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WHO’S WATCHING YOUR FIRM’S 401(k)?

- Is your firm’s 401(k) subject to quarterly reviews by an independent board of directors?
- Does it include professional investment fiduciary services?
- Is your firm’s 401(k) subject to 23 contracted service standards?
- Does it have an investment menu with passive and active investment strategies?
- Is your firm’s 401(k) sponsor a not-for-profit whose purpose is to deliver a member benefit?
- Does it feature no out-of-pocket fees to your firm?
- Is your firm’s 401(k) part of the member benefit package of 36 state and national bar associations?

If you answered no to any of these questions, contact the ABA Retirement Funds to learn how to keep a close watch over your 401(k).

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The American Bar Association Members/Northern Trust Collective Trust (the “Collective Trust”) has filed a registration statement (including the prospectus therein (the “Prospectus”)) with the Securities and Exchange Commission for the offering of Units representing pro rata beneficial interests in the collective investment funds established under the Collective Trust. The Collective Trust is a retirement program sponsored by the ABA Retirement Funds in which lawyers and law firms who are members or associates of the American Bar Association, most state and local bar associations and their employees and employees of certain organizations related to the practice of law are eligible to participate. Copies of the Prospectus may be obtained by calling (877) 947-2272, by visiting the Web site of the ABA Retirement Funds Program at www.abaretirement.com or by writing to ABA Retirement Funds, P.O. Box 5142, Boston, MA 02206-5142. This communication shall not constitute an offer to sell or the solicitation of an offer to buy, or a request of the recipient to indicate an interest in, Units of the Collective Trust, and is not a recommendation with respect to any of the collective investment funds established under the Collective Trust. Nor shall there be any sale of the Units of the Collective Trust in any state or other jurisdiction in which such offer, solicitation or sale would be unlawful prior to the registration or qualification under the securities laws of any such state or other jurisdiction. The Program is available through the State Bar of New Mexico as a member benefit. However, this does not constitute an offer to purchase, and is in no way a recommendation with respect to, any security that is available through the Program.
THE TRIBAL LAW & ORDER ACT:
Changes in the Landscape of Indian Criminal Law

Thursday, November 4, 2010 • State Bar Center, Albuquerque
2.2 General & 1.0 Professionalism CLE Credits

☐ Standard Fee $119  ☐ Indian Law Section Member, Government, Legal Services Attorney, Paralegal $105
Co-Sponsor: Indian Law Section

The Tribal Law and Order Act of 2010 will give tribes and the federal government the necessary tools to address complex jurisdictional issues by enhancing the Indian Country criminal justice system and improving coordination and communication. The Act provides for increased penalties that Tribes may impose under the Indian Civil Rights Act. However, there are certain civil rights and due process requirements that must be met by the Tribe in order to impose such increased sentences. For lawyers involved in criminal cases in Indian Country, learning about the new law and its implications is crucial. Tribes may be required to amend current tribal criminal laws in order to meet the new requirements under the Act.

8:00 a.m.  Registration
8:30 a.m.  Introductory Remarks and Course Overview
    Helen B. Padilla, Esq., (Isleta Pueblo) ILS Board Member, Director, American Indian Law Center, Inc.
8:35 a.m.  Background of the Tribal Law & Order Act of 2010
    John Harte, Esq., San Felipe Pueblo, Partner, Mapetsi Policy Group and former Policy Director, U.S. Senate Indian Affairs Committee
9:45 a.m.  What Do Tribes Do Now? New Requirements for Tribal Courts and Tribal Criminal Codes to Meet Civil Rights and Due Process Requirements of the Act
    Professor Barbara Creel (Jemez Pueblo), UNM School of Law
10:40 a.m. Break
10:55 a.m.  Different Roles of Lawyers in Criminal Cases in Indian Country (1.0 P)
    Lawyer representing the federal government as prosecutor
    Lawyer representing the tribe as tribal prosecutor
    Lawyer representing criminal defendants in federal cases
    Lawyer representing criminal defendants in tribal cases
    Moderator, Professor Gloria Valencia-Weber, UNM School of Law, ILS Board Member
    Panelists:
    Steve McCue, Federal Public Defender, District of New Mexico
    Carrie Martell, Esq., Assistant Tribal Prosecutor, Hopi Tribe
    David Adams, Esq., Tribal Prosecutor, Pueblo of Laguna
    Delilah Choneska, Esq., (Santo Domingo Pueblo), New Mexico Legal Aid, Native American Program

11:55 a.m. Lunch (provided at the State Bar Center)
Traditional Native American food with guest speaker on Alternative Lending in Indian Country

1:00 p.m. Indian Law Section Annual Meeting followed by Indian Law Section Board of Directors Meeting

TWO WAYS TO REGISTER

INTERNET: www.nmbarcle.org  FAX: (505) 797-6071, 24 hour access
Please Note: For all WEBCASTS, you must register online at www.nmbarcle.org

Name ___________________________________________________________________ NM Bar # _________________________________
Street __________________________________________________________________________________________________________
City/State/Zip _____________________________________________________________________________________________________
Phone ____________________________________________________ Fax ____________________________________________________
E-mail __________________________________________________________________________________________________________
Credit Card # ________________________________________________________________ Exp. Date ________________ CVV# ________________
Authorized Signature  _______________________________________________________________________________________________
2010 BUSINESS LAW INSTITUTE

Friday, November 5, 2010
State Bar Center, Albuquerque
6.5 General CLE Credits

☐ Standard Fee $ 209
☐ Business Law Section Member, Government, Legal Services Attorney, Paralegal $179
Co-Sponsor: Business Law Section

8:00 a.m.  Registration
8:30 a.m.  Documenting the Business Sale in Difficult Economic Times
James J. Widland, Esq., Miller Stratvert PA

9:30 a.m.  Employment Law Considerations for Business Lawyers: Hiring, Wage and Hour Laws, Downsizing and Layoffs
Christa M. Hazlett, Esq., Conklin Woodcock & Ziegler PC

10:15 a.m.  Break
10:30 a.m.  Keeping Your Non-Compete Clauses Out of Litigation
Gary J. Van Luchene, Esq., Keleher & McLeod PA
W. Spencer Reid, Esq., Keleher & McLeod PA

11:15 a.m.  Banking Law Reform Update
Erik F. Gerding, Esq., Professor, UNM School of Law

1:00 p.m.  How Business Lawyers Can ‘Do’ Due Diligence Using Free Internet Sites
Carole Levitt, Esq., Internet For Lawyers
Mark Rosch, Internet For Lawyers

2:45 p.m.  Break
3:00 p.m.  How Business Lawyers Can ‘Do’ Due Diligence (continued)
Carole Levitt, Esq., Internet For Lawyers
Mark Rosch, Internet For Lawyers

4:30 p.m.  Adjourn and Reception (State Bar Lobby)

TWO WAYS TO REGISTER

INTERNET: www.nmbarcle.org  FAX: (505) 797-6071, 24 hour access
Please Note: For all WEBCASTS, you must register online at www.nmbarcle.org

Name __________________________________________________________ NM Bar # _________________________________

Street __________________________________________________________________________________________________________

City/State/Zip _____________________________________________________________________________________________________

Phone ___________________________ Fax ___________________________

E-mail __________________________________________________________________________________________________________

Credit Card # ___________________ Exp. Date ________________ CVV# ________________

Authorized Signature __________________________________________________________

also available via LIVE WEBCAST
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Meetings

Month
18
  Attorney Support Group,
  7:30 a.m., First United Methodist Church
19
  Solo Section
  BOD, 11:30 a.m., Section, noon, State Bar Center
20
  Law Practice Management Committee,
  noon, State Bar Center
21
  Business Law Section BOD,
  4 p.m., via teleconference
27
  Prosecutors Section Annual Meeting,
  noon, State Bar Center
28
  Health Law Section,
  11:30 a.m., Presentation
  noon, BOD, via teleconference

State Bar Workshops

October
21
  Lawyer Referral for the Elderly Workshop
    9:30–11:45 a.m., Presentation
    1–5 p.m., Clinics
  Mary Ester Gonzales Senior Center,
  Santa Fe
27
  Consumer Debt/Bankruptcy Workshop
    6 p.m., State Bar Center, Albuquerque

November
10
  Estate Planning Workshop
    6 p.m., State Bar Center, Albuquerque
17
  Lawyer Referral for the Elderly Workshop
    10–11:30 a.m., Presentation
    1:30–4 p.m., Clinics
  Belen Senior Center, Belen

From the Cover Artist: As a landscape painter, Phil Hulebak finds the subtlety in the light of the moment that imparts a sense of nature and the creator. Capturing a moment as though it is familiar, his intimacy with the outdoors uncovers some of the magic that makes the legends. 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
Supreme Court Committee/Board Vacancies

Courts of Limited Jurisdiction 2
Rules of Civil Procedure for the District Courts 3
Appellate Court Rules 3
Rules of Evidence 1
Uniform Jury Instructions-Civil 1
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Children’s Court Rules 2
Domestic Relations Task Force 3
Disciplinary Board 2
MCLE 2
Code of Professional Conduct 1
Board of Legal Specialization 2
Board Governing the Recording of Judicial Proceedings
1 court reporter member, 1 judge member 2
Code of Judicial Conduct 3
Judicial Education and Training 1
Drug Court Advisory Committee 3
Committee for Improvement of Jury Service 3
Board of Bar Examiners 1

Attorneys interested in volunteering on any of these committees/boards may send a letter of interest and/or resume by Oct. 22 to:
Kathleen Jo Gibson, Chief Clerk
PO Box 848
Santa Fe, NM 87504-0848.

Interested attorneys should describe why they believe they are qualified and shall prioritize no more than three committees of interest.

N.M. Board of Legal Specialization
Comments Solicited

The following attorney is applying for certification as a specialist in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, 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.

J. Edward Hollington
Trial Specialist - Civil Law

Proposed Rule Revisions

Proposed Revisions to the Rules of Procedure for the District Courts, Magistrate Courts, Metropolitan Court, and Municipal Courts

The Joint Committee on Rules of Procedure for New Mexico State Courts has recommended for the Supreme Court’s consideration proposed new rules to govern criminal contempt proceedings that may arise within a civil, criminal, or children’s court proceeding. In light of the proposed new committee commentary for each rule, the joint committee also proposes withdrawing Appendix 5-902 NMRA.

Proposed Rule Revisions to the Rules of Criminal Procedure for the District Courts

The Rules of Criminal Procedure for the District Courts Committee has recommended for the Supreme Court’s consideration proposed amendments to Paragraphs 1 and K of Rule 5-805 of the Rules of Criminal Procedure for the District Courts.

Proposed Revisions to the Rules of Civil Procedure for the District Courts and Civil Forms

The Rules of Civil Procedure for the District Courts Committee has recommended proposed amendments to the Rules of Civil Procedure for the District Courts and Civil Forms for the District Courts for the Supreme Court’s consideration.

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>
</tr>
</thead>
<tbody>
<tr>
<td>1st Judicial District Court</td>
<td>Exhibits in criminal, civil, domestic relations, and children’s court</td>
<td>1978–1995</td>
<td>Nov. 5</td>
</tr>
<tr>
<td>(505) 455-8275</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| 5th Judicial District Court   | Exhibits in criminal cases                    | 1971–2009    | Nov. 12                  |
| County of Chaves              |                                              |              |                          |
| (575) 622-2565, x120          |                                              |              |                          |
To comment on the proposed amendments before they are submitted to the Court for final consideration, either submit a comment electronically through the Supreme Court’s website at http://nmsupremecourt.nmcourts.gov/ or send written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 87504-0848

Comments must be received on or before Oct. 25 to be considered by the Court. Note that any submitted comments may be posted on the Supreme Court’s website for public viewing. For reference, see the Oct. 4 (Vol. 49, No. 40) Bar Bulletin.

Second Judicial District Court
Judicial Vacancy

A vacancy on the 2nd Judicial District Court will exist in Albuquerque as of Dec. 1 upon the retirement of the Honorable Angela J. Jewell. Chief Judge Ted Baca has indicated he intends to assign the vacancy to the domestic relations division. Kevin K. Washburn, chair of the Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14, of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website, http://lawschool.unm.edu/judsel/application.php, or via e-mail, fax, or mail by sending Sandra Bauman, (505) 277-4700. The deadline for applications has been extended to 5 p.m., Oct. 18. Applications received after that date will not be considered. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the Office of the Secretary of State. The Judicial Nominating Commission will meet Nov. 8 at the 2nd Judicial District Courthouse, Albuquerque, to evaluate the applicants for this position. The meeting is open to the public.

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

In partnership with the U.S. District Court of New Mexico and the Federal Bar Association, a complimentary 90-minute training session on using PDF markup tools will be offered Oct. 19–20 in Santa Fe.

Session I 8:30–10 a.m.
Session II 10:30 a.m.–noon
Session III 1–2:30 p.m.

Attendees will learn to use a variety of PDF tools to mark portions of exhibits identified for the Court’s attention and meet the requirements of the U.S. District Court for the District of New Mexico Local Civil Rule 10.6. “Identifying Portions of Exhibits: Using Markup Tools to Correctly Mark PDF Documents” will be taught by Court staff and a trainer specializing in computer skills. To register online, go to www.nmcourt.fed.us. CLE credit is not available.

STATE BAR NEWS

Attorney Support Group

• Oct. 18, 7:30 a.m.–Morning groups meet regularly on the third Monday of the month.
• Nov. 1, 5:30 p.m.–Afternoon groups meet regularly on the first Monday of the month.

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

Board of Bar Commissioners
Meeting Summary

The Board of Bar Commissioners met Sept. 24 at the State Bar Center in Albuquerque. Action taken is as follows:

• Approved the July 15 meeting minutes as submitted.
• Accepted the August 2010 financials and executive summaries.
• Reviewed the accounts receivable aging report as well as the directors’ reimbursements and credit card file.
• Approved an amendment to the State Bar’s Investment Policy to change the amount for a certificate of deposit from $100,000 to $250,000.
• Approved an expenditure of $3,000 towards the cost of a brochure for the 2012 National Mock Trial Program.
• Tabled a request to join the Hispanic Chamber of Commerce and referred it to the Bylaws and Policies Committee to determine whether it would conflict with Keller or Popejoy.
• Held an executive session to discuss a personnel issue.
• Approved the 2011 Budget Worksheet with a five percent dues increase in anticipation of cuts to civil legal services.
• Approved amendments to the Dues Form.

FEDERAL DISTRICT COURT

Save up to 20% on select FedEx Office copy and print services and 10% off other select services at over 1,800 FedEx Office locations. Enroll in the SBNM FedEx Advantage® Program to upload, print and ship all in one place! For more information or to enroll, visit www.1800members.com/sbnm or call 1-800-MEMBERS (1-800-636-2377), 8 a.m.–6 p.m. EST, Monday–Friday.

Received a report from the Bylaws and Policies Committee, which included the following: approved an amendment to the State Bar Bylaws, Article IX, Sections, Committee and Commissions, to add a new section 9.5, Bylaw and Policy Compliance by Sections and Committees; reviewed amendments to the fee waiver application regarding a hardship and approved eliminating the form and granting waivers for deployed military personnel or reservists with all other requests for waivers being brought to the Board; reviewed a proposed policy to not publish any art in the Bar Bulletin unless it pertains to State Bar business or is law related and did not approve the policy; provided thirty days’ notice of a proposed amendment to the State Bar Bylaws, Article II, Section 2.3, License Fees, regarding the reinstatement language, which will be voted on at the December meeting; approved a request from the Bankruptcy Law Section to amend its bylaws to increase the number of positions on its board from 11 to 13; approved a request from the Indian Law Section to amend its bylaws to add a non-voting student member to its board; reviewed the sections and committees scheduled for sunset, including the Ethics Committee, Technology Committee, Elder Law Section, Family Law Section, Public Law Section and the Solo and Small Firm Section and approved continuing all of them.

Reviewed a report from the Governmental Affairs Committee, which included the following: reviewed a request from the New Mexico Foundation for Open Government to oppose two of the Jiffy
Committee's recommendations on public access and reported that the Court had issued a rule on the recommendations, which coincides with the position; received a report on civil legal services funding cuts; received a request from the Young Lawyers Division to support gender neutral legislation and approved the Board's support of the legislation; and denied a request to support a resolution from the Hispanic Bar to not schedule any events in Arizona, since there are no meetings currently scheduled out-of-state.

- Received a report on and request for support of judicial funding and legislation and referred the matter to the Governmental Affairs Committee to make a recommendation.
- Approved in concept the terms and conditions of the Equal Access to Justice merger with the N.M. State Bar Foundation.
- Received a report from the LLC Special Committee that was formed to review issues presented by the Ethics Advisory Committee regarding attorneys establishing limited liability companies and approved forwarding a proposed rule change to 24-107 to the Supreme Court for consideration.
- Received a report on the Legal Research Program which will have a proposal for the Board's approval by April 2010. The committee will research the options and make a recommendation by then.
- Reported that the Lawyers Assistance Program will be expanded to a full-time program.
- Received a report on the UPL Task Force, which will have a proposal for the Board's approval at the December meeting.
- Received a written report on the Public Defender Special Committee which is looking at public defender issues with indigent defense and funding in New Mexico.
- Reported that the N.M. Women's Bar Association is being revived and a reception will be held on Sept. 28 at the Hotel Andaluz.
- Reviewed the 2010 election schedule. Six positions are expiring this year. Ballots are being mailed out Oct. 29 and the election will be held on Nov. 30.
- Appointed a committee to develop questions for a membership survey to be conducted next year.
- Appointed a committee to look at responding to judicial criticism of judges.
- Received a written report from the State Bar's appointee to the Rocky Mountain Mineral Law Foundation.
- The minutes in their entirety will be available on the State Bar's website following approval by the Board at the Dec. 6 meeting.

Committee on Women and the Legal Profession

Minzner Award Nominations

Nominations are now being accepted for the 2010 Justice Pamela B. Minzner Outstanding Advocacy for Women Award, which recognizes attorneys who have distinguished themselves during the prior year by providing legal assistance to women who are underrepresented or underserved or by advocating for causes that will ultimately benefit and/or further the rights of women. The Committee on Women and the Legal Profession will review the nominations and select a recipient. Submit a letter of nomination summarizing the work and efforts of the nominee to Jocelyn Castillo, PO Box 27047, Albuquerque, NM 87125-7047; fax to (505) 247-3213 or e-mail: jocelyn@moseslaw.com. The nomination deadline is Nov. 5.

Professional Attire Program

Make plans now to attend “Fashion Do’s and Don’ts: A Professional Attire Presentation” from 11:45 a.m. to 1:30 p.m., Oct. 26, at the UNM Student Union, Ballroom A. The program will include lunch, a panel discussion on appropriate professional attire for attorneys and a fashion show which will include tips on investing in key wardrobe items, even while on a budget. This presentation is also the kick-off event for the newly created “Professional Clothing Closet,” a program to provide donated clothing to law students and members of the State Bar. Lunch is free for law students and for attorneys who donate a suit to the Professional Clothing Closet. The cost of lunch without a clothing donation is $8.50. R.S.V.P. to Jocelyn Castillo, jcastillo@moseslaw.com, by Oct. 22 and indicate whether you will be donating professional clothing or will be paying for lunch. Visit http://www.nmbar.org/AboutSBNM/Committees/Women/womenprofessioncommittee.html for more information.

Prosecutors Section

Annual Meeting

The Prosecutors Section will hold its annual meeting at noon, Oct. 27, during the Association of District Attorneys Fall Conference at the Marriott Pyramid, Albuquerque. Send agenda items to Chair Janice Schryer, dschryer04@msn.com.

Senior Lawyers Division

Board of Directors Election

The Senior Lawyers Division Nominating Committee has nominated the members listed below. Additional nominations may be made by Oct. 29 in the form of a petition signed by at least 10 members of the division. Visit http://www.nmbar.org/AboutSBNM/SLD/SLDelection.html for more information and to download a petition.

Position #1 Term: 2009–2011
Nominee: Robert S. Simon

Position #2 Term: 2009–2011
Nominee: Anthony J. Williams

Position #3 Term: 2009–2011
Nominee: William J. Arland

Position #4 Term: 2009–2011
Nominee: Ronald T. Taylor

Position #5 Term: 2009–2011
Nominee: Daniel J. Behles

Position #6 Term: 2011–2013
Nominee: Martin Lopez, David L. Mathews, Michael Milligan, Donald Becker and Bradford Zeikus

Position #7 Term: 2011–2013
Nominee: Jocelyn Castillo

Position #8 Term: 2011–2013
Nominee: John P. Burton

Position #9 Term: 2011–2013
Nominee: Virginia L. Ferrara

Position #10 Term: 2011–2013
Nominee: Anita Podell Miller

Trial Practice Section

Law Student Writing Competition

The Trial Practice Section is sponsoring a writing competition for UNM law students. The goal of the competition is to encourage and reward law student writings on legal subjects within the scope of the section and of general and current interest. It is also designed to attract students to the civil trial fields and to strongly encourage scholarship in these areas. The deadline to submit entries is Nov. 19. For complete contest rules, visit http://www.nmbar.org/AboutSBNM/sections/TrialPractice/trialpracticesection.html.
Commission/Board Vacancies

■ Client Protection Fund Commission
The Board of Bar Commissioners will make one appointment to the Client Protection Fund Commission (http://www.nmbar.org/Attorneys/CPF/ClientProtectionFund.pdf) for a three-year term. Members wishing to serve should send a letter of interest and brief resume by Nov. 19 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 828-3765; or e-mail jconte@nmbar.org.

■ New Mexico Legal Aid
The Board of Bar Commissioners will make two appointments to the New Mexico Legal Aid Board (http://www.nmlegalaid.org/). One of the terms is for one year and the other term is for three years. Members wishing to serve on the board should send a letter of interest and brief resume by Nov. 19 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 828-3765; or e-mail jconte@nmbar.org.

■ Judicial Performance Evaluation Commission
There is one vacancy on the Judicial Performance Evaluation Commission (http://www.nmjpec.org/) for a five-year term. The State Bar president is the nominating authority for this appointment, which will be made by the Supreme Court. The Court seeks geographic diversity for the commission and is specifically requesting candidates from the 4th and 11th judicial districts for this vacancy. Members wishing to serve should send a letter of interest and brief resume by Nov. 8 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; fax to 828-3765; or e-mail jconte@nmbar.org.

■ Ethics Advisory Committee
The State Bar Ethics Advisory Committee (http://www.nmbar.org/legalresearch/ethicsadvisoryopinions.html) meets once a month to analyze and respond to specific requests for ethics advisory opinions from members of the State Bar. Work is done throughout the month via e-mail. Committee members outside of Albuquerque can participate via teleconference or video conference. To volunteer for the committee, contact Richard Spinello, rspinello@nmbar.org.

■ Board of Editors
Five attorney positions on the Board of Editors will expire at the end of 2010. New appointees will serve two-year terms (January 2011 to December 2012), with the option of serving a second two-year term. The Board of Editors reviews and approves articles submitted for publication in the Bar Bulletin and the New Mexico Lawyer. Board members are asked to be available to review articles regularly, work with writers when needed, and attend quarterly board meetings in person or by teleconference. Interested attorneys with experience in publishing/editing should send resumes by Nov. 22 to Dorma Seago, dseago@nmbar.org. Appointments are made by the president of the Board of Bar Commissioners. Visit http://www.nmbar.org/AboutSBNM/Committees/boardeditorscommittee.html.

Other Bars

Albuquerque Bar Association
Member Luncheon
The Albuquerque Bar Association’s Member Luncheon will be held at noon, Nov. 2, at the Embassy Suites Hotel, 1000 Woodward Pl. NE, Albuquerque. The luncheon speaker is UNM School of Law Dean Kevin Washburn. The CLE (1.0 professionalism CLE credit) will immediately follow the luncheon from 1:15 to 2:15 p.m. Bill Lang, Hillary Noskin, Briggs Cheney, Jill Anne Yeagley, and Bill Stratvert will present Coping with Stress. Lunch only: $25 members/$35 non-members with reservations; lunch and CLE: $55 members/$75 non-members with reservations; CLE only: $30 members/$40 non-members. Register for lunch by noon, Oct. 29. To register:
1. log onto www.abqbar.org;
2. e-mail abqbar@abqbar.org;
3. call (505) 842-1151 or (505) 243- 2615;
4. fax to (505) 842-0287; or
5. mail to PO Box 40, Albuquerque, NM 87103.

New Mexico Black Lawyers Association
Electronic Evidence CLE
The New Mexico Black Lawyers Association will present Electronic Evidence: Can You Get It In? Can You Preserve It? (4.0 general, 1.0 professionalism, and 1.0 ethics CLE credits) from 8 a.m. to 4:30 p.m., Oct. 22, at the African American Performing Arts Center, New Mexico Expo. Speakers include Justice Edward L. Chávez, Christine Long, Randi McGinn, Judge Linda Vanzi, Kenny Calhoun, Regina Moss, Judge Robert Robles, Howard R. Thomas, and Michael Hoses. Register at http://www.newmexicoblacklawyersassociation.org/cle.html. For more information, call (505) 450-1032.

New Mexico Criminal Defense Lawyers Association
DWI Defense CLE
A live DWI mock trial demonstration is the linchpin of this year’s annual DWI Defense CLE sponsored by the New Mexico Criminal Defense Lawyers Association Oct. 29 at UNM Continuing Education.

www.nmbar.org
seminar is for intermediate and advanced practitioners. The mock trial will feature a real judge, former prosecutor and DWI police officer. Case law and rules update, client testimony, and use of experts are additional topics to be covered. Find registration information at www.nmcdla.org, info@nmcdla.org or call (505) 992-0050.

New Mexico Hispanic Bar Association

Mentorship Program Kickoff

The New Mexico Hispanic Bar Association will kick off its mentorship program from 5:30 to 7:30 p.m., Oct. 22, at Slate Street Cafe. R.S.V.P. to Vanessa@roblesrael.com.

Other News

Center for Civic Values

Mock Trial Coaches Needed

Attorneys are needed at New Mexico high schools to provide legal expertise as coaches for the 2011 Gene Franchini High School Mock Trial program. One coach is needed at each of the following schools: Alamogordo High School, Animas High School, Piedra Vista High School in Farmington, and Valley High School in Albuquerque. The amount of time needed will be decided by the attorney/coach and the teacher advisor, but teams usually meet at least once each week. Regionals are February 25 and 26, and state finals are March 26 and 26. Information about the role and responsibilities of attorney coaches is available on the “Tips and Advice” pages in the mock trial section of the Center for Civic Values website at www.civicvalues.org. If you have a few hours a week to devote to helping provide an outstanding educational experience to New Mexico high school students or would like to know more, contact Michelle Giger (505) 764-9417, ext. 11.

Christian Legal Aid

New Volunteer Training

Christian Legal Aid of New Mexico will host a seminar for new volunteers from 11 a.m. to 5 p.m., Oct. 29, at the State Bar Center. Volunteers are invited to join the organization to help secure justice for the poor and uphold the cause of the needy. Learn the basics of providing legal aid and enjoy a free lunch. For more information or to register, contact Jen Meisner, (505) 610-8800 or christianlegalaid@hotmail.com.
**Statement of Ownership, Management, and Circulation**

*(All Periodicals Publications Except Requester Publications)*

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<thead>
<tr>
<th>1. Publication Title</th>
<th>2. Publication Number</th>
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<td>Bar Bulletin</td>
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<td>10-04-09</td>
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<td>Publisher (Name and complete mailing address)</td>
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<td>State Bar of New Mexico</td>
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<td>PO Box 92860 (87199-2860), 5121 Masthead NE, Albuquerque, NM 87109</td>
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| Editor (Name and complete mailing address)                                                   |
| Dorma Seago                                                                                |
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| Managing Editor (Name and complete mailing address)                                         |
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PS Form 3526, September 2007 (Page 1 of 3 (Instructions Page 3)) PSN 7550-01-000-9931 PRIVACY NOTICE: See our privacy policy on www.usps.com
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- ☐ If the publication is a general publication, publication of this statement is required. Will be printed in the Oct. 18, 2010 issue of this publication.
- □ Publication not required.

### Signature and Title of Editor, Publisher, Business Manager, or Owner

/s/ Dorma Seago, Editor

Date: Oct. 4, 2010

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G = General  
E = Ethics  
P = Professionalism  
VR = Video Replay  
Programs have various sponsors; contact appropriate sponsor for more information.
30 Lawyer Substance Abuse Addictions: Causes and Results
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### Certiorari Granted but Not Yet Submitted to the Court:

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http://nmsupremecourt.nmcourts.gov.

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NO. 32,577  May v. DCP Midstream LP  (COA 29,331/29,490)  9/27/10

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Submission = date of oral argument or briefs-only submission

Submission Date
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Slip Opinions for Published Opinions may be read on the Court's website:

http://coa.nmcourts.gov/documents/index.htm
Clerk's Certificate
From the New Mexico Supreme Court

Clerk's Certificate
Dated September 22, 2010

Charles M. Burton
999 Ogden Street, Apt. #503
Denver, CO 80218
303-830-2810
charlesMburton@comcast.net

Martha A. Daly
2360 Santa Barbara Drive
Santa Fe, NM 87505
madaly@earthlink.net

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

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Denver, CO 80218
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madaly@earthlink.net

Clerk's Certificate
Of Admission

On September 21, 2010:
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Office of the Attorney General
PO Drawer 1508
408 Galisteo Street (87501)
Santa Fe, NM 87504-1508
505-827-7481
505-827-4440 (fax)
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On September 17, 2010:
Thomas J. Bunting
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505-842-1950
505-243-4408 (fax)
tbunting@mstlaw.com

On September 24, 2010:
Christopher J. Centeno
PO Box 316
Moffett Field, CA 94035-0316
415-819-2514

On September 23, 2010
Kenneth Rooney
4849 Connecticut Avenue, NW, Apt. 608
Washington, DC 20008

Clerk's Certificate
Of Change to Inactive Status

On September 24, 2010:
Andre Christian Shiromani
Legal FACS
981 East Gail Drive
Gilbert, AZ 85296
480-963-9767
Heidipz@cox.net

Clerk's Certificate
Of Withdrawal

Effective September 22, 2010:
Wanseuk Oh
Law Offices of Wanseuk Oh
3530 Wilshire Boulevard, Suite 1720
Los Angeles, CA 90010

Clerk's Certificate
Of Indefinite Suspension From Membership in the State Bar of New Mexico

Effective October 1, 2010:
David G. Reynolds
PO Box 293
Placitas, NM 87043-0293
505-867-6110
505-867-6110 (fax)
wd5gkq@aol.com

Clerk's Certificate
Of Indefinite Suspension From Membership in the State Bar of New Mexico

Effective July 21, 2010:
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Ruidoso, NM 88355-2198
575-808-1061
mikerunnels@zianet.com
## Recent Rule-Making Activity

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

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

**Effective October 18, 2010**

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**Since Release of 2010 NMRA**

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13-2307J “Otherwise qualified” defined. 09/27/10
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28-302 Narrative profile requirements. 02/24/10
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To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court’s website at http://nmsupremecourt.nmcourts.gov.

To view recently approved rule changes, visit the New Mexico Compilation Commission’s website at http://www.nmcompcomm.us.
RULES/ORDERS
From the New Mexico Supreme Court

PROPOSED REVISIONS TO THE RULES OF APPELLATE PROCEDURE

The Rules of Appellate Procedure Committee is considering whether to recommend for the Supreme Court’s consideration proposed amendments to the Rules of Appellate Procedure. If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court’s website at http://nmsupremecourt.nmcourts.gov or sending your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received on or before Nov. 8, 2010, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court’s website for public viewing.

12-210. Calendar assignments.

A. Calendar assignment; notice. After the docket fee has been paid in accordance with Rule 12-208 NMRA or free process has been granted in accordance with Rule 12-304 NMRA or Rule 23-114 NMRA, based upon the docketing statement or statement of the issues and record proper, the [court] Court shall assign the case to either the general, legal or summary calendar. The assignment may be made by a single judge or justice. The appellate court clerk shall file and promptly serve notice of the assignment upon the parties and the district court clerk. The date stamped on the calendar notice is the date of service for purposes of Rule 12-308 NMRA. If the clerk mails the notice, Paragraph B of Rule 12-308 NMRA applies.

B. General calendar. If the case is placed on the general calendar:

(1) the transcript of proceedings shall be filed as provided in Rule 12-211 NMRA;

(2) except for cases assigned to the expedited bench decision program in the Court of Appeals under Paragraph E of this rule, the appellant shall serve and file a brief in chief within forty-five (45) days after the date all transcripts of proceedings, as designated by any party, are filed in the appellate court, or if no transcript is filed, within forty-five (45) days after the appellant’s notice of nondesignation of transcript is filed in the appellate court. The appellee shall serve and file an answer brief within thirty (30) days after service of the brief of the appellant. The appellant may serve and file a reply brief within twenty (20) days after service of the brief of the appellee. The time limits for briefs on cross-appeals are set forth in Rule 12-213 NMRA; and

(3) if filed in the Court of Appeals, the case shall be submitted for decision to a randomly chosen panel of three judges.

C. Legal calendar. If the case is placed on the legal calendar:

(1) a transcript of proceedings shall not be filed;

(2) the case will be submitted on legal issues;

(3) except for cases assigned to the expedited bench decision program in the Court of Appeals under Paragraph E of this rule, briefing time shall commence from the date of service of the appellate court clerk’s notice of the calendar assignment; the appellant shall file and serve a brief in chief within thirty (30) days; the appellee shall serve and file an answer brief within thirty (30) days after service of the brief of the appellant; the appellant may serve and file a reply brief within twenty (20) days after service of the brief of the appellee. The time limits for briefs on cross-appeals are set forth in Rule 12-213 NMRA; and

(4) if filed in the Court of Appeals, the case shall be submitted for decision to a randomly chosen panel of three judges.

D. Summary calendar. If the case is placed on the summary calendar:

(1) a transcript of proceedings shall not be filed;

(2) the appellate court clerk’s notice shall state the basis for proposed disposition;

(3) appellate counsel or trial counsel shall have twenty (20) days from date of service of the appellate court clerk’s notice of proposed disposition to serve and file a memorandum setting forth reasons why the proposed disposition should or should not be made and why the case should or should not be assigned to the summary calendar, but the party shall be restricted to arguing only issues contained in the docketing statement. The docketing statement or statement of the issues may be amended at this time for good cause shown with the permission of the appellate court. A motion to amend the docketing statement or statement of the issues may be combined with a memorandum in opposition;

(4) no oral argument shall be allowed concerning the proposed disposition;

(5) after reviewing the memorandum or memoranda in support of or in opposition to the disposition proposed in the notice, the appellate court will either reassign the case to a non-summary calendar, issue another notice of proposed summary disposition or proceed to decide the case by opinion or order. The Court’s disposition of cases on the summary calendar may be in any form permitted under Rule 12-405 NMRA. In the Court of Appeals, every case decided on the summary calendar will be decided by a three-judge panel; and

(6) if there is no summary disposition, the case will be reassigned to the appropriate calendar.

E. Expedited bench decision program in the Court of Appeals. Cases assigned to the expedited bench decision program are governed by a Court of Appeals miscellaneous order. The most recent version of the miscellaneous order governing the expedited bench decision program may be viewed on the Court of Appeals’ web site at http://coa.nmcourts.gov/.

F. Length limitations for summary calendar memoranda. Except by permission of the Court, memoranda filed under Subparagraph (1) of Paragraph D of this rule shall comply with Rule 12-305 NMRA and the following length limitations:

(1) Body of the memorandum defined. The body of the memorandum consists of headings, footnotes, quotations and all other text except any cover page, table of contents, table of authorities, signature blocks and certificate of service.

(2) Page limitation. The body of the memorandum shall not exceed thirty-five (35) pages unless the memorandum complies with Subparagraph (3) of this paragraph.

(3) Type-volume limitation. The body of the memorandum shall not exceed eleven thousand (11,000) words, if the party uses a proportionally-spaced type style or typeface, such as Times New Roman, or one thousand two hundred (1,200) lines,
12-309. Motions. 

A. Use of motion. Unless otherwise prescribed by these rules, all applications for an order or other relief shall be made by filing a motion. 

B. Content and filing. Motions shall be filed, together with any supporting affidavits or other papers, with proof of service on all parties as provided in Rule 12-307. A motion shall state concisely and with particularity the relief sought and the grounds therefor. If the motion is based upon inquiry by counsel for the movant, any other party has exchanged or obtained process on the movant. If the party uses a monospaced type style or typeface, such as Courier, the statement shall identify the program and version used. 

[As amended, effective July 1, 1990; August 1, 1992; January 1, 1997; January 1, 2000; September 15, 2000; as amended by Supreme Court Order __________, effective __________.] 

G. Statement of compliance. If the body of the memorandum exceeds the page limitations of subparagraph (2) of Paragraph F of this rule, then the memorandum must contain a statement that it complies with the limitations of Subparagraph (3) of Paragraph F of this rule. If the memorandum is prepared using a proportionally-spaced type style or typeface, such as Times New Roman, the statement shall specify the number of words contained in the body of the memorandum as defined in Subparagraph (1) of Paragraph F of this rule. If the memorandum is prepared using a monospaced type style or typeface, such as Courier, the statement shall specify the number of lines contained in the body of the memorandum. If the word-count or line-count of information is obtained from a word-processing program, the statement shall identify the program and version used. 

[As amended, effective July 1, 1990; August 1, 1992; January 1, 1997; January 1, 2000; September 15, 2000; as amended by Supreme Court Order __________, effective __________.] 

PROPOSED REVISIONS TO THE SUPREME COURT GENERAL RULES AND CIVIL FORMS 

The ATJ Commission is considering whether to recommend to the Supreme Court’s consideration proposed amendments to the Supreme Court General Rules and Civil Forms. If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court’s web site at http://nmsupremecourt.nmcourts.gov/ or sending your written comments to: 
Kathleen J. Gibson, Clerk 
New Mexico Supreme Court 
PO Box 848 
Santa Fe, New Mexico 87504-0848 

Your comments must be received on or before Nov. 8, 2010, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court’s web site for public viewing. 

23-114. Free process in civil cases. 

A. Eligibility. In any civil matter, if the court finds that a party is indigent or otherwise unable to pay a fee or fees payable to the court or the cost of service of process, the court may waive such fee or fees and the cost of service of process shall be paid by the state. 

(1) An applicant is presumed indigent if the applicant is the current recipient of aid from a state or federally administered public assistance program such as Temporary Assistance for Needy Families (TANF), General Assistance (GA), Supplemental Security Income (SSI), [Social Security Disability Income (SSDI)] Disability Security Income (DSI), Department of Health, Case Management Service (DHMS), Food Stamps, Medicaid, or public assisted housing. 

(2) An applicant who is not presumptively indigent can nevertheless establish indigency by showing in the application that the applicant’s annual gross income does not exceed [one hundred fifty percent (150%) one hundred eighty-five percent (185%)] of the current federal poverty guidelines established by the United States Department of Labor. 

(3) A presumption of indigency under this rule does not require the court to grant free process if it appears from the application that the applicant is otherwise able to pay. 

(4) Even if an applicant cannot establish indigency, the court may still grant full or partial free process if, in the court’s discretion, the court finds that the applicant is not reasonably able to pay fees or costs. 

B. Procedure. 

(1) A party seeking free process shall file with the court clerk an application for free process with an attached affidavit of indigency and a proposed order for free process. The application, affidavit and proposed order shall be in the form set forth in Form 4-222 and 4-223 NMRA. The court may decide an application for free process ex parte and without hearing. If an application for free process is denied, the court clerk shall, upon the request of the applicant, schedule a hearing on the application. 

(2) Upon the filing of an attorney certificate in the form set forth in Form 4-224 NMRA, certifying that a party (a) is represented by (i) an attorney pursuant to a referral from a local pro bono committee for a judicial district created pursuant to Supreme Court order,
(iii) a legal services organization, (iv) by private counsel working on behalf of or under the auspices of such society or organization, or (b) has met the income qualifications of a legal services organization and attended a training program designed and presented by the legal services organization to assist self-represented litigants in filing their own action in court, the court shall enter an order providing that all fees and costs relating to filing the action and service of process shall be waived without the necessity of an application for free process or affidavit of indigency from the party. In the court’s discretion, the order may provide that any applicable alternative dispute resolution fee is not waived.

(3) Upon the award of any judgment to a party allowed free process, the court may order the party to pay court fees and costs. If a pro se party becomes represented subsequent to being allowed free process, the party shall submit another application for free process along with an affidavit and proposed order. If a case is closed and reinstatement or reopening sought, the party shall submit another application, affidavit and proposed order.

(4) An attorney representing a party allowed free process must also file a certificate stating that no fee has been received, and promising that in case any fee is paid for legal services, the attorney shall first deduct court fees and service of process costs and pay them to the court administrator.

(5) If at any time the court discovers that information in an application for free process was false, misleading, inaccurate, or incomplete at the time the application was submitted, and that an order of free process was improvidently granted, the court may require the applicant or other appropriate party to pay for any costs or fees that were waived. The court may exercise its discretion to impose sanctions for failure to comply with an order of the court issued pursuant to this subparagraph, up to and including dismissal.

[Approved by Supreme Court Order 07-8300-44, effective February 25, 2008; as amended by Supreme Court Order 08-8300-30, effective November 17, 2008; as amended by Supreme Court Order __________, effective __________.]

4-222. Application for free process and affidavit of indigency.
[For use with Supreme Court General Rule 23-114]

STATE OF NEW MEXICO
COUNTY OF_________________ COURT

________________________________________, Petitioner,
v.______________________________________, Respondent,

APPLICATION FOR FREE PROCESS
AND AFFIDAVIT OF INDIGENCY

I request that the court enter an order permitting me to file this case without prepayment of fees and costs and give upon my oath or affirmation the following statement.

My marital status is: Single ____ Married ____ Divorced ____
Separated ____ Widowed ____. I request interpretation services: yes __ no (If yes, please describe what you need) _______________________________.

INFORMATION ABOUT MY FINANCES (check all that apply to you and fill in the blanks):

A. PUBLIC ASSISTANCE
___ I do not receive public assistance (If you check this blank, go directly to Section B EMPLOYMENT/UNEMPLOYMENT).

___ I currently receive the following public assistance in County (please check all applicable public assistance programs):
___ Temporary Assistance for Needy Families (TANF)
___ Food Stamps
___ Medicaid (for myself)
___ General Assistance (GA)
___ Supplemental Security Income (SSI)
___ Social Security Disability Income (SSDI)
___ Public Housing
___ Disability Security Income (DSI)
___ Department of Health Case Management Services (DHMS)
___ Other (please describe __________________________)

B. EMPLOYMENT/UNEMPLOYMENT
___ I am currently unemployed and have been unemployed for ___ months in the past year. I am unemployed because ___ I receive unemployment benefits in the amount of $__________ per month.
___ I have no income because I am unemployed.
___ I am employed. I am paid $______ per hour and work ___ hours per week.

My employer’s name, address and phone number is:

________________________________________
________________________________________
________________________________________

[C] (I am paid weekly ____ every other week ____ twice a month ____ once a month _____. When I am paid my net take home pay minus deductions required by law like state and federal tax withholding and FICA is $___________.]

___ I am married, and my spouse is unemployed and has been unemployed for ___ months in the past year because ___ My spouse receives unemployment benefits in the amount of $__________ per month.
___ I am married, and my spouse is employed. My spouse is paid $__________ per hour and works ___ hours per week.

My spouse’s employer’s name, address and phone number is:

________________________________________
________________________________________
________________________________________

[D] (My spouse is paid weekly ____ every other week ____ twice a month ____ once a month _____. When my spouse is paid his or her net take home pay minus deductions required by law like state and federal withholding and FICA is $___________.]

C. OTHER SOURCES OF INCOME (Check all that apply)
___ I have income from another source not mentioned above.
___ Child Support $__________
___ Alimony $__________
This statement is made under oath. I hereby state that the above information regarding my financial condition is correct to the best of my knowledge. I hereby authorize the Court to obtain information from financial institutions, employers, relatives, the federal internal revenue service and other state agencies. If at any time the Court discovers that information in this application for free process was false, misleading, inaccurate, or incomplete at the time the application was submitted, the Court may require me to pay for any costs or fees that were waived under an order of free process that was granted based on the information in this application.

(Signature)

(Print Name)

Petitioner  Respondent

(Pro Se)

(Street Address)

(City, State, Zip Code)

(Telephone)

State of ) ss

County of )

Signed and sworn to (or affirmed) before me on (date) by (name of applicant).

Notary

My commission expires: ________

IF YOU ARE REPRESENTED BY AN ATTORNEY, YOUR ATTORNEY MUST SIGN THE FOLLOWING CERTIFICATE.

I, (Name of attorney), hereby certify that I have not received any attorney fee to represent (Name of applicant).

If any attorney fee is paid to me, I understand that I shall pay to the court clerk from such attorney fee any court fees and costs that may be waived by the court.

(Attorney Signature)

(Address)

(City, State, Zip Code)

(Telephone/Fax Number)
4-223. Order for free process.  

[For use with Supreme Court General Rule 23-114]  
STATE OF NEW MEXICO  
COUNTY OF ______________________  
______________________________ COURT  
v. __________________________, Petitioner,  
______________________________, Respondent.  

ORDER ON APPLICATION FOR FREE PROCESS  

THIS MATTER having come before the court on Petitioner’s application for free process and affidavit of indigency, or upon Petitioner’s attorney’s certificate supporting indigency and free process pursuant to Rule 23-114(B)(2) NMRA, and the court being otherwise advised in the premises, FINDS that:  

[ ] the applicant is entitled to free process in accordance with Rule 23-114(B)(2) NMRA.  
[ ] the applicant receives public assistance and is, therefore, entitled to free process.  
[ ] the applicant’s annual gross income does not exceed [one hundred and fifty percent (150%)] of the federal poverty guidelines, and the applicant is, therefore, entitled to free process.  
[ ] the applicant’s annual gross income exceeds [one hundred and fifty percent (150%)] of the federal poverty guidelines, but the applicant is not reasonably able to pay fees or costs and is, therefore, entitled to free process.  
[ ] on the basis of the applicant’s available funds or annual gross income, the applicant is not entitled to free process.  

THE COURT ORDERS that:  

[ ] the filing fee is waived.  
[ ] the filing fee is waived except for the $_______ alternative dispute resolution (ADR) fee.  
[ ] the applicant is granted free service of process by the Sheriff in _____________ County, New Mexico for 1 2 3 4 5 or ________ summons(es), provided that the applicant first attempts service by certified mail pursuant to Rule 1-004 NMRA.  
[ ] the applicant is granted free service by the Sheriff in _____________ County, New Mexico, of a temporary restraining order or _________.  
[ ] the applicant is to pay the filing fee on __________.  
[ ] interpretation services shall be provided to the applicant.  
[ ] free process is denied.  
[ ] Other:  

______________________________________________  

Unless specifically granted above, this order of free process does not include the following costs: jury fees, certification fees, subpoena fees for witnesses, witness fees for hearings or trials, mailings, long distance charges, transcripts for appeals or record proper, duplication fees for audiotapes or compact discs, copy charges, publication fees, or facsimile services. Application for all other costs are to be made to the judge assigned to your case.  

If the applicant prevails in this law suit and collects money by judgment or settlement, the court may order reimbursement for any waived costs. If the applicant is represented by an attorney who is paid an attorney fee, any fees or costs waived by this order must be deducted from any such attorney fee and paid to the court clerk. This order is subject to revision, modification or recission by the judge assigned to your case.

4-224. Attorney’s certificate supporting indigency and free process.  

[For use with Supreme Court General Rule 23-114]  
STATE OF NEW MEXICO  
COUNTY OF ______________________  
v. __________________________, Petitioner,  
______________________________, Respondent.  

ATTORNEY’S CERTIFICATE SUPPORTING INDIGENCY AND FREE PROCESS  

I, __________________________, (Attorney name) hereby certify that [check one]  

[ ] I represent ________________________, (Client name) and that my client is entitled to free process pursuant to Rule 23-114(B)(2) NMRA without the necessity of filing an application for free process or affidavit of indigency, or  

[ ] I represent ________________________, (name of self-represented litigant) has met the income qualifications of a legal services organization and attended a training program designed and presented by __________________________ (name of legal services organization) to assist self-represented litigants in filing their own action in court and is therefore entitled to free process pursuant to Rule 23-114(B)(2) NMRA without the necessity of filing an application for free process or affidavit of indigency. The filing of this certificate does not constitute an entry of appearance.  

I further certify that I have not, nor has any legal services organization under whose auspices I am providing representation or training, received any attorney fee for [this representation] representing the client named above or providing the training program to the person named above. If any attorney fee is paid to me or said legal services organization, court fees and costs shall be paid to the clerk from such fee.  

Respectfully submitted,  

(legal services organization or referring local pro bono committee)  

Address  

City, State, Zip Code  

Telephone/Fax Number
From the New Mexico Supreme Court

Opinion Number: 2010-NMSC-042

Topic Index:
Appeal and Error: Harmless Error
Criminal Law: Felony Murder
Criminal Procedure: Grand Jury; Indictment; and Jury Instructions
Evidence: Admissibility of Evidence; Character Evidence; and Prior Convictions or Judgments
Jury Instructions: Jury Instructions, General

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
CHRISTOPHER BRANCH,
Defendant-Appellant.
No. 31,538 (filed: August 18, 2010)

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY
STEPHEN D. PFEFFER, District Judge

STEPHEN D. AARONS
AARONS LAW FIRM, P.C.
Santa Fe, New Mexico
for Appellant

GARY K. KING
Attorney General
MAX W. SHEPHERD
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

OPINION
PATRICIO M. SERNA, Justice

Pursuant to Rule 12-102(A)(1) NMRA, Christopher Branch (Defendant) is before this Court on direct appeal from his conviction for first-degree murder. He raises two issues on appeal: (1) whether the district court erred in admitting evidence of Defendant’s prior conviction for robbery, and (2) whether the predicate felonies on which the jury was instructed constituted an impermissible variance to the indictment. We hold that the district court erred when it admitted evidence of Defendant’s prior conviction for robbery, in violation of Rule 11-404(B) NMRA. Given the ample evidence supporting the conviction, however, the error was harmless. We also hold that the addition of predicate felonies supporting the felony murder charge to those set forth in the indictment was a permissible variance as it did not prejudice Defendant’s substantial rights. Accordingly, we affirm.

I. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

On the morning of April 27, 2007, Defendant and his girlfriend, Contessa Salazar, were arguing in Defendant’s trailer home in Mendanales, New Mexico and became physically violent. Ms. Salazar locked Defendant outside of his trailer and Defendant left in his red pickup truck. Ms. Salazar, hitting her with the open door and causing her to fall to the ground. Defendant then drove the truck’s front wheels over Ms. Salazar’s legs and stomach. Ms. Salazar stood up, using a street sign to stabilize her self. Defendant then began driving around her in circles at a fast rate of speed.

Ronnie Greene was driving a semi-truck on U.S. Highway 84 when he observed a red pickup truck driving abnormally on the shoulder. As Mr. Greene approached, he observed Ms. Salazar holding onto the street sign and mouthing the words, “Help me.” Mr. Greene and Brian Peterson, another truck driver, stopped on the shoulder of the highway to assist Ms. Salazar. Mr. Greene exited his truck and saw Ms. Salazar running towards him as the red pickup truck made a U-turn. Mr. Greene approached Ms. Salazar and observed that she was bleeding from her leg, was missing a shoe and sock, and appeared to be in pain. Mr. Greene saw the red pickup truck driving towards them and they “ran for [their] lives.” Mr. Greene was assisting Ms. Salazar onto the catwalk of his semi-truck when Defendant drove straight at them at a rate of about 45 miles per hour, coming within inches of hitting Mr. Greene. Mr. Greene climbed onto his flat-bed trailer and saw Defendant driving towards the semi-truck a second time, at a speed of about 30 miles per hour. Defendant drove by Mr. Greene and Ms. Salazar, turned around, and drove towards them a third time, at a speed of about 45 miles per hour.

“Michael Rutkowski (Victim) and his wife had been ‘driving down U.S. Highway 84 . . . [when victim] pull[ed] over to help.’ Victim parked their vehicle between the two semi-trucks and exited his car to assist Ms. Salazar and Mr. Greene.” Defendant drove by the parked vehicles, swerved to his right, and struck Victim, projecting him several feet. Mr. Greene and Victim’s wife both testified that Defendant did not slow down as he approached Victim and purposefully swerved to hit Victim. After Defendant struck Victim, he turned his truck around and left the scene. Victim died at the scene.

Defendant was charged with open count of first-degree murder, contrary to NMSA 1978, Section 30-2-1A(1)(A) (1994), under three theories: depraved mind murder, deliberate murder, and felony murder. He was also charged with attempted first-degree murder, contrary to NMSA 1978, Section 30-28-1 (1963) and Section 30-2-1A, or in the alternative, aggravated battery against a household member with a deadly weapon, contrary to NMSA 1978, Section 30-3-16(C) (1995); aggravated
assault against a household member with a deadly weapon, contrary to NMSA 1978, Section 30-3-13(A)(2) (1995); aggravated assault with a deadly weapon against Mr. Greene, contrary to NMSA 1978, Section 30-3-2(C) (1963); kidnapping, contrary to NMSA 1978, Section 30-4-1(A)(4) (2003); and aggravated fleeing a law enforcement officer, contrary to NMSA 1978, Section 30-22-1.1 (2003). At the close of evidence, the district court entered a directed verdict of not guilty for the kidnapping charge. After deliberations, the jury found Defendant guilty of all other counts. Defendant appeals his conviction for first-degree murder.

II. DISCUSSION

A. The Admission of Defendant’s Prior Robbery Conviction Violated Rule 11-404(B) but Was Harmless Error

{6} Before opening statements, the State informed the court that it intended to admit Defendant’s prior robbery conviction. Defendant argued that admitting the robbery conviction would violate Rule 11-404(B), as the conviction would be offered to show propensity. The State asserted that the robbery conviction was relevant because Defendant committed the robbery in the same condition as he committed the crimes in this case—while he was under the influence of drugs and alcohol. The State also contended that the fact that Defendant “elected to keep doing drugs, [and] keep drinking” after he was ordered to undergo treatment as part of his plea agreement for the robbery charge showed that Defendant was cognizant of how drugs and alcohol affected him, tending to refute Defendant’s theory of being impaired by the drugs and alcohol at the time he committed the crime. The district court allowed the prior robbery conviction to be admitted, reasoning that “the robbery arguably show[ed] that . . . [Defendant was] supposed to get treatment and arguably shows that whether drunk or high . . . , he [did] this purposeful act at the same time[.] that [he was] intoxicated”, and concluding that it was not evidence of propensity to commit the alleged crimes.

{7} During trial, the State called Defendant’s mother (Mother) and questioned her about a restraining order that she obtained against Defendant two days prior to Victim’s murder. On cross-examination, Defendant asked Mother if the restraining order was the first time she had filed charges against Defendant. Mother testified that she had filed robbery charges against Defendant for stealing her car keys and leaving without her permission. During re-direct examination, the State informed the court that Defendant had raised the issue of the prior robbery conviction and, since Mother had testified that she wanted help for her son, the State should be allowed to question Mother about the help that was available to Defendant after the robbery conviction plea agreement, in which addiction treatment was ordered. Defendant objected under Rule 11-404(B). In response, the State argued that Defendant’s refusal to undergo treatment was evidence of his state of mind, as “he didn’t care what he did or who he did it to.” The district court granted the State’s request, allowing the prosecutor to question Mother about the robbery conviction and the ordered treatment accompanying the conviction. The State asked Mother if Defendant was required to participate in a drug and alcohol treatment program as a consequence of his robbery conviction, to which Mother replied, “[I]t never went through. The Court never approved it.” In order to refresh her recollection, the State approached Mother with Defendant’s judgment and sentence (“J & S”) for his robbery conviction in which the court ordered Defendant to attend an in-patient treatment program. Over Defendant’s objection, the J&S was admitted.

1. Defendant’s Robbery Conviction Was Inadmissible Under Rule 11-404(B)

{8} Rule 11-404(B) provides in part that [e]vidence 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 motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

“This list is not exhaustive and evidence of other wrongs may be admissible on alternative relevant bases so long as it is not admitted to prove conformity with character.” State v. Otto, 2007-NMSC-012, ¶ 10, 141 N.M. 443, 157 P.3d 8 (internal quotation marks and citation omitted). “[T]he proponent of the evidence is required to identify and articulate the consequential fact to which the evidence is directed,” and even if the evidence is relevant for a reason other than propensity, the requirements of Rule 11-403 must still be satisfied in order for the evidence to be admitted. State v. Gallegos, 2007-NMSC-007, ¶22, 141 N.M. 185, 152 P.3d 828.

{9} We review the admission of evidence for an abuse of discretion. State v. Sena, 2008-NMSC-053, ¶ 12, 144 N.M. 821, 192 P.3d 1198. An abuse of discretion “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 . . . unless we can characterize [its ruling] as clearly untenable or not justified by reason.” Id. (internal quotation marks and citation omitted).

{10} The State argues that Defendant’s refusal to undergo the ordered treatment, and the fact that he committed purposeful acts while under the influence of drugs or alcohol, established his depraved state of mind at the time of the murder. We disagree. Defendant’s conduct that led to his robbery conviction occurred about five years prior to the killing. The only conceivable way in which this conduct could establish Defendant’s state of mind on the day of Victim’s murder would be to impermissibly conclude that because Defendant acted in such a way years ago, his actions on the day of the killing were in conformity with that conduct. In other words, Defendant had the propensity to act dangerously when he was under the influence of drugs or alcohol and this propensity contributed to Victim’s death. In fact, the State argued in such terms: “Defendant was an individual that simply did not care to try to address his drug and alcohol problem, a problem that the evidence established contributed to the death of [Victim].” The purpose of introducing the prior robbery conviction was to establish that, because Defendant was under the influence of drugs and alcohol when he committed the robbery, he is the type of individual who acts dangerously when under the influence, and his actions on the day of Victim’s murder were in conformity with his character. This is the very type of propensity evidence that Rule 11-404(B) prohibits. If we were to allow this type of evidence to be admitted, then we would run “the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment.” Gallegos, 2007-NMSC-007, ¶ 21 (quoting Old Chief v. United States, 519 U.S. 172, 181 (1997)).

{11} Additionally, the State’s reliance on State v. Sandalo, 88 N.M. 267, 539 P.2d 1029 (Ct. App. 1975), is misplaced, as the case is distinguishable. In that case, the evidence at issue was that “during the hours and minutes immediately preceding the accident,” the defendant was “showing off in a ‘hot-rod’ type of vehicle” by driving up and down the streets at high speeds, straddling lanes, turning corners very rapidly, and making illegal U-turns. Id. at 269, 539
P.2d at 1031. On appeal, the defendant argued that the district court erred when it admitted evidence of his driving conduct throughout the entire day of the incident which led to his vehicular homicide conviction. Id. at 270, 539 P.2d at 1032. The Court of Appeals disagreed, reasoning that the record contained evidence of the defendant’s conduct immediately before the incident and thus admissible under Rule 11-404(B), as it showed the defendant’s mental state and lack of an accident. Id. at 270, 539 P.2d at 1032.

When comparing the two cases, the time between the previous conduct and the conduct which led to the respective convictions is the critical difference. It can readily be shown that the defendant’s reckless driving in Sandoval, which occurred immediately before the incident, could be evidence of the defendant’s mental state at the time of the incident because not much time had transpired between the incidents. In fact, it could be reasonably concluded that the defendant’s reckless driving on that day was one continuous act of driving, beginning from the hours before the incident.

The same cannot be said in the instant case. Approximately five years had transpired between Defendant’s robbery conviction and the incident that led to Victim’s murder. It is illogical to conclude that Defendant’s state of mind five years prior could establish his state of mind on the day he murdered Victim. While we are not defining how close in time a prior incident must be to the incident in question in order to establish a defendant’s state of mind at the pertinent time, we do emphasize that the time between incidents is an important factor to consider when determining the admissibility of a prior crime, wrong, or act under Rule 11-404(B) to establish a defendant’s state of mind. The closer in time a prior act is to the act at issue, the more likely the prior act can establish a defendant’s state of mind.

Evidence of Defendant’s prior robbery conviction was used to establish that Defendant acted in conformity with such actions surrounding the robbery at the time he murdered Victim. Therefore, Defendant’s prior robbery conviction was inadmissible propensity evidence under Rule 11-404(B), and thus the district court abused its discretion by admitting it.

2. Admission of Defendant’s Prior Robbery Conviction Was Harmless Error

Having concluded that the district court erred when it admitted Defendant’s prior robbery conviction, we now must determine if the error was harmless. Given that the error in this case was an evidentiary error, we employ the non-constitutional standard for the harmless error analysis. “[A] non-constitutional error is harmless when there is no reasonable probability the error affected the verdict.” State v. Barr, 2009-NMSC-024, ¶ 53, 146 N.M. 301, 210 P.3d 198. Reviewing courts consider three factors when determining whether an error is harmless: “[W]hether there is: (1) substantial evidence to support the conviction without reference to the improperly admitted evidence; (2) such a disproportionate volume of permissible evidence that, in comparison, the amount of improper evidence will appear minuscule; and (3) no substantial conflicting evidence to discredit the State’s testimony.” Id. ¶ 56 (footnote omitted). These factors “are considered in conjunction with one another . . . [and] provide a reviewing court with a reliable basis for determining whether an error is harmless.” Id. ¶ 55.

After careful examination of the record and consideration of the three factors identified in Barr, we determine that there is no reasonable probability that the improperly admitted evidence affected the verdict. Even if evidence of Defendant’s prior robbery conviction and his subsequent refusal to undergo treatment had been excluded, the record still establishes that there was substantial evidence to support Defendant’s convictions. Primarily, the testimony of Ms. Salazar establishes not only Defendant’s abusive behavior in the hours leading up to the murder, but also a detailed account of how Defendant drove around her in circles, struck her with the opened door of the truck, ran over parts of her body, and nearly hit her and Mr. Greene while driving at a fast rate of speed. The testimony of the three eye witnesses corroborated Ms. Salazar’s testimony and added additional detail. Mr. Greene testified that Defendant drove straight toward them at a rate of speed of about forty-five miles per hour, came within inches of hitting them, and then proceeded to drive straight toward them two additional times. Also, Mr. Greene and Victim’s wife both testified that Defendant drove straight toward Victim and purposefully swerved his truck in order to hit Victim. Mr. Greene also testified that, after striking Victim, Defendant fled the scene. The testimony from the eye witnesses provides substantial evidence to support each of Defendant’s convictions, and not one of the convictions relied on the inadmissible robbery conviction. This substantial amount of evidence—the eyewitness testimony from four different witnesses—also leads us to conclude that the second factor identified in Barr weighs in favor of harmless, because when comparing this evidence with the inadmissible evidence of Defendant’s prior robbery conviction, there is a disproportionate volume of admissible evidence and the lone piece of inadmissible evidence appears minuscule. Finally, we do not find substantial evidence that discredited the State’s case.

After weighing the factors, we conclude that there was no reasonable probability that the admission of evidence of the robbery conviction affected the verdict, and thus the district court’s error in admitting it was harmless.

B. The Addition of the Predicate Felonies to The Felony Murder Charge Was a Permissible Variance

Defendant was charged by indictment with an open count of first-degree murder under three theories: depraved mind murder, premeditated murder, and felony murder. The indictment only listed attempted murder and kidnapping as predicate felonies for the felony murder charge. After the conclusion of the State’s evidence, the district court granted the State’s motion to include aggravated assault with a deadly weapon against both Ms. Salazar and Mr. Greene as predicate felonies. In addition to the original predicate felonies, the district court instructed the jury that it could find Defendant guilty of felony murder if the State proved beyond a reasonable doubt that “[D]efendant caused the death of [Victim] during the commission of . . . Aggravated Assault against a Household Member with respect to Contessa Salazar and/or Aggravated Assault with respect to Ronnie Greene.”

On appeal, Defendant argues that the grand jury limited the scope of the felony murder charge to the predicate felonies of attempted murder and kidnapping and that “[a] last minute ploy to broaden the indictment at the close of evidence, by including two aggravated assault counts into the list of predicate offenses within the felony murder elements instruction, requires reversal as a matter of law.” We disagree.

Rule 5-204(C) provides:

No variance between those allegations of a complaint, indictment, information or any supplemental
pleading which state the particulars of the offense, whether amended or not, and the evidence offered in support thereof shall be grounds for acquittal of the defendant unless such variance prejudices substantial rights of the defendant. The court may at any time allow the indictment or information to be amended in respect to any variance to conform to the evidence. . . . See also State v. Roman, 1998-NMCA-132, ¶ 11, 125 N.M. 688, 964 P.2d 852 (“[i]t is permissible to amend an information to conform to evidence introduced in support of the charge made in the information.

“Rule 5-204(C) can[not] be used to impose an entirely new charge against a defendant after the close of testimony.” Id. ¶ 9 (emphasis added). Also, “[a] variance is not fatal unless the accused cannot reasonably anticipate from the indictment what the nature of the proof against him will be.” State v. Marquez, 1998-NMCA-010, ¶ 20, 124 N.M. 409, 951 P.2d 1070 (filed 1997). We review a district court’s interpretation and application of Rule 5-204 de novo. Roman, 1998-NMCA-132 ¶ 8.

20] Under Rule 5-204(C), if the substantial rights of a defendant are prejudiced by a variance, then such a variance may provide the grounds for an acquittal. Thus, in order to determine if it was error for the district court to instruct the jury as to the additional predicate felonies, we must ascertain whether Defendant’s substantial rights were prejudiced. Defendant claims he was prejudiced because the variance added (1) a victim (Mr. Greene) and (2) an element (the temporal nexus with respect to the aggravated assaults predicate felonies) to the predicate felonies.

21] Defendant is correct that an additional victim was added to the predicate felonies of the felony murder charge. In Count I of the indictment, kidnapping and attempted murder were the only predicate felonies of the felony murder charge, and Counts II and V specify Ms. Salazar as the victim of both these charges. Therefore, Mr. Greene was not identified in the indictment as a victim of any of the predicate felonies with respect to the felony murder charge. He was, however, included in the jury instructions regarding the felony murder charge by virtue of the addition of the aggravated assault with respect to him as a predicate felony. Defendant argues that he was prejudiced because “[t]he pre-trial interview and trial cross-examination of Mr. Greene and others might have progressed differently had counsel been given notice that the assault on him by motor vehicle would also be treated as a predicate offense.” We disagree and conclude that Defendant’s mere speculation of how he would have conducted his defense differently does not rise to the level of prejudice that is required for an acquittal.

22] The jury could have concluded that when Defendant drove towards Ms. Salazar and Mr. Greene at a high rate of speed, coming within inches of striking them, Defendant had committed attempted murder of Ms. Salazar and aggravated assault against both Ms. Salazar and Mr. Greene. Given that the attempted murder and aggravated assault charges arose from the same underlying conduct, Defendant was put on notice and could “reasonably anticipate from the indictment what the nature of proof against him [would] be.” See Marquez, 1998-NMCA-010, ¶ 20. Because Defendant was aware that he had to defend against the aggravated assault charge with respect to Mr. Greene, Defendant was not prejudiced by the designation of the already-existing aggravated assault charge as a predicate felony.

23] Regarding the “temporal nexus” argument, Defendant contends that since the aggravated assaults against Ms. Salazar and Mr. Greene were not included as predicate felonies in the felony murder charge, he “had no reason to show how the assaults on Ms. Salazar and Mr. Greene ceased when they climbed up the safe haven of his tractor trailer.” Defendant argues that the “[c]ross-examination[s] of [Ms.] Salazar and [Mr.] Greene and [Victim’s wife] and other eyewitnesses might have shown that [Ms.] Salazar and [Mr.] Greene were no longer in harm’s way, their assaults by motor vehicle having ceased well before, not during, the tragic homicide.”

24] For the same reasons that the variance’s addition of another victim to the predicate felonies did not amount to a prejudice of Defendant’s substantial rights, we conclude that Defendant’s substantial rights were likewise not prejudiced by the addition of a “temporal nexus” element. The felony murder charge, in the indictment stated that Defendant murdered Victim “while in the commission of or attempt to commit a felony, to wit: attempted murder or Kidnapping . . . .” Therefore, Defendant had notice of both the felony murder charge with the predicate felony being the attempted murder against Ms. Salazar, and the “temporal nexus” element, i.e., that Victim’s murder had to have occurred “while in the commission of” the attempted murder. Given that Defendant had notice as to the “temporal nexus” element, Defendant’s argument relies on the distinction between the attempted murder of Ms. Salazar and aggravated assaults against either Ms. Salazar or Mr. Greene.

25] Under the facts of this case, there is no meaningful difference between the attempted murder of Ms. Salazar and aggravated assault against either Ms. Salazar or Mr. Greene. As we have previously stated, the attempted murder and aggravated assault charges may have arisen from the same underlying conduct—when Defendant almost struck both Ms. Salazar and Mr. Greene with his truck as he drove towards them at a high rate of speed. The preparation for defending against the felony murder charge, where the predicate felony was attempted murder of Ms. Salazar, should have been the same as defending against a felony murder charge with aggravated assaults against Ms. Salazar and Mr. Greene as the predicate felonies. Defendant was not prejudiced by the addition of the aggravated assaults as predicate felonies with respect to the additional “temporal nexus” element. Defendant’s substantial rights were not prejudiced when the district court allowed for the variance.

26] We hold that the additional predicate felonies on which the jury was instructed did not amount to an impermissible variance to the indictment, and thus the district court did not error by granting the amendment.

III. CONCLUSION

27] The district court erred when it admitted evidence of Defendant’s prior robbery conviction as it was inadmissible propensity evidence under Rule 11-404(B). However, given the substantial evidence supporting the district court’s conviction of Defendant without reference to the impermissible evidence, the district court’s error was harmless. The additional predicate felonies on which the jury was instructed did not amount to an impermissible variance to the indictment as Defendant’s substantial rights were not prejudiced. Defendant’s conviction is affirmed.

28] IT IS SO ORDERED.

PATRICIO M. SERNA,
Justice

WE CONCUR:

CHARLES W. DANIELS,
Chief Justice

PETRA JIMENEZ MAES, Justice

RICHARD C. BOSSON, Justice

EDWARD L. CHÁVEZ, Justice

Bar Bulletin - October 18, 2010 - Volume 49, No. 42 29
From the New Mexico Supreme Court

Opinion Number: 2010-NMSC-043

Topic Index:
Civil Procedure: Summary Judgment
Negligence: Assumption of Risk; Breach of Duty; Comparative Negligence; Duty; Foreseeability; Liability, General; and Personal Injury
Torts: Premises Liability

EDWARD C. and JANIS C., individually and as parents of
EMILIO C., RACHEL C., and CASSANDRA G., minor children,
Plaintiffs-Respondents,
versus
CITY OF ALBUQUERQUE,
Defendant-Petitioner.

Consolidated with:

No. 31,917
EDWARD C. and JANIS C., individually and as parents of
EMILIO C., RACHEL C., and CASSANDRA G., minor children,
Plaintiffs-Respondents,
versus
ALBUQUERQUE BASEBALL CLUB, L.L.C., d/b/a ALBUQUERQUE ISOTOPES,
Defendant-Petitioner.
No. 31,907 (filed: September 3, 2010)

ORIGINAL PROCEEDINGS ON CERTIORARI
RICHARD J. KNOWLES, District Court Judge

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OPINION

EDWARD L. CHÁVEZ, JUSTICE

1. In this case, it is alleged that a child was struck in the head by a baseball during pre-game batting practice at Isotopes stadium. The child was seated in the picnic area beyond the left field wall in fair ball territory with his family for a pre-game Little League party. The child had just begun to eat his food when, without warning, pre-game batting practice began and a baseball struck him, fracturing his skull. Plaintiffs sued the Albuquerque Baseball Club, LLC d/b/a Albuquerque Isotopes (Isotopes), the City of Albuquerque (City), Houston McLane Co. d/b/a Houston Astros (Astros), and Dave Matranga, the player who batted the ball that struck the child (collectively “Defendants”).

2. The question we must answer is what duty do owner/occupants of commercial baseball stadiums have to protect spectators from projectiles leaving the field of play. The district court applied the most limited duty, which is followed in a minority of jurisdictions, commonly referred to as the “baseball rule.” The district court held that the duty was limited to providing screening for the area of the field behind home plate for as many spectators as may reasonably be expected to desire such protection. Because Isotopes stadium has such screening, the district court granted summary judgment to Defendants.

3. On appeal, the Court of Appeals reversed summary judgment regarding the City and the Isotopes “on the ground that, under the particular circumstances alleged, there are issues of material fact precluding summary judgment” and rejected application of a limited-duty baseball rule, holding instead that these Defendants owed a duty to exercise ordinary care. Crespin v. Albuquerque Baseball Club, LLC, 2009-NMCA-105, ¶¶ 1, 13, 147 N.M. 62, 216 P.3d 827. We granted certiorari to decide whether New Mexico should recognize a limited duty for owner/occupants of commercial baseball stadiums.

4. Considering the nature of the sport of baseball, which involves spectator participation and a desire to catch balls that leave the field of play, contrary to the Court of Appeals majority opinion, we believe that a limited-duty rule, albeit not the one argued for by Defendants, is warranted by sound policy considerations. Accordingly, we hold that an owner/occupant of a commercial baseball stadium owes a duty that is symmetrical to the duty of the spectator. The spectator must exercise ordinary care to protect himself or herself from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk.

5. In this case, it is alleged that the injured child was not in an area dedicated solely to viewing the game, but was in the picnic area with tables positioned perpendicular to the field of play. This type of area can be described as a multi-purpose area. It is alleged that, without warning, batting practice commenced when the child was hit by a baseball that left the field of play. Given the scope of duty that we define today and Plaintiffs’ allegations, we conclude that, on the record before us, Defendants did not make a prima facie showing entitling them to summary judgment.

I. BACKGROUND

6. Plaintiffs and their four-year-old son, Emilio, two-year-old daughter, Rachel, and ten-year-old daughter, Cassandra, were attending a Little League party at Isotopes stadium. The City owns the stadium, which is leased by the Isotopes. Plaintiffs were in the stadium’s picnic area, located beyond the left field wall in fair ball territory. They “had just sat down with [their] hot dogs and drinks” and had “just begun to eat [their] meals, when without a warning from anyone at the ball park a baseball struck Emilio in the head.” During pre-game batting practice, New Orleans Zephyrs player Dave Matranga batted a ball out of the park into the picnic area, striking Emilio “in the upper right portion of his head fracturing his skull.” The picnic tables in the left field stands are arranged in alignment with the left field foul line, so that seated individuals are not directly facing the field of play, but face perpendicular to the action. Isotopes stadium has a screen or protective netting between home plate and the seats behind home plate, but has no screen or protective netting between home plate and the seats beyond the left field wall.

7. Plaintiffs allege that injury to Emilio was foreseeable and Defendants owed a duty to exercise ordinary care for his safety. Defendants contend that the central issue is whether Defendants breached the duty of ordinary care by not screening the picnic area, when that area was designed so that patrons are not focused on the game or pre-game activities, and by failing to warn Plaintiffs that batting practice had begun. Under these facts, Defendants argue, “the issue of negligence . . . should be reserved for the jury to determine with reference to the facts of the particular case,” and to compare Defendants’ fault with any fault that might be attributable to Plaintiffs.

8. Defendants contend that before the question of breach of duty can be addressed, the court must determine the scope of duty. They argue that baseball is a unique spectator sport and “justifies a specific definition of the duty owed by operators of baseball facilities.” They explain that “baseball subjects spectators to an inherent risk of being struck by a batted ball . . . [yet] most spectators . . . prefer to sit in an area where they can watch the game without the obstruction of a screen . . . [and have] the opportunity to . . . catch a . . . ball [that leaves the playing field].” (Citations omitted.) Because proprietors of ball parks have a legitimate interest in catering to these desires, their duty should be limited.

9. Defendants argue that the Court of Appeals conferred upon the jury, not the courts, “the power to decide the legal question of what duty of care exists in the context of a baseball game” (emphasis omitted) when it applied the duty of ordinary care. “It left the question unanswered as to where an owner or operator’s duty begins.” The result, Defendants claim, is that “[t]here would be no predictability as to how one might satisfy an ever-changing duty that different fact finders might decide.”

10. Defendants urge this Court to adopt a limited-duty baseball rule that is satisfied when the owner/occupant of a baseball stadium provides a screened area behind home plate with adequate seating for those seeking protection. “Where a spectator rejects the protected seating and opts for seating that is not, or is less, protected the owner or operator is not liable.” As will be discussed infra, the baseball rule proposed by Defendants and adopted by the district court is the most limited and is followed only by a minority of jurisdictions in this country.

11. Plaintiffs contend that the baseball rule proposed by Defendants does little to promote safety because it offers “little incentive to examine new methods of keeping fans safe.” Where, as in this case, the attending public is specifically invited not to give their full attention to the field, the baseball rule cannot fairly be applied. Plaintiffs also contend that the baseball rule is inconsistent with New Mexico’s system of pure comparative fault because the rule is a “species” of the assumption of risk defense, which was abolished in New Mexico along with other “all or nothing” defenses. (Internal quotation marks omitted.)
Defendants respond by contending that there is nothing inconsistent with our comparative fault system “because where the duty ends, there can be no negligence to impute.” The baseball rule specifically defines the duty of ordinary care owed in the limited context of what protection must be provided to spectators from baseballs that leave the field of play.” Therefore, nothing about the rule conflicts with comparative negligence and “many of the twenty plus states to adopt the baseball rule have done so by defining the duty of ordinary care owed in the context of a comparative negligence setting.” Finally, Defendants argue that “failure to adopt the baseball rule . . . will isolate New Mexico from almost every other jurisdiction to consider the issue and have a significant, adverse social and economic impact on citizens of this State.”

The district court was persuaded by Defendants’ argument and granted summary judgment in their favor, concluding that New Mexico would adopt their version of the baseball rule, and therefore Defendants satisfied their duty as a matter of law. On appeal, the Court of Appeals affirmed summary judgment in favor of the Astros and Matranga. Crespin, 2009-NMCA-105, ¶ 35. The basis for affirming summary judgment in favor of it was that they were “simply the personification of the game in this case,” id. ¶ 30, which is to say that Matranga “was simply playing baseball according to the rules and doing what his employer, the Astros, wanted him to do,” id. ¶ 31, which was to hit home runs. Reversing summary judgment for the City and the Isotopes, the Court of Appeals held that “a duty of ordinary care was the applicable standard of care” in relation to “a specific individual or group of individuals” created by the “specific statutory or common-law standard”; and (2) a “defensive” duty that is the “general negligence standard, requiring the individual to use reasonable care in his activities and dealings” in relation to “society as a whole.” Calkins, 110 N.M. at 62 n.1, 792 P.2d at 39 n.1; see Herrera v. Quality Pontiac, 2003-NMSC-018, ¶ 12, 134 N.M. 43, 73 P.3d 181 (following analytical structure laid out in Calkins looking first for a specifically defined statutory duty then a specifically defined common-law duty).

“As a general rule, an individual has no duty to protect another from harm.” Grover v. Stechel, 2002-NMCA-049, ¶ 11, 132 N.M. 140, 45 P.3d 80. Certain relationships, such as a possessor of land and a visitor, however, give rise to such a duty. Id. The special relationship between Defendants, as owners and occupants of Isotopes stadium, and Plaintiffs, as visitors, places Defendants’ duty within the first category. Indeed, Defendants do not dispute that a duty is owed; they simply argue that the scope of that duty should be limited.

New Mexico generally applies a “single standard of reasonable care under the circumstances” to landowners or occupants. Ford v. Bd. of Cnty. Comm’rs, 118 N.M. 134, 138, 879 P.2d 766, 770 (1994) (abolishing the distinction between invitees and licensees but not trespassers, because trespassers have “no basis for claiming extended protection” and such “would place an unfair burden on a landowner who has no reason to expect a trespasser’s presence” (internal quotation marks and citation omitted)). In Ford, we articulated the standard of reasonable care as follows:

A landowner or occupier of premises must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of the injury, and the burden of avoiding the risk. This duty of care shall extend to all persons, other than trespassers, who enter property with the defendant’s consent, express or implied.

Id. at 139, 879 P.2d at 771. Accordingly, our jury instructions provide that “[a]n [owner] [occupant] owes a visitor the duty to use ordinary care to keep the premises safe for use by the visitor[, whether or not a dangerous condition is obvious].” UJI 13-1309 NMRA. UJI 13-1603 NMRA provides guidance on what constitutes “ordinary care.”

“Ordinary care” is that care which a reasonably prudent person would use in the conduct of the person’s own affairs. What constitutes “ordinary care” varies with the nature of what is being done.

As the risk of danger that should reasonably be foreseeable increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.

The Court of Appeals determined that ordinary care was the applicable standard because “Emilio and his injury were[,] foreseeability,” and “[c]onsequently, all Defendants owed Emilio a duty to exercise ordinary care for his safety.” Crespin, 2009-NMCA-105, ¶ 13. Foreseeability, however, is but one factor to consider when determining duty and not the principal question. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 cmt. j (2010) (disapproving the use of foreseeability to limit liability in preference for “articulat[ing] polic[ies] or principle[s] . . . to facilitate more transparent explanations of the reasons for a no-duty [or limited-duty] ruling and to protect the traditional function of the jury as factfinder”). Instead, “duty is a policy question that is answered by reference to legal precedent, statutes, and other principles of law.” Herrera, 2003-NMSC-018, ¶ 7 (internal quotation marks and citation omitted).

In considering the policy implications of adopting the baseball rule, the Court of Appeals determined “that there is no compelling reason to immunize the owners/
occupiers of baseball stadiums” because “[c]omparative negligence principles allow the fact finder to take into account the risks that spectators voluntarily accept when they attend baseball games as well as the ability of stadium owners to guard against unreasonable risks that are not essential to the game itself.” Crespin, 2009-NMCA-105, ¶ 23. This Court’s restatement of New Mexico’s uniform jury instruction in Bober v. New Mexico State Fair, 111 N.M. 644, 648, 808 P.2d 614, 618 (1991), that “[e]very person has a duty to exercise ordinary care for the safety of the person and the property of others” (quoting UJI 13-1604 NMRA), seemingly drove the Court of Appeals’ rationale. The Court of Appeals determined that rejection of the baseball rule is consistent with our move “‘towards a public policy that defines duty under a universal standard of ordinary care, a standard which holds all citizens accountable for the reasonableness of their actions.’” Crespin, 2009-NMCA-105, ¶ 24 (quoting Yount v. Johnson, 1996-NMCA-046, ¶ 4, 121 N.M. 585, 915 P.2d 341).

[20] To determine whether New Mexico’s duty of ordinary care for owners/occupants is appropriate in the context of commercial baseball, we will review baseball spectator injury cases from other jurisdictions for comparison to our owner/occupant duty framework. In doing so, we look for instances where courts have imposed a duty other than the duty to exercise ordinary care that are supported by sound policy consistent with New Mexico’s pure comparative fault system and a general interest in promoting safety, welfare, and fairness.

[21] The approach we take is consistent with the approach suggested by the American Law Institute. The Restatement notes that modification of duty is appropriate in situations when “reasonable minds could differ about the application of the negligence standard to a particular category of recurring facts.” Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7 cmt. i. The American Law Institute notes that courts can “render a judgment about that category of cases” under “the rubric of duty” taking “into account factors that might escape the jury’s attention in a particular case, such as the overall social impact of imposing a significant precautionary obligation on a class of actors.” Id. “Such a categorical determination . . . has the benefit of providing clearer rules of behavior for actors who may be subject to tort liability and who structure their behavior in response to that potential liability.” Id.

III. THE HISTORY AND DEVELOPMENT OF A BASEBALL RULE

[22] The first recorded baseball game in America was played in 1846 on Elysian Fields in Hoboken, New Jersey, just across the Hudson River from New York City. Between the Knickerbocker Base Ball Club and the New York Nine. Leonard Koppett, Koppett’s Concise History of Major League Baseball 5, 7 (2004). The era’s restrictive rules meant that the game with balls pitched underhand was less dangerous than the style of baseball played today. See Robert M. Gorman & David Weeks, Death at the Ballpark: A Comprehensive Study of Game-Related Fatalities of Players, Other Personnel and Spectators in Amateur and Professional Baseball, 1862-2007 9, 131 (2009). By the 1880s, the rules of the game had been modified to allow pitchers to throw overhand, catchers wore masks and chest protectors, and the grandstand area behind home plate became known as the “slaughter pen,” apparently because of the frequent injuries suffered by spectators watching the game from that area. J. Gordon Hylton, A Foul Ball in the Courtroom: The Baseball Spectator Injury as a Case of First Impression, 38 Tulsa L. Rev. 485, 488 (2003); see also Gorman & Weeks, supra at 131. It was not until 1879 that the first professional team, the Providence Grays, installed a screen behind home plate for the express purpose of protecting spectators. Hylton, supra at 488; Gorman & Weeks, supra at 131. However, “[i]n spite of the safety they provided, the new screens were not always well received. In Milwaukee . . . a wire screen was erected in front of the grandstand on June 25, 1884, but was removed seven days later because of fan complaints about the obstructed view.” Hylton, supra at 488. Nonetheless, “by the late 1880s, it was commonplace . . . to screen in the portion of the grandstand directly behind homeplate,” leaving the rest of the grandstand area and bleacher seats “unscreened and unprotected.” Id. The reason stated for leaving most of the spectator stands unprotected was that “many field-level fans do not want screens or other protective devices in these areas because they feel their views will be degraded, foul ball catching opportunities will be decreased, or the intimate feeling derived from sitting close to the action will be reduced.” Gorman & Weeks, supra at 132.

[23] The limited protective screening behind home plate, however, failed to eliminate spectator injuries and did not curtail burgeoning plaintiffs’ claims. As a result, more baseball spectator injury cases came under appellate review, see Gil Fried & Robin Ammon, Baseball Spectators’ Assumption of Risk: Is it ‘Fair’ or ‘Foul’?, 13 Marq. Sports L. Rev. 39, 42 (2002), and courts responded by developing a baseball-specific jurisprudence. Courts almost universally adopted some form of what is known as the “baseball rule,” creating on the part of ball park owners and occupants only a limited duty of care toward baseball spectators. See Benejam v. Detroit Tigers, Inc., 635 N.W.2d 219, 221 (Mich. Ct. App. 2001) (“Our review of precedents from other jurisdictions finds overwhelming, if not universal, support for the limited duty rule that defendant advocates.” (footnote omitted)); see, e.g., Crane v. Kan. City Baseball & Exhibition Co., 153 S.W. 1076, 1077 (Mo. Ct. App. 1913) (holding that defendants had a duty “of providing seats protected by screening from wildly thrown or foul balls,” which is fulfilled by providing screened seats and giving patrons “the opportunity of occupying one of those seats”). In its most limited form, the baseball rule holds that where a proprietor of a ball park furnishes screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest and that screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, the proprietor fulfills the duty of care imposed by law and, therefore, cannot be liable in negligence.


[24] From the earliest cases, the legal theories underlying the baseball rule precluding recovery have been the doctrines of

1Available online at http://books.google.com/books?id=crjbVkBashHcC&printsec=frontcover&q=Leonard%20Koppett&source=bl&ots=YJL8pgvyn&sig=GW37mXRtbJNCMMe6kzlwpv9ERE0c0kh=en&ei=4C98T1i-RnwfgwlydCw&sa=X&oi=book_result&ct=result&resnum=10&ved=0CDkQ6AEwCQ#v=onepage&q&f=false
assumption of risk and contributory negligence. See Quinn v. Recreation Park Ass’n, 46 P.2d 144, 147 (Cal. 1935) (per curiam) (“[I]n accepting the unscreened seat, even temporarily, with full knowledge of the danger attached to so doing, [plaintiff] assumed the risk of injury, which precluded recovery of damages.”); Crane, 153 S.W. at 1078 (“And if it could not be said that [plaintiff] assumed the risk, still he should not be allowed to recover, since his own contributory negligence [for choosing an unprotected seat] is apparent and indisputable.”).

[25] Nearly from the outset, courts recognized a baseball rule as a necessary divergence from the prevailing “high degree of care for . . . safety” that is owed to business invitees, given the nature of the game and the relationship between the spectator and the stadium owner or occupant. Wells v. Minneapolis Baseball & Athletic Ass’n, 142 N.W. 706, 707-08 (Minn. 1913). [T]his [business invitee] rule must be modified when applied to an exhibition or game which is necessarily accompanied with some risk to the spectators. Baseball is not free from danger to those witnessing the game. But the perils are not so imminent that due care on the part of the management requires all the spectators to be screened in.

Id. at 708. In limiting the duty, the courts also reasoned that “a large part of those who attend prefer to sit where no screen ob- scures the view” and owners or occupants have “a right to cater to their desires.” Id.; see also Maisonave v. Newark Bears Prof’l Baseball Club, Inc., 881 A.2d 700, 706 (N.J. 2005) (noting that “most spectators prefer to sit where they can have an unobstructed view of the game and are willing to expose themselves to the risks posed by flying balls . . . to obtain that view” and that professional baseball is unique “because fans actively engage in the game by trying to catch foul balls” (internal quotation marks and citation omitted)), superseded by statute, New Jersey Baseball Safety Act of 2006, L. 2005, c. 362, N.JSA 2A:53A-43 to -48, as recognized in Sciarrotta v. Global Spectrum, 944 A.2d 630, 632 (N.J. 2008); Akins, 424 N.E.2d at 533 (“[M]any spectators . . . desire to watch the contest taking place on the playing field without having their view obstructed or obscured by a fence or a protective net.”). [26] While the Akins baseball rule arguably once represented a majority approach across jurisdictions to baseball spectator injury claims, a wide variation in the formulation of the baseball rule now exists, making the Akins rule the minority approach. Some jurisdictions impose duties on stadium owners greater than those pronounced in Akins, yet less onerous than a general duty of ordinary care. See, e.g., Lowe v. Cal. League of Prof’l Baseball, 65 Cal. Rptr. 2d 105, 106 (Cal. Ct. App. 1997) (“[D]efendants had a duty not to increase the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume.”); Jones v. Three Rivers Mgmt. Corp., 394 A.2d 546, 550-51 (Pa. 1978) (holding that recovery is barred to those “exposed in the stands of a baseball stadium to the predictable risks of batted balls,” but not to those who show that their injury was not the result of a “common, frequent and expected part of the game” (internal quotation marks and citation omitted)).

[27] This shift has been attributed, in part, to a move away from the absolute defenses of contributory negligence and assumption of risk, which functioned as complete bars to plaintiff recovery, to comparative fault tort systems. Fried & Ammon, supra at 43 (“Some lawyers involved in baseball negligence cases believed the subtle change toward plaintiff judgments occurred due to the shift in some states from assumption of risk [and contributory negligence] to comparative negligence as a defense.”); see also Akins, 424 N.E.2d at 533 (noting that the early baseball rule cases “arose prior to the adoption of the comparative negligence rule”). Aside from shifts in tort law, advances in the game and the business of baseball have also been significant factors contributing to court modification of the traditional baseball rule. The common theme among contemporary cases modifying the traditional baseball rule is that spectators injured by baseballs are generally allowed to advance their claim when the injury is the result of some circumstance, design, or conduct neither necessary nor inherent in the game.

[28] For example, in Maisonave, 881 A.2d at 706-07, the New Jersey Supreme Court recognized that “[i]t would be unfair to hold owners and operators of baseball stadiums liable for injuries to spectators in the stands when the potential danger of fly balls is an inherent, expected, and even desired part of the baseball fan’s experience.” Accordingly, the court applied the Akins baseball rule only within the stands—areas “dedicated solely to viewing the game,” id. at 707, where fly balls are inherent, expected, and even desired. “In contrast, multi-purpose areas, such as concourses and playground areas, are outside the scope of the rule,” id. at 707, and are subject to “a duty of reasonable care,” id. at 709. In these multi-purpose areas, “[t]he validity of the baseball rule diminishes” because “[f]ans foreseeably and understandably let down their guard when they are in other areas of the stadium” where the fan “is no longer trying to catch foul balls or even necessarily watching the game,” id. at 708, and so fly balls are neither expected nor desired.

[29] The New Jersey court understood that applying the “old [baseball rule] to a sport that has changed tremendously in the last seventy years” poses “pragmatic difficulties.” Id. (internal quotation marks and citation omitted). Specifically, the court noted that players are faster and stronger than in the past, and marketing techniques employed at games create “a sensory overload of distractions,” id. (internal quotation marks and citation omitted); therefore, “[t]he limited duty rule does not accommodate all of the activities that are part of today’s game, nor does it take into account that players can hit baseballs harder and farther.” Id.

[30] Additionally, the Maisonave court also expressed concern about the ability of the spectators to protect themselves from balls leaving the field of play. Id. at 708-09. The court noted “[t]he fact that [c]hildren and seniors are an important part of minor league games underscores our concern” for the implicit reason that old and young spectators may be poorly equipped to protect themselves from sharply hit balls or less likely to remain attentive to the action on the field. Id. (alteration in original) (internal quotation marks and citation omitted). Thus, while minor league clubs especially market their games as family events for young and old, the effect of the baseball rule has been to insulate stadium owners from legal responsibility so “they are under little pressure to add more protection for fans,” id. at 706 (internal quotation marks and citation omitted), even when they employ the distractions for their own benefit to attract patrons least able to defend themselves. Noting these changes to viewing and playing the game, the Maisonave court echoed a prominent concern raised by the dissent in Akins. “The [Akins] ruling will . . . foreclose juries in the future from considering the wide range of circumstances of individual cases, as well as new developments in safety devices.
or procedures. . . . [The Akins Court] has frozen a position that is certain to become outdated, if it is not already.” Akins, 424 N.E.2d at 537 (Cooke, C.J., dissenting). Even before Akins, courts in other jurisdictions did not adopt a baseball rule as limited as the rule adopted by the Akins court. In Blakeley v. White Star Line, 118 N.W. 482 (Mich. 1908), the plaintiff was injured by a wildly thrown ball while at an amusement park watching dancers in a pavilion near a baseball diamond. Id. at 482 (syllabus of the court). The players who threw the ball were removed from the diamond by players who had properly reserved it for play. Id. The former had nonetheless resumed their play in an area between the diamond and the dance pavilion not intended for baseball play, at which point the errant throw was made. Id. The Blakeley court essentially set out the language for what would become a baseball rule.

It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond, and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk. They can watch the ball, and may usually avoid being struck. . . .

So the defendant in its private park may establish places for a sport dangerous to those visitors who choose to come within the radius of danger, without incurring liability for an injury. Id. at 483-84. Despite this statement, the court held the proprietor of the park was potentially liable for the plaintiff’s injuries. The plaintiff “was not in any danger from a ball game played at the customary place” because errant balls from the diamond could not have reached the plaintiff standing near the dance pavilion. Id. at 483 (emphasis added). The plaintiff, however, had no reason to anticipate a game of throw and catch off the diamond, and in close proximity to the dancing pavilion. Id. at 483 (emphasis added). The plaintiff, however, arrangement for the protection of its visitors. Id. Therefore, the baseball rule was held inapplicable and “[t]he defendant owed [the plaintiff] a duty, and that was either to prevent the game at that unusual place, or to notify him and other visitors that it was to be played.” Id.

In Cincinnati Baseball Club Co. v. Eno, 147 N.E. 86 (Ohio 1925), the plaintiff was sitting in an unscreened portion of the grandstand between games of a double-header when she was struck by a ball that was batted, not from home plate, but from along side the foul line, where players were practicing a mere fifteen to twenty-five feet from the grandstand between games of a double-header. Id. at 86, 88. This peculiar fact scenario led the Eno court, despite expressly adopting the baseball rule, to hold that “[u]nder such circumstances . . . it was [the management’s] duty to exercise ordinary care not to invite [the plaintiff] into danger, and to that end it was its duty to exercise ordinary care to render the premises reasonably safe,” and so “should not lead its invited guests into unusual dangers.” Id. at 88 (emphasis added); see also id. at 87 (noting that the court “concur[red] in the soundness of the views expressed in the [cited cases]” employing the baseball rule, and would have barred recovery under the theory that defendants were negligent in not screening the area of the grandstand where plaintiff sat).

In Maytnier v. Rush, 225 N.E.2d 83 (Ill. App. Ct. 1967), the plaintiff requested a seat near the Chicago Cubs dugout and received a seat in the front row, adjacent to the team’s bullpen, which was located in foul ball territory between the third-base foul line and the stands. Id. at 85-86. “The seat occupied by plaintiff was in such a position that it required him to look to his right to see the pitcher and batter in the game and to his left to see the bullpen activity.” Id. at 86. “[T]he plaintiff was struck by a ball, not in play in the game, coming from [the bullpen to] his left at a time when the spectators’ attentions were focused on the ball actually in play in the game, to plaintiff’s right.” Id. at 89. Despite holding that the duty of care required by a baseball stadium is met “if they provide [a] screen for the most dangerous part of the grandstand and for those who may be reasonably anticipated to desire protected seats,” the Maytnier court nonetheless held the defendant owed a duty. Id. at 87 (internal quotation marks and citation omitted). “It does not necessarily follow, however, that once an owner of a ballpark has provided an adequate fenced-in area for the most dangerous part of the grandstand he has thereafter exculpated himself from further liability . . . .” Id. The court found the facts of the case distinguishable from cases where the baseball rule had been applied to limit the defendant’s liability because, by implication, those injuries arose out of the normal consequence of playing the game or were largely plaintiff’s fault for failing to protect himself or herself. See id. at 89 (citing to a case where plaintiff was denied recovery because of “his failure to keep his eye on the ball, a ball that was in play” (internal quotation marks and citation omitted)). The court, however, reasoned that the plaintiff in Maytnier was doing only what could be expected to protect himself, which was to be attentive to the ball in play. Similarly, the Pennsylvania Supreme Court adopted a different form of the baseball rule it titled the “place of amusement rule” (internal quotation marks omitted), noting that the rationale for a limited-duty rule that “does not impose a duty to protect from risks associated with baseball, naturally limits its application to those injuries incurred as a result of risks any baseball spectator must and will be held to anticipate.” Jones, 394 A.2d at 551. Therefore, “[e]vidence that an injured party was exposed in the stands of a baseball stadium to the predictable risks of batted balls . . . is not sufficient to establish, prima facie, a breach of the standard of care owed a baseball patron by a stadium operator.” Id. at 550. “Only when the plaintiff introduces adequate evidence that the amusement facility in which he was injured deviated in some relevant respect from established custom will it be proper for an ‘inherent-risk’ case to go to the jury.” Id. This is because “‘no-duty’ rules[] apply only to risks which are ‘common, frequent and expected,’ and in no way affect the duty of . . . sports facilities to protect patrons from foreseeable dangerous conditions not inherent in the amusement activity.” Id. at 551 (citation omitted).

Adopting this form of the baseball rule, the Pennsylvania court focused its analysis first on whether a patron hit by a ball batted during pre-game practice was owed a duty under the “rule applicable to common, frequent and expected risks of baseball or by the ordinary [care] rules applicable to all other risks which may be present in a baseball stadium.” Id. In Jones, the plaintiff was “properly using an interior walkway,” id. at 551, within the stadium in
the right-field area of the ball park when a batted ball entered the concourse through one of several large openings in the wall, designed so that “pedestrians may look out over the field and stands,” and struck her in the eye, id. at 548. The court determined that “[t]he openings built into the wall . . . are an architectural feature of Three Rivers Stadium which are not an inherent feature of the spectator sport of baseball. They are not compelled by or associated with the ordinary manner in which baseball is played or viewed.” Id. at 551. As “these concourse openings simply cannot be characterized as part of the spectator sport of baseball” (internal quotation marks omitted), the court determined that the plaintiff could not be barred from recovering for her injuries, and found that the trial court was in error “when it extended to [the plaintiff], standing in this walkway, the no-duty rule applicable to patrons in the stands.” Id. at 552. Because the baseball rule did not apply to the concourse, the plaintiff was able to establish breach of the applicable standard of care by showing that the walkway’s “structure required patrons to turn their attention away from any activity on the field in order to safely navigate the concourse,” and that the plaintiff “was not aware that batting practice had begun and did not see home plate.” Id. at 553.

{36} The California appellate court in Brown v. San Francisco Ball Club, Inc., 222 P.2d 19 (Cal. Dist. Ct. App. 1950), laid the groundwork for a significant shift in baseball spectator liability cases in California by initially adopting a baseball rule that imposed a relative and mutual duty on the owner/occupant and the spectator, as defined by the inherent and incidental aspects of the sport itself. The court noted that “the duty of self-protection rests upon the invitee,” thereby reducing “the duty of the invitor to protect.” Id. at 20. The extent of the relative duties depended on many factors, including the fact that in baseball, because the spectator is an active participant, the spectator subjects himself or herself to risks necessarily and usually incident to and inherent in the game. Id. “This does not mean that he assumes the risk of being injured by the proprietor’s negligence but that by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks and hazards inherent in and incident to the game.” Id. Therefore, baseball patrons are responsible for protecting themselves from the “risks necessarily and usually incident to and inherent in the game” of baseball, id., but not the risks created by the owner or occupant’s negligence because those are outside the relative and mutual expectations of the parties.

{37} California advanced the relative and mutual duties approach in Knight v. Jewett, 834 P.2d 696, 697 (Cal. 1992) (in bank), a case about the duty owed by co-participants engaged in a game of pick-up football. The California Supreme Court determined that “whether the defendant owed a legal duty to protect the plaintiff from a particular risk . . . turn[s] on . . . the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport.” Id. at 704. This determination, echoing Brown’s rationale, set up the holding that “defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself . . . [but] do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.” Knight, 834 P.2d at 708 (emphasis added).

{38} With this legal backdrop, a division of the California Court of Appeals modified the state’s earliest baseball rule to hold that “the key inquiry [in baseball spectator injury cases] is whether the risk which led to plaintiff’s injury involved some feature or aspect of the game which is inevitable or unavoidable in the actual playing of the game.” Lowe, 65 Cal. Rptr. 2d at 111. In Lowe, the plaintiff had been bumped repeatedly by the tail of the minor league ball club’s seven-foot tall mascot who was performing “antics” in the aisle behind plaintiff’s seat while the ball was in play. Id. at 106. The plaintiff was hit in the face by a foul ball immediately after he had turned around in his seat to determine what had been bumping him on the back of the neck and head. Id. The Lowe court determined that eliminating foul balls would make the game impossible to play, and therefore that foul balls “represent an inherent risk to spectators attending baseball games,” whereas “the antics of the mascot are not an essential or integral part of the playing of a baseball game.” Id. at 111. Accordingly, the court determined that “whether such antics increased the inherent risk to plaintiff is an issue of fact to be resolved at trial.” Id.

{39} From these seminal and contemporary baseball spectator injury cases, it is clear that the baseball rule, rigid as it may be for injuries arising from necessary and inherent aspects of the game, historically has not been applied to preclude recovery for spectators injured in extraordinary circum-

stances, where conduct or situations–even stadium design flaws–leading to injury were beyond the norm. Therefore, when a stadium owner or occupant has done something to increase the risks beyond those necessary or inherent to the game, or to impede a fan’s ability to protect himself or herself, the courts have generally, and we believe correctly, allowed claims to proceed for a jury to determine whether the duty was breached.

{40} After reviewing the history of baseball spectator injury cases and the rationale and policy choices motivating those decisions, we believe that commercial baseball stadium owners/occupants owe a duty to their fans that is justifiably limited given the unique nature of their relationship, as well as the policy concerns implicated by this relationship. Accordingly, New Mexico’s traditional common-law framework for land owners and occupants that would otherwise prescribe a standard duty of ordinary care is inappropriate in the limited circumstance of spectator injuries resulting from the play of commercial baseball. At the same time, we reject the baseball rule pronounced in Akins because of its extreme and unyielding results. Instead, we modify the duty owed by commercial baseball stadium owners/occupants.

{41} We hold, therefore, that an owner/occupant of a commercial baseball stadium owes a duty that is symmetrical to the duty of the spectator. Spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk. This approach recognizes the impossibility of playing the sport of baseball without projectiles leaving the field of play. This approach also balances the competing interests of spectators who want full protection by requiring screening behind home plate consistent with the Akins approach and allowing other spectators to participate in the game by catching souvenirs that leave the field of play. In addition, it balances the practical interest of watching a sport that encourages players to strike a ball beyond the field of play in fair ball territory to score runs with the safety and entertainment interests of the spectators in catching such balls. As long as the owner/occupant exercises ordinary care not to increase the inherent risk of being hit by a projectile leaving the field, he or she need not be concerned about adverse social and economic impacts on the citizens of New Mexico. While not of paramount concern,
this approach will bring New Mexico in line with the vast majority of jurisdictions that have considered the issue.

[42] Finally, it is consistent with New Mexico case law to modify the duty owed in the context of participatory sporting events when a risk of physical injury is inherent to the activity. Similar to what California did in the Knight case, New Mexico has limited the duty owed by co-participants in activities involving physical contact and inherent risk of injury. See Kabella v. Bouschelle, 100 N.M. 461, 463, 672 P.2d 290, 292 (Ct. App. 1983) (duty owed by co-participant in football game bars recovery for injuries resulting from “normal risks . . . permitted by the rules of the sport” because “[s]uch risks are . . . inherent to the playing of the sport”).

IV. DEFENDANTS DID NOT MAKE A PRIMA FACIE CASE ENTITLING THEM TO SUMMARY JUDGMENT

[43] In this case, Defendants filed a motion for summary judgment relying exclusively on the baseball rule, which we have rejected, and an affidavit that proved their compliance with that rule. Summary judgment may be proper when the moving party establishes a prima facie case for summary judgment. Romero v. Philip Morris Inc., 2010-NMSC-035, ¶ 10, ___ N.M. ___, ___ P.3d ___ (No. 31,433, June 25, 2010). Once this prima facie showing has been made, the burden shifts to the non-movant to adduce evidence that would justify a trial on the merits. Id. The non-moving party may not simply rely upon the allegations of his or her pleading. Rule 1-056(E) NMRA. Because resolution on the merits is favored, a reviewing court “view[s] the facts in a light most favorable to the party opposing the motion and draw[s] all reasonable inferences in support of a trial on the merits.” Handmaker v. Henney, 1999-NMSC-043, ¶ 18, 128 N.M. 328, 992 P.2d 879.

[44] Here, it was insufficient for Defendants’ prima facie case to simply rely on an affidavit that established their compliance with the baseball rule we have rejected. To make their prima facie case, Defendants must establish that there is not a genuine issue of material fact and that they are entitled to a judgment as a matter of law, based on the limited duty we announce today. We therefore remand this matter to the district court for proceedings consistent with this Opinion.

V. CONCLUSION

[45] The Court of Appeals rejection of a limited-duty rule is reversed. We adopt a limited-duty rule that applies to owner/occupants of a commercial baseball facility. Under the duty we adopt, an owner/occupant of a commercial baseball stadium owes a duty that is symmetrical to the duty of the spectator. Spectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk. Defendants did not make a prima facie case for their entitlement to a summary judgment under the limited duty we announce today, and therefore this matter is remanded to the district court for further proceedings consistent with this Opinion.

[46] IT IS SO ORDERED,

EDWARD L. CHÁVEZ,
Justice

WE CONCUR:
CHARLES W. DANIELS,
Chief Justice
PATRICIO M. SERNA, Justice
PETRA JIMÉNEZ MAES, Justice
RICHARD C. BOSSON, Justice
Certiorari Denied, August 27, 2010, No. 32,540

From the New Mexico Court of Appeals

Opinion Number: 2010-NMCA-086

Topic Index:
Appeal and Error: Interlocutory Appeal
Civil Procedure: Dismissal; Failure to Prosecute; Reinstatement; and Stay of Proceedings
Courts: Inherent Powers
Federal Law: Bankruptcy

SUMMIT ELECTRIC SUPPLY COMPANY, INC. and SE TECHNOLOGIES, INC., Plaintiffs-Appellants, versus RHODES & SALMON, P.C., Defendant-Appellee.
No. 28,284 (filed: July 8, 2010)

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

J. DOUGLAS FOSTER
TRAVIS G. JACKSON
FOSTER, RIEDER & JACKSON, P.C.
Albuquerque, New Mexico
for Appellants

BRIGGS F. CHENEY
JAIME L. DAWES
LAW OFFICE BRIGGS F. CHENEY
Albuquerque, New Mexico
for Appellee

OPINION

ROBERT T. ROBLES, JUDGE

{1} Summit Electric Supply Company, Inc. (Summit) and SE Technologies, Inc. (SE) (collectively, Plaintiffs) appeal the district court’s dismissal for failure to prosecute pursuant to Rule 1-041(E) NMRA. After review, we reverse the district court.

I. BACKGROUND

{2} Plaintiffs, represented by the same attorney, filed a complaint on July 18, 2002. The record reveals that Plaintiffs pursued their claim for nearly a year before SE filed for bankruptcy in federal court on June 27, 2003 and notified the district court of the bankruptcy action on July 8, 2003. Rhodes & Salmon, P.C. (Defendant) filed a motion, arguing that the bankruptcy proceeding automatically stayed the case as to both Plaintiffs and, in the alternative, requested that if the district court were to hold that the bankruptcy proceeding did not stay the case as to Summit, that the district court certify interlocutory appeal as to the issue. Summit filed a brief in opposition to certification for interlocutory appeal, arguing, inter alia, that the case was not automatically stayed. The district court set a hearing on the issue for November 13, 2003. The day before the hearing, Plaintiffs’ counsel filed a motion to vacate the hearing because SE had asserted a claim against Summit in the bankruptcy proceedings and claimed sole ownership of the legal malpractice claim against Defendant. From Plaintiffs’ counsel’s perspective, he was uncertain whether he could represent both Plaintiffs in the claim asserted in this action if they were adversarial in satellite litigation, which concerned ownership of this claim. In his motion to vacate, Plaintiffs’ counsel stated: “Unless and until the bankruptcy court approves the undersigned to act as counsel for [both Plaintiffs] in these proceedings, counsel may not proceed further.”

{3} No further action took place on this case in state court for two years and six months. The district judge presiding over this case retired, and the cause was assigned to a new district judge. On May 23, 2006, in an apparent effort to manage its docket, the district court entered an order on its own motion, which stated, in pertinent part: “[T]he court having been advised that a bankruptcy petition has been filed, orders that this case is closed as to all pending claims. No reopen fee shall be required if the movant seeks reinstatement within sixty days after termination of the bankruptcy stay. Movant shall comply with [Local Rule] 2-301.”

{4} One year later, on May 25, 2007, Plaintiffs filed a motion to reinstate the action. Their motion stated that the bankruptcy proceedings had concluded on May 16, 2007 in Connecticut, and a settlement had been reached between Plaintiffs under which both Summit and SE would be pursuing the claims in this case. Attached to the motion was an order from the federal bankruptcy court approving the settlement, as well as a request for a trial setting in accordance with Rule 1-016 NMRA (outlining the procedures for pretrial conferences, scheduling, and management); Local Rule 2-125(A) NMRA (“[A]ny party may request a trial by filing a request for hearing with the clerk.”); Local Rule 2-130 NMRA (“Cases and parts of cases closed for lack of prosecution shall be reinstated only by court order to reinstate upon agreement of the parties or good cause shown.”); and Local Rule 2-301(B) NMRA (“A party seeking to reinstate a case pursuant to Rule 1-041(E)(2) . . . shall attach a copy of a proposed pretrial scheduling order to the motion to reinstate.”). In response, Defendant filed a motion to dismiss the suit for failure to prosecute in accordance with Rule 1-041(E)(1). Defendant argued that more than two years had passed from filing the action, and Plaintiffs had failed to take significant action to bring the case to final disposition. Following a hearing and a subsequent motion for reconsideration, the district court granted Defendant’s motion to dismiss and denied Plaintiffs’ motion for reconsideration. This appeal followed.

II. DISCUSSION

{5} The question in the instant case is whether the district court’s order correctly denied Plaintiffs’ motion to reinstate and correctly granted Defendant’s motion to dismiss. Rule 1-041(E) states:

(1) Any party may move to dismiss the action, or any counterclaim, cross-claim or third-party claim with prejudice if the party asserting the claim has failed to take any significant action to bring
such claim to trial or other final disposition within two (2) years from the filing of such action or claim. An action or claim shall not be dismissed if the party opposing the motion is in compliance with an order entered pursuant to Rule 1-016 . . . or with any written stipulation approved by the court.

(2) Unless a pretrial scheduling order has been entered pursuant to Rule 1-016 . . . the court on its own motion or upon the motion of a party may dismiss without prejudice the action or any counterclaim, cross-claim or third[-]party claim if the party filing the action or asserting the claim has failed to take any significant action in connection with the action or claim within the previous one hundred and eighty (180) days. A copy of the order of dismissal shall be forthwith mailed by the court to all parties of record in the case. Within thirty (30) days after service of the order of dismissal, any party may move for reinstatement of the case. Upon good cause shown, the court shall reinstate the case and shall enter a pretrial scheduling order pursuant to Rule 1-016 . . . At least twice during each calendar year, the court shall review all actions governed by this paragraph.

[6] District courts have discretion in determining whether to dismiss a case for inactivity, and their decisions shall be reversed if they abuse their discretion. N.M. Water Quality Control Comm’n v. Emerald Corp., 113 N.M. 144, 146, 823 P.2d 944, 946 (Ct. App. 1991). Discretion is abused “when the court exceeds the bounds of reason, all the circumstances before it being considered.” Dunham-Bush, Inc. v. Palkovic, 84 N.M. 547, 550, 505 P.2d 1223, 1226 (1973) (internal quotation marks and citation omitted). “[W]e make no attempt to fix a standard of what action is sufficient to satisfy the requirement of the rule, for each case must be determined upon its own particular facts and circumstances.” Martin v. Leonard Motor-El Paso, 75 N.M. 219, 222, 402 P.2d 954, 956-57 (1965).

A. Plaintiffs’ Motion to Reinstate Under Rule 1-041(E)(2)

[7] On May 23, 2006, the district court on its own motion “closed” the instant case. We conclude that only the way the district court may have closed the case on its own motion for inactivity would be pursuant to Rule 1-041(E)(2). Likewise, it appears that the district court believed it was acting pursuant to Rule 1-041(E)(2) because it stated in its order that the “[m]ovant shall comply with . . . LR2-301.” LR2-301(B) provides that “[a] party seeking to reinstate a case pursuant to Rule 1-041(E)(2) . . . shall attach a copy of a proposed pretrial scheduling order to the motion to reinstate.” Rule 1-041(E)(2) provides that a district court that dismisses a case on its own motion following a 180-day period of inactivity should reinstate the case if good cause is shown for the inactivity. We have previously held that the “good cause” required for reinstatement of a case after dismissal without notice following a relatively short period of time should be construed liberally. Vigil v. Thriftway Mktg. Corp., 117 N.M. 176, 179-80, 870 P.2d 138, 141-42 (Ct. App. 1994).

To show good cause, the party filing the motion to defer dismissal must demonstrate to the court that he is ready, willing, and able to proceed with the prosecution of his claim and that the delay in prosecution is not wholly without justification. If the party makes this showing, the court should regard the case as viable and defer dismissal.

Id. at 180, 870 P.2d at 142 (citing Powell v. Gutierrez, 529 A.2d 352, 355 (Md. 1987) (internal quotation marks omitted))). This Court concluded that the concern for judicial efficiency should not eclipse the ultimate goal of our justice system, which is to provide fair resolutions on the merits of claims brought before our courts. Id.

[8] We observe two points. First, Plaintiffs’ efforts to determine appropriate counsel and prosecuting party is a good cause not wholly without justification. See Vigil, 117 N.M. at 178, 80, 870 P.2d at 140, 142 (finding a good cause justification where counsel waited to see if his client’s new symptoms were related to an accident, which was the subject of a suit). Second, Plaintiffs’ efforts to pursue this claim by filing a motion to reinstate and a request for a trial setting within nine days of conclusion of the bankruptcy proceedings demonstrates willingness, ability, and readiness to pursue this action. See id. (requesting a trial setting on the merits demonstrated pursuit of the case). In short, Plaintiffs demonstrated good cause.

[9] “Abuse of discretion has been found where dismissal results in an injustice and special circumstances impeded [a] plaintiff’s prosecution of his claim, or where a claim is being pursued actively after a prior lapse in activity.” Sewell v. Wilson, 97 N.M. 523, 330, 641 P.2d 1070, 1077 (Ct. App. 1982). A district court must use its discretion in harmony with the spirit of the law, which is served by giving litigants a chance to be heard when possible. Id. at 531, 641 P.2d at 1078. We conclude that, under Rule 1-041(E)(2), it was an abuse of discretion for the district court not to reinstate this case for the good cause shown. Rule 1-041(E)(2) is designed to allow district courts “to clear deadwood from the docket,” not to penalize the plaintiffs who are attempting to bring a case to final determination and have demonstrated the viability of the action. Vigil, 117 N.M. at 180, 870 P.2d at 142 (“Nevertheless, our concern with expeditious case management should not blind us to the true goal of our system, which is to provide a fair determination of legitimate issues brought before us.”) (internal quotation marks and citation omitted).

B. Defendant’s Motion to Dismiss Under Rule 1-041(E)(1)

[10] Having concluded that the district court should have reinstated this case, we turn our attention to whether it was error to dismiss the case for failure to prosecute. Defendant urges affirmance under Rule 1-041(E)(1) by citing to the test first introduced in State ex rel. Reynolds v. Molybdenum Corp. of America, 83 N.M. 690, 697, 496 P.2d 1086, 1093 (1972). At the time that case was decided, the applicable rule allowed for three years of inactivity before a party could move to dismiss an action for failure to prosecute. Id. at 692-93, 496 P.2d at 1088-89. The defendant in that case moved to dismiss three years after the time for failure to prosecute. Id. at 691, 496 P.2d at 1087. Our Supreme Court, in examining the specific facts of that case, fashioned a two-pronged test, which required district courts to first determine “upon the basis of the court record and the matters presented at the hearing, whether such action has been timely taken by the plaintiff, the cross-claimant or the counter-claimant against whom the motion is directed.” Id. at 697, 496 P.2d at 1093. If it is determined that action was not “timely taken,” then the district court should consider the second prong, which asks “whether [the party against whom the motion is directed] has been excusably prevented from taking such action.” Id. A reviewing court will uphold
a district court's analysis except in cases where discretion had been abused. Id.

{11} Defendant argues that under the first prong of the Reynolds test, no action was taken to bring this case to a final determination between November 2003 and May 2007. They also argue that there is no authority that actions in another proceeding, such as the federal bankruptcy court, may constitute activity in this case sufficient to make a Rule 1-041(E)(1) dismissal inappropriate. Under the second prong, Defendant states that no valid excuse exists for Plaintiffs' failure to pursue their claims during the period of inactivity. Conversely, Plaintiffs argue, under the first prong of the Reynolds test, that they (1) took timely action to prosecute the case through their necessary involvement in the bankruptcy proceeding and (2) timely moved to have this case reinstated prior to Defendant's motion to dismiss. We conclude that Plaintiffs' second argument under the first prong is dispositive and, therefore, do not consider whether the satellite litigation merits timely action, or whether Plaintiffs were excusably prevented from taking timely action.

{12} In Martin, our Supreme Court held that a moving party must elect to invoke their right to compel a dismissal, which is manifested by filing a motion to dismiss. 75 N.M. at 222, 402 P.2d at 956. There, the plaintiff's action of requesting that the case be set for trial on the merits occurred more than the provided two years after filing the complaint, but before the defendant's motion to dismiss. Id. In analyzing dismissal for failure to prosecute, the court noted that if “the requisite action is taken to bring the case to its final determination, Rule 1-041(E)) is satisfied.” Martin, 75 N.M. at 222, 402 P.2d at 956. The filing of a motion for a trial setting on the merits amounted to action by the plaintiff to bring the case to its final determination and, moreover, because the action came before the defendant elected to invoke his right to dismissal, the court concluded that the plaintiff had satisfied the rule. Id. at 223, 402 P.2d at 957; cf. Stoll v. Dow, 105 N.M. 316, 319, 702 P.2d 1360, 1362 (Ct. App. 1986) (affirming dismissal for failure to prosecute where the plaintiff requested a setting for trial, but took no further action for eleven years until the defendant moved to dismiss).

{13} New Mexico cases have previously declined to outline precisely what action is sufficient to satisfy Rule 1-041(E)(1). See Martin, 75 N.M. at 222-23, 402 P.2d at 956-57; Sewell, 97 N.M. at 527, 641 P.2d at 1074. However, a plaintiff's filing of a request for a trial setting before a defendant’s filing of a motion to dismiss has been consistently viewed as a good faith action to prosecute a case. See Cottonwood Enters. v. McAlpin, 109 N.M. 78, 80, 781 P.2d 1156, 1158 (1989) (holding that the defendants sat on their rights by waiting to file their motion to dismiss until after the plaintiff had moved for a trial setting because Rule 1-041(E) is not self-executing and requires the timely filing of a motion for its operation); Found. Reserve Ins. Co. v. Johnston Testers, Inc., 77 N.M. 207, 209, 421 P.2d 123, 124 (1966) (finding that a letter authored by a district court that acknowledged a plaintiff’s request to set a case for trial filed in the record before the filing of a motion to dismiss for failure to prosecute demonstrated “a good-faith attempt had been made to obtain a setting,” and satisfied the requirement that action be taken to bring a case to a final determination); Procter v. Fez Club, 76 N.M. 241, 241, 414 P.2d 219, 219 (1966) (“[The p]laaintiffs’ motion to set the case for trial, made prior to [the] defendant’s motion to dismiss, prevents a dismissal under Rule 1-041(E)).”).

{14} Reviewing courts have found an abuse of discretion in cases where dismissal resulted in injustice when special circumstances impeded a plaintiff’s prosecution of his claim, or where a claim has been pursued actively after a prior lapse in activity. Sewell, 97 N.M. at 530, 641 P.2d at 1077. Rule 1-041(E) “is intended to promote judicial efficiency and to conclude stale cases, but it should not be applied in complete disregard of this [C]ourt’s often stated concerns for the rights of litigants to have their day in court and their cases decided on the merits and not on trivial technicalities.” Sewell, 97 N.M. at 530, 641 P.2d at 1077 (internal quotation marks and citation omitted). In light of the policies behind Rule 1-041(E) and the facts of this case, we conclude that dismissal of Plaintiffs’ case with prejudice amounted to an abuse of discretion.

C. Inherent Authority of the District Court

{15} As a final matter, Defendant makes the argument that this Court should affirm the district court by arguing that “[c]ourts have inherent power to dismiss a cause of action for failure of prosecution” and that “[a] court’s dismissal of a case pursuant to this inherent power [should] not be overturned on appeal absent an abuse of discretion.” However, in Jimenez v. Walgreens Payless, our Supreme Court held that district courts do not possess inherent power to dismiss for failure to prosecute, independent of a statute or rule. 106 N.M. 256, 259, 741 P.2d 1377, 1380 (1987); Vigil, 117 N.M. at 179, 870 P.2d at 141 (“Where a rule of civil procedure addresses the specific situation before a court, a trial judge is not free to ignore the dictates of the rule and rely instead on inherent authority.”). Additionally, upon review of the district court’s order, we are not convinced that the district court was relying on inherent authority independent of Rule 1-041(E) (1). Regardless, in light of Plaintiffs’ good faith efforts to bring the cause to a final determination before Defendant’s motion to dismiss, we conclude that the exercise of a district court’s inherent authority to dismiss, if it occurred, would have been an abuse of discretion.

III. CONCLUSION

{16} The district court’s order is reversed. We remand with directions to set aside the order of dismissal and to reinstate the case on the court’s docket for further proceedings consistent with this Opinion.

{17} IT IS SO ORDERED.

ROBERT E. ROBLES, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

MICHAEL E. VIGIL, Judge
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