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"Taos Door" by Ed Wyatt (see page 5)
Weems Gallery, Albuquerque

2008 State Bar Budget Disclosure
Available online at www.nmbar.org
For a printed copy, call (505) 797-6035
See the Nov. 5 Bar Bulletin

www.nmbar.org
Alliance Program:
Guide to Member Benefits

For more information visit www.nmbar.org; or contact
State Bar of New Mexico Membership Services, 5121 Masthead NE, Albuquerque, NM 87109
Phone: (505) 797-6033 • E-mail: membership@nmbar.org

Through the stated or implied endorsement of Alliance Program Participants, the State Bar of New Mexico assumes no liability for claims, losses, costs, damages, judgments or settlements including costs, expenses and attorneys fees arising from or in any manner relating to (1) any inaccurate representations made by the participant, (2) any breach of any warranty or any default in the performance of any of the covenants made by the participant, and (3) any negligent acts or omissions, whether inadvertent or intentional, and any willful misconduct by participant.
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For information on how you can set up your Attorney or Firm page contact:

Marcia Ulibarri
Direct 505.797.6058
Cell 505.400.5469
mulibarri@nmbar.org
<table>
<thead>
<tr>
<th>Event</th>
<th>Description</th>
<th>Credit</th>
<th>Fee</th>
<th>Time</th>
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</thead>
<tbody>
<tr>
<td>e-Filing in Federal District Court (excerpt from 2007 Annual Meeting)</td>
<td>1.0 General CLE Credit</td>
<td>$49</td>
<td>8:30 a.m. – 9:30 a.m.</td>
<td></td>
</tr>
<tr>
<td>e-Discovery (excerpt from 2007 Annual Meeting)</td>
<td>1.0 General CLE Credit</td>
<td>$49</td>
<td>9:45 a.m. – 10:45 a.m.</td>
<td></td>
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<tr>
<td>Defending Computer Crime Cases</td>
<td>4.2 General CLE Credits</td>
<td>$159</td>
<td>11:00 a.m. – 3:15 p.m.</td>
<td></td>
</tr>
<tr>
<td>Jay Foonberg: Ballooning, Boxes, and the Successful Practice of Law – From Womb to Tomb</td>
<td>3.0 General, 1.0 Ethics, 1.0 Professionalism Credits</td>
<td>$239</td>
<td>9:00 a.m. – 2:30 p.m.</td>
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TERENCE F. MACCARTHY, ESQ.

Thursday, November 29, 2007 • State Bar Center, Albuquerque

6.0 General CLE Credits

Co-Sponsor: Trial Practice Section

- Standard Fee $169
- Trial Practice Section Members, Government, Legal Services Attorney, Paralegal $159

Terence F. MacCarthy has been called one of America's most popular and respected teacher of lawyers having taught trial advocacy to lawyers and law students in every state in the country. Described as "...constitutionally incapable of boring anybody for long...", he is the author of numerous legal articles and serves on the Permanent Faculty of six law schools. He is also a permanent faculty member of the National Criminal Defense College, has served on Gerry Spence's Trial Lawyers College, and has lectured for the Federal Judicial Center, the Department of Justice, and State Bar Associations across the nation.

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>8:30 a.m.</td>
<td>Registration</td>
</tr>
<tr>
<td>9:00 a.m.</td>
<td>Impeachment</td>
</tr>
<tr>
<td>10:00 a.m.</td>
<td>Break</td>
</tr>
<tr>
<td>10:15 a.m.</td>
<td>Impeachment (continued)</td>
</tr>
<tr>
<td>Noon</td>
<td>Lunch (provided at the State Bar Center)</td>
</tr>
<tr>
<td>12:45 p.m.</td>
<td>Trial Practice Section Annual Meeting</td>
</tr>
<tr>
<td>1:00 p.m.</td>
<td>Cross-Examination</td>
</tr>
<tr>
<td>3:00 p.m.</td>
<td>Break</td>
</tr>
<tr>
<td>3:15 p.m.</td>
<td>Cross-Examination (continued)</td>
</tr>
<tr>
<td>4:30 p.m.</td>
<td>Adjourn</td>
</tr>
</tbody>
</table>

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbarcle.org
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Name ___________________________________________ NM Bar # _________________________________
Street ______________________________________________________________________________________
City/State/Zip ________________________________________________________________________________
Phone ___________________________________________ Fax ___________________________________________
E-mail ________________________________________________________________________________________

- Purchase Order (Must be attached to be registered)
- Check enclosed $ ____________ Make check payable to: CLE

Authorized Signature ___________________________________________________________ Exp. Date _______________
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Professionalism Tip

Judge’s Preamble
As a judge, I will strive to ensure that judicial proceedings are fair, efficient and conducive to the ascertainment of the truth. In order to carry out that responsibility, I will comply with the letter and spirit of the Code of Judicial Conduct, and I will ensure that judicial proceedings are conducted with fitting dignity and decorum.

Meetings

November

14
Children’s Law Section Board of Directors, noon, Juvenile Justice Center
14
Criminal Law Section Board of Directors, noon, State Bar Center
14
Law Office Management Committee, noon, State Bar Center
14
Membership Services Committee, noon, State Bar Center
15
Alternative Methods of Dispute Resolution Committee, noon, Bernalillo County Courthouse
15
Health Law Section Board of Directors, noon, State Bar Center

State Bar Workshops

November

14
Consumer Debt/Bankruptcy Workshop 6 p.m., Silver City Annex (Bank of America Building) Silver City
28
Lawyer Referral for the Elderly Workshop 9:30 a.m., Munson Senior Center, Las Cruces

December

5
Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque

6
Consumer Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces

Cover Artist: Following successful careers as a photojournalist, television art director and graphic designer, Ed Wyatt turned his attention to portraying the dramatic and spiritual quality of the architecture, landscapes and light of the Southwest. Wyatt’s original screen prints are produced and hand-printed on archival paper. To see the cover art in its original color, visit www.nmbar.org and click on Bar Bulletin.
NOTICES

COURT NEWS

N.M. Supreme Court

Board of Legal Specialization

Comments Solicited

The following attorney is applying for recertification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Attorneys and others are encouraged to comment upon any of the applicant’s qualifications within 30 days after the publication of this notice. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Paul L. Civerolo
Workers’ Compensation Law

Law Library

Open Monday–Friday, 8 a.m.–6 p.m.
Closed Saturdays and Sundays
Phone: (505) 827-4850
Fax: (505) 827-4852
E-mail: libref@nmcourts.com
Web site: www.supremecourtlawlibrary.com

N.M. Compilation Commission

A meeting of the New Mexico Compilation Commission will be held to review and take action upon the proposed recommendations of the NMSA Advisory Committee for the continued publication of the NMSA 1978, appellate court opinions and Supreme Court rules of procedure. The meeting will take place at 9 a.m., Dec. 17, at the Supreme Court Building, Room 208. A copy of the agenda is available by calling the New Mexico Compilation Commission, (505) 827-4821.

Proposed Revisions to the Children’s Court Rules

The Children’s Court Rules Committee is proposing comprehensive amendments to the Children’s Court rules. To comment on the proposed amendments before they are submitted to the Court for final consideration, send written comments to: Kathleen J. Gibson, Clerk New Mexico Supreme Court PO Box 848 Santa Fe, NM 87504-0848 Comments must be received by the clerk on or before Nov. 26 to be considered by the Court.

For reference, see the Nov. 2 (Vol. 46, Special Issue) Bar Bulletin.

Proposed Revisions to the Rules of Evidence

The Rules of Evidence Committee is considering proposed revisions to the Rules of Evidence. Send written comments to: Kathleen J. Gibson, Clerk New Mexico Supreme Court PO Box 848 Santa Fe, NM 87504-0848 Comments must be received by the Clerk on or before Nov. 19 to be considered by the Court.

For reference, see the Oct. 29 (Vol. 46, No. 44) Bar Bulletin.

Second Judicial District Court

Judicial Appointment

Governor Bill Richardson has announced his appointment of William Edward Parnall to fill the vacancy in Division I at the 2nd Judicial District Court. Effective Nov. 5, Judge Parnall was assigned Children’s Court cases previously assigned to Judge Marie A. Baca. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Nov. 5 to challenge or excuse Judge Parnall pursuant to Supreme Court Rule 1-088.1.

National Adoption Day

The 2nd Judicial District Court, Children’s Court Division, will celebrate National Adoption Day on Nov. 17. Clients having an adoption pending in Bernalillo District Court are invited to participate. Contact Nancy Sandstrom in Judge M. Monica Zamora’s office, (505) 841-7392.

Swearing-In Ceremony

William Edward Parnall will be formally sworn in as a 2nd Judicial District Court judge, Division I, at 4:30 p.m., Nov. 30, in the Frank H. Allen Jr. Courtroom #338, Bernalillo County Courthouse, 400 Lomas Blvd., NW, Albuquerque. A joint reception with Justice Charles Daniels, New Mexico Supreme Court, will immediately follow at the Unser Racing Museum, 1776 Montaño Road NW, Albuquerque.

Destruction of Exhibits and Tapes

Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits or tapes filed with the court for the years and courts shown below, including but not limited to cases that have been consolidated, are to be destroyed. Cases on appeal are excluded. Counsel for parties are advised that exhibits and tapes can be retrieved by the dates shown below. Attorneys who have cases, or who have cases with tapes and wish to have duplicates made, may verify exhibit or tape information with the Special Services Division at the numbers shown below. Plaintiff(s) exhibits will be released to counsel of record for the plaintiff(s), and defendant(s) exhibits will be released to counsel of record for defendant(s) by Order of the Court. All exhibits will be released in their entirety. Exhibits and tapes not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

| Judicial District Court | Exhibits | Tapes | Date
|-------------------------|---------|-------|-------
| 1st Judicial District Court (505) 827-4735 | Exhibits in criminal, civil, Children's Court, domestic incompetency/mental health, probate cases, 1973–1994 | | May be retrieved through Jan. 8, 2008
| 10th Judicial District Court (505) 461-2764 | Tapes in civil cases, 1988–2005 | | May be retrieved through Dec. 1
**U.S. District Court for the District of New Mexico**

**Ceremony to Honor Judge Joe H. Galvan**

The legal community is invited to attend a ceremony honoring U.S. Magistrate Judge Joe H. Galvan at 4 p.m., Nov. 15, U.S. Courthouse, Third Floor Courtroom I, 200 E. Griggs, Las Cruces. A reception will immediately follow from 5:30 to 7:30 p.m. at the Stan Fulton Athletic Center, New Mexico State University. Call (505) 348-2001 or e-mail jbullington@nmcourt.fed.us to R.S.V.P.

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**STATE BAR NEWS**

**Attorney Support Group**

The Attorney Support Group offers two meeting opportunities:

- 5:30 p.m., Dec. 3 (meets regularly on the first Monday of the month)

- 7:30 p.m., Nov. 19 (meets regularly on the third Monday of the month)

Both groups meet at the First United Methodist Church at Fourth and Lead SW, Albuquerque. For more information, contact Bill Stratvert, (505) 242-6845.

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**Board of Bar Commissioners**

**Appointments**

**Fifth Bar Commissioner District Vacancy**

A vacancy in the 5th Bar Commissioner District, representing Curry, DeBaca, Quay and Roosevelt counties, was created due to Donald C. Schutte’s appointment to a judgeship in the 10th Judicial District. The Board will make the appointment at its Nov. 30 meeting to fill the vacancy for the remainder of the unexpired term, which ends December 2008. Active-status members with a principal place of practice located in the 5th Bar Commissioner District are eligible to apply. Anyone interested in serving on the Board of Bar Commissioners should submit a letter of interest and resume to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to (505) 828-3765; or e-mail jconte@nmbar.org.

**Children’s Law Section**

**5th Annual Art Contest**

Children’s Law Section invites the winners of the “What Other People Think of Me/What I Think of Myself” art contest. Masks decorated by children in D-homes and drug court will be on display.

The reception in Santa Fe will be held from 4 to 6 p.m., Nov. 16, at the B.F. Young Professional Building, Main Conference Room, 1300 Camino Sierra Vista. Refreshments will be served!

The section thanks the following sponsors for their generous donations:

- Susan Alkema
- Abyad Temple
- Ballut
- Elizabeth Collard
- Jean Conner
- Ballad
- Frances McCrady
- Carden
- Fine Law Firm
- Flynn-O’Brien
- Fry Law Firm
- Jewish Community
- Kiva Lighting LLC Center

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

**Annual Meeting and CLE**

The Natural Resources, Energy and Environmental Law Section will hold its annual meeting at 12:15 p.m., Dec. 14, in conjunction with the CLE, Natural Resource Issues in Indian Country. Agenda items for the annual meeting should be sent to Chair Steve Hattenbach, steve.hattenbach@usda.gov, or (505) 248-6020.

Attendees at the CLE will earn 6.1 general, 1.0 ethics and 1.0 professionalism CLE credits. The cost of the CLE program is $229; and $219 for section members, government and legal services attorneys and paralegals. Lunch will be provided and a reception and law student/attorney mixer will be held after the CLE. 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.

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**Paralegal Division**

**Monthly Brown-Bag CLE for Attorneys and Paralegals**

The Paralegal Division invites members of the legal community to bring a lunch and attend Trial Technology: Trials in the 21st Century, presented by Jeanne Adams, paralegal. The program will be held from noon to 1 p.m., Nov. 14, at the State Bar Center and offers 1.0 general CLE credit (pending MCLE approval). Registration begins at the door at 11:30 a.m. The cost is $16 for attorneys and $15 for paralegals and support staff.

For more information, contact Cheryl Passalaqua, (505) 872-7469 or Evonne Sanchez, (505) 222-9356.
Prosecutors Section
Annual Meeting

The Prosecutors Section will hold its annual membership meeting at noon, Nov. 15, at the State Bar Center. Lunch will be provided to those who R.S.V.P. by Nov. 13 to membership@nmbar.org. Contact Chair Stephen Kovach, skovach@da.state.nm.us, to place an item on the agenda.

Real Property, Probate and Trust Section
Annual Meeting and CLE

The Real Property, Probate and Trust Section will hold its annual membership meeting at 12:45 p.m., Nov. 30, in conjunction with the 2007 Real Property Institute at the State Bar Center. Contact Chair Scotty Holloman, scotty@leaco.net or (505) 393-0505, to place an item on the agenda. CLE attendees will earn 7.0 general CLE credits. The cost of the CLE program is $189; and $179 for section members, government and legal service attorneys and paralegals. Lunch will be provided. See the CLE At-a-Glance insert in the Oct. 15 (Vol. 46, No. 42) Bar Bulletin for more information. 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.

Senior Lawyers Division
Holiday Social and Year-End Meeting

The Senior Lawyers Division will hold its year-end meeting at 4 p.m., Dec. 7, at the State Bar Center. A holiday social with wine and snacks will follow at 5 p.m. R.S.V.P. by Dec. 5 to Tony Horvat, thorvat@nmbar.org or (505) 797-6033.

Software Tutorials

Free software tutorials for State Bar members and their support staff will be offered every Friday at the State Bar Center Computer Lab through the end of the year (excluding Nov. 16 and Nov. 23). Provided by the Law Office Management Committee, tutorials will be offered on Lotus 1-2-3, PowerPoint, Office Integration, Excel, Access, Quicken and QuickBooks. Only one space is available for each tutorial, but all seven will be available every Friday. Space will be reserved on a first-come first-served basis. Each tutorial is 3½ to 4 hours in length and participants are encouraged to start by 9 a.m. to provide ample time to finish. Call (505) 797-6039 or e-mail vcordova@nmbar.org to reserve a spot. Leave your name, phone number, e-mail address, the date you wish to attend, and the title of the program you are interested in so confirmation can be sent.

Featured Program: Quickbooks—Learn how to add and manage customer and vendor accounts, create invoices, receive payments, make deposits, enter and pay bills, make adjustments, setup and process payroll and track accounts receivable. In addition, learn how to run reports, make journal entries, reconcile bank statements and address tax issues and year-end procedures.

For more information about the panelists and to register, visit http://www.rpost.com/webinar/2007/11/28. Use promotional code “SBNM” to attend free of charge.

Free Live Webinar Sponsored by SBNM and RPost
How to Increase ROI While Mitigating Risk When Moving from Paper to Electronic
10 a.m., Nov. 28

Learn how to protect important e-mail against all types of challenges, especially legal. If you have not ventured from paper-based business transactions to electronic for fear of losing your solid business records or you have made the conversion but without sufficiently addressing your business record retention/retrieval/transfer capabilities, then this webinar is for you. Take advantage of new technologies that put e-mail on a level playing field with couriers in terms of assurance, tracking and proof of delivery.

Panelists from The ePolicy Institute, Locke Lord Bissell & Liddell and RPost will explain in detail how critical it is that you manage your electronic business records properly to minimize risk AND how your e-documents can be authenticated to withstand legal scrutiny to give you the upper hand when challenged. You will learn about an all-in-one best practices tool that will give you more confidence and legal protection when conducting business electronically, allowing you to take advantage of its simplicity, cost-effectiveness, efficiency and protections at a fraction of the cost of over-night delivery.

For more information about the panelists and to register, visit http://www.rpost.com/webinar/2007/11/28. Use promotional code “SBNM” to attend free of charge.
872-8626. Attendees will earn 6.0 general CLE credits. The cost of the CLE program is $169; $159 for section members, government attorneys and paralegals. 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.

OTHER BARS
Doña Ana County Bar Association
Reception for Justice Charles W. Daniels
Recently appointed Justice Charles W. Daniels of the New Mexico Supreme Court will address the legal community and the general public at 4 p.m., Nov. 16, in the Ceremonial Courtroom of the 3rd Judicial District Court at 201 W. Picacho, Suite A, in Las Cruces. The Doña Ana County Bar Association will host a welcoming reception at the courthouse immediately following his remarks. Refreshments will be served until 6 p.m. For further information, call (575) 523-8200.

UNM
School of Law
Juvenile Justice Advisory Committee
Delinquency Program for Attorneys
The Juvenile Justice Advisory Committee has generously agreed to fund a CLE program for prosecutors and defense counsel on delinquency issues to be held from 7:30 a.m. to 5 p.m., Dec. 4, at the Hotel Albuquerque. Sponsored by the Children’s Law Center at UNM, The Legacy of Gault: Professional Excellence in Delinquency Practice celebrates attorneys on both sides of the aisle. Topics will include credibility, competency, ethics and the latest research on juvenile sex offenders, with breakout sessions on related topics. For information, visit http://ipl.unm.edu/childlaw or call (505) 277-1050.

Attorneys are encouraged to also attend the 2007 Juvenile Justice Conference on Dec. 5 and 6 at the same hotel. Dr. Abigail Baird will speak on adolescent brain development and cover a host of topics important to anyone working with young people at risk. Registration and lodging scholarships are available to judges, attorneys and others. Visit www.nmjjcregistration.com for details.

Library Hours
Monday–Thursday 8 a.m. to 11 p.m.
Friday 8 a.m. to 6 p.m.
Saturday 9 a.m. to 6 p.m.
Sunday Noon to 11 p.m.

Reference
Monday–Friday 9 a.m. to 6 p.m.
Sunday Noon to 4 p.m.
Thanksgiving Holidays Closed
Nov. 22–23

Media Training Course
Free to Legal Community
Professor Margaret Montoya’s Lawyers and the New and Old Media class will be host Training Lawyers for the Mass Media from 3 to 8 p.m., Nov. 19, in room 2525 at the Law School. This free media training workshop for UNM law students, faculty and local attorneys will feature expert media trainer and Bernalillo County Metro Court Public Information Director Janet Blair.

In this world of ever-changing media, it is more important than ever for lawyers to be media savvy.
- Learn to communicate the exact message desired.
- Learn to get the media to use the precise quotes and sound bites created.
- Look comfortable and sound relaxed on TV and in all media interviews.

Registered attendees are asked to attend the entire training. Spaces are limited.

To register, e-mail Jacob Gallegos, GALLEG@law.unm.edu, by Nov. 16.
Denise M. Chanez has joined the Narvaez Law Firm as an associate. Prior to joining the firm, Chanez worked as a law clerk with Chief Justice Edward Chavez.

The Best Lawyers in America® 2008 Edition has selected 33 Modrall Sperling attorneys as the best in the state in a diverse range of specialty areas, from natural resources law, corporate law and administrative law, to commercial litigation, tax law, construction law and employment law.

Larry P. Ausherman
Douglas A. Baker
Duane E. Brown
Stuart R. Butzler
John R. Cooney
Timothy J. De Young
Earl E. DeBrine
Dale Wallace Ek
Dennis J. Falk
Timothy L. Fields
Paul M. Fish
Peter Franklin
Kenneth L. Harrigan
James P. Houghton
William Reeves Kelcher
John J. Kelly
Lisa Mann

Margaret Lewis Meister
Arthur Melendres
Jennifer A. Noya
Maria O’Brien
James M. Parker
Patrick J. Rogers
Marjorie A. Rogers
Ruth M. Schifani
Douglas G. Schneebeck
William C. Scott
Lynn H. Slade
Walter E. Stern III
R. E. Thompson
Douglas R. Vadinis
Timothy R. Van Valen
Curtis W. Schwartz

The Best Lawyers in America® 2008 Edition has selected 36 attorneys with the Rodey Law Firm. Rodey has the distinction of having more attorneys listed than any other law firm in New Mexico.

Mark K. Adams
Leslie McCarthy Apodaca
William J. Arland, III
James A. Askew
Jack M. Brant
David W. Bunting
John P. Burton
Jeffrey M. Crossdell
R. Nelson Frange
Catherine T. Goldberg
Scott D. Gordon
Alan Hall
Bruce Hall
Jonathan W. Hewes
Paul R. Koller
W. Robert Lasater, Jr.
Robert G. McCorkle
Mark C. Meiering
Richard C. Minzner
Donald B. Monnheimer
Dewitt Michael Morgan
W. Mark Mowery
Julie P. Neerken
Sunny J. Nixon
Thomas A. Outler
Charles K. Purcell
Edward Ricco
John P. Salazar
Andrew G. Schultz
Patrick M. Shay
Ellen T. Skrak
Mark A. Smith
R. Tracy Sprouls
Robert M. St. John
Rex D. Throckmorton

In addition, Rodey was ranked #1 in New Mexico in the following areas:
- Commercial litigation (10 attorneys listed)
- Corporate law (4 attorneys listed)
- Medical malpractice law (4 attorneys listed)
- Personal injury litigation (8 attorneys listed)
- Real estate law (4 attorneys listed)

Sam M. Gill recently joined Modrall Sperling as an associate. Gill’s professional focus is in the firm’s litigation department, primarily within the employment, labor and education law practice areas. Gill received his J.D. from the UNM School of Law. While in school, he was the recipient of the Lewis R. Sutin Award for excellence in trial advocacy.

Cate Stetson of Stetson Law Offices PC and Jana L. Walker, of counsel to Stetson Law Offices, have been selected as two of the seven Southwest Super Lawyers in the field of Native American law. Both Stetson and Walker are certified as specialists in federal Indian law by the New Mexico Board of Legal Specialization.

Laura Cass has joined the Law Office of Peter H. Johnstone PC as an associate.

Matthew W. Park recently joined Modrall Sperling Law Firm in the firm’s litigation department. Park was a judicial clerk for the Honorable James M. Johnson of the Washington State Supreme Court and served as a judicial extern for the Honorable Lynn B. Davis of the Utah 4th District Court. Park received his undergraduate degree from Brigham Young University and his Juris Doctor from the University of Southern California, where he was managing editor of the Southern California Review of Law and Social Justice and president of the Federalist Society for Law and Public Policy. Park also holds a Master of Arts in communication law and policy from the University of Southern California, Annenberg School for Communication.

General Services Department Secretary Arturo Jaramillo received a 2007 Spirit of Excellence Award from the American Bar Association’s Commission on Racial and Ethnic Diversity in the Profession. The award “celebrates the achievements of diverse lawyers and others who contribute to the legal profession and society.” In 1993, Jaramillo became the first Hispanic president of the State Bar. Commission Chair Kay Hodge described Jaramillo as "both a role model and mentor, particularly for lawyers of color."

Michael G. L. Hamilton has joined the Rodey Law Firm as an associate practicing in the firm’s business department. His practice focuses primarily in the areas of natural resources, corporate law and public finance. His experience includes structuring water transactions and preparing the issuance of municipal bonds. Hamilton received his law degree from Stanford Law School.
Albuquerque attorney Michelle A. Hernandez of Modrall Sperling has been selected as a fellow of the Litigation Counsel of America. Hernandez is a litigator whose practice is concentrated in the areas of nursing home litigation and insurance defense. Hernandez received her J.D. from the University of California at Los Angeles in 1997. The Litigation Counsel of America is a trial lawyer honorary society comprised of litigators throughout the United States. Fellowship in the LCA is limited and by invitation only.

Gina T. Constant has joined the Rodey Law Firm as an associate practicing primarily in the area of intellectual property law—specifically, patent, copyright and trademark law. Constant is a registered patent agent with the U.S. Patent and Trademark Office. She brings over 20 years of business experience to her practice including two years as a process engineer at a nuclear-chemical processing plant in Washington and 14 years as a process engineer, projects manager and department manager at Intel. She also ran a small health care business.

Richard K. Barlow, of the Albuquerque firm of Barlow & Wilcox PA, was recently selected by 2007 Southwest Super Lawyers in the field of closely held business. Barlow is also listed in The Best Lawyers in America® 2008 Edition. He has been selected for inclusion in this publication for over 20 years and is currently listed in six categories: tax law, trusts and estates, non-profit/charities law, corporate law, mergers and acquisitions law and securities law. Barlow also has an “AV” rating in the Martindale-Hubbell Law Directory. Barlow has been an attorney in New Mexico for 32 years, and he currently focuses his practice in the areas of tax law, estate planning, and business and corporate law.

The following attorneys from Sutin Thayer & Browne have been selected as 2007 Southwest Super Lawyers: Paul Bardacke—attorney dispute resolution and business litigation; Gail Gottlieb—bankruptcy and creditor-debtor rights; Robert G. Heyman—securities and corporate finance; Michael G. Sutin—real estate.

In addition, 12 lawyers from the firm have been included in the The Best Lawyers in America® 2008 Edition: Paul Bardacke—an alternative dispute resolution and commercial litigation; Anne P. Browne—real estate law; Saul Cohen—intellectual property law; Gail Gottlieb—bankruptcy and creditor-debtor rights law; Michael J. Golden—family law; Jay D. Hertz—banking law; Robert G. Heyman—banking law, corporate law, public finance law and securities law; Henry A. Kelly—corporate law, leveraged buyouts and private equity law and real estate law; Sarita Nair—water law; Jay D. Rosenblum—corporate law and mergers and acquisitions law; and Norman S. Thayer—antitrust law and commercial litigation. Michael G. Sutin, of counsel with the firm—real estate law and trusts and estates.

Atkinson & Kelsey PA, the first New Mexico law firm to specialize in divorce and family law, has received a “Preeminent Law Firm” ranking, the highest possible, from the 2007 Martindale-Hubbell Law Directory. The rankings, reflecting ethical standards and legal ability, are based upon information received from peers and from the judiciary.

Andrew G. Schultz is one of this year’s recipients of the Distinguished Achievement Award from the UNM School of Law. The award is given to an attorney who has contributed long and valuable service to the Law School over a significant period of time. Schultz is a partner in the Rodey Law Firm where he practices in the litigation department and chairs the firm’s complex and high risk litigation practice group. Schultz shares his ever-changing expertise with the UNM School of Law, both as a visiting and adjunct professor. Over the years he has taught many seminars and other courses, and serves as a frequent lecturer. He has been a member of the UNM School of Law alumni board of directors since 1986 and served two terms as president. If he weren’t practicing law, Andy, a movie fanatic, would be a film critic. He has combined his love for movies with his legal career by frequently lecturing about law and film both at the Law School and around the country.

Jeffrey H. Albright (administrative law and environmental law) and Dennis E. Jontz (corporate law) of Lewis and Roca have been selected for inclusion in The Best Lawyers in America® 2008 Edition. Firmwide, Lewis and Roca has 48 attorneys represented on lists across a variety of specialty areas in the publication including: alternative dispute resolution, administrative, antitrust, appellate, bankruptcy and creditor-debtor rights, bet-the-company litigation, commercial litigation, construction, corporate, employee benefits, energy, gaming, information technology, intellectual property, labor and employment, land use & zoning, legal malpractice, mass tort litigation, municipal, natural resources, personal injury litigation, product liability, real estate, trusts and estates, and water law.

Rick Beitler and Timothy Bergstrom have joined the Rodey Law Firm and will practice in the litigation department specializing in professional liability, medical malpractice and health law.

Beitler has tried cases in both state and federal courts and has extensive experience representing physicians and other health care providers before the New Mexico Medical Review Commission.

Rodey has defended cases in federal and state courts and before the New Mexico Medical Review Commission. He received his law degree from the University of Wyoming College of Law.
IN MEMORIAM

Pat Chowning passed away Oct. 14. A New Mexico native and successful attorney, Chowning closed his practice and a lucrative flying career to move to California in 2000 to become the western states regional representative for Brenderup horse Trailers. He was the helicopter pilot for KGGM-TV and was known as “Captain Pat,” the traffic reporter for KRST radio in Albuquerque. In 1971 he competed in the first Albuquerque International Balloon Fiesta. When he wasn’t flying, he was on the back of a horse. He was adicted to the sport of team roping and in 1998 won the USTRC Reserve World Championship in Oklahoma City—a gold buckle he wore proudly. He won many awards in archery and sporting clays as well. Chowning enjoyed listening to people and weaving his own tales. In the early 70’s he was a frequent winner of the “Liar’s Trophy” and retired the coveted award. His rye sense of humor and ability to relate to people will be greatly missed. Chowning’s wife Wendy will “take over the reins” as the Western States dealer for Brenderup trailers.

Judge Bengino B. C. (Ben) Hernandez, 90, a resident of Albuquerque, died peacefully of Parkinson’s disease Sept. 30. He was born in Santa Fe July 7, 1917, to Benigno Cardenas Hernandez (first congressman from the state of New Mexico) and Frances V. Whitlock (daughter of Rev. Whitlock, the 1st Presbyterian minister to the territory of New Mexico). Judge Hernandez is survived by his wife of 65 years, Evangeline C. de Baca Hernandez; children, Anrea Rector, Dan Hernandez, David Hernandez (Cindy Trudeau), and Crissi Letherer (Don); 7 grandchildren and four great-grandchildren. Judge Hernandez and Vangie began their life journey while students at UNM and married in 1943. After graduation from UNM, they moved to Corpus Christi where Judge Hernandez was a flight instructor for the Navy during World War II. He earned his law degree from DePaul University in 1948 and began his legal career in Albuquerque. He was a member of the law firm of Hernandez, Atkinson and Kelsey until he was appointed U.S. ambassador to Paraguay in 1967. He became a judge on the New Mexico Court of Appeals from 1967 until retirement in 1982. Judge Hernandez was active in many civic and social organizations throughout his life. He was president of the UNM Alumni Association, a founding member of the Albuquerque Citizens Committee, (a precursor to our present system of city government), and a member of the Kiwanis Club. Among his many accolades are the Grand Master of the Order of National Merit award from the Republic of Paraguay; the UNM Rodey and Zimmerman awards, DePaul University Distinguished Alumni Award, and the National Conference of Christians and Jews Brotherhood Award.

Perry Kohn, an artist and human rights activist, passed away in his home Oct. 19. He was born in Philadelphia, Aug. 28, 1955, the child of Mulford Kohn and Elaine Toltzis. Kohn was preceded in death by his father who died in 1987 and an older brother Barry. He is survived by his sister Cynthia Kohn, his daughter Amarech, his brother Ronald and son Brandon, his nephew Daniel, son of Barry, and his mother Elaine Toltzis. He held a Masters of Fine Art from UNM and a J.D. From the UNM School of Law. Kohn was an artist and a lawyer and held the position of guardian ad litem for Doña Ana County where he worked as a domestic violence hearing officer. He was well known in the community and was regarded as a compassionate advocate for the underprivileged and marginalized, especially children in peril. Being an artist allowed him the sensitivity to express himself creatively, and his paintings and handprints were collected by many and shown in galleries in Albuquerque and Las Cruces. His dear companion, Wendy Rodkey, remembers him as “truly extraordinary, with a sense of humor, gentle nature...always there for me when I needed a non-judgmental ear.” Another friend remembers, “He seemed to embody both the privacy of the artistic bohemian life and the practical caring life of public service.” Kohn loved hiking with friends, baking pies and listening to opera. He was diligent in his artwork and recently embarked on a house restoration project that included wildly designed parapets which he arduously determined with shapes of cardboard and hours on his knees up on the roof.

The Honorable Joseph Rich passed away Aug. 26 in Rio Rancho. He retired from the bench in 2006. Judge Rich graduated in 1952 from Eastern Kentucky University and later served in the U.S. Army, 25th Division, in Korea. He earned a law degree from the University of Cincinnati Law School and was admitted to the Ohio Bar and the Kentucky and New Mexico bars. He took a brief break from his legal studies and worked as a special agent for the FBI. His career with the FBI ended when the agency asked him to relocate to Chicago. Rich and his late wife Barbara were expecting their first child and he didn’t want to uproot his family. Rich worked as an assistant district attorney in San Juan and McKinley counties and opened a private practice in 1975. He was the southwest regional chief trial attorney for the risk management division of the Navajo Nation. He was then appointed McKinley district judge in 1988 where he served until 1996. He was active in the community, serving as director of both the Gallup-McKinley County Chamber of Commerce and the McKinley County Red Cross. He was president of the McKinley County Bar Association. Rich is survived by children Lauren, Joseph, Jr., Amy, Paula Rich Pruitt and Stephen; brother Stephen; and seven grandchildren.

Raúl A. Sedillo, age 65, scion of the legendary political family of former Valencia County Democratic Chairman Judge Filo M. Sedillo, passed from this world in the arms of his beloved wife Diane McDougal Sedillo and their children, Raúl P., Juan Carlos and Ciana Breece Sedillo. Sedillo, a former district judge appointed by then-Governor Bruce King, was a graduate of the University of Oklahoma and was admitted to the State Bar of New Mexico in 1973. He served one term as district judge before returning to private practice. He was serving as the attorney for the City of Belen until a recent illness tragically ended his life. An early “student” of his father, together with his elder brother, Filo (Bobo) Sedillo, he became involved with the grassroots of the Democratic Party. Along with his brother, he participated in the various political activities by putting up signs to support local candidates, raising money, and participating in various political campaigns. He enjoyed swimming, hunting and fishing with his children, family and friends. He was also a supporter of the local Eagles football team, of which he was a member during his high school years. He loved playing golf with friends at the local country club, and generally made fun of anything and everyone who came along by exclaiming his “yes” when he made a good putt. His amazing humor always entered the room before he did. If you were not affected by his devilish sense of humor, then you didn’t know Raúl. He was a man that was not affected by status and could easily make friends with dignitaries as well as with acquaintances and neighbors. His passion for law was instilled in his sons, Raúl P. and Carlos, when
they embarked on their own careers in law and began the fourth generation of lawyers in the Sedillo family, a “genetic pursuit” one would say. Raúl P. is an attorney with Butt Thornton & Beahr PC in Albuquerque and Carlos is a first-year law student at St. Mary’s in San Antonio, Texas. Then there is his beautiful daughter Ciana, who would remain the apple of his eye as he watched her develop to the height of his expectations. Through it all, a woman by his side whose beauty, grace and spirit would be his greatest source, his loving wife Diane. He was preceded by his parents, former District Judge, Filo M. Sedillo and Emily Page Sedillo; and his father and mother-in-law, Dr. Cloise McDougal and Jane Breece McDougal. Sedillo is survived by his loving wife of 35 years, Diane of the family home in Belen; two sons, Raúl P. and his wife, Ida Hernandez Sedillo of Albuquerque and their daughter, Jasmine whom Raúl loved and cherished; Carlos Sedillo of San Antonio, Texas; and daughter, Ciana Breece Sedillo of Albuquerque; brother, Filo (Bobo) and his wife, Corrine of Belen; and sister, Sonia James and her husband, Tony of Albuquerque. He is also survived by several loving nieces and nephews.

Judge Edward Paul Snead, Jr., passed away Oct. 14. He was born in 1922 in Idabel, Oklahoma, to Edward Paul Snead Sr. and Opal West Snead. He graduated from Idabel High School as salutatorian of his class. After two years at Southeastern Oklahoma University, he enlisted in the Army Air Corps where he became a B-24 “Liberator” bomber pilot. He flew missions in the South Pacific Theater during World War II. Judge Snead married Dorothy Williams in 1945. He is survived by his wife and his son, Edward Paul Snead III, and his wife, Sharon; his daughters, Laura Jane Waters and husband John and Susan Zimmer Allen and husband John of Salisbury, Md.; his brother, John Robert Snead and wife Mary Lou; his sister, Amelia Tyler and husband Ralph; and one grandchild, Daniel Zimmer, four nieces, two nephews and numerous cousins. Judge Snead was devoted and dedicated to his family, his church, the law and his community. He spent his entire working life in Roswell where he practiced law for 27 years. Judge Snead arrived in Roswell in the summer of 1948 after graduating from the University of Oklahoma Law School. He began his legal career as a sole practitioner and soon joined the firm of Frazier and Cusack where he was a partner until he joined Dick Bean in practice in 1955. Judge Snead again became a sole practitioner in 1966. He was appointed judge in the 5th Judicial District Court 1970 and served in that capacity until 1985 when he retired from the bench. He joined Jennings and Christy as of counsel and was also of counsel to Phil Brewer when he fully retired from the practice of law in 1992. He was designated by the New Mexico Supreme Court to hear several cases as a pro tem judge. Fifteen years after retirement, Judge Snead is still considered one of the best lawyers to have practiced in Roswell and certainly one of the best district judges to have held that post. His professionalism in his practice, his fairness on the bench, and his general good humor, which he brought to both tasks, will be deeply missed. Through the years he served as PTA president for Valley View School, on the board of the Regional Girl Scouts, won the Grand Ribbon at the Eastern New Mexico State Fair for his hooked rug, gave programs appearing as the Choctaw Baritone, and went to numerous organizations with his You Be the Judge program. He spent his “vacation” time teaching through the NITA program in law schools in New Mexico, Texas, Arizona and California. He was on the New Mexico Judicial Standards Committee. He was an elder in the First Presbyterian Church of Roswell and taught Sunday School for over 50 years. When he had to give up his class because of failing sight, the church named the library The Paul Snead Library. Judge Snead held offices on the local, presbytery, synod and national levels of the church. After retirement, Judge Snead enjoyed his time with the CASA program, the Auxiliary of Eastern New Mexico Medical Center and the Senior Olympics. (He won medals with his frisbee.) He will be remembered for his love of people, his interest in everything (mustn’t forget his loyalty to the Oklahoma University and Dallas Cowboy football teams), his stories and his fabulous hugs.
LEGAL EDUCATION

NOVEMBER

12 When Politics Tip the Scales of Justice
Teleconference
TRT
2.0 E
(800) 672-6253
www.trtcle.com

13 2007 Probate Institute
VR, State Bar Center
Center for Legal Education of NMSBF
6.0 G, 1.0 P
(505) 797–6020
www.nmbarcle.org

13 Advancing the HR/Attorney Relationship: Enhancing Employer Practices for Any Size Business
VR, State Bar Center
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(505) 797–6020
www.nmbarcle.org

13 Real Estate Management Agreements
Teleseminar
Center for Legal Education of NMSBF
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(505) 797–6020
www.nmbarcle.org

13 Tsunami on the Horizon—Ethics of Transnational Law
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14 ABCs of Trucking Law
Telephone Seminar
NMDLA
1.0 G
www.nmdla.org

14 Conservation Easements
Santa Fe
Paralegal Division
1.0 G
(505) 986-2502

14 Fundamentals of Water Law
Santa Fe
National Business Institute
5.0 G, 1.0 E
(715) 835-8525
www.nbi-sems.com

14 Surprising Legal Ethics Outcomes
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TRT
1.0 E, 1.0 P
(800) 672-6253
www.trtcle.com

14 Trial Technology
Albuquerque
Paralegal Division
1.0 G
(505) 222-9356

14 Triple LP Comes to New Mexico
State Bar Center
Business Law Section
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

15 Drafting and Enforcing Commercial Leases
Albuquerque
Sterling Education Services
6.6 G
(715) 855-0495
www.sterlingeducation.com

15 Estate and Gift Tax Audits
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797–6020
www.nmbarcle.org

15 Ethical Standards and Government Lawyering
Teleconference
TRT
2.0 E
(800) 672-6253
www.trtcle.com

16 2007 Bridge the Gap
State Bar Center
Young Lawyers Division
Center for Legal Education of NMSBF
6.2 G, 1.0 E, 1.0 P
(505) 797–6020
www.nmbarcle.org

16 Art of the Deal 7: When the Deal Goes Bad: Bankruptcy Issues in Real Estate Deals
Teleseminar (Live Replay)
Center for Legal Education of NMSBF
1.0 G
(505) 797–6020
www.nmbarcle.org

16 E-Discovery: Applying the New FRCP Changes
Albuquerque
National Business Institute
6.0 G
(715) 835-8525
www.nbi-sems.com

16 Getting Ready For Your Client’s Deposition
Teleconference
TRT
2.0 G
(800) 672-6253
www.trtcle.com

19 Professionalism—Practicing Law Without Fear
Teleconference
TRT
1.0 E, 1.0 P
(800) 672-6253
www.trtcle.com

G = General E = Ethics
P = Professionalism VR = Video Replay
Programs have various sponsors; contact appropriate sponsor for more information.
20  E-Filing in Federal District Court  
[Excerpt from 2007 Annual Meeting]  
VR, State Bar Center  
Center for Legal Education of NMSBF  
1.0 G  
(505) 797–6020  
www.nmbarcle.org

21  Scientific Evidence—Practical Solutions to Real World Problems  
Teleconference  
TRT  
2.0 G  
(800) 672-6253  
www.trtcle.com

26  Accountability vs. the Right to Practice  
Teleconference  
TRT  
1.0 E, 1.0 P  
(800) 672-6253  
www.trtcle.com

20  E-Discovery  
[Excerpt from 2007 Annual Meeting]  
VR, State Bar Center  
Center for Legal Education of NMSBF  
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(505) 797–6020  
www.nmbarcle.org

27  Drafting Documents That Even Clients Might Appreciate  
VR, State Bar Center  
Center for Legal Education of NMSBF  
1.0 G  
(505) 797–6020  
www.nmbarcle.org

27  Nuts and Bolts of Medicaid Planning  
Albuquerque  
National Business Institute  
3.0 G  
(715) 835-8525  
www.nbi-sems.com

27  Picking the Right Cases—When to Say No  
Teleconference  
TRT  
2.0 G  
(800) 672-6253  
www.trtcle.com

20  Defending Computer Crime Cases  
VR, State Bar Center  
Center for Legal Education of NMSBF  
4.2 G  
(505) 797–6020  
www.nmbarcle.org

27  Success as a Lawyer and Judicial Elections  
[Excerpts from 2007 Annual Meeting]  
VR, State Bar Center  
Center for Legal Education of NMSBF  
0.7 G, 0.5 E  
(505) 797–6020  
www.nmbarcle.org

27  UCC “Toolkit:” A Practical Guide to Drafting Key Commercial Agreements  
Video Webcast  
Center for Legal Education of NMSBF  
3.0 G  
(505) 797–6020  
www.nmbarcle.org

27  What Every Lawyer Should Know About IP  
VR, State Bar Center  
Center for Legal Education of NMSBF  
2.7 G  
(505) 797–6020  
www.nmbarcle.org

27–28 Estate Planning for Real Estate, Part 1 & 2  
Teleseminar  
Center for Legal Education of NMSBF  
2.0 G  
(505) 797–6020  
www.nmbarcle.org

27  Increasing the Effectiveness of Mediation Advocacy: Using the Negotiator’s Toolbox  
VR, State Bar Center  
Center for Legal Education of NMSBF  
6.0 G  
(505) 797–6020  
www.nmbarcle.org

28  Ethical Quandaries—Problem-Solving Workshop  
Teleconference  
TRT  
2.0 E  
(800) 672-6253  
www.trtcle.com

27  Water Rights Sales and Transfers  
Albuquerque  
Lorman Education Services  
5.5 G, 0.5 E  
(715) 833-3940  
www.lorman.com

29 2007 Health Care Update  
Video Webcast  
Center for Legal Education of NMSBF  
3.0 G  
(505) 797–6020  
www.nmbarcle.org
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<th>Writs of Certiorari Granted but not yet Submitted to the Court:</th>
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<tr>
<td><strong>Date Writ Issued</strong></td>
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<td><strong>NO. 29,951</strong> State v. Cardenas</td>
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**WRITS OF CERTIORARI**

**CERTIORARI GRANTED AND SUBMITTED TO THE COURT:**

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

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**PETITION FOR WRIT OF CERTIORARI DENIED:**

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**UNPUBLISHED DECISION FILED:**

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Published Opinions

No. 26156 2nd Jud Dist Bernalillo LR-05-26, STATE v I GRANILLO-MACIAS (affirm) 11/1/2007

Unpublished Opinions

No. 27748 2nd Jud Dist Bernalillo PQ-03-227, A MARTINEZ v V MARTINEZ (reverse) 10/29/2007
No. 27244 2nd Jud Dist Bernalillo DM-03-1442, C SAIN v C SNYDER-SAIN (affirm) 10/30/2007
No. 27491 2nd Jud Dist Bernalillo DM-03-1442, C SAIN v C SNYDER-SAIN (affirm) 10/30/2007
No. 27659 5th Jud Dist Chaves CR-06-8, STATE v F VILLA (affirm) 10/30/2007
No. 27661 5th Jud Dist Luna CR-06-187, STATE v A SANCHEZ (affirm) 10/30/2007
No. 27531 5th Jud Dist Lea CV-06-615, M SIMMS v L SMITH (affirm) 11/1/2007
No. 27570 5th Jud Dist Grant CR-06-91, STATE v D CLARK (affirm) 11/1/2007

Slip Opinions for Published Opinions may be read on the Court’s Web site:
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Certi...:

STATE OF NEW MEXICO, Plaintiff-Appellee, versus FREDERICK LUCERO, Defendant-Appellant.

No. 26,135 (filed: July 31, 2007)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
MARK A. MACARON, District Judge

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European Opinion

James J. Wechsler, Judge

{1} The opinion filed in this case on June 21, 2007 is hereby withdrawn and the following substituted therefor. The motion for rehearing is denied.

{2} This is an appeal from the district court’s judgment in an on-record appeal from the Bernalillo County Metropolitan Court. We consider the preservation requirements in challenging procedures attached to a post-conviction domestic violence program of the metropolitan court. We also address notice issues involved in termination from the program. We hold that Defendant Frederick Lucero did not preserve for appellate review by this Court his challenges to procedural aspects of the program because he did not raise them in the metropolitan court. We further hold that, although the metropolitan court failed to provide proper notice to Defendant regarding evidence presented to the court relating to Defendant’s termination from the program, or a hearing on the evidence, Defendant was not prejudiced. We therefore affirm the district court’s judgment affirming the judgment and sentence of the metropolitan court.

BACKGROUND

{3} Defendant was the subject of two criminal domestic violence complaints for violation of a protective order filed in metropolitan court. At arraignment, Defendant was ordered not to have contact with his ex-wife. The two cases were consolidated and assigned to Judge Cristina Jaramillo. Judge Jaramillo referred Defendant to the domestic violence early intervention program.

{4} At a hearing to determine if Defendant should remain in the program because of violations of the order not to have contact with his ex-wife, Defendant admitted making telephone calls to her. Judge Victoria Grant, the judge originally assigned to the other case consolidated before Judge Jaramillo, terminated Defendant from the program, and set the cases on the trial calendar. Judge Grant reiterated the no contact order and advised Defendant that he could be sent to jail if he violated it.

{5} Defendant then entered a plea and disposition agreement, agreeing to plead guilty to telephone harassment, with the remaining charges in the two complaints to be dismissed. At a hearing on the plea agreement, Judge Grant found Defendant guilty of telephone harassment and ordered a pre-sentence report. As a condition of release, she again ordered that Defendant have no contact with his ex-wife. At sentencing, on the recommendation of the court intervention program officer, Judge Grant referred Defendant to the new domestic violence repeat offender program.

OPINION

Defendant’s attorney stated that neither he nor Defendant had any argument with the recommendation.

{6} Defendant complied with the requirements of the program for four months and advanced to the next phase of the program. However, fourteen days later, the court intervention program officer reported to Judge Sandra Clinton, the metropolitan court judge in charge of the domestic violence repeat offender program, that he had received an affidavit that morning from Defendant’s ex-wife that Defendant had violated the no contact order by contacting her ex-wife and her ex-boyfriend. Defendant denied calling his ex-wife. Judge Clinton remanded Defendant to jail for four days for violating the order.

{7} Seven days later, on December 7, 2004, Defendant again appeared before Judge Clinton for his program review. The hearing was not recorded. Judge Clinton found that Defendant had violated the terms of the program and sentenced him for the charge of telephone harassment to 364 days in jail less credit for the four days he had served. She ordered Defendant to participate in the domestic violence repeat offender program offered in jail. The next day, Judge Clinton set a sentencing hearing for December 13, 2004. At that hearing, Judge Clinton explained that she erred when she sentenced Defendant at the program review on December 7 and that she should have remanded him and set the case for sentencing. Defendant’s attorney believed that the judge’s error was not a problem and had been corrected. Judge Clinton further explained that immediately after Defendant served the four days in jail, Defendant went to his ex-wife’s house. The following night, he went to his ex-wife’s ex-boyfriend’s house, engaging in stalking behavior. Defendant’s attorney requested that sentencing be continued until January, with Defendant in custody until after the holidays, to enable the attorney to pursue sentencing alternatives. Judge Clinton vacated her December 7 sentence and continued the hearing until January.

{8} Defendant then obtained additional counsel and changed his approach. He first filed a motion for immediate release on the ground that Defendant’s case had been assigned to Judge Jaramillo, and Judge Clinton did not have authority to order Defendant incarcerated. Next, he requested that Judge Clinton recuse from the case, filing a notice of facts requiring recusal. Defendant asserted that recusal was required because, among other things, Judge Clinton had numerous ex parte come-
munications with the court intervention program officer, mental health professionals associated with Defendant’s program, and Defendant’s ex-wife prior to sentencing Defendant and remanding Defendant to jail. Defendant further asserted that Judge Clinton acted without notice to Defendant, without the presence of Defendant’s counsel, and despite the fact that she was not assigned to the case.

{9} Prior to sentencing at the hearing on January 12, 2005, Judge Clinton denied Defendant’s request that she recuse. Judge Clinton reasoned, in part, that the program contemplates that she may have ex parte communication concerning conditions of release, that she disclosed her communication at the hearing on December 13, 2004, and that Defendant has the ability to subpoena witnesses for any hearing. At sentencing, Judge Clinton again expressed that she terminated Defendant from the program and noted that the case would be transferred back to Judge Jaramillo. Judge Clinton sentenced Defendant to 364 days in jail with credit for the four days already served with instruction that Defendant continue the domestic violence repeat offender program in jail.

{10} The district court then intervened. See Rule 7-106(G) NMRA (providing for district court review of a metropolitan court judge’s declining to recuse when a notice of facts requiring recusal has been filed). It held that Judge Clinton should have recused from the case because of the ex parte communication between Defendant’s ex-wife and the program staff, including Judge Clinton. It remanded to the metropolitan court the assigned sentencing judge for sentencing. In metropolitan court, Defendant filed three motions addressing Judge Clinton’s sentence: a motion for credit for time served, a motion for release pending revocation hearing, and a motion to vacate sentencing. The motions all had the premise that Defendant served in the domestic violence repeat offender program as a condition of probation. Prior to her sentencing, Judge Grant denied Defendant’s motions, concluding that Defendant was serving in a post-adjudication, pre-sentence program, and was not on probation. At the sentencing hearing, Defendant raised the additional argument that, by virtue of Judge Clinton’s ex parte communication, all of Judge Clinton’s actions were tainted, such that her termination of Defendant from the program was void. Judge Grant stated that she did not have the authority to address Judge Clinton’s action because Judge Clinton was in charge of the program. Judge Grant sentenced Defendant to 364 days incarceration, granted him credit for sixty-two days served, and ordered him to pay a fine of $1000. Defendant appealed to the district court from the judgment and sentence.

{11} In the district court, Defendant argued that Judge Clinton violated Defendant’s due process rights in her ex parte communication with Defendant’s ex-wife and by terminating him from the domestic violence repeat offender program; that the metropolitan court lacked the statutory authority to institute a post-adjudicatory, pre-sentencing program instead of probation; that Defendant was entitled to credit for time served on probation in the early intervention and the domestic violence repeat offender programs; and that the metropolitan court erred in allowing a non-assigned judge to sentence Defendant over his objection. Although it entertained testimony, the district court affirmed the judgment and sentence of the metropolitan court based on the metropolitan court record. Defendant appeals to this Court from the district court judgment.

ARGUMENTS ON APPEAL

{12} Defendant’s arguments on appeal frame our analysis. They evolved in the course of briefing. In his brief in chief, Defendant argues that the metropolitan court lacked the authority to create a post-adjudication, pre-sentence program independent of placing Defendant on probation. As a consequence, Defendant contends that he was entitled to a probation revocation hearing before being incarcerated and terminated from the domestic violence repeat offender program. He further contends in his brief in chief that he was entitled to credit in sentencing for the time he served in the program because it was essentially probation.

{13} In its answer brief, the State counters that Defendant failed to preserve his arguments concerning the metropolitan court’s lack of authority or the requirement for a probation violation hearing or other hearing on termination from the program. It argues that no credit for time served on probation was required because the metropolitan court did not place Defendant on probation.

{14} In reply, Defendant re-charactersizes his arguments. He contends that he does not attack the authority of the metropolitan court to create the domestic violence repeat offender program. Instead, he argues that the metropolitan court could not terminate him from the program without affording him due process and that all of Judge Clinton’s sentencing actions were void. As to his termination from the program, Defendant expands his argument to state that he was entitled to due process regardless of whether his participation in the program was as a condition of probation.

LACK OF PRESERVATION OF CHALLENGE TO PROGRAM

{15} Preservation plays an important role in the appellate review process. Argument of an issue to the lower court enables the party opposing the position advanced to marshal arguments to convince the court, permits the lower court to decide the issue and correct any mistakes with regard to it, and provides the record for an appellate court to review and make an informed decision about the issue. See State v. Joanna V., 2003-NMCA-100, ¶ 7, 134 N.M. 232, 75 P.3d 832, affirmed on other grounds, Joanna V. v. State, 2004-NMSC-024, 136 N.M. 40, 94 P.3d 783. As a consequence, we do not generally afford appellate review to issues that have not been raised to the lower court. See, e.g., State v. Garcia, 2005-NMCA-065, ¶ 6, 137 N.M. 583, 113 P.3d 406.

{16} Preservation issues arise with respect to alternative sentencing programs such as in this case because of the timing of the placement in a program. When a defendant has been convicted and there is the prospect of avoiding incarceration with the use of an alternative program, the defendant is frequently eager to participate in the program. At that time, the defendant does not have the impetus to challenge the program or its procedures. Later, if the program does not work out after the defendant has participated in it, and the defendant wishes to assert challenges, it may be too late to preserve the issues because the program has progressed or because the defendant has received the benefit of the program.

{17} We have addressed this type of issue in Joanna V. and State v. Steven B., 2004-NMCA-086, 136 N.M. 111, 94 P.3d 854, both challenges to grade court programs. In Joanna V., the respondent did not object to conditions of release that required school attendance, did not object to the requirements of the grade court program and its detention sanctions when the children’s court explained them to her as part of the plea agreement, and did not object when the children’s court again discussed the program at the final disposition hearing. Joanna V., 2003-NMCA-100, ¶ 8. We held that the respondent did not preserve her subsequent challenge to her detention for violation of the program requirements. Id. ¶ 9. Similarly, in Steven B., we held that the respondents could not argue due process issues on appeal that they did not raise below when responding to violationssubj ecting them to detention. Steven B., 2004-NMCA-086, ¶¶ 5, 7.

{18} In this case, Defendant agreed to participate in the program and signed the program’s forms explaining his conditions of release and sanctions for non-compliance. He voluntarily did so, because if Defendant successfully completed the program, he would receive credit for his time in the program and could avoid serving any
time in jail. Defendant participated in the program for four months without difficulty. He did not object when, consistent with the sanctions for non-compliance form, Judge Clinton reminded him to jail for four days for violating the no contact order. If Defendant had made a timely objection to the metropolitan court’s authority to create or carry out the program, Judge Grant, who referred Defendant to the program prior to sentencing, could have addressed the issue and made a ruling that could have corrected any error before Defendant participated in the program. Cf. State v. Pacheco, 2007-NMSC-009, ¶ 8, 141 N.M. 340, 155 P.3d 745 (stating that an objection “would have allowed the trial court to address the issue”). Defendant’s participation in the program precluded his later objection to its structure. See Joanna V., 2003-NMCA-100, ¶¶ 7-10.

DEFENDANT’S DUE PROCESS CHALLENGES

{19} Similarly, Defendant did not make a timely objection concerning his entitlement to a probation revocation hearing before being incarcerated or terminated from the program. Judge Clinton incarcerated Defendant on November 30, 2004 for four days and again on December 7, 2004, when she terminated Defendant from the program and sentenced him on the telephone harassment charge. She corrected her order on December 13, 2004 to state that she remanded Defendant to jail, but set aside sentencing. Defendant appeared with his attorney on December 13, 2004, but did not argue that he had not violated the no contact order or raise the argument that he makes on appeal that he was not afforded due process rights that attach to probation revocation or otherwise. Defendant raised the issue before sentencing by Judge Grant. He filed a motion to vacate sentencing and argued the issue to Judge Grant.

{20} However, Judge Clinton’s ex parte communication with Defendant’s ex-wife prior to the November 30, 2004 incarceration clouds our preservation analysis. Defendant argues that all of Judge Clinton’s subsequent actions in incarcerating Defendant and terminating him from the program should be considered void for purposes of review on appeal. While we do not take that view, we believe that the impact of Judge Clinton’s communication requires that we analyze the merits of Defendant’s due process claims along with our preservation review.

{21} Defendant claims that he was entitled to notice and a hearing prior to being incarcerated for violating the no contact order and prior to being terminated from the program. Defendant contends that Judge Clinton essentially revoked his probation by incarcerating and terminating him. According to Defendant, Judge Grant originally placed him on probation and established conditions of probation, entitling him to a probation revocation proceeding for an alleged violation.

{22} But Defendant was not on probation. As Judge Grant held in denying Defendant’s motion to vacate sentencing, the program was “post-adjudication, pre-sentencing.” She had referred Defendant to the program before sentencing him. She did not defer or suspend a sentence. From Defendant’s perspective, he voluntarily participated in the program. He had the potential of avoiding jail time. He agreed to abide by the conditions of release established by the program, not as conditions of probation. The metropolitan court may set and enforce conditions of release pending sentencing. See Rules 7-402(B), 7-403 NMRA; State v. Rivera, 2003-NMCA-059, ¶ 20, 133 N.M. 571, 66 P.3d 344 (applying comparable district court rule and stating that conditions of release “are separate, coercive powers of a court,” and are “enforceable by immediate arrest, revocation, or modification if violated”), reversed on other grounds, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

{23} Moreover, Defendant had a hearing on December 13, 2004 and could have addressed his incarceration. Significantly, he did not raise any argument that he was entitled to any additional process. He appeared with his attorney, who did not contest that Defendant violated the no contact order.

{24} Defendant would have us disregard that hearing because Judge Clinton presided, and she had not been an ex parte communication with Defendant’s ex-wife. We note, as the district court concluded, the impropriety of the communication. Defendant’s ex-wife had contacted the court intervention programs officer concerning contact by Defendant. She and others provided affidavits that were given to Judge Clinton. Defendant had the right to confront the complaining witness, his ex-wife, at a hearing before Judge Clinton to test the veracity of the complaint. See State v. Phillips, 2006-NMCA-001, ¶ 12, 138 N.M. 730, 126 P.3d 546, cert. quashed, 2006-NMCERT-009, 140 N.M. 543, 144 P.3d 102. Judge Clinton’s communication with the witness tainted the appearance of propriety of that process. See Rule 21-200(A) NMRA (“A judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”).

{25} However, we see no prejudice to Defendant justifying reversal of the conclusions reached. See State v. Padilla, 1998-NMCA-088, ¶ 14, 125 N.M. 665, 964 P.2d 829 (requiring actual and substantial prejudice be shown in an appeal based on a confrontation clause violation). First, Defendant did not argue that Judge Clinton should not preside at the December 13, 2004 hearing. Second, although Defendant’s brother and girlfriend made statements to the effect that Defendant did not violate the no contact order, Defendant did not raise the issue to the court.

{26} We also do not find merit in Defendant’s claim that he was denied due process in connection with his termination from the program. First, Defendant did not preserve the issue. Judge Clinton terminated Defendant from the program at the December 7, 2004 hearing and reiterated her action at both the December 13, 2004 and January 12, 2004 hearings. As we have stated, Defendant did not argue that the metropolitan court did not afford him the requisite process. Second, even if we assume that Defendant preserved the argument, Defendant did not contest his violation of the conditions. He was not prejudiced.

{27} For the same reason, we deny Defendant’s motion for rehearing. In the motion, Defendant contends that he did not have access to the affidavits that Judge Clinton received as part of her ex parte communications and that he was not given the opportunity to respond to the allegations prior to his sentencing. However, Judge Clinton expressly stated at the December 13, 2007 hearing that she terminated Defendant from the program because Defendant had made telephone calls to his ex-wife and her ex-boyfriend and, immediately after his release from jail, again violated the no contact order by going to his ex-wife’s house and by parking in front of her ex-boyfriend’s house. Defendant did not contest these allegations or request a hearing to contest his violation of the no contact order.

PROBATION SERVICE CREDIT

{28} Defendant lastly argues that he was entitled to credit against his sentence for his time in the program because it was time served on probation. As we have discussed, Judge Grant did not sentence Defendant when she referred him to the domestic violence repeat offender program, and Defendant was not on probation during his time in the program.

CONCLUSION

{29} We affirm the judgment of the district court affirming the metropolitan court’s judgment and sentence.

{30} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
MICHAEL D. BUSTAMANTE, Judge
CELIA FOY CASTILLO, Judge

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BAR BULLETIN - November 12, 2007 - Volume 46, No. 46
CERTIORARI NOT APPLIED FOR
From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-128

CYNTHIA LEONARD, Worker-Appellee/Cross-Appellant, versus
PAYDAY PROFESSIONAL and BIO-CAL COMP., Employer/Insurer-Appellee, and
CNA UNISOURCE and CONTINENTAL CASUALTY COMPANY, Employer/Insurer-Appellant/Cross-Appellee.
Nos. 26,787 and 26,740 (Consolidated) (filed: August 7, 2007)

APPEAL FROM THE WORKERS’ COMPENSATION ADMINISTRATION
GREGORY D. GRIEGO, Workers’ Compensation Judge

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OPINION

MICHAEL D. BUSTAMANTE, JUDGE

{1} This is a workers’ compensation case in which Worker suffered two injuries to her back, each while working for a different employer. The case presents two issues: (1) whether the Workers’ Compensation Judge (WCJ) erred by apportioning Worker’s nonsurgical medical expenses evenly between the two employers, yet apportioning all surgical expenses to the second employer; (2) whether the WCJ erred in denying Worker’s motion for attorney fees on the ground that Worker’s offer of judgment had no legal effect. The issues were raised in separate appeals and later consolidated under Case No. 26,787.

{2} We affirm the WCJ’s ruling on apportionment because it was not contrary to law and because substantial evidence supports the ruling. We also affirm the WCJ’s ruling on attorney fees.

BACKGROUND

{3} On December 11, 1997, Worker suffered an injury to her back while working for Payday Professional (Payday). Worker received treatment from Dr. Reeve, which included chiropractic care, epidural injections, and pain-relieving medication. An MRI scan showed that Worker had disc degeneration and possibly a disc herniation. Worker continued to work full-time following her injury. Dr. Reeve pursued a “conservative” course of treatment in which surgery was an option but was not required. On May 20, 1998, Dr. Reeve placed Worker at maximum medical improvement (MMI) and gave her a 10% whole body impairment rating. Worker continued periodic treatment with Dr. Reeve and reported occasional pain and discomfort.

{4} On November 4, 1999, Worker suffered a second injury while working for a different employer, CNA Unisource (CNA). Worker stated that she did not recover from the second injury to the same extent that she had recovered from the first, and that the pain from the second injury was more severe. The second injury aggravated her previous injury and may have caused additional disc movement. Dr. Reeve referred Worker to Dr. Claude Gelinas, an orthopedic surgeon, for an examination. Dr. Gelinas ordered a second MRI and, after reviewing it, determined that Worker had a disc disease that existed prior to her first injury. According to Dr. Gelinas, the 1997 injury aggravated the pre-existing condition and the 1999 injury re-aggravated the condition. Dr. Gelinas recommended that Worker undergo “a one-level fusion operation at L5-S1.” Dr. Gelinas was reluctant to estimate the degree to which each of Worker’s injuries contributed to her back condition, but concluded that surgery probably would not have been necessary had Worker not suffered her second injury. However, Dr. Gelinas also stated that the changes he noted in the second MRI could have occurred even if the second injury had not taken place. Dr. Reeve testified that Worker’s ongoing symptoms were 70% attributable to the first injury and 30% attributable to the second.

{5} On April 27, 2005, Worker filed separate workers’ compensation complaints against CNA and Payday seeking medical treatment. The cases were eventually consolidated by stipulation of the parties. The parties entered into mediation discussions but could not resolve the issue of each employer’s liability for Worker’s medical benefits. In the interest of having surgery performed at the earliest possible date, the mediator recommended that Payday and CNA each pay 50% of the cost of surgery with a complete resolution of rights. Worker and Payday accepted the mediator’s recommended resolution, but CNA rejected it.

{6} On February 8, 2006, Worker sent an offer of judgment to counsel representing each employer. The offer stated the following terms:

1. Worker will withdraw her complaint if the employer/insurers[] will pay for the medical treatment prescribed by the Worker’s authorized [healthcare professional] to include any back surgery prescribed by Dr. Gelinas.

2. In addition, Worker’s attorney, in the event of acceptance of this offer, will reduce his attorney fees awarded by the court by five percent (5%), two and one-half percent (2 ½ %) to the Worker.

A third issue regarding injunctive relief was raised in yet another appeal, No. 26,927, and will be resolved in a separate opinion.
and two and one-half percent (2 ½ %) to the employer/insurers[].

The offer expired without a response from either Payday or CNA.

{7} After hearing testimony and reviewing the evidence, the WCJ entered his compensation order on April 19, 2006. The WCJ made the following pertinent findings of fact in the compensation order:

13. Worker had a need for non-surgical medical care following the accident of December 11, 1997.

14. Worker had a need for both non[-]surgical and surgical medical care following the accident of November 4, 1999.

15. Worker had reached maximum medical improvement on May 20, 1998, following the accident of December 11, 1997.

16. Worker’s symptoms increased markedly after the accident of November 4, 1999.

... .

18. As a direct and proximate result of the accident[s] of December 11, 1997 and November 4, 1999, to a reasonable medical probability, Worker suffered an injury to the whole person. The nature of the injury is exacerbation of degenerative disk [sic] disease and spondylolisthesis at the L5-S1 level.


The WCJ then made the following conclusions:

12. Worker’s need for non[-]surgical medical care is the result of both accidents in this case, and there is overlap in medical benefits as a result.

13. Non[-]surgical medical benefits should be apportioned equally between Employers and Insurers, as a result of overlap in medical care.

14. Worker’s need for surgical medical care is the result of the second accident, and there is no overlap in surgical medical benefits.

15. Surgical medical benefits should not be apportioned, as they are exclusively the result of the second accident.

16. Surgical medical benefits should be provided and paid for by CNA[].

{8} Worker thereafter filed a motion for attorney fees requesting that the employers pay the full sum of her attorney fees based upon their rejection of her offer of judgment. The WCJ entered an order granting Worker’s attorney fees on May 11, 2006. However, the WCJ rejected Worker’s request that the employers pay all of her attorney fees because “Worker’s Offer of Judgment has no legal effect because it would not have disposed of the merits of the case.” The WCJ ruled instead that Worker was responsible for 50% of her attorney fees, Payday was responsible for 12.5%, and CNA was required to pay 37.5%.

{9} CNA filed a notice of appeal and challenges the WCJ’s apportionment ruling in the compensation order. Worker filed a notice of appeal challenging the WCJ’s award of attorney fees.

DISCUSSION

I. Standard of Review

{10} We review workers’ compensation orders using the whole record standard of review. Tallman v. ABF (Arkansas Best Freight), 108 N.M. 124, 126, 767 P.2d 363, 365 (Ct. App. 1988), modified on other grounds by Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, 131 N.M. 272, 34 P.3d 1148. Whole record review “contemplate[s] a canvass by the reviewing court of all the evidence bearing on a finding or decision, favorable and unfavorable, in order to determine if there is substantial evidence to support the result.” Id. at 128, 767 P.2d at 367. We may not “substitute [our] judgment for that of the administrative agency,” and we view “all evidence, favorable and unfavorable, . . . in the light most favorable to the agency’s decision.” Id. at 129, 767 P.2d at 368. We will affirm the agency’s decision if, after taking the entire record into consideration, “there is evidence for a reasonable mind to accept as adequate to support the conclusion reached.” Id. at 128, 767 P.2d at 367. We review the WCJ’s application of the law to the facts de novo. Tom Growney Equip., Co. v. Jouett, 2005-NMSC-015, ¶ 13, 137 N.M. 497, 113 P.3d 320.

II. Apportionment

{11} CNA attacks the WCJ’s apportionment ruling on two grounds. First, CNA argues that the WCJ erred as a matter of law by separately apportioning Worker’s surgical and non-surgical medical expenses. More specifically, CNA claims that: (1) “it is inconsistent and contrary to logic for Worker’s . . . second injury to be ‘causally connected’ to her first injury for some treatment modalities but not others,” (2) Payday is not “totally immune” from liability for surgical expenses, and (3) “there is no basis in New Mexico workers’ compensation law for such treatment-specific . . . apportionment.” Second, CNA maintains that the WCJ’s findings of fact are not supported by substantial evidence.

{12} Apportionment of benefits among multiple employers for a worker’s successive injuries is authorized by NMSA 1978, § 52-1-47(D)(1990). Jouett, 2005-NMSC-015, ¶ 42. “When a disability develops gradually, or when it comes as the result of a succession of accidents, the [employer or] insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation.” Id. ¶ 24 (internal quotation marks and citation omitted). However, under Section 52-1-47(D), “the current employer’s liability is reduced to the extent of benefits paid or payable for disability resulting from the first accidental injury.” Jouett, 2005-NMSC-015, ¶ 46 (internal quotation marks and citation omitted). Section 52-1-47(D) provides that:

[T]he compensation benefits payable by reason of disability caused by accidental injury shall be reduced by the compensation benefits paid or payable on account of any prior injury suffered by the worker if compensation benefits in both instances are for injury to the same member or function . . . and if the compensation benefits payable on account of the subsequent injury would, in whole or in part, duplicate the benefits paid or payable on account of such prior injury.

Section 52-1-47(D) therefore prevents a worker who has successive injuries to the same member or function from obtaining a double recovery. Garcia v. Mora Painting & Decorating, 112 N.M. 596, 599, 817 P.2d 1238, 1241 (Ct. App. 1991). However, we have also stated that “Section 52-1-47(D) is not merely a device for preventing a double recovery. It is an affirmative allocation of the burden in a successive injuries situation.” Garcia, 112 N.M. at 603, 817 P.2d at 1245 (internal quotation marks and citation omitted).
{13} In the present case, the WCJ found that Worker’s need for non-surgical medical care was a result of both accidents and that non-surgical medical benefits should be apportioned equally between Payday and CNA. The WCJ further concluded that Worker’s need for surgery was 100% related to the second injury and that CNA should therefore provide the full amount of Worker’s surgical medical benefits.

{14} CNA argues that the WCJ’s order was contrary to logic because the WCJ found that the second injury was an aggravation of the first, but only held Payday liable for non-surgical medical benefits while holding CNA liable for both non-surgical and surgical medical benefits. In other words, CNA maintains that, if the first accident was partially to blame for Worker’s present condition, then Worker’s need for surgery must also be a result of the first accident, at least to some extent. CNA also points out that Dr. Gelinas testified that Worker’s need for surgery could have arisen had the second accident never occurred. Therefore, according to CNA, all treatment should be apportioned between CNA and Payday, not just the non-surgical medical benefits.

{15} CNA’s argument is unpersuasive. After reviewing the whole record, we hold that Dr. Gelinas’ testimony that surgery would not have been necessary had Worker not suffered her second injury, although equivocal in light of his other statements, is evidence that a reasonable mind could accept as adequate to support the WCJ’s decision. Furthermore, we do not read the compensation order as necessarily holding that the first injury had no causal connection whatsoever to Worker’s present need for surgery. As CNA correctly points out, the WCJ ruled that Worker’s back injury was a “direct and proximate result” of both accidents. Accordingly, the WCJ fashioned a remedy in which each employer would be liable for the expenses that the WCJ found to correspond to that employer’s risk. The WCJ found that Payday was liable for some of Worker’s ongoing, non-surgical medical care, and that Worker would not have needed surgery—and thus Payday would not have been liable for Worker’s surgery—had the second accident never taken place.

{16} In contrast, the WCJ found that CNA was liable for Worker’s non-surgical and surgical medical benefits. Although he did not explicitly cite Section 52-1-47(D) in the compensation order, the WCJ essentially concluded that the surgery was not “payable” on account of Worker’s first injury within the meaning of the statute. Therefore, CNA was not entitled to a reduction of its liability for Worker’s surgical medical benefits. Jouett v. City of Albuquerque, 2005-NMSC-015, ¶ 46. We see no error in the WCJ’s conclusion and hold that it is supported by substantial evidence. Moreover, Worker correctly points out that the WCJ’s apportionment complies with Section 52-1-47(D) in that it does not provide Worker with a double recovery. The fact that CNA has cited evidence in the record to support its theory that the first injury contributed to Worker’s need for back surgery does not alter our analysis. See Abeyta v. Bumper To Bumper Auto Salvage, 2005-NMCA-087, ¶ 20, 137 N.M. 800, 115 P.3d 816 (“[T]he question before us is not whether the circumstances of this case would have supported an opposite result. It is whether the circumstances supported the WCJ’s ruling.” (citation omitted)).

{17} CNA’s remaining arguments are equally unavailing. For example, CNA asserts that “the WCJ effectively made Payday totally immune for one type of treatment.” In support of this argument, CNA cites our decision in McMains v. Aztec Well Service, 119 N.M. 22, 24, 888 P.2d 468, 470 (Ct. App. 1994), as standing for the proposition that, in a successive injuries case, a first employer is immune from an apportionment of liability for medical care “only if there is no possibility that Worker would need future medical care for [her] back injury had there been no [second] accident.” Therefore, according to CNA, the WCJ could not hold Payday immune because the record demonstrates a possibility that surgery would have been necessary despite the second accident.

{18} CNA’s citation to McMains is inapposite. The WCJ in McMains found that the worker’s successive accidents caused his disability, yet ruled that the subsequent employer was liable for all future medical care. Id. at 23-24, 888 P.2d at 469-70. We reversed, holding that the first employer was “liable for future medical care arising from the [first] accident that would be required even if the [subsequent] accident had not occurred.” Id. at 24, 888 P.2d at 470. The immunity to which we referred in McMains was essentially a total immunity, i.e., immunity “from any potential future liability for medical care arising from the [first] accident.” Id. (emphasis added). However, the WCJ in the present case did not hold Payday immune from all future medical care; to the contrary, the WCJ apportioned 50% of Worker’s non-surgical medical benefits to Payday. Again, we see no error in the WCJ’s conclusion that surgery would not have been necessary had the second accident not occurred.

{19} CNA next argues that there is no basis in New Mexico law for apportioning liability for some medical treatments but not others. However, CNA has not set forth any authority prohibiting such an apportionment. Instead, CNA argues that allowing treatment-specific apportionment could lead to absurd results and increased litigation over fine points of causation and treatment. In the absence of any authority to the contrary, and in light of our deferential standard of review, we decline to overturn the WCJ’s decision simply because it involves a novel application of Section 52-1-47(D). If such an application of Section 52-1-47(D) becomes more prevalent and has a deleterious effect on the workers’ compensation system in New Mexico, we are confident that the Workers’ Compensation Administration, the appellate courts, and/or the legislature will be able to address the situation appropriately at that time.

{20} Finally, CNA directly attacks the WCJ’s findings of fact for lack of substantial evidence. In support of this argument, CNA essentially claims that Dr. Gelinas’ opinion was unworthy of belief and that Dr. Reeve’s opinion should carry more weight. However, it was the WCJ’s role to resolve these issues at trial. Garney v. Concrete Inc. of Hobbs, 1996-NMCA-081, ¶ 20, 122 N.M. 195, 922 P.2d 577 (“It is the duty of the fact-finder to weigh the evidence and resolve any conflicts.”). Although on appeal we take the whole record into account, we do not reweigh the evidence. Tallman, 108 N.M. at 127, 767 P.2d at 366 (“A reviewing court may not reweigh the evidence. . . .”). As stated previously, we conclude that substantial evidence supports the WCJ’s decision. We now turn to the question of whether the WCJ erred in denying Worker’s motion for attorney fees.

III. Attorney Fees

{21} Worker does not challenge the amount of attorney fees awarded, but instead argues that the WCJ erred in refusing to apply the fee-shifting provision of NMSA 1978, § 52-1-54(F)(4) (2003). Although we normally review a WCJ’s award of attorney fees for an abuse of discretion, the issue of whether the WCJ correctly interpreted Section 52-1-54(F)(4) is a question of law that we review de novo. Hise v. City of Albuquerque, 2003-NMCA-015, ¶ 8, 133 N.M. 133, 61 P.3d 842. Section 52-1-54(F)(4) provides that:
F. After a recommended resolution has been issued and rejected . . . the employer or claimant may serve upon the opposing party an offer to allow a compensation order to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued, subject to the following:

. . . .

(4) if the worker’s offer was less than the amount awarded by the compensation order, the employer shall pay one hundred percent of the attorney fees to be paid the worker’s attorney, and the worker shall be relieved from any responsibility for paying any portion of the worker’s attorney fees.

{22} In the instant case, Worker presented the employers with an offer of judgment that proposed a two and one-half percent reduction in attorney fees for each employer in exchange for the employers’ willingness to cover Worker’s medical expenses, including the cost of Worker’s surgery. However, the offer of judgment did not specify a dollar amount or a percentage of liability for which each employer would be responsible. The parties do not dispute that the employers’ failure to respond to the offer constituted a rejection of it.

{23} In denying Worker’s motion for attorney fees, the WCJ ruled that Worker’s offer “has no legal effect because it would not have disposed of the merits of this case.” The WCJ explained his reasoning in a memorandum opinion filed on April 27, 2006:

It is apparent . . . that a critical issue in the outcome of this case was the relative responsibilities of the Employers and Insurers to pay for surgical medical care for the Worker. The offer of judgment did not address this issue. Because the offer of judgment was silent on the allocation issue, acceptance of the offer of judgment by the Employers and their Insurers would have left unanswered one of the key questions in the case . . . . This flaw in the offer represents a fatal error in the offer and therefore the offer must be deemed to be incomplete. The offer of judgment is a nullity.

{24} On appeal, Worker asserts that her offer of judgment, if accepted, would have disposed of all issues between her and the employers. Worker notes that neither of the employers filed a cross-claim against the other and that the employers would have had the option to move for post-litigation proceedings for reimbursement, if necessary. Therefore, Worker could have been dismissed from the case without affecting the employers’ rights or their ability to defend or prosecute the remaining issues. Finally, Worker contends that the legislative intent of Section 52-1-54(F) is to encourage settlement in workers’ compensation cases and, in light of that purpose, Worker’s offer of judgment was not without legal effect merely because it left some issues unresolved.

{25} Worker is correct that the purpose of Section 52-1-54(F) is to encourage settlement. Leo v. Cornucopia Rest., 118 N.M. 354, 362, 881 P.2d 714, 722 (Ct. App. 1994). One of the mechanisms employed within the statute to achieve the goal of settlement is the “financial sanction against a party that rejects an offer of judgment and fails to obtain a more favorable outcome at the formal hearing.” Id. However, in the present case, Worker’s offer of judgment did not specify an outcome in terms of each employer’s liability because it was silent regarding apportionment. Because the offer of judgment lacked any frame of reference regarding the employers’ liability, the WCJ’s compensation order cannot be said to provide a more or less favorable outcome for the employers. For this reason, we agree with the WCJ that the offer of judgment was fatally defective.

{26} Nevertheless, Worker cites our opinion in Abeyta for the proposition that an offer of judgment may still be valid even where certain details are left unresolved. However, the unresolved issues in Abeyta were the worker’s date of MMI and the identity of the doctor who would determine the date of MMI. 2005-NMCA-087, ¶ 10. We concluded that there was no basis to set an MMI while the worker’s healing process was still underway, and that the worker was sufficiently clear as to which doctor should determine the MMI date. See id. Therefore, the unresolved issues in Abeyta were not so critical as to render the offer of judgment invalid. Id. ¶¶ 12-13. In contrast, the issue left unresolved in the present case—apportionment—was the main, contested issue in the litigation. We agree with the WCJ that the issue of apportionment was too important to have been left unresolved in Worker’s offer of judgment.

CONCLUSION

{27} For the foregoing reasons, we affirm the WCJ’s compensation order and his order granting Worker’s attorney fees. The case is remanded for proceedings consistent with this opinion.

{28} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Chief Judge
LYNN PICKARD, Judge
CERTIORARI GRANTED, NO. 30,543, SEPTEMBER 25, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-129

PRIMETIME HOSPITALITY, INC.,
Plaintiff-Appellee,
versus
THE CITY OF ALBUQUERQUE,
Defendant-Appellant.
No. 25,616 (filed: June 13, 2007)

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

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OPINION

MICHAEL D. BUSTAMANTE, JUDGE

{1} This inverse condemnation case presents an issue of first impression in New Mexico: What is the proper measure of damages for a temporary, but total, physical taking of a commercial property in the early stages of construction? Following a bench trial the district court awarded Plaintiff Primetime Hospitality, Inc. (Primetime), $456,242 for lost profits and $153,518.45 for excess construction costs, plus interest and costs against the City of Albuquerque (City). The City appeals contending that the district court erred in awarding consequential damages to Primetime. The City also argues that the court improperly awarded Primetime costs. In its cross-appeal, Primetime argues that the court erred in denying its request for attorney fees. We reverse in part and affirm in part as to the appeal and remand for further proceedings on the City’s appeal. We affirm the denial of attorney fees in the cross-appeal.

FACTS

{2} Primetime is experienced in the business of developing, owning, and operating hotels. In early 2000 Primetime started planning for a hotel near the airport in southeast Albuquerque. Prior to starting construction, Primetime entered into a franchise arrangement with Hilton Inns, Inc. that imposed a substantial liquidated damages provision if the facility was not completed. Primetime also arranged construction financing and hired a contractor.

{3} Within two months of the start of construction, Primetime’s contractor struck and ruptured an encroaching City main waterline. At about the same time, Primetime discovered another encroaching domestic waterline. The waterlines had to be physically relocated by the City. The district court found that the relocation process delayed construction for a 102-day period. The district court also found that as a direct result of the construction disruption, another 40-day delay occurred due to winter weather.

{4} Primetime filed its complaint for damages before construction was complete asserting causes of action for inverse condemnation and trespass. The trespass claim was dismissed with Primetime’s approval. Primetime moved for summary judgment on the issue of liability, and the parties eventually entered into a “Stipulated Partial Summary Judgment Order on Liability” in which the City stipulated to liability for inverse condemnation. The stipulated order specifically reserved all issues relating to the proper measure of damages and attorney fees.

{5} The parties then filed cross motions for summary judgment as to the elements of damages Primetime could pursue at trial. Primetime argued, as it does here, that it was entitled to a full measure of separate consequential damages covering (1) physical damage to the property from water discharge; (2) clean-up, re-excavation, and all additional construction costs caused by the delay; (3) the reasonable fair market value of the loss of use of the property; and (4) the net lost profits the hotel would have generated had there been no delay. The City argued that Primetime was limited to a traditional “before and after” measure of damages with no separate provision for any consequential damages. The district court granted Primetime’s motion for summary judgment specifically with respect to lost profits, ruling that they were a “proper element of damages.”

{6} The parties’ approach did not change through trial as evidenced by their written closing arguments and proposed findings of fact and conclusions of law. The district court awarded damages for lost profits and additional construction costs in the exact amount Primetime requested. The lost profit calculation was based on a 142-day delay in opening the hotel. The additional construction cost figure included a number of items, some connected directly to repairing water damage, but the vast majority connected to the delay of construction. The excess construction costs include:

Excess Construction Costs:

- Admin. Time
- Buttress Wall
- Hussein Salary (PD 266.66)
- Mayan Construction
- LSC Landscaping
- Cartesian
- Custom Grading
- Vineyard
- Builders Risk (7.67/day)
- Pat Richardson (88.90 PD)
- Fence

Total 153,518.45

{7} The City does not question the district court’s finding that the additional construction costs were incurred as a direct result of the encroaching waterlines. Nor does the City dispute the accuracy or reasonableness of the additional costs or lost profit figures. Rather, the City limits its challenge to the legal question of whether any of them are permissible in inverse condemnation actions.
In support of the lost profits award, the district court found as a fact that Primetime’s expert “demonstrated that a before and after appraisal methodology would not be appropriate to measure the lost profits suffered by [Primetime].” The district court concluded as a matter of law that “[w]hen reliable proof of damage and its amount is presented by a methodology other than a before and after appraisal, such proof is admissible on the damage issue.”

**JUST COMPENSATION FOR A TEMPORARY TAKING**

The City’s power of eminent domain is limited by the constitutional requirement that the property owners be paid “just compensation.” See N.M. Const. art. II, § 20 (stating that “[p]rivate property shall not be taken or damaged for public use without just compensation”); City of Sunland Park v. Santa Teresa Servs. Co., 2003-NMCA-106, ¶ 43, 134 N.M. 243, 75 P.3d 843 (recognizing that “[t]he primary condition to the exercise of eminent domain is the constitutional requirement to pay just compensation”).

The statutory provision carrying out this constitutional mandate in the context of inverse condemnation, NMSA 1978, § 42A-1-29(A) (1983), states:

A. A person authorized to exercise the right of eminent domain who has taken or damaged or who may take or damage any property for public use without making just compensation . . . is liable to the condemnee, or any subsequent grantee thereof, for the value thereof or the damage thereto at the time the property is or was taken or damaged. . . .

The City argues that the district court applied a constitutionally and statutorily improper measure of damages. This is a question of law that we review de novo. See Lorentzen v. Smith, 2000-NMCA-067, ¶ 6, 129 N.M. 278, 5 P.3d 1082.

New Mexico’s constitution mandates just compensation when property is taken or damaged but does not say how to measure it in any particular circumstance. Similarly, our Eminent Domain Code contemplates just compensation but provides little guidance as to its measurement. For example, NMSA 1978, § 42A-1-24(A) (2001) simply provides that “actual value” as of the date a petition of condemnation is filed shall constitute just compensation. The Code is more specific in describing the measure of damages to remainders in partial taking cases. NMSA 1978, § 42A-1-26 (1981) (describing the measure of damages to remainder properties as the “difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking”).

But the Code does not address in any way how to measure damages for a temporary taking-physical or regulatory.

Before entering into our discussion of the law of damages for temporary taking, both within this state and without, we believe it prudent to emphasize the unique circumstances with which we are confronted. The case could be viewed as a temporary invasion incidental to negligence by the City in the placement and mapping of its water lines. We need not decide or even examine in detail whether the case could have been brought as a tort action. The parties stipulated to the dismissal of the trespass claim, Primetime never sought compensation under the Tort Claims Act, and the City stipulated to liability for inverse condemnation. Thus, we decide the case on the basis that it was presented both below and to us—as a proper case for inverse condemnation in which we need only decide the proper measure of damages.

This Court has addressed damages for a temporary regulatory taking in one case. In PDR Development Corp. v. City of Santa Fe, 120 N.M. 224, 900 P.2d 973 (Ct. App. 1995), the trial court determined that a zoning ordinance had been unlawfully applied to PDR’s existing property, but then refused to grant damages in the form of lost profits. Id. at 226-27, 900 P.2d at 975-76. We affirmed the trial court’s refusal to grant lost profits damages and enunciated a measure of damages tied to the “market rate of return on the difference in the fair market value of the property without the restriction and the fair market value of the property with the restriction for that period of time during which the restriction was in place.” Id. at 226, 900 P.2d at 975. The City relied heavily on this aspect of PDR in its briefing before us.

Taken at face value, application of this measure would seem to provide a ready answer to this case. As the City recognized at oral argument, however, PDR is not a cure-all given the factual circumstances we deal with here. First, it is unclear how the PDR formula would apply to the disruption of a construction process such as we have here. Second, the PDR formula was taken from an Eleventh Circuit opinion, Wheeler v. City of Pleasant Grove, 833 F.2d 267 (11th Cir. 1987). As we will develop later in this opinion, the Wheeler formula was clearly influenced by the facts in that case and represents but one of a number of approaches taken by the federal courts to measure damages in temporary takings cases. See id. at 271. Thus, we feel less bound to try and apply Wheeler here than if it represented a unified and consistent federal approach to the issue. Third, at least two of the cases cited in PDR in support of the Wheeler formula appear to apply a different measure, thus emphasizing the lack of uniformity in the case law on the issue. See Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 411-12 (Neb. 1994) (awarding the actual difference between rent available for office usage as opposed to retail usage); Sheer v. Twp. of Evesham, 445 A.2d 46, 74 (N.J. Super. Ct. Law Div. 1982) (granting damages equal to the “option value” of the premises for the period of the taking “calculated on the market value of the property without any zoning regulation” plus fees, costs, and interest). Finally, PDR itself appears to leave room for proof and payment of “temporary market damages” such as loss of rental income.

Believing that PDR does not provide a definitive answer, we return to first principles, although we remain guided by the approach we approved in PDR. As a general matter the stated aim of just compensation is to pay a property owner “an amount sufficient to cover his loss—that is, to make him whole and fully indemnify him.” State ex rel. State Highway Comm’n v. Pelletier, 76 N.M. 555, 560, 417 P.2d 46, 49 (1966). We are aware that the notion of full indemnification in the context of condemnation proceedings is generally recognized to encompass a more limited range of remedies than, for example, negligence tort law. The roots of that difference are not easily disentangled. See Robert Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57 (1999) (tracing the development of just compensation litigation in state courts from the pre-civil era reliance on common law torts to the development of a theoretical basis grounded more on constitutional mandates with remedies and procedures influenced by a variety of factors including sovereign immunity concepts, socio-economic forces, and legislative enactments). We cannot unravel those roots here; we do remain mindful of their effects on our case law.

The problem of calculating value and deriving appropriate eminent domain damages caused by temporary takings has been particularly vexing. The leading treatise on eminent domain asserts that the measurement of compensation for a “temporary taking is not the same as determining...
value when the acquisition is permanent.” 4 Julius L. Sackman, Nichols on Eminent Domain § 12E.01[1] (3d ed. 2006) [hereinafter Nichols]. Noting that loss in market value is not a proper criterion, Nichols lists three alternative methods used to calculate compensation: (1) the value of the property for the time it is held by the condemnor; (2) the difference in the value of the property before and after the taking; (3) the fair market rental value of the property during the time it was taken. Nichols, supra, § 12E.01[1], at 12E-2.1 to -3; see 2 Dan B. Dobbs, Dobbs Law of Remedies § 6.9(2), at 182 (2d ed. 1993) (noting that the types of “harm suffered by the landowner may be quite varied and no single damages measure is likely to properly cover all cases”).

{16} The Nichols list is actually underinclusive. We have already noted the option value measure allowed in Sheerr. Other cases have allowed damages for fixtures and permanent equipment destroyed or subject to excessive wear and tear during the taking. See, e.g., United States v. General Motors Corp., 323 U.S. 373, 383-84 (1945) (discussing a possible different approach to measuring damages when the government takes occupancy of a premises for a temporary period rather than taking property permanently). In the General Motors case, the Supreme Court also allowed consideration of the cost of moving and storing personal property from the occupied building as a component affecting the rental value of the building for the duration of the taking. Id. at 383. The Court acknowledged this would not be proper in a permanent taking context. Id. at 379-80. In another of its post-World War II takings cases, the Supreme Court approved a damage award for lost business goodwill. In Kimball Laundry Co. v. United States, 338 U.S. 1, 3 (1949), the Court was faced with a situation in which government (the Army) had occupied a business property (a laundry) with the intent of carrying on the laundry to serve Army personnel and actually utilized not only the property but the employees as well. As a result, the Court recognized, the business owner could not simply move its business elsewhere. The effect was that the business lost the value of what it called “trade routes.” Id. at 8. The Court treated the taking as if the government had acquired the going concern value of the business and held that compensation for that loss was required. Id. at 16.

{17} The Supreme Court’s rationale for treating temporary takings differently is multifaceted. In General Motors the Court was concerned that the total award under the standard used by the district court—the market long term rental rate for bare space—did not even cover the owner’s continuing rental obligation, much less the demonstrable and comparatively larger costs of moving and damage to equipment and fixtures. General Motors, 323 U.S. at 376, 382-84. Aware that the owner had not received anything near what it had lost, the Court was clearly concerned about the “just” component of just compensation. See id. at 382. Also in General Motors, the Court held that in temporary takings cases the owner’s property interest in fixtures and permanent equipment was entitled to be recognized as a separate matter from its possession and use interests in the structure. Id. at 383-84.

{18} The Supreme Court’s concern in Kimball Laundry Co. was more abstract, but quite relevant to our case. Noting that compensable value of property in the eminent domain context generally concerns itself with transferable values, the Court made clear that when property is of a kind seldom exchanged, it has no “market price,” and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights. These considerations have special relevance where “property” is “taken” not in fee but for an indeterminate period. Kimball Laundry Co., 338 U.S. at 5-6 (citation omitted). The Court concluded that a temporary interruption “so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor’s obligation to him.” Id. at 15. In short, the Court made clear that context matters in calculating just compensation. It is important to keep in mind that the Court made its statement in the course of deciding that the value of the trade routes was property the loss of which should be compensated.

{19} The lower federal courts have heeded the Court’s lesson. The federal courts appear to adjust their approach to damages to fit the situation before them. For example, in Independence Park Apartments v. United States, 465 F.3d 1308, 1311 (Fed. Cir. 2006), denying a petition for rehearing, the Federal Circuit Court relied on Supreme Court cases to reiterate that “measuring just compensation can be difficult in certain instances and is not amenable to a rigid formula.” In a prior opinion, the Court had approved a method of calculation that included actual lost rents caused by an improper federal regulation. See Independence Park Apartments v. United States, 449 F.3d 1235, 1246-48 (Fed. Cir. 2006); Independence Park Apartments v. United States, 61 Fed. Cl. 692, 706-08 (2004) (rejecting government assertion that damages be limited to interest on lost rents and instead awarding net lost rents). In addition, federal courts routinely grant restoration and repair damages in addition to rental values for the term of the taking. Riverside Military Acad., Inc. v. United States, 122 Ct. Cl. 756, 783 (1952); United States v. 37.15 Acres of Land, 77 F. Supp. 798, 802-03 (S.D. Cal. 1948). And the calculation of rental value is customized to the particular facts of each case. See Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1580 (Fed. Cir. 1990) (equating rental value with the “minimum amount in rent and royalties that [the plaintiff] would have received” under a proposed joint venture agreement which was not entered into because of the government’s temporary taking of the property). Some courts get quite creative with their efforts to reflect reality. See Herrington v. County of Sonoma, 790 F. Supp. 909, 915-16 (N.D. Cal. 1991) (calculating “lost use-value of the property” by applying a probability analysis).

{20} State courts have displayed even greater flexibility in fashioning appropriate remedies for temporary takings. In Poirier v. Grand Blanc Township, 481 N.W.2d 762, 766-67 (Mich. Ct. App. 1992), a regulatory temporary taking case, the court rejected a “fair market value rate of return” measure as inadequate to “place plaintiff in as good a position as he would have been had no taking occurred.” Instead, relying on an approach suggested by the Arizona Supreme Court, the court in Poirier upheld an award for increased construction costs and loss of income. Id. (citing Corrigan v. City of Scottsdale, 720 P.2d 513, 518-19 (Ariz. 1986) (en banc) (advocating for a flexible approach to damages in temporary takings cases aimed at compensating owners for actual losses suffered and requiring that such damages “be provable to a reasonable certainty similar to common law tort damages”)); see also W.H. Pugh Coal Co. v. State, 460 N.W.2d 787, 791 (Wis. Ct. App. 1990) (approving lost income as a consideration in assessing the “reasonable value of the property’s use” as a proper measure of damages for a temporary taking of property which limited the owner’s ability to expand his business (internal quotation marks and citation omitted)); City of San Antonio v. Guidry, 801 S.W.2d 142, 150-51 (Tex. Ct. App. 1990) (allowing lost profits as damages caused by temporary interference with access to restaurant eventually causing the business to fail).

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Finally, academic commentators agree that no one measure of damages is appropriate to meet all of the factual scenarios bound to be seen in temporary takings. They urge courts to be sensitive to this reality and remain flexible in their approach. David Schultz, The Price is Right! Property Valuation for Temporary Takings, 22 Hamline L. Rev. 281, 294 (1998); Joseph P. Mikitish, Note, Measuring Damages for Temporary Regulatory Takings: Against Undue Formalism, 32 Ariz. L. Rev. 985, 1002 (1990); Cynthia J. Barnes, Comment, Just Compensation or Just Damages: The Measure of Damages for Temporary Regulatory Takings in Wheeler v. City of Pleasant Grove, 74 Iowa L. Rev. 1243, 1252 (1989).

Considering all of the above, we turn back to the job of resolving this case while keeping in mind that the City does not challenge the amounts reflected in the judgment on a factual basis. We must decide whether, and if so, how, New Mexico should adapt its takings law to adequately recognize Primetime’s loss and fashion a reasonable remedy. We agree with the cautionary approach suggested by the Arizona Supreme Court in Corrigan, however, and we will not attempt to create a measure to be used in all temporary takings cases.

EXCESS CONSTRUCTION COSTS

The judgment reflects two separate categories of damages—excess construction costs and lost profits. Adopting the Supreme Court’s approach in General Motors and Kimball Laundry Co., we hold that except for the award for the cost of the buttress wall ($76,856.94), the excess construction costs award should be affirmed. All of the costs—except the buttress wall—are directly related to the interruption of the construction project and would not have been incurred but for the City’s interference with the owner’s loss of possession and use of the property. In a real sense these costs were imposed on Primetime by the City. As such, they are akin to the repair and restoration expenses allowed in General Motors and Kimball Laundry Co. They are also akin to the types of special damages allowed in partial takings cases. UJI 13-705 NMRA allows the award of special damages for such items as replacing fencing, parking areas, and signage, as well as loss of crops and fertilizing, reestablishment of irrigation works and relocation expenses. El Paso Elec. Co. v. Pinkerton, 96 N.M. 473, 474, 632 P.2d 350, 351 (1981); Transwestern Pipe Line Co. v. Yandell, 69 N.M. 448, 458, 367 P.2d 938, 944 (1961). Awarding these damages also serves the aim of putting the landowner in the same pecuniary position as though the taking had not occurred. See Pelletier, 76 N.M. at 560, 417 P.2d at 49; Fowler Irrevocable Trust v. City of Boulder, 17 P.3d 797, 799, 806 (Colo. 2001) (en banc) (allowing restoration costs and fair rental value for temporary possession of vacant land).

The cost of the buttress wall is a potentially different matter. The testimony of Primetime’s architect and construction manager makes it clear that a wall was redesigned as a bearing wall in order to reduce construction time after Primetime regained possession of the site. The redesign was not strictly required by the City’s taking. In this sense the City is correct when it asserts that the buttress wall represents a mitigation of damages effort by Primetime. The question is whether that by itself makes the expense noncompensable here.

In run-of-the-mill tort and contract cases a plaintiff is normally entitled to recover the reasonable cost of mitigating its damages, usually regardless of whether the mitigation efforts are successful. Spang Indus., Inc. v. Aetna Cas. & Sur. Co., 512 F.2d 365, 370-71 (2d Cir. 1975); see 1 Dan B. Dobbs, Dobbs Law of Remedies § 3.9, at 383 (2d ed. 1983). But, of course, this is not a contract or tort action. Is the fact that this is an inverse condemnation case sufficient by itself to preclude consideration of mitigation expenses? Or, put another way, does the basic nature or purpose of the condemnation action preclude consideration of mitigation efforts as a factor in fixing damages? Given the uniqueness of temporary takings, and this circumstance in particular, we hold that it does not. At least one way in which temporary takings differ from permanent appropriations is that the owner likely has an interest in returning to the property. On return the owner may continue a prior use, finish development of an interrupted use, or find a new use for the property. The owner’s interest in, or need to spend money on, the property upon return will vary depending on any number of variables. We see no reason why reasonable expenditures demonstrably aimed at reducing the losses suffered by an owner subjected to a temporary taking should not be reflected in the award. The policy rationale underlying the encouragement to mitigate damages is at play in this arena just as it is in contracts and tort law. Appropriately used mitigation would help reduce the losses suffered by property owners and the damages payable by inverse condemnation defendants. For example, if a taking were caused by flooding and the owner could prevent the flooding from inundating the entire property by building a barrier of some kind and thus averting greater harm to the remainder of the property, we see no reason not to allow as damages the reasonable cost of the barrier. However, if the barrier has independent worth to the owner, which the owner gets to keep after the temporary taking, then its value should not properly be a part of the damages.

Of course the key requirement is reasonableness under the circumstances. One way to evaluate reasonableness is to compare the cost of the mitigation effort to the value of the harm averted. The district court did not address this issue explicitly. On remand it will be Primetime’s burden to demonstrate reasonableness of its mitigation effort in light of the general damages award, excluding excess construction damages.

We emphasize that any award for excess construction costs will likely be, but may not be, entirely separate and distinct from the value of the right of occupancy and use we discuss later in this opinion.

LOST PROFITS

We now turn to the award of lost profits. The parties’ approaches to this issue are starkly different. Though it does not say so explicitly, Primetime would have us adopt a full tort measure of damages. The City’s approach has evolved. In the district court, the City argued for a “before and after” measure, but it also presented evidence of lost rental value. At oral argument the City altered its position and conceded that under the United States Supreme Court opinions in General Motors and Kimball Laundry Co., a fair rental value approach for the period of the taking was more appropriate. We conclude that neither approach is entirely correct, though the City is closer to the mark.

Primetime urges us to adopt the approach taken by the Michigan Court in Poirier and allow a “full” measure of damages. More precisely, Primetime argues that New Mexico already recognizes full consequential damages in inverse condemnation. Primetime relies on Estate & Heirs of Sanchez v. County of Bernalillo, 120 N.M. 395, 902 P.2d 550 (1995) and State ex rel. State Highway Comm’n v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969) for the proposition that New Mexico already recognizes and grants a full measure of consequential damages in condemnation actions. Primetime’s reading of these cases is simply too broad.

Primetime plucks the following partial quote from Chavez to support its
argument: “all the elements of damage resulting from [inverse condemnation].”] Id. at 399, 456 P.2d at 873. The full sentence is:

“We see nothing in our earlier holding that denied the right to have all the elements of damage resulting from the condemnation considered when arriving at the award.” Id. In Chavez, the defendant conducted a retail business on leased acreage. Id. at 397, 456 P.2d at 871. The partial quote Primetime relies on is included in a discussion in which the Court rejects an argument made by the condemning agency that in a prior opinion in the case the Court had limited the owner’s damages to the remainder of the term of the lease in effect when the taking occurred. Id. at 399, 456 P.2d at 873.

The full sentence from which the quote is extracted simply reflects the Court’s holding that lease renewals could be taken into account in determining the before and after value the owner could assert.

{31} Sanchez was a zoning case in which the Supreme Court held that inverse condemnation did not lie because the zoning action—whether proper or not—did not deprive the owner of all or substantially all beneficial use of its property or cause an injury other than that suffered by the general public. 120 N.M. 395-96, 902 P.2d at 550-51, 553-54. To the extent Sanchez discusses consequential damages it does so in response to the property owner’s argument that it could claim damages under cases such as Board of County Commissioners v. Harris, 69 N.M. 315, 366 P.2d 710 (1961). Sanchez, 120 N.M. at 398-99, 902 P.2d at 553-54. Harris, in turn, is one of the first cases in which New Mexico recognized a cause of action under our constitution for damages when property is damaged by government action even though the property itself is not taken. 69 N.M. at 317, 366 P.2d at 712. In Harris, highway improvements had affected the owner’s access to his property causing a demonstrable reduction in value. Id. at 316-17, 366 P.2d at 711-12. The measure of damage in Harris was the traditional before and after measure. Id. at 318, 366 P.2d at 713.

{32} Sanchez and Harris do not use the term “consequential damages” in a technical sense to describe the kind of damages that can be awarded in condemnation cases. They use the term generically to say that damages resulting from the condemnation did not lie because the zoning action—whether proper or not—did not deprive the owner of all or substantially all beneficial use of its property or cause an injury other than that suffered by the general public. 120 N.M. 395-96, 902 P.2d at 550-51, 553-54. To the extent Sanchez discusses consequential damages it does so in response to the property owner’s argument that it could claim damages under cases such as Board of County Commissioners v. Harris, 69 N.M. 315, 366 P.2d 710 (1961). Sanchez, 120 N.M. at 398-99, 902 P.2d at 553-54. Harris, in turn, is one of the first cases in which New Mexico recognized a cause of action under our constitution for damages when property is damaged by government action even though the property itself is not taken. 69 N.M. at 317, 366 P.2d at 712. In Harris, highway improvements had affected the owner’s access to his property causing a demonstrable reduction in value. Id. at 316-17, 366 P.2d at 711-12. The measure of damage in Harris was the traditional before and after measure. Id. at 318, 366 P.2d at 713.

The term consequential damages in the law of eminent domain is sometimes used in a very special sense. When only a portion of a tract of land is taken, it is common to speak of damages to the remaining and unpartitioned portion of the tract as consequential damages. But this often refers to the diminished value of the remaining land rather than damages that would be called consequential in other settings.

Dobbs, supra, § 6.9(2) n.14. Thus, we disagree with Primetime’s assertion that New Mexico already recognizes a tort measure for damages in condemnation.

{33} Since New Mexico has not adopted a tort measure of damages in condemnation, we must decide whether to follow cases like Poirier at least in the specific circumstance of temporary takings. We decline to do so. First, we already have a case, PDR Development Corp., which indicates that we take a narrower view of condemnation damages than many of the states and we follow more closely the federal law in this regard. Second, we detect no general movement in our condemnation case law toward a broader measure of damages. Perhaps New Mexico courts have not been specifically asked to consider such a move. But we frankly doubt our courts would adopt the rationale of cases such as State v. Hammer, 550 P.2d 820, 824, 827 (Alaska 1976), a permanent takings case in which the Alaska Supreme Court rejected the normal rule that damages over and above the fair market value of the actual physical property taken are simply not recoverable. This is not evidence of judicial timidity. See County of Doña Ana v. Bennett, 116 N.M. 778, 784, 867 P.2d 1160, 1166 (1994) (quoting Nichols approvingly for the proposition that “judicial power has been held to be a constitutionally guaranteed limitation upon the power of the legislature to fix the rule of damages to the detriment of the rights of the owner to just compensation” (citation omitted)). We simply see no felt need in our courts to adjust the usual rules in the permanent takings context. See Leigh v. Village of Lopez Lanes, 2005-NMCA-025, ¶ 13, 137 N.M. 119, 108 P.3d 525 (applying the “before and after” rule in the context of the permanent taking of a restrictive covenant).

{34} Second, Poirier is distinguishable in that it involved a regulatory taking caused by an unconstitutional zoning of the owner’s property. 481 N.W.2d at 765. Though litigated as a constitutional taking of private property without compensation, Poirier could have been prosecuted as a damages claim under 42 U.S.C. § 1983 (2000). The cause of action and the remedy allowed in Poirier can thus be analogized to a tort action. See Zaintz v. City of Albuquerque, 739 F. Supp. 1462, 1467, 1469-70 (D.N.M. 1990) (denying summary judgment by defendant and allowing § 1983 action based on allegedly arbitrary zoning action to proceed to trial); County Concrete Corp. v. Twp. of Roxbury, 442 F.3d 159, 168-70 (3d Cir. 2006) (drawing distinctions between just compensation takings claims and Section 1983 substantive due process and equal protection claims arising from zoning actions).

{35} Primetime did not assert a Section 1983 claim and we do not see any basis for one under these facts. Because of the stipulation that this was a physical taking, in accord with the Supreme Court’s specific holding in Kaiser Steel Corp. v. W. S. Ranch Co., 81 N.M. 414, 421-22, 467 P.2d 986, 993-94 (1970), Primetime was limited to its inverse condemnation remedy. The default measure of damages for Primetime’s loss is thus an eminent domain measure. Whatever that measure ultimately may be, we do not agree that we must import tort concepts wholesale to provide constitutionally adequate just compensation.

{36} What then is an appropriate way to measure Primetime’s damages? We have already rejected Primetime’s invitation to apply a pure tort measure. The City’s alternative approach is also unsatisfactory. At oral argument the City proposed an approach suggested by the Supreme Court’s opinions in General Motors and Kimball Laundry Co. The City argued that a combination of rental value for the time of the taking and some recognition of excess construction costs would yield a reasonable figure. While we could agree with the City’s general approach, the specific figures used by the Court cause concern. The difficulty is two-fold. First, the excess construction costs it would agree to were based on its expert’s first “before and after” market value analysis. This approach assumed a potential sale and was based on what the market would recognize in such a hypothetical sale. That assumption in this circumstance could easily be viewed as ignoring reality. And as we have affirmed for the most part the excess construction costs based on Primetime’s approach, we need not discuss the City’s approach to them any further.

{37} Second, the rental value suggested by the City could similarly be viewed as being disconnected from the facts in this case. The City’s suggested basis for a rental value is the property’s value as a car rental
lot. The difficulty with that comparison is obvious. The property was no longer a rental car lot when the City’s occupation occurred. After Primetime’s purchase, it became an active construction site backed by an executed franchise agreement and financing adequate to build an operating hotel. The Supreme Court noted in General Motors that it would be inappropriate to value the temporary taking of an active leasehold on the basis of a long-term rental of vacant premises. General Motors, 323 U.S. at 382. Rather, the value should be “the market rental value of such a building on a lease by the long-term tenant to the temporary occupier.” Id.

{38} We believe this same approach should guide valuation here. The question then becomes how to calculate the figure in what would be an “extraordinary and unusual transaction.” Id. at 383. We have already determined that the excess construction costs should be treated separately like the damaged or destroyed fixtures and equipment in General Motors. Id. at 383-84. What is left to measure once basic out-of-pocket items are accounted for? Since the goal of just compensation is to measure and pay for what the owner has lost, we must analyze this question from Primetime’s viewpoint. That viewpoint should not include merely personal, unique, or idiosyncratic factors. See Kimball Laundry Co., 338 U.S. at 5. Rather it should focus on what the Supreme Court has referred to as “transferable value.” Id. at 383. If there is a recognized market for such exchanges, the market’s method of valuation is a reasonable proxy for—indeed, the best indicator of—value. Id. at 6. The Supreme Court also explained how to deal with situations where there are no established markets.

But when the property is of a kind seldom exchanged, it has no “market price,” and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights. These considerations have special relevance where “property” is “taken” not in fee but for an indeterminate period.

Id. (citation omitted).

{39} The taking here interfered with Primetime’s possession and use of the property. Possession and use from Primetime’s standpoint translated into delay in construction and ultimately delay in opening the hotel. Primetime quantified the value of this delay by equating it to lost gross profits—or cash flow. We note that though not the focus of the City’s argument, we harbor concern about the propriety of Primetime’s proof of damages even under a tort theory. Primetime’s experts calculated the $456,242 lost profit based on gross income less current gross operating expenses without taking into account depreciation or mortgage expenses. As a result the figure derived is more akin to lost cash flow than lost profits. We obviously do not need to decide here whether that approach is appropriate. Another flaw in this approach is that directly allowing lost profits treats Primetime’s loss as a true business interruption claim. Primetime’s measure of loss might be more germane if it had been forced to close a functioning hotel; but that is not what happened. Its loss was delay at an early stage of construction.

{40} This does not mean that lost profits are irrelevant to the calculation of Primetime’s damages. They may be taken into account, but only as a component in calculating rental value for the period of delay. As noted in Dobbs, [1] if, as a result of the defendant’s invasion, the plaintiff is unable to use the land and to develop it, he might traditionally recover, as general damages, the rental value of the land for the period in which he was dispossessed or for the period in which the land was unusable. Alternatively, he might be granted special damages for any actual profits he could have made by use of the land during the period in question. But he should not recover both. Rental value of the land would be an objective or market estimate of the land’s value for the purpose of generating profits; so an award of rental value already taken into account the profitability of the land, and the plaintiff must not be allowed to recover both.


{41} In this context the ultimate question is: What would an objective property owner accept to delay construction of a hotel facility in this circumstance for a period of 142 days? We leave the details of the calculation to the parties’ accounting and economics experts on remand.

COSTS

{42} The City argues that the district court erred in awarding costs to Primetime for expert witness fees relating to the measure of damages based on lost profits. The City’s theory is that the expert’s fees were not reasonable and necessary because they testified to a measure of damages that is not recoverable in an inverse condemnation action as a matter of law. The City does not quarrel with the amount of the fees as such. Primetime’s response is that: (1) it is the prevailing party; (2) nothing requires a party to prevail on the specific issue on which a particular expert testifies in order to recoup his costs; and (3) it was necessary for the district court to hear testimony about lost profits to consider “complex issues as to the proper methodology to use to assess lost profits under the factual circumstances of this case.”

{43} We review award of costs under an abuse of discretion standard. Pioneer Savings & Trust, F.A. v. Rue, 109 N.M. 228, 231, 784 P.2d 415, 418 (1989). The district court has wide discretion to award costs to the prevailing party, including costs for multiple experts, if it determines their testimony was reasonably necessary for the case. Dunleavy v. Miller, 116 N.M. 353, 362-63, 862 P.2d 1212, 1221-22 (1993).

{44} Rule 1-054(D)(1) NMRA provides that costs “shall be allowed to the prevailing party unless the court otherwise directs.” Rule 1-054(D)(2)(g) lists expert witness fees as a recoverable cost “as limited by [NMSA 1978, § 38-6-4(B)]” (1983)).” The statute provides that the district court may award a reasonable fee “for any witness who qualifies as an expert and who testifies.” The statute allows the district court to award costs for more than one expert on liability or damages if such testimony is “reasonably necessary” and “not cumulative.” Id.

{45} Although we see no abuse of discretion in the district court’s award given that Primetime was the prevailing party below, in light of our remand, we believe it only appropriate to vacate the award of costs and allow the judge to redetermine the costs to be awarded once it makes a proper award of eminent domain damages. If the court finds that the expert’s testimony is reasonable and necessary because lost profits are part of the mix of information the district court needed—and will need on remand—to evaluate the difficult issue of valuation in this case, then it may consider awarding the costs of that expert even though we
have reversed the award of lost profits as a separate item of damages.

ATTORNEY FEES

{46} Primetime appeals the district court’s refusal to grant its attorney fees arguing that (1) the facts in its case are “indistinguishable” from the relevant facts in Landavazo v. Sanchez, 111 N.M. 137, 141-43, 802 P.2d 1283, 1287-89 (1990) (Montgomery, J., specially concurring, but delivering the opinion for the majority on this issue); (2) the district court erred in allowing the City to introduce evidence that its placement of the waterlines was merely inadvertent or a mistake; and (3) we should extend the holding of Landavazo and allow attorney fees as a matter of course in inverse condemnation cases.

{47} The parties disagree about the standard of review we should apply. Primetime argues for a de novo standard on the theory that it presents a pure question of law concerning the proper interpretation and application of NMSA 1978, § 42A-1-25(A)(3) (1981), and article II, § 20 of the New Mexico Constitution. The City argues the problem is only subject to an abuse of discretion standard, citing New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-028, ¶ 6, 127 N.M. 654, 986 P.2d 450. The answer is that both are partly right. We will apply a de novo standard to Primetime’s third issue and an abuse of discretion standard to the others.

{48} We start with the legal question and hold that neither our constitution nor Section 42A-1-25(A)(3) mandates attorney fees in inverse condemnation cases. Primetime does not cite to any cases—and we have found none—holding that attorney fees are mandated by constitutional takings provisions. The Florida Supreme Court opinion that Primetime relies on does not hold that attorney fees are required by Florida’s constitution. The opinion pays homage to the spirit and letter of Florida’s constitution and its idea of just compensation. Jacksonville Expressway Auth. v. Henry G. Dupree Co., 108 So. 2d 289, 294 (Fla. 1958), limited on other grounds by Fla. E. Coast Ry. Co. v. Martin County, 171 So. 2d 873, 877 (1965). But the decision is actually grounded on statutory provisions allowing costs to owners in condemnation actions. “Costs” had previously been interpreted to include attorney’s fees. Id. at 294-95. We have no comparable cases in New Mexico, except for Landavazo, and Landavazo is not grounded on constitutional mandate. 111 N.M. 138, 802 P.2d at 1284.

{49} Should we, then, expand Landavazo and hold that Section 42A-1-25(A)(3) supports a rule that attorney fees are preemptively appropriate in all inverse condemnation cases? Our response is: No. The language of Section 42A-1-25(A)(3) does not require it. That section provides:

A. The court shall award the condemnee his litigation expenses whenever:

   (3) there is a final determination that the condemnor does not have a right to take the property sought to be acquired in the condemnation proceeding.

{50} In a sharply divided opinion, the majority in Landavazo construed the phrase “does not have a right” in inverse condemnation cases to mean “that the condemning authority has proceeded wrongfully in taking the landowner's property without paying or offering just compensation.” 111 N.M. at 142, 802 P.2d at 1288. The Court felt that this construction would protect landowners from abuse and would require—or encourage—entities to proceed in an orderly fashion by direct condemnation.

{51} The Court’s decision was informed by the facts in Landavazo. There the county widened a roadway and in the process stripped away almost 20,000 square feet of the plaintiff’s farmland. Id. at 141, 802 P.2d at 1287. The county did not ask permission to invade the owner’s property and did not make any effort to proceed under the Eminent Domain Code before or after the taking. Id. When the landowner protested the action, the landowner apparently was told that “if he did not agree with the county’s actions, he could ‘take it to court.’” Id. The Landavazo opinion illustrates a clear instance of aggravated and objectionable conduct by a governmental agency. As Landavazo points out, the county could have avoided the entire problem—including attorney fees—if it had simply followed procedures under the Eminent Domain Code. Id. at 141-42, 802 P.2d at 1287-88. Having literally forced the landowner to bring an inverse condemnation suit for relief, the Court felt that granting attorney fees was a reasonable way to compensate him for the county’s wrongful conduct. Id. at 143, 802 P.2d at 1289.

{52} The Supreme Court’s decision in Landavazo “that the county did not have the right to take the property,” id., includes the implicit limit “in the way it did here.” In this sense the aggravated circumstances present in Landavazo are an integral part of the decision. The absence of such aggravated circumstances argues against the expansion of the Landavazo rule to all inverse condemnation cases, and we decline to expand it in this case.

{53} The facts here are the polar opposite of those in Landavazo. There is no hint that the City deliberately misplaced its waterlines. We surmise that the City was just as surprised as Primetime to find the encroachment. If there was evidence of calculation or indifference on the part of the City, it would have been Primetime’s burden to produce it and it did not. Further, it was not error or an abuse of discretion by the district court to allow evidence from the City that the misplacement some years earlier—before Primetime owned the property—was a mistake or inadvertent. The City’s stipulation to liability did not act as a waiver of its ability to prove inadvertence if only because placement of the pipes and their removal were separated by so many years. The taking matured only when the pipes interfered with Primetime’s use and possession. “The trial court has broad discretion when awarding attorney fees and will not be reversed unless there is an abuse of discretion.” Hedicke v. Gunville, 2003-NMCA-032, ¶ 23, 133 N.M. 335, 62 P.3d 1217. There is no abuse of discretion here.

CONCLUSION

{54} We affirm the district court’s measure of damages for excess construction costs with the exception of the cost of the buttress wall. We remand that portion of the award for reconsideration as to its reasonableness in light of the general award for lost rental value. We reverse the district court’s award of lost profits and remand for reconsideration in accord with this opinion. We vacate the district court’s grant of costs and affirm the denial of attorney fees. On remand, since the judge who decided this case is no longer on the bench, the judge to whom the case is assigned may exercise discretion to determine how much of the existing proceedings to review and how much new or revised material the parties may present on remand. See, e.g., Gomez v. Gomez, 119 N.M. 755, 756-57, 895 P.2d 277, 278-79 (Ct. App. 1995), superseded by statute on other grounds as stated in Erickson v. Erickson, 1999-NMCA-056, ¶ 25, 127 N.M. 140, 978 P.2d 347; Smith v. Trailways, Inc., 103 N.M. 741, 748, 713 P.2d 557, 564 (Ct. App. 1986).

{55} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

LYNN PICKARD, Judge

JAMES J. WECHSLER, Judge
Certiiorari Granted, No. 30,624, September 25, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-130

STATE OF NEW MEXICO,

Plaintiff-Appellee,

versus

JONATHAN KING,

Defendant-Appellant.

No. 24,323 (filed: June 27, 2007)

APPEAL FROM THE DISTRICT COURT OF TORRANCE COUNTY

THOMAS G. FITCH, District Judge

GARY K. KING
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for Appellee

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Chief Public Defender
KARL ERICH MARTELL
Assistant Appellate Defender
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for Appellant

OPINION

CELIA FOY CASTILLO, Judge

{1} In a previous unpublished memorandum opinion, this Court affirmed the aggravation of Defendant’s sentence. Defendant petitioned the New Mexico Supreme Court for a writ of certiorari, which was denied. Subsequently, Defendant filed a petition for writ of certiorari in the United States Supreme Court, which granted Defendant’s petition, vacated the judgment, and remanded the case to this Court for further consideration in light of Cunningham v. California, 127 S. Ct. 856, 860 (2007) (striking down California’s determinate sentencing law, which is similar to that of New Mexico, on the ground that the California law violated the Sixth Amendment right to a jury trial). We conclude that Defendant’s sentence violated Defendant’s right to a jury trial. We therefore remand for resentencing in accordance with this opinion and Cunningham.

I. BACKGROUND

{2} Defendant was charged in two complaints with several crimes related to his interaction with three young girls. Ultimately, Defendant pled guilty to two counts of attempt to commit criminal sexual penetration in the first degree, and to one count each of criminal sexual contact of a minor in the third degree and failure to appear. Later, the trial court held a sentencing hearing to take evidence and statements that would assist in determining the appropriate sentence. See NMSA 1978, § 31-18-15.1 (1993). The court viewed videotapes of each victim’s investigatory interview at the Children’s Safe House of Albuquerque (Safe House), during which the victims vividly recounted the events that formed the basis of the charges against Defendant. The court also viewed another videotape, recorded by the mother of one victim, in which the child discusses her friendship with Defendant’s adopted daughter. In addition, the court listened to a letter read aloud from another alleged victim, who is unrelated to the charges in the instant case, and heard testimony from a Safe House employee who worked as an interviewer in unrelated child abuse cases with Defendant, while Defendant was acting in his former job capacity as a law enforcement officer. Finally, the court heard argument from the State based on facts presented at the sentencing hearing.

{3} After considering this evidence, the trial court imposed the basic statutory sentence for each count and, sua sponte, aggravated each sentence by one-third, the maximum permitted. See NMSA 1978, § 31-18-15 (2005) (establishing the basic sentence available); see also § 31-18-15.1 (establishing the procedure for altering a basic sentence). The reasons for aggravating the basic sentence were enumerated in the judgment and sentence:

a.) [D]efendant’s use of his position of authority to commit the charged offenses.

b.) [D]efendant’s use of his adopted daughter . . . in the facilitation of his offenses.

c.) [D]efendant’s use of his knowledge of law enforcement procedures in the facilitation of his offenses.

d.) The manner of how [D]efendant told the victims not to report the offenses.

Defendant filed a motion to reconsider, which was denied.

II. STANDARD OF REVIEW

{4} Generally, we review a trial court’s sentencing determination for abuse of discretion. State v. Bonilla, 2000-NMSC-037, ¶ 6, 130 N.M. 1, 15 P.3d 491. However, we review de novo any question regarding the legality of the sentence. State v. Williams, 2006-NMCA-092, ¶ 4, 140 N.M. 194, 141 P.3d 538.

III. DISCUSSION

{5} This Court previously affirmed Defendant’s aggravated sentence in reliance on our Supreme Court’s decision in State v. Lopez, 2005-NMSC-036, ¶ 55, 138 N.M. 521, 123 P.3d 754 (concluding that New Mexico’s sentencing scheme is consistent with Blakely v. Washington, 542 U.S. 296 (2004), and United States v. Booker, 543 U.S. 220 (2005), and that Section 31-18-15.1 is constitutional). Subsequently, the United States Supreme Court issued Cunningham, explaining the holdings in Apprendi v. New Jersey, 530 U.S. 466 (2000), Blakely, and Booker, and thereafter remanded the instant case for reconsideration. See Cunningham, 127 S. Ct. at 864-68. We now reconsider Defendant’s arguments in light of Cunningham. We recognize that Cunningham deals with sentencing after a jury trial. 127 S. Ct. at 860. Accordingly, we must read Cunningham in conjunction with Blakely because Blakely deals with a sentencing after a plea agreement—the circumstances we have in this case. See Blakely, 542 U.S. at 298.

{6} Defendant’s arguments are based on Blakely. He contends that the enhancement of his sentence violated his rights under the Sixth Amendment because the enhancement was based on findings that were not part of the factual basis for the plea and because the plea alone did not authorize the aggravated sentence. See Blakely, 542 U.S. at 303 (stating that the “maximum sentence” is that which the “judge may impose solely on the basis of the facts
A. New Mexico Law

The State argues that under New Mexico law, Blakely does not apply and therefore the trial court was not required to consider specific factors or make factual findings beyond the factual basis entered in the plea in order to impose an aggravated sentence. The State asserts that the court was only required to hold a hearing. It appears that the State bases this argument on its contention that State v. Wilson, 2001-NMCA-032, 130 N.M. 319, 24 P.3d 351, is controlling. In Wilson, this Court held that Sections 31-18-15 and 31-18-15.1 created a sentencing range "within which a court may exercise discretion as long as the discretion is supported by the required statement of reasons on the record." Wilson, 2001-NMCA-032, ¶ 13; see Lopez, 2005-NMSC-036, ¶ 55 (reaffirming the holding in Wilson and concluding that the sentence authorized by Section 31-18-15.1 is the statutory maximum for purposes of the Sixth Amendment).

Our Supreme Court’s holding in Lopez relied heavily on its analysis of a California case construing California’s sentencing structure, which is similar to that of New Mexico. 2005-NMSC-036, ¶¶ 36, 53-54 (discussing and relying on People v. Black, 113 P.3d 534 (Cal. 2005)). However, the United States Supreme Court held in Cunningham that California’s sentencing structure violated the defendant’s Sixth Amendment right to a jury trial. 127 S. Ct. at 868 (discussing Black, stating that “[i]n accord with Blakely, . . . the middle term prescribed in California’s statutes, not the upper term, is the relevant statutory maximum,” and therefore concluding that California’s sentencing scheme violated the bright-line rule, which requires a jury determination beyond a reasonable doubt of any fact increasing the criminal penalty beyond the statutory maximum). Thus, in light of Cunningham, we cannot conclude that the reasoning of Wilson is controlling under these circumstances.

B. Nature of the Sentencing Process

Moreover, to the extent that the State contends there is no violation of Defendant’s Sixth Amendment rights because the trial court in New Mexico is not required to consider specific factors nor make findings beyond the factual basis entered in the plea, we are not persuaded. The State asserts that “it is the mandatory nature of the judicial sentencing process that created the Sixth Amendment problem” in both Blakely and Booker and thus neither case applies to the New Mexico sentencing scheme. See Booker, 543 U.S. at 233 (finding "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue [because] the relevant sentencing rules are mandatory and impose binding requirements on all sentencing judges"). The State misconstrues Blakely and Booker.

The violation of the Sixth Amendment is not in the mandatory nature of the scheme but in the judicial fact-finding that mandates the statutory maximum or allows the sentencing judge to go beyond the statutory maximum. Blakely, 542 U.S. at 305 n.8 (“Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence.”); see Cunningham, 127 S. Ct. at 869 (“[B]road discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions.”); Booker, 543 U.S. at 232 (stating that a defendant’s right to have the jury find facts essential to the punishment “is implicated whenever a judge seeks to impose a sentence that is not solely based on ‘facts reflected in the jury verdict or admitted by the defendant’” (quoting Blakely, 542 U.S. at 303)). We therefore conclude that the discretionary nature of New Mexico’s aggravated sentencing process does not escape the structures of the Sixth Amendment as construed in Booker and Blakely.

C. Facts Admitted When Defendant Entered His Plea

When a defendant enters a plea agreement, the state may seek a sentence enhancement only if the defendant con-
case, the record does not reflect that at the time Defendant entered his plea, he was informed of his right to a jury trial on the aggravating factors; nor does it appear that Defendant was informed of acts that would be sufficient to constitute an aggravating factor.

{14} Defendant’s plea hearing was held before Blakely was decided. Wilson was controlling at the time of sentencing, and therefore neither Defendant nor the State was aware of Defendant’s right to a jury determination of aggravating factors. See 2001-NMCA-032, ¶ 4 (holding that New Mexico’s sentencing scheme provided “for a range of sentences, and that sentencing within this range, based on findings made on the record by the trial court, is constitutional”); cf. Cunningham, 127 S. Ct. at 868 (concluding that the middle term of sentencing prescribed by the California statutes is the relevant statutory maximum and that imposing an aggravated sentence, based on findings made by the judge, was unconstitutional). Thus, at the time Defendant entered his plea, he was not informed of his right to a jury determination of facts that would support enhancement of his sentence. See State v. Ward, 118 P.3d 1122, 1124 (Ariz. Ct. App. 2005) (“[A] waiver of the right to a jury trial in the context of a plea agreement cannot be interpreted as a valid waiver of the right to a jury trial for sentencing proceedings, unless the record shows that the defendant knew, first, that he had this right, and second, that by pleading guilty, he was waiving that right.”).

{15} Further, the record does not reveal that Defendant, at the time of his plea agreement, was informed of acts that would be sufficient to constitute aggravating factors. At the time, the State had no need to rely on admissions of acts in the plea agreement to support the aggravating factors because aggravating factors were determined by the court pursuant to Section 31-18-15.1 under Wilson. In addition, the State had no impetus to inform Defendant of acts constituting sufficient evidence of aggravating circumstances because the State did not intend to ask the court below to aggravate the sentence. Thus, we conclude that Defendant was not informed of acts that would constitute sufficient evidence of aggravating circumstances when he entered into the plea agreement.

{16} For the foregoing reasons, we hold that Defendant’s waiver of his right to a jury trial in the plea agreement was not a voluntary and intelligent waiver of his right to a jury trial on the sentence enhancement factors. The majority of other jurisdictions considering this issue have reached the same conclusion. Ward, 118 P.3d at 1127; see, e.g., Brown, 115 P.3d at 138; People v. Johnson, 121 P.3d 285, 288 (Colo. Ct. App. 2005) (concluding that “[a] defendant’s admission of a factual basis for the guilty plea is not the equivalent of either an admission that the same facts constitute aggravating factors for sentencing purposes or a consent to judicial factfinding”), rev’d on other grounds, 142 P.3d 722, 724 (Colo. 2006); State v. Fairbanks, 688 N.W.2d 333, 336-37 (Minn. Ct. App. 2004) (holding that the defendant’s waiver of his right to trial by jury was not a waiver of his right to a jury determination of aggravating factors); State v. Gornick, 102 P.3d 734, 741 (Or. Ct. App. 2004) (“To be valid, a waiver must be an intentional relinquishment or abandonment of a known right or privilege.”) (internal quotation marks and citation omitted), rev’d on other grounds, 130 P.3d 780, 785 (Or. 2006); State v. Curtis, 108 P.3d 1233, 1236 (Wash. Ct. App. 2005) (holding that the defendant “could not knowingly, voluntarily, and intelligently waive his Blakely rights” during allocution when the defendant did not know of these rights); cf. Higginbotham v. State, 826 N.E.2d 5, 7 (Ind. Ct. App. 2005) (holding that the defendant waived his right to a jury trial on aggravating factors when he agreed to a specific sentence in his plea).

{17} Finally, the State argues in the alternative that even if Defendant’s sentence is unconstitutional, this Court should remand for reconsideration of Defendant’s plea. The State cites no authority and provides no analysis in support of its request. Thus, we decline to consider this contention. See Santa Fe Exploration Co. v. Oil Conservation Comm’n, 114 N.M. 103, 108, 835 P.2d 819, 824 (1992) (stating that the appellee is required to provide citations to authorities in support of its arguments); see also Rule 12-213(A)(4), (B) NMRA.

IV. CONCLUSION

{18} We conclude that Defendant’s sentence violated his right to a jury trial, and we remand to the trial court with instructions to resentence Defendant in accordance with this opinion and Sixth Amendment requirements, as discussed in Cunningham, 127 S. Ct. at 871 (stating that “several states have modified their systems . . . by calling upon the jury—either at trial or in a separate sentencing proceeding—to find any fact necessary to the imposition of an elevated sentence”), and Blakely, 542 U.S. at 310 (“When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding.”).

{19} IT IS SO ORDERED.

CELIA FOY CASTILLO,
Judge

WE CONCUR:
JONATHAN B. SUTIN, Chief Judge
IRA ROBINSON, Judge
Certiﬁrari Granted, No. 30,620, September 25, 2007

From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-131

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
STEPHEN NOZIE,
Defendant-Appellant.
No. 25,481 (filed: August 7, 2007)

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

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for Appellant

Opinion

JOSEPH ALARID, JUDGE

(1) Defendant-Appellant, Stephen Nozie, appeals his conviction for aggravated battery on a peace officer. We are persuaded by Defendant’s arguments that the district court erred in denying Defendant’s requested jury instructions on mistake and the lesser-included offense of battery and that the denial of these instructions was not harmless error. Accordingly, we reverse Defendant’s conviction for aggravated battery on a peace officer and remand for a new trial.

Discussion
Instruction on Mistake

(2) In Rutledge v. Fort, 104 N.M. 7, 715 P.2d 455 (1986), a proceeding on a petition for a writ of superintending control brought by the prosecutor, the Supreme Court construed the statutes defining the offenses of aggravated assault upon a peace officer and battery upon a peace officer. The Supreme Court addressed the question of whether these statutes require the State to prove that the defendant knew that the victim was a peace officer. A three-justice majority of the Supreme Court concluded that proof of the defendant’s knowledge of the victim’s status as a peace officer is not required to obtain a conviction for aggravated assault upon a peace officer or battery upon a peace officer, reasoning that imposing a knowledge requirement would be equivalent to adding an additional element to the offenses as defined by the Legislature. Id. at 9, 715 P.2d at 457. Justice Walters and Sosa dissented. Id. at 10, 715 P.2d at 458. Thereafter, the defendant was convicted of aggravated assault upon a peace officer under jury instructions that imposed strict liability on the defendant with respect to the victim’s status as a peace officer as required by Rutledge. Reese v. State, 106 N.M. 498, 745 P.2d 1146 (1987). On the defendant’s appeal from the conviction, we afﬁrmed, applying the law as settled by Rutledge. Reese, 106 N.M. at 499, 745 P.2d at 1147. The defendant petitioned for certiorari. A three-justice majority reversed, the prior decision in Rutledge notwithstanding. Justices Sosa and Walters, the two justices who had dissented in Rutledge, held that as a matter of due process of law the defendant’s knowledge that the victim was a peace officer was a necessary element of the offense of aggravated assault on a peace officer. Reese, 106 N.M. at 501, 745 P.2d at 1149. Justice Ransom, who had joined the Supreme Court after Rutledge was decided, provided the third vote in favor of overruling Rutledge. Justice Ransom would have imposed as a matter of statutory construction a requirement that the defendant have had knowledge of the victim’s status as a peace officer. Id. at 501-03, 745 P.2d at 1149-51 (Ransom, J., specially concurring).

(3) Subsequent to Reese, the Supreme Court promulgated a uniform jury instruction that addresses the defendant’s ignorance or mistake as to the victim’s status as a peace officer. UJI 14-2216 NMRA. Although this instruction appears to have been drafted in response to Reese, the instruction is not tailored speciﬁcally to aggravated assault upon a peace officer or battery on a peace officer, the particular offenses at issue in Rutledge and Reese, and Use Note 1 to UJI 14-2216 states, without limitation to any offense, that “[t]his instruction is to be given if there is a question of fact as to whether or not the defendant knew that the victim was a law enforcement ofﬁcer.” Moreover, the two alternate rationales relied on by the three Justices who held in Reese that the defendant was entitled to an instruction on mistake apply with equal force to aggravated battery on a peace officer. We therefore hold that when there is a question of fact as to whether the defendant knew the victim was a peace ofﬁcer, UJI 14-2216 applies to the offense of aggravated battery on a peace ofﬁcer, NMSA 1978, § 30-22-25 (1971).

(4) The State argues that UJI 14-2216 should be given only when the defendant’s mistake as to the victim’s status as a police ofﬁcer is a complete defense to criminal liability, as for example where the defendant “lacked criminal intent because he honestly and reasonably believed himself the victim of a crime or intentional tort being perpetrated by a private citizen, and [the defendant] used no more than reasonable force to repel the attack, or fled to avoid having to use force.” We reject the State’s proposed limitation on the use of UJI 14-2216. Because an assault or battery against a peace ofﬁcer cannot be accomplished without assaulting or battering “another,” State v. Kraul, 90 N.M. 314, 317, 563 P.2d 108, 111 (Ct. App. 1977) (observing that “[o]ne cannot batter a peace ofﬁcer while in the lawful discharge of his duties without battering the person of another”), a

1 Reese arose out of the same criminal prosecution that was the subject of the writ proceeding in Rutledge. Reese v. State, 106 N.M. 505, 745 P.2d 1153 (1987) (opinion on rehearing).
number of the various assaults or batteries defined in Article 3 of the Criminal Code are “included” offenses of parallel offenses against peace officers defined in Article 22 of the Criminal Code, see id. (characterizing simple battery as an “included” offense of battery on a peace officer); compare, e.g., NMSA 1978, § 30-3-4 (1963) (defining battery, a petty misdemeanor) with NMSA 1978 § 30-22-24 (1971) (defining battery upon a peace officer, a fourth degree felony). UJI 14-2216 is written in a traditional “step down” format. UJI 14-2216 requires the jury first to consider whether the defendant is guilty of an offense against a peace officer. UJI 14-2216 requires the jury to acquit the defendant of the offense against a peace officer if the jury has a reasonable doubt as to whether the defendant knew the victim was a peace officer. If the jury acquits the defendant due to a mistake as to the victim’s status as a peace officer, UJI 14-2216 requires the jury to consider the parallel lesser-included offense not involving a peace officer as the victim. This step down format would not be necessary if, as the State argues, the Supreme Court intended a mistake instruction to be available only when mistake is a complete defense to any criminal liability.

{5} In the present case, Defendant tendered an instruction conforming to UJI 14-2216. Having tendered a legally proper instruction, Defendant was entitled to that instruction if the record contained substantial evidence supporting the factual elements of his defense. See State v. Mantelli, 2002-NMCA-033, ¶ 16, 131 N.M. 692, 42 P.3d 272. The prosecutor argued, and the district court agreed, that Defendant was not entitled to an instruction on mistake because there was no testimony directly establishing that Defendant did not know that the person he attacked was a peace officer.

{6} “As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.” State v. Gaines, 2001-NMSC-036, ¶ 6, 131 N.M. 347, 36 P.3d 438 (quoting Mathews v. United States, 485 U.S. 58, 63 (1988)). “A defendant is entitled to have the jury instructed on his theories of the case if that [sic] theory is supported by the evidence.” State v. Bunce, 116 N.M. 284, 287, 861 P.2d 965, 968 (1993). We are satisfied that the record contains substantial evidence supporting an instruction on Defendant’s ignorance or mistake as to the victim’s status as a peace officer.

{7} The jury was presented with evidence of the following circumstances: Defendant and his wife, Philipita, had been drinking throughout the day and early evening. They were joined by Philipita’s sister, Oleta, who was driving her car. Oleta drove Defendant and Philipita to a supermarket. Defendant and Philipita got out of the car and began fighting. A male security guard intervened. The guard was wearing a uniform with black slacks and a gray shirt with a badge and patches identifying him as a security guard. Defendant grabbed the guard’s shirt. In the ensuing struggle, the guard struck Defendant in the head and face three to five times with his fist. While Defendant was lying on the ground, Philipita and Oleta kicked Defendant in the head until the guard stopped them. Defendant got up and wandered into a vacant lot located across the street from the supermarket. Defendant’s BAC was close to a black-out level. Defendant also had elevated blood sugar, a condition that can cause blurred vision.

{8} The victim, Lt. Craig Meo of the Gallup Police Department, arrived in response to a report of a domestic disturbance. Lt. Meo was wearing a uniform with black pants and a black jacket with insignia on the shoulders. Lt. Meo parked his car in front of the lot without engaging his emergency lights. Lt. Meo got out of the car and followed Defendant into the vacant lot. It was approximately 10:00 p.m. on a March evening, and the light in the lot came from lights at an adjacent car dealership. Lt. Meo turned off his belt radio and jogged toward Defendant. Lt. Meo did not identify himself as a police officer due to his concern that Defendant would flee if Defendant realized that a police officer was approaching. When Lt. Meo caught up with Defendant, the two men were about ten to fifteen feet apart.Lt. Meo made a come here gesture with his hand. Defendant walked toward Lt. Meo. Lt. Meo turned so that his gun was on the side opposite Defendant, and the two men began walking back toward Lt. Meo’s car.

{9} Without warning, Defendant hit Lt. Meo in the eye with his fist. Defendant then punched Lt. Meo in the nose. As Lt. Meo fought back, he slipped and fell on his back. Defendant straddled Lt. Meo, “head-butting” Lt. Meo three times. Lt. Meo suffered a broken nose, a gash above his eye, one lost tooth, and two chipped teeth. Lt. Meo, now afraid for his life, drew his handgun and shot Defendant, wounding him in the chest. Defendant went limp, falling on Lt. Meo’s chest.

{10} We are satisfied that a reasonable jury could have found that Defendant was in a dazed, disoriented, and intoxicated state and that, in this state, he believed that the person he attacked in the lot was the private security guard who had followed him into the field from the supermarket parking lot. Defendant’s theory of ignorance or mistake was supported by the State’s own witnesses and, contrary to the argument of the prosecutor, did not depend upon Defendant taking the stand to directly deny knowledge. See Mantelli, 2002-NMCA-033, ¶ 16 (observing that the State’s evidence may support an instruction requested by the defendant); State v. Castañeda, 2001-NMCA-052, ¶ 21, 130 N.M. 679, 30 P.3d 368 (noting general rule that a defendant’s state of mind may be proved by circumstantial evidence). That there are views of the evidence that support a finding adverse to Defendant is not a reason for denying Defendant an instruction so long as the evidence viewed most favorably to Defendant supported Defendant’s theory of the case.

{11} We are not persuaded by the State’s argument that the instructions on intent adequately address Defendant’s state of mind with respect to the victim’s status as a peace officer. The victim’s status as a peace officer is an “attendant circumstance.” 1 Wayne R. LaFave, Substantive Criminal Law § 5.1 at 332 (2d ed. 2003) (observing that “[i]t is commonly stated that a crime consists of both a physical part and a mental part . . . and sometimes also . . . prescribed attendant circumstances”). The attendant circumstance of the victim’s status as a peace officer in the lawful exercise of his duties distinguishes felony aggravated battery on a peace officer from misdemeanor aggravated battery. Compare Section 30-22-25(B) with NMSA 1978, § 30-3-5(B) (1969). As a majority of the Supreme Court recognized in Reese in the closely related context of the offenses of aggravated assault on a peace officer and battery on a peace officer, a mens rea requirement of knowledge attaches to the attendant circumstance of the victim’s status as a peace officer. 106 N.M. at 501, 745 P.2d at 1149. The instruction on general criminal intent, UJI 14-141 NMRA, focuses on the state of mind attaching to a defendant’s act (touching or applying force); the instruction on specific intent, paragraph 3 of UJI 14-2214 NMRA focuses on a defendant’s state of mind with respect to the consequence of a defendant’s act (injury to the victim). Neither of these UJIs directly addresses the
defendant’s state of mind with respect to the attendant circumstance of the victim’s status as a peace officer. Paragraph 6 of UJI 14-2214 merely requires the jury to find that the victim was a peace officer in the performance of his duties; it does not address the defendant’s state of mind with respect to the victim’s status. We must bear in mind that the function of instructions is to assist the members of the jury, who are likely to have a limited knowledge of substantive criminal law, in understanding and applying the law. See UJI 14-123 NMRA (requiring jurors to affirm that they will arrive at a verdict “according to . . . the law as contained in the instructions of the court”). Without UJI 14-2216, a lay jury would not fully appreciate the legal significance of the defendant’s ignorance or mistake as to the victim’s status as a peace officer. Because UJI 14-2216 is specially tailored to the defense theory of ignorance/mistake as to the victim’s status as a peace officer, when UJI 14-2216 is given we perceive no need to give UJI 14-5120 NMRA, the general instruction on ignorance or mistake of fact. See Bunce, 116 N.M. at 287, 861 P.2d at 968 (observing that a trial court is not required to give duplicative instructions).

Other Requested Instructions

{12} Defendant also was entitled to an instruction on battery, UJI 14-320 NMRA. For purposes of jury instructions, battery is a lesser included offense of aggravated battery on a peace officer. Kraul, 90 N.M. at 317, 563 P.2d at 111. The district court instructed the jury on the question of Defendant’s inability to form the specific intent to injure, UJI 14-5111 NMRA, indicating that the district court recognized that there was sufficient evidence of intoxication to support this defense. If the jury found that Defendant was unable to form the specific intent to injure, it still could have found that Defendant was able to form the general criminal intent necessary to commit battery. See State v. Crespin, 86 N.M. 689, 691, 526 P.2d 1282, 1284 (Ct. App. 1974) (observing that voluntary intoxication is not a defense to a “nonspecific” intent crime); State v. Duran, 80 N.M. 406, 407, 456 P.2d 880, 881 (Ct. App. 1969) (distinguishing the intent to apply force required to commit battery from the intent to injure required to commit aggravated battery). If the jury found both that Defendant was mistaken as to the victim’s status as a peace officer and that Defendant was unable to form the specific intent to injure, it could have found Defendant guilty of battery. The district court should have instructed the jury on the offense of battery as requested by Defendant.

{13} Citing State v. Gonzales, 97 N.M. 607, 642 P.2d 210 (Ct. App. 1982), Defendant argues that in view of evidence that Lt. Meo resorted to deadly force, Defendant was entitled to an instruction on whether Lt. Meo was acting within the scope of his duties, UJI 14-2214 Use Note 6. We agree with the State that this argument ignores the chronology of events. At the time that Defendant attacked Lt. Meo, Lt. Meo had not used any force, much less excessive force. Lt. Meo’s use of deadly force was in response to Defendant’s violent attack. Defendant’s case is clearly distinguishable from Gonzales, where it was undisputed that the officer, not the defendant, struck the first blow. 97 N.M. at 610, 642 P.2d at 213.

{14} We also agree with the State that Defendant was not entitled to an instruction on self-defense. The facts as summarized in Defendant’s Brief-in-Chief clearly demonstrate that Lt. Meo confronted Defendant in a non-threatening manner: When he caught up to [Defendant], about 10-15 feet separated the men. [Lt.] Meo gestured in silence to [Defendant] with his hand for [Defendant] to come toward him. [Defendant] responded to the gesture and walked toward [Lt.] Meo. [Lt.] Meo turned so his gun was on his hip opposite to [Defendant], and then fell in step with [Defendant]. . . . They commenced to walk in step, abreast, in the dark, back toward [Lt.] Meo’s car in this “escort” position.

Even if Defendant believed that he was being confronted by the security guard with whom he had previously struggled, no reasonable jury could have found on the evidence before it that at the point in time that Defendant attacked Lt. Meo there was “an appearance of immediate danger of bodily harm,” that the force used by Defendant was “reasonable and necessary,” or that a reasonable person in the same circumstances would have acted as Defendant did. UJI 14-5181 NMRA; cf. Gonzales, 97 N.M. at 609, 642 P.2d at 212 (emphasizing evidence that the defendant fought back after the officer struck the defendant in the face). Because Defendant failed to put self defense in issue, we also reject his claim that he was entitled to a related instruction on retreat, UJI 14-5190 NMRA.

CONCLUSION

{15} We reverse Defendant’s aggravated battery on a peace officer conviction and remand for a new trial in which the jury is given instructions consistent with this opinion.

{16} IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:
LYNN PICKARD, Judge
CELIA FOY CASTILLO, Judge
Certiorari Not Applied For
From the New Mexico Court of Appeals

Opinion Number: 2007-NMCA-132

STATE OF NEW MEXICO,
Plaintiff-Appellant,
versus
TOMMY DOMINGUEZ,
Defendant-Appellee.
No. 26,628 (filed: August 21, 2007)

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
STEPHEN K. QUINN, District Judge

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OPINION

JONATHAN B. SUTIN, Chief Judge

{1} The State appeals from a district court order dismissing the charges against Defendant for failing to bring Defendant to trial within six months of the date of his arraignment in violation of Rule 5-604(B)(1) NMRA. One day after the six-month time period expired, the State filed a petition for an extension to commence trial, pursuant to the procedure that authorizes late extension requests, but only in exceptional circumstances. See Rule 5-604(E). The State challenges the district court’s ruling that no exceptional circumstances justified the late petition for extension and argues that the district court’s dismissal constitutes a hypertechnical application of the six-month rule that is not supported by the equities in this case. This appeal requires us to review for the first time a district court’s application of the “exceptional-circumstances” requirement to excuse an untimely petition to extend trial commencement. See id. We determine that exceptional circumstances do not exist in this case and that the equities do not demand a more liberal application of the six-month rule. Accordingly, we affirm the district court’s dismissal.

I. BACKGROUND

{2} Generally, the parties agree on the facts material to our analysis of the issues. On July 8, 2005, Defendant was arraigned on charges of forgery, attempted forgery, and resisting, evading, or obstructing an officer. In this case, the arraignment date is the undisputed triggering event for the running of the six-month period, requiring trial to commence by Monday, January 9, 2006. See Rule 5-604(B)(1). The trial date was scheduled for November 30, 2005. Due to a scheduling conflict on November 30, the district court vacated the trial and reset it for an unspecified date. On December 29, 2005, the district court assigned the new trial date for March 15, 2006, over two months past the expiration of the rule period.

{3} In anticipation of filing a petition for extension before the end of the six-month period to accommodate the late trial date, the prosecutor called defense counsel on January 9, 2006, the last day of the rule period, in order to represent in writing Defendant’s position in the petition. Defense counsel returned the prosecutor’s phone call at 4:05 p.m. on the same day, five minutes after the district court clerk’s office closed. Defendant expressed opposition to the extension. The State contends that it was forced to file the petition for extension the next day, January 10, 2006, one day late, in an effort to comply with Rule 5-120(C) NMRA. “The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order initiated by opposing counsel shall accompany the motion.” Id.

{4} On January 20, 2006, the district court granted the State’s request for an extension with the mistaken belief that Defendant had concurred in the petition. On February 13, 2006, Defendant filed two motions to dismiss: one claiming a six-month rule violation and the other claiming a speedy trial violation. In the motions, Defendant represented that he was not served with the State’s petition until January 23, 2006, three days after the extension was granted. The district court held a hearing on the motions, and issued a letter ruling which found that the State failed to establish that exceptional circumstances existed as required by Rule 5-604’s provision for untimely petitions to extend the time for trial commencement, and further found that the court therefore lacked authority to grant the opposed petition. The district court entered an order of dismissal from which the State now appeals.

II. DISCUSSION

{5} On appeal, the State argues that the district court’s dismissal resulted from an overly technical application of the six-month rule that is not supported by case law or justified by the equities of this case. As the basis for its argument, the State contends the following: the extension was for good cause, undisputedly required to accommodate the district court’s heavy docket; the State would have timely filed the petition for extension but for defense counsel’s delayed response; the State was burdened by a heavy caseload at the time it requested the extension; and Defendant acquiesced in the delay, or otherwise failed to adequately protect his right to a timely trial, and also suffered no prejudice. We are not persuaded that the State’s argument demonstrates exceptional circumstances, nor are we persuaded that Defendant acquiesced in the extension, resulting in a technical dismissal.

Six-Month Rule and Standard of Review

{6} Rule 5-604 “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); see State v. Guzman, 2004-NMCA-097, ¶ 9, 136 N.M. 253, 96 P.3d 1173. The rule “requires a defendant’s trial to commence within one-hundred eighty-two days of a triggering event,
absent permissible extensions.” State v. Carreon, 2006-NMCA-145, ¶ 6, 140 N.M. 779, 149 P.3d 95 (citing Rule 6-506(B)-(E) NMRA of the Rules of Criminal Procedure for the Magistrate Courts), cert. granted, 2006-NMCERT-011, 140 N.M. 846, 149 P.3d 943. Where the State fails to bring a defendant to trial within the applicable period, given any extensions granted under the rule, “the information or indictment filed against such person shall be dismissed with prejudice.” Rule 5-604(F) (emphasis added). This Court has interpreted the time limit for commencement of trial within the applicable period, not as jurisdictional, but as mandatory, upon a defendant’s appropriate invocation of the right to a timely trial. See Carreon, 2006-NMCA-145, ¶ 6; Guzman, 2004-NMCA-097, ¶ 9. Although the time limit in the rule is described as “bright-lined” and “mandatory,” our case law has also created a recognized easing of application by requiring the courts to apply the rule with common sense to avoid effecting a hypertechical dismissal. See Jaramillo, 2004-NMCA-041, ¶¶ 1, 8-17 (addressing the blurred line created by the conflicting policies underlying how to apply the rule and reviewing cases that applied a less technical view of the time limit); see also State v. Lobato, 2006-NMCA-051, ¶¶ 28-30, 139 N.M. 431, 134 P.3d 122 (interpreting both the literal meaning of the rule and the policy against technical dismissals, without the use of common sense, to affirm the denial of dismissal where there was an improperly granted mistrial).

{7} Consistent with the duality of the policies underlying application of the six-month rule, a permissible extension for trial may be obtained under the rule for good cause shown even outside of the six-month period. See Rule 5-604(E). However, the extension must be sought by a petition filed “within ten (10) days after the expiration of the applicable time limits” and only where the untimeliness of the petition “is based on exceptional circumstances beyond the control of the state or trial court.” Id.; see State v. Sandoval, 2003-NMSC-027, ¶ 11, 134 N.M. 453, 78 P.3d 907 (confirming that “petitions to extend may be filed up to ten days after the six-month rule has expired for exceptional circumstances beyond the control of the State or the trial court”).

{8} We review the district court’s application of the six-month rule de novo. See Carreon, 2006-NMCA-145, ¶ 5.

Exceptional Circumstances

{9} Our only direct guidance for constructing what is contemplated by the provision in Rule 5-604(E) for “exceptional circumstances beyond the control of the state or trial court” is provided by the committee commentary to the rule. The commentary states that “[i]t is believed that exceptional circumstances would include the death or illness of the judge, prosecutor or defense attorney immediately preceding the commencement of the trial which was to commence the day prior to the expiration of the six-month trial requirement.”

{10} There is an analogous procedural misstep, an untimely notice of appeal, that also must be justified by exceptional circumstances for untimely notices of appeal. Because a timely notice of appeal is a mandatory precondition to the exercise of our jurisdiction, we will excuse an untimely appeal only in exceptional circumstances beyond the control of the parties, which we have determined would include errors on the part of the court. See id. at 276-78, 871 P.2d at 372-74 (remanding for a determination of whether the actions of the court caused the party to file the untimely appeal); see also State v. Upchurch, 2006-NMCA-076, ¶ 5, 139 N.M. 739, 137 P.3d 679 (observing that, where an appeal is filed untimely by the State, we do not presume the effective assistance of counsel and “we rigidly enforce the mandatory time limits for filing the notice of appeal” in the absence of exceptional circumstances). In addition, we have entertained an untimely appeal where the appellant reasonably relied on case law indicating that the probable court order, from which the party should have timely appealed, was not the final, appealable order. See In re Estate of Newalla, 114 N.M. 290, 296, 837 P.2d 1373, 1379 (Ct. App. 1992).

{11} In the present case, to demonstrate exceptional circumstances for the lateness of the petition for extension, the State points to defense counsel’s failure to respond to the prosecutor’s phone call with a position on the extension until after the district court closed on the last day of the rule period. The State maintains that it did not seek the extension earlier because of its heavy caseload. In Upchurch, we held that a prosecutor’s inadvertence in filing a notice of appeal one day late and in failing to request an extension for appeal does not constitute exceptional circumstances. 2006-NMCA-076, ¶¶ 2, 5. Similarly, we are not persuaded that the State’s inadvertent oversight under the pressure of a heavy caseload is an exceptional circumstance. Although we appreciate the State’s attempt to obtain and state Defendant’s stance on the petition, the State could have filed the petition earlier or without Defendant’s stance to ensure its timeliness. See Rule 5-604(E) (stating that “[w]ithin five (5) days after service of the petition, opposing counsel may file an objection to the extension setting forth the reasons for such objection”).

{12} Likewise, we will not excuse the untimeliness of the petition because the docket of the district court necessitated rescheduling the untimely petition. See Guzman, 2004-NMCA-097, ¶ 13 (acknowledging that “the State has the obligation to conduct the prosecution of its case in a timely manner”); cf. State v. Johnson, 113 N.M. 192, 197, 824 P.2d 332, 337 (Ct. App. 1991) (Hartz, J., dissenting) (stating, in a speedy trial case, that “[u]nintentional delays caused by overcrowded court dockets or understaffed prosecutors’ must be considered against the State” (alteration in original) (quoting Strunk v. United States, 412 U.S. 434, 436 (1973))). There is no indication or argument that the district court’s rescheduling in any way caused the State to file a petition for an extension the day after the rule period expired. None of the circumstances in this case rise to the level of exceptional circumstances in the manner of an illness preventing an imminent trial, court error, or misleading precedent. See Rule 5-604(E) comm. cmt.; cf. Trujillo, 117 N.M. at 278, 871 P.2d at 374 (“One unusual circumstance which would warrant permitting an untimely appeal might arise if the delay was the result of judicial error.”); Newalla, 114 N.M. at 296, 837 P.2d at 1379 (“One . . . exceptional circumstance might be reasonable reliance on a precedent indicating that the order not timely appealed was not a final, appealable order.”). Therefore, we hold that the State has not demonstrated exceptional circumstances to justify the untimely petition for an extension.

Equities of Dismissal

{13} The question arises whether, where the extension that was sought after the rule period had lapsed was not grounded in exceptional circumstances, the State can nevertheless override the dismissal based on theories of over-technicality and lack
We assume, without deciding, that those theories are applicable even when exceptional circumstances do not support the untimely filing for an extension. Under that assumption, because assertion of the theories comes after the State untimely filed its petition and has not met the exceptional circumstances exception, the State’s attempt to have us apply the theories to overturn the district court’s dismissal should be an arduous task. In our view, the State has not met its burden. The circumstances do not reflect acquiescence in delay, affirmative conduct that would count against Defendant, or any other conduct that would require a conclusion that dismissal was based on an over-technical application of the rule or any lack of common sense in its application.

The State argues that Defendant acquiesced in the delay by invoking the district court’s jurisdiction over other matters and failing to promptly protect his rights under the six-month rule, relying on three recent opinions from this Court. First, the State argues that our decision in Lobato, 2006-NMCA-051, ¶ 29, supports its contention that even if the benefit from the delay did not inure to Defendant, dismissal is inappropriate where Defendant acquiesced in the delay by failing to take action to protect his right, as well as by taking action causing delay. We are not persuaded that Lobato aids the State’s position. In Lobato, we rejected the defendant’s argument that the six-month rule should continue to run where the district court improperly declared a mistrial. See id. ¶¶ 22-30. We based our decision on both a literal reading of the rule, which provides that a mistrial starts the rule period anew, and a common sense approach to the circumstances. See id. ¶¶ 27-30. We observed that the defendant took affirmative steps to delay his retrial by appealing the mistrial order, and that the defendant acquiesced in the delay for six months when he participated in the retrial proceedings in all respects without objection until the morning of trial. See id. ¶ 29. Under these circumstances, we held that “only a hypertechnical reading of the rule would dictate dismissal.” Id. Lobato is too factually distinguishable to provide support for the State’s position.

The State also refers to Jaramillo, 2004-NMCA-041, ¶¶ 15-18, for support of its contention that where the parties seem to operate in contemplation of a delayed trial and where Defendant submitted to the authority of the district court without raising his rights under the six-month rule, common sense precludes a dismissal. Like Lobato, the facts and holding of Jaramillo are too distinct to control the analysis in the present case. In Jaramillo, the defendant’s motion for mistrial was granted, the trial was not officially severed, and the defendant did not join his co-defendant’s appeal asserting a double jeopardy violation. See Jaramillo, 2004-NMCA-041, ¶¶ 2-5. Instead, the defendant waited until his co-defendant’s appeal was resolved to determine the propriety of a retrial and to object to the delayed retrial counting from the time of the mistrial order. See id. ¶ 15, 17. This Court held that a dismissal would amount to an overly technical application of the rule where the defendant’s actions indicate his intention to benefit from his co-defendant’s appeal, the parties did not indicate a belief that the case was completely severed, and where the defendant failed to move for dismissal on numerous appropriate occasions while retrial was proceeding. See id. ¶¶ 15-17.

In the second paragraph of the “facts and course of proceedings part of his answer brief, Defendant states that on November 30, 2005, when the court continued the case because the trailing docket necessitated that a different case be tried, his attorney stated that he opposed any extension by the court of the six-month rule. Defendant also refers to a chart on the following page of his brief that shows under “date” and “event” that on November 30, 2005, “Defense states it opposes any extension past the six month rule.” Further, Defendant refers in his brief to his motion to dismiss on speedy trial grounds in which he represented that the November 30, 2005 trial was continued and that he would oppose an extension. In answering the State’s argument that he acquiesced, Defendant again points out that he objected to an extension at the original trial date and further states that “[t]he State knew on November 30, 2005 that [Defendant] objected to an extension beyond the six-month period,” and that in spite of that, the State did not file a petition. The State nowhere in its brief in chief or reply brief mentions this objection or denies that it occurred.

Further, in contrast to the defendants in Lobato and Jaramillo, Defendant in the present case invoked the jurisdiction of the district court only once after the rule period had lapsed and after he had objected to the petition. Defendant requested a hearing in order to seek modification of his bond and release from confinement, after having spent ten months in jail. The timing of and reasons for the hearing do not indicate a waiver of the right to be timely tried, as was the case in Lobato and Jaramillo. Defendant’s hearing was held on January 31, 2006, eleven days after the district court granted the State’s untimely petition for an extension and eight days after Defendant was served with the petition. Defendant’s request for the hearing does not indicate an intention to participate in the action as though it would proceed to trial or indicate any intention to delay trial. Rather, Defendant’s request was made because his then thirteen-year-old son was hit by a truck and was having to undergo surgery. Defendant needed to work and make money for his son’s medical expenses. Therefore, we are not persuaded that Defendant’s invocation of the court’s authority after the rule period lapsed demonstrates acquiescence in any respect.

Lastly, the State relies on Guzman, 2004-NMCA-097, ¶¶ 8-12. Guzman held that the district court may extend the time to commence trial in an oral ruling, and may even extend it sua sponte, and permitted the extension upon the prosecutor’s oral motion for an extension, when the written order was drafted by the State after the rule period had expired. Id. ¶¶ 11-13. The Court in Guzman balanced the prosecutor’s failure to file a verified petition and the district court’s late written order with the defendant’s actions as a whole and the need for the continuance. See id.

The defendant in Guzman had stipulated to an extension a few days before the first scheduled trial, within only a month of the expiration of the rule period. Id. ¶¶ 2, 11. The continuance was granted and trial was reset within the rule period. Id. ¶ 2. About two weeks thereafter, the prosecutor left the district attorney’s office. Id. ¶ 2, 6. At that time, the successor prosecutor orally requested a continuance, which the district court granted, but the prosecutor failed to memorialize in a written order until eighteen days after the rule period passed. Id. ¶ 3. The defendant did not agree
to the continuance, but conceded that it was for good cause and that she suffered no prejudice. Id. ¶ 7. The defendant did not file a motion to reconsider the extension or to set it aside, but instead waited another thirty-one days after the written order to file a motion to dismiss. Id. ¶¶ 3, 11. Further, the extensions were needed in Guzman in part because the prosecutor resigned and a successor took over the case after the stipulated extension, and there were three changes in the presiding judges due to the death of the first judge, the reassignment to the second judge pro tempore, and the permanent assignment of the last judge. Id. ¶¶ 2-6. On appeal, this Court noted that while the successor prosecutor and judge worked to correct the oversight in failing to enter a written order granting the extension before the end of the rule period, the defendant did nothing and waited an unreasonable time, forty-nine days past the rule period, to assert her rights. See id. ¶¶ 11-12. On balance, the Court held that the defendant’s rights under Rule 5-604 were not sufficiently asserted to outweigh the technical violation of the rule, where the causes of the delay were so anomalous and forgivable. See id. ¶¶ 12-13. Guzman is distinguishable.

{21} Contrary to the cases on which the State relies, Defendant in the present case neither benefitted from, caused, nor stipulated to any delay in bringing him to trial. Further, in contrast, Defendant did not participate in the proceedings or wait until the last moment or take an unreasonably lingering amount of time to move for dismissal. Defendant filed his motion to dismiss for violation of the six-month rule twenty-one days after he discovered that the district court granted the extension. Equally important, the State’s request for an extension in Guzman was timely even though orally made, and we agree with the district court in the present case that the State failed to comply with the rule and did not meet the exceptional-circumstances requirement of Rule 5-604(E).

{22} The crux of the six-month rule is promptness. The rule contains a strongly worded provision for noncompliance with the time limit-dismissal. See Rule 5-604(F). Also, the State’s showing of the need for the extension in Guzman was greater and more clearly developed than was the State’s showing in the present case. Thus, although the defendant’s actions in Guzman are somewhat similar to Defendant’s in the present case, the procedural and administrative oddities of Guzman combined with the defendant’s greater failure in that case to promptly act in any manner create factual distinctions that permit us to weigh in favor of protecting Defendant’s rights under Rule 5-604 in the present case. Therefore, we are not persuaded that Guzman compels reversal. On balance, we hold that the circumstances here do not warrant deviation from the literal application of the rule.

III. CONCLUSION

{23} For the reasons set forth in this opinion, we are not persuaded that there are exceptional circumstances to justify the State’s untimely petition for extension, or that the district court’s application of the six-month rule and dismissal was over-technical or defied common sense. We affirm the district court’s order dismissing the charges against Defendant.

{24} IT IS SO ORDERED.

JONATHAN B. SUTIN,
Chief Judge

WE CONCUR:
A. JOSEPH ALARID, Judge
IRA ROBINSON, Judge
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The Third Judicial District Court is seeking letters of interest for a Respondent Attorney contract. The individual selected shall provide respondent representation for indigent parties that are subject to abuse or neglect proceedings or Family in Need of Court Ordered Services (FINIS), including proceeding for termination of parental rights or other proceedings in which the Court finds it necessary to appoint respondent custodian representation. Interested individuals must be a licensed attorney in the State of New Mexico who has experience with the Children’s Code, including, but not limited to abuse and neglect proceedings. The selected attorney shall represent clients to the best of their ability in accordance with the Code of Professional Responsibility, S.C.R. A. 16-101 ET. Seq. NMSA, 1978, and all applicable laws. Must have experience working with social service agencies and residential treatment centers within the community. Will work closely with Court Appointed Special Advocates (CASA) and their clients in order to determine what will be in the best interest of the client. The term of the contract will be approximately December 1, 2007 through June 30, 2008 and may be extended up to four (4) years. Compensation will range between $30,000 to $37,500 for next six months depending on experience and qualifications. Letters of interest and a resume shall be forwarded and marked Letter of Interest - Respondent Attorney, to: Nadine Sanchez, Court Administrator, Third Judicial District Court, 201 W. Picacho, Las Cruces, New Mexico 88005, Closing date for all submissions is November 26, 2007. The Third Judicial District Court reserves the right to reject any or all letters of interest.

Full-Time Trial Court Staff Attorney Announcement
The 13th JUDICIAL DISTRICT COURT IN VALENCIA COUNTY, LOS LUNAS, NEW MEXICO, is accepting applications for a Full-Time Trial Court Staff Attorney. This is a permanent full-time classified position. Salary for this position will be $30,390 per year. Recruitment and selection for this position shall be based on the New Mexico Judicial Branch Personnel Rules. Under direction, performs legal research, analysis, writing and assisting pro se litigants. Assists with policies and procedures and makes recommendations to enhance the operations of the court and ensure compliance with law and Supreme Court rules. MINIMUM QUALIFICATIONS: Must be a graduate of a law school meeting the standards of accreditation of the American Bar Association; possess a license to practice law in the State of New Mexico; Three years of experience in the practice of law. Thorough knowledge of New Mexico case law, constitution, statutes, court rules, policies and procedures; Judicial Code of Ethics and Rules of Professional Conduct; manual and computer legal research and analysis; and court structure and operations. KNOWLEDGE: Performs legal research and analysis. Examines briefs, records and legal authorities cited. Drafts memorandums, opinions, orders and decisions for judges’ review and final approval. Provides updated information to judges on recent decisions, opinions and changes to rules and statutes to ensure compliance with current law. Responds to inquiries from attorneys and pro se litigants; conducts pro se programs; manages ADR programs; provides information and literature to attorneys and pro se litigants to ensure compliance with local and Supreme Court rules. Drafts requests for proposals, contracts, forms and other documents for court. Attends trials, hearings and meetings as necessary. Performs special assignments as directed, gathers relevant information and performs legal research and analysis. Travel required for training, meetings, presentations and pro se programs. TO APPLY: Applications are mandatory and are available on the judicial website @ www.nmcourts.com. Resumes will not be accepted in lieu of applications, but may be attached. All applications must be submitted by 4:00 p.m. on NOVEMBER 30, 2007 to: Gregory T. Ireland, Court Administrator, P.O. Box 1089, Los Lunas, NM 87031. THE JUDICIAL BRANCH OF NEW MEXICO STATE GOVERNMENT IS AN EQUAL OPPORTUNITY EMPLOYER.

Staff Attorney
Albuquerque, New Mexico
Gallup, New Mexico
Las Vegas, New Mexico
Roswell, New Mexico
Socorro, New Mexico
New Mexico Legal Aid is “under new management” and undergoing a renaissance!! Our new management team (including Executive Director, Litigation Director and PAI Coordinator) is committed to making New Mexico Legal Aid the Best Legal Aid Office in the United States and we are looking for staff to help us reach that goal. Do you have what it takes to help propel us to the next level? If so, take a look at the following position(s) we have available: New Mexico Legal Aid seeks staff attorneys to provide advice, brief service, and representation for clients focusing on the provision of legal services to low income persons. Work: handling cases in all areas of general poverty law including domestic violence/relations, housing, public benefits, and consumer; utilizing a computerized case management system; handling telephone intake; participating in community education and outreach to domestic violence victims and providers; and participating in recruitment of pro bono attorneys. Qualifications: Dedication and commitment to serving the needs of persons living in poverty; excellent research, writing and interviewing skills; proficiency in Spanish is a plus. New Mexico bar license is preferred, but will consider recent law school graduate who will take the next N.M. State bar exam. Note: State of the art communication technology. Excellent supervision, training, mentoring and oversight provided by firm experts across state through use of technology. Excellent fringe benefits including health, dental, vision, paid holidays, generous personal and sick leave and an Employer Matched 401(k). Salary: Range $35,000-$65,000 DOE. NMLA is an EEO/AA Employer. Deadline: November 9, 2007. Send letter of intent (referencing the position you are applying for), resume, two references and writing sample to: Gloria A. Molinar, NMLA, PO Box 25486, Albuquerque, NM 87125-5486 and or email to: gloriam@nmlegalaid.org.
New Mexico Public Regulation Commission
General Counsel Insurance Division (GOVEX Position)

DESCRIPTION OF DUTIES: This classification is in the Governor Exempt Service. It is an “at will” position serving the New Mexico Public Regulation Commission (NMPC) providing legal counsel to the Insurance Division. Nature of Work: Performs a variety of work functions of a legal nature providing legal advice to the Superintendent of Insurance, the Insurance Division, and the NMPC; Supervision of one or more attorneys representing the Insurance Division or support staff personnel may be required. Distinguishing Characteristics: This position reports directly to the General Counsel of the NMPC and to the NMPC, and is administratively overseen by the Chief of Staff. It is expected to advise the NMPC Insurance Division in all legal matters, and to advise the NMPC on insurance matters; This position is responsible for coordination of all NMPC Insurance Division legal activities and development of the division’s standards in dealing with Federal and State statutes and regulations to ensure division compliance statewide in a fair and equitable fashion; Applying laws and regulations in evaluation of technical facts; Advising the Insurance Division on sensitive issues relating to division conduct; Make legal recommendations, on regulatory cases coming before the superintendent; Oversee the advisement and counsel provided the NMPC by Legal staff on the most complex legal, technical, economic and policy issues concerning insurance; in all issues concerning the NMPC Insurance Division, exercising the highest level of independent professional legal judgment and rendering candid advice; This position will oversee the external legal representation, including federal and state trial and appellate courts, federal and state agency proceedings, and may testify before the legislature and in other forums for the Insurance Division; Advise and assist the Superintendent of Insurance in rulemakings; Travel may be required both intra-state and nationally. Key Knowledge and Skills Required for Fully Competent Performance: Extensive knowledge of State and Federal legal rules, laws, and NMPC Insurance Division background information; Extensive knowledge of the New Mexico statutes relating to Insurance Regulation oversight; Extensive knowledge of the New Mexico legislative process; Knowledge of all aspects of the division’s programs, goals, and long-term plans; Knowledge of ex-parte rules and regulations; Skill in anticipating developing issues facing agency and assisting to develop long-term strategies and programs; Skill in effectively representing division strategies and programs in a variety of the most complex, difficult, or sensitive settings, including the legislature, other agencies, and the public; Skill in understanding the broad range of the Insurance Division’s legal positions and policies and integrating those with the position of the NMPC and of other state agencies and private organizations to accomplish the state’s overall policies and goals; Skill in working independently, consistently exercising the highest degree of independent professional judgment and developing such judgment in others. Education and Experience Standards: Juris Doctorate from an accredited university; Admission to the New Mexico Bar; Two (2) years experience in working or advising a state agency, or in the practice of administrative law, or the equivalent. Statutory Requirements: N/A. Conditions of employment: N/A. FLSA status: Exempt. Bargaining Unit: Non-Bargaining Unit Eligible. Date: Revised September 2006. NOTE: Submit Letter of Interest, Resume and Writing Sample to: Daniel Mayfield, Chief of Staff, New Mexico Public Regulation Commission, 1120 Paseo de Peralta – Room 418, P. O. Box 1269, Santa Fe, NM 87504-1269.

Attorney Position

The Office of General Counsel of the Public Employees Retirement Association is accepting applications for an “exempt” (not classified) attorney position in Santa Fe. The Office of General Counsel assists in all aspects of Agency operations, including benefits administration and related administrative proceedings, investments and contractual services. Excellent research, communication and writing skills required. Experience in administrative law and domestic relations law preferred. Salary consistent with the New Mexico Governor’s Exempt Salary Schedule, Range 30. New Mexico bar admission required. Letter of interest, resume, writing sample and three professional references must be received at the Office of General Counsel by 5:00 p.m. December 7, 2007. Attn: Office of General Counsel, Public Employees Retirement Association, P.O. Box 2123, Santa Fe, NM 87504-2123. In addition, please e-mail resumes and salary requirements to Judy Olson, Administrator, at judy.olson@state.nm.us.

Insurance Defense Attorney

Government Employees Insurance Company (GEICO) seeks an attorney with substantial civil litigation and trial experience in the personal injury area, preferably insurance defense. Applicants must have New Mexico bar membership. The successful candidate will manage a one attorney/support staff office, possibly increasing in size up to three attorneys, which will defend GEICO insureds in third party cases and GEICO in first party cases in the Albuquerque, NM area. The office will also handle some subrogation cases for GEICO. Email resume with salary requirements to Richard Dwyer at RDwyer@geico.com or fax to (858)-513-5229. EOE/M/F.

Legal Assistant/Paralegal

Legal Assistant/Paralegal with exp needed for busy and growing Law Firm in new offices w/ a pleasant environment. Must multi task & be able to thrive in a high volume, fast paced practice. Submit in confidence cover letter, resume, sal hist & req to 7430 Washington St, NE, ALB, NM 87109, fax 833-3040, or email resume@littledranetel.com

Legal Assistant/Legal Secretary

Legal Assistant/Legal Secretary needed for small law firm. Legal experience required; bankruptcy experience a plus. Microsoft Outlook and experience calendaring a plus. You must be self motivated, organized, detail oriented, and be willing and able to work fast. Salary DOE. Benefits offered. Please send cover letter, references, resume, salary requirements and history to: Puccini & Meagle, P.A., Attention: Laura Peck, PO Box 30707, Albuquerque, NM 87190-0707.

Legal Assistant/Office Manager

Small, fast-paced law office serving people with disabilities seeks experienced legal assistant / office manager. First qualification: commitment to social justice. Maturity, good people skills, flexibility and willingness/ability to learn also essential. Answer phones; open mail; filing, scanning documents; word processing in WordPerfect and MS Word. Experience with Quickbooks and Timeslips a plus. Knowledge of Excel and Access helpful. Career position. Competitive wages; good benefits; respectful working environment. Write Peter Cebra, 2001 Carlisle NE, Suite E, ABQ 87110.

Part-Time Legal Secretary

Nob Hill Area

Massey Law Office, LLC seeks legal secretary with civil litigation experience in insurance defense. Experienced in Word Perfice, TimeSlips. Detail oriented and organized. M-Th 5 hours/ day 20 hour/wk. Please send resume and references to John P. Massey, 3616 Campus Blvd. N.E., Albuquerque, New Mexico 87106 or fax to (505) 268-6629 or email mlolic@qwest.net.
Consulting

Forensic Psychiatrist
Board certified in adult and forensic psychiatry, available for psychiatric evaluations, consultation, case review, competency evaluations, and expert testimony. Licensed in New Mexico, Connecticut and New York. Please leave a message for Dr. Kelly at 866 317 7959 or email forensicpsychiatry@comcast.net.

Commercial Real Estate Issues
Expert witness/consultant with 20+ years experience. Daniel Boardman CCIM. 505.440.8070.

Thousands of Medical Malpractice Expert Witnesses

Services

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For your tape, CD and digital transcription needs, call Legal Beagle @ 883-1960

Professional Administrative Legal Services (PALS)
Specializing in all your paralegal/legal assistant needs - 505-927-2409.

Legal Research and Writing
Available for legal research and writing projects. bridjetjacober@hotmail.com

NM Licensed Atty for Research, Drafting, etc.
Affordable rates. Fast turn-around. Ample experience. Contact Abby at 505-771-8360 or AbbyMWear@gmail.com

For Sale

Conference Room Table
Executive solid wood table with glass top, 12 feet long, 4-1/2 feet wide, exquisite, $2,300.00, contact Ken or Sheila at 242-6300 or 280-3599.

Miscellaneous

Will Search
Seeking Will for Florian Crestino Romero. Drafted within the past five years in Albuquerque. Contact Chris, 505.975.7520 or cristinor@aol.com

Seeking Will or Trust
Richard Davis Rieser passed away on February 8, 2007. We are seeking information regarding any estate planning that Mr. Rieser may have done in New Mexico. If you prepared a will or trust on behalf of Mr. Rieser, please contact Michael Pottow, Catron, Catron & Pottow, P.A. at 505/982-1947 or by email at mpot- trow@catronlaw.com.

Ski Colorado at Christmas

Will Search
M. Louise Maestas of Bernalillo, NM. Prepared within the last 12 months. Contact Tom Bailey, 505.898.3231.

Office Space

Downtown Albuquerque
620 Roma Avenue, N.W. $550.00 per month. Includes office, all utilities (except phones), cleaning, conference rooms, access to full library, receptionist to greet clients and take calls. Must see. Call 243-3751.

Prime Uptown Location

Offices for rent
One block from courthouses, all amenities: copier, fax, telephone system, conference room. We have wireless, high-speed internet. Rates: $500 to $1,000 depending on space rented, call Ramona @ 243-7170.

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

Beautiful Adobe
Close to downtown, courthouses, hospitals. Reception area, conference rooms, employee lounge included. Copy machine available. Ample free parking and easy freeway access. From $ 195.00 per mo. Utilities included. Oak Street Professional Bldg., 500 Oak St. N. E. Call Jon, 507-5145; Orville or Judy, 867-6566.

Office Space – Uptown Area
Hunt & Davis, P.C., has two offices and two secretarial spaces for rent in a beautiful one-story building near Louisiana and Menaul. Rent includes reception services, shared use of four conference rooms, utilities and an afternoon courier service for filings at the Courts and County and for mail. Plenty of parking, great location and nice atmosphere. Will rent either together or separately. Basement space is also available for rent for files. Space is immediately available. Contact Cathy Davis at 881-3191 for more information.

Will Search
M. Louise Maestas of Bernalillo, NM. Prepared within the last 12 months. Contact Tom Bailey, 505.898.3231.

Will Search
M. Louise Maestas of Bernalillo, NM. Prepared within the last 12 months. Contact Tom Bailey, 505.898.3231.
2007 REAL PROPERTY INSTITUTE

Friday, November 30, 2007
State Bar Center, Albuquerque
7.0 General CLE Credits

Co-Sponsor: Real Property, Probate, & Trust Section
Standard Fee $189
Real Property, Probate, & Trust Section Member,
Government, Legal Services Attorney, Paralegal $179

8:00 a.m. The Impact of Impact Fees
David Campbell, Campbell, Vogel & Blueher
9:15 a.m. What’s Going On With Title Insurance?
Orlando Lucero, Stewart Title of Albuquerque
10:00 a.m. Break
10:15 a.m. Dealing With the New Mexico State Land Office
Peter Berman, State Land Office
Steve Hughes, State Land Office
11:15 a.m. Real Estate Brokerage Issues
Margaret Romero, Rodey Law Firm
Peter Parnegg, Coldwell Banker Legacy
Noon Lunch (provided at the State Bar Center)
12:45 p.m. Annual Section Meeting with Election of Directors
1:00 p.m. How To Do a Foreclosure
Jeanette Martinez Whittaker, Esq., Segal & Whittaker LLP
2:00 p.m. How to Given an Opinion Letter for a
          Deed of Trust
          Catherine Goldberg, Rodey Law Firm
2:45 p.m. Tax Credits for Conservation Easements and
          Sustainable Development
          Ethan M. Epstein, Modrall Law Firm
3:15 p.m. Section 1031 Exchanges—the Basics
          Orlando Lucero, Stewart Title of Albuquerque
3:30 p.m. Tenancy in Common (TIC) Exchanges
          Larry Wells, Esq., Campbell & Wells PA
4:15 p.m. Adjourn

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours     INTERNET: www.nmbarcle.org
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

Please Note: For all WEBCASTS, you must register online at www.nmbarcle.org

Name ____________________________  NM Bar # ______________________
Street ______________________________
City/State/Zip __________________________
Phone __________________________ Fax __________________________
E-mail ______________________________
☐ Purchase Order (Must be attached to be registered)   ☐ Check enclosed $ __________ Make check payable to: CLE
Credit Card # __________________________ Exp. Date ______________________
Authorized Signature __________________________
## 2007 Paralegal Institute

Friday, December 7, 2007  
State Bar Center, Albuquerque  
5.2 General and 1.2 Ethics CLE Credits

**Co-Sponsor:** Paralegal Division  
**Paralegals $99**

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| 8:30 a.m. | **NATIONAL**  
Trends in the Legal Profession: Changes That Will Challenge Your Law Firm  
Kristin Stark, Director, Hildebrandt International, San Francisco |
| 9:15 a.m. | Break                                                               |
| 9:30 a.m. | **TRENDS, Part 2**  
Kristin Stark                                                             |
| 10:15 a.m. | Break                                                               |
| 10:30 a.m. | **Avoiding Scandal and Headlines** – What Every Paralegal Needs to Know About Metadata, Electronic Documents, Privacy and Compliance  
Donna Payne, CEO and Founder, Payne Consulting Group, Seattle |
| Noon  | Lunch (provided at the State Bar Center)                             |
| 1:00 p.m. | **STATE / LOCAL**  
Access to Justice in New Mexico and How Paralegals Can Get Involved (1.2 E)  
Introductory Remarks Hon. Edward L. Chavez, Chief Justice, New Mexico Supreme Court  
Hon. Nan Nash, 2nd Judicial District Court |
| 2:15 p.m. | Break                                                               |
| 2:30 p.m. | **The Youthful Offender**  
Hon. John J. Romero, 2nd Judicial District Court                        |
| 3:45 p.m. | Break                                                               |
| 4:00 p.m. | **How to Start a Contract Paralegal Business?**  
Jeanne L. Adams, Jencor Associates, Inc.                                |
| 5:00 p.m. | Adjourn                                                              |

### Four Ways to Register

**PHONE:** (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m. (Please have credit card information ready)  
**FAX:** (505) 797-6071, Open 24 hours  
**INTERNET:** [www.nmbarcle.org](http://www.nmbarcle.org)  
**MAIL:** CLE, PO Box 92860, Albuquerque, NM 87199

Please Note: For all WEBCASTS, you must register online at [www.nmbarcle.org](http://www.nmbarcle.org)

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☐ Check enclosed $ ____________  

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