a breath test for DWI purposes] or pursuant to a conviction for driving while under the influence of intoxicating liquor or drugs.

It is a violation of the Motor Vehicle Code to drive on a suspended license. NMSA 1978, § 66-5-39(A) (1993). Section 66-8-123(A) reads:

Except as provided in Section 66-8-122 NMSA 1978, unless a penalty assessment or warning notice is given, whenever a person is arrested for any violation of the Motor Vehicle Code . . . or other law relating to motor vehicles punishable as a misdemeanor, the arresting officer, using the uniform traffic citation, shall complete the information section and prepare a notice to appear in court, specifying the time and place to appear, have the arrested person sign the agreement to appear as specified, give a copy of the citation to the arrested person and release him from custody.

An officer who violates Section 66-8-123 “is guilty of a misconduct in office and is subject to removal.” § 66-8-123(E).

[9] While the statute uses the words “arrest” and “custody,” we believe the Legislature intended those terms to refer to a temporary detention rather than a traditional custodial arrest in which a person is arrested and taken to the police station for booking. See United States v. Gonzalez, 763 F.2d 1127, 1130 n.1 (10th Cir. 1985) (discussing Sections 66-8-122 and 66-8-123 and the use of the words “arrest” and “custody” in Section 66-8-123(A), and stating, “[d]espite the statute’s use of the words ‘arrest’ and ‘custody,’ when a New Mexico police officer stops a car merely to issue a traffic summons for a minor speeding infraction, we think that for Fourth Amendment purposes that stop is more in the nature of an investigative detention than a traditional [custodial] arrest.”); State v. Reynolds, 119 N.M. 383, 388, 890 P.2d 1315, 1320 (1995) (holding that continued detention in a traffic stop to request, review, and check a motorist’s license, registration, and insurance documentation is not unreasonable and does not violate the Fourth Amendment or Article II, Section 10 of the New Mexico Constitution).

[10] Section 66-8-122 lists several circumstances in addition to that in Subpart G that require a person to be taken before a magistrate. As we pointed out earlier in this opinion, no evidence exists in the record that Officer Johnson knew at the time he arrested Defendant and took Defendant to the police station for booking whether Defendant’s license suspension was DWI-related. Nor was there evidence of any other circumstance listed in the statute requiring that Defendant be taken before a magistrate.

[11] The State attempts to change that focus by arguing that Defendant had the burden to show the reason for the suspension of his license as a condition precedent to arguing that the custodial arrest was unlawful under Section 66-8-123(A). We are unpersuaded. It is true that a defendant has the burden of establishing that a seizure or search is unlawful in order to suppress the fruits of an unlawful seizure or search. See State v. Ponce, 2004-NMCA-137, ¶ 7, 136 N.M. 614, 103 P.3d 54 (stating that a defendant moving to suppress has the burden to come forward with evidence to raise an issue as to an illegal search and seizure), cert. granted, 2004-NMCERT-012, 136 N.M. 666, 103 P.3d 1098. However, under the circumstances in this case, the State had the burden to justify the custodial arrest by showing that the arrest and detention were mandated by Section 66-8-122(G); otherwise, the State bore the consequences of the officer’s wrongful custodial arrest in violation of Section 66-8-123(A). See Ponce, 2004-NMCA-137, ¶ 7 (“In the face of a defendant’s challenge to the constitutionality of a warrantless arrest or search, the State is required to present testimony or other evidence showing that the arrest or search met constitutional muster.”).

[12] Further, we reject the State’s attempt to override Section 66-8-123(A) by contending that NMSA 1978, § 66-8-127 (1978) absolves an officer of the mandates in Section 66-8-123(A). Section 66-8-127 reads:

Sections 66-8-122 through 66-8-125 NMSA 1978 govern all police officers in making arrests without warrant for violations of the Motor Vehicle Code . . . and other laws relating to motor vehicles, but the procedure prescribed is not exclusive of any other method prescribed by law for the arrest and prosecution of a person violating these laws.

The State argues that this section evinces a legislative intent not to supplant the common law misdemeanor arrest rule for traffic violations. Thus, according to the State, the requirements in Section 66-8-123(A) regarding issuance of a citation and release from custody are inapplicable whenever an officer observes a driver violate any misdemeanor covered in the Motor Vehicle Code. Again, we are unpersuaded. The State’s interpretation of Section 66-8-127 renders the citation and release from custody mandates in Section 66-8-123(A) virtually meaningless. See State v. Herbstman, 1999-NMCA-014, ¶¶ 18, 20, 126 N.M. 683, 974 P.2d 177 (stating that “[w]e presume the legislature was informed as to existing law and did not intend to enact a law inconsistent with other law[,]” that “[w]e will reject an interpretation of a statute that makes parts of it . . . meaningless[,]” and we “will not render a legislative enactment meaningless”).

[13] Furthermore, we are unaware of any strong government policy, and the State does not argue one, that would call for Section 66-8-127 to come into play and override Section 66-8-123(A) to permit an officer to engage in a custodial arrest, rather than to merely cite and release, simply because the officer knew before stopping the driver that the driver was driving with a suspended license. Given the careful and mandatory language in Sections 66-8-122(G) and 66-8-123(A) and (E), we do not believe the Legislature intended to give police officers unbridled discretion to either arrest and book a driver or merely cite and release the driver.

[14] We hold that Officer Johnson was authorized, pursuant to Section 66-8-123(A), only to issue Defendant a citation and release him. The officer was not authorized to make a traditional custodial arrest, that is, to arrest Defendant and take him to the police station for booking. The custodial arrest of Defendant violated Section 66-8-123(A) and was therefore unlawful. However, this holding alone does not resolve the question of whether the evidence obtained from the search of Defendant’s wallet should have been suppressed. That question requires an analysis of whether the unlawful custodial arrest violated the Fourth Amendment to the United States Constitution or Article II, Section 10 of our State Constitution. Cf. State v. Wilson, 92 N.M. 54, 55-56, 582 P.2d 826, 827-28 (Ct. App. 1978) (stating that a right to refuse the taking of blood may be an enlargement of a constitutional right, and holding that whether it was or not an enlargement of a constitutional right, the
right was granted by the Legislature and violation of the statute granting the right required exclusion of the blood sample).

The Constitutional Reasonableness of the Seizure

{15} The Fourth Amendment and Article II, Section 10 of the New Mexico Constitution “simply state[] a right—the right to be free from unreasonable searches and seizures.” State v. Gutierrez, 116 N.M. 431, 444, 863 P.2d 1052, 1065 (1993). It is fundamental “that every person in this state is entitled to be free from unwarranted governmental intrusions.” Id. “New Mexico courts interpret Article II, Section 10 . . . more broadly than its federal counterpart, and specifically appl[y] that broader protection to motorists.” State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 15, 130 N.M. 386, 25 P.3d 225. “It is the duty of appellate courts to shape the parameters of police conduct by placing the constitutional requirement of reasonableness in factual context.” State v. Vandenberg, 2003-NMSC-030, ¶ 19, 134 N.M. 566, 81 P.3d 19 (internal quotation marks and citation omitted).

{16} A routine traffic stop constitutes a seizure under the Fourth Amendment. State v. Duran, 2005-NMSC-034, ¶ 22, 138 N.M. 414, 120 P.3d 836; State v. Reynolds, 117 N.M. 23, 26, 868 P.2d 668, 671 (Ct. App. 1993), rev’d on other grounds, 119 N.M. 383, 890 P.2d 1315 (1995); State v. Werner, 117 N.M. 315, 317, 871 P.2d 971, 973 (1994) (“Stopping an automobile and detaining its occupants constitute a seizure under the Fourth and Fourteenth Amendments.”) (alteration, internal quotation marks, and citation omitted). However only if the seizure is unreasonable is it constitutionally proscribed. Id. (stating that the Fourth Amendment only proscribes seizures that are unreasonable); see also Duran, 2005-NMSC-034, ¶ 22 (stating that “[t]raffic stops must . . . be conducted in a reasonable manner to satisfy the Fourth Amendment”).

{17} In the present case, it is undisputed that the traffic stop, based on the officer’s reasonable suspicion that Defendant was driving with a suspended license, and the detention to investigate the status of the license, were reasonable under the Fourth Amendment. See id. However, this traffic stop seizure and investigative detention to check the status of Defendant’s license dramatically changed posture immediately upon Officer Johnson’s custodial arrest of Defendant for driving with a suspended license. The question of the constitutional reasonableness of the initial traffic stop and de minimis detention disappeared from the radar screen, supplanted by the question of the constitutional reasonableness of the custodial arrest of Defendant for driving with a suspended license.

{18} The State opens its argument to affirm the denial of Defendant’s suppression motion by pointing out New Mexico’s well-established common law misdemeanor arrest rule. Under that rule, a police officer is authorized to arrest a person violating a misdemeanor traffic law in the officer’s presence. See State v. Gutierrez, 76 N.M. 429, 430, 415 P.2d 552, 553 (1966) (holding that police officers were justified in arresting driver without a warrant when officers knew before the arrest that the driver was driving with a revoked license, because the violation was committed in the officer’s presence); Cave v. Cooley, 48 N.M. 478, 481, 152 P.2d 886, 888 (1944) (“It is the well-established doctrine now throughout the United States that for a crime, which they have probable cause to believe is being committed in their presence, though it be a misdemeanor, duly authorized peace officers may make arrest without a warrant.”) (internal quotation marks and citation omitted)).

{19} Based on an arrest that conforms to the misdemeanor arrest rule, the State argues that Defendant failed to establish the existence of a constitutional violation, thereby eliminating application of the exclusionary rule that would bar evidence as the poisonous fruit of an unconstitutional arrest. The State also argues that an arrest in violation of a statute does not elevate the issue to a constitutional level. See People v. Lyon, 577 N.W.2d 124, 129 (Mich. Ct. App. 1998) (hold that the exclusionary rule is “only applicable . . . if the seizure was constitutionally invalid,” based on a lack of probable cause, and “not merely statutorily illegal”); State v. Eubanks, 196 S.E.2d 706, 708-09 (N.C. 1973) (holding evidence obtained following arrest which is constitutionally valid as based on probable cause but unlawful under state law need not be excluded under the federal exclusionary rule); Penn v. Commonwealth, 412 S.E.2d 189, 193-94 (Va. Ct. App. 1991) (holding that there is no constitutional violation requiring exclusion of evidence where police officers arrest a person in violation of a state statute that adopts a more stringent standard for arrests than the probable cause standard under the Federal Constitution).

{20} We do not find the State’s arguments and authorities persuasive. New Mexico’s Constitution and laws compel the conclusion that the seizure of Defendant by custodial arrest fails the test of constitutional reasonableness under Article II, Section 10. Under the circumstances here, two rationales dovetail to support this conclusion. First, the purpose underlying Section 66-8-123(A) is to protect liberty and privacy in circumstances in which the violation of law does not warrant a custodial arrest. Second, Article II, Section 10 provides the broader privacy protection needed.

{21} Were we to be guided solely by federal law interpreting the Fourth Amendment, the custodial arrest of Defendant would be reasonable. Under the Fourth Amendment, the constitutional reasonableness of a custodial arrest is measured by whether probable cause existed for the arrest. See Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (confirming that the standard of probable cause applies to all arrests and holding that the Fourth Amendment does not proscribe any arrest made with probable cause). In Atwater, the United States Supreme Court held that under the Fourth Amendment a warrantless custodial arrest based only on probable cause of a mere seatbelt violation, for which jail time was not authorized, was permissible. Id. The Court preferred to remain with what it considered the traditional probable cause standard for constitutional reasonableness, rather than to "mint a new rule of constitutional law on the understanding that when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness.” Id. at 345-46. Thus, the United States Supreme Court held fast with probable cause as the test of reasonableness, “without the need to balance the interests and circumstances involved in particular situations.” Id. at 354 (internal quotation marks and citation omitted). And the Court ultimately held that the arrest of the defendant satisfied constitutional requirements, stating: “If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” Id.

{22} In Atwater, Justice O’Connor dissented, disagreeing that the constitutional propriety of the custodial arrest, which she characterized as “the quintessential seizure,” should be limited to whether probable cause existed. See id. at 360-
62 (O’Connor, J., dissenting). In Justice O’Connor’s view, the reasonableness inquiry required not only a determination of the existence of probable cause, but also an evaluation of the seizure under the standard rejected by the majority, namely, by assessing the intrusion upon individual privacy against the need to promote legitimate governmental interests. Id. at 361.

[23] In Rodarte, this Court refused to follow the majority’s decision in Atwater, preferring instead to follow Justice O’Connor’s dissent. See Rodarte, 2005-NMCA-141, ¶¶ 1, 15. We held:

that, under Article II, Section 10, probable cause that a non-jailable offense has been committed does not automatically make arrest reasonable, and that for such arrests to be reasonable, there must be specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion of a full custodial arrest.

Id. ¶ 14 (internal quotation marks and citation omitted) (alteration in original). Several state courts have distanced themselves from Atwater. See State v. Bauer, 36 P.3d 892, 897 (Mont. 2001) (holding that under the Montana Constitution, it was unreasonable for a police officer to effect a custodial arrest for a non-jailable offense absent special circumstances); State v. Bayard, 71 P.3d 498, 501-02 (Nev. 2003) (applying the Nevada Constitution to affirm the suppression of evidence, holding that an arrest for a minor traffic violation violated the state statute giving an officer discretion to cite or arrest an offender, where the officer abused his discretion in performing a full custodial arrest, and stating “[a]bsent special circumstances requiring immediate arrest, individuals should not be made to endure the humiliation of arrest and detention when a citation will satisfy the state’s interest”); State v. Brown, 792 N.E.2d 175, 178-79 (Ohio 2003) (applying the Ohio Constitution which provided greater protection than the Fourth Amendment and holding that arrest of jaywalker violated the constitutional provision against unreasonable seizures where the arresting officer violated a state statute). Pre-Atwater cases are also supportive. See also State v. Toes, 964 P.2d 1007, 1015 (Or. 1998) (en banc) (holding the detention of a defendant to be a violation of a statute relating to a traffic infraction, and requiring the suppression of evidence discovered following the unlawful detention “[b]ecause the object of [the statute] is to define the authority of officers to respond to a traffic infraction” and, in order to give effect to the statute, “denying the state the use of evidence that it would not have secured if its officer had respected the rights that the statute was designed to protect” (internal quotation marks, citations, and emphasis omitted)); State v. Valdez, 561 P.2d 1006, 1011 (Or. 1977) (invoking the sanction of exclusion of evidence obtained after police arrested the defendant in violation of a statute governing the officer’s authority to stop and interrogate a person concerning the possible commission of certain crimes).

[24] In addressing the custodial arrest at issue in Rodarte, we applied Article II, Section 10 in order to provide greater protection than the Federal Constitution provides to misdemeanor traffic violators where the infraction is punishable by fine and not jail. Rodarte, 2005-NMCA-141, ¶¶ 15-16, 21. Significantly, Rodarte adopted a test that required officers to “articulate a legitimate reason for the decision to escalate the seizure into a full custodial arrest.” Id. ¶ 9, 16 (internal quotation marks and citation omitted). “[W]hen an individual has not committed an offense that our Legislature has deemed significant enough to warrant a loss of liberty, that individual should not be deprived of his or her liberty through arrest unless there is a legitimate reason for the deprivation.” Id. ¶ 20. The ultimate disposition in Rodarte was to overturn a conviction that was based on evidence that should have been suppressed.

[25] Further, in Rodarte, as in Justice O’Connor’s dissent in Atwater, upon balancing governmental and individual interests, little weight was given to the Atwater majority’s concern about an officer’s ability to decide on the spot what was and was not a jailable offense. See Rodarte, 2005-NMCA-141, ¶¶ 15-16. Importantly, the controlling statute in the present case, Section 66-8-123(A), requires an officer to make an on-the-spot decision whether a misdemeanor traffic offense comes within the exceptions listed in Section 66-8-122. Thus, our Legislature has indicated an intent that, with respect to misdemeanors covered in these statutes, and, implicitly, irrespective of whether the misdemeanor is a jailable or non-jailable offense, the officer must make a decision, at the time of the traffic stop and based on any permitted de minimis computer check, whether the driver’s violation is one requiring citation and release or one requiring custodial arrest.

[26] As in Rodarte, we think Justice O’Connor’s reasoning was correct and we are not, in the present case, restricted by Atwater’s interpretation of constitutional reasonableness under the Fourth Amendment. Our appellate courts have preferred a balancing-of-interests test for reasonableness, rather than a bright-line test. See Rodarte, 2005-NMCA-141, ¶¶ 14-15; see also Duran, 2005-NMSC-034, ¶ 34 (“Our case law has consistently disfavored a bright-line test in analyzing Fourth Amendment questions.”); Werner, 117 N.M. at 317, 871 P.2d at 973 (“A bright line test does not exist to evaluate whether an investigatory seizure is invasive enough to constitute an arrest requiring probable cause.”). Our courts have approved a balancing-of-interests standard in several search and seizure cases. See Duran, 2005-NMSC-034, ¶ 34; Vandenberg, 2003-NMSC-030, ¶ 23; State v. Jason L., 2000-NMSC-018, ¶ 14, 129 N.M. 119, 2 P.2d 856; Reynolds, 119 N.M. at 385, 890 P.2d at 1317; Werner, 117 N.M. at 317, 871 P.2d at 973; Rodarte, 2005-NMCA-141, ¶ 14; State v. Jones, 114 N.M. 147, 503 P.2d 863, 866 (Ct. App. 1992) (stating that the Fourth Amendment establishes a reasonableness standard that permits lesser intrusion without warrants, based on a balance of “the degree of intrusion into an individual’s privacy against the interest of the government in promoting crime prevention and detection”). Thus, while probable cause is essential to the constitutionality of the custodial arrest in the present case, it is not the sole factor to be applied in the constitutional inquiry. We hold, as to the custodial arrest here, that it is appropriate to apply the balance-of-interests standard.

[27] We acknowledge that we are faced in this case with a jailable offense and not a fine-only offense such as in Atwater and Rodarte. See NMSA 1978, § 66-5-39(A) (1993) (stating that the crime of driving on a suspended license carries a mandatory sentence of a minimum of four days in jail and up to 364 days in jail, although the sentence can be suspended). However, that alters nothing. Our Legislature has stated in no uncertain terms that persons who violate a misdemeanor covered in Section 66-8-123(A) shall be cited and released from custody. That the traffic offense is jailable is irrelevant. Jiclality cannot justify overlooking an unlawful custodial arrest and permitting searches based on the unlawful arrest. The intrusion upon one’s liberty is no less significant in cases in which the offense is jailable than in cases in which
the offense is non-jailable. While the Legislature has assigned greater punishment for some traffic misdemeanors than others, the Legislature has not indicated any particular distinction on the basis of punishment in regard to loss of liberty.

{28} It seems obvious from Sections 66-8-122(G) and 66-8-123(A) that our Legislature required more than merely driving with a suspended license to warrant the loss of liberty occasioned by custodial arrest, as long as the suspension is not DWI-related. We see no reason to think that the Legislature intended to leave a driving with a suspended license offense open to a custodial arrest that escapes constitutional scrutiny.

{29} That the Legislature has zeroed in on the traffic offense at issue here and has only required citation and release is evidence of an intent to protect individual liberty over perceived governmental need. This has constitutional bearing. See Bingham v. City of Manhattan Beach, 341 F.3d 939, 950 (9th Cir. 2003) (determining that, in evaluating a custodial arrest for a traffic offense, including a unilateral driver violation, “federal courts must determine the reasonableness of the arrest in reference to state law governing the arrest” (internal quotation marks and citation omitted)); United States v. Mota, 982 F.2d 1384, 1388-89 (9th Cir. 1993) (holding that custodial arrest for a minor infraction to be unlawful under California law, that the unlawful arrest was unreasonable and therefore unlawful under the Fourth Amendment, that the search incident to the arrest was not therefore exempt from the warrant requirement of the Fourth Amendment, and that the evidence from the search was unlawfully obtained and should have been suppressed). It fits well within the constitutional reasonableness standard our courts often turn to in constitutional seizure inquiries.

{30} Therefore, for the reasons set out in this opinion, we hold the custodial arrest in this case was unreasonable and the seizure was unconstitutional under Article II, Section 10 of the New Mexico Constitution. Defendant’s motion to suppress should have been granted and the evidence obtained from the search of Defendant’s wallet should have been excluded as poisonous fruit of an unconstitutional seizure. See State v. Prince, 2004-NMCA-127, ¶¶ 20-21, 136 N.M. 521, 101 P.3d 332 (holding exclusionary rule should be employed to suppress evidence obtained after unlawful detention irrespective of consent to search); State v. Gutierrez, 2004-NMCA-081, ¶ 6, 136 N.M. 18, 94 P.3d 18 (stating that under the exclusionary rule unconstitutionally obtained evidence is inadmissible at trial).

CONCLUSION

{31} We reverse the district court’s denial of Defendant’s motion to suppress.

{32} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

IRA ROBINSON, Judge

OPINION

JAMES J. WEchsLER, Judge

{1} In this appeal, we consider whether mere negligence in failing to perform a settlement agreement constitutes a basis in equity to set aside a judgment based on the settlement agreement itself. The conflict here arises in the context of a settlement agreement between Plaintiff Builders Contract Interiors, Inc., its president Third-party Defendant Robert L. Novis (together BCI), and Defendant Hi-Lo Industries, Inc. (Hi-Lo), requiring BCI to pay a settlement amount to Hi-Lo on or before a certain date. The settlement agreement provided that “[t]ime [was] of the essence” and, if the amount was not paid by that date, Hi-Lo was entitled to file and enter with court a stipulated judgment against BCI. BCI did not pay within the specified time, and Hi-Lo filed the stipulated judgment. The district court set aside the judgment on equitable grounds. Because BCI’s justification for failing to pay within the specified time was based on its own negligence rather than mistake, we reverse the district court, thereby upholding the settlement agreement.

BACKGROUND

{2} BCI, a cabinet subcontractor, purchased cabinets from Hi-Lo on open account. Novis was the guarantor of the account. After
conducting business for more than a year, Plaintiff sued Hi-Lo, alleging claims for breach of contract, business interference, interference with prospective contract, and direct business damage. It requested compensatory and punitive damages. It alleged that Hi-Lo had overbilled, delivered substandard cabinets, filed false liens, and engaged in defamatory communications with Plaintiff’s customers. Hi-Lo filed a counterclaim and a third-party complaint against Novis. It alleged that BCI had fallen behind on its payments, had exceeded its credit limit, and owed on the open account, plus interest and attorney fees.

[3] The night before trial was scheduled to start, the parties settled the case while represented by counsel. The settlement agreement, signed by the parties, provides that

1. BCI shall pay to Hi-Lo the sum of $27,703.00 on or before 5:00 p.m. on October 24, 2003.
   . . . Time is of the essence in this Settlement Agreement.
   . . .
   5. In the event BCI fails to timely deliver to Hi-Lo the sum required by paragraph 1 hereinafter above, Hi-Lo may file and enter with this Court a full and final Judgment in this matter . . . in the form of Exhibit C attached hereto . . . .

The stipulated judgment approved by counsel for the respective parties provides, “Hi-Lo Industries, Inc. is awarded judgment for damages against Builders Contract Interiors, Inc. and Robert L Novis, jointly and severally, in the amount of $75,711.51.” BCI did not make the agreed-upon payment on or before October 24. On October 28, Hi-Lo filed the stipulated judgment after it was approved by the district court. BCI then delivered Hi-Lo a cashier’s check in the amount of $27,703 on October 31. Hi-Lo did not accept the late payment and so informed BCI by letter.

[4] On November 12, BCI filed a motion to set aside the stipulated judgment. The district court granted BCI’s motion, finding that “[i]t would be unconscionable to allow BCI from alerting the court to any defect in the proceeding. We will not address this argument made for the first time on appeal. See Campos Enters., Inc. v. Edwin K. Williams & Co., 1998-NMCA-131, ¶ 12, 125 N.M. 691, 964 P.2d 855.

INAPPLICABILITY OF EQUITY TO CHANGE PARTIES’ AGREEMENT

[6] BCI relied on mistake in the district court in seeking to set aside the stipulated judgment. Novis claimed that he had “the mistaken understanding” that payment was not due until October 31, rather than October 24. The district court thereupon set aside the stipulated judgment on equitable grounds, finding that “[i]t would be unconscionable to allow the Judgment to stand.” Because the district court’s finding of unconscionability depends on a showing of mistake, we analyze the district court’s ruling based on BCI’s claim of mistake. Whether the district court was permitted to exercise its discretion for mistake on this set of facts presents a question of law.

United Props. Ltd. v. Walgreen Props., Inc., 2003-NMCA-140, ¶ 7, 134 N.M. 725, 82 P.3d 535 (“The question of whether, on a particular set of facts, the district court is permitted to exercise its equitable powers is a question of law . . . .”). If the district court was permitted to do so, we then review the district court’s exercise of its equitable power for abuse of discretion.

Id. ("[T]he issue of how the district court uses its equitable powers to provide an appropriate remedy is reviewed only for abuse of discretion.").

[7] We begin our analysis by recognizing and enforcing the strong policy of favoring settlement agreements. See Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc., 106 N.M. 705, 707, 749 P.2d 90, 92 (1988) (discussing the policy of enforcing settlement agreements). Courts look favorably when parties resolve their disputes, and, as a result, hold such agreements in high regard and require a compelling basis to set them aside. See Marrujo v. Chavez, 77 N.M. 595, 599, 426 P.2d 199, 201 (1967); Gonzales v. Atinip, 102 N.M. 194, 195, 692 P.2d 1343, 1344 (Ct. App. 1984). A lack of certainty of contract would be contrary to the policy favoring settlement because it would promote additional litigation with regard to the terms of the settlement agreement. Further, as in United Properties, we do not use equitable principles “to save a party from the circumstances it created.” United Props. Ltd., 2003-NMCA-140, ¶ 31 (internal quotation marks and citation omitted).

BCCI freely entered the unambiguous settlement agreement with knowledge of its terms. Unless there is “an affirmative showing of mistake, fraud or illegality,” “the fact that some of the terms of [an] agreement resulted in a hard bargain or subjected a party to exposure of substantial risk, does not render a contract unconscionable.” Smith v. Price’s Creameries, 98 N.M. 541, 545, 650 P.2d 825, 829 (1982).

[8] Because a settlement agreement is a species of contract, we also recognize and give effect to the intersecting “strong public policy of freedom to contract” that has been enforced in New Mexico. State ex rel. Udall v. Colonial Penn Ins. Co., 112 N.M. 123, 126, 812 P.2d 777, 780 (1991) (internal quotation marks and citation omitted). Our courts have consistently enforced clear contractual obligations. United Props. Ltd., 2003-NMCA-140, ¶ 12. See Nearburg v. Yates Petroleum Corp., 1997-NMCA-069, ¶ 31, 123 N.M. 526, 943 P.2d 560 (“Parties to a contract agree to be bound by its provisions and must accept the burdens of the contract along with the benefits. When a contract was freely entered into by parties negotiating at arm’s length, the duty of the courts is ordinarily to enforce the terms of the contract which the parties made for themselves.”) (citation omitted).

We will allow equity to interfere with this consistency only when “well-defined equitable exceptions, such as unconscionability, mistake, fraud, or illegality” justify deviation from the parties’ contract. Id.; see Winrock Inn Co. v. Prudential Ins. Co. of Am., 1996-NMCA-113, ¶ 36, 122 N.M. 562, 928 P.2d 947 (“In the absence of fraud, unconscionability, or other grossly inequitable conduct, New Mexico courts do not have discretion . . . to interfere with contractual rights and remedies which go to the heart of the bargain.”).

[9] In United Properties, we addressed the type of mistake that applies in the context of “freely negotiated bargains.” United Props. Ltd., 2003-NMCA-140, ¶ 30. We stated that a “mistake within the meaning of equity is a non-negligent but erroneous mental condition, conception, or conviction induced by ignorance, misapprehension, or misunderstanding, resulting in some act or
In which there was “quite late” notice. But involves an extension of a commercial lease is distinguishable on its facts because it involves an extension of a commercial lease, we held that the lessee was negligent such that its mistake did not justify equitable relief and that “[f]orgetfulness is not the equivalent of a mistake.” Id. ¶ 30 (internal quotation marks and citation omitted). We cannot characterize Novis’ inadvertence as non-negligence.

ABSENCE OF ACCORD AND SATISFACTION

BCI additionally argues that Hi-Lo should be held to have accepted its untimely tender of the settlement amount because Hi-Lo did not return the cashier’s check. In Warren v. New York Life Insurance Co., 40 N.M. 253, 58 P.2d 1175 (1936), cited by BCI, our Supreme Court, applying a principle used in cases of accord and satisfaction, stated that when a creditor receives a check “in full settlement of a disputed or unliquidated demand,” the creditor must notify the debtor whether the offer of settlement is accepted within a reasonable time and return the amount received if it is not accepted. Id. at 261, 58 P.2d at 1180 (internal quotation marks and citation omitted). The Court stated that reasonableness of the time period depends on the circumstances of each case. Id. In Miller v. Montgomery, 77 N.M. 766, 427 P.2d 275 (1967), the Court held that a creditor who gave a cashier’s check to counsel to bring a lawsuit on the claim and who brought the action within five weeks of receipt of the check acted within a reasonable period of time and that there was no accord and satisfaction precluding the creditor from bringing the action. Id. at 768-69, 427 P.2d at 276-77.

CONCLUSION

Because the district court did not have the equitable authority to alter the settlement agreement of the parties for BCI’s negligence, we reverse the district court’s order setting aside the stipulated judgment and order the judgment reinstated.

WE CONCUR:
IRA ROBINSON, Judge
MICHAEL E. VIGIL, Judge

IT IS SO ORDERED.
JAMES J. WECHSLER, Judge
The facts of this case are not in dispute. Worker suffered an injury in the scope and course of his employment. The parties agreed to a stipulated compensation order (Stipulated Order), in which they resolved all outstanding issues in the case, except for the amount of credit due Employer for payment of TTD. As to this issue, the parties agreed to the following. From April 9, 2002, to December 8, 2002, a period of 35 weeks, Worker returned to work before he reached maximum medical improvement (MMI) for all of his injuries. During this 35-week period, Worker was paid partial TTD benefits in the aggregate amount of $3,840.86, which was an average payment of $109.73 per week in partial TTD benefits. Worker’s compensation rate for TTD benefits is $492.98 per week. Worker’s PPD benefit rate is $236.63 per week. As to the credit for the payment of TTD benefits, Employer argued that Employer should receive a week of credit for each week benefits were paid. Worker, on the other hand, contended that credit should be calculated on a dollar-for-dollar basis, which would allow Employer a week of credit when the payments made equal the TTD compensation rate of $492.98. Under Employer’s argument, 35 weeks of payments equal 35 weeks of Section 51-1-42(B) credit. Under Worker’s theory, Employer would receive only 7.8 weeks of credit under the statute.

[3] After the Stipulated Order was entered, Worker filed a second complaint, seeking resolution of the question regarding the appropriate credit to be given Employer. The parties filed cross-motions for summary judgment on this issue. The Workers’ Compensation Judge (WCJ) granted Employer’s motion and denied Worker’s motion. Observing that partial TTD benefits are paid under a weekly scheme, the WCJ concluded that credit for payment should be applied in a similar fashion -- that is, based on the weeks paid. Worker appealed.

II. DISCUSSION
A. Standard of Review

B. Statutory Interpretation
[5] Section 52-1-25.1(C) deals with payment of TTD benefits to a worker who has not reached MMI, is released to return to work, and earns less than his pre-injury wage. This section states the following:

If, prior to the date of maximum medical improvement, an injured worker’s health care provider releases the worker to return to work and the employer offers work at less than the worker’s pre-injury wage, the worker is disabled and shall receive temporary total disability compensation benefits equal to sixty-six and two-thirds percent of the difference between the worker’s pre-injury wage and his post-injury wage.

Id.

[6] In this case, Worker received TTD benefits for a 35-week period, during which he received an average of $109.73 per week. When an employer pays TTD under Section 52-1-25.1(C), that employer receives credit for payment of those TTD benefits, pursuant to Section 51-1-42(B), which states the following:

If an injured worker receives temporary total disability benefits prior to an award of partial disability benefits, the maximum period for partial disability benefits shall be reduced by the number of weeks the worker actually receives temporary total disability benefits.

Id.

[7] Worker and Employer urge differing interpretations of Section 51-1-42(B). We begin our analysis by looking to the plain language of the statute and to the intent of the legislature. See Draper v. Mountain States Mut. Cas. Co., 116 N.M. 775, 777, 867 P.2d 1157, 1159 (1994) (stating that courts first look to the plain language of a statute and also examine an act in its entirety in order to construe legislative intent). The language of Section 51-1-42(B) is clear: the maximum period for PPD benefits is reduced by the “number of weeks” the worker actually receives TTD benefits. Section 51-1-42(B). One of the legislative goals of the Workers’ Compensation Act (Act), NMSA 1978, §§ 51-1-1 to -11 (1929, as amended through
05), is to promote the rehiring of injured workers and thereby reduce their reliance on compensation benefits. See Grubelnik v. Four-Four, Inc., 2001-NMCA-056, ¶ 20, 130 N.M. 633, 29 P.3d 533 (stating that Section 52-1-25.1 is intended to advance the purpose of rehiring injured workers); Lackey v. Darrell Julian Constr., 1998-NMCA-121, ¶ 20, 125 N.M. 592, 964 P.2d 153 (“The Workers’ Compensation Act provides statutory incentives to both employers and employees to encourage return to work with minimal dependence on compensation rewards.”) Allowing an employer full credit for each week of TTD benefits paid under Section 52-1-25.1(C) fosters this goal. The employer is encouraged to rehire an injured worker, and compensation is provided to the worker who returns to work at less than his pre-injury wage. [8] Worker argues that our case law also recognizes that because the Act is imprecise, the plain meaning rule should be cautiously applied in the workers’ compensation context. Chavez v. Mountain States Constructors, 1996-NMSC-070, ¶ 25, 122 N.M. 579, 929 P.2d 971. Worker relies on the definitions in Section 52-1-25.1(A) and Section 52-1-50.1 for his argument that TTD is a benefit based on total disability but is awarded for a temporary period of time. Worker cites to several New Mexico cases in which the courts distinguished between partial and full TTD benefits. See Lackey, 1998-NMCA-121, ¶ 10 (recognizing that the award of benefits under Section 52-1-25.1(C) is a partial benefit); Ortiz v. BTU Block & Concrete Co., 1996-NMCA-097, ¶¶ 8, 10, 122 N.M. 381, 925 P.2d 1 (holding that the worker was entitled to full TTD benefits because the employer never made an offer of employment once the worker was released to work). Worker acknowledges that the distinction between full and partial TTD benefits is only found in New Mexico case law because the legislature did not make such a distinction. [9] Worker then argues that the language of Section 52-1-42(B) recognizes this distinction for purposes of calculating the reduction of future PPD benefits. According to Worker, the phrase “actually receives” in Section 52-1-42(B) creates an ambiguity: is the result of Worker’s receipt of one week of partial TTD benefits a reduction of one full week of future PPD benefits or a reduction of future PPD benefits by a partial week? Worker contends that Section 52-1-42(B) must be interpreted so that the reduction to which the statute refers is an equitable and fair reduction. See Garcia v. Mt. Taylor Millwork, Inc., 111 N.M. 17, 19, 801 P.2d 87, 89 (Ct. App. 1989) (stating that when the courts interpret the Act, the guideline is fundamental fairness to both the worker and the employer). [10] Worker’s position is that a week-for-week reduction results in a substantial loss to him because his future benefits are calculated based on his PPD rate, which is paid at a higher weekly rate than the partial TTD benefits he received, and that a reduction in weeks of benefits received at the lower TTD benefit rate thus works to reduce the total benefit amount actually received by him during his benefit period. Worker resolves the ambiguity by contending that “to be paid an actual TTD benefit is to be paid a full TTD benefit.” Thus, Worker concludes that Section 52-1-42(B) must be interpreted to mean that his future PPD benefits can only be reduced by 7.8 weeks. [11] Employer argues that the plain language of the statutes supports a week-for-week credit and that there is no need to apply the doctrine of fundamental fairness. We agree that TTD benefits can be paid at a reduced rate or in full, depending on a worker’s employment status during the period before the worker reaches MMI. See §§ 52-1-25.1; 52-1-50.1(B). We fail to see how this affects the language of Section 52-1-42(B). The term “actually receives” modifies a worker and refers to the benefits received by the worker. See id. Absent an ambiguity, there is no need to undertake a fundamental fairness analysis. Grubelnik, 2001-NMCA-056, ¶ 23 (stating that when there is no ambiguity, there is no need to analyze the statute for fundamental fairness); Lackey, 1998-NMCA-121, ¶ 20 (stating that when there is no explicit guidance in the Act, fundamental fairness is to be our guide); Ortiz, 1996-NMCA-097, ¶¶ 9-10 (rejecting application of fundamental fairness analysis because the language of the statute in question covered the issue under consideration). [12] Even if we were to agree with Worker that we must analyze these statutes by using the fundamental fairness guideline, we are not persuaded by Worker’s contention. While we agree that reducing the maximum period for PPD benefits one week for each week Employer pays partial TTD can result in the receipt of less money over the total benefit period, we do not consider this fundamentally unfair. As we stated before, Section 52-1-25.1, together with Section 52-1-42(B), encourages employers to rehire injured workers and therefore satisfies one of the intents of the Act. The WJC’s analysis of the issue provides additional support. In its order, the WJC observed that the duration of a worker’s benefit entitlement is based on a weekly scheme, rather than an absolute dollar amount, and that the rate of the benefit may vary over the duration of a worker’s entitlement. Once we consider the intent of the legislature to give workers the opportunity to return to gainful employment, as well as the Act’s general approach of paying benefits on a weekly basis, we are not persuaded that interpreting the statute according to its plain meaning is fundamentally unfair. Thus, we hold that Section 52-1-42(B) allows employers credit for payment of TTD benefits on a week-for-week basis, regardless of whether the benefits paid are full or partial.

III. CONCLUSION [13] For the foregoing reasons, we affirm the WJC’s order granting Employer’s motion for summary judgment and denying Worker’s cross-motion. [14] IT IS SO ORDERED.

CELIA FOY CASTILLO, Judge

WE CONCUR:
LYNN PICKARD, Judge
MICHAEL E. VIGIL, Judge
Opinion

LYNN PICKARD, JUDGE

[1] In this case, we examine the requirement in NMSA 1978, § 52-1-24(B)(1990), that a worker must suffer a "psychologically traumatic event" in order to receive workers' compensation benefits for a work-related mental illness that is unaccompanied by physical injury. Because the worker in this case did not suffer a psychologically traumatic event within the meaning of the statute, we affirm the order of the workers' compensation judge (WCJ) denying compensation.

FACTS AND PROCEEDINGS BELOW

[2] Dominic Romero (Worker) worked as a swimming pool manager for the City of Santa Fe. As part of his duties, Worker was required to perform cleaning and maintenance tasks at one of the City's pools, which was an outdoor pool. Worker had complained to his supervisors on several occasions about ongoing problems with pigeons in the pool area and on the roof of the building adjoining the pool. Worker testified that on two occasions in March 2003, he went up onto the roof to clean up pigeon detritus. Worker estimated that he cleaned up about 160 pounds of pigeon feces and carcasses. Worker testified that he would get headaches after dealing with the pigeon matter. Subsequently, the City hired an independent company to clean up the roof. The company removed approximately one and one-half tons of pigeon matter from the roof.

[3] On June 5, 2003, Worker became ill. He began to experience photophobia, nausea, disturbing dreams, and body tremors. Worker saw several doctors and underwent extensive testing, but none of the testing revealed any non-psychological condition that could be causing his symptoms. Worker also saw a psychiatrist, Dr. Davis, who stated that Worker met most of the criteria for post-traumatic stress disorder (PTSD). Davis was initially skeptical that Worker suffered from PTSD, because a diagnosis of PTSD generally requires that the patient's symptoms are precipitated by an event that is objectively life threatening. Davis initially felt that Worker's experiences cleaning up pigeon detritus did not qualify as an objectively life-threatening event that would cause PTSD. Contrary to Worker's claim that Davis diagnosed him with PTSD, Davis did not clearly state an opinion on whether Worker suffered from PTSD. Davis stated that if he had to provide an alternate diagnosis, he would say that Worker was suffering from "major depressive disorder, generalized anxiety disorder and panic disorder, and adjustment disorder with depression and behavioral features." Davis further opined that having to clean up large amounts of pigeon detritus was outside of the usual experiences of most pool workers and doing so would evoke symptoms of distress in other workers.

[4] Worker brought a claim for compensation under Section 52-1-24(B), which states in full:

"primary mental impairment" means a mental illness arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances, but is not an event in connection with disciplinary, corrective or job evaluation action or cessation of the worker's employment."

[5] After a hearing, the WCJ denied compensation. The WCJ found that Worker had been in an “accident” on June 5, 2003, the date on which Worker first began to suffer significant symptoms. The WCJ also made the following findings:

23. As a direct and proximate result of the accident of June 5, 2003, to a reasonable medical probability, Worker suffered a mental impairment. The nature of the injury fits neither primary, nor secondary mental impairment. There was no physical injury, and no psychologically traumatic event outside of the Worker's usual experience.

24. The events of June 5, 2003, would not have evoked distress in a worker in similar circumstances.

[6] The WCJ entered the following conclusions:


3. The accident of June 5, 2003, was in the course of employment with Employer.

6. Worker's injuries are purely psychological, but were not the result of a traumatic event so as to qualify as a primary mental impairment. Jensen v. New Mexico State Police, 109 N.M. 626, 788 P.2d 382 (Ct. App. 1990).

[7] Worker appeals from the order denying compensation. Worker advances three arguments on appeal: (1) the WCJ's finding that Worker did not suffer a psychologically traumatic event that was outside of his usual
experiences and would evoke symptoms of distress in similarly situated workers is not supported by substantial evidence; (2) the WCJ misinterpreted the law in determining that, in order for an injury to be compensable, the psychologically traumatic event must be catastrophic in nature; and (3) if the statute does require the traumatic event to be catastrophic in nature, it violates the equal protection clause of the New Mexico Constitution by discriminating against workers with mental disabilities. We reject all of Worker’s arguments.

**DISCUSSION**

1. The WCJ Did Not Err in Determining That Worker Did Not Suffer a Psychologically Traumatic Event Under Section 52-1-24(B)

[8] Worker contends that (1) the WCJ erred in requiring Worker to show a “catastrophic” event in order to satisfy the “psychologically traumatic event” requirement of Section 52-1-24(B) and (2) the WCJ’s decision that Worker did not suffer any event that would meet the requirements of the statute was not supported by substantial evidence.

[9] Worker’s real disagreement is with the WCJ’s determination that Worker did not suffer a psychologically traumatic event within the meaning of the statute. This is a conclusion of law and not a finding of fact that we would review for substantial evidence. Indeed, the WCJ did not make any underlying factual findings that Worker disputes. Accordingly, we will address Worker’s arguments in the following manner. We will first set forth the requirements of the statute as established in prior cases. In so doing, we will address Worker’s contention that the statute does not require a “catastrophic” event. We will then address the WCJ’s determination that Worker did not experience a psychologically traumatic event within the meaning of the statute. Because the WCJ did not make underlying findings of historical fact to support his ruling, we will examine the record to ascertain the historical facts on which the WCJ based his decision, in order to ensure that there was substantial evidence in the record that would support the WCJ’s decision. See State v. Lopez, 2005-NMSC-018, ¶ 22, 138 N.M. 9, 116 P.3d 80 (noting that where trial court has not entered specific findings, “we must draw from the record to derive findings based on reasonable facts and inferences and determine whether those facts and inferences support the conclusion reached by the court” (internal quotation marks and citation omitted)). Finally, we will address whether those facts show that Worker did not suffer a psychologically traumatic event within the meaning of the statute. This step requires us to review the WCJ’s application of the law to the facts, making sure that the WCJ applied the correct law. This is a task we perform de novo. See Tom Grownwy Equip. Co. v. Jouett, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320 (reviewing WCJ’s application of law to facts de novo).

[10] In order to demonstrate a psychologically traumatic event under Section 52-1-24(B), a worker must show three things: (1) that a specific and identifiable psychologically traumatic event has occurred, (2) that the event is “generally outside of a worker’s usual experience,” and (3) that the event “would evoke significant symptoms of distress in a worker in similar circumstances.” Jensen, 109 N.M. at 628, 788 P.2d at 384 (internal quotation marks, citation, and emphasis omitted). The first element, a psychologically traumatic event, is a “threshold criterion.” Id. If no psychologically traumatic event is shown, a court need not analyze the second and third elements. Id. at 629, 788 P.2d at 385. In this case, we conclude that Worker did not suffer a psychologically traumatic event within the meaning of the statute. Thus, we do not reach the other elements.

[11] Jensen was the first case to examine what constitutes a psychologically traumatic event. In Jensen, the worker was a police dispatcher. Id. at 627, 788 P.2d at 383. Due to other employees quitting, the worker’s facility experienced understaffing. Id. The dispatchers were required to work eight-hour shifts alone and often could not take any breaks. Id. The worker filed a claim seeking compensation due to an alleged primary mental impairment, which he contended was brought on by the understaffing. Id. Although this Court noted that being a dispatcher was considered a stressful job even under normal circumstances, id., we affirmed the WCJ, holding that understaffing did not qualify as a psychologically traumatic event under Section 52-1-24(B). Jensen, 109 N.M. at 629, 788 P.2d at 385.

[12] We began our analysis by noting the important changes that had recently been made to New Mexico workers’ compensation law involving mental disabilities. We first examined Candelaria v. General Electric Co., 105 N.M. 167, 730 P.2d 470 (Ct. App. 1986), superseded by statute as stated in Breen v. Carlisle Mun. Schs., 2005-NMSC-028, ¶ 33, 138 N.M. 331, 120 P.3d 413, in which we had held that a mental disability accruing gradually and resulting from stress caused by a worker’s “day-to-day activities” was compensable under the Workers’ Compensation Act. Jensen, 109 N.M. at 628, 788 P.2d at 384. We noted that in the legislative session immediately following the filing of Candelaria, our Legislature had amended the Act to include Section 52-1-24(B). Jensen, 109 N.M. at 628, 788 P.2d at 384. We implied that Section 52-1-24(B) was intended to supercede Candelaria. Jensen, 109 N.M. at 629, 788 P.2d at 385.

[13] We then proceeded to examine what type of event would satisfy Section 52-1-24(B). We noted that the language of the statute was substantially similar to the language used in the discussion of PTSD found in the Diagnostic and Statistical Manual of Mental Disorders (DSM). Jensen, 109 N.M. at 629, 788 P.2d at 385. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000). We noted that events described by the DSM as producing PTSD included rape, assault, military combat, floods, earthquakes, car accidents, airplane crashes, large fires, bombing, torture, and death camps. Jensen, 109 N.M. at 629, 788 P.2d at 385. We then held as follows:

Section 52-1-24(B) reflects a legislative intent to limit primary impairment to sudden, emotion-provoking events of a catastrophic nature as described in the DSM description of PTSD as opposed to gradual, progressive stress-producing causes such as occurred in Candelaria (harassment by supervisor over period of time).

Id. Applying this standard, we concluded that “[t]he event that precipitated worker’s symptoms, understaffing, does not meet the definition of a ‘psychologically traumatic event’ under the facts of this appeal.” Id.

[14] The Jensen rule has become well established, and numerous subsequent cases have quoted or referred to the above-mentioned holding, either in dicta, or in support of their substantive holdings. See Chavez v. Mountain States Constructors, 122 N.M. 579, 586, 929 P.2d 971, 978 (1996) (citing Jensen and reciting the list of events from the DSM in examining whether a rollover accident involving a dump truck satisfied the “would evoke significant symptoms of distress in a worker in similar circumstances” element of Section 52-1-24(B)); Breen, 2005-NMSC-028, ¶ 40 (citing
Worker was not barred by exclusivity provisions of the Workers’ Compensation Act because mental distress caused by ongoing sexual harassment was not compensable under the Act); Collado v. City of Albuquerque, 120 N.M. 608, 613-14, 904 P.2d 57, 62-63 (Ct. App. 1995) (repeating the list of events from the DSM and citing Jensen for the proposition that Section 52-1-24(B) uses language similar to that found in the DSM); Douglass v. State Regulation & Licensing Dep’t, 112 N.M. 183, 186, 812 P.2d 1331, 1334 (Ct. App. 1991) (citing relevant portion of Jensen for the proposition that the Legislature intended to “make gradual, stress-caused mental injuries non-compensable under the New Act” (emphasis omitted)); Holford v. Regents of Univ. of Cal., 110 N.M. 366, 368, 796 P.2d 259, 261 (Ct. App. 1990) (quoting Jensen in support of holding that work environment allegedly leading to “derangement which resulted in . . . suicide” was not a sufficient event under Section 52-1-24(B)).

{15} It is clear from Jensen and the subsequent cases that in order to prevail on a Section 52-1-24(B) claim, a worker must allege a specific, identifiable, and significant traumatic event. Work-related mental injuries are not compensable under the Act where (1) they are caused by a specific and identifiable event that is arguably traumatic but is not significant enough to qualify as a psychologically traumatic event under the statute and our cases interpreting it or (2) they accrue gradually over time as a result of ongoing, distressing work-related experiences. See Breen, 2005-NMSC-028, ¶ 40 (noting that the definition of primary mental impairment is “purposely narrow in scope so that it covers only mental illnesses that arise from a specific and definite occurrence, and not mental illnesses that develop gradually over time”).

{16} Worker appears to argue that the WCI’s decision was based on category (1) above, i.e., Worker believes that the WCI determined that Worker’s experiences may have been “traumatic events” in the colloquial sense, but were not traumatic enough, or “catastrophic” enough, to qualify as predicate events under Section 52-1-24(B). Worker further argues that the statute itself does not require a “catastrophic” event and that Jensen wrongly imposed that requirement. Worker points out that the other proof requirements in the statute already guard against recovery for mental illnesses caused by mundane events.

{17} Worker may be correct that Jensen may have overstated how severe an event must be to satisfy Section 52-1-24(B) and may have overemphasized the importance of the list of traumatic events from the DSM. Specifically, we note that Jensen was concerned with gradually accruing mental problems caused by ongoing stress. Jensen, 109 N.M. at 629, 788 P.2d at 385. Thus, the Jensen Court was not required to decide “how traumatic” a traumatic event must be in order to satisfy the statute. While the Legislature did use language “markedly similar to the medical definition of PTSD,” Collado, 120 N.M. at 613-14, 904 P.2d at 62-63, we doubt that the Legislature intended to limit recovery to those workers suffering from mental illnesses caused by an event that is scientifically proven to cause PTSD. Certainly our courts have not intended the DSM list to be exclusive. See Chavez, 122 N.M. at 586, 929 P.2d at 978 (noting that even if the DSM list did not include severe car accidents, “it is self-evident that for almost any person . . . rolling a loaded dump truck would be traumatic”).

{18} However, our cases clearly require the traumatic event to be “catastrophic” in nature, and Worker has not persuaded us that those cases were wrongly decided. In enacting Section 52-1-24(B), the Legislature clearly intended to supercede this Court’s holding in Candelaria and allow for compensation only in cases where a significant traumatic event has occurred. The use of the word “catastrophic” in past cases is simply a way of defining the category of cases in which the Legislature intended to allow compensation. It is not a separate requirement that our courts have imposed.

{19} In any event, we need not further address our concerns regarding the breadth of the holding in Jensen, because we are confident that the WCI’s decision was based on category (2) above. In other words, we believe the WCI found that Worker’s illness was caused by his ongoing, distressing experiences of having to clean up pigeon matter. We do not believe the WCI found that Worker suffered a specific and identifiable, but not sufficiently catastrophic, event. We base this interpretation of the order on two factors. First, the WCI found that Worker’s illness was “not the result of a traumatic event.” We do not think the WCI would have made this statement had he in fact meant that Worker’s illness was caused by a traumatic event, but that the event was not traumatic enough, or was not “catastrophic” enough, to satisfy the statute. Second, we note the following finding, which was requested by Worker and rejected by the WCI:

26. If not for the dicta in Jensen delineating what that Court considered to be a psychologically traumatic event, this [court] would have found that Worker’s accidental injury and resulting psychological illness was compensable.

By “the dicta in Jensen,” Worker was clearly referring to the section that quotes the DSM, and not to Jensen’s central holding that injuries caused by “gradual, progressive stress-producing causes” are not compensable. See Jensen, 109 N.M. at 629, 788 P.2d at 385.

{20} When a party bearing the burden of proof requests a finding on a particular issue and that finding is rejected, we view the rejection as a rejection of the position advocated for in the requested finding. Gonzales v. Lopez, 2002-NMCA-086, ¶ 27, 132 N.M. 558, 52 P.3d 418. Thus, it is clear to us that the WCI was rejecting Worker’s argument that Worker should be found ineligible for compensation only because the events he experienced were not traumatic enough. Rather, we think the WCI found this case to be factually analogous to Jensen, because Worker’s illness was caused by ongoing work-related stress, rather than by one or more specific and identifiable traumatic events. We agree with the WCI.

{21} As we have stated, the WCI did not make factual findings regarding the relevant historical facts in this case. Rather, he merely entered a conclusion of law stating that Worker did not suffer a traumatic event under Jensen. Thus, we must examine the record to determine whether the evidence presented below supports the conclusion that Worker’s experiences were analogous to those in Jensen. See Lopez, 2005-NMSC-018, ¶ 22 (drawing from the record to establish historical facts where the trial court did not enter specific findings). We believe that Worker’s own testimony and his requested findings of fact were sufficient to establish that his illness was caused by the type of ongoing, stress-producing causes referred to in Jensen. We proceed to briefly outline his testimony and requested findings.

{22} In March of 2003, Worker was assigned to prepare the outdoor pool for opening in the summertime. Worker testified that
he spent a significant amount of time during the spring of 2003 cleaning the matting in the building adjacent to the pool because the roof had leaked and the matting was soiled with pigeon feces. Worker also testified that there was pigeon feces in the pool and in the deck area. He stated that he would often have to clean out the pool strainers because they would become clogged with feces, carcasses, and feathers. Worker estimated that during April and May, he spent one to two hours a day cleaning up pigeon feces on the matting and in the area surrounding the pool. Worker testified that he would experience mild headaches after dealing with the pigeon matter.

[23] Worker testified that he went up on the roof and removed pigeon matter on two occasions. He stated that he used 45-gallon garbage bags, which he would fill approximately half to three-quarters of the way full. Worker’s exhibits establish that he removed two bags of pigeon matter on each of the two occasions when he worked on the roof. Worker stated that he “did not even” the amount of pigeon detritus on the roof. Worker stated that the odor on the roof was “horrible” and that it made him nauseous and gave him headaches.

[24] Worker requested the following findings of fact:

1. Worker testified that from the time that he started working at the [outdoor pool] there was a problem with pigeons and pigeon droppings. . . .

4. Worker testified credibly that before June 5, 2003, he and other people suffered from headaches and nausea when they worked at the pool. . . .

6. Worker’s Trial Exhibits . . . give ample evidence to support Worker’s testimony that the [pool] area, especially the roof, was inundated with pigeon fecal matter and produced foul odors.

7. Worker testified that he was asked to clean up the pigeon feces and carcasses from the [pool] roof . . . .

19. Worker has a psychological condition caused by his exposure to the pigeon feces and detriment [sic] at his place of employment.

[25] Worker’s testimony and his requested findings do not indicate that Worker suffered a psychologically traumatic event. In fact, we cannot say that Worker has alleged any “event” at all. We note that while Worker’s appellate brief puts some emphasis on the occasions when Worker cleaned up pigeon matter on the roof, his requested findings of fact do not make significant mention of those occasions. The requested findings state only that he “was asked to clean up the pigeon feces and carcasses from the [pool] roof.” The requested findings do not mention any details about those occasions, such as how many times he worked on the roof, the relevant dates, or how much pigeon matter he removed. On balance, Worker’s statements indicate an ongoing problem with pigeon detritus, not one or more specific and identifiable distressing events. Jensen speaks to precisely such an ongoing pattern of occurrences that are relatively insignificant when viewed in isolation but combine to distress a worker. Thus, we hold that the WCJ did not err in ruling that Worker did not suffer a psychologically traumatic event under Section 52-1-24(B).

[26] Before turning to Worker’s constitutional argument, we briefly address two additional arguments he makes with regard to the WCJ’s finding that he did not suffer a psychologically traumatic event. First, Worker appears to argue as follows: Worker’s expert witness, a psychiatrist, testified that Worker suffered a “traumatic event”; this testimony was uncontroverted; thus the WCJ was required to accept the testimony. Worker appears to be referring to the “uncontroverted medical evidence rule,” which dictates that where expert medical testimony regarding the “causal connection between disability and accident” in a workers’ compensation case is uncontroverted, that testimony is binding on the trier of fact. Hernandez v. Mead Foods, Inc., 104 N.M. 67, 70, 716 P.2d 645, 648 (Ct. App. 1986), limited on other grounds by Graham v. Presbyterian Hosp. Ctr., 104 N.M. 490, 492, 723 P.2d 259, 261 (Ct. App. 1986). Worker’s argument is unavailing. The uncontroverted medical evidence rule applies to issues of causation, and the question of whether Worker experienced a traumatic event is not a causation issue. Moreover, the term “traumatic event” is a term of art with a specific meaning under the Act. Thus, whether Worker experienced a “traumatic event” is a question of law that is not subject to conclusive proof by expert testimony. Cf. State v. Elliot, 2001-NMCA-108, ¶ 22, 131 N.M. 390, 37 P.3d 107 (“[O]pinion testimony that seeks to state a legal conclusion is inadmissible.”). We reject Worker’s argument with regard to the expert testimony.

[27] Second, Worker argues that he should prevail based on one of this Court’s unpublished memorandum opinions, Carrasco v. Carlsbad Mun. Schs., Nos. 20,833/20,832 (May 29, 2001). As Worker acknowledges, memorandum opinions have no precedential value and should not be cited. Rule 12-405(C) NMRA (“An order, decision or memorandum opinion . . . shall not be published nor shall it be cited as precedent in any court.”). As we have made clear in the past,

Unpublished decisions are not meant to be used as precedent; they are written solely for the benefit of the parties. Because the parties knew the facts of the case, a memorandum opinion may not describe fully the critical facts upon which the case was decided. When the facts of a case are not fully known, it is not possible to know whether it can be accurately distinguished from similar cases. Winrock Inn Co. v. Prudential Ins. Co., 122 N.M. 562, 569, 928 P.2d 947, 954 (Ct. App. 1996) (internal citations omitted). We agree that on the surface, the facts of Carrasco bear some similarities to the facts of this case. We also note some distinguishing factors between the two cases. However, in light of the above policies, we decline to address the facts of Carrasco.

2. Section 52-1-24(B) Does Not Violate Equal Protection

[28] Finally, Worker argues that if Section 52-1-24(B) is interpreted to require a showing of a “catastrophic event,” that requirement violates equal protection under the New Mexico Constitution. Worker argues that requiring a showing of a catastrophic event discriminates against workers with mental disabilities because workers with physical disabilities are not required to make such a showing. Worker also argues that, if a catastrophic event is required, the statute violates equal protection by creating two classes of workers who have mental disabilities—those who have suffered a catastrophic event and those who have not. We review challenges based on equal protection de novo. See Pinnell v. Bd. of County Comm’rs, 1999-NMCA-074, ¶ 17, 127 N.M. 452, 982 P.2d 503 (reviewing equal protection challenge de novo).

[29] As we have already held, the requirement that a worker must demonstrate a catastrophic event in order to prevail on
The Court stated that the elements of the statute constituted “permissible proof requirement[s].” Id. The Court followed this point with a cite to Holford, 110 N.M. 366, 796 P.2d 259, in which this Court had held that the proof requirements of Section 52-1-24(B) did not violate equal protection. Breen, 2005-NMSC-028, ¶ 40.

(32) We acknowledge that Holford applied rational basis review, rather than intermediate scrutiny. See Holford, 110 N.M. at 368, 796 P.2d at 261 (“[W]e find that the limitations on proof of primary mental impairment in Section 52-1-24(B) are not arbitrary and unreasonable, but are rationally related to a legitimate legislative purpose.”). We agree with Worker's Compensation Act, which limited compensation for workers with mental disabilities to 100 weeks. Breen, 2005-NMSC-028, ¶ 1. Because the statute made a legislative classification on the basis of mental disability, the Court applied intermediate scrutiny. Id. ¶ 28. The Court held that the 100-week limitation violated the equal protection clause of the New Mexico Constitution because it was not “substantially related to furthering the purposes and goals of the Act.” Id. ¶ 50.

(31) As part of its analysis, the Court examined Section 52-1-24(B). Breen, 2005-NMSC-028, ¶ 40. The Court determined that the proof requirements of Section 52-1-24(B) represented “a valid way to prevent fraudulent claims from being compensated in the first place.” Breen, 2005-NMSC-028, ¶ 40. The Court then cited Jensen, noting that the definition of primary mental impairment was “purposefully narrow in scope.” Breen, 2005-NMSC-028, ¶ 40. The Court stated that the elements of the statute was “purposefully narrow in scope.”
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