Inside This Issue

Table of Contents ................................................3
Report by the Disciplinary Counsel:
Disciplinary Quarterly Report .................................6
Hearsay/In Memoriam .............................................9
Clerk's Certificates ...............................................16
From the New Mexico Supreme Court
2011-NMSC-027, No. 31,204:
State v. Gallegos ......................................................20
From the New Mexico Court of Appeals
2011-NMCA-070, No. 28,815:
State v. Skinner ......................................................30
2011-NMCA-071, No. 29,382:
State v. Lopez .........................................................34
2011-NMCA-072, No. 29,142/No. 29,760:
Chan v. Montoya ......................................................37
2011-NMCA-073, No. 28,436:
Alcantar v. Sanchez ...............................................40

Special Insert:
CLE At-a-Glance
Constitution Day is designated by Public Law 108-447 Sec. 111 Division J - SEC. 111(b) which states that all levels of educational institutions receiving federal funds are required to educate students about the U.S. Constitution.

Constitution Day, designed to teach 5th graders about the Constitution, is an event taking shape across the country.

During the week of September 12–16, volunteer attorneys will be partnered with 5th grade teachers in their areas to co-teach lessons on the Constitution. Suggested course materials will be provided as well as pocket-size Constitutions. Each presentation should last 1–1.5 hours.

Volunteer attorneys will be given the teacher’s name and contact information in advance so that specific planning may take place.

- **YES! I would like to be a Constitution Day volunteer. ($30 donation to cover classroom materials is requested.)**

- **I am unable to volunteer my time, but I would like to make a donation. ($___________ )**

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<tr>
<th>Name</th>
<th>State Bar ID</th>
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<th>Address</th>
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<th>Phone</th>
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Send this completed form to Marilyn Kelley
Email: mkelley@nmbar.org; or fax (505) 797-6074; or US mail:
New Mexico State Bar Foundation, Public & Legal Services Department
Attention Marilyn Kelley
PO Box 92860, Albuquerque, NM 87199
# TABLE OF CONTENTS

- Notices .................................................................................. 4
- Report by the Disciplinary Counsel: Disciplinary Quarterly Report .................................................. 6
- Legal Education Calendar .................................................................................................................. 9
- Writs of Certiorari ....................................................................... 11
- List of Court of Appeals’ Opinions ..................................................... 13
- Clerk’s Certificates ...................................................................... 15
- Recent Rule-Making Activity .......................................................... 16
- Opinions .................................................................................. 18

**From the New Mexico Supreme Court**

- 2011-NMSC-027, No. 31,204: State v. Gallegos ................................................................. 20

**From the New Mexico Court of Appeals**

- 2011-NMCA-070, No. 28,815: State v. Skinner ................................................................. 30
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- 2011-NMCA-073, No. 28,436: Alcantar v. Sanchez ........................................................... 40

Advertising ................................................................................. 46

## MEETINGS

### JULY

**27**

- NREEL BOD, noon, State Bar Center

**28**

- Health Law Section BOD, 7:30 a.m., via teleconference

**29**

- Senior Lawyers Division BOD, 4 p.m., State Bar Center

- Immigration Law Section BOD, noon, via teleconference

### AUGUST

**1**

- Attorney Support Group, 5:30 p.m., First United Methodist Church

- Bankruptcy Law Section BOD, noon, U.S. Bankruptcy Court

**3**

- Employment and Labor Law Section BOD, noon, State Bar Center

## STATE BAR WORKSHOPS

### JULY

**27**

- Consumer Debt/Bankruptcy Workshop 6–8 p.m., State Bar Center, Albuquerque

### AUGUST

**10**

- Estate Planning/Probate Workshop 6–8 p.m., State Bar Center, Albuquerque

**24**

- Consumer Debt/Bankruptcy Workshop 6–8 p.m., State Bar Center, Albuquerque

### SEPTEMBER

**1**

- Landlord/Tenant Bankruptcy Workshop 5:30–7:30 p.m., State Bar Center, Albuquerque

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**Cover Artist:** Helen Gwinn’s expressive images are acrylics on wooden panels and water media on paper with collage. She often embellishes her works with handmade paper packets stuffed, folded, tied, painted and incorporated into each composition. Her full resume, an artist statement, and selected images are located at [www.HGWINN.com](http://www.HGWINN.com).
Proposed Rule Revisions

Proposed Revisions to the Children's Court Rules

The Children's Court Rules Committee has recommended proposed amendments to the Children's Court Rules for the Supreme Court's consideration.

Proposed Amendments to Uniform Jury Instructions—Civil

The Committee on Uniform Jury Instructions for Civil Cases is considering whether to recommend proposed amendments to the committee commentary to UJI 13-2304 for the Supreme Court's consideration.

Proposed Amendments to Uniform Jury Instructions—Criminal

The Committee on Uniform Jury Instructions for Criminal Cases is considering whether to recommend proposed amendments to the Uniform Jury Instructions—Criminal for the Supreme Court's consideration.

Proposed Revisions to Uniform Jury Instructions for Criminal Cases

The Committee on Uniform Jury Instructions for Criminal Cases is considering whether to recommend proposed amendments to the Uniform Jury Instructions—Criminal for the Supreme Court's consideration.

To comment on the proposed amendments 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, NM 87504-0848

Comments must be received on or before Aug. 3 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 July 13 (Vol. 50, No. 27) Bar Bulletin.

Second Judicial District Court

CLE in Family Court

The 2nd Judicial District Court will present Death and Dissolution: Oldham, the Probate Code and Beyond (1.3 general CLE credits) from 11:30 a.m.—1 p.m., Aug. 1, at the Bernalillo County Courthouse, Courtroom 706, 400 Lomas NW, Albuquerque. The cost of $2 (cash only) includes CLE credit and administrative fee.

New Clerk/Executive Officer

Effective Aug. 1, Gregory T. Ireland will assume the duties of clerk of the court/court executive officer to fill the vacancy created by the retirement of Juanita M. Duran.

Settlement Week 2011

The 2nd Judicial District Court's 23rd Annual Settlement Week is Oct. 17–21. The deadline for requesting a referral of a civil or domestic relations case is July 29. For complete details regarding referral requests, refer to LR2-602, Section C, of the 2nd Judicial District Court's Local Rules governing the Settlement Facilitation Program. Blank referral forms are available in the Clerk’s Office, Court Alternatives, and online at http://www.nmcourts.gov/second-districtcourt/cal2.html. All referrals should be filled out completely and sent directly to the assigned judge in the case. Include names, addresses and contact numbers of all parties/attorneys (especially pro se parties) involved and any other individuals requiring notice of the settlement facilitation. For more information, call Court Alternatives, (505) 841-7412.

Eighth Judicial District Court

Case Judge Assignments

Judge John M. Paternoster (Division I) will keep all pending cases currently assigned to him.

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. Plaintiffs' 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/Tapes</th>
<th>For Years</th>
<th>May Be Retrieved Through</th>
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<tr>
<td>1st Judicial District Court</td>
<td>1984–1996, Civil and domestic relations, and children's cases Tapes in all criminal cases Tapes in incompetency, mental health and competency, guardianships/conservatorships, abuse/neglect, juvenile, adoption, and probate cases Tapes in grand jury cases Tapes in criminal preliminary cases</td>
<td>1984–1996, Civil and domestic relations, and children's cases</td>
<td>September 19</td>
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<tr>
<td>10th Judicial District Court</td>
<td>2001–July 2005, Tapes in all criminal cases Tapes in incompetency, mental health and competency, guardianships/conservatorships, abuse/neglect, juvenile, adoption, and probate cases</td>
<td>2001–July 2005, Tapes in all criminal cases Tapes in incompetency, mental health and competency, guardianships/conservatorships, abuse/neglect, juvenile, adoption, and probate cases</td>
<td>August 19</td>
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<td>2002–July 2005, Tapes in all criminal cases Tapes in incompetency, mental health and competency, guardianships/conservatorships, abuse/neglect, juvenile, adoption, and probate cases</td>
<td>2002–July 2005, Tapes in all criminal cases Tapes in incompetency, mental health and competency, guardianships/conservatorships, abuse/neglect, juvenile, adoption, and probate cases</td>
<td>August 19</td>
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<td>2004, Tapes in all criminal cases Tapes in incompetency, mental health and competency, guardianships/conservatorships, abuse/neglect, juvenile, adoption, and probate cases</td>
<td>2004, Tapes in all criminal cases Tapes in incompetency, mental health and competency, guardianships/conservatorships, abuse/neglect, juvenile, adoption, and probate cases</td>
<td>August 19</td>
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<td>August 2005–2008, Tapes in all criminal cases Tapes in incompetency, mental health and competency, guardianships/conservatorships, abuse/neglect, juvenile, adoption, and probate cases</td>
<td>August 2005–2008, Tapes in all criminal cases Tapes in incompetency, mental health and competency, guardianships/conservatorships, abuse/neglect, juvenile, adoption, and probate cases</td>
<td>August 19</td>
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Judge Sarah C. Backus (Division II) will be assigned all pending cases with the following case types: civil, domestic violence, criminal, adoptions, probate sequestered, and juvenile sequestered.

Judge Andria L. Cooper (Division III) will be assigned all pending cases with the following case types: domestic matters, juvenile criminal, probate, appeals (criminal) extradition, mental health, sequestered miscellaneous, and juvenile civil.

Case reassignments are effective as of July 11.

**STATE BAR NEWS**

**Attorney Support Group**

- Aug. 15, 7:30 a.m.–Morning groups meet regularly on the third Monday of the month.
- Aug. 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.

**Committee on Women and the Legal Profession**

The Employment and Labor Law Section Board Meeting

The Employment and Labor Law Section board of directors welcomes section members to attend its meetings, which are usually held on the first Wednesday of each month. The next meeting will be held at noon, Aug. 3, at the State Bar Center. Lunch is provided to those who R.S.V.P. to membership@nmbar.org. For information about the section, visit the State Bar website, www.nmbar.org, or contact contact Chair Ernestina Cruz, (505) 681-8521 or ernestinacruz@msn.com.

**Indian Law Section Summer Mixer**

Join the Indian Law Section for a Summer Mixer from 6–8 p.m., July 28, at Imbibe Cigar Bar, 3101 Central Avenue NE, Albuquerque. Light appetizers and a cash bar will be available. This social event will provide an opportunity for new and existing members of the section to gather in an informal setting to relax, get acquainted, and catch up with other attorneys that are interested in Indian law. Section members and new bar members are free. Non-section members can join the section for $20. All other guests can join the fun for $20. All mixer attendees will be eligible for door prizes to be given away at the event. For more information, contact Mekko Miller, mekkomiller@gmail.com.

**Paralegal Division Luncheon CLE Series**

The Paralegal Division invites members of the legal community to bring a lunch and attend *What's New in Domestic Relations* (1.0 general CLE credit) presented by Virginia Dugan. The program will be held from noon–1 p.m., Aug. 10, at the State Bar Center (registration fee for attorneys–$16, members of the Paralegal Division–$10, non-members–$15). Registration begins at the door at 11:45 a.m. For more information, contact Cheryl Passalaqua, (505) 247-0411, or Evonne Sanchez, (505) 222-9356. This CLE will be webcast to two locations:

- Santa Fe: Montgomery & Andrews,

- Rio Rancho: 1000 Old Coors Drive NE, Albuquerque.

**Committee on Women and the Legal Profession**

Family Event

Members of the State Bar, law students and their families are invited to an enjoyable family event at the Sunport Pool, 2033 Columbia Dr. SE, Albuquerque, from 5:30–8 p.m., Aug. 6. Admission is free. Food, beverages and goodies for the children will be provided. Two door prizes valued at $100 each will be given away. Don’t miss this opportunity to connect with other members of the State Bar in a relaxed, family atmosphere. For more information, contact Jocelyn Castillo, jocelyn@moseslaw.com. The event is co-sponsored by the Committee on Women and the Legal Profession and the New Mexico Women’s Bar Association.

**Employment and Labor Law Section**

**Board Meeting**

Under the leadership of State Bar President Jessica Pérez and President-elect Hans Voss, the State Bar will send a delegation of New Mexico lawyers to Cuba for an interactive, educational professional exchange program to learn about the Cuban legal system and share New Mexico information with Cuban lawyers. The trip is scheduled for Oct. 1–8. The cost is approximately $4,200 per person based on double occupancy and includes air from Miami, hotel accommodations, meals, transportation, etc. The cost does not cover the flight from New Mexico to Miami. Non-attorney guests are welcome. A once-in-a-lifetime opportunity. Contact Joe Conte, (505) 797-6099 or jconte@nmbar.org.
Final Decisions

Final Decisions of the NM Supreme Court.............................................4

Matter of Rita Neumann, Esq. (Disciplinary No. 03-2010-590) New Mexico Supreme Court entered an order of Indefinite Suspension for a period of six months with automatic reinstatement. Respondent was further ordered to pay costs.

Matter of Gany Mike Bello, Esq. (Disciplinary No. 05-2008-545) New Mexico Supreme Court entered an order of Indefinite Suspension. Respondent was further ordered to take and pass the Multi-State Professional Responsibility Examination and have scores reported to the New Mexico Board of Bar Examiners, and have a Character and Fitness Evaluation completed prior to reinstatement.

Matter of Dennis W. Montoya, Esq. (Disciplinary No. 07-2010-599 and 02-2011-610) New Mexico Supreme Court entered an order of Indefinite Suspension from the practice of law for a period of time no less than one (1) year. Respondent was ordered to refrain from providing legal services in connection with cases in which, any of his present or former clients were involved; not to work in, out, or for the same office where his clients have their cases handled; Respondent may provide paralegal services but must have any attorney that he is providing paralegal services notify the office of disciplinary counsel. Respondent shall not act as an independent contractor or provide any paralegal services that are not performed pursuant to the retention by and under the direct supervision of a lawyer approved by the Supreme Court. Respondent may apply for reinstatement and if granted, Respondent shall be placed on supervised probation for three (3) years and shall submit to and bear the expense of an audit of his trust account, conducted at time and by auditors selected or approved by disciplinary counsel.

Matter of Rene Ostrochovsky, Esq. (Disciplinary No. 11-2010-607) New Mexico Supreme Court entered an order of Indefinite Suspension for a period of no less than one (1) year. Respondent was ordered to pay costs. It was further ordered that prior to the filing of any petition for reinstatement Respondent shall successfully complete a Character and Fitness Evaluation by the New Mexico Board of Bar Examiners; shall satisfy the continuing legal education requirements during the period of suspension; shall take and pass with a score of 86 the multi-state professional responsibility examination; and upon reinstatement shall be placed on supervised probation for a period of one (1) year.

Resignations in Lieu of Discipline.....................................................1

Matter of John M. Burnett, Jr., Esq. (Disciplinary No. 03-2011-612) New Mexico Supreme Court entered an order approving the petition for resignation in lieu of discipline. Respondent was ordered to pay any documented unpaid subrogation or medical liens, pay the Client Protection Fund any amounts the Fund may have paid based on claims, make restitution to an estate, and have his IOLTA account audited by an independent Certified Public Accountant and pay any amounts determined by the Certified Public Accountant to be owed by Respondent to any client or third party not previously identified. Respondent shall not apply for reinstatement earlier than three (3) years and shall take and pass the Multi-State Professional Responsibility Examination prior to reinstatement.

Summary Suspensions

Total number of attorneys summarily suspended....................0

Disability Suspensions

Total number of attorneys placed on disability suspension......0

Charges Filed

Charges were filed against an attorney for allegations of general misrepresentation; failure to act with reasonable diligence in representing a client; failure to promptly inform the client of any decisions made with respect to the client’s informed consent; failure to consult with the client; failure to exercise independent professional judgment and render candid advice; knowingly making a false statement of fact to the client; engaging in conduct which is prejudicial to the administration of justice; and knowingly stating or implying an ability to improperly influence a judge.

Charges were filed against an attorney for allegations of engaging or assisting the client in conduct that misleads the tribunal; knowingly disobeying an obligation under the rules of the tribunal; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct which is prejudicial to the administration of justice.

Charges were filed against an attorney for allegations of failure to maintain an attorney trust account and allowing account to be overdrawn and failure to give full cooperation and assistance to the disciplinary board and disciplinary counsel in discharging the lawyer’s respective functions and duties with respect to discipline and disciplinary procedures.

Charges were filed against an attorney for allegations of failure to give full cooperation and assistance to the disciplinary board and disciplinary counsel in discharging the lawyer’s respective functions and duties with respect to discipline and disciplinary procedures and engaging in conduct which is prejudicial to the administration of justice.

Charges were filed against an attorney for allegations of failure to act with reasonable diligence and promptness in representing a client; failure to keep clients reasonably informed; failure to comply with requests for information; failure to charge a reasonable fee; failure to withdraw representation after being discharged by client; failure to take steps for the orderly termination of representation from client; and failure to give full cooperation and assistance to the disciplinary board and disciplinary counsel in discharging the lawyer’s respective functions and duties with respect to discipline and disciplinary procedures.
Charges were filed against an attorney for allegations of failure to provide competent representation to a client; failure to act with reasonable diligence and promptness in representing a client; failure to promptly comply with reasonable requests for information; failure to keep the client reasonably informed about the status of the matter; knowingly disobeying an obligation under the rules of a tribunal; knowingly violating the Rules of Professional Conduct; and engaging in conduct which is prejudicial to the administration of justice.

Charges were filed against an attorney for allegations of knowingly using means that have no substantial purpose other than to embarrass a third person; knowingly making a statement with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge and/or public legal officer; knowingly violating the Rules of Professional Conduct; engaging in conduct that involves dishonesty, fraud, deceit or misrepresentation; and engaging in conduct that is prejudicial to the administration of justice.

Charges were filed against an attorney for allegations of knowingly making an agreement for, charging or collecting an unreasonable fee or an unreasonable amount for expenses.

An attorney was informally admonished for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation by signing a third party's name on a document and having a paralegal notarize those documents without proper legal authority to do so in violation of Rule 16-804 (C) of the Rules of Professional Conduct.

An attorney was informally admonished following a period of probation for failure to properly maintain an attorney trust account and failing to maintain accurate records in violation of Rules 16-115 and 17-204 of the Rules of Professional Conduct.

**Letters of Caution**

Total number of attorneys cautioned.................................11

Attorneys were cautioned for the following conduct: (1) general neglect (3 letters of caution issued); (2) failure to act with reasonable diligence and promptness; (3) failure to communicate; (4) conflict of interest; (5) general incompetence (2 letters of caution issued); (6) libel/slander; (7) general misrepresentation to Court; (8) overreaching excessive fees; (9) accounting for funds; and (10) failure to file.

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<th>Complaints Received</th>
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<tr>
<td>Trust Account Violations</td>
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<tr>
<td>Conflict of Interest</td>
<td>1</td>
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<tr>
<td>Neglect and/or Incompetence</td>
<td>60</td>
</tr>
<tr>
<td>Misrepresentation or Fraud</td>
<td>15</td>
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<tr>
<td>Relationship with Client or Court</td>
<td>14</td>
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<tr>
<td>Fees</td>
<td>18</td>
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<tr>
<td>Improper Communications</td>
<td>8</td>
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<td>Criminal Activity</td>
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<td>Personal Behavior</td>
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<tr>
<td>Other</td>
<td>27</td>
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<td>Total number of complaints received</td>
<td>154</td>
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**Bridge the Gap Mentorship Program**

**for newly admitted attorneys**

**New Attorneys**

Pursuant to 24-110 NMRA, newly admitted attorneys have 30 days after admission to the State Bar to either submit a new attorney application or file for exemption/deferment.

**Potential Mentors**

Sign up to mentor a new attorney in the practical aspects of law. Mentors and new lawyers discuss the practice of law and work on activities they choose from a mentoring plan. Both participants receive CLE credits.

Information and details are available at http://www.nmbar.org/Attorneys/Mentorship/mentorship.html. For additional information, contact Marilyn Kelley, mkelley@nmbar.org.
Volunteer Attorneys and Judges Needed Statewide for Constitution Day

Constitution Day, an event designed to teach 5th graders about the Constitution, is taking shape across the country. During the week of Sept. 12–16, volunteer attorneys will be partnered with 5th grade teachers in their areas to co-teach lessons on the Constitution. Suggested course materials will be provided as well as pocket-size Constitutions to give each student. Each presentation should last 1–1½ hours. Volunteer attorneys will be given the teacher’s name and contact information in advance so that specific planning may take place. Visit http://www.nmbar.org/Public/educationalprograms.html to sign up.

For additional information, contact Marilyn Kelley, mkelley@nmbar.org.

Through your donations to the New Mexico State Bar Foundation . . . You protect children with your gift.

Seventeen-year-old A.J. hadn’t lived with his parents for three years and didn’t know their whereabouts. He had been out of school for two years because he had no parent to enroll him. He was denied GED classes for the same reason. Pegasus Legal Services for Children helped him obtain emancipation, enabling him to enroll in GED classes and obtain housing for himself.
The partners of Atkinson, Thal & Baker PC have been selected for inclusion in Chambers USA-America’s Leading Lawyers for Business 2011 in the area of Litigation.

Danny Jarrett was one of 54 Jackson Lewis attorneys recently listed in the “Leaders in their Field” section in the Chambers USA Legal Guide 2011. Jarrett is the managing partner of the Albuquerque office. His legal practice focuses on counseling and representing employers, government entities and tribal organizations regarding labor and employment disputes.

Modrall Sperling’s Native American practice and lawyer Lynn H. Slade were awarded national recognition for the third consecutive year by Chambers USA-America’s Leading Lawyers for Business 2011. The firm received five Band 1 rankings in New Mexico, more than any other firm in the state, including the following areas: Corporate/Commercial, Environment, Natural Resources and Regulated Industries, Litigation-General Commercial, Native American Law and Real Estate. Seventeen lawyers were selected in 21 categories as “Leaders in Their Field” in New Mexico, including 11 Band 1 rankings. They are: Corporate/Commercial: Duane Brown, Peter Franklin, Chris Muirhead, and James M. Parker; Corporate/Commercial, Tax: James M. Parker; Environment, Natural Resources and Regulated Industries: Larry Ausher, Stuart Butzier, John R. Cooney, William C. Scott, and Walter Stern; Environment, Natural Resources and Regulated Industries, Water Law: Maria O’Brien; Labor and Employment: George McFall; Labor and Employment, Employee Benefits and Compensation: James M. Parker; Litigation-General Commercial: Kenneth Harrigan and Douglas G. Schneebeck; Native American Law: William C. Scott, Lynn H. Slade, and Walter Stern; Real Estate: Dale Ek, Margaret L. Meister, and Ruth Schifani.

Mary Ann Baker-Randall has joined the Atkinson & Kelsey law firm to practice divorce and family law. With over two decades of experience, she is focusing on a broad range of issues, including collaborative law. Baker-Randall served as deputy litigation directory and private attorney involvement coordinator for New Mexico Legal Aid, Inc. She was employed by the New Mexico Commission on the Status of Women and the State Bar of New Mexico.

Attorney Angela Chavez Adkins has joined Rugge, Rosales & Associates PC. Adkins will work on cases involving nontraditional and traditional family law, estate planning, civil rights and employment law.

Andrew Indahl has joined Atkinson, Thal & Baker as an associate practicing in the Litigation Department, primarily in the areas of arbitration and mediation. He received his law degree from the University of Georgia School of Law in 2005 and was admitted to the State Bar of New Mexico in 2011.

David G. Crum, managing partner of the New Mexico Legal Group PC has been appointed to the board of directors of the Children’s Grief Center, a non-profit organization that provides a safe place for children, teens, and adults to share feelings and experiences through facilitated peer support groups while grieving a death.

Chambers USA Guide has recognized Brownstein Hyatt Farber Schreck as the top New Mexico corporate and commercial practice. Chambers also recognized several individual Brownstein attorneys as the best in their respective fields and geographic locations. Ranked as top attorneys are Perry E. Bendickson III and David P. Buchholz. Bonnie J. Paisley and Jill K. Sweeney were ranked among the best attorneys. Shareholder Steven O. Sims was ranked among the best New Mexico attorneys in the area of environment, natural resources, and regulated industries-water law. Shareholder Timothy R. Van Valen was ranked as a top New Mexico attorney in the area of corporate and commercial, tax.

Mary Ann Baker-Randall has joined Rodey Hyatt and Fields as six of its lawyers, is again included in Chambers USA Guide as the top New Mexico corporate and commercial practice. Rodey attorney Robert L. Lucero has graduated from the Greater Albuquerque Chamber of Commerce’s Leadership Albuquerque program, which brings together emerging leaders from across the community to participate in projects and interactions that result in a shared vision for the greater Albuquerque community. This is done through delivering an eight-month program to 40 mid-to-senior level executives from the private, public and voluntary sectors of the community. A member of Rodey’s Business Department, Lucero’s practice is in the areas of real estate, land use and finance law.

Stormy Ralstin has joined Baysinger Wildeman & Sale as an associate. Ralstin will focus her practice in the areas of fiduciary litigation, estate planning, guardianships and conservatorships, and elder law. She attended the College of Santa Fe (bachelor’s degree, computer science, summa cum laude) and the UNM School of Law (J.D., magna cum laude).

The firm of Sutin, Thayer & Browne, as well as six of its lawyers, is again included in Chambers USA-America’s Leading Lawyers for Business—2011. The Sutin firm is again ranked as a “Leading Firm” in the area of corporate/commercial law in addition to being ranked in General Commercial Litigation and Native American Law. Six lawyers were also singled out for their work in their respective practice areas: Commercial Litigation and special recognition as a “Star” in New Mexico: Paul Bardacke; Corporate/Commercial Law: Anne P. Browne and Henry Kelly; General Commercial Litigation: Gail Gottlieb; Corporate/Commercial Law: Robert Heyman; Corporate/Commercial Law: Jay Rosenblum.
Denise M. Chanez has joined the Rodey Law Firm as an associate in the Albuquerque office. She practices in the Litigation Department with an emphasis on health law and medical malpractice defense. Chanez also has experience in the areas of employment, civil rights, education, personal injury, and media law. Chanez received her law degree from the UNM School of Law (2006, magna cum laude).

Barbara J. Koenig and Jaya Rhodes have joined Foster, Rieder & Jackson PC. Koenig, a “BV-” rated lawyer, graduated from UNM School of Law (1981, summa cum laude). She was a career law clerk for federal Senior U.S. District Court Judge E.L. Mechem and later for Federal Magistrate Judge Alan C. Torgerson. She has been in private practice for several years. She has represented children as a guardian ad litem. Rhodes is working as a summer associate and is a third-year student at the UNM School of Law. She is currently in the top fifth of her class and a member of the New Mexico Law Review.

Lewis and Roca is pleased to announce that Dennis Jontz was ranked and included in Chambers USA: A Guide to America's Leading Business Lawyers 2011 in the category of Corporate/Commercial. Jontz is a partner with the firm's Banking and Lending, Corporate, Commercial Litigation, Government Contracts Law, and Intellectual Property Practice groups. He represents clients in business, secured, and real estate transactions, mergers and acquisitions, capital acquisitions, real estate transactions, land development, and commercial litigation. His commercial litigation experience includes serving as legal counsel for banks and credit unions and representing a broad range of clients in business disputes.

Hannah S. Turner, Rodina C. Cave and Venu M. Manne have joined Sutin, Thayer & Browne. Turner is a member of the firm’s Commercial Group. She earned her law degree from the University of Texas School of Law. Cave has experience in the areas of American Indian law and complex litigation. She chairs the Indian Law Section of the State Bar and serves as an adjunct faculty member at the UNM School of Law. Manne is a member of the firm’s Commercial Group, with experience in commercial lending as well as mergers and acquisitions. He earned his law degree and a master’s degree in business administration from Boston University.

Quentin Smith of Sheehan & Sheehan PA is now a shareholder and director of the firm. He works primarily in counseling, employment litigation and administrative proceedings. Smith is recognized as a specialist in employment and labor law by the New Mexico Board of Legal Specialization.

Martha Kaser an attorney for New Mexico Legal Group PC recently became a licensed independent social worker (LISW), the highest licensure a social worker can receive. Kaser practices statewide in the areas of divorce and family law, with a focus in complex custody cases, mediation, settlement facilitation and guardian ad litem appointments.

James A. Noel has joined the Wilcox Law Firm PC as an estate-planning lawyer focusing on trusts and estate planning with a special emphasis on business planning. Noel previously worked as the cabinet secretary for the New Mexico Energy, Minerals and Natural Resources Department and served on two legislative election-reform task forces as well as two gubernatorial ethics reform task forces. He has a master’s degree in business administration from Indiana University and a law degree from UNM.

Bruce Alan Larsen passed away June 2 after battling cancer. He was born Nov.14, 1949, in Fargo, North Dakota, and moved with his family to Albuquerque as a child. He attended Sandia High School (Class of ’67) and UNM. He graduated from the UNM School of Law in 1974. Larsen was preceded in death by his father Lewis. He is survived by his mother Harriett; his sisters, Jo Cito and Susan Larsen; nephews Michael Cito (Allison), Marc Cito (Alana), Joseph Cito, and L. Ian Larsen; and his beloved dog Cybil. For most of his career, he practiced law in Hobbs. Larsen enjoyed his dogs and hiking and fishing. He was an avid reader, particularly of history.

John Schuelke passed away June 29 at the age of 82. He was born in Watertown, South Dakota, and was preceded in death by his father, William Schuelke; his mother, May Madeline Brusnighan; his brother, Gene Schuelke; and step-grandson, Lee Budick. Schuelke grew up in Watertown on a farm. He served in the U.S. Navy on the USS Badoeng Strait during the Korean War. Schuelke received his law degree from UNM and his juris doctor degree from the University of South Dakota. He was a fraternal member of Sigma Delta Chi. Schuelke spent the majority of his career as one of the founding partners of the Shuelke, Wolfe & Rich law firm in Gallup. He was council for the Navajo Nation Housing Authority and served as president of the McKinley County School Board. In his leisure, he enjoyed traveling in his motor home, flying his own plane and snowmobiling. He is survived by his beloved wife, Hilda of 30 years and six children: Heather; Michael; Leisa and husband Wayne; Kelley and husband Allen; Stacy and husband Brad; Paul and wife Jody; 16 grandchildren; eight great grandchildren; four step-children: Frank and wife Tela; Kathy; Heidi; Mike and wife Janice; eight step-grandchildren; and eight great-great grandchildren. He loved good food and a good cold beer. He will be greatly missed by all.
### Legal Education

#### July

- **28** Tax Planning Issues in Divorce  
  1.0 G  
  Teleseminar  
  Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org

#### August

<table>
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<tr>
<th>Date</th>
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<th>Location</th>
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</table>
| 1     | Death and Dissolution: Oldham, the Probate Code and Beyond            | Teleseminar| 1.3 G    | Albuquerque               | Second Judicial District Court  
  (505) 222-4575       | Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 2     | Conflicts of Interest in Law Practice: A Practical Guide              | Teleseminar| 1.0 EP   | Albuquerque               | Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 2     | Employment Law: The Basics and New Developments                       | Video Replay| 6.1 G    | Albuquerque               | Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 2     | Workers’ Compensation to Social Security: Avoid the Holes in the Social Safety Net | Video Replay| 2.7 G    | Albuquerque               | Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 2     | Workers’ Compensation to Social Security: Representing Claimants in Social Security Disability Appeals | Video Replay| 3.4 G    | Albuquerque               | Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 5     | Screening and Assessing Intimate Partner Violence and Abuse           | Teleseminar| 5.0 G, 1 EP | Albuquerque               | Samaritan Counseling Center  
  (505) 842-5300  
  www.samaritannm.org    |
| 9-10  | Business Torts, Parts 1 and 2                                        | Teleseminar| 2.0 G    | Albuquerque               | Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 12    | Rocky Mountain Regional Meeting                                       | 5.0 G, 1 EP | Santa Fe | American College of Trust  
  and Estate Counsel  
  (202) 684-8454  
  www.actec.org          |
| 16    | 2010 Intellectual Property Institute                                 | Video Replay| 4.5 G, 2 EP | Albuquerque               | Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 16    | When Agendas Collide: New Mexico’s Natural Resources and its Threatened and Endangered Species | Video Replay| 4.5 G, 2 EP | Albuquerque               | Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 16-17 | Eminent Domain Practice, Parts 1 and 2                                | Teleseminar| 2.0 G    | Albuquerque               | Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 23    | Drafting Employee Handbooks                                           | Teleseminar| 1.0 G    | Albuquerque               | Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 30    | Buying, Selling and Exchanging LLC and Partnership Interests          | 1.0 G      | Teleseminar  
  Center for Legal Education of NMSBF  
  (505) 797-6020  
  www.nmbarcle.org      |
| 31    | Effective Use of Custody Evaluations in Divorce                       | 5.0 G, 1.0 EP | Albuquerque | NBI Inc.  
  (800) 930-6182  
  www.nbi-sems.com      |
## SEPTEMBER

<table>
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| 9    | 22nd Annual Appellate Practice Institute | 7.0 G  
State Bar Center  
Center for Legal Education of NMSBF  
(505) 797-6020  
www.nmbarcle.org |
| 16   | Animal Law CLE | 3.5 G, 2.0 EP  
State Bar Center  
Center for Legal Education of NMSBF  
(505) 797-6020  
www.nmbarcle.org |
| 23   | 2011 Tax Symposium: Gross Receipts | 8.1 G  
State Bar Center  
Center for Legal Education of NMSBF  
(505) 797-6020  
www.nmbarcle.org |

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<tr>
<th>Date</th>
<th>Event</th>
<th>Description</th>
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</table>
| 15   | Everyday Ethics in Your Practice | 3.0 EP  
State Bar Center  
Center for Legal Education of NMSBF  
(505) 797-6020  
www.nmbarcle.org |

## OCTOBER

<table>
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</table>
| 12   | Art of Self-Awareness | 5.0 EP  
Taos  
Grove Burnett Vallecitos Mountain Ranch  
(575) 751-9613 |
## WRITS OF CERTIORARI

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

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court

PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective July 27, 2011**

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

<table>
<thead>
<tr>
<th>No.</th>
<th>Petitioner(s)</th>
<th>Case Name(s)</th>
</tr>
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<tbody>
<tr>
<td>33,003</td>
<td>Martinez v. Department of Transportation</td>
<td>(COA 28,661) 7/15/11</td>
</tr>
<tr>
<td>33,011</td>
<td>State v. Rodriguez</td>
<td>(COA 29,187) 7/14/11</td>
</tr>
<tr>
<td>33,017</td>
<td>State v. Lopez</td>
<td>(COA 31,110) 7/14/11</td>
</tr>
<tr>
<td>33,012</td>
<td>State v. Cruz</td>
<td>(COA 29,957) 7/13/11</td>
</tr>
<tr>
<td>33,011</td>
<td>State v. Loera</td>
<td>(COA 30,895) 7/11/11</td>
</tr>
<tr>
<td>33,009</td>
<td>State v. Moore</td>
<td>(COA 29,248) 7/11/11</td>
</tr>
<tr>
<td>33,010</td>
<td>State v. Jim</td>
<td>(COA 30,981) 7/11/11</td>
</tr>
<tr>
<td>33,010</td>
<td>State v. Steven H.</td>
<td>(COA 28,666) 7/11/11</td>
</tr>
<tr>
<td>33,058</td>
<td>Trujillo v. State</td>
<td>(COA 30,859) 7/11/11</td>
</tr>
<tr>
<td>33,109</td>
<td>State v. Gonzalez</td>
<td>(COA 30,977) 7/8/11</td>
</tr>
<tr>
<td>33,086</td>
<td>Lopez v. Bravo</td>
<td>(12-501) 7/7/11</td>
</tr>
<tr>
<td>33,107</td>
<td>State v. Veronica L.</td>
<td>(COA 30,736) 7/5/11</td>
</tr>
<tr>
<td>33,106</td>
<td>State v. Gutierrez</td>
<td>(COA 28,754) 7/5/11</td>
</tr>
<tr>
<td>33,103</td>
<td>State v. Brazeal</td>
<td>(COA 31,106) 7/11/11</td>
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<td>33,104</td>
<td>Barron v. Evangelical Lutheran Good Samaritan Soc.</td>
<td>(COA 29,707) 6/30/11</td>
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<td>33,077</td>
<td>State v. Gonzales</td>
<td>(COA 28,700) 6/30/11</td>
</tr>
<tr>
<td>33,098</td>
<td>State v. Chelsea S.</td>
<td>(COA 30,352) 6/29/11</td>
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<td>33,097</td>
<td>State v. Perea</td>
<td>(COA 31,122) 6/28/11</td>
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<td>33,094</td>
<td>State v. Yazzie</td>
<td>(COA 28,191) 6/28/11</td>
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<td>33,093</td>
<td>State v. Mahsem</td>
<td>(COA 29,671) 6/28/11</td>
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<td>33,096</td>
<td>State v. Cofer</td>
<td>(COA 29,717) 6/27/11</td>
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<td>Widman v. City of Albuquerque</td>
<td>(COA 31,168) 6/24/11</td>
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<td>33,089</td>
<td>Sabatini v. Roybal</td>
<td>(COA 29,804) 6/24/11</td>
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<td>33,088</td>
<td>State v. Stacy C.</td>
<td>(COA 30,987) 6/24/11</td>
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<td>33,084</td>
<td>State v. Lavone</td>
<td>(COA 29,266) 6/23/11</td>
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<td>33,081</td>
<td>State v. Castillo</td>
<td>(COA 29,270) 6/22/11</td>
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<td>33,080</td>
<td>State v. Rivera</td>
<td>(COA 29,118) 6/22/11</td>
</tr>
<tr>
<td>33,075</td>
<td>State v. Marchiondo</td>
<td>(COA 30,029) 6/17/11</td>
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<td>33,070</td>
<td>Montoya v. City of Albuquerque</td>
<td>(COA 29,838) 6/17/11</td>
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<td>33,072</td>
<td>Perry v. Pacheco</td>
<td>(12-501) 6/14/11</td>
</tr>
<tr>
<td>33,063</td>
<td>Duran v. Jaramillo</td>
<td>(12-501) 6/10/11</td>
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<tr>
<td>33,057</td>
<td>State v. Turrietta</td>
<td>(COA 29,561) 6/9/11</td>
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<tr>
<td>33,017</td>
<td>Trujillo v. State</td>
<td>(12-501) 6/8/11</td>
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<tr>
<td>33,053</td>
<td>State v. Coleman</td>
<td>(COA 29,143) 6/6/11</td>
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<td>33,046</td>
<td>State v. Munoz</td>
<td>(COA 30,837) 6/1/11</td>
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### Certiorari Granted but not yet Submitted to the Court:

<table>
<thead>
<tr>
<th>No.</th>
<th>Petitioner(s)</th>
<th>Case Name(s)</th>
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<tr>
<td>32,360</td>
<td>State v. Figueroa</td>
<td>(COA 28,798) 6/2/10</td>
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<td>32,430</td>
<td>State v. Muqqeddin</td>
<td>(COA 28,474) 8/2/10</td>
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<td>32,483</td>
<td>State v. Jackson</td>
<td>(COA 28,657) 8/19/10</td>
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<td>32,532</td>
<td>Gutierrez v. Hatch</td>
<td>(12-501) 9/15/10</td>
</tr>
<tr>
<td>32,548</td>
<td>State v. Robles</td>
<td>(COA 30,118) 9/27/10</td>
</tr>
<tr>
<td>32,602</td>
<td>State v. Marez</td>
<td>(COA 30,233) 10/18/10</td>
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<td>32,603</td>
<td>Holguin v. Fulco Oil</td>
<td>(COA 29,149) 10/18/10</td>
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<td>32,605</td>
<td>State v. Franco</td>
<td>(COA 30,028) 10/18/10</td>
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<td>32,510</td>
<td>State v. Swick</td>
<td>(COA 28,316) 10/28/10</td>
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<td>State v. Dominguez-Meraz</td>
<td>(COA 30,382) 11/5/10</td>
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<td>32,696</td>
<td>Herbison v. Chase Bank</td>
<td>(COA 30,630) 12/3/10</td>
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<tr>
<td>32,697</td>
<td>State v. Amaya</td>
<td>(COA 28,347) 12/3/10</td>
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<td>32,713</td>
<td>Bounds v. D’Antonio</td>
<td>(COA 28,860) 1/27/11</td>
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<td>NM Farm and Livestock Bureau v. D’Antonio</td>
<td>(COA 28,860) 1/27/11</td>
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<td>State v. Sneed</td>
<td>(COA 30,467) 1/27/11</td>
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<td>32,789</td>
<td>Chatterjee v. King</td>
<td>(COA 29,823) 1/27/11</td>
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<td>State v. Martinez</td>
<td>(COA 30,637) 1/31/11</td>
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<td>State v. Servantez</td>
<td>(COA 30,414) 2/7/11</td>
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<td>32,800</td>
<td>State v. Spearman</td>
<td>(COA 30,493) 3/8/11</td>
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<td>32,791</td>
<td>Snider v. State</td>
<td>(12-501) 3/14/11</td>
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<td>State v. Stevens</td>
<td>(COA 29,357) 3/15/11</td>
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<td>32,868</td>
<td>Nunez v. Armstrong</td>
<td>(COA 29,522) 3/23/11</td>
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<tr>
<td>32,882</td>
<td>General Contractors</td>
<td>(COA 29,731) 4/4/11</td>
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<td>State v. Gonzales</td>
<td>(COA 30,541) 4/4/11</td>
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<tr>
<td>32,876</td>
<td>Gonzales v. State</td>
<td>(12-501) 4/7/11</td>
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<td>32,915</td>
<td>State v. Collier</td>
<td>(COA 29,805) 4/7/11</td>
</tr>
<tr>
<td>32,871</td>
<td>Bowen v. Mescalero Apache Tribe</td>
<td>(COA 29,625) 4/27/11</td>
</tr>
<tr>
<td>32,899</td>
<td>State v. Esperanza</td>
<td>(COA 28,911) 4/27/11</td>
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<tr>
<td>32,937</td>
<td>SF Pacific Trust v. City of Albuquerque</td>
<td>(COA 30,930) 5/3/11</td>
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<tr>
<td>32,940</td>
<td>State v. Vest</td>
<td>(COA 28,888) 5/3/11</td>
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<td>32,941</td>
<td>Titus v. City of Albuquerque</td>
<td>(COA 29,461) 5/3/11</td>
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<tr>
<td>32,942</td>
<td>Schuster v. Taxation &amp; Revenue Dept. (COA 30,023) 5/3/11</td>
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<td>32,939</td>
<td>State v. Hall</td>
<td>(COA 29,092) 5/4/11</td>
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<tr>
<td>32,943</td>
<td>State v. Hall</td>
<td>(COA 29,138) 5/11/11</td>
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<tr>
<td>32,968</td>
<td>Sunnyland Farms, Inc. v. Central NM Electric</td>
<td>(COA 28,807) 5/17/11</td>
</tr>
<tr>
<td>32,976</td>
<td>State v. Olson</td>
<td>(COA 29,010) 5/24/11</td>
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<td>32,985</td>
<td>Helena Chemical Co. v. Uribe</td>
<td>(COA 29,567) 6/8/11</td>
</tr>
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No. 32,987  Helena Chemical Co. v. Uribe (COA 29,567)  6/8/11
No. 33,001  State v. Rudy B. (COA 27,589)  6/8/11
No. 33,008  State v. Lasky (COA 28,782)  6/8/11
No. 33,011  Felts v. CLK Management, Inc. (COA 29,702/30,142)  6/8/11
No. 33,013  Felts v. CLK Management, Inc. (COA 29,702/30,142)  6/8/11
No. 33,014  State v. Crane (COA 29,470)  6/8/11
No. 33,023  State v. Gurule (COA 29,734)  6/8/11
No. 31,100  Allen v. LeMaster (12-501)  2/15/10
No. 32,099  Wachocki v. Bernalillo Co. Sheriff’s Dept. (COA 27,761)  7/19/10
No. 32,131  Wachocki v. Bernalillo Co. Sheriff’s Dept. (COA 27,761)  7/19/10
No. 32,149  State v. Sandoval (COA 28,437)  8/30/10
No. 32,137  State v. Skippings (COA 28,324)  10/13/10
No. 32,130  State v. Cruz (COA 27,292)  10/14/10
No. 32,311  Rodriguez v. Permian Drilling Corp. (COA 29,435)  11/15/10
No. 32,170  State v. Ketelson (COA 29,876)  11/16/10
No. 32,344  Provenco v. Wenrich (COA 28,882)  11/16/10
No. 32,447  Mendoza v. Tamaya Enterprises (COA 28,809)  1/10/11
No. 32,486  City of Rio Rancho v. Amrep (COA 28,709)  1/11/11
No. 32,489  City of Rio Rancho v. Cloudview Estates (COA 29,510)  1/11/11
No. 32,340  Rivera v. American General (COA 28,691)  1/12/11
No. 32,234  State v. Trujillo (COA 29,870)  2/23/11
No. 32,524  Republican Party v. Tax & Revenue Dept. (COA 28,292)  3/14/11
No. 32,594  Smith v. Durden (COA 28,896)  3/15/11
No. 32,505  Charley v. Franklin Corporation (COA 28,876)  3/22/11
No. 32,542  Quintero v. Department of Transportation (COA 28,875)  3/22/11
No. 32,545  State ex rel. CYFD v. Octavio F. (COA 29,469)  3/23/11
No. 32,570  City of Albuquerque v. Montoya (COA 28,846)  4/11/11
No. 32,695  Diamond v. Diamond (COA 30,009/30,135)  5/10/11
No. 32,690  Joey P. V. Alderman-Cave Milling & Grain Co. (COA 29,120)  5/11/11
No. 32,756  Lenscrafters, Inc. v. Kehoe (COA 28,145)  7/18/11
No. 32,388  State v. Harper (COA 27,830)  7/27/11
No. 32,402  State v. Harper (COA 27,830)  7/27/11
No. 32,577  May v. DCP Midstream LP (COA 29,331/29,490)  8/15/11
No. 32,291  State v. Torres (COA 29,603)  8/16/11
No. 32,677  State v. Rivera (COA 29,317)  8/16/11
No. 32,436  Estate of Gutierrez v. Meteor Monument Derizotis, Inc. v. Tomada (COA 28,799)  8/17/11
No. 32,589  State v. Ordonez (COA 28,297)  8/31/11
No. 32,776  Sais v. NM Department of Corrections (COA 30,785)  9/12/11
No. 32,707  Smith LLC v. Synergy Operating LLC (COA 28,248/28,263)  9/12/11
No. 32,704  Tri-State v. State Engineer (COA 27,802)  9/26/11
No. 32,972  Trujillo v. Tapia (12-501)  6/30/11
No. 33,019  Chand v. Bravo (12-501)  7/13/11
No. 33,059  State v. Chavez (COA 30,997)  7/13/11
No. 33,062  State v. Sophia Z. (COA 30,982)  7/13/11
No. 33,064  State v. Begay (COA 31,076)  7/13/11
No. 33,068  State v. Stevens (COA 29,423)  7/13/11
No. 33,073  State v. Stinnett (COA 30,772)  7/13/11
No. 33,058  Chavez v. City of Rio Rancho (COA 31,070)  7/13/11
No. 33,060  State v. Otafi (COA 30,332)  7/15/11
No. 33,035  State v. Telles (COA 28,943)  7/18/11
No. 32,984  Rivero v. Rivera (COA 30,882)  7/19/11
No. 33,076  State v. Diaz (COA 31,034)  7/19/11
No. 33,082  Rohlev v. Rohlev (COA 31,010)  7/19/11
No. 33,084  State v. Lavone (COA 29,266)  7/19/11
### OPINIONS

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

Gina M. Maestas, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • (505) 827-4925

**Effective July 15, 2011**

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**Published Opinions**

<table>
<thead>
<tr>
<th>Case Number</th>
<th>District</th>
<th>Case Description</th>
<th>Date Filed</th>
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</thead>
<tbody>
<tr>
<td>No. 28898</td>
<td>3rd Jud Dist Dona Ana</td>
<td>CR-07-417, STATE v D EBERT (affirm)</td>
<td>7/15/2011</td>
</tr>
<tr>
<td>No. 29134</td>
<td>5th Jud Dist Eddy</td>
<td>CV-07-749, DAV v VETERANS CLUB (reverse and remand)</td>
<td>7/15/2011</td>
</tr>
<tr>
<td>No. 29624</td>
<td>3rd Jud Dist Dona Ana</td>
<td>CV-08-1364, P HOLGUIN v SALLY’S BEAUTY (reverse)</td>
<td>7/15/2011</td>
</tr>
<tr>
<td>No. 29505</td>
<td>3rd Jud Dist Dona Ana</td>
<td>CR-07-804, STATE v O CLARK (reverse and remand)</td>
<td>7/15/2011</td>
</tr>
<tr>
<td>No. 30119</td>
<td>12th Jud Dist Lincoln</td>
<td>CR-09-26, STATE v M SILVA (affirm)</td>
<td>7/15/2011</td>
</tr>
<tr>
<td>No. 31139</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CR-10-4480, STATE v F RAMIREZ (affirm)</td>
<td>7/15/2011</td>
</tr>
<tr>
<td>No. 31140</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CR-10-4481, STATE v S POWELL (affirm)</td>
<td>7/15/2011</td>
</tr>
<tr>
<td>No. 31149</td>
<td>6th Jud Dist Grant</td>
<td>CV-10-45, GILA REGIONAL v C OSUAGWU (reverse and remand)</td>
<td>7/15/2011</td>
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**Unpublished Opinions**

<table>
<thead>
<tr>
<th>Case Number</th>
<th>District</th>
<th>Case Description</th>
<th>Date Filed</th>
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<tbody>
<tr>
<td>No. 30649</td>
<td>WCA-07-54771, J RUBIO</td>
<td>v DPS (affirm)</td>
<td>7/11/2011</td>
</tr>
<tr>
<td>No. 30985</td>
<td>3rd Jud Dist Dona Ana</td>
<td>DM-08-878, D PERRAULT v J PERRAULT (affirm)</td>
<td>7/11/2011</td>
</tr>
<tr>
<td>No. 31138</td>
<td>12th Jud Dist Otero</td>
<td>CR-09-268, STATE v K POLSON (affirm)</td>
<td>7/12/2011</td>
</tr>
<tr>
<td>No. 31153</td>
<td>6th Jud Dist Grant</td>
<td>DM-05-238, D VILLANUEVA v A VILLANUEVA (affirm)</td>
<td>7/12/2011</td>
</tr>
<tr>
<td>No. 31239</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CV-11-94, M TRUJILLO v ABQ (affirm)</td>
<td>7/12/2011</td>
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<tr>
<td>No. 29505</td>
<td>3rd Jud Dist Dona Ana</td>
<td>CR-07-804, STATE v O CLARK (reverse and remand)</td>
<td>7/13/2011</td>
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<tr>
<td>No. 28258</td>
<td>5th Jud Dist Eddy</td>
<td>CR-06-141, STATE v A CARRILLO (affirm in part, reverse in part)</td>
<td>7/14/2011</td>
</tr>
<tr>
<td>No. 29947</td>
<td>7th Jud Dist Sierra</td>
<td>DM-06-37, D ARMijo v K ARMijo (affirm)</td>
<td>7/14/2011</td>
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<tr>
<td>No. 31148</td>
<td>12th Jud Dist Lincoln</td>
<td>LR-09-20, RUIDOSO VILLAGE v L GARRISON (affirm)</td>
<td>7/14/2011</td>
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<tr>
<td>No. 31223</td>
<td>1st Jud Dist Rio Arriba</td>
<td>JQ-09-21, CYFD v ANTHONY M (affirm)</td>
<td>7/14/2011</td>
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<tr>
<td>No. 29819</td>
<td>4th Jud Dist Mora</td>
<td>CV-03-45, M MAESTAS v A MEDINA (affirm)</td>
<td>7/15/2011</td>
</tr>
<tr>
<td>No. 30119</td>
<td>12th Jud Dist Lincoln</td>
<td>CR-09-26, STATE v M SILVA (affirm)</td>
<td>7/15/2011</td>
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<tr>
<td>No. 30204</td>
<td>12th Jud Dist Lincoln</td>
<td>CR-09-10, STATE v M SILVA (affirm)</td>
<td>7/15/2011</td>
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<tr>
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<td>2nd Jud Dist Bernalillo</td>
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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 July 8, 2011

James Frank Beckley
Beckley & Tann PA
PO Box 30868
8500 Menaul Blvd., NE
Suite A400
Albuquerque, NM 87190-0868
505-275-1222
505-275-7927 (fax)
jim@beckleylawfirm.com

Florence Athene Berger
Office of the District Attorney
PO Box 2025
1800 New Mexico Avenue
Las Vegas, NM 87701-2025
505-425-6746
505-425-9372 (fax)
pberger@da.state.nm.us

Peter L. Bruso
2885 Highway 14
Madrid, NM 87010
505-471-5134
505-471-9339 (fax)
peterbruso@aol.com

Douglas H.M. Carver
N.M. Legislative Council Service
490 Old Santa Fe Trail, Suite 411
Santa Fe, NM 87501
505-986-4636
505-986-4680 (fax)
Douglas.Carver@nmlegis.gov

George Cherpelis
Law Offices of George Cherpelis PLLC
9202 North 83rd Place
Scottsdale, AZ 85258-1812
480-368-8031
480-368-8071 (fax)
gxlaw@cox.net

Kelly de la Torre
Anton Law Group LLC
55 Madison Street, Suite 650
Denver, CO 80206
720-536-4683
720-536-4601 (fax)
kellydl@antonlaw.com

Kelly de la Torre
Anton Law Group LLC
55 Madison Street, Suite 650
Denver, CO 80206
720-536-4683
720-536-4601 (fax)
kellydl@antonlaw.com

Brandi Nicole Doss
Pratt, Aycock & Associates PLLC
18101 Preston Road,
Suite 201
Dallas, TX 75252
817-200-7553
214-540-9333 (fax)
Brandi@dfwtitlelaw.com

Sarah K. Downey
U.S. District Court
District of New Mexico
333 Lomas Blvd., NW, #740
Albuquerque, NM 87102
505-348-2203
sarah_downey@nmcourt.fed.us

Thomas R. Erickson
Watson Law Office LLC
125 W. Mountain
Las Cruces, NM 88005
575-526-9094 (fax)
tomewatsonlawlc@gmail.com

Martina M. Gauthier
PO Box 802
Keshena, WI 54135-0802
505-780-9182 (fax)
mlilne@cbtd.com

Elizabeth Han
PO Box 21907
Albuquerque, NM 87154-1807
505-265-1720
ellen.leitzer@gmail.com

Lori A. Martinez
Office of the State Auditor
2540 Camino Edward Ortiz,
Suite A
Santa Fe, NM 87507
505-476-3800
Lori.Martinez@osa.state.nm.us

Lance Lee Milne
Cotton, Bledsoe, Tighe & Dawson PC
PO Box 2776
500 West Illinois, Suite 300
Midland, TX 79702-2776
432-688-5885
432-684-3113 (fax)
lmilne@cbtdm.com

William C. Nedbalek
Office of the Public Defender
211 North Canal Street
Carlsbad, NM 88220-5829
505-887-5573
505-887-6874 (fax)
Chris.Nedbalek@state.nm.us

C. Richard Newsome
Newsome Law Firm
201 South Orange Avenue, Suite 1500
Orlando, FL 32801
407-648-5977
407-648-5282 (fax)

Susan M. Porter
Susan Porter Law Office
908 Lomas Blvd., NW
Albuquerque, NM 87102
505-312-7742
505-508-5145 (fax)
sporterlaw@gmail.com

Michael N. Prinz
Office of the District Attorney
105 Albright Street, Suite L
Taos, NM 87571
575-758-8683
575-758-7802 (fax)
MPrinz@da.state.nm.us

Christina Retts
Struck, Wieneke & Love PLC
3100 West Ray Road, Suite 300
Chandler, AZ 85226
480-420-1605
cretts@swlfirm.com

Mark Reynolds
Office of the Attorney General
PO Drawer 1508
408 Galisteo Street (87501)
Santa Fe, NM 87504-1508
505-827-7416
505-827-6478 (fax)
mreynolds@nmag.gov

Hon. Robert Eugene Robles
8509 Tierra Morena Pl, NE
Albuquerque, NM 87122
575-642-1106

Michael Patrick Sanchez
Office of the Public Defender
211 North Canal Street
Carlsbad, NM 88220-5829
575-887-5573
575-887-6874 (fax)
Michael.Sanchez12@state.nm.us
Clerk’s Certificates

Joseph F. Strelitz
El Paso County Statutory Probate Court No. 1
500 E. San Antonio, # 803
El Paso, TX 79901
915-546-2161
915-875-8527 (fax)
jstrelitz@epcounty.com

Lisa Sullivan
N. M. Legislative Council Service
490 Old Santa Fe Trail, Suite 411
Santa Fe, NM 87501
505-986-4600
505-986-4680 (fax)
lisa.sullivan@nmlegis.gov

Guy Tann
Beckley & Tann PA
PO Box 30868
8500 Menaul Blvd., NE, Suite A400
Albuquerque, NM 87190-0868
505-275-1222
505-275-7927 (fax)
guy@beckleylawfirm.com

Laura K. Vega
Carpenter Law PC
111 Lomas Blvd., NW, Suite 424
Albuquerque, NM 87102
505-243-0065
505-243-0067 (fax)
lvega@carpenterlawnm.com

Matthew G. Watson
Watson Law Office LLC
125 W. Mountain
Las Cruces, NM 88005
575-528-0500
575-526-9094 (fax)
watsonlawlc@gmail.com

http://nmsupremecourt.nmcourts.gov.

Clerk’s Certificate of Admission

On June 22, 2011:
Aletheia Vadin
Pamela Allen
201 3rd St., NW, Suite 505
Albuquerque, NM 87102
505-338-4057
aallen@thearlandlawfirm.com

Clerk’s Certificate of Change to Inactive Status

Effective June 18, 2011:
LaMerle M. Boyd
417 Camino de Las Animas
Santa Fe, NM 87505-0334

Effective June 9, 2011:
Carla Anne Carter
441 Montclaire Drive, SE
Albuquerque, NM 87108-2629

Effective July 1, 2011:
William “Bill” Panagakos
2 Ute Circle
Santa Fe, NM 87505

Clerk’s Certificate of Reinstatement to Active Status

As of June 30, 2011:
Eleanor K. Bratton
2741 Indian School Road, NE
Albuquerque, NM 87106-2653

As of July 11, 2011:
Andrea U. Calve
30 1/2 Prescott Hall Road
Newport, RI 02840

As of June 30, 2011:
Scott Allen Klundt
2695 S. Deframe Cir.
Lakewood, CO 80228-4740

As of June 27, 2011:
Curtis Jay Lombardi
Curtis J. Lombardi PC
2530 San Pedro Drive, NE
Albuquerque, NM 87110

As of July 11, 2011:
Michael C. Parks
2941 Santa Clara, SE
Albuquerque, NM 87106

As of July 11, 2011:
Steven Anthony Reinhart
7708 Mountain Road, NE
Albuquerque, NM 87110

Clerk’s Certificate of Change to Inactive Status

Effective June 24, 2011:
Joseph F. Strelitz
El Paso County Statutory Probate Court No. 1
501 Executive Center Blvd., Suite 200
El Paso, TX 79902-1037

In Memoriam

As of December 30, 2010:
James W. Anthony
PO Box 312
La Plata, NM 87418-0312
CURRENT 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 JULY 27, 2011

PENDING PROPOSED RULE CHANGES
OPEN FOR COMMENT

<table>
<thead>
<tr>
<th>Proposed Rule Changes</th>
<th>Comment Deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>13-2304 Retaliatory discharge</td>
<td>08/03/11</td>
</tr>
<tr>
<td>13-832 Good faith and fair dealing - [No instruction drafted.]</td>
<td>08/03/11</td>
</tr>
<tr>
<td>10-111 Motions; how and when presented</td>
<td>08/03/11</td>
</tr>
<tr>
<td>10-341 Witness immunity</td>
<td>08/03/11</td>
</tr>
<tr>
<td>10-342 Admissions, including no contest pleas, and consent decrees</td>
<td>08/03/11</td>
</tr>
<tr>
<td>14-945 Criminal sexual penetration of a 13 to 18 year old in the second degree; use of coercion by person in position of authority; essential elements</td>
<td>08/03/11</td>
</tr>
<tr>
<td>14-972 Aggravated criminal sexual penetration in the first degree; child under thirteen; essential elements</td>
<td>08/03/11</td>
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<tr>
<td>14-2241 Tampering with evidence; essential elements</td>
<td>08/03/11</td>
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</table>

RECENTLY APPROVED RULE CHANGES
SINCE RELEASE OF 2011 NMRA

CIVIL FORMS

4-831 Petition for writ of certiorari in appeal pursuant to Unemployment Compensation Law | 04/18/11 |
4-832 Writ of certiorari in appeal pursuant to Unemployment Compensation Law | 04/18/11 |
4-222 Application for free process and affidavit of indigency | 02/09/11 |
4-223 Order for free process | 02/09/11 |
4-224 Attorney’s certificate supporting indigency and free process | 02/09/11 |

RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

5-123 Public inspection and sealing of court records | 02/07/11 |
5-805 Probation; violation | 01/31/11 |
5-604 Time of commencement of trial for cases of concurrent trial jurisdiction originally filed in the magistrate, metropolitan, or municipal court | 03/23/11 |

RULES OF CRIMINAL PROCEDURE FOR THE MAGISTRATE COURTS

6-701 Judgment | 03/25/11 |
6-114 Public inspection and sealing of court records | 02/07/11 |

RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

7-701 Judgment | 03/25/11 |
7-113 Public inspection and sealing of court records | 02/07/11 |

RULES OF PROCEDURE FOR THE MUNICIPAL COURTS

8-701 Judgment | 03/25/11 |
8-112 Public inspection and sealing of court records | 02/07/11 |

CHILDREN’S COURT RULES AND FORMS

10-162 Peremptory challenge to a children’s court judge; recusal; procedure for exercising; disability | 09/09/11 |
Form 10-496A Order for evaluation of competency to stand trial | 09/09/11 |
Form 10-496B Order for diagnostic evaluation | 09/09/11 |
Form 10-496C Order for pre-dispositional diagnostic evaluation | 09/09/11 |
Form 10-496D Order for evaluation of amenability to treatment for youthful offender (requested by defense counsel) | 09/09/11 |
10-166 Public inspection and sealing of court records | 02/07/11 |
10-409 Affidavit for Arrest Warrant | 02/14/11 |
10-410 Arrest Warrant | 02/14/11 |
10-412A Bench warrant | 02/14/11 |
10-137 Continuing duty to disclose; failure to comply | 01/31/11 |

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS

1-071.1 Statutory stream system adjudication suits; service and joinder of water rights claimants; responses | 06/08/11 |
1-071.2 Statutory stream system adjudication suits; stream system issue and expedited inter se proceedings | 06/08/11 |
1-071.3 Statutory stream system adjudication suits; annual joint working session | 06/08/11 |
1-071.4 Statutory stream system adjudication suits; ex parte contacts; general problems of administration | 06/08/11 |
1-071.5 Statutory stream system adjudication suits; excusal or recusal of a water judge | 06/08/11 |
1-023 Class actions | 05/11/11 |
1-077 Appeals pursuant to Unemployment Compensation Law | 04/18/11 |
1-079 Public inspection and sealing of court records | 02/07/11 |

RULES OF CIVIL PROCEDURE FOR THE MAGISTRATE COURTS

2-112 Public inspection and sealing of court records | 02/07/11 |

RULES OF CIVIL PROCEDURE FOR THE METROPOLITAN COURTS

3-105 Assignment and designation of judges | 05/27/11 |
3-701 Appeal from metropolitan court on the record | 05/27/11 |
3-112 Public inspection and sealing of court records | 02/07/11 |
**Rule-Making Activity**  

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Date</th>
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<tbody>
<tr>
<td>10-312</td>
<td>Filing of petition; amendment of petition; appointment of guardian ad litem or attorney</td>
<td>01/31/11</td>
</tr>
<tr>
<td><strong>Rules of Evidence</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11-804</td>
<td>Hearsay exceptions; declarant unavailability</td>
<td>01/31/11</td>
</tr>
<tr>
<td><strong>Rules of Appellate Procedure</strong></td>
<td></td>
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<tr>
<td>12-215</td>
<td>Brief of an amicus curiae</td>
<td>06/28/11</td>
</tr>
<tr>
<td>12-306</td>
<td>Number of copies of papers</td>
<td>06/28/11</td>
</tr>
<tr>
<td>12-302</td>
<td>Appearance, withdrawal or substitution of attorneys</td>
<td>05/16/11</td>
</tr>
<tr>
<td>12-314</td>
<td>Public inspection and sealing of court records</td>
<td>02/07/11</td>
</tr>
<tr>
<td>12-210</td>
<td>Calendar assignments</td>
<td>02/09/11</td>
</tr>
<tr>
<td>12-309</td>
<td>Motions</td>
<td>02/09/11</td>
</tr>
<tr>
<td><strong>UJI Civil</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13-110</td>
<td>Conduct of jurors</td>
<td>03/21/11</td>
</tr>
<tr>
<td>13-305</td>
<td>Causation (Proximate cause)</td>
<td>03/21/11</td>
</tr>
<tr>
<td>13-306</td>
<td>Independent intervening cause</td>
<td>03/21/11</td>
</tr>
<tr>
<td>13-1424</td>
<td>Causation; products liability</td>
<td>03/21/11</td>
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<tr>
<td>13-1424A</td>
<td>Independent intervening cause; products liability</td>
<td>03/21/11</td>
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<td><strong>UJI Criminal</strong></td>
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<tr>
<td>14-5101</td>
<td>Insanity; jury procedure</td>
<td>04/25/11</td>
</tr>
<tr>
<td>14-101</td>
<td>Explanation of trial procedures</td>
<td>03/25/11</td>
</tr>
<tr>
<td>14-114</td>
<td>Recess instructions</td>
<td>03/25/11</td>
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<tr>
<td>14-2215</td>
<td>Resisting; evading or obstructing an officer, essential elements</td>
<td>03/21/11</td>
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<tr>
<td>14-4511</td>
<td>“Operating” or driving a motor vehicle; defined</td>
<td>03/21/11</td>
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<tr>
<td>14-4512</td>
<td>Actual physical control; defined</td>
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**Rules Governing Discipline**

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<tbody>
<tr>
<td>17-309</td>
<td>Formal charges; designation of hearing officer or committee</td>
<td>06/01/11</td>
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<tr>
<td>17-105</td>
<td>Disciplinary counsel</td>
<td>03/28/11</td>
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**Rules for Minimum Continuing Legal Education**

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<td>18-201</td>
<td>Minimum educational requirements</td>
<td>05/01/11</td>
</tr>
<tr>
<td>18-203</td>
<td>Accreditation; course approval; provider reporting</td>
<td>05/01/11</td>
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<tr>
<td>18-204</td>
<td>Earning credits; credit types</td>
<td>05/01/11</td>
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**Supreme Court General Rules**

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<thead>
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<th>Rule</th>
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<tr>
<td>23-114</td>
<td>Free process in civil cases</td>
<td>02/09/11</td>
</tr>
<tr>
<td>23-110</td>
<td>Commission on Professionalism</td>
<td>04/06/11</td>
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**Rules Governing the New Mexico Bar**

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<tr>
<td>24-109</td>
<td>Trust accounts; special requirements for IOLTA trust accounts</td>
<td>05/17/11</td>
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<tr>
<td>24-110</td>
<td>“Bridge the Gap: Transitioning into the Profession” program</td>
<td>04/06/11</td>
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**Rules for Review of JSC**

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Date</th>
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</thead>
<tbody>
<tr>
<td>27-104</td>
<td>Filing and service</td>
<td>05/04/11</td>
</tr>
<tr>
<td>27-106</td>
<td>Form of papers</td>
<td>05/04/11</td>
</tr>
</tbody>
</table>

**Local Rules for the Eleventh Judicial District**

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>LR11-120</td>
<td>Service by electronic transmission; water rights adjudication proceedings</td>
<td>02/21/11</td>
</tr>
</tbody>
</table>

**Local Rules for the Thirteenth Judicial District**

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
<th>Date</th>
</tr>
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<tbody>
<tr>
<td>LR13-411</td>
<td>Electronic filing and service pilot project</td>
<td>06/13/11</td>
</tr>
</tbody>
</table>

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](http://nmsupremecourt.nmcourts.gov).

To view recently approved rule changes, visit the New Mexico Compilation Commission’s website at [http://www.nmcompcomm.us](http://www.nmcompcomm.us).
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December 3-10, 2011
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22nd ANNUAL APPELLATE PRACTICE INSTITUTE
Friday, September 9, 2011 • State Bar Center, Albuquerque
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☐ Appellate Practice Section Member, Government, Legal Services Attorney, Paralegal $199
Co-Sponsor: Appellate Practice Section

8:00 a.m. Registration
8:15 a.m. Introductory Remarks
   Anastasia S. Stevens, Esq., Keleher & McLeod, P.A.
   Chair, Appellate Practice Section
8:30 a.m. Administrative Appeals: Anticipating and Addressing Issues That Arise
   Hon. Sarah M. Singleton, District Court, First Judicial District
   Mark A. Basham, Esq., Basham & Basham, P.C.
9:30 a.m. Break
9:45 a.m. Point Made: How to Write Like the Nation’s Top Advocates
   Ross Guberman, Esq., Legal Writing Pro
11:45 a.m. Lunch/Annual Appellate Practice Section Meeting
1:00 p.m. Point Made: How to Write Like the Nation’s Top Advocates (Cont.)
   Ross Guberman, Esq., Legal Writing Pro
2:15 p.m. Recent Developments in Appellate Practice
   Sue A. Herrmann, Esq.
   Bruce R. Rogoff, Esq.
2:45 p.m. Break
3:00 p.m. Finality for Purposes of Taking an Appeal: Figuring It Out
   Alice Tomlinson Lorenz, Esq., Lorenz Law
4:00 p.m. Chief Clerk’s Views: Passing Words of Wisdom
   Gina M. Maestas, Chief Clerk of the New Mexico Court of Appeals
4:30 p.m. Judicial Panel: Issues of Interest to Appellate Practitioners
   Hon. Richard C. Bosson, New Mexico Supreme Court
   Hon. Roderick T. Kennedy, New Mexico Court of Appeals
5:00 p.m. Adjourn

EVERYDAY ETHICS IN YOUR PRACTICE
Thursday, September 15, 2011 • State Bar Center, Albuquerque
☐ Standard Fee $109
Presenter: Chris Stiegemeyer, Esq., The Bar Plan, St Louis

In the everyday practice of law, a lawyer’s ethical obligations in any particular situation can get caught up in the rush of circumstances. Too often, these circumstances can lead to a lawyer reacting to events without fully thinking through how the Rules of Professional Conduct may apply to the lawyer’s actions. This seminar will review the legal profession’s ethical obligations as expressed in the Rules and consider how they guide a lawyer’s response to common occurrences faced by them daily.

8:30 a.m. Registration
9:00 a.m. The Quiz
   Exploring recent developments and emerging trends and highlighting and exploring current legal, ethical and malpractice issues. The attendee with the most correct answers wins a prize!
10:00 a.m. Break
10:10 a.m. The New Client
   Risks to the lawyer when considering whether to take that new client and how to avoid them.
11:10 a.m. Break
11:20 a.m. A Trust Account You Can Trust
   There’s more to handling clients’ money than Rule 1.15. Is it Privilege and Confidentiality, or Confidentiality and Privilege What you can talk about and when.
12:20 p.m. Adjourn and Lunch (provided at the State Bar Center)

2011 ANIMAL LAW CLE
Friday, September 16, 2011 • State Bar Center, Albuquerque
☐ Standard Fee $189
☐ Government, Legal Services Attorney, Paralegal $159

8:30 a.m. Registration
9:00 a.m. Landlord/Tenant and Therapy Animals
   Adam Karp, Animal Law Offices of Adam Karp, Bellingham, Washington
10:00 a.m. Break
10:15 a.m. Electric Utilities and Duty of Care to Animals
   Adam Karp
11:15 a.m. Dog Shootings and the Police
   Adam Karp
12:15 p.m. Lunch
1:15 p.m. Legal Ethics Considerations of Scientific Research and the Constitution (2.0 EP)
   Yolanda Eisenstein, Eisenstein Law Office, Dallas
3:15 p.m. Break
3:30 p.m. Estate and Emergency Planning
   Yolanda Eisenstein
4:00 p.m. Adjourn

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2011 TAX SYMPOSIUM: GROSS RECEIPTS

Friday, September 23, 2011 • State Bar Center, Albuquerque

Standard Fee $239  Taxation Law Section Member, Government, Legal Services Attorney, Paralegal $209

Co-Sponsor: Taxation Law Section

Presenters: Tim Van Valen, Esq., Brownstein Hyatt Farber Schreck LLP; Richard Anklam, President and Executive Director, New Mexico Tax Research Institute; James O’Neill, O’Neill Consulting LLC

8:00 a.m. Registration
8:30 a.m. Gross Receipts and Compensating Tax Basics
New Mexico Tax System
Gross Receipts Tax:
Who is the taxpayer?
What is taxable unless exempt or deductible?
Tax rates
Compensating tax
Who is the taxpayer?
What is taxable unless exempt or deductible?
Tax rate
Compliance
9:50 am Break
10:00 am Exemption and Deduction Overview
Exemptions
Deductions
Compliance
Nontaxable transaction certificates
11:15 a.m. Tangible Personal Property and Services
Where does a sale occur?
Interstate transactions
Mixed sales of goods and services
Out of State
R&D
Pyramiding and resales
12:30 p.m. Lunch
1:30 p.m. Overview of Special Topics
Construction
Manufacturing
Research and development
Indian transactions
2:50 p.m. Break
3:00 p.m. Avoiding Controversies and Controversies
Regulations
Revenue rulings
Filing agreements
Managed audits
Audits
Assessments
Refunds
Protests
Litigation
Closing agreements
Collections
4:00 pm New Mexico Tax Update
Statutes
Cases
Regulations
The future
4:30 pm Stump the Band: Q & A
5:00 p.m. Adjourn

STATE BAR VIDEO REPLAYS

State Bar Center • Albuquerque

August 2
Employment Law: The Basics & New Developments
8:30 a.m. – 3:00 p.m.
6.1G
$209

Workers’ Compensation to Social Security: Assisting Clients to Avoid the Holes in the Social Safety Net
8:30 a.m. – 11:30 p.m.
2.7 G
$109

August 16
2010 Intellectual Property Institute
9:00 a.m. – 4:00 p.m.
4.5 G, 2 EP
$209

When Agendas Collide:
New Mexico’s Natural Resources and its Threatened and Endangered Species
9:00 – 3:45 p.m.
4.5 G, 2 EP
$209

UPCOMING PROGRAMS

OCTOBER
6 Health Law Symposium
7 Employment and Labor Law Institute
14-15 Family Law Institute
20 Med Mal CLE
21 Procurement Code Institute
28 2nd Annual Fall Elder Law CLE

NOVEMBER
3 Indian Law CLE
4 3rd Annual Business Law Institute
10 2nd Annual ADR Institute
17 Criminal Law CLE
18 2011 Bridge The Gap

DECEMBER
1 2nd Annual Intellectual Property Institute
2 2011 Real Property Institute

7 Business Development 101
7 Negotiation Skills CLE
8 Electronic Discovery CLE featuring Craig Ball and Judge Paul Grimm
9 6th Annual Paralegal Institute
14 Trial and the Art of War with Todd Winegar
15 Presentation Skills and Oral Argument with Faith Pincus
16 Natural Resources CLE
19 Internet Research CLE
21 CLE TBA (A Day with the Mad Hatter)

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CLE At-A-Glance • 3
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AUGUST
2 Ethics
Conflicts of Interest in Law Practice: A Practical Guide
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Business Torts, Parts 1 & 2
This program will provide transactional counsel with a guide to the most common business torts that arise in middle market businesses. The program will focus on two categories of torts – those committed by a departing employee against the company and those that arise between the company, its partners, lenders, and vendors. Among other torts, the program will discuss misappropriation of company trade secrets and interference with a business expectancy.
2.0 General CLE Credits  $129

16-17 Real Estate, Litigation
Eminent Domain Practice, Parts 1 & 2
The taking by the government of a piece of private property is a substantial legal and controversial action that raises issues of purpose, fair value, and procedure. This program will provide you with a practical guide to the fundamentals and practical developments in eminent domain practice.
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PROGRAM CANCELLATION: Pre-registration is recommended. Program will be cancelled one week prior to scheduled date if attendance is insufficient. Pre-registrants will be notified by phone and full refunds given.

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OPINION

RICHARD C. BOSSON, JUSTICE

[1] In this first-degree murder case, we affirm the convictions for murder, aggravated arson, and conspiracy to commit murder. We find, however, that Defendant’s convictions for two other conspiracies violate constitutional principles against double jeopardy. In so doing, we apply for the first time our unit of prosecution analysis from double jeopardy jurisprudence to multiple conspiracy convictions. In the course of that analysis, we clarify existing case law and set a new course for the future application of double jeopardy principles to multiple conspiracy convictions.

BACKGROUND

[2] A jury convicted Defendant of one count of first-degree murder in violation of NMSA 1978, Section 30-17-6 (1963); and three counts of conspiracy to commit murder in violation of NMSA 1978, Section 30-28-2 (1979). The trial court vacated Defendant’s kidnapping conviction because it was subsumed within the first-degree murder conviction. Defendant was sentenced to life imprisonment for first-degree murder, he was given a fifteen-year concurrent sentence for conspiracy to commit first-degree murder, a nine-year consecutive sentence for aggravated arson, a three-year consecutive sentence for conspiracy to commit aggravated arson, and a nine-year consecutive sentence for conspiracy to commit kidnapping.

[3] Defendant raises numerous issues on appeal. Defendant contends (1) there is insufficient evidence of deliberate first-degree murder, (2) there is insufficient evidence to support a conspiracy to commit murder, (3) his convictions on multiple counts of conspiracy violate prohibitions against double jeopardy, (4) the trial court improperly denied Defendant’s request for a continuance, (5) all convictions rest on testimony that is inherently improbable as a matter of law, and (6) the trial court improperly denied Defendant’s motion for new trial based on newly discovered evidence.

[4] We have jurisdiction to review Defendant’s direct appeal pursuant to Article VI, Section 2 of the New Mexico Constitution and Rule 12-102(A)(1) NMRA. See State v. Smallwood, 2007-NMSC-005, ¶ 6, 141 N.M. 178, 152 P.3d 821 (“[O]ur appellate jurisdiction extends to appeals from district court judgments imposing a sentence of life imprisonment or death.”). We first conclude that substantial evidence supports these verdicts. We dispose of issues 4-6 with only brief discussion. The third issue, multiple counts of conspiracy and double jeopardy, occupies most of our attention in this Opinion. We reverse all but one conspiracy conviction and remand to the district court for further, appropriate action.

[5] The record at trial supports the following factual summary. On September 6, 2003, at approximately 11 p.m., Juan Alcántar (“Victim”) was socializing at Richard “Red” Anaya’s home in Taos when someone at the residence placed a phone call to the cell phone of Ivan Romero, also known as “Diablo.” A little after midnight, September 7, 2003, Victim and Steve Tollardo arrived at a local Taos bar, where security denied them entry. Before leaving the premises, Victim got into a fight with Ivan Romero after Tollardo “called out” Romero, who was inside that bar. Before security broke up the fight, Ivan Romero struck Victim. Victim’s girlfriend testified at trial that Victim, at the time, owed Ivan Romero money for drugs.

[6] After leaving the bar, Victim and Tollardo returned to Anaya’s home. At approximately 1:15 a.m., someone placed another phone call from Anaya’s home to Ivan Romero’s cell phone. At approximately 1:45 a.m., Victim went to Allsup’s, during which time someone placed an additional phone call from Anaya’s home to Ivan Romero’s cell phone. Around the same time, Defendant, along with Luis “Tablas” Trujillo and Raquel “Quela” Gonzales, Defendant’s girlfriend or wife at the time, stopped by Anaya’s home to see Anaya’s home and (6) the trial court improperly denied Defendant’s motion for new trial based on newly discovered evidence.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY

EUGENIO S. MATHIS, District Judge

CRAIG CHARLES KLING
LAW OFFICE OF CRAIG C. KLING
San Diego, California
for Appellant

GARY K. KING
Attorney General
JAMES W. GRAYSON
Assistant Attorney General
Santa Fe, New Mexico
for Appellee

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
LAWRENCE GALLEGOS,
Defendant-Appellant.
No. 31,204 (filed: June 15, 2011)
between Ivan Romero’s cell phone and Anaya’s home.

{7} Soon after these phone calls, “out of nowhere,” Defendant and Trujillo attacked Victim. After the assault began, Defendant instructed Gonzales, Anaya, and another individual to wait in the back bedroom. Thirty to forty-five minutes later, Defendant came to the back room and instructed Gonzales to clean up Victim’s blood from the floor. The only people in the living room and kitchen area at that time were Defendant and Victim. Defendant remained at Anaya’s home in charge of Victim, who was still alive.

{8} At approximately 3:00 a.m. on September 7, Tollardo and Trujillo arrived at Elias Romero’s shack. Tollardo and Trujillo told Elias Romero that Victim was tied up at Anaya’s home and was threatening to kill Ivan Romero, Elias Romero’s son. Elias Romero loaded a syringe with heroin and instructed Michelle Martinez, his girlfriend at the time, “[t]o go take care of it.” Ultimately, Martinez testified for the State, and much of this evidentiary recitation comes from her testimony. As a long time drug user, Martinez knew that the amount of heroin she was given was a lethal dose and that Elias Romero was asking her to kill Victim. When Tollardo and Trujillo returned to Anaya’s home with Martinez, Victim was on the floor with his hands tied behind his back, and Defendant was standing over him with a knife.

{9} When Victim saw Michelle Martinez come into the house, he began to ask for her help. Martinez, who was wearing gloves, immediately pulled out the heroin-filled syringe. When Victim saw the syringe, he began crying in fear for his life. Martinez attempted to grab Victim’s arm, but he managed to kick her away. As Defendant continued to stand over him with a knife, Victim eventually stopped resisting, and Martinez was able to inject the full dose of heroin. Following injection, Victim continued crying and asking for help. Tollardo responded by telling Victim that “he shouldn’t have fucked with Diablo.” Defendant told Victim to ask for forgiveness.

{10} Once the heroin had taken effect, Defendant, Tollardo, and Trujillo moved Victim onto a tablecloth, at which point Victim began to moan and toss about. Michelle Martinez was of the opinion that sudden movements can potentially jolt an individual out of a heroin overdose, and therefore she instructed Defendant and the others to prevent Victim from moving. Several phone calls were again placed from Anaya’s home to Ivan Romero’s cell phone.

{11} Defendant, Martinez, and Tollardo eventually carried Victim, who at this point was unconscious, to Victim’s car, where he was placed in the fully-reclined passenger seat. Defendant sat on top of Victim, and Martinez drove Victim’s car to the parking lot of a remote, local church. Once there, Victim again started making noises. In response, Defendant and Martinez tried to kill Victim with other means. Specifically, Defendant tried to snap Victim’s neck at least three times, and Martinez tried to suffocate Victim with a plastic shopping bag. When these methods proved ineffective, Defendant removed the shoelace he had been using as a belt and attempted to strangle Victim. This also proved ineffective. Just as Defendant and Martinez were preparing to throw Victim into nearby brush, Tollardo and Trujillo arrived in a separate car. Defendant and Martinez got into Trujillo’s car and the group drove off, leaving Victim alone and unconscious, or barely conscious, in the passenger seat of his car.

{12} After stopping at Allsup’s, Defendant, Martinez, Tollardo, and Trujillo returned to Elias Romero’s shack. As they were driving, Defendant mentioned that fingerprints had been left at the scene and suggested returning to the church to set Victim on fire. When the group arrived at the shack, Elias Romero asked if they had done it, to which they responded in the affirmative. After someone again mentioned burning Victim, Elias Romero instructed Martinez to get some lantern fuel, which she retrieved and placed on a table. Defendant took the fuel and left the shack with Tollardo and Trujillo.

{13} After some time, the three returned to the shack bragging about setting Victim on fire. Tollardo said that he had started the blaze with a cherry bomb. They also mentioned driving to the house of Ivan Romero, who paid Defendant, Tollardo, and Trujillo $50 each. Shortly thereafter, all three men left the shack in Trujillo’s car. Several hours later, a series of phone calls was placed from Trujillo’s residence to Ivan Romero’s cell phone and then from Ivan Romero’s cell phone to the same house.

{14} At trial, Victim’s cause of death was attributed to both the drug overdose and the church parking lot fire. Victim’s lungs contained residue of smoke and soot, indicating that Victim was still alive when he was set ablaze.

DISCUSSION
Sufficient Evidence of Deliberation to Support First-Degree Murder

{15} Defendant claims the record is insufficient to support a first-degree murder conviction. In applying our standard of review, we first “view the evidence in the light most favorable to the state, resolving all conflicts . . . and indulging all permissible inferences . . . in favor of the verdict.” State v. Graham, 2005-NMSC-004, ¶ 6, 137 N.M. 197, 109 P.3d 285 (quoting State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988)). We then “determine[] whether the evidence, [when] viewed in this manner, could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt.” Id. (quoting State v. Sanders, 117 N.M. 452, 456, 872 P.2d 870, 874 (1994)). We are at all times mindful of “the jury’s fundamental role as factfinder in our system of justice and the independent responsibility of the courts to ensure that the jury’s decisions are supportable by evidence in the record, rather than mere guess or conjecture.” State v. Flores, 2010-NMSC-002, ¶ 2, 147 N.M. 542, 226 P.3d 641.

{16} Our Legislature has defined first-degree murder as “any kind of willful, deliberate and premeditated killing.” Section 30-2-1(A)(1).

“Deliberate intention” is intention that is “arrived at or determined upon as a result of careful thought and the weighing of the consideration for and against the proposed course of action.” [State v.] Cunningham, 2000-NMSC-009, ¶ 25, 128 N.M. 711, 998 P.2d 009 (internal quotation marks and citation omitted). We have emphasized that circumstantial evidence alone can amount to substantial evidence. Id. ¶ 29; see also [State v.] Rojo, 1999-NMSC-001, ¶ 23, 126 N.M. 438, 971 P.2d 829. Indeed, “[i]ntent is subjective and is almost always inferred from other facts in the case . . . .” [State v.] Duran, 2006-NMSC-035, ¶ 7-8, 140 N.M. 94, 140 P.3d 515 (internal quotation marks and citation omitted) (“Deliberate intent may be inferred from the particular circumstances of the killing . . . .”).

Flores, 2010-NMSC-002, ¶ 19.

{17} To demonstrate that he did not act with the requisite “deliberate intent,” Defendant emphasizes that he was not at

BAR BULLETIN - JULY 27, 2011 - VOLUME 50, NO. 29 21
Elias Romero’s shack when the plot to kill Victim was likely hatched and that there is no direct evidence showing Elias Romero passed along instructions for Defendant to harm Victim in any way. Defendant also argues that, after Trujillo and Tollardo returned to Anaya’s home with Michelle Martinez, Martinez immediately returned to Anaya’s home with Michelle Martinez, Martinez immediately pulled out a syringe and injected Victim with heroin, leaving Defendant with no opportunity to weigh the consequences of his actions. Defendant additionally claims that his multiple attempts to kill Victim in the church parking lot were not the legal cause of death and, therefore, do not support his conviction for murder. Even assuming the fire could have been the cause of death, Defendant insists that he did not intend to kill Victim but only meant to destroy incriminating evidence by setting the fire.

The State responds that Defendant is engaged in a classic case of “divide-and-conquer,” whereby each piece of evidence is viewed in isolation, ignoring reasonable inferences from the totality of the circumstances that support guilt. See Graham, 2005-NMSC-004, ¶ 13. We agree with the State.

The jury reasonably could have concluded that Defendant possessed a deliberate intent to kill throughout the evening. First, the jury could have determined that Defendant possessed a deliberate intent to kill even before Michelle Martinez arrived at Anaya’s home and that his intent continued through Victim’s death. Such a finding is supported by the timing of the phone calls placed between Anaya’s home and Ivan Romero’s cell phone; Defendant’s participation in the initial, unprovoked assault; and his subsequent acts of clearing witnesses from the area, covering up evidence of the assault, and preparing the house for subsequent criminal conduct. See State v. Sosa, 2000-NMSC-036, ¶ 9, 129 N.M. 767, 14 P.3d 32 (“Intent is subjective and is almost always inferred from other facts in the case, as it is rarely established by direct evidence.”) (internal quotation marks and citation omitted).

The jury could have also determined that Defendant continued to possess a deliberate intent to kill when Martinez injected Victim with heroin. By this time, Defendant had been standing guard over the bound Victim with a knife while awaiting the return of Tollardo and Trujillo. Defendant continued his menacing conduct as a gloved Martinez struggled to inject the heroin. Then, when Victim began to cry in fear for his life, Defendant taunted him.

Defendant’s actions at Anaya’s home, which actually took place over the course of a few hours, clearly support the jury’s conclusion that Defendant had a sufficient opportunity to weigh the consequences of his actions. See id. Of course, Defendant’s culpability did not end with the events at Anaya’s home. When viewed in the light most favorable to the verdict, Defendant’s subsequent conduct in the church parking lot, including his attempt to snap Victim’s neck and strangle him with a shoelace, further supports a reasonable finding by the jury that Defendant continued to possess a deliberate intent to kill as the evening unfolded.

Defendant’s contention that he did not intend to kill Victim when starting the fire is also unavailing. The jury reasonably could have found that Defendant and his co-conspirators knew Victim was alive and returned to the church parking lot to finish the task. Indeed, Martinez testified that Victim was alive when they initially left him in the car at the church parking lot. Furthermore, a forensic pathologist testified that Victim was breathing when the fire started. The jury could have used this evidence to conclude that after several, less-than-successful attempts to kill Victim, Defendant, along with Tollardo and Trujillo, returned to the church parking lot with the deliberate intent to finish the job.

“Typically, criminal liability is premised upon a defendant’s culpable conduct, the actus reus, coupled with a defendant’s culpable mental state, the mens rea.” State v. Padilla, 2008-NMSC-006, ¶ 12, 143 N.M. 310, 176 P.3d 299; accord United States v. Bailey, 444 U.S. 402, 1980. Here, the forensic pathologist opined that Victim’s death was caused by drug intoxication with inhalation of smoke and soot as a “significant contributing condition[].” Based on this testimony, the jury reasonably could have concluded that both the heroin overdose and the fire killed Victim. See State v. Simpson, 116 N.M. 768, 772, 867 P.2d 1150, 1154 (1993) (“General principles of criminal law do not require that a defendant’s conduct be the sole cause of the crime. Instead, it is only required that the result be proximately caused by, or the natural and probable consequence of, the accused’s conduct. (internal quotation marks and citation omitted)). Substantial evidence in this case supports a finding of “concurrence” between Defendant’s actus reus and requisite mens rea for willful, deliberate murder of Victim. See State v. Lopez, 1996-NMSC-036, ¶ 23, 122 N.M. 63, 920 P.2d 1017.

Evidence of a Conspiracy to Commit Murder

Defendant claims his conviction for conspiracy to commit first-degree murder is not supported by substantial evidence because, again, he was not present at Elias Romero’s shack when the agreement to kill Victim was likely formed. We review this claim for a sufficiency of the evidence. Sanders, 117 N.M. at 456, 872 P.2d at 874.

“The gist of conspiracy under the statute is an agreement between two or more persons to commit a felony.” State v. Deaton, 74 N.M. 87, 89, 390 P.2d 966, 967 (1964). “In order to be convicted of conspiracy, the defendant must have the requisite intent to agree and the intent to commit the offense that is the object of the conspiracy.” State v. Varela, 1999-NMSC-045, ¶ 42, 128 N.M. 454, 993 P.2d 1280. “It is the agreement constituting the conspiracy which the statute punishes.” State v. Gilbert, 98 N.M. 77, 81, 644 P.2d 1066, 1070 (Ct. App. 1982).

That Defendant was not physically present at Elias Romero’s shack has little bearing on whether he agreed to commit murder, because the State was not required to define the precise moment in time when Defendant entered into a conspiratorial agreement. “A conspiracy may be established by circumstantial evidence. Generally, the agreement is a matter of inference from the facts and circumstances.” State v. Ross, 86 N.M. 212, 214, 521 P.2d 1161, 1163 (Ct. App. 1974). “The agreement need not be verbal, but may be shown to exist by acts which demonstrate that the alleged co-conspirator knew of and participated in the scheme.” State v. Trujillo, 2002-NMSC-005, ¶ 62, 131 N.M. 709, 42 P.3d 814. “[T]he prosecutor need not prove that each defendant knew all the details, goals or other participants.” United States v. Perez, 280 F.3d 318, 347 (3d Cir. 2002). A review of the complete evidentiary record supports a jury finding that Defendant agreed to murder Victim, making it immaterial whether this agreement occurred before Trujillo and Tollardo returned to Anaya’s home with Martinez or at some point later that evening.

Defendant’s Multiple Conspiracy

Convictions Constitute Double Jeopardy

Defendant argues that he has been improperly convicted of three counts of conspiracy: (1) conspiracy to commit first-degree murder, (2) conspiracy to commit kidnapping, and (3) conspiracy to commit
aggravated arson. According to Defendant, his three convictions for violating the same conspiracy statute runs afoul of the prohibition against double jeopardy. The State responds that the existence of one or more conspiracies is purely a factual issue for the jury to decide, one that does not implicate double jeopardy principles. Applying a deferential, sufficiency-of-the-evidence standard, the State relies on substantial evidence to support each of the three conspiracy convictions.

28 We find ourselves squarely faced with a conflict in terms of how our courts should analyze a double jeopardy challenge to multiple conspiracy convictions. Proceeding as the State suggests, with a pure substantial evidence review, would lead almost inevitably to affirmance. There is no doubt that each of the three conspiracy convictions is supported by substantial evidence in the record, but substantial evidence does not address legislative intent. Proceeding as Defendant proposes leads to a more nuanced, analytical review, which acknowledges the court’s role in determining whether multiple punishments for violation of the same criminal statute conflicts with legislative intent.

29 Strangely, the question of which body of law to apply to multiple conspiracy convictions has never been directly presented to this Court, and so we are faced with an issue of first impression. State v. Bernal, 2006-NMSC-050, ¶ 23, 140 N.M. 644, 146 P.3d 289; cf. State v. Turner, 2007-NMCA-105, ¶¶ 10-12, 142 N.M. 460, 166 P.3d 1114; State v. Jackson, 116 N.M. 130, 133-34, 860 P.2d 772, 775-76 (Ct. App. 1993). Before taking that question head on, we begin with a brief discussion of basic double jeopardy principles.

30 The double jeopardy clause of both the federal and state constitutions affords three levels of protection to a criminal defendant. “‘It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.’” Swafford v. State, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). Defendant has been convicted three times of violating the same conspiracy statute, and therefore this is a multiple punishment case.

31 We classify multiple punishment cases in two ways. First, there are “‘double description [cases] in which a single act results in multiple charges under different criminal statutes.”’ Bernal, 2006-NMSC-050, ¶ 7 (quoting Swafford, 112 N.M. at 8, 810 P.2d at 1228). Second, there are “‘unit of prosecution [cases] in which an individual is convicted of multiple violations of the same criminal statute.”’ Id. (quoting Swafford, 112 N.M. at 8, 810 P.2d at 1228). This being three convictions under the same conspiracy statute, we apply a unit of prosecution analysis. For unit of prosecution cases, we have previously instructed courts to engage in the following two-step analysis:

First, we review the statutory language for guidance on the unit of prosecution. State v. Barr, 1999-NMCA-081, ¶¶ 13-14, 127 N.M. 504, 984 P.2d 185. If the statutory language spells out the unit of prosecution, then we follow the language, and the unit-of-prosecution inquiry is complete. Id. ¶ 14. If the language is not clear, then we move to the second step, in which we determine whether a defendant’s acts are separated by sufficient “indicia of distinctness” to justify multiple punishments under the same statute. Id. ¶ 15. In examining the indicia of distinctness, courts may inquire as to the interests protected by the criminal statute, since the ultimate goal is to determine whether the legislature intended multiple punishments. See State v. Alvarez-Lopez, 2004-NMSC-030, ¶ 42, 136 N.M. 309, 98 P.3d 699. If the acts are not sufficiently distinct, then the rule of lenity mandates an interpretation that the legislature did not intend multiple punishments, and a defendant cannot be punished for multiple crimes. Barr, 1999-NMCA-081, ¶ 14.


32 We are mindful that both stages of the unit of prosecution analysis turn on legislative intent. See Herron v. State, 111 N.M. 357, 359, 805 P.2d 624, 626 (1991) (“The issue, though essentially constitutional, becomes one of statutory construction.”). As we have previously recognized, “the only function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended.” State v. Pierce, 110 N.M. 76, 84-85, 792 P.2d 408, 416-17 (1990) (internal quotation marks and citation omitted); see also Missouri v. Hunter, 459 U.S. 359, 366 (1983) (The prohibition against multiple punishment “prevent[s] the sentencing court from prescribing greater punishment than the legislature intended.”). 33 Accordingly, even when analyzing whether an “indicia[um] of distinctness” sufficiently separates the acts of the accused to justify multiple punishment, we remain guided by the statute at issue, including its language, history, and purpose, as well as the quantum of punishment that is prescribed. State v. Vallejos, 2000-NMCA-075, ¶ 7, 129 N.M. 424, 9 P.3d 668; see also State v. Frazier, 2007-NMSC-032, ¶ 50 n.3, 142 N.M. 120, 164 P.3d 1 (Chavez, C.J., specially concurring) (”[i]f the defendant was charged with multiple violations of the same statute, a unit-of-prosecution case, then the only question to be answered in determining whether two charges are the ‘same offense’ is whether the defendant’s conduct underlying each charge was part of the ‘same act or transaction’ as defined by the legislature.” (emphasis omitted)).

34 We have not, however, had occasion to apply our unit of prosecution case law to the crime of conspiracy. In fact, as the State suggests, our case law currently treats the question of more than one conspiracy as an issue of fact for the jury, whose determination is reviewed by our courts for a mere sufficiency of the evidence. See Ross, 86 N.M. at 215-16, 521 P.2d at 1164-65. This is the position advocated by the State as the basis for review here. We codified this deferential standard in Sanders, where we wrote the following:

The standard for determining whether one who has conspired to commit a number of crimes is guilty of one or more conspiracies was established in [Ross], 86 N.M. at 214-15, 521 P.2d at 1163-64. In Ross, our Court of Appeals held that the number of agreements is the focus for determining the number of conspiracies: Where there is one agreement to commit two or more criminal acts, the perpetrators are guilty of a single conspiracy. Because the conspiracy statute, NMSA 1978, Section 30-28-2 (Repl. Pamp. 1984), criminalizes the agreement constituting the
conspiracy, [Gilbert, 98 N.M. at 81, 644 P.2d at 1070], the number of agreements to break the law determines the number of criminal conspiracies subject to prosecution. We review the question whether there was one agreement or several under the sufficiency-of-evidence standard set out above. See State v. Hernandez, 104 N.M. 268, 720 P.2d 303, 313 (Ct. App.) (stating that determination of number of conspiracies is fact question for jury; jury findings reviewed under sufficiency-of-evidence principles), cert. denied, 104 N.M. 201, 718 P.2d 1349 (1986).

Neither Sanders nor Ross purports to be a double jeopardy case or makes a conscious decision not to apply double jeopardy principles. It appears that our courts have looked at multiple conspiracies in terms of substantial evidence almost by default. Accordingly, the case before us presents the first opportunity, or at least the first of which we are aware, to bring together both analytical points of view—sufficiency of the evidence and multiple punishment/double jeopardy—and to determine the proper role for each.

Our holding in Sanders is largely based on the United States Supreme Court’s opinion in Braverman v. United States, 317 U.S. 49 (1942). The defendants in Braverman were convicted of seven counts of conspiring to violate portions of the U.S. Internal Revenue Code relating to the unlawful production, possession, transportation, and distribution of liquor. Id. at 50 n.1. The Supreme Court reversed all but one of the seven convictions after the government conceded that the defendants had entered into only one agreement to commit an assortment of crimes. The Court reasoned that “[t]he single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute . . . . For such a violation only the single penalty prescribed by the statute can be imposed.” Id. at 54.

Braverman also cautioned against defining a conspiracy in terms of the criminal objects that were intended to be accomplished. Rather, “the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects.” Id. at 53.

Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

While Braverman teaches that the number of prosecutable conspiracies from an evidentiary perspective under the federal conspiracy statute is based on the number of agreements, the opinion does not address how to define the number of agreements and whether this is an issue for the judge or jury. Of course, under the specific facts of Braverman, there was no need for the Court to engage in such analysis in light of the government’s concession. Accordingly, we turn elsewhere—to jurisdictions outside New Mexico, both state and federal—for guidance on whether the existence of more than one conspiracy is a question of law for the court, or one of fact for the jury to determine.

Our review of state cases in this area demonstrates a significant split in authorities. Some states, such as Pennsylvania, have decided that the number of conspiracies is an evidentiary issue for the jury. See, e.g., Wade v. State, 581 So. 2d 1255, 1256 (Ala. Crim. App. 1991) (“The problem is a factual one and each case is unique.” (internal quotation marks and citation omitted)); People v. Morocco, 191 Cal. App. 3d 1449, 1453 (Cal. Ct. App. 1987) (“It is well-settled law that the question whether one or multiple conspiracies are present is a question of fact, to be resolved by a properly instructed jury.” (internal quotation marks and citation omitted)); Commonwealth v. Andrews, 768 A.2d 309, 314 (Pa. 2001) (“[T]he issue is more properly presented as a challenge to the sufficiency of the evidence, with the facts being reviewed in the light most favorable to the verdict winner.”); Commonwealth v. Martinez, 777 A.2d 1121, 1125-26 (Pa. Super. Ct. 2001) (same); Williams v. Commonwealth, 407 S.E.2d 319, 322 (Va. Ct. App. 1991) (“The question of whether the evidence presented in a single trial establishes the existence of one conspiracy or multiple conspiracies is a factual issue for the jury’s determination.”).

In contrast, other states such as Washington have determined that multiple conspiracies raise double jeopardy concerns—questions of law for the court. See, e.g., State v. Pham, 136 P.3d 919, 934-35 (Kan. 2006) (“Whether convictions are multiplicitous is a question of law subject to unlimited review.”); State v. Day, 925 A.2d 962, 976 (R.I. 2007) (“In cases such as this, where a defendant has been charged with multiple conspiracies but only one exists in actuality, in order to safeguard the defendant’s constitutional right not to be placed in double jeopardy, he or she should be sentenced with respect to only one of the counts with the other count(s) being dismissed.”); State v. Johnson, 371 S.E.2d 340, 352 (W. Va. 1988) (“[T]he defendant’s conviction of two conspiracy offenses constituted a violation of the . . . established double jeopardy principles.”); State v. Bobic, 996 P.2d 610, 617-20 (Wash. 2000) (explaining that convictions for more than one count of conspiracy is a double jeopardy unit of prosecution problem).

circuits have adopted this position, in part, because the “[t]he Double Jeopardy Clause prohibits subdivision of a single criminal conspiracy into multiple violations of one conspiracy statute.” United States v. Montgomery, 150 F.3d 983, 989 (9th Cir. 1998) (internal quotation marks and citation omitted); see also United States v. Daniels, 857 F.2d 1392, 1393 (10th Cir. 1988) (“[I]f two charges of conspiracy are in fact based on a defendant’s participation in a single conspiracy, the [double] jeopardy clause bars the second prosecution.”).2

[42] Every federal circuit to have considered this issue, except the Tenth Circuit, applies a multi-factor “totality of the circumstances” test for the court to determine “whether there are two agreements or only one,” and hence several conspiracies or one. United States v. Rigas, 605 F.3d 194, 213 (3d Cir. 2010) (internal quotation marks and citation omitted); cf. United States v. Sasser, 974 F.2d 1544, 1549 n.4 (10th Cir. 1992). Among the factors used by the federal circuits to analyze the number of agreements are whether:

(a) the [location] of the two alleged conspiracies is the same;
(b) there is a significant degree of temporal overlap between the two conspiracies charged;
(c) there is an overlap of personnel between the two conspiracies (including unindicted as well as indicted coconspirators); and
(d) the overt acts charged and [(e)] the role played by the defendant . . . [in the alleged conspiracies are] similar. Rigas, 605 F.3d at 213 (first and second alterations in original) (quoting United States v. Liottard, 817 F.2d 1074, 1078 (3d Cir. 1987)); see Susan R. Klein & Katherine P. Chiarello, Successive Prosecutions and Compound Criminal Statutes: A Functional Test, 77 Tex. L. Rev. 333, 348-49 (1998). The Third Circuit asks several related questions, including “(1) whether there was a common goal among the conspirators; (2) whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators; and (3) the extent to which the participants overlap in the various dealings.” Rigas, 605 F.3d at 213 (internal quotation marks and citation omitted).

[43] With this background in mind, we approach the question at hand. Should New Mexico treat multiple conspiracies merely as an issue of evidentiary sufficiency, or should unit of prosecution principles apply as well? First, it is not readily apparent why the crime of conspiracy should remain an outlier from our double jeopardy jurisprudence. We have consistently applied unit of prosecution principles to criminal statutes as far flung as attempt, Bernal, 2006-NMCC-050, ¶¶ 13-31; child abuse, State v. Castaneda, 2001-NMCA-052, ¶¶ 12-18, 130 N.M. 679, 30 P.3d 368; and defacing tombs, State v. Morro, 1999-NMCA-118, ¶¶ 7-26, 127 N.M. 763, 987 P.2d 420; and presumably conspiracy should be no different. We are unable to offer any principled basis for isolating conspiracy from all other criminal statutes.

[44] Second, given the nature of conspiracy, good reason exists for our courts to take greater precautions and exercise more judicial oversight when presiding over multiple conspiracy prosecutions. We are mindful of former U.S. Supreme Court Justice Robert Jackson’s admonition more than sixty years ago:

The modern crime of conspiracy is so vague that it almost defies definition. . . . It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself. . . . However, even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought . . . .

Krulewitch v. United States, 336 U.S. 440, 446-49 (1949) (Jackson, J., concurring). Numerous scholars have likewise criticized conspiracy as overly vague, such that the nature of the crime creates a distinct advantage for the prosecution over the accused. See 2 Wayne R. LaFave, Substantive Criminal Law § 12.1(b)(1), at 256-57 (2d ed. 2003) (describing the various scholarly critiques of conspiracy law).3

[45] For instance, “[a] conspiracy is complete when the agreement is reached.” State v. Villalobos, 120 N.M. 694, 697, 905 P.2d 732, 735 (Ct. App. 1995); see also State v. Lopez, 2007-NMSC-049, ¶ 21, 142 N.M. 613, 168 P.3d 743 (noting that New Mexico does not require proof of an overt act). Yet, “[b]ecause most conspiracies are clandestine in nature, the prosecution is seldom able to present direct evidence of the agreement.” 2 LaFave, supra § 12.2(a), at 267. The jury may therefore infer the existence of an agreement based on the defendant’s conduct and surrounding circumstances, which raises at least the specter of conviction by guess and speculation. See generally Ross, 86 N.M. at 214, 521 P.2d at 1163.

[46] Conspiracy is also described as a continuing crime. Villalobos, 120 N.M. at 697, 905 P.2d at 735. “A single conspiracy can last for years, with many of its substantive offenses being completed during that time . . . .” Pham, 136 P.3d at 939. It ends only when “the purposes of the conspiracy have been accomplished or abandoned.” United States v. Eppolito, 543 F.3d 25, 47 (2d Cir. 2008) (internal quotation marks and citation omitted). Furthermore, a conspiracy may “mature and expand” over time, adding more members and embracing additional criminal objectives without changing the fundamental nature of the single agreement. See State v. Orgain, 115 N.M. 123, 129, 847 P.2d 1377, 1383 (Ct. App. 1993) (Hartz, J., specially concurring) (“[A] single conspiracy may mature and expand as more conspirators and objectives are added.”); see also United States v. Rabinowich, 238 U.S. 78, 86 (1915) (“[A] single conspiracy might have for its

3In federal court, multiple conspiracies most frequently present in the context of successive conspiracy prosecutions. See, e.g., United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985); United States v. Dortch, 5 F.3d 1056, 1061-64 (7th Cir. 1993). However, the U.S. Supreme Court has repeatedly noted that whether a defendant is subject to multiple punishments for the same offense does not depend upon whether the charges were brought at a single trial or a successive trial. See Frazier, 2007-NMSC-032, ¶ 47 n.2 (Chavez, C.J., specially concurring). “If two offenses are the same . . . for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions.” Brown v. Ohio, 432 U.S. 161 (1977). “We have often noted that the [Double Jeopardy] Clause serves the function of preventing both successive punishment and successive prosecution, but there is no authority . . . for the proposition that it has different meanings in the two contexts.” United States v. Dixon, 509 U.S. 688, 704 (1993) (citations omitted).
object the violation of two or more of the criminal laws.”), Model Penal Code § 5.03, cmt. (1985) (“[T]he original agreement subsequently came to ‘embrace’ additional objects.”).

[47] These characteristics of conspiracy do not impugn its validity. They do, however, underscore the need for judicial vigilance, since courts are in the best position to assure that multiple conspiracies and their underlying agreements are sufficiently distinct that the accused is not twice placed in jeopardy for the same offense. Given the “inherent dangers” and the “looseness and pliability” of conspiracy noted by Justice Jackson, it is particularly important that the judiciary embrace its unique responsibility to assure the basic fairness and adherence to legislative intent that only the courts can afford.

Parenthetically, it is worth observing that the amount of deference our earlier cases granted the jury cannot be justified in light of how the jury is instructed. Under cases such as Ross and Sanders, we review the jury’s determination of one or more agreements for sufficiency of the evidence, yet we do not provide the jury with a multiple conspiracy instruction. We do not explain to the jury that each conspiracy conviction must be supported by evidence of a distinct agreement beyond a reasonable doubt. Nor do we provide the jury with guidance on how to differentiate between agreements. Essentially, we have been deferring to the decision of the jury without ever asking the jury the necessary questions.

This approach has invited needless confusion. When the jury is not explicitly instructed that multiple conspiracy convictions require multiple agreements, we run the risk of conflating the existence of multiple conspiracies with the existence of multiple objectives—not multiple agreements—contrary to the holding in Braverman. See United States v. Mallah, 503 F.2d 971, 985 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975) (“[M]easuring only overt acts provides no protection against carving one larger conspiracy into smaller separate [conspiracies].”).

Accordingly, whether a defendant has entered into one or more conspiracies inevitably presents a double jeopardy question. Of course, once past the unit of prosecution test, a properly instructed jury must still find, subject to our traditional deferential review, that substantial evidence supports each separate conspiracy. We now turn to the particular facts and circumstances of the case before us and begin our unit of prosecution analysis. As a constitutional matter, our courts apply double jeopardy analysis as a matter of law. State v. Saiz, 2008-NMSC-048, ¶ 22, 144 N.M. 663, 191 P.3d 521 (“Double jeopardy presents a question of law, which we review de novo.”) (citing Bernal, 2006-NMSC-050, ¶ 6), abrogated by State v. Belanger, 2009-NMSC-025, ¶ 36 n.1, 146 N.M. 357, 210 P.3d 783; see also State v. Rodriguez, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737 (“We generally review double jeopardy claims de novo. However, where factual issues are intertwined with the double jeopardy analysis, we review the trial court’s fact determinations under a deferential substantial evidence standard of review.”)

The first question we generally ask is whether the “statutory language spells out the unit of prosecution . . . .” Bernal, 2006-NMSC-050, ¶ 14. “If the statutory language for [conspiracy] were clear regarding the unit of prosecution, then the language would control, and the . . . analysis would be complete.” Id. ¶ 19. New Mexico’s conspiracy statute reads: “Conspiracy consists of knowingly and intentionally entering into one or more conspiratorial agreements.” Id. ¶ 19. New Mexico’s conspiracy statute reads: “Conspiracy consists of knowingly and intentionally entering into one or more conspiratorial agreements.” Id. ¶ 19. New Mexico’s conspiracy statute reads: “Conspiracy consists of knowingly and intentionally entering into one or more conspiratorial agreements.”

While our case law makes clear that the “gist” of any conspiracy is the agreement, the plain language of the statute defines the crime in terms of the act of “combining” without specifically requiring an agreement. While it appears, based on the plain language of the statute, that our Legislature intended to define the unit of prosecution for conspiracy in terms of the number of conspiratorial combinations, case law teaches that the unit of prosecution for conspiracy is more properly framed in terms of an agreement. It is difficult to say what difference there is, if any, between a combination and agreement. However, irrespective of whether we refer to the prosecutable unit as a combination or as an agreement, the statutory language evinces a clear intent on the part of the Legislature to follow the rule set forth in Braverman and reject a definition that focuses on the criminal objectives of the agreement, i.e., the individual crimes that each combination or agreement sets out to accomplish.

It is also worth observing that the Legislature in 1979 amended the conspiracy statute to add Subsection B, which provides only one increasingly severe punishment for a conspiracy conviction regardless of the number of underlying crimes that may be the objectives of that agreement. Compare § 30-28-2(B), with 1963 N.M. Laws, ch. 303, § 28-2. The one punishment is calibrated at the level of the “highest crime to be committed” pursuant to the one conspiracy. For example, a conspiracy to commit first-degree murder and other lesser crimes would be punished as one second-degree felony. If the highest level of crime under the conspiracy is a second-degree felony, the conspiracy is punished as a third-degree felony, and so forth. Prior to amendment, conspiracy was punished as a lesser fourth-degree felony no matter how diverse its criminal objects.

By amending the statute to set punishment at the highest crime, it is reasonable to assume that the Legislature foresaw that in many, if not most, cases there would be a single combination or agreement, and a single punishment, regardless of how many underlying criminal objectives were envisioned. Indeed, the statute would not contemplate a “highest” penalty unless the Legislature determined that a single conspiracy could encompass committing a multitude of crimes.

Based on the foregoing principles, a fair inference to draw from the text, history, and purpose of our conspiracy statute is that the Legislature established what we will call a rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one, severe punishment at the highest crime conspiracy to be committed. At trial, the state has an opportunity to overcome the Legislature’s presumption of singularity, but doing so requires the state to carry a heavy burden.

The totality of the circumstances test utilized by the federal circuits is the best mechanism to determine the exceptional instances in which the Legislature’s presumption of singularity may be overcome by demonstrating the existence of more than one conspiracy. This multi-factored approach most appropriately tracks the specific language of our statute and the special considerations that inform the crime of conspiracy.

When applied to the case at hand, it

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1One of the federal factors analyzes the nature of the overt acts committed by conspiracy participants. See, e.g., Rigs, 605 F.3d at 213. While New Mexico law does not require the existence of an overt act, our courts may still rely on this factor to help determine whether a defendant entered into one or more conspiratorial agreements.
becomes clear that the State cannot rebut the presumption that Defendant entered into only one agreement and took part in only one conspiracy. First, the three charged conspiracies involve only one victim. Not only is there one victim, but each charged conspiracy intended to inflict a similar type of harm upon that victim. To be convicted of conspiracy, the jury found that Defendant possessed the intent to commit the substantive offense that was the object of the conspiracy. See Varela, 1999-NMSC-045, ¶ 42. For conspiracy to commit kidnapping, the jury found that Defendant “intended to hold [Victim] against [his] will to inflict death or physical injury.” See § 30-4-1. For conspiracy to commit first-degree murder, the jury found that Defendant’s “deliberate intent” was to kill Victim. See § 30-2-1(A). For conspiracy to commit aggravated arson, the jury found that Defendant intended to burn Victim’s car, causing him great bodily harm. See § 30-17-6. That each charged conspiracy required Defendant and his confederates to contemplate inflicting great bodily harm or death upon the same individual strikes us as “a strong indicator of legislative intent.” Bernal, 2006-NMSC-050, ¶ 18, to impose no more than one, severe punishment set by statute at the “highest crime to be committed,” § 30-28-2(B).

The relatively short time frame also supports the existence of one conspiracy. The entire series of events, from the fight at the bar up through the murder by arson, took place between the hours of midnight and seven in the morning of September 7, 2003. While a six- to eight-hour time frame might support a finding of distinctness in the context of other crimes, the time frame for conspiracy depends upon the unique nature of the crime.

Conspiracy was criminalized to address “the special and continuing dangers incident to group activity.” 2 LaFave, supra § 12.1, at 254. Conspiracy is also an inchoate crime, developed as “a means for preventive intervention against persons who manifest a disposition to criminality” without necessarily ever committing the underlying crime which is the object of the agreement. 2 LaFave, supra § 12.1(c), at 263; see also Boyle v. United States, __ U.S. __, 129 S. Ct. 2237, 2246 (2009) (“[A] conspiracy is an inchoate crime that may be completed in the brief period needed for the formation of the agreement and the commission of a single overt act in furtherance of the conspiracy.”).

Because the crime is characterized by multiple individuals who have agreed to achieve illegal objectives, a single conspiracy may take longer to develop than crimes such as criminal sexual penetration, robbery, or shooting at a motor vehicle, where group activity is not inherent to the offense and where planning and consensus building are less relevant. Under the facts presented here, we think that the modest time line, which was continuous and undisturbed by any intervening event, strongly suggests that Defendant and his co-conspirators formed one overarching agreement, rather than three distinct agreements, separated by time and space.

Another factor that points to the existence of a single conspiratorial combination is that the actions of all conspirators were overlapping and mutually dependent. The same conspirators are implicated in all three charged conspiracies, and without their concerted action and continued communication, none of the substantive crimes would have otherwise taken place.

Finally, it is unclear how this Court can meaningfully distinguish between the three charged conspiracies in a way that would justify multiple punishment under the conspiracy statute. For instance, even if we credit Defendant’s argument that he was unaware of the plot to murder while taking part in the initial kidnapping, it does not follow that Defendant entered a new combination when he later joined his confederates in their efforts to kill. Such a finding would be contrary to the plain language of our conspiracy statute, which punishes the act of combining with another, not the objects that were to be committed, and contrary to the holding in Braverman, which adopted a similar rationale. That the same agreement evolved over time to embrace a murderous new objective upon the introduction of Michelle Martinez and her heroine overdose did not create a new crime but simply added a new objective to the same criminal combination. Because the objectives of a single agreement may change over time without such changes creating a new agreement, the conspiracy to commit kidnapping should be understood as one aspect of a larger continuous combination that eventually embraced murder as its central objective. Orgain, 115 N.M. at 129, 847 P.2d at 1383 (Hartz, J., specially concurring). Under the terms of our statute, the addition of this objective would justify greater liability, but only insofar as first-degree murder is now the “highest crime conspired to be committed.” Section 30-28-2(B). The agreement, and hence the combination, would remain the same.

In a similar sense, the conspiracy to commit aggravated arson is subsumed within the larger agreement. By the time Defendant and Tollardo left Elias Romero’s shack to burn Victim alive, there had been numerous attempts on Victim’s life, all of which were unsuccessful or not yet fully effective. The fact that Defendant and his hapless confederates decided to light Victim on fire after their previous attempts to kill—a heroin overdose, a broken neck, and strangulation—had proven ineffective was not tantamount to forming an additional agreement to kill by use of fire. Their actions did not create a new criminal combination.

We are persuaded that this is the type of routine case on which the Legislature clearly intended to impose one punishment. Because the State cannot overcome the strong presumption of singularity embodied in the conspiracy statute, we conclude that the Legislature did not intend to allow multiple punishments in this case. We have held that double jeopardy problems are not cured “by the trial court imposing concurrent sentences for the multiple convictions” because “a separate conviction is itself punishment that has potential adverse consequences.” Barr, 1999-NMCA-081, ¶ 12 (citing Pierce, 110 N.M. at 87, 792 P.2d at 419). For this reason, the appropriate remedy is to vacate Defendant’s redundant convictions with 4As we have previously indicated, a reasonable inference that the jury could have drawn from the evidence is that Defendant and his confederates held Victim against his will with the understanding that he was to be killed later that evening. According to this view of the evidence, the conspiracy to commit kidnapping was subsumed within the scheme to kill because an intent to kill was fully formed by the time the kidnapping occurred. In other words, we would be justified in concluding, in the alternative, that the conspiracy to commit kidnapping was a “necessary immediate step” to the conspiracy to commit murder. See Andrews, 768 A.2d at 316-17 (discussing Commonwealth v. Richbourg, 394 A.2d 1007, 1011 (Pa. Super. Ct. 1978), where a conspiracy to commit robbery was a “necessary intermediate step” to a conspiracy to commit burglary, because the “robbery was committed for the purpose of obtaining keys to a restaurant that was later burglarized”)
punishment imposed on the single remaining conspiracy at the level of the “highest crime conspired to be committed,” which is a conspiracy to commit first-degree murder. See § 30-28-2(B). Accordingly, we remand this case to the district court to vacate Defendant’s convictions for conspiracy to commit kidnapping and conspiracy to commit aggravated arson and resentence Defendant in a manner consistent with this Opinion.

Request for a Continuance to Secure the Presence of Defense Witnesses

[65] Defendant claims the district court erred by refusing to grant a continuance to secure the attendance of two defense witnesses at trial. Those witnesses are Kami Ramsey, a guard at the Cibola County Detention Center during Michelle Martinez’s incarceration at that facility, and Surtina Cohoe, Martinez’s former cell mate at the Cibola County facility. The court ultimately read their testimony to the jury in the form of a stipulation which the parties jointly drafted. We review Defendant’s claim for an abuse of discretion. See State v. Salazar, 2007-NMSC-004, ¶ 10, 141 N.M. 148, 152 P.3d 135 (“The grant or denial of a continuance is within the sound discretion of the trial court, and the burden of establishing abuse of discretion rests with the defendant.”).

[66] Both parties agree that our opinion in State v. Torres, 1999-NMSC-010, 127 N.M. 20, 976 P.2d 20, controls. In Torres, we promulgated a number of factors for courts to consider when evaluating a motion for a continuance. Id. ¶ 10. These factors include “the length of the requested delay, the likelihood that a delay would accomplish the movant’s objectives, the existence of previous continuances in the same matter, the degree of inconvenience to the parties and the court, the legitimacy of the motives in requesting the delay, the fault of the movant in causing a need for the delay, and the prejudice to the movant in denying the motion.” Id.

[67] In applying the Torres factors to the present case, we conclude that the district court did not abuse its discretion in denying Defendant’s motion for a continuance. When prompted, defense counsel could not provide the court with an estimate for the amount of time needed to bring either Ramsey or Cohoe to court. Nor did counsel attempt to explain why granting a continuance would likely result in their ultimate appearance. Regarding the degree of inconvenience, by the time defense counsel motioned the court for a continuance on the third day of the three-day trial, the State had already called its final witness, and one of the two alternate jurors had been excused.

[68] The district court properly ascribed fault to defense counsel in creating the need for a delay. The district court raised significant questions about whether the witnesses had been properly subpoenaed. While defense counsel insisted that his investigator was prepared to testify as to service of process, the court’s offer of a stipulation was accepted without counsel ever providing proof of service. Regarding Cohoe, even assuming she was properly served, defense counsel did not timely notify the court that Cohoe had failed to appear on the appropriate subpoena date. This was a particularly egregious oversight in light of defense counsel’s repeated assurances that Cohoe was reliable and trustworthy and would show up to testify as she promised. The court was justified in holding defense counsel accountable for creating the need for a delay to secure Ramsey’s attendance. On the first day of trial, defense counsel refused the court’s offer to issue a warrant and admitted that Ramsey’s testimony was not sufficiently important to justify any kind of delay.

[69] As to the final Torres factor—prejudice—Defendant argues that Cohoe’s live testimony was vital to his defense, as she was prepared to refute Martinez’s version of events and undercut her credibility. Despite these contentions, Defendant cannot show how Cohoe’s live testimony would have differed from what was presented by stipulation. In addition, as Martinez’s cell mate, Cohoe had credibility problems of her own; even her stipulated testimony was accepted without counsel ever providing proof of service. Regarding Cohoe, even assuming she was properly served, defense counsel did not timely notify the court that Cohoe had failed to appear on the appropriate subpoena date. This was a particularly egregious oversight in light of defense counsel’s repeated assurances that Cohoe was reliable and trustworthy and would show up to testify as she promised. The court was justified in holding defense counsel accountable for creating the need for a delay to secure Ramsey’s attendance. On the first day of trial, defense counsel refused the court’s offer to issue a warrant and admitted that Ramsey’s testimony was not sufficiently important to justify any kind of delay.

[70] Finally, Cohoe’s testimony was cumulative. The record reveals that defense counsel attacked Martinez’s credibility throughout the trial. Specifically, Defendant demonstrated that Martinez had changed her story several times, she had committed numerous crimes of dishonesty, she had accepted a generous plea deal, she had engaged in a litany of related misdeeds, and she had a reputation in jail for lying. In light of the voluminous evidence presented on Martinez’s credibility, including the stipulated testimony itself, we cannot conclude that Defendant was prejudiced by his inability to present live testimony from either Ramsey or Cohoe.

Improbability of Michelle Martinez’s Testimony as a Matter of Law

[71] Defendant argues that Michelle Martinez’s uncorroborated testimony is inherently improbable as a matter of law. See State v. Trujillo, 60 N.M. 277, 291, 291 P.2d 315, 319 (1955) (“an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable” (internal quotation marks and citation omitted)); State v. Boyd, 84 N.M. 290, 292, 502 P.2d 315, 317 (Ct. App. 1972) (“The rule is that testimony is not inherently improbable unless what is claimed to have occurred could not in fact have occurred.”).
We reject Defendant’s claim. Defendant cannot show why the district court needed Elias Romero’s trial transcript before it could rule on his motion for a new trial. Defendant never asked the district court to consider the transcript and never disputed the district court’s characterization of Martinez’s testimony.

In any event, the newly discovered evidence fails to satisfy many of the factors set forth in Garcia. First, the newly discovered evidence is not substantive, as Martinez’s perjury is “merely impeaching.” In addition, Defendant cannot explain why a new jury would likely reach a different result based on new evidence, when a description of Elias Romero’s gun is not material to Defendant’s case. Martinez did not admit to lying about Defendant’s degree of involvement in the crime. Finally, the newly discovered evidence is cumulative. In light of Defendant’s sustained attacks against Martinez at trial, we are unpersuaded that impeaching her credibility with this new act of perjury would have provided the jury with information that it had not already heard.

Given the wide latitude we provide to district courts in resolving motions for a new trial based on newly discovered evidence, we cannot conclude that an abuse of discretion occurred on these facts. See State v. Sosa, 1997-NMSC-032, ¶ 16, 123 N.M. 564, 943 P.2d 1017 (explaining that motions for a new trial based on newly discovered evidence are “not encouraged” and the “denial of such a motion will only be reversed if the district court has acted arbitrarily, capriciously, or beyond reason”).

CONCLUSION

Accordingly, we affirm in part, reverse in part, and remand to the district court for further proceedings.

IT IS SO ORDERED.

RICHARD C. BOSSON, Justice

WE CONCUR:
CHARLES W. DANIELS, Chief Justice
PATRICIO M. SERNA, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
CERTIORARI DENIED, MAY 25, 2011, NO. 32,921

From the New Mexico Court of Appeals

OPINION NUMBER: 2011-NMCA-070

Topic Index:
Appeal and Error: Harmless Error; Preservation of Issues for Appeal; and Substantial or Sufficient Evidence
Constitutional Law: Confrontation
Criminal Law: Criminal Sexual Penetration
Criminal Procedure: Children as Witnesses; Right to Confrontation; and Substantial or Sufficient Evidence
Evidence: Children as Witnesses; Hearsay Evidence; Probative Value vs. Prejudicial Effect; and Substantial or Sufficient Evidence

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
ARCHIE SKINNER,
Defendant-Appellant.
No. 28,815 (filed: February 24, 2011)

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY
CHARLES C. CURRIER, District Judge

GARY K. KING
Attorney General
Santa Fe, New Mexico
FRANCINE A. CHAVEZ
Assistant Attorney General
Albuquerque, New Mexico
for Appellee

NANCY L. SIMMONS
LAW OFFICES OF
NANCY L. SIMMONS, P.C.
Albuquerque, New Mexico
for Appellant

OPINION

CELLA FOY CASTILLO, CHIEF JUDGE

[1] Defendant appeals his conviction of criminal sexual penetration of a minor (CSPM). His primary contention is that the district court erred in allowing Dr. Karen Carson, a pedestrian, to testify as to hearsay statements made by the child victim (Child) during a sexual assault nurse examination (SANE exam). We hold that Dr. Carson’s testimony concerning Child’s account of the abuse, as well as the identification of Defendant as the perpetrator, was properly admitted pursuant to Rule 11-803(D) NMRA. Dr. Carson’s testimony regarding Child’s statements about a drawing of a penis were admitted in error, but this error was harmless. Defendant failed to preserve his argument that the drawing itself was inadmissible hearsay and that Child’s statements were inadmissible because they were more prejudicial than probative. We are unpersuaded by Defendant’s sufficiency of the evidence and Sixth Amendment confrontation clause arguments. Accordingly, we affirm.

I. BACKGROUND

[2] Defendant was charged with two counts of CSPM, in violation of NMSA 1978, Section 30-9-11 (2007) (amended 2009), and one count of criminal sexual contact with a minor (CSCM), in violation of NMSA 1978, Section 30-9-13 (2003). All three counts were based on allegations that Defendant engaged in sexual activity with Child who is his granddaughter and who was six years old at the time. Several witnesses testified at Defendant’s trial, among them Child and Dr. Carson.

[3] Child took the stand and testified that Defendant put his hand underneath her underwear, touched her vagina, and performed the act of cunnilingus on her. Dr. Carson, who performed a SANE exam of Child shortly after the sexual abuse came to light, also testified. Dr. Carson was asked what history she obtained from Child during the exam in relation to Defendant. As she began testifying about what Child told her, Defendant objected on grounds of hearsay and confrontation. The district court asked the State for additional foundation, which the State provided. The district court then overruled Defendant’s objection concluding that Dr. Carson was engaged in medical diagnosis and treatment during the SANE exam and, thus, could testify as to hearsay statements Child made during the exam pursuant to Rule 11-803(D) that provides that statements made for purposes of medical diagnosis or treatment are not excluded by the hearsay rule.

[4] After the ruling, Dr. Carson proceeded to explain that Child identified Defendant as the perpetrator of the abuse and then described the nature and scope of the abuse. Dr. Carson testified that Child told her that Defendant inserted his fingers into her vagina and anus, that he performed fellatio on her, and that he made her perform fellatio. Dr. Carson further testified that, after obtaining Child’s medical history, she studied Child’s vagina with specialized medical equipment and observed that Child’s hymen had been torn in abnormal areas suggesting that Child’s vagina had been deeply penetrated with either a finger or some other object.

[5] The district court also admitted, over Defendant’s objection, a drawing Child made for Dr. Carson during the SANE exam. The drawing was of a penis, and Dr. Carson testified that Child told her the drawing depicted Defendant’s penis. Defendant objected that the drawing was irrelevant because Child had testified that the drawing depicted her uncle’s penis.

[6] A directed verdict was granted as to the one count of CSCM and as to one of the two counts of CSPM. The jury found Defendant guilty on the remaining count of CSPM. Defendant was sentenced based on this conviction.

II. DISCUSSION

[7] On appeal, Defendant makes four arguments. First, Defendant argues that the district court made several errors relating to the admissibility of the evidence. Specifically, Defendant claims that the district court wrongly permitted Dr. Carson to testify as to statements Child made during the SANE exam. Defendant also argues that the district court erred in admitting the drawing Child drew during the SANE exam. Third, Defendant argues that there was insufficient evidence to support the conviction. Finally, Defendant argues, pursuant to State v. Franklin, 78 N.M. 1009, 427 P.2d 137 (1967),
127, 129, 428 P.2d 982, 984 (1967), and State v. Boyer, 103 N.M. 655, 658-60, 712 P.2d 1, 4-6 (Ct. App. 1985), that allowing Dr. Carson to testify about Child’s statements during the SANE exam violated Defendant’s Sixth Amendment right to confrontation. We address these matters in turn.

A. Evidentiary Matters

[8] Generally speaking, a reviewing court defers to the trial court’s decision to admit or exclude evidence and will not reverse unless there has been an abuse of discretion. However, our review of the application of the law to the facts is conducted de novo.” State v. Martinez, 2008-NMSC-060, ¶ 10, 145 N.M. 220, 195 P.3d 1232 (internal quotation marks and citation omitted). “A misapprehension of the law upon which a court bases an otherwise discretionary evidentiary ruling is subject to de novo review.” Id. We begin our analysis by examining Defendant’s arguments relating to Dr. Carson’s testimony and then turn to Defendant’s claims concerning the drawing.

1. Statements by Child to Dr. Carson

[9] Relying on State v. Ortega, 2008-NMCA-001, ¶ 27, 143 N.M. 261, 175 P.3d 929, overruled in part by State v. Mendez, 2010-NMSC-044, 148 N.M. 761, 242 P.3d 328, Defendant asserts that hearsay statements made by a victim of sexual abuse during a SANE exam do not fall within Rule 11-803(D) as such statements are not for the purpose of medical diagnosis or treatment but are primarily for evidentiary purposes to prosecute a crime. Accordingly, Defendant contends that the district court improperly admitted Dr. Carson’s testimony concerning statements made by Child during the SANE exam. However, our Supreme Court overruled Ortega to the following extent: “Under [Ortega, 2008-NMCA-001, ¶¶ 16-27], hearsay statements made to a [SANE nurse] . . . during an examination of a victim of alleged sexual abuse, are rarely admissible at trial, even if some of those statements pertain to ‘medical diagnosis or treatment’ under Rule 11-803(D) . . . , and even if the declarant testifies at trial.” Mendez, 2010-NMSC-044, ¶ 1. The Court concluded that “Ortega went too far in its hearsay analysis and in categorically excluding statements made to SANE nurses,” and “reverse[d] the evidentiary ruling of the trial court, and the affirming opinion of the Court of Appeals that relied on Ortega,” which the Supreme Court partially overruled. Mendez, 2010-NMSC-044, ¶ 1.

[10] “The hearsay rule excludes from admissible evidence statements that are inherently untrustworthy because of the risk of misperception, failed memory, insincerity, ambiguity, and the like.” Mendez, 2010-NMSC-044, ¶ 19. “There are, however, numerous exceptions to the hearsay rule when statements made by an out-of-court declarant nevertheless possess circumstantial guarantees of reliability sufficient to make the statements trustworthy and admissible.” Id.; see Rule 11-802 NMRA (“Hearsay is not admissible except as provided by these rules . . . .”). Rule 11-803(D) is one such exception and provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

“The State bears the burden of laying the proper foundation for admitting statements under Rule 11-803(D) and Rule 11-403 NMRA.” Mendez, 2010-NMSC-044, ¶ 54.

[11] In Mendez, our Supreme Court overruled Ortega, in part, and clarified existing law for applying Rule 11-803(D) as it relates to the admissibility of hearsay statements elicited from a victim of sexual abuse during a SANE exam. Mendez, 2010-NMSC-044, ¶¶ 13, 40-55. Defendant’s trial occurred before Mendez, and Defendant’s submissions on appeal were also filed before Mendez had been issued. Mendez explains that Ortega erroneously directed “courts to determine the purpose of the encounter, instead of considering the substance of, and circumstances surrounding, individual statements.” Mendez, 2010-NMSC-044, ¶ 39. This approach, our Supreme Court determined, “is irreconcilable with previous hearsay opinions in which our courts have focused on particular statements, determining in each instance the purpose for which the statement was made.” Id. The Court acknowledged “the special challenges posed by determining the admissibility of statements made” by victims during SANE exams under Rule 11-803(D), but rejected “the notion that statements can be categorically excluded based on the professional status or affiliation of the individual to whom the statement is made.” Mendez, 2010-NMSC-044, ¶ 41. We reject Defendant’s assertion that Child’s statements to Dr. Carson during the SANE exam were categorically inadmissible as this claim is contrary to Mendez. We proceed to evaluate these statements in light of the guidance provided in Mendez.

[12] Our Supreme Court explained in Mendez that “[t]wo underlying rationales traditionally animate Rule 11-803(D).” Mendez, 2010-NMSC-044, ¶ 20. The first rationale is the help-seeking motivation. Id. “[T]he declarant’s self-interest in obtaining proper medical attention renders the usual risks of hearsay testimony . . . minimal when associated with medical treatment.” Id. (omission in original) (internal quotation marks and citation omitted). The second rationale is commonly referred to as pertinence. Id. ¶ 21. “[I]f a statement is pertinent to a medical condition, such that a medical care provider reasonably relies upon it in arriving at a diagnosis or treatment, the statement is deemed sufficiently reliable to overcome hearsay concerns.” Id. “Trustworthiness can be established under either rationale alone, or some degree of both. In any event, trial courts are best suited to consider the relevant facts and circumstances of a given case in order to make the ultimate determination.” Id. ¶ 23. Trial courts must closely scrutinize the exchange between the medical provider and patient “to determine the statement’s overall trustworthiness under Rule 11-803(D) in light of the[se] two rationales.” Mendez, 2010-NMSC-044, ¶ 42. In other words, “[t]he trial court must . . . carefully parse each statement made to a [SANE nurse] to determine whether the statement is sufficiently trustworthy, focusing on the declarant’s motivation to seek medical care and whether a medical provider could have reasonably relied on the statement for diagnosing or treating the declarant.” Id. ¶ 43.

[13] The hearsay statements proffered by Dr. Carson can be divided into three discrete categories. The first is Dr. Carson’s testimony concerning Child’s account of the nature and scope of the sexual abuse. The second is Dr. Carson’s testimony regarding Child’s identification of Defendant as the perpetrator of the abuse. The third is Dr. Carson’s testimony that Child stated the drawing she drew was of Defendant’s penis. We analyze the admissibility of each category in turn.

[14] As to the first category, Mendez states that a “patient’s account of what happened to her body helps medical care pro-
providers determine the best way to proceed in diagnosing and ultimately treating any injury.” *Id.* ¶ 48. Mendez further indicates that statements elicited from a victim of sexual abuse by a medical provider concerning the nature of any body-to-body contact involved in the abuse, the possibility of any fluid-to-body contact occurring during the abuse, and any bodily sensations experienced by the victim during the abuse may, under the context and circumstances, relate directly to the victim’s help-seeking motivation and be pertinent to medical diagnosis and treatment. *Id.* ¶¶ 44-45.

¶ 15 The evidence shows that in the morning hours of November 8, 2007, Child was taken to a doctor because she was experiencing vaginal pain. Officers from the Roswell Police Department were summoned to the doctor’s office at around 10 a.m. and were informed that Child had been sexually assaulted. Child was brought to Esperanza House at 11:00 a.m. for an interview and then taken to Dr. Carson at roughly 1:45 p.m. for the SANE exam.

¶ 16 Dr. Carson testified that she complied with the statewide SANE protocols and obtained a history of Child prior to conducting the physical examination. The State asked Dr. Carson what purpose was served in her attempt to obtain Child’s history. Dr. Carson responded that the purpose of obtaining Child’s medical history was to diagnose Child and treat her physical complaints. Dr. Carson further testified that this is something that all physicians do when a person with physical maladies seeks treatment. Dr. Carson then described Child’s account of the nature and extent of the abuse which, as previously described, involved vaginal and anal penetration, cunnilingus, and fellatio. Dr. Carson testified that after she obtained this history, she performed an external and internal examination of Child’s body. Dr. Carson discovered that Child had no external injuries but had sustained penetrating injuries to her vagina which corroborated Child’s claim that she had been vaginally penetrated with either a finger or some other object.

¶ 17 In our view, the State laid a sufficient foundation to permit us to conclude that the district court did not abuse its discretion in ruling that Child’s statements to Dr. Carson about the nature and scope of the abuse were admissible under Rule 11-803(D). The evidence indicates (1) that Dr. Carson was attempting to identify whether Child was injured when Dr. Carson asked Child to describe the nature and scope of the abuse, (2) that Child’s statements about the scope of the abuse were pertinent to her health and treatment, and (3) that it was reasonable for Dr. Carson to rely on Child’s statements in attempting to identify Child’s injuries. Indeed, during her physical examination of Child, Dr. Carson found injuries in the areas of Child’s body where Child claimed she had been penetrated. Dr. Carson’s testimony concerning Child’s account of the scope and nature of the abuse was properly admitted.

¶ 18 We turn now to the second category of Dr. Carson’s testimony—Child’s identification of Defendant as the perpetrator of the sexual abuse. *Mendez* instructs that “statements of fault or identity are inadmissible under the hearsay exception for purposes of medical diagnosis or treatment because they are not pertinent to treatment or diagnosis[.]” but there is an exception: victim statements involving the identification of the abuser may be admissible under Rule 11-803(D) where the identity of the abuser is pertinent to psychological treatment or where treatment involves separating the victim from the abuser. *Mendez*, 2010-NMSC-044, ¶¶ 52-53.

¶ 19 At trial, the State presented evidence that Defendant served as a caregiver for Child during the period of time preceding Child’s complaint of vaginal pain. Dr. Carson stated that Child told her that Defendant was her “Papa,” thus alerting Dr. Carson to the probability that Defendant was Child’s relative. This evidence is sufficient to permit us to conclude that Dr. Carson would need to know if Defendant was the source of the sexual abuse so as to prevent Child from being returned to Defendant’s care and further harmed. See *id.* ¶ 53 (“[I]nformation that a child sexual abuser is a member of the patient’s household is reasonably pertinent to a course of treatment that includes removing the child from the home.” (internal quotation marks and citation omitted)). We conclude that Dr. Carson’s statement that Child told her Defendant was the perpetrator of the abuse was also properly admitted under Rule 11-803(D).

¶ 20 The last category of hearsay at issue here is Dr. Carson’s statement that Child told her that the drawing she drew was of Defendant’s penis. At trial, Dr. Carson testified that Child volunteered to draw the drawing during the SANE exam. Dr. Carson stated that she does not ask patients undergoing SANE exams to make drawings, but she allowed Child to make the drawing in this instance because Child volunteered to do so. Dr. Carson testified that after Child drew the drawing, Child told Dr. Carson it was a drawing of Defendant’s penis.

¶ 21 The record provides no guidance as to how Child’s assertion that the drawing was of Defendant’s penis might have assisted Dr. Carson in her efforts to diagnose or treat Child’s injuries. Dr. Carson merely testified that Child asked to draw a drawing, she did so, and then she claimed it was of Defendant’s penis. Without more, we cannot conclude that the State met its foundational burden as to the admissibility of this statement under Rule 11-803(D).

¶ 22 Even though admission of this evidence was error, we conclude that this error was harmless. The standard for harmless error review in the evidentiary context is summarized in *State v. Branch*, 2010-NMSC-042, 148 N.M. 601, 241 P.3d 602. There, our Supreme Court provided the following guidance:

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. 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 insubstantial; and (3) no substantial conflicting evidence to discredit the State’s testimony. 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.* ¶ 15 (alterations in original) (omission in original) (internal quotation marks and citations omitted).

¶ 23 As to the first factor, there was substantial evidence other than Dr. Carson’s improperly admitted statement regarding the drawing to support Defendant’s conviction. The jury was instructed that, to find Defendant guilty of CSPM, they were required to find: (1) that Defendant caused Child to engage in cunnilingus or that Defendant caused the insertion of his finger, to any extent, into Child’s vagina; (2) that Child was twelve years of age or younger; and (3) that this happened in New Mexico on or about November 6, 2007.
Child testified that Defendant touched her vagina and performed cunnilingus on her. Dr. Carson similarly testified that Child stated during the SANE exam that Defendant inserted his finger into her vagina and anus and performed cunnilingus on her. Dr. Carson’s examination of Child’s vagina revealed evidence that Child’s vagina had been penetrated with either a finger or some other object.

Turning to the second factor, we determine that Dr. Carson’s improperly admitted testimony appears minuscule in comparison to the permissible evidence just described. As detailed above, the testimony regarding the drawing was insignificant in relation to the permissible evidence admitted.

The third factor relates to other evidence in the case. While there was some evidence of Child’s untruthfulness, there was no substantial conflicting evidence to discredit the testimony presented by the State. Moreover, Defendant submitted evidence in the form of testimony from various family members that Child had a reputation for being untruthful. The conflict between Child’s testimony as to the drawing and that of Dr. Carson provided support for Defendant’s theory. Although Defendant contends that Dr. Carson’s testimony as to the drawing corroborated Child’s account, this is not the case. Child’s other testimony regarding the abuse was corroborated by Dr. Carson’s testimony, but Child’s identification of the penis in the drawing contradicted Dr. Carson’s testimony and in doing so, aided Defendant in presenting his theory of the case.

Accordingly, after weighing the factors, we conclude that there was no reasonable probability that the admission of Dr. Carson’s testimony concerning Child’s statements about the drawing during the SANE exam affected the verdict. The district court committed harmless error in admitting this evidence.

Before proceeding to the next issue on appeal, we address Defendant’s contention that Dr. Carson’s hearsay statements should be excluded under Rule 11-403 NMRA. Specifically, Defendant argues that Dr. Carson’s status as an expert shrouded her testimony in an air of trustworthiness and impinged on the jury’s role as factfinder. We decline to entertain this argument because “Defendant’s brief-in-chief fails to include the requisite statement regarding preservation” regarding this argument. State v. Harrison, 2010-NMSC-038, ¶ 11, 148 N.M. 500, 238 P.3d 869; see Rule 12-213(A)(4) NMRA.

2. Drawing

We now turn to Defendant’s arguments concerning the admissibility of the drawing itself. In his brief-in-chief, Defendant provides three grounds for his position that the drawing was inadmissible: (1) because it was based on the inadmissible statements of Dr. Carson, (2) because allowing Dr. Carson to testify to the drawing allowed improper validation of the exhibit, and (3) because it was irrelevant. Defendant did not preserve the first two claims; thus, we will not address them on appeal. See Rule 12-216(A) NMRA (“To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[,]”).

As to relevancy, Defendant maintains that because there was no admissible testimony linking the drawing to Defendant, the drawing itself was irrelevant and was therefore wrongly admitted. We disagree. As we have explained in paragraph 25, Defendant’s theory of the case was that Child had a reputation for being untruthful and that the accusations against Defendant were false. Child’s testimony that the drawing depicted her uncle’s penis would tend to show that she had seen her uncle’s penis. This could raise a question regarding the veracity of her testimony that Defendant was the perpetrator. Viewed in this light, we cannot see how such evidence was relevant because this evidence tends to show precisely what Defendant wanted the jury to believe—that Child had lied. The drawing was relevant, and we reject Defendant’s arguments to the contrary.

C. Sufficiency of the Evidence

Defendant contends that the evidence was insufficient to “allow a rational trier of fact to find him guilty of” the one count of CSMC of which he was convicted. “The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.” State v. Riley, 2010-NMSC-005, ¶ 12, 147 N.M. 557, 226 P.3d 656 (internal quotation marks and citation omitted). We set forth the jury instruction and described the evidence supporting the conviction in the preceding section of this opinion and need not do so again here. Rather, we focus on Defendant’s arguments.

Defendant asserts that the evidence was insufficient to support the verdict because Child’s credibility is dubious and because Child testified that her family members instructed her to identify Defendant as the source of the abuse. This line of argument is unavailing. “As an appellate court, we do not substitute our judgment for that of the factfinder concerning the credibility of witnesses or the weight to be given their testimony.” State v. Nichols, 2006-NMCA-017, ¶ 9, 139 N.M. 72, 128 P.3d 500 (internal quotation marks and citation omitted). “Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the]defendant’s version of the facts.” State v. Rojo, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829.

Defendant also claims that, while the medical evidence indicates that Child suffered a penetrating injury to her vagina, there was no evidence to connect Defendant with the injury. We disagree. Child testified that Defendant touched her vagina with his finger. Dr. Carson testified that during the SANE examination Child claimed that Defendant penetrated her vagina with his finger. Moreover, the jury instruction indicates that Defendant could be convicted of CSMC for either inserting his finger into Child’s vagina to any degree or by causing Child to engage in cunnilingus. Putting aside the evidence that Defendant penetrated Child’s vagina with his finger, there was also evidence presented that Defendant caused Child to engage in cunnilingus. We reject Defendant’s assertion that the evidence was insufficient to support the conviction.

D. Confrontation

Defendant’s final argument is submitted pursuant to Franklin and Boyer. He asserts that his Sixth Amendment right to confrontation was violated when the district court allowed Dr. Carson to testify about the statements Child made during the SANE exam. This argument is without merit as Child testified in this case, and Defendant did have an opportunity to face Child at trial and cross-examine her. Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (observing that the confrontation clause provides criminal defendants the right to physically face those who testify against them and the right to conduct cross-examination).

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

IT IS SO ORDERED.

CELIA FOY CASTILLO,
Chief Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge
LINDA M. VANZI, Judge
Certiiorari Denied, May 6, 2011, No. 32,951

From the New Mexico Court of Appeals

Opinion Number: 2011-NMCA-071

Topic Index:
Criminal Law: Robbery
Criminal Procedure: Credit for Time Served
Statutes: Interpretation; and Legislative Intent

STATE OF NEW MEXICO,
Plaintiff-Appellee,
versus
RICHARD LOPEZ,
Defendant-Appellant.
No. 29,382 (filed: March 16, 2011)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
DENISE BARELA SHEPHERD, District Judge

GARY K. KING
Attorney General
Santa Fe, New Mexico
FRANCINE A. CHAVEZ
Assistant Attorney General
Albuquerque, New Mexico

ROBERT E. TANGORA
ROBERT E. TANGORA, L.L.C
Albuquerque, New Mexico
for Appellant

OPINION

JAMES J. WECHSLER, JUDGE

[1] Defendant Richard Lopez appeals from the district court’s order of criminal commitment, pursuant to NMSA 1978, Section 31-9-1.5(D) (1999). Defendant argues that the district court erred by (1) finding that there was sufficient evidence that Defendant inflicted great bodily harm while committing armed robbery, (2) concluding that armed robbery is a crime delineated in Section 31-9-1.5(D) permitting commitment, and (3) denying Defendant presenceence confinement credit for the period of detainment prior to the commitment. Because armed robbery that results in the infliction of great bodily harm on another person is a delineated crime under Section 31-9-1.5(D) and there was sufficient evidence to support the district court’s finding that Defendant inflicted great bodily harm on the victim while committing armed robbery, the district court did not err by ordering Defendant’s commitment for twelve years. However, because Defendant was entitled to presenceence confinement credit for the period of detainment prior to the commitment in light of our opinion in State v. Lopez, 2009-NMCA-112, 147 N.M. 279, 219 P.3d 1288, we remand to the district court to modify the commitment period.

BACKGROUND

[2] A grand jury indicted Defendant on charges of armed robbery, contrary to NMSA 1978, Section 30-16-2 (1973), aggravated burglary with a deadly weapon, contrary to NMSA 1978, Section 30-16-4(A) (1963), and aggravated battery with a deadly weapon or, alternatively, aggravated battery with great bodily harm, contrary to NMSA 1978, Section 30-3-5(A), (C) (1969). Before trial, the district court ordered a criminal commitment hearing after finding that Defendant was incompetent to proceed to trial and still dangerous, pursuant to Section 31-9-1.5(D), Section 31-9-1.5(D) permits a district court to criminally commit a defendant in a locked, secured facility for a period of time equal to the maximum sentence that could have been imposed had the defendant been convicted in a criminal proceeding. The judge must find by clear and convincing evidence that the defendant committed a crime specified in Section 31-9-1.5(D) and that the defendant is incompetent and dangerous.

[3] Prior to the commitment hearing, the parties stipulated to facts regarding the incident forming the basis of the charges against Defendant, which we summarize as follows. Defendant was staying with his girlfriend at the Ambassador Inn (hotel). During the stay, the victim, who is a night clerk at the hotel, twice told Defendant, his girlfriend, and another individual to refrain from drinking outside their room. Both times, Defendant and his companions complied with the request. Early the next morning, Defendant approached the victim in the hotel laundry room and asked for towels. The victim turned away to get the towels, and when he turned to hand them to Defendant, Defendant struck him in the face with a closed fist. As a result, the victim fell into an industrial-sized laundry basket, and Defendant continued to strike him. The victim could not defend himself due to a congenital birth defect that does not allow him to extend his hands. Defendant then picked up a hard, plastic tube and beat the victim over the head with it until the victim “‘played dead.’” Defendant took the keys to the hotel office from the victim and entered the hotel office. Police later discovered that $46.81 was missing from the cash drawer inside the office. Defendant was charged and arrested three weeks later. While being arrested, Defendant told the arresting officers that he “recalled being in an altercation with an employee,” that he “received a few dollars from the [hotel’s] cash drawer,” and spontaneously stated that “$40 was not worth it.”

[4] Based on the preceding stipulated facts, the district court found, by clear and convincing evidence, that Defendant committed armed robbery that resulted in great bodily harm to the victim and both 2 alternative counts of aggravated battery.

The district court concluded that both armed robbery and aggravated battery are crimes delineated for criminal commitment pursuant to Section 31-9-1.5(D) and ordered Defendant’s commitment in a locked, secure facility for three years for the aggravated battery and nine years for the armed robbery. The district court denied Defendant presenceence confinement credit for the period of detainment prior to the criminal commitment.

SUFFICIENCY OF THE EVIDENCE

ing that robbery includes “the concept of criminal intent”); see also U.I. 14-1621 NMRA (including the intent to permanently deprive the victim of property as an element of armed robbery). Section 31-9-1.5(D) only permits a district court to commit a defendant upon a finding by clear and convincing evidence that the defendant committed a crime that “involves the infliction of great bodily harm on another person,” and that the defendant was incompetent and dangerous. As a result, to have committed Defendant, the district court must necessarily have found that (1) Defendant inflicted great bodily harm on the victim during the commission of the armed robbery, and therefore, (2) Defendant intended to steal the property of the victim while he inflicted great bodily harm on the victim.

[6] Defendant argues that there was insufficient evidence in the stipulated facts to support a finding that Defendant intended to commit armed robbery at the time that great bodily harm was inflicted on the victim. This Court reviews the sufficiency of the evidence for an order of commitment under Section 31-9-1.5(D) using a test that parallels the test for substantial evidence in reviewing a criminal conviction. See State v. Taylor, 2000-NMCA-072, ¶ 18, 129 N.M. 376, 8 P.3d 863. We determine whether there is direct or circumstantial evidence to support a verdict of guilty with respect to every element essential to conviction. Id. We review the evidence in the light most favorable to the prevailing party, resolving all conflicts and permissible inferences in its favor. Id. We will not substitute our judgment for that of the district court and only determine whether “any rational fact finder could have found . . . the essential facts required” for conviction. State v. Adonis, 2008-NMSC-059, ¶ 12, 145 N.M. 102, 194 P.3d 717 (emphasis, internal quotation marks, and citation omitted).

[7] While there is no direct evidence as to the time that Defendant formed the intent to commit robbery, circumstantial evidence can be sufficient to support a finding of intent. See State v. Durant, 2000-NMCA-066, ¶ 15, 129 N.M. 345, 7 P.3d 495 (recognizing that “[i]ntent can rarely be proved directly and often is proved by circumstantial evidence”). The stipulated facts indicate that Defendant committed the battery on the victim and that immediately after the victim “played dead,” Defendant took the keys to the hotel office. Defendant did not leave the laundry room between the battery and the taking of the keys. The stipulated facts also indicate that Defendant admitted “receiv[ing] a few dollars” from the cash drawer and that he spontaneously told the arresting officer that “$40 was not worth it.” While this statement is not a direct admission, it can be interpreted as circumstantial evidence that Defendant committed the battery on the victim with the intent to rob him. The close temporal proximity between the battery and the taking of the keys, along with the statement to the officer, is sufficient circumstantial evidence to support a finding that Defendant formed the intent to commit the robbery before or during the time he committed the battery on the victim.

[8] While Defendant implies in his brief in chief that he may have had other reasons for committing the battery aside from intent to commit robbery, such as that he was upset that the victim had previously told Defendant and his friends to refrain from drinking in public, we decline to disturb the judgment of the factfinder and reweigh the evidence. See State v. Juan, 2010-NMSC-041, ¶ 33, 148 N.M. 747, 242 P.3d 314. The factfinder is free to reject a defendant’s version of events. State v. Sutphin, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988).

GREAT BODILY HARM UNDER SECTION 31-9-1.5(D)

[9] Defendant further argues that the district court erred in finding that armed robbery is a crime for which a defendant can be committed because Section 31-9-1.5(D) only permits commitment of a defendant who commits a felony containing the infliction of great bodily harm as an element necessary for conviction. Our review of Section 31-9-1.5(D) is a question of statutory interpretation that we review de novo. See Villa v. City of Las Cruces, 2010-NMCA-099, ¶ 12, 148 N.M. 668, 241 P.3d 1108 (“Statutory construction calls for de novo review.”), cert. denied, 2010-NMCERT-009, 149 N.M. 49, 243 P.3d 753.

[10] In interpreting a statute, our primary objective is to give effect to the Legislature’s intent. State v. Davis, 2003-NMSC-022, ¶ 6, 134 N.M. 172, 74 P.3d 1064. In determining legislative intent, we first look to the language used and give effect to the plain meaning of that language. Id. Under the plain meaning rule, if the plain meaning of the statute is clear and unambiguous, we refrain from any further statutory interpretation. State v. Rivera, 2004-NMSC-001, ¶ 10, 134 N.M. 768, 82 P.3d 939. Moreover, when the statute at issue is complete and makes sense as written, we do not read into the statute any words that are not in the statutory language. Burroughs v. Bd of Cnty. Comm’rs of Cnty. of Bernalillo, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975).

[11] We must determine whether the Legislature intended “a felony that involves the infliction of great bodily harm” in Section 31-9-1.5(D) to mean that the felony must contain infliction of great bodily harm as an element necessary for conviction. (Emphasis added.) The question hinges on the meaning the Legislature intended by the term “involves.” In determining the plain meaning of statutory language, we are aided by the dictionary definition. See Battishill v. Farmers Alliance Ins. Co., 2006-NMSC-004, ¶ 8, 139 N.M. 24, 127 P.3d 1111 (“We . . . hold that the common and ordinary meaning . . . may be ascertained from a dictionary.”). “Involves” is defined as “to oblige to become associated.” Webster’s Third New International Dictionary 1191 (Unabridged 1993). “Associated” is defined as “closely connected, joined, or united with another.” Id. at 132. Using these definitions as a guide, the plain meaning of Section 31-9-1.5 is that it allows for confinement of defendants who commit felonies closely connected, joined, or united with the infliction of great bodily harm.

[12] A felony can be closely connected, joined, or united with the infliction of great bodily harm even when the felony does not contain the infliction of great bodily harm as an element necessary for conviction, such as in this case in which a felony is committed in a manner that results in great bodily harm to another. To require that the infliction of great bodily harm be an element of the felony requires us to equate “involves” with a phrase such as “contains as an element.” Such a reading would require this Court to add words not specifically stated in Section 31-9-1.5(D) and place a limitation not found in the text of the statute. We decline to do so. See Burroughs, 88 N.M. at 306, 540 P.2d at 236 (recognizing that this Court “will not read into a statute or ordinance language which is not there, particularly if it makes sense as written”). If the Legislature had intended great bodily harm to be a necessary element of the underlying felony before criminal commitment can be imposed, the Legislature could have drafted the statute using such language. Cf. State v. Ordunez, 2010-NMCA-095, ¶ 8, 148 N.M. 620, 241 P.3d 621 (stating that if “the Legislature...
intended to extend the district court’s jurisdiction beyond a defendant’s probation period, it certainly could have done so”), cert. granted, 2010-NMCERT-010, 149 N.M. 65, 243 P.3d 1147.

While this Court may deviate from the plain meaning of a statute when the plain meaning leads to results that are “absurd, unreasonable, or contrary to the spirit of the statute,” we believe that our reading of Section 31-9-1.5 furthers the legislative purpose behind the New Mexico Mental Illness and Competency Code (NMMIC). See Martinez v. Cornejo, 2009-NMCA-011, ¶ 11, 146 N.M. 223, 208 P.3d 443 (internal quotation marks and citation omitted). The NMMIC provides for the “confinement of dangerous, incompetent defendants,” State v. Trujillo, 2009-NMSC-012, ¶ 15, 146 N.M. 14, 206 P.3d 125, and thereby promotes the state’s interest in protecting the community from dangerous individuals. See State v. Rotherham, 122 N.M. 246, 262, 923 P.2d 1131, 1147 (1996). In fulfilling this purpose, the Legislature “intended to include, not exclude, the most serious crimes involving the most dangerous defendants.” Taylor, 2000-NMCA-072, ¶ 14. Commitment for felonies committed in a manner that results in great bodily harm to another person furthers the community protection purpose to a much greater extent than if criminal commitment were limited to only those felonies containing the infliction of great bodily harm as an element. Because the Legislature intended the delineation of crimes in Section 31-9-1.5(D) to be inclusive and because the plain meaning furthers the purpose of the NMMIC, we see no reason to deviate from the plain meaning of Section 31-9-1.5(D) and read into it a requirement that the felony must contain the infliction of great bodily harm, an element necessary for conviction in order for a court to commit a defendant.

PRESENTENCE CONFINEMENT CREDIT

Defendant lastly argues that he was entitled to presentence confinement credit toward his commitment period under NMSA 1978, Section 31-20-12 (1977). Section 31-20-12 provides that a “person held in official confinement on suspicion or charges of the commission of a felony shall . . . be given credit for the period spent in presentence confinement against any sentence finally imposed for that offense.” The district court found that Defendant was not entitled to presentence confinement credit because the district court did not convict Defendant of a criminal offense and did not impose a criminal sentence. In other words, the district court found that Section 31-20-12 does not require presentence confinement credit to apply to commitment pursuant to Section 31-9-1.5(D), because commitment under Section 31-9-1.5(D) is not a criminal conviction. However, this Court has recently determined, and the State concedes, that presentence confinement credit should be credited to criminal commitment under Section 31-9-1.5(D) to the same extent the confinement would have been credited against a sentence for a criminal conviction. See Lopez, 2009-NMCA-112, ¶ 10. We therefore remand to the district court to modify Defendant’s commitment period for the time spent in detention prior to the commitment.

CONCLUSION

Because Section 31-9-1.5(D) allows criminal commitment of a defendant who commits a felony in a manner that results in great bodily harm to another person, and the evidence was sufficient to support a finding that Defendant inflicted great bodily harm on the victim during the commission of an armed robbery, we uphold the district court’s order detaining defendant for twelve years. However, because the district court erred in concluding that Defendant was not entitled to presentence confinement credit, we remand to the district court to modify Defendant’s commitment period granting credit for the time spent in detention prior to commitment.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
CELIA FOY CASTILLO, Chief Judge
LINDA M. VANZI, Judge
We conclude that the time begins on the date the payment becomes delinquent. The date the tax payment is due, or on the Property Tax Code, begins to run on NMSA 1978, Section 7-38-40 (2003) of filing a property tax refund complaint, under whether the question presented in these cases the 2007 tax year. In the second case, Tax- for property located in Albuquerque, New Mexico, was mailed a property tax bill for the 2007 tax year. In the second case, Taxpayer also received its 2007 property tax bill for property it owns in Albuquerque, New Mexico. (Hereinafter, “Taxpayers” refers to both sets of Taxpayers.) Each of the tax bills stated that the first of two installments of the annual tax payment was due on November 10, 2007, and that the first installment payment would become delinquent on December 10, 2007.

After making the installment payments, Taxpayers each filed a complaint for property tax refund in February 2008, approximately ninety days after the November 10 due date. Pursuant to Section 7-38-40(A)(1), claims for refund must be filed as a civil action in district court “no later than the sixty first day after the first installment of the property tax for which a claim for refund is made is due[.]” According to Taxpayers, the statutory time limit for filing their complaint did not begin to run until the delinquency date.

Asserting that the complaints were untimely, the Bernalillo County Assessor (Assessor) moved to dismiss. In response, Taxpayers argued that the common understanding among taxpayers and tax authorities is that the first installment payment is not due until the delinquency date and, therefore, Section 7-38-40(A)(1) should be interpreted to favor public convenience and not to prejudice the public interest. Taxpayers further argued that if the filing time limit begins to run on the statutory due date, the result is an unreasonably short time frame for taxpayers to file a tax refund complaint, rendering the filing time limit unconstitutional as a violation of due process. After hearings in each case, the district court denied the motions to dismiss, concluding the tax refund complaints may be filed within sixty days of the delinquency date. Stipulated judgments were entered in each case, which allowed Assessor to appeal the district court determination that each complaint was timely filed, and Assessor appealed in both cases. We consolidated the two cases since the appeals raise an identical issue.

II. DISCUSSION

A. Standard of Review

We review the district court interpretation of the Property Tax Code de novo. See Sonic Indus. v. State, 2006-NMSC-038, ¶ 7, 140 N.M. 212, 141 P.3d 1266 (stating that questions of statutory interpretation are questions of law that are reviewed de novo). Taxpayers also raise questions concerning the constitutionality of Section 7-38-40, which we also review de novo. See Manning v. N.M. Energy, Minerals, & Natural Res. Dep’t, 2006-NMSC-027, ¶ 9, 140 N.M. 528, 144 P.3d 87 (reviewing constitutional question under de novo standard).
B. The Language of the Property Tax Code Requires a Tax Refund Complaint to Be Filed Within Sixty Days of the Statutory Due Date

[6] When interpreting statutes, our guiding principle is to determine and give effect to legislative intent. Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n, 1999-NMSC-040, ¶ 18, 128 N.M. 309, 992 P.2d 860. In ascertaining the intent of the Legislature, we are assisted by classic canons of statutory construction. Id. The first of these is that a court is required to give effect to the statute’s language and refrain from further interpretation when the language is clear and unambiguous. Sims v. Sims, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 930 P.2d 153; Bd. of Comm’rs of Doña Ana Cnty. v. Las Cruces Sun-News, 2003-NMCA-102, ¶ 19, 134 N.M. 283, 76 P.3d 36 (noting that where language is clear, appellate courts “give the statute its plain and ordinary meaning and refrain from further interpretation”).

[7] NMSA 1978, Section 7-38-38(A) (1987) provides that the first installment of two property tax payments is due on November 10 of the year in which the tax bill was prepared and mailed. If taxpayers believe they have been excessively taxed and want to file a tax refund complaint, Section 7-38-40(A)(1) directs: “Claims for refund shall be filed by the property owner as a civil action in the district court . . . and shall be filed no later than the sixtieth day after the first installment of the property tax for which a claim for refund is made is due[.]” Since Section 7-38-40 clearly and unambiguously directs that a tax refund complaint must be filed within sixty days of the due date, the statutory time limit for filing a complaint began to run on the due date of November 10. Taxpayers’ complaints, which were filed more than sixty days later, were untimely under the plain language of the statute.

C. The Common Usage of the Word “Due” Does Not Alter the Plain Meaning of the Statute

[8] Although Section 7-38-40 provides that the first installment of a tax payment is due on November 10, NMSA 1978, Section 7-38-46 (2003) provides that the payment does not become delinquent so as to incur a penalty for being late until thirty days after the statutory due date or, in other words, by December 10. Taxpayers argue that the common usage and understanding among taxpayers of their tax bill notices is that the first installment of the tax payment is not actually “due” until the statutory delinquency date. To support this conten-

tion, Taxpayers cite dictionary definitions of the word “due.” These definitions state that the word “due” means “having reached the date at which payment is required” and “required or expected in the prescribed, normal, or logical course of events.” Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/due. As such, Taxpayers contend that payment is not “required” or “due” until a penalty is to be assessed on the delinquency date. Taxpayers assert that it is not common to believe that tax payments are “past due” before the delinquency date and urge that we construe the word “due” with this ordinary meaning. Tafoya v. N.M. State Police Bd., 81 N.M. 710, 714, 472 P.2d 973, 977 (1970) (stating that where there is no clearly expressed legislative intent providing otherwise, “the word is to be given its usual, ordinary meaning”). Thus, based on the asserted common understanding that a payment is not actually due until the date on which a penalty will be assessed, Taxpayers contend that the statutory time limit for filing a tax refund complaint should not begin to run until one day after the delinquency date. We disagree.

[9] First, Taxpayers have provided no facts or evidence to support this argument. “It is not our practice to rely on assertions of counsel unaccompanied by support in the record. The mere assertions and arguments of counsel are not evidence.” Muse v. Muse, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104. In addition, this common usage argument does not alter the plain language of the Property Tax Code itself. Reading “delinquent” as synonymous with “due” does not comport with the Legislature’s use of two, distinct statutory definitions of the two words. The “due” date is a statutorily fixed date of November 10, and the “delinquency” date is a separate date, thirty days later. See § 7-38-40; § 7-38-46(A). Because the legislative intent is clear that the due date is a different date from the delinquency date, we decline Taxpayers’ invitation to alter the most logical reading of the word “due” as it is used in the Property Tax Code.

[10] Our conclusion is further supported by the way the Legislature requires tax bills to be worded. NMSA 1978, Section 7-38-37(B) (2008), states that “[e]ach property tax bill shall . . . contain at least the following: . . . the amount of property taxes due on each installment, the due dates of the installments and the dates on which taxes become delinquent[,]” (Emphasis added). As Taxpayers concede, they received appropriately worded tax bills informing them that the first installment of their annual tax payment was due on November 10 and that payment would become delinquent on December 10. Therefore, it follows that if “delinquent” were meant to be one and the same with “due” than such a distinction between the words would not have been made in Taxpayers’ bills as required by Section 7-38-37.

D. The Practical Implications of the Property Tax Code Do Not Alter the Plain Meaning of the Statute

[11] NMSA 1978, Section 7-38-39 (2003) states that “[a]fter receiving his property tax bill and after making payment prior to the delinquency date of all property taxes due in accordance with the bill, a property owner may protest the value . . . for his property.” Thus, it is payment that creates the right of action. Taxpayers contend that Section 7-38-39 supports their argument that the due date of the first installment is actually the delinquency date because to hold otherwise would have the practical result of allowing the statutory time limit to begin to run before payment is actually made and, thus, before the taxpayer’s cause of action for a claim for refund arises. Thus, a taxpayer who makes payment on December 9, the day before the delinquency date, will only have thirty days to file a tax refund complaint before the sixty-day filing time limit expires. Taxpayers contend that such a result makes an interpretation of Section 7-38-40, which requires the time limit for filing a tax refund complaint to begin to run on November 10, unreasonable. Taxpayers argue that a more reasonable reading would be that the time limit begins to run on December 10, so all taxpayers who make payment prior to the delinquency date have the full sixty days to bring their claims for refund. We are not persuaded.

[12] Section 7-38-39 sets forth who has the right to file a complaint for a tax refund. It provides that if a taxpayer has (1) received his or her property tax bill and (2) has made payment prior to the delinquency date of all property taxes due in accordance with the bill, then the taxpayer may elect to file a claim for refund. Section 7-38-40 dictates when a taxpayer may file a tax refund claim. A taxpayer cannot assert a right to file a refund claim until making a payment before the delinquency date of the first installment. However, the taxpayer must also abide by the separate procedural filing deadline for filing a claim in district court within sixty days of the
due date of the first installment. Hence, the two sections serve different functions. One purpose of Section 7-38-39 is to ensure that only taxpayers who are not delinquent in their tax payment may file a tax refund complaint. On the other hand, Section 7-38-40 is a statute of repose, which begins to run from the statutorily determined tax payment due date without regard to when the tax is actually paid. See Garcia v. La Farge, 119 N.M. 532, 537, 893 P.2d 428, 433 (1995) (stating that “[s]tatutes of repose begin to run from a statutorily determined time defined without regard to when the underlying cause of action accrues and without regard to the discovery of injury or damages”). As such, it is the nature of a statute of repose to begin to run before a cause of action accrues in some circumstances.

E. Taxpayers Must Make Payment of Property Taxes Due on the First Installment Due Date

{13} In the alternative, Taxpayers argue that their complaints were timely because a taxpayer may file a complaint any time before any delinquency date shown on the tax bill. Since their tax bills stated that the second installment of the annual tax payment was not delinquent until April 10, they assert that their complaints were timely filed because the complaints were filed prior to April 10. They base their argument on language of Section 7-38-39 that the right to file a claim for refund arises when payment is made “prior to the delinquency date of all property taxes due in accordance with the bill[.]” (Emphasis added.) Therefore, Taxpayers contend that taxpayers have until April 10 to file a complaint for refund. In essence, Taxpayers’ argument requests us to look solely at Section 7-38-39 and disregard the requirements articulated in Section 7-38-40. However, we decline to do so. Section 7-38-40 plainly dictates that filing must take place sixty days from the first installment due date. Therefore, a taxpayer must make payment of all property taxes due as of the first installment due date in order to preserve his or her right to file a tax complaint.

F. The Sixty-Day Period for Bringing Suit Does Not Violate Due Process

{14} Taxpayers argue that our interpretation of Section 70-38-40 creates a time limit for filing suit that is too short for purposes of due process under the federal and state constitutions. Taxpayers’ main contention is that if the sixty-day time limit begins to run on the due date of November 10, then the statute begins to run even before the cause of action accrues because payment, which creates the right of action, does not become delinquent until December 10. Therefore, taxpayers will have only between thirty and sixty days to file tax refund claims, depending on when they make their payments.

{15} We agree with Taxpayers that for a statute of repose to be constitutional, the time frame to pursue a remedy cannot be unreasonably short. See Terry v. N.M. State Highway Comm’n, 98 N.M. 119, 122, 645 P.2d 1375, 1379 (1982) (holding that the constitutionality of statutory time limits has “hinged on the reasonableness of the time provided to pursue a remedy”). However, we do not agree that the time frame provided in these cases is unnecessarily short.

{16} Taxpayers rely on Terry and Garcia to support their argument that the sixty-day statute of repose provided in Section 7-38-40 is unreasonably short and, therefore, violates due process. In Terry, the relevant statute provided that wrongful death actions against engineers or contractors that arise out of an unsafe condition of a physical improvement to real property must be brought within ten years of the date of substantial completion of the improvement. 98 N.M. at 120, 645 P.2d at 1376. The decedents in Terry were killed in a car accident on a state highway built by the contractor and engineer defendants three months before the ten-year filing time limit ended. Id. Our Supreme Court held that three months was not a constitutionally reasonable amount of time to give the plaintiffs time to pursue their claim. Id. at 123, 645 P.2d at 1379. In Garcia, our Supreme Court considered the three-year statute of repose in the Medical Malpractice Act. Garcia, 119 N.M. at 534, 893 P.2d at 430. The plaintiff’s medical malpractice cause of action arose after a cardiac arrest, which occurred eighty-five days before the statute of repose expired. Id. at 542, 893 P.2d at 438. The court held that eighty-five days was an unreasonably short amount of time to require the plaintiff to file his malpractice claim. Id. In both Terry and Garcia, the due process inquiry hinged on the reasonableness of the time limit as applied to the particular facts of those cases.

{17} The tax situation in this case is dissimilar. In both Terry and Garcia, application of the statutes was unconstitutional because the cause of action had arisen, or an injury had been discovered, near the expiration of the statutory time limit. We have no such facts in this case. Moreover, unlike situations involving accidents or illness, which are unpredictable and generally cannot be anticipated, taxpayers are aware that they will be required to pay taxes every year on particular dates. Furthermore, taxpayers have notice each year as of April 1 of the actual property valuations on which their claims for refund will necessarily be based. See NMSA 1978, § 7-38-20(A) (2001) (“By April 1 of each year, the county assessor shall mail a notice to each property owner informing him of the net taxable value of his property that has been valued for property taxation purposes by the assessor.”). Taxpayers may pursue redress by either protesting the property valuation with the county assessor, or electing to protest the property valuation by filing a claim for refund after payment of taxes. See NMSA 1978, § 7-38-21(A) (2001). As such, taxpayers have notice almost nine months in advance of the district court filing deadline and, therefore, almost nine months in which to pursue an alternate remedy or wait to file a tax refund complaint after payment. Thus, the time period provided in Section 7-38-40 for which to file tax refund complaints is reasonable and does not violate due process.

III. CONCLUSION

{18} We hold that the Legislature meant for Section 7-38-40 to begin to run on the statutory due date and that Taxpayers’ complaints for refund were untimely filed. We therefore reverse the district court orders denying Assessor’s motions to dismiss Taxpayers’ untimely complaints seeking claims for refund.

{19} IT IS SO ORDERED.

MICHAEL E. VIGIL,
Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
MICHAEL D. BUSTAMANTE, Judge

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BAR BULLETIN - JULY 27, 2011 - VOLUME 50, NO. 29 39
Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2011-NMCA-073

Topic Index:
Appeal and Error: Preservation of Issues for Appeal; and Standard of Review
Civil Procedure: Interpleader; Intervention; Notice; Summary Judgment; and Third-Party Actions
Commercial Law: Fiduciary Duty
Contract: Offer and Acceptance
Negligence: Breach of Duty; Negligence Per Se; Negligence, General; and Third Parties
Remedies: Garnishment
Torts: Conversion; and Negligence

CARMEN M. ALCANTAR and ISIDRO R. ALCANTAR, Plaintiffs/Judgment Creditors, and
GILBERT SANCHEZ, Personal Representative of the ESTATE OF MIKE SANCHEZ, deceased, Intervenor/Third-Party Plaintiff-Appellant,
v.
JOE SANCHEZ, d/b/a GLENWOOD CUSTOM HOMES, Defendant/Judgment Debtor, and

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
WILLIAM F. LANG, District Judge

RENE OSTROCHOVSKY
Albuquerque, New Mexico
for Appellant
Gilbert Sanchez

ALICIA L. GUTIERREZ
JASON M. WEXLER
MOSES, DUNN, FARMER & TUTHILL, P.C.
Albuquerque, New Mexico
for Appellee

DAVID A. GRAMMER III
ALDRIDGE, GRAMMER, JEFFREY, & HAMMER, P.A.
Albuquerque, New Mexico
for Appellees
Carmen M. Alcantar and Isidro R. Alcantar
Wells Fargo Bank, N.A.

OPINION
RODERICK T. KENNEDY, Judge

{1} This appeal presents issues relating to the garnishment of funds held in a joint bank account. The district court awarded summary judgment in favor of the bank. For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

{2} Our standard of review is well settled. “Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” Self v. United Parcel Serv., Inc., 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. “In determining whether a factual dispute exists, courts must resolve all reasonable inferences in favor of the nonmovant and must read the pleadings, affidavits, depositions, answers to interrogatories, and admissions in the light most favorable to a trial on the merits.” Limacher v. Spivey, 2008-NMCA-163, ¶ 8, 145 N.M. 344, 198 P.3d 370. “Ultimately, we review de novo the legal question of whether a party is entitled to summary judgment as a matter of law.” State ex rel. State Eng’r v. Comm’r of Pub. Lands, 2009-NMCA-004, ¶ 12, 145 N.M. 433, 200 P.3d 86.

II. BACKGROUND

{3} In March or April 2006, Mike Sanchez (Mike) visited a local branch of Wells Fargo Bank (the Bank) in order to change the status of his accounts. In light of the recent death of his wife, Mike wanted his two sons, Joe and Gilbert, to be able to assist him with the payment of bills and other financial matters. Mike was advised by the Bank to close his existing accounts and open new ones. To that end, a “Consumer Account Application” was filled out, in which Mike was denominated the “Primary Joint Owner” and his sons were denominated “Secondary Joint Owner[s].” Midway through a paragraph at the bottom of the application is an affirmation that the applicant has “received a copy of the applicable account agreement and privacy brochure and agree[s] to be bound by them.” Mike signed the application, and the joint accounts that are the subject of this appeal were opened.

{4} In late October 2006, a writ of garnishment was issued in connection with a civil lawsuit in which Carmen and Isidro Alcantar (the Alcantars) had obtained a judgment against Joe. The writ, which was addressed to the Bank, identified Joe as the judgment debtor and specified that the outstanding balance exceeded $36,000. In its answer, the Bank indicated that it owed Joe $17,474.77. This was the entire amount held in the accounts held jointly by Mike, Joe, and Gilbert. The Bank took immediate possession of all of the funds, such that none of the joint account owners could access them.

{5} When Mike received notice of the garnishment, he promptly filed a motion to intervene, asserting that he was in fact the sole owner of all funds in the accounts and contending the garnishment was wrongful. The motion was granted. Mike then filed a permissive complaint in intervention against the Bank, advancing claims of conversion, breach of fiduciary duty, negligence, and negligence per se. In response, the Bank filed a counterclaim and cross-claim for interpleader, indicating that while it had no claim of its own upon
the funds in question, both the Alcantars and Mike had made conflicting claims. Over Mike’s objections, the Bank’s counterclaim and cross-claim for interpleader were granted.

[6] Mike filed a motion for partial summary judgment, asserting that his sole ownership of the funds was undisputed. This motion was denied. The Bank then filed its own motion for summary judgment. It contended that its seizure of the funds was in accordance with the terms of the consumer account agreement as well as the law pertaining to garnishment, such that the claims for conversion and negligence were not viable. The Bank further contended there was no basis for the existence of a fiduciary duty. The district court found in the Bank’s favor and granted summary judgment with respect to all of Mike’s claims. Mike was reimbursed by the Bank. This appeal followed.

III. DISCUSSION

[7] A large number of issues have been raised on appeal. We will address related matters together under unified headings.

A. Denial of Mike’s Motion for Partial Summary Judgment

[8] First, Mike contends the district court erred in denying his motion for partial summary judgment with respect to the ownership of the funds in the garnished accounts.

[9] The denial of a motion for summary judgment is not generally reviewable on appeal. Green v. Gen. Accident Ins. Co. of Am., 106 N.M. 523, 527, 746 P.2d 152, 156 (1987) (holding that “denial of a motion for summary judgment is not reviewable after final judgment on the merits”); but see, e.g., McAlpine v. Zangara Dodge, Inc., 2008-NMCA-064, ¶¶ 29-30, 144 N.M. 90, 183 P.3d 975 (reviewing the denial of a motion for summary judgment). However, to the extent that the argument might be characterized as an attack on the award of summary judgment to the Bank, we briefly address the merits.

[10] In support of his motion, Mike relied on an affidavit and an alleged admission. In the affidavit, Joe stated that he had never deposited or withdrawn any money from the garnished accounts, he claimed no ownership in the accounts, and his name had merely been added in order to assist Mike with Mike’s own financial affairs. The “admission” was extracted from an e-mail exchange between counsel for the Bank and counsel for Mike, in which document production was the subject of discussion. Counsel for the Bank suggested that documents reflecting recent deposits into the account, “which would support your position that the money did not belong to Joe,” should be produced.

[11] Mike contends that the foregoing materials “conclusively” established Mike as the sole owner of the funds in the garnished accounts, such that partial summary judgment should have been granted with respect to this central question. We disagree. With respect to the affidavit, we fail to see how Joe’s unilateral assertion as to the ownership of the funds could be regarded as conclusive. Cf. Jemko, Inc. v. Liaghat, 106 N.M. 50, 52, 738 P.2d 922, 924 (Ct. App. 1987) (“[T]he answer of the garnishee is not conclusive upon the court issuing the garnishment as to the true ownership of the funds sought to be garnished[,]”). Plus, the alleged “admission” extracted from the e-mail message is ambiguous. These documents cannot be said to conclusively resolve the ownership issue, particularly in light of conflicting evidence that the funds were jointly owned by Mike, Joe, and Gilbert as reflected in the account documents. Because there was a genuine issue of material fact with respect to the ownership of the funds, the district court properly denied Mike’s motion for partial summary judgment.

B. Award of Summary Judgment to the Bank

[12] As an initial matter, the Bank suggests Mike’s appeal from the award of summary judgment should be deemed moot because the garnished funds were ultimately returned to him. However, the return of the funds was not the only relief sought in the complaint. Mike also requested compensatory damages, pre- and post-judgment interest, punitive damages, and attorney fees and costs. Insofar as these matters were not addressed by the return of the funds, the various issues relating to the award of summary judgment are not moot. See, e.g., Cromer v. J.W. Jones Constr. Co., 79 N.M. 179, 181, 441 P.2d 219, 221 (Ct. App. 1968) (concluding that an appeal from an order dismissing a complaint was not rendered moot by payment where the claimant’s entitlement to additional recovery remained unresolved), overruled on other grounds by Schiller v. Sw. Air Rangers, Inc., 87 N.M. 476, 478, 535 P.2d 1327, 1329 (1975).

[13] A variety of theories were advanced below regarding the Bank’s motion for summary judgment. The district court did not specifically identify the basis for its ruling. We therefore address all pertinent arguments, organizing our analysis around the claims advanced in the complaint.

1. Conversion

[14] The first claim set forth in the complaint is for conversion. “Conversion is the unlawful exercise of dominion and control over property belonging to another in defiance of the owner’s rights, or acts constituting an unauthorized and injurious use of another’s property, or a wrongful detention after demand has been made.” See, e.g., Pac. Fin. Servs. v. Signfilled Corp., 1998-NMCA-046, ¶ 15, 125 N.M. 38, 956 P.2d 837.

[15] In his complaint, Mike avers that the Bank converted his property when it seized the funds held in his accounts. The Bank’s conduct is alleged to have been unlawful, unauthorized, and/or wrongful, insofar as notice and joinder were not accomplished as required by law, and insofar as all of the funds actually belonged to Mike, rather than the judgment debtor identified in the writ.

[16] The Bank successfully argued it was entitled to summary judgment on either of two theories: (1) the Bank’s conduct was in compliance with the writ and in conformity with all applicable laws; and (2) the consumer account agreement associated with Mike’s accounts provided complete authorization for the Bank’s course of conduct. For the following reasons, we conclude that neither of these arguments supports the award of summary judgment.

a. The Writ and Applicable Law

[17] The writ of garnishment issued by the court was in the general, statutorily specified form. See NMSA 1978, § 35-12-18 (1969) (generally setting forth the form of writs of garnishment issued by the magistrate courts); NMSA 1978, § 35-12-19 (1979) (providing for the issuance of writs of garnishment by the district courts in the same manner specified for the magistrate courts). It orders the Bank to file an answer, keep any money that is owed to the judgment debtor in sufficient quantity to satisfy the outstanding indebtedness and mail copies of the writ, the application, the answer, and the claim of exemption forms to the judgment debtor within four business days.

[18] Superficially, the Bank’s conduct appears to have been in compliance with the terms of the writ. The difficulty arises, however, when the identity of the judgment debtor is considered. As the writ clearly specifies, the only judgment debtor was Joe. Accordingly, only monies owed by Joe were subject to seizure. Jemko, 106 N.M. at 52, 738 P.2d at 925 (“A judgment creditor acting under a writ of garnishment, after due notice to interested
by enacting provisions of this nature, the P.2d 1043, 1045 (1993) (agreeing that, Sunwest Bank the writ of garnishment. have been subject to seizure pursuant to net contributions to the accounts should be deemed appropriate whenever a writ of garnishment identifies any co-owner of a joint account as a judgment debtor. 23] Upon careful consideration, we conclude that the approach advocated by the Bank is at odds with the basic propositions articulated above, concerning the ownership interests of joint account holders and judgment creditors’ ability to garnish only property belonging to judgment debtors. We therefore reject the Bank’s argument that the seizure of all of the funds held in the joint accounts, without any acknowledgment of or concession to the interests of the non-debtor co-owners, was in accordance with law. 24] We recognize that banking institutions may be placed in a difficult position when presented with a writ of garnishment in a case such as this where a joint account exists and only one of the co-owners is identified as a judgment debtor. See Churchill, supra, at 559-60 (describing the difficulties presented in such cases). Immediate resort to interpleader, together with payment of all disputed monies into the court registry, may be the most appropriate response. See supra. Alternatively, placing a brief hold on the account and promptly engaging in a reasonable investigation might be permissible. Cf. Landrum v. Sec. Nat’l Bank of Roswell, 104 N.M. 55, 62, 716 P.2d 246, 253 ( Ct. App. 1985) (holding that a bank could place a hold on a depositor’s checking account in order to make a reasonable inquiry). However, neither of those approaches was taken in this case. Instead, as previously stated, the Bank acted on the writ by seizing all funds in the joint accounts and sending the standard paper-work to the judgment debtor, disregarding entirely any interests of the other named co-owners. 25] Likewise, the Bank’s conduct runs afoul of at least one statutory provision, which applies with respect to adverse claims on deposits:

Notice to any bank of an adverse claim to a deposit with such bank need not be recognized, and shall not be deemed effective, unless and until either the person making the claim supplies indemnity deemed adequate by the bank or the bank is served with process or order issued by a court of competent jurisdiction in an action in which the adverse claimant and the person or persons nominally entitled to the deposit are parties[.] NMSA 1978, § 58-1-7 (1975) (emphasis added). This language suggests that a writ of garnishment is not to be deemed effective absent indemnity provided by the garnishee, service of process, or an order reflecting that all interested parties have been joined. 26] To the extent the Bank deemed the writ to be effective without ensuring that the necessary statutory preconditions were met, Mike contends that the seizure of the funds in the joint accounts may be characterized as unauthorized, unlawful, and wrongful, thereby supplying further support for his conversion claim. By contrast, the Bank characterizes Section 58-1-7 as permissive, allowing it to refuse to honor an adverse claim under the specified circumstances but not requiring it to do so. 27] We reject the Bank’s interpretation for two reasons. First, it is at odds with the mandatory nature of the language employed. See generally State v. Guerra, 2001-NMCA-031, ¶ 14, 130 N.M. 302, 24 P.3d 334 (“The word ‘shall’ as used in a statute is generally construed to be mandatory.”). Second, it is inconsistent with precedent. See Landrum, 104 N.M. at 59-60, 716 P.2d at 250-51 (rejecting an argument that Section 58-1-7 should be deemed to permit banks to recognize adverse claims that fail to comply with the specified procedural requirements). “Section 58-1-7 provides that notice of an adverse claim is not an effective notice unless the claimant complies with the procedure set forth in Section 58-1-7.” Landrum, 104 N.M. at 60, 716 P.2d at 251. Accordingly, to the extent the Bank deemed the writ to be effective notice of an adverse claim, despite the absence of parties nominally entitled to the deposit, the Bank’s conduct was contrary to Section 58-1-7 when Mike’s money was taken by the Bank. 28] In summary, we conclude that the foregoing authorities provide sufficient
support for the claim of conversion to render the award of summary judgment to the Bank improper, and we reverse.

b. The Applicable Account Agreement

[29] As stated above, the consumer account application that Mike, Joe, and Gilbert signed contained a provision indicating each “received a copy of the applicable account agreement and privacy brochure and agree[d] to be bound by them.” In connection with its motion for summary judgment, the Bank relied on portions of a document in excess of thirty-five pages in length, which a paralegal for the Bank identified as the applicable account agreement in effect at the time the accounts in question were opened. This document specifies that account holders “agree” to numerous terms and conditions, among which is a provision allowing the Bank to “accept and act on any legal process that it believes is valid . . . [including] garnishment[.]” Additionally, the document provides that “[t]he Bank may rely solely on its records to determine the form of ownership[.]” Finally, the document indicates that “[i]f there is . . . legal action (such as a third-party garnishment . . .) affecting any co-owner, the Bank may rely solely on its records to determine the form of ownership[.]” Additionally, the document provides that “[t]he Bank may rely solely on its records to determine the form of ownership[.]”

[30] The Bank has argued that its course of conduct in relation to the account and in response to the writ of garnishment was expressly authorized under the foregoing terms, such that there is no basis for the claim of conversion.

[31] We tend to agree that if the document in question actually governs Mike’s contractual relationship with the Bank, the Bank’s conduct was authorized. However, in his response to the Bank’s motion for summary judgment, Mike filed an affidavit in which he clearly and explicitly denied ever receiving a copy of the applicable “account agreement,” or being informed of its terms. This creates a genuine issue of material fact with respect to the applicability of the agreement. See generally Pope v. The Gap, Inc., 1998-NMCA-103, ¶ 11, 13, 125 N.M. 376, 961 P.2d 1283 (“For an offer and acceptance to create a binding contract, there must be an objective manifestation of mutual assent by the parties to the material terms of the contract . . .[and, mutual assent is based on objective evidence, not the private, undisclosed thoughts of the parties.”).

[32] We understand the Bank to contend that there should be no question as to Mike’s receipt of the applicable account agreement and its binding effect because the consumer account application contains an affirmation of receipt. Yet, the affirmation is not strictly controlling. Rather, we may look beyond the terms of the consumer account application and consider the circumstances surrounding the bargain. See generally Ponder v. State Farm Mut. Auto. Ins. Co., 2000-NMSC-033, ¶ 13, 129 N.M. 698, 12 P.3d 960 (“In abandoning reliance only on the four-corners approach, courts are now allowed to consider extrinsic evidence in determining whether an ambiguity exists in the first instance, or to resolve any ambiguities that a court may discover.”).

[33] Because there is a genuine dispute as to whether the applicable account agreement was incorporated in the parties’ contractual relationship, its terms do not supply a basis for the award of summary judgment to the Bank.

2. Negligence and Negligence Per Se

[34] We turn next to the claims for negligence and negligence per se. “Negligence as a cause of action requires the proof of the following elements: duty, breach of that duty by failing to conform to the required standard, proximate cause, and loss or damage.” Payne v. Hall, 2004-NMCA-113, ¶ 17, 136 N.M. 380, 98 P.3d 1030, rev’d on other grounds, 2006-NMSC-029, 139 N.M. 659, 137 P.3d 599. Negligence per se requires:

1. There must be a statute which prescribes certain actions or defines a standard of conduct, either explicitly or implicitly, (2) the defendant must violate the statute, (3) the plaintiff must be in the class of persons sought to be protected by the statute, and (4) the harm or injury to the plaintiff must generally be of the type the [L]egislature through the statute sought to prevent.

McElhannon v. Ford, 2003-NMCA-091, ¶ 32, 134 N.M. 124, 73 P.3d 827 (alteration omitted) (internal quotation marks and citations omitted).

[35] In the complaint, the claims for negligence and negligence per se are premised on much the same conduct and considerations as the claim for conversion. To summarize, the Bank is alleged to have wrongfully seized the funds in the accounts despite its actual or constructive knowledge of Mike’s actual ownership in violation of Section 58-1-7 without providing notice to Mike.

[36] The Bank moved for summary judgment with respect to these claims on grounds that (1) no basis for the existence of any statutory duty had been established, (2) proper notice was given, and (3) its conduct was in compliance with the terms of the writ and the applicable account agreement.

[37] We have already rejected the Bank’s first and third enumerated arguments in connection with the claim for conversion. To briefly reiterate, Section 58-1-7 establishes a mandatory statutory procedure with respect to the handling of adverse claims to deposits. As a result, it supplies a basis for the existence of a statutory duty. Had the Bank only complied with that statute, this case may well have not been needed to vindicate Mike’s rights. With respect to the Bank’s conduct, there are genuine issues of material fact concerning compliance with the terms of the writ and the law as it pertains to the garnishment of joint accounts, as well as with the applicability of the account agreement. We therefore reject these arguments as grounds for the award of summary judgment in relation to the claim for negligence per se.

[38] The Bank’s remaining argument, relating to the question of Mike’s entitlement to notice, has greater merit. Our rules concerning notice to third-party, non-debtor co-holders of jointly held accounts when a notice of garnishment is received require nothing of a bank. Rule 1-065.2(F) NMRA provides for mailings to each debtor by the garnishee, but leaves off short of the present situation. When a bank has knowledge of a non-debtor owner of an account subject to garnishment, Section 58-1-7 obligates the bank to act with regard to the garnishment and the sufficiency of the creditor’s claim, but not with regard to the non-debtor owners.

[39] Mike relies principally on an excerpt from Jemko, which provides that “[a] judgment creditor acting under a writ of garnishment, after due notice to interested parties, can only seize the property that belongs to the judgment debtor.” 106 N.M. at 52, 738 P.2d at 924 (emphasis added). Jemko, however, does no more than state that a judgment creditor cannot reach funds owned jointly by the debtor and someone who is not a party to the garnishment proceeding. While Jemko’s holding may be furthered and enforced by a bank declining under Section 58-1-7, a garnishment that does not on its face show that the other owners of a bank account sought to be garnished, it does not require that the bank provide notice to the non-
depositor depositors. Similarly, Johnston, mentioned above, may deny summary judgment to a bank and allow an action for negligence when a bank has violated its own procedures by allowing a new person to be added to an account without any notice to an account holder, even if the complaining party is not an owner by virtue of having made no contribution to the account, but having a contingent survivor’s interest. 116 N.M. at 426, 863 P.2d at 1047. However, Johnston did not deal with a garnishment, but the removal of the funds by the added third owner of whom the plaintiff might not have been given notice. It did not deal with a claim for funds in a joint account by an outsider through garnishment.

A debtor may not make his fellow depositors aware of his status or of proceedings against him that might impact their interests in the joint account. A bank, as garnishee, has the obligation not to honor a garnishment that does not list all owners of the account, even if we are hesitant to impose a further duty to notify the non-debtor account owners of the garnishment. Current statutes impose a duty to ensure that incoming claims against accounts are sufficient; that account ownership exists in proportion to account contributions under Section 46-6-211(A) absent contrary intent of the owners does not compel a bank garnishee to provide any greater measure of protection to non-debtor account owners. In the absence of clear legislative or common law rules establishing a duty of notice, we find none and affirm the district court’s grant of summary judgment for the Bank as to negligence.

Jenko and other authorities previously discussed in relation to the garnishment of joint accounts imply that all interested parties are entitled to notice with respect to garnishment, but from the creditor, not the garnishee bank.

Such a duty to give notice when the bank is aware of non-debtor holders (in this case, owners) whose interests are jeopardized by a garnishment of which the bank becomes aware comes from the primary status as garnishee that the bank occupies. A fellow depositor may not be made aware of the garnishment by the fellow depositor who is a debtor, but the bank possesses the information concerning the claim quite directly. Together with the statutory duty to ensure a garnishment not proceed against innocent depositors if they were not included in or served with the proceedings for garnishment, the bank can properly be viewed as having a responsibility to notify the non-debtor holders of an account that a problem with their account exists by way of a claim against it. To the extent to which these duties are supported by sufficient facts in this case, we hold that the claims for negligence per se and negligence were improperly dismissed, and we reverse the district court.

3. Breach of Fiduciary Duty

Next, we consider Mike’s claim for breach of fiduciary duty. “[A] fiduciary relationship exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of one reposing the confidence.” Moody v. Stribling, 1999-NMCA-094, ¶ 18, 127 N.M. 630, 985 P.2d 1210 (internal quotation marks and citations omitted). Our assessment of whether a fiduciary duty exists between two parties turns on “whether the relationship between the parties is one of trust and confidence.” Id. ¶ 17.

As the basis for the claim in this case, the complaint specifies that the Bank owed Mike a fiduciary duty “as trustee of [his] deposited funds.” The Bank challenged this proposition below, contending as a matter of law that it could not be said to owe any fiduciary duty to Mike.

No authority has been cited to suggest that banks universally owe fiduciary duties to their depositors. See generally In Re Adoption of Doe, 100 N.M. 764, 676 P.2d 1329, 1330 (1984) (observing that if a party cites no authority to support an argument, we may assume no such authority exists). There is a similar lack of authority to support the proposition that banks should be regarded as trustees vis-à-vis their depositors. To the extent Mike advocates the adoption of either of these approaches, we decline to do so.

Nor do we find any evidentiary support for the existence of a fiduciary relationship in this case. The only evidence in the record addressing the specifics of the relationship between the parties is the aforementioned account agreement. Nothing therein suggests the Bank was a fiduciary. By all appearances, the parties merely established an arm’s-length, commercial relationship. Under such circumstances, a claim for breach of a fiduciary duty cannot stand. Branch v. Chumisa Dev. Corp., 2009-NMCA-131, ¶ 41, 147 N.M. 397, 223 P.3d 942, cert. denied, 2009-NMCR-011, 147 N.M. 463, 225 P.3d 793.

In his reply brief to this Court, Mike suggests that his claim for breach of fiduciary duty could properly be based on the Bank’s activities as an account advisor, which were undertaken in response to his request to alter the status of his accounts. But this theory was not advanced below, and we decline to consider its merits.

In summary, because Mike failed to establish any basis for the existence of a fiduciary relationship between himself and the Bank, we affirm the district court’s award of summary judgment with respect to that claim.

C. Interpleader

Mike argues the district court erred in granting the Bank’s counterclaim and cross-claim for interpleader. The Bank contends Mike’s challenge to the propriety of the interpleader order should be deemed moot because the funds that were the subject of interpleader have been returned to Mike.


In this case, vacating the interpleader order affords Mike no relief, insofar as the interpleader proceedings have been concluded and the disputed funds have been returned to him. Although Mike contends that the order should be vacated on remand to “dispense with the fiction that the Bank was an innocent bystander,” the order supports no such inference. To the contrary, it specifically provides that the interpleader did not absolve the Bank of any liability with respect to Mike’s complaint in intervention. As a result, we agree with the Bank that the propriety of the interpleader order is moot. Yet, in the event some form of supplemental relief might otherwise be afforded, we very briefly address Mike’s various challenges.

Mike attacks the order chiefly on the theory that the Bank abandoned neutrality by litigating against him, rendering interpleader improper. However, the Bank’s litigation conduct was not inconsistent with interpleader.

“Traditionally, one of the essential requirements in an equitable interpleader action was that the plaintiff seeking interpleader be entirely indifferent to the conflicting claims, asserting no interest in the fund or property deposited.” Fireman’s Ins. Co. v. Bustami, 105 N.M. 760, 761, 737 P.2d 541, 542 (1987). We find
no indication that the Bank ever asserted any claim to the funds, which were the subject of the garnishment dispute. Nor did the Bank advance any other claim against Mike or any other party. Rather, it was Mike who advanced claims against the Bank. The Bank’s defensive response to Mike’s claims does not undermine the propriety of interpleader. See id. (“It is no longer a ground for objection that the [party seeking interpleader] avers that he is not liable in whole or in part to any or all of the claimants.” (internal quotation marks and citation omitted)).

Mike further argues that the district court erred because there was no longer any dispute with respect to the disposition of the funds at the time the interpleader order was entered. In support of this proposition, Mike relies on the Alcantars’ filing of notice of withdrawal of the writ of garnishment. However, that withdrawal was expressly “conditioned on there being no fees, costs, or damages assessed” against the Alcantars. We find no indication the district court took action upon that conditional notice. To the contrary, the record reflects that the writ was withdrawn only after the parties stipulated to the disbursement of the funds to Mike. We therefore conclude that there was a continuing dispute at the time the order was entered, providing a proper subject for interpleader.

Finally, Mike takes issue with supplemental language appearing in the interpleader order. In part, this language indicates that the Bank “is discharged from any liability to any of the parties, except as to the allegations pled by Mike . . . [which] will be decided by the court at a later date.” Mike contends that this represents an improper attempt to eliminate the basis for any claims that might have been brought by third parties. However, Mike has failed to demonstrate any basis to assert the rights of third parties. See generally ACLU of N.M. v. City of Albuquerque, 2008-NMSC-045, ¶ 31, 144 N.M. 471, 188 P.3d 1222 (describing the showing that a litigant must make in order to assert the rights of third parties).

Mike further contends that the language indicating that his claims and the Bank’s request for attorney fees would be decided at a later date was improper because it reflects an expression of intent to deny him a jury trial and because there was no basis for an award of attorney fees to the Bank. It seems reasonably clear, however, that the language in question was merely intended to reflect that there had been no release of liability with respect to Mike’s claims and that the merits of the Bank’s request for attorney fees would not be immediately addressed. See generally Albuquerque Nat’l Bank v. Second Jud. Dist. Ct., 77 N.M. 603, 609, 426 P.2d 204, 208 (1967) (Wood, J., dissenting) (“Orders, like judgments, must receive a reasonable interpretation. Whenever a judgment is susceptible of two interpretations, one of which is in the power of the court and the other would exceed it, the first must be preferred.”). As such, we perceive no impropriety. We therefore reject Mike’s challenges to the interpleader order.

D. Miscellaneous Matters

Finally, we briefly address an assortment of residual issues and arguments advanced in the briefs.

1. Violation of Federal Laws

In several places throughout his briefs to this Court, Mike contends that the Bank’s course of conduct violated federal laws. Mike further argues that the district court erred in granting the Alcantars’ no-jury trial motion because there was no longer any dispute with respect to the disposition of the funds at the time the order was entered, providing proper subject for interpleader.

2. Attorney Fees

Finally, Mike contends that the district court erred in granting the Alcantars’ no-jury trial motion because there was no longer any dispute with respect to the disposition of the funds at the time the order was entered, providing proper subject for interpleader. Mike further argues that the district court erred in granting the Alcantars’ no-jury trial motion because there was no longer any dispute with respect to the disposition of the funds at the time the order was entered, providing proper subject for interpleader.

Finally, Mike contends that the district court erred in granting the Alcantars’ no-jury trial motion because there was no longer any dispute with respect to the disposition of the funds at the time the order was entered, providing proper subject for interpleader.

Finally, Mike contends that the district court erred in granting the Alcantars’ no-jury trial motion because there was no longer any dispute with respect to the disposition of the funds at the time the order was entered, providing proper subject for interpleader.

IV. CONCLUSION

For the foregoing reasons, we affirm the award of summary judgment with respect to the claim for breach of fiduciary duty; we reverse the award of summary judgment with respect to the claims for conversion, negligence, and negligence per se; and we remand for further proceedings consistent with this Opinion.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

CELIA FOY CASTILLO, Chief Judge
MICHAEL E. VIGIL, Judge

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