27th Annual Appellate Practice Institute

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27th Annual Appellate Practice Institute

Presenter Biographies

David Aemmer is the chief circuit mediator for the U.S. Court of Appeals for the Tenth Circuit and has headed that court's mediation program since it began in 1991. He has mediated over 4000 civil appeals and has participated in numerous local and national mediation training programs and symposia. He has also advised state and federal courts on the design of court-connected mediation programs. Dave has taught mediation for the High Court of Karnataka in Bangalore, India, and advised that court in the development of the Bangalore Mediation Centre. Aemmer also worked as a circuit mediator with the U.S. Court of Appeals for the Sixth Circuit, where he was involved in the development of that court's mediation program. He left the Sixth Circuit to obtain a master's degree from the Fletcher School of Law and Diplomacy and then practiced commercial law at a small firm in Cambridge, Massachusetts. After that he was a research scholar at the Parker School of Foreign and Comparative Law at Columbia Law School before being hired to establish the Tenth Circuit's mediation program.

Timothy J. Atler recently formed Atler Law Firm, PC to focus his practice on civil appeals and on other actions involving complex legal issues. He holds an undergraduate degree in psychology from the University of Michigan and dual degrees in law and Latin American studies from the University of New Mexico. Atler has served on the board of directors of the Appellate Practice Section since 2008 and is currently chair-elect. He also serves on the New Mexico Supreme Court's Appellate Rules Committee. Before entering private practice, Atler was a law clerk for Judge Michael D. Bustamante on the New Mexico Court of Appeals.

Judge C. Shannon Bacon was appointed to the Second Judicial District Court in 2010. Judge Bacon presides over a civil docket. Currently, Judge Bacon is the co-chair of the Second Judicial District's pro bono committee, a commissioner on the Access to Justice Commission, serves on the Supreme Court's Rules of Evidence and Personnel committees and is the president of the District and Metropolitan Court Judges Association. She also donates time to organizations serving the homeless and providing legal services to underserved populations. Prior to taking the bench, Judge Bacon was a shareholder both at Sutin, Thayer & Browne and Eaves, Bardacke, Baugh, Kierst & Larson. Her practice focused on a broad range of civil litigation from personal injury cases to complex commercial litigation. Judge Bacon also sat on numerous boards and committees.

Chief Justice Charles W. Daniels has served on the New Mexico Supreme Court since November 2007.

Jocelyn Drennan is a director at the Rodey Law Firm in Albuquerque where she practices appellate law. She is listed in the *Best Lawyers in America*, *Southwest Super Lawyers* and *Benchmark Litigation—The Definitive Guide to America's Leading Litigation Firms & Attorneys*—for her expertise and experience in appellate law. Drennan is a member of the New Mexico Supreme Court Uniform Jury Instructions -Civil Committee and the State Bar Appellate Practice Section Board. She is a co-author of the New Mexico chapter of the *Appellate Practice Compendium*, published by the American Bar Association Council of Appellate Lawyers (2012). Drennan is a graduate of the University of New Mexico Law School (1997, magna cum laude, order of the coif) and Smith College (1992, magna cum laude).

Jane Gagne is an assistant disciplinary counsel for the Office of Disciplinary Counsel of the Disciplinary Board of the Supreme Court of New Mexico. She graduated from University of New Mexico School of Law in 1994. Before she joined the Office of Disciplinary Counsel in January of 2011, she had her own practice in plaintiffs' employment and civil rights law.

Judge J. Miles Hanisee has served on the New Mexico Court of Appeals since 2011. Judge Hanisee was born in New Orleans, Louisiana, and was raised in nearby Mandeville. In 1986, his family relocated from Louisiana to Taos, New Mexico, where his mother still resides. Judge Hanisee attended Louisiana State University, where he earned a Bachelor of Arts degree in English in 1990. He is a 1993 graduate of Pepperdine University School of Law where he received his Juris Doctor, was a Merit Scholar and wrote for the law review. From 1994 to 1996, he was selected to be a law clerk by judges Oliver Seth and Paul Kelly, both of the U. S. Court of Appeals for the Tenth Circuit. As an Assistant U.S. Attorney from 1996-2007, Judge Hanisee's responsibilities included jury trials in U. S. District Court and appellate advocacy before the Tenth Circuit Court of Appeals. In 2007, he formed the Law Office of J. Miles Hanisee, LLC, where he represented individual and corporate clients in criminal, civil, and administrative matters in both state and federal courts.

C. David Henderson is the appellate defender for the Law Offices of the New Mexico Public Defender. He graduated from the University of New Mexico School of Law in 1988 after earning an M.A. in anthropology from the University of Hawaii. From 1988 to 1990 he clerked for Justice Richard E. Ransom at the New Mexico Supreme Court. Henderson has continued to practice appellate law throughout his career. After two years in private practice he was an assistant appellate defender from 1992 through 1997. From 1998 through 2012 Henderson again was in private practice and handled civil and criminal cases before trial courts and on appeal. He has been admitted to practice before state courts in New Mexico; the federal district courts of New Mexico, the southern district of Texas and the District of Columbia; and before the Tenth Circuit Court of Appeals. Henderson also has filed amicus briefs in the Sixth Circuit Court of Appeals and in the U. S. Supreme Court. Over the years he has made a number of presentations at CLE programs and has taught appellate advocacy at training seminars conducted by NCDLA and by the Administrative Offices of the U.S. Courts.

Alice Tomlinson Lorenz is a New Mexico certified appellate specialist admitted to practice in the state of New Mexico, the Tenth and D.C. Circuit Courts of Appeal and the U. S. Supreme Court. She lectures on legal writing, a variety of appellate practice issues and legal ethics. In 2012 she served as an adjunct professor, co-teaching Advanced Brief Writing at the University of New Mexico School of Law. Lorenz is a former member of the New Mexico Commission on Professionalism, was a co-recipient of the New Mexico Law Review Excellence in Jurisprudence Award in 2005 and received the New Mexico State Bar's highest honor, the Professionalism Award, in 2006. She is currently chair of the Appellate Practice Specialty Committee and chair of the New Mexico Federal Court Bench and Bar Fund Committee. She recently completed her term as a director on the board of directors of the State Bar Appellate Practice Section.

Robert Rambo was born and raised in Philadelphia, Pennsylvania, and was trained there as a mediator in 1989 by the Friends Conflict Resolution Program. He later attended law school and graduated summa cum laude in 1993 from the University of Puget Sound School of Law (now known as Seattle University School of Law). While in law school he received additional mediation training from the Conflict Resolution Research Resource Institute in Tacoma, Washington, and volunteered as a mediator for the Pierce County District Court. Upon moving to Albuquerque in 1993, Rambo practiced briefly with a civil law firm and spent nine years with the Office of the District Attorney for the Second Judicial District, primarily in the Violent Crimes Division. During this time he continued to mediate in a volunteer capacity for the Metropolitan Court. Rambo has mediated at the New Mexico Court of Appeals since August of 2003. If you have any appellate mediation questions, you are encouraged to call Robert Rambo at (505) 767-6102.

Mark Reynolds is the Chief Clerk of the New Mexico Court of Appeals.

Edward Ricco is a New Mexico Board of Legal Specialization recognized specialist in appellate practice and a fellow of the American Academy of Appellate Lawyers. As head of the appellate practice group at the Rodey Law Firm, Ricco has been involved in numerous appeals in a wide variety of substantive areas. He is admitted to practice in the New Mexico courts, the U. S. Court of Appeals for the Ninth, Tenth and District of Columbia Circuits, and the U. S. Supreme Court.

Judge David K. Thomson serves on Division VI in the New Mexico First Judicial District Court. Judge Thomson was born and raised in Santa Fe, New Mexico. He has an undergraduate degree in economics and government from Wesleyan University, Middletown Connecticut. Before law school he worked for U.S. Senator Jeff Bingaman. He graduated from the University of Denver College of Law in 1998. Judge Thomson was term law clerk for U.S. District Judge Bruce Black, District of New Mexico. After his clerkship he joined the New Mexico Attorney General's Office as a litigation attorney, eventually serving as a deputy attorney general. Prior to taking the bench in 2015, Judge Thomson was a sole practitioner. The New Mexico Supreme Court has appointed Judge Thomson to serve on the Uniform Jury Instruction Committee (currently), New Mexico Rules of Civil Procedure (term ended) and the Disciplinary Board of the New Mexico Supreme Court (term ended). Judge Thomson has graduated from the National Judicial College and teaches CLEs on a number of topics including trial practice and ethics in the courtroom.

Judge Linda M. Vanzi was appointed to the New Mexico Court of Appeals in October 2008. Prior to her appointment on the Court of Appeals, Judge Vanzi was a district court judge in the Second Judicial District Court's civil division. Judge Vanzi has served as the chair of the Uniform Jury Instruction Committee, the chair of the Judicial Education Committee and as the co-chair of the Alternative Dispute Resolution Committee. She is currently the chair of the Judicial Education and Training Advisory Committee.

Judge James J. Wechsler is the senior judge on the New Mexico Court of Appeals, having served on the court since December 1994. He currently serves as chair of the Advisory Committee on the Judicial Code of Conduct and is a member of the Code of Judicial Conduct Committee.

RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE

(Civil Appeals and Generally Applicable Principles)

Compiled by Edward Ricco
Rodey, Dickason, Sloan, Akin & Robb, P.A.

27th Appellate Practice Institute, September 2016

Cases from Bar Bulletin, Vol. 54, No. 31 through Vol. 55, No. 31
(August 2015 –July 2016)

Appealable Judgments and Orders – Finality

Citizen Action N.M. v. N.M. Environment Dep't, 2015-NMCA-058, 350 P.3d 1178, cert. denied, 2015-NMCERT-005, __ P.3d __.

In 2005 NMED approved waste disposal permit modification, but order was ambiguous as to when five-year reporting period regarding waste disposal plan would begin to run. In 2011, NMED issued letter requiring first report five years after approval of plan. Plan, approved by NMED letter issued in 2014, included statement that first report would be submitted five years after approval. Appeal was taken from 2014 letter, contending that reporting period began to run in 2005 and first report was due in 2010. 2014 appeal was untimely because appeal should have been taken from 2011 letter. "Final agency action" triggering right to appeal is given pragmatic construction depending on whether agency indicates that it will continue to gather evidence, engage in further fact finding, and revisit issues. Appeal was not required in 2005 because that order was ambiguous regarding timing. But Department's 2011 letter reflected a definite determination based on consideration of relevant facts and did not suggest that question of when first report would be due was subject to reconsideration or change. 2014 letter only reflected approval of implementation of prior decision; it was not itself an appealable action.

Hoyt v. State, 2015-NMCA-108, __ P.3d __.

This case illustrates how a "muddled" [¶ 31] procedural process can lead to decisions resulting in the loss of an opportunity to appeal. Petitioner filed petition for writ of mandamus in district court to require change to death certificate. No form of writ was filed with petition. District court issued summons rather than alternative writ. State filed response stating why relief should not be granted, and evidentiary hearing was held after which district court ruled on merits. Court granted writ ordering amendments to death certificate and advised state of right to appeal that ruling. Writ that was entered did not state whether it was alternative or peremptory. State treated writ as alternative and filed answer reiterating its prior response. District court entered order striking answer, characterizing that order as a final order from which appeal could be taken. State filed notice of appeal from order. Court of Appeals held appeal untimely because writ was substantively a peremptory writ from which appeal had to be taken. By initially answering on merits, State waived district court's error in failing to issue alternative writ; petition functionally became the alternative writ. All procedures leading to peremptory writ were completed. Writ that was issued fully determined case on its merits after evidentiary hearing and therefore was

peremptory. Factors that could excuse untimely appeal – judicial error or extraordinary circumstances beyond party's control – were not present. Court advised state of right to appeal from writ; state made calculated or misguided decision to file answer instead. State declined to participate in proceedings on entry of writ that could have clarified nature of writ. (Dissent would have found excuse factors to exist.)

Brannock v. The Lotus Fund, 2016-NMCA-030, __ P.3d __, cert. denied, 2016-NMCERT-002, __ P.3d __.

Court's findings and conclusions, which included final paragraph stating that it is "Ordered that Judgment shall issue in favor of Plaintiffs consistent with these Findings and Conclusions," contained decretal language and was a final order from which an appeal could be taken. [¶ 1 n.1]

Notice of Appeal – Effect on District Court's Jurisdiction

Atherton v. Gopin, 2015-NMCA-087, 355 P.3d 804.

District court had jurisdiction to increase amount of ne exeat bond while appeal pending. Bond was not akin to judgment but was aid to enforcement of judgment, a collateral matter. [¶¶ 14-17]

Standards of Review

– Abuse of Discretion

DeMichele v. State Taxation & Revenue Dep't, 2015-NMCA-095, 356 P.3d 523.

"[R]eviewing the decision of a lower court for an abuse of discretion does not prevent meaningful review by an appellate court." After construing "good cause" for restoration of driver's license under statute, court concludes that district court abused discretion in refusing restoration; no reasonable view of the evidence would permit conclusion that good cause was not established by evidence of petitioner's rehabilitation and sobriety. [¶¶ 20-22]

– Arbitrary and Capricious Action (Administrative Agency)

Vigil v. Public Employees Retirement Bd., 2015-NMCA-079, 355 P.3d 67, cert. denied, 2015-NMCERT-008, __ P.3d __.

Agency's rejection of hearing officer's findings and recommendation and adoption of contrary findings was arbitrary and capricious where agency violated its own regulations by making findings without reviewing hearing record, agency relied selectively on certain evidence without consideration of contrary evidence accepted by hearing officer or explanation of basis for adopting opposite findings, and agency's decision lacked rational basis in light of whole record.

– Jury Composition

Bustos v. City of Clovis, 2016-NMCA-018, __ P.3d __, cert. denied, 2016-NMCERT-001, __ P.3d __.

In reviewing Batson challenge to composition of civil jury, appellate court affords deference to district court's factual findings. But issue ultimately is constitutional one; therefore, constitutional adequacy of party's peremptory challenges to jurors is reviewed de novo. [¶¶ 29-31]

– Substantial Evidence (Whole Record)

Trujillo v. Los Alamos National Laboratory, 2016-NMCA-041, __ P.3d __, cert. denied, 2016-NMCERT-004, __ P.3d __.

Court engages in very careful parsing of expert medical testimony regarding causation in workers' compensation proceeding and concludes that substantial evidence standard is not met.

Preservation of Issues / Waiver

Firstenberg v. Monribot, 2015-NMCA-062, 350 P.3d 1205, cert. denied, 2015-NMCERT-006, __ P.3d __.

Challenge to district court's order on ground that it contained typographical and semantic errors was waived because party failed to file objections to form of order in district court. [¶ 25]

Deutsche Bank National Trust Co. v. Johnston, 2016-NMSC-013, Vol 55, No. 25, SBB 25.

Lack of prudential standing, which unlike lack of statutory standing does not deprive district court of jurisdiction over cause of action, is analogous to failure to state a claim and may be raised at any time up to the completion of trial; it is not waived if not raised in initial response to complaint but cannot be raised to set aside a final judgment under Rule 1-060(B) NMRA. [¶¶ 16, 34]

Wells Fargo Bank, N.A. v. Pyle, 2016-NMCA-046, __ P.3d __.

Court quotes portions of remarks by appellant's counsel and trial court during argument at motion hearing in concluding that issue as framed on appeal was adequately preserved below. "It is clear from the district court's comments that it understood Appellant's arguments." [¶ 4]

State v. Baxendale, 2016-NMCA-048, __ P.3d __, cert. denied, 2016-NMCERT-005, __ P.3d __.

Defendant did not preserve claim of error in district court's failure to instruct on defense of habitation theory, because defendant's tendered instructions did not correctly state the law. But Court of Appeals invokes prior cases in which it has held that an issue is preserved if district court clearly understood the type of instruction that was wanted and understood that tendered instruction had to be modified to be correct. Court concludes based on Defendant's evidence,

motions, and tendered instructions at trial that district court "was sufficiently on notice that Defendant was requesting an instruction on self defense and defense of his habitation." Therefore issue was preserved.

Dollens v. Wells Fargo Bank, N.A., 2015-NMCA-096, 356 P.3d 531.

Defendant did not waive right to respond to plaintiff's claim for attorney fees, made in written closing argument on merits, by adhering to district court's instruction not to litigate reasonableness of attorney fees until after liability was established – rejecting argument that defendant could have responded to claim sooner. [¶¶ 22-23]

– Exceptions to Preservation Requirement

Santa Fe Water Resource Alliance, LLC v. D'Antonio, 2016-NMCA-035, __ P.3d __, cert. denied, 2016-NMCERT-004, __ P.3d __.

Although issue was not preserved in trial court, Court of Appeals addresses question whether district court has authority to tax costs against State Engineer "because it raises a question of general public importance." Question "is a pure question of law that will apply . . . to every appeal of the Engineer's decisions," and "the issue has been raised and briefed before the district court in other pending appeals from the Engineer's office." [¶ 9]

Appellant's Duty to Bring Up Record

State v. Herrera, 2015-NMCA-116, __ P.3d __, cert. denied, 2015-NMCERT-010, __ P.3d __.

Party preserved issue of whether its requested jury instruction should have been given by explaining to district court how party believed standard instruction should be modified. But Court of Appeals could not address correctness of modified instruction because requested instruction was not included in or read into record. Opposing party pointed out omission it its answer brief and party still failed to supplement record with instruction. (But court resolved merits by holding that case on which requested modification was based could be distinguished.)

Review Limited to Record

State v. Sanchez, 2015-NMCA-084, 355 P.3d 795.

In case involving warrantless seizure of pills, court does not consider statistical information provided by defendant regarding percentage of people using prescription drugs that is not in district court record, but it takes judicial notice that "many people are prescribed medication." [¶¶ 8, 10]

Atherton v. Gopin, 2015-NMCA-087, 355 P.3d 804.

Court does not consider affidavit filed in appellate court by one party that is not part of record proper nor documents cited by another party that also are outside the record. [¶ 29 n.1]

Review of Findings of Fact vs. Conclusions of Law

Miller v. Bank of America, N.A., 2015-NMSC-022, 352 P.3d 1162.

Appellate court is bound by trial court's findings of fact, not its conclusions of law. But court is not bound by designation of determination as one of fact. Nor is appellate court bound where it is unclear whether a determination is a finding of fact or a conclusion of law. Court could review "finding," although not challenged for substantial evidence on appeal, that was not based on evidence but on legal arguments as to scope of remedy. [¶ 27]

Scope of Review on Certiorari

Snow v. Warren Power & Machinery, Inc., 2015-NMSC-026, 354 P.3d 1285.

Fact that important procedural issue (addition of parties where motion to amend complaint was filed before, but granted after, limitations period had run) became moot upon settlement of case and party petitioning for certiorari filed notice of withdrawal of petition did not prevent Supreme Court from rejecting notice of withdrawal, granting writ of certiorari, and addressing issue. Court is undeterred by argument that ruling on issue after settlement might discourage future settlements, given importance of addressing concern about pleading rules. Because settling parties did not submit briefs, Court invited trial lawyers and defense lawyers associations to brief issue. [¶¶ 10-15]

Badilla v. Wal-Mart Stores East, Inc., 2015-NMSC-029, __ P.3d __.

After reversing grant of summary judgment, Supreme Court remands for Court of Appeals to consider validity of summary judgment on alternative ground relied on by district court. "Because this issue was not included in the grounds upon which this Court granted Plaintiff's petition for writ of certiorari, we decline to address it." [¶ 50]

Extraordinary Writs

N.M. Building & Construction Trades Council v. Dean, 2015-NMSC-023, 353 P.3d 1212.

Mandamus would lie, in exercise of Supreme Court's original jurisdiction, to require director of Labor Relations Division to set prevailing wage and benefit rates in accordance with statute. Matter involved purely legal issue of public importance involving separation of powers, director had clear duty to set rates, and remedy at law was inadequate in light of director's failure for five years to update rates to reflect current economic conditions.

Writ of Error

Montano v. Frezza, 2015-NMCA-069, 352 P.3d 666, cert. granted, 2015-NMCERT-006, __ P.3d __.

Writ of error proceeding was appropriate to decide choice of law issue, where choice of law would determine whether defendant was immune from suit.

"Right for Any Reason" Doctrine

Wild Horse Observers Ass'n, Inc. v. N.M. Livestock Bd., 2016-NMCA-001, __ P.3d __, cert. denied, 2015-NMCERT-010, __ P.3d __.

Although affidavits in district court record set forth facts supporting mootness, Court of Appeals would not affirm dismissal on alternative ground of mootness under "right for any reason" doctrine where district court did not actually consider the factual allegations in the affidavits or the issue of mootness in its ruling. Similarly, Court of Appeals would not affirm on alternative ground of collateral estoppel where district court did not consider issue and did not make factual findings necessary for application of collateral estoppel. [¶¶ 28-32]

Precedent

Miller v. Bank of Am., N.A., 2015-NMSC-022, 352 P.3d 1162.

"Uniform acts and the commentaries explaining those acts are often useful guidance in interpreting New Mexico law derived from a uniform code." [¶ 12]

State v. Dopslaf, 2015-NMCA-098, 356 P.3d 559, cert. denied, 2015-NMCERT-008, __ P.3d __.

Although Court of Appeals is bound by Supreme Court precedent even if it appears contrary to United States Supreme Court decision, it is not bound by Supreme Court dicta that is contrary to supervening decision of U.S. Supreme Court. [¶ 11]

Law of the Case

State v. Godkin, 2015-NMCA-114, __ P.3d __.

In first appeal, Court of Appeals reversed and remanded for new hearing. On second appeal following hearing, State argued that prior opinion determined district court's jurisdiction under law of the case doctrine. Court of Appeals declines to treat issue of jurisdiction as foreclosed, because its focus in prior opinion on other issues "obscured the issue of jurisdiction itself." Further, jurisdiction cannot be established by law of the case if ruling was erroneous. [¶¶ 12-14]

Briefs

Citizen Action N.M. v. N.M. Environment Dep't, 2015-NMCA-058, 350 P.3d 1178, cert. denied, 2015-NMCERT-005, __ P.3d __.

Where answer brief presents argument and record citations refuting appellant's argument in brief in chief, and appellant in reply fails to respond to answer brief argument or to provide record citations in support of its original argument, court concludes that appellant has conceded point. [¶ 26]

Firstenberg v. Monribot, 2015-NMCA-062, 350 P.3d 1205, cert. denied, 2015-NMCERT-006, __ P.3d __.

Court would "not attempt to decipher" argument that "is comprised of a series of quotations from various authorities with no coherent attempt to demonstrate how those authorities relate to the circumstances of this case or why reversal is warranted." [¶ 56]

Gila Resources Information Project v. NM Water Quality Control Comm'n, 2015-NMCA-076, 355 P.3d 36, cert. granted, 2015-NMCERT-007, __ P.3d __.

In administrative appeal, court declined to reach issues where (1) appellant failed to show where in record one issue was raised and preserved and (2) appellant's substantial evidence challenge relied on evidence contrary to agency's findings but failed to cite to evidence supporting the findings and referred to more than 100 challenged findings and hundreds of pages of record documents; "Even when undertaking whole-record review, it is not the duty of this Court to search through the record seeking the bases for reversal or to re-weigh the evidence." [¶¶ 54-58]

State v. Dopslaf, 2015-NMCA-098, 356 P.3d 559, cert. denied, 2015-NMCERT-008, __ P.3d __.

Where only evidence of street layout in appeal reviewing police traffic stop was officer's testimony at suppression hearing, court would not consider diagrams incorporated into defendant's appellate brief. [¶ 2]

Sanctions

Brannock v. The Lotus Fund, 2016-NMCA-030, __ P.3d __, cert. denied, 2016-NMCERT-002, __ P.3d __.

Despite contention that appellees misstated evidence in order to forestall proposed summary disposition and showing in answer brief of allegedly purposeful misrepresentations, court would not award attorney fees on appeal; appellees' position was not solely frivolous or vexatious.

Appellate Rules

Extensive amendments to Rules of Appellate Procedure proposed. See Vol. 55, No. 10 SBB 23 (summary).

RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE

(Criminal Appeals)

Compiled by David Henderson,
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27th Appellate Practice Institute, September 2016

Cases from July 2015-July 2016

Curative instructions, standard of review:

State v. Wyatt B. 2015-NMCA-110, ¶ 27, 359 P.3d 165.

Generally, "a prompt admonition from the court to the jury to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which might otherwise result." ***State v. Newman***, 1989-NMCA-086, ¶ 19, 109 N.M. 263. In this case the Court recognized a different analysis applies when the prosecution intentionally elicits inadmissible evidence. ***See State v. Armijo***, 2014-NMCA-013, ¶ 9, 316 P.3d 902 ("regardless of whether a [district] court admonishes the jury not to consider the testimony, [we] must determine whether there is a reasonable probability that the improperly admitted evidence could have induced the jury's verdict." *Id.* (internal quotation marks and citation omitted); ***cf. State v. Garcia,*** 1994-NMCA-147, 118 N.M. 773 (intentional elicitation of testimony that violated due process reviewed to determine whether it was harmless beyond a reasonable doubt despite curative instruction).

Discovery, preservation, and in camera review:

State v. Branch, 2016-NMCA-___, ___ P.3d ___ 2016 WL 3014609 (May 23, 2016).

In ***Branch***, the defendant was convicted of aggravated battery and aggravated assault after shooting his adult son in the leg and in the presence of his wife. The defendant claimed he acted in self-defense against his son, and to support this claim sought to subpoena the son's military records, which allegedly contained evidence that the son had been in fights in the military and may have been discharged as a result. On appeal it was argued that the trial court should have examined the subpoenaed records in camera in order to determine whether they

contained discoverable information. The Court of Appeals stated, "We agree that in camera review would have been the best way to balance [the son's] privacy interests with Defendant's interests in obtaining records that were potentially relevant to his defense." 2016-NMCA-___, ¶ 45 (bracketed material added). The Court also noted there were "compelling arguments on appeal that in camera review of [the son's] military records could have been useful to locate material information." ***Id.***, ¶ 47 (listing examples; bracketed material added). However, the Court held the district court did not abuse its discretion "in rejecting the arguments that were actually presented below, where Defendant did not seek in camera review but sought full disclosure of all discharge records." ***Id.***

The district court's jurisdiction to grant a new trial and the State's right to appeal the grant of a new trial:

State v. Acosta, 2016-NMCA-003, 363 P.3d 1240.

The defendant timely filed a motion for a new trial, and the district court had jurisdiction to grant a new trial based on grounds raised by the court itself sua sponte more than 10 days after the verdict. The Court of Appeals reviewed the district court's jurisdiction to grant a new trial de novo. The Court also held the State had a right to appeal the grant of the new trial when the district court's ruling was based on its legal analysis of the notice requirements of Rule 11-404(B)(2), NMRA.

Double jeopardy and trials de novo:

State v. Ken, 2015-NMCA-118, 362 P.3d 180.

For double jeopardy purposes, a *de novo* appeal from a DWI conviction in magistrate court in a district court is functionally the same as a retrial following a record appeal. Therefore, when the lower-court conviction was based on one of several statutory means of committing the offense, and this conviction did not require a factual finding inconsistent with guilt on the other theory, there was no applied acquittal that prevented the district court from finding the defendant guilty on the alternative theory.

Extraordinary writs:

Kerr v. Parsons, 2016-NMSC-___, ___ P.3d ___, 2016 WL 3126128 (June 2, 2016).

The district court had ruled that "the flat-fee rates paid to indigent defense contract counsel by the Law Office of the Public Defender (LOPD) contravened the right to counsel" and therefore struck down the Legislature's prohibition on hourly rates to contract counsel. The court also directed LOPD to pay all contract counsel at least $85 per hour, and ordered the State to provide the necessary funding. The Supreme Court issued its writ of superintending control and held the General Appropriations Act of 2015 did not violate the right to effective assistance of counsel and declined to presume the flat-fee rates paid to contract counsel violated the defendant's rights. 2016-NMSC-___, ¶ 1. In the course of the Court's opinion it reiterated a number of principles regarding extraordinary writs:

- In the exercise of the power of superintending control, the Supreme Court may take judicial notice of the proceedings in the district court. 2016-NMSC-___, ¶ 9.

- "Article VI, Section 3 of the New Mexico Constitution confers on this Court 'superintending control over all inferior courts' and the power to issue 'writs necessary or proper for the complete exercise of ... [our] jurisdiction and to hear and determine the same.' 'The power of superintending control is the power to control the course of ordinary litigation in inferior courts.' In contrast to the writ of prohibition, the writ of superintending control is not limited to the correction of jurisdictional errors. Where appropriate, the power of superintending control permits this Court's interposition to correct any *specie* of error. We may exercise our power of superintending control to control the course of ordinary litigation 'if the remedy by appeal seems wholly inadequate.' We may also exercise the power of superintending control 'where it is deemed to be in the public interest to settle the question involved at the earliest moment.'

2016-NMSC-___, ¶ 16 (internal citations omitted).

Fundamental error:

State v. Anderson 2016-NMCA-007,364 P.3d 306.

The trial court's failure to give a no-duty-to-retreat instruction as it had agreed created fundamental error, because a jury's assessment of whether the accused acted reasonably must be made in the context of an understanding that failure to retreat in itself cannot be deemed unreasonable.

Judicial notice and its limits:

1. ***State v. Dopslaf***, 2015-NMCA-098, ¶ 2, 356 P.3d 559.

"As an initial matter, we clarify that our review of the facts in this case is limited to Officer Daniel Burge's testimony because this was the only evidence presented. Therefore, we do not consider Defendant's statements at sentencing regarding the stop, nor do we consider the diagrams Defendant incorporated in his brief on appeal."

2. ***State v. Sanchez***, 2015-NMCA-084, 355 P.3d 795.

"Lastly, we note that we do not consider matters that are not of record, including the statistical information provided by Defendant on appeal. ***State v. Maez***, 2009–NMCA–108, ¶ 8, 147 N.M. 91, 217 P.3d 104 ('This Court will not consider and counsel should not refer to matters not of record in their briefs'). We acknowledge, however, that many people are prescribed medication. ***See State v. Erickson K.***, 2002–NMCA–058, ¶ 24, 132 N.M. 258, 46 P.3d 1258 ("A court may take judicial notice of adjudicative facts that are not subject to reasonable dispute. Such facts must be matters of common and general knowledge which are well established and authoritatively settled.") (alteration, internal quotation marks, and citation omitted)."

Law of the case, waiver, and statutory jurisdiction:

State v. Godkin, 2015-NMCA-114, 362 P.3d 161.

In a prior appeal, an issue arose regarding denial of a continuance in a probation revocation proceeding to obtain a competency evaluation. The COA reversed and remanded, with directions that the probationer be permitted to waive the

adjudicatory time limit for motions to revoke as set forth in the Rules of Criminal Procedure, Rule 5-805, NMRA.

By the time the case came before the District Court, however, the statutory time limit for revoking probation had expired, because the probationer had completed his sentence. The district court nevertheless relied on the language in the first unpublished opinion and denied the defense motion to dismiss. 2015-NMCA-114, ¶ 8.

During the second, interlocutory appeal, the State argued that under law of the case principles the Court's prior opinion implicitly determined the jurisdiction issue against the probationer. The Court rejected this argument for three reasons: First, law of the case is discretionary. ***Id.,*** ¶ 11. Second, the Court of Appeals discussion of waiving time limits for adjudicating a probation revocation proceeding was not intended to address the expiration of the district court's statutory jurisdiction. ***Id.*** ¶ 12. Third, "Because jurisdiction cannot be waived, *Frost,* 2003–NMCA–002, ¶ 8, 133 N.M. 45, there is no 'law of the case' here."

Preservation versus waiver on appeal:

1. ***State v. Herrera***, 2015-NMCA-116, 362 P.3d 167.

The defense wanted a jury instruction on whether the element of "restraint" in a charged kidnapping was merely "incidental" to the acts constituting aggravated assault under ***State v. Trujillo***, 2012–NMCA–112, 289 P.3d 238, ***cert. quashed,*** 2015–NMCERT–003, 346 P.3d 1163.

The Court first applied the principle applicable to criminal appeals that "if the record reflects that the judge clearly understood the type of instruction the [d]efendant wanted and understood the tendered instruction needed to be modified to correctly state the law, then the issue is deemed preserved for appellate review." 2015-NMCA-116, ¶ 7.

Then, despite having framed the issue in terms of the arguments made at the jury-instruction conference, the Court seemed to hold that the issue had been waived by failure to perfect the record, reasoning that because the proposed instruction was not produced on appeal, the Court could not address its propriety. ***Id.***, ¶ 8.

Perhaps as an alternative rationale, however, the Court also addressed the merits and concluded that the facts adduced at trial would not have supported an incidental-restraint instruction. ***Id.***, ¶¶ 9-10.

2. ***State v. Baxendale***, 2016-NMCA-048, 370 P.3d 813.

Baxendale also involves a jury instruction issue. As in ***Herrera,*** the issue had been preserved below but arguably was waived on appeal – here, because appellate counsel did not make the argument the Court concluded was the winning argument.

Unlike ***Herrera***, in ***Baxendale*** the Court explained *why* it proceeded to the merits notwithstanding what the Court viewed as an error by counsel in prosecuting the appeal. In the process, the Opinion illustrates that the appellate court's analysis of jury-instruction issues reflects legal principles that apply in a criminal case but not in civil cases.

As in ***Herrera***, at issue was the trial court refusal to instruct the jury on the defense theory of the case – *i.e.*, that when the defendant crouched down and fired a gun upward towards a locked door in his home to ward off suspected intruders, he was using non-deadly force in defense-of-habitation and self-defense.

The Court of Appeals held, first, that this constituted the use of deadly force rather than non-deadly force and thus the instructions tendered by the defense at trial were deficient. 2016-NMCA-048, ¶ 13.

However, the Court noted, this does not end the analysis: "We have held that if the record reflects that the court clearly understood the type of instruction the defendant wanted and understood the tendered instruction needed to be modified to correctly state the law, then the issue is deemed preserved for appellate review." ***Id.*** ¶ 14; ***accord Herrera***, 2015-NMCA-116, ¶ 7.

This principle reflects the nature of the defendant's constitutional right to a jury determination of the facts essential to any conviction and the trial court's greater responsibility to instruct the jury on the law in a criminal case.

First, Rule 5-608(A), NMRA provides: "**Required Instructions.** The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury." By contrast, in civil cases Rule 1-051(B) provides "**B. Duty to Instruct.** The court shall instruct the jury regarding the law applicable to the facts in the cause unless such instructions be waived by the parties."

Second, Rule 5-608(D), ***cited in*** 2016-NMCA-048, ¶ 14, requires the defense to tender a correct written instruction, "Except as provided in Paragraph A of this rule." There is no similar language in Rule 1-051(I).

The Court, having ruled that the deadly-force issue was preserved, then confronted the implications of the fact that appellate counsel had argued for non-deadly-force instructions on appeal, noting, "We ordinarily do not reach issues that the parties have failed to raise in their briefs." 2016-NMCA-048, ¶ 18.

However, the Court took note of the fact that legal justification provided the only possible defense to the aggravated assault charges, ***Id.***, ¶ 19, and cited the importance of the defendant's "fundamental right to present his or her theory of defense to the jury where the evidence supports it." ***Id.***, ¶ 20. Reasoning that the duty of courts to safeguard this right "should not stop at the district court," ***Id.***, ¶ 21, the Court essentially relied on the fundamental error exception codified in Rule 12-216(B) to conclude that failure to instruct required reversal on appeal.

While this reasoning is analogous to that found in a variety of criminal cases, for the vast majority of civil cases, fundamental error is not available to excuse failure by the appellant to preserve (or properly present) an issue. ***See generally Garcia v. Bittner***, 1995-NMCA-064, ¶¶ 12-20 (explaining why Rule 12-216(B) did not apply to a jury instruction issue in a landlord-tenant dispute).

Remedies on remand:

State v. Vargas, 2016-NMCA-038, ¶ 47, 368 P.3d 1232 (when the State violated the defendant's due process and double jeopardy rights in a child abuse case by pursuing "carbon copy" counts and Court was reversing on other grounds, the remedy on remand was either for the prosecution to pursue a single "course of conduct" count or to provide a bill of particulars to the defense).

Standard of review:

State v. Hobbs, 2016-NMCA-006, 363 P.3d 1269.

De novo review applied to a claim that the accused was denied a public trial. The deprivation of a public trial creates a structural defect that ordinarily would require automatic reversal on appeal; however, the right here was affirmatively waived and not merely forfeited by failure to object.

State appeals from dismissals without prejudice

State v. Angulo, 2016 WL 577872 (January 5, 2016) (non-precedential).

This non-precedential decision is important because it has provided a vehicle by which the State has pursued a series of appeals from dismissals without prejudice. The Second Judicial District Court adopted new local rules intended to resolve a serious backlog of cases. The new rules provide for dismissal of cases without prejudice when, *e.g.*, the prosecution fails to timely meet its discovery deadlines.

Here, the State appealed a dismissal without prejudice because the defendant was not present at scheduling conference. Before reaching the merits (and reversing), the Court of Appeals ruled the State had a right to appeal, reasoning, "In ***State v. Armijo***, '[w]e conclude[d] that the [L]egislature intended to permit the [s]tate to appeal any order dismissing one or more counts of a complaint, indictment, or information, *regardless* of whether the dismissal is with prejudice.' 1994–NMCA–136, ¶ 6, 118 N.M. 802, 887 P.2d 1269 (emphasis added)."

The Court did not address or find distinguishing the fact that in ***Armijo*** the district court not only quashed an indictment but also disqualified the Attorney General from re- prosecuting the case.

Statutory Interpretation

1. ***State v. Benally***, 2016-NMSC-010, 368 P.3d 402.

The Supreme Court construed the term "seizure" as used in the pre-2015 version of New Mexico's forfeiture statute, NMSA 1978, Section 31–27–5(A). The forfeiture complaint was filed within thirty days of the search of a vehicle in which the police found currency, but not within thirty days of the seizure of the vehicle containing the currency. The Court held the currency was seized when the police first took possession of the vehicle and not when they later searched it. The forfeiture complaint therefore was untimely filed.

The Court relied on well-established principles of statutory instruction and noted, 2016-NMSC-010, ¶ 10, that forfeitures "are not favored at law and statutes are to be construed strictly against forfeiture." (Citation omitted.) The Court also noted that a "seizure" has been defined by state and federal courts to indicate "the dispossession of an owner of his or her property," and it presumed the Legislature enacted the statute with knowledge of this legal usage. ***Id.***, ¶ 11.

The Court rejected the argument that the seizure occurred when the police searched the vehicle and became aware of the currency inside, concluding, "The statute

refers to a state of affairs, not a type of activity that entails a specific mental state." ***Id.***, ¶ 13. It also rejected the argument that a seizure requires a warrant or court order, reasoning, "The Forfeiture Act explicitly provides that, in certain circumstances, property may be seized without a prior seizure order or search warrant." ***Id.***, ¶ 20.

2. ***State v. Armijo***, 2016-NMSC-021, 375 P.3d 415.

-- Introduction. After having taken the unusual step of issuing a formal dispositional order last year, in ***Armijo*** the Court explained why it rejected the State's argument that a defendant has no right to a second appeal in the Court of Appeals from a district court's on-record or *de novo* review of cases originating in metropolitan court.

The Court found the Court of Appeals' jurisdiction and the defendant's right to appeal were both provided by statute under the Constitution's grant of authority to the Legislature. The Opinion also suggests, however, that the current system may not be the best one and perhaps should be changed.

In surveying the appellate jurisdiction of New Mexico courts, this case also provides an exemplar of a more historically rich method of statutory construction seen in a number of the Court's other recent cases. The importance of history here can be seen in particular in the Court's examination of what kind of appellate review New Mexico statutes provided at the time the metropolitan court became a court of record for certain criminal cases.

-- Jurisdiction. After a historical review of the law beginning with the Kearny Code, ***id.***, ¶ 3, through the creation of the metropolitan court, ***id.***, ¶ 16, the Court held the New Mexico Constitution and current statutes provide jurisdiction to the Court of Appeals to provide a second layer of appellate review. The Court began by noting it applies the same principles of construction to the State Constitution as it does to statutes. ***Id.,*** ¶ 20.

The Court then noted that Article VI, Section 29 of the Constitution "grants appellate jurisdiction to the Court of Appeals 'as may be provided by law,'" which includes statutes. ***Id.*** ¶ 21. NMSA 1978, Section 34-5-8(A)(3) (1983) provides for Court of Appeals review of all "criminal actions," except "those in which a judgment of the district court imposes a sentence of death or life imprisonment." ***Id.***

Under this statute, the Court held, a district court's record review of a criminal case originating in metropolitan court was a "continuation" of the underlying "criminal

action." Referring back to its survey of the law, the Court held, "This interpretation is in accordance with the history of New Mexico's appellate procedure, in which cases originating in the limited-jurisdiction courts have consistently been given further appellate review after an initial appeal to the district court." ***Id.***, ¶ 22. Absent specific exceptions in the Constitution or by statute, the Court would not make an exception for further review of either *de novo* or record appeals to the district court. ***Id.*** ¶ 23.

-- The right to appeal. The Court further held the defendant had a right to this second layer of appellate review. This right was *not* provided by the Constitution itself: Article VI, Section 27 of the Constitution provides only a right to appeal to the district court from courts of limited jurisdiction, and Article VI, § 2 provides only a right to appeal from cases originating in the district court itself. ***Id.***, § 25. Instead, the right to a second layer of appellate review is provided by Section 39-3-3(A)(1) (1972). ***Id.,*** ¶ 26.

When the Legislature made the metropolitan court a court of record for certain criminal cases in 1993, it did not amend the statute providing for an appeal of right to the Court of Appeals from criminal proceedings before the district court. Looked at through a historical lens, this sequence of enactments implied that the defendant has the same right to appeal the district court's determination irrespective of the nature of the district court's appellate review (record or *de novo*). ***Id.,*** ¶ 32.

After discussing the conflicting policy considerations attendant to the current system, and noting that Section 34–8A–6(C) might provide authority for the Supreme Court to promulgate a rule providing for only certiorari review to the Court of Appeals, the Court concluded that issue was not currently before it. ***Id.,*** § 35.

3. ***State v. Begay,*** 2016-NMCA-039, 368 P.3d 1246, ***cert granted*** 3/25/16.

In ***Begay,*** the Court of Appeals panel employed the same kind of historical analysis employed by the Supreme Court in ***Armijo.***

NMSA 1978, Section 31-21-5(C) (1985, amended 2003), authorizes sentences of probation in magistrate courts, metropolitan court, and municipal courts. ***Begay*** held this statute does not permit those courts to toll the running of probation if the defendant absconds. In so doing, it also traced some of the same history regarding district courts and courts of limited jurisdiction surveyed in ***Armijo***. After ***Begay*** was decided, three bills were introduced immediately in the legislative session

aimed at amending the statute. Among others, the effort was publicly supported by the metropolitan court.

In its analysis, the Court of Appeals noted that the Probation and Parole Act, §§ 31–21–3 to –19 (1955, as amended through 2013), provides tolling authority. However, under the definition section, the Act only applies when the defendant was convicted in district court. The tolling provision was passed in 1963, at a time when the district courts had concurrent jurisdiction over misdemeanors with inferior courts. In 1984 the Legislature passed Section 31-21-5 providing for probation. However, this statute contains no tolling provision, and the Legislature did not amend the Probation and Parole Act so that its tolling provision would apply in cases originating in magistrate, metropolitan, or municipal courts.

Given the plain language and historical context, the Court held the tolling provisions therefore did not apply. 2016-NMCA-037, ¶ 6.

The Court also concluded this result was not unjust or absurd, reasoning "the Legislature may have chosen to limit the tolling provision in this manner because (1) convictions obtained by magistrates (and, later, the magistrate court) only involved minor crimes ...; and (2) the burden of injecting an additional administrative process and additional inmates into our magistrate court system arising from probation violations involving only minor offenses may well outweigh the public benefits achieved through these courts of limited criminal jurisdiction." ***Id.***

4. ***State v. Anthony Holt,*** 2016-NMSC-011, 368 P.3d 409.

In ***Holt***, the defendant was convicted of breaking and entering based on evidence that he placed his fingers behind the screen of a residence's window. The Court of Appeals affirmed, and at one point framed the issue as whether "whether the space between a window screen and an open window is protected space under the statute" such that forcible entry into that space violated the statute. 2015-NMCA-073, ¶ 9, 352 P.3d 702.

However, after reviewing other case law the majority stated, "Our question thus becomes whether a window screen forms an enclosure such that ***penetration beyond the screen is sufficient for entry of a structure***. '[I]n general, the roof, walls, doors, and windows constitute parts of a building's outer boundary, the penetration of which is sufficient for entry.'" ***Id.***, ¶ 12 (citation omitted; emphasis added).

On certiorari, the Supreme Court agreed with the Court of Appeals' majority that the answer to this latter question was "yes." 2016-NMSC-011, ¶ 1. Nevertheless, the Court felt compelled to expressly reject the first manner in which the majority framed the analysis: "It suggests that the space between the screen and the window is a separate and independent dimension of space apart from the further interior space that comprises Stamper's residence. The issue is more straightforward: did Holt's conduct constitute entry into Stamper's residence?" ***Id.*** ¶ 14.

This concern may have arisen from what the Supreme Court viewed as a misapplication of its opinion in ***State v. Office of Public Defender ex rel. Muqqddin***, 2012–NMSC–029, 285 P.3d 622, which concerned whether entry into the open wheel-well of a truck was an auto-burglary. ***See also State v. Mestas***, 2016-NMCA-047, ¶ 24, 370 P.3d 805 (under burglary statute, entry into a hotel clerk's work space, which was separated from the rest of the lobby by a chest-high counter and locked door, with the intent to empty the cash drawer, was an unauthorized entry into a protected structure; in rejecting the argument under ***Muqqddin*** that Section 30–16–3 does not protect component parts of structures, the Court noted that "every 'whole' is composed of parts.").

5. ***State v. Tarrah Hobbs***, 2016-NMCA-022, 366 P.3d 304.

The Court uses the same principles and standard of review to interpret regulations as it does statutes and rules.

RECENT DEVELOPMENTS IN NEW MEXICO APPELLATE PRACTICE (CRIMINAL APPEALS)

Compiled by David Henderson,
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Statutory construction and appellate jurisdiction:

- ***State v. Armijo***, 2016-NMSC-021, 375 P.3d 415.
- The Court held a defendant has the right to appeal in the Court of Appeals from a district court's on-record or *de novo* review of cases originating in metropolitan court.
- The Court's jurisdiction and the defendant's right to appeal are provided by statute under the Constitution's grant of authority to the Legislature.
- The Opinion suggests, however, that the current system may not be the best one and perhaps should be changed.

Construing statutes by constructing a statutory history:

- Distinct from legislative history;
- By examining the historical treatment of a subject area in the law over time, the Court
  - Creates a context in which to understand what the law meant before it was changed; and,
  - Creates a context to understand what the Legislature intended when it changed part of the law but left part unchanged.

- After a historical review of the law beginning with the Kearny Code, *id.*, ¶ 3, through the creation of the metropolitan court, *id.*, ¶ 16, the Court held the New Mexico Constitution and current statutes provide jurisdiction to the Court of Appeals to provide a second layer of appellate review.
- The Court began by noting it applies the same principles of construction to the State Constitution as it does to statutes. *Id.*, ¶ 20.
- The Court then noted that Article VI, Section 29 of the Constitution "grants appellate jurisdiction to the Court of Appeals 'as may be provided by law,'" which includes statutes. *Id.* ¶ 21.

- NMSA 1978, § 34-5-8(A)(3) (1983) provides for Court of Appeals review of all "criminal actions," except capital cases. *Id.*
- A district court's record review of a criminal case originating in metropolitan court is the "continuation" of a "criminal action."
- This accords with New Mexico history, as cases "originating in the limited-jurisdiction courts have consistently been given further appellate review after an initial [*de novo*] appeal to the district court." *Id.*, ¶ 22.
- Absent specific exceptions in the Constitution or by statute, the Court would not make an exception for further review of either *de novo* or record appeals by the district court. *Id.* ¶ 23.

- The *right* to appeal was not provided by the Constitution:
  - Article VI, Section 27 of the Constitution provides only a right to appeal to the district court from courts of limited jurisdiction, and
  - Article VI, § 2 provides only a right to appeal from cases originating in the district court itself. *Id.*, § 25; *cf.* administrative appeals.
- NMSA 1978 § 39-3-3(A) provides an appeal may be taken by the defendant to the supreme court or court of appeals "in any criminal proceeding in district court."

Should the current system be changed and how?

- Misdemeanants receive more layers of appellate review than capital defendants;
- This requires a substantial commitment of resources by the courts, appellate prosecutors, and the LOPD;
- However, when the lower court is not a court of record, *de novo* appeals to the district court appear necessary to any record review;
- Metropolitan court defendants in record proceedings already receive less process than other misdemeanants who receive an initial *de novo* appeal.

Allocation of appellate functions:

- Traditional appellate functions include:
  - Error correction through independent review by a higher court;
  - Precedential decision-making;
  - Consensus-based decision-making by a multiple-judge panel.

Current allocation of appellate functions among different courts:

- District court error correction (and creation of a record in non-record appeals).
- Followed by Court of Appeal error correction; precedent creation; and multiple judge panels; and finally
- Discretionary review on certiorari by the Supreme Court.

Options for change include:

- Leave the District Court as a purely error-correcting forum and provide for discretionary review by the Court of Appeals.
  - Targets the creation of precedent.
  - Same standard as in certiorari review of administrative decisions?
- Allocate additional appellate review functions to the District Court and provide for discretionary review by the Court of Appeals;
  - Expense, docket impact, and expertise concerns.
- Dispense with error correction at the District Court level and divert metropolitan-court record appeals directly to the Court of Appeals.
  - Continued or increased devotion of Court of Appeals' resources to less serious cases.
  - Constitutional amendment required.

State v. Begay, 2016-NMCA-039, 368 P.3d 1246, cert granted 3/25/16.

- The Court of Appeals employed the same kind of historical analysis employed by the Supreme Court in ***Armijo***.
- NMSA 1978, Section 31-21-5(C) authorizes sentences of probation in magistrate courts, metropolitan court, and municipal courts.
- This statute does not permit those courts to toll the running of probation if the defendant absconds, and the Legislature did not amend the Probation and Parole Act to apply outside of District Court cases.
- Three bills were introduced immediately in the legislative session aimed at amending these statutes. Among others, that effort was publicly supported by the metropolitan court.

Preservation and waiver on appeal:

State v. Baxendale, 2016-NMCA-048, 370 P.3d 813.

- Treatment of jury-instruction issues involve different principles in criminal cases reflecting the importance of the constitutional right to a jury.
- Here, those principles affected the Court's determination, first, that the winning issue had been preserved, and, second, that the Court would reach that issue even though it had not been argued on appeal.

- The trial court refused to instruct the jury on the defense theory of the case – *i.e.*, that the defendant used non-deadly force in defense-of-habitation and self-defense.
- The Court of Appeals held that even though the facts supported only the deadly-force versions of these defenses and counsel did not tender those instructions, because

  "the record reflect[ed] that the court clearly understood the type of instruction the defendant wanted and understood the tendered instruction needed to be modified to correctly state the law ... the issue [was] preserved for appellate review."

  Id. ¶ 14 (bracketed material added).

Different preservation requirements under the Rules of Procedure for district courts:

Rule 5-608(A), NMRA provides: "**Required Instructions.** The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury."

By contrast, in civil cases Rule 1-051(B) provides "**B. Duty to Instruct.** The court shall instruct the jury regarding the law applicable to the facts in the cause unless such instructions be waived by the parties."

Rule 5-608(D), ***cited in*** 2016-NMCA-048, ¶ 14, requires the defense to tender a correct written instruction, "Except as provided in Paragraph A of this rule." There is no similar language in Rule 1-051(I).

The Court also reached the merits, even though appellate counsel had argued for non-deadly-force instructions but not deadly-force instructions.

Reasoning that the duty of courts to safeguard the right of the defendant to present a defense "should not stop at the district court," 2016-NMCA-048, ¶ 21, the Court essentially relied on the fundamental error exception codified in Rule 12-216(B) to conclude that failure to instruct required reversal on appeal.

- Rule 12-216 (B), NMRA, declares that lack of preservation
- "shall not preclude the appellate court from considering jurisdictional questions or, in its discretion, questions involving:
- (1) general public interest; or
- (2) fundamental error or fundamental rights of a party.

See generally Garcia v. Bittner, 1995-NMCA-064, ¶¶ 12-20 (explaining why Rule 12-216(B) did not apply to jury instruction issue in a landlord-tenant dispute).

NOTES

Discretionary Review of Administrative Appeals

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Judge J. Miles Hanisee has served on the New Mexico Court of Appeals since 2011. Judge Hanisee was born in New Orleans, Louisiana, and was raised in nearby Mandeville. In 1986, his family relocated from Louisiana to Taos, New Mexico, where his mother still resides. Judge Hanisee attended Louisiana State University, where he earned a Bachelor of Arts degree in English in 1990. He is a 1993 graduate of Pepperdine University School of Law, where he received his Juris Doctor, was a Merit Scholar, and wrote for the law review. From 1994 to 1996, he was selected to be a law clerk by Judges Oliver Seth and Paul Kelly, both of the United States Court of Appeals for the Tenth Circuit. As an Assistant United States Attorney from 1996-2007, Judge Hanisee's responsibilities included jury trials in United States District Court and appellate advocacy before the Tenth Circuit Court of Appeals. In 2007, he formed the Law Office of J. Miles Hanisee, LLC, where he represented individual and corporate clients in criminal, civil, and administrative matters in both state and federal courts.

Judge David K. Thomson serves on Division VI in the New Mexico First Judicial District Court. Judge Thomson was born and raised in Santa Fe, New Mexico. He has an undergraduate degree in Economics and Government from Wesleyan University, Middletown Connecticut. Before law school he worked for U.S. Senator Jeff Bingaman. He graduated from the University of Denver College of Law in 1998. Judge Thomson was term law clerk for U.S. District Judge Bruce Black, District of New Mexico. After his clerkship he joined the New Mexico Attorney General's Office as a litigation attorney eventually serving as a Deputy Attorney General. Prior to taking the bench in 2015, Judge Thomson was a sole practitioner. The New Mexico Supreme Court has appointed Judge Thomson to serve on the Uniform Jury Instruction Committee (currently), New Mexico Rules of Civil Procedure (term ended), and the Disciplinary Board (term ended). Judge Thomson has graduated from the National Judicial College, and teaches CLE's on a number of topics including trial practice, and ethics in the courtroom.

Timothy J. Atler recently formed Atler Law Firm, PC to focus his practice on civil appeals and on other actions involving complex legal issues. He holds an undergraduate degree in psychology from the University of Michigan and dual degrees in law and Latin American studies from the University of New Mexico. Tim has served on the board of directors of the Appellate Practice Section since 2008 and is currently Chair-Elect. Tim also serves on the New Mexico Supreme Court's Appellate Rules Committee. Before entering private practice, Tim was a law clerk for Judge Michael D. Bustamante on the New Mexico Court of Appeals.

Overview

1) Discuss differences between administrative appeals under Rules 1-074 and 1-075 NMRA, including practice tips for presenting appeals to a district court.

2) Explore district court's discretion to accept an appeal by issuing a writ of certiorari under Rule 1-075.

3) Consider procedure and standards for seeking certification of an appeal from the district court to the New Mexico Court of Appeals under Rules 1-074 and 1-075.

4) Consider procedure and standards for seeking certiorari review of a district court's final order or judgment in the New Mexico Court of Appeals under Rules 1-074 and 1-075.

Rules Governing Appeals From Administrative Adjudications

Rule 1-074 NMRA (Administrative appeals; statutory review by district court of administrative decisions or orders.)

- Appeal as of right when authorized by statute – not discretionary. Rule 1-074(A); NMSA 1978, § 39-3-1.1(A) (1999).

- Court of Appeals may review either by: (1) certification from district court, Rules 1-074(S) and 12-608 NMRA, or (2) writ of certiorari following district court's final order or judgment. Rules 1-074(V) and 12-505 NMRA. See additional discussion below.

Rule 1-075 NMRA (Constitutional review by district court of administrative decisions and orders.)

- Certiorari procedure in district court when there is no statutory right to review an administrative decision. Rule 1-075(A).

- Understand the difference between rulemaking and adjudication and when Court intervention is proper. *See Earthworks Oil and Gas Accountability Project. N.M. Oil Conservation Comm'n*, 2016-NMCA-055, ¶¶ 5-9, 374 P.3d 710.

- "[T]he granting of a writ of certiorari is within the sound discretion of the [trial] court." *Town of Mesilla v. City of Las Cruces*, 1995-NMCA-058, ¶ 18, 120 N.M. 69, 898 P.2d 121 (internal quotation marks and quoted authority omitted).

    - Examples

        - Appeals from municipal personnel decisions. *Zamora v. Vill. of Ruidoso Downs*, 1995-NMSC-072, 120 N.M. 778. *But see Madrid v. Vill. of Chama*, 2012-NMCA-071, 283 P.3d 871 (terminated employee could bring original breach of contract action in district court where administrative remedies were not exclusive under ordinance in question).

        - Appeals from mandatory revocation of a driver's license. *Masterman v. State Taxation & Revenue Dep't*, 1998-NMCA-126, 125 N.M. 705.

- Appeals from municipal water well permitting decisions. *Smith v. City of Santa Fe*, 2007-NMSC-055, 142 N.M. 786.

- Appeals from orders of the Workers' Compensation Administration (WCA) suspending attorneys from practicing before the WCA. *Chavez v. NM Workers' Comp. Admin.*, 2012-NMCA-060, 280 P.3d 927.

- Appeals by county assessors from decisions of county valuation protest boards. *CAVU Co. v. Martinez*, 2013-NMCA-050, 302 P.3d 126, *rev'd and remanded*, 2014-NMSC-029, 332 P.3d 287.

- Appeals from N.M. Department of Health decisions concerning certified nurse aide abuse, neglect or exploitation. *Victor v. N.M. Dep't of Health*, 2014-NMCA-012, 316 P.3d 213.

- Rule 1-075 "does not itself create a right to obtain a constitutional writ of certiorari to an administrative entity[.]" *Moriarty Municipal Schools v. New Mexico Public Schools Ins. Authority*, 2001-NMCA-096, ¶ 34, 131 N.M. 180, 34 P.3d 124.

- District courts have general power to issue writs of certiorari under Art. VI, § 13 of the New Mexico Constitution, which "authorizes district courts to issue writs of certiorari to inferior judges or courts." *Masterman v. State Taxation and Revenue Dept.*, 1998-NMCA-126, ¶ 10, 125 N.M. 705, 964 P.2d 869. "Writs of certiorari provide a method of judicial review **where an inferior court or tribunal has proceeded illegally** and there is no statutorily specified mode of review." *Id.* (emphasis added).

- When does an administrative tribunal act "illegally?"

  - *Regents of University of New Mexico v. Hughes*, 1992-NMSC-049, ¶ 19, 114 N.M. 304, 838 P.2d 458 (finding no meaningful difference between grounds for certiorari and those for ordinary administrative appeals because the words "arbitrary, unlawful, unreasonable, capricious, or not based on substantial evidence[] . . . are synonymous with the word 'illegal.'").

- Note: standards of review under Rules 1-074 and 1-075 are identical:

  > **R. Standard of review.** The district court shall apply the following standards of review:
  >
  > (1) whether the agency acted fraudulently, arbitrarily, or capriciously;
  >
  > (2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence;
  >
  > (3) whether the action of the agency was outside the scope of authority of the agency; or
  >
  > (4) whether the action of the agency was otherwise not in accordance with law.

- *But see Roberson v. Bd. of Educ. of the City of Santa Fe*, 1967-NMSC-176, ¶ 8, 78 N.M. 297, 430 P.2d 868 ("Appeals and writs of error are in no sense to be compared to certiorari . . . a formal application showing a prima facie case for relief is a prerequisite to issuance of certiorari.") (internal quotation marks and quoted authority omitted); Rule 1-075(C)(4) ("A petition for writ of certiorari shall contain . . . a concise showing that the petitioner is entitled to relief[.]").

- How does one make a prima facie case for entitlement to relief?

  - Can one simply allege that the administrative tribunal acted illegally?

  - If not, what more is required?

- Court of Appeals may review either by: (1) certification from district court, Rules 1-075(S) and 12-608 NMRA, or (2) writ of certiorari following district court's final order or judgment. Rules 1-075(V) and 12-505 NMRA. See additional discussion below.

Additional Authorities For Reviewing Administrative Action

Rule 1-076 NMRA governs *de novo* appeals from the NM Human Rights Commission.

Rule 1-077 NMRA governs appeals pursuant to NMSA 1978, § 51-1-8 of the Unemployment Compensation Law and follows review procedures similar to those set forth in Rule 1-074 NMRA.

The **Declaratory Judgment Act**, NMSA 1978, §§ 44-6-1 through -15 (1975), may be another avenue for challenging administrative agency action. But, "a declaratory judgment action challenging an administrative entity's authority to act ordinarily should be limited to purely legal issues that do not require fact-finding by the administrative entity." *Smith v. City of Santa Fe*, 2007-NMSC-055, ¶ 16, 142 N.M. 786.

Practice Tips For Administrative Appeals to District Court

1. Understand your audience. Remember that district court judges rarely act as record review judges; they more frequently act as the trier of fact.

2. Pay attention to the quality of the evidence the administrative agency considered.

3. Tie your briefing and your argument to the record. Spend the necessary time to advocate a point with a direct reference to the record.

Certification to the New Mexico Court of Appeals

Rules 1-074(S) and 1-075(S) are identical and govern certification to the Court of Appeals as follows:

> Certification. Upon the district court's own review, or in response to a motion for certification by any party within thirty (30) days of the filing of the notice of appeal and after allowing fifteen (15) days from service for response, **the district court may, as a matter of judicial discretion**, certify to the Court of Appeals a final decision appealed to the district court, but undecided by that court, **if the appeal involves an issue of substantial public interest** that should be decided by the Court of Appeals. In determining whether a case involves an issue of substantial public interest, the district court shall consider, but is not limited to, whether the case involves:
>
> (1) a novel question;
>
> (2) a constitutional question;
>
> (3) a question of state-wide impact;
>
> (4) a question of imperative public importance;
>
> (5) a question that is likely to recur and the need for uniformity is great;
>
> (6) whether an appeal from any district court determination is highly likely such that certification in the first instance would serve the interests of judicial economy and reduce the litigation expenses to the parties; or
>
> (7) whether the case involves an important local question which should receive consideration from the district court in the first instance.
>
> Upon the request of a party or on the court's own motion, the court may allow oral argument on the issue of certification. After receipt of the completed record, the district court shall notify the parties of its decision concerning certification as provided by Rule 12-608 NMRA.

(Emphasis added).

NMSA 1978, § 39-3-1.1(F) provides that "[t]he district court may certify to the court of appeals a final decision appealed to the district court, but undecided by that court, if the appeal involves an issue of substantial public interest that should be decided by the court of appeals. The appeal ***shall then be decided*** by the court of appeals." (Emphasis added).

Rule 12-608 NMRA is the corresponding rule of appellate procedure governing certification from the district court, and provides the following:

> Any certification of a matter to the Court of Appeals by the district court pursuant to Section 39-3-1.1 NMSA 1978 shall be accompanied by the district court file, including all copies of transcripts of the agency and briefs filed in the district court, which shall thereafter be treated as filed with the Court of Appeals. The clerk of the district court shall give prompt notice to all parties of the certification of any matter to the Court of Appeals. ***After certification, the court shall issue a calendar notice and the case shall proceed in accordance with Rule 12-210 NMRA.*** The Court of Appeals may direct the filing of other or supplemental briefs and may limit the questions to be argued therein. A party may file a request for oral argument within fifteen (15) days of the date of certification, and otherwise in accordance with Rule 12-214 NMRA.

(Emphasis added).

The Court of Appeals has held that it must accept a "proper" certification by the district court; a proper certification is one that invokes issues of substantial public interest. *Jicarilla Apache Nation v. Rio Arriba County Assessor*, 2004-NMCA-055, ¶¶ 11-13, 135 N.M. 630, *rev'd on other grounds by Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, 136 N.M. 630.

Certiorari Review in the New Mexico Court of Appeals

Both Rule 1-074(V) and Rule 1-075(V) provide an avenue for "further review" of an administrative decision in the New Mexico Court of Appeals. These rules reference Rule 12-505 of the Rules of Appellate Procedure, which is the rule governing petitions for writ of certiorari.

The Court of Appeals "may exercise its discretion whether to grant the [certiorari] review." Rule 12-505(B).

Contents of the petition "shall" include:

(a) the date of entry of the judgment or final order of the district court and any order entered by the court on a motion for rehearing;

(b) the questions presented for review by the Court of Appeals (the Court will consider only the questions set forth in the petition);

(c) the facts material to the questions presented;

(d) the basis for granting the writ, specifying where applicable:

(i) **the citation to any decision of the Supreme Court or Court of Appeals with which it is asserted the final order of the district court is in conflict**, including a quotation from the part of the Court of Appeals or Supreme Court decision showing the alleged conflict with the district court decision;

(ii) **the citation to any statutory provision, ordinance or agency regulation with which it is asserted the final order of the district court is in conflict** and appropriate quotations from the statutes, ordinances or regulations showing the alleged conflict with the district court decision;

(iii) **what significant question of law under the Constitution of New Mexico or the United States is involved**; or

(iv) **the issue of substantial public interest** that should be determined by the Court of Appeals;

(e) a direct and concise argument amplifying the reasons relied upon for granting the writ, including specific references to the statement of appellate

or review issues filed in the district court, showing where the questions were presented to the district court; and

(f) a prayer for relief, including whether the case should be remanded to the district court for consideration of issues not raised in the petition if the relief requested is granted.

Rule 12-505(D)(2) (emphasis added).

NOTES

NOTES

NEW MEXICO COURT OF APPEALS
CASELOAD REPORT 7/1/15 TO 6/30/16

NEW CASE FILINGS:

Category	Total Filed		Percentage of Cases Filed
Criminal	**379**		**43%**
General Civil	**266**		**31%**
Mental Health		0	
WC Dist. Ct.		0	
Medical Malpractice		7	
Writ of Error		13	
Other Torts		13	
Property		5	
Probate		12	
Environmental-Water		3	
Environmental-Misc.		0	
Other Civil Cases and contracts		213	
Discretionary	**66**		**8%**
Interloc-Crim		22	
Interloc-Civ		24	
12-505 Writ of Certiorari		19	
Class Action Certification		1	
Domestic	**40**		**5%**
Divorce w/Custody/Support		21	
Divorce w/o Custody/Support		19	
Administrative/WCA	**49**		**6%**
Workers Comp Administration		39	
Unemployment Comp		0	
Other Administrative Appeals		10	
Children's Court	**64**		**7%**
Children's Court Delinquency		15	
Termination of Parental Rights		49	

GRAND TOTAL NEW CASES- 864

NEW MEXICO COURT OF APPEALS
CASELOAD REPORT 7/1/15 TO 6/30/16

CASE DISPOSITIONS:

Category	Total Number Filed
Opinions	554
Dismissals by Order	184
Transfers	3
Certifications	9
Total Cases Disposed of	750

DISPOSITION RATE FOR FY 16:

Total New Cases Filed	864
Total Dispositions	750
Disposition Rate	87%

CASELOAD BACKLOG as of July 31, 2016
(cases submitted to a panel for decision and
cases fully briefed, ready for submission): 179

GENERAL CALENDAR OPINIONS 240 (43%)

SUMMARY CALENDAR OPINIONS 314 (57%)

REVERSAL RATE: 23%

NOTES

NOTES

THE MEDIATION PROGRAM
IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

I. BACKGROUND

1. History

The United States Court of Appeals for the Tenth Circuit's mediation program began operation on April 1, 1991. Mediation conferences are held in civil cases prior to briefing to explore settlement possibilities and to perform limited case management functions.

On October 1, 2009, the Bankruptcy Appellate Panel of the Tenth Circuit started to use the services of the Tenth Circuit's mediation office. The BAP currently refers all its appeals, other than those filed by *pro se* parties, to the Tenth Circuit's mediation office.

2. Purpose

A. The primary purpose of the mediation conference is to explore the possibilities of settlement.

-- It is also used incidentally to clarify issues presented in the appeal and to identify and resolve, by agreement of the parties, any matters that may interfere with the smooth handling or disposition of the case.

-- Experience shows that preliminary review of the issues by the parties with a court mediator often leads to a realistic and less partisan view of the chances of success, resulting in settlement or withdrawal of some appeals or particular issues.

B. The program is based on four assumptions:

1) lawyers are frequently reticent about initiating settlement negotiations for fear of appearing weak;

2) the appellate process, unlike at the trial level, presents few opportunities for the parties to meet to discuss settlement;

3) a third-party mediator can help parties accomplish things they cannot accomplish alone; and

4) a mediation office, operating with confidentiality apart from the court's decisional process, can offer flexibility otherwise unavailable in a formal court setting.

3. Authority

A. Federal Rule of Appellate Procedure 33

> The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

B. Tenth Circuit Rule 33.1

> **(A) Circuit mediation office; purpose of mediation conference.** The circuit mediation office may schedule and conduct mediation conferences in any matter pending before the court. The primary purpose of a conference is to explore settlement, but case management maters may also be addressed.
>
> **(B) Participation of counsel and parties.** Counsel must participate in every scheduled mediation conference and in related discussions. Generally a party may participate but need not unless required by the circuit mediation office. Conferences are conducted by telephone unless the circuit mediation office directs otherwise.

(C) **Preparation of counsel for mediation conference; settlement authority**. Counsel must consult with their clients and obtain as much authority as feasible to settle the case and agree on case management matters in preparing for the initial conference. These obligations continue throughout the mediation process.

(D) **Confidentiality.** Statements made during the conference and in related discussions, and any records of those statements, are confidential and must not be disclosed by anyone (including the circuit mediation office, counsel, or the parties; and their agents or employees), to anyone not participating in the mediation process. Proceedings under this rule may not be recorded by counsel or the parties.

(E) **Conference order; mediator authority**. The circuit mediation office may cause a judgment or order to be entered controlling the course of the case or the mediation proceedings. The circuit mediation office and its mediators are delegates of this court. Any conference orders or other communications from the circuit mediation office must be treated the same as any other court directive.

(F) **Extensions for ordering transcript or filing brief.** The time allowed by Fed. R. App. P. 10(b)(1) for ordering a transcript and by Rule 31.1 for filing briefs is not automatically tolled pending a conference. If a conference has been scheduled, counsel may contact the circuit mediation office for an extension of time to order a transcript or to file a brief.

(G) **Request for mediation conference by counsel.** Counsel may request a mediation conference by contacting the circuit mediation office. The office will determine whether a conference will be held.

(H) **Sanctions.** The court may impose sanctions if counsel or a party violates this rule or an order entered under it.

4. Scope – Cases selected by the program

-- All civil appeals in which all parties are represented by counsel are eligible for a mediation conference.

-- Mediation conferences are not referred in *pro se* cases.

-- All eligible cases are mediated unless their number exceeds the mediation office's availability to handle them. In that event, cases are selected at random from the pool of eligible cases.

II. PROCEDURE

1. Docketing Statement

Tenth Circuit Rule 3.4 requires a docketing statement to be filed within 14 days after filing of the notice of appeal. The docketing statement sets forth a brief procedural history and factual background of the case, as well as the issues to be raised on appeal, a copy of the decision or order appealed from, and a copy of the district court docket sheet.

2. Scheduling

Cases are selected and scheduled for mediation conferences from the docketing statement. When a case is set for a mediation conference, counsel are notified of the time, date, and nature (in person or telephone) of the conference.

Cases are ordinarily selected and the mediation conference notice sent out within a week of the filing of the docketing statement. Mediation conferences are usually held about two weeks after the notice is sent. If someone has an unavoidable scheduling conflict, they may request that the mediation conference be rescheduled. Usually one or more alternate dates will be provided by the circuit mediation office and the requesting attorney will be asked to secure agreement from the other participants.

3. Mediation conference

Typically, the initial mediation conference is conducted by telephone. In some cases, however, counsel and/or clients may be required to attend in person. The mediation conference notice will specify whether the mediation

conference will be by telephone or in person.

The mediation conference usually lasts about an hour, although it may last anywhere from twenty minutes to over two hours.

A. Discussion of law and facts

Counsel are expected to be fully prepared to discuss the legal merits of the case.

The mediator will have reviewed the order or opinion appealed from and possibly other materials and may try to anticipate settlement options.

The mediation conference frequently involves a discussion of the legal merits of the case for the purpose of focusing on the key issues in the appeal and making a realistic assessment of the case.

B. Examine bases for settlement and explore common ground

Counsel are required to discuss settlement with their clients in advance of the conference and to be familiar with their clients' interests and wants regarding settlement.

Counsel are encouraged to avoid rigid, predetermined positions that inhibit the development of new and creative settlement options.

Frequently the mediator will have candid private discussions with counsel to determine the client's reasons for pursuing the case and to discover real interests.

C. Discuss procedural matters

Procedural matters are also discussed in order to streamline the appeal process and avoid unnecessary paperwork. For example, transcript difficulties may be resolved, briefing schedules modified, or appeals consolidated.

All actions are done with the agreement of the parties.

4. Confidentiality

To encourage full and frank discussion, all communications in the course of a mediation conference or in any subsequent discussions are kept confidential. See 10th Cir. R. 33.1(D).

Nothing said in the mediation conference is placed in the record or disclosed in any way to the court by the mediator. Similarly, counsel may not refer to or quote any statements made during the course of the mediation conference in briefs or at oral argument or to anyone outside the mediation process. *Clark v. Stapleton Corporation*, 957 F.2d 745 (10th Cir. 1992).

5. Follow-up

If further negotiations beyond the initial mediation conference are warranted, follow-up conversations or additional conferences may be conducted. Follow-up work typically constitutes the bulk of the workload of the office. If briefs are due to be filed soon after the initial mediation conference and the parties and the mediator agree that it would be worth deferring briefing until negotiations are completed, an order may be entered extending briefing dates.

If a settlement is reached, the parties will be given a date certain for the filing of a settlement stipulation or further report. If agreement is reached on matters that would facilitate the handling of the appeal (such as elimination of duplicative briefs or motions, stipulations or amendments regarding the record, etc.), an appropriate order reflecting such agreement will be issued.

6. Function of mediator

- -- act as catalyst (bring parties together)
- -- maintain fairness in the negotiating process
- -- act as buffer when parties or counsel clash
- -- keep lines of communication open and negotiations credible and trustworthy
- -- help parties objectively assess merits of case
- -- propose settlement alternatives

7. Common pitfalls and trouble spots

- -- pressing extreme bargaining positions
- -- bargaining too hard
- -- acting in bad faith
- -- failure to communicate with client
- -- failure to understand client's needs and interests

The New Mexico Court of Appeals

MEDIATION CONFERENCE PROCEDURES AND SUGGESTIONS FOR EFFECTIVE MEDIATION REPRESENTATION

The Appellate Mediation Office conducts mediation conferences pursuant to Rule 12-313 NMRA, and Court of Appeals Order No. 1-42. Mediation Procedures are governed by Order No. 1-42 and the procedures outlined herein, not the Mediation Procedures Act. (See NMSA 1978, § 44-7B-3(B)4 (2007)). The mediation conferences are designed to reduce the time and expense of appeals by addressing any matter that may aid in their disposition. The mediation conferences offer parties and their counsel confidential, no cost, risk-free opportunities to explore possibilities for voluntary settlements.

Case Selection

Any matter pending before the Court is eligible for mediation. Although the Appellate Mediation Office typically schedules civil cases for mediation upon assignment to the general calendar, mediation services are available at any time in any case during the pendency of the appeal. Counsel may request mediation by contacting the Mediation Office; such requests are kept confidential unless permission is given to disclose the request. Additionally, the Court may refer cases for mediation at any time. The Mediation Office does its best to schedule conferences only in cases that appear to have some potential for settlement; should a case be scheduled for mediation that seems unsuited or inappropriate for mediation counsel are requested to contact the Mediation Office.

Appellate Mediation Conference Format

After a brief opening statement by the mediator, each side will be asked to make an opening statement that should include its perspectives on the conflict and possibilities they see for a mediated outcome. Often, by going beyond the issues on appeal, participants are able to identify important needs, values, and interests that serve as a basis for global resolution of the dispute. Legal issues may be directly discussed, however, the purpose is not to decide or reach a conclusion about the merits of the appeal, but rather to facilitate an understanding of the issues and an evaluation of the risks and opportunities for each side. Candid examination of the case can help the parties reach consensus on a reasonable settlement. The mediator may inquire whether any procedural questions or problems can be resolved by agreement.

Extensions of Time

The times on appeal are not suspended upon notice of a mediation conference. However, the Court recognizes that a case's settlement potential may decline as substantial funds are expended on an appeal. In order to moderate such expenditures in appropriate cases while settlement is

being considered, counsel are encouraged to orally request the mediator to grant an extension of time on deadlines imposed by the Court. Such requests may be made before, during, and after a scheduled conference. The mediator has complete authority to grant such extensions of time. No formal motions are required.

What Participants Can Expect

The mediator typically probes for each party's underlying needs and interests in an effort to help the parties create and explore options for resolving the dispute. The mediator may lead a considered and sometimes detailed exploration of the cases' merits, depending on the extent to which the participants place importance on their ability to predict how the Court of Appeals would resolve the appeal. The Mediation Office welcomes the opportunity to go beyond just the issues in the appeal to explore the possibilities of global settlement of any and all issues related to the parties.

What the Court Expects from Counsel

Mediation is most productive when counsel are conversant with the pertinent facts and law in a case and are fully aware of their clients' interests, goals, and needs. Sessions are not productive when counsel present and maintain extreme positions and engage in hard, bottom-line bargaining. Counsel should obtain advance authority from their clients to make those commitments as may reasonably be anticipated. By developing and discussing a realistic view of the consequences of not reaching an agreement, counsel can obtain the authority to settle the case if the mediation results in a settlement opportunity that is favorable to the client. Experience has shown that in most cases there is substantial movement from prior settlement positions. Counsel are strongly urged to consider having their clients present or available by phone at the time of the conferences.

Mandatory Participation--Voluntary Settlement

Although mediation conferences are relatively informal, they are official proceedings of the Court and the Court may require all parties to participate. The mediation process is nonbinding, so no settlement is complete until all parties fully agree to settlement terms and conditions and the necessary documents are finalized.

Confidentiality

The Court, by rule and verbal agreement of the parties at each conference, ensures that nothing said by the participants, including the mediator, is disclosed to anyone on the Court of Appeals or any other court that might address the case's merits. The Court will not reveal any request by counsel for mediation without the requesting party's permission. Ex parte communications are

also confidential except to the extent disclosure is authorized. This confidentiality rule applies in all cases including those referred for mediation by a panel.

How to Prepare for a Mediation Conference

- Prepare thoroughly (as if you were going to a hearing or a trial) with the ultimate goal of resolving the dispute in mind. Make a candid assessment of the respective strengths and weaknesses of both sides' legal positions. Be prepared to suggest an approach for the mediator to take in an attempt to settle the case (e.g. "problem" to be resolved, sequence of issues). Understand your client's priority of interests. Imagine creative solutions.
- Understand the rules of the Court and the role of the mediator.
- Advise the mediator if you believe it might be helpful to invite the participation of an entity who is not a party to the appeal.
- Consider contacting opposing counsel in advance of the conference as a means to establish a positive working relationship.
- Consider the principal-agent issues (e.g. incentives, roles, information) that may impact on each side's behavior.

The "Authority" Issue in Mediation

- If "having the right person involved in the negotiation" has been a problem in the past, raise the issue with the mediator before the mediation session. Obtain a clear understanding of who will be present at the mediation and what authority they will have.
- If your client is a government or institution, understand the settlement approval process that applies and discuss your concerns and timetable issues with the mediator in advance.
- Understand whether the person has authority to decide or to "report and recommend" a proposed settlement to a superior.
- Have someone with authority present or available.

How to Work with the Mediator

- Follow the mediator's cues. Anticipate questions such as: (1) What happened? (2) How do you feel about the situation and what underlying needs would you like have satisfied? (3) What do you want from the mediation in terms of priorities, interests, results?
- If the mediator asks you to restate a point, be patient. The mediator may be asking you questions for clarification or to elicit information that the other party needs to hear.

The Role of Case Evaluation in the Mediation

- Mediation is not designed for "deciding past rights and past wrongs"--that is more suitably the role of courts and arbitration. It is designed to help parties look forward to develop solutions for problems.
- The mediator will not predict how the court will rule in a particular case, but rather attempt to clarify the tensions surrounding the issues on appeal.
- The mediator may provide objective court information--how the court operates. The mediator may discuss generally how a case gets assigned to a non-summary calendar, the

probabilities of the case being decided by a formal opinion, time lines, and generic reversal rates.

Elements of Effective Communication

- A skillful presentation does not need to be conciliatory. A reason based approach to settlement may serve to generate a rigorous analysis of the risks and benefits of both reaching a settlement and continued litigation. There is nothing wrong with stating all the reasons for settlement but at the same time communicating that you are prepared for a judicial resolution of the legal issues. The style and tone of your approach will have a substantial influence in persuading the other side to listen to you and to seriously consider what you are saying.
- Discuss the "common ground" that the parties may have in seeking to resolve the situation.
- Encourage your client to speak if you believe it appropriate, and let your client respond directly to questions from the mediator or the other side, if you are prepared to do so.

Private Conferences with the Mediator

- Be clear about what information you expect the mediator to treat as confidential.
- Use this opportunity to (1) do reality checking with your client; (2) discuss expectations with your client; (3) explore your strengths and weaknesses in the case; (4) discuss the other party's needs or interests; (5) discuss what information the mediator can use to do "reality-testing" of other party's expectations and position.

Further information is available from the Appellate Mediation Office, New Mexico Court of Appeals, Box 25306, Albuquerque, New Mexico 87125. Telephone 505-767-6101. Fax 505-841-4614.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE COURT OF APPEALS SETTLEMENT CONFERENCE PROCEDURES.

Miscellaneous Order
No. 01-42

ORDER

This matter has come before the Court upon re-evaluation of the Appellate Mediation Office and the Court is satisfied that the office continues to significantly reduce the number of cases to be decided by opinion and continues to provide a valuable service to litigants. The Court therefore adopts the following procedures, pursuant to Rule 12-313 NMRA 1998, to hold conferences to facilitate the settlement of cases pending on appeal.

IT IS THEREFORE ORDERED THAT:

1. Appellate Mediation Office and Appellate Mediator. The Appellate Mediation Office operates under the direct supervision of an Appellate Mediator, an employee of the Court designated to oversee implementation of the program. Judges, their law clerks, prehearing staff attorneys, and administrative personnel of the Court shall not have access to information related to settlement that is generated by the activities of the Appellate Mediation Office.

2. Mediation conference; scheduling and purpose. The Appellate Mediation Office may schedule and conduct mediation conferences in any matter pending before the Court. The primary purpose of a mediation conference is to explore settlement and simplify issues, but matters relating to processing of the appeal may be discussed.

3. Participation of counsel and parties. Counsel shall participate in every scheduled mediation conference and in related discussions. Generally, a party may participate but need not unless required by the Appellate Mediator. Conferences are conducted by telephone unless the Appellate Mediation Office directs otherwise.

4. Preparation of counsel for mediation conference; settlement authority. In preparing for the initial conference, counsel shall consult with their clients and obtain as much authority as feasible to settle the case and to agree on case management matters. These obligations continue throughout the mediation process.

5. Confidentiality. Statements made during a mediation conference and in related discussions are confidential and shall not be disclosed to any court by the Appellate Mediation Office, counsel, or the parties. See Rule 11-408 NMRA 1998. The Appellate Mediator shall not communicate anything to the other side that was revealed in a private discussion without authorization from

counsel. The proceedings shall not be recorded by counsel or the parties.

6. **Conference order; mediator authority.** The Appellate Mediator may cause an order to be entered controlling the course of the mediation proceedings. The Appellate Mediator is a delegate of the Court. All conference orders and other directives from the Appellate Mediation Office shall be treated as any other Court directive.

7. **Extensions.** The time allowed by Rule 12-208 for filing a docketing statement, by Rule 12-211 NMRA 1998 for causing a transcript to be filed, by Rule 12-212 NMRA 1998 for designating exhibits and depositions, and by Rules 12-210 and -213 NMRA 1998 for filing briefs and memoranda is not automatically tolled pending a mediation conference, but the Appellate Mediator has authority to grant extensions of time, whether specifically requested or not and whether requested orally or in writing. If no extension order is entered, applicable time limits continue to run.

8. **Request for mediation conference by counsel.** Counsel or any Court of Appeals Judge working on a case may request a mediation conference by contacting the Appellate Mediation Office. All requests shall be kept confidential. The Appellate Mediator shall determine whether a conference will be held.

9. **Sanctions.** The Court may impose sanctions if counsel or a party

fails to comply with these procedures or an order entered pursuant to these procedures.

CYNTHIA A. FRY, Chief Judge

JAMES J. WECHSLER, Judge

MICHAEL D. BUSTAMANTE, Judge

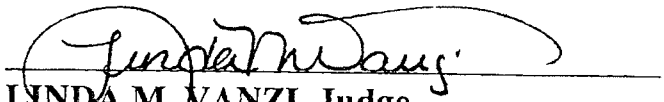
JONATHAN B. SUTIN, Judge

CELIA FOY CASTILLO, Judge

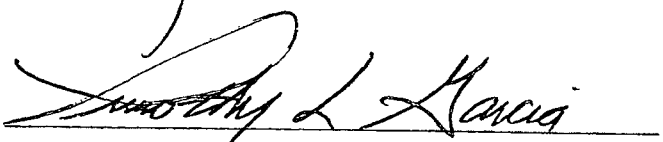
RODERICK T. KENNEDY, Judge

MICHAEL E. VIGIL, Judge

ROBERT E. ROBLES, Judge



LINDA M. VANZI, Judge



TIMOTHY L. GARCIA, Judge

NOTES

West's New Mexico Statutes Annotated
State Court Rules
1. Rules of Civil Procedure for the District Courts
Article 7. Judgment

NMRA, Rule 1-054

RULE 1-054. JUDGMENTS; COSTS

Currentness

A. Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master or the record of prior proceedings.

B. Judgment Upon Multiple Claims or Involving Multiple Parties.

(1) Except as provided in Subparagraph (2) of this paragraph, when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

(2) When multiple parties are involved, judgment may be entered adjudicating all issues as to one or more, but fewer than all parties. Such judgment shall be a final one unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment. If such provision is made, then the judgment shall not terminate the action as to such party and shall be subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties.

C. Demand for Judgment. A judgment by default shall not be different in kind from or exceed the amount prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

D. Costs.

(1) *Costs other than attorney fees.* Except when express provision therefor is made either in a statute or in these rules, costs, other than attorney fees, shall be allowed to the prevailing party unless the court otherwise directs; but costs against the state, its officers and agencies shall be imposed only to the extent permitted by law.

(2) *Recoverable costs.* Costs generally are recoverable only as allowed by statute, Supreme Court rule and case law. The following costs generally are recoverable:

(a) filing fees;

(b) fees for service of summonses, subpoenas, writs and other service of process;

(c) jury fees as provided in Rule 1-038 NMRA;

(d) transcript fees including those for daily transcripts and transcripts of hearings prior or subsequent to trial, when requested or approved by the court;

(e) the cost of a deposition:

(i) if any part is used at trial; or

(ii) in successful support or defense of a motion for summary judgment pursuant to Rule 1-056 NMRA; or

(iii) when the court determines the deposition was reasonably necessary to the litigation;

(f) witness mileage or travel fare and per diem expenses, when the witness testifies at trial or at a deposition which is deemed reasonable and necessary, and as limited by Sections 38-6-4(A), 39-2-8, 39-2-9 and 39-2-10 NMSA 1978;

(g) expert witness fees for services as provided by Section 38-6-4(B) NMSA 1978 or when the court determines that the expert witness was reasonably necessary to the litigation;

(h) translator fees, when the translated document is admitted into evidence;

(i) reasonable expenses involved in the production of exhibits which are admitted into evidence;

(j) official certification fees for documents admitted into evidence; and

(k) interpreter fees for judicial proceedings and depositions.

(3) *Non-recoverable costs.* Unless specifically authorized by statute, Supreme Court rule or case law, the following costs generally are not recoverable:

(a) except as provided in Paragraph D(2)(i) of this rule, photocopying and other reproduction expenses;

(b) telephone expenses;

(c) facsimile expenses;

(d) courier service expenses;

(e) attorney mileage, travel fare and per diem expenses;

(f) paralegal and other support staff expenses;

(g) general office expenses; and

(h) legal research, including computer-assisted research.

(4) *Procedure for recovery of costs.* Within fifteen (15) days after filing of the final judgment, the party recovering costs shall file with the clerk of the district court an itemized cost bill, with proof of service of a copy on opposing counsel. Any party failing to file a cost bill within fifteen (15) days after the filing of the final judgment shall be deemed to have waived costs. If no objections are filed within ten (10) days after service of the cost bill, the clerk of the district court shall tax the claimed costs which are allowable by law. The judge shall settle any objections filed.

E. Attorney Fees.

(1) Claims for attorney fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(2) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than fifteen (15) days after entry of judgment; must specify the judgment and the statute or other grounds entitling the moving party to the award; and must state the amount sought and the basis for the amount claimed.

(3) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. A judgment shall be prepared and entered as provided in Rule 1-058 NMRA.

F. Applicability. The provisions of this rule do not apply to claims for fees and expenses as sanctions.

Credits

[Amended effective Oct. 1, 1996; Dec. 15, 1999; Feb. 1, 2001; May 23, 2008.]

Editors' Notes

COMMITTEE COMMENTARY

After the filing of the final judgment, upon request of the prevailing party, the clerk shall issue a transcript of judgment. Section 39-1-6 NMSA 1978.

Notes of Decisions (334)

NMRA, Rule 1-054, NM R DIST CT RCP Rule 1-054
State court rules are current with amendments received through May 1, 2016.

End of Document

West's New Mexico Statutes Annotated
State Court Rules
12. Rules of Appellate Procedure
Article 2. Appeals from District Court

NMRA, Rule 12-203

RULE 12-203. INTERLOCUTORY APPEALS

Currentness

A. Application for Interlocutory Appeal. An appeal from an interlocutory order containing the statement prescribed by NMSA 1978, § 39-3-3(A)(3) or § 39-3-4(A) is initiated by filing an application for interlocutory appeal with the appellate court clerk within fifteen (15) days after the entry of such order in the district court. Copies of the application shall be served by the applicant on all persons who are required to be served with a notice of appeal pursuant to Rule 12-202 NMRA. The three (3) day mailing period set forth in Rule 12-308 NMRA does not apply to the time limits set by this subsection.

B. Content of Application. The application shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the district court, a statement of the question itself and a statement of the reasons why a substantial ground exists for a difference of opinion on the question and why an immediate appeal may materially advance the ultimate termination of the litigation. The statement of reasons shall contain case references, where available, and shall contain a summary of the applicant's arguments. The application shall include or have annexed thereto a copy of the order from which appeal is sought and of any findings of fact, conclusions of law and opinion relating thereto. The application may have annexed thereto any other documentary matters of record that will assist the appellate court in exercising its discretion. The docket fee shall accompany the application but no docketing statement or statement of the issues is required.

C. Form of Papers; Number of Copies. An application for interlocutory appeal shall conform to the requirements of Rules 12-305 and 12-306 NMRA.

D. Response. Any other party may file a response, with attachments, if any, with the appellate court clerk within fifteen (15) days after service of the application and shall serve a copy on the appellant. The appellate court may deny the application prior to the filing of a response. The appellate court may set a hearing on the application.

E. Grant of Application; Assignment. If an application for interlocutory appeal is granted, the case may be assigned to a calendar and the appellate court clerk shall give notice of the assignment in accordance with Rule 12-210 NMRA. The district court clerk shall transmit a copy of the record proper upon receipt of the notice of calendar assignment or of the proposed summary disposition. The granting of an application shall automatically stay the proceedings in the district court

unless otherwise ordered by the appellate court.

Credits

[Amended effective Jan. 1, 1997; April 1, 1998; June 15, 2000.]

Notes of Decisions (314)

NMRA, Rule 12-203, NM R RAP Rule 12-203
State court rules are current with amendments received through May 1, 2016.

End of Document

West's New Mexico Statutes Annotated
State Court Rules
12. Rules of Appellate Procedure
Article 5. Writs

NMRA, Rule 12-503

RULE 12-503. WRITS OF ERROR

Currentness

A. Scope. This rule governs the procedure for issuance of a writ of error by the Supreme Court and Court of Appeals to the district court.

B. Jurisdiction to Issue. As part of its appellate jurisdiction pursuant to Article 6, Section 29 of the Constitution of New Mexico, the Court of Appeals is granted authority to issue writs of error in those cases over which it would have appellate jurisdiction from a final judgment.

C. Time. A petition for writ of error shall be filed within thirty (30) days after the order sought to be reviewed is filed in the district court clerk's office. The three (3) day mailing period set forth in Rule 12-308 does not apply to this time limit.

D. Parties. The first party to file a petition for writ of error, and any party joining in that petition, shall be designated an "appellant". Any opposing party, regardless of whether that party has also filed a petition, shall be designated an "appellee". The district court shall not be a party to the proceeding on a writ of error.

E. Contents. A party seeking a writ of error shall file a petition not exceeding fifteen (15) pages in length which shall contain:

(1) a concise statement of the nature of the case, a summary of the proceedings, the disposition below and the facts relevant to the petition;

(2) a concise statement of how the order sought to be reviewed:

(a) conclusively determines the disputed question;

(b) resolves an important issue completely separate from the merits of the action; and

(c) would be effectively unreviewable on appeal from a final judgment because the remedy by way of appeal would be inadequate;

(3) a copy of the order of the district court with the date of filing noted on its face and any other matters of record that will assist the appellate court in exercising its discretion.

F. Filing. The petition shall be filed in the court which would have appellate jurisdiction over a final judgment in the case along with the appellate docket fee or free process order.

G. Service. The party filing the petition shall serve a copy of it on all other parties to the proceeding and on the district court judge.

H. Response. Any party may file a response to a petition for writ of error within ten (10) days of service of the petition. The response shall be limited to fifteen (15) pages in length and shall be served on all other parties and on the district court judge.

I. Proceedings Upon Issuance of Writ. The appellate court in its discretion may issue the writ. Upon issuance of the writ, the court shall assign the case to a calendar and the parties shall proceed in accordance with Rule 12-210. The district court clerk shall transmit a copy of the record proper upon receipt of the notice of calendar assignment. Upon issuance of the writ a copy of the writ shall be served on all persons required to be served under Rule 12-202.

J. Stay Upon Issuance of the Writ. Upon issuance of the writ, a party seeking a stay of the order which is the subject of the writ of error or a stay of proceedings pending appeal shall first seek such an order from the district court, and any party may thereafter seek appellate review of the district court's ruling pursuant to Rule 12-205, 12-206 or 12-207.

Notes of Decisions (51)

NMRA, Rule 12-503, NM R RAP Rule 12-503
State court rules are current with amendments received through May 1, 2016.

End of Document

West's New Mexico Statutes Annotated
State Court Rules
12. Rules of Appellate Procedure
Article 5. Writs

NMRA, Rule 12-504

RULE 12-504. EXTRAORDINARY WRITS

Currentness

A. Scope of Rule. This rule governs the procedure for the issuance of all writs in the exercise of the Supreme Court's original jurisdiction except for writs of certiorari to the Court of Appeals pursuant to Rule 12-502 NMRA and the district courts pursuant to Rule 12-501 and writs of error.

B. Initiation of Proceedings.

(1) Extraordinary writ proceedings in the exercise of the Supreme Court's original jurisdiction shall be initiated by filing with the Supreme Court clerk a verified petition of the party seeking the writ. Subject to the provisions of Rule 12-304 NMRA and Rule 23-114 NMRA, the appropriate docket fee shall accompany the petition. As used in this rule, a "verified petition" is one which contains a statement under oath that the signer has read the petition and that the statements contained in the petition are true and correct to the best of the signer's knowledge, information and belief. The statement under oath need not be notarized. The petition shall set forth the following:

(a) the grounds on which jurisdiction of the Supreme Court is based;

(b) the circumstances making it necessary or proper to seek the writ in the Supreme Court if the petition might lawfully have been made to some other court in the first instance;

(c) the name or names of the real parties in interest, if any, if the respondent is a justice, judge, or other public officer or employee, court, board or tribunal, purporting to act in the discharge of official duties;

(d) the ground or grounds upon which the petition is based, and the facts and law supporting the same stated in concise form; and

(e) a concise statement of the relief sought.

(2) The petition shall have attached as exhibits any opinions, orders, transcripts or other papers indicating the respondent's position on the matter in question, if available. The petition may have attached as exhibits any pleadings or other papers that are necessary and appropriate to inform the Court adequately regarding the circumstances out of which the petition arises and the basis for granting relief.

(3) If the circumstances giving rise to the petition appear to the petitioner to require the Court to act on an emergency basis, the petition shall clearly be designated in its title as an "emergency" petition.

C. Proceedings and Disposition.

(1) The respondent, the real parties in interest, and the attorney general may file a response to the petition. A response shall comply with the requirements of Paragraphs G and H of this rule. The Court may act on a petition prior to the filing of a response.

(2) If it appears to a majority of the Court that the petition is without merit, concerns a matter more properly reviewable by appeal, or seeks relief prematurely, it may be denied summarily.

(3) If the petition is not summarily denied, the Court may direct the respondent, the real parties in interest, and the attorney general to file a response or further response to the petition, may request briefs on the issues presented in the petition, or may set a hearing on the petition, and the matter shall proceed accordingly or as otherwise ordered by the Court.

(4) If the petitioner is entitled to a writ or relief other than that requested in the petition, the petition shall not be denied but the Court shall grant the writ or relief to which the petitioner is entitled.

D. Stays.

(1) A party filing a petition for an extraordinary writ and also seeking a stay of some action by the respondent pending disposition of the petition shall include the phrase "and Request for Stay" in the title of the petition in addition to complying with other requirements of this paragraph. The respondent, the real parties in interest, and the attorney general may file a response to the request for stay, which may be joined with a response to the petition. The Court may act on a request for stay prior to the filing of a response.

(2) The Court may issue a stay to the respondent without notice to the respondent or the real parties in interest only if:

(a) it clearly appears from the verified petition or by affidavit filed with the Court that immediate and irreparable injury, loss or damage will result to the petitioner before the respondent or real parties in interest can be heard in opposition;

(b) it clearly appears from the verified petition or by affidavit filed with the Court that no loss or damage will result to the respondent or any real parties in interest, or, if loss or damage will occur, what that loss or damage will be; and

(c) petitioner certifies in writing to the Court the efforts, if any, that have been made to give notice and the reasons supporting the petitioner's claim that notice should not be required.

(3) If a request for stay is granted pursuant to this rule, the respondent, the real parties in interest, and the attorney general may move to have the stay vacated and the Court may act thereon with or without notice as deemed appropriate.

E. Service. Service of all papers filed under the rule shall be made pursuant to Rule 12-307 NMRA upon petitioner, respondent, any real parties in interest and, if the respondent is as described in Subparagraph (c) of Subparagraph (1) of Paragraph B of this rule, the attorney general.

F. Costs and Fees. In disposing of a petition or request for stay, the Court may, in its discretion, assess costs and may, as permitted by law, award attorney fees.

G. Length Limitations. Except by permission of the Court, the petition shall comply with Rule 12-305 NMRA and the following length limitations:

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

(2) *Page limitation.* Unless the petition complies with Subparagraph (3) of Paragraph G of this rule, the body of the petition shall not exceed twenty (20) pages; or

(3) *Type-volume limitation.* The body of the petition shall not exceed six thousand (6,000) words, if the party uses a proportionally-spaced type style or typeface, such as Times New Roman, or six hundred fifty-five (655) lines, if the party uses a monospaced type style or typeface, such as Courier.

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

Credits

[Amended effective January 1, 1988; September 1, 1991; September 1, 1993; January 1, 1997; August 4, 2008; December 3, 2010.]

Notes of Decisions (49)

NMRA, Rule 12-504, NM R RAP Rule 12-504
State court rules are current with amendments received through May 1, 2016.

Stipulated Judgments

Kysar v. BP America Production Co., 273 P.3d 867 (2012)

2012 -NMCA- 036

KeyCite Yellow Flag - Negative Treatment
Distinguished by Gaddy v. Brascho, Ala., September 20, 2013

273 P.3d 867
Court of Appeals of New Mexico.

Raymond L. KYSAR, Patsy Sue Kysar, and The Kysar Family Trust, Plaintiffs–Appellants,
v.
BP AMERICA PRODUCTION COMPANY, f/k/a Amoco Production Company,
Defendant–Appellee.
and
William Karl Johnson and Mary M. Johnson, his wife, and all of their heirs and successors known and unknown, BP, the heirs and successors of Maude Keys, including, but not limited to Olie Mae McCoy, Laura A. Tovey, Clarence Riddle, Eugene Riddle, Joyce (Joy) Riddle Lee and Tommy Ralph Riddle, Ben Case, Henry and Georgia Knowlton; Onofre R. Jaquez and Alvina Jaquez, his wife, and all of their heirs and successors, known and unknown; Coleman Oil & Gas, Inc.; William Holmberg and Joyce Holmberg, his wife, Shirley M. Holmberg, and unknown Entities A–Z; John Does I–X (as yet unidentified agents, employees or contractors of BP America Production Company, BP, or unknown entities A–Z, who have trespassed on the Kysar Ranch); and all other persons unknown, claiming any right, title, estate, lien, easement, or interest in the real property described in the complaint adverse to Plaintiffs' ownership, or any cloud on Plaintiffs' title thereto, Defendants.

No. 29,756.
|
Jan. 19, 2012.

Synopsis

Background: Surface estate owner brought action against oil and gas lessee, alleging that lessee had no right to use road to access certain wells. The District Court, San Juan County, Robert A. Aragon, D.J., entered a stipulated order granting lessee a directed judgment. Surface owner appealed.

Holdings: The Court of Appeals, Vigil, J., held that:

[1] in a matter of first impression, owners were entitled to appeal from stipulated conditional directed verdict in favor of oil and gas lessee, and

[2] allegations in complaint were sufficient to allege issues of misrepresentation, fraud, and mistake.

Reversed and remanded.

West Headnotes (11)

[1] **Appeal and Error**
On consent, offer, or admission

New Mexico adheres to the general rule that a judgment by consent is not appealable.

Cases that cite this headnote

[2] **Stipulations**
Stipulations as to judgment and review

Surface estate owners were entitled to appeal from stipulated conditional directed verdict in favor of oil and gas lessee in which owners reserved their right to challenge the district court's evidentiary rulings; the parties stipulated that in light of the district court's decisions and evidentiary rulings, a reasonable jury would not have a legally sufficient evidentiary basis to find for owners on any of their claims, and in light of this stipulation, requiring owners to proceed with a trial when they could not prove a prima facie case simply to preserve an issue for appellate review would have resulted in a needless waste of scarce judicial resources, a needless waste of the jury's time, and a needless

waste of time and expense by the parties and their counsel.

1 Cases that cite this headnote

[3] **Appeal and Error**
⇐On consent, offer, or admission

An appeal will lie from a stipulated conditional directed verdict when the following conditions are satisfied: (1) rulings are made by the district court, which the parties agree are dispositive; (2) a reservation of the right to challenge those rulings on appeal; (3) a stipulation to entry of judgment; and (4) approval of the stipulation by the district court.

2 Cases that cite this headnote

[4] **Appeal and Error**
⇐Defects, objections, and amendments

Appellate court would not consider argument that district court committed reversible error by ordering counsel not to refer to certain facts in the opening statement in the absence of citation to some authority.

1 Cases that cite this headnote

[5] **Appeal and Error**
⇐Cases Triable in Appellate Court
Appeal and Error
⇐Rulings on admissibility of evidence in general

Ordinarily, appellate court reviews an evidentiary ruling of the district court admitting or excluding evidence for an abuse of discretion, while reviewing any interpretation of law underlying the ruling de novo.

2 Cases that cite this headnote

[6] **Constitutional Law**
⇐Advisory Opinions

Since there was no trial due to the district court entering a stipulated directed verdict, appellate court had no basis for determining whether trial court's exclusion of evidence constituted error, and any attempt by the appellate court to undertake an analysis would only result in an advisory opinion.

Cases that cite this headnote

[7] **Pretrial Procedure**
⇐Motions in limine; preclusion of evidence, argument, or reference

A motion in limine is merely a preliminary determination by a district court regarding the admissibility of evidence.

Cases that cite this headnote

[8] **Pretrial Procedure**
⇐Motions in limine; preclusion of evidence, argument, or reference

Order entered on a motion in limine should be clear and unequivocal; it should provide and advise counsel such ruling is without prejudice to the right to offer proof during the course of the trial, in the jury's absence, of those matters covered in the motion and if it then appears in the light of the trial record that the evidence is relevant, material and competent it may then be introduced, subject to opposing counsel's

objections, as part of the record of evidence for the jury's consideration.

Cases that cite this headnote

[9] **Pretrial Procedure**
Motions in limine; preclusion of evidence, argument, or reference

Motions in limine are interlocutory orders which are subject to reconsideration by the district court during the trial.

Cases that cite this headnote

[10] **Fraud**
Fraudulent representations or concealment as to particular facts

The allegations in surface estate owners' complaint against oil and gas lessee were sufficient to allege issues of misrepresentation, fraud, and mistake, where complaint alleged that lessee had made false representations regarding its right to cross property to reach wells which mislead owners. NMRA, Rule 1–009(B).

Cases that cite this headnote

[11] **Pleading**
Certainty, definiteness, and particularity

Although allegations of fraud must be stated with particularity in the complaint, the complaint does not have to use words such as "fraud" or "fraudulent" to meet the pleading requirement so long as the facts alleged are such as constitute fraud in themselves, or are facts from which fraud will be necessarily implied. NMRA, Rule 1–009(B).

Cases that cite this headnote

Attorneys and Law Firms

***868** Victor R. Marshall & Associates, P.C., Victor R. Marshall, Albuquerque, NM, for Appellants.

Holland & Hart, LLP, Bradford C. Berge, Jacqueline E. Davis, Santa Fe, NM, for Appellee.

OPINION

VIGIL, Judge.

{ 1} This case presents us with an issue of first impression: whether a plaintiff may appeal from a stipulated directed verdict when the parties have stipulated that the plaintiff cannot make a prima facie case due to in limine rulings made by the district court, the plaintiff reserves the right to appeal the in limine rulings, and the district court approves the stipulation. Answering this question in the affirmative, we then address the in limine orders of the district court, and reverse.

BACKGROUND AND PROCEDURAL HISTORY

{ 2} Plaintiffs own the surface estate of the Kysar Ranch, which consists of some 600 acres of land along the Animas River. The northern portions of the ranch were previously owned by Jessie Maude Keys, and the southern portions of the ranch were previously owned by Onofre and Alvina Jaquez. In 1948, Keys and Mr. and Mrs. Jaquez executed separate oil and gas leases on their respective properties to C.H. Nye. In 1949, Mr. and Mrs. Jaquez conveyed their surface estate, together with half of the underlying oil, gas, and mineral rights to Keys. In 1956, Keys deeded the now unified surface estate to Henry and Georgia Knowlton, reserving the entire mineral estate. By this transaction, all the minerals were

severed from the surface estate, and access to the minerals was preserved because Keys also reserved a right of ingress and egress to access the oil, ***869** gas, and other minerals. In 1983, Mr. and Mrs. Knowlton sold the entire surface estate to Plaintiffs, subject to all prior reservations of oil, gas, and other minerals. The surface estate is now known as the Kysar Ranch.

{ 3} As a result of a series of assignments, BP America Production Company (BP) is now the lessee under both of the original 1948 oil and gas leases, and operates six wells within the boundaries of the Kysar Ranch. Only two roads access the wells: the "Back Gate Road," which starts at the southeast corner of the Kysar Ranch and travels north, first through the Jaquez lease, and continuing north through the Keys lease; and the "Bridge Road," which crosses the Keys lease. The Bridge Road goes across a bridge over the Animas River and because of concerns that it cannot support the heavy machinery and equipment trucks must carry to and from the wells, BP uses the Back Gate Road to access all the wells on the Kysar Ranch.

{ 4} Since Plaintiffs acquired the surface estate to the Kysar Ranch in 1983, their relationship with BP and Amoco, its immediate predecessor, has been marked by discord. A series of disputes were resolved by a settlement agreement in 2000 (the 2000 Settlement Agreement) between Plaintiffs and Amoco. The 2000 Settlement Agreement resolved claims that Amoco's operations had damaged the Kysar Ranch, constituted an unreasonable use of the surface, or otherwise constituted a trespass. However, the 2000 Settlement Agreement did not resolve one major disagreement: whether Amoco had a right to use the Back Gate Road to access the Sullivan Gas Com E–1 Well (the E–1 Well) located on Bureau of Land Management (BLM) land outside, but adjacent to, the Kysar Ranch.

{ 5} In accordance with the 1953 amendments to the Keys and Jaquez leases, the BLM land and a portion of the Kysar Ranch were subject to a 1992 communitization agreement under federal law. The parties disagreed about whether under these instruments or the leases, Amoco had a right to use the Back Gate Road on the Kysar Ranch to access the E–1 Well outside of the Kysar Ranch. Thus, Plaintiffs filed suit against Amoco in the United States District Court in 2000, alleging that its use of the Back Gate Road to access the E–1 Well outside the Kysar Ranch constituted an unlawful trespass under New Mexico law. This case resulted in two opinions, which we refer to herein as *Kysar I* and *Kysar II.* In *Kysar v. Amoco Prod. Co.,* 2004–NMSC–025, 135 N.M. 767, 93 P.3d 1272 (*Kysar I*), our Supreme Court answered questions certified by the Tenth Circuit. This was followed by *Kysar v. Amoco Prod. Co.,* 379 F.3d 1150 (10th Cir.2004) (*Kysar II*), in which the Tenth Circuit decided the appeal before it after our Supreme Court answered the questions certified to it by the Tenth Circuit. These appeals determined that the 1992 communitization agreement did not grant Amoco a right to use the Back Gate Road located on the Keys lease to access the E–1 Well off the Kysar Ranch and that Amoco could not use that part of the Back Gate Road on the Jaquez lease for this purpose, because the Jaquez lease did not expressly grant such a right. *Kysar II,* 379 F.3d at 1156. After *Kysar I* and *Kysar II* were decided, Plaintiffs and BP, Amoco's successor, entered into a second settlement agreement in 2005 (the 2005 Settlement Agreement), which granted BP an easement to access the E–1 Well through the Kysar Ranch.

{ 6} However, the 2005 Settlement Agreement did not resolve BP's access to any other existing wells or any other matters. The 2005 Agreement expressly provides, "The parties contested issue may facilitate settlement expressly reserve whatever rights they may have concerning other wells, or any other matters, including any rights of the parties under other agreements or instruments heretofore executed by the parties, except as expressly covered in this Agreement."

{ 7} The case before us concerns Plaintiffs' subsequently filed suit in which they contend that BP has no right to use the Back Gate Road crossing the Jaquez leases to reach wells located on the Keys leases. Plaintiffs demanded a jury and they sought damages and injunctive relief in several causes of action.

***870** { 8} After the jury was chosen, Plaintiffs' counsel advised that he intended to publish to the jury in the opening statement, placards with blown up excerpts of the opinions in *Kysar I* and *Kysar II.* BP objected, and the district court ruled that Plaintiffs' counsel was prohibited from using or displaying the placards or mentioning them or their content to the jury during the course of opening statement. Following additional discussion, Plaintiffs' counsel stated he could not give an intelligible opening statement and asked the district court to certify an interlocutory appeal. The district court inquired if this request stemmed from the ruling on the opening statement, and counsel responded, "No, it's the culmination of all the rulings that have been made over

the last two years which leave me with essentially no case and no ability to present it." This referred to various in limine rulings made by the district court which prohibited Plaintiffs from presenting certain evidence at trial.

{ 9} BP stated that if Plaintiffs were unable to prove their case, the district court should enter a directed verdict. The district court expressed discomfort about entering a directed verdict in favor of BP before any evidence was introduced and, after additional discussion, Plaintiffs' counsel again reiterated that he had no case to present. The parties therefore agreed that in light of the in limine rulings of the district court, a stipulated order granting BP a directed verdict was appropriate. The stipulated order approved by the district court grants BP a directed verdict, while expressly preserving all of Plaintiffs' claims on appeal. In its entirety, the "Stipulated Order Granting Directed Verdict In Favor Of Defendant BP America Production Company" states:

> THIS MATTER came before the Court on May 19, 2009, on the parties' joint request for entry of a stipulated order directing a verdict in favor of BP American [sic] Production Company. The Court having heard the arguments of counsel, having reviewed the applicable law, and being otherwise fully advised in the premises, find that the parties' joint request is well-taken and should be GRANTED, as follows:
>
> 1. On May 18, 2009, a 12–person jury was selected, sworn into service, and empaneled for trial of this matter.
>
> 2. On May 19, 2009, prior to the parties' opening statements, the Court addressed and ruled upon certain evidentiary issues raised by the parties. The Court's decisions on those evidentiary matters are reflected in separate orders in this case.
>
> 3. In light of the Court's decisions and evidentiary rulings to date, the parties stipulated that a reasonable jury would not have a legally sufficient evidentiary basis to find for Plaintiffs on any of the claims raised by Plaintiffs' complaint. In so stipulating, each party reserved the right to challenge the Court's aforementioned decisions and rulings on appeal.
>
> 4. In light of the parties' stipulation, which is well taken, the Court determines that the claims raised by Plaintiffs' complaint, insofar as they pertain to BP America Production Company, should be dismissed and finds that BP America Production Company is entitled to judgment as a matter of law.
>
> 5. The parties further stipulated that, respecting BP America Production Company's counterclaim, because Plaintiffs have not prevented or attempted to prevent BP or its personnel from accessing its wells on Plaintiffs' property, BP America Production Company has incurred no damage as a result of Plaintiffs' revocation or purported revocation of permission relating to such access. The parties further stipulated that no such damage will be incurred for so long as Plaintiffs do not prevent or attempt to prevent BP America Production Company or its personnel from accessing its wells on Plaintiffs' property.
>
> 6. In light of the parties' stipulation, which is well taken, the Court determines that the parties stipulation of dismissal respecting BP America Production Company's counterclaim pursuant to Rule 1–041(A)(2) NMRA is proper.
>
> IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that, pursuant to Rule 1–050 NMRA, JUDGMENT is hereby entered in favor of BP America Production Company, and against Plaintiffs, ***871** on all issues raised by Plaintiffs' complaint, and that all of Plaintiffs' claims against BP America Production Company be and hereby are DISMISSED, *with prejudice,* and without leave to amend.
>
> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that, pursuant to Rule 1–041(A)(2), BP America Production Company's counterclaim against Plaintiffs is hereby DISMISSED.
>
> IT IS FINALLY ORDERED, ADJUDGED, AND DECREED that each party to this action shall bear its own costs, expenses, and attorney fees incurred to date.

{ 10} We first address whether this is an appealable order, and then address the orders on the various motions in limine in greater detail.

APPEAL OF A STIPULATED CONDITIONAL DIRECTED VERDICT

{ 11} We characterize the order before us as a "stipulated conditional directed verdict." The directed verdict was conditionally stipulated to, with each party

expressly reserving the right to challenge rulings of the district court on appeal, with success on appeal resulting in a reversal of the directed verdict. Whether such an order is appealable presents a question of law, which invokes de novo review. *Baca v. Los Lunas Cmty. Programs,* 2011–NMCA–008, ¶ 7, 149 N.M. 198, 246 P.3d 1070 (stating that a question of appellate jurisdiction presents a question of law, which we review de novo).

{ 12} BP contends that Plaintiffs are barred from appealing based on our precedent which ordinarily prohibits a party from appealing from a judgment entered with that party's consent. *See Gallup Trading Co. v. Michaels,* 86 N.M. 304, 305, 523 P.2d 548, 549 (1974) (stating the general rule that a judgment by consent cannot be appealed from). In *Gallup Trading Co.,* it was not necessary for the Supreme Court to address the various circumstances that would allow an exception to the general rule regarding appeals from stipulated and consent judgments. For the reasons which follow, we disagree with BP and conclude that under the conditions we hereinafter set forth, an appeal will lie from a stipulated conditional directed verdict.

{ 13} In general, a party cannot appeal from a judgment entered with its consent. E.H. Schopler, Annotation, *Right to Appellate Review of Consent Judgment,* 69 A.L.R.2d 755, § 3 (1960). However, the federal courts and some state courts have carved out exceptions allowing appeals from consent judgments in certain circumstances. Schopler, *supra* § 5. All the federal circuits except the Fifth Circuit allow an appeal from a consent judgment provided that the party explicitly reserves the right to appeal a contested issue.[1] Some state courts also allow an appeal from a consent judgment if the party has expressly reserved the right in the judgment.[2] Other states reach the same result ***872** when the trial court's rulings have effectively precluded the plaintiff from proceeding with the trial.[3] The broad reasons supporting these views are that: (1) it is a waste of judicial resources to require a plaintiff to undertake a trial which will in all probability be unsuccessful merely to obtain a judgment which is appealable; and (2) allowing an appeal in these circumstances effectuates the intention of the parties. *See Villano v. Waterman Convalescent Hosp., Inc.,* 181 Cal.App.4th 1189, 105 Cal.Rptr.3d 276, 279 (2010). On the other hand, some state courts have concluded that parties cannot confer appellate jurisdiction by stipulating to a reservation of appellate rights, and they do not allow appeals from consent judgments. Schopler, *supra* note 6, § 29, at 814–15.

[1] { 14} New Mexico also adheres to the general rule that a judgment by consent is not appealable. *See Gallup Trading Co.,* 86 N.M. at 305, 523 P.2d at 549. While our courts have not conclusively decided whether to adopt an exception to this general rule, historical precedent points us in that direction. We begin with *Ward v. Broadwell,* 1 N.M. 75, 90–91 (1854), *superseded by statute as stated in State v. De Armijo,* 18 N.M. 646, 654, 140 P. 1123, 1125 (1914) (decided under former law), in which our Supreme Court held that a party was entitled to appellate review when he abandoned his case by a nonsuit due to an adverse pretrial ruling of the district court. *Id.* The Court stated, "[w]here a party has been compelled to abandon his case in consequence of an adverse decision of the court, to which he excepts, upon a vital point in his cause, we are by no means prepared to concede that his action was voluntary." *Id.* On this ground, the Court considered the appeal on the merits notwithstanding the general rule prohibiting appellate review of voluntary nonsuits. *Id.*

{ 15} More recently, and in a similar vein, in *Rancho del Villacito Condos., Inc. v. Weisfeld,* 121 N.M. 52, 908 P.2d 745 (1995), our Supreme Court noted with apparent approval authorities recognizing a "lack of consent" exception to the general rule, which prohibits an appeal from a consent judgment. *Id.* at 55, 908 P.2d at 748. This exception applies when the consent judgment is not completely voluntary because "an adverse ruling by the [district] court would effectively preclude recovery by the plaintiff or is completely dispositive of the case." *Id.* However, it was not necessary for the Court to decide whether to adopt the exception because the district court's rulings in that case did not fit the exception. *Id.*

[2] { 16} In this case, the parties stipulated that in light of the district court's decisions and evidentiary rulings, "a reasonable jury would not have a legally sufficient evidentiary basis to find for Plaintiffs on any of the claims raised by Plaintiffs' complaint." In light of this stipulation, requiring Plaintiffs to proceed with a trial when they cannot prove a prima facie case would result in a needless waste of scarce judicial resources, a needless waste of the jury's time, and a needless waste of time and expense by the parties and their counsel. Requiring a trial simply to preserve an issue for appellate review under these circumstances serves no useful purpose. Thus, the parties stipulated to entry of a judgment in favor of BP on all of Plaintiffs' claims. Further, Plaintiffs reserved the right to challenge the district court's decisions and rulings on appeal that ***873** prevented them from proving a prima

facie case. Finally, the stipulation of the parties was approved by the district court.

[3] { 17} Based on the foregoing, we conclude that an appeal will lie from a stipulated conditional directed verdict when the following conditions are satisfied: (1) rulings are made by the district court, which the parties agree are dispositive; (2) a reservation of the right to challenge those rulings on appeal; (3) a stipulation to entry of judgment; and (4) approval of the stipulation by the district court. Recognizing an exception to the general rule that an appeal will not lie from a judgment entered by consent when these conditions are satisfied conserves scarce judicial resources and preserves the constitutional right to appeal. Having determined that this case is properly before us, we turn to the pretrial rulings of the district court that Plaintiffs challenge on appeal.

THE DISTRICT COURT RULINGS

{ 18} We first address Plaintiffs' arguments concerning the *Kysar* opinions. The district court stated that counsel could not mention them in opening statements, as their relevance was not yet clear, but it was not ruling that Plaintiffs could not use them as evidence because this would require making an evidentiary ruling in a vacuum. The district court stated, "[I]f you have evidence that you wish to present that renders those opinions admissible, then you can seek to do that." The written order subsequently filed states, "Plaintiffs, through their counsel, are prohibited, in opening statement, from referencing prior court decisions between the parties and from showing the jury excerpts from those decisions. During trial, [P]laintiffs may renew their attempt to reference or introduce evidence respecting such decisions, subject to BP's ability to object and the Court's ability to rule on the admissibility of such evidence."

[4] { 19} Plaintiffs have failed to cite any authority, and we find none, in which an appellate court held that a district court committed reversible error by ordering counsel not to refer to certain facts in the opening statement. Therefore, we do not give further consideration to this issue. *State v. King*, 2007–NMCA–130, ¶ 17, 142 N.M. 699, 168 P.3d 1123 (declining to consider arguments unsupported by authority or analysis).

[5] { 20} We now turn to whether the district court's ruling on the admissibility of the *Kysar* opinions into evidence constituted reversible error. Ordinarily, we review an evidentiary ruling of the district court admitting or excluding evidence for an abuse of discretion, while reviewing any interpretation of law underlying the ruling de novo. *Dewitt v. Rent–A–Center, Inc.*, 2009–NMSC–032, ¶ 13, 146 N.M. 453, 212 P.3d 341.

[6] { 21} Importantly, in this case, no offer of proof was made, and no evidence was ever presented to the jury. Moreover, the district court ruled that during trial, Plaintiffs could seek to introduce the evidence, whereupon it would consider whether to admit the evidence. Reconsideration of the ruling would then be made in the specific context of the case at that point in the trial. However, since there was no trial, we have no basis for determining whether excluding the evidence might constitute error, and even if we could, we have no context for assessing whether excluding the evidence was prejudicial. It is a well-established principle of appellate review that the appellant has the burden of ensuring that the appellate court is provided with a complete record and transcript of proceedings that is sufficient to review the appellant's claims. *State v. Martinez*, 2002–NMSC–008, ¶ 48, 132 N.M. 32, 43 P.3d 1042; *see Vill. of Angel Fire v. Wheeler*, 2003–NMCA–041, ¶ 25, 133 N.M. 421, 63 P.3d 524 (stating that for appellate review to be meaningful, the record must be of sufficient completeness to permit proper consideration of the appellant's claims); *State v. Wilson*, 116 N.M. 793, 797, 867 P.2d 1175, 1179 (1994) ("It was [the] defendant's burden to make a sufficient record for review on appeal."). Furthermore, even if a district court makes an erroneous evidentiary ruling, it does not constitute reversible error unless it results in prejudice. Rule 11–103(A) NMRA ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]"); *City of Albuquerque v. Ackerman*, 82 N.M. 360, 365, 482 P.2d 63, 68 (1971) ("Harmless ***874** error in the exclusion of evidence cannot be the basis for a new trial."); *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 98 N.M. 570, 574, 651 P.2d 105, 109 (Ct.App.1982) ("A party must show prejudice before reversal is warranted."). Under the circumstances, there is no issue for us to decide, as we have no basis for reviewing whether the order of the district court constituted reversible error. Any attempt to undertake an analysis at this point would result in an advisory opinion, which we decline to give. *See Santa Fe So. Ry., Inc. v. Baucis Ltd. Liab. Co.*, 1998–NMCA–002, ¶ 24, 124 N.M. 430, 952 P.2d 31 ("Our concern with issuing advisory opinions stems from the waste of judicial resources used to resolve hypothetical situations which may or may not arise.").

{ 22} Prior to trial, the district court also made certain in limine rulings: (1) prohibiting Plaintiffs from introducing any evidence in support of their claim that their consent to BP to use the Back Gate Road was fraudulently or mistakenly induced by BP's misrepresentations about its rights to do so; (2) prohibiting Plaintiffs from introducing any evidence that BP refused to produce information or documents supporting its claimed right to use the Back Gate Road; (3) prohibiting Plaintiffs from introducing any evidence of damages for any alleged trespass occurring prior to June 20, 2005, the date that the complaint was filed; (4) prohibiting Plaintiffs from introducing any evidence of payments they received from BP for the easement on the Back Gate Road pursuant to the 2005 Settlement Agreement or payments for an easement on the Back Gate Road, which Plaintiffs granted to a third party; and (5) prohibiting Plaintiffs from introducing any evidence concerning the 2005 Settlement Agreement, and related evidence, if any.

[7] [8] [9] { 23} A motion in limine is merely a preliminary determination by a district court regarding the admissibility of evidence. *Proper v. Mowry,* 90 N.M. 710, 715, 568 P.2d 236, 241 (Ct.App.1977).

> The Order entered should be clear and unequivocal. It should provide and advise counsel such ruling is without prejudice to the right to offer proof during the course of the trial, in the jury's absence, of those matters covered in the motion and if it then appears in the light of the trial record that the evidence is relevant, material and competent it may then be introduced, subject to opposing counsel's objections, as part of the record of evidence for the jury's consideration.

Id. (internal quotation marks and citation omitted). Thus, motions in limine are interlocutory orders which are subject to reconsideration by the district court during the trial. "It is often impossible to make definitive evidentiary rulings prior to trial because admissibility will depend on the state of the evidence at the time of the ruling." *State v. Dubois,* 150 Vt. 600, 556 A.2d 86, 87–88 (1988). As the trial unfolds, and other evidence admitted, the context may demonstrate that excluded evidence is, in fact, relevant and admissible, making it proper for the district court to revisit, and modify or reverse its prior ruling. This is due to the very nature of a motion in limine. "[M]otions in limine seeking advance rulings on the admissibility of evidence are fraught with problems because they are necessarily based upon an alleged set of facts rather than the actual testimony which the trial court would have before it at trial in order to make its ruling." *State v. Young,* 133 Idaho 177, 983 P.2d 831, 833 (1999). In addition, "[R]ulings in limine can never be totally accurate in balancing the probative and prejudicial values of a piece of evidence which is best evaluated in the total trial context." Rothblatt & Leroy, *The Motion in Limine in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence,* 60 Ky. L.J. 611, 633 (1972). Thus, the ruling on the motion in limine may subsequently be changed, expanded or modified by the district court in light of the development of the evidence at trial. *See Proper,* 90 N.M. at 715, 568 P.2d at 241.

{ 24} Because of their nature, motions in limine are inherently difficult to review on appeal under an abuse of discretion standard in the circumstances before us in this case. There was no trial, so we have no context in which to determine whether the evidence is admissible. Further, since no evidence has been presented, we have no basis for assessing ***875** the effect of the ruling, and thus, whether prejudice resulted. We therefore conclude that, as with the district court's rulings concerning the *Kysar* opinions, we do not have an adequate record or basis for addressing Plaintiffs' arguments that the district court's in limine rulings 3, 4, and 5 set forth above constituted reversible error. *See Villano,* 105 Cal.Rptr.3d at 288 (holding that the tentative evidentiary rulings of the district court and posture of the case on review left the appellate court with no way of knowing what the evidence would have shown, which defeated the plaintiff's ability to show prejudice). We therefore decline to address Plaintiffs' arguments concerning these rulings.

[10] { 25} However, we do have an adequate record to assess the district court's in limine rulings 1 and 2. Those issues arose as follows. BP filed a motion in limine seeking to prohibit Plaintiffs from introducing any evidence that the permission Plaintiffs gave to BP to enter the Kysar Ranch was the product of misstatements or misrepresentations by BP. BP contended that the first time Plaintiffs raised either misrepresentation or mistake was when they included these claims in their requested jury instructions; that Plaintiffs never pled mistake or fraud, either specifically or generally; and that Plaintiffs had not attempted to amend their pleadings to include

claims of fraud or mistake. BP asserted that because Plaintiffs "have not complied with the pleading rules," and "have not heretofore alleged misrepresentation (fraud) or mistake," that Plaintiffs "cannot now raise these claims." BP therefore contended that Plaintiffs "should be barred from offering testimony or evidence in support of them."

{ 26} In response, Plaintiffs referred the district court to Paragraphs 26, 27, and 62–64 of the complaint, which they said "specifically allege misrepresentation, fraud, and concealment." In those paragraphs, the complaint alleges:

> 26. In response to the Kysars' objections, BP continues to falsely represent that it has the right to cross the Kysar Ranch to reach existing and proposed wells. However, no such express written conveyance exists.
>
> 27. Amoco (BP's predecessor in interest) knowingly made false representations about its supposed right to cross the Kysar Ranch which tended to and actually did deceive and mislead the Kysars in connection with BP's production and purchase of coal seam gas from the wells located on the Kysars' land.
>
> ....
>
> 62. Plaintiffs have asked BP for pertinent information concerning the basis for BP's claimed access rights on the Kysar Ranch, including the documents relating to the unitized or pooled tracts that affect the Kysar Ranch, and for those units contiguous to the Kysar Ranch. BP has refused to provide the information sought. The Kysars do not have ready access to this information, which is not regularly tracked by title companies.
>
> 63. BP continues to insist that it has the right to cross the Kysar Ranch where and when it pleases to access existing wells and any new wells that it locates anywhere on the Kysar Ranch. BP insists that it may use the Back Gate Road access for all of its existing wells and any new ones that it drills. BP is using roads located on one "unit" to gain access to wells located on other "units."
>
> 64. BP's dilatory, hide-the-ball tactics, when it has superior knowledge of the unitization agreements and oil and gas leases that impact on its location of various new wells, and its refusal to share this information with [P]laintiffs, constitutes a breach of the duty of good faith and fair dealing.

Plaintiffs asserted, "Misrepresentation can encompass innocent mistake, bona fide, but erroneous belief, negligent misrepresentation and intentional misrepresentation. It is for the jury to decide which it is once the evidence has been introduced and considered."

{ 27} The district court agreed with BP that Plaintiffs had not properly pled misrepresentation, mistake, or fraud, and ordered, "Plaintiffs are prohibited from offering any evidence or testimony in support of their claim that the consent that Mr. Kysar gave Amoco/BP, to use the Back Gate Road for ***876** access to wells on the Kysar Ranch, was fraudulently or mistakenly induced."

[11] { 28} Rule 1–009(B) NMRA states that allegations of fraud be stated with particularity in the complaint. However, this does not mean that the complaint must use words such as "fraud" or "fraudulent" to meet the pleading requirement so long as "the facts alleged are such as constitute fraud in themselves, or are facts from which fraud will be necessarily implied." *Romero v. Sanchez,* 83 N.M. 358, 359, 492 P.2d 140, 141 (1971) (internal quotation marks and citation omitted). Furthermore, our rules merely require pleadings to contain a short and plain statement of the claim or defense, and each pleading averment to be "simple, concise and direct," even when pleading with particularity. *See* Rule 1–008(E)(1) NMRA; *Maxey v. Quintana,* 84 N.M. 38, 40, 499 P.2d 356, 358 (Ct.App.1972). The allegations we have quoted above are sufficient to allege issues of misrepresentation, fraud, and mistake and they put BP on notice that such claims were being made. *See Robertson v. Carmel Builders Real Estate,* 2004–NMCA–056, ¶¶ 33–35, 135 N.M. 641, 92 P.3d 653 (concluding that general and specific allegations of ongoing false representations were sufficient to plead fraud under Rule 1–009(B)).

{ 29} We agree with Plaintiffs that the foregoing allegations are sufficient to raise issues of misrepresentation, fraud, and mistake. Accordingly, it was error for the district court to exclude evidence that the consent given to Amoco/BP, to use the Back Gate Road for access to wells on the Kysar Ranch, was fraudulently or mistakenly induced. Further, the allegations make evidence of BP's refusal to produce pertinent documents purporting to give it a right to cross the Kysar Ranch to access existing and future wells, relevant to Plaintiffs'

claim that BP breached the duty of good faith and fair dealing. *See* Rule 11–401 NMRA (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); Rule 11–402 NMRA (providing that all relevant evidence is admissible).

CONCLUSION

{ 30} The "Stipulated Order Granting Directed Verdict In Favor Of Defendant BP America Production Company" is reversed, and the case is remanded to the district court for further proceedings consistent with this Opinion.

{ 31} **IT IS SO ORDERED.**

WE CONCUR: MICHAEL D. BUSTAMANTE and TIMOTHY L. GARCIA, Judges.

All Citations

273 P.3d 867, 2012 -NMCA- 036

Footnotes

1 *See Amstar Corp. v. So. Pac. Transp. Co.,* 449 U.S. 924, 924, 101 S.Ct. 327, 66 L.Ed.2d 153 (1980) (Blackmun, J., dissenting) (dissenting from the denial of certiorari from the Fifth Circuit case declining to adopt other circuits' view stating that the denial "utterly ignores the parties' intent in executing a consent to a judgment and in their subsequent actions pursuant thereto"); *Downey v. State Farm Fire & Cas. Co.,* 266 F.3d 675, 683 (7th Cir.2001) (noting that "[a] reservation of rights is incompatible with waiver" and citing all circuits that have adopted the view that consent judgments are appealable on issues reserved for appeal and noting that the Fifth Circuit is the exception); *Keefe v. Prudential Prop. & Cas. Ins. Co.,* 203 F.3d 218, 223 (3d Cir.2000) (adopting other circuits' view that consent judgments are appealable when the right to appeal is reserved; the court noted, "[w]hen it is clear from the agreement between the parties that the losing party intends to appeal ... it is unlikely that an appeal will undermine the settlement agreement.... Indeed, in some situations, the option to craft a settlement agreement that provides for the possibility of an appeal on some contested issue may facilitate settlement of other issues"); *Dorse v. Armstrong World Indus., Inc.,* 798 F.2d 1372, 1375 (11th Cir.1986) (declining to follow Fifth Circuit view), *aff'd by Dorse v. Eagle–Picher Indus., Inc.,* 898 F.2d 1487 (11th Cir.1990).

2 *See Uncle Joe's Inc. v. L.M. Berry & Co.,* 156 P.3d 1113, 1120–21 (Alaska 2007) (determining that parties may only appeal a stipulated judgment if they have expressly reserved the right to appeal, and the appeal is limited to those issues to which the right has been reserved); *N.J. Schs. Constr. Corp. v. Lopez,* 412 N.J.Super. 298, 990 A.2d 667, 674 (N.J.Super.Ct.App.Div.2010) (allowing reservation of appeal from a stipulated judgment provided that the parties agree that "the judgment would be vacated if the interlocutory order were reversed on appeal" and the order reflects that agreement explicitly or implicitly (internal quotation marks and citation omitted)).

3 *See Hense v. G.D. Searle & Co.,* 452 N.W.2d 440, 444–45 (Iowa 1990) (holding that the plaintiff did not consent to judgment because the rulings of the trial court effectively precluded her from recovery); *Bldg. Indus. Ass'n v. City of Camarillo,* 41 Cal.3d 810, 226 Cal.Rptr. 81, 718 P.2d 68, 71 (1986) (In Bank) ("If consent was merely given to facilitate an appeal following adverse determination of a critical issue, the party will not lose his right to be heard on appeal."); *Carden v. Johnson,* 282 Or. 169, 577 P.2d 513, 515 (1978) (en banc) (hearing appeal after the plaintiff voluntarily dismissed her case in order to obtain a final appealable order after the district court refused to enter a default judgment, noting that although illogical and unorthodox, it was a more efficient way to secure a right to appeal than by obtaining a writ of mandamus); *Marlboro Cotton Mills v. O'Neal,* 114 S.C. 459, 103 S.E. 781, 782 (1920) (determining that when the district court's rulings foreclose the plaintiff's claims the plaintiff may enter a nonsuit that will not be considered voluntary by the court and will therefore be appealable).

Kysar v. BP America Production Co., 273 P.3d 867 (2012)

2012 -NMCA- 036

End of Document

Practical Finality

State v. Begay, 148 N.M. 685 (2010)
241 P.3d 1125, 2010 -NMCA- 089

148 N.M. 685
Court of Appeals of New Mexico.

STATE of New Mexico, Plaintiff–Appellee,
v.
Eugene BEGAY, Defendant–Appellant.

No. 29,425.
|
Sept. 3, 2010.

Synopsis
Background: Defendant appealed magistrate court's revocation of his probation. The District Court, San Juan County, Karen L. Townsend, D.J., denied defendant's request for a de novo revocation hearing and remanded matter to magistrate court. Defendant appealed.

Holdings: The Court of Appeals, Castillo, J., held that:

[1] district court order was final and appealable, and

[2] defendant was entitled to de novo hearing in district court.

Reversed and remanded.

West Headnotes (6)

[1] **Criminal Law**
Probation or suspension of sentence

District court order, denying defendant's request for de novo hearing on appeal of revocation of probation and remanding matter to magistrate court, was a final appealable order, pursuant to doctrine of practical finality, since order was in error; dismissal of defendant's appeal for lack of finality would in effect deny the appeal on its merits, since defendant had been entitled to a de novo hearing at district court level, rather than a new hearing at magistrate court level.

2 Cases that cite this headnote

[2] **Criminal Law**
Finality of determination in general

In general, the right to appeal is restricted to final judgments and decisions.

1 Cases that cite this headnote

[3] **Criminal Law**
Finality of determination in general

A "final order," for purposes of determining a party's right to appeal, is commonly defined as an order that decides all issues of fact and law necessary to be determined or which completely disposes of the case to the extent the court had the power to dispose of it.

3 Cases that cite this headnote

[4] **Criminal Law**
Finality of determination in general

For purposes of determining a party's right to appeal, finality of an order is to be given a practical, rather than a technical, construction.

1 Cases that cite this headnote

[5] **Criminal Law**
Preliminary or interlocutory orders in general

Ordinarily, an order remanding a case for further proceedings in a lower court is not considered final for purposes of appeal, since after remand, the appellant has another opportunity to obtain review in the district court and then in an appellate court.

2 Cases that cite this headnote

[6] **Criminal Law**
Trial de novo

Defendant was entitled to de novo hearing in district court following magistrate court's revocation of probation, since probation revocation in magistrate court was not of record. NMRA, Rule 6–802(D).

1 Cases that cite this headnote

Attorneys and Law Firms

**1126 Gary K. King, Attorney General, Francine A. Chavez, Assistant Attorney General, Santa Fe, NM, for Appellee.

Hugh W. Dangler, Chief Public Defender, Kathleen T. Baldridge, Assistant Appellate Defender, Santa Fe, NM, for Appellant.

OPINION

CASTILLO, Judge.

*686 { 1} The district court reversed the magistrate court's order revoking Defendant's probation and remanded the case to the magistrate court for a full hearing on the probation revocation. Defendant appeals, and we reverse. The district court erred in failing to conduct a de novo hearing on the revocation and in remanding for an additional hearing at the magistrate court level on this issue. We remand for a de novo hearing by the district court consistent with this opinion.

I. BACKGROUND

A. Proceedings in Magistrate Court

{ 2} Defendant was convicted of DWI, third offense, and was sentenced to 364 days of incarceration with 306 suspended, followed by a twenty-eight-day stay at a treatment facility, and then 364 days of supervised probation including an unspecified aftercare program. An aftercare contract was signed by Defendant and filed with the magistrate court specifying that Defendant would receive outpatient treatment from the Salvation Army Adult Rehabilitation Program (Salvation Army Program). After completing a large portion of the Salvation Army Program, Defendant was terminated. On November 20, 2008, Don Teel, the adult rehabilitation program residence manager for the Salvation Army Program, sent a letter addressed "To Whom it May Concern" indicating that on November 19, 2008, Defendant was terminated from the Salvation Army Program for non-compliance with the established program policy. The letter alleged violations including "[d]isrespecting staff[,] giving false statement implicating another beneficiary of misconduct[, and] giving false statement on conduct report write [-]up." On the face of the letter, there is what appears to be a photocopied post-it note to "Ethan" from "Traci" indicating that Teel had died on December 27.

{ 3} Defendant's probation was revoked in magistrate court on January 6, 2009, and he was sentenced to 265 days in jail. Defendant appealed the probation revocation to district court.

B. Proceedings in District Court

{ 4} At the initial hearing in district court held on February 17, 2009, Defendant argued that the magistrate court revoked his probation without an evidentiary basis and that he was denied a full hearing. The State did not have enough information to respond and requested the probation violation paperwork from Defendant. The court also requested the paperwork and requested that Defendant identify the issues on appeal.

{ 5} The next day, Defendant filed a motion to re-examine revocation of probation. He argued that his probation should not have been revoked because he did not violate any of the conditions of probation. He claimed that his attendance in the Salvation Army Program was entirely voluntary and, as it was not ordered by the magistrate court, his premature termination from the program did not violate a condition of probation. Defendant also argued that there was insufficient evidence regarding his termination from the Salvation Army Program to establish a violation of his probation to a reasonable certainty. He stated his position that the only evidence introduced at the revocation hearing ***687 **1127** in magistrate court was the hearsay evidence of unverified facts consisting of Teel's letter. He argued that the hearsay evidence was particularly unpersuasive because it consisted of only a conclusion of misbehavior, not a "narrative of specific events."

{ 6} The district court conducted a hearing on March 2, 2009. The State conceded that the only evidence supporting termination was Teel's letter, which was hearsay. Although the State and district court determined that there had not been a full hearing in magistrate court, Defendant informed the court that he was not seeking a remand for another hearing because there was no evidence for the State to present. He further asserted that a remand was unwarranted because he was entitled to a new probation revocation hearing in district court because this was a de novo appeal. The State disagreed because there had yet to be a full hearing in magistrate court.

{ 7} The district court found that the propriety of the revocation was questionable because there appeared to be no admissible evidence to support the magistrate court's findings. The district court also found that Defendant was not entitled to a de novo hearing on the probation revocation so it issued an order remanding to the magistrate court for a new hearing on the probation revocation. It orally indicated that the magistrate court should be instructed not to take hearsay into account in redetermining whether Defendant violated his probation, but there is nothing in the order so stating.

{ 8} In its order of remand and mandate, the district court included findings that: (1) Defendant was not entitled to a de novo hearing on the revocation of probation because a revocation hearing is not a trial; (2) the parties stipulated that revocation was based on Teel's letter of November 20, 2008, and that Teel had died prior to the hearing; (3) the parties' stipulations call into question the propriety of the evidence used at the revocation hearing; and (4) there appeared to be no appropriate evidence to support the revocation.

{ 9} Defendant appealed to this Court, and the parties were specifically instructed to brief two questions: (1) when is an order on probation revocation subject to de novo review and when is such an order subject to on-record review, and (2) which magistrate and/or district court rules apply to appeals of probation revocation orders.

II. DISCUSSION

A. Finality

[1] { 10} The State contends that Defendant's appeal is improper because the order remanding to the magistrate court is not a final order for purposes of appeal. We disagree.

[2] [3] [4] { 11} "In general, the right to appeal is restricted to final judgments and decisions." *High Ridge Hinkle Joint Venture v. City of Albuquerque,* 119 N.M. 29, 33, 888 P.2d 475, 479 (Ct.App.1994) (citing NMSA 1978, § 39–3–2 (1966)), *rev'd on other grounds by* 1998–NMSC–050, 126 N.M. 413, 970 P.2d 599. A final order is commonly defined as an order that decides all issues of fact and law necessary to be determined or which completely disposes of the case to the extent the court had the power to dispose of it. *See B.L. Goldberg & Assocs. v. Uptown, Inc.,* 103 N.M. 277, 278, 705 P.2d 683, 684 (1985). However, finality "is to be given a practical, rather than a technical, construction." *Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992), *limited on other grounds by Trujillo v. Hilton of Santa Fe,* 115 N.M. 397, 398, 851 P.2d 1064, 1065 (1993); *see State v. Apodaca,* 1997–NMCA–051, ¶ 15, 123 N.M. 372, 940 P.2d 478 (recognizing that "the constitutional right to appeal must be given a practical construction").

{ 12} The State notes that the district court's order does not address sentencing, and the State asserts that the district court remanded the case to the magistrate court so that Defendant could be afforded a full hearing in accordance with Rule 6–802(C) NMRA and NMSA 1978, Section 31–21–15(B) (1989). It then argues that the district court's order is not sufficiently final because

Defendant is awaiting a new hearing consistent with the order of remand, and the outcome of the State's motion to revoke probation has yet to ***688 **1128** be determined. We are unpersuaded that the district court's order is not final.

[5] { 13} "Ordinarily, an order remanding a case for further proceedings in a lower court is not considered 'final' for purposes of appeal." *State v. Ahasteen,* 1998–NMCA–158, ¶ 11, 126 N.M. 238, 968 P.2d 328. The rationale is that, after remand, the appellant has another opportunity to obtain review in the district court and then in this Court. *See id.* However, this rationale does not apply in a case such as this one where dismissal of Defendant's appeal for lack of finality would in effect deny the appeal on its merits. *Id.* ¶ 12.

{ 14} Assuming that Defendant is correct and that he is entitled to a de novo hearing in district court—an issue addressed in the following section of this opinion—then the order remanding for a new hearing is in error, and Defendant should not be subject to another revocation hearing at the magistrate court level. *See generally id.* ¶¶ 12–20 (holding that the district court's order refusing to exercise jurisdiction and remanding to the magistrate court for trial was sufficiently final for purposes of appeal and then determining that the remand was in error); *cf. Collado v. N.M. Motor Vehicle Div.,* 2005–NMCA–056, ¶ 6, 137 N.M. 442, 112 P.3d 303 (recognizing an exception to the general rule that an order of remand is not sufficiently final for purposes of appeal pursuant to the doctrine of practical finality "if the party opposing remand would be unable to have the propriety of the remand heard at a later date"); *Apodaca,* 1997–NMCA–051, ¶ 16, 123 N.M. 372, 940 P.2d 478 (holding that the defendant could appeal the district court's order granting a new trial because his "right not to be subjected to a second trial for the same offense could not be remedied once the second trial has taken place"). Therefore, because finality depends upon the very question at issue in this case, whether Defendant is entitled to a de novo hearing in district court on the State's motion to revoke his probation, we apply the doctrine of practical finality in this case and proceed to the merits of Defendant's appeal. *See Ahasteen,* 1998–NMCA–158, ¶ 13, 126 N.M. 238, 968 P.2d 328 (applying the doctrine of practical finality to allow an appeal from an order of remand).

B. Merits

[6] { 15} The question of whether Defendant is entitled to a de novo hearing in district court on the State's motion to revoke his probation requires us to interpret and apply Rule 6–802(D) and, as such, presents a question of law that we review de novo. *State v. Foster,* 2003–NMCA–099, ¶ 6, 134 N.M. 224, 75 P.3d 824 ("We review de novo questions of law concerning the interpretation of Supreme Court rules and the district court's application of the law to the facts[.]").

{ 16} Rule 6–802(D) provides:

> The decision of the court to revoke probation may be appealed to the district court as otherwise provided in these rules. The only issue the district court will address on appeal will be the propriety of the revocation of probation. The district court shall not modify the sentence of the magistrate court.

The State acknowledges that multiple authorities provide that appeals from magistrate court are subject to de novo review, except as otherwise provided by law. *See, e.g.,* N.M. Const. art. VI, § 27 ("Appeals shall be allowed in all cases from the final judgments and decisions of ... inferior courts to the district courts, and in all such appeals, trial shall be had de novo unless otherwise provided by law."); NMSA 1978, § 39–3–1 (1955) ("All appeals from inferior tribunals to the district courts shall be tried anew in said courts on their merits, as if no trial had been had below, except as otherwise provided by law."); NMSA 1978, § 35–13–2(A) (1996) ("Appeals from the magistrate courts shall be tried de novo in the district court."); Rule 6–703(J) NMRA ("Trials upon appeals from the magistrate court to the district court shall be de novo."). However, the State argues that this authority should be interpreted as only applying to de novo trials as opposed to special proceedings such as a probation revocation hearing which, the State contends, may only be reviewed for errors of law. We reject this contention.

{ 17} First, there is nothing in the language of Rule 6–802(D) or any other rule or ***689 **1129** statute specifically providing that the district court only reviews probation revocation orders for errors of law. To the contrary, as previously stated, numerous rules and statutes provide that appeals to district court are de novo unless some rule or provision of law specifically states

otherwise. We are not aware of any such contrary provision; there is no other standard of review indicated in Rule 6–802(D), and there is no other rule supporting the State's position that the district court was correct in holding "a deferential hearing on the magistrate court's ruling." *See State v. Garcia,* 2003–NMCA–045, ¶ 5, 133 N.M. 444, 63 P.3d 1164 (filed 2002) (observing that "[t]he only law of which we are aware indicates that magistrate court appeals to district court are to be heard by trial de novo").

{ 18} Likewise, we are not convinced that the inability of the district court to alter the sentence or the limitation on its review to the propriety of the revocation impacts Defendant's right to a de novo hearing on the propriety of the revocation. *See* Rule 6–802(C) (outlining the magistrate court's probation and sentencing options once a probation violation is established); Rule 6–802(D) (stating that when reviewing a probation revocation on appeal, the district court may not modify the sentence of the magistrate court). To the contrary, we interpret the limitation as merely reflecting that the district court's review of the propriety of a probation revocation does not warrant the additional exercise of its discretion to determine the effect of that revocation on sentencing. It recognizes that, unless the district court disagrees with the magistrate court's revocation decision, the latter court's decision as to the effect of revocation on sentencing should be allowed to stand. *See State v. Gallegos,* 2007–NMCA–112, ¶ 21, 142 N.M. 447, 166 P.3d 1101 (noting that a common sense approach should be taken when "determining the jurisdiction of the district court to entertain de novo appeals").

{ 19} Although this case presents an issue of first impression in that it requires us to interpret Rule 6–802(D), we are guided by previous cases establishing that when a court is not of record, de novo review is necessary. For example, although the State contends that this Court's opinion in *Foster* supports its position, we disagree. In *Foster,* we noted that "[w]hether a lower court is of record determines whether a trial will be de novo." *Foster,* 2003–NMCA–099, ¶ 9, 134 N.M. 224, 75 P.3d 824. We also observed that "[t]he magistrate court ... is not a court of record [and] [t]herefore, appeals from magistrate courts are de novo." *Id.* (citations omitted).

{ 20} We further note that *Foster* did not concern a de novo trial. Instead, the defendant was convicted in magistrate court, appealed to district court, and filed a pretrial motion claiming that the trial in magistrate court had violated double jeopardy. *Id.* ¶ 4. The state argued that the district court should not be allowed to consider the defendant's claim of double jeopardy because, given that trial was de novo, it was as if the magistrate court trial never existed. *Id.* ¶ 10. This Court disagreed and held that a de novo appeal was an appropriate avenue for the defendant to assert his double jeopardy claim. *Id.*

{ 21} In *Foster,* we recognized the broad appellate jurisdiction of district courts to conduct trials de novo and, "when called upon, [to] hear pretrial motions in de novo appeals." *Id.* ¶ 11; *see State v. Hicks,* 105 N.M. 286, 287, 731 P.2d 982, 983 (Ct.App.1986) ("[T]he right of appeal [from courts not of record] is the right to a trial *or hearing de novo* in the district court." (emphasis added)). As in *Foster,* "[w]e see no justification for limiting the authority of the district court to hear [the] motion in this case [and] hold that the district court has jurisdiction as well as a constitutional and statutory obligation to consider [the] motion on the merits." 2003–NMCA–099, ¶ 11, 134 N.M. 224, 75 P.3d 824; *see Hicks,* 105 N.M. at 287, 731 P.2d at 983.

{ 22} A similar issue, albeit with the state taking a contrary position, was considered by this Court in *Hicks.* In *Hicks,* the metropolitan court dismissed the complaint filed against the defendant because the complaint was not filed in a timely manner, and the district court affirmed the dismissal, finding that the metropolitan court did not abuse its discretion. 105 N.M. at 287, 731 P.2d at 983. On appeal, the state argued that the district ***690 **1130** court erred in applying an "appellate standard of review" and that it should have made an independent determination of whether dismissal was proper. *Id.* The defendant argued that the district court proceeding was not a "trial" in the ordinary meaning of that word and, thus, a de novo proceeding was not required. *Id.* This Court agreed with the state and found the defendant's argument was "not consistent with the meaning of the word 'appeal' in the context of [Article] VI, Section 27." *Hicks,* 105 N.M. at 287, 731 P.2d at 983.

{ 23} In *Hicks,* this Court held that, because criminal actions in metropolitan court were not of record at that time, "the right of appeal in such actions is the right to a trial or hearing de novo in the district court [, and] [i]n de novo proceedings, the district court is not in any way bound by the proceedings in the lower court." *Id.* (citation omitted). We held that the district court was required to independently determine whether the requirements of the metropolitan court were complied with and thus

remanded the case to district court to make such a determination. *Id. Compare State v. Spillman,* 2010–NMCA–019, ¶ 6, 147 N.M. 676, 227 P.3d 1058 (filed 2009) (holding that before a defendant could contest the validity of a plea entered in metropolitan court by appealing to district court, he had to first move to set aside his plea in metropolitan court because in an on-the-record appeal to district court, that court is the equivalent of an appellate court), *cert. denied,* 2010–NMCERT–001, 147 N.M. 673, 227 P.3d 1055, *with Gallegos,* 2007–NMCA–112, ¶¶ 3–8, 142 N.M. 447, 166 P.3d 1101 (conducting an evidentiary hearing in district court to determine the validity of the defendant's plea entered in magistrate court).

{ 24} In this case, because the probation revocation in magistrate court was not of record, Defendant was entitled to a hearing de novo in the district court in which the court was in no way "bound by the proceedings in the lower court." *Hicks,* 105 N.M. at 287, 731 P.2d at 983. After such a hearing, the district court should either reverse the order revoking probation and remand for enforcement of that judgment or if de novo review indicates that the probation revocation was proper, remand for enforcement of the sentence imposed by the magistrate court. *See* Rule 6–703(P); Rule 6–802(D).

{ 25} While acknowledging that the magistrate court is not a court of record, the State argues that a sufficient "record can be made by requiring the party filing an appeal in district court to request that the magistrate court enter findings of fact and conclusions of law to be incorporated in [its] judgment and sentence orders following probation revocation hearings." The propriety of the revocation proceeding could then be determined from the findings and conclusions and, if not, remand would be the proper remedy. The State suggests that this Court could "mandate as a matter of procedure that the magistrate courts make such findings and conclusions as part of the record on appeal," and probation revocation orders issued by magistrate courts could be amended to reflect that on appeal defendants are not entitled to de novo review.

{ 26} We construe these procedures and requirements suggested by the State as a request for a change in the Rules of Criminal Procedure because there are no current magistrate or district court rules mandating such procedures and requirements. *See generally* Rule 6–703 (setting forth the requirements for an appeal from magistrate court to district court). Specifically, there is nothing in the current rules requiring the record on appeal to contain findings and conclusions when a magistrate court revokes a probationer's probation. *See* Rule 6–703(F) (setting forth the contents of the record in an appeal from magistrate court). Any development or change in this area should be directed to our Supreme Court, our state's rule-making authority. *See Pub. Serv. Co. of N.M. v. Lyons,* 2000–NMCA–077, ¶ 23, 129 N.M. 487, 10 P.3d 166 (discussing the law of privilege). Nor do we perceive any need to adopt such procedures or to require the magistrate court to make findings and conclusions because the availability of de novo review obviates the need for such new procedures, findings, and conclusions. *See Gallegos,* 2007–NMCA–112, ¶ 3, 142 N.M. 447, 166 P.3d 1101 (recognizing that because the magistrate court is not a court of record, any "record" on appeal ***691 ****1131* would only consist of papers filed in that court).

{ 27} Finally, we note that the State is correct that a probation revocation hearing is not a trial, that a defendant is not entitled to all of the rights afforded during a criminal prosecution, and that the State's burden of proof is different for a probation revocation proceeding. *See State v. Phillips,* 2006–NMCA–001, ¶ 17, 138 N.M. 730, 126 P.3d 546 (filed 2005) (stating that the trial court's finding of a probation violation must be based on verified facts sufficient to establish the violation of probation to a "reasonable certainty" (internal quotation marks omitted)); *State v. Martinez,* 108 N.M. 604, 606, 775 P.2d 1321, 1323 (Ct.App.1989) (recognizing that the state must introduce proof which would incline "a reasonable and impartial mind to the belief that a defendant has violated the terms of probation"). However, we fail to see how these differences negate the need for a de novo hearing when the appeal is from a magistrate court proceeding that is not of record.

III. CONCLUSION

{ 28} Based upon our holding that the district court erroneously remanded to give the magistrate court another opportunity to conduct a full hearing, we reverse and remand so that the district court can conduct a de novo hearing on the revocation.

{ 29} **IT IS SO ORDERED.**

WE CONCUR: CYNTHIA A. FRY, Chief Judge, and JONATHAN B. SUTIN, Judge.

148 N.M. 685, 241 P.3d 1125, 2010 -NMCA- 089

All Citations

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Montano v. Frezza, 352 P.3d 666 (2015)
2015 -NMCA- 069

KeyCite Yellow Flag - Negative Treatment
Certiorari Granted by Montano v. Frezza, N.M., June 19, 2015

352 P.3d 666
Court of Appeals of New Mexico.

Kimberly MONTAÑO, Plaintiff–Appellee,
v.
Eldo FREZZA, M.D., Defendant–Appellant,
and
Lovelace Insurance Company, a domestic For–Profit Corporation, Defendant.

No. 32,403.
|
March 19, 2015.
|
Certiorari Granted, June 19, 2015, No. 35,297.
|
Certiorari Granted, June 19, 2015, No. 35,214.

Synopsis
Background: Patient sued nonresident surgeon for medical negligence, violations of Unfair Practices Act, and lack of informed consent, stemming from complications arising from bariatric surgery performed by surgeon at state university health center. The District Court, Bernalillo County, C. Shannon Bacon, D.J., denied surgeon's motion that he was immune from suit under Texas Tort Claims Act (TTCA), determining that law of the forum state applied. Surgeon filed petition for writ of error under collateral order doctrine, which was granted.

Holdings: The Court of Appeals, Bustamante, J., held that:

[1] surgeon's petition was appropriately granted under collateral order doctrine, and

[2] surgeon was entitled to immunity from suit to extent that immunity was consistent with New Mexico Tort Claims Act (NMTCA).

Affirmed in part, reversed in part, and remanded with instructions.

Sutin, J. filed separate opinion concurring in part and dissenting in part.

West Headnotes (9)

[1] **Appeal and Error**
Necessity of final determination

Principle of finality of judgments evinced in statute governing civil appeals serves a multitude of purposes, including the prevention of piecemeal appeals and the promotion of judicial economy. West's NMSA § 39–3–2.

Cases that cite this headnote

[2] **Appeal and Error**
Affecting collateral matters and proceedings

Exception to preference for appeal from final judgments is known as the "collateral order doctrine," whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. West's NMSA § 39–3–2.

Cases that cite this headnote

[3] **Appeal and Error**
Affecting collateral matters and proceedings

To permit review under collateral order doctrine: (1) order must finally determine disputed question; (2) it must concern an issue that is entirely separate from the merits of the claim; and (3) there must be no effective remedy by appeal.

Cases that cite this headnote

[4] **Appeal and Error**
Affecting collateral matters and proceedings

Nonresident surgeon's petition for writ of error, arguing that trial court erred in concluding that law of the forum state, rather than Texas Tort Claims Act (TTCA), applied to patient's medical negligence claim, stemming from complications arising from bariatric surgery performed by surgeon, was appropriately granted under collateral order doctrine; choice of law encompassed whether surgeon was immune from suit, such that decision as to which law applied necessarily implicated right that would have been irretrievable lost if not heard. V.T.C.A., Civil Practice & Remedies Code § 101.106(f).

Cases that cite this headnote

[5] **Appeal and Error**
Cases Triable in Appellate Court
Appeal and Error
Allowance of remedy and matters of procedure in general

Court of Appeals reviews district court's decision to use a comity analysis de novo, and then reviews district court's application of comity for abuse of discretion.

Cases that cite this headnote

[6] **Torts**
What law governs

Place-of-the-wrong rule may give way when policy considerations outweigh its application in choice of law matters.

Cases that cite this headnote

[7] **Courts**
Comity between courts of different states
Health
Official or governmental immunity
Public Employment
Particular torts

Under principles of comity, nonresident surgeon, who was employed at state university health center in Texas, was entitled to immunity under Texas Tort Claims Act (TTCA) from patient's medical negligence suit, stemming from complications resulting from bariatric surgery performed by surgeon, to extent that immunity was consistent with New Mexico Tort Claims Act (NMTCA); although application of Texas law would have prevented forum shopping, similar action against governmental entity or employee in forum state would not have been barred by NMTCA, forum state had strong interest in litigating patient's case, and applying TTCA in full would have violated public policy of forum state in various ways, including by contravening forum state's broader waiver of sovereign immunity and prohibiting suits against individuals. West's NMSA §§ 41–4–4(A), 41–4–4(B), 41–4–5 to 41–4–12; V.T.C.A., Civil Practice & Remedies Code §§ 101.021, 101.022, 101.106(f).

1 Cases that cite this headnote

[8] **Courts**
Comity between courts of different states
Public Employment
In general; official immunity
States
Liabilities of officers for negligence or misconduct

As factor in determining whether extending immunity to another state's employee through comity would violate forum state's public policy, the state has a particular interest in providing compensation or access to courts to state residents.

Cases that cite this headnote

[9] **Health**
Notice

Time period for the notice requirement to bring a medical malpractice case under New Mexico Tort Claims Act (NMTCA) begins to run only when plaintiff knows or with reasonable diligence should have known of the injury and its cause. West's NMSA § 41–4–16(A).

Cases that cite this headnote

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OPINION

BUSTAMANTE, Judge.

{ 1} This case is one of three presently before the Court of Appeals that involve the asserted medical negligence of then Texas-based physician Dr. Eldo Frezza. *See Gonzales v. Frezza,* COA No. 32,606, and *Gallegos v. Frezza,* COA No. 32,605. The issue presented in this case is whether Dr. Frezza should enjoy the immunity granted by the Texas Tort Claims Act (TTCA) when he is sued by a New Mexico resident in a New Mexico court. We conclude that under principles of comity Dr. Frezza is entitled to immunity, but only so far as that immunity is consistent with the New Mexico Tort Claims Act (NMTCA). We also conclude that the district court's order was too broadly worded. Hence, we affirm in part and vacate in part the district court's ruling and remand for further proceedings.

BACKGROUND

{ 2} Like the plaintiffs in the other two cases, Ms. Montaño, a New Mexico resident, traveled to Lubbock, Texas to undergo bariatric surgery by Dr. Frezza at the Texas Tech University Health Sciences Center (the Center). Ms. Montaño had been told by her insurer, Lovelace Insurance Company (Lovelace), that Dr. Frezza was the only bariatric surgeon for whom it would provide coverage. For approximately six years, Ms. Montaño traveled to Lubbock for follow-up care and treatment by Dr. Frezza for complications arising from the surgery. Eventually, testing by another doctor revealed gastrointestinal bleeding caused by an "eroding permanent suture." That doctor performed corrective surgery.

{ 3} At all times relevant to this case, Dr. Frezza was an employee of the Center, which is a governmental unit of the state of Texas. *See Tex. Tech Univ. Health Scis. Ctr. v. Ward,* 280 S.W.3d 345, 348 (Tex.App.2008) (stating that the center is a governmental unit). The Center established Texas Tech Physician Associates (TTPA) to administer managed care contracts for its physicians, including the contract with Lovelace. Although not a party to the contract, Dr. Frezza was a "represented physician" subject to the terms of the contract. Additional facts are included in our discussion.

{ 4} Ms. Montaño filed suit against Dr. Frezza and Lovelace, alleging breach of contract and negligent referral by Lovelace, medical negligence by Dr. Frezza, violation of the New Mexico Unfair Practices Act by both Dr. Frezza and Lovelace, and lack of informed consent.

Dr. Frezza filed two motions for dismissal. One motion asserted that New Mexico did not have personal jurisdiction over him. In the other he argued that as a Texas public employee he was immune from suit under the TTCA. *See* Rule 1–012(B)(2), (6) NMRA. The district court determined that New Mexico law, not the TTCA, should be applied. The district court also concluded that Dr. Frezza had sufficient contacts with New Mexico such that New Mexico courts court assert personal jurisdiction over him. The district court then denied both motions. Dr. Frezza filed a motion to reconsider the denial of his motion to dismiss based on personal jurisdiction. The motion to reconsider is still pending below.

{ 5} Dr. Frezza petitioned this Court for a writ of error under the collateral order doctrine, arguing that the district court erred in concluding that New Mexico law applied. *See* Rule 12–503 NMRA. The petition, which addresses only this issue, was granted.

DISCUSSION

A. The Petition for Writ of Error was Appropriately Granted

[1] [2] [3] { 6} We begin by addressing whether the district court's decision to apply New Mexico law is appropriate for appellate review under the collateral order doctrine. Generally, appeal lies only from a "final judgment or decision, any interlocutory order or decision which practically disposes of the merits of the action, or any final order after entry of judgment which affects substantial rights[.]" NMSA 1978, § 39–3–2 (1966). "The principle of finality [evinced in this statute] serves a multitude of purposes, including the prevention of piecemeal appeals ***669** and the promotion of judicial economy." *Handmaker v. Henney,* 1999–NMSC–043, ¶ 7, 128 N.M. 328, 992 P.2d 879. An exception to this preference for finality is known as the collateral order doctrine, "whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Carrillo v. Rostro,* 1992–NMSC–054, ¶ 16, 114 N.M. 607, 845 P.2d 130 (internal quotation marks and citation omitted). To permit review under the doctrine, "(1) the order must finally determine the disputed question; (2) it must concern an issue that is entirely separate from the merits of the claim; and (3) there must be no effective remedy by appeal." *Handmaker,* 1999–NMSC–043, ¶ 9, 128 N.M. 328, 992 P.2d 879.

{ 7} Our cases have held that where an order addresses a party's immunity from suit, as opposed to immunity from liability, it satisfies the collateral order doctrine criteria. *See Campos de Suenos, Ltd. v. Cnty. of Bernalillo,* 2001–NMCA–043, ¶ 15, 130 N.M. 563, 28 P.3d 1104 (stating, "We issue writs of error to review immunity from suit cases because we consider them collateral order[s] affecting interests that would be irretrievably lost if the case proceeded to trial." (alteration in original) (internal quotation marks and citation omitted)); *accord Handmaker,* 1999–NMSC–043, ¶ 14, 128 N.M. 328, 992 P.2d 879; *Carrillo,* 1992–NMSC–054, ¶ 20, 114 N.M. 607, 845 P.2d 130; *Sugg v. Albuquerque Pub. Sch. Dist.,* 1999–NMCA–111, ¶ 8, 128 N.M. 1, 988 P.2d 311; *cf. Carmona v. Hagerman Irrigation Co.,* 1998–NMSC–007, ¶ 21, n. 5, 125 N.M. 59, 957 P.2d 44 ("The [NMTCA] provides immunity from liability, not absolute immunity from suit, so the collateral order exception to the finality of judgments rule would not apply in this case.").

[4] { 8} To the extent that Ms. Montaño argues that the writ of error was improvidently granted because the collateral order doctrine criteria were not satisfied, we disagree. Ms. Montaño contends that the real question before the district court depended on the nature of TTPA's contract with Lovelace and thus the district court's order (1) did not resolve the question, and (2) was dependent on the merits of the case. But the question before the district court was a basic one: whether New Mexico or Texas law should apply. As will be seen in our discussion below, the answer to this question does not involve detailed examination of the facts related to Dr. Frezza's practice. Application of Texas law here would result in dismissal of Ms. Montaño's suit against Dr. Frezza because the TTCA does not permit suits against government employees acting within their employment. *See* Tex. Civ. Prac. & Rem.Code Ann. § 101.106(f) (West 2013). Because the choice of law encompasses whether Dr. Frezza is immune from suit, the decision necessarily implicates a right that would be "irretrievably lost" if not heard by this Court. *See Campos de Suenos, Ltd.,* 2001–NMCA–043, ¶ 15, 130 N.M. 563, 28 P.3d 1104. We conclude that the district court's order is properly before us for review.

B. New Mexico Law Applies

[5] { 9} We turn to whether the district court properly analyzed whether New Mexico or Texas law governs Ms.

Montaño's suit. In doing so, we "review the district court's decision to use a comity analysis de novo, and then review a district court's application of comity for abuse of discretion." *Sam v. Sam,* 2006–NMSC–022, ¶ 9, 139 N.M. 474, 134 P.3d 761. Dr. Frezza does not challenge the district court's decision to embark on its comity analysis. Thus, as to the comity issue, we only determine whether the district court's decision exceeded the bounds of its discretion. We begin, however, by addressing the "place-of-the-wrong" rule, and then address whether the district court properly analyzed whether Texas law should apply under principles of comity.

{ 10} Although some states have adopted the "most significant relationship" approach to the choice of law, the New Mexico Supreme Court has continued to endorse the "place-of-the-wrong" rule in choice of law cases. *Terrazas v. Garland & Loman, Inc.,* 2006–NMCA–111, ¶¶ 12, 14, 140 N.M. 293, 142 P.3d 374 (stating that "New Mexico courts have steadfastly applied the *lex loci delicti* rule in tort cases"); *see* Restatement (Second) of Conflict of Laws § 6 (1971); 15A C.J.S. *Conflict of Laws* § 38 (2014). Under ***670** this rule, "the substantive rights of the parties are governed by the law of the place where the wrong occurred." *Terrazas,* 2006–NMCA–111, ¶ 12, 140 N.M. 293, 142 P.3d 374. "The place of the wrong ... is the location of the last act necessary to complete the injury." *Torres v. State,* 1995–NMSC–025, ¶ 13, 119 N.M. 609, 894 P.2d 386 (internal quotation marks and citation omitted).

[6] { 11} But the place-of-the-wrong rule may give way when policy considerations outweigh its application. *See In re Estate of Gilmore,* 1997–NMCA–103, ¶ 18, 124 N.M. 119, 946 P.2d 1130 ("[P]olicy considerations may override the place-of-the-wrong rule."). For instance, in *Torres,* the New Mexico Supreme Court held that New Mexico law should apply where the alleged negligence of the Albuquerque Police Department resulted in a death in California because "public policy dictates that New Mexico law determine the existence of duties and immunities on the part of New Mexico officials." 1995–NMSC–025, ¶ 14, 119 N.M. 609, 894 P.2d 386 (alteration, internal quotation marks, and citation omitted). Similarly, in *Sam,* the New Mexico Supreme Court reversed the Court of Appeals, which had relied on the place-of-the-wrong rule to conclude that New Mexico law should apply where the plaintiff sued an Arizona governmental unit over an accident that occurred in New Mexico. 2006–NMSC–022, ¶¶ 1, 6, 29, 139 N.M. 474, 134 P.3d 761. The general rule derived from these cases is that "we begin with a strong presumption in favor of application of the place-of-the-wrong rule, but we will not close our eyes to compelling policy arguments for departure from the general rule in specific circumstances." *In re Estate of Gilmore,* 1997–NMCA–103, ¶ 21, 124 N.M. 119, 946 P.2d 1130.

[7] { 12} The district court determined that "New Mexico is the location of the last act necessary to complete the injury because [Ms. Montaño's] injuries manifested themselves in New Mexico." Based on its decision that the injury manifested itself in New Mexico, the district court concluded that "New Mexico law applies" to the case. We perceive no error in the district court's Restatement-based place-of-the-wrong analysis.[1] *See Torres,* 1995–NMSC–025, ¶ 13, 119 N.M. 609, 894 P.2d 386; *Roberts v. Piper Aircraft Corp.,* 1983–NMCA–110, ¶ 9, 100 N.M. 363, 670 P.2d 974; *Beh v. Ostergard,* 657 F.Supp. 173, 175–76 (D.N.M.1987).

{ 13} However, the outcome of the place-of-the-wrong analysis does not end the matter. The district court understood this. Recognizing that Dr. Frezza was an employee of the State of Texas and potentially immune from suit under Texas's TTCA, the district court went on to conduct an analysis of whether it should apply Texas law as a matter of comity. The presence of a defendant who can colorably assert his status as a Texas state actor entitled to the protection of Texas's sovereignty as expressed in the TTCA required the district court—and requires us—to engage in a comity analysis. In this circumstance, the comity analysis all but displaces the place-of-the-wrong analysis in resolving the issues before us. Thus, we move on to comity.

{ 14} The concept of comity as a tool for deciding choice-of-law issues in the United States has a long history, most of which is not necessary to recount here. *See generally* Holly Sprague, *Choice of Law: A Fond Farewell to Comity and Public Policy,* 74 Calif. L.Rev. 1447, 1449–50 (1986). We do note that comity concerns play a role in the Restatement (Second) formulation of a conflict-of-law analysis. *See* Restatement (Second) of Conflict of Laws § 6 (1971). The role ***671** of comity in actions against states or their employees in the courts of their sister states, however, was unexplained and unclear until the Supreme Court's opinion in *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979).

{ 15} In *Hall,* a California resident sued the University

of Nevada in the California courts for injuries he suffered in an auto collision that occurred in California. The California courts accepted jurisdiction of the case, and after a verdict was entered, refused to honor the statutory damages limit set by Nevada law for actions against Nevada governmental entities. *Id.* at 412–13, 99 S.Ct. 1182. *Hall* held, as a matter of first impression, that there was nothing in the federal constitution preventing a state from being sued in another state, assuming personal and subject matter jurisdiction was otherwise appropriate. The Court held that nothing "in Art. III authorizing the judicial power of the United States, or in the Eleventh Amendment limitation on that power, provide any basis, explicit or implicit, for this Court to impose limits on the powers of California exercised in this case." *Id.* at 421, 99 S.Ct. 1182. The Court also held that the "Full Faith and Credit Clause does not require a [s]tate to apply another [s]tate's law in violation of its own legitimate public policy." *Id.* at 422, 99 S.Ct. 1182. Finally, the Court ruled that no other provision of the Constitution—including the Commerce Clause, the Extradition Clause, and the Privileges and Immunities Clause—supported any conclusion other than that "one [s]tate's immunity from suit in the courts of another [s]tate is [nothing] other than a matter of comity." *Id.* at 425, 99 S.Ct. 1182. The Supreme Court provided no guidance in *Hall* as to how the states could or should exercise this comity.

{ 16} The Supreme Court again visited the issue of interstate immunity in the case of *Franchise Tax Board of California v. Hyatt,* 538 U.S. 488, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003). In *Hyatt,* a Nevada resident sued a California tax collection agency in Nevada for damages, asserting both negligent and intentional torts. The trial court denied the California agency's motion to dismiss for lack of subject matter jurisdiction. The Nevada Supreme Court reversed in part, holding that the theories sounding in negligence should have been dismissed under comity principles, but concluding that the intentional tort claims could proceed to trial. 538 U.S. at 492, 123 S.Ct. 1683. The Nevada Supreme Court acknowledged that California had granted its agency complete immunity from suit. Nevertheless, noting that Nevada does not provide immunity for acts taken in bad faith or for intentional torts, the Nevada Supreme Court held that "Nevada's interest in protecting its citizens from injurious intentional torts ... committed by sister states' government employees should be accorded greater weight than California's policy favoring complete immunity for its taxation agency." 538 U.S. at 493–94, 123 S.Ct. 1683 (internal quotation marks and citation omitted).

{ 17} In a unanimous opinion, the Supreme Court affirmed its holding in *Hall* that the "Constitution does not confer sovereign immunity on [s]tates in the courts of sister [s]tates." *Hyatt,* 538 U.S. at 497, 123 S.Ct. 1683. The Supreme Court also affirmed and strengthened its prior ruling that the Full Faith and Credit Clause does not require Nevada to honor California's statute, noting that:

> There is no principled distinction between Nevada's interests in tort claims arising out of its university employee's automobile accident, at issue in Hall, and California's interests in the tort claims here arising out of its tax collection agency's residency audit.

Hyatt, 538 U.S. at 498, 123 S.Ct. 1683.

{ 18} As in *Hall,* the Supreme Court in *Hyatt* provided no guidance as to how the states should apply comity principles when resolving suits against sister states. It did observe that it saw no "policy of hostility" toward California by Nevada. *See Hyatt,* 538 U.S. at 499, 123 S.Ct. 1683. Rather, it noted, Nevada had "sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.*

***672** { 19} Abstract descriptions of "comity" are as varied as the opinions applying them. In *Hyatt,* for example, the Nevada Supreme Court phrased the principle as "an accommodation policy, under which the courts of one state voluntarily give effect to the laws and judicial decisions of another state out of deference and respect, to promote harmonious interstate relations [.]" 538 U.S. at 493, 123 S.Ct. 1683 (internal quotation marks and citation omitted). Closer to the case at hand, a Texas court described it as "a principle under which the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign, not as a rule of law, but rather out of deference or respect. It is a doctrine grounded in cooperation and mutuality." *State of N.M. v. Caudle,* 108 S.W.3d 319, 321 (Tex.App.2002) (citation omitted).

{ 20} Even closer to home, in *Sam,* our Supreme Court described comity as "a principle whereby a sovereign forum state recognizes and applies the laws of another

state sued in the forum state's courts. The sovereign forum state has discretion whether or not to apply the laws of the other state." 2006–NMSC–022, ¶ 8, 139 N.M. 474, 134 P.3d 761. These formulations emphasize the core concerns of comity—mutual respect and harmonious relationships while protecting the forum state's own policy choices—but they provide no specific guideposts to follow as the comity decision is made.

{ 21} In *Sam,* our Supreme Court did provide guideposts. First, the Court set the stage by noting that comity should be extended to other states but only if doing so will not violate or undermine New Mexico's own important public policies. *Id.* ¶¶ 13, 21. *Sam* then suggested four factors our courts should take into account when "determining whether extending immunity through comity would violate [New Mexico's] public policy." *Id.* ¶ 22. In determining whether to extend immunity, courts should consider: "(1) whether the forum state would enjoy similar immunity under similar circumstances, (2) whether the state sued has or is likely to extend immunity to other states, (3) whether the forum state has a strong interest in litigating the case, and (4) whether extending immunity would prevent forum shopping[.]" *Id.* (citations omitted).

{ 22} Unfortunately *Sam* does not provide any indication how the four factors should be weighed as between themselves. And, more importantly, *Sam* does not provide explicit guidance as to how or when courts should fold in the comparative public policy analysis which is central to deciding whether honoring the state's immunity law improperly contravenes our own public policy choices. It is not clear whether that discussion must be had within the parameters of each factor or whether it is more appropriately conducted separately and used as a bright backdrop when assessing the impact of the four factors.

{ 23} Thus, we confess some confusion as to how *Sam* should be applied. We also perceive some confusion in the district court about the matter. As a drafting solution, we will deal with each factor on its terms, comparing and contrasting Texas and New Mexico law as appropriate, but we will also separately sum up the public policy implications of the factors and the differences in the two states' laws.

{ 24} We first examine the district court's assessment of the four *Sam* factors for an abuse of discretion. *See id.* ¶ 9. As to the first factor, the district court found that "it is unlikely the State of Texas would extend immunity to the State of New Mexico under similar circumstances[.]" This is not a correct formulation of the first factor. This factor was derived from *Head v. Platte County, Missouri,* 242 Kan. 442, 749 P.2d 6 (1988), in which the Kansas Supreme Court considered whether to apply Missouri law in a suit between a Kansas resident and a Missouri county. *Id.* at 7, 10. The court concluded that application of Missouri law would afford Missouri defendants greater protections than Kansas provided to its own citizens. *Id.* at 10. It stated, "If Missouri has sovereign immunity within our borders, a Kansas resident would be denied all recovery for injury caused by Missouri agents in this state, even though if agents of the State of Kansas had committed the same act, recovery could be permitted under our [t]ort [c]laims [a]ct." *Id.* (McFarland, J., dissenting); ***673** *accord Morrison v. Budget Rent A Car Sys.,* 230 A.D.2d 253, 268, 657 N.Y.S.2d 721 (N.Y.App.Div.1997). Similarly, the *Sam* court's analysis under the first factor addressed whether "a similar action brought against a New Mexico entity or government employee would be barred by the ... [NMTCA]." 2006–NMSC–022, ¶ 23, 139 N.M. 474, 134 P.3d 761. Thus, in the context of this case, the first factor should be stated as follows: would a similar action against a New Mexico governmental entity or employee be barred by the NMTCA? The answer to this question is clearly "no" because, as we discuss in more detail below, contrary to the TTCA, the NMTCA permits suits against government employees. In addition, as we explain below, the TTCA's strict occurrence-based notice of claim provision would clearly preclude Ms. Montaño's action, whereas the NMTCA notice provision allows for discovery-based calculation of time. We view both of these provisions as important aspects of New Mexico immunity law that merit protection.

{ 25} Thus, although for different reasons, we agree with the district court that this factor weighs against enforcing the TTCA. *See In re Clark's Will,* 1955–NMSC–063, ¶ 7, 59 N.M. 433, 285 P.2d 795 (stating that comity does not require "the courts of this state to extend to a citizen of another state a right or privilege that would not be extended to one of our own citizens in a matter of this kind").

{ 26} The second factor is whether Texas has or will extend immunity to New Mexico. *Sam,* 2006–NMSC–022, ¶ 22, 139 N.M. 474, 134 P.3d 761. Dr. Frezza relies on *Caudle* in support of his argument that the second factor weighs in favor of extending immunity.

The district court found that *Caudle* "has limited application in the context of this matter[.]" We agree. In *Caudle,* Texas residents employed by the State of New Mexico alleged in a Texas court that their retirement plan provided by the State of New Mexico "violate[d] the ... Texas Constitution and ... the Fourteenth Amendment to the United States Constitution." 108 S.W.3d at 321. The Texas Court of Appeals began by stating that "Texas should extend comity by recognizing the laws and judicial decisions of other states unless (1) the foreign state declines to extend comity to Texas or sister states under the same or similar circumstances, or (2) the foreign statute produces a result in violation of Texas'[s] own legitimate public policy." *Id.* It concluded that since New Mexico had "extended comity to its sister states[,]" it would consider New Mexico a "cooperative jurisdiction." *Id.* It then determined that since it is the responsibility of each state to determine the constitutionality of its own statutes, "[i]t is ... good public policy for Texas to avoid scrutinizing its sister states' statutes to determine their constitutionality under either the United States Constitution or the Texas Constitution." *Id.* at 322. The court consequently ordered the matter dismissed. *Id.*

{ 27} Caudle is not dispositive of the second comity factor for two reasons. First, under Dr. Frezza's reasoning, Texas's determination to extend comity in one case would mean that it would have no reason to analyze whether to apply comity in any other contexts. In other words, the first case extending comity to New Mexico would settle the issue forever. But since the Texas courts have analyzed whether to apply comity in cases both before and after *Caudle,* this is clearly not the course Texas has taken. *See, e.g., Robertson v. Estate of McKnight,* 609 S.W.2d 534, 537 (Tex.1980) (applying New Mexico law on interspousal immunity); *N.M. State Univ. v. Winfrey,* No. 11–10–00213–CV, 2011 WL 3557239, at *2 (Tex.App. Aug. 11, 2011) (comparing the jurisdiction and venue provisions of the NMTCA and the TTCA and applying the NMTCA). Nor does such an approach comport with the *Sam* court's characterization of the comity analysis as "fact-intensive," indicating that the factors must be examined in the context of the circumstances of each case. 2006–NMSC–022, ¶ 12, 139 N.M. 474, 134 P.3d 761; *see City of Raton v. Ark. River Power Auth.,* 611 F.Supp.2d 1190, 1212 (D.N.M.2008) (discussing the *Sam* holding and concluding that a "case-by-case approach to the comity analysis" is required). Second, the policy interest served by dismissal of the *Caudle* matter—that New Mexico courts should interpret the constitutionality of New Mexico's statutes—is entirely different ***674** from the policies at play here. *See* 108 S.W.3d at 322.

{ 28} *Winfrey,*[2] which is not cited by either party and was not considered by the district court, provides more compelling support for Dr. Frezza's position than *Caudle.* In *Winfrey,* the Texas Court of Appeals considered whether to apply the NMTCA as a matter of comity where a Texas resident sued New Mexico State University (NMSU) for damage done to his sheep when a weather balloon owned or operated by NMSU fell on his land in Texas. 2011 WL 3557239, at *1. NMSU moved for dismissal based on a lack of jurisdiction, which the district court denied. *Id.* The court of appeals started its analysis by reiterating the two-part test for comity set out in *Caudle,* stating that "comity ... will be applied to a cooperating state so long as the law of that state does not offend Texas public policy." *Winfrey,* 2011 WL 3557239, at *1. After determining that New Mexico was a cooperating state, the court examined the purpose of the NMTCA and TTCA and their provisions related to jurisdiction and venue. *Id.* at *1–2. It concluded, "Our comparison of the[se] similar provisions leads to the conclusion that [NMSU has] satisfied the second prong of the principle of comity: the jurisdiction and venue provisions of the [NMTCA], as applicable in this case, do not violate the public policy of Texas." *Id.* The court concluded, therefore, that it should apply the NMTCA and that since the NMTCA (1) vested exclusive jurisdiction in the New Mexico district courts and (2) required that the suit be brought in Santa Fe County, the suit should be dismissed "for lack of jurisdiction." *Id.* at *1, 2 (internal quotation marks omitted); *see* NMSA 1978, § 41–4–18(B) (1976) ("Venue for any claim against the state or its public employees, pursuant to the Tort Claims Act, shall be in the district court for the county in which a plaintiff resides, or in which the cause of action arose, or in Santa Fe county.").

{ 29} Although Texas applied New Mexico law on jurisdiction and venue in *Winfrey,* the *Winfrey* holding does not compel us to conclude that Texas would apply the NMTCA's other provisions under the circumstances of this case. The *Winfrey* court's analysis was based on the similarity of the two acts' venue and jurisdiction requirements. *Cf. Univ. of Iowa Press v. Urrea,* 211 Ga.App. 564, 440 S.E.2d 203, 205 (1993) (stating that where two statutes' provisions were "conceptually identical" the forum state "should recognize and give effect to the legislatively declared policy of [the other state] as a matter of comity"). The court did not consider

the portions of the NMTCA and TTCA at issue in this case, which are very different. Consequently, it is not clear whether Texas would extend immunity to New Mexico under the circumstances here. *But see Hawsey v. La. Dep't of Soc. Servs.*, 934 S.W.2d 723, 727 (Tex.App.1996) (affirming dismissal of an action under Louisiana law and stating, "Louisiana's waiver of sovereign immunity is more extensive than that of Texas, yet we cannot say it violates our public policy"); *Greenwell v. Davis*, 180 S.W.3d 287, 298 (Tex.App.2005) ("Even though the amounts of the waivers differ, applying Arkansas' limited waiver of sovereign immunity would not be contrary to Texas public policy. The mere fact that the law of the other state differs from Texas does not render it so contrary to Texas public policy that Texas courts will refuse to enforce it." (footnote omitted)). Although neither *Caudle* nor *Winfrey* are conclusive on this issue, we will assume without deciding that Texas would extend immunity to New Mexico in a similar situation. *See Hall*, 440 U.S. at 425, 99 S.Ct. 1182(stating that the Court has "presumed that the [s]tates intended to adopt policies of broad comity toward one another [based on] state policy"); *Sam*, 2006–NMSC–022, ¶ 16, 139 N.M. 474, 134 P.3d 761 (acknowledging the presumption).

[8] { 30} We turn to the third factor: "whether the forum state has a strong interest in litigating the case[.]" ***675** *Sam*, 2006–NMSC–022, ¶ 22, 139 N.M. 474, 134 P.3d 761. Although its interest is bounded by the limits of the NMTCA, *id.* ¶ 25, "New Mexico has a particular interest in providing compensation or access to the courts to residents of the state." *Id.* ¶ 26. Here, if Texas law applies, Ms. Montaño would be left without any recourse against Dr. Frezza or his employer. This fact heightens New Mexico's interest in providing a forum. *Cf. Flemma v. Halliburton Energy Servs., Inc.*, 2012–NMCA–009, ¶ 25, 269 P.3d 931 ("New Mexico courts will apply New Mexico law to automobile insurance contracts that were formed in other states if innocent accident victims would be otherwise unprotected."), *rev'd on other grounds*, 2013–NMSC–022, 303 P.3d 814; *Levert v. Univ. of Ill. at Urbana/Champaign ex rel. Bd. of Trustees*, 2002–2679, pp. 17–18 (La.App. 1 Cir. 9/26/03), 857 So.2d 611, 622 (holding that "because [the] plaintiffs/appellants have recourse to individually seek full redress of their claims in [the sister state], [that state's] sovereign immunity law does not violate Louisiana's public or judicial policies"). On the other hand, because Dr. Frezza is an employee of the State of Texas, that state also has an interest in the case. *Cf. Zavala v. El Paso Cnty. Hosp. Dist.*, 2007–NMCA–149, ¶ 34, 143 N.M. 36, 172 P.3d 173 (stating, in the context of a personal jurisdiction analysis, that because the defendant "[h]ospital [wa]s not only located in Texas but ... [was] also an entity of the government of the State of Texas[, i]t [was] ... clear that Texas has a substantially stronger sovereignty interest [than New Mexico]"). Weighing these competing interests, we conclude that the district court did not abuse its discretion in determining that "the State of New Mexico has equal or greater interest in litigating this matter than does the State of Texas[.]"

{ 31} The final factor is whether application of Texas law will prevent forum shopping. *Sam*, 2006–NMSC–022, ¶ 22, 139 N.M. 474, 134 P.3d 761. Ms. Montaño conceded below that it would, and the district court concluded that "forum shopping would be diminished by an application of [Texas law]." *See Newberry v. Ga. Dep't of Indus. & Trade*, 286 S.C. 574, 336 S.E.2d 464, 465 (1985) (holding that refusal to apply the sued state's law would permit forum shopping). We discern no error in this conclusion by the district court.

{ 32} In sum, the first and third factors weigh against applying the TTCA, whereas the second and fourth factors weigh in favor of it. Again, *Sam* does not provide guidance on how these factors should be balanced against each other or whether one factor should be weighed differently from the others. Conforming to *Sam*'s approach, however, we start with the notion that New Mexico should recognize Dr. Frezza's immunity as expressed in the TTCA, unless doing so will violate substantial New Mexico policy. Put another way, whether to apply the TTCA depends on the bedrock question guiding the comity analysis: would application of Texas law in this case be contrary to New Mexico's public policies? *See Sam*, 2006–NMSC–022, ¶ 22, 139 N.M. 474, 134 P.3d 761; *City of Raton*, 611 F.Supp.2d at 1212 ("Rather than all-or-nothing, a court must assure that, for each claim for which it applies another state's sovereign immunity rules, the application of the other state's rules does not offend the state's public policy in a substantial way.").

{ 33} We look to the NMTCA for an expression of our public policy as to tort claims against governmental bodies. *See Torres*, 1995–NMSC–025, ¶ 10, 119 N.M. 609, 894 P.2d 386 ("[I]t is the particular domain of the [L]egislature, as the voice of the people, to make public policy."). In a legislative declaration accompanying the NMTCA, "[t]he legislature recognize[s] the inherently

unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity." NMSA 1978, § 41–4–2(A) (1976). It also recognizes that "the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done." *Id.* In enacting the NMTCA, therefore, "the [L]egislature expressed its intent to achieve balance between the public policy supporting compensation of those injured by public employees and the public policy militating in favor of limiting government liability." *Niederstadt v. Town of Carrizozo,* 2008–NMCA–053, ¶ 14, 143 N.M. 786, 182 P.3d 769.

***676** { 34} A comparison of the NMTCA and the TTCA reveals that the balance struck by the New Mexico Legislature is substantively different from that struck by Texas legislators. *See* NMSA 1978, §§ 41–4–1 to –30 (1976, as amended through 2013); Tex. Civ. Prac. & Rem.Code Ann. §§ 101.002 to .109 (1985, as amended through 2013). Both statutes address the extent to which each state has waived its sovereign immunity. *See* § 41–4–2(A) ("[I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the [NMTCA]."); § 101.021. The NMTCA and TTCA are also similar in that they provide for limits on recovery (although the limits are different), *see* § 41–4–19 and § 101.023, and waive immunity for certain injuries arising from the operation of " 'any motor vehicle, aircraft[,] or watercraft.' " Section 41–4–5; *see* § 101–021(1)(A).

{ 35} But there are stark differences between the statutes. For instance, the TTCA waives sovereign immunity in only three limited cases: "(1) claims arising from the operation or use of motor-driven vehicles or equipment; (2) claims caused by a condition or use of tangible personal or real property; and (3) claims arising from premises defects." *Paz v. Weir,* 137 F.Supp.2d 782, 820 (S.D.Tex.2001); *see* §§ 101.021, .022. In contrast, New Mexico has waived sovereign immunity for negligent conduct in eight different categories, including medical facilities, health care providers, law enforcement, public utilities, highways/streets, and airports, and does not limit liability to incidents involving motor vehicles or personal or real property. *See* §§ 41–4–5 to –12.

{ 36} The NMTCA and TTCA also differ dramatically in their provisions concerning the liability of individual government employees. The TTCA does not allow actions against employees in their individual or personal capacity. Under the TTCA, a suit naming a government employee must be dismissed upon the employee's motion, unless the plaintiff files an amended complaint naming the appropriate governmental unit instead of the employee within thirty days of the employee's motion. Section 101.106(f). There is no such limitation on suits against public employees in the NMTCA. *See* § 41–4–4(A), (B) (addressing waiver of immunity for public employees); *Abalos v. Bernalillo Cnty. Dist. Attorney's Office,* 1987–NMCA–026, ¶ 18, 105 N.M. 554, 734 P.2d 794 ("Each of the eight waivers listed in Sections 41–4–5 to –12 identifies public employees; it follows that one can sue the public employee and the agency or entity for whom the public employee works.").

{ 37} Finally, while both statutes have a notice requirement, the requirements function very differently. In Texas, plaintiffs must file a notice within six months of "the day that the incident giving rise to the claim occurred." § 101.101(a). Failure to do so results in dismissal. *See Univ. of Tex. Health Sci. Ctr. at Houston v. McQueen,* 431 S.W.3d 750, 754 (Tex.App.2014) ("The failure to give notice under [S]ection 101.101 requires dismissal of a suit."). This requirement functions as a statute of repose: it cuts off claims six months after the negligent conduct, regardless of whether the plaintiff's injury had been discovered. *See Putthoff v. Ancrum,* 934 S.W.2d 164, 174 (Tex.App.1996) ("[T]he discovery rule does not apply to claims made under the [TTCA]."); *Black's Law Dictionary* 1637 (10th ed.2014) (defining "statute of repose" as "[a] statute barring any suit that is brought after a specified time since the defendant acted ..., even if this period ends before the plaintiff has suffered a resulting injury").

[9] { 38} In contrast, while the NMTCA requires notice "within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the [NMTCA]," Section 41–4–16(A), New Mexico cases have applied the "discovery rule" to the notice requirement. Under this rule, the time period for the notice requirement to bring a medical malpractice case under the NMTCA begins to run only when "the plaintiff knows or with reasonable diligence should have known of the injury and its cause." *Maestas v. Zager,* 2007–NMSC–003, ¶ 19, 141 N.M. 154, 152 P.3d 141; *Emery v. Univ. of N.M. Med. Ctr.,* 1981–NMCA–059, ¶ 29, 96 N.M. 144, 628 P.2d 1140 (extending the discovery rule to the NMTCA's notice ***677** requirement), *abrogated on other grounds by Maestas,* 2007–NMSC–003, 141 N.M. 154, 152 P.3d 141. Thus,

the NMTCA's notice requirement is much more flexible than that in the TTCA. *Cf. Timmons v. Univ. Med. Ctr.*, 331 S.W.3d 840, 846, 848 (Tex.App.2011) (recognizing that "the operation of section 101.101 [when the plaintiff did not discover the injury until after six months had passed] appears harsh and unfair"); *Streetman v. Univ. of Tex. Health Sci. Ctr. at San Antonio,* 952 S.W.2d 53, 56 (Tex.App.1997) (same); *Univ. of Tex. Med. Branch at Galveston v. Greenhouse,* 889 S.W.2d 427, 430, 432 (Tex.App.1994) (same).

{ 39} We conclude that applying the TTCA here would violate New Mexico public policy by (1) contravening New Mexico's broader waiver of immunity, (2) prohibiting suits against individuals, and (3) imposing a notice requirement substantially more restrictive than that in the NMTCA. *See Sam,* 2006–NMSC–022, ¶ 27, 139 N.M. 474, 134 P.3d 761 (stating that "[t]o apply [another state's shorter] statute of limitations would violate our own public policy of allowing two years to file suit [under the NMTCA]"). There may also be other ways the statutes differ substantially; we have not conducted an exhaustive comparison of the two statutes. It is sufficient to hold that, to avoid infringing on the public policy expressed in the NMTCA, the immunity extended to Dr. Frezza with regard to the three areas discussed above should be coextensive with the immunity enjoyed by New Mexico governmental agencies and employees. *See id.*

{ 40} This conclusion is consonant with *Sam,* in which the Court concluded that comity principles required the extension of "a limited grant of immunity to Arizona" where both states had passed similar tort claims acts but with different statutes of limitation, and held that the NMTCA's statute of limitations applied. *Id.* Similarly, in *Hyatt,* the United States Supreme Court affirmed the Nevada Supreme Court's refusal to apply California law, which provided the Franchise Tax Board with complete immunity, because Nevada law waived immunity for intentional torts. 538 U.S. at 493–94, 123 S.Ct. 1683.

{ 41} As a general matter, it is appropriate to use the NMTCA to provide the contours—or measure—of the immunity Dr. Frezza should enjoy in New Mexico courts. Texas and its employees cannot and should not be treated as purely private litigants for the simple and obvious reason that they are not. Employees of a sister state acting within the scope of their employment do not become purely private citizens when they cross state lines or when they are subjected to the jurisdiction of the courts of another state. *See City of Red Wing v. Ellsworth Cmty. Sch. Dist.,* 617 N.W.2d 602, 607 (Minn.Ct.App.2000) (holding that it was appropriate to apply Minnesota's municipal tort liability laws as a measure of the extent of a Wisconsin teacher's monetary liability). Using the contours of the NMTCA levels the field and assures that non-New Mexico actors are not provided greater protection than New Mexico provides its employees and governmental agencies. *See Head,* 749 P.2d at 10; *In re Clark's Will,* 1955–NMSC–063, ¶ 7, 59 N.M. 433, 285 P.2d 795. *Cf. Hansen v. Scott,* 2004 ND 179, ¶ 11, 687 N.W.2d 247, 251 ("We hold the Texas defendants are immune from suit to the same extent the State of North Dakota would grant immunity to its employees under North Dakota law. Applying the same level of immunity does not compromise the public policy of North Dakota."); and *cf.* Ann Woolhandler, *Interstate Sovereign Immunity,* 2006 Sup.Ct. Rev. 249, 291 (stating that one approach employed in comity analyses "involves ignoring defendant-state forum limitation provisions, notice and time limits, and liability and damages limitations, and applying the forum's law of state suability." (footnotes omitted)).

{ 42} In sum, we affirm the district court with one caveat: the district court's order seems to impose New Mexico law in toto on the proceedings. It is premature to decide that the TTCA is fully displaced. We limit our holding to the three subjects discussed in paragraphs 34–39 of this Opinion. The applicability of other provisions of the NMTCA should be determined by the district court on remand.

CONCLUSION

{ 43} We affirm in part, vacate in part, and remand for proceedings consistent with this Opinion.

{ 44} **IT IS SO ORDERED.**

***678** I CONCUR: CYNTHIA A. FRY, Judge.

JONATHAN B. SUTIN, Judge (concurring in part and dissenting in part).

SUTIN, Judge (concurring in part and dissenting in part).

{ 45} I concur in the majority's resolution of the comity question. I respectfully dissent in regard to the majority's approbation given to the district court's application of the place-of-the-wrong rule.

A. INTRODUCTION: Dr. Frezza's Points on Appeal

{ 46} Dr. Frezza's points on appeal, aside from the writ of error issue, are that (1) the place-of-the-wrong rule and public policy concerns require that Texas law apply to Ms. Montaño's claims, and (2) the doctrine of comity requires the application of Texas law. The Texas law to which Dr. Frezza refers is the TTCA.

1. The Place–of–the–Wrong Point

{ 47} In his motion to dismiss, Dr. Frezza asserted that the TTCA applied under the doctrine of comity because Texas was the place of the wrong. He indicates that the district court determined that he was not entitled to immunity from suit under the TTCA because, based on the place-of-the-wrong rule and on principles of comity, New Mexico law applied. Dr. Frezza erroneously conflates two distinct doctrines. Further, in arguing the place-of-the-wrong rule, Dr. Frezza relies on New Mexico conflict-of-laws cases having nothing to do with the circumstance of competing foreign state and forum state sovereign immunity laws and interests requiring a comity analysis. *See Torres,* 1995–NMSC–025, 119 N.M. 609, 894 P.2d 386; *Terrazas,* 2006–NMCA–111, 140 N.M. 293, 142 P.3d 374; *In re Estate of Gilmore,* 1997–NMCA–103, 124 N.M. 119, 946 P.2d 1130.

{ 48} Ms. Montaño buys in to the confusing and erroneous application of the place-of-the-wrong rule. She argues that the place of the wrong is New Mexico and that the district court properly determined that the nexus of facts pled by her raised both a question of choice of law (meaning selecting, pursuant to a conflict-of-laws analysis, the law of one state over another pursuant to a place-of-the-wrong rule analysis) and comity.

{ 49} Although they combine the application of the place-of-the-wrong rule with the rule of *lex loci delicti* (*lex loci*), neither Dr. Frezza nor Ms. Montaño says what particular New Mexico law was to be applied under the place-of-the-wrong rule as to Dr. Frezza's immunity defense. In ruling that the place-of-the-wrong rule applied, that the place of the wrong was New Mexico, and that the law to be applied was New Mexico law, the district court also failed to indicate what New Mexico law applied to Dr. Frezza's immunity defense.

2. The Comity Point

{ 50} Separately addressing comity, Dr. Frezza says that, in addition to the fact that Texas is the place of the wrong, "principles of comity require the application of Texas law[,]" namely, the immunity provided under the TTCA. He discusses solely the TTCA and the NMTCA in the bout between the immunity provisions within sovereigns' tort claims acts. Dr. Frezza analyzes the four factors in *Sam,* 2006–NMSC–022, ¶¶ 22–28, 139 N.M. 474, 134 P.3d 761. As to the state-interest factor, Dr. Frezza seems to again insert the place-of-the-wrong and *lex loci* rules into the comity analysis when he argues that "New Mexico's interest is limited by virtue of the fact that all of the alleged negligent acts occurred in Texas[,]" and thus that the TTCA applies under comity. Ms. Montaño's comity analysis, of course, ends with comity not extendable to Texas. Following a *Sam* analysis, the district court denied Dr. Frezza's motion to dismiss insofar as it was based on his comity position that the TTCA applied.

B. DISCUSSION: Misplaced Application of the Place–of–the–Wrong Rule

1. Application of the Place–of–the–Wrong Rule—What Ifs?

{ 51} The choice-of-law, conflict-of-laws analysis path chosen by the district court and *679 the parties begged the unanswered question: When the determination is made that New Mexico law applies, which New Mexico law is to be applied? If New Mexico law on sovereign immunity is the law to be applied, that law would be the NMTCA. If the NMTCA were to be applied, the question necessarily becomes, can the NMTCA apply to claims against a physician for medical negligence when the physician is an employee of a Texas governmental entity and is not an employee of a New Mexico governmental entity?

{ 52} The answer to the foregoing question is that the NMTCA cannot be applied to that physician. In particular, because Dr. Frezza is not employed by a New Mexico governmental entity, the NMTCA cannot be applied to him. *See* § 41–4–3(B), (C), (F), (H). The upshot is that, given that the NMTCA does not apply to Dr. Frezza and barring the application of the TTCA, his existence as a medical malpractice defendant in a New Mexico lawsuit is such that he would have no New Mexico immunity from suit. Neither the parties nor the district court engaged in any such analysis.

{ 53} Questions arise: Were the district court to have determined that Texas law instead of New Mexico law applied as to Dr. Frezza's immunity defense and that the TTCA applied, would this then have foreclosed any comity analysis? Would *Torres* have been applicable to override on public policy grounds, the application of the TTCA? *See Torres,* 1995–NMSC–025, ¶¶ 13–14, 119 N.M. 609, 894 P.2d 386 (holding that, in a choice-of-law and conflict-of-laws, place-of-the-wrong analysis, based on New Mexico's public policy, New Mexico law would control notwithstanding that the place of the wrong was California). Would a *Torres* override on public policy grounds be a decision tantamount to a refusal to extend comity?

{ 54} It is noteworthy that in Sam our Supreme Court noted that this Court in *Sam v. Estate of Sam,* 2004–NMCA–018, ¶ 15, 135 N.M. 101, 84 P.3d 1066, rev'd by 2006–NMSC–022, 139 N.M. 474, 134 P.3d 761, employed a choice-of-law, place-of-the-wrong rule analysis. See *Sam,* 2006–NMSC–022, ¶ 7, 139 N.M. 474, 134 P.3d 761. Our Supreme Court in Sam appears to have purposely chosen to disregard the place-of-the-wrong rule and to stick solely to comity, see *id.* ¶¶ 7–8, although one might infer that, in reversing this Court, our Supreme Court was not disregarding the place-of-the-wrong rule in the case, but was holding that the place-of-the-wrong rule was not applicable. It is also noteworthy that, in Sam, the Supreme Court also mentioned that this Court, in *Sam,* 2004–NMCA–018, ¶ 14, 135 N.M. 101, 84 P.3d 1066, also determined that the NMTCA was inapplicable "because [the plaintiff] was not employed by New Mexico and was therefore not covered by [the NMTCA]." *Sam,* 2006–NMSC–022, ¶ 6, 139 N.M. 474, 134 P.3d 761. We have no indication whether the Supreme Court considered the significance of this Court's determination that the plaintiff in Sam was not employed by New Mexico and not covered under the NMTCA.

2. Misapplied Place–of–the–Wrong Rule

{ 55} The foregoing questions and conundrums aside, the place-of-the-wrong rule had no place in this comity case. None of the choice-of-law, conflict-of-laws, place-of-the-wrong/*lex loci* rule New Mexico cases, including in particular, *Gilmore, Terrazas,* and *Torres,* are comity cases. As well, and notably, neither our Supreme Court in *Sam,* nor the United States Supreme Court in *Hyatt* and *Hall,* on which *Sam* relied, engage in a place-of-the-wrong or *lex loci* analysis. *See Hyatt,* 538 U.S. 488, 123 S.Ct. 1683; *Hall,* 440 U.S. 410, 99 S.Ct. 1182. It was error for the district court to rely on and apply the place-of-the-wrong and lex loci rules in regard to the immunity defense issue in this case. I therefore disagree with the majority's "perceiv[ing] no error in the district court's ... place-of-the-wrong analysis [,]" *see* Majority Op. ¶ 12, which brings me to *Sam* and comity, and also to the majority's opinion on comity in the present case.

C. DISCUSSION: *Sam*

{ 56} *Sam* involved the issue whether New Mexico claimants suing an Arizona government employee in New Mexico were barred by the Arizona Tort Claims Act's one-year statute of limitations, the NMTCA's two-year statute of limitations, or New Mexico's three- ***680** year general statute of limitations for tort actions. *Sam,* 2006–NMSC–022, ¶ 7, 139 N.M. 474, 134 P.3d 761; *Sam,* 2004–NMCA–018, ¶¶ 13–15, 135 N.M. 101, 84 P.3d 1066 (setting out the three statutes of limitations). The action was filed just before three years had run. *Sam,* 2006–NMSC–022, ¶ 3, 139 N.M. 474, 134 P.3d 761.

{ 57} On appeal from the district court decision in *Sam,* this Court determined that the NMTCA did not apply to an Arizona government employee. *Sam,* 2004–NMCA–018, ¶ 13, 135 N.M. 101, 84 P.3d 1066. Citing *Hyatt* and *Hall,* we held that "New Mexico, as the forum state in this case, is not required to recognize Arizona's statute of limitations attaching or the sovereign immunity granted to its public employees." *Sam,* 2004–NMCA–018, ¶ 13, 135 N.M. 101, 84 P.3d 1066. We further held that the NMTCA was inapplicable because the plaintiff "was not a public employee covered

under our Tort Claims Act." *Id.* ¶ 14. Declaring that sovereign immunity and public employment were irrelevant to the issues in the case, this Court turned to the place-of-the-wrong rule as applied in *Torres* and held that "because the accident resulting in [the victim's] death occurred in New Mexico, New Mexico's three-year statute of limitations [in NMSA 1978, Section 37–1–8 (1976)] applies to this suit." *Sam,* 2004–NMCA–018, ¶ 15, 135 N.M. 101, 84 P.3d 1066. In a certiorari proceeding, our Supreme Court saw the case differently and reversed this Court. *Sam,* 2006–NMSC–022, ¶¶ 1, 20, 139 N.M. 474, 134 P.3d 761.

{ 58} The issue before our Supreme Court in *Sam* was whether the New Mexico district court should, as a matter of comity, recognize the sovereign immunity of a sister state, Arizona. *Id.* ¶ 1. *Sam* stated at the outset that it would discuss "what factors a New Mexico court should consider to determine if comity should be extended." *Id.* ¶ 8. *Sam* analyzed *Hall* and stated that the difference between California and Nevada law as to a cap on damages "was sufficient for California to justify not extending comity." *Sam,* 2006–NMSC–022, ¶ 17, 139 N.M. 474, 134 P.3d 761. *Sam* declared that "[a]s a general rule, comity should be extended. Only if doing so would undermine New Mexico's own public policy will comity not be extended." *Id.* ¶ 21.

{ 59} In *Sam,* our Supreme Court at the outset indicated that the question was whether, with respect to the plaintiff's claim, the Arizona Tort Claims Act's one-year statute of limitations should be applied under comity, whether the NMTCA's two-year statute of limitations, or whether the New Mexico three-year statute of limitations on common law tort claims, should be applied. *Id.* ¶¶ 1, 3. The Court noted that Arizona and New Mexico both waived sovereign immunity with respect to the plaintiff's claim, but further noted that the waiver of sovereign immunity was "restrained by strict statutes of limitations." *Id.* ¶ 1.

{ 60} The Court in *Sam* addressed whether it should extend comity to Arizona for application of Arizona's one-year statute of limitations, holding that "we believe that New Mexico should extend a limited grant of immunity to Arizona because both states have done so through tort claims acts. However, we should only extend New Mexico's two-year statute of limitations instead of applying Arizona's one-year statute of limitations." *Id.* ¶ 27. The Court did not *apply* Arizona's tort claims act's one-year statute. *Id.* ¶¶ 20, 27. The Court decided to "*extend* a limited grant of immunity *to* Arizona" and also to "*extend* [the NMTCA's] two-year statute of limitations." *Id.* ¶ 27 (emphasis added). Thus, in regard to Dr. Frezza's immunity defense, in its analysis of whether to extend comity, instead of using the words "apply" or "application" with reference to law, our Supreme Court chose the word "extend"—that is, under the comity analysis, New Mexico would (1) "extend" immunity to Arizona, and (2) at the same time would "extend" the New Mexico statute of limitations "as a matter of comity" or "based on the principles of comity" or "through comity" to Arizona. *Id.* ¶¶ 13, 20, 22, 27.

{ 61} What I glean from *Sam* is that: (1) the Court *extended comity* to Arizona with respect to Arizona's limited sovereign immunity waiver, leaving Arizona immunity in place and applicable, but did not *extend comity* with respect to Arizona's statute of limitations; and (2) the Court, without expressly ***681** saying so, under principles of comity actually applied the NMTCA statute of limitations in place of Arizona's statute of limitations as though the NMTCA statute of limitations was Arizona law. The Court employed the notion "extending" a New Mexico law, namely, NMTCA provisions, presumably because those provisions cannot "apply" to a person who is not an employee of a New Mexico governmental entity.

{ 62} I am unaware of how New Mexico, by extending comity to Arizona by recognizing the sovereign immunity provision in the Arizona tort claims act, also under or based on comity or comity principles "extends" the NMTCA statute of limitations provisions "*to* Arizona" or "*to* an Arizona public employee." *Sam,* 2006–NMSC–022, ¶¶ 13, 20, 27, 139 N.M. 474, 134 P.3d 761 (emphasis added). I do not find support in either *Hyatt* or *Hall* for applying the doctrine of comity or its principles by "extending" the NMTCA to the sister state, in effect incorporating the NMTCA into Arizona's tort claims act. I am unaware of any cases outside of *Sam* that resolves comity issues in this manner.

D. DISCUSSION: Following *Sam* Here

{ 63} The majority essentially follows in *Sam* 's footsteps, stating that its "conclusion is consonant with *Sam*[.]" Majority Op. ¶ 40. Like in *Sam,* which "extended" the NMTCA's two-year statute of limitations to an Arizona government employee to bar a claim filed

in New Mexico against that employee—a person clearly not covered under the NMTCA—the majority "uses" the NMTCA's waiver of immunity to strip Dr. Frezza of immunity, when Dr. Frezza clearly is not covered under the NMTCA. The majority does not use the words "extend" or "extend under comity or comity principles." The majority states that "it is appropriate to *use* the NMTCA to provide the contours—or measure—of the immunity Dr. Frezza should enjoy," Majority Op. ¶ 41 (emphasis added), and further states that NMTCA's immunity-related provisions should be *coextensive* with the immunity enjoyed by New Mexico governmental agencies and employees. Majority Op. ¶ 39 (emphasis added).

{ 64} In resorting to the words "extending," "coextensive," and "use," the Court in *Sam* and the majority here employ legal fictions. *Sam* and the majority have created theories or methodologies by which NMTCA provisions either become a part of or replace a provision in a sister state's tort claims act to bar a claim (as in *Sam*) or to bar a defense (as in the case here).

{ 65} It may well be that the legal-fiction approach necessarily must be employed to arrive at a satisfactory result in these sovereign immunity, comity circumstances. Given *Sam,* I cannot fault the majority's approach here. The majority tweaks the *Sam* analysis by discarding the notion of "extending" the NMTCA to the sister state. The majority's "use" and "coextensive" theories are, according to the majority, "consistent" with *Sam.* The majority's word selection perhaps more descriptively suggests what the Court in *Sam* was doing.

{ 66} I go along with the majority's resolution albeit there exists no underlying explanation as to how a Texas resident and government employee with TTCA immunity, who is recognized as such when sued in New Mexico, will in essence be treated as a New Mexico resident and New Mexico government employee, consistent with or under the NMTCA, with no immunity, when, in all probability, he will be denied any benefit under the NMTCA and may even receive no TTCA protection. With the understanding that the TTCA violates New Mexico public policy, I go along, given the apparent absence of a better resolution based on any underlying rational support and given the incomplete manner in which the case was developed and handled on Dr. Frezza's motion to dismiss.[3]

***682** { 67} Comity policy resides with each state in dealing with sovereignty issues such as those in the case before us. *See Hall,* 440 U.S. at 425–26, 99 S.Ct. 1182. State courts exercise reasonable discretion through practical wisdom and general fairness in their judicial-law-making determinations and development. *See* Albert Tate, Jr., *The Law–Making Function of the Judge,* 28 La. L.Rev. 211, 214–17 (1968). This function is appropriate in our policy-driven comity circumstance. Note Judge Tate's poignant view:

> I ... emphasize again what all lawyers know and what few laymen can deny: That the ordinary and customary operation of our judicial process requires the courts on occasion to create law-rules where needed to decide the case[ ] and that these law-rules operate with prospective effect to regulate the clashes of similar interests in the future, in much the same manner (although more limited in scope) as does a new statute.

Id. at 217. The import of a legal fiction into a law-rule where needed to decide the case can be appropriate, if done through practical wisdom and general fairness, as long as we recognize and make clear what we are doing and why we are doing it. Although there might be a different solution for the case before us than to employ a legal fiction,[4] I am satisfied that the methodology employed is consistent with reason and fairness and appropriate in this case. That is why I concur in the majority's solution.

All Citations

352 P.3d 666, 2015 -NMCA- 069

Footnotes

1 The special concurrence takes issue with our discussion of and approval of the district court's application of the

place-of-the-wrong rule. We disagree that it was error for the district court to begin with this analysis. In *Sam*, the Supreme Court stated that appellate courts should "review the district court's decision to use a comity analysis *de novo*" and that this review assesses "the appropriateness of a district court's decision to engage in a comity analysis." 2006–NMSC–022, ¶¶ 9, 12, 139 N.M. 474, 134 P.3d 761. This language suggests that the decision to engage in the comity analysis itself depends on a prior legal conclusion that it is necessary. If the place-of-the-wrong rule indicated that Texas law applied, there would have been no need to proceed to a comity analysis. Thus, if the question could have been resolved by relying on an established set of legal principles not requiring a detailed policy analysis, it was not error for the district court to begin with that tack.

2 *Winfrey* is not reported in South Western Reporter 3d. According to the commentary associated with Texas Rules of Appellate Procedure 47.2 and 47.7, however, "[a]ll opinions and memorandum opinions in civil cases issued after the 2003 amendment [to the rules] have precedential value." *Id.* (notes and comments). Hence, we consider *Winfrey* as a precedential opinion of the Texas Court of Appeals.

3 I note that the standard of review in *Sam* for a court's analysis under comity is abuse of discretion. *See Sam,* 2006–NMSC–022, ¶ 12, 139 N.M. 474, 134 P.3d 761. I am unsure why that standard was chosen. One would think that the standard would be de novo, given (1) the claimed error was the district court's denial of a motion to dismiss under Rule 1–012(B)(6), and (2) the underlying question is whether the TTCA violates New Mexico public policy. *See Sam,* 2006–NMSC–022, ¶ 9, 139 N.M. 474, 134 P.3d 761 (stating that we generally view a denial of a motion to dismiss de novo); *Nat'l Bank of Ariz. v. Moore,* 2005–NMCA–122, ¶¶ 6–7, 138 N.M. 496, 122 P.3d 1265 (indicating that we review de novo whether New Mexico public policy is violated).

4 One might offer a possible alternative comity solution by determining that there exist two strong New Mexico public policies militating against granting immunity to physicians sued in New Mexico for medical malpractice: one, lack of immunity under the NMTCA; two, lack of immunity for a non-New Mexico government physician sued for medical malpractice in New Mexico. If the TTCA violates both policies, New Mexico courts will not extend comity to Texas on immunity. The statutes and common law related to medical malpractice actions control. Under those laws, the physician has no New Mexico immunity. It is doubtful that this analysis would "fly" under *Sam,* considering that *Sam* appears to have chosen not to explore public policy underlying the three-year statute of limitations and whether the Arizona statute offended that public policy.

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Extraordinary Writs

State ex rel. Schwartz v. Kennedy, 120 N.M. 619 (1995)

904 P.2d 1044, 1995 -NMSC- 069

KeyCite Yellow Flag - Negative Treatment
Distinguished by State v. Nunez, N.M., December 30, 1999

120 N.M. 619
Supreme Court of New Mexico.

STATE of New Mexico, ex rel., Robert M. SCHWARTZ, Second Judicial District Attorney, Petitioner,
v.
Hon. Roderick T. KENNEDY, Judge of the Metropolitan Court, Respondent,
and
Greg Baca and Ray Holguin, Real Parties in Interest.

No. 22904.
|
Oct. 18, 1995.

Following administrative revocation of defendants' driver's licenses for failing or refusing blood-alcohol content tests, the Bernallilo County, Metropolitan Court, Roderick T. Kennedy, J., dismissed aggravated driving while intoxicated (DWI) charges against them on double jeopardy grounds. State petitioned for writ of superintending control directing trial judge to withdraw dismissals of charges. The Supreme Court, Franchini, J., held that: (1) question of whether state was barred from prosecuting an individual for DWI once that individual had been subjected to administrative hearing for driver's license revocation based on same offense was one of great public importance requiring the use of Supreme Court's power of superintending control; (2) administrative license revocation hearings and criminal prosecutions for DWI were separate proceedings for purposes of double jeopardy analysis; and (3) for both defendants, the conduct precipitating the separate proceedings consisted of the same offense; but (4) driver's license revocation under Implied Consent Act is not punishment for purposes of double jeopardy clause.

Petition for writ of superintending control granted.

West Headnotes (29)

[1] **Courts**
Issuance of Prerogative or Remedial Writs

Question of whether the state is barred on double jeopardy grounds from prosecuting an individual for driving while intoxicated (DWI) once the individual has been subjected to an administrative hearing for driver's license revocation based on same offense as criminal charge is one of great importance requiring that Supreme Court use its power of superintending control. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15, art. 6, § 3; NMSA 1978, §§ 66–8–102, subd. D, 66–8–112, subd. F.

Cases that cite this headnote

[2] **Courts**
Issuance of Prerogative or Remedial Writs

Supreme Court's power of superintending control is the power to control course of ordinary litigation in inferior courts. Const. Art. 6, § 3.

3 Cases that cite this headnote

[3] **Courts**
Issuance of Prerogative or Remedial Writs

Supreme Court's power of superintending control is an extraordinary power, hampered by no specific rules or means for its exercise, so general and comprehensive that its complete and full extent and use have not been fully known and exemplified; it is unlimited, being bounded only by the exigencies which call for its exercise. Const. Art. 6, § 3.

1 Cases that cite this headnote

State ex rel. Schwartz v. Kennedy, 120 N.M. 619 (1995)
904 P.2d 1044, 1995 -NMSC- 069

[4] **Courts**
Issuance of Prerogative or Remedial Writs

Supreme Court has traditionally limited its exercise of power of superintending control to exceptional circumstances, such as cases in which the remedy by appeal seems wholly inadequate or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship, or costly delays and unusual burdens of expense. Const. Art. 6, § 3.

2 Cases that cite this headnote

[5] **Courts**
Issuance of Prerogative or Remedial Writs

Supreme Court may exercise its power of superintending control even when there is a remedy by appeal, where it is deemed to be in the public interest to settle the question involved at the earliest moment. Const. Art. 6, § 3.

2 Cases that cite this headnote

[6] **Double Jeopardy**
Administrative or non-judicial proceedings; prison discipline

Driver's license revocations pursuant to Implied Consent Act, based on conduct of either failing blood-alcohol test or refusing to take one, are not "punishment" for purposes of double jeopardy analysis, and thus do not prohibit subsequent prosecution, even though they will have some deterrent effect on drunk drivers; such revocations serve legitimate nonpunitive goal of protecting public from drunk drivers and are therefore remedial, not punitive. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15; NMSA 1978, §§ 66–8–107, subd. A, 66–8–112, subd. F.

18 Cases that cite this headnote

[7] **Double Jeopardy**
Constitutional and statutory provisions

Due to the similarity of the federal and New Mexico double jeopardy clauses, Supreme Court has consistently construed the state clause as providing the same protections offered by the federal clause. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

4 Cases that cite this headnote

[8] **Double Jeopardy**
Double Jeopardy

Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal, second prosecution for same offense after conviction, and multiple punishments for same offense. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

1 Cases that cite this headnote

[9] **Double Jeopardy**
Multiple sentences or punishments

Double Jeopardy Clause not only protects against imposition of two punishments for same offense, but also protects criminal defendants against being twice placed in jeopardy for such punishment. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

Cases that cite this headnote

[10] **Double Jeopardy**
⇐Simultaneous proceedings; multiplicity
Double Jeopardy
⇐Multiple sentences or punishments

Double Jeopardy Clause protects the accused from multiple punishments in separate proceedings for same offense. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

Cases that cite this headnote

[11] **Double Jeopardy**
⇐Multiple sentences or punishments

Multiple punishment analysis under Double Jeopardy Clause entails three factors: whether state subjected defendant to different proceedings, whether conduct precipitating separate proceedings consisted of one offense or two offenses, and whether the penalties in each of the proceedings may be considered "punishment" for purposes of Double Jeopardy Clause. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

4 Cases that cite this headnote

[12] **Double Jeopardy**
⇐Administrative or non-judicial proceedings; prison discipline

For purposes of multiple punishment analysis under Double Jeopardy Clause, an administrative proceeding to revoke a person's driver's license for refusal to submit to a chemical test is entirely separate and distinct from the proceeding to determine guilt or innocence as to the crime of driving while intoxicated (DWI). U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

2 Cases that cite this headnote

[13] **Double Jeopardy**
⇐Proceedings, Offenses, Punishments, and Persons Involved or Affected
Double Jeopardy
⇐Civil or criminal nature

Parallel actions, instituted at about the same time and involving the same criminal conduct, constitute separate proceedings for double jeopardy purposes; thus, a civil action aimed at exacting at exacting a penalty and a criminal prosecution arising out of the same offense constitute two separate proceedings when pursued separately and concluded at different times. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

1 Cases that cite this headnote

[14] **Double Jeopardy**
⇐Proof of fact not required for other offense

The *Blockburger* test to determine whether two statutory violations constitute two offenses or only one for double jeopardy purposes is whether each provision requires proof of a fact the other does not; if each statute requires proof of an element not contained in the other, the offenses are two separate crimes and double jeopardy does not bar multiple punishment. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

Cases that cite this headnote

[15] **Double Jeopardy**
Administrative or non-judicial proceedings; prison discipline

Statute setting out elements necessary for revoking driver's license based on refusal to submit to chemical test for intoxication does not require proof of an element not contained in statute defining aggravated driving while intoxicated (DWI) charge; thus, these statutes define the same offense for purposes of double jeopardy analysis. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15; NMSA 1978, §§ 66–8–102, subd. D(3), 66–8–112, subd. F.

3 Cases that cite this headnote

[16] **Double Jeopardy**
Administrative or non-judicial proceedings; prison discipline

Statute setting out elements necessary for revoking driver's license based on failure of blood-alcohol content test does not require proof of an element not contained in statute defining aggravated driving while intoxicated (DWI) charge; thus, these statutes define the same offense for purposes of double jeopardy analysis. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15; NMSA 1978, §§ 66–8–102, subd. D(1), 66–8–112, subd. F.

1 Cases that cite this headnote

[17] **Double Jeopardy**
Civil or criminal nature

Traditionally, for purposes of double jeopardy analysis, jeopardy does not attach in proceedings in which only a civil penalty can be imposed, because the risk to which the Double Jeopardy Clause refers is not present in proceedings that are not essentially criminal; thus, a legislature may impose both a criminal and a civil sanction in respect to the same act or omission without violating Double Jeopardy Clause. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

2 Cases that cite this headnote

[18] **Double Jeopardy**
Civil or criminal nature

Double jeopardy analysis based on distinction between criminal and civil proceedings is not well suited to the context of humane interests safeguarded by Double Jeopardy Clause's proscription of multiple punishments; the determination whether a given civil sanction constitutes "punishment" in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that penalty may be fairly said to serve. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

2 Cases that cite this headnote

[19] **Double Jeopardy**
Civil or criminal nature

A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is "punishment" for purposes of double jeopardy analysis; therefore, a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or as retribution. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

3 Cases that cite this headnote

[20] **Double Jeopardy**
⇐Proceedings, Offenses, Punishments, and Persons Involved or Affected
Double Jeopardy
⇐Administrative or non-judicial proceedings; prison discipline
Double Jeopardy
⇐Fines, penalties, and forfeitures

The *Halper* proportionality or "compensation for loss" analysis appears to permit a finding of double jeopardy only in those rare cases in which the government imposes a criminal penalty and a civil monetary penalty that is not rationally related to the government's loss; the test is inappropriate for determining the punitive nature of a tax or determining whether a nonmonetary civil penalty such as an administrative license revocation is punishment for double jeopardy purposes. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

5 Cases that cite this headnote

[21] **Double Jeopardy**
⇐Civil or criminal nature
Double Jeopardy
⇐Administrative or non-judicial proceedings; prison discipline

In determining what purposes are served by civil sanctions against motorists who fail blood-alcohol content test or refuse to take it, in connection with double jeopardy analysis, Supreme Court evaluates the government's purpose in enacting the legislation, rather than the effect of the sanctions on the defendant. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15; NMSA 1978, §§ 66–5–33.1, 66–8–111, subds. B, C(1), 66–8–112, subd. F.

1 Cases that cite this headnote

[22] **Double Jeopardy**
⇐Particular proceedings

When an individual fails to adhere to standards set by government for participation in a regulated activity or occupation, the government generally may bar the individual from participation in that activity or occupation without implicating double jeopardy, so long as the sanction reasonably serves regulatory goals adopted in the public interest. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

1 Cases that cite this headnote

[23] **Double Jeopardy**
⇐Particular proceedings

By revoking a conditionally granted license because of noncompliance with conditions governing its issuance, the government intends to protect public from licensees who are unfit to participate in the regulated activity or occupation; thus, such revocation is not "punishment" for double jeopardy purposes, but rather is remedial insofar as it serves the interests of enforcing regulatory compliance and protecting the public. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

1 Cases that cite this headnote

[24] **Automobiles**
⇐Control and regulation in general

New Mexico state government regulates activity of driving on state's highways in the interest of public's safety and general welfare.

2 Cases that cite this headnote

[25] **Double Jeopardy**
Administrative or non-judicial proceedings; prison discipline

The fact that an administrative sanction imposed under a regulatory scheme has some incidental deterrent effect does not render that sanction "punishment" for purposes of double jeopardy analysis. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

3 Cases that cite this headnote

[26] **Double Jeopardy**
Fines, penalties, and forfeitures

Monetary sanctions, such as fines or forfeitures, are qualitatively different from other types of administrative sanctions, for double jeopardy purposes, because of their distinctly punitive purposes. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

1 Cases that cite this headnote

[27] **Double Jeopardy**
Administrative or non-judicial proceedings; prison discipline

The deterrent effect of administrative license revocation is incidental to government's purpose of protecting public from licensees who are incompetent, dishonest, or otherwise dangerous; therefore, administrative license revocation is not motivated by a punitive purpose for purposes of double jeopardy analysis. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

5 Cases that cite this headnote

[28] **Double Jeopardy**
Fines, penalties, and forfeitures

For purposes of double jeopardy analysis, a monetary sanction must be described as having a deterrent or retributive purpose if it is not designed to compensate government for its losses. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

2 Cases that cite this headnote

[29] **Double Jeopardy**
Administrative or non-judicial proceedings; prison discipline
Double Jeopardy
Fines, penalties, and forfeitures

Because of the inherent differences between regulatory sanctions, such as license revocations, and monetary sanctions, such as fines or forfeitures, different standards of "punishment" should be applied when evaluating each distinct type of sanction for double jeopardy purposes; sanctions will not be deemed "punishment" in this regard if they are reasonably calculated to constitute a rough compensatory remedy, reasonably serve regulatory goals adopted in the public interest, or provide treatment for persons unable to care for themselves. U.S.C.A. Const.Amend. 5; Const. Art. 2, § 15.

2 Cases that cite this headnote

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OPINION

FRANCHINI, Justice.

{ 1} In this case we answer the question whether a conviction for driving while intoxicated (DWI), NMSA 1978, § 66–8–102 (Repl.Pamp.1994), following the revocation of the defendant's driver's license in a civil proceeding for failing or refusing a chemical test for blood-alcohol content administered pursuant to the Implied Consent Act, NMSA 1978, §§ 66–8–105 to –112 (Repl.Pamp.1994), constitutes double jeopardy. We conclude that double jeopardy is not implicated by this process because an administrative driver's license revocation under the Implied Consent Act does not constitute "punishment" for the purposes of the Double Jeopardy Clause.

I. FACTS

{ 2} In November 1994 Greg Baca and Gary Holguin were arrested for DWI, in separate incidents, by officers of the Albuquerque Police Department. Baca submitted to a breath test to determine his blood alcohol content. Because Baca's test revealed that his blood alcohol content was in excess of .08 percent, the Motor Vehicle Division (MVD) of the New Mexico Department of Transportation revoked his driver's license pursuant to the Implied Consent Act, § 66–8–112(F). Holguin refused to submit to a chemical test to determine his blood alcohol content. Because Holguin refused to take the test, the MVD revoked his driver's license pursuant to the Implied Consent Act, § 66–8–112(F).

**1048 *623 { 3} Baca and Holguin were each charged with aggravated DWI, § 66–8–102(D).[1] These charges were dismissed by the Honorable Roderick T. Kennedy of the Bernallilo County Metropolitan Court on the grounds that the Double Jeopardy Clauses of the United States and New Mexico Constitutions prohibit the State from seeking to punish individuals twice in separate proceedings for a single act of driving while intoxicated, once by revoking their driver's licenses in administrative proceedings under the Implied Consent Act, and a second time in criminal prosecutions under Section 66–8–102.

{ 4} On behalf of the State, Robert Schwartz, the Second Judicial District Attorney, petitioned this Court to issue a writ of superintending control to Judge Kennedy (Respondent), directing him to withdraw his dismissals of the charges against Baca and Holguin. The question whether double jeopardy prohibits the State from subjecting an accused drunk driver to both an administrative driver's license revocation proceeding and a criminal prosecution was briefed for the State by the Attorney General, by Baca and Holguin as the real parties in interest, and by the New Mexico Criminal Defense Lawyer's Association as amicus curiae for Respondent.

{ 5} The parties presented oral argument on the petition June 14, 1995, and that same day we issued a writ from the bench ordering Respondent to vacate the dismissals and to reinstate the cases on his docket. This opinion contains the Court's rationale for granting the writ of superintending control.

II. WRIT OF SUPERINTENDING CONTROL

[1] { 6} We first address the question why the Court entertained this petition for writ of superintending control. Baca and Holguin insist that the State should follow normal appellate procedure. Ordinarily the State would appeal Respondent's rulings to the district court. *See* SCRA 1986, 7–703 (Supp.1995). In the event of an unfavorable ruling by the district court, it could appeal to the Court of Appeals, *see* SCRA 1986, 12–102(B) (Cum.Supp.1995), and eventually petition for writ of certiorari, *see* SCRA 1986, 12–502 (Cum.Supp.1995). Baca and Holguin argue that their cases are more

appropriately reviewed through appeals, and therefore contend that this Court should not grant immediate review by way of writ. *See* SCRA 1986, 12–504(C)(1) (Cum.Supp.1995) ("If it appears to a majority of the court that the petition [for writ of superintending control] ... concerns a matter more properly reviewable by appeal ... it may be denied without a hearing.").

[2] [3] { 7} This Court, under authority granted by the New Mexico Constitution, has "superintending control over all inferior courts." N.M. Const. art. VI, § 3. "The power of superintending control is the power to control the course of ordinary litigation in inferior courts." *District Court v. McKenna,* 118 N.M. 402, 405, 881 P.2d 1387, 1390 (1994) (quoting *State v. Roy,* 40 N.M. 397, 421, 60 P.2d 646, 661 (1936)), *cert. denied,* —— U.S. ——, 115 S.Ct. 1361, 131 L.Ed.2d 218 (1995). In *Roy* we observed:

> The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. *It is unlimited, being bounded only by the exigencies which call for its exercise.*

**1049 *624 40 N.M. at 422, 60 P.2d at 662 (emphasis added) (quoting Annotation, *Superintending Control and Supervisory Jurisdiction of the Superior Over the Inferior or Subordinate Tribunal,* 51 L.R.A. 33, 111 (Burdett A. Rich ed. 1901)); *see also McKenna,* 118 N.M. at 405, 881 P.2d at 1390 ("[O]ur jurisdiction under superintending control seemingly is boundless....").

[4] [5] { 8} We have traditionally limited our exercise of the power of superintending control to exceptional circumstances, such as cases in which "the remedy by appeal seems wholly inadequate ... or where otherwise necessary to prevent irreparable mischief, great, extraordinary, or exceptional hardship [, or] costly delays and unusual burdens of expense." *McKenna,* 118 N.M. at 405, 881 P.2d at 1390 (alterations in original) (quoting *State ex rel. Transcontinental Bus Serv., Inc. v. Carmody,* 53 N.M. 367, 378, 208 P.2d 1073, 1080 (1949) (citation omitted)). Nonetheless, we may exercise our power of superintending control "even when there is a remedy by appeal, where it is deemed to be in the public interest to settle the question involved at the earliest moment." *State ex rel. Townsend v. Court of Appeals,* 78 N.M. 71, 74, 428 P.2d 473, 476 (1967); *see also State Racing Comm'n v. McManus,* 82 N.M. 108, 110, 476 P.2d 767, 769 (1970) (holding that questions "of great public interest and importance" may require this Court to use its power of superintending control).

{ 9} The question whether the State is barred from prosecuting an individual for DWI (DWI) once the individual has been subjected to an administrative hearing for driver's license revocation based on the same offense as the criminal charge is one of great public importance requiring the use of our power of superintending control. New Mexico has a serious problem with drunk drivers, with one of the highest rates in the nation of DWI-related fatalities. Our citizens are obviously concerned by this dangerous situation, and through their elected representatives have established a system providing punishment for drunk drivers along with remedial measures for the protection of the population. Respondent's ruling has placed this system in doubt. Under Respondent's ruling, the State would essentially be unable to prosecute defendants charged with DWI because in almost every case the driver's license revocation hearing precedes the corresponding criminal prosecution. Trial courts throughout the state are in a position of uncertainty regarding how to proceed with DWI prosecutions, and some courts have chosen to follow Respondent's lead by dismissing such cases on double jeopardy grounds. In order to provide a prompt and final resolution to this troubling question we agreed to consider the petition for writ of superintending control.

III. DOUBLE JEOPARDY ANALYSIS

{ 10} New Mexico's two-tier approach to DWI cases came about as a result of federal efforts to encourage states to decrease the prevalence of drunk drivers on the nation's highways. In 1983, Congress established a program that allowed the Secretary of Transportation to "make grants to those States which adopt and implement effective programs to reduce traffic safety problems resulting from persons driving while under the influence of alcohol." 23 U.S.C. § 408(a) (1988). To qualify for a basic incentive grant, a State must adopt a program providing for the prompt suspension of the driver's

license of any individual whom a law enforcement officer has probable cause to stop for an alcohol-related traffic offense, and who is determined by a chemical test to be intoxicated or who refuses to submit to such a chemical test. 23 C.F.R. § 1309.5(a)(1) (1995). The legislatures of thirty-seven states, perhaps inspired by the availability of federal funding for alcohol-traffic-safety programs, have provided for the administrative suspension or revocation of an individual's license to drive when the individual has been arrested for DWI and has either refused to take or failed a chemical test. Respondent, however, ruled that this scheme, in which individuals suspected of drunk driving are subject to having their driver's licenses revoked in an administrative proceeding, as well as criminal prosecution for the same underlying act, violates the Double Jeopardy Clauses of the Fifth Amendment of the United States Constitution and Article II, Section 15 of the New Mexico Constitution.

**1050 *625 { 11} We note that Respondent is not alone in his ruling. Trial courts in over a dozen states, as well as at least one Ohio Court of Appeals panel, have also concluded that this scheme violates the federal Double Jeopardy Clause. *See State v. Gustafson,* No. 94 C.A. 232, 1995 WL 387619 (Ohio Ct.App. 7 Dist., June 27, 1995) (unpublished opinion, subject to Ohio Sup.Ct.R. for Reporting Ops. R.2 (Anderson 1995)), *appeal allowed,* 73 Ohio St.3d 1427, 652 N.E.2d 800 (1995); *but see State v. Miller,* No. 2–94–32, 1995 WL 275770 (Ohio Ct.App. 3 Dist., May 12, 1995) (holding that trial court may prosecute defendant for driving under the influence of alcohol following administrative license revocation imposed for testing over the legal limit without violating Double Jeopardy Clause) (unpublished opinion, subject to Ohio Sup.Ct.R. for Reporting Ops. R.2 (Anderson 1995)); *see also Drunk Driving Defense Succeeds in More States,* 95 Law.Wkly. USA 422 (May 22, 1995) (listing cases).

[6] { 12} Most appellate courts that have considered the question, however, have concluded that the scheme does not violate the Double Jeopardy Clause. *See, e.g., United States v. Bulloch,* 994 F.2d 844 (8th Cir.1993) (table) (text available in Westlaw, 1993 WL 177690); *State v. Zerkel,* 900 P.2d 744, 746 (Alaska Ct.App.1995); *State v. Nichols,* 169 Ariz. 409, 413–414, 819 P.2d 995, 999–1000 (Ct.App.), *review denied* (Ariz. Dec. 3, 1991); *Baldwin v. Department of Motor Vehicles,* 35 Cal.App.4th 1630, 42 Cal.Rptr.2d 422, 430 (1995); *Ellis v. Pierce,* 230 Cal.App.3d 1557, 282 Cal.Rptr. 93, 95–96, *review denied* (Sept. 4, 1991); *Freeman v. State,* 611 So.2d 1260, 1261 (Fla.Ct.App.1992) (per curiam), *review denied,* 623 So.2d 493 (Fla.), *and cert. denied,* 510 U.S. 957, 114 S.Ct. 415, 126 L.Ed.2d 361 (1993); *State v. Higa,* 79 Hawai'i 1, 7, 897 P.2d 928, 934 (1995); *State v. Maze,* 16 Kan.App.2d 527, 825 P.2d 1169, 1174 (1992); *Butler v. Department of Pub. Safety and Corrections,* 609 So.2d 790, 796 (La.1992); *State v. Savard,* 659 A.2d 1265, 1268 (Me.1995); *Johnson v. State,* 95 Md.App. 561, 622 A.2d 199, 205–06 (1993); *State v. Hanson,* 532 N.W.2d 598, 602 (Minn.Ct.App.), *review granted* (Minn. Aug. 9, 1995); *State v. Young,* 3 Neb.App. 539, 530 N.W.2d 269, 278, *review sustained,* (Neb. May 11, 1995); *Schreiber v. Motor Vehicles Div.,* 104 Or.App. 656, 802 P.2d 706, 706 (per curiam), *review denied,* 311 Or. 266, 810 P.2d 855 (1991); *State v. Strong,* 158 Vt. 56, 605 A.2d 510, 514 (1992). The question before this Court obviously is the subject of nationwide controversy. After reviewing the Supreme Court's recent opinions concerning the Double Jeopardy Clause, we conclude that the courts that have found that administrative license revocations are punitive have misread those Supreme Court opinions. To the contrary, for the reasons discussed below, driver's license revocations pursuant to the Implied Consent Act are not "punishment" for the purposes of double jeopardy analysis.

A. General Principles of Double Jeopardy Analysis.

[7] { 13} The Fifth Amendment provides "... nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb...." U.S. Const. amend. V. The New Mexico Constitution similarly provides "... nor shall any person be twice put in jeopardy for the same offense...." N.M. Const. art. II, § 15. Due to the similarity of the Federal and State Double Jeopardy Clauses, this Court consistently has construed and interpreted the state clause as providing the same protections offered by the federal clause. *See Swafford v. State,* 112 N.M. 3, 7 n. 3, 810 P.2d 1223, 1227 n. 3 (1991); *State v. Rogers,* 90 N.M. 604, 606, 566 P.2d 1142, 1144 (1977). Therefore, when we refer to the "Double Jeopardy Clause" in the context of this case, our analysis is identical for both the federal and state clause. We reserve the question, however, whether the New Mexico Double Jeopardy Clause, under circumstances other than the multiple punishment doctrine, provides greater protection than the federal clause.

[8] [9] { 14} The Double Jeopardy Clause "protects

against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper,* 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989); *see also Swafford,* ****1051 *626** , 112 N.M. at 7, 810 P.2d at 1227 (same (quoting *North Carolina v. Pearce,* 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969))). Here we are concerned with the third of these protections, the protection against multiple punishments. As the Ninth Circuit Court of Appeals has recently noted, "at its most fundamental level [the Double Jeopardy Clause] protects an accused against ... repeated attempts to exact one or more punishments for the same offense." *United States v. $405,089.23 U.S. Currency,* 33 F.3d 1210, 1215 (9th Cir.1994), *opinion amended on denial of rehearing,* 56 F.3d 41 (9th Cir.), *and petition for cert. filed,* 64 U.S.L.W. (U.S. Aug. 28, 1995). The Double Jeopardy Clause not only protects against the imposition of two punishments for the same offense, but also protects criminal defendants against being twice placed in jeopardy for such punishment. *Witte v. United States,* 515 U.S. 389, ——, 115 S.Ct. 2199, 2204, 132 L.Ed.2d 351 (1995) ("[T]he Double Jeopardy Clause 'prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense.' ") (quoting *Helvering v. Mitchell,* 303 U.S. 391, 399, 58 S.Ct. 630, 633, 82 L.Ed. 917 (1938)).

[10] [11] { 15} The Supreme Court has held that the Double Jeopardy Clause protects the accused from multiple punishments in separate proceedings for the same offense. *Department of Revenue v. Kurth Ranch,* 511 U.S. 767, ——, 114 S.Ct. 1937, 1945, 128 L.Ed.2d 767 (1994) ("A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding."). Multiple punishment analysis thus entails three factors: (1) whether the State subjected the defendant to separate proceedings; (2) whether the conduct precipitating the separate proceedings consisted of one offense or two offenses; and (3) whether the penalties in each of the proceedings may be considered "punishment" for the purposes of the Double Jeopardy Clause.

B. Whether the Administrative Revocation Hearing and the Criminal Prosecution are Separate Proceedings.

[12] [13] { 16} We first address the question whether the administrative revocation hearing and the criminal prosecution are separate proceedings. This Court has recognized that an administrative proceeding to revoke a person's driver's license for refusal to submit to a chemical test "is entirely separate and distinct from the proceeding to determine the guilt or innocence of the person" as to the crime of DWI. *In re McCain (Commissioner of Motor Vehicles v. McCain),* 84 N.M. 657, 662, 506 P.2d 1204, 1209 (1973). The revocation hearing and the criminal action are parallel actions. The civil action is pursued independently of the criminal action, the two actions are tried at different times before different factfinders, and the actions are resolved by separate judgements. "The Supreme Court has made clear that parallel actions, instituted at about the same time and involving the same criminal conduct, constitute *separate* proceedings for double jeopardy purposes." *$405,089.23 U.S. Currency,* 33 F.3d at 1217. Accordingly, "a civil action aimed at exacting a penalty and a criminal prosecution arising out of the same offense constitute two separate proceedings when pursued separately and concluded at different times." *Savard,* 659 A.2d at 1267 (citing *Kurth Ranch,* 511 U.S. at —— n. 21, 114 S.Ct. at 1947 n. 21). The administrative license revocation and criminal prosecution are pursued separately and concluded at different times. Therefore, for the purposes of double jeopardy analysis, we conclude that a criminal prosecution for DWI is a separate proceeding from the action taken to suspend the defendant's driver's license.

C. Whether Violation of the Implied Consent Act and Violation of Section 66–8–102 are Separate Offenses.

[14] { 17} The second factor under multiple punishment analysis is whether the conduct precipitating the revocation hearing and the criminal prosecution consists of one offense or two offenses. We apply the test established in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), to determine whether the two statutory violations are one offense for double jeopardy purposes. *See Swafford,* 112 N.M. at 8, 810 P.2d at 1228 (adopting *Blockburger* ****1052 *627** test). In *Blockburger,* the Supreme Court stated that:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the

> test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact the other does not.

Blockburger, 284 U.S. at 304, 52 S.Ct. at 182; *see also United States v. Dixon,* 509 U.S. 688, ——– – ——, 113 S.Ct. 2849, 2859–60, 125 L.Ed.2d 556 (1993) (reaffirming use of *Blockburger* same-elements test for determining what constitutes same offense for double jeopardy purposes). The *Blockburger* test focuses the inquiry on whether each statute requires proof of an element that is not contained in the other. If each statute requires proof of an element not contained in the other, then the offenses are two separate crimes and double jeopardy does not bar multiple punishment. *Blockburger,* 284 U.S. at 304, 52 S.Ct. at 182; *Dixon,* 509 U.S. at ——, 113 S.Ct. at 2856.

{ 18} In one of the cases dismissed by Respondent, the defendant refused to submit to a chemical test; in the other case, the defendant failed the chemical test. We analyze these situations independently to determine whether each statute requires proof of an additional fact that the other does not.

[15] { 19} We first examine Holguin's case, in which the suspected drunk driver refused to submit to a chemical test. The Implied Consent Act, § 66–8–112(F), sets out the elements that the hearing officer must find before revoking the driver's license of a person who has refused to submit to a chemical test.[2] The hearing officer must find that the law enforcement officer had reasonable grounds to believe the driver was driving a motor vehicle while under the influence of intoxicating liquor; that the driver was arrested; and that the driver refused to submit to the test upon request of the law enforcement officer after the law enforcement officer advised the driver that his or her failure to submit to the test could result in the revocation of the driver's privilege to drive.

{ 20} The DWI statute provides that a person may be convicted of aggravated driving while under the influence of intoxicating liquor if the trial court finds that the person "refused to submit to chemical testing, as provided for in the Implied Consent Act" and that the person was under the influence of intoxicating liquor. Section 66–8–102(D)(3). A violation of Section 66–8–102(D)(3) is predicated on a failure to submit to a chemical test as required under the Implied Consent Act, with the additional requirement that the court must find that the person refusing the chemical test was in fact driving under the influence of intoxicating liquor. The civil revocation statute, § 66–8–112(F), does not require proof of an element not contained in the aggravated DWI charge, § 66–8–102(D)(3). We conclude that Section 66–8–112(F) and Section 66–8–102(D)(3) constitute the same offense under the *Blockburger* same-elements test.

[16] { 21} In the Baca case, the defendant failed the chemical test. The Implied Consent Act, § 66–8–112(F), provides that the hearing officer may revoke the driver's license of a person if the officer finds that the law enforcement officer had reasonable grounds to believe the driver was driving a ****1053 *628** motor vehicle while under the influence of intoxicating liquor; that the driver was arrested; that a chemical test was administered pursuant to the provisions of the Implied Consent Act; and the test results indicated an alcohol concentration of eight one-hundredths or more if the person is over twenty-one years old. The DWI statute, § 66–8–102(C), provides that a person may be convicted of driving while under the influence of intoxicating liquor if the person is over twenty-one years old and is shown to have had an alcohol concentration of eight one-hundredths or more in his or her blood or breath. The elements of these two offenses are identical; the criminal charge does not require proof of facts which the civil revocation action would not have required to be proven. Accordingly, we conclude that the criminal charge for DWI under Section 66–8–102(C) is based on the same offense underlying a Section 66–8–112(F) driver's license revocation action.

D. Whether Driver's License Revocation Under the Implied Consent Act is Punishment for the Purposes of the Double Jeopardy Clause.

{ 22} Our determinations that the license revocation hearing and criminal prosecution for DWI are separate proceedings, and that license revocation under the Implied Consent Act and criminal prosecution for DWI are the same offense, do not end our analysis. The Double Jeopardy Clause bars multiple *punishments* for the same offense in separate proceedings. We now direct our discussion to the third factor in multiple punishment analysis: whether an implied consent driver's license revocation is "punishment" for the purposes of the Double Jeopardy Clause.

[17] { 23} Traditionally, jeopardy does not attach in proceedings in which only a civil sanction can be imposed, because "the risk to which the Clause refers is not present in proceedings that are not 'essentially criminal.' " *Breed v. Jones,* 421 U.S. 519, 528, 95 S.Ct. 1779, 1785, 44 L.Ed.2d 346 (1975). Thus a legislature "may impose both a criminal and a civil sanction in respect to the same act or omission" without violating the Double Jeopardy Clause. *Helvering v. Mitchell,* 303 U.S. 391, 399, 58 S.Ct. 630, 633, 82 L.Ed. 917 (1938); *see also United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 359, 104 S.Ct. 1099, 1103, 79 L.Ed.2d 361 (1984) (same); *United States v. Ward,* 448 U.S. 242, 250, 100 S.Ct. 2636, 2642, 65 L.Ed.2d 742 (1980) (same).

{ 24} In *United States v. Halper,* 490 U.S. 435, 446, 109 S.Ct. 1892, 1900, 104 L.Ed.2d 487 (1989), the Supreme Court addressed the questions "whether and under what circumstances a civil penalty may constitute punishment for the purposes of the Double Jeopardy Clause." *Halper* concerned a manager of a medical services provider who made sixty-five false claims to Medicare, causing the government to overpay the company $585. *Id.* at 437, 109 S.Ct. at 1895. The manager was convicted on sixty-five counts of violating the federal criminal false claims statute, 18 U.S.C. § 287 (1988), and received a sentence of two years imprisonment and a fine of $5,000. *Id.* The government subsequently sued the manager under a similar civil false claims statute, 31 U.S.C. §§ 3729–3731 (1982 & Supp. II 1984), seeking fines of $2,000 per count, for a total monetary sanction of $130,000. *Halper,* 490 U.S. at 438, 109 S.Ct. at 1896.

[18] [19] { 25} In *Halper,* the Supreme Court decided that double jeopardy analysis based on the distinction between criminal and civil proceedings is an approach that is "not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." *Id.* at 447, 109 S.Ct. at 1901. The Court explained:

> This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.
>
> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.... [T]he determination whether a **1054 *629 given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that penalty may be fairly said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
>
> These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 447–49, 109 S.Ct. at 1901–02 (footnotes and citations omitted).

[20] { 26} The Supreme Court concluded that the fine of $130,000 was "a sanction overwhelmingly disproportionate to the damages" the manager had caused. *Id.* at 449, 109 S.Ct. at 1902. The penalty bore "no rational relation to the goal of compensating the Government for its loss, but rather appear[ed] to qualify as 'punishment' in the plain meaning of the word," *id.,* and thus constituted a second punishment in violation of double jeopardy, *id.* at 452, 109 S.Ct. at 1903. The Court stated, however, that the test applied in *Halper* was directed to "the rare case, the case such as the one before [the Court], where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449, 109 S.Ct. at 1902. This proportionality or "compensation for loss" analysis thus appears to be limited to the "rare case" in which the government imposes a criminal penalty and a civil monetary penalty that is not rationally related to the government's loss. *See, e.g., Manocchio v. Kusserow,* 961 F.2d 1539, 1542 (11th Cir.1992) (holding that *Halper* 's analysis contrasting government's loss with monetary

damages does not apply when monetary damages are not awarded); *Higa,* 897 P.2d at 932–33 (holding that *Halper* test, comparing civil penalty and the government loss, does not apply in case challenging criminal prosecution for DWI on double jeopardy grounds following administrative revocation of driver's license); *Johnson,* 622 A.2d at 205 (holding that *Halper* only "applies to instances where the government attempts to extract from a person who has committed a punishable act, preceded or followed by criminal prosecution, a monetary penalty 'related to the goal of making the government whole' ") (quoting *Halper,* 490 U.S. at 451, 109 S.Ct. at 1903).

{ 27} For example, in *Department of Revenue v. Kurth Ranch* the Supreme Court addressed the question whether the Double Jeopardy Clause prevented the State of Montana from prosecuting an individual for possession of marijuana with intent to sell and later imposing a tax on the drugs at a rate of ten percent of the value of the drugs or $100 per ounce of marijuana, whichever was greater. 511 U.S. at ——— – ———, 114 S.Ct. at 1941–42. The critical issue before the Court was whether Montana's drug tax constituted a second punishment under the Double Jeopardy Clause for conduct already punished criminally. *Id.* at ———, 114 S.Ct. at 1944. The Court noted that:

> [T]ax statutes serve a purpose quite different from civil penalties, and *Halper* 's method of determining whether the exaction was remedial or punitive "simply does not work in the case of a tax statute." Subjecting Montana's drug tax to *Halper* 's test for civil penalties is therefore inappropriate.

Id. at ———, 114 S.Ct. at 1948 (quoting with approval *id.* at 1950 (Rehnquist, C.J., dissenting)). Accordingly, the Court did not apply the "compensation for loss" test used in *Halper* to determine whether the tax was punitive, but rather looked to whether the tax ***630 **1055** "depart[ed] so far from normal revenue laws as to become a form of punishment." *Id.*

{ 28} Just as the "compensation for loss" test is an inappropriate standard to apply for judging the punitive nature of a tax, it likewise is inappropriate for determining whether a nonmonetary civil penalty such as administrative license revocation is punishment for double jeopardy purposes. We conclude, however, that although the test set out in *Halper* does not apply to the present case, the general principles espoused in *Halper* do inform our determination whether a particular nonmonetary civil penalty is "punishment." *See id.* at ———, 114 S.Ct. at 1946; *Manocchio,* 961 F.2d at 1542; *Higa,* 897 P.2d at 933. Thus, in order to determine whether the revocation of a driver's license under the Implied Consent Act is punishment for double jeopardy purposes, we must make a "particularized assessment of the penalty imposed and the purposes that penalty may be fairly said to serve." *Halper,* 490 U.S. at 448, 109 S.Ct. at 1901. If the penalty may be fairly characterized only as a deterrent or as retribution, then the revocation is punishment; if the penalty may be fairly characterized as remedial, then it is not punishment for the purposes of double jeopardy analysis. *Id.* at 448–49, 109 S.Ct. at 1901–02.

{ 29} We now examine the procedure and penalties under the Implied Consent Act to determine the purposes those penalties might fairly be said to serve. Under the Act, when a person is arrested for DWI, the arresting officer may request that the person submit to a chemical test for the purpose of determining the alcohol content of his or her blood. Section 66–8–107. If the driver refuses to permit chemical testing, or is over twenty-one years old and submits to a chemical test and has a result that indicates a blood-alcohol concentration of .08 or more, or is under twenty-one years old and submits to a chemical test and has a result that indicates a blood-alcohol concentration of .02 or more, the officer must serve the driver with immediate written notice of revocation and of right to a hearing by the MVD. Section 66–8–111.1. At the time of notice the officer takes the person's driver's license and issues a temporary license valid for twenty days. If the person requests a hearing, the temporary license remains valid until the date the MVD issues the order following that hearing. *Id.*

{ 30} The law enforcement officer then sends the person's driver's license to the MVD along with a signed statement stating the officer's reasonable grounds to believe the arrested person had been driving a motor vehicle in New Mexico while under the influence of intoxicating liquor and that the person either refused to submit to a chemical test after being advised that failure to submit could result in revocation of his or her privilege to drive, or submitted to a chemical test and the test results exceeded the statutory limits for blood-alcohol content. Section 66–8–111(B)–(C). The MVD revokes the person's driving privilege upon receipt of the officer's statement, or if the person has requested a hearing, upon receipt of the hearing officer's ruling that revocation is proper. *See* Section 66–8–112. The revocation is for a

period of ninety days if the driver is over twenty-one and failed the chemical test, § 66–8–111(C)(1), for a period of six months if the driver is under twenty-one and failed the chemical test, § 66–8–111(C)(2), for a period of one year if the person had previously had his or her driver's license revoked under the Implied Consent Act, § 66–8–111(C)(3), or for a period of one year if the person refused to take the chemical test, § 66–8–111(B). If the person requests a hearing and his or her driver's license is revoked following that hearing, the decision of the hearing officer may be appealed to the district court. Section 66–8–112(G).

{ 31} Drivers who lose their license for the first time under the Implied Consent Act for the first time may apply for a limited license thirty days after the date of revocation if they provide the MVD with proof of insurance, proof of employment or enrollment in school, and proof of enrollment in an approved DWI course and an approved alcohol screening program. NMSA 1978, § 66–5–35(B) (Repl.Pamp.1994). The revoked license may be reinstated following the term of revocation upon application to the MVD and the payment of a fee of $100. NMSA 1978, § 66–5–33.1 (Repl.Pamp.1994).

**1056 *631 [21] { 32} In short, the penalty imposed on Baca for failing the chemical test for blood-alcohol content was the revocation of his driver's license for a period of ninety days. *See* Section 66–8–111(C)(1). Holguin's license was revoked for one year for refusing to take the chemical test. *See* Section 66–8–111(B). Each of the defendants is subject to a $100 fee for reinstatement of his driver's license upon completion of their respective terms of revocation. *See* Section 66–5–33.1. In order to ascertain whether these sanctions are punitive we must look at the purposes that the sanctions actually serve. *Halper,* 490 U.S. at 447 n. 7, 109 S.Ct. at 1901 n. 7. We make this determination by evaluating the government's purpose in enacting the legislation, rather than evaluating the effect of the sanction on the defendant. *See Doe v. Poritz,* 142 N.J. 1, 662 A.2d 367, 396 (1995) ("What counts ... is the purpose and design of the statutory provision, its remedial goal and purposes, and not the resulting consequential impact ... that may inevitably, but incidentally, flow from it."). As the Supreme Court stated in *Kurth Ranch,* "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.' " 511 U.S. at —— n. 14, 114 S.Ct. 1937, 1945 n. 14 (quoting *Halper,* 490 U.S. at 447 n. 7, 109 S.Ct. at 1901 n. 7).

{ 33} We believe it significant that the operation of automobiles on public highways is an activity that is regulated by the government. The government regulates many activities, including driving, participation in government programs such as Medicare, and participation in certain professions such as the practice of law or medicine. A critical element of this government regulation is the requirement that participants obtain licenses to pursue the regulated activity or occupation. As one court has stated:

> The rationale for this system of regulation is that the public is exposed to an unacceptable risk of harm if the activity or occupation is performed incompetently, recklessly, dishonestly, or with intent to injure. Under these regulatory schemes, a person must obtain a license to pursue the regulated activity or occupation, and the government possesses the power to revoke the license of someone whose conduct demonstrates his or her unfitness to continue in that activity or occupation....
>
> In many instances, the conduct that demonstrates a person's unfitness to pursue the regulated activity or occupation is also potentially criminal. Nevertheless, courts have traditionally declared that administrative action to revoke a license is distinct from any possible criminal prosecution, and administrative revocation of the person's license is not considered punishment for a crime.

Zerkel, 900 P.2d at 752 (footnote omitted).

[22] [23] { 34} When an individual fails to adhere to the standards set by the government for participation in a regulated activity or occupation, the government generally may bar the individual from participation in that activity or occupation without implicating double jeopardy, so long as the sanction reasonably serves regulatory goals adopted in the public interest. *See Emory v. Texas State Bd. of Medical Examiners,* 748 F.2d 1023, 1026 (5th Cir.1984) ("[R]evocation of privileges voluntarily granted is 'characteristically free of the punitive criminal element.' ") (quoting *Helvering,* 303 U.S. at 399 n. 2, 58 S.Ct. at 633 n. 2). By revoking a conditionally granted license because of noncompliance with the conditions governing its issuance, the government intends to protect the public from licensees who are unfit to participate in the regulated activity or occupation. *See, e.g., In re Nelson,* 79 N.M. 779, 784, 450

P.2d 188, 193 (1969) (per curiam) (disciplinary action taken against attorney was for "the protection of the public, the profession, and the administration of justice, and not the punishment of the person disciplined"); *United States v. Hudson,* 14 F.3d 536, 541–42 (10th Cir.1994) (disbarment of banking officials from further banking activities for mismanagement and illegal operation of several banks was "a means of protecting the integrity of the banking system and the interests of the depositors," and served "a legitimate remedial purpose"); *United States v. Furlett,* 974 F.2d 839, 844 (7th Cir.1992) (trading bar on commodities broker accused of fraudulent commodities trading served "to ensure the integrity of the markets and protect[****1057 *632**][ ] them from people like [the defendant]," and thus was remedial rather than punitive); *Manocchio,* 961 F.2d at 1542 (exclusion of physician from participation in Medicare programs for making fraudulent claim was remedial); *United States v. Bizzell,* 921 F.2d 263, 267 (10th Cir.1990) (debarment of employee from participation in federal housing program for filing false statements was "strictly remedial"); *Loui v. Board of Medical Examiners,* 78 Hawai'i 21, 889 P.2d 705, 711 (1995) (suspension of doctor's medical license for one year after conviction for attempted sexual abuse and kidnapping was "designed to protect the public from unfit physicians" and served "legitimate nonpunitive governmental objectives"); *Alexander v. Louisiana State Bd. of Medical Examiners,* 644 So.2d 238, 244 (La.Ct.App.1994) (suspension of doctor's medical license after conviction for bank robbery was designed to protect public and was not punishment for purposes of double jeopardy), *cert. denied,* 649 So.2d 423 (La.), *cert. denied,* 516 U.S. 813, 116 S.Ct. 64, 133 L.Ed.2d 26 (1995); *Cocco v. Maryland Comm'n on Medical Discipline,* 384 A.2d 766, 768–69 (Md.Ct.Spec.App.1978) ("[D]isciplinary proceedings against a professional have the unique purpose of protecting the public from the results of a professional's improper conduct, incompetence or unscrupulous practices."), *aff'd in part, rev'd in part sub nom. Unnamed Physician v. Commission on Medical Discipline,* 285 Md. 1, 400 A.2d 396, *cert. denied,* 444 U.S. 868, 100 S.Ct. 142, 62 L.Ed.2d 92 (1979); *In re Oxman,* 496 Pa. 534, 437 A.2d 1169, 1172 (1981) ("[T]he primary purpose of professional disciplinary proceedings is to protect the public."), *cert. denied,* 456 U.S. 975, 102 S.Ct. 2240, 72 L.Ed.2d 849 (1982). Thus courts have repeatedly held that revocation of a license for violation of the laws governing the licensed activity or occupation is not "punishment," but rather is remedial insofar as it serves the interests of enforcing regulatory compliance and protecting the public.

[24] { 35} The New Mexico state government regulates the activity of driving on the state's highways in the interest of the public's safety and general welfare. *Johnson v. Sanchez,* 67 N.M. 41, 48, 351 P.2d 449, 453 (1960). The suspension of an individual's license to drive based on failure of a chemical test for blood-alcohol content or refusal to take the chemical test serves the legitimate nonpunitive purpose of protecting the public from the dangers presented by drunk drivers and helps enforce regulatory compliance with the laws governing the licensed activity of driving. *See, e.g., Bierner v. State Taxation and Revenue Dep't,* 113 N.M. 696, 699, 831 P.2d 995, 998 (Ct.App.1992) (stating that the Implied Consent Act protects the "public by promptly removing from the highways those who drive while intoxicated"); *Ellis,* 282 Cal.Rptr. at 94 ("Appellate courts have repeatedly described the goals of the statute as twofold: the immediate purpose is to obtain the best evidence of blood-alcohol content, and the long-range purpose is to reduce highway injuries by inhibiting intoxicated persons from driving."); *Freeman,* 611 So.2d at 1261 ("[T]he purpose of the statute providing for revocation of a driver's license upon conviction of a licensee for driving while intoxicated is to provide an administrative remedy for public protection and not for punishment of the offender."); *Higa,* 897 P.2d at 933 ("[T]he purpose of the administrative revocation process is not to 'punish' those in [the defendant's] position; it is to safeguard the public and reduce traffic fatalities caused by those driving under the influence of alcohol."); *Maze,* 825 P.2d at 1174 ("Our State's interest is to foster safety by temporarily removing from public thoroughfares those licensees who have exhibited dangerous behavior, which interest is grossly different from the criminal penalties that are available in a driving under the influence prosecution."); *Butler,* 609 So.2d at 797 ("The statute's primary effect is remedial; it removes those drivers from our state highways who have been proven to be reckless or hazardous."); *Young,* 530 N.W.2d at 278 ("The purpose of enacting the license revocation procedure under [the Implied Consent Law] was to protect the public by getting people with drinking propensities off the road...."); *Strong,* 605 A.2d at 513 ("The summary suspension scheme serves the rational remedial purpose of protecting public safety by quickly removing potentially dangerous drivers ****1058 *633** from the roads."). We conclude that the administrative driver's license revocation provision of the Implied Consent Act may be fairly characterized as remedial, and therefore it is not punishment for the purposes of double

jeopardy analysis.

{ 36} Respondent and others, however, stress that license revocation is also punitive in nature. They therefore conclude that license revocation constitutes punishment for the purposes of double jeopardy analysis. Respondent emphasizes the phrase from *Halper,* "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." 490 U.S. at 448, 109 S.Ct. at 1902. He contends that the sections of the Implied Consent Act providing for the revocation of a driver's license if the driver either refuses to take a chemical test or if the results of the chemical test show a blood-alcohol content of .08 or greater serve the purposes of punishment insofar as they deter individuals from DWI. Respondent further contends that our appellate courts have recognized the deterrent purpose of the Implied Consent Act in cases such as *McKay v. Davis,* 99 N.M. 29, 30, 653 P.2d 860, 861 (1982) (stating that "[t]he Implied Consent Act is intended to deter driving while intoxicated and to aid in discovering and removing the intoxicated driver from the highway"); *Bierner,* 113 N.M. at 699, 831 P.2d at 998 (stating that administrative driver's license revocations further "the purpose of punishing and deterring violations of Section 66–8–102(A)"); and *Cordova v. Mulholland,* 107 N.M. 659, 660, 763 P.2d 368, 369 (Ct.App.) (stating that purpose of Implied Consent Act "is to deter individuals from driving while under the influence and endangering the lives and property of others"), *cert. denied,* 107 N.M. 546, 761 P.2d 424 (1988). Respondent concludes that administrative driver's license revocation under the Implied Consent Act is punitive because the sanction serves the purpose of deterring individuals from driving while intoxicated and thus cannot be said to be solely remedial. *See Gustafson,* 1995 WL 387619, at *12 (holding that the existence of a deterrent purpose in Ohio's implied consent law compelled finding that sanction of license revocation was punishment for purposes of double jeopardy).

[25] { 37} It is incontrovertible that the sanction of driver's license revocation will have some deterrent effect on drunk drivers. *See, e.g., Mackey v. Montrym,* 443 U.S. 1, 18, 99 S.Ct. 2612, 2621, 61 L.Ed.2d 321 (1979) ("[T]he very existence of the summary sanction of [driver's license suspension] serves as a deterrent to drunken driving."); *Zerkel,* 900 P.2d at 756 ("It is obvious that deterrence of misconduct will be one practical effect of any regulatory scheme that allows the government to revoke a license to drive motor vehicles or pursue a livelihood."); *Savard,* 659 A.2d at 1268 ("[W]e acknowledge that any [driver's license] suspension may have a deterrent effect on the law-abiding public...."). However, the fact that the regulatory scheme has some incidental deterrent effect does not render the sanction punishment for the purposes of double jeopardy analysis. As one court has noted,

> It is obvious that deterrence of misconduct will be one practical effect of any regulatory scheme that allows the government to revoke a license that authorizes a person to drive motor vehicles or pursue a livelihood. But this deterrent purpose does not mean that administrative revocation of these licenses is "punishment" for purposes of the double jeopardy clause.

Zerkel, 900 P.2d at 756; *see also Nichols,* 819 P.2d at 998 ("[T]he fact that a statute designed primarily to serve remedial purposes incidentally serves the purposes of punishment as well does not mean that the statute results in punishment for double jeopardy purposes."); *Butler,* 609 So.2d at 797 ("While this court recognizes that the Implied Consent Law ... is to some extent deterrent and thus of a punitive nature because the statute attempts to discourage the repetition of criminal acts, this court has previously stated that the deterrence may be a valid objective of a regulatory statute.").

[26] [27] [28] { 38} We do not believe that the Supreme Court, by stating that "a civil sanction that cannot be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or **1059 *634 deterrent purposes, is punishment," was holding that any administrative sanction that has a deterrent effect is punishment for double jeopardy purposes. We find the Supreme Court's opinion in *Kurth Ranch* instructive on this point. There the Court explained that monetary sanctions, such as fines or forfeitures, are qualitatively different from other types of administrative sanctions because of their distinctly punitive purposes. *Kurth Ranch,* 511 U.S. at ——, 114 S.Ct. at 1946 (distinguishing between fines, which are motivated by punitive purposes, and taxes, which are "motivated by revenue-raising rather than punitive purposes"). Administrative revocation of a license to engage in an

activity or occupation is fundamentally different than a monetary sanction. The deterrent effect of administrative license revocation is incidental to the government's purpose of protecting the public from licensees who are incompetent, dishonest, or otherwise dangerous. Therefore, administrative license revocation generally is not motivated by a punitive purpose. A monetary sanction, on the other hand, *must* be described as having a deterrent or retributive purpose if it is not designed to compensate the government for its losses. *Halper,* 490 U.S. at 449–50, 109 S.Ct. at 1902.

{ 39} The Court went on to state in *Kurth Ranch* that, "while a high tax rate *and deterrent purpose* lend support to the characterization of the drug tax as punishment, these features, in and of themselves, do not necessarily render the tax punitive." 511 U.S. at ——, 114 S.Ct. at 1947 (emphasis added). Thus the fact that the sanction in question may have some deterrent purpose does not, standing alone, render the sanction punishment for double jeopardy purposes.

[29] { 40} Because of the inherent differences between regulatory sanctions, such as license revocations, and monetary sanctions, such as fines or forfeitures, different standards of "punishment" should be applied when evaluating each distinct type of sanctions. As Professor Mary M. Cheh has explained,

> In th[e] context [of nonmonetary civil sanctions], any definition of punishment must enable us to distinguish between punishment on the one hand and regulation or treatment on the other. Common experience and common sense dictate that a criminal conviction for aggravated assault should not bar a departmental proceeding to suspend the police officer for the same conduct, or that a conviction for bribery should not prevent the dismissal of a housing inspector for accepting bribes. Indeed, if we allowed the fact of a previous conviction to bar administrative action against an individual for the same conduct, felons would enjoy immunity from regulation to which others are not subject. Moreover, history suggests that the multiple punishments against which double jeopardy protects are those traditionally associated with criminal proceedings, such as fines and incarceration.
>
> The conventional definition of punishment is thus inadequate here. That definition equates punishment with a burden imposed in response to an offense against legal rules and for the purpose of rehabilitation, deterrence, incapacitation, or retribution. Under that definition, regulation can be, and often is, punishment.
>
> For double jeopardy purposes, then, sanctions will not be deemed to be "punishment" if they are reasonably calculated to constitute a rough compensatory remedy, reasonably serve regulatory goals adopted in the public interest, or provide treatment for persons unable to care for themselves. As *Halper* itself indicated, however, the courts actually must determine, on a case-by-case basis, whether a given burden is reasonably calculated to achieve and actually does achieve the non-punishment goals of recompense, regulation, or treatment.

Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal–Civil Law Distinction,* 42 Hastings L.J. 1325, 1378–79 (1991) (footnotes omitted).

{ 41} We conclude that a regulatory sanction is not "punishment" simply because the sanction has some deterrent effect on those who might otherwise violate the standards of the regulatory body. The Alaska Court of ****1060 *635** Appeals reached this same conclusion in a recent case, stating that

> when the legislature employs a licensing scheme to regulate a profession or an activity affecting the public health or safety, a statute that authorizes a regulatory body to revoke these licenses is "remedial" for double jeopardy purposes even though the law serves to deter licensees from engaging in conduct that is inconsistent with their duties as licensees or that is inconsistent with the public welfare.

Zerkel, 900 P.2d at 756. The Chief Judge of the Court, in a concurring opinion, explained that, "the sanction of suspending or revoking a license for noncompliance with the conditions governing its very issuance or continued existence necessarily bears an inherent relationship to the remedial goal of restoring regulatory compliance." *Id.* at 758 (Bryner, C.J., concurring). Accordingly, the revocation or suspension of a license issued by the government to engage in an activity or occupation will be deemed remedial "so long as the revocation or suspension is based on conduct that bears a direct relation to the

government's regulatory goals." *Id.* at 757; *see also* Cheh, *supra,* at 1379 (opining that "sanctions will not be deemed to be 'punishment' if they ... reasonably serve regulatory goals adopted in the public interest").

{ 42} Applying this standard to administrative driver's license revocation pursuant to the Implied Consent Act, we note that license revocation under the Act is based either on a test revealing the driver's excessive blood-alcohol level or refusal to take a chemical test for blood-alcohol content in violation of Section 66–8–107(A).[3] When a driver has failed a chemical test, he or she has been shown to have operated a vehicle under dangerous conditions. When a driver has refused to take a chemical test, he or she has failed to obey one of the conditions for licensure—willingness to consent to a chemical test for blood-alcohol content under certain circumstances. The legislative goal in instituting the Implied Consent Act is to provide the public with safe roadways. *See* 23 U.S.C. § 408(a) (encouraging States to adopt and implement programs such as the Implied Consent Act in order "to reduce traffic safety problems resulting from persons driving while under the influence of alcohol"); 23 C.F.R. § 1309.2 (1995) (encouraging States to adopt and implement programs such as the Implied Consent Act in order to "significantly reduce crashes resulting from persons driving while under the influence of alcohol"). We conclude that—despite its deterrent effect—revocation of a person's driver's license based on the conduct of either failing a blood-alcohol test or refusing to take a chemical test under the circumstances stated in Section 66–8–107 is consistent with the government's goals in implementing the Implied Consent Act and is therefore remedial, not punitive, for the purposes of the Double Jeopardy Clause.

IV. CONCLUSION

{ 43} We hold that administrative driver's license revocation under the Implied Consent Act does not constitute "punishment" for the purposes of the Double Jeopardy Clause. Respondent is ordered to vacate the dismissals of the charges against Baca and Holguin of aggravated DWI and to reinstate the cases on his docket.

{ 44} **IT IS SO ORDERED.**

BACA, C.J., and RANSOM, FROST and MINZNER, JJ., concur.

All Citations

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Footnotes

1 Baca was charged under Section 66–8–102(D)(1), and Holguin was charged under Section 66–8–102(D)(3). Section 66–8–102(D) states:

> D. Aggravated driving while under the influence of intoxicating liquor or drugs consists of a person who:
> (1) has an alcohol concentration of sixteen one-hundredths or more in his blood or breath while driving any vehicle within this state;
> (2) has caused bodily injury to a human being as a result of the unlawful operation of a motor vehicle while driving under the influence of intoxicating liquor or drugs; or
> (3) refused to submit to chemical testing, as provided for in the Implied Consent Act [66–8–105 to 66–8–112 NMSA 1978], and in the judgment of the court, based upon evidence of intoxication presented to the court, the person was under the influence of intoxicating liquor or drugs.

2 Section 66–8–112(F) provides:

> F. The department shall enter an order sustaining the revocation or denial of the person's license or privilege to drive if the department finds that:
> (1) the law enforcement officer had reasonable grounds to believe the driver was driving a motor vehicle while under the influence of intoxicating liquor or drug;
> (2) the person was arrested;
> (3) this hearing is held no later than ninety days after notice of revocation; and
> (4) the person either refused to submit to the test upon request of the law enforcement officer after the law

enforcement officer advised him that his failure to submit to the test could result in the revocation of his privilege to drive or that a chemical test was administered pursuant to the provisions of the Implied Consent Act and the test results indicated an alcohol concentration of eight one-hundredths or more if the person is twenty-one years of age or older or an alcohol concentration of two one-hundredths or more if the person is less than twenty-one years of age.

If one or more of the elements set forth in Paragraphs (1) through (4) of this subsection are not found by the department, the person's license shall not be revoked.

3 Section 66–8–107(A) reads in part:

Any person who operates a motor vehicle within this state shall be deemed to have given consent ... to chemical tests of his breath or blood or both ... for the purpose of determining the drug or alcohol content of his blood if arrested for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or drug.

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