Inside This Issue

Table of Contents .............................................. 5

Board of Bar Commissioners
  Meeting Agenda ............................................. 7

Keys to Law Practice Management:
  Developing and Improving Systems,
  by Donald Becker ........................................ 9

Clerk Certificates ............................................. 15

From the New Mexico Supreme Court
  2008-NMSC-053, No. 30,540:
    State v. Sena ............................................ 16
  2008-NMSC-054, No. 30,571:
    Salazar v. D.W.B.H., Inc. ............................ 19
  2008-NMSC-055, No. 30,709:
    State v. Marquez ....................................... 24

From the New Mexico Court of Appeals
  2008-NMCA-123, No. 27,360:
    Flores v. McKay Oil Corporation .................... 26
  2008-NMCA-124, No. 26,336:
    Miller v. Santa Fe County Board of County Commissioners .................................. 32
  2008-NMCA-125, No. 27,346:
    State v. Chavez ......................................... 37
  2008-NMCA-126, No. 26,563:
    State v. Chavez ......................................... 39

Special Insert:
Daniels-Head Professional Liability Insurance

Canyon de Chelly, White House Cliff Dwelling Ruin
by Robert Martin (see page 5)

www.nmbar.org
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

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Authorized Signature _______________________________________________________________________________________________

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Utilizing Forensic Accounting & Analysis in Litigation and Valuation Matters

Wednesday, October 22, 2008 • State Bar Center, Albuquerque

3.0 General CLE Credits

☐ Standard $109

Presenters:
Edward R. Street, CPA-ABV, CVA, Principal, REDW LLC The Rogoff Firm
Tina MacGregor, Director of Technologies, CISA, GSEC, MCSE, CCNA
Timothy C. Kelly, CPA-ABV, ASA, Senior Manager, REDW LLC The Rogoff Firm
Susan Hansen, CFE, Senior Manager, REDW LLC The Rogoff Firm

8:30 a.m. REGISTRATION
9:00 a.m. PART I
Introduction and Background
Common Fraud Schemes, Analysis and Detection Techniques
Consideration of Fraud in Financial Statement Audits

10:00 a.m. Break

10:45 a.m. PART II
Forensic Analysis in Business Valuation, Due Diligence and Economic Damage Engagements
Forensic Analysis in Divorce Engagements

12:15 p.m. Adjourn and Lunch (provided at the State Bar Center)
CLIMATE CHANGE IN NEW MEXICO:
The Impact of Climate Change on New Mexico and Initiatives to Address the Problem

Friday, October 24, 2008 • State Bar Center, Albuquerque

5.0 General CLE Credits
Co-Sponsor: Natural Resources, Energy, and Environmental Law (NREEL) Section

Standard Fee $179
NREEL Section Member, Government, Legal Services, Paralegal $149

9:00 a.m. Registration
9:30 a.m. Introductory Remarks
Steve Hattenbach, Esq., Office of General Counsel, U.S. Department of Agriculture

9:35 a.m. Congressional Climate Change Initiatives
Mike Connor, Majority Counsel, U.S. Senate Energy and Natural Resources Committee

10:00 a.m. Climate Change Litigation
Steve Susman, Esq., Susman Godfrey, LLP

10:45 a.m. Break

11:00 a.m. Irrigation District Initiatives and Proposals in Response to Climate Change
Chuck Dumars, Law & Resource Planning Assoc., Counsel for MRGCD
Steve Hernandez, Hubert & Hernandez, PA, Counsel for Elephant Butte Irrigation Dist.

12:00 p.m. Lunch (provided at the State Bar Center)

1:00 p.m. Effects of Global Climate Change on New Mexico
Brad Udall, National Oceanic & Atmospheric Administration

1:45 p.m. State Government Initiatives and Proposals in Response to Climate Change
Jim Norton, Director, EPD, New Mexico Environment Department
John Longworth, Office of State Engineer

2:30 p.m. Local Government Initiatives and Proposals in Response to Climate Change
Claudia Borchert, City of Santa Fe
John Stomp, Albuquerque-Bernalillo County Water Utility Authority

2:45 p.m. Climate Change and the National Forests
Mary Ann Joca, Assistant Regional Attorney, USDA
Bob Davis, Director of Ecosystem Analysis, Planning, Watershed & Air, Southwestern Region, U.S. Forest Service

3:25 p.m. Adjourn and NREEL Reception / Law Student Mixer

FOUR WAYS TO REGISTER

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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
LAW OFFICE TECHNOLOGY FOR THE REST OF US: Real Solutions and Hot Tips for Technology that Works in Your Office

Thursday, October 30, 2008 • State Bar Center, Albuquerque

2.0 General CLE Credits

Co-Sponsor: Business Law Section

Presenters: Jon Hill, President, iniCom.networks
Joshua R. Link, VP, COO, iniCom.networks

A program with real life advice for how to make technology work for you to improve your practice. Information on how to add cost effective value to your practice and clients in the digital age. Presented by real tech support people who work with local law firms every day. Whether you are a “tech-head” or a tech-tenderfoot, this is a program all will understand. Bring your own questions and problems to discuss. Topics and tips will include:

- The technology life-cycle & best practices (isn’t it time to DOS boot?)
- How to do more with less (less paper, less equipment, less overhead, less cost)
- Who’s got your Backup? – Security, backup, and disaster proofing your digital assets and clients’ information
- Selecting hardware, software, and service vendors – what do you need, not what do they sell
- How much should your technology cost?
- What is “information assurance and IT governance”?
- OK, I bought it now what? How can you really use new(er) technology
- Business lawyers really don’t hate trees - Mobile/paperless office – is it real and will it work?
- Mobile devices – make sure your PDA isn’t DOA
- Technology as a value added service, making technology work for you.
- How can you technology benefit you and your clients?
- Hot Tips – quick, easy, and cheap tips and shortcuts you might not know (or your staff wouldn’t tell you)
- Bring your questions… no question is too basic or embarrassing.

11:30 a.m. Registration and Lunch
Noon – 2:00 p.m. **CLE**

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 ________________________________
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Credit Card # ____________________________  Exp. Date ____________ CVV# ____________
Authorized Signature ____________________________________________________________
TABLE OF CONTENTS

Notices .......................................................................................................................................................... 6
Keys to Law Practice Management: Developing and Improving Systems, by Donald Becker ....... 9
Legal Education Calendar .......................................................................................................................... 10
Writs of Certiorari ....................................................................................................................................... 12
List of Court of Appeals’ Opinions ........................................................................................................... 14
Clerk Certificates ......................................................................................................................................... 15
Opinions

From the New Mexico Supreme Court

2008-NMSC-053, No. 30,540: State v. Sena .......................................................................................... 16
2008-NMSC-055, No. 30,709: State v. Marquez ............................................................................. 24

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2008-NMCA-125, No. 27,346: State v. Chavez ............................................................................. 37
2008-NMCA-126, No. 26,563: State v. Chavez ................................................................................ 39

Advertising ................................................................................................................................................. 43

Professionalism Tip

With respect to the courts and other tribunals:
I will be punctual for court hearings, conferences and depositions.

Meetings

October

20 Attorney Support Group, 7:30 a.m., First United Methodist Church
21 Solo and Small Firm Section Board of Directors, 11:30 a.m., noon, Section meeting
24 Board of Bar Commissioners, noon, State Bar Center
25 Young Lawyers Division Board of Directors, 10 a.m., State Bar Center
30 International and Immigration Law Section Board of Directors, 1:30 p.m., State Bar Center
30 Financial Planning Seminar, 6 p.m., State Bar Center

State Bar Workshops

October

22 Consumer/Debt/Bankruptcy Workshop 6 p.m., State Bar Center, Albuquerque
23 Consumer/Debt/Bankruptcy Workshop 5:30 p.m., Branigan Library, Las Cruces
November

12 Estate Planning/Probate Workshop 6 p.m., State Bar Center, Albuquerque
13 Lawyer Referral for the Elderly Workshop 10:30 a.m., Presentation 1:30–3:30 p.m., Clinics Bonnie Dallas Senior Center, Farmington

Albuquerque and Las Cruces Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney.

Cover Artist: Bob Martin practiced in New Mexico for 36 years before changing to inactive status in 2003. He started his photography hobby at age eight and still enjoys it, especially with digital mode rather than film. To see the cover art in its original color, visit www.nmbar.org and click on Attorneys/Members/Bar Bulletin.
NOTICES

COURT NEWS
N.M. Supreme Court Board of Legal Specialization Comments Solicited

The following attorney is applying for certification as a specialist in the area of employment/labor 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. Further, 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.

Smith, Quentin F.
Employment/Labor Law Certification

Judicial Performance Evaluation Commission Upcoming Meeting
The Judicial Performance Evaluation Commission was created by the New Mexico Supreme Court to provide voters with fair, responsible and constructive evaluations of trial and appellate judges and justices seeking retention in general elections. The results of the evaluations also provide judges with information that can be used to improve their professional skills as judicial officers. The commission’s next regular meeting will be from 8 a.m. to 5 p.m., Oct. 31, at the State Bar Center, to interview metro judges.

Proposed Revisions to the Rules of Appellate Procedure
The Rules of Appellate Procedure Committee is considering whether to recommend proposed amendments to the Rules of Appellate Procedure for the Supreme Court’s consideration. To comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, submit a comment electronically through the Supreme Court’s Web site at http://nmsupremecourt.nmcourts.gov/ or send written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, NM 87504-0848
Comments must be received on or before Nov. 3 to be considered by the Court. Note that any submitted comments may be posted on the Supreme Court’s Web site for public viewing. For reference see the Oct. 13 (Vol. 47, No. 42) Bar Bulletin.

Proposed Revisions to the Uniform Jury Instructions for Criminal Cases
The Committee on Uniform Jury Instructions for Criminal Cases is considering whether to recommend proposed amendments to the Uniform Jury Instructions—Criminal for the Supreme Court’s consideration. To comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, either submit a comment electronically through the Supreme Court’s Web site at http://nmsupremecourt.nmcourts.gov/ or send written comments to:

Judicial Records Retention and Disposition Schedules
Pursuant to the Judicial Records Retention and Disposition Schedules, exhibits (see specifics for each court below) filed with the courts 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 (see specifics for each court below) can be retrieved by the dates shown below. Attorneys who have cases with exhibits may verify exhibit 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 not claimed by the allotted time will be considered abandoned and will be destroyed by Order of the Court.

<table>
<thead>
<tr>
<th>Court</th>
<th>Exhibits</th>
<th>For Years</th>
<th>May be Retrieved Through</th>
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<tbody>
<tr>
<td>1st Judicial District Court</td>
<td>Exhibits filed with the court, in adoptions, children’s court, criminal, civil, domestic, and probate cases</td>
<td>1973–1985</td>
<td>Nov. 28</td>
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<tr>
<td>(505) 827-4735</td>
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<tr>
<td>2nd Judicial District Court</td>
<td>Exhibits filed in probate, guardianship, and conservatorship cases</td>
<td>1999–2008</td>
<td>Oct. 30</td>
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<tr>
<td>(505) 841-7596/5452</td>
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<tr>
<td>9th Judicial District Court</td>
<td>Exhibits filed in domestic relations cases</td>
<td>1998–2005</td>
<td>Nov. 3</td>
</tr>
<tr>
<td>(575) 762-9148</td>
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<tr>
<td>10th Judicial District Court</td>
<td>Unmarked exhibits, oversized poster boards/maps and diagrams filed with the court in criminal, civil, children’s court, domestic, competency/mental health, adoption and probate cases.</td>
<td>1952–2006</td>
<td>Dec. 18</td>
</tr>
<tr>
<td>(575) 356-4463</td>
<td>Tapes filed in criminal, civil, children’s court, domestic, competency/mental health, adoption and probate cases</td>
<td>1975–2006</td>
<td>Dec. 18</td>
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<td>Tapes in criminal cases</td>
<td>1989–1993</td>
<td>Dec. 10</td>
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<td>Tapes in juvenile cases</td>
<td>1988–2001</td>
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<td>Tapes in grand jury cases</td>
<td>1997–2001</td>
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<td>Tapes in incompetency, mental health and competency cases</td>
<td>1989–2001</td>
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<td>Tapes in adoption cases</td>
<td>1992–2001</td>
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<td></td>
<td>Tapes in probate cases</td>
<td>1988–2001</td>
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Second Judicial District Court Amended Announcement of Vacancies

Two vacancies on the 2nd Judicial District Court will exist in Albuquerque as of Jan. 1, 2009, upon the resignation of the Honorable Ernesto J. Romero. The chair of the 2nd Judicial District Nominating Commission solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site at http://lawschool.unm.edu/judsel/application.php, or via e-mail by contacting Sandra Bauman, (505) 277-4700. Applications received after that date will not be considered. The Judicial Nominating Commission will meet 9 a.m., Nov. 13, at the County Courthouse, 400 Lomas NW, Albuquerque, to evaluate the applicants for this position. The meeting is open to the public.

National Adoption Day

The 2nd Judicial District Court, Children’s Court Division, will be celebrating National Adoption Day on Nov. 13. Interested attorneys and their clients who have an adoption pending in Bernalillo and who would be interested in participating should contact Nancy Sandstrom in Judge M. Monica Zamora’s office, (505) 841-7392.

Bernalillo County Metropolitan Court Art Show

The Bernalillo County Metropolitan Court and the UNM College of Fine Arts, Department of Art and Art History, will officially open Judicial Notice III, a special exhibition of works by UNM students and faculty. A reception will be held in the courthouse rotunda from 5:15 to 7:15 p.m., Oct. 23. The eclectic exhibition includes photography, paintings, ceramics, and mixed media and will be on display until 2010 in the rotunda and on the first three floors of the courthouse.

Judicial Vacancy

A vacancy on the Bernalillo County Metropolitan Court will exist in Albuquerque as of Dec. 1 upon the retirement of the Honorable Theresa A. Gomez. The chair of the nominating commission solicits applications for this position from attorneys who meet the statutory qualifications in Section 34, Article 8A-4b of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection Web site at http://lawschool.unm.edu/judsel/application.php, or via e-mail by contacting Sandra Bauman, (505) 277-4700. The deadline for applications is 5 p.m., Nov. 3. Applications received after that time will not be considered. The Judicial Nominating Commission will meet at 9 a.m., Nov. 20, at the Metropolitan Courthouse, Albuquerque, to evaluate the applicants for this position. The meeting is open to the public.

STATE BAR NEWS

Attorney Support Group

- Afternoon groups meet regularly on the first Monday of the month: Nov. 3, 5:30 p.m.
- Morning groups meet regularly on the third Monday of the month: Oct. 20, 7:30 a.m.

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

Board of Bar Commissioners Meeting Agenda

The Board of Bar Commissioners will meet at noon, Oct. 24, at the State Bar Center.

1. Approval of Sept. 12 minutes.
2. Finance Committee report.
3. Acceptance of financials.
4. Approval of 2009 Dues and Licensing Form.
5. Videoconferencing demos.
7. Personnel Committee report.
8. Update regarding Lawyers Professional Liability Committee proposed rule.
10. President’s report.

Business Law Section

Business Lawyer of the Year Award

Since 2002, the Business Law Section has presented the annual Business Lawyer of the Year Award to a lawyer who has made significant contributions to the practice of business law in New Mexico. Past recipients have been Robert J. Desiderio (2002), Graham Browne (2003), John (Jack) P. Burton (2004), Charles L. Moore (2005), James J. Widland (2006) and Theodore Parnall (2007). The award is presented during the section’s annual meeting and reception, which will be from 5 to 7 p.m., Nov. 19, at the Albuquerque Country Club, 601 Laguna Blvd. SW, Albuquerque. Hors d’oeuvres will be served. Submit nominations for the 2008 award by Oct. 24 to Christine Morganti, PO Box 92860, Albuquerque, NM 87199, fax (505) 828-3765; or e-mail cmorganti@nmbar.org.

Criminal Law Section

Annual Meeting and CLE

The Criminal Law Section will hold its annual membership meeting at 12:15 p.m., Nov. 12, at the State Bar Center in conjunction with the Joint Conference for Criminal Defense Attorneys and Prosecutors. Lunch will be provided. Contact Chair-Elect Matthew Coyte, mcoyte@earthlink.net, to place an item on the agenda.

The cost of the CLE program is $189; and $159 for section members, government and legal services attorneys and paralegals. To register call (505) 797-6020; fax (505) 797-6071; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Fair Judicial Elections Committee

Judicial Forum

The League of Women Voters of Central New Mexico and the Fair Judicial Elections Committee of the State Bar are sponsoring a judicial forum from 5:30 to 7:30 p.m., Oct. 22, at the UNM School of Law, Bondurant Lecture Hall. The following candidates will participate in the forum: Justice Charles Daniels from the New Mexico Supreme Court; Judge Reed Sheppard, Judge Kevin Fitzwater, and Judge...
Connections

Members earn required credits in seminars, webcasts, self-study programs, and national series programming offered by the State Bar’s Center for Legal Education.

A variety of business and personal financial services are available through Bank of America™ WorldPoints™ Platinum Plus™ MasterCard™. Earn points and get rewards—cash, travel, merchandise, and gift certificates. The WorldPoints card has no annual fee. To apply, call 1-800-421-2110.

Elizabeth Whitefield from the 2nd Judicial District Court; Judge Maria Dominguez from the Metropolitan Court; and Edward L. Benavidez. The Fair Judicial Elections Committee will be distributing information on judicial elections in New Mexico.

Membership Services

Financial Planning Workshops Free for Members, Staff, Law Students and Faculty

The last in a series of four workshops presented by the New Mexico Project for Financial Literacy will be held from 6 to 7 p.m., Oct. 30, and is for those in or on the verge of retirement. It includes information about Social Security and Medicare as well as de-cumulation strategies for retirement income. The workshop will also cover sophisticated strategies for managing retirement funds for those who may live 30 or 40 years after retiring. R.S.V.P. by Oct. 29 to Chris Morganti, cmorganti@nmbar.org or (505) 797-6028, so that a sufficient number of handouts may be prepared.

Prosecutors Section

Annual Meeting and CLE

The Prosecutors Section will hold its annual membership meeting at 12:15 p.m., Nov. 12, at the State Bar Center in conjunction with the Joint Conference for Criminal Defense Attorneys and Prosecutors. Lunch will be provided. Contact Chair Barbara Romo, BRomo@da.state.nm.us, to place an item on the agenda. The cost of the CLE program is $189; and $159 for section members, government and legal services attorneys and paralegals. To register call (505) 797-6020; fax (505) 797-6071; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Trial Practice Section

Annual Meeting and CLE

The Trial Practice Section will hold its annual meeting at noon, Nov. 19, following Evidentiary Issues for the Civil Trial Practitioner in State and Federal Courts, presented by Professor Barbara Bergman, associate dean for academic affairs and professor at law, UNM School of Law. Agenda items for the section's annual meeting should be sent to Chair Eric Dixon, dixonlawoffice@qwestoffice.net, or (575) 359-1233. Attendees will earn 2.7 general CLE credits. The cost of the CLE program is $109; and $95 for section members, government attorneys and paralegals. Lunch will be provided. To register call (505) 797-6020; fax (505) 797-6071; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Other Bars

Albuquerque Bar Association Membership Luncheon

The Albuquerque Bar Association’s Membership Luncheon will be held at noon, Nov. 4, at the Hyatt Regency Hotel, 330 Tijeras NW, Albuquerque. The luncheon speaker will be the Honorable Linda M. Vanzi, 2nd Judicial District Court. The CLE program from 1:30 to 2:30 p.m. (1.0 professionalism CLE credit) will be Professionalism: The Secret to a Successful Practice, presented by Lauren Marble.

Lunch only: $25 members/$35 non-members with reservation; $5 additional at door; lunch and CLE: $45 members/$65 non-members with reservation; $5 additional at door; CLE only: $20 members/$30 non-members with reservation; $5 additional at door.

Register for lunch by noon, Oct. 31.
2. Send e-mail to abqbar@abqbar.com.
3. Call (505) 842-1151 or (505) 243-2615.

N.M. Criminal Defense Lawyers Association 2nd Annual White Collar Crime CLE

The New Mexico Criminal Defense Lawyers Association will hold its 2nd Annual White Collar Crime CLE (6.0 general CLE credits) on Oct. 31 at the State Bar Center. Topics include grand jury practice, security clearances/professional licensing, newest cases update, fraud cases, child pornography and white collar sentencing. Peter Schoenborg and Sara Sanchez will moderate an interactive discussion between panelists and audience members. Among the panelists are David Freedman, Mary Kay McCullough, Jackie Robins, Steven Yarbrough, Todd Wertheim and Jonathan Ibarra. Prosecutors are invited. For registration and schedule, call (505) 992-0050, e-mail info@nmcdla.org or visit www.nmcdla.org.

N.M. Water Lawyers Association New Association Forming

In the past couple of years, water law has become an increasingly hot area of the law with many cases in all levels of the courts, yet there is not a volunteer bar concerning this unique area of the law. An increasing number of questions go unanswered because of a lack of a cohesive body to address water law issues as well as a lack of communication as to what is happening in the courts. The initial goals of this group would be along the lines of newsletters notifying practitioners what is going on in water law across the state, submitting questions to the Ethics Advisory Committee concerning representation issues, and addressing policy issues surrounding water law. Our hope is also to create an opportunity for student membership so that interested UNM students could gain some exposure to the water law community. We are seeking involvement and input from water law practitioners. For more information or for comments and questions, e-mail NMWaterLawyerAssoc@gmail.com or call Blair Dunn (505) 681-7801.

Other News

Center for Civic Values Coaches Needed

High schools in Animas and Clovis need an attorney to provide legal expertise and
coaching for the 2008 New Mexico High School Mock Trial Program. The amount of time invested will be decided by the attorney and the teacher advisor, but teams usually meet at least once each week. Regionals are Feb. 20–21, state finals are March 20–21, and nationals are May 7–10. Each team is provided a subscription for eight students and one teacher to the National Mock Trial Practicum, an online resource that will help teams learn the basics and beyond. Your mission, should you decide to accept it, will be to help students learn the finer points of presenting their cases before panels of judges and jurors. Attorneys with a few hours a week to devote to helping provide an outstanding educational experience to high school students, should contact Michelle Giger, (505) 764-9417, ext. 11.

N.M. Association of Legal Administrators Ethics CLE

The New Mexico Association of Legal Administrators invites members of the legal community to attend Ethics in Billing: The Good, the Bad, and the Ugly (1.0 ethics CLE credit) from noon to 1:30 p.m., Nov. 13, at the State Bar Center. Thomas P Gulley, a partner with Lewis and Roca LLP and vice-chair of the Rules of Professional Conduct Committee, will discuss the New Mexico Rules of Professional Conduct, Ethics 2000—ABA’s proposed revisions and New Mexico’s proposed revisions to the Rules of Professional Conduct. He will also discuss common issues pertaining to billing; Disciplinary Board statistics relating thereto; and key concepts of the good, the bad, and the ugly of billing.

Keys to Law Practice Management

By Donald Becker

Systems are a way of consistently producing a desired end result. A system is a process, method, or procedure that allows us to control various tasks to be performed. Avoid re-inventing the wheel by learning and using the lessons from prior experience and/or work. Systems should work together to create and document logical ways of handling repetitive transactions, procedures, or work flow to minimize waste, conserve professional time, reduce errors, and optimize productivity.

Too often, we think in terms of tangible things, such as computers, printers, filing cabinets, calendars, files, statements, etc. Too often, we think in terms of programs, such as WordPerfect, TimeSlips, Amicus, etc.

Consider examining the function or purpose of a particular system. Often, an existing system is being used because it exists, perhaps created by a former staff person. Rarely does an office look at its systems for the role or function performed and its value in the firm. Are the systems effective? Is there unnecessary duplication? Are the right people getting the information needed? Are safety checks in place to protect against improper activities? Does the office have a current procedural manual where it’s clear as to what is to be done and by whom? Are there controls to prevent loss of funds?

Forms of Systems:

- **Administrative Systems**: tickler (reminder), time keeping, filing, document control, conflict checks, record retention/destruction, billing, collections, trust account, accounts receivable and accounts payable, purchasing, etc.
- **Substantive Legal Systems**: computer systems or forms frequently used in the areas of practice.

Benefits of Systems:

1. Systems protect clients’ rights and remedies, save lawyer and staff time, reduce stress on lawyer and staff, and may reduce professional liability premiums by reducing mistakes and minimizing drudge work.
2. Systems improve the quality of the work product, prevent malpractice, help identify and prompt responses to problems, and aid in reducing clients’ costs for professional services by maximizing the value provided by each person in the firm.
3. Systems help market the firm by showing concern for clients’ problems; demonstrating efforts on behalf of clients; and assuring consistent, prompt delivery of quality services at a reasonable price by improving the productivity of everyone in the firm.

The cost of the program is $20. Lunch will be provided. To register call (505) 764-5468 or e-mail CCnare@LRLaw.com by Nov. 11.

N.M. Christian Legal Aid Volunteer Training

New Mexico Christian Legal Aid is hosting training for new and prospective volunteers from 11 a.m. to 5 p.m., Oct. 24, at Los Griegos Health and Social Services Center, 1231 Candelaria Road NW, Albuquerque. The training will provide 3.0 general CLE credits. Lunch will be provided. Call (505) 761-4050 for more information.

Red Mass Celebration

The annual Red Mass will be held at noon, Oct. 24, at Immaculate Conception Church in Albuquerque. All members of the legal community and law enforcement are invited to attend. The Red Mass is celebrated annually in the Roman Catholic Church and requests guidance for all who seek justice.

Submit announcements for publication in the Bar Bulletin to notices@nmbar.org by 5 p.m., Monday the week prior to publication.
October

20 Real Property Foreclosure: A Step-by-Step Workshop
Albuquerque
National Business Institute
5.0 G, 1.0 E
1-800-930-6184
www.nbi-sems.com

20 Scientific Evidence: The Law Against Junk
Teleconference
TRT
2.0 G
1-800-672-6253
www.trtcle.com

21 2008 Administrative Law Institute
VR, State Bar Center
Center for Legal Education of NMSBF
5.6 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

21 Annual New Mexico Water Law Conference
Albuquerque
New Mexico Water Resources Research Institute
8.9 G
(575) 646-4337
www.nmsu.edu

21 Avoiding Malpractice in Trust and Estate Planning
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

21 DWI in New Mexico
VR, State Bar Center
Center for Legal Education of NMSBF
6.5 G
(505) 797-6020
www.nmbarcle.org

22 Prosecutorial Ethics in the Crosshairs
Teleconference
TRT
2.0 E
1-800-672-6253
www.trtcle.com

22 Utilizing Forensic Accounting and Analysis in Litigation and Valuation Matters
State Bar Center
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbarcle.org

22 Mediation: An Alternative to Litigation?
Teleconference
TRT
2.0 G
1-800-672-6253
www.trtcle.com

22 Annual Labor and Employment Law Update
Santa Fe
Texas State Bar
8.3 G, 0.7 E
(956) 682-5501

23 Climate Change in New Mexico: The Impact of Climate Change on New Mexico and Initiatives to Address the Problem
State Bar Center
Center for Legal Education of NMSBF
5.0 G
(505) 797-6020
www.nmbarcle.org

24 New Mexico Christian Legal Aid Volunteer Training
Los Griegos Health and Social Services Center, Albuquerque
New Mexico Christian Legal Aid
3.0 G
(505) 761-4050

24 24th Annual Bankruptcy Year in Review
VR, Las Cruces
Center for Legal Education of NMSBF
6.0 G, 1.0 E
(505) 797-6020
www.nmbarcle.org

24 Sox May Yet Knock Your Socks Off
Teleconference
TRT
2.0 E
1-800-672-6253
www.trtcle.com

24 2008 Professionalism: Angels and Demons: How Attorneys Help and Hinder ADR
VR, Las Cruces
Center for Legal Education of NMSBF
1.0 P
(505) 797-6020
www.nmbarcle.org

24 Damage in Employment Cases
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

24 International Adoption (2007)
VR, State Bar Center
Center for Legal Education of NMSBF
4.2 G, 2.5 E
(505) 797-6020
www.nmbarcle.org

24 Overcoming Poverty Barriers, Donna Beegle
(from 2008 Annual Meeting)
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

24 Trust Accounting
VR, Las Cruces
Center for Legal Education of NMSBF
1.5 E, 1.0 P
(505) 797-6020
www.nmbarcle.org
28 Unique Ineffective Assistance Claims and Rulings
Teleconference
TRT
2.0 E
1-800-672-6253
www.trtcle.com

29 Impact of Aging, Senility and Substance Abuse on Practitioners
Teleconference
TRT
1.0 E, 1.0 P
1-800-672-6253
www.trtcle.com

29 Life Cycle of a Limited Liability Company Treated as a Partnership
Satellite Broadcast
Edward Jones
2.8 G
(314) 515-5848

30 E: Mysteries and Histories
Teleconference
TRT
2.0 E
1-800-672-6253
www.trtcle.com

30 Law Office Technology for the Rest of Us: Real Solutions and Hot Tips for Technology That Works in Your Office
State Bar Center
Center for Legal Education of NMSBF
2.0 G
(505) 797-6020
www.nmbarcle.org

31 2nd Annual White Collar Crime CLE
State Bar Center
New Mexico Criminal Defense Lawyers Association
6.0 G
(505) 992-0050 or info@nmcdla.org
www.nmcdla.org

31 Get Out of Jail Free Card for Corporate Lawyers?
Teleconference
TRT
2.0 G
1-800-672-6253
www.trtcle.com

3 Lawyers and Law Firm Crackups
Teleconference
TRT
2.0 E
1-800-672-6253
www.trtcle.com

4 2008 Fiduciary Litigation Update
Teleseminar
Center for Legal Education of NMSBF
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4 Law Office Technology for the Rest of Us: Real Solutions and Hot Tips for Technology That Works in Your Office
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Center for Legal Education of NMSBF
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www.nmbarcle.org

4 Avoiding Oops! Uh-Oh! and Yikes! Some Ethical Dilemmas for Lawyers (from 2008 Annual Meeting)
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 E
(505) 797-6020
www.nmbarcle.org

4 Avoiding Scandal and Headlines: What Every Lawyer Needs to Know about Metadata (from 2008 Annual Meeting)
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

4 Corporate Counsel's Moral Compass
Teleconference
TRT
2.0 E
1-800-672-6253
www.trtcle.com

4 How to Prepare and Defend a Medical Malpractice Case (2007)
VR, State Bar Center
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbarcle.org

4 Ken Feinberg: Keynote (from 2008 Annual Meeting)
VR, State Bar Center
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

4 Professionalism: The Secret to a Successful Practice
Albuquerque
Albuquerque Bar Association
1.0 P
(505) 842-1151

5 Expert Work Product and Discovery
Teleconference
TRT
2.0 G
1-800-672-6253

6 Annual Estate Planning Institute
Las Cruces
Southern New Mexico Estate Planning Council
10.0 G, 1.0 E, 1.0 P
(575) 521-4794

6 Estate Planning with S Corps
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

7 Corporate Counsel's Moral Compass
Teleconference
TRT
2.0 E
1-800-672-6253
www.trtcle.com

7 How to Prepare and Defend a Medical Malpractice Case (2007)
VR, State Bar Center
Center for Legal Education of NMSBF
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1-800-672-6253
www.trtcle.com

9 How to Prepare and Defend a Medical Malpractice Case (2007)
VR, State Bar Center
Center for Legal Education of NMSBF
3.0 G
(505) 797-6020
www.nmbarcle.org

11–12 2008 Update on Advising MC and DDS Practices, Parts 1 and 2
Teleseminar
Center for Legal Education of NMSBF
1.0 G
(505) 797-6020
www.nmbarcle.org

12 Estate Planning Update
Satellite Broadcast
Edward Jones
2.8 G
(314) 515-5848

12 Estate Planning Update
Satellite Broadcast
Edward Jones
2.8 G
(314) 515-5848
### Petitions for Writ of Certiorari Filed and Pending:

<table>
<thead>
<tr>
<th>No.</th>
<th>Petition</th>
<th>Date Petition Filed</th>
<th>Date Writ Issued</th>
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<tbody>
<tr>
<td>31,367</td>
<td>Marquez v. Hatch</td>
<td>(12-501) 10/8/08</td>
<td></td>
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<tr>
<td>31,365</td>
<td>State v. Lucero</td>
<td>(COA 27,364) 10/7/08</td>
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<td>31,364</td>
<td>Mountain States v. Allstate Insurance Co.</td>
<td>(COA 28,686) 10/7/08</td>
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<td>31,363</td>
<td>Hansho v. King</td>
<td>(COA 28,175) 10/6/08</td>
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<td>31,362</td>
<td>State v. Smith</td>
<td>(COA 28,451) 10/6/08</td>
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<td>31,361</td>
<td>State v. Maclaurin</td>
<td>(COA 28,359) 10/6/08</td>
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<td>31,360</td>
<td>State v. Morales</td>
<td>(COA 26,969) 10/6/08</td>
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<tr>
<td>31,356</td>
<td>Wood v. Taxation and Revenue Dept.</td>
<td>(COA 28,772) 10/6/08</td>
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### Writs of Certiorari Granted but not yet submitted to the Court:

<table>
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<tr>
<th>No.</th>
<th>Petition</th>
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<tbody>
<tr>
<td>30,575</td>
<td>State v. Zador</td>
<td>(COA 27,412) 9/17/07</td>
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<td>30,548</td>
<td>State v. Leyba</td>
<td>(COA 27,478) 9/17/07</td>
</tr>
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<td>30,716</td>
<td>State v. Boyle</td>
<td>(COA 27,185) 11/20/07</td>
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<td>30,766</td>
<td>State v. Jones</td>
<td>(COA 27,342) 12/17/07</td>
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<td>30,800</td>
<td>State v. Gutierrez</td>
<td>(COA 26,454) 1/16/08</td>
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<td>30,827</td>
<td>State v. Sims</td>
<td>(COA 26,590) 1/22/08</td>
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<tr>
<td>30,851</td>
<td>Rodriguez v. Jaramillo</td>
<td>(12-501) 1/22/08</td>
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<tr>
<td>30,894</td>
<td>State v. Soto</td>
<td>(COA 26,861) 2/28/08</td>
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<tr>
<td>30,909</td>
<td>State v. Willie</td>
<td>(COA 26,116) 2/28/08</td>
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<td>30,787</td>
<td>Cable v. Wells Fargo Bank</td>
<td>(On reconsideration) (COA 26,357) 3/10/08</td>
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<td>30,953</td>
<td>State v. Santiago</td>
<td>(COA 26,859) 3/19/08</td>
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<tr>
<td>30,937</td>
<td>State v. Garcia</td>
<td>(COA 27,091) 3/25/08</td>
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<td>30,956</td>
<td>Davis v. Devon</td>
<td>(COA 28,147/28,154) 3/25/08</td>
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<td>30,957</td>
<td>Ideal v. BP America</td>
<td>(COA 28,148/28,153) 3/25/08</td>
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<td>30,958</td>
<td>Smith v. Conocophillips Hospital</td>
<td>(COA 28,151/28,152) 3/25/08</td>
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<td>30,101</td>
<td>State v. Trossman</td>
<td>(COA 26,576) 4/15/08</td>
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<td>30,103</td>
<td>Truong v. Allstate Insurance Company</td>
<td>(COA 26,329) 4/15/08</td>
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<tr>
<td>30,107</td>
<td>State v. Villalobos</td>
<td>(COA 27,262) 5/5/08</td>
</tr>
<tr>
<td>30,105</td>
<td>State v. Demongey</td>
<td>(COA 26,543) 5/16/08</td>
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<tr>
<td>30,106</td>
<td>State v. Rael</td>
<td>(COA 26,737) 5/16/08</td>
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<tr>
<td>30,134</td>
<td>State v. Del Valle</td>
<td>(COA 28,459) 6/23/08</td>
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<tr>
<td>30,134</td>
<td>State v. Alderete</td>
<td>(COA 28,325) 6/27/08</td>
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<tr>
<td>30,151</td>
<td>State v. Munoz</td>
<td>(COA 26,956) 6/27/08</td>
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<td>30,100</td>
<td>Allen v. LeMaster</td>
<td>(12-501) 6/27/08</td>
</tr>
<tr>
<td>30,121</td>
<td>Dietrich v. Tapia</td>
<td>(12-501) 7/21/08</td>
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<tr>
<td>30,117</td>
<td>State v. Williamson</td>
<td>(COA 27,193) 7/21/08</td>
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<td>30,186</td>
<td>State v. Bulcoming</td>
<td>(COA 26,413) 7/21/08</td>
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<td>30,191</td>
<td>State v. Schwartz</td>
<td>(COA 28,349) 7/21/08</td>
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<td>30,218</td>
<td>State v. Henley</td>
<td>(COA 27,925) 7/25/08</td>
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<td>30,208</td>
<td>Pielhaus v. LLI Insurance</td>
<td>(COA 27,686) 7/25/08</td>
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<td>30,187</td>
<td>State v. Aragon</td>
<td>(COA 26,185) 7/31/08</td>
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<td>30,185</td>
<td>State v. Johnson</td>
<td>(COA 26,878) 8/6/08</td>
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<td>30,224</td>
<td>State v. Harrison</td>
<td>(COA 27,224) 8/6/08</td>
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<td>30,202</td>
<td>State v. Chavez</td>
<td>(COA 26,563) 8/6/08</td>
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<tr>
<td>30,213</td>
<td>State v. Dodson</td>
<td>(COA 28,382) 8/6/08</td>
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<tr>
<td>30,226</td>
<td>State v. Shanta R.B.</td>
<td>(COA 28,403) 8/11/08</td>
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<td>30,234</td>
<td>Chapman v. Varela</td>
<td>(COA 27,069/27,164) 8/11/08</td>
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<td>30,244</td>
<td>State v. Slayton</td>
<td>(COA 27,892) 8/13/08</td>
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WRITS OF CERTIORARI

NO. 31,245 State v. Littlefield (COA 27,504) 8/13/08
NO. 31,153 State v. Wyman (COA 28,237) 8/25/08
NO. 31,185 Talbott v. Roswell Hospital Corp. (On rehearing) (COA 27,135) 8/25/08
NO. 31,263 Garcia v. Gutierrez (COA 26,484) 8/25/08
NO. 31,265 State v. Hill (COA 27,401) 8/25/08
NO. 31,192 Reule Sun Corporation v. Valles (On rehearing) (COA 27,254) 8/26/08
NO. 31,267 Flores v. McKay Oil (COA 28,360) 9/9/08
NO. 31,279 Lions Gate v. D’Antonio (COA 27,668) 9/9/08
NO. 31,288 State v. Savedra (COA 27,289/27,290) 9/15/08
NO. 31,293 Armendariz v. Wasser (COA 28,285) 9/15/08
NO. 31,300 Waters v. NM Human Services Dept. (COA 26,891) 9/15/08
NO. 31,294 State v. Marquez (COA 27,735) 9/22/08
NO. 31,308 State v. Sosa (COA 26,863) 9/22/08
NO. 31,258 Marchstadt v. Lockheed (COA 27,222) 10/1/08
NO. 31,315 D’Antonio v. Garcia (COA 27,681) 10/1/08
NO. 31,317 State v. Day (COA 25,290) 10/1/08
NO. 31,318 Dept. of Transportation v. S & S Trezza (COA 28,475) 10/1/08
NO. 31,232 Ovecka v. Burlington (COA 26,449) 10/6/08

CERTIORARI GRANTED AND SUBMITTED TO THE COURT:

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

Submission Date
NO. 30,263 State v. Downey (COA 25,068) 11/26/07
NO. 30,558 Beggs v. City of Portales (COA 26,903) 3/10/08
NO. 30,592 Gushwa v. Hunt (COA 26,887) 3/26/08
NO. 30,526 State v. Maddox (COA 25,404) 3/26/08
NO. 30,608 Marchand v. Marchand (COA 26,558) 5/12/08
NO. 30,536 Cordova v. World Finance (COA 27,436) 5/13/08
NO. 30,643 NM Public Schools v. Gallagher (COA 26,251) 7/21/08
NO. 30,318 State v. Trujillo (COA 25,898) 8/12/08
NO. 30,543 Primetime v. City of Albuquerque (COA 25,616) 8/13/08
NO. 30,717 Cortez v. Cortez (COA 27,629) 8/13/08
NO. 30,722 State v. UU Bar Limited (COA 26,194) 8/25/08
NO. 30,735 Salas v. Mountain States (COA 26,385) 8/25/08
NO. 30,465 State v. Flores (COA 27,180) 9/15/08
NO. 30,663 State v. Hubble (COA 26,452) 9/15/08
NO. 30,747 Bianco v. Horror One Land Grant (COA 27,887) 9/24/08
NO. 30,656 Durham v. Guest (COA 26,123) 9/24/08
NO. 30,463 State v. Williams (COA 25,519) 9/24/08
NO. 30,640 Dewitt v. Rent a Center (COA 27,596) 9/24/08
NO. 30,808 Montoya v. Tecolote (COA 26,170) 10/14/08
NO. 30,619 State v. Kincaid (COA 27,021) 10/14/08
NO. 30,897 State v. Sewell (COA 26,742) 10/29/08
NO. 30,939 Grygorwicz v. Trujillo (COA 27,752) 10/29/08
NO. 30,715 State v. Garza (COA 27,731) 10/29/08
NO. 30,620 State v. Nozie (COA 25,481) 10/29/08
NO. 30,710 Marbob v. NM Oil (COA 27,871) 10/29/08
NO. 30,654 State v. Belanger (COA 26,771) 10/29/08
NO. 30,467 State v. Verdugo (COA 25,534) 10/29/08
NO. 30,997 Bell v. Bell (COA 27,392) 11/10/08
NO. 30,789 State v. Olsson (COA 27,028) 11/10/08
NO. 30,899 Bishop v. Evangelical Society (COA 25,510) 11/12/08
NO. 30,916 State v. Quick (COA 27,013) 11/12/08
NO. 30,993 State v. Myers (COA 26,837) 11/12/08
NO. 30,723 State v. Carrasco (COA 25,669) 11/26/08
NO. 30,870 Redi Mix v. Scottsdale (COA 26,872) 11/26/08
NO. 30,801 State v. Gutierrez (COA 26,455) 11/26/08
NO. 30,862 State v. Satterfield (COA 26,848) 11/26/08
NO. 30,755 State v. Glascock (COA 26,337) 11/26/08
NO. 31,004 State v. Martinez (COA 26,893) 11/26/08
NO. 30,903 Schwettmann v. Schwettmann (COA 26,905) 11/26/08

PETITION FOR WRIT OF CERTIORARI DENIED:

NO. 31,332 Harton v. Greka Energy (COA 25,642) 10/6/08
NO. 31,344 Orvis v. Heredia (12-501) 10/6/08
NO. 31,345 Holloway v. Ezell (12-501) 10/6/08
NO. 31,311 State v. Loyd (COA 28,211) 10/10/08
NO. 31,322 State v. Lobberger (COA 26,161) 10/10/08
NO. 31,335 Capco v. Greka Energy (COA 25,642) 10/10/08
NO. 31,334 Sepulveda v. Lopez (COA 27,012) 10/10/08
NO. 31,352 Delarosa v. Janecka (12-501) 10/10/08

WRIT OF CERTIORARI QUASHED:

NO. 30,346 State v. Owens (COA 27,093) 10/14/08
## Published Opinions

<table>
<thead>
<tr>
<th>Date opinions Filed</th>
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<tbody>
<tr>
<td>10/6/2008</td>
<td>No. 27539 5th Jud Dist Eddy CR-06-133, STATE v B GONZALES (reverse)</td>
</tr>
<tr>
<td>10/8/2008</td>
<td>No. 28161 13th Jud Dist Valencia CV-06-711, G BIRD v C TRUJILLO (affirm)</td>
</tr>
<tr>
<td>10/8/2008</td>
<td>No. 28339 3rd Jud Dist Dona Ana DM-06-685, M FLUITT v D FLUITT (reverse and remand)</td>
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<tr>
<td>10/9/2008</td>
<td>No. 28492 5th Jud Dist Eddy CR-07-252, STATE v E TRUJILLO (affirm)</td>
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<tr>
<td>10/9/2008</td>
<td>No. 28622 2nd Jud Dist Bernalillo DM-06-431, K CARLSON v R CARLSON (affirm)</td>
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<tr>
<td>10/9/2008</td>
<td>No. 28519 9th Jud Dist Roosevelt CV-02-11, SOUTHERN FARM v E HINER (affirm)</td>
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## Unpublished Opinions

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Slip Opinions for Published Opinions may be read on the Court’s Web site:
# Clerk Certificates from the New Mexico Supreme Court

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

<table>
<thead>
<tr>
<th>Clerk</th>
<th>Address</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jennie D. Behles</td>
<td>Behles Law Firm, P.C. PO Box 7070 202 Central Ave., SE, #A-100 (87102) Albuquerque, NM 87194-7070 505-242-7004 505-242-7066 (telecopier) <a href="mailto:behles@jdbehles.com">behles@jdbehles.com</a></td>
<td></td>
</tr>
<tr>
<td>Aimee S. Bevan</td>
<td>U.S. District Court District of New Mexico 106 S. Federal Place Santa Fe, NM 87501 505-992-3821 505-988-6332 (telecopier) <a href="mailto:aimee_bevan@nmcourt.fed.us">aimee_bevan@nmcourt.fed.us</a></td>
<td></td>
</tr>
<tr>
<td>Peggy L. Bird</td>
<td>2012 Gabaldon Rd., NW Albuquerque, NM 87104-2811 505-449-7787 <a href="mailto:sunplbird@aol.com">sunplbird@aol.com</a></td>
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<tr>
<td>Thomas M. Brown</td>
<td>Thomas M. Brown Law Office PO Box 1966 115 Eighth St., SW (87102) Albuquerque, NM 87103-1966 505-247-4321 505-247-4441 (telecopier) <a href="mailto:btm1028@qwest.net">btm1028@qwest.net</a></td>
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<tr>
<td>Roe W. Bubar</td>
<td>Bubar &amp; Hall 5810 Greenbelt Ln. Fort Collins, CO 80524-9506 970-416-1703 <a href="mailto:bubar@cahs.colostate.edu">bubar@cahs.colostate.edu</a></td>
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<td>Bruce Wesley Burkle</td>
<td>4105 Aralia Street Mesquite, TX 75150</td>
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<tr>
<td>Herbert Maxwell Campbell, II</td>
<td>1612 San Patricio, SW Albuquerque, NM 87104</td>
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<td>Alesia N. Cappon</td>
<td>Office of the District Attorney 5100 Second St., NW Albuquerque, NM 87107 505-841-7675 505-841-7676 (telecopier) <a href="mailto:acappon@da2nd.state.nm.us">acappon@da2nd.state.nm.us</a></td>
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## Clerk Certificates

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<tr>
<th>Clerk</th>
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<tr>
<td>Jennie D. Behles</td>
<td>Behles Law Firm, P.C. PO Box 7070 202 Central Ave., SE, #A-100 (87102) Albuquerque, NM 87194-7070 505-242-7004 505-242-7066 (telecopier) <a href="mailto:behles@jdbehles.com">behles@jdbehles.com</a></td>
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<tr>
<td>Aimee S. Bevan</td>
<td>U.S. District Court District of New Mexico 106 S. Federal Place Santa Fe, NM 87501 505-992-3821 505-988-6332 (telecopier) <a href="mailto:aimee_bevan@nmcourt.fed.us">aimee_bevan@nmcourt.fed.us</a></td>
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Take Stock of Your Liability Risks

An important step in considering which coverage would be right for your law firm is to examine your operations and how you conduct business. Certain activities make your firm more vulnerable to potential losses. To begin your analysis, just review the list below and start by identifying areas that could expose you or your law firm to loss.

Do I need to increase my limits of liability to protect me and my firm against any increased exposure?

Has my liability exposure increased with new clients and new matters?

Could this potentially increase the damages I am responsible for if I make an error?

Have my areas of practice changed since my last application?

Have I added or increased my hazardous areas of practice?

Does this create more of an exposure to my practice?

Can I afford my deductible? Is the premium difference affordable so that there would be little or no money out of pocket in the event of a claim?

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Will my limits of liability protect me in my “worst case” claim?

Will my limits cover defense costs and actual judgment or settlement?

Do I use the services of other attorneys, Of Counsel attorneys, or independent contractors?

If so, are these attorneys insured?

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**Preliminary Premium Indication Worksheet**

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*All attorneys must be listed to be considered as Insureds. Of Counsel attorneys need not be listed unless individual coverage is desired. If you are a sole practitioner, please list yourself. A attach sheet if additional attorneys are to be listed.*

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<th>Prior Acts Exclusion Date #</th>
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*Designation Codes (D/C):*  
- O = Officers, Directors or Shareholders of the corporation who are licensed as lawyers  
- E = Employed lawyers (must be employee of applicant)  
- S = Sole Proprietor  
- P = Partners of Partnership  
- FT = Part-time Lawyer (must work less than 26 hours per week in the private practice of law solely on behalf of the applicant firm)

**Current Insurance** (Complete this section or send copy of your Current Declaration Page)

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**Are you aware of any claims against your firm or any incidents that could result in a claim against your firm within the past five years? If “YES”, how many?”**

- [ ] Yes  
- [ ] No

**Has any member of the applicant firm been refused admission to practice, disbarred, suspended, reprimanded, sanctioned, or held in contempt by the court administrative agency or regulatory body?**

- [ ] Yes  
- [ ] No

**Does the firm handle any Class Action or Mass Tort Cases?**

- [ ] Yes  
- [ ] No

**Areas of Practice** (Round to the nearest whole percent.)

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**TOTAL MUST EQUAL 100%**

Print or Type Name and Title  
Signature of Owner, Officer or Partner  
Date (Month/Day/Year)

**Preliminary Indications Are Not Binding**

BB 3/08
OPINION

PATRICIO M. SERNA, JUSTICE


[2] Defendant was indicted on five counts of criminal sexual penetration of a minor (CSPM), contrary to NMSA 1978, Section 30-9-11(C)(1) (1995, prior to amendments through 2007), and seven counts of CSCM. The victim (Child) is Defendant's granddaughter. During the summer of 2000, which is the time of the incidents in question, Child would occasionally spend time at her grandparents' house under the supervision of her grandmother and Defendant. One of the couple's responsibilities while taking care of Child was to treat an eczematous rash that covered her body from the back of her waist to the back of her knees; importantly, the rash never appeared on Child's vagina.

Part of the treatment regimen required the application of medicinal ointment to Child's rash—a procedure done by both grandmother and Defendant. Child later alleged that Defendant had inappropriately touched her "private area" during at least one of those treatments.

[3] As part of its case against Defendant, the State sought to introduce evidence that he walked around naked in front of Child; that he showed her a pornographic video; that he showed her his wife's thong underwear; and that he showered naked with her (hereinafter collectively referred to as "the grooming evidence"). Before trial, Defendant filed a motion in limine, seeking to exclude the grooming evidence. At a hearing on the motion, the State argued that the grooming evidence showed Defendant's attempt to gain Child's trust and to make her comfortable with things of a sexual nature so that she would become comfortable with his sexual behavior. The State also claimed that the evidence was admissible because it showed Defendant's intent. Defendant argued that the evidence should not be admitted because he was not claiming lack of sexual intent, but instead was denying that any illegal touching had ever occurred. The trial court admitted the grooming evidence pursuant to Rule 11-404(B) NMRA (providing that evidence of other crimes, wrongs, or acts, while inadmissible to show action in conformity with character, may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).

[4] At trial, Child had difficulty identifying the exact dates on which Defendant had purportedly committed his illegal acts. To help Child locate the events in question, the State utilized two benchmarks that Child could more easily remember and could rely on when testifying about the details of Defendant's alleged offenses. Thus, all of the crimes with which Defendant was charged were alleged to have occurred between a family trip to Colorado, beginning June 11, 2000, and Child's eighth birthday, on July 8, 2000.

[5] When Child testified at trial, she was inconsistent as to the number of times that Defendant had allegedly touched her during the charging period. When the prosecutor asked Child how many times Defendant had touched her subsequent to the family trip to Colorado, Child responded, "I think it was about five[.] I am not sure." Immediately thereafter, the prosecutor asked, "So did some of it happen before Colorado?" Child said, "Most happened before Colorado and once after." The prosecutor followed up, "Once after Colorado and before your birthday?" Child answered, "Yes." She then proceeded to describe two incidents during which Defendant allegedly touched her inappropriately. First, she explained that once while she was attempting to put lotion on her rash, Defendant intervened to help apply the lotion and then touched her "privates." Second, she testified that Defendant touched her "privates" another time while she was falling asleep.

[6] At the close of the State's case, Defendant moved for a directed verdict. He
argued that the evidence was insufficient to support more than one instance of illegal touching and construed Child’s testimony as establishing that Defendant touched her only once during the charging period. The trial court denied the motion, ruling that Child’s testimony supported two counts of CSPM and, in the alternative, two counts of CSCM. So instructed, the jury found Defendant guilty of both counts of CSCM.

{7} A majority of the Court of Appeals disagreed with the trial court’s ruling on the directed verdict motion. *State v. Sena*, 2007-NMCA-115, ¶¶ 8-10, 142 N.M. 677, 168 P.3d 1101. It held that the evidence supported only one CSCM conviction because Child’s testimony could not reasonably be interpreted as establishing that Defendant had touched her more than once during the charging period. See id., ¶ 10. The dissent, however, argued that a reasonable jury could have resolved the inconsistencies in Child’s testimony to support the trial court’s ruling, and thus concluded the trial court had reached the proper result. Id., ¶ 35 (Fry, J., dissenting).

{8} The majority also held that the trial court erred in admitting the grooming evidence. Id., ¶ 23. Stating that the grooming evidence was improper character evidence purpose[d] on “show[ing]” the jury that Defendant acted like a pervert on occasion” in an attempt to “imply that Defendant was acting in conformity with that trait,” the majority concluded that the grooming evidence was inadmissible under Rule 11-404(B). Id. Again, the dissent disagreed. It countered that our precedent supported admission of the grooming evidence and that the trial court’s ruling should have been upheld. Id. at ¶¶ 36-38 (Fry, J., dissenting).

{9} On the State’s petition, we review each issue in turn, beginning with the directed verdict motion.

II. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION FOR A DIRECTED VERDICT

{10} Our review of the denial of a directed verdict motion asks whether sufficient evidence was adduced to support the underlying charge. See *State v. Robinson*, 94 N.M. 693, 696, 616 P.2d 406, 409 (1980). “The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction.” *State v. Duran*, 2006-NMSC-035, ¶ 5, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted). When considering the sufficiency of the evidence, this Court “does not evaluate the evidence to determine whether some hypothesis could be designed which is consistent with a finding of innocence.” *State v. Graham*, 2005-NMSC-004, ¶ 13, 137 N.M. 197, 109 P.3d 285 (internal quotation marks and citation omitted).

Instead, “[w]e view the evidence as a whole and indulge all reasonable inferences in favor of the jury’s verdict,” id., while at the same time asking whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,” id., ¶ 7 (alteration in original) (internal quotation marks and citation omitted).

{11} Child’s testimony in this case was ambiguous as to the number of times that Defendant touched her during the charging period. She told the jury about two separate instances of inappropriate touching, the first occurring while she was putting lotion on her rash and the second happening while she was falling asleep. However, that testimony came after Child had first stated that Defendant had touched her five times subsequent to the Colorado trip, only to then answer that the touching had occurred just once after Colorado. Thus, Child’s testimony was inconsistent. When parts of a witness’s testimony are “conflicting and ambiguous[,] . . . [i]t is the exclusive province of the jury to resolve [the] factual inconsistencies in [that] testimony,” *State v. Morales*, 2000-NMCA-046, ¶ 8, 129 N.M. 141, 2 P.3d 878 (internal quotation marks and citation omitted). In the instant case, the record supports the inference that Defendant touched Child multiple times during the charging period, as well as the inference that he touched her only once during that time. However, the applicable standard of review does not contemplate our “pars[ing] the testimony and view[ing] the verdict only in light of theprobative value of individual pieces of evidence.” *Graham*, 2005-NMSC-004, ¶ 13. Instead, “[a]ppellate courts faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the [prevailing party], and must defer to that resolution.” Id. (internal quotation marks and citation omitted). Given that presumption and the record before us, we conclude that the jury acted rationally in resolving the factual inconsistencies present in Child’s testimony in favor of the conclusion that Defendant touched Child twice during the charging period. We defer to that resolution, and thus agree with Judge Fry’s conclusion in dissent that the trial court properly denied Defendant’s directed verdict motion. See *Sena*, 2007-NMCA-115, ¶ 35 (Fry, J., dissenting).

III. THE TRIAL COURT PROPERLY ADMITTED THE GROOMING EVIDENCE

A. The Grooming Evidence was Admissible under Rule 11-404(B)

{12} “Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of . . . intent . . . or absence of mistake or accident.” Rule 11-404(B). Accordingly, “evidence of other acts is admissible under Rule 11-404(B) if relevant to a material issue other than the defendant’s character or propensity to commit a crime.” *State v. Kerby*, 2007-NMSC-014, ¶ 25, 141 N.M. 413, 156 P.3d 704. We review a trial court’s decision to admit evidence under Rule 11-404(B) for abuse of discretion, which occurs when the court’s ruling is “clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason.” *State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted).

{13} In this case, the grooming evidence was admissible to prove Defendant’s intent. See *Kerby*, 2007-NMSC-014, ¶ 26. To prove CSCM, the State must establish that the defendant’s touch was “unlawful,” and it may do so by showing that the “defendant’s behavior was done to arouse or gratify sexual desire.” *Kerby*, 2007-NMSC-014, ¶ 26 (internal quotation marks and citation omitted). In *Kerby*, the defendant created a peephole into the victim’s bathroom. Id. We affirmed the trial court’s admission of that other-evidence to counter the defendant’s assertion that he had touched the victim’s buttocks merely as a fatherly pat. Id. The peephole evidence, we reasoned, supported the inference that the defendant had touched his victim with a sexual intent, and thus was relevant to prove the unlawfulness element of CSCM. Id.

{14} In the instant case, the State elicited testimony from several witnesses that Defendant had admitted to touching Child’s “privates” while putting the ointment on her rash. It also cross-examined Defendant with his statement to an investigating officer that he had touched Child’s vagina while putting medicine on her rash but had not done so sexually. Thus, evidence offered at trial supported the inference that, when Defendant touched Child during his application
of medicinal ointment to her rash, he did so without a sexual intent. The grooming evidence counters that inference because it suggests that Defendant was attempting to familiarize Child with sexuality and thereby to create an atmosphere in which she would be less resistant to his sexual advances. As “evidence of Defendant’s sexually fraught conduct with the Child,” the grooming evidence was properly admitted to “refute[] the evidence that Defendant touched the Child strictly for medical reasons.” Sena, 2007-NMCA-115, ¶ 37 (Fry, J., dissenting). Thus, while the Court of Appeals correctly asserted that the grooming evidence could not be offered to show Defendant’s propensity to “act[] like a pervert on occasion,” id. ¶ 23, it erred in rejecting the evidence as proof of Defendant’s intent, see id. ¶ 22. {15} For those reasons, we cannot characterize the trial court’s admission of the grooming evidence as clearly untenable or not justified by reason, and thus hold that it was properly admitted under Rule 11-404(B).

B. The Grooming Evidence was Admissible under Rule 11-403 NMRA

{16} Defendant argues that, even if the grooming evidence was admissible under Rule 11-404(B), it should have been excluded under Rule 11-403 as unfairly prejudicial. Rule 11-403 states that otherwise relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Other-act evidence that proves only character or propensity is unfairly prejudicial and properly excluded under Rule 11-403. State v. Otto, 2007-NMSC-012, ¶ 16, 141 N.M. 443, 157 P.3d 8. However, as we concluded above, the grooming evidence was offered for a legitimate, non-character purpose. Thus, its admissibility under Rule 11-403 depends on the balance of its probative value against any prejudicial effect that it may have had. See State v. Gallegos, 2007-NMSC-007, ¶ 22, 141 N.M. 185, 152 P.3d 828. “Determining whether the prejudicial impact of evidence outweighs its probative value is left to the discretion of the trial court.” Rojo, 1999-NMCA-001, ¶ 48 (internal quotation marks and citation omitted). We review such determinations for abuse of discretion and give much leeway to “trial judges who must fairly weigh probative value against probable dangers.” Otto, 2007-NMSC-012, ¶ 14 (internal quotation marks and citation omitted). {17} In the instant case, the grooming evidence was probative of the fact that Defendant acted with a sexual intent. Without hearing the grooming evidence, the jury was more likely to believe that Defendant touched Child simply for medicinal purposes and less likely to believe that he did so with a sexual intent. Given the probative value of the grooming evidence when offered to show Defendant’s intent, we cannot characterize the trial court’s admission of it as clearly untenable or unjustified by reason. Thus, we hold that the trial court did not abuse its discretion in admitting the grooming evidence under Rule 11-403.

C. Expert Testimony was not Required to Submit the Grooming Evidence to the Jury

{18} While holding that the grooming evidence was inadmissible, the Court of Appeals majority stated that testimony regarding a defendant’s grooming behavior is “best left to an expert witness.” Sena, 2007-NMCA-115, ¶ 25. While we agree with the dissent that the propriety of lay testimony on the subject of grooming was not raised at trial or on appeal, and thus should not have been addressed by the majority, id. ¶ 40 (Fry, J., dissenting), we are compelled to briefly address the issue.

{19} Rule 11-404(B)’s list of exceptions to the general prohibition against character evidence is not exhaustive; it is merely illustrative. Gallegos, 2007-NMSC-007, ¶ 22. Apparently in recognition of this, the majority opinion characterized the trial court’s ruling as having admitted the grooming evidence under an unlisted exception to Rule 11-404(B). Sena, 2007-NMCA-115, ¶¶ 14, 19. Namely, the majority opined that the trial court admitted the grooming evidence to prove the fact that Defendant had groomed Child, and to explain how that theory applied in this case. However, as detailed above, the grooming evidence was properly admitted as proof of the fact that Defendant had groomed Child, an expert would likely have been necessary to expound upon the theory of grooming and to explain how that theory applied in this case. Thus, we conclude that the grooming evidence, as used in this case, was not based in scientific, technical, or other specialized knowledge and was thus within the realm of lay testimony. We reject any reading of the majority opinion that would be inconsistent with the discussion above.

IV. CONCLUSION

{20} While an expert witness is needed when details of a scientific or specialized theory and its application to the facts of a particular case are being introduced to the jury, see Rule 11-701 NMRA (preventing lay witnesses from testifying “based on scientific, technical or other specialized knowledge within the scope of [the rule governing testimony by experts]”), we do not agree that the grooming evidence in the instant case needed an expert witness to explain to the jury how Defendant’s behavior showed his sexual intent or his lack of mistake or accident, cf. State v. Boyett, 2008-NMSC-030, ¶ 28, 144 N.M. 184, 185 P.3d 355 (explaining that non-experts can testify about a defendant’s intent so long as their testimony addresses matters within the realm of common knowledge and experience). Although the factual question of whether certain behavior constitutes grooming—as the term is scientifically or specially understood—begs an answer laced with details from the theory of grooming, the question of whether certain behavior shows a sexual intent does not. Lay persons are well-aware of what it means to act with a sexual intent, and therefore can identify behavior as exhibiting that trait without the aid of an expert witness.

{21} Thus, in this case, the lay witnesses and lay persons on the jury were well-equipped to understand how Defendant’s behavior proved his sexual intent, even though they may have been ill-equipped to decide whether Defendant had groomed Child, according to a scientific or specialized definition of that term. Had the grooming evidence been offered and admitted solely as proof of the fact that Defendant had groomed Child, an expert would likely have been necessary to expound upon the theory of grooming and to explain how that theory applied in this case. However, as detailed above, the grooming evidence was properly admitted to prove intent; creating a new exception to Rule 11-404(B) for grooming, as suggested by the majority opinion, was unnecessary.

{22} We conclude that the grooming evidence, as used in this case, was not based in scientific, technical, or other specialized knowledge and was thus within the realm of lay testimony. We reject any reading of the majority opinion that would be inconsistent with the discussion above.

IT IS SO ORDERED.

PATRICIO M. SERNA, Justice

WE CONCUR:

EDWARD L. CHÁVEZ, Chief Justice

PETRA JIMÉNEZ MAES, Justice

RICHARD C. BOSSON, Justice

CHARLES W. DANIELS, Justice
OPINION

EDWARD L. CHÁVEZ, CHIEF JUSTICE

[1] Defendant D.W.B.H., Inc., d/b/a Santa Fe Mitsubishi (Mitsubishi), installed a used engine in Plaintiff Sandra Salazar’s car. Salazar sued Mitsubishi, alleging that the used engine smoked and lost oil from the moment the car was retrieved from Mitsubishi until it ultimately ceased to work approximately three months after its installation. Following a bench trial, the trial court found that Mitsubishi had breached express and implied warranties and violated the Unfair Practices Act (UPA), NMSA 1978, §§ 57-12-1 to -22 (1967, as amended through 1999), and awarded Salazar compensatory damages, punitive damages, and attorney fees, but denied to award her damages for the loss of use of her vehicle. Mitsubishi appealed this adverse judgment to the Court of Appeals, which reversed the trial court. We granted certiorari and conclude that there is substantial evidence to support the trial court’s award of compensatory damages under the theories of breach of the implied warranty of merchantability and violation of the UPA. We therefore reverse the Court of Appeals and remand for its consideration of the issues concerning punitive damages, attorney’s fees, and loss of use damages.

I. BACKGROUND

[2] Salazar sought Mitsubishi’s services after having engine problems with her 1993 Mitsubishi Eclipse. A Mitsubishi employee informed Salazar that her car’s engine needed to be replaced. Salazar initially wanted her car’s engine to be replaced with a new engine, but after speaking with a Mitsubishi employee about the cost of a new engine, she opted to have a used engine installed instead. She left her car with Mitsubishi in December 2000. Mitsubishi installed a used replacement engine that it purchased from Coronado Auto Recyclers (Coronado). Unbeknownst to Salazar, Coronado sold her an engine that was in need of repair.

[3] Salazar picked up her car from Mitsubishi in April 2001. She testified that the car was smoking when she drove it home from Mitsubishi and that two days later, after the car’s oil light went on, a service attendant at a gas station checked the oil and found that the car was completely out of oil. A few days later, Salazar took the car back to Mitsubishi. Mitsubishi was unable to find a problem with the engine, so it sent the car to Coronado for further troubleshooting. Coronado was also unable to find anything wrong with the engine.

[4] Salazar retrieved her car from Coronado and drove it until mid-July. She testified that during this time, the car continued to smoke and lose oil rapidly. After the engine completely stopped working, it was towed to Mitsubishi, and Mitsubishi advised Salazar that the engine needed to be replaced. Salazar asked Mitsubishi to provide a new engine, but Mitsubishi informed her that, while their labor was warranted, they did not provide a warranty on the engine itself, and thus Salazar would have to pay for another replacement engine.

[5] Salazar then filed suit against Mitsubishi alleging violations of the UPA, breach of express and implied warranty, negligence, fraud, and breach of contract. After a two-day bench trial, the trial court found in Salazar’s favor on each count and awarded her compensatory damages, punitive damages, and attorney’s fees. The trial court did not, however, award Salazar damages for the loss of use of her vehicle. Mitsubishi appealed the trial court’s judgment, and Salazar cross-appealed the trial court’s denial of loss of use damages. The Court of Appeals filed an unpublished opinion reversing the trial court because it concluded that the evidence was insufficient to support the trial court’s judgment. Salazar v. D.W.B.H., Inc., No. 25,928, slip op. at 20 (N.M. Ct. App. June 29, 2007).

[6] On review, we will uphold the trial court’s judgment if it is supported by substantial evidence. Chavarria v. Fleetwood Retail Corp., 2006-NMSC-046, ¶¶ 12, 17, 140 N.M. 478, 143 P.3d 717. “Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion.” Landavazo v. Sanchez, 111 N.M. 137, 138, 802 P.2d 1283, 1284 (1990). Under this standard, we resolve all factual disputes and indulge all reasonable inferences in favor of Salazar, who prevailed in the trial court. See Coates v. Wal-Mart Stores, Inc., 1999-NMSC-013, ¶ 46, 127 N.M. 47, 976 P.2d 999.

[7] Under this standard, we conclude that there is substantial evidence to support the trial court’s compensatory damage award under the theories of breach of the implied
warranty of merchantability and violation of the UPA. Salazar’s compensatory damages award can be reinstated under either of these two theories, and thus we need not address Salazar’s other theories of recovery. We address breach of warranty and violation of the UPA in turn.

II. DISCUSSION

A. BREACH OF EXPRESS WARRANTY

[8] Under the Uniform Commercial Code (UCC), NMSA 1978, §§ 55-1-101 through 55-2A-532 (1961, as amended through 2005), an express warranty can be created in one of three ways: (1) “any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain,” (2) “any description of the goods which is made part of the basis of the bargain,” or (3) “any sample or model which is made part of the basis of the bargain.” Section 55-2-313(1)(a)-(c). Common to all three types of express warranty is the requirement that an express warranty must be made as part of the basis of the bargain. This does not mean, however, that an express warranty must be specifically bargained for or even included as part of a written contract. 18 Richard A. Lord, Williston on Contracts § 20, at 260-61 (4th ed. 2001). The UCC specifically provides that use of formal words such as “warranty” or “guarantee” are not necessary for the creation of an express warranty. Section 55-2-313(2). Nor is it necessary for the seller to have the specific intention to make an express warranty. Id. While the law does not require such specificity and formality in creating an express warranty, the fact still remains that at the very least, an express warranty must be made as part of the basis of the bargain.

[9] In this case, the record discloses very little evidence that would support a finding that the used engine was expressly warranted by Mitsubishi. There is no evidence of any description of the used engine that was made part of the basis of the bargain, nor is there any evidence that Mitsubishi provided a sample or model engine from which an express warranty could be created. Rather, at issue is whether Mitsubishi made a statement of fact or promise to Salazar relating to the engine that became part of the basis of the bargain. Salazar argues that there is a “mass of evidence” relating to the existence of such a warranty. However, none of the evidence to which Salazar points is sufficient to show that the used engine was expressly warranted by Mitsubishi. Part of the evidence on which Salazar relies relates to the existence of a warranty on labor provided by Mitsubishi and the 90-day warranty on the engine provided by Coronado. Neither of these warranties are at issue in this case. At issue is whether Mitsubishi expressly warranted the used engine it installed in Salazar’s car. Other evidence relied on by Salazar is testimony by a Mitsubishi employee regarding a 12-month warranty on parts and labor. However, Salazar only cites to a portion of the employee’s testimony and fails to point out that the employee later clarified that the 12-month warranty on parts and labor is offered by Mitsubishi on the purchase of new engines, not used engines.

{10} Finally, Salazar contends that Mitsubishi’s President, James Bewley, admitted that there was an express warranty at trial. Specifically, Bewley testified that “[t]here was never an issue of it in warranty or not. We tried to fix the car until it came in, and the second engine was destroyed.” This statement is taken out of context. Bewley did not admit that Mitsubishi expressly warranted the engine. Rather, in this portion of his testimony, Bewley emphasized Mitsubishi’s attempts to diagnose the problem with the used engine it installed in Salazar’s car. Only in isolation can Bewley’s statement be interpreted as an admission of the existence of an express warranty.

{11} Part of our task in resolving factual disputes is to indulge all reasonable inferences in favor of Salazar. However, drawing inferences from statements that have been taken out of context would be unreasonable. See Payne v. Tuozzoli, 80 N.M. 214, 218, 453 P.2d 384, 388 (Ct. App. 1969) (“In resolving conflicts in the evidence in support of the findings, it is not contemplated, nor is it consistent with reason, that words, phrases, clauses or sentences may be selected out of context and then combined to give support for a conclusion which is not supportable by the entire text of the testimony of the witnesses on the particular subject or subjects from which the selections are taken.”).

{12} Despite Salazar’s claim of a “mass of evidence” relating to this issue, there is really only one statement in the record worthy of review. Salazar and a Mitsubishi employee both testified that when Salazar came to pick up her car after the used engine had been installed, the Mitsubishi employee told Salazar that if she had any problems, to bring the car back in. This statement, however, does not constitute an express warranty on the used engine. We realize that a statement made after the engine had already been installed can create an express warranty. The official comment to the UCC states that “[t]he precise time when words of description or affirmation are made . . . is not material. The sole question is whether the language . . . [is] fairly to be regarded as part of the contract.” Section 55-2-313 cmt. 7.

{13} After reviewing the record, we do not find evidence that would indicate that the employee’s statement was made as part of the basis of the bargain. The employee testified that he made the statement as part of “[g]ood customer service.” Salazar testified that she believed that the statement constituted a warranty. The testimony that Salazar believed the statement to be a warranty is not enough to conclude that the statement was an express warranty. Finding no other evidence that would support such a conclusion, we find that the trial court’s determination that the used engine was expressly warranted is not supported by substantial evidence. The breach of warranty review, however, does not end here.

B. BREACH OF IMPLIED WARRANTY

[14] Unlike express warranties, implied warranties are not bargained for; they are imposed by law. Int’l Paper Co. v. Farrar, 102 N.M. 739, 742, 700 P.2d 642, 645 (1985). Under the UCC, “[u]nless excluded or modified, a warranty that the goods shall be merchantable is implied in a contract for their sale.” Section 55-2-314(1) (citation omitted). The trial court found that “[Mitsubishi] did not provide [Salazar] with a written statement of warranty or statement that there was no warranty.” In so finding, the trial court concluded that “[p]ursuant to 55-2-313 NMSA, the engine and installation [Salazar] purchased was warranted. Pursuant to 55-2-316 NMSA, [Mitsubishi] did not limit or exclude warranty. [Mitsubishi] breached the implied warranty of fitness . . . . Such breach caused [Salazar] damages.” The Court of Appeals disagreed and held that Mitsubishi effectively excluded the implied warranty of merchantability.

2 Although the trial court refers to the “implied warranty of fitness,” the only implied warranty at issue in this case is the implied warranty of merchantability, and thus we view the trial court’s reference to the implied warranty of fitness as an oversight.
by including an “Exclusion of Warranties” provision, which is typed in extremely small print in a document Salazar allegedly signed when she picked up her car from Mitsubishi. Salazar, No. 25,928, slip op. at 17. The “Exclusion of Warranties” provision reads

[a]ny warranties on the parts and accessories sold hereby are made by the manufacturer. The undersigned purchaser understands and agrees that dealer makes no warranties of any kind, express or implied, and disclaims all warranties, including warranties of merchantability or fitness for a particular purpose, with regard to the parts and/or accessories purchased; and that in no event shall dealer be liable for incidental or consequential damages or commercial losses arising out of such purchase. The undersigned purchaser further agrees that the warranties excluded by dealer include, but are not limited to, any warranties that such parts and/or accessories are of merchantable quality or that they will enable any vehicle or any of its systems to perform with reasonable safety, efficiency, or comfort.

For such a written exclusion to be effective, the UCC provides that it must mention merchantability and it must be conspicuous. Section 55-2-316(2). While the exclusion mentions merchantability, whether it is conspicuous requires further analysis. Such a determination is for the court to make, and is thus subject to de novo review. See § 55-1-201(b)(10).

{15} The UCC defines conspicuous as “so written, displayed or presented that a reasonable person against whom it is to operate ought to have noticed it.” Section 55-1-201(b)(10). For example, a heading in all capital letters “equal to or greater in size than the surrounding text” is considered to be conspicuous. Section 55-1-201(b)(10)(A). A provision that is “set off from surrounding text of the same size by symbols or other marks that call attention to the language” is also considered conspicuous. Section 55-1-201(b)(10)(B). The Court of Appeals relied on these two examples in determining that, as a matter of law, Mitsubishi’s exclusion provision was conspicuous and thus constituted a valid exclusion of warranties. Salazar, No. 25,928, slip op. at 18-19. The provision is set off to one side of the page with the heading “Exclusion of Warranties” in all capital letters. The heading’s capital letters are greater in size than the provision’s extremely small lettering, but they are smaller than other capitalized words on the page. Indeed, the heading is smaller than the word “Signed,” which follows the provision and calls for Salazar’s signature, noting her agreement that warranties are excluded. As discussed below, Salazar did not sign her acknowledgment of this provision, and therefore did not agree that the warranties could be excluded.

{16} Although we do not conclude as a matter of law that the “Exclusion of Warranties” on this document is conspicuous, even if it was conspicuous, the exclusion is without force. The exclusion provision explicitly calls for an affirmative act; it requires that the customer agree to the exclusion of warranties. The exclusion provision states that “[t]he undersigned purchaser understands and agrees that dealer makes no warranties of any kind, express or implied, and disclaims all warranties, including warranties of merchantability.” (Emphasis added.) Directly under the provision are lines for date and signature. Both lines are blank. A signature does appear on another portion of the document that specifically authorizes repairs. However, while Salazar may have signed the document to authorize repairs, she did not sign agreeing to exclude warranties from the transaction.

{17} This conclusion is consistent with the policy underlying the UCC. In requiring an exclusion of warranties to be conspicuous, the UCC “seeks to protect a buyer from unexpected and unbargained language of disclaimer.” Section 55-2-316 cmt. 1; see also C.E. Alexander & Sons, Inc. v. DEC Int’l, Inc., 112 N.M. 89, 95, 811 P.2d 899, 905 (1991) (“[t]he purpose of the requirement that the disclaimer be ... conspicuous is to insure that the disclaimer of implied warranties is bargained for and forms part of the agreement.”). In essence, because implied warranties are imposed by law, “[a] buyer is entitled to rely on the fact that he [or she] has warranty protection, unless the seller . . . make[s] it brutally clear that such is not the case.” 1 William D. Hawk-land, Uniform Commercial Code Series § 2-316:3, at 2-711 (2002). To make a written exclusion provision clear to a buyer, a seller must employ the correct language and must also communicate it “in such a way that [its] meaning is driven home.” Id. at 2-723; see also § 55-2-316(2) (requiring a written exclusion to mention merchantability and to be conspicuous). Thus, when reviewing exclusion provisions, we must look both to the provision’s form and its language. In this case, we cannot ignore the specific language in the provision that requires a buyer’s agreement in order to exclude warranties.

{18} In requiring such an affirmative agreement, a seller ensures that a buyer is not taken by surprise. We realize that actual consent is not mandated by the UCC in this area. The requirements and examples provided in the UCC, however, set the minimum criteria to protect buyers. Sellers are free to supplement the standards established in the UCC, and in doing so, make certain that buyers are aware of an exclusion of warranties. See § 55-2-316. We will uphold such efforts, especially since “[d]isclaimers of implied warranties are not favored and are strictly construed against the sellers for reasons of public policy.” 3A Lary Lawrence, Lawrence’s Anderson on the Uniform Commercial Code, § 2-316:34, at 149 (3d ed. 2002) (internal quotation marks and quoted authority omitted).

{19} In this case, without an effective exclusion, the implied warranty of merchantability remained intact. Therefore, the used engine was guaranteed to be merchantable. Under the UCC, for goods to be merchantable, they must at least be “fit for the ordinary purposes for which such goods are used.” Section 55-2-314(2) (c). In addressing used goods, the official comment to the UCC provides that [a] specific designation of goods by the buyer does not exclude the seller’s obligation that they be fit for the general purposes appropriate to such goods. A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description.

1In her brief in chief, Salazar claims that the signature on this document is a forgery. At trial, however, Salazar admitted that she signed the document. The trial court found that one of the documents presented at trial that contained Salazar’s signature was forged. However, it is unclear exactly which document the trial court was referring to. Despite the confusion, whether or not the signature on the document in question is a forgery is not dispositive of this issue.
in describing the merchantability standard, stated that
the ordinary buyer in a normal commercial transaction has a
right to expect that the goods . . .
will not turn out to be completely worthless. The purchaser cannot
be expected to purchase goods offered by a merchant for sale
and use and then find the goods are suitable only for the junk pile.
On the other hand, a buyer who has purchased goods without
obtaining an express warranty as to their quality and condition cannot
reasonably expect that those goods will be the finest of all possible
goods of that kind. Protection of the buyer under the uniform com-
mercial code lies between these two extremes. If an item is used or
is second hand, surely less can be expected in the way of quality than
if the item is purchased new.
Int'l Petroleum Servs., Inc. v. S & N Well
Serv., Inc., 639 P.2d 29, 32-33 (Kan.
1982). Accordingly, the implied warranty of merchantability, as applied to a used
engine, does not guarantee that the engine
will operate as would a brand-new engine.
Nonetheless, the used engine at the very
least must be fit for its ordinary purpose.
{20} After reviewing the evidence, we
conclude that there is sufficient evidence to support a finding that the used engine
did not operate properly when Mitsubishi
delivered the car to Salazar, and thus that
Mitsubishi breached the implied warranty
of merchantability. Salazar’s mother testi-
fied that she accompanied Salazar to get her
car from Mitsubishi after the used engine
had been installed and the car was “smok-
ing a lot” at that time. Salazar testified that
the car’s oil light went on two days after she
picked up her car, which prompted her to
take it to a nearby gas station. The attendant
at the gas station testified that the car was
completely out of oil. Thereafter, Salazar
 testified that she had to add a quart of oil
to the car every two to three days. Other
witnesses also testified that they observed
the car smoking soon after Salazar picked
it up from Mitsubishi and that the car was
losing oil.
{21} From these facts, the trial court
could reasonably infer that the used en-
gine did not function properly from the
moment Salazar retrieved her car from
Mitsubishi. When a used engine smokes and continuously loses oil immediately
after its installation, the trial court could
find that there was a breach of the implied
warranty of merchantability. In its brief,
Mitsubishi implied that Salazar needed
to present more proof in this area and that
there needed to be evidence “tying the
smoke or the car’s use of oil to a problem
with the engine.” However, to establish a
breach of the implied warranty, a buyer is not required to prove a specific defect in
the goods. Oggi Trattoria & Caffe, Ltd. v.
Isuzu Motors Am., Inc., 865 N.E.2d 334,
341 (Ill. App. Ct. 2007). Rather, a buyer can
use circumstantial evidence to show that the
goods were not fit for the ordinary purpose
for which they were intended. Id.; Meldco,
Inc. v. Hollytex Carpet Mills, Inc., 796 P.2d
142, 146 (Idaho Ct. App. 1990); Plas-Tex,
Inc. v. U.S. Steel Corp., 772 S.W.2d 442,
444 (Tex. 1989).
{22} New Mexico case law has im-
plicitly recognized these principles. For
example, in Arnold v. Ford Motor Co., we
held that there was substantial evidence to
support the trial court’s determination that
an expressly warranted vehicle was defec-
tive despite the trial court’s failure to make
a specific finding of a defect and despite the
fact that expert testimony was not presented
at trial. 90 N.M. 549, 550-51, 566 P.2d 98,
99-100 (1977). We found it sufficient that
the trial court based its finding of a defect
on evidence that the vehicle’s engine would
cease to operate during normal driving
functions, would overheat when the air
conditioner was in use, and would exhaust
black smoke. Id.
{23} In light of these principles, Salazar
was not required to prove the existence of a
specific defect in the used engine. Rather, it
was incumbent on Salazar to show only that
the used engine was not fit for its ordinary
purpose. While this may be proven with
evidence of a specific defect, it can also be
proven by circumstantial evidence. In this
case, the trial court found the circumstantial
evidence sufficient to find a breach of the
implied warranty of merchantability, and
the record supports such a finding.
C. UPA VIOLATION
{24} The UPA makes it unlawful, in the
conduct of any trade or commerce, to en-
gage in unfair or deceptive trade practices
and unconscionable trade practices. Section
57-12-3. An unfair or deceptive trade
practice is defined in the UPA as
any false or misleading oral or
written statement, visual descrip-
tion or other representation of any
kind knowingly made in connec-
tion with the sale, lease, rental or
loan of goods or services or in the
extension of credit or in the col-
lection of debts by any person in
the regular course of his [or her]
trade or commerce, which may,
tends to or does deceive or mislead
any person.
Section 57-12-2(D). In addition, the UPA
empowers the attorney general “to issue
and file as required by law all regulations
necessary to implement and enforce any
provision of the Unfair Practices Act.”
Section 57-12-13. Pursuant to this power,
the attorney general has implemented regu-
lations, in part, “to deter unfair business
practices within the automotive industry.”
12.2.6.6 NMAC. These regulations pro-
vide that
[it] is an unfair or deceptive trade
practice for an automotive repair
shop to fail to post the major pro-
visions of its warranty policy in a
prominent and conspicuous loca-
tion within the repair facility and
to fail to provide any person who
has purchased automotive repair
services with a written warranty or
statement that there is no warranty,
if such is the case.
12.2.6.9(A) NMAC.
{25} A violation of the regulations is a
violation of the UPA. 12.2.6.15 NMAC.
The regulations, however, are not “exhaus-
tive,” but rather provide “basic rules.”
12.2.6.8(C) NMAC. As such, “it is not
intended that literal compliance with [the]
regulations be an absolute protection
against liability for practices and proce-
dures surrounding automotive repair.”
Id. Therefore, in reviewing compliance
with the regulations, we are to take “all
relevant circumstances into account,” and
if “the purpose of the . . . requirement in
the regulation is met, regardless of whether
or not the technical requirements of the
regulations are met,” then a party can be
found to be in “substantial compliance.”
12.2.6.13 NMAC.
{26} In this case, the trial court found
that Mitsubishi failed to provide Salazar
with a statement of warranty, and thus vi-
olated the regulations. The record supports
such a finding. At trial, there was testimony
indicating that Mitsubishi warranted their
labor, and it is undisputed that Coronado
provided a 90-day warranty on the used
engine. Yet, Salazar testified that Mitsubishi
never provided her with a written statement
explaining this warranty information.
{27} The closest evidence indicating that
Salazar received any warranty information in
writing is the document that contained

22  BAR BULLETIN - October 20, 2008 - Volume 47, No. 43
the “Exclusion of Warranties” provision. However, as previously discussed, this document did not effectively disclaim any warranties. In addition, the document addresses neither the alleged warranty on labor provided by Mitsubishi nor the 90-day warranty on the engine provided by Coronado. As previously discussed, there is also some confusion regarding whether Salazar signed the document in question at all. If Salazar did not sign the document, an inference can be made that she never received it. If this is the case, there is no evidence that Mitsubishi provided her with any warranty information. If, on the other hand, Salazar did receive the document, the only warranty information she was provided was an ineffective disclaimer of warranty. In either case, Mitsubishi failed to provide Salazar with appropriate warranty information. In failing to do so, Mitsubishi violated the attorney general’s regulations and, in turn, violated the UPA.

III. CONCLUSION

{28} The trial court’s award of compensatory damages is supported by both breach of the implied warranty of merchantability and violation of the UPA. We therefore reverse the Court of Appeals and reinstate Salazar’s compensatory damage award of $2,926.45 plus pre-judgment interest. We also remand the case to the Court of Appeals to consider the issues it did not reach, including punitive damages, attorney’s fees, and loss of use damages.

{29} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
CHARLES W. DANIELS, Justice
From the New Mexico Supreme Court

Opinion Number: 2008-NMSC-055

Topic Index:
Criminal Law: Driving While Intoxicated (DWI); Misdemeanor; Motor Vehicle Violations; and Resisting Arrest
Criminal Procedure: Arrest; and Fresh Pursuit
Government: Municipalities; and Ordinances
Statutes: Interpretation; Legislative Intent; Rules of Construction; and Statutes, General

STATE OF NEW MEXICO,
Plaintiff-Petitioner,
versus
JUAN MARQUEZ,
Defendant-Respondent.
No. 30,709 (filed: September 3, 2008)

ORIGINAL PROCEEDING ON CERTIORARI
CHARLES C. CURRIER, District Judge
GARY K. KING
Attorney General
MARGARET McLEAN
Assistant Attorney General
Santa Fe, New Mexico
for Petitioner

HUGH W. DANNER
Chief Public Defender
KATHLEEN T. BALDRIDGE
Assistant Appellate Defender
Santa Fe, New Mexico
for Respondent

OPINION

EDWARD L. CHÁVEZ, CHIEF JUSTICE

{1} Defendant Juan Marquez was found guilty by a jury of aggravated DWI and resisting, evading, or obstructing an officer. The Court of Appeals reversed the conviction for DWI, holding that the initial stop leading to Defendant’s arrest was invalid under Section 31-2-8 of the Fresh Pursuit Act, NMSA 1978, §§ 31-2-1 to -8 (1937, as amended), and the charge should therefore have been dismissed. State v. Marquez, 2007-NMCA-151, ¶¶ 1, 8, 15-16, 143 N.M. 79, 173 P.3d 1. We conclude that the arresting officer did have the authority to stop Defendant. We therefore reverse the Court of Appeals and affirm Defendant’s conviction and sentence.

I. BACKGROUND

{2} On June 23, 2004, Officer James Seely was sitting in his marked car within the city limits of Dexter, New Mexico, when he heard Defendant “rev his motor making [a] loud noise with the muffler system.” Defendant began to slow down when the officer made eye contact with him. After Defendant had begun to slow down, the officer’s radar indicated that Defendant was traveling thirty-two miles per hour in a thirty-mile-per-hour zone.

{3} The officer turned on his overhead lights, but not his siren, and began to follow Defendant. The officer followed Defendant for over a mile until Defendant eventually pulled over outside the Dexter city limits. No evidence was introduced that the officer observed any other infractions before the stop. During the stop, the officer noticed that Defendant showed signs of intoxication. After Defendant failed several field sobriety tests, the officer told Defendant that he was being placed under arrest for DWI. The officer claimed that Defendant resisted arrest both verbally and physically.

{4} Based on the noise, Defendant was charged with racing on highways, contrary to NMSA 1978, Section 66-8-115 (1969). The officer also believed that the noise violated a Dexter municipal ordinance, but he did not charge Defendant with violating that ordinance. Defendant was also charged with operating a motor vehicle without proof of insurance, contrary to NMSA 1978, Section 66-5-205 (1998); aggravated DWI, contrary to NMSA 1978, Section 66-8-102 (2004); battery on a police officer, contrary to NMSA 1978, Section 30-22-24 (1971); and resisting arrest, contrary to NMSA 1978, Section 30-22-1(D) (1981).

{5} Before trial, Defendant filed a motion to dismiss based on lack of jurisdiction. Defendant argued that the noise ordinance is a non-arrestable offense, and therefore the officer did not have the authority to pursue him outside the Dexter city limits pursuant to the Fresh Pursuit Act. The trial court denied Defendant’s motion, finding that the officer pursued Defendant based on violation either of the Dexter noise ordinance or the racing ordinance, which prohibits an “exhibition of speed or acceleration.” Section 66-8-115(A). Defendant was tried only on the DWI, battery, and resisting arrest charges, all of which stemmed from the events that occurred after Defendant was pulled over. At the end of trial, Defendant moved to dismiss the DWI charge, arguing that the officer used the noise from his car as a pretext to stop him. The trial court reviewed this as a motion for directed verdict and denied the motion, finding that Defendant’s speed and possible exhibition driving violation were non-pretextual reasons for pulling him over.

{6} Defendant was convicted on the resisting arrest and DWI charges, but acquitted on the battery charge. Defendant appealed his conviction for DWI, arguing again that the Fresh Pursuit Act did not give the officer the authority to pursue and arrest him outside the Dexter city limits. Marquez, 2007-NMCA-151, ¶ 3. The Court of Appeals agreed, reversed the DWI conviction, and remanded for amendment of the sentence. Id. ¶¶ 15-16. The case reaches us on the State’s petition for writ of certiorari.

II. DISCUSSION

{7} Interpretation of the Fresh Pursuit Act is an issue of statutory construction that we review de novo. State v. Padilla, 2008-NMSC-006, ¶ 7, 143 N.M. 310, 176 P.3d 299. When the Legislature enacts a statute, we presume that it is aware of existing statutes. State v. Maestas, 2007-NMSC-001, ¶ 21, 140 N.M. 836, 149 P.3d 933. Statutes concerning the same subject matter must be read in connection with each other. Quantum Corp. v. State Taxation & Revenue Dep’t, 1998-NMCA-050, ¶ 8, 125 N.M. 49, 956 P.2d 848.

{8} The Fresh Pursuit Act states that [a]ny county sheriff or municipal police officer who leaves his jurisdictional boundary while in fresh pursuit of a misdemeanant whom
he would otherwise have authority to arrest shall have the authority to arrest that misdemeanor anywhere within this state and return him to the jurisdiction in which the fresh pursuit began without further judicial process.

Section 31-2-8(A). To determine whether the officer’s stop of Defendant was valid, we must determine what the Legislature meant by “authority to arrest.” 

{9} The Court of Appeals held that “authority to arrest” means the officer must be pursuing the suspect for an “arrestable offense.” Marquez, 2007-NMCA-151, ¶ 6 (internal quotation marks and citation omitted). The Court, however, never defined “arrestable offense.” Rather, the Court required the State to produce evidence, in the form of the municipal ordinance itself, to show that the offense is “arrestable.” Id. ¶ 9. Following its opinion in State v. Rodarte, 2005-NMCA-141, ¶¶ 14-16, 138 N.M. 668, 125 P.3d 647, the Court noted that “an arrest for a non-jailable offense is constitutionally unreasonable in the absence of specific and articulable facts warranting a custodial arrest rather than a citation.” Marquez, 2007-NMCA-151, ¶ 12. As a result, the Court of Appeals equated “arrestable offense” with “jailable offense.” The word “arrestable,” however, appears nowhere in the New Mexico statutes, and within New Mexico case law it appears only in the Marquez opinion.

{10} Rather than injecting a new term into the analysis, we instead look to the plain language of the Fresh Pursuit Act and ask whether the pursuing officer had the authority to arrest Defendant. Police officers have the authority to make warrantless arrests for non-jailable misdemeanors under NMSA 1978, Section 3-13-2(A)(4)(d) (1988), which allows an officer to “apprehend any person in the act of violating the laws of the state or the ordinances of the municipality and bring him before competent authority for examination and trial.” Rodarte, 2005-NMCA-141, ¶ 19. This authority, however, does not extend to a custodial arrest when the Legislature has stated a preference for citations only. Id. ¶¶ 19-20.

{11} Nothing in the Fresh Pursuit Act indicates that the Legislature intended “authority to arrest” to be limited to a custodial arrest. In fact, reference to other statutes indicates that the Legislature intended no such limit. Under NMSA 1978, Section 66-8-123(A) (1989), which provides for citations in lieu of custodial arrest for certain violations of the Motor Vehicle Code, “a person is arrested” for the offense, “the arresting officer” prepares the citation, “the arrested person” signs the citation, and “the arrested person” receives a copy of the citation before being released. (Emphasis added.) In State v. Ochoa, we recognized that the word “arrest” in Section 66-8-123(A) refers to an investigatory detention to issue a citation for a traffic violation. 2008-NMSC-023, ¶ 14, 143 N.M. 749, 182 P.3d 130.

{12} Under this definition of “arrest,” the officer had the authority to arrest Defendant. Both speeding and exhibition driving are misdemeanor violations of the Motor Vehicle Code. NMSA 1978, § 66-8-7(A) (1989). Section 66-8-123(A) gave the officer the authority to arrest Defendant by pulling him over and issuing a citation for the alleged violations. As a result, under the Fresh Pursuit Act, he could pursue Defendant into another jurisdiction to issue the citation. Similarly, if violation of the municipal noise ordinance was a misdemeanor, then the officer had the authority under Section 3-13-2(A)(4)(d) to effect the same type of arrest for Defendant’s alleged violation of that ordinance.

{13} Because the officer had the authority to pursue Defendant outside the city limits, his subsequent administration of field sobriety tests and arrest of Defendant for DWI were valid. We examined a similar situation in County of Los Alamos v. Tapia, 109 N.M. 736, 790 P.2d 1017 (1990). In that case, the arresting officer observed the defendant running a stop sign and driving with an inoperative tail light. Id. at 738, 790 P.2d at 1019. The officer pursued the defendant into the neighboring county, where he arrested the defendant for DWI based on his observations during the stop. Id. Although we did not look specifically at the meaning of “authority to arrest” in Tapia, we held that the officer had the authority to pursue the defendant for petty misdemeanor traffic violations, and therefore the arrest for DWI was valid. Id. at 745, 790 P.2d at 1026. We see no factual distinction between this case and Tapia.

III. CONCLUSION

{14} Nothing in the Fresh Pursuit Act or related statutes indicates that an arrest is limited to a custodial arrest. As defined by the Legislature, an arrest includes pulling a motorist over to issue a citation. The evidence for Defendant’s DWI conviction was developed following a lawful, non-custodial arrest pursuant to the Fresh Pursuit Act. Defendant’s conviction and sentence for DWI are therefore affirmed.

{15} IT IS SO ORDERED.

EDWARD L. CHÁVEZ,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
RICHARD C. BOSSON, Justice
CHARLES W. DANIELS, Justice
In this case, we adhere to the general “going and coming rule” in workers' compensation law where oil field workers were killed or injured traveling home from a drilling rig located within commuting distance. We hold that exceptions to the rule, most notably the “traveling employee” exception, do not apply because Appellants were not traveling employees and because the evidence does not establish any other exception. Commuting was not required as an integral part of Appellants’ job duties for their employer. We affirm the Workers' Compensation Judge’s dismissal of their case.

FACTS AND PROCEDURAL BACKGROUND

Workers Raymond Flores and Hector Brito (Appellants') were killed, and workers Harley Harkness and Angelo Apodaca were injured in a one-vehicle accident on their way home from work. Harkness is not a party to this appeal, nor is Apodaca, who brought no claim from the accident.

Brito was driving the crew back to Roswell in his own vehicle at the time of the accident. The truck failed to negotiate a curve at a high speed, had a blow-out in its left rear tire, and rolled over a number of times, ejecting Harkness and Appellants. They were traveling at the end of their work day from the site of an oil drilling rig to Roswell, where they lived. The accident occurred after working hours and away from the work site. All were employees of McKay Oil Corporation (Employer).

Harkness was the driller for the oil crew in which Appellants worked as roughnecks. They were employed to work on an oil rig operating in southeastern New Mexico, approximately thirty-seven miles from Roswell on the 2-p.m. to 10-p.m. shift. As a driller, Harkness was the supervisor of the crew. This drilling crew was paid an hourly wage beginning when they arrived at the work site and ending when they left. Although they characteristically traveled to and from the rig together, the crew members were responsible for their own transportation to and from the rig site. They did not meet at or go to any place associated

1The Appellants concerned with Brito’s claims are actually the mothers of his young daughters, in whose names the claims were brought. Flores’ claim was brought in his own name.
with the company on their way to or from the rig. They were not paid for travel time or mileage to and from the drill site. As a driller, Harkness was paid a fifty-dollar daily per diem, which the driller has total discretion to spend as he pleases, for which he does not account to Employer, and which is not subject to any rules as to its application. The driller may, as happened in this case, agree to give his per diem to a crew member who actually drives the crew. The crew did not travel in a company vehicle, and at the time of the accident they were traveling in Brito’s truck. There were no requirements concerning crews traveling in any particular vehicle, though it was common for them to travel with the driller. Employer did not require or check for insurance or driver’s licenses of its drilling crew members.

5 Appellants and Harkness filed for workers’ compensation benefits arising from the accident. Employer denied that the injuries had arisen out of the course and scope of their employment, asserting that they were traveling from work and that recovery was precluded by the going and coming rule. Below, Appellants also raised the issue of whether they were “traveling employees” as an exception to the going and coming rule. The Workers’ Compensation Judge (WCJ) determined in a memorandum opinion that Appellants were not traveling employees and that, except for Harkness’s case, no exception to the going and coming rule applied to them.

6 Subsequently, the WCJ entered findings of fact and conclusions of law, finding that the workers commuted daily from their homes to the work site and back that the accident occurred after normal working hours and away from the workplace. The WCJ further found that no employee was required to travel with Brito to the work site and that each could have traveled in his own vehicle. The WCJ found that the accident was not in the course of employment, did not arise out of Appellants’ employment, and was subject to the going and coming rule. The WCJ dismissed Appellants’ claims with prejudice.

STANDARD OF REVIEW

7 When considering an appeal from the Workers’ Compensation Administration, we engage in whole record review. 
Moya v. City of Albuquerque, 2008-NMSC-004, ¶ 6, 143 N.M. 258, 175 P.3d 926. Whole record review involves a review of all the evidence bearing on the WCJ’s decision in order to determine if there is substantial evidence to support the result. Leonard v. Payday Prof’l, 2007-NMCA-128, ¶ 10, 142 N.M. 605, 168 P.3d 177; Herman v. Miners’ Hosp., 111 N.M. 550, 552, 807 P.2d 734, 736 (1991) (“We will not, however, substitute our judgment for that of the agency; although the evidence may support inconsistent findings, we will not disturb the agency’s finding if supported by substantial evidence on the record as a whole.”); Tallman v. AFB (Arkansas Best Freight), 108 N.M. 124, 129, 767 P.2d 363, 368 (Ct. App. 1988) (same). We will affirm the WCJ’s decision if, after taking the entire record into consideration and applying the law to the facts de novo, “there is evidence for a reasonable mind to accept as adequate to support the conclusion reached.” Leonard, 2007-NMCA-128, ¶ 10 (internal quotation marks and citation omitted).

DISCUSSION

8 Appellants realize that to prevail in this case, they must demonstrate that the circumstances of Flores’s and Brito’s deaths occurred outside of the domain of the going and coming rule. Accordingly, they assert that this accident is covered by the traveling employee exception to the rule. This exception would place workers driving home from their jobs within the scope and course of their employment by relating the means and reasons for their driving more directly to the benefit and purpose of their employment than to merely going to work and leaving it. We discuss the going and coming rule, the traveling employee exception, and our conclusion that Appellants’ activities fell well short of what would make them traveling employees.

The Going and Coming Rule

9 The Workers’ Compensation Act (the Act), NMSA 1978, § 52-1-1 to -70 (1987, as amended through 2007), is designed to compensate workers for injury arising out of and in the course of employment. The going and coming rule is codified by the Act:

[Injury by accident arising out of and in the course of employment . . . shall not include injuries to any worker occurring while on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which is not the employer’s negligence. ]

Section 52-1-19 (internal quotation marks omitted). As we recently stated, “an employee enroute [sic] to, or returning from, his place of employment, using his own vehicle[,] is not within the scope of his employment absent additional circumstances evidencing control by the employer at the time of the negligent act or omission of the employee.” Lessard v. Coronado Paint & Decorating Ctr., Inc., 2007-NMCA-122, ¶ 9, 142 N.M. 583, 168 P.3d 155 (alteration in the original) (internal quotation marks and citation omitted), cert. quashed, 2008-NM-CERT-002, 143 N.M. 667, 180 P.3d 674; see Ramirez v. Dawson Prod. Partners, Inc., 2000-NMCA-011, ¶ 7, 128 N.M. 601, 995 P.2d 1043 (“Under [the Act], . . . workers injured while traveling between home and work are generally not eligible for compensation.”).

{10} “It is well settled that this requirement involves two separate inquiries[,]” whether the injury (1) “arose out of” and (2) “in the course of . . . employment . . . In order to recover benefits, the worker must show that both requirements are satisfied.” Kloer v. Municipality of Las Vegas, 106 N.M. 594, 595, 746 P.2d 1126, 1127 (Ct. App. 1987). “The term ‘arising out of’ the employment denotes a risk reasonably incident to claimant’s work.” Id. (citing Losinski v. Drs. Corcoran, Barkoff & Stagnone, P.A., 97 N.M. 79, 80, 636 P.2d 898, 899 (Ct. App. 1981)). It requires that the employment be a contributing proximate cause of the injury. The causative danger must be peculiar to the work itself and not independent of the employment relationship. McDaniel v. City of Albuquerque, 99 N.M. 54, 55-56, 653 P.2d 885, 886-87 (Ct. App. 1982). The accidental injury must have its origin in a risk connected with the employment and have flowed from the risk as a rational consequence. Id.; Mortgage Inv. Co. of El Paso v. Griego, 108 N.M. 240, 242-43, 771 P.2d 173, 175-76 (1989). “The phrase, in the course of employment, relates to the time, place, and circumstances under which the accident takes place.” Veldkowitz v. Penasco Indep. Sch. Dist., 96 N.M. 577, 577, 633 P.2d 685, 685 (1981). We look at whether the injury “takes place within the period of employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the duties of employment or doing something incidental to it.” Chavez v. AFB Freight Sys., Inc., 2001-NMCA-039, ¶ 11, 130 N.M. 524, 27 P.3d 1011 (internal quotation marks and citation omitted). If the worker was not reasonably involved in fulfilling the duties of his employment at the time of his injury, he was not acting within the course of his employment. Gutierrez v. Artesia Pub. Sch., 92 N.M. 112, 114, 583 P.2d 476, 478 (Ct. App. 1978); Mortgage Inv. Co. of
To sum up, “[t]he general rule is that employment begins when the employee reaches his place of work and ends after he leaves his place of work.” Barton v. Las Cositas, 102 N.M. 312, 315, 694 P.2d 1377, 1380 (Ct. App. 1984). “Ordinarily, an injury that occurs to an employee while he is away from his work place is not compensable as an injury arising out of and in the course of his employment,” as the “employment relationship is suspended” between the times an employee leaves work and returns to it. Id. This rule generally applies when the employee’s employment is encompassed by fixed hours and a fixed place of work. Espinosa v. Albuquerque Pub’g Co., 1997-NMCA-072, ¶ 8, 123 N.M. 605, 943 P.2d 1058. Once employment status is suspended by removing the constraints of the work’s time and place, the risk of being on the road to and from work is a risk of the worker’s private conduct.

Appellants point to our decision in Barton that recognized the possibility of compensation if the employer were negligent and in instances where an “employee’s work creates the necessity for the travel,” except for travel covered under the going and coming rule. Id., 102 N.M. at 315, 694 P.2d at 1380. Other exceptions exist to the going and coming rule, such as the “dual purpose exception.” See Ramirez, 2000-NMCA-011, ¶ 10. The dual purpose exception was specifically adopted by the WCJ to confer coverage on Harkness for his injuries based on his job duties requested by his employer beyond the rig site and beyond hours worked by Appellants that made him responsible to haul water to the work site every day—a duty that required taking the water cooler home at night.

Other exceptions that might confer coverage for injuries incurred going to or coming from work arise when the employment contract includes transportation to and from work, when the employee has no fixed place of work, if the employee is on special assignment for the employer, or when special circumstances demonstrate that the employee was furthering the business of the employer. See Peer v. Workmen’s Comp. Appeal Bd. (B & W Constr.), 503 A.2d 1096, 1098 (Pa. Commw. Ct. 1986). In this case, Appellants wish us to apply the special circumstance of employer-required travel to remote (and sometimes various) work sites as a necessary aspect of the employment, furthering its purpose and constituting the basis for the traveling employee exception. It is Appellants’ burden to show that they fall within an exception to the going and coming rule. Barton, 102 N.M. at 315, 694 P.2d at 1380.

Since the going and coming rule exists to make everyday commuting between home and the workplace the employee’s business rather than the employer’s, some place of transition must exist where traveling away from the workplace is sufficiently related to the scope and purpose of an employee’s job duties that it brings traveling itself within the employment relationship for compensation purposes. Colorado has employed a framework of factors to determine whether an employee who is injured while going to or coming from work might come under an exception to the going and coming rule because of the employee’s travel. While not adopting these tests, we consider them to be highly illustrative of the factors that a court must consider when determining the extent to which travel to and from the work site is related to the core purpose of the employment, which is working in furtherance of the employer’s business. These factors include but are not limited to:

1. Whether the travel occurred during working hours, 2. Whether the travel occurred on or off the employer’s premises, 3. Whether the travel was contemplated by the employment contract, and 4. Whether the obligations or conditions of employment created a “zone of special danger” out of which the injury arose. Whether meeting one of the variables is sufficient, by itself, to create a special circumstance warranting recovery depends upon whether the evidence supporting that variable demonstrates a causal connection between the employment and the injury such that the travel to and from work arises out of and in the course of employment.

Staff Adm’ts, Inc. v. Reynolds, 977 P.2d 866, 868 (Colo. 1999) (en banc) (citation omitted). As we continue to discuss whether Appellants were traveling employees, a status that would place their trip home within the scope and course of their employment, we are mindful of this simple framework.

The Traveling Employee Exception

A traveling employee is one “whose work entails travel away from the employer’s premises.” 2 Arthur Larson & Lex K. Larson, Larson’s Workers’ Compensation Law § 25.01 (2006). Stated another way, “a traveling employee is one whose job requires travel from place to place or to a place away from a permanent residence or the employee’s place of business.” Ball—Foster Glass Container Co. v. Giovanelli, 177 P.3d 692, 698 (Wash. 2008) (en banc) (quoting 2 John P. Ludington, Modern Workers Compensation § 111:15 (Matthew J. Canavan ed., 1993)). “Traveling employees are employees for whom travel is an integral part of their jobs, such as those who travel to different locations to perform their duties, as differentiated from employees who commute daily from home to a single workplace.” Ramirez, 2000-NMCA-011, ¶ 11 (internal quotation marks and citation omitted).

Generally, if the worker was not reasonably involved in fulfilling the duties of his employment at the time of his injury, he was not acting within the course of his employment. See Gutierrez, 92 N.M. at 114, 583 P.2d at 478. The traveling employee exception serves to expand the scope and course of employment commensurate with the extent to which the employee is required to travel to perform his job duties and incurs risk specifically related to this additional activity. The traveling employee rule exists because there is some work of which travel is an integral part, and hence travel is accomplished in the scope and course of the employment. Ramirez, 2000-NMCA-011, ¶¶ 11-12. A job that characteristically takes the employee on the road presents a sufficiently different set of conditions and hazards to the traveling employee, as contrasted with an employee who merely commutes daily to work, and requires a different legal approach. See id. ¶¶ 9, 12 (“[I]t is the job’s requirement of travel and the employer’s authority and control in assigning its employees to different work sites that increase the normal risk and render compensable . . . injuries suffered during such travel.” (alterations in original) (internal quotation marks and citation omitted)). For this reason, “[t]he general rule is that an employee whose work entails travel away from the employer’s premises is, in most circumstances, entitled to workers’ compensation coverage from the time he leaves home until he returns.” Id. ¶ 11 (internal quotation marks and citation omitted).

An example of the traveling employee is one whose job takes the employee on the road over such distances that require eating and sleeping away from home, all to fulfill the duties of employment and further
the employer’s business. *Id.* Such persons are considered to be in the continuous employment of their employer, “day and night.” *Id.* (internal quotation marks and citation omitted). Such a traveling employee is exposed by his employment to hazards inherent to travel that he might otherwise have the option of avoiding. As such, “the hazards of the route become the hazards of the employment.” *Id.* 4. The driver was expected to sleep, and his injury occurred while moving a dresser to better access the phone on which he expected a wake-up call. *Id.* 5. We applied the traveling employee rule because this worker was exactly where he was supposed to be, doing what was required by his employment at the time he was injured. *Id.* 14. Therefore, the injury “occurred during the commission of an activity that was reasonable and foreseeable both as to its nature and manner of commission, and must have been of some benefit to the employer.” *Id.* 15 (internal quotation marks and citation omitted).

Elements of the Exception: The Nature of the Employee’s Travel

18 The increased risk to the employee of required travel away from home is the primary consideration in establishing the exception. It is not that the travel on the road creates the exception but that the job requires the employee to travel and does so under the “employer’s authority and control in assigning its employees to different work sites.” *Ramirez,* 2000-NMCA-011, ¶ 12 (internal quotation marks and citation omitted). Thus, a traveling employee is one for whom travel is required by the employer and is essential to the work required of the employee by the employer. *Id.* 17. Such travel takes the employee between different work sites. In *Chavez,* these requirements were met because travel was necessary to transfer trucks for the employer’s benefit. *Id.,* 2001-NMCA-039, ¶ 4. In *Ramirez,* the two compensated employees were (respectively) traveling to a designated location for mandatory time off and making a round trip to launder uniforms. *Id.,* 2000-NMCA-011, ¶¶ 18-19. The third employee who was not compensated was just riding along to accompany the employee who would return with the laundry. *Id.* 20. Similarly in this case, the WCJ ordered compensation for Harkness because his job duties required him to supply drinking water to the rig and excluded Appellants from compensation by the going and coming rule.

Elements of the Exception: The Relationship of the Injury to the Employment

19 Because the exception applies to activities within the course and scope of employment, the injury must “arise out of” the worker’s employment, and we must consider the time, place, and circumstances of the injury’s occurrence. *Id.* 14. This means that an employee “was performing acts the employer instructed the [employee] to perform, acts incidental to the [employee]’s assigned duties, or acts which the [employee] had a common law or statutory duty to perform.” *Id.* (internal quotation marks and citation omitted). Additionally, we held in *Ramirez* that the activity giving rise to the injury must confer some direct benefit on the employer and that it must be reasonably related or incidental to employment. *Id.* 16. In such an instance, the employee’s time spent traveling is brought within the course and scope of his employment.

20 Appellants urge that any employee becomes a “traveling employee” if the travel is “reasonably incidental to conditions and circumstances” of the employment. They cite *Ramirez* for this proposition and then quote the opinion as requiring the travel to be “an integral part of their jobs, . . . differentiated from employees who commute daily from home to a single workplace [sic].” *Id.* 11 (internal quotation marks and citation omitted). Appellants erroneously seek an expanded view of “incidental” to encompass “integral.” While employment is certainly “the cause of the workman’s journey between his home and the factory, it is generally taken for granted that workmen’s compensation was not intended to protect [an employee] against all the perils of that journey.” *Id.* 7 (internal quotation marks and citation omitted). Merely driving one’s self to work does not establish one of these exceptions. Such conduct is the essence of “going and coming” and does not arise from the work or from its course or scope. It is clear that to prevail on their claim that the traveling employee exception applies, Appellants’ driving must be something more essential to their work as a drilling team for Employer than mere commuting to and from work.

Injuries Did Not Arise Out of Appellants’ Employment Nor From Its Course and Scope

21 The foregoing constitutes the framework for our evaluation of the WCJ’s conclusion that the going and coming rule precluded compensating Appellants as “traveling employees” as this term was used in *Ramirez.* We conclude that substantial evidence supports this legal conclusion and address the elements of the rule in turn.

1. Injuries Did Not Arise Out of the Employment

22 It is necessary that both the risk of injury and the proximate cause of injury arise out of the employment to allow an award of compensation. See *Section 52-1-19.* Ordinarily, the hazards of traveling to and from work are not hazards of the job but hazards that are faced by all travelers that are unrelated to the employer’s business. *Barrington v. John Drilling Co.,* 51 N.M. 172, 177, 181 P.2d 166, 169 (1947). However, the traveling employee doctrine recognizes that because the employment itself requires travel, the traveling employee is necessarily exposed to hazards due to the employment which other employees are not exposed to because of their employment. *Ramirez,* 2001-NMCA-011, ¶ 12 (“[I]t is the job’s requirement of travel and the employer’s authority and control in assigning its employees to different work sites that increase the normal risk[,]” (internal quotation marks and citation omitted)). Evidence before the WCJ from the overall supervisor of the rig, John Pogue, clearly indicated that the employees did not reside at the job site because “there [was] no need to.” Harkness testified that he had worked for Employer precisely because Employer’s rigs were close to his home. This is not the traveling employee scenario.

23 The fact that Harkness turned over the $50 per diem that he received from Employer does not make Brito a traveling employee. *Barrington,* 51 N.M. at 178, 181 P.2d at 170 (holding that “[m]ore is required” than payment of the cost of transportation to establish liability). There is no evidence that the per diem represents payment for transportation as a benefit.

[2] The dual-purpose doctrine is suggested by this second circumstance, though in *Ramirez* we affirmed coverage for the workers as traveling employees.
furnished under the employment contract. Employer did not furnish transportation, nor did it specifically pay to transport its workers to the rig. Id. (stating the general rule that mere payment of transportation where an injury is sustained in the trip does not arise out of and in the course of employment). The situation in Barrington was different, in fact, in that transportation was provided as direct compensation in the employment bargain because wages had been frozen. Id.

Here, Employer exerted no authority or control over Appellants either before or after work. Employer imposed no requirement on employees’ driving or on other employee conduct away from the drilling rig. Driver’s licenses and insurance were not checked or verified by Employer, and no one was assigned to drive anyone else. Each crew member was responsible for his own transportation to and from the rig. Appellants were discharging no duty to request of Employer. “When work for the rig. Appellants were discharging no duty to for his own transportation to and from the rig. 

and no one was assigned to drive anyone or for mileage. See Rinehart v. Massman-Gladden, Inc., 77 N.M. 470, 472, 423 P.2d 991, 992 (1967) (stating that not being compensated for time while traveling is a factor in determining that a person is no longer operating in the scope and course of the person’s employment). Even if Brito had not been driving his own vehicle at the time of the crash, traveling home from work in the employer’s vehicle does not necessarily place an employee within the course of his employment. Id. at 471-72, 423 P.2d at 991-92.

The evidence below shows that the rigs were located about thirty-seven miles from Appellants’ homes and that the two operating rigs were within a couple of miles of each other. In Ramirez, the rig was ninety miles away from the employees’ homes, and the employees lived away from home, with their employer paying for food, lodging, and travel to the work site. Ramirez, 2000-NMCA-011, ¶¶ 2-3. With regard to distance from living accommodations, Appellants’ assertion that they were required to travel because of the “lack of accommodations at the rig site, and any type of crew vehicle provided by [Employer]” rings hollow. Nothing about their job duties required them to travel any great distance away from their residences to work on Employer’s oil rig. The rig itself was a fixed work site. The WCJ found that Appellants were commuters and that they did not need to seek accommodations or board away from home. These findings were reasonably based on the evidence. Appellants’ emphasis on the time spent getting their crew together to go to work is similarly unpersuasive; no employee was required to travel with the crew. We hold that nothing about the distance between Appellants’ homes and the rig was so burdensome as to confer upon Appellants any status beyond that of mere commuters.

Appellants’ emphasis on the time spent getting their crew together to go to work is similarly unpersuasive; no employee was required to travel with the crew. We hold that nothing about the distance between Appellants’ homes and the rig was so burdensome as to confer upon Appellants any status beyond that of mere commuters.
rom the time he got in Compton’s car until he would have arrived at the drill site had he not been killed, he was acting in the course of his employment, in that he was seeing to it that the crew would be on hand at four o’clock to begin work.” *Id.* at 89, 227 P.2d at 370. There, the driller himself had the specific responsibility, not present in this case, to ensure that his crew members were present at the rig and remained there for their shift by personally arranging for their transportation. Nothing in *Wilson* held that the crew members with whom the driller traveled were on any special mission encompassed by their employment. In this case, the WCJ found that no worker was required to travel with any other worker but that each could travel to the rig in his own vehicle. We hold that this finding was reasonably supported by the evidence.

Appellants have not established that their travel gave rise to an exception to Section 52-1-19 or to the common-law going and coming rule. In short, Appellants’ employment was not a contributing proximate cause of the accident since no circumstance necessarily arising from their employment presented them with any greater risk on the way home than that faced by normal commuters. It was not the lack of accommodations at the rig that caused them to travel home but rather the proximity of the rig to their residences. Their employment likewise did not require them to travel away from the location where they worked to perform other duties of their employment, and at the time of the accident they were not performing such other duties.

**CONCLUSION**

We conclude that the WCJ had ample evidence in the record to support the conclusion that Appellants were not traveling employees as defined under *Ramirez* and that compensation for their deaths was precluded by the going and coming rule. The judgment of the WCJ was reasonably based upon substantial evidence that the drilling crew was commuting and that their driving was not essential to their job duties. We therefore affirm the decision of the Workers’ Compensation Judge.

**IT IS SO ORDERED.**

RODERICK T. KENNEDY, Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
MICHAEL E. VIGIL, Judge
CERTIORARI DENIED, NO. 31,216, AUGUST 6, 2008

From the New Mexico Court of Appeals

Opinion Number: 2008-NMCA-124

Topic Index:
Administrative Law: Standard of Review
Government: Land Use
Property: Subdivisions; and Vested Rights

JOSEPH F. MILLER, et al., Plaintiffs-Appellees, versus
BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, et al., Defendants-Appellants.
No. 26,336 (filed: June 18, 2008)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
Timothy L. Garcia, District Judge

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OPINION

RODERICK T. KENNEDY, Judge

In this opinion, we discuss limits on the continuing validity of approval given to a subdivision plat. Under the circumstances of this case, we hold that the approval given to a subdivision plat in 1986 did not survive to 2004 so as to grant rights to proceed with development of the land and that Santa Fe County was correct in determining that the plat was no longer viable so as to deny the landowner construction permits.

We reverse the district court and remand for proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Introduction

The dispute in this case concerns the remaining portion of a tract of undeveloped land in the Eldorado area of Santa Fe County referred to as Lot 8, owned by Appellee Miller. In 1986, a subdivision plat was approved for Lot 8 by the Santa Fe Board of County Commissioners (Board). The land was subsequently split into two lots; one is partially developed, and the portion purchased by Miller passed through other owners without being developed. Miller sought to develop his lot. In 2004, the Board issued a decision that the subdivision plat that had been approved in 1986 was no longer viable and denied construction permits for Miller. Miller appealed to the district court, and the district court reversed the Board’s order. The Board now appeals the district court’s final order on appeal.

Historical Facts

In May of 1986, the Board granted the original owners of Lot 8 final plat approval to develop a 100 unit subdivision known as Tierra Colinas. This final plat approval was subject to several conditions. The final plat for Lot 8 was never recorded with the County Clerk, and the land was not developed at that time.

Lot 8 was subsequently sold to two parties, Michael Richter and Pat Coughlin. In April of 1988, these owners of Lot 8 decided to divide the lot into two parcels, referred to as Lot 8A and Lot 8B. The lot split was approved by Santa Fe County and recorded in April of 1988. Lot 8A was retained by Mr. Richter and is the subject of this appeal.

In June of 1994, Mr. Coughlin, the owner of Lot 8B, went before the Board asking that it “reapprove” the Tierra Colinas subdivision as a down-scaled subdivision from 100 units to 50 units to be built on Lot 8B. The Board granted conditional approval of the down-scaled subdivision, requiring compliance with the original conditions imposed on the Tierra Colinas subdivision and additional conditions.

In 1996, Lot 8A’s owner applied for and received master plan approval of a 98-unit residential subdivision called Sun Ranch East on Lot 8A. This master plan differed from the Tierra Colinas final plat approval for the same acreage of Lot 8 in almost doubling the density of development from that previously approved. This master plan was approved; the approval was recorded with the County Clerk. No further action was taken to develop Lot 8A.

Later in 1996, however, the Board passed a series of moratorium ordinances to deal with a water emergency within the Eldorado communities. The first was Ordinance No. 1996-4: Ordinance Declaring a Water Emergency within the Service Area of Eldorado Utilities. The ordinance stated that “no applications for new land divisions, master plans and subdivisions will be accepted by the Santa Fe County Land Use Administrator or his staff and no pending applications for land divisions, master plans or subdivisions will be acted upon by the Santa Fe County Land Use Administrator, for any property within Eldorado Utilities’ Service Area.” Subsequent ordinances have since been enacted which further limit development in the service area of Eldorado Utilities due to the water emergency. It is undisputed that Lot 8A is within the Utilities’ service area.

By January of 2000, Lot 8A had passed to Stephen Gibbens. On January 21, 2001, the Assistant County Attorney sent Mr. Gibbens a letter informing him that the County would not recognize the 1986 Tierra Colinas preliminary and final development plans. The County’s attorney gave three bases for his opinion that the 1986 final plat approval was not valid. First, he stated that Mr. Gibbens did not have a vested right in the 1986 development plan because there was no contracting, building, or other substantial reliance by Mr. Gibbens on the 1986 approval. Second, the County...
stated that because the conditions of the 1986 approval were never met, the 1986 final development was never approved, and therefore no rights had vested. Third, the County took the position that the approval of the 1996 master plan for a new and more dense subdivision on the property showed the prior owner’s intent to abandon the 1986 Tierra Colinas plan. The record does not indicate whether Mr. Gibbens took any further action with respect to this issue.

{10} Two years later, in March of 2003, Miller bought Lot 8A by warranty deed. The Real Estate Purchase Agreement stated that the property was being sold in “as is” condition. The agreement further stated that the seller has sustained losses and damages, including for diminution of the value of the Property, by reason of certain actions, inactions, errors, omissions, breaches of contract and/or wrongful conduct of the County of Santa Fe, the State of New Mexico, Amrep Corporation, Eldorado at Santa Fe, Inc., Eldorado Utilities, Inc., and others presently unknown which resulted in the imposition of a moratorium on residential subdivision development at the Property.

In February of 2004, Miller submitted a final plat plan and a development plan to the County Land Use Director for a scaled-back 50-unit subdivision on Lot 8A.

{11} On March 31, 2004, the County Land Use Administrator, Roman Abeyta, sent Miller a letter in which he stated that the County would not recognize the 1986 Tierra Colinas final plat approval. Mr. Abeyta referenced the January 21, 2000 letter from the Assistant County Attorney to Mr. Gibbens. Mr. Abeyta stated that Miller had not provided any information that would change the County’s opinion that the 1986 plat had expired or been abandoned. Mr. Abeyta also stated that Lot 8 had been split into two plats and recorded subsequent to 1986, thus creating two lots of record, and that the conditions of final plat approval for the 1986 plat had never been met. Specifically, the County had never been supplied with proof of adequate water supply and infrastructure as required. Finally, Mr. Abeyta stated that it was unreasonable to expect the County to allow such a project for which approval had been granted nearly 20 years ago to proceed in light of the development and water availability issues that had arisen since then.

{12} On May 20, 2004, Miller appealed the County Land Use Administrator’s decision to the County Development Review Committee (CDRC). CDRC determined that the final plat approval for the 1986 Tierra Colinas subdivision had been abandoned and was expired. CDRC also determined that the 1996 Sun Ranch East master plan approval for Lot 8A had extinguished any prior land use or subdivision approvals for that property. Finally, they determined that the original conditions of approval had never been fulfilled. Therefore, there was never any actual approval and no vested rights to the subdivision.

{13} In July of 2004, Miller appealed the CDRC’s decision to the Board. At the hearing, Miller testified that he had met with Country Attorney Steve Kopelman and an Assistant County Attorney prior to purchasing Lot 8A and that he had been assured that the 1986 final plat approval for Tierra Colinas was still valid. Miller also testified that he was assured by the Land Use Administrator that the subdivision approvals were still in effect. Miller stated that he relied on a 1993 letter from the then County Attorney, Terrence Brennan, to Mr. Coughlin (the owner of Lot 8B) in which Brennan stated: “Since Terra Colina [sic] was approved by Santa Fe County as a subdivision in 1986, and since that approval has never been rescinded, amended, or otherwise affected, Santa Fe County recognizes Terra Colina [sic], and the water tabs allocated to it, as a prior subdivision.”

{14} The Board unanimously upheld the decision of the CDRC. The Board’s letter decision stated that it determined that the 1986 50-lot residential subdivision approval had been abandoned. In its order, the Board stated several bases for its decision. It determined that the 1986 Tierra Colinas unrecorded plat had been abandoned by the action of the previous owners of the Lot 8A. The Board also found that the previous owner demonstrated intent to abandon the plat by dividing Lot 8 into two separate lots in 1988. The Board stated that “[t]he original subdivision could not now be constructed, as half of the property is no longer owned by the Applicant.” The Board also stated that the 1996 master plan approval for the Sun Ranch East subdivision differed from the previous subdivision because it had increased density and made other configuration changes. The Board noted that the conditions of the 1986 plat approval were never satisfied. The Board further found that these actions on the part of the previous owners evidenced an intent to abandon seeking final approval of the 1986 plat. The Board also found that the 1986 final plat approval had to be recorded within a reasonable period of time and that approval no longer existed because of the passage of time. Finally, the Board concluded that it was unreasonable for Miller to expect to be exempted from the current moratorium ordinances based on a 20-year-old unrecorded plat.

District Court Appeal

{15} Miller appealed the Board’s decision to the district court. The district court reversed the Board, determining that there was no legal basis to deny the plat approval. In its final order, the district court found that “[t]he 1986 County Commission final approval for the properly submitted subdivision of Lot 8, Eldorado, Santa Fe, New Mexico, is still in force and effect and has been neither extinguished nor modified.” The court determined that obtaining master plan approval for Sun Ranch East subdivision did not extinguish or modify the Tierra Colinas final plat approval, nor did the passage of time affect the Tierra Colinas approval. The court found that the conditions of final approval imposed by the County in 1986 must be satisfied prior to recording, and that all ordinances applicable to existing subdivision approvals which have not obtained final approval status also had to be satisfied. Finally, the court determined that the moratorium ordinance did not operate to prevent recording of the subdivision plat for Lot 8A once the conditions and other ordinances were met.

DISCUSSION

Standard of Review

{16} “[T]his Court applies the same statutorily defined standard of review as the district court.” Lantz v. Santa Fe Extraterritorial Zoning Auth., 2004-NMCA-090, ¶ 5, 136 N.M. 74, 94 P.3d 817. “The district court may reverse an administrative decision only if it determines that the administrative entity . . . acted fraudulently, arbitrarily, or capriciously; if the decision was not supported by substantial evidence in the whole record; or if the entity did not act in accordance with the law.” Gallup Westside Dev., LLC v. City of Gallup, 2004-NMCA-010, ¶ 10, 135 N.M. 30, 84 P.3d 78. We must also determine “whether the district court erred in the first appeal.” Id. (internal quotation marks and citation omitted).
On appeal, the Board argues that there was never any final plat approval for the 100-unit subdivision on Lot 8. In the alternative, the Board argues that the 1986 plat approval (1) was extinguished and abandoned by the actions of the owners of Lot 8A; (2) was subject to revocation by the Board for failure to comply with the conditions of approval; and (3) was never vested, and therefore development on Lot 8A is subject to all current ordinances, including the 1996 moratorium ordinance on new developments.

We begin by considering the vested rights doctrine because the corresponding issue is dispositive. Accordingly, we do not reach the other arguments made by the Board urging reversal.

**Vested Rights and the Board’s Authority to Revoke Plat Approval**

In its order, the Board stated that it could not recognize a purported subdivision on Lot 8A based on the Tierra Colinas plat approval that was 20 years old, unrecorded, and with conditions of approval that had never been fulfilled. The Board also determined that it was unreasonable for Miller to expect to be exempt from the current development moratorium ordinances on the basis of the 20-year-old final plat approval. On appeal, the Board makes several arguments regarding the effect of the passage of time on the viability of the Tierra Colinas plat approval, relying on New Mexico’s vested rights doctrine. The Board argues that Miller’s rights are not vested, that they expired with the passage of time, that it has the power to revoke the Tierra Colinas plat approval, and last that because his rights are not vested he is subject to all current subdivision regulations, including the moratorium. We first investigate what a vested right is, and we conclude that rights based on the 1986 approval are subject to expiration and revocation. We hold that Miller’s rights are not vested. As a result, we further hold that the Board had the authority to revoke its previous plat approval because a reasonable period of time had passed with the original conditions of approval not having been met.

**A. Vested rights depend on written approval and substantial change in position in reliance on approval**

“In New Mexico, the vested rights doctrine applies to an ongoing development or project that has been approved and upon which substantial investment has been made.” *KOB-TV, LLC v. City of Albuquerque*, 2005-NMCA-049, ¶ 13, 137 N.M. 388, 111 P.3d 708. “The vested rights doctrine allows the development or project to be completed and operated in accordance with the regulations in effect at the time of approval and substantial investment. Thus, the vested rights doctrine is used in those instances in which there is work in progress when a change in land use regulations goes into effect.” *Id.* (internal citations omitted). “In order to establish a vested use so as to exempt property from the necessity of complying with applicable land use regulations, as a general rule, a party asserting a prior vested right must establish two factors: (1) issuance of written approval to the applicant for the proposed subdivision or construction project; and (2) a substantial change in position by the applicant in reliance upon such approval.” *Sandoval County Bd. of Comm’rs v. Ruíz*, 119 N.M. 586, 589, 893 P.2d 482, 485 (Ct. App. 1995); see also *El Dorado at Santa Fe, Inc. v. Bd. of County Comm’rs of Santa Fe County*, 89 N.M. 313, 319, 551 P.2d 1360, 1366 (“Upon compliance with the statutory prerequisites to subdivision and sale by a subdivider, followed by a determination of the board of county commissioners that such compliance had in fact occurred, rights vest in the subdivider which cannot thereafter be withheld, extinguished or modified except upon due process of law.”). Additionally, the reliance must be reasonable. See *Gallup Westside Dev., LLC, 2004-NMCA-010, ¶ 18.*

1. Written approval

The Board argues that Miller cannot show either prong of the vested rights analysis. The Board first argues that Miller cannot show written approval for the subdivision. Miller relies on the minutes of the May 1986 board meeting at which the Board gave final plat approval for the Tierra Colinas subdivision on Lot 8. Miller argues that the minutes were recorded in the records of the County Clerk to show written approval. Miller also points to the May 14, 1986 letter from Ernest Martinez (land use administrator) to David Schutz in which Mr. Martinez stated that the Board had decided to give final plat approval for Tierra Colinas subject to conditions.

The Board does not state what would constitute written approval, nor does it argue that the recorded minutes of the board meeting are insufficient to constitute written approval. Because we determine next that Miller is unable to establish that he made a substantial and reasonable change in position in reliance on the approval of the Tierra Colinas subdivision, we defer decision on what constitutes adequate written approval to vest property rights in a subdivision plan.

2. Miller cannot establish a substantial change in position in reliance on the Tierra Colinas subdivision.

Under the circumstances of this case, Miller has not established that he meets the second prong of the analysis: that he made a substantial and reasonable change in position in reliance on the approval. Miller purchased Lot 8A in March 2003, seventeen years after the Board granted final plat approval for the Tierra Colinas subdivision. Miller argues that he relied on the representations of the then County Attorney and Assistant County Attorney that the Tierra Colinas approval was valid as an approval for a subdivision on Lot 8A. Miller also argues that in addition to purchasing the property, he expended money on engineering drawings and obligated himself for several hundred thousand dollars in contracts for utility costs.

Miller’s argument that he purchased the property in reliance on representations of county officials that the Tierra Colinas plat approval was valid is not sufficient to establish reliance under the vested rights doctrine. Language in *Gallup Westside* suggests that a developer incurring extensive contractual obligations pursuant to the purchase of property might be sufficient to confer vested rights. *Gallup Westside Dev., LLC, 2004-NMCA-010, ¶ 18* (emphasis added). However, the substantial change in position must be reasonable. See *id., ¶ 18.* The purchase of land alone is insufficient to confer vested rights on the purchaser, see *id.,* and Miller’s sole reliance on the county officials’ statements is belied by the parties’ actions.

The November 18, 1993 letter from Terrence Brennan to the owner of Lot 8B, in which he stated that the Tierra Colinas approval had never been rescinded, amended, or otherwise affected and that the County recognized it as a prior subdivision was contradicted some seven years later when the County informed Mr. Gibbens, Miller’s predecessor in interest, by letter in January of 2000 that it did not consider the final plat approval for the subdivision to be valid. Miller does not argue that he was not aware of the County’s position when he purchased the property and entered into contracts for utilities.

By the time Miller purchased Lot
8A and entered into contracts for utility services, he knew that the original Tierra Colinas plat approval was conditional and that the conditions of approval had not been met. The land sales contract for Lot 8A between Miller and its previous owner states that the property was sold “as is” and recites that there had been a diminution in the value of the property based on wrongful conduct on the part of the Santa Fe County and others, which resulted in the imposition of a moratorium ordinance. Accordingly, Miller cannot show reasonable reliance on the Tierra Colinas approval. Given all these circumstances, Miller’s reliance on the Tierra Colinas plat approval was not reasonable, and therefore Miller does not have vested rights. See id. (“We see no substantial evidence in the record that ties such asserted actions to any governmental assurances to support reasonable, actual reliance or change in position.”).

(27) The vested rights doctrine operates to exempt a developer from compliance with regulations and laws enacted subsequent to the rights vesting. See e.g., Cerillos Gravel Prods., Inc. v. Santa Fe Bd. of County Comm’rs, 2005-NMCA-023, ¶ 22-23, 138 N.M. 126, 117 P.3d 932 (holding that the vested rights doctrine did not prevent the County from enforcing its regulations on existing mine operations); Gallup Westside Dev., LLC, 2004-NMCA-010, ¶ 21 (holding that a final plat approval did not give vested rights to prevent application of current subdivision regulations); In the Matter of Sundance Mountain Ranches, Inc., 107 N.M. 192, 194, 754 P.2d 1211, 1213 (Ct. App. 1988) (applying a vested right analysis to hold that ordinances and regulations in effect at the time of subdivision application applied to ongoing development of proposed subdivision); Brazos Land, Inc. v. Bd. of County Comm’rs, 115 N.M. 168, 170, 848 P.2d 1095, 1097 (Ct. App. 1993) (applying vested rights analysis to determine that new zoning ordinance did apply to proposed subdivision because there was no approval of the application or substantial reliance or changing position by the developer).

(28) Miller’s rights are not vested. Because Miller does not have vested rights in the subdivision, he is not exempt from the general rule that a landowner must comply with all applicable law and regulations at the time of development, including the moratorium ordinances. See KOB-TV, LLC, 2005-NMCA-049, ¶ 14. This conclusion, however, does not resolve the question of whether the Board had the authority to revoke the 1986 plat approval. We have not previously decided whether the lack of vested rights alone is a sufficient basis for revocation of a previously approved final subdivision plat. There are also no New Mexico cases dealing with the passage of time as affecting a subdivision plat approval.

B. Authority to revoke the plat

(29) Miller argues that because the Board did not revoke the Tierra Colinas plat approval, it was reasonable to rely on the approval. The Board’s position is that because Miller does not have vested rights in the Tierra Colinas subdivision, the Board had authority to revoke the plat approval. The Board also argues that the passage of more than 18 years from the original approval in the absence of vested rights renders the plat approval invalid for a subdivision on Lot 8A.

1. County could revoke because conditions were not met.

(30) The Board argues that even though the plat approval was at one time valid, because there are no vested rights in the Tierra Colinas approval, it has the authority to revoke the approval based on the failure to comply with conditions of approval. The Board relies on NMSA 1978, § 47-6-25(1995), under the New Mexico Subdivision Act, which states: “The board of county commissioners may suspend or revoke a plat as to the unsold, unleased or otherwise unconveyed portions of a subdivision’s plat if the subdivision plat does not meet the schedule of compliance approved by the board.” The Board acknowledges that the 1986 final plat approval did not specify a time for compliance with the conditions attached to approval. However, the Board argues that under Gallup Westside, a reasonable time for compliance with the conditions of approval can be implied. Gallup Westside Dev., LLC, 2004-NMCA-010, ¶ 16. In Gallup Westside, the City gave final plat approval for a subdivision in 1975. Id. ¶ 2. The final plat approval was expressly conditioned on the developer’s compliance with the terms of the Assessment Procedure Agreement (APA). Id. ¶ 3. Although some initial road grading and installation of utilities was done, Westside did not attempt to develop the property until 1996, at which time the original APA had expired. Id. ¶ 5. The city decided to extend the APA but to also amend it to require compliance with current building standards and practices. Id. Westside argued that it should not have to comply with the current regulations. Id. ¶ 6.

(31) On appeal, the issue was whether Westside had vested rights under the original APA. Id. ¶¶ 12, 13. The Court held that Westside did not have vested rights because although the City had granted final plat approval, the approval was conditioned on compliance with the terms of the APA, and the APA allowed for the City to vacate the final plat approval if the conditions were not met. Id. ¶ 14 (“[T]he first prong of the vested rights doctrine is not met as long as revocation of that approval remains a possibility.”). Under the terms of the APA and the applicable subdivision regulations, approval was conditioned on the developer providing assurances for the installation of public improvements. Id. ¶ 16. The Court held that, although there was no specified time for performance under the method chosen, it was reasonable to construe that the method did require performance within a reasonable period of time. Id. The Court also determined that twenty years was a reasonable time in which to have complied. Id.

2. County could revoke if substantial time had passed without action.

(32) In 2000, Mr. Gibbens was informed that the County would not recognize the Tierra Colinas plat approval as valid, in part because there had not been compliance with the conditions of approval. This occurred fourteen years after the approval of Tierra Colinas. In Parker, the county suspended a plat approval because the developer failed to meet a deadline for surfacing all roads. Parker v. Bd. of County Comm’rs, 93 N.M. 641, 642, 603 P.2d 1098, 1099 (1979). The county had enacted a regulation that allowed it to suspend or revoke a subdivision plat approval because of a failure to comply with county regulations. Id. The Court in Parker determined that even after approval of a subdivision, Section 47-6-25 “clearly allows a county to revoke or suspend that

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1Parker was decided under former Section 47-6-25: “The board of county commissioners may suspend or revoke approval of a plat as to the unsold or unleased portions of a developer’s plat if the developer does not meet the schedule of compliance approved by the board.” Id. at 643, 603 P.2d at 1100.
approval for failure of the developer to comply with a schedule of compliance.” Parker, 93 N.M. at 643, 603 P.2d at 1100. The Court also stated:

We cannot equate the approved subdivision plat in this case with vested property rights, as the approval was conditioned upon performance by the subdivider. Suspension or revocation of plat approval remain realities for the developer until he complies with the reasonable conditions imposed by the county within its authority. The appellant failed to accomplish the conditions he agreed to accomplish and which were required by the county as a prerequisite to plat approval.

Id. at 644, 603 P.2d at 1101. In this case, the Board has noted a similar provision that appears in the Santa Fe County Subdivision Regulations and was not included in the record proper.

{33} Applying Section 47-6-25 and Cerrillos Gravel Prods., Inc., 2005-NMSC-023, ¶¶ 22-24, we hold that compliance with the conditions of final approval did not occur within a reasonable period of time and that the Board can revoke the Tierra Colinas approval. Although it did not specifically address the issue of revocation, the Board determined that the plat approval was invalid. “[A] court may uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” Rio Grande Chapter of the Sierra Club v. New Mexico Mining Comm’n, 2003-NMSC-005, ¶ 13, 133 N.M. 97, 61 P.3d 806 (internal quotation marks and citation omitted).

CONCLUSION

{34} Because we conclude that Miller’s rights were not vested and that the Board had the authority to revoke the 1986 plat approval, we need not address whether that approval was extinguished or abandoned. We reverse the district court, and we remand for proceedings consistent with this opinion.

{35} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

A. JOSEPH ALARID, Judge

CELIA FOY CASTILLO, Judge


**Certiorari Denied, No. 31,220, August 6, 2008**

From the New Mexico Court of Appeals

**Opinion Number: 2008-NMCA-125**

**Topic Index:**
Criminal Law: Burglary; Conspiracy; and Larceny
Criminal Procedure: Right to Confrontation; and Witnesses
Evidence: Hearsay; and Present Sense Impression

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
RUDY CHAVEZ,
Defendant-Appellant.
No. 27,346 (filed: June 20, 2008)

**APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
ERNESTO ROMERO, District Judge

GARY K. KING
Attorney General
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JOHN BIGELOW
Chief Public Defender
WILL O’CONNELL
Assistant Appellate Defender
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for Appellee

**for Appellant**

**OPINION**

Roderick T. Kennedy, Judge

[1] Defendant Rudy Chavez was arrested for auto burglary and other charges after an anonymous observer handed the victim a note with a physical description of the thief and a description and license plate number of the vehicle in which the thief left the scene. Over Defendant’s objections, the substance of the note was admitted into evidence through the testimony of the victim. Defendant was convicted of auto burglary, larceny, and conspiracy to commit auto burglary. Defendant appeals, citing the admission of the note as a testimonial statement under Crawford v. Washington, 541 U.S. 36 (2004), and State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, and found it admissible under Rule 11-803(A) NMRA as a statement of “present sense impression.”

[2] The victim in this case arrived at his car in a parking lot to find his car door ajar. He was approached by an unknown man, who told him that someone had just taken a “book” from the victim’s car. The man handed the victim a note that contained information about the theft. We pause to state that neither the note itself nor its author has ever turned up. The victim, upon returning home, called the police to report the theft of the book, which was actually a case of the victim’s CDs. The victim gave the note to the police. Detective Salazar traced the license plate number to an address occupied by Defendant and his girlfriend. Defendant was of a similar appearance to the description in the note. When contacted, Defendant’s girlfriend admitted having taken the CDs but stated that Defendant had not participated in the theft and had been upset with her when he later became aware of her theft. Defendant told the same story, that his girlfriend had stolen the case and that he was upset about it. The CDs were recovered from their house, along with clothing matching the description given in the note, and Defendant was ultimately charged with the crime.

[3] At trial, Defendant had no quarrel with the State’s use of the license plate number but sought to exclude the portion of the note’s statement that gave a description of the thief, asserting that it was testimonial hearsay and that under the New Mexico Constitution and United States Constitution its admission would violate his right to confront the person who made the statement. The State countered that the statement was not offered for the truth of the matter asserted—namely, the thief’s identity—but rather to provide the information that set the victim’s actions in motion, as would be done with any anonymous tip. The district court ruled that the license plate number was admissible. The court further stated that it did not regard the note as a testimonial statement under Crawford v. Washington, 541 U.S. 36 (2004), and State v. Romero, 2006-NMCA-045, 139 N.M. 386, 133 P.3d 842, and found it admissible under Rule 11-803(A) NMRA as a statement of “present sense impression.”

[4] Largely ignored by Defendant’s brief in chief, Detective Salazar testified at trial that upon contacting Defendant at the house, Defendant admitted to having possession of the CDs and asked the detective if charges could be dropped if he returned them. Detective Cain-Saul testified that Defendant made a statement to her in which he said that his girlfriend saw the CDs in the car next to his. He went to the passenger side of his own vehicle to unlock the door for his girlfriend, and as he returned to the driver’s side, his girlfriend grabbed the CDs. He said “come on, let’s go,” and Defendant drove away. Detective Cain-Saul added that Defendant told her that he was not surprised at the arrival of the police because so many people had been in the parking lot to witness the incident. Defendant’s girlfriend testified that it had been she and not Defendant who had stolen the CDs. The jury was instructed as to the use of a voluntary statement as well as accessory liability.

**The District Court’s Admission of the Statement Was Not Error.**

The Statement Is Not Testimonial; There Is No Confrontation Clause Violation.

[5] Defendant claims that the admission of the note violates his right to confront and cross-examine the declarant. We review constitutional claims such as this de novo. State v. Walters, 2006-NMCA-071, ¶ 23, 139 N.M. 705, 137 P.3d 645, rev’d on other grounds, 2007-NMSC-050, 142 N.M. 644, 168 P.3d 1068; State v. Lopez, 2000-NMSC-003, ¶ 10, 128 N.M. 410, 993 P.2d 727. Under Crawford, “[t]he Confrontation Clause is always implicated when ‘testimonial’ statements of an absent witness are admitted.” Romero, 2006-NMCA-045, ¶ 46 (citation omitted).
{6} Defendant asks us to review admission of the statement under Crawford as it has since been applied. Crawford, 541 U.S. 36; see, e.g., State v. Alvarez-Lopez, 2004-NMSC-030, ¶¶ 20-22, 136 N.M. 309, 98 P.3d 699; State v. Silva, 2007-NMCA-117, ¶ 43, 142 N.M. 686, 168 P.3d 1110, cert. granted, 2007-NMCERT-008, 142 N.M. 436, 166 P.3d 1090. In Silva, this Court held that a statement given by the declarant to a girlfriend that he had killed someone at the defendant’s behest was not a testimonial statement subject to the application of Crawford. Silva, 2007-NMCA-117, ¶¶ 33, 43. Specifically, we said that “[t]he statement was not given in connection with any official contact with the declarant, and was not given in such circumstances that the declarant might anticipate its preservation for later use to establish or prove past events potentially relevant to later criminal prosecution.” Id. ¶ 41 (internal quotation marks and citation omitted).

“We therefore do not view the statement as one given in a situation that would lead the declarant to have an objective belief that it would be available for use at a later trial, and [we] hold that the statement is not testimonial.” Silva, 2007-NMCA-117, ¶ 41; see also Alvarez-Lopez, 2004-NMSC-030, ¶ 23 (finding the admission of accusatory statements made to “acquaintances” not in violation of the Confrontation Clause).

{7} Similarly in this case, the anonymous declarant gave a note to the person whose CD folio had just been stolen from the car parked near the declarant’s vehicle. The note was intended for the victim, and the use to which it would be put was solely at the victim’s discretion. It was not solicited by or given to the police by the declarant, whose only apparent motive was helping the victim ascertain the identity of the thief. Because the statement is not testimonial, its admission is not barred by the Confrontation Clause. Present Sense Impression

{8} Hearsay is an out-of-court statement by a person offered into evidence to prove the truth of the matter asserted in the statement. See Rule 11-801(C) NMRA. A statement is an oral or written assertion. Rule 11-801(A) (1) NMRA. The assertion of the unknown witness concerning the burglary made to the victim who is then asked to testify about it is a statement, is hearsay, and absent an applicable exception to the hearsay rule is inadmissible. Rule 11-802 NMRA; Rule 11-803.

{9} We review the admission of evidence for abuse of discretion, noting that trial courts have broad latitude in exercising their discretion under this rule. State v. Salgado, 1999-NMSC-008, ¶¶ 5, 6, 126 N.M. 691, 974 P.2d 661. Admission of a statement under the present sense impression exception requires meeting the following test: The statement must be made while the event or condition is being perceived by the declarant or immediately thereafter. Id. ¶ 5; Rule 11-803(A). It is immaterial that the declarant is unavailable to testify; it is immaterial that the declarant is unknown. The statement must be one that describes or explains the event or condition, and it must be made very close in time to the event that the statement describes. The judge must decide if the time element affects the statement’s reliability and if there is any apparent motive to lie. State v. Perry, 95 N.M. 179, 180-81, 619 P.2d 855, 856-57 (Ct. App. 1980) (noting that other considerations include the type of case, the availability of other evidence, details corroborating the statement, and the setting in which the statement arose). The statement may be in writing. See State v. Hope, 2001 MT 207, ¶ 14, 33 P.3d 629 (holding that “contemporaneous notes based on personal observations are admissible as recorded present sense impressions”), post-conviction relief granted by 2003 MT 191, 74 P.3d 1039; Rules 11-801(A)(1), -803(A). In this case, the victim was handed the statement by a man who occupied a vehicle parked near the victim’s car, who told the victim “they just left” when handing him the note. The tests for admitting this statement under the present sense impression exception are met. We can find no abuse of discretion in the court’s ruling and turn to the constitutional issue.

CONCLUSION

{10} There being no constitutional impediment to admitting a statement that falls squarely into the present sense impression exception to the hearsay rule, the district court did not err in admitting the statement. We affirm Defendant’s convictions.

{11} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

JONATHAN B. SUTIN, Chief Judge
IRA ROBINSON, Judge
OPINION

LYNN PICKARD, Judge

[1] Defendant appeals his convictions for child abuse by endangerment of his three children. He challenges (1) whether the evidence was sufficient to support his convictions, (2) whether the evidence supported only a single conviction under New Mexico law, (3) whether the trial court erred in declining to grant a directed verdict on the child abuse resulting in death count, and (4) whether giving the child abuse uniform jury instruction (UJI) was fundamental error. We affirm the trial court on all issues except the second, and we reverse one of Defendant’s convictions.

FACTS

[2] Defendant is the father of Juan, who was four years old at the time criminal child abuse charges were filed against Defendant; Leo, who was two years old; and Shelby, who died at the age of five months. The mother of the children is Jennifer Wheeler. In 2001, an anonymous referral was made to the New Mexico Children, Youth and Families Department (CYFD) for neglect.

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APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY

JAMES WAYLON COUNTS, District Judge

GARY K. KING
Attorney General
KATHERINE ZINN
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

JOHN BIGELOW
Chief Public Defender
WILL O’CONNELL
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

After the referral, Defendant did not apply for Housing and Urban Development housing because he wanted the family members to “do it on [their] own.” Instead, Defendant and his family moved into a trailer in Tularosa, New Mexico, despite the fact that Wheeler did not believe that the trailer was a healthy, safe environment for the children.

[3] Wheeler took a job outside the home working long hours while Defendant stayed home with the children. Wheeler testified that although Defendant sometimes worked to support the family, he mostly worked on his own car and played video games. Most of the money he earned went into his car. When the boys misbehaved, Defendant hit them. When Shelby cried, Defendant would visit Wheeler at work, leaving all three children unattended at home.

[4] At some point, Shelby’s bassinet broke, and Defendant fashioned a bed for her out of a dresser drawer. The night Shelby died in 2003, Wheeler placed her in the drawer with a pillow, a sheet, and a blanket. Shelby woke up at 3:30 a.m., but she would not take a bottle. Defendant and Wheeler placed her on her stomach in the drawer, and Wheeler went back to sleep. Later, Defendant shook Wheeler awake, saying that Shelby was not breathing. Attempts to resuscitate Shelby failed, and law enforcement was notified. It was noted by a medical investigator at the time that Defendant did not know the birthdays of his children and that Shelby had never been taken to a doctor.

[5] The trailer in which the family lived was first investigated by the medical investigator. The investigator observed food, dirty bottles, and clothes on the floor. She also observed a broken window and an unclean kitchen and bathroom. There were no signs of drugs or alcohol besides a couple of empty beer bottles in a trash bag. The investigator opined that the drawer in which Shelby died was “not wide enough or long enough for an infant to move around freely.” However, there was nothing suspicious about Shelby’s body, which appeared to have been clean and healthy. Dr. Ross Reichard, who performed Shelby’s autopsy, testified that the cause of her death was “undetermined,” but he testified that the small size of the drawer in which she slept was a possible cause of her death.

[6] The testimony of several witnesses detailed the dangers to small children present in the family’s trailer and yard. Detective Norbert Sanchez made a videotape of the scene of Shelby’s death, and the tape was played for the jury while Sanchez described its contents. Physical dangers were cataloged, including a nearly collapsed ceiling, broken windows, and glass shards on the ground. The smoke detector had no batteries, and items such as razors and chemicals were left where the children could access them. Unsanitary conditions were observed, including rodent feces in the kitchen cabinets, on the dishes, and in the drawer-bed in which Shelby died; a bag of dirty diapers that appeared to have been left on the ground for some time; and mold in the bathroom and shower. Outside of the home, there was a trash pit at ground level that had flies and a very pungent odor, rusty nails exposed in lumber lying on the ground, and open cans of solvent and cleaning fluid on the porch.

[7] Deputy Lisa Delorm testified concerning the dangers to children she saw at the trailer, including car parts in the yard, a gap in the ramp leading to the home, open

CERTIORARI GRANTED, NO. 31,202, AUGUST 6, 2008
CERTIORARI DENIED, NO. 31,217, AUGUST 6, 2008

From the New Mexico Court of Appeals

Opinion Number: 2008-NMCA-126

Topic Index:

Criminal Law: Child Abuse or Neglect
Criminal Procedure: Directed Verdict; Jury Instructions; Separate Offense; and Substantial or Sufficient Evidence

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
JULIO CHAVEZ,
Defendant-Appellant.
No. 26,563 (filed: June 20, 2008)

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JAMES WAYLON COUNTS, District Judge

GARY K. KING
Attorney General
KATHERINE ZINN
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Santa Fe, New Mexico
for Appellee

JOHN BIGELOW
Chief Public Defender
WILL O’CONNELL
Assistant Appellate Defender
Santa Fe, New Mexico
for Appellant

OPINION

LYNN PICKARD, Judge

[1] Defendant appeals his convictions for child abuse by endangerment of his three children. He challenges (1) whether the evidence was sufficient to support his convictions, (2) whether the evidence supported only a single conviction under New Mexico law, (3) whether the trial court erred in declining to grant a directed verdict on the child abuse resulting in death count, and (4) whether giving the child abuse uniform jury instruction (UJI) was fundamental error. We affirm the trial court on all issues except the second, and we reverse one of Defendant’s convictions.

FACTS

[2] Defendant is the father of Juan, who was four years old at the time criminal child abuse charges were filed against Defendant; Leo, who was two years old; and Shelby, who died at the age of five months. The mother of the children is Jennifer Wheeler. In 2001, an anonymous referral was made to the New Mexico Children, Youth and Families Department (CYFD) for neglect.
cans of paint thinner on the porch, and an accessible razor in the bathroom. She also saw mice in the trailer, but she did not see any mousetraps. Tamarsha Means, a cousin of Defendant who lived in the trailer before Shelby’s death, testified that “[t]he home was a disaster” and that the trailer and the children were “filthy.” She testified that on at least one occasion she came home and found the children alone. Officer Damian Picazzo, CYFD social worker Antoinette Pirelli, and CYFD supervisor Pam Wong also testified to conditions in the home. Additional evidence gathered from testimony adduced at trial, including evidence elicited during the viewing of Detective Sanchez’s videotape, will be included in our discussion below as needed.

**DISCUSSION**

**Sufficiency of the Evidence**

[8] Defendant challenges the sufficiency of the evidence to support his three convictions for third-degree felony child abuse. “In reviewing the sufficiency of evidence used to support a conviction, we resolve all disputed facts in favor of the State, indulge all reasonable inferences in support of the verdict, and disregard all evidence and inferences to the contrary.” *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. “Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [a defendant’s version of the facts].” *Id.*

[9] In order to prove child abuse by endangerment, the State had to prove beyond a reasonable doubt that Defendant knowingly, intentionally, or negligently, and without justifiable cause, caused or permitted his children to be placed in a situation that may have endangered their lives or health. NMSA 1978, § 30-6-1(D)(1) (2001) (amended 2004 and 2005). To prove Defendant guilty under the negligence standard set forth in our child abuse statute, the State had to prove beyond a reasonable doubt that Defendant “knew or should have known of the danger involved and acted with a reckless disregard for the safety or health” of his children. Section 30-6-1(A)(3).

[10] We hold that the evidence before the trial court was sufficient for the jury to convict Defendant of child abuse by endangerment. First, we hold that there was sufficient evidence that Defendant “knew or should have known of the danger involved.” *Id.* In 2001, Defendant and the children’s mother were reported to CYFD based on the conditions in which they were raising their sons. A visual inspection from outside the home revealed both unsanitary and unsafe conditions. The couple was referred by CYFD for help in obtaining case management services to ensure that they had the resources to take care of their children and to learn adequate parenting skills, but they did not avail themselves of these services. A rational jury could infer from this evidence that Defendant understood that the conditions in which he was raising his children may have endangered them and thus were cause for remedial action on his part. In fact, Defendant subsequently acknowledged that the conditions in which he was raising his sons in 2001 were not suitable for children.

[11] We hold further that the evidence supports a finding that Defendant “acted with a reckless disregard for the safety or health” of his children because, by raising them in the conditions described later in this opinion, he caused or permitted his children to be “placed in a situation that may [have] endanger[ed] [their lives] or health.” Section 30-6-1(A)(3), (D)(1). The trailer had no gas utility and no alternative heating source or hot water. It was infested with mice, and rodent feces were found throughout, including in the kitchen cabinets, on the dishes, and in the drawer-bed in which Shelby died. An area of the living room ceiling had sustained water damage and appeared ready to collapse. One window was missing, another was broken, and glass shards were on the ground. The kitchen area had several cabinet doors either missing or hanging. A strong-smelling bag of dirty diapers appeared to have been left on the ground for some time. There was a water leak in the house, and the bathroom and shower were moldy. The smoke detector had no batteries, and items such as razors and chemicals were left where the children could access them.

[12] Outside the home, there was a trash pit at ground level that had flies and a very pungent odor. A shed was falling in, and there were rusty nails exposed in lumber lying on the ground. Open cans of solvent and cleaning fluid were observed on the porch. There were car parts, spray cans, matches, and other objects that could be dangerous to children found around the yard. The ramp leading to the trailer had a gap wide enough to injure a child.

[13] Defendant allowed Juan and Leo to run around in this environment, where they were observed in diapers or underwear, unwashed, and without shoes. Defendant often left Shelby inside on her baby swing or in her bed while he worked on his car outside. Defendant sometimes left all three children unattended in this environment. Finally, Shelby had been sleeping regularly in a drawer that she had little room in which to move around, a circumstance which may have created a danger to her health and may have resulted in suffocation as a possible cause of her death.

[14] When viewed in the light most favorable to the State, the evidence supports Defendant’s convictions. “By including endangerment in Section 30-6-1, the Legislature expressed its intent to extend the crime of child abuse to certain conduct even if the child has not suffered physical harm.” *State v. Graham*, 2005-NMSC-004, ¶ 9, 137 N.M. 197, 109 P.3d 285. Because “the Legislature did not intend to criminalize conduct creating a mere possibility, however remote, that harm may result to a child,” there must be “a reasonable probability or possibility that the child will be endangered.” *Id.* (internal quotation marks and citations omitted). Testimony in this case, regarding the trailer and yard in which Defendant’s children lived, the size of the drawer-bed in which Shelby slept, and Defendant’s failure to protect his children from the many potential harms with which he surrounded them, described more than a remote possibility that the safety and health of Defendant’s children were endangered. We hold that a rational jury could have found beyond a reasonable doubt that Defendant knowingly, intentionally, or negligently, and without justifiable cause, caused or permitted his children to be placed in a situation that may have endangered their lives or health and that Defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of his children. *See Rojo*, 1999-NMSC-001, ¶ 19.

[15] Defendant argues that he has been criminally punished because of his poverty. However, the jury heard testimony that Defendant’s landlord would have allowed a reduction in rent for the cost of any improvements or repairs Defendant chose to make to the trailer and that Defendant assured Wheeler that he would make the trailer habitable. The cost of eliminating the aforementioned dangers, therefore, would not have resulted in additional financial hardship or required additional outlay of funds. Moreover, as noted by CYFD supervisor Wong, there is a difference between poverty and neglect. In this case, the evidence established that the dangerous, unsanitary living conditions found in and around the trailer and the confined space
in which Shelby slept were not the necessary by-products of Defendant’s poverty, but were instead the result of Defendant’s lifestyle choices and parenting decisions. {16} Defendant also seeks relief on the ground that the underlying conduct giving rise to his convictions was not itself criminal. However, our child abuse statute does not require that the conduct forming the basis for an endangerment charge must itself be a crime. See § 30-6-1(D)(1). Rather, the conduct need only cause the child to be “placed in a situation that may endanger the child’s life or health.” Id. We also reject Defendant’s argument that his conduct did not place his children in the “direct line of physical danger” because the risks to which he exposed his children were “nowhere near the risks involved in being shot, stabbed, or involved in a car accident.” We find no support for this argument in our case law, which proscribes any adult conduct that presents “a reasonable probability or possibility” that a child may be endangered. Graham, 2005-NMSC-004, ¶ 9 (internal quotation marks and citation omitted).

Unit of Prosecution {17} Defendant contends that his three convictions for child abuse should be reduced to a single count, following this Court’s reasoning in State v. Castañeda, 2001-NMCA-052, 130 N.M. 679, 30 P.3d 368. In Castañeda, we held that a driver who endangered three child passengers by driving drunk was only subject to a single conviction for child abuse because “the abuse of the three children occurred during a single criminally negligent act and therefore constituted only one violation of the statute.” Id. ¶ 18. In so holding, we examined the facts of that case in light of the “indicia of distinctness” set forth in Swafford v. State, 112 N.M. 3, 13, 810 P.2d 1223, 1233 (1991). Castañeda, 2001-NMCA-052, ¶ 13 (internal quotation marks and citation omitted). Applying these indicia to the case before us, we reverse one of Defendant’s three convictions for child abuse by endangerment.

{18} “Where an accused is charged with multiple violations of a single statute and raises a double jeopardy challenge, we must determine whether the legislature intended to permit multiple charges and punishments under the circumstances of the particular case.” Castañeda, 2001-NMCA-052, ¶ 13. Because Section 30-6-1 does not clearly define the unit of prosecution, we must determine whether Defendant’s offenses are separated by sufficient “indicia of distinctness.” See Castañeda, 2001-NMCA-052, ¶ 13 (internal quotation marks and citation omitted). “[I]f the defendant commits two discrete acts violative of the same statutory offense, but separated by sufficient indicia of distinctness, then a court may impose separate, consecutive punishments for each offense.” Swafford, 112 N.M. at 13, 810 P.2d at 1233. These indicia include (1) the temporal proximity of the acts, (2) the location of the victims during each act, (3) the existence of an intervening event, (4) the sequencing of acts, and (5) the defendant’s intent as evidenced by his conduct and utterances, and (6) the number of victims. Castañeda, 2001-NMCA-052, ¶ 13.

{19} The State concedes that Defendant’s convictions for child abuse of his two sons are premised on a singular, continuous course of conduct related to the living conditions in the family’s trailer and Defendant’s failure to properly clothe and supervise his sons in this environment. The State further concedes that, under Castañeda, Defendant’s conduct with regard to his two sons constituted only one violation of the child abuse statute and that he should be punished accordingly. See id. ¶ 14 (holding that because the defendant committed “one continuous act” of DWI with multiple children in her vehicle who were also not restrained by seatbelts, the defendant was subject to punishment for only one conviction for child abuse despite fact that there were multiple victims of the abuse); see also State v. Cuevas, 94 N.M. 792, 794, 617 P.2d 1307, 1309 (1980) (holding that despite the fact that numerous juveniles were present, the defendant’s conduct constituted only one act of contributing to the delinquency of a minor where the facts did not indicate any differences in the relationships between the defendant and individual juveniles, the criminal act occurred at one place and at one time, and no juvenile was treated differently than any other), overruled on other grounds by State v. Pitts, 103 N.M. 778, 780, 714 P.2d 582, 584 (1986). We agree that the offenses that gave rise to Defendant’s convictions for child abuse by endangerment of his sons were not sufficiently separated in time and space to warrant separate convictions, and we reverse one of Defendant’s two convictions for child abuse by endangerment of his sons. To the extent that the State asks us to reconsider Castañeda, we decline to do so.

{20} Defendant further contends that Castañeda requires that we reverse his conviction for child abuse by endangerment of Shelby, leaving him subject to only a single conviction under Section 30-6-1(D)(1). We disagree. Defendant placed Shelby in a drawer-bed that was too small and, combined with the bedding, gave Shelby no room to move if the bedding interfered with her breathing. In doing so, Defendant subjected his daughter to an entirely different danger to her life and health than any to which he exposed his sons, one that we hold is sufficiently distinct from the unsanitary living conditions and household dangers to which all three children were routinely subjected to warrant a separate conviction. The fact that Defendant was acquitted of child abuse resulting in death does not alter our analysis. See State v. Leyba, 80 N.M. 190, 195, 453 P.2d 211, 216 (Ct. App. 1969) (noting that “we may only speculate as to why the jury acquitted [the] defendant” of one of the charges against him and that this Court’s “business is to review the verdict of conviction”).

{21} Moreover, “when determining the appropriate unit of prosecution, the focus is upon the prohibited act.” State v. House, 2001-NMCA-011, ¶ 20, 130 N.M. 418, 25 P.3d 257 (surveying national authority on a unit of prosecution question under our vehicular homicide statute). “[A] charge of multiple counts of violating a statute is appropriate only where the actus reus prohibited by the statute—the gravamen of the offense—has been commited more than once.” Id. ¶ 19 (quoting Wilkoff v. Superior Court, 696 P.2d 134, 137 (Cal. 1985) (en banc)). The gravamen of the offense with which Defendant was charged under our child abuse statute was that of “causing or permitting a child to be . . . placed in a situation that may endanger the child’s life or health.” Section 30-6-1(D)(1). In essence, Defendant committed two acts: (1) causing all three children to live in dangerous, unsanitary conditions and (2) causing Shelby to sleep in a drawer that was dangerously small for her. Because the actus reus prohibited by the child abuse statute was committed twice, two convictions are warranted.

Denial of Motion for Directed Verdict {22} Defendant argues that the trial court erred when it failed to direct a verdict of acquittal on the charge of child abuse resulting in death. He contends that the evidence was insufficient to support a conviction on the charge that Defendant killed Shelby because the State’s medical expert deemed Shelby’s cause of death to be “undetermined” and there was “no nexus
between the undetermined cause of death and the condition of the home.” He argues that the trial court was thus obligated to dismiss the charge of child abuse resulting in death before instructing the jury on the case. We disagree.

First, as argued by the State in opposition to Defendant’s motion, the evidence showed that Defendant chose the trailer for the family’s residence, picked out the drawer in which Shelby slept, put the items in the drawer with Shelby, was awake with her from 5:00 a.m. until some time in the morning, and discovered her dead in the morning. Testimony concerning Defendant’s demeanor the morning Shelby was found dead was also presented at trial. Because direct evidence of abuse is not required to sustain a conviction for child abuse by endangerment, \textit{Graham}, 2005-NMSC-004, ¶ 10, we agree that the jury could have drawn reasonable inferences from the above evidence, including the inference that Shelby died as a result of Defendant’s actions. We affirm the trial court’s denial of Defendant’s motion for directed verdict.

Second, Defendant fails to explain how he has been prejudiced by the trial court’s denial of his motion, simply contending that allowing the jury to consider the child abuse resulting in death count “injected an intolerable quantum of confusion into the jury’s deliberations.” A mere assertion of prejudice is not a showing of prejudice. \textit{See In re Ernesto M.}, 1996-NMCA-039, ¶ 10, 121 N.M. 562, 915 P.2d 318. Moreover, this Court has previously held that where a multiplicity of charges were given to the jury, and the jury acquitted on some counts but convicted on others, the jury demonstrated that it was not confused and could carefully apply the evidence to each count upon which it had been instructed. \textit{State v. Armijo}, 1997-NMCA-080, ¶ 10, 123 N.M. 690, 944 P.2d 919; \textit{State v. Orgain}, 115 N.M. 123, 125, 847 P.2d 1377, 1379 (Ct. App. 1993).

Defendant contends that the UJI given in this case allowed the jury to convict under a civil negligence standard rather than a criminal negligence standard. He focuses on the words “knew or should have known” in the instruction given in this case, which was patterned on UJI 14-602 NMRA. He argues that he could only have properly been found guilty of criminal negligence if the jury determined he had subjective knowledge of the risk of harm, and he contends that objective knowledge, as reflected in the phrase “should have known,” cannot support a criminal negligence conviction in New Mexico.

Defendant cannot prevail on this issue under our case law. In \textit{State v. Schoonmaker}, 2008-NMSC-010, ¶¶ 42-45, 143 N.M. 373, 176 P.3d 1105, our Supreme Court rejected the defendant’s argument as it pertained to the “should have known” language in UJI 14-602 NMRA, the UJI for child abuse resulting in death. The Court noted that “[w]hat distinguishes civil negligence from criminal negligence is not whether the person is subjectively aware of a risk of harm; rather, it is the magnitude of the risk itself.” \textit{Schoonmaker}, 2008-NMSC-010, ¶ 43. UJI 14-602 and 14-604 are materially identical, with the exception that UJI 14-602 includes the additional element that the child abuse must result in death or serious bodily harm. \textit{Compare UJI 14-602, with UJI 14-604}. Accordingly, we apply the reasoning and holding of \textit{Schoonmaker} to the case before us, and we reject Defendant’s attack on UJI 14-604 on this basis.

\textbf{CONCLUSION}

We affirm two of Defendant’s convictions for child abuse by endangerment, we reverse one conviction for child abuse by endangerment, and we remand to the district court for entry of a new judgment and resentencing consistent with this opinion.

\textbf{IT IS SO ORDERED.}

LYNN PICKARD, Judge

WE CONCUR:
JONATHAN B. SUTIN, Chief Judge
JAMES J. WECHSLER, Judge
Technology Tools: Pre-Trial and Trial Seminar

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PROGRAM SCHEDULE

8:30 a.m. Check-in/Registration
9:00 a.m. Harnessing the Power of Practice Management Systems
          Paul Munsfeld
10:00 a.m. Paperless Discovery
          Feliz Angelica Rael, Esq.
10:45 a.m. Break
11:00 a.m. Jury Selection in the Age of Cyberspace
          Lin S. Lilley, Ph.D.
12:00 p.m. Lunch (on your own)
1:15 p.m. Sanction: Trial Presentation Software
          Mike Hahn
2:15 p.m. Judges Panel: Admissibility of Electronic Evidence and Demonstrative Exhibits
3:15 p.m. Break
3:30 p.m. Electronic Evidence, Discovery Issues and Daubert
          Randy J. Knudson, Esq.
4:15 p.m. Overcoming Technophobia: Simple Uses of PowerPoint in the Courtroom
          Kathleen J. Love, Esq. and A. Elisa Montoya, Esq.
5:00 p.m. Adjourn

Kristina Bogardus, Program Co-Chair
David J. Jaramillo, Program Co-Chair

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A native of England, Dame Sian earned her LL.B. with honors at Auckland University, and a Master’s in jurisprudence at Stanford Law School. She practiced in both the private and public sector and was appointed Queen’s Counsel in 1988, a prestigious honor in Commonwealth countries. She earned great renown for her representation and defense of New Zealand’s indigenous Māori people in treaty claims and litigation concerning fisheries, land transfers, elections, broadcasting, and other matters. In 1995, Elias was appointed to New Zealand’s High Court. She became Chief Justice in 1999 with the goal to support a judiciary that was both rigorous and open, holding to what was best in its tradition.

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Prior to joining Keleher and McLeod she was an attorney at White and Steele, P.C. in Denver, Colorado; Neil, Dymott, Perkins, Brown & Frank in San Diego, California; and Foster, Rieder & Jackson in Albuquerque.

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Ms. Bayless earned her bachelor’s degree in business administration from Eastern New Mexico University in 2001 and her J.D. from the University of New Mexico School of Law in 2005.

Ms. O’Neill earned her bachelor’s degree in mass communication from the University of Tulsa in 1999 and her J.D. from the University of Tulsa College of Law in 2007.
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