



**IN THE SUPREME COURT
FOR THE STATE OF NEW MEXICO**

**STATE OF NEW MEXICO ex rel.
WESLEY and JESSICA BIGNEY
NORBERT BARCENA, BETTY
BIRNER and PAMELA LEE HAINES
Plaintiffs/Respondents**

v.

**Supreme Court No. S-1-SC-40768
Ct. App. No. A-1-CA-40664**

**CITY OF RIO RANCHO, A MUNICIPAL
CORPORATION
Defendant/Petitioner**

ANSWER BRIEF

Of Plaintiffs/Respondents

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Respondents (“Plaintiffs”), by counsel of record, Cadigan Law Firm, P.C. (Michael J. Cadigan) submits their answer brief to the Defendant-Petitioner City of Rio Rancho’s (“City”) Brief in Chief.

STATEMENT REGARDING TRANSCRIPT CITATIONS

Citations to trial proceedings are stenographic and are cited in the form contained in Rule § 23-113 NMRA Appendix X.

STATEMENT OF COMPLIANCE

This Answer Brief complies with the type-volume requirements set forth in Rule §12-318(F)(3) NMRA. It is in 14 point Times New Roman and the body of the Answer Brief contains 9194 words according to Microsoft Word.

SUMMARY OF PROCEEDINGS¹

In this case, five Plaintiffs owned residential lots that fronted on and relied solely upon Epazote Road in Rio Rancho for access. Epazote was a platted, dedicated, accepted public road, which like many roads in Rio Rancho, had not been paved. Plaintiffs’ only reasonable access to the Rio Rancho network of roads was the intersection of Epazote Road with Idalia Road, which had been open and passable since Plaintiffs purchased their lands. In 2014, the City embarked on a project to improve Idalia Road, adding medians, sidewalks, curb, landscaping and

¹ In accordance with Rule § 12-318(B) this summary of proceedings is necessary because the Brief in Chief does not accurately represent the course of the trial.

gutters. As part of the Idalia project, the City's engineering consultants recommended leaving the intersection of Idalia and Epazote open. Despite this recommendation, and against the request of Plaintiffs, the City decided to close the intersection of Epazote and Idalia by placing a median, gutters, curb, sidewalk and landscaping across what had been the intersection of Idalia and Epazote, blocking Plaintiffs' access². The elevation of Idalia was lowered, making what had been the intersection of Idalia and Epazote significantly steeper. This affirmative decision was made, in large part because Harold's Grading & Trucking, Inc. ("HGT"), Plaintiff's neighboring landowner across Epazote, had developed an unlawful 40 foot deep gravel pit and unpermitted Construction and Demolition landfill that rendered Epazote Road unsafe, and excavated into the City's right of way, while the City failed to take effective action to stop them for years. As a result, the Jury found, Plaintiffs no longer had reasonable access to their properties. The Jury awarded Plaintiffs a total of \$60,000 (\$15,000 each) on Plaintiffs' claim of inverse condemnation.

The City's Summary of Proceedings contain several misleading and superfluous factual contentions that seem intended to convince this Court, contrary to the unchallenged jury verdict, that the City did not close access to Epazote, it

² The City argued that Plaintiffs could simply drive over and across the gutter, curb, landscaping and sidewalk to access their lots. The Jury rejected this argument.

merely “diverted” traffic temporarily.³ This theory was rejected by the Court and the Jury. The Jury found that City’s actions constituted an inverse condemnation. City’s own witnesses acknowledged that Plaintiffs’ only alternative access -- southward on Epazote, down a steep narrow hill, across several arroyos to Chayote Road -- was never, and is not now, *reasonable* access. This finding is inconsistent with any theory that there was a temporary diversion of traffic.

City argues at Brief in Chief (“BIC”) 2 that it “temporarily placed curb and gutter along Idalia where it intersected Epazote.” In fact, City installed curb, gutter, landscaping and sidewalks across the point where Epazote previously entered onto Idalia. Plaintiff’s real estate appraiser expert, Lee Morris, testified that the improvements appeared permanent. [6 TR 45:21-23.] Plaintiff’s traffic engineering expert, Kevin Broderick, P.E. testified that the curb, gutter and sidewalk were permanent based on his experience as a traffic engineer. [6 TR 132:11-21.] Thus, there was substantial evidence that the closure of Epazote was permanent, not temporary. The Court gave a jury instruction noting the City’s claim that the taking was not permanent. [11 RP 2766] The City argued to the jury that the curb, gutter and sidewalks blocking Plaintiffs’ access were temporary, [9 TR 128:10-13], but the Jury rejected this claim.

³ The Court gave Jury Instruction No. 18 which contained the City’s contention that there was no taking because closing Epazote “changed the Plaintiffs’ current access point but did not rise to the level of a permanent taking of all reasonable access”. [11 RP 2766]. By finding a taking, the Jury necessarily rejected this contention.

The City argues that the Plaintiffs never had access to their properties from Idalia. BIC 2. In fact, Jaime Marrufo, the City's Deputy Director of Public works admitted the Plaintiffs had physical access to their properties from Idalia and Epazote before the improvements to Idalia were constructed. [6 TR 198: 19-22.]

The City did not appeal the Jury's verdict which necessarily found that the Plaintiffs had access before the project and did not have it after. The City should not be permitted collaterally to attack these factual findings.

I. STANDARD OF REVIEW

City argues this Court should apply a *de novo* standard of review in this case. City recognizes generally, award of attorney fees is subject to an "abuse of discretion review" but argues *de novo* is proper because it claims the District Court committed error in misapplying the Eminent Domain Code. While the decision to apply the attorney fee shifting provision of the Eminent Domain Code, §42A-1-29 NMSA, may be subject to a *de novo* review, the remainder of the District Court's analysis, including its factual finding that the City's "did not have the right to take or damage Plaintiffs' property without compensation and thus its actions were wrongful" [RP 2043], that certain fees for the trial were inextricably intertwined and not reasonably segregable, and its finding that the attorney fees were reasonable [11 TR 80:11-14] and that the costs were awardable [RP 3045-3047] are subject to a more deferential abuse of discretion review. "We review an award of

attorney fees for an abuse of discretion”. Paz v. Tijerina, 2007-NMCA-109, ¶ 8, 142 N.M. 391, 393, 165 P.3d 1167, 1169. In an appeal regarding attorney fees after the Court determines whether the correct law has been applied, it reviews a decision for an abuse of discretion and reverses only if it is contrary to logic and reason.” In re N.M. Indirect Purchasers Microsoft Corp., 2007-NMCA-007, ¶ 6, 140 N.M. 879, 887. “The trial court has broad discretion when awarding attorney fees and will not be reversed unless there is an abuse of discretion.” Hedicke v. Gunville, 2003–NMCA–032, ¶ 23, 133 N.M. 335, 62 P.3d 1217. Primetime Hosp., Inc. v. City of Albuquerque, 2007-NMCA-129, ¶ 53, 142 N.M. 663, 676, 168 P.3d 1087, 1100, rev'd, 2009-NMSC-011, ¶ 53, 146 N.M. 1, 206 P.3d 112 (“Primetime I”).

New Mexico law gives District Courts a heightened level of discretion when dealing with attorney fee awards and cost bills because the District Judge was present for the pre-trial phase and personally observed the entire trial. It would be difficult for a reviewing court to gain the type of familiarity the District Court had from reviewing designated parts of a “cold” transcript. “Further, abuse of discretion—already one of the most deferential standards of review—takes on special significance when a court is reviewing fee decisions. The district court, which is intimately familiar with the nuances of the case, is in a far better position to make such decisions than is an appellate court, which must work from a cold

record.” Puma v. Wal-Mart Stores E., LP, 2023-NMCA-005, ¶ 54, 523 P.3d 589, 605, vacated in part, No. S-1-SC-39540, 2024 WL 5166686 (N.M. Dec. 19, 2024)

II. THE COURT CORRECTLY APPLIED THE ATTORNEY FEE PROVISION OF THE EMINENT DOMAIN CODE

The City argues that Plaintiffs, the District Court, the Court of Appeals and the Court in Landavazo v. Sanchez, 1990-NMSC-114, 111 N.M. 137, 802 P.2d 1283 all wrongfully relied on the attorney fee provision of the “Condemnation Statute” in this case under the “Inverse Condemnation Statute.” BIC at 8. This argument ignores the fact that the cited Inverse Condemnation provisions and the Attorney Fee Provisions *are parts of the same statute* – the Eminent Domain Code. Section 42A-1-1NMSA states: “Sections 42A-1-1 through 42A-1-33 NMSA 1978 may be cited as the “Eminent Domain Code.” Section 42A-1-29 (the inverse condemnation provision) and Section 42A-1-25 (the attorney fee provision) are both *parts* of the Eminent Domain Code. They are not different statutes. The Court of Appeals has recognized that both a condemnation and an inverse condemnation are “eminent domain proceeding[s].” “An inverse condemnation proceeding is an action or eminent domain proceeding initiated by the property owner (condemnee) rather than the governmental entity (condemnor), and is generally available where private property has been taken for public use without a formal condemnation proceeding.” Moongate Water Co. v. City of Las Cruces, 2014-NMCA-075, ¶ 7, 329 P.3d 727, 729.

Thus, the Courts below properly applied the attorney fee section of the of the Eminent Domain Code to an inverse condemnation claim which was also under the Eminent Domain Code.

III. LANDAVAZO WAS CORRECTLY DECIDED AND SHOULD NOT BE ABANDONED

Landavazo has been the law of New Mexico for 35 years -- since 1990. No Court has even suggested it is ripe for reversal and none of the subsequent 34 legislatures has taken action to change it. Even applying the test suggested by the City there is no compelling reason to abandon it.

a. There is No Reason to Abandon the Well-Settled Law

The City recognizes that reversing Landavazo implicates *stare decisis*, but argues for its abandonment nonetheless. “The principle of *stare decisis* dictates adherence to precedent. This doctrine “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” Therefore, “the doctrine of *stare decisis* is of fundamental importance to the rule of law,” and “it lies at the very core of the judicial process of interpreting and announcing law.” While “[*s*]tare decisis is not an inexorable command,” we require a **compelling reason** to overrule one of our prior cases. Padilla v. State Farm Mut. Auto. Ins. Co., 2003-NMSC-011, ¶ 7, 133 N.M. 661, 664, 68 P.3d 901,

904 [citations omitted, emphasis added]. The City offers no compelling reason to overrule Landavazo other than its disagreement with this Court’s reading of the Eminent Domain Code and the City’s desire to avoid expense.

The City cites the four-part test for overruling longstanding doctrine from Pennsylvania v. Casey, 505 U.S. 833, 855, 112 S. Ct. 2791, 2809, 120 L. Ed. 2d 674 (1992), overruled by Dobbs v. Jackson Women’s Health Org., 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022)(“Casey”) and adopted in in Trujillo v. City of Albuquerque, 1998-NMSC-111, 62 N.M. 721. Each of the Casey factors favors upholding Landavazo.

i. Landavazo is not unworkable.

Ladavazo and Primetime I together set forth a workable test that considers several factors, including, whether the taking is a mistake or the result of an affirmative decision to take or harm property without a condemnation process.

“If a condemnor’s taking is unintentional, or if a landowner sues for inadvertent damaging of his property, then the basis for applying Section 42A-1-25 NMSA to the condemnor’s actions—i.e., that the actions were wrongful; that the condemnor “did not have the right” to take them—might not be present. But here, where the county deliberately chose to take the property first and litigate afterwards, forcing the landowner to initiate the lawsuit, the district court properly concluded that the county did not have the right to take the property. Landavazo at ¶ 30.

To the contrary, in this case, the City knew it was going to eliminate Plaintiffs' access and chose to go forward with the closure against the request of one Plaintiff and against its engineer's advice.

The Court of Appeals summarized the holding of Landavazo accurately and in such a way as to avoid the "unworkable" interpretation the City is concerned with:

"[T]he [Landavazo] Court's decision was confined to a circumstance in which the governmental entity, rather than proceeding by way of a direct condemnation action, deliberately took the landowner's property without paying for it, thereby forcing the landowner to initiate the lawsuit and unnecessarily incur attorney fees. The *Landavazo* Court was clearly concerned with protecting landowners against unfettered government abuse and wanted to discourage condemnors from simply taking property without just compensation. The facts of this case are markedly different." Moongate Water Co. v. City of Las Cruces, 2014-NMCA-075, ¶ 17, 329 P.3d 727, 732 [internal citations omitted].

Trial courts are perfectly able to apply Landavazo subject to the limitations articulated by Primetime I and Moongate. The fact that a doctrine requires a judge to examine the facts of a case carefully does not make a rule "unworkable." The Casey Court, rejecting the claim that Roe v. Wade and its progeny had become an overly complicated and unworkable doctrine wrote: "While Roe has, of course, required judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement, and although the need for such review will remain as a consequence of today's decision, the required determinations fall within judicial competence." Casey at 505 U.S. 833. Similarly,

evaluating whether a taking is “wrongful” is well within the “judicial competence” of New Mexico district courts.

ii. Parties Have Relied on Landavazo.

The City argues with no support that “as of this writing, no party in any reported decision, including plaintiffs has justifiably relied on the precedent of Landavazo.” BIC at 25. The City would have no way of knowing whether a party in a reported or unreported decision *actually relied* on Landavazo. Contrary to the City’s bald assertion, however, the Plaintiffs in this case did “justifiably” rely on Landavazo. Plaintiffs’ counsel accepted this case on a contingency basis, relying on the fact, that even if the condemnation award were modest, that attorney fees would be available. Other attorneys have likely made the same calculation.

Casey does not limit reliance to reported decisions or even cases that came before courts. As Casey explains, Americans (including those who did not file lawsuits) had relied upon the protections of Roe for years in making family planning decisions. Casey at 505 U.S. 856. Similarly, governments in New Mexico have since 1990 (when Landavazo was decided) known that a potential consequence of wrongfully taking land without a condemnation process could be an attorney fee award. Landowners have relied on the same. Thus, the absence of reported cases proving reliance does not mean no one has relied.

iii. Landavazo is Not a “Remnant of an Abandoned Doctrine”

The City identifies no case that demonstrates Landavazo is a “remnant of an abandoned doctrine.” To the contrary, the City points to Primetime I and Moongate, but both cases *reaffirmed* the holding of Landavazo and distinguished it from the facts at bar in those cases. Neither case criticized the central holding of Landavazo or suggested it was ripe for reversal. In 2014 our Court of Appeals referred to Landavazo as good law: “In Landavazo, our Supreme Court decided that Section 42A-1-25 permits an award of attorney fees to a successful inverse condemnation plaintiff.” Moongate at ¶ 17. As recently as 2023, the Court of Appeals cited Landavazo, but found it inapplicable because the plaintiff therein was not a “*successful* inverse condemnation plaintiff.” Reddy v. New Mexico Dep't of Transportation, No. A-1-CA-41214, 2023 WL 6602032, at *1 (N.M. Ct. App. Oct. 10, 2023), cert. denied sub nom. Reddy v. NM Dep't of Transportation, 2024-NMCERT-002, ¶ 4, 546 P.3d 1276. Primetime I and Primetime II (Primetime Hosp., Inc. v. City of Albuquerque, 2009-NMSC-011, ¶ 7, 146 N.M. 1, 4, 206 P.3d 112, 115) presented this Court and the Court of Appeals with an opportunity to overrule or limit Landavazo in 2007 and 2009. The failure to do so shows that Landavazo is still a doctrine the Courts rely on, even as limited to intentional takings by Primetime I. Finally, the Legislature has had 34 years to change the Eminent Domain Code if it had determined Landavazo should be

abandoned, and it has not done so. Thus, there is no indication that Landavazo is a “remnant of an abandoned doctrine.”

iv. Facts Have Not Changed to Rob the Old Rule of Justification

The fourth Casey factor is whether facts have changed that “rob the old rule of justification.” The Casey Court referred to the fact that advances in health care sciences had made abortions safer in the third trimester than they were in 1973 when Roe was decided, but decided that these changes of fact were not sufficient to justify overruling Roe. This is the type of fact changes Casey referred to as a potential reason to abandon a precedent. The City points to no changes in the science and engineering behind road building, or the development of cities that justify abandoning 35 years of Landavazo precedent. Rather they point to the alleged “temporary” nature of the taking (which the Jury rejected) and the City’s right to re-route traffic (also rejected by the Jury) which has been the law since long before Landavazo. State ex rel. State Highway Comm’n v. Danfelser, 1963-NMSC-138, ¶ 12, 72 N.M. 361, 365, 384 P.2d 241, 244, which established the right of a government to re-route traffic without effecting a taking⁴, predates Landavazo by 27 years and can hardly be seen as a post-Landavazo change of

⁴ The Jury was instructed on the City’s defense of its right to re-route traffic at the City’s request and found a taking nevertheless. See: 11 RP 2776.

facts. Thus, each of the Casey factors favors honoring *stare decisis* and leaving Landavazo in place.

b. The Taking in this Case Was Not Temporary

The City spends much of its Brief engaging in semantic gymnastics to argue changing an intersection to a cul-de-sac and installing curb, gutters, sidewalks and a change in elevation is “temporary” because it can theoretically be un-done at some time in the future. By the same logic, *any taking*, to build a road or construct a building is temporary because either could, theoretically, be torn down or removed. Thus, the City’s argument regarding temporariness is a red herring. This issue is not before the Court as the City did not appeal the jury’s verdict on substantial evidence or any other grounds. In fact, Landavazo and Primetime I apply whether the taking is temporary or permanent, as they involved a damages award in a temporary taking case. (A significant difference is that in Primetime, the taking was inadvertent *and* temporary and the City’s water line was moved as soon as it was discovered. By way of contrast in this case, the Plaintiffs asked the City not to close Epazote and the City refused. 12 TR 31:4-13. In sum, Landavazo provides a clear and workable rule: Where a government deliberately chooses to take or damage property first, not proceed under the Eminent Domain Act, and force the owner to litigate after, an award of reasonable attorney fees is appropriate. There is no reason to upset 34 years of well settled law.

IV. PUBLIC POLICY DEMANDS THAT GOVERNMENT BE REQUIRED TO PAY FEES IN INVERSE CONDEMNATION CASES

Public policy supports an award of attorney fees under the facts of this case. As the Landavazo court recognized, failing to award attorney fees and costs to a successful inverse condemnation plaintiff incentivizes governments to take property first and litigate later, which is contrary to the process outlined in the Eminent Domain Code, and is, as such, *wrongful*. Inverse condemnation cases are often complicated, expensive and require substantial expertise in real estate and government law. They require appraisals that cost several thousands of dollars and often require expert testimony from engineers, both of which were true in this case. When a government refuses to settle, and defends a case aggressively, the costs and fees of litigation can easily be far greater than the damages award, as it was in this case. Unless fees are available to successful inverse condemnation plaintiffs, there will be a chilling effect on the public's ability to hold governments to comply with the Eminent Domain Code. The Code gives the government enormous power against a citizen – to take his or her property without consent. When it does so, good public policy demands the citizen must be compensated fully, not left with attorney fee and cost bills that exceed the value of the property taken. “In fee-shifting cases like Plaintiff's, courts generally use the lodestar method “because it provides adequate fees to attorneys who undertake litigation that is socially

beneficial, *irrespective of the pecuniary value to the [plaintiffs].*” Vinyard v. New Mexico Hum. Servs. Dep’t, No. A-1-CA-36717, 2019 WL 6728859, at ¶38 (N.M. Ct. App. Nov. 12, 2019)(unpublished). While Vinyard was a Human Rights Act case, the concept is applicable here. Citizens should be encouraged, not punished for opposing illegal conduct by governments. See also: Rio Grande Sun v. Jemez Mountains Pub. Sch. Dist., 2012-NMCA-091, ¶ 19, 287 P.3d 318, 322.

V. THE NEW MEXICO AND UNITED STATE CONSTITUTION REQUIRE THAT FEES BE INCLUDED

Just compensation is required by the plain text of the New Mexico and United States Constitutions. N.M. Const., art. II, § 20: “Private property shall not be taken or damaged for public use without just compensation.” “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. Amend. V. In a case where a government chooses to take property without going through the eminent domain process, the property owner does not receive “*just* compensation” unless they also receive attorney fees. This case is a perfect example of the problem. Here, the Plaintiffs suffered a relatively modest amount of damages (\$60,000 or \$15,000 each) as a result of the taking. But in part because the City chose not to go through the eminent domain process, and instead vigorously defended this case, the Plaintiff incurred fees of more than twice the amount of damages. Where a group of citizens is forced to spend \$130,221.00 to obtain its

constitutionally protected \$60,000 in compensation, the net (which would be negative \$70,221) is not “just” under any definition of that term.

The City argues that the Eminent Domain Code should be construed strictly. BIC at 8. However, the Plaintiffs’ constitutional right to *just* compensation, must be construed liberally in favor of citizens and against the government. “We interpret our constitution to carry out its spirit, avoiding legal technicalities and subtle niceties.” See, e.g.: State ex rel. Udall v. Colonial Penn Ins. Co., 1991-NMSC-048, ¶ 22, 112 N.M. 123, 128, 812 P.2d 777, 782; City of Raton v. Sproule, 1967-NMSC-141, 78 N.M. 138, 429 P.2d 336 (Constitutional provision that electors be enabled to vote on amendments separately should receive a liberal construction). Federal courts interpret the Fifth Amendment liberally. “The importance to political liberty and the welfare of our country of this Constitutional provision and the language of the Fifth Amendment cannot be over-emphasized. These amendments should receive a liberal construction to prevent any depreciation of the rights of our citizens by well-intentioned but mistakenly over-zealous executive officers.” Moyer v. Brownell, 137 F. Supp. 594, 607 (E.D. Pa. 1956)

Forcing a citizen to pay her own attorney fees, especially where the fees exceed the condemnation judgment, violates the spirit of the New Mexico and U.S. Constitution, both of which require “just” compensation. A Plaintiff who receives

inverse condemnation damages less attorney fees does not receive Constitutionally mandated “just compensation.” The Landavazo Court recognized this:

At that point, under the thoroughly settled New Mexico law just mentioned, Mr. Landavazo's options were severely limited. He could not successfully sue the county in ejectment, or for trespass, or for an injunction, or for compensatory or punitive damages. His only recourse, in order to obtain the “just compensation” that was his due under N.M. Const. Article II, Section 20—the \$5,000 that the district court ultimately awarded him—was to hire an attorney and incur the \$15,000 attorney's fee that the court ultimately found he reasonably incurred.

Landavazo at ¶ 22. The Court went on to write: “Our construction has the salutary effect of encouraging entities with the power of eminent domain to proceed under the Eminent Domain Code and offer just compensation.”

Landavazo at ¶ 28 See also: City of Sunland Park v. Santa Teresa Servs. Co., 2003-NMCA-106, ¶ 43, 134 N.M. 243, 252, 75 P.3d 843, 852 (“legislature could compel a property owner to give up his property but only “by giving him *full* indemnification and equivalent for the injury thereby sustained.”) [emphasis added].

The Landavazo opinion pointed out that allowing attorney fees to an inverse condemnation plaintiff is consistent with the Model Eminent Domain Code. “Our construction is also consistent with Section 213 of the American Law Institute's *Model Eminent Domain Code* (1974), which provides for an award of the plaintiff's litigation expenses in an inverse condemnation action.” Landavazo at ¶ 29.

Federal law requires an award of attorney fees as a matter of compliance with the Fifth Amendment. “Accordingly, for the foregoing reasons, we hold that plaintiffs are entitled under 42 U.S.C. §4654(c) [Uniform Relocation Assistance and real Property Acquisition Act (“URA”)] to recovery of litigation expenses in a successful inverse condemnation action for the taking by a federal agency of their personal property.” Pete v. United States, 569 F.2d 565, 569 (Ct. Cl. 1978). Congress and the federal courts recognize that forcing inverse condemnation plaintiffs to bear their own fees results in them not receiving “just compensation.” “The basic principle underlying the constitutional requirement of ‘just compensation’ is one of indemnity. The condemnee is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but he is entitled to no more.” Olson v. United States, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934). See also: United States v. 564.54 Acres of Land, More or Less, In Monroe & Pike Ctys., Com. of Pennsylvania, 506 F.2d 796, 799 (3d Cir. 1974). In other words, “[t]he URA expressly allows landowners to retain the full compensation of the value of their property by mandating the Government to assume the litigation expenses of counsel in bringing forth the takings claim.” Banks v. United States, 171 Fed. Cl. 142, 150 (2024).

The City refers to Landavazo’s operative holding as a “concurrence” apparently seeking to diminish its precedence. While the operative language

regarding attorney fees appears in Justice Montgomery’s concurrence, on the issue of attorney fees it was the *majority opinion* having three of five votes. “This opinion therefore announces the ruling of the Court on this issue and explains our reasoning.” Landavazo at ¶ 19. Landavazo’s attorney fee rule is equally binding precedent as any other majority decision of this Court.

VI. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE TAKING WAS WRONGFUL

The City argues that because the *jury* did not make a finding of “wrongful” or aggravated and objectionable” conduct by the City in the taking of Plaintiffs’ access, that the District Court lacked a basis to find the taking was “wrongful.” The jury’s task was to determine *whether a taking occurred*, not whether it was wrongful, such that attorney fees were awardable. The Court found that the City “did not have the right to take or damage Plaintiff’s property without compensation and thus its actions were wrongful.” 12 RP 3028 at ¶2.

City argues that a finding of “aggravated circumstances” is required under Primetime I. BIC 10. The cited language at ¶52 of Primetime I does not require “aggravated circumstances.” The Primetime I Court merely described the facts in Landavazo, where the County refused to even begin condemnation proceedings before it took Landavazo’s access road and distinguished it from the circumstance in Primetime where the City erroneously placed a water line on Plaintiff’s property and removed it when the error was pointed out. Landavazo set the standard as

follows: It seems to us to make more sense to hold that the phrase “does not have the right” in the inverse condemnation situation means that the condemning authority has proceeded wrongfully in taking the landowner’s property without paying or offering just compensation.” Landavazo at ¶28. The Jury was instructed in this case that “Private property shall not be taken or damaged by the City without just compensation.” Jury Instruction No. 16 [11 RP 2764.]. The Jury determined that the City “took or damaged” Plaintiffs’ property and awarded damages to each Plaintiff. Verdict Form [11 RP 2813.] The necessary implication of the Jury’s answer, having been instructed that private property cannot be damaged or taken without compensation is that the jury found that the City took property without just compensation. This is the standard Landavazo set out. Thus the District Court properly applied Landavazo in determining that because the Plaintiffs’ land was taken or damaged, without compensation, that such action was wrongful.

It is for the trial judge, not the jury, to determine whether a claim for attorney fees exists. In this case, the Judge saw ample evidence at trial that the City *never* offered to pay Plaintiffs for their access before they closed the access, despite knowing the access would be lost. Rio Rancho’s Deputy Planning Director Marrufo confirmed the City never offered to pay Plaintiffs for their loss of access, although it purchased the lands of 90 other people who lost access as part of the

Idalia project. [6 TR 214:14-24.] Plaintiff Bigney testified no offer was made and no money paid. [3A TR 44:19-25; 3A TR 149:8-15.] Thus, there was ample evidence the City took Plaintiffs' property without offering to pay for it, as described in Landavazo.

There was ample evidence in this case the taking was deliberate and intentional, and not accidental as was the case in Primetime I. Mr. Marrufo testified the City's engineering team decided to put curb and gutter across Epazote at its intersection with Idalia, in part, because Harold's Grading & Trucking had developed a dangerous cliff face along Epazote. [6 TR 210:25-212:24; 14 TR 225:20-25.] Mr. Marrufo testified the City's consulting engineers recommended leaving the intersection open, but the City decided not to. [6 TR 2116-12.] Mr. Marrufo told two of the Plaintiffs the City had decided not to have an access at Epazote. [6 TR 210:25-212.] Plaintiff Wes Bigney testified he contacted the City concerning the loss of access and the City told him they decided to close the Epazote and Idalia intersection because of a safety hazard created by the gravel pit. [12 TR 31:4-13.] Thus, there was evidence the City deliberately closed access to the road that provided access to the Plaintiff's properties. The District Court's determination the elimination of access, the "taking" in this case, was deliberate and intentional to satisfy Landavazo.

The City argues that the Plaintiffs had alternate access from the south from Chayote Road. [BIC at 3]. City did not appeal the Jury's *specific finding* that all reasonable access was taken. [11 RP 2813, ¶1] Nevertheless, Plaintiffs point out that this allegation is false. Marrufo testified he did not know if there was access from Chayote. [6 TR 199:20-23.] Broderick testified the access to Plaintiffs' lots from Chayote was not possible because of a berm across the road, a steep incline, at least one arroyo and a steep, narrow rocky incline. [6 TR 150-153.]

A jury finding is not required for an attorney fee award. "All that is required (for an attorney fee award) is that there be "evidentiary support," which can mean facts presented during or after trial." Tafoya v. S & S Plumbing Co., 1981-NMCA-150, ¶ 13, 97 N.M. 249, 252. The trial evidence cited above provided ample support for the Court's finding that the taking was wrongful and without compensation. In a jury trial, the judge may rely on facts necessarily found by the jury or her own view of the same facts considered by the jury. "In contrast, because the jury awarded punitive damages in this case, the district court could rely on the jury's explicit determination that USAA's conduct was malicious, reckless, or wanton **and its own view that the same facts support the predicate of willfulness necessary to award attorney fees** to O'Neel." O'Neel v. USAA Ins. Co., 2002-NMCA-028, ¶ 20, 131 N.M. 630, 636. See also: Guest v. Allstate Ins. Co., 2024-NMCA-022, ¶ 29, 542 P.3d 768, 777, cert. denied (Jan. 17, 2024)(jury

award of punitive damages was sufficient to support judge’s finding that Allstate acted willfully, justifying punitive damages.)

Here, the jury instruction on inverse condemnation included the requirement that it be without just compensation. Thus, to the extent the Court needed evidentiary support from the jury to award fees, which it did not need, the jury necessarily found the City did not pay for the access, which satisfies Landavazo.

VII. THE ANTI-DONATION CLAUSE HAS NO APPLICATION HERE

The Anti-Donation clause has no application here. While there is, perhaps, a legitimate dispute regarding whether the attorney fee provisions apply here, there is no reason to elevate the dispute to a constitutional one. The City has no more standing to object to an allegedly excessive attorney fee award than does a citizen or corporation⁵.

The City concedes the Anti-Donation Act does not prohibit a city from paying attorney fees and costs, provided the award is in accordance with applicable law. The City argues when a court makes a legal or factual error in awarding fees, that dispute becomes constitutionalized – it violates not only the applicable law, but the Anti-Donation Clause of the Constitution too. However, there is no reason

⁵ Throughout its BIC, the City refers to “burden on the taxpayers” as if this is a greater burden than burden on a citizen. There are no grounds to treat governments more favorably than people without clear legislative authority, e.g. the Tort Claims Act. By virtue of owning property in Rio Rancho, Plaintiffs too are Rio Rancho taxpayers.

to constitutionalize this issue and no need to decide this issue. An award of fees and costs that violates the law is error regardless of whether the payor is a government or not. “It is an enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional questions unless required to do so.” Schlieter v. Carlos, 1989-NMSC-037, ¶ 13, 108 N.M. 507, 510. “We have repeatedly declined to decide constitutional questions unless necessary to the disposition of the case.” Allen v. LeMaster, 2012-NMSC-001 ¶ 28. In this case, the Court can decide whether Landavazo allows an award of fees under these circumstances and whether the District Court properly exercised its discretion in awarding reasonable fees, without reaching constitutional questions. Nevertheless, the Anti-Donation Clause does not apply even to erroneous orders that governments must pay attorney fees.

The Anti-Donation clause, N.M. Const. art. IX, §14, applies only to “donations.” It does not limit a Court’s ability to impose damages, costs or attorney fees in a case where a government is a losing party. Provided a government does not voluntarily pay attorney fees, without an order to do so, no “donation” is made. Modern Anti-donation cases make it clear it is limited to literal “give-aways” not cases where a Court imposes fees or damages. See, e.g.: Treloar v. County of Chaves, 2001–NMCA–074, ¶ 32, 130 N.M. 794, 32 P.3d 803 (holding that because “severance pay is deemed to be in the nature of wages that

have been earned,” such pay was in return for some consideration, not a gift, and not in violation of the anti-donation clause). In State ex rel. Office of State Eng'r v. Lewis, 2007-NMCA-008, ¶ 49, 141 N.M. 1, 15, the Court held the purchase of senior water rights at an allegedly inflated value did not violate the Anti-Donation clause because the State received some consideration, despite a dispute about whether the consideration was sufficient.

The City cites not a single case where a court has analyzed an excessive fee case using an Anti-Donation Clause rubric.

State ex rel. Mechem v. Hannah, 63 N.M. 110, (1957) demonstrates the difference between a “donation” and a payment the amount of which is in question. In Hannah, the State passed an appropriation to give free vouchers to ranchers in a drought condition so that they could maintain livestock for breeding purpose. It was literally free money. By contrast, in State ex rel. Off. of State Eng'r v. Lewis, 2007-NMCA-008, ¶ 51, 141 N.M. 1, 16, the Court rejected a claim that the water rights received by the State were not worth the money paid. “To the extent Appellants suggest that the State is receiving some lesser value for what it is paying, Appellants are simply suggesting that an issue of fact exists in regard to consideration.” The Lewis Court held that there was no “donation” despite the fact that some might have questioned the value of the what the state received. A “donation” is “a gift, an allocation or appropriation of something of value, *without*

consideration to a person, association or public or private corporation.” Moses v. Skandera, 2015-NMCA-036, ¶ 42, 346 P.3d 396, 407, rev'd, 2015-NMSC-036, ¶ 42, 367 P.3d 838, cert. granted, judgment vacated sub nom. New Mexico Ass'n of Non-public Sch. v. Moses, 582 U.S. 951, 137 S. Ct. 2325, 198 L. Ed. 2d 753 (2017). [emphasis added]. To the contrary, a payment in which one party questions the value of the thing received is not a “donation.” Similarly where a judge imposes attorney fees in excess of what a city, self servingly considers “reasonable” there is no “donation.”⁶ As the City acknowledges at BIC 32, the fees awarded herein was not a gift, it was payment of an obligation imposed by the Court. The City essentially argues that the Court awarded too much in attorney fees. As the Lewis Court held, questioning the value of consideration is not a donation. Similarly, the City’s quarrel with whether the fees awarded were too much does not make any alleged overage a gift.

Amicus argues at page 7 of its Brief that it was the City’s co-defendant, Harold’s Grading & Trucking, that received the donation in this case by being relieved of its obligation to pay attorney fees. This argument fails to recognize that none of the claims tried in the *jury trial* in this case allowed an award of attorney fees against HGT. (The Court did award attorney fees against HGT under the

⁶ Plaintiffs concede that although it is not a constitutional issue, the award of attorney fees must be determined by the Court as “reasonable” pursuant to §42A-1-29 NMSA . Judge Noel and the Court of Appeals so found.

Public Nuisance Act, arising out of a previous, bench trial on that issue.) Thus, neither the Plaintiffs nor HGT received a “donation.”

VIII. THE DISTRICT COURT CORRECTLY AWARDED FEES AND COSTS

a. The Plaintiffs Segregated, Requested and Were Awarded Fees Relating Only to the Eminent Domain Case to the Extent Possible

The City argues that Plaintiffs spent “less than half their attorney time in trial – and throughout the prior pendency of the case – litigating their claim against the City. The only citation to the record to support this claim is “12 RP 2900”. BIC at 31. That is a single page from the City of Rio Rancho’s Response to Plaintiffs’ Motion for Attorney Fees, which begins at 12 RP 2891. The page cited, refers to Exhibit B to the Response (12 RP 2908) which is a list of *pre-trial* activities, *not trial time*. Exhibit C (12 RP 1209) to the Response is an unknown person’s allocation of trial time to the two defendants to which the City apparently intended to refer. The first entry on Exhibit C refers to the first trial day, May 16, 2022, and claims that it was “All HGT.” This is blatantly false. That day of trial is transcribed at Volume 2 of the Trial Transcript. Day one included vior dire, jury selection, and opening statements, all of which involved both the City *and* HGT. It includes the Plaintiff’s opening statement regarding the City and HGT and City’s opening statement that runs from 2 TR 169-183. It includes the City’s lengthy and cumulative argument about alternative theories of inverse condemnation. 2 TR

189-191. Similarly, the City’s chart claims that Friday May 20, 2022 was also “All HGT.” In fact, the City’s attorney examined both of the witnesses who testified that day, (5-TR-40; 5-TR-152), made several objections, and the term “City” was mentioned 118 times that day, including a long discussion of the City’s choice to provide HGT an access point on Idalia but not Plaintiffs. 5 TR19-23. In sum, chart at Exhibit C is blatantly false and unreliable and any argument based on it should fail. The City fails to support the argument that *most* of the trial time related only to HGT and this Court should not be required to scour the record for support of the argument. “This [C]ourt will not search the record to find evidence to support an appellant's claims.” Muse v. Muse, 2009-NMCA-003, ¶ 42, 145 N.M. 451, 463, 200 P.3d 104, 116

Parsing the entire five-day trial transcript, line by line, question by question, for the purpose of determining whether a particular moment in trial related to HGT, the City or both (and drafting an argument thereon) would likely take more time than the five trial days the Court awarded. This demonstrates that at least as to trial time, the fees are truly inextricably intertwined and segregation is not reasonably possible.

b. The District Court and Court of Appeals Correctly Determined That Trial Time Was Inextricably Intertwined and Could Not Be Reasonably Segregated

The City cites Dean v. Brizuela, 2010-NMCA-076, 148 N.M. 548 for the proposition there is a “requirement that ‘recoverable fees be segregated from non-recoverable fees to ensure that only those fees for which there is authority to award attorney fees are in fact awarded.’” BIC 26. This is an oversimplification of the rule. The Dean Court recognized the flexible and case-specific nature of the rule: “Where a party has asserted a claim for which attorney fees are authorized and has also been required to defend a counterclaim for which no attorney fees are authorized, our courts have not adhered to a rigid rule that attorney fees may never be awarded for defending the counterclaim, but we do caution that it should be the exception and not the rule to do so.” Dean at ¶ 16 [internal citations omitted]. The Dean Court went on to explain the District Court had not abused its discretion in not awarding non-covered fees relating to the Counterclaim because “Defendant made no showing of any kind to the trial court what portion of the attorney fees charged was attributable to defending the UPA claim or why it was difficult or impossible to segregate the work in defending the UPA claim from Plaintiff’s other claims and Defendant’s own counterclaims.” Id. at ¶ 19. This case is the polar opposite. Here the Plaintiff *did* show, and the District Court agreed 1) Plaintiff segregated (and not seek payment for) *pre-trial* hours not attributable to the claim against the City; 2) it was difficult or impossible to segregate the *trial* hours spent

between HGT and the City; and 3) many of the trial hours overlapped or applied to both the claims against HGT and the City.

A party seeking fees for covered and non-covered claims must make an effort to exclude non-covered hours “*to the extent possible*” and hours that apply to both covered and non-covered claims may be awarded in the discretion of the Court. No court has held that fees that are inextricably intertwined *cannot* be awarded, as the City argues. New Mexico Courts have denied fees only where the parties and the District Courts have failed to explain why fees cannot be entirely segregated between covered and non-covered claims.

By way of contrast “Defendant *made no showing* of any kind to the trial court what portion of the attorney fees charged was attributable to defending the UPA claim or why it was difficult or impossible to segregate the work in defending the UPA claim from Plaintiff’s other claims and Defendant’s own counterclaims. Under these circumstances we conclude the trial court did not commit an abuse of discretion in refusing to award Defendant attorney fees for successfully defending the UPA claim.” Dean ¶ 19.

The necessary implication of this language is that if the Defendant had been able to show that it was difficult or impossible to segregate, it would have been entitled to the time spent on both claims together. Similarly in J.R. Hale Contracting Co. v. Union Pac. R.R., 2008-NMCA-037, ¶ 95, 143 N.M. 574, 600,

179 P.3d 579, 605, the Court wrote: “*Hale made no attempt* in the district court and makes no attempt on appeal to show the intertwining of work and claims that Defendants assert did not exist.” [emphasis added.] Again, if Hale had shown that the work was intertwined, the Court may have held that the denial of fees by the District Court was error. In Hinkle, Cox, Eaton, Coffield & Hensley v. Cadle Co. of Ohio, 1993-NMSC-010, ¶ 32, 115 N.M. 152, 158, the Court wrote: “Some of the work may be inextricably intertwined, making it difficult or impossible to segregate some of the time worked on the complaint from work related to the counterclaims. Nevertheless, *the trial court should attempt to distinguish* between the two types of work to the extent possible. Accordingly, we vacate the entire award of attorney's fees. If, on remand, Hinkle prevails on its complaint and the trial court awards a reasonable attorney's fee, the award should be limited, to the extent feasible, to work related to prosecution of the complaint.” *Id.* [Emphasis added.] The Hinkle Court did not hold that fees jointly incurred related to claims with fee shifting and without fee shifting were never recoverable. Rather it held that the District Court must, to the extent feasible or possible, segregate the fees or explain why it did not. In this case, the Court did so to the extent possible. In Chavarria v. Fleetwood Retail Corp. of New Mexico, 2005-NMCA-082, ¶ 44, 137 N.M. 783, 799, aff'd in part, rev'd in part sub nom. Chavarria v. Fleetwood Retail Corp., 2006-NMSC-046, ¶ 44, 140 N.M. 478, as revised (Oct. 11, 2006), the Court

upheld awarding fees for work that overlapped between covered claims and uncovered claims:

“We conclude that the trial court met its obligation of separating the claims and estimating with reason the proportion of services compensable under the UPA based on the evidence submitted and its familiarity with the case. Defendant claims that the trial court erred in awarding fees related to work done under the UPA that promoted the success of Plaintiffs' usury claim, which is not compensable. The trial court, however, may properly award fees for UPA work that overlaps factually with another claim. [citation omitted.] Here, the trial court found that proof of an unfair trade practice “was an element of the usury claim that required presentation of evidence at trial” and deducted from its fee determination a portion of the time spent on other aspects or legal issues related to the usury claim. We defer to the trial court's reasoned estimate of the amount of work attributable to the UPA in this regard.”

Similarly, in this case, the Court found overlap between the case against the City and the case against HGT in part because HGT and the City cooperated in their trial strategy so closely and because the Plaintiffs argued that the City's failure to take enforcement action abetted HGT's creation of the nuisance.

The district court has discretion, based on its first-hand observation of the trial, to determine fairly what part of fees apply to overlapping claims. “Similarly,

when the attorney's services are rendered in pursuit of multiple objectives, some of which permit an award of fees and some of which do not, the court must make a reasoned estimate, based either on evidence or on its familiarity with the case at trial, of the proportion or quantum of services that are compensable and award fees only for those services.” Econ. Rentals, Inc. v. Garcia, 1991-NMSC-092, ¶ 55, 112 N.M. 748, 765. In this case, Judge Noel made a reasoned estimate based on his review of the case and the trial, that trial time could not and should not be segregated because of the trial strategies of the City and HGT, and the Court of Appeals agreed.

The Court of Appeals has held when a party's action, which is subject to a fee shifting provision, causes other non-covered claims to be brought, fees should be awarded on all claims. “We thus conclude that the trial court did not err in determining that all of Plaintiff's legal costs expended in the Shores lawsuit were recoverable.” Charter Servs., Inc. v. Principal Mut. Life Ins. Co., 1994-NMCA-007, ¶ 11, 117 N.M. 82, 86. Similarly, here, the City's decision to close Epazote, because HGT had excavated the roadway and created a dangerous cliff, precipitated the entirety of the lawsuit.

Part of the reason it was impossible to segregate all time between the City and HGT was, as the Court found, the City and HGT cooperated in a number of ways to harm the Plaintiffs, before trial and during trial. One concrete example is

the fact that on June 3, 2021, The City issued HGT a grading and drainage permit that both defendants contended would repair the damage HGT did to Plaintiffs' land. 10 RP 2534-2539.

Another instance of cooperation was that the City had filed a cross-claim against HGT claiming HGT had violated the grading and drainage ordinance. Just months before trial, and without Plaintiffs' knowledge, on November 19, 2021, the City and HGT agreed to settle and dismiss the cross-claim *with no payment of money*. 9 RP 2304-2310. HGT filed a motion to exclude discussion of the settlement agreement from evidence, which the City joined in and filed a Reply in Support of. 10 RP 2391-2395. The City then argued in closing that the settlement agreement between HGT and the City eliminated the Plaintiffs' damages 9 TR 131:5-11. "But the City sued Harold's Grading & Trucking, and Harold's has agreed, in a legally enforceable agreement, to fix that drop-off."

Over the City's objection, Plaintiffs gave evidence that the City had engaged in a taking by aiding and abetting the creation of a nuisance by HGT, by failing to take action to stop the illegal landfill. Plaintiff relied on cases from, other states including Litz v. Maryland Dept. of Env't., 446 Md. 254, 131 A.3d 923 (2016). Although Plaintiff did not ultimately request a jury instruction on this issue, facts admitted at trial showed that for years, the City failed to stop HGT's creation of a nuisance, and in some cases, actually encouraged it by purchasing materials from

HGT's illegal building material yard [5 TR 19-20] and by directing HGT to cut a new road from Epazote into HGT's gravel pit. [5 TR 129].

Thus, Judge Noel properly exercised his discretion to find that the trial time was inextricably intertwined between the claims against both defendants.

c. The District Court Correctly Awarded Costs

The City argues that the Court improperly awarded costs for depositions not used at trial, for “duplicative experts,” experts whose testimony did not apply to the City. They complain about “double recovery” of gross receipts tax, surveys, mediation fees, filing fees and appraisal costs. BIC at 36. None of these arguments are developed. Rather the City refers to its arguments made in its objections to the Plaintiffs' Cost Bill at 12 RP 2871-74. Again, the City asks this Court and counsel to scour the record for their argument, which this Court should not do. Muse at ¶ 42. Nevertheless, each of these items was rebutted in Plaintiffs' Reply in Support of Plaintiffs' Cost Bill at 12 RP 2915-2923. The Trial Court properly considered the objections. 11 TR 5-56.

d. The Court Properly Considered the City's Cooperation with HGT in Deciding that Fees Were Inextricably Intertwined.

In determining that the trial time fees were intertwined, both the Trial Court (who presided over the entire case and trial) and Court of Appeals relied *in part* on the fact that, as the District Court found, the City took actions at trial to assist with

HGT's defense. The City argues at BIC 33 that there is no case that holds that one defendant can be liable for the other's fees where it supports the other's defenses. While counsel has found no New Mexico case directly on point, equitable apportionment of attorney fees among defendants is not without support. See: e.g.: Amica Mut. Ins. Co. v. Maloney, 1995-NMSC-059, ¶ 23, 120 N.M. 523, 530, 903 P.2d 834, 841. Similarly, here, the City made the strategic decision to throw in with HGT, hoping it would benefit from a unified defense. Equity demands that this decision be considered in whether their actions contributed the fees being inexorably intertwined.

The City does not dispute the basic conclusion that it chose litigation strategies that assisted HGT's defense. By choosing to do so, to the extent it led the Court to determine that the fees were inextricably intertwined, the City invited any error. Allowing a party "to invite error and to subsequently complain about that very error would subvert the orderly and equitable administration of justice. See e.g.: Hodgkins v. Christopher, 1954-NMSC-089, ¶ 11, 58 N.M. 637, 641, 274 P.2d 153, 155; Est. of Gutierrez ex rel. Jaramillo v. Meteor Monument, L.L.C., 2012-NMSC-004, ¶ 34, 274 P.3d 97, 107.

e. The Fees Were Not Excessive

City argues at BIC 35 that the fees awarded by the Trial Court and affirmed by the Court of Appeals were "excessive" because they were for work that

Plaintiffs' counsel "undertook on his own initiative, with no external necessity and with no concomitant benefit in litigation." The City's only support for this conclusory and false statement is a reference to 12 RP 2901. This is a page of the City's response to Plaintiff's Motion for Attorney fees where the only time entry that is noted is Plaintiff's counsel's meeting with the mediator at the "site" where Epazote Road previously intersected with Idalia road, providing Plaintiffs with access to their lots. The City cites no authority or develops its argument that a site visit as part of a mediation is not a "reasonable" use of time. Moreover, the City's claim that the visit was "ex parte" ignores the very nature of mediations. The parties each meet with the mediator in private. "Ex parte" communication with a mediator is required and universal, not improper. Next the City complains that Plaintiffs counsel billed in increments of two tenths of an hour (12 minutes) rather than one tenth of an hour (6 minutes). The City does not develop or support its argument. While most insurance companies require billing in tenths of hours, there is no authority for the proposition that all lawyers must do so. These arguments require the Court and counsel to scour the record for evidence and authority to support the conclusory statements, which Courts are loathe to do.

Muse at ¶ 42.

IX. CONCLUSION

The City has failed to show that Landavazo should be overruled or that Judge Noel abused his discretion to award fees and costs. Therefore, the decision of the Court of Appeals should be affirmed and Plaintiffs should be awarded attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED

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A copy of the foregoing was served on all counsel of record this 20th day of June, 2025 via the Court's Electronic Filing System. /s/Michael J. Cadigan